

**Straight Baselines: The flexibility of the inner limit of the 350 mile outer limit of the continental shelf:**

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**1. Overview:**

Nearly 75 years ago Gidel in his magisterial work on the contemporary law of the sea noted that the outer limit of the internal waters regime is also the inner limit for the territorial sea. This fact could according to Gidel tempt some states to use the ‘uncertainties’ of the internal waters regime to extend the outer limit of territorial sea into areas which hitherto had been considered part of the high sea. <sup>1</sup>

Today, even though the outer limit of the territorial sea is now fixed to a twelve mile maximum limit, the fundamental problem still exists as to the inner limit. The uncertainty or rather discretionary flexibility of the rules of extension of the internal waters regime means that the delimitation of the outer limit of maritime jurisdictional zones from the territorial sea to the continental shelf regime is left to a regime regulated in broad and discretionary customary law rules only. The issue of constructive use of the regime of internal waters to extend to outer limit of the continental shelf is a relevant today as it was for the territorial sea at Gidel time.

The role of internal waters and its continued status as a purely customary law regime, as well as the coastal state’s sovereign right to choose the baselines for the internal waters as their straight baselines for their maritime zones is sometime ignored in often unduly polemical legal doctrine and lead to unnecessary and unfounded criticism of the state practice.

The presentation will focus on the legal effect of the inherent flexibility in the rules of drawing straight baselines on the 350 mile outer limit of the continental shelf. Special

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<sup>1</sup> This most extensive overview in legal doctrine is still Gidel magisterial law sea treatise from 1934, *The Droit International de la Mer* (Paris, 1932-1934) vol 2 on the internal waters regime and Vol 3, part 2 on the delimitation of internal waters . Gidel gives amongst other an excellent overview of state practice on which the modern law of internal waters still rest. The most balanced modern exposition on baselines is still C Beazley’s short overview in *Maritime Limits and Baselines*, The Hydrographic Society, Special Publication No. 2, 3ed. 1987.

focus will be on the often ignored importance of the international customary law regime of internal waters for the drawing of straight baselines. The special issue of drawing straight baselines based on the customary law regime in the special archipelagic waters has unfortunately to be left out as this interesting topic will demand a separate presentation.

Straight baselines are often claimed to be exhaustively regulated by the 'explicit and stringent criteria' in the section on territorial sea in the Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, on 29 April 1958 and 1982 United Nations Law of the Sea Convention (UNCLOS). This presumption is open to serious criticism. First the treaty law rules of baselines in the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone and the UNCLOS are neither exhaustive or the criteria for drawing baselines clear and stringent. Second, it is presumed in the preparatory works as well as in the treaty rules themselves, that the rules of baselines are supplemented by the customary rules of internal waters. Both according to treaty law and general customary law straight baselines can be generated on two separate legal bases in international law as the inner limit of territorial sea and the outer limit of internal waters. The existence of a double legal basis for drawing straight bases lines could have wide ranging effect for the delimitation of the 350 outer limit of the continental shelf.

The double function and double legal basis of the straight baselines will be presented. The legal gaps in the existing treaty law of straight baselines will be outlined. The main emphasis will, however, be on the often ignored independent role of the purely customary law regime of internal waters for drawing straight baselines. Straight baselines with similar effect as the treaty law baselines can be drawn according to customary law only. The closing line of internal waters will in practice be a straight baseline even if drawn according to customary law. The customary law regime contain few and very vague restrictions on coastal state sovereignty to delimit areas of adjacent sea as internal waters. Perhaps most important, no definite maximum mile limit has been agreed upon. Consequently, the formal 350 mile outer limit of the continental shelf could in practice be pushed further outward into the high sea based on pure customary law with few legal restrictions.

**2. The issue: Mind the gap or is there any maximum limit for inner limit of the extended continental shelf?**

The concept baseline plays a decisive role in a number of situations in the delimitation of the outer limit of the continental shelf in UNCLOS, article 76. As example, the 350 miles outer limit of the continental shelf in article 76, section 5 is measured from the baselines 'from which the breadth of the territorial sea is measured'.

