

2012

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Publication Details

C. Schofield, 'Departures from the Coast: trends in the application of territorial sea baselines under the Law of the Sea Convention' (2012) 27 (4) *International Journal of Marine and Coastal Law* 723-732.

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Keywords

territorial, sea, baselines, under, law, departures, convention, coast, trends, application

Disciplines

Law

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Departures from the Coast: Trends in the Application of Territorial Sea Baselines under the Law of the Sea Convention

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Abstract

Baselines are crucial to the definition of maritime claims and the delimitation of maritime boundaries. The United Nations Convention on the Law of the Sea (LOS) provides for several distinct types of baseline. These various baselines are discussed relative to their practical application over the past three decades. While some LOS baseline provisions have proved to be well drafted and have led to broad compliance, the loose language contained in other baselines Articles has resulted in their being interpreted liberally. Contemporary and emerging trends and challenges are also highlighted.

Keywords

baselines; maritime limits; boundaries; sea level rise; excessive claims

Introduction

A key achievement of the United Nations Convention on the Law of the Sea (LOS) was that it established a clear framework for the limits of coastal State claims to maritime jurisdiction. It is perhaps easy to forget that this was no mean achievement given the lack of consensus on these issues in the course of earlier efforts at the codification of the international law of the sea in 1958 and 1960.

The majority of such maritime claims are defined by maximum breadth limits, such as 12 nautical miles (nm) for the territorial sea and 200 nm for the exclusive economic zone (EEZ), measured from baselines along the coast.¹

¹ LOS, Arts. 3 and 4 re the Territorial Sea and Art. 57 re the EEZ. While the delineation of the outer limits of the continental shelf involves complex geophysical factors, distance measurements from baselines, specifically the 200-nm and 350-nm limits, remain important. LOS, Article 76.

Accordingly, baselines are critical to defining the limits of national claims to maritime jurisdiction. However, while the LOSC has delivered an admirable measure of spatial certainty with respect to the maximum breadth of maritime jurisdictional zones and, importantly, there has been a large measure of compliance with these international norms,² where such zones are claimed from has proved to be more open to interpretation.

This contribution addresses a deceptively straightforward question: where does the land end and the sea begin? The LOSC dealt with this challenge by providing for multiple distinct types of what are often termed ‘territorial sea baselines’, regardless of the fact that they are relevant to the measurement of the full suite of maritime zones claimable by coastal States. This diversity to a large extent reflects the complexity of coastlines on a global scale. How, then, have the LOSC provisions on baselines stood the test of time over the three decades and what challenges and prospects can be envisaged for the future?

Normal Baselines

The predominant type of baseline in use by coastal States is the “normal” baseline coincident with “the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”³ Such baselines represent a coastal State’s ‘default’ baselines in that they require no formal declaration or due publicity. The absence of a reference to a particular low-water line in Article 5 of the LOSC implies that this choice is left up to the coastal State.

The level of the low-water line forming the normal baseline is dependent on the choice of vertical datum, that is, the level of reference for the measurement of depths and elevations. In this context, many States have tended to opt for a particularly conservative vertical datum, such as lowest astronomical tide (LAT),⁴ and thus low normal baselines. This is essentially because such a low interpretation of the low-water line is preferable in the context of nautical

² See United Nations Division of Ocean Affairs and the Law of the Sea (DOALOS), “Table of claims to national jurisdiction”, as at 15 July 2011, available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf>.

³ LOSC, Article 5.

⁴ LAT is defined as: “The lowest tide level which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions.” See International Hydrographic Organization (with the International Oceanographic Commission and the International Association of Geodesy), *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea, 1982*, Special Publication no. 51, 4th edition (Monaco: International Hydrographic Bureau, 2006) Chapter 2, p.18 (hereafter TALOS Manual).

charting with a view to ensuring safety of navigation, leading to LAT being adopted by the International Hydrographic Office (IHO) as the preferred vertical datum for nautical charts. It is worth noting that use of a particularly low vertical datum, such as LAT, also has the advantage of advancing the low-water line further ‘down the beach’, as it were, thereby expanding and maximising the coastal State’s land territory and simultaneously potentially enhancing the scope of its claims to maritime jurisdiction by advancing the starting point for measuring its maritime claims.

