

PART II

TERRITORIAL SEA AND CONTIGUOUS ZONE

Section 1

General provisions

Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Bibliography: *Richard Barnes*, Property Rights and Natural Resources (2009); *Ian Brownlie*, Principles of Public International Law (6th edn. 2003); *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Percy T. Fenn Jr.*, Origins of the Theory of Territorial Waters, AJIL 20 (1926), 465–482; *H. S. K. Kent*, Historical Origins of the Three Mile Limit, AJIL 48 (1954), 537–553; *Geoffrey Marston*, The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea, BYIL 48 (1976–1977), 321–332; *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Daniel P. O’Connell*, The International Law of the Sea, vol. I (1982); *Daniel P. O’Connell*, The Juridical Nature of the Territorial Sea, BYIL 45 (1971), 303–384; *Lassa Oppenheim*, International Law, vol. I (8th edn. 1955); *Wyndham L. Walker*, Territorial Waters: The Cannon-Shot Rule, BYIL 22 (1945), 210–231

Documents: ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; ILC, Report of the International Law Commission Covering the Work of Its Eighth Session, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9; ILC, Report of the International Law Commission, UN Doc. A/2693 (1954), GAOR 9th Sess. Suppl. 9, reproduced in: ILC Yearbook (1954), vol. II, 140–173; League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.74.M.39.1929.V (1929.V.); League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.351.M.145.1930.V (1930.V.); League of Nations, Report of Second Commission, League of Nations Publication V. Legal, LN Doc. C.230.M.117.1930.V. (1930.V.9)

Cases: *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] AC 153 (UK); *Award between the United States and the United Kingdom, Relating to the Rights of Jurisdiction of United States in the Bering’s Sea and the Preservation of Fur Seals*, Decision of 15 August 1893, RIAA XXVIII, 263–276; *Carr v. Francis Times & Co.* [1902] AC 176 (UK); *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923); ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116; PCA, *Grisbådarna Case* (Norway v. Sweden), Award of 23 October 1909, RIAA XI, 147; PCA, *In the Matter of the Chagos Marine Protected Area Arbitration* (Republic of Mauritius v. United Kingdom), Award of 18 March 2015, ILR 162, 1; PCA, *In the Matter of the South China Sea Arbitration* (Republic of the Philippines v. People’s Republic of China), Award of 12 July 2016, available at: <http://www.pcacases.com/web/view/7>; PCA, *Island of Palmas Case* (Netherlands v. United States), Award of 4 April 1928, RIAA II, 829; PCA, *The North Atlantic Coast Fisheries Case* (Great Britain v. United States of America), Award of 7 September 1910, RIAA XI, 167; PCIJ, *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment of 5 September 1933, Series A/B, No. 53, 22; PCIJ, *The Case of the S.S. Lotus* (France v. Turkey), Judgment of 7 September 1927, Series A, No 10, 3; *R. v. Keyn* [1876] 2 Ex. D. 63 (UK)

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I. Purpose and Function

- 1 Art. 2 defines the status of the territorial sea, including the airspace above and the seabed and sub-soil. Sovereignty is exercised subject to the provisions of the Convention and other rules of international law. Sovereignty over the territorial sea was first recognised at the 1930 Hague Codification Conference¹ and since then it has been generally accepted by States. Art. 2 has the status of customary international law.² There is some disagreement about the precise operation of the restrictions on sovereignty, but these pertain to the extent of navigational rights rather than the status of the territorial sea *per se*.
- 2 The principal limitation on the exercise of sovereignty is the right of innocent passage, which establishes certain navigational rights for other States within the territorial sea. Art. 2 does not detail the precise extent of sovereignty or of any of the limitations thereupon. Indeed, sovereignty is a highly mutable concept and alone it does not identify the precise nature of rights that can be exercised in the territorial sea.³ As such, it needs to be read alongside other provisions of the Convention, especially Arts. 17–32. However, in the event there is uncertainty as to the extent of coastal State authority to control activities in the territorial sea, Art. 2 will be relevant since general international law presumes against restrictions on the sovereignty of States.⁴ This places a burden on a State to show that international law does in fact restrict the residual authority of the coastal State to control a particular activity.
- 3 The sovereignty of the coastal State over the territorial sea, superjacent airspace, seabed and subsoil is presented as a unitary rule of international law. However, this masks important differences in the precise scope of coastal State sovereignty in this zone, or rather the limitations imposed upon it by international law. Sovereignty over each component part of the territorial sea has developed in a different manner, reflecting the physical qualities of each space, as well as the different economic, security and practical uses to which the territorial sea can be subject.⁵ Accordingly, only the water column is subject to the right of innocent passage (→ Art. 17).

II. Historical Background

- 4 The development of coastal State sovereignty over the territorial sea has a long and complex history. It is closely linked to the development of the nation State, and the emergence of international law as discrete field of study and practice. Numerous theories about the legal status and nature of coastal waters have been offered by jurists since early

¹ Cf. *infra*, MN 9.

² ILC, Report of the International Law Commission Covering the Work of Its Eighth Session, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9; Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 77.

³ Daniel P. O'Connell, *The Juridical Nature of the Territorial Sea*, BYIL 45 (1971), 303, 304.

⁴ PCIJ, *The Case of the S.S. Lotus* (France v. Turkey), Judgment of 7 September 1927, Series A, No. 10, 3, 18.

⁵ Geoffrey Marston, *The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea*, BYIL 48 (1976–1977), 321, 332.

times and these only consolidated in a coherent doctrine of the territorial sea in the late nineteenth century.⁶

The exercise of some degree of authority over a belt waters adjacent to the coastline predates the modern concept of the State.⁷ Limited claims to jurisdiction over adjacent seas can be traced to Roman law. These were based upon the need to suppress piracy and protect shipping. However, any consideration of sovereignty over the sea was absent. Of course, until the emergence of the nation State the exercise of sovereignty over the sea was not a juristic possibility. These claims to jurisdiction over certain activities at sea were received, through the work of the Glossators and post-Glossators, into medieval Roman law and civil law systems. Such assertions of rights did not amount to sovereignty, but they provided a means of justifying subsequent claims.

The question of authority over the sea came to prominence in the early seventeenth century with the explosion of colonial, maritime and trading pretensions by European States. During the legal debates between Grotius and his contemporaries, there was a general recognition that some degree of authority could be exercised over a small band of marginal sea.⁸ In the absence of any overarching theory of international legal authority, domestic law conceptions of property provided the best conceptual framework for explaining claims to control activities in coastal waters. Accordingly, the extent of authority over coastal waters was contingent upon the extent to which ownership of the sea could be asserted through, for example, effective control.⁹ During the 17th century the distinction between the high seas, which were free to all, and a band of coastal waters, which were susceptible to appropriation, coalesced.

During the seventeenth and eighteenth centuries, State practice confirmed the existence of coastal State authority over the territorial sea, principally through the assertion of exclusive fishing rights and the assertion of the canon-shot rule.¹⁰ However, this practice was not entirely uniform, and the precise juridical nature of the territorial sea remained unresolved until the twentieth century. Some States claimed ownership or sovereignty of a belt of waters, whilst others asserted more limited jurisdictional competence over specific activities such as fishing or customs regulation. The 'property theory' of the territorial sea tended to prevail until the nineteenth century. As upheld in the *Bering Fur Seals Arbitration* (1893), property rights in natural resources and the territorial sea were coterminous.¹¹ However, the property theory struggled to reconcile ownership with recognition of the rights of ships to navigate unimpeded through coastal waters. During the nineteenth century, a number of other theories were advanced to account for the nature and extent of coastal State authority over coastal waters, including the police theory, the competence theory and the servitude theory.¹² However, these lacked the capacity to explain the authority of the State to exclusive authority to appropriate the resources of the sea, control aspects of navigation essential to security, and yet facilitate rights of navigation essential to maritime trade. The uncertain legal status of the territorial sea revealed itself in the English case, *R. v. Keyn*, when the Court held that the Crown lacked jurisdiction to try a foreign national on a foreign flagged ship for manslaughter arising out of a collision occurring within British territorial waters.¹³ Although the territorial sea was recognised to be part of the British realm, it was observed that even if a territorial sea could be claimed, until this was done through legislation, the courts were not entitled to extend jurisdiction over foreign-

⁶ O'Connell (note 3), 303 *et seq.*

⁷ Percy T. Fenn Jr., *Origins of the Theory of Territorial Waters*, AJIL 20 (1926), 465-482.

⁸ Richard Barnes, *Property Rights and Natural Resources* (2009), 166 *et seq.*

⁹ O'Connell (note 3), 303, 315; Churchill/Lowe (note 2), 71 *et seq.*

¹⁰ H. S. K. Kent, *Historical Origins of the Three Mile Limit*, AJIL 48 (1954), 537-553; Wyndham L. Walker, *Territorial Waters: The Cannon-Shot Rule*, BYIL 22 (1945), 210-231.

¹¹ *Award Between the United States and the United Kingdom, Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United States v. United Kingdom), Decision of 15 August 1893, RIAA XXVIII, 263.

¹² O'Connell (note 3), 315.

¹³ *R. v. Keyn* [1876] 2 Ex. D. 63 (UK).

ers.¹⁴ The questionable status of the territorial sea was further complicated by the absence of any agreement over the precise geographic extent of coastal State authority.

- 8 Until there was some international agreement upon the status of territorial waters this uncertainty would continue. During the 1910 *North Atlantic Coast Fisheries Case*, Great Britain asserted sovereignty over a belt of seas adjoining its coast.¹⁵ However, the tribunal did not pronounce on this matter in its final award. Domestic judicial authorities depended upon the respective Government's public positions on the status of coastal waters. Thus British and American courts tended to recognise the existence of sovereignty over a band of territorial waters,¹⁶ whereas French and Italian decisions excluded such waters from the national domain.¹⁷ Despite this, there was growing acceptance by international law commentators that the territorial sea was subject to sovereignty.¹⁸ This reflected a growing body of practice favouring the extension of sovereignty over the territorial sea.

Sovereignty over the territorial waters was recognised in the *Grisbådarna Case*,¹⁹ where the Permanent Court of Arbitration (PCA) held it to be an inseparable appurtenance of the land territory, and the *Eastern Greenland Case*, where Danish fisheries legislation over territorial waters was accepted as evidence of Danish sovereignty over disputed parts of Greenland.²⁰ It was also acknowledged in the 1919 Paris Convention relating to the Regulation of Aerial Navigation (1919 Paris Convention).²¹

- 9 In 1924, the Assembly of the League of Nations appointed a Committee of Experts to prepare for the codification of international law, including the regime of the territorial sea. A schedule of points was circulated to participating States prior to the conference, the responses to which revealed general support for a regime of sovereignty over the territorial sea.²² The text on the territorial sea put forward to the Hague Codification Conference of 1930 provided that

'[t]he territory of a State includes a belt of sea described in this Convention as the territorial sea. Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and other rules of international law.'²³

This may be regarded as the point at which the legal status of the territorial sea was resolved, although it should be observed that the term 'sovereignty' could allow for a range of differing interpretations to be maintained by States. Since then, the idea that coastal States have sovereignty over the territorial sea has been generally accepted. The most important development of the Hague text was the emphasis given to the right of innocent passage, which was by then unquestionable part of international law.²⁴

- 10 When the International Law Commission (ILC) commenced work on codifying the law of the sea in 1950, the notion of coastal State sovereignty was introduced without controversy by

¹⁴ The Territorial Waters Jurisdiction Act 1878 was quickly introduced and a unified claim to sovereignty over territorial waters was subsequently maintained throughout the British Empire, available at: <http://www.legislation.gov.uk/ukpga/Vict/41-42/73>.

¹⁵ PCA, *The North Atlantic Coast Fisheries Case* (Great Britain v. United States of America), Award of 7 September 1910, RIAA XI, 167 *et seq.*

¹⁶ *Carr v. Francis Times & Co.* [1902] AC 176, 182–183 (UK); *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122 (1923); however, a more cautious view was expressed by the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] AC 153, 174 (UK).

¹⁷ O'Connell (note 3), 347.

¹⁸ *Ibid.*, 343.

¹⁹ PCA, *Grisbådarna Case* (Norway v. Sweden), Award of 23 October 1909, RIAA XI, 147.

²⁰ PCIJ, *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment of 5 April 1933, Series A/B, No. 53, 22, 23.

²¹ *Cf. infra*, MN 18; Paris Convention relating to the Regulation of Aerial Navigation, 13 October 1919, LNTS 11, 174.

²² League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.74.M.39.1929.V (1929.V.XX).

²³ League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.351.M.145.1930.V (1930.V.XX).

²⁴ This was detailed in S. III and accommodated by the rule of reference 'provision of these Articles in paragraph 2'.

FRANCOIS, the Commission's Special Rapporteur. Art. 1 of the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ), which was negotiated on the basis of the ILC text, reads:

'(1) The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

(2) This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.'

The position on agreed in the CTSCZ in 1958 influenced later negotiations at 11
UNCLOS III. The negotiation and drafting of the relevant provisions on the status of the territorial at the UNCLOS III was done in accordance with the consensus-based approach. The Sea-Bed Committee, which was responsible for the preparatory work for UNCLOS III, and the Conference were divided into three main negotiating committees. The territorial sea provisions were negotiated in Committee Two, which was also responsible for dealing with other maritime zones and certain related topics.

Art. 2 evolved from the Arts. 1 and 2 of the CTSCZ. The CTSCZ influenced the provisions on 12
the territorial sea contained in the Declaration of Santo Domingo which was presented to the Sea-Bed Committee in 1972.²⁵ At the 1973 session of the Sea-Bed Committee, a number of draft proposals on the territorial sea were submitted.²⁶ These followed the same basic approach taken in the CTSCZ. The only significant development was reference to the concept of archipelagic waters, which was provisionally referenced in some formal proposals. At the Second Session of the Conference in 1974, a number of proposals were submitted to, and discussed in the Second Committee.²⁷ These contained no significant drafting changes. By this time, general acceptance of the concept of archipelagic waters resulted in its inclusion in proposals and negotiating texts. At the Second Session, the concept of a plurality of regimes emerged, whereby multiple regimes would operate in the same coastal waters at the same time but for different activities, such as navigation or security. This approach was advanced by a group of States that desired more extensive coastal State authority over a national maritime zone extending up to 200 NM from the baseline. However, this was a relatively short-lived development and it lapsed as the regime of the exclusive economic zone evolved. At the Third Session (1975), some time was devoted to a proposal by Ecuador that advanced the plurality of regimes approach.²⁸ A draft provision provided a detailed list of activities that were to be regulated by the coastal State, including natural resources, energy generation, marine pollution, marine scientific research, artificial islands and installations, customs, fiscal, immigration, and sanitary matters. After further discussion and proposals, the following text was included in the Informal Single Negotiating Text (ISNT):

²⁵ Sea-Bed Committee, Santo Domingo Declaration of the Specialized Conference of the Caribbean Countries on Problems of the Sea, UN Doc. A/AC.138/80 (1972), 3.

²⁶ Main points noted by Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 66.

²⁷ UNCLOS III, Canada *et al.*: Working Paper, UN Doc. A/CONF.62/L.4 (1974), OR III, 81; Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183; Second Committee UNCLOS III, India: Draft Article on the Nature and Characteristics of the Territorial Sea, UN Doc. A/CONF.62/C.2/L.4 (1974), OR III, 187; Second Committee UNCLOS III, Guyana: Introductory Draft Articles on Coastal State Competence in Contiguous Ocean Space, UN Doc. A/CONF.62/C.2/L.5 (1974), OR III, 187; Second Committee UNCLOS III, Spain: Draft Article on the Nature and Characteristics of the Territorial Sea, UN Doc. A/CONF.62/C.2/L.6 (1974), OR III, 187; Second Committee UNCLOS III, Bangladesh: Draft Article on the Nature and Characteristics of the Territorial Sea, UN Doc. A/CONF.62/C.2/L.7 (1974), OR III, 188; Second Committee UNCLOS III, Ecuador: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.10 (1974), OR III, 189; Second Committee UNCLOS III, Fiji *et al.*: Draft Articles on the Nature and Characteristics of the Territorial Sea, UN Doc. A/CONF.62/C.2/L.13 (1974), OR III, 190; Second Committee UNCLOS III, Nicaragua: Working Paper on Characteristics of the National Zone, UN Doc. A/CONF.62/C.2/L.17 (1974), OR III, 195; Second Committee UNCLOS III, Greece: Draft Articles, UN Doc. A/CONF.62/C.2/L.22, OR III, 200; Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.26 (1974), OR III, 203; Second Committee UNCLOS III, Austria *et al.*: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.33 (1974), OR III, 212.

²⁸ Second Committee UNCLOS III, Ecuador: Draft Article on the Nature and Characteristics of the Territorial Sea, UN Doc. A/CONF.62/C.2/L.88 (1975), OR IV, 194.

‘(1) The sovereignty of a coastal State extends beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, over an adjacent belt of sea described as the territorial sea.

(2) This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

(3) The sovereignty over the territorial sea is exercised subject to the provisions of these articles and to other rules of international law.’²⁹

- 13 At the Fourth Session in 1976, the Revised Single Negotiating Text repeated the ISNT, with the addition of a heading referring to the ‘[j]uridical status of the territorial sea’.³⁰ The only significant change at the Sixth Session (1977) was the renumbering of the provision to Art. 2, following the insertion of a new Art. 1 into the Informal Composite Negotiating Text on ‘use of terms’.³¹ During the final drafting process, the heading was changed to ‘Legal Status’ of the territorial sea.³²

III. Elements

1. ‘The sovereignty of a coastal State extends [...] to an adjacent belt of sea’

- 14 Art. 2 (1) designates coastal State sovereignty over the territorial sea. The rights of the coastal State over the territorial sea do not differ in nature from rights exercised over land territory. There was no substantial discussion of this at the Conference, but this was the position taken by the ILC during the drafting of the equivalent provisions of the CTSCZ.³³ This sovereignty is subject to the limitations noted in Art. 2 (3). Hence, the coastal State may exercise both prescriptive and enforcement jurisdiction within the territorial sea. Although it is clear that coastal State sovereignty extends to the territorial sea as a matter of international law, this does not necessarily entail the automatic application of municipal law to the territorial sea. This will depend upon the precise operation of municipal law in individual States. Territorial sovereignty involves the ‘exclusive right to display the attributes of the State’.³⁴ This includes both a negative and positive aspect. The former excludes other States from engaging in unauthorised activities in the territorial sea. The latter requires the coastal State to protect those rights which other States may enjoy in the territorial sea. This approach is manifest in the specific rules on innocent passage (→ Art. 17).³⁵
- 15 Apart from the right of innocent passage, one further significant difference between sovereignty over land and territorial sea should be noted. Sovereignty over the territorial sea is an extension of sovereignty over land territory, rather than sovereignty inherent in the zone *per se*. The International Court of Justice (ICJ) has described the character of territorial waters ‘as appurtenant to the land territory’.³⁶ This may limit the exercise of sovereignty. Whereas land territory may be ceded, sovereignty over the territorial sea cannot be ceded unless this forms part

²⁹ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152 (Text presented by the Chairman of the Second Committee).

³⁰ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151 (Text presented by the Chairman of the Second Committee).

³¹ UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1.

³² UNCLOS III, Report of the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.40 (1979), OR XII, 95.

³³ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12 (Commentary to Art. 1).

³⁴ Judge Huber in the PCA, *Island of Palmas Case* (Netherlands v. United States), Award of 4 April 1928, RIAA II, 829, 839.

³⁵ See *Barnes* on Art. 17 MN 7–10.

³⁶ ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 128; In the same case, Sir Arnold McNair, dissenting, stated that: ‘To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters (and in some cases national waters in addition). International law does not say to a State: “You are entitled to claim territorial waters if you want them.” No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out

of the cession of littoral land territory.³⁷ In the *Grisbådarna Case*, the PCA described maritime territory as an essential appurtenance of land territory, which would automatically form part of a cession.³⁸

Art. 2 (1) distinguishes between the territorial sea, and internal waters and archipelagic waters. Internal waters are subject to the full sovereignty of the coastal State. They lie landward of the baseline for the measurement of the territorial sea, the drawing of which is governed by Arts. 5–14 and 16. There is no right of innocent passage through internal waters, unless the use of straight baselines is used to enclose areas of water that were not previously internal waters (Art. 8 (2)).³⁹ Archipelagic States exercise sovereignty over archipelagic waters. For States that possess archipelagic waters, the delimitation of the territorial sea is done in accordance with Art. 47.⁴⁰

2. ‘sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil’

Art. 2 (2) extends sovereignty to both the airspace above and seabed and subsoil below the territorial sea. This reflects the maxim of private law: *Cuius est solum eius est usque ad coelum et ad inferos* (‘the owner of the land owns everything up to the sky down to the centre of the earth’).

Sovereignty over the superjacent airspace has been recognised under international law since the 1919 Paris Convention. Art. 1 of the 1919 Paris Convention provides that ‘every Power has complete and exclusive sovereignty over the air space above its territory’ and that ‘the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.’ Arts. 1 and 2 of the 1944 Chicago Convention on Civil Aviation take the same approach. There is no right of aircraft to innocent passage through the airspace above the territorial sea.

The question of sovereignty over the seabed and subsoil has received little attention. For the most part it has been subsumed within the regime of territorial seas and been regarded as subject to coastal State sovereignty. It was not until the development of the notion of the continental shelf that interest in legal precedents for claims to extended authority over the seabed became of wider interest.⁴¹

State practice remains largely consistent with the provisions of Art. 2, at least in respect of the claim to exercise sovereignty over the territorial sea. Not all municipal legislation giving effect to the Convention refers to sovereignty, but since no greater rights can be claimed or rejected, this is not significant. More significant are those variations pertaining to the operation of the right of innocent passage.

3. ‘The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law’

Art. 2 (3) subjects the exercise of sovereignty to a special (‘this Convention’) and general limitation (‘other rules of international law’). The special limitation pertains to the right of innocent passage through the territorial sea. Innocent passage is limited to passage through the waters of the territorial sea. It does not extend to internal waters or to the airspace above the territorial sea, most likely because such a right could result in the risk of hostile incursions by fast moving aircraft into the territory of the State. Neither does it extend to the seabed, since this would amount to a right to mine the seabed.

of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory’, *ibid.*, 158, 160.

³⁷ *Lassa Oppenheim*, International Law, vol. I (8th edn. 1955), 463, 488; cf. *Ian Brownlie*, *Principles of Public International Law* (6th edn. 2003), 118.

³⁸ *Grisbådarna Case* (note 19), 159.

³⁹ See *Trümpler* on Art. 8 MN 14 *et seq.*

⁴⁰ See *Symmons* on Art. 47 MN 12–54.

⁴¹ See further *Maggio* on Art 77 MN 4–8.

- 22 Art. 2 (3) clearly states that the exercise of sovereignty is limited by international law. This may seem superfluous since sovereignty is fundamentally limited by international law. However, the inclusion of this qualification was considered necessary in the equivalent provision advanced at the Hague Codification Conference to confirm that the powers of the State over the territorial sea are no greater than those possessed over land domain.⁴² This was reiterated by the ILC during the drafting of its articles on the territorial sea.⁴³ It further accommodates the fact that a convention could not list all such limitations that exist or may come to exist under general international law. This indicates that the Convention is not exhaustive as regards the limitations on the exercise of sovereignty in the territorial sea.
- 23 This provision is not merely descriptive; it embodies the obligation of the coastal State to comply with the Convention and other rules of international law. This view was adopted in the *Chagos Arbitration*, where the Tribunal's interpreted the authoritative languages of the Convention, the context of Art 2 (3), and object and purpose of the Convention, as well as its negotiating history, to find the existence of a duty.⁴⁴ The meaning of 'other rules of international law' refers to rules of general international law, as opposed to mere bilateral obligations that the coastal State may enter into from time to time. The important distinction being that bilateral limitations entered into on a voluntary basis are at the discretion of the coastal State, whereas general rules of international law, such as abuse of right or good faith, cannot impose mandatory restrictions on the exercise of sovereignty in territorial sea. In the *Chagos Arbitration*, the sovereignty of the United Kingdoms was limited by a duty to act in good faith and to have due regard to Mauritius' rights and interests (in respect of fishing) in the territorial sea.⁴⁵ This general position was reaffirmed in the *South China Sea Arbitration*, where the Tribunal held that traditional fishing rights constitute a vested right, and that vested rights 'fall squarely within the "other rules of international law" applicable to the territorial sea'.⁴⁶ Such vested rights are not absolute and may be subject to 'reasonable regulation', for example to ensure conservation and prevent environmental harm.⁴⁷ This concept allows for a balancing of interests to take place between coastal States and third States. Reasonable regulation appears to include regulation to protect or preserve fisheries, regulation to uphold public order or morality, and regulation to secure equitable treatment between fishermen.⁴⁸

Section 2

Limits of the territorial sea

Article 3

Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

⁴² League of Nations, Report of Second Commission, League of Nations Publication V. Legal, LN Doc. C.230.M.117.1930.V. (1930.V.9).

⁴³ ILC, Report of the International Law Commission Covering the Work of Its Sixth Session, UN Doc. A/2693 (1954), GAOR 9th Sess. Suppl. 9, reproduced in: ILC Yearbook (1954), vol. II, 140, 154.

⁴⁴ PCA, *In the Matter of the Chagos Marine Protected Area Arbitration* (Republic of Mauritius v. United Kingdom), Award of 18 March 2015, ILR 162, 1, paras. 499–517.

⁴⁵ *Ibid.*, para. 534.

⁴⁶ PCA, *In the Matter of the South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China), Award of 12 July 2016, para. 808.

⁴⁷ *Ibid.*, para. 809.

⁴⁸ *The North Atlantic Coast Fisheries Case* (note 15), 174.

Bibliography: *Thomas Baty*, The Three-Mile Limit, AJIL 22 (1928), 503–537; *Cornelius van Bijnkershoek*, Quaestionem juris publici, The Classics of International Law 14 (English translation 1964); *Cornelius van Bijnkershoek*, Opera Minora, De Dominio maris dissertation, in: The Classics of International Law (English translation 1964); *Sigurd R. Björkstén*, Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht (1925); *Vanssay de Blavous*, Units of Length, Hydrographic Review 5 (1928), 227–232; *Robin R. Churchill/Alan. V. Lowe*, The Law of the Sea (3rd edn. 1999); *Vladimir-Duro Degan*, Sources of International Law (1997); *Rene-Jean Dupuy/Daniel Vignes* (eds.), A Handbook on the New Law of the Sea (1990); *Thorsten Kalijarvi*, Scandinavian Claims to Jurisdiction over Territorial Waters, AJIL 26 (1932); *H. S. K. Kent*, The Historical Origins of the Three-Mile Limit, AJIL 48 (1954), 537–558; *John Norton Moore*, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, AJIL 74 (1980), 77–121; *Fritz Münch*, Küstengewässer, in: Karl Strupp/Hans-Jürgen Schlochauer (eds.), Wörterbuch des Völkerrechts, vol. 2 (2nd edn 1961); *Myron H. Nordquist* (ed.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. I (1985); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. III (1995); *Daniel P. O’Connell*, The International Law of the Sea, vol. I (1982); *Jesse S. Reeves*, The Codification of the Law of Territorial Waters, AJIL 24 (1930), 486–499; *Alphonse Rivier*, Lehrbuch des Völkerrechts, vol. I (2nd edn. 1899); *Yoshifumi Tanaka*, The International Law of the Sea (2nd ed. 2015); *Kai Trümpler*, Grenzen und Abgrenzungen des Küstenmeeres (2007); *Wolfgang Graf Vitzthum*, Begriff, Geschichte und Rechtsquellen des Seerechts, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 1–61; *George K. Walker*, Definitions for the Law of the Sea – Terms not Defined by the 1982 Convention (2012)

Documents: GA Res. 1307 (XIII) of 10 December 1958; IHO, A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea, Special Publication No. 51 (edition 5.0.0, 2014); ILC, Régime of the Territorial Sea: Rapport par J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/53 (1952), ILC Yearbook (1952), vol. II, 25–43; ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12; ILC, First Report on Unilateral Acts of States by Victor Rodriguez-Cedeno, Special Rapporteur, UN Doc. A/CN.4/486 (1998); ILC, Third Report on Unilateral Acts of States by Victor Rodriguez-Cedeno, Special Rapporteur, UN Doc. A/CN.4/505 (2000); The International Bureau of Weights and Measures, The International System of Units (SI) (8th edn. 2006); UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea (1989); UN DOALOS, National Claims to Maritime Jurisdiction – Excerpts of Legislation and Table of Claims (1992)

Cases: ECJ, Case C-146/89, *Commission v. United Kingdom*, 1991 ECR I-03533, I-03533; ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116; *The Anna Case* [1805] 165 E.R. 809, 817, 814 (UK); *Twee Gebroeders (The Espiegle and four Dutch Vessels)* [1800] 165 E.R. 422, 423 (UK)

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I. Purpose and Function

First and foremost, Art. 3 is at the core of the answer to one of the crucial questions of the law of the sea: How far does the State’s jurisdiction extend out to sea? The answer to this question eluded the Hague codification conference in 1930 as well as UNCLOS I and UNCLOS II. At UNCLOS III it was agreed to limit full State sovereignty at 12 NM. As a demonstration of the importance UNCLOS III attached to this number, Part II opens with the 12 NM numerical limit and only then proceeds to establish the starting point and the method of measurement of this distance.

Next to its obvious function to provide a spatial limit to the extent of the territorial sea, Art. 3 introduces two other principles: First, it is the right of the State ‘to establish the breadth of its territorial sea’. The State must act to establish the breadth of the territorial sea. Perhaps surprisingly it is not fixed as in the case of the continental shelf (→ Art. 77). This is an implication of the second principle, that the territorial sea may extend ‘up to a limit not exceeding’ 12 NM. The State is free to choose any breadth of the territorial sea as long as it

does not exceed 12 NM. Again, this is in contrast to the continental shelf, which exists *ipso facto* and *ab initio* without any declaration on the side of the coastal State. Its task is merely to technically determine the outer limit. For the territorial sea, the State must decide on its breadth and proceed to establish the baseline as well as the outer limit, pursuant to Part II.

II. Historical Background

- 3 The debate about the extent of the territorial sea dominated the law of the sea for centuries. In the middle of the 17th century, at a time when the question of open or closed seas started to be resolved in favour of open seas,¹ when the domination of large expanses of sea proved practically impossible,² State's began to focus their interest on coastal waters.³ While there was widespread acceptance as to the sovereignty of the coastal State over the waters adjacent to its coast, the extent of its sovereignty was unclear. Next to other criteria, such as line of sight, the cannon-shot rule began to gain acceptance, probably originating in the law of armed conflict at sea, in particular in prize law.⁴ CORNELIUS VAN BJINKERSHOEK contributed decisively to condense emerging State practice into a rule of international law with his two works, '*De dominio maris dissertatio*' and '*Quaestionem juris publici*'.⁵ He postulated that 'the power of the land properly ends where the force of arms ends. Therefore the sea can be considered subject as far as the range of cannon extends'.⁶ It is unclear how this cannon-shot rule evolved into the 3 NM limit: It may have been because acceptance emerged that 3 NM was the effective range of weaponry⁷; or the three-mile limit was a parallel and independent development to the cannon-shot rule⁸, or the three-mile limit was an illustration of the cannon-shot rule.⁹
- 4 It appears that at the turn of the 18th to the 19th century, both concepts had merged at least partially and the three-mile limit was widely understood as determining the spatial limit of the cannon shot rule.¹⁰ This understanding was independent of the presence of coastal artillery on site.¹¹ In the 19th century, the three-mile limit began to be applied by important

¹ Wolfgang Graf Vitthum, Begriff, Geschichte und Rechtsquellen des Seerechts, in: Wolfgang Graf Vitthum (ed.), Handbuch des Seerechts (2006), 1, 31–33 (MN 65–68).

² Daniel P. O'Connell, The International Law of the Sea, vol. I (1982), 125.

³ There are indications of prior State practice of claiming territorial waters, such as the establishment of a territorial sea in the middle of the 14th century at the Flemish coast, see Fritz Münch, Küstengewässer, in Karl Strupp/Hans-Jürgen Schlochauer (eds.), Wörterbuch des Völkerrechts, vol. 2 (2nd edn. 1961), 388. However, these do not seem to have been widespread.

⁴ O'Connell (note 2), 126.

⁵ Cornelius van Bijnkershoek, Quaestionem juris publici, The Classics of International Law 14 (English translation 1964), 54[59]. Square brackets refer to original page number, other to the page number of the translation.

⁶ Cornelius van Bijnkershoek, Opera Minora, De Dominio maris dissertation, The Classics of International Law (engl. Translation 1964), 44 [364]. Square brackets refer to original page number, other to the page number of the translation.

⁷ Oppenheim (note 4).

⁸ H. S. K. Kent, The Historical Origins of the Three-Mile Limit, AJIL 48 (1954), 538–539, with reference to the practice of Scandinavian States; cf. Norwegian Pleadings to the International Court of Justice in the *Fisheries Case* for several detailed descriptions of state practice in that respect, ICJ, *Fisheries Case* (United Kingdom v. Norway), Oral Proceedings (1951), 165 *et seq.*

⁹ Thomas Baty, The Three-Mile Limit, AJIL 22 (1928), 503, 516.

¹⁰ Robin R. Churchill/Alan V. Lowe, The Law of the Sea (3rd edn. 1999), 78.

¹¹ *Ibid.*

maritime States beyond the rules on naval warfare¹² to fishery zones.¹³ However, it seems that outside its origins in the Anglo-American sphere of legal influence, the three-mile limit never was universally accepted.¹⁴

The Hague Conference on Codification of International Law in 1930 showed the lack of a consistent practice or *opinio juris* among States on the breadth of the territorial sea. Collating State practice as rapporteur in preparation of the conference, SCHÜCKING concluded that, while the cannon-shot rule was universally accepted, using the range of modern artillery would clearly lead to disproportionate results. As the three-mile limit was in his view not universally accepted, he proposed six miles as an acceptable compromise.¹⁵ While the preparatory committee eventually settled on the three-mile limit,¹⁶ the 1930 conference itself remained deeply divided on the breadth of the territorial sea.¹⁷ Without agreement on the breadth of the territorial sea, it became clear that no draft convention would be forthcoming.¹⁸

State practice in the 1950s was non-uniform.¹⁹ UNCLOS I clearly showed economic reasons at the heart of the dispute, in particular the right of third States to fish in coastal waters.²⁰ Just as the 1930 Hague conference showed a minimum agreement that the State is

¹² An act in addition to the Act for the Punishment of Certain Crimes Against the United States, U.S. Statutes at Large I (1789–1799), 381, 384, available at: <http://www.constitution.org/uslaw/sal/sal.htm>; O'Connell (note 2), 131, notes the correspondence between Jefferson and the British and French governments preceding the legislation which referenced the cannon shot rule; *Twee Gebroeders (The Espiegle and four Dutch Vessels)* [1800] 165 E.R. 422, 423 (UK); 'We all know that the rule of law on this subject is "*terrae dominium finitur, ubi finitur armorum vis*" and since the introduction of fire-arms, that distance has usually been recognised to be about three miles from the shore.' *The Anna Case* [1805] 165 E.R. 809, 817, 814 (UK).

¹³ A Convention to Regulate the Commerce between the Territories of the United States and of His Britannic Majesty, 3 July 1815, TS 112, 59.

¹⁴ *Alphonse Rivier*, *Lehrbuch des Völkerrechts*, Bd. 1 (2nd edn. 1899), 134: 'Diese Entfernung [3 sm, Anm. d. Verf.] ist offenbar zu gering und hat durchaus keinen Anspruch auf allgemeine Geltung'. League of Nations, Committee of Experts for the Progressive Codification of International Law: Questionnaire No. 2: Territorial Waters, LN Doc. C.44.M.21.1926.V (1926), Annex I: Memorandum by M. Schücking, reproduced in: Shabtai Rosenne (ed.), *League of Nations Committee of Experts for the Progressive Codification of International Law*, vol. II: Documents (1972), 55, with detailed references to contradictory State practice (see also table, *ibid.*, 83). However, it must be noted that other States did at times accept a 3 NM limit, e.g. in the First World War the Berlin High Prize Court (*Oberprisengericht*) ruled that the 3 NM limit was the only accepted limit of the territorial sea, see *Sigurd R. Björkstén*, *Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht* (1925), 44; for details on Scandinavian claims for a 4 NM territorial sea, see *Thorsten Kalijarvi*, *Scandinavian Claims to Jurisdiction over Territorial Waters*, AJIL 26 (1932), 57–69. *Baty* asserted in 1928 that the rule was 'supreme in practice', but 56 out of 89 cited 'affirmations' are based on Anglo-American practice, while others involve litigation involving citizens from these countries in other States, *Baty* (note 10), 517–532.

¹⁵ Memorandum Schücking (note 15), 62.

¹⁶ League of Nations, Conference for the Codification of International Law: Bases of Discussion for the Conference Drawn Up by the Preparatory Committee, vol. II: Territorial Waters, LN Doc. C.74.M.39.1929.V.2 (1929), 33: 'The breadth of the territorial waters under the sovereignty of the coastal State is three nautical miles'.

¹⁷ For a 3 NM limit: the delegations of South Africa, Federal Republic of Germany (plus contiguous zone), USA, Belgium, UK (also on behalf of the government of Australia), Canada, Chile (plus contiguous zone, otherwise 6 NM), China, Denmark, Egypt (plus contiguous zone), Estonia (plus contiguous zone), Greece, India, Ireland, Japan, the Netherlands, Poland (plus contiguous zone); for a 6 NM limit: the delegations of Columbia, Cuba, Spain (plus contiguous zone), Italy, Latvia (plus contiguous zone), Persia (plus contiguous zone), Portugal (plus 6 NM contiguous zone, otherwise 12 NM), Romania, Turkey, Uruguay, Brasil and Yugoslavia; for a four NM limit: the delegations of Finland (with the option for a 3 NM zone), Iceland, Norway and Sweden; the delegation of Czechoslovakia abstained, the USSR proposed not to settle on a fixed limit. Of 36 countries, 18 voted for a 3 NM limit or were prepared to accept it, 12 preferred 6 NM, see Shabtai Rosenne (ed.), *Conference for the Codification of International Law*, vol. IV (1975), 1325–1327; cf. *Jesse S. Reeves*, *The Codification of the Law of Territorial Waters*, AJIL 24 (1930), 493.

¹⁸ See among others the official records of the 7 April 1930 session, reproduced in: Rosenne (note 18), 1348–1362.

¹⁹ ILC, *Régime of the Territorial Sea*: Rapport par J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/53 (1952), ILC Yearbook (1952), vol. II, 25, 26.

²⁰ First Committee UNCLOS I, *Territorial Sea and Contiguous Zone*, UN Doc. A/CONF.13/39 (1958) OR III, 174–175. For a short summary of proposals, see UNCLOS I, Report of the First Committee, UN Doc. A/CONF.13/L.28/REV.1 (1958) OR II, paras. 6–25; UNCLOS I, 38th Meeting, UN Doc. A/CONF.13/39 (1958) OR III, 114–115. Most of the proposals at the conference included some form of compromise between a territorial sea and a contiguous fishery zone.

entitled to a territorial sea that extends to three nautical miles,²¹ the text of UNCLOS I can be read to reflect an agreement that a territorial sea beyond 12 NM is inconsistent with international law: Art. 24 UNCLOS I sets the outer limit of the contiguous zone at 12 NM; as the contiguous zone extends seaward of the territorial sea, the drafters – while not agreeing on the details – envisaged some control of the coastal State to be exercised up to 12 NM from the coast, but not further.²² UNCLOS II, convened in 1960 with the explicit mandate to consider ‘further the questions of breadth of the territorial sea and fishery limits’,²³ but for one vote reached agreement with a proposal for a 6 NM territorial sea and a 6 NM fisheries zone.²⁴ The rapid expansion of territorial sea claims over the next two decades casts doubt on the assumption that a 6 NM limit could have lasted even if *opinio juris* had crystallized for that brief moment at UNCLOS II. The (perceived) need to ensure economic control over the adjacent coastal seas was considered to be too pressing.²⁵

- 7 At UNCLOS III the practice of States had changed dramatically. A number of States, particularly in Latin America, had claimed a 200 NM territorial sea on patrimonial grounds.²⁶ One of the reasons for convening UNCLOS III was the desire of the USA and the USSR as naval powers to limit the rapid expansion of claims to coastal waters.²⁷ After some hesitation,²⁸ in 1975 the conference settled on the 12 NM limit.²⁹ The emergence of the exclusive economic zone (EEZ) as a legal concept in the negotiating texts suggests that an agreement on the limit of the territorial sea was possible only because the concurrent introduction of functional sovereign rights in the EEZ dissociated full sovereignty from the right of economic exploitation for the coastal States. Hence, the most pressing economic topics, in particular fishery rights, were uncoupled from the negotiations of the breadth of the territorial sea. Further, UNCLOS III balanced competing security interests of naval powers and some coastal States with detailed provisions for the regime of innocent passage through the territorial sea and the introduction of the regime of transit passage.³⁰
- 8 Since the adoption of the Convention, the 12 NM limit has gained near universal acceptance.³¹ While the maximum limit set out in Art. 3 is straightforward in itself, it must

²¹ The records do not appear to show any proposal being made for a smaller territorial sea.

²² The International Law Commission, in its preparations for UNCLOS I, reached an agreement that a territorial sea of more than 12 NM was not consistent with international law, but could not reach agreement on how a territorial sea of more than 3 NM could be validly claimed even in relation to persistent objectors, ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 265–266 (Commentary to Art. 3).

²³ GA Res. 1307 (XIII) of 10 December 1958; cf. Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. III (1995), 77.

²⁴ The vote was 54 to 28 with five abstentions, UNCLOS II, Fourteenth Plenary Meeting, UN Doc. A/CONF.19/SR.14 (1960), OR, 30; cf. Myron H. Nordquist (ed.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. I (1985), Introduction xxv.

²⁵ See also *Proelss* on Art. 55 MN 4–9.

²⁶ *Proelss* on Art. 55 MN 9.

²⁷ O’Connell (note 2), 164.

²⁸ The Sea-Bed Committee originally could not agree on the 12 NM limit as a number of States were arguing for a broader territorial sea, see Nordquist/Nandan/Rosenne (note 24), 77–82.

²⁹ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1982), OR IV, 152.

³⁰ Cf. John Norton Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, AJIL 74 (1980), 90 *et seq.*

³¹ Of the few remaining States not parties to the UNCLOS, only Benin, Ecuador (in connection with the Galapagos islands), El Salvador, Peru, the Philippines, Somalia, and Togo are claiming more than 12 NM. There appears to be only a very small number of States that claim a territorial sea of less than 12 NM (Jordan, Greece, and Turkey), all of which seem to have a special geographic situation; of those, only Turkey is not party to the UNCLOS (6 NM in the Aegean Sea, but 12 NM in the Black Sea), see UN DOALOS, National Claims to Maritime Jurisdiction – Excerpts of Legislation and Table of Claims (1992) and updated Table of claims to maritime jurisdiction (as at 15 July 2011) <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/claims.htm>. No State seems to be in a position to object to a 12 NM limit, see Churchill/Lowe (note 11), 80. In particular the USA accepted territorial seas of other States based on customary law as reflected in the Convention, see Statement by the President of 10 March 1983, LOSB 1 (1983), 80, 81, and has claimed a 12 NM limit, see: Territorial Sea of the United States of America, A Proclamation of 27 December 1988, LOSB 12 (1988), 18.

be viewed together with Art. 56. Only if both provisions are accepted as an integral and interrelated package will it become clear how UNCLOS III was able to succeed where three prior attempts failed.

III. Elements

1. ‘Every State has the right to establish the breadth of its territorial sea’

The following principle lies at the core of Art. 3: the State creates its own territorial sea in a unilateral act, restricted by international law, specifically by the regulations of Part II. It is the right of the State to establish the breadth of its territorial sea. While the term ‘coastal’ is not used in Art. 3 (in contrast to Arts. 56 and 76), Arts. 2 and 5 make it clear that only the coastal State can establish the breadth of its territorial sea. There can be no territorial sea without a corresponding coast. The coastal State has no duty to establish the breadth of its territorial sea up to 12 NM, this would clearly run counter to the wording of the Convention. Less clear are the consequences of not establishing the exact breadth of the territorial sea, in particular if a State can choose not to have a territorial sea at all. Art. 3 does presume the existence of a territorial sea; merely the breadth needs to be established.³²

The State establishes the territorial sea in a unilateral act.³³ The particular characteristic of this act is that it must be undertaken within the limits circumscribed by international – i. e. other States’ – consent according to the UNCLOS. Establishing the breadth of the territorial sea is one of five such unilateral acts in the UNCLOS.³⁴ While it can be argued that, due to the prior consent of contracting parties, the establishment of the breadth of the territorial sea is not a unilateral act in the strict sense, this argument somewhat overlooks the situation before the UNCLOS. At a time when there was no consensus among States as to a territorial sea beyond 3 NM, the acquisition of sovereign rights in adjacent coastal waters beyond 3 NM was necessarily based on unilateral acts, which in turn coalesced into State practice.³⁵ With the near universal acceptance of Part II UNCLOS, the result of this difference remains largely semantic, as there is agreement in substance: As long as the State acts within the framework of the Convention, it can establish the breadth of its territorial sea as it sees fit; other States, in particular flag States, are under an obligation of acceptance. If the State leaves the conventional framework, it is acting *ultra vires* and, in relation to other States, it cannot validly claim the coastal waters as territorial sea.³⁶

2. ‘up to a limit not exceeding twelve nautical miles’

The State is free to establish the breadth of its territorial sea up to 12 NM. There is no obligation to use the full distance, though the full use of this limit is almost universal. As indicated above, there is an implication that the breadth cannot be established at zero. The

³² However, the question may be of little practical relevance. There is no evidence known to the author of land territories adjacent to the sea that do not also generate a territorial sea. There may be circumstances in which the states claim a territorial sea very close to an opposite state; but that is a matter of delimitation and does not call into question the generation of territorial sea by the appurtenant coast in principle.

³³ Rene-Jean Dupuy/Daniel Vignes (eds.), *A Handbook on the New Law of the Sea* (1990), 357; ECJ, Case C-146/89, *Commission v. United Kingdom*, 1991 ECR I-03533, I-03533; ILC, Third Report on Unilateral Acts of States by Victor Rodriguez-Cedeno, Special Rapporteur, UN Doc. A/CN.4/505 (2000), 9.

³⁴ Vladimir-Duro Degan, *Sources of International Law* (1997), 335.

³⁵ ILC, First Report on Unilateral Acts of States by Victor Rodriguez-Cedeno, Special Rapporteur, UN Doc. A/CN.4/486 (1998), 19; Degan (note 35), 334. By nature of the claim, it was made towards all flag States, as bilateral agreements would have been impracticable. The issue of establishing the territorial sea between neighboring and opposing States is dealt with in Art. 15: see particularly *Symmons* on Art 15 MN 1–2 and 9 *et seq.* Settlements are almost invariably formalized in explicit agreements. See also O’Connell (note 2), 31 and 33 *et seq.*, on the influence of unilateral acts on the law of the sea in general.

³⁶ See *Churchill/Lowe* (note 11), 80, on the question of an obligation of acceptance of excessive claims by States that themselves claim a territorial sea of more than 12 NM.

UNCLOS establishes not only rights but also responsibilities for the coastal State. The *de facto* dereliction of its territorial sea would be the strongest possible indicator of an attempt to avoid these responsibilities; e.g. the State may try to avoid its obligations under Part XIII. In practice, no State has claimed a territorial sea of less than 3 NM.³⁷ The claim to a territorial sea broader than 12 NM³⁸ is *ultra vires* and does not create duties and obligations for third States.³⁹ If a State claims an excessive territorial sea, it can be assumed that the intention was to claim the maximum possible extent under international law. Rather than considering the whole act establishing the territorial sea as *ultra vires* and invalid, only the exceeding part should be so qualified. To consider the whole act invalid would lead to uncertainties that are clearly not desired by the UNCLOS; e.g. it would be difficult to ascertain the latest previous valid act of establishing a territorial sea.⁴⁰

- 12 A nautical mile equals a distance of 1,852 m.

‘The nautical mile is a special unit employed for marine and aerial navigation to express distance. The conventional value given here [1,852 m] was adopted by the First International Extraordinary Hydrographic Conference, Monaco 1929, under the name ‘International nautical mile’. As yet there is no internationally agreed symbol, but the symbols M, NM, Nm, and nmi are all used [...]. The unit was originally chosen, and continues to be used, because one nautical mile on the surface of the Earth subtends approximately one minute of angle at the centre of the Earth, which is convenient when latitude and longitude are measured in degrees and minutes of angle.’⁴¹

- 13 Before 1929,⁴² different lengths for the ‘sea-mile’ were in use, ranging from 1,851.8 m in Portugal and Spain to 1,854 m in Belgium.⁴³ The International Hydrographic Bureau proposed to adopt a length of 1,852 m for the sea-mile at the First Extraordinary Hydrographic Conference in 1929 in Monaco.⁴⁴ The proposal was adopted with slight modifications.⁴⁵ The UNCLOS does not define the nautical mile as being equivalent to the internationally agreed nautical mile of 1,852 m. Nevertheless, the history of the text as well as prior and subsequent State practice suggests agreement that the nautical mile referred to in the UNCLOS is equal to 1,852 m.⁴⁶ It seems that most States claiming maritime zones have

³⁷ Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn. 2015), 85.

³⁸ See UN DOALOS National Claims to Maritime Jurisdiction (note 32).

³⁹ See *supra*, MN 10.

⁴⁰ Kai Trümpler, *Grenzen und Abgrenzungen des Küstenmeeres* (2007), 190; cf. Churchill/Lowe (note 11), 80. The International Bureau of Weights and Measures, *The International System of Units* (SI) (8th edn. 2006), 127 (table 8), available at: http://www.bipm.org/utils/common/pdf/si_brochure_8_en.pdf; see also: League of Nations, Committee of Experts for the Progressive Codification of International Law: Questionnaire No. 2: Territorial Waters, LN Doc. C.44.M.21.1926.V (1926), Annex IV: Draft Convention Amended By M. Schücking in Consequence of the Discussion in the Committee of Experts, reproduced in: Shabtai Rosenne (ed.), *League of Nations Committee of Experts for the Progressive Codification of International Law*, vol. II: Documents (1972), 98 (Art. 2: ‘the zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude)’).

⁴² George K. Walker, *Definitions for the Law of the Sea – Terms not Defined by the 1982 Convention* (2012), 247–249, 248 gives 1959 as the date since which ‘the current international nautical mile has been 6076.115 feet or 1852 meters’.

⁴³ Vanssay de Blavous, *Units of Length*, *Hydrographic Review* 5 (1928), 231, giving two main reasons for the unification of the sea-mile: the measurement of the speed of ships, where he gave speed-trials as a particular example, and to make working with charts easier under certain conditions.

⁴⁴ Report of the Proceedings of the First Supplementary International Hydrographic Conference, Monaco 9–20 April 1929, 105.

⁴⁵ *Ibid.*, 251: ‘the length represented by 1852 times that of the international standard prototype of the metre shall be the International Nautical Mile.’ Interestingly, the reference is tied to the actual prototype and not to the metre itself.

⁴⁶ IHO, *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea*, Special Publication No. 51 (5th edn. 2014), para. 3.6.1, Ch. 3–11 states clearly: ‘The standard unit of distance and length measurement stipulated in the LOS Convention is the International nautical mile (M). This nautical mile, approved by IHO at the International Hydrographic Conference of 1929, has a value of 1852 metres and is equivalent to the length of a minute of arc of geographical latitude at about 44 degrees of latitude.’ At UNCLOS I, the UK proposal for the territorial sea limits contained the definition: ‘For the purposes of this convention, the term “mile” means nautical mile (1,852 metres) reckoned at sixty to one degree of latitude.’, UNCLOS I, United Kingdom of Great Britain and Northern Ireland (Articles 1 and 3); Proposal, UN Doc. A/CONF.13/C.1/L.134 (1958), OR III, 247; A Colombian proposal took up this definition, UNCLOS I, Colombia: Proposal (Articles 1, 2,

used the international nautical mile; at least the most current compilation of maritime claims does not suggest otherwise,⁴⁷ although, in fact a definition of ‘nautical mile’ is often omitted in territorial sea legislation submitted to the UN.⁴⁸ The result of the 1929 conference is not legally binding upon the parties of the UNCLOS.⁴⁹ However, it must be noted that the UNCLOS specifies in Art. 16 that baselines ‘be shown on charts of a scale or scales adequate for ascertaining their position’. This refers to nautical charts.⁵⁰ Nautical charts are the subject of International Hydrographic Organisation (IHO) recommendations, indicating a strong link between the technical recommendations of IHO and legal aspects of delimitation.⁵¹

3. ‘measured from baselines determined in accordance with this Convention’

The UN Baseline Study defines baselines as ‘[t]he line from which the seaward limit of a State’s territorial sea and certain other maritime zones of jurisdiction are measured’.⁵²

‘In accordance with this Convention’ clarifies that the coastal State may not use arbitrary baselines to establish its territorial sea (and other maritime zones) but only those determined in the framework of UNCLOS. These are the normal baseline (Art. 5), the baseline on certain fringing reefs (Art. 6), straight baselines (Art. 7), straight baselines or historically ‘closing lines’⁵³ across rivers (Art. 9) and certain bays (Art. 10), as well as archipelagic baselines (Art. 47).⁵⁴ It is to be noted that Art. 11 and 13 do not establish a special category of baselines but clarify technical aspects regarding ports, and low tide elevations; in particular, whether these may be used in fixing any of the other possible baselines.

Article 4 Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

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3 and 66), UN Doc. A/CONF.13/C.1/L.82 (1958), OR III, 172–173 (paras 22, 23); at UNCLOS II the US and Canada 6 + 6 mile proposal contained a similar definition, see UNCLOS II, Canada and the United States of America: Proposal, UN Doc. A/CONF.19/L.11 (1960), OR I, 173; UNCLOS III materials contain little reference to a specific definition of nautical mile, see also on other aspects Nordquist/Nandan/Rosenne (note 24), 44; Canada, Legal Bureau, Memorandum: Nautical Mile – Definition, CYIL 18 (1980), 310.

⁴⁷ However, referencing O’Connell, *Walker* (note 43), 248 (footnote 745) indicates that Spain, UK and Scandinavia may use different lengths, though no current practice is given.

⁴⁸ See for example United States of America, A Proclamation (note 32) and LOSB 27 (1995), 6 *et seq.*, following the deposit of information by Germany. See the Territorial Sea and Exclusive Economic Zone Act 1977, Act No. 28 of 26 September 1977 as amended by Act No. 146 of 1980 (New Zealand) as an example including a definition of nautical mile, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NZL_1980_Act.pdf.

⁴⁹ See *Walker* (note 43), 247–248, for a more detailed analysis, pointing out that another definition [other than 1,852 m] may apply *inter alia* in law of armed conflict governed situations.

⁵⁰ *Trümpler* on Art. 5 MN 28–32.

⁵¹ IHO Manual on Technical Aspects (note 47), Preface-1 *et seq.*, for historic context.

⁵² UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989), 50 (para. 11).

⁵³ O’Connell (note 2), 352–353.

⁵⁴ Cf. *Tanaka* (note 38), 50, who categorizes into four types: normal baselines, straight baselines, closing lines across river mouths and bays, and archipelagic baselines.

Reisman/Gayl S. Westerman, Straights Baselines in International Maritime Boundary Delimitation (1992); Aaron L. Shalowitz/Michael W. Reed, Shore and Sea Boundaries, vol. I (1962); Kai Trümpler, Grenzen und Abgrenzungen des Küstenmeeres (2007)

Documents: ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur spécial, UN Doc. A/CN.4/61/ADD.1 (1953), ILC Yearbook (1953), vol. II, 75–78; ILC, Regime of the Territorial Sea: Troisième rapport de J.P.A. Francois, rapporteur spécial, UN Doc. A/CN.4/77 (1954), ILC Yearbook (1954), vol. II, 1–6

Cases: ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116

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I. Purpose and Function

1 While Art. 4 might seem self-evident at first glance, it serves a crucial purpose in clearly defining a unique line as the outer limit of the territorial sea. There is only one line that has the geometrical properties described.¹ Art. 4 does not mandate a specific method to arrive at this line. The breadth of the territorial sea and the baselines alone are insufficient to define a clear, unambiguous outer limit of the territorial sea. A rule for deriving the outer limit from the baselines is needed. Simply tracing a line parallel to the coast will not produce an unambiguous result and can potentially lead to uncertainty and disputes as ever the applicable outer limit of the territorial sea.

II. Historical Background

2 Art. 4 can be traced to the arcs-of-circles method which was first proposed as a general rule to determine the outer limit of the territorial sea at the Hague codification conference. Before the Conference in 1930, there was little discussion on the method best suited to determine the outer limit of the territorial sea.² It certainly seems that participants at the conference were unaware of any prior practice, so two proposals were debated on equal merits: the *tracé parallèle* and the arcs-of-circles method proposed by the US delegation. The *tracé parallèle* was proposed as a line parallel to the coastline, drawn at the distance of the limit of the territorial sea. It originated with the requirement that the outer limit of the territorial sea must follow ‘all the sinuosities of the coast’.³ However, the actual drawing of the *tracé parallèle* is somewhat arbitrary (see Figure 4.1 below) and would not result in a line in accordance with Art. 4. It would not be easy for a ship to determine its position in relation to the territorial sea if its outer limit was marked by the *tracé parallèle*, as there are no unambiguous rules on how the parallel to the coastline should be drawn.

¹ S. Whittemore Boggs, Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law, AJIL 33 (1930), 544.

² In the *Fisheries Case*, the International Court of Justice explicitly stated ‘The arcs of circles method, [...] is a new technique in so far as it is a method for delimiting the territorial sea’ and ‘not obligatory by law’, see ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 129. However, Aaron L. Shalowitz/Michael W. Reed, Shore and Sea Boundaries, vol. I (1962), 73 (footnote 14), state the method was well known ‘long before 1930’ and refer to a UK proposal from 1928 in connection with a proposed agreement with Norway and to the delimitation of a 3-mile belt in the Firth of Clyde in 1911.

³ W. Michael Reisman/Gayl S. Westerman, Straights Baselines in International Maritime Boundary Delimitation (1992), 12; also ILA, Draft Convention: Laws of Maritime Jurisdiction in Time of Peace, Report of the 34th Conference (1926), 42–45 (Art. 7); for the history of this draft see H.M. Cleminson, Laws of Maritime Jurisdiction in Time of Peace with Special Reference to Territorial Waters, BYBIL 6 (1925), 144–158; Daniel P. O’Connell, The International Law of the Sea, vol. I (1982), 379.

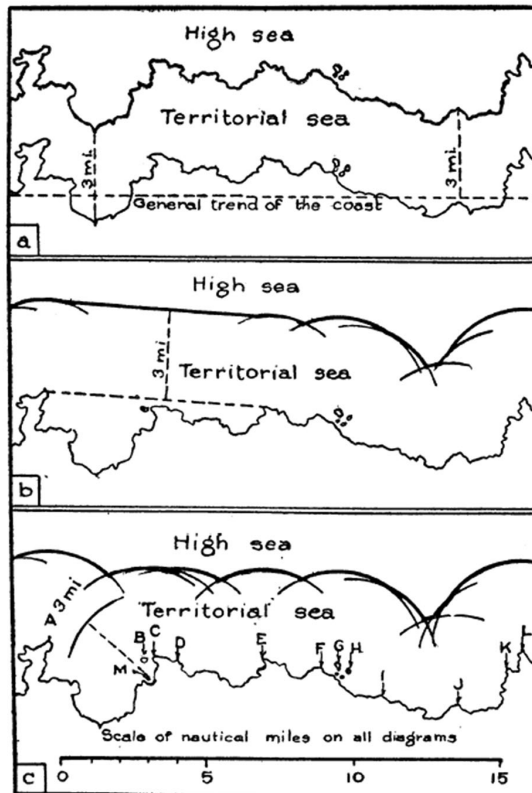


Fig. 4.1 The different approaches to delimiting the territorial sea, in particular the difference between the *tracé parallèle* (a) and the envelopes of arcs-of-circles method (c).⁴ Note that (a) does not result in a line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea. The comparison to (c) shows quite clearly that for example point B is less than 3 NM from the outer limit.

Source: Boggs (note 1), 541, 546 (Fig. 1). Reproduced with permission from © The American Society of International Law.

In the end, the Hague conference could not agree on a proposal, and the International Court of Justice's (ICJ) judgment in the *Fisheries Case* did little to clarify the law on the outer limit of the territorial sea on this point.⁵ In the years following the ICJ decision, the International Law Commission (ILC) drew heavily on the work of the Hague Conference in preparation for UNCLOS I.⁶ It proposed what was to become the definition of the outer limit of the territorial sea in UNCLOS I (Art. 6), as well as in the UNCLOS.⁷

⁴ Boggs (note 1), 541, 546 (Fig. 1), original caption: 'Suggested methods of delimiting the territorial sea: (a) Lines following the sinuosities of the coast, drawn parallel to the general trend of the coast. A vague and impracticable idea.

(b) Straight lines parallel to straight lines, drawn between selected points on a concave coast (with the arcs of circles elsewhere). This illustration is copied from an unpublished foreign chart.

(c) The American proposal: a line every point of which is exactly three nautical miles from the nearest point on the coast, described as the envelope of the arcs of circles of three-mile radius drawn from all points on the coast.'

⁵ Kai Trümpler, *Grenzen und Abgrenzungen des Küstenmeeres* (2007), 35; see also Trümpler on Art. 7 MN 4–8.

⁶ O'Connell (note 3), 232–233; ILC, *Regime of the Territorial Sea: Troisième rapport de J.P.A. François, rapporteur spécial*, UN Doc. A/CN.4/77 (1954), ILC Yearbook (1954), vol. II, 1, 4 (see in particular Art. 7).

⁷ ILC Third Report on the Territorial Sea (note 6), 4; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. III (1995), 83, 85.

- 4 The ILC's Special Rapporteur FRANÇOIS proposed the following wording for Art. 7 (now Art. 4):

'[1]The outer limit of the territorial sea is the line, every point of which is at a distance of T miles from the nearest point of the base line (T being the breadth of the territorial sea). [2]It constitutes a continuous series of intersecting arcs of circles drawn with a radius of T miles from all points on the base line. [3]The limit of the territorial sea is formed by the most seaward arcs.'⁸

The wording of the proposed Art. 7 was based on the work of an expert committee on technical questions of the delimitation of the territorial sea.⁹ In the end, the ILC decided that the 'rule as such was really given in full in the first sentence', and added the remaining sentences to the commentary.¹⁰

III. Elements

1. 'the territorial sea'

- 5 Art. 4 does not fix a certain breadth of the territorial sea; its rule is independent of the actual distance agreed for the outer limit.¹¹ Its function is to describe a clear and unambiguous line for the outer limit of the territorial sea for a given breadth thus avoiding any doubt on the exact position of the outer limit of the territorial sea.

2. 'the line'

- 6 Art. 4 describes a line that is unique, i.e. there is only one such line.¹² A succinct description under the name 'envelope line' has been given by SHALOWITZ:

'Geometrically, the envelope line is the locus of the center of a circle the circumference of which is always in contact with the coastline, that is, with the low-water line or the seaward limits of inland waters. Although often referred to as the 'arcs-of-circles' method, because of the manner in which the line can be drawn (by swinging arcs from points along the coastline), it will occasion less confusion if thought of in its geometric sense, that is, as a derivative of the coastline.'¹³

- 7 It is important to note that the wider the territorial sea, the fewer the number of points along the coastline that will determine the 'locus' of the center. A wider territorial sea is determined by relatively fewer coastal points, with the effect that even a fairly irregular coastline will result in a relatively even outer limit of the territorial sea.¹⁴

⁸ ILC Third Report on the Territorial Sea (note 6), 4 (Art. 7). English translation according to 258th Meeting of the ILC, ILC, Summary Records of the Meetings of the 6th Session, ILC Yearbook (1954), vol. I, 81, 85 (footnote 13, Art. 7) [sentence numbering added by author].

⁹ ILC, Additif au deuxième rapport de M. J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/61/ADD.1 (1953), ILC Yearbook (1953), vol. II, 75, 79 (Annexe: 'Rapport du Comité d'experts sur certaines questions d'ordre technique concernant la mer territoriale', V). The mimeographed English translation can be found in Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 59–63. It is interesting that W. Boggs, the author of the American proposal at the Hague Codification conference, was a member of the expert committee.

¹⁰ ILC, Summary Records of the Meetings of the 6th Session, ILC Yearbook (1954), vol. I, 86, 87 (259th Meeting – Discussion of Art. 7).

¹¹ However, when measuring distances considerably greater than 12 NM, Euclidian geometry will be replaced by spherical geometry, and the swinging of arcs on charts will lead to erroneous results.

¹² Shalowitz/Reed (note 2), 171.

¹³ *Ibid.*; also quoted in John P. Grant/J. Craig Barker, Parry and Grant Encyclopedic Dictionary of International Law (3rd edn. 2009), 186: 'Envelope Line'.

¹⁴ This point is illustrated by Figure 7.1: Trümpler on Art. 7 MN 21.

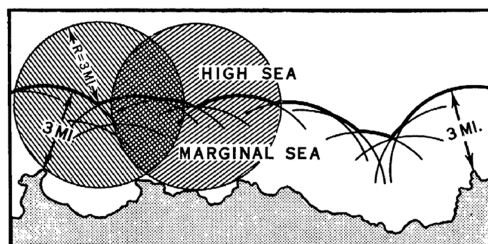


Fig. 4.2 ‘The envelope line is the locus of the center of a circle rolled along the coastline with circumference always in contact with it.’¹⁵

Source: *Shalowitz/Reed* (note 2), 171 (Fig. 27)

In contrast to the *tracé parallèle*, the outer limit of Art. 4 allows for easy determination of whether a ship is within the territorial sea (see Fig.).

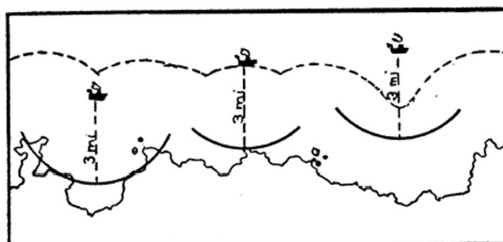


Fig 4.3 ‘The navigator’s method of ascertaining whether he is in territorial waters or on the high sea, if the limit is defined as the “envelope of the arcs of circles of three-mile radius.” It is evident that the limit of the territorial sea need not be indicated on the chart.’¹⁶

Source: *Boggs* (note 1), 546 (Fig. 2). Reproduced with permission from © The American Society of International Law.

Art. 4 is a strict geometric rule that derives the outer limit of the territorial sea from certain given baselines. The outer limit of the territorial sea is thus determined solely by the land (in fact by certain salient points of the land). This is a clear indication that the State has no original claim on the territorial sea, but that its claim is derived from the possession of the coastline, that the territorial sea is thus derivative in nature.¹⁷

In situations of adjacent or opposite coastlines, Art. 15 applies.¹⁸ States may, for example, agree to not extend their territorial seas to the maximum extent possible, so as to leave an important shipping lane part of the high seas (or EEZ).¹⁹

Article 5 Normal baseline

Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

¹⁵ *Shalowitz/Reed* (note 2), 171 (Fig. 27).

¹⁶ *Boggs* (note 1), 541, 546 (Fig. 2).

¹⁷ Art. 4 can thus be seen as a continuation of the cannon-shot rule. The range of cannons placed on the outermost promontories of the coast could be described by circles drawn from these promontories, resulting in an arcs-of-circles line.

¹⁸ See generally *Symmons* on Art. 15.

¹⁹ See also *Trümppler* on Art. 5 MN 31 for the possibility to fix the outer limit of the territorial sea by straight lines.

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Cases: ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40; PCA, *Arbitration between Guyana and Suriname* (Guyana v. Suriname), Award of 17 September, 2007, ILM 47 (2008), 166; PCA, *The South China Sea Arbitration* (Philippines v. People’s Republic of China), Award of 12 July 2016, <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>

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I. Purpose and Function

The baseline defined by Art 5. determines where the land ends and the sea begins under international law. Art. 5 thus establishes the fundamental datum for the measurement of maritime zones. The low-water line under Art. 5 is not only important for the direct measurement of the outer limit of the territorial sea, it also provides the relevant land/sea boundary line on which the further application of Arts. 6, 7, 9, 10, 13 and 47 is based. Part II Section 2 UNCLOS as a whole is based on the idea of the two-dimensional representation of land and sea on a chart. The extent of the land's dominance of the sea is subject to the rules of Section 2. The line of interest for this purpose is the low-water line. This two-dimensional view is the basis for the allocation of space throughout UNCLOS, with the notable exception of Part VI.

While Art. 5 defines the norm, other articles provide additions for specific geographical situations. Arts. 6, 9 and 13 directly reference the low-water line. Arts. 7 and 10 do so indirectly: The shape of the coastline (Art. 7) or the coast (Art. 10) is determined by the low-water line, as is the shape of a bay and the indentations of the coast. Importantly, under Arts. 7 and 10 the basepoints of straight baselines need to be situated on the normal baseline.

Arts. 5–7 and 9–14 provide rules for establishing baselines for the measurement of the territorial sea (→ Art. 3), and by reference for the contiguous zone (→ Art. 33 (2)), the exclusive economic zone (EEZ) (→ Art. 57), the default continental shelf (→ Art. 76 (1), and for one of the outer limits of the extended continental shelf (→ Art. 76 (6)). The outer limit of the territorial sea (→ Art. 4) is the derivative of the baseline established by Arts. 5–7, 9–11, and 13. But it is Art. 5 that is at the beginning of the delineation process.

II. Historical Background

The first international convention to make reference to the low-water line dates from 1839.¹ Previously, several other possible data had been used: the high-water mark, the point at which the sea first becomes navigable, and points where it is possible to erect coastal artillery, among others.² The North Sea Fisheries Convention of 1882³ marked the acceptance in Europe of the low-water line as the normal baseline.⁴ At the Hague Codification Conference, the Second Subcommittee, which dealt with technical issues of the territorial sea, settled on the 'line of low-water mark'.⁵ It did so following the proposals by the rapporteur, the expert committee⁶ and

¹ Convention for Defining and Regulating the Limits of the Exclusive Right of the Oyster and Other Fishery on the Coast of Great Britain and of France, 2 August 1839, BFSP 27, 983; see also *Daniel P. O'Connell*, *The International Law of the Sea*, vol. I (1982), 172.

² *O'Connell* (note 1), 172.

³ International Convention for Regulating the Police of North Sea Fisheries Outside Territorial Waters, 6 May 1882, CTS 160, 219.

⁴ *Georg Dahm/Jost Delbrück/Rüdiger Wolfrum*, *Völkerrecht*, vol. I/1 (2nd edn. 1989), 422; *O'Connell* (note 1), 172.

⁵ Conference for the Codification of International Law, Final Act, AJIL 24, No. 3 Suppl. (1930), 169, 247 (Annex II).

⁶ League of Nations, Committee of Experts for the Progressive Codification of International Law: Questionnaire No. 2: Territorial Waters, LN Doc. C.44.M.21.1926.V (1926), Annex IV: Draft Convention Amended By M. Schücking in Consequence of the Discussion in the Committee of Experts, reproduced in: Shabtai Rosenne (ed.),

the recommendation of the preparatory committee.⁷ In 1953, the expert commission invited by the special rapporteur FRANÇOIS of the International Law Commission (ILC) in preparation for UNCLOS I also recommended using the low-water line if detailed, recognized charts were available, and the high-water line if such charts had not been drawn.⁸ The ILC initially adopted draft Art. 4 along the lines of the expert commission's proposal but later removed the reference to the high-water mark⁹, stating:

‘it might lead to confusion since it could be interpreted as meaning that not only a ship on the high seas but also the coastal State must take the high-water line as baseline in the absence of detailed charts, which was not the Commission's intention.’¹⁰

III. Elements

1. The Normal Baseline, its Exceptions and Function

- 5 The low-water line is the default option for determining the normal baseline for the territorial sea. The other options provided by the Convention (namely Arts. 7 and 9–12) are rather exceptions to the normal baseline, as they may only be applied in certain circumstances (whereas the normal baseline is applicable in all circumstances). For example, while the State may choose to apply Art. 5 in all circumstances described in Art. 7, conversely Art. 7 cannot be applied everywhere where Art. 5 is applied. While the coastal State is free to use the other regulations (→ Art. 14), it must choose them actively and ensure that the requirements of the provisions concerned are met. It must then show them specifically for the purpose of delineation on suitable charts (Art. 16). In the absence of choice, Art. 5 will provide the baseline for the measurement of the territorial sea. Most of Part II, including Art. 5, is very close to the wording of the corresponding articles in the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ). The normal baseline is a framework not only for the measurement of the territorial sea, but for all other measurements that reference a distance to the coast (notably the contiguous zone, the EEZ, certain aspects of the continental shelf, but also by implication delimitation when it involves the distance, e.g. when drawing an equidistance line).

2. The Low-Water Line

- 6 The low-water line is the intersection of the plane of low-water with the shore.¹¹ The low-water line thus depends on the plane of low-water and the form of the shore (see Fig. 1).

League of Nations Committee of Experts for the Progressive Codification of International Law, vol. II: Documents (1972), 98 (Art. 2). The rapporteur (Schücking) found that State practice on this point was consistent and that all codification projects agreed on that point: *Ibid.*, Annex I Memorandum by M. Schücking, reproduced in: Shabtai Rosenne (ed.), League of Nations Committee of Experts for the Progressive Codification of International Law, vol. II: Documents (1972), 55, 63.

⁷ League of Nations, Acts of the Conference for the Codification of International Law: Meetings of the Committees, vol. III: Minutes of the Second Committee, LN Doc. C.351(b).M.145(b).1930.V (1930), Annex I: Bases of Discussion Drawn up by the Preparatory Committee (Basis of Discussion No. 6), reproduced in: Shabtai Rosenne (ed.), League of Nations Conference for the Codification of International Law (1930), vol. IV (1975), 1381.

⁸ ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur spécial, UN Doc. A/CN.4/61/ADD.1 (1953), ILC Yearbook (1953), vol. II, 75, 77 (Annex ‘Rapport du Comité d'experts sur certaines questions d'ordre technique concernant la mer territoriale’, I): English translation in: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 59; Aaron L. Shalowitz/Michael W. Reed, *Shore and Sea Boundaries*, vol. I (1962), 213, citing G. Etzel Percy, *Geographical Aspects of the Law of the Sea*, *Annals of the Association of American Geographers* 49 (1959), 6, who mentions the group of experts recommended the low-water line ‘as giving the state the right to measure the breadth of its territorial sea from the outermost land which is above water at low tide.’

⁹ See *infra*, MN 6–12.

¹⁰ ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), GAOR 7th Sess. Suppl. 10, 35.

¹¹ IHO, *Hydrographic Dictionary*, vol. I (5th edn. 1994), No. 2951.

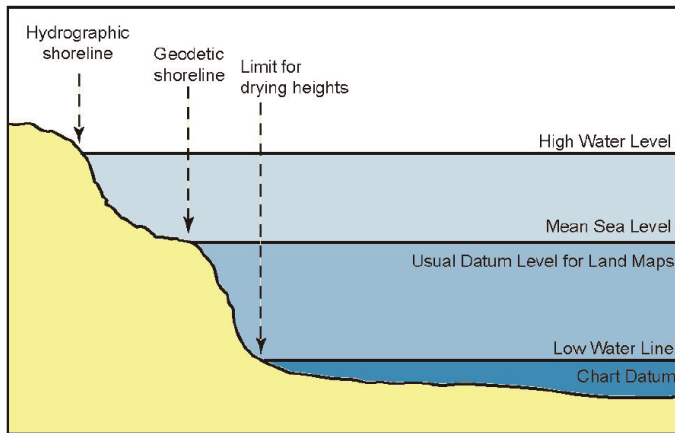


Fig. 5.1 Vertical Datums¹²

While the plane of low-water, or the reference plane, is derived from tidal observations and can usually be considered static,¹³ the coast may change by natural processes.

a) **'Line' in UNCLOS.** The UNCLOS uses 'line' without any further definition. In its Manual on Technical Aspects, the IHO gives a succinct definition of the possible meanings of 'straight lines'.¹⁴ Generally, when coordinates for the end or turning points of lines are specified, the type of line connecting them should be made clear as should the reference ellipsoid for the coordinates themselves (Art. 16). If the type of the line is not specified, it may be reasonable to assume that the line follows the curve giving the shortest distance between two points on a given surface (probably the reference ellipsoid), a geodesic.¹⁵ This would seem to require the fewest additional assumptions, for example on projections used. If the line is drawn for a specific purpose, the use of other lines may be more plausible: The lines connecting the turning points of traffic separation schemes, for example, may be seen as a 'true straight line on a Mercator chart' (or a loxodrome)¹⁶, as their purpose is for the navigation of ships and this type of line would allow for navigation on a constant bearing. While in practice this makes little difference for the ship, the distinction may matter when permanent structures are constructed in the vicinity and safety distances have to be observed.

aa) **Low-water datum.** At many coasts, the gravitational pull of the moon and the sun lets the sea level rise and fall periodically, usually twice in a lunar day (tide). The level of the rise is dependent on the exact astronomical conditions, e.g. if sun and moon are aligned, the rise and fall will be more pronounced (springtide) than average. The tide is also influenced by

¹² Source: IHO, A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982, Special Publication No. 51 (4th edn. 2006), Chapter 2–19 (Fig. 2.9); note that the 2014 edition has replaced this figure with a more comprehensive one (IHO, A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982, Special Publication No. 51 (5th edn. 2014), Ch. 2-17, Fig 210), however, the figure from the previous version is reproduced here for its relative simplicity. Material from relevant IHO publications and standards is reproduced with the permission of the Secretariat of the International Hydrographic Organization (IHO), acting for the International Hydrographic Organization (IHO), which does not accept responsibility for the correctness of the material as reproduced: in case of doubt, the IHO's authentic text shall prevail.

¹³ See *Shalowitz/Reed* (note 8), 89 and IHO, A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982, Special Publication No. 51 (3rd edn. 1993), Ch. 2.5 for a more detailed explanation. See also *infra* MN 36–40 for sea-level rise.

¹⁴ IHO, A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982, Special Publication No. 51 (5th edn. 2014), Ch. 3-12.

¹⁵ For definition see IHO, A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982, Special Publication No. 51 (5th edn. 2014), Ch. 3-12.

¹⁶ Definition according to IHO, A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982, Special Publication No. 51 (5th edn. 2014), Ch. 3-12.

local geography (sometimes resulting in a diurnal tide, i.e. a tide in which one of the two daily tides is stronger than the other), oscillations of the body of water at the coast, and centrifugal forces of the earth.¹⁷

- 9 The Convention does not specify the low-water datum.¹⁸ The second sub-committee of the Hague Conference was more specific in its draft and included

‘[f]or the purposes of this Convention, the line of low-water mark is that indicated on the charts officially used by the Coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides.’¹⁹

- 10 The ILC in 1954, following the advice of the committee of experts convened in 1953 in the Hague, did not make reference to a particular datum. The question to the committee was: ‘Assuming the territorial sea to be measured from the low-water line what line might then preferably be taken as such?’ The committee answered:

‘Except as otherwise provided for, the base-line for measuring the territorial sea should be the low-water line along the coast as marked on the largest-scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn, which show the low-water line, the shore line (high-water line) should be used.’²⁰

The committee of experts further stated that it did not consider

‘that there was any danger that omission of the provisions made by the 1930 Conference as regards special indications in this matter, might tempt governments unreasonably to extend their low-water lines in their charts.’²¹

- 11 On the basis of the suggestions of the committee of experts, the special rapporteur proposed the following revised article in his third report:

‘As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal state. If no detailed charts of the area have been drawn which show the low-water line, the shore line (high-water line) shall be used.’²²

- 12 A draft article (Art. 4) was adopted in 1954 along these lines.²³ In 1955 the last sentence referencing the high-water line was removed. It was pointed out by the Commission that the sentence ‘might lead to confusion since it could be interpreted as meaning that not only a ship on the high seas but also the coastal State must take the high-water line as base line in the absence of detailed charts, which was not the Commission’s intention.’ With minor alterations the 1956 draft Art. 4 was prepared for the conference.²⁴ This was then adopted as Art. 3 of the CTSCZ:

‘Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.’

¹⁷ For detailed information on tides see *Nuno Sérgio Marques Antunes*, *The Importance of the Tidal Datum in the Definition of Maritime Limits and Boundaries*, *Maritime Briefing* (2000), 2 (No. 7); *Nuno Sérgio Marques Antunes*, *The German-Danish Border, Boundary and Territory Briefing* 2 (2000), 1–4; *Shalowitz/Reed* (note 8), 84–85.

¹⁸ The IHO Hydrographic Dictionary (note 11) lists definitions for at least 11 low-water data: higher low water, Indian spring low water, lower low water, lowest low water, low water, mean lower low-water, mean lower low water springs, mean low water, mean low-water neaps, mean low-water springs, and lowest astronomical tide.

¹⁹ League of Nations, *Acts of the Conference for the Codification of International Law: Meetings of the Committees*, vol. III: *Minutes of the Second Committee*, LN Doc. C.351(b).M.145(b).1930.V (1930), Report adopted by the Committee, reproduced in: *AJIL* 24, No. 3 Suppl. (1930), 234, 247.

²⁰ ILC, *Reference Guide to the Articles Concerning the Law of the Sea* (Prepared by the Secretariat), UN Doc. A/C.6/L.378 (1956), 25.

²¹ ILC *Addition to the Second Report on the Territorial Sea* (note 8), 77: English translation as given in Nordquist/Nandan/Rosenne (note 8), 59.

²² ILC, *Régime of the Territorial Sea: Troisième rapport de J.P.A. Francois, rapporteur spécial*, UN Doc. A/CN.4/77 (1954), ILC Yearbook (1954), vol. II, 1, 2–3 (draft Art. 5); English translation in ILC Reference Guide (note 20), 26.

²³ ILC, *Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 13 (Commentary on Art. 4).

²⁴ *Ibid.*; see also ILC Reference Guide (note 16), 24 *et seq.*

In 1919 the International Hydrographic Organisation (IHO) adopted Technical Resolution A.2.5²⁵, which recommended that the chart datum should be on a plane that the tide does not frequently fall below it.²⁶ In 1998 the resolution was amended to explicitly recommend the lowest astronomical tide (LAT).²⁷ As a result, a number of States have moved to set their chart datum to the LAT, in some cases trying to harmonize within their region.²⁸

As LAT is defined as the ‘lowest tide level which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions’²⁹, any reference plane lower than LAT would rely on special meteorological conditions, e.g. a storm blowing the water off the land. A lower reference plane would therefore not be a result of coastal geography and the tidal forces, but of coincidental additional factors such as the wind. While there would still be an observed low-water line, such a reference plane is unlikely to be acceptable under Art. 5. Part II as a whole seems to regard the low-water line as the fairly stable (with the notable exception of Art. 7 (2)), defining element of the coast. It is relied upon to determine the status of indentations as bays (Art. 10 (3)) and – perhaps even more importantly – of low-tide elevations (LTE) (Art. 13 (1)): The question as to whether an elevation on the sea-bed is merely shallow water or constitutes a LTE depends on the reference plane alone. It would be inconsistent with the Convention’s aim to provide a dependable legal framework if such crucial determinations would depend on one-time, non-repeatable observations. The low-water line should be determined by a reference plane depending on regular occurrences. This seems to indicate that the LAT is the lowest acceptable reference plane for the low-water line.

bb) Intersection with the shore – ‘actual’ vs. charted line. Two main interpretations of the phrase ‘as marked on large-scale charts’ have been put forward: (1) the normal baseline is the low-water line depicted on the charts officially recognized by the coastal State (in the following referred to as charted line); or (2) the normal baseline is the low-water line along the coast at the vertical or tidal datum indicated on the charts officially recognized by the coastal State (in the following referred to as ‘actual line’).³⁰ Scholarly opinion on the issue seems divided.³¹

²⁵ O’Connell (note 1), 178; IHO Res. 3/1919 (Technical Resolution A 2.5) of 2008 References Datum and Benchmarks.

²⁶ Nordquist/Nandan/Rosenne (note 8), 89; UNCLOS III, Study on the Future Functions of the Secretary-General Under the Draft Convention and on the Needs of Countries, Especially Developing Countries, for Information, Advice and Assistance under the New Legal Regime, UN Doc. A/CONF.62/L.76 (1981), OR XV, 153, 169.

²⁷ IHO Res. 3/1919 (Technical Resolution A 2.5) of 2008; ‘It is further resolved that the Lowest Astronomical Tide (LAT), or as closely equivalent to this level as is practically acceptable to Hydrographic Offices, be adopted as chart datum where tides have an appreciable effect on the water level. Alternatively the differences between LAT and national chart datums may be specified on nautical documents. If low water levels in a specific area frequently deviate from LAT, chart datum may be adapted accordingly.’

²⁸ This takes considerable technical knowledge and cooperation. Even in the generally well surveyed and charted North Sea, neighbouring States encounter difficulties in harmonising their reference planes, see: Report of the 17th meeting of the NSHC-TWG to the 29th NSHC Conference, Merging and Comparison of Reference Surfaces for the North Sea Area, Annex D, available at: http://www.iho.int/mtg_docs/rhc/NSHC/NSHC29/NSHC29-E1.1-Denmark.pdf. For a summary of State practice current as of 2000, see *Antunes*, The Importance of the Tidal Datum (note 12), 6–7. However, more States seem to shift to LAT or datums that are very close to LAT, including the Australian Hydrographic Office (Tidal Glossary, <http://www.hydro.gov.au/prod/serv/data/tides/tidal-glossary.htm#1> Lowest Astronomical Tide, visited 07.04.09), and North Sea Hydrographic Services, including Belgium, Germany, France, Netherlands, Norway and the UK, with the exception of Denmark.

²⁹ IHO Hydrographic Dictionary (note 11), 135 (No. 2936).

³⁰ ILA Baseline Committee, Baselines under the International Law of the Sea, Sofia Conference (2012), 3.

³¹ *Daniel P. O’Connell*, The International Law of the Sea, vol. II (1982), 682, states in the context of lateral delimitation ‘However, a practical problem arises when the frontier lines have been officially described on charts, since there would be discordance between official documents and geographical reality, resulting in difficulties in applying and enforcing the law. Gidel proposes that the simple solution is to follow the line of the chart, because this is intended to eliminate uncertainty. However, it may be that this would involve an exercise of sovereignty in neighbouring territory, so that rectification of the charts would seem to be incumbent upon the State whose shoreline has altered’; *Chris Carleton/Clive Schofield*, Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits, IBRU Maritime Briefing 3(3) (2001), 24, state ‘if

- 16 It is important to note that the low-water line is a constructed line. In particular along coasts with tidal influence it is a constructed line defined as the intersection of a certain defined reference plane (usually LAT) and the coast (see paragraph 2 above). The low-water line can rarely be observed; it is not a fixture on the ground that can easily be ascertained.³² Finding the low-water line requires tidal observations that are time consuming and costly and a survey of the land (using different survey methods, e.g. traditional terrestrial geodetic measurements or satellite positioning).³³ The best representation of an actual low-water line is therefore a nautical chart based on up-to-date survey data.
- 17 The question of interpretation would be purely academic if such up-to-date charts existed in all cases. That is not the case, as the IHO points out in its Manual on Technical Aspects:

‘Most charts are compiled from the results of hydrographic surveys that are very time consuming operations, even with modern equipment. Ocean surveys have only been undertaken by a limited number of maritime States. Consequently, large areas of the world’s continental shelves have never been properly surveyed, and perhaps surprisingly significant areas of coastal waters have not been surveyed in the detail required for today’s shipping or for LOS boundary delimitation. The significance of this variable quality of charts in maritime boundary delimitation is that:

- a. Geographical positions may be based upon inaccurate, imperfect or inadequate observations.
- b. In areas where the low-water line is composed of soft materials like mud or sand, the details are likely to have changed since the surveys were undertaken, particularly in areas of strong currents or tidal streams, or along coasts that are subject to major storms.
- c. If the chart has been based on the original printing plates it may not be clear from the symbols used at that time which contour line or lines represent the low-water line.’

The interpretation of Art. 5 must therefore answer two questions. Does Art. 5 refer to the charted or the ‘actual’ line (accepting that this line may not be observable)? And what are the consequences, if no chart exists or the chart is erroneous?

- 18 The ordinary meaning of the English words ‘as marked on’ seems to emphasize the charted line.³⁴ However, taking into account the other authoritative versions of the text of the Convention, no preferable interpretation emerges.³⁵
- 19 The historical analyses of the text is inconclusive. Art. 5 has its root in the 1930 codification effort.³⁶ The International Law Association’s (ILA) report – pointing out the multiple low-water data used by states prior to the 1930 conference – came to the conclusion that the phrase ‘line of low-water mark [...] indicated on charts’ ‘did not refer to the line, *per se*, but to the chart datum that, when applied to that coast during the chart-making process, would result in that particular charted line.’³⁷ As the understanding of the 1930 discussion and text is important for the question at hand, it may be helpful to reproduce the 1930 second sub-committee’s observations on its own text in some detail:

‘[...]For purposes of this Convention, the line of low-water mark is that indicated on the charts officially used by the Coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides. [...]’

the coastline has altered, but it has not been published, the legal baseline is that on the published chart’. Aaron L. Shalowitz/Michael W. Reed, *Shore and Sea Boundaries*, vol. III (2000), 182, argue ‘It is the actual low-water line and not the charted line that is to be used as the baseline under the Convention.’ See also ILA Baseline Report (note 30), 23–24 for a detailed analysis of the literature.

³² Aaron L. Shalowitz/Michael W. Reed, *Shore and Sea Boundaries*, vol. I (1962), 89–90: ‘A water Boundary determined by tidal definition is thus not a fixed, visible mark on the ground, such as a roadway or fence, but represents a condition at the water’s edge during a particular instant of the tidal cycle.’

³³ See IHO Manual on Technical Aspects 2014 (note 13), Ch. 3-7-3-8.; Carleton/Schofield (note 31), point out: ‘Where chart coverage and land-mapping is insufficient [...] processed satellite imagery can be used to determine a digital model of the territorial sea basepoints.’ They further state that accurate imagery (+/- 30 m) may be available that is ‘not expensive’.

³⁴ ILA Baseline Report (note 30), 8.

³⁵ See *ibid.*, 8 for a detailed analysis.

³⁶ See *supra*, MN 6 and 7; ILA Baseline Report (note 30), 11, ‘Understanding the discussions in 1929 and 1930 and the proposed language that resulted is crucial to the interpretation of 1958 Article 3 and 1982 Article 5 [...]’.

³⁷ ILA Baseline Report (note 30), 11.

[...] The traditional expression “low-water mark” may be interpreted in different ways and requires definition. In practice, different States employ different criteria to determine this line. The two following criteria have been taken more particularly into consideration: first the low-water mark indicated by the charts officially used by the coastal state, and, secondly, the line of mean low-water spring tides. Preference was given to the first, as it appeared more practical. Not every State, it is true, possesses official charts published by its own hydrographic services, but every coastal State has some chart adopted as official by the State authorities, and a phrase has therefore been used which also includes these charts.

The divergencies due to the adoption of different criteria on the different charts are very slight and can be disregarded. In order to guard against abuse, however, the proviso has been added that the line indicated on the chart must not depart appreciably from the more scientific criterion: the line of mean low-water spring tides. The term “appreciably” is admittedly vague. Inasmuch, however, as this proviso would only be of importance in a case which was clearly fraudulent, and as, moreover, absolute precision was extremely difficult to attain, it is thought, that it might be accepted. [...] ³⁸

The sub-committee apparently considered an objective ‘scientific’ criterion for the definition but settled on the low-water mark indicated on charts as the more practical criterion. It is to be noted that the sub-committee did not enumerate the different vertical data used at the time. It considered as defining criteria, on the one hand, a line resulting from an objective vertical datum, and, on the other, a charted line. In particular, the second paragraph does not necessarily support the conclusion that the sub-committee’s intention was not to refer to the line, *per se*. On the contrary, it seems to suggest that the charted line is the defining criterion for the low-water line, unless the charted line was drawn in a ‘clearly fraudulent’ way. However, the committee does not seem to have considered the case that a nautical chart may be outdated so that natural processes and not fraud are the reason for the line to depart ‘appreciably’ from the scientific line. ³⁹

The ILC was heavily influenced by the results of the 1930 conference. The first proposal 20 for a draft regulation by Special Rapporteur FRANÇOIS was similar to the 1930 proposal in the sub-committee report⁴⁰: ‘3. The line of low-water mark is that indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides.’ The rather strong phrase ‘is that’ also indicates, that indeed the low-water line was to be defined as the charted line.

The text was revised following the advice of the ILC Committee of Experts and thus 21 appeared as Art. 4 of the 1956 draft articles:

‘Subject to the provisions of article 5 and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal State.’⁴¹

In its commentary the ILC states:

‘The traditional expression “low-water mark” may have different meanings; there is no uniform standard by which States in practice determine this line. The Commission considers that it is permissible to adopt as the base line the low-water mark as indicated on large scale charts officially recognized by the coastal state.’⁴²

³⁸ League of Nations, Acts of the Conference for the Codification of International Law: Meetings of the Committee, vol. III: Minutes of the Second Committee, LN Doc. No. C.351(b).M145(b).1930.V (1930), Annex V (Appendix 2: Report of the Second Sub-Committee), reproduced in: Shabtai Rosenne (note 7), 1419.

³⁹ This was criticized early on, Fritz Münch, *Die technischen Fragen des Küstenmeers* (1934), 78, explicitly stated that the reference to the line mean low-water spring tides should not only be ‘a clause de bonne foi’ as stated in the sub-committee report, but was also necessary with regard to changes in nature.

