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International Law Situations with Solutions and Notes

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SITUATION III

JURISDICTION AND POLAR AREAS

States O and X as allies are at war with states T and Y which are allied. Other states are neutral. States M, N, O, and P have land bordering on or have made claims to jurisdiction over polar areas.

(a) State M prohibits aircraft of all descriptions and nationalities from entering its jurisdiction, and orders, under penalty of being shot down, an aircraft of state O to alight when it is flying over the ice ten miles polarward from the coast.

(b) State O orders closed a radio station established by state N on the ice polarward fifty miles from the coast of state O and previously open to the use of all.

(c) State O prohibits the entrance of any aircraft, other than those of state X, polarward from its coast.

(d) A regular aircraft service is maintained between state M and state P and the route passes near the pole. A state M aircraft in this service, in a disabled condition, alights on the ice five miles coastward from the pole in the direction of state O, but one hundred miles from any land. State O learning of this sends an aircraft to seize the aircraft of state M as having violated the jurisdiction of state O.

(e) State P proclaims an open water route ten miles polarward off its coast but two miles from
permanent coast ice to be closed to all navigation during the war.

(f) State N proclaims a similar open water route closed to vessels of war and to all submarines except neutral submarines navigating on the surface with identifying flags displayed.

How far are the acts of the several states and their contentions lawful?

SOLUTION

(a) State M may lawfully prohibit the flight of aircraft above its territorial and maritime jurisdiction.¹

It is not lawful to interfere with the flight of aircraft outside this space.

(b) State O may not lawfully order the radio station of state N to be closed though it may protest to state N against any violation of neutrality in its use.

(c) State O may lawfully prohibit or regulate the entrance to its jurisdiction of any or all aircraft.

(d) State O may not lawfully seize the aircraft of state M.

(e) State P may not lawfully prohibit innocent passage though it may issue regulations essential to its own protection.

(f) State N may lawfully prohibit the entrance or regulate the movements of vessels of war or regulate the movements of other vessels within its territorial waters when essential for its protection.

¹As yet there is no international agreement upon the limit of maritime jurisdiction though a minimum of three miles is generally recognized.
JURISDICTION

NOTES

Jurisdiction.—The term "territory" and the term "jurisdiction" have often been confused and the courts have been called upon to interpret their meaning. The Federal Court referring to the meaning of the word "territory" said:

"Various meanings are sought to be attributed to the term 'territory' in the phrase 'the United States and all territory subject to the jurisdiction thereof.' We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense—that it refers to areas or districts having fixity of location and recognized boundaries. See United States v. Bevans, 3 Wheat. 336, 390, 4 L. Ed. 404. It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed areas of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles." (Lam Mow v. Nagle, 24 F. (2d) 316 [1928].)

Courts of other countries have made a clear distinction between territory and jurisdiction as in the case of continuous pursuit when pursuit of a vessel is commenced within the territorial waters and continued upon the high sea as a lawful exercise of jurisdiction without any claim to extension of territory. (The Ship North v. The King; 37 Canada, S. C. R. 385 [1905].) Jurisdiction is the right to exercise state authority and may extend where property or domain does not exist.

Acquisition of jurisdiction.—The common methods of acquisition of territorial jurisdiction have
been: (1) discovery, (2) occupation, (3) conquest, (4) cession, (5) prescription, (6) accretion, and (7) lease. In the polar region the main questions relate to (1) discovery and (2) occupation. Early claims on the ground of discovery were often fantastic in extent. Not merely Protestant Powers but also Catholic Powers queried the authority of the Pope in assigning the lands of the New World to Spanish and Portuguese discoverers. Even Francis I of Spain in the sixteenth century demanded evidence in the will of Adam which would deprive his country of the right to acquire territory by discovery in the New World. Controversies over priority of discovery were common. Beacons, flags, monuments, etc., were set up as evidence of title, but it was soon demanded that something more than mere discovery be required.

During the early nineteenth century there were many problems arising on the ground that occupation of an effective nature must be shown to give good title, and a mere intention to occupy is not sufficient.

Notification and occupation.—In early days discovery and occupation were considered essential to title in an area not previously under the jurisdiction of a recognized state. Later, particularly from the middle of the nineteenth century, as the region of possible discovery became very limited, the idea that proposed occupancy should be made known by notification was introduced. This is evident in the declarations of the General Act of the Conference of Berlin, February 26, 1885:

"Art. 34. La Puissance qui dorénavant prendra possession d'un territoire sur les côtes du Continent Africain situé en dehors de ses possessions actuelles, ou qui, n'en ayant pas
eu jusque-là, viendrait à en acquérir, et de même la Puissance qui y assumera un Protectorat, accompagnera l'acte respectif d'une Notification adressée aux autres Puissances Signataires du présent Acte, afin de les mettre à même de faire valoir, s'il y a lieu, leurs réclamations.

"Arr. 35. Les Puissances Signataires de présent Acte reconnaissent l'obligation d'assurer, dans les territoires occupés par elles, sur les côtes du Continent Africain, l'existence d'une autorité suffisante, pour faire respecter les droits acquis et, le cas échéant, la liberté du commerce et du transit dans les conditions où elle serait stipulée." (76 Br. & For. State Papers, p. 19.)

The Bulama case, 1870.—There had been a long pending controversy in regard to sovereignty over the island of Bulama off the mouth of the Rio Grande river on the west coast of Africa. Portuguese discovery in 1446 was admitted. Later there had been periods of British and Portuguese occupation and various cessions by native chiefs. The question as to title was at length referred to the President of the United States as arbitrator. The President delegated the handling of the case to Mr. J. C. Bancroft Davis, then Assistant Secretary of State. In the report the opinions of Vattel cited by the British were held applicable to this case. Discovery would be a good title, "provided it was soon after followed by a real possession," settlement, and actual use.

It was further added that:

"It is to be observed, in qualification of these rules, that countries inhabited by savage tribes may, under well-established rules of public law, be so occupied and possessed by the representatives of a Christian power as to dispossess the native sovereignty and transfer it to the Christian power. The word 'uninhabited' in the extract from Vattel must therefore be taken with this limitation.
"It is also to be remarked that islands in the vicinity of the mainland are regarded as its appendages: that the ownership and occupation of the mainland includes the adjacent islands, even though no positive acts of ownership may have been exercised over them." (2 Moore, History and Digest of the International Arbitrations to which the United States has been a Party, p. 1919.)

_Institut de Droit International, 1888._—After long discussion of the question of occupation, the Institute of International Law, at the meeting held at Lausanne in 1888, adopted a projet as follows:

"**Article 1.**—L'occupation d'un territoire à titre de souveraineté ne pourra être reconnue comme effective que si elle réunit les conditions suivantes:

"1o La prise de possession d'un territoire enfermé dans certaines limites, faite au nom du gouvernement;

"2o La notification officielle de la prise de possession.

La prise de possession s'accomplit par l'établissement d'un pouvoir local responsable, pourvu de moyens suffisants pour maintenir l'ordre et pour assurer l'exercice régulier de son autorité dans les limites du territoire occupé. Ces moyens pourront être empruntés à des institutions existantes dans le pays occupé.

"La notification de la prise de possession se fait, soit par la publication dans la forme qui, dans chaque État, est en usage pour la notification des actes officiels, soit par la voie diplomatique. Elle contiendra la détermination approximative des limites du territoire occupé." (X Annuaire de l'Institut de Droit International, p. 201.)

_British position, 1889._—In a communication of the Marquis of Salisbury of December 26, 1889, regarding Portuguese claims to territories in the vicinity of Zambesi, it was said:

"The fact of essential importance is, that the territory in question is not under the effective government or occupation of Portugal, and that if it ever was so, which is very doubtful, that occupation has ceased during an interval of
more than two centuries. During the whole of that period the Government of Portugal has made no attempt either to govern or civilize or colonize the vast regions to which a claim is now advanced, and it may be said, with respect to a very large portion of them, that no Portuguese authority has ever attempted their exploration. The practical attention of that Government has only been drawn to them at last by the successful enterprise of British travellers and British settlers. The Portuguese authorities during that long interval have made no offer to establish in them even the semblance of an effective government, or to commence the restoration of their alleged dominion, even by military expeditions, until they were stimulated to do so by the probability that the work of colonizing and civilizing them would fall to the advancing stream of British emigration. It is not, indeed, required by international law that the whole extent of a country occupied by a civilized Power should be reclaimed from barbarism at once; time is necessary for the full completion of a process which depends upon the gradual increase of wealth and population; but, on the other hand, no paper annexation of territory can pretend to any validity as a bar to the enterprise of other nations if it has never through vast periods of time been accompanied by a reality, and has been suffered to be ineffectual and unused for centuries.” (81 Br. & For. State Papers, 1888–89, p. 1031.)

Falkland Islands dependencies.—Under British Letters Patent, March 28, 1917, after relating that doubt had arisen as to the limits of certain groups of islands, it was stated by George V:

“1. Now we do hereby declare that from and after the publication of these our Letters Patent in the Government ‘Gazette’ of our Colony of the Falkland Islands, the Dependencies of our said Colony shall be deemed to include and to have included all islands and territories whatsoever between the 20th degree of west longitude and the 50th degree of West longitude which are situated south of the 50th parallel of south latitude; and all islands and territories whatsoever between the 50th degree of west longitude
and the 80th degree of west longitude which are situated south of the 58th parallel of south latitude.” (111 Br. & For. State Papers, 1917-18, p. 16.)

The area to the south of these parallels would seem to extend to the south pole.

**Clipperton Island case, 1931.**—While the agreement to submit to arbitration the question as to the title to Clipperton Island had been considered between France and Mexico from March 2, 1909, the award was not rendered till January 28, 1931. The island itself was a small coral lagoon nearly 700 miles south west off the coast of Mexico. It had been regarded as of little value and was usually unoccupied. The agreement of 1909 had named the King of Italy as arbitrator. Referring to the title by occupation the arbitrator said:

"Consequently, there is ground to admit that, when in November, 1858, France proclaimed her sovereignty over Clipperton, that island was in the legal situation of *territorium nullius*, and, therefore, susceptible of occupation.

"The question remains whether France proceeded to an effective occupation, satisfying the conditions required by international law for the validity of this kind of territorial acquisition. In effect, Mexico maintains, secondarily to her principal contention which has just been examined, that the French occupation was not valid, and consequently her own right to occupy the island which must still be considered as *nullius* in 1897.

"In whatever concerns this question, there is, first of all, ground to hold as incontestable, the regularity of the act by which France in 1858 made known in a clear and precise manner, her intention to consider the island as her territory.

"On the other hand, it is disputed that France took effective possession of the island, and it is maintained that without such a taking of possession of an effective character, the occupation must be considered as null and void.

"It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual,
and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.” (26 A. J. I. L. [1932], p. 393.)