5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4(a) (I) and (ii), **either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured** or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 meters.

The article refers to 'the baselines from which the breadth of the territorial sea is measured'. Initially, the baselines referred to in article 76 would be taken as a reference to the principles of drawing the baselines for the inner limit of the territory sea in the Part II, section 2. On the other hand this is not clearly stated in the article 76. The term 'baselines' is not further qualified by reference to the section 2 of Part II of the UNCLOS on baselines. Secondly, even the treaty rules themselves do not preclude the drawing of baselines according to the customary law of internal waters. On the contrary such power is explicitly referred to in one of the treaty rules themselves as the reference to historical bays in UNCLOS, article 7, section 5. Moreover, both the preamble as well as UNCLOS, article 2, section 3 explicit refers to the existence of other rules as relevant to UNCLOS.

As long as the baseline is the inner limit of the territorial sea, the baseline will be the starting point for the delimitation of the maximum limit. The inner limit of the territorial sea can be drawn on two separate jurisdictional bases depending on the actual circumstances as well as the discretion of the coastal state.

First as inner limit of the territorial sea based on the treaty rules in 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone and the UNCLOS. Second, as the outer limit of the customary law regime of internal waters. This regime and consequently its outer limit is not regulated by the two law of the sea conventions. The existence of this separate customary law regime is sometimes overlooked especially in legal doctrine if less in legal state practice. Moreover, it

should be noted that the two regimes are not necessarily mutually exclusive but often interconnected. The treaty law refers to the customary law and accepts its separate operation outside the treaty but with indirect effects for the treaty law. Likewise, the customary law can have affect for the treaty law as it will be argued in this presentation.

This double function of the straight baseline has lead to understandably confusion in legal doctrine. The focus has generally been on the function as inner limits of the territorial sea and consequently discussed under that heading. Even Gidel chose to analyze the important question of the outer limit of the internal waters under the heading of the inner limit of the territorial sea even though he had written a separate volume on the regime of internal waters:<sup>2</sup>

*‘Délimitation des eaux intérieures.* – La délimitation des eaux intérieures au sens du droit public maritime international requiert d’être faite dans deux directions: vers la mer et vers la terre.

Ce qui concerne la délimitation vers la mer sera examine à propos de la mer territoriale (tome III) : en effet la ligne extrême des eaux intérieures vers la mer coïncide avec la ligne de départ de la zone de la mer territoriale.’

This approach, however expedient, weakened the independent character of the delimitation of the outer limit of the internal waters regime. The question was subsumed under the rules of the territorial sea only and the double function as well as the double legal basis has been somewhat overlooked. The double function and separate bases has been left untouched if not unmentioned by the three general codifications of the law of the sea in modern times, the League of Nation Codification Conference of 1930, the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone, and the UNCLOS. In 1930 the issue was referred to further investigation by the Final Resolution of the League of Nation Codification Conference, article 2. In 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone, the matter internal waters regime was deliberately kept outside the agenda for the codification.

In the UNCLOS, the rules of the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone on baselines were accepted without any in-depth discussion. The main focus was on the agreement on a maximum outer limit and the

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<sup>2</sup> See Gidel, Vol. 2, p. 13.

new archipelagic baselines. The straight baseline issue was left unattended except for the necessary adaption to the new maritime zones as the EEZ and archipelagic waters regime.

In Gidel's time this did not cause major problems but could be seen as a matter of presentation only. Both the territorial sea including its inner limit and the internal waters including delimitation of its outer limit were still customary law only. Neither regime had been subjected to a general codification process. The problem today for the delimitation of the continental shelf is the existence of two separate but interactive regimes; a purely customary law regime as the internal waters and a treaty law regime of straight baselines which, however, still also mainly is codification of the still existent of customary law of the territorial sea, as underlined in the ICJ Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986:

'The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. ... That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.'

This is an important and again somehow overlooked fact, that even if the two law of the sea conventions have extensive and it must be stressed also inexhaustive rules of on straight baselines, this does not suspend the operation of the independent customary law regime of the internal waters. The existence of an independent if overlapping customary law regime of straight baselines as part of the customary law regime of the territorial sea must be taken into consideration as well.

