

HISTORIC BAYS IN INTERNATIONAL LAW—AN IMPRESSIONISTIC OVERVIEW

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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.

—The International Court of Justice¹

I. INTRODUCTION

Today a world-wide, irreversible enclosure movement is committed to annexing new sea areas into the territory of coastal states or adding them to zones of exclusive state jurisdiction. But the movement we can observe in the oceans' commons today is not only a decentralized one whereby each state takes what may be permitted (or at least what would not appear to it to be effectively prohibited), but also a second, "centralized"² enclosure movement

1. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 130 (Judgment of Dec. 18).

2. For the descriptive terms "centralized" and "decentralized" enclosures of the oceans, see Friedheim, *The Political, Economic, and Legal Ocean*, in *MANAGING OCEAN RESOURCES: A PRIMER* 26 (Friedheim ed. 1979). He defines "centralized" enclosure as follows:

Ownership is transferred to the world system under the notion that the oceans are the "common heritage of mankind," allowing a new comprehensive organization for the management of ocean space, acting as agent for the world community, to allocate the permitted uses of ocean space so as to avoid the boom-or-bust activity.

Id. at 36.

Friedheim defines decentralized enclosure or national enclosure, "a second best solution," as follows:

The right to allocate which the coastal States have assigned to themselves may be used to redistribute wealth only and not create rational management schemes

limiting high seas freedoms. Be the issues of the centralized enclosure as they may,³ this paper will take up the traditional concept of historic bays as one time-honored basis for asserting national claims at the expense of the common high seas, which, however, unlike some of the more recent forms of decentralized enclosures, purports to rely on, or should rely on, a specific, objective and clearly articulated definition, rather than on a Humpty-Dumpty subjectivity—as reflected in the following well-known assertion: Words mean what I choose them to mean . . . Neither more nor less . . . The question is . . . which is to master—that's all.⁴

This kind of capriciousness and uncontrolled subjectivity is, for example, to be found in the concept, not recognized in international law, of "Closed Seas." This writer has written, regarding this Soviet concept:

"Closed Seas." The Soviet Union is known as a state which has continuously adhered to the Czarist claim of a territorial sea of 12 marine miles. Now, when the United States appears to be ready to negotiate that claim, another category of exclusive claims has arisen over seas which Soviet Russia has inherited from the Czars, namely the so-called "closed seas." These would now appear to have been left out of the U.S. calculations. It is very hard to pin down any exact meaning of this concept, but it would appear to indicate that the Soviet Union regards the following seas (and this list is neither complete nor closed against the future additions) as internal waters: the White Sea, the Black Sea, the Kara Sea, the Sea of Okhotsk, the Baltic Sea, the Sea of Japan. In these seas, according to the Soviet view, only littoral coasts may exercise freedom of navigation. This claim is unrecognized by the Family of Nations, and the Soviet Union is not pressing it—for the moment. The Arab States have sought to adopt this Russian concept to the Gulf of Aqaba.⁵

In the belief that values of legality and the fulfillment of justified expectations arise through the predictability of law, the

for the resources. It is a system dependent upon drawing borders, but borders in the ocean world are still hard to define, draw, and defend. . . . Finally, national enclosure does not handle the question of equity well . . .

Id. 37-38.

3. Goldie, *A Note on Some Diverse Meanings of the "Common Heritage of Mankind,"* 10 SYR. J. INT'L L. & COM. 69 (1983).

4. L. CARROLL, *Through the Looking Glass in C. DODGSON, THE ANNOTATED ALICE* 269 (1960) (paraphrased).

5. Goldie, *International Law of the Sea—A Review of States' Offshore Claims and Competences*, 24 NAVAL WAR C. REV., 43, 51 (No. 6 Sequence No. 234, Feb. 1972).

paper which follows has been set to the two related tasks of proposing a definition of the traditional legal concept of historic bays and of suggesting the advantages of establishing claims, and of asserting counterclaims, in terms of this established criterion rather than exposing the world's seafaring interests to the indeterminacy and capriciousness of emerging, vague and subjectively-oriented concepts.

II. THREE CONFERENCES: THREE MISSED OPPORTUNITIES

The special legal status of historic bays was recognized in the *North Atlantic Coast Fisheries Arbitration* of 1910.⁶ The Tribunal stated 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 claims should be held valid in the absence of any principle of international law on the subject. . . ." The tribunal found that "the more important bays such as Chaleurs, Conception, and Miramichi"⁸ should be so regarded. In the *Fisheries Case*⁹ the International Court of Justice unequivocally recognized historic waters as an established category of international law as the quotation under the title of this paper testifies. The doctrine forming the topic of this paper is thus well known to publicists and commentators and has been invoked in diplomatic exchanges as a basis of states' claims to exercise a special maritime jurisdiction. It has been attested to in decisions of domestic courts of the highest reputation, in those of arbitral tribunals and in at least one landmark judgment of the International Court of Justice. It is thus something of a surprise, perhaps, that the twin

6. *North Atlantic Coast Fisheries (U.S. v. Gr. Brit.) The Hague Arbitration Cases* 134 (Wilson ed. 1915).

7. *Id.* at 184. Although the tribunal employed the adjective "territorial" to qualify the waters of the relevant historic bays, it is clear from the context that the term was not utilized to give those bays the legal status of the territorial sea, since the baselines of the true territorial sea were to be drawn at their outer limits, thus distinguishing them from the territorial sea properly so-called. Hence the term should be taken to indicate that an analogy with land territory and the waters within the boundaries of the state, designating the area of its full sovereign authority and competence, is intended.

8. *Id.* The tribunal added that Conception Bay should be found to be an historic bay as this "was provided for by the decision of the Privy Council in the case of the *Direct United States Cable Co. v. The Anglo-American Telegraph Co.*, [1877] L. R. 2 App. Cas. 394 (P.C.) in which decision the United States have acquiesced." *North Atlantic Coast Fisheries*, *supra* note 6, at 188.

9. *Fisheries Case*, *supra* note 1, at 116.

concepts of historic bays and historic waters were not codified in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone¹⁰ but were only made an exception to the Regime of Bays provided in Article 7 of that Convention. Despite the fact that publicists have long recognized the legal categories of historic bays and, more generally, of historic title in ocean areas other than bays, a recent publication of the Law of the Sea Institute of the University of Hawaii entitled *Law of the Sea: Neglected Issues*¹¹ neglected to deal with the Third United Nations Conference's failure to agree on a provision defining historic bays and other historic rights and their legal scope and operation. This scholarly omission may be contrasted with the remarks of Mr. Rubio, representative of Panama at the 1958 United Nations Conference on the Law of the Sea at Geneva, which he uttered at the third meeting of the First Committee (this was, in fact, the first meeting at which matters of substance were discussed). He said, after proposing that the Committee set up a sub-committee, that:

The International Law Commission's draft contained only a passing reference to historic bays—in article 7, paragraph 4—but the Committee had before it a valuable Secretariat paper (A/CONF.13/1). The question of historic bays was of great importance, as had been recognized by eminent writers, including Bustamante and Gidel. The latter regarded historic bays as a safety

10. Geneva Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964) [hereinafter cited as 1958 Convention on the Territorial Sea].

11. *Law of the Sea: Neglected Issues*, in PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE TWELFTH ANNUAL CONFERENCE (J.K. Gamble, Jr. ed. 1979). It is of further interest to note that Bowen and Friedheim's introduction to the "Stage-Setting Session" entitled *Neglected Issues at the Third United Nations Law of the Sea Conference*, sets forth in Figure 1 ("A Typology of UNCLOS Neglect") "three reasons" for the neglect of their seven perceived issues as follows:

Reason for Neglect	Issues
1. Too little known to consider as subject of regulation or management	* Non-nodule resource recovery * Energy Resources beyond 200 mi. EEZ/margin
2. Issues too delicate or political	* Polar Regions * Military Uses
3. UNCLOS inappropriate forum	* North Sea * Airspace * Navigation

Id. at 2, 6. Quite clearly, historic bays do not fit into any of the above three "reasons for neglect," although, perhaps, the Conference's failure to agree may have arisen from political factors.

valve in the law of the sea, and considered that the refusal of States to accept the theory would make it impossible to arrive at an agreement on general rules concerning maritime areas. State practice in respect of historic bays was equally important; a number of bays had been declared "historic" by international treaties or pronouncements of state authorities, and several had been recognized as such by arbitral awards.¹²

Be the events of the 1958 Conference as they may, the legal concept of historic bays was, when at the Third United Nations Conference on the Law of the Sea it came up for review, available for reconsideration. A renewed possibility of codification one may have thought, had become available. The net result was, however, that this topic was the subject of only three oblique references in the

12. Statement of Mr. Rubio, U.N. Doc. A/CONF. 13/1 (1958), reprinted in III UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS, 74 (1958) [hereinafter cited as III UNCLoS OFFICIAL RECORDS (1958)]. See statements of Mr. Shukairi (Saudi Arabia) *id.*; Mr. Bartos (Yugoslavia) *id.*; Mr. Martinez-Moreno (El Salvador) *id.* at 48. Also note the *Annex* to the 21st Meeting Statement by Mr. J.P.A. Francois, Expert to the Secretariat of the Conference where he stated (footnotes omitted):

13. As regards historic bays, the International Law Commission have given no definition, for it thought that the concept was familiar to everyone concerned with international law. Moreover, historic bays could be defined very satisfactorily in the words of the International Court of Justice: "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." That definition is a very innocuous one. If, however, it is desired to go farther and state the conditions which bays must satisfy in order to be considered historic bays, the matter becomes much more complicated. It raises the whole problem of acquisition by prescription, and several uncertain points will then have to be cleared up. Is this "continued and well-established" usage, as the Institute of International Law called it in 1894, or "international" usage, as the Institute called it in 1920? Or is it an "uncontested" international usage, the word used in the 1928 draft? Must there be "established" usage, as the International Law Association's draft of 1926 requires, or established usage "generally recognized by nations," as required by the wording finally adopted? Can the vital interests of the coastal State be the sole root of a right? The 1930 Conference thought that, before beginning to study historic bays, it should have before it information from all the States on the bays which they claimed to be historic and the reasons for their claims.

14. The Secretariat's excellent memorandum [A/CONF.13/1] does not provide us with the material needed for a thorough study of this question. I therefore do not think it would be of any use to set up a sub-committee for that purpose, as proposed by the delegation of Panama [3rd meeting]. In my opinion, the Conference might merely use the term "historic bays" and leave it to be construed, in case of dispute, by the Court, with due regard for all the features of the special case, which could not possibly be provided for in a general rule. If necessary, the International Law Commission could be instructed to study acquisition by prescription, with special reference to historic bays.

Id., U.N. Doc. A/CONF. 13/C, L.10 (1958), at 69.

United Nations Convention on the Law of the Sea 1982:¹³ Article 10(6) provides that the twenty-four mile closing straight baseline of bays does "not apply to so-called 'historic bays' . . ." ¹⁴; Article 15 which recognizes the existence of historic title to waters by excluding such waters from the operation of the equidistance rule for which the Article provides, in the absence of agreement, for the delimitation of the territorial seas between adjacent and opposite states.^{14a} Historic waters are again recognized in Article 298(1) which provides states parties with the capacity to invoke "optional exceptions to the applicability of Section 2" (which establishes compulsory dispute settlement procedures entailing binding decisions), including disputes "involving historic bays or titles." This "optional exception" may be invoked by a party to the treaty by making a written declaration. On the other hand, alternative dispute settlement procedures become incumbent upon the parties where "no

13. Third United Nations Convention of the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter cited as 1982 Convention].

14. *Id.* art. 10(6). This formula for avoiding definition in Article 10(6) namely the reference to "so-called 'historic' bays" (note the inverted commas around the qualifier "historic"), was taken from Article 7(6) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, *supra* note 10, and further back the Inter-American Council of Jurists, "Principles of Mexico on the Juridical Regime of the Sea," approved at the Fourth Plenary Session, February 3, 1956, which provided (as far as historic bays are concerned):

E.

Bays

5. So-called "historic bays" shall be subject to the regime of international waters of the coastal state or states. McChesney, U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW "BLUE BOOK" 246 (1957). Pan-American Union Doc. CIJ-29 at 38 (English).

The formula "so-called 'historic' bays" in the "Principles of Mexico" and the 1958 Convention on the Territorial Sea and Contiguous Zone regarding historic bays was carried through into the drafts of the Third United Nations Conference on the Law of the Sea. *See, e.g.* Statement of Activities of the Conference During its First and Second Sessions, U.N. Doc. A/CONF. 62/L. 8/REV. 1, Annex II, Appendix I. 3 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 110, U.N. Sales No.: E.75. V.5 (1975) [hereinafter cited as 3 UNCLOS III OFFICIAL RECORDS (1975)] for the following formulations:

Provision 17

Formula A

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

Formula B

In the absence of other applicable rules the baselines of the territorial sea are measured from the outer limits of historic bays or other historic waters.

14a. 1982 Convention, *supra* note 13, art. 15.

agreement within a reasonable period of time is reached in negotiations between the parties."^{14b}

The reason for the two applicable United Nations-sponsored international conventions (which were drafted with a view to the codification of the relevant rules of the international law of the sea, so signally failing to define the concept of historic bays, prescribe how they may be acquired and determine the rights and duties entailed, can be found in the United Nations International Law Commission's sense of indefiniteness when the need arose for the formulation of the specific concept. It was also confronted by a difficulty in reaching a consensus for casting into binding, indeed mandatory language, the specific international law rules governing the topic. The Commission was, furthermore, confronted by political problems which could not be resolved by the purely juridical considerations informing the studies which the United Nations Secretariat had prepared on the subject¹⁵ or by other entirely objective and equally excellent scientific expositions. While these products of the study might provide guides to the strictly legal issues, they were not capable of settling the rivalries which would have been exacerbated by providing any form of words with the authority of a code. Thus, the International Law Commission and the two Conferences were unable to strike a satisfactory balance between the interests of states with authentic claims to adjacent sea areas based on long usage, and those of states that opposed particular claims to historic bays which their neighbors asserted, or states that in general imposed strict standards for the recognition of historic rights in order to vindicate the freedom of the seas and oppose, as a matter of principle, the facilitation of enclosures in ocean regions.¹⁶

14b. *Id.* art. 298(1).

15. These studies were: (1) *Historic Bays: Memorandum by the Secretariat of the United Nations (Preparatory Document, U.N. Doc. A/CONF. 13/1 (1957), reprinted in I UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 1 U.N. Doc. A/CONF.13/37, U.N. Sales No. 58.V4, vol. 1 (1959) [hereinafter cited as I UNCLOS OFFICIAL RECORDS (1957)]*. (2) United Nations Secretariat, *Juridical Regimes of Historic Waters Including Historic Bays*, U.N. Doc. A/CN. 4/143 (9 March 1962), [1962] 2 Y.B. INT'L L. COMM'N. 1 (1964).

16. There would appear to be a similar dearth of attempts at codifying this concept by private scholars and organizations. True, one may find oblique references such as the following:

Quant aux baies, y compris les embouchures des grands fleuves et aux fjords ainsi qu'aux parties de la mer enfermées par des îles et des îlots, c'est une question d'histoires de savoir jusqu'à quelle mesure ils auront été occupés par l'état riverain: car il s'agit là vraiment de parcelles de la mer faisant partie intégrante du cros de l'état.

RAESTAD, LA MER TERRITORIALE 171 (1913).

