



HISTORIC BAYS AS A “SAFETY VALVE” IN CODIFICATION OF THE LAW OF THE SEA

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ABSTRACT: The treaty conditions on status of bays are based on the conventions concluded in 1958 and 1982 within United Nations in the process of codification of law of the sea. Interestingly they possess almost the same wording and are included in Articles 7 and 10 of the 1958 Geneva Convention on Territorial Sea and Contiguous Zone and 1982 United Nations Convention of Law of The Sea respectively. However, both articles stipulate that their provisions do not apply to so-called "historic" bays. According to this theory states are allowed to claim on historical grounds bays failing to fulfill the requirements specified by the aforementioned conventions for juridical ones. It means that this exception excludes not only conventional regulations regarding delimitation of bays including the maximum length of their closing line, but also the definition of a bay itself and semi – circle test as well. Therefore the historic bays concept seemed to be one of the crucial points in the codification of law of the sea. In the present article author makes an attempt to examine the formation of the legal situation of bays in historical terms as a basis of historic bays concept.

KEY WORDS: Bays, Historic bays, Juridical Bays, Territorial sea, Law of the sea.

RÉSUMÉ: Les conditions des traités sur le statut des baies sont basées sur les conventions adoptées sous l'égide de l'Organisation des Nations Unies en 1958 et 1982, suite à la codification du droit de la mer. Fait intéressant, ces réglementations ont presque le même libellé et sont incluses respectivement dans les articles 7 et 10 de la Convention de Genève (1958) sur la mer territoriale et la zone contiguë et la Convention des Nations Unies (1982) sur la loi de la mer. Toutefois, les deux articles indiquent que leurs dispositions ne s'appliquent pas aux baies dites «historiques». D'après ce concept, les États sont autorisés à réclamer, sur des bases historiques, des baies à défaut de satisfaire aux exigences spécifiées par les conventions susmentionnées comme baies juridiques. Cela signifie que cette exception exclut non seulement les règlements conventionnels concernant la délimitation de baies, dont la longueur maximale de leur ligne de fermeture, mais elle concerne aussi la définition elle-même de baie avec le test de demi-cercle. Par conséquent, le concept de baies historiques semblait être l'un des points cruciaux de la codification du droit de la mer. Dans cet l'article, l'auteur tente d'examiner la formation du statut juridique des baies dans le sens historique comme base du concept de baies historiques.

MOTS CLÉ: Baies, Baies historiques, Baies juridiques, Mer territoriale, Droit de la mer.

It was G. C. Gidel who first referred to “historic bays” as a “safety valve,” stating in his classic work in 1934 that rejection of this concept would ultimately prevent the development of rules governing the legal situation of bays in the process of codification of the international law of the sea¹. Failure to recognize the conception of historic bays as an exception to the general rules of delimitation would make it highly probable that there would be a lack of interest in the proposed codification on the part of states whose territories included

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¹ G. C. Gidel, *Le droit international public de la mer*, Paris, 1934, p. 651.

waters they claimed on the basis of historic title. Here we will attempt to examine the formation of the legal situation of bays in historical terms.

1. *Legal status of bays beginnings*

Scholars studying the genesis of regulations governing the legal situation of coastal waters and bays included in them look to the world of antiquity and the political units distributed around the Mediterranean Sea, as a broad water route used for commercial exchange, conquests, and common piracy. In examining this issue, M. P. Strohl indicates that in ancient Greece there was customary recognition of the right of a coastal state to the port waters generally located within the “sheltered arms of the sea, that is a bay”². Strohl further points out that although “there is no evidence of a commonly understood line of demarcation between inner seas and the high seas, there is considerable evidence that, starting with the Greeks, interested societies clearly understood that two separate concepts of control were involved”³.

The issue of control over the seas was an element of political arrangements from ancient times, as witnessed by the first treaty concluded between Rome and Carthage, allegedly in the middle of the 4th century BCE, which, as indicated by R. Bierzanek, “provided that the Romans would not sail through certain areas of the Mediterranean Sea except in instances where it was absolutely necessary”⁴. L. Ehrlich stressed, however, that although particularly in the last centuries of the existence of the ancient Roman state there were legal rules referring to the use of the sea, which were finally ratified in the Code of Justinian, they addressed only the use of the sea by individuals⁵. They did not deal with Rome’s relations on the sea with other state organisms, because there was no other state in those times “with which the Roman state would regard itself as bound by any law standing over the two states treating both of them on the principle of equality”⁶. A similar opinion is found in the work by G. Butler and S. Maccoby from 1928 on the development of international law, stressing that in those times, “the Roman juriconsults in their opinions considered maritime navigation solely from the point of view of private law, or of

² M. P. Strohl, *The International Law of Bays*, The Hague, 1963, p. 18.

