INTERNATIONAL LAW ASSOCIATION

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BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA

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I. Background

1. The International Law Association (ILA) Committee on Baselines under the International Law of the Sea was formed with the approval of the ILA Executive Council in November 2008. The Committee's final report was considered at the Sofia Conference (2012) and in Resolution No. 1/2012 the 75th Conference of the ILA noted the conclusions of the Committee and requested the Secretary-General of the ILA to forward the Report to relevant Parties. The Committee's original four-year mandate ended in 2012.

2. The Committee was formed on the basis of a proposal with a two-part mandate: first, to "identify the existing law on the normal baseline" and, second, to "assess if there is a need for further clarification or development of that law."[1] The need to identify, and possibly to clarify or develop, the existing law on the normal baseline arose in response to the phenomenon of sea level rise likely to accompany climate change, and in particular the effect this may have on low-lying, small island developing States.[2] The need was also considered to arise with respect to the artificial extension of existing coasts[3] and the issue of baselines along ice-covered coasts. In addition to concerns raised by these phenomena, the importance of identifying the existing law on the normal baseline was highlighted by two international maritime delimitation cases – *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (ICJ Judgment 2007)[4] and *Guyana/Suriname* (Annex VII Arbitral Tribunal award 2007)[5] – in which the location of the normal baseline was in question.

3. In pursuit of these objectives, the Committee drafted an internal discussion document for consideration at the August 2010 ILA biennial meeting in The Hague. The draft final report was circulated to Committee members

[1] *Proposal for the establishment of a new committee on baselines*, para. 7.
[2] Ibid para. 4.
[3] Ibid para. 5.
[4] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras) [2007] ICJ Rep 659.
[5] *Award of the Arbitral Tribunal in the Matter of an Arbitration between Guyana and Suriname* (Guyana v. Suriname) (2008) 47 ILM 166.

on 18 January 2012 and was discussed during an inter-sessional Committee meeting in Hamburg, Germany on 16 and 17 March 2012, and the final report of the Committee was considered at the 2012 Sofia Conference and adopted by Resolution No. 1/2012.

4. Two matters were identified during the conclusion of the final report. The first was a recognition that substantial territorial loss arising from sea-level rise is an issue that extends beyond baselines and the law of the sea to encompass additional areas of international law. Resolution No. 1/2012 acknowledged that issue by noting that it "requires consideration by a committee established for the specific purpose of addressing this broad range of concerns".[6] In response, a proposal for the establishment of a new ILA Committee on International Law and Sea-Level Rise was submitted to ILA Headquarters with Professor Davor Vidas (Norwegian Branch) as proposed Chair, and Professors David Freestone (UK branch) and Jane McAdam (Australian branch) as the proposed Co-rapporteurs. The Executive Council of the ILA endorsed that proposal and that Committee has now commenced its work plan.

5. The second matter that was identified in the 2012 Committee's Report was the desirability of a further exploration of the international law of the sea addressing 'straight baselines' under an extended mandate of the Committee on Baselines under the International Law of the Sea. This arose due to 'straight baselines' not being considered in any detail in the 2012 Committee Report. A related matter was 'archipelagic baselines' under Part IV of the 1982 United Nations Convention on the Law of the Sea (LOSC) and related state practice with respect to those baselines. In addition, a view existed amongst Committee members that the work of the Committee on baselines would not be complete if its deliberations were ultimately limited to issues principally associated with Article 5 of the LOSC.[7]

6. It was therefore proposed that the ILA Committee on Baselines under the International Law of the Sea have its mandate expanded for a further 4 years during which time it would consider the following matters:

> 1. The interpretation and relevant state practice of Article 7 of the 1982 United Nations Convention of the Law of the Sea regarding the method adopted by States of drawing straight baselines.
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> 2. The interpretation and relevant state practice of Article 8 (2) of the 1982 United Nations Convention on the Law of the Sea regarding the effect arising from the establishment of straight baselines within waters previously not considered internal waters and the consequences thereof for innocent passage.
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> 3. The interpretation and relevant state practice of Article 10 of the 1982 United Nations Convention on the Law of the Sea relating to the method adopted by States of drawing straight baselines within a bay.
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> 4. The interpretation and relevant state practice of Article 13 of the 1982 United Nations Convention on the Law of the Sea as it relates to the method adopted by States in relying upon low-tide elevations in the drawing of straight baselines, and the consistency of that practice with Article 7 (4) of the Convention.
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> 5. The interpretation and relevant state practice of Article 14 of the 1982 United Nations Convention on the Law of the Sea as it relates to the matters noted above with respect to how States rely upon a combination of methods in determining baselines, including the normal baseline as provided for in Article 5 of the Convention and as considered in the Committee's 2012 Sofia Conference Report.
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> 6. The interpretation and relevant state practice of Article 47 of the 1982 United Nations Convention on the Law of the Sea regarding the method adopted by States in the drawing of archipelagic baselines.

7. The then Director of Studies, Professor Chinkin, asked the Executive Council to agree to an extended mandate until 2016 and that extension was duly granted.[8] Captain J. Ashley Roach, JAGC, U.S Navy (Retired) (USA) was appointed as Chair and Professor Donald R. Rothwell (Australia) was appointed as Rapporteur.

8. The Work Plan of the Committee is divided into two phases. The first phase, which culminated in this First Report, has focussed on the question of straight and archipelagic baselines as provided for in Articles 7 (Task 1) and 47 (Task 6) of the LOSC. A First Interim Report was prepared for circulation and discussion at the ILA

[6] Resolution No. 1/2012 [8].
[7] United Nations Convention on the Law of the Sea, 1833 UNTS 397 (LOSC).
[8] International Law Association, Executive Council Meeting Minutes, 10 November 2012.

American Branch conference in New York on 26 October 2013. The Rapporteur then prepared a draft of the First Report for circulation in December 2013 inviting comments from Committee members prior to finalisation in February 2014. During the Committee meeting at the Washington Conference the Work Plan for the period 2014-2016 was finalised.

9. In preparing the First Report the Rapporteur has been supported with research assistance provided by students from the ANU College of Law, Australian National University. The support and assistance of those students in the finalisation of this Report is acknowledged.[9]

10. As a preliminary comment, the Committee acknowledges that this report is narrowly focussed to address only those baselines referred to in Articles 7 and 47 of the LOSC. The Committee's mandate also extends to consider other LOSC articles and relevant state practice with respect to baselines, and these matters will be duly considered in the Committee's Report for the 2016 Conference. The Committee also acknowledges that in addition to straight baselines, the LOSC and relevant state practice in the law of the sea includes closing lines, and straight lines and other lines (including those predicated on Articles 9 and 10 of the LOSC, as well as on historic claims) on the basis of which outer limits of maritime zones are delineated. Finally, it can be observed that the terms 'miles' and 'nautical miles' have been used interchangeably.

II. Article 7

A. Relevant Historical Background

11. The origin of Article 7 can be found in first the decision of the International Court of Justice (ICJ) in the *Fisheries* case,[10] the work of the International Law Commission (ILC) including the Draft Articles on the Law of the Sea, and then the deliberations of the First United Nations Conference on the Law of the Sea (UNCLOS I) that resulted in adoption of the 1958 Convention on the Territorial Sea and the Contiguous Zone.[11]

1. *Fisheries* case

12. The 1951 *Fisheries* case arose out a claim by the United Kingdom that the straight baseline system developed by Norway connecting the islands of the *skjærgaard* along Norway's west coast including both large and small islands and in some instances reefs, rocks and islets only above water at low tide,[12] was not supportable under international law. The United Kingdom argued that Norway was unable to draw baselines from other than the low-water mark on permanently dry land, and contested Norway's definition of a bay and historic waters.

13. The Court by majority found that Norway's method for the delimitation of its fisheries zone, and its reliance upon the straight baselines drawn around the *skjærgaard* "were not contrary to international law."[13] The Court noted the distinctive nature of the Norwegian coastline as being one in which the "coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea",[14] and in recognition of the particular geographic nature of the Norwegian coastline endorsed the use of straight baselines which could "within reasonable limits" depart from the "physical line of the coast".[15] The Court additionally noted at the outset that "several States ha[d] deemed it necessary to follow the straight base-lines method and that they ha[d] not encountered objections of principle by other States".[16] The Court also accepted that a straight

[9] Zoe Winston-Gregson acted as a research assistant in the later stages of this project and also made a contribution along with a team of ANU College of Law students who contributed to the research and writing of parts of this First Report who included Alice Bolt, Alice Bradshaw, Jacqueline Edwards, Anita Gupta, Sam Osborne, Nishadee Pereva, Andrew Read, Russell Schmidt (Summer Research Scholar), Kai Scott, Sasha Silberstein, Marc Vandenbrooke, Anna Whitton, and Clara Wilson.

[10] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116.

[11] Convention on the Territorial Sea and the Contiguous Zone, 516 UNTS 206.

[12] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 127.

[13] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 143 by respective majorities of ten votes to two, and eight votes to four; Judges McNair and Read wrote dissenting opinions.

[14] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 127.

[15] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 129.

[16] Ibid. State practice resorting to straight lines preceded the *Fisheries* case by a few decades, it having been considered during the work of the 1930 Hague Conference.

baseline could also be drawn between islands, islets and rocks that make up the *skjærgaard* even if those waters do not fall within the conception of a bay.[17]

14. Nevertheless, the ICJ was not prepared to concede that the delimitation of these areas of the sea was merely a unilateral act of the coastal State which could be undertaken without any reference to international law and certain basic considerations were identified which courts could apply in assessing the legitimacy of straight baselines. These included the close dependence of the territorial sea upon the land domain, that the baselines must not depart to any appreciable extent from the general direction of the coast, the close relationship between certain sea areas and the adjoining land formations, and the economic interests peculiar to the region which may be evidenced by long usage.[18] The Court concluded that the acceptability of the method of straight baselines used by Norway was the result of the particular geography of the coastline, and that Norway's approach had been historically consolidated through long practice which had not been contested by other States as being contrary to international law.[19]

2. International Law Commission

15. When the ILC considered the question of baselines and associated issues during its review of the law of the sea between 1949-1956, in addition to the *Fisheries* case it also drew upon various examples of state practice and the commentaries and reports of learned associations and bodies which throughout the early part of the twentieth century had investigated the regime of the territorial sea and the related issues of baselines. It also benefited from a 1953 report which had been prepared by a Committee of Experts on "technical questions concerning the territorial sea".[20] The experts were given a set of questions to address and their report supported the low-water mark as the baseline for the territorial sea, a ten mile closing line across juridical bays, and straight baselines of no longer than ten miles between headlands and islands.[21] This technical report was influential, and aspects of it were eventually reflected in four draft articles found within the ILC *Articles concerning the Law of the Sea with commentaries* (ILC Draft).[22]

16. Article 5 of the ILC Draft (which became Article 4 of the Convention on the Territorial Sea and the Contiguous Zone) substantively reflected the judgment of the *Anglo-Norwegian Fisheries* case, which the ILC interpreted as "expressing the law in force."[23] The ILC made clear that the baseline may be independent of the low-water mark where "circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity."[24] Straight baselines were not to be drawn between drying rocks and drying shoals.[25] This approach proposed in Article 5 was that straight baselines could only be relied upon where the coastline had one of three characteristics:

- that it was 'deeply indented' as in the case of a gulf;
- 'cut into' as would be the case with a fjord; or,
- where there were offshore islands proximate to the coastline.

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[17] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 130.
[18] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 133; on this last point Norway was able to point to various Royal decrees and other orders dating back to 1812 which reflected the use of a baseline system for some of the waters within the *skjærgaard.*
[19] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 139; for detailed assessment see H. Lauterpacht, *The Development of International Law by the International Court* (1958) 45, 190-199; D.P. O'Connell, *The International Law of the Sea* Vol I (1982) 199-206; W. Michael Reisman and Gayl S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 19-37.
[20] "Report of the Committee of Experts on technical questions concerning the territorial sea" reproduced in Satya N. Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea: A Commentary* Vol II (1993) 59-63; the experts comprised Professor L.E.G. Asplund (Norway), S. Whittemore Boggs (USA), P.R.V. Couillault (France), R.H. Kennedy (UK), and A.S. Pinke (Netherlands).
[21] The distinction between 'closing' lines and 'straight baselines' reflected that a 'closing line' would close off the entrance to a bay and would be a single line, whilst a straight baseline would be multiple lines connecting various geographic features adjacent to the coast: J.R.V. Prescott, "Straight and Archipelagic Baselines" in Gerald Blake (ed), *Maritime Boundaries and Ocean Resources* (1987) 38, 39.
[22] International Law Commission "Articles concerning the Law of the Sea with commentaries" (1956) II ILC Year Book 265, 266-271.
[23] Ibid 267.
[24] Ibid.
[25] Ibid 270-271. Article 11 did however separately provide that drying rocks and drying shoals which fell within the territorial sea "may be taken as points of departure for measuring the extension of the territorial sea."

