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# International Law and the Delimitation of Bays

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The fourth circuit recognized the extensive amount of time, labor, and expertise required to cultivate an oyster bottom and said that the lessee had acquired "valuable property rights."<sup>116</sup>

### CONCLUSION

The Newport River area is admittedly small; yet one hundred persons made a part or full-time living from oyster fishing in it. Two sewage-treatment facilities were likely responsible for the effective destruction of the area for oyster fishing. When this area is magnified to include all of the oyster beds in North Carolina and the nation, the problem becomes overwhelming. It reflects the broader ecological crisis that our nation and state are facing.

Private damage suits may serve to recompense a few of the parties directly injured by pollution and possibly might deter some polluters. Proposed statutes, which would grant standing to any citizen to sue to enjoin environmental damage, would give concerned groups a significant voice. Any lawsuit, whether won or lost, would help define the issues and alert the public to the problems. Ultimately, however, a more systematic approach must be employed.

A literal reading of the statutes indicates that the three agencies discussed above have been given sufficient powers to make substantial inroads into the problem of estuarine pollution. The basic problem seems to be that little more is being accomplished than the location of polluted waters. Clearly, more steps must be taken towards prompt identification and penalization of polluters. Only through strict enforcement of the statutes can the rapid degradation of the estuaries of this state be reversed.

TRAVIS W. MOON  
WILLIAM M. TROTT

## International Law and the Delimitation of Bays

### I. THE PROBLEM

In recent years nations have achieved some measure of success in agreeing upon the principles of international law to be employed in

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<sup>116</sup>*Id.* at 486.

<sup>1</sup>U.N. Doc. A/CONF.13/L.52 (1958).

delimiting bays from territorial waters and the high seas. The 1958 Convention on the Territorial Sea and the Contiguous Zone<sup>1</sup> marked a high point in agreement, but the work is not yet finished. This area of the law remains incomplete because of the failure of nations to agree on a definition of the "historic bay." So long as this loophole in the law exists, it will be quite difficult to make effective those principles upon which there is apparent agreement. The problem was dramatized in 1957 when the Soviets suddenly decided that Peter the Great Bay was an historic bay and annexed it to the internal waters of the Soviet Union.<sup>2</sup> Although the action has been condemned in the West and strongly opposed by Japan as a violation of traditional concepts of international law, the law on the subject is sufficiently unclear to enable the Soviets to justify the closing of the bay on the basis of their view of the governing principles of law.<sup>3</sup> The point, however, is not that the Soviet view is right or wrong, but that the imprecision in the law leads to harsh feelings in the international community. While international law should retain a degree of flexibility, it would appear that the time has come for nations to reach some international agreement on the historic-bay concept. Even though it may not be possible to reduce the doctrine to some mathematical formula, at least there should be a clear statement of general criteria.

## II. DELIMITATION IN GENERAL

The delimitation of territorial waters involves the conflict between two principles of international law, freedom of the seas and the territorial jurisdiction of the sovereign. It is one of the oldest struggles recognized in international law. The general principle of international law with regard to the delimitation of territorial waters is that territorial waters are measured from an imaginary line drawn at the low-water mark and following the sinuosities of the coast. This is the normal base line. It is also generally agreed that in the instance of a bay within the littoral of a single state, that state has the right to deviate from this normal base line and draw a straight base line across the bay from one shore to the other, closing off the entire bay or some portion thereof.

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<sup>2</sup>Pravda, July 21, 1957, at 1. Peter the Great Bay lies off the southeastern coast of the Soviet Union in the vicinity of Vladivostock. The closing line was more than one hundred miles long.

<sup>3</sup>See Romanov, *The Gulf of Peter the Great—Internal Waters of the Soviet Union*, 5 SOVETSKOE GOS. & PRAVO 47 (1958).

This process of delimitation presents two areas of potential disagreement: first, the location of the closing line and, second, the rights of the littoral state on the landward side of this imaginary line.<sup>4</sup>

Of these two problems, the second has been easier to resolve, and today it is generally agreed that the waters on the landward side of the closing line are internal waters of the coastal state. At first, the state's rights within the delimited area were not so clear. There was a tendency for writers to say that these waters "belonged to" the territorial sovereign.<sup>5</sup> Lord Hale was one of the earliest writers who attempted to be more explicit. Writing in the seventeenth century, he said that where an arm of the sea is so situated that a man can reasonably see from shore to shore, it "is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner."<sup>6</sup> Hostie stated that the great majority of writers considered these waters within the bays to be part of the sovereign's territory rather than merely part of its territorial sea.<sup>7</sup> Any lingering doubts were laid to rest by article 7(4) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which refers to the enclosed area as internal waters.

Returning to the question of the location of the closing line, it should be noted that there are several exceptions to the normal-base-line rule in the delimitation of territorial waters generally. For example, the littoral state is permitted to draw a straight base line, from which to measure the belt of marginal waters, in those areas where the coast is marked with an unusual number of indentations or where there is a string of coastal islands. There is no generally accepted rule about the maximum length of these base lines. However, according to the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*<sup>8</sup> and article 4(2) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, it appears that these base lines should follow the general direction of the coast.