³ *Id.*

⁴ R. Bierzanek, *Morze otwarte ze stanowiska prawa międzynarodowego (The High Sea from the Position of International Law)*, Warsaw, 1960, p. 7. Conclusion of an agreement demarcating sea areas between Rome and Carthage is also referred to by M. P. Strohl, who adds that the agreement was intended to combat the Carthaginian practice of sinking all foreign ships approaching the shore of Carthage (probably a measure against piracy), providing instead for free access to ports by ships of both parties under the principle of reciprocity. M. P. Strohl, *op. cit.*, p. 19.

⁵ It is worth pointing here to the reference in Roman practice to legal rules concerning maritime trade which developed long before the reign of the Roman Empire, as evidenced by a passage from the Code of Justinian (D. 14, 2) entitled *De lege Rhodia de jactu*, referring to the institution of general average in Rhodian law, arising in the 9th century BCE. See H. Flanders, *A Treatise on Maritime Law*, Boston, 1852, reprint New Jersey 1999, pp. 4-5; K. S. Płodzień, *Lex Rhodia de iactu. Studium historycznoprawne z zakresu rzymskiego prawa handlowomorskiego (A Legal Historical Study on Roman Maritime Commercial Law)*, 2nd ed., Lublin, 2010, pp. 15 ff.

⁶ L. Ehrlich, *Suverenność a morze w prawie międzynarodowym (Sovereignty and the Sea in International Law)*, Warsaw, 1961, p. 13.

the internal public law of the Roman state”⁷. It may thus be stated that the Roman regulations at that time display a functional approach to the issue of the use of the seas, and the jurisdiction of the Roman state concerning for example combating the plague of piracy was based exclusively on national law. However, as pointed out by M.P. Strohl, although the concept of “territorial sea” was not found in those days, “in coastal areas and especially in the approaches to ports, Rome assumed special authority over such waters under the principle of public use, and in the collective interest. This concept, which enjoyed general recognition, found expression in two articles of the Digest”⁸.

However, in the opinion of L. Ehrlich, after the fall of the Roman Empire, in Medieval times, with the exception of coastal areas, “vast areas of the sea were regarded as strayed”⁹.

But the 17th century works of Hugo Grotius declaring the principle of the freedom of the seas probably would not have come to be were it not for the practice of states attempting to claim huge areas of the sea. In this context we may point to both attempts to divide sea waters on the basis of treaty as well as those made by grant of the pope as the spiritual head of the Eurocentric international community of that time. The agreement covering the largest areas of sea was the Treaty of Tordesillas, concluded between Spain and Portugal in 1494. Pursuant to that treaty, the parties divided between themselves territories already identified in the basin of the Atlantic Ocean as a result of the great geographical discoveries, as well as those yet to be discovered, along the line dividing the zones of influence of the two states, which would run 370 leagues west of Cape Verde. Under that treaty, binding like any international agreement only between its parties, they added the previous papal grants confirmed by the bull *Inter caetera* issued by Pope Alexander VI in 1493 as a result of the papal arbitration of the dispute between these parties. It should be added that the provisions of the Treaty of Tordesillas changed to Portugal’s advantage the boundary between the possessions of the powers, which according to the bull from 1493 was to run along the meridian at a distance of 100 leagues west of the islands of the Azores and the Cape Verde Islands. It was thanks to this change that among the territories discovered in the New World, the territory of today’s Brazil fell to Portugal. The papal bull also addressed the issue of navigation, prohibiting “ships of other states from access to newly discovered areas without the permission of the sovereign of those areas,” and the provisions of the Treaty of Tordesillas amending the provisions of the bull of 1493 were approved by the pope in 1506¹⁰.

Claims to the vast sea areas off the southern coast of Europe were asserted in turn by states of the Apennine Peninsula. Genoa claimed authority over the Ligurian Sea, Pisa sought control over the Tyrrhenian Sea, and Venice regarded itself as the ruler of the entire Adriatic. Venice relied in this respect on

⁷ They cite *among* others the view of Ulpian “that the sea was by nature open to all and that therefore, like the air, it belonged to all.” G. Butler & S. Maccoby, *The Development of International Law*, Union, NJ, 2003, p. 40.