The direct relationship between the position of normal baselines and the limits of maritime jurisdiction is potentially and increasingly problematic, however. This is the case because, just as the coast is dynamic and susceptible to change over time, so too, inevitably, is the location of the low-water line. The implication of this is that as normal baselines change or “ambulate” over time, so too will the maritime jurisdictional limits measured from them should the critical basepoints along that baseline upon which the outer limits of maritime claims depend be affected.⁵

While the inherently unstable nature of many coasts and, therefore, of normal low-water-line baselines has long been recognised, the advent of climate change and, particularly, significant sea level rise have led to suggestions that normal baselines, and thus the maritime spaces under national jurisdiction measured from them, are under increasing threat.⁶ Such concerns arise from the likelihood that, in general terms, should sea levels rise, the low-water line will inevitably retreat inland. Coastal States possessing significant areas of heavily populated low-lying territory, as well as small island States, may therefore be faced with a twin threat, not only of inundation of land territory, but also the diminution of their maritime claims and thus of rights over the valuable marine resources contained therein. A further, even direr threat that has been posited is the total inundation of certain low-lying States and consequent loss of Statehood. While such concerns are not to be blithely dismissed, they

⁵ M.W. Reed, *Shore and sea boundaries: the development of international maritime boundary principles through United States practice* (US Department of Commerce, Washington, D.C., 2000) 185.

⁶ These issues were first raised in the late 1980s and early 1990s, by Bird and Prescott, Caron, Freestone and Soons. See F. Bird and J.R.V. Prescott, “Rising Global Sea Levels and National Maritime Claims” (1989) 177 *Marine Policy Reports* 177–96; D.D. Caron, “When Law Makes Climate Change Worse: Rethinking the Law of Baselines in light of Rising Sea Level” (1990) 17 *Ecology Law Quarterly* 621–653; D. Freestone, “International Law and Sea Level Rise”, in R.R. Churchill and D. Freestone (eds.) *International Law and Global Climate Change* (London/Dordrecht, Graham and Trotman/Martinus Nijhoff, 1991) pp. 109–125; and A.H.A. Soons, “The Effects of Sea Level Rise on Maritime Limits and Boundaries” (1990) 37 *Netherlands International Law Review* 207–232.

do not appear to be likely in the short- to medium-term.⁷ The spatially and temporally uneven character of sea level rise should also be borne in mind in this context.⁸

In this context it can be observed that while the multi-faceted challenges posed by climate change and sea level rise were apparently not anticipated by the drafters of the Convention, they nonetheless proved themselves to be open to the fixing of baselines and limits under certain circumstances—notably with regard to unstable coasts, outer continental shelf limits, and also maritime boundaries.⁹

Although there have been suggestions that this challenge could be met through a range of measures, such as a UN General Assembly Resolution, a supplementary agreement to the Convention analogous to, for example, the Fish Stocks Agreement, or even amendment of the Convention itself,¹⁰ the most likely avenue in this regard would appear to be through unilateral State practice. In particular, threatened coastal States might opt unilaterally to declare the location of their normal baselines and/or the limits of the maritime zones derived from them.¹¹

Straight-line Departures from the Coast

The LOSC also provides for several ‘departures from the coast’ in terms of baselines defined by straight lines, as an alternative to normal, low-water-line baselines. The general objective of these provisions is to recognise and address coastal complexity through approximation or generalisation of the low-water line. These include straight baselines (LOSC, Article 7), river closing lines (Article 9), bay closing lines (Article 10), the use of the outermost

⁷ See, for example, A. Webb and P. Kench, “The dynamic response of reef islands to sea-level rise: Evidence from multi-decadal analysis of island change in the Central Pacific” (2010) 72 *Global and Planetary Change* 234–246.

⁸ See, for example, *Inter-governmental Panel on Climate Change (IPCC)*, Executive Summary, Chapter 5: Observations: Oceanic Climate Change and Sea Level, Contribution of Working Group I, “The Physical Science Basis”, to the IPCC 4th Assessment Report 2007, available at: http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch5s5-es.html.

⁹ See LOSC Articles 7(2) and 76(8). Boundary treaties are not subject to change even in the case of “subsequent fundamental change of circumstances.” See Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, 331(VCLT); Article 62(2)(a).

¹⁰ Moritaka Hayashi, “Sea Level Rise and the Law of the Sea: Legal and Policy Options”, in Hiroshi Terashima (ed.), *Proceedings of The International Symposium of Islands and Oceans* (Ocean Policy Research Foundation, Tokyo, 2009) 90.