As previously indicated, another exception to the general rule is made for areas classified as bays. Bays are also subject to straight base lines, but there is much disagreement as to exactly where these lines

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<sup>4</sup>J. BRIERLY, *THE LAW OF NATIONS* 194-95 (6th ed. 1963).

<sup>5</sup>Hurst, *The Territoriality of Bays*, 1922-23 *BRIT. Y.B. INT'L L.* 42. See also 1 J. WESTLAKE, *INTERNATIONAL LAW* 191 (2d ed. 1910).

<sup>6</sup>1 F. HARGRAVE, *A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* 10 (1787).

<sup>7</sup>Hostie, *Le domaine maritime*, 8 *REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE* 239 (1927).

<sup>8</sup>[1951] I.C.J. 116, 129-30.

should be drawn. How narrow must the mouth of a bay be before it can be completely closed off from headland to headland? In the case of a bay with a very wide mouth that cannot be closed from headland to headland, where is the first point at which the bay is narrow enough that a base line can be drawn from shore to shore?<sup>9</sup>

Several methods have been suggested for the resolution of these fundamental problems involved in the delimitation of bays. These suggestions can be grouped into three major categories. First, there are those who suggest strict application of the three-mile limit as the generally accepted width of territorial waters (or whatever width may be generally agreed upon) so that the maximum length of the closing line would be exactly twice the width of territorial waters.<sup>10</sup> This rule seems simple enough in theory, but in practice problems arise because of the lack of any international agreement designating the maximum width of territorial waters allowable under international law. This is one of the most unfortunate failures of both the 1958 and 1960 Conferences on the Law of the Sea. Another suggestion is that bays be considered as part of the territory of the littoral state when their apertures do not exceed a width of ten miles (or some other fixed length not related to the width of the territorial waters). The rationale for the ten-mile maximum is that the extent of a man's vision along the surface at sea is supposed to be about five miles. Therefore, if he were located in the midst of a bay, he could only see for a distance of five miles on either side. Thus, it was claimed that a state could only be expected to patrol and maintain a closing line of ten miles or less. Modern technology makes this reasoning about as outdated as the old cannon-shot rule, which is discussed hereinafter. Finally, there are a few adherents to the headland theory who would make all bays territorial regardless of the length of the closing line.<sup>11</sup> Despite the trend toward increasing the width of territorial waters, few states would be prepared to make such a radical break with the tradition of freedom of the seas.<sup>12</sup>

Although the disagreement over the maximum length of closing lines of bays is one of the most difficult problems of delimitation, it is by

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<sup>9</sup>M. STROHL, *THE INTERNATIONAL LAW OF BAYS* 5-6 (1963) [hereinafter cited as STROHL].

<sup>10</sup>P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 355-57 (1927) [hereinafter cited as JESSUP].

<sup>11</sup>D. AZUNI, *SYSTEME UNIVERSEL DE PRINCIPES DU DROIT MARITIME DE L'EUROPE* 254 (1805); F. VON LISZT, *DAS VOLKERRECHT* 91 (5th ed. 1907).

<sup>12</sup>JESSUP 362.

no means the only problem. A few others should be mentioned. First, the necessity of distinguishing a bay from a mere curvature of the coastline is generally admitted in international law. The semi-circle test has been widely accepted for making this determination. For this test a straight closing line is drawn between the natural entrance points of the indentation. The waters on the landward side of the closing line form a bay if their area, measured at low water, is as large as or larger than the area of a semi-circle whose diameter is equal in length to the closing line.<sup>13</sup> Another problem arises in the case of multi-mouth bays. With regard to a bay which has multiple entrances because of the presence of islands at the opening, it is permissible to draw a closing line for each entrance. However, it is generally accepted in international law that the semi-circle principle still applies, the diameter being equal to the total length of the closing lines.<sup>14</sup> Finally, it should be mentioned that estuaries, wide river mouths subject to tidal action, qualify as bays in the legal application of base lines. The separate article on estuaries approved by the First Committee of the 1958 Conference on the Law of the Sea was not approved by a majority in the final Convention. Thus, estuaries must retain the legal status of bays.<sup>15</sup>

The third exception to the normal-base-line rule is the historic bay. Historic bays can be closed off from headland to headland and the belt of marginal waters measured from the straight base line regardless of the width of the aperture.<sup>16</sup> Unlike the other exceptions to the normal-base-line rule, the historic-bay doctrine has not been defined by the international community as a whole. Thus, there is a divergence of views which leads to conflict. However, before this concept can be presented in greater detail, it is necessary to examine more closely the international law governing the delimitation of bays in general.

### III. DELIMITATION OF ORDINARY BAYS

Since the writings of learned scholars and jurists are often cited as sources of international law, it is helpful to consider what some of these authorities have to say about territorial bays. Hugo Grotius, one of the most renowned scholars of international law, proposed a rather vague

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<sup>13</sup>Convention on the Territorial Sea and the Contiguous Zone, *supra* note 1, art. 7(2).