⁸ M. P. Strohl cites in this respect studies by Müller-Jockmus (Mauritius, *Geschichte des Völkerrechts im Altertum*, Leipzig, 1848, p. 252) and A. Reastad (*La mer territoriale*, Paris, 1913, pp. 8-9, 51-52). M. P. Strohl, *op. cit.*, p. 20; *Digest*, XLIII, 3, 8.

⁹ L. Ehrlich, *op. cit.*, p. 14.

¹⁰ R. Bierzanek in introduction to H. Grotius, *Wolność mórz czyli dysertacja o prawie jakie przysługuje Holendrom do handlu z Indiami (Mare liberum)*, Warsaw, 1955, p. XIV.

the award to it of this right by Pope Alexander III in exchange for aid against Frederick I Barbarossa, as well as on the emergence of a customary norm based on the tacit relinquishment by the emperor of rights with respect to Venice, which together with the failure by other states to dispute the norms established by Venice (concerning for example fees on navigation by ships) over the longer term allowed it to assume sovereignty over the Adriatic Sea through prescription and formation of the relevant customary norm¹¹. Analogous claims were also asserted by states of northern Europe. And thus in the late Middle Ages Norway laid claim to authority over the North Sea between Norway, Greenland and Iceland, while Denmark, Sweden and also Poland under the reign of King Władysław IV claimed the right to exercise territorial sovereignty over the waters of the Baltic Sea¹².

2. *Mare liberum or mare clausum?*

In this situation, with clear tendencies of states to occupy more extensive sea waters, voices began to be raised in the doctrine of international law in favour of the right of all countries to navigate the high seas and oceans. The classic works of Grotius arose as justification of the right of Holland to freely navigate waters that had been awarded to Portugal under the Treaty of Tordesillas. The first work of Grotius on an international theme, *De jure praedae (On the Law of Spoils)*, was written in 1604 to protect the interests of the Dutch East India Company but did not appear in print until 1868¹³. In 1609 a section of the 12th chapter of the work was published, with a preface and concluding section, under the title *Mare liberum (The Freedom of the Seas)*. The most important work of Grotius, his *opus vitae* which insured his prominent place among the fathers of international law, *De jure belli ac pacis (On the Laws of War and Peace)*, appeared in 1625 in Paris¹⁴.

It should be added that views stressing the importance of the freedom of the seas appeared even earlier. R. Bierzanek points out that in 1557, Francisco de Vitoria in his treatise *De Indis* “held that the right to navigation, with all its practical consequences, arises from the law of nations and the law of nature”¹⁵. Alfonso de Castro, in his treatise *De potestate legis poenalis* of 1571, held that sovereignty over the sea is contrary to law, and spoke against the claims mentioned above of Genoa and Venice and of Spain and Portugal¹⁶. Meanwhile, in 1564, the work *Controversiae illustres* appeared, in which Fernando Vázquez de Menchaca presented the view, subsequently elaborated

¹¹ For more see L. Ehrlich, *op. cit.*, pp. 22-23. But by the mid-18th century E. de Vattel was already referring to “the undisputed right of Venice to sovereignty over the area over which it could exercise de facto authority and which it needs for its security.” However, he regarded the claim of Venice to sovereignty over the entire Adriatic Sea as unrealistic in light of the international balance of power at that time, arguing that “pretensions to sovereignty are recognized only as long as the nation that asserts them has the strength to support them, and lapse along with its power.” E. de Vattel, *The Law of Nations*, ed. B. Kapossy & R. Whatmore, Indianapolis, Liberty Fund, 2008, b.1, ch. XXIII, §289.

¹² *Id.*, p. 23.

¹³ H. G. Hamaker, *Hugonis Grotii de iure praedae commentarius*, The Hague, 1868.

¹⁴ R. Bierzanek, introduction to Grotius, *supra*, pp. XVI-XXVII.

¹⁵ *Id.*, p. XXII.

¹⁶ *Id.*

by Grotius, that the seas, like all “immovables,” were originally held in common, and in the case of the seas this status remained in force¹⁷.

