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Internal Waters

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A. The Notion

1 Internal waters are generally defined in relation to the → *territorial sea* as the waters inside the inner limit of the territorial sea. But internal waters can exist without a territorial sea, and a territorial sea can exist without internal waters. The concept comprises saltwater areas, as well as internal freshwater areas, such as rivers and lakes. Important areas of internal waters such as navigable rivers have often, however, been subjected to special regimes, eg the international rivers regime and the Kiel Canal, the → *Suez Canal* and the → *Panama Canal*. The term 'internal waters' was defined at a comparatively late stage in the development of the modern conceptual framework of the international → *law of the sea* and it became the accepted term only after World War II.

2 The growing inconsistencies during the early 20th century between various claims of national sovereignty led to codification attempts of coastal State sovereignty over adjacent maritime areas including separation of territorial waters with innocent passage from internal waters and historical waters regime with no access for foreign ships. The early attempts at formalizing the extent of coastal State sovereignty over adjacent sea areas conflicted with divergent national practice such as eg United Kingdom doctrine of Kings Chambers with bay closing lines over 90 nautical miles as well as Scottish closed waters doctrine and other States' various headland doctrines. The various national inherent conflicting doctrines became the focus of international disputes as seen in the 1906 *Mortensen v Peters* case (High Court of Justiciary [Scotland] 14 Scots LTR 227) and the 1910 *North Atlantic Coast Fisheries case* (PCA, 11 RIAA 167).

3 At the League of Nations Territorial Waters Codification Conference on Territorial Waters (1930), the inclusion of internal waters regime met with resistance from a number of important maritime States as being too complex and varied to be condensed into general abstract formulas. A majority of States even ignored suggestions to furnish maps over existing territorial sea with historic and/or internal water areas included. This reluctance reflected a widespread use of the historic waters regime as the basis for claims of internal waters as well as the apparent role as the safety valve which allows for accommodation of often abstract principles in a variety of different geographical and historical scenarios.

4 The internal waters regime was given an authoritative restatement by the International Court of Justice in the *Fisheries Case (UK v Norway)* (Merits) ([1951] ICJ Rep 116) where the concept of internal waters was defined as part of the Court assessment of drawing of straight baselines. The ICJ outlined the flexible nature of the concept and distinguished between historical waters and internal waters (at 130 and 133). After some initial reservation especially by adversely affected States, the view of the Court was, however, acknowledged by the international community and made the basis for modern treaty law of straight baselines in the 1958 UN Convention on the Territorial Sea and the Contiguous Zone and the UN Convention on the Law of the Sea, Part II.

5 Though formally excluded from both the United Nations Convention on the Law of the Sea ('UN Convention on the Law of the Sea') and the 1958 UN Convention on the Territorial Sea and the Contiguous Zone, the relevance of → *customary international law* in regard to internal waters is reflected in both treaties. The UN Convention on the Law of the Sea even contains a definition of the internal waters regime as 'waters [that] on the landward side of the baseline of the territorial sea form part of the internal waters of the State' (Art. 8 (2) UN Convention on the Law of the Sea). An exception is made, however, for the special → *archipelagic waters* regime in Part IV UN Convention on the Law of the Sea, where special treaty rules may apply. Moreover, Art. 8 (2) UN Convention on the Law of the Sea states that → *innocent passage* is not suspended in waters that become internal waters by the drawing of straight → *baselines* according to Art. 7 UN Convention on the Law of the Sea. However, if the baselines are drawn purely on the basis of customary law relating to the internal waters regime, this rule will not necessarily apply.

B. The Status of Internal Waters in International Law

6 The internal waters regime is a customary law regime. Internal waters and the partly-overlapping regime of historical waters are the only regimes in the law of the sea that are exclusively regulated under general customary law. Both regimes have been deliberately excluded from the UN Convention on the Territorial Sea and the Contiguous Zone and the UN Convention on the Law of the Sea. Moreover, no official study of internal waters has been attempted. As an important part of the internal waters regime, the historical waters regime and the historical bays regime have, however, been analysed in two studies prepared by the UN Secretariat in 1957 and 1962 (UNCLOS I 'Historical Bays' [30 September 1957] and UN ILC 'Juridical Regime of Historic Waters, including Bays' [9 March 1962]; see also → *Bays and Gulfs*).