17. It is of significance for this study that the ILC did not recommend limits on the length of the baselines, though an earlier draft had proposed a maximum length of ten miles, and that islands to or from which the baselines were drawn could be only five miles from the coast.[26] The ILC indicated that objections were raised by States that the limit on the maximum length of baselines seemed to be arbitrary and not in conformity with the ICJ decision in the *Fisheries* case.[27]

3. First United Nations Conference on the Law of the Sea

18. At the First United Nations Conference on the Law of the Sea (UNCLOS I) held in Geneva in 1958 the work of the ILC was drawn upon in efforts to codify the law with respect to straight baselines. However, there remained disagreement between States as to the maximum length of straight baselines and the circumstances in which they could be resorted to. The United Kingdom revived the ILC's earlier proposal of a maximum baseline length of 10 miles. This proposal was amended to 15 miles during the Conference debates, but still failed to attract the necessary two-third majority in favour of its adoption.[28] The vote was 34 States in favour and 30 against, with 12 abstentions; a majority thus not endorsing a maximum length for straight baselines.[29] Concerns raised in earlier Conference meetings about the need for flexibility in the rules governing baselines shed some light on this outcome.[30] A key change endorsed at UNCLOS I, which was raised by Denmark at early stages, was that the use of straight baselines should not be considered a "special regime"[31].

4. Convention on the Territorial Sea and the Contiguous Zone

19. The 1958 Convention on the Territorial Sea and the Contiguous Zone addresses straight baselines in Article 4. The principal elements of Article 4 include the ability of a coastal State to draw straight baselines along a coastline that was deeply indented and cut into, or where there is a fringe of islands along the coast in the immediate vicinity. Baselines are not to depart to any appreciable extent from the general direction of the coast, and sea areas within the lines are to be closely linked to the land domain so as to be subject to the regime of internal waters. Limits are placed on the drawing of baselines to and from low-tide elevations, as are circumstances where the baselines can cut off from the high seas the territorial sea of another State. In drawing the baselines account can also be taken of economic interests that are peculiar to a region, such as evidence of long usage. Finally, coastal States are required to clearly indicate baselines on publicly available charts. Consistent with the work of the ILC, Article 4 of the Convention on the Territorial Sea and the Contiguous Zone is, to a large extent, substantially based upon the ICJ's decision in the *Fisheries* case.[32]

B. LOSC Text

20. During UNCLOS III negotiations on the matter of straight baselines, emphasis was given to seeking to repeat the essential elements of Article 4 of the Convention on the Territorial Sea and the Contiguous Zone, albeit with appropriate modifications to reflect changes in the structure of the draft Convention negotiating text. The most significant adjustment to the text of the original article was a proposal to take into account the circumstances of highly unstable coastlines. Bangladesh was a strong supporter of such a change, and made a number of proposals at various stages of the conference negotiations.[33] The Bangladesh proposal was ultimately

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[26] ILC "Articles concerning the Law of the Sea with commentaries" 267; for discussion of the work of the ILC see Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 38-49.
[27] ILC, "Articles concerning the Law of the Sea with commentaries" 267.
[28] *United Nations Conference on the Law of the Sea, Volume III: First Committee (Territorial Sea and Contiguous Zone)*, 51st mtg, 156 [11], UN Doc A/CONFC.13/39 (1958).
[29] *United Nations Conference on the Law of the Sea, Volume II: Plenary Meetings*, 19th plen mtg, 62 [11], UN Doc /CONFC.13/38 (1958).
[30] *United Nations Conference on the Law of the Sea, Volume III: First Committee (Territorial Sea and Contiguous Zone)*, 51st mtg, 158 [43], 159 [53], UN Doc A/CONFC.13/39 (1958).
[31] *United Nations Conference on the Law of the Sea, Volume III: First Committee (Territorial Sea and Contiguous Zone)*, 4th mtg, 5 [15], UN Doc A/CONFC.13/39 (1958). The reference to "special regime", which appeared in Article 5 of the ILC draft articles, was eventually left out of the treaty text.
[32] O'Connell, *The International Law of the Sea* Vol I (1982) 208 commented that Article 4 was a "faithful expression of the principal criteria adopted by the International Court…. The division into paragraphs had the merit of separating the criteria, leaving it open to consider some as independent of, or subordinate to, others." See also Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea: A Commentary* Vol II (1993) 97 who commented that "Article 4 itself is a substantively revised version of article 5 of the ILC's draft articles, which indicates that the concepts embodied in the articles are derived from the judgment of the International Court of Justice in the *Fisheries* case." See also discussion in Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 49-56.
[33] *United Nations Convention on the Law of the Sea: A Commentary* Vol II (1993) 97-98.

adopted, with variation, in what became paragraph 2 of Article 7 of the LOSC.[34] Another adjustment made to Article 4 was a separate provision contained in Article 16 of the LOSC requiring States to show baselines drawn for the purposes of measuring the breadth of the territorial sea on publicly available charts. Article 14 of the LOSC was equally an innovation, further clarifying that recourse to straight lines was just another method to draw baselines to suit certain conditions, not a 'special regime'.

21. Article 7 of the LOSC is situated within Part II of the Convention which is titled 'Territorial Sea and Contiguous Zone'. Part II is divided into four sections, and Article 7 falls within Section 2 titled 'Limits of the Territorial Sea'. Relevantly for present purposes it is immediately preceded by Articles 5 'Normal Baseline' and 6 'Reefs'. The article provides as follows:

Article 7

Straight baselines

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.

22. The terms 'straight baseline/s', or 'straight line' are not limited to Article 7 and can also be found in Article 8 'Internal waters', Article 9 'Mouths of rivers', and Article 10 'Bays'. [35]

C. Analysis of Article 7

1. Text

23. A number of preliminary observations can be made with respect to Article 7. The first is that it retains many of the core elements found in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone, and which in turn were primarily based upon the ICJ's decision in the *Fisheries* case. This is particularly the case with paragraphs 1, 3, 4, 5, and 6 of Article 7 which are identical or nearly identical to equivalent paragraphs found in Article 4, even though the treaty background is distinct in either case.

[34] See discussion of the UNCLOS III negotiations in *United Nations Convention on the Law of the Sea: A Commentary* Vol II (1993) 97-100; Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 57-62; JA Roach and RW Smith, *Excessive Maritime Claims* 3rd (2012) 124, n145.

[35] While the LOSC makes no reference to historic waters or historic rights, the use of 'straight lines' as closing lines across bays and other maritime areas has been widely discussed in international law, including during UNCLOS I and UNCLOS III.

24. The second observation is that Article 7 permits the coastal State to rely upon the method of straight baselines in three instances:

1. Where a coastline is deeply indented and cut into (Article 7 (1) LOSC);
2. When there is a fringe of islands along the coast in its immediate vicinity (Article 7 (1) LOSC); or
3. Where because of the presence of a delta or other natural conditions the coastline is highly unstable (Article 7 (2) LOSC).

25. These criteria are not cumulative and any one of these three geographic circumstances will be sufficient for the coastal State to become entitled to use the straight baseline method. In this respect the Committee recalls that Article 7 (2) was added to the convention text arising from the LOSC negotiations and provides an additional basis upon which a coastal State could seek to draw straight baselines. Where straight baselines have been drawn consistently with Article 7 (1), Article 7 (5) also provides that account may be taken when drawing the baselines of economic interests peculiar to the region "the reality and importance of which are clearly evidenced by long usage".

26. The third observation is that the coastal State's entitlements to use the straight baseline method are subject to four controls as follows:

1. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast (Article 7 (3) LOSC);
2. The sea areas within the baselines must be sufficiently linked to the land domain to be subject to the regime of internal waters (Article 7 (3) LOSC);
3. Straight baselines must not be drawn to and from low-tide elevations, except in the case:
    a. Where lighthouses or similar installations that are permanently above sea level have been built on the low-tide elevation, or
    b. Where the drawing of baselines to and from a particular low-tide elevation has received general international recognition (Article 7 (4) LOSC); and,
4. The drawing of straight baselines must not cut off the territorial sea of another State from the high seas or the exclusive economic zone (Article 7 (6) LOSC).

27. In 1989 the United Nations Office for Ocean Affairs and the Law of the Sea (now the United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS)) published a study on baselines which gave an explanation for several of the relevant terms found within Article 7.[36] That study provided as follows:

> "Straight baselines" are a system of straight lines joining specified or discrete points on the low-water line, usually known as straight baseline tuning points. A "straight line" is mathematically the line of shortest distance between two points.
>
> "Delta" means a tract of alluvial land enclosed and traversed by the diverging mouths of a river.[37]

28. The UN study also makes important observations with respect to how the relevant provisions of Article 7 could be interpreted. While observing that there may be 'different views' on the matter it is noted that the "concept of straight baselines is designed to avoid the tedious application of rules dealing with the normal baselines and the mouths of rivers and bays, where their application would produce a complex pattern of territorial seas."[38] The UN study highlights that an application of Articles 5 and 10 could in certain circumstances create enclaves and deep-pockets of 'non-territorial sea' and that this "might create considerable difficulties for both the observance of the appropriate régime and surveillance."[39] It is then observed that:

> The spirit of article 7, in respect of indented coasts and fringing islands, will be preserved if straight baselines are drawn when the normal baseline and closing lines of bays and rivers would produce a

[36] United Nations Office for Oceans Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989); the UN study was subject to review by a Group of Technical Experts On Baselines who commented on a preliminary draft of the publication as prepared by the United Nations Office for Ocean Affairs and the Law of the Sea. This UN study is mentioned at this juncture for reasons of practicality.
[37] *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989) Appendix I, 47.
[38] Ibid 18.
[39] Ibid.

complex pattern of territorial seas and when those complexities can be eliminated by the use of a system of straight baselines. It is not the purpose of straight baselines to increase the territorial sea unduly.[40]

29. The UN study proceeds to provide some guidance on the interpretation of some of the critical terms found within Article 7. It is suggested that the term 'deeply indented' found in Article 7 (1) can be used in "either an absolute or a relative sense".[41] As to the characterisation of a fringe of islands, the UN study observes that "[t]here is no uniformly identifiable objective test which will identify for everyone islands which constitute a fringe in the immediate vicinity. States should, however, be guided by the general spirit of article 7."[42] Two examples are given to illustrate this proposition where a fringe of islands is likely to exist. The first is one which relates to the circumstances of the *Fisheries* case and where the islands appear to form a unity with the mainland. The other is where the islands may be a distance from the coast and "form a screen which masks a large proportion of the coast from the sea."[43] As to the distance of the islands from the coast and being within the 'immediate vicinity', the view of the UN study was that a distance of 24 miles would be satisfactory.[44] It was also observed that the concept applies to the inner edge of the islands because the fringe may be of considerable width. [45]

2. State Practice

30. For the purposes of this Report it is not possible to provide an exhaustive analysis of all relevant state practice. Nor it is possible to discuss the legal grounds on which States may have predicated their recourse to straight (or closing) baselines, as typically that is not made publicly known. Rather mention will be made of some particular examples of state practice in areas that have been the subject to debate.

31. In the most recent authoritative study on straight baseline state practice, Roach and Smith identified over 75 States that had delimited straight baselines along portions of their coasts, with a further 7 States having enacted enabling legislation but not yet having published coordinates or charts of straight baselines.[46] Some coastal States which would otherwise be eligible to declare straight baselines have hitherto chosen not to do so.[47] In this respect it needs to be recalled that under Article 7 coastal States 'may' employ the method of straight baselines and that there is no requirement that they do so even when their coastal configurations meet the criteria identified in Article 7.