<sup>14</sup>*Id.* art. 7(3). For an explanation of the intricacies of the law relating to multi-mouth bays, see I. A. SHALOWITZ, *SHORE AND SEA BOUNDARIES* 372 (1962).

<sup>15</sup>M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 212 (1965).

<sup>16</sup>H. BRIGGS, *THE LAW OF NATIONS* 288 (2d ed. 1952).

formula. He said that a bay can be considered territorial if it is not so large that, when compared with the land surrounding it, it cannot be considered a part of the land.<sup>17</sup> Actually, there is much merit in Grotius' notion of considering the relationship between the bay and the contiguous land mass. The members of the International Court of Justice in the *Anglo-Norwegian Fisheries Case* reverted to this principle, as is shown below.

Vattel applied the principle of defendability. He said that territorial bays are necessarily limited to those bays whose apertures are small enough to be defended by the littoral state.<sup>18</sup> Thus, he required the opening of the bay to be so situated that it could be dominated by cannon (the cannon-shot rule). This is not a very satisfactory solution because it is too closely tied to the progress of science and the development of weapon technology. The application of this principle would lead to ever-increasing portions of the high seas being included within the territorial waters.

Fauchille took a more extreme position. He refused to allow any deviations from the principle of the normal base line. He said that bays, gulfs, internal seas, and straits should be considered parts of the high seas. In short, everything was to be included in the high seas with the possible exception of that portion of the sea which fell into the normal band of territorial waters.<sup>19</sup>

Calvo elaborated on Vattel's view. He said that only those bays protected naturally by islands, sandbanks, or rocks or artificially by cannon placed at the entrances constitute territorial waters. He further noted that such territorial waters are governed by the same principles as internal waters. Although they are under the exclusive jurisdiction of the littoral state, there should be no discrimination in allowing foreign states access to them.<sup>20</sup>

Both Jessup<sup>21</sup> and Oppenheim<sup>22</sup> agreed that bays not more than six miles wide are territorial. This rule is a simple function of doubling the three-mile limit for territorial waters. For bays of greater width, both Jessup and Oppenheim were only able to conclude that the matter was

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<sup>17</sup> H. GROTIUS, *DE JURE BELLI AC PACIS* 209 (The Classics of International Law ed. 1925).

<sup>18</sup> E. VATTEL, *LE DROIT DES GENS* 272 (1820).

<sup>19</sup> P. FAUCHILLE, *LE DROIT INTERNATIONAL PUBLIC* 372-73 (1925).

<sup>20</sup> C. CALVO, *LE DROIT INTERNATIONAL* 500 (1896).

<sup>21</sup> JESSUP 357-58.

<sup>22</sup> L. OPPENHEIM, *INTERNATIONAL LAW* 458 (7th ed. H. Lauterpacht 1948).

controversial. Oppenheim did say that bays with entrances too wide to be commanded by the coastal batteries of the littoral state are definitely not territorial. However, this leaves an area of doubt about bays that are more than six miles wide but are not too wide to be commanded.

John Bassett Moore, who tended to agree with the three-mile limit for territorial waters, favored the ten-mile rule for bays because that rule seemed to reduce the possibility for conflict among nations. For example, the consequences of a vessel fishing in the territorial waters of a foreign state are quite severe with conviction usually being punishable by forfeiture of the vessel captured. Moore pointed out that the ten-mile rule has the effect of reducing the number of instances of illegal fishing. He argued that a fisherman in a bay ten miles wide and subject to the three-mile limit has an area only four miles wide in which to fish, and so he may fail to recognize that he is crossing into territorial waters. However, if the entire bay were designated as part of the internal waters of the coastal state, the fisherman would not be so likely to commit a violation since it is much easier for him to perceive that he is entering into the waters of the bay. Moore's argument seems rather effective in answering those who advocate a maximum closing line of six miles, but he makes no effort to defend his position from the attacks of those who advocate a closing line of fifteen or twenty-four miles.<sup>23</sup>

There are numerous treaties, conventions, and agreements which establish rules and regulations for bays. These constitute an important source of law on the subject. Indeed, it is the most positive form of law for those nations which duly sign and ratify the agreements.

Most of the precedents in treaty law favor the ten-mile maximum closing line. Luis Drago in his dissent from the majority award in the *North Atlantic Coast Fisheries Arbitration*<sup>24</sup> listed several early precedents.<sup>25</sup> Other precedents that could be listed include the rule adopted, with certain exceptions, in the unratified treaty between the

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<sup>23</sup>Barclary, *Troisieme commission—mer territoriale*, 13 ANNUAIRE DE L' INSTITUT DE DROIT INTERNATIONAL 146 (1894-95).

<sup>24</sup>J. SCOTT, ARGUMENT OF THE HONORABLE ELIHU ROOT ON BEHALF OF THE UNITED STATES BEFORE THE NORTH ATLANTIC COAST FISHERIES ARBITRATION TRIBUNAL AT THE HAGUE, 1910, 488 (1912).