⁴⁰ ILC, Régime of the Territorial Sea: Rapport par J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/53 (1952), ILC Yearbook (1952), vol. II, 25, 32; English translation in ILC, Summary Records of the 4th Session, ILC Yearbook (1952), vol. 1, 169, 171 (169th Meeting, footnote 6).

⁴¹ Changes made in the Third report of the Special Rapporteur: ILC, Régime of the Territorial Sea: Troisième rapport de J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/77 (1954), ILC Yearbook (1954), vol. II, 1, 2–3 (see draft Art. 5); ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12, 4.

⁴² ILC Law of the Sea Articles with Commentaries (note 23), 13 (Art. 4).

- 22 In the light of this history, the interpretation that ‘as marked on large-scale charts’ refers not to ‘the line, *per se*, but to the chart datum [...]’ does not fully explain the prominent role of the charted line and, in particular, why the reference to ‘large-scale charts’ was added by the Committee of Experts. A ‘large-scale chart’ would not be necessary to fix the chart datum: it is however necessary to ascertain the exact position of the line. It seems at least possible to interpret the history as also indicating that the charted low-water line is to be considered as the baseline.
- 23 cc) **Error in the chart or no chart.** A separate question is whether the officially recognized charts remain open to challenge in a court or tribunal. Here, historical analysis suggests strongly that this option was always assumed by the drafting bodies. The 1930 conference contained an explicit reference to a standard line, but only envisioned that to be necessary in fraudulent circumstances. Several ILC members raised the point of adjudication, also concerning outdated or otherwise unacceptable charts.⁴³
- 24 This analysis would indicate that at the heart of the matter is not the interpretation of ‘low-water line’, but of ‘chart’. The 1930 conference assumed that the ‘divergencies’ between charted line and objective line would be appreciable only in the context of fraud. Accordingly, an up-to-date chart was presupposed. However, the basis to accept the primacy of the chart is an existent chart, i.e. nautical chart, produced and adhering to certain standards, suitable for navigation. If evidence, e.g. observable facts, indicate that the chart does not meet this level of quality, the basis for the acceptance of the charted line no longer exists.
- 25 In the *Arbitration between Guyana and Suriname*⁴⁴, the tribunal heard evidence on the accurate depiction of a basepoint located on a shoal. The chart depicting the low-water line along the shoal was produced after the beginning of the arbitration and showed the low-water line several kilometres seaward of the previous line.⁴⁵ After hearing the evidence the tribunal declared itself ‘not convinced’ that the point in question was inaccurate.⁴⁶ In the *Qatar/Bahrain Case*, the International Court of Justice analyzed evidence pertaining to the question of whether a feature was an island or a low-tide elevation and concluded, contrary to submitted charts, that the feature was an island.⁴⁷ However, this is a question of the high-water mark, which determines the quality of *terra firma* and separates low-tide elevations from the islands. The low-water mark of the feature was not at issue.
- 26 Considering the wording and the history of Art. 5, it would seem that the possibility of challenge if the charted line departs appreciably from a certain objective standard has been accepted throughout the drafting history. ‘Appreciably’ was understood at first to refer to fraudulent cases only. Drafting history and judicial practice indicates that this has been extended to factual errors. The drafting history suggests, and *Arbitration between Guyana and Suriname* supports, the view that these errors need to be clear and convincingly shown, and have considerable influence on the coastline; in other words they need to be significant. The following interpretation emerges from this: The low-water line is the line charted on large-scale charts officially recognized by the coastal State, unless there is evidence of significant errors in the chart. These may include errors that arise from the use of inappropriate procedures or other unintentional mistakes, but also errors that result from a shift in the coastline since the survey that the chart is based on.
- 27 The view expressed here emphasizes the stability and relative certainty gained by using the charted line as the low-water line: the limit of the territorial sea would not fluctuate on

⁴³ ILC, Summary Records of the Meetings of the 4th Session, ILC Yearbook (1952), vol. I, 172, 177–178 (170th Meeting – statements of members Amado, Yepes, and Scelle).

⁴⁴ PCA, *Arbitration between Guyana and Suriname* (Guyana v. Suriname), Award of 17 September 2007, ILM 47 (2008), 166.

⁴⁵ *Ibid.*, para. 395; also ILA Baseline Report (note 30), 13, for a concise summary.

⁴⁶ *Arbitration between Guyana and Suriname* (note 44), para. 395.

⁴⁷ ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40, 98–99.

perhaps even a daily basis with the morphological changes in the coastline,⁴⁸ but would remain tethered to the charted line until the error between the observations and charted line is significant.⁴⁹ Whether such an error is significant or not should be determined by recourse to the purpose of the chart: if the error is such that by accepted hydrographic standards a correction of the chart is necessary, then the error is significant.

The view expressed here and the view expressing that the low-water line is the ‘actual’ low-water line, for example in the ILA report, have a considerable overlap in practice. In particular, while the ILA report does not accept the charted line as the normal baseline, but states that ‘[a]s a matter of evidence for proving the location of the normal baseline the charted line appears to enjoy a strong presumption of accuracy’⁵⁰. However, there may be discrepancies in cases where evidence in the form of observations does not indicate a significant error in the charts, but a small error with significant consequences, for example in the question of whether a feature is a low-tide elevation or merely an elevation of the seafloor. If no charts or no adequate charts exist, the low-water line may be determined by recourse to other means.⁵¹ For example, in the *South China Sea Arbitration*, the Tribunal considered the respective merits of satellite imagery and nautical charts at length.⁵²

The Convention provides no guidance on the measurement of the low-water line along coasts permanently covered in ice.⁵³ In such areas, a low-water line is not readily observable. However, given the fact that in most areas the low-water line is now calculated electronically, it should be possible to calculate the low-water line as an intersection of the reference plane with the (ice-covered) shore relatively easily using geographical information systems. A low-water line thus calculated would have the advantage of stability and be independent of

⁴⁸ Though this seems to be the view expressed by Reed in: Aaron L. Shalowitz/Michael W. Reed, *Shore and Sea Boundaries*, vol. III (2000), 185.

⁴⁹ Cf. Leendert Dorst/Alex Oude Elferink/Thijs Ligteringen, *Recent Changes In the Dutch Baseline: The Inseparable Connection Of Human Activities And Natural Processes*, ABLOS 7 Conference Papers, Session 8 (2012), available at: http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf7/ABLOS_Conf7.htm, ‘by using nautical charts, the baseline is frozen until the next edition of the chart is published, usually after a few years. The intermediate stability of the baselines and outer limits has an advantage for mariners, like fishermen and their inspectors. They do not have to ascertain continuously whether the limits have changed, but have to handle changes in the extent of zones due to a specific coastal project only once every few years. A permanent, gradual change of the extent of zones would have been a lot harder to implement into procedures for up-to-date geographic information at sea.’

⁵⁰ ‘The Committee concludes that the legal normal baseline is the actual low-water line along the coast at the vertical datum, also known as the chart datum, indicated on charts officially recognized by the coastal State. The phrase “as marked on large-scale charts officially recognized by the coastal State” provides for coastal State discretion to choose the vertical datum at which that State measures and depicts its low-water line. The charted low-water line illustrates the legal normal baseline, and in most instances and for most purposes the charted low-water line provides a sufficiently accurate representation of the normal baseline. As a matter of evidence for proving the location of the normal baseline the charted line appears to enjoy a strong presumption of accuracy. However, where significant physical changes have occurred so that the chart does not provide an accurate representation of the actual low-water line at the chosen vertical datum, extrinsic evidence has been considered by international courts and tribunals in order to determine the location of the legal normal baseline.’ ILA Baseline Report (note 30), 31.

⁵¹ E.g. Peter Beazley, *Technical Considerations in Maritime Boundary Delimitations*, in: Jonathan I. Charney/Lewis M. Alexander (eds.), *International Maritime Boundaries* (1993), 243, 245, contends that in some situations existing charts have been thought inadequate. The examples that follow make clear, that they had been judged inadequate by the coastal state itself in its negotiations with other states. In this context official recognition may be lacking. See further: Carleton/Schofield (note 31), 18–19; UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Seas* (1989), 2; Aaron L. Shalowitz/Michael W. Reed, *Shore and Sea Boundaries*, vol. II (1964), 185.

⁵² PCA, *The South China Sea Arbitration* (Philippines v. People’s Republic of China), Award of 12 July 2016, paras. 322–326, available at: <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>, include technical details on satellite imagery and its limitations. Paras. 327–332 contrast this with the use of nautical charts based on surveys undertaken in parts in the 1930s and 1860s.

⁵³ UN DOALOS, *Baselines: National Legislation with Illustrative Maps* (1989), 3, 5 para 13. For the use of the low-water line along ice-covered coasts, see Christoph C. Joyner, *Ice Covered Regions in International Law*, *Natural Resources Journal* 31 (1991), 224. For the edge of the ice as baseline at stable ice formations, see Jørgen Molde, *The Status of Ice in International Law*, *Nordic Journal of International Law* 51 (1982), 164, 165.

seasonal variations in glacier extension and ice coverage. It would avoid any questions related to diminishing ice coverage due to global warming. The definition of the low-water line as the intersection of the reference plane with the actual land mass can thus provide a consistent definition of the low-water line even for ice-covered areas.

3. Large-Scale Charts

- 30 The UNCLOS contains no definition of ‘chart’. Chart is however usually understood as a nautical chart,⁵⁴ i.e. a map specifically designed to meet the needs of marine navigation. The history of the text⁵⁵ supports this understanding. For commercial shipping, The International Convention for the Safety of Life at Sea (SOLAS 1974) requires the carriage of adequate and up-to-date charts;⁵⁶ outdated charts clearly do not meet the needs of marine navigation.
- 31 On the other hand, charts submitted under Art. 16 (2) UNCLOS may be marked explicitly as not to be used for navigation, or are by their nature unsuitable for navigation. Moreover, charts are not always regularly resubmitted and at least some are bound to be outdated (see also sea-level rise below). While there is no requirement to submit charts depicting normal baselines under Art. 16, there is a significant link between the articles in the use of the word charts and in the fact that the base points of the baselines notified under Art. 16 usually lie on the low-water line.
- 32 The phrase ‘as marked on large-scale charts’ contains the key concept that the information on the low-water line must be publicly available with reasonable accuracy. It is unclear what scale a large-scale chart should have. Two situations need to be distinguished here: (a) the physical chart contains the defining information on the low-water line, and by implication on the limit of the territorial sea and (b) the defining information is contained elsewhere, e.g. the outer limit of the territorial sea or the low-water line is fixed by co-ordinates and the chart serves illustrative purposes. In situation (a), i.e. when the chart is the actual carrier of the information on which the definition of the territorial sea depends, the charts used should be of a scale that allows for a reasonably accurate determination of the outer limit. This would be consistent with Art. 16, which requires that baselines other than the normal baseline ‘be shown on charts of a scale or scales adequate for ascertaining their position.’ As the normal baseline and straight baseline both serve the same purpose in the delimitation of all maritime zones it seems that ‘large scale’ and ‘a scale or scales adequate for ascertaining their position’ may be used synonymously. The UN-Baseline Study proposes a scale of 1:50,000 to 1:200,000.⁵⁷ The IHO Manual on Technical Aspects suggests a scale of 1:50,000 to 1:100,000 and points out that the plotting errors in the determination related to the various scales are approximately 10 m at a scale of 1:50,000 and 40 m at a scale of 1:200,000.⁵⁸ This seems reasonably precise if compared with the breadth of the territorial sea (40 m are less than 0.2% of twelve NM). However, in absolute terms, this level of accuracy may already be unacceptable, in particular when the determination not only of the outer limit, but of the boundary to opposite or adjacent states is at stake. Also, when taking into consideration that one of the purposes of charts in this context is to enable ships to determine if they are within the territorial sea of a State, the limiting factor in the determination should not be the

⁵⁴ IHO Manual on Technical Aspects (note 13), defines chart as: ‘A NAUTICAL CHART specially designed to meet the needs of marine navigation. It depicts such information as depths of water, nature of the seabed, configuration and nature of the coast, dangers and aids to navigation, in a standardised format; also called simply, Chart. (Appendix 1–2). This is the same definition as given in the Glossary of Terms included in UN DOALOS Baselines (note 53), 47, 51; and 1 (para. 2); Nordquist/Nandan/Rosenne (note 8), 90 (MN 5.4(c)): ‘The term “chart” refers to nautical charts, which are especially designed to meet the needs of marine navigation [going on to quote the UN Baseline Study Glossary].’

⁵⁵ See also George K. Walker (ed.), *Definitions for the Law of the Sea: Terms not Defined by the 1982 Convention* (2012), Walker, 126 (para. 23 ‘Chart; nautical chart’ and in particular text to footnotes 365 and 366).

⁵⁶ Reg. 27 Ch. V Annex International Convention for the Safety of Life at Sea 1974 (SOLAS 1974), as amended.

⁵⁷ UN DOALOS Baselines (note 53), 2 (para. 8).

⁵⁸ IHO Manual on Technical Aspects 2014 (note 13), Ch. 3-11.

accuracy of the charts provided by the State. Hence, the charts should allow for an accuracy that matches the navigational needs of the ship in determining its position. GPS navigation routinely allows for determinations of the position within tens of meters.⁵⁹ However, the IHO provides the following definitions for charts⁶⁰:

'In the case of paper charts, very generally, the terms 'medium-scale' and 'large-scale', as in the title of S-4 Part B, cover the following types of chart:

Medium-scale:	General: passage/landfall	1:2 000 000–1:350 000
	Coastal: coastal navigation	1:350 000–1:75 000
Large-scale:	Approach: port approach/intricate or congested coastal waters	1:75 000–1:30 000
	Harbour: harbour/anchorage/narrow straits	larger than 1:30 000
	Berthing	very large scales'

While the primary focus of the IHO guidelines is safety of navigation, and not baselines, this can still be seen to indicate that charts in the range of 1:75,000 and larger would be deemed sufficient. However, in certain coastal areas only smaller scale charts used for coastal navigation may be available, while there is still a need to ascertain the extent of the territorial sea. In the *South China Sea Arbitration* award the Tribunal addresses the question of large-scale charts and seems to indicate that it generally considers charts of a scale of 1:150,000 large scale, and points out that it 'has identified some relevant evidence in nautical charts up to 1:250,000 scale'.⁶¹ In summary, the term 'large-scale chart' should be understood as a chart preferably with the scale of 1:30,000 to 1:75,000 or the largest scale chart available, but no smaller than 1:250,000. Certainly in situations where a boundary has to be delimited between adjacent or opposite States, a scale of 1:40,000 or so would seem desirable, as at smaller scales the breadth of the lines on the chart alone would introduce significant uncertainties.⁶² In situation (b), charts serve only illustrative purposes; the information necessary for the determination of the outer limit of the territorial sea is given with the co-ordinates. It is neither practicable nor necessary to give an approximation of the entire low-water line in the form of co-ordinates, because as outlined above with a 12 NM territorial sea the outer limit is determined by relatively few points.⁶³

It is also possible for a State to fix the outer limit of its territorial sea directly by straight lines between fixed co-ordinates,⁶⁴ as long as the entire boundary thus delimited is inside the envelope of arcs of circles that the State could draw using Part II of the Convention, including the provisions on straight baselines and bays. When using this method, the territorial sea has a variable breadth, as straight lines cannot have a constant distance to an

⁵⁹ IMO Res. MSC.112(73) of 1 December 2000 requires an accuracy of at least 100 m for 95 % of operations (Annex 3.4 and 3.5), the US Department of Defense, Global Positioning System Standard Positioning Service Performance Standard (4th edn. 2008), 22, specifies an accuracy of 7.8 m for 95 % of operations (Table 3.4-1.), available at: <http://www.gps.gov/technical/ps/2008-SPS-performance-standard.pdf>.

⁶⁰ IHO, Regulations of the IHO for International (INT) Charts and Chart Specifications of the IHO (edn. 4.5.0, 2014), S. B-126.

⁶¹ *The South China Sea Arbitration* (note 52), para. 330.

⁶² Robert D. Hodgson/E. John Cooper, The Technical Delimitation of a Modern Equidistant Boundary, ODIL 3 (1976), 377; O'Connell (note 1), 646 seems to argue for smaller scale charts; Robert W. Smith, A Geographical Primer to Maritime Boundary Making, ODIL 9 (1982), 16; cf. S. P. Jagota, Maritime Boundary (1985), 62.

⁶³ Trümpler on Art. 4 MN 7, see also *infra*, MN 38.

⁶⁴ See for example: Proclamation of 11 November 1994 by the Government of the Federal Republic of Germany concerning the extension of the breadth of the German territorial sea for the Baltic Sea, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/deu_1994_territorial_proclamation.pdf; Denmark, Executive Order No 242 of 21 April 1999, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1999_Order.pdf.

irregularly shaped coastline. That the State might use this method follows from Art. 3, which allows a breadth of up to 12 NM. Consequently, the State is free to give the territorial sea the shape it sees fit within this limit.

- 34 a) **Electronic Navigational Charts (ENC).** As the use of electronic charts for navigation and geographical information systems is spreading,⁶⁵ the question arises whether the State may refer to electronic charts for the determination of the low-water line. Electronic charts can be categorized in raster (a digital facsimile of a paper chart that is referenced to known locations) and vector (object-based) charts.⁶⁶ Electronic navigational charts (ENCs) are official charts issued by or on the authority of government authorized hydrographic offices.⁶⁷ ENCs are vector charts and may contain more accurate information in some respects, in particular as they allow for a variable scale.⁶⁸ The wording of Art. 5 does not specifically require paper charts. As official ENCs are comparable in status to official paper charts, while in quality they may be superior, they may be used in the context of Art. 5 to determine the low-water line, if officially recognized by the coastal State. If such charts will be submitted to a tribunal, procedures for examining them and transferring their content to a usually paper-based judgment will have to be developed.

4. Officially Recognized Charts

- 35 The chart used to establish the low-water line does not need to be produced by the coastal State; it merely needs to be officially recognized by the State. Recognition can have two possible meanings: It can refer to official recognition for the purposes of delimitation, or to recognition as a chart suitable for navigation in the coastal waters of the State. Reg. 2 Ch.V SOLAS states:

“Nautical chart” or “nautical publication” is a special-purpose map or book, or a specially compiled database from which such a map or book is derived, that is issued officially by or on the authority of a Government, authorized Hydrographic Office or other relevant government institution and is designed to meet the requirements of marine navigation.”⁶⁹

⁶⁵ Ch. V SOLAS 1974 and the Protocol thereto implies the possibility to navigate only with electronic charts, if sufficient backup (which may also be electronic) is provided (Reg. 9, sect. 2.1.4 and accompanying footnote).

⁶⁶ See IHO Manual on Technical Aspects 2006 (note 12), Ch. 3-4 for a more detailed explanation. See also carriage requirements under Regulation 19 Ch. V SOLAS, requiring the use of ECDIS for certain ships.

⁶⁷ For a definition of ECDIS and ENC see IMO Resolution A.817 (19), Performance Standards for Electronic Chart Display and Information Systems (ECDIS) and Resolution MSC.232(82) (adopted on 5 December 2006) Adoption of the Revised Performance Standards for Electronic Chart Display And Information Systems (ECDIS): ‘[...] 3 DEFINITIONS

For the purpose of these performance standards:

3.1 Electronic Chart Display and Information System (ECDIS) means a navigation information system which with adequate back-up arrangements can be accepted as complying with the up-to-date chart required by regulations V/19 and V/27 of the 1974 SOLAS Convention, as amended, by displaying selected information from a system electronic navigational chart (SENC) with positional information from navigation sensors to assist the mariner in route planning and route monitoring, and if required display additional navigation-related information.

3.2 Electronic Navigational Chart (ENC) means the database, standardized as to content, structure and format, issued for use with ECDIS by or on the authority of a Government, authorized Hydrographic Office or other relevant government institution, and conform to IHO standards. The ENC contains all the chart information necessary for safe navigation and may contain supplementary information in addition to that contained in the paper chart (e.g. sailing directions) which may be considered necessary for safe navigation. [...]’.

‘An ENC is an official chart and should not be confused with Electronic Charts (EC) sold by commercial companies’, IHO Manual on Technical Aspects 2006 (note 12), Ch. 3-5. See Hecht, Horst/Jonas, Mathias/Berking, Bernard, *The Electronic Chart*, 3rd ed., Lemmer 2011, pp. 39 ff.

⁶⁸ On certain types of charts, the operator can ‘zoom in’ on an area of interest. See also IHO Manual on Technical Aspects 2006 (note 12), Ch. 3-6.

⁶⁹ A footnote at the end of the definition states ‘Refer to appropriate resolutions and recommendations of the International Hydrographic Organization concerning the authority and responsibilities of coastal States in the provision of charting in accordance with regulation 9.’

Merchant ships⁷⁰ are required to carry ‘adequate and up-to-date charts’ under Reg. 27 Ch. V SOLAS ‘to plan and display the ship’s route for the intended voyage and to plot and monitor positions throughout the voyage’ (Reg. 19 sect. 2.1.4); however, Regulation 9 section 1 requires that ‘Contracting Governments undertake to arrange for the collection and compilation of hydrographic data and the publication, dissemination and keeping up to date of all nautical information necessary for safe navigation.’⁷¹ On the other hand, it seems uncommon for States to routinely issue statements that a chart is suitable for delimitation under Art. 5. In the absence of an explicit declaration as to recognition of the chart for boundary delimitation, issuing or authorizing a chart for use in navigation under SOLAS may constitute recognition under Art. 5. This would be in line with the history of Art. 5.⁷²

a) **Coastal Defense and Land reclamation.** While there may be overlap with Art. 11⁷³ 36 there seems to be consensus that coastal defense structures including dykes, levees and seawalls form part of the coastline and may serve as basepoints.⁷⁴

Similarly, it seems accepted State practice to shift the territorial sea baseline with land 37 reclamation works. Especially in the Netherlands, vast stretches of the coastline are formed by land reclamation with the man-made low-water line apparently as the accepted normal baseline.⁷⁵

5. Sea-level Rise

The legal situation is unclear regarding substantial changes in the coastline, including the 38 disappearance of islands as the result of climate change. The Convention requires the existence of land with its associated low-water line so that territorial sea may be established. Along with the land vanishes the State’s domination of the sea and the *raison d’être* for the territorial sea. The ILA states that ‘[s]ubstantial territorial loss is a much broader issue, encompassing concerns of statehood, national identity, refugee status, state responsibility, access to resources, and international peace and security.’⁷⁶ The Convention is a constitution of the oceans, but it cannot provide the answer to the fate of States disappearing into the ocean.

As long as no legal instrument specifically addresses the issue, it is necessary to evaluate 39 the existing law in UNCLOS. In the framework of the UNCLOS, several technical options are being discussed to mitigate the legal consequences for States from rising sea levels: These are coastal protection of the whole or of salient points of the coastline, and ‘fixing’ the baseline through legal means.⁷⁷

Coastal protection seems the least contentious option, though substantial construction 40 work may have negative impacts on other States and raise separate issues of liability.⁷⁸ In principle, however, coastal protection works are fully in-line with the UNCLOS. Coastal protection may focus on salient points in the coastline instead of the entire coast. The outer limit of the territorial sea depends only on a relatively small number of points along the coast (the outer limit of the EEZ on even less).⁷⁹ These points could be chosen for selective coastal

⁷⁰ Ch. V SOLAS 1974 applies to all ships on all voyages, with very few exceptions (see Reg. 1 Ch. V).

⁷¹ See also Peter B. Beazley, *Maritime Limits and Baselines, A Guide to their Delineation* (3rd edn. 1987), 8.

⁷² The observations on the phrase ‘officially used’ in the 1930 report of the second sub-committee above.

⁷³ See ILA Baseline Report (note 31), 27. See generally Symmons on Art. 11.

⁷⁴ Chris Carleton, Problems Relating to Non-Natural and Man-Made Basepoints under UNCLOS, in: Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 31–68.

⁷⁵ *ibid.*, 19–22; Dorst/Elferink/Ligteringen (note 49), 2 and 6; ILA Baseline Report (note 31), 28.

⁷⁶ ILA Baseline Report (note 31), 31.

⁷⁷ Clive Schofield/David Freestone, Options to Protect Coastlines and Secure Maritime Jurisdiction in the Face of Global Sea Level Rise, in: Michael B. Gerrard/Gregory E. Wannier (eds.) *Threatened Island Nations, Legal Implications of Rising Seas and a Changing Climate* (2013), 141–165.

⁷⁸ *Ibid.*, 153.

⁷⁹ Trümpler on Art. 4 MN 7.

defense work. The number of points needed may be further reduced by the use of straight (archipelagic) baselines and a focus on the basepoints of the baselines.⁸⁰

- 41 'Fixing' baselines legally and not physically is more controversial. In the context of Art. 5, this would only be possible if the charted line is accepted as the legal baseline and – in contrast to the conclusions above – significant errors in the chart would be disregarded as they appeared over time.⁸¹ Outside the context of Art. 5, the use of straight baselines in accordance with Art. 7 (2) has been proposed,⁸² as well as the use of publication requirements in Arts. 16, 47 and 75. RAYFUSE argues that

'the ability to stipulate geographic coordinates [under these articles] indicates that baselines and charts may be disaggregated. As such, the charts may subsequently amended for navigation purposes to reflect the physical reality of a receding coast while the baselines and outer EEZ limits remain fixed. Thus, once declared and publicized, these claims attract a presumption of permanence.'⁸³

This conclusion though seems inconsistent with the requirement that basepoints be 'anchored' on the low-water line.⁸⁴

- 42 However, publicized basepoints seem to be updated fairly infrequently⁸⁵, with little criticism from other States.⁸⁶ This may be an indication that States are willing to accept a less frequent updating of charts and associated basepoints as a 'price' for the legal certainty gained by publication; though a conclusive study of State practice in this particular regard is yet to be undertaken. It also seems questionable that this legal inertia of publicized baselines (even if accepted) would be unaffected not by mere changes in, but by the disappearance of whole sections of the coastline, or even the inundation of the land itself.

Article 6 Reefs

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

⁸⁰ *Ibid.*

⁸¹ See *Schofield/Freestone* (note 77), 162–163, proposing a dual system of charts for navigational and jurisdictional purposes to 'avoid potential dangers to seafarers'. See also *Rosemary Rayfuse*, *Sea Level Rise and Maritime Zones*, in: *Gerrard/Wannier* (note 77), 167, 181.

⁸² *Rayfuse* (note 81), 182; *Schofield/Freestone* (note 77), 159.

⁸³ *Rayfuse* (note 81), 183.

⁸⁴ ILA Baseline Report (note 31), 2 (footnote 9): 'It should be noted that the low-water line serves as the anchor for these "straight line" baselines. To be valid in international law each of these baselines – which deviate from the location of the normal baseline – still must attach to or link up with the low-water line at their endpoints, and intermediate turning points.'; *ibid.*, 30: 'Coastal states may protect and and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line.'

⁸⁵ Cf. for example submissions by Argentina, available at: www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn10.pdf; Deposit of charts (straight baselines and outer limits of the EEZ) and lists of geographical coordinates (straight baselines) as contained in Act 23,968 on the Maritime Spaces of 10 September 1991; and Germany, available at: www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn1.pdf; Deposit of charts and geographical coordinates on the territorial sea and the exclusive economic zone in the Baltic Sea and in the North Sea as contained in: Announcement of the Proclamation by the Government of the Federal Republic of Germany concerning the extension of the breadth of the German territorial sea of 11 November 1994; and Proclamation by the Federal Republic of Germany concerning the establishment of an exclusive economic zone of the Federal Republic of Germany in the North Sea and in the Baltic Sea of 25 November 1994; *Rayfuse* (note 81), 185 argues 'by accretion of state practice, baselines may become "fixed" at the geographical coordinates expressed in domestic legislation'.

⁸⁶ In fact, while pointing out that many coastal states 'have yet to deposit charts of lists of geographical coordinates with the Secretary-General', the Oceans and the law of the sea report of the Secretary-General of the United Nations makes no reference to the submitted ones being out-dated: GA, *Oceans and Law of the Sea: Report of the Secretary General*, UN Doc. A/69/71/ADD.1 (2014), 6 (para. 14).

Bibliography: *Lewis M. Alexander*, Baseline Delimitation and Maritime Boundaries, *VJIL* 23 (1983), 503–536; *Peter B. Beazley*, Reefs and the 1982 Convention on the Law of the Sea, *IJECL* 6 (1991), 281–312; *Chris Carleton/Clive Schofield*, Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits, *IBRU Maritime Briefing* 3(3) (2001); *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Robert D. Hodgson*, Islands: Normal and Special Circumstances, in: John King Gable/Giulio Pontecorvo (eds.), *Law of the Sea Proceedings of the 8th Annual Conference of the Law of the Sea Institute* (1974), 137–199; *Robert D. Hodgson/Lewis M. Alexander*, Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls, *Law of the Sea Institute Occasional Paper* No. 13 (1972); *Robert D. Hodgson/Robert W. Smith*, The Informal Single Negotiating Text (Committee II): A Geographical Perspective, *ODIL* 3 (1976), 225–259; *Ian Kawaley*, Delimitation of Islands Fringed with Reefs: Article 6 of the 1982 Law of the Sea Convention, *ICLQ* 41 (1992), 152–160; Myron Nordquist (ed.), *New Directions in the Law of the Sea*, vol. 7 (1980); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982); *John R. V. Prescott*, *The Maritime Political Boundaries of the World* (1985); *Michael W. Reisman/Gayl S. Westerman*, Straight Baselines in International Maritime Boundary Delimitation (1992); *Clive R. Symmons*, *The Maritime Zones of Islands in International Law* (1979); *Kai Trümpler*, *Grenzen und Abgrenzungen des Küstenmeeres* (2007); *Wolfgang Graf Vitzthum/Stefan Talmon*, *Alles fließt: Kulturgüterschutz und innere Gewässer im neuen Seerecht* (1998)

Documents: IHO, *A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982*, Special Publication No. 51 (edn. 5.0.0 June 2014); IHO, *Regulations of the IHO for International (INT) Charts and Chart Specifications of the IHO* (edn. 4.5.0 October 2014); ILC, *Additif au deuxième rapport de M. J. P. A. François, rapporteur spécial*, UN Doc. A/CN.4/61/ADD.1 (1953), *ILC Yearbook* (1953), vol. II, 75–78; ILC, *Régime of the Territorial Sea: Troisième rapport de J.P.A. François, rapporteur spécial*, UN Doc. A/CN.4/77 (1954); UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Seas* (1989); US Department of State, *US Commentary: The 1982 United Nations Convention on the Law of the Sea*, in: *US Department of State Dispatch Supplement: Law of the Sea Convention*, vol. 6 Supplement No. 1 (1995), 8, reprinted in: *ILM* 34 (1999), 1403

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I. Purpose and Function

With a twelve-mile territorial sea, Art. 6 may seem redundant, given most reefs are likely 1 to be situated within a distance less than the breadth of the territorial sea from the shore and thus constitute a low-water line under Art. 13.¹ Though Art. 13 allows for the use of the low-water line of certain low-tide elevations (LTE) for measuring the breadth of the territorial sea – thus extending the territorial sea – Art. 6 shifts the low-water line further seaward to the reef, making the waters landward of the reef internal waters. Its main purpose is thus to reflect the special importance of reef-enclosed waters by changing their legal status: Waters landward of the reef are subject to the regime of internal waters (→ Art. 8), limitations to State sovereignty applicable in the territorial sea (such as innocent passage) do not apply.

II. Historical Background

Unlike most rules on the delimitation of the territorial sea, Art. 6 is an addition made by 2 the UNCLOS. Although the International Law Commission (ILC) rapporteur FRANÇOIS had

¹ *Peter B. Beazley*, Reefs and the 1982 Convention on the Law of the Sea, *IJECL* 6 (1991), 281, 298.

proposed the use of coral reefs as baselines in his 1953 report², the idea was dropped without any further explanation in the subsequent report³, perhaps in connection with a general revision of the regulations concerning low-tide elevations. The 1953 proposal was part of the article on the normal baseline and followed the advice provided by a committee of experts invited by FRANÇOIS to make recommendations on technical questions relating to the territorial sea.⁴ Its wording suggested that FRANÇOIS intended a *lex specialis* for coral reefs:

‘As regards coral reefs, the edge of the reef as marked on the abovementioned charts, should be accepted as the low-water line for measuring the territorial sea’.⁵

The expression ‘accepted as’ indicates a legal fiction that even constantly submerged coral reefs – as long as they were marked as reefs on nautical charts – were to be considered as providing a low-water line.

- 3 The notion of a special rule for coral reefs resurfaced in the preparations for the UNCLOS, possibly because of the larger number of island States involved in the discussion.⁶ Following a Maltese proposal in the Sea-Bed Committee in 1973,⁷ in 1974, four island States presented a common proposal⁸ that closely resembles Art. 6 in all but one decisive point. The wording suggested that the baseline be the ‘seaward edge of the reef, as shown on official charts.’ It was thus closer to the original FRANÇOIS proposal, as it did not refer to the low-water line of the reef but its seaward edge. The reason behind this proposal was probably a desire to reflect the special situations of atolls, where coral reefs have grown over time to enclose a lagoon and often form an island.⁹ The inhabitants of the island, which is often quite small in land area, depend on their survival on the whole system formed by their island with the surrounding lagoon and reef.¹⁰
- 4 It seemed justified to drop the distinction between drying and continuously submerged reefs which may seem arbitrary in these circumstances.¹¹ However, the Revised Single Negotiating Text replaced ‘seaward edge’ with ‘seaward low-water line’ thus limiting Art. 6 to reefs that are above the low-water datum chosen by the State.¹²

² ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur spécial, UN Doc. A/CN.4/61/ADD.1 (1953), ILC Yearbook (1953), vol. II, 75, 76 (Annex ‘Rapport du Comité d’experts sur certaines questions d’ordre technique concernant la mer territoriale’, IV): ‘En ce qui concerne les banes de coraux, on considérera le rebord de ces banes, indiqué sur ces cartes, comme la laisse de basse mer pour tracer la limite de la mer territoriale.’ For details on State practice prior to UNCLOS I, see *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982), 185–193.

³ ILC, Régime of the Territorial Sea: Troisième rapport de J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/77 (1954), 1, 3.

⁴ ILC Addition to the Second Report on the Territorial Sea (note 2), 77, 78.

⁵ *Ibid.*; English translation as given in and Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 59.

⁶ *Lewis M. Alexander*, *Baseline Delimitation and Maritime Boundaries*, VJIL 23 (1983), 503, 510, refers to ‘warmer climate island states’: Madagascar, West Samoa, Jamaica, Maldives, Nauru, Mauritius, Fiji and the Seychelles.

⁷ Nordquist/Nandan/Rosenne (note 5), 92 (MN 6.3.); Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 28th Sess. Suppl. 21 (A/9021) vol. III, 35, 38; the draft was not necessarily reflecting the views of the Maltese government.

⁸ Second Committee UNCLOS III, Fiji *et al.*: Draft Articles on Islands and on Territories under Foreign Domination or Control, UN Doc. A/CONF.62/C.2/L.30 (1982), OR III, 210, 211.

⁹ *Robert D. Hodgson*, *Islands: Normal and Special Circumstances*, in: John King Gable/Giulio Pontecorvo (eds.), *Law of the Sea Proceedings of the 8th Annual Conference of the Law of the Sea Institute* (1974), 137, 164–166, includes detailed information on the origin of atolls.

¹⁰ *Robert D. Hodgson/Lewis M. Alexander*, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls*, *Law of the Sea Institute Occasional Paper* 13 (1972), 53–54.

¹¹ *Alexander* (note 6), 511.

¹² UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 154 (Art. 5); according to *Robert D. Hodgson/Robert W. Smith*, *The Informal Single Negotiating Text (Committee II): A Geographical Perspective*, ODIL 3 (1976), 225, 229–230, this was supposed to be the case in previous versions of the text and was indicated by the phrase ‘by appropriate symbol’.

III. Elements

1. 'islands situated on atolls or islands having fringing reefs'

The inclusion of Art. 6 stems from the desire to give special recognition and protection to atolls/lagoons/reefs. As a technical term of geomorphology, atoll refers to 'reefs which surround a lagoon and are surmounted by one or more islands,' while fringing reef refers to reefs 'derived from some biological process involving coral, oysters or lime-secreting worms'.¹³ However, it would be at odds with the systematical approach of Part II to restrict Art. 6 to atolls in the geomorphological sense. The rules of Part II determine the limit of the territorial sea based on information found on charts; formations that have the same appearance on a chart are treated in the same way. Atolls and fringing reefs should be no exception. If a formation appears to be an atoll on the chart, i. e. an island surrounded by reefs, Art. 6 should be applicable, regardless of the geomorphological origin of the formation.¹⁴ Also, 'fringing reef' may refer to any reef, including a barrier reef, which forms a fringe along the shore of an island.¹⁵ While the origin of the text argues for a wide interpretation regarding the origin of the atoll and reef, it indicates a narrow interpretation in terms of appearance of the insular formation. Otherwise the text would allow larger islands (e. g. Iceland, Great Britain) to include reefs in their baseline system using Art. 6. Such an interpretation would, however, contradict the history and purpose of Art. 6. Both indicate a limitation to islands where the need for special protection and the interdependence of atoll/lagoon/reef are inherent in the insular formation.¹⁶

2. Status of Enclosed Waters

The clear wording indicates the advantage and rationale for Art. 6: Waters so delimited landwards are true internal waters under Art. 8 (1), in contrast to both the effect of LTE, which merely extend the territorial sea, and to a system of straight baselines (Art. 7), where resulting internal waters are subject to the right of innocent passage under Art. 8 (2).

3. 'is seaward low-water line of the reef'

The historical background indicates that Art. 6 requires the reef to be above the chart datum. In contrast to Art. 47 (1) and (7), Art. 6 does not explicitly refer to 'drying reefs', which may give rise to some doubts about this historical interpretation.¹⁷ However, the reference to 'drying reefs' in Art. 47 (1) and (7) cannot imply that reefs under Art. 6 may be constantly submerged. This would require 'low-water line' in Art. 6 to have a completely different meaning than in all other articles of the Convention. Also, further analysis of Art. 47 (7) reveals that its first part is likely a reference to areas delimited using Art. 6,¹⁸ while

¹³ UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Seas* (1989), 5 (para. 16): 'Geomorphologists reserve the term atoll for reefs which surround a lagoon and are surmounted by one or more islands'; and *ibid.*, 8 (para. 21): 'The term "fringing reefs" also has a strict meaning in geomorphology. Such reefs are derived from some biological process involving coral, oysters or lime-secreting worms'.

¹⁴ *Ibid.*, 7 (para. 17); *Chris Carleton/Clive Schofield*, *Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits*, IBRU Maritime Briefing 3(3) (2001), 25–26; *John R. V. Prescott*, *The Maritime Political Boundaries of the World* (1985), 48; compare: IHO, *A Manual on the Technical Aspects of the United Nations Convention on the Law of the Sea – 1982*, Special Publication No. 51 (edn. 5.0.0 2014), Appendix 1-23 (para. 74): 'Reef/A mass of rock or coral [...]'. Arguing that Art. 6 refers to coral reefs only: *Beazley* (note 1), 298.

¹⁵ UN DOALOS *Baselines* (note 13), 10 (para. 23).

¹⁶ *Kai Trümpler*, *Grenzen und Abgrenzungen des Küstenmeeres* (2007), 52.

¹⁷ *Ian Kawaley*, *Delimitation of Islands Fringed with Reefs: Article 6 of the 1982 Law of the Sea Convention*, ICLQ 41 (1992), 152, 157.

¹⁸ *Clive R. Symmons*, *The Maritime Zones of Islands in International Law* (1979), 46.

its second part refers to a special interest case outside Art. 6.¹⁹ In the latter case the fact that the second part refers explicitly to ‘drying reefs’ would ensure that it does not contradict the first part by allowing submerged reefs to be used. It would thus serve as a confirmation of the historical interpretation of Art. 6.

- 8 While atolls are mostly closed,²⁰ there are often gaps and channels in the surrounding reef.²¹ There are no special rules for drawing closing lines in this situation. The direct application of Art. 10 would stretch the meaning of ‘well-marked indentation’ exceedingly, as the reef might be submerged for most of the time. Art. 9 seems also inapplicable, while Art. 11 might apply if the edges of the reef form part of the ‘harbour works’. However, Art. 6 presumes the option of a closing line.²² Otherwise, only waters in naturally fully enclosed lagoons may in their totality be internal waters; this would run counter to the intention of Art. 6 to provide special protection to the waters inside the fringing reef. As these waters are landlocked (though this might not be immediately visible at high tide) their situation is comparable to that of waters in a bay under Art. 10. Thus it would be sensible to apply the same principles to closing lines of fringing reefs as to bays, notably the limitation on absolute length.²³
- 9 Art. 6 is a rule for the special case of islands with fringing reefs. It does not make otherwise ineligible LTE suitable for selection as base points for a system of straight baselines under Art. 7.²⁴ Despite its fairly recent history, Art. 6 is part of customary international law.²⁵

4. ‘as shown by the appropriate symbol on charts officially recognized by the coastal State’

- 10 While Art. 5 makes an explicit reference to large-scale charts, Art. 6 references merely ‘charts’; this does not seem to form much of a practical problem. International Hydrographic Organization (IHO) standards provide clear guidelines for the marking of reefs on large and medium-scale charts.²⁶ If charts use appropriate symbols, such as those recommended by the IHO, can be used for safe navigation, and are officially recognized by the coastal State²⁷, the low-water line of the reef can be used for delimitation purposes.²⁸

¹⁹ For further information, see *Symmons* on Art. 47.

²⁰ According to *Hodgson/Alexander* (note 10), 165, coral reefs generally cover more than 75% of the perimeter of the lagoon, and usually about 90%.

²¹ UN DOALOS Baselines (note 13), 10 (para. 26).

²² *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999), 52; UN DOALOS Baselines (note 13), 9–10 (para. 25); *Kawaley* (note 17), 157; US Department of State, US Commentary: The 1982 United Nations Convention on the Law of the Sea, in: US Department of State Dispatch Supplement, Law of the Sea Convention, vol. 6 Supplement No. 1 (1995), 8 (reprinted in: ILM 34 (1999), 1403 *et seq.*); Nordquist/Nandan/Rosenne (note 5), 94 (para. 6.7 (d)). See S. 5 Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, Myron Nordquist (ed.), *New Directions in the Law of the Sea*, vol. 7 (1980), 468 and http://www.un.org/Depts/los/LEGISLATION-ANDTREATIES/PDFFILES/NZL_1977_Act.pdf as an example for such a closing line.

²³ *Carleton/Schofield* (note 14), 26.

²⁴ *Michael W. Reisman/Gayl S. Westerman*, *Straight Baselines in International Maritime Boundary Delimitation* (1992), 94.

²⁵ *O’Connell* (note 2), 195; *Kawaley* (note 17), 152, 158–159 with references to state practice of Fiji, Kiribati, Maldives, Solomon Islands, Tonga, Tuvalu, Vanuatu, Cook Islands, Niue, and Tokelau.

²⁶ Cf. IHO, *Regulations of the IHO for International (INT) Charts and Chart Specifications of the IHO* (edn. 4.5.0 October 2014), S. B-426.3 (Nature of the Seabed: Intertidal Areas, Coral Reefs and Foreshores).

²⁷ On this elements, see *Trümpler* on Art. 5 MN 33.

²⁸ Nordquist/Nandan/Rosenne (note 5), 94 (para. 6.7(e)).

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 light-houses 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.

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I. Purpose and Function

The plain purpose of Art. 7 – together with Art. 16 – is the simplification of otherwise 1 complicated coastlines and the enhancement of legal certainty on territorial sea baselines. The territorial sea off complicated coastlines may otherwise be hard to determine, leaving mariners unsure as to its limit. Historically, those aims were plausible when the sovereignty of the State ended 3 NM off its coast. With the acceptance of a 12 NM territorial sea and a 200 NM exclusive economic zone (EEZ), a rationale for Art. 7 that is coherent with the system of drawing baselines of Part II of the UNCLOS is no longer easy to discern.

Art. 7 (1) addresses those situations where the coastline is complicated, due to special 2 geographic features, and straight baselines may serve to simplify it. Art. 7 (2) addresses a special situation, that of a volatile coastline, and the purpose of this paragraph is not so much spatial but temporal simplification. Art. 7 (3) provides some criteria for the drawing process, while paragraph 4 addresses technical issues of admissible basepoints (in this context the end of each baseline). Art. 7 (5) introduces non-geographical considerations to the process, that can best be understood by the historical background. Art. 7 (6) contains a safeguard against one coastal State being cut-off from the high seas by the drawing of straight baselines.

II. Historical Background

Straight baselines are a relatively new phenomenon in international law. While Norway in 3 1869¹ and France in 1888² established straight baselines on parts of their coasts, it does not seem that many other States followed the practice.³ The matter received some discussion at the 1930 Hague Codification Conference, but straight baselines are not mentioned in the report of the Second Sub-committee,⁴ even though the Norwegian government explicitly reported its practice to use straight baselines.⁵ However, at the time, delegations may not have clearly distinguished between the question of bay closing lines and straight baselines.⁶

¹ Royal Decree 16th October 1869, cf. ICJ, Pleadings, Oral Arguments, Documents: Fisheries Case (United Kingdom v. Norway), vol. I, 259 (para. 59); ICJ, Pleadings, Oral Arguments, Documents: Fisheries Case (United Kingdom v. Norway), vol. II, 56.

² Daniel P. O'Connell, *The International Law of the Sea*, vol. I (1982), 199 (footnote 125).

³ Other States that used straight baselines prior to 1951 include: Ecuador, Egypt, Iran, Saudi Arabia and Yugoslavia: Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 34 (footnote 8); Benjamin H. Read, *Normal and Straight Baselines*, in: Marjorie M. Whiteman (ed.), *Digest of International Law*, vol. IV (1965), 148, excerpt (pp. 31–33) from Benjamin H. Read, Attorney Adviser, Office of the Legal Adviser, *Normal and Straight Baselines*, US/CLS/LEG/4-5, August 1957.

⁴ League of Nations, *Acts of the Conference for the Codification of International Law: Meetings of the Committees*, vol. III: *Minutes of the Second Committee*, LN Doc. C.351(b).M.145(b).1930.V (1930), 217 (Appendix II: Report of Sub-Committee No. II).

⁵ League of Nations, *Conference for the Codification of International Law: Bases of Discussion for the Conference Drawn Up by the Preparatory Committee*, vol. II: *Territorial Waters*, LN Doc. C.74.M.39.1929.V.2 (1929), 37; League of Nations, *Committee of Experts for the Progressive Codification of International Law: Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation*, LN Doc. C.196.M70.1927.V. (1927), Annex II: *Replies by Governments to the Questionnaires Nos. 1 to 7*, reproduced in: Shabtai Rosenne (ed.), *League of Nations Committee of Experts for the Progressive Codification of International Law*, vol. II: *Documents* (1972), 153, 198 (Norway); see joint proposal of Norway and Sweden, League of Nations, *Acts of the Conference for the Codification of International Law: Meetings of the Committees*, vol. III: *Minutes of the Second Committee*, LN Doc. C.351(b).M.145(b).1930.V (1930), 190–191 (Annex II: *Observations and Proposals Regarding the Bases of Discussion Presented to the Plenary Committee by Various Delegations*), reproduced in: Shabtai Rosenne (ed.), *League of Nations Conference for the Codification of International Law* (1930), vol. IV (1975), 1392–1393.

⁶ See S. Whittemore Boggs, *The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law*, AJIL 24 (1930), 541, 544 and the statement of the Norwegian delegate (League of Nations, *Acts of the Conference for the Codification of International Law*:

- 4 The acceptance of straight baselines in UNCLOS I and hence in UNCLOS III was a direct result of Norwegian practice. In its 1951 *Fisheries Case* decision, the International Court of Justice (ICJ) ruled on the conformity of Norwegian baselines with international law, resolving a disagreement that dated back to 1906.⁷ At the core of the dispute was the validity of a Norwegian fisheries zone established 4 NM (the then traditional Norwegian breadth) from a system of straight baselines. Norway had started enforcing these limits more stringently in 1948, preventing British trawlers from using these waters, eventually leading the UK to bring the matter before the ICJ.⁸ The Court ruled on the principles guiding the Norwegian delimitation⁹ and on the validity of individual Norwegian baselines.¹⁰ The ICJ found the Norwegian practice to be in conformity with international law. It stated:

‘Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the ‘skjærgaard’ along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction.’¹¹

The Court did not accept the UK’s view that Norway had to use the envelopes of arcs of circles method for this construction as the Court found such a system to be non-obligatory under international law.¹²

- 5 The Court agreed upon the Norwegian baseline system, finding that other States had also drawn straight baselines ‘where it was solely a question of giving a simpler form to the belt of territorial waters’.¹³ Introducing criteria to limit the use of straight baselines, the Court went on to state that

‘the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast [the areas in question should be] sufficiently closely linked to the land domain to be subject to the regime of internal waters, [finally] certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage’¹⁴

have to be taken into consideration. Perhaps more importantly, the Court specifically rejected the notion that the baselines should have a maximum length. The UK had argued for such a limitation based on emerging international law that indicated a limitation for closing lines of bays; however, the Court found that ‘the ten-mile rule has not acquired the authority of a general rule of international law’.¹⁵

- 6 The impression remains that the Court was influenced by the situation of local fishermen facing the competition of an industrialized fleet. It stated: ‘In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.’¹⁶ At the time, the concept of a fishery zone independent from the territorial sea was not generally accepted.¹⁷

Meetings of the Committees, vol. III: Minutes of the Second Committee, LN Doc. C.351(b).M.145(b).1930.V (1930), 15, reproduced in: Rosenne, 1975 (note 5), 1217), directly comparing bays and the Skjaergaard.

⁷ ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116. For detailed discussion of the case see also: *Humphrey M. Waldock*, The Anglo-Norwegian Fisheries Case, BYIL 28 (1951), 114–171; *Jens Evensen*, The Anglo-Norwegian Fisheries Case and its Legal Consequences, AJIL 46 (1952), 609–630; *Fritz Münch*, Urteil des Internationalen Gerichtshofes vom 18. Dezember 1951 im englisch-norwegischen Fischereistreit, AVR 5 (1955/56), 214–219; *Lothar Gündling*, Fisheries Case (U.K. v. Norway), in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II (1995), 381–383 including further references.

⁸ *Fisheries Case* (note 7), 125 and 118.

⁹ *Ibid.*, 126 and 127–132.

¹⁰ *Ibid.*, 126 and 132–143.

¹¹ *Ibid.*, 128–129.

¹² *Ibid.*, 129 though the reasoning leaves the impression the Court might not have fully taken into consideration the geometric properties of that line.

¹³ *Ibid.*, 130.

¹⁴ *Ibid.*, 133, concerning the linkage of the enclosed waters to the land domain the Court stated that this idea ‘should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway’.

¹⁵ *Ibid.*, 131.

¹⁶ *Ibid.*, 128.

¹⁷ For further information on the development of the EEZ, see *Proelss* on Art. 56.

The only means for a State to assert exclusive fishery rights was through the territorial sea.¹⁸ The issue was thus inseparable from the economic implications on coastal fisheries.

There is a direct line from the findings of the ICJ to the International Law Commission's (ILC) preparatory work for UNCLOS I. In his first draft, special rapporteur FRANÇOIS copied the essence of the Court's language and included straight baselines as an alternative to the normal baseline in the same article.¹⁹ The next draft was drastically changed by the results of the expert committee convened by FRANÇOIS in 1953 to address technical questions in the ILC's work. The experts (most of which were part of the Hague deliberations in 1930) tried to set a quantifiable framework for the use of straight baselines with notably a 10 mile-limit on length²⁰ and a 5 mile distance limit from the coast.²¹ FRANÇOIS based his next draft on the experts' advice. It drew heavy criticism from some members of the Commission. The ILC's divide into 'expansionists' arguing for the widest potential extension of coastal sovereignty and 'contractionists'²² trying to restrict this extension showed itself very clearly in this argument, perhaps more clearly than in any other question, save the extent of the territorial sea. The final draft of the ILC in 1956 dropped all numerical limitations on straight baselines, but included the right of innocent passage in the newly created internal waters.²³

Debate continued at the Geneva Conference itself in 1958.²⁴ The First Committee agreed on a maximum limit of 15 NM for straight baselines, albeit with some exceptions.²⁵ The plenary removed the limit following a proposal from Canada²⁶ and adopted Art. 4 Conven-

¹⁸ *Ibid.*, 125: 'Although the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea.'

¹⁹ ILC, Régime of the Territorial Sea: Rapport par J.P.A. François, rapporteur spécial, UN Doc. A/CN.4/53 (1952), ILC Yearbook (1952), vol. II, 25, 32-34.

²⁰ ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur spécial, UN Doc. A/CN.4/61/ADD.1 (1953), ILC Yearbook (1953), vol. II, 75, 77, 78 (Annex: 'Rapport du Comité d'experts sur certaines questions d'ordre technique concernant la mer territoriale', III, paras. 1 and 2).

²¹ *Ibid.*, 78-79 (IV).

²² For the terminology: W. Michael Reisman/Gayl S. Westerman, Straight Baselines in International Maritime Boundary Delimitation (1992), 44; W. Michael Reisman, Straight Baselines in International Law: A Call For Reconsideration, ASIL Proceedings of the Annual Meeting 82 (1988), 260, 261.

²³ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4-5. With regard to right of innocent passage in this newly created waters, see the proposal of Fitzmaurice: ILC, Summary Records of the Eight Session, ILC Yearbook (1956), vol. I, 186 (para. 40) and 190 (para. 34). The idea to extent the right of innocent passage originated with Lauterpacht in 1954: ILC, Summary Records of the Sixth Session, ILC Yearbook (1954), vol. I, 74 (para. 27).

²⁴ In favour of a limit to baseline length: Federal Republic of Germany (First Committee UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 45 (para. 28)), Sweden (*ibid.*, 156 (para. 6)), the United Kingdom (*ibid.*, 9 (para. 30) and First Committee UNCLOS I, United Kingdom of Great Britain and Northern Ireland: Revised Proposal (Article 5), UN Doc. A/CONF.13/C.1/L.62/CORR.1 (1958), OR III, 228), Italy (First Committee UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 148 (para. 26) and First Committee UNCLOS I, Federal Republic of Germany, Greece, Italy and Japan: Proposal, UN Doc. A/CONF.13/C.1/L.157 (1958), OR III, 252) and Japan (First Committee UNCLOS I, Japan: Proposal, UN Doc. A/CONF.13/C.1/L.95 (1958), OR III, 238), Greece (First Committee UNCLOS I, Greece: Proposal (Articles 1, 4, 5, 7 and 12) UN Doc. A/CONF.13/C.1/L.63 (1958), OR III, 229), Spain (First Committee UNCLOS I, Spain: Proposal (Article 5), UN Doc. A/CONF.13/C.1/L.91 (1958), OR III, 237), Philippines (First Committee UNCLOS I, Philippines: Proposal (article 5), UN Doc. A/CONF.13/C.1/L.98 (1958), OR III, 239) and United States of America (First Committee UNCLOS I, United States of America: Proposal (Article 5), UN Doc. A/CONF.13/C.1/L.91 (1958), OR III, 235); against USSR (First Committee UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 156 (para. 16)).

²⁵ First Committee UNCLOS I, Text of the Articles and the Resolution Adopted by the First Committee, UN Doc. A/CONF.13/C.1/L.168 (1958), OR III, 258 (Art. 5 (2)): 'Except where justified on historical grounds or imposed by the peculiar geography of the coast concerned, the length of the straight baseline provided for in paragraph 1 shall not exceed fifteen miles [...].' The text was based on a UK proposal (UK: Revised Proposal (Article 5) (note 24)), the 15 NM limit was proposed by Sweden (First Committee UNCLOS I Summary Records of Meetings and Annexes (note 24), 157 (paras. 6 and 11)).

²⁶ UNCLOS I, Plenary Meetings: Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR II, 62.

tion on the Territorial Sea and the Contiguous Zone (CTSCZ) as a codification of the straight baseline system. UNCLOS III added paragraph 2 and kept the other results of UNCLOS I with some drafting changes.

III. Elements

1. Employment of Straight Baselines

- 9 In the light of Art. 14, it is sometimes discussed whether Art. 7 is an ‘exception’ to the normal baseline (it certainly is in a formal sense as evidenced by Art. 5). The ICJ stated in the *Qatar/Bahrain Case*:

‘The Court observes 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.’²⁷

- 10 Art. 7 is in its structure similar to Art. 10. There is first a general description of the situation that allows the use of straight baselines. These similarities and the wording of the following paragraphs lead to the conclusion that Art. 7 (3)-(6) are further restrictions on the drawing of straight baselines. These can and need only be considered if the coast is of the general configuration described in Art. 7 (1). Unlike Art. 10 (2), Art. 7 lacks quantitative requirements.
- 11 a) ‘**In localities where the coastline**’. When seen in connection with the French text ‘[d]ans le régions’ the wording indicates that straight baselines may only be applied in certain places along the coast that meet the requirements of Art. 7 (1). The existence of such localities at one place along the coast does not justify the application of straight baselines elsewhere. The State may not opt to enclose its entire coast in a system of straight baselines when only isolated parts – localities – of the coast meet these requirements. The term ‘coastline’ refers to the low-water line along the mainland coast, not including islands.²⁸ ‘Fringe of islands’ is an alternative to a deeply indented coastline (in order to employ the straight baseline system), so any determination if the coastline is deeply indented and cut into should not be based on the presence of islands near the main coastline.
- 12 b) ‘**is deeply indented and cut into**’. Several attempts have been made to quantify the meaning of ‘deeply indented’.²⁹ One of the most detailed has been undertaken by BERNHARDT, who proposed the following criteria:

‘(1) Within the particular locality being considered, baseline segments accounting for at least 70 % of the total length of the relevant baselines should each have at least a 6:10 ratio of coastal penetration to segment length;

(2) A coastline must have at least three significant indentations in any given locality;

(3) No individual straight baseline segment should exceed 48 nautical miles in length.’³⁰

²⁷ ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40, 103 (para. 212); see also: *Yoshifumi Tanaka*, *The International Law of the Sea* (2nd edn. 2015), 51.

²⁸ *Reisman/Westerman* (note 22), 78.

²⁹ Robert D. Hodgson/Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls* (1972), 23–44; Peter B. Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation* (3rd edn. 1987), 12–16; *Reisman/Westerman* (note 22), 71–104; J. Ashley Roach/Robert W. Smith, *United States Responses to Excessive Maritime Claims* (2nd edn. 1996), 60–69; UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Seas* (1989), 18–21; US Department of State: Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 106: Developing Standard Guidelines for Evaluating Straight Baselines* (1987), 5–32, available at: <http://www.state.gov/documents/organization/59584.pdf>.

³⁰ US Department of State (note 29), 6. Apparently the text was reset for publication on the US State Departments website without regard for consistent pagination <http://www.state.gov/documents/organization/>

The importance of the proposal lies in the identification of certain parameters to discern 13
coasts deeply indented and cut into and to give a suggestion for what the numerical limits on
those should be. It seems reasonable to proceed in any analysis of straight baselines using the
parameters proposed, as they serve to characterize the configuration of the coast. It seems
doubtful that any textual analysis can support the numerical limits with certainty. Never-
theless, these limits can provide support in the evaluation of straight baseline systems: If a
system meets the guidelines, it is very likely in compliance with international law.³¹

aa) ‘deeply indented’. It can be deduced from Art. 10 (2) that indentation is a general term 14
describing all concave coastlines, even mere curvatures (as opposed to bays proper) of the
coast. It would seem hard to argue that such mere curvatures could lead to a deeply indented
coast. Consequently, a deep indentation should at least qualify as a juridical bay according to
Art. 10 (2). According to BERNHARDT’S proposal, the minimum ratio of width to penetration
for a bay is 2:1, therefore a deep indentation should exceed this ratio, resulting in his
suggestion of a 10:6 ratio.³² However, Art. 10 does not describe a ratio of width to
penetration but of width to area; juridical bays may have a ratio even shallower than 2:1.³³

Given these considerations, it is unclear whether ‘deeply indented’ is a relative term or if 15
there is an absolute minimum depth to the indentation. The 1989 UN Baseline Study defines
‘deeply indented’ using relative terms³⁴ and has received some criticism for it.³⁵ Art. 10 does
not require a minimum area for a juridical bay, the indentation is qualified on the ratio of
width and area alone. A consistent approach between the two closely related articles would
therefore argue for a relative definition of ‘deeply indented’. However, at some point the
influence of an indentation of a very small width on the outer limit of the territorial sea
becomes negligible, as other salient points on the coastline define the outer limit (see Fig.
7.3); an essential part of the rationale for straight baselines is the simplification of a
complicated coastline, so indentations that only have a small influence on the coastline
should not be used to justify the drawing of straight baselines.

bb) Number of Indentations. Arts. 10 and 7 may sometimes be applicable to the same 16
coastal formations. However, for each provision to have a unique meaning and function in
the UNCLOS, there must be a specific set of cases left for each provision where the other
does not apply. Consequently, it would not be in line with the Convention to enclose a single
indentation of the coast on the basis of Art. 7, as this would leave Art. 10 devoid of any
meaning. It seems also unreasonable to allow the drawing of straight baselines in localities
where there are only three indentations that do not qualify as bays under Art. 10. This
hypothetical example may demonstrate this point: State A and State B have a similar coast.
In one locality, State A has three curvatures that do not amount to bays under Art. 10, while
State B has only one. If State A were allowed to draw straight baselines, B would be
disadvantaged for having a less indented coastline, a result contrary to the basic principle
‘the land dominates the sea’.³⁶ As the ICJ ruled in the *Fisheries Case*, ‘it is the land which

59584.pdf as the text shows difference to the original version of on or two pages. This text uses the version as published on the State Department website in 2012.

³¹ Kai Trümpler, *Grenzen und Abgrenzungen des Küstenmeeres* (2007), 119.

³² US Department of State (note 29), 7. For further information on the term ‘indentation’ within the context of Art. 10, see Symmons on Art. 10 MN 7 *et seq.*

³³ Monterey bay has an opening of 19.24 NM and a depth of 9.2 NM (Gayl S. Westerman, *The Juridical Bay* (1987), 88).

³⁴ UN DOALOS (note 29), 21 (para. 40): ‘The term “deeply indented” may be used in either an absolute or a relative sense. For example, in absolute terms a narrow indentation measuring four nautical miles in a relatively large land territory may not merit the description deep, but on an island eight miles wide an indentation of that length cuts across half the island.’

³⁵ Reisman/Westerman (note 22), 81: ‘There is neither textual nor legislative nor historical support for this view’.

³⁶ ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, 51 (para. 96); ICJ, *Aegean Sea Continental Shelf* (Greece v. Turkey),

confers upon the coastal State a right to the waters off its coasts'³⁷; one might add, 'not the absence of it'. In general, it seems reasonable to apply Art. 7 as far as possible in a manner that does not leave the State with a smaller territorial sea if – hypothetically – portions of land were to be added to his coast. Thus, in a specific locality a straight baseline system should only be applied if it encloses several indentations of which at least some meet the requirements of Art. 10 (2).

- 17 cc) 'and cut into'. It is doubtful whether the wording 'cut into' has a separate meaning in Art. 7. The French text is missing a similar expression – referring to 'profondes échancrures et indentations' – so at most it can be argued that the use of the plural in the French text and the word 'and' in the English text emphasize the necessity for more than one indentation.³⁸ The difficulty in interpretation highlights that 'deeply indented and cut into' is first and foremost a textual description of the Norwegian coastline³⁹ and not an easily generalized concept.
- 18 Some studies have addressed the question of how much of the stretch of a coastline needs to be deeply indented to justify the use of the straight baseline system along this stretch. HODGSON/ALEXANDER conclude from analysis of the Norwegian Arctic coast that the 'general nature of the coast may be determined by the character of approximately 60 % of the coast [...] being indented and cut into.'⁴⁰ Building on this result, BERNHARDT suggests 70 % of the coast should consist of indentations.⁴¹ These conclusions are questionable. As BERNHARDT himself admits:

'[g]iven the extraordinary nature of the Norwegian coastline – both the frequency of the fjords that penetrate deep into the land and the proliferation of offshore islands – one can assume that Article 4 of the Territorial Sea Convention was formulated with the expectation that less extreme coastlines could fulfill its criteria.'⁴²

Therefore, it is not advisable to try to determine a coast's indented nature by a mathematical comparison with the Norwegian Arctic coast.

- 19 This difficulty is exacerbated by a general problem in using the Norwegian example as a blueprint for the evaluation of straight baseline systems: fundamental aspects of the law of the sea have changed and it is likely that these changes would have led to a different ruling at least on some aspects of the case had they been accepted law in 1951. UNCLOS I and the UNCLOS III codified the result of the employment of the envelopes of arcs-of-circles method as the outer limit of the territorial sea, while the ICJ had dismissed the method as not mandatory under international law.⁴³ In addition, UNCLOS III agreed on a 12 NM territorial sea.
- 20 It seems likely that the irregularity of the Norwegian coast was a necessary, if not in itself sufficient reason for the ICJ to resort to a 'geometrical construction'. The straight baselines were used to give a 'simpler form to the belt of territorial waters'. In other words, had the belt of territorial waters been of a simple form despite the irregular character of the coast, it would not have been necessary to resort to a system of straight baselines.
- 21 If a 12 NM territorial sea is delimited by using the arcs-of-circles method, at least parts of the coast of Norway will exhibit a fairly smooth outer limit of the territorial sea (see *infra*,

Judgment of 19 December 1978, ICJ Reports (1978), 3, 36 (para. 86); *Qatar/Bahrain Case* (note 27), 97 (para 185).

³⁷ *Fisheries Case* (note 7), 133.

³⁸ *Reisman/Westerman* (note 22), 82.

³⁹ *Tullio Scovazzi*, The Establishment of Straight Baseline Systems: The Rules and the Practice, in Davor Vidas/Willy Østreng (eds.), *Order for the Oceans at the Turn of the Century* (1999), 445, 451–452.

⁴⁰ *Hodgson/Alexander* (note 29), 29.

⁴¹ He argues that accepting that indentations may be significantly less deep than the Norwegian fjords, as proposed by his criterion for coastal penetration, justifies a higher percentage of indentations (US Department of State (note 29), 9–11).

⁴² *Ibid.*, 7.

⁴³ *Fisheries Case* (note 7), 129.

Fig. 7.1). The outer limit of the territorial sea alone would probably not indicate that a deeply indented and cut into coast lies behind it. Simplification would no longer be necessary in the case of the Norwegian coast.

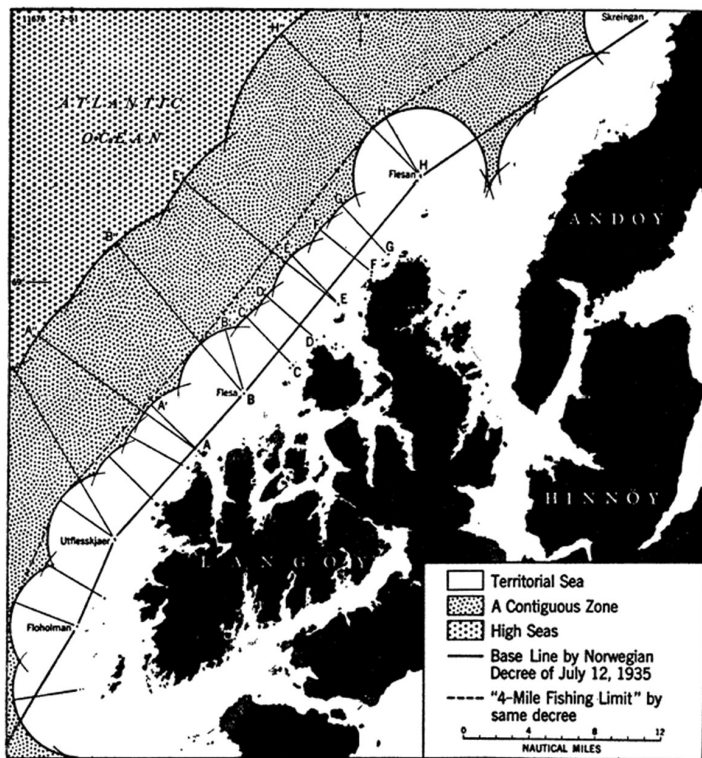


Fig. 7.1: Illustration of the outer limit of different maritime zones off the Norwegian coast. The 12 NM Contiguous Zone has a fairly regular outline, despite the coast being irregular. Note that while the 4 NM limit is based on points A-H, the 12 NM limit is based only on points A, B, E and H.⁴⁴

Source: S. Whittemore Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, AJIL 45 (1951), 240, 249 (Fig. 1). Reproduced with permission from © The American Society of International Law.

Given these remarks, it seems problematic to rely too heavily on the specific Norwegian 22 geography for guidance in establishing whether a coast is indented in terms of Art. 7 (1), especially when the analysis results in seemingly very precise limits. The Norwegian example

⁴⁴ S. Whittemore Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, AJIL 45 (1951), 240, 246, original caption: 'Seaward limit of the territorial sea and of any contiguous zones – On a portion of the northwest coast of Norway the technique of laying down the outer limit of the territorial sea is here illustrated. The Norwegian claim of a 4-mile limit is here used. Arcs of radius $T = 4$ nautical miles are described from all salient points on the coast (A, B, C, D, E, etc.), including outlying islands. The "envelope of the arcs of circles of 4-mile radius drawn from all points on the coast" constitutes the outer limit of the territorial sea, and is thus the line every point of which is exactly T miles from the nearest point on the shore.

The minor "gain" in areas of exclusive jurisdiction frequently achieved by drawing a series of artificial straight lines as part of the "base line" is illustrated by the small area between the broken-line "4-mile fishing limit" (by Norwegian decree of July 12, 1935) and the envelope of 4-mile arcs.

The technique of laying down the limit of any contiguous zone is seen to be the same as for the territorial sea. For purposes of illustration a contiguous zone 12 miles wide is here assumed, constituting the arcs A", B", E", H", etc. The wider the contiguous zone the fewer will be the number of salient points that actually determine its "envelope"; but all of these salient points will also be among those that determine the outer limit of the territorial sea.'

can serve as useful guidance. If the changes in the law of the sea are taken into due consideration, it should not be used as a strict template.

- 23 c) ‘**fringe of islands along the coast in its immediate vicinity**’. This wording was proposed by the 1953 expert committee⁴⁵ and made its way into CTSCZ via a UK proposal.⁴⁶ The wording ‘fringe’ of islands (as opposed to the original ‘string’ of islands in the English translation of the expert’s report)⁴⁷ indicates that the provision is not limited to chain-like formations, but also applicable to *skjaergaard*-like situations, where numerous small islands form a screen off the coast. The UN Baseline Study explicitly distinguishes between these two situations.⁴⁸ BERNHARDT rejects the distinction in his careful analysis and proceeds to develop detailed criteria based on the analysis of the Norwegian example. He proposes that islands should mask at least 50 % of the coast in question.⁴⁹ In the context of a ‘fringe of islands’, such an approach is even more questionable than in the analysis of other parts of Art. 7 (1), as the codification process has developed its own wording relatively independent of the ICJ *Fisheries* judgment. The UN Baseline Study and other authors do not recommend any specific percentages on the ‘masking’ of the coast by islands.
- 24 aa) ‘**along the coast**’. The fringe of islands has to be situated along the coast. It is not sufficient for islands to form a single cluster in front of the coast,⁵⁰ nor should they be ‘arranged like stepping-stones perpendicular to the coast’.⁵¹ BERNHARDT proposes a maximum deviation of an island chain from the coast of 20 degrees, finding 45 degrees too large a deviation.⁵² He also points out that deviation in Norway’s case was always below fifteen degrees, except for one baseline.⁵³ Besides the general difficulties in arriving at a result based on the Norwegian example outlined above, a strict requirement expressed in degrees may sometimes not be practicable, as the general direction of the coast is unclear and may be altered significantly by small changes made in the selection of salient points to determine its direction.⁵⁴ Also, the ICJ and other authors did accept a deviation of 45 degrees in one baseline in Norway;⁵⁵ this indicates that at least some exceptions should be possible, even if a strict rule was to be followed.
- 25 bb) ‘**immediate vicinity**’. The fringe of islands may not be situated at any distance from the coast. The UN Baseline Study is somewhat vague in expressing an absolute limit, but does refer to 24 NM as the generally accepted distance.⁵⁶ BERNHARDT proposes 48 NM,⁵⁷ ROACH/

⁴⁵ ILC Addition to Second Report on the Territorial Sea (note 20), 78 (Annex, III): ‘chapelet d’îles’ in the French original.

⁴⁶ UK: Revised Proposal (Article 5) (note 24).

⁴⁷ ILC Addition to Second Report on the Territorial Sea (note 20), 78. An English translation can be found in: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 59–63.

⁴⁸ UN DOALOS (note 29), 20 (paras. 44–45); similar: *J. Victor Prescott*, *Straight Baselines, Theory and Practice*, in: Robin R. Churchill/Edward D. Brown (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation: Proceedings, Law of the Sea Institute Nineteenth Annual Conference (1987)*, 288, 295–296.

⁴⁹ US Department of State (note 29), 16–17.

⁵⁰ *Qatar/Bahrain Case* (note 27), 103 (para 214): ‘Moreover, in the present case it is only possible to speak of a “cluster of islands” or an “island system” if Bahrain’s main islands are included in that concept. 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 of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case.’

⁵¹ UN DOALOS (note 29), 21 (para. 43); *Reisman/Westerman* (note 22), 88, US Department of State (note 28), 19.

⁵² US Department of State (note 29), 17–19 and Fig. 6 and 7.

⁵³ *Ibid.*, 20, citing *Hodgson/Alexander* (note 29), 37–38.

⁵⁴ For the comparable difficulties in using the *tracé parallèle* method, see *supra*.

⁵⁵ *Fisheries Case* (note 7), 142–143; on the baseline at Vestfjord between point 45 and 46: *Hodgson/Alexander* (note 29), 37. They argue that the baseline is contrary to the ‘general direction criterion but continue: ‘However, the large-scale chart of the examination of the area shows that, except for a small range of choices, the line has to be drawn approximately as Norway did.’

⁵⁶ UN DOALOS (note 29), 20–21 (para. 46); see also: *Prescott* (note 48), 298–299.

⁵⁷ US Department of State (note 29), 20–21, even arguing that a limit of 48 NM may be exceeded in special cases.

SMITH describe a limit of 24 NM as the US position, as otherwise the interceding High Seas or EEZ would sever the close link to the land domain demanded by Art. 7 (3).⁵⁸ REISMAN/WESTERMAN argue for a 12 NM limit, referring to the special emphasis that the firm establishment grounded in the term ‘immediate’ puts on vicinity, and the general ‘depreciation’ in the value of islands in maritime boundary cases as seen since 1958.⁵⁹ However, if simplification of ‘the belt of territorial waters’ is one of the conditions for applying a regime of straight baselines, the distance from a chain of islands to the mainland and also between islands⁶⁰ cannot be limited to 12 NM and indeed should probably be larger than 24 NM in at least some cases. As (Fig. 7.2) illustrates, it is unlikely that a territorial sea needing simplification by straight baselines, e.g. because of pockets of EEZ or High Seas, will be generated by islands 24 NM or less apart. Irregularities requiring such simplification, such as narrow stretches or pocket of high seas or EEZ can only be expected if the distance between the islands is more than twice the breadth of the territorial sea. A limit between 24 and 48 NM is likely to allow for the inclusion of formations that need straight baseline systems for simplification.

cc) ‘appropriate points’. The straight baselines join appropriate basepoints. Basepoints must be situated on the charted low-water line.⁶¹ It seems to be up to the discretion of the coastal State to determine which of the points on the baseline are ‘appropriate’ provided that all other conditions are met. 26

2. Selection of Basepoints on the Low-Water Line in the Case of a Highly Unstable Coastline

While simplification is a major aspect of Art. 7 (1), Art. 7 (2) serves to generate a fictitious stability for a coastline that is otherwise highly unstable. It gives legal stability to a rapidly changing low-water line. Once established, the straight baselines may be overtaken by the advancing coastline and eventually be situated landward of the actual coastline, thus the coastal State may in effect choose to not exercise sovereignty.⁶² 27

Some of the main ideas of Art. 7 (2) can be found in Provision 9 (2) of the Main Trends Working Paper of 1974, which summarized negotiating results of the UNCLOS III: 28

‘In localities where no stable low-water line exists along the coast due to a continual process of alluvion and sedimentation [...], baselines shall be drawn linking appropriate points on the sea adjacent to the coast not exceeding the 10 fathom line.’⁶³

Art. 6 (1) of the Informal Single Negotiating Text (ISNT) changed the proposed submerged line (twenty meters of depth in the French text)⁶⁴ to straight baselines linked to the low-water line.⁶⁵ Except for some drafting changes, the final wording of Art. 7 (2) appeared in the Revised Single Negotiating Text (RSNT) of 1976.⁶⁶ 29

⁵⁸ Roach/Smith (note 29), 63 and 63 (footnote 20). It should be noted that Bernhardt’s study is part of an official US publication, *Limits in the Sea*, where also the 1st edition of US Responses was published (*Limits in the Sea* No. 112). The difference might be indicative of a change in the official US position in this question.

⁵⁹ Reisman/Westerman (note 22), 89–90.

⁶⁰ Similar limits are proposed here: Beazley (note 29), 14 (para. 9.7 (iv)); Roach/Smith (note 29), 64; US Department of State (note 29), 24.

⁶¹ UN DOALOS (note 29), 24 (para. 51); ILA Baseline Committee, *Baselines under the International Law of the Sea*, Sofia Conference (2012), 2 (footnote 9). For low-tide elevations, see *infra*, MN 37–38.

⁶² Most deltas extend ever further into the sea: Nordquist/Nandan/Rosenne (note 46), 101 (MN 7.9 (d)).

⁶³ UNCLOS III, Statement of Activities of the Conference During its First and Second Sessions, UN Doc. A/CONF.62/L.8/REV.1 (1974), OR III, 93, 110 (Provision 9).

⁶⁴ *Ibid.*, 127.

⁶⁵ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 158 (Art. 6 (1)).

⁶⁶ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 154 (Art. 6 (2)).

- 30 a) ‘Where’. According to the UN Baseline Study, Art. 7 (2) is only applicable if the coast also meets the conditions of Art. 7 (1).⁶⁷ The argument for this interpretation derives from the ISNT: Art. 7 (1) and Art. 7 (2) were originally contained in one paragraph, and the split in two with the ISNT did not sever this connection.⁶⁸ This interpretation is not entirely convincing, since the original ISNT seems to indicate that the two situations are alternative to each other:

‘Là où la côte est profondément échancrée et découpée, [...] la méthode des lignes de base droites reliant des points appropriés peut être employée [...]. Là où la côte est extrêmement instable en raison de la présence d’un delta ou d’autres conditions naturelles, les points appropriés peuvent être choisis le long de la limite extrême de la laisse de basse mer [...]’.⁶⁹

- 31 The wording implies a clear alternative. The Main Trends Working Paper also indicates the delta-situation as sufficient for the drawing of straight baselines with the English text stating:

‘1. In localities where the coastline [...]. Where [...]’.⁷⁰

Against this conclusion, it has been argued that the French phrase ‘*les points appropriés*’ and the English equivalent ‘the appropriate points’ in the second sentence of the ISNT directly refer to the same phrase in the first sentence, indicating that only the points referred to in the first sentence may be used,⁷¹ and that consequently Art. 7 (2) is subject to Art. 7 (1).⁷² This is not a necessary conclusion. The reference ‘appropriate points’ might also indicate that such appropriate points exist where the coastline is highly unstable. The wording in UNCLOS III is at least ambiguous in this regard.⁷³

- 32 The interpretation that Art. 7 (2) is in itself sufficient to justify the drawing of straight baselines also avoids some manifestly absurd results: If Art. 7 (1) were a precondition for the application of Art. 7 (2), only a deeply indented and highly unstable coast would benefit from the fictitious ‘steadification’ of the low-water line. As the low-water line is highly unstable, it might, at some point, change to a non-indented shape. In that case, the condition for the application of Art. 7 (2) would cease to be met, but the privilege of Art. 7 (2) covers only a regression of the coastline, not the disappearance of its conditions of application.⁷⁴ The result would be that an unfavourable change in a highly unstable coastline calls the applicability of the regulation in question that was designed to privilege just such a coastline: a case of Art. 32 (b) VCLT. The operating part of Art. 7 (2) is clearly ‘notwithstanding regression of the low-water line’, the purpose of paragraph 2 is to provide some legal security as to the low-water line in a highly unstable environment. This is as necessary for an indented coast as it is for a smooth coastline.

- 33 b) ‘presence of a delta and other natural conditions’. Art. 7 (2) is only applicable to deltas. A delta can be defined as a ‘tract of alluvial land enclosed and traversed by the diverging mouths of a river’.⁷⁵ In addition (‘and’), Art. 7 (2) requires the cumulative presence of other circumstances that render the coastline highly unstable, e.g. monsoon or frequent storms (see below).⁷⁶ However, the interpretation that ‘other natural conditions’ refers to a

⁶⁷ UN DOALOS (note 29), 23 (para. 48); see also *Reisman/Westerman* (note 21), 101–102.

⁶⁸ UN DOALOS (note 29), 23 (footnote. 9).

⁶⁹ ISNT (note 65), 158 (Art. 6 (1)).

⁷⁰ *Ibid.*, 153.

⁷¹ J. Victor Prescott/Eric C. Bird, The Influence of Rising Sea Levels on Baselines from which National Maritime Claims are Measured and an Assessment of the Possibility of Applying Article 7 (2) of the 1982 Convention on the Law of the Sea to Offset any Retreat of the Baseline, in: Carl Grundy-Warr (ed.), *International Boundaries and Boundary Conflict Resolution: Proceedings of the 1989 IBRU Conference* (1990), 279, 291.

⁷² Tanaka (note 27), 53.

⁷³ Churchill/Lowe (note 3), 37–38; for an independent reading of Art. 7 (2) see also: ILA Baseline Committee, *Baselines under the International Law of the Sea*, Washington Conference (2014), para. 62.

⁷⁴ Also, it seems questionable if a regulation could alter the condition it is dependent upon.

⁷⁵ UN DOALOS (note 29), 53–54.

⁷⁶ Prescott (note 48), 303.

cumulative requirement may be challenged. Most importantly, the Russian final text uses the word ‘or’.⁷⁷ Hence it could be argued that the shift from ISNT, which used the words ‘or other natural condition’, to RSNT, which uses ‘and other natural conditions’, was an oversight or not intended to change the meaning.⁷⁸

c) ‘the coastline is highly unstable’. The definition of ‘highly unstable’ is unclear. As Art. 7 (2) is mainly the result of the initiative of one State – Bangladesh⁷⁹ – its local situation provides a good starting point for further analysis. It seems that Art. 7 (2) was intended for use at the Ganges/Brahmaputra delta. Tidal forces, monsoons and storms can rapidly create and destroy islands and coastal features.⁸⁰ This indicates that Art. 7 (2) was probably not intended for any changing environment, especially since most coastlines constantly change. The application of Art. 7 (2) requires a coastline that undergoes drastic changes in a short period of time.⁸¹ Art. 7 (2) refers to the present coastline, the retroactive use of an historic coastline based on the phrase ‘notwithstanding subsequent regression’ would be beyond reasonable interpretation.⁸² The application of Art. 7 (2) is subject to the implicit assumption that States will adjust their straight baselines if the coastline has shifted significantly and permanently landward or seaward.⁸³

One of the few States that may have based the drawing of straight baselines on Art. 7 (2) is Egypt in the Nile delta. In response, the US submitted a note of protest, arguing the coastline is not deeply indented and cut into.⁸⁴ While this argument is not entirely convincing (see *supra*, MN 30–32), the drawing of straight baselines may be questioned because it is uncertain whether the Nile delta qualifies as highly unstable.⁸⁵

It must be noted that the interpretation of ‘highly unstable’ and of ‘delta and other natural conditions’ proposed here would render Art. 7 (2) almost useless as a tool for situations of sea-level rise.⁸⁶ If Art. 7 (2) is seriously considered for such uses, it would seem that either a special interpretation for the specific situation of sea-level rise needs to be found, or efforts would result in an extremely permissive general interpretation.

⁷⁷ For further analysis and some State practice, see Sally MacDonald/J. Victor Prescott, *Baselines Along Unstable Coasts: An Interpretation of Article 7 (2)*, *Ocean Yearbook* 8 (1989), 70, 79–80.

⁷⁸ *Ibid.*; leaning towards an alternative interpretation of ‘and’, see also Churchill/Lowe (note 3), 38; strictly for a cumulative interpretation, see UN DOALOS (note 29), 24 (para. 48).

⁷⁹ Art. 7 (2) originated with a proposal from Bangladesh, that was taken up in the Main Trends Working Paper (Prescott/Bird (note 71), 288–291 in particular 288: ‘This [Art. 7 (2)] is one of at least four provisions in the 1982 Convention to meet the needs of one country which made strong representations on the point. In this case the country was Bangladesh, [...]’; Nordquist/Nandan/Rosenne (note 47), 99–101 (MN 7.6–7.7. and 7.9. (c)). In 1974, Bangladesh drew straight baselines with 8 basepoints in the sea, roughly following the 10-fathom line, with a total length of 221 NM (Notification No. LT – 1/3/74 of the Ministry of Foreign Affairs, Dacca, 13 April 1974, reproduced in: UN DOALOS, *Baselines: National Legislation with Illustrative Maps* (1989), 62; Prescott/Bird (note 71), 288). This is clearly not in conformity with Art. 7. On acceding to UNCLOS, Bangladesh announced a comprehensive review of its domestic laws (Declaration of Bangladesh, 27 June 2001, LOSB 46 (2001), 14, 15).

⁸⁰ UN DOALOS (note 29), 23 (para 50).

⁸¹ For example, the German Wadden Sea shows a constantly changing low water line, while the changes can be drastic, e.g. through severe storm surges, these drastic changes do not occur on a regular basis.

⁸² Chris Carleton/Clive Schofield, *Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits*, IBRU Maritime Briefing 3(3) (2001), 38–39.

⁸³ UN DOALOS (note 29), 23 (para 50). Different opinion: Prescott (note 48), 303 who seems to argue that the baseline cannot be adjusted should the low-water line shift seaward.

⁸⁴ American Embassy Cairo Note, 13 June 1991, State Department Telegram 188615, 8 August 1991; Roach/Smith (note 28), 85–86; US Department of State (note 29), 9.

⁸⁵ Churchill/Lowe (note 3), 38, point out that the Nile Delta recedes up to 40 m a year, which seems significantly slower than regular changes in the Ganges delta; see also Prescott (note 48), 305–306; different opinion by Nordquist/Nandan/Rosenne (note 46), 101 (MN 7.9 (c)), who argue that Art. 7 (2) is applicable in Egypt and also in Myanmar, Nigeria and Vietnam; cf. also G. Orlova/V. Zenkovich, *Erosion of the Shores of the Nile Delta*, *Geoforum* 5 (1974), 68–72 and Sally/Prescott (note 78), who – based on rates of change observed around the world – seem to argue that 10 m a year can be accepted as ‘highly unstable’.

⁸⁶ For further information, see Trümpler on Art. 5 MN 36–40.

3. No Departure from the General Direction of the Coast and the Linkage Requirement

37 The ‘general direction’ criterion should work as an important corrective against excessive baseline claims; however, as with the whole of Art. 7, it lacks geometric precision. Straight baselines can only be drawn in the situation of Art. 7 (1) or 7 (2); only then can they be tested for compliance with the general direction criterion. It is not sufficient for straight baselines to follow the general direction of the coast only; in this case, they will still be invalid under international law if Art. 7 (1) or (2) is not met.⁸⁷

38 a) ‘must not depart to any appreciable extent from the general direction of the coast’. It is problematic to ascertain the general direction of any coast. By choosing the scale of the chart, it is possible to make almost all baselines look like they are either following the coastline or significantly departing from it.⁸⁸ There have been several proposals to give the Convention’s language more precision, in particular by trying to determine the general direction of the coast using reference lines connecting points along the coast.⁸⁹ Once the general direction of the coast is ascertained, the ‘appreciable extent’ needs to be determined. Mostly based on analysis of the Norwegian coastline, fifteen degrees⁹⁰ or twenty degrees⁹¹ have been proposed as acceptable. While it would be desirable to give geometrical precision to Art. 7 (3), it seems questionable whether that can be achieved relying on the Norwegian precedent. The ICJ specifically stated, in responding to a challenge of a particular baseline in Norway:

‘The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision.’⁹²

39 REISMAN/WESTERMAN propose to compare the straight baselines directly with the coastline, with the option to construct a simplified baseline using the arcs-of-circles method with the breadth of the territorial sea as radius.⁹³ This is in effect comparing the limit of the territorial sea before the drawing of straight baselines with the direction of the straight baselines chosen. As the comparison is based on the territorial sea limit and not on reference lines whose position and length are to some extent arbitrary, this approach is the most convincing.

40 b) ‘the sea areas lying within the lines must be sufficiently closely linked’. The wording originates in the ICJ *Fisheries Case*.⁹⁴ While the actual meaning is vague, it is clear that it is an additional, necessary requirement. The ICJ does not see a conceptual difference between the connection required for straight baselines and the connection required for bays, but stated that this idea should ‘be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.’⁹⁵ Apparently, Art. 7 (3) does not require the same strong connection as ‘land-locked waters’ in Art. 10 (2). But, in contrast to Art. 10 (2), Art. 7 (3) does not provide any precise criteria to determine whether a link is sufficient. That leaves in doubt even the nature of the link: REISMAN/WESTERMAN argue that

⁸⁷ *Reisman/Westerman* (note 22), 121–122, give the Australian baseline system around Cape York as an example.

⁸⁸ *Fisheries Case* (note 7), 141–142, where the ICJ notes this difficulty for the Norwegian coast.

⁸⁹ US Department of State (note 29), 28–29 proposes a maximum length of 60 NM for such a line; *Beazley* (note 28), 14 (para. 9.7 (vi)) seems to argue for a length of around 45 NM.

⁹⁰ *Hodgson/Alexander* (note 29), 37.

⁹¹ US Department of State (note 29), 30; *Roach/Smith* (note 29), 64 (footnote 23) seem to agree with the use of reference lines but do not propose a fixed deviation in degrees.

⁹² *Fisheries Case* (note 7), 141–142, in reference to the baseline drawn between point 20 and 21 in the LoppHAVET basin.

⁹³ *Reisman/Westerman* (note 22), 97.

⁹⁴ *Fisheries Case* (note 7), 133.

⁹⁵ *Ibid.*, 133.

the 'claimant should establish that there is a strong historic interrelationship between the waters and the land [...]'.⁹⁶ Other authors view the link in geographical terms.⁹⁷ This is the more convincing approach: The nature of the link is the same as in Art. 10 and, at least from the CTSCZ onwards, the determination of a juridical bay is independent of historic rights,⁹⁸ and is a purely geographical determination.⁹⁹ Unfortunately, even if one decides on a geographical test to establish the link, general criteria for the test are still elusive.¹⁰⁰ In the case of a deeply indented and cut into coast, a sufficient link can probably be assumed if most of the indentations qualify as juridical bays in their own right. In the case of fringing islands, BEAZLEY views the presence of the islands that determine the straight baselines in the original belt of territorial waters as indication of a sufficient link.¹⁰¹

4. Drawing Straight Baselines to Low-Tide Elevations

The Norwegian system of straight baselines included low-tide elevations without any structures.¹⁰² While Art. 4 (3) CTSCZ, prohibited the drawing of straight baselines using low-tide elevations unless lighthouses are built on them,¹⁰³ the UNCLOS added the last half-sentence. In the preparatory work for the CTSCZ the ILC proposed to completely ban the use of low-tide elevations, but in an unsuccessful effort to gain Norwegian support for the CTSCZ, the lighthouse clause was added.¹⁰⁴ Following a proposal from Norway, the reference to 'general international recognition' was inserted into the UNCLOS.¹⁰⁵ With a view to the Norwegian example that received explicit recognition by the ICJ, claims to general international recognition should meet a high standard.¹⁰⁶ Except for Norway, it would be hard to identify a country that could meet this standard without any controversy. Otherwise, light-houses or similar installations need to be built on low-tide elevations. 'Similar installations' refers to all structures used for navigation which are above water at high tide, such as beacons, foghorns, radar reflectors, and the like¹⁰⁷; similar structures that are clearly marked – even if not built for the purpose of navigation – may qualify, such as wind turbines. There is an apparent contradiction between Art. 7 (3), which excludes the use of low-tide elevations for the drawing of straight baselines, and Art. 13 (1), which permits the use of some low-tide elevations for the purpose of drawing the normal baseline. This is likely the result of the

⁹⁶ *Reisman/Westerman* (note 22), 99–100; agreeing *Roach/Smith* (note 29), 65–66 (footnote 25).

⁹⁷ ICJ Pleadings I (note 1), 232–279 and ICJ, Pleadings, Oral Arguments, Documents: Fisheries Case (United Kingdom v. Norway), vol. III, 35–58; cf. also comment by Sweden to the ILC on the similar UNCLOS I provision, ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), reproduced in: ILC Yearbook (1955), vol. II, 19, 54.

⁹⁸ Art. 7 (6) CTSC; Art. 10 (6) UNCLOS.

⁹⁹ See also *Symmons* on Art. 10 MN 7–13.

¹⁰⁰ According to UN DOALOS (note 29), 25 (para. 57) it has not proved possible to develop a mathematical test to justify the application of this rule.

¹⁰¹ *Beazley* (note 29), 14 (para 9.7 (iii)); critical United States Department of State (note 29), 22–23. However, especially in situations that result in a complex limit of the territorial sea, some islands will be situated beyond that belt. A case by case evaluation might be the only way forward in such a situation.