A deeply indented and cut into coastline (Article 7 (1))

32. Some coastal States accept that multiple indentations along the section of coast in question are necessary to satisfy Article 7 (1). The United States position, for example, is that three conditions must be met as follows:

- In a locality where the coastline is deeply indented and cut into, there exist at least three deep indentations;
- The deep indentations are in close proximity to each other; and
- The depth of penetration of each deep indentation from the proposed straight baseline enclosing the indentation at its entrance to the sea is, as a rule, greater than half the length of that baseline segment.[48]

The practice of a significant number of other States reflects a different approach. For example, there is state practice of straight baselines being drawn around a coastline that is generally smooth and without deep

[40] Ibid17-20.
[41] Ibid 20, at which there is an accompanying illustrative example.
[42] Ibid.
[43] Ibid; an example of such islands is given as the Recherche Archipelago off the coast of Western Australia.
[44] Ibid 21; cf. *Maritime Delimitation in the Black Sea* (Romania v. Ukraine) Judgment [2009] ICJ Reports 61 [149] where the ICJ considered that Serpents' Island, at a distance of 20 nautical miles from the Ukrainian coast, could not be considered to be a part of the Ukraine's coastal configuration.
[45] Ibid.
[46] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 73-82, Table 2.
[47] V Prescott and CH Schofield, *The Maritime Political Boundaries of the World* 2nd (2005), 163 who, amongst States whose practice has not subsequently been modified, identify the US, Eritrea, Greece, Kuwait, New Zealand, Panama, Qatar, Sierra Leone, Sri Lanka, and Tanzania as falling into this category. Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) 73, advances the cases of the USA, Greece, Malaysia, Panama, Singapore and Tanzania.
[48] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 61-2.

indentations, including those straight baselines drawn by Madagascar, by Norway around Jan Mayen, and by Spain on its mainland,[49] and by Albania, Colombia, Costa Rica, Egypt, Guinea, Iran, Oman, Pakistan and Senegal.[50]

Fringe of islands along the coast (Article 7 (1))

33. The United States position with respect to this criterion is that providing the islands in question meet the criteria under Article 121 (1), then three further conditions must be met:

> 1. The most landward point of each island lies no more than 24 miles from the mainland coastline;
> 2. Each island to which a straight baseline is drawn is not more than 24 miles apart from the island from which the straight baseline is drawn; and
> 3. The islands, as a whole, mask at least 50% of the mainland coastline in any given locality.[51]

Some States have drawn straight baselines to and from islands off their coasts without meeting these criteria. Relying upon the above criteria, the United States has protested the straight baseline claims of China, Cuba, Djibouti, Ecuador, Honduras, Italy, Japan, Mexico, Oman, Portugal, South Korea and Thailand.[52]

Highly Unstable Coastlines (Article 7 (2))

34. There is not a great deal of state practice giving precise effect to this provision. Roach and Smith observe that applicable deltas include those of the Mississippi River (USA), Nile River (Egypt), and the Ganges-Brahmaputra River (Bangladesh).[53] In 1990, Egypt established straight baselines along its Mediterranean coast which included that part of the Nile River delta that empties into the Mediterranean Sea. In 1991 the United States protested that claim, generally observing that the coastline was neither deeply indented nor cut into.[54]

35. Prior to the adoption of the LOSC, Bangladesh proclaimed a system of straight baselines in the Bay of Bengal on 13 April 1974. All the baselines are between 16 and 30 miles from the coastline to cater for the unstable nature of the Ganges-Brahmaputra River delta.[55] This is a combination subaerial and subaqueous delta; the coastline is unstable as it both advances and retreats.[56] Hoque asserts that the Bengal baseline system was "an attempt to cover the fluctuation of coastline within the proclaimed baseline." [57] Hoque claims that Bangladesh held the view that Article 4 of the Convention on the Territorial Sea and the Contiguous Zone "did not cover the characteristics of Bangladesh's coastline and did not cater [for Bangladesh's] practical needs", but that, "due to presence of peculiar geographic conditions in its coast, it would be permitted to draw straight baselines on depth criteria to meet the local needs."[58] Hoque asserts that Bangladesh "is the only deltaic coastal State that, more or less, tried to follow the spirit of Article 7(2)."[59]

Length of straight baselines

36. In the absence of definite criteria for the length of straight baselines in Article 7, there is considerable variance in state practice regarding the length of straight baseline segments. Finland and the US assert that baseline segments should not exceed 24 nautical miles (nm).[60] This is not consistent with the position that is found in state practice, which appears to reflect views expressed during UNCLOS I and UNCLOS III, where such limitation to the length of segments did not find enough support to be incorporated in the treaty texts. There are numerous instances of baseline segments which exceed 24nm, particularly in Asia. In terms of historical trends, the entry into force of the Convention on the Territorial Sea and the Contiguous Zone had great

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[49] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 150.
[50] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 83-95 which have all been subject to protest by the United States.
[51] Ibid 62-63.
[52] Ibid 98-107.
[53] Ibid 67.
[54] Ibid 85, 89.
[55] Muhammad Nazmul Hoque, *The Legal and Scientific Assessment of Bangladesh's Baseline in the Context of Article 76 of the United Nations Convention on the Law of the Sea* (2006) 74.
[56] Ibid 74-75.
[57] Ibid.
[58] Ibid 73-74.
[59] Ibid 78.
[60] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 64, n26 giving the explanation for the US interpretation.

impact upon claims of straight baseline systems. Prior to this only a few States claimed straight baselines, including Iran (1934), Norway (1935), Ecuador (1948), Yugoslavia (1948), Saudi Arabia (1949) and Egypt (1951). The 1960s and 1970s saw a number of ambitious claims, especially in South America and Asia, many of which continue to be asserted today.

37. While recent practice amongst States proclaiming straight baselines suggests a more moderate approach, there are a number of longstanding and contemporary straight baseline claims which have been considered by both publicists and other States to be excessive. These include the claims made by Burma in the Gulf of Martaban (222.3nm),[61] Madagascar (123nm), Argentina (123nm), Ecuador (136nm), and Vietnam (161nm).[62] According to Prescott and Schofield, as of 2005, the following States have asserted baseline segments measuring between 50nm and 100nm: Argentina, Burma, Canada, Chile, China, Colombia, Cuba, Denmark, Ecuador, Guinea, Honduras, Haiti, Iceland, Japan, Madagascar, Mauritania, Pakistan, Russian Federation, South Korea, Thailand, Uruguay, Venezuela and Vietnam.[63]

Straight baselines drawn to and from low-tide elevations (Article 7 (4))

38. Other than the case of Norway,[64] there is little apparent state practice giving effect to Article 7 (4). The US has taken the position that 'similar installations' are those that are permanent, substantial and actually used for safety of navigation and that 'general international recognition' includes recognition by the major maritime users over a period of time.[65] While not strictly an application of Article 7 (4), in an analogous situation the United States protested a 1984 claim by the Federal Republic of Germany of straight baselines drawn out to a roadstead, and Germany modified its claim in 1994.[66] Likewise, the United States has protested a claim by Sudan that established straight baselines along shoals not more than 12 nautical miles from the mainland.[67]

Dependent archipelagos

39. Dependent archipelagos and the capacity of coastal States to draw straight baselines around such islands pursuant to Article 7 have proven contentious in state practice. These situations are distinguishable from the islands that comprise an archipelagic State which may be subject to the Article 47 archipelagic baseline regime. Straight baselines around and between islands of dependent archipelagos are permissible provided that, *mutatis mutandis*, the geographical circumstances verify the criteria of Article 7. This stems from the principle of entitlement of islands to maritime zones in the exact same terms as other land territory.[68] A recent study by Kopela examined the use of Article 7 in respect of dependent archipelagos.[69] Declarations appended to the LOSC by the Netherlands and the United Kingdom at the time of their ratification of the convention made clear that declarations of baselines not in conformity with Article 7 were inconsistent with the LOSC.[70] The United States, in particular, has protested the drawing of straight baselines around these islands, some of which may meet the geographic criteria of archipelagos. States whose baselines have been the subject of protest by the United States on these grounds Canada (Arctic Archipelago), Portugal (Azores), Denmark (Faroe Islands), Ecuador (Galapagos Islands), and Sudan.[71] A recent study has also identified instances of States such as Australia, China, Eritrea, France, India, Myanmar, Norway, Portugal, Spain and the United Kingdom drawing straight baselines around dependent archipelagos.[72]

Oceanic Islands

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[61] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 654.
[62] Ibid 654-655.
[63] Ibid Table 7.1, 654-655.
[64] Ibid 160.
[65] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 66.
[66] Ibid 118-120.
[67] Ibid 120, referring to the Territorial Waters and Continental Shelf Act of 1970 (Sudan) [6(1)].
[68] Cf. Article 121 (2) of the LOSC.
[69] Kopela, *Dependent Archipelagos in the Law of the Sea* (2013).
[70] Division of Ocean Affairs and the Law of the Sea (United Nations), *United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereunder* (29 October 2013), available at <www.un.org/Depts/los> (accessed 31 January 2014).
[71] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 108-112.
[72] Erik Franckx and Marco Benatar, "Straight Baselines Around Insular Formations Not Constituting an Archipelagic State", in Trần Trường Thủy & John Jenner (eds.), *The South China Sea: Towards Sovereignty Based Conflict or Regional Cooperation?* (Cambridge, Cambridge University Press: 2014) (forthcoming) 6-7.

40. The situation of oceanic islands raises some distinctive issues. These extend to islands which are recognised as such under Article 121 of the LOSC and as such have an entitlement to generate the full suite of maritime zones as recognised in Article 121 (2). There are two types of such islands. The first is the oceanic island State, of which Nauru is an example. The other is an oceanic island that is separate from the mainland State of which it forms a part. These islands may fall within or are adjacent to the EEZ of the mainland State, or may be at a significant distance from the mainland State in seas and oceans far distant from the mainland State. Ascension Island (UK), Bouvet Island (Norway), Campbell Island (New Zealand), Christmas Island (Australia), and Marion Island (South Africa) are examples. Provided straight baselines can be drawn around oceanic islands consistently with Article 7, then such baselines would be permissible.

Significance of state practice

41. Many publicists have commented upon the variations in state practice with respect to Article 7, which in turn has raised for consideration the significance of state practice as it relates to Article 7 and whether those variations in state practice have resulted in new customary international law regarding straight baselines. In a detailed assessment of this issue in 2005, Churchill observed that:

> Although the amount of non-conforming state practice is substantial, it still represents no more than about a quarter of coastal States parties to the Convention. It is also quite diverse, in the sense that it does not point to any particular way in which straight baselines should be drawn: in reality, it seems to suggest no more than that a coastal State may draw straight baselines however it likes. All this, coupled with the fact that at least eight different States and the EU have protested to one or more baseline claims, leads to the conclusion that practice relating to the drawing of straight baselines does not amount (yet) either to an agreed interpretation of the Convention or a new rule of customary international law.[73]

Even if not leading to a customary rule, the aforesaid practice – of States which are parties to the LOSC and the 1958 Convention on the Territorial Sea and the Contiguous Zone – must be further reviewed. As a number of directly interested States have adopted a practice in respect of straight baselines that relies on a 'flexible' interpretation of Article 7, it should be assessed as an element of interpretation of the treaty provisions. The criteria incorporated in Article 7 of the LOSC were drafted with such a degree of 'fluidity' precisely because no agreement on 'tighter' criteria was reached. Various States expressed the view that these criteria had to provide some room for adaptation to a broad range of circumstances. Not entirely surprisingly, the number of States which have protested relevant state practice in this regard, in proportion to the number of potentially interested States, is very small. The existence of a body of state practice that relies on the margin of appreciation of the indeterminate concepts embodied in Article 7 was acknowledged by O'Connell towards the end of UNCLOS III, when stating that:

> the attempt to restrict the straight baseline technique to coasts which are at least as complicated as that of Norway has failed. The concept of the 'general direction of the coast' is a matter of appreciation, not of scientific discovery, and this necessarily requires that a considerable margin of appreciation be applied in favour of the coastal State.[74]

3. Case Law

42. Since adoption and eventual entry into force of the LOSC there have been a number of disputes determined by courts or arbitral tribunals in which the status of Article 7 straight baselines have been considered. These cases have principally concerned maritime boundary disputes where the baselines from which maritime zones have been proclaimed have been relevant to the claims asserted by coastal States. However in those instances the principal issue for determination is what influence, if any, the straight baseline would have upon the delimitation of the maritime boundary and not the consistency of the straight baseline with the LOSC.[75] An analysis of some of the principal cases highlights the following observations by courts and tribunals.

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[73] Robin R. Churchill, "The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention" in Alex G. Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (2005) 91, 108; see also the more recent view of Yoshifumi Tanaka, *The International Law of the Sea* (2012) 50.

[74] D.P. O'Connell, *The International Law of the Sea* Vol I (1982) 214-215.

[75] See eg. *Maritime Delimitation in the Black Sea* (Romania v. Ukraine) Judgment [2009] ICJ Reports 61 [137] where the ICJ distinguished base points determined by a coastal State under LOSC articles 7, 9, 10, 12, and 15, from the delimitation

43. In the *Eritrea/Yemen Arbitration*,[76] the resolution of the dispute necessitated the identification of the appropriate baselines from which to determine each State's territorial sea and EEZ. The status of the Dahlaks, a "tightly knit group of islands and islets", and the capacity of the islands making up that group to be subject to straight baselines consistent with Article 7 of the LOSC was a matter of particular consideration.[77] While the Tribunal and both of the parties were in agreement that the Dahlaks were an appropriate island group for the establishment of a straight baseline system, ultimately the validity of the actual baselines proposed by the parties was not a matter the Tribunal was called upon to decide.[78] Brief reference was made to a feature known as 'Negileh Rock' which lay beyond the Dahlaks and which on certain charts was shown as a reef and not above water at any tidal state.[79] The Tribunal directly referred to Article 7 (4) and observed that "since Eritrea claims the existence of a straight baseline system, that claim seems to foreclose any right to employ a reef that is not proud of the water at low-tide as a baseline of the territorial sea."[80]

44. In the *Qatar v Bahrain* case[81] before the ICJ, a number of matters arose with respect to maritime delimitation and related territorial questions. Qatar made an application instituting proceedings against Bahrain in respect of disputes between the two States relating to sovereignty over certain islands and shoals, and the delimitation of the maritime areas between the two States.[82] As to the method of straight baselines, Bahrain contended that it was a multiple-island State characterised by a cluster of islands off the coast of its main islands. Bahrain applied the method of straight baselines, maintaining that the external fringe should serve as the baseline for the territorial sea.[83] However, the ICJ observed that:

> … the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in the immediate vicinity.[84]

Directly referring to Bahrain's claim that it was a 'multi-island State', the Court went on to observe that such an assertion does not allow the State "to deviate from the normal rules for the determination of baselines unless the relevant conditions are met."[85] The Court rejected Bahrain's contention that the maritime features off the coast of its main islands could be assimilated to a fringe of islands, noting that the islands were relatively small and that they would only be a part of a 'cluster of islands' or 'island system' if Bahrain's main islands were included.[86]

45. On the basis of the Court's decision in the *Fisheries* case, and the subsequent reliance upon that judgment by the ILC in its Draft Articles and the accompanying commentaries, the principles that are now embodied in Article 7 (1), 7 (3) and 7 (4) are reflective of customary international law.[87] In its more recent judgment in *Qatar v Bahrain* the Court directly referred to Article 7 (4) as reflecting customary international law.[88] While the customary nature of these provisions is doubtless, case law has yet to provide hard and fast rules as to the interpretation of the 'indeterminate concepts' in Article 7. This has been acknowledged by the Court since the *Fisheries* case where, in referring to the 'general direction of the coast', it stated that "however justified the rule in question may be, it is devoid of any mathematical precision."[89]

4. Commentary by Publicists

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of maritime areas between States, where it was observed that the court "must, when delimiting the continental shelf and exclusive economic zone, select base points by reference to the physical geography of the relevant coasts".