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- (1) Treaty between Great Britain and France, 2 August 1839;
- (2) Regulations between Great Britain and France, 24 May 1843;
- (3) Treaty between Great Britain and France, 11 November 1867;
- (4) British Board of Trade notice to fishermen (under the regulations agreed to by Great Britain and the North German Confederation in November 1868) and repeated in



United States and Great Britain, 15 February 1888; the North Sea Convention of 6 May 1882, to which Great Britain, Germany, Belgium, Denmark, France, and Holland were signatories;<sup>26</sup> article II of the Hague Fishing Arbitration of 1883;<sup>27</sup> and the Anglo-Danish Fishing Convention of 1901.<sup>28</sup> In addition to providing for a ten-mile closing line from headland to headland, the Anglo-Danish Convention specifically provided that the state bears the burden of proving that the area claimed is part of its territorial waters. Some other twentieth century precedents for the ten-mile rule include the agreement of the Third Commission of the Second Hague Conference, 1907;<sup>29</sup> the Uruguayan Neutrality Declaration, 4 August 1914;<sup>30</sup> and the Temporary Fisheries Agreement between Great Britain and Soviet Russia, 22 May 1930.<sup>31</sup> The Netherlands Neutrality Declaration issued during the Russo-Japanese War (1904-1905) reads in part:

In regard to bays, that distance of three nautical miles shall be measured from a straight line athwart the bay as close as possible to the entrance at the first point at which the entrance to the bay exceeds ten miles of 60° latitude.<sup>32</sup>

Finally, it is worthy of note that The Hague Conference for the Codification of International Law (1930) formulated a rule incorporating the ten-mile principle.<sup>33</sup>

Although most precedents in treaty law seem to embody the ten-mile limit, there are some that do not. It is not difficult to find precedents for a twelve-mile maximum closing length as far back as the nineteenth century—including the treaty between Spain and Portugal, 2 October 1885,<sup>34</sup> and article III of the *Rules for the Definition and Regime of the Territorial Sea* adopted by the Institute of International Law in 1895.<sup>35</sup>

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December 1874 (under the arrangement between Great Britain and the German Empire); (5) British Order-in-Council, 23 October 1877.

Id. 519-20.

<sup>26</sup> G. MARTENS, *NOUVEAU RECUEIL GENERAL DE TRAITES* 556-57 (2d Serie 1884).

<sup>27</sup> W. SCHUCKING, *DAS KUSTENMEER IM INTERNATIONALEN RECHTE* 22 (1897).

<sup>28</sup> 23 HERTSLET'S *COMMERCIAL TREATIES* 425 (1905).

<sup>29</sup> J. SCOTT, *REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907*, at 664 (1917).

<sup>30</sup> [1916] *NAVAL WAR COLLEGE INTERNATIONAL LAW TOPICS* 106-07 (1917).

<sup>31</sup> L. OPPENHEIM, *supra* note 22, at 461 n.1.

<sup>32</sup> [1904] *FOREIGN REL. U.S.* 27 (1905).

<sup>33</sup> *LEAGUE OF NATIONS DOC. C.230.M.117.1930.V.*, at 11.

<sup>34</sup> 14 G. MARTENS, *NOUVEAU RECUEIL GENERAL DE TRAITES* 77-78 (2d Serie 1889).

<sup>35</sup> *INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 25TH CONFERENCE, 1908*, at 547 (1909).

Occasionally there have been agreements which have set only a general formula rather than a fixed standard. One precedent worthy of mention is the Russian-Japanese Convention Concerning Fisheries, 15 July 1907. In this agreement Japanese subjects were granted fishing rights along the coasts of certain Russian possessions, with the exception of specific bays and inlets. The exclusion applied to "bays which cut into the continent a distance three times as great as the width of their entrances."<sup>36</sup> And a more recent agreement—the 1958 Convention on the Territorial Sea and the Contiguous Zone, which is discussed below—set a twenty-four mile closing line.

A final source of the international law of bays is that embodied in the decisions of various tribunals. Two decisions in this century have been especially important in the development of the trend toward consideration of a multiplicity of factors, rather than just historical claims, in determining whether or not the littoral state can claim a bay as part of its internal waters. The first of these is the *North Atlantic Coast Fisheries Arbitration*, which was argued before the Permanent Court of Arbitration in 1910. In this case the court was asked to interpret the definition of "bay" in the 20 October 1818 treaty between Great Britain and the United States. The majority opinion set forth several specific factors that it considered in making the interpretation:

The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.<sup>37</sup>

The court concluded that both the United States and Great Britain had accepted the ten-mile closing line in view of agreements and treaties entered into by the two countries with other members of the international community. However, the court also hastened to add that "these circumstances are not sufficient to constitute this a principle of international law . . . ."<sup>38</sup>

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<sup>36</sup>2 AM. J. INT'L L. 274, 280 (Supp. 1908).

<sup>37</sup>J. SCOTT, *supra* note 24, at 511.

<sup>38</sup>*Id.* at 512.

