The Appurtenance of Internal Waters to the Land Domain
A proposal to resolve the ambiguity of Article 7(3) of the UN Convention on the Law of the Sea

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Abstract

The exact position in space of the meeting between sea and land takes legally the form of a line, namely the baseline. Although customary international law has early developed the idea that the territorial sea is appurtenant to the coastal State's land territory, nothing has been settled whether internal waters are also appurtenant to the land territory. 'Internal waters' is the character that the drawing of baselines for the measurement of the breadth of the territorial sea attributes to the waters situated within these lines. Article 7(3) of the UN Convention on the Law of the Sea requires that internal waters resulting from straight baselines be 'sufficiently closely linked to the land domain' to be subject to that particular regime. The paper suggests that such a link derives from the notion of 'appurtenance', which it elaborates, in both senses of being an 'accessory' of the land territory and its 'belonging'.

Keywords

Appurtenance in the law of the sea; internal waters; land domain; straight baselines.

Introduction

The drawing of baselines[1] for the measurement of the breadth of the territorial sea, as it is provided in the 1982 UN Convention on the Law of the Sea (UNCLOS), either draws upon the principle of the 'normal' baselines of Article 5,[2] or follows the conditions which Article 7 describes as regards 'straight' baselines. Although the first type of baselines automatically attributes to the waters inside these lines the character of internal waters, the same cannot be said for the second type of baselines, for which internal waters have to pass a 'qualifying test'.

[1] The views expressed hereinafter are those of the author in her personal capacity and do not reflect the views of the International Tribunal for the Law of the Sea.

[2] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 396. Article 5 provides: *"Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large scale charts officially recognized by the coastal state."* This article repeats the same provision as in Article 3 of the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958.

Customary international law has built upon the very notions of historic bays and waters to accept the drawing of straight baselines for the measurement of the breadth of the territorial sea.[3] The relevant textbook case is the *Anglo-Norwegian Fisheries* case of 1951 (United Kingdom v. Norway).[4] The International Court of Justice (ICJ) endorsed Norway's practice that was to connect the outermost points of a distinctive nearshore geological feature, namely the *Skjaergaard*, for the reason that the latter constituted a specific common fishing ground that responded to "the vital needs of the population."[5] It is true that the approved straight baselines in that case do not solely follow *geographically* the coastal configuration, that is the low-water line. They are rather considered to express the *legally* significant line of the coast,[6] thus, taking into consideration non-geographical circumstances, including the human interests and associated economic uses. Key takeaways from this judgment[7] have been transposed *expressis verbis* into Article 4 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, now Article 7 of UNCLOS. The third paragraph of the latter Article lays down two conditions, one of which is for the baselines themselves while the second condition is for the internal waters which result therefrom. Although the first condition is a negative one which requires straight baselines not to "depart to any appreciable extent from the general direction of the coast", the second condition sets a superficial threshold for internal waters to be "sufficiently closely linked to the land domain".[8] This paper hence explores the particular legal nature of that superficial threshold.

The present wording of Article 7(3) may leave a nasty taste in the mouth. The provision raises a number of questions. Although the rationale of the drawing of straight baselines is justified as "a convenient tool to bypass the structures of Part II and to maximize the appropriation of sea areas by coastal States",[9] the vagueness in its chosen formulation remains

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[3] M Kohen, '9 Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?' in L del Castillo (eds), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (Brill | Nijhoff, Leiden, The Netherlands, 2015) 110-124, at p. 117.

[4] V Degan, 'Internal Waters' (1986) 17, *Netherlands Yearbook of International Law (NYIL)* 3-44. *"This practice of straight baselines was first used by some Scandinavian countries after 1912, and later on was extended to other States. It was Denmark which first used these straight baselines in its 1912 Decree on Neutrality. However, the ICJ in the 1951 Fisheries case endorsed the practice of straight baselines used by Norway, and established some rules of a general character in this respect, applicable to other States having a similar coastal configuration. These rules have since been considered by States as declaratory of general customary law."*

[5] Anglo-Norwegian Fisheries case, I.C.J. Reports 1951, at p. 133.

[6] K Purcell, *Geographical Change and the Law of the Sea* (OUP, Oxford 2019), 1-299, at p. 25.

[7] Anglo-Norwegian Fisheries case (n 5).

[8] Article 7(3), United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 396.

[9] *Ibid.*

misleading. First, the 'general direction of the coast' stated in Article 7(1) appears to be "anomalous" *vis-à-vis* the entire Part II of the Convention, in which most of the regulations are formulated in mathematical terms.[10] This vagueness surely undermines the legal certainty of the delimitation of the inner limits of the territorial sea.[11] It consequently becomes "prejudicial not only to the interests of the coastal State but [also] to the stability of the legal order as a whole".[12] Moreover, the second formulation relying on the condition that the 'link' between internal waters and the land domain must be 'close' enough is scarcely any better: what is the particular nature of a sufficient link between land and sea? Although some scholars view it in purely geographical terms,[13] while a few has recently analysed it through legal geography,[14] it is true that, most of the publicists agree to draw parallels with the particular nature of the 'indentation' that Article 10 of UNCLOS describes to characterise bays. Pursuant to this provision, the coastal State bears the onus of proof and "should establish that there is strong historic interrelationship between the waters and the land' for an indentation to be a legal bay.[15] The regime of bays therefore, cannot be generalised to all internal waters and in particular to those generated from the drawing of straight baselines, for at least two reasons. On one point, Article 10 implies a variable-geometry test, taking into account the historical dependency, that is the long usage which characterises the link between land and sea in a bay. Secondly, given that state practice shows numerous examples of questionable straight baselines, it appears that a corresponding *opinio juris* and a permissive view are still lacking, as regards the extent the consequential internal waters.[16]