[76] *Eritrea v Yemen* (Maritime Delimitation) Award of the Arbitral Tribunal in the Second Stage of the Proceedings (17 December 1999) (1999) XXII RIAA 335.

[77] *Eritrea v Yemen* (1999) XXII RIAA 335 [139].

[78] *Eritrea v Yemen* (1999) XXII RIAA 335 [140-142].

[79] *Eritrea v Yemen* (1999) XXII RIAA 335 [143].

[80] *Eritrea v Yemen* (1999) XXII RIAA 335 [145].

[81] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)(Judgment)* [2001] ICJ Rep 40.

[82] *Qatar v. Bahrain (Judgment)* [2001] ICJ Rep 40 [31].

[83] *Qatar v. Bahrain (Judgment)* [2001] ICJ Rep 40 [210-211].

[84] *Qatar v. Bahrain (Judgment)* [2001] ICJ Rep 40 [212].

[85] *Qatar v. Bahrain (Judgment)* [2001] ICJ Rep 40 [213].

[86] *Qatar v. Bahrain (Judgment)* [2001] ICJ Rep 40 [213-214].

[87] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 127, 139.

[88] *Qatar v. Bahrain (Judgment)* [2001] ICJ Rep 40 [201].

[89] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 141-142.

46. Article 7 of the LOSC and its predecessor, Article 4 of the Convention on the Territorial Sea and the Contiguous Zone, have been the subject of analysis by a great many law of the sea publicists. O'Connell's major 2 volume work on *The International Law of the Sea* appeared in 1982-1984 and did not take into account the final text of the LOSC. As noted above, O'Connell did make certain observations with respect to Article 4 which have relevance to an appreciation of the system of straight baselines provided for under Article 7 of the LOSC.[90] This view is one that had previously been taken by Lauterpacht, who in 1958 had commented that the notion of the general direction of the coast and the application of that test was one that was "not free from difficulty."[91]

47. More recently, Lowe and Tzanakopolous have considered Article 7 and its relationship with the decision in *Fisheries*. In their opinion it is "debatable whether the decision indeed had any serious impact on the right to draw straight baselines", noting that the UK had acquiesced in Norway's right to draw such baselines.[92] They are of the view that contemporary state practice with respect to straight baselines tends to disregard the parameters that have been set in the LOSC and that straight baselines are viewed by some States as an open alternative to the normal baseline, and this has implications for the normativity of the customary law on straight baselines and how the conventional rule can be properly viewed as an exception.[93] In an equally recent analysis, Kopela states that "the success of Article 7 can only be judged in light of its purpose", and that the "problematic aspect" of this provision is "that it does not entirely reveal its purpose and objective". In specifically looking into the criterion of 'fringe of islands', Kopela contends that the "expansionary effect on Article 7" of state practice was "not unanticipated in light of [its] vague conditions". The point made by Kopela is that because of "this ambiguity, expanding tendencies need to be assessed by taking into consideration the purpose of straight baselines".[94]

48. Modern commentators, reflecting upon Article 7 of the LOSC predominantly consider the following elements:

- Deeply indented and cut into coastline;
- Fringe of islands;
- General direction of the coast;
- Length of straight baselines.

A deeply indented and cut into coastline (Article 7 (1))

49. Publicists have taken differing views on this issue. Reisman and Westerman are of the view that there must be more than one deep indentation along the coast, and observe that in the case where there is a single indentation along the coast then the closing line for a juridical bay would apply.[95] They are also of the view that the deep indention along the coastline must co-exist with a coastline that is cut into. Noting the reference made by the ICJ to this criterion in the *Fisheries* case,[96] Reisman and Westerman observe that:

> However it be construed, it is plain that the test requires that the conjunction of deep indentation and being cut into to be cumulative. In the locality under consideration, thereof, there must be a number of deep indentations such that the coastline appears to be cut-into.[97]

Recently, Tanaka has asserted that "There is no objective test that may identify deeply indented coasts."[98] Prescott and Schofield have noted that "there can be no doubt that the term 'deeply indented' must have both an absolute and a relative meaning…it is possible that 'deeply indented' refers to horizontal penetration of the land and 'cut into' refers to vertical incision."[99]

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[90] D.P. O'Connell, *The International Law of the Sea* Vol I (1982) 214-215.
[91] Sir Hersch Lauterpacht, *Development of International Law by the International Court* (1958) 192.
[92] Vaughan Lowe and Antonios Tzanakopoulos, "The Development of the Law of the Sea by the International Court of Justice" in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 177, 190; see *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 129-130.
[93] Lowe and Tzanakopoulos, "The Development of the Law of the Sea by the International Court of Justice" 190.
[94] Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) 74.
[95] Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 81.
[96] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 128-129.
[97] Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 82.
[98] Tanaka, *The International Law of the Sea* (2012), 49.
[99] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 145.

Fringe of islands along the coast (Article 7 (1))

50. With respect to the fringe of islands criteria, Tanaka observes that "It is also difficult to objectively identify the existence of a 'fringe of islands'. Whilst there must be more than one island in the fringe, the LOSC does not provide any further precision regarding the minimum number of islands. The concept of the coast's 'immediate vicinity' may also depend on subjective appreciation."[100] Prescott and Schofield on the other hand comment that "The reference to the fringe of islands being in the immediate vicinity of the coast must be construed to mean the landward edge of the fringe… While the intent of the phrase ['immediate vicinity'] is clear enough, Article 7 fails to deliver a clear-cut, objective test by which to judge whether certain islands are close enough to a mainland in order to be considered in its immediate vicinity."[101] Reisman and Westerman are of the view that this requirement in Article 7 (1) of the LOSC introduces three cumulative tests as follows. The first is a quantitative and spatially distributional test in that there must be a number of islands that are spatially related to each other so as to create a 'fringe'. The second is a spatial test with regard to the relation of the islands and coast in that they must be distributed 'along' the coast. The third is a relational element as between the islands and coast in terms of their proximity. They are of the view that each of these elements must be established cumulatively in order to meet the geographical test.[102] Kopela reviews the various aspects underlying the notion of 'fringe of islands', notably 'number of islands', 'compactness of the group', and 'relationship with the coast.'[103] The word 'fringe', it is put forward, "reflects the tightness of the group, but it also presupposes that this tightness will be determined always in relation to the coast."[104]

Highly Unstable Coastlines (Article 7 (2))

51. Brown suggests that given its location within the general provisions of Article 7, the provisions of Article 7 (2) are "intended to apply in situations where a system of straight baselines is justified by reference to the rules laid down in Article 7."[105] Brown considered that straight baselines drawn in reliance upon Article 7 (2) are to be part of a "system of straight baselines" and here a contrast is drawn between single straight baselines that may be drawn in reliance upon Article 9 and 10 of the LOSC.[106] Brown is of the view that the precise scope of Article 7 (2) is not clear, making particular reference to the difficulty associated in identifying a highly unstable coastline. The question is asked: "What degree of change over what period of time would be considered to constitute a high degree of instability?"[107]

52. Churchill and Lowe echo some of the concerns raised by Brown and assert that Article 7 (2) is "not very well drafted".[108] They also observe that the reference in Article 7 (2) to other natural conditions is "obscure, but appears to refer to causes of coastal instability other than deltas."[109] Roach and Smith link Article 7 (1) with Article 7 (2) and indicate that a coastline that is highly unstable because of the presence of a delta or other natural conditions, must also be one that is deeply indented and cut into or fringed with islands, before the basepoints can be drawn the furthest seaward extent of the low-water line.[110]

53. Hoque also subscribes to the view that Article 7 (2) is ambiguous, stating that "it is not clear upon which criteria the coast will be considered highly unstable."[111] In his opinion, the provision was adopted with the Ganges-Brahmaputra River delta in mind, but does not deal adequately with such situations.[112] Hoque considers that the provision "covers only the unstable characteristics of the coastline, not the unstable characteristics of the coastal seas and the geographic needs."[113] An aspect of particular concern in coastal seas is the creation and loss, due to deltaic sediments and currents, of islands from which basepoints may be drawn.[114] In light of this, Hoque states that "in hindsight… it would have been better that this type of situation was covered by a different

[100] Tanaka, *The International Law of the Sea* (2012), 49.
[101] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005), 147.
[102] Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 82-83.
[103] Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) 56-63.
[104] Ibid, 61.
[105] E.D. Brown, *The International Law of the Sea* vol 1 (1994) 27.
[106] Ibid.
[107] Ibid.
[108] R.R. Churchill and A.V. Lowe, *The Law of the Sea* 3rd (1999) 37-8.
[109] Ibid, 38.
[110] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 67.
[111] Hoque, *Bangladesh's Baseline* (2006) 72.
[112] Ibid 77.
[113] Ibid 76-77.
[114] Ibid.

paragraph in the convention."[115] Hoque also highlights the importance of the last part of the provision, that the "baselines shall remain effective until changed by the coastal State." This is another instance of the discretion given to States by Article 7, as "there is no time limit within which the baselines are to be revised."[116]

General direction of the coast (Article 7 (3))

54. The need for straight baselines to not depart from the general direction of the coast has been considered by Tanaka, who after reflection on the judgment in *Fisheries*[117] noted that the Court "seems to imply that 'the general direction of the coast' provides the principle governing the baseline; and that the straight baseline method is a result of the application of this principle."[118] His conclusion on this element in Article 7 (3) is that "there is no objective test which may identify the general direction of the coast. Neither is there any objective test to identify the close linkage between the land domain and the sea lying within the straight baselines."[119] Prescott and Schofield are of the view that this requirement, interpreted in light of the *Fisheries* decision, is one in which: "There is no reason why other countries should not treat the outer edge of a fringe of islands as the coastline from which departures of the straight baselines are measured, even if the fringe is not dovetailed into the mainland." They went on to observe that "Attempts to impose precise mathematical tests to measure the propriety of straight baselines are an interesting academic activity but predictably doomed to failure in the real world of national maritime claims."[120] Roach and Smith report that the US position is that straight baseline segments must not depart to any appreciable extent from the general direction of the coastline "by reference to general direction lines which in each locality shall not exceed 60 miles in length."[121] Reisman further adds that Article 7 relaxes whatever restraint the 1958 Convention had in that it allows baselines to be established offshore and it relaxes the prohibition on using phenomena that are not consistently above water as basepoints.[122]

Straight baselines drawn to and from low-tide elevations (Article 7 (4))

55. Prescott and Schofield have observed that there is a widespread belief that the Article 7 (4) exception applies only to Norway.[123] This view was endorsed by Tanaka, who has commented that "The first requirement of lighthouses or similar installations serves to benefit navigators because low-tide elevations are, by nature, not visible at all times. The second requirement, which is absent from Article 4 (3) of the TSC [Convention on the Territorial Sea and the Contiguous Zone], reflects the case of Norway where a straight baseline was drawn to and from a low-tide elevation with no lighthouse or similar installation."[124] Rothwell and Stephens, citing the writings of Marston, addressed the issue as to the length of time a navigational feature had to be in place on a low-tide elevation for it to qualify as a feature that could be utilised as a point for a straight baseline. They observe that "The LOSC is silent as to the length of time a lighthouse or similar feature should have been in situ, suggesting that a coastal State is free to build such a structure after which it may become eligible for the drawing of a straight baseline."[125]

Length of straight baselines

56. The length of straight baselines has been the subject of extensive comment by some publicists, often in the context of particular controversies. Fitzmaurice observed, with respect to the views of the ICJ in *Fisheries* that "The Court did not say that the baseline must be moderate and reasonable in *length*, but rather that it must be so in its general character, and must be drawn in a reasonable *manner*. But length is nevertheless an element in assessing what is reasonable and moderate."[126] Prescott and Schofield have also reverted to an analysis of the

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[115] Ibid 77.
[116] Ibid 72-73.
[117] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 129-130.
[118] Tanaka, *The International Law of the Sea* (2012) 47-48.
[119] Ibid 49.
[120] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 157.
[121] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 64.
[122] W. Michael Reisman, "Straight Baselines in International Law: a call for reconsideration" (1988) 82 *Proceedings of the American Society of International Law* 266.
[123] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 160.
[124] Tanaka, *The International Law of the Sea* (2012) 51.
[125] Donald Rothwell and Tim Stephens, *The International Law of the Sea* (2010), 45 n100 citing Geoffrey Marston, 'Low-Tide Elevations and Straight Baselines' (1972-1973) 46 *British Year Book of International Law* 405–423.
[126] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 1 (1986), 239.

baseline length by reference to *Fisheries*, and Norwegian state practice and the views of some States since that time as to what is an appropriate limitation on the length of straight baselines. They have noted that:

> In the baseline proclaimed by Norway in 1935 the maximum distance between two adjacent islands is 43.6nm between Points 21 and 22. This suggests that the maximum acceptable distance would not be less than 43.6nm… This [a maximum of 24nm as asserted by the US] seems unreasonable when the International Court of Justice noted that Norway's baselines were not contrary to international law and eight segments of the 1935 baseline exceeded 24nm in length.[127]

Another publicist, Alexander, has also made reference to how the ICJ's interpretation of the Norwegian baseline length should be viewed following adoption of the LOSC, observing that "Neither the 1958 nor the 1982 Conventions suggest a maximum limit, and the only potential yardstick is the 1935 Norwegian delimitation method approved by the ICJ. The longest line utilized by the Norwegians was the 44 mile line across Lopphavet."[128] In reviewing the the absence of a precise limitation upon the length of straight baselines in Article 7, Churchill and Lowe commented in the context of how the length of straight baselines needs to be read against the overall provisions of Article 7 as follows: "[i]t would seem, therefore, that there is in principle no restriction on the length of individual baselines, although obviously in practice the necessity for compliance with the general conditions set out above will be a restraining factor."[129] Tanaka, on the other hand, is of the view that "arguably length is an important element in assessing the validity of straight baselines."[130] While noting that "the LOSC does not provide a mathematical formula", the figures advanced being "mere suggestions", Kopela emphasises that the general conditions of Article 7 are "a 'restraining factor' regarding the use of exorbitantly long lines"[131].