7 As the internal waters regime is interconnected with the territorial sea regime, both the UN Convention on the Territorial Sea and the Contiguous Zone, and the UN Convention on the Law of the Sea have an effect on the internal waters regime and vice versa. The drawing of straight baselines according to the UN Convention on the Law of the Sea generates internal waters, which are regulated exclusively by customary law. On the other hand, if drawn using only the criteria of customary law, the outer limit of internal waters generates baselines which automatically become the inner limit of the territorial sea that is regulated by the treaty law. Therefore, the general treaty law regime of the UN Convention on the Law of the Sea can generate a customary law regime of internal waters, which in turn can create straight baselines independent of the treaty law and which can subsequently have an effect on the inner limit of the various jurisdictional zones laid down in the UN Convention on the Law of the Sea. Internal waters can consequently be generated both 'inside-out' by applying customary law and 'outside-in' by drawing straight baselines according to the treaty rules, thereby generating internal waters. The internal waters generated by application of the treaty rules on straight baselines will still be regulated by customary law.

C. Archipelagic Waters

8 The customary law regime of internal waters found application in the new archipelagic States that emerged after World War II, especially in the Pacific area. The question of archipelagic States had been discussed both in connection with the → *League of Nations* Codification Conference and the UN Convention on the Territorial Sea and the Contiguous Zone, although in the end, no rules relating to the issue were included. In practice, however, the principles outlined in the 1951 → *Fisheries Case (United Kingdom v Norway)* ('Anglo-Norwegian Fisheries Case') before the → *International Court of Justice (ICJ)* naturally found growing application *mutatis mutandis* (see *Fisheries Case (UK v Norway)* [1951] ICJ Rep 116. Consequently, the treaty law regime of Part IV UN Convention on the Law of the Sea must be compared to the customary law regime of the time, as it reflected this new political situation. The geographical and economic considerations outlined in the *Anglo-Norwegian Fisheries Case* can also be applied in the case of an independent State consisting of → *islands* that have a similar geographical configuration, such as the Norwegian Skaergaard. Against this background, the maximum limit for archipelagic baselines of 100 nautical miles laid down in Art. 47 (2) UN Convention on the Law of the Sea must be seen as a purely treaty-based provision that has little basis in general customary law. No such maximum limit for the baselines can be found in the internal waters regime. On the contrary, Art. 47 (2) UN Convention on the Law of the Sea introduces a new special treaty regime of archipelagic baselines as part of the new regime of archipelagic waters in Part IV UN Convention on the Law of the Sea. The criteria for drawing archipelagic baselines are more restricted than both the criteria for drawing straight baselines according to Arts (7) UN Convention on the Law of the Sea and the customary law rules for drawing baselines as the outer limit for internal waters. As already mentioned, a specific maximum length for archipelagic baselines is provided for the first time, as archipelagic baselines are restricted to a maximum of 100 nautical miles or, in special cases, 125 nautical miles (Art. 47 (2) UN Convention on the Law of the Sea). The area enclosed by the archipelagic baselines does not become internal waters, but instead becomes archipelagic waters that are subject to a special *suiiuris* regime, according to Art. 49 UN Convention on the Law of the Sea. The archipelagic waters regime contains elements of several other regimes, including that of the territorial sea (right of passage for foreign ships but confined to a special sea lanes system in Arts 52 and 53 UN

Convention on the Law of the Sea), the → *exclusive economic zone* ('EEZ') regime, as well as the → *continental shelf* regime (certain rights as to fishing and laying submarine cables is retained for foreign States according to Art. 51 UN Convention on the Law of the Sea). According to Art. 50 UN Convention on the Law of the Sea, the archipelagic State 'may draw closing lines for the delimitation of internal waters, in accordance with Articles 9, 10 and 11', which regulate the status of mouths of rivers, bays and → *ports*. However, Arts 6, 12, and 13 (2) UN Convention on the Law of the Sea have not been included in the archipelagic waters regime as a basis for drawing internal waters, an exclusion which confirms the restricted approach of the archipelagic waters regime to the creation of internal waters. It remains an open question as to how the relationship between the treaty law regime of archipelagic baselines under the UN Convention on the Law of the Sea and the separate, but parallel, customary law regime of internal waters, will develop.