To try to resolve ambiguity and identify the 'true meaning' of a provision, an international lawyer typically looks at what the law governing the interpretation of treaties provides, based

[10] A Proelss, Art. 7, 47-49 in Proelss, United Nations Convention on the Law of the Sea: A Commentary, 1st ed, 2017, p. 82. "*Most of the regulations in this Part date from the 1930 The Hague Codification Conference and their guiding theme is to derive the outer limits of the territorial sea in an almost mathematical sense from the low-water line. Straight baselines have devolved into a convenient tool to bypass the structures of Part II and to maximize the appropriation of sea areas by coastal States."*

[11] *Ibid.*, at p. 78. *"[O]ne can make almost all baselines to look like they are either following the general direction of the coast or departing from it "by choosing the scale of the chart" or simply by relying on the Norwegian 1951 precedent."*

[12] K Purcell (n 6).

[13] M Nordquist (eds), United Nations Convention on the Law of the Sea, 1982: A commentary ('*Viriginia Commentary*') Brill | Nijhoff, Leiden, 2012, Part II, p 102: "*internal waters must be in fairly close proximity to land represented by islands or promontories*."

[14] K Purcell, *Geographical Change and the Law of the Sea* (OUP, Oxford 2019), 1-299.

[15] M Reisman/G Westerman, '*Straight Baselines in International Maritime Boundary Delimitation'* (1992), 91(26); K Bangert, 'Internal Waters' (2018), *Max Planck Encyclopedias of International Law (MPEPIL*, online) para 9.

[16] A Proelss (n 10), at p. 84.

on Article 32(1)(a) of the Vienna Convention on the Law of Treaties.[17] Departing from this approach, the paper suggests that the nexus between land and sea as provided in Article 7(3) of UNCLOS can be traced in the study of legal systems and is reflected in state practice. First, the law of the sea is governed by the principle of domination, according to which 'the land dominates the sea, and it dominates it by the intermediary of the coastal front'.[18] Although the verb 'dominates' suggests rule or control[19], it also means predominance in the coastal *lawscape*.[20] Put in simple words, the powers of a coastal State in the ocean is subject to the internationally recognised legislative power – or full sovereignty – the State has over land. A second ground of justification for departing from a pure positive international law approach lies in the unilaterality of the drawing of straight baselines, whereby a coastal State does not generally have to wait for any recommendation or any approval of its title over internal waters to govern those waters, as this may be the case for other maritime zones under UNCLOS. In light of these elements, it will be interesting to explore the possible ways in which the legal nature of the link between internal waters and the land domain is treated in pure legal terms. To address this issue, the paper draws upon the notion of 'appurtenance'.[21]

The notion is not a stand-alone one, as it inevitably resonates with the *relationship* between two things, here the territorial sea and the coastal State's land territory.[22] 'Appurtenance' has been used in the law of the sea to refer to the territorial sea, back in 1909.[23] Given that internal waters are directly deriving from the drawing of straight baselines in the territorial sea, that makes them *a fortiori*, appurtenant too. The Oxford English Dictionary defines appurtenance in multiple ways.[24] A first meaning refers to an 'accessory' attached to something principal. A second meaning of appurtenance which collides directly with the spirit of the first one, refers

[17] Article 32(1)(a) of the Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM. 679, entered into force Jan. 27, 1980. "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty (p. 1050) in their context and in the light of its object and purpose."*

[18] P Weil, *The Law of Maritime delimitation. Reflections* (Grotius Publications, Cambridge) 1989, 1-327, at p. 51

[19] K Purcell (n 6) at pp. 11-12.

[20] On this concept of "coastal lawscape", T O'Donnell, 'Coastal Lawscape: A framework for understanding the complexities of climate change adaptation', 2021, *Marine Policy*, 129.

[21] E Weiner, J Simpson (eds), Oxford English Dictionary, (Oxford University Press, 2nd ed 2004), at p. 590. *'Appurtenance': 1. Adj. Belonging as a property or legal right (to); constituting a property or right subsidiary to one which is more important. 2. Sb. A thing appertaining; a 'belonging'.*

[22] M Pappa, *Non-State Actors' Rights in Maritime Delimitation. Lessons from Land*, (Cambridge University Press, Cambridge 2021), 1-220, at p. 19.

[23] Arbitral Award in the Matter of Delimitaion of a Certain Part of the Maritime Boundary between Norway and Sweden (*Grisbaddarna* case) (Norway v Sweden) (1909) 11 RIAA 147-66.

[24] V Degan (n 4) at p. 5. *"Is the attitude which rests on the assimilation of all parts of internal waters to the land territory of coastal States still justified? If not, then the neglect of these particular sea areas in codifying conventions is no longer altogether appropriate."*

to a 'belonging' forming part of a whole system. The current paper is structured around those two meanings. The first section investigates what makes internal waters an accessory part of the land territory. To that end, the section begins by examining whether UNCLOS equates or differentiates the two statuses. As it suggests not, the section further discusses the strategic and symbolic use of 'land' made so far in the law of the sea. From defining land as the cartographic representation of coastal geography, hence, involving extra-legal considerations and in order to avoiding the assimilation of the seabed of internal waters with the continental shelf, it appears that UNCLOS, in order to capturing the accessory character of adjacent sea waters to the land domain, provides only for avenues limited to the navigability of these sea waters. The second section analyses the way in which international law and the major legal systems, namely the common and continental legal families, have ever referred to the legal fiction of internal waters as an appurtenance to the land domain, in that particular sense of being a belonging. A brief overview of the Roman law helps us to observe that significant parallels exist between the development of the major legal systems on the one hand, and the law of the sea on the other hand. Indeed, as far as the sea is treated as an easement, literally an *ease of accessibility* to reach land, navigability remains the main criterion to distinguish between land and the sea. The second section further examines what is left of the navigability criterion in UNCLOS to consider internal waters as a belonging of the land territory.