¹¹ C.H. Schofield, “Rising Waters, Shrinking States: The Potential Impacts of Sea Level Rise on Claims to Maritime Jurisdiction” (2010) 53 *German Yearbook of International Law* (Berlin, Bunker and Humbolt, 2011) pp. 189–231, at p. 229.

permanent harbour works of ports (Article 11), and in respect of archipelagic states (Article 47).

Expansive claims to straight baselines in particular have been the dominant theme over the past three decades. Such excessive claims arise from the lack of objective tests within Article 7 of the Convention, which has therefore been open to varied interpretation. Article 7 of the LOSC allows coastal States to define systems of straight baselines “where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.” Unfortunately, Article 7 contains no indication as to the depth or frequency of such deep indentations or cuts into the coast line needed for a particular stretch of coastline to qualify for the application of straight baselines or, alternatively, how many, how close to one another and how far off-shore fringing islands need to be.¹²

While the intention of Article 7, that is, to allow for the simplification or approximation of especially complex coasts, may be clear, its practical implementation has proved to be highly problematic with much State practice that can be deemed excessive in character. Indeed, the loose terminology and criteria contained in Article 7 led one leading commentator to observe in the aftermath of the Convention being opened for signature that: “the imprecise language [of Article 7] would allow any coastal country, anywhere in the world, to draw straight baselines along its coast.”¹³

This statement has proved to be prescient as it seems that many coastal States have interpreted Article 7 to their maximum advantage. The vast majority of what can be regarded as excessive straight baseline claims remain on the books and have not been ‘rolled back’. This is despite the vigorous efforts of, in particular, the United States Freedom of Navigation (FON) program.¹⁴ Support for the more conservative view advocated by the United States, among others, can also be found in the International Court of Justice’s (ICJ) decision in the *Qatar/Bahrain* case, which stated unequivocally that the method of straight baselines in accordance with Article 7 of the LOSC “must be applied restrictively.”¹⁵

¹² The U.S. Department of State has issued guidelines on the application of Article 7 but, as the study itself states, such guidelines “do not have international standing as benchmarks” for testing the legality of straight baselines systems. See United States Department of State, “Developing Standard Guidelines for Evaluating Straight Baselines”, *Limits in the Seas*, No. 106 (Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, Washington, D.C.: 31 August 1987).

¹³ J.R.V. Prescott, *The Maritime Political Boundaries of the World* (Methuen, London, 1985), 64.

¹⁴ See J.A. Roach, R.W. Smith, *United States Responses to Excessive Maritime Claims* (Martinus Nijhoff Publishers, The Hague, 1996) pp. 57–146.

¹⁵ *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain) (Merits) [2001] ICJ Rep 40 (paras. 212–215).

Arguably many of the more liberal interpretations of Article 7 of the LOSC stem from a desire by coastal States to position themselves ahead of negotiations on the delimitation of maritime boundaries. Indeed, there is evidence of tit-for-tat declarations of straight baselines with the aim of achieving balance in relations between maritime neighbours ahead of such discussions. Here it can be remarked that the existence of clearly excessive straight baseline claims has not, in fact, prevented coastal States from resolving their overlapping maritime jurisdictional claims, which are at least partially attributable to baseline issues, through boundary delimitation. In such cases the straight baselines in question tend to cancel one another out.¹⁶ Furthermore, despite many excessive straight baseline systems remaining on the books, it is uncertain whether they are actually observed or enforced, so their practical impact on freedom of navigation remains unclear. While not dismissing the potential significance of such claims, it can be observed that they may in practice have something of a symbolic or even illusory character. Nonetheless, in light of the extreme reluctance on the part of coastal States to revise and pull back their more expansive claims shown to date, excessive straight baselines would appear likely to be a prominent feature of maritime practice for the foreseeable future.

Alternative Departures

In contrast to the considerable uncertainties that undermine the LOSC provisions on straight baselines, those relating to bays and archipelagic baselines provide clear, objective tests whereby it can be determined whether a particular set of baselines are compliant with international law or not. As such, these provisions have largely withstood the test of time.

