Chapter 15

**VITAL INTERESTS (‘VITAL BAYS’): A ‘FOURTH’ FACTOR RELEVANT TO EVIDENCE OF HISTORIC WATERS?**

1. Definitions of ‘Vital Interests’ and ‘Vital Bays’

“Vital interests” are defined by Bouchez¹ as “interests to which such a great value is attached by a State that their realisation is seen a necessity for the existence of a national community”. Closely allied to this concept is the phenomenon known as the ‘vital bay’. Some publicists of the past have treated the terms ‘historic bays’ and ‘vital bays’ as being interchangeable;² but in fact “vital bay” is a term often used by more recent Third World claimants to historic waters. The substitution of the word ‘vital’ for ‘historic’ is significant. For, as Bouchez says more generally,³ the concept of a vital bay is based on an “entirely different” theory because “the historic element is entirely lacking”. Bouchez⁴ claimed that it was Dr Drago in 1917 who “perhaps for the first time”

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⁴ Id.
formulated the idea that “vital interests could be considered as a justification for claims to parts of the sea”. Dr Drago had held in the *North Atlantic Fisheries Arbitration* that historic bays were a “class distinct and apart”, with “particular circumstances such a geographical configuration, immemorial usage and, above all, the requirements of self-defense” justifying such a “pretension”.

As to what these ‘interests’ may comprise, Bouchez commented that in the *Gulf of Fonseca* case (1917), the Court called attention to three kinds of circumstances, namely “historical factors, geographical factors and vital interests”; and that the latter category included “especially economics and defence”. Such factors have been raised since then in other fora. For example, at the 1930 Hague Codification Conference, a few States mentioned concepts of *security and defence* and even the “well-being of the States” as being relevant.

2. Past Reference to ‘Vital Interests’ in US Caselaw and Elsewhere

The early US case (concerning the *Alleganean*, *Stetson v. US*), clearly evidences not only the stress on ‘other interest’ factors such as geography (“entirely encompassed by our own territory”), but also defence (“can we permit belligerent operations between foreign nations within the shores of this bay?”). However, as McDougal and Burke rightly comment on such early cases (here from 1793), “[i]t is both relevant and necessary to consider . . . that the opinion was given at a time when there was not the slightest notion of historic bays or of any limitations on claims to bays”. Reference in the later US tidelands cases to such factors is discussed below.

In the *Gulf of Fonseca* case also, the Central American Court of Justice appears in 1917 to have made strong reference to “vital interests”, when it said that in order to determine the Gulf’s international status it was “necessary to specify the characteristics proper thereto from the threefold point of history, geography and the vital interests of

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7 *Id.*, at p. 212. He enumerates (*id.*, at p. 258) the “various economic considerations” and the “strategic aspect” where the Court held (at p. 705) that the strategic situation was so advantageous to the riparian States “that [they] can defend their great interests therein and provide for the defense of their independence and sovereignty”.
8 See Blum, *op. cit.*, at pp. 83/4 & 182 (where he views such extraneous considerations as a “fallacious”). On defense aspects, see Bouchez (*op. cit.*, at pp. 291–294) who cites Dr Drago in the 1910 *North Atlantic Fisheries Arbitration* emphasising the “defense element” as an important factor in historic waters claims; but he rejects (*id.*, at p. 293) such considerations as a sole basis of claim because of their subjectivity. McDougal & Burke (*op. cit.*, at p. 363) point out that at the 1930 Hague Codification Conference, none of the drafts adopted such vital interest factors (though these were referred to by some delegates – *e.g.*, by Portugal (LN Doc C. 74. M. 39.1919, V, at p. 184) (“security and defense”).
9 Moore’s *Arbitration*, vol. iv, at p. 4332; cited by Strohl, *op. cit.*, at p. 277. Goldie (*supra* p. 196, n. 154, at p. 270) points out that Delaware Bay was in fact first claimed “to vindicate [US] neutrality”.