Again, while the Third United Nations Conference on the Law of the Sea finally failed to come up with a definitive and substantive article on historic bays, the topic was actively canvassed at the Caracas (Second) Session of the Conference. For example, Mr. Herrera Caceras (Honduras) observed, after noting that his country was not a party to any of the Geneva (1958 Law of the Sea) Conventions, that:

Honduras was one of three coastal States bordering on the Gulf of Fonseca in the Pacific Ocean. That gulf was regulated exclusively by existing delimitations and agreements between the coastal States. The legal concept contained in article 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone would be applicable to that bay but for the exception laid down in that article, i.e., that it related only "to bays the coasts of which belong to a single State" and that it would not apply to so-called "historic" bays. He regarded the latter provision as open to objection because of its discriminatory nature. It was discriminatory to exclude bays which bordered the coasts of various States when, as in the present case, all the coastal States maintained that the waters of the bay were internal. Although there was no established legal norm, the status of that bay had been accepted by the coastal States. It had never been maintained that the entrance to the Gulf of Fonseca was an international strait, which showed that the legal unity of all parts of the bay was generally accepted. Moreover, there was no valid reason for excluding from the legal concept of bays the so-called "historic" bays in cases where the concept applied to them. His delegation therefore maintained that the traditional concept of "historic" bays should be revised because it had been elaborated in response to a former need for a legal definition of bays under the exclusive competence of the coastal State.¹⁷

In addition, the Philippines representative, Mr. Abad Santos, criticised the United Kingdom's draft articles on the territorial sea,¹⁸ his grounds being that it made no mention of the impact on the territorial sea of historic bays.¹⁹ At the next meeting, however, Mr.

17. Statement of Mr. Herrera Caceras, II THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 100-01 (1974) [hereinafter cited as II UNCLOS III OFFICIAL RECORDS (1974)].

18. United Kingdom: draft articles on the Territorial Sea and Straights, U.N. Doc. A/CONF. 62/C.2/L.3 (1974), reprinted in III THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 183 (1974) [hereinafter cited as III UNCLOS III OFFICIAL RECORDS (1974)].

19. Statement of Mr. Abad Santos, reprinted in II UNCLOS III OFFICIAL RECORDS (1974), *supra* note 17, at 102-03.

Galindo Pohl (El Salvador) attacked Mr. Herrera Caceras's presentation, and raised the question whether "it was in order to discuss bilateral issues." He saw the purpose of the debate as fulfilling "the task of preparing general rules which would subsequently serve as the basis for settling specific cases."²⁰ Be that as it may, the representative of Guatemala (also a coastal state of the Gulf of Fonseca), Mr. Santiso Galvez, was reported in the following terms: "Finally, he wished to take the opportunity to repeat that the waters of the historic Bay of Amatique were internal waters, and always had been under the sovereignty of Guatemala."²¹

But the dispute did not end with the intervention of the third state—one interested in the status of the Gulf of Fonseca. Both Mr. Herrera Caceras and Mr. Galindo Pohl had further comments to make at this same fourth meeting. In brief, the three representatives agreed, in effect, that a dispute over the Gulf existed between the three littoral countries²²—Nicaragua, Honduras and El Salvador. Thus, after two studies by the United Nations Secretariat and three United Nations Conferences on the Law of the Sea, the world seems as far as ever from finding a universally acceptable definition of the concept. It is, therefore, necessary to turn from asking why this should be so to an inquiry whether the legal doctrine may be the subject of a general definition and, if not, whether there is, in fact, validity to claims such as those of the United States in terms of the Chesapeake and Delaware Bays on grounds of historic title, or whether alternative bases of sovereignty and authority over them exist, and have existed from the earliest times of this country's nationhood, or whether changes in United States policy have dictated changes in characterizing the legal bases for asserting territorial sovereignty over these reaches of internal waters.

III. BASIC ISSUES

In understanding the strange opposition between the writers and the case law on the one hand, and the codification conferences on the other, it is necessary to begin the requisite analytical review by presenting the basic notions which publicists, judges and arbitrators have canvassed on the general question of historic bays.

20. *Id.* at 104.

21. *Id.* at 106.

22. *Id.* at 108. Other representatives who canvassed ideas on historic bays included Mr. Abad Santos (Philippines). *Id.* at 111.

As with all historic titles, whether by *occupatio rei nullius*, or alternatively by prescription good against the world community, there must be an effective exercise of sovereignty over the area in question. Secondly, the claim must be acquiesced in, or recognized, or perhaps just tolerated by the world community. (There is debate on this point with regard to the degree of non-opposition.) Thirdly, there is the challenging question of the effectiveness of control. This element is a variable one. Fourthly, this paper will examine the kind of rights that the coastal state may demand over these sea areas, and so may assert against all other states. Having raised these elementary points, the discussion will then touch on the question of the relevance, which some scholars and states assert, of the vital interests of the coastal state to the acquisition of historic titles over bays and other maritime areas. Fifthly, the question of time is important: both with regard to periods of time and the frequency of the sovereign acts of the coastal state. Sixthly, some thoughts will be tentatively offered regarding the burden of proof. Then, finally, after this groundwork has been laid, the initial question will be raised once again, namely, whether a comprehensive formulation governing historic bays in general is practicable, in the sense of being acceptable to the world community.

IV. EFFECTIVENESS, ACQUIESCENCE AND SOVEREIGNTY

In international law, as in all legal systems, effectiveness is an essential element. Indeed the existence of the state itself is determined by the effectiveness of its capacity to exercise and display its authority and maintain its sovereign independence as a state over its territory and population. But effectiveness itself is a doctrine which confronts, in dialectical opposition, the old legal Latin maxim *ex injuria non oritur jus* with its Latin negation and the lawyer's morally jejune tag *factus facit jus*. These two concepts are contradictory, yet their dialectical interaction over time provides the stuff out of which law and legal rights grow. Emphasis on one, so as to deny validity to the other, is, I strongly suggest, only stressed by authorities who wish to develop a theory of law based exclusively on the former (utopianism) or the latter (Hobbesian power) rather than accept their dynamic interaction. Obviously if one asserts that *ex injuria non oritur jus* provides a fundamental rule of law, the premise of an argument that prescriptive rights may not be legally obtained is laid. The claims of an individual, a

neighbor or a group of neighboring states to prescriptive rights arise out of an initial *injuria* or a wrongful act. Again, we know that we should not accept wrongful acts as destructive of rights which are to be protected under the United Nations Charter—especially when those wrongful acts establish new rights for which the protection of the Charter is claimed. But such an argument flies in the face of legal history and all experience. It is here that the issue of acquiescence becomes important. When the community of states acquiesces in the assertion of claims, because the assertion is at a minimal cost to the world community's rights such as, for example, a claim that a bay in a distant ocean without traffic is an historic bay, the balance of convenience and equity favors the enclosure. (Spencer's Gulf in Australia may provide one example; Hudson's Bay in the Canadian Arctic may provide another.) Yet when the "*injuria*" is great enough, it is assumed there will be non-acquiescence. But where acquiescence is found to exist, despite the "*injuria*," title usually depends on the degree of "*injuria*" in counterpoint to the level of the cost of acquiescence. Effectiveness thus provides the political test for the validity of legal rights.

Is acquiescence an essential element to the formulation of historic title and rights? Some writers tell us yes, on the other hand, the majority of the International Court of Justice, in the Anglo-Norwegian *Fisheries Case*, said that it was enough that the Norwegian baseline claims were tolerated.²³ Toleration is not acquiescence. It implies a far less exacting standard. Simply to do nothing may not be acquiescence. Non-reaction can be (and was in the Anglo-Norwegian *Fisheries Case*) taken as tolerance. This observation gives rise to a further test. Lawyers all know that equity frowns on the abuse of faith. A claim based on a failure to respect the equity of reliance is generally labeled "injurious reliance." Where a state in international law, or a person in private law, "has slept on their rights" and has allowed another person to act on the assumption that a certain condition of fact exists, and the other person has so acted upon perceiving and being encouraged by the silence of the first, then that first person cannot later, when the second person has altered his or its position relying on that silence, turn around and demand that the acts done (with its silent tolerance) be undone, or form the basis of a claim of injury. Underlying the

23. *Fisheries Case*, *supra* note 1, at 138: "The general toleration of foreign states with regard to the Norwegian practice is an unchallenged fact." *See also id.* at 139: "the general toleration of international community."

verbal debate about tolerance, as used in the Anglo-Norwegian *Fisheries Case*, and acquiescence, which we find in most of the publicists, there is the value judgment that a state should not be permitted to allow a situation to continue once it has decided that such a state of affairs is contrary to its legally protected interests and, as such, should form the basis of a timely protest. Tolerance is thus a failure to protest against a known state of affairs, notwithstanding the injured state's appraisal of the potential effectiveness, or ineffectiveness of making such a protest.

An effective protest must be strongly made. A *pro forma* or paper protest is not enough. It should be emphatic and point to the rights invaded in no uncertain or ambiguous terms and, if necessary, be insistently repeated so as to lead to negotiations, or, in the alternative, to induce the characterization of the other state's conduct as intractably unreasonable or even as aggressive. Otherwise, a simple paper protest establishes no more than an adverseness of the claimant state's assertion of right to the protesting state. This, of course, may strengthen, rather than undermine, the adverse claim, for a paper protest provides an insufficient basis for protecting a valid legal right constituting part of the status quo. It is also insufficient for demanding, effectively, a halt to the process of the creation of an adverse historic right. Finally, in the context of acquiescence and tolerance, the question of recognition arises. While the recognition of a right may provide a reinforcement for the establishment of a right, its converse, namely the refusal of recognition, may provide a very feeble obstacle to the process of claim whereby a coastal state accumulates instances for asserting a right, for example, to an historic bay. The simple refusal of recognition could be ineffective to halt the ongoing and cumulative process of the historic consolidation of title if, under the *Fisheries Case* ruling, tolerance is enough; a state may and often does, in effect, tolerate a situation it does not recognize. Indeed the court's view of the British inaction with regard to Norway's fisheries claims and those rights' assertion through the Royal Decrees illustrates this distinction.

Is prescription relevant to claiming historic bays? Professor D.H.N. Johnson, amongst other writers, has asserted that a historic bay can only be lawfully acquired by a coastal state by means of the application of international rules of acquisitive prescription.²⁴

24. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L L. 1950 332 (1951); Johnson, *Consolidation as a Root of Title in International Law*, CAMBRIDGE L.J. 215 (1955).

In Professor Johnson's view, moreover, the prescription which is essential in such cases is not a prescriptive right against one or two neighboring states, but one good against the world community. Starting from the point that the high seas are free, we must necessarily be talking about a world community right to exercise the freedom of the high seas in the sense of all nations' free access to use it as a spatial resource for transportation and to gather its other resources. Professor Johnson sees the high seas, in addition, as a commons whose common resources may be individually exploited in common. The establishment of rights inconsistent with these world community rights can only be effectuated, according to Johnson, by means of the satisfaction of the hard requirements of a prescription good against the whole world. Professor Johnson's thesis is criticised, although not in name, in the *United Nations Study on Historic Bays*. This latter study points out, quite correctly it is suggested, that in the Anglo-Norwegian *Fisheries Case* the idea of acquisitive prescription was rejected, in effect, by the International Court. One relevant Norwegian interpretation (and many other states' interpretation as well) of the judgment was that the Norwegian claims had survived as a limited residue from the age of *mare clausum* when the Dano-Norwegian kings claimed the so-called Norwegian Sea as being subject to their sovereignty, and that the historic right therefore had nothing to do with prescription, but was simply the consolidation of shrunken rights which had been maintained over the centuries, and were finally enunciated in the Royal Decrees of 1935. These ancient claims, so this argument runs, residually survive as Norway's rights over the waters enclosed by her Skerryguard.

It is also true to say that there are other bays or historic waters in the world, apart from the coastal waters of Norway, where the coastal state's jurisdiction may be seen as pre-dating the arrival and supremacy of the doctrine of the freedom of the high seas. Examples include the traditional exercise of sovereignty over the Gulf of Manaar and Palk's Bay between India and Ceylon. Both of these have, from ancient times, been treated as subject to the sovereignty of the rulers of Ceylon, now Sri Lanka.²⁵ Today Sri Lanka claims those bays as the successor to the British Raj which, in its turn, claimed those bays as enclosed waters by virtue of being

25. See Ceylon Ordinance No. 6 of 1933, 4 CEYLON LEGISLATIVE ENACTMENTS ch. 168 (1938). Annakumar Pillai v. Muthupayal, 28 INDIAN L. REV. 551 (1904).

the successor to the Dutch, the Portuguese and the ancient kings of the island who had, since time immemorial, exercised sovereignty and authority over the pearl fisheries of those enclosed waters. It is also true to say that in a number of other maritime areas similar rights have survived from the earlier periods of the history of international law. For example, certain rights to particular sedentary fisheries (coral and sponge) in the southern Mediterranean have fallen under the historic rights of such coastal states as Tunisia, Libya and Egypt. These may be seen as having come down to the present as survivals of the rights asserted by the rulers of those states under Islamic law. Pre-dating contemporary public international law, they have little or nothing to do with our ideas of the Roman law rights upon which Hugo Grotius and his contemporaries and followers relied when they acclaimed it as *ratio scripta*. Nor did the evolution of the doctrine of the freedom of the high seas amongst Western European states have a similar impact upon these Buddhist, Islamic, and other non-Western states so as to limit or restrict their earlier extensive maritime rights.

In light of the foregoing, it seems feasible to observe that historic bays stem from a number of separate theories of law. One, indeed, is their creation alternatively either by way of a prescriptive right or by the tolerance of other states. This assertion can more confidently be made with regard to historic bays in Europe and in North America and especially the Bay of Granville (Cancalle) off the coasts of Brittany and Normandy, Conception Bay in North America, as well as many others. Their status as historic bays may be seen as the product of historic rights. It is not, however, of universal significance. What may be true of the Bay of Cancalle may not necessarily be true of the Gulf of Manaar. It is also not true of bays whose coastal states may assert historic title over them on the southern shore of the Mediterranean Sea, and whose title may stem from a different legal regime (that of Islam) from that of a purely European provenance.

Having referred, briefly, to historic maritime rights existing under different historical regimes (namely those derived from Islam) on the African coasts of the Mediterranean, a further clarification becomes necessary. At the moment the evidence has not been presented which would establish the Gulf of Sirte as an historic bay. Furthermore, aerial and naval incidents of the recent past indicate that any such claim has not been tolerated by states which are prepared to vindicate their rights of free navigation on the free

high seas. But, on the other hand, the Libyan claim to the Gulf of Sirte could be an interesting subject of study. It would be interesting because, while the policy and authority of the Kingdom of Italy during the period when Libya was subject to the sovereignty of that state would be relevant, it would not be conclusive. On the other hand, evidence of state practice stemming from the policies of rulers in the pre-colonial era may well be more effective, provided a record of these could be substantiated.

More generally, a decolonization argument, rejecting colonial power's policies, furthermore, could, indeed, be formulated so as to assert that a colonial power should not be able to terminate, for the indefinite future, and for purpose of its own interests, the rights of the colonized community or state which has fallen under its sovereignty. There is some truth in this, but such an argument would, of course, still have to look at the evidence about whether Italy asserted, or negotiated away, for its own interests, a pre-existing historic right. Secondly, it should be asked whether the historic right now asserted over the Gulf of Sirte ever existed under Islamic law in the first place. On the basis of insufficient evidence, perhaps, and before ever having had the opportunity to study the history of the Gulf of Sirte, it is highly probable that historic rights never were effectively consolidated under Islamic law. So, possibly, Italy never believed that she could assert a lawful claim to the Gulf of Sirte as an historic bay. This is distinguishable from the legal character of certain other smaller bays of North Africa, especially those on the Tunisian coast, where fishing by means of traps, sponge fisheries and shell fisheries of sea-bottom creatures of all kinds have been strictly regulated. These sea areas bear analogies with the pearl fisheries in the Persian Gulf which have been, since time immemorial, strictly regulated by the coastal prince or sovereign.