However, at about the same time the view was presented indicating the permissibility of appropriation of waters adjacent to land territory. Thus in Sir Thomas Craig’s 1603 treatise *Jus feudale*, in describing the types of ownership that may be the subject of the feudal relation, Craig stated that although the sea is common to all in the sense that they may navigate upon it, its ownership belongs to those who rule the nearest land. He added that “it was as if the kings had divided among themselves all the seas, and under that division the sea is regarded as belonging to that one among them to whom the sea is closest and most convenient”¹⁸. Interestingly, when postulating the freedom of the seas, Grotius also admitted the possibility of appropriation by states of certain sea waters. He clearly indicated, however, that this had to do only with the portion of the sea surrounded by the coast belonging to one or more states (including bays and straits), “provided that the part of the sea in question is not so large that, when compared with the lands on both sides, it does not seem a part of them”¹⁹. But Grotius added, “It is certain that the one who has occupied a part of the sea cannot hinder navigation which is without weapons and of innocent intent”²⁰.

The permissibility of rule over the seas by monarchs is indicated by J. Selden in the work *Mare clausum*, published in 1635 in London and commonly regarded as a response to Grotius’ *Mare liberum*. Selden also pointed out that the English had for ages ruled over the waters adjacent to their country. The scope of those claims was not limited in any event to British coastal waters, but included areas stretching north of the British Isles to Iceland and Greenland, south to the coast of France, east to Holland and Norway, and west all the way to the New World²¹. Selden’s conceptions thus extended well beyond the range of coastal waters, although like Grotius he admitted free navigation of waters submitted to the sovereignty of a specific ruler²².

3. *The cannon-shot rule*

A breakthrough in the justification for the right of a coastal state to occupy the coastal waters for reasons of security was the work *De dominio maris* by Cornelius van Bynkershoek from 1703. G. Butler and S. Maccoby aptly point to the view of this author which is vital to consideration of the issue, in which he summarized one of the chapters of his work with the words: “There is nothing in the Law of Nature or in the Law of Nations or even in the Roman Law which stands in the way of sovereignty over the seas”²³. But Bynkershoek is best known for the thesis, often repeated later, that power from land ends where the

¹⁷ *Id.*

¹⁸ From L. Ehrlich, *op. cit.*, pp. 23-24. Craig also indicated the possibility of a state’s acquiring rights to specific parts of the sea by way of prescription. *Id.*

¹⁹ H. Grotius, *The Law of War and Peace in Three Books* (1625), trans. F. W. Kelsey (1925), b. II, ch. 3, VIII.

²⁰ *Id.*, b. II, ch. III, XII.

²¹ For more see L. Ehrlich, *op. cit.*, pp. 38-39.

²² *Id.*, p. 39.

²³ G. Butler & S. Maccoby, *op. cit.*, p. 42.

power of its armaments ends (*terrae potestas finitur ubi finitur armorum vis*).²⁴ Under this view, the scope of a state's authority at sea would extend to the range of a cannon-shot, under the author's proviso that he was referring to the "machines" then in use²⁵. The justification posited by Bynkershoek for the permissibility of occupying certain sea waters by considerations of the security of the coastal state, as well as conditioning the range of such areas on the possibility of exercising effective military control using artillery on the shore, triumphed for the next two centuries.

It should be pointed out that in a work published little over half a century later, Emer de Vattel regards the cannon-shot rule as obvious, stating: "At present the whole space of the sea within cannon-shot of the coast is considered as making a part of the territory"²⁶. He also indicates considerations of security as the basis for occupation of bays and straits, although as he adds this right would be enjoyed only with respect to bodies of water "of small extent"²⁷. Vattel decisively rejected the possibility of extending sovereignty over "those great tracts of sea" –such as Hudson Bay or the Strait of Magellan, to which, as he stated, "these names are sometimes given"²⁸. Permitting occupation of coastal waters was justified where the state would be more open to attack, and thus the main criterion for including specific bays within the group of sea areas subject to occupation was the ability to defend their entrance: "A bay whose entrance can be defended, may be possessed and rendered subject to the laws of the sovereign; and it is of importance that it should be so, since the country might be much more easily insulted in such a place, than on a coast that lies exposed to the winds and the impetuosity of the waves"²⁹.

