The Issue of the Delimitation of Multi-State Bays in the International Law of the Sea

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The issue of delimitation of bays was one of the complex issues in the law of the sea which has been subject to extensive debate among States since early this century. It was in the First United Nations Conference on the Law of the Sea (UNCLOS I) that States finally reached agreement on a set of rules to govern the delimitation of bays. Although these rules were incorporated into the 1958 Convention on the Territorial Sea and Contiguous Zone (TSC)[1] for the first time, they were to be applied only to single-State bays, that is bays which were bordered by a single State. No rules were included to clarify the uncertainty over the issue of the delimitation of multi-State bays. This uncertainty resulted in both a divergence of views among States, and the division of publicists on this issue. The issue was, in fact, left to be governed by the status quo and customary international law. The main problem, however, was the uncertainty which existed in customary international law with respect to the issue of the delimitation of multi-State bays.[2] Although there is a prevailing trend with respect to the status of multi-State bays, it seems that efforts should be made to codify uniform rules governing the delimitation of these bays.

Delimitation of Single-State Bays

There are established provisions of the law of the sea dealing with bays located on the coasts of a single State. These bays are subject to the sovereignty of the coastal States concerned. There is no right for foreign vessels to be in these bays, because they are regarded as internal waters. Access to these bays is subject to the consent of the coastal State concerned. Before analysing the issue of the delimitation of

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1 Convention on the Territorial Sea and Contiguous Zone, Geneva, 1958. 1964 516 UNTS 205. Adopted by the UNCLOS I on 29 April 1958. Entered into force on 10 September 1964.

2 The case of historic bays also presents similar difficulties, though these bays are subject to different rules.

multi-State bays, it is necessary to clarify how these bays are delimited and define the rules governing this delimitation. This is important, particularly if it is recognised that the delimitation of the multi-State bays can be subject to the rules governing the delimitation of single-State bays.

The delimitation of the single-State bays is governed by provisions of Article 7 of the TSC and Article 10 of the 1982 United Nations Convention on the Law of the Sea[3] (LOSC).[4] As Article 7(1) of the TSC (Article 10(1) of the LOSC) provides that these provisions relate 'only to bays the coasts of which belong to a single State'. There are definitional criteria for identifying juridical bays which are provided in Article 7(2) of the TSC (Article 10(2) of the LOSC). According to this provision, a bay is defined as:[5]

> a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast.[6] An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that

3 United Nations Convention on the Law of the Sea, Montego Bay (1982) 21 ILM 1261. Adopted by the Third United Nations Conference on the Law of the Sea (UNCLOS III) on 10 December 1982, it entered into force on 16 November 1994.

4 It should be noted that the enclosure of true bays is a right and not an obligation. This means that any State may wish to establish the method of low-water mark with respect to the baseline within bays. In general, however, no State appears to have excluded itself from enjoying the right to enclose its bays in accordance with the international positive law.

5 The above-mentioned definition of a bay was first suggested by the International Law Commission (ILC) to the UNCLOS I and was then incorporated into Article 7(1) of the 1956 ILC draft articles. Article 7 of the 1956 ILC Draft was reprinted in M P Strohl, *The International Law of Bays* (Martinus Nijhoff, 1963) p 224. It is emphasised that '[t]his definition [definition of "bay" in Article 7(2) of the TSC and Article 10(2) of the LOSC] is purely legal and is applicable only in relation to the determination of the limits of maritime zones. It is distinct from and does not replace the geographical definitions used in other contexts'. Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of the Sea - Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989) p 50.

6 Shalowitz states that this part of the definitional criterion of a legal bay 'sets forth the important concept of landlocked waters, or waters situated within the body of the land, for an indentation to qualify as a bay'. A L Shalowitz, *Shore and Sea Boundaries* Vol.2 (United States Government Publishing Office, 1964) pp 218-219. Prescott writes that '[t]he reference to a bay being a well-marked indentation and more than a mere curvature of the coast convey the same message'. J R V Prescott, *The Maritime Political Boundaries of the World* (Methuen & Co Ltd, 1985) p 51. For example, Prescott mentions that the Brunei Bay is a well-marked indentation while there is a gentle curve in the east of Tanjong Baram which cannot be considered a bay under the TSC's definition of a bay. Ibid.

> of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

This definition of a juridical bay is made upon two main criteria: the geographical criterion and mathematical criterion.[7] The first part of the definition reflects the geographical test and the second part of the definition reflects the geometric test. The geographical criterion is applied to assist in finding that an indentation is not a mere curvature of the coast. To find whether an indentation is a mere curve or a true bay from a geographical viewpoint, three guidelines are suggested:

- Firstly, the indentation should be 'well-marked'.
- Secondly, the ratio of the depth of the penetration to the width of the indentation should be such that the indentation is surrounded by land mass, except at its mouth.
- The third element is that the indentation should contain land locked waters. 8 This element is, in fact, associated with the second element in the sense that if the indentation has a deep penetration into the land, it will probably contain landlocked waters.

Although the geographical criterion gives an overall evaluation of an indentation as a bay or as a mere curve, it is unable to provide a final solution in the cases where there are different views as to whether a

7 In its commentary, the ILC maintained that the provision on the definition of a bay established 'the conditions that must be satisfied by an indentation or curve in order to be regarded as a [legal] bay'. See the ILC's Commentary on Draft Article 7, [1956] 2 *Yearbook of the International Law Commission* 269. (Hereinafter ILC's Commentary on Draft Article 7, (1956)) In the *United States v Louisiana Case* (Louisiana Boundary Case, 1969) the Court disagreed with Louisiana's view that it is sufficient for a bay only to satisfy the semi-circle test to be considered as a bay. The Court described the semicircle test as 'a minimum requirement' and held that other requirements should be met. These requirements, among others, are that an indentation should be well-marked and to enclose landlocked waters. *United States v Louisiana* (Louisiana Boundary Case, 1969) 394 US 11 at 54 (1969), 22 L Ed 2d 44 at 79 (1969).

8 As one author points out, the conventional provisions present no guidance to find how landlocked an indentation should be to be distinct from a mere curve. Shalowitz, note 6 above, at p 219. As one author points out the term 'landlocked waters' should be interpreted liberally because this term in its literal meaning implies that a bay should have 'an entrance channel from the sea that is curved in such a manner as to enter upon a body of water that is truly landlocked'. If only this literal meaning is taken into account a few bays in the world will fall into the meaning. Examples of the bays which may satisfy the character of landlocked waters are Purvis Bay (Solomon Islands); the Gulf of Corinth (Greece); Trandheimfjord (Norway); Galveston Bay (Texas); the North Gulf of Evvoia (Greece); Port Philip Bay (Australia); and Lake Maracaibo (Venezuela). Strohl, note 5 above, at p 56.

particular indentation is to be considered a bay or a mere curve.[9] Such a determination has a significant effect since there are different legal regimes for the delimitation of internal waters and the territorial sea on the basis of the nature of the indentation. For these reasons, a mathematical criterion was designed to give a more precise and practical solution in cases of uncertainties over the legal nature of a coastal indentation. The mathematical method was in a sense introduced to prevent any abuse by coastal States in enclosing mere curvatures of the coast.[10]

The essence of the mathematical criterion is the application of a semi-circle test.[11] This quantitative formula is used to accurately find the character of an indentation on a mathematical basis for legal purposes. To apply the semi-circle test, the first step is to draw a line across a bay which links the natural entrance points on the shores.[12] Then a semi-circle, whose diameter is the line drawn across the bay, will be drawn within the bay. If the area of water within the bay is as large as, or larger than, the area of the semi-circle, the bay will be a juridical bay which then will be subject to other provisions on the delimitation of bays. The area of an indentation or a bay, for the purpose of comparing its size with the semi-circle, is defined as the water area 'lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural en-

9 The ILC was aware of this problem and provided a geometric solution. In fact, in its commentary view, the ILC stated that: '(3) ... The majority [of the ILC] considered that it was not sufficient to lay down that the waters must be closely linked to the land domain by reason of the depth of penetration of the bay into the mainland, or otherwise by its configuration, or by reason of the utility the bay might have from the point of view of the economic needs of the country. *These criteria lack legal precision.* (4) The majority of Commission took the view that the maximum length of the closing line must be stated in figures and that a limitation based on geographical or other considerations, *which would necessarily be vague,* would not suffice...' ILC's Commentary on Draft Article 7 (1956), note 7 above, at p 269 (emphasis added).

10 This view was explicitly expressed by the ILC when it commented that the provision on the definition of a legal bay 'was calculated to prevent abuse'. Ibid.

11 As Prescott asserts, in a strict legal sense the semi-circle test 'should only be applied after it has been decided that the bay is a well-marked indentation'. Prescott, note 6 above, at p 53.

12 As Brown writes, at this stage 'the length of the line drawn across the mouth of the indentation (whether, in particular, it is more or less than 24 miles) and the size of the area enclosed by the line are irrelevant'. E D Brown, *The International Law of the Sea* Vol.1: Introductory Manual (Dartmouth, 1994) p 28.

trance points'.[13] If there are islands located within an indentation, they are included as part of the water area within the indentation.[14]

When it becomes clear that an indentation, which satisfies the semi-circle test, may be described as a legal bay, then the rules on the enclosure of bays apply to it. The question as to whether a legal bay may entirely or partially be enclosed depends on the distance between natural entrance points on the shores of such a bay. If this distance is not longer than 24 nautical miles, then a closing line[15] up to maximum of 24 nautical miles may be drawn between low-water marks on the shores to enclose the whole area of the bay.[16] In this case, all waters within the bay are parts of the internal waters of the coastal State.[17] Where the distance exceeds the limit of 24 nautical miles, a line with the length of 24 nautical miles will be drawn across the bay 'in such a manner as to enclose the maximum area of water that is

13 Article 7(3) of the TSC (Article 10(3) of the LOSC).

14 Article 7(3) of the TSC (Article 10(3) of the LOSC). As early as 1930, the Swedish Government, inter alia, asserted that 'islands situated at the entrance of a bay should also be regarded as forming part of the bay'. 'Part of Reply of the Swedish Government to the Questionnaire 2 of the Committee of Experts (1926)' in S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* Vol.2. (Oceana Publications Inc, 1975) p 262. In its 'Observations' to the Basis of Discussion No.6, the Preparatory Committee of the 1930 Hague Convention viewed that 'where islands belonging to the coastal State lie at the entrance of a bay, the breadth of the opening of the bay is to be measured from the coast to the island or from one island to another'. Id at 263. Strohl states that the provision of Article 7(3) of the TSC (Article 10(3) of the LOSC) 'would appear to favor the littoral State in converting bay waters into internal waters'. Strohl, note 5 above, at p 61. In the *United States v Louisiana Case* (1969), the United States Supreme Court stated that the purpose of the provision of Article 7(3) of the TSC is to prevent islands within bays 'to defeat the semi-circle test by consuming areas of the indentation'. *United States v Louisiana* 394 US 11 at 53 (1969), 22 L Ed 2d 44 at 78 (1969). Edeson is of the view that permanent harbour works should also be taken into account as part of the indentation for the purpose of the application of the semi-circle rule. For reasons on such interpretation see W R Edeson, 'Australian Bays' in (1968-9) 5 *Australian Yearbook of International Law* 5, 37.

15 A 'closing line' is defined as 'the line marking the boundary between internal waters of a bay and the marginal bet [territorial sea]. It is used where the boundary is drawn between the natural entrance points'. Strohl, note 5 above, at p 70. It is also maintained that a straight baseline is applied for the same purpose as the closing line for bays, but that the closing line is used to distinguish between the boundary when drawn with respect to a juridical bay with the boundary created by the straight baseline. Id at 71.