V. *THE "VITAL INTERESTS" OF THE COASTAL STATE*

Some writers have asserted that the establishment of historic rights over bays and offshore waters may arise from the vital interests of the coastal state. Can, for example, an historic bay be created by means of asserting that to exercise sovereign power over the bay is of vital interest to the coastal state? We come here to the assertion that vital interests can create historic title.

At the First Codification Conference of 1930 at The Hague, for example, the Portuguese representative stated the following point of view:

From a variety of circumstances, the state to which the bay belongs finds it necessary to exercise full sovereignty over it without restriction or hindrance. The considerations which justify their claim are security and defense of the land territory and ports, and the well-being and even existence of the state.²⁶

The present government of the Libyan Peoples Arab Jamahirayah has, as a result of United States Navy exercises, asserted that the Gulf of Sirte is an historic bay. By this means Libya has claimed to enclose it in order to bring it within its domestic territorial jurisdiction. The argument adduced in support of this assertion is that the Gulf's incorporation represents an essentially vital interest of Libya.

The argument that the vital interests of the coastal state should also provide a basis for enclosing a bay within the territory of the coastal state and for, further, classing it as "historic" was first put forward by Dr. Drago, the famous Argentinian international lawyer of the pre-World War I era. He argued that such great river estuaries as the Rio de la Plata and the mouths of the Orinoco and the Amazon should be regarded as historic bays of the Latin countries from whose shores those rivers debouch,²⁷ on the ground that to find otherwise would be unfair to newly decolonized states. (Incidentally, in saying these words with regard to Latin America, Dr. Drago was employing contemporary language long before the present age of decolonization.) It is true to say, whatever other justification a coastal state may give in terms of its vital interests for enclosing such bays within its sovereign territory, the features should not be called historic bays. To label them so does unnecessary violence to the requirement that this characterization must have a meaningful basis in history. History does not spring like Pallas Athena fully armed, and complete, from the head of Jove. Nor can an interest be based both on arguments of historic development and on criteria which have no relevant need for a time dimension. Rather, an historic title unrolls, evolves, and is consolidated. Accordingly, to try to fit such claims as Dr. Drago's vital interests argument and indeed, those of the Portuguese government at The

26. Statement by the Portuguese government at the First Codification Conference at The Hague, League of Nations Doc. C. 74. M.39.1919V, at 184.

27. See, e.g., Judge Drago's dissent in *Proceedings in the North Atlantic Coast Fisheries Arbitration*, S. Doc. No. 870, 61st Cong., 3rd Sess. 519 (1912) [hereinafter cited as *North Atlantic Coast Fisheries Arbitration*]; Briery, *Vital Interests and the Law*, 21 BRIT. Y.B. INT'L L. 51 (1944).

Hague Codification Conference of 1930 (which again raised the issues of vital interest being a basis for asserting historic bays)²⁸ should be sympathetically turned aside as contradictory of the essential meaning of the term "historic bays." It emphatically negates the unfolding and consolidating elements of the concept. Hence language and definition, authority and justice effectively negate any historic claim to enclose a sea area merely on the premise of the vital interests of the coastal state while, of course, vital interests may, on other grounds strongly justify the establishment of some kind of maritime protective jurisdiction. Alternative justifications should be established which do not do violence to the very name and category of an historic bay. Surely if a claim is asserted for the purpose of defense, or for obtaining exclusive control of valuable offshore resources, vital interests may today well vindicate claims under alternative legal concepts to that of historic bays.

The Third United Nations Conference on the Law of the Sea, long before December 1982 (when the Convention was accepted by the great majority of negotiating states) had, for example, already accepted the theory of archipelagic waters. Today few people would deny that an emerging customary international law rule, which is in the process of ascribing their archipelagic waters to island states, is unfolding before our very eyes. Then again, the twenty-four mile closing line for bays has come to be accepted as part of general international law. This may seem a modest closing line to many, but in the early days of this century it would have been regarded as the greatest extravagance. At that time the closing line of bays was widely held to be limited to double the distance of the breadth of the territorial sea — no more than six miles. Then again, and particularly with regard to vitally needed offshore fisheries such as those asserted by Chile, Ecuador and Peru in regard to the resources of the Humboldt Current, an alternative regime to that of historic bays is called into play to protect exclusive claims. Today we also hear of the 200-mile Exclusive Economic Zone. Surely this constitutes a far more generous recognition of the vital interests of the coastal state in a maritime region than the concept of historic bays? Then again on the issue of defense, surely, we cannot leave out of consideration the whole system of air traffic control and the authority over approaching aircraft in terms of what is called, in the United States, the Air Defense Identification Zone (ADIZ). This

28. See *supra* note 26 and accompanying text.

reaches a distance of 500-miles off the East and West Coasts of America. Similarly, national interests are protected by the so-called Dew Line combining the security interests of Canada and the United States with regard to the Arctic. In this context, it should be noted that no state has protested against the exercise of authority in the ADIZ. Parallels of these assertions of national authority to vindicate the national security of the coastal state are to be found on every continent. In fact, every developing and developed state today is not only entitled to exercise such power, but has a duty to engage in air traffic control to maintain international air traffic safety when aircraft approach its shores, otherwise there would be worse air traffic congestion and greater risk of catastrophic accidents than we would ever experience on the crowded highways of Europe and North America. Before focusing attention onto historic bays for the protection of vital interests, policy makers might do well to remember that there are other and possibly more functional concepts available for the protection of vital interests without making a fiction of history or a distortion of the past.

VI. FIVE UNITED STATES SUPREME COURT CASES

A. BACKGROUND

Since 1945 a considerable volume of litigation has taken place regarding the delimitation, *inter se*, of the offshore continental shelf areas appertaining to the United States. The first round of litigation²⁹ chiefly involved domestic constitutional law rather than public international law questions, and in the three cases that these issues arose, the Supreme Court of the United States found that the United States, rather than the littoral states, had gained dominion and control over the seabed and subsoil of the three-mile territorial belt (except in the case of *United States v. Louisiana*³⁰ where the state's claim had been to a twenty-seven mile belt). As

29. *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

30. 339 U.S. 699. This claim of land underlying a three leagues belt of territorial sea was reiterated in *United States v. Louisiana*, 363 U.S. 1, *reh'g denied*, 364 U.S. 856 (1960), *modified*, 382 U.S. 288 (1965), but only vindicated for the seaward boundaries of Texas, Alabama, Louisiana and Mississippi. In *United States v. Florida*, 363 U.S. 121 (1960), the Supreme Court found that the Submerged Lands Act of 1953 granted Florida a three marine-league belt of land under the Gulf of Mexico lying seaward of its coastline. But this Spanish measurement giving additional breadth to the territorial sea did not apply to the waters of Florida's Atlantic coast.

Justice Douglas pointed out in *United States v. California*: "Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of external sovereignty."³¹

B. THE SUBMERGED LANDS ACT

As a result of the holdings of the Supreme Court in the *California, Louisiana, and Texas* cases, the Congress enacted the Submerged Lands Act in 1953³² that "quit-claimed" and "released" to the states all rights to lands beneath navigable waters out to the outer limits of the three-mile marginal sea or, with regard to the states bordering on the Gulf of Mexico, to their outer boundaries if more than three miles offshore.

With regard to historic bays, there is no express mention in the Act, as finally passed, of these legal entities, although earlier versions of the bill did mention them. In the Act, Section 2(c) defines "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."³³ It should be noted that in the first draft of the bill inland waters were defined as including: "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea."

But this definition was removed by the Senate Committee on Interior and Insular Affairs.³⁴ In *United States v. California*, moreover, the Supreme Court observed that the above definition was eliminated "on grounds that it would prejudice and limit the position which the United States could take in its future conduct of foreign affairs."³⁵

After the enactment of the Submerged Lands Act, and apart from one lawsuit which was brought by states lacking a coastline and hence the possibility of benefiting from the Act and which attacked the constitutionality of the Act on the ground that ceding

31. 332 U.S. at 38.

32. The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-15 (1982). See also The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-46 (1982), which provided for the jurisdiction of the United States over the "Outer Continental Shelf" (defined as areas seaward of those "quitclaimed" to the states by the Submerged Lands Act) and authorized the Secretary of the Interior to lease such areas for exploration and exploitation purposes.

33. Submerged Lands Act of 1953, § 2(c), 43 U.S.C. § 1301 (1982).

34. S. REP. NO. 133, 83d Cong., 1st Sess., at 18.

35. 381 U.S. 139, 151 (1965).

the submerged lands to individual states would take away the "equal footing" among states by extending state power into the domain of federal responsibility,³⁶ litigation was between the coastal states benefiting from the Act and the United States. This litigation fell into two categories: (1) disputes as to the width of the quitclaimed lands under the marginal sea³⁷ in the Gulf of Mexico; and (2) the definition of the baselines from which the territorial sea and, hence, the lands included within the Submerged Lands Act's "quitclaim" should be measured. While the disputes with respect to the width of the coastal state's territorial sea do not include historic bays issues, those involving baselines do. In this respect five cases are of interest, namely: *United States v. California*,³⁸ *United States v. Louisiana (Louisiana Boundary Case)*,³⁹ *United States v. Florida*,⁴⁰ *United States v. Maine*,⁴¹ *United States v. Alaska*.⁴²

C. AN OUTLINE OF THE FIVE SUBMERGED LANDS CASES
RELATING TO HISTORIC BAYS AND HISTORIC WATERS

At the outset it should be noted that, in the first of these five cases (namely *United States v. California*⁴³), the Supreme Court held that "Congress, in passing the Act, left the responsibility for defining inland waters to this Court. We think that it did not tie our hands at the same time."⁴⁴ This thesis was predicated on the more

36. *Alabama v. Texas*, 347 U.S. 272, 274 (1954) (Reed, J., concurring).

37. *United States v. Louisiana*, 363 U.S. at 1. It should be noted that in this case Justice Harlan observed, for the Court, that "there is no question of Congress' power to fix state land and water boundaries as a domestic matter." *Id.* at 35. See also *United States v. Louisiana*, 389 U.S. 155 (1967), *reh'g denied*, 389 U.S. 1059 (1968) in which the State of Texas claimed that the baselines of its three-league territorial sea should be measured from the seaward edge of artificial jetties. Under this argument the Submerged Lands Act of 1953 would be seen to quitclaim, to the State of Texas, the submerged lands lying more than three leagues from those jetties (as well as three leagues from the shoreline where the jetties do not create the greater belt of quitclaimed submerged lands). The argument failed. The Supreme Court held that the three-league belt must be measured by the boundary which existed in 1845, when Texas was admitted to the Union, and not from the jetties which were built long thereafter.

38. *U.S. v. California*, 381 U.S. 139, *reh'g denied*, 382 U.S. 889 (1965), *modified*, 382 U.S. 448, (1966), *modified*, 432 U.S. 40 (1977).

39. *U.S. v. Louisiana*, 394 U.S. 11, *reh'g denied*, 394 U.S. 994, *modified*, 394 U.S. 1, *modified*, 394 U.S. 836 (1969).

40. *U.S. v. Florida*, 420 U.S. 531 (1975).

41. *U.S. v. Maine*, 420 U.S. 515 (1975).

42. *U.S. v. Alaska*, 422 U.S. 184, *reh'g denied*, 423 U.S. 885, *on remand*, 519 F.2d 1376 (1975).

43. 381 U.S. at 139.

44. *Id.* at 164, 150-51.

general foundation of the separation of powers. In the 1960 *United States v. Louisiana* case the Court had said:

The power to admit new states resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. Any such determination is, of course, binding on the states. The exercise of Congress' power to admit new states, while it may have international consequences, also entails consequences as between Nation and State. We need not decide whether action by Congress fixing a state's territorial boundary more than three miles beyond its coast constitutes an overriding determination that the state, and therefore this country, are to claim that much territory against foreign nations. It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter. Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the state under the *Pollard* rule. Were that rule applicable also to the marginal sea—the premise on which Congress proceeded in enacting the Submerged Lands Act—it is clear that such a boundary would be similarly effective to circumscribe the extent of submerged lands *beyond* low-water mark, and within the limits of the Continental Shelf, owned by the state. For, as the Government readily concedes, the right to exercise jurisdiction and control over the seabed and subsoil of the Continental Shelf is not internationally restricted by the limit of territorial waters.

We conclude that, consonant with the purpose of Congress to grant to the states, subject to the three-league limitation, the lands they would have owned had the *Pollard* rule been held applicable to the marginal sea, a state territorial boundary beyond three miles is established for purposes of the Submerged Lands Act by Congressional action so fixing it, irrespective of the limit of territorial waters.⁴⁵

But while the Court left to the United States complete discretion in deciding whether or not to extend its boundaries to the furthest extent permitted under international law, it saw, in *United States v. California*,⁴⁶ a partial exception to that proposition with

45. See *Louisiana*, 363 U.S. at 35-36.

46. 381 U.S. at 139.

regard to historic bays. It observed that there could be situations where a United States title to a bay would not "be decisive in all circumstances, for a case might arise in which the historic title was clear beyond doubt."⁴⁷

1. *United States v. California*⁴⁸

In the first case relating to offshore submerged lands, which had been decided in 1947,⁴⁹ the decision related to the ownership, under the Constitution of the United States, of those lands. This second case sought the interpretation of the relevant provisions of the Submerged Lands Act and, in particular, the meaning of the term "inland waters." California claimed, as historic waters (bays) of the state, the following sea areas:

- (1) Crescent City Bay
- (2) Monterey Bay⁵⁰
- (3) San Luis Obispo Bay
- (4) Santa Monica Bay⁵¹
- (5) San Pedro Bay⁵²
- (6) Newport Bay

California also claimed the following expanses of the Pacific Ocean as "inland" (internal) waters of the State, on the precedent of the Norwegian *Fisheries Case*⁵³ and the authority of Article 4 of the Convention on the Territorial Sea and Contiguous Zone.⁵⁴ The latter provides for the use of straight baselines if the "coast line is deeply indented and cut into, or if there is a fringe of islands

47. *Id.* at 175. The Court added, "[b]ut in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive." *Id.*

48. 381 U.S. at 139.

49. 332 U.S. at 19.

50. California's claim, at least in part, that Monterey Bay appertained to her on the basis of its being a historic bay turned on one state court and one federal court decision, namely, *Ocean Industries, Inc. v. Superior Court*, 200 Cal. 235, 252 P. 722 (1927), and *Ocean Industries, Inc. v. Greene*, 15 F.2d 862 (N.D. Cal. 1926).

51. California's similar claim to Santa Monica Bay turned on a state court decision in *People v. Stralla*, 14 Cal. 2d 617, 96 P.2d 941 (1939) (finding that the Sheriff of Los Angeles County could make an arrest more than three miles from the shore line, but within the body of the Bay).

52. The California claim to San Pedro Bay was predicated in part, on *United States v. Carrillo*, 13 F. Supp. 121 (S.D. Cal. 1935).

53. *Fisheries Case*, *supra* note 1, at 116.

54. 1958 Convention on the Territorial Sea, *supra* note 10, art. 4.

along the coast in its immediate vicinity."⁵⁵ Accordingly, California argued that she was free to use such boundary lines across the opening of her bays and around her islands and, in particular, the following:

(1) The first area runs from Bodega Head, to Point Reyes, to the outermost inlet of the Farallon Islands and thence to Pescadero Point

(2) Half Moon Bay

(3) Morro Bay

(4) The second such area runs from Point Arguello to Point Conception

(5) California's third claim, namely to the "overall unit area," runs from Point Conception to Richardson Rock (21 miles across water), to San Miguel Island, to Santa Rosa Island, to Gull Island, to San Clemente Island (43 miles); thence back to the mainland at Point Loma (56.8 miles). San Nicolas and San Clemente Islands are over 50 miles from shore.⁵⁶ (It should be noted that this "overall unit area" embraces *inter alia*, the Santa Barbara channel, Santa Monica Bay and Newport Bay but, of course, extends far beyond them.)