Over time a tendency arose to detach the width of the coastal belt from the determination in each instance of the reach of a cannon-shot from the artillery potentially belonging to the coastal state. The first attempt to establish a fixed distance appears in a work of Ferdinando Galiani published in 1782. Galiani took the view that it would be appropriate to set this distance once and for all at 3 miles, a distance "which certainly is the greatest to which the strength of the powder so far discovered can hurl a ball or bomb"³⁰. The rule of three miles as the measure of a cannon-shot was repeated later in the 18th century by Domenico Azuni in a work from 1795, and was already appearing at that time in the practice of states. It was asserted in 1793 by US Secretary of State Thomas Jefferson in notes to envoys from Great Britain and France in connection with the war underway between those countries. In turn, the rule of the three-mile width of the territorial sea, which gained broad application in the 19th century, gradually with the development of military technology ceased to correspond to the potential range of artillery and became the subject of criticism. The debate thus initiated on the maximum width of the territorial sea would not end until adoption of United Nations Convention of Law of the Sea (UNCLOS) in 1982.

²⁴ J. Symonides, *Terytorium państwowe w świetle zasady efektywności (The territory of the state in the light of the principle of effectivity)*, Toruń, 1971, p. 193.

²⁵ L. Ehrlich, *op. cit.*, p. 44.

²⁶ E. de Vattel, *op. cit.*, b. 1, ch. XXIII, §289.

²⁷ *Id.*, §291.

²⁸ *Id.*

²⁹ *Id.*

³⁰ F. Galiani, *Doveri dei principi neutrali*, from L. Ehrlich, *op. cit.*, p. 53.

4. *Rule of double the range of coastal artillery*

Together with the development of norms specifying the width of the belt of coastal waters, rules also formed defining the permissible width of bays included within the coastal waters of a state. The views of Grotius cited above indicate the permissibility of claiming a bay surrounded by the territory of the state, so long as the principle of proportionality between the area of the state and the seized bay was maintained. But following adoption of the cannon-shot rule, conceptions appeared adapting this solution to the width of a bay which could be subject to seizure by a coastal state. An example was the view stated by A. Chrétien in his *Principles de Droit international public*, published in 1893, which repeats the criterion of the ability to defend the entrance to the bay already formulated by Vattel, indicating that the mouth of the bay should be narrow enough that it can be defended by coastal artillery. Clarifying his position, the author added that the entrance to the bay should not be broader than twice the range of cannon, that is, no greater than 6 nautical miles³¹. It should nonetheless be pointed out that, writing at about the same time as Chrétien, in a work from 1896³², A. Rivier also cited the rule of double the range of cannon, but set the maximum width of the mouth of the bay at ten miles, not six. Clearly the three-mile rule established in the late 18th century by Galiani was ripe for a change. It is also hard to resist the impression that in connection with the rapid development of artillery it turned out that the existing three-mile rule increasingly failed to reflect the true range of cannon, the basis for the rule was recalled. Thus the return to the source in the form of the cannon-shot rule would justify efforts to further extend the areas that could be subject to occupation by states. On the other hand, it should be pointed out that as a result of technological progress, the cannon-shot rule no longer guaranteed legal stability in the international community. As a consequence of this, proposals arose for adopting higher limits for the width of bays included in the territory of the state, which were supposed to restore that certainty.

5. *Historic bays—birth of the concept*

The issue of setting a higher limit for the width of the entrance to a bay was also expressed in the work conducted by learned societies established in the 19th century to address issues of international law. Thus at its Paris session in 1894, the Institut de Droit International (IDI) proposed the width of 12 nautical miles, equal to twice the width of the belt of territorial sea called for by it³³. Then, at a session in Brussels in 1895, the International Law Association (ILA) proposed a solution essentially repeating that of the IDI from 1894, except that the width of the mouth of the bay in this case was set at 10 miles³⁴. Limiting the width of bays subject to seizure by a coastal state to 10 miles also appeared in the 19th century, in the practice of treaty states, but while it was originally permitted to claim bays with an entrance no wider than 10 miles, beginning with

³¹ See *Historic Bays, Memorandum by the Secretariat of United Nations (A/CONF.13/1)*: Official Records of the United Nations Conference on the Law of the Sea, 1958 (Preparatory Document), p. 17.

³² A. Rivier, *Principles du Droit de Gens*, Paris, 1896, vol. 1, pp. 154-155, in *id.*

³³ *Historic Bays, Memorandum by the Secretariat of United Nations, op. cit.*, p. 14.

³⁴ *Id.*

the North Sea Fisheries Convention of 1882, a modified version began to be applied, permitting in the case of wider bays seizure of a maximum area of the bay with a closing line of a length of 10 miles³⁵. It should be added that over half a century later the ten-mile rule was unsuccessfully defended by the UK as a customary norm in a British/Norwegian fisheries case which ended in a ruling of the International Court of Justice in 1951³⁶.