16 Article 7(4) of the TSC (Article 10(4) of the LOSC).

17 This is because a legal bay can be excluded from application of the normal low-water mark rule and a deviation from this rule can be justified.

possible with a line of that length'.[18] In this case a question arises as to whether the area enclosed by a line of 24 nautical miles should also satisfy the semi-circle test.[19] It seems that no such requirement exists since no conventional rule provides the double application of the semi-circle test with respect to an indentation as a legal bay. It should also be added that the use of a 24 mile line in the case of bays whose mouths are larger than 24 miles does not always follow the fact that such a line should link one headland to the other. This means that in some cases there only exists a need to find one natural entrance point on the shore as a terminus point, while the other base point is not located on the other shore but on the water within the bay. This applies if no closing line with the length of 24 nautical miles can be constructed by linking two points on the shore. In a sense, in such cases the 24 mile line is independent of the rule to adjoin two natural entrance points.

If a bay does not meet the geographical and mathematical requirements, it will not be a legal bay under Article 7 of the TSC (Article 10 of the LOSC), irrespective of the width of its entrance. Therefore, the bay would not be a legal bay and its waters are not internal waters over which coastal States have exclusive sovereignty. If, however, the mouth of the bay is more than 24 nautical miles and the bay cannot be enclosed by a closing line of 24 nautical miles in length, the waters

[18] Article 7(4) of the TSC (Article 10(4) of the LOSC). It was the ILC which first suggested that if the mouth of a legal bay is wider than the maximum permissible width (in its draft fifteen miles), the closing line should be drawn in a way to cover as much water as possible to be enclosed. In this connection, the ILC commented that this rule will in practice be applied to the cases where it is possible to draw more than one closing line of the same length across the mouth but on different parts of the shores. See Commentary [1955] 2 *YILC* Vol.II 37. Also see *Report of the International Law Commission to the General Assembly*, UNGAOR Vol.11, Supplement No.9, UN Doc. A/3159, at p 16 (1956). In short, there are three stages for identifying an indentation as a legal bay. The indentation should first meet the definitional criterion. Secondly, it should comply with the measurement rules. Finally, it should be enclosed by a closing line of maximum 24 nautical miles in length.

[19] Shalowitz argues that in the case of bays whose mouths are larger than 24 miles, that part of the bay which is enclosed with a line of 24 miles should also meet the requirement of the semi-circle test. See Shalowitz, note 6 above, at pp 220 and 222-223. For a discussion of this issue and the opposite view see G Westerman, *The Juridical Bay* (Oxford University Press, 1987) pp 170-175. For opposite view see Edeson, note 14 above, at pp 41-42. With respect to the relevance of the issue to Australia, Edeson writes that: 'The question could become important to Australia as the Gulf of Carpentaria has the configuration of a bay but considerably exceeds the maximum width. A 24 mile baseline drawn within the Gulf under paragraph 5 [of Article 7 of the TSC] to enclose the maximum area of internal waters conceivably may not satisfy the semi-circle test. Id at 42.

inside the bay may have two separate legal status. Those waters covered by the closing line will be internal,[20] and the other parts of the bay will be part of the territorial sea (up to 12 nautical miles from the low-water mark), where there is a recognised right of innocent passage for foreign ships, even though the area may not be of interest for international shipping. This right is reserved for peaceful passage.

As is clear, in the case of bays whose mouths are larger than 24 nautical miles and which meet the semi-circle test, a line is drawn within the bays to enclose the entire bays or some portion of them.[21] This line is termed a 'straight baseline' in Article 7(5) of the TSC (Article 10(5) of the LOSC). It appears that the term 'straight baseline' was used by the drafters of the TSC to distinguish between the line which is drawn in the case of bays larger than 24 nautical miles in width and the closing line which is employed to enclose bays with a maximum of 24 nautical miles in width.[22] However, the use of the term 'straight baseline' in the context of delimitation of bays can cause confusion with the straight baseline systems which are used in the case of deeply indented and cut off coasts or coasts with fringing islands.[23] Although in both cases the baselines are used for the purpose of separating internal waters from the territorial sea, they are two different methods of delimitation designed for different coastal features. To resolve this problem of terminology, and to avoid the confusion caused by the use of similar term, one author suggests the term 'boundary line' to replace the term 'straight baseline'.[24] By doing so, Article 7(5) of the TSC (Article 10 (5) of the LOSC) would read:

> Where the distance ... exceeds twenty-four miles, an *internal waters boundary line* of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

20 Churchill and Lowe state that 'around the unclosed part of the bay the baseline will be the low-water mark (unless any of the features that justify a different baseline are present)'. R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 1983) pp 31-32.

21 This is in the cases where there are no other base points on the shores to construct a 24 nautical mile closing line and the geographical circumstances are in a way that the bay cannot be enclosed by a line with the maximum length of 24 nautical miles.

22 Compare Article 7(5) of the TSC (Article 10(5) of the LOSC) where the term 'straight baseline' is used with Article 7(4) of the TSC (Article 10(4) of the LOSC) where the term 'closing line' is used.

23 See Strohl, note 5 above, at p 71.

24 Westerman, note 19 above, at p 162.

General Rules Governing Multi-State Bays

Although there are long established rules governing the delimitation of single-State bays, there is no general contractual provision governing bays with several coastal States (and also historic bays).[25] Why are single-State bays and multi-State bays subject to different legal rules? McDougal and Burke consider two factors which distinguish a single-State bay from a multi-State bay: (a) although a multi-State bay is an indentation which penetrates into the land mass 'the political boundaries are such that the land territory does not compose one political entity',[26] and (b) a multi-State bay is 'very likely to be used for international transport' whether in the case of a foreign ship heading to a port of one of the riparian States, or travel within the bay from one riparian State to another.[27] In addition, Strohl is of the view that the fundamental difference between a single-State bay and a multi State bay is that in the case of a single-State the littoral State 'exercises sovereignty *erga omnes*' while in the case of a multi-State bay, the bordering States 'are, by their geographical proximity, forced to share the shores of the bay'.[28]

The discussions on multi-State bays indicate that two issues constitute the core of debates on their legal aspects: (a) whether multi-State

[25] According to Article 7(6) of the TSC and Article 10(6) of the LOSC, the provisions of these Articles 'do not apply to so-called "historic" bays'. Claims to historic bays not only include bays located in a single State but may include bays shared with more than one coastal State. The number of claims in the former case is much higher than in the latter one.

[26] In this connection, Strohl writes that '[b]y reason of the differences in geography, natural resources, economy, and political structure, the bay in question *may* be of greater importance to one of the littoral States than to another: one might have a port elsewhere and the other State might have its only port on the bay in question. One State may be sovereign over most of the shore line while another is sovereign over very little. One State may have a rich hinterland and the other a very poor one. The two or more States may, respectively, pursue policies that are antithetical'. Strohl, note 5 above, at p 372.

[27] M S McDougal and W T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Second Printing, Yale University Press, 1965) p 438. With respect to the second factor, McDougal and Burke are of the view that 'no single state of those surrounding an indentation can be considered competent to incorporate all the area as internal waters, or, for that matter, as territorial sea'. They add that '[n]or should any factional group of these states be permitted to combine to claim these waters at the expense of another adjacent state'. Ibid. This latter part of their view seems to refer to the case of the Gulf of Aqaba where once access to the open seas through such Gulf was denied to Israel by the other coastal States bordering either side of the Gulf.

[28] Strohl, note 5 above, at p 372. As regards the problems which may arise with respect to a multi-State bay which may never arise in relation to a single-State bay, see Ibid.

bays are susceptible to enclosure, as is the case with legally qualified bays belonging to a single State; and (b) if multi-State bays cannot be enclosed on the basis of normal legal rules for bays bordered by a single State, whether multi-State bays can be claimed by their respective coastal States on the ground of historic title.[29] It should be noted that these two issues arise mainly in the case of those multi-State bays which are not covered by territorial seas of bordering States. Although no closing line is used in these cases, the waters of these multi-State bays are subject to the legal regime of the territorial sea where there is a right of innocent passage. This means coastal States have almost a full range of sovereignty over portions of these bays up to the boundary line (which is usually a median line), subject to recognition of the right of peaceful passage of foreign ships.

In general, bays with several coastal States are now considered as not being part of internal waters, though there have been different viewpoints among jurists and learned institutions on this issue. For example, Jessup was of the view that a bay with more than one coastal State 'is clearly not a part of the high seas, and is properly considered by the bordering states as their common property'.[30] Oppenheim did not consider these bays as the common property of the coastal Sates and wrote that 'all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, ... are in time of peace and war open to vessels of all nations'.[31] The Harvard Law School Research on Territorial Waters contained a provision that '[w]hen the waters of a bay or river-mouth which lie within the seaward limit thereof are bordered by the territory of two or more states, the bordering states may agree upon *a division of such waters as internal waters...*'.[32] The American Institute of International Law also

[29] As Bouchez views the main question which concerns the multi State bays as 'whether and to what extent it is desirable to limit the operation of the principle of the freedom of the seas' within these bays as well as within those bays claimed on historic title. L Bouchez, *The Regime of Bays in International Law* (A W Sythoff, 1964) p 15.

[30] P C Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (G A Jennings Co Inc, 1927) p 476.

[31] L Oppenheim, *International Law* Vol.1. - Peace, H Lauterpacht (Ed) (7th ed, Longmans, Green and Co, 1948) pp 460-461. Similar views have also been presented by contemporary authors. For example see, McDougal and Burke, note 27 above, at p 441, Churchill and Lowe, note 20 above, at p 33 and J Wang, *Handbook on Ocean Politics and Law* (Greenwood Press, 1992) p 9.

[32] McDougal and Burke, note 27 above, at p 441. (emphasis added)

held the view that the 'territorial sea follows the sinuosities of the coast, unless there exists a convention to the contrary'.[33]

According to a study undertaken for the UNCLOS I, *A Brief Geographical and Hydrographical Study of Bays and Estuaries the Coast of Which Belong to Different States*, there are more than forty multi-State bays in the world.[34] Multi-State bays with two bordering States are more common than those belonging to more than two States. The greater the number of coastal States around a multi-State bay, the more complex the legal situation within the bay may be. Examples of multi-States bays with two coastal States bordering them are Lough Foyle (between Ireland and the United Kingdom), the Bay of Figuier (between France and Spain), and Passamaquoddy Bay (between Canada and the USA).[35] Examples of multi-State bays with more than two coastal States are the Gulf of Fonseca (El Salvador, Honduras, and Nicaragua, where the headlands are controlled by El Salvador and Nicaragua), and the Gulf of Aqaba (between Egypt, Israel, Jordan, and Saudi Arabia, where the headlands are controlled by Egypt and Saudi Arabia).[36] (For a list of multi-State bays see Table 1.)

The study undertaken on bays bordered by several States also included the cases of bays where one of the coastal States has no shore on the headlands where the bay connects to the territorial sea or the high seas. In addition to the Gulf of Fonseca and the Gulf of Aqaba, the study showed that these bays include: (a) The Tanga Lagoon bordered by Ghana and The Ivory Coast where the latter controls the headlands; (b) Chetumal Bay in Central America, bordered by Honduras and Mexico where the latter controls the headlands.[37]

33 Id at p 442.

34 For information on various multi-State bays and estuaries see the survey made by Kennedy for the UNCLOS I. R H Kennedy, 'A Brief Geographical and Hydrographical Study of Bays and estuaries the Coast of Which Belong to Different States' UNCLOS I Official Records, Vol.1, Doc. A/CONF. 13/15, p 198ff. In addition to bays, the Study also included cases which are categorised as rivers and estuaries rather than being classified as bays. An example is the case of the River Schelde whose shores belong to the Netherlands.

35 Churchill and Lowe, note 20 above, at p 33.

36 In his eighth report as the special rapporteur (1956), Francois considered the case of the Gulf of Aqaba as an exceptional case and possibly unique. However, Strohl asserts that although the case of multi-State bays where one bordering State has no control over headlands is not very common and is an exceptional case, such a case is not unique to any of such particular bays. Strohl, note 5 above, at p 375.

