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The Extent and Delimitation of Territorial Waters

HENRY S. FRASER*

It is not too much to say that the confused condition of the law of territorial waters has for years hampered commerce, delayed and impaired the administration of justice, and endangered international political relations. The confusion, however, in the law on this subject is partially due to inherent difficulties and honest differences of opinion, and not to any lack of attempts on the part of courts and publicists to establish the true bases of the law, or on the part of international societies to draft codes in the interest of uniformity. In fact, at the present time an ambitious attempt to bring order out of the chaos in the law of territorial waters is being made by the Committee of Experts for the Progressive Codification of International Law. This Committee of sixteen experts was appointed by the Council of the League of Nations on December 12, 1924, and is composed of a group of eminent jurists not only possessing individually the required qualifications but also as a body representing the main forms of civilization and the principal legal systems of the world. The Committee held its first session in April, 1925, and at that time appointed twelve sub-committees to make a preliminary examination of certain questions of public and private international law, with a view to more detailed propositions at a later date. Among the subjects chosen for study was the problem of territorial waters, which topic was given into the hands of Dr. Walther Schücking (Germany), M. Barboza de Magalhaes (Portugal), and Mr. George W. Wickersham (United States).

In January, 1926, the Committee of Experts convened at Geneva for their second session, and took up one by one the reports of the several sub-committees. It was decided, among other things, to submit a draft convention on the law of territorial waters to the governments of the world, whether members of the League or not, for the purpose of receiving criticisms and suggestions to enable the Committee to continue its work in a practical fashion. In sending the report to the governments, it was requested that their replies be returned not later than October 15, 1926, in time for the third session of the Committee of Experts. The Committee will then report to the Council of the League of Nations whether the time is ripe for an

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international conference to draw up a definitive convention on territorial waters.¹ In view, therefore, of the present situation and the vast possibilities of the immediate future, this article is written, with the earnest hope that it may contribute a very little to the solution of certain difficulties.

I. THE EXTENT OF TERRITORIAL WATERS

In this section we shall not be concerned with the precise extent of territorial waters under all the varied geographical conditions of the shore-line, which will be the subject of investigation in the second half of this article, but rather with the limit of the marginal sea on the open coast, whether three, four, six, etc., miles. The discussion of the general limit must precede that of the methods of measurement, because the latter depends upon the former. For the present, therefore, no special attention will be given to bays, straits, and islands; and account will be taken only of the historical evolution and present status of the general limits of the marginal sea.²

The practice of nations in respect to the extent of territorial waters, both in the past and in the present, has widely varied. One country will claim three miles, another four miles, another six miles, while virtually all exercise jurisdiction for particular purposes, as neutrality and customs, well beyond the bounds of the sea claimed to be territorial.³ This confusion of national usages quite evidently hinders beneficial economic intercourse among the states, to say nothing of the ill-feeling frequently caused in diplomatic circles when one state has exceeded what another state conceives to be the reasonable rule. If England regards three miles as the limit on her shores, she will not willingly acquiesce in a claim of six miles on the part of Spain. A confusion of laws on such a vital point of world-wide significance has led, and still leads, to dangerous friction. There would seem little reason why uniformity could not be achieved in this field, to the great advantage of the administration of the law, of maritime commerce, and of international good-will.

Uniformity need not, and should not, take the form of a universal, fixed limit for all purposes. What requires to be done, it would seem, is first to fix a limit to the marginal sea, binding throughout the world

¹See article in this issue of the CORNELL LAW QUARTERLY by the Hon. George W. Wickersham.

²For an exhaustive and scholarly study of the history of the territorial sea, the reader is referred to Thomas W. Fulton, *The Sovereignty of the Sea*. Edinburgh and London, 1911. See also note by Henry P. Farnham in 46 L. R. A. 264. An admirable treatise on all phases of the subject was recently published by the late Paul Fauchille, *Traité de droit international public*, Vol. I, Pt. 2, Peace. Paris, 1925.

³See Rodriguez Martin, *Mares Territoriales*, pp. 13 *et seq.*

and carrying with it, in favor of the littoral state, all powers of sovereignty (subject always to the right of innocent passage), and secondly to fix a number of maximum limits beyond that, likewise binding all nations, up to which a state, if it chose, might exercise jurisdiction for the three or four special purposes for which each of the said maximum limits would be provided. History has shown that states must exercise some powers of jurisdiction beyond the narrow limits of the marginal belt proper, especially for customs and neutrality requirements.⁴ On the other hand, the nations will hardly consent to enlarging the marginal sea, with all its far-reaching powers of sovereignty, beyond three miles; and, in fact, the Committee of Experts has agreed in the tentative draft convention upon three marine miles of sixty to the degree of latitude.

The advantage of a system of maxima for the few purposes where history has demonstrated the necessity of a jurisdiction wider than three miles, would lie in the privilege of each state to choose its own customs or neutral limit to meet its own peculiar local requirements, always, of course, keeping within the maximum allowed in each case for such jurisdiction. Thus, for example, if some country did not wish to assume the obligations of a neutral to the full maximum distance allowed, this method would permit it to proclaim some more modest limit within the maximum.⁵ To go one detail further, it might be feasible to require each nation to give international notification of the several distances it elected to go within the various maxima, by filing copies of its legislation with the Secretary of the League of Nations, otherwise the limit of the marginal sea to be presumed in favor of or against it.

It will be useful briefly to survey the history of the various limits employed by different nations. Let us first consider the three-mile limit. This well-known limit is the outgrowth of a theory of sovereignty based on the range of cannon, which theory first gained attention in the early seventeenth century, namely in 1610, when it was proposed by a Dutch embassy in London. It was not, however, accepted by the British at that time, nor very seriously discussed.⁶

⁴This has been effected sometimes by treaty, but more often by unilateral legislation.

⁵This system would be in harmony with the liberal practice of certain nations in permitting foreigners to fish in territorial waters. Finland and the Soviet Republic fish in each other's territorial waters in the Arctic Ocean, with certain exceptions. See Convention signed at Helsingfors, Oct. 21, 1922. League of Nations, Treaty Series, XXIX, 205-209. The territorial waters of the Archipelago of Spitzbergen are open for fishing to the United States, the British Empire, Denmark, France, Italy, Japan, Norway, the Netherlands, and Sweden. Treaty signed at Paris, Feb. 9, 1920. *Ibid.*, II, 8-19.

⁶Fulton, *op. cit.*, pp. 155-159.

The theory was again referred to in 1625 by Grotius in somewhat ambiguous language,⁷ and again in 1639 by Gerbier, the British agent at Brussels, who wrote that the Hollanders "cannot acknowledge His Majesty to have any further jurisdiction on the seas than within reach of cannon shot."⁸

In 1703, Cornelius van Bynkershoek succeeded in giving the theory of cannon-range widespread publicity. This eminent Dutch jurist crystallized the idea in an aphoristic form that gained the ears of statesmen—"potestatem terrae finiri, ubi finitur armorum vis."⁹ This phrase became a potent watchword and has been quoted by publicists ever since. In this way, while not by any means originating the theory of cannon-range, Bynkershoek gave it an international standing.

The next step was to express the theory in practical form, that is, in terms of miles. This was the contribution of Fernando Galiani, Sicilian Secretary of Legation at Paris, who wrote a work in 1782 in which three miles were first fixed upon as the equivalent of the range of cannon.¹⁰ The three-mile limit gained considerably more headway about a decade later, when the United States tentatively adopted "one sea league or three geographical miles" to serve as the zone in which the United States would enforce her rights as a neutral in the war between England and France.¹¹ From this time on, the three-mile limit gradually won acceptance elsewhere, for example, in England during the early years of the nineteenth century by means of certain decisions of Sir William Scott (Lord Stowell).¹²

The first ratified treaty adopting the three-mile limit came in 1818,

⁷"Videtur autem imperium in maris portionem eadem ratione acquiri, qua imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt, qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur." *De Jure Belli ac Pacis*, Lib. II, Cap. III, § XIII, 2.

⁸R. G. Marsden, *Ed.*, *Documents Relating to Law and Custom of the Sea*, I, 487 note. (Publications of the Navy Records Society, Vol. XLIX.)

⁹*De Dominio Maris*, Cap. II.

¹⁰He was followed by Azuni in 1795. Fulton, pp. 563, 564-565. Arnold Raestad, *La mer territoriale*, pp. 124-125.

¹¹Jefferson's letter reads in part as follows: "Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores." Jefferson to Hammond, Nov. 8, 1793. J. B. Moore, *A Digest of International Law*, I, 702-703. A geographical mile is the same as a marine, sea, nautical, or Admiralty mile.