D. Historical Waters Including Historical Bays

9 The special case of the outer limit of historical waters including historical bays partly overlaps with the independent regime of general rules regarding internal waters. Historical waters including bays are, by definition, internal waters, so that the outer limit of historical waters, where such areas exist, also forms the outer limit of a coastal State's internal waters. The internal waters of a coastal State often consist of a combination of water areas claimed as both internal waters and historical waters. Unless specially claimed by a coastal State as part of its territorial waters, the historical waters become part of and have the status of internal waters.

E. The Delimitation

10 The main issue in the delimitation of internal waters is the delimitation of the outer limit. The delimitation of the inner limit will depend on the definition of internal waters. In the broadest sense, internal waters comprise all waters inside the outer limit of the internal waters. As this will include inland freshwater areas, the notion of a fixed limit is irrelevant or purely theoretical. Pre-World War II legal doctrine often included an extensive analysis of the regimes of rivers and lakes when discussing internal waters. In the more limited definition of internal waters as the area of water inside the outer limit of the internal waters, the coastline of the mainland is the inner limit.

F. The Outer Limit

11 International customary law gives some broad guidelines for delimitation of internal waters. The procedures for delimitation of internal waters were authoritatively addressed by the ICJ in the *Anglo-Norwegian Fisheries Case*. The ICJ underlined that the guidelines were not necessarily exhaustive but had been adapted to the relevant local circumstances in the actual case before the Court. The ICJ's decision was subsequently applied in the treaty law on the drawing of straight baselines in the UN Convention on the Territorial Sea and the UN Convention on the Law of the Sea.

12 In practice, the outer limits of internal waters are drawn as straight baselines to facilitate their practical use for navigation, etc. No prescriptive requirement to follow this practice exists, however. The only authoritative exposition of the delimitation rules of the outer limits of internal waters is still the *Anglo-Norwegian Fisheries Case*. Although the ICJ deliberately refused to give an exhaustive exposé of the general rules of delimitation, it outlined guidelines relevant for the actual case. The ICJ elaborated on waters having the status of internal waters due to a special historical entitlement. In the absence of historical title, these waters would not have had the status of internal waters. According to the ICJ, internal waters are generated by a series of independent considerations, the most important of which is the criterion

of being 'sufficiently closely linked to the land domain to be subject to the regime of internal waters' (*Anglo-Norwegian Fisheries Case* 133).

13 It is unclear, however, what constitutes 'closely linked to the land domain'. Seen within the specific context, it seems that geographical circumstances are being referred to, such as the special geographic configuration of the Norwegian Skaergaard. But these criteria are supplemented by social-economic criteria; 'certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage' (ibid). It remains unclear whether a hierarchy of such criteria exists, how the relative value of each criterion is determined, and whether the fulfilment of only one of the criteria is sufficient. According to the ICJ, the geographical, historical, and economic interests were relevant in this case. In a different case, other considerations might be relevant.

14 A series of factual cases on the delimitation of the outer limits of internal waters can be observed in general customary international law. In practice, the outer boundary of internal waters consists of lines drawn between geographical points on the furthest seaward extension of natural configurations, such as the mouth of a bay, a river delta, a reef, a fringe of islands adjacent to the main coast, or artificial constructions such as ports and purely functionally defined areas such as → *roadsteads*. The cases enumerated in treaty law are, however, neither conclusive nor exhaustive for general customary law. Other than historical bays and roadsteads, there is a notable absence of historical waters that are seen to be internal waters Historical waters and roadsteads are delimitated as internal waters by their respective historical entitlement or function. In both cases, the coastal State has wide discretionary powers and control over the relevant evidence.

