

BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA

WORKING SESSION

Tuesday, 8 April 2014, 9.00am

Chair: Manuel Ribeiro (Portugal)

The Chair thanked all of the participants and audience for attending and commended the committee for their report. He remarked that as the sea levels change, it is increasingly important to have a clear understanding of rules regarding baselines in international law. He then introduced the two other panellists, and asked Professor Donald Rothwell, the Committee Rapporteur, to deliver the committee's findings.

Professor Donald Rothwell (Australia) gave an overview of part II of the committee report, which focused on the role of straight baselines under Article 7 of the United Nations Convention on the Law of the Sea. The overview included historical information leading to the development of Article 7 and subsequent interpretations. Ultimately, the committee found that Article 7 contained many ambiguities left to state and judicial interpretation. However, state practice still largely attempts to adhere to Article 7 even without a strict definition for straight baselines.

The Chair opened the floor for conversation on part II of the report.

Mr Hyun-Jin Park (Korea) emphasized the need for strict guidelines or tests for clarification in drawing straight baselines which could be found by applying equitable principles to find criteria for the application of straight baselines rules. For example, borrowing from the water to land ratio test for archipelagic baselines he suggested a maximum 2:1 ratio in the application of straight baselines. He asked the committee to focus future endeavours on establishing or at least suggesting firm rules for straight baselines.

Dr Marie Jacobsson (Sweden) stated that as a member of the committee, she largely agreed with the committee's conclusions. It is important to discuss the differences in state practice but to be aware that many more states may protest straight baseline claims than is publicly known, creating difficulties in establishing real state practice. For instance, the European Union (EU) and individual EU member states make protests in bilateral negotiations which are not in the public domain. Therefore, she agreed with paragraph 60 of the report, which concludes that no rule of customary law has formed.

Mr A. K. M. Emdadul Hague noted that although the international community came together before to determine rules for straight baselines, there is still a strong need for clarification. He also raised the point that the ill-defined straight baseline rules will raise significant questions as sea levels rise and glaciers melt. Will these boundaries need to be reevaluated and under what rubric?

Professor George K. Walker (US) suggested that equitable principles be used as a gap filler in cases of ambiguous terms such as those in the straight baselines rules, that ice-covered areas be assimilated to unstable areas of Article 7(2) for the purpose of analysis, and that the committee's findings be subjected to a 10-year review process to take account of sea level rise.

Mr Hans Corell (Sweden) also inquired into sea level rise and ice melting in shifting straight baselines and suggested there should be regular reviews of baselines.

Captain J. Ashley Roach (US) responded to the several inquires on sea level rise by alerting the audience to the formation of a new ILA committee on sea level rise and that this new committee would hold a separate session later in the week to discuss just that issue. He also addressed the question of state protests that are not public and agreed that there certainly are state protests that are classified and should be considered when determining state practice.

Professor Robert Beckman (Singapore) asked about the committee's consideration of Article 6 and coral reefs and the publicity requirements of Article 16 in their analysis. He also mentioned Southeast Asian practice as generally non-adherent to Article 7, noting a regional practice of both exaggerated baseline claims and acceptance of similar claims by neighbours, with only the US protesting. He wondered if a regional custom was forming for determining straight baseline law in Asia.

Captain Roach stated that the committee had not taken Article 6 into account but that they may do so in later reports.

The Chair then turned the conversation back over to Mr Rothwell for discussion on part III of the report.

Professor Rothwell provided a summary of the committee's findings for Article 47, baselines for archipelagic states. He noted that unlike Article 7, there is little room for interpretation of Article 47's more technical parts. However, some terms, such as "main islands," still provide some ambiguity.

Captain Roach said that the US State Department recently uploaded its analyses of all archipelagic straight baseline claims online so that anyone can access them.

Professor Natalie Klein (Australia) asked that the committee include cross-references to the sea level rise report, as their findings were important in straight baseline analysis.

Mr Beckman noted that the Article 74(6), the so-called "Malaysian provision," now applies to East Timor.

Professor John Noyes (US) believed there was a danger in allowing an overly expansive interpretation of Article 7 because archipelagic states might then choose to renounce reliance on Article 47 in order to take advantage of more lenient straight baselines under Article 7. This could undercut navigational rights assured under the Law of the Sea Convention.

Professor Rothwell discussed future work for the committee and mentioned that Articles 8(2), 10, 13, and 14 still remain within the committee's mandate. Additionally, questions from the recent report also deserve future consideration, including article 50 on drawing closing lines for delimitation of internal waters within an archipelagic state.

Captain Roach inquired to the audience whether or not some states could be in violation of good faith under Article 300 when determining baselines. If so, it may be important to discuss the reason or utility of taking cases to compulsory dispute settlement.

Ms Simona Drenik (Slovenia) agreed with the conclusions of the report and with looking at the additional points suggested for future work.

Mr Leonardo Bernard asked who or what state would take a case to Compulsory Dispute Settlement. Should it be states directly affected by coastal state's straight baselines, such as the state of a ship's registry or perhaps the International Seabed Authority? Perhaps the International Seabed Authority could bring a claim for states that limit its jurisdiction.

Professor Klein suggested including Article 6 in the extended mandate and to explore the consequences of inconsistent application of the straight baselines rules. She suggested that the decision in Philippines vs China Arbitration might provide some answers and in response to Mr Bernard, noted that any State Party to UNCLOS may raise a challenge under the Convention.

Professor Beckman stated that protests are viewed among Asian states as an unfriendly act and that Asian states would not be likely to invoke Part XV dispute settlement.

Professor Walker suggested that some focus be put on the use of the terms and features described, including rocks, atolls, etc., in the application of straight baselines rules.

Ms Drenik confirmed that governments view protests as unfriendly acts, but suggested looking at the record of protest in the context of EU human rights.

Reporter: Mason Wiley