California reinforced her claims, where possible, by arguing that all bays with a closing line of 24 sea miles or less enclosed

55. Article 4 provides:

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baseline shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Id.

56. See 381 U.S. at 178 (Black, J., dissenting) (Map in Appendix C). The Appendices follow page 213 of the Report.

internal or "inland" waters—hereinafter referred to as "juridical bays" and justified under Article 7 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.⁵⁷ In particular Monterey Bay fell within this category. More generally, however, California argued that the state's internal or "inland" waters were established under her constitution and legislation.⁵⁸ But the Court, recalling its rationale in the 1947 *United States v. California* decision,⁵⁹ asserted

57. Article 7 of the Convention is as follows:

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 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 areas of the indentation.
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 waters that is possible with a line of that length.
6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

1958 Convention on the Territorial Sea, *supra* note 10, art. 7.

58. *See, e.g.*, 381 U.S. at 153 where the Court correctly credited California with the following argument:

"[I]nland waters" [in the Submerged Lands Act] must have been intended to encompass all waters which the States "thought" were inland waters, for that is the only way in which the Act can now be interpreted to effectuate fully its supposed "philosophy" of granting to the States all submerged lands within their historic boundaries.

59. 332 U.S. at 19. *See id.* at 35-36 (footnotes omitted) where the Court states: The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so if wars come, they must be fought by the nation. . . . The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared

that the definition of inland waters was for the Union and not for the several states to determine and, further, that since the date of the decree of the first *California* case, the issue has become settled by the United States' ratification of the Convention on the Territorial Sea and Contiguous Zone on March 24, 1961 and the consequential adoption of the definitions therein. Hence the Court applied the "Boggs Formula,"⁶⁰ namely the 24-mile maximum closing line for bays plus the "semicircle" test for determining the bay-like characteristics of the water area enclosed. Finally, the Court decided that the choice of asserting claims to inland waters on the basis of Article 4's straight baselines was for the United States in her conduct of international relations to decide, and not for the several states. Applying these principles, the Court found that of all the disputed sea areas only Monterey Bay should be classified as inland waters and, hence, as appertaining to the State of California. (Monterey Bay has a closing line of 19.24 miles across its entrance from headland to headland.) On the other hand, none of the other coastal segments which California claimed met the Court's tests. Hence they did not fall to that State as constituting a part of its territory. Accordingly, their outer limits did not constitute the "coast line" of the state from which the statutorily quitclaimed three mile belt of state submerged lands would have been measured, as claimed by California.

2. *United States v. Louisiana (Louisiana Boundary Case)*⁶¹

In the immediately preceding case, *United States v. Louisiana (Texas Boundary Case)*,⁶² the Supreme Court applied its holding in

boundaries, these do not detract from the Federal Government's paramount rights in and power over this area.

60. The "Boggs Formula" follows the proposed definition by Dr. S. Whittemore Boggs, Geographer, Department of State, in his influential article, Boggs, *Delimitation of the Territorial Sea*, 24 AM. J. INT'L L. 541, (1930). In that article Boggs wrote:

[T]he American proposal is to use a method inside the indentations which is exactly similar to the drawing of the arcs of circles from all points along the coast. . . . It is drawn, however, not with a radius of three miles but with a radius that is proportionate to the width of the entrance. A comparison is then made between the area enclosed by the envelope of the arcs of circles and the straight line across the entrance . . . and the area of a semi-circle whose diameter is proportionate to the width of the entrance. When the area of the special "envelope" inside the bay exceeds the area of the semi-circle, the waters inside the straight line are national waters, and the three-mile limit is measured from the straight line.

Id. at 550.

61. 394 U.S. at 11.

62. 394 U.S. at 1.

United States v. California.⁶³ In that earlier case it decided that, apart from the special circumstances where straight baselines are permitted, the submerged lands quitclaimed to the states in the Submerged Lands Act should be measured from the "line of ordinary low water."⁶⁴ In the *Texas Boundary Case* it decided that the coastline referred to in the Act was "ambulatory" in that it should be viewed as being modified as the extensive erosion and accretion of its shores modified the low water mark which provided the datum for measuring the quitclaimed submerged lands.

While the low water mark rule was still seen as basic in the *Louisiana Boundary Case*, the Court did agree that parts of the Louisiana coastline should be drawn by straight baselines marking "the seaward limit of inland waters."⁶⁵ In determining the areas to be so characterized the Court looked, again, to the Convention on the Territorial Sea and Contiguous Zone, Article 7, and strictly applied the twenty-four-mile closing line and semicircle test (the so-called Boggs Formula) for juridical bays. It also recognized the principle of straight baselines enunciated and applied by the International Court of Justice in the *Fisheries Case*⁶⁶ as well as Article 7, paragraph 2, of the above Convention and concluded that, since there was "too little technical information or consensus among nations on that and related subjects to allow the formulation of uniform rules,"⁶⁷ each nation is "left free to draw straight baselines along suitable insular configurations if it so desired."⁶⁸ Hence the decision whether or not to invoke this power was entirely in the hands of the United States. The Court observed:

While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method

63. 381 U.S. at 139.

64. *Id.* at 175-76. For determining this line the Court followed Article 3 of the Convention on the Territorial Sea and the Contiguous Zone which provides that "[e]xcept where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." The Court applied this rule as follows: "We interpret the two lines thus indicated to conform, and on the official United States coastal charts of the Pacific Coast prepared by the United States Coast and Geodetic Survey, it is the lower low-water line which is marked." *Id.* at 176.

65. Submerged Lands Act of 1953, 43 U.S.C. § 1302(c).

66. *Fisheries Case*, *supra* note 1, at 116.

67. 394 U.S. at 11.

68. *Id.* at 70.

of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy.⁶⁹

The Supreme Court also canvassed a third basis for characterizing maritime areas as "inland waters," namely "historic bays." After pointing out that, although historic bays are acknowledged to exist in Article 7 of the Convention on the Territorial Sea and Contiguous Zone, they are not defined in the Convention; but the concept "therefore derives its content from general principles of international law."⁷⁰ The Court also observed, however, that: "it is generally agreed that historic title can be claimed only when the 'coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations'.⁷¹

The Court did not decide whether Louisiana's evidence of historic waters to which it was entitled was "clear beyond doubt,"⁷² but remitted that issue to a Special Master. It concluded its holding on this subject in the following rather oracular and recondite terms:

The only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent the United States could rely on state activities in advancing such a claim, they are relevant to the determination of the issue in this case.⁷³

Subsequently, the Special Master found that:

From the foregoing it is apparent that there is no basis for Louisiana's claim of historic inland waters extending beyond the limits of its coastline as determined by Section 2(c) of the Submerged Lands Act as interpreted by Subsections 1 through 5 of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, Subsection 6 thereof having no application to the facts in this case, even though undisputed. All of these facts are as consistent with a claim of territorial seas which Louisiana was asserting to the extent of 27 miles from its shore line from 1938

69. *Id.* at 72-73. The Court relied on *U.S. v. California*, 381 U.S. at 139, 168. In quoting this latter decision the Court said: "[t]he choice under the Convention to use the straight-baseline method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." 394 U.S. at 72 (quoting *U.S. v. California*, 381 U.S. at 168).

70. 394 U.S. at 75 (footnote omitted).

71. 394 U.S. at 23 (quoting *U.S. v. California*, 381 U.S. at 172 (footnotes omitted)).

72. 394 U.S. at 77 (quoting *U.S. v. California*, 381 U.S. at 175).

73. 394 U.S. at 77-78.

to 1953 (Louisiana Act 55 of 1938) and nine miles from its shoreline from 1954 until the Court's decision of 1960 (Louisiana Act 33 of 1954) as they are with any claim of inland waters. Far from being clear beyond doubt, the evidence here adduced resembles that introduced in the California case which was held to be questionable, and therefore insufficient to support a finding of historic waters in the face of a contrary declaration by the United States.

3. *United States v. Florida*⁷⁴

The most substantial claim which Florida made in this case (apart from the claim to submerged lands extending three leagues, rather than three sea-miles, under the territorial sea into the Gulf of Mexico) was that Florida Bay as internal waters. (The State defined this feature by means of a closing line between the Dry Tortugas and Cape Romano, a distance of about one hundred nautical miles.) It based this claim on an argument in the alternative. Florida Bay was either a juridical bay or an historic bay.

In the brief decree in this case the Special Master reviewed his finding that Florida Bay was not an historic bay. This was on the motion of the State of Florida. On the motion of the United States, he was ordered to review his finding that a portion of Florida Bay, namely the part which could be defined by a twenty-four mile closing line, was a juridical bay by virtue of his recommendation that closing lines be drawn around three groups of islands that make up the Florida Keys.

Subsequently, on May 24, 1976, the Supreme Court of the United States, after hearing argument from both the United States and Florida on the Special Master's Supplemental Report, entered a decree concluding the issues of both historic and juridical bays in this case.⁷⁵ It stated, *inter alia*, that:

There is no historic bay on the coast of the State of Florida. There are no inland waters within Florida Bay, or within the Dry Tortugas Islands, the Marquesas Keys and the lower Florida Keys (from Money Key to Key West), the closing lines of which affect the rights of either the United States or the State of Florida under this decree.⁷⁶

In finding that Florida Bay did not constitute a historic bay or historic waters, the Special Master, after reviewing the opinions

74. *U.S. v. Florida*, 420 U.S. 531 (1975).

75. *U.S. v. Florida*, 425 U.S. 791 (1976).

76. *Id.* at 793.

of the Supreme Court in the *California* and *Louisiana* cases, concluded that the criteria for establishing the existence of an historic bay or historic waters were:

(1) There must be an open, notorious and effective exercise of sovereign authority over the area not merely with respect to local citizens but as against foreign nationals as well;

(2) This authority must have been exercised for a considerable period of time; and

(3) Foreign states must have acquiesced in the exercise of this authority as against their nationals.⁷⁷

The Special Master was, in part, persuaded by the disclaimer of the United States that Florida Bay was an historic bay but, in the light of the Court's reiteration, in the *California* and *Louisiana* cases, that such a disclaimer by the United States might not be decisive when the state's historic claim was "clear beyond a doubt."⁷⁸ He thereupon found that Florida had not met that burden of proof.⁷⁹ Indeed, he pointed out that it "seems clear from the evidence that the State of Florida has never, before or since 1968, seized a foreign vessel in the disputed area beyond the three-league limit for violating its laws."⁸⁰

The Special Master's further Report was then appealed to the Supreme Court which entered a decree⁸¹ upholding that Report in general. With regard to historic bays the Court found, as has already been pointed out, that there "is no historic bay on the coast of the State of Florida."⁸²

4. *United States v. Maine*⁸³

In a brief opinion Justice White, expressing the unanimous views of the eight justices participating in the case, upheld the Court's prior doctrine regarding states' claims to historic bays. While the case had certain unique historical features (it was brought by the thirteen original states and therefore required an analysis of eighteenth century English law and policy and of the original patents granted by the English Crown), these unique features no more required the Court to distinguish the *California*, *Texas*, *Loui-*

77. *U.S. v. Florida*, Report of Albert B. Maris, Special Master, January 18, 1974 (October Term 1973, No. 52 Original) 41 [hereinafter cited as *Report of the Special Master*].

78. *Id.* at 42.

79. *Id.* at 46.

80. *Id.* at 45.

81. See *U.S. v. Florida*, 425 U.S. at 791.

82. *Id.* at 793.

83. *U.S. v. Maine*, 420 U.S. 515 (1975).

siana and *Florida* cases, which have already been discussed, than they provided the occasion for any reconsideration of what should now be regarded as the Supreme Court's established doctrine with regard to states' claims to historic bays. This is especially interesting because both Chesapeake and Delaware bays have, since the early days of the Union, been regarded as historic bays.⁸⁴ Be that as it may, the Court was not disposed to disturb the Special Master's finding that since these bays were, in effect, less than twenty-four miles from headland to headland at their entrances, they were the internal waters of the respective states and that there was no need to go further with the onerous burden of proof of having to adduce "historical evidence [which is] clear beyond doubt."⁸⁵ Although these advantageous geographical characteristics do not equally apply to the whole of Long Island Sound, and despite the fact that traditionally this stretch of water has been regarded as internal waters on the basis of historic title, the *Maine* case tells us now that only those parts of the Sound which comply with the criteria for establishing juridical bays may now be claimed by the littoral states as internal waters. The Court held itself to be bound by the earlier cases, not by any doctrine of *res judicata*, because the states parties to the present action had not participated in the earlier ones, but by virtue of *stare decisis*. Hence the Court's three criteria^{85a} and its strict requirement of proof of historic title "beyond doubt" have become this tribunal's settled doctrine with regard to disputes over historic titles between states of this Union and the United States. Later an argument will be presented to the effect that these holdings, relating as they do to domestic constitutional law issues, should not necessarily be viewed as binding on the United States in an international dispute with a foreign country—especially where this country is seeking to uphold an exclusive claim on the basis of its historic title.

5. *United States v. Alaska*⁸⁶

Claiming Cook Inlet to be inland waters on the basis of historic title, the State of Alaska offered, for competitive oil and gas lease sale, mineral resources in the submerged lands under that arm of the Pacific Ocean. Cook Inlet is an elongated body of water extending from the ocean for some 150 miles into Alaska. Its opening, front-

84. See *infra* notes 113-14 and accompanying text regarding both of these bays.

85. See *supra* note 72 and the accompanying text.

85a. See *supra* text accompanying note 77.

86. *U.S. v. Alaska*, 422 U.S. 184 (1975).

ing on the open sea, is some 47 miles across from headland to headland. This offer prompted the United States to seek injunctive relief and to quiet its title over the submerged lands under the Inlet which it claimed. It should be noted that the upper or inner portion of the Inlet, namely above the point where a twenty-four mile closing line effectively joined its opposite sides, was not in dispute. The United States conceded that above such a line the Inlet constituted a juridical bay and hence was "inland waters" under the Submerged Lands Act of 1953. The issue between the state and the United States was whether the whole of the Inlet should be recognized as an historic bay.

The Federal District Court for the District of Alaska, where the United States sued for relief, dismissed the United States' complaint. The court examined the evidence relating to the periods of Russian sovereignty over Alaska, United States sovereignty when that area was a federal territory and Alaska's sovereignty after becoming a state. It found that Alaska had effectively established that Cook Inlet was an historic bay. The Supreme Court, on the other hand, by Justice Blackmun for six of the justices to two, decided that the District Court's assessment of the legal significance of the facts before it was erroneous. Justices Stewart and Rehnquist dissented on the ground that both of the courts below had applied correct legal criteria for establishing the status of Cook Inlet as an historic bay.

The majority found that the District Court had been clearly correct in its finding that the United States had exercised jurisdiction over the Lower Cook Inlet during the period of Alaska's existence as a territory, "for the purpose of fish and wildlife management."⁸⁷ It added that:

It is far from clear, however, that the District Court was correct in concluding that the fact of enforcement of fish and wildlife regulations was legally sufficient to demonstrate the type of authority that must be exercised to establish title to a historic bay.⁸⁸

The majority stressed its view that to establish Cook Inlet as inland or internal waters by virtue of historic title the state would have to show that the area had not been one in which foreign ships' right of innocent passage had been exercised, for that would be

87. *Id.* at 196.