The award does not accept the conventional agreement of the Act of Berlin as applicable but refers back to the status of 1858 when France proclaimed title to the island.

“It follows from these premises that Clipperton Island was legitimately acquired by France on November 17, 1858. There is no reason to suppose that France has subsequently lost her right by delictio, since she never had the animus of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitely perfected.” (Ibid., p. 394.)

Contiguity and propinquity doctrines.—The claim that contiguity gives special rights to a state over neighboring areas more or less remote and varying in nature has frequently been made and on differing grounds. One of the most common claims has been to islands off the coast of a state, but relatively near. Without other basis for the validity of the claim than mere proximity, the claim has
been regarded as of little weight, as nearness is in itself a relative term.

On January 23, 1925, the United States and the Netherlands agreed to submit to the Permanent Court of Arbitration at The Hague the question as to "whether the Island of Palmas in its entirety forms a part of territory belonging to the United States of America or of the Netherlands territory." In this case the argument for title based on contiguity was advanced among others. The arbitrator, Judge Huber, referring to this, says:

"In the last place there remains to be considered title arising out of contiguity. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing ipso jure the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking
in precision and would in its application lead to arbitrary results.” (Scott, Hague Court Reports, 2d Series, p. 111.)

It has been admitted that territorial propinquity may create special relations between neighboring states of which other states may take notice. If states are to be considered as equally entitled to rights and privileges, a third state might be open to criticism if recognizing any right of one to disregard the rights of the other. Just how far territorial propinquity may be a ground for recognition of a special position on the part of one state as regards a neighboring state is an open question, but experience seems to show that the precedents are of doubtful value.

The doctrine of contiguity was naturally advanced in early claims to jurisdiction following discovery. That a certain hinterland appertained to the coast, watershed to a river, etc., was usually admitted. That the title to the coast gave some right in the adjacent waters was an ancient contention. What should be the limit of jurisdiction based upon contiguity was often a question settled by the issue of war when these areas met or overlapped. Some have assimilated the doctrine of contiguity to a type of inferred potential effective occupation, which still leaves a large area for difference of opinion. There has also been a tendency to extend this to a doctrine of propinquity. As the area of the earth’s surface which could be regarded as res nullius was effectively occupied, the doctrine of propinquity received more attention, but this became rather a matter of politics than of law.

The doctrine of propinquity may also have the political appeal of identity of interest as often advanced in the solidarity of the Americas or might
give rise to special interests as stated in the Lansing-Ishii note of November 2, 1917:

"In order to silence mischievous reports that have from time to time been circulated, it is believed by us that a public announcement once more of the desires and intentions shared by our two Governments with regard to China is advisable.

"The Governments of the United States and Japan recognize that territorial propinquity creates special relations between countries, and, consequently, the Government of the United States recognizes that Japan has special interests in China, particularly in the part to which her possessions are contiguous.

"The territorial sovereignty of China, nevertheless, remains unimpaired and the Government of the United States has every confidence in the repeated assurances of the Imperial Japanese Government that while geographical position gives Japan such special interests they have no desire to discriminate against the trade of other nations or to disregard the commercial rights heretofore granted by China in treaties with other powers.

"The Governments of the United States and Japan deny that they have any purpose to infringe in any way the independence or territorial integrity of China and they declare, furthermore, that they always adhere to the principle of the so-called 'open door' or equal opportunity for commerce and industry in China." (Foreign Relations, U. S., 1917, p. 264.)

In the above note it is recognized that "territorial propinquity creates special relations" and that "Japan has special interests in China, particularly in the part to which her possessions are contiguous," and the two states "mutually declare that they are opposed to the acquisition by any Government of any special rights or privileges," or impairment of the independence or the freedom of commerce of China.
This note was the subject of much diplomatic correspondence and difference of opinion, and the agreement was cancelled by an exchange of notes on April 14, 1923, affirming that an identity of view had been disclosed in the Washington Conference on the Limitation of Armament of the previous year.

That the principle of propinquity would give special relations in an established state which might be a subject of negotiation by a third state was not admitted by China.

"The principle adopted by the Chinese Government towards the friendly nations has always been one of justice and equality; and consequently the rights enjoyed by the friendly nations derived from the treaties have been consistently respected, and so even with the special relations between countries created by the fact of territorial contiguity, it is only in so far as they have already been provided for in her existing treaties. Hereafter the Chinese Government will still adhere to the principle hitherto adopted, and hereby it is again declared that the Chinese Government will not allow herself to be bound by an agreement entered into by other nations." (Ibid., p. 270.)

The tendency to extend the doctrine of contiguity to cover political policies has led some writers to reject it and to denounce the propinquity theory.

This attitude of those who reject the doctrine of contiguity does not usually involve an entire rejection of all claims based upon geographical nearness.

The claim of potential effective occupation is recognized as having legal weight which is demonstrable.

Polar regions.—As other areas of the earth's surface have become known and have been subjected to the jurisdiction of established states, attention has been turned to the less known polar regions. These
areas have not been clearly defined but different states have made claims to jurisdiction in polar areas on varying grounds. The areas about the north and about the south pole are not identical in their characteristics. The economic and strategic importance of the areas also differ. Some areas are of value for strategic reasons; in some there are deposits of minerals; fishing and hunting give importance to some areas; and proximity and other reasons give grounds to other claimants of jurisdiction.

The value of scientific data obtainable in the polar regions has also been emphasized; particularly the value of meteorological investigations. The flora and fauna as well as the ethnic characteristics of life in the polar regions may offer serviceable data.

The ancient quest for a North-West passage from the Atlantic to the Pacific has lost interest as aircraft have made earlier barriers of little importance, and many polar air routes have been surveyed.

In recent years the polar regions, north and south, have received more attention. The spirit of discovery as far as the surface of the earth is concerned has been largely confined to these areas. Discovery of the geographical north or south pole has lured explorers. Economic resources have also called for investigation. That there were fish and whales in the polar waters has long been known and the fisheries have proven valuable. The long sought North-West passage may now be by air and the time required may be insignificant as compared with that contemplated by early explorers. The controversies over Wrangel Island or Herald
Island, and over the territories of Greenland claimed by Denmark and Norway before the Permanent Court of International Justice in 1932 and 1933 have attracted relatively little attention.

While the Arctic ice seems to be for the most part mobile at least for some season of the year, some of the Antarctic ice seems to be relatively stationary. Scientific investigation may determine to what extent the ice rests upon the land surface and to what extent it is below low-water mark. If the seaward limits do not change, it would seem that a measure of jurisdiction over permanent ice should be in the adjacent land sovereignty.

**Objectives in polar explorations.**— Probably it would be found that the broadening of the knowledge of the polar regions has been due to many stimuli. The spirit of adventure into unknown regions has often been evident both in early and late expeditions. The lure of a North West or North East passage from the Atlantic to the Pacific was always present in the minds of some, even before aircraft removed many difficulties. The exploitation of the polar resources, whaling, sealing, fishing, etc., and recently mining, has attracted a different type of expedition. Scientific knowledge has been the aim of some explorers. The discovery of the poles has been sought by some. The extension of state authority has naturally been a motive prompting to direct or indirect state aid. Often the objectives have been mixed and, as stated, sometimes misleading.

**Fauchille on polar domain.**—The late Paul Fauchille gave much attention to the doctrine of sovereignty over polar areas and reviewed the various
theories which had been advanced. He said in the eighth edition of Bonfils, published in 1925:

Étant des territoires, les régions polaires sont susceptibles d’appropriation. Mais, étant des territoires glacés, elles ne sont pas véritablement habitables; elles se sont seulement exploitables: les hommes ne sauraient y vivre comme sur les autres territoires pour une durée de temps indéfinie, ils ne peuvent y demeurer que d’une manière temporaire; c’est en conséquence un personnel constamment renouvelé qu’il faudra y entretenir. Il suit de là que l’appropriation dont elles sont susceptibles doit nécessairement présenter un caractère particulier. Il ne peut pas s’agir dans de pareilles régions d’une occupation proprement dite, et il ne saurait être question d’y instituer sur place un gouvernement et une administration avec tous les rouages que ceux-ci impliquent d’ordinaire (comp. n°. 554). L’occupation que les pôles autorisent est une occupation d’exploitation, non pas une occupation d’habitation. Cela-là est pour les régions polaires la seule qui soit admissible. Mais il faut qu’elle existe. Ici, comme en ce qui concerne tout autre domaine sans maître, le simple fait de la découverte est inopérant pour produire un droit définitif: il prépare l’appropriation, mais il ne la crée pas. Rebelles à toute idée d’un séjour indéfini, et nécessitant un personnel constamment changeant, les régions glacées sont par là même incompatibles, de leur nature, avec celle d’une souveraineté individuelle exclusive. Ce n’est pas à un seul État, c’est à tous les États qu’il faut reconnaître le droit de les exploiter. C’est en définitive d’une sorte de condominium plural qu’elles doivent entre l’objet: elles doivent devenir une possession commune de tous les membres de la famille des nations.” (Droit International Public, Tome 1, 2me Partie, § 531 39, p. 658.)

Opinion of Professor Hyde.—Professor Hyde in 1934 in an article entitled “Acquisition of Sovereignty over Polar Area” takes into account the Sector system and its consequences. He concludes that—

“If, on account of the rigour of climatic conditions in the polar regions, there is to be a relaxation of the requirements
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of the law demanding occupation as the mode of acquiring a right of sovereignty over newly found lands, it should be kept within rigid bounds, and never regarded as applicable to kindred efforts in the temperate zones. The relaxation should be confined to the waiving of settlement as a necessary condition for the perfecting of a right of sovereignty, provided a claimant state may establish that by some other process it is in a position to exercise control over what it claims as its own. This requirement should be applied in all polar regions. In those of the Arctic, it might, however, be recognized that the sovereign of contiguous territory projecting itself into the Arctic Circle was, by reason of that fact, in a position to exercise requisite control over an extensive area, or at least in a position to make proof of the fact. Yet in such case, the doctrine of contiguity should not be permitted to supplant the need of proof, as by acknowledging the possession of a power of control when none was found to exist. In the Antarctic regions no assumption of the requisite power should be deemed to suffice to beget a right of sovereignty, or be accepted as a substitute of proof of the requisite power to control.” (29 Iowa Law Review, January 1934, p. 294.

Russian rules, 1821.—A Russian edict of 4/16 September 1821, published “for the information of all men,”

“Rules established for the limits of Navigation and order of Communication, along the Cost of the Eastern Siberia, the North-western Coast of America, and the Aleutian, Kurile, and other Islands

“Sect. 1. The pursuits of commerce, whaling, and fishery, and of all other industry, on all Islands, Ports, and Gulfs, including the whole of the North-west Coast of America, beginning from Behring's Straits, to the 51° of Northern Latitude, also from the Aleutian Islands to the Eastern Coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz: to the 45° 50' Northern Latitude, is exclusively granted to Russian Subjects.
“II. It is therefore prohibited to all Foreign Vessels, not only to land on the Coast and Islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles. The Transgressor’s Vessel is subject to confiscation, along with the whole cargo.” (9 Br. & For. State Papers, 1822, p. 473.)