15 In contrast to the other maritime zones under a costal State's national jurisdiction, there is no maximum outer limit for internal waters. As seen in practice, the outer limits of the internal waters often extend well beyond the 12 mile maximum outer limit for the territorial sea laid down in treaty law. Moreover, in the broad legal definition of geographical configurations, such as reefs, deltas, sandbanks, etc the rules are flexible and can be adapted to actual circumstances, as defined by the coastal State. No concrete legal definitions of these natural configurations exist. Moreover, some of the natural formations, such as sandbanks, change according to prevailing local currents. Problems such as the effect of shifting water levels, so that it is not always clear which areas are permanently covered by water, have led to practical accommodation. The shifting of sandbanks in the → *North Sea* and the effects of the strong tide were addressed by the drawing of artificial base-points that had been agreed upon by the affected States, one example being the baseline of the border between Denmark and Germany in the North Sea (see Danish Order No 497 of 1923 Lovtidende A [1923] 2022 and the French text in UN Legislative Series 'Laws and Regulations on the Regime of the Territorial Sea' ST/LEG/SER.B/6 [1957] 9–11).

16 In general, due to moderation in the exercise of these wide powers, the rules on delimitation of the outer limit of internal waters serve the accepted legislative purpose as a useful moderator of theoretical principles that are otherwise too abstract and that hardly reflect the actual geographical, economic and historical circumstances of each case.

17 The question of delimitation of the outer limit of internal waters between States with opposite coasts was partly addressed at the League of Nations Codification Conference in the context of delimitation of the territorial sea. The delimitation of the areas of adjacent waters belonging to two neighbouring States should be settled by consideration of the historical circumstances in the case of existing States. In the case of new States, or a change in the borderline between coastal States, the local geographical circumstances, which led to the change in the borderline, should be used as a guideline.

G. The Treaty Law on Generation of Internal Waters

18 The general principles of customary law as applied by the ICJ in the *Anglo-Norwegian Fisheries Case* were used as the basis for the UN Convention on the Territorial Sea and the Contiguous Zone and later also for the similar rules in the UN Convention on the Law of the Sea. Although they are not exhaustive, both treaties are inadvertently the most extensive written declarative evidence of customary law. The UN Convention on the Law of the Sea lists a number of practical cases where the outer boundaries of the following features can be drawn as straight baselines: reefs (Art. 6 UN Convention on the Law of the Sea); a fringe of islands situated outside the mainland (Art. 7 UN Convention on the Law of the Sea); mouths of rivers (Art. 9 UN Convention on the Law of the Sea); bays, including historical bays (Art. 10 UN Convention on the Law of the Sea); ports (Art. 11 UN Convention on the Law of the Sea); roadsteads (Art. 12 UN Convention on the Law of the Sea); and low-tide elevations (Art. 13 UN Convention on the Law of the Sea). The waters inside these straight baselines are internal waters. Just as the ICJ stressed that its list of considerations was not exhaustive, the treaty rules cannot be seen as an exhaustive list of the factual circumstances which can generate internal waters. For instance, although the UN Convention on the Law of the Sea refers to the question of historical bays in its Art. 10, the existence of other historical waters is not referred to. But the 1962 Report on the judicial regime of historic waters including historic bays by the → *International Law Commission (ILC)* (UN ILC 'Juridical Regime of Historic Waters including Historic Bays - Study prepared by the Secretariat' (1962) UN Doc A/CN.4/143), rightly treated historical bays as part of the broader notion of historical waters.