88. *Id.* The Court remained unconvinced that fisheries and wildlife management provided that "the historic evidence [is] clear beyond doubt." *Id.* See *supra* note 72 and accompanying text.

evidence that the area in dispute had been treated as territorial sea. Hence evidence of merely the enforcement of fishing and wildlife regulations was "patently insufficient,"⁸⁹ and what had to be shown was "historically, an assertion of power to exclude all foreign vessels and navigation."⁹⁰

On the element of acquiescence, the District Court had argued that historic title had been established by the "failure of any foreign nation to protest."⁹¹ The Supreme Court, in contrast with the International Court of Justice in the Anglo-Norwegian *Fisheries Case*, decided that "something more than the mere failure to object must be shown."⁹² It added:

The failure of other countries to protest is meaningless unless it is shown that the government of those countries knew or reasonably should have known of the authority being asserted.⁹³

Furthermore, the Court stressed the international dimension of a claim to historic title, even in a dispute between a state and the United States. It said:

Alaska clearly claims the waters in question as inland waters, but the United States neither supported nor disclaimed the State's position. Given the ambiguity of the Federal Government's position, we cannot agree that the assertion of sovereignty possessed the clarity essential to a claim of historic title over inland waters.^{93a}

Finally, the Court felt that the evidence was inconclusive regarding foreign acquiescence. Rather, it pointed to a Japanese protest against the position taken by Alaska.^{93b}

D. THE RELIANCE OF THE UNITED STATES CASES FOR THE CLARIFICATION AND EVOLUTION OF RELEVANT PRINCIPLES OF INTERNATIONAL LAW—PERSUASION, RECEPTION AND TRANSFORMATION

The holding in *United States v. Louisiana* that the setting of states' boundaries is a domestic matter has already been quoted

89. *Id.* at 197.

90. *Id.*

91. *Id.* at 199-200.

92. *Id.* at 200.

93. *Id.* These comments clearly testify to a divergence between the Supreme Court of the United States and the International Court of Justice's holding in the Fisheries Case, *see supra* text accompanying note 23.

93a. *Id.* at 203.

93b. *Id.*

at length.^{93c} On the other hand, in *United States v. California* the Supreme Court announced that it would follow the criteria prescribed by international law, and especially those agreed upon (for example those regarding straight baselines and juridical bays) in the Convention on the Territorial Sea and the Contiguous Zone, where applicable.^{93d} In *United States v. Louisiana (Louisiana Boundary Case)*, it observed that while historic bays were not defined in the convention:

[T]he term . . . derives its content from general principles of international law. As the absence of a definition indicates, there is no universal accord on the exact meaning of historic waters. There is substantial agreement, however, on the outlines of the doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters.⁹⁴

But, because the Court was reluctant to accept disclaimers of waters as constituting historic bays by the United States as completely conclusive, as it had with regard to waters within straight baselines (for example those lying shoreward of "fringes of islands"⁹⁵), it did require the state to adduce evidence which is "clear beyond doubt" before accepting, or guiding a Special Master to accept, that state's case on historic bays as an accepted concept of public international law. Secondly, its formulation was contrary to what has been seen in international law and especially in the *Fisheries Case*, of a strict burden of proof incumbent upon the claimant member state of the Union that it must establish its case as "clear beyond doubt." This second issue will be deferred to this paper's discussion, under a separate heading, of "burden of proof." The former will, however, be taken up in the present context under the rubric of the function of international law in the process of decision when a federal court exercises its original jurisdiction to resolve disputes between member states of the federation, and questions the persuasiveness of those domestic court decisions before international tribunals.

1. *International Law in Domestic Tribunals*

The classical generalization, for both American and Commonwealth common law jurisdictions, on the relationship of inter-

93c. *Supra* note 45 and accompanying text.

93d. 381 U.S. 139, 163-65 (1965).

94. 394 U.S. at 75 (footnotes omitted).

95. *Id.* at 75. See also *U.S. v. Alaska*, 422 U.S. 184, 203 (1975).

national and domestic law, remains Lord Mansfield's declaration in *Triquet v. Bath* that: "the law of nations, in its full extent, [is] part of the [common] law."⁹⁶ But this should not be misunderstood. International law binds the state in its international relations while municipal law operates within the state. Hence a binding rule of municipal law does not operate internationally: nor does a rule of international law directly create obligations among private individuals. But certain rules of international law call upon states to legislate (to "receive" into their domestic system) domestic law rules reflecting or implementing those international law obligations or rules. Failure to do so would constitute a breach of the state's international obligations. The international law rule which is so received, however, is transformed into a domestic law rule by the act of reception. Anzilotti tells us that:

D'autre part, étant donnée la separation des orres juridiques, toute récéption est un act *d'établissement de normes*. La récéption, de plus, implique nécessairement une transformation, des normes reçues, qui va au delà de la pure valeur formelle. Avant tout, toute norme s'adresse aux sujets de l'ordre juridique dans lequel elle est en vigueur; et puisque le qualité de sujet juridique est une corrélation entre une entité et les normes qui composent un ordre juridique donné, ainsi le seul fait qu'une norme est reu dans un ordre juridique, implique que cette norme vaur pour des sujets différents de ceux pous lesquels elle valait dane l'ordre intérier. . . . Une transformation, non seulement formelle, mais meme substantielle, est donc include dans le concept même de récéption; c'est pour quoi il ne semple pas exact déduire l'impossibilité de la récéption du degré de transformation qui est nécessaire dans les normes ayant fait l'objet d'une récéption.⁹⁷

International law only operates in the arena of international obligations: municipal law only operates in the arena of municipal law obligations. Thus, Lord Mansfield's maxim should be understood to mean that, for settling disputes in municipal law, such as domestic disputes between private parties, the rule establishing relevant international obligations becomes, for the purposes of international decision, transformed into norms of municipal law. International law may thus, in relevant cases, provide the materials out of which the municipal rule of decision is fashioned. Such transformation,

96. *Triquet v. Bath*, 97 Eng. Rep. 936, 937-38, 3 Burr. 1478, 1481 (K.B. 1764) (quoting Lord Talbot in *Barbuit's Case*, 25 Eng. Rep. 777, T. Talb. 281 (K.B. 1735)).

97. ANZILOTTI, 1 COURS DE DROIT INTERNATIONAL 62-63 (Gidel Trans. 1929). Note: the above quotation is at page 59 of the third edition (1927) (Italian) [hereinafter cited as ANZILOTTI].

in addition, saves the state from being in breach of its international obligations.

Even when the Supreme Court of the United States, or similarly placed courts in other federations, exercises original jurisdiction (or its equivalent) in disputes between states, or between one or more states and a federal authority, the court does not sit as an international tribunal, but as a domestic one. Hence the following remark by Dr. James Brown Scott is not accepted as far as that writer's belief in the Court's international character is concerned: "The Supreme Court [of the United States] is one of limited jurisdiction and as an International Court is also one of limited jurisdiction and is likely to be so indefinitely. . . ."⁹⁸

Of similar import, of course, was Justice Field's statement, which is also not accepted in *Iowa v. Illinois*, that the "rules of international law will be held to obtain, unless changed by statute or usage."⁹⁹ In such remarks as these decisions of the United States Supreme Court in conflicts between States of the Union are seen simply as applications of international law.¹⁰⁰ Of course, in such cases the Court has received and applied principles of international law as indeed did the Federal High Court of Germany under the Weimar Republic¹⁰¹ and as does the Swiss Federal Tribunal.¹⁰² But the decisions rendered in such cases are still municipal decisions, settling municipal issues under international municipal law. The late Professor Josef L. Kunz labeled such decisions as these as falling under "international law *by analogy*" and distinguished this category from "*genuine* international law" and explained his thesis as follows:

The application of international law norms in these interstate cases is neither a duty imposed by international law, nor has it anything to do with the municipal "part of the law of the land" rule which envisages only *genuine* international law. It is purely a matter of municipal law to apply in such cases international law *by analogy*.¹⁰³

98. Scott, *The Role of the Supreme Court of the United States in the Settlement of Interstate Disputes*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1540, 1546 (1938).

99. *Iowa v. Illinois*, 147 U.S. 1, 10 (1892).

100. See, e.g., H.A. SMITH, *THE AMERICAN SUPREME COURT AS AN INTERNATIONAL LAW IN NATIONAL COURTS* (1968).

101. See, e.g., *Wurtemberg and Prussia v. Bader* (The Donauversinkung Case), Ann. Dig. 128 (Case No. 86) (Germany, Staatsgerichtshof 1927).

102. See, e.g., *Argona v. Solure*, (Federal Court of Switzerland), cited in *Trial Smelter Case* (U.S. v. Canada) 3 R. Int'l Arb. Awards 1905 (1949).

103. Kunz, *International Law by Analogy*, 45 AM. J. INT'L L. 329, 334 (1951).

2. *Domestic Law in International Tribunals*

In Article IV of the compromise of the *Trail Smelter Arbitration* the Parties agreed that "The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice . . ." ¹⁰⁴

The arbitration clauses of the Treaty of Berlin of 1925 (the Peace Treaty signed between Germany and the United States) ¹⁰⁵ contained a clause providing that the Tribunal could apply, in the settlement of disputes, principles of law common to the legal systems of both Parties. Finally, Article 38.1.c. of the Statute of the International Court of Justice (and of the Court's predecessor, the Permanent Court of International Justice) extends the list of applicable law to "the general principles of law recognized by civilized nations." ¹⁰⁶ These principles were conceived of as a third category independent of treaty and custom and intended "to push to the last limit . . . the productivity of [the Court's] sources." ¹⁰⁷ As Professor Julius Stone tells us, this source of materials refers to common principles analogous to the Old Roman *jus gentium*, the

104. *Trail Smelter Case*, *supra* note 102, at 1907.

105. Treaty between the United States and Germany of Friendship, Commerce and Consular Rights, *done* Dec. 8, 1923, 44 Stat. 2132, T.S. No. 725, 8 Bevans 153 (effective Feb. 10, 1925).

106. While this category was innovative and creative its formulation has not been without criticism. Representatives of the Group of 77 have expressed resentment at the choice of the qualifier of the nations whose legal systems provide the materials of legal decision as "civilized." They tend to see an exclusion of the newly decolonized countries in this legal creativity. In the *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.) 1969 I.C.J. 4 (Judgment of Feb. 20), for example, Judge Ammoun expressed the view that "the term 'civilized nations' is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law." *Id.* at 132. He explained this incompatibility by pointing out that:

Thus it is that certain nations, to whose legal systems allusion was made above, which did not form part of the limited concert of states which did the law-making, up to the first decades of the 20th century, for the whole of the international community, today participate in the determination or elaboration of the general principles of law, contrary to what is improperly stated by Article 38, paragraph 1(c) of the Court's Statute.

Id. at 34-35.

Judge Ammoun considered any of the following formulations to be preferable:

(a) The "universally recognized principles of law" (Root); *id.*
 (b) The "general principles of law recognized by . . . [the] nations" (a voluntary omission of the offending adjective); *id.* at 135.
 (c) The "general principles of law recognized in national legal systems" (Waldock); *id.*
 (d) The "general principles of law." *Id.*

107. ANZILOTTI, *supra* note 97, at 117.

highest common factor in national legal systems.¹⁰⁸

It is clearly arguable that the five tidelands litigations between the United States and certain states of the Union raising historic bay issues in connection with the delimitation of their respective shares of the national continental shelf relate to the interpretation of a municipal statute, and that the Supreme Court's resort to international law is a clear example of transformation in the sense that Professor Anzilotti presented that function. International law was simply used as providing an interpretative tool for the elucidation of a domestic statute and of the intent of Congress in drafting it.

Do the five United States continental shelf cases which deal with the issue of historic bays then have utility for formulating law solutions in delimitation problems, if they cannot be brought within the broad and generous scope of "general principles of law?" It is agreed that the utility of those cases is that of offering persuasive precedents under Article 38, paragraph 1 (d) of the Court's Statute. In particular, as later paragraphs will show, they provide useful starting points for analysis of such questions as burden of proof, the type of authority assured to the coastal state (the quantum of the interest if you will) and the residual nature of the historic bays concept.

VII: THE ESTABLISHMENT OF RIGHTS

A. ACTS NECESSARY TO CONSOLIDATE HISTORIC TITLE: EFFECTIVENESS

One theme running through the decisions of the Supreme Court of the United States in the *California*, *Texas*, *Louisiana*, *Florida* and *Maine* cases relating to the establishment of historic title over coastal waters so that the claimant states became entitled to regard those waters as parts of their territory, consisted of the requirement of the continuous and open exercise of authority; authority acceded to, moreover, by other (foreign sovereign) states. The states asserting such a claim to an historic title must unequivocally exercise an authority which is exclusively referable, not to some lesser claim, such as the regulation of fisheries and game, but to its plenary and sovereign power. On the other hand, the requirement of the open, unequivocal and continuous exercise of authority is, necessarily, a relative notion. For example, in the case of *Direct*

108. See STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 137 (1954). See also C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 400-03 (Corbett trans. 1968) [hereinafter cited as DE VISSCHER].

U.S. Cable Co. v. Anglo-American Cable Co.,¹⁰⁹ the Judicial Committee of the Privy Council found Conception Bay, a very large bay indeed off the coast of Newfoundland, to be an historic bay. Unlike the United States Supreme Court in the *California, Texas, Louisiana, Florida* and *Maine* cases which have just been discussed, the Judicial Committee was satisfied that the continued control of the fishery of the Bay, in the Bay, effectively constituted the relevant acts of sovereignty. An act of the British Parliament in closing the Bay to foreign fishermen together with the regulations and statutes enacted by the Newfoundland Parliament administering fishing in the Bay as a colonial Parliament implementing and adapting the British statute, were enough to establish the rule that an American company, the Direct Cable Company, was not entitled to lay a cable in Conception Bay. Interestingly, we can note that the acts of sovereignty leading to the establishment of the status of Conception Bay in *Direct U.S. Cable Co. v. Anglo-American Cable Co.* were all related to fisheries in the water column of the bay, yet the activity to be controlled was a sea-bottom activity—the laying of cables. One ground for distinguishing this case from the five decided by the Supreme Court of the United States on historic bays lies in the relativity of the time and place to the continuity and frequency of acts of sovereignty providing the basis of the claim. These questions will be determined by the degree of use and the kind of use relative to the location, accessibility, terrain and amenability to sovereign control by the claimant state in relation to the uses by other states adverse to the coastal state's claim. The Bay of Cancale again provides an example. Although this bay was the subject of a dispute, that dispute was not settled by judicial proceedings, but by an Anglo-French treaty. But the activities which were agreed as establishing special French rights there were those of the French government's continued and consistent regulation of an oyster fishery (as well as other forms of fishing). In contrast with the holding of the United States Supreme Court in the *Louisiana* and *Florida* cases, generally speaking sedentary fisheries, where the produce is itself cultivated on the sea bottom and is stationary there, appositely lend themselves to the idea of a sovereign activity consolidating title over a specific area. The vocational and economic activities of the fishermen providing the oysters with their beds do not provide the basis for this argument; but the regulation by the state of those fishermen, and the protection of the health of

109. *Direct U.S. Cable Co. v. Anglo-American Cable Co.*, 2 App. Cas. 394 (P.C. 1877).

consumers by regulating the density of the fishery and the purity of the water and by avoiding disease amongst the fish, and so forth, especially when the state's regulation of the fishery included the letting of oyster-bed leases, do offer sound bases for arguments on behalf of historic titles to bays. Interestingly enough, away on the other side of the world, Antipodean to the Bay of Cancale, there is another historic bay. It lies off the western coast of Australia. Shark Bay is a large bay of some seventy miles in length and forty-six miles wide at the mouth and for the most part, very shallow.¹¹⁰ This bay has long been claimed by Australia as an historic bay. In the early times of the European settlement extensive pearl fisheries were established there. The regulation of the fishery was predicated upon the idea, so as to prevent quarrels amongst the pearl fishermen, that the colonial government of Western Australia and later the state government, should lease sea-bed areas both within and without what would normally be the territorial sea, to fishermen, giving to each of those fishermen exclusive use and control of the tract of oyster bed leased to him (a somewhat similar system is followed in parts of Chesapeake Bay). This Western Australian example, I suggest, illustrates unequivocally what is meant by an exercise of sovereignty. The whole area is administered and controlled, and there is unequivocal compliance with the legislation and the clauses of the leases issued by the government. Furthermore, no foreign state, or ships wearing foreign flags, have fished there. The exercise of police power in ensuring that the leases are complied with provides testimony that there is a clear exercise of territorial sovereignty by the very fact that the state is prepared to give leases of the soil of the sea-bed within the whole extent of the bay for the purpose of ensuring the peaceable exploitation of its bounty. Of course, other bays have been viewed as historic without such an intensely territorial and detailed exercise of sovereign control as illustrated in the *Direct U.S. Cable Co. v. Anglo-American Cable Co.* case.