¹⁰² *Fisheries Case* (note 7), 140; ICJ, Pleadings, Oral Arguments, Documents: Fisheries Case (United Kingdom v. Norway), vol. IV, 613–614; *Beazley* (note 29), 14 (para. 9.8).

¹⁰³ Cf. PCA, *Award on Territorial Sovereignty and Scope of the Dispute* (Eritrea v. Yemen), Award of 9 October 1998, ILM (2001), 900, 1007 (para. 145).

¹⁰⁴ *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea. Part I. The Territorial Sea and Contiguous Zone and Related Topics, ICLQ 8 (1959), 73, 86 (footnote 34).

¹⁰⁵ *Robert D. Hodgson/Robert W. Smith*, The Informal Single Negotiating Text (Committee II): A Geographical Perspective, ODIL 3 (1976), 225, 239; also, the lack of a similar exception in Art. 47 (4) indicates that the reference to international recognition is motivated by a desire to accommodate the Norwegian situation.

¹⁰⁶ *Reisman/Westerman* (note 22), 93–94, argue for a test similar to the rules for occupation.

¹⁰⁷ *John R. V Prescott*, The Maritime Political Boundaries of the World (1985), 71–72; UN DOALOS (note 29), 25 (para. 52). The UN study seems to assume that structures similar in appearance to lighthouses can also serve as basepoints. However, the reasonable justification for privileging lighthouses is that they are above high water at all times, and that they are clearly marked on navigational charts. Structures which are similar in function will meet both of these criteria, while structures similar in appearance are unlikely to be marked on charts.

apprehension that low-tide elevations used for straight baselines might exert a more than local influence on the territorial sea.¹⁰⁸

- 42 Whether basepoints in the sea may be allowed under certain circumstances is subject of debate. However, if low-tide elevations that are visible at least some of the time may not be basepoints, *a fortiori* it seems clear that mere points in the sea are not allowable. Nevertheless, their use is discussed for a certain case: A baseline is drawn between two eligible basepoints, but situated in two different States, crossing the territorial sea boundary, the intersection of the baseline and the boundary; would be located in the sea and serve as a basepoint.¹⁰⁹ Following the ICJ's logic that the straight baselines are a simpler representation of the coastline, this use of basepoints in the sea by coastal States¹¹⁰ seems a natural consequence. On the other hand, the basepoint in question is by definition either the first or last point used by the State for the system of straight baselines that intersect the territorial sea boundary. Also, according to the wording of Art. 7, the delimitation is done by *the* coastal State, i.e. by one State. Moreover, the functional aspect of basepoints has to be considered: Just as with low-tide elevations during high tide, it is impossible for mariners to determine the exact position of the territorial sea if it begins at an unmarked point in the sea. While the lines eventually end at an eligible basepoint, this still leaves uncertainty for the mariner regarding the extent of the territorial sea of the states involved.¹¹¹ It is not convincing to allow more flexibility for the starting or ending basepoint of the system than for any other point.¹¹² At the same time, the text does not justify any special requirements for the start or the end point.¹¹³

¹⁰⁸ Fitzmaurice (note 104), 73, 87.

¹⁰⁹ Arguing in favour: Wolfgang Graf Vitzthum/Stefan Talmon, Alles fließt: Kulturgüterschutz und innere Gewässer im neuen Seerecht (1998), 83; Beazley (note 29), 15–16 (paras. 9.12–9.13), who would also accept the unilateral use of basepoints outside the State's territorial sea to draw a straight baseline, stating: 'Adjacent States may or may not use the same set of features to control the line at the boundary'; Peter B. Beazley, Territorial Sea Baselines, International Hydrographic Review 48 (1971), 143, 147 seems to argue against the use of such a line by only one State. Against: ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 15 (Commentary to Art. 5); UN DOALOS (note 29), 24 (para. 51), requiring that 'the system must start and finish on or above the low-water line'.

¹¹⁰ Denmark: Ordinance No. 437 Governing the Delimitation of the Territorial Sea, 19 April 1978; Germany: Communiqué No. 1184, 28 April 1970, both reproduced in: UN DOALOS Baselines Legislation (note 79), 122 *et seq.* and 176 *et seq.* See also: Graf Vitzthum/Talmon (note 109), 83; Finland: Decree on the of the Application on the Act of Delimitation of the Territorial Waters of Finland No. 993, 31 July 1995, LOSB 29 (1995), 56; Sweden: Royal Notice No. 375 containing Regulations on the Measurement of the Territorial Waters of Sweden, reproduced in: UN DOALOS, National Legislation (note 79), 300; Cf. also: Tullio Scovazzi, Atlas of Straight Baselines (2nd ed. 1989), 157 and 57, Reisman/Westerman (note 22), 18; United States Department of State (note 29), 48, Straight Baselines: Finland: 4.; Art. 2 (Point 1) Agreement between Sweden and Finland concerning the Delimitation of the Continental Shelf in the Gulf of Bothnia, the Bothnian Sea, the Åland Sea, and the Northernmost Part of the Baltic Sea, 29 September 1972, UNTS 987, 396. Some States have drawn such a line to an eligible neighboring basepoint without consultation: Chile following an award from Court of Arbitration (Argentina v. Chile, ILM 1978 [Vol. 17], p. 632), though the drawing of the baseline was not part of the award (cf. Reisman/Westerman (note 22), 181). Argentina and Chile mutually accepted their straight baselines in 1984 (Eduardo Jiménez de Aréchaga, Argentina-Chile Report 3-1, in: Jonathan I. Charney (ed.), International Maritime Boundaries, vol. I (1993), 719, 723); Art. 11 Argentine-Chile Treaty of Peace and Friendship, 29 November 1984, UNTS 1399, 103. For the case of Iran, see UN DOALOS Baselines Legislation (note 79), 194–19; cf. Reisman/Westerman (note 22), 181–183.

¹¹¹ Though with today's navigational aids and electronic nautical charts, this may be less of a practical issue than in the 1980s, at the time of drafting.

¹¹² It might be argued that two States together should be able to exercise their sovereignty to no lesser extent than if the coast belonged to one State alone. This argument is unconvincing since it does not take into consideration the reality of a territorial sea boundary that bisects the area in question.

¹¹³ Reisman/Westerman (note 22), 91, argue that 'commencing and concluding basepoints are distinguished from the points which depart from the coastline', and that they should be located on the low-water line, though it is unclear if they are referring to the low-water line on the mainland.

5. Impact of Economic Interests on the Drawing of Straight Baselines

Art. 7 (5) is an almost verbatim quote from the ICJ *Fisheries Case*.¹¹⁴ It should be noted that, even though the wording is clear in this respect, Art. 7 (5) does not provide justification for the drawing of straight baselines in itself; it may only lead to adjustment of baselines in a particular locality if Art. 7 (1) can be applied.¹¹⁵ To make it clear: Economic interests alone cannot justify the drawing of straight baselines.¹¹⁶ Art. 7 (5), like Art. 7 (3), addresses the question of how straight baselines are to be drawn. The relationship of Arts. 7 (3) and 7 (5) can be derived directly from the wording: baselines have to conform to Art. 7 (3), but particular baselines, i.e. very few individual baselines, may be adjusted when economic interests in accordance with Art. 7 (5) can be found in the region concerned. In the Norwegian case, just one baseline clearly did not follow the general direction of the coast.¹¹⁷

a) ‘economic interests peculiar to the region concerned’. It is unclear what nature the economic interests of the State under Art. 7 (5) may have: The introduction of the 200 NM EEZ gives the State exclusive access to practically all economically interesting goods the sea may offer in that zone. The use of straight baselines may result in an increase in the EEZ, but it seems doubtful that the reality and importance of this potential increase can be clearly evidenced by long usage. The use of Art. 7 (5) for the adjustment of baselines would be most plausible in cases where the State did not declare an EEZ.

b) ‘evidenced by long usage’. In the ICJ *Fisheries* judgment, ‘evidenced by long usage’ refers to Norwegian economic interests dating back centuries.¹¹⁸ It is unconvincing to require a similarly long timeframe for every use of Art. 7 (5). That would not only exclude certain natural resources discovered in recent times, but also severely disadvantage States that cannot provide records dating back that far. Considering that Art. 7 (5) can probably only be applied in very singular circumstances, generalizations are difficult.

6. Proscription of Cutting-Off the Territorial Sea of Another State

Art. 7 (6) requires unimpeded access to the high seas or any EEZ, highlighting its character as a regulation that ultimately protects the freedom of navigation.¹¹⁹ It is unclear if it is sufficient that any access remains or if a partial cut-off is already an infringement of Art. 7 (6).¹²⁰ It would seem that any cut-off of a self-contained part of the territorial sea constitutes an impediment to the freedom of navigation, and hence a violation of Art. 7 (6). The same is true for the drawing of baselines that amounts to a functional cut-off, e.g. if a deep waterway necessary to reach a self-contained part of the territorial sea would be included in the new

¹¹⁴ *Fisheries Case* (note 7), 133 ‘Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance or which are clearly evidenced by a long usage’.

¹¹⁵ *Beazley* (note 29), 15 (para. 9.9).

¹¹⁶ UN DOALOS (note 29), 25 (para. 58). This is also supported by the legislative history. While an intermediate report of the ILC had proposed using economic interests for the justification of straight baselines: ILC Report (note 97), 36; cf. also ILC, Summary Records of the Seventh Session: 2 May – 8 July 1955, ILC Yearbook (1955), vol. I, 201 (para. 2) and 205 (para. 42); the final report: ILC Law of the Sea Articles with Commentaries (note 109), 14 (Art. 5) read: ‘The application of the straight baseline system should be justified in principle on other grounds before purely local economic considerations could justify a particular way of drawing the lines.’ See also *Fisheries Case* (note 7), 133.

¹¹⁷ See also *supra*, MN 38–39.

¹¹⁸ UN DOALOS (note 29), 25 (para. 59); *Reisman/Westerman* (note 22), 101.

¹¹⁹ Cf. Nordquist/Nandan/Rosenne (note 47), 103 (para. 7.9 (h)).

¹²⁰ *Reisman/Westerman* (note 22), 187, give as an example the drawing of a baseline of Venezuela across the Orinoko, cutting off parts of the territorial sea of Guyana. But as the authors themselves point out, the drawing of the baseline is based on disputed territory, so that it remains unclear if territorial sea of Guyana even exists landward of the straight baseline. It seems questionable to argue this case on the basis of Art. 7 (6).

territorial sea of the delimiting state.¹²¹ The UN Baseline Study cites the case of the straight baselines of France around Monaco as a positive example,¹²² while PRESCOTT identifies a number of situations where baselines might be in violation of Art. 7 (6).¹²³

7. Critique Of Straight Baselines

- 47 Art. 7 is an anomaly in Part II. Most of the regulations in this Part date from the 1930 The Hague Codification Conference, and their guiding theme is to derive the outer limits of the territorial sea in an almost mathematical sense from the low-water line. Based on a map, two geographers should be able arrive at the same limit independently. The outcome is determined by the coastline. This can be seen in in Art. 10 in particular.¹²⁴ One cannot help but think that from a device that the ICJ deemed necessary to ensure the very livelihood of rural Norwegian fishermen, straight baselines have devolved into a convenient tool to bypass the structures of Part II and to maximize the appropriation of sea areas by coastal states.¹²⁵
- 48 Since the acceptance of straight baselines by the ICJ, the following conditions, which were of defining importance to the judgment, have changed: A twelve NM territorial sea is generally accepted, giving the coastal State sovereignty for a distance three times farther seaward than the ICJ accepted in the *Fisheries* judgment and through the effects of the envelopes of the arcs-of-circles method resulting in a more even outer limit at all coasts. The concept of an EEZ was accepted in the UNCLOS, giving the coastal State sovereign rights over vast areas of ocean, rendering the economic effect of straight baselines in coastal areas marginal (though in some cases considerable in absolute terms at the outer limit of the EEZ). Therefore, the only tenable rationale that remains for straight baselines is simplification, ‘giving a simpler form to the belt of territorial waters’. Even if this conclusion is not accepted in full, a coastline in need of simplification is quite clearly a necessary precondition before any other circumstances can be considered (notwithstanding application of Art. 7 (2)).
- 49 If a coast’s demand for simplification is a necessary condition for applying straight baselines, the drawing of straight baselines should be limited to cases where the outer limit of the territorial sea is complex without the use of straight baselines, i.e. contains pockets of high seas or EEZ or has an otherwise irregular form. (see Fig. 7.2) If the ‘belt of territorial waters’ without the use of straight baselines has a form that cannot be distinguished from one found on a regular coast (*cf.* Fig. 7.3), straight baselines do not lead to simplification, hence their application is not ‘giving a simpler form’ to the territorial sea and the coastline is not deeply indented enough to require simplification.

¹²¹ Lewis M. Alexander, *Baseline Delimitations and Maritime Boundaries*, VJIL 23 (1983), 503, 516, seems to argue for a less strict interpretation of paragraph 6.

¹²² UN DOALOS (note 29), 25 (para. 60).

¹²³ Prescott (note 48), 312.

¹²⁴ Boggs (note 6), 541 ‘The American proposal was based on the assumption that, since we cannot choose our coasts but must take them as we find them, so the limit of the territorial sea, once the breadth of the belt is agreed upon, must be a line which is derived directly from the coast-line, in an automatic manner [...]’

¹²⁵ See Tanaka (note 27), 51.

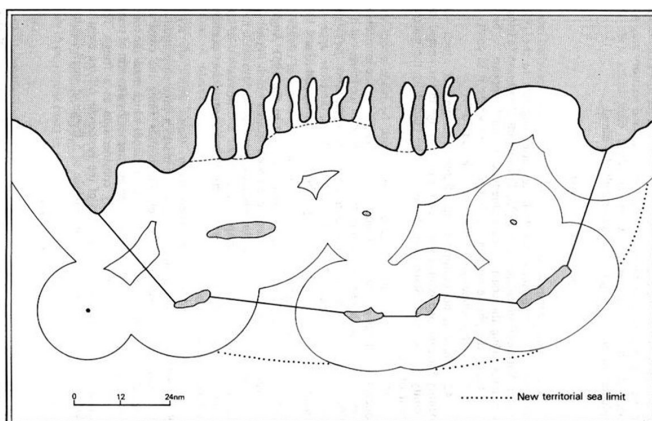


Fig. 7.2: 'The role of straight baselines in simplifying territorial sea boundaries.'¹²⁶

Source: UN DOALOS (note 29), 20 (Fig. 12). Reprinted with the permission of United Nations.

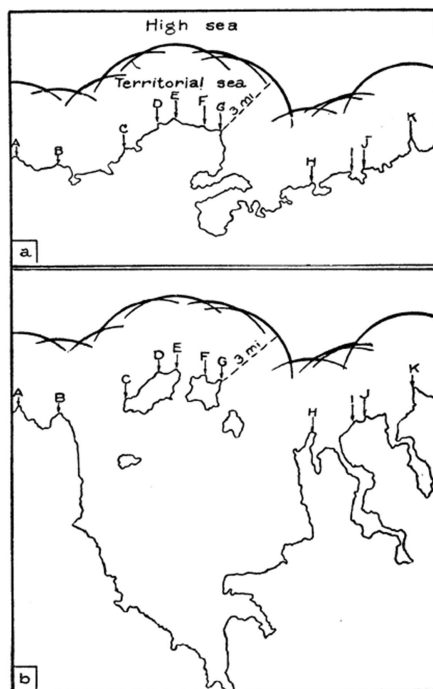


Fig 7.3¹²⁷

Source: *Boggs* (note 6), 546 (Fig. 3). Reproduced with permission from © The American Society of International Law. The coast is different, but the territorial sea boundary is the same, even though the coast in (b) is more indented, the territorial sea boundary is not more complicated.

¹²⁶ UN DOALOS (note 29), 20 (Fig. 12).

¹²⁷ Original caption (*Boggs* (note 6), 546): Two dissimilar coasts the limits of whose territorial waters are identical in form. The points from which the envelopes of the arcs of circles are developed (A, B, C, etc.) have exactly the same relative positions on the two coasts.

- 50 Whenever straight baselines are subject to legal scrutiny, their evaluation should start with an examination of the territorial sea boundary in the locality in question that would be the result of the use of the normal baseline, without the straight baselines proposed. If this boundary shows no irregularity, if it is indistinguishable from an outer limit generated by a regular coast, there should be a *prima facie* assumption for the use of the normal baseline in this locality. While State practice shows numerous examples of questionable straight baselines,¹²⁸ the corresponding *opinio iuris*, detailing an explicitly permissive view, is lacking. There seems to be a trend to ignore baselines established by parties when delimiting maritime boundaries.¹²⁹

Article 8

Internal waters

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

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Documents: ILC, Comments by Governments on the Provisional Articles Concerning the Regime of the High Seas and the Draft Articles on the Regime of the Territorial Sea Adopted by the International Law Commission at Its Seventh Session in 1955, UN Doc. A/CN.4/99/ and ADD. 1–9 (1956), ILC Yearbook (1956), vol. II, 37–101; ILC, Reference Guide to the Articles Concerning the Law of the Sea (Prepared by the Secretariat), UN Doc. A/C.6/L.378 (1956); ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), reproduced in: ILC Yearbook (1955), vol. II, 19–32; ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; Institut de Droit International Resolution, The Distinction Between the Régime of the Territorial Sea and the Régime of Internal Waters, 24 September 1957, Session of Amsterdam (1957); Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013); Memorandum of Understanding on Port State Control in the Caribbean Region (1996); Memorandum of Understanding on Port State Control in the Mediterranean Region (2006); Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013); Memorandum of Understanding on Port State Control for West and Central

¹²⁸ See generally *Roach/Smith* (note 29), *passim*.

¹²⁹ E.g. PCA, *Bay of Bengal Maritime Boundary Arbitration* (Bangladesh v. India), Award of 7 July 2014, para. 250, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1376; see also: *Vladimir D. Degan*, Internal Waters, *NYIL* 17 (1986), 3, 41.

African Region (1999); Paris Memorandum of Understanding on Port State Control (2013); Riyadh Memorandum of Understanding on Port State Control (2004); UN, Laws and Regulations on the Regime of the Territorial Sea, UN Doc. ST/LEG/SER.B/6 (1957); UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Seas* (1989)

Cases: ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4; ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports (1986), 14; ITLOS, *The 'ARA Libertad' Case* (Argentina v. Ghana), Order of 15 December 2012, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; *Saudi Arabian v. Arabian American Oil Company (ARAMCO)*, Award of 23 August 1958, ILR 27 (1963) 117, 212; *The MV 'Toledo' ACT Shipping (PTE) Ltd v. Minister for the Marine, Ireland and the Attorney General* [1995] 2 ILRM 30; *The Eleanor* (1809) 165 ER 1067

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I. Purpose and Function

Art. 8 clarifies the status of waters on the landward side of the territorial sea boundary as internal waters. It does not define this status in any detail, with the exception of Art. 8 (2). Art. 8 (2) subjects the waters landward of straight baselines to the regime of innocent passage (→ Art. 17). Thus Art. 8 serves to preserve the freedom of navigation that existed in parts of the sea that were once territorial seas, high seas or exclusive economic zone (EEZ) but will become, through the drawing of straight baselines, internal waters.

II. Historical Background

When the difficulties in the deliberations became apparent, the scope of discussion at the Conference for the Codification of International Law in The Hague in 1930 was narrowed and the Conference did not address the question of internal waters, even though considerable effort was spent in the preparation of questions relating to the jurisdiction in ports.¹ One can find that the preparatory documents² and the outcome clearly distinguished between the

¹ Jesse S. Reeves, *The Codification of the Law of Territorial Waters*, AJIL 24 (1930), 486, 489: "The Commission changed the subject of general deliberations from territorial waters to that of territorial sea. There was consequently an elimination of all of those bases concerned with inland waters as distinguished from the waters of the marginal or territorial sea in a strict sense. All of these were matters to which much attention had been given by the Preparatory Committee."

² See League of Nations, Committee of Experts for the Progressive Codification of International Law: Questionnaire No. 2: Territorial Waters, LN Doc. C.44.M.21.1926.V (1926), Annex I: Memorandum by M. Schücking, reproduced in: Shabtai Rosenne (ed.), *League of Nations Committee of Experts for the Progressive Codification of International Law*, vol. II: Documents (1972), 55, 73: "Questions of special difficulty arise when we come to consider how far a vessel passing through territorial waters is subject to the civil and criminal

territorial sea and the internal ('inland waters') of a coastal State. Indeed, this distinction led to the adoption of the term territorial sea:

"There was some hesitation whether it would be better to use the term "territorial waters" or the term "territorial sea". The use of the first term, which was employed by the Preparatory Committee, may be said to be more general and it is employed in several international conventions. There can, however, be no doubt that this term is likely to lead – and indeed has led – to confusion, owing to the fact that it is also used to indicate inland waters, or the sum total of inland waters and "territorial waters" in the restricted sense of this latter term. For these reasons, the expression "territorial sea" has been adopted."³

- 3 In preparation for UNCLOS I, the International Law Commission (ILC) developed the definition that 'waters within the baseline of the territorial sea are considered "internal waters".'⁴ Draft Art. 26 was the first article in Part II, 'High Seas'; it was located in Section I 'General Regime' under the heading 'Definition of the high seas'.⁵ The drafting history,⁶ as well as the commentary to the final draft, indicate that this definition was adopted more out of the necessity to find a negative definition for the high seas, than out of desire to define 'internal waters' as a term in its own right:

"The waters of the sea belong either to the high seas or to the territorial sea or to internal waters. In that part of these articles which deals with the territorial sea, the Commission has attempted to define the external limits of the territorial sea and has indicated the baselines from which it should be measured. Waters within these baselines are internal waters, over which, subject to the provisions of international law limiting the rights of the State – particularly as regards ports and international waterways – the State exercises its sovereignty in the same way as over the land."⁷

The ILC did not concern itself with the status of internal waters, as was made clear in the commentary to draft Art. 8, concerning the delimitation of the territorial sea around ports: 'No rules for ports have been included in this draft, which is exclusively concerned with the territorial sea and the high seas.'⁸

- 4 Discussion on draft Art. 26 (2) was referred from the Second Committee to the First Committee (Territorial Sea and Contiguous Zone).⁹ In addition, a number of proposals similar in wording were made to the First Committee to insert a clause similar to Art. 26.¹⁰

jurisdiction of the riparian state. We feel that in considering this question is well to distinguish two cases – that of a vessel passing through foreign territorial waters and that of a vessel at a port in a foreign riparian State; for the legal position is essentially different. The port forms a portion of the inland waters, as is also perhaps implied by the definition given in the Ports Statute. [...] The territorial sea, on the other hand, has an entirely different character'; see also *ibid.*, 81; and League of Nations, Acts of the Conference for the Codification of International Law: Bases of Discussion for the Conference Drawn up by the Preparatory Committee, vol. II: Territorial Waters, LN Doc. C.74.M.39.1929.V (1929), 10, 101 (Basis of Discussion No. 27) and 102 (Basis of Discussion No. 28), reproduced in: AJIL 24, No. 1 Supp. (1930), 25, 45.

³ League of Nations, Acts of the Conference for the Codification of International Law: Meetings of the Committees, vol. III: Minutes of the Second Committee, LN Doc. C.351(b).M.145(b).1930.V (1930), Report adopted by the Committee, reproduced in: AJIL 24, No. 3 Suppl. (1930), 234, 240 (observations to draft Art. 1).

⁴ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 7 (Art. 26 (2)).

⁵ *Ibid.*, 7.

⁶ See ILC, Reference Guide to the Articles Concerning the Law of the Sea (Prepared by the Secretariat), UN Doc. A/C.6/L.378 (1956), 93, for a summary.

⁷ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 23; see also the comment to the previous draft Art. 1 in 1955 that did not yet contain a rule comparable to draft Art. 26 (2): ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), reproduced in: ILC Yearbook (1955), vol. II, 19, 21. However, the content of that paragraph was already present in the commentary: 'In the part of the present report dealing with the territorial sea, the commission has attempted to define the external limits of the territorial sea and indicated the base lines from which it should be measured. Waters within these base lines constitute internal waters. Art. 1 and the articles contained in the chapter on the territorial sea thus furnish a definition of the high seas.'

⁸ ILC Law of the Sea Articles with Commentaries (note 7), 16 (Art. 8).

⁹ See First Committee UNCLOS I, Letter from the Chairman of the Second Committee to the Chairman of the First Committee, UN Doc. A/CONF.13/C.1/L.143 (1958), OR III, 250.

¹⁰ First Committee UNCLOS I, Yugoslavia: Proposal (Art. 66), UN Doc. A/CONF.13/C.1/L.58 (1958), OR III, 226; First Committee UNCLOS I, Greece: Proposal (Arts. 1, 4, 5, 7 and 12), UN Doc. A/CONF.13/C.1/L.63/

‘As regards a proposal by the representative of Turkey that the text of the new paragraph should contain a reference to internal seas, the Committee took note that this inclusion was unnecessary, there being unanimous agreement that internal seas were considered to be internal waters.’¹¹

Art. 8 (2) can be traced back to the 1956 draft¹² of the ILC, in which draft Art. 5 (3) on straight baselines states:

‘Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in article 15, through those waters shall be recognized by the coastal State in all those cases where the waters have normally been used for international traffic.’¹³

The observations to that article were as follows:

‘The question arose whether in waters which become internal waters when the straight baseline system is applied the right of passage should not be granted in the same way as in the territorial sea. Stated in such general terms, this argument was not approved by the majority of the Commission. The Commission was, however, prepared to recognize that if a State wished to make a fresh delimitation of its territorial sea according to the straight baseline principle, thus including in its internal waters parts of the high seas or of the territorial sea that had previously been waters through which international traffic passed, other nations could not be deprived of the right of passage in those waters. Paragraph 3 of the article is designed to safeguard that right.’¹⁴

The reference to waters normally used for international traffic was deleted following a proposal by the United States.¹⁵

The Drafting Committee of the First Committee merged the new draft Art. 5A, containing the definition, with the ILC draft Art. 5 (3) on innocent passage into a new article giving the following reason and summarizing the proceedings:

‘NEW ARTICLE 5 A

The Committee had adopted the proposal of a number of delegations to add a provision: “Waters within the baseline of the territorial sea are considered as internal waters.”

The Drafting Committee was favourably disposed toward the Yugoslav proposal (A/CONF.13/C.1/L.58) to place this provision after article 5 [on straight baselines] and not in article 4 [on the normal baseline]. This created an element of overlap with paragraph 6 of article 5 [on innocent passage in newly created internal waters] as adopted by the First Committee, also relating to internal waters. The Drafting Committee therefore recommends the insertion after article 5 of the following new article, paragraph 1 of which incorporates the above-mentioned proposal, while paragraph 2 contains paragraph 6 of article 5 adopted by the First Committee:

“INTERNAL WATERS”

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

CORR.I, OR III, 229; First Committee UNCLOS I, China: Proposal (Art. 4), UN Doc. A/CONF.13/C.1/L.85, OR III, 234; First Committee UNCLOS I, Turkey: Proposal (Art. 4), UN Doc. A/CONF.13/C.1/L.94, OR III, 238. These proposals mainly differ with regard to where in the convention the referred part should be inserted.

¹¹ UNCLOS I, Report of the First Committee, UN Doc. A/CONF.13/L.28/REV.1 (1958), OR II, 115, 118 (para. 45).

¹² The initiative came from the UK Government, which in its reply to the previous draft of the ILC ‘again dr[e]w the Commission’s attention to the problems relating to the status of the waters enclosed by base lines in particular the matter of the right of innocent passage through newly enclosed waters in front of the coastline which were previously territorial (or even high seas), and have now become “internal” or national. This enclosure may nevertheless not have altered their intrinsic character as waters affording access to the coast and its ports and estuaries.’; ILC, Comments by Governments on the Provisional Articles Concerning the Regime of the High Seas and the Draft Articles on the Regime of the Territorial Sea Adopted by the International Law Commission at Its Seventh Session in 1955, UN Doc. A/CN.4/99/ and ADD. 1-9 (1956), ILC Yearbook (1956), vol. II, 37, 80, 84. The UK representative in the ILC, Sir Gerald Fitzmaurice, then introduced a draft article that was adopted with some minor changes as 1956 draft Art. 5 (3): ILC, Summary Records of the Meetings of the 8th Session, ILC Yearbook (1956), vol. I, 185-190.

¹³ ILC Law of the Sea Articles (note 4), 4-5 (Art. 5).

¹⁴ ILC Law of the Sea Articles with Commentaries (note 7), 14-15 (Art. 5).

¹⁵ First Committee UNCLOS I, United States of America: Proposal (Article 5), UN Doc. A/CONF.13/C.1/L.86 (1958), OR III, 235, 236; for discussion, see First Committee UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 156-160.

2. Where the establishment of a straight baseline in accordance with article 5 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 15 to 25, shall exist in those waters.¹⁶

This text later became Art. 5 of the Convention on the Territorial Sea and the Contiguous Zone. It seems clear from this history that at no point was it the intention of the conference to regulate internal waters. Rather, two paragraphs from two originally separate parts of the convention were combined in a new article, because they both related to internal waters.

- 7 At UNCLOS III, a proposal to delete paragraph 2 did not receive sufficient support.¹⁷ The Informal Single Negotiating Text contained two significant changes to the text, reflecting the introduction of the EEZ and archipelagic States as new concepts in the UNCLOS:

‘Article 7

1. Except as *provided in part VII*, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 6 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea, *of the exclusive economic zone or of the high seas*, a right of innocent passage as provided in these articles shall exist in those waters.’ [emphasis added by author]¹⁸

- 8 In the Revised Single Negotiating Text, the reference to specific zones enclosed by baselines was replaced by a more generic reference to ‘areas which had not previously been considered as such’.¹⁹ The amended text became Art. 8 of the Informal Composite Negotiating Text, and with some minor drafting changes, eventually Art. 8 UNCLOS.

III. Elements

1. ‘waters on the landward side’

- 9 This includes waters on the landward side of all closing lines (Arts. 6, 9, 10) and straight baselines (Art. 7). Art. 12 does not allow the State to draw ‘baselines’, but merely includes the roadstead in the territorial sea. Roadsteads are not part of the internal waters.²⁰ In particular, internal waters include waters between the high-water and the low-water marks, ports and harbours, as well as estuaries.²¹
- 10 The UNCLOS does not specify how far the internal waters reach on the landward side in the case of estuaries or ports for seagoing vessels situated on rivers. Several conventions on the protection of the marine environment establish the landward limit of the internal waters at the freshwater limit.²² The freshwater limit seems a practicable solution; in the case of

¹⁶ First Committee UNCLOS I, Report by the Secretariat on the work of the Drafting Committee of the First Committee, UN Doc. A/CONF.13/C.1/L.167 (1958), OR III, 254, 255 (incorporating A/CONF.13/C.1/L.167/CORR.1 (1958)), text in brackets by author.

¹⁷ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 106 (MN 8.4).

¹⁸ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 157; see also Nordquist/Nandan/Rosenne (note 17), 106 (MN 8.4).

¹⁹ Nordquist/Nandan/Rosenne (note 17), 106–107 (MN 8.5), gives as the reason for this change that it was pointed out that the reference to EEZ would be inappropriate, as the zone was ‘a new concept to be established by the convention’.

²⁰ Wolfgang Graf Vitzthum, Maritimes Aquitorium und Anschlusszone, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 63, 73 (MN 11); ILC Law of the Sea Articles with Commentaries (note 7), 16 (Art. 9) and ILC, Summary Records of the Sixth Session, ILC Yearbook (1954), vol. I, 89 (para. (34)).

²¹ Yoshifumi Tanaka, The International Law of the Sea (2nd edn. 2015), 78; Robin R. Churchill/Alan V. Lowe, The Law of the Sea (3rd edn. 1999), 60.

²² See e.g. Art. 1 (b) of the Convention for the Protection of the Marine Environment of the North-East Atlantic: “‘Internal waters’ means the waters on the landward side of the baselines from which the breadth of the territorial sea is measured, extending in the case of watercourses up to the freshwater limit”; Arts. 2 (c) and 3 (b)

ports situated far inland it may have to be supplemented by a functional approach, including fairways for seagoing vessels.²³

Art. 8 (2) seems to assume that newly formed internal waters are clearly enclosed by the coastline and straight baselines. That might not always be the case if the straight baselines are drawn from the territorial sea of one State to that of another,²⁴ leading to a situation where the internal waters of two States are directly adjacent. REISMAN/WESTERMAN argue that the first and last basepoint of a system need to be located on the low-water line.²⁵ The UN Baseline Study more explicitly states that internal waters need to be enclosed by a system of straight baselines.²⁶ The Convention does not contain any specific rules on the delimitation of internal waters. The necessity might arise in particular when States share a system of straight baselines. The application of Art. 15 to these areas would seem in line with the interests of the States concerned, particularly when taking into consideration that the areas in question were likely territorial sea at some point in time.²⁷

2. ‘form part of the internal waters’

Art. 8 does not regulate the status of internal waters. It does, however, provide that if the application of the provisions of Art. 7 result in the generation of ‘new’ internal waters, these will be subject to the right of innocent passage. Conceptually, the status of internal waters is outside the scope of Part II; the status of internal waters must thus be inferred from other provisions of the UNCLOS or customary international law.

3. ‘Except as provided in Part IV’

In its archipelagic waters, the archipelagic State may only draw closing lines in accordance with Arts. 9, 10 and 11 (Art. 50). It may not apply Art. 7 in its archipelagic waters.²⁸ Accordingly, there should be no situation in archipelagic waters where Art. 8 (2) applies; internal waters subject to the right on innocent passage should not exist in archipelagic waters.

4. Status of Internal Waters

The coastal State has full sovereignty over its internal waters,²⁹ as stated by Art. 2:

‘The sovereignty of a coastal State extends, beyond its land territory and *internal waters* and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.’³⁰

of the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, 17 May 1980, ILM 19 (1980), 869.

²³ Graf Vitzthum (note 20), 84 (MN 35).

²⁴ See Trümpler on Art. 7 MN 42.

²⁵ W. Michael Reisman/Gayl S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992), 91.

²⁶ UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Seas* (1989), 24 (para. 51), while it seems to recognize in a footnote (note 11) the practice of baselines drawn from the basepoint of one State to the basepoint of another, citing Netherlands, Germany, Finland, Norway and Sweden as examples.

²⁷ Kai Trümpler, *Grenzen und Abgrenzungen des Küstenmeeres* (2007), 138.

²⁸ Nordquist/Nandan/Rosenne (note 17), 445 (MN 50.6(a)). On the possibility to apply Arts. 6 and 13, see Graf Vitzthum (note 20), 83 (MN 32); Trümpler (note 27), 172 *et seq.*; see also Symmons on Art. 50 MN 5.

²⁹ Graf Vitzthum (note 20), 87 (MN 42); Churchill/Lowe (note 21), 61; see also ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports (1986), 14, 111 (para. 212): ‘The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory’.

³⁰ Emphasis added.

The language indicates that there is no difference in the sovereignty over land and internal waters; only in the realm beyond is the sovereignty subjected to the UNCLOS (see Art. 2 (3)). This underlines that the sovereignty over the territorial sea is in its nature and spatial extent derived from the coast – it is derivative in nature – while the sovereignty over the internal water is original. The sovereignty that the coastal State exercises over its territorial sea is justified by the possession of land that is situated next to the sea, i.e. the coastline; the sovereignty exercised over the internal waters is justified by the possession of the internal waters themselves.³¹

- 15 States thus have the right to regulate and enforce within their internal waters as on their land territory. In particular, they are free to regulate the exploration and exploitation of all living and non-living resources, archaeological research³² and marine scientific research.
- 16 However, internal waters are situated between the State's territorial sea and its *terra firma*; notably all sea ports form part of the State's internal waters, so they are frequently entered by ships. These ships are then subject to the coastal State's territorial sovereignty, as well as to the flag State's jurisdiction, possibly leading to conflict.
- 17 a) **Access to Internal Waters.** As stated above, the coastal State enjoys full sovereignty over its internal waters. Regarding internal waters other than open commercial ports, such as internal waters along the coast, closed ports and bays, it seems clear that the State may regulate at its discretion.³³ With regard to ports in general, the International Court of Justice (ICJ) stated: 'It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.'³⁴ The majority of writers seem to be in agreement with this conclusion.³⁵ A notable exception in earlier jurisprudence is the 1958 *ARAMCO Award*, which presumes a right of entry to ports under international law.³⁶ A considerable number of writers disagree with this finding, and it does not seem to have had a decisive influence on later decisions,³⁷ such as that of the ICJ quoted above.
- 18 LAGONI distinguishes three distinct situations in the question of port access: The closure of all or some ports of the State to international traffic, measures against vessels from certain flag States, and measures against individual vessels. Regarding the first situation, there seems to be strong support for the concept that States may decide which, if any, of their ports are open for foreign vessels, though such regulations are the exception in modern times.³⁸

³¹ *Graf Vitzthum* (note 20), 87 (footnote 97).

³² *Ibid.*, 95 (MN 63–64); see also Arts. 149, 303 UNCLOS.

³³ Vladimir D. Degan, *Internal Waters*, NYIL 17 (1986), 3, 12: 'Subject only to the exception of ships in distress, the coastal State is free to refuse access to these parts of its internal waters to any foreign ships, or it can accept at will the ships of friendly nations and refuse others. Because this is a matter of exercising its sovereignty, the coastal State is allowed to discriminate against flags or types of foreign ships.'

³⁴ *Nicaragua Case* (note 29), 111 (para. 213).

³⁵ *Graf Vitzthum* (note 20), 88 (MN 45); *Tanaka* (note 21), 80; see Alan V. Lowe, *The Right of Entry into Maritime Ports in International Law*, San Diego LRev 14 (1976–1977), 597–622, for analysis of the *ARAMCO Award*, with extensive references to other authors in favor of and against a right of entry as well as elaboration on State practice; Louise de La Fayette, *Access to Ports in International Law*, IJMCL 11 (1996), 1, 22, with reference to writers arguing for a right to access *ibid.*, 13; Rainer Lagoni, *Der Hamburger Hafen und die internationale Handelsschifffahrt im Völkerrecht*, AVR 26 (1988), 261, 267–275, distinguishing between the closure of ports to all shipping, closure of ports to vessels of a certain flag State and closure of ports to certain vessels; Kaare Bangert, *Internal Waters*, MPEPIL, paras. 19–24, available at: <http://www.mpepil.com>; Churchill/Lowe (note 21), 62; Institut de Droit International Resolution, *The Distinction Between the Régime of the Territorial Sea and the Régime of Internal Waters*, 24 September 1957, Session of Amsterdam (1957), para. II: 'Subject to the rights of passage sanctioned either by usage or by treaty, a coastal State may deny access to its internal waters to foreign vessels except where they are in distress.' (English translation: http://www.idi-il.org/idiE/navig_chon1953.html/French original: AnnIDI 47-II (1957), 473 *et seq.*) Arguing for a right to entry into ports: C. John Colombos, *The International Law of the Sea* (6th edn. 1967), 167; Erwin Beckert/Gerhard Breuer, *Öffentliches Seerecht* (1991), MN 364.

³⁶ *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, Award of 23 August 1958, ILR 27 (1963) 117, 212: 'According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require'.

³⁷ See *supra*, note 35, in particular: Lowe (note 35); *Tanaka* (note 21), 81.

³⁸ Churchill/Lowe (note 21), 62, with reference to State practice; Lagoni (note 35), 268; Lowe (note 35), 612, citing: Bulgarian Decree of 10 October 1951 (UN, *Laws and Regulations on the Regime of the Territorial Sea*,

On the question as to whether States may close their ports selectively to foreign flagged 19
 merchant vessels, there are a number of bilateral treaties,³⁹ as well as one multilateral
 convention: The Convention and Statute on the International Régime of Maritime Ports of
 1923.⁴⁰ It allows for the non-discriminatory access of the parties to the port of other parties.
 It must be noted that warships and fishing vessels are excluded and that even a non-
 discriminatory right of entry for such vessels does not exist;⁴¹ by 1933 the Convention had
 33 parties. States continued to accede to the convention, albeit at a slow rate. There have been
 10 accessions and 10 successions – the latest by St. Vincent and the Grenadines in 2001 – and
 one denunciation (Thailand) since 1966.⁴² A number of the ratifications have been by so
 called ‘flags of convenience’. O’CONNELL argues that the *ARAMCO Award* should be under-
 stood as ‘corollary of a different rule of international law which forbids discrimination
 among foreign ships using ports.’⁴³ O’CONNELL further argues that the Geneva Convention on
 the International Régime of Maritime Ports is a ‘standard source of practice’ and concludes:
 ‘If a country chooses to close its ports altogether that would seem to be an act of sovereignty;
 but if it opens them, it must open them at least to the parties to this convention, and arguably
 also to allcomers, on a non-discriminatory basis.’⁴⁴ The view that this convention reflects
 customary law is contested by other writers.⁴⁵ State practice seems to support the view that
 there is no right of non-discriminatory access in customary international law.⁴⁶ However, it
 must be noted that the closure of ports for ships under a certain flag usually occurs in a
 broader context and whether it is a case of retorsion, implying a lawful but unfriendly act, or
 a reprisal, implying an unlawful but justified act, depends on the individual circumstances.⁴⁷
 There is agreement that access to ports is presumed for all merchant ships, but this is not a
 legal obligation.⁴⁸

Regarding measures against individual or certain types of vessels, or vessels with certain 20
 cargo, the law seems clearer. States have a wide discretion for setting conditions of entry into
 port (Art. 25 (2); Art. 38 (2); for environmental port entry-requirements Art. 211 (3)⁴⁹; for

United Nations Legislative Series, vol. 6, UN Doc. ST/LEG/SER.B/6 (1957), 81); Art. IV Regulations Governing Foreign Ships on Bordering Rivers, 19 April 1966 (Chinese regulation from 1966, on that: *Tao Cheng*, Communist China and the Law of the Sea, AJIL 63 (1969), 47, 69); and Art. 5 of the Romanian Decree No. 39 of 28 January 1956 on the Port of Mangalia and a Designated Zone of Romanian Waters (UN, Laws and Regulations on the Regime of the Territorial Sea, United Nations Legislative Series, vol. 6, UN Doc. ST/LEG/SER.B/6 (1957), 239).

³⁹ See *Graf Vitzthum* (note 20), 88 (footnote 103); *Tanaka* (note 21), 81, with some examples of State practice; *De La Fayette* (note 35), 17, gives the number of treaties of ‘friendship, navigation and commerce’ as more than 100; *Lagoni* (note 35), 291 and 362–365, lists 50 bilateral treaties for the Federal Republic of Germany alone.

⁴⁰ Convention and Statute on the International Régime of Maritime Ports, Geneva, 9 December 1923, INTS 58, 285, reproduced in: Alan V. Lowe/Stefan Talmon (eds.), *Basic Documents on the Law of the Sea: The Legal Order of the Oceans* (2009), 1.

⁴¹ *De La Fayette* (note 35), 4.

⁴² UN, Status of Multilateral Treaties Deposited with the Secretary-General, available at: <https://treaties.un.org/Pages/LONViewDetails.aspx?src=IND&id=558&chapter=30&lang=en#4>.

⁴³ *Daniel P. O’Connell*, *The International Law of the Sea*, vol. II (1984), 848, citing: *Ingo von Münch*, *Freedom of Navigation and the Trade Unions*, *Jahrbuch für Internationales Recht* 19 (1976), 128, 135.

⁴⁴ O’Connell (note 43), 848; undecided: *Lagoni* (note 35), 308–309.

⁴⁵ *Churchill/Lowe* (note 21), 61–62; *de La Fayette* (note 35), 14; *Lowe* (note 35), 605–606.

⁴⁶ *Lagoni* (note 35), 271, refers to a prohibition of entry by Turkey on ships under the flag of Cyprus in 1987 and as an example for banning ships from unrecognized flags, to the ban for ships under the USSR flag into France, in force until 1923.

⁴⁷ *Ibid.*, 270. The distinction between reprisal and retorsion of course also depends on the decision to accept or not accept a right of entry, see *Lowe* (note 35), 613. As States usually do not carefully explain whether they consider their action a reprisal or a retorsion, evaluation of State practice in this regard is difficult.

⁴⁸ See *G. Gidel*, *Le Droit public de la mer: Tome II Les eaux intérieures* (1932, reprinted 1981), 50: ‘La règle demeurant en vigueur dans le droit international général [est] celle de la simple présomption de l’ouverture des ports aux navires privés, mais non celle de l’obligation de l’ouverture des ports à ces navires.’; *Degan* (note 33), 19, referring to the 1898 Hague resolution of the Institute of International Law.

⁴⁹ See EC Regulation No 417/2002 of 18 February 2002 on the Accelerated Phasing-in of Double Hull or Equivalent Design Requirements for Single Hull Oil Tankers and Repealing Council Regulation (EC) No 2978/94 (Part of the so called ERIKA I-Package), OJ 2002 L 64, 1.

non-discrimination under Part XII see Art. 227).⁵⁰ States have denied access to individual vessels in a number of cases, mostly if the cargo (such as toxic waste⁵¹), or the vessel itself (e.g. nuclear propulsion⁵²) was unwanted.⁵³

- 21 **b) Jurisdiction in Ports.** Once the ship has entered the port, the question remains as to how far the coastal State may exercise its territorial jurisdiction on the ship vis-à-vis the flag State's jurisdiction. While there is no question that a ship is subject to the coastal State's jurisdiction in 'navigation and its sanitary, fiscal, technical and customs controls'⁵⁴, to what extent the coastal State may exercise jurisdiction over internal matters of the ship is debated. It must be noted that, in practice, most states seem to limit the exercise of their jurisdiction⁵⁵ and act mostly to an extent harmonized with other harbor states in international agreements (see c) *infra*). The legal nature of this practice is not quite clear. Traditionally, the Anglo-American view on this question – that the ship is subject to full jurisdiction, which may not be exercised in internal matters of the ship out of comity⁵⁶ – is contrasted with the French view – that the coastal State has no jurisdiction in internal matters.⁵⁷ Recent practice in port State control⁵⁸ indicates that coastal States are more willing than before to exercise their jurisdiction even with regard to the details of internal arrangements of the ship, if they act in accordance with other harbour states. While sanctions in these matters typically do not include criminal proceedings, this practice indicates that coastal States may on any issue assume their full territorial jurisdiction over a commercial vessel in its internal waters.
- 22 **c) Port State Control.** '[P]ort State jurisdiction is increasingly recognized as a remedy for the failure of flag States to exercise effective jurisdiction and control of their ships.'⁵⁹ The most practically relevant exercise of port State jurisdiction with regard to ships in port is the port State control regime. Port State control usually refers to the preventive inspection of ships to ensure compliance with international standards and any actions resulting from this inspection, but may also be used to refer to investigations and criminal sanctions taken by the port State against ships in a more general way.⁶⁰ The UNCLOS contains specific regulations in Arts. 216, 218 and 219 regarding port State control if an illegal discharge is suspected in the high seas, or if the lack of seaworthiness of a vessel threatens to damage its marine environment. No comparable articles exist in the UNCLOS regarding the protection of lives at sea or the employment conditions of seafarers.⁶¹ State practice regarding preventive port State control extends beyond UNCLOS regulations⁶² and is largely codified in regional 'memoranda of understanding'.
- 23 Following the loss of the AMOCO CADIZ in 1977 and the December 1980 Regional European Conference on Maritime Safety,⁶³ the Paris Memorandum of Understanding (Paris MoU)

⁵⁰ Churchill/Lowe (note 21), 62; Graf Vitzthum (note 20), 90 (MN 50).

⁵¹ Such as the KARIN B carrying toxic waste from Nigeria and denied access to France in 1988 and the PETERSBERG, carrying 'slightly radioactive debris' and denied access in Turkey in 1988, see Lagoni (note 35), 274; see also de la Fayette (note 35), 6, for more examples.

⁵² De la Fayette (note 35), 6, referring to New Zealand denying entry to a US nuclear ship; see also the special agreements concluded by Germany and the USA regarding access of their nuclear merchant vessels OTTO HAHN and SAVANNAH to various ports, *ibid.*, 4.

⁵³ For individual bans as part of the port State control regime see *infra*, MN 22 *et seq.*

⁵⁴ Anne Bardin, Coastal State's Jurisdiction over Foreign Vessels, *Pace International Law Review* 14 (2002), 27, 30.

⁵⁵ Graf Vitzthum (note 20), 101 (MN 75).

⁵⁶ Graf Vitzthum (note 20), 102 (MN 77).

⁵⁷ Tanaka (note 21), 79; for details of the history of this distinction see Churchill/Lowe (note 21), 66–67.

⁵⁸ See *infra*, MN 22 *et seq.*

⁵⁹ James Crawford, *Brownlie's Principles of International Law* (8th edn. 2012), 465.

⁶⁰ Lagoni (note 35), 340 *et seq.*; for further information, see generally König on Art. 218.

⁶¹ Note that the right according Art. 94 (6) is conferred to any State, but limits the State exercising it to a flag State report.

⁶² Lagoni (note 35), 341.

⁶³ For a detailed look at the history of port State control: John Hare, *Port State Control: Strong Medicine to Cure a Sick Industry*, *Ga. J. Int'l & Comp. L.* 26 (1996), 571, 574, 578.

was signed as the first of these memoranda in 1982.⁶⁴ The rationale of the agreement is clearly stated in its preamble:

‘Mindful that the principal responsibility for the effective application of standards laid down in international instruments rests upon the authorities of the State whose flag a ship is entitled to fly;
Recognizing nevertheless that effective action by port States is required to prevent the operation of substandard ships;
Recognizing also the need to avoid distorting competition between ports;
Convinced of the necessity, for these purposes, of an improved and harmonized system of port State control and of strengthening co-operation and the exchange of information;’

Participating authorities agree to an annual inspection commitment of ships calling at their ports.⁶⁵ The ships are inspected to ensure compliance with a list of international agreements (‘relevant instruments’⁶⁶). The inspection under the Paris MoU starts with an ‘initial inspection’ (including inspection of documents and overall condition); if the inspector finds ‘clear grounds’ for a deficiency, a ‘more detailed inspection’ (an in depth examination) and under certain circumstances an ‘expanded inspection’ (covering core aspects of most relevant instruments) may be carried out.⁶⁷ The Paris MoU issues non-public guidelines for the inspections. If a deficiency is found, authorities will ‘endeavor to secure’ its rectification;⁶⁸ ships may be detained if the deficiency is grave, causing significant financial loss to the operator. Under certain circumstances (e.g. repeated deficiencies), a ship may be temporarily refused access (‘banned’) from port entry in the entire MoU area.⁶⁹

The Paris MoU contains the following no-more-favourable-treatment-clause:

24

‘Ships entitled to fly the flag of a State which is not a Party to a relevant instrument and thus not provided with certificates representing *prima facie* evidence of satisfactory conditions on board, or manned with crew members who do not hold valid STCW certificates, calling at a Paris MoU port of a member State which is Party to that relevant instrument, will receive a more detailed or, as appropriate, expanded inspection. In making such an inspection the Port State Control Officer will follow the same procedures as provided for ships to which the relevant instruments are applicable.’

In the light of the discussion about the extent of port State jurisdiction, this clause is particularly illuminating. The legal basis for the exercise of port State control on third-party ships can be neither the Paris MoU nor the relevant instrument, as this would be a violation of Art. 34 of the Vienna Convention on the Law of Treaties.⁷⁰ It must thus be the port State’s own territorial jurisdiction that provides the legal basis for the port State control of third

⁶⁴ Paris Memorandum of Understanding on Port State Control (2013) (as amended). As of May 2015, the MOU had 25 member States, see <https://www.parismou.org/about-us/memorandum>.

⁶⁵ S. 1.3 Paris MoU. This used to be a target of 25 % of ships calling at the ports of contracting authorities (*Hare* (note 63), 579), but this has been replaced in 2011 by a risk based formula (see Annexes 7, 8 and 11 to the Paris MoU), based on EC Directive 2009/16/EC of 23 April 2009, OJ 2009 L 131, 57).

⁶⁶ Relevant instruments include, as of May 2015, the 1966 International Convention on Load Lines and its 1988 Protocol; the International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974) (as amended) and its relevant protocols (1978, 1988); International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78), and as further amended by the Protocol of 1997; the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers; the Convention on the International Regulations for Preventing Collisions at Sea, 1972, available at: <http://www.imo.org/about/conventions/listofconventions/pages/colreg.aspx> (COLREGs 72); the 1969 International Convention on Tonnage Measurement of Ships; the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147) and its 1996 Protocol; the Maritime Labour Convention, 2006; the 1969 International Convention on Civil Liability for Oil Pollution Damage as amended by its 1992 Protocol; the 2001 International Convention on the Control of Harmful Anti-Fouling Systems on Ships; the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage; the 2004 International Convention for the Control and Management of Ships’ Ballast Water and Sediments.

⁶⁷ See Annex 9 of the Paris MOU for details.

⁶⁸ S. 3.4 Paris MoU.

⁶⁹ S. 4 Paris MoU.

⁷⁰ Art. 34 VCLT (General Rule Regarding Third States) ‘A treaty does not create either obligations or rights for a third State without its consent.’

parties.⁷¹ The Paris MoU lists the Maritime Labour Convention (MLC) and the International Labor Organization Convention No. 147⁷² as relevant instruments. According to the MLC, detailed inspection with regard to the MLC covers, among others, such areas as hours of work and rest, accommodation, on-board recreational facilities, food and catering, on-board medical care and payment of wages. All of these can be considered to be part of the internal economy of the ship. That port State control inspections are carried out on non-parties clearly indicates that port States can assume jurisdiction over any issue on board ships in their ports that they see fit.

- 25 Following the example of the Paris MoU, other regional agreements on port State control were adopted.⁷³ In general they are substantively similar and follow the model of the Paris MoU⁷⁴, though they may differ in details, e.g. the relevant instruments.⁷⁵
- 26 **d) Criminal and Civil Jurisdiction of the Port State.** According to Art. 27 (1), the coastal State may exercise criminal jurisdiction in the territorial sea even with regard to a ship in innocent passage in the following cases:

‘(a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.’

A fortiori, these rights must exist for the port State in internal waters.⁷⁶ Indeed, as Art. 27 (2) shows, criminal jurisdiction in internal waters is not limited to these offences, but can be wider. In principle, the State may exercise its jurisdiction with regard to all crimes committed aboard the vessel.⁷⁷ However, in practice, States confine the exercise of their jurisdiction. State practice in this area is fairly uniform and cases seem to align with the situations under Art. 27 (1): States will assume criminal jurisdiction if the matter affects the peace and good order of the port State; this also includes cases of ‘intrinsic gravity’ (such as homicide) that warrant local intervention.⁷⁸ States will also assume jurisdiction upon request of the ship or the flag State, or when a non-crew member is involved.⁷⁹

- 27 The situation in the territorial sea is also a useful starting point for the evaluation of civil jurisdiction. According to Art. 28 (3), the coastal State has the right ‘in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.’ It follows *a fortiori* that the port State has full civil jurisdiction in relation to

⁷¹ Lagoni (note 35), 342 (para. 67); see also Ted. L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, Ocean and Coastal L.J. 5 (2000), 207, 211–212.

⁷² Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147), available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312292.

⁷³ McDorman (note 71), 208. Latin American Agreement on Port State Control (1992); Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013) (Tokyo MoU), the Memorandum of Understanding on Port State Control in the Caribbean Region (1996); Memorandum of Understanding on Port State Control in the Mediterranean Region (2006) (as amended); Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013); ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999). In 2004 the Riyadh Memorandum of Understanding on Port State Control (2004) was signed.

⁷⁴ McDorman (note 71), 208.

⁷⁵ See for example the list of the Persian Gulf, S. 2.1 Riyadh MoU, that contains at the time of writing 8 relevant instruments, in comparison to the Paris MoU’s 17, notably not the MLC, but the 1976 Merchant Shipping (Minimum Standards) Convention (ILO Convention No. 147).

⁷⁶ Degan (note 33), 24–25; somewhat less convincingly, Degan also argues that the duties of notification according to Art. 27 (3) also apply in the internal waters; that would seem to be an unintended extension of the applicability of the UNCLOS to internal waters.

⁷⁷ Churchill/Lowe (note 21), 65.

⁷⁸ Churchill/Lowe (note 21), 66–67; Tanaka (note 21), 80.

⁷⁹ Churchill/Lowe (note 21), 67, with further examples of State practice; Tanaka (note 21), 80. See also Arts. 92 (1) and 97 (1).

merchant vessels in its port.⁸⁰ In principle, civil jurisdiction also extends to disputes involving the crew of the merchant vessel. However, port States may be reluctant to exercise their jurisdiction if matters are involved that relate to the relationship between the master and crew, crew and owner, or matters originating outside the port State's jurisdiction.⁸¹ However, in practice, these matters are often subject to specific treaties.⁸²

e) **Ships in distress.** Ships in distress have a customary right to entry into foreign ports.⁸³ Distress is to be interpreted narrowly and in this context refers only to situations in which human life is in danger.⁸⁴ Recent State practice indicates the reluctance of States to allow a ship in distress to enter their ports if the ship itself or its cargo may pose a danger to the port State, in particular its environment.⁸⁵ However, it is unclear whether that includes situations where the lives of persons on board are in immediate danger. If the underlying humanitarian argument⁸⁶ for the right of entry of ships in distress is taken seriously, it would seem that the danger for the port State must be severe to deny entry.⁸⁷

Once a ship is in port due to distress or *force majeure* the port State's jurisdiction is limited, as the vessel is not voluntarily under the sovereignty of the port State.⁸⁸ The ship will be immune from those laws it has breached due to *force majeure*, but it will be required to follow the laws it reasonably can, given its circumstances, such as health and safety regulations.⁸⁹

f) **Other vessels in internal waters.** Except for cases of distress, States have the right to regulate the access of warships (Art. 29) or other government ships operated for non-commercial purposes to their internal waters at their discretion.⁹⁰ Once a government ship is in port

⁸⁰ *Bardin* (note 54), 30; *Degan* (note 33), 25–26; *O'Connell* (note 43), 859 *et seq.*, see in particular the summary of American practice with reference to the case of the *ESTER*, *ibid.*, 864; also instructive as a summary for both criminal and civil jurisdiction is the 1957 Amsterdam Resolution of the Institute of International Law: 'IV. Judicial Competence. The coastal State may exercise its judicial competence over delictual acts committed on board a vessel during its sojourn in the internal waters of that State. In civil matters, if the seizure of the vessel has taken place in accordance with the laws of the coastal State and of international conventions, civil proceedings may be instituted against the owner of the vessel even if the vessel and its conduct have given no occasion for the proceedings.'

However, according to widely accepted practice, judicial competence is not exercised in penal matters with respect to acts committed on the vessel which are not of a kind to disturb public order. Nor, in general, is judicial competence exercised in matters of civil jurisdiction which relate to the internal order of the vessel.'

⁸¹ *O'Connell* (note 43), 874 *et seq.*, for the question of collision suits.

⁸² *Churchill/Lowe* (note 21), 68.

⁸³ *Ibid.*, 63; *Tanaka* (note 21), 83; *Graf Vitzthum* (note 20), 89; *The Eleanor* (1809) 165 ER 1067: 'Real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws.'

⁸⁴ *Tanaka* (note 21), 83 (para. 2.5 (a)), with reference to the *The MV 'Toledo' ACT Shipping (PTE) Ltd v. Minister for the Marine, Ireland and the Attorney General* [1995] 2 ILRM 30; *Churchill/Lowe* (note 21), 63; arguing for a right of entry in the case of danger for the ship: *Lagoni* (note 35), 311.

⁸⁵ *Tanaka* (note 21), 83, with reference to the *ERIKA* and the *PRESTIGE*, among others, note also the case of the *MSC FLAMINIA* in 2012, that was denied entry in Portugal, Great Britain and France (*Giftige Irrfahrt der brennenden "MSC Flaminia"*, <http://www.zeit.de/wissen/umwelt/2012-08/flaminia-havarie>); see also *Graf Vitzthum* (note 20), 90, with details on ships with nuclear propulsion.

⁸⁶ See also, ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4, 22; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10, para. 155: 'Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.'

⁸⁷ Cf. *Graf Vitzthum* (note 29), 90; *Lagoni* (note 35), 312.

⁸⁸ *Churchill/Lowe* (note 21), 68; see also *Bardin* (note 54), 31.

⁸⁹ *O'Connell* (note 43), 857; *Churchill/Lowe* (note 21), 68; *Lagoni* (note 35), 312. See also Art. 218 (1) which begins 'When a vessel is voluntarily within a port [...]', emphasis added.

⁹⁰ *Lowe* (note 35) 11; *Bardin* (note 54), 33; *Graf Vitzthum* (note 20), 102 (MN 76); *Degan* (note 33), 9; for a detailed analysis regarding the different types of government vessels, incl. presidential yachts, troopships and so on, see *ibid.*, 33–37.

with the consent of the port State, it enjoys sovereign immunity (see Art. 32).⁹¹ The port State may impose special regulations regarding privately owned pleasure or racing yachts and boats.⁹²

5. Status of Internal Waters Subject to Article 8 (2)

- 31 Internal waters subject to Art. 8 (2) are by definition internal waters in which a right of innocent passage applies. CRAWFORD describes the legal regime of the territorial sea such that '[t]he coastal state has all practical rights and duties inherent in sovereignty, whereas foreign vessels have privileges, in particular with the right of innocent passage'.⁹³ It must be noted that this description also applies to a large degree to internal waters under Art. 8 (2). The coastal State may not regulate access to those waters; consequently, a large number of the conclusions above are not applicable. As innocent passage is one of the defining aspects of the territorial sea regime it may be argued that these waters are more akin in status to the territorial sea than to the internal waters proper.⁹⁴

Article 9 Mouths of rivers

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.

Bibliography: *Lewis M. Alexander*, Baseline Delimitations and Maritime Boundaries, VJIL 23 (1983), 503–536; *Leo J. Bouchez*, The Regime of Bays in International Law (1964); *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Robert D. Hodgson/Lewis M. Alexander*, Towards an Objective Analysis of Special Circumstances, Law of the Sea Institute Occasional Paper 13 (1972); *Charles C. Hyde*, International Law as Chiefly Interpreted and Applied by the US, vol. I (2nd edn. 1945); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Daniel P. O'Connell*, The International Law of the Sea, vol. I (1982); *John V. R. Prescott*, The Maritime Boundaries of the World (1985); *Benjamin H. Read*, Delimitation of the Territorial Sea at the Mouth of a River (1957); *Michael W. Reed*, The Development of International Maritime Boundary Principles through United States Practice, in: US Department of Commerce, Shore and Sea Boundaries, vol. III (2000); *J. Ashley Roach/Robert Smith*, United States Responses to Excessive Maritime Claims (2nd edn. 1996); *Tullio Scovazzi/Giampiero Francalanci/Daniela Romano/Sergio Mongardini*, Atlas of Straight Baselines (2nd edn. 1989); *Tullio Scovazzi*, Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters, in: *Clive R. Symmons* (ed.), Selected Contemporary Issues in the Law of the Sea (2011), 15–30; *Clive R. Symmons*, L'échange de lettres de 1990 entre l'Iran et l'Iraq: un règlement définitif du différend et du conflit?, AFDI 36 (1990), 229–247; *Clive R. Symmons*, The Maritime Border Areas of Ireland, North and South: An Assessment of Present Jurisdictional Ambiguities and International Precedents Relating to Delimitation of 'Border Bays', IJMCL 24 (2009), 457–500; *Gayl Westerman*, The Juridical Bay (1987); *Marjorie Whiteman* (ed.), US Department of State: Digest of International Law, vol. IV (1965)

Documents: American Law Institute, Restatement of the Law: Foreign Relations Law of the United States, No. 1 (1957); IHB, Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982 (4th edn. 2006); ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014); ILC, Report on the Regime of the Territorial Sea by J. P. A. François, Special Rapporteur, UN Doc. A/CN.4/53 (1952), reproduced in: ILC Yearbook (1952), vol. II, 25–43; ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur special, UN Doc. A/CN.4/61/ADD.1 (1953), reproduced in: ILC Yearbook

⁹¹ ITLOS, *The 'ARA Libertad' Case* (Argentina v. Ghana), Order of 15 December 2012, para. 95: '[...] in accordance with general international law, a warship enjoys immunity, including in internal waters[...]', available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf; see also *Tanaka* (note 21), 80 (para. 2.3). Cf. also Art. 3 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, 1926, *Degan* (note 33), 31, sees Art. 3 (1) of that convention as declaratory of customary international law.

⁹² *Degan* (note 33), 9. For regulations regarding research vessels, see Art. 255.

⁹³ *Crawford* (note 58), 264.

⁹⁴ Cf. *Graf Vitzthum* (note 25), 92 (MN 52); *Degan* (note 33), 38: 'Therefore, by means of Article 4 (2), [sic, the author clearly intends to refer to Article 5] the 1958 Convention on the Territorial Sea assimilated in all respects, save in name, these newly enclosed parts of internal waters to the territorial sea.'

(1956), vol. II, 75–79; ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), GAOR 10th Sess. Suppl. 9, reproduced in: ILC Yearbook (1955), vol. II, 19–62; ILC, Amendements proposés par M. J. P. A. François, Rapporteur spécial, sur la base des observations des gouvernements au projet d'articles provisoires, adopté par la Commission du droit international à sa sixième session, sur le régime de la mer, UN Doc. A/CN.4/93 (1955), reproduced in: ILC Yearbook (1955), vol II, 5–9; ILC, Summary Records of the Meetings of the 7th Session, ILC Yearbook (1955), vol I; ILC, Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea Adopted by the International Law Commission at its Seventh Session in 1955, UN Doc. A/CN.4/99 (1956), reproduced in: ILC Yearbook (1956), vol. II, 37–67; ILC, Summary Records of the Meetings of the 8th Session, ILC Yearbook (1956), vol. I; League of Nations, Report of the Second Commission (Territorial Sea), LN Doc. C.230.M.117.1930.V. (1930.V.15.); US Department of State, Measurement of the U.S. Territorial Sea, Department of State Bulletin 1044 (1959); UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989)

Cases: *Georgia v. South Carolina*, 497 U.S. 376 (1990); ICJ, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Reports (1991), 53; ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40; ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports (2007), 659; ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61; *Post Office v. Estuary Radio Ltd.* [1968] 2 QB 740 (UK); *Texas v. Louisiana*, 406 U.S. 465 (1976)

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I. Purpose and Function

This provision, which is almost identical to Art. 13 Convention on the Territorial Sea and the Contiguous Zone (CTSCZ),¹ proceeds to refer to the second of the several enunciated geographical situations where a State may resort to the use of what may be broadly described as a straight baseline (as compared with the normal baseline in accordance with Art. 5 based on the 'low-water line')² which applies particularly where waters penetrate into the land mass, as do rivers, bays, ports etc;³ so closing off internal waters under Art. 8 (1).⁴ As such, river-based lines constitute one example of what the International Court of Justice (ICJ) has dubbed generically as an 'exception to the normal rules for the determination of baselines'.⁵ In the instance of rivers, unlike in the terminology in the case of the 'straight baselines' sanctioned under Art. 7 or the 'closing line' in the case of bays under Art. 10, there is reference here simply to a 'straight line' being useable to close off rivers: though this difference in expression is without substantive importance, seemingly meaning a single straight line.⁶ In comparison to these two other geographical situations pursuant to Art. 7

¹ Apart from the fact that now 'low-water line' is used instead of 'low-tide line'.

² See further Trümpler on Art. 5 MN 5–10.

³ See Gayl Westerman, *The Juridical Bay* (1987), 23; and Leo J. Bouchez, *The Regime of Bays in International Law* (1964), 20–21; see also Arts. 7, 10 (bays), and (by implication) 11 (ports).

⁴ See Trümpler on Art. 8 MN 9–13.

⁵ ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40, para. 212.

⁶ Though Michael W. Reed, *The Development of International Maritime Boundary Principles through United States Practice*, in: US Department of Commerce, *Shore and Sea Boundaries*, vol. III (2000), 314, when discussing the 'straight line' requirement, mentions that, e.g., in rare circumstances an island (or presumably also islands) may lie at the mouth of a river, in which case two-line segments or even more – as in the case of bays in Art. 10 (3) – might be applied in a similar way to the situation in a true delta region.

and Art. 10, the internal waters enclosed landward of such river-enclosing baselines will not normally be significantly large, though they may, of course, enclose large amounts of fresh water down-river. Furthermore and correspondingly, in most instances the straight lines will not be lengthy (though see the precedent of the mouth of the Rio de la Plata between Argentina and Uruguay as noted below).

- 2 The provision seems not intended to cover all issues relating to river-based lines. Some such issues concern the rules relating to bays and relate to at least one other issue in the UNCLOS, namely Art. 7 (2) where there is 'the presence of a delta and other natural conditions' causing the coastline to be 'highly unstable': in this case, as seen, appropriate points may be chosen along the furthest seaward extent of the low-water line which will remain effective, despite regression of the low-water line until changed by the competent coastal State.⁷ Although this provision is contained in a river-related aspect of the expansive baseline scenario authorised under Art. 7, it implicitly excludes an Art. 9 type of a **single** straight baseline as such, envisaging, for example, an alternating mix of low-water mark baselines and straight baselines.⁸ Thus the abovementioned delta-based closing lines of Art. 7 envisage not only **multiple** straight baselines and basepoints being used at a deltaic river mouth, but also points which do not necessarily correspond to points on a river's banks (as is here required in Art. 9).⁹ However, the general ambulatory intent of Art. 7 (2), as to recognising baseline changes on river bank low-water lines at least, would seem to apply also to baselines drawn under Art. 9 in a similar fashion to those in deltaic river regions of the world.¹⁰

II. Historical Background

- 3 At the 1930 Hague Codification Conference, the Second Commission's Sub-Committee II recorded the view that 'when a river flows directly into the sea, the waters of the river constitute inland water up to a line following the general direction of the coast drawn across the mouth of the river whatever its width'; and that if the river flows 'into an estuary, the rules applicable to bays apply [...]'.¹¹ The 1956 draft provision on (then) Art. 13 CTSCZ (concerning rivers) indicated, in similar fashion, that if a river flowed directly into the sea 'the territorial sea shall be measured from a line drawn *inter fauces terrarum* across the mouth of the river' (para. 1); and that '[i]f the river flows into an estuary the coasts of which belong to a single State, article 7 [on bays] shall apply' (para. 2).¹² However, the International Law Commission (ILC) pointed out in its commentary¹³ that so far as Art. 7 (2) CTSCZ was concerned, the ILC did not have 'the necessary geographical data at its disposal

⁷ See also Trümpler on Art. 7 MN 24–32.

⁸ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 111; see also Robin R. Churchill/Alan V. Lowe, The Law of the Sea (3rd edn. 1999), 47.

⁹ Thus, e.g., in the case of the Mississippi Delta, it has been necessary to construct 'numerous closures', US Department of State, Measurement of the U.S. Territorial Sea, Department of State Bulletin 1044 (1959), 963, 966–967; see the map in: Marjorie Whiteman (ed.), US Department of State: Digest of International Law, vol. IV (1965), 338.

¹⁰ This was a point made by Mr Fitzmaurice: ILC, Summary Records of the Meeting of the 7th Session, ILC Yearbook (1955), vol. I, 220, 221, who stated that when the land domain was being constantly pushed out to sea 'by the constant formation of [new coastal features], it was necessary to determine the point from which the low watermark was to be measured, and States might find it necessary to revise the line from time to time'.

¹¹ League of Nations, Report of the Second Commission (Territorial Sea), LN Doc. C.230.M.117.1930.V. (1930.V.15.), 14 (Appendix B); the phrase 'general direction of the coast' was to be criticised in the ILC's 1953 Report of its Committee of Experts, who observed that it was 'impossible' to establish such a position 'in many instances', ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur special, UN Doc. A/CN.4/61/Add.1 (1953), reproduced in: ILC Yearbook (1956), vol. II, 75, 78; see more generally Reed (note 6), 314–315.

¹² ILC, Summary Records of the Meetings of the 8th Session, ILC Yearbook (1956), vol. I, 199.

¹³ *Ibid.*

to decide whether this provision [was] applicable to all existing estuaries'; and it was also thought that the meaning of 'estuary' was too hard to define.¹⁴

The absence of a wording referring to estuaries in Art. 9 can, then, be traced back to the final draft article provisions on river baselines of the ILC at UNCLOS I which, whilst being approved in the First Committee of UNCLOS I, were partially rejected in the Plenary Conference vote by failing to get the necessary two-thirds majority.¹⁵ Accordingly, as will be seen below, only a paragraph concerning the first of two river situations finally remained: so that in the case of the second – where a river flows into an estuary – arguably the provision on bays was to apply.¹⁶ Some commentators such as BOUCHEZ view the distinction between an estuary and a river mouth as important, especially as there are no 'limits for the length of a river mouth *stricto sensu*'; so that in the former case only the bay rules apply.¹⁷

As seen, the wording of Art. 9 is almost identical to that in Art. 13 CTSCZ,¹⁸ and at the 1973 session of the Seabed Committee – and subsequently at UNCLOS III – there were proposals submitted to retain the exact wording of the CTSCZ, which then appeared as Provision 13 of the 'Main Trends' working paper.¹⁹ At the Third Session in 1975, the then-Art. 8 of the Informal Single Negotiating Text detailed an expanded version which, whilst not changing the main previous substantive wording, added a procedural obligation on a coastal State to 'clearly indicate these baselines on large-scale charts deposited with the Secretary-General of the UN, who shall give due publicity thereto'.²⁰ However, when this latter requirement was duly (and logically) hived off into a separate new article in the Revised Single Negotiating Text, the text reverted essentially to its originally-proposed form.²¹

III. Elements

1. Does the Article Include Estuaries?

A major problem of interpretation is involved with the opening phrase '[i]f a river flows directly into the sea' (emphasis added). As has been pointed out by previous commentators, the French text is clearer than the English in stating '[s]i un fleuve se jette dans la mer sans former estuaire [...]'; and that '[i]f the expression 'flows directly' is taken to mean 'without forming an estuary' as in the French text, the application of this article in practice may be limited'²², insofar as there may be few examples of rivers which do not have tidal mouths (i. e., where sea water meets fresh water as is typical in an estuary). So that in most estuarial situations the bay rules will here seemingly apply based on Art. 10.²³ As CHURCHILL/LOWE comment, it 'may not always be easy to distinguish between a river entering the sea directly and one entering the sea via an estuary'.²⁴ In the light of the French text, it has, then, been suggested that the word 'directly' may be interpreted to mean 'without forming an estuary',²⁵

¹⁴ ILC, Regime of the Territorial Sea: Report by J. P. A. François, Special Rapporteur, UN Doc. A.CN.4/53 (1952), reproduced in: ILC Yearbook (1952), vol. II, 25, 37, to the effect that the Second Commission's report (note 11) was open to objection in that an estuary 'does not admit of a general and sufficiently firm definition'.

¹⁵ Nordquist/Nandan/Rosenne (note 8), 111; see UNCLOS I, 19th Plenary Meeting (1958), OR II, 61, 64 (para. 35).

¹⁶ See *infra*, notes 22 and 27.

¹⁷ Bouchez (note 3), 21–22., stating one has 'always to decide on the basis of the particular circumstances whether there is an estuary or a rivermouth'.

¹⁸ Nordquist/Nandan/Rosenne (note 8), 110.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, 111; see also the Spanish text: '*directamente*'.

²³ See, e. g., Westerman (note 3), 110, stating that: 'It is clear from this language that [Art. 13 CTSCZ did] not apply to rivers which flow into a bay or estuary'.

²⁴ Churchill/Lowe (note 8), 47.

²⁵ UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989), 27 (para. 62).

though it may be contended that estuaries are parts of rivers anyway; and that particularly in modern times, with rising sea levels, there are ‘very few rivers which do not have estuaries’.²⁶ In fact early drafts of Art. 13 CTSCZ by the ILC indicated that an estuary was not to be considered part of a river;²⁷ so that in this instance the bay rules should inevitably apply. Indeed, two of the past theories relating to mouths of rivers have respectively assimilated the regime either to that of bays or, as adopted by the 1930 Hague Codification Conference, to one based on a rule which depends on the geographical formation of the river mouth.

- 7 The fact that the reference to estuaries was dropped in the CTSCZ, largely for reasons of difficulty of definition, has been seen as indicating to some commentators that the bay rules still apply to estuaries²⁸ as, indeed, has been US practice.²⁹ Thus whether a bay or a river-based line is finally adopted may depend on ‘a case-by-case determination’.³⁰ It has been further suggested that the English text may be interpreted as covering the geographical situation where a river runs into the sea ‘without forming a delta’.³¹ This may be on the basis that Art. 7 applies to deltas as such – with a different baseline rule – and not to estuaries as such.³²

2. No Prescribed Length

- 8 Another problem is that, unlike in the case of bays in Art. 10 (5)³³, there is no maximum length specified as to the closing line. Accordingly, some commentators suggest there is no maximum here; so that provided the line drawn meets the other conditions of Art. 9, it can be of any length.³⁴ However, at times maximum limits have been suggested, usually on an analogy with the bay rules;³⁵ and if a river flows into a bay or estuary, the bay rule of a 24

²⁶ *Ibid.*

²⁷ *Reed* (note 6), 311–312; cf. the British viewpoint in 1955 that the draft article on rivers should ‘make clear that the “mouth of a river” means the river proper and not an estuary or bay into which it may flow’, ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), GAOR 10th Sess. Suppl. 9, reproduced in: ILC Yearbook (1955), vol. II, 19, 58.

²⁸ *Reed* (note 6), 312; though *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982), 225, concludes more vaguely that the bay rules may not necessarily apply to ‘estuaries’, so that such cases are left ‘unresolved’. The definition of an ‘estuary’ as such (compared with a ‘river mouth’) – apart from it having wide entrance points (as the banks diverge), high salinity and tidal flow in contained waters (so no longer being ‘riverine’) – is not an easy one to make as the Rapporteur to the ILC admitted in ILC, Summary Records of the Meetings of the 7th Session, ILC Yearbook (1955), vol. I, 220. Despite the Rapporteur’s doubts on definition, he there stated that he had been ‘reassured that it [an estuary] was a well-defined geographical concept which required no elucidation’. The term is (vaguely) defined by the International Hydrographic Bureau, as the ‘tidal mouth of a river where the seawater is measurably diluted by the fresh water’ from a river, see: IHB, *Manual on Technical Aspects of the UN Convention on the Law of the Sea – 1982* (4th edn. 2006), Appendix 1–12, para. 32.

²⁹ See *Reed* (note 6), 312; and *Bouchez* (note 3), 22, where a river flows into an estuary (‘indentation of the sea’), the rules governing bays apply unless the claimant can prove otherwise.

³⁰ *Reed* (note 6), 313.

³¹ Nordquist/Nandan/Rosenne (note 8), 111, citing *Lewis M. Alexander*, *Baseline Delimitations and Maritime Boundaries*, VJIL 23 (1983), 503, 512.

³² Nordquist/Nandan/Rosenne (note 8), 111.

³³ Further, see *Symmons* on Art. 10 MN 17–18.

³⁴ *Reed* (note 6), 318; *Robert D. Hodgson/Lewis M. Alexander*, *Towards an Objective Analysis of Special Circumstances*, *Law of the Sea Institute Occasional Paper* 13 (1972), 3; *John V. R. Prescott*, *The Maritime Boundaries of the World* (1985), 51; cf. *American Law Institute, Restatement of the Law: Foreign Relations Law of the United States*, No. 1 (1957), para. 6 (3), referring to a line being drawable ‘irrespective’ of its width where a river does not flow into an estuary.

³⁵ *Reed* (note 6), 318; *Whiteman* (note 9), 336; see also, e.g., the 10-mile width rule suggestion in the case of a bay ‘or river-mouth’, *Benjamin H. Read*, *Delimitation of the Territorial Sea at the Mouth of a River* (1957), 17–18; cf. the interesting past suggestion of Yugoslavia that if the breadth of a river mouth exceeded a set distance (12 NM), the principle of a bay should apply, ILC Report (note 27), 48; cf. also the comments of Belgium in 1956 relating to closing line length, ILC, *Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea* adopted by the International Law Commission at its Seventh Session in 1955, UN Doc. A/CN.4/99 (1956), reproduced in: ILC Yearbook (1956), vol. II, 37 *et seq.*; and the comments of the UK, *ibid.*, 80, 85; *Reed* (note 6), 313–314.

NM maximum line may be solely applicable.³⁶ Added to this, there is not any river-based semi-circle hydrographic test to determine the legality as to the choice of an entity for the closing line as in the case of bays proper in Art. 10 (2).³⁷ So in the case of major estuaries – such as that of the Rio de la Plata in South America – it could be of more than mere academic interest whether the river rules or the bay rules apply.³⁸

3. Meaning of ‘Mouth of the River’ and ‘Banks’

Another problem concerns the meaning of the ‘mouth of the river’: namely, what constitutes the points on the low-water line, and, indeed, what is meant by ‘banks’³⁹ across which a straight line may be drawn⁴⁰ (i. e., what points are to be chosen as the *termini* of any closing line of the river). In this connection, given that the connecting river basepoints must be on the low-water line of the banks of a river’s mouth, even the mouth of a river may be difficult to determine ‘especially if it has a low coast’ and a ‘large tidal range’.⁴¹ Accordingly, if the seaward banks of a river are gently curving outwards, there may be a locational problem as to selection of the appropriate ‘mouth’ analogous to that of the choice of the natural entrance points of a bay under Art. 10. A simple case is where there are **parallel** banks of a river which ‘form right angles with the shore of the open sea’, and where a direct line across may define the ‘mouth’.⁴² However, this may not always be the case: many rivers do not retain their river-like ‘parallel bank’ characteristics all the way to the sea, often having diverging banks as they approach the sea and begin to form an estuary;⁴³ in this case, the same processes employed for determining the basepoints of a juridical bay (→ Art. 10 (2)) will have to be resorted to by analogy.⁴⁴ In US case-law a ‘45 degree test’ has been used as a supposed method of locating not only the headlands of bays, but also the mouths of rivers: in a similar way to that on the analogous problem relating to determining the natural entrance points of bays.⁴⁵ Thus controversies over the provisions on river-closing lines have also arisen over ‘identifying the points on the banks that serve as *termini* of the closing line’ at the ‘mouth’.⁴⁶

A related problem here is where non-natural extensions, such as parallel jetties, may have been added to the original banks of a river. There is some US authority to suggest in the case of such artificial extensions, the actual seaward *termini* of them may be treated as the relevant connecting basepoints.⁴⁷ The meaning of ‘banks’ may also cause basepoint-connection problems where submerged features such as a shoal area lie at a river mouth, though the

³⁶ *Reed* (note 6), 318.

³⁷ A point mentioned by *Reed* (note 6), 313, ‘even [an estuary] would have to constitute a well-marked indentation into the coast and enclose enough water area to meet the semicircle test’. For further information on the semi-circle test, see *Symmons* on Art. 10 MN 7–8.

³⁸ *Churchill/Lowe* (note 8), 47, comment that few cartographers would be ‘likely to choose the location of the [chosen] line or indeed say that the river [Plate] entered the sea directly’.

³⁹ Cf. the somewhat differing and vaguer tentative draft restatement by the American Law Institute Restatement of the Law (note 34), which referred simply to ‘the shore’ of a river or a line across its ‘mouth’ where it does not flow into an ‘estuary’, *Whiteman* (note 9), 336.

⁴⁰ *Nordquist/Nandan/Rosenne* (note 8), 111. Note that the ILA Committee on Baselines under the Law of the Sea at their Washington Conference (2014), in proposing a new committee on baselines, suggested in their ADD Report that it should consider the interpretation and State practice relating to Art. 9 and the mouths of rivers, see: ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014), para. 89.

⁴¹ UN DOALOS Baselines Study (note 25), 26.

⁴² *Reed* (note 6), 311.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 317.

⁴⁵ *Ibid.*, 260 (footnote 228), 311, 317. He notes also that this test was used by Mexico and the US to locate the mouth of the Rio Grande during negotiations leading to the treaty establishing their joint maritime boundary 12 NM into the Gulf of Mexico.

⁴⁶ *Ibid.*, 310–311.

⁴⁷ *Ibid.*, 315, 316, citing the US domestic precedent of *Texas v. Louisiana*, 406 U.S. 465 (1976).

word ‘bank’ itself implies land above high tide.⁴⁸ Added to this, as seen, natural components of river mouth such as sandbars and mudflats may be constantly moving their positions, so that choosing an appropriate fixed low-tide basepoint on them may be difficult, as, for example, in the case of the mouth of the Rio de la Plata.⁴⁹

4. Inclusion of Border Rivers?

- 11 Curiously there is no provision in Art. 9 – equivalent to Art. 10 (1) on bays – as to whether Art. 9 is confined to rivers ‘which belong to a single State’. Thus in the case where a river belongs to more than one State, the Art. 9-rules may seemingly be more liberally applied as compared with the rule concerning bays.⁵⁰ Some commentators seem to assume a literal interpretation from the abovementioned omission: so that, even where a ‘border river’ exists, Art. 9 applies to allow a straight baseline;⁵¹ and certainly there are examples throughout the world where straight closing lines have been extended either unilaterally – to at least the mid-way line of a river mouth,⁵² as in the case of Iran and the Shatt-al-Arab river⁵³ – or bilaterally, as in the case of the estuarial area of the River Oyapock between French Guyana and Brazil.⁵⁴ However some State practice has reacted against such an interpretation: as, for example, in the case of the US (and others’ protests) in 1963 to the jointly-agreed Argentina-Uruguay straight closing line across the Rio de la Plata.⁵⁵
- 12 At UNCLOS I, a draft ILC article did refer to a river which flows into ‘an estuary the coasts of which belong to a single State’;⁵⁶ and the UK commented to the ILC in 1956 that it approved the ILC’s draft article on the ‘assumption that baselines cannot be drawn across the frontier between States’.⁵⁷ However several agreements relating to border rivers seem to apply no closing line, but instead opt for an open-ended seaward delimitation up to the river

⁴⁸ *Reed* (note 6), 317. He cites the US precedent of *Georgia v. South Carolina*, 497 U.S. 376 (1990), where the Supreme Court allowed a ‘geographical feature’ in the form of a submerged shoal at the mouth of the Savannah River to be the equivalent of an opposing headland as it had been ‘long recognized as confining the river’, and he criticizes this decision for law of the sea purposes on the basis that the Art. 9 reference to ‘points on the low-tide [now low-water] line of its banks’ makes it clear that ‘features without a low-water line will not qualify as riverbanks’.

⁴⁹ Note, e.g., the query of Mr Salamanca at the Seventh Session of the ILC as to the application of a straight line where a river, such as the Rio de la Plata, is ‘continuously forming new strips of land’ with a ‘constantly changing contour’, ILC, Amendements proposés par M. J. P. A. François, Rapporteur spécial, sur la base des observations des gouvernements au projet d’articles provisoires, adopté par la Commission du droit international à sa sixième session, sur le régime de la mer, UN Doc. A/CN.4/93 (1955), reproduced in: ILC Yearbook (1955), vol II, 5, 6. It may be noted that in the case of *Nicaragua v. Honduras* baseline problems (albeit lateral ones) arose in a boundary delimitation situation in the River Coco where the ICJ found it impossible to identify clear basepoints because of progressive and on-going sedimental accretion in the river: ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports (2007), 659, paras. 277–281.

⁵⁰ Nordquist/Nandan/Rosenne (note 8), 112.

⁵¹ UN DOALOS Baselines Study (note 25), 27 (para. 62); *Reed* (note 6), 313.

⁵² Cf. though the Venezuelan claim to a closing line across the Orinoco River Delta area connecting with adjacent Guyanese territory, see *Tullio Scovazzi et al.*, *Atlas of the Straight Baselines* (2nd edn. 1989), 64–65.

⁵³ *Clive R. Symmons*, *The Maritime Border Areas of Ireland, North and South: An Assessment of Present Jurisdictional Ambiguities and International Precedents Relating to Delimitation of ‘Border Bays’*, IJMLC 24 (2009), 473; *Scovazzi et al.* (note 52), 152–153.

⁵⁴ *Scovazzi et al.* (note 52), 14–15.

⁵⁵ See, for the US protest, *Whiteman* (note 9), 343: ‘the provisions of [Art. 9] relate only to rivers which flow [...] from the territory of a single State and not to rivers whose coasts belong to two or more different States’; for the UK protest, see *Symmons* (note 53), 468 (footnote 46).

⁵⁶ Cf. UN DOALOS Baselines Study (note 25), 27 (para. 62).

⁵⁷ ILC Comments by Governments (note 35), 85 (emphasis omitted). An associated problem is that if a river mouth is estuarial, and the bay rules in Art. 10 are applicable, it may be the case that Art. 10 (1) disallows a straight baseline across a border bay in this instance. A case in point is the Ems-Dollard estuary between Germany and the Netherlands, in the case of which the Netherlands has unilaterally imposed a closing line between Rottumeroog and Borkum specifically as a ‘river closing line’, see: *Steffen Dewina*, *The Factors of Relevance in the Delimitation between the Territorial Seas of the Netherlands and Germany* (2012), Masters Thesis, University of Tromsø.

mouth or beyond, based very often simply on a mere lateral median line, with no consequent ‘connecting line’ going across between a border river’s banks so as to effect any clear containment of internal (river) waters. There appears, however, to be no reason in principle why two or more bordering States should not agree on closing off a shared river mouth.⁵⁸ Indeed, REED wisely comments that boundary rivers most certainly contain internal waters; and that if such rivers are not delimited in accordance with the UNCLOS-based provision for rivers, this may be unfortunate for the international community.⁵⁹ Furthermore, the authoritative UN publication on baselines specifically asserts that Art. 9 applies even if ‘the rivers in question [...] are shared by two or more countries’.⁶⁰

A border river was discussed in the *Case Concerning Maritime Delimitation in the Black Sea*, where it appears that both parties (Romania and Ukraine) had accepted previous agreements (*‘process verbaux’*) dating back to 1949 as constituting the agreed ‘land-river boundary’ between them on the mouth of the St George arm of the Danube (debouching into the border bay of Musura), which line delimited the territorial sea and/or the internal waters of Romania and (originally) the Soviet Union, laterally following the mid-channel line; though the river had no final agreed closing line across its mouth.⁶¹ 13

5. State Practice and International Jurisprudence

Most State practice concerns closing lines of bays, which have a more important role both in terms of defining the extent of enclosed internal waters and the seaward extent of baselines for measurement of maritime zones therefrom. Thus, in terms of State practice as to claiming and drawing straight baselines across the mouths of rivers, the matter has been of no great practical significance, because States may not have bothered to close off their rivers as internal waters; and have concentrated rather on closing off bays, under the provisions of Art. 10, or more expansively, closing off marine waters under Art. 7 thereof: whereby not only may more expansive internal waters be created, but also the straight baselines used may cause the maritime zones extending therefrom to be similarly more expansive. Indeed as CHURCHILL/LOWE point out, few States have legislation referring to river-closing lines.⁶² 14

Furthermore, as many river mouths or estuaries are themselves contained within bays or an expansive straight baseline system under Art. 7, the need to close off such already-enclosed rivers becomes redundant.⁶³ However in the rare instance where States have utilised an explicitly river-based closing line to enclose expansive marine waters, as in a large estuary, other States have seen fit to protest. A prime example of this is the above mentioned joint declaration by Uruguay and Argentina in 1961 to close off the mouth of the Rio de la Plata with an imaginary line some 120 NM long. This was protested by the US in 1963 on the basis that ‘the provisions of [now Art. 9] 15

⁵⁸ Cf. Symmons (note 53), 457, 463–464.; also Tullio Scovazzi, Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters, in: Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea*, 15, 29.

⁵⁹ Reed (note 6), 318.

⁶⁰ UN DOALOS Baselines Study (note 25), 27 (para. 62); see also Charles C. Hyde, *International Law as Chiefly Interpreted and Applied by the US*, vol. I (2nd. edn. 1945), 475, who criticised the observations of the League of Nations Preparatory Committee as to the low-water mark rule in shared rivers by saying ‘the bordering States may agree on a division of such waters as inland waters’.

⁶¹ ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61, paras. 51–58.

⁶² Churchill/Lowe (note 8), 55; cf. as an example the Papua New Guinea National Seas Act, Act No. 7 (1977), Schedule 1: Principles for Ascertaining Baselines, especially Schedule 1.5 (referring to river mouths).