H. Applicable Legal Regime Including the Access to Internal Waters by Seagoing Vessels

19 Three problems have generally been discussed in relation to the legal regime of internal waters: firstly, the absence of any right to innocent passage in internal waters in general; secondly, the status of foreign ships in internal waters and especially in ports; and thirdly, the existence of a special right of access for foreign → *merchant ships* to commercial maritime ports. Finally, and somewhat inconsistently with the original mandate, which deliberately excluded internal waters, the UN Convention on the Law of the Sea introduced a special treaty regime of → *port State jurisdiction* in Part XII, Art. 211 on enforcement by port States of marine environment regulations (→ *Marine Environment, International Protection*; → *Marine Pollution from Ships, Prevention of and Responses to*). The intermediate status of internal waters, both as part of the more extensive coastal State's → *sovereignty* over its land territory and its status as the innermost or first of the maritime zones, is reflected in the legal regime. The most important constituent element of the internal waters regime is the lack of any right of passage for foreign ships, except in cases of distress or special agreement (see also → *Ships in Distress*). This absence of a general right of passage is balanced by a widespread and reciprocal acceptance of the access of foreign merchant ships to major commercial ports as a matter of international commercial → *comity*. Foreign warships and fishing vessels are excluded from having this access, except in cases of distress. The status of the foreign ship and access to it are subject to the sovereignty of the coastal State and are limited only by the general rules relating to the status of foreigners in the land territory of the coastal State, or by special agreement. Of all the maritime zones, internal waters are the zone over which a coastal State has the most unrestricted jurisdictional powers in the modern law of the sea.

I. Passage

20 There is no right of passage to or through internal waters. It has, however, been debated whether there is a right of passage to ports. The view that there might be such a right originated before the precise jurisdictional effects of the modern conceptual framework developed, with its clear distinction between internal waters and the territorial sea. Authoritative modern doctrine rightly remains sceptical. Moreover, the coastal State's growing environmental concerns, as well as the development of homeland security

legislation, will restrict the practical role of such a right of access, if any such exists, to a pure formality, subject to the exclusive control of and discretionary suspension by the coastal State.

21 Generally, most States allow foreign merchant ships access to their major commercial ports. Such rights were normally agreed upon in the extensive system of bilateral treaties regarding reciprocal access to ports negotiated between a large number of States in the 19th century and even earlier. Moreover, the 1923 Convention on the International Regime of Maritime Ports ([signed 9 December 1923, entered into force 26 July 1926] 58 LNTS 285; 'Maritime Ports Convention') expressly allowed for access to international ports. In legal doctrine, it has been argued that the Maritime Ports Convention was declarative of general customary law.

22 No such rule on a right of access was included in the preparatory works of the League of Nations Codification Conference (1926 to 1930), even though the status of foreign ships in ports was extensively discussed. There was also no discussion of such a right during the drafting of the articles on the right of passage. This is significant because no clear distinction between internal waters and the territorial sea was present in the initial deliberations of the League of Nations conference. Even after the conceptual development of a jurisdictional distinction between the territorial sea and internal waters that reflected the actual customary law, the right of passage was explicitly restricted to the territorial sea in the final draft of the 1930 Draft Articles on the Legal Status of the Territorial Sea (Report of the Second Committee (1930) League of Nations Doc C.230.M117.1930.V. 7; Final Act of the Conference (1930) League of Nations Doc C.228.M.115.1930V. 16).

23 It should be noted that the Maritime Ports Convention included a provision for discretionary exclusion of general access to the colonies of the States Parties, just as the State could renounce the treaty at short notice. Finally, even such a general right of access would be subject to discretionary limitations, as well as indefinite suspension, subject to the sovereign jurisdiction of the coastal State. A safer view is to regard the Maritime Ports Convention as a codification of the numerous contemporary bilateral agreements of reciprocal access to commercial ports.