Exceptions were provided for vessels in distress and detailed regulations for other vessels.

In acknowledging the receipt of the Rules, the Secretary of State of the United States said:

“I am directed by the President of The United States to inform you, that he has seen with surprise in this Edict the assertion of a Territorial Claim on the part of Russia, extending to the 51st degree of North Latitude on this Continent; and a Regulation interdicting to all Commercial Vessels, other than Russian, upon the penalty of seizure and confiscation, the approach, upon the High Seas, within 100 Italian miles of the shores to which that Claim is made to apply. The relations of The United States with His Imperial Majesty have always been of the most friendly character; and it is the earnest desire of this Government to preserve them in that state. It was expected, before any Act which should define the Boundary between the Territories of The United States and Russia, on this Continent, that the same would have been arranged, by Treaty, between the Parties. To exclude the Vessels of our Citizens, from the shore, beyond the ordinary distance to which the Territorial Jurisdiction extends, has excited still greater surprise.

“This Ordinance affects so deeply the Rights of The United States and of their Citizens, that I am instructed to inquire, whether you are authorized to give explanations of the grounds of Right, upon principles generally recognized by the Laws and Usages of Nations, which can warrant the Claims and Regulations contained in it.” (Ibid., p. 483.)

The Russian Minister in a long reply, after relating the historical events leading to Russian claims, said of these claims that, they—

“rest upon three bases required by the general Law of Nations and immemorial usages among Nations; that is, upon
the title of first discovery; upon the title of first occupation; and, in the last place, upon that which results from a peaceful and uncontested possession of more than half a century; an epoch, consequently, several years anterior to that when the United States took their place among Independent Nations.

"It is moreover evident, that, if the right of the possession of a certain extent of the North-west Coast of America, claimed by The United States, only devolves upon them in virtue of the Treaty of Washington, of the 22d of February, 1819, and I believe it would be difficult to make good any other title, this Treaty could not confer upon the American Government any right of claim against the Limits assigned to the Russian Possessions upon the same Coast, because Spain herself had never pretended to a similar right.

"The Imperial Government, in assigning for Limits to the Russian Possession on the North-West Coast of America, on the one side Behring's Strait, and, on the other, the 51st degree of North Latitude, has only made a moderate use of an incontestible right; since the Russian Navigators, who were the first to explore that part of the American Continent, in 1741, pushed their discovery as far as the 49th degree of North Latitude. The 51st degree, therefore, is no more than a mean Point between the Russian Establishment of New Archangel, situated under the 57th degree, and the American Colony at the mouth of the Columbia, which is found under the 46th degree of the same Latitude." (Ibid., p. 485.)

The Minister, after alluding to the need of 100 miles protective jurisdiction, also said,

"I ought, in the last place, to request you to consider, Sir, that the Russian Possessions in the Pacific Ocean extend, on the North-west Coast of America, from Behring's Strait to the 51st degree of North Latitude, and, on the opposite side of Asia, and the Islands adjacent, from the same Strait to the 45th degree. The extent of Sea of which these Possessions form the limits, comprehends all the conditions which are ordinarily attached to shut seas (Mers fermées), and the Russian Government might consequently judge itself authorized to exercise upon this Sea, the right of Sover-
eignty, and especially that of entirely interdicting the entrance of Foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities.” (Ibid., p. 487.)

The Arctic and the United States.—American explorers found the Arctic an alluring area after the middle of the nineteenth century and made many valuable contributions to the knowledge of the Arctic, but even the discovery of the North Pole, though giving arise to much discussion, did not contribute to the territorial extension of the United States.

By the Convention between the United States and Russia concluded April 17, 1824, relative to fishing and trading, the regulations in regard to subjects of each state were entrusted to each state in the Pacific Northwest area to 54 degrees 40 minutes North latitude. The Treaty of 1832 between these Powers extended the privileges of mutual commercial intercourse and introduced the most-favored nation treatment, except as in special agreements between Russia and Prussia, and Russia and Sweden and Norway.

By the Convention of March 30, 1867, between the United States and Russia, the Emperor ceded to the United States—

“all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain, of February 28-16, 1825, and described in Articles III and IV of said convention, in the following terms:

“Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the par-
allel of 54 degrees 40 minutes north latitude, and between the 131st and 133d degree of west longitude, (meridian of Greenwich,) the said line shall ascend to the north along the channel called Portland channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude, (of the same meridian;) and finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the Frozen ocean.

"IV. With reference to the line of demarcation laid down in the preceding article, it is understood—

"1st. That the island called Prince of Wales Island shall belong wholly to Russia." (now, by this cession, to the United States.)

"2d. That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possession and the line of coast which is to belong to Russia as above mentioned (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom.

"The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring’s straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Iglalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest, through Behring’s straits and Behring’s sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian
of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper island of the Kormandorsni couplet or group, in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian islands east of that meridian." (15 Stat. 539.)

This convention conferred upon the United States only those rights which Russia then possessed in the area described.

In 1920 the United States participated in a conference at Paris which in a multilateral treaty (signed, February 9, 1920, in force, August 14, 1925) determined the status of the Archipelago of Spitzbergen, including Bear Island, with view to assuring "their development and peaceful utilisation." Under this treaty, by Article I —

"The High Contracting Parties undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the island situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto." (43 Stat. 1892.)

Norway in accepting this treaty agrees to give equality of treatment to nationals of the other Powers. There is in Article IV special provision in regard to radio:

"All public wireless telegraphy stations established or to be established by, or with the authorisation of, the Norwegian Government within the territories referred to in Article 1 shall always be open on a footing of absolute
equality to communications from ships of all flags and from nationals of High Contracting Parties, under the conditions laid down in the Wireless Telegraphy Convention of July 5, 1912, or in the subsequent International Convention which may be concluded to replace it.

"Subject to international obligations arising out of a state of war, owners of landed property shall always be at liberty to establish and use for their own purposes wireless telegraphy installations, which shall be free to communicate on private business with fixed or moving wireless stations, including those on board ships and aircraft." (Ibid.)

Alaska and the polar area.—In the convention between Great Britain and Russia of February 18/16, 1825, the boundary line between Russia and British possessions in America on the continental mainland was to follow northward 56 degrees North latitude from the summit of the coast mountains to the point of intersection of the 141st degree of West longitude and from the point of intersection was to follow this meridian "in its prolongation as far as the Frozen Ocean." The English version was a translation of the French "dans son prolongement jusqu'à la Mer Glaciale."

The convention concluded March 30, 1867, between the United States and Russia by which the Russian title in the North West passed to the United States, being in French and English, contained the same clause. In Article I of this convention, the western line of boundary in "Behring's Strait" is fixed at the meridian which passes midway between the islands of Igalalook and Noonarbook "due north, without limitation, into the same Frozen Ocean." Apparently this convention of 1867 between the United States and Russia was referring in its terms to the same area
that had been the subject of negotiation between Great Britain and Russia in 1825.

Interpretation of "jusqu'à."—The significance of the words "jusqu'à" as used in defining boundaries has been the subject of dispute. The interpretation of jusqu'à was involved in the Advisory Opinion No. 9 of the Permanent Court of International Justice. September 4, 1924, in regard to the Monastery of Saint-Naoum. The paragraphs in which the words occur were as follows:

"1) Les territoires sur lesquels s'étendront les travaux de la Commission ne peuvent rester indéterminés. Ses limites seront, à l'ouest, les montagnes séparant la région cotière attribuée à l'Albanie jusqu'à Phtélia, de la vallée d'Argyrocastro. Au nord-est, la ligne frontière de l'ancien caza ottoman de Koritza; entre ces deux régions, la ligne indiquée dans le mémorandum présenté par M. Venizelos à la réunion formera la limite septentrionale des travaux de la Commission, tandis qu'au sud et sud-est ceux-ci s'étendront jusqu'à la ligne proposée par l'Autriche-Hongrie.

"2) Il est dès à présent établi que la région cotière jusqu'à Phtélia, y compris l'île de Sasseno, la région située au nord de la ligne grecque, ainsi que l'ancien caza ottoman de Koritza, avec la rive ouest et sud du lac d'Ochrida, s'étendant du village de Lin jusqu'au monastère de Sveti-Naoum, feront intégralement partie de l'Albanie." (Publications, Permanent Court of International Justice, Ser. B, No. 9, p. 18.)

These paragraphs translated into English read,

"(1) The territories over which the Commissioner's work will extend cannot be left undetermined. Their limits will be, on the west, the mountains separating the coastal region attributed to Albania as far as Phthelia, from the valley of Argyrocastro. On the north-east, the boundary of the former Ottoman Casa of Koritza; between these two regions, the line indicated in the memorandum submitted by M. Venizelos to the meeting will form the northern limit of the
Commission's work; while to the south and south-east it will extend as far as the line proposed by Austria-Hungary.

"(2) It is hereby decided that the whole of (intégrale-ment) the coastal region as far as Phthelia, including the island of Sasseno, the region to the north of the Greek line and the former Ottoman Casa of Koritza, together with the western and southern shore of Lake Ochrida from the village of Lin as far as the Monastery of Sveti-Naoum shall form part of Albania." (Ibid.)

Of these paragraphs the opinion says,

"As regards the frontier which the Commission had to settle in this district, the London decision of August 11th, 1913, in its second paragraph fixes it when it determines which districts shall 'henceforth' form an integral part of Albania and gives their limits. It follows that the reference, contained in the first paragraph of the decision of August 11th, to the Austro-Hungarian line has not necessarily the meaning which Serbia desires to give it. The frontier at Saint-Naoum, far from having been fixed in favour of the latter country, had indeed remained undetermined, as the Ambassadors' Conference thought. In fact, as regards determining it, the second paragraph of the decision of August 11th seems to give no further guidance than the single expression: jusqu'à. As regards that expression the following is to be observed:

"One possible interpretation of the expression jusqu'à is that Saint-Naoum is included in Albania; another that it is excluded from that country. The Court considers it impossible to affirm which of these interpretations should be accepted. Numerous instances have been cited of the use of this expression (jusqu'à) both in an inclusive and in an exclusive sense. The Court does not think it possible to affirm that the meaning of this word in connection with a place like the Monastery of Saint-Naoum necessarily implies either its inclusion or exclusion. It should, however, be observed that in the same paragraph, side by side with the expression jusqu'à Saint-Naoum, is to be found the expression: jusqu'à Phthelia which is shown by the facts of the case to mean: 'Phthelia inclusive.'" (Ibid., p. 20.)
Fur seals.—Toward the end of the nineteenth century, the fur seal conservation in the Bering Sea and the North Pacific Ocean became a matter of negotiation between the United States and Russia. After the exchange of many notes, a modus vivendi was concluded on May 4, 1894. Provision was made for establishing "zones outside the territorial waters of Russia." The paragraphs relating to the zones were as follows:

"1. The Government of the United States will prohibit citizens of the United States from hunting for fur-seal within a zone of ten nautical miles along the Russian coasts of Behring Sea, and of the North Pacific Ocean, as well as within a zone of thirty nautical miles around the Komandorsky (Commander) Islands and Tulienew (Robben) Island, and will promptly use its best efforts to ensure the observance of this prohibition by citizens and vessels of the United States.