37 Kennedy, note 34 above, at p 198ff.

Table 1 - A List of Multi-State Bays

Bay/Gulf/Estuary	Bordering States	Continent
Bay of Figuier (Hendaya)	Spain and France	Europe
Bay of Gwuttur	Persia and Pakistan	Asia
Bay of San Juan del Norte (on the Caribbean Sea)	Costa Rica and Nicaragua	America
Chetumal Bay	Belize and Mexico	America
Dixon Entrance	Alaska (USA) and Canada	America
Dollart	The Netherlands and Germany	Europe
Ems	The Netherlands and Germany	Europe
Estuary of Gambia River	Gambia and Senegal	Africa
Estuary of Río Muni	Equatorial Guinea and Gabon	Africa
Estuary of the Sundarbans (Hariahanga and Rimangal Rivers)	India and Pakistan	Asia
Estuary of Tana or Tendo River	Ghana and Côte d'Ivoire (Ivory Coast)	Africa
Flensburger Fjord	Denmark and Germany	Europe
Fundy Bay	Canada and the United States of America	America
Gulf of Aqaba	Egypt, Israel, Jordan, and Saudi Arabia	Asia
Gulf of Fonseca	El Salvador, Honduras, and Nicaragua	America
Gulf of Menton	France and Italy	Europe
Gulf of Paria	Venezuela and Trinidad and Tobago	America

Gulf of Sollum	Libya and Egypt	Africa
Gulf of Trieste	Italy and Croatia	Europe
Head of Bottenviken	Finland and Sweden	Europe
Honduras Bay	Honduras and Guatemala	America
Jdefjord	Sweden and Norway	Europe
Khor Abdullah	Iraq and Kuwait	Asia
Kuski Zaliv (Kurisches Haff)	Poland and Lithuania	Europe
Lough Carlingford	Irish Republic and Northern Ireland	Europe
Long Foyle	Irish Republic and Northern Ireland	Europe
Macão Area	Macão and China	Asia
Manzanillo Bay	Haiti and Dominican Republic	America
Panguapi Bay	Colombia and Ecuador	America
Passamaquoddy Bay	Canada and the United States of America	America
Rio de la Plata	Uruguay and Argentina	America
Salinas Bay (on the Pacific coast)	Costa Rica and Nicaragua	America
San Juan del Fuca Strait	Canada and the United States of America	America
Viro Lachti Area	Finland and Russia	Europe
Wester Schelde	The Netherlands and Belgium	Europe
Zalw Wislany (Frisches Haff)	Poland and Lithuania	Europe

Source: Bouchez note 29 above, at p 118-170. For State practice concerning the above-mentioned multi-State bays and some other bays see ibid.

A number of other bays are also mentioned among multi-State bays. These include Lübecker Bucht, Travemünder Reede, Bay of Kleh, Sibuko Bay, Cowie Bay, Deep Bay, and Mirs Bay.

It should be noted that political geography of the world has changed since 1964 (when Bouchez wrote his book). Accordingly, some of the said multi-States bays are presently located in the territory of one State. For example, the Sibuko bay is now part of the Philippines and falls into the category of single-State bays. This is also the case for Deep Bay and Mirs Bay (between Hong Kong and China) after the return of Hong Kong to China. In addition, bays such as Green Bay (between the American States of Michigan and Wisconsin), Mississippi Sound and Lake Borgne (between the American States of Mississippi and Louisiana) are part of the USA and do not fall into the categories of multi-State bays because the American States are not independent countries.

The Bay of Fundy is another example of a multi-nation bay. It is bordered by Canada and the United States of America. Although the Canadian coast covers most of the shores of the bay, a limited area of its coastline belongs to the United State of America. However, these States each control one of the two headlands. In the case of the *Washington* (an American ship which was seized by a Canadian patrol ship within the Bay of Fundy, ten miles from the Canadian shore on 10 May 1843) the main question was to find whether the Bay of Fundy is a territorial bay or part of the high seas. Since the Claims Commission established under the Anglo-American Convention of 8 February 1853 could not resolve the dispute, the case was referred to an umpire, Mr Joshua Bates, to present the final opinion.[38] The umpire referred to the fact that one of the headlands was located in the territory of the United States of America, and that the bay was not entirely surrounded by Canadian land territory. In concluding his arguments for finding the Bay of Fundy as part of the high seas, the umpire relied on two main facts: (a) the large size of the bay, which prevented claiming the bay as a restricted body of waters; and (b) the existence of two States bordering the bay, even though one only controlled a small portion of the shores of the bay.[39]

38 Strohl, note 5 above, at p 381.

39 Id at 382. For more detailed information on the case see J B Moore, *International Arbitrations (History and Digest of International Arbitrations to which the United States has been a Party)* Vol.IV (US Government Printing Office, 1898) pp 4342-3, and J B Moore *A digest of International Law* Vol.1 (US Government Printing Office, 1906) pp 785-787.

Strohl considers the Gibraltar Bay as one of those belonging to two States (Spain and Britain) since Britain seized the Rock (Gibraltar) as part of the shore of the bay in 1704.[40] This bay is about five miles wide at its mouth between Europa Point and Carnero Point. The bay is as deep as six miles. The main ports on the shores of the bay are the Spanish port of Algeciras and the British port of Gibraltar.[41] The bay is not included among the forty-eight bays mentioned by Kennedy in his study on bays with several States.

The Issue of the Multi-State Bays at the 1930 Hague Conference for the Codification of International Law

At the 1930 Hague Conference, the issue of multi-State bays was not discussed by many States.[42] However, it seems that the issue was addressed more than at any other future conference especially designed for the codification of rules on the law of the sea. Those which presented their views on the issue of multi-State bays at the 1930 Hague Conference took different positions as to what should be the rule for the baseline of these bays. The two main approaches were: (a) that territorial waters should be measured from a low-water mark along the coast of States bordering a multi-State bay; and (b) that a multi-State bay may be enclosed, regardless of the width of its mouth, and the waters within the bay should be divided among the bordering States. As far as freedom of the seas was concerned, these views would produce different results. It is clear that these views primarily concerned those multi-State bays which were not overlapped by the territorial waters of bordering States. Some States referred to the method of delimitation for those multi-State bays which were, wholly or partly, overlapped by the territorial waters of States bordering such bays.

[40] The British rule over Gibraltar was ceded to Britain in accordance with Article X of the Treaty of Peace and Friendship between Spain and England in July 1713. The British rule over Gibraltar was confirmed by later treaties between the two countries: these included the Treaty of Sevill (1729), the Treaty of Aix-La-Chapelle (1748), and the Treaties of Paris (1763 and 1783). Strohl, note 5 above, at pp 385-386.

[41] The geographical information on the Bay of Gibraltar was extracted from Strohl, note 5 above, at p 383.

[42] Article 4 of the Draft Convention on Territorial Waters as Amended by M. Schucking the Rapporteur had, inter alia, provided that '[i]n 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'. Rosenne, note 14 above, Vol.2, Annex, at p 411.

Denmark favoured the enclosure of multi-State bays. It was of the view that '[t]he waters of bays whose coasts belong to two or more States must be divided among those States, either according to the general rule of international law, or, it may be, by treaty. The ten-mile rule does not apply automatically in such a case'.[43] On the other hand, Latvia was of the opinion that '[w]hen the coasts of a bay belong to more than one State, the territorial waters should follow the sinuosities of the coast or be fixed by conventional means'.[44] Japan also took the position that '[i]n the case of a bay or gulf the coast of which belongs to two or more States, the territorial waters follow the trend of the coast according to the general rule'. Considering three nautical miles as the breadth of territorial waters, it added that '[i]n those portions of such bay or gulf where the distance between the two coasts does not amount to six nautical miles, the dividing line between the respective territorial waters shall, as a rule, be the middle line measured from the two coasts'.[45]

Based on the replies of the governments to the issue of the delimitation of bays, the Preparatory Committee of the 1930 Hague Conference stated that '[w]here two or more States touch the coast of a bay, the Government replies are ... in favour of the method of measuring the breadth of territorial waters from the line of low-water mark along the coast'.[46] Accordingly, the Committee proposed the following basis of discussion for the issue of the delimitation of multi-State bays:[47]

> Basis of Discussion No.9
>
> If two or more States touch the coast of a bay or estuary of which the opening does not exceed ten miles, the territorial waters of each coastal State are measured from the line of low-water mark along the coast.

During the 1930 Hague Conference, there were again different views on the method of delimitation of bays bordered by more than one State. In response to the above basis of discussion, Denmark suggested that the reference to 'ten miles' should be replaced by 'six miles or less' and where this was the case, the multi-State bay would be under the exclusive authority of the coastal States bordering the

43 Rosenne, note 14 above, Vol.2, at p 258.
44 Id at p 260.
45 Ibid.
46 Observations, Id at p 263.
47 Id Vol.4, Annex I, at p 1381.

bay.[48] It further stated that the provision would not affect those multi-State bays which had already been delimited by existing treaties between States concerned.[49]

The Delegation from Great Britain and Northern Ireland also suggested the removal of 'ten miles' from the Basis of Discussion No. 9 and proposed that the following paragraph be added to its content: 'Where the width at the opening of the bay is less than twice the breadth of the belt of territorial waters, the territorial waters of each coastal State shall in principle extend as far as the median line'.[50] Iceland also suggested that a similar paragraph be added to the text of the Basis of Discussion No. 9.[51] The Delegation from the United States of America proposed that in the case of multi-State bays where the delimitation of territorial waters would result in 'a small area of high sea' within the bay that was wholly surrounded by territorial waters, this area would have the legal status of territorial waters of the bordering States.[52]

Since the discussion on multi-State bays did not concern many States, only a few States addressed the issue, and no definite rule resulted from the limited discussion on the issue. Although the Sub-Committee II of the Second Committee of the 1930 Hague Conference included in its report a provision on bays which belong to a single State,[53] the report did not include any provision on the issue of multi-State bays.[54] The Conference, subsequently, left the issue to be

48 Observations and Proposals Regarding the Bases of Discussion Presented to the Plenary Committee by Various Delegations, Id Vol.4, Annex II at p 1386.

49 Ibid.

50 Id at p 1390.

51 Id at p 1391.

52 Id at p 1403.

53 See Report of Sub-Committee No.II, Id, Vol.3, at pp 833-834.

54 This is also the case regarding historic bays. Judge Oda regarded the lack of reference to multi-State bays in the report of the Sub-Committee of the Second Committee as indicating that multi-State bays should follow 'the general rule whereby the territorial sea of each riparian State is measured from the State's own coastline'. He added that 'the lack of reference to an historic bay in those draft articles [in the report] was presumably due to the difficulty of generalizing historical elements that could have justified giving the status of a bay to certain coastal configurations which would otherwise not be regarded as bays because of their larger measurement at the mouth'. Dissenting Opinion of Judge Oda in the *Case Concerning the Land, Island, and Maritime Frontier Dispute* (El Salvador / Honduras: Nicaragua intervening), 1992 ICJ 732-761 at 742. (Hereinafter Dissenting Opinion of Judge Oda, 1992 ICJ.)

governed by customary international law: but this customary law was not reflective of a uniform treatment of multi-State bays.[55]

The UN Conferences on the Law of the Sea: The Lack of any Concrete Solution for the Problem of Multi-State Bays in Positive Law

Neither the ILC,[56] the UNCLOS I,[57] nor the UNCLOS III presented any definite answer to the question of the legal status of bays surrounded by two or more States.[58] This is why no provision on multi-State bays exists either in the TSC or the LOSC. McDougal and Burke believe that the content of the existing conventions on the law of the sea and the failure to provide provisions for these types of bays, supported the idea that 'the several states indented by a bay are not regarded as authorized jointly to claim these areas as internal waters as a single State could do in the same circumstances'.[59] Ac-

[55] Dupuy wrote that problems related to multi-State bays are associated with the nature of relations between the coastal States. Such a relationship is reflected in the practice of these States. He adds that '[e]ven when they are not engaged in conflict, the coastal States may experience difficulties in apportioning the waters of the bay among themselves'. R Dupuy 'The Sea Under National Competence' in R Dupuy and D Vignes, *A Handbook on the New Law of the Sea* Vol.1, Ch.5, (Martinus Nijhoff Publishers, 1991) p 267. As a general rule, all littoral States have the freedom of access to the bay, whether for the purpose of leaving the bay towards the high seas or vice versa. In the case of Gulf of Aqaba, Egypt and Saudi Arabia as the States located at the entrance attempted to deprive Israel from having access to the high seas through the Gulf of Aqaba, while a right of innocent passage for Jordan was not denied. This was the case until 1967 when Egypt and Israel signed the peace treaty of 26 March 1979 by which the Strait of Tiran at the entrance of the Gulf of Aqaba was recognised as international waterway. The case of Gulf of Aqaba is an example how the nature of the relationship between littoral States of a multi-State bays may affect the state of affairs in these bays. It is no longer possible for some littoral States bordering such bays to exclude the other littoral States.