¹²The Twee Gebroeders, *Alberts*, master, 3 C. Rob. 162 (1800); *The Anna*, 5 C. Rob. 373 (1805). But the earlier claims of England to extensive portions of the seas died hard, and it was not until the Territorial Waters Jurisdiction Act of 1878 that the shroud was finally drawn around Selden's pretensions. See Fulton, p. 580 note.

between the United States and Great Britain in regard to their respective fishing rights in North America.¹³ Many other countries now began to follow the Anglo-American lead and to recognize three miles as a reasonable limit for many purposes: France by treaty with England in 1839;¹⁴ Austria by decree in 1846;¹⁵ Germany by treaty with England in 1868;¹⁶ Greece in 1869;¹⁷ Russia in 1869 and 1893,¹⁸ (but lately Russia has fixed on four miles in the Gulf of Finland, with certain exceptions, by the Treaty of Peace of Dorpat between Finland and Russia, October 14, 1920);¹⁹ Japan in 1870;²⁰ Belgium and Holland by the North Sea Fishery Convention of 1882;²¹ Portugal by statute in 1909;²² Chile by decree in 1914;²³ the British colonies;²⁴ etc.²⁵

Individual governments have not been the only agents in the progress of the three-mile rule. At least two famous international arbitral tribunals have been guided by the three-mile limit, namely, in the matter of the seal controversy in Behring Sea, and in the matter of the North Atlantic coast fisheries in 1910. It is to be observed, however, that the parties to these arbitrations were the United States and Great Britain, both of which Powers had previously adhered to the three-mile rule.²⁶

Not all states, however, have welcomed the three-mile doctrine. For example, Norway and Sweden have long maintained a wider

¹³Fulton, p. 581.

¹⁴Henry G. Crocker, Compiler, *The Extent of the Marginal Sea*, p. 524.

¹⁵Fulton, pp. 658-659.

¹⁶Crocker, p. 555.

¹⁷Fulton, p. 661.

¹⁸Crocker, pp. 620-621.

¹⁹Text in League of Nations, Treaty Series, III, 11-15. See also a work published last year, but to which I have not had access, by S. R. Björkstén, *Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht*. Helsingfors, 1925.

²⁰Proclamation of neutrality during the Franco-Prussian War. Crocker, pp. 603-604. Japan and Russia, in 1911, together with Great Britain and the United States, agreed not to allow their subjects or vessels to kill, capture, or pursue sea otters beyond the distance of three miles from the shore-line of their respective Pacific coasts north of the thirtieth parallel of north latitude. *The Statutes at Large of the United States of America*, Vol. 37, Part 2, p. 1543.

²¹Crocker, p. 486.

²²*Ibid.*, p. 619.

²³*Ibid.*, pp. 512-513.

²⁴Fulton, p. 661.

²⁵See also, Arnold Raestad: "Tableau des lois et règles actuellement en vigueur dans les pays d'Europe et aux États-Unis d'Amérique en ce qui concerne l'étendue de la mer territoriale," *Revue générale de droit international public*, 21:401-420 (1914). A valuable summary may also be found in Paul Fauchille, *op. cit.*, pp. 179-183.

²⁶This limit has recently been given renewed sanction by general declarations in liquor treaties between the United States and Great Britain (May 22, 1924); and Germany (August 11, 1924); and Panama (January 19, 1925); and the Netherlands (April 8, 1925).

limit, supporting their claims from history. It will not be out of place to examine these Scandinavian claims rather closely.

The true reason for the larger claim of Norway is the fishing advantage thereby gained. Norway is essentially a maritime country, only a very small part of the land being under cultivation. Fisheries have always constituted one of the chief industries. The greatest cod fishing in Europe is carried on annually off the coast of Norway. Hence, the importance to her of reserving as much of the adjacent seas as possible for the exclusive enjoyment of the local fishermen. As early as 1747, long before the three-mile limit had come into vogue, Norway by a royal rescript fixed four miles as the extent of the national fishing monopoly.²⁷ This distance was expressed in the rescript as one Norwegian mile, or sea-league, which was later defined (1759) as a marine league, of which there are fifteen to a degree. Thus a Norwegian marine league is made to equal about four English marine or geographical miles, of which there are sixty to a degree. In this way the four-mile limit came into use in Norway, and has never been withdrawn as to exclusive fishing rights, despite occasional objections from foreign governments.²⁸

As Fulton points out,²⁹ the fact that the Norwegian claim has been respected, for the most part, by foreign Powers is probably owing to the infrequent visits of foreign fishing vessels to the coast of Norway.³⁰ But there is no assurance that such conditions will continue in-

²⁷Thorvald Bøye, "Territorial Waters. With Special Reference to Norwegian Legislation," International Law Association, Stockholm Conference, 1924, pp. 302, 318. L. M. B. Aubert, "La mer territoriale de la Norvège," *Revue générale de droit international public*, 1:429-441, at p. 432 (1894).

²⁸This is perhaps the place to note very briefly the problem of the delimitation of territorial waters off Norway. Studded with islets and rocks, the precipitous Norwegian coast presents a special and interesting case. The government of that country was early faced with a very practical situation—shall these numerous archipelagos, seemingly designed by nature to constitute part of the coast itself, be considered as an appendant portion thereof, and the territorial sea consequently measured from the outermost isles and rocks? National advantage dictated an affirmative answer, which was in fact given by royal decree in 1812, and it is to this decree that the present Scandinavian method of delimiting territorial waters may be traced. This method consists of drawing a base line from one outermost island to another, even where the ordinary territorial zones surrounding the said islands would not intersect each other; in other words, between islands whether or not they are more than eight marine miles apart. Landward of this base line all the sea is territorial, as is also the ocean for four marine miles seaward therefrom. The territoriality of the fjords is determined in like arbitrary fashion. The government, supporting its decrees from history and long usage, reserves exclusive fishery rights for its nationals in whatever fjords it chooses, almost regardless of extent or configuration. See further, Romée de Villeneuve, *De la détermination de la ligne séparative des eaux nationales et de la mer territoriale spécialement dans les baies*, pp. 185-195.

²⁹Pp. 677-680.

³⁰The same fact was commented upon in 1870 by the Minister of the Interior in Norway. Fulton, p. 678.

definitely. Moreover, Norway's peculiar method of delimiting territorial waters, by taking as a base a line connecting the outermost islands, thereby marking off wholesale tracts of the sea, constitutes an aggravation of a condition already pregnant with the danger of international discord.

Despite Norway's claims, and her refusal to join in the North Sea Fishery Convention of 1882, the World War demonstrated that she would yield a point when it came to matters of neutrality. In May, 1918, Norway informed England that she recognized the difficulty of maintaining her point of view as to neutral rights and duties when such view was not shared either by England or Germany. Consequently, Norway restricted her neutral zone to three miles.³¹ As to fishing, however, the ancient claims are still maintained.³²

The claim of Sweden to four miles has had a different development. It has been argued with some reason by Baron de Staël-Holstein that the Swedish limit in the middle of the eighteenth century was three French or English geographical miles.³³ However that may be, a change of some kind was intended shortly thereafter by naval instructions to the effect that the national domain extended to a German mile. But as Baron de Staël-Holstein asserts, this only confused the situation, since a German mile was not a maritime measure. All doubts were cleared away, however, in 1788 when the distance was fixed at one marine league or one-fifteenth of a degree.³⁴ This is the Scandinavian marine league, which is equal to four English or French marine miles. Thus, in 1788, Sweden first made an unequivocal claim to four miles, and confirmed it later by certain prize regulations (1808).³⁵

It is important to note that the above Swedish decrees and regulations were solely for purposes of neutrality, and did not apply to fishing rights. Not until 1871 was the four-mile fishing limit, which in Norway dated from 1747, embodied in Swedish legislation.³⁶ Even

³¹Dr. J. Paulus, "La mer territoriale," *Revue de droit international et de législation comparée*, 51:397-424, at pp. 407-408 (1924). See also note, "The Three-Mile Limit as a Rule of International Law," 23 *Columbia Law Review*, 472-476, at p. 475, note 46 (1923). In 1915, the German Supreme Prize Court of Berlin refused to recognize Norwegian neutral waters beyond three miles. Case of the *Géfiion*, June 18, 1915. Paul Fauchille et Charles de Visscher, *La Guerre de 1914. Jurisprudence allemande en matière de prises maritimes. Décisions de la cour suprême de Berlin*, p. 16. A like decision was made in regard to Swedish neutral waters in the case of the *Elida*, May 18, 1915. *Ibid.*, p. 8.