When seeking for the origins of the conception of historic bays, we should return to the IDI and ILA proposals from the 1890s. Both proposals, limitations on the length of the closing line of a bay to 12 or 10 nautical miles, respectively, make exceptions for cases in which “a continued usage of long standing has sanctioned a greater width”³⁷. Thus both of these learned societies clearly perceived the practice of states, indicating that sometimes also broader bays are included among the territorial waters of a state, and moreover that such claims are sometimes recognized both in international agreements concluded by the states in question and in arbitration awards.

This situation had already occurred in at least several instances, such as:

Bay of Cancale (or Granville Bay), in the north-western part of France, with its closing line 17 nautical miles long. In a work published in 1927, P. C. Jessup remarked that that bay “seems to be claimed by France without objection.” He added that Great Britain recognized the exclusive French fisheries’ rights to those waters on the basis of treaties concluded in 1839 and 1867³⁸.

Chesapeake Bay, with its entrance only 12 miles wide, and being about 200 miles long, resembles a long sleeve, especially as it is no more than 20 miles wide at its widest spot. The bay’s status was determined in 1885 by the Second Court of Commissioners of Alabama Claims, in the case of the vessel *Alleganean*, which had been sunk by Confederate forces inside the bay. According to the court’s decision, the bay “was entirely within the territorial jurisdiction of the United States”³⁹.

Conception Bay, in Newfoundland. The entrance of the bay is 20 miles long. It is 40 miles in length, with an average width of 15 miles. Great Britain’s claims that the bay is entirely within its jurisdiction were upheld in 1877 by the Privy Council (in *Direct United States Cable Co v Anglo-American Telegraph Co*). Then the North Atlantic Coast Fisheries Arbitral Tribunal in 1910 “refrained from expressing any opinion on Conception Bay,” simply referring to the 1877 decision, pointing out that this decision was acquiesced to by the United States⁴⁰.

Delaware Bay is only 10 miles wide at the entrance and 40 miles long, and thus now its configuration fulfils all the requirements specified for a UN-

³⁵ For more see W. Góralczyk, *Szerokość morza terytorialnego i jego delimitacja (The Width of the Territorial Sea and Its Delimitation)*, Warsaw, 1964, p. 136.

³⁶ For more see *id.*, pp. 137-142.

³⁷ Art. 3 of the IDI draft from 1894 read: “In the case of bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea, where the distance between the two shores of the bay is twelve nautical miles, unless a continued usage of long standing has sanctioned a greater width.” *Historic Bays, Memorandum by the Secretariat of United Nations*, *op. cit.*, p. 14 (emphasis added).

³⁸ P.C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, 1927, p. 383; see *id.*, p. 3 [13].

³⁹ *Id.*, p. 4 [16].

⁴⁰ *Id.*, pp. 4-5 [20-21].

sanctioned juridical bay. Therefore the reason Delaware Bay is listed among historic bays should be traced back in time. Its status was determined on the basis of an incident in 1793 during the Anglo-French war, when the British vessel *Grange* was captured inside the bay by the French frigate *L'Embuscade*. It was decided then that the French action was unlawful as the incident took place within the territory of the United States, a neutral power in that conflict⁴¹.

Although instances of including bays with an entrance wider than twice the range of coastal artillery, and even wider than 10 or 12 nautical miles, had already occurred in the history of international relations, as reflected in the IDI and ILA proposals from 1894 and 1895, the concept of "historic bays" probably appeared for the first time several years later, in the dissenting opinion by L.M. Drago in a fishing dispute decided by an arbitral tribunal⁴². Drago stated that certain types of bays, which could be called "historic," such as Chesapeake Bay and Delaware Bay, form a distinct class and undoubtedly belong to the littoral country, regardless of their depth of penetration or the width of their mouth. However, Drago did not leave the determination of the status of the bay to the will of the littoral country asserting sovereignty over the bay, but also required the claim to be justified by "particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defence"⁴³. Therefore Drago's conception would by definition apply to exceptional situations where occupation of larger bays by a littoral country could be justified by the existence of additional factors supported by long-term practice of states.