5. Conclusions

57. The Committee observes that a significant number of coastal States have sought to proclaim straight baselines in reliance upon Article 7 of the LOSC. While Article 7 contains a number of constraints, there is also a margin by which coastal States can seek to legitimately interpret the drawing of straight baselines so as to reflect their distinctive circumstances. The Committee notes that in *Qatar v Bahrain* the ICJ indicated that the method of drawing straight baselines is to be "applied restrictively". However, the evolution of Article 7 via the judgment in *Fisheries*, work of the ILC, debates at the 1958 Geneva Conference and the resulting text of Article 4 of the Convention on the Territorial Sea and the Contiguous Zone, and the debates in and outcome of UNCLOS III, makes clear that notwithstanding a number of proposals for specific limitations to be placed upon the straight baseline regime, they were rejected in favour of the current text, which incorporates certain indeterminate concepts to be concretised in light of specific circumstances. In this respect the Committee recalls the comments of J.P.A. François in his capacity as Expert to the Secretariat of the 1958 Geneva Conference when he observed with respect to the work of the ILC and straight baselines:

> The Commission was criticized for not having drafted some of the articles as precisely as might be desired. Such expressions as "where circumstances necessitate", "to any appreciable extent", "sufficiently closely linked", "adequate grounds", "reasonable measures", "unjustifiable interference" and others are, it is said, out of place. The Commission cannot regard these objections as fully justified. It is true that the articles ought to be drafted in the clearest possible language. Perhaps the Commission's texts can still be improved in this respect. Nevertheless, it should be remembered that these expressions all occur in national legislation. In the opinion of the International Law Commission, a codification of international law can no more do without these expressions than can national law. Any attempt to codify international law without using such expressions will prove vain. In contentious cases, the meaning will have to be decided by an impartial authority, to which disputes regarding the interpretation of these expressions in specific cases are to be submitted.[132]

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[127] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 146.
[128] Lewis M Alexander "Baseline Delimitations and Maritime Boundaries" (1982-1983) 23 *Virginia Journal of International Law* 503, 518.
[129] Churchill and Lowe, *The law of the sea* 3rd (1999) 37.
[130] Tanaka, *The International Law of the Sea* (2012) 49.
[131] Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) 66.
[132] *United Nations Conference on the Law of the Sea, Volume III: First Committee (Territorial Sea and Contiguous Zone)*, 21st mtg, 69 [15], UN Doc A/CONFC.13/C.1/L.10 (1958); François was an ILC member from 1949-1961 and Special Rapporteur for the 'Law of the sea – regime of the high seas' (1950-1954, 1956) and 'Law of the sea – regime of the Territorial Sea' (1952-1956).

In the absence of objective criteria, a succession of indeterminate concepts have been used throughout the history of the straight baselines regime and this needs to be borne in mind when interpreting Article 7 of the LOSC.

58. The Committee also acknowledges that interpretations of Article 7 that are arguably not seen as consistent with the LOSC have been the subject of protest, principally by the United States but also by the European Union. The Committee also accepts that there may be other instances of diplomatic protests having been lodged with respect to state practice and Article 7 that have not been publicly released. Likewise a small number of significant maritime States have lodged Declarations under Article 310 expressing their view with respect to the drawing of straight baselines not in accordance with the LOSC. The reactions of these protesting States against state practice places some constraints on the emergence of customary international law at significant variance with their interpretation of the LOSC and the evolution of Article 7 as treaty law consistent with the Vienna Convention on the Law of Treaties (VCLT), where the protesting States are party to the relevant treaty.[133] The Committee acknowledges equally that the general rules of treaty interpretation as provided for in Article 31 of the VCLT are applicable and that it is legitimate to take into account state practice (of parties to the LOSC) with respect to the interpretation of Article 7, which incorporates 'indeterminate concepts' that stem from the negotiations in UNCLOS I and UNCLOS III. The weight accorded to that state practice must be assessed against whether it reflects the "agreement of the parties regarding its interpretation."[134] In this respect statements made by States during UNCLOS I and UNCLOS III bear particular significance.

59. The Committee notes that a number of publicists have been critical of the Article 7 straight baseline regime. Reisman and Westerman, writing in 1992, were firmly of the view that the regime of straight baselines requires a form of reconceptualization.[135] In 2005, Prescott and Schofield, for example commented that "A survey of the approximately 70 straight baselines drawn around the world demonstrates that the rules established in 1958 and 1982 to govern their delimitation have been bent out of shape. That should surprise no analyst. The terms of Article 7 are so imprecise that it would be possible for most countries to draw straight baselines along some or all of their coastlines. Nor would such countries need to invent new interpretations of terms in Article 7, because existing baselines provide all the justifications in terms of state practice and precedents that any could need."[136] More recently, Tanaka wrote in 2012 that "the rules governing straight baselines are so abstract that the application of the rules to particular coasts is to a large extent subject to the discretion of coastal States."[137] In 2013, Kopela claimed that "expanding tendencies need to be assessed by taking into consideration the purpose of straight baselines", which is not an easy task since such purpose and objective was not spelt out in Article 7.[138]

60. As to the general status of Article 7 and its interpretation, the Committee notes its observations in paragraphs 57-58. It endorses the observations of Churchill[139] that as at 2014 there is no agreed single interpretation of Article 7 or a new rule of customary international law. There is though significant evidence of state practice that, while applying straight baselines to distinct geographic settings, is in general conformity with Article 7 and consistent with the indeterminate concepts that it contains. There is also evidence that following protests by some States over practice not considered to be in conformity with Article 7 that some States have modified their straight baselines in conformity with the LOSC.

61. With respect to some of the specific provisions of Article 7, the Committee observes that the terms 'deeply indented and cut into' are criteria that are not subject to absolute precision in their interpretation. While they have traditionally been understood in the context of the geographical circumstances of the Norwegian coastline considered in the *Fisheries* case, the Committee notes that the Court referred to a consideration of "all the geographical factors involved."[140] This supports the view that a variety of geographical factors can be taken into account in order to determine whether the particular coastline in question is one that is deeply indented and cut into, which may involve the application of a proportionality test.[141]

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[133] Vienna Convention on the Law of Treaties 1155 UNTS 331 (VCLT).
[134] VCLT, Article 31 (3)(b).
[135] Reisman and Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992) 73-74.
[136] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005), 160.
[137] Tanaka, *The International Law of the Sea* (2012) 49.
[138] Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) 73-74.
[139] Churchill, "The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention" 108.
[140] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 141.
[141] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 141 which was applied in the case of the Lakesfjord and Porsangerfjord.

62. The Committee is of the view that Article 7 (2) is to be read independently, and not cumulatively, with Article 7 (1) and notes the historic basis for this provision is separate and distinctive from the criteria outlined in Article 7 (1). The Committee also notes the potential difficulties that may arise from a strict application of Article 7 (3) to the circumstances outlined in Article 7 (2) in that a highly unstable coastline may be one in which determining the general direction of the coast may present significant challenges. In that respect, the Committee notes that the 'general direction' criterion in Article 7 (3), recognised by the Court as devoid of any mathematical precision[142], is qualified by the words 'to any appreciable extent' which would permit a margin of appreciation for a coastal State seeking to draw straight baselines along a high unstable coastline.

63. The Committee is divided as to whether it is possible to specify limits on the length of straight baselines. Some Committee members favoured adopting a 24 nautical mile limit for straight baselines. Other Committee members were of the view that notwithstanding repeated efforts to place constraints on the length of straight baselines, the ILC, the 1958 Geneva Conference and UNCLOS III, and both the Convention on the Territorial Sea and the Contiguous Zone and the LOSC failed to do so. In this respect the Committee notes the emphasis placed upon proportionality in the *Fisheries* case, and that according to the Court in *Qatar v Bahrain* the regime should be "applied restrictively".

64. The Committee notes that in the case of dependent archipelagos, consistent with the ruling of the court in *Qatar v Bahrain* a State is unable to proclaim archipelagic baselines unless it meets the criteria of being an archipelagic State. In the absence of being able to proclaim archipelagic status a State that comprises multiple islands remains able to draw straight baselines if it meets the criteria identified in Article 7. In this respect the Committee observes that the application of Article 7 is not limited to continental States, and extends to multi-island States in which case some dependent archipelagos of main islands may meet the fringe of islands criteria in Article 7 (1).[143]

III. Article 47

A. Relevant Historical Background

65. While consideration was given in the nineteenth century to the status of waters that lay between islands and beyond groups of islands, there is no nineteenth century state practice with respect to the enclosure of waters that were adjacent to the islands that made up an archipelago.[144] The first formal consideration of whether a distinctive status should be assigned the waters that comprise an archipelago took place in the 1920s when the International Law Association (1924 and 1926), the American Institute of International Law (1925), and the *Institut de droit international* (1927 and 1928) gave some preliminary consideration to the matter.[145] In preparation for the 1930 Hague Codification Conference, active consideration was given to the status of the territorial sea of an archipelago, however no agreement was possible during the Hague Conference on this issue.[146] Academic debate continued during the 1930s, however it was the emergence of Indonesia and the Philippines as independent States that introduced for the first time significant state practice in the area.

66. Indonesia had long advocated that its status as a geographic archipelago should be given recognition in the law of the sea. In support of this claim successive Indonesian governments since independence in 1945 had asserted that the Indonesian islands and waters between them constituted a singular, unified nation.[147] This was reflected in the concept of *wawasan nusantara* which reflected the objective of the unification of the land, waters and the people of Indonesia.[148] *Wawasan nusantara* was first officially expressed by Indonesia in the 1957 Djuanda Declaration which affirmed the concept of the Indonesian archipelago as an entity, encompassing the islands and waters.[149] The Declaration was implemented internally in Act No 4 of 18 February 1960 which

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[142] *Fisheries* (United Kingdom v. Norway) [1951] ICJ Rep 116, 142.
[143] In this respect the Committee notes the recent study by Kopela on dependent archipelagos, which reviews the interpretation and application of the Article 7 criteria in regard to such geographical settings: Kopela, *Dependent Archipelagos in the Law of the Sea* (2013).
[144] D.P. O'Connell, "Mid-Ocean Archipelagos in International Law" (1971) 45 *British Year Book of International Law* 1, 3.
[145] Ibid 5-7.
[146] Ibid 8-10.
[147] These assertions became more developed in the light of the International Court of Justice decision in the *Fisheries* Case [1951] ICJ Reps 116; John G. Butcher, "Becoming an Archipelagic State: The Juanda Declaration of 1957 and the 'Struggle' to gain International Recognition of the Archipelagic Principle" in Robert Cribb and Michelle Ford (eds), *Indonesia beyond the Water's Edge* (2009) 28, 34-35.
[148] *Wawasan* means outlook; *nusantara* refers to people.
[149] Butcher, "Becoming an Archipelagic State", 38-40.

indicated that "Indonesian waters consist of the territorial sea and the internal waters of Indonesia"[150] and that Indonesian internal waters were those that lay within the baselines. The baselines were to be "straight lines connecting the outermost points of the low water mark of the outermost islands or part of such islands comprising Indonesian territory".[151]

67. In the case of the Philippines, which achieved independence from the United States of America in 1946, the first international indication of the extent of a Philippines claim to the waters between the islands of the Philippines archipelago came in 1955, reinforced in 1956 during communications with the United Nations in response to the ILC's draft articles on the law of the sea.[152] This claim was given greater clarity following adoption of the Republic Act No. 3046,[153] which defined the baselines that comprised the outer limits of the Philippines and reaffirmed aspects of the 1955 and 1956 *notes verbale*, including the historical basis for the claim.