"2. Vessels of the United States engaged in hunting fur-seal in the above-mentioned zones outside of the territorial waters of Russia may be seized and detained by the naval or other duly commissioned officers of Russia; but they shall be handed over as soon as practicable to the naval or other commissioned officers of the United States or to the nearest authorities thereof. In case of impediment or difficulty in so doing, the commander of the Russian cruiser may confine his action to seizing the ship’s papers of the offending vessels in order to deliver them to a naval or other commissioned officer of the United States, or to communicate them to the nearest authorities of the United States as soon as possible.

"3. The Government of the United States agrees to cause to be tried by the ordinary courts, with all due guarantees of defense, such vessels of the United States as may be seized, or the ship’s papers of which may be taken, as herein prescribed, by reason of their engaging in the hunting of fur-seal within the prohibited zones outside of the territorial waters of Russia aforesaid." (28 Stat. 1202.)
Hinterland doctrine.—Claims to polar areas have brought forward the "hinterland doctrine" in a sort of reverse direction from the coast line outward rather than from the coast line inland as in the nineteenth century claims in Africa. Secretary of State Olney in a note to the British Ambassador said of this:

"It can not be irrelevant to remark that 'spheres of influence' and the theory or practice of the 'Hinterland' idea are things unknown to international law and do not as yet rest upon any recognized principles of either international or municipal law. They are new departures which certain great European powers have found necessary and convenient in the course of their division among themselves of great tracts of the continent of Africa, and which find their sanction solely in their reciprocal stipulations. 'Such agreements,' declares a modern English writer on international law, 'remove the causes of present disputes; but, if they are to stand the test of time, by what right will they stand? We hear much of a certain 'Hinterland' doctrine. The accepted rule as to the area of territory affected by an act of occupation in a land of large extent has been that the crest of the watershed is the presumptive interior limit, while the flank boundaries are the limits of the land watered by the rivers debouching at the point of coast occupied. The extent of territory claimed in respect of an occupation on the coast has hitherto borne some reasonable ratio to the character of the occupation. But where is the limit to the 'Hinterland' doctrine? Either these international arrangements can avail as between the parties only and constitute no bar against the action of any intruding stranger, or might indeed is right.' Without adopting this criticism, and whether the 'spheres of influence' and the 'Hinterland' doctrines be or be not intrinsically sound and just, there can be no pretense that they apply to the American continents or to any boundary disputes that now exist there or may hereafter arise. Nor is it to be admitted that, so far as territorial disputes are likely to arise between Great Britain and the United States, the accepted principles of international law
are not adequate to their intelligent and just consideration and decision. For example, unless the treaties looking to the harmonious partition of Africa have worked some change, the occupation which is sufficient to give a state title to territory cannot be considered as undetermined. It must be open, exclusive, adverse, continuous, and under claim of right. It need not be actual in the sense of involving the possessio pedis over the whole area claimed. The only possession required is such as is reasonable under all the circumstances—in view of the extent of territory claimed, its nature, and the uses to which it is adapted and is put—while mere constructive occupation is kept within bounds by the doctrine of contiguity.

"It seems to be thought that the international law governing territorial acquisition by a state through occupation is fatally defective because there is no fixed time during which occupation must continue. But it is obvious that there can be no such arbitrary time limit except through the consensus, agreement, or uniform usage of civilized states." (Foreign Relations, U. S., 1896, p. 235.)

Russian customs waters, 1910.—In 1910 the Russian authorities raised question as to whether Great Britain had protested the claim of the United States to a twelve mile maritime custom's jurisdiction. The United States replied in the negative. In 1909 Russia had adopted a law "whereby the area of supervision by the Russian customs authorities is extended to twelve marine miles from low-water mark." (Foreign Relations, U. S., 1912, p. 1288.) At the same time it was reported that a British steamer—

"the Onward was seized on the charge of fishing within Russian territorial waters; but she was voluntarily released by the Russian Government upon its appearing that when arrested she was, though perhaps within twelve miles of a line from headland to headland of the White Sea, at a distance of more than twelve miles from the shore. The case is there-
fore of no significance as indicating the intention of the Russian Government to insist upon the extension of its territorial control over the marginal seas, whether for customs purposes only, or for other jurisdictional purposes.” (Ibid.)

The British and Japanese Governments protested an extension of Russian maritime jurisdiction.

Russia on maritime jurisdiction, 1912.—Questions arose upon the jurisdiction of states beyond the three-mile limit in several states in 1912.

Russia had interpreted its law in regard to customs regulations on December 10/23, 1909, as follows:

"The surface of the water for twelve marine miles from extreme low-water mark from the seacoasts of the Russian Empire, whether mainland or islands, is recognized as the Marine Customs area, within the limits of which every vessel, whether Russian or foreign, is subject to supervision by those Russian authorities in whose charge is the guarding of the frontiers of the Empire.” (Foreign Relations, U. S., 1912, p. 1289.)

This interpretation of rights over the marginal sea was reaffirmed in subsequent Russian legislation and proposals were made to extend the application of the act to fisheries and other maritime undertakings as well as to close certain sea areas off the Russian coast.

The arguments that the range of cannon had increased, that there was a scarcity of fish, etc., were advanced in support of the claim for extension of jurisdiction.

Rules were proclaimed by Russia in 1911 for fishing under the Russo-Japanese Convention of 1907. In these regulations it was stated:

"Where the extent of the seashore radius is not defined by special international enactments or treaties, the present rules
cover the coastal sea to a distance of three geographical miles (= 12.02 marine miles = 20.87 versts), counting from the line of the lowest ebb-tide, or from the extremity of the coastal standing ice.

“The present rules do not cover the Amur estuary from a line connecting Cape Lazareff on the mainland to Cape Pogobi on the island of Saghalin, to a line connecting Cape Perovskiy on the mainland with the northern tributaries to the Baikal Gulf on the island of Saghalin.” (Ibid., p. 1303.)

The American Ambassador (Guild) reviewed the situation in a note to the Secretary of State, February 3, 1912, saying that while the whole matter was “most complicated and confusing,” the understanding seemed to be that—

“Russia proposes ultimately to extend her control in every way to a distance of twelve miles from all her coasts bordering on the ocean. This has not yet been fully accomplished, but only in part. The question naturally groups itself into three divisions:

1. The exercise of customs authority to a distance of twelve miles from all her coasts on the open sea.

“This law was approved by the Emperor December 10/23, 1909, promulgated January 1/14, 1910, and is now in force. As yet, so far as can be ascertained, no case calling for special international protest has occurred under it.

2. The extension of Russian jurisdiction over all open-sea fisheries on the Pacific coasts within twelve miles of the lands of the Russian Empire.

“This law was passed May 29/June 11, 1911, and went into force December 25/January 7, last.

3. The law extending jurisdiction over fisheries conducted in the White Sea and within twelve miles of the Archangel Government was reported favorably by the Committee to the Duma last June, but has not yet been passed. It lies on the table and it is reported that English influence is responsible for the delay in its passage.

“England has formally protested against all three of these laws in particular and against the attitude of Russia in general in regard to the extension of jurisdiction from three
miles to twelve. Not being, however, specially interested in the Pacific Coast fisheries, England has confined vigorous action to the Archangel and White Sea fisheries, where her interests are large. England hopes to be able to get this proposed law postponed long enough to permit the matter to be presented before the next Hague Conference in 1915. The President of the Duma has assured the British Ambassador that the project can not be reached by the present Duma, and M. Sazonov practically admitted the same thing to me.

"Japan also has protested in general against the whole proposition of extension of jurisdiction to twelve miles from shore in the open sea, but she has confined her vigorous action to the fisheries in the Pacific, where her direct interests are enormous. The annual Japanese catch of fish in what are now claimed to be Russian waters is valued in gross by the Japanese Embassy at 80,000,000 roubles.

"Japan contends that the section of these laws dealing with Pacific fisheries is not only in violation of international law, but is also a violation of the spirit of the existing Russo-Japanese Fishery Agreement." (Ibid, p. 1304.)

Soviet decree, 1926.—On April 15, 1926—

"The Presidium of the Central Executive Committee of the Union of Soviet Socialist Republics decrees:

"All discovered lands and islands, as well as all those that may in the future be discovered, which are not at the date of the publication of this decree recognised by the Government of the U. S. S. R. as the territory of a foreign Power, are declared to be territories belonging to the U. S. S. R., within the following limits:

"In the Northern Arctic Ocean, from the northern coast of the U. S. S. R. up to the North Pole, between the meridian 32°4'35" east longitude from Greenwich, passing along the eastern side of Vaida Bay through the triangulation mark on Kekursk Cape, and meridian 168°49'30" west longitude from Greenwich, passing through the middle of the strait which separates Ratmanov and Kruzenstern Islands of the Diomed group of islands in the Behring Straits." (125 Br. & For. State Papers, 1926, Pt. II, p. 1064.)
British Soviet temporary agreement, 1930.—
The limits for fisheries was partially outlined in a
temporary agreement, May 22, 1930:

"The Government of the United Kingdom of Great Brit-
ain and Northern Ireland and the Government of the Union
of Soviet Socialist Republics, being mutually desirous to
conclude as soon as possible a formal convention for the regu-
lation of the fisheries in waters contiguous to the northern
coasts of the territory of the Union of Soviet Socialist Re-
publics, have meanwhile decided to conclude the following
temporary agreement to serve as a modus vivendi pending
the conclusion of a formal convention:

"Art. 1.—(1) The Government of the Union of Soviet
Socialist Republics agree that fishing boats registered at the
ports of the United Kingdom may fish at a distance of from
3 to 12 geographical miles from low water mark along the
northern coasts of the Union of Soviet Socialist Republics
and the islands dependent thereon, and will permit such
boats to navigate and anchor in all "waters contiguous to the
northern coasts of the Union of Soviet Socialist Republics.

"(2) As regards bays, the distance of 3 miles shall be
measured from a straight line drawn across the bay in the
part nearest entrance, at the first point where the width does
not exceed 10 miles.

"(3) As regards the White Sea, fishing operations by fish-
ing boats registered at the ports of the United Kingdom
may be carried on to the north of latitude 68°10' north, out-
side a distance of 3 miles from the land.