The LOSC provisions relating to river closing lines have predominantly not been abused.¹⁷ Similarly, the use of outermost harbour works to form part of the coastal State's composite baseline has similarly proved to be largely uncontroversial.¹⁸ Furthermore, although it might be argued that the inclu-

¹⁶ For example, Thailand and Vietnam. See C.H. Schofield and M. Tan-Mullins (2008) 'Claims, Conflicts and Cooperation in the Gulf of Thailand', *Ocean Yearbook* 22 (Martinus Nijhoff, Leiden/Boston, 2008) pp. 75–116, at p. 88; and, N.H. Thao, "Vietnam's First Maritime Boundary Agreement" (1997) 5(3) *Boundary and Security Bulletin* 74–78, at 76–77.

¹⁷ A notable exception to this general rule is provided by Argentina and Uruguay's claimed closing line across the mouth of the Rio de la Plata measuring 135 miles in length. See Roach and Smith, *United States Responses to Excessive Maritime Claims*, pp. 143–144.

¹⁸ But see the ICJ's treatment of the Sulina Dyke in respect of the delimitation of maritime boundaries in the *Case Concerning Maritime Delimitation in the Black Sea* (Romania v. Ukraine), (3 February 2009), I.C.J. Reports 2009, p. 61, paras. 132–141.

sion of a reference to historic bays within Article 10 of the LOSC detracts from the otherwise laudably precise language of the rest of the Article and, in particular, the inclusion of the semi-circle test¹⁹ as well as the length limitation on bay closing lines,²⁰ in practice there does not appear to have been a major proliferation of historic bay claims and some notable ones, such as that relating to the Gulf of Sirte, have been rolled back.²¹

With respect to archipelagic baselines, the inclusion of the land/water ratio requirement²² and of a maximum length (125 nm) for individual archipelagic baseline segments²³ within Article 47 of the LOSC provides objective tests against which archipelagic baselines can be readily assessed. This, in turn, has ensured a significant degree of compliance. That said, these apparently clear rules have yielded some rather unexpected results with both Jamaica and São Tomé and Príncipe, which might not be obviously considered as archipelagic States, fulfilling the requirements of Article 47 of the LOSC.

Baselines and Boundaries

An intimate connection exists between baselines and the delimitation of maritime boundaries. This arises from the critical role of baselines in the construction of equidistance lines. With respect to the delimitation of territorial sea boundaries, median lines are explicitly mentioned in Article 15 of the LOSC. In contrast, the LOSC provisions related to the delimitation of continental shelf and EEZ boundaries are silent regarding a preferred method of delimitation and offer only limited guidance.²⁴ In practice, however, the equidistance method has proved to be overwhelmingly popular in the delimitation of continental shelf and EEZ boundaries also.

¹⁹ LOSC, Article 10(2).

²⁰ LOSC, Article 10(4).

²¹ This apparent progress is qualified, however, as Libya's Gulf of Sirte historic bay closing line was simply replaced with the world's longest single segment of claimed straight baselines. See "General People's Committee Decision No.104 of the year 1373 from the death of the Prophet (AD 2005) concerning straight baselines for measuring the breadth of the territorial sea and maritime zones of the Libyan Arab Jamahiriya", Note Verbale from the Permanent Mission of the Socialist People's Libyan Arab Jamahiriya to the Secretary-General of the United Nations, 18 August 2005, reproduced in United Nations Division of Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin*, No.59 (2005), pp. 15–18, available at: <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin59e.pdf>.

²² LOSC, Article 47(1).

²³ LOSC, Article 47(2).

²⁴ Articles 74 and 83 of the LOSC call for agreement to be reached on the basis of international law in order to achieve "an equitable solution."

Indeed, the drafting of the LOSC and, especially, the introduction of the 200-nm EEZ led to a significant shift in ocean boundary-making. Taking their cue from these “new developments in international law”, namely the introduction of the EEZ concept by the 1982 text, the ICJ held that where the parties’ coastlines are less than 400 nm apart, “the geological and geomorphological characteristics of those areas . . . are completely immaterial.”²⁵ International courts and tribunals have subsequently evolved an increasingly clear approach to the delimitation of EEZ and continental shelf boundaries, generally termed the ‘equidistance/special circumstances approach’. In particular, in the *Black Sea* case (2009), the ICJ articulated a three-stage approach to the delimitation.²⁶ This process comprises: first, the construction of a provisional delimitation line based on equidistance; second, consideration of any factors that might lead to a modification of the provisional line with a view to achieving an equitable result; and, third, undertaking a (dis)proportionality test.²⁷ The ICJ stated that “[i]n keeping with its settled jurisprudence on maritime delimitation”,²⁸ a provisional delimitation line should be established using geometrically objective methods, and “an equidistance line will be drawn *unless there are compelling reasons that make this unfeasible* in the particular case” [emphasis added].²⁹ This three-stage approach to the delimitation of continental shelf and EEZ boundaries was also adopted by the International Tribunal on the Law of the Sea (ITLOS) in its delimitation case between Bangladesh and Myanmar in the Bay of Bengal, underscoring the importance of this development in the approach to the delimitation of international maritime boundaries.³⁰