B. United Nations Conferences on the Law of the Sea: I, II, III

68. The 1958 United Nations Conference on the Law of the Sea (UNCLOS I) did not directly address what was at that time referred to as a 'mid-ocean archipelago'. This in part reflected the inability of the ILC to agree upon any precise recommendation on the matter.[154] At UNCLOS I, it was asserted by Indonesia, the Philippines, Denmark and Yugoslavia that the developing rules with respect to straight baselines could also be applied to these archipelagos.[155] At the 1960 United Nations Conference on the Law of the Sea (UNCLOS II), notwithstanding efforts by the Philippines to generate some debate as to the breadth of the territorial sea as it related to certain historic waters, there was no active consideration of archipelagic waters.[156]

69. With a decision having been made to include the topic of "Archipelagos" on the agenda of the Third United Nations Conference on the Law of the Sea (UNCLOS III), in 1973 during sessions of the Seabed Committee, Fiji, Indonesia, Mauritius, and the Philippines sought to advance debate by introducing proposals which outlined the principles for an archipelagic regime.[157] During the final 1973 session of the Seabed Committee the United Kingdom indicated a willingness to accept the archipelagic State concept subject to objective criteria regarding the identification of archipelagic States, and safeguards with respect to navigational freedoms. This resulted in a set of 'Draft Articles on Archipelago' being prepared.[158] These developments formed the basis for formal proposals eventually put to UNCLOS III in 1974.[159] An initial threshold issue related to the eligibility of an archipelago to make certain claims, and the distinction between continental and mid-ocean archipelagos. This was highlighted not only because of the great geographical variety among archipelagos, but also because of concerns that the definition could be expanded to cover a wide variety of geographic circumstances. In 1975 an important breakthrough in the negotiations occurred when the Bahamas introduced a document titled "18 Principles for Inclusion in Archipelagic Articles"[160] which had the effect of crystallising the debate with respect to those States possibly entitled to archipelagic status, and sought to give clarity to the issues associated with the drawing of baselines. By 1976 agreement had been reached within UNCLOS III that the archipelagic regime would focus on mid-ocean archipelagos, and not those archipelagos associated with a continental State. UNCLOS III ultimately decided to deal with the question of archipelagos in Part IV of the final convention text.

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[150] Act No. 4 (18 February 1960) (Indonesia), art 1 (1).
[151] Act No. 4 (18 February 1960) (Indonesia), art 1 (2). Indonesia has conceded that the Declaration was "prepared in some haste" in order to achieve recognition of archipelagic waters prior to UNCLOS II: *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia) [2002] ICJ Reports 625 [130].
[152] "Note Verbale Dated 20 January 1956 from the Permanent Mission of the Philippines to the United Nations" (1956) Vol II *Yearbook of the International Law Commission* 69-70. In commenting on the definition of the high seas, a *note verbale* lodged by the Philippines stated that: "All waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines."
[153] 'An Act to Define the Baselines of the Territorial Sea of the Philippines', reprinted in S. Houston Law, Robin Churchill and Myron Nordquist (eds) *New Directions in the Law of the Sea* Vol 1 (1973) 27.
[154] ILC "Articles concerning the Law of the Sea with commentaries" 270 where in discussing draft Article 10 'Islands' the ILC noted that "The Commission had intended to follow up this article with a provision concerning groups of islands. Like The Hague Conference… the Commission was unable to overcome the difficulties involved."
[155] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 118-119.
[156] O'Connell, "Mid-Ocean Archipelagos in International Law", 22.
[157] R.P. Anand, *Origin and Development of the Law of the Sea* (1983) 203.
[158] UN Doc. A/AC.138/SC.II/L.48.
[159] 'Fiji, Indonesia, Mauritius, and Philippines: draft articles relating to archipelagic states' Doc A/CONF.62/C.2/L.49 *Third United Nations Conference on the Law of the Sea, Official Records* Vol III (New York, United Nations: 1975) 226.
[160] Nandan and Rosenne (eds), *United Nations Convention on the Law of the Sea: A Commentary* Vol II (1993) 405.

C. LOSC Text

70. Part IV of the LOSC titled 'Archipelagic States' encompasses nine articles and brings together the principal articles of the convention dedicated to the specific law of the sea issues that arise with respect to archipelagos. Part IV, however, both directly and indirectly cross-refers to other provisions in the LOSC and as such no effort is made to create a specialist regime for archipelagic States outside of the general law of the sea. Nevertheless, Part IV does create a distinctive regime applicable to the island States that make up certain archipelagos, especially with respect to archipelagic baselines and archipelagic navigation.

71. An 'archipelagic State' is entitled to draw straight archipelagic baselines consistent with Article 47 (1). An 'archipelagic State' is defined in Article 46 (a) as "a State that is constituted wholly by one of more archipelagos and may include other islands". Such a State must therefore not only meet the criteria of a State under international law, but it needs to also meet the geographic criteria of being a State principally comprised of one or more archipelagos. Article 46 (b) provides further definition for the meaning of an archipelago, including reference to the term meaning "a group of islands, including parts of islands".

72. An archipelagic State may draw archipelagic baselines which join the outermost points of the outermost islands and drying reefs of the archipelago in the manner provided for under Article 47, which provides as follows:

Article 47

Archipelagic baselines

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

7. For the purpose of computing the ratio of water to land under paragraph l, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

D. Analysis of Article 47

1. Text

73. The core elements of the straight archipelagic baseline provisions in Article 47 set out five tests which the baselines must satisfy.[161] In 1989 the UN study identified those five tests as being:[162]

1. That the baselines include the main islands;[163]
2. That the baselines must enclose an area of sea at least as large as the area of enclosed land but must not be more than nine times that land area;[164]
3. No segment of baseline may exceed 125 nautical miles in length;[165]
4. Not more than 3 per cent of baseline segments may exceed 100 nautical miles;[166] and
5. That the baselines must not depart to any appreciable extent from the general configuration of the archipelago.[167]

74. These requirements make clear that the archipelagic baselines are to enclose the main islands of the archipelago and may extend to the outermost points and drying reefs of the archipelago, thereby thwarting any attempts to enclose small separate clusters of islands that do not include one of the main islands of the archipelago. In addition, the water to land ratio requirement ensures that the archipelagic State is one in which there is a focus upon the ocean spaces which connect the islands, rather than a State which is dominated by large island land masses. For example, Cuba does not qualify as an archipelagic State entitled to draw archipelagic baselines because of the size of its main islands compared to the size of its accompanying islands and the consequence this has for the water to land ratio. The Bahamas does qualify because of the presence of several main islands and adjoining smaller islands including atolls.

75. In its 1989 commentary to Article 47, the UN Office for Ocean Affairs and the Law of the Sea made reference to the 3 per cent rule embedded in Article 47 (2) and how the capacity of an archipelagic State to draw baselines in excess of 100 nautical miles will be contingent upon the total number of baselines enclosing the archipelago. In this respect it was noted that: "Since there is no restriction on the number of segments a country can draw, and since the more segments used the closer the system is likely to be to the general configuration of the archipelago, it will usually be possible to adjust the number of segments to secure the necessary number of very long baselines."[168] Reference was also made to Article 47 (7) and the means by which an archipelagic State can calculate the area of water to land and be able to include in the calculations certain waters. With respect to those waters which are "enclosed or nearly enclosed by a chain of limestone islands and drying reefs" that are on the perimeter of a steep-sided oceanic plateau, specific reference was made to the fact that there "might be difficulties in deciding whether particular formations could be properly judged to nearly enclose a specific plateau."[169]

2. State Practice

76. Since the conclusion of UNCLOS III, and adoption of the LOSC a total of 22 States have sought to claim archipelagic status.[170] Those States claiming status as an archipelagic State under the LOSC, nineteen of which have declared archipelagic baselines in reliance upon Article 47 of the LOSC, are identified in Table 1. On the basis of available information with respect to archipelagic State claims,[171] the following observations can be made. The water to land ratio of 9:1 to 1:1 is met by the vast majority of archipelagic States. In 1977 Cape Verde proclaimed archipelagic baselines which resulted in a water to land ratio that exceeded the limits set

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[161] Prescott, "Straight and Archipelagic Baselines" 46 observed that "Three of the five tests are incapable of consistent objective interpretation".
[162] *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Se*a (1989) 35.
[163] LOSC, Article 47 (1).
[164] LOSC, Article 47 (1); that is the water to land ration is between 1:1 and 9:1.
[165] LOSC, Article 47 (2).
[166] LOSC, Article 47 (2).
[167] *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Se*a (1989) 35.
[168] Ibid.
[169] Ibid 36. This is an issue that has been relevant for the Bahamas and Mauritius.
[170] An extensive review of state practice amongst archipelagic States up to 1991 can be found in Barbara Kwiatkowska and Etty R. Argoes, *Archipelagic State Regime in Light of the 1982 UNCLOS and State Practice* (1991).
[171] Drawn from the Law of the Sea Bulletin, Limits in the Seas, the United Nations Practice of Archipelagic States (1992), and Roach and Smith, *Excessive Maritime Claims* 3rd (2012).

down in Article 47 (1).[172] The United States protested this claim in 1980. In 1992 Cape Verde modified its straight archipelagic baselines in a manner that is consistent with the LOSC.[173] In the case of Papua New Guinea, the water to land ratio has been calculated at 0.39: 1 if the main island of New Guinea is included.[174] In the case of the Seychelles, which has enclosed four separate groups of islands within straight archipelagic baselines, one of those enclosures appear to significantly exceed the 9:1 ratio. When applying the land to water ratio test, Prescott and Schofield claim that the Bahamas counts oceanic plateaus to satisfy the test.[175]

77. It would appear on the basis of existing state practice that the 125nm baseline length constraint is not a significant issue for the great majority of archipelagic States, with only the Maldives appearing to exceed that limitation with three of its 37 baselines in the 100-125nm range. These claims have been subject to protest by the United States.[176] Papua New Guinea appears to be the only archipelagic State with a baseline in excess of 125nm. Cape Verde adjusted the length of two of its straight archipelagic baselines in 1992 in response to a United States protest to achieve compliance with this provision.[177]

78. Some archipelagic States have adjusted their archipelagic baselines from time to time, partly as a result of the changing circumstances of the territory that makes up their State. Indonesia, one of the largest archipelagic States, modified its original 1960 baselines with Act no. 6/1996 on Indonesian Waters. The changes that were made in regard to the baselines/basepoints around the Celebes Sea included Pulau Sipadan and Pulau Ligitan within the Indonesian archipelagic baselines system. A further baseline designation occurred in 2008 under PP no. 37/2008 (19 May 2008) which revised the baseline system in the Sulawesi Sea, in the vicinity of Timor, and off the south coast of Java. Changes made to Indonesia's archipelagic baseline on the south coast of Java were made in order to accommodate the three per cent requirement of Article 47 (2) with the effect that one long baseline has now been divided into three shorter ones. The new baseline configuration here has been shifted slightly landwards, only minimally impacting upon Indonesia's archipelagic waters and territorial sea claims.[178]

3. Case Law

79. There has to date been little case law interpreting Article 47, or even Part IV of the LOSC. However in *Qatar v Bahrain* the ICJ did make some observations with respect to the interpretation of Article 47. In that case Bahrain had contended that it was a de facto archipelago and that it was entitled to declare itself an archipelagic State under Part IV of the LOSC and to accordingly draw baselines consistent with Article 47.[179] While the ICJ took the view that it was not required to take a position on the issue of Bahrain's status as an archipelagic State as it had not formally made such a claim,[180] the Court did observe that "in such a situation the method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV".[181] The Court had also declared that the fact a State may consider itself to be a de facto archipelagic State "does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met."[182] In his dissenting opinion, Judge *ad hoc* Torres Bernárdez observed that Bahrain had not fulfilled the obligations in the LOSC with respect to the drawing of straight archipelagic baselines.[183] As to Bahrain's assertion that it was a de facto archipelagic State, it was noted that there is "no such thing in conventional or general international law as a 'secret archipelagic State' appearing in or disappearing from general international judicial proceedings or international relations in general."[184]

4. Commentary by Publicists

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[172] The Cape Verde claim enclosed an area of water of 50,546 sq km, while the land area was 4,031 sq km resulting in an approximate ratio of 12.5: 1.
[173] See Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 209.
[174] The island of New Guinea is divided by a land border that runs north/south along the axis of 141E and divides the island such that the eastern portion is under the title of Papua New Guinea and the western portion is under the title of Indonesia; the island is unique as it is the only island that forms a portion of two archipelagic States.
[175] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 177.
[176] See Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 216.
[177] See ibid, 209.
[178] Clive Schofield and I. Made Andi Arsana "Closing the loop: Indonesia's revised archipelagic baselines system" (2009) 1 (2) *Australian Journal of Maritime and Ocean Affairs* 57, 61-2.
[179] *Qatar v. Bahrain (Merits, Judgment)* [2001] ICJ Rep 40 [180-183].
[180] *Qatar v. Bahrain (Merits, Judgment)* [2001] ICJ Rep 40 [183].
[181] *Qatar v. Bahrain (Merits, Judgment)* [2001] ICJ Rep 40 [214].
[182] *Qatar v. Bahrain (Merits, Judgment)* [2001] ICJ Rep 40 [213].
[183] *Qatar v. Bahrain (Merits, Judgment)* [2001] ICJ Rep 40, Dissenting Opinion of Judge ad hoc Torres Bernárdez, 279-280 [55-56].
[184] *Qatar v. Bahrain (Merits, Judgment)* [2001] ICJ Rep 40, Dissenting Opinion of Judge ad hoc Torres Bernárdez, 280 [56].