What the Permanent Court of Arbitration had done in undercutting the general applicability of the ten-mile closing line in the *North Atlantic Coast Fisheries Arbitration*, the International Court of Justice built upon in the *Anglo-Norwegian Fisheries Case* in 1951. Based on proceedings in the case, it appears that as of 1951, there was still no generally accepted definition of the term "bay," for both parties to this dispute went to great lengths to try to define the term.<sup>39</sup>

The court's decision was not based on geographical factors alone. Much attention was given to the economic situation of the fishermen who inhabited the barren Norwegian coastal zone and derived the greatest part of their livelihood from the sea. The court stressed the interlocking nature of geographical and economic interests in the area. Indeed, the justices were inclined to regard certain areas of the sea and the adjacent land mass as forming a geo-economic system, the very nature of which forces the inhabitants of such an area to be dependent upon the territorial sea for their livelihood. The court believed that this dependency constituted sufficient reason for allowing the state to adapt delimitation to the practical needs and local requirements of the people.<sup>40</sup>

Great Britain contended that the limits of the Norwegian fisheries zone laid down in 1935 were contrary to international law because that law permitted a state to draw only straight base lines across bays. The court disagreed and remarked on the ramifications of the British view:

[I]f the method of straight base lines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even where such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the "skjaergaard", *inter fauces terrarum*.<sup>41</sup>

Reminiscent of what was said in the *North Atlantic Coast Fisheries Arbitration*, the court stated that although the ten-mile rule had been accepted in the national law and treaties and conventions of certain states, it "[had] not acquired the authority of a general rule of international law."<sup>42</sup> The court made the applicability of the rule dependent upon evidence in the form of some positive international law

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<sup>39</sup>Y. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 263 (1965).

<sup>40</sup>[1951] I.C.J. 116, 133.

<sup>41</sup>*Id.* at 130.

<sup>42</sup>*Id.* at 131.

that the state was willing to be bound by the rule. Since Norway had given no such indication and, indeed, had always been opposed to application of the rule, the court declined to apply the ten-mile rule in the case.<sup>43</sup>

Although the apparent effect of the decision in the Anglo-Norwegian Fisheries Case was to leave the territorial sovereign largely unrestrained in delimiting bays, the court emphasized that international law potentially provides some restraint on such action:

Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.<sup>44</sup>

Those states which advocate wider territorial seas and larger closing lines for bays tend to ignore this portion of the decision. Clearly, the purpose of the court in interring the ten-mile rule was not to undermine international law but to announce that the rule was no longer applicable to the then-current stage of economic development. However, in 1958 at the Geneva Conference on the Law of the Sea, the impact of the decision on international law became clear.

#### IV. UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 1958

The First Committee of the 1958 Geneva Conference was concerned with the international law governing territorial seas and contiguous zones. The Committee's discussion of bays was based on the International Law Commission's report to the General Assembly covering the work of its eighth session. Of particular interest is article 7 of that report.<sup>45</sup> The fifteen-mile closing line suggested in article 7(3) is indicative of the far-reaching consequences of the 1910 and 1951

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<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 132.

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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

decisions discussed above and of the general impact of the communist countries and the underdeveloped nations on international law. However, the rule was not particularly satisfactory to any nation since it represented a compromise between the established Western nations, which advocated a ten-mile rule, and the communist and "third world" nations, which advocated closing lines of greater length. At the 1958 Conference the Soviet Union was a leader in advocating a twenty-four-mile closing line, primarily for military and defense reasons. However, the Soviets were able to convince many other states of the First Committee to go along with them by stressing economic, rather than military, grounds for the twenty-four-mile rule.<sup>46</sup> The twenty-four-mile amendment was offered by Bulgaria, Poland, the Union of Soviet Socialist Republics,<sup>47</sup> and Guatemala.<sup>48</sup> The amendment was adopted over strong opposition.<sup>49</sup>

The animosity between the Soviet Union and Japan over the Peter the Great incident was apparent at the Conference. When J.P.A. Francois, a rapporteur of the Conference, proposed that all disputes arising from the definition of "historic bay" be referred to the International Court of Justice, the Japanese delegate responded:

The function of the court, . . . is to determine whether a given bay falls under the definition of historic bays, such definition having been formulated beforehand. Formulation of a definition is a part of the function of codification; it is surely not a function of the court . . . . [M]ere mention of "so-called historic bays" without stipulating their definition would lead to confusion and possible abuse of the term. In the past, there have actually been a number of cases where a State has claimed vast sea areas as territorial, on the pretext of historic bays, without the slightest historic elements whatsoever. Unfortunately,

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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.

[1956] 2 Y.B. INT'L L. COMM'N 257, U.N. Doc. A/3159 (1956).

<sup>46</sup>STROHL 228.

<sup>47</sup>U.N. Doc. A/CONF.13/C.1/L.103 (1958).

<sup>48</sup>U.N. Doc. A/CONF.13/C.1/L.105 (1958).