[56] In its report of 1956, the ILC attributed the lack of any draft article on the delimitation of multi-State bays to the lack of data on the issue and of sufficient time to deal with the issue. See [1956] 2 YILC 269, para.7. However, as Prescott points out, no definite solution for this issue has so far been included in any international convention on the law of the sea. Prescott, note 6 above, at p 51.

[57] Although the Kennedy Study on multi-State bays was available at the time of the UNCLOS I, no provision was adopted to determine how multi-State bays should be treated. It seems that the UNCLOS I followed the view of the ILC that there was not sufficient data to present a definite rule for the issue of the delimitation of multi-State bays.

[58] At the UNCLOS II, the main discussions were focused on the issues of the breadth of the territorial sea and the fisheries zone. No debate was made on the issue of the multi-State bays.

[59] McDougal and Burke, note 27 above, at pp 442 and 443.

cordingly, the baseline in these bays is the low-water mark from which the maritime zones of the States bordering the bays are measured.[60] The lack of any special provision in the TSC and the LOSC applying to multi-States bays may also mean that multi-nation bays cannot be enclosed by the enclosure of their mouths.[61] These bays are similar to enclosed/semi-enclosed seas, in some respects, such as in regard to rights of navigation,[62] delimitation, marine environmental concerns, and security interests.

Bays enclosed by more than one State would only fall under the sovereignty of the coastal States concerned if it were recognised that these bays were historic waters.[63] This particularly has been the case with the Gulf of Fonseca. However, the question as to whether a multi-State bay can be qualified as an historic bay is controversial. When a bay with several coastal States is categorised as an historic bay, a number of questions arise concerning the establishment of a

60 Some commentators explicitly stated that 'if more than one state were involved (with respect to bays) the territorial sea must be delimited from the coastline of the indentation'. Id at 441.

61 Dixon states that bays with several States 'may not be capable of enclosure under customary law, unless a local custom or treaty between the neighbouring states establishes otherwise'. M Dixon, *Textbook on International Law* (Blackstone Press Limited, 1990) p 136. Dixon considers the possibility that a multi-State bay can be enclosed, if the littoral States would agree to do so. Also, Brownlie is of the opinion that the provision of Article 15 of the 1982 Convention (Article 12(1) of the 1958 Convention), is applicable to the bays bordered by two or more States. I Brownlie, *Principles of Public International Law* (4th ed, Clarendon Press, 1995) p 191. The provision refers to the application of the median line for the delimitation of the territorial sea of the opposite and adjacent States. This provision excludes its scope where there are historic rights, or special circumstances, or where there is an agreement between opposite or adjacent States.

62 In the *Case Concerning the Land, Island, and Maritime Frontier Dispute*, the ICJ, inter alia, stated that 'an enclosed pluri-State bay presents the need of ensuring practical rights of access from the ocean for all the coastal States; and especially so where the channels for entering the bay must be available for common user, as in the case of an enclosed sea'. *Case Concerning the Land, Island, and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) 1992 ICJ 351 at 590. (Hereinafter 1992 ICJ)

63 At the request of the Secretariat of the United Nations and at the time of the First United Nations Conference on the Law of the Sea, a list of forty-eight bays and estuaries the coasts of which belong to different States was prepared by Commander R H Kennedy. This list includes the Gulf of Fonseca, the Gulf of Paria, the Gulf of Aqaba, the Hong Kong Area, and the Gulf of Trieste. This list does not seem to be comprehensive since Strohl places the Bay of Fundy and the Bay of Gibraltar in the same category. Knight, Gary and Hungdah Chiu, *The International Law of the Sea: Cases, Materials, and Readings* (Elsevier Applied Science, 1991) p 133.

mechanism for enforcing the authority of the coastal States in the bay. There are three possible alternatives:

- The first alternative is to divide the maritime area into different parts, each one belonging to one State. In this case, the problem is the method which should be applied to divide the area. A number of relevant factors, including special geographical circumstances, should be taken into account to ensure that the delimitation of the bay leads to equitable consequences.
- The second one is to establish a system of common sovereignty and jurisdiction (*condominium*) in the entire area of the bay. This requires the creation of a competent authority or committee composed of representatives of the coastal States bordering the bay. Undoubtedly, there should be an agreement among the coastal States that provides for essential matters such as the scope of functions and legal status of such an authority or committee.
- The last alternative is to subject the bay to two different mechanism of sovereignty: individual sovereignty and joint sovereignty. This means the coastal States may agree to have exclusive limits up to a certain distance from the coasts, and to have a common dominium over the maritime area beyond the exclusive limits of the coastal States. The coastal States are sovereign in all aspects related to their exclusive limits. However, the control of the common area should be exercised by a joint authority or committee of the coastal States.

Analysis of the Rights of Navigation in Multi-State Bays

There has been no uniform practice of States concerning the treatment of waters within multi-States bays and legal scholars have presented differing views on the issue. However, the main trend which now prevails is that these bays are normally not under the control of bordering States unless waters within these bays fall into the legal regime of territorial seas. By the extension of territorial seas to twelve nautical miles, more multi-State bays are covered by territorial seas. Since there is not yet any conventional rule concerning recognition or rejection of sovereignty of States bordering multi-State bays, it is useful to examine the rights of navigation for coastal States and other States in two situations: (a) where the sovereignty of States bordering multi-State bays is recognised with respect to all waters within these bays, even where they include the exclusive economic zones (EEZs) or the high seas; and (b) where such sovereignty is rejected where central areas of multi-State bays are part of the EEZs or the high

seas.[64] In both cases, the following part of the paper will examine the navigational issues with respect to two situations:

- where there are only two bordering States, both controlling the headlands (most of multi-State bays fall into this category); and
- where there are more than two bordering States, one of which has no control over the headlands.

Where States are entitled to enclose a multi-State bay

In this case, coastal States concerned are permitted to enclose a multi-State bay and assume sovereignty over the entire waters within it. The recognition of this sovereignty means that there will be no EEZs or high seas routes within the bay, even though the size of the bay is wider than double the breadth of the territorial sea. The status of waters within the bay, therefore, will be subject to either the legal regime of internal waters or, in exceptional cases, that of the territorial sea.

If there are only two bordering States and both are located at one side of the entrance, there would not generally be any navigational problem hindering their access to the high seas. These States may decide not to divide the bay into two sections and instead they may assume joint sovereignty over the bay. Having joint authority implies that they have equal rights of navigation in all parts of the bay, including through the main navigational routes. Entry into the bay by foreign ships is regulated by the bordering States, which should reach agreement on this regulation. If the bay is divided, no navigational problem arises where the navigational route is situated in the middle of bay. In other words, the main mechanism for division of the bay is a median or equidistance line (or both, where the coasts are not only opposite but are also adjacent in some areas of the bay).[65] Thus, both States may share the same route equally to have access to the high seas. The problem is whether there is a right of access by a State to the waters of the other State if the essential navigational route is located in these waters. It seems that such a State should be entitled to use the navigational route in waters of the other States on the basis of the principle of free communication. Foreign ships should respect the rules of entry to the waters of the bay which have been regulated by the bordering States for either part of the bay. Where the essential naviga-

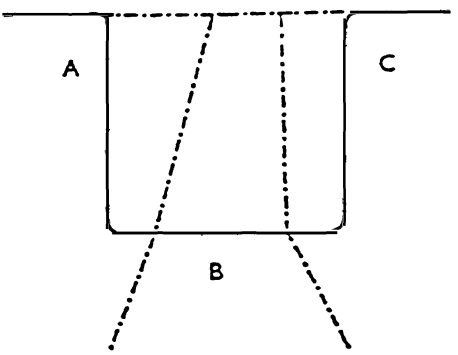
[64] For discussion of navigational rights within multi-State bays see also Bouchez, note 29 above, at pp 174-175 and 177-181.

[65] For discussion of the issue of the delimitation of a multi-State bay see Id at pp 188-198.

tional route exists in the waters of one bordering State, foreign ships should observe rules laid down by this bordering State for the use of the route. In any event, foreign ships require permission from bordering State(s) to enter into the bay to anchor at a port.

If the bay is bordered by more than two States, at least one of which does not own one of the headlands, the status of waters within the bay again depends on whether the bay is made subject to joint authority, or is divided among bordering States. As far as access to the high seas is concerned, the main difficulty affects the bordering State in the central part of the bay, which does not have direct contact with the high seas. Ships of this State usually need to cross the waters of the State or States located at the entrance to reach the high seas. Bouchez suggests that all bordering States may have free access to the high seas, if the waters of the bay are divided so that these States can have sovereignty over part of the entrance. For example, if the bay is surrounded by three States, Bouchez's suggestion is illustrated in Figure 1. To what extent this suggestion may work depends on the relations between the bordering States, and on the degree to which the suggestion will satisfy the interests of these States.

Figure 1



Source: Bouchez note 29 above, at p 178.

If bordering States are entitled to joint sovereignty over the bay, there exists a question as to whether: (a) they have joint sovereignty over all parts of the bay; or (b) they exercise independent sovereignty over the bay up to a certain distance from their coast and that they have only shared control over waters in the central part of the bay (as is the case with the Gulf of Fonseca).

If littoral States have shared sovereignty over the entire waters of the bay, the waters within the bay are regarded as internal waters of these States and these States have navigational rights through these waters to gain access to the high seas. Accordingly, the littoral State, which is not located at either side of the opening of the bay, will not be isolated from the high seas. The littoral States should set up uniform rules for the entry of foreign ships into the bay, to avoid practical problems. Foreign ships should obtain prior permission for entry into the bay either by a general agreement with a littoral State (or all littoral States) or on a case by case basis.

Where the status of the bay is such that riparian States have independent sovereignty over waters adjacent to their coasts and have joint authority in the central part of the bay, navigation will still occur in the bay without any problem. For example, if there are three riparian States, the bay will have four sections: three sections are the exclusive waters of riparian States and the central section includes waters belonging to all riparian States. The existence of a central part, where all riparian States enjoy equal rights, removes any possible navigational problem for riparian States, particularly for the one which does not have the privilege of controlling one of the headlands. In general, riparian States will regulate the access of foreign ships through the central part of the bay and the entry of these ships into the exclusive waters of each riparian State is subject to conditions established by that State.

If the bay is divided among bordering States, a number of navigational problems would be created, in particular for the States not having a headland at the entrance.[66] Since waters of the bay have a status similar to that of internal waters, there is no primary right of navigation, including the right of innocent passage. It is apparent that littoral States controlling the headlands normally encounter no difficulty with respect to navigation. However, the State without a headland may experience problems if its navigational needs are not met. The principle of free communication is the foundation for meeting the navigational needs of this State. As Bouchez argues, there are

[66] It should be noted that the main purpose of enclosing a multi-State bay is to give the status of internal waters to this bay, except in exceptional cases where the status is assimilated to that of the territorial sea. Here the examination is based on the main trend which regards waters within a multi-State bay entitled to enclosure as internal waters of riparian States.

three reasons why such a State is entitled to navigation through waters of the other littoral States to access the high seas.[67]

The first reason is based on Article 3 of the 1958 Geneva Convention on the High Seas. This Article, among others, provides that '[i]n order to enjoy the freedom of the seas on the equal terms with coastal States, States having no sea-coast should have free access to the sea'.[68] Bouchez asserts that when land-locked States have a right of free access to the high seas, a coastal State bordering a multi-State bay, but not located at the entrance, should *a fortiori* be entitled to free access to the high seas.