³²See further, Baron L. de Staël-Holstein, "Le régime scandinave des eaux littorales," *Revue de droit international et de législation comparée*, 51:630-679 (1924).

³³Resolution of the King, Aug. 7, 1758. *Ibid.*, pp. 636, 646.

³⁴Crocker, p. 627.

³⁵*Ibid.*, p. 627.

³⁶Baron L. de Staël-Holstein, article cited, pp. 650-653.

then the law applied only to that portion of the coast north of the Sound.³⁷ The same limit was subsequently carried through the Sound and up to Simrishamn by the treaty of July 14, 1899, with Denmark,³⁸ but in regard to the Baltic Sea and the Gulf of Bothnia, no fishery decree appears to have been issued. Lundberg and Berlin allege that the three-mile limit is understood, but Reuterskjöld declares that the decree of 1871 of four miles applies by analogy to the whole coast of Sweden.³⁹

The third European Power that lays claim to more than three miles for most, if not all, purposes is Spain. Here a six-mile limit is asserted, although not always enforced. Spain's claim is based on a Real Cédula of December 17, 1760, and is supported by a royal decision in 1775, and royal decrees in 1830 and 1852. Six miles constituted the minimum limit for all purposes, a greater distance being enforced against certain states in accordance with the terms of treaties.⁴⁰

The decrees of Spain have not gone unchallenged by other Powers. The United States has more than once informed Spain that no greater limit than three miles would be recognized.⁴¹ Great Britain likewise has "always uniformly and strenuously resisted the pretensions of the Spanish Government to exercise jurisdiction at a greater distance than one league, or three nautical miles, from the Spanish coast seawards, or within bays of the Spanish shore."⁴²

Despite this opposition Spain has clung to her original claim. On the other hand, the six-mile limit does not appear to be rigidly enforced everywhere on her coasts or equally against all nations. According to Professor A. F. Marion, the three-mile limit, instead of the six-mile, is applied in practice against French fishermen in the Mediterranean.⁴³ Likewise some years ago British and German trawlers developed an extensive fishery up to three miles off the Atlantic

³⁷The decree of May 5, 1871 reserved for nationals the fishery in the waters between the Kullen Light in Scania and the Swedish-Norwegian boundary within the limit of one geographical mile (*i. e.*, one Swedish league equal to four French or English geographical miles of sixty to a degree). Crocker, p. 627; Fulton, p. 674.

³⁸Fulton, pp. 674-675.

³⁹Baron L. de Staël-Holstein, p. 659.

⁴⁰Fulton, p. 569; Crocker, pp. 622-626.

⁴¹In 1856 in the case of the *El Dorado*; in 1862 and 1863 in the case of the *Blanche*; in 1870 in the case of the *Colonel Lloyd Aspinwall*; in 1880-81 in the cases of the *Ethel A. Merritt*, *Eunice P. Newcomb*, *George Washington*, and *Hattie Haskell*; and indirectly, in 1875, by a note to the British government. J. B. Moore, *A Digest of International Law*, I, 706-714. Francis Wharton, *A Digest of the International Law of the United States*, 2nd ed., I, 102-109.

⁴²Lord Derby to Mr. Watson, Sept. 25, 1874. *British and Foreign State Papers*, LXX, 186-187.

⁴³Letter to Mr. Fulton, p. 667 of the latter's work.

coast, in the face, however, of strong opposition from the local fishermen.⁴⁴

Perhaps the only other European country necessary to mention as a special case is Italy. The position of Italy regarding the three-mile limit is doubtful. Paragraph 14 of her rules of international maritime law issued in 1908 for the use of the navy declares that territorial waters for purposes of the law of war have the extent of cannon-range from shore, and that the said extent, by customary law, must be held to be fixed at three marine miles, beginning at low-water mark.⁴⁵ In 1914, however, only six years later, Italy by law established her territorial sea for purposes of neutrality at six marine miles from the shore.⁴⁶

The larger claims of Norway, Sweden, Spain, and other Powers, and the fact that most nations exercise certain forms of jurisdiction beyond three miles, have led the aforementioned Committee of Experts to propose a sort of compromise. Article 2 of the draft convention, now before the governments of the world for suggestion and criticism, reads as follows:

The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude) from low-water mark along the whole extent of the coast. Beyond the zone of sovereignty, States may exercise administrative rights on the ground either of custom or of vital necessity. There are included the rights of jurisdiction necessary for their protection. Outside the zone of sovereignty no right of exclusive economic enjoyment may be exercised.

Exclusive rights to fisheries continue to be governed by existing practice and conventions.⁴⁷

⁴⁴Fulton, pp. 667-668.

⁴⁵Crocker, p. 601. Certain Italian courts (Genoa, Sarzana, and Naples) have adopted the range of cannon as the measure of the territorial sea. Paul Fauchille, *Traité de droit international public*, Vol. I, Pt. 2, Peace, p. 183.

⁴⁶*Gazzetta Ufficiale*, Aug. 16, 1914. But Italy was not alone in 1914 in proclaiming waters beyond three miles as neutral. Greece proclaimed a zone of six miles, Uruguay five miles, Ecuador four naval leagues. See note, 23 *Columbia Law Review*, 472-476 (1923). French neutral waters were carried to six miles in certain places on the coast. See decree in *Journal officiel de la République Française*, Aug. 9, 1914, p. 7285. Paul Fauchille, *La Guerre de 1914. Jurisprudence française en matière de prises maritimes*, Annexe, p. xxiii.

⁴⁷French text: "La zone de la mer côtière s'étend à 3 milles marins (60 au degré de la latitude) de la laisse de basse-marée sur toute l'étendue des côtes. Au-delà de la zone de domination, les Etats peuvent exercer des droits administratifs, en se basant, ou sur les usages, ou sur un besoin essentiel. Sont inclus les droits de juridiction nécessaires à leur protection. Au-delà de la zone de domination, les droits de jouissance économique exclusive ne peuvent pas être exercés.

"Les droits exclusifs de pêche demeurent soumis aux pratiques et conventions existantes."

I have not yet seen the official printed French text; the above and following French quotations from the draft convention are taken from a typewritten copy brought from Geneva.

It is submitted that this article may be improved in several essential particulars. In the first place, low-water mark is not the same at all times, and it would perhaps be advisable expressly to incorporate the rule of an ordinary neap tide, which is taken as the base in English law.⁴⁸

In the second place, no definite limit whatever is placed on the second zone beyond the three-mile zone of sovereignty. The only guides in this outer zone are to be "custom" and "vital necessity." But these criteria do not tend to unify the general law of territorial waters, which is the great object of the Committee of Experts, and the great need of the maritime world. Moreover, vital necessity seems a dangerous term inviting abuse. If by vital necessity is meant necessity as conceived unilaterally by the littoral state, then there will be no end of trouble, and the problem of territorial waters will still remain a thorn in the international flesh. Furthermore, the term "vital necessity" seems superfluous, because a nation always has the right of self-defense, and in a true emergency may exceed ordinary bounds without offending against international law. Under Article 2 as it now stands, what is there to prevent a state from legislating in its own interests, and to the detriment of other states, under the cloak of vital necessity? In such a contingency, from which side ought a court of arbitration to view the necessity?

Is not the solution to be found in a maximum beyond which no state may legislate? If it is feared that the fixing of maximum limits outside of the three-mile zone for customs and neutral purposes would result in an undesirable inelasticity in the law, it may be answered that when a genuine need is felt in the future for an extension of a given maximum, the matter may readily be handled by special treaties, or the draft convention itself may be amended. In the meantime, certainty in law will have afforded comfort to commerce.⁴⁹

Finally, a latent inconsistency is present in the last two sentences of the Article, one forbidding exclusive economic enjoyment beyond three miles, and the other leaving fishery privileges to be governed by existing practice and conventions. The inconsistency arises from the fact that certain countries at the present time exclude foreigners from the coastal fisheries for more than a distance of three miles from the

⁴⁸Fulton, p. 641.

⁴⁹Dr. Louis Franck, President of the International Maritime Committee, in summarizing the results of its work, recently wrote: "There is a first result, the importance of which cannot be put too high. It is that in all countries the bulk of shipowners, underwriters, merchants, bankers, and maritime lawyers are practically unanimous in the opinion that an international law for the sea is required by modern commerce." Dr. Louis Franck, "A New Law for the Seas," 42 *Law Quarterly Review*, 25-36, at p. 28 (1926).

shore. If it be the present intention of the Committee of Experts to postpone the complex fishery problem, it would seem preferable to qualify the absolute tenor of the last sentence of the first paragraph, thus avoiding the sharp conflict with the closing sentence of the Article.

