Chapter 3

THE REGIME OF HISTORIC WATERS IN THE CASE OF BAYS/COASTAL ARCHIPELAGOES

1. The Usually-Stated Rule

According to the main authorities, historically-enclosed waters are generally internal.\(^1\) As, for example, has been stated, “[g]enerally speaking, writers and publicists, as well as a majority of the arbitrations and World Court decisions on the subject, classify historic waters and historic bays” under such a characterisation, which is supposedly reflected in the TSC by reading “together” Articles 5(1) and 7(6), so generally giving no right of innocent passage therein.\(^2\) This is, then, an interpretation arising directly from treaty law, borrowing from the juridical bay concept, as although the 1958 TSC did not expressly state this in the case of an historic bay, it did at least provide that waters enclosed in a “bay” shall have such (internal waters) status.\(^3\)

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\(^1\) It should be noted that the term “inland waters” is not used in current law of the sea legal terminology, as the appropriate phrase used both in the TSC (1958) and the LOSC (1982) is “internal waters”. However in US caselaw and legislation (most particularly in s (a)(2)(c) of the Submerged Lands Act (43 USC)), the phrase “inland waters” still persists.


\(^3\) D. Pharand, ‘Historic Waters in International Law with special reference to the Arctic’ (1971)
1.1 The status of historic waters as discussed in the El Salvador/Honduras case

It was argued its pleadings to the case by El Salvador that as there was no single category of ‘historic bays’ or ‘historic waters’ each historic claim case depended upon its own circumstances. Accordingly it was controversially alleged that there is “no basis for saying that all waters of a historic bay are placed under the unequivocal status of internal waters”, insofar as it had been judicially opined⁴ that there were in the Gulf not only areas of “exclusive jurisdiction”, but also zones of “maritime inspection” as well as “areas of waters not affected by these concepts”.⁵

Despite the rather unique features relating to a pluristate bay in the case, the ICJ found the status of waters enclosed in a properly-proved historic bay intrinsically to have the status of internal waters. Thus the majority of judges not only found the waters of the Gulf of Fonseca to be (both historically and today) internal waters,⁶ but also⁷ that “[n]o great difficulty arises about the legal position of the waters of an historic bay that constitutes an enclosed sea entirely within the territory of a single State: then the enclosed waters are simply internal waters of the coastal State”.

Additionally, the Dissenting Opinion of Judge Oda emphasised in the case that “[t]he words ‘historic bay’ are certainly not meant to suggest that the legal status of the waters concerned is anything less than that of ‘internal waters’ of the coastal State, as in the case of a normal (juridical) bay”;⁸ and that under contemporary law sea-waters adjacent to coasts “cannot come into any other category other than that of such internal waters or the territorial sea”, with the possible exception of the “new concept of archipelagic waters”.⁹

1.2 Are historic coastal archipelagic waters of the same internal status as historic bays?

1.2.1 Problems arising under the treaty regime

It may seem to be academic whether the claimed historic waters are enclosed in a bay or a coastal archipelago, as the same internal regime and status would appear, prima

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⁴ See supra, p. 15.
⁶ Supra, p. 2, at pp. 604/5, para. 412.
⁷ Id., at p. 594, para. 395 (emphasis added).
⁸ Id., at p. 734, para. 4.
⁹ Id., at p. 745, n. 1 and p. 399, para. 26. He also interestingly decried the use of language in the plenary Court judgment such as “internal waters in a qualified sense” (id., at p. 747, para. 26 (emphasis added). He was clearly not including here more seaward zones such as the 200-nm exclusive economic zone.

21 University of Toronto Law Jnl., 1, at p. 5. See also Blum, op. cit., at p. 300 (“[b]oth categories of bays are to be regarded as internal waters”). This appears to be a long-standing position. See, for example, the 1927 Memorandum preceding the 1930 Hague Codification Conference (Report to the Council of the League of Nations on Questions which Appear Ripe for International Regulation), cited by Judge Oda in the El Salvador/Honduras case: supra p. 2, at p. 739, para. 15 (even where a “greater distance” has been claimed on basis of “continuous and immemorial usage”, the waters are to be “assimilated to internal waters”).