The fact, that a regime has been wholly or partly as in the case of baselines codified in treaty law, does not suspend the customary law regime. On the contrary, both regimes continue to exist and interact, as stated by the Internal Court in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 1986, p 92:

'174. In its Judgment of 26 November 1984, the Court has already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that it

'cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. **The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.** Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, **continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.**' (I.C.J. Reports 1984, p. 424, para. 73.)'

### **3. The two regimes of straight baselines: the treaty law and the customary law:**

The treaty law consists of the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone and the UNCLOS, Part II, section 2. Both are identical as to main principles except for some adjustments caused by new EEZ and archipelagic waters regimes. The treaty law is moreover at times nearly verbatim restatement of the wording of the *ICJ 1951 Anglo Norwegian Fisheries Case (UK v Norway)*. Not only did the treaty law applied the straight baselines principles of the ICJ combined with similar cases from customary law not direct dealt by the Court as ports, roadsteads, mouths of rivers etc. But moreover the treaty provisions restated the Court's view of the relative balance between the low water line at the main coast and the straight baselines as equal principles of general law only varying in geographic application. The straight baselines are not a special exemption but a special application of the general rule, which has important effects for the burden of proof. The coastal states claiming straight baselines shall not necessary prove that there are consistent with international law. But, rather the opposite, the state protesting the baselines must prove that the baselines are inconsistent with international law. The presentation shall not enter further into the issue of the treaty law on baselines, as the time constraint does not allow that. The topic has moreover been dealt with in sufficient detail although often in what is more restatements of national policies than accepted international legal doctrine.<sup>3</sup>

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<sup>3</sup> Two excellent modern exception are however the short fundamental overview by P.B Beazley *Maritime Limits and Baselines*, The Hydrographic Society,

#### **4. The notion 'Internal Waters':**

Internal waters are generally defined in relation to the territorial sea as the waters areas inside the inner limit of the territorial sea. The concept comprises both saltwater area as well as the internal freshwater area as river and lakes.

#### **5. The status of internal waters in international law**

The Internal waters regime is a customary law regime. Internal waters and the partly overlapping regime of historical waters are the only law of the sea regimes which are exclusively regulated in general customary law. Both regimes have been deliberately excluded from the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone and the United Nations Convention on the Law of the Sea 10 December 1982. Moreover, no official study of internal waters has been attempted. An important segment of the internal waters regime, the historical waters regime and the historical bays regime have, however, been analysed in two studies prepared by the Secretariat of the United Nations in 1957 and 1962; the UN Secretariat 'Historical Bays' (30 September 1957) UN doc A/CONF.13/1 'United Nations Conference on the Law of the Sea, Official Records' vol 1, 1-38 and the UN Secretariat 'Juridical Regime of Historic Waters, including Bays' (9 March 1962) UN doc A/CN.4./143 ILC, Yearbook (1962) vol 2, 1-26).

As the internal waters regimes is interconnected with the territorial sea regime, both the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone, as well as the UNCLOS unintentionally have effects for the internal waters regime and vice versa. . The article 8 (2) UNCLOS even contains a definition of the internal waters regime as 'waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State'. Moreover, article 8 section 2 states that innocent passage is not suspended in waters changed into internal waters by drawing of straight baselines according to article 7. If the baselines, however are drawn on the pure customary law basis of internal waters regime, this rule will not necessary apply.

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Special Publication No. 2, 3 ed 1987 and the more extensive L Lucchini and M Voelckel *Le Droit de la mer* ((Pedone Paris 1996) vol 2.

The drawing of straight baselines according to the treaty law in UNCLOS generates internal waters which again are regulated by customary law only. On the other hand outer limit of the internal waters drawn exclusively on the criteria of customary law generates the baselines which automatically become the inner limit of the territorial sea regulated by the treaty law. The general treaty law regime of UNCLOS can generate a customary law regime and the general customary law regime of internal waters can generate straight baselines independent of the treaty law, which can have effect of the inner limit of the various jurisdictional zones of the UNCLOS. Internal water can consequently both be generated inside-out by applying customary law or outside-in by drawing straight baselines according to the treaty rules and thereby generate internal waters. The internal waters generated by application of the treaty rules of straight baselines will still be regulated by customary law.