110. Historic Bays claimed by Australia (since earliest times of settlement) would appear, from a letter from the Secretary of the Navy Office, Melbourne to Professor Charteris of Sydney University Law School, dated April 26, 1936 (copy held in author's files), to be:

	Breadth at <u>Mouth (miles)</u>	Penetration <u>miles</u>
1. Van Dieman's Gulf	34.4	95.5
2. Exmouth Gulf	26	42.4
3. Shark Bay	46	70.4
4. Moreton Bay	8.7	8.7

An interesting question now arises regarding the status of Delaware and Chesapeake Bays in light of the holding of the United States Supreme Court in the *Maine* case. It should be pointed out that the twenty-four mile closing line for "juridical bays" is of relatively recent origin—international consensus only being finally formalized at the 1958 United Nations Conference on the Law of the Sea. Accordingly one may ask whether, after the general reception of the twenty-four mile closing line, the question is still relevant regarding these two bays, no matter what may have been the concept's importance to them prior to the reception of the modern concept of juridical bays. In addition, the characterization of the United States' title to these bays as based on historic grounds may still be of importance independently of their contemporary status as juridical bays. Waters seaward of the twenty-four mile closing line may be recognized as internal waters of the coastal state under international law, as distinct from domestic law, if title can be shown to be predicated on historic grounds. Be that as it may, there seems to be ample evidence of historic title over these bays which, however, may lapse if permitted to fall into desuetude.

The status of Chesapeake Bay, which had been originally within the lands which King James I granted to the Virginia Company in 1609, was finally settled by the Second Court of Commissioners of the Alabama claims in the case of *Stetson v. United States* which asserted that "[w]e are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the United States and no part of the high seas . . ."¹¹¹

Prior to the American Revolution, Delaware Bay, like Chesapeake Bay, was considered by the British Crown to be part of its territories in North America and was transferred, in the 1783 Treaty of Paris, to the newly created republics constituting the United States. Then, ten years later and during Britain's wars with revolutionary France, the French frigate *L'Embuscade* took a British ship, the *Grange*, as prize more than three miles off-shore, but within a line joining Cape May and Cape Henlopen.

On May 14, 1793 the then Attorney-General of the United States declared that the *Grange* had been seized within the neutral territory of the United States. France released the captured ship, thereby recognizing the neutral status of the waters where she had

111. MOORE, 4 INTERNATIONAL ARBITRATIONS 4333, 4341, (1898). See MOORE, 1 DIGEST OF INTERNATIONAL LAW 742 (1906).

been taken and, since Great Britain had accepted the return of the vessel, she, too, recognized the neutrality of the bay and hence its status as a bay subject to the coastal state's sovereignty over its full extent.¹¹² The United States' historic title has not been challenged since then. Indeed, it was promptly acquiesced in by the two maritime nations with the greatest interest in the bay's status, and thus, provides a clear example of the manner in which effective control ripened into an unchallenged historic title.

Just as the types of controlling acts which justify sovereignty and control are relative to and dependent on the terrain, the intensity of use and the degree of accessibility of the territory claimed are crucial. So, too, is the frequency or continuity of sovereign activities over a bay claimed by means of an historic title. To achieve effectiveness these are, similarly, relative and dependent on the factors of location, ease of control and the types of sovereign acts, as well as the world community's interest in resisting its status as an enclosed bay. Here Dr. Huber's arbitration (not relating to the consolidation of an historic title over a sea area, but over an island) in the *Island of Palmas (Miangas) Case*,¹¹³ conflicts with the Judgement of the Permanent International Court of Justice in the *Eastern Greenland Case*¹¹⁴ and finally the Mexican/French arbitration with regard to the status of Clipperton Island.¹¹⁵ This last decision took the relativity doctrine almost to its ultimate limit—the dependence of the sovereign acts on the accessibility of territory was taken to mean that when the territory is almost completely inaccessible and the world community's interest in its political fate minimal, the requisite sovereign acts are reduced to just above a nullity, yet they may be treated as sufficient to establish title.

B. THE CRITICAL DATE¹¹⁶

In international law the point of time falling at the end of a period within which the material facts of a claim are said to have

112. MOORE, 1 DIGEST OF INTERNATIONAL LAW 735-39 (1906); 1 Op. Att'y Gen. 32 (1793).

113. *Island of Palmas Case (U.S. v. Neth.)*, Hague Ct. Rep. (Scott) 83 (Perm. Ct. Arb. 1928).

114. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J., ser. A/B, No. 53, at 3 (Judgment of Apr. 5).

115. *Clipperton Island Case (France v. Mexico)* 2 R. Int'l Arb. Awards 1105 (1949); *Arbitral Award on the Subject of the Difference Relative to the Sovereignty Over Clipperton Island*, 26 AM. J. INT'L L. 390 (1932). See Dickinson, *The Clipperton Island Case*, 27 AM. J. INT'L L. 130 (1933).

116. For a fuller presentation of this theme see Goldie, *The Critical Date*, 12 INT'L & COMP. L.Q. 1251 (1963) [hereinafter cited as Goldie, *The Critical Date*].

occurred is usually called the "critical date." It is also the date after which the actions of the parties to a dispute can no longer affect the issue.¹¹⁷ It is exclusionary, and it is terminal. Hence it is most frequently resorted to in cases of historic title to indicate the period within which a party should be able to show the crystallization of its title or its fulfillment of the requirement of the doctrine of acquisitive prescription or consolidation. Elsewhere¹¹⁸ this writer has discussed, as examples of the uses of the critical date for the purpose of establishing a consolidation of historic title, the establishment of a limited Norwegian sovereignty over Spitzbergen¹¹⁹ under the Treaty of Paris of 1920,¹²⁰ the *Minquiers and Ecrehos Case*,¹²¹ the *Island of Palmas Case*,¹²² the *Legal Status of Eastern Greenland Case*,¹²³ the *Right of Passage Case*¹²⁴ and the *Fisheries Case*.¹²⁵ In all these cases the critical date was an essential element indicating the point of time from which the Court was satisfied that the rights in question had crystallized. They were shown to have depended on the point of time of the convergence of distinct sets of facts of concatenations of events which characterizes or defines the issues between the claimant states and their opponents. This is the point of the common juristic definition of the dispute—the point at which

117. Johnson, *supra* note 24, at 324 n.4. See Sir Lionel Heald's submission to a similar effect before the International Court of Justice in *Minquiers and Ecrehos* (U.K. v. Nor.), 1953 I.C.J. Pleadings 2, 48-61 (Oral Argument of Sir Lionel Heald) (Judgment of Nov. 17).

118. Goldie, *The Critical Date*, *supra* note 116, at 1256-57.

119. *Id.* at 1252-64.

120. Treaty between the United States and Other Powers Relating to the Spitsbergen Archipelago, done Feb. 9, 1920, 43 Stat. 1892, T.S. No. 686, 2 Bevans 269 (effective Feb. 18, 1924). The nine signatory states were Denmark, France, Great Britain, Holland, Italy, Japan, Norway, Sweden, and the United States of America. Norway's sovereignty was recognized over Bear Island and of the resort to this archipelago by the nationals of many European countries from the late middle of the seventeenth century to the 1920 Agreement, see Scott, *Arctic Exploration and International Law*, 3 AM. J. INT'L L. 928, 930, 937 (1909); Lansing, *A Unique International Problem*, 11 AM. J. INT'L L. 763 (1911); FULTON, THE SOVEREIGNTY OF THE SEA 112, 104, 181, 182-83, 193, 194, 198-200, 527 (1911). For a brief outline of the 1920 Treaty see Nielsen, *The Solution of the Spitzbergen Question*, 14 AM. J. INT'L L. 232 (1920). Soviet Russia protested against the 1920 Treaty in 1923, see 8 BULLETIN DE L'INSTITUT INTERMEDAIRE INTERNATIONAL 311 (1923), as she had not been consulted. In 1924, however, the Soviets informed the Norwegian government that they would recognize Norwegian sovereignty over Spitzbergen. Letter from the Norwegian Minister (Bryn) to the Secretary of State, March 20, 1924, [1924] 1 FOREIGN REL. U.S. at 1 (1939 ed.).

121. *Minquiers and Ecrehos*, *supra* note 117, at 47.

122. *Island of Palmas Case*, *supra* note 113.

123. *Legal Status of Eastern Greenland*, *supra* note 114.

124. *Case Concerning Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 6 (Judgment of Apr. 12).

125. *Fisheries Case*, *supra* note 1, at 6.

"the issues are joined." For before a dispute can be the subject of adjudication, the separately characterized right-creating facts in the dispute must be brought to a common ground: their convergence must necessarily be effectuated. The critical date arises when questions of time form a necessary element in the point of convergence.

This concept of a critical date may be illustrated by disputes over territory. In such cases a series of acts creating no more than an inchoate title¹²⁶ (each of which in itself not being sufficient to establish the claimant's title) may be seen to converge with, for example, acts of recognition by other states. The establishment of Norway's sovereignty over Spitzbergen illustrates this point. After several centuries, during which her sovereignty remained inchoate and disputed, Norway gained a perfected title by virtue of its recognition by the Powers in the Treaty of 1920 signed at Paris. Norway's acts, never sufficient in themselves to perfect her title, but capable of keeping her claim alive, converged with the general recognition in 1920 to create a complete sovereignty which came to be recognized by the third states. On the other hand, in 1923 the Soviet Union protested against the perfection of Norway's title by the general recognition at a conference in which she did not participate.¹²⁷ But in 1928 she recognized Norway's sovereignty in a separate agreement.¹²⁸ A situation may be brought into focus, and a critical date result, from convergence through a peace treaty, the demarcation of a frontier, a general agreement of recognition, or a guarantee of frontiers, with the unilateral acts of the claimant state which had, previously, been sufficient only to establish an inchoate title, or to assert a provisional or tentative claim. This example illustrates the convergence of facts and their crystallization into a legal relation. The converging facts form the elements of legal relation, and their convergence firmly establishes that legal relation in the place of a situation which would otherwise have remained inchoate and unripe for settlement.

The critical date is more, it should be stressed¹²⁹ than a procedural rule for the exclusion of evidence and more than a rule

126. For a discussion of the concept of "inchoate title" in international law see HALL, INTERNATIONAL LAW 127-28 (P. Higgins ed. 8th ed. 1924); OPPENHEIM'S INTERNATIONAL LAW 558-59 (Lauterpacht ed. 8th ed. 1955).

127. See Soviet Protest, *supra* note 120, at 341.

128. Treaty between the United States and Other Powers Relating to Spitzbergen Archipelago, *supra* note 120.

129. See Goldie, *The Critical Date*, *supra* note 116, at 1257-64.

whereby the tribunal's jurisdiction may be successfully objected to. It is a substantive rule setting a term to the span of time during which, in a given case, right-creating facts can be availed of in order to perfect a title. This aspect of the doctrine is connected with Professor de Visscher's concept of "consolidation by historic title."¹³⁰ This was brought out in the *Fisheries Case*,¹³¹ especially where the International Court of Justice said:

From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889 nor their application gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed the 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.

....

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, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.¹³²

As Professor D.H.N. Johnson has pointed out, this concept of consolidation may be used to show a good root of title to territory.¹³³ It is submitted, however, that before it can become an effective means of showing a good root of title it requires further development and specificity in application. So far it seems capable, as the example of the *Fisheries Case* shows, of doing no more than providing an apparent *post hoc* justification to a decision which might otherwise be exceptionable. How may a state utilize the doctrine to justify a claim, or to defend an exercise of jurisdiction? Unless there is some means, either qualitatively or quantitatively, of setting a term to the period of consolidation, it remains a broken reed to those who would put their trust in it, for until it has crystallized—

130. DE VISSCHER, *supra* note 108, at 200-01, 215, 217.

131. *Fisheries Case*, *supra* note 1, at 116.

132. *Id.* at 138-39.

133. Johnson, *Consolidation as a Root of Title in International Law*, *supra* note 24, at 215.

become consolidated—it must lack certainty and specificity of application. This weakness arises from the fact that neither the International Court of Justice, nor Professors de Visscher and Johnson have proposed any means of indicating when a given historic title may be said to have become consolidated.

On the other hand, the uses to which Judge Basdevant and Sir Percy Spender put the critical date doctrine in the *Minquiers and Ecrehos* and *Rights of Passage* cases respectively demonstrate the utility of that doctrine in giving a hard cutting edge to the consolidation of historic titles. The convergence of separate activities, which is inherent in the notion of the critical date as discussed in the preceding paragraphs, provides the means of determining the period over which the claimant may be said to have consolidated its sovereignty, or failed in the enterprise. The argument here is that since general international law sets no fixed period for the consolidation or perfection of titles, the relevant aspect of the critical date doctrine, namely the convergence of disparate elements, provides a functional terminating point to a period over which a state may consolidate or perfect its title to a disputed territory or to a right similar to an easement or servitude. It does not follow from this, however, that the decision of whether a good root of title has come into being lies in the Court's discretion. The critical date doctrine comes into operation when a catalytic event which, converging as it were with a series of acts constituting a state's inchoate relation to a territory, crystallizes that relation and presents it for a decision as to whether the acts in question have consolidated the title claimed, or have failed.

Examples of this convergence, operating with a catalytic effect to terminate a period of indeterminate activity, either in favor of the claimant, or against it, may be found in each of the cases discussed in the foregoing paragraphs. Thus the Treaty of Paris of 1898 operated to terminate any possible inchoate claims that Spain, or her successor in title, may have had in the *Palmas Island Case* and which were derivable from the discoveries in the sixteenth century. Similarly, because the Norwegian Proclamation of sovereignty over Eastern Greenland was effective to give a fixed and certain definition to the issues of the dispute between Denmark and Norway, and crystallize the formulae of each of the parties' claims in the *Status of Eastern Greenland Case*, that Proclamation's date, July 10, 1931, provided the critical date of the dispute. Again Judge Basdevant's opinion in the *Minquiers and Ecrehos Case*

illustrates this point. There the Treaty of Brétigny, it is suggested, had the effect of settling the partition of Normandy between England and France and so provided the critical date. Finally, the Treaty of 1878 crystallized the relations of the sovereigns of India and Goa respectively in the *Rights of Passage Case*. In reconciliation, on the level of legal principles, of the majority's decision and Sir Percy Spender's dissent, it is submitted that once the view of the critical date proposed in this paper is accepted, the difference between the majority and Sir Percy Spender becomes limited to the factual issue of whether the Treaty merely reflected no more than a practice of accommodation on the part of the sovereign of the neighboring territories or whether it granted rights capable of becoming vested.

