

The law of the sea

third edition

R. R. Churchill and A. V. Lowe



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Internal waters

Definition

Internal, or national, or interior, waters are those waters which lie landward of the baseline from which the territorial sea and other maritime zones are measured (LOSC, art. 8; TSC, art. 5(1); see chapter two). Thus, internal waters of a maritime character mostly comprise bays, estuaries and ports, and waters enclosed by straight baselines.¹ Waters enclosed by the baseline drawn around the outermost islands of an archipelagic State have a special status, which is considered in chapter six; but each separate island within the archipelago is entitled to its own baseline, drawn according to the normal principles, so that its ports, bays and so on may be constituted as internal waters (LOSC, art. 50).

Legal status

In the seventeenth century Hale set out a simple test for deciding whether as a matter of English law an area of water fell within 'the realm' and within the jurisdiction of the common law courts: 'That arm or branch of the sea which lies within the *fauces terrae*,² where a man may reasonably discern between shore and shore is or at least may be within the body of a county'. The same general approach, treating waters lying within notional lines drawn between distinct headlands as integral parts of the territory of the coastal State, was adopted in international practice.³ The present conventional rules concerning the baseline fulfil the same function with greater precision. As a matter of international law the baseline divides a State's land territory and the internal waters which are assimilated to it from its territorial sea, which is the State's maritime territory.

¹ The great internal 'seas', such as the Caspian, which have no outlet to the oceans are not maritime areas, and are not governed by the international law of the sea.

² The 'jaws of the land'.

³ See *Attorney-General of Canada v. Attorney-General of British Columbia* (Canada, 1984).

Internal waters

This approach implies that, just as the State is in principle free to deal with its land territory, so it should be free to deal with its internal waters as it chooses; and for this reason those waters have not been made the subject of detailed regulation in any of the Conventions on the Law of the Sea.

The coastal State enjoys full territorial sovereignty over its internal waters. Consequently, there is no right of innocent passage, such as exists in the territorial sea, through them. The single exception to this principle is that where straight baselines are drawn along a coastline that is deeply indented or fringed with islands, enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage continues to exist through those newly enclosed waters, at least for parties to the Territorial Sea and Law of the Sea Conventions (LOSC, art. 8(2); TSC, art. 5 (2)).⁴ That, at least, is the position under the Conventions: the position in cases where such lines are drawn in exercise of rights under customary law is less clear, the *Anglo-Norwegian Fisheries* case making no reference the preservation of rights of innocent passage in these circumstances.⁵

Two aspects of coastal States' sovereignty over internal waters have given rise to much discussion, and will be considered separately. These are the question of access to ports, and the question of the exercise of jurisdiction over foreign ships in ports.

The right of access to ports and other internal waters

The existence of sovereignty over internal waters and the absence of any general right of innocent passage through them logically implies the absence of any right in customary international law for foreign ships to enter a State's ports or other internal waters. There is, indeed, very little support in State practice for such a right. A much quoted dictum from the award in the *Aramco* arbitration in 1958 stated that 'According to a great principle of public international law, the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require.'⁶ But that dictum itself is not supported by the authorities cited by the tribunal, and there is almost no other support for the proposition. While it is undoubtedly true that the international ports of a State are presumed to be open to international merchant traffic (the right to exclude foreign warships is undoubted), this presumption has not acquired the status of a

⁴ The Minches, lying between the mainland of north-west Scotland and the islands of the Outer Hebrides, are an example: see *UKMIL* 1993, 660. Cf., the comment of the International Law Commission on this provision: *ILC Yearbook*, 1956, Vol. II, p. 268.

⁵ See, e.g., T. L. McDorman, 'In the wake of the *Polar Sea*: Canadian jurisdiction and the Northwest Passage', 10 *Marine Policy* 243-57 (1986) at 247-9.

⁶ 27 *ILR* 167 at 212. See further Lowe, *op. cit.* in 'Further reading'.