The second reason is based on an analogy with the provision of Article 5(2) of the TSC (Article 8(2) of the LOSC). This Article provides that where a new straight baseline system is established, while the waters within this new system have already been part of the territorial sea, the right of innocent passage will apply in these enclosed waters. Bouchez asserts that this provision applies if a multi-State bay is divided among littoral States, one of which has no direct access to the high seas. In other words, the enclosure of a multi-State bay by drawing a line between its headlands is similar to the enclosure of coastal waters by straight baselines. Where there is a new claim enclosing the entrance of a multi-State bay, a right of innocent passage will apply in the waters enclosed by the closing line. This means that there is a guarantee of access to the high seas for the State not having a headland at the entrance.[69]

The third reason is based of 'the right of servitude'.[70] This right was primarily developed with respect to land territory but it was later extended to maritime areas as well.[71] For example, the rights of naviga-

67 See Bouchez, note 29 above, at pp 178-181.

68 Part X of the LOSC is devoted to the right of access of land-locked States to and from the sea and freedom of transit (Articles 124-132.). In particular Article 125(1) states that '[l]andlocked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind'.

69 The same argument may be extended to the case of foreign ships. If a right of innocent passage is going to survive in the waters of the bay, foreign ships can exercise this right to cross the bay before entering internal waters of each littoral State. Foreign ships normally exercise this right after getting permission from one of the littoral States to enter its internal waters to anchor at one of its ports.

70 Brittin defines the term servitude as '[a] right by which a thing is subject to certain use or enjoyment by another person [or State]'. B Brittin, *International Law for Seagoing Officers* (4th ed, US Naval Institute Press, 1981) p 460.

71 See, for example, F A Váll, *Servitudes in International Law* (2nd ed, London, 1958).

tion of Finland through the River Neva were guaranteed before the 1939-1940 war between Finland and Russia occurred. In addition, the rights of navigation of Costa Rica through the San Juan River (over which Nicaragua possesses sovereignty) were ensured by the Cañas-Jerez Treaty (15 April 1858)[72] and the judgment of 30 September 1916 of the Central American Court of Justice (CACJ). The CACJ held that '[i]t is clear, therefore, that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute nor unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica'.[73] Therefore, it can be argued that where a State bordering a multi-State bay is not at the entrance, the right of passage to access the high seas and vice versa should be granted to such a State on the ground of the right of servitude.

Where States are not entitled to enclose a multi-State bay

This bay should be subject to the normal rules of the law of the sea for delimitation of maritime zones. Accordingly, the baseline for this bay is the low-water mark on the coastline. The navigational rights depend on the size of a multi-State bay and the location of the bordering States. Littoral States may claim sovereignty over the waters of these bays under the concept of territorial seas, but they may not enclose these bays and claim their waters as internal.

Bordering States have sovereignty over the waters of bays if the bays are covered by the territorial seas of littoral States. This is consistent with the current Law of the Sea and legal scholars have recognised this sovereignty. In this case, if there are only two littoral States which own the entrance, ships of either State have the right of innocent passage in the territorial sea of the other State. This is particularly a matter of necessity where essential navigational routes are

72 This Treaty was concluded between Nicaragua and Costa Rica. Article 6 of the Treaty, inter alia, reads: 'The Republic of Nicaragua shall have exclusive dominion and the highest sovereignty over the waters of the San Juan River from their issue out of the lake to their discharge into the Atlantic; but the Republic of Costa Rica shall have in those waters perpetual rights of free navigation from the said mouth of the river up to a point three English miles below Castillo Viejo, for purposes of commerce ... The vessels of either country may touch at any part of the banks of the river where the navigation is common without paying any dues except such as may be established by agreement between the two Governments'. See the decision of the Central American Court of Justice (*Costa Rica v Nicaragua*), in 'Judicial Decisions Involving Questions of International Law' (1917) 11 *American Journal of International Law* pp 181-229, at pp 192-193.

73 See Váll, note 71 above, at pp 151-152.

located in the territorial sea of another State.[74] Ships of the littoral States have the same right where they are heading from a national port to a port of the other State. When exercising this right of passage, these ships make themselves subject to the absolute sovereignty of the other State when they enter its internal waters. It is clear that ships of littoral States have no difficulty in using the territorial seas of their respective States to reach a port or in heading to the high seas. Foreign ships also have a right of innocent passage through waters of either State. Foreign ships exercise the right of innocent passage to reach ports of littoral States and are subject to the full authority of a littoral State in its internal waters.

There is also the case of multi-State bays whose entrances are overlapped by the territorial seas of littoral States, where there is also another coastal State which is not located at the entrance. A question then arises as to what are the navigational rights of this State through the entrance. The principle of free access to the high seas (principle of free communication with the high seas) is the main basis of the navigational rights for a State which is cut off from the high seas by maritime zones of other States, including by the territorial seas of other States. In the above-mentioned situation, the concept of free communication is reflected in the right of innocent passage through the territorial seas of the littoral States controlling the headlands. It is true that the Law of the Sea has permitted coastal States to temporarily suspend the right of innocent passage in certain areas of their territorial seas.[75] However, such suspension by States controlling the headlands of a multi-State bay should not affect the access routes to a State which does not have control over the entrance of this bay. This is a corollary of the principle of free communication which prohibits taking any measure which may hinder free access to the high seas. Bouchez also relies on the provision of Article 16(4) of the TSC[76] as

74 Bouchez states that there are direct and indirect communications between all coastal States within multi-State bays and the high seas. He writes that '[t]here is direct and free communication, if ships navigating from the coastal State to the high seas and vice versa do not have to pass through the territorial sea of one of the other coastal States. On the other hand, if ships must navigate through the territorial sea of one of the other coastal States situated on the bay in order to reach the high seas, there is only indirect communication'. He adds that 'passage through the territorial sea of the other coastal State may be necessary if the navigable channel runs through the territorial sea of the other'. Bouchez, note 29 above, at p 174.

75 Article 16(3) of the TSC and Article 25(3) of the LOSC.

76 See also Part III (Straits Used for International Navigation) of the LOSC in general and its Articles 38(1) and 45(2) in particular.

guaranteeing a continued right of innocent passage for those States not being at the entrance. This Article provides that innocent passage through straits used for international navigation between two parts of the high seas or one part of the high seas and the territorial sea of a foreign State must not be suspended. By analogy, Bouchez maintains that the case of a multi-State bay, with one State not being located at the entrance, is similar though the entrance of a bay is not as narrow as a strait. Bouchez, therefore, asserts that '[i]f it is not permitted to suspend the right of innocent passage in the case of straits, it is a fortiori prohibited to suspend that right in the case of [a multi-State] bay'.[77]

If the entrance of a multi-State bay is considerably larger than the double breadth of the territorial sea, the problem of overlapping of territorial seas does not occur. This means that there would be a route of EEZs or the high seas in the central parts of the entrance where littoral States do not have authority to restrict navigation and overflight. In this situation, there would be no difficulty for the exercise of the right of navigation. It is evident that three navigational regimes exist in the waters of this bay: (a) a freedom of navigation and flight in the EEZs or the high seas parts of the bay; (b) the right of innocent passage in the territorial sea of the riparian States; and (c) passage through internal waters of riparian States under the conditions regulated by these States.

In conclusion, whether or not a multi-State bay is susceptible to enclosure, the navigational rights of littoral States and the international community are not affected. Although the scope and nature of the rights of passage through multi-State bays vary depending on recognition or non-recognition of enclosure of these bays, these bays have never been closed to local or international navigation. The case of Gulf of Fonseca (which will be examined below) is a typical example of multi-State bays where navigational rights have been guaranteed.

Claiming Multi-State Bays on the Basis of Historic Title

Given that multi-nation bays are not subject to enclosure under the rules codified for single-nation bays, may bordering States rely upon historic title to enclose a certain multi-State bay? Two studies of the United Nations have briefly examined this issue. The 1957 UN Memorandum pointed out that the previous studies by the League of Nations, learned institutes, and the ILC only considered the issue of

[77] Bouchez, note 29 above, at p 181.

historic titles concerning single-nation bays. The Memorandum contains a few cases which (except with respect to the Gulf of Fonseca) reflected the idea that multi-State bays are not susceptible to enclosure by any means, including by reference to historic title. Even in the case of the Gulf of Fonseca, the Memorandum stresses that although the CACJ recognised the historic character of the Gulf, it 'does not attribute to ... [the waters within the Gulf] the characteristics of internal waters; rather it tends to class them as territorial sea'.[78] This case is of exceptional character and is the only gulf bordered by several States which acquired recognition of its historic character by the CACJ (1917) and the ICJ (1992).

As Blum points out the decision in the case of Gulf of Fonseca was not followed in any other similar cases. In fact, none of claims made by bordering States of multi-State bays on historic title were successful. For example, in the case of Gulf of Aqaba, an historic claim was made by Arab States bordering the Gulf for the main purpose of cutting off the access of Israel to the high seas though the Strait of Tiran towards the Red Sea.[79] In 1957 Saudi Arabia claimed the Gulf of Aqaba as a closed sea.[80] However, this claim was challenged by a number of States. States such as the USA, France, the UK, Italy, the Netherlands, Belgium, Sweden, Denmark, and Canada indicated their opposition to the historic claim made to the Gulf of Aqaba, particularly because of its effect on the rights of navigation.[81] Although Egypt joined Saudi Arabia in claiming the Gulf of Aqaba as historic and as a closed sea without any right of navigation for Israel, the

78 'Historic Bays', Memorandum by the Secretariat of the United Nations, UN Document A/CONF.13/1, (Preparatory Document No.1) [Original Text: French], (30 September 1957), UNCLOS I Official Records, Vol.I (Preparatory Documents) at p 27 (1958).

79 For the discussion of this issue see Strohl, note 5 above, at pp 389-397.

80 For the statement of the representative of Saudi Arabia concerning the Gulf of Aqaba, see UNGAOR, 12th Sess., Plenary Meeting, at p 233 (1957), and UNGAOR, 14th Sess., Sixth Comm., at pp 227ff. (1959). The same claim was also made in the UNCLOS I. See UNCLOS I Official Records, Vol.III, 1st Comm., at p 3 (1958).

81 See UNGAOR, 11th Sess., Plenary Meeting, at pp 1277-1278, 1280, 1284, 1287, 1288, 1296, 1303 (1957). For example, France asserted that 'the Gulf of Aqaba, by reason partly of its breadth and partly of the fact that its shores belong to four different States, constitutes international waters'. Id at p 1280. The USA also stated that it 'believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto'. Id at pp 1277-1278. The Gulf of Aqaba is about six miles wide at its entrance and includes two narrow channels as a result of the existence of the two islands of Tiran and Sanafir in the mouth of the Gulf.

claim proved to be unsuccessful and the 1967 Peace Treaty between Egypt and Israel weakened the basis of the claim. The 1957 UN Memorandum does not mention the Gulf of Aqaba as an historic bay. In addition, Article 16(4) of the TSC also extends the right of non-suspendable innocent passage to straits which link the high seas to the territorial sea of a foreign State. This provision was incorporated into the TSC particularly to guarantee the right of Israel to have access to the high seas through the Gulf of Aqaba and the Strait of Tiran. Hypothetically, the Gulf of Aqaba could be claimed as historic, if all four littoral States had claimed the Gulf as historic, taking into account the interests of all bordering States, whether at the entrance or in the central parts of the Gulf.[82] Even this claim would not have been guaranteed success under the general rules governing multi-State bays.