80. Churchill and Lowe have identified a total of seven conditions for the drawing of archipelagic baselines of which they observe that two are "precise and mathematical" while the remainder they classify as "more general and less precise".[185] They observe that the land/water ratio requirement was intended to "accommodate the main archipelagic claims" and refer to the Indonesian and Philippine claims as being 1:1.2 and 1:1.8 respectively.[186] With respect to the limitations on the length of archipelagic baselines they observe that the figures are "generous" and that "their choice is not based on any objective geographical, ecological or oceanographical factors".[187] As to the interpretation of the main islands of the archipelago, they observe that the meaning of that term is unclear and that it could refer to "the largest islands, the most populous islands or the islands most prominent in some other way."[188] As to the requirement that the baselines not depart from the general configuration of the archipelago they observe that "it may be doubted" whether archipelagos have an ascertainable configuration.[189] They also observe that "[i]t is not necessary for an archipelagic State to attempt to enclose all the islands making up that State in a system of archipelagic baselines" and make reference to Article 46 and its reference to an archipelagic State including a number of archipelagos and islands.[190]

81. Prescott and Schofield argue that "[i]n contrast to the provisions for straight baselines, those relating to archipelagic baselines are technically robust, leave little room for interpretation and represent a clear attempt to provide rational tests by which to determine the validity or otherwise of a particular archipelagic baseline system."[191] When interpreting Articles 46 and 47, Prescott and Schofield say that it is unclear as to whether the articles explicitly permit or forbid the construction of a set of archipelagic baselines around each archipelago in an archipelagic State.[192]

82. Roach and Smith observe that "[u]ntil an archipelagic State claims archipelagic status, the normal baseline is the low-water line around each island."[193] They subsequently observe that notwithstanding the provisions of Part IV, several continental States with offshore groups of islands that may be described as archipelagos but which do not meet the juridical definition in Article 46 of the LOSC, have sought to enclose "islands with straight baselines in a manner simulating an archipelago."[194]

83. Brown in his analysis has considered the relationship between paragraphs 1 and 4 of Article 47 with respect to drying reefs and low-tide elevations, and observes as follows: "Since a drying reef is a form of low-tide elevation, it would seem that the effect of Paragraph 1 is to add a third exception to Paragraph 4's prohibition against using basepoints on low-tide elevations. Accordingly, low-tide elevations taking the form of archipelagic drying reefs are not subject to either the distance criterion or the installations criterion applicable to other low-tide elevations."[195] A particular aspect of Brown's analysis of these provisions is the link between Article 47 (4) as it relates to low-tide elevations and Articles 4 (3) and 11 (1) of the Convention on the Territorial Sea and the Contiguous Zone and the drawing of baselines to low-tide elevations. Brown commented that "Given a territorial sea breadth of 12 miles, the effect of the second part of Article 47 (4) would be to permit very considerable extensions of archipelagic waters in areas where the islands of an archipelago are merely the raised portions of a submarine platform."[196]

5. Conclusions

84. The Committee notes that Part IV of the LOSC was carefully drafted during UNCLOS III to reflect the aspirations of those States that were pressing for recognition under the law of the sea of archipelagic State

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[185] Churchill and Lowe, *The Law of the Sea* 3rd (1999) 123. In this respect it should also be noted that they observe with respect to the general and less precise conditions: "many of which parallel the conditions governing the drawing of straight baselines". Ibid.
[186] Ibid.
[187] Ibid, 124.
[188] Ibid.
[189] Ibid.
[190] Ibid 125.
[191] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 171-172; cf. an earlier comment by Prescott who observed that "Three of the five tests are incapable of consistent objective interpretation": Prescott, "Straight and Archipelagic Baselines" 46.
[192] Prescott and Schofield, *The Maritime Political Boundaries of the World* 2nd (2005) 174.
[193] Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 23.
[194] Ibid 208, where reference is made to the practice of Canada, Denmark, Ecuador, Portugal, Sudan and the United Kingdom.
[195] Brown, *The International Law of the Sea* vol 1 (1994) 113.
[196] Ibid 114.

status. That the technical provisions of Article 47 were only finalised following extensive consultations with the principal aspiring archipelagic States has resulted in substantive compliance by the great majority of those States claiming Archipelagic State status since the entry into force of the LOSC. The Committee observes that variations in state practice which appear to depart from Article 47 have either been relatively minor, or subject to protest by other States, which in some instances has resulted in an adjustment of state practice and consistency with the LOSC.

85. Part IV of the LOSC has given greater status to the 'Archipelagic State' and has raised issues as to whether a State must declare itself as such to be able to draw straight archipelagic baselines consistent with Article 47. The ICJ in *Qatar v Bahrain* has suggested that for a State to enjoy entitlements under Part IV of the LOSC, including the drawing of Article 47 archipelagic baselines, then the making of such a declaration is necessary. The Committee notes in particular the significance of the relationship between Articles 46 and 47 which has been reinforced by the decision in *Qatar v Bahrain* with the emphasis upon the connection in Articles 46 and 47 between an 'archipelagic State' and a State able to draw straight archipelagic baselines consistent with Article 47.

86. The Committee notes that compared to Article 7 of the LOSC, there is little room for widely varying interpretation of the more technical provisions of Article 47. On the other hand, terms such as 'main islands', 'appreciable extent', and 'general configuration' found within Article 47 are more indeterminate and provide the archipelagic State with some capacity to apply those provisions consistent with its particular geographic circumstances.

87. With respect to the 3 per cent straight archipelagic baseline requirement in Article 47 (2), the Committee notes that this provision should be applied to each set of archipelagic baselines drawn by an archipelagic State around each archipelago that comprises the archipelagic State.[197]

IV. Issues for Committee deliberation during its 2014-2016 work phase

88. With respect to Articles 7 and 47, the Committee will continue to explore the following issues during the second phase of its work during 2014-2016.

1. The interpretation of Article 7 (2) with respect to deltas and unstable coastlines;
2. The meaning of 'main islands' in Article 47 (1);
3. The legal consequences arising when the status of an archipelagic State and that State's capacity to proclaim archipelagic baselines is disputed; and
4. The significance and relevant state practice with respect to Article 50 and the drawing of closing lines for the delimitation of internal waters within an archipelagic State.

89. In addition, consistent with the Committee's mandate Tasks 2, 3, 4, and 5 will also be addressed. The Committee may also consider extending its mandate to consider:

- the interpretation and relevant state practice with respect to Article 9 dealing with mouths of rivers.

[197] See for discussion on this point *United Nations Convention on the Law of the Sea: A Commentary* Vol II, 430-431.

Annex I

Archipelagic States and Archipelagic Baseline Laws and Proclamations[198]

No	State	Legislation/Proclamation	Date
1	Antigua and Barbuda	Maritime Areas Act 1982 (CAP. 260)	1 September 1982
2	The Bahamas	The Archipelagic Waters and Maritime Jurisdiction 1993; modified by The Archipelagic Waters and Maritime Jurisdiction (Archipelagic Baselines) Order 2008	4 January 1996; 8 December 2008
3	Cape Verde	Decree Law No. 60/IV 92	21 December 1982
4	Comoros	Law No. 82-005; Presidential Decree No. 10-092	6 May 1982; 13 August 2010
5	Dominican Republic	Act 66-07	22 May 2007
6	Fiji	Marine Spaces (Archipelagic Baselines and EEZ) Order, Legal Notice No. 117 of 1981	1 December 1981
7	Grenada	Grenada Territorial Sea and Maritime Boundaries Act 1989; Statutory Rules and Orders No. 31 of 1992	25 April 1989; 16 November 1992
8	Indonesia	List of geographical coordinates of points of archipelagic baselines, Government Regulation No. 38 of 2002 (as amended by Government Regulation No. 37 of 2008)	19 May 2008
9	Jamaica	The Maritime Areas Act, 1996; baselines promulgated by the Exclusive Economic Zone (Baselines) Regulation, 1992	12 October 1992
10	Kiribati	Maritime Zones (Declaration) Act 1983 (Archipelagic straight baselines not drawn)	16 May 1983
11	Maldives	Maritime Zones Act No.6/96	27 June 1996
12	Marshall Islands	Maritime Zones Declaration Act 1984 (Archipelagic straight baselines not drawn)	13 September 1984
13	Mauritius	Maritime Zones Act 2005; Maritime Zones (Baselines and Delineating Lines) Regulations 2005	5 August 2005
14	Papua New Guinea	Offshore Seas Declaration 1978 (Declaration of the baselines by method of coordinates of base points for purposes of the location of archipelagic baselines)	25 July 2002
15	Philippines	Republic Act No. 9522, 2009	10 March 2009
16	Saint Vincent and the Grenadines	Maritime Areas Act 1983 (Archipelagic straight baselines not drawn)	19 May 1993
17	Sao Tome and Principe	Law No. 1/98	31 March 1998
18	Seychelles	Maritime Zones Act 1999; Maritime Zones (Baselines) Order, 2008	6 November 2008
19	Solomon Islands	Legal Notice No. 41 of 1979: Declaration of Archipelagic Baselines (The Delimitation of Marine Waters Act (No. 32 of 1978))	31 August 1979
20	Trinidad and Tobago	Archipelagic Waters and Exclusive Economic Zone Act	11 November 1986
21	Tuvalu	Tuvalu Maritime Areas Act 2012; Declaration of Archipelagic Baselines 2012	4 May 2012; 22 November 2012
22	Vanuatu	Maritime Zones Act No. 6 of 2010; Maritime Zones Act [CAP 138] Amendments of the Schedule, Order No. 81 of 2009	18 June 2010; 29 July 2009

[198] Prepared from Roach and Smith, *Excessive Maritime Claims* 3rd (2012) 206-208.

Annex II

Straight Baselines and Archipelagic Baselines

Reprinted from: B.Kwiatkowska, Decisions of the World Court Relevant to the UNCLOS (2nd Revised Edition 2010), pages 10-11: Straight Baselines and pages 48-50: Archipelagic Baselines at: http://nijhoffonline.nl/credited_person?id=KwiatkowskaB & http://www.brill.nl/decisions-world-court-relevant-un-convention-law-sea

Straight Baselines

1958 TSC, Articles 4 and 5(2); 1982 UNCLOS, Articles 7 and 8(2):

1958 TSC, Article 4(1); 1982 UNCLOS, Article 7(1): *Anglo/Norwegian Fisheries* Judgment, ICJ Rep. 1951, 139, 143 (*dispositif*); *Tunisia/Libya (Merits)* Dissent Evensen, ICJ Rep. 1982, 315; *Qatar v. Bahrain (Merits)* Judgment, ICJ Rep. 2001, 103-104, paras 211-215; *Romania v. Ukraine* Judgment, ICJ Rep. 2009, 61, paras 124-129, 136-137; Hearings, CR 2008/20, 20, para.25 and at 22, para.28 [Counsel Pellet, 4 Sep 2008], CR 2008/24, 32, para.55 [Counsel Bundy, 9 Sep], CR 2008/26, 13, para.53 [Counsel Queneudec, 10 Sep], 23, para.13 and at 25-26, paras 22-29 [Bundy], CR 2008/31, 13, para.15 [Counsel Lowe, 16 Sep 2008] www.icj-cij.org.

1982 UNCLOS, Article 7(2): *Nicaragua v. Honduras (Merits)* Separate O. Ranjeva, ICJ Rep. 2007, 767, para.7, Dissent Torres Bernardez, 826, para.161.

1958 TSC, Article 4(2); 1982 UNCLOS, Article 7(3) and Article 47(3) - general direction of the coast and link to the land domain: *Anglo/Norwegian Fisheries* ICJ Rep. 1951, 116 - Judgment, 133, 135, 140-142, Separate O. Hsu Mo, 154-155, 156; *North Sea* Pleadings, Vol.II, 92 [Counsel Sir Humphrey Waldock, 29 Oct 1968], 221 [Agent Riphagen, 7 Nov], 272 [Waldock, 11 Nov 1968]; *Tunisia/Libya (Merits)* Separate O. de Arechaga, ICJ Rep. 1982, 138; *Gulf of Maine* Pleadings, Vol.V, 479 [US Reply], Vol.VII, 223 [Counsel Colson, 10 May 1984]; *Indonesia/Malaysia (Merits)* Judgment, ICJ Rep. 2002, 679, 683, paras 130, 137; Hearings, CR 2002/29, 54-55 [Counsel Pellet, 4 June], CR 2002/32, 28 n.36 [Counsel Crawford, 7 June 2002] www.icj-cij.org; 2002 *Russia v. Australia Volga* Separate O. Cot, para.17 www.itlos.org.