I.- Appurtenance as an accessory

A.- The subsidiary character of internal waters under UNCLOS

Searching for the status of internal waters in the Convention may be tricky. Obviously, these are sea waters. Complication arises from the wording of Article 2(1) which provides that the sovereignty of a coastal State extends to all the relevant areas this article mentions, including land territory and internal waters.[25] Although sovereignty is the common denominator of these two areas,[26] it does not mean that the Convention equates internal waters with the land domain. The provision aims to solely describe where the territorial sea is located.[27] However, what appears to be a straightforward reading of the law was judicially

[25] M Kohen (n 3), at p. 115.

[26] V Degan (n 4), at p. 8. *"There is no doubt that the coastal State enjoys 'sovereignty' over all parts of its internal waters, and over its territorial sea and archipelagic waters if any. This 'sovereignty' in internal waters embraces the exclusive rights of the coastal State to undertake most of the above-mentioned activities. Thus, it has the exclusive right of fishing, and of exploration and exploitation of other natural resources in the waters, seabed and subsoil of its internal waters."*

[27] *Ibid.*

challenged. During the proceedings of the *ARA Libertad* case[28] (Argentina v Ghana) before the International Tribunal for the Law of the Sea (ITLOS), Counsel Philippe Sands acting on behalf of Ghana asserted that internal waters, as being an integral part of a coastal State, shall not be governed by UNCLOS.[29] Throughout the judgment process, Judges Cot and Wolfrum uphold the same reasoning in their joint separate opinion.[30] The eminent judges first outlined the 'limited scope' of the provisions in the Convention dealing with the legal regime of internal waters. They further drew upon Article 2(1) to affirm that "internal waters originally belong to the land whereas the territorial sea so belongs but only on the basis of international treaty and customary international law."[31]

Furthermore, the current wording of the Convention constructs internal waters as an enclosed maritime zone, deriving from the territorial sea.[32] Although the inner limits of internal waters have only been mentioned in the context of the drawing of normal baselines, namely as the low-water line, it is clear that the internal waters produced from the drawing of straight baselines don't include other existing types 'waters' inland which are not the sea *per se.* Therefore, inland waters such as fresh waterways, ground waters or coastal aquifers constitute strictly speaking the land domain. The law on straight baselines[33] makes substantial use of the 1951 judgment rendered in the *Fisheries* case. It may be surprising that what was originally an exceptional state practice was enshrined in international law[34] and has further left the door open for the drawing of straight baselines based on extra-geographical circumstances to perpetuate. Yet, Article 7 of UNCLOS which now embodies this 'law', does not represent an equal delimitation provision as is the case for the territorial sea, the continental shelf or the exclusive economic zone.[35] Article 7 solely describes the conditions that straight baselines must follow in the particular light of "giving a simpler form to the belt of territorial waters."[36] Simplifying

[28] *'ARA Libertad'* case, Argentina v Ghana, Order, provisional measures, ITLOS Case No 20, [2012] ITLOS Rep 21, ICGJ 454 (ITLOS 2012), 15th December 2012.

[29] '*ARA Libertad'* case, 30 November 2012, ITLOS/PV.12/C20/4 p 3, lines 39-43 (Counsel P Sands) and ITLOS, '*ARA Libertad'* case, Written Statement of the Republic of Ghana, 28 November 2012, para 13.

[30] *'ARA Libertad'* case, (Argentina v Ghana), Joint separate opinion of Judges Cot and Wolfrum, at p. 363 §22-23.

[31] M Kohen (n 3), at p. 114.

[32] Article 8 of UNCLOS (n 2) refers to the "*waters on the landward side of the baseline of the territorial sea*".

[33] For sake of clarity, the paper aims to address the ambiguity of internal waters as a whole, despite their multi-layered and conditional nature. In addition, the specific treatment of 'ice' in the law of the sea is also to be put aside from the current analysis.

[34] The *Virginia* commentators (n 13) indicated that "*there was no attempt to depart from the 1958 Convention on the Territorial Sea and the Contiguous Zone"* during UNCLOS III negotiations.

[35] M Kohen (n 3), at p. 118.

[36] A Proelss (n 10).

the inner limits of the territorial sea amounts to making use of a cartographical view of the coast,[37] which the 'legal coast' draws upon. The latter, without being identical to the physical coast, has never been defined though.[38] The simplification process of straight baselines attributes to the internal waters a subsidiary character which can be evidenced from two perspectives: both in their relation to the other maritime zones and in their relation to the land domain.