6. *Historic bays under UN conventions on territorial seas*

The issue of historic bays once again came to light during work by the International Law Commission on the United Nations draft articles on the status of territorial seas. Interestingly, the rules concerning the delimitation of bays finally included in Art. 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and repeated in UNCLOS Art. 10 address this issue with only the laconic statement that the provisions on bays are not applicable to historic bays. The wording differs slightly: UNCLOS Art. 10(6) states that the provisions of this article, considering the position of a "juridical" bay,⁴⁴ "do not

⁴¹ *Id.*, pp. 5-6 [22-23].

⁴² M. P. Strohl states that this term was probably used for the first time in the case of the North Atlantic Coast Fisheries Arbitration in 1910. M. P. Strohl, *op. cit.*, p. 269.

⁴³ In *Historic Bays, Memorandum by the Secretariat of United Nations*, *supra*, par. 92, p. 18.

⁴⁴ According to par. 1 and 2 of the aforementioned articles of the 1958 Geneva Convention and UNCLOS, the term "bay" means "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast." It should also be landlocked by the territory of a single state. Moreover, a bay in the juridical sense should form a distinct indentation of the coast which is supposed to satisfy the so-called semicircle test, which means that an indentation shall be regarded as a bay only if "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." The last condition considers the maximum distance between the low-water marks of the natural entrance points of a bay. According to the par. 4 of the aforementioned articles, such distance should not exceed 24 nautical miles. If all of the presented requirements are fulfilled, a closing line may be drawn between two low-water marks at the mouth of the bay, and the waters enclosed thereby shall be considered internal waters of the coastal state. Then the bay's closing line forms a straight baseline where the internal waters of state end, and which on the other hand is a starting line

apply to so-called ‘historic’ bays”, whereas Art. 7(6) of the 1958 Geneva Convention states that the provisions of that article “shall not apply to so-called ‘historic’ bays” (emphasis added). However, this difference appears inconsequential. The important thing is that the parties to these conventions do admit that there are some other sea areas capable of being part of the internal waters of the state, even if the legal requirements for bays of this type are not included in the conventions⁴⁵. In each case, the parties also appear to agree to refer to some unspecified principles (probably based on customary rules of general international law) determining the status of historic bays. That also seemed to be the view of the International Court of Justice when it stated in the *Continental Shelf* case that the matter of historic bays “continues to be governed by general international law”⁴⁶.

It should also be noted that the exception embodied in these paragraphs excludes not only conventional regulations regarding delimitation of bays, including the maximum length of the closing line, but also the definition of a bay itself. It also seems to exclude the semicircle test as well. This means that a certain sea area may be included in the internal waters of the state on the basis of historic title, no matter its configuration, because the conventional definition of a bay does not apply in the case of historic bays⁴⁷. G. Westerman stresses that based on par. 6 of these articles, none of the foregoing provisions of the article, “even the configuration requirements of paragraph two, are to be applied to historic bays, and the burden will fall to the coastal state to justify a claim of historic use.”⁴⁸ Y.Z. Blum states that “it may reasonably be argued that a ‘historic bay’ does not necessarily have to fit the semicircular area criterion laid down for a ‘bay’ in these Conventions”⁴⁹. The same opinion is presented by M. P. Strohl, who emphasizes that the onus of proving historic title lies on the claimant state. He also stresses that “in a world of legally equal and sovereign States, there appears no orderly or simple machinery for establishing such proof and no agreed upon criteria against which the proof can be measured.”⁵⁰

It should be pointed out that the wording excluding historic bays from the general rules of delimitation of bays did not arise at the Geneva Conference in 1958, but had already been proposed in the draft prepared by the UN International Law Commission. More extensive light was cast on this issue also by a lengthy memorandum on historic bays by the UN Secretariat, commissioned by the UN ILC. Among other things, the memorandum included an exemplary list of bays to which historic title had been recognized by the international community⁵¹.

for all the other maritime zones, including the territorial sea, the contiguous zone and the exclusive economic zone.

⁴⁵ G. Westerman is of the view that if the historic status of a bay is “proven, such a bay will not be a juridical bay under Article 7; but the coastal state will be permitted to enclose the waters of the bay as internal and to enjoy the panoply of sovereign rights which attach to that juridical status.” *The Juridical Bay*, New York-Oxford 1987, pp. 177-178.

⁴⁶ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, judgment, *International Court of Justice Reports*, 1982, p. 74 [100].

⁴⁷ See W. Góralczyk, *op. cit.*, p. 151.

⁴⁸ G. Westerman, *op. cit.*, pp. 177-178.