II. THE DELIMITATION OF TERRITORIAL WATERS

The problem of the delimitation of the marine zone is highly technical, but it must be faced and pursued to the end, for upon its proper solution will depend in large measure the success of any convention or future treaty. To obtain any degree of uniformity in the law on this subject by attempting to restate customary law is impossible, because of the very absence of authoritative customary law due to widely divergent national practices. It would seem that uniformity in this important field could be attained in many instances only through sheer legislation by way of international convention.

The first question concerns the necessity of some limit that is definite. At least one writer has expressed the opinion that it is unnecessary to have any fixed width, that it is merely a matter of reasonable "protective jurisdiction."⁵⁰ This writer maintains that the "validity of the principle of 'control from land' should be maintained irrespective of the precise manner in which it may be applied. Nations will naturally strive to exercise their right of jurisdiction in a manner that will not adversely affect the legitimate interests of other nations. If by any chance they should abuse the right, they must expect, as in all other fields of international relations, to make proper redress. If any nation, on the other hand, under the cloak of vindicating the principle of freedom of the seas, should abet its nationals in dubious transactions resulting in the violation of the laws of another nation, it would be guilty of an unfriendly act which is not merely to be deplored but to be vigorously resented at times. In view of the fact, however, that this right of 'protective jurisdiction,' like the freedom of the seas, is of mutual and vital concern to all nations, it is not to be expected that it will either be exercised rashly or challenged in a captious spirit."

The above doctrine appears charged with danger. Every extension by one state would serve as the signal for a universal extension. Moreover, the author fails to take into account upon what prescribed basis a nation shall make complaint to another. A municipal

⁵⁰Philip Marshall Brown, "The Marginal Sea," Editorial, 17 *American Journal of International Law*, 89-95 (1923). See also, same author, "Protective Jurisdiction over Marginal Waters," *Proceedings of the American Society of International Law*, 1923, pp. 15-31, and discussion, pp. 40-47.

law may seem reasonable to one nation and most unreasonable to the nation against which the law may operate. If the dispute should go to arbitration, it would be difficult under this doctrine of general protective jurisdiction to determine from which side to view the question of reasonableness. The strongest argument against this doctrine is that historically the three-mile limit has progressively gained favor. It was not by mere chance that a fixed limit was set, but because a definite limit was felt imperative.

If the territorial sea is to be measured, the next problem concerns the standard of measurement, whether ballistic, visual, geographical, etc.

As was indicated in the foregoing section, cannon-range provided an early standard. But this proved too vague in practice, and by the close of the eighteenth century, a definite number of marine miles was substituted as an equivalent. The theory of cannon-range has of late fallen into desuetude, although its ghost occasionally walks.⁵¹ If this theory were literally followed to-day, the results would not be tolerated by a single great Power. First, the limit would be increased far beyond what any nation claims, for modern cannon carry twenty miles and more. Second, the limit would vary with the progress of ballistics, and the invention of a new gun in Germany in the month of March would determine whether a Japanese fishing vessel was in Chinese territorial waters in April. Third, enormous tracts of the sea would be reserved to national fishermen, out of all proportion to their needs. Fourth, since the low-water mark is taken as the base line, and cannon could not be placed on the land between the tides, the rule would result in a physical impossibility. Fifth, the jurisdiction of coastal states for police purposes would be extended to an unwonted degree. Sixth, the obligations of neutral states would be much greater than they ever have been in the past. Seventh, the freedom of the seas, as generally understood, would be radically curtailed.⁵²

⁵¹Professor Stoerk declares that it is time to do away with "die aus der Barockzeit stammende Formel Bynkershoeck's, der eben alles fehlt, was von einer juristischen Norm gefordert werden muss: Schärfe und regulatorische Kraft für jeden einzelnen Fall des wechselvollen Lebens." Professor Stoerk in F. Holtzendorff, *Handbuch des Völkerrechts*, II, 478. Léon Pézeril, on the other hand, stands out for cannon-range. *Des navires de commerce français dans les eaux étrangères*, pp. 121-128.

⁵²For criticism of the theory of cannon-range, see Arnold Raestad, *La mer territoriale*, Ch. XI. Sir Thomas Barclay in his report to the Institut de Droit International in 1894 asserted that for fishing purposes the range of guns is not acceptable. "It implies a vast and vague distance of jurisdiction with which no State could desire to charge itself and which, probably, no neighboring States would admit in case of conflict." See also note, 23 *Michigan Law Review*, 163-166, at p. 166 (1924).

If vision is taken as the standard, equal difficulties are encountered. The old "land-kenning" was fixed at fourteen miles, and although this is less than the range of modern guns, it is more than any nation now claims. Whatever may be the merits of vision in dealing with territorial bays,⁵³ it clearly is an unsatisfactory norm for the open coast.⁵⁴ It is too variable, depending on the position of the observer, the weather conditions, the keenness of the eye, etc.⁵⁵

A third method of measuring the territorial sea is by the distance a vessel can traverse in a given time. This method, a most ancient one,⁵⁶ has been adopted in the recent liquor treaties negotiated by the United States.⁵⁷ It might well be questioned, however, whether this rule, whatever its value against rum runners, would be a good or practical one if applied to other purposes.

The fourth method, and the one in almost universal modern use, is geographical. This would seem to meet the practical need for definiteness.

If, then, the standard of measurement is to be geographical, how shall it be applied? The first question pertains to high and low-

⁵³Dunham v. Lamphere, 3 Gray (Mass.) 268 (1855). Regina v. Cunningham, Bell's Crown Cases 72 (1859).

⁵⁴Two fairly recent authors, however, favor the range of vision. Paul Godey, *La mer côtière*, pp. 19 ff. Paris, 1896. Robert David, *La pêche maritime au point de vue international*, pp. 19, 31. Paris, 1897.

⁵⁵See Bynkershoek, *De Dominio Maris*, and Fulton, p. 546.

⁵⁶It was proposed by Bartolus of Saxo-Ferrato and Baldus Ubaldus in the fourteenth century. Fulton, pp. 539-540. See also, Walther Schücking, *Das Küstenmeer im internationalen Rechte*, pp. 6-7.

⁵⁷Paragraph (3) of Article II of the Convention between the United States and Great Britain for prevention of smuggling of intoxicating liquors (proclaimed May 22, 1924) reads as follows: "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised." *The Statutes at Large of the United States of America*, Vol. 43, Part 2, p. 1762. The recent decisions under this and similar treaties may be classed under two main heads; first, those decisions grounded on the theory that the treaties extend the territorial waters of the United States to one hour's travel as to the liquor laden vessels, and therefore authorize their seizure; and second, those decisions resting on the theory that the transshipment of liquor beyond four leagues is not forbidden by the Tariff Act of 1922, and that, such transshipment not being made illegal by the treaties, no American municipal law forbids unloading if performed beyond four leagues. To the first group of decisions belong *The Pictonian*, 3 F. (2d) 145 (1924) and *United States v. Henning*, 7 F. (2d) 488 (1925). To the second group belong *The Over the Top*, 5 F. (2d) 838 (1925); *The Panama*, 6 F. (2d) 326 (1925); and the recent opinion (April, 1926) of Hough, C. J., in the case of the *United States v. The Sagatind and The Diamantina* (Circuit Court of Appeals).

water mark. In modern times the latter is regarded as the base line,⁵⁸ and when a statute or a treaty refers to the "sinuosities of the coast," the sinuosities at low tide are meant. The Committee of Experts has wisely incorporated in Article 2 of the draft convention, quoted above, this almost universal rule of low-water mark.

A contentious problem arises in regard to islands, shoals, banks, and rocks. At one time it was doubted that small islands possessed any maritime belt, at least for purposes other than neutral rights.⁵⁹ But it would now seem that islands stand on the same basis as the mainland.⁶⁰ A difficulty in administering any other rule would lie in the great difference in size of various islands. If Australia, Cuba, and Porto Rico are allowed territorial seas, at what point would an island become too small to merit one?⁶¹ The chief difficulty, however, does not concern islands, but shoals, banks, and rocks. Strictly speaking, shoals and banks are invisible, this fact distinguishing them from islands. But if at low-water of an ordinary neap tide they are left dry, a question at once arises whether they are entitled to rank with islands. Formerly, courts hesitated to accord territorial significance to such banks and shoals,⁶² but modern practice has been

⁵⁸But an ordinance of Argentine in 1907 declared that in respect to fisheries, the water up to ten miles from high-water mark on land is under state control. But this is very exceptional. In Austria-Hungary, due to the virtual absence of tides in the Mediterranean, the limit used to be measured from a line, fixed by the local authorities, where the water ceased to be brackish. It should also be stated in this connection that tides vary considerably at different times of the month and year. In a treaty between Spain and Portugal in October, 1893, low-water mark of spring tides was specified. In English law an ordinary neap tide is taken. Fulton, pp. 641, 659, 661, 666. Léon Pézeril thinks that the limit of the coast should be fixed at the point on the shore where artillery could be placed without being endangered by the tides. *Des navires de commerce français dans les eaux étrangères*, pp. 120-121.