⁶³ Cf. the reluctance at one time on the part of the UK to claim a line from headland to headland across the Thames Estuary; cf. Written Answers, Hansard 550 (House of Commons) col. 68, 15 March 1956; however in a later court case, *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740 (UK), the Thames ‘estuary’ was determined to be a ‘bay’ within judicially-set closing lines.

relate only to rivers which flow directly into the sea from the territory of a single State and not to rivers whose coasts belong to two or more different States'.⁶⁴

- 16 It seems from such limited State practice that there is controversy over what the phrase 'flows directly into the sea' means; and also whether an analogous application of the provision contained in Art. 10 (1) bars the straight-baselining of **shared** river mouths, as at an international boundary, even if there is agreement on this by the riparian States concerned. There are several examples worldwide, as seen, where border river baselines have caused problems, either because a unilaterally-imposed straight closing line has been imposed by one riparian State across it; or where, by mutual agreement an excessively broad river estuary has been closed off by neighbouring States. For an example of the first instance, a line may be unilaterally extended to the 'thalweg line' at the mouth of a border river – as in the case of Iran in 1973 where the northerly endpoint of its straight baseline system terminated on what were (then) Iraqi-claimed waters across the mouth of the Shatt-al-Arab River mouth/estuary at that line.⁶⁵ This line was, however, later sanctioned by an agreed protocol in 1975.⁶⁶ In many cases, merely the lateral river mouth limits have been agreed.⁶⁷ There is no significant jurisprudence applying to closing off of river mouths, though, as seen, there was some indirect reference made to this issue by the ICJ in the context of continental shelf delimitation in the *Maritime Delimitation in the Black Sea* case.⁶⁸
- 17 Art. 16 applies to any such baselines which are drawn, so that such closing lines must either be depicted on charts (or the coordinates of the ends of the lines published) or the limits of the territorial sea extending therefrom must be published *in lieu*.⁶⁹ The above-mentioned lack of clarity as to the extent of the application of Art. 9, and the fact that the bay-closing Art. 10 is 'much more restrictive' than Art. 9,⁷⁰ may not have any great practical consequences in most geographical situations, as there are, in any event, distinct analogies between the 'straight baseline' provisions relating to both rivers (under Art. 9) and bays (under Art. 10).⁷¹
- 18 There are no boundary delimitation provisions relating generally to any type of internal waters in the UNCLOS, including rivers; but, as stated in the *Case of the Maritime Boundary between Guinea-Bissau and Senegal*,⁷² the delimitation of an area of spatial validity can apply not only to a land or sea area, but also to the waters of rivers and lakes. As seen, some States have laterally divided their shared internal river waters up to at least the mouth of a boundary river.⁷³

⁶⁴ The UK made a similar protest in 1961, see Whiteman (note 9), 343; it seems that also the Netherlands (in 1962) made a protest, *J. Ashley Roach/Robert Smith*, United States Responses to Excessive Maritime Claims (2nd edn. 1996), 129. The controversial agreed boundary river closing line is to be found in Art. 1 of the Treaty between Uruguay and Argentina concerning the Rio de la Plata and the Corresponding Maritime Boundary, 19 November 1973, LIS 64, 2 (reproducing a joint declaration of 1961) where under the estuary is specifically claimed as a mouth of a river (rather than e.g., a bay) along an imaginary line some 120 NM wide joining Punta del Este (in Uruguay) with Punta Rasa del Cabo Antonio (in Argentina), see *Scovazzi et al.* (note 52), 8 *et seq.*

⁶⁵ *Cf. Symmons* (note 53), 473.

⁶⁶ As discussed by the present writer, see *Clive R. Symmons*, L'échange de lettres de 1990 entre l'Iran et l'Iraq: un règlement définitif du différend et du conflit?, *AFDI* 36 (1990), 228, 231–233.

⁶⁷ *Cf. Maritime Delimitation in the Black Sea Case* (note 61).

⁶⁸ *Ibid.*

⁶⁹ See *Symmons* on Art. 16 MN 7–9.

⁷⁰ UN DOALOS Baselines Study (note 25), 27 (para. 62).

⁷¹ *Reed* (note 6), 311, who points out that, unlike bays, river mouths are 'rarely so wide that they have any significant effect on the seaward limits of the territorial sea', but may still be important for determining the extent of internal waters of rivers; and so for the status of the enclosed waters, with no rights of innocent passage etc. in this instance.

⁷² ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, ICJ Reports (1991), 53.

⁷³ See, e.g., *supra*, note 64.

Article 10

Bays

1. This article relates only to bays the coasts of which belong to a single State.
2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.
4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.
6. The foregoing provisions do not apply to so-called 'historic' bays, or in any case where the system of straight baselines provided for in article 7 is applied.

Bibliography: *Damir Arnaut*, Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation between Croatia and Slovenia, in: David D. Caron/Harry N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (2004), 427–466; *Peter B. Beazley*, *Maritime Limits and Baselines: A Guide to Their Delineation* (2nd edn. 1978); *Leo J. Bouchez*, *The Regime of Bays in International Law* (1964); *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Robert D. Hodgson/Lewis M. Alexander*, *Towards an Objective Analysis of Special Circumstances*, *Law of the Sea Institute Occasional Paper* 13 (1972); *Ted L. McDorman*, Notes on the Historic Waters Regime and the Bay of Fundy, in: Aldo Chircop/Ted L. McDorman/Susan J. Ralston (eds.), *Essays in Tribute to Douglas M. Johnston* (2009), 701–722; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Daniel P. O'Connell*, *The International Law of the Sea*, vol. I (1982); *John R. V. Prescott*, *The Maritime Political Boundaries of the World* (1985); *John R. V. Prescott*, *Straight Baselines: Theory and Practice*, in: Eddie D. Brown/Robin R. Churchill (eds.), *The United Nations Convention on the Law of the Sea: Impact and Implementation* (1987), 288–313; *John R. V. Prescott*, *Publication of a Chart Showing the Limits of South Africa's Maritime Claims*, *ICMCL* 14 (1999), 557–566; *Michael W. Reed*, *The Development of International Maritime Boundary Principles through United States Practice*, in: US Department of Commerce, *Shore and Sea Boundaries*, vol. III (2000); *Anne E. Reynolds*, Is Riga an Historic Bay?, *IJECL* 2 (1987), 20–35; *J. Ashley Roach/Robert W. Smith*, *United States Responses to Excessive Maritime Claims* (2nd edn. 1996); *James Brown Scott*, *The Hague Court Reports* (1916); *Tullio Scovazzi/Giampiero Francalanci/Daniela Romano/Sergio Mongardini*, *Atlas of Straight Baselines* (2nd edn. 1989); *Tullio Scovazzi*, Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters, in: Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 15–30; *Aaron L. Shalowitz*, Boundary Problems Associated with the Submerged Lands Cases and the Submerged Lands Acts, in: US Department of Commerce, *Shore and Sea Boundaries*, vol. I (1962); *Mitchell P. Stroh*, *The International Law of Bays* (1963); *Clive R. Symmons*, *Ireland and the Law of the Sea* (2nd edn. 2000); *Clive R. Symmons*, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (2008); *Clive R. Symmons*, *The Maritime Border Areas of Ireland, North and South: An Assessment of Present Jurisdictional Ambiguities and International Precedents Relating to Delimitation of 'Border Bays'*, *IJMCL* 24 (2009), 457–500; *Clive R. Symmons/Michael W. Reed*, *Baseline Publicity and Charting Requirements: An Overlooked Issue in the UN Convention on the Law of the Sea*, *ODIL* 41 (2010), 77–111; *Farhad Talaie*, The Issue of Delimitation of Multi-State bays in the International Law of the Sea, *University of Tasmania Law Review* 18 (1999), 22; Yoshifuma Tanaka, *The International Law of the Sea* (2012), 53–59; *Gayl Westerman*, *The Juridical Bay* (1987); Marjorie Whiteman (ed.), *US Department of State: Digest of International Law*, vol. IV (1965)

Documents: ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014); ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), GAOR 10th Sess. Suppl. 9, reproduced in: ILC Yearbook (1955), vol. II, 19–62; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; ILC, Juridical Regime of Historic Waters, Including Historic Bays, Study Prepared by the Secretariat, UN Doc. A/CN.4/143 (1962), reproduced in: ILC Yearbook (1962), vol. II, 1–26; ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur special, UN Doc. A/CN.4/61/ADD.1 (1953), reproduced in: ILC Yearbook (1956), vol. II, 75–79; UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989); US Department of State, Straight Baselines: Dominican Republic, Limits in the Seas No. 5 (1970)

Cases: *Alaska v. United States*, 546 U.S. 413 (2006); Central American Court of Justice, *Costa Rica v. Nicaragua*, Judgment of 30 September 1916, AJIL 11 (1917), 181–229; Central American Court of Justice, *El Salvador v. Nicaragua*, Opinion and Decision of 9 March 1917, AJIL 11 (1917), 674–730; ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116; ICJ, *Case Concerning the Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports (1982), 18; ICJ, *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), Judgment of 11 September 1992, ICJ Reports (1992), 351; ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61; PCA, *South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China), Award of 12 July 2016, available at: <https://www.pcacases.com/web/view/7>; PCA, *The North Atlantic Coast Fisheries Case* (Great Britain v. United States of America), Award of 7 September 1910, RIAA XI, 167; *Post Office v. Estuary Radio Ltd.* [1968] 2 QB 740 (UK); *United States v. California*, 382 U.S. 448 (1966); *United States v. Louisiana*, 394 U.S. 11 (1969)

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I. Purpose and Function

- 1 This article – which largely follows the provisions set out in Art. 7 Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) – is aimed at defining what is understood to be a bay in juridical terms (hence the common phrase ‘juridical bay’)¹ – both in somewhat vague subjective terms but also with a built-in hydrographic test to help objectivize the concept and impose a ‘mathematical standard’² so as to include only indentations properly considered to be surrounded on all sides but one.³ These tests hopefully eliminate past dubious claims by States and help to safeguard the freedom of the seas.⁴ The article then indicates – if such a bay is juridically in existence – where, and to what distance, a so-called closing line may be drawn across the mouth of such an indentation (a matter complicated where the natural entrance points are more than 24 NM wide or where islands exist in the

¹ Cf. in geography, the terms ‘bay’ and ‘gulf’ are used interchangeably: *Leo J. Bouchez*, The Regime of Bays in International Law (1964), 17.

² *Ibid.*, 112.

³ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 113–117; UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989), 28–29; *Michael W. Reed*, The Development of International Maritime Boundary Principles through United States Practice, in: US Department of Commerce, Shore and Sea Boundaries, vol. III (2000), 23–236.

⁴ *Bouchez* (note 1), 115.

mouth of the alleged bay). Such a straight baseline then proportionately extends the coastal State's various maritime limits of jurisdiction generated therefrom seawards.⁵

The article goes on to make clear that certain bays and situations are excepted from its provisions – namely bays shared by at least two States (hereinafter 'border bays'), historic bays, and where Art. 7 (on straight baselines) applies.⁶ At UNCLOS III suggested new rules (such as mandatory central deposit of historic bay claims) failed to be added, so that existing principles such as a 24 NM closing line were re-affirmed⁷ and further elaboration of matters relating to historic bays rejected.⁸ River mouths have their own regulations in Art. 9⁹ as seen, though inter-relating here arguably in the case of estuaries with the bay provisions; and inland seas are usually considered as being distinct from bays.¹⁰ The status of the waters enclosed within such a bay is that of internal waters in which other States have no right of innocent passage.¹¹ Nonetheless, the above-summarized bay rules are aimed at striking a balance between a coastal State's perceived strong economic (e.g. fishing) and defense interests within its coastal indentation and that of the principle of freedom of the seas.¹²

II. Historical Background

Historically, one of the most controversial issues relating to bays has been the permissible maximum width allowed for their mouths under customary international law. Such supposed maximum widths ranged in the past from 3 to 6 NM initially and then increased to 10 NM¹³ – a distance, though, which was found in the International Court of Justice (ICJ) *Fisheries Case* not to have the consistency and authority of a general rule of law.¹⁴ The basis for some such distances was probably that these were twice the distance of the territorial sea at the particular points in history.¹⁵ Academic views similarly varied considerably on the requisite width, ranging from 6, 10 and 12, to even 15 and 25 NM¹⁶ and eventually settled at 24 NM.¹⁷ Furthermore, earlier in 1910 in the *North Atlantic Coast Fisheries Case*, the Permanent Court of Arbitration had found no clear customary law rules relating to the definition of bays.¹⁸

In 1958, the controversy relating to definition of bays, and maximum permissible width of their mouths, was put to rest at UNCLOS I in the CTSCZ, with a more precise legal definition; and where the closing line limits were confirmed at 24 NM.¹⁹ The latter limit was chosen on the basis that it represented twice the distance of the then-developing rule for the width of the territorial sea and was liberal enough to limit excessive claims.²⁰ There was further consideration of the bay provisions at UNCLOS III, but none of the rules was changed; and so Art. 10 is now based on, and largely repeats, Art. 7 CTSCZ.

⁵ Gayl Westerman, *The Juridical Bay* (1987), 77.

⁶ Cf. Nordquist/Nandan/Rosenne (note 3), 115.

⁷ *Ibid.*, 116.

⁸ *Ibid.*, 115.

⁹ See also Symmons on Art. 9 MN 9–10.

¹⁰ Cf. *Bouchez* (note 1), 21.

¹¹ Cf. Art. 8 (2) where in the case of straight-baselined waters (Art. 7) such a right continues in former territorial/high seas areas now enclosed. See *Triimpler* on Art. 8 MN 31.

¹² *Bouchez* (note 1), 108.

¹³ Westerman (note 5), 16, 164.

¹⁴ ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 131.

¹⁵ *Bouchez* (note 1), 105, 112.

¹⁶ *Ibid.*, 105–107, 112–114.

¹⁷ *Ibid.*, 114.

¹⁸ James Brown Scott, *The Hague Court Reports* (1916), 141, 183–184; see Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 41.

¹⁹ UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 146.

²⁰ See ILC, Summary Records of the 5th Session, ILC Yearbook (1953), vol. I, 106; and Westerman (note 5), 169, who strangely views the distance choice as being 'arbitrary'; the history of the UNCLOS I proceedings is well set out in Marjorie Whiteman (ed.), *US Department of State: Digest of International Law*, vol. IV (1965), 207–241.

- 5 A definitive maximum closing line distance has long been seen as one limitation on excessive ‘bay’ claims. The other limiting criterion – the semi-circle test – had its origins in the 1930 Hague Codification Conference²¹ and was inserted in the UNCLOS I to act as a final test of an indentation’s bay-like qualification. The *travaux préparatoires* of UNCLOS I indicate that such an objective test of a bay was an additional necessary legal test.²²
- 6 The origin of historic bays (mentioned in Art. 10 (6)) is sometimes claimed to go back to the dissent of DRAGO in the *North Atlantic Coast Fisheries Case*;²³ and seemingly emerged as a doctrine in the 19th century,²⁴ gaining international judicial approval by the ICJ in its judgment in the *Fisheries Case* (1951),²⁵ the ICJ *Case Concerning the Continental Shelf* (1982)²⁶ and, most recently, in the ICJ *Case Concerning the Land, Island and Maritime Frontier Dispute* (1992)²⁷ wherein Judge ODA, in his Dissenting Opinion, discussed the history of such bays *in extenso*.²⁸ The concept was also discussed at the 1930 Hague Codification Conference and at UNCLOS I,²⁹ though in the latter instance it was finally agreed only to refer the matter to the United Nations with a view to consideration by way of study of the topic; as a result of which it was then referred to the ILC.³⁰

III. Elements

1. Geographical and Other Requirements for Juridical Bay Status

- 7 Art. 10 (2) – for the purposes of the UNCLOS – incorporates, as mentioned above, the essential characteristics an indentation needs to qualify as a juridical bay. The three (arguably four)³¹ geographical elements in the first sentence referred to are essentially subjective³² and full of ambiguity:³³ namely requiring a ‘well-marked indentation’, more than a mere ‘curvature of the coast’ and with a proportionate ‘penetration’ compared with its mouth-width so as to contain ‘land-locked waters’). These provisions have led to extensive commentary on whether they meaningfully add much, if anything, to the finally-mentioned hydrographic test (e.g., through a width of mouth-depth of indentation ratio).³⁴ The definitional test then goes on to apply a mathematical formula,³⁵ without any limitation as to mouth size at this stage in the definition.³⁶ If an indentation fails these tests, the baseline reverts to the normal baseline, i.e., the low-tide mark within the indentation, under Art. 5; so that in this instance no internal waters are created within the whole of the indentation.

²¹ *Westerman* (note 5), 93, 172.

²² *Ibid.*, 95; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 15 (the geographical criteria ‘lacked legal precision’).

²³ PCA, *The North Atlantic Coast Fisheries Case* (Great Britain v. United States of America), Award of 7 September 1910, Dissenting Opinion of Luis M. Drago, RIAA XI 167, 203 *et seq.*

²⁴ *Clive R. Symmons*, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (2008), 8, 56; *Mitchell P. Stroh*, *The International Law of Bays* (1963), 26, 251.

²⁵ *Fisheries Case* (note 14), 130.

²⁶ ICJ, *Case Concerning the Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports (1982), 18, 74.

²⁷ ICJ, *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), Judgment of 11 September 1992, ICJ Reports (1992), 351, 588.

²⁸ *Ibid.*, Dissenting Opinion of Judge Oda, 732 *et seq.*; cf. *Symmons* (note 24), 22.

²⁹ *Bouchez* (note 1), 203–207.

³⁰ *Ibid.*, 206–207.

³¹ UN DOALOS Baselines Study (note 3), 29 (para. 67); for example *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982), 390, adds also the ‘24-mile’ mouth rule.

³² UN DOALOS Baselines Study (note 3), 29 (para. 67).

³³ *Reed* (note 3), 226.

³⁴ Cf. *Westerman* (note 5), 85–93, who reads a lot into these geographical aspects.

³⁵ *Ibid.*, 79.

³⁶ *Ibid.*, 81.

The abovementioned ‘hydrographic test’ (often called the ‘semi-circle test’) in Art. 10 (2) 8 cl. 2 arguably makes the preceding geographical requirements essentially otiose;³⁷ so that an indentation which satisfies this test is seen to be *ipso jure* compliant with the preceding geographical requirements.³⁸ Where there is presence of islands, the semi-circle test may be particularly important;³⁹ and here it is the combined widths of mouths which can be taken into account⁴⁰ in accordance with Art. 10 (3).

Further, Art. 10 (3) indicates how the essential (and *prima facie* provisional) line for 9 applying the hydrographic test is to be actually drawn. Unfortunately, it is at this point that subjective elements can creep in,⁴¹ most particularly as to what are the ‘natural entrance points’ (the so-called apex of ‘maximum extension’ of land into water) on the low-water marks of which the ‘test line’ is to be drawn.⁴² This aspect is described by REED as ‘the most difficult problem’⁴³; and it involves a concept more liberal than headlands because it may include near-land islands.⁴⁴ Where indentations have one or more significant protrusions or consist of only extensively rounded headlands, difficulties of choice of possible bay *termini* abound,⁴⁵ and such locations may lead to subjective choices unless some geometric test is applicable, several of which have, in the past, been suggested.⁴⁶

Islands, or even low-tide elevations (→ Art. 13 (1))⁴⁷, lying off and near to a headland – 10 may, irrespective of the baseline length provision of Art. 10 (3) – be considered to form lateral natural entrance points or headlands; and so fictively form part of the mainland themselves (as opposed to creating multiple mouths of a bay) in certain cases.⁴⁸ This is particularly the case if an insular feature is separated from the mainland by only a narrow channel; and thus is closely related or ‘assimilated’ to the mainland proper as viewed on a nautical chart, even though not part of a continuous low-water line. However, the matter is not covered specifically by the UNCLOS.⁴⁹ Such an insular protrusion, if useable, may

³⁷ Cf., e.g., Peter B. Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation* (2nd. edn. 1978), para. 6.5; but cf. Strohl (note 24), 57; and Westerman (note 5), 93, 95–97, who sees some legal import in the geographical tests and reasons for retention of the wording, citing the case of US Supreme Court, *United States v. Louisiana*, 394 U.S. 11 (1969), 54. However, Westerman, *ibid.*, 97, concedes that the final (hydrographic) test must be passed before ‘the indentation can unequivocally be designated as a bay’; see also Reed (note 3), 226.

³⁸ But see Westerman (note 5), 94–95; also Reed (note 3), 226, who, however, cites John R. V. Prescott, *The Maritime Political Boundaries of the World* (1985), 53, as arguing he did not believe any third State would ever object to a claimed bay satisfying the semi-circle test alone.

³⁹ Westerman (note 5), 98.

⁴⁰ UN DOALOS Baselines Study (note 3), 29 (para. 68).

⁴¹ *Ibid.* (‘two uncertainties’).

⁴² Aaron L. Shalowitz, *Boundary Problems Associated with the Submerged Lands Cases and the Submerged Lands Acts*, in: US Department of Commerce, *Shore and Sea Boundaries*, vol. I (1962), 63–64.

⁴³ Reed (note 3), 256; cf. Prescott (note 38), 53.

⁴⁴ Natural entrance points were introduced at UNCLOS I to replace the older ‘*inter fauces terrarum*’-concept: cf. Westerman (note 5), 112, who also cites: *United States v. Louisiana* (note 37), 61, which approved of same; natural entrance points are also mentioned in Art. 10 (4) and (5), cf. Nordquist/Nandan/Rosenne (note 3), 117.

⁴⁵ Westerman (note 5), 114. There may also, for example, be more than two obvious ‘candidates’ for choice existing in the form of marked protrusions into the sea on one or either side of a claimed bay (the ‘multi-headed bay’ or ‘double-headed bay’); Reed (note 3), 258–266, describes the latter as typically consisting of a ‘single promontory that separates adjacent indentations’, as in the case of Harrison Bay off Alaska.

⁴⁶ UN DOALOS Baselines Study (note 3), 29 (para. 69); for the US-proposed ‘tangent’ tests as used in US Supreme Court, *United States v. California*, 382 U.S. 448 (1966), 451; or the so-called ‘45 degree test’, Westerman (note 5), 116–117, favoured by her for a ‘featureless curve’ of coast. See also Reed (note 3), 258–266, on this latter test supposedly most favoured in US practice. He concludes that both the 45 degree and bisector of shortest distance tests will provide a solution ‘in a majority of cases’, the ‘bisector of the angle test’ being useful where there are no pronounced headlands: for the ‘shortest distance’ test, cf. also O’Connell (note 31), 406; and Beazley (note 37), 17.

⁴⁷ See also Symmons on Art. 13 MN 28.

⁴⁸ Reed (note 3), 271.

⁴⁹ *Ibid.*, 238–240. He discusses US case law (such as *United States v. Louisiana* (note 37, 67) to the effect that Art. 7 CTCZ did not ‘encompass bays formed in part by islands which cannot realistically be considered part of the mainland’. In the above-cited case, the US Supreme Court purported to lay down possible criteria for selecting such insular headlands (such as size of island, propinquity to mainland etc.), *United States v. Louisiana*

considerably enhance the waters enclosed in the semi-circle test, quite apart from extending the straight baseline seawards (if the gap is less than 24 NM wide).⁵⁰ In such a case, a notional additional line (or lines) would have to be drawn laterally connecting the insular formation with the mainland to completely ‘box in’ the putative bay’s internal waters and to make up one or both sides of a bay,⁵¹ even though this is not strictly a ‘mouth’ between the mainland and the island.⁵² Similarly, even a low-tide elevation off a mainland headland may be considered in similar circumstances as a fictive ‘headland’.⁵³ Analogous issues may also arise as to whether ‘non-natural’ entrance points such as terminal-point jetties and breakwaters may be used.⁵⁴

- 11 The other (and second) main subjective problem arising is what, more generally, are the waters within the low-water marks extending from within the bay shore for determining the extent of enclosed waters (for the purposes of the hydrographic test) to be taken in the calculation,⁵⁵ particularly where there may be subsidiary bays and tributaries within the line or rivers. As an example may be cited the case of New Zealand which has enclosed Palliser Bay, relying on the waters contained in Onoko Lake lying inside the indentation. On this problem, REED points out there is disagreement on which subsidiary bay waters may be included in the test; but in general he opines that such ‘mini-bays’ waters may be added to the calculation:⁵⁶ at least if the waters are collectively to be considered as one, as where subsidiary bays and lagoons are enclosed within the primary indentation. This is particularly so where the subsidiary indentations may in their own right form bays, and so may be more landlocked even than the primary bay, where such subsidiary bays and lagoons are enclosed within the primary indentation.⁵⁷
- 12 A particular analogous problem may arise here in the case of the rivers and tributaries which are contained within the drawn semi-circle; i.e., the landward area contained within the diameter drawn between an indentations’s natural entrance points; this being done so as to calculate whether the enclosed area is as large as, or larger, than the area of the semi-circle. Such waters may, in marginal cases – i.e., where the enclosed ‘main-bay’ waters themselves fall just short of equaling or surpassing in area the waters contained in a notional semi-circle – may be critical in the hydrographic calculation; as, for example, was essentially the situation in a UK case concerning the Thames Estuary.⁵⁸ SHALOWITZ would include all such subsidiary

(note 37), 66. In general, though bays may not be created by islands, this insular use is suggested by *Robert D. Hodgson/Lewis M. Alexander*, Towards an Objective Analysis of Special Circumstances, Law of the Sea Institute Occasional Paper 13 (1972), who originally proposed four (later five) criteria for such qualification; discussed by *Westerman* (note 5), 143–145, pointing out that Art. 7 (now Art. 10) never uses the term ‘mainland’, or indeed even ‘headland’.

⁵⁰ Cf., e.g., in Ireland’s Dublin Bay the possible use of Dalkey Island to its south as a linking point; or, in the US, the Elizabeth Islands which extend in a line from the mainland promontory of Buzzards Bay, see *Reed* (note 3), 271, 301–302.

⁵¹ *Strohl* (note 24), 77. Where this is permissible, then, some line must be continued from the mainland to the island as argued by the US Government in *United States v. Louisiana* (note 37), 62 *et seq.*, which purported to lay down various criteria to determine this; such an extra line (or lines) is not added to the 24 NM length of closing line as it does not connect the bay ‘mouth’, a point not fully discussed by *Westerman* (note 5), 30–31.

⁵² *Reed* (note 3), 285, 302 (footnote 311); in fact the water area separating mainland and island can here be considered not as a mouth but as land. Any such notional lateral connecting lines from mainland to island would not be computable in any hydrographic or 24 NM bay-closing exercise.

⁵³ *Ibid.*, 286.

⁵⁴ *Ibid.*, 267–270; in *United States v. Louisiana* (note 37), 11, 53–54., the ends of artificial jetties were considered as seaward headlands of a bay.

⁵⁵ *Westerman* (note 5), 101; UN DOALOS Baselines Study (note 3), 28 (para. 65).

⁵⁶ *Reed* (note 3), 307.

⁵⁷ *Westerman* (note 5), 104–105; *Beazley* (note 37), 15 (footnote 3), notes, for example, that New Zealand has enclosed Palliser Bay relying on the waters contained in an adjoining lake, as mentioned above.

⁵⁸ *Post Office v. Estuary Radio Ltd.* [1968] 2 QB 740 (UK), here it was held that the area of Thames and subsidiary rivers should be calculated to the distance affected by rise and fall of tides; a viewpoint, however, rejected by the Special Master and Supreme Court concerning the Mississippi basin in *United States v. Louisiana* (note 37), 50; see further *Reed* (note 3), 245–246.

waters in the calculation;⁵⁹ but it has been countered that rivers at any rate already contain internal waters in their own right;⁶⁰ and additionally, how far up the river estuary may one go in the calculation?⁶¹ Whilst, then, some commentators seem to have opined that all the river waters may be included in the calculation,⁶² others have opined such waters are not to be accounted for at all, on the basis that these are not part of the bay areas.⁶³ Yet others take a more midway approach by making the cut-off point where the tide ceases to run and where there is no strict low-water line⁶⁴ – a test decried by WESTERMAN.⁶⁵ A practical and logical reading of this provision seems to be this: that as rivers strictly have no low-tide marks except in estuarial situations, river water proper should be left out of the mathematical calculation which could otherwise take in waters extensively upstream (which are not part of the bay indentation at all). As REED points out, at some point a river channel has to be crossed to apply such a test sensibly.⁶⁶ Thus the UN Baselines Study suggests that straight lines can be drawn across any internally-placed rivers so as to ‘link up the low-water lines, except possibly where the mouth is wide and penetrated by tide’.⁶⁷

In calculating the enclosed ‘semi-circled’ waters, Art. 10 (3) states that ‘islands’ thereby 13 enclosed in the indentation ‘shall be included as if they were part of the water area of the indentation’. In other words, in this geographical context, the insular land in enclosed areas is fictively treated as ‘waters’ for this purpose.⁶⁸ This is justifiable, as any such enclosed islands tend to enhance the ‘internal character of the waters’.⁶⁹ Such calculation may, *a fortiori*, include enclosed low-tide elevations and artificial islands within, particularly as Art. 10 (2) speaks only of measuring the ‘indentation area’ and not the ‘water area’ as such.⁷⁰

2. Method to Enclose Internal Waters

Once an indentation satisfies Art. 10 (1) – so that the sea area of the indentation equals or 14 exceeds the area within the drawn semi-circle in accordance with Art. 10 (2) – the only remaining question is how much of the then-enclosed waters can be claimed to be internal waters; and Art. 10 provides rules for determining the actual and finalised position of the ‘closing line’.⁷¹ Here the starting point is Art. 10 (4), which indicates clearly that if the initially-used bay-test line is not in excess of 24 NM, it shall constitute the finalised line connecting the low-water marks of the natural entrance points. As seen, the 24 NM maximum width, first settled in the CTSCZ, was preserved in the UNCLOS after a long period of divergent State practice on the matter.⁷² It may be noted that the phrase ‘shall be’ in this context implies no mandatory obligation to necessarily close off even a juridical bay,⁷³ no more so than in the case of the use of the phrase ‘may be drawn’ concerning an ‘overlarge

⁵⁹ Shalowitz (note 42), 219–220; cf. also Westerman (note 5), 104; UN DOALOS Baselines Study (note 3), 28–30; Reed (note 3), 241–243.

⁶⁰ Westerman (note 5), 103.; cf. *ibid.*, 106, the interconnected ‘multi-headed bay’ problem below, where a 24 NM closing line drawn within a primary bay leaves such a subsidiary bay seaward of the line.

⁶¹ *Ibid.*

⁶² Shalowitz (note 42), 219.

⁶³ Hodgson/Alexander (note 49), 4–6.

⁶⁴ Beazley (note 37), para. 6.15.

⁶⁵ Westerman (note 5), 107–112, plumps for the Hodgson/Alexander (note 49) viewpoint, ruling out ‘un-baylike’ features running from the land.

⁶⁶ Reed (note 3), 244–245.

⁶⁷ UN DOALOS Baselines Study (note 3), 21.

⁶⁸ Cf. the converse situation in the case of computing land/water ratio in archipelagic waters in Art. 47 (7) where certain waters are treated as land, see further Symmons on Art. 47 MN 48–49.

⁶⁹ Beazley (note 37), 21.

⁷⁰ Reed (note 3), 250–252.

⁷¹ Westerman (note 5), 98–99.

⁷² *Ibid.*, 163.

⁷³ Clive R. Symmons/Michael W. Reed, Baseline Publicity and Charting Requirements: An Overlooked Issue in the UN Convention on the Law of the Sea, ODIL 41 (2010), 77, 80.

bay' and its baseline (see below). Within such internal waters coastal States have total sovereignty (→ Art. 2 (1)), including the right, as seen, to exclude innocent passage.⁷⁴

- 15 Under Art. 10 (3), if there is a 'presence of islands' so that an indentation 'has more than one mouth' (as e.g., in the Mississippi delta), a 'special measurement'-rule kicks in.⁷⁵ This is to the effect that in calculating the 'bay-test line', the semi-circle is to 'be drawn on a line as long as the sum total of the lengths of the lines across the different mouths' between the islands, so helping an indentation to qualify as a bay, as this typically reduces the total mouth distance.⁷⁶ This implicitly means, in consequential manner, that if this test is satisfied and the insular-based line segments collectively do not exceed 24 NM, this line may be the finalised closing line: with the line running from island to island rather than (just one) drawn directly between the mainland lateral points.⁷⁷ Thus in this one instance the closing line is not 'a' line (in the singular, as mentioned in Art. 10 (4)) between the low-water marks of the natural entrance points. Again, this clearly means that as only the intervening water areas between the fringing bay islands are relevant for the distance calculation (the actual length of the individual 'screening' islands being irrelevant), this aspect is very favorable to the claimant State.⁷⁸
- 16 What, however, is unclear is the meaning of the combined phrases 'more than one mouth' and 'across the different mouths', as the ILC in its 1955 commentary talked of islands 'at the entrance to an indentation'.⁷⁹ Strangely, WESTERMAN sees 'no locational requirements' or need for geographic relationship with the indentation applying to qualifying islands.⁸⁰ Other commentators have taken a different view.⁸¹ In any case the matter may be academic in terms of creation of internal waters, as the situation relating to 'masking' off-shore islands intrinsically interrelates with the laxer baseline position under Art. 7 (1) where a 'fringe of islands' lies in close vicinity to the coastline; which may lead independently to a straight baseline system enclosing them.⁸²
- 17 Where the provisional 'bay-test line' is more than 24 NM wide (i.e., in a case of what has been aptly called the 'overlarge bay')⁸³, internal waters by dint of Art. 10 (5) may still be claimed if the 'straight baseline' is drawn 'in such a manner as to enclose the maximum area of water that is possible with a line of that length'. This seems to give great choice of a fallback baseline route for the coastal State.⁸⁴ Thus this line need not, for example, be linked

⁷⁴ Bouchez (note 1), 5.

⁷⁵ Westerman (note 5) 119; Reed (note 3), 253–256.

⁷⁶ Reed (note 3), 254.

⁷⁷ *Ibid.*; Westerman (note 5), 132; this (unusually) has been specifically enacted in S.3 (2)(b) Vanuatu Maritime Zones Act, Act No. 23 (1981), which states that a closing line of a bay with more than one mouth because of the presence of islands may comprise 'a series of closing lines across each of the mouths so as to join [the] low-water lines', if the 'added together' distance in the mouth does not exceed 24 NM in total.

⁷⁸ The ILC viewed such bays as more closely linked to the mainland, see ILC Commentaries to the Articles Concerning the Law of the Sea (note 22), 12, 15; cf. Westerman (note 5), 121.

⁷⁹ ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), GAOR 10th Sess. Suppl. 9, reproduced in: ILC Yearbook (1955), vol. II, 19, 37; cf. Westerman (note 5), 123.

⁸⁰ Westerman (note 5), 128–133, includes in this process 'islands lying geographically seaward of the mainland entrance points'; cf. UN DOALOS Baselines Study (note 3), 32 (para. 72), according to which it is 'a matter of judgment to decide when such islands lie too far seawards to be considered as forming mouths of bays'; thus it seems to be undecided how far seaward (or, indeed, landward) of a notional 'mainland-to-mainland' closing line the islands must be for this purpose, cf. Reed (note 3), 298.

⁸¹ Cf. Hodgson/Alexander (note 49), discussed by Westerman (note 5), 131–138, i.e., stressing the reference to only two lateral locations *stricto sensu*. *Per contra*, Westerman (note 5), 132, states: 'the natural entrance points [here] no longer lie solely on the mainland but at the land *terminus* of each entrance, however numerous these entrances may be [...]', and that the line need not be 'continuous'; this interpretation is borne out by the *travaux préparatoires* to Art. 7 CTSCZ, ILC, Additif au deuxième rapport de M. J. P. A. François, rapporteur special, UN Doc. A/CN.4/61/ADD.1 (1953), reproduced in: ILC Yearbook (1953), vol. II, 75, 78 (Rapport du Comité d'Experts); and by the fact that the 24 NM-rule, as applied, may in itself eliminate any islands lying too far off the general direction of a bay entrance, Westerman (note 5), 135.

⁸² Westerman (note 5), 140 (footnote). Her apparent conclusion seems unwarranted on this issue.

⁸³ Reed (note 3), 306, citing as such bays (in the US) Ascension Bay in Louisiana and Cook Inlet in Alaska.

⁸⁴ UN DOALOS Baselines Study (note 3), 34 ('anywhere within the bay'); although the single straight line must clearly, by necessary implication, connect up with two opposite low-water marks within the bay; Reed

to geographical features akin to natural entrance points, as is required in Art. 10 (4), even if, for example, headlands exist within the indentation.⁸⁵

It may be noted here that the reference in Art. 10 (5) is to a ‘straight baseline’ (similar to the term used in Art. 7) rather than a ‘closing line’ (as used in Art. 10 (4)).⁸⁶ There seems, though, to be no substantive difference between either term, as both straight lines form the baseline from which a territorial sea is measured and both enclose internal waters (though there is no reference to the latter phrase in the paragraph). Where such a line is drawn, there is, of course, no need for the enclosed waters to pass a second semi-circle test.⁸⁷ Furthermore, if any subsidiary bays in an otherwise ‘overlarge bay’ still qualify individually as bays on the hydrographic test, and if such indentations fall outside the finalised drawn line, they may as a fallback be closed off in their own right by lines less than 24 NM wide.⁸⁸ In the latter instance, any areas seaward of such lines, albeit notionally within the large ‘bay-test’ indentation, are part of the territorial sea; and the baseline in this instance will normally there be the low-tide mark.⁸⁹

3. Bays Not Covered by the Article

a) ‘This article relates only to bays the coasts of which belong to a single State’. Art. 10 (1) seems to state that the provisions of the article only apply to a single State.⁹⁰ The two other exceptions are dealt with separately in Art. 10 (6) and relate to historic bays and Art. 7-situations discussed below. In general, any shared bays have been viewed by several writers to not even be capable of becoming juridical bays and to be enclosed with a shared artificial straight line.⁹¹ So that at most such ‘border bays’ were seen to just contain a (shared) territorial sea (unless large enough to contain a high seas pocket (or now lesser related jurisdictional enclave (e.g. an EEZ))), measured from the low-tide mark therein.⁹² BOUCHEZ typically sees the exclusion of border bays as being based on possible infringement of navigation and freedom of communication with the high seas and other maritime rights; though such problems might, he thought, be avoided by virtue of joint sovereignty, division of waters etc.⁹³

Suggestions for changes to Art. 10 (1) were not accepted at UNCLOS III.⁹⁴ Despite this, the paragraph does not explicitly rule out such border bays as having shared internal waters, at least by mutual agreement;⁹⁵ but, in disputed border bay situations, States may in practice be more inclined to treat them as, at most, a shared territorial sea.⁹⁶

(note 3), 265 (footnote 242) and 308, states clearly that it is ‘not required that such lines be anchored on interior headlands’ (emphasis added) as the entire indentation has ‘already been identified as landlocked to its most seaward headlands’. It may be noted that the International Law Association Committee on Baselines under the Law of the Sea at their Washington Conference in 2014 proposed an expanded mandate to consider the interpretation and relevant State practice under the UNCLOS relating to methods adopted by States to draw a baseline within a bay. See: ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014), para. 5.

⁸⁵ In this regard *Westerman* (note 5), 112 seems to be misleading in her initial comment, though, clearer where she states later (*ibid.*, 175) that the provision ‘is independent of any need to locate well-marked “entrance points”’ to serve as such *terminus* points within the bay; of course, the interior line may in fact be linked to other headlands within the bay proper, as was done in the British case concerning the Thames Estuary in *PO v Estuary Radio* (note 56) between The Naze and Foreness; cf. *O’Connell* (note 31), 397–398.

⁸⁶ *Westerman* (note 5), 161.

⁸⁷ *Contra*, e.g., *Shalowitz* (note 42), 223; *Westerman* (note 5), 170–176.

⁸⁸ *Reed* (note 3), 308–310, the fallback-line device was, e.g., used in the case of the overlarge US bay, Cook Inlet, to close off a maximum 24 NM area.

⁸⁹ *Churchill/Lowe* (note 18), 42.

⁹⁰ *Bouchez* (note 1), 117 and 178–198, gives the history of this principle from 1930 onwards and examines the matter *in extenso*.

⁹¹ *Westerman* (note 5), 79; *Bouchez* (note 1), 117.

⁹² *Reed* (note 3), 223.

⁹³ *Bouchez* (note 1), 137, 174. The Bay of Figuer, e.g., has the enclosed waters divided up into three categories under an 1879 Treaty between France and Spain, one part being under their joint sovereignty (*ibid.*, 137).

⁹⁴ *Nordquist/Nandan/Rosenne* (note 3), 116–117.

⁹⁵ *Reed* (note 3), 223.

⁹⁶ See, e.g. the dispute regarding the Bay of Piran situation on the border of Slovenia and Croatia.

- 21 There are, however, several examples in State practice where one neighboring State has unilaterally extended a straight baseline across a border bay or indentation from its shoreline either to notionally connect up with a set (e.g. median) point in the sea or actually extending to the coastline of the adjacent State. Such practice appears to be illegal,⁹⁷ but it is arguable that any consensual closing off of shared bay waters by riparian States is acceptable; as, e.g., in the case of the 1988 Agreement between Mozambique and Tanzania which closed off the border bay of Rivuma.⁹⁸ However in at least one instance (the Rio de la Plata estuary on the border between Argentina and Uruguay) even such consensual closing off of internal waters has led to international protest (see below).
- 22 b) ‘provisions do not apply to so-called “historic” bays’. Art. 10 (6) excludes so-called ‘historic’ bays from all the preceding juridical bay rules; and so not just from the 24 NM rule, but even from the bay ‘configuration’ requirements, as was decided at an early stage at UNCLOS I.⁹⁹ However, no definitional criteria were then laid down concerning such bays;¹⁰⁰ nor were any to be inserted later in the UNCLOS. Thus the supposed rules depend on customary international law, as confirmed in the *Tunisia/Libya Case*. Here the ICJ affirmed that the ‘matter continue[d] to be governed by general international law which [did] not provide for a single “regime” for [...] “historic bays”, but only for a particular regime for each of the concrete, recognized cases’ of such bays. Bays in fact constitute the most important form of the broader doctrine of ‘historic waters’¹⁰¹; so the doctrine of historic waters does not apply only to bays as such. Being based on customary law, the doctrine has never been codified in the law of the sea – either in the CTSCZ or in the UNCLOS – though the latter makes three express references to historic title issues.¹⁰² Accordingly much reliance has been put on an influential UN study, the *Juridical Regime of Historic Waters, Including Historic Bays* (1962).¹⁰³
- 23 The gist of the doctrine of historic bays seems to be that an indentation claimed as historic has been originally claimed in derogation of international law – an exceptional (even ‘prescriptive’) claim – at least at the time of the claim.¹⁰⁴ It is because of this – and its effect on other States’ rights – that the quantum of proof needed relating to historic bay claims has been viewed as having to be ‘exceptionally strong’.¹⁰⁵
- 24 The alleged basic international rules for existence of historic bays are formal claim, continuous (or consistent) and effective exercise of jurisdiction (of which control over navigation, and to a lesser degree, fishing¹⁰⁶ are the most important elements),¹⁰⁷ over a

⁹⁷ One blatant example of this was the action of Ecuador in 1971 in the case of its claimed baseline in the southern border bay shared with Peru, which the US protested against in 1986; other examples are cited *infra*, note 136; on this and other ‘unilateral baseline’ situations, see *Clive R. Symmons*, *The Maritime Border Areas of Ireland, North and South: An Assessment of Present Jurisdictional Ambiguities and International Precedents Relating to Delimitation of ‘Border Bays’*, IJMCL 24 (2009), 457, 474.

⁹⁸ *Ibid.*, 468–470.

⁹⁹ *Westerman* (note 5), 176; cf. ILC Report (note 79), 37.

¹⁰⁰ See *Westerman* (note 5), 177; *Symmons* (note 24), 21–22; *Bouchez* (note 1), 26.

¹⁰¹ *Tunisia/Libya Case* (note 26), 18. See now the PCA, *South China Sea Arbitration* (Republic of the Philippines v. People’s Republic of China), Award of 12 July 2016, para. 265, available at: <http://www.pcacases.com/web/view/7>, where the Tribunal recalled the 1962 UN Secretariat Memorandum on Historic Waters and affirmed that ‘historic waters’ are merely one form of historic right; and that the same rules there laid down applied “for claims to [historic] rights short of sovereignty”.

¹⁰² *Symmons* (note 24), 9, 17–23.

¹⁰³ ILC, *Juridical Regime of Historic Waters, Including Historic Bays*, Study Prepared by the Secretariat, UN Doc. A/CN.4/143 (1962), reproduced in: ILC Yearbook (1962), vol. II, 1; see *Symmons* (note 24), 10.

¹⁰⁴ This brings intertemporal problems today in the light of later more liberal treaty-based bay-closing rules, see *Symmons* (note 24), 49–64.

¹⁰⁵ *Ibid.*, 67–70.

¹⁰⁶ *Ibid.*, 194–206.

¹⁰⁷ *Ibid.*, 181–211; but see *Case Concerning the Land, Island and Maritime Frontier Dispute* (note 27), where the Gulf of Fonseca was confirmed by the ICJ to be an historic bay with internal waters despite rights therein of innocent passage; *Symmons* (note 24), 190–192.

sufficient period of time,¹⁰⁸ and with international acquiescence. The above factors were to be implicitly endorsed by the ICJ in the *Case Concerning the Land, Island and Maritime Frontier Dispute*,¹⁰⁹ including the need for international acquiescence, or, as it was there expressed, ‘absence of protest from other States’.¹¹⁰

Among the various sub-rules, the need for publicity of historic bay claim is important – possibly also requiring notification (as part of the publicity requirement) to other States.¹¹¹ Academic commentators have largely agreed with the supposed rules;¹¹² but unfortunately several of the sub-rules arising out of the three commonly-referred to basic rules further ‘muddy’ the requirements,¹¹³ including the time factor.¹¹⁴ Several of the latter issues, for example – such as the ‘time’ and ‘acquiescence’ requirements – tend to merge unsatisfactorily into each other; resulting in a close interrelationship existing between several aspects of rules and sub-rules: such as between acquiescence and the supposed need for display of commensurate jurisdiction appropriate to the type of historic claim or the principle of effective enforcement of claim etc.¹¹⁵

Judge ODA in his Dissenting Opinion in the *Case Concerning the Land, Island and Maritime Frontier Dispute* doubted there ever was a doctrine of historic waters.¹¹⁶ With this viewpoint the present commentator has much sympathy because of the problem as to whether a historic claim has originally to be claimed *eo nomine*¹¹⁷ – an issue which can cause logical problems over the alleged rules.¹¹⁸ In fact, so many aspects of the supposed international rules have problems underlying them¹¹⁹ that the doctrine is difficult to apply objectively in an *erga omnes* sense rather than on a subjective *quoad hunc* or opposability basis.¹²⁰ The so-called concept of ‘vital bays’ has also arisen in the context of historic bays, a doctrine particularly supported by third world States to circumvent the difficulty of proving historicity of title to bays (in pre-independence periods),¹²¹ and where, consequently, the claim is made to an excessively large bay on the basis of vital interest factors. Sometimes this has been cited as a fourth factor in proving historic title,¹²² but at most such factors can only have a subsidiary role in proof of historic title.¹²³

c) ‘provisions do not apply [...] where the system of straight baselines provided for in article 7 is applied’. Art. 10 (6) also excepts application of the bay rules to indentations relating to the straight baseline system as laid down in Art. 7. WESTERMAN states that ‘[w]hile both regimes result in the delimitation of the baseline separating internal waters and territorial waters [sic]’, Art. 7 (as now is) ‘is much broader in concept and more inclusive in scope’.¹²⁴ As such, this proviso seems to be aimed at preserving the impact of Art. 7 (where, for example, headlands of a deep indentation are closed off) from the more restrictive ‘bay

¹⁰⁸ Symmons (note 24), 117 *et seq.*

¹⁰⁹ *Case Concerning the Land, Island and Maritime Frontier Dispute* (note 27), 610. See now approval of these rules by the Arbitral Tribunal *South China Sea Arbitration* (note 101).

¹¹⁰ *Ibid.*

¹¹¹ Symmons (note 24), 113–116 and 139–149.

¹¹² *Ibid.*, 111; State practice is analysed by several writers on historic bays, e.g. by Bouchez (note 1), 215–238, who list supposed examples of such bays; see also on this Symmons (note 24), 301 *et seq.*

¹¹³ Symmons (note 24), 285–287.

¹¹⁴ *Ibid.*, 151–162.

¹¹⁵ *Ibid.*, see respectively 285–287, 115, 174–211, 235–236.

¹¹⁶ *Ibid.*, 50; *Case Concerning the Land, Island and Maritime Frontier Dispute* (note 27), Dissenting Opinion of Judge Oda, ICJ Reports (1992), 732, 738.

¹¹⁷ Symmons (note 24), 101–109.

¹¹⁸ *Ibid.*, 109.

¹¹⁹ *Ibid.*, 213–245 and 287, these aspects include the required international acquiescence to claim the type of required knowledge and, particularly, the type and extent of the requisite ‘acquiescence’.

¹²⁰ *Ibid.*, 242–245.

¹²¹ Cf. Bouchez (note 1), 298; Symmons (note 24), 247–257.

¹²² Symmons (note 24), 250–251; see the Report of the Special Master in *Alaska v. United States*, 541 U.S. 1008.

¹²³ Symmons (note 24), 255–256.

¹²⁴ Westerman (note 5), 178.

rules' in terms of a maximum mouth distance requirement and the hydrographic test.¹²⁵ However this may be, the proviso leaves significant discretion for States to, for example, ignore the Art. 7-requirement for deep indentations, and the 24 NM mouth rules which apply to bays *stricto sensu*, and to apply straight baselines in the case of what are in essence shallow or overlarge bays.¹²⁶ Indeed, WESTERMAN admits that Art. 10 has been 'eclipsed' as the 'bay provision of choice', because of the tendency of many States to adopt the Art. 7-straight baseline system, whether or not their coastlines warrant it.¹²⁷ Many former bays have also later been enclosed in more expansive baseline systems under Art. 7. Thus, for example, seven bays are now included in the later straight baselines of Canada;¹²⁸ and the latest straight baselines of South Africa (updated in 2004) enclose half of all possible South African bays (Saldanha, Hout, and Knysna Bays), prior to which six were claimed as such which all met the semi-circle test and the entrance points of which never exceeded 17 NM.¹²⁹

4. State Practice on Bays

- 28 Several States have claimed bays which do not satisfy the 'semi-circle' test.¹³⁰ Also several formerly dubious bay claims with closing lines of more than 24 NM wide exist or have later been overtaken by more expansive straight baseline claims.¹³¹ In fact many excessive bay claims appear to be contained anyway in a more expansive straight baseline claim under Art. 7. So that, for example, the US has protested such lines (as in the case of the Burmese claim to the Gulf of Matapan); and occasionally has made protests over oversize bays *stricto sensu*, such as in the case of the claims of Costa Rica (in 1988), Mauritania (1967) and Sudan (1989).¹³² In only a few cases does State legislation expressly refer to the Art. 10 bay provisions.¹³³ Several existing historic bay claims appear to be contrary to the stated international requirements (e.g.,

¹²⁵ Cf. *ibid.* She seems to put the aim of the proviso less clearly by stating that its 'legislative history' [sic] 'was intended to address the possibility that certain coasts to which the straight baseline system might be applied [...] would also contain bays', in which case the straight baseline would be drawn 'in such a way as to 'subsume the entire bay in the larger area of internal waters' created by Art. 7, so that for this reason the bay rules would be inapplicable here.

¹²⁶ As has Ireland, for example, in the case of Donegal Bay where the line is more than 24 NM wide but where the baseline rationale seems to be based on continuous use of the more expansive Art. 7-system; see also the practice of Republic of Korea, where some of its straight baselines under its 1965/77 maritime legislation raise questions of legality (as perceived by both China and Japan) under both Arts. 7 and 10 of the UNCLOS (e.g., the 60 NM line between Cholmyang and Shuksun-do); see also UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 147.

¹²⁷ Westerman (note 5), 184–185.

¹²⁸ Symmons (note 24), 293.

¹²⁹ John R. V. Prescott, Publication of a Chart Showing the Limits of South Africa's Maritime Claims, ICMCL 14 (1999), 557, 559; now only one South African bay (False Bay) is claimed as containing bay waters.

¹³⁰ E.g., US Department of State, Straight Baselines: Dominican Republic, Limits in the Seas No. 5 (1970), 5; Churchill/Lowe (note 18), 43; cf. e.g., Ocoa Bays, Escoscesa, Yuma, Santo Domingo Bays which are claimed as historic bays; and for El Arab Bay (Egypt), see Tullio Scovazzi *et al.*, Atlas of Straight Baselines (1989), 24 *et seq.*; for Dungarvan Bay in Ireland see Clive R. Symmons, Ireland and the Law of the Sea (2nd edn. 2000), 49 (footnote 63).

¹³¹ See, e.g., Formosa Bay, Scovazzi *et al.* (note 130), 34. These may, as seen, be disguised as being part of more expansive straight baseline claims under (now Art. 7); e.g., those of Albania, *ibid.*, 70; Algeria, *ibid.*, 72; Burma: Gulf of Mattapan, *ibid.*, 88; Colombia, *ibid.*, 108; Ecuador, *ibid.*, 124; France, *ibid.*, 130; Italy, *ibid.*, 156; Madagascar, *ibid.*, 164; Morocco, *ibid.*, 170; Portugal, *ibid.*, 194; Senegal, *ibid.*, 196; Spain, *ibid.*, 214; Vietnam, *ibid.*, 230; Australia: Lacedpede and Rivoli Bays (seemingly on an historic basis), *ibid.*, 12; Cameroon: Bibundi, *ibid.*, 18; Mauritania: Darguin Bank (89 NM wide), *ibid.*, 42; Venezuela: Boca Grande Baya (98.9 NM wide), *ibid.*, 64; Argentina: S. Jorge, 123 NM and Gulf of San Matias, 65 NM long respectively, *ibid.*, 4 *et seq.*, where closing lines are hypothetical; Rio de la Plata (albeit claimed as a river rather than a bay by both Argentina and Uruguay, 120 NM wide, *ibid.*, 8; China: Gulf of Pohai, 45 NM long, *ibid.*, 22; Ireland: Dungarvan Bay mouth 25.1 NM wide, and in the case of Donegal Bay, 24.6 NM long, Symmons (note 130), 48, 60.

¹³² J. Ashley Roach/Robert W. Smith, United States Responses to Excessive Maritime Claims (2nd edn. 1996), 138–143.

¹³³ Churchill/Lowe (note 18), 55.

by Libya to the Gulf of Sirte in 1973)¹³⁴ and thus have given rise to diplomatic protest,¹³⁵ or they have been retrospectively endorsed as being historic, so giving rise to problems of when such claims actually originated for the purpose of the length of claim requirement.¹³⁶

As seen, in the case of border bays there are several examples where neighboring States have either unilaterally attempted to close off a border bay in part or wholly (as in the case of the Bay of Amatique claim by Guatemala in 1940 and Boca Grande border bay lying between Guyana and Venezuela),¹³⁷ or by agreement with a neighbour. Even in the latter instance, such consensual closing off has led to international protests by major maritime nations,¹³⁸ as in the case of the claimed straight baseline across the Rio de la Plata estuary.¹³⁹ Often, though, border bays seem to have been considered as areas of territorial sea to be delimited laterally by agreement between the neighboring States, as, for example, in the case of the disputed Slovenian/Croatian border Bay of Piran.¹⁴⁰

5. International Jurisprudence on Bays

In the *Case Concerning the Land, Island and Maritime Frontier Dispute*, the ICJ opined that the treaty-based provisions on bays might be found to express ‘customary law’.¹⁴¹ In the 2009 *Maritime Delimitation in the Black Sea Case*, the ICJ pointed out (citing the 1951 *Fisheries Case*): ‘[T]he coastal State, in conformity with the provisions of UNCLOS, (Arts. 7, 9, 10, 12 and 15), may determine the relevant base points. It is nevertheless an exercise which always has an international aspect [...]’.¹⁴²

Accordingly, the limited international case-law concerning bays indicates that any ‘artificial’ lines, i.e., straight baselines – including bay-closing lines – must accord with all the relevant UNCLOS requirements to be valid internationally. In the case cited, the ICJ did not see fit to question the validity internationally of either the Romanian- or Ukrainian-claimed baselines in a continental shelf delimitation context: even though, for example, some of the

¹³⁴ Symmons (note 24), 104, 166; see also, e.g., Vietnam’s supposed historic claim to part of the Gulf of Tonkin, the USSR (as then was) to Peter the Great Bay (1957), Thailand to part of the Gulf of Thailand (1959), Kenya to Ungwana Bay (1969); the dubious former Soviet Russian claim to the Gulf of Riga as a historic Bay is discussed by Anne E. Reynolds, *Is Riga an Historic Bay?*, IJELC 2 (1987), 20.

¹³⁵ In its protest to the USSR in 1958, the US asserted concerning the historic claim there to Peter the Great Bay, that there had to be ‘a degree of acceptance on the part of the rest of the world to justify the claim’, cf. Symmons (note 24), 221. More recently, when Canada, in 1973, announced that it claimed the Bay of Fundy ‘as internal waters of Canada, on an historical basis’, the US protested, saying that it had ‘always reserved its position on this ‘inchoate claim’, see Ted L. McDorman, Notes on the Historic Waters Regime and the Bay of Fundy, in: Aldo Chircop/Ted L. McDorman/Susan J. Ralston (eds.), *Essays in Tribute to Douglas M. Johnston* (2009), 704 *et seq.* The author particularly complains that the mouth of this bay was not properly identified for the purposes of the historic claim and he notes that Canada has not relied on Art. 10, where an additional problem is that it is a ‘border bay’.

¹³⁶ Cf. the Japanese protest to the USSR over its Peter the Great Bay claim, Strohl (note 24), 351; and the US against Australia over its supposed historic bay claims, Symmons (note 24), 102–106.

¹³⁷ Straight baselines were here decreed by Venezuela in 1956, cf. Symmons (note 24), 472–473. Regarding the Bay of Gwatar between Iran and Pakistan, an 1871 agreed river boundary has not led to delimitation of the bay itself, *Bouchez* (note 1), 143; but Iran has unilaterally extended a closing line across it to end at a supposed equidistant point in the Bay, see John R. V. Prescott, *Straight Baselines: Theory and Practice*, in: Eddie D. Brown/Robin R. Churchill (eds.), *The United Nations Convention on the Law of the Sea: Impact and Implementation* (1987), 288, 300. The US-Canadian border bays of Passamaquoddy Bay and Fundy Bay are discussed by *Bouchez* (note 1), 153–156.

¹³⁸ *Ibid.*

¹³⁹ In the case of which there were protests from France, the Netherlands, the UK and the USA, see Tullio Scovazzi, *Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters*, in: Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 15, 25.

¹⁴⁰ Damir Arnaut, *Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation between Croatia and Slovenia*, in: David D. Caron/Harry N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (2004), 427.

¹⁴¹ *Case Concerning the Land, Island and Maritime Frontier Dispute* (note 27), 588 (para. 383).

¹⁴² ICJ, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Reports (2009), 61, 108 (para. 137).

Romanian straight baselines enclosed shallow indentations which would not satisfy the Art. 10 requirements.¹⁴³ US case-law has discussed in several instances problems of determining natural entrance points¹⁴⁴ and whether islands can in themselves form natural entrance points to a bay or form part of the closing line¹⁴⁵ (several claims worldwide can be interpreted as using islands for this purpose).¹⁴⁶ The problem of calculation of enclosed waters in the semi-circle test has been aired in US case-law, such as *United States v. Louisiana*¹⁴⁷ regarding treatment of rivers flowing into a bay as well as treatment of subsidiary bays.¹⁴⁸ In the *Case Concerning the Land, Island and Maritime Frontier Dispute*, the ICJ confirmed that the closing line of a bay is the baseline for whatever regime that lies seaward of it; and that to hold that the closing line of a (historic) bay is other than the 'baseline for the territorial sea' would be 'incompatible with the legal status of a bay'.¹⁴⁹

- 32 Also in the *Case Concerning the Land, Island and Maritime Frontier Dispute*, the ICJ referred somewhat anomalously to an 'inconsistent element' from the 1917 judgment of the Central American Court of Justice¹⁵⁰; inasmuch as this allowed the waters of the Gulf (as an historic bay) to be subject to 'innocent passage' by all ships for historical and access reasons, such rights being admittedly 'at odds with the present general understanding of the legal status of the waters of bays as constituting "internal waters"'¹⁵¹ – a viewpoint criticized by this commentator elsewhere.¹⁵² In re-affirming the doctrine of historic waters, the ICJ stated that the waters of the Gulf of Fonseca 'continue[d] to be subject of that acquiescence of other nations' to which the 1917 Judgment refer[red], for the court was unaware of a differing view by a third State;¹⁵³ and it recited with approval an earlier statement in the 1982 *Tunisia/Libya Case*; ¹⁵⁴ that historic titles must 'enjoy respect'.¹⁵⁵
- 33 In the *North Atlantic Fisheries Case*, DR. DRAGO had opined that historic bays were a class distinct and apart from other bays, with 'particular circumstances such as geographical configuration, immemorial usage and, above all, the requirements of self-defense' justifying such a 'pretension'; and in the same case he recommended a ten mile-rule for bays.¹⁵⁶ Similar in tone, in the *Case Concerning the Land, Island and Maritime Frontier Dispute* of 1917 the Central American Court of Justice referred to 'vital interests' necessary to determine the

¹⁴³ As, e.g., near the Bay of Musura, cf. *Symmons/Reed* (note 73), 96.

¹⁴⁴ The need for two identifiable headlands has led to judicial discussion in US case law, as in *United States v. Louisiana* (note 37) in the case of more complex geographical situations, particularly in the case of a multi-headed or double-headed indentation as was the case in: *United States v. Alaska* (note 122), relating to Harrison Bay; discussed by *Reed* (note 3), 231–233, 266–267. The author describes this bay as the only one of its kind to have been 'considered by the courts'; and here the Special Master accepted the longer and exterior Alaskan-claimed line where the position of headlands could have affected the hydrographic test in regard to depth of penetration of the waters in question and the finalized 24 NM line; see also judicial consideration in *United States v. Louisiana* (note 37) in the case of relative straight coasts where the question arose whether the most seaward minor protrusions were the appropriate points.

¹⁴⁵ Cf. *Reed* (note 3), 286–297.

¹⁴⁶ E.g., the claim by France for Djibouti to enclose the Gulf of Tadjoura, see *Scovazzi et al.* (note 130), 122.

¹⁴⁷ *United States v. Louisiana*, Report of the Special Master of 31 July 1974.

¹⁴⁸ See *supra*, note 58; and the lengthy discussion by *Reed* (note 3), 241–248 and 312 (footnote 329), regarding river areas not being judicially considered in calculation of enclosed semi-circle waters (in respect of river channels of the Mississippi emptying into East Bay not being included as part of the relevant waters calculation in *United States v. Louisiana* (note 37)).

¹⁴⁹ *Case Concerning the Land, Island and Maritime Frontier Dispute* (note 27), 199, 605 (para. 417, see also paras. 411, 416, 419, 420).

¹⁵⁰ Central American Court of Justice, *Costa Rica v. Nicaragua*, Judgment of 30 September 1916, AJIL 11 (1917), 181, 229; Central American Court of Justice, *El Salvador v. Nicaragua*, Opinion and Decision of 9 March 1917, AJIL 11 (1917), 181, 229 and 674–730.

¹⁵¹ *Case Concerning the Land, Island and Maritime Frontier Dispute* (note 27), 593 (para. 393).

¹⁵² *Symmons* (note 24), 190 *et seq.*

¹⁵³ *Case Concerning the Land, Island and Maritime Frontier Dispute* (note 27), 593 (para. 394).

¹⁵⁴ *Tunisia/Libya Case* (note 26), 589.

¹⁵⁵ *Ibid.*, 73.

¹⁵⁶ *The North Atlantic Coast Fisheries Case* (note 23), 167 *et seq.*; see also *Bouchez* (note 1), 101–102.

Gulf's international status.¹⁵⁷ The recent US case of *Alaska v. US* (2005) involves the fullest discussion yet – albeit in a more domestic law federal context – of the supposed rules which underlie the doctrine of historic waters.¹⁵⁸

Article 11

Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.

Bibliography: *Peter B. Beazley*, *Maritime Limits and Baselines: A Guide to their Delineation* (2nd edn. 1978); *Chris Carleton*, *Problems Relating to Non-Natural and Man-Made Basepoints under UNCLOS*, in: Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 31–68; *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Myres S. McDougal/William T. Burke*, *Public Order of the Oceans* (1962); *Erik Franckx*, *Belgium and the Law of the Sea*, in: Tullio Treves (ed.), *The Law of the Sea: The EU and Its Member States* (1997), 37–96; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Michael W. Reed*, *The Development of International Maritime Boundary Principles through United States Practice*, in: US Department of Commerce, *Shore and Sea Boundaries*, vol. III (2000); *Tullio Scovazzi*, *Baselines, MPEPIL*, available at: www.mpepil.com; Robert Jennings/Arthur Watts (eds.), *Oppenheim's International Law* (9th edn. 1992); Marjorie Whiteman (ed.), *US Department of State: Digest of International Law*, vol. IV (1965)

Documents: ILA, *Report of the Committee on Baselines under the Law of the Sea*, Sofia Conference (2012); ILC, *Report of the International Law Commission*, UN Doc. A/2934 (1955), GAOR 10th Sess. Suppl. 9, reproduced in: ILC Yearbook (1955), vol. II, 19–62; ILC, *Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the Law of the Sea* (1989); US Department of State, *Measurement of the U.S. Territorial Sea*, Department of State Bulletin 1044 (1959)

Cases: *Dubai/Sharjah Border Arbitration*, Arbitral Award of 19 October 1981, ILR 91, 543; ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116; ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61; ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Request for Provisional Measures, Doc. ITLOS/PV.03/02/CORR.1 (2003); PCA, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Decision of 1 September 2005, RIAA XXVII, 133; *United States v. California*, 432 U.S. 40 (1977); *United States v. California*, 447 U.S. 1 (1980); *United States v. Alaska*, 521 U.S. 1 (1997)

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¹⁵⁷ *El Salvador v. Nicaragua* (note 150), 700.

¹⁵⁸ See Symmons (note 24), x-xii.

I. Purpose and Function

- 1 This article – in similar fashion to Art. 8 Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) – is the sole article dealing with baselines concerning man-made constructions, essentially in a harbor system (though, as will be seen, non-harbor constructions may also be implicitly included). These may constitute basepoints for baselines as part of the normal baseline referred to in Art. 5 (i. e., the low-water line) with which feature such constructions are intrinsically inter-connected.¹
- 2 What is strange – in the light of its title ‘Ports’ – is that the article omits to state whether a port or harbor may have a straight baseline drawn across its mouth (connecting the outermost harbor works on both sides) so as to contain internal waters in a similar way to bays, as is expressly allowed under the archipelagic provisions, Art. 50. Art. 50 refers back to Art. 11 as though provision for closing lines is there permitted,² and it is generally agreed that this was a mere treaty oversight, and that implicitly ports and harbors may be straight-baselined as provided for by Art. 50, which expressly allows archipelagic States to do so in their archipelagic waters.³ Indeed, the joining of the outermost harbor works by a straight line was seen by the International Law Commission (ILC) as permissible at an early stage in 1954,⁴ though just which structures (harbor works) may be used for this purpose may be problematic.⁵ It is thus unfortunate that there was not an additional provision dedicated to this important basepoint function of artificial harbor structures. In referring to the outer harbor works and their having to be an ‘integral part’ of the ‘harbor system’, it is made clear that artificial constructions detached from such a system are not generally to be considered as basepoints, a matter now reinforced by the second provision in the article stating that ‘off-shore islands and artificial islands’ are not part of the harbor system.
- 3 The article is silent on the issue of artificial baselines not connected with harbors: such as use of reclaimed land for basepoint purposes, such as on the Hook of Holland,⁶ or where

¹ Cf., Michael W. Reed, *The Development of International Maritime Boundary Principles through United States Practice*, in: US Department of Commerce, *Shore and Sea Boundaries*, vol. III (2000), 55–56.; as to this relationship, see US Supreme Court, *United States v. California*, 447 U.S. 1, 6 (1980), where the Supreme Court held that open-piled piers do not conform to the ‘general rule for establishing a baseline’ as ‘piers’ in the absence of a low-water line did not fall within the ambit of the normal baseline in a way similar to the other baseline articles which deal with natural basepoints. The Report of the International Law Association Committee on Baselines under the Law of the Sea from the 2012 Sofia Conference has commented that the case that ‘harbor works constitute part of the normal baseline is fairly clear cut’, and that the structures referred to in the first sentence of Art. 11 are to be considered ‘part of the low-water line on the baseline from which the territorial sea is measured’, see: ILA, *Report of the Committee on Baselines under the Law of the Sea*, Sofia Conference (2012), 26. In the *Dubai/Sharjah Border Arbitration*, Arbitral Award of 19 October 1981, ILR 91, 543, 661, the arbitral tribunal stressed that ‘outermost permanent harbour structures should be considered as part of the land for the purposes of drawing baselines’ (emphasis added) in the light of the history of Art. 11.

² Cf., e.g., UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the Law of the Sea* (1989), 34, features ‘regarded as forming part of the coast’. In a similar way, there is no explicit mention here that such artificial structures may be part of a normal baseline (under Art. 5) as being part of the coast, or an appropriate linking point under an Art. 7-straight baseline system.

³ See, e.g., Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 47; UN DOALOS *Baselines Study* (note 2), 34 (para. 77).

⁴ Cf. Marjorie Whiteman (ed.), *US Department of State: Digest of International Law*, vol. IV (1965), 262.

⁵ As in the case of San Pedro port and the status of Long Beach breakwater in California, see Reed (note 1), 319–321, who points out that the law of the sea treaties do not give ‘specific objective guidance’ in these cases as in the analogous instance of choice of natural entrance points in the case of bays (Art. 10).

⁶ Chris Carleton, *Problems Relating to Non-Natural and Man-Made Basepoints under UNCLOS*, in: Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 31, 52. In the oral pleadings of the *Land Reclamation Case*, Malaysia’s agent noted that the question of ‘land reclamation’ was not dealt with specifically in UNCLOS at all: ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Request for Provisional Measures, Doc. ITLOS/PV.03/02/CORR.1 (2003), 13. For a recent discussion of coastal protective works, land reclamation and artificial extensions of a baseline, see ILA Report (note 1), 27–28. This Report noted that there was a need for further clarification concerning the

coastlines have been artificially protected to stop erosion;⁷ or where artificially-created spoil banks or jetties/piers (detached from a harbor) radiate from the coast;⁸ but it seems that, by analogous application, outer limits of such land areas could lawfully be used to generate maritime zones even if not part of a harbor complex. Past examples – where a territorial sea has been extended thereby – seem in general to have been acquiesced in by the international community.⁹ However those off Singapore have not been used for delimitation purposes in the case of Singapore's agreed boundaries with Malaysia and Indonesia.¹⁰

Perhaps, indeed, more generally, any dubiously-qualifying artificial structures may have their status solved either bilaterally or multilaterally through principles of acquiescence and even recognition by other interested States. This principle comes out of the recent judgment of the International Court of Justice (ICJ) in the *Black Sea Case*, where the Court pointed out that not only had Romania notified the United Nations under Art. 16 of use of the end of Sulina Dyke as a baseline for its territorial sea, but that this choice of baseline 'was not contested by Ukraine'.¹¹ The provisions in Art. 8 CTSCZ and Art. 11 UNCLOS were impliedly found to be part of international customary law in the *Dubai/Sharjah Arbitration* (1981).¹²

II. Historical Background

Art. 11 had a relatively uncomplicated drafting history.¹³ The origin of the present wording (in its first clause) was Art. 8 CTSCZ, which largely reflected the wording proposed by the Second Committee of the Hague Codification Conference,¹⁴ based on ILC recommendations which viewed the provision as reflecting the existing 'positive law'.¹⁵ The second sentence was added at UNCLOS III to make it clear that 'off-shore loading and unloading points are not considered as harbour works'.¹⁶ The latter addition was noted by the ICJ in the *Black Sea Case*, and there described as a 'minor change' from the 1958 CTSCZ regime.¹⁷ The title 'Ports' (an undefined term) was added in the Revised Single Negotiating Text at UNLOS III.¹⁸

'normal baseline' in response to possible sea level rise and 'artificial extension of existing coasts', eg., through land reclamation (*ibid.*, 1).

⁷ Carleton (note 6), 32.

⁸ See Reed (note 1), 198–200.

⁹ Cf. Carleton (note 6), 52, 65, who concludes that although there is no international jurisprudence on the matter, it is to be 'assumed' that States do consider such man-made extensions to 'form an integral part of the baseline'; and, in any event, such reclaimed areas are often contained within an already-enclosed stretch of water landward of territorial sea baselines, as in the case of Japan, so having no effect on limits of seaward zones; see also *infra*, note 67.

¹⁰ Carleton (note 6), 53. In the Malaysia/Singapore Settlement Agreement of 26 April 2005, *Land Reclamation Case* (note 6), Annex to the Decision of 1 September 2005, RIAA XXVII, 133, 141, it is stated, for instance, in the preamble, that a group of independent experts would conduct a study on the effects of Singapore's reclamation works and to propose appropriate measures to deal with any 'adverse effects' from such; and, in Art. 8, that Singapore 'reassures Malaysia that even after the Pulau Tekong reclamation, the safe and smooth passage of ships through Kuala Johor and Clader Harbour will not be adversely affected by the said reclamation' (emphasis added).

¹¹ ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61, 107 (para. 135).

¹² *Dubai/Sharjah Border Arbitration* (note 1), the arbitration tribunal had to apply customary law in that case; see Churchill/Lowe (note 3), 48.

¹³ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 120–121; see also Myres S. McDougal/William T. Burke, Public Order of the Oceans (1962), 419–424.

¹⁴ See Whiteman (note 4), 261–262; and the *Dubai/Sharjah Border Arbitration* (note 1), 661, where the tribunal stressed the 'complete agreement' between the 1930 proposals on this matter and the provisions of the CTSCZ and UNCLOS.

¹⁵ Whiteman (note 4), 262.

¹⁶ Nordquist/Nandan/Rosenne (note 13), 122.

¹⁷ *Black Sea Case* (note 11), 106–107 (para. 134).

¹⁸ Nordquist/Nandan/Rosenne (note 13), 122.

III. Elements

1. ‘For the purpose of delimiting the territorial sea’

- 6 This wording indicates that in essence the article is aimed at clarifying what man-made structures in a harbor complex may be used as basepoints from which maritime zones such as the territorial sea may be drawn; but it also incidentally could indicate what parts of such a complex could be used as the equivalent of natural entrance points of bays where closing lines are drawn across the mouths of ports and harbors to delineate internal waters – as seen, an implicit right under the UNCLOS.¹⁹

2. ‘outermost permanent harbor works’

- 7 a) ‘outermost permanent’. The word ‘permanent’ here does not connote total permanence;²⁰ though it would appear that even any originally-intended long-lasting structures (such as piers)²¹ may lose basepoint value if they become derelict. Normally a solid structure, at any rate, will be presumed to have sufficient permanence. In the recent *Black Sea Case*, for example, the ICJ stated that the ‘permanent nature’ of the dyke in question there (Sulina Dyke) had ‘not been questioned’.²² More crucial, then, is the proper interpretation of harbor works ‘which form an **integral** part of the **harbour** system’ (emphasis added).
- 8 b) ‘harbor’. Firstly, the double reference to ‘harbor’ (‘harbor works’ and ‘harbor system’) in the first clause of Art. 11 might seem to indicate that only harbor installations *stricto sensu* are being referred to. However, in State practice a liberal interpretation has been made of this wording so as to include structures not strictly connected to harbors (such as isolated piers, breakwaters and groynes attached to the land).²³ By contrast, in the recent ICJ judgment in the *Black Sea Case*, the Court, whilst pointing out that the expression ‘harbour works’ is not defined either in the CTSCZ or UNCLOS, added that they ‘are generally installations which allow ships to be harboured, maintained or repaired and which facilitate the embarkation and disembarkation of passengers and the loading or unloading of goods’.²⁴ The use, however, of the word ‘generally’ by the Court indicates a vagueness remaining as to what is included, even when a structure is not connected with shipping activities.²⁵ It may be noted that US case law has interpreted the previous equivalent of Art. 11 (namely, Art. 8 CTSCZ) as never being intended to cover **all** artificial coastal

¹⁹ See UN DOALOS Baselines Study (note 2), 34 (paras. 76 *et seq.*). Peter B. Beazley, *Maritime Limits and Baselines: A Guide to their Delineation* (2nd edn. 1978), 24, points out that harbor entrances will normally be narrow anyway, so not affecting outer limits of territorial waters, but important for fixing the limits of internal waters; and that the bay rules could have analogous application here.

²⁰ See US case law on this aspect, US Supreme Court, *United States v. Alaska*, 521 U.S. 1 (1997), 290, where the US had argued only permanent harbor works (in the case of Arco Pier, Alaska) were recognized as basepoints; *cf. Reed* (note 1), 141; further in *United States v. Alaska*, *ibid.*, 321 the Special Master opined that ‘permanent’ meant simply something ‘other than temporary’, and did not necessarily mean ‘forever’ or ‘perpetual’; and that Arco Pier, which featured as a potential basepoint in that case, was intended for long-range or indefinite use; the point also came up in the US Supreme Court case *United States v. California* (note 1), 6, as to whether the piers there met the ‘permanency’ requirement, the Special Master concluded they were permanent for the purposes of the litigation; see *Reed* (note 2), 195.

²¹ *Carleton* (note 6), 34, 47, indicating that where a man-made structure has disappeared, it loses any erstwhile basepoint value.

²² *Black Sea Case* (note 11), 106 (para. 133).

²³ See, e.g., *Carleton* (note 6), 43–44, citing the Oosterschelde in the Zeeland Estuary. For a recent extensive discussion of the meaning of ‘harbor works’, see ILA Report (note 1), 28 *et seq.*

²⁴ *Black Sea Case* (note 11), 106 (para. 133).

²⁵ As indicated in US case law see, e.g., *United States v. California* (note 1), where it was found that most Californian piers were built and used as recreational structures and not intended to provide shelter for vessels; see also *Reed* (note 1), 196.

structures, such as certain Californian piers which did not protect, enclose or shelter areas adjacent to the coast; and therefore were not harbor works.²⁶

c) ‘works’. In the *Black Sea Case*, the ICJ stated that ‘the term “works” denotes a combination of apparatus, structures and facilities installed for a specific purpose’.²⁷

3. ‘integral part of the harbor system’

More problematic is the meaning of what constitutes an ‘integral part’ of the harbor system. The UN-Baselines Study, in defining ‘harbour works’ themselves, referred rather repetitiously to ‘man-made structures built along the coast which form an integral part of the harbour system such as jetties, moles, quays or other port facilities, coastal terminals, wharves, breakwaters, sea walls, etc.’²⁸ However, as seen, some of the here-listed structures, such as sea walls and breakwaters, may not even be part of a harbor system at all, and so not be associated with port facilities as such: for example, merely being used as coastal defences, as in the Netherlands;²⁹ or they may be built purely for recreational use (see below). However, all the latter structures may, as seen, still qualify as basepoints in the light of present State practice.³⁰ Training walls, for example, which help maintain river flow and channel depth are one example of works which may not be directly related to harbor structures.³¹ Here the case of the Sulina Dyke which featured in the *Black Sea Case* is relevant, despite the fact that in this case the ICJ found it not to be part of a harbor installation,³² though in such an instance it could be argued that such a structure may still be considered an integral part of, for example, any riverside port insofar as it helps maintain navigational access thereto.³³ The ICJ noted in the abovementioned case that the functions of a dyke are different from those of a port, but also noted that

‘the [...] dyke may of use in protecting shipping destined for the mouth of the Danube and for ports situate there’.

Here the Court cited the *travaux préparatoires* of the ILC Rapporteur in 1954 to the effect that

‘dykes used for the protection of the coast [constituted] a separate problem and did not come under either Art. 9 [CTSCZ] (ports) or Art. 10 [CTSCZ] (roadsteads).’³⁴

However, despite the above dictum indicating some port–protection function by the dyke in question, in the final analysis the ICJ stated (somewhat paradoxically) that there was ‘no convincing evidence [...] presented that this dyke serve[d] any direct purpose in port activities’.³⁵

²⁶ *United States v. California* (note 1), 7; see *Reed* (note 1), 196.

²⁷ *Black Sea Case* (note 11), 106 (para. 133).

²⁸ UN DOALOS Baselines Study (note 2), 56 (para. 38); the ILC in its commentary had pointed out that even permanent structures jutting out to sea from land (such as jetties and dykes) are ‘assimilated to harbour works’, restated by Whiteman (note 4), 262; this problem is interconnected with the distance to which installations extend from the coast, see *infra*, notes 40, 41; *Churchill/Lowe* (note 3), 47, state rather vaguely that the harbor works must be ‘attached’ to the coast or ‘at least very close’ to it.

²⁹ *Carleton* (note 6), 43.

³⁰ See *supra*, notes 9, 23, and 25; but not all commentators agree; see, e.g., *Tullio Scovazzi*, Baselines, MPEPIL, para. 7, available at: <http://www.mpepil.com>, alleging that Art. 11 ‘applies only to harbour works’ and ‘not to other artificial structures which are built along the coast but serve different purposes’; see also the Malaysian argument in *Land Reclamation Case* (note 6), 11, 13, discussed *infra*, note 63; *Beazley* (note 19), seems to view jutting-out jetties etc. along a coast as ‘protection works’ and so assimilated to harbor works, if only because they tend to ‘obscure’ the natural low-water line.

³¹ *Carleton* (note 6), 45; and *McDougal/Burke* (note 13), 425: ‘protective works’ may be included ‘even when they are isolated structures’ as these are not usually ‘extensive’.

³² *Black Sea Case* (note 11), 108 (para. 140); *Carleton* (note 6), 65.

³³ *Carleton* (note 6), 47.

³⁴ *Black Sea Case* (note 11), 106 *et seq.* (para. 134); likewise *Reed* (note 1), 190, suggests that whilst in US practice breakwaters that form artificial harbors (such as Los Angeles harbor) are valid baselines, this is less clear in the case of similar constructions built to ‘discourage erosion of beaches’.

³⁵ *Black Sea Case* (note 11), 108 (para. 138).

- 11 Further interpretational difficulty resides in the fact that some structures, such as piers, may be used essentially for pleasure and recreational purposes, but also have berthing and landing-stage facilities (i.e., ship-based activities) at their terminals; and so more closely resemble harbors.³⁶ There also now exist certain near-shore artificial islands constructed purely for tourist purposes and connected to the mainland by a causeway or a bridge which may also be considered to be potential territorial sea basepoints, as, e.g., the 'World Project' in the United Arab Emirates or (before being detached), Jumeirah Palm Island.³⁷
- 12 A further problem may also arise if such seaward-radiating structures are of excessive length; and so are thus less directly linked to the main harbor complex.³⁸ It may be noted that the ICJ in the *Black Sea Case* cited an expert stating at the 1958 Geneva Conference that 'jetties [could be regarded] as [...] land territory' (together with the ILC comment in its report to the General Assembly); but the Court said it did not wish to 'state an opinion' for qualification under this provision where 'such structures are of excessive length', such as a 'jetty extending several kilometers into the sea', as did the Sulina Dyke in that case (7.5 km long).³⁹ Indeed, the Court emphasized, in this context, the vagueness inherent in the vital phrase 'integral part of the harbour system'. As it commented: 'In the light of the above [*travaux préparatoires*], the ILC did not, at the time, intend to define precisely the limit beyond which a dyke, jetty or works would no longer form a 'integral part of the harbour system'.⁴⁰
- 13 The key issue here, then, is again the true meaning of 'integral'. In combination with the rider in the second sentence of Art. 11, this epithet obviously excludes off-shore installations and artificial islands, as they are considered to be separate from the coast⁴¹ (including those covered by Arts. 60 and 80). However, the word would seem to include mooring facilities at the end of structures running out from the main harbor works – and so attached directly to the landmass⁴² – if used as terminals. This is in contrast to oil rigs etc. which, as seen, are clearly included as exploration/exploitation platforms under Arts. 60 and 80, thus only having security zones round them. Even jetties and piers which are on piles (rather than being a solid causeway) and which support a roadway radiating out to sea may be an essential part of the harbor works, particularly as they often have a berthing terminal at the end for

³⁶ See e.g., *Carleton* (note 6), 48.

³⁷ *Ibid.*, 58; but cf. the status of Rincon Island (California) which featured in *United States v. California* (note 1), 7, in the case of which the piers and complex on the island were held by the Supreme Court in the case as being 'neither harborworks nor harbors' and thus not an integral part of a 'harbor system'; this was also held not to be part of the coast although attached to mainland by a bridge. Cf. *Carleton* (note 6), 59; *Reed* (note 1), 196, also on the status of bridges linking structures to the coast generally.

³⁸ This problem interrelates with the more general meaning of 'integral', see *Carleton* (note 6), 43; on the 'excessive length' issue, see e.g., Robert Jennings/Arthur Watts (eds.), *Oppenheim's International Law* (9th edn. 1992), para. 193; see also the UK worries on excessive jetty length in ILC, Report of the International Law Commission, UN Doc. A/2934 (1955), GAOR 10th Sess. Suppl. 9, reproduced in: ILC Yearbook (1955), vol. II, 19, 58. In the *Dubai/Sharjah Border Arbitration* (note 1), 662, the tribunal noted that the harbor works of Dubai (about one and a half miles long) extended about half a mile seaward; cf. also *McDougal/Burke* (note 13), 419, stating a main problem is where outer harbor installations 'project into the sea for a considerable distance, i.e., several miles'.

³⁹ *Black Sea Case* (note 11), 106 *et seq.* (para. 134); ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 16.

⁴⁰ *Black Sea Case* (note 11), 106 *et seq.* (para. 134).

⁴¹ See, e.g., Nordquist/Nandan/Rosenne (note 13), 122; and *McDougal/Burke* (note 13), 422, who comment that the 'works' must be 'physically connected' with the coast in order to qualify as basepoints.

⁴² See the comment of George E. Pearcy in: US Department of State, Measurement of the U.S. Territorial Sea, Department of State Bulletin 1044 (1959), 963, 966–968, concerning piers and breakwaters 'connected with the shore itself or an installation on the shore' which are connected to structures such as above-water off-shore terminals; cf. *Reed* (note 1), 52–53, who refers to *United States v. California* (note 1) where exceptionally the Special Master accepted that the above-water end of the Zuniga jetty – which was partly submerged – could be considered an entrance point to San Diego Bay, as this structure helped the servicing of visiting vessels for the purpose of loading/unloading cargo; see Nordquist/Nandan/Rosenne (note 13), 122, such seaward terminals may also even convey substances via pipelines to the coast.

unloading or loading of cargo⁴³ (even when such constructions go miles out to sea);⁴⁴ though US practice is not in accord on such open-piled structures.⁴⁵

The modern trend towards construction of extensive – and more multi-purpose – seaward man-made structures is obviously creating an additional interpretative problem for the future,⁴⁶ particularly in terms of ‘creeping jurisdiction’ where existing long structures are later made even longer. Thus in the *Black Sea Case*, the Court concluded cautiously that in the light of earlier statements:

‘[T]here are grounds for proceeding on a case-by-case basis, and [...] the text of Article 11 of UNCLOS and the travaux préparatoires do not preclude the possibility of interpreting restrictively the concept of harbour works so as to avoid or mitigate the problem of excessive length identified by the ILC.’⁴⁷

4. Do Artificial Structures Possess Low-Tide Baselines Anyway?

Another (albeit technical) problem thrown up by man-made basepoints is whether – if their outer limits are constantly surrounded by sea – they truly have a ‘low-water line’ for the purposes of Art. 5 (i.e., as being part of the normal baseline): not only because of there being merely a vertical rise and fall of the tide at the same location, but additionally because the waterline itself may not be continuous, particularly in the case of open pile-type piers. As seen, US case-law seems to doubt whether a piling structure has such a line as part of the ‘coast line’,⁴⁸ even when such piers are marked as actual territorial sea basepoints on official US charts;⁴⁹ but there are many instances, of course, where even natural coastal projections – such as cliffs – fall vertically into deep water (like the end of a pier often does), but remain as territorial sea basepoints.

5. Meaning of ‘Harbor’ or ‘Port’

A ‘harbor’ (as indeed ‘port’)⁵⁰ is here left undefined in the article; but the key element in both expressions is a sheltered area protecting vessels and giving anchorage and docking facilities⁵¹ – a function which also flavours the meaning of ‘harbour works’ as described by the ICJ in the *Black Sea Case*.⁵²

6. ‘Off-shore installations and artificial islands’

This wording was added at UNCLOS III to reinforce the meaning of what does not constitute an integral part of a harbor system. It has been stated, somewhat broadly, that this wording was to ‘make clear that offshore loading and unloading points are not considered as

⁴³ Though, of course, as seen, not all jetties are ‘closely associated with a natural harbor, or haven for vessels’ so as to be part of the coastline, *Reed* (note 1), 55, 194; see also *Carleton* (note 6), 41.

⁴⁴ E.g., Saudi Arabia’s Ra’s Al Ju’aymah LPG terminal; cf. *Carleton* (note 6), 41.

⁴⁵ See *Carleton* (note 6), 51. In the US Supreme Court case *United States v. California*, 432 U.S. 40 (1977), the US argued successfully that ‘open-pile’ piers were invalid baselines, the Special Master finding that although the CTSCZ was silent on the issue, such formations did not create any interest in the surrounding waters, having no ‘harbor-like function’ nor ‘continuous waterline’ and so should not be basepoints; see also *Reed* (note 1), 55; but he also points out that the intentional gaps left in solid-built jetties to allow passage through of small craft has not prevented their acceptance as harbor works, *ibid.*, 191.

⁴⁶ As *Reed* (note 1), 190, points out more generally, ‘just what “artificial” features are to be regarded as forming “part of the baseline” is “not always clear” in the convention reference’.

⁴⁷ *Black Sea Case* (note 11), 106 *et seq.* (para. 134).

⁴⁸ See *supra*, note 45.

⁴⁹ *Reed* (note 1), 56; *Carleton* (note 6), 33. This seems to negate the plain meaning of Art. 11, as they still constitute ‘coast’.

⁵⁰ This is defined in the UN DOALOS Baselines Study (note 2), 60 (para. 65), as a ‘place provided with various installations, terminals and facilities for loading and discharging cargo or passengers’.

⁵¹ See *Carleton* (note 6), 35.

⁵² See *Black Sea Case* (note 11), 106 (para. 133).

harbor works'.⁵³ However, as seen above, certain near off-shore terminals – of which an increasing number are being built – if connected to harbor installations by roadways or jetties/piers at least, may be part of the harbor complex as compared with single point moorings, lines of dolphins or submerged turrets for use in loading/unloading large-ship cargo off-shore, even if merely connected by pipeline to the mainland: as in the case, e.g., of the Sea Islands terminal which is at least one and a half miles off Saudi Arabia.⁵⁴ As it has been commented, this wording would not strictly apply to far-out oil and gas rigs as such as they are already covered by Arts. 60 and 80.⁵⁵ Thus, most commentators agree that a structure must normally be 'physically attached to the mainland coast' to have any basepoint value.⁵⁶

7. State Practice and International Jurisprudence

- 18 As seen, State practice has given a broad meaning to harbor works, so including even structures connected to the mainland but away from harbors (such as breakwaters and piers), as valid territorial sea basepoints⁵⁷ (though, as noted, US case-law has treated certain coastally-connected constructions as not constituting harbor works). In some instances even recent additions to ports have been included in the baseline, such as in the case of the second extension of the mole off the Belgian harbor of Zeebrugge in 1970; in the case of which the outermost permanent harbor works are now 3.3 km seaward from a line connecting the normal baseline on both sides of the port, considerably expanding territorial waters in the area as official charts show.⁵⁸
- 19 There have been no clear examples of challenges to the use of artificial structures for this purpose (even from the US) except in a maritime delimitation context such as the Malaysia/Singapore dispute,⁵⁹ concerning the delimitation of the western boundary in the Straits of Johor and the effect of Singapore's land reclamation works when Malaysia filed a case for provisional measures with International Tribunal for the Law of the Sea. Although the Court decreed certain such measures, the case was settled before it could come to an Annex VII-Tribunal.⁶⁰ However, in the oral pleadings, it was argued for Malaysia that an artificial coastline could not constitute a delimitation basepoint in the absence of being connected with 'harbor works' because of the wording of Art. 11⁶¹ and, more generally, that the question of 'land reclamation' was not dealt with specifically in the UNCLOS at all.⁶²
- 20 Some States have claimed rights in their legislation under this article. For example, Tuvalu in S. 2 (2) of its Marine Zones (Declaration) Ordinance (1983) states that 'permanent harbour works that form an integral part of a harbour system shall be regarded as part of the coast, installations or artificial islands'.⁶³ It seems, then, that most man-made structures used as territorial sea basepoints have either been acquiesced in or accepted by other States, especially where these have been notified to the UN under Art. 16. However, as was noted in this very context in the *Black Sea Case* by the ICJ, although in the first instance a coastal State may determine its own relevant basepoints (quoting the *Fisheries Case*⁶⁴), this is 'nonetheless

⁵³ Nordquist/Nandan/Rosenne (note 13), 122.

⁵⁴ See *Carleton* (note 6), 38–39.

⁵⁵ Nordquist/Nandan/Rosenne (note 13), 122.

⁵⁶ E.g., *McDougal/Burke* (note 13), 422.

⁵⁷ See *supra*, MN 3.

⁵⁸ See *Erik Franckx*, Belgium and the Law of the Sea, in: Tullio Treves (ed.), *The Law of the Sea: The EU and its Member States* (1997), 38–39.

⁵⁹ *Land Reclamation Case* (note 6), 52.

⁶⁰ *Carleton* (note 6), 55.

⁶¹ See the argument of Professor James Crawford in *Land Reclamation Case* (note 6), 7, 11, where he emphasised that at the start of the dispute in 1980 there was no such artificial coastline in existence.

⁶² See the argument by Professor Nicolaas J. Schrijver in the *Land Reclamation Case* (note 6), 13.

⁶³ See also S. 2 (2) Solomon Islands Delimitation of Marine Waters Act, Act No. 32 (1978).