In conclusion it should be observed that, in its substantive, right-creating, aspect the critical date doctrine provides a point of time as the touchstone for qualifying or selecting the operative facts, and hence for characterizing appropriate cases. In this way the doctrine effectively brings the whole legal relation into focus. Once determined upon or manifest, the critical date sets limits to the period within which the definitive facts can be seen as having taken place. This in turn leads to the casting of the issues of the dispute into a concrete form—for example, the perfection of titles to territory, or the espousal of a claim, or the characterization of transactions affected by the emergence of new rights of sovereignty or dominion.

VIII. BURDEN OF PROOF

A. A VIEW FROM THE UNITED NATIONS SECRETARIAT

The United Nations Secretariat, in its study for the International Law Commission, *Juridical Regimes of Historic Waters Including Historic Bays*¹³⁴ stated:

The task of the parties to a dispute [over historic waters] seems less to establish certain facts than to persuade the judges to follow their respective opinions regarding the evaluation of the facts. Still, the question of the burden of proof cannot be ignored, in particular since it is one of the problems usually raised in connection with the right to "historic waters."¹³⁵

134. *Juridical Regimes of Historic Waters Including Historic Bays*, *supra* note 15.

135. *Id.* at 21.

The paper, however, then asserts that:

Each of the opponents therefore bears the burden of proof with respect to the facts on which they rely. Obviously, this involves an evaluation not only of the evidence presented regarding the facts but also of the importance of these facts as signs of the alleged exercise of sovereignty.¹³⁶

It concludes its substantive statement on the matter with the observation that:

In summarizing this discussion of the problem of the burden of proof, it may be said that the general statement that the burden of proof is on the State claiming historic title to a maritime area is not of much value.¹³⁷

The idea that the burden of proof, as distinct from the burden of persuasion, shifts from the first party (claimant) whose duty it was to prove its case to the other party if he wishes to win, of answering, is surely contrary to what we are taught by the cases. There is a confusion here between the legal obligation of the burden of proof with the advocate's factual and contingent task of carrying the burden of convincing the court that the burden of proof has or has not been discharged, or that the facts adduced have either been discredited or answered or, in terms of "confession and avoidance," although the claimant has successfully discharged its burden of proof, the opposing party has adduced its own independent affirmative facts negating the effect of the claimant's discharge of its burden of proof. Of these latter facts raised defensively the party that raises them (the opposing party) must prove them. But such an act of answering or discrediting the original case is surely not discharging a sort of countervailing "burden of proof." It is merely successfully performing the advocate's task of persuasion. Only when the opponent raises independent facts does he carry the burden of proof on the basis of the old maxim "he who alleges must prove," for the rest he carries the "burden of persuasion." This burden, rather than that of proof, shifts as the case develops.

B. THE SUPREME COURT'S DOCTRINE AND INTERNATIONAL LAW

The doctrine of the Supreme Court of the United States has already been outlined in this paper and an argument has been

136. *Id.* at 22.

137. *Id.* at 22-23.

presented for evaluating its utility in the international arena. First, the Supreme Court established specific requirements for the purpose of settling, in terms of domestic United States federal law, disputes between the United States and the several states over the interpretation of the Submerged Lands Act. These requirements were threefold, namely:

- (1) There must be an open, notorious and effective exercise of sovereign authority over the area not merely with respect to local citizens but as against foreign nationals as well;
- (2) This authority must have been exercised for a considerable period of time; and
- (3) Foreign states must have acquiesced in the exercise of this authority as against their nationals.¹³⁸

As has already been pointed out, these United States domestic law requirements are much more stringent than those laid down in the *Fisheries Case* where the International Court of Justice was satisfied that Norway could establish her claim to have consolidated historic title to the waters lying beyond her territorial sea measured by traditional methods, through merely carrying a far lighter burden of proof and far fewer requirements. The International Court of Justice stressed Norway's domestic actions and interests while the Supreme Court of the United States rigorously looked for confirmation of the consolidated reality of the right through its affirmation by control of foreign citizens and acquiescence by foreign states. Nor was the Norwegian case established by facts which were "clear beyond a doubt."¹³⁹ Rather, the International Court of Justice accepted evidence that was not conclusive and interpreted ambiguities, not in favor of the party seeking to vindicate the world community's freedom of the high seas, but in support of the state seeking to establish an encroachment.¹⁴⁰ For example, Waldock tells us:

The principal argument of the United Kingdom was that, even if the 1869 and 1889 Decrees did apply a definite system in Norwegian law, it was unreasonable to fix other states with knowledge of the acquiescence in a system which only lay concealed in these two minor decrees covering small sections of the coast.¹⁴¹

138. See *supra* note 77 and accompanying text.

139. See *supra* notes 78-79 and accompanying text.

140. See Waldock, *The Anglo-Norwegian Fisheries Case*, 8 BRIT. Y.B. INT'L L. 114, 117-24, 152-66 (1951).

141. *Id.* at 163. Waldock pointed out

That the Supreme Court of the United States has imposed, on states of the United States which seek to appropriate submerged lands beyond the statutory margin measured from the low water mark, a more onerous burden of persuasion than that required of Norway by the International Court of Justice in the *Fisheries Case*, may or may not provide a persuasive doctrine for international tribunals. It may be well to point out, however, that the Supreme Court was guided by the claims of all states, coastal and landlocked, of the Union for the vindication of the community interest of all as represented by the United States, as well as by the special rights of the coastal states which were vouchsafed to them under the Submerged Lands Act. Such decisions as the *Fisheries Case* may, from this perspective, appear to treat the world community interests rather more cavalierly than did the Supreme Court of the United States treat the community interests of the Union. But while this issue of the different policy perspectives of the different Courts may be of significance, it must be recalled that the systems are juridically, as they may also be perceived as politically, distinct and independent. But surely their shared values may call for a degree of mutual relevance—each within their own spheres?

IX. THE RIGHTS OF THE COASTAL STATE

Generally speaking, writers and publicists, as well as a majority of the arbitrations and World Court decisions on the subject, classify historic waters and historic bays as internal waters—that is, waters subject to the same degree of state authority as the state's land territory and inland lakes, so that the state's territorial sea is measured from baselines constituting the outer limits of the historic waters or bays. This characterization of the waters of historic bays is also reflected in the 1958 Convention on the Territorial Sea and Contiguous Zone¹⁴² by reading together Articles 5(1) and 7(6) of the 1982 United Nations Convention on the Law of the Sea¹⁴³ the same principle is carried through unchanged into this a test treaty on

[t]he superiority of a system so largely subjective and so dependent on *loyauté et modération* over the essentially objective, geographical system [as, for example, that advocated by the United Kingdom] hardly seems obvious in a world of sovereign states less than half of which have subjected themselves to the risk of having their *loyauté et modération* investigated by the International Court.

Id. at 170.

142. 1958 Convention on the Territorial Sea, *supra* note 10.

143. 1982 Convention, *supra* note 13, arts. 5(1) & 7(6).

the law of the sea. Within such internal waters no right of innocent passage exists for the benefit of foreign flag shipping. Foreign flag shipping may not even transit harmlessly through the waters of historic bays without the leave and license of the coastal state. Indeed, it is the existence of this right through the coastal state's territorial sea which distinguishes this category of maritime zones from internal waters.

The United Nations Secretariat's study of the *Juridical Regimes of Historic Waters, Including Historic Bays*¹⁴⁴ which has already been critically adverted to, asserts that historic bays may, depending on their individual histories, belong to one of these two categories. It states:

On the other hand, it should be recalled that the right to "historic bays" is based on the effective exercise of sovereignty over the area claimed, together with the general toleration of foreign States. The sovereignty exercised can either be sovereignty as over internal waters or sovereignty as over the territorial sea. In principle, the scope of the historic title emerging should not be wider in scope than the scope of the sovereignty actually exercised. If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea.¹⁴⁵

This writer is doubtful of the validity of this proposition. It does have a certain superficial attractiveness. On the other hand, when the International Court of Justice was called upon to determine the status of waters over which ships of many nations had transited it found, in the *Anglo-Norwegian Fisheries Case*, that, without exception, all the waters lying behind baselines connecting the outermost skerries and rocks of the Norwegian rock rampart to be internal waters. But there are at least two channels within the skerrygard which are highways of international navigation, one is the West Fjord leading to Narvik and allowing passage both south and north to the Lofoten Islands, and the Indrelea (a channel which permits through passage at its north and south ends). Transit parallel to the coast is thus possible. The channel has been used by ships navigating to and from the Norwegian port of Transholm.

144. *Juridical Regimes of Historic Waters Including Historic Bays*, *supra* note 15.

145. *Id.* at 23.

So we have both these passages (West Fjord and the Indrelea) as examples of what had been treated as subjects to rights of innocent passage by the world community, and yet have been allowed by the International Court of Justice to be imprinted, after its judgment at least, with the status of internal waters. Back in 1868, the Norwegian authorities arrested a fishing boat *Les Quatres Frères* in the West Fjord and the French Empire protested, and protested vigorously, against this arrest, giving as its reason that the West Fjord served as a passage for navigation towards the north.¹⁴⁶ There is no doubt about the truth of that factual statement and yet, as has already been pointed out, despite the International Court of Justice's earlier holding that a right of innocent passage existed in territorial waters in straits connecting areas to the high seas, it found, in the instant case, that Norway was entitled to close those passages of straits, namely the West Fjord and the Indrelea. Hence it is at least arguable that one might well say that, since the Anglo-Norwegian *Fisheries Case* is frequently cited as an authority, the International Court of Justice's willingness to deny rights of innocent passage in or through any Norwegian historic bays, or through any Norwegian historic waters, despite their previous use as maritime highways, tends to throw doubt on the United Nations Secretariat's position. The International Court of Justice has told us quite conclusively that, despite its previous holding—of only a couple of years before—in the *Corfu Channel* case,¹⁴⁷ that waters through which third states claimed rights of innocent passage such as the West Fjord and the Indrelea could still be found to be internal waters (and thereby no longer subject to other state's rights of innocent passage) by reason of Norway's assertion, and proof, of her historic title.

Indeed, the only way one can rationally reconcile the *Corfu Channel* case with the Anglo-Norwegian *Fisheries Case* is in terms of the Court's finding of the status of Norway's historic bays and waters to be internal waters, even though the two passages already discussed, namely the Indrelea and the West Fjord, "connected two

146. Memorial of the United Kingdom (U.K. v. Nor.), 1951 I.C.J. Pleadings (1 Fisheries Case) annex 12, at 188 (Memorial dated Jan. 27, 1950); Norwegian Counter-Memorial (U.K. v. Nor.), 1951 I.C.J. Pleadings (2 Fisheries Case) annex 15, at 53-55 (Counter-Memorial dated July 31, 1950); Reply of the United Kingdom (U.K. v. Nor.), 1951 I.C.J. Pleadings (2 Fisheries Case) 330-32 (Reply dated Nov. 28, 1950); Rejoinder of the Kingdom of Norway (U.K. v. Nor.), 1951 I.C.J. Pleadings (3 Fisheries Case) 69 (Rejoinder dated Apr. 30, 1951).

147. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9).

areas of the high seas" through which foreign shipping ordinarily and necessarily transited. In the *Corfu Channel* case, we may recall, it was the use of that channel as a passage connecting two high seas areas (even although it was less than six miles wide) that preserved the Royal Navy's right, and the rights of all other navies and merchant ships, to navigate through it in terms of their rights of innocent passage. While the Corfu Channel was territorial sea, the Norwegian channels were internal waters by virtue of Norway's consolidation of an historic title over them. In conclusion, then, the United Nations Secretariat's proposition that the rights of sovereignty or jurisdiction over historic waters or bays, which a coastal state may claim are dependent on the competences or type of sovereignty exercised, is questionable. In its regard we may find reinforcement for the Anglo-Norwegian *Fisheries Case* in the justly famous decision of the Judicial Committee of the Privy Council in the heyday of its functions as an imperial court deciding cases between member states of the British Empire as well as between their citizens, in the *Direct U.S. Cable Co. v. Anglo-American Cable Co.*,¹⁴⁸ where a title consolidated in terms of fishery regulation (which in terms of the United Nations Secretariat's thesis would merely establish a competence over fisheries, or at most rights in the nature of the territorial sea, leaving intact rights of innocent passage), was seen as establishing a plenary competence including full sovereignty and control over the laying of cables on the sea-bed, and the full spectrum of activities lying between those discrete undertakings. By contrast the critical comments which have been given in this paper of the United Nations Secretariat's view are vindicated by the excerpt from the judgment of the International Court of Justice in the Anglo-Norwegian *Fisheries Case* quoted at the beginning of this paper. This statement, moreover, accurately reflects customary international law.¹⁴⁹

X. SOME CODIFICATION PROPOSALS

A. A VIEW FROM AFRICA

Despite the failure of the International Law Commission and the 1958 and 1960 Law of the Sea Conferences to agree on a generally acceptable definition of historic bays, some proposals have been forthcoming both within and without the Third United Nations

148. *Direct U.S. Cable Co.*, [1877] L.R. 2 App. Cas. 394 (P.C.).

149. See *supra* note 1 and accompanying text.

Conference on the Law of the Sea. For example, the African States Regional Seminar held in Yaoundé on 20-30 June 1972 adopted, *inter alia*, the following recommendations on "'Historic Bays' and 'Historic Rights':"

(1) That the "historic rights" acquired by certain neighboring African States in a part of the Sea which may fall within the exclusive jurisdiction of another State should be recognized and safeguarded.

(2) The impossibility of an African State to provide evidence of an uninterrupted claim over a historic bay should not constitute any obstacle to the recognition of the rights of that State over such a bay.¹⁵⁰

The exception, in paragraph two above, of the practice in former colonial areas pursued by the former colonial power refers to the problem of how much credence should be given to the formulations and policies arising from a former colonial occupation. A major maritime colonial power may, in the pursuit of vindicating a policy giving the freedom of the high seas the widest possible geographical extent, have determinedly refrained from championing a subject community's previously acquired, or possible inchoate, historic rights in order to remain consistent in its global policy. Or, alternatively, it may have refrained from enforcing such historic rights against third states in order to give a *quid pro quo* for the opening up to the access of the world community by such third states of their enclosed seas. Such a consistency of policy, the African States Regional Seminar indicates, would have been bought at too high a price and should not be permitted to continue to provide a ruling principle in the post-colonial age.

Although this Seminar provides us with a very interesting point of view regarding states' refusals to be bound by policies stemming from the colonial era which they view as stultifying their national interests in coastal waters, it was disappointing because it still left its member states' perceptions of historic bays undefined. Perhaps the persistence of specific political rivalries in maritime areas made agreement on an effective definition impossible.

150. Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, held in Yaounde, from 20-30 June 1972, circulated as a Document of the United Nations General Assembly Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction II, U.N. Doc. A/AC.138/79 (mimeo. July 21, 1972).