⁵⁹See the dispute in 1853 over fishing rights off the Farne Isles. (Fulton, pp. 618, 639-640.) As to neutral rights, the case of *The Anna*, 5 C. Rob. 373 (1805), had decided in favor of reckoning from islands.

⁶⁰The islands off Norway are always considered, at least by Norway herself, as possessing a territorial value. Recent treaties have specifically mentioned islands as being entitled to an encircling territorial belt. See, for example, the North Sea Fishery Convention of 1882; the treaty between Great Britain and Denmark in 1901 for the regulation of fishing outside the territorial waters surrounding the Farøe Islands and Iceland; and the Treaty of Peace of Dorpat between Finland and Russia, October 14, 1920.

⁶¹"The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighboring water, carries the sovereignty over the same width of the latter all round it as a piece of mainland belonging to the same state would carry." John Westlake, *International Law*, Part I, Peace, 2nd ed., p. 190.

⁶²Sir William Scott (Lord Stowell), in the first case of *The Twee Gebroeders*, 3 C. Rob. 162, 163 (1800), had his doubts, as the following excerpt from the opinion would indicate: "An exact measurement cannot easily be obtained; but in a case of this nature, in which the court would not willingly act with an unfavorable minuteness towards a neutral state, it will be disposed to calculate the distance very liberally; and more especially, as the spot in question is a sand covered with

more liberal. The North Sea Fishery Convention of 1882 mentioned "dependent islands and banks," and the treaty in 1901 between Great Britain and Denmark with regard to Iceland and the Farøe Islands mentioned "dependent islets, rocks, and banks."⁶³

The question of islands has been made the subject of Article 5 of the convention drafted by the Committee of Experts for the Progressive Codification of International Law. For the moment we shall be concerned with only the first of the two paragraphs into which the Article is divided. The English translation of the first paragraph follows:

If there are natural islands, not continuously submerged, situated off a coast, the inner zone⁶⁴ of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland that they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself.⁶⁵

The above Article of the convention was originally proposed by Dr. Walther Schücking, the eminent Rapporteur of the sub-committee on territorial waters. But Dr. Schücking, I say it with all respect, has mistaken the purport of the notes he cites in support of this Article. As it stands, the Article cannot help but prove unworkable in practice. Dr. Schücking cites the North Sea Fishery Convention of 1882 to show that the three miles are measured from the islands along the coast and not from the mainland. And other

water only on the flow of the tide, but immediately connected with the land of East Friesland, and when dry, may be considered as making part of it." Mr. T. H. Haynes in 1890 declared himself in favor of giving nations territorial jurisdiction for three miles around shoals within a certain depth, say six fathoms, in order to render the nations responsible for providing lighthouses and buoys. See his discussion from the floor at the fourteenth conference of the Association for the Reform and Codification of the Law of Nations (now the International Law Association), p. 200.

⁶³A thorough discussion of banks and rocks may be read in Fulton, pp. 640-643, 649. It is interesting to note in this connection the anomalous act passed by Congress in 1856, giving the President power to protect the rights of discoverers of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government. All acts done on these islets, or in waters adjacent thereto, were to be deemed as done on the high seas upon a merchant vessel of the United States. See Jones v. United States, 137 U. S. 202 (1890).

⁶⁴For "the inner zone" read "the inner line" to correspond with French text. The French text originally read "la zone intérieure," but this was corrected to "la ligne intérieure."

⁶⁵French text: "Si des îles naturelles, non constamment submergées, sont préposées à une côte, la ligne intérieure de la mer sera mesurée à partir de ces îles, excepté le cas où des îles seraient éloignées du continent de telle manière qu'elles ne se trouveraient plus dans la zone de la mer territoriale, si celle-ci était mesurée à partir du continent. Dans ce cas, l'île a une mer territoriale à elle."

treaties and ordinances are cited as tending to the same effect. Thus, concludes the Rapporteur, where there is an island, or islands, not continuously submerged by the sea and not entirely outside of the regular three-mile line measured from the low-water mark of the mainland, the three-mile line will be measured from such island, or islands. But a study of the text of the said Fishery Convention of 1882, of the other treaties cited, and of Thomas W. Fulton, *The Sovereignty of the Sea*, pp. 634 *et seq.*, will show that the purpose of the said Fishery Convention was merely to guarantee that islands along the coast would possess a territorial value, that is to say, that each island would possess a territorial sea around itself. The framers of the Convention of 1882 desired to lay at rest the doubts existing at that period as to whether coastal islands (and banks that became islands when the tide was out) had any territorial belt at all. Consequently, they stated in the Convention that, "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, *as well as of the dependent islands and banks.*" (Italics mine.)

At that period (1882) it was generally conceded that an island in the middle of the high seas possessed a territorial belt, but it was far from clear whether an island, falling wholly or partially within the territorial belt measured from the mainland, should have any extra consideration given to it, by reckoning a three-mile belt from such portions of its shores as would guarantee to it throughout its circumference a protective zone three miles in width. Consequently, the above provision was inserted in the Fishery Convention of 1882.

Dr. Shücking does not expressly indicate how it is proposed to delimit the line from an island, or islands, located wholly or partially within the three-mile zone as counted from the mainland. It appears certain that the Article seeks to effect some change in the existing law. The existing law is very simple, namely, that every island has a three-mile zone around its shores. Thus, by existing law, where islands happen to lie within the three-mile zone measured from the mainland, the three-mile zone around each island would fall partly within and partly without the three-mile zone measured from the mainland. Of course, the portion of the island's zone that falls within the zone measured from the mainland does not change the legal status of the waters of the latter zone, because such are territorial already; but the rest of the island's zone, falling outside of the mainland's zone, adds to the sum total of the state's territorial waters.

But inasmuch as the Article of the draft convention under discussion distinguishes between an island inside and outside of the three-mile zone measured from the mainland, expressly endowing an outside island with "a special territorial sea for itself," it is to be assumed that a new method of delimitation is recommended for islands situated three miles or less from the mainland.

One possible interpretation that might be given to the Article as it stands is, that where islands are located within three miles of the mainland, the line to separate the high from the territorial sea shall be drawn three miles from the outermost island and *shall follow the sinuosities of the mainland*. (If the line were not to follow the mainland but to follow the sinuosities of the islands, the Article would not effect any change in the law; but a change of some kind was intended, as we have seen). But the difficulty with this interpretation is how the line shall ever return to three miles from the mainland. Once the line begins to follow the sinuosities of the mainland at a distance of three miles from an island, how and where shall the line drop back to three miles from the coast of the mainland?

The only other possible interpretation that this Article could receive is that it is meant to adopt the Scandinavian method of delimitation.⁶⁶ If this is the intention, the Article should be rendered more specific in its terms, and describe how the connecting base line is to be drawn from outermost island to outermost island and how all the sea is to be territorial for three miles seaward from the base line.

It would seem rather unwise to alter the present general practice of delimitation as radically as this Article apparently does. All that should be stated in the draft convention in respect to islands is, that *all natural islands in the sea not thereby constantly submerged shall possess a territorial zone of three miles measured from low-water mark of an ordinary neap tide.*⁶⁷

Let us now consider the second paragraph of Article 5. This reads as follows:

In the case of archipelagos, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the center of the archipelago.⁶⁸

⁶⁶The Scandinavian system is described *supra*, p. 460, n. 28.

⁶⁷If the Article in question does not intend to change the existing law, it should be revised to conform therewith in unambiguous language.

⁶⁸French text: "S'il s'agit d'un archipel, les îles qui le constituent seront considérées comme formant un ensemble, et l'étendue de la mer territoriale sera comptée à partir des îles les plus éloignées du centre de l'archipel."