"(4) The waters to which this temporary agreement ap-
plies shall be those lying between the meridians of 32° and
48° of east longitude.

"2. Nothing in this temporary agreement shall be deemed
to prejudice the views held by either contracting Govern-
ment as to the limits in international law of territorial
waters.

"3. The present temporary agreement comes into force on
this day and shall remain in force until the conclusion and
coming into force of a formal convention for the regulation
of the fisheries in waters contiguous to the northern coasts
of the territory of the Union of Soviet Socialist Republics,
subject, however, to the right of either contracting Government at any time to give notice to the other to terminate this agreement, which shall then remain in force until the expiration of 6 months from the date on which such notice is given.” (132 Br. & For. State Papers, 1930, Pt. 1, p. 332.)

Lakhtine’s statement of U. S. S. R. attitude, 1930.—After the World War there was a growing interest in the Polar regions. The Arctic from its nearness to the areas that had been concerned in the war became of particular interest, and expeditions were fitted out in various countries which increased the knowledge of the Arctic area.

Lakhtine, the Secretary-Member of the Committee of Direction of the Section of Aerial Law of the Union of Societies “Ossoaviachim” of U. S. S. R., would be expected to represent the Soviet point of view at the time when he was writing in 1930. In a general statement he said:

“Within, or rather to the north of, the Arctic Circle there lie still open to claims of jurisdiction: (1) discovered lands and islands, (2) undiscovered lands and islands, (3) ice formations, (4) sea regions, (5) air regions. Each of these categories has a legal status in international law as possible objects of the right of possession and jurisdiction.” (24 A. J. I. L. [1930], p. 704.)

Lakhtine states that the rigors of Arctic climate and other physical conditions make the usual requirements for acquisition difficult in the Arctic regions. These have been discovery and continued occupation and, more recently, notification. He finds that hitherto the political and economic motives for occupation and annexation have not been strong and says that—

“Inasmuch, therefore, as the economic possibilities were confined to a relatively narrow maritime belt, sovereignty over the lands and islands of the Arctic Ocean has been,
hitherto, exercised by the adjacent littoral states without the required formalities of effective occupation.

"As a consequence, the legal principle of 'occupation' as applied to the Arctic and Antarctic has been rendered inapplicable. It has also become evident that in Polar regions 'effective occupation' cannot be realized, and a substitute principle that sovereignty ought to attach to littoral states according to 'region of attraction' is now suggested and practically applied. In support of this principle several illustrations can be given of the practices of States in the region of the Antarctic. For instance, England, and then France, acquired sovereignty over islands and areas of land within the Antarctic Circle; England chiefly basing her claim upon possession of the Falkland Islands, and France, here, upon possession of Madagascar. Neither England nor France were in the least disconcerted by the fact that the areas annexed in this manner had not been effectively occupied, and that neither had made settlements. These facts did not prevent them from acquiring control over the whole of the hunting, seal fisheries, etc., in the waters adjacent to these possessions, and in some places wholly to prohibit them to foreigners.

"Let us revert to the consideration of the present legal status of lands and islands lying within the Polar circles. It will be clearer perhaps for the moment to refer to the section of 'regions of attraction' of contiguous northern States." (Ibid.)

The statements in regard to the degree of control acquired by England and France may be open to question. Analogies drawn from the Antarctic would not necessarily be applicable to the Arctic.

Lakhtine describes what he considers are the "regions of attraction" in the north polar region and reviews to some extent the discussions in regard to the Canadian claims, concluding that "it is obvious that 'effective occupation' is realized by the activity of the U. S. S. R. no less, if not even more completely, than, for example, Canada in the case of
her Polar lands in the same latitude." (Ibid., p. 707.)

Lakhtine also bases title upon notes such as that of September 20, 1916, and the decree of April 15, 1926:

"The Presidium of the Central Executive Committee of the Union of Soviet Socialist Republics decrees:—

"All discovered lands and islands, as well as all those that may in the future be discovered, which are not at the date of the publication of this decree recognised by the Government of the U. S. S. R. as the territory of a foreign Power, are declared to be territories belonging to the U. S. S. R., within the following limits:

"In the Northern Arctic Ocean, from the northern coast of the U. S. S. R. up to the North Pole, between the meridian 32°44'35" east longitude from Greenwich, passing along the eastern side of Vaida Bay through the triangulation mark on Kekursk Cape, and meridian 168°49'30" west longitude from Greenwich, passing through the middle of the strait which separates Ratmanov and Kruzenstern Islands of the Diomede group of islands in the Behring Straits." (124 Br. & For. State Papers, p. 1064.)

From the notes and decrees Lakhtine states:

"Therefore, at present, the rights of the U. S. S. R. over the lands and islands, situated within the sector mentioned in the decree, are strictly based and precisely defined." (24 A. J. I. L. [1930], p. 709.)

He cited Fauchille, who reviewing the climatic conditions and difficulties of occupation, said,

"Il suit de là que l’appropriation dont elles sont susceptibles doit nécessairement présenter un caractère particulier. Il ne peut pas s’agir dans de pareilles régions d’une occupation proprement dite, et il ne saurait être question d’y instituer sur place un gouvernement et une administration avec tous les rouages que ceux-ci impliquent d’ordinaire. L’occupation que les pôles autorisent est une occupation d’exploitation, non pas une occupation d’habitation. Celle-là est pour les régions polaires la seule qui soit admissible. Mais il faut
qu'elle existe. Ici, comme en ce qui concerne tout autre
domaine sans maître, le simple fait de la découverte est in-
opérant pour produire un droit définitif : il prépare l'appro-
priation, mais il ne la crée pas.” (Traité de droit interna-
tional public, t. I. Pt. 2, p. 658.)

After further discussion Lakhtine sums up the
position of the U. S. S. R. on undiscovered lands
and islands as follows:

“The question, then, of the legal status of the undiscovered
Arctic territories may be regarded as solved not only as a
theory but by positive law. That is to say, the said lands
and islands being still undiscovered are already presumed to
belong to the national territory of the adjacent Polar State
in the sector of the region of attraction in which they are to
be found.” (24 A. J. I. L. [1930], p. 711.)

As to ice formations, he says:

“It must be remembered that some of the immovable ice
fields are utilized for land communication, and that it is pos-
sible to establish there intermediate aerial stations, etc. We
are of the opinion that floating ice should be assimilated
legally to open polar seas, whilst ice formations that are
more or less immovable should enjoy a legal status equivalent
to polar territory. Polar States acquire sovereignty over
them within the limits of their sectors of attraction.” (Ibid.,
p. 712.)

Referring to the sea regions, Lakhtine affirms,
after considering what he regards as practice in the
Arctic:

“Thus the proposed legal status for the high seas of the
Arctic, is, in its essential part, nearly identical with that of
‘territorial waters.’

‘Summing up we reach the following conclusions:

‘1. Polar States wield sovereignty over sea regions cov-
ered with ice, according to their sectors of attraction.

‘2. Littoral States wield sovereignty over land-locked seas
free from ice, and over gulfs and bays.

‘3. Littoral States are entitled to a somewhat limited sov-
ereignty over all remaining sea regions free from ice, as well
as over territorial waters, maritime belts and waters between islands according to their sectors of attraction.” (Ibid., p. 714.)

The air regions naturally receive attention at this time and Lakhtine after the preceding conclusions, says:

“The problem yet remaining to be solved is that of the right of Polar states to sovereignty over the aerial space above the remaining water area of the Arctic Ocean, free from ice, i.e., the high sea.

“Inasmuch as the legal status of these water areas is closely assimilated to that of territorial waters over which a state does exercise a limited sovereignty; and since, according to the international law of today a littoral State exercises unlimited jurisdiction over the atmosphere above its territorial waters, there is no reason for treating the question of the legal status of these Arctic air regions in a different manner.

“This argument is strengthened when we realize the impossibility of using airships for economic purposes exclusively in this part of Arctic aerial space. If an airship should be used for operations connected with fishing and hunting in these open waters, it would be as necessary to obtain the permission of the littoral State as it would be to obtain permission for fishing and hunting from vessels. Moreover, it is impossible to use the air for aerial communication without crossing ice regions, territorial waters and territories belonging to a State which exercises sovereignty over the atmosphere above.

“Hence we conclude that each Polar State exercises sovereignty over the aerial space above the whole region of attraction of its sector. Mr. L. L. Breitfus supports this opinion. Writing in 1928 he says: ‘Within each of these sectors, an adjacent State exercises its sovereignty over discovered as well as over undiscovered lands and islands, this sovereignty being exercised not only over land, but also to a certain extent (yet to be precisely fixed internationally) over seas covered with ice, surrounding these lands and islands and as well over air regions above this sector.’” (Ibid., p. 714.)
He divides the Arctic area into five sectors and allocates these on treaty and other grounds; then says:

"As to the ownership of the North Pole, it should be remarked that the Pole is an intersection of meridian lines of the said five sectors. Neither legally, nor in fact does it belong to anyone. It might be represented as an hexahedral frontier post on the sides of which might be painted the national colors of the state of the corresponding sector."

(Ibid., p. 717.)

**Bering Sea Award, 1893.—**In the treaty of Washington, 1892, agreeing to the arbitration of the jurisdictional rights of the United States over the waters of the Bering Sea and the preservation of the "fur seals in or habitually resorting to said waters," there were five questions proposed. The first question was:

"What exclusive jurisdiction in the sea now known as the Bering’s Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?" (27 Stat. 947, 949.)

Six of the seven arbitrators decided as to this point:

"By the Ukase of 1821 Russia claimed jurisdiction in the sea now known as the Bering’s Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Bering’s Sea, or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters." (I Fur Seal Arbitration. Proceedings of the Tribunal of Arbitration, p. 77.)
Width of territorial waters.—There was an informal expression of opinion upon the width of territorial waters at the Conference for the Codification of International Law, The Hague, 1930. Of thirty-three declarations, sixteen favored three miles, ten favored four miles, and seven favored six miles. M. Egoriev, representing the U. S. S. R. said, after these opinions had been given:

"If one takes into consideration the state of positive law at the present time, as it can be discovered in the legislation of the different States through treaties and diplomatic correspondence, it is necessary to recognise the great diversity of view which exists regarding the extent in which the exercise of the rights of the Coastal State exists in the waters called territorial and adjacent. The exercise of such rights for all purposes or for certain purposes is admitted sometimes within the limit of three, sometimes four, six, ten, or twelve miles.

"The reasons, both historical and theoretical, involved by some States and disputed by others, cannot be put into opposition to these facts and the rule or actual necessity for States to ensure their needs, particularly in waters along the coast which are not used for international navigation. This aspect which has been already noted in the literature on the subject, as well as in debates, in this Commission, cannot be overlooked.

"Under these conditions it would be better to confine oneself to a general statement to the effect that the use of international maritime waterways must under no conditions be interfered with." (24 A. J. I. L., Sup. [1930], p. 257.)