Firstly, internal waters are a subsidiary part of the territorial sea, as they derive therefrom. The law, in two ways, allows sea areas to be included within baselines. *Primo*, Article 5 of UNCLOS provides that the normal baseline is the one 'marked on large scale charts officially recognized by the coastal State'. State practice has made it clear that most of the baselines are described with either explicit or implied reference to a charted line,[39] although the weight of charts as evidence of the baselines may vary significantly.[40] *Secundo*, when addressing the question of how straight baselines are to be drawn, Article 7(4) provides that they "shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations […] have been built on them or […] where the drawing of baselines to and from such elevations has received general international recognition." Secondly, internal waters are a subsidiary part of the land domain. Although coastline configurations vary around the world, a systemic approach to the use of special baselines, namely the baselines which are not based on the low-waters line, has emerged from state practice.[41] Indeed there is a correlation between on the one hand, a 'deeply indented' coast or the presence of a fringe of islands along the coast in its immediate vicinity,[42] or a river that 'flows directly to the sea',[43] or bays 'constituting more than a mere curvature of the coast',[44] or a 'State constituted wholly by one or more archipelagos'[45] and the use, on the other hand, of straight baselines,[46] closing lines,[47] and archipelagic baselines[48]

[37] K Purcell (n 6), at pp. 21-22.

[38] *Ibid.*

[39] C Lathrop, J Roach, & D Rothwell, (eds), *Baselines under the International Law of the Sea* (Brill, Leiden, 2019), 1-177, at p. 31.

[40] *Ibid.*, at p. 34.

[41] K Purcell (n 37).

[42] Article 7(1) UNCLOS.

[43] Article 9 UNCLOS.

[44] Article 10(2) UNCLOS.

[45] Article 46 UNCLOS for the main definition of 'archipelagic State'.

[46] Article 7 UNCLOS.

[47] Article 10 UNCLOS.

[48] Article 47 UNCLOS. In this regard, see K Purcell (n 37), pp. 23-24. *"While archipelagic baselines do not enclose internal waters, the rules governing their construction also respond to the notion that the waters they*

respectively.[49] Straight baselines surely appear to be a more stable and fixed alternative to the ambulatory nature which is now recognised as characterising normal baselines.[50] Given that particular emphasis is now being placed on the subsidiary character of internal waters appurtenant to the land domain in analysing the legal implications of sea level rise to the coastline, it appears that, as long as the axiom that the land dominates the sea is not 'overruled',[51] both legal situations in the present context of global and accelerated sea-level rise, will lead to the same result: the loss of territorial sovereignty over coastal land results in the loss of entitlement to the maritime space appurtenant to that territory. Professor Hayashi has explained it in simple terms: "in the case where straight baselines are employed, a total submergence of an island which has been used as a basepoint of the baseline system could cause the coastal State more serious effects, as the submerged feature may no longer be capable of being used as a basepoint. In the case that such an island becomes submerged only at high tide, thus rendering it a low-tide elevation, […] it may no longer be used as a basepoint, unless lighthouses or similar installations permanently above sea level have been built on them or where drawing straight baselines has received general international recognition."[52]

One explanation for this result may be found in the assumption that Article 7 of UNCLOS embodies. Special baselines are intended to enclose areas in which there is a close relationship, namely a '*link'* between land and sea. This is reflected in the general legal maxim of '*accessorium principale sequitur',* meaning the accessory follows the principal. The 'principal' here refers to the "strategic and symbolic use of the term 'land'" – in the particular sense of a cartographic representation of coastal geography. In other terms, the relationship between land and sea appears to be, pursuant to Article 7(5), a function of both geographical circumstances and other considerations relating to the State's interests. These considerations have been recognised by customary international law to express the dependency of internal waters to the land domain.

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enclose are closely linked to the land domain (though this fact alone does not justify the archipelagic State's entitlement to archipelagic waters)."

[49] C Lathrop, et al. (n 39).

[50] *Ibid.*

[51] A Torres Camprubí, *Statehood under Water* (Brill | Nijhoff. 2016), p. 102. *"As the ILA's Baselines Committee has concluded the normal baselines are thus ambulatory. […] Baselines and the outer limits of the maritime zones are therefore unstable, and the shifting of baselines often causes a coastal state's maritime zones to shrink. In an extreme case, changes caused to an island's coast could result in total loss of baselines and of the maritime space measured therefrom. The current law of the sea system provides no effective remedy for such eventuality."*

[52] M Hayashi, 'Sea Level Rise and the Law of the Sea: Legal and Policy Options', in *Proceedings of International Symposium on Islands and Oceans* (*Ocean Policy Research Foundation*, Japan, 2009) p. 84.

B.- The dependency of internal waters to the land domain in customary international law

Both legal maxims, that are "the accessory follows the principal" and "the land dominates the sea" capture the idea that entitlement to maritime space is a natural, appropriate and automatic consequence of territorial sovereignty over coastal land.[53] The ICJ confirmed early on, in the *North Sea Continental Shelf* cases of 1969 (Germany/Denmark; Germany/Netherlands)[54] that "[t]he land is the legal source of the power which a State may exercise over territorial extensions to seaward." In that case, it is noteworthy that significant economic interests involved in continental shelf resources. The Court, in the absence of historical sovereignty display,[55] thus regarded the extension of the coastal territory from which the continental shelf extends to be a sufficient criterion of 'naturalness', a matter of natural law,[56] relying on the principle of appurtenance. According to this principle, the continental shelf appertains inherently to a coastal State as it constitutes "a natural prolongation of its land territory into and under the sea that exists ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."[57] Such a principle is, however, limited to the 'legal continental shelf', resulting from the extension of continental shelf pursuant to Article 76 of UNCLOS. The latter sets out the methodology to be followed to measures of specified aspects of seabed geomorphology. The methodology encompasses an exercise in geometry which applies specified metric criteria. In this regard, the role of a specific UN scientific body, namely the Commission on the Limits on the Continental Shelf deserves attention. This body is bound by a set of scientific and technical guidelines[58] which defined the term 'test of appurtenance' as "the process designed to determine the legal entitlement of a coastal State to delineate the outer limits of the continental shelf throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured

[53] K Purcell (n 6), at p. 12.