⁶⁴ ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 132.

an exercise which has always an international aspect' (as in the case of all claimed baselines).⁶⁵ Despite this, the implied tenor of the judgment in that case is that in essence, possibly at least because of the absence of protest there, the seaward end of the dyke was seemingly viewed as a valid Romanian territorial sea basepoint by the Court; its use having not been 'contested' by Ukraine.⁶⁶

In delimitation agreements, artificial structures have often not been discounted – as in the UK-French agreement on Dover Strait and the similar one with Belgium.⁶⁷ This is not surprising as such basepoints, as seen, can be considered as technically part of the normal low-tide baseline and so may *prima facie* influence any median/equidistance line. Thus in the *Dubai/Sharjah Border Arbitration*, the tribunal – after referring to the illustrations of State practice on this issue in the pleadings on the effect of harbor works on a delimitation of boundaries – stated that this showed that 'there is a body of practice, and of conventional law, in which full effect has been given to harbour works in the construction of maritime boundaries' between States,⁶⁸ and that giving full effect to them would not (in the case of the harbor works of both disputing States) produce an inequitable result.⁶⁹

In the *Black Sea Case*, though, the ICJ indicated that artificial basepoints – such as the Sulina Dyke – used by one party to a maritime dispute as a territorial sea basepoint may be discounted in a maritime boundary delimitation dispute because of the otherwise inequitable result.⁷⁰ Romania had argued that the equidistance line in the Black Sea should take account of the 'seaward end of Sulina Dyke',⁷¹ relying particularly on the fact of this baseline having been previously communicated to the UN under Art. 16 for the purpose of measuring the territorial sea.⁷² Surprisingly, even Ukraine itself had accepted use of it by Romania for the purposes of determining a provisional equidistance line;⁷³ and, what is more, had not contested the use of Sulina as a Romanian territorial sea basepoint.⁷⁴ The Court accepted that the dyke was a permanent work, but seemingly not as part of integral 'harbor works'.⁷⁵ In so doing, as seen above, the Court made several useful interpretations of the wording of Art. 11. However, on the delimitation issue, the Court finally decided to take account of its basepoint at the landward end where it adjoined the mainland, opining that the 'specific characteristics of the seaward end' of this dyke 'irrespective of its length', ruled it out as a relevant basepoint for a provisional equidistance line.⁷⁶ It is noteworthy, however, that in so doing, the ICJ stressed that the issue of determining baselines 'for the purpose of measuring the breadth' of maritime zones and delimitation of the exclusive economic zone and continental shelf between adjacent/opposite States 'are two different issues'.⁷⁷

⁶⁵ *Black Sea Case* (note 11), 108 (para. 137).

⁶⁶ *Ibid.*, 107 (para. 135).

⁶⁷ See, e.g., *Carleton* (note 6), 60–61, citing, *inter alia*, the detached mole in Dover harbor having been given full weight as part of the UK baseline for delimitation purposes with France; in the UK/Belgian continental shelf delimitation the extended harbor works from Zeebrugge, and also Ostende, were taken into account, *cf. Franckx* (note 58), 39.

⁶⁸ *Dubai/Sharjah Border Arbitration* (note 12), 662.

⁶⁹ *Ibid.*

⁷⁰ See *Carleton* (note 6), 62.

⁷¹ *Black Sea Case* (note 11), 103 (para. 123) and 106 (para. 130), as seen above, the construction extended extensively (7.5 km) to sea.

⁷² See *supra*, note 58.

⁷³ *Black Sea Case* (note 11), 104 (para. 125).

⁷⁴ *Ibid.*, 107 (para. 135).

⁷⁵ *Ibid.*, 106 (para. 133).

⁷⁶ *Ibid.*, 108 (para. 137).

⁷⁷ *Ibid.*

Article 12
Roadsteads

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Gilbert Gidel*, Le droit international public de la mer, vol. II (1932–1934); *Myers S. McDougal/William T. Burke*, The Public Law of the Oceans (1962); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *J. Ashley Roach/Robert W. Smith*, United States Responses to Excessive Maritime Claims (2nd edn. 1996); *Marjorie Whiteman* (ed.), US Department of State: Digest of International Law, vol. IV (1965); *Rüdiger Wolfrum*, Germany and the Law of the Sea, in: *Tullio Treves* (ed.), The Law of the Sea: the European Union and its Member States (1997), 199–224

Documents: ILC, Report of the International Law Commission, UN Doc. A/2693 (1954), GAOR 9th Sess. Suppl. 9, reproduced in: ILC Yearbook (1954), vol. II, 140–173; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; League of Nations, Territorial Waters, Basis of Discussion Drawn up for the Conference by the Preparatory Committee, LN Doc. C.74.M.39.1929.V (1929); UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989)

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I. Purpose and Function

- 1 The purpose of this article, which corresponds with Art. 9 Convention on the Territorial Sea and the Contiguous Zone (CTSCZ), is not concerned with baselines from which the territorial sea is measured,¹ but with creating a possible extension to the outer limits of the general territorial sea where a roadstead – normally a safe anchorage adjacent to (but separate from) a port a short distance from the coast² – is claimed by a coastal State.³ In such an instance the roadstead itself becomes part of that State’s territorial sea because of the

¹ UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989), 34 (para. 78); cf. the Hague Codification Conference 1930, which described ‘roadsteads’ as sea areas from which loading and unloading of ships took place, but originally proposed that ‘territorial waters’ were to be measured from ‘the exterior boundary of [such a] roadstead’; however, following a UK-based amendment, the Second Committee stated that such waters were contained in the ‘territorial sea’, League of Nations, Territorial Waters, Basis of Discussion Drawn up for the Conference by the Preparatory Committee, LN Doc. C.74.M.39.1929.V. (1929), 47; see further *Marjorie Whiteman* (ed.), US Department of State: Digest of International Law, vol. IV (1965), 266–267.

² See *Gilbert Gidel*, Le droit international public de la mer, vol. II (1932–1934), 22–25; though he viewed them as part of internal waters if not delimited arbitrarily. The ILC, in a commentary to their 1954 Report, stated it did not wish to include roadsteads in internal waters as it ‘wished to preserve the right of innocent passage’. The ILC further considered that coastal State rights were sufficiently safeguarded by the recognition of such waters as territorial sea as opposed to internal waters, ILC, Report of the International Law Commission, UN Doc. A/2693 (1954), GAOR 9th Sess. Suppl. 9, reproduced in: ILC Yearbook (1954), vol. II, 140, 156; cf. *Whiteman* (note 1), 270.

³ UN DOALOS Baselines Study (note 1), 34. (para. 78).

relative proximity to the coast, whether wholly or partly detached from it. Such zones have rightly been said to have ‘very limited practical application’⁴ and few exist in practice particularly since the advent of a 12 NM territorial sea.⁵

II. Historical Background

The history of this provision is well-documented.⁶ In substance, the article is based on the 1930 Hague Codification Conference Text.⁷ At UNCLOS I the main controversies relating thereto concerned roadsteads situate wholly outside the territorial sea⁸ and whether they created merely a territorial sea enclave surrounded by the High Seas.⁹ One change made (apart from the addition of the head ‘Roadsteads’ to the article) from the 1958 CTSCZ at the UNCLOS was a drafting and re-positioning issue: namely, the removal of the second sentence in Art. 9 CTSCZ which had stated that: ‘The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given.’¹⁰ This was done as part of a more a general ‘tidying-up’ exercise to collect together all such zonal publicity obligations into one dedicated article.

III. Elements

1. Meaning of ‘Roadstead’

This had been defined in the UN-Baselines Study as ‘an area near the shore where vessels are intended to anchor in a position of safety; often situated in a shallow indentation of the coast’.¹¹ Because of possible lack of natural geographically-defining limits in such areas – i.e., being generally situated in the open sea – there is now (as seen above) an obligation under the UNCLOS to show them on charts or by way of geographical coordinates (→ Art. 16).¹²

2. ‘normally used for loading, unloading and anchoring’

The adverb ‘normally’ was added by the ILC at its 7th session in 1955.¹³ The addition of the word to the text of Art. 12 applies extra objectivity to assessment of the legality of any such claimed areas of sea; and approximates the purposes of such zones directly to those regarding ports and harbors. It has been argued that the three words loading, unloading and

⁴ Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 48; see also Myres S. McDougal/William T. Burke, *Public Order of the Oceans* (1962), 424.

⁵ One of the few recent examples is the roadstead claimed by Australia near the port of Karumba in Queensland in 2000, see *infra*, note 27.

⁶ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 124–125; Whiteman (note 1), 263–267.

⁷ *Ibid.*, 270; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 16.

⁸ ILC Law of the Sea Articles with Commentaries (note 7).

⁹ McDougal/Burke (note 4), 425–426; Whiteman (note 1), 272–273.

¹⁰ This sentence was dropped in UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151; see also Nordquist/Nandan/Rosenne (note 6), 125. The gist of this publicity obligation is now contained in Art. 16: (‘lines of delimitation in accordance with article 12’); for an isolated example in more recent times, see the notification by Australia in 2000 relating to a claimed roadstead near the port of Karumba, UN DOALOS, Law of the Sea Information Circular No. 16 (2002), 25.

¹¹ UN DOALOS Baselines Study (note 1), 47.

¹² Nordquist/Nandan/Rosenne (note 6), 125; see Symmons on Art. 16 MN 6, which differs in the wording from that in Art. 9 CTSCZ essentially in allowing roadstead ‘lines of delimitation’ to be indicated by geographical coordinates instead of on charts.

¹³ This qualification did not appear in the inherited Hague Codification Conference text (1930), restated by Whiteman (note 1), 126; the UK had in 1955 suggested the word ‘substantially’ should be added, cf. Whiteman (note 1), 269.

anchoring need not be fulfilled simultaneously, but only alternatively and disjunctively;¹⁴ as in a case where no loading or unloading occurred in a claimed deep-water roadstead off the German coast, merely anchorage of ships.

3. ‘situated wholly or partly outside [...] the territorial sea’

- 5 The 1930 Hague Codification Conference proposals dealt only with roadsteads partly outside the general belt of territorial sea;¹⁵ but in 1954 this areal limit was expanded by the ILC to include such areas even outside the ‘outer limit of the territorial sea’.¹⁶ As roadsteads generally exist in the proximity of the coast, they were likely to have more relevance when and where more modest territorial sea distances were claimed (i. e., the 3 NM breadth). Now that most States claim 12 NM, the existence and need for such zones, as stated above, seems to be largely gone, as in the case of the past German claim to a roadstead where the extension of the German territorial sea to 12 NM from 3 NM meant a significant part of the controversial roadstead was then absorbed into the main German territorial sea.¹⁷
- 6 Where a ship is at anchor in a claimed roadstead, it has been argued that the coastal State has extensive jurisdiction over it in view of the fact that it may be viewed as technically no longer in (innocent) passage.¹⁸ As Art. 18 (1)(a) indicates, a ship may only be in such ‘passage’ if it is traversing a territorial sea without ‘calling at a roadstead’, but may be in such passage if it is proceeding ‘to or from’ a ‘call at a roadstead’.¹⁹

4. ‘are included in the territorial sea’

- 7 Despite some UNCLOS I attempts to provide that waters intervening between a roadstead wholly beyond the general territorial sea (i. e., that generated from conventional baselines) and the roadstead’s territorial sea should have the same legal status as that of the roadstead regime itself, this was rejected; so that any such intervening waters are unaffected in terms of freedom of navigation.²⁰ To date, only one claim seems to have been made which included closure lines out to a roadstead situated outside a general territorial sea line; and that was by the (then) Federal Republic of Germany in 1984. This led to a strong protest from the US, but only on the basis that it was illegal to enclose an outlying roadstead situated wholly outside the ‘general territorial sea’ as part of the latter.²¹ Suggestions that roadsteads should have the same regime as ports and constitute ‘internal waters’ were rejected at an early stage in the provision’s history.²²
- 8 Whether a roadstead is includable wholly in the territorial sea, or is a separate detached and enclaved part of it, depends on whether the roadstead as claimed overlaps with the general (coastally-based) territorial sea claim of a State.²³ If the two areas overlap, the effect

¹⁴ Rüdiger Wolfrum, Germany and the Law of the Sea, in: Tullio Treves (ed.), *The Law of the Sea: The European Union and its Member States* (1997), 199, 203; he further argues that the German claim (*infra*, note 25) was justified in the interests of traffic safety, but this is a controversial assertion.

¹⁵ Whiteman (note 1), 268.

¹⁶ *Ibid.*

¹⁷ See Wolfrum (note 14), 204.

¹⁸ See McDougal/Burke (note 4), 419, emphasise that in a roadstead a coastal State’s jurisdiction is not as extensive as in a port; see also ILC Law of the Sea Articles with Commentaries (note 7), 16 (Art. 9), which stated that a coastal State should be able to exercise special supervisory and police rights in such roadsteads.

¹⁹ See further, Barnes on Art. 18 MN 6.

²⁰ An attempt by the Netherlands to propose the main territorial sea zone should be extended to include and swallow up a notionally detached roadstead, rather than to leave an enclave surrounded by high seas, was rejected at the UNCLOS I: Netherlands: Proposal, UN Doc A/CONF.13/C.1/L.67 (1958), OR III, 230; Whiteman (note 1), 272–273.

²¹ J. Ashley Roach/Robert W. Smith, *United States Responses to Excessive Maritime Claims* (2nd edn. 1996), 126.

²² ILC Law of the Sea Articles with Commentaries (note 7), 16 (Art. 9).

²³ UN DOALOS Baselines Study (note 1), 125.

of using the roadstead's outer limits as part of the territorial sea will be to create a bulge of such limits in that location, like the effect of a low-tide elevation. If the roadstead is wholly detached – a situation now increasingly unlikely, as seen – an intervening space of international waters (formerly high seas) will interpose between the two territorial sea regimes.²⁴

5. State Practice and International Jurisprudence

There is very little State practice, and no international jurisprudence, on Art. 12. An exception to this was the attempt by Germany in 1984 to justify an extension of its territorial sea to 16 NM in one area by claiming inclusion therein of an off-shore roadstead there; but this was tacitly withdrawn in 1994 when the area became largely absorbed by the new 12 NM limit of territorial sea and the intervening waters between the 12 NM territorial sea and roadstead were converted to an EEZ.²⁵ In a protest note in 1985, the US had stated that it refused to recognize any aspect of the German move to extend its territorial sea beyond 12 NM; and that: '[T]he waters lying between an outlying roadstead and the general territorial sea are not territorial in nature, and the high seas freedoms applicable to those intervening waters cannot be prejudiced by the coastal State.'²⁶

One of the few announced instances since 1985 of a detached roadstead was that of Australia; which in 2000 deposited under Art. 16 a list of co-ordinates of points for drawing the extended outer limits of the territorial sea in the southern area of the Gulf of Carpentaria to include the part of the roadstead near the port of Karumba in Queensland and giving the outer limits of the claimed roadstead, as established under its proclamation of 28 August 2000 under the Seas and Submerged Lands Act, 1973.²⁷

Article 13 Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

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²⁴ See *McDougal/Burke* (note 4), 420; there was a move by some States at UNCLOS I to designate even the interposing area as part of the territorial sea, see *Whiteman* (note 1), 271.

²⁵ Proclamation of 11 November 1994 by the Government of the Federal Republic of Germany concerning the extension of the breadth of the German territorial sea, UN DOALOS, LOSB No. 27 (1995), 55 *et seq.*; *Wolfrum* (note 15), 204; *cf. Churchill/Lowe* (note 4), 48; and *Roach/Smith* (note 21), 126–128.

²⁶ Note dated 15 March 1985, *cf. Roach/Smith* (note 21), 126, 128.

²⁷ Australian Maritime Zone Notification 36 (2000), reproduced in: UN DOALOS, LOSB No. 45 (2001), 45 *et seq.*

EJIL:Talk! Blog 29 January 2015, available at: <http://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration/>; *Hartini Dipla*, Le regime juridique des îles dans le droit international de la mer (1984); *Harm M. Dotinga/Alfred H. A. Soons*, The Netherlands and the Law of the Sea, in: Tullio Treves (ed.) *The Law of the Sea: The European Union and its Member States* (1997), 365–426; *Erik Franckx*, Belgium and the Law of the Sea, in: Tullio Treves (ed.), *The Law of the Sea: The European Union and Its Member States* (1997), 37–96; *Michael Gagain*, Climate Change, Sea Level Rise and Artificial Islands: ‘Saving the Maldives’ Statehood and Maritime Claims through the ‘Constitution of the Oceans’, *Colo. J. Int’l Envtl. L. & Pol’y* (2012), 77–120; *David H. Gray*, The Use Or Abuse of ‘Normal’ Territorial Sea Baselines (2008), available at: http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Papers/Session7-Paper2-Gray.pdf; *David Hancox/J. R. Victor Prescott*, A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst those Islands, IBRU Maritime Briefing 1(6) (1995); *Elisio B. Jamine*, Maritime Boundaries Delimitation, Management and Dispute Resolution: Delimitation of the Mozambique Maritime Boundaries with Neighbouring States (Including the Extended Continental Shelf) and the Management of Ocean Issues (2006–2007); *Hiran W. Jayewardene*, The Regime of Islands in International Law (1989); Robert Jennings/Arthur Watts (eds.), *Oppenheim’s International Law* (9th edn. 1992); *Sophia Kopela*, 2007 Archipelagic Legislation of the Dominican Republic, *IJMCL* 24 (2009), 501–533; *Barbara Kwiatkowska*, The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Delimitation, *ODIL* 32 (2001), 1–25; *Roberto Lavalle*, Not Quite a Sure Thing: the Maritime Areas of Rocks and Low-Tide Elevations under the UN Law of the Sea Convention, *IJMCL* 19 (2004), 43–69; *Hugo I. Llanos*, Low-Tide Elevations: Reassessing their Impact on Maritime Delimitation, *Pace International Law Review* 14 (2002), 256–272; *Alan V. Lowe*, The United Kingdom and the Law of the Sea, in: Tullio Treves (ed.), *The Law of the Sea: The European Union and its Member States* (1997), 521–554; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982); *Gregory Poling*, The Legal Challenge of China’s Island Building, *Asian Maritime Transparency Initiative* (2015); *Michael W. Reed*, The Development of International Maritime Boundary Principles through United States Practice, in: US Department of Commerce (ed.), *Shore and Sea Boundaries*, vol. III (2000); *Clive Schofield*, The Trouble with Islands: the Definition and Role of Islands and Rocks in Maritime Delimitation, in: Seoung-Yong Hong/Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea* (2009), 19–38; *Sandra H. Shaw/Daniel J. Dzurek*, Charts in the Law of the Sea, in: Dorinda G. Dallmayer/Louis DeVorse (eds.), *Deciding and Drawing Maritime Boundaries* (1989), 15–24; *Clive R. Symmons*, The Maritime Zones of Islands in International Law (1979); *Clive R. Symmons*, Some Problems Relating to the Definition of ‘Insular Formations’ in International Law: Islands and Low-Tide Elevations, IBRU Maritime Briefing 1(5) (1995), 1–32; *Clive R. Symmons*, When is an ‘Island’ not an ‘Island’ in International Law: The Riddle of Dinkum Sands in the Case of *US v. Alaska*, IBRU Maritime Briefing 2(6) (1999); *Clive R. Symmons*, Ireland and the Law of the Sea (2nd edn. 2000); *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015); *Prosper Weil*, Les haut fonds decourant dans la delimitation maritime, a propos des paragraphes 200–209 de l’arret de la Cour Internationale de Justice du 16 Mars 2001 en L’Affaire de la Delimitation Maritime et Questions Territoriales Entre Qatar et Bahrein, in: Nisuke Ando/Edward McWhinney/Rüdiger Wolfrum (eds.), *Liber Amicorum for Judge Shigeru Oda*, vol. I (2002), 307–321; Marjorie Whiteman (ed.), *US Department of State Digest of International Law*, vol. IV (1965); *Rüdiger Wolfrum*, Germany and the Law of the Sea in: Tullio Treves (ed.), *The Law of the Sea: The European Union and Its Member States* (1997), 199–224

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Cases: ICJ, *Minquiers and Ecrehos Case* (France v. United Kingdom), Judgment of 17 November 1953, ICJ Reports (1953), 47; ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40; ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports (2007), 659; ICJ, *Case of Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge* (Malaysia/Singapore), Merits, Judgment of 23 May 2008, ICJ Reports (2008), 12; ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment of 19 November 2012, ICJ Reports (2012), 624; PCA, *Award of the Arbitral Tribunal in the First Stage – Territorial Sovereignty and Scope of the Dispute* (Eritrea v. Yemen), 9 October 1998, available at: http://www.pca-cpa.org/showpage6e71.html?pag_id=1160; PCA, *Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation* (Eritrea v. Yemen), 17 December 1999, RIAA XXII, 335; PCA, *South China Sea Arbitration* (Republic of the

Philippines v. People's Republic of China), Award of 12 July 2016, available at: <https://www.pcacases.com/web/view/7>; *Post Office v. Estuary Radio Ltd*, [1968] 2 QB 740, 761 (UK); *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Alaska*, 521 U.S. 1 (1997)

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I. Purpose and Function

It has been stated that this article is 'another example' of where a coastal State may use other than the normal baseline.¹ However, it may be argued that the baseline here has an affinity with the normal baseline insofar as it does not come into the residual category of 'artificial' basepoints or straight baselines permissible in Arts. 7 and 9–11. This is because where a low-tide elevation (as here defined and hereafter referred to as a 'LTE') is situated wholly or partly within the territorial sea of the mainland or an island *stricto sensu*, it is allowed to generate a territorial sea from its low-water line in a similar way to an island; and in this sense may be dubbed a 'fictive island' as earlier definitions (as at the 1930 Hague Codification Conference) indicated.² Indeed, some States have treated any intraterritorial³ LTEs as if they were islands; such as Belize in its legislation,⁴ although in definitional terms (despite having to be 'naturally formed' and 'surrounded by' water), LTEs differ greatly from true islands in that they only normally surface at low tide, not at high tide. Similarly, early codification attempts, such as in 1930, tended to approximate LTEs (as now known) to islands proper.⁵ ANTUNES aptly remarks that the phrase – 'may be used as the baseline for measuring the breadth of the territorial sea' – can be seen as 'an implicit allusion to Article 5' which, using the same phrase, defines the normal (low tide) baseline by reference to official charts.⁶

¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 127.

² See Marjorie Whiteman (ed.), *US Department of State: Digest of International Law*, vol. IV (1965), 297, 306 making reference to: ILC, Second Report on the Regime of the Territorial Sea by J. P. A. François, Special Rapporteur, UN Doc. A/CN.4/61 (1953), where intraterritorial 'elevations of the seabed' (i.e., those within territorial sea distance of a mainland or island) were said to be 'treated as islands' and the fact several States then favored treating drying rocks as 'islands' for all purposes.

³ See *ibid.*, for the meaning of this term here and elsewhere in this commentary.

⁴ See UN DOALOS, Legal Information Relevant to UNCLOS, LOSB No. 21 (1992), 3; and, e.g., the legislation of the Bahamas *infra*, note 69; also Clive R. Symmons, Some Problems Relating to the Definition of 'Insular Formations' in International Law: Islands and Low-Tide Elevations, IBRU Maritime Briefing 1(5) (1995), 1, 7; and Hartini Dipla, Le regime juridique des îles dans le droit de la mer (1984), 69, stating that LTEs are 'en principe assimilés aux îles' if situated within the territorial sea of other land.

⁵ See Symmons (note 4), 14.

⁶ Nuno Antunes, The Importance of the Tidal Datum in the Definition of Maritime Limits and Boundaries, IBRU Maritime Briefing 2(7) (2000), 1, 14. See now the Award in the Merits in the Philippines v. China: PCA, *South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China), Award of 12 July 2016,

- 2 Hence in such an intraterritorial instance there is a similar notional coalescence of mainland and LTE-generated territorial sea as happens in the case of islands; though here, as its effect is 'geographically limited to [its] coastal location', such coalescence is essentially 'parasitic'.⁷ For the latter reason – and because a LTE does not autonomously generate any maritime zones, but only in conjunction with the general territorial sea regime⁸ – it is only in the latter way that it may generate the major maritime zones. So that, as will be seen, for this reason there is no analogy with Art. 121 (3) on uninhabitable rocks⁹ (which are to be considered as 'islands'). This feature of 'parasitic' attachment to waters within a territorial sea avoids any anomaly with the rule under Art. 121 (1) concerning certain rocks (outside the territorial sea) being disqualified from generating the major maritime zones.
- 3 Under Art. 13 (2), where such a formation is situated wholly outside the territorial sea, unlike an island it generates no maritime zones for its owner; and thus is treated, in effect, as part of the seabed.¹⁰ Nonetheless, similar to a near off-shore island, the permissible use of this more seaward basepoint, if it is intraterritorially situated (even marginally), will create a bulge in the mainland/island generated territorial sea (and possibly other) limits and so enhance maritime jurisdiction in that area.¹¹

para. 331, available at: <https://www.pccases.com/web/view/7>, where the arbitral tribunal commented that although UNCLOS 'gives important weight to published nautical charts', and Art. 5 'provides for States to use the low-water line on large-scale charts as the baseline for the territorial sea', the provision 'envisages a situation in which a State is presenting information concerning its own coastlines in areas which can be expected to be well surveyed'; but that considerations 'of an altogether different nature arise where [as in the case], a determination involves the status of remote features, subject to the demands of competing States, that have been carefully surveyed only infrequently'.

⁷ Symmons (note 4), 4–7; cf. *Hugo I. Llanos*, Low-Tide Elevations: Reassessing Their Impact on Maritime Delimitation, *Pace International Law Review* 14 (2002), 256, 258, stating that as a sort of 'adjunct' to the normal low-tide baseline a qualifying LTE may generate territorial sea from its baselines.

⁸ Some commentators seem to wrongly ignore this important factor and maintain – because of the provision in Art. 121 (3) depriving 'rocks' of EEZ/continental shelf-regimes – that *a fortiori* LTEs, even seemingly if intraterritorially placed, must be discounted for such purposes: cf. *Dipla* (note 4), 23, 43; and *Roberto Lavalle*, Not Quite a Sure Thing: the Maritime Areas of Rocks and Low-Tide Elevations under the UN Law of the Sea Convention, *IJMC* 19 (2004), 43–46, who confusingly seems to view such formations as 'proximate', but without the capacity to generate EEZ/continental shelf in an 'autonomous' manner: see further *Eddie D. Brown*, Seabed Energy and Mineral Resources and the Law of the Sea: the Areas within National Jurisdiction, vol. I (1984), para. 1.4.23. As LTEs can **only ever** generate jurisdiction in a parasitic fashion – and never autonomously – the whole of this sort of argument seems somewhat spurious: cf. *Derek W. Bowett*, Islands, Rocks, Reefs and Low-Tide Elevations in Maritime Boundary Delimitation, in: Jon I. Charney/Lew M. Alexander (eds.), *International Maritime Boundaries*, vol. I (1993), 130, 147–148, stating that such elevations 'represent the land-mass' and so create no autonomous title to maritime areas; see also *Llanos* (note 7), 262. See now the Award on the Merits the *South China Sea Arbitration* (note 6), para. 308, where the arbitral Tribunal commented that although Art. 13 (2) does not expressly state that a LTE is 'not entitled to an [EEZ] or continental shelf', this 'restriction is necessarily implied in [UNCLOS]'.

⁹ For example, it has been argued that the transference of the identical LTE article wording from the more restrictive 1958 zonal regime into that of UNCLOS needs to take account of the new phenomena of 200 NM EEZs and a more extensive continental shelf: *Lavalle* (note 8) views this factor as not being explicitly addressed in UNCLOS in the case of LTEs; but in fact such jurisdictional capacity is at least necessarily implicit because Art. 13 shares the standardised reference to 'territorial sea' generation as in other UNCLOS articles, such as Art. 5, which in turn is picked up *seriatim* in the case of the more extensive zones definitions, such as the EEZ under Art. 57.

¹⁰ Symmons (note 4), 6. It may be noted that in the ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports (2007), 659, 720 *et seq.* (paras. 202, 219, 245, 248), the Court repeated what it had said in the ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40, concerning 'features which are **not permanently** above water' (emphasis added) and lying **outside territorial waters**, which were distinguishable from 'islands'. The Court confirmed that four disputed cays were above high tide and thus 'islands' (*ibid.*, 702 (para. 136)), but that there was an insufficiency of evidence as to the identity of a 'number of other maritime features in the disputed area' (*ibid.*, 702 (para. 138)), and that it was not in a position to 'make a determinative finding on the maritime features in dispute' apart from four named islands (*ibid.*, 704 (para. 144)). See also *Sophia Kopela*, 2007 Archipelagic Legislation of the Dominican Republic, *IJECL* 24 (2009), 501, 506.

¹¹ The effect may be significant depending, of course, on the distance of the LTE out to sea, cf. *David H. Gray*, The Use Or Abuse of 'Normal' Territorial Sea Baselines (2008), 5, available at: http://www.ihoint.org/mtg_docs/

II. Historical Background

The article exactly reproduces the low-tide elevation provision in Art. 11 Convention on the Territorial Sea and the Contiguous Zone (CTSCZ); and at UNCLOS III there was little in the way of proposals put forward to change the wording. The history of this article is well documented.¹² Originally, the phrase of the International Law Commission (ILC) to describe the relevant elevations was ‘drying rocks and shoals’.¹³ The wording ‘wholly or partially’ within the territorial sea came about as a later ‘compromise solution’¹⁴ in view of the above-noted support at an earlier stage to analogue LTEs with islands; and happened without complete ILC ‘unanimity’.¹⁵

III. Elements

1. Definition of the Term ‘Low-Tide Elevation’

The elements of the definition are contained in the opening sentence of Art. 11 (1) CTSCZ, namely ‘a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide’. Their now-*verbatim* repeated definition in the UNLOS may indicate that the definition of LTEs is, indeed, now part also of customary law.¹⁶

a) ‘naturally formed area’. This phrase must be interpreted in the same way as in the case of the definition of islands in Art. 121 (1). In other words, to generate any maritime zones at all, the formation must not have been artificially created, such as a spoil heap, to create its above low-tide appearance.¹⁷ The only exception to this requirement of natural protrusion above low-water level is under Art. 7 (4) where, in a straight-baseline context, lighthouses or similar installations permanently above sea level should normally have been built on LTEs to enable them to have basepoint value.¹⁸ This issue has now been discussed in the Award in *Philippines v. China South China Sea Arbitration* (Merits, 2016). There, the arbitral Tribunal stated that a point necessarily following from the LTE’s definition in Art. 13 was that this indicated that the status of such a feature was to be ‘evaluated on the basis of its natural condition’; and that as a ‘matter of law, human modification cannot change the seabed into a [LTE]’; and that a LTE ‘will remain a [LTE] under [UNCLOS], regardless of the scale of the

com_wg/ABLOS/ABLOS_Conf5/Papers/Session7-Paper2-Gray.pdf, who comments that belated use by Canada, in 1986, of two small (previously-overlooked) LTEs on the Labrador Reef, 2.5 NM off the coast, could give Canada an extra 55 square miles of territorial sea in consequence.

¹² Nordquist/Nandan/Rosenne (note 1), 127; Whiteman (note 2), 297 *et seq.*

¹³ ILC, Report of the International Law Commission, UN Doc. A/2693 (1954), GAOR 9th Sess. Suppl. No. 9, reproduced in: ILC Yearbook (1954), vol. II, 140, 156; Whiteman (note 2), 307.

¹⁴ ILC, Troisième rapport de M. J.P.A. François, rapporteur special, UN Doc. A/CN.4/77 (1954), reproduced in: ILC Yearbook (1954), vol. II, 13 *et seq.*; Whiteman (note 2), 300, 306.

¹⁵ Michael W. Reed, The Development of International Maritime Boundary Principles through United States Practice, in: US Department of Commerce, Shore and Sea Boundaries, vol. III (2000), 215.

¹⁶ *Dipla* (note 4), 232; UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989), 58 (para. 49).

¹⁷ Compare the analogous problem relating to build-up of LTEs so as to purportedly become ‘islands’ because of the artificial heightening, as e.g., in the case of Subi Reef in the Spratly Islands, amongst the Thitius Reef group, which is clearly a LTE although China has constructed above-high water constructions there, *cf. Symmons* (note 4), 2–3. See also *Talmon* on Art. 121 MN 19–26. In the arbitration brought by the Philippines against China concerning the South China Sea, the Philippines statement of claim alleged that certain submerged features, under present Chinese occupation, are at best mere LTEs, even if they have ‘artificial islands’ constructed on top of them: PCA, *The Republic of the Philippines v. The People’s Republic of China*, Notification and Statement of Claim of 22 January 2013, para. 14, available at: <https://seasresearch.wordpress.com/2014/12/17/2nd-press-release-from-pca-the-arbitral-tribunal-sets-further-proceedings/>. See also Award on Merits (note 6).

¹⁸ *Symmons* (note 4), 3; and further Clive R. Symmons, The Maritime Zones of Islands in International Law (1979), 29, 35.

island or installation built atop it'.¹⁹ The Tribunal noted that many of the features in the South China Sea had been 'subjected to substantial human modifications as large islands constructed on top of coral reefs'; so that in some cases, 'it would likely no longer be possible to directly observe the original status of the features, as the contours of the reef platform have been entirely buried by millions of tons of landfill and concrete'. In such circumstances the Tribunal decided that '[UNCLOS] requires that the status of a feature be ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification'.²⁰

- 7 **b) 'area of land'.** The term 'low-tide elevations' (proposed by the US at UNCLOS I)²¹ was substituted at UNCLOS I for the original phrase favored by the ILC in their draft Art. 11 CTSCZ, namely 'drying rocks and drying shoals',²² so that qualifying elevations need no specific geological make-up or size.²³ Thus, apart from rocks, such formations may include sand, mud, coral etc. – in fact any terrestrially-formed shoals appearing at low water.²⁴ The phrase 'of land' also is contained in the definition of an island in Art. 121 (1). As, in essence, 'land' in such instances means that the formation must have a terrestrial composition, problems here may exceptionally arise (as also in the case of islands) where part of the natural components are formed, for example, from ice, as in the case of Dinkum Sands off Alaska where the tiny formation in question was composed of alternating layers of frozen sea-water and gravel deposits (in *US v. Alaska*)²⁵. The impermanency of this was illustrated by 'thermo-erosion' and so 'ice collapse' in a summer period.²⁶ In such a case arguably the 'excess ice' has to be discounted in assessing the low-tide status as it does not have a truly terrestrial and permanent nature.
- 8 An allied question relating to LTE 'land' status is whether they are equivalent to 'territory' in international law, and so capable of appropriation.²⁷ This question arose in the 2001 *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, where an acknowledged LTE, *Fash ad Dibal*, was situated in the overlapping territorial sea of both contesting States; and in the case of which Bahrain argued that LTEs, whatever their location, were subject to the law which governs the acquisition of territory and thus were 'capable of appropriation'.²⁸ The International Court of Justice (ICJ) there rejected the idea that a LTE outside a State's territorial sea, could, like an island, be subject to rules relating to acquisition of territory.²⁹ This decision has been recently reinforced by the Award on the Merits in the *Philippines v. China South China Sea Arbitration* (2016), where the Tribunal commented that 'notwithstanding the use of the term 'land' in the physical description of a [LTE in UNCLOS]', such LTEs 'do not form part of the land territory in a legal sense'; but rather 'form part of the submerged landmass of the State'. Accordingly, they 'cannot be appropriated; though a coastal State has sovereignty' over LTEs situate within its territorial

¹⁹ *South China Sea Arbitration* (note 6), para. 305.

²⁰ *Ibid.*, para. 306. Thus the Tribunal indicated that it would reach its decision on certain features 'on the best available evidence of the previous status of what are now heavily modified coral reefs'.

²¹ First Committee UNCLOS I, United States of America: Proposal, UN Doc. A/CONF.13/C.1/L.115 (1958), OR III, 243.

²² See *Llanos* (note 7), 260, following a proposal from the US which objected to the aforementioned phrase as being 'irrelevant and vague'.

²³ Nordquist/Nandan/Rosenne (note 1), 128.

²⁴ Whiteman (note 2), 304, notes that coral-formed elevations would be equivalent to terrestrial components despite their living-organism origin.

²⁵ *United States v. Alaska*, 521 U.S. 1 (1997); Symmons (note 4), 3–4.

²⁶ Symmons (note 4), 4.

²⁷ In fact this question incidentally arose as early as 1953 in the ICJ, *Minquiers and Ecrehos Case* (France v. United Kingdom), Judgment of 17 November 1953, ICJ Reports (1953), 47, 53, where the ICJ remarked that in order to be capable of appropriation, territory needed to be 'permanently above high tide, thus not a drying rock 'only uncovered at low tide', unless already within the territorial waters of the 'appropriative territory'.

²⁸ *Qatar/Bahrain Case* (note 10), 100 (para. 200); see also *Qatar/Bahrain Case* (note 10), Counter-Memorial of Bahrain, 11 June 1992, 39 (para. 5.24), available at: <http://www.icj-cij.org/docket/files/87/7025.pdf>.

²⁹ *Qatar/Bahrain Case* (note 10), 101 *et seq.* (paras. 202, 245, 248).

sea, 'since it has sovereignty over the territorial sea itself'.³⁰ The Philippines argued in the case that in the light of previous international caselaw, 'sovereignty and other rights' in relations to LTEs are determined 'by the maritime zone in which they are located';³¹ hence, that Mischief Reef was in its EEZ and on its continental shelf; and so subject to its 'sovereign rights', without the need for occupation or express proclamation.³² The Tribunal endorsed this viewpoint and decided that LTEs 'as distinct from land territory' 'cannot be appropriated';³³ and stated that Mischief Reef could 'only constitute part of the [EEZ] and continental shelf of the Philippines'.³⁴ However, in the *Eritrea/Yemen Arbitration First Stage* (1998), the tribunal seems to have decided implicitly that LTEs outside a territorial sea could be subject to territorial jurisdiction.³⁵ The abovementioned principle in the *Qatar/Bahrain Case* has, however, since been repeated in three later cases by the ICJ³⁶ and, most recently, as seen, by an arbitral tribunal.³⁷ Such case-law indirectly analogises, in the law of the sea, with the rule regarding the 'parasitic' value of LTEs in creating maritime jurisdiction only where they are located in intraterritorial limits. It seems now from the abovementioned ruling in the *Philippines v. China South China Sea Arbitration* that similarly LTEs lying in a State's EEZ or on its continental shelf ipso jure belongs to that State. So that there Mischief Reef was a feature which fell 'within the regime for the continental shelf' as a part of the 'submerged landmass'.³⁸

Reefs (→ Art. 6) may constitute low-tide elevations, even though formed of coral (including isolated ones), particularly as the *travaux préparatoires* seem to indicate that the intention underlying use of the phrase 'fringing reefs' was to restrict any baseline to the seaward side only of drying reefs.³⁹

c) 'surrounded by [...] water'. This requirement is also necessary for an 'island' under Art. 121 (1). It means that in the case of an inter-tidal area, a formation drying at low tide and attached to the shore by, for example, a sandbar at low tide, will deprive the projecting formation of a low-tide elevation status as such; for it is then merely part of a mainland, or

³⁰ *South China Sea Arbitration* (note 6), para. 309. See also the Tribunal's comments in section E of its Award ('Occupation and Construction Activities on Mischief Reef' (Submission No.12).

³¹ *Ibid.*, para. 1018.

³² *Ibid.*

³³ *Ibid.*, paras. 1040, 1043.

³⁴ *Ibid.*, para. 1030.

³⁵ PCA, *Award of the Arbitral Tribunal in the First Stage – Territorial Sovereignty and Scope of the Dispute* (Eritrea v. Yemen), 9 October 1998, 147 (para. 527), available at: http://www.pca-cpa.org/showpage6e71.html?pag_id=1160 ('LTEs' forming the Mohabbahah Islands 'are subject to the territorial sovereignty of Eritrea'); see *Kopela* (note 10), 501, 506; and see *Prosper Weil*, Les haut fonds decourant dans la delimitation maritime, a propos des paragraphes 200–209 de l'arrêt de la Cour Internationale de Justice du 16 Mars 2001 en L'Affaire de la Delimitation Maritime et Questions Territoriales Entre Qatar et Bahrein, in: Nisuke Ando/Edward McWhinney/Rüdiger Wolfrum (eds.), *Liber Amicorum* for Judge Shigeru Oda, vol. I (2002), 307, 318–319.

³⁶ *Nicaragua/Honduras Case* (note 10), 720 (para. 204); and ICJ, *Case of Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge* (Malaysia/Singapore), Merits, Judgment of 23 May 2008, ICJ Reports (2008), 12 (paras. 295 *et seq.*), where the ICJ did not specifically determine ownership of 'South Ledge' rock, as a LTE, as the respective territorial seas of both States around the formation had not then been delimited. In the most recent instance, the ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment of 19 November, 2012, ICJ Reports (2012), 624, 641 (para. 26), in citing the *Qatar/Bahrain* case, stated that 'low tide elevations cannot be appropriated'; however, 'a coastal State has sovereignty over low-tide elevations which are situated in its territorial sea, since it has sovereignty over the territorial sea itself' (emphasis added): by contrast, the only formation on Quitasueno bank found by the Court to be an 'island' there (QS32) was held to be capable of 'appropriation': *ibid.*, para. 37.

³⁷ See *South China Sea Arbitration* (note 6).

³⁸ *Ibid.*, para. 1040.

³⁹ Cf. Hiran W. Jayewardene, *The Regime of Islands in International Law* (1989), 96–97. That reefs may be also LTEs is implied in the *Eritrea/Yemen Arbitration First Stage* (1998) (note 35), 43 (para. 143), and by the fact that the wording of Art. 6 UNCLOS refers to 'the seaward low-water line' of a reef (emphasis added) (so implying also an allowance of mere low-tide appearance of the feature itself). 'Drying reefs' are indeed defined in the Glossary of the IHB, *Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982* (4th edn. 2006), Appendix 1–12, para. 74, as ones which are 'above water at low tide but submerged at high tide'.

island generated, normal low-tide mark.⁴⁰ In general, therefore, this factor should not be problematic in the case of LTEs; but in the *Qatar/Bahrain Case* concerning a request to the ICJ to fix a single-line boundary between the two States, an analogous problem arose over the status of a contested formation, Fasht al Azm.⁴¹ Bahrain there argued this formation was part of the island of Sitrah; whereas Qatar maintained it was simply a LTE that had always been ‘separated from that island by a natural channel (a ‘fisherman’s channel’) which was navigable even at low tide’.⁴² The problem here was complicated by the fact that it was impossible to determine whether the natural channel existed before 1982 when an artificial channel had been made there.

- 11 d) ‘above water at low tide but submerged at high tide’. Unlike the critical balancing phrase ‘above water at low tide’, the latter accompanying phrase (‘submerged at high tide’) is arguably only an essentially descriptive one indicating, on the other side of the coin as it were, the usual geographical circumstances attaching to a LTE.⁴³ This means, for example, that a ‘failed island’ (i.e., a formation which fails to have sufficient permanence of appearance above high tidal datum) may fall into the **residual** category of a LTE despite any occasional **above-high tide** appearances.⁴⁴
- 12 One of the main problems, therefore, in the case of LTEs concerns the qualifying requirement of appearance of a formation **above water at low tide**. Here there is the same problem that attends the definition of an ‘island’ under Art. 121 (1): namely, no tidal datum is here prescribed in UNCLOS regarding the above-water surface requirements.⁴⁵ State practice varies considerably in use of various datums for this purpose;⁴⁶ and so many commentators have not been very incisive over the issue.⁴⁷ Furthermore in the case of potentially qualifying LTEs, their exact height above the required low-water datum may be

⁴⁰ Symmons (note 4), 4.

⁴¹ See Llanos (note 7), 268.

⁴² *Qatar/Bahrain Case* (note 10), 104 (para. 218): the ICJ decided in this case that, even if not a LTE, it constituted a special circumstance in the delimitation.

⁴³ See Antunes (note 6), 13, who aptly describes the concept of a LTE being ‘defined by reference not only to a LW datum, but also in negative terms to the HW datum’ (emphasis added).

⁴⁴ Symmons (note 4), 10–11. Note that in the case of *Nicaragua/Honduras Case* the ICJ stated that ‘features which are not permanently above water, and which lie outside the territorial sea, should be distinguished from islands’: *Nicaragua/Honduras Case* (note 10), 703 (para. 141); and the parties were said to have accepted that that a formation known as Media Luna Cay was now a submerged formation, and so no longer an island (*ibid.*, 704 (para. 143)). Such vague dicta seem to put ‘failed islands’ in a residual category as LTEs or even underwater seabed formations.

⁴⁵ Symmons (note 4), 12–27. See also Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn. 2015), 71. In the *Nicaragua/Colombia Territorial and Maritime Dispute* (note 36), 627, the Court pointed out that the Caribbean Sea has numerous reefs, ‘some of which were above the water surface as cays’, with LTEs which might be ‘located on a bank or shoal’. The two parties disagreed on which features on such a shoal called Quitasueno qualified as ‘islands’ (*ibid.*, 642 (para. 27)). Nicaragua claimed that Quitasueno was a shoal **on which all formations were submerged at high tide** (*ibid.*, para. 28). Colombia, in turn, alleged that there were ‘at least 20 [LTEs] situated well within 12[NMs]’ of one or more of the alleged islands there (*ibid.*, para. 29). Applying the Court’s there-approved tidal model, the Court found that all features on this reef but one (QS32) were **below highest astronomic tide** (‘HAT’), so being mere LTEs, as photographic evidence showed them ‘to be above water at some point in the tidal circle’ (*ibid.*, 645 (para. 38)). It is evident from this vague statement that the ICJ was much less concerned with any requisite legally-required **low tide** datum relating to LTEs compared with that relating to the **high tide** test for ‘islands’. It seems, therefore, misleading to allege that this case set a ‘high bar’ for proof of LTEs (though it may have done so regarding proof of ‘islands’). See Diane Disierto, *The Jurisdictional Rubicon: Scrutinizing China’s Position Paper on the South China Sea Arbitration – Part I*, EJIL:Talk! Blog 29 January 2015, available at: <http://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration/>. In the *Nicaragua/Honduras Case* the ICJ referred to there being in the area to be delimited numerous banks, reefs and cays, some of which were above water at high tide, others above water only at low tide (i.e. LTEs): *Nicaragua/Honduras Case* (note 10), paras. 105, 127.

⁴⁶ Cf. *Dipla* (note 4), 32; and Robert Jennings/Arthur Watts (eds.), *Oppenheim’s International Law* (9th edn. 1992), 104–105.

⁴⁷ Cf. e.g. *Dipla* (note 4), 45, who, whilst commenting on the diversity of State practice relating to this and the fact that several States use the term without precision, concludes rather vaguely that it simply suffices if LTEs uncover ‘at the lowest tide’, even if only ‘very little’.

difficult to assess because of their low-lying nature.⁴⁸ In fact, lowest astronomic tide ('LAT') is increasingly used in the world today as the most appropriate datum for LTEs (see below); but several other datums – such as mean low-water spring tide, mean low-water, low neap tide, mean lower low water – have also been evident in State practice,⁴⁹ with converse equivalents as to high tide datums (the latter of importance in gauging true insular status). The matter of relevant tidal datum has been most recently discussed by the arbitral Tribunal in the Philippines v. China *South China Sea Arbitration* (2016), which noted the use of the term 'high tide' in the definition of both LTEs and islands. The Tribunal stated that the term 'high tide' is 'not a technical term and is potentially subject to a number of different technical interpretations', noting that the International Hydrographic Organisation (IHO) made no recommendation about heights depicted on nautical charts except that highest astronomic tide should be used as the datum for vertical clearances.⁵⁰ The Tribunal concluded in the case that nothing in UNCLOS or customary international law would mandate that the 'status of low-tide elevations [...] be determined against any particular water datum'; so that, accordingly, the Tribunal considered that States are free under UNCLOS to claim a high-tide feature or island on the basis of any high-water datum (and presumably also any low-tide datum) that 'reasonably corresponds to the ordinary meaning of the term "high tide"' (or, it would seem, also of low-tide) in Arts. 13 and 121; and that '[o]rdinarily, this would also be the height datum for nautical charts published by that State, above which rocks would be depicted as not covering at high tide'.⁵¹

It is curious that in the case of LTEs – in the light of this tidal datum ambiguity – the UNCLOS does not here make specific reference to officially recognized charts for depictive reference to such features, as does Art. 5 (in respect of evidencing the coastal 'low water line').⁵²

In the light of such State diversity – and the silence, as seen, as to the relevant tidal datum⁵³ for this purpose in the UNCLOS – adoption by one State of any of the more 'surface-stringent' datums than LAT (e.g. 'mean low-water'), could entail it viewing another State's claimed LTE formation (based on a more liberal test such as LAT) as not constituting such a formation at all because of its very periodic and spasmodic above-water appearances; whereas another State – using the most lax and beneficial low-water test, that of LAT – could argue that the same feature is a LTE because of (even) occasional appearances at such an extreme low-tide level.⁵⁴ Indeed use of LAT (recommended for low water datum use by the IHO)⁵⁵ may mean that often an elevation will not be visible at many, or most, states of the

⁴⁸ Cf. IHB Manual (note 39), Ch. 2-24.

⁴⁹ Symmons (note 4), 17; Antunes (note 6), 7.

⁵⁰ See *South China Sea Arbitration* (note 6), para. 310.

⁵¹ *Ibid.*, para. 311.

⁵² Antunes (note 6), 13–14, aptly remarks, though, that the phrase – 'may be used as the baseline for measuring the territorial sea' (in Art. 13) – can be seen as 'an implicit allusion to Article 5' which defines the normal baseline by reference to official charts, so that the 'low water datum [in the case of LTEs] should be the same as that indicated in Article 5'. Thus it has been argued that impliedly the term 'low-tide' here must refer to those levels 'shown on the officially-recognized charts' of the State concerned, *Peter B. Beazley*, *Maritime Limits and Baselines: A Guide to their Delineation* (2nd edn. 1978), 24; but cf. IHB Manual (note 39), Ch. 4-9, which includes LTEs as 'exceptions' to application of the 'normal' baseline. Compare, though, the analogous situation of Art. 6 on 'fringing reef' baselines, which refers expressly to their seaward low-tide limits having to be 'shown by the appropriate symbol on charts officially recognized by the coastal State' (emphasis added). More recently, the Report of the International Law Association Committee on Baselines under the Law of the Sea took the view that the 'normal baseline' (ie., low tide mark) may also be used under Arts. 6 and 13 of UNCLOS: ILA, Report of the Committee on Baselines under the International Law of the Sea, Sofia Conference (2012), 24.

⁵³ Antunes (note 6), 5.

⁵⁴ Symmons (note 4), 17–18; *Peter B. Beazley*, *Technical Aspects of Maritime Boundary Delimitations*, IBRU Maritime Briefing 1(2) (1994), 1, 6. This happened, for example, in French/Belgian delimitation agreements, as in the case of the formation called 'Banc Breddt', off the French coast: according to Belgian charts, using mean low water spring tides as chart datum, it was not a LTE, but according to French charts, using LAT datum, it was a LTE, cf. Antunes (note 6), 20.

⁵⁵ IHO, Regulations of the IHO for International Charts and Chart Specification of the IHO (September 2013), available at: http://www.iho.int/iho_pubs/standard/S-4/S-4_e4.4.0_EN_Sep13.pdf, B-405.3.

tide. The lack of clarity in the law of the sea is well reflected in a *dictum* from a 1968 British domestic case, concerning a controversial sandbank in the Thames Estuary – *Post Office v. Estuary Radio* – where it was stated prophetically:

‘Upon these [international and municipal] definitions [of LTEs] interesting and difficult questions arise as to whether [a LTE] must be above water at all low tides, at mean low-water spring tides, at admiralty datum, at the lowest tides experienced from time to time (if so, how often?) in the course of a year, or at lowest astronomical tides. Someday some court, municipal or international, may have to decide this.’⁵⁶

- 15 There is also the analogous problem of ‘peripatetic appearance’ of an alleged LTE more generally, caused by constant movement of position (and often surface appearance), as also can happen in the case of so-called ‘occasional islands’.⁵⁷ The fact is that typically low-lying formations which may typically constitute LTEs – such as particularly sand and mud banks – may not only be prone to continual erosion through tide and weather (so that their appearance above low tide at one location may not occur on a regular basis), but may also be subject to constant change of position as ‘ambulatory’ seabed formations. It may be implicit from the above-mentioned *Dinkum Sands* case⁵⁸ where such problems arose, that like an island proper, a true LTE should also have a similar degree of ‘permanence’ and predictability of regular appearance in one location (eg., at least once every 24 hours, consequentially being covered half of every 24 hours);⁵⁹ and that if the formation does not so comply, it is merely part of the seabed.
- 16 Furthermore, the weasel phrase ‘rocks awash’ (at chart datum) is also one that has entered maritime terminology and charting practice; and it should be distinguished from a ‘drying rock’ which implies that the formation does emerge at low-tide datum.⁶⁰ Such low-lying types of formations may be especially subject to inadequate survey work;⁶¹ and even qualifying off-shore LTEs may escape initial charting detection.⁶² Only drying rocks (or other similarly surfacing formations) will now constitute a LTE; though even here there may be a problem with changes in sea level due to global warming, with certain LTEs in danger of disappearing

⁵⁶ *Post Office v. Estuary Radio Ltd*, [1968] 2 QB 740, 761 (UK) (*per* Diplock LJ).

⁵⁷ *Clive R. Symmons*, When is an ‘Island’ not an ‘Island’ in International Law: The Riddle of Dinkum Sands in the Case of *US v. Alaska*, IBRU Maritime Briefing 2(6) (1999), 1, 12–13, 26–28.

⁵⁸ *US v. Alaska* (note 23); see *Symmons* (note 56), 12–13, referring to the US argument therein that there had been ‘dramatic movements of the exposed areas of Dinkum Sands’, often by hundreds of feet.

⁵⁹ A rare example of a ‘time’ factor being used in a multi-faceted way for defining low-water surfacing requirements can be seen in the legislation of Finland (in connection with basepoints for its straight baseline system) where there is reference to a formation having to be ‘above sea level more than one half day per year on the average, at low water levels during the ten-year period preceding when this law takes effect’, Arts. 3 and 4 of the Act on the Delimitation of the Territorial Waters of Finland, Act No. 463 (1956).

⁶⁰ *Jayewardene* (note 39), 6. It has been pointed out that if one changes the chart symbolization of ‘rock awash’ to that of a ‘low tide elevation’, the extent of maritime claim may ‘drastically change’, *Sandra H. Shaw/Daniel J. Dzurek*, *Charts in the Law of the Sea*, in: Dorinda G. Dallmayer/Louis DeVorse (eds.), *Deciding and Drawing Maritime Boundaries* (1989), 15, 18; see further the marginal LTE status of Middleton Reef located 125 NM from the Australian coast, which may be a LTE although allegedly periodically submerged; discussed by *Clive Schofield*, *The Trouble with Islands: the Definition and Role of Islands and Rocks in Maritime Delimitation*, in: Seoung-Yong Hong/Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea* (2009), 19, 34–35. *Gray* (note 11), 9, mentions that during 1982–1992, when Canada and Denmark were investigating an equidistance line between Canada and Greenland, Denmark submitted its list of basepoints, including many rocks just marked with crosses on charts, which Canada objected to because they were charted as being below low-water. On re-survey of these rocks, some were indeed found to be below low-water datum, but one was even found to have a drying height at high tide.

⁶¹ *Gray* (note 11), 6–7, who points out the four types of chart symbols which may apply in such situations and comments that ‘rocks awash’, if they were just a little higher, could be LTEs and need further survey observation. See the comment of the arbitral Tribunal on this in the *Philippines v. China* case: *South China Sea Arbitration* (note 6), para. 331.

⁶² *Gray* (note 11), 5–6, who cites the case of LTEs north of Cape Chidley (off Canada) on the Labrador Reef, consisting of two pinnacles of rock drying respectively to 2.4 and 2.7 metres which were initially overlooked by Canada in setting its baseline system, and were only later included in it as a territorial sea basepoint in 1986, although they lie only 2.5 NM from the nearest island.

entirely.⁶³ It may be noted here, though, that just as low-lying islands such as cays⁶⁴ may be overrun by waves in certain weather conditions (such as monsoon periods); so a *fortiori* may even lower lying LTEs be overswept by seas when weather is not calm.⁶⁵

In the light of all this, it has been rightly stated that the ‘most difficult issue’ with LTEs has been ‘determining whether a given feature extends above the low-water datum’, especially as even the very chart symbols used for these vary and are based on warning of navigational hazard on standard nautical charts.⁶⁶ Not surprisingly, several disputes have arisen for such reasons over the status of certain ‘marginal’ LTEs resulting from divergent (and evolving)⁶⁷ low-water datum practice; i.e., as to whether they are even LTEs and so part of the seabed. Equally problematic may be deciding the analogous question of the status of a formation falling between a LTE and an island properly so called. For example, in the *Qatar/Bahrain Case*, Qatar claimed that a small feature known as Qit’at Jaradah was merely a LTE,⁶⁸ but Bahrain argued that it was an ‘island’. In the case, on the basis of expert evidence from both States, the Court decided it was (marginally) an island under Art. 121 (1).⁶⁹

More recently, a similar question has arisen incidentally in the context of maritime delimitation. For in the *Eritrea/Yemen Arbitration Second Stage* in 1999, Eritrea argued that

⁶³ Cf. Second Report on the Regime of the Territorial Sea (note 2). An example of a former LTE later (due to man-created change in currents) losing this status, and thus not even being exposed at the lowest of spring tides off Nova Scotia, Canada, is the case of Bass Rock, see further *Gray* (note 11), 11–12; this new situation may cause loss to Canada of 0.4 square km of territorial sea in the area. Loss (through disappearance) of former LTE status may also, and more often, be due to entirely natural conditions and so cause jurisdictional problems: see ILA Report 2012 (note 52), 24, commenting that LTEs may be ‘highly susceptible to coastal change’. This Report (*ibid.*, 21) refers, as an example, to the two cases in the Netherlands of 29 June 2007 (cases 13/501817(A) and 13/500730-06(B)), where the defendants argued, when prosecuted for illegal fishing, that they were not in fact fishing within the Netherlands 12 NM zone because a LTE (named ‘Shovwen’), although included on a then-current Dutch official large-scale chart, was actually **no longer in existence**. The District Court rejected this plea, and the official Netherlands position at the time was that a change in its actual coastline had no effect **until such time as it was taken note of in an official State chart**. Rising tides due to global warming constitute another particular problem for the status of LTEs: see, for example, *Clive Schofield & David Freestone*, Options to Protect Coastlines and Maritime Jurisdictional Claims in the Face of Global Sea Rise, 1, 6–7 (loss of ‘significant rights’): Research Online, University of Wollongong (2013), available at: <http://ro.uon.edu.au/lhapapers/1236>.

⁶⁴ See *David Hancox/John R. V. Prescott*, A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst those Islands, IBRU Maritime Briefing 1(6) (1995), 1, 3, 5, 7, 26, where descriptions of the various formations in the area evidence that many are below the sea surface (or rarely appear above it) or are often awash with water.

⁶⁵ *Ibid.*, 13. See, e.g., the *Nicaragua/Honduras Case* (note 10), 672 (para. 28), regarding cays in that case which were ‘small, low-lying islands composed largely of sand derived from the break-down of coral reefs by wave action and subsequent reworking by the wind’, the smaller ones of which are ‘extremely vulnerable to tropical storms’.

⁶⁶ *Reed* (note 15), 220, cites the case of Carpentaria Rock off the coast of California, in the case of which, despite having been subject of an extensive survey by both US federal and state authorities, no consensus was obtained as to its status, the rock surface lying as little as two inches either above or below mean low water (the usual US tidal datum for such determination).

⁶⁷ For one example, see *supra*, note 43. An example of a sudden change of datum use is the more recent reliance of Australia on LAT for LTE datum, changing from the more stringent ‘low-water spring tide’ test. This change may expose a number of new low-tide elevations within Australia’s territorial sea distance off its coasts which were earlier covered at former low water datum. *Antunes* (note 6), 14, refers to adoption of a ‘lower’ chart datum leading to ‘new’ LTEs on charts, just as charting updates generally may unearth new basepoints in the analogous case of status of ‘islands’ such as Dinkum Sands off Alaska in *US v Alaska*; see further *Symmons* (note 57), 1 *et seq.* *Gray* (note 11), 12–15, gives the example of a possible new external bank (‘Visser’s Bank’) on a mudflat off the Suriname coast. On a possible solution to conflicting datums in an inter-State dispute, see also *supra*, note 43.

⁶⁸ *Qatar/Bahrain Case* (note 10), 104 (para. 219).

⁶⁹ Though Judge Vereshchetin commented on the opposing views of the expert evidence and the fact that there was no ‘evidence whatsoever to the effect that Qit’at Jaradah ha[d] ever been shown on nautical charts as an island’, added to which allegedly ‘attempts had been made by both States to artificially change the upper part of its surface’, *Qatar/Bahrain Case* (note 10), Declaration of Judge Vereshchetin, 217, 220 *et seq.* (para. 13). Cf. *Kopela* (note 10), 512 (concerning the archipelagic baseline legislation of the Dominican Republic, where various banks have been used north of its archipelago; these may be wholly submerged features in an area which has not been fully surveyed, such as Mouchoir and Navidad Banks, and against the baseline use of which both the US and UK have protested).

a rocky formation contained in its straight baseline system (called Negileh Rock) should be taken into account for the purposes of fixing a median line; whereas Yemen argued that on the chart used in the proceedings, the rock was depicted as a ‘reef’ which appeared not to be above water at any state of the tide.⁷⁰ In its judgment the Court agreed with the Yemeni position; as the reef was ‘not proud of the water at low-tide’.⁷¹ Thus despite these evidential problems, the Court had to make a definitive decision on the issue.

2. ‘situated wholly or partly at a distance not exceeding the breadth of the territorial Sea’

- 19 The phrase ‘wholly or partly’ refers to the necessary intraterritorial location of a qualifying LTE as a basepoint,⁷² and causes no interpretational problems. However, it means in practice that in some marginal cases precise measurement will have to be made from the general shoreline to determine if any partial inclusion of a LTE, however slight, pertains within an existing general territorial sea distance from that shoreline. This proved to be a problem recently in the *Philippines v. China South China Sea Arbitration*: in terms of whether one of the many small reefs in issue, namely Subi Reef, was within 12NMs of a ‘high-tide feature, such that it could serve as a baseline for the territorial sea of that high-tide feature pursuant to Article 13(1)’ of UNCLOS⁷³. Presumably if an erstwhile LTE once near the outer perimeter of a territorial sea changes position (as is quite common in the case of such small formations) and becomes situate outside this perimeter, it then loses any continuing baseline value.⁷⁴
- 20 The locational requirement for baseline use of a LTE was well-described in the Qatari pleadings in the *Qatar/Bahrain Case* as being ‘strictly dependent’ on the distance of the LTE

⁷⁰ See *Llanos* (note 7), 267; PCA, *Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation (Eritrea v. Yemen)*, 17 December 1999, RIAA XXII, 335, paras. 143 *et seq.*; Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Delimitation*, ODIL 32 (2001), 1, 9.

⁷¹ *Eritrea/Yemen Arbitration Second Stage* (note 70), para. 129 (note here the vagueness as to the meaning of ‘low tide’). Similarly, in the *Nicaragua/Columbia Territorial and Maritime Dispute* (note 36), 645 (para. 38), the ICJ there found that the sufficiency of evidence was not enough to prove that many ‘tiny maritime features [were] above water at [HAT]; nonetheless, as seen, they were all found on photographic evidence to be LTEs, seemingly without any tidal datum being specified in this instance’, even if it was not proveable in this instance that the formations were just a few centimetres above water at high tide, *ibid.*, 645 (para. 38). As the Court also stated in the *Nicaragua/Honduras Case* (note 10), 702 (para. 136), in addition to the four main insular cays, ‘there were a number of smaller islets, cays and reef in the same area, of which the physical status (such as whether they were completely submerged below sea level, either permanently or at high tide), [...] and consequently their legal status under Articles 6, 13 or 121 of [UNCLOS] [were] not clear’.

⁷² Cf. Whiteman (note 2), 306; unlike at the Hague Codification Conference in 1930, where there was some support for LTEs situate anywhere being able to generate maritime zones like islands; see *Elisio B. Jamine*, *Delimitation of the Mozambique Maritime Boundaries with Neighbouring States (Including the Extended Continental Shelf) and the Management of Ocean Issues*, in: UN DOALOS, *Maritime Boundaries Delimitation, Management and Dispute Settlement (2006–2007)*, 39. LTEs may be situate far out to sea: an example of such an isolated reef, which seems to mostly dry, but to be ‘barely emergent’ at low tide, is the coral atoll of Bassas da India in the Indian Ocean. As it is situate more than the territorial sea distances of both neighboring territories (France and Madagascar), it constitutes, if a LTE, an inadmissible basepoint for delimitation.

⁷³ *South China Sea Arbitration* (note 6), para. 369. In its conclusion (*ibid.*, para. 373), the Tribunal found Subi Reef to be within 12 NMs of nearby Sandy Cay (an above high-tide reef feature), so it could serve as a basepoint for that reef.

⁷⁴ Cf. *supra*, note 63, on an analogy with an intraterritorial LTE which later falls below low-tide: see Michael Gagain, *Climate Change, Sea Level Rise and Artificial Islands: Saving the Maldives’ Statehood and Maritime Claims through the ‘Constitution of the Oceans’*, *Colo. J. Int’l Envtl. L. & Pol’y* 23 (2012), 77, 98, stating that the same principle would apply if the island generating a territorial sea within which a LTE is situate disappears permanently or becomes a LTE itself, e.g., due to rising sea levels. A similar, more general, point is made in the ILA Report 2012 (note 52), 24, which comments that changes in coastal configuration of the nearest mainland or island to a LTE may also have an impact on the ‘location of the normal baseline’; and so place a previously-qualified LTE ‘outside the territorial sea’.

from the mainland or an island ‘by reference to the breadth of the territorial sea as adopted by the State concerned in conformity with international law’ (emphasis added).⁷⁵

Thus, as States change to a more extreme low-tide datum such as LAT, as well as adopting 12 NM territorial sea breadths,⁷⁶ these factors may individually, but particularly in combination, be a reason for erstwhile ‘marginal’ LTEs being brought into account by a ‘chain reaction’.⁷⁷ However, it is to be noted that the qualifying locational phrase – ‘from the mainland or an island’ – means exactly what it says; and it excludes LTEs within territorial sea distance of each other as successive seaward basepoints: the accompanying phrase relating to the low-water line ‘on that [first] elevation’ (emphasis added) supports this interpretation. Thus there can be no ‘leap-frogging’ process from the first (properly-qualifying) LTE out to the next in progressive fashion, as the reference here to an ‘island’ cannot include another LTE.⁷⁸ Indeed, this very process was disapproved of by the ICJ in the *Qatar/Bahrain Case* relating to the northern-sector feature called Dibal, where Bahrain had argued that it was within the territorial sea breadth of another (more landward) LTE it owned, namely Fasht al-Azm⁷⁹, saying:

‘Whereas a [LTE] which is situated within the limits of the territorial sea may be used for the determination of its breadth, this does not hold for a [LTE] which is situate less than 12 [NM] from that [LTE] but is beyond the limits of the territorial sea.’⁸⁰

If a LTE lies wholly beyond the general territorial sea belt, it merely forms part of the seabed, constituting a bank or reef in shallow water (despite any occasional above low-tide appearances); and so at most forms part of a continental shelf regime.⁸¹ However, LTEs

⁷⁵ *Qatar/Bahrain Case* (note 10), Reply of Qatar, para. 7.40, available at: <http://www.icj-cij.org/docket/files/87/11053.pdf>. The emphasised aspect of this *dictum* could apply where a State claims a territorial sea in excess of 12 NM or, more likely today, where a State has used other illegal baselines to make a LTE supposedly ‘intraterritorial’, or even where a LTE is measured from a valid straight-type baseline, see *infra*, note 75. In the case of the analogous rule for LTEs under Art. 47 (4) and qualifying archipelagic basepoints, see Symmons on Art. 47 MN 36–41. There are some cases where States have used LTEs lying outside territorial waters as such basepoints: cf. *Kopela* (note 10), 513, citing the Solomon Islands’ use of indispensable reef lying 40 NM from the nearest island for such purposes. By way of comparison, in the *Nicaragua/Colombia Territorial and Maritime Dispute* (note 36), 643 (para. 29), Colombia alleged that at least 20 LTEs were situated within 12 NMs of one or more of the near-lying islands. Thus the ICJ there found that the one insular feature on Quitasueno reef (QS32) took in, within its 12 NMs envelope of arcs around it these intraterritorial LTEs to expand territorial sea jurisdiction of Colombia in the area: *ibid.*, 713 (para. 238). The Tribunal in the Philippines v. China: *South China Sea Arbitration* (note 6), para. 373, noted that in contrast to a rock or coral boulder, ‘it is possible that a sand cay may be dispersed by storm action and reform in the same location after a while’.

⁷⁶ As territorial seas limits have expanded in many cases from 3 NM to 12 NM, so consequentially has the jurisdictional effect of LTEs now contained in these broader zones, *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999), 48–49. Whereas some States have taken explicit advantage of this (see *infra*, note 65), others, such as Ireland, have seemingly not: cf. *Clive R. Symmons*, *Ireland and the Law of the Sea* (2nd edn. 2000), 42–43: e.g., off the South East Irish coast there lies, 4 NM from the coastline, a possible tiny LTE on the Arklow Bank, marked on a very dated Admiralty chart as ‘drying’, which is now within the expanded Irish 12 NM territorial sea. There is no indication that this feature is claimed as a basepoint there by Ireland.

⁷⁷ *Antunes* (note 6), 14–15. A good example of this is when the UK extended its territorial sea from 3 NM to 12 NM in 1987 which brought in new LTEs as relevant basepoints for the first time: see *Alan V. Lowe*, *The United Kingdom and the Law of the Sea*, in: Tullio Treves (ed.), *The Law of the Sea: The European Union and its Member States* (1997), 521, 523. *Robin R. Churchill*, *Law of the Sea*, ICLQ 37 (1988), 412, 413, has noted that when the UK tried to utilize new LTEs off its east coast, this led to protests from Belgian and French fishermen who claimed that the consequential attempted expansion of territorial waters violated their fishery rights under EU law.

⁷⁸ *Derek W. Bowett*, *The Legal Regime of Islands in International Law* (1979), 12. Some States, though, have implemented the above-discussed particular qualificatory principle in their maritime legislation: cf. the Bahamian Act respecting the territorial sea, archipelagic waters, internal waters and the exclusive economic zone, Act No. 37 (1993), S. 4 (4): ‘Where a [LTE] lies wholly or partly within the breadth of the territorial sea of The Bahamas if all [LTEs] were disregarded for the purpose of measurement of the breadth thereof, the low-tide elevation shall be treated as an island’ (emphasis added).

⁷⁹ *Qatar/Bahrain Case* (note 10), Counter-Memorial of Qatar, 31 December 1997, 272 *et seq.* (paras. 8.52 *et seq.*).

⁸⁰ *Qatar/Bahrain Case* (note 10), 102 (para. 107); *Llanos* (note 7), 271.

⁸¹ *Kopela* (note 10), 505. In the Philippines v. China: *South China Sea Arbitration* (note 6), the Philippines in its pleadings stressed the distinction, pursuant to Art. 13 (1) between LTEs falling wholly or partially ‘within the

within the territorial sea distance of ‘rocks’ under Art. 121 (3) may be used, insofar as such rocks constitute technical ‘islands’ under Art. 121 (1) and implicitly generate their own autonomous territorial seas.⁸² Controversially also, by a reading together of Art. 13 with Art. 7 (4), LTEs situated within territorial sea limits might be considered to be permissible as basepoints for a straight baseline system under Art. 7, despite the fact that they have no installations on them or have not otherwise received any international recognition as such.⁸³

- 23 By contrast, under Art. 7 a low-tide elevation which lies outside the 12 NM limit, may still be used as a basepoint for a straight baseline system⁸⁴ (or as an archipelagic basepoint under Art. 47 (4)) where it has a lighthouse or similar above-high tide installation built on it, or alternatively, has received ‘international recognition’ as a basepoint.⁸⁵
- 24 Another possible exception to the territorial sea distance requirement is where a ‘fringing reef’ is involved under Art. 6⁸⁶ which makes the low-water line of such a relevant baseline implicitly useable, even if not within the territorial sea distance of its generating atoll-type ‘island’; and despite the fact that such reefs may in most cases also fall under the definition of LTEs under Art. 13 insofar as they may only appear at low tide.⁸⁷ The fact that there is a reference to a ‘seaward’ low-water line makes no substantive difference here, as in effect it is also only the seaward limit of any LTE which is critical in generating further external maritime zone therefrom.
- 25 The reference to ‘breadth’ of the territorial sea in Art. 13 (1) could include (on a literal interpretation) a breadth measured not only from the low-tide mark, but also from any permissible **straight baselines** (particularly under Arts. 7 and 10); though this is controversial.⁸⁸ Thus in such areas where LTEs lie outside such straight lines, any such formations less than 12 NM seaward of these lines may arguably be the actual territorial sea basepoints in that area; and so may add a ‘bulge’ to an otherwise straightish limit line.⁸⁹ In US practice⁹⁰ LTEs within the territorial sea distance of bay closing lines have been taken into account.⁹¹

territorial sea of a high-tide feature’ and ones beyond the territorial sea which have ‘no capacity to generate claims to maritime jurisdiction’; and incapacity to have any ‘independent entitlement to maritime zones’: *ibid.*, paras. 281, 291.

⁸² *Llanos* (note 7), 56, endorses this viewpoint.

⁸³ See *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982), 211. Note that the 2014 Report of ILA Committee on Baselines under the Law of the Sea announced an expanded mandate to consider interpretation and State practice of Art. 13 of the UNCLOS relating to methods adopted by States in relying on LTEs in drawing straight baselines; and consistency with Art. 7 (4): ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014), para. 5.

⁸⁴ *Kopela* (note 10), 6. Cf. UN DOALOS Baselines Study (note 17), 72.

⁸⁵ *Symmons* (note 4), 6. Although generally such a formation must, as stated, have an artificial construction on it which is ‘above sea level’ to be an ‘Art. 7 basepoint’, this need not be the case where the LTE has otherwise received ‘international recognition’ as a basepoint under Art. 7 (4), which is clearly, from use of the disjunctive phrase, taking in an alternative situation where there may be no artificial construction (which is permanently above high tide) on such LTE.

⁸⁶ The term ‘fringing reefs’ is not defined in Art. 6, but the very word ‘fringing’ implies propinquity of such coral-type structures to the relevant island; see the definition of such ‘reefs’ in the Glossary of the IHB Manual (note 30), Appendix 1–22, para. 74 (formations attached ‘directly to the shore’ or located in its ‘immediate vicinity’).

⁸⁷ *Peter B. Beazley*, *Reefs and the 1982 Convention on the Law of the Sea*, *IJELC* 6 (1991), 298, 311, states that ‘there is no limit on the distance that the reef may lie from the island’, but Art. 6 ‘probably achieves nothing that could not be effected under Article 13’.

⁸⁸ See *Beazley* (note 43), 25, who argues to the contrary, based on a ‘strict interpretation’ of the provision where the LTE is not overlapping the straight baseline; but he also admits that US practice seems to indicate otherwise. Note that the wording of Art. 13 (1) does not here refer to the qualifying distance as emanating from the mainland/island ‘low-tide’ mark as such, but this is arguably implicit.

⁸⁹ As in case of the Netherlands territorial sea limits, where some LTEs even eclipse the effect of Dutch straight baselines: see *Harm M. Dotinga/Alfred H. A. Soons*, *The Netherlands and the Law of the Sea*, in: *Tullio Treves* (ed.) *The Law of the Sea: The European Union and Its Member States* (1997), 365, 368.

⁹⁰ *United States v. Louisiana*, 363 U.S. 1 (1960).

⁹¹ *Reed* (note 16), 61, 218, citing Hanus Reef, Alaska, within 3 NM of a closing line there.

3. Function of the Low-Water Line of the Elevation

The identical phrase to that in Art. 5 – ‘low-water line’ – is again used here in Art. 13 (1) 26 (and without any specified tidal datum as is also the case concerning Art. 5). Anomalous, in the case of a LTE, the very entity (LTE) that creates this baseline – the low-tide mark – is by definition destined at regular intervals to disappear completely from view at high tide; so that the LTE itself may be *pro tempore* without then any visible tide-line at all, unlike a mainland or insular coast.⁹²

An added complication is that some States (such as has the UK) may even use different 27 tidal datums for this low-tide purpose compared to that which they use to gauge the ‘vertical height qualification’ of an actual LTE above low tide.⁹³ As seen above, insofar as a LTE forms a basepoint from which the territorial sea may be drawn (if it is wholly or partly within mainland or insular-generated limits), this may potentially push out the outer limits of that zone in the area a further 12 NM or so in proportion to its seaward position from the shore; and also potentially do the same in respect of any limits in the area of the 24 NM contiguous zone, EEZ⁹⁴ or (to the extent relevant), the outer continental shelf.⁹⁵ This is so whatever the size of the LTE.⁹⁶

4. LTEs and Publicity

Considering the abovementioned zone-creating capacity of LTEs, it is perhaps strange that 28 though not being, as seen,⁹⁷ strictly part of a mainland or insular normal low-tide line, there is no explicit ‘publicity’ requirement for use of LTEs as baselines under Art. 16 or elsewhere in this Convention. Art. 16, for example, refers back, in terms of baselines, only to Art. 7 (straight baselines), Art. 9 (rivers) and Art. 10 (bays). There is seemingly also no specific obligation on a State to indicate such basepoints on its charts anywhere else in the UNCLOS, for example, even under Art. 5 (the normal baseline, i. e., the low-water line), unless, as seen, by implication.⁹⁸ Technically, the low-water line as described in Art. 13 (1) is arguably not the same thing as the ‘normal baseline – the ‘low-water line along the coast’ (emphasis

⁹² See *Llanos* (note 7), 67, who comments on this aspect.

⁹³ Such as respectively LAT/mean low spring tide; cf. *Eddie D. Brown*, *The International Law of the Sea*, vol. I (1994), 33–34, pointing out that the British Territorial Order-in-Council of 1964 defined a LTE by reference to ‘mean high-water spring tides’, but did not define ‘low-water line’, the latter presumably depending on British Admiralty chart datum which anomalously nowadays (at least) is based on LAT and so ‘more favourable’ to the UK.

⁹⁴ See *Llanos* (note 7), 67. Some commentators seem to have doubted this generative power on an analogy with ‘rocks’ under Art. 121 (3), LTEs being less visible areas of land, even where they are ‘proximate’ to the coast; for example, *Lavalle* (note 8), 60, seems (at times at least) to doubt that LTEs ‘lying on the edge of the territorial sea’ can generate major maritime zones, the reason apparently being that LTEs are not truly ‘autonomous’ entities; but see also his clearer (albeit inconsistent) statement on not confusing capacity to generate maritime areas autonomously with ‘capacity to do so by serving as a basepoint of a straight baseline system’. He gives a list of reasons why LTEs should be used to generate more extensive maritime zones, whilst also mentioning the ‘down-grading’ of such formations in the *Qatar/Bahrain Case*. Other commentators, however, such as *Llanos* (note 7), 53 and 58 (footnote 41), rightly note that while Art. 13 (1) does not expressly grant capacity to LTEs to generate EEZ/continental shelf regimes like the mainland baseline of a State, the wording seems to imply this capacity: so that, for example, ‘[if] full generating capacity were attributed to [LTEs] a bulge would be added to the outer edges of the EEZ’.

⁹⁵ *Antunes* (note 6), 13.

⁹⁶ However, the size of a formation may be of relevance in delimitation of boundaries between States; cf. the *Qatar/Bahrain Case* (note 10) and the formation called Facht al Jarim, a feature relatively far out to sea, which Qatar argued was a LTE, though Bahrain had incorporated as a basepoint in its supposed archipelagic baseline system. The ICJ finally decided not to take it into account, *inter alia*, because ‘at most a minute part of it was above water at high tide’ (emphasis added), *ibid.*, 115 (para. 248); see also *Llanos* (note 7), 270.

⁹⁷ *Supra*, note 42.

⁹⁸ *Antunes* (note 6), 13; cf. *Llanos* (note 7), 57 (footnote 41), who remarks, somewhat strangely in the light of the actual wording of Art. 16 (1), that nonetheless a State can ‘take [its LTEs] into account in implementing Art. 16 (1)’ (emphasis added). The ILA Report 2012 (note 41) takes the position that the charting requirements under Art. 5 of the UNCLOS apply equally to Art. 13, as is also the opinion of this commentator (see note 88).

added) – used for ‘measuring the breadth of the territorial sea’ as described in Art. 5. So there may even, and anomalously, be no express obligation on a State utilizing such a LTE basepoint to mark (or publicise) such basepoints on charts;⁹⁹ i.e., on ‘large-scale charts’ officially recognised by it under Art. 5; but it would obviously be to its own advantage to do so for the sake of clarity.

- 29 An analogy can certainly be made with the publicity requirements relating to ‘reefs’ as baselines under Art. 6, where, specifically, the similarly-worded phrase ‘seaward low-water line of the reef’ has expressly to be shown ‘by the appropriate symbol on charts officially recognised by the coastal state’ under that article.¹⁰⁰

5. Waters Behind and Seaward of LTEs

- 30 Unlike waters in a ‘straight line’ type of baseline system, waters landward of a LTE do not constitute internal waters, merely part of the general territorial sea.¹⁰¹ To this extent they are like off-shore islands (to which some State maritime legislation has likened them)¹⁰² whose insular-generated territorial sea limits simply coalesce with those independently-generated by a mainland or other islands. As seen, as part of the general baseline system linking in with (by the above-mentioned sort of coalescence) territorial sea following the normal low-tide mark rule, such a basepoint generates for its owner not only a territorial sea, but also implicitly other zones outside it in a seaward direction (a contiguous zone, including an EEZ¹⁰³, but nothing shorewards behind it).¹⁰⁴ By way of contrast, insofar as ‘reefs’ under Art. 6 may also be LTEs, they not only in this capacity constitute baselines to generate a territorial sea if fringing an atoll-type island, but also here seemingly may enclose internal waters.¹⁰⁵

6. Low-Tide Elevations and Maritime Delimitation

- 31 In a few decided cases, LTEs have been taken into account as basepoints in maritime delimitation between States. For example, in the 1982 *Case Concerning the Continental Shelf*, the question of the effect of LTEs in the Gulf of Gabes and the island of Djerba and the Kerkennahs had to be considered by the ICJ; which held that although relevant in terms of size and location, they should respectively be only given less than full effect or ‘half-effect’.¹⁰⁶ In other cases, LTEs have been both, on occasion, taken into account or discounted, as in the *Qatar/Bahrain Case*.¹⁰⁷

⁹⁹ *Churchill/Lowe* (note 76), 53, on LTEs and charting obligations.

¹⁰⁰ One may speculate why there seems to be a discrepancy in this regard between Art. 6 and Art. 13, but it seems to this commentator that the omission to insert a similar express publicity obligation to that found in Art. 16 into Art. 13 resulted from a simple oversight at UNCLOS II, inherited from the situation *ante quo* in Art. 11 CTSCZ; and it may be argued in a general sense, as seen, that the phrase in Art. 5 (‘low-water line *along the coast*’ (emphasis added) implicitly includes, or approximates to, the similar phrase in Art. 13 (‘low-water line’ on a LTE), the latter also being (albeit in a looser sense) ‘along the coast’. So that in the latter case there is logically an obligation under Art. 5 (but not Art. 16) to give such baselines publicity.

¹⁰¹ In any event, there would be no clear lateral limits of any internal waters if this were not the case.

¹⁰² *Supra*, note 2; and, for example, see S. 5 (2) Trinidad and Tobago Territorial Sea Act, Act No. 38 (1969), according to which an intraterritorially located LTE shall be ‘treated as an island’.

¹⁰³ But see now the Philippines v. China Award: *South China Sea Arbitration* (note 6), para. 308, where the Tribunal states that although Art. 13 (2) does not ‘expressly’ say that a LTE is not entitled to an EEZ or continental shelf, this ‘restriction is necessarily implied’ in UNCLOS; so that if a LTE is not entitled to a territorial sea, it is also not entitled to an EEZ/continental shelf.

¹⁰⁴ Like a normal baseline, a LTE does not generate internal waters immediately behind it like straight-type baselines, despite the fact that Art. 8 (1) defines ‘internal waters’ as all ‘waters on the landward side of the baseline of the territorial sea’ (emphasis added).

¹⁰⁵ *Jayewardene* (note 39), 95 (‘according to established principles’); *Churchill/Lowe* (note 76), 52, state that any ‘gaps’ of open water between the various reefs may be notionally closed with extra straight lines, as has been done by several States to box in landward waters.

¹⁰⁶ *Llanos* (note 7), 266–267.

¹⁰⁷ *Ibid.*, 270.

7. State Practice and International Jurisprudence

Several States have explicitly used LTEs as part of their baseline if within the territorial sea distance.¹⁰⁸ Several States also¹⁰⁹ (such as Ireland and the UK) have incorporated the treaty definitions into their own maritime legislation;¹¹⁰ and have, in some cases, updated them to take account of an expanded territorial sea claim.¹¹¹ Some States also have indicated a specific tidal datum, such as ‘mean low-water spring tide’ in their legislative definition of LTEs.¹¹² Despite the fact that expanded territorial sea limits of 12 NM have brought into use additional LTEs as basepoints, the practical effect in many cases may have been small. For example, it has been commented in the case of the US that few areas of the US coast have LTEs which enlarge the US territorial sea to ‘any appreciable extent’.¹¹³ In terms of international case-law, recent decisions of the ICJ and arbitral tribunals have discussed whether LTEs may be appropriated;¹¹⁴ or used as territorial sea basepoints, e.g., in the context of maritime delimitation.

In terms of international case law, there has, in the past, been very little detailed or incisive discussion on the definition of LTEs. However, this situation has changed as a result of the Award on the Merits on July 12, 2016, in the *Philippines v. China* Arbitration concerning several maritime features in the South China Sea, the respective statuses of which were ruled on by the arbitral Tribunal¹¹⁵. In 2014 the Philippines published photographs of several reefs in the South China Sea where China has been ‘reef-building’; and in this case the Philippines asked the arbitral Tribunal to declare that such formations as Mischief Reef were at best mere LTEs, even if they now have artificial islands built upon them; so that consistently with what the ICJ has held in the *Qatar/Bahrain* case, they do not generate any maritime zones in their own right.¹¹⁶

Article 14

Combination of methods for determining baselines

The coastal State may determine baselines in turn by any of the methods provided for in the foregoing articles to suit different conditions.

Bibliography: *Lucius Caflisch*, Les zones maritimes sous juridiction nationale, leurs limites et leur delimitation, in: Daniel Bardonnnet/Michel Virally (eds.), *Le nouveau droit de la mer* (1983), 35–116; *Robin R. Churchill/Alan V. Lowe*, *Law of the Sea* (3rd edn. 1999); *Hartini Dipla*, Le regime juridique des iles dans le droit international de

¹⁰⁸ E.g., Belgium, uses a lower low-water spring standard, in respect of LTEs near the French border such as Trapegeer, cf. *Erik Franckx*, Belgium and the Law of the Sea, in: Treves (note 77), 37, 38; and, see, e.g., S. 1 (1) Netherlands Territorial Sea Demarcation Act (1985); cf. *Rüdiger Wolfrum*, Germany and the Law of the Sea, in: Treves (note 65), 199, 206; see also *Dotinga/Soons* (note 89), 365, 367–368. The US has used many LTEs on its coast following extensive surveys, cf. *Reed* (note 15), 220; as also has the UK, see *supra*, note 77. On use or non-use of LTEs in straight baseline practice under Art. 7, see *Dipla* (note 4), 122–123.

¹⁰⁹ *Churchill/Lowe* (note 76), 55, cite 15 such States, all but one (Saudi Arabia) following the UNCLOS wording.

¹¹⁰ As for Ireland, see *Symmons* (note 76), 40–41.

¹¹¹ *Lowe* (note 66), 521, 522–523.

¹¹² E.g., s. 2 (1)(b) Kiribati Marine Zones (Declaration) Act No. 7 (1983); s. 1 (1) Papua New Guinea National Seas Act No. 7 (1977); s. 2 Trinidad and Tobago Territorial Sea Act No. 38 (1969).

¹¹³ US Department of State, Measurement of the U.S. Territorial Sea, Department of State Bulletin No. 1044 (1959), 963, 966–967; but see *supra*, note 10 and note 76 where LTEs did play an important role in generating maritime zones.

¹¹⁴ *Supra*, note 27.

¹¹⁵ *South China Sea Arbitration* (note 6), paras. 382, 383.

¹¹⁶ See *Gregory Poling*, The Legal Challenge of China’s Island Building, Asian Maritime Transparency Initiative (2015), available at: <http://amti.csis.org/the-legal-challenge-of-chinas-island-building/>. This issue, as seen, has been dealt with in the *Philippines v. China* arbitral Award: *South China Sea Arbitration* (note 6), in section E of its award.

la mer (1984); *Elisio B. Jamine*, Maritime Boundaries Delimitation, Management and Dispute Resolution: Delimitation of the Mozambique Maritime Boundaries with Neighbouring States (Including the Extended Continental Shelf) and the Management of Ocean Issues (2006–2007); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Tullio Scovazzi/Giampiero Francalanci/Daniela Romano/Sergio Mongardini*, Atlas of the Straight Baselines (2nd edn. 1989); *Clive R. Symmons*, Ireland and the Law of the Sea (2nd edn. 2000)

Documents: ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014); ILA, Report of the Committee on Baselines under the International Law of the Sea, Sofia Conference (2012)

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I. Purpose and Function

- 1 This provision – which had no equivalent in the Convention on the Territorial Sea and Contiguous Zone (CTSCZ)¹ – gives implied recognition to the fact that not all, or every part of, coastlines have geographical features which qualify for the more extensive and expansive straight baseline systems allowed for under the UNCLOS where a succession of (often many) consecutive linking points is typical, including even basepoints in an archipelagic baseline system claimed by an archipelagic State (→ Art. 47). The principle entails that where, for example, a coastline is not deeply indented, nor has a cluster of islands off it as to meet the requirements of Art. 7 (1),² the baseline must revert to the normal rule, i.e., the low-tide mark; and so be 'waisted in' where such areas occur.³ This principle would in any case be implicit in the UNCLOS,⁴ but this article spells it out *ex abundanti cautela* as it were. Thus, many States which have adopted extensive straight baseline systems around their coasts have had to 'tie in' those baselines at intervals where geography changes to (often implicitly) bring in coastal areas where the low-tide mark pertains.⁵

¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 129. It may be noted that the ILA Committee on Baselines in the Law of the Sea proposed in its Report at the Washington Conference (2014) proposed a study on the interpretation and relevant State practice on Art. 14, as had been considered in its Sofia conference Report of 2012: ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014), para. 5. See also ILA, Report of the Committee on Baselines under the International Law of the Sea, Sofia Conference (2012).

² Thus if, for instance, some off-shore islands do not qualify for being tied into a straight baseline system, they can only generate maritime zones from their own individual baselines under Art. 14, cf. *Hartini Dipla*, Le regime juridique des îles dans le droit international de la mer (1984), 124.

³ *Robin R. Churchill/Alan V. Lowe*, Law of the Sea (3rd edn. 1999), 33, for such reasons query whether the 'low-water line' is really the 'normal baseline' for most States.

⁴ *Lucius Caflisch*, Les zones maritimes sous juridiction nationale, leurs limites et leur delimitation, in: Daniel BarDonnet/Michel Virally (eds.), Le nouveau droit de la mer (1983), 39.

⁵ E.g. for Australia, see *Tullio Scovazzi et al.*, Atlas of the Straight Baselines (2nd edn. 1989), 76–85; Ireland, *ibid.*, 155; Canada, *ibid.*, 93–98; China, *ibid.*, 105; Colombia, *ibid.*, 109; Denmark, *ibid.*, 115; France, *ibid.*, 129–131; Italy, *ibid.*, 157; Mexico, *ibid.*, 169; Morocco, *ibid.*, 171; Mozambique, *ibid.*, 173; Portugal, *ibid.*, 195; Senegal, *ibid.*, 197; Russia, *ibid.*, 199–213; Spain, *ibid.*, 215–216; Sweden, *ibid.*, 221. Sometimes this 'waisting in' has been done because of prior diplomatic representations from another State, as e.g., in the case of the Irish straight baselines decrees in 1959, in the case of which the original Irish plan to link consecutive points by straight baselines around its whole Southern western and north-western coasts was later scaled down due to British prior objections to a 'continuous series of lines', so as to allow reversion in 'hiatus areas' to the low-tide mark, where the coastline no longer justified the (then) application of Art. 4 CTSCZ, cf. *Clive R. Symmons*, Ireland and the Law of the Sea (2nd edn. 2000), 55–57. Relating to the Mozambiquan coastline, it has been remarked that considering the configuration of the coast there, a combination of methods is called for under Art. 14, including normal and straight baselines and closing lines, see *Elisio B. Jamine*, Maritime Boundaries Delimitation,

II. Historical Background

The history of this new provision (compared with the CTSCZ-regime) is well-documented.⁶ It resulted from a more detailed Chinese proposal in the 1973 session of the Sea-Bed Committee.⁷ This was progressively revised to a shorter text in 1976, in particular the phrase ‘with coasts of great lengths and complicated topography’ being omitted. It was then given its own independent article.⁸

III. Elements

1. ‘The coastal State may determine baselines in turn by any of the methods [...]’

The article’s purpose is self-evident and straightforward, though the phrase ‘in turn’ is one aspect of the article which has been seen to give rise to possible interpretation difficulties in that it might imply perhaps a mandatory rotation of baseline systems along any one coastline. It is best interpreted as meaning simply that a State’s baseline system may have to change only wherever the coastal topography merits a different sort of baseline, as the title of the article, ‘combination of methods’ implies.⁹ In essence this will mean, as seen above, that States, for example, with extensive areas of coastline meriting Art.-7 or Art.-47-type baselines, or even river mouths (Art. 9), bays (Art. 10) or perhaps fringing reefs (Art. 6), are not necessarily entitled to ignore even small ‘hiatus’ areas of straight and ordinary coastline alternating within an otherwise expansive (e.g., straight) baseline system; and must generally interpose in such ‘hiatus areas’ the normal low-tide baseline.

There is little evidence of explicit reference to Art. 14 in State practice; though in many instances States have not claimed straight baselines in all areas of their coasts where circumstances do not warrant it, so implicitly following the spirit of Art. 14, a principle which is sometimes alluded to in general terms in maritime legislation.¹⁰

Article 15 Delimitation of the territorial sea between States with opposite or adjacent coasts

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the territorial sea of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Management and Dispute Resolution: Delimitation of the Mozambique Maritime Boundaries with Neighbouring States (Including the Extended Continental Shelf) and the Management of Ocean Issues (2006–2007), 17.