Canadian Arctic.—Since 1576 when Martin Frobisher discovered the bay which bears his name, near to the entrance to Hudson Strait, the British have had an important part in opening the Arctic area North of the American continent. The jurisdiction over the area became a matter of particular discussion after Lieutenant William A. Mentzer of the Engineer Corps, U. S. N., applied to the British
Consul at Philadelphia, February 10, 1874, for a grant of land of about twenty square miles on Cumberland Sound. This led to correspondence between the British Colonial Office and the Governor General of Canada and on April 3, 1874, the Colonial Office wrote to the Governor General of Canada:

"I request that you will communicate these papers confidentially to your ministers for their observation. It seems to me desirable in reference to this and similar questions to be informed whether your government would desire that the territories adjacent to those of the Dominion on the North American continent, which have been taken possession of in the name of this country but not hitherto annexed to any colony, or any of them, should now be formally annexed to the Dominion of Canada.

"Her Majesty's government of course reserve for future consideration the course that should be taken in any such case, but they are disposed to think that it would not be desirable for them to authorize settlement in any unoccupied British territory near Canada unless the Dominion Government and Legislature are prepared to assume the responsibility of exercising such surveillance over it as may be necessary to prevent the occurrence of lawless acts or other abuses incidental to such a condition of things." (Southern Baffin Island. Department of Interior, p. 9.)

There was further correspondence and in 1880 an Imperial Order in Council, without fixing boundaries, tendered to Canada—

"all the British possessions on the North American continent not hitherto annexed to any colony."

The implied responsibilities were gradually assumed by the Canadian Government.

The map of the Department of Interior showing the Canadian Northwest Territories indicates the eastern boundary in the Arctic as starting from the North Pole along the line of longitude 60° to a point midway between Cape Brevoort, northern
Greenland and Cape Union, Ellesmere Island, and then in a southerly direction along the waters separating Greenland and Ellesmere Island. The western boundary follows the line 141° south to the eastern boundary of Alaska at Demarcation Point in the Arctic Ocean. The claim is to a fan-shaped sector north of Canada and extending to the North Pole, in which are many islands.

The boundaries of the Canadian Arctic were indefinite but discoveries by expeditions sent out from time to time increased the known area and the hydrographical, geological, and other knowledge of these areas.

From 1903 a more effective control was planned as was evident in instructions given to the commander-in-charge of an expedition to "Hudson Bay and northward therefore":

"The Government of Canada having decided that the time has arrived when some system of supervision and control should be established over the coast and islands in the northern part of the Dominion, a vessel [the Neptune] has been selected and is now being equipped for the purpose of patrolling, exploring, and establishing the authority of the Government of Canada in the waters and islands of Hudson Bay, and the north thereof. * * *

"The knowledge of this far northern portion of Canada is not sufficient to enable definite instructions to be given you as to where a landing should be made, or a police post established; decision in that respect to be left to the Board of Three above mentioned, and wherever it is decided to land you will erect huts and communicate as widely as possible the fact that you are there as representative of the Canadian Government to administer and enforce Canadian laws, and that a patrol vessel will visit the district annually, or more frequently.

"It may happen that no suitable location for a post will be found, in which case you will return with the vessel but you
will understand that it is the desire of the Government that, if at all possible, some spot shall be chosen where a small force representing the authority of the Canadian Government can be stationed and exercise jurisdiction over the surrounding waters and territory.

"It is not the wish of the Government that any harsh or hurried enforcement of the laws of Canada shall be made. Your first duty will be to impress upon the captains of whaling and trading vessels, and the natives, the fact that after considerable notice and warning the laws will be enforced as in other parts of Canada." (Ibid., p. 14.)

**Canadian claim, 1924.**—When asked in the Canadian House of Commons, April 7, 1924, if other states were claiming sovereignty over islands to the north of Canada, Mr. Stewart replied:

"Of course my honorable friend is aware that international law, in a vague sort of way, creates ownership of unclaimed lands within one hundred miles of any coast, even if possession has not been taken. At least there is a sort of unwritten law in that respect. Of course possession is a very large part of international law as well as any other law." (Canada Debates, House of Commons, 1924, p. 1111.)

On June 10, 1925, when question was again raised in regard to the Arctic islands, Mr. Stewart said:

"Indeed, I made the statement in the House the other evening that we claimed all the territory lying between meridians 60 and 141." (Ibid., 1925, p. 4069.)

On the same date, Mr. Stewart, in reply to a question as to whether the jurisdiction of Canada extended to the North Pole, said, "We claim that we go to it." (Ibid., p. 4084.) Further discussion showed that it was not expected that any nation would claim the North Pole, but would claim land lying polarward from their coasts.

**Recognition of Arctic sovereignty.**—In 1930 claims to sovereignty were made by Norway and
Great Britain over certain islands in the Arctic and these claims were reciprocally recognized.

"Royal Norwegian Legation
London, August 8, 1930.

"Sir,

"Acting on instructions from my government, I have the honor to request you to be good enough to inform His Majesty's Government in Canada that the Norwegian Government, who do not, as far as they are concerned, claim sovereignty over the Sverdrup Islands, formally recognize the sovereignty of His Britannic Majesty over these islands.

"At the same time, my government is anxious to emphasize that their recognizance of the sovereignty of His Britannic Majesty over these islands is in no way based on any sanction whatever of what is named 'the sector principle.'

I have, &c.

Daniel Steen
(Chargé d'Affaires, a. i.).

"Sir,

With reference to my note of today in regard to my government's recognition of the sovereignty of His Britannic Majesty over the Sverdrup Islands, I have the honor, under instructions from my government, to inform you that the said note has been despatched on the assumption on the part of the Norwegian Government that His Britannic Majesty's Government in Canada will declare themselves willing not to interpose any obstacle to Norwegian fishing, hunting or industrial and trading activities in the areas which the recognition comprises.

I have, &c.

Daniel Steen
(Chargé d'Affaires, a. i.)."

(27 A. J. I. L. [1933], Sup. p. 93.)

The Government of Canada was unable to grant the fishing and other rights mentioned because these were reserved for the aboriginal population, and the Norwegian government concurred.
In November 1930 the following note and reply was exchanged:

"Oslo, November 18, 1930.

"M. le Ministre d'État,

"As your Excellency is doubtless aware, on the 9th May, 1929, the Norwegian Minister in London addressed a note to His Majesty's Principal Secretary of State for Foreign Affairs, announcing that, by a royal decree dated the 8th May, Jan Mayen Island had been placed under Norwegian sovereignty.

"I now have the honor by direction of His Majesty's Secretary of State for Foreign Affairs to inform your Excellency that His Majesty's Government in the United Kingdom have taken note of this decree and formally recognize Norwegian sovereignty over Jan Mayen Island.

"I am instructed to add that, His Majesty's Government not having been informed of the grounds on which Norwegian sovereignty was extended to Jan Mayen Island, their recognition of that sovereignty is accorded independently of and with all due reserves in regard to the actual grounds on which the annexation may have been based.

I avail, &c.

KENNETH JOHNSTONE."

"The Ministry for Foreign Affairs

Oslo, November 19, 1930.

"M. le Chargé d'Affaires,

"In a note of the 18th instant you were so good as to state that His Britannic Majesty's Government recognized Norway's sovereignty over Jan Mayen Island.

"I have the honor, while acknowledging the receipt of your note, to ask you to convey to your government the thanks of the Norwegian Government for their friendly attitude towards Norway, which has found expression in the above-mentioned recognition.

"I avail, &c.

(For the Minister for Foreign Affairs),

Aug. Esmarch."

(Ibid., p. 92.)
Ross Dependency, 1923.—By British Order in Council of July 30, 1923, it was stated that—

"Whereas by ‘The British Settlements Act, 1887,’ it is, amongst other things, enacted that it shall be lawful for His Majesty in Council from time to time to establish all such laws and institutions and constitute such Courts and officers as may appear to His Majesty in Council to be necessary for the peace, order and good government of His Majesty’s subjects and others within any British settlement;

"And whereas the coasts of the Ross Sea, with the islands and territories adjacent thereto, between the 160th degree of East Longitude and the 150th degree of West Longitude, which are situated south of the 60th degree of South Latitude, are a British settlement within the meaning of the said Act;

"And whereas it is expedient that provision should be made for the government thereof:

"Now, therefore, His Majesty, by virtue and in exercise of the powers by the said Act, or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows:

"1. From and after the publication of this Order [August 16, 1923] in the ‘Government Gazette of the Dominions of New Zealand’ that part of His Majesty’s Dominions in the Antarctic Seas, which comprises all the islands and territories between the 160th degree of East Longitude and the 150th degree of West Longitude which are situated south of the 60th degree of South Latitude shall be named the Ross Dependency.

"2. From and after such publication as aforesaid the Governor-General and Commander-in-Chief of the Dominion of New Zealand for the time being (hereinafter called ‘the Governor’) shall be the Governor of the Ross Dependency; and all the powers and authorities which by this Order are given and granted to the Governor for the time being of the Ross Dependency are hereby vested in him." (117 Br. & For. State Papers, p. 91.)

In this Order in Council no southern limit was named for the British territory.
American writers on polar areas.—In recent years American writers have given considerable attention to topics related to polar areas. There was for many years a keen interest in exploration and discoveries in these regions without any further purpose than in astronomical discoveries. Who would first reach the North Pole became an interesting competition long after the hopes for an easy northwest water passage had disappeared. The rewards of polar fisheries widened knowledge of polar areas.

In concluding an article on Arctic Exploration and International Law in 1909, Dr. James Brown Scott said:

“It would therefore appear that arctic discovery as such vests no title, and that the arctic regions, except and in so far as they have been occupied, are in the condition of Spitzbergen, that is to say, no man’s land.” (3 A. J. I. L. [1909], p. 941.)

After the World War there was an increase in attention to the significance of control of the polar regions from the political point of view. Mr. David Hunter Miller in an article in Foreign Affairs in April 1927 raises certain questions saying:

“The area of the earth’s surface north of the Arctic Circle (66°30’, as usually drawn; strictly it is 66°312/3’) comprises over eight million square miles. What States have sovereignty over this vast region? To what countries are we to assign the known and the unknown?” (4 Foreign Affairs, p. 47.)

After reviewing the various claims to the Arctic territories, Mr. Miller sums up the claims as follows:

“It comes to this: the areas round the North Pole, whatever they may be, form three or four great cone-shaped
sectors—the Canadian sector from 60° west to 141° west; the American sector from 141° west to 169° west; and the great Russian sector running from 169° west to some undefined line in the neighborhood of 30° or 40° east longitude. The remainder of the circle, from say 40° east to 60° west, would, so far as this theory goes, be unassigned, but, very fittingly, that remainder seems to contain no land at all north of Spitsbergen and Greenland. Possibly a few islands close to the north Greenland coast are exceptions to this statement.