A number of justifications may be found in certain cases on the question as to why multi-State bays cannot be claimed as historic. One justification for qualifying certain single-State bays as historic is that these bays are not linked to any foreign nation.[83] Multi-State bays lack this character.[84] This rationale was also taken into account by the Second Court of the Commissioners of Alabama Claims in the case of *Alleganean* (1885). As part of its reasoning in favour of the Chesapeake Bay being historic, the Court held that '[Chesapeake Bay] is entirely encompassed by ... [the territory of the United States] ... It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another'.[85] In the case of multi-State bays, these areas of waters do constitute a roadway from one nation to another or to the high seas. It is due to this fact that Blum comments that 'multinational bays have generally come to be regarded as parts of the open sea, except the marginal belt to which each of the littoral States is entitled in accordance with the

82 In 1957, the Secretary of State of the United States of America, Mr John Foster Dulles, stated in a news conference that '[i]f the four littoral states which have boundaries upon the gulf [of Aqaba] should all agree that it should be closed, then it could be closed'. News Conference Statement of 19 February 1957, *Department of State Bulletin* 36, (January-June 1957) p 404.

83 See the view of the United States Attorney-General, E Randolph, in the 1973 case resulting from the capture of the British vessel *Grange* by the French frigate *L'Embuscade*. Moore, note 39 above Vol.I (1906), at pp 735-739.

84 Blum writes that 'one of the major considerations which permit a given [single-State] bay to be turned into an historic bay is the fact that by its incorporation into the national domain of the littoral State no harm is done, or is likely to be done, to another State and that the rights of such a State are not affected thereby'. Y Blum, *Historic Titles in International Law* (Martinus Nijhoff, 1965) p 270.

85 Moore, note 39 above Vol.IV (1898) at pp 4332-4341, at p 4339.

general rules of international law'.[86] It should be noted that if a bay is not large enough to contain an area of the EEZ or the high seas, and accordingly it is overlapped by the territorial seas of littoral States,[87] the bay is subject to the legal regime of the territorial sea. In this case, although the bay is not part of the high seas, it is not part of internal waters either.

In the case of *Washington* (1843), the umpire was asked to decide whether the capture of this American Ship by a British vessel in the Bay of Fundy was lawful.[88] To answer this question, the umpire needed to decide whether the Bay of Fundy was a British Bay. The umpire concluded that the bay was not British because '[o]ne of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it'.[89]

Despite the views asserted in these cases and those reflected in the 1957 UN Memorandum, the 1962 UN study presents a new approach. The study is entitled *Juridical Regime of Historic Waters, Including Historic Bays*.[90] This study was also undertaken by the Secretariat of the UN following a request by the ILC to prepare more comprehensive research on the issue of historic waters, including historic bays. The study examined two cases: (a) where littoral

86 Blum, note 84 above, at p 270.

87 In such cases, the delimitation of territorial seas within bays will be subject to the provisions of Article 12(1) of the TSC (Article 15 of the LOSC) where the median line (with respect to opposite coasts) and the equidistance line (with respect to adjacent coasts) are the methods of delimitation in normal circumstances. The provision, however, recognises that deviation from these methods may be made where there are special circumstances or historic titles.

88 See McDougal and Burke, note 27 above, at p 441.

89 Moore, note 39 above Vol.IV (1898) pp 4342ff, at p 4344. Referring to the decision made in the case of *Washington*, Dana presented his view to the Halifax Fishery Commissioners (which was set up by the Washington Treaty of 1871 between Great Britain and the United States of America). Dana maintained that 'the real ground [for the decision in the case of *Washington*] was that one of the headlands belonged to the United States, and it was necessary to pass the headland in order to get to one of the ports of the United States'. See R J Phillimore, *Commentaries Upon International Law* Vol.I (Butterworths, 1879). pp 287-289. Fauchille also presented a similar view. He wrote that the principal basis of the arbitral award in defining the bay of Fundy as an open bay was that 'its coasts do not all belong to a single State; one of its headlands is situated in the territory of the United States, the other in the territory of Great Britain [now part of Canada]'. P Fauchille, *Traité de droit international public* Vol.I, Part II, (Paris, 1925) p 384.

90 'Juridical Regime of Historic Waters, Including Historic Bays', A study undertaken by the Secretariat of the United Nations, 6 March 1962, Document A/CN.4/143 in [1962] 2 YILC at pp 1-26. (Hereafter The 1962 UN Study.)

States agree that the bay is historic; and (b) where littoral States do not in agree with respect to the nature of waters within a bay as historic waters.

In the first case (the 1957 UN Memorandum), the study showed that if all littoral States agree that a bay is historic, the bay may be regarded as historic in the same manner as a single-State bay may be claimed as historic.[91] Then all the requirements for proving the historic nature of a single-State will apply to such a multi-State bay claimed as historic.[92] Therefore, riparian States should indicate that they have peacefully exercised continuous sovereignty over the bay for a long period, without opposition from other States. This is what has been considered to be the case concerning the Gulf of Fonseca, but this case is not to be extended to other geographically similar bodies of water. The study seems to have considered that any multi-State bay can be claimed as historic if bordering States jointly lay a claim over the bay by historic title. However, it is not the mere claim of littoral States which determines the status of a multi-State bay as historic. The mere claim produces nothing. These States should substantiate the historic character of a multi-State bay. As one of the most important factors in recognising an historic claim over a body of water, it should be demonstrated that all interested States have not opposed such claim.[93] In the current status of the Law of the Sea, it does not appear that new claims on historic bases may be successfully made over multi-State bays. This is because the main trend regarding these bays is to maintain the status of their waters as free for international navigation. Accordingly, it will not be surprising if these claims prove to be unsuccessful.[94]

Concerning the second case (the 1962 UN study), the study rejected any possibility of claiming a multi-State bay as historic, where littoral

91 Id at p 21.

92 The study states that one problem which arises in the case of a multi-State bay is 'whether sovereignty over the bay must during the required period have been exercised by all the States claiming title or whether it is sufficient that during that period one or more of them exercised sovereignty over the bay'. Ibid.

93 Gidel states that even where all littoral States are in agreement to enclose a multi-State bay, it is not legally possible to enclose the bay unless other States recognise such enclosure or at least acquiesce in it. G Gidel, *Le Droit International Public de la Mer* Vol.III (Paris, 1934) p 604.

94 Blum writes that 'it would be far more in accordance with the prevailing concepts of modern maritime international law if the waters surrounded by more than one littoral State would be considered as falling *ex definitione* outside the category of historic bays, and if the waters beyond the marginal belts of each of the littoral States were regarded as part of the high seas'. Blum, note 84 above, at p 310.

States are not in agreement concerning the status of waters within the bay as historic waters. The study is flexible in advancing an historic claim over a multi-State bay only if all littoral States agree that the bay is historic. In general, opposition from one or two States may be regarded as not having significant adverse effects on establishing an historic claim over a body of water like a single-State bay, if other foreign States have acquiesced. However, this is not the case with respect to a multi-State bay, if the persistent opposition comes from one or more littoral States against the claim laid over such a bay by the other littoral States. This is because, in assessing whether affected States have shown tolerance towards historic claim over a multi-State bay, the opposition of some littoral States against the historic claims by the other littoral States is of 'great if not decisive importance'.[95]

Case Study: The Case of the Gulf of Fonseca

The Gulf of Fonseca is a typical example of a bay which represents two characteristics. It is geographically classified as a multi-State bay, while it is also categorised as an historic bay. The Gulf of Fonseca is located on the Pacific coast of central America and is surrounded by the three countries of El Salvador in the north-west, Nicaragua in the south-east, and Honduras in the central part of the coasts within the Gulf. El Salvador and Nicaragua own the headlands of the Gulf, and Honduras is located in the central part of the Gulf without headlands.[96] (See Map 1.) The mouth of the Gulf is slightly more than nineteen miles wide[97] and is fifty miles long. Until 1821 Spain had authority and control over the Gulf of Fonseca.[98] Then this authority over the Gulf was transferred to the Federal Republic of Central America that lasted until 1839, when the three new States of El Salvador, Nicaragua, and Honduras (as the successor States) formed the new coastal States around the Gulf.

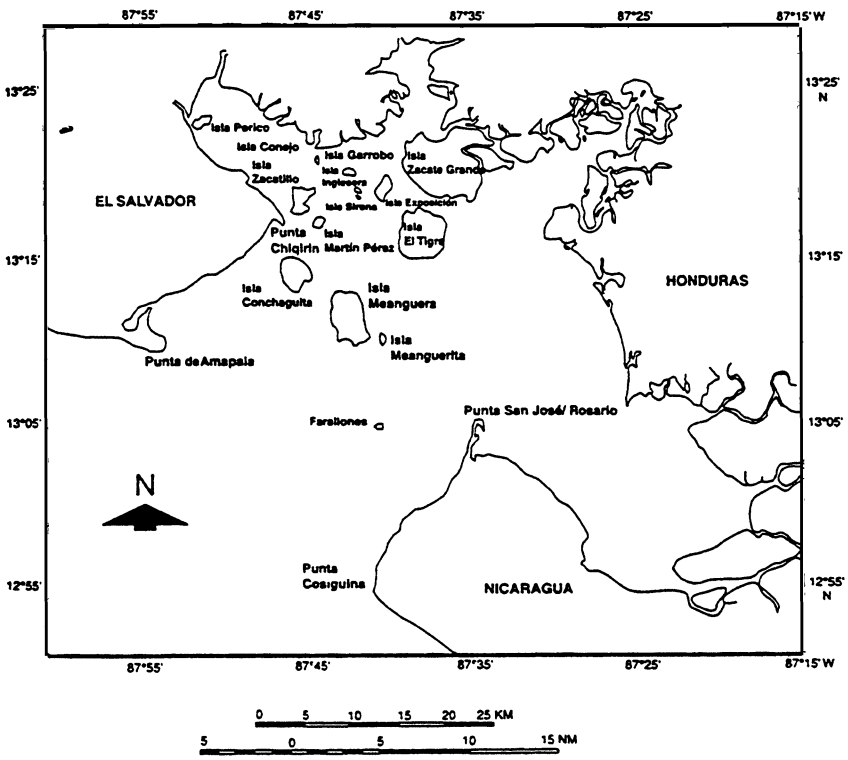
95 Ibid.

96 Honduras has a coastline of approximately forty miles in the Gulf of Fonseca. Strohl, note 5 above, at p 376.

97 This width is where the two headlands of the Cosiguina Point on the mainland of Nicaragua and the Amapala Point on the mainland of El Salvador are used as natural entrance points to the Gulf of Fonseca. C J Colombos, *The International Law of the Sea* (6th Revised Ed, Longmans, 1967) p 188.

98 Strohl, note 5 above, at p 376.

Map 1 - The Gulf of Fonseca



Source: Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening, ICJ Reports (1992) at 587.

The Gulf of Fonseca has been subject to a decision of the Central American Court of Justice[99] (*Republic of El Salvador v Republic of Nicaragua*, March 9, 1917).[100] The question was whether the Gulf could be considered as historic waters and, if so, whether the Gulf had to be divided among the three coastal States or was indivisible and had to be subject to common dominium (joint ownership). The case was brought before the Court as a result of the conclusion of the *Bryan-Chamorro Treaty* of 5 August, 1914 between the USA and Nicaragua.[101] According to Article II of the Treaty, the USA was granted a

[99] The Central American Court of Justice was established as a result of the Central American Peace Conference at Washington on 20 December 1907.

[100] The text of the decision of the Court (English Translation) is found in 'Judicial Decisions Involving Questions of International Law' (1917) 11 *AJIL* pp 674-730.

[101] For information on the preparation of the Treaty see G A Flinch, 'The Treaty with Nicaragua granting Canal and other rights to the United States' (1916) 10

right to establish a naval base in the Nicaraguan coast in the Gulf of Fonseca for ninety-nine years.[102] This Treaty was challenged by El Salvador,[103] which argued that the Treaty would affect the interests of other littoral States of the Gulf and, as far as the Gulf was concerned, the Treaty should have been concluded with the consent of all the three littoral States.[104] The reasoning of El Salvador was that the Gulf was an historic bay, like other claimed historic bays such as the Chesapeake and Delaware Bays. The problem was that the Gulf was not bordered by a single State. El Salvador argued that the existence of the three littoral States did not change the status of the Gulf as an historic bay since these States had once been 'a single international political entity'.[105]

Nicaragua accepted the nature of the Gulf as a 'closed or territorial bay', but it stated that it was the small size of the Gulf which gave the territorial nature to this maritime area, not the historic rights over the Gulf.[106] The Court held that the Gulf of Fonseca 'belong[s] to the category of *historic bays* and to be possessed of characteristics of *a closed sea*'.[107] The Court also stated that the Gulf was 'property be-

AJIL pp 344-351. The text of the Treaty can be found in *International Law Documents* (US Naval War College, 1924) pp 31-34.

102 Nicaragua gave a right to the USA, for a period of ninety-nine years, 'to establish, operate, and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select'. (Article II of the Bryan-Chamoro Treaty) The Treaty was also optional for extension. In addition, the USA was granted a right to build an inter-oceanic canal. Jessup, note 30 above, at p 398. Jessup refers to two other names used for the Gulf of Fonseca. These are the Gulf of Amapala and the Gulf of Conchagua. Ibid.

103 Jessup states that the grants given to the USA by Nicaragua faced opposition of both El Salvador and Costa Rica and they asked the Central American Court of Justice to declare the nullification of the Treaty: Ibid. Honduras also protested against the Treaty. See, for example, S Gonzales, 'Neutrality of Honduras and the Question of the Gulf of Fonseca' (1916) 10 *AJIL* pp 509-544.

104 The 1914 Treaty came to the end in 1971 and the USA never established the naval base in the Gulf of Fonseca. Prescott, note 6 above, at p 254.

105 Jessup, note 30 above, at p 399. As regards the use of the term 'territorial waters' by the Central American Court of Justice in referring to the body of water inside the closing line but beyond the three-mile maritime limits, the ICJ's view is noteworthy. The ICJ commented that the Central American Court of Justice referred to 'territorial' not to mean territorial sea but to represent that those waters 'were not international and were on historical grounds claimed *à titre de souverain* by the three coastal States'. 1992 ICJ at 604.

106 (1917) 11 *AJIL* p 705.

107 Id at p 707. The ICJ viewed that by 'closed sea' the Central American Court 'seems to mean simply that it [the Gulf of Fonseca] is not part of the high seas, and its waters are not international waters'. 1992 ICJ at 591.

longing to the three countries that surround it'.[108] Nonetheless, the Court provided a three mile limit from the coast for the waters of each littoral State in accordance with the practice of the bordering States.[109] Only the area beyond the three mile limit was undivided, in which common jurisdiction was accepted. The Court indicated that one of the effects of common ownership of the Gulf (*condominio*) is that none of the coastal States could 'lawfully alter, or deliver into the hands of an outsider, or even share with it, the use and enjoyment of the thing held in common' if it did not obtain the consent of the other two countries.

In regard to the reasons for possession of the Gulf by its littoral States, the Court ruled:[110]

> [I]t combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have described as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that these States should possess the Gulf fully as required by these primordial interests and interest of national defence.

The Court, by considering the three factors of geography, history of the Gulf, and the vital interests of the littoral States, concluded that El Salvador, Honduras and Nicaragua were co-owners of waters of the Gulf, 'except as to the littoral marine league which is the exclusive property of each [littoral State]'.[111] This marine league limit applies

[108] This was the opinion of the majority of Judges, composed of Medal, Oreamuno, Castro Ramirez, and Bocanegra. However, Judge Guttierez Navas stated that 'the ownership of the Gulf of Fonseca belongs, respectively, to the three riparian countries in proportion. Jessup, note 30 above, at p 400. See also (1917) 11 *AJIL* p 716.

[109] Although a limit of three miles was considered as the area of exclusive sovereignty of each coastal State, a right of innocent passage through this maritime area was granted to the other coastal States on a mutual basis. 1992 ICJ at 590.

[110] (1917) 11 *AJIL* p 705 (emphasis added). To give authority to its judgement, the Central American Court of Justice referred to the Arbitral Award of 7 September 1910 of the Permanent Court of Arbitration in the North Atlantic Fisheries Case and the comments made by Dr Drago in relation to question V put before the arbitral tribunal. 1992 ICJ at 591-592.

[111] (1917) 11 *AJIL* p 694. The Central American Court of Justice also recognised that each of the three coastal States has the right to exercise police power for fiscal and national security purposes in an area of 9 miles beyond the exclusive limits of the coastal States. 1992 ICJ at 595.

to the mainland and islands within the Gulf as well. The decision of the Court did not receive any adverse reactions from non-littoral countries and it was recognised in practice.[112]

Although the Court granted historic title to the Gulf of Fonseca, it recognised the right of innocent passage (the right of *uso inocente*) within the Gulf for all nations.[113] This primarily seems to be in contrast with the normal legal status defined for internal waters, including juridical bays and those bays claimed on historic grounds, where no right of innocent passage exists. However, as the ICJ pointed out in the *Case Concerning the Land, Island and Maritime Frontier Dispute*, rules and principles regarding bays belonging to a single State do not necessarily apply to a bay which is a pluri-State bay and is also an historic bay. The ICJ, in particular, referred to the right of navigation within the Gulf and held that: [114]

> the Gulf being a bay with three coastal States, there is a need for shipping to have access to any of the coastal States through the main channels between the bay and the ocean. That rights of innocent passage are not inconsistent with a regime of historic waters is clear, for that is pre-

[112] With reference to the 18 February 1914 note of the Department of State of the USA in response to the protest of El Salvador, the Court argued that the note was a recognition of common sovereignty of the coastal States in the Gulf of Fonseca. See 1992 ICJ at 593. The note, inter alia, stated that '[i]n your protest [Honduras' protest] the position is taken that the Gulf of Fonseca is a territorial bay whose waters are within the jurisdiction of bordering States. This position the Department is not disposed to controvert'. Strohl, note 5 above, at p 378, no.7. It should be also mentioned that Article 7 of the 1950 Constitution of El Salvador contains a provision which provided that '[t]he Gulf of Fonseca is an historic bay subject to a special regime'. *Laws and Regulations on the Regime of the Territorial Sea*, United Nations Legislative Series, ST/LEG/SER.B/6 (December 1956), (United Nations Publications, 1957) p 14.

[113] (1917) 11 *AJIL* p 715.

[114] 1992 ICJ at 593. As far as navigation rights are concerned, the view of Honduras is also noteworthy. It prefers the idea of 'community of interests' instead of the '*condominium*'. To support its argument, Honduras relied on the judgement of the Permanent Court of International Justice (PCIJ) in the case of the *Territorial Jurisdiction of the International Commission of the River Oder* (1929) where the Court held that '[when] a single waterway traverses or separates the territory of more than one State ... a solution of the problem has been sought not in the idea of a right of passage for upstream States, but in that of a community of interest of riparian States'. The Court further elaborated that '[t]his community interest in a navigable river becomes the basis of a common legal right [*communaute de droit*], the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others'. *Territorial Jurisdiction of the International Commission of the River Oder Case*, Judgement No.16 1929 PCIJ (Ser. A) No.23 at p 27. Also see 1992 ICJ at 602.

> cisely now the position in archipelagic internal waters and indeed in former high seas enclosed as internal waters by straight baselines.

The ICJ reconfirmed this approach in another part of its 1992 judgment on the bases of 'historic reasons' and 'practical necessities'. To indicate the necessity of rights of navigation for either coastal States or third States wishing to access a port of any bordering State of the Gulf of Fonseca, the ICJ argued that: [115]

> Since the practice of the three coastal States still accepts that there are the littoral maritime belts subject to the single sovereignty of each of the coastal States, *but with mutual rights of innocent passage*, there must also be rights of passage through the remaining waters of the Gulf, not only for historical reasons but because of the practical necessities of a situation where those narrow Gulf waters comprise the channels used by vessels seeking access to any one of the three coastal States. Accordingly, these rights of passage must be available to vessels of third States seeking access to a port in any one of the three coastal States; such rights of passage being essential in a three-State bay with entrance channels that must be common to all three States. The Gulf waters are therefore, if indeed internal waters, *internal waters subject to a special and particular regime, not only of joint sovereignty but of rights of passage.*

Despite the recognition of the Gulf of Fonseca as an historic bay which cannot be divided, El Salvador and Honduras disputed their maritime delimitation.[116] This dispute arose due to the existence of a number of islands in adjacent areas to the coasts of these countries and within the Gulf. A boundary line was already drawn within the Gulf by a joint commission between Nicaragua and Honduras in March 1900.[117] (See Map 2.) However, El Salvador and Honduras could not resolve their differences and submitted their boundary dis-

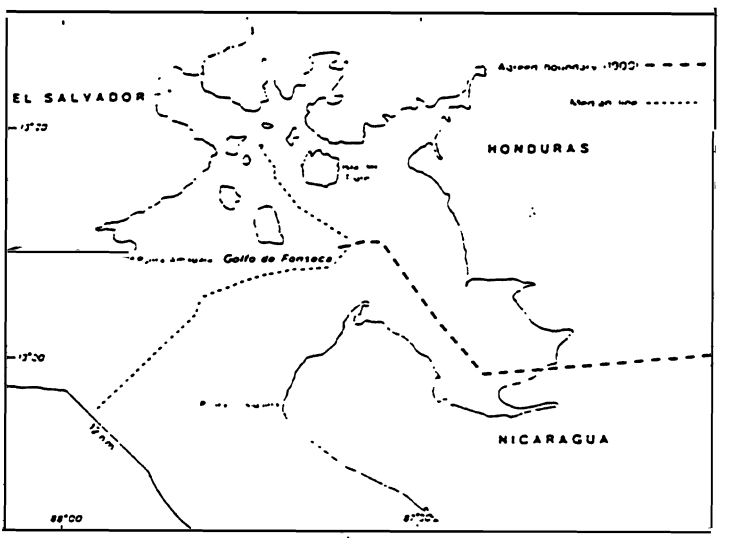
[115] Id at 605 (emphasis added). Cf Judge Oda's opinion where he stated that '[u]nder the contemporary concept of the law of the sea, the sea-waters adjacent to the coasts of States are either territorial sea or, otherwise, internal waters. There cannot be any other category for such offshore sea-waters'. Dissenting Opinion of Judge Oda, 1992 ICJ at 734. In another part of his dissenting opinion Oda asserted that the decision of the ICJ in establishing a three mile maritime limit for each of the three coastal State is not consistent with the legal nature of an historic bay as internal waters. Id at 750.

[116] Due to the geographical features of the Gulf of Fonseca, the ICJ emphasised that 'mere delimitation without agreement on questions of passage and access would leave many practical problems unresolved. It is not easy to conceive of a satisfactory final solution without participation of all three States together in the creation of a suitable regime, whether or not including delimitation of separate areas as internal waters' 1992 ICJ at 603.

[117] Prescott, note 6 above, at p 254. Honduras still considers the 1900 boundary line as valid. However, Nicaragua and El Salvador are of the opinion that the Gulf is indivisible. Ibid.

putes, including maritime boundary within the Gulf, to the ICJ on 11 December 1986 for settlement.[118]

Map 2 - The 1900 Maritime Boundary in the Gulf of Fonseca (Honduras - Nicaragua)



Source: Prescott note 6 above, at p 255.

A Chamber of the ICJ which dealt with the *Case Concerning the Land, Island and Maritime Frontier Dispute* accepted the status of the Gulf of Fonseca as an historic bay, consistently with the judgment of the CACJ in 1917. In line with the common dominium of the three littoral States, the Chamber rejected the division of the Gulf among these States. The case was finally concluded by the judgment of the ICJ in 1992. The ICJ endorsed the legal status of the Gulf of Fonseca as defined by the 1917 judgment of the CACJ and issued, inter alia, the following judgement on 11 September 1992:[119]

[118] Knight and Chiu, note 63 above, at p 134.

[119] 1992 ICJ at 616-617 (emphasis added). As regards the issue of the delimitation of maritime zones of the three States bordering the Gulf of Fonseca, the Court held that 'the closing line of the Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone of El Salvador and those of Nicaragua off the coasts of those two States are also to be measured outwards from a section of the closing line extending 3 miles (1 marine league) along that line from Punta Ampala (in El Salvador) and 3 miles (1 marine league) from Punta Cosiguina (in Nicaragua) respectively; but entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion

> the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, *and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf*, that is to say, between a point on that line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosiguina, *are subject to the joint entitlement of all three States of the Gulf*[120] *unless and until a delimitation of the relevant maritime area be effected* ...

Generally, multi-State bays are not considered to have the characteristic of an historic bay under customary law. In cases where historic titles over certain bays were subject to debate, these bays were entirely within the territory of one coastal State.[121] However, the existence of this fact did not prevent the ICJ from confirming the historic status of the Gulf of Fonseca in accordance with the 1917 judgment of the CACJ. In fact, the ICJ was convinced that before 1839, when the Gulf of Fonseca was bordered by only a single State (the Federal Republic of Central America), the Gulf acquired the status of an historic bay and its division into three States did not change the historic status of the Gulf. In its words: 'there seems no reason in principle why a succession should not create a joint sovereignty where a single

of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and that any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law'. Id at 617.

[120] As regards the concept of *condominium*, the ICJ gave the example of joint jurisdiction of France and Spain in the *Baie du Figuier* under the 1879 Declaration on the Atlantic boundary between France and Spain. The Declaration considered three sections in the bay for jurisdiction purposes, *'la troisième formant des eaux communes'*. 1992 ICJ at 600. Judge Oda in his dissenting opinion asserted that the case of the *Baie du Figuier* cannot be used as a precedent for the Gulf of Fonseca because there was an agreement between France and Spain on the condominium in the *Baie du Figuier* while no agreement has ever concluded among the three riparian States of the Gulf of Fonseca. He added that the mouth of the *Baie du Figuier* is a bout 3,000 meters wide which means that 'it could by the mere distance criterion have been under the jurisdiction of either State [France and Spain]'. Dissenting Opinion of Judge Oda, 1992 ICJ at 754-755.

[121] V Prescott, *The South China Sea: Limits of National Claims* (Maritime Institute of Malaysia (MIMA), 1996) p 12.

and undivided maritime area passes to two or more new States'.[122] The ICJ referred to the 1962 United Nations Study to support its view that certain multi-State bays may fall into historic bays if certain conditions exist. As regards the issue of multi-State bays and historic titles, the Study asserted that '[i]f all the bordering States act jointly to claim historic title to a bay, it would seem that in principle what has been said ... regarding a claim to historic title by a single State would apply to this group of States'.[123]

Judge Oda in his dissenting opinion in the *Case Concerning the Land, Island, and Maritime Frontier Dispute* (1992), however, argued that there has been no rule in international law which permits a claim over a multi-State bay[124] on any grounds, including on historic basis.[125] Judge Oda was of the view that the Gulf of Fonseca is no exception and accordingly it may not be enclosed by reliance on historic title. Judge Oda did not agree with the findings of the CACJ and those of the majority of the judges of the ICJ on the legal status of the Gulf of Fonseca as an historic bay on the ground that the findings were inconsistent with traditional and contemporary law of the sea.[126] In fact, the main argument of Judge Oda was that all references to the Gulf of Fonseca as an historic bay were after the 1917 judgment of the CACJ,[127] a judgment which was, in his view, based on the mere views of the judges and was not a proper decision in accordance with the traditional and contemporary law of the sea.[128] He asserted that the 1957 and 1962 Studies of the UN Secretariat had also relied on the

122 1992 ICJ at 598.

123 The 1962 UN Study, p 21, para. 147.

124 See also B Kwiatkowska, 'Judge Shigeru Oda's Opinions in Law of the Sea Cases: Equitable Maritime Boundary Delimitation' (1993) *German Yearbook of International Law*.

125 Dissenting Opinion of Judge Oda, 1992 ICJ at 745. Judge Oda further stated that waters of a multi-State bay cannot be considered as internal waters and be divided among riparian States. He argued that such an approach 'is tacitly confirmed by the absence of any provision concerning the delimitation or division of internal waters either in the 1958 or the 1982 Conventions; the internal waters of one State cannot abut the internal waters of another State'. Id at 746.

126 In his comment on the decision of the CACJ concerning the status of waters within the Gulf of Fonseca, Gidel was of the view that the CACJ's opinion was inconsistent with normal rules governing historic bays. Gidel asserted that the CACJ 'attributes to the waters of the gulf the characteristics not of internal waters, which their status as historic have normally required, but of the territorial sea. This is a truly remarkable departure from the logical rules governing historic bays'. Gidel, note 93 above, Vol.II, at p 627.

127 Id at p 748.

128 Id at p 750.

same judgment and had given the Gulf of Fonseca 'a somewhat special treatment without offering any sufficiently convincing reasons'.[129] As regards the positions of the parties to the case before the ICJ, Oda stated that they had only relied upon the 1917 judgment of the CACJ[130] and they had not demonstrated that there were 'any established rules governing a 'historic bay' bordered by the land of two or more States'.[131]

Judge Oda then defined what, in his view, was the legal status of waters within the Gulf of Fonseca. He stated that the practice of States in Latin America after the Second World War indicated a trend towards a 12 mile limit for the territorial sea. It should, however, be noted that many Latin American States favoured a much larger limit of 200 miles for their territorial seas. As far as the littoral States of the Gulf of Fonseca are concerned, Honduras currently claims a 12 mile territorial sea while El Salvador and Nicaragua (situated on the headlands of the Gulf) claim a 200 mile territorial sea. As a universally adopted limit for the territorial sea, Judge Oda considered the 12 mile limit as the basis for the case of the Gulf of Fonseca and argued that the legal status of the Gulf's waters could be defined as follows:[132]

> the Gulf of Fonseca must now be deemed to be totally covered by the territorial seas of the three riparian States ... [Accordingly] ... the waters within the Gulf of Fonseca now consist of the territorial seas of three riparian states, without leaving any maritime space beyond 12-mile distance from any part of the coasts.

Thus, Oda concluded that Honduras and foreign ships enjoyed the right of innocent passage to and from the Pacific Ocean through the overlapping territorial Seas of El Salvador and Nicaragua *under the*

[129] Id at pp 748-749.

[130] According to Oda, the practice of the riparian States of the Gulf of Fonseca early this century indicates that they claimed one league for their territorial seas and a distance of 4 leagues for exercising their police powers. Id at p 757. See, for example, the 1860 Civil Code of El Salvador in UN ST/LEG/SER.B/1, p 71, the 1933 Navigation and Maritime Act of El Salvador in Ibid. and also UN ST/LEG/SER.B/6, p 126, and the 1906 Civil Code of Honduras in UN ST/LEG/SER.B/1, p 71.

[131] Dissenting Opinion of Judge Oda, 1992 ICJ at 749. Oda also referred to the period when Spain (until 1821) and the Federal Republic of Central America (until 1839) had certain authority over the Gulf of Fonseca. According to Oda, although Spain and the Federal Republic of Central America may have exercised certain control powers over the waters of the Gulf, there is no evidence to indicate that 'at times prior to 1821 or 1839 Spain or Federal Republic of Central America had any control in the sea-waters beyond the traditionally accepted rule of the range of the cannon-shot in the Gulf'. Id at 753.

[132] Id at 758.

protected right by international law of innocent passage in the territorial sea of other States.[133]

As a general rule, it appears that the view of Judge Oda reflects the position of multi-State bays in international law. There is no ground in international law upon which a multi-State bay can be enclosed, whether through historic reasons or any other justification. However, the case of the Gulf of Fonseca is mentioned by many jurists as an exception to the general rule due to its particular circumstances from Oppenheim (1920)[134] to Brown (1994).[135] The ICJ confirmed the 1917 judgment of the CACJ since it was of the view that there was adequate evidence to qualify the Gulf of Fonseca as an historic bay at the time it was first under the control of a single authority, whether Spain (until 1821), or later the Federal Republic of Central America (until 1839). The basis of the ICJ's view was the principles governing the concept of State succession, that is to say according to that concept 'territorial sovereignty passes from one State to another State'.[136] In the case of the Gulf of Fonseca, the territorial sovereignty passed from the Federal Republic of Central America in 1839 to the three riparian States of El Salvador, Honduras, and Nicaragua.

Although there might be different approaches on the legal status of the waters within the Gulf, there would not be any change on the nature of the rights of navigation through the Gulf. A right of innocent passage for ships belonging to the riparian States or other States

[133] Id at 760. As far as maritime areas outside the closing line of the Gulf is concerned, unlike the ICJ, Oda was of the view that, due to the geographical location of Honduras, it cannot lay claim over the territorial sea, the EEZ, and the continental shelf outside the closing line. He, however, emphasised that 'Honduras is fully guaranteed access to the high seas of the Pacific Ocean outside the Gulf of Fonseca *by the unchallenged concept of innocent passage through the territorial seas of the two neighbouring States both within and without the Gulf*'. Ibid (emphasis added). Although Honduras has its own EEZ on the Atlantic coast, Oda does not exclude the possibility of considering it as a geographically disadvantaged State in the Pacific side to participate in the exploitation of surplus of living resources in the EEZs of El Salvador and Nicaragua under the provisions of the LOSC (Art. 69(1), Art. 70(1), and Art. 70(2)). Id at 761.

[134] L Oppenheim, *International Law* (3rd ed, London, 1920) para. 192, no. 4.

[135] Brown, note 12 above, at p 31. Brown is of the opinion that '[u]nder international customary law (and, it would seem, under the two Conventions, since they qualify neither the normal baseline rule nor the bays rule in this respect), the presumption must be that the normal baseline rule applies. Although one such bay, the Gulf of Fonseca, has been recognised as an exception to this rule, it was on the basis that it constituted an historic bay'. Ibid.

[136] 1992 ICJ at 598.

is protected either under the established practice of the riparian States or under the regime of the territorial sea.

There seem to be no other multi-State bays which have the same circumstances as the case of the Gulf of Fonseca. Accordingly, the exceptional case of the Gulf of Fonseca should not be taken into account as a precedent for other multi-State bays.[137] This is particularly due to the impact of such claims on the free seas. Although the rights of navigation were guaranteed in the whole area of the Gulf of Fonseca in accordance with the concept of innocent passage, there may be no guarantee that new claims on the enclosure of multi-State bays do not make the rights of navigation subject to more restrictive rules.

Conclusion

The Law of the Sea has not yet codified any rules on the issue of multi-State bays. This has, in turn, resulted in uncertainty as to whether the determination of the status of waters within these bays should be left to the littoral States concerned, or whether there should be international rules for delimitation of these bays. In particular, there has been a debate on the establishment of a balance between the exclusive rights of States bordering multi-State bays and the inclusive rights of the international community. In addition, the scope of the rights of littoral States surrounding multi-State bays have been subject to extensive debate. The main issue has been the status of navigation through waters within multi-State bays, whether by ships belonging to the littoral State not located at the entrance, or by foreign ships.

The prevailing trend is that multi-States bays may not be enclosed and claimed as internal waters. In fact, the status of their waters is determined by their size: whether they are wider than double the breadth of the territorial sea (24 nautical miles) or not. The waters of multi-State bays are subject to the legal regime of the territorial sea if they are wholly covered by territorial seas of littoral States. If they are wider than 24 nautical miles, they may also include the EEZs and the

[137] It appears that Churchill and Lowe are of the view that it is still possible for certain multi-State bays to be claimed as historic as they write that '[e]xceptionally it may be possible for the riparian States to show that the position is different by reason of historic title', even though they only refer to the case of the Gulf of Fonseca as an example. Churchill and Lowe, note 20 above, at p 33. This view is, however, questionable under the general rules of international customary law governing historic bays and waters.

high seas.[138] Accordingly, the rights of navigation, whether for littoral States of multi-State bays or for foreign ships, are guaranteed under the concepts of innocent passage or freedom of navigation under the legal regimes of the EEZ and the high seas.

[138] Multi-State bays also contain internal waters behind the low water mark along the coast or behind straight baselines, if certain circumstances exist along the coast to justify the use of straight baselines.