⁶ Nordquist/Nandan/Rosenne (note 1), 129–130.

⁷ *Ibid.*, 129.

⁸ *Ibid.*, 130, having been removed from what became Art. 7 on straight baselines.

⁹ *Ibid.*

¹⁰ See *supra*, note 5; for a legislative example, see S. 4 (2)(e) Mauritius Maritime Zone Act, Act No. 2 (2005), reprinted in: UN DOALOS, LOSB No. 62 (2006), 52, 54, which states that baselines may be ‘a combination of the methods for determining baselines specified [above]’, i.e., including archipelagic baselines, normal baselines (‘low-water line’), reefs (under Art. 6), and straight baselines (under Art. 7). See *Symmons* on Art. 47 where it is stated that it may be particularly apt to vary between straight and low-tide baselines in archipelagic situations.

Bibliography: *David Anderson*, Maritime Boundaries and Limits: Some Basic Legal Principles (2001), available at: <http://www.gmat.unsw.edu.au/ablos/ABLOS01Folder/ANDERSON.PDF>; *David Anderson*, The Modern Law of the Sea (2008); *Nuno Antunes*, Towards the Conceptualisation of Maritime Delimitation (2003); *I. Made Andi Arsana*, Maritime Delimitation in the Singapore Strait, *Hydro International* 14 (2010), available at: http://www.hydro-international.com/issues/articles/id1193-Maritime_Delimitation_in_the_Singapore_Strait.html; *Damir Arnaut*, Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation between Croatia and Slovenia, in: David D. Caron/Harry N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (2004), 427–466; *Matej Avbelj/Jernej L. Cernic*, The Conundrum of the Piran Bay: Slovenia v. Croatia – The Case of Maritime Delimitation, *Journal of International Law & Policy* 5 (2007), 1–19; *Jonathan I. Charney/David A. Colson/Lewis M. Alexander/Robert W. Smith*, *International Maritime Boundaries*, vol. II (1996); *Aldo Chircop/David Dzidzornu/José Guerreiro/Catarina Grilo*, The Maritime Zones of East African States in the Law of the Sea: Benefits Gained, Opportunities Missed, *African Journal of International and Comparative Law* 16 (2008), 121–151; *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Robin R. Churchill*, The *Bangladesh/Myanmar Case*: Continuity and Novelty in the Law of Maritime Delimitation, *CJICL* 1 (2012), 137–152; *Nugzar Dundua*, Delimitation of Maritime Boundaries between Adjacent States (2007); *S. P. Jagota*, *Maritime Boundaries* (1985); *Shi Jiuyong*, Maritime Delimitation in the Jurisprudence of the International Court of Justice, *Chinese JIL* 9 (2010), 271–291; *Zou Keyuan*, Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends, *Singapore YBIL* 9 (2005), 37–53; *Zou Keyuan*, Maritime Boundary Delimitation in the Gulf of Tonking, *ODIL* 30 (1999), 235–254; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Hernando Otero*, *Law of the Sea Reports*, vol. II (2011); *Iriní Papanicolopulu*, A Note on Maritime Delimitation in a Multizonal Context: The Case of the Mediterranean, *ODIL* 38 (2007), 381–398; *Iriní Papanicolopulu*, From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea, *EJIL: Talk!*, Blog of the EJIL, 23 March 2012, available at: <http://www.ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-the-sea/>; *Clive Schofield*, Parting the Waves: Claims to Maritime Jurisdiction and Division of Ocean Space, *Penn State Journal of Law & International Affairs* 1 (2012), 40–58; *Tullio Scovazzi*, *Maritime Delimitation Cases before International Courts and Tribunals*, MPEPIL, available at: <http://www.mpepil.com>; *Clive R. Symmons*, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (2008); *Yoshifumi Tanaka*, Reflections on Maritime Delimitation in the *Qatar/Bahrain Case*, *ICLQ* 52 (2003), 53–80; *Yoshifumi Tanaka*, Predictability and Flexibility in the Law of Maritime Delimitation (2006); *Yoshifumi Tanaka*, Reflections on Maritime Delimitation in the *Nicaragua/Honduras Case* (2008), *ZaöRV* 68 (2008), 903–937; *Prosper Weil*, *The Law of Maritime Delimitation: Reflections* (1989)

Documents: ILC, Report of the International Law Commission, UN Doc. A/2456 (1953) GAOR 8th Sess. Suppl. No. 9, reproduced in: ILC Yearbook (1953), vol. II, 200–269; ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12; IHB, Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982 (4th edn. 2006)

Cases: *Dispute Concerning Delimitation of the Maritime Boundary* (Guinea v. Guinea-Bissau), Award of 14 February 1985, *ILM* 25 (1986), 251; *Dubai/Sharjah Border Arbitration*, Arbitral Award of 19 October 1981, *ILR* 91 (1993), 543; ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Netherlands/Denmark), Judgment of 20 February 1969, *ICJ Reports* (1969), 3; ICJ, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, *ICJ Reports* (1991), 53; ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, *ICJ Reports* (2001), 40; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Judgment of 10 October 2002, *ICJ Reports* (2002), 303; ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, *ICJ Reports* (2007), 659; ICJ, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), Judgment of 23 May 2008, *ICJ Report* (2008), 12; ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, *ICJ Reports* (2009), 61; ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment of 19 November 2012, *ICJ Reports* (2012), 624; ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, *ITLOS Reports* (2003), 10; ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar), Judgment of 14 March 2012, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf; PCA, *Grisbådarna Case* (Norway v. Sweden), Award of 23 October 1909, *RIAA* XI, 147; PCA, *Case Concerning a Dispute between Argentina and Chile Concerning the Beagle Channel* (Argentina v. Chile), Award of 18 February 1977, *RIAA* XXI, 53; PCA, *Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation* (Eritrea v. Yemen), Award of 17 December 1999, *RIAA* XXII, 335; PCA, *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them* (Barbados v. Trinidad and Tobago), Award of 11 April 2006, *RIAA* XXVII, 147; PCA, *South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China), Award of 12 July 2016, available at: <https://www.pcacases.com/web/view/7>

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I. Purpose and Function

The purposes and functions of this provision are self-evident, being aimed at specifying rules as to fixing maritime boundaries ('delimitation' as in the headnote)¹ concerning notionally overlapping areas of territorial sea between neighbouring States, whether opposite or adjacent to each other. In the case of opposite States, the rules here expressed only cover areas of overlapping seas less than 24 (12x2) NM wide.² Problems may arise here generally if two States have differing widths of territorial sea claims; and where the potentially maximum distance seemingly must be applied uniformly in both cases.³ The rules express three basic factors for such maritime boundary-fixing: 'agreement' in the first instance, failing which (secondly) the boundary is to be a 'median' (i.e., a mid-way line) between the coasts of such States unless (thirdly) 'special circumstances' or 'historic title' arise (where, accordingly, a different delimitation principle may be used). As such, the rules have more substantive content than those relating to other more extensive zones – the exclusive economic zone (EEZ) and continental shelf (→ Arts.74 and 83).

A basic aim of this provision, then, is to give some element of objectivity to such delimitation. As the International Law Commission (ILC) stated (with reference to former Art. 12 of the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ)), although 'special circumstance would probably necessitate frequent departure from the

¹ IHB, Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982 (4th edn. 2006), Appendix 1, para. 58, for meaning of 'maritime delimitation', namely 'the determination of a maritime boundary between States effected by agreement'.

² Nuno Antunes, Towards the Conceptualisation of Maritime Delimitation (2003), 136, stressing the initial need for overlapping potential entitlements; this may mean, as stated in the *Dubai/Sharjah Border Arbitration*, Arbitral Award of 19 October 1981, ILR 91 (1993), 543, that an island, although entitled to a territorial sea, may have that entitlement affected where a territorial sea boundary with another opposite or adjacent State is involved. This factor was alluded to more recently in ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), ICJ Reports (2012), 624, 642 (para. 29), where the ICJ referred to the treatment of the islet of Alcatraz in the *Guinea/Guinea Bissau arbitration* (1985 RIAA,77, p. 635) and stated (at para. 179, 691 that territorial seas less than 12NMs wide have 'invariably involved either an overlap between the territorial sea entitlement of States[....] or the presence of a historic or agreed boundary' (emphasis added).

³ Irini Papanicolopulu, A Note on Maritime Delimitation in a Multizonal Context: The Case of the Mediterranean, ODIL 38 (2007), 381, 387. An example of this problem is the Agreement between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the Delimitation of the Continental Shelf in the Area East of 30 Minutes West of the Greenwich Meridian, 24 June 1982, available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/FRA-GBR1982CS.PDF>, in the Strait of Dover which was then based on a simplified equidistance line of two areas of territorial seas of 12 NM, although at this time the UK had not extended its territorial sea to this limit (only France had): following extension of the UK territorial sea to 12 NM in 1987, a new delimitation agreement was made to eliminate any interposing 'high seas' hiatus (Agreement between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the delimitation of the territorial sea in the Straits of Dover, 2 November 1988, available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/FRA-GBR1988TS.PDF>); see further David Anderson, The Modern Law of the Sea (2008), 175, 181–182.

median line, it was thought advisable to adopt, as a general rule, the system of the median line as a basis for delimitation [...].⁴ Judging from the fact that few major international disputes have arisen over territorial sea boundaries in the last decades, the delimitation formula here seems to have been efficacious; possibly because the distorting effects of equidistance/median lines are ‘comparatively small’ within such narrower waters;⁵ and because the law of territorial sea delimitation is more ‘predictable’ than in the case of more extensive zones – the EEZ and continental shelf – where the element of ‘equity’ more ostensibly applies.⁶ Indeed, until comparatively recently there had been no important judicial or arbitral decisions on territorial sea delimitation, indicating, it seems, that negotiation of this type of maritime boundary has been generally successful,⁷ entailing, as it does, a simpler – and arguably clearer – delimitation provision as compared with that pertaining to more extensive maritime zones.⁸ It is, however, recently evident that the delimitation principles for the division of territorial sea may differ greatly in their practical results from those relating to more extensive maritime zones; as in the recent ITLOS *Bay of Bengal Case* where it was the geographical circumstances in the immediate vicinity of the terminus of the Bangladesh-Myanmar border that were relevant in this regard.⁹

- 3 It has been noted by CHURCHILL/LOWE that although each maritime zone demands ‘a separate delimitation’, in practice there has been an ‘increasing tendency’ in third party settlement (i. e., of a judicial or arbitral nature) and bilateral agreements to lay down a ‘single delimitation line’ without distinguishing between the various zones.¹⁰ This is further discussed below.
- 4 In the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the International Court of Justice (ICJ) stated that Art. 15 was part of customary law, which was applied there where neither State was party to the UNCLOS.¹¹

II. Historical Background

- 5 The historical background is well set out in existing commentaries.¹² Early attempts to fix a rule relating to delimitation of the territorial sea between neighbouring States centred either on ‘straits’ (less than 24 NM wide)¹³ between two opposite States or centred on those States with lateral boundaries to be fixed, i. e., adjacent States.¹⁴ From an early stage this set the

⁴ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 5.

⁵ ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, para. 59; see also *Antunes* (note 2), 98, who views the distorting effect of certain features in the vicinity of a coast as being ‘negligible’ in a territorial sea delimitation, and he notes the small number of States at UNCLOS III concerned about Art. 15’s ‘practical impact’.

⁶ *Prosper Weil*, The Law of Maritime Delimitation: Reflections (1989), 136; cf. *infra*, note 28. See also the ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports (2007), 659, 740 (para. 269), where the ICJ stated that the ‘methods governing territorial sea delimitations needed to be, and are, more clearly articulated than for other, more functional, areas’.

⁷ *Damir Arnaut*, Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation between Croatia and Slovenia, in: David D. Caron/Harry N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (2004), 427, 428; but see *Antunes* (note 2), 98 (footnote 442).

⁸ *Arnaut*, *ibid.*, 428.

⁹ See *infra*, note 33; and *Robin R. Churchill*, The *Bangladesh/Myanmar Case*: Continuity and Novelty in the Law of Maritime Delimitation, *CJICL* 1 (2012), 137, 138.

¹⁰ *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 181, 182; indeed, at UNCLOS III there was some support for one regime for the delimitation of all maritime zones, cf. Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 138–141, and the same rules in line with what are now Arts. 74 and 83.

¹¹ ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports (2001), 40, para. 175.

¹² See Nordquist/Nandan/Rosenne (note 10), 134–141; also *Antunes* (note 2), 22, 25, 29–30.

¹³ Nordquist/Nandan/Rosenne (note 10), 134.

¹⁴ *Yoshifumi Tanaka*, Predictability and Flexibility in the Law of Maritime Delimitation (2006), 32–33.

pattern of viewpoints which varied from fixing a general rule, on the one hand, or merely accepting a case-by-case solution, i.e., a flexible solution aimed at achieving an equitable result, on the other.¹⁵ This dichotomy of viewpoint was typified at the 1930 Hague Codification Conference relating to opposite neighbouring States,¹⁶ and where the Conference failed to agree on any general delimitation provision, such as a median line rule.¹⁷

Prior to UNCLOS I, the ILC addressed the topic of delimitation of the territorial sea in two separate articles – draft Arts. 12 and 14 – reflecting the abovementioned format concerning delimiting a territorial sea in straits between opposite States and between adjacent States, in both cases reflecting the ‘median line’ failing agreement, in the absence of any ‘special circumstances’ (following on the recommendation of the Committee of Experts).¹⁸ This 1955 draft was later simplified by combining of the two sets of articles because the delimitation questions in both types of waters were then seen as being essentially the same.¹⁹

At UNCLOS I, the two general approaches reflected earlier involving the median line/equidistance viewpoint and mutual agreement between such abovementioned neighbouring States continued,²⁰ and Arts. 12 and 14 of the ILC draft were combined into one as Art. 12.²¹ It has been aptly commented that the ‘main difficulty’ envisaged at UNCLOS I was the ‘recourse to equidistance’ and the accompanying ‘need to provide for cases where departures [therefrom] would have to be considered’; the former being concerned with ‘geography’, the latter with ‘concerns of equity’.²²

Art. 12 CTSCZ enunciated a rule similar to the later-adopted wording of Art. 15 and to that as mentioned, in Art. 6 of the Convention on the Continental Shelf (CSC) on delimitation of the continental shelf.²³ The drafting history of Art. 15 has been accordingly viewed as being not complex and as having raised ‘very little controversy’, the wording in Art. 12 CTSCZ remaining ‘substantially unchanged’.²⁴ It is to be noted, though, that the Art. 12 (2) CTSCZ – concerning publicity of delimitation lines – was removed and added to Art. 16.²⁵

III. Elements

1. General Considerations

The wording of Art. 15, being virtually identical to that formerly in Art. 12 CTSCZ,²⁶ has been viewed as crystallising the 1958 CTSCZ equivalent; and so, in effect, it consolidates the previous rule.²⁷ As seen, compared with the delimitation process concerning the more

¹⁵ *Ibid.*

¹⁶ *Ibid.*; see also Nordquist/Nandan/Rosenne (note 10), 135; and S. P. Jagota, *Maritime Boundaries* (1985), 49–50.

¹⁷ Tanaka (note 14), 34.

¹⁸ Nordquist/Nandan/Rosenne (note 10), 134.

¹⁹ *Ibid.*, 135; ILC Law of the Sea Articles (note 4), 5 (Art. 12); the ILC saw the three elements of agreement, equidistance and special circumstances here as being the same in the case of continental shelf delimitation, *cf.* David Anderson, *Maritime Boundaries and Limits: Some Basic Legal Principles* (2001), 5, available at: <http://www.gmat.unsw.edu.au/ablos/ABLOS01Folder/ANDERSON.PDF>.

²⁰ Nordquist/Nandan/Rosenne (note 10), 135, 140.

²¹ *Ibid.*, 135.

²² Antunes (note 2), 26 and 100, where he adds that the equidistance/special circumstances rule offers ‘a balance between an objective element that promotes certainty (equidistance) and an element of flexibility that promotes justice *in casu* (special circumstances)’.

²³ See Antunes (note 2), 152; further below it will be discussed that the only differences seem to be that in Art. 12 CTSCZ reference is made to what has been well named as ‘equidistance by negative prescription’; Tanaka (note 14), 38–39, stating that in the case of Art. 6 CSC, there is additional use of the term ‘equidistance line’ and no reference to ‘historic title’.

²⁴ Antunes (note 2), 98.

²⁵ Nordquist/Nandan/Rosenne (note 10), 139–140.

²⁶ Antunes (note 2), 16; see *supra*, note 3.

²⁷ Antunes (note 2), 100; Churchill/Lowe (note 10), 183. This was commented on by the ICJ in the *Nicaragua/Honduras Case* (note 6), where it noted that Art. 15 of the UNCLOS was ‘virtually identical to the text’ of Art. 12 (1) of the CTSCZ: *ibid.*, 744 (para. 280).

extensive zones – EEZ and continental shelf – territorial sea delimitation has arguably been a simpler process and less controversial; as, for example, distorting effects of equidistant lines are ‘comparatively small within territorial waters’.²⁸ This is so despite the fact that the break-ups in more recent years of big federal entities such as the USSR and Yugoslavia – with long coastal facades – have added considerably to the sea areas where territorial sea delimitation is now required, and accordingly also to the list of potential disputes.²⁹ For example, in the recent and on-going Slovenia/Croatia maritime delimitation dispute following the break-up of Yugoslavia, Croatia claims an equidistant line boundary under Art. 15 in the (bordering) Bay of Piran, whereas adjacent Slovenia claims ‘special circumstances’ under the same provision.

- 10 Furthermore in areas where several islands lie on one or both sides of notional median lines (such as in the Aegean Sea) or where narrow coastal facades exist limiting access to sea, as in case, e.g., of both Bosnia and Slovenia, territorial sea delimitation can become addedly problematic.³⁰
- 11 It has been pointed out that with an increasing trend towards States adopting a single maritime boundary line by mutual agreement or by requesting same in third party adjudication (as in the ICJ *Qatar/Bahrain Case*)³¹, this boundary line may include a territorial sea boundary as well as one combined with an EEZ and/or continental shelf, though States may always decide to delimit the territorial sea separately.³² The ICJ has defined such a procedure as ‘one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them’;³³ and such a line has been requested in several adjudications in recent years,³⁴ most recently in the International Tribunal for the Law of the Sea (ITLOS) *Bangladesh/Myanmar* dispute, which is discussed below. Indeed, in the *Barbados/Trinidad and Tobago Arbitration*, the Tribunal stated that State practice had now ‘overwhelmingly resorted to the establishment of single maritime boundary lines’.³⁵
- 12 In the light of such developments, it may be that some equitable provisions applicable in the past to EEZ/continental shelf delimitation may also be relevant on occasion in a territorial sea area to be delimited either in isolation or as part of a single continuous maritime boundary stretching beyond the territorial sea itself. As pointed out in the

²⁸ *North Sea Continental Shelf Cases* (note 5), 3, para. 59; arguably also the territorial sea delimitation provisions are less vague than those relating to EEZ/continental shelf delimitation, cf. Tullio Scovazzi, *Maritime Delimitation Cases before International Courts and Tribunals*, MPEPIL, para. 40, available at: <http://www.mpepil.com>.

²⁹ Arnaut (note 7), 428.

³⁰ See *infra*, notes 73 and 140.

³¹ See Yoshifumi Tanaka, *Reflections on Maritime Delimitation in the Qatar/Bahrain Case*, ICLQ 52 (2003), 53, 57.

³² Papanicolopulu (note 3), 381, 390.

³³ *Qatar/Bahrain Case* (note 11), para. 173; ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar), Judgment of 14 March 2012, ITLOS Reports, 28 (para. 62), in this dispute Myanmar was alleged by Bangladesh to have not signed the original Agreed Minutes of negotiations (in 1974 and 2008) because it preferred a ‘comprehensive maritime delimitation’, see also *ibid.*, 29 (para. 66), where there is reference to Myanmar not wishing to sign or ratify a treaty which ‘did not resolve the delimitation dispute in all the different contested areas’ (emphasis added); see also Myanmar’s reference to para. 2 of the ‘Agreed Minutes’ referring to the ‘first sector of maritime boundary’, *ibid.*, 32 (para. 76).

³⁴ E.g., in the cases involving ICJ, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Reports (1991), 53; PCA, *Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation* (Eritrea v. Yemen), Award of 17 December 1999, RIAA XXII, 335; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Judgment of 10 October 2002, ICJ Reports (2002), 303; and PCA, *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them* (Barbados v. Trinidad and Tobago), Award of 11 April 2006, RIAA XXVII, 147: see especially *Nicaragua/Honduras Case* (note 6), 659 (para. 12), where the Nicaraguan request to the ICJ was to delimit the course of a ‘single maritime boundary’ between the ‘areas of territorial sea’, as well as continental shelf and EEZ, between Nicaragua and Honduras in the Caribbean Sea, which the Court acceded to doing. Note, however, that Judge Oda indicated in his Separate Opinion in the *Nicaragua/Honduras Case*, *ibid.* (para. 12), that the aforementioned term usually meant simply a single line for continental shelf/EEZ delimitation purposes.

³⁵ *Barbados/Trinidad and Tobago Arbitration* (note 34), 71 (para. 235).

Cameroon/Nigeria Case, the ‘equitable principles/relevant circumstances method’ used in a line covering several zones of jurisdiction ‘is very similar to the equidistance/special circumstances method applicable in the delimitation of the territorial sea’.³⁶ So that this method may potentially relate to any maritime zone delimitation.³⁷

Certainly there are signs in the case-law that similar principles can apply to all delimitation situations: for example, that of proportionality of coastlines, such as advocated by Myanmar in the ITLOS *Bangladesh/Myanmar* maritime dispute, relates to Art. 15 just as it may be applied in Arts. 74 and 83.³⁸ Thus, in this recent *Bay of Bengal Case*, Myanmar argued that the location of the Bangladeshi-owned St Martin’s Island (off-shore of Myanmar) constituted ‘special circumstances’ regarding both the territorial sea delimitation and the EEZ delimitation³⁹ as it could lead to manifest disproportionality;⁴⁰ arguing that its approach was ‘in accordance with case-law relating both to delimitation of the territorial sea and other maritime zones’,⁴¹ and also with State practice where small or middle-sized islands were ‘usually totally ignored’.⁴²

Interestingly, whilst the ITLOS commented in the case that ‘neither case law nor state practice indicates that there is a general rule concerning the effect to be given to islands in maritime delimitation’,⁴³ it then noted that ‘the effect to be given to islands may differ, depending on whether the delimitation concerns the territorial sea or other maritime areas beyond it’.⁴⁴ So in this case, the ITLOS was to discount the relevant island only in the context of the EEZ/continental shelf delimitation aspect because giving it effect in this instance would ‘cause an unwarranted distortion of the delimitation line’⁴⁵; as distortion of an equidistance line ‘may increase substantially as the line moves beyond 12 NM from the coast’.⁴⁶

It has nonetheless been argued that a territorial sea delimitation is also a ‘two-step’ process (in the absence of an agreement), involving a provisionally drawn equidistance line first and secondly, if necessary, an adjustment of this line to take in ‘special circumstances’, an approach also adopted for the determination of a maritime boundary beyond the territorial sea.⁴⁷

³⁶ *Cameroon/Nigeria Case* (note 34), 441 (para. 288); see also *Antunes* (note 2), 99, who opines, citing the *Qatar/Bahrain Case*, that *dicta* there suggest the ‘equitable principles’ doctrine was applicable to zones other than the territorial sea, and that in practice this merely boils down to a general application of the ‘equidistance-special circumstances rule’. In the *Qatar/Bahrain Case* (note 11), 91 (para. 167), the ICJ stated generally that: ‘The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of special circumstances’: in the southern sector the delimitation involved was effectively of territorial sea of the parties only, whereas in the northern sector, the delimitation involved EEZ/continental shelf: *cf. infra*, note 114.

³⁷ See the *Cameroon/Nigeria Case* (note 34), 442 (para. 290); and *Papanicopolulu* (note 3), 389; note, however, that Bangladesh in its reply in the ITLOS *Bay of Bengal Case* argued that the case-law showed a distinction on delimitation between treatment of islands (at least) in a territorial sea and those in a continental shelf/EEZ situation, *Bay of Bengal Case* (note 33), Reply of Bangladesh of 15 March 2011, vol. I, 41 *et seq.* (paras. 2.81 *et seq.*).

³⁸ *Bay of Bengal Case* (note 33), Rejoinder of the Republic of the Union of Myanmar of 1 July 2011, 58 (para. 3.19).

³⁹ *Ibid.*, 55 (para. 3.11).

⁴⁰ *Ibid.*, 57 (paras. 3.14, 3.15).

⁴¹ *Bay of Bengal Case* (note 33), 47 (para. 136) (emphasis added).

⁴² *Ibid.*, 47 (para. 137); on Bangladesh’s response to this, see *ibid.*, 47 *et seq.* (paras. 138 *et seq.*).

⁴³ *Ibid.*, 50 (para. 147), saying it depended on the ‘particular circumstances of each case’. In so saying, and using the broad phrase ‘maritime delimitation’, the Tribunal might be seen to have implied similar *prima facie* considerations applying beyond a mere territorial sea delimitation context.

⁴⁴ *Ibid.*, 50 (para. 148) (emphasis added).

⁴⁵ *Ibid.*, 96 (para. 318).

⁴⁶ *Ibid.*; see also *infra*, MN 31. The ITLOS indeed commented that most cases referred to by Myanmar in the case were concerning the effect of islands on lines relating to EEZ/continental shelf delimitation and ‘thus were not directly relevant to the delimitation of the territorial sea’: *Bay of Bengal Case* (note 33), 50 (para. 150). Thus the ITLOS distinguished the treatment of ‘insignificant maritime features’ (such as Qit’at Jaradah in the ICJ *Qatar/Bahrain Case* (note 11), 104 (para. 219)); see further *infra*, note 107.

⁴⁷ *Tanaka* (note 31), 57–58; see the *Qatar/Bahrain Case* (note 11), 94 (para. 176) (‘provisionally an equidistance line’).

- 16 Territorial sea delimitation can only, of course, take place where land territory (and so any potential baseline) is not in dispute in the region to be delimited. Thus, for example, in 2008 the ICJ was asked to determine ownership of three land features at the eastern end of the Singapore Strait.⁴⁸ The Court's decision on this has now cleared the way for Indonesia, Malaysia and Singapore to delimit their territorial waters in the Strait by subsequent agreement between themselves.

2. 'agreement'

- 17 This word, as in other delimitation situations, reflects the primary rule in all maritime delimitations as being based on the 'mutual consent' of the parties involved concerning a boundary line.⁴⁹ The meaning of the word featured prominently in the recent *Bay of Bengal Case* in 2012, where the ITLOS had to decide whether, in the context of the request for a delimitation by the Tribunal of the two States' territorial seas under Art. 15, there was already an 'agreement' on this between the two States in the light of their signing of 'Agreed Minutes' of 1974 and 2008 (or by 'tacit agreement'),⁵⁰ which had provisionally fixed a territorial sea boundary at a mid-point between St Martin's Island and the Myanmar mainland.⁵¹ Bangladesh had there argued that the 1974 'Agreed Minutes' created rights and obligations for each State and therefore constituted an 'agreement' under Art. 15.⁵²
- 18 On this issue the ITLOS determined that 'in the light of the object and purpose of Article 15 [of UNCLOS], the term "agreement" refers to a legally binding agreement',⁵³ and admitted that in some circumstances 'Agreed Minutes' might constitute such an 'agreement'.⁵⁴ The Tribunal concluded that 'the circumstances in which the 1974 Agreed Minutes were adopted do not suggest they were intended to create legal obligations or embodied commitments of a binding nature'.⁵⁵ Nor did the Tribunal find the conduct of the parties evidenced any tacit or *de facto* agreement relating to the territorial sea boundary.⁵⁶ It is implicit in this statement that an express and formal treaty-type understanding may not be required *stricto sensu* under Art. 15, as the Tribunal's decision⁵⁷ seems to infer that a tacit or *de facto* maritime 'agreement', as well as the doctrine of estoppel, constitute potentially separate or additional grounds for displacing the remaining wording of Art. 15.⁵⁸

⁴⁸ ICJ, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), Judgment of 23 May 2008, ICJ Reports (2008), 12; and see *infra*, note 137.

⁴⁹ *Antunes* (note 2), 39.

⁵⁰ *Bay of Bengal Case* (note 33), 25 (para. 56).

⁵¹ *Ibid.*, 25 (para. 57).

⁵² *Ibid.*, 29 (para. 64); Bangladesh also argued that an 'agreement' under Art. 15 need not necessarily be 'in every sense a formally negotiated and binding treaty', *ibid.*, 31 (para. 70) (emphasis added), and added that the instant case was similar to the process-verbal 'agreement' in the 2009 ICJ *Maritime Delimitation in the Black Sea Case*, *ibid.* (para. 74); Bangladesh further argued that agreed minutes could reflect an 'agreement' which was legally binding, Reply of Bangladesh (note 37), 26 (para. 2.38). Myanmar argued the opposite on several grounds, *Bay of Bengal Case* (note 33), 29 (paras. 65, 66). Bangladesh even argued that the word 'agreement' in Art. 15 'includes, but is not limited to, a "treaty" or a "convention"', Reply of Bangladesh (note 37), 24 (para. 2.33) (emphasis added).

⁵³ *Bay of Bengal Case* (note 33), 36 (para. 89).

⁵⁴ *Ibid.*, 36 (para. 90).

⁵⁵ *Ibid.*, 37 (para. 93) (emphasis added); the same was found to be true of the 2008 agreed minutes, *ibid.*, 38 (para. 98), these being merely 'a record of a conditional understanding reached during the course of negotiations [...]', *ibid.*, 37 (para. 92).

⁵⁶ *Ibid.*, 39 (para. 100).

⁵⁷ *Ibid.*, 45 (para. 126).

⁵⁸ Previously the term had also featured more generally in the *Cameroon/Nigeria Case* (note 34), 429 (para. 263), where the ICJ held that the Maroua Declaration (with chart), 1 June 1975, UNTS 1273, 319, constituted an international agreement in written form in respect of delimitation of the territorial sea area involved there; cited by Bangladesh, Reply of Bangladesh (note 37), 21 (para. 2.25).

3. ‘opposite or adjacent’ coasts and the ‘median line’

‘Opposite coasts’ are defined in the IHO Manual as being ‘the geographical relationship of the coasts of two States facing each other’,⁵⁹ which interposing area of seas may therefore need a boundary delimitation to avoid overlap. ‘Adjacent coasts’ are there defined as ‘the coasts lying between either side of the land boundary between two adjoining States’.⁶⁰ The same wording as here was used in Art. 12 (1) CTSCZ. Although the line is referred to as a ‘median line’, this is substantially the same as an ‘equidistance’ line.⁶¹ Technically a difference has been made between the two, the first being used in connection with neighbouring opposite States and the second relating to neighbouring laterally-positioned States.⁶² In practice, however, as has been evident in past delimitation case-law, any supposed difference in construction of either type of line is unclear.⁶³ So, despite the differing wording, the terms have arguably interchangeable meanings.⁶⁴ There is, though, some evidence in recent case-law that, where coasts are opposite, the presumption of a median line is stronger than when the coasts are merely adjacent (the *Eritrea/Yemen Arbitration Second Stage*).⁶⁵

A ‘median line’ has been defined as ‘a line every point of which is **equidistant** from the nearest points on the baselines of two States’,⁶⁶ the very phrase used in Art. 15 in the first sentence where further use of the word ‘equidistant’ in itself implies the interchangeability between the two terms. Indeed, most recently in the *Bay of Bengal Case*, the ITLOS observed (in the context of essentially, or at least partially, opposite States) that under Art. 15 ‘the territorial sea of the Parties is to be delimited by an **equidistance line**’.⁶⁷ Even in fixing a territorial sea median line *eo nomine*, certain normally-existing (minor) qualifying coastal features may, for reasons of mutual convenience, be discounted as basepoints for such a line; as, for example, a dubious ‘island’ and certain LTEs in the *Bangladesh/Myanmar* dispute, where neither side used such minor basepoints,⁶⁸ accepting here the ‘low-water line’.⁶⁹ As such, even an ostensible ‘median line’ may be a ‘modified’ or ‘simplified’ one.

4. ‘failing agreement’

It has been commented that the fundamental rule in territorial sea delimitation is that it should be effected (as now expressed in Art. 15) ‘by the mutual agreement of the parties involved, and not unilaterally’.⁷⁰ This rule is here negatively expressed, as was also the case in Art. 12 (1) CTSCZ, supposedly to *pro tempore* regulate a delimitation situation involving

⁵⁹ IHB Manual (note 1), Appendix 1, para. 69.

⁶⁰ *Ibid.*, para. 1.

⁶¹ *Ibid.*, para. 62; *cf.*, *ibid.*, para. 31, defined as being the same as a ‘median line’.

⁶² *Ibid.*, para. 62; according to *Tanaka* (note 31), 76–77, 80, the distinction between adjacent and opposite coasts has not been important in existing judicial and arbitral decisions relating to territorial sea delimitation.

⁶³ See *Antunes* (note 2), 153.

⁶⁴ *Ibid.*, 154, he claims, e.g., that the lines involve the same ‘geometric method’ and the seeming differentiation of terminology in Art. 6 CSC has accordingly ‘no juridical relevance’.

⁶⁵ See *Eritrea/Yemen Arbitration Second Stage* (note 34); *cf.* *Bay of Bengal Case* (note 33), 46 (para. 133), where Myanmar had pleaded that where the dominant coastal relationship is an adjacent one, rather than ‘opposite’, islands in general ‘generate more exaggerated distortions’.

⁶⁶ IHB Manual (note 1), Appendix 1, para. 59 (emphasis added).

⁶⁷ *Bay of Bengal Case* (note 33), 51 (para. 153) (emphasis added): in the case, Myanmar had argued that where the coasts of Myanmar and St Martin’s island were ‘opposite’, a median line was appropriate; but where coasts were no longer opposite, an equidistant line (discounting the island) was called for: *cf.* Reply of Bangladesh (note 37), 34 (para. 2.61).

⁶⁸ Reply of Bangladesh (note 37), 28 *et seq.* (paras. 247 *et seq.*); *cf.* further *infra*, note 76.

⁶⁹ *Bay of Bengal Case* (note 33), 51 (para. 156). This line was used by the Tribunal to draw the equidistance line: where comparatively narrow territorial sea zones are in issue, the greater the number of salient basepoints may be needed to obtain an accurate mid-point line, see *infra*, note 85.

⁷⁰ Nordquist/Nandan/Rosenne (note 10), 141.

notionally-overlapping territorial seas pending agreement on a boundary line.⁷¹ As TANAKA points out, for example, in contrast to Art. 6 CSC, the use of the phrase ‘failing agreement’ (as in Art. 12 CTSCZ), emphasised ‘equidistance by negative prescription’.⁷² In other words it implies a *status quo* holding rule⁷³ (as well as a residual rule for finalised delimitation, including third party settlement procedures)⁷⁴ which applies *prima facie* in the absence of, and pending, agreement, based on an objective geometric test.⁷⁵ This expedient is expressly provided for in some States’ maritime legislation.⁷⁶

- 22 To some extent this makes up for the fact that unlike Arts. 74 (2) and (3) and 83 (2) and (3) on (respectively) EEZ and continental shelf delimitation, there is here no express provision here regarding the making of ‘provisional arrangements’ pending the settlement of disputes.

5. ‘baselines from which the breadth of the territorial seas [...] is measured’

- 23 In the process of drawing an equidistance/median line as a territorial sea boundary – at the first (provisional) stage of the delimitation process or at the final one – it will be necessary to ‘identify baselines’ and ‘relevant coasts’ in the process,⁷⁷ both of which can give rise to

⁷¹ Anderson (note 19), 5; Nordquist/Nandan/Rosenne (note 10), 135: the phrase ‘failing agreement’ was substituted for previous wording at UNCLOS I.

⁷² Tanaka (note 14), 38 (emphasis added).

⁷³ E.g., The Declaration on the Inter-State Relations between the Republic of Croatia and the Republic of Slovenia, 26 March 1999, Official Journal of Croatia, No. 32/99 (1999), 1089 *et seq.*, concerning the (disputed) Bay of Piran in 1999, relying explicitly on Art. 15, stated that the two disputing coastal States (Croatia and Slovenia) were (while the dispute lasted) ‘obligated to refrain from any type of jurisdiction beyond the line of equidistance’ in the Bay: cf. Arnaut (note 7), 434; and Matej Avbelj/Jernej L. Cernic, The Conundrum of the Piran Bay: Slovenia v. Croatia – the Case of Maritime Delimitation, Journal of International Law & Policy 5 (2007), 6, 10. This is in contrast to the stated EEZ/continental shelf delimitation principles in Arts. 74 and 83; in ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Request for Provisional Measures, Public Sitting of 25 September 2003, ITLOS Doc. ITLOS/PV.03/02/CORR.1 (2003), 9, Professor James Crawford argued on behalf of Malaysia that Singapore’s use of reclaimed land to push out its equidistant line for territorial sea boundary purposes was an automatic infringement of the first part of Art. 15 because, under this part, Malaysia’s rights had to be preserved pending agreement beyond what had been agreed by treaty in 1979. In the absence of territorial sea delimitation treaties with Turkey in the Aegean, Greece has argued for an equidistance/median line under customary law in overlapping zones, seeing Art. 15 as codifying international law: Statement of Hellenic Republic Ministry of Foreign Affairs of 15 February 2011.

⁷⁴ E.g., the ICJ, in the ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61, has borrowed this ‘provisional line’ technique even for determining finalised EEZ/continental shelf delimitation; see further Irini Papanicopolulu, From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea, EJIL: Talk!, Blog of the EJIL, 23 March 2012, available at: <http://www.ejiltalk.org/from-the-north-sea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-law-of-the-sea/>. She comments on the ICJ *Bay of Bengal Case* that the expedient of the provisional equidistance line in the case of the territorial sea area there (giving St Martin’s island full effect) was in line with previous decisions and state practice giving a privileged status to this principle.

⁷⁵ Anderson (note 19), 4; Antunes (note 2), 98. It seems, therefore, that where agreement on a territorial sea boundary is not, or cannot be, effected, the equidistance line *pro tempore* acts automatically as ‘a line beyond which [...] states cannot exercise their sovereignty’, as well as, more generally, being the presumptive rule in any territorial sea boundary negotiations or international adjudication on same, where it is ‘the starting line for delimitation’. Many territorial delimitation negotiations have started on the basis of a median line being required, e.g., in 1970, regarding the Norway/USSR boundary on the northern border when Norway advocated a midway line under Art. 15 as the normal practice internationally, though the USSR argued the ‘sector principle’ should apply.

⁷⁶ States which have provided for such a provisional unilateral territorial sea delimitation method in their legislation in cases where there has been, as yet, no mutual agreement on a line include Mozambique (Art. 5 Mozambique Maritime Zones Sea Law), cited by: Aldo Chircop *et al.*, The Maritime Zones of East African States in the Law of the Sea: Benefits Gained, Opportunities Missed, African Journal of International and Comparative Law 16 (2008), 121, 147; Kenya has similar provision except that its claimed median line with an adjacent State is ‘not premised on the absence of agreement with that State’, *ibid.*; see also Art. 6 of the Law on the Territorial Sea and Contiguous Zone of the Republic of China, which states: ‘In the event that [its] territorial sea [...] overlaps [...] the delimitation shall be the median line [...]’.

⁷⁷ Tanaka (note 14), 110; e.g., in the setting of a third party settlement procedure, whether the parties have specified them or not; the parties may, indeed, often dispute what the relevant basepoints are: Bangladesh argued

problems of a 'technical nature'⁷⁸ at a negotiation stage.⁷⁹ Thus, for example, where disputing parties do not agree on relevant baselines, on any referral of a delimitation dispute to an international tribunal, the latter will have to determine such baselines (for any median line purposes) independently; i.e., *sua sponte*⁸⁰, whether these are based on possible low-water lines, straight baselines,⁸¹ LTEs etc. Importantly also, as the ICJ case-law shows, a baseline adopted by any particular disputing State is not binding on another in a territorial sea (or indeed EEZ/continental shelf)⁸² delimitation adjudication situation. For example, in the *Qatar/Bahrain Case*, the ICJ disallowed in such delimitation circumstances Bahrain's claimed straight (or archipelagic) baselines.⁸³ However, disputing States may themselves come to a mutual agreement, for reasons of convenience, to ignore certain basepoints in fixing a median line.⁸⁴

In fixing such a line, there may be a dispute not only as to individual basepoints being 24 used, but also their numbers, as in the *Bay of Bengal Case*, where Myanmar complained that Bangladesh's claimed choice of insular basepoints in its construction of a provisional equidistance line would determine the course of the territorial sea boundary over its whole

in its Reply (note 37), 35 (para. 2.65), that Myanmar had ignored the first sentence of Art. 15 by employing a 'hybrid line', 'based on artificial coastal control points' rather than points derived 'from an actual geographical situation'.

⁷⁸ *Antunes* (note 2), 98 (footnote 442).

⁷⁹ The claim to different baselines, e.g., in the case of the Singapore Strait between Malaysia, Indonesia and Singapore, may hamper the necessary tripartite agreement on a boundary there; most particularly in the Public Sitting of the ITLOS *Land Reclamation Case* (note 73), 7, Malaysia denied that Singapore could unilaterally use its artificial extension of its land by reclamation as basepoints there (as the latter claimed, *cf. ibid.*, 11, *per* Professor James Crawford, and 13, *per* Professor Nicolaas J. Schrijver) for an as yet not agreed part of the territorial sea boundary between Singapore and Johor. The earliest Treaty between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Seas of the Two Countries in the Strait of Singapore, 25 May 1973, UNTS 2528, 3 was, incidentally, deficient in that it had not specified a geodetic datum (as now required under Art. 16 (1)); this was remedied in the Treaty between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Seas of the Two Countries in the Western Part of the Strait of Singapore, 10 March 2009, UNTS 2713, 1, where WGS84 is the datum specified, *cf. I. Made Andi Ardsana*, *Maritime Delimitation in the Singapore Strait* (2010), available at: http://www.hydro-international.com/issues/articles/id1193-Maritime_Delimitation_in_the_Singapore_Strait.html.

⁸⁰ In the *Qatar/Bahrain Case* (note 11), 94 (paras. 177 *et seq.*), e.g., the ICJ had first to identify baselines for equidistance purposes which was a matter on which neither party had even seemingly submitted details or maps, so leaving the task to the Court; *cf. further Tanaka* (note 31), 59 *et seq.* In its pleadings, Qatar argued for a mainland-to-mainland method, including Hawar Island and Bahrain Island, ignoring any other formations and based on a high-water line, *Qatar/Bahrain Case* (note 11), Counter Memorial of Qatar, 31 December 1997, 228 *et seq.* (paras. 7.24 *et seq.*). According to *Tanaka* (note 31), 62, this approach was seemingly rejected by the ICJ. Bahrain, by contrast, argued for a baseline connecting its outermost islands and LTEs, *Qatar/Bahrain Case* (note 11), Reply of the State of Bahrain, 30 May 1999, paras. 287 *et seq.* The ICJ rejected any use of a high-water line baseline in the *Qatar/Bahrain Case* (note 11), 97 *et seq.* (paras. 184 *et seq.*), and made rulings over certain formations of dubious insular status – Fasht al Azm, Qit'at Jaradah, and Fasht ad Dibal – concluding that Qit al Jaradh was an island to be taken into account as a baseline; the latter being disregarded as a LTE lying within the territorial sea of both States.

⁸¹ It had been intended by the ILC to include in the process both normal, i.e., low-tide, and 'straight', baseline systems, ILC, Report of the International Law Commission, UN Doc. A/2456 (1953) GAOR 8th Sess. Suppl. No. 9, reproduced in: ILC Yearbook (1953), vol. II, 271.

⁸² See *Black Sea Case* (note 74), 108 (para. 137): determination of basepoints is 'an exercise which always has an international aspect', and in 'delimitation of maritime areas' the ICJ 'should not base itself solely on the choice of basepoints made by one of [the] parties'.

⁸³ *Qatar/Bahrain Case* (note 11), 103 (paras. 212 *et seq.*).

⁸⁴ In the *Bay of Bengal Case* (note 33), 78 (paras. 247 *et seq.*), e.g., Myanmar in its pleadings pointed out that several potential basepoints had been excluded by both sides in the territorial sea delimitation discussions in previous documents aimed at fixing a provisional equidistance line, including, e.g., exclusion of certain LTEs off Myanmar's coast, even though these could, of course, be used as normal baselines for measuring the breath of the territorial sea, and would otherwise have been the nearest relevant basepoints for construction of such a line; *ibid.*, 51 (para. 156). In the context of the territorial sea delimitation and median line, the Tribunal accordingly accepted the use of basepoints selected by the parties on the low-water lines of their coasts for fixing an equidistance line on an Admiralty chart.

course.⁸⁵ Thus a reasonably representative selection of basepoints may be required to give a ‘balanced’ median line in such narrower waters.⁸⁶

6. ‘special circumstances’

- 25 This exception – based on the idea of ‘equity’ and to ‘correct inequitable results’ of the application of equidistance⁸⁷ – was originally contained in Art. 12 CTSCZ.⁸⁸ The ILC had noted, prior to that convention’s adoption, that ‘special circumstances’ would ‘probably necessitate frequent departures from the mathematical median line’; but it still thought it was ‘able to adopt, as a general rule, the system of the median line as a basis for delimitation’.⁸⁹ As will be seen below, this prediction has been largely borne out by judicial decisions and State practice.
- 26 There has, at times, been criticism of the abovementioned proviso to a median line for being cast in ‘exceedingly general terms’,⁹⁰ and until recently there was little in the way of case-law to elucidate the phrase.⁹¹ The idea behind it found early expression in the *Grisbådarna Case* where the tribunal ignored a median line and used instead a line perpendicular to the general direction of the coast to come to a just solution.⁹² The phrase, however, received much judicial attention in the recent *Bay of Bengal Case*, where the ITLOS emphasised its importance as part of a residual and routine rule: by stating that it followed ‘from article 15 that before the equidistance principle is applied, consideration should be given to the possible existence of historic title or other special circumstances relevant to the area to be delimited’.⁹³ However, the final effect of applying any special circumstance considerations in modifying a median line may be minimal.⁹⁴ And, in any event, as Bangladesh opined in the *Bay of Bengal Case*, the burden of proof here may be on the State which has raised the existence of special circumstances.⁹⁵
- 27 Just what ‘special circumstances’ may include is unclear without any ‘authoritative definition’, as at UNCLOS I, where any examples mentioned in the records are ‘merely illustrative’.⁹⁶ However, in the past matters such as exceptional configuration of coastlines (e.g., concavity and convexity, as was largely the situation in the ICJ *Nicaragua/Honduras Case*)⁹⁷,

⁸⁵ Cf. *ibid.*, 79 (paras. 251 and 254), concerning Bangladesh’s assertion on this, as well as alleged inconsistency with ‘geographic realities’.

⁸⁶ Reply of Bangladesh (note 37), 83 (para. 3.97).

⁸⁷ Tanaka (note 14), 40.

⁸⁸ Nordquist/Nandan/Rosenne (note 10), 135.

⁸⁹ ILC Report (note 81), 271 (emphasis added).

⁹⁰ Anderson (note 70), 4.

⁹¹ Arnaut (note 7), 448.

⁹² PCA, *Grisbådarna Case* (Norway v. Sweden), Award of 23 October 1909, RIAA XI, 147 *et seq.*; commented on by Antunes (note 2), 42 *et seq.*

⁹³ *Bay of Bengal Case* (note 33), 45 (para. 129).

⁹⁴ For example, in PCA, *Case Concerning a Dispute between Argentina and Chile Concerning the Beagle Channel* (Argentina v. Chile), Award of 18 February 1977, RIAA XXI, 53, the Tribunal stressed matters other than equidistance, but found none of these had ‘resulted in much deviation from the strict median line’.

⁹⁵ *Bay of Bengal Case* (note 33), 49 (para. 142); see further *infra*, note 116.

⁹⁶ Tanaka (note 14), 42.

⁹⁷ For instance, in the *Nicaragua/Honduras Case* (note 6), 742 *et seq.* (paras. 277 *et seq.*), the ICJ determined it was impossible to identify basepoints and construct a provisional equidistance line for single maritime delimitation purposes, and that this in itself amounted to ‘special circumstances’ where the equidistance rule could not apply. Added to this was the fact here that the baselines were unstable at the mouth of the River Coco, so making construction even of a provisional equidistance difficult. The ICJ referred to the volatile coastal topography where continued accretion ‘might render any equidistance line so constructed today arbitrary and unreasonable in the near future’, *ibid.*, 746 (para. 286); so that an alternative method of delimitation was necessary, see *infra*, note 140. As the Court noted (*ibid.*, 744 (para. 280)), nothing ‘in the wording of Article 15 suggests that **geomorphological problems** are *per se* excluded from being “special circumstances” within the meaning of the exception, nor that such “special circumstances may only be used as a corrective element to a line already drawn” (emphasis added). See also *Shi Jiuyong*, Maritime Delimitation in the Jurisprudence of the International Court of Justice,

islands, navigational channels or security matters⁹⁸ and fishery interests have been mentioned as examples.⁹⁹ Of these, small islands may be the most common and problematic,¹⁰⁰ as discussed below.

Small insular features, particularly where situate far from their owner's coast, may indeed be considered as constituting typical 'special circumstances', as recent case-law shows. In the *Bay of Bengal Case*, Myanmar claimed that Bangladeshi St Martin's Island (8 km² in area and populated),¹⁰¹ and lying immediately off Myanmar's coast, was a special circumstance as it was on the 'wrong side' of an equidistance line drawn between the mainland coasts and was (allegedly) a 'relatively small feature'.¹⁰²

In its pleadings Bangladesh had argued, *inter alia*, that, relating to the interposing of St Martin's Island, the case-law cited by Myanmar supported less than full effect on a median line relating to delimitation instances concerning the EEZ or continental shelf, and not the territorial sea.¹⁰³ The ITLOS agreed with this, stating that such case-law (and, indeed, State practice) was 'not directly relevant to the delimitation of the territorial sea'.¹⁰⁴ Bangladesh had attempted to distinguish the treatment by the ICJ of insular features in the previous *Qatar/Bahrain Case*.¹⁰⁵ In that case, the ICJ, having drawn a provisional equidistance line, decided certain insular features should be disregarded as baselines as being 'special circumstances' – Fasht al Azm because of its proximity to Qatar's coast (and its consequent disproportionate effect)¹⁰⁶ – and a Bahraini-claimed small formation called Qit'at Jaradah¹⁰⁷, a small portion of which was above high tide and so technically an island, located about midway in the parties' overlapping territorial seas to the north east of Bahrain. In that case the ICJ gave the latter formation effectively no influence on the delimitation in passing the boundary line just to its east to avoid a disproportionate result because of a special circumstance.¹⁰⁸

Chinese JIL 9 (2010), 271, 280; Yoshifumi Tanaka, Reflections on Maritime Delimitation in the *Nicaragua/Honduras Case* (2008), ZaōRV 68 (2008), 903, 910 *et seq.*

⁹⁸ E.g. at UNCLOS I the UK mentioned in this context the presence of a navigational channel (UNCLOS I, 60th Meeting, UN Doc. A/CONF.13/C.1/L.62 (1958), OR III, 186, 189; UNCLOS I, 32th Meeting, UN Doc. A/CONF.13/C.4/L.28 (1958), OR VI, 93); Tanaka (note 31), 62, referring to the *Qatar/Bahrain Case*, where channel navigation matters and security were raised. In the *Beagle Channel Arbitration* (note 94), 146 (para. 110), the Court mentioned 'convenience, navigability, and the desirability of enabling each Party so far as possible to navigate in its own waters', and specifically referred to the situation of median-line divergence near Gable Island where 'the habitually used navigable track [had] been used'.

⁹⁹ Antunes (note 2), 33.

¹⁰⁰ See, e.g. Sea-Bed Committee, Turkey: Draft Article Related to the Following Items: 2.3.1, 5.3, 6.7.2, UN Doc. A/AC.138/SC.II/L.22 (1973), regarding the 'existence of islands or islets'.

¹⁰¹ *Bay of Bengal Case* (note 33), 49 (para. 143).

¹⁰² See Churchill (note 9), 140; and *Bay of Bengal Case* (note 33), 46 *et seq.* (paras. 132, 134); and see Reply of Bangladesh (note 37), 36 (paras. 2.66 *et seq.*), arguing Myanmar's alleged wrongful interpretation of the 'wrong side' phrase and its 'cartographic manipulation' which necessitated departure from a median line; *cf.* further ICJ, *Bay of Bengal Case* (note 33), 46 (paras. 131 *et seq.*), being situate 'immediately off the coast of Myanmar' (about 6.5 NM from the endpoint of the land boundary and 4.5 NM and 4.9 NM from Myanmar, the bestowal of full effect to which would lead to a 'considerable distortion with respect to the general configuration of the coastline, created by a relatively small feature', and thus (allegedly) calling for 'shifting or adjusting the median line'. Bangladesh, on the other hand, stressed the fact that the island was within its own twelve NM limit: this point was accepted by the Court.

¹⁰³ *Bay of Bengal Case* (note 33), 48 (paras. 140 *et seq.*); Bangladesh had cited three ICJ cases – the *Qatar/Bahrain Case*, *Nicaragua/Honduras Case* and the *Black Sea Case* – to support its plea that the island should have full effect in a territorial sea delimitation.

¹⁰⁴ *Bay of Bengal Case* (note 33), 50 (para. 150).

¹⁰⁵ *Ibid.*; Reply of Bangladesh (note 37), 38 *et seq.* (para. 2.74): here, as seen above, the ICJ was asked to draw a single delimitation line which included territorial sea.

¹⁰⁶ *Qatar/Bahrain Case* (note 11), 80 (para. 128).

¹⁰⁷ A very small, uninhabited, islet situate more than 10 miles from the respective coastlines.

¹⁰⁸ *Qatar/Bahrain Case* (note 11), 104 *et seq.* (para. 219); see generally Tanaka (note 31), 62, 78, who points out that in so doing the ICJ deprived it of any insular territorial sea: *Qatar/Bahrain Case* (note 11), 97 (para. 185). The ICJ stressed the equal right of islands regardless of size and status, to generate baselines and maritime rights; *ibid.*, 104 (para. 218); however, in the light of disproportionate proximity of such formations to Qatar's mainland, the Court considered that the special circumstances here ruled out an equidistance line; *cf.*

- 30 In its judgment in the *Bay of Bengal Case*, the ITLOS determined there were no reasons why the abovementioned island (St Martin's) should be treated as a 'special circumstance'; so that it had full effect in the territorial sea boundary.¹⁰⁹ On this the Tribunal noted that the island was 'located almost as close to Bangladesh's mainland coast as to the coast of Myanmar' and was within Bangladesh's mainland-generated territorial sea;¹¹⁰ but it also opined that it was 'not unprecedented' in case-law for 'insignificant maritime features' to be given less than full effect in delimitation.¹¹¹ However, the Tribunal applied 'pursuant to Art. 15' an equidistance line here as there were 'no compelling reasons' for treating it 'as a special circumstance for the purposes of article 15';¹¹² as it concluded that 'St Martin's Island is a significant maritime feature by virtue of its size and population and the extent of economic and other activities'.¹¹³
- 31 In contrast, however, the island was given **no equidistance effect** in the continuing single maritime boundary in that case,¹¹⁴ which, as seen, indicates the differing effect which 'equitable'/special circumstances may have in territorial sea delimitations, on the one hand, and delimitation of more extensive zones, on the other.
- 32 The initial reference to a 'median line' in Art. 15 has prompted more than one commentator to view the wording in Art. 15 as having a 'clear preference' for use of an equidistance line (rather than resort to 'special circumstances'), in contrast to the rules in Arts. 74 and 83 (where there is no mention of a median/equidistance line). This is despite the fact that the 'special circumstances' proviso in Art. 15 arguably has the same meaning as the 'equidistance'/equitable solution' rule more generally used in EEZ/continental shelf delimitations decided by international tribunals.¹¹⁵ And in similar fashion, TANAKA concludes that whilst the hierarchical relationship between equidistance and special circumstances is problematic, the *travaux préparatoires* to Art. 12 CTSCZ favour viewing 'equidistance' circumstances as the principle and 'special' circumstances as the exception.¹¹⁶
- 33 Others see it more as a single rule which arises *proprio motu*. ANTUNES, for example, whilst agreeing that the *onus probandi* of special circumstances rests with the 'claiming party' – with equidistance here acting as a '*juris tantum* presumption'¹¹⁷ – nonetheless opines that 'adjudicating bodies are entitled to investigate the matter' on their 'own initiative'.¹¹⁸

further Tanaka (note 31), 112. Thus the disproportionate effect of small insignificant features both close to land and further out to sea may potentially amount to 'special circumstances' in territorial sea delimitation.

¹⁰⁹ See Churchill (note 9), 141.

¹¹⁰ *Bay of Bengal Case* (note 33), 50 (para. 149).

¹¹¹ *Ibid.*, 51 (para. 151); by contrast, here the island in question was to be 'given full effect in drawing the delimitation line', *ibid.*, 51 (para. 152).

¹¹² *Ibid.*, 51 (para. 152); see also the treatment of small insular formations in *Eritrea/Yemen Arbitration Second Stage* (note 34), 37 *et seq.* (paras. 115 *et seq.*).

¹¹³ *Bay of Bengal Case* (note 33), 51 (para. 151).

¹¹⁴ On the EEZ/continental shelf delimitation, see *ibid.*, 82 (para. 265); this more extensive zone was found to commence where the outer limit of the 12 NM territorial sea around the island intersected with the equidistance line drawn by the ITLOS, so giving the island, in this instance, merely 'a full 12-mile territorial sea at the expense of a small part of Myanmar's EEZ and continental shelf' (*cf.* Churchill (note 9), 145), but no effect otherwise on the single maritime boundary. This was similar to the solution decreed in the *Dispute Concerning Delimitation of the Maritime Boundary* (Guinea v. Guinea-Bissau), Award of 14 February 1985, ILM 25 (1986), 251, 298, where, in part at least, a territorial sea boundary had to be fixed by the tribunal, and in which case, the maritime boundary was drawn to allow an island lying just south of the main delimitation line to have a territorial sea to its west.

¹¹⁵ Clive Schofield, *Parting the Waves: Claims to Maritime Jurisdiction and Division of Ocean Space*, Penn State Journal of Law & International Affairs 1 (2012), 40, 49; see also Antunes (note 2), 90.

¹¹⁶ Tanaka (note 14), 40; in the Bay of Piran dispute, for example, Slovenia has argued that the principle of equidistance is the general principle which must always be applied unless the 'exception' (or agreement) applies (or there is otherwise agreement), so that as an exception, the phrase 'special circumstances' must be narrowly construed with burden of proof on the invoker – hence Croatia says Slovenia must prove them, *cf.* Avbelj/Cernic (note 73), 13.

¹¹⁷ Antunes (note 2), 34.

¹¹⁸ *Ibid.*, 35; he views the related *France-United Kingdom Arbitration*, reprinted in: ILM 18 (1979), 397, as being effectively concerned with continental shelf delimitation.

Such a difference of views indicates that it may be a vain exercise to read *any* hierarchical order into the median line/'special circumstances' interpretation in Art. 15; and the recent *dicta* of the ITLOS in the *Bay of Bengal Case*¹¹⁹ and other tribunals tend to support this viewpoint; as, for example, in the 1999 *Eritrea/Yemen Arbitration Second State*,¹²⁰ where a single maritime boundary was in issue, and the arbitral tribunal was concerned with delimiting some areas of overlapping territorial sea. Concerning the latter, the tribunal decided that such areas were to be divided by a median/equidistance line, unless a variation was required because of special circumstances. Thus the tribunal effectively stated that it would approach the delimitation issues using, as a rebuttable presumption, the proposition that the median line fitted the requirements not only of Arts. 74 and 83, but also Art. 15.¹²¹ However, the tribunal still only gave the three sets of mid-sea islands involved there a partial effect in this exercise when taking into account the overlapping territorial seas.

7. Historic Title

The reference to historic title was added to the original ILC draft to follow the phrase 'special circumstances' at UNCLOS I.¹²² Such a proviso is not mentioned in other 'delimitation provisions' of the Convention, such as Arts. 74 and 83.¹²³ There is here no definition of the term 'historic title', which theoretically might include both historic 'rights' as well as historic 'title' *stricto sensu*, such as including claims to historic waters.¹²⁴ However, the arbitral Tribunal in the *Philippines v. China South China Sea Arbitration* has recently clarified the meaning of the phrase, albeit in the wider context of the meaning of 'historic titles' in Art. 298(1)(i)(a) of UNCLOS: to mean a 'reference to claims to sovereignty over maritime areas derived from historical circumstances'¹²⁵. In other words, both references in UNCLOS to 'title' – in Art. 15 and Art. 298 – have the same meaning which excludes any reference to non-sovereign historic claims as in the separable doctrine of 'historic rights'.¹²⁶ As the phrase following it is formulated – 'or **other** special circumstances' (emphasis added) – the natural and ordinary meaning here implies that historic title is merely a special, and 'spelt-out', special circumstance; and so is not to be viewed as a 'stand-alone' exception to a median line, at least where all that is claimed in the area to be delimited is merely 'historic rights'.¹²⁷ The ITLOS in the *Bay of Bengal Case*,¹²⁸ commented that neither party had

¹¹⁹ See the ITLOS's *dictum* in the case *Bay of Bengal Case* (note 33), 45 (para. 127), which implies a preliminary testing of any 'median line' *sua sponte* by the Tribunal.

¹²⁰ See *Eritrea/Yemen Arbitration Second Stage* (note 34), 41 (paras. 131 and 132).

¹²¹ *Ibid.*, 27 (para. 83): '[...] the Tribunal has taken as its starting point, as a fundamental point of departure, that, as between opposite coasts, a median line obtains'.

¹²² Nordquist/Nandan/Rosenne (note 10), 135; *cf.* Antunes (note 2), 31: Germany had suggested the addition of historic rights to that of special circumstances at UNCLOS I, Federal Republic of Germany: Proposal (Article 12), UN Doc. A/CONF.13/C.1/L.121 (1958), OR III; see further Tanaka (note 14), 42.

¹²³ See Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (2008), 45; and Tanaka (note 31), 39.

¹²⁴ Antunes (note 2), 98.

¹²⁵ Award in the arbitration between the Philippines v. China: PCA, *South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China), Award of 12 July 2016, para. 226, available at: <https://www.pca-cases.com/web/view/7>. As the Tribunal stated (*ibid.*, para. 225): '[h]istoric rights may include sovereignty, but may equally include more limited rights, such as fishing rights[...]; whereas by contrast, the term "historic title" is used specifically to refer to historic sovereignty to land or maritime areas'.

¹²⁶ In so finding the Tribunal noted the history of the phrase; as introduced by Norway to reflect the ICJ's judgment in the *Anglo-Norwegian Fisheries Case* (1951); and to imply 'an area of sea claimed exceptionally as internal waters'; so that the phrase in Art. 12 of the TSC (1958) was intended to have the same meaning (para. 221), this being then verbatim adopted in Art. 15 of UNCLOS 'without significant discussion' (*ibid.*, para. 223).

¹²⁷ Symmons (note 123), 4–6.

¹²⁸ *Bay of Bengal Case* (note 33), 45 *et seq.* (para. 129): 'consideration should be given to the possible existence of historic title or other special circumstance relevant to the area [...]' (emphasis added).

invoked any historic grounds; and the tribunal accordingly found no evidence of such title.¹²⁹ However, the abovementioned implication is denied by some commentators.¹³⁰

- 36 Claims to historic title are rare in territorial sea delimitation disputes. However, it has been raised as an issue in the on-going Piran Bay dispute, where Slovenia has claimed the existence of both special circumstances and historic title (a historic bay).¹³¹ The 1974 Agreement between Sri Lanka and India on the Boundary in Historic Waters between the two Countries (1974) may be an actual example where such considerations were taken into account, though the agreement makes no reference to the territorial sea as such, merely stating in its Art. 4 that each State shall have sovereignty and exclusive jurisdiction over the 'waters' etc. falling its own side of the there-agreed boundary in the 'historic waters' area.¹³²
- 37 The matter of historic rights has also surfaced in international case-law. For example, this aspect was raised by Bahrain in the *Qatar/Bahrain Case*, but seemingly only in the context of the delimitation line outside the territorial sea.¹³³ In a similar way, claimed 'traditional Red Sea fishery rights' were raised in the *Eritrea/Yemen Arbitration Second Stage*, but here the invocation of an 'immemorial regime' relating to fishery practices had no effect on the adjudicated maritime boundary.¹³⁴

¹²⁹ *Eritrea/Yemen Arbitration Second Stage* (note 34), 40 *et seq.* (para. 130). See also the *Nicaragua/Honduras Case* (note 6), 745 (para. 281), where the ICJ noted that it found the situation to be within the exception provided for in Art. 15 UNCLOS, namely 'special circumstances', in which it could not apply the 'equidistance principle'; but in the case of the islands there involved (all with overlapping territorial seas), the Court noted, that it had already determined that in their case that there was 'no existing "historic" or traditional line along the [alleged] fifteenth parallel' (*ibid.*, 740 (para. 267), emphasis added).

¹³⁰ Cf. e.g., Nugzar Dundua, *Delimitation of Maritime Boundaries between Adjacent States* (2007), 81, available at: http://www.un.org/depts/los/nippon/unnnf_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf; and Antunes (note 2), 36–38, who, whilst accepting that the UNCLOS I *travaux préparatoires* seemed to comprise both 'historic titles and historic rights' within the whole phrase (as the word 'other' implies), nonetheless opines that, as to territorial sea delimitation, there has to be an 'overlapping of potential entitlements' as a *sine qua non* for such; and existence of such a title *ex hypothesi* precludes this exercise: whereas where mere 'historic rights' are in issue, they are no more than 'special circumstances'. Both authors, thus, argue that in its most extreme application, historic title may rule out any need for delimitation of the area affected for lack of any overlap; see further Dundua, *ibid.*, 81; alleged historic 'title' is, however, often controversial where claimed, and may be illusory in any particular instance, so that there may in fact still exist a situation where territorial sea claims overlap despite such a claim. For example, in the case of the agreed China/Vietnam boundary in the Gulf of Tonkin (Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Seas, the Exclusive Economic Zones and Continental Shelves in Beibu Bay/Bac Bo Gulf, 25 December 2000, LOSB 56, 137), points 1 *et seq.* of the Treaty divide respective territorial seas in the Gulf to connect with the EEZ/continental shelf delimitation line, and the claim of Vietnam that since 1887 the Vietnamese part of the Gulf constituted 'historic waters' was not taken into account as it was not recognised by China. However, prior to this, Vietnam claimed internal waters in the Gulf, so allegedly eliminating the need for territorial sea baselines there: cf. Zou Keyuan, *Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends*, Singapore YBIL 9 (2005), 1, 12, 13; and Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, ODIL 30 (1999), 235, 242–250.

¹³¹ This claim was made on the basis that the bay belonged to the Piran municipality: in this dispute, however, Croatia has argued that at least one of the cumulative requirements for an historic bay is not fulfilled, cf. *Avbelj/Cernic* (note 73), 6–13. Slovenia has claimed that the bay is a '*sui generis*' case which demands 'strict respect for historic title', and so rejection of the 'equidistance method'. The claim seems to be based on *uti possidetis* and extensive use of and claimed jurisdiction over waters in the Bay by Slovenia. In a tentative agreement of 2001, Croatia and Slovenia apparently agreed a line in the bay giving Slovenia 80 % of its waters, but this was soon afterwards rejected in Croatia, cf. Arnaut (note 7), 436 *et seq.*

¹³² The case has been viewed as involving a territorial sea delimitation and a 'modified median line', see Churchill/Lowe (note 10), 183.

¹³³ See Tanaka (note 31), 63; the claim by Bahrain to the effect that its alleged historic rights over pearling grounds to the north of Qatar constituted special circumstances requiring the shifting of a provisional median line further east, was rejected by the ITLOS in *Bay of Bengal Case* (note 33), 73 (para. 231) and 75 (paras. 235 and 236), as the activity had long since finished and local practice had never recognised that control over such fisheries gave territorial rights to the pearling grounds or their superjacent waters.

¹³⁴ Here the Arbitration Tribunal, in deciding to fix an equidistance boundary between two sets of small islands, indicated that it saw no reason to vary the 'normal methods for drawing an equidistance line' on the basis of either 'historic title or other special circumstances', *Eritrea/Yemen Arbitration Second Stage* (note 34), 47 (para. 158). See also *supra*, note 127.

8. State Practice and International Jurisprudence

Several existing delimitation agreements are concerned specifically with delimitation of the territorial sea or territorial waters,¹³⁵ often as a prelude to later, and separate, delimitation by treaty of the EEZ/continental shelf beyond such waters.¹³⁶ Other agreements take a more 'holistic' policy, by delimiting the territorial sea and EEZ/continental shelf areas at one and the same time.¹³⁷ Some delimitations of the territorial sea have also included the protective ambit of the contiguous zone,¹³⁸ or concerned the division of territorial straits.¹³⁹ In the absence of any delimitation treaty, some States have acted to unilaterally delimit the boundary of their territorial seas.¹⁴⁰

Several existing delimitation treaties, possibly for reasons of 'special circumstances'¹⁴¹ have used, in whole or in part, a line other than an equidistant one, such as a mid-channel line,¹⁴²

¹³⁵ See, e.g., the Exchange of Notes between the United Republic of Tanzania and Kenya concerning the Delimitation of the Territorial Waters Boundary between the two States 17 December 1975–9 July 1976, available at: www.un.org/depts/los/.../PDFFILES/TREATIES/TZA-KEN1976TW.PDF; and the Agreement between the Government of Malaysia and the Government of the Republic of Singapore to Delimit Precisely the Territorial Waters Boundary in Accordance with the Straits Settlements and Johore Territorial Waters Agreement 1927, 26 April 1995, available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SGP.htm>.

¹³⁶ E.g., the Turkey/USSR Treaty of 1973 entitled Agreement between the Government of the Republic of Turkey and the Government of the USSR Concerning the Establishment of the Maritime Boundary between Turkish and Soviet Territorial Waters in the Black Sea, 23 June 1978, UNTS 990, 201.

¹³⁷ As in the Agreement between the Republic of Turkey and the Republic of Bulgaria on Determination of the Boundary in the Mouth Area of the Mutludere/Rezovska River and Delimitation of the Maritime Areas between the Two States in the Black Sea, 4 December 1997, UNTS 2087, 5, which delimits the territorial sea (Art. 3) separately from the continental shelf and EEZ (Art. 4); see also US Department of State, Exchange of Notes between France and Portugal Regarding the Maritime Boundary between Senegal and Portuguese Guinea, 26 April 1960, Limits in the Seas No. 68 (1976).

¹³⁸ E.g., the Convention between France and Spain on the Delimitation of the Territorial Sea and the Contiguous Zone in the Bay of Biscay, 29 January 1974, available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/FRAESP1974VZ.PDF>; and the Agreement between Portugal and Spain on the Delimitation of the Territorial Sea and Contiguous Zone, 12 February 1976, available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/ESP.htm>.

¹³⁹ E.g., the Indonesia/Singapore Treaty 1973 (note 79); Treaty between the Republic of Indonesia and Malaysia Relating to the delimitation of the Territorial Seas of the Two Countries in the Strait of Malacca, 17 March 1970, available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm>; Indonesia and Singapore signed a further maritime delimitation agreement in 2009, Indonesia/Singapore Treaty 2009 (note 79), relating to the Singapore Strait, which could be extended eastward to finalise this delimitation (including Malaysia), helped by the determination of ownership of rocks in the area previously disputed by the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (note 48), cf. *Ardsana* (note 79); see also the Agreement between the Government of the French Republic and the Government of the Italian Republic on the Delimitation of the Maritime Boundaries in the Area of the Strait of Bonifacio, 28 November 1986, available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/FRAITA1986MB.PDF>; and that of France/UK Agreement in the Straits of Dover (note 3).

¹⁴⁰ For examples, see *supra*, note 76; recently (on 12 July 2011) Israel transmitted geographical coordinates of its claimed boundary of territorial sea to the north of its coast to the UN Secretary-General, see *Scovazzi* (note 28), para. 9.

¹⁴¹ It must be remembered that in practice the law of the sea rules can be derogated from by agreement, allowing the parties to adopt any boundary solution they wish, *North Sea Continental Shelf Cases* (note 5), 41 *et seq.* (para. 72).

¹⁴² For example, although five of the territorial sea boundary turning points between the coasts of Canada and St Pierre and Miquelon are equidistant from Canada and the French territory in St Pierre and Miquelon, other points are not, using e.g., a mid-channel line, see US Department of State, Territorial Sea Boundary between Canada-St Pierre and Miquelon, Limits in the Seas No. 57 (1974); in river estuaries the 'thalweg' line, i.e. the line of the deepest channel, has sometimes been used, as in the case of the Nicaragua/Honduras eastern sector of land boundary which follows the deepest channel of the River Coco; the ICJ, in the *Nicaragua/Honduras Case* (note 6), 742 *et seq.* (paras. 277 *et seq.*), determined that it was impossible to identify basepoints and construct a provisional equidistance line for single maritime delimitation purposes, and that this in itself amounted to 'special circumstances' where the equidistance rule could not apply, added to the fact here that the baselines were unstable at the mouth of the River Coco. As an alternative method of delimitation was necessary, here the ICJ opted for 'the bisector method' as an 'approximation of the equidistance method', using the macrogeography of the coastline (represented by a line drawn between two points on the relevant coasts); i.e., treating the bisector

a thin extended corridor of waters from the land boundary,¹⁴³ or a line perpendicular to the shore, often following a geographical coordinate; as, for example, in the 1997 Bulgarian/Turkish delimitation treaty which used a geographical parallel extending from the land boundary terminal (so not complying with equidistance) for the territorial sea boundary because of historical circumstances, despite the fact that the coastline here has no islands or protrusions on either coastline, so that an equidistant line could here have produced an equitable result.¹⁴⁴ In the case of small interposing insular features, giving them reduced effect on a median line may be an equitable solution.¹⁴⁵

- 40 Some past delimitation treaties have expressly used a different principle for the territorial sea boundary from that of the EEZ/continental shelf because of special circumstances applying to one area and not the other.¹⁴⁶ Thus, for example, some Black Sea States have used equidistance as a solution to their EEZ/continental shelf boundaries irrespective of its non-use in the case of their agreed territorial sea delimitations.¹⁴⁷ An additional consideration related to this approach is that insofar as more extensive maritime zone boundaries should link up with the terminal line of any existing territorial sea boundary, it may cause inequity to one State to have the starting point of any EEZ/continental shelf boundary consequentially extended from such a point, a matter referred to in the pleadings in the *Bay of Bengal Case*.¹⁴⁸ This aspect may be less problematical, though, where States have opted for a comprehensive and contemporaneous 'single boundary' solution which seems to be a growing trend in current State practice.¹⁴⁹

method, like equidistance, as a geometric approach, see *Jiuyong* (note 96), 280; thus here, because of geographical peculiarities, namely, the existence of Cape Gracias a Dios – a convex projection abutting an otherwise concave coastline and sedimental accretion on the River Coco – a more equal division ruled out an equidistance line because of its disproportional effect, *Nicaragua/Honduras Case* (note 6), 742 (para. 277); see further *Tanaka* (note 96), 910 *et seq.*

¹⁴³ Cf. *Avbelj/Cernic* (note 73), 6 *et seq.* Added to this, a median line would box in Slovenian territorial waters between the Italian and Croatian territorial seas thus negotiations aimed at a solution based on the second paragraph of Art. 15, i.e., the existence of 'special circumstances'; in consideration of the latter geographical circumstances, for example, the Convention on Maritime Delimitation between the Government of His Most Serene Highness the Prince of Monaco and the Government of the French Republic, 16 February 1984, reprinted in: UN DOALOS, LOSB No. 9 (1987), 58 *et seq.*; a full twelve NM territorial sea corridor to prevent any cutting off of Monegasque waters from the high seas, noted in *Arnaut* (note 7), 444.

¹⁴⁴ Cited in the Memorial of Romania of 19 August 2005 in the *Black Sea Case* (note 74), 66 (para. 6.19); similarly, Gambia and Senegal agreed in 1975 to use parallels of latitude instead of equidistance to avoid a cutting off of Gambian waters, see *Arnaut* (note 7), 445 *et seq.*; this method is also evident in the recent Peru/Ecuador agreed maritime boundary registered with the UN in 2011, which has been drawn along the geographical parallel running from the land boundary in accordance with the Santiago Declaration of 1952 and their previous 'agreement' of 1954, see *Hernando Otero*, *Law of the Sea Reports*, vol. II (2011), 1, 3; cf. also the 1975 Ecuador/Colombia delimitation, the 1958 Poland/USSR and 1972 Brazil/Uruguay agreements, all using perpendicular lines from the respective coasts, *Churchill/Lowe* (note 10), 182.

¹⁴⁵ As was done by the PCA in the *Eritrea/Yemen Arbitration Second Stage* (note 34), 41 (paras. 131 and 132).

¹⁴⁶ See above the Monaco/France Territorial Sea Delimitation Agreement (note 143), where this difference is evident and their continental shelf/EEZ boundary is based on a simplified equidistance as an equitable solution; as the ILC commented at UNCLOS I, other options, apart from a median line, include an extension of the land frontier out to sea, a line at right angles to the coast, a geographical parallel, or a line at right angles to the general direction of the coast, though the 'best solution' was a median line, which will take coastal irregularities into account, ILC Yearbook, vol. II, 272.

¹⁴⁷ A point stressed in the Memorial of Romania (note 144), 69 *et seq.* (para. 6.24); similarly, in contrast to the agreed continental shelf boundary between Turkey and the USSR, based on simplified equidistance, their agreed territorial sea boundary was based on a non-equidistance line set on the prolongation of the terminal of the land boundary, see *Jonathan I. Charney et. al.*, *International Maritime Boundaries*, vol. II (1996), 1683; the small territorial loss to Turkey so caused in the territorial sea delimitation was compensated for in the first segment of their continuing continental shelf/EEZ agreed boundary, cf. Memorial of Romania (note 142), 68 (para. 6.20) (as illustrated there in Fig. 10).

¹⁴⁸ See the Reply of Bangladesh (note 37), 37 (para. 2.69).

¹⁴⁹ See *Papanicolopulu* (note 3), 390 *et seq.*; two delimitation treaties in the Mediterranean Sea area reflect all-purpose boundaries, provisionally or otherwise, Monaco/France Territorial Sea Delimitation Agreement (note 141), and the Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundaries between the Republic of Tunisia and the People's Democratic Republic of Algeria, 11 February 2002, reprinted in: UN

It has been commented in the past that the matter of delimitation of the territorial sea has only featured in a few modern cases;¹⁵⁰ and some of these involved a 'single line' delimitation.¹⁵¹ However, the most recent case to come before the ITLOS, the *Bay of Bengal Case*, has now added further clarity to the delimitation principles under Art. 15, and shows clearly that despite the supposed similarity between 'special circumstances' and 'equitable principles', in practice the delimitation principles may lead to different solutions depending on whether the area to be delimited is territorial sea, on the one hand, or the more extensive zones of EEZ/continental shelf, on the other, as under Arts. 74 and 83.¹⁵² This case has also clarified the meaning of 'agreement' at the start of Art. 15; and evidences the fact that despite the apparent (or supposed) prioritisation of a median line in territorial sea delimitation under that article, a tribunal must always take into account, if only *sua sponte*, any special circumstances or historic title in coming to a final determination.¹⁵³

Article 16

Charts and lists of geographical coordinates

1. The baselines for measuring the breadth of the territorial sea determined in accordance with articles 7, 9 and 10, or the limits derived therefrom, and the lines of delimitation drawn in accordance with articles 12 and 15 shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical coordinates of points, specifying the geodetic datum, may be substituted.

2. The coastal 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.

Bibliography: Peter B. Beazley, Technical Aspects of Maritime Boundary Delimitations, IBRU Maritime Briefing 1(2) (1994); Robin R. Churchill/Alan V. Lowe, The Law of the Sea (3rd edn. 1999); Bill Hurst/David Robertson, GIS, Charts and UNCLOS – Can They Live Together?, Maritime Studies 136 (2004), 1–6; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); John R. V. Prescott, Straight Baselines: Theory and Practice, in: Eddie D. Brown/Robin R. Churchill (eds.), The United Nations Convention on the Law of the Sea: Impact and Implementation (1987), 288–313; Michael W. Reed, An Attempt to Unravel Charting and Publicity Requirements Imposed by UNCLOS Article 16, in: Clive R. Symmons (ed.), Selected Contemporary Issues in the Law of the Sea (2011), 3–14; J. Ashley Roach/Robert W. Smith, United States Responses to Excessive Maritime Claims (2nd edn. 1996); Tullio Scovazzi, Baselines, MPEPIL, available at: <http://www.mpepil.com>; Tullio Scovazzi/Giampiero Francalanci/Daniela Romano/Sergio Mongardini, La linea di base del mare territoriale (1986); Sandra H. Shaw/Daniel J. Dzurek, Charts in the Law of the Sea, in: Dorinda G. Dallmayer/Louis DeVorsey (eds.), Deciding and Drawing Maritime Boundaries (1989); Clive R. Symmons, Ireland and the Law of the Sea (2nd edn. 2000); Clive R. Symmons/Michael W. Reed, Baseline Publicity and Charting Requirements: An Overlooked Issue in the Law of the Sea, 41 ODIL (2010), 77–111; Mark Valencia, Validity of Malaysia's Baselines and Territorial Sea Claim in the Northern Malacca Strait, Marine Policy 27 (2002), 367–373

DOALOS, LOSB No. 52 (2003), 41 *et seq.*; delimitation treaties in the same region dealing with the territorial sea include Turkey/USSR Treaty of 1973 (note 134); France/Italy Agreement of 1986 (note 137); Treaty on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947, 10 November 1975, UNTS 1466, 72; Turkey/Bulgaria Agreement of 1997 (note 135); and Treaty on the State Border between the Republic of Croatia and Bosnia and Herzegovina, available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/HRVBIH1999SB.PDF>.

¹⁵⁰ Such as the *Grisbådarna Case* (note 92); the *Beagle Channel Arbitration* (note 94) and others mentioned at *supra*, notes 34, 35, 37; Nordquist/Nandan/Rosenne (note 10), 142; and, as seen in the *Qatar/Bahrain Case* (note 11), 111 (para. 230) and 114 *et seq.* (para. 247), where in drawing a 'single maritime boundary', as the southern area to be delimited was nowhere more than 24 NM wide, this involved there solely a territorial sea delimitation; see further *Tanaka* (note 31), 55.

¹⁵¹ See *supra*, MN 11.

¹⁵² See *supra*, note 146.

¹⁵³ See *supra*, note 116.

Documents: IHB, Manual on Technical Aspects of the United Nations Convention on the Law of the Sea 1982 (4th edn. 2006); IHO, Hydrographic Dictionary, vol. I (5th edn. 1994); UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989); UN DOALOS, Presentation on the Deposit and Charts and Lists of Coordinates of Points: Briefing, 13th Meeting of States Parties to the UN Convention on the Law of the Sea (2003)

Cases: High Court of Singapore, Suit No. 76 of 2002/w between Image and Sun Cruises Ltd, Sun Vista and Sembawang Ship Management Pte Ltd; ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116; ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61; ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar), Judgment of 14 March 2012, ITLOS Reports (2012)

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I. Purpose and Function

- 1 The purposes of Art. 16 can be said to be two-fold. Firstly, to give adequate publicity, by means of charts of adequate scale or by issue of coordinates pursuant to Art. 16 (2), to the main examples of straight (or artificial) baselines mentioned in connection with deeply indented coasts or fringing coastal islands (Art. 7), rivers (Art. 9) or bays (Art. 10); or, in this context, to give the same publicity to the limits of the territorial sea from such baselines.¹ It may be noted that here is no UNCLOS obligation to publicise the latter limits generally in the same manner,² though the limits of other more extensive zones, such as exclusive economic zone (EEZ), do have standardised publicity requirements attached in their respective articles.³ Secondly, Art. 16 (1) adds a similar publicity and charting obligation in respect of certain issues relating to the territorial sea – namely, concerning the lines of delimitation of roadsteads (Art. 12) and delimitation lines of territorial sea jurisdiction between opposite or adjacent States (Art. 15).
- 2 Previously there existed in Art. 4 (6) of the Convention on the Territorial Sea and the Contiguous Zone of 1958 (CTSCZ) only one ‘baseline publicity’ duty similar to that now in Art. 16; and this concerned a straight baseline system *stricto sensu*.⁴ Even this duty was more

¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 145; however, the reference there seems to overstate the publicity effect, as will be seen below, in the case of straight baselines as well as outer limits of the territorial sea, see *infra*, note 28; furthermore, the reference to the ‘objective’ of such publicity mentions only protection of the territorial sea and ensuring ‘international navigation’ does not ‘unwittingly’ enter a territorial sea. However, an equally likely objective may be seen to be ensuring mariners do not enter internal waters unwittingly, cf. Michael W. Reed, An Attempt to Unravel Charting and Publicity Requirements Imposed by UNCLOS Article 16, in: Clive R. Symmons (ed.), Selected Contemporary Issues in the Law of the Sea (2011), 1, 4, 5–8.

² See Clive R. Symmons/Michael W. Reed, Baseline Publicity and Charting Requirements: An Overlooked Issue in the Law of the Sea, ODIL 41 (2010), 77, 79; the reference to ‘low-water’ mark in Art. 5 does, however, in referring to marking of such on ‘large-scale chart’, amount to a kind of publicity obligation in general terms, see Nordquist/Nandan/Rosenne (note 1), 148.

³ See Art. 75 (1) and (2) on the EEZ, and Art. 76 (9) and Art. 84 on the outer limits of the continental shelf.

⁴ Symmons/Reed (note 2), 78.

procedurally limited than that under the UNCLOS,⁵ and there were no similar publicity duties relating to baselines of rivers and bays.⁶

In fact, most commentators, and even the UN itself, seem to have ignored the full wording of Art. 16 (1); and assumed that it puts a duty on States to publicise in the relevant manner and in all instances, all baselines claimed under Arts. 7, 9 and 10. In so assuming they have omitted to consider the legal significance of the added phrase 'or the limits derived therefrom'.⁷ In fact, on a literal interpretation, it is arguable that in many instances, by resorting to the option of merely publishing outer territorial sea limits from 'straight' baselines,⁸ a coastal State may be allowed to conceal any such 'artificial' baselines. This situation might, in some instances at least, lead to a 'hidden baselines' problem and a consequential failure to alert a mariner of where internal waters commence (and so loss of innocent passage ceases).

To reinforce these publicity obligations, an additional procedural rule is added (not to be found in the CTSCZ-regime); namely to deposit the relevant charts or lists of co-ordinates in all the above instances with the UN Secretary-General under Art. 16 (2).⁹ This latter process has been described by the United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS) as having the purpose of ensuring 'that the international community is adequately informed of the boundaries of the territorial sea and other maritime zones of a coast'.¹⁰

As the word 'permanently' does not appear in the Art. 16-wording (as, e.g., in Art. 76 (9) relative to the continental shelf limits), it is implied that a State may update its baseline and re-deposit up-dated Art. 16 information from time to time as new chart data becomes available, though in the meantime the deposited information should take precedence.¹¹

II. Historical Background

As seen, the only equivalent duty to publicise baselines in the CTSCZ was in respect of Art. 4 (6), where the wording stated that a State claiming a straight baseline system *stricto sensu* was to 'clearly indicate straight baselines on charts, to which due publicity must be given'. This was a more restrictive duty (uncontroversially added by the International Law Commission Committee of Experts in 1952)¹² than that under Art. 16 (1) of the UNCLOS; in that these baselines themselves had in all instances to be published.¹³ Another major change at UNCLOS III was that the new UNCLOS publicity duty was extended from the straight baseline situation *stricto sensu* (in what is now Art. 7) to include also the closing lines of rivers and bays under Arts. 9 and 10 respectively; and the option was also added for States to indicate all such lines by way of co-ordinates (with specified datum) as well as on charts.¹⁴ This publicity duty was extended also to cover roadsteads (to which some publicity duty had attached under Art. 9 CTSCZ)¹⁵, as also to delimitation lines of territorial sea limits between opposite or adjacent States (Art. 12 (2) CTSCZ).¹⁶ These strands were all eventually put together in the context of a separate dedicated publicity article in the Revised Single

⁵ *Ibid.*, 79.

⁶ *Ibid.*, 81-82.

⁷ *Ibid.*, 77, 78 and 92-93.

⁸ By this phrase is meant any artificial lines of a straight variety, not specifically those drawn under Art. 7.

⁹ Nordquist/Nandan/Rosenne (note 1), 145.

¹⁰ UN DOALOS, Presentation on the Deposit and Charts and Lists of Coordinates of Points: Briefing, 13th Meeting of States Parties to the UN Convention on the Law of the Sea (2003).

¹¹ See Bill Hurst/David Robertson, GIS, Charts and UNCLOS - Can They Live Together?, *Maritime Studies* 136 (2004), 1, 3-5.

¹² Symmons/Reed (note 2), 81.

¹³ *Ibid.*

¹⁴ Nordquist/Nandan/Rosenne (note 1), 146; for a full history, see *ibid.*, 144-147.

¹⁵ *Ibid.*, 146; Art. 9 CTSCZ states: 'The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given'.

¹⁶ Nordquist/Nandan/Rosenne (note 1), 145-147.

Negotiating Text (RSNT), later designated as Art. 16.¹⁷ Although in the earlier *travaux préparatoires* at UNCLOS III the duty to publicise all such baselines arose,¹⁸ the alternative duty to similarly publicise the ‘limits derived from’ such baselines only came in with the RSNT in 1976, a change which has no explanation in the published UNCLOS records.¹⁹ So there is no supplementary material to help flesh out any interpretative ambiguity in this area.

III. Elements

1. Types of Baselines under Art. 16 (1)

- 7 As seen above, the explicit reference here to Arts. 7, 9 and 10 indicates (in a literal interpretation) that these are the only baseline provisions where the publicity obligations under this provision arise; and the further references to Arts. 12 and 15 indicate that in two other situations under this provision, certain matters relating also to territorial sea delimitation must be similarly publicised; namely roadsteads under Art. 12 and territorial sea delimitation boundaries between neighbouring States under Art. 15. This means that in terms of baselines generally, the normal one (i.e., the low-tide mark under Art. 5) is subject to its own less onerous charting publicity rules,²⁰ though, this may also not include (explicitly, at any rate) other quasi-exceptions to the coastal low-tide mark *stricto sensu*, such as low-tide elevations (→ Art. 13) or outer harbor works (→ Art. 11).²¹
- 8 It has been said that the option to publish/deposit a list of coordinates, rather than just charts, is particularly aimed at ‘accurately locating the ends of straight lines’,²² though this method could also locate outer line limits of the territorial sea as indeed has been done by Nauru in defining its maritime limits (mixing use of coordinates of basepoints and arc intersection points on its outer limit line).²³ Similar charting obligations to that laid down here also apply elsewhere in the UNCLOS, under their respective individual articles in the case of EEZ limits (→ Art. 75 (1) and (2)) and outer continental shelf limits (→ Arts 84).²⁴
- 9 The only real interpretative difficulty in the initial wording of Art. 16 is whether it implicitly brings into the publicity duty any straight baselines across the mouths of ports. As seen, Art. 11 does not expressly refer to the question of whether ports qualify for a straight closing line across their mouths;²⁵ so this explains why, in turn, there is no express reference to publicity obligations in this case in Art. 16. Nonetheless, most commentators²⁶ accept that the failure to deal with this issue in the UNCLOS was an unfortunate omission; and the inclusion of ports for straight baseline enclosure is in any case implied as Art. 50 allows an archipelagic State to close off a port ‘within its archipelagic waters’ and to ‘draw closing lines for the delimitation of its internal waters, in accordance with Arts. 9, 10 and 11’.²⁷

¹⁷ *Ibid.*, 147.

¹⁸ *Symmons/Reed* (note 2), 83–84.

¹⁹ *Ibid.*

²⁰ See, e.g. *Hurst/Robertson* (note 11), 6, noting that Art. 5 is not referred to in Art. 16 ‘presumably because it is assumed that the coastline as depicted on a chart is a fair representation (if not the actual source) of the baseline’; *Tullio Scovazzi*, *Baselines*, MPEPIL, para. 5, available at: <http://www.mpepil.com>, queries why there is this omission in UNCLOS.

²¹ However, some commentaries treat Art. 6 on reefs, as well as Art. 11 on harbour works and Art. 13 on low-tide elevations, as being comprised in the ‘general definition of the normal baseline’, i.e., the low-water line along a continental or insular shore: IHB, *Manual on Technical Aspects of the United Nations Convention on the Law of the Sea* 1982 (4th edn. 2006), para. 4.1; in any event, some States have notified the UN of such baselines even though there is no obligation to do so, as for example, Romania regarding its Sulina dyke basepoint, cf. *infra*, note 73.

²² *Hurst/Robertson* (note 11), 6.

²³ *Ibid.*, 7.

²⁴ See *Symmons/Reed* (note 2), 85.

²⁵ See *Symmons* on Art. 11 MN 2.

²⁶ E.g., *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999), 47–48; and UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the Law of the Sea* (1989), 33 (para. 73).

²⁷ Emphasis added; see *Symmons/Reed* (note 2), 93–94; and *Reed* (note 1), 10–11.