This provision is borrowed from a draft project submitted by M. Alejandro Alvarez to the Stockholm meeting of the International Law Association in 1924.⁶⁹ On the surface, the provision seems a happy one, but on second thought, grave doubts arise. I should venture to suggest, despite the high source of this paragraph, that it adds only confusion to the general law of territorial waters. An archipelago is a general and somewhat vague conception; can anyone say where an archipelago begins and ends, or fix its center? If the archipelago is a dense one with numerous islands, a three-mile belt around each individual island will give virtually the same result, namely, that the waters of the archipelago as a whole will be territorial. If there should, however, be some high sea between more distant islands, no harm is done. The effort to codify the law of territorial waters should never lose sight of the principle of the freedom of the seas, and one should be twice careful before making territorial those waters that stand to-day as high seas. Furthermore, there has been no long demand, historically speaking, of a special rule for an archipelago. M. Alvarez seems to be the first to have urged one. And the vagueness of the term "archipelago" contributes a new subject for debate to the field of territorial waters, where the need is urgent for fewer such subjects. And what of the case where two or more governments possess islands in the same archipelago?

Closely related to the question of rocks and islands is the status of lighthouses built on piles or rocks. Thought on this subject has sometimes been confused.⁷⁰ Strictly, it is not the lighthouse that is im-

⁶⁹M. Alvarez' provision also appeared later in Project No. 10 (Art. 7) of the *Codification of American International Law*, as follows: "In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial sea referred to in Article 5 shall be measured from the islands farthest from the center of the archipelago." This Project No. 10 is one of several prepared at the request on January 2, 1924, of the Governing Board of the Pan American Union for the consideration of the International Commission of Jurists, and submitted by the American Institute of International Law to the Governing Board of the Pan American Union, March 2, 1925.

⁷⁰Sir Charles Russell in his argument before the tribunal in the Behring Sea controversy claimed complete territorial rights for a lighthouse built on piles or rocks even beyond the territorial waters proper of the littoral state. (J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, I, 900-901). Paul Fauchille agrees with Sir Charles Russell. (Paul Fauchille, *Traité de droit international public*, Vol. I, Pt. 2, Peace, p. 130). But Oppenheim and Westlake deny that lighthouses rank above lightships and argue against a territorial sea. (L. Oppenheim, *International Law*, 3rd ed., I, 341. John Westlake, *International Law*, Part I, Peace, 2nd ed., p. 190). Sir Graham Bower, on the other hand, would not refuse even a lightship a territorial belt, at least for neutrality purposes. (Sir Graham Bower, "Territorial Waters," *Journal of Comparative Legislation and International Law*, 3rd series, 1925, Vol. VII, pp. 137-141). In a recent American case, a beacon, built on an entirely submerged reef, was held to have no territorial value. *United States v. Henning*, 7 F. (2d) 488 (1925).

portant for territorial purposes, but the foundation. If the latter is natural, to the extent that any natural part of it is exposed at low tide, then such exposed land is entitled to a territorial sea. It would be entitled to such a belt in the absence of the lighthouse, provided it was not *res nullius*. But if the foundation is wholly artificial, it is not entitled to a belt. A nation should not be permitted to create maritime zones in the ocean by erecting at will artificial objects projecting above the water. Nor should a state in theory be allowed to enjoy an increased territorial zone consequent upon any artificial extension of the mainland. The general subject has probably been sufficiently dealt with by the Committee of Experts by specifying "natural islands" in Article 5 of the convention.⁷¹

The next problem in the delimitation of territorial waters is that of bays. The fundamental question here is whether a bay should be treated as a special case, or whether the general three-mile limit, should be applied around the shores within the bay. In the first place, what is a bay? The name bay has been given to bodies of water ranging from a mile square in area to hundreds of thousands of miles square. Again, the name gulf or sea may be given to a body of water smaller in extent than some so-called bay. Hence, it is evident that names and area do not aid in defining a bay. About all that can be said with certainty by way of definition is that a bay is a body of water indenting land and forming a part of some larger body of water.⁷²

Self-defense may have been the original motive for placing bays upon a special basis. Sovereign states undoubtedly considered it awkward, as well as dangerous, to have foreign warships enter the local harbors and bays. Then, too, a bay deeply indenting the land, especially if the entrance from the open sea was narrow, seemed by nature herself placed upon a different footing from the high seas. Such an arm of the ocean invited the exercise of sovereign power; such a bay seemed like a part of the very realm itself.⁷³ Thus, from

⁷¹Quoted *supra*, p. 469.

⁷²"Even if it be granted that bays are territorial under International Law, the definition of the term 'bay,' and the question at what point a bay ceases to be a bay, are amongst the thorniest and knottiest problems which the international jurist has to tackle." Ludovic J. Grant, "The King's Chambers," 31 *Law Quarterly Review*, 410-420, at p. 420 (1915).

⁷³*Lord Advocate v. Trustees of the Clyde Navigation*, 19 Court of Session Rep., 4th series, p. 174 (1891). Paul Fauchille distinguishes between the jurisdiction over bays and over ports, holding that in the case of the former, the three-mile limit always applies, in the absence of treaty, around the shores within the bay regardless of the extent of the opening towards the sea, and holding that in the case of ports, full and complete jurisdiction, equivalent to *dominium*, exists over all the waters. This distinction, he contends, is justified because bays are the creation of nature, but ports the work of man. As for myself, I find it im-

the earliest times many bays were regarded by municipal law as lying within the body of the nation and therefore completely subject to local jurisdiction.⁷⁴ The first rough standard employed to determine whether a given bay constituted a part of the realm was the extent of vision from headland to headland. Hale stated the rule thus: "That arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county."⁷⁵ East,⁷⁶ however, and Coke⁷⁷ held the rule to be "where a man standing on the side of the land may see what is done on the other." All these writers refer for their ultimate source to a case in 1314 or 1315 given in Fitzherbert's *Abridgement*.⁷⁸ Hale's statement is an inaccurate paraphrase from Fitzherbert.⁷⁹ The original rule, then, as cited by Fitzherbert, was that an arm of the sea lay within the county when a man standing on one shore could see what was being done on the other.⁸⁰ This rule has been correctly applied in several well-known American cases.⁸¹ But the standard of vision for bays is open to all the ob-

possible to agree with Fauchille in his distinction. First, ports are often not the work of man but are natural in every sense of the word. In many ports, excavation has been unnecessary to their complete utilization. Moreover, one could hardly determine by any rule of law the amount of manual labor necessary to raise a bay to the status of a port. Second, the adjudicated cases make no distinction between bays and ports, and hold both to form part of the realm provided their configuration will so warrant. Third, if a distinction were attempted, it would prove awkward in practice, because ships frequent both bays and ports for objects of trade; to distinguish between the two would require in each case the exercise of an arbitrary will. Fauchille advances his arguments in his *Traité de droit international public*, Vol. I, Pt. 2, Peace, pp. 387-395.

⁷⁴The historical question of the King's Chambers, although related to the problem of bays, has little in common therewith. The doctrine of the King's Chambers, by which in 1604, vast tracts of the ocean were subjected to English sovereignty by means of lines connecting the outermost headlands of England at whatever distance apart, was in reality merely another method under different guise of appropriating the high seas.

⁷⁵Sir Matthew Hale, *De jure maris et brachiorum ejusdem*, Ch. IV.

⁷⁶Edward Hyde East, *A Treatise of the Pleas of the Crown*, Ch. XVII, § 10.

⁷⁷Sir Edward Coke, *Reports*, Pt. XII, p. 81; Pt. XIII, p. 52.

⁷⁸Sir Anthony Fitzherbert, *La Grande Abridgement*, "Corone & plees del corone," 399. A search through the Year Books of Edward II, as edited for the Selden Society, does not reveal this case, decided by Hervey of Stanton, Justice of the Common Bench.

⁷⁹Thomas Jefferson fell into the same error. Jefferson to the Secretary of the Treasury, Sept. 8, 1804. P. L. Ford, *The Writings of Thomas Jefferson*, VIII, 319. (Cited by Crocker, p. 641).

⁸⁰Western Australia, according to Mr. T. H. Haynes, has advanced claim to all bays, the headlands of which are in sight of each other, thus following Hale's error. A. H. Charteris, "Claims of Territorial Jurisdiction in Wide Bays," 16 *Yale Law Journal*, 471-496, at pp. 479-480 (1907). The whole rule of vision as to bays was frowned upon in *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, [1877] 2 App. Cas. 394.

⁸¹*United States v. Grush*, 5 Mason's Rep. (U. S. C. C. A.) 290 (1829); *Commonwealth v. Peters*, 12 Metc. (Mass.) 387 (1847); *Dunham v. Lamphere*, 3 Gray (Mass.) 268 (1855).

jections urged against it for the open coast.⁸² Consequently, a fixed geographical distance has frequently been incorporated in modern treaties as being more satisfactory,⁸³ and this policy is adopted by the Committee of Experts in Article 4 of the draft convention in the following terms:

In the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea where the distance between the two shores of the bay is ten marine miles,⁸⁴ unless a greater distance has been established by continuous and immemorial usage. The waters of such bays are to be assimilated to internal waters.