#### **6. The delimitation of the outer limit:**

The international customary law gives some broad guidelines for delimitation of outer limit of internal waters. In practice, the outer limit of internal waters is drawn as straight baselines to facilitate their practical use for navigation etc. But no such prescriptive requirement exists. The only authoritative exposition of the rules of delimitation of the outer limit of the internal waters is still the *ICJ 1951 Anglo Norwegian Fisheries Case (UK v Norway)*. Although the Court deliberately refused to give an exhaustive exposé of the general rules of delimitation, the Court outlined guidelines relevant for the actual case. According to the Court, internal waters which are generated by a series of independent considerations, the most important is the criterion of being ‘sufficiently closely linked to the land domain to be subject to the regime of internal waters’.

It is unclear however what constitutes ‘closely linked to the land domain’. From the context it seems that geographical circumstances are referred to such 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.’ If a hierarchy of such criteria exist or what the relative value or if only one is sufficient remains unclear. According to the Court the geographical, historical and economical interests were relevant in this case. In other cases other considerations might be relevant.



A series of factual cases of delimitation of the outer limit 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 the natural configurations such as the mouth of a bay, a river delta, reef, a fringe of islands adjacent to the main coast or artificial constructions as ports and purely functionally defined area such as roadsteads. The common deciding factor is that the waters included by the drawn outer limits of internal waters must 'sufficiently closely linked to the land domain to be subject to the regime of internal waters' in words of the Court in the *1951 Anglo Norwegian Fisheries Case (UK v Norway)*. The operational application of this somewhat flexible statement has found expression in the more detailed terms in the treaty law on straight baselines based on the general customary law. The cases enumerated in the treaty law are, however, neither conclusive nor exhaustive for the general customary law. Notable is the absence of the historical waters in other cases than historical bays and the roadstead as internal waters. The historical waters and roadsteads are delimited as internal waters by their respective historical entitlement or function. In both cases, the coastal state has wide discretionary powers as having control over the relevant evidence.

In opposition to the other maritime zones under coastal state national jurisdiction, there is no maximum outer limit of internal waters. As seen in practice even after the 12 miles treaty law maximum outer limit of the territorial sea, the outer limits of the internal waters are often considerable more than 12 miles from the main land. Moreover the broad legal definition of geographical configurations as reefs, deltas, sandbanks etc the rules are flexible in the extreme as to adaptability to actual circumstances as defined by the coastal state. No definite legal definition of these natural configurations exists. Moreover, some of the natural formations as sandbanks change according to prevailing local currents. The problems including the effect of shifting levels of waters levels for which areas are seen as permanent covered by water or not, has led to practical accommodation. The shifting sandbanks of the North Sea and the effects of the strong tide was addressed by the drawing of artificial base points agreed to by the affected states as in baseline in border between Denmark and Germany in the North Sea.

In general, due to moderation in exercise of the wide powers, the rules of delimitation of the outer limit of internal waters serves the legislative accepted purpose as a useful moderator of otherwise too abstract theoretical principles with little reflection of the actual geographical, economical and historical circumstances in each case.

### **7. Historical waters including historical bays:**<sup>4</sup>

The special case of the outer limit of historical waters including historical overlaps partly as independent regime with the general rules of internal waters. The historical waters including bays are by definition internal waters so the outer limit of historical waters form also the outer limit of the coastal state internal waters where such area exist. The internal waters of coastal state often consist of a combination of waters area claimed as internal waters and historical waters. Unless specially claimed by the coastal state as part of territorial waters, the historical waters become part of and have status as internal waters. The more precise definition of what constitute the historic entitlement for historical waters remains, however, still somewhat unclear.