<sup>49</sup>U.N. Doc. A/CONF.13/39 (1958), at 146. The vote was thirty-one in favor, twenty-seven opposed, and thirteen abstaining. The United States was among those opposed.

similar claims have been made in recent years as well. In order to avoid recurrence of such claims, it is essential that a definition of historic bays should be provided for in the article.<sup>50</sup>

He then proposed that the maximum length for closing lines be reduced to ten miles and a definition of historic bays be included.<sup>51</sup>

Nikolaev, the U.S.S.R. delegate, showed little interest in the proposal and stated that he preferred to defer any further consideration of the "historic bay" question. He suggested that the problem be sent to a committee for further study.<sup>52</sup> The result was that the committee did not adopt the Japanese proposal, claiming that there was a lack of information on the subject and that the Committee was not prepared to handle the problem. Instead, it adopted a resolution directing the United Nations to arrange a study of the question of "historic waters."<sup>53</sup>

Article 7 of the Convention on the Territorial Sea and the Contiguous Zone was adopted in the following form:

1. This article relates only to bays the coasts of which belong to a single State.

2. 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 whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

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<sup>50</sup>*Japan and the U.N. Conference on the Law of the Sea*, 3 JAP. ANNUAL INT'L L. 65, 72 (1959).

<sup>51</sup>The following definition was offered by Mr. Yakota, the Japanese delegate:

The foregoing provisions shall not apply to historic bays. The term "historic bays" means those bays over which coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practices by foreign states.

U.N. Doc. A/CONF.13/C.1/L.104 (1958).

<sup>52</sup>U.N. Doc. A/CONF.13/39 (1958), at 146.

<sup>53</sup>*Id.* at 148. The vote was fifty-two in favor, two opposed, and ten abstaining.

4. 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 these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 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.

6. 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.<sup>54</sup>

Despite the failure of the Convention to provide the needed definition of historic bays, it does offer a fairly well accepted definition of bays in general. It is significant from the standpoint of freedom of the seas that, through the inclusion of the semi-circle test, the Convention makes a distinction between a bay and a mere indentation of the coast. While the twenty-four-mile rule does encroach upon the freedom of the seas, it is undoubtedly a reflection of the growing movement toward acceptance of a twelve-mile limit for territorial waters. The rule also reflects the effort of international law to accommodate a rapidly advancing technology and the growing economic interdependence of states. Indeed, even the current international law of bays, including the twenty-four-mile limit, must be regarded as unstable and subject to alteration as economic and social conditions change.<sup>55</sup>

## V. DELIMITATION OF HISTORIC BAYS

While it is difficult to determine on the basis of existing international law when a state may deviate from the use of the normal base line with regard to bays in general, the question is even more complicated with respect to "historic bays." Today it is almost impossible to state exactly the criteria that are used to identify historic bays. Many states have embraced the notion that it is not necessarily the state's historic claim that is important; rather it is the existence of vital interests of the state in the area claimed. This historic-bay category of territorial waters has been so widely expanded that it is often referred to

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<sup>54</sup>U.N. Doc. A/CONF.13/L.52 (1958).

<sup>55</sup>STROHL 173.

as "historic waters" since many states assert historic claims to waters that in no way resemble bays.<sup>56</sup> Undoubtedly, the uncertainty about the meaning of the term "historic bay" leads to misuse of the term. Therefore, an attempt will be made herein to determine its meaning in international law.

Lawrence, much like many people today who are dissatisfied with the old law, focused on a state's special interests in waters claimed to be an historic bay. He recognized that these special interests in fact motivate the claim and that the "historic" argument is merely an attempt to justify it.<sup>57</sup> He probably would have regarded Fauchille's term, *la baie vitale*,<sup>58</sup> as being more descriptive of the actual situation.

Gidel and Westlake were somewhat less enthusiastic about the historic-bay doctrine. Gidel viewed the doctrine as a safety valve accompanying the general rule on bays. He agreed that there are times when a state must of necessity assert a claim to waters which ordinarily would not fall under its jurisdiction, but he emphasized that states should not be allowed to assert these claims with regularity. He wished to see uniformity in the law of bays, but he did not deny the need for consideration of the basic needs of a state.<sup>59</sup>

Westlake was quite concerned about the problem of unjustifiable claims. While he did recognize that there is merit in the effort to relate delimitation to geographical and practical considerations, he was unable to fix a precise definition of the geographic criteria. Therefore, he advocated reference to the "immemorial usage of States" as a criterion more susceptible of objective measurement.<sup>60</sup> Although the term "immemorial usage" seems too restrictive, there are few who would deny that historic precedent at least gives strength to a claim, even if only to serve as evidence of the existence of special interests.

The views of Jessup and Hyde on the subject of historic bays are clearly at variance. Jessup is of the opinion that the historic-bay concept falls outside the general delimitation rules and that claims to historic bays are based on prescriptive right. According to him, the crucial factors in determining the validity of a claim are the nature and duration

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<sup>56</sup>For example, the Soviet Union often makes the claim that the Kara, Laptev, East Siberian, and Chukov Seas are "historical" Russian seas. W. BUTLER, *THE LAW OF SOVIET TERRITORIAL WATERS* 12 (1967).

<sup>57</sup>T. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 143 (5th ed. 1913).

<sup>58</sup>See 2 P. FAUCHILLE, *supra* note 19, at 380.

<sup>59</sup>3 G. GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 651 (1934).