In the case of bays which are bordered by the territory of two or more States, the territorial sea shall follow the sinuosities of the coast.⁸⁵

The above principle of ten-mile bays is not without its difficulties. Certain bays present a narrow entrance, ten miles or less in width, but then spread into a vast sea.⁸⁶ Is such a sea to form part of the realm? If a single nation occupied all the shores of the Black Sea, as was once the case, should the latter be considered as part of that nation merely because of the narrow entrance from the Mediterranean? Another difficulty arises when islands are situated in the mouth of a bay. Suppose one large island in a bay eleven miles from headland to headland; suppose the island leaves only two very narrow channels, one on each side, by which ships can enter the bay. Is the bay

⁸²See above, p. 467.

⁸³North Sea Fishery Convention of 1882; convention between Great Britain and Denmark, June 24, 1901, for regulating the fisheries outside territorial waters in the ocean surrounding the Farøe Islands and Iceland; agreement between the United States and Great Britain in 1912 adopting, with certain modifications, the rules and method of procedure recommended in the award of September 7, 1910, of the North Atlantic Coast Fisheries Arbitration; etc. See further, A. H. Charteris, "The Seaward Limit of Territorial Jurisdiction," 18 *Juridical Review* 288-292, at p. 291 (1906). Also see note in *Journal of the Society of Comparative Legislation and International Law*, n. s., Vol. 18, p. 304 (1918).

⁸⁴May I suggest the phrase "does not exceed ten marine miles" instead of "is ten marine miles"? Otherwise, the text of the Article would seem to refuse a line of closure where the distance between the outer headlands is less than ten miles.

⁸⁵French text: "Pour les baies, qui sont environnées de terres d'un seul Etat, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie, dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de 10 milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande. Les eaux de ces baies sont à assimiler à des eaux intérieures."

⁸⁶"Pour les baies, qui sont environnées de terres de deux ou plusieurs Etats, la mer territoriale suit les sinuosités de la côte."

⁸⁷For example, the Zuyder Zee.

territorial, and if so, what is the base line from which to calculate the outer territorial sea?⁸⁷

Little help is to be derived from a study of the cases, which only add to the prevailing confusion. Edmund Randolph in 1793 in the case of the ship *Grange* held that Delaware Bay was territorial because the United States was the only nation controlling the shores.⁸⁸ In 1866, Long Island Sound was held territorial because cannon planted on the *fauces terrae* could control the eastern entrance. The islands at the eastern extremity of the Sound were held to be the *fauces terrae*.⁸⁹ Again, prescription and jurisdiction exercised for a long period of time have served as bases for territorial claims to bays.⁹⁰ In 1885, the unsatisfactory precedent of the *Grange* in Delaware Bay was partly relied upon in the case of the *Alleganean* in the Chesapeake.⁹¹

Still another difficulty is the question of "bays" that are only slightly concave. When the coast for miles slowly bends in like a wide bow, but the bend is so gradual as to be almost imperceptible, is an infinite series of ten-mile base lines to be drawn in the bosom of the bow, despite the fact that the coast in question presents none of the normal characteristics of a bay? Moreover, is every little break in the shore-line to constitute a bay and warrant a base line across its headlands? It would seem that to hold either small breaks or wide and shallow concavities to be bays within the meaning of the rule, would amount in most instances to a nullification of the common law principle of low-water on the open coast. The solution would best be

⁸⁷An island situated at the mouth of a bay has at least twice in American cases been deemed to be the opposite shore. *United States v. Grush*, 5 Mason's Rep. 290 (1829); *Mahler v. Transportation Co.*, 35 N. Y. 352 (1866).

⁸⁸"The corner-stone of our claim is that the United States are proprietors of the lands on both sides of the Delaware from its head to its entrance into the sea." 1 Op. Att. Gen. 32, 34. But this is no reason; it amounts to more than fiat.

⁸⁹*Mahler v. Transportation Co.*, *supra*, n. 87.

⁹⁰Conception Bay: see *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, [1877] 2 App. Cas. 394. Long Island Sound: see *Mahler v. Transportation Co.*, *supra*, at p. 360. As to prescription, Dana has the following to say: "But, however long acquiesced in, such an appropriation is inadmissible, in the nature of things; and, whatever may be the evidence of the time or nature of the use, it is set aside as a bad usage, which no evidence can make legal. . . . And it may be said to be now *res adjudicata*, that the only question is whether a given sea or sound is in fact, as a matter of politico-physical geography, within the exclusive jurisdiction of one nation." Note 113 to Wheaton's *Elements of International Law*. The doctrine of prescription or immemorial usage is recognized by the Committee of Experts in Article 4, quoted above in the text.

⁹¹*Stetson v. United States*, Court of Commissioners of *Alabama Claims*, 32 Albany Law Journal 484 (1885). Long usage was also much relied upon.

left in the hands of each court passing on the merits of the particular case.⁹²

The chief remaining difficulty concerns a situation where two or more nations border on the same bay, which otherwise would be territorial.⁹³ In such a case the ten-mile rule, resulting in *dominium*

⁹²At least two methods of deciding this question have been suggested by writers. Professor George Grafton Wilson of Harvard has proposed the following legal definition of a bay: "Bays are bodies of water extending into the land a distance greater than that between the opposite shores when the opposite shores are not more than ten miles distant from each other."—Article 11 of his draft in the Report of Proceedings of the Third Annual Meeting of the American Branch of the International Law Association, (1924), p. 16. Cf. Romée de Villeneuve, *De la détermination de la ligne séparative des eaux nationales et de la mer territoriale spécialement dans les baies*, p. 242. Sir John W. Salmond suggests that "the true doctrine as to enclosed territorial waters is that all harbours, bays, gulfs, and estuaries are included within and form part of the adjacent territory if, having regard to their size and configuration in relation to that territory, it is reasonable to presume an intention on the part of the Crown or the legislature, as the case may be, in annexing the territory or in constituting it as a dependency of the Crown, to include those waters as part of that territory or dependency." Sir John W. Salmond, "Territorial Waters," 34 *Law Quarterly Review*, 235-252, at p. 248 (1918). The Hague Tribunal in 1910 in the North Atlantic Coast Fisheries Case expressed itself as follows: "This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule." George Grafton Wilson, *The Hague Arbitration Cases*, p. 182.

⁹³See Salvador R. Gonzáles, "The Neutrality of Honduras and the Question of the Gulf of Fonseca," *The American Journal of International Law*, 10:509-542 (1916). See ease of the schooner *Fame*, 3 Mason's Rep. 147 (1822), where Story, J., employed the principle of the *thalweg* in Passamaquoddy Bay, on which both Canada and the United States bordered. See also the ease of Costa Rica v. Nicaragua, *The American Journal of International Law*, 11:181-229 (1917). Another problem of some importance concerns the delimitation of territorial waters in the vicinity of the point on the shore at the termination of the land boundary of two adjoining states. It is obvious that a ship at a given time might be within three miles of the coast of both states. The solution would seem to be that the vessel should be considered in the territorial waters of the state whose coast it is nearer. For a discussion of this problem, consult Dr. Deszö Dárday, "Notes upon the Question of the Delimitation of Territorial Waters," International Law Association, 25th Report, 1908, pp. 547-556. An interesting decision in this connection was handed down by the Conseil des Prises in France, October 19, 1916. The Greek vessel *Zoodochos-Pighi*, seized by the French, August 31, 1915, in the canal of Chios at a less distance from the Turkish isle of Koumoutli, than from the coast of Chios occupied by the Greeks, was deemed to be in Turkish, and therefore enemy, waters. Paul Fauchille, *La guerre de 1914. Jurisprudence française en matière de prises maritimes*, p. 313. Still another question is the status of waters at the mouth of a boundary river. Manuel Roldan has treated this subject and shown the undesirability of the principle of the *thalweg* at the mouths of rivers like the Guadiana and Minho between Spain and Portugal, where the depth of the channel varies, navigation being forced first near one bank and then near the other. He argues in favor of a community of dominion over the mouths of boundary rivers, each state to appoint members on a joint committee to have charge of navigation at the mouth. See his paper in the Association internationale de la marine, Congrès de Lisbonne, 1904, pp. 314-317. See also, in

over the bay, would be inappropriate, because each state must by necessity have the right of innocent passage within the bay as against the other state or states. Since the right of passage is incompatible with the theory of *dominium*, it follows that these waters must be regarded as on a parity with any outer territorial zone, and this fact is recognized by the Committee of Experts in Article 4 quoted above. It would seem, however, that in the case of secondary bays (*i. e.*, a bay, indenting a single nation, within a bay, on which one or more other nations border), the rule of *dominium* would be applicable, unless ships from the sea could not have access to one of the nations except by navigating the secondary bay.⁹⁴