In case law the security aspect had been given dominant weight as seen in the *North Atlantic Coast Fisheries Case* from 1910. The majority of the Arbitration Court noted:<sup>5</sup>

‘(a) Because admittedly the geographical character of a bay contains conditions which concern the interest of the territorial sovereign to a more intimate and important extent than those connected with the open coast. **Thus conditions of national and territorial integrity, of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coastline.** This interest varies, speaking generally in proportion to the penetration inland of the bay;

But even more weight was put on the security entitlement by Drago in his influential Dissenting Opinion, p. 206<sup>6</sup>:

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<sup>4</sup> See UN Secretariat ‘Historical Bays’ (30 September 1957) UN doc A/CONF.13/1 ‘United Nations Conference on the Law of the Sea, Official Records’ vol 1, 1-38, and UN Secretariat ‘Juridical Regime of Historic Waters, including Bays’ (9 March 1962) UN doc A/CN.4/143 ILC, Yearbook (1962) vol 2, 1-26. For legal doctrine in addition to Gidel see still LJ Bouchez *The Regime of bays in International Law* (AW Sijthoff Leiden 1963) and YZ Blum *Historic Titles in International Law* (Martinus Nijhoff The Hague 1965).

<sup>5</sup> See Reports of International Arbitral awards, Vol. XI, United Nations", p. 196.

<sup>6</sup> See p. 206.

‘So it may be safely asserted that a certain class of bays, which might be properly called the historical bays such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage **and above all, the requirements of selfdefence, justify such pretension.**’

According to Russian state-practice claims on historic waters can be based on pure economic and security interest. In one of the few Russian monographs on the law of the sea translated into English it is stated ‘Besides, state may control, by prescriptive right (i.e., on the grounds of historic traditions), certain waters of special geographic importance for its economy or defence.’<sup>7</sup> It is not clear whether ‘on the grounds of historic traditions’ means the factual historic exercise as internal waters or only a more general historic right to protect vital interests by delimitation of internal waters.

### **8. Ice covered areas and pure security concerns as entitlement for internal waters?**

In addition to these already well known entitlements, two potentially controversial entitlements can be mentioned. Both are applied in older practice although often left out the above list of entitlements:

**A. Permanent ice covered area**, although not discussed during the *ICJ 1951 Anglo Norwegian Fisheries Case (UK v Norway)* or in the drafting of the treaty law on baselines, the matter was first addressed in early legal doctrine in relation to early 19<sup>th</sup> century Russian state practice. In certain areas Russia drew baselines from the outer limit of permanent ice covered areas.<sup>8</sup> In his exposition Gidel refers to a Russian legislative act from 1911. The practice was however continued during the Soviet period.<sup>9</sup> Likewise the potential role of ice was mentioned by the International Court in the 1993 *Jan Mayen Case* but left out of consideration as no parties had made any such claims.<sup>10</sup> The question will undoubtedly resurface within few years again in relation to the inner limit of the continental shelf in the Arctic.

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<sup>7</sup> See I. P. Blishehenko and G.S.A. Gureyev (eds) *The International Law of the Sea* Moscow, 1988, p. 26.

<sup>9</sup> See Taracouzio *Soviet in the Arctic* (New York 1938) p. 356ff

<sup>10</sup> See *Jan Mayen Case (Denmark v Norway)* (Merits) [1993] ICJ Reports p. 72-73.

**B. Security concerns**, the first formative state practice on internal waters both in case law and in national legislation as the Danish-Norwegian 1812 Ordinance<sup>11</sup> were primary regulation promulgated during and in response to concerns over maritime armed conflict. The geographical elements were supplementary only. This is important to note, seen on the background on the 1812 Ordinance decisive importance for the origin of the modern baselines system as seen the *ICJ 1951 Anglo Norwegian Fisheries Case (UK v Norway)* and the subsequent treaty law in 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone and the UNCLOS. The national security interest was the main reason for treating bays as internal waters as seen in fundamental *North Atlantic Coast Fisheries Case* from 1910 referred to above in the section on historical waters.

### **9. Conclusion with a view to the future:**

Due to the status as a purely customary law regime, the coastal state can as part of its sovereignty draw the outer limit of the continental shelf according to UNCLOS article 76 on variety of wide and general discretionary entitlements:

**1. Geographical entitlement** as islands, bays, mouth of rivers, banks and reefs etc.

It should be noted that not only islands forming a fringe along the cost, but also interconnected islands forming an independent archipelagos can give entitlement to internal waters.