<sup>60</sup>1 J. WESTLAKE, *supra* note 5, at 191.



of the claim and the willingness of other powers to recognize it. He says:

It is believed that it will appear from a study of this material 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 is to be measured, not by the size of the area affected, but by the definiteness and duration of the assertion and the acquiescence of foreign powers. The evidence of international practice and usage does not indicate that a claim to a large bay is illegal.<sup>61</sup>

Hyde, on the other hand, believes that historic bays are illustrative of a habit of maritime states rather than a mere exception to the general rule. He denies that such claims are based on prescriptive right. He points out that most prescriptive claims are opposed by at least one state from the beginning of the claim. Prescription necessarily entails a claimant state taking and holding an area which another state looks upon as its own. Thus, Hyde believes that the historic-bay right is not based on prescription because of the unlikelihood that all other states will acquiesce in an asserted claim. He says:

The phrase [historic bay] signifies that in each case where it is applied the interested coastal State at some earlier time began to endeavor to possess itself as it were of the waters 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 the assertion and discourage foreign opposition to it.<sup>62</sup>

Hyde emphasizes that the geographical situation, rather than any prescriptive right, is the proper justification for a claim. He denies that there is anything wrong with a state's attempt to acquire what nature has made geographically attractive. Furthermore, he is much less vigorous in his insistence on historic precedent. In short, he believes that it is possible for a state to begin to establish at the present time an historic claim to a bay, "provided that nature has made it part and parcel of the country into which it has been thrust."<sup>63</sup>

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<sup>61</sup>JESSUP 382.

<sup>62</sup>1 C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE U.S. 469 (2d rev. ed. 1945).

<sup>63</sup>*Id.* at 482.

Finally, it is instructive to consider Drago's dissent in the *North Atlantic Coast Fisheries Arbitration*. He said that a nation's claims to historic bays were justified

[w]hen such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defense, justify such a pretension.<sup>64</sup>

These criteria can be said to reflect the older view of the historic-bay concept. And, it would appear that in the absence of an international agreement expressly denying the need to prove immemorial usage, the older view cannot be completely ignored.

Turning to a second source of the law, international treaties and agreements, it is the lack thereof that is significant. Indeed, there is apparently no international agreement which sets forth criteria for determining what constitutes an historic bay. The only document that might be mentioned in this regard is article 4 of the draft convention of The Hague Codification Conference of 1930, which establishes the ten-mile limit for closing bays "unless a greater distance has been established by continuous and immemorial usage."<sup>65</sup> However, even this provision was not adopted by the 1930 Conference. The 1958 Convention on the Territorial Sea and Contiguous Zone reveals that the delegates to the Law of the Sea Conference made no progress in this area. As has been shown above, the Conference specifically refused to insert a provision defining historic waters. One explanation for this lack of consideration is that the historic-waters concept is relatively new in international law. It probably dates back no further than Drago's dissent in the *North Atlantic Coast Fisheries Arbitration* of 1910.<sup>66</sup> Perhaps the better explanation is simply that states are not anxious to define the term. By keeping the concept vague, they allow for more flexibility in their own interactions with the international community.

With regard to judicial decisions on the subject, in *Mortensen v. Peters*,<sup>67</sup> tried before the High Court of Justiciary of Scotland in 1906, the bay in question was the Moray Firth, located on the northeast coast of Scotland. It measures seventy-three miles from headland to headland.

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<sup>64</sup>J. SCOTT, *supra* note 24, at 519.

<sup>65</sup>STROHL 203.

<sup>66</sup>*Id.* at 269.

<sup>67</sup>14 Scots L.T.R. 232, 233, 235 (1906).

Scottish fishermen had fished in the bay for centuries, and in order to protect them, Parliament passed the Herring Fisher (Scotland) Act of 1889 authorizing the Fishing Board of Scotland to establish regulations forbidding beam and other trawling.<sup>68</sup> There was no doubt about the application of those rules to British trawlers, but with regard to those of foreign registry, it was not clear. Subsequently, a large number of foreign trawlers, many of them British-owned but registered in Norway, began conducting operations within Moray Firth, although outside the three-mile coastal limit.<sup>69</sup> The court upheld Parliament's right to restrict the fishing in these waters on the basis of the sovereign's power to take "protective" measures. Significantly, the British government did not claim that the waters constituted an historic bay, even though such a claim would have been quite tenable. Much like the Norwegian authorities who hesitated to declare the Norwegian fjords territorial waters, British authorities were reluctant to close off Moray Firth,<sup>70</sup> probably for fear of retaliation on the part of other governments against British fishermen using similar fishing areas along their coasts.

The most informative case on historic bays is the *Anglo-Norwegian Fisheries Case* of 1951. The dispute in that case concerned certain areas along the Norwegian coast which Norway claimed as historic waters while Great Britain claimed that they were part of the high seas. The court upheld the Norwegian view and based its decision on historic, geographical, and economic grounds. The majority of the court agreed that it was necessary to establish an historic title. Norway showed that she had prevented the British from fishing in the area for over three hundred years. However, British trawlers had ventured into the region around 1906, and the Norwegians took measures at that time to limit the areas within which foreigners could fish. The important fact in the case was that the Norwegians had continuously resisted foreign encroachment and that, by 1949, many British trawlers had been seized and condemned.<sup>71</sup> With regard to geographical factors, the court spoke of the land as conferring upon the coastal state "a right to the waters off its coasts."<sup>72</sup> Finally, the court considered the economic concerns of Norway, especially those "evidenced by long usage."<sup>73</sup> Thus, while the

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<sup>68</sup>52 & 53 Vict., c. 23, § 6.