In concluding this section on the delimitation of territorial waters, it is necessary to say a few words on the troublesome topics of straits and river mouths. If a strait is more than six miles wide throughout its length, a strip of high sea would ordinarily be deemed to run along the middle. If, on the other hand, the strait, in whole or in part, is less than six miles across, and the opposite shores are occupied by different nations, the principle either of the *thalweg* or of the *ligne médiane* would apply, and a vessel would be deemed in the territorial waters of either nation, depending on which side of the *thalweg* or *ligne médiane* it was navigating or was at anchor. But practice is not uniform. In the Strait of Fuca, the boundary between Canada and the United States is carried across a space of water thirty-five miles long and twenty miles wide, and then extends for fifty miles down a strait fifteen miles wide to the Pacific.⁹⁵ If the opposite shores of a strait less than six miles across are held by the same nation, it would seem that such strait, nevertheless, could not be considered as part of

this connection, Ernest Nys, "Rivières et fleuves frontières.—La ligne médiane et le thalweg. Un aperçu historique," *Revue de droit international et de législation comparée*, 33:75-88 (1901).

⁹⁴On the general subject of bays, see, in addition to the works already cited, Charles Noble Gregory, "The Recent Controversy as to the British Jurisdiction over Foreign Fishermen more than Three Miles from Shore: Mortensen v. Peters," *The American Political Science Review*, 1:410-437 (1907). L. Oppenheim, "Zur Lehre von den territorialen Meerbusen," *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1:579-587 (1907). A. H. Charteris, "Recent International Disputes Regarding Territorial Bays," *International Law Association*, 27th Report, 1912, pp. 107-127. P. T. McGrath, "The Hudson Bay Dispute," *The Fortnightly Review*, n.s., 83:125-136 (1908). Thomas W. Balch, "Is Hudson Bay a Closed or an Open Sea?" *The American Journal of International Law*, 6:409-459 (1912). Same author, "The Hudsonian Sea is a Great Open Sea," *Ibid.*, 7:546-565 (1913). Same author, "The Legal Status of Hudson's Bay," *The Annals of the American Academy of Political and Social Science*, 45:47-55 (1913). Sir Cecil J. B. Hurst, "The Territoriality of Bays," *The British Year Book of International Law*, 1922-23, pp. 42-54. Anon., "Territorial Jurisdiction in Wide Bays," *41 American Law Review*, 743-746 (1907). Anon., "United States Rights in British Bays," *31 Canadian Law Times*, 289-298 (1911).

⁹⁵By the arbitral award of the German Emperor in 1873. W. E. Hall, *A Treatise on International Law*, 8th ed., pp. 195-196.

the realm, like a bay, unless it is merely the entrance to a basin serving as a bay, which is also surrounded by the territory of the Power controlling the shores of the strait.⁹⁶ On the other hand, if two or more Powers border on such inland basin or bay, and the shores of the strait forming a narrow entrance thereto are entirely controlled by one nation, this nation has no right to shut the strait. In such a situation, the strait would be on the same basis as outer territorial sea. *A fortiori* a strait would be like outer territorial sea if connecting two high seas, for the reason that it would constitute a maritime highway and be subject to the right of innocent passage.⁹⁷ This right, of course, is conditioned upon the observance of reasonable regulations made by the littoral state, and the commission of no hostilities while in the neutral waters.⁹⁸

The sixth Article of the draft convention of the Committee of Experts treats of the régime of straits. It reads as follows:

The régime of straits at present subject to special conventions is reserved. In straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds ten miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding ten miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line.⁹⁹

This Article is evidently drawn to correspond with the Article on bays, in that the ten-mile rule is carried over and applied to straits. There would seem slight objection to this if it were not for doubts as to the status of waters between a large island and the mainland. Such narrows, any atlas will show, are time and again denominated straits; and if the proposed ten-mile rule were applied, the

⁹⁶John Westlake, *International Law*, Part I, Peace, 2nd ed., p. 197.

⁹⁷G. de Rayneval, *Institutions du droit de la nature*, I, 298.

⁹⁸On the question of straits, see M. le Comte de Penha Garcia, "Régime des détroits et des canaux narritimes," *Union Interparlementaire. Compte-rendu de la XVIII^e Conférence tenue à La Haye du 3 au 5 septembre 1913*, pp. 51-89, 175-192. J. G. Guerra, "Les eaux territoriales dans les détroits spécialement dans les détroits peu larges," *Revue générale de droit international public*, 31: 232-254 (1924). J.M. Abribat, *Le détroit de Magellan au point de vue international*, Paris, 1902. Rudolf Edler von Laun, *Die Internationalisierung der Meerengen und Kanäle*. The Hague, 1918. Ernest Nys, *Le droit international*, Vol. I, Ch. V. Brussels and Paris, 1904. Paul Godey, *La mer côtière*, pp. 26-34. Paris, 1896. Paul Fauchille, *Traité de droit international public*, Vol. I, Pt. 2, Peace, pp. 246-285. Paris, 1925.

⁹⁹French text: "Le régime des détroits, actuellement soumis à des conventions spéciales, demeure réservé. Dans les détroits dont les côtes appartiennent au même Etat, la mer est territoriale, bien que l'écartement des côtes dépasse 10 milles, si, à chaque entrée du détroit, cette distance n'est pas dépassée.

"Les détroits, dont l'écart n'excède pas 10 milles et dont les côtes appartiennent à des Etats différents, font partie de la mer territoriale jusqu'à la ligne médiane."

anomalous situation would develop of all waters between an island and the mainland being held territorial when the nearest shores of the island are perhaps ten miles from the mainland. Thus, the terms of Article 5 dealing with islands would be contradicted. The shore of the island in question would lie seven miles beyond the zone of sovereignty measured from the mainland, and yet all the intermediate waters by Article 6 would be considered territorial. In view of these considerations, it would seem advisable to substitute six miles for ten miles in Article 6.

The last problem we shall consider is that of river mouths, or *embouchures*.¹⁰⁰ Only a few general observations, limited to national rivers, will be made concerning this intricate question.¹⁰¹

It is rare to find the banks of a river parallel to the end and cutting more or less of a right angle with the coast; generally a river spreads, and the mouth resembles the configuration of a bay. If, however, a river retains its parallel banks when it empties into the ocean, and at the same time the headlands are more than ten miles apart, the question is presented, where does the river end, and how far, if at all, may the sea be said to penetrate. If such a river empties into a territorial bay, then there is no difficulty, for it is all part of the realm, for international purposes. But where such a river empties into the sea on the open coast, a problem of jurisdiction at once comes up, because the outer territorial sea, according to generally accepted doctrine, does not form part of the realm. In such a case, which admittedly would be extremely rare, it would undoubtedly be held that the river was a river to the end, no matter what its width at the mouth; and a line from headland to headland would separate the *dominium* of the river from the *imperium* of the outer territorial sea.

Take the more common case of a river parallel to the end, but less than ten miles wide at the mouth, and emptying into the sea on the open coast. Here the river is river to the end, and a line from headland to headland would mark the jurisdictions, as in the case of the river more than ten miles wide.

Take now the ordinary case of a river spreading its shores into the form of a bay. The bay should be treated like other bays, and if determined to be territorial, it follows that everything landward from the line of closure is territorial.

¹⁰⁰There is no Article on this subject in the draft convention.

¹⁰¹In regard to international rivers, see G. Kaeckenbeeck, *International Rivers*. Grotius Society Publications, No. 1. London, 1918. See also, Report on Danube Navigation Submitted to the Advisory and Technical Committee for Communications and Transit of the League of Nations, by Walker D. Hines. Geneva, Aug. 20, 1925.

One possible case remains. The parallelism of the banks of the river is interrupted, and there is presented a wide expanse of water in the shape of a basin or lake, and then the parallelism is resumed to the outer sea. In this case, if the second parallel state is at all reasonable in length, the stream is a river throughout, for international purposes, regardless of the salinity of the water in the basin, the presence of tides, or the nature of the vegetation on the shores.¹⁰²

¹⁰²A suggestive article on the subject is by Léon Aucoc, "De la délimitation du rivage de la mer et de l'embouchure des fleuves et rivières," *Annales de l'école libre des sciences politiques*, 2: 1-36 (1887).