"Whatever may be said by way of argument against this Canadian theory, it is certainly a highly convenient one. All unknown territory in the Arctic is appropriated by three Great Powers and divided among them on the basis of the more southerly status quo. Certainly if these three Powers are satisfied with such a partition, the rest of the world will have to be." (*Ibid*, p. 59.)

Referring briefly to the Antarctic in 1927, after mentioning Coats Land, Enderby Land, Kemp Land, etc., Mr. Miller says:

"It may be assumed that each 'Land,' while not capable of precise delimitation and perhaps referring primarily to the coast, is intended to include the segment to the south as far as the Pole, the hinterland or 'hinter-ice,' so to speak. Taken all together, with the Ross Dependency and the Falkland Islands Dependency, they would include nearly all of the Antarctic Continent." (*Ibid.*, p. 509.)

The judgment of the Permanent Court of International Justice of April 5, 1933, concerning the Legal Status of Eastern Greenland paid great respect to ancient claims even though these had not been followed by actual and continued control. There were, however, for many years diplomatic assertions of rights over Greenland territory. In a declaration accompanying the treaty confirming the purchase of the Danish West Indies by the United States on August 4, 1916 (proclaimed January 25, 1917), it was stated "that the Government
of the United States of America will not object to the Danish Government extending their political and economic interests to the whole of Greenland. Professor Charles Cheney Hyde says of this and other diplomatic communications of the claimants:

"Nevertheless, the readiness of the court to find in the conduct in behalf of the monarchs of Norway and Denmark the creation and maintenance of rights of sovereignty over an unoccupied area, and the early development of the territorial limits of those rights by assertions of authority that were and remained unsupported by the exercise of actual administrative control or occupation, is of much significance." (27 A. J. I. L. [1933], p. 738.)

The polar sector.—The polar sector to which reference has been made since early in the nineteenth century is a spherical triangle with apex at the pole and bounded by two meridians, and having usually as a base a coast line or a parallel of latitude. Within this area various degree of control may be claimed and inchoate title to all lands is usually claimed.

The sector theory.—The sector theory as applied to polar areas would cover the area of a spherical triangle the base of which would be the line of polar jurisdiction of a state, and the apex the pole so far as this area is free from other jurisdiction. The claim is also made that the jurisdiction would extend below the surface of the sector to the center of the earth and above the sector to the limit of aerial jurisdiction.

Whether the base line of the polar sector must be wholly or in part within the polar circle has been a debatable question, but it would be more difficult to determine just where this line should be if not limited to the polar area.
In the case before the Permanent Court of International Justice in 1933 on the Legal Status of Eastern Greenland, even though much of the area of Greenland is north of the Arctic Circle, the three mile limit of coast jurisdiction seems to have been recognized.

Opinion of Smedal.—Gustav Smedal, who has given much attention to the sector doctrine, said:

"The sector principle is not a legal principle having a title in the law of nations. This is partly admitted by those who uphold it. Nor should the principle be embodied in international law, for one reason because it aims at a monopoly which will doubtless delay, and partly prevent, an exploitation of the polar regions.

"It is of interest to observe how States that claim sovereignty in sector areas nevertheless attempt to take charge of lands lying in these areas by effective occupation. By so doing they show they fully realise that a territorial sovereignty which they may rightly require to be respected by foreign States, must be based on a more solid foundation than the sector principle." (Acquisition of Sovereignty over Polar Areas, p. 64.)

Aerial sovereignty.—Changing attitudes toward rights in the air marked the early decades of the twentieth century. Even the Institute of International Law in 1906 favored the doctrine of freedom of the air subject only to limitations essential to the security of the subjacent state. With the coming of the World War, it became evident that the doctrine of freedom of the air was no longer practicable after the development of aircraft and radio. Control of the superjacent air was assumed by neutrals and by belligerents to the limit of the jurisdiction of states, and the Convention for the Regulation of Aerial Navigation, 1919, recognized "that every Power has complete and exclusive sov-
ereignty over the air space above its territory," and this included territorial waters. Over areas which are not under any jurisdiction, as the high seas, the air is free and the delineation of maritime jurisdiction therefore becomes important.

Aerial commerce.—During the period since the World War, civil aerial commerce has increased in number of aircraft and in passengers, and in mail carried and miles flown, at a ratio that seems almost inconceivable. In 1926 air express in the United States was less than 4,000 pounds; in 1935 the total was nearly 14,000,000 pounds. The speed of aircraft in Europe increased in the five year period from 1930 to 1935 from about 275 kilometers per hour to more than 700 kilometers. The radius of flight has almost eliminated distance so that the limits of national boundaries are insignificant and some states may be flown over in a few minutes. Aids to aerial navigation through radio and other means have greatly facilitated aerial commerce. The knowledge of weather conditions is easily transmitted from surface stations. Some of the difficulties of flight in the upper altitudes are being overcome and enthusiasts are even looking forward to interplanetary journeys.

Aircraft and neutral jurisdiction.—From the nature of aerial navigation it is evident that domestic legislation of a single state could cover only a limited space within which aircraft would normally operate. The period of the World War, 1914–18, gave ample opportunity for testing the attitude of neutral states toward belligerent aircraft. The prohibition of entrance to neutral jurisdiction was general and many belligerent aircraft were shot down when above neutral land or maritime juris-
diction. Even in time of peace, military aircraft are often forbidden to fly over foreign territory without previous authorization to be requested through diplomatic representatives.

_Aircraft in distress._—During the World War aircraft of a belligerent entering neutral territory in distress or in a disabled condition were usually interned, and the unratified rules of the Commission of Jurists, The Hague, 1923, accepted internment as the treatment to be accorded to belligerent aircraft entering neutral jurisdiction "for any reason whatsoever." That a neutral aircraft in distress entering a belligerent jurisdiction should be interned or has violated any law does not necessarily follow. That a belligerent would be justified in taking precautions essential to its safety and to the unhampered carrying out of its military plans is not denied. This may even extend to the area of immediate military operations on the high sea, but not to an area more remote.

_Commission of Jurists, 1923._—The Commission of Jurists which drew up the rules for aerial warfare, 1923, formulated the following:

"Article 37. Members of the crew of a neutral aircraft which has been detained by a belligerent shall be released unconditionally, if they are neutral nationals and not in the service of the enemy. If they are enemy nationals or in the service of the enemy, they may be made prisoners of war.

"Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

"Release may in any case be delayed if the military interests of the belligerent so require.

"The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special
and active assistance to the enemy.” (1924 Naval War College, International Law Documents, p. 130.)

Comment on this article explains that—

“If they are of enemy nationality or in the service of the enemy, or engaged in a violation of neutrality, there is good reason for detaining them as prisoners of war. If not, they should be released unconditionally.

“Passengers who are in the service of the enemy or who are enemy nationals fit for military service may likewise be detained.” (Ibid.)

It was admitted that temporary delay in release might be a military exigency without infringing on the right. When crew or passengers had rendered military service during the flight they might be made prisoners of war regardless of nationality. This rule was said to be in conformity with World War practice but had not received “unanimous assent,” because it was “an extension of the accepted rules of international law” and lack of provisions for unconditional release.

It has been admitted that reservists in transit from a neutral state to a belligerent to enter military service may be allowed to depart by a neutral state provided this does not constitute the setting on foot of a military expedition from the neutral state. That persons already embodied in the military service of a belligerent might be liable to be removed from a vessel seemed to be in accord with the practice during the World War. That citizens of neutral states might be in such a category would seem to be very unusual, as foreign enlistment is contrary to the domestic law of most states and is a violation of neutrality. Journeying to a belligerent country for the purpose of enlisting is not prohibited. Even the rules of the Commission of
Jurists, 1923, presume liability on the ground that "services have been rendered." The liability seems to rest upon persons who are "embodied in the service" and therefore under legal obligation to serve, or persons who "have rendered service."

Transit in polar regions.—The movement of persons and property in the polar regions has long been a capital problem. The climatic conditions have been very severe in some parts and snow and ice have added difficulties. Long periods of darkness further limited activities. When sailing vessels relied solely on air currents, their movements were to some degree seasonal and correspondingly slow, and the speed of sailing vessels in Arctic ice was relatively insignificant. Russian ice breakers, however, became increasingly serviceable. Dog and reindeer sleds were used for some purposes. More recently steam vessels, tractors, aero-sleds and various types of aircraft and radio have made polar regions relatively accessible and removed many barriers.

Merchant submarines.—It has been mentioned as a possibility that if a satisfactory surface passage through the polar ice cannot be found, a passage under the ice for a part of the distance might be discovered. This has led to the renewal of the discussion as to whether submarine merchant vessels would be admitted to waters of foreign states.

The entrance of foreign merchant submarines became a subject of discussion in 1916 when the German submarine Deutschland entered American waters. The fact that the United States was neutral and Germany was at war led the British Government to give the Secretary of State of the United
States quite full information upon the British attitude in the matter in a communication of July 3, 1916:

"Now, persistent rumours are current that a German submarine is on its way to a United States port. In view of such a possibility, I am directed by Sir Edward Grey to submit for your consideration some of the views held by His Majesty's Government on the issues raised by the visit of such a craft to a neutral port.

"It is unlikely that a German submarine would cross to an American port except for the purpose of conducting hostile operations on this side of the Atlantic. The practice of admitting belligerent vessels of war into neutral ports and allowing them supplies arises, as you are aware, out of the exigencies of life at sea and from the hospitality which it is customary to extend to vessels of friendly powers. But the principle does not extend to enabling such vessels to utilise neutral ports and obtain supplies for the purpose of facilitating their belligerent operations.

"In 1904 when the Russian Baltic Fleet was about to sail for the Far East to attack the Japanese forces and was expected to coal in British ports, His Majesty's Government publicly defined their attitude in the above sense and made it clear that the use of British ports by belligerent men-of-war under such circumstances could not be regarded by them as consistent with the declared neutrality of Great Britain in the war then in progress.

"The enemy submarines have been endeavoring for nearly eighteen months to prey upon the Allied and neutral commerce, and throughout that period enemy governments have never claimed that their submarines were entitled to obtain supplies from neutral ports. This must have been due to the fact that they thought they would be met with a refusal and that hospitality could not be claimed as of right. The difficulty of knowing the movements or controlling the subsequent action of the submarines renders it impossible for the neutral to guard against any breaches of neutrality after the submarine has left port and justifies the neutral in drawing a distinction between surface ships and submarines. The latter, it is thought, should be treated on the same
footing as seaplanes or other aircraft and should not be allowed to enter neutral ports at all. This is the rule prescribed during the present war by Norway and Sweden. Another point of distinction between surface ships and submarines should be borne in mind. A surface vessel demanding the hospitality of a neutral port runs certain inevitable risks; its whereabouts become known and an enemy cruiser can await its departure from port. This and similar facts put a check on the abuse by belligerent surface ships of neutral hospitality. No such disadvantages limit the use to which the Germans might put neutral ports as bases of supplies for submarine raiders.