<sup>69</sup>STROHL 162.

<sup>70</sup>H. BRIGGS, *supra* note 16, at 56.

<sup>71</sup>[1951-1952] I.C.J.Y.B. 78.

<sup>72</sup>[1951] I.C.J. 116, 133.

<sup>73</sup>*Id.*

court was not primarily concerned about "immemorial usage," it did, at least, imply that long usage may be required to substantiate economic interests.

Several of the justices who did not join in the majority opinion wrote separate opinions which are worthy of mention. In one of these opinions, Judge Hsu Mo denied that the private acts of individual citizens can confer sovereignty on a state. He said:

In support of her historic title, Norway has relied on habitual fishing by the local people and prohibition of fishing by foreigners. As far as the fishing activities . . . are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries.<sup>74</sup>

In a dissenting opinion, Judge Read said that the only convincing historical evidence for establishing a claim was seizures.<sup>75</sup> He would completely disregard other historical data. Although this view purports to be a rather practical, objective formula for the measurement of a nation's claim to a particular body of water, opposition to it would arise from diverse camps. Not only would states already asserting historical claims be apprehensive of the effect of the new formula, but also the underdeveloped countries which lack capacity to make effective seizures would be opposed to it.

One of the most recent cases to discuss the historic-waters concept was *Civil Aeronautics Board v. Island Airlines, Inc.*,<sup>76</sup> tried in the United States District Court for Hawaii in 1964. The court in that case adhered to the Jessup view that the historic-waters concept is an exception to the general rule covering bays and that the right to such waters must be established by prescription. The opinion of the court took into account the following factors in determining whether there was an historic right to the waters claimed: the exercise of authority over the waters by the state claiming the right, the continuity of this exercise of authority, and the attitude of foreign states.<sup>77</sup> In the words of the court,

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<sup>74</sup>*Id.* at 157.

<sup>75</sup>*Id.* at 191.

<sup>76</sup>235 F. Supp. 990 (D. Hawaii 1964).

<sup>77</sup>*Id.* at 1004.

there are two steps necessary to establish a claim in the absence of international approval:

1. The sovereignty claimed must be effectively exercised; intent of the state must be expressed by deed and not merely by proclamations, e.g., keeping foreign ships or foreign fishermen away from the area, or taking action against them.
2. The *acts* must have notoriety which is normal for the acts of the state.<sup>78</sup>

The United States District Court, by accepting the Jessup view, may not have been very progressive in its outlook, but it undoubtedly had the preponderance of opinion and case law on its side.

Two additional aspects of the historic-bay problem—the width-of-territorial-waters morass and the prescription requirement—require further examination because they presently inhibit resolution of the problem. Clearly, the historic-bay problem cannot be separated from that of the width of territorial waters because an historic-bay claim only arises with regard to those bays whose apertures are wider than twice the width of territorial waters. Today the problem is greatly complicated by the increasing divergence of opinion over what the width of territorial waters should be. The widths claimed by states vary from three to two hundred miles. Furthermore, states are reluctant to make any formal statement concerning delimitation of territorial waters unless the pressure of circumstances compels it. Thus, it is quite difficult to ascertain with certainty the current position of many states.<sup>79</sup>

It would appear that most authorities on international law have viewed prescription as having some role in the establishment of claims to historic bays. Writers back to the time of Grotius have referred to prescription and have justified it as punishment of the former possessor of the territory for his silence and inactivity. Grotius emphasized that the acceptance and adherence to prescription as a principle of international law promotes international peace and stability. In his view its absence would entail “a very serious inconvenience . . . in that contests about kingdoms and the boundaries of kingdoms [would] never come to an end with the lapse of time.”<sup>80</sup>

The current problem is that the relationship between the historic-

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<sup>78</sup>*Id.* at 1004-05 (emphasis by the court).

<sup>79</sup>STROHL 253.

<sup>80</sup>2 H. GROTIUS, *supra* note 17, at 220.

bay concept and prescription is not very clear. In recent years there has been much talk about the importance of the special needs and interests of a state in establishing a valid claim. The role of prescription has become more obscured than ever. However, even if prescription remains the dominant element of a claim, there remains the problem of determining the necessary prerequisites for ripening title by prescription. What are the objective manifestations of prescription? How long does it take to perfect a prescriptive claim? May a newly asserted claim be valid, or must a potentially valid claim already have an historical basis? These are just a few of the unanswered questions.

If the concept of historic waters is to be considered an exception to the general rule of international law, it is only reasonable that the claimant state should bear the burden of proof. The problem lies in the lack of any international agreement as to how this burden may be carried. States in general, and the Soviet Union in particular, seem to prefer that the law applicable to historic bays remain unclear in order to protect the exercise of sovereignty under dubious circumstances. So long as this condition is allowed to prevail, Grotius' prediction of endless conflict of claims will remain the reality.

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