B. POLITICS IN THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: FORESTALLING A SOLUTION

During the course of the Third United Nations Conference on the Law of the Sea the issue of historic bays was raised in the Second Committee, mostly during the Second Session (at Caracas) and delegates whose states had an interest in such bays or made a special claim to historic waters (including Tonga's claim, propounded on historic grounds, to a rectangle of the Pacific Ocean of approximately 150,000 square miles)¹⁵¹ spoke strongly on the subject.¹⁵² At the Third Session of the conference (in Geneva) an informal consultative group on historic bays and historic waters held two meetings. In addition, a smaller working party was formed and held two meetings.¹⁵³ But it was not until the following year that draft articles came before the Second Committee. That was the document which Colombia submitted. It was as follows:

1. A bay shall be regarded as historic only if it satisfies all of the following requirements:
 - (a) that the State or States which claim it to be such shall have clearly stated that claim and shall be able to demonstrate that they have had sole possession of the waters of that bay continuously, peaceably and for a long time, by means of acts of sovereignty or jurisdiction in the form of repeated and continuous official regulations on the passage of ships, fishing and any other activities of the nationals or ships of other States;
 - (b) that such practice is expressly or tacitly accepted by third States, particularly neighbouring States.
2. A bay the coasts of which belong to two or more States and which satisfies the requirements laid down in paragraph 1 of this article shall be regarded as historic only when there is agreement between the coastal States to that effect.
3. The coastal State or States shall notify the International Hydrographic Organization of the agreement or agreements referred to in the foregoing paragraph and shall mark them on

151. See Statement of Mr. Tupou (Tonga), *reprinted in II UNCLOS III OFFICIAL RECORDS, supra note 17, at 107.*

152. See Statement of Mr. Herrera Caceras (Honduras), *id.* at 101; Statement of Mr. Abad Santos (Philippines), *id.* at 102; Statement of Mr. Galindo Pohl (El Salvador), *id.* at 104; Statement of Mr. Santiso Galvez (Guatemala), *id.* at 106; Statement of Mr. Herrera Caceras (Honduras), *id.* at 108; Statement of Mr. Galindo Pohl (El Salvador), *id.*; Mr. Abad Santos (Philippines), *id.* at 111.

153. See IV THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 196 (1975) [hereinafter cited as IV UNCLOS II OFFICIAL RECORDS (1975)].

large-scale charts prepared by the States concerned. Until such notification is supplied, the regime of historic bay shall not apply to the said bay.

4. No claim to historic bays shall include land, territory or waters under the established sovereignty, sovereign rights or jurisdiction of other States.¹⁵⁴

The student of the Conference's proceedings may well anticipate a spirited debate of this perhaps unnecessarily restrictive formulation of the doctrine. But, having placed this draft on record, Colombia appeared to be satisfied, for example, by the non-inclusion of this topic in the list of "core issues" upon which the Conference was determined to concentrate as expressed in its "Organization of Work: Decisions taken by the Conference at its 90th Meeting on the Report of the General Committee."¹⁵⁵ Nor would there appear to be any further debate, or at least significant debate, on the record. Thus the Colombian draft article appears as the only attempt, by the participating states at the Conference, to define historic bays.

On the other hand, it should be remembered that Colombia has actively opposed Venezuela's claim to exercise sovereignty over almost the full extent of the Gulf of Venezuela (which leads to the Lake of Maracaibo). Colombia's resistance to the Venezuelan claim is due to the fact that a combination of historic title and the Colombian-Venezuelan boundary on the western side of the bay would give an extensive stretch of water (otherwise, in part, free high seas) and its fishery, exclusively to Venezuela.¹⁵⁶ The rationale, accordingly, of paragraph 2 of the Colombian proposal would appear to have been drafted for the sole purpose of ensuring difficulty for Venezuela in establishing her historic title to the bay and guaranteeing that Colombia's consent would have to be bargained for. A similar rationale underlies the requirement of notification (in effect registration?). This would provide Colombia with international machinery whereby she could lodge a caveat against any attempt, on the part of Venezuela, to establish the Gulf as an historic bay.

154. Colombia, *Draft Articles Concerning the Territorial Sea: Bays, the Coasts of Which Belong to a Single State, Historic Bays or Other Historic Waters*, U.N. Doc. A/CONF.62/C.2/L.91 (1976), reprinted in V THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 202 (1976) [hereinafter cited as V UNCLOS III OFFICIAL RECORDS (1976)].

155. U.N. Doc. A/CONF.62/62 (1978), reprinted in VI THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 173 (1978) [hereinafter cited as VI UNCLOS III OFFICIAL RECORDS (1978)].

156. On the chronic discord between Colombia and Venezuela over the Gulf of Venezuela,

On the other hand, paragraph 2's restrictive principle of only permitting title to a historic bay to exist when (if two or more coastal states are involved) they both, or all, agree would appear to be in direct contradiction to the decision of the Central American Court of Justice in the *Gulf of Fonseca Case*.¹⁵⁷ In that case the Central American Court of Justice found that the Gulf of Fonseca (Gulf of Amapala or Conchagua) had been an historic bay jointly owned by the three littoral states (Honduras, Nicaragua and El Salvador) as successors of the Federal Republic of the Center of America and of the Crown of Castile (which had exercised sovereignty over the whole area of the bay from 1552 down to 1821 when the Federal Republic replaced it) as *res communis*, despite Nicaragua's individual attempt to part with, and dispose of, its share.¹⁵⁸

This disposition arose from the Bryan-Chamorro Treaty whereby Nicaragua granted to the United States rights to dig and operate an inter-oceanic canal from the Gulf to the Atlantic Ocean and to establish a naval base in the Bay for a period of 99 years. Protesting this agreement as a third party, El Salvador asserted that such a concession derogated from her right of condominium over the whole bay, while Nicaragua argued that only her separate and individually owned portion of the Gulf was affected—and of this she was entitled to dispose in full sovereignty.¹⁵⁹ This separate share of the Bay, moreover, was outside any zone of El Salvador's interest, even though it was within the Gulf, because its historic waters were not jointly owned by the littoral states under a condominium regime, but separately under regimes of individual ownership and sovereignty. Nicaragua also pointed to the fact that she and El Salvador did not possess adjacent coasts (the coast of Honduras on the Gulf separated them) so that there could be no claim arising out of the adjacency of the proposed construction works.

The judges of the Central American Court of Justice unanimously found that the Gulf constituted a "closed sea" and that it "belongs to three nations instead of one." It also found that Nicaragua was not able to dispose of any rights in the Gulf as "a thing possessed in common except jointly or with the consent of

see Nweihed, *EZ (Uneasy) Delimitation in the Semi-enclosed Caribbean Sea: Recent Agreements Between Venezuela and her Neighbors*, 8 OCEAN DEV. & INT'L L. 1, 9-10 (1980).

157. *The Gulf of Fonseca*, 11 AM. J. INT'L L. 674 (1917).

158. *Id.* at 693.

159. *Id.* at 694.

all."¹⁶⁰ Had the Colombian draft article's paragraph 2 reflected the international law of historic bays, Nicaragua's refusal to agree to the inalienably joint ownership of the Bay, as reflected in her disposition of her separate share of the bay the provision, would have been justified. The fact that Nicaragua's conduct was found to be invalid on the ground of the Bay's special status as a jointly and inalienably owned historic bay, points to the contradiction between that decision and paragraph 2 of the Colombian draft.

Secondly, paragraph 2 of the Colombian draft is not clear whether such a bay as it contemplates should be held by the littoral states in common or separately when all agree thereto. Be that as it may, paragraph 2 of the Colombian draft article, which contemplates historic title over a bay shared by two or more littoral states as only being legally valid if both or all of the littoral states (if there are more than two) have expressly agreed thereto, is contradicted by both state practice and public international law.

Indeed, the appraisal by Professors McDougal and Burke¹⁶¹ of the outcome, in terms of bays adjacent to two or more states, of the 1930 League of Nations Codification Conference, and of the 1958 United Nations Law of the Sea Conference would seem to be equally applicable to the Third (1974-82) Conference. They wrote:

Unfortunately, all these [i.e. private or preparatory draft codification drafts and replies on this topic of governments to the Preparatory committee of the 1930 League Conference on the subject] indications of consensus are not reflected explicitly in the outcome of the 1930 Conference, in the International Law Commission or in the 1958 Conference. The 1930 Conference did not consider the question, the [International Law] Commission followed suit and the 1958 Convention article on bays is limited to those within a single state. Nevertheless all the prior indications of agreement among states, coupled with refusal of subsequent official codification efforts to apply a provision similar to that evolved for bays within a single state, provide strong support for the position that the several states indented by a bay are not regarded as authorized jointly to claim these areas as internal waters as a single state could do in the same circumstances.¹⁶²

The authors did argue, however, that bays whose waters had been the subject of historic assertions provided an exception to the

160. *Id.* at 728.

161. MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962).

162. *Id.* at 442-43.

rule of bays in general and they cited the *Gulf of Fonseca Case* as authority¹⁶³ and pointed out that it also justified the "present-day expectation that one of several states may not unilaterally decide upon the use of waters over which the several possess authority in common because of historic rights."¹⁶⁴

Both the Gulf of Fonseca and the Gulf of Aqaba,¹⁶⁵ came into legal existence as enclosed seas when each of them was subjected to the sovereignty of a single imperial state and survived as a *res communis* (shared in community) amongst the plurality of successor states or, perhaps, owned by one of the successor states, as in the case of Palk's Bay and the Gulf of Manaar (these bays being under the sovereignty of Sri Lanka alone rather than as the community property of it and India¹⁶⁶). But, of course, these arms of the sea had been subject, exclusively, to the sovereignty of the ancient kings of the island since time immemorial. So, in a sense, the title of the present Republic of Sri Lanka does not so much stem from being a successor to the British Raj (and its predecessors, the Portugese and Dutch colonial empires) as from the revival of that ancient polity's earlier indigenous rights.

C. THE PROPOSAL OF A DISTINGUISHED SCHOLAR

A third proposed definition, although brief, of historic bays at least enjoys the impartiality and relevance to a wide variety of phenomena which the Colombian draft appears to lack. That is Strohl's proposed formulation which is as follows:

- (b) A historic bay is an indentation whose waters are considered, in whole or in part, to be internal waters. The indentation is one having a genuine and long-standing economic link with the surrounding coast. The historic bay contains waters over which the coastal state or states have exercised a regime of internal waters for a period of long standing, with explicit or implicit recognition of such practice by foreign states.¹⁶⁷

This writer, however, does have reservations regarding the above. While the need for a genuine link is acceptable, the validity

163. *Id.* at 443.

164. *Id.* at 445.

165. See Claim of October 2, 1957, by Saudi Arabia in the United Nations General Assembly, 12 U.N. GAOR (697th plen. mtg) at 233, U.N. Doc. A/3575 (1957).

166. François, *Deuxieme Rapport Sur la Haute Mer*, U.N. Doc. A/CN.4/42, [1951] 2 Y.B. INT'L L. 94-95.

167. M. STROHL, *THE INTERNATIONAL LAW OF BAYS* 404-05 (1963).

of the definition's restriction to an economic (presumably including resource-winning) limitation is questioned. Delaware Bay first came under the exclusive and sovereign control of that young United States from the need to vindicate her neutrality. It is suggested that both Chesapeake and Delaware Bays testify to the fact that national security interests may, equally with economic interests and independently of them, provide the requisite "genuine link" with the land territory to establish an historic bay. In addition to economic and national security considerations, social, historical and political factors may also provide the necessary intimate relationship between the sea area in question and the land.

Secondly, resort to the term "genuine link" without some further definition may arouse criticism. Some influential publicists, for example, have objected to its extension from the *Nottebohm Case*¹⁶⁸ (in which its absence was used to disqualify a grant of naturalization from entitlement to international recognition) to the definition of the relationship of a state with a ship it permits to fly its flag in Article 5(1) of the 1958 Convention on the High Seas¹⁶⁹ and Article 91(1) of the United Nations Convention on the Law of the Sea.¹⁷⁰

Thirdly, the requirement, in light of the *Fisheries Case*, for recognition is questionable. Surely if that case was correctly decided, acquiescence is enough?¹⁷¹

D. A STRATEGIC WITHDRAWAL?

Be these considerations as they may, many publicists and diplomats today agree with what Mr. Sikri, the representative of India at the First United Nations Conference on the Law of the Sea, said in 1958, namely that:

[H]is county, which possessed two historic bays, was highly interested in the problem raised by the Panamanian delegation. He felt, however, that the Committee had neither the time nor the material available to deal with the matter properly. Each bay having its own particular characteristics, a mass of data would have to be sifted and collated before any general principles could be established.¹⁷²

168. *Nottebohm Case (Liechtenstein v. Guat.) (Second Phase) 1955 I.C.J. 4 (Judgment of Apr. 6).*

169. *Geneva Convention on the High Seas, done Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962) [hereinafter cited as Convention on the High Seas].*

170. 1982 Convention, *supra* note 13, art. 91(1).

171. *See supra* text of section III.

172. Statement of Mr. Sikri (India), *reprinted in* III UNITED NATIONS CONFERENCE ON

Things have not moved on, since 1958, from this concession to the raw facts of geography, history and the local politics of a region. Does this simply relegate the determination of whether a bay is historic or not to the relative power of the claiming and the negating state or states, or to their relative skills in negotiation? Has the law to remain helpless in the face of this lacuna?

E. CODIFICATION OF HISTORIC RIGHTS: THE IMPOSSIBLE DREAM?

The considerations may be concluded with two quotations from the late Charles de Visscher. The first related to length of time and publicity. He wrote:

[I]n the maritime domain, where some types of state activity tending to create particular rights at the cost of the community of states may at times go on without precise knowledge on the part of interested governments or without placing them under any legal obligation to communicate their view. Precise criteria can hardly be formulated for judging the legal effect of abstention or silence which may in some cases be due to a passing lack of interest.¹⁷³

The second quotation from de Visscher's magisterial work relates to the issue of legal precision and the possibility of general definition. He pointed out:

This consolidation [by "Historic Titles"] which may have practical importance for territories not yet finally organized under a state regime as well as certain stretches of sea, such as bays, is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given state. It is these relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles.¹⁷⁴

XI. SOME QUESTIONS

(1) With the development of new alternative concepts for the purpose of coastal states' exercise of control over many of the

THE LAW OF THE SEA OFFICIAL RECORDS 74 (1958).

173. DE VISSCHER, *supra* note 108, at 208.

174. *Id.* at 209.

activities which traditionally may have lacked adequate bases in international law (other than extensions of the doctrine of historic bays or historic waters, for example the Exclusive Economic Zone, the Contiguous Zone, the Continental Shelf, the Air Defense Identification Zone and the Doctrine of Archipelagos), has the doctrine of historic bays and historic waters become obsolete?

(2) What benefits does the doctrine confer on the international community and/or coastal states which are not conferred by the doctrines which extend coastal states' competences seawards and which are recognized in the 1982 United Nations Convention on the Law of the Sea?

(3) Are the provisions of Article 298 of the 1982 Convention adequate for settling disputes with respect to historic bays or historic waters?

(4) In any future codification of the legal doctrine of historic waters including historic bays, should acceptance (as required in paragraph 1(b) of the Colombian Draft Articles¹⁷⁵ for the Third United Nations Conference on the Law of the Sea) provide the ruling criterion, or should the Anglo-Norwegian *Fisheries Case*¹⁷⁶ test of acquiescence be enough to establish a littoral state's sovereignty over an adjacent bay on historic grounds?

(5) Despite obvious differences between the doctrines enunciated, in the international arena, by the International Court of Justice, for example in the *Fisheries Case*, with regard to the substantive requirements for establishing rights to historic waters and the procedural issues of burden of proof, and those prescribed for the domestic scene within the United States by that Nation's Supreme Court, do the more stringent requirements of the later tribunal have a prospective utility as persuasive arguments for the future evolution of international law on the subject?

(6) Are disputes with regard to the status of waters as historic bays difficult to resolve when two or more states front onto a bay, and only one or more (but not all) wish to characterize the waters of the bay as historic (whether in terms of community property or for their own individual claims of separate maritime areas)?

(7) Is it predictable that the evolution of the Exclusive Economic Zone Doctrine, or the application of the Continental Shelf Doctrine, will eventually facilitate or exacerbate a common

175. See *supra* note 156 and accompanying text.

176. See *supra* text accompanying notes 23-25.

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understanding amongst maritime nations as to the meaning, and as to the rights thereunder, of historic bays? Or render them obsolete?

(8) Does a general doctrine of historic bays in international law have any future or should historic title be seen as arising under unique circumstances so that historic bays can have no common legal factors?