"For these reasons, in the opinion of His Majesty's Government, if any enemy submarine attempts to enter a neutral port, permission should be refused by the authorities. If the submarine enters it should be interned unless it has been driven into port by necessity. In the latter case it should be allowed to depart as soon as necessity is at an end. In no circumstances should it be allowed to obtain supplies.

"If a submarine should enter a neutral port flying the mercantile flag His Majesty's Government are of opinion that it is the duty of the neutral authorities concerned to enquire closely into its right to fly that flag, to inspect the vessel thoroughly and, in the event of torpedoes, torpedo tubes or guns being found on board, to refuse to recognise it as a merchant ship.

"In bringing the above to your serious consideration I have the honor to express the confident hope that the United States Government will feel able to agree in the views of His Majesty's Government and to treat submarine vessels of belligerent powers visiting United States port accordingly."

(Foreign Relations, U. S., 1916, Sup., p. 765.)

The Acting Secretary of State acknowledged the receipt of the communication and later indicated, that as to the Deutschland, he thought the British "were making entirely too much of the incident."

On arrival in Baltimore, the German submarine Deutschland was found to be a merchant vessel with a cargo of dyestuffs. (Ibid., p. 768.)
The French Embassy on August 21, 1916, transmitted a memorandum to the Department of State which related to submarine navigation. Later identical memoranda were received from British, Russian, Japanese and Italian embassies and the Portuguese Legation. The memorandum was as follows:

"In view of the development of submarine navigation, and by reason of the acts which, in present circumstances, may unfortunately be expected from enemy submarines, the Allied Governments consider it necessary, in order not only to safeguard their belligerent rights and the liberty of commercial navigation, but to avoid risks of dispute, to urge neutral governments to take effective measures, if they have not already done so, with a view to preventing belligerent submarine vessels, whatever the purpose to which they are put, from making use of neutral waters, roadsteads, and ports.

"It may further be said that any place which provides a submarine warship far from its base with opportunity for rest and replenishment of its supplies thereby furnishes such an addition to its powers that the place becomes in fact, through the advantages which it gives, a base of naval operations.

"In view of the state of affairs thus existing, the Allied Governments are of opinion that—

"Submarine vessels should be excluded from the benefit of the rules hitherto recognized by the law of nations regarding the admission of vessels of war or merchant vessels into neutral waters, roadsteads, or ports, and their sojourn in them.

"Any belligerent submarine entering a neutral port should be detained there.

"The Allied Governments take this opportunity to point out to neutral powers the grave danger incurred by neutral submarines in navigating regions frequented by belligerent submarines." (Ibid., p. 769.)
In concluding, a somewhat detailed reply, the Secretary of State said:

"the Government of the United States reserves its liberty of action in all respects and will treat such vessels as, in its opinion, becomes the action of a power which may be said to have taken the first steps toward establishing the principles of neutrality and which for over a century has maintained those principles in the traditional spirit and with the high sense of impartiality in which they were conceived.

"In order, however, that there should be no misunderstanding as to the attitude of the United States, the Government of the United States announces to the Allied powers that it holds it to be the duty of belligerent powers to distinguish between submarines of neutral and belligerent nationality, and that responsibility for any conflict that may arise between belligerent warships and neutral submarines on account of the neglect of a belligerent to so distinguish between these classes of submarines must rest entirely upon the negligent power." (Ibid., p. 771.)

An inquiry undertaken by the United States about this time showed that many neutral states reserved the right to treat private merchant submarines as other private merchant vessels would be treated.

Résumé.—(a) During the World War neutral states prohibited the use of the superjacent air by aircraft of all descriptions and in many cases shot down aircraft entering this jurisdiction. Subsequent conventions, proposed or concluded, have usually affirmed the complete sovereignty of the subjacent state in the superjacent air not merely in the time of war but also in the time of peace. Many conventions, mutually permit and regulate in detail the entrance of foreign aircraft, the use of airdromes, the bounds between which entrance may take place and the routes to be followed, etc.
Conventions also specifically state that the provisions apply as well to the air above jurisdictional waters as above land. At The Hague in 1923, the Commission of Jurists discussed some of these propositions for extension of jurisdiction and reported:

"Detailed consideration of the proposal led the majority of the delegations to think that the suggestion is not practicable.

"It seems inevitable that great confusion would follow from any rule which laid down a different width for the territorial airspace from that recognised for territorial waters, more particularly in the case of neutral countries for whose benefit and protection the proposal is put forward. As an example it is only necessary to take article 42, which obliges a neutral State to endeavour to compel a belligerent military aircraft entering its jurisdiction to alight. If the aircraft entered the jurisdiction from over the high seas, it would do so at 10 miles from the coast, and if in compliance with neutral orders it forthwith alighted on the water, it would then be outside the neutral jurisdiction, and the neutral State could not intern the aircraft.

"On principle it would seem that the jurisdiction in the airspace should be appurtenant to the territorial jurisdiction enjoyed beneath it, and that in the absence of a territorial jurisdiction beneath, there is no sound basis for jurisdiction in the air.

"Furthermore, it is felt that the obligation to enforce respect for neutral rights throughout a 10-mile belt would impose an increased burden on neutral Powers without adequate compensating advantages." (1924 Naval War College, Int. Law Situations, p. 152.)

There seems ample ground for prohibition of the use of air above the state jurisdiction but not for extension of authority beyond this limit. There is, however, no general agreement upon a maritime jurisdiction off the coast except for three miles, in spite of many claims to more extended jurisdiction.
(b) A state may for reasons of its own establish a radio station outside the jurisdiction of any other state and it would become responsible for its control and operation. As a neutral state in control of the station, responsibility would extend to the prevention of the use of the station in any unneutral manner, but not necessarily to the closing of the station. Such a station on the high sea might be for scientific or other purpose having no relation to the war and as such would not be under orders from a belligerent.

(c) The right of a state to prevent or to regulate the movement of foreign aircraft is limited to the air within its jurisdiction which extends to the air above its land and maritime boundaries. Generally accepted maritime boundaries now extend at least to three miles from the low-water mark along the coast and three miles outside the limits of its bays. Whether the direction is toward the equator or toward the pole makes no difference—the jurisdiction extends seaward for three miles.

(d) All aircraft have equal rights in flight over the high sea. In time of war, neutral aircraft must respect the rights of belligerents. The route over the poles may be found to have special advantages, or routes in some other regions may be found more practicable. These facts do not give to states in the neighborhood any extension of jurisdictional control though extension by conventional agreements might be expedient in some cases.

(e) The right of innocent passage prevails both in time of war and in time of peace.

The three-mile limit is usually measured outward from the low-water mark.
The Conference for the Codification of International Law, The Hague, 1930, gave considerable attention to the determination of the low-water mark and the Report says:

"The traditional expression 'low-water mark' may be interpreted in different ways and requires definition. In practice, different States employ different criteria to determine this line. The two following criteria have been taken more particularly into consideration: first, the low-water mark indicated on the charts officially used by the Coastal State, and, secondly, the line of mean low-water spring tides. Preference was given to the first, as it appeared to be the more practical. Not every State, it is true, possesses official charts published by its own hydrographic services, but every Coastal State has some chart adopted as official by the State authorities, and a phrase has therefore been used which also includes these charts.

"The divergencies due to the adoption of different criteria on the different charts are very slight and can be disregarded. In order to guard against abuse, however, the proviso has been added that the line indicated on the chart must not depart appreciably from the more scientific criterion: the line of mean low-water spring tides. The term 'appreciably' is admittedly vague. Inasmuch, however, as this proviso would only be of importance in a case which was clearly fraudulent, and as, moreover, absolute precision would be extremely difficult to attain, it is thought that it might be accepted.

"If an elevation of the sea bed which is only uncovered at low tide is situated within the territorial sea off the mainland, or off an island, it is to be taken into consideration on the analogy of the North Sea Fisheries Convention of 1882 in determining the base line of the territorial sea.

"It must be understood that the provisions of the present Convention do not prejudge the questions which arise in regard to coasts which are ordinarily or perpetually ice-bound." (24 A. J. I. L., Sup. [1930], p. 248.)
On a sandy beach the mark may shift at different seasons because of changing configuration of the shore line.

Along a cliff the low-water mark may be relatively permanent. Similarly the low-water mark may be relatively at the same line along permanent ice and it may be essential that the adjacent state exercise jurisdiction over this ice and the usual distance over the adjacent sea in order that its rights may be secure.

It must be admitted that the Conference for the Codification of International Law was unable to reach an agreement upon the width in miles of the belt of sea which should be regarded as under the jurisdiction of each state. A large number of states, however, accept the three-mile limit. It was mentioned by the Hague Conference in its report to the League of Nations that—

"In this connection it is suggested that the Council of the League should consider whether the various States should be invited to forward to the Secretary-General official information, either in the form of charts or in some other form, regarding the base lines adopted by them for the measurement of their belts of territorial sea." (Ibid., p. 238.)

In regard to passage this same report states,

"Article 3. 'Passage' means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters. Passage is not innocent when a vessel makes use of the territorial sea of a Coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State.

"Passage includes stopping and anchoring, but in so far as the same are incidental to ordinary navigation or are
rendered necessary by force majeure or by distress.” (Ibid., p. 240.)

(f) During the World War submarine vessels were in many states prohibited entrance except upon the surface and this applied alike to all submarines.

At the Conference for the Codification of International Law, The Hague, 1930, mention of vessels other than warships received consideration, and it was provided:

"VESSELS OTHER THAN WARSHIPS.

"ARTICLE 4. A Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea.

"Submarine vessels shall navigate on the surface.

"Observations.

"The expression 'vessels other than warships' includes not only merchant vessels, but also vessels such as yachts, cable ships, etc., if they are not vessels belonging to the naval forces of a State at the time of the passage.” (24 A. J. I. L., Sup. [1930], p. 241.)

It has been admitted that underwater navigation off ports might endanger other navigation and the enforcement of customs and other regulations would be difficult and in some cases impossible so that a requirement that foreign submarines navigate on the surface is deemed reasonable.

SOLUTION

(a) State M may lawfully prohibit the flight of aircraft above its territorial and maritime jurisdiction.¹

¹ See note 1, supra, p. 70.
It is not lawful to interfere with the flight of aircraft outside this space.

(b) State O may not lawfully order the radio station of state N to be closed though it may protest to state N against any violation of neutrality in its use.

(c) State O may lawfully prohibit or regulate the entrance to its jurisdiction of any or all aircraft.

(d) State O may not lawfully seize the aircraft of state M.

(e) State P may not lawfully prohibit innocent passage though it may issue regulations essential to its own protection.

(f) State N may lawfully prohibit the entrance or regulate the movements of vessels of war or regulate the movements of other vessels within its territorial waters when essential for its protection.