⁴⁹ Y. Z. Blum, “The Gulf of Sidra Incident,” *American Journal of International Law*, vol. 80, 1986, p. 671.

⁵⁰ M. P. Strohl, *op. cit.*, p. 252.

⁵¹ *Historic Bays, Memorandum by the Secretariat of United Nations, supra.*

Meanwhile, during the work of the Geneva Conference in 1958, proposals were submitted calling for a definition of the term “historic bay” as well as proposals discouraging this idea in order to leave this issue to the jurisprudence. Interestingly, the latter proposal was made by J. P. A. François, the rapporteur for this project within the ILC, who appeared at the conference as an expert of the Secretariat. The proposal to define the term was raised by a delegate from Japan, who argued that it should not be left up to the courts to formulate the definition, and offered the following amendment: “The foregoing provisions shall not apply to historic bays. The term ‘historic bays’ means those bays over which a coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign states”⁵². Finally, however, this proposal was dropped in favour of the “Indian-Panamanian” proposal, which called for requesting the UN General Assembly to arrange for further research on the issue of historic bays. By resolution of the General Assembly, this issue was returned to the UN Secretariat, which in 1962 prepared an extensive Study on the Juridical Regime of Historic Waters, Including Historic Bays⁵³. This UN study may aptly be regarded as the most complete international document to date devoted to this issue. The study identified three elements that should be taken into consideration to determine whether or not there are “historic waters” in a specific case⁵⁴. These are:

- (i) The authority exercised over the area by the State claiming it as “historic waters”,
- (ii) The continuity of such exercise of authority, and
- (iii) The attitude of foreign states⁵⁵.

These factors are commonly regarded as the classic elements for a properly formulated claim to historic bays, or historic waters more generally, and are cited in nearly every commentary on the situation of historic bays. It is therefore necessary for the coastal state to openly exercise authority over the given waters for a significant period, with the knowledge and assent of other countries.

The topic of historic bays sometimes arises as well in rulings by international tribunals. The most interesting view in this respect is that expressed by the International Court of Justice in the *Continental Shelf* case (*Tunisia v Libya*), when the court took the position that the matter of historic bays “continues to be governed by general international law” but such law “does not provide for a single ‘régime’ for ‘historic waters’ or ‘historic bays’, but only for a particular régime for each of the concrete, recognized cases of ‘historic waters’ or ‘historic bays’”⁵⁶. It nonetheless appears that while the legal regime of historic bays undoubtedly requires case-by-case clarification in each factual situation, the criteria presented in the UN study from 1962 constitute the point of departure for evaluation in every case.

⁵² *ILC Yearbook 1962*, vol. II, p. 3 [13].

⁵³ *Juridical Regime of Historic Waters, Including Historic Bays (A/CN.4/143)*, Study prepared by the Secretariat, *Yearbook of the International Law Commission*, vol. II, 1962, pp. 1-26.

⁵⁴ *Id.*, p. 25.

⁵⁵ *Id.*

⁵⁶ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, judgment, *supra*, p. 74 [100].

7. Final remarks

To summarize the foregoing considerations concerning the development of rules for delimitation of bays, it may be stated that they were largely shaped by the influence of technological development in the ability to defend bodies of water, where it was considered important for the waters to be occupied for the security of the coastal state.

The concept of historic bays arose as an exception to general rules as early as the first attempts to establish rules for delimitation of territorial waters in the course of private codification by international scientific associations. It turned out that there were already instances of occupation of larger maritime waters by coastal states which were accepted by at least some sections of the international community. Moreover, the examples raised above demonstrated assertion and maintenance of claims to such bays on the part of the maritime powers at that time.

In this context, the notion of G. C. Gidel of historic bays as a safety valve for the overall process of codification of rules of international law concerning the definition of bays and the rules for their delimitation appears to be an incisive observation based on a sober assessment of the international situation. This solution enabled entry into a new phase based on clear rules set forth in international agreements while maintaining the existing state of possession. For this reason as well, a *sine qua non* would be the requirement to demonstrate historic title to the waters in question.

It should be borne in mind that due to the specific nature of international law, states must display the will to assent to regulation creating law on treaty basis. Therefore recognizing of the concept of historic bays and placing it within the treaty framework was a move helping to build the will of cooperation between states, especially maritime powers, in the process of codification of the law of the sea, at the price of confirmation of historically justified territorial acquisitions.

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