24 It is, however, a fact that most States allow access by foreign ships to their major commercial ports without requiring explicit prior permission. As already agreed at the League of Nations Conference in 1930 with respect to the status of foreign ships in ports, a widespread and restrictive practice is based on reciprocal comity and not on any legal obligation. The general open access to commercial ports for foreign merchant ships is based on a similarly widespread reciprocal comity, without which international communications would be hampered. It may be possible to view the tacit reciprocal acceptance in practice of a presumption of free access, subject to the sovereignty of the coastal State, as a reflection of international maritime commercial policy and evidence of comity based on reciprocity. Moreover, even a reciprocal comity of access is becoming more and more restrictive. Finally, with international maritime anti-terrorist regulations, in addition to the already stricter environmental conditions for access to internal waters including ports, the State treaty regime of the UN Convention on the Law of the Sea will eradicate any trace of free access to ports.

J. Environmental Aspects

25 Due to the status of internal waters as intermediate areas between the land territory and the maritime zones of coastal States, the environmental laws of coastal States could be extended to cover the internal waters, if no explicit exception has been made. The coastal State could enforce application of its national environmental law in respect of internal waters *mutatis mutandis*, as internal waters are subjected to the sovereignty that the coastal State has over its land territory. It would be possible to enforce stricter norms on foreign ships as part of granting access to internal waters or even ports. The reciprocity factor, as well as existing bilateral treaty law governing mutual access, would generally counter excessively discriminatory

regulations. But foreign ships would not have any rights to → *cabotage* or transport between ports in the coastal State unless expressly agreed, just as special requirements for foreign ships could be made conditional on such access. Further, the coastal State could introduce more restricted practices for foreign ships entering the internal waters including ports under the nitrogen oxide (NOx) restrictions on emissions in the 1997 Protocol to the International Convention for the Prevention of Pollution from Ships ('MARPOL').

26 The traditional and exclusive juridical powers of the coastal State have, moreover, been supplemented by the special juridical regime of port State control in the UN Convention on the Law of the Sea. Although the UN Convention on the Law of the Sea explicitly excluded internal waters, as did the UN Convention on the Territorial Sea and the Contiguous Zone, the exclusion has been somewhat undermined by the inclusion of the special port control regime. The main function is to link the new treaty regime to the already existing jurisdictional powers under general customary law. Recently, emerging regional initiatives such as the European Union coordinated European Maritime Surveillance Networking project ('MARSUR') and the Sea Surveillance Cooperation Baltic Sea ('SUCBAS'), have been developing administrative tools for internal waters jurisdiction in addition to the developing port State control and enforcement regime based on the UN Convention of the Law of the Sea.

K. Assessment

27 The robustness of the internal waters regime and the continued application is evidenced in State practice. The regime of internal waters is a necessary prerequisite for the application of the general treaty rules of the UN Convention on the Law of the Sea to various local contexts, whether they are of historical, geographic, economic, or strategic significance. The continued acceptance and application of the regime in practice, and its open-textured structure as seen in the overlapping regime of historical waters, highlight, on the one hand, the inherent futility of laying down rules that are too general for a variety of actual circumstances. On the other hand, the continued existence of this parallel regime, which has been kept outside the general codification of the law of the sea, also shows the necessary flexibility of and rationality behind the UN Convention on the Law of the Sea itself. The fact that internal waters were not included shows both the strengths and weaknesses of general codification. It also underlines how a codification, if done flexibly, can create workable procedures for the continued solving of potential conflicts over vital interests.

28 A codification which did not recognize the necessity of the internal waters regime in its present form would have been neither accepted nor respected as a guideline, but would have been seen as a mere exercise in political posturing, without having any effect on States' behaviour in practice.

29 Emerging conflicts as to access to Arctic waters could, however, revitalize and enhance the question of internal waters. Hitherto ice covered areas are gradually being opened for navigation due to climate changes. Some of the key areas for international navigation are being claimed as internal waters both by Canada and Russia, or would fulfill the criteria as such under existing international law. It is likely, however, that the issue of access will be dealt with by regional treaty law leaving the internal waters regime as such intact. Moreover, in disputes as to allocation of marine resources in the South China Sea claims as to drawing of baselines based on historical claims play a significant part. Similar to the Arctic issues a negotiated solution is foreseeable leaving the constituent core of the internal waters regime untouched, but perhaps adding to its scope of application.

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