2. ‘or the limits derived therefrom’

It is this phrase (‘or the limits derived therefrom’), added, as seen above, at a later stage of the UNCLOS negotiations to the original baseline publicity wording, which causes problems and interpretative questions: namely whether the apparent literal meaning of this added phrase gives a complete choice to a State claiming a system of straight baselines as to whether it publicises (in the relevant manner) the baselines themselves, or instead merely publicises the ‘limits derived’ from them (which would appear to refer here to the external limits of the territorial sea extending from same in the light of the preceding reference to this zone).²⁸

The conjunctive word ‘or’ here seems to indicate, at first glance, a complete freedom of choice of either method on the most literal interpretation, though most commentators seem to have ignored this additional (territorial sea limits) possibility; and concluded that the relevant baselines must in all cases be appropriately publicized.²⁹ Thus even the UN website on such UNCLOS obligations (headed ‘Deposit and Due Publicity’) says categorically that States ‘are required to deposit [with the UN Secretary-General] charts [or co-ordinates] showing straight baselines as well as the outer limits of the territorial sea’.³⁰ This statement is, unfortunately, doubly incorrect in that first it implies that in all instances straight baselines must be publicized in the relevant ways; and secondly because, as seen, there is no general obligation under the UNCLOS to publicise the outer limits of the territorial sea.

The problem with the apparent second alternative – i.e., merely publicising in the relevant manner outer limits of territorial sea lying off straight baselines – is that although in most instances straight baselines may be re-constructed by a charting process back from known territorial sea limits (an ‘arcs of circle exercise in reverse’),³¹ this will not be possible where any straight baselines are ‘masked’ by other basepoints in the area, such as low-tide marks or baselines influenced by off-shore islands.³² In such a case a State might deliberately disguise its straight baselines by opting for the second alternative – leading to the ‘hidden baseline’ problem – a type of policy which has been decried by some commentators.³³

It has been argued by SYMMONS and REED that the apparent freedom of choice here is unfortunate in terms of the policy object mentioned above: this is that mariners and other concerned authorities should in all instances know where straight baselines exist because of the legal regime change there.³⁴ To avoid the latter situation, a narrower, but still literal interpretation, may be made here. This is on the basis that the wording ‘derived therefrom’ implies a *contrario* that if the actual territorial sea limits in any area are not in fact influenced by straight baselines (i.e., are not ‘derived’ from them for the geographical reasons mentioned above), there is at least then a duty under Art. 16 to publicise the straight baselines themselves. As here no reverse ‘arcs of circles’ charting is possible to reveal the baselines. This interpretation is aided by the contextual references in the preceding treaty law (i.e., Art. 4 (6) CTSCZ where, as seen, there was an absolute duty to publicise such straight

²⁸ *Symmons/Reed* (note 2), 89; but cf. *Reed* (note 1), 10, who argues that ‘limits’ derived could be referable to the extent of internal waters on the landward side of the baseline. Symmons disagrees with this ingenious explanation, largely because it makes redundant the initially-mentioned situation of straight ‘baselines’, where the stock composite phrase ‘baselines for measuring the breadth of the territorial sea’ in and of itself already defines the exterior limits of internal waters, as reinforced by the wording of Art. 5 defining compositely ‘internal waters’, cf. *Symmons/Reed* (note 2), 89: thus the phrase ‘derived therefrom’ must, it is believed, refer to limits which are external to, and seaward of, the internal waters themselves.

²⁹ See *Symmons/Reed* (note 2), 78 and 92–93; commentators who are in this category are listed, *ibid.*, 107 (footnotes 93–96); and in *Reed* (note 1), 8–9; even the UN DOALOS Baselines Study (note 26), 40, is equivocal on this matter, though the study does, in its commentary on Art. 16 itself, later indicate apparent freedom of choice between the two possibilities.

³⁰ See *Reed* (note 1), 8 (emphasis added).

³¹ *Ibid.*, 5; *Symmons/Reed* (note 2), 89.

³² *Symmons/Reed* (note 2), 86.

³³ See *ibid.*, 92.

³⁴ *Ibid.*, 80; *Reed* (note 1), 4–8.

baselines); and even other parts of the text of the UNCLOS itself support this. For example, Art. 47 (8) states that in the analogous case of publicity concerning archipelagic baselines, these 'shall be shown on' charts or by way of geographic coordinates; so that in this instance there is no 'derived limits' alternative given.³⁵ Another situation where the actual baselines will have to be published arises again in the archipelagic context by implication from Art. 50 (headed 'Delimitation of Internal Waters'), where in a 'regime-within-a-regime' situation such internal waters baselines (contained within archipelagic waters) cannot, *ipso jure*, have any 'derived' territorial sea limits.³⁶

3. 'shall be shown on charts of a scale or scales adequate for ascertaining their position'

- 14 It is at least clear from this wording (unlike that preceding, as seen) that a coastal State claiming straight baselines or limits as referred to in Art. 16 has a complete discretion as to whether to use a charting display *simpliciter* of such lines and limits, or to list co-ordinates alone (or indeed use both), thanks to the clearly disjunctive wording '[a]lternatively' and 'substituted' in Art. 16 (1).³⁷ The charting obligation here is more specific and detailed than the more general and simpler obligation laid down under Art. 4 (6) CTSCZ relating to a straight baseline system *stricto sensu*. In Art. 16 (1) such 'charts'³⁸ – which may not necessarily be published by the baseline claimant State³⁹ – must be of an adequate scale for showing such lines or limits (usually comprising scales between 1:100,000 and 1:250,000),⁴⁰ though they do not necessarily have to be 'large-scale' as under Art. 5. As the phrase – 'of an adequate scale or scales adequate for ascertaining position' – is a vague one, the scale used may depend on underlying circumstances⁴¹ (including varying in scale along long coastlines).⁴² It has been commented that charts provide an 'immediate visual presentation of information',⁴³ and, as such, may supplement the alternative method (see below) of a listing of co-ordinates as basepoints, as charts cannot provide the same precision as co-ordinates, even if on the 'largest practicable scale'.⁴⁴

4. 'a list of geographical coordinates of points'

- 15 As seen, this mode of baseline and limits publicity was not mentioned in the CTSCZ-regime context, and was only added in Art. 16. It is similarly contained in the UNCLOS relative to the other limits articles where publicity is required, e. g., Arts. 75 (1) and (2), 76 (9)

³⁵ Cf. some commentators who have thought the obligations in Art. 16 (1) and Art. 47 (8) are the same, *Symmons/Reed* (note 2), 91 and 107 (footnote 86); or 'similar', Nordquist/Nandan/Rosenne (note 1), 147–148; see also UN DOALOS Baselines Study (note 26), 39–40.

³⁶ See *Symmons/Reed* (note 2), 107 (footnote 91); for further details, see *Symmons* on Art. 50 MN 5–8.

³⁷ *Symmons/Reed* (note 2), 81.

³⁸ These must not be mere land maps, but 'nautical' charts, see *John R. V. Prescott*, Straight Baselines: Theory and Practice, in: Eddie D. Brown/Robin Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation* (1987), 288, 312; according to the IHO, *Hydrographic Dictionary*, vol. I (5th edn. 1994), 37, a 'chart' is defined 'a special purpose map generally designed for navigation or other particular purposes'.

³⁹ The UN DOALOS Baselines Study (note 26), 40–41, says that a State may decide to use a chart 'published by the primary charting authority' rather than prepare special charts of its own; see *Sandra H. Shaw/Daniel J. Dzurek*, *Charts in the Law of the Sea*, in: Dorinda G. Dallmayer/Louis DeVorse, *Deciding and Drawing Maritime Boundaries* (1989), 15–16, who point out that some countries have no charting capability and thus will be forced to rely on charts made by others.

⁴⁰ IHB Manual on Technical Aspects (note 21), para. 4.6.

⁴¹ *Ibid.*, para. 3.3.1, it is stated that in connection with this requirement the 'accuracy of depiction of various lines and features on a chart is a function of the scale'; and that a 'criterion of the choice of scale is that it must provide the resolution necessary for the user to determine baselines [...] to the same level of accuracy as originally achieved by the coastal State' (emphasis added).

⁴² UN DOALOS Baselines Study (note 26), 41.

⁴³ *Ibid.*, 40.

⁴⁴ *Ibid.*

and 84. Such a method provides a better ‘degree of precision’ than charts to fix definitive basepoint positions (even if only given to the nearest second of arc); and many States use both charts and coordinates in conjunction.⁴⁵ Any coordinates so given must be accompanied by ‘appropriate information regarding original geodetic datum’.⁴⁶ This, as advised by the UN,⁴⁷ should be converted into WGS (World Geodetic System) 84, as used by UN DOALOS to produce maps and store internal data.

5. ‘The coastal State shall give due publicity’

The phrase ‘due publicity’ was borrowed from the same wording in Art. 4 (6) CTSCZ, and it appears again in other similar publicity-orientated provisions of the UNCLOS, including Arts. 75 (1), 76 (9), 47 (9), with the same interpretative implications arising, though, Art. 76 (9) puts an additional publicity obligation there on the Secretary-General of the UN and Art. 84 mentions the Seabed Authority as an additional depositary in relevant circumstances.

This above wording in Art. 16 (2) has been somewhat cumbrously defined in the UN-Baseline Study as meaning ‘notification of a given action for general information through appropriate authorities within a reasonable amount of time in a suitable manner’.⁴⁸ Whether this implies that a coastal State, beyond mere publication of information through legislative or decree processes (giving internal information on this), must do more, and, for example, individually notify other States of such information in terms of advertising them to such legislation, decrees etc., is unclear.⁴⁹ It seems arguable that the very act of deposit of such information with the UN might qualify in itself as coming from an ‘appropriate authority’ and in a suitable manner to satisfy the requirement, bearing in mind that UN DOALOS, as will be seen, speedily propagates such information to other States through maritime zone notifications (MZNs) etc.⁵⁰ This obligation to deposit charts or lists of co-ordinates relative to matters in Art. 16 (1) with the UN Secretary-General reflects the identical procedural duty imposed in Art. 75 (2) (EEZ limits) and Art. 47 (9) (archipelagic basepoints);⁵¹ and has been aptly described as an ‘additional’ publicity duty under Art. 16.⁵²

The UN has emphasized that the ‘mere existence or adoption of legislation’ (even if it contains charts or lists of co-ordinates) cannot be considered as ‘an act of deposit’ with the UN Secretary-General under the Convention.⁵³ Acting upon the request of the General Assembly in its Resolution 49/28 of 6 December 1994, UN DOALOS, as the responsible unit of the UN Secretariat, ‘established facilities for the custody of charts and [list of co-ordinates] deposited and for the dissemination of such information in order to assist States in complying with their publicity obligations’.⁵⁴ UN DOALOS has since established a GIS (Geographical Information System) and data base to store and process all such geographic information and to produce charts etc. in digital form.⁵⁵

⁴⁵ *Ibid.*

⁴⁶ See UN DOALOS, Law of the Sea Information Circular No. 27 (2008), 5 (para. 26); for discussion of such datums, see, e.g., Peter B. Beazley, Technical Aspects of Maritime Boundary Delimitations, IBRU Maritime Briefing 1(2) (1994), 1, 5–7.

⁴⁷ UN DOALOS, Law of the Sea Information Circular No. 16 (2002), 22 (LOSIC).

⁴⁸ UN DOALOS Baselines Study (note 26), 54 (para. 27).

⁴⁹ See *Symmons/Reed* (note 2), 85.

⁵⁰ *Ibid.*; see however, on the UN DOALOS website the statement that apart from deposit of information under Art. 16, coastal State are ‘also required to give due publicity to all these [deposited] charts and lists of geographical co-ordinates’ (emphasis added). This implies that mere deposit of charts/coordinates with the UN may not in itself be enough to satisfy Art. 16 (2), available at: https://www.un.org/depts/los/doalos_activities/about_doalos.htm.

⁵¹ See *Symmons/Reed* (note 2), 91.

⁵² Nordquist/Nandan/Rosenne (note 1), 145.

⁵³ LOSIC (note 47), 22.

⁵⁴ *Ibid.*; UN DOALOS itself views the receipt of charts and co-ordinates as a depositary as (now) a ‘core function’.

⁵⁵ LOSIC (note 47), 22.

- 19 In practical terms such deposit is effected by a Note Verbale to the UN Secretary-General or a letter by the State's permanent representative to the UN or 'other person considered as representing the State party'.⁵⁶ Parties to the UNCLOS are then informed by UN DOALOS of such deposits by an MZN, subsequently circulated to all States by means of a Law of the Sea Information Circular (LOSIC) containing the relevant legislation and maps. These are then published in the Law of the Sea Bulletins.⁵⁷ It has been suggested that the deposit of maritime zonal information under Art. 16, such as lists of co-ordinates, could be done in GIS format.⁵⁸

6. Consequences of Non-Compliance with Art. 16

- 20 The legal effect for a State disregarding all or, indeed, some of the publicity obligations arising under Art. 16 (1) and (2) relative to its baseline claims etc. are unclear (even if the claims otherwise comply substantively with the UNCLOS provisions); as no sanctions for breach of these duties are spelt out in the UNCLOS. Such disregard could come about through lack of charting depiction/supply of coordinates, or, more generally, under Art. 16 (2), in failing to give such matters 'due publicity'⁵⁹ and/or (in addition) failing to deposit such information with the UN (under Art. 16 (2)). However, it is arguable that there is an implied sanction similar to that which can be applied where straight baselines are viewed as impermissible and contrary to the UNCLOS; and that is that other States may ignore such unpublicised baselines, at least until the publicity obligations under Art. 16 are rectified.⁶⁰
- 21 The matter has only been incidentally raised in international case-law. In the *Maritime Delimitation in the Black Sea Case*, for example, the ICJ did not have to deal with the matter directly. The Court referred there to Romania's notification to the UN of its use of the seaward end of the Sulina Dyke as a territorial sea basepoint, and the fact that use of this baseline had not been 'contested by Ukraine'; and this was accompanied by the Court's *caveat* that such a claim 'always has an international aspect', citing in this regard the *dictum* from the ICJ in the *Fisheries Case* (1951).⁶¹ There was, however, a converse argument raised in the case by Romania: namely, that a basepoint claimed by the Ukraine (a small islet called Serpent's Island) had not been notified to the UN; and therefore was inadmissible as a delimitation basepoint. However, on this issue the ICJ endorsed the view that 'normal baselines, defined as the low-water line along the coast, do not have to be notified to the [UN], as straight baselines have to be'.⁶² It is possible from this meager evidence to view the Court's *dicta* as implying, more generally, that unpublished baselines actually within the remit of Art. 16 may not affect another State which has not expressly or impliedly accepted them through a process of estoppel and/or recognition.⁶³
- 22 The matter was more directly raised, but, in the end, inconsequentially, in the recent *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, where Myanmar had argued that neither party in that case had publicized or submitted charts or lists of coordinates of the 'Agreed Minutes', which were there in issue on delimitation of territorial sea boundaries, under Art. 16 (2); and that this factor was an added reason for making the 'Agreed Minutes' non-binding.⁶⁴ As the ICJ found

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 22–23.

⁵⁸ *Hirst/Robertson* (note 11), 7.

⁵⁹ See *Symmons/Reed* (note 2), 97.

⁶⁰ *Ibid.*, 95–98.

⁶¹ ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports (2009), 61, 108 (para. 137); ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 132.

⁶² *Ibid.*, 104 (para. 126).

⁶³ *Symmons/Reed* (note 2), 97–98.

⁶⁴ ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar), Judgment of 14 March 2012, 35–36 (para. 86), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf.

these ‘minutes’ not to bring about any binding obligations, it stated that it found it unnecessary ‘to address the relevance, if any [...] of the failure to deposit’ such information with the UN as provided in Art. 16 (2).⁶⁵

7. State Practice and International Jurisprudence

Despite the admonitions of the UN to comply with Art. 16,⁶⁶ it is evident that many States have not complied with the stipulations thereof, in particular by not depositing charts or coordinates with the UN Secretary-General.⁶⁷ Several have taken advantage of the alternative ‘derived limits’ option;⁶⁸ with others listing both types;⁶⁹ and some States have expressly ‘signed off’ on the fact of completion of their Art. 16 obligations.⁷⁰ The recapitulative lists in UN publications, such as LOSIC, show up this deficiency. For example in a 1992 UN listing, only about 21 States had complied with Art. 16 as such.⁷¹ Some States have made specific reference to the obligation to publicise baselines etc. in their domestic laws. Thus, for example, in the Solomon Islands’ and Mauritian legislation such duties are spelt out.⁷²

It seems some State may have deposited basepoint information to the UN which is not strictly covered by the list in Art. 16, if only *ex abundanti cautela*. For example, on the question of whether Art. 16 (1) applies to basepoints on ‘outermost permanent harbor works’, it may be noted that in the *Maritime Delimitation in the Black Sea Case*, Romania saw fit to notify the UN of its baseline use of an artificial construction, Sulina Dyke, even though this construction does not enclose internal waters of a port as such.⁷³

It is interesting to note as regards the abovementioned interpretative difficulty relating to the apparent option of merely publicising the territorial sea limits lying off ‘straight’ baselines, that not only have some authors decried the use by some States of hidden straight baselines, but also some States, such as the US, have protested against such a practice. This is evident, for example, in past US protests against such practices in the case of Haiti,⁷⁴ North Korea, Sudan and Malta in this regard.⁷⁵ Curiously, the US did not protest against the Malaysian ‘hidden’ baselines, though Indonesia did.⁷⁶ The hidden Malaysian baselines have already caused legal problems in the Sun Vista incident off Malaysia (2002).⁷⁷

⁶⁵ *Ibid.*, 38 (para. 99).

⁶⁶ See e.g., LOSIC (note 47), 22: ‘coastal States [parties to UNCLOS] are required to deposit with the Secretary-General [of the UN] charts [or geographical co-ordinates, [citing GA Res. 56/12] showing straight baselines [...] as ‘an international act’ and to ‘give due publicity’] (emphasis added).

⁶⁷ Such States include Ireland, see *Clive R. Symmons*, Ireland and the Law of the Sea (2nd edn. 2000), 62.

⁶⁸ E.g., it seems these include Belgium, Maritime Zone Notification (MZN) No. 24 of 1 June 1999; Equatorial Guinea, MZN No. 25 of 2 June 1999; Germany, MZN No. 1 of 8 March 1995.

⁶⁹ E.g., Finland: MZN No. 8 of 21 July 1996. Japan: MZN No. 14 of 6 June 1997; MZN No. 18 of 23 June 1998; MZN No. 19 of 23 June 1998; MZN No. 21 of 30 November 1998; MZN No. 26 of 3 June 1999; MZN No. 29 of 29 July 1999; and MZN No. 33 of 28 March 2000. Mauritius: MZN No. 63 of 27 June 2008. Nauru: MZN No. 23 of 19 February 1999. Romania: MZN No. 15 of 7 August 1997. Uruguay: MZN No. 30 of 30 July 1999.

⁷⁰ As, e.g., Japan: MZN No. 33 of 28 March 2000.

⁷¹ LOSIC (note 47), 25–30.

⁷² S. 8 (1) Solomon Islands Delimitation of Marine Waters Act, Act No. 32 (1978); see also S. 16 Belize Maritime Areas Act (1992), which makes a similar provision on publicity, stating that the Minister shall cause all relevant baselines, charts etc ‘to be clearly indicated on charts of a scale or scales adequate for them to be readily determined and shall give due publicity to such charts by notice in the Gazette and shall cause a copy of each such chart to be deposited with the Secretary-General of the [UN]’ (emphasis added).

⁷³ See *Symmons/Reed* (note 2), 96; Art. 11 was cited in the case by the ICJ for limited purposes only.

⁷⁴ *Symmons/Reed* (note 2), 93.

⁷⁵ See *J. Ashley Roach/Robert Smith*, United States Responses to Excessive Maritime Claims (2nd edn. 1996), 144–145; also *Tullio Scovazzi et al.*, La linea di base del mare territoriale (1986), 168–169, which mentions the legislation of Haiti and the Maldives in this regard; and further *Prescott* (note 38), 288, 312–313.

⁷⁶ *Symmons/Reed* (note 2), 108 (footnote 101).

⁷⁷ *Mark Valencia*, Validity of Malaysia’s Baselines and Territorial Sea Claim in the Northern Malacca Strait, Marine Policy 27 (2002), 367–373; *Symmons/Reed* (note 2), 101 (footnote 13); this case involved civil litigation in the High Court of Singapore, Suit No. 76 of 2002/w between *Image and Sun Cruises Ltd*, *Sun Vista* and *Sembawang Ship Management Pte Ltd*, where the matter in issue was whether an on-board fire and sinking of a

Section 3

Innocent passage in the territorial sea

Subsection A

Rules applicable to all ships

Article 17

Right of innocent passage

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Bibliography: *William E. Butler*, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, *AJIL* 81 (1987), 331–347; *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *René-Jean Dupuy/Daniel Vignes*, *A Handbook on the New Law of the Sea* (1991); *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics, *ICLQ* 8 (1959), 73–121; *Hugo Grotius*, *The Freedom of the Seas* (1609, translated 1916); *William E. Hall*, *International Law* (7th edn. 1917); *Sir Cecil Hurst*, *The Territoriality of Bays*, *BYIL* 3 (1922–1923), 42–54; *Philip C. Jessup*, *The Law of Territorial Waters and Maritime Jurisdiction* (1927); *Myres S. McDougall/William T. Burke*, *The Public Order of the Oceans* (1987); *Erik J. Molenaar*, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998); *Francis Ngantcha*, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990); *Daniel P. O’Connell*, *The Juridical Nature of the Territorial Sea*, *BYIL* 45 (1971), 303–384; *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982); *John Selden*, *Mare Clausum* (1635, translated 1663); *Emmerich de Vattel*, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758, translated 1916)

Documents: American Institute of International Law, Project No. 12: Jurisdiction, *AJIL* 20, No. 4 Suppl. (1926), 323–325; Harvard Law School, Draft on ‘International Responsibility of States for Damage Done in Their Territory to the Person or Property for Foreigners’ (1929), reproduced in: *ILC Yearbook* (1956), vol. II, 229–230; Harvard Law School, *The Law of Territorial Waters: Appendix No. 1: Amended Draft Convention Communicated to Various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law*, With Questionnaire No. 2, January 29, 1926, *AJIL* 23, No. 2 Suppl. (1929), 366–368; Harvard Law School, *The Law of Territorial Waters: Appendix No. 7: Drafts Prepared by the Kohusaiho-Gakkwai (L’Association de Droit International du Japon) in Conjunction with the Japanese Branch of the International Law Association*, *AJIL* 23, No. 2 Suppl. (1929), 376–378; *ILA*, Report of the Thirty-Third Conference (1924), 101; *ILC*, Report of the International Law Commission: Articles Concerning the Law of the Sea, *UN Doc. A/3159* (1956), *GAOR* 11th Sess. Suppl. 9, 4–12; *UN OLA*, *Laws and Regulations on the Regime of the Territorial Sea* (1957)

Cases: *Attorney-General v. Ngati Apa* [2003] 3 NZLR 643 (New Zealand); *Cope v. Vallette Dry-Dock Co*, 119 US 625 (1887); *ECJ*, C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, 1992 ECR I-6019; *ECJ*, C-308/06, *The Queen on the Application of: International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*, 2008 ECR I-4057; *Ellis v. United States*, 206 US 246 (1907); General Claims Commission, *Compañía de Navegación Nacional (Panama) v. U.S.*, 29 June 1933, *RIAA* XI, 382; *ICJ*, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1985, *ICJ Reports* (1985), 14; *ICJ*, *Corfu Channel Case* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Merits, Judgment of 9 April 1949, *ICJ Reports* (1949), 4; *Pianka v. The Queen* [1979] AC 107 (UK); *Post Office v. Estuary Radio Ltd.* [1968] 2 QB 740 (UK); *Steedman v. Scofield* [1992] 2 Lloyd’s Rep 163 (UK); *Stewart v. Dutra Construction*, 543 US 481 (2005); *R. v. Keyn* [1876] 2 Ex. D. 63 (UK); *R. v. Goodwin* [2006] 1 Lloyd’s Rep 432 (UK); *United States v. Louisiana*, 394 US 11 (1969)

vessel occurred in international waters or within Malaysia’s legitimate internal waters or territorial sea – a matter critically dependent on the validity of Malaysia’s unpublished straight baselines, and important there because if the incident did not happen in such Malaysian waters, the law of the flag State would apply.

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I. Purpose and Function

Art. 17, in clear terms, states that '[s]ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.' The provision introduces the regime of innocent passage. This is the right of vessels to navigate through the territorial sea without stopping or anchoring, unless rendered necessary by *force majeure* or to provide assistance to persons or vessels in distress. Art. 17 must be read in particular with Arts. 18 and 19, which define the meaning of passage and innocent passage respectively.¹ The aim of the regime of innocent passage is to accommodate the littoral States' exclusive interests in securing and protecting coastal waters with the inclusive interests of the international community in guaranteeing certain rights of communication and passage through the seas.² This requires a balancing of interests between coastal States and vessels enjoying the right of innocent passage. Section 3 of Part II continues to define the meaning and extent of passage, the rights and duties of coastal States and flag States, and other parameters shaping the operation of the regime of innocent passage in general.

Art. 17 applies to the ships of all States, although later provisions of the Convention contain specific rules pertaining to warships and State operated non-commercial vessels (→ Arts. 29–32), nuclear powered ships and ships carrying nuclear and other inherently dangerous cargo or noxious subjects (→ Art. 23). Specific provisions also deal with the exercise of criminal (→ Art. 27) and civil jurisdiction (→ Art. 28) over merchant ships and commercially operated State vessels. The right of innocent passage through the territorial sea only applies to ships. The right of overflight above the territorial sea by aircraft remains subject to specific provisions of aviation law.

II. Historical Background

It is difficult to identify consistent and uniform practice supporting a right of innocent passage prior to the nineteenth century. Neither is it possible to identify any consistent recognition of the right in the doctrinal writing of this period. In accordance with his theory of freedom of the seas, GROTIUS asserted a general right of passage.³ SELDEN also accepted a right of 'inoffensive passage' in coastal waters.⁴ The following century, VATTTEL asserted that the marginal sea may be navigated without the coastal State's permission.⁵ On the other hand, BYNKERSHOEK acknowledged some form of transit, but that this could be forbidden. The precise nature and extent of passage was not certain, reflecting the broader juridical uncertainty as to the nature of territorial seas, as evident in the celebrated case of *R. v. Keyn* (1876).⁶ Thereafter,

¹ See further: *Barnes* on Art. 18 MN 6–11; *Barnes* on Art. 19 MN 6–23.

² See ECJ, Case C-308/06, *The Queen on the Application of: International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*, 2008 ECR I-4057, para. 58.

³ Hugo Grotius, *The Freedom of the Seas* (1609, translated 1916), 7–10.

⁴ John Selden, *Mare Clausum* (1635, translated 1663), 123.

⁵ *Emmerich de Vattel*, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758, translated 1916), 106–110.

⁶ *R. v. Keyn* [1876] 2 Ex. D. 63 (UK).

the question of the nature and extent of coastal State rights over territorial waters gained greater attention.⁷ Whilst the right of a coastal State to exercise some prescriptive jurisdiction over activities in the territorial sea was not in question,⁸ the claim that persons on board foreign vessels could be liable for offenses committed under the criminal law of England was hotly disputed.⁹ The scope of innocent passage became inextricably linked with questions about the nature and scope of coastal State authority over coastal waters.

- 4 Between 1894 and the 1930 Hague Codification Conference, a number of learned societies and groups of experts proposed draft rules on the right of innocent passage. This included the Institute de Droit International,¹⁰ the League of Nations Committee of Experts in 1929,¹¹ the International Law Association in 1924,¹² the American Institute of International Law in 1925,¹³ the Japanese Branch of International Law,¹⁴ and the Harvard Law School Draft in 1929.¹⁵ These drafts asserted, without significant deviation, a general right of peaceful passage through coastal waters. It is unclear whether such a right unequivocally existed in practice, but these efforts were nonetheless indicative of a desire that such a right be recognised and codified under international law. This was reflected in academic opinions, with a number of scholars accepting the right of innocent passage.¹⁶ During this period, international agreements were adopted which accorded such a right between contracting parties. In 1921, the Barcelona Convention and Statute on Freedom of Transit required States parties to allow 'transit in accordance with the customary conditions and reserves across their territorial waters'.¹⁷ The same year, the convention between Germany, Poland and the Free City of Danzig concerning freedom of transit between East Prussia and other parts of Germany provided for transit of persons, goods and vessels across territorial waters.¹⁸ Although the Hague Codification Conference failed to produce a text for adoption, the Second Committee was able to report that it is 'precisely because the freedom of navigation is of such great importance to all States that the right of innocent passage through the territorial sea has been generally recognized'.¹⁹
- 5 Given the general acceptance of a right of innocent passage, there has been little international jurisprudence on the matter. In *Compañía de Navegación Nacional (Panama) v. US* (1933), the tribunal stated that there is a 'clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters'.²⁰ More detailed consideration was given to

⁷ Daniel P. O'Connell, *The Juridical Nature of the Territorial Sea*, BYIL 45 (1971), 303, 332 *et seq.*

⁸ See *Barnes* on Art. 2 MN 4–13.

⁹ O'Connell (note 7), 332 *et seq.*

¹⁰ Institute de Droit International, *Règles sur la définition et le régime de la mer territoriale*, AnnIDI 13 (1894–1895), 329–330.

¹¹ Amended Draft Convention Communicated to Various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law, With Questionnaire No. 2, January 29, 1926. LN Doc. C.196.M.70 1927. V, p. 72. Reproduced in Harvard Law School, *The Law of Territorial Waters*: Appendix No. 1, AJIL 23, No. 2 Suppl. (1929), 366, 367.

¹² ILA, *Report of the Thirty-Third Conference* (1924), 101.

¹³ American Institute of International Law, *Project No. 12: Jurisdiction*, AJIL 20, No. 4 Suppl. (1926), 323, 324.

¹⁴ Harvard Law School, *The Law of Territorial Waters*: Appendix No. 7: Drafts Prepared by the Kohusaiho-Gakkwai (L'Association de Droit International du Japon) in Conjunction with the Japanese Branch of the International Law Association, AJIL 23, No. 2 Suppl. (1929), 376 *et seq.*

¹⁵ Harvard Law School, *The Law of Territorial Waters* (note 11), 241.

¹⁶ William E. Hall, *International Law* (7th edn. 1917), 166; Sir Cecil Hurst, *The Territoriality of Bays*, BYIL 3 (1922–1923), 42, 53; Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 119, 120.

¹⁷ Art. 2 Barcelona Convention and Statute on Freedom of Transit, 20 April 1921, LNTS 7, 11.

¹⁸ Art. 1 Agreement Relating to Freedom of Transit between East Prussia and the Rest of Germany, 21 April 1921, LNTS 12, 62.

¹⁹ League of Nations, *Report of Second Commission*, League of Nations Publication V. Legal, LN Doc. C.230.M.117.1930.V. (1930.V.9).

²⁰ General Claims Commission, *Compañía de Navegación Nacional (Panama) v. U.S.*, 29 June 1933, RIAA vol. XI, 382, 384.

the question of passage in the *Corfu Channel Case* 1949, where the International Court of Justice (ICJ) recognised the right of innocent passage through straits used for international navigation.²¹ However, the court explicitly decided against considering the more general question of a right of passage for warships through coastal waters.²²

The text of Art. 17 originated in Art. 15 of the draft articles on the law of the sea prepared in advance of the Geneva Conference by the International Law Commission.²³ This reiterated 'a principle recognized by international law and confirmed by the 1930 Codification Conference'.²⁴ Art. 15 was subsequently adopted as Art. 14 of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ), which reads, '[s]ubject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.' During the negotiation of the UNCLOS, proposals by States largely conformed to the approach taken in the CTSCZ.²⁵ This formulation was followed with only minor technical and drafting changes to produce the final version of Art. 17.²⁶

III. Elements

1. 'Subject to this Convention'

The right of innocent passage is not absolute since it is qualified by reference to other rules of the Convention. This specifically relates to Section 3 of Part II. Consideration should also be made to other provisions affecting or dealing with the right of innocent passage. Thus, Art. 8 confirms that a right of innocent passage exists in waters that have been rendered internal waters through the use of straight baselines.²⁷ Art. 45 deals specifically with the right of innocent passage through straits used for international navigation.²⁸ Art. 52 regulates the right of innocent passage through archipelagic waters. Finally, Arts. 211 (3) and (4) deal with the right of coastal States to regulate pollution in respect of vessels in the territorial sea.²⁹

2. 'ships'

Although the right is enjoyed by ships, as a matter of international law the right extends to ships by virtue of their connection to a State through the process of registration.³⁰ Enjoyment of the right of innocent passage by non-military vessels is uncontroversial. Most controversies have focused on the rights of warships and submarines. An informal proposal by Argentina,

²¹ ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4, 28.

²² *Ibid.*, 30.

²³ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 5-6 (Art. 15). Reproduced in ILC Yearbook (1956) vol II, p. 254, 258.

²⁴ ILC Yearbook, *ibid.*, 272.

²⁵ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 184 (Art. 14); Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192 (Art. 1); Second Committee UNCLOS III, Nicaragua: Working Paper on Characteristics of the National Zone, UN Doc. A/CONF.62/C.2/L.17 (1974), OR III, 195 (para. 1); Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196 (Art. 1).

²⁶ See: UNCLOS III, Statement of Activities of the Conference During its First and Second Sessions, UN Doc. A/CONF.62/L.8/REV.1 (1974), OR III, 93, 111 (Provision 24); UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 156 (Art. 16); UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 7 (Art. 17).

²⁷ See *Trümpler* on Art. 8 MN 31.

²⁸ See further *Jia* on Art. 45 MN 14-16.

²⁹ See *Bartenstein* on Art. 211 MN 20-30.

³⁰ *Intertanko Case* (note 2), para. 58.

Bangladesh, China, Democratic Republic of Yemen, Ecuador, Madagascar, Pakistan, Peru and the Philippines to limit the right to non-military vessels was submitted at the Seventh Session of the Conference, but did not receive sufficient support.³¹ Today a number of States continue to claim that warships and military vessels may not pass through the territorial sea without at least the prior notification to the coastal State. This position nevertheless continues to be resisted by naval powers, and it seems likely that the position will remain uncertain so long as neither side wishes to ‘force the issue’.³²

- 9 The Convention does not define ship.³³ It uses ship and vessel interchangeably, although the former tends to apply to matters of navigation and the latter to pollution control. Other international agreements provide broad definitions of ships.³⁴ This includes hydrofoils, air-cushion vehicles, submersibles, floating craft and floating platforms. The International Convention for Prevention of Pollution from Ships (MARPOL 73/78)³⁵ includes within its definition fixed platforms which may be too wide for the purposes of Art. 17.³⁶ There is some consideration of the definition of a ship under domestic law.³⁷ Such judicial authorities tend to focus on whether or not the vessel is capable of being used in navigation. This usually excludes small leisure craft, such as jet-skis.³⁸ However, such definitions are concerned with the definition of ‘ship’ in municipal law and do not generally impact upon the question of the right of innocent passage.³⁹ Given the general nature of the right of innocent passage, it may be assumed to include all ocean going vessels. This is consistent with the fact that specific provisions later deal with the passage of certain types of vessel, such as submarine, nuclear powered ships, ships carrying dangerous substances and warships. Accordingly, it becomes crucial to determine how the passage and activities of any specific vessel may be regulated in accordance with other provisions of Part II, Section III.

3. ‘of all States, whether coastal or land-locked’

- 10 The use of the word ‘of’ does not infer ownership. Rather, it refers to the nationality of a ship, as addressed in Art. 91.⁴⁰ Art. 17 states a rule of general international law, hence the reference to the ships of ‘all States’, and not merely States parties. The right of innocent passage is well established as a matter of customary international law, a point rightly noted by the ICJ in the *Nicaragua Case*.⁴¹ The right of innocent passage has been universally secured in domestic law, although some aspects of its operation vary in practice.⁴² It is also

³¹ UNCLOS III, Informal Suggestion by Argentina *et al.*, UN Doc. C.2/Informal Meeting/30 (1978, mimeo.), reproduced in: Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 39.

³² Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 90; see also *Barnes* on Art. 23 MN 5–8.

³³ The International Law Commission avoided defining ship, given the drafting difficulties this posed. See: ILC, Summary Records of the Meetings of the 7th Session, ILC Yearbook (1955), vol. I, 10.

³⁴ See Rule 1 (c) International Regulations for Preventing Collisions at Sea; Annex 1 Art. 1 Convention for Prevention of Pollution of the Sea by Oil.

³⁵ International Convention for Prevention of Pollution from Ships, as amended by 1978 Protocol (MARPOL 73/78).

³⁶ Annex I Art. 1 MARPOL 73/78.

³⁷ *Cope v. Vallette Dry-Dock Co*, 119 US 625 (1887); *Ellis v. United States*, 206 US 246 (1907); *Stewart v. Dutra Construction*, 543 US 481 (2005).

³⁸ See, for example, *Steedman v. Scofield* [1992] 2 Lloyd’s Rep. 163 (UK); *R. v. Goodwin* [2006] 1 Lloyd’s Rep. 432 (UK).

³⁹ The question posed in those cases was whether the vehicle in question met the definition of ‘ship’ contained in S. 313 (1) of the UK Merchant Shipping Act, which states that ‘ship includes every description of vessel used in navigation.’ Personal watercraft, like jet-skis, are excluded from this definition since they are not used for purposive navigation which is regarded as meaning planned or ordered movement, and not simply general movement.

⁴⁰ See *Guilfoyle* on Art. 91 MN 12–17.

⁴¹ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, ICJ Reports (1986), 14 (para. 214).

⁴² See generally UN OLA, *Laws and Regulations on the Regime of the Territorial Sea* (1957).

widely recognised in domestic case law.⁴³ The right is universally accepted in academic writings, although commentators report some variations in the views of States and vary in their interpretation of the precise extent of the right, especially as regards its exercise by warships and vessels carrying hazardous materials.⁴⁴ The inclusion of the terms coastal or land-locked seems superfluous given the previous reference to all States.

4. Violations of Art. 17

Art. 17 does not deal expressly with violations of the right of innocent passage. In principle, coastal States which violate the rights of foreign vessels may incur international responsibility to the flag State. Non-military vessels engaged in non-innocent passage are subject to the enforcement jurisdiction of the coastal State, although it appears uncommon in practice for this to be asserted whilst vessels are at sea.⁴⁵ This is implicit in the right of coastal State under Art. 25 (1).⁴⁶ The position of warships which violate the right of innocent passage is dealt with under Art. 30.

Article 18 Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:
 - (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
 - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Bibliography: Richard Barnes, *Refugee Law at Sea*, ICLQ 53 (2004), 44–77; Aldo Chircop/Olof Linden/Detlef Nielsen, *Characterising the Problem of Places of Refuge*, in: Aldo Chircop/Olof Linden (eds.), *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (2006), 1–32; Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999); Constantine J. Colombos, *The International Law of the Sea* (3rd edn. 1954); Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927); Anthony Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* (2012); Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); Daniel P. O’Connell, *The International Law of the Sea*, vol. I (1984); Haijiang Yang, *Jurisdiction of the Coastal State of Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006)

Documents: Harvard Law School, *The Law of Territorial Waters, Draft Convention with Commentary*, AJIL 23, Suppl. No. 2 (1929), 242–365; ILC, *Report of the International Law Commission Covering the Work of Its Eighth Session*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, reproduced in: ILC Yearbook (1956), vol. II, 253–

⁴³ *United States v. Louisiana*, 394 US 11 (1969), 22–23; *Post Office v. Estuary Radio Ltd.* [1968] 2 QB 740, 759 (UK); *Pianka v. The Queen* [1979] AC 107 (UK); ECJ, C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, 1992 ECR I-6019, paras. 25 and 27; *Attorney-General v. Ngati Apa* [2003] 3 NZLR 643 (New Zealand).

⁴⁴ Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topic*, ICLQ 8 (1959), 73, 90; Daniel P. O’Connell, *The International Law of the Sea*, vol. I (1982), 259–298; William E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, AJIL 81 (1987), 331–347; Myres S. McDougall/William T. Burke, *The Public Order of the Oceans* (1987), 176 *et seq.*; Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 38 *et seq.*; René-Jean Dupuy/Daniel Vignes, *A Handbook on the New Law of the Sea* (1991), 906 *et seq.*; Churchill/Lowe (note 33), 81 *et seq.*

⁴⁵ See Erik J. Molenaar, *Coastal State Jurisdiction Over Vessel-Source Pollution* (1998), 271–272.

⁴⁶ See Barnes on Art. 25 MN 5–8.

302; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12-45; ILC, Decisions of National Courts Relating to the Most-Favoured-Nation Clause, UN Doc. A/CN.4/269 (1973), reproduced in: ILC Yearbook (1973), vol. II, 117-153; League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.74.M.39 (1929); League of Nations, Report of Second Commission (Territorial Sea), LN Doc. C.230.M.117.1930.V. (1930.V.9); League of Nations, Report to the Council on the Questions which Appear Ripe For International Regulation, LN Doc. C.196.M.70.1927.V (1927)

Cases: *ACT Shipping (OTE) Ltd v. Minister for the Marine, Ireland and the Attorney-General (The MV Toledo)* [1995] 2 ILRM 30 (Ireland); ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, ICJ Reports (1986), 14; International Arbitral Tribunal, *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, Arbitral Award 4 March 1991, ILR 96 (1994), 279

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I. Purpose and Function

- 1 The purpose of Art. 18 is to provide a definition of passage in relation to the right of innocent passage. This pertains to the navigational aspect of passage, and is distinct from the motive or reasons for passage, or its innocent conduct, which is addressed in Art. 19.¹ O'CONNELL asserts that the purpose of defining passage separately from its innocence is to confirm the authority of coastal States to expel vessels that are not engaged in passage, innocent or otherwise.²
- 2 The meaning of passage is limited to navigation through the territorial sea, without necessarily entering the internal waters of the coastal State. It also includes passage to or from internal waters, and calls at roadsteads or ports. However, this does not extend to a right of entry into ports or internal waters. Such entry depends upon the permission of the coastal State. Passage should be continuous and expeditious, although allowance is made for stopping and anchoring when this is incidental to ordinary navigation, or rendered necessary by *force majeure* or situations of distress, or to provide assistance to others. Art. 18 should be read in conjunction with Art. 19 on the meaning of innocent passage. Passage may also be subject to qualifications or conditions as per Arts. 21, 22, 25 (2), 27 (2) and 28 (3).

II. Historical Background

- 3 The idea that foreign ships have a general right of passage through a third State's coastal waters can be traced to early writers on the law of the sea, with potential older antecedents in Roman Law.³ Such passage supported communication and trade between peoples and nations, and it was generally required to be peaceful. It is not clear when the right of passage emerged as a matter of customary international law, although prevailing opinion points to

¹ See *Barnes* on Art. 19 MN 6-23.

² *Daniel P. O'Connell*, *The International Law of the Sea*, vol. I (1982), 269 *et seq.*

³ *Ibid.*, 260; *Francis Ngantcha*, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 39; *Haijiang Yang*, *Jurisdiction of the Coastal State of Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006), 139-142.

the decades preceding the 1930 Hague Codification Conference.⁴ Thus, the Institut De Droit International rules on the status of sovereign waters referred to '*le droit de passage inoffensive*' and outlined the extent of this in four articles.⁵ Art. 6 of the International Law Association draft articles of 1924 refers to the 'right to pass freely through [coastal] waters'.⁶ In 1929, the Harvard Law School Draft Convention stated that '[a] State must permit innocent passage through its marginal seas'.⁷

Much of the current legal regime was consolidated during the preparations for the Hague Codification Conference of 1930. Art. 7 of the League of Nations Committee of Experts Draft, drawn up by SCHÜCKING, referred to the right of 'pacific passage'. This included 'the right of sojourn in so far as the latter may be necessary for navigation'.⁸ The Preparatory Committee for the 1930 Conference issued a statement based on the views of States which noted that the right of innocent passage for merchant ships was uncontested.⁹ This was followed by Provision 19 of the Basis of Discussion which included as part of the right, persons and goods aboard ships, and anchoring so far as is necessary for navigational purposes. Art. 3 of the Draft Text of the Codification stated:

'Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters [...]. [Passage] includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.'¹⁰

It may be observed that consensus on the existence of a general right at this time should not be taken to mean absolute agreement on the precise parameters of the right of passage. For example, NGANTCHA cites the view of the United States and United Kingdom as rejecting the position that innocent passage includes passage to or from ports.¹¹ The Hague definition introduced a new element to passage not previously encompassed by State practice: the idea of ships travelling through the territorial sea to or from internal waters. CHURCHILL & LOWE point out that this was done not because there was a right to enter or leave such waters, but to bring such ships within the general regime of innocent passage and to subject them to coastal State control and jurisdiction.¹²

The approach taken at the Hague Conference was followed by the International Law Commission (ILC) during the drafting of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ).¹³ Art. 14 of which provides that:

'2. Passage means navigation through the territorial sea for the purpose of either traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas.

3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.'¹⁴

⁴ Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 120; Constantine J. Colombos, *The International Law of the Sea* (3rd edn. 1954), 239-240; for a contrasting view, see Ngantcha (note 3), 38.

⁵ Institut de Droit International, *Règles sur la définition et le régime de la mer territoriale*, AnnIDI 13 (1894-1895), 329-330.

⁶ ILA, Report of the Thirty-Third Conference 1924 (1925), 101.

⁷ Harvard Law School, *The Law of Territorial Waters: Draft Convention with Commentary*, AJIL 23, Suppl. No. 2 (1929), 242, 295 (commentary on Art. 14).

⁸ League of Nations, Report to the Council on the Questions which Appear Ripe For International Regulation, LN Doc. C.196.M.70.1927.V (1927), 72.

⁹ League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.74.M.39 (1929).

¹⁰ League of Nations, Report of Second Commission (Territorial Sea), LN Doc. C.230.M.117.1930.V. (1930.V.9), 13.

¹¹ Ngantcha (note 3), 53.

¹² Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 82.

¹³ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4-12.

¹⁴ *Ibid.*, 5.

This provided the basis for Art. 18 of the 1982 Convention, although subject to a number of drafting changes that were intended to clarify the meaning of passage. Firstly, Art. 18 refers to roadsteads and ports outside internal waters. This recognised recent developments in practice and can be traced to a proposal advanced by Fiji at the Sea-Bed Committee in 1973,¹⁵ and subsequently repeated at the First Session of UNCLOS by the UK.¹⁶ Secondly, Art. 18 (2) adds a reference to the objective of rendering assistance. This originated in a proposal by Malaysia, Morocco, Oman and Yemen.¹⁷ Thirdly, an introductory sentence referring to continuous and expeditious passage was included in Art. 18 (2). These changes were included in a consolidated text in the Informal Single Negotiation Text.¹⁸ No significant amendments were made pending the adoption of the final text.

III. Elements

1. ‘Passage means navigation through the territorial sea’

- 6 Passage encompasses both lateral passage, as well as passage to or from internal waters or ports (→ Art. 11) and roadsteads (→ Art. 12). Lateral passage involves progress through the territorial sea without calling at a port or other shore facility. Passage to or from coastal facilities and internal waters will only be available when internal waters or said facilities are open to international navigation. It is important to note that coastal States are quite free to control access to ports and internal waters.¹⁹ Historically, this has been done through bilateral treaties of friendship, commerce and navigation. In the absence of such treaty rights, access by ships remains a privilege. There is no distinction between the two types of passage under Art. 18 (1); the provision merely serves to reinforce that passage is not limited to mere lateral passage.

2. ‘Passage shall be continuous and expeditious’

- 7 The general rule, subject to the specified exceptions, is that passage must be continuous and expeditious. The use of ‘only’ in the wording of Art. 18 (2) cl. 2 indicates that the exceptions are the only permissible grounds for stopping or anchorage. The general rule is indicative of a requirement to proceed in a reasonably direct route through the territorial sea. As the ILC noted during the preparatory work on the CTSCZ, this was specifically intended to preclude hovering.²⁰ Expeditious passage does not mean that vessels must navigate at full speed.²¹ They should proceed at a normal operational speed, having due regard to the local, weather, hydrographical and navigational conditions.

¹⁵ Sea-Bed Committee, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 (1973), 1 (paras. 1 and 2).

¹⁶ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183 (Art. 2).

¹⁷ Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), 192 (Art. 3 (5)).

¹⁸ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 155 (Art. 15).

¹⁹ ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, ICJ Reports (1986), 14, 111 (paras. 212–213).

²⁰ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 19.

²¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 163.

3. ‘stopping and anchoring incidental to navigation’

The first exception to continuous passage relates to stopping or anchorage when it is incidental to ordinary navigation. The view that a vessel anchoring in the territorial sea of another State has broken passage and may be regarded as within these waters for purposes other than innocent passage is no longer tenable.²² However, it may be argued that if stopping and anchoring was the sole purpose of entering territorial waters, then this may not be considered *incidental* to passage and the coastal State may seek to deny passage into the territorial sea.

In practice, it is difficult to ascertain whether or not stoppage or anchoring is incidental to ordinary navigation. Typically this would include anchoring in bad weather, stoppage due to mechanical failure, temporary anchorage outside a port whilst awaiting a berth, anchorage pending pilotage and other navigational assistance, and anchorage under direction from the coastal State. Coastal States may be more ready to interfere with foreign vessels when there is some manifestation of non-innocence rather than on the basis of the quality of passage alone.

4. ‘force majeure or distress’

The second exception relates to emergency situations involving the vessel itself – *force majeure* and distress. Art. 18 does not define either of these terms. However, both may be taken to mean situations of real danger that are beyond the control of those aboard the vessel. During its discussion of distress in the context of State responsibility, the ILC referred to ‘a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned’.²³ Typically *force majeure* or distress admit situations where individuals lack control over their circumstances and so exculpates them from acting in breach of their obligations. This defence tends to preclude self-induced *force majeure*.²⁴

A strict reading of Art. 18 suggests this exception only relates to emergency situations arising during passage through the territorial sea, rather than permitting entry into the territorial sea to seek shelter or assistance. Historically, such a right of refuge has usually been granted by coastal States.²⁵ However, this has recently become a source of controversy, as vessels either in physical distress or having rendered assistance to persons in distress have sought to gain access to ports or sheltered waters in the territorial sea. In some circumstances refuge in coastal waters has been refused.²⁶ This refusal has typically been on the basis that the coastal State wishes to protect itself from the risks of pollution or from immigration problems resulting from mass influxes of irregular maritime migrants, including people seeking asylum.²⁷

5. ‘rendering assistance’

The third exception relates to vessels rendering assistance to other persons, vessels or aircraft. This aspect of Art. 18 marks a development beyond the scope of earlier regimes on passage in the Hague Codification draft and the CTSCZ but is consistent with normal maritime practice. It also reflects Art. 98, which establishes a general duty to render

²² Draft Convention with Commentary (note 7).

²³ ILC, Decisions of National Courts Relating to the Most-Favoured-Nation Clause, UN Doc. A/CN.4/269 (1973), reproduced in: ILC Yearbook (1973), vol. II, 117, 134.

²⁴ International Arbitral Tribunal, *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, Arbitral Award 4 March 1991, ILR 96 (1994), 279.

²⁵ Aldo Chircop/Olof Linden/Detlef Nielsen, Characterising the Problem of Places of Refuge, in: Aldo Chircop/Olof Linden (eds.) *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (2006), 1, 4.

²⁶ Anthony Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* (2012), 28–37.

²⁷ Richard Barnes, *Refugee Law at Sea*, ICLQ 53 (2004), 44–77.

assistance.²⁸ The provision embodies a strong humanitarian rationale and expands the scope of passage to allow for rescue assistance. It is an approach that is also recognized in domestic case-law.²⁹

6. Relationship with other Articles

- 13 Art. 18 considers navigation to or from internal waters as constituting ‘passage’ within the framework of innocent passage. A number of related provisions also refer to passage, but in more restrictive terms.³⁰ Thus, Art. 25 (2) permits the coastal State to take steps to prevent the breach of any conditions attaching to ships visiting internal waters or port facilities outside internal waters. Art. 27 (2) reaffirms the coastal State’s right to assert criminal jurisdiction over vessels passing through the territorial sea after leaving internal waters. Art. 28 (3) reserves the right to execute civil proceedings against foreign vessels lying in or passing through the territorial sea after leaving internal waters.

Article 19 Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

Bibliography: *Richard Barnes*, *Refugee Law at Sea*, ICLQ 53 (2004), 47–77; *William T. Burke*, *Who Goes Where, When and How: International Law for Sea Transportation*, International Organization 31 (1977), 267–289; *Karin M. Burke/Deborah A. DeLeo*, *Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea*, Yale Journal of World Public Order 9 (1983), 389–408; *William E. Butler*, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, AJIL 81 (1987), 331–347; *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Douglas Guilfoyle*, *Maritime Interdiction of Weapons of Mass*

²⁸ Nordquist/Nandan/Rosenne (note 1), 162. See further Guilfoyle on Art. 98 MN 7–11.

²⁹ *ACT Shipping (OTE) Ltd v. Minister for the Marine, Ireland and the Attorney-General (The MV Toledo)* [1995] 2 ILRM 30, 48–49 (Ireland).

³⁰ *Ngantcha* (note 3), 55.

Destruction, *Journal of Conflict and Security Law* 12 (2007), 1–36; *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics, *ICLQ* 8 (1959), 73–121; *David Froman*, Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea, *San Diego LRev* 21 (1983), 625–689; *Kari Hakapää*, Marine Pollution in International Law: Material Obligations and Jurisdiction (1981); *Kari Hakapää/Erik J. Molenaar*, Innocent Passage-Past and Present, *Marine Policy* 23 (1999), 131–145; *Lindy S. Johnson*, Coastal State Regulation of International Shipping (2004); *Daniel H. Joyner*, The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law, *Yale JIntL* 30 (2005), 507–548; *Michael J. Kearney*, The Prohibition of Propaganda for War in International Law (2007); *Natalie Klein*, Maritime Security and the Law of the Sea (2011); *Rob McLaughlin*, United Nations Mandated Naval Interdiction Operations in the Territorial Sea, *ICLQ* 51 (2002), 249–278; *Erik J. Molenaar/Harm M. Dottinga*, The Netherlands, in: *Erik Franckx* (ed.) *Vessel-source Pollution and Coastal State Jurisdiction* (2001), 303–322; *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982); *Glen Plant*, International Law and Direct Action Protests at Sea: Twenty Years On, *NYIL* 33 (2002), 75–117; *J. Ashley Roach and Robert W. Smith*, Excessive Maritime Claims (2012); *John W. Rolph*, Freedom of Navigation and the Black Sea Bumping Incident: How ‘Innocent’ Must Innocent Passage Be?, *Military Law Review* 135 (1992), 137–165; *Marco Roscini*, The Navigational Rights of Nuclear Ships, *LJIL* 15 (2002), 251–265; *Donald R. Rothwell*, Coastal State Sovereignty and Innocent Passage: The Voyage of the *Lusitania Expresso*, *Marine Policy* 16 (1992), 427–437; *Brian Wilson/James Kraska*, American Security and Law of the Sea, *ODIL* 40 (2009), 268–290; *Rüdiger Wolfrum*, Freedom of Navigation: New Challenges, in: *Myron H. Nordquist/Tommy T. B. Koh/John Norton Moore* (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (2009), 79–94; *Haijiang Yang*, Jurisdiction of the Coastal State of Foreign Merchant Ships in Internal Waters and the Territorial Sea (2006)

Documents: Conference for the Codification of International Law: Final Act, *AJIL* 24, No. 3 Suppl. (1930), 169–191; EU, Commission Decision of 21 April 2016 on Notifying a Third Country of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing, *C/2016/2255*, *OJ C* 23.4.2016; ILC, Report on the Regime of the Territorial Sea by Mr. J.P.A. François, Special Rapporteur, *UN Doc. A/CN.4/53* (1952); ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, *UN Doc. A/3159* (1956), *GAOR* 11th Sess. Suppl. 9, 4–12; IMO, Guidelines on Places of Refuge for Ships in Need of Assistance, *IMO Res. A. 949* (23) of 5 December 2003; *SC Res. 820* of 17 April 1993; Union of Soviet Socialist Republics – United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, *ILM* 28 (1989), 1444–1447; US Department of State, Proliferation Security Initiative: Statement of Interdiction Principles, available online at <http://www.state.gov/t/isn/c27726.htm>

Cases: ECtHR, *Women on the Waves and Others v. Portugal*, Judgment of 2 March 2009, App. No. 31276/05; ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, *ICJ Reports* (1949), 4; Supreme Court of the Netherlands, *Attican Unity*, 7 February 1986, *Schip en Schade* No. 61 (1986); *R. v. Keyn* [1876] 2 Ex. D. 63 (UK)

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I. Purpose and Function

- 1 Art. 19 defines the term ‘innocent’ for the purposes of passage within the territorial sea of a foreign State. The innocence of passage is directly linked to the concept of sovereignty in the territorial sea (→ Art. 2 (1)). Without sovereignty there would be no need to determine whether passage was innocent or not since there would be no State authority to which non-innocent passage would relate. Passage through the territorial sea will be considered innocent provided that it is not prejudicial to the peace, good order or security of the coastal State. In order to help determine what constitutes a prejudicial act, a list of twelve non-innocent activities is provided in Art. 19 (2). This is intended to minimise subjectivity in determining innocence. Non-innocent activities must occur within the territorial sea before the coastal State can invoke its rights in relation to non-innocent passage under the Convention.

II. Historical Background

- 2 The idea or principle of peaceful passage is long rooted in practice.¹ However, the modern concept of innocent passage only emerged in the 19th century, being advanced for the first time in the English case of *R. v. Keyn*.² The majority of judges, by a narrow margin of seven to six, held that the court had no jurisdiction to try a foreign person for manslaughter who was in command of a foreign ship and responsible for a death resulting from a collision within 3 miles of the English shore. This verdict was unexpected, and it is clear from the judges’ reasoning that there were conflicting authorities as to the nature of the territorial sea, the right of the State to exercise jurisdiction, as well as the rights and responsibilities therein. The uncertainty and debate sparked by this decision, and the need for a clear and uniform system of navigation, generated serious attempts to codify the regime of the territorial sea and passage therein. Art. 19 has its origins in Art. 3 (2) of the 1930 Hague Draft Articles, which provided that ‘[p]assage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State’.³ The reference to fiscal interests was intended to cover all matters relating to customs, and export, import and transit prohibitions.
- 3 An opportunity to consider the legal nature of innocent passage arose in the *Corfu Channel Case* of 1949, in which the International Court of Justice placed emphasis on the manner of passage.⁴ Thus, passage that did not threaten the coastal States was innocent. The approach of the Court was to make it clear that innocence should be determined objectively.⁵
- 4 In 1952, International Law Commission (ILC) Special Rapporteur FRANÇOIS submitted his first report on the law of the territorial sea, marking the beginning of the ILC’s work on this topic.⁶ The ILC tended to favour the approach taken in the Hague Conference, which focused on specific acts. The threefold approach to non-innocence in the Hague Draft was streamlined in the ILC draft text for the Convention on the Territorial Sea and Contiguous Zone (CTSCZ). Thus, draft Art. 15 (3) provided that: ‘[p]assage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal

¹ *Haiyang Yang*, Jurisdiction of the Coastal State of Foreign Merchant Ships in Internal Waters and the Territorial Sea (2006), 139–145.

² *R. v. Keyn* [1876] 2 Ex. D. 63 (UK); see also *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982), 264.

³ Conference for the Codification of International Law: Final Act, AJIL 24, No. 3 Suppl. (1930), 169, 185.

⁴ ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4, 30.

⁵ *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999), 83.

⁶ ILC, Report on the Regime of the Territorial Sea by Mr. J.P.A. François, Special Rapporteur, UN Doc. A/CN.4/53 (1952), 3–44.

State or contrary to the present rules, or to other rules of international law.⁷ This was regarded as sufficient to protect coastal State interests in the territorial sea. The reference to 'present rules' established a link between passage and compliance with coastal States laws under draft Art. 18, although this raised concerns about whether trivial breaches of local laws could render passage non-innocent.

At UNCLOS I, agreement on the precise text for innocent passage remained difficult to achieve.⁸ This was mainly the result of trying to balance a clear and unfettered right for passage with the authority of the coastal State to take protective measures, especially in situations where the precise conduct of a vessel was difficult to discern. Eventually, Art. 14 (4) CTSCZ was adopted, providing that:

'[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these Articles and with other rules of international law'.

Art. 14 (5) CTSCZ continued to provide that the passage of fishing vessels is non-innocent if they fail to observe coastal States restrictions on foreign fishing in the territorial sea. This acknowledged the importance of exclusive fishing rights in the territorial sea. The text was broadly framed and so generally compatible with State practice, although FITZMAURICE did note that it adopted a more restrictive view of innocent passage by enlarging the potential range of non-innocence.⁹ Art. 14 CTSCZ did not require the commission of a particular act, or the breach of a coastal State law, before innocence was lost, nor did such an act or breach necessarily result in a loss of innocence. It left coastal States with considerable latitude in determining whether particular passage was innocent or not.

By the time UNCLOS III was convened, it was clear that the wide discretion afforded to coastal States in Art. 14 (4) CTSCZ was unacceptable to many States. This resulted in concerted efforts to redress the balance of interests between coastal States and maritime States in favour of the latter. Although Art. 19 (1) is virtually the same as Art. 14 (4) CTSCZ, with the substitution of 'this Convention' for 'these Articles', a significant development was the enumeration of a range of acts in Art. 19 (2), acts considered to be prejudicial to peace, good order and security. Art. 19 (2) emerged from a Fijian proposal intended to provide a more objective means of determining what acts are prejudicial to the peace, good order and security of the coastal State.¹⁰ This approach gained broad support during the subsequent negotiations, with States adding to or refining the lists of acts.¹¹ At the Third Session of the Conference in 1975, an informal consultative group drafted a consolidated text which was then presented as Art. 16 of the Informal Single Negotiating Text.¹² This established the current structure of Art. 19 (2), with the main difference being a separate provision on the passage of fishing vessels, requiring such passage to be in conformity with coastal State laws and regulations, and a paragraph making allowance for activities either permitted by the coastal State or rendered necessary by *force majeure* or when rendering assistance to vessels and persons in distress. At the Fourth Session in 1976, the Revised Single Negotiating Text further consolidated the draft text, bringing fishing in line with the list of other prejudicial

⁷ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 6.

⁸ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 167.

⁹ Gerald Fitzmaurice, Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics, ICLQ 8 (1959), 73–121.

¹⁰ Sea-Bed Committee, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/7AC.138/SC.II/L.42 and Corr. 1 (1973), reproduced in: GAOR 28th Sess., Suppl. 21 (A/9021-III), 91, 98 (Art. 14), was replaced by UNCLOS III, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196 (Art. 2).

¹¹ See Nordquist/Nandan/Rosenne (note 8), 167 *et seq.*

¹² UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 155 (Art. 16).

activities and removing the separate provision on prior authorization and *force majeure*/distress.¹³ During this period there were unsuccessful proposals by some States and the International Chamber of Shipping to modify the provisions on pollution and to remove the 'catch-all' provision contained in Art. 19 (2)(l).¹⁴ There were no changes of significance before the text's final adoption in 1982.

III. Elements

1. 'prejudicial to peace, good order or security'

- 7 The Convention does not define 'peace, good order and security'. The phrase admits a wide range of factors that could be prejudicial to the coastal State, and suggests that a residual discretion is available to the coastal State to determine such matters. 'Innocent' has always been used in a negative formulation in the context of innocent passage in the territorial sea. Thus, Art. 3 (2) of the 1930 Hague Draft states that 'passage is not innocent when a vessel' makes use of the sea for prejudicial acts. Art. 14 (4) CTSCZ provides that 'passage is innocent so long as it is not prejudicial [...]' Similarly, Art. 19 (1) refers to passage which is 'not prejudicial to peace, good order and security.' This approach indicates that some positive act is required to manifest non-innocence. Accordingly, it precludes a coastal State from considering a wider range of passive factors that do not amount to acts, such as nature of a vessel's cargo, its previous and destination ports of call, its previous navigational history, the nationality of its crew, and the identity of any controlling interests in the vessel.¹⁵
- 8 Since peace, good order and security are very wide terms, several commentators have sought to limit their construction. Commenting on the same phrase within the 1958 CTSCZ, FITZMAURICE insisted upon a narrow construction and evidence of a clear and direct prejudice to the coastal State.¹⁶ Another restrictive approach to determining prejudicial acts is to presume innocence until actual prejudicial conduct is established.¹⁷ This places the burden on the coastal State to justify any interference, rather than the ship to justify its exercise of the right. In the present writer's opinion, the best approach is that coastal States should exercise, at the very least, some degree of caution when deciding to interfere with passage, since this can undermine collective interests in trade and communication between nations. To some extent, this collective interest in communication and trade is served by Art. 19 (2), which provides for the first time, a list of activities deemed prejudicial to peace, good order and security.
- 9 In recent years, the question of which State's security is prejudiced by the passage has become germane to the legality of measures taken to prevent the proliferation of weapons of mass destruction (WMD), and, more specifically, the interdiction of vessels in the territorial sea suspected of carrying WMD or related materiel. A literal reading of Art. 19 (1) appears to exclude coastal State interference with passage in order to prevent acts prejudicial to the peace, good order and security of third States or community interests.¹⁸ Drawing on the idea that carriage of WMD is characteristic of non-innocence, some commentators argue that coastal States can take action against vessels carrying WMD through their territorial sea.¹⁹

¹³ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/Rev.1/PART II (1976), OR V, 151, 156 (Art. 18).

¹⁴ See Nordquist/Nandan/Rosenne (note 8), 171 and 173.

¹⁵ William T. Burke, *Who Goes Where, When And How: International Law for Sea Transportation*, International Organization 31 (1977), 267, 272.

¹⁶ Fitzmaurice (note 9), 96-97.

¹⁷ William E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, AJIL 81 (1987), 331-347.

¹⁸ Rüdiger Wolfrum, *Freedom of Navigation: New Challenges*, in: Myron H. Nordquist/Tommy T. B. Koh/John Norton Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (2009), 79, 90.

¹⁹ Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counter-Proliferation and International Law*, YaleJIntL 30 (2005), 507, 536; Natalie Klein, *Maritime Security and the Law of the Sea* (2011), 201.

However, this view is difficult to reconcile with the idea that innocent passage focuses on the external conduct of the vessels, not internal matters or latent threats against unspecified and future targets.²⁰ The Statement of Interdiction Principles adopted under the Proliferation Security Initiative attempts to strengthen and coordinate action against vessels suspected of carrying WMD, by exhorting both flag States and coastal States to take enforcement measures against vessels suspected of carrying WMD.²¹ However, such action must be consistent with existing legal authorities, i. e. the UNCLOS.

2. ‘in conformity with this Convention and other rules of international law’

In addition to the requirement that passage be non-prejudicial to the peace, good order and security of the coastal State, the second sentence of Art. 19 (1), requires that passage to be done ‘in conformity with this Convention and with other rules of international law’. The meaning of this sentence is not clear. A literal reading suggests that innocence is not the only criterion for passage, and that other rules of international law might also control the right of passage. On the other hand, a more contextual interpretation suggests that other rules of law can be used to define the meaning of innocence with the scope of the first sentence. In either case, it indicates that neither Art 19 nor the Convention is exhaustive of factors determining the meaning of innocent passage. At the very least, it leaves the door open for further regulation of the right.

The reference to ‘conformity with this Convention’ creates a link to other articles, namely Art. 21 concerning the coastal State’s right to regulate vessels in passage. It could be argued that compliance with such local laws is a requirement of passage under Art. 19 (1) since regulations must relate to innocent passage. However, this risks collapsing the distinction between international provisions governing the right of passage, and municipal laws adopted in accordance with this right. Furthermore, a mere breach of local regulations adopted in accordance with Art. 21 does not necessarily result in the loss of the right of innocent passage.²² For example, a vessel engaged in passage might accidentally damage a navigational aid and so become subject to local penal jurisdiction. This does not mean the loss of innocence. A mere breach of local navigation or conservancy laws should not render passage non-innocent because this would undermine the practical enjoyment of the right and defeat its purpose in facilitating navigation. However, the failure to comply with the coastal State’s subsequent and legitimate right to exercise enforcement powers to ensure compliance with such laws should be construed as non-innocent because this act would be prejudicial to peace, good order and security of the coastal State. It is the failure to comply with enforcement measures in respect of local laws that is non-innocent conduct and may lead to further measures under Art. 25. Navigational and conservancy matters aside, and except for the special case of customs, fiscal immigration or sanitary laws, the other provisions of Art. 21 (1) are already covered by the list of non-innocent activities in Art 19 (2) so there is no need to explain the relationship between these provisions in this way.

3. Is Article 19 (2) Exhaustive?

Undoubtedly, Art. 19 (2) provides a more objective means of determining the innocence of passage. However, the question remains as to whether or not it is exhaustive of non-innocent acts. If it is not exhaustive, then the coastal State retains broader powers to limit navigation in the territorial sea. Scholarly opinion is divided on the (non-) exhaustive nature of Art. 19 (2),

²⁰ Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, *Journal of Conflict and Security Law* 12 (2007), 1, 17.

²¹ US Department of State, *Proliferation Security Initiative: Statement of Interdiction Principles of 4th September 2014* (Principles 4(b) and 4(d)), available at: <http://www.state.gov/t/isn/c27726.htm>.

²² This reflects the emphasis on the ‘manner’ of passage in the *Corfu Channel Case* (note 4), 30; cf. also Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 46.

although the majority view appears to be that Art. 19 (2) is non-exhaustive.²³ It is difficult to identify a clear body of practice favouring either view. Weight is frequently attached to USSR and US Uniform Interpretation of Rules, developed after the *Black Sea Bumping Incident*.²⁴ This posits that Art. 19 contains an exhaustive list of activities. Accordingly, 'a ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.'²⁵ On the other hand, there are instances when States have interdicted or prevented vessels from entering or passing through the territorial sea in respect of activities that are not clearly defined under the Art. 19 (2). For example, in 1992, Indonesia prevented the *LUSITANIA EXPRESSO* from completing a voyage through its territorial sea to the port of Dili in East Timor when the stated the purpose of the voyage was to raise awareness of human rights issues in East Timor.²⁶ In 2001, Australia prevented the *MV TAMPA* from entering coastal waters off Christmas Island when the aim of the passage was to disembark persons rescued at sea and seeking asylum Australia.²⁷ In 2004, Portugal denied access to its territorial sea to the *BORNDIEP*, a vessel operated by the Women on Waves Foundation to offer abortion advice and support.²⁸ In this case, the European Court of Human Rights held, with reference to Arts. 10 and 11 of the European Convention on Human Rights, that the interference with the navigational rights of the vessel could not be justified as 'necessary in a democratic society'.²⁹ Although rejecting this attempted limitation of passage, it indicates that questions of peace, good order and security could be construed in light of wider requirements of human rights, at least by human rights tribunals.

- 13 The open textured language used in Art. 19 (1) allows for a broad range of matters to be categorised as non-innocent. This is reinforced by the use of the word 'any' in the 'catch-all clause' in Art. 19 (2)(l). Together these provisions support the view that Art. 19 is non-exhaustive. Indeed, if Art. 19 (2)(l) were missing then there would be a closed list of non-innocent activities. In practice, instances of exorbitant assertions of jurisdiction over transiting vessels are few and far between. This combined with the fact that few maritime States are able to actively assert a right of passage against a coastal State means that a conclusive body of practice is unlikely to emerge on the precise limits of Art. 19 (2).

4. 'threat or use of force'

- 14 Vessels may not engage in 'any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations'. This restates a fundamental rule of international law contained in Art. 2 (4) of the United Nations Charter. Arguably, it is actually wider than Art. 2 (4) UN-Charter since it also refers to 'sovereignty', thereby including acts prejudicial to the coastal State's rights in its territorial

²³ See O'Connell (note 2), 270; Ngantcha (note 22), 52; Kari Hakapää/Erik J. Molenaar, Innocent Passage: Past and Present, *Marine Policy* 23 (1999), 131, 132; Churchill/Lowe (note 5), 85; Lindy S. Johnson, Coastal State Regulation of International Shipping (2004), 64, 66. The contrary view tends to be the domain of American publicists, see: Karin M. Burke/Deborah A. DeLeo, Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea, *Yale Journal of World Public Order* 9 (1983), 389, 395; David Froman, Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea, *San Diego LRev* 21 (1983), 625, 659; Brian Wilson/James Kraska, American Security and Law of the Sea, *ODIL* 40 (2009), 268, 278.

²⁴ John W. Rolph, Freedom of Navigation and the Black Sea Bumping Incident: How 'Innocent' Must Innocent Passage Be?, *Military Law Review* 135 (1992), 137–165.

²⁵ Union of Soviet Socialist Republics – United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, *ILM* 28 (1989), 1444.

²⁶ Donald R. Rothwell, Coastal State Sovereignty and Innocent Passage: The Voyage of the *Lusitania Expresso*, *Marine Policy* 16 (1992), 427–437.

²⁷ Richard Barnes, *Refugee Law at Sea*, *ICLQ* 53 (2004), 47–77.

²⁸ See ECtHR, *Women on the Waves and Others v. Portugal*, Judgment of 2 March 2009, available at: <http://hudoc.echr.coe.int/hudoc/>.

²⁹ *Ibid.*, para. 43.

sea. It has the status of customary law and is thus binding on States regardless of its inclusion within the Convention. It is echoed in Art. 301.

Apart from restrictions on the conduct of foreign vessels, it is important to note that questions concerning the use of force and international peace and security take priority over normal rules on navigation. Thus, the UN Security Council may authorise the closure of a territorial sea to foreign shipping and authorise force to enforce such measures.³⁰ In principle, such measures are not limited to belligerent States. Arguably, Security Council measures under Chapter VII of the UN-Charter could be used to require other States to make coastal waters open to naval peacekeeping forces, and to permit supporting activities not within the scope of innocent passage, such as hovering, anchoring, and launching of aircraft.³¹

5. ‘exercise or practice with weapons of any kind’

Vessels in innocent passage may not engage in ‘any exercise or practice with weapons of any kind.’ This follows from the foregoing rule on the threat or use of force, and reflects the priority afforded to the security interests of the coastal State. The fact that innocent passage is carried out as part of a military programme, such as the United States’ Freedom of Navigation Programme,³² does not mean that it falls within Art. 19 (2)(b). The key distinction is between mere navigation and activities involving the use of weapons. That said, a coastal State is free to permit foreign States to conduct naval exercises and weapons practice within its territorial sea.

6. ‘collecting information’

Vessels must not engage in ‘any act aimed at collecting information to the prejudice of the defence or security of the coastal State.’ This emphasises the security interests of the coastal State, and extends to conduct that is not immediately but also potentially hostile. Such activities might include observing and assessing the capacity and location of military/security facilities, charting the capacity and movements of military vessels, collecting data on submarine hydrography, and listening into or accessing secure communications. However, a challenge here is that such actions are invariably done clandestinely and so are difficult to ascertain and challenge.

7. ‘act of propaganda’

Vessels must not engage in ‘any act of propaganda aimed at affecting the defence or security of the coastal State.’ Propaganda is not defined in the Convention. It is a problematic term since it may entail a wide range of communications designed either to serve the interests of the communicator or to influence the views, values and morale of the target audience.³³ This may range from communications more directly associated with military action to general communications promoting human rights and other values, and which may challenge those held by the coastal State. Such activities might include the display of information on vessels, the distribution of leaflets, broadcasting radio/television signals and sending messages by other media. This restriction emphasises the importance of the security interests of the coastal State over acts that cannot be associated with navigation.

³⁰ SC Res. 820 of 17 April 1993, paras. 28–29.

³¹ See *Rob McLaughlin*, United Nations Mandated Naval Interdiction Operations in the Territorial Sea, ICLQ 51 (2002), 249–278.

³² See US Department of State, GIST: US Freedom of Navigation Program, December 1988, discussed in: *J. Ashley Roach/Robert W. Smith*, Excessive Maritime Claims (2012), 1–15.

³³ See further *Michael J. Kearney*, The Prohibition of Propaganda for War in International Law (2007).

8. ‘launching, landing or taking on board of any aircraft’

- 19 Vessels may not launch, land or take on board any aircraft. This is consistent with the fact that aircraft do not enjoy the right of innocent passage. Such matters are governed by air law. No distinction is made between State and civil aircraft, both of which are covered by the prohibition. One possible exception here might be the launch of aircraft to assist in search and rescue operations, although this should generally be at the request or with the permission of the coastal State.

9. ‘launching, landing or taking on board of any military device’

- 20 Vessels may not launch, land or take on board of any military device. ‘Military device’ is not defined in the Convention, but it should be construed purposively, having regard to the device’s intended function. It includes any weapons systems munitions, mines, traps, detection, surveillance and communication devices, drones, unmanned submersibles and troop carrying equipment, such as jet-skis or launches. It might be questioned whether the prohibition on taking aboard of military devices includes dual use goods and technologies, for example as listed in the Wassenaar Arrangement List of Dual Use Goods and Technologies and Munitions List.³⁴ However, the delivery or loading of such items would probably fall under sub-paragraphs 19 (2)(g) or (l). Furthermore, the resupplying of vessels goes beyond mere passage, and would be subject to the restrictions in Art. 18. In cases of doubt, vessels should seek coastal State consent for such activities.

10. Activities ‘contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State’

- 21 Under Art 19 (2)(g), vessels may not engage in ‘the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State’. Unlike the other provisions of Art 19 (2), this provision refers directly to the adoption of local laws. As such, Art. 19 (2)(g) is contingent upon the coastal State adopting appropriate law, as per Art. 21 (1)(h). The rationale for this appears to be that the variable nature of such types of regulation within individual States means that a general designation of non-innocence would be unworkable.

11. ‘wilful and serious pollution’

- 22 Vessels may not commit ‘any act of wilful and serious pollution contrary to this Convention’. It should be read in conjunction with Art. 211 (4) which provides, in the context of the protection of the marine environment from vessel source pollution, that:

‘Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.’³⁵

- 23 The focus of Art. 19 (2) is on activities that are prejudicial to the coastal State. Accordingly, a vessel which violates passive requirements of international law, such as those pertaining to construction, equipment, design and manning standards, or a vessel which is carrying potentially dangerous cargo, does not automatically engage in non-innocent passage.³⁶ Pollu-

³⁴ See further <http://www.wassenaar.org/>.

³⁵ See further *Bartenstein* on Art. 211 MN 27–30.

³⁶ *Kari Hakapää*, *Marine Pollution in International Law: Material Obligations and Jurisdiction* (1981), 184; *Churchill/Lowe* (note 5), 85; ILA, *Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution* (2000), 51–52.

tion must be both wilful and serious in order to render passage non-innocent. Wilful indicates a requirement of intention. However, the Convention does not specify the requisite nature or degree of intention. This requirement appears to preclude accidental pollution. However, it is arguable that wilful can be construed to mean navigation without due regard to the risks of pollution.³⁷ This approach is consonant with a growing body of practice allowing for preventative measures without actual pollution taking place.

Neither does the Convention define the meaning of ‘serious’. However, pollution is defined widely under Art. 1 (1)(4).³⁸ Given that some degree of operational discharge is permitted under international law, then it may be inferred that pollution must be at least beyond this *de minimis*-threshold. It is likely that States will form different opinions on the degree of pollution required to render passage non-innocent. It will also be contextual since some waters may be more sensitive to pollution than others, or subject to prevailing high levels of pollution such that there is no tolerance for further pollution.

A particular difficulty in this context is the extent to which coastal States can take action to prevent future pollution. There are examples of States having refused vessels posing a pollution threat entry into coastal waters.³⁹ However, there is insufficient practice to provide a conclusive interpretation of the Convention on this point or to give rise to a rule of custom generally permitting proactive measures against vessels. Despite this, there is some consensus that vessels in a condition so poor as to be likely to cause serious pollution cannot exercise a right of innocent passage.⁴⁰ This still requires some balancing of the interests of the ship and port/coastal State. In order to reconcile the conflicting interests of coastal States and vessels in distress, the International Maritime Organisation has adopted guidelines on places of refuge which seek to facilitate and structure decision-making about granting stricken vessels access to sheltered waters.⁴¹

12. ‘fishing activities’

Vessels may not engage in ‘any fishing activities’. The use of ‘any’ indicates a wide approach to fishing. The approach of the EU is indicative of the potentially wide scope used in practice:

‘The definition of fishing activities includes searching for, catching, taking and harvesting fish as well as any activity in support of or preparation of these activities, including through the use of aircraft’⁴²

It should be noted that coastal States may regulate fishing activities under Arts. 21 (1)(e) and 42 (2)(c), and so determine the meaning of fishing in relation to Art. 19 (2)(i).

13. ‘research or survey activities’

Vessels may not carry out ‘research or survey activities’. This is to be understood broadly and includes hydrographical surveying, exploration for mineral resources and fisheries, investigation of underwater cultural heritage sites. This provision should be read in conjunction with Art. 245, which notes that coastal States have the exclusive right to regulate,

³⁷ Marco Roscini, *The Navigational Rights of Nuclear Ships*, LJIL 15 (2002), 251, 258–259.

³⁸ See further Tanaka on Art. 1 MN 12–15.

³⁹ Supreme Court of the Netherlands, *Attican Unity*, 7 February 1986, Schip en Schade No. 61 (1986); noted by Erik J. Molenaar/Harm M. Dotinga, *The Netherlands*, in: Erik Franckx (ed.) *Vessel-source Pollution and Coastal State Jurisdiction* (2001), 303, 311.

⁴⁰ ILA Report (note 40), 53.

⁴¹ IMO, *Guidelines on Places of Refuge For Ships in Need of Assistance*, IMO Res.A.949(23) of 5 December 2003.

⁴² Commission Decision of 21 April 2016 on Notifying a Third Country of the Possibility of Being Identified as a Non-cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing. C/2016/2255. OJ C 23.4.2016, 9–13.

authorize and conduct marine scientific research in their territorial sea.⁴³ Art. 245 is broader than Art. 19 (2)(j), which is limited to research activities by vessels.

14. 'interfering with any systems of communication'

- 28 Vessels may not engage in any 'any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State'. This provision should be read in conjunction with Art. 21 (1)(b) and (c), which provide for the regulation of navigational aids and facilities, and facilities and installation, and cables and pipelines, respectively.

15. 'other activities not having a direct bearing on passage'

- 29 Vessels may not engage in 'any other activity not having a direct bearing on passage'. This provision is open-ended and it is difficult to determine the meaning of Art. 19 (2)(l) with any precision. YANG suggests that it could include 'dumping, bunkering, broadcasting, hanging out posters or placards against local religions or social systems, picking coral reefs, rebellions on board, and unwarranted stopping and anchoring other than as provided for in Art. 18 (2)'.⁴⁴ To this list one might add vessels engaged in environmental protest at sea⁴⁵ and acts of maritime violence, such as armed robbery against other vessels or vessels hijacking. However, many such activities appear to fall under the foregoing provisions or Art. 27 concerning criminal jurisdiction. All that can be said with certainty is that this provision reinforces the requirement that there be some positive act that renders passage non-innocent. It may also afford coastal States some measure of discretion in determining whether an act is non-innocent. However, this must be read in light of Art. 19 (1) and is further subject to the duty to act in good faith and not amount to an abuse of right as required by under Art. 300.

Article 20

Submarines and other underwater vehicles

In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Jane G. Dalton*, *Future Navies: Present Issues*, *Naval War College Review* 59 (2006), 17–39; *Ingrid Delupis*, *Foreign Warships and Immunity for Espionage*, *AJIL* 78 (1984), 53–75; *Gerald Fitzmaurice*, *Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics*, *ICLQ* 8 (1959), 73–121; *David Froman*, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, *San Diego LRev* 21 (1983), 625–689; *Natalie Klein*, *Maritime Security and the Law of the Sea* (2011); *Francis Ngantcha*, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990); *Myron Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Daniel P. O'Connell*, *The International Law of the Sea*, vol. I (1982); *Roma Sadurska*, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm*, *Yale JIntL* 10 (1984–1985), 34–58; *Tullio Treves*, *Navigation*, in: *René J. Dupuy/Daniel Vignes* (eds.), *A Handbook on the New Law of the Sea*, vol. II (1991), 833–976

Documents: Conference for the Codification of International Law: Final Act, *AJIL* 24 (1930), Suppl. No. 3, 169–191; ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, *UN Doc. A/3159* (1956), GAOR 11th Sess. Suppl. 9, 4–12

Cases: *R. v Goodwin* [2006] 1 Lloyd's Rep. 432 (UK)

⁴³ See *Huh/Nishimoto* on Art. 245.

⁴⁴ *Yang* (note 1), 167.

⁴⁵ *Glen Plant*, *International Law and Direct Action Protests at Sea: Twenty Years on*, *NYIL* 33 (2002) 75, 91–93.

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I. Purpose and Function

Art. 20 establishes specific requirements for the navigation of submarines and underwater vehicles through the territorial sea of third States in peacetime. It requires such vehicles to navigate on the surface and show their flags while exercising their right of innocent passage. The rule balances navigational interests with the safety and security concerns of coastal States. As submarines are intended to navigate by stealth and underwater conduct is difficult to assess, the provision aims to ensure surface passage and thereby avoid suspicion or inference of non-innocence.

II. Historical Background

The development of submarines as an important component of naval forces in the early twentieth century presented a challenge to rules on passage in territorial waters, since such rules were naturally developed in respect of sailing vessels. The expectation was that submarines should navigate on the surface when entering the territorial waters of third States.¹ Thus Art. 12 of the Final Act of the Hague Conference for the Codification of International Law stated that ‘submarine shall navigate on the surface’.²

This provision was incorporated into the International Law Commission (ILC) draft articles on the law of the sea in 1956.³ The provision was included in Art. 15 on the definition of innocent passage rather than in articles dealing with warships, and was intended to ensure applicability to commercial submarines, if they were introduced. Art. 14 (6) of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ) incorporated the ILC provision, adding the requirement that submarines must also ‘show their flag’. Art. 20 is drawn directly from Art. 14 (6) CTSCZ.

During the negotiation of the 1982 Convention, there was opportunity to reconsider the scope and content of the conventional rule for the submerged passage of submarines. In the Second Committee, the US stated that since submarines are designed to travel submerged, for reasons of safety this was the manner in which they should exercise their right of innocent passage. The majority of States refuted this suggestion.⁴

At the 1973 Sea-Bed Committee, a proposal by eight States added a reference to ‘other underwater vehicles’.⁵ This was retained in subsequent revisions and into the final text. A number of States suggested the inclusion of explicit provisions emphasizing the coastal State

¹ Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 153.

² Conference for the Codification of International Law: Final Act, AJIL 24 (1930), Suppl. No. 3, 169, 187; for non-military vessels, Art. 4 introduced a similar requirement.

³ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 5–6 (Art. 15).

⁴ Ngantcha (note 1), 153–154.

⁵ Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation through the Territorial Sea Including Straits Used For International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), GAOR 26th Sess. Suppl. 21 (A/9021-III), 3, 5 (Art. 3 (5)).

discretion concerning the mode of passage of submarine.⁶ Ultimately, these were not included since the coastal State can always waive this requirement. Two further proposals, neither of which was ultimately included, suggested an explicit link between surface navigation and innocent passage.⁷ This indicates a high degree of consensus about the core content of the Art. 20.

III. Elements

1. ‘Submarines and other underwater vehicles’

- 6 In practical terms, Art. 20 is mainly relevant to military vessels because, for the present time, it is only such vehicles that are used in general navigation. In principle, Art. 20 also applies to commercially operated submersible craft. However, this has not been an issue in practice for two reasons. First, at the present time, such commercial submersibles are not generally capable of, or intended for use in ‘passage’ or navigation; they are normally limited to use in operations such as exploration, research, sub-sea repair activities and tourism.⁸ This means their actual use falls out with the scope of innocent passage. Accordingly, they would be subject to coastal State regulation in the territorial sea since they are engaged in activities coming within the scope of Art. 21. Secondly, many such submersibles are tethered by cable to, and operated from, a mother ship. Thus they do not constitute a separate entity from the mother ship subject to discreet regulation. They would be regulated as part of the mother ship. This situation may change. There is increasing use of a range of untethered autonomous unmanned underwater vehicles by both military and private operators. To the extent that such vehicles are truly independent and capable of navigating, these craft should be treated as any other ship for the purposes of innocent passage.⁹ Given the aim of Art. 20 to ensure surface passage and avoid inferences of non-innocent activity, such craft will be covered by Art. 20.

2. Submerged Passage

- 7 The rule requiring surface passage is clear and long-established, although not always observed in practice.¹⁰ This means a key issue in practice is how to respond to vessels engaged in submerged passage. The English language text uses the phrase ‘are required’ to describe the emerged conduct of submarines, rather than the usual term ‘shall’. NORDQUIST *et al.* suggest that this leaves open the possibility that the coastal State may decide to waive this requirement.¹¹ This seems consistent with the coastal State prerogative to determine that specific vessels are not engaged in unsafe or prejudicial conduct in the territorial sea.

3. Breach of Art. 20

- 8 Neither Art. 20 nor any other provision specifically deals with the consequences of a breach of the requirement of surface passage. Assuming that a submerged vessel can be

⁶ See Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 197 (Art. 6 (1)); Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 184 (Art. 20).

⁷ Second Committee UNCLOS III, United Arab Emirates: Article 16 (ISNT II) (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference, vol. IV (1983), 268, 270 (Art. 18); Second Committee UNCLOS III, Group of Arab States: Article 17 (ISNT II) (1976, mimeo.) reproduced in: *ibid.*, 270.

⁸ The Convention does not define navigation. Domestic cases have defined navigation as ‘ordered progression over the water from one place to another’. See English Court of Appeal: *R. v. Goodwin* [2006] 1 Lloyd’s Rep. 432 (UK).

⁹ Jane G. Dalton, Future Navies: Present Issues, Naval War College Review 59 (2006) 17, 24–25.

¹⁰ Robin R. Churchill/Alan V. Lowe, The Law of the Sea (3rd edn. 1999), 90–91.

¹¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 183.

identified, there are two views on the matter. The first is that submerged passage renders the passage non-innocent, and, hence, a breach of Art. 17.¹² The other view is that it does not necessarily render passage non-innocent, although it may do so depending upon the circumstances.¹³ FROMAN argues that a failure to include submerged passage in the list of non-innocent activities in Art. 19 indicates an intention not to make surface navigation a requirement of innocent passage.¹⁴ This cannot be conclusively determined from the *travaux préparatoires*, and a better approach would be to permit coastal States to have regard to this factor as a means of determining the character of passage.

There is no conclusive State practice on this matter.¹⁵ Of note were the repeated incursion 9 of submerged submarines into Swedish coastal waters between 1962 and 1982.¹⁶ These incidents were subject to protest by Sweden, and, ultimately, the adoption of a domestic ordinance permitting the use of force against submerged submarines in the territorial sea. During the *Harsfjärden Incident* of 1982, Sweden used depth charges to force the submarines to leave.¹⁷ The absence of any protest against such measures suggests that States may be willing to accept a wider degree of latitude in responding to such threats to security.¹⁸

It is to be noted that a distinction must be drawn between military and civilian vessels. In 10 the case of the former, coastal States may not interdict and detain submarines; they are generally limited to requiring it to leave the territorial sea. In the last resort, force may be permitted where such a request is refused.¹⁹

Article 21

Laws and regulations of the coastal State relating to innocent passage

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

¹² See the view of Spain, Second Committee UNCLOS III, 14th Meeting, UN Doc. A/CONF.62/C.2/SR.14 (1974), OR II, 135, 137 (para. 24); *Ngantcha* (note 1), 154.

¹³ See *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics, ICLQ 8 (1959), 73, 98; *Roma Sadurska*, Foreign Submarines in Swedish Waters: The Erosion of an International Norm, YaleIntL 10 (1984–1985), 34, 57; *Tullio Treves*, Navigation, in: René J. Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. II (1991), 833, 928.

¹⁴ *David Froman*, Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea, San DiegoLRev 21 (1983), 625, 663.

¹⁵ See *Daniel P. O'Connell*, The International Law of the Sea, vol. I (1982), 296–297.

¹⁶ *Sadurska* (note 13), 57.

¹⁷ *Ibid.*, 37.

¹⁸ *Natalie Klein*, Maritime Security and the Law of the Sea (2011).

¹⁹ *Ingrid Delupis*, Foreign Warships and Immunity for Espionage, AJIL 78 (1984), 53, 73; *O'Connell* (note 15), 296–297; *Treves* (note 13), 928; see further *Barnes* on Art. 30 MN 7–8.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

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Documents: ILA, Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000), available at: <http://www.ila-hq.org/download.cfm/docid/C52ADCAF-E925-4BD4-8159B588EFD02597>; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation, IMO Doc. LEG/MISC/7 (2012); IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation, IMO Doc LEG/MISC/1 (1986); IMO Res. MEPC/45(30) of 16 November 1990; Report of the Second Committee, LN Doc. C.230.M.117.1930.V. (Annex I), reproduced in: Shabtai Rosenne (ed.), *League of Nations Conference for the Codification of International Law 1930* (1975), 869

Cases: *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) (New Zealand)

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I. Purpose and Function

Art. 21 establishes the basis for the coastal State to adopt laws and regulations relating to innocent passage in respect of a defined range of activities. Thus, the coastal State may only extend its laws to vessels engaged in innocent passage in respect of the following matters: safety of navigation; regulation of marine traffic; protection of navigational aids and facilities, cables and pipelines; conservation of living resources of the sea; prevention of infringement of fisheries regulations; preservation of the coastal State's environment; prevention, reduction and control of pollution; marine scientific research and hydrographic surveys; and prevention of infringement of the State's customs, fiscal, immigration or sanitary regulations. The list in Art. 21 parallels, but does not replicate, the activities listed in Art. 19 which render passage non-innocent.¹ The main difference is the absence from Art. 21 of any provisions on hostile activities (i. e. those activities listed Art. 19 (2)(a)-(f)). Such activities are fundamentally inimical to the idea of innocent passage. Given the overlap in respect of other activities, there is link between compliance with coastal State laws and enjoyment of the right of innocent passage.