The consequence of these evolutions in the approach to ocean boundary-making is to reinforce the role and significance of baselines. In order to construct a provisional delimitation line based on equidistance, baselines, or more specifically key basepoints along such baselines, are critical. That said, it is notable that international Courts and Tribunals have proved to be selective in their choice of appropriate basepoints for the construction of provisional

²⁵ *Case Concerning the Continental Shelf (Libya Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, [1985] I.C.J. Reports 1985, p. 13 (hereinafter the *Libya/Malta* case), para. 39.

²⁶ *Ibid.*, paras. 118–122.

²⁷ *Black Sea* case, paras. 118–122.

²⁸ *Ibid.*, para. 118.

²⁹ *Ibid.*, para. 116.

³⁰ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, International Tribunal for the Law of the Sea (ITLOS), Case no. 16, Judgment, 14 March 2012, para. 233, available at, <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf> [hereinafter *Bay of Bengal* case].

equidistance-based delimitation lines. Rather than employing strict equidistance lines, both the ICJ³¹ and the ITLOS³² have opted to discount certain island basepoints prior to drawing the provisional equidistance line. In the *Black Sea* case the ICJ eliminated the use of Serpents' Island as a basepoint prior to construction of the provisional boundary line, arguing that to use this small island as a basepoint would amount to "a judicial refashioning of geography".³³ The ITLOS advanced analogous arguments, citing the *Black Sea* case, as the basis for its treatment of St. Martin's Island in the delimitation of the continental shelf and EEZ boundary in the *Bay of Bengal* case.³⁴

While these decisions are arguably consistent with a general welcome trend in judicial decisions towards awarding small and frequently sparsely or uninhabited islands a much reduced impact on maritime boundary delimitation, the manner in which the discounting of certain island basepoints has been achieved through the qualified application of the equidistance method is arguably problematic and undermines the three-stage process.³⁵ After all, overtly ignoring potentially critical basepoints and thereby departing from strict equidistance as a starting point, itself necessarily represents a "judicial refashioning of geography" that serves to undermine the clarity and consistency of the three-stage process.

Trends and Challenges

Baselines remain crucial both to the delineation of the definition of the spatial limits to maritime jurisdictional zones and the delimitation of equidistance-based maritime boundaries. The LOSC provides for several types of baseline in recognition of the complexity of coastlines worldwide. A number of these provisions include clear, objective rules and have consequently withstood the test of time over the past three decades in admirable fashion, as exemplified by broad compliance with their terms in State practice. However, a number of the baseline Articles contained in the LOSC have fared less well with respect to their implementation. This is particularly the case with regard to straight baselines, which have proved to be the focus for excessive practice over the past three decades. Although such expansive claims are unlikely to disappear in the foreseeable future given the great reluctance shown by coastal States to

³¹ In respect of the Filfla in the *Libya/Malta* case and Serpents' Island in the *Black Sea* case.

³² In relation to St Martin's Island in the *Bay of Bengal* case.

³³ *Black Sea* case, para. 149.

³⁴ *Bay of Bengal* case, para. 265.

³⁵ St. Martin's Island is 8 km² in area, with a population of c.7,000 people. *Ibid.*, para. 143.

pull back from even their most clearly excessive practices, the overall trend has been to award such extreme claims no effect, notably in the delimitation of maritime boundaries. Contemporary and future baselines issues are likely to feature ongoing attempts to reel in and moderate excessive claims and potentially also to fix the location of normal baselines and/or the limits derived therefrom in light of the threats posed by sea level rise. Defining the interface between the land and the sea is therefore likely to remain a distinctly challenging proposition.