[54] *The North Sea Continental Shelf* cases of 1969 (Germany/Denmark; Germany/Netherlands), Judgment of 20th Feb 1969 [1969] ICJ Rep 3; digested and excerpted in 63 *American Journal of International law (AJIL, 1969)* 591.

[55] R Holst & J Rozemarijn, *Change in the Law of the Sea.* (Brill | Nijhoff, Leiden, 2022), 1-322, p. 29.

[56] N W Friedman, "The North Sea Continental Shelf Cases: A. Critique", in 64 *American Journal of International Law* (AJIL, 1970), pp. 229-240.

[57] *The North Sea Continental Shelf* cases. Judgment (n 54), ICJ Rep 3, para 19.

[58] Scientific and Technical Guidelines, adopted by the Commission on the Limits of the Continental Shelf, on 13th May 1999 at its fifth session CLCS/11.

where the outer edge of the continental margin does not extend up to that distance."[59] Although such a specified methodology has been described as a "more data-intensive and technical exercise that the construction of baselines by reference to the charted coast",[60] the principle of appurtenance in the law of the sea is not an absolute basis for all maritime zones, including internal waters. Hence, the law does not recognise as legitimate the seabed of internal waters to constitute a single 'natural prolongation of the land mass'. In other terms, there is no legal assimilation of that portion of the seabed within internal waters and the status of the legal continental shelf. This important question has been raised following the 1982 *Continental Shelf* case (Tunisia/Libyan Arab Jamahiriya). In that case, the ICJ, in order to measure the 'proportionality' of the appurtenant coastal areas, took into account not only the coastline length of the areas in consideration but also the areas of the seabed off the low-water line along the coast. This solution, although prudent does not conform with the actual regimes laid down in the Convention, namely the continental shelf and the exclusive economic zone, which both extend from the outer limits of the territorial sea, and not from either the baseline or the low-water line.[61] Therefore, this case was not considered as a milestone in the development of customary international law. However, the question whether the status of the seabed of internal waters is analogous to the continental shelf remains open in state practice,[62] especially for federal systems such as Germany, Canada, Australia or the United States.[63]

In light of the above considerations, the dependency of internal waters to the land domain respond to a specific concept of the 'coastal front' which draws upon extra-legal considerations. Coastal geography is considered in conjunction with certain security-based, economic, social, political, or historical interests in the sea that the law recognises.[64] First, UNCLOS in Article 7(5) was one main takeaway derived from the ICJ's *Fisheries* case[65] to provide an adjustment clause in the resort of straight baselines. Economic interests of the coastal State opting for those baselines have not been explicitly defined. In the 1951 case *supra*, the Court considered the reality and importance of the economic interests, as being materialized

[59] Scientific and Technical Guidelines of the CLCS, paragraph 2.2.2.

[60] K Purcell (n 6), at pp. 32-33.

[61] Degan (n 4), at p. 41.

[62] E.g., *« Les enjeux domaniaux de l'extension du plateau continental : étude de droit comparé droit administratif / droit international. »* RFDA, Dalloz, Paris 2020, p. 359. The author refers to the "quasi-domanial" regime of the extended continental shelf.

[63] O'Connell, The Juridical Nature of the Territorial Sea, *British Yearbook of International Law* (*BYIL*, 1971), Vol. 45, pp. 303-384, at p. 304.

[64] K Purcell (n 48).

[65] *Anglo-Norwegian Fisheries* case (n 5), 133.

and 'clearly evidenced by a long usage',[66] that long usage referred precisely to Norwegian economic interests dating back centuries.[67] It is true that a generalised application of Article 7(5) with the solution from the *Fisheries* judgment is not possible, and "would not only exclude certain natural resources discovered in recent times, but also severely disadvantage States that cannot provide records dating back for that."[68] A cautious addition to this criticism can be made with regard to the current context of economic liberalism, in which the blue economy or the land-based oceanic industry are situated. The rationale being that private governance is preferable to traditional public administration, it is true that such an approach contributes towards the business activity and the profitability of multinationals and industries to which the coastal State, in particular through public-private partnerships, may delegate its substantive powers over its maritime zones.[69] In sum, one might wonder whether this still meet the *Fisheries* requirement for the economic interests to be pursued in "very ancient and peaceful usage, together with the vital needs of the population".[70] Moreover, a cautious reading of the entire Article 7 of UNCLOS clearly demonstrates that there is no any hierarchy among all the requirements it provides. Consequently, it remains unclear whether the fulfilment of only one of the criteria is sufficient or not.[71]

The idea that the land dominates the sea and its corollary that the sea depends on the land to be recognised as such by law blur together legal and geographical concepts and categories.[72] It may be tempting to think that the verb 'dominates' suggests apart of rule or control, predominance in a landscape which depends upon a culturally and historically specific privileging of the 'terrestrial'.[73] However, given that cartographic representation of borders encouraged abandoning bordering processes based on natural features, the dependency between land and sea is not purely 'natural'. To the contrary, natural features are functionally selected in providing coastal States with new and powerful tools, such as maps, in order to fulfil their political goals. Therefore, the view that the use of straight baselines in order to connect various features of the configurations is due to "the close relationship between the mainland and adjacent sea areas which can be traced to geographical similarities such as