Art. 21 seeks to balance coastal State interests with collective interests in maritime navigation. In this respect, a key limitation on the coastal State's competency to regulate is found in Art. 21 (2), which prohibits a coastal State from adopting laws which affect the 'design, construction, manning or equipment of foreign vessels' unless such laws conform to generally accepted international standards. Under Art. 21 (4) foreign ships must comply with all coastal State laws under the scope of this provision as well as 'all generally accepted international regulations relating to the prevention of collisions at sea.'

II. Historical Background

Historically, some degree of coastal State prescriptive jurisdiction was accepted over territorial waters, although it was not subject to codification efforts until the 20th century. This appears to have resulted from the divergent views of States as to the nature of the territorial sea and whether it was a merely bundle of servitudes or an area within which coastal States enjoyed plenary jurisdiction.² The 1930 Hague Codification Conference Draft contained a provision requiring foreign ships to comply with coastal State laws and regulations enacted in conformity with international usage.³ Art. 6 (1) of the 1930 Draft provided a list of activities to be regulated, although this was not definitive. It referred to laws relating to safety and navigation, pollution protection, fishing and other products of the sea. Whilst no specific limits were imposed on coastal States, Art. 4 (1) provided that no obstacles to passage were permitted, and Art. 6 (2) provided that any such rules must be non-discriminatory between vessels of different nationalities.

This basic approach was adopted by the International Law Commission during their work on the law of the sea. In their commentary to draft Art. 18, a similar and illustrative list was provided, but with the addition of hydrographical surveys.⁴ However, this list of activities did not feature in what became Art. 17 of the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ), which simply read:

¹ See generally *Barnes* on Art. 19.

² *Robin R. Churchill/Alan V. Lowe, The Law of the Sea* (3rd edn. 1999), 91-94.

³ Report of the Second Committee, LN Doc. C.230.M.117.1930.V. (Annex I), reproduced in: Shabtai Rosenne (ed.), *League of Nations Conference for the Codification of International Law 1930* (1975), 869.

⁴ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 20 (Art. 18).

‘Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and in particular with such laws and regulations relating to transport and navigation.’

Art. 14 (5) of the CTSCZ further referred to coastal State laws preventing foreign fishing in the territorial sea. This resulted in some ambiguity as to the extent of any material restrictions on the legislative jurisdiction of coastal States.⁵ This ambiguity was to be resolved at UNCLOS III.

- 5 The idea of listing topics for coastal State regulation was introduced by Cyprus, Greece, Indonesia Malaysia, Morocco, Philippines, Spain and Yemen at the 1973 session of the Sea-Bed Committee.⁶ A further proposal was submitted by Fiji, which included reference to the prevention of damage to pipelines and cables, and to customs, fiscal, immigration, quarantine and sanitary matters.⁷ Significantly, this list was intended to be exhaustive. At the Second Session of UNCLOS III in 1974, further attempts to clarify the powers of the coastal State were made, with a detailed draft Art. 18 being submitted by the United Kingdom.⁸ Subsequent proposals make it clear that a definitive list was desirable. These listed coastal State powers but subjected them to a duty to give due publicity to all laws and regulations and limitations in respect of laws impinging upon matters relating to vessel design, construction, manning and equipment.⁹ These proposals were consolidated in Art. 18 of the Informal Single Negotiating Text, with more detailed reference to the designation of sea lanes and their operation being put into a separate provision.¹⁰ The draft was refined and accepted as the Revised Single Negotiating Text without any significant changes.¹¹ Reference to non-discrimination between ships was submitted in some of the early proposals but was not accepted into the final provision.¹² Non-discrimination now features in Arts. 24 (1)(b) and 25 (3).
- 6 NORDQUIST *et al.* note that although the text was not changed in substance after the Informal Composite Negotiating Text, there continued to be discussion of the article in respect of the passage of foreign warships, and, in particular, the right of coastal States to require prior notification or authorization as a condition of passage.¹³ Despite considerable debate, this issue was not included within the draft or final texts. Notably, a number of States have since included declarations upon signing the Convention stating that they reserve the right to adopt measures regulating the innocent passage of warships in their territorial sea.¹⁴

⁵ Churchill/Lowe (note 2), 94.

⁶ Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 3, 5 (Art. 5).

⁷ Sea-Bed Committee, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. AC.138/SC.II/L.42 and Corr. 1 (1973), GAOR 28th Sess., Suppl. 21 (A/9021), 91, 94 (Art. 5).

⁸ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 184 (Art. 18).

⁹ Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 197 (Art. 5); Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.26 (1974), OR III, 203, 204 (Art. 20).

¹⁰ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152152, 155.

¹¹ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 156.

¹² UK Draft Articles (note 8), 184 (Art. 17).

¹³ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 195–199.

¹⁴ For example, see the declarations of Bangladesh (27 July 2001), China (7 June 1996), Ecuador (24 September 2012), Egypt (26 August 1983), Iran (10 December 1982), Malta (20 May 1993), Oman (17 August 1989), Yemen (21 July 1987), available at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm. Other States have expressly confirmed the right of innocent passage without prior notification: Italy (7 December 1984), Netherlands (28 June 1996), *ibid.*

III. Elements

1. 'laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage'

Art. 21 is specifically concerned with prescriptive jurisdiction and the right of coastal States to legislate in respect of innocent passage. This is both a significant and delicate matter since it may intrude upon matters otherwise the exclusive concern of the flag State and thereby threaten the integrity of global navigation.¹⁵ Although the negotiations appear to indicate that the list of matters is exhaustive, thereby creating certainty as to the extent of Art. 21, some doubt remains as to the precise scope of the provision. Despite the categorical list of prescriptive matters, CHURCHILL & LOWE note that the existence of general enforcement jurisdiction presupposes the existence of a general legislative jurisdiction.¹⁶ There are also inevitable textual ambiguities. Thus, JOHNSON observes that the use of the phrase 'relating to innocent passage' in the chapeau may be interpreted widely so as to go beyond actual passage and so raise the question whether a ship actually has to be in the territorial sea or not before a law or regulation applies to it.¹⁷ More specifically, she alludes to possibility of this permitting coastal States to require prior notification for the passage of warships. The point is supported when one contrasts the different language used in Art. 19 (2) and Art. 21 (1), with Art. 19 (2) referring to the phrase 'in the territorial sea' and Art. 21 (1) using the phrase 'relating to innocent passage'. It could be argued that the ships' location is incidental to the application of the law or regulation since it must simply relate to the conduct of innocent passage. However, this potentially extends the spatial scope of coastal States' prescriptive jurisdiction and this reads too much into any textual ambiguity.¹⁸ Innocent passage is limited to the territorial sea, and so too must any regulation pertaining to it be limited. The use of the words 'relating to' is better understood as making it clear that the defined prescriptive authority in Art. 21 (1) is limited but only in respect of the regulation of foreign vessels engaged in innocent passage. Otherwise the coastal State's prescriptive jurisdiction, for example as relating to mineral resources, remains unaffected, at least when it does not touch upon the right of passage. This approach seems to be implicit in the text of Art. 27, which assumes the existence of a general criminal jurisdiction.

The relationship between Art. 21 and Art. 19, and in particular the question of whether or not a breach of coastal State laws renders passage non-innocent is discussed in Art. 19 MN 11.

2. 'safety of navigation and the regulation of maritime traffic'

Subject to Art. 21 (2), a coastal State may adopt laws and regulations in respect of safety of navigation and the regulation of maritime traffic under Art. 21 (1)(a). The aim of this provision is to ensure that coastal States can take steps to ensure the safety of navigation in the territorial sea. Thus the right to exercise innocent passage cannot be used to the detriment of navigation. Although coastal States enjoy quite broad powers to regulate the operational conduct of vessels in the territorial sea, this tends to be done in accordance with international conventions, even when not concerned with design, construction, manning and equipment standards (CEDM). Safety of navigation is best achieved through coordinated measures. These can ensure a degree of uniformity, as well as the availability of accurate and comprehensible information to those engaged in navigation. Safety of navigation is addressed in a range of detailed international agreements including the International Convention for

¹⁵ Richard A. Barnes, Flag State, in: Donald R. Rothwell *et al.* (eds.), *The Oxford Handbook of the Law of the Sea* (2015), 304–324.

¹⁶ Churchill/Lowe (note 2), 95.

¹⁷ Lindy S Johnson, *Coastal State Regulation of International Shipping* (2004), 68–69.

¹⁸ *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44 (CA), 54 (New Zealand).

the Safety of Life at Sea (SOLAS 1948), the International Convention on Load Lines 1966 (Convention on Load Lines 1966), the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs), International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978, and Protocol of 1978, relating to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78). One should also consider the International Convention on Maritime Search and Rescue 1979. Safety matters also extend to the adoption of sea lanes and traffic schemes, with such being explicitly addressed in Art. 22. Thus, Art. 21 (1)(a) should be read in conjunction with Art. 22.

- 10 The precise extent to which coastal States can adopt safety measures is not detailed in the Convention. Any such measure must respect the balance between legitimate coastal concerns about safety and foreign vessels' right of innocent passage. An interesting test of this arises in respect of pilotage, i.e. the requirement that ships take aboard a specially qualified navigator before proceeding through certain waters. Since 1991, Australia has operated a compulsory pilotage area in parts of its territorial sea within the Great Barrier Reef.¹⁹ Notably, Australia sought and obtained International Maritime Organisation (IMO) approval for this measure, indicating that international recognition of such safety measures is necessary, or at least desirable.²⁰ Under Finland's Pilotage Act 2003, all vessels must, as a general rule, use a pilot when navigating fairways within Finnish territorial waters.²¹ Under this law, vessels carrying hazardous substances or materials harmful to the sea always require a pilot. The United States has sought to protest such measures, at least as regards their application to sovereign immune vessels or where they extend to international straits.²²
- 11 Art. 42 (1)(a) is the corresponding provision in respect of coastal State prescriptive jurisdiction over international straits. Although discreet provisions, they should be interpreted consistently given that they use exactly the same language.²³

3. 'protection of navigational aids and facilities and other facilities or installations'

- 12 Art. 21 (1)(b) extends coastal State jurisdiction to measures to protect navigational aids, facilities and other installations. It complements Art. 19 (2)(k), which renders acts that interfere with communications systems and facilities or installations as non-innocent. Like Art. 21 (1)(a), it is intended to ensure that passage is not exercised to the detriment of navigation. The term 'navigational aids' refers to equipment which is external to the ship, such as lighthouses, buoys, channel markers, and beacons. 'Facilities' and 'installations' are not defined, but presumably this includes any artificial islands or man-made structures erected within the territorial sea. Typically, these structures are engaged in offshore energy development and extraction. Offshore oil and gas installations tend to be relatively few. In contrast, offshore wind turbines are grouped in large numbers and so when subject to protective measures may adversely impact upon navigation within territorial waters. Coastal States are entitled to establish safety zones around installations consistent with Art. 60 and Art. 80.

¹⁹ See s. 59A–59M Great Barrier Reef Marine Park Act 1975 (Australia); s. 162–174 Navigation Act 2012 (Australia).

²⁰ IMO Res. MEPC/45(30) of 16 November 1990; see further, *Michael White*, Navigational Rights in Sensitive Marine Environments: The Great Barrier Reef, in: Donald R. Rothwell/Sam Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 230, 250; *Peter Ottesen/Stephen Sparkes/Colin Trinder*, Shipping Threats and Protection of the Great Barrier Reef Marine Park: The Role of the Particularly Sensitive Sea Area Concept, *IJMC* 9 (1994), 507–522.

²¹ S. 5 Pilotage Act 2003 (940/2003) (Finland), available at: <http://www.finlex.fi/en/laki/kaannokset/2003/en20030940.pdf>.

²² See *J. Ashley Roach/Robert W. Smith*, *Excessive Maritime Claims* (3rd edn. 2012), 231, 339.

²³ See further *Jia* on Art. 42.

4. ‘protection of cables and pipelines’

International law has long recognised the need to protect submarine cables and pipelines.²⁴ 13
 Art. 21 (1)(c) entitles coastal States to adopt measures to protect submarine pipelines and cables. This serves to both protect communication systems and prevent marine pollution from damaged pipelines. Measures envisaged under this provision include restrictions on anchoring when incidental to passage, as well as rules on liability and penalties for damage done to pipelines and cables.²⁵

5. ‘conservation of the living resources’

Coastal States can adopt laws and regulations in order to conserve the living resources of 14
 the sea. This is not simply limited to fisheries conservation, but extends to the conservation of any living resource. It thus provides the basis for potentially broader conservation measures, such as the adoption of protected sea areas, measures to conserve biological diversity, and the protection of individual species, such as marine mammals and seabirds.²⁶ Practice on this is presently mixed, but is indicative of a willingness to limit or regulate navigation. Thus, SPADI provides examples of States which limit or control navigation in certain areas on conservation grounds (Australia, Germany, Israel, Italy, Trinidad and Tobago, the United States, and Venezuela) and States which reserve the power to limit navigation (Norway, New Zealand).²⁷ Potential measures include prohibitions on navigation, prior authorisation of navigation, restrictions on anchoring, and routing requirements around or through marine protected areas. The potential for such measures to be taken under Art. 21 is important, since Art. 22 is limited to sea lanes and traffic schemes where necessary for maritime safety. Presently, such measures tend mostly to limit fishing, rather than navigation *per se*.

NORDQUIST *et al.* treat Art. 21 (1)(d) and Art. 21 (1)(e) together, noting that they link to 15
 Part VII and provisions on the conservation and management of living resources.²⁸ They further note that these provisions form the starting point of a wider range of coastal State enforcement powers, including Art. 73 on EEZ enforcement measures, Art. 111 on hot pursuit, Art. 220 on the protection and preservation of the marine environment, and Art. 253 on marine scientific research.

6. ‘fisheries laws and regulations’

Art. 21 (1)(e) provides that the coastal State can adopt measures relating to passage in 16
 respect of the prevention of infringements of fisheries laws and regulations. This includes not only restrictions on fishing activity, but measures to prevent vessels supporting illegal fishing activities, protecting fixed gear and marine fish farms. This provision reinforces Art. 19 (2)(i).

7. ‘preservation of the environment’

Art. 21 (1)(f) provides that the coastal State can adopt measures relating to passage for the 17
 preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof. This complements Art. 19 (2)(f), although is drawn in broader terms, since it is not limited to wilful and serious pollution. It also links to Art. 192, which

²⁴ See the International Convention for the Protection of Submarine Telegraph Cables 1884, CTS 163, 391.

²⁵ See for example, S. 3 of the United Kingdom Submarine Telegraph Cable Act 1885, available at: http://www.legislation.gov.uk/ukpga/1885/49/pdfs/ukpga_18850049_en.pdf.

²⁶ See Fabio Spadi, Navigation in Marine Protected Areas: National and International Law, ODIL 31 (2000), 285–302.

²⁷ *Ibid.*, 291–293.

²⁸ Nordquist/Nandan/Rosenne (note 13), 200.

sets out the general obligation of States to protect and preserve the marine environment, and is developed in more detail in Part XII of the Convention. It may be observed that Art. 21 (1)(f) refers to the environment of the coastal State, so it is not limited to mere pollution of the marine environment. This provides the basis for controls on atmospheric pollution and measures to prevent, control or deal with land and coastal pollution resulting from activities in marine spaces. The detail of pollution control regimes is extensive and is covered in a number of expert commentaries.²⁹

8. ‘marine scientific research and hydrographic surveys’

- 18 Art. 21 (1)(g), which provides for laws and regulations on marine scientific research and hydrographic surveys, complements Art. 19 (2)(j). Art. 21 is potentially broader since it permits the regulation of vessels engaged in passage which may indirectly impact on marine scientific research. Art. 21 (1)(g) must also be read in conjunction with Part XIII, and in particular, Art. 246, which provides that the coastal State has the exclusive right to regulate, authorise and conduct marine scientific research in its territorial sea. Furthermore, such research shall be conducted only with the express consent of and under conditions set forth by the coastal State.³⁰

9. ‘customs, fiscal, immigration or sanitary laws and regulations’

- 19 Art. 21 (1)(h), which provides for measures to prevent the infringement of customs, fiscal, immigration or sanitary laws and regulations, complements Art. 19 (2)(g). Indeed, Art. 19 (2)(g) is contingent upon coastal States adopting and publicising such laws and regulations.³¹

10. ‘design, construction, manning and equipment of foreign ships’ and the use of ‘generally accepted international rules or standards’

- 20 A significant limitation imposed under Art. 21 (2) is that coastal States cannot adopt laws and regulations in respect of CEDM standards for foreign ships unless this is to give effect to generally accepted international rules and standards (‘GAIRS’).³² CHURCHILL & LOWE highlight that this limitation is intended to balance coastal and flag State interests. The limitation removes the risk of coastal States seeking to apply design, construction and other standards to which vessels cannot adjust during voyage.³³ NORDQUIST *et al.* describe Art. 21 (2) as ‘categorical, and [it] serves to protect the integrity of global maritime navigation’.³⁴ The terms design, construction, manning and equipment assume their ordinary meaning and are not problematic. However, precisely which measures constitute ‘GAIRS’ is less straightforward. As HAKAPÄÄ highlights, this phrase is subject to interpretation.³⁵ Neither UNCLOS itself nor the conference discussions shed any light as to its definition. Accordingly, a number of questions are left open including: Who may develop such standards? How are such standards

²⁹ See Douglas M. Johnston, *The Environmental Law of the Sea* (1981); Henrik Ringbom (ed.), *Competing Norms in the Law of Marine Environmental Protection* (1997); Erik J. Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (1998); Robert B. Clarke, *Marine Pollution* (2001); Alan Khee-Jin Tan, *Vessel Source Marine Pollution* (2012).

³⁰ See further Huh/Nishimoto on Art. 246 MN 9 *et seq.*

³¹ See Barnes on Art. 19 MN 21.

³² A number of provisions of UNCLOS refer to ‘GAIRS’ or similar: Arts. 39 (2), 41 (3), 53 (8), 60 (3), (5) and (6), 94 (2)(a), 94 (5), 211 (2), (5) and (6)(c), 226 (1)(a), 271. The terminology varies but some degree of common analysis is possible, see: Budislav Vukas, *Generally Accepted International Rules and Standards*, in: Alfred H. A. Soons (ed.), *Implementation of the Law of the Sea Convention through International Institutions*, *Proceedings of the Law of the Sea Institute* 23 (1990), 405, 407; James Harrison, *Making the Law of the Sea* (2011), 166.

³³ Churchill/Lowe (note 2), 94.

³⁴ Nordquist/Nandan/Rosenne (note 13), 201.

³⁵ Kari Hakapää, *Innocent Passage*, MPEPIL, para. 17, available at: <http://www.mpepil.com>.

to be identified? And, if such standards are to be found in treaties, then on what basis can they be applied against non-States parties to the relevant treaty?

In general, it is States that are responsible for developing international rules and standards. 21 In the context of shipping standards this has been done through the IMO. Indeed, the original IMO study on the implications of UNCLOS for the IMO stated that for the purposes of Art. 21 (2), the IMO is

‘the only global institution with the mandate in this area and all existing rules and standards on the design, construction, equipment and manning of vessels have in fact been established in or by the IMO.’³⁶

However, this unduly disregards the potential role the International Labour Organisation has to play in developing maritime labour standards, most recently through the Maritime Labour Convention 2006.³⁷ Such standards play an important role in ensuring safety at sea by establishing appropriate working conditions on ships.

The issue of identifying the normative content of the category of ‘GAIRS’ is more 22 problematic. A number of alternatives have been advanced in this respect.³⁸ One approach is to accept the mere adoption of a rule within a treaty as forming part of GAIRS.³⁹ However, this is problematic since it might be considered to bestow a broad legislative power upon international organisations. A second approach is to focus upon the entry into force of a particular instrument.⁴⁰ Whilst more reflective of State practice, this does mean the threshold for general acceptance will vary according to each individual treaty’s conditions for entry into force. It also precludes rules and standards in instruments other than treaties, such as the original International Safety Management Code, from forming part of GAIRS.⁴¹ A third approach is to look to the level of acceptance of a treaty. This is unproblematic for an instrument such as SOLAS which is widely ratified, but it is problematic when levels of participation drop. It also precludes non-treaty instruments from the category of GAIRS. A fourth approach is to use the same test that is used to determine if State practice is sufficiently widespread to constitute a rule of custom.⁴² However, arguably this sets too high a threshold for general acceptance and would render the purpose of ‘GAIRS’ moot because any qualifying rule would be binding by virtue of custom. The International Law Association examined this matter extensively in its Committee on Coastal State Jurisdiction Relating to Marine Pollution between 1992 and 2000. The Committee’s Final Report suggests that:

‘Generally accepted international rules and standards cannot be equated with customary law nor with legal instruments in force for the states concerned. Generally accepted international rules and standards, instead, are primarily based on state practice, attaching only secondary importance to the nature and status of the instrument containing the respective rule or standard.’⁴³

³⁶ IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation, IMO Doc LEG/MISC/1 (1986), para 20; the IMO publication has been periodically updated, for the most recent version see: IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation, IMO Doc. LEG/MISC/7 (2012).

³⁷ Maritime Labour Convention, 23 February 2006, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/normativeinstrument/wcms_090250.pdf.

³⁸ Harrison (note 32), 171–179.

³⁹ *Ibid.*, 174.

⁴⁰ Mario Valenzuela, IMO: Public International Law and Regulation, in: Douglas M. Johnson/Norman G. Letalik (eds.) *The Law of the Sea and Ocean Industry: New Opportunities and Restraints* (1984), 145; see also Churchill/Lowe (note 2), 346.

⁴¹ ILA, Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000), 37, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/12>; Molenaar (note 29), 142, who limits his study to those rules in instruments intended to be binding.

⁴² See George Kasoulides, Port State Control and Jurisdiction: Evolution of the Port State Control Regime (1993), 38 *et seq.*; also W. van Reenan, Rules of Reference in the new Convention on the Law of the Sea in Particular Connection with the Pollution of the Sea, NYIL 12 (1981), 3, 11.

⁴³ ILA Report (note 41), 33.

The emphasis on State practice is correct, but this still leaves the precise threshold for determining which rules comprise 'GAIRS' uncertain. In light of this, it is suggested that the inclusion of instruments within the various regional memoranda of understanding on port State control could provide a useful proxy for determining the 'general acceptance' of States. In practice, the relevant CEDM standards are to be found in International Convention for the SOLAS 1948, the Load Lines Convention 1966 and protocol thereto, the STCW Convention, and MARPOL 73/78. It may also include the International Convention on the Control of Harmful Anti-fouling Systems on Ships 2001, to the extent it concerns equipment. Of course, such standards will continue to evolve with technology and in light of changing perceptions of how best to regulate ships.

11. 'coastal State shall give due publicity to all such laws and regulations'

- 23 According to Art. 21 (3), the coastal State must give due publicity to all applicable laws, and while no detail is given on what constitutes due publicity, the intention seems clear enough. At a minimum, relevant legislation and regulations must be publicly available. The IMO has noted that this requirement is effectively achieved if the relevant information reaches the States, authorities, entities and persons that are intended to be guided by the information. This can be facilitated by the IMO, which has held itself out to assist States in this respect.⁴⁴

12. 'Foreign ships [...] shall comply with all such laws and regulations'

- 24 All foreign ships shall comply with the laws and regulations of the coastal State, and generally accepted international regulations for the prevention of collisions at sea. The latter issue is covered by COLREGs. Thus all vessels, regardless of flag, engaged in innocent passage will be subject to a range of controls pertaining to safe speed, look outs, manoeuvring (overtaking and crossing), and navigational priorities between different types of vessel, as well as technical rules on displays, signals, sounds and communications between vessels. This provision should be read in conjunction with Art. 22 on sea lanes and traffic separation schemes.
- 25 Art. 21 (4) does not deal with the consequences of a failure to comply with coastal States laws and regulations. Accordingly, HAKAPÄÄ notes that this is left to the practice of individual States.⁴⁵ Given that the decision to exercise of enforcement jurisdiction is within the discretion of States, and that most enforcement activities will occur within port, it is difficult to ascertain any general patterns to enforcement jurisdiction within the territorial sea. Account should be taken of Art. 25, which requires that coastal States do not hamper innocent passage and Art. 27 on the enforcement of criminal jurisdiction. In the special case of pollution, Art. 220 is relevant. Enforcement of coastal States laws against warships is limited under Art. 30.

Article 22

Sea lanes and traffic separation schemes in the territorial sea

1. The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.

2. In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.

⁴⁴ Implications of UNCLOS for the IMO 2012 (note 36), 91–92.

⁴⁵ *Hakapää* (note 35), para 20.

3. In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account:

- (a) the recommendations of the competent international organization;
- (b) any channels customarily used for international navigation;
- (c) the special characteristics of particular ships and channels; and
- (d) the density of traffic.

4. The coastal State shall clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity shall be given.

Bibliography: *David H. Anderson*, Strait of Dover, MPEPIL, available at: <http://www.mpepil.com>; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *David B. Dixon*, Transnational Shipment of Nuclear Material by Sea: Do Current Safeguards Provide Coastal States A Right to Deny Innocent Passage, J. Transnat'l L. & Pol'y 16 (2006), 73-99; *Lindy S. Johnson*, Coastal State Regulation of International Shipping (2004); *Lawrence Marin*, Oceanic Transportation of Radioactive Materials: The Conflict Between the Law of the Seas' Right of Innocent Passage and Duty to the Marine Environment, Florida JIL 13 (2001), 361-378; *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel Source Pollution (1998); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Donald R. Rothwell*, Sea Lanes, MPEPIL, available at: <http://www.mpepil.com>; *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2005)

Documents: IMO, Ships' Routing (2015); IMO MSC, Report of the Maritime Safety Committee on its Eighty-First Session, IMO Doc. MSC 81/25 (2006); IMO MSC, Report of the Sub-Committee on Navigation, Communications and Search and Rescue IMO Doc. NCSR 1/28 (2014); IMO Res. A.572(14) of 20 November 1985; Union of Soviet Socialist Republics/United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, ILM 28 (1989), 1444-1447

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I. Purpose and Function

Art. 22 is one of three key articles which provide coastal States with the authority to regulate the manner in which foreign ships exercise their right of innocent passage. It empowers a coastal State, where necessary and having regard to navigational safety, to designate sea lanes and traffic separation schemes (TSS) for the purpose of regulating the innocent passage of vessels. This article should be read in conjunction with Art. 21 which provides that the coastal State may adopt laws and regulations relating to innocent passage and Art. 25 which allows the coastal State to take measures to prevent non-innocent passage. Art. 22 (2) is also linked to Art. 23, which confirms a right of innocent passage for nuclear powered ships and ships carrying nuclear and dangerous substances and materials, but subjects this to special conditions. Sea lanes and TSS are particularly important in straits where passage may be confined. TSS in international straits are addressed by more detailed rules in Art. 41.¹

Although framed in terms of safety of navigation, TSS also play an important role in preventing harm to the environment through measures which can help reduce the risk of hazardous materials entering the environment. Thus, tankers or nuclear-powered ships and

¹ See further *Jia* on Art. 41 MN 6-14.

ships carrying nuclear or dangerous substances are particularly highlighted as those which may be required to use sea lanes. However, all ships may be subject to this requirement. The use of TSS is likely to increase as competition for ocean space increases from new uses, such as energy development and conservation, limits the space available for shipping.

- 3 In designating sea lanes or prescribing TSS, the coastal State must take into consideration the recommendations of the competent international organization, namely the International Maritime Organisation (IMO), as well as usage and the navigational characteristics of ships and waterways. The existence of sea lanes and TSS must be publically available and their position clearly indicated on charts. The coastal State has responsibility to ensure this publicity. Compliance with navigational rules within a sea lane will depend on the relevant laws of the coastal State.

II. Historical Background

- 4 Use of sea lanes dates back to as early as 1855 when lanes were charted in the North Atlantic and adopted by the US hydrographic office in order to limit the risk of collisions on the high seas.² As these sea lanes operated only on the high seas, they were subject to the freedom of navigation and so there was no legal basis to compel vessels to navigate within the charted limits. The first International Convention for the Safety of Life at Sea (SOLAS) 1914 considered this matter. However, pursuant to Art. 13, it left the selection of routes across the North Atlantic to private shipping companies.³ Shipping companies were to give public notice of such routes and States would encourage other vessels to use such routes. The development of sea lanes and TSS was given impetus by significant increases in maritime traffic during the 20th century, and the increased risk of accidents particularly within coastal waters. The scope for coastal States to introduce mandatory traffic schemes was limited at the time because when the territorial sea only extended to between two and four nautical miles the significance of sea lanes and traffic schemes for global navigation was relatively small. However, this changed as coastal States acquired greater legal rights over coastal waters and demands for a wider territorial sea emerged.
- 5 The 1958 Convention of the Territorial Sea and the Contiguous Zone did not expressly address the issue of sea lanes, although it may be deemed to be implicit in its Art. 17 which permitted coastal States to enact laws and regulations relating to transport and navigation. TSS first emerged on a localised basis. Between 1956 and 1960, there were 60 collisions in the Dover Straits.⁴ In response to concerns about safety of navigation, French, German and British navigation authorities convened in 1961 to explore the options for controlling traffic in the Dover Straits. The proposed traffic separation scheme was implemented in 1967. This was the first such formal scheme. Initially this was voluntary, but it was made mandatory in 1972 following a number of serious collisions in the channel. The following year, the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) were revised, with Rule 10 making compliance with all TSS mandatory.⁵
- 6 These developments were taken into account during the negotiations of the UNCLOS. A proposal by eight States at the 1973 Sea-Bed Committee session first introduced the idea of seas lanes and TSS.⁶ This proposal discussed maritime safety and traffic and, in particular, the establishment of sea lanes and TSS. Further proposals from Malta suggested a coastal

² Donald R. Rothwell, *Sea Lanes*, MPEPIL, para. 2, available at: <http://www.mpepil.com>.

³ Available at: <http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201914.pdf>.

⁴ David H. Anderson, *Strait of Dover*, MPEPIL, para. 8, available at: <http://www.mpepil.com>.

⁵ Convention on the International Regulations for Preventing Collisions at Sea 1972, 1050 UNTS 17.

⁶ Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 3, 5–6 (Art. 6).

State should have competence in establishing draft compulsory TSS, sea lanes and draft limits for navigation in certain areas.⁷ Fiji proposed a more detailed draft article which applied only to ships having special characteristics.⁸ Notably this also contained more controversial requirements for prior notification. Subsequent proposals advanced either general provisions for traffic schemes⁹ or discreet rules for traffic schemes and for potentially hazardous vessels and cargoes.¹⁰ The basic elements of what is now Art. 22 were formed at this stage and incorporated into the Informal Single Negotiating Text.¹¹ A range of drafting changes were introduced during later sessions without significantly altering the text.

III. Elements

1. 'require foreign ships [...] to use such sea lanes and traffic separation schemes'

A coastal State is under no duty to establish sea lanes or TSS. It is a discretionary right.⁷ The right of innocent passage continues whether or not a coastal States has designated a sea lanes or traffic separation scheme.¹² There is some debate as to whether coastal States can introduce traffic schemes for reasons other than safety.¹³ NORDQUIST *et al.* note that States may not invoke interests other than safety of navigation to instigate TSS.¹⁴ This is supported by the reference to safety in Art. 22 (1) and the list of navigational factors in Art. 22 (3). However, this position has been overtaken by developments in marine environmental protection. JOHNSON suggests that the text of Art. 22 supports the designation of sea lanes for reasons of environmental protection.¹⁵ First it must be read in the context of Art. 21, which permits a broader range of regulatory controls over vessels in innocent passage.¹⁶ Secondly, Art. 22 (2) clearly recognizes the importance of these routing measures for the protection of the environment because it specifically addresses vessels that pose a threat to the marine environment.¹⁷ Furthermore, Art. 211 (1) should be noted, which specifically refers to the adoption of routing systems for environmental reasons. Thus, a contextual reading of Art. 22 suggests that coastal States are empowered to adopt routing measures for environmental protection, and, as MOLENAAR surveys, the practice of States and the IMO confirm this.¹⁸ As long as innocent passage is not hampered, and that safeguards are in place through the use of the IMO procedures, there can be little reason to object to this approach.

⁷ Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 35, 48 (Art. 32 (a)).

⁸ Sea-Bed Committee, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 and Corr. 1 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 91, 94–95 (Art. 5).

⁹ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 184 (Art. 18); Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.26 (1974), OR III, 203, 204 (Art. 21).

¹⁰ Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation Through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192, 193 (Arts. 7 and 8 (3) and (4)); Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 197 (Arts. 5 and 6).

¹¹ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 155 (Art. 19).

¹² See Union of Soviet Socialist Republics/United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, ILM 28 (1989), 1444, para. 5.

¹³ Erik J. Molenaar, Coastal State Jurisdiction over Vessel Source Pollution (1998), 203.

¹⁴ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 211–212.

¹⁵ Lindy S. Johnson, Coastal State Regulation of International Shipping (2004), 70.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, 71.

¹⁸ Molenaar (note 13), 226 *et seq.*

- 8 Although Art. 22 only refers to sea lanes and TSS, it has since developed to include other measures, such as routing requirements, traffic flow schemes, two-way tracks, deep water routes, precautionary areas and areas to be avoided, since these are generally accepted as legitimate routing measures by the IMO.¹⁹ In the future, it seems likely that physically demarcated traffic schemes will increasingly be supplemented by E-navigation systems.²⁰
- 9 One final issue highlighted by ROTHWELL is that Art. 22 confers specific rights upon the coastal State with respect to foreign ships exercising the right of innocent passage, but it does not address navigational issues which may arise from the actions of vessels flying the flag of the coastal State.²¹ Clearly, traffic schemes would be ineffective if they excluded such ships. However, coastal States remain competent to regulate flag ships, and, in practice, they ensure that all shipping is required to comply with any navigational rules in the territorial sea. This is in line with Art. 24 (1)(b) which requires that the laws and regulations of the coastal State should not discriminate against foreign ships.

2. 'ships carrying nuclear or other inherently dangerous or noxious substances or materials'

- 10 Art. 22 (2) strengthens the authority of coastal States to require certain types of vessel to confine their passage to sea lanes. This recognizes the risks to the coastal State inherent in the passage of specific types of ship or ships with hazardous cargoes. The use of the term 'in particular' means that a mandatory requirement to use sea lanes or TSS is not confined to those ships with special characteristics. Although Art. 22 seeks to balance navigation with security, it may be questioned whether confining vessels to sea lanes provides adequate security to coastal States, especially if hazardous cargoes are shipped in secrecy. In this vein, VAN DYKE points out the violations of international environmental law arising from the voyage of the AKATSUKI MARU, a vessel carrying large quantities of reprocessed nuclear waste, in 1992.²² MARIN suggests that the protective measures in Art. 22 may fail if inadequate safety precautions are taken on the part of those shipping the radioactive materials.²³ Further problems may arise from errors or forgery of a shipment's documentation, meaning that proper consideration cannot be given to safety considerations.²⁴ However, such vessels may be subject to more stringent requirements for passage under Art. 23, and general international law.²⁵ The passage of such ships raises the question of prior notification, since it is arguable that a coastal State will be unable to exercise its rights unless it is aware that such vessels are to navigate the territorial sea.²⁶

3. 'designation of sea lanes and prescription of traffic separation schemes'

- 11 The coastal State does not enjoy an unqualified right to introduce sea lanes or TSS. Art. 22 (3) requires it to take into account a range of factors: the recommendations of the competent international organization; any channels customarily used for navigation; special character-

¹⁹ IMO Res. A.572(14) of 20 November 1985.

²⁰ See IMO MSC, Report of the Maritime Safety Committee on its Eighty-First Session, IMO Doc. MSC 81/25 (2006), paras. 23.34–34.37. The Maritime Safety Committee Sub-committee on Navigation, Communications and Search and Rescue is currently working on the development of an e-navigation strategy implementation plan. See IMO MSC, Report of the Sub-Committee on Navigation, Communications and Search and Rescue IMO Doc. NCSR 1/28 (2014), s. 9.

²¹ Rothwell (note 2), para 17.

²² Jon M. Van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, ODIL 24 (1993), 399, 400–407.

²³ Lawrence Marin, *Oceanic Transportation of Radioactive Materials: The Conflict Between the Law of the Seas' Right of Innocent Passage and Duty to the Marine Environment*, Florida JIL 13 (2001), 361–378.

²⁴ David B. Dixon, *Transnational Shipment of Nuclear Material by Sea: Do Current Safeguards Provide Coastal States A Right to Deny Innocent Passage*, J. Transnat'l L. & Pol'y 16 (2006), 73, 80.

²⁵ See generally Barnes on Art. 23.

²⁶ *Ibid.*, MN 5–8.

istics of particular ships; and density of traffic. These are only factors that are to be taken into account and so are not determinative of whether any specific traffic scheme is permitted.

The relevant international organisation is the IMO. In accordance with Ch. V, Regulation 12 10 (2) of SOLAS 1974 the IMO is recognized as the only international body for developing guidelines, criteria and regulations on an international level for ships' routing systems.²⁷ It is widely recognized as enjoying an exclusive role in establishing and adopting measures at an international level concerning routing.²⁸ Although the IMO measures should be considered, this does not mean the same as approval. The final decision to implement a traffic scheme remains with individual coastal States.

Apart from UNCLOS, the most significant conventions relevant to traffic schemes are 13 SOLAS and the COLREGs. Ch. V of SOLAS contains extensive rules on safety of navigation, including the use of routing systems (Regulation 10), ship reporting systems (Regulation 11) and vessel traffic services (Regulation 12). Rule 10 of the COLREGs deals with vessels navigating in or near a TSS. *Inter alia*, ships are required to proceed in the direction of traffic flow, keep clear of separation lines or zones, join traffic lanes at appropriate points or directions, and refrain from crossing traffic lanes.

4. 'coastal State shall clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity shall be given'

The effectiveness of traffic schemes is contingent on vessels and maritime authorities being 14 aware of the location and requirements of the scheme. Accordingly, coastal States are to clearly mark sea lanes and TSS on charts and to give due publicity to these. In practice, the IMO takes a leading role in coordinating and disseminating knowledge of traffic schemes. It publishes periodically a compilation of routing measures adopted by the IMO worldwide.²⁹ This contains descriptions, reference maps and coordinates for different traffic schemes. Such schemes include TSS, deep water routes, areas to be avoided, prohibited anchoring areas, other routing measures (such as traffic flows schemes), archipelagic sea lanes and mandatory ship reporting schemes.

Article 23

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.

Bibliography: Kari Hakapää/Erik Jaap Molenaar, *Innocent Passage: Past and Present*, Marine Policy 23 (1999), 131–145; Robert Nadelson, *After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea*, IJMC 15 (2000), 193–244; Marco Roscini, *The Navigation Rights of Nuclear Ships*, LJIL 15 (2002), 251–265; Jon M. Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, ODIL 33 (2002), 77–108

Documents: IAEA, General Conference Resolution on Code of Practice on the International Transboundary Movement of Radioactive Waste, 21 September 1990, ILM 30 (1991), 556–564; ILC, Report of the International Law Commission: Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 53th Sess. Suppl. 10, 370–377; IMO, *Implications of the United Nations Convention on*

²⁷ International Convention for the Safety of Life at Sea 1974, as amended. The original version available in 1184 UTS 277. Originally Chapter V, Regulation 8(b), this was amended in 2002 and now is Regulation 10 (2).

²⁸ Nordquist/Nandan/Rosenne (note 14), 212.

²⁹ IMO, *Ships' Routeing* (2015).

the Law of the Sea for the IMO, IMO Doc. LEG/MISC.7 (2012); Union of Soviet Socialist Republics/United States of America: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, ILM 28 (1989), 1444–1447

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I. Purpose and Function

- 1 The carriage of nuclear and other hazardous substances present particular risks to marine and coastal environments. A range of international agreements have been concluded to address such risks. The purpose of Art. 23 is not to limit passage *per se*, but to ensure that hazardous activities are properly controlled in line with such standards as may be adopted by the international community. Art. 23 confirms the right of innocent passage of nuclear powered ships and ships carrying nuclear material or other dangerous substances. It subjects passage to the requirement that such vessels are properly documented and observe special precautionary measures as are established under international agreements. Art. 23 should be read in conjunction with Art. 22 (2) which permits coastal States to limit the passage of such vessels to designated sea lanes. The reference to international agreements indicates that coastal States cannot unilaterally regulate such vessels beyond any such general controls permitted under Arts. 21, 25 and 211 (4).

II. Historical Background

- 2 The regulation of nuclear vessels within the territorial sea was not addressed in the 1958 Convention on the Territorial Sea and Contiguous Zone. As such, Art. 23 was the product of negotiations at UNCLOS III. A proposal by Fiji at the 1973 session of the Sea-Bed Committee and two subsequent proposals at the Second Session of UNCLOS III in 1974 advocated that ships with specific characteristics, including nuclear-powered ships or ships carrying nuclear materials should be required to give prior notification of their passage to the coastal State.¹ This was not accepted for inclusion within the Convention but reflected a concern of many States about the risk of transit of hazardous materials. The requirement for vessels to observe precautionary measures originated in a proposal by Bulgaria, the German Democratic Republic, Poland and the USSR.² Despite not being based in any existing conventional provision, this proposal was carried into the final text, subject only to drafting modifications.

¹ Sea-Bed Committee, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 and Corr. 1 (1973) reproduced in: GAOR 28th Sess., Suppl. 21 (A/9021-III), 91, 95 (Art. 6 (2)), was replaced by Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 197 (Art. 6 (2)); Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation through the Territorial Sea, Including Straits Used For International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192, 193 (Art. 8 (1) and (2)).

² Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.26 (1974), OR III, 203 (Art. 17 (1)).

III. Elements

1. 'nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances'

Art. 23 does not define every type of vessel subject to special measures, or the range of hazardous goods that engage special measures for carrying vessels. Hence its application may be wide. Nuclear powered vessels are normally military vessels or used by States as ice-breakers. Private commercial vessels are normally engaged in the carriage of nuclear and other hazardous material. The range of such dangerous or noxious material is defined and regulated in other agreements, as noted further below.

2. Compliance

It is the flag State's duty to ensure that any such vessel flying its flag complies with the requirements of Art. 23. This is in conformity with Art. 94 concerning the duties of flag States.³

3. Prior Consent or Notification

Art. 23 explicitly acknowledges the right of innocent passage of nuclear vessels through the territorial sea. It does not include a positive provision permitting countries to require prior notification or consent. However, this issue is a serious point of contention within the international community, with a number of States having adopted domestic laws requiring this and a number of other States protesting such measures.⁴

The joint declaration by the US and the Soviet Union on 23 September 1989 supports the view that there is no requirement of prior notification or authorization for passage through the territorial sea.⁵ However, a number of States require vessels carrying dangerous or polluting substances to provide prior notification.⁶ Surveys of State practice indicate divergent views on the requirements for the passage of such vessels.⁷ As such, it is not possible to conclude that any consistent interpretation of Art. 23 exists or that a general rule of customary international law has emerged. Whilst a prohibition of authorization for passage is contrary to plain meaning of Art. 23 and Art. 24 (1),⁸ since this could impede or hamper innocent passage, it is arguable that a requirement for notification may be compatible with Art. 23, for the reasons indicated below. Admittedly, proposals to include prior notification were rejected during the negotiation of UNCLOS.⁹ However, the case for such a requirement generally proceeds on the basis of developments since its adoption.¹⁰

There are a number of related international instruments which include an obligation of prior notification. This could constitute an *inter se* limitation of the right in Art. 23. Thus Art. 6 (1) of both the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa¹¹ and the 1989 Basel Convention on the Control of Transboundary Movements of

³ See *Guilfoyle* on Art. 94 MN 5-6.

⁴ *Marco Roscini*, The Navigation Rights of Nuclear Ships, LJIL 15 (2002), 251.

⁵ Union of Soviet Socialist Republics/United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, ILM 28 (1989), 1444 *et seq.*

⁶ *Kari Hakapää/Erik Jaap Molenaar*, Innocent Passage: Past and Present, Marine Policy 23 (1999), 131, 142.

⁷ *Ibid.*; Also, *Roscini* (note 4), 251.

⁸ See *Barnes* on Art. 24 MN 6-9.

⁹ See *Hakapää/Molenaar* (note 11), 144; *Roscini* (note 4), 253.

¹⁰ *Jon M. Van Dyke*, The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials, ODIL 33 (2002), 77, 85-87; *Roscini* (note 4), 251.

¹¹ 2101 UNTS, 177.

Hazardous Waste and its Disposal require the exporting State to give transit States notice of any proposed movement of hazardous wastes.¹² The transit State may refuse permission, subject transit to conditions or request information.¹³ A similar approach is taken in Art. 6 (4) of the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (the Izmir Protocol) 1996,¹⁴ which requires prior notification for movements through the territorial sea. Following such notification, the transit State must inform the exporting state of any obligations relating to passage through its territorial sea.

- 8 A duty of prior notification is promoted in other instruments, including the International Atomic Energy Agency Code of Practice on the International Transboundary Movement of Radioactive Waste 1990,¹⁵ Principle 19 of the Rio Declaration, and the International Law Commission Draft Articles on the Prevention of Harm from Hazardous Activities.¹⁶ It may be argued that Art. 23 has been surpassed by a general duty to notify States of activities posing a risk of transboundary harm. However, it remains debatable the extent to which these developments may constitute further conditions on the general right of passage.¹⁷ First, the convention measures are limited to specific types of carriage, rather than having general application. Second, the fact that such agreement has to provide for notification implies not such general right to require this exists. Notably, both the United States and Germany sought to arrange bilateral agreements in respect of visits by nuclear powered vessels, the *NS SAVANNAH* and the *OTTO HAHN*, during the 1960s and 1970s. Although States demand and accede to requests for notification on an *ad hoc* basis, it is not clear that this is attended to other than on the basis of comity.

4. 'precautionary measures established [...] by international agreements'

- 9 Art. 23 states that relevant vessels must 'observe special precautionary measures established for such ships by international agreements'. These international agreements are not specified within the Convention. Rather, the provision was intended to facilitate the development of suitable technical controls as appropriate. A study by the International Maritime Organization (IMO) has listed a number of instruments falling within the reference of Art. 23.¹⁸ This includes International Convention for the Safety of Life at Sea 1974 (SOLAS 1974),¹⁹ and, in particular, Ch. VIII in respect of nuclear ships and Ch. VII in respect of dangerous goods. Regulation VIII/10 of SOLAS 1974 states that a certificate shall be issued to a nuclear ship which complies with the requirements of the Convention.
- 10 Ships carrying dangerous cargo are subject to Ch. VII of SOLAS 1974, which regulates safety measures, including safe packaging and stowage, applicable to the carriage of dangerous goods by sea. This chapter is supplemented by several IMO codes, which have since been made mandatory: the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code); the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code); the

¹² 1673 UNTS, 57.

¹³ See Art. 6 (4) of each convention.

¹⁴ Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, 1 October 1996, available at: <http://www.unep.ch/regionalseas/main/med/medhaz.html>.

¹⁵ IAEA, General Conference Resolution on Code of Practice on the International Transboundary Movement of Radioactive Waste, 21 September 1990, ILM 30 (1991), 556, 560.

¹⁶ ILC, Report of the International Law Commission: Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 53th Sess. Suppl. 10, 370–377.

¹⁷ *Robert Nadelson*, After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea, *IJMCL* 15 (2000), 193, 230.

¹⁸ IMO, Implications of the United Nations Convention on the Law of the Sea for the IMO, IMO Doc. LEG/MISC.7 (2012), 33.

¹⁹ As amended.

International Maritime Dangerous Goods Code (IMDG Code); the Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code); and the International Maritime Solid Bulk Cargoes Code (IMSBC Code).²⁰

5. Breach of Art. 23

A vessel which fails to comply with Art. 23 cannot be considered to enjoy the right of innocent passage. This occurs when it fails to carry necessary documents or to meet the requirements set forth in relevant international agreements. Steps may be taken in accordance with Art. 25 in respect of civilian vessels. This is reinforced by reference to Art. 220 (2),²¹ which permits coastal States to inspect vessels and subject them to domestic legal proceedings in the event of a violation of domestic laws and regulations or applicable international rules and standards. Enforcement action against warships and other government vessels is subject to the limitations noted in Arts. 30 and 32.²²

Article 24 Duties of the coastal State

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

- (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
- (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

2. The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.

Bibliography: *Derek W. Bowett, The Law of the Sea* (1967); *Kari Hakapää/Erik J. Molenaar, Innocent Passage: Past and Present, Marine Policy* 23 (1999), 131–145; *Natalie Klein, Maritime Security and the Law of the Sea* (2011); *Myres S. McDougal/William T. Burke, The Public Order of the Oceans* (1962); *Erik J. Molenaar, Coastal State Jurisdiction Over Vessel Source Pollution* (1998); *Francis Ngantcha, The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Donald R. Rothwell, Coastal State Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso, Marine Policy* 16 (1992), 427–437; *Brian Smith, Innocent Passage as a Rule of Decision: Navigation v Environmental Protection*, *Colum. J. Transnat'l L.* 21 (1982), 49–102; *Seline Trevisanut, The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, *MPYUNL* 12 (2008), 205–246; *Haijiang Yang, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2005)

Documents: Denmark Ministry of Foreign Affairs, Press Release No 88/1992 (1992), reprinted in: *ILR* 105 (1997), 249–250; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; IMO, Study by the Secretariat of the IMO, Doc. LEG/MISC.7 (2012)

Cases: ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4; ICJ, *Passage through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports (1991), 12; PCA, *Case concerning Land Reclamation by Singapore in and Around the Straits of Johor* (Malaysia v. Singapore), Decision of 1 September 2005, Settlement Agreement, RIAA vol. XXVII, 141

²⁰ All available at: <http://www.imo.org/>.

²¹ See *Hamamoto* on Art. 220 MN 5–8.

²² See: *Barnes* on Art. 30 MN 7–8; *Barnes* on Art. 32 MN 8–10.

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I. Purpose and Function

- 1 Art. 24 is expressed in negative terms and establishes the duty of a coastal State not to hamper the innocent passage of foreign ships. This requirement applies to both prescriptive and enforcement measures taken by the coastal State and it needs to be read in conjunction with other provisions of the Convention, in particular Art. 21, which permits the coastal State to regulate the conduct of vessels engaged in innocent passage. Thus a balance is struck between the coastal State’s legislative competency and the maintenance of the right of innocent passage by preventing excessive regulatory claims by coastal States.
- 2 More specifically, the coastal State cannot impose requirements on foreign ships, which have the effect of denying or impairing passage. Neither can coastal States discriminate against foreign ships in their regulation of innocent passage. Lastly, the coastal State must provide appropriate publicity to any danger to navigation, of which it has knowledge within its territorial sea. Cumulatively, this provision indicates that coastal States are under a duty to ensure that factors within their knowledge and control do not negate the right of innocent passage.

II. Historical Background

- 3 Art. 24 is an expanded version of Art. 15 of the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) which, the International Law Commission noted, was based upon the ICJ’s decision in the *Corfu Channel Case*.¹ Here the ICJ held that a minefield could not have been laid without the knowledge of the Albanian government. Accordingly, Albania as the coastal State was under a duty to notify shipping in general of the minefield’s existence.² The Court did not base its decision on practice or doctrinal opinion. Indeed, it was open to the Court to refer to the Final Act of the Hague Codification Conference 1930, which provided that a ‘coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea’.³ Instead, this duty to notify was attributed to three things:

‘[E]lementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’⁴

This approach is indicative of fundamental nature of the duty, as rooted in general principles of international law.

¹ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 19 (Art. 16).

² ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4.

³ League of Nations, Draft Convention on the Territorial Sea, LN Doc. C.351.M.145.1930.V.14, 165.

⁴ *Corfu Channel Case* (note 2), 22.

Art. 15 CTSCZ provides that:

- '1. The coastal State must not hamper innocent passage through the territorial sea.
2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within the territorial sea.'

Earlier drafts provided that coastal States shall ensure respect for innocent passage and are under a duty not allow the sea to be used for acts contrary to the rights of other States.⁵ However, this was omitted because it would go beyond existing international law and place too great a burden on coastal States. It might also be construed as incurring an absolute liability for failing to ensure passage.⁶

The core requirements of Art. 15 CTSCZ not to hamper navigation and to give publicity to dangers to navigation remained largely unchanged during the negotiations at UNCLOS III. However, more detailed constraints on the way in which the former was to be exercised were developed in two respects: the introduction of a requirement of non-discrimination and the prohibition of 'practical limits' on passage. Records of the conference proceedings show that from the outset, States were keen to ensure that coastal States were under an explicit duty not to discriminate between ships flying the flags of particular States.⁷ Then, at the second session of UNCLOS, the United Kingdom introduced a proposal that would prohibit the coastal State from imposing requirements on passage that would have the practical effect of denying or prejudicing passage.⁸ This established a clear link between the duties of the coastal State and its regulatory powers under what would become Art. 21. These two conditions were generally accepted and included within Part II of the Informal Single Negotiation Text.⁹ At the fourth session, a proposal by Australia to insert the phrase 'except in accordance with the provisions of the present Convention' was designed to help reconcile the draft article with draft Art. 18 which expressly allowed for the coastal State to adopt laws that would place limits on navigation.¹⁰ Art. 23 of Part II of the Revised Single Negotiation Text incorporated these changes and was not subject to any significant changes prior to the adoption of the final text.

III. Elements

1. 'shall not hamper the innocent passage'

Whilst the meaning of the term 'deny' is straightforward, the terms 'impair' and 'hamper' are less so. McDUGAL/BURKE indicate that they refer to situations where impositions on passage are so stringent that passage becomes impossible or too burdensome to be practical.¹¹ SMITH offers a more nuanced approach that requires 'hamper' to be construed proportionately or reasonably, or, in other words, in a way which best accommodates the competing

⁵ UNCLOS I, Annexes Text of Articles 1 to 25 and 66 Adopted by the International Law Commission at Its Eight Session, UN Doc. A/CONF.13/39 (1958), OR III, 209, 210 (Art. 15 (2)).

⁶ UNCLOS I, United States of America: Proposal, UN Doc. A/CONF.13/C.1/L.38 (1958), OR III, 220 (Art. 16).

⁷ Sea-Bed Committee, Cyprus *et al.*: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.18 (1973), GAOR 26th Sess. Suppl. 21 (A/9021-III), 3; Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under Their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 26th Sess. Suppl. 21 (A/9021-III), 35, 44 (Art. 21), 45-6 (Art. 26); Sea-Bed Committee, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 (1973), reproduced in: GAOR 28th Sess., Suppl. 21 (A/9021-III), 91, 92-93 (Art. 3).

⁸ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 184 (Art. 18(2)(b)).

⁹ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 156 (Art. 21).

¹⁰ Cf. Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 225.

¹¹ Myres S. McDougal/William T. Burke, *The Public Order of the Oceans* (1962), 255.

interests of the coastal State and community.¹² This is surely correct since Art. 24 seeks to balance coastal State legislative competence with the right of innocent passage. Without Art. 24, there is a risk that passage could be impaired or denied through the issue of apparently legitimate local laws. As such Art. 24 represents a concrete application of the doctrine of abuse of rights. As BOWETT observes, ‘where the coastal State manifests its sovereignty in a manner which goes beyond the necessities of protecting its real interests, and interferes with the legitimate interests of other States, this is an abuse of rights.’¹³ The application of this balance is considered by ROTHWELL in his analysis of the *Lusitania Expresso Incident* where the Indonesian government declared its territorial waters closed to a vessel that was on a voyage from Portugal to highlight human rights abuses in East Timor.¹⁴ Indonesia sought to base its position on the vessel’s infringement of immigration laws, which provided that entry to East Timor for aliens was restricted to persons carrying permits. ROTHWELL highlights that while Indonesia was justified in implementing laws and regulations in relation to immigration under Art. 21, Art. 24 suggests that irrespective of the significant interest of coastal State in immigration matters, the implementation of such immigration laws must not have the effect of denying innocent passage.¹⁵ Therefore vessels engaged in continuous and expeditious passage through the territorial sea of the coastal State without any intention of stopping at a port would not pose a threat to coastal State immigration laws and should therefore be permitted to proceed unhampered.¹⁶ Conversely, vessels intending to proceed to port may be subject to controlling measures prior to arriving at port. These same issues are at stake in recent efforts to interdict vessels suspected of smuggling people of carrying irregular migrants.¹⁷ This is indicative of a need to weigh up the various interests in each case in light of all the relevant circumstances, a task which can be facilitated, according to MOLENAAR, using the concept of reasonableness.¹⁸

2. ‘the coastal State shall not [...] impose requirements [...] which have the practical effect of denying or impairing the right of innocent passage’

- 7 Art. 24 (1)(a) prohibits States from imposing requirements on foreign ships which have the practical effect of denying or impairing passage. Apart from prescriptive measures, this can result through the construction of devices, installations or bridges within the territorial sea. This tends to arise in straits or areas of limited navigation. Thus Finland objected to Denmark’s proposed bridge over the Great Belt,¹⁹ and the development only proceeded after Denmark made a payment of 94 million Kroner and the bridge was designed with a clearance of 65 meters.²⁰ Similarly, Singapore and Malaysia reached an agreement to ensure Malaysian navigation rights were not adversely affected by Singapore’s land reclamation activities.²¹
- 8 A particular concern in this context is the issue of whether or not coastal States can impose the requirement of prior consent or prior notification on foreign vessels intending to navigate

¹² Brian Smith, *Innocent Passage as a Rule of Decision: Navigation v Environmental Protection*, Colum. J. Transnat’l L. 21 (1982), 49, 91–97.

¹³ Derek W. Bowett, *The Law of the Sea* (1967), 44.

¹⁴ Donald R. Rothwell, *Coastal State Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso*, Marine Policy 16 (1992), 427 *et seq.*

¹⁵ *Ibid.*, 434.

¹⁶ *Ibid.*

¹⁷ Seline Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, MPYUNL 12 (2008) 205, 224.

¹⁸ Erik J. Molenaar, *Coastal State Jurisdiction Over Vessel Source Pollution* (1998), 202.

¹⁹ ICJ, *Passage Through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports (1991), 12: Memorial of the Government of Finland, para. 412, available at: <http://www.icj-cij.org/docket/files/86/6885.pdf>.

²⁰ Denmark Ministry of Foreign Affairs, Press Release No 88/1992 (1992), reprinted in: ILR 105 (1997), 249–250.

²¹ PCA, *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (Malaysia v. Singapore), Decision of 1 September 2005, Settlement Agreement, RIAA vol. XXVII, 141–145.

through the territorial sea.²² As HAKAPÄÄ/MOLENAAR highlight, notwithstanding the lack of an express provision having this effect, a requirement of coastal State consent would imply the possibility of denial of passage.²³ This would, however, be in conflict with the provision in Art. 24 (1) forbidding coastal States from imposing requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage.

3. ‘the coastal State shall not [...] discriminate in form or in fact’

The duty not to discriminate covers both overt (legal) discrimination, and covert (factual) discrimination.²⁴ Thus, for example, it covers discrimination on the basis of the flag flown by the ship and discrimination on the basis of where a vessel has traded or intends to trade. The purpose of Art. 24 (1)(b) is to secure the right of innocent passage. As long as all vessels enjoy this right, there is nothing to stop coastal States granting some ships special navigational privileges within territorial waters.²⁵ Although the language used in Art. 24 (1) suggests that the duty of non-discrimination only applies to foreign flagged vessels (‘foreign ships’), there seems to be no reason why coastal States own flag ships should not benefit from the protection of Art. 24, especially if such vessels appear to be discriminated against on the basis that they are trading with particular third States. This is reinforced by the later reference in Art. 24 (1)(b) to ‘any State’ when describing the targets of discrimination. Art. 24 does not preclude coastal States taking action against individual vessels under Art. 25. Finally, nothing in Art. 24 prevents a coastal State from taking action that is required to implement sanctions or embargoes against individual ships or flag States under Security Council Resolutions.²⁶ This flows from the legal priority afforded to obligations arising under the Art. 103 of the United Nations Charter.

4. ‘[t]he coastal State shall give appropriate publicity to any danger to navigation’

The coastal State’s duty to give appropriate publicity to any danger to navigation, of which it has knowledge, follows from the *Corfu Channel Case*.²⁷ Accordingly, knowledge will be imputed to the coastal State where the facts support this. The duty does not require that positive steps be taken to gather knowledge and report on dangers, or to dredge channels or implement other safety measures, unless this is necessary to deal with navigational hazards caused by the coastal State.²⁸ As noted above, such a positive duty to take steps to ensure passage was rejected.²⁹

The Virginia Commentaries highlight that what is ‘appropriate’ will depend on all circumstances.³⁰ They also note that there is a difference between ‘appropriate’ publicity under Art. 19 and ‘due publicity’ under Arts. 16, 75, 84 and 134, although they do not indicate the nature of the distinction.³¹ YANG also notes this difference, and suggests that ‘appropriate’ may entail a lower degree of responsibility.³² This seems correct since the other articles on publicity relate to regulatory factors within the control of the States,³³ whereas

²² See *Barnes* on Art. 23 MN 5–8 and on Art. 30 MN 9.

²³ *Kari Hakapää/Erik J. Molenaar*, *Innocent Passage: Past and Present*, *Marine Policy* 23 (1999), 131, 138.

²⁴ *Haijiang Yang*, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2005), 182.

²⁵ Cf. for example EC Regulation No 3577/92/EEC of 7 December 1992, OJ 1992 L 364, 7.

²⁶ *Natalie Klein*, *Maritime Security and the Law of the Sea* (2011), 276–285.

²⁷ *Corfu Channel Case* (note 2), 22.

²⁸ *Francis Ngantcha*, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 171–172.

²⁹ See *supra*, MN 4.

³⁰ *Nordquist/Nandan/Rosenne* (note 10), 227.

³¹ *Ibid.*

³² *Yang* (note 24), 183.

³³ For reference to ‘due publicity’, see *Barnes* on Art. 21 MN 23.

Art. 24 dangers can include exogenous factors. The means of publicising danger are not detailed in Art. 24. In practice this is done through 'Notices to Mariners' or similar publications. International publicity can also be facilitated through the International Maritime Organisation (IMO). As its Secretariat has pointed out:

'it appears clear that the required publicity objective will be effectively achieved only if the information in question reaches the States, authorities, entities and persons that are intended to be guided by the information. IMO maintains the most direct and continuing contact with the authorities of States concerned with safety of navigation and the prevention, reduction and control of pollution of the marine environment from vessels. Accordingly, the purpose of the publicity is likely to be served by some IMO involvement.'³⁴

Article 25

Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

Bibliography: Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999); Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009); Alan V. Lowe, *The Right of Entry into Maritime Ports in International Law*, San Diego LRev 17 (1977), 597–622; Erik J. Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (1998); Erik J. Molenaar/Harm M. Dottinga, *Case Study of the Netherlands*, in: Erik Franckx (ed.), *Vessel Source Pollution and Coastal State Jurisdiction* (2001), 303–321; Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990); Myron H. Nordquist, *International Law Governing Places of Refuge for Tankers Threatening Pollution of Coastal Environment*, in: Tafsir Malik Ndiaye/Rüdiger Wolfrum (eds.), *Law of the Sea: Environmental Law and Settlement of Disputes* (2007), 497–517; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); Daniel P. O'Connell, *The International Law of the Sea*, vol. II (1982); Donald R. Rothwell, *Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice*, in: Donald R. Rothwell/Sam Bateman (eds.), *Navigational Rights and Freedoms in the New Law of the Sea* (2000), 74–93; Ivan A. Shearer, *Problems of Law Enforcement and Jurisdiction Against Delinquent Vessels*, ICLQ 35 (1986) 320–343; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2005)

Documents: ILA, *Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution* (2000); ILC, *Report of the International Law Commission: Articles Concerning the Law of the Sea*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12; IMO, *Guidelines on Places of Refuge for Ships in Need of Assistance*, IMO Res. A.949(23) of 5 December 2003; League of Nations, *Draft Articles on the Legal Status of the Territorial Sea*, Report of the Second Committee, LN Doc. C.230.M117.1930.V.7 (1930)

Cases: ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports (1986), 14; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; Raad van State (Judicial Division of the Council of State of the Netherlands), *Long Lin*, 10 April 1995, Netherlands Juristen Blaad (1995), 199–200; Hoge Raad der Nederlanden (Supreme Court of the Netherlands), *Attican Unity*, 7 February 1986, Schip en Schade No. 61 (1986)

³⁴ IMO, Study by the Secretariat of the IMO, Doc. LEG/MISC.7 (2012), 91.

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I. Purpose and Function

The territorial sea forms part of the territory of the State, wherein it enjoys general enforcement jurisdiction. This is limited in so far as foreign vessels are engaged in innocent passage. Accordingly, Art. 25 establishes the circumstances in which the coastal States can take action to limit the right of innocent passage in order to protect its interests. First, there is a general right to take necessary steps to prevent non-innocent passage. Secondly, the coastal State may take action to prevent any breach of the conditions set by the coastal State for ships proceeding to internal waters or to a call at a port facility outside internal waters. Thirdly, it may suspend passage in specified areas for its security. This must be done without discrimination in form or in fact among foreign ships, and any such suspension will only take effect after being published.

II Historical Background

States have long exercised some degree of enforcement jurisdiction in coastal waters. However, the specific application of this in the context of innocent passage is linked to the emergence of that concept and its development during the 20th century. Although the possibility for a coastal State limiting or suspending innocent passage was not proposed at the Hague Codification Conference, Art. 5 of the Hague Codification Draft 1930 provided that:

'The right of passage does not prevent the coastal State from taking all necessary steps to protect itself in the territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State.'¹

This influenced the work of the International Law Commission in codifying the law of the sea between 1949 and 1956. Draft Art. 17 (1) (later Art. 16 (1) of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ)) provided that:

'The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law.'²

Notably, the reference to public policy in the 1930 Draft was dropped because this was considered to be imprecise, and potentially open to abuse.³ Subsequent sections addressed conditions for entry into internal waters, temporary suspension of passage in specified areas on non-discriminatory basis and non-suspension of passage in straits used for international navigation.⁴

¹ League of Nations, Draft Articles on the Legal Status of the Territorial Sea, Report of the Second Committee, LN Doc. C.230.M117.1930.V.7 (1930).

² ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 6.

³ *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990), 164.

⁴ ILC Law of the Sea Articles (note 2), 6-7.

- 4 Art. 25 was based directly upon Art. 16 CTSCZ with some important changes to the wording of the text. First, the requirement of non-discrimination was strengthened with the addition of the words ‘in form or in fact among foreign ships’.⁵ Second, the provision on straits was removed and became subject to more detailed provisions in Part III of the Convention.⁶

III Elements

1. ‘take necessary steps [...] to prevent passage which is not innocent’

- 5 It is generally accepted that merchant vessels engaged in non-innocent passage fall under the plenary jurisdiction of the coastal State.⁷ This means that the coastal State may have recourse to the full range of enforcement jurisdiction in order to deal with vessels engaged in non-innocent passage. Thus Art. 25 must be understood in light of Arts. 18 and 19 which define the legitimate scope of innocent passage.⁸ Protective measures extend to both vessels engaged in non-innocent activities and vessels which are not in passage, e. g. hovering. In this regard, CHURCHILL & LOWE point out that there is no express provision setting out the right to exclude vessels not engaged in passage but that this right does exist under customary international law.⁹ Art. 25 only appears to deal with non-innocent passage. However, it may be relevant to enforcement measures against vessels in innocent passage, which for example threaten the marine environment.¹⁰ SHEARER notes the existence of general enforcement jurisdiction and suggests that coastal States may choose to prosecute vessels for offences or to expel them from the territorial sea.¹¹
- 6 The way in which protective enforcement jurisdiction is exercised is at the discretion of coastal State, although it is subject to the requirement that only ‘necessary steps’ are taken. The Convention gives no indication of the meaning of ‘necessary steps’. MOLENAAR’s review of State practice shows this to be diverse and mostly silent on the extent or basis of enforcement jurisdiction, indicating that most States consider a definition of ‘necessary steps’ under domestic law to be superfluous.¹² Thus, it is reasonable to assume that States enjoy a wide discretion on how they respond to non-innocent passage. This is reinforced, if somewhat controversially, by the practice of States preventing passage of vessels carrying potentially illegal migrants¹³ or vessels posing a risk to the maritime environment.¹⁴
- 7 Art. 25 does not establish a process to be followed by States when undertaking preventative action. A logical first step is for the State to verify the exact nature or character of the passage so that it is fully appraised of the situation. It can then decide what further necessary measures are appropriate. This may include requesting information from the ship about, *inter alia*, its flag status, route, and purpose. This is not expressly provided for in Art. 25, but is implicit within the general enforcement jurisdiction.¹⁵ Subsequent measures may include

⁵ Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation Through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192 (Art. 4).

⁶ See further *Jia* on Art. 45 MN 14–16.

⁷ Erik J. Molenaar, Coastal State Jurisdiction over Vessel Source Pollution (1998), 249; Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 87; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2005), 216.

⁸ See generally Barnes on Arts. 18 and 19.

⁹ Churchill/Lowe (note 7), 87.

¹⁰ ILA, Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000), 497.

¹¹ Ivan A. Shearer, Problems of Law Enforcement and Jurisdiction Against Delinquent Vessels, ICLQ 35 (1986) 320, 326–327.

¹² Molenaar (note 7), 268 *et seq.*

¹³ See Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea (2009), 199–204.

¹⁴ See Myron H. Nordquist, International Law Governing Places of Refuge for Tankers Threatening Pollution of Coastal Environment, in: Tafsir Malik Ndiaye/Rüdiger Wolfrum (eds.), *Law of the Sea. Environmental Law and Settlement of Disputes* (2007), 497–517.

¹⁵ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 19–20. (Art. 17).

warning communications, warning shots, interdiction, boarding and inspection. Vessels may then be denied passage, diverted, expelled from the territorial sea or ordered to put into port. It also is open to coastal State authorities to detain and institute proceedings against vessels, although this will be contingent upon whether or not such vessels have committed an offence under coastal State laws.¹⁶ Ultimately, force may be used to secure the coastal State against threats posed by delinquent ships. Any protective steps must also conform to principles of general international law. In particular, efforts should be made to ensure human life is not endangered, and that forcible measures do not go beyond what is reasonable and necessary.¹⁷

Art. 25 applies to all ships including warships, although its application is limited in respect of the immunity enjoyed by warships.¹⁸

2. ‘conditions to which admission [...] to internal waters or such a call is subject’

Coastal States enjoy an enhanced right to take necessary steps to prevent any breach of the admission conditions for ships proceeding to internal waters or port facilities outside internal waters. This reflects the greater degree of interest States have in controlling entry into ports and internal waters. Ships may otherwise be engaged in innocent passage but still fail to meet conditions set for entry into internal waters or port facilities. Ships do not enjoy an automatic right to enter ports or internal waters.¹⁹ Accordingly, States may regulate such access as they see fit, except as noted below at MN 10. At a minimum, a refusal by a foreign flagged vessel to comply with such conditions is tantamount to a breach of Article 21. However, it is to be viewed more seriously because any attempt to enter a port or internal waters without permission may be regarded as a direct threat to the peace, good order and security of the coastal State. Thus, the enforcement measures under Art 25 (2) are described in the same terms as enforcement measures against non-innocent passage generally. On this basis, the conduct of foreign vessels attempting to breach port entry conditions is akin to vessels engaged in non-innocent passage.

Conditions of entry to port may be regulated by international law, and in such cases coastal States are required to comply with any such obligations incumbent upon them. Notably, international law has established common standards concerning port security measures under the International Ship and Port Facility Security Code.²⁰

3. ‘suspend temporarily [...] the innocent passage of foreign ships’

According to Art. 25 (3), coastal States can suspend passage in areas where this is necessary to protect its security, including for weapons practice. CHURCHILL & LOWE note temporary suspensions are commonly implemented in zones around naval dockyards.²¹ Suspension of the right of innocent passage cannot be a blanket coverage of the entire territorial sea; it must be limited to the part of the sea which prompted the security closure in the first instance.

¹⁶ Hoge Raad der Nederlanden (Supreme Court of the Netherlands), *Attican Unity*, 7 February 1986, *Schip en Schade* No. 61 (1986); Raad van State (Judicial Division of the Council of State of the Netherlands), *Long Lin*, 10 April 1995, *Netherlands Juristen Blaad* (1995), 199–200; noted in *Erik Jaap Molenaar/Harm M. Dotinga*, *Case Study of the Netherlands*, in: Erik Franckx (ed.), *Vessel Source Pollution and Coastal State Jurisdiction* (2001), 303, 311.

¹⁷ ITLOS, *The M/V ‘Saiga’* (No. 2) *Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10 (paras. 155–156); ILA Report (note 10), 454–457, 497.

¹⁸ See *Barnes* on Art. 32 MN 10–13.

¹⁹ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports (1986), 14, 111 (paras. 212–213). See also: *Daniel P. O’Connell*, *The International Law of the Sea*, vol. II (1982), 848; *Alan V. Lowe*, *The Right of Entry into Maritime Ports in International Law*, *San Diego LRev* 17 (1977), 597, 619.

²⁰ The International Ship and Port Facility Code (as adopted 12 December 2002) is implemented under Ch. XI/2 Ch. 2 Annex International Convention for the Safety of Life at Sea 1974 (SOLAS 1974 as amended).

²¹ *Churchill/Lowe* (note 7), 87.

- 12 The right to suspend innocent passage is subject to four conditions. First, it must be necessary to protect coastal State security. It may be noted that this provision only refers to 'security' unlike Art 19(1), which refers to 'peace, good order and security'. This indicates a more limited range of reasons may be available to justify instances where passage is temporarily suspended. However, it is difficult to conceive of how such a difference would operate in practice. In this respect CHURCHILL & LOWE note that this aspect of the right is liberally framed, with the additional of the example of 'weapons exercises'.²² This indicates that suspension is possible for a range of wider security matters, of which military security is just one example. This seems to be born out in practice, with States taking protective measures against vessels carrying migrants and vessels posing environmental risks. In the latter instance, the International Maritime Organisation has sought to coordinate State responses through the use of places of refuge for vessels in distress.²³
- 13 Second, suspension must be non-discriminatory between foreign ships 'in form or in fact'. This phrase also appears in Arts. 24, 42 (2), 52 (2) and 227, and bears a similar connotation. It means, in principle, all foreign vessels must be banned from any areas of sea in which the right to innocent passage has been suspended. State practice on this point is difficult to assess, although there are reported instances of States suspending innocent passage as a means of targeting specific vessels, as in the case of the *LUSITANIA EXPRESSO*.²⁴
- 14 Third, suspension must be temporary. However, there is no definition of 'temporary' suspension and no limit on its duration is provided in the text. In practice this period of time should be coterminous with the related security threat.
- 15 Finally, before any suspension can be effective the coastal State must publish notice of the area of suspension. Some States have gone as far as notifying the UN Secretary-General, although the list of notifications appears to be limited.²⁵ It would seem sensible to approach the issue of publicity in a manner consistent with publicity of navigational hazards under Article 24 (2).²⁶

Article 26

Charges which may be levied on foreign ships

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.
2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

Bibliography: *David H. Anderson*, The Imposition of Tolls on Ships: A Review of International Practice, Singapore JICL 2 (1998), 400–407; *Isaac Smith Homans/Issac Smith Homans Jr*, A Cyclopedia of Commerce and Commercial Navigation (1858); *David C. Jackson*, Enforcement of Maritime Claims (4th edn. 2005); *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990); Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Daniel P. O'Connell*, The International Law of the Sea, vol. II (1984); *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2005)

Documents: ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; League of Nations, Committee of

²² *Ibid.*, 87–88.

²³ IMO, Guidelines on Places of Refuge for Ships in Need of Assistance, IMO Res. A.949(23) of 5 December 2003.

²⁴ *Donald R. Rothwell*, Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice, in: Donald R. Rothwell/Sam Bateman (eds.), Navigational Rights and Freedoms in the New Law of the Sea (2000), 92.

²⁵ Available at: http://www.un.org/depts/los/convention_agreements/innocent_passages_suspension.htm.

²⁶ See further *Barnes* on Art. 24 MN 11.

Experts for the Progressive Codification of International Law, LN Doc. C.196.M.70.1927.V.193 (1927); League of Nations, Conference on the Codification of International Law, LN Doc. C.230.M.117.1930.V.8 (1930)

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2. Failure to Pay for Services Rendered During Passage..... 8

I. Purpose and Function

Art. 26 provides that a coastal State may not levy any charges on a foreign ship engaged in innocent passage by reason of mere passage alone. The coastal State may, however, levy charges on a foreign ship for specific services rendered during passage. In doing so, the coastal State must not act in a manner which is discriminatory. The prohibition on levying charges upon foreign ships provided in Art. 26 (1) represents a clear limitation on the enforcement powers of the coastal State in order to protect global navigational interests. 1

II. Historical Background

Attempts to levy passage tolls in coastal waters dates back to at least the 15th century, but this was usually disputed.¹ At the end of the 19th century the members of the Third Committee of the Institut de Droit International 1882 unanimously agreed that the coastal State might not subject shipping in the territorial sea to payment of tolls. While the Rapporteur agreed that a right to levy tolls in certain exceptional circumstances would be justified, neither this nor any mention of tolls was included in the final draft report adopted by the Institut due to a negative response on the point of tolls in exceptional circumstances.² 2

SCHÜCKING’S draft Art. 10 to the Sub-Committee of the Committee of Experts to the Hague Codification Conference stated that ‘within the territorial waters no dues of any kind may be levied, except dues intended solely to defray expenses of supervision and administration’.³ It appeared that general consensus supported the payment of fees only for specific services rendered and as a result the final draft of the Hague Codification read as follows: 3

‘No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea. Charges may be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel. These charges shall be levied without discrimination.’⁴

The International Law Commission (ILC) accepted the general principle that no charges were to be levied upon general navigation. Notably, the ILC rejected a proposal to include a further provision stating the right of the coastal State to demand information on the nationality, tonnage, provenance and destination of passing vessels in order to facilitate the levying of charges.⁵ This was considered to open up the possibility of interference 4

¹ Isaac Smith Homans/Issac Smith Homans Jr, A Cyclopedia of Commerce and Commercial Navigation (1858), 534.

² Daniel P. O’Connell, The International Law of the Sea, vol. II (1984), 839; Haijiang Yang, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2005), 178.

³ League of Nations, Committee of Experts for the Progressive Codification of International Law, LN Doc. C.196.M.70.1927.V.193 (1927).

⁴ League of Nations, Conference on the Codification of International Law, LN Doc. C.230.M.117.1930.V.8 (1930), Art. 7.

⁵ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 20–21 (Art. 19).

with passage if used injudiciously. The ILC also noted that special rights may be provided for by international agreement.⁶

- 5 Art. 18 of the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ) was reproduced verbatim in Art. 26. The only change between Art. 18 CTSCZ and Art. 26 is the position of the article in the overall convention, with it being moved from ‘Rules Applicable to Merchant Ships’ in sub-section B of the 1958 CTSCZ to ‘Rules applicable to all ships’ under UNCLOS.⁷

III. Elements

1. ‘Charges may be levied upon a foreign ship [...] as payment only for specific services rendered’

- 6 Art. 26 precludes charges for mere passage, whilst allowing charges for specific services. This precludes general tolls on passing ships. Following the ILC’s comments on Art. 18 CTSCZ, YANG suggests that the smooth operation of Art. 26 requires general services to be distinguished from specific services.⁸ Arguably, general services include those which are provided to any ship, such as placing and maintaining navigation aids (e.g. buoys, lights and signals, and satellite positioning systems) and the provision of vessel traffic services. The United Kingdom and Ireland levy ‘light dues’ that help to defray the costs of navigational aids around the coast.⁹ As these are only levied on ships entering port and not on passing ships, they are a form of port State jurisdiction and do not breach Art. 26. In any event, they have not been protested by other States.¹⁰ Whilst these services might be used by specific vessels, by levying for the defray, they effectively result in a general toll on services. Art. 26 is not entirely clear how far charges on general services used by specific ships can be recovered. This possibility seems open especially given that the equivalent provision for straits (Art. 43) seems to countenance this. Specific services are those directed at a particular ship, such as pilotage, salvage, wreck removal, towage, dedicated dredging services and urgent repairs, and these will be subject to charges by service providers, either under contract or private maritime law.
- 7 NORDQUIST *et al.* indicate that it is implicit from the provision as a whole that charges for services should be reasonably commensurate with the cost of those services.¹¹ However, States have little control over such matters since such services are usually provided by private companies.

2. Failure to Pay for Services Rendered During Passage

- 8 NGANTCHA questions whether a failure by a foreign ship to pay for a service rendered by the coastal State will affect the right of innocent passage.¹² He presents two schools of thought. The first is that failure to pay does not render passage non-innocent; it requires the coastal State to recover costs through other channels. The other approach is that Art. 26 forms part of the conditions for passage and so must be complied with in order to maintain the innocence of passage. NGANTCHA suggests that the second interpretation is tenable when

⁶ *Ibid.*

⁷ Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 236.

⁸ Yang (note 2), 179.

⁹ For example, see s. 205 (2) of the Merchant Shipping Act 1995 (UK).

¹⁰ David H. Anderson, *The Imposition of Tolls on Ships: A Review of International Practice*, Singapore JICL 2 (1998), 400, 402.

¹¹ Nordquist/Nandan/Rosenne (note 7), 236.

¹² Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 176–178.

considering the legislative history of the provision. A combined reading of Art. 7 of the Hague Codification Draft and the attached observations highlight that in appropriate circumstances no foreign ship could escape charges, and as such a ship which fails to pay the dues could forfeit the right of innocent passage.¹³ He further relies on the ILC's deliberations during the preparation of the 1956 draft articles and the proposed elimination of the phrase 'these charges shall be levied without discrimination'. The purpose of this elimination was to allow for cases:

'[...] in which special rights granted by one State to another given State may be fully justified by the special relationship between the two States, and that in the absence of treaty provisions to the contrary, the grant of such rights cannot be invoked by other States as a ground for claiming similar treatment.'¹⁴

At UNCLOS I, the non-discrimination clause was re-inserted into the 1958 CTSCZ. It was considered that there could be no special rights within the framework of the general obligation of foreign vessels to pay charges to the coastal State for the provision of specific services. The existence of a general rule on service charges without exception, when read with the requirement for vessels to adhere to coastal State laws and regulations under Art. 21, leads NGANTCHA to conclude that payment of charges (for services rendered) and the exercise of the right of innocent passage are 'phenomena which could not be divorced one from the other.'¹⁵ In other words non-payment of charges may equate to non-compliance with the requirements of innocent passage. As Art. 26 has incorporated the CTSCZ and 1930 Hague codification texts, the UNCLOS framework has adopted this interpretation and as such, 'in appropriate circumstances, the non-payment of charges levied by the coastal State could be prejudicial to the exercise of the right of innocent passage.'¹⁶

This view is difficult to reconcile with the view that not every breach of coastal State laws or regulations renders passage non-innocent.¹⁷ Moreover, private maritime law provides appropriate mechanisms for the recovery of the costs of shipping services through an internationally recognised system of maritime liens and claims.¹⁸ Private service providers are certainly limited to such mechanisms, and there seems to be little reason to treat State controlled services differently. As such, the preferred view is that mere non-payment does not immediately render passage non-innocent, although subsequent non-compliance with coastal State measures to secure payment may ultimately have this effect.

Subsection B

Rules applicable to merchant ships and government ships operated for commercial purposes

Article 27

Criminal jurisdiction on board a foreign ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

¹³ *Ibid.*, 177.

¹⁴ ILC Law of the Sea Articles with Commentaries (note 5), 20 (Art. 18).

¹⁵ *Ngantcha* (note 12), 178.

¹⁶ *Ibid.*

¹⁷ See *Barnes* on Art. 19 MN 11.

¹⁸ See Art. 4 International Convention on Maritime Liens and Mortgages; and generally *David C. Jackson*, *Enforcement of Maritime Claims* (4th edn. 2005).

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.

5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Bibliography: *Bin Cheng*, General Principles of Law as Applied by International Courts and Tribunals (1987); *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea, ICLQ 8 (1959), 73–121; *Anne T. Gallagher/Fiona David*, The International Law of Migrant Smuggling (2014); *Douglas Guilfoyle*, Shipping Interdiction and the Law of the Sea (2009); *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2005); *Robert Y. Jennings*, Extradition and Asylum, BYIL 26 (1949), 468; *Phillip C. Jessup*, The Law of Territorial Waters and Maritime Jurisdiction (1927); *Luke T. Lee*, Jurisdiction Over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea, AJIL 55 (1961), 77–96; *Myres S. McDougal/William T. Burke*, The Public Order of the Oceans: A Contemporary International Law of the Sea (1962); *Herman Meyers*, The Nationality of Ships (1967); *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Daniel P. O'Connell*, The International Law of the Sea, vol. II (1984); *Tom Obokata*, The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land Sea and Air, in: *Bernard Ryan/Valsamis Mitsilegas* (eds.), Extraterritorial Immigration Control (2010), 151–166; *Alla Pozdnakova*, Criminal Jurisdiction Over Perpetrators of Ship-Source Pollution (2013); *Ivan A. Shearer*, Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels, ICLQ 35 (1986), 320–343; *Yoshifumi Tanaka*, The International Law of the Sea (2012)

Documents: Harvard Law School, The Law of Territorial Waters: Appendix No. 2: *Projet de règlement relatif à la Mer Territoriale en Temps de Paix*, L'Institut de Droit International, AJIL 23, No. 2 Suppl. (1929), 368–370; Harvard Law School, The Law of Territorial Waters: Appendix No. 4: *Project No. 12 on 'Jurisdiction'* submitted to the International Commission of Jurists at Rio de Janeiro, April 1929, by the American Institute of International Law, AJIL 23, No. 2 Suppl. (1929), 372–373; Harvard Law School, The Law of Territorial Waters: Appendix No. 6: *Draft Convention on Law of Maritime Jurisdiction in Time of Peace* by the International Law Association, AJIL 23, No. 2 Suppl. (1929), 373–375; IMO, The Collation and Preservation of Evidence Following an Allegation of a Serious Crime Having Taken Place on Board a Ship or Following a Report of a Missing Person From a Ship, and Pastoral and Medical Care of Victims, IMO Res. A.1058(27) of 20 December 2011; SC Res. 1540 (2004)

Cases: *Antoni Case*, 6 El Foro 194 (Mexico); Cour de Cassation, *M/C 'Ruby' Case*, No. 95-80725, 3 May 1995 (France); *US v. Postal et al* 589 F.2d. 862 (5th Cir. 1979) (US); *Cunard Steamship Co. v. Mellon*, 43 S.Ct. 504 (1923) (US); ITLOS, *M/V 'Virginia G' Case* (Panama/Guinea Bissau), Judgment 14 April 2014, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr.pdf; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; *R. v. Keyn* [1876] 2 Ex. D. 63 (UK); *Pianka v R* [1979] AC 107 (UK); *The Schooner Exchange v. McFaddon*, 11 U.S. 116; *Wildenhus Case*, 120 U.S. 1 (1897)

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I. Purpose and Function

Art. 27 concerns the exercise of criminal jurisdiction by a coastal State in relation to offences on board a foreign ship that is passing through its territorial sea. It is concerned mainly with matters on-board the vessel, rather than its external conduct, which is addressed by Art. 25. Since Art. 27 falls under Part II, Section 3, Subsection B, the provision on coastal State criminal jurisdiction extends to all merchant ships *and* government ships operated for commercial purposes. The aim of Art. 27 is to balance flag State interests in shipping and navigation on the one hand, with the interests of the coastal State in securing the enforcement of criminal law in its territory.¹ However, Art. 27 does not generally resolve conflicts of jurisdiction that may arise, leaving these to be determined on a case-by-case basis.

For the purposes of Art. 27, a distinction can be drawn between three types of passage: lateral passage, inward passage and outward passage. In the first case, coastal States *should not* exercise jurisdiction in relation to acts occurring on board a ship during innocent passage, except in the circumstances listed in Art. 27 (1). This includes: crimes which incur consequences that extend to the coastal State; crimes which disturb the peace of the coastal State or good order of the territorial sea; requests for assistance; and measures to suppress illicit drug trafficking. It is debateable whether this list of exceptions is exhaustive, as will be discussed below.² When a vessel is engaged in inward passage, such jurisdiction may not be exercised if the offence occurred before the ship entered the territorial sea. In contrast, the coastal State has broader jurisdictional rights against foreign vessels engaged in outward-bound passage. Thus, coastal States are not restricted in enforcing criminal laws against vessels leaving internal waters.

Two conditions apply to the exercise of jurisdiction on-board a foreign flagged vessel. Firstly, under Art. 27 (3), the coastal State is required to notify the diplomatic or consular authorities of the flag State. Secondly, the coastal State is required to have due regard to the interests of navigation when deciding whether and how to conduct the arrest of a vessel.

II. Historical Background

The authority of coastal States to enforce their criminal law against acts occurring on-board foreign flagged vessels in territorial waters was not settled as a matter of customary international law prior to the codification efforts of the twentieth century. Two positions prevailed in practice and doctrine.³ The first view, held by common law States like the United

¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 239.

² See *infra*, MN 12.

³ Phillip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), Ch. 3; Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 95–96.

Kingdom and the United States, was that a coastal State could enforce any of its laws against foreign vessels, subject only to restraint exercised as a matter of comity.⁴ The other view, typically held by continental European States like Belgium, France and Norway, was that coastal States could only enforce specific laws against foreign ships. Despite these positions of principle, JESSUP noted that there was little significant difference in actual practice.⁵

- 5 In the 1920s, prior to the Hague Codification Conference, a number of proposals on coastal State jurisdiction over criminal acts within the territorial sea were developed. These tended to reflect the above divergence of views. Thus, the American Institute of International Law advanced the plenary criminal jurisdiction of the coastal State,⁶ whereas the International Law Association and the Institut de Droit International took the view that unless acts troubled the public order or peace of the coastal State they remained subject to the law of the flag State.⁷ As such, it can be concluded that there was no general consensus on the matter.
- 6 Although the Hague Conference did not result in an agreement, its work in producing Draft Articles on the Territorial Sea in 1930 had a lasting influence on subsequent codification efforts, as shown by the similarities in subsequent codification texts. Art. 8 of the draft provides that:

‘A coastal State may not take any steps on board a foreign vessels passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessels during its passage, save only in the following cases:

1. If the consequences of the crime extend beyond the vessel; or
2. If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
3. If the assistance of the local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel flies;

The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel in the inland waters of that State or lying in its territorial sea, or passing through the territorial sea after leaving inland waters. The local authorities shall, in all cases, pay due regard to the interests of navigation when making an arrest on board a vessel.⁸

Whilst NGATCHA notes that contemporary commentators questioned the precise content of Art. 8 of the draft, it was later adopted without significant change as the basis for Art. 19 of the Convention on the Territorial Sea and the Contiguous Zone (CTSCZ).⁹ Art. 19 (1) CTSCZ provides that:

- ‘1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:
 - (a) If the consequences of the crime extend to the coastal State; or
 - (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

⁴ In the UK, see the Territorial Waters Jurisdiction Act 1878, adopted in response to the decision of the House of Lords in *R. v. Keyn* [1876] 2 Ex. D. 63 (UK). In the US, see for example *The Schooner Exchange v. McFaddon*, 11 U.S. 116 and *Cunard Steamship Co. v. Mellon*, 43 S.Ct. 504 (1923), 507 (US).

⁵ Jessup (note 3), 286.

⁶ Harvard Law School, The Law of Territorial Waters: Appendix No. 4: Project No. 12 on ‘Jurisdiction’ submitted to the International Commission of Jurists at Rio de Janeiro, April 1929, by the American Institute of International Law, AJIL 23, No. 2 Suppl. (1929), 372 (Art. 8).

⁷ Harvard Law School, The Law of Territorial Waters: Appendix No. 6: Draft Convention on Law of Maritime Jurisdiction in Time of Peace by the International Law Association, AJIL 23, No. 2 Suppl. (1929), 373, 374 (Art. 11); Harvard Law School, The Law of Territorial Waters: Appendix No. 2: Projet de règlement relatif à la Mer Territoriale en Temps de Paix, L’Institut de Droit International, AJIL 23, No. 2 Suppl. (1929), 368, 369 (Art. 7).

⁸ League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.228.M.115.1930.V.

⁹ Francis Ngantcha, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990), 99.

(c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or

(d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.'

Apart from developing in more detail the circumstances when coastal States could exercise enforcement authority, Art. 19 (1) CTSCZ contained an important change to draft Art. 8 (1), with the phrase 'should not' replacing the phrase 'may not'. This was largely at the insistence of the United States, who took the view that in principle sovereignty over the territorial sea included the exercise of criminal jurisdiction. 'May not' would derogate from such sovereignty by creating a strict legal prohibition on the coastal State not to exercise jurisdiction, whereas 'should not' indicated that the exercise of jurisdiction was permissible and at the discretion of the coastal State. This was considered to be consistent with the underlying sovereignty of the coastal State, whilst accommodating due regard to navigational interests.¹⁰ As LEE notes, however, this position was questionable as a matter of principle, and not without objection from other States.¹¹

Art. 27 UNCLOS is copied almost verbatim from Art. 19 CTSCZ, with the following 7 differences: Firstly, the scope of application of Art. 27 is wider than Art. 19 CTSCZ, which applies only to merchant ships. Secondly, there are also minor drafting changes, such replacing the term 'captain' with 'master', the inclusion of a reference to 'psychotropic substances' in Art. 27 (1)(d), and the inclusion of a reference to 'diplomatic agents' in addition to consular officers in Art. 27 (1)(c).¹² More significant are the new cross-references in Art. 27 (5) to Part V on the exclusive economic zone (EEZ) and Part XII on Protection and Preservation of the Marine Environment, where the coastal State is permitted to take investigatory and enforcement measures outside the territorial sea. This was introduced at the Sixth Session in 1977 to take account of developments occurring in the negotiation of other conventional provