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THE SOUTH AUSTRALIAN HISTORIC BAYS: AN ASSESSMENT*

INTRODUCTION

The historic bay remains one of the more equivocal concepts within the Law of the Sea. Although its origins can be traced back to the writings of publicists in the 19th century,[1] and there appears to be general acceptance within the international community that historic bays exist,[2] there has been little concrete progress towards any codification of the rules pertaining to such bays. Indeed, in both the 1958 *Territorial Sea Convention*[3] and the 1982 *Law of the Sea Convention,*[4] the term "historic bay" is referred to as an exception to the closing line rules for bays, yet no attempt at all is made in either Convention to define the term.

In this comment, it is proposed to examine the proclamation of four historic bays in South Australia in 1987, and to gauge the international reaction to it. The latter consists largely of the protest of the United States, and the validity of the Australian proclamation will be considered

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1 The United Nations Secretariat cites the writings of Kent (1878), Phillimore (1879) and Barclay (1894-95) as examples (amongst many others) of 19th century approval of the concept: United Nations Secretariat, *Historic Bays*, (UN Document A/CONF 13/1, New York, 1957) at 16-17 (hereafter cited as "1957 Memorandum"); see also the treatment of Gidel: Gidel, *Le Droit International Public de la Mer: le Temps de Paix* Vol 3 (Chateauroux, Paris 1934) pp621-663.

2 As will be considered below, the term "historic bay" was used in both Art 7, 1958 *Territorial Sea Convention* (see fn 3 below) and Art 10, 1982 *Law of the Sea Convention* (see fn 4 below).

3 *Convention on the Territorial Sea and the Contiguous Zone*. Done at Geneva on 29 April 1958; in force 10 September 1964; 516 UNTS 205.

4 *United Nations Convention on the Law of the Sea* Done at Montego Bay on 10 December 1982, in force 16 November 1994; Doc A/CONF 62/122.

in the light of this protest, considering the various rules of international law dealing with the validity of historic bay claims.

SOUTH AUSTRALIAN HISTORIC BAYS: 1987 PROCLAMATION

On 19 March 1987, the then Governor-General of Australia, Sir Ninian Stephen issued a Proclamation pursuant to section 8 of the *Seas and Submerged Lands Act* 1973 (Cth).[5] Section 8 empowered the Governor-General to proclaim baselines to enclose the waters of certain bays as historic bays, and the Proclamation in this instance enclosed the waters of four bays in South Australia.

The Proclamation was the Commonwealth Government's response to the recommendations made by a joint Commonwealth/South Australian Committee in 1986. The Committee had been formed as a result of South Australian concerns that the 1983 baseline proclamation could adversely affect its rights to exploit the waters off its southern coasts. The Committee consisted of senior law officers of both the State and Federal Governments, and its terms of reference required it to consider the status of ten South Australian bays,[6] as to whether they were historic bays. In the course of their deliberations, the Committee added Lacepede Bay to their list of bays under consideration.[7]

After compiling technical and historical data concerning the various bays, the Committee recommended that four bays be proclaimed as "historic bays": Encounter Bay, Lacepede Bay, Rivoli Bay and Anxious Bay. The Committee's reasoning was apparently compelling as far as the Commonwealth Government was concerned, as the four bays enclosed in the 1987 Proclamation were those recommended in the Report of the Joint Cth/SA Committee. This might have been an end to the matter but for the response to the 1987 Proclamation by the US Embassy, which on 7 April

5 *Proclamation* No S57 31 March 1987.

6 These bays were Fowlers Bay, Clare Bay, D'Estrees Bay, Flower Cask Bay, Encounter Bay, Rivoli Bay, MacDonnell Bay, Umpherstone Bay, Anxious Bay and Guichen Bay: Commonwealth/South Australian Committee, *South Australian Historic Bays Issue* (AGPS, Canberra 1986) at 2 (hereafter cited as Cth/SA Committee).

7 Lumb, writing in 1978, noted specifically that Lacepede Bay did not come within the juristic definition of a bay: Lumb, *The Law of the Sea and Australian Offshore Areas* (QUP, St Lucia, 2nd ed 1978) p88.

1991 lodged a formal protest to Australia over the proclamation of the four South Australian historic bays.[8]

PRINCIPLES OF INTERNATIONAL LAW IN RELATION TO HISTORIC BAYS

The law of historic waters, of which historic bays are a subset, has developed over the last one hundred years. It grew from the notion that certain waters, regardless of their dimensions, were so intimately associated with the land that a State could assert its sovereignty over them as if they were land in the same way it could do so over the waters of a river or lake. Some States had claimed special rights over areas of sea for hundreds of years,[9] and during the last quarter of the 19th century, a number of international lawyers began to consider the bases of such claims, and in what circumstances they could be opposable to other States.[10]

Early efforts produced little in the way of consensus, but did generate long lists of bays that could be considered as historic. Real progress in terms of codification only took place following World War II, with some consideration of the issue by the International Court of Justice,[11] and studies undertaken under the auspices of the United Nations.[12] From this work, it is possible to distil the elemental requirements of an historic bay claim, although it is by no means settled as to the exact nature of each.

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8 Note No 28, Embassy of the United States of America to the Australian Department of Foreign Affairs and Trade, 7 April 1991 (hereafter cited as US Note).

9 The best known example was the King's Chambers, which were large areas of water claimed to be under the authority of the King of England in medieval times. They had fallen out of use by the 18th century, when the enclosure of seas had become inconsistent with British maritime policy: Colombos, *The International Law of the Sea* (Longman, London 1972) pp182-183; O'Connell (ed), *The International Law of the Sea* (Clarendon, Oxford 1982) Vol 1 pp339-341.

10 See fn1 above.

11 *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 116 at 130-131 and 142.

12 The UN Secretariat undertook a study of historic bays in 1957, and the UN General Assembly directed the International Law Commission (ILC) to consider the question of historic waters, including historic bays in 1959. The results of the latter study were published by the ILC in 1962. See "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6.

Sovereignty

The first element required to sustain successfully an historic bay claim is an assertion of sovereignty. This is more than simply claiming an area of water is subject to exclusive rights of use, such as fishing. Rather, it requires a coastal State to treat the waters in question as if they were internal waters, and to have complete and entirely unfettered control over them. This is necessary because an historic bay claim will give sovereign control to the coastal State, and it would be strange if acts less than an assertion of sovereignty ultimately gave such control.[13]

The assertion of sovereignty must also take a certain form to be effective. The acts in question must be open and public and must emanate from the littoral State. The rationale for this appears to be, at least in part, that third States must be given the opportunity to be made aware of the acts forming the basis of the claim. By making the claim reliant on acts of State, the third State can be left in no doubt as to the nature of the act in making its own decision as to whether an objection to the claim ought to be lodged.[14]

Time

As the term itself suggests, an historic bay should be associated with a claim of some not insignificant duration. In order to permit the waiving of the rules for closing bays, the feature must have been treated differently by the coastal State for a long period. The vexed question is how long this period ought to be. Publicists and States hold a variety views on this question. They range from a term of years sufficiently short to permit the States who achieved independence in the decades following World War II,[15] to "time immemorial".[16] In determining what will be a suitable time

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13 Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Clarendon Press, Oxford 1993) pp199-200; O'Connell, *The International Law of the Sea*, Vol I at 427-428; International Law Commission, "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6 at 14-15.

14 This assessment was reached by the ILC after having reviewed the writings of Gidel, Bourquin, Bustamante and the Pleadings of both parties in the *Anglo-Norwegian Fisheries Case*: International Law Commission, "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6 at 14-15; see also O'Connell, *The International Law of the Sea*, Vol 1 at 431.

15 Note the declaration pertaining to historic bays at the OAU Conference at Yaoundé in 1972, rejecting the notion that a claim could not be sustained by a recently independent African State: reprinted in Goldie, "Historical Bays in

period, the nature of the waters in question, and the attitude of foreign States to the claim over the period may all be relevant considerations.[17]

Acquiescence

It is generally recognised that the simple assertion of an historic bay claim is insufficient in itself to ensure the validity of the claim. The response of other States, especially neighbouring States or States whose interests may be directly affected by the claim, is vital in assessing the character of the waters involved. If a third State has protested the action used by the coastal State to base its historic bay claim, then it is clear that the claim will be invalid, at least as against that third State. A more difficult situation comes where the third State has taken no action. Publicists suggest that what is required of a third State is acquiescence to the claim. In a case where the third State had taken no action, provided the assertion of sovereignty was sufficiently public to assume that the third State had knowledge of it, it seems reasonable that the absence of protest equates with toleration or acquiescence.[18]

It is also worth noting that one protest is not necessarily fatal to a claim. The International Law Commission's 1962 Study noted that it may be possible to characterise a hierarchy of States for the purpose of protest. That is to say, the objections of a major maritime power will have a far greater detrimental impact on a claim than those of a remote third State, whose interests are entirely unaffected. Finding a middle ground between

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International Law - An Impressionistic Overview" (1984) 11 *Syracuse Journal of International and Commerce* 211 at 264.

16 International Law Commission, "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6 at 15; The ICJ in the *Anglo-Norwegian Fisheries Case* refer to "ancient and peaceful usage": (1951) ICJ Reports 116 at 142.

17 International Law Commission, "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6 at 15-16; Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea*, pp202-203; cf O'Connell, *The International Law of the Sea*, Vol 1 pp424-425; Pharand, "Historic Waters in International Law with Special Reference to the Arctic" (1971) 21 *University of Toronto Law Journal* 1 at 4; Bouchez, *The Regime of Bays in International Law* (Sythoff, Leyden 1964) p257.

18 International Law Commission, "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6 at 17; Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea*, pp208-209; Bouchez, *The Regime of Bays in International Law*, pp268-273.

these two positions in order to assess the impact of a protest remains a difficult task.[19]

Vital Interests

A fourth factor that is occasionally mooted is that of vital interest. Rather than using an historical connection to justify the assertion of sovereignty over the particular waters, it is argued that if the State has an essential interest in controlling those waters, it may do so. An essential interest may stem from the location of a crucial port facility or fishing ground.[20] While still referred to by publicists, it is submitted that this ground has lost much of its force, given that the vast majority of such interests can be adequately protected by other less contentious means, such as the Exclusive Economic Zone (EEZ).

BASES OF THE SOUTH AUSTRALIAN CLAIM

The joint Commonwealth/South Australia Committee based its findings with regard to the four bays on a number of factors. It noted the 1962 Study, and indicated that a continuous exercise of sovereignty over an extended time with the toleration or acquiescence of other States was necessary to establish a valid historic bay claim. In South Australian waters, the Committee stated that the 1836 Letters Patent (and the 1834 Imperial Act permitting their issue) which defined the limits of the colony to include "bays and gulfs" were evidence of a long standing claim to the gulfs and bays of South Australia. The four bays in question were not bays under the current international definition, but as the High Court had said in *A Raptis & Son v South Australia*,[21] the Letters Patent were referring to the 1836 definition of a bay rather than the current definition,[22] and in 1836, a bay could include any significant indentation in the coastline.[23]

19 International Law Commission, "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6 at 17; Bouchez, *The Regime of Bays in International Law*, p267.

20 International Law Commission, "The Juridical Regime of Historic Waters, including Historic Bays" [1962] *Yearbook of the International Law Commission* Vol II 6 at 20, pp28-30; O'Connell, *The International Law of the Sea*, Vol 1 p425; see also *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 116 at 142.

21 (1977) 138 CLR 346.

22 At 367-368, 383.

23 Originally, at common law, the waters of a bay were under the control of a littoral State if the opposite headland was visible from the shore - a practice known as "land-kenning": O'Connell, "Problems of Australian Coastal Jurisdiction" (1958) 35 *British Yearbook of International Law* 318 at 334; Edeson, "Australian Bays" (1968-9) 5 *Australian Yearbook of International Law*

The Committee also noted that since 1836 each of the four bays had been the location of significant fishing interests and some port facilities. In the case of Anxious Bay, the Committee cited two decisions of South Australian magistrates, *Evans v Milton*[24] and *Glover v Paul*,[25] as applications of *Raptis' Case* to one of the nominated bays thus confirming their position.[26] Further, it stated that any State then represented at the Court of St James had sufficient notice of the claim to have been held to have acquiesced in it.

Some other conclusions of the Committee are worth noting. One point that the Committee regarded as being of "considerable weight" was the relationship between domestic Australian law and international law. The Committee was of the view that it would be anomalous that parts of the bays could be part of South Australia, and yet sovereignty would be limited to that asserted over the territorial sea or beyond for the same areas.[27] The suggestion therefore appears to be that where there is conflict between domestic and international law conflict, the latter ought to accommodate the former.

With respect, this argument cannot be sustained. If there is a conflict between domestic and international law, it is not necessarily the best course to ignore established principles of international law, and apply an interpretation of a half-forgotten Imperial instrument made over 150 years ago. Australia could claim a 400 nautical mile territorial sea, which, if given effect to by a Commonwealth Act, Australian courts would have to apply, but that would not mean such a claim had any pretence of legality at international law.[28]

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5 at 19-20. From the second half of the 19th century, the old test was gradually abandoned and replaced by a test not dissimilar to that which developed in international law: see *Direct United States Cable Company v The Anglo-American Telegraph Company* [1877] 2 AC 394; *R v Cunningham, Brown & Summers* (1859) 169 ER 1171.

24 (Unreported, Adelaide Magistrate's Court, 1981).

25 (Unreported, Adelaide Magistrate's Court, 1984).

26 Both of these cases involved rulings to the effect that Encounter Bay was within the bounds of the state of South Australia: Cth/SA Committee, *South Australian Historic Bays Issue* at 25.

27 Cth/SA Committee, *South Australian Historic Bays Issue*, at 9.

28 In addition, the Committee made the statement:

> some parts of Encounter Bay, which on the view taken in this Report is wholly within the boundaries of South Australia, would for international purposes be high seas if the historic claim is not confirmed.

SOUTH AUSTRALIAN HISTORIC BAYS: US PROTEST

On 7 April 1991, the United States Embassy in Canberra lodged a formal protest to Australia over the Proclamation of the four South Australian historic bays.[29] While the protest was part of a series of American protests over historic bay claims, it did purport to consider evidence provided by the Australian Government and to assess the bays against the three basic criteria.

The American note expressed the United States' view that historic bay claims required:

> A) open, notorious and effective exercise of authority over the bay by the coastal state [sic]; B) continuous exercise of that authority and C) acquiescence by foreign states in the exercise of that authority.[30]

This does not include the "vital interests factor", but certainly represents a conventional position in the current state of international law. To some extent, the vital interests factor is dealt with implicitly in so far as the US points out that Australia is not deprived any interest that is not otherwise safeguarded by more acceptable means.[31]

The American protest focused upon the relatively recent nature of the claim, noting that the Proclamation was the first indication of any Australian intention to treat the bays as historic. To emphasise this, the protest notes that none of the four bays is listed in the 1957 UN Memorandum or in any other compilation of such bays. It is also significant that the US protest reserves the US position on the validity of other Australian baselines.[32]

The Australian response to the US protest has been sensibly guarded. In an opinion provided to the Commonwealth Government, it was noted that

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Australia had declared an exclusive fishing zone in those waters in 1979, and it is unclear from the above statement whether the Committee was aware of that, nor of the fact that there existed the potential to validly extend the territorial sea to 12 miles, as was done in 1990: Cth/SA Committee, *South Australian Historic Bays Issue* p9.

29 Note No 28, Embassy of the United States of America to the Australian Department of Foreign Affairs and Trade, 7 April 1991.

30 At 1.

31 At 2-3.

32 As above.

the US protest was a *pro forma* protest, and to concede ground upon it could be prejudicial to other Australian baselines. On the other hand, to maintain the claims would not adversely affect any foreign interests, while the passage of time acts to bring more substance to the claims.[33]

SOUTH AUSTRALIAN HISTORIC BAYS: AN EVALUATION

Introduction

Evaluating the validity of the proclamation of the four South Australian bays as "historic bays" is dependent upon a number of factors. It is submitted that the bays must be evaluated from an international perspective rather than an Australian one,[34] as obviously the validity of the Proclamation itself is not justiciable in Australia.[35] As such, the following analysis will focus on the four factors identified in the earlier examination of historic bays: (1) an assertion of sovereignty; (2) a long period of time where such an assertion was made; (3) the acquiescence of other States; and (possibly) (4) vital interests of the State making the claim. Nevertheless, the domestic law pertaining to historic bays may be of assistance in determining the overall question of international validity.

Sovereignty

The first difficulty encountered by the claims is related to sovereignty. As noted above, there must be an assertion of total sovereignty over the

33 Information provided to the author by Professor IA Shearer.

34 The validity of domestic legislation cannot be used as an excuse to justify a breach of international law: *Free Zones of Upper Savoy and Gex* PCIJ Ser A/B No 46 1932 at 167.

35 Within Australia, the Proclamation is an executive act-of-state which the courts will refuse to examine, other than the question of whether the act itself was *intra vires* for the body making it: Edeson, "Foreign Fishermen in the Territorial Waters of the Northern Territory, 1937" (1976) 7 *Fed LR* 202 at 217-219; however, note the judgment of Wells J in *Haruo Kitaoka v Commonwealth* (unreported, NT Supreme Court, 1937, discussed in Edeson) where his Honour refused to take account of an executive certificate where the Commonwealth was a defendant in the case (217-219). Cf with the view of O'Connell, where he questions the impact a Commonwealth executive certificate might have in determining the status of an historic bay. He notes that the certificate would have the effect of altering the boundary of a state: O'Connell, "Problems of Australian Coastal Jurisdiction" (1958) 34 *British Yearbook of International Law* 199 at 256-259. In the US, it has been held that such a certificate is of great assistance to the court, but will not be decisive: *US v Louisiana et al (Alabama and Mississippi Boundary Case)* 470 US 93 (1985) at 110-111.

waters of the bay, and such an assertion must be by way of a reasonably public act, to give other States the opportunity to protest if they wish. Under the current offshore legislative regime, the Proclamation of the bays as historic has the effect of labelling them as the internal waters of South Australia. This is in effect stating that, within Australian Constitutional parameters, the state of South Australia has complete sovereignty over the waters and subsoil of the four bays. The Proclamation is a public act, which has attracted the notice of at least one other State, and so in terms of the claim as it presently stands, a sufficiently public act of sovereignty has taken place.

Time

The second factor presents significant difficulties for the four bays. In addition to acts of sovereignty, the requisite acts must have taken place over a substantial period of time. As submitted above, the old test of 'time immemorial' is inappropriate for Australia because the relatively recent British settlement of the continent would deprive any bay of sufficient longevity of practice, and that test has been deemed inappropriate by a number of publicists. As such, a lesser test, of a substantial period is all that would need to be met by the four bays.

As the United States pointed out in its protest, it is difficult to see how the claim has sufficient longevity to be sustained. From the Committee's Report, apart from the 1836 Letters Patent, the claim is sustained by the presence of port facilities in some of the bays, and by a history of exploitation of the large fisheries in the bays.[36] With respect to the Committee, an historic bay claim requires more than a fishery or a port to help exploit it. Fishing as an activity does not provide the requisite assertion of sovereignty needed to establish an historic bay claim. There is no evidence of any assertion of dominion and ownership as against third States (although in fairness, the general remoteness of the bays means it is safe to assume that no vessel of a third State has tried to fish them), nor of any legislation which purported to do so. In fact, there is no evidence of any legislation which singled out the four bays over and above any others within South Australia prior to the 1987 Proclamation.

36 The Committee Report cites, inter alia, the building of jetties, lighthouses and railways to the towns on the shores of the bays, as well as the value of the fisheries: Cth/SA Committee, *South Australian Historic Bays Issue*, at 28-31 (Attachment F).

Basing the claims on the 1836 Letters Patent is even more remarkable. This instrument does not refer to any of the four bays individually.[37] While the High Court in *Raptis' Case* generously stated that the 1836 definition of a bay was wider than the modern definition, it is difficult to see that the four bays in question would qualify under the old common law definition either. For example, Anxious Bay has a mouth of over thirty nautical miles across, which would preclude the application of the old 'land-kenning' test.[38] Whilst it does form a clear indentation in the general direction of the coast, it could not be said that Anxious Bay was a bay with the same degree of penetration and clarity as Conception Bay or Spencer Gulf. In its size and general shape, Anxious Bay is not dissimilar to Boucaut Bay in the Northern Territory, which was expressly held not to be a part of the Territory, in spite of the identical reference to "bays and gulfs" in its constitutive instrument.[39] On the other hand, Anxious Bay was held by two South Australian Magistrates to be part of that State, which may be sufficient to confirm the bay as *inter fauces terrae*.[40] Lacepede and Encounter Bays are of a configuration where both have only one headland.[41] As such the angle of the closing line is largely a matter of

37 Edeson made the point in 1974 that "bays and gulfs" in the Letters Patent included the two gulfs, Coffin Bay, Nepean Bay, Sleaford Bay and Streaky Bay. These were the "only indentations of any significance along the South Australian coastline", which is something of an indictment against the claim that was made 13 years later: Edeson, "The Validity of Australia's Possible Maritime Historic Claims in International Law" (1974) 48 *ALJ* 295 at 298.

38 As early as 1308 in England, it was recognised that those with authority within a county, such as a coroner, could extend that authority to an arm of the sea extending inland, where the opposite shore was visible: O'Connell, "Problems of Australian Coastal Jurisdiction" (1958) 34 *British Yearbook of International Law* 199 at 234; Edeson, "Australian Bays" (1968-9) 5 *Australian Yearbook of International Law*, 5 at 19-23; Colombos, *The International Law of the Sea*, at pp182-183.

39 *Haruo Kitaoka v Commonwealth* (Unreported, NT Supreme Court, 1937, per Wells J): extracted in Edeson, "Foreign Fishermen in the Territorial Waters of the Northern Territory, 1937" (1976) 7 *Fed LR* 202 at 202-223, especially at 212; see also Edeson, "The Validity of Australia's Possible Maritime Historic Claims in International Law" (1974) 48 *ALJ* 295 at 303.

40 Cth/SA Committee, *South Australian Historic Bays Issue*, at 25; Prescott, *Australia's Maritime Boundaries* (Dept of International Relations, Canberra 1985) at 70.

41 The lack of clear headland to mark the mouth of the bay was perceived to be important in assessing the status of a bay at common law by Wells J in *Haruo Kitaoka v Commonwealth*, as well as low sandy headland, the lack of shelter, and a long curving shoreline: Edeson, "Foreign Fishermen in the Territorial

subjective opinion, and applying the old tests could produce an enclosed bay of far smaller size if circumstances and/or land-kenning were to be taken into account. Of the four, Rivoli Bay would be most likely to qualify at common law as it has been claimed in the Proclamation.

Obviously, if the bays are not historic at common law, either now or in 1836 when the 'land-kenning' test might have held sway, then they cannot have been validly claimed under the 1836 Letters Patent. Since the Committee's conclusion is entirely dependent on the South Australian instruments for the historical portion of the requirements, then the claims would, by necessity, fail. In the Committee's favour, the common law tests are sufficiently loose to make it at least possible to conclude that any or all of the four could conceivably be regarded as bays under them, with Rivoli Bay by far the most likely to be accepted. Encounter and Lacepede Bays would also be likely to succeed, although they would still be problematic because of the closing line suggested by the Committee.

It is further difficult to see how a statement in a South Australian constitutive instrument could have been held to have been suitably public to have received the toleration of third States. Certainly, Letters Patent issued by the British Crown were and are public documents; however to impose on a third State a duty to inspect such documents, particularly when no specific bay is even referred to, is probably far more onerous than most publicists would envisage as necessary. Further, Australia and South Australia have had numerous opportunities to confirm the supposed assertion of sovereignty over the four bays. In an official communication to Professor Charteris in 1936, the Commonwealth Government took no steps to indicate the four bays were historic.[42] Likewise, no steps were taken to alert other States to the omission of the four when the 1957 UN Memorandum listed 17 Australian bays as historic and failed to include them. Similarly, the British Government was not advised of any change of heart since South Australia had withdrawn any claim to Rivoli Bay in a letter to the Commonwealth in the 1920s.[43]

Waters of the Northern Territory, 1937" (1976) 7 *Fed LR* 202 at 212. Similar charges could be levelled at Lacepede and Encounter Bays.

42 The text of the letter (dated 24 April 1936) is reproduced in Charteris, *Chapters on International Law* (University of Sydney Law School, Sydney 1940) p99.

43 In 1924, the Colonial Office wrote to the Commonwealth asking to be advised of any claims to "territorial inlets". The Commonwealth passed this request on to the states, and South Australia responded claiming Rivoli and Streaky Bays, and the Gulf of St Vincent and Spencer Gulf. Pressure from the Admiralty through the Commonwealth saw South Australia withdraw the claim to the two bays, but not the two Gulfs. The Lords of the Admiralty had "emphasised" to the

Acquiescence

As well as positive and public actions to assert sovereignty, Australia has to show at least acquiescence by other States. The United States protest makes this task more difficult, and would seem to make the historic bays not opposable to that country. Whether it will invalidate the claim as against all States is more difficult. On the one hand, the US protest is a lone protest and the United States has no direct interests affected by the declaration of the bays as historic. On the other hand, it may be inappropriate to look at interests of other States adversely affected by the 1987 Proclamation. The bays are geographically remote from all other States, and it is most unlikely that any State would directly suffer some inconvenience from the claim. As such, the protest of so powerful and influential a State as the United States may go some way to weakening the claim, although of itself, it would be going too far to suggest it was fatal to it.

Vital Interests

The fourth factor, of vital interests, is mooted by some publicists as an alternative to an 'honourably aged' claim. As evidence of the importance of the bays, the Committee appended a section entitled "Historic, Economic and Other Information on the Bays". This attachment briefly reviewed the activities that had taken place in and around the bays since they were charted by Flinders and Baudin in the first half of the 19th century.[44]

There is little in the attachment to suggest the bays represent vital strategic or economic interests to Australia. Certainly there are settlements in each bay, but none of these deal with a volume of shipping on the scale of the Mississippi Sound for example, or even one hundredth of such a scale.[45] The Committee does note that all of the bays are the site of not insignificant fishing interests. While this might be a factor in other

Secretary of State for Dominion Affairs that claims in respect of territorial inlets should be restricted "as far as possible". This was forwarded from the Dominion Office to the Commonwealth Government in 1927, and hence to South Australia in 1928: Cth/SA Committee, *South Australian Historic Bays Issue*, at 32-33.

44 Both Flinders and Baudin explored the South Australian coasts in separate expeditions in 1802. Both met on 9 April of that year in Encounter Bay: see Cth/SA Committee, *South Australian Historic Bays Issue*, at 28-31.

45 The Gulf of Mississippi was under consideration by the US Supreme Court to determine whether it satisfied the historic bay test in *Alabama and Mississippi Boundary Case* 470 US 93 (1985) at 102.

situations and times, it cannot be relevant here. Firstly, an historic bay was and is unnecessary to protect those fisheries. They have been more than adequately protected since 1979 with the establishment of the Australian Fishing Zone, and certainly from 1994 with the proclamation of an Australian Exclusive Economic Zone (EEZ). Secondly, while these fisheries are significant, they cannot be said to represent *vital* Australian interests. Even the complete loss of fisheries worth five to ten million dollars could not be regarded as a vital concern to a State such as Australia.[46] Further, there is no evidence that the fishery is threatened by other States in any case, or even that other States have ever fished within sight of the South Australian coast. In the face of so slight a threat, and with the protection of an internationally recognised EEZ, the historic bay claims could not be said to be the guardian of a vital interest.

Conclusions

In summation, the claims appear to be more than a little opportunistic. They appear to be based almost entirely upon the phrasing of a 19th century British prerogative instrument, and fishing interests. As submitted above, fisheries of themselves cannot found an historic bay claim, and there was no further evidence of any assertion of sovereignty over the four bays. There has been little in the way of effective notice of the claims given, with apparent reliance on third States to peruse 150 year old British Orders-in-Council and detailed maps of South Australia. The claims face the protest of at least one influential State, and may have only avoided others by the general remoteness of the whole region from other States. While Australia may choose to maintain these claims, it is submitted that the claims cannot withstand international scrutiny.

46 Cth/SA Committee, *South Australian Historic Bays Issue*, at 30-31.