[66] K Bangert (n 15).
[67] A Proelss (n 10), at p. 81
[68] *Ibid.*
[69] N Ros, L'émergence d'un colonialisme bleu, *Neptunus E-Revue, 2021/4,* 27.
[70] *Anglo-Norwegian Fisheries* case (n 5).
[71] K Bangert (n 15).
[72] K Purcell (n 19).
[73] *Ibid*

climate, marine environment and resources"[74] is not that straightforward. This may further shed some light on the root cause of the legal issues related to global and accelerated sea-level rise, namely the effects caused on the natural features taken in consideration in the drawing of those baselines. On the one hand it is true that shorelines change inevitably, either naturally or artificially, leaving formerly submerge or tidal lands wholly dry, or vice versa.[75] On the other hand, the freezing of baselines could result in large expanses of internal waters, which would not be closely linked to the land domain as required under Article 7(3) of UNCLOS.[76]

Although it has been said that such a proposal of freezing boundaries cannot be reconciled with existing international law,[77] the current paper suggests an intended transition can be found in the "roots" of the law of the sea, that is, the particular doctrine according to which a waterbody is considers as belonging to riparian land. By preserving the value the land draws from its adjacency to water and thus the land's relation thereto, this doctrine ensures a spatial continuity and the legal stability both required in the context of physical coastal change.

II.- Appurtenance as a belonging

A.- Tracing back the origins of the belonging of internal waters in legal history

The joint separate opinion to the ITLOS decision held in *Ara Libertad* (Argentina v Ghana)[78] has made it clear that "internal waters originally belong to the land". This section analyses the extent to which both international law and the major legal cultures, namely the continental and common law systems, have ever considered the legal fiction of internal waters to likely *belong* to the land domain. This may constitute the legal 'origin' of internal waters that the two eminent judges referred to in 2012.

This origin can be traced back to Roman law, as it was applied to the practice of land allocation along aquatic features, including the sea. Considering that the Romans established the adjacent waters to the land subject to their dominion, that is, the *mare nostrum*,[79] it appears that the law equated the 'public' status of the sea with that of the other public lands.[80] This

[74] B H Dubner, *The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States*, (Springer Dordrecht, 1976).

[75] J W Dellapenna 'Water Law', in J W Dellapenna, J Gupta, *Elgar Encyclopedia of Environmental Law series*, 10, 2021 pp. 117-118.

[76] M Hayashi (n 52), at p. 79.

[77] *Ibid*

[78] 2012 ITLOS *Ara Libertad* case, Joint Separate Opinion of Judges Cot and Wolfrum *(n 30).*

[79] J W Dellapenna (n 75), at p. 106.

[80] P Deveney, Jus Publicum, and the Public Trust: An Historical Analysis, in Sea Grant Law Journal, 1975, Vol. 1, pp. 13-82, p. 31.

equation is reflected both in the Justinian's code of laws, namely the *Institutes,* and the explanatory commentary of the *Digest.* The code refers to the aquatic boundaries; its first two sections lay the foundation for 'public waters', or the 'public lands' beneath those waters.[81] What is noteworthy at that time is that land and sea are governed by different legal fields in that law: while the land is managed by *ius civile*, namely the law of Roman citizens, the sea remains a space of *ius gentium*, the law of Nations.[82] Here, emphasis is placed on the functional sea being a defensive device and falling under Roman control and authority.[83] Consequently, a fixed line was chosen by the Romans to be the coastline.[84] This line is called the *limes,* literally the foreshore which is never covered by the tide,[85] and does not aim to separate land and sea, but rather specifies the border of the Empire. Hence, the sea areas beyond this line remain floating zones, which are known as the *aeger publicus,* an unlimited public domain. What is interesting is that despite this common property character of the sea,[86] it allows private interest or control over the latter, so long as the private interest or control does not prejudice any public uses, including navigation.[87] In that sense, the *Digest* completes the *Institutes,* by providing the rule that the private owner cannot sell the interest over the sea except as an appurtenance to abutting land.[88] Alternatively, the owner can sell such an interest as an appurtenance to abutting land. This exception to the established public domain constitutes the basis of the distinction between public waters, which are navigable by all, and private waters which are non-navigable waters.[89] Thus, boundaries for the *jus communis*, namely the property of all, are established, either for the sea to the highest water mark or for rivers and harbours, as if they all form a single (navigable) unit.[90] Two important implications have resulted from this particular concept of sea waters' publicness.

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[81] The first two sections of the *Institutes* read as follows: *"1. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments and buildings generally, for these are not, like the sea itself, subject to the law of nations. 2. On the other hand, all harbours are public, so that all persons have a right to fish therein."*

[82] P Deveney (n 80), at p. 23.

[83] G J MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water, *Florida State University Law Review,* 1975(3), p. 532.

[84] W Schoenborn, « La nature juridique du territoire », in *Collected Courses of the Hague Academy of International Law*, vol. 30, 1929-V, p. 136.

[85] *Ibid.*

[86] G J Macgrady n (83).

[87] J W Dellapenna (n 79). *"Such appropriations were a usufruct, a limited ownership somewhat like the common-law trust."*

[88] A Watson (transl.) *The Digest of Justinian, Volume 1*, (University of Pennsylvania Press, Philadelphia, 1998).

[89] J W Dellapenna (n 79), at p. 110.

[90] *Ibid.*

A first implication comes with the theory that defining the boundaries of private ownership along aquatic features directly refers to a public access to waterways and the freedom of navigation and fishing.[91] It appears that these concerns have survived in two doctrines: the public trust on the one hand, and the public domain on the other. The first doctrine has flourished in American common law. It holds that the State owns public waters and their underlying lands solely in order to further the public uses of navigation, commerce, and fishing.[92] The doctrine of public domain is mainly found in legal cultures other than common law and which rely on a civil code.[93] The latter precisely enumerates a list of natural features of the marine environment which are 'insusceptible of private ownership'.[94] In sum, given that both doctrines define boundaries in terms of property law, this helps resolve the issue of change, that is, the physical and sudden change made to the coastline. In this regard, one of the main English authoritative encyclopaedias of law, namely *Halsbury's Laws* defines 'sudden change' as the situation where the change of boundary between the land and the water is not slow and imperceptible,[95] but on the contrary is accidental or *avulsive*. This laid down the foundation of the avulsion doctrine, according to which sudden changes in the aquatic features do not change their boundaries.[96] Slow change takes many forms. It is called 'accretion' for additions to the land,[97] 'reliction' for the opposite process, that is the exposure of land by the retreat of an aquatic feature,[98] or 'erosion', for reductions in land. Considering a slow change shifts boundaries and erode away plots of land, the title over these plots is lost entirely.[99] This is not the case for sudden changes which the doctrine of avulsion encompasses.[100] Hence, this

[91] *Ibid.*, at pp. 112-113.

[92] J L Sax, Defending the Environment: A Strategy for Citizen Action, Joseph L. Sax, New York: Borzoi Books, 1970, 252 pp., at p. 163-64.

[93] J W Dellapenna (n 91).

[94] E.g., Article 538 Code civil des Français (transl.) This provision as it stood was abrogated in France but remains in force in numerous civil law countries.

[95] Halsbury's Laws, vol 100 "*The sea and seashore*", at p. 6 § 39. 'imperceptible' means "imperceptible in its progress, not imperceptible after a length of time; it means that the increase in the area of dry land cannot be seen as it occurs, not that it could not be later observed to have in fact occurred."

[96] *Ibid.*, at p. 6 § 42.

[97] *Ibid.*, 'Accretion' means *"the gradual and imperceptible receding of the sea or inland water and which leads to an addition to the land or foreshore."*

[98] *Ibid.* 'Dereliction' means *"the gradual and imperceptible encroachment of water onto land causing a reduction in the surface area of the foreshore."*

[99] J W Dellapenna (n 91), at pp. 117-118.

[100] K Purcell (n 6), at p. 273. "*This is also the case for the US understanding of the ambulatory character of maritime limits has been influenced by the 'tidelands' litigation concerning boundaries between state and federal jurisdiction over 'submerged lands'."*

rule of avulsion keeps the boundary where it was delineated by deed, treaty or otherwise.[101] Consequently, any contemporary climate-disruption, including sea level rise is likely to throw light on the different possible treatment of avulsion. It thus appears that the political approach towards freezing boundaries treats all changes thereafter as avulsive, that is, with no effect on the boundary.[102] In other words: a coastal State may adopt certain measures unilaterally, such as legislation on baselines and the outer limits of its maritime zones to be clearly established.[103] But the *way* the State is doing this however depends on its own legal system and precisely whether the latter involves the doctrine of avulsion. This still remains to be substantiated, but it seems appropriate to question the relationships between international law and the various legal systems. This indeed appears to be an increasingly timely question. Like any system, international law evolves, seeks and sometimes finds solutions capable of effectively governing international relations, including in their new dimensions. In doing so, the international law of the sea can undoubtedly draw on the wealth of the legal systems and the legal cultures that had developed over centuries.[104] A good example is the territorial sea. The latter was already within the national boundary and was tackled by the doctrines of public domain and public trust contained in domestic legal systems when international law came to endorse the application of sovereignty thereupon. In light of the above, it can be said therefore, that sovereignty is an affirmation of the enclosure of the territorial sea within the public domain[105] and the public trust.[106]

A second implication resulting from the concept of sea waters' publicness is that internal waters are regarded as a public right of way. Surprisingly enough, this was one major point of understanding between Grotius and Selden, despite the so-called "battle of the books" between them.[107] Their demonstration revolves around the assertion that the sea is a road. Although they both bring out the possibility of drawing boundaries in the sea,[108] according to the two eminent

[101] J W Dellapenna (n 99). "*If a boundary shifts every time it rains, mineral and other leases of submerged lands (frequent today) would be void if the lessor loses title and a lessee might find it had paid rent to the wrong party."*

[102] *Ibid.*

[103] M Hayashi (n 52), at p. 90.

[104] SFDI, Droit international et diversité des cultures juridiques - International Law and Diversity of Legal Cultures, journée franco-allemande Pedone, Paris, 2008, 473 pp., at p. 3.

[105] Y Tanaka, 'Reflections on Georges Scelle's Theory of the Law of dédoublement fonctionnel in the Law of the Sea: Two Models for the Protection of Community Interests.' *The International Journal of Marine and Coastal Law, IJMCL, 2022, 38(1), 39-69.*

[106] O'Connell (n 63), at p. 381.

[107] *Ibid.,* at p 313.

[108] J Hostie, Le domaine maritime, p 39 Le domaine maritime (Ire partie), 1927, pp. 33-57. "[…] *either by means of promontories, capes, islands, etc., or by means of degrees of longitude and latitude."*

jurists, the sea is nothing more than an easement of passage that can be found on land.[109] Hence, the shape of the coasts is irrelevant towards this endeavour. It does not constitute a valid criterion for assessing the legal nature of sea waters.[110] What is essential from the point of view of navigation is not the relatively regular appearance of the low tide mark, but it is, rather, the waterway itself.[111] In sum, based on identifying the essential characteristic of the sea, - namely a route – navigability constitutes the main criterion, both, in defining boundaries along aquatic features, and in defining the scope of the public interest in the structure of aquatic features.[112] The concept of navigability is a legal construct rather than a fact; it is increasingly separated from actual navigation.[113] This demonstration leads us to conclude that sea waters are not only a geographical accessory area of the main land. They constitute an easement, to *'ease'* accessibility to reach land. Seen in this light, this concept has not remained a dead letter. To the contrary, the UN Convention on the Law of the Sea is likely to recognise internal waters as a public easement of navigation.

B.- Tracing forward the trend of UNCLOS: internal waters as a public easement of navigation

Two provisions reflect the trend of considering internal waters as a public easement of navigation in the letter of the Convention, namely Article 7(4), regarding the lighthouse requirement clause in the drawing of straight baselines, and Article 8(2), establishing innocent passage for newly enclosed internal waters. It appears clear from the outset that the two perspectives of analysing internal waters – both in its relationship with the territorial sea and in its relationship with the land territory – show that one main focus of the law on baselines is put on navigation, and in particular navigational safety.

First, Article 7(3) excludes the use of low-tide elevations as basepoints for the drawing of straight baselines, "unless lighthouses or similar installations permanently above sea level have been built on them or where drawing straight baselines has received general international recognition."[114] The functional aspect of basepoints is here contemplated, namely what has been described as "the exact position where the territorial sea begins as a marked point in navigational charts."[115] Although it is assumed that structures similar in appearance to

[109] *Ibid.*, at p. 39.
[110] *Ibid*, at p. 37.
[111] *Ibid.*, *at* p. 239.
[112] J W Dellapenna (n 75), at p. 110.
[113] *Ibid.*
[114] Art. 7(3) UNCLOS.
[115] A Proelss (n 10), at p. 80 § 42.

lighthouses can also serve as basepoints[116], and those include "beacons, foghorns, radar reflectors, and the like",[117] it is true, however, that "the reasonable justification for privileging lighthouses is that they are above high water at all times, and that they are clearly marked on navigational charts."[118]

In addition, Article 8(2) states that "[w]here the establishment of a straight baseline […] has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters." This final provision about internal waters concerns those parts of the sea which were, prior to the drawing of straight baselines, part of the territorial sea.[119] It seems necessary to briefly outline the background to, and development of, the final 'newly enclosed' parts of internal waters laid down in that Article 8(2). It results from the distinction made between the legal regimes of territorial sea and internal waters during the debates in the *Institut de droit international*. One member of the British delegation, Sir Gerald Fitzmaurice, strongly advocated that "it would be an abuse of this right if the *full* regime of internal waters were applied" to certain waters which were previously territorial. This proposal was retained for negotiation at the 1958 Geneva Conference on the Law of the Sea, and won approval. An innocent passage can apply to internal waters. The rationale for this has been recently demonstrated and can be traced, here again in the corollary of the 'property theory',[120] including the concept of public domain, or '*domaine public international*'.[121] It is neither intended to go into details on Georges Scelle's theory of '*dédoublement fonctionnel*',[122] according to which the coastal State is obligated by exercising its competence to "contribute to a public service of navigation", nor to develop the theory of servitude such as presented by Lapradelle.[123] The present paper simply refers the reader to these recent reflections made by a prominent publicist.[124]

[116] *Ibid.*, at p. 79.

[117] *Ibid.*

[118] *Ibid.*

[119] V Degan (n 4), at p. 37.

[120] O'Connell (n 63), at p. 324.

[121] Y Tanaka (n 105), at p. 45.

[122] G Scelle, Manuel élémentaire de droit international public (avec les Textes essentiels) (Les éditions Domat-Montchrestien, Paris, 1943) 276.

[123] A Geouffre de Lapradelle, 'Le droit de l'État sur la mer territoriale' (1898) 5 Revue générale de droit international public 264–284.

[124] Y Tanaka (n 105).

Conclusion

Assessing the compatibility of straight baselines with international law, the ICJ in the 1951 *Fisheries* case mentioned the criterion of the appurtenance of territorial waters to the land territory. This paper suggests this criterion is now reflected in Article 7(3) of UNCLOS. It argues that this is not deriving from the appurtenance of the territorial sea to the land territory, but to the contrary the appurtenance of internal waters thereto is an inherent feature of the law itself, which, from times immemorial has linked the sea to land. Although the Convention left important contentious issues outstanding, including the breadth of internal waters,[125] the paper endorsed the view that both doctrines of public trust and public domain formulate in pure legal terms the link between land and sea. This consequently makes the need for further extra-legal considerations, namely the (historic) economic interests and the geographic condition of the coastline, that were used in 1951, particularly redundant.

Reaching a conclusion that the appurtenance of internal waters to the land domain remains a matter of accessing the latter *via* the navigability character the former has, this ensures two main legal safeguards: legal stability as sea waters will always belong to the land domain, and spatial continuity, which appears to be most welcome in the present context of global and accelerated physical changes in the coastline, either from erosion or submersion. Although finding a new and effective solution to the existing problem is not an easy task, only "time will reveal the correct reading of the law on maritime limits".[126]

[125] The only exception is provided in Article 10(5) on bays which reads as follows: "*Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length."*

[126] S Árnadóttir, Emerging State Practice on Maritime Limits: A Grotian Moment Unveiling a Hidden Truth? Grotiana, 2023, 44 (1), pp. 4-29.