1958 TSC, Article 4(3); 1982 UNCLOS, Article 7(4) & Article 47(4) - low-tide elevations: *Anglo/Norwegian Fisheries* Judgment, ICJ Rep. 1951, 137-138, 140; *Tunisia/Libya (Merits)* Separate O. de Arechaga, ICJ Rep. 1982, 139, Dissent Evensen, 302, 316; 1999 *Eritrea/Yemen Maritime Delimitation (Phase II)* Award, para.144 www.pca-cpa.org; *Qatar v. Bahrain (Merits)* Judgment, ICJ Rep. 2001, 100, 102, paras 201, 208 www.icj-cij.org; 2012 *Bangladesh/Myanmar Bay of Bengal Maritime Boundary Delimitation* Judgment, para.58 www.itlos.org.

See also Low-Tide Elevations under 1958 TSC, Article 11; 1982 UNCLOS, Article 13

1958 TSC, Article 4(4); 1982 UNCLOS, Article 7(5) and Article 47(6) - economic interests: *Anglo/Norwegian Fisheries* Judgment, ICJ Rep. 1951, 133.

1958 TSC, Article 4(5); 1982 UNCLOS, Article 7(6) - another State's TS's cutt off from the HS/EEZ: *Anglo/Norwegian Fisheries* Pleadings, Vol.I, 95 [UK Memorial], 396, 470, 609 [UK Reply]; *Gulf of Fonseca* Oral Hearings, C 4/CR 91/45, 28 [Counsel Bowett, 10 June 1991]; 2002 *Belize/Guatemala* OAS Facilitators' Proposals, B-para.5 www.belize-guatemala.gov.bz/ & http://www.oas.org/sap/peacefund/belizeandguatemala ; Note Verbale of Pakistan Protesting Baseline System of India of 6 Dec 2011, including India's Base Points 1 to 3 of Schedule-I, which encroach upon Pakistan TS and territorial limits in Sir Creek and which violate UNCLOS Article 7(6), in *UN Law of the Sea Bulletin* 33 (2012 No.78) www.un.org/Depts/los/; India/Pakistan Sir Creek Talks Scheduled During UNGA on 16-17 Sep 2013 http://news.outlookindia.com/items.aspx?artid=805247 , http://www.asianewsnet.net/Indo-Pak-dialogue-futile-49796.html & http://www.thehindu.com/news/national/loc-killings-will-delay-secretarylevel-talks-india/article5019294.ece and 1968 *India/Pakistan Rann of Kutch* Award [7 ILM 633 (1968); 50 ILR 2; 23 ICLQ 821 (1974)].

Cf. *UNCLOS III Off. Rec.* Vol.XVI, Statement of Rosenne (Israel), 56, para.49, 31 March 1982 (1984).

1958 TSC, Article 5(2); 1982 UNCLOS, Article 8(2) - preservation of IP: *Fisheries Jurisdiction* Pleadings (UK), 475 [Counsel Silkin, 25 March 1974]; *Great Belt* Pleadings, 540 [Denmark 's Counter-Memorial] www.icj-cij.org.

Archipelagic Baselines : 1982 UNCLOS Articles 47-48

Libya/Malta Pleadings, Vol.I, 129 [Libya's Memorial]; *Gulf of Fonseca* Judgment, ICJ Rep. 1992, 593, para.393; Hearings, C 4/CR 91/45, 28 [Counsel Bowett, 10 June 1991]; *Qatar v. Bahrain (Merits)* Judgment - see Bahrain *infra*; Oral Hearings, CR 2000/14, 36-37 [Counsel Reisman, 13 June 2000], CR 2000/16, 48-50 [15 June 2000]; *Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits)* Hearings, CR 2002/12, 65-6 [Counsel Crawford, 6 March], CR 2002/13, 28 [7 March 2002]; *Indonesia/Malaysia* - see Indonesia and the Philippines *infra*.

For Malta's 1971 Territorial Waters and Contiguous Zone Act No.13, as Amended in 1975, 1978 and 1981, see *Libya/Malta* Pleadings, Vol.V, 14 [Map 2], 42 [Fig.11]; *The Law of the Sea - Baselines: National Legislation with Illustrative Maps* 217-218 (UN 1989); *The Law of the Sea - National Legislation on the Territorial Sea* 208-209 (UN 1995). The water to land ratio of Malta (comprising islands of Malta , Gozo, Comino and Cominotto, as well as Fifla of 500 by 250 metres) is 0.64:1 (204 square km:320 square km). The *Libya/Malta (Merits)* Judgment, ICJ Rep. 1985, 20, 48, 50-52, 57, para.79C, Dissent Mosler, 120-121, Oda, 135, 169, Schwebel, 179, did not express any opinion on whether inclusion of tiny uninhabited rock - Fifla Island into the Maltese baselines was legally justified; Pleadings, Vol.I, 35, 65-66, 155, 175 [Libya's Memorial], 413-414 [Malta's Memorial], Vol.II, 37, 41 [Libya's Counter-Memorial], Vol.III, 137 [Malta's Reply], 278, 281 [Agent Mizzi, 26 Nov 1984]. Cf. *Denmark v. Norway* Hearings, CR 93/5, 35 [Agent Tresselt, 15 Jan 1993]; *Qatar v. Bahrain (Merits)* Joint Dissent Bedjaoui, Ranjeva, Koroma, para.188, ICJ Rep. 2001, 203-204; *Nicaragua v. Honduras* Hearings, CR 2007/1, 20, para.18 [Agent Arguello, 5 March 2007], 61, para.43, at 63, para.47 [Counsel Oude Elferink], CR 2007/11, 59, para.21 [Oude Elferink, 19 March 2007]; *Romania v. Ukraine* Judgment, ICJ Rep. 2009, 109-110, 120-122, paras 149, 182, 185; Hearings, CR 2008/18, 67, para.18 [Counsel Crawford, 2 Sep 2008], CR 2008/19, 55, para.11 and at 57, para.15 [Agent Aurescu, 3 Sep], CR 2008/28, 49, para.64 and at 52, para.76 [Counsel Bundy, 11 Sep 2008] www.icj-cij.org. For Declaration made by Malta on 20 May 1993 upon ratification of the 1982 LOSC, that its baselines are fully compatible with the Convention, see *UN LOS Bull.* 15 (1994, No.25).

Bahrain, including the Hawar Islands which were attributed by the 2001 Judgment to its sovereignty, satisfies the water to land ratio of 1:1. Cf. *Qatar v. Bahrain (Jurisdiction and Admissibility)* Judgment, ICJ Rep. 1994, 118, Dissent Oda, 144-145, 147, *(Jurisdiction and Admissibility)* Judgment, ICJ Rep. 1995, 9-10, 12, 25, Dissent Oda, 42, *(Merits)* Judgment, ICJ Rep. 2001, 40, paras 32-34, 109, 180-183, 214, Dissent Torres Bernardez, 257, paras 45-58, 223-226, 248, 251, 362, 462-479, 507, 511; Hearings, CR 94/4, 45 [Counsel Bowett, 4 March 1994], CR 94/5, 43 [Counsel de Arechaga, 7 March 1994], CR 2000/5, 19 [Agent Al-Muslemani, 29 May 2000], CR 2000/10, 15-16 [Counsel Queneudec, 6 June], CR 2000/14, 33-38 [Counsel Reisman, 13 June], CR 2000/15, 8, 14-16 [14 June], 37 [Counsel Weil], CR 2000/16, 41-42, 45-46, 48-50 [Reisman, 15 June], CR 2000/19, 17-19 [Queneudec, 22 June], CR 2000/25, 7 [Reisman, 29 June 2000] www.icj-cij.org.

On Baselines Act No.4 of Indonesia of 18 February 1960 (without Ligitan and Sipadan) [*The Law of the Sea - Baselines* 187-193 (UN 1989); *The Law of the Sea - Practice of Archipelagic States* 45-53 (UN 1992)], see *Indonesia/Malaysia (Merits)* Judgment, ICJ Rep. 2002, 625, paras 84, 130-131, 137; Hearings, CR 2002/29, 51, 53-56 [Counsel Pellet, 4 June], CR 2002/32, 27-29 [Counsel Crawford, 7 June], CR 2002/34, 33 [Pellet, 10 June 2002] www.icj-cij.org.

On the Indonesian archipelagic regime and baselines, see also *Indonesia/Malaysia (Merits)* Hearings, CR 2002/27, 15 [Agent Wirajuda, 3 June], CR 2002/30, 13 [Agent Mohamad, 6 June 2002], 22 [Co-Agent Ariffin] www.icj-cij.org; 2004 Archipelagic Baselines Act No.38, in *MIMA Bull.* 26-36 (Kuala Lumpur 2004 No.11); 2002 Archipelagic Baselines Regulation No.38, as Amended by 2008 Regulation No.37, in *LOS Bull.* 81 (2009 No.69); 2009 *Abyei Boundary* Award, para.762 www.pca-cpa.org.

See also *Malaysia/Singapore (Merits)* Judgment, ICJ Rep. 2008, para.225, Separate O. Parra Aranguren, para.21, Dissent Dugard, para.26.

On Baselines Act No. 3046 of the Philippines of 17 June 1961, as Amended by Act No.5446 of 18 Sep 1968 [*The Law of the Sea - Baselines* 250-259 (UN 1989); *The Law of the Sea - Practice of Archipelagic States* 75-83

(UN 1992)] as Amended by Act No.9522 of 10 March 2009 [http://www.senate.gov.ph/lis/committee_rpt.aspx?congress=14&q=225, http://www.senate.gov.ph/lisdata/57785137!.pdf & www.op.gov.ph/directives/RA9522.pdf ; UN LOS Bull. 32 (2009 No.70) and China's Protest, *id.* 58 www.un.org/Depts/los] , see *Indonesia/Malaysia (Intervention)* Hearings, CR 2001/1, 17-18 [Co-Agent Magallona, 25 June], CR 2001/2, 31 [Counsel Lauterpacht, 26 June], CR 2001/3, 19 [Magallona, 28 June 2001] www.icj-cij.org; Concurring Opinion of Judge Velasco Jr., FNs 38 & 46 [quoting B.Kwiatkowska, Archipelagic Regime in Practice in the Philippines and Indonesia - Making or Breaking International Law?, 6 IJECL 1991/1, at 1-32 http://brill.nl/estu] to *Magallona v. Executive Secretary* Judgment (GR No. 187167) of the Supreme Court of the Philippines of 16 July 2011 http://sc.judiciary.gov.ph/jurisprudence/2011/august2011/187167_velasco.htm Upholding Constitutionality of the Republic Act No.9522 Adjusting Philippine Archipelagic Baselines and Classifying Baselines Regime of Nearby Territories - the 2011 Judgment ruled that archipelagic regime under the UNCLOS and the Republic Act No.9522 is not incompatible with the Philippine Constitution's delineation of internal waters http://dfa.gov.ph/main/, www.manilastandardtoday.com/, http://www.president.gov.ph/default.aspx & www.op.gov.ph/directives/RA9522.pdf ; 28 IJMCL 16 (2013) http://brill.nl/estu.

On the Philippine archipelago, see also *Indonesia/Malaysia (Merits)* Judgment, ICJ Rep. 2002, 625, paras 24, 28, 102-105, 115-119; Hearings, CR 2002/28, 50, 53-54 [Counsel Bundy, 3 June], CR 2002/29, 14 [Bundy, 4 June], 48 [Counsel Malintoppi], CR 2002/31, 44-45 [Counsel Crawford, 7 June 2002], CR 2002/32, 24 [Crawford] www.icj-cij.org ; 50th Anniversary of the Archipelagic Doctrine of the Philippines 7 March 2005 www.dfa.gov.ph/news/pr/pr2005/mar/pr134.htm ; 12 August 2008 www.manilastandardtoday.com/?page=politics2_aug12_2008 ; *Romania v. Ukraine* Hearings, CR 2008/31, 17, para.31 [Counsel Lowe, 16 Sep 2008] www.icj-cij.org.

On Archipelagic Waters and EEZ Act No.24 of Trinidad and Tobago of 18 August 1986 [*UN LOS Bull.* 6 (1987 No.9); *The Law of the Sea - Practice of Archipelagic States* 112 (UN 1992)], Continental Shelf (Amendment) Act No.23 of 7 Nov 1986 [*UN LOS Bull.* 125 (2005 No.56)] and 2004 Maritime Zone Baselines Notification M.Z.N.49 of 14 May 2004 [*UN LOS Bull.* 29 (2004 No.55); *UN LOSIC* 41-42 (2004 No.20)], see 2006 *Barbados/Trinidad & Tobago (Jurisdiction and Merits)* Award, President S.M. Schwebel, para.49, Maps I-II, paras 95, 114, 161, Map III, paras 326, 332-334, 356, 373, 381-382, Maps VI-VII, Technical Report; Trinidad's Counter-Memorial, paras 190-198 [www.pca-cpa.org; RIAA XXVII, 147; 45 ILM 800 (2006)].