**2. Permanent installations** as ports. It should be noted that no generally accepted definition of port exists in international law. Nor is there any limit to which types of installations which will qualify as permanent as long as they a permanent fixed to the seabed.

**3. Historical entitlements** as in historical waters including bays. In this context it should be noted that the historical entitlement as to internal waters are not restricted to

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<sup>11</sup> See Royal Order (Cancelli Promemoria) of 22 February 1812 on the extent of Danish-Norwegian Territorial Sea translated from Danish in 'Laws and Regulations on the Regime of the Territorial Sea', United Nations Legislative Series, ST/LEG/SER.B/6, New York, 1957, p. 8:

'...It is Our most gracious Will that it shall be established as a rule in all cases where the question is of fixing the limit of Our territorial sovereignty out into the sea, that it shall be calculated until the distance of the ordinary sea league from the extremest island and islet from the land which is not overflowed by the sea; about which all parties concerned are to be instructed by rescript.'

geographical formations as bays but other historic based entitlement as economy and security has been applied in state practice.

**4. Functional entitlement** as seen in roadsteads, where the use of sea areas as roadsteads can serve as entitlement to internal waters. Again there is no generally accepted definition of roadsteads. The concept is not necessarily limited to an alternative to ports as a landing place, but amongst other seen as anchorage waiting areas and traffic regulation area for access to major commercial ports. As there is no fixed legal definition of roadstead, few restrictions exists of the use to extend the outer limit of internal waters.

Finally, permanent ice covered areas and purely security concerns as entitlement can perhaps be added to the list of recognized entitlements for extending internal waters.

Common for all entitlements for drawing the straight baselines based on the internal waters regimes is that there is non maximum mile limit from the mainland and no maximum limit as to length of baseline. Few limits if any restrictions exist of extension by use of internal waters. Moreover, the outer limit of the internal waters is often drawn on a combination of the existent entitlement, as seen in the *ICJ 1951 Anglo Norwegian Fisheries Case (UK v Norway)*, where geographical, economical, and historical entitlement were combined to a complex composite entitlement. The question is now, if a new mixed entitlement or a changed mixture of entitlement could emerge with similar results? A likely arena for this new development is both the Arctic and the North East passage. A mixture of strong entitlements are all present and could even be combined with ice and security to a new interesting but powerful composite discretionary entitlement.

The issue of the effects of the outer limit of internal waters on the outer limit of other maritime jurisdictional zones is still as vibrant and controversial today as it has been at the first attempt at international codification of the law of the sea in Gidels time. Moreover, the reason for this status of uncertainty is same today as it was then, the states general reluctance to change a regime which serves its or rather their purpose quite well today as then. How this accepted role will influence the delimitation of the 350 miles continental shelf remain highly interesting. Especially, the arctic with its combination of historical, geographical economical and security entitlements

combined with the unregulated role of ice as a dark horse or better perhaps a white knight could create some constructive new applications.

Whatever might happen, the reason for the continued acceptance in state practice of the internal waters regime can undoubtedly be found in Gidels remark on the historical waters regime quoted by the Internal Law Commissions Report 'Juridical regime of historic waters including historic bays':<sup>12</sup>

'§36. The concept of "historic waters" came to be considered as an indispensable concept without which the task of establishing simple and general rules for the delimitation of maritime areas could not be carried out. Gidel expresses this thought when he says:

'The theory of 'historic waters', whatever name it is given, is a necessary theory; in the delimitation of maritime areas, it acts as a sort of safety valve; its rejection would mean the end of all possibility of devising general rules concerning this branch of public international law"(Gidel, III, p. 651)'

Gidels view applies to the other customary law regimes of internal waters regimes as well. Otherwise it is difficult understand, that the internal waters regimes has not yet been subjected to any more extensive regulation.

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<sup>12</sup> See (A/CN.4/143) in International Law Commission (ILC) Year Book (YB), 1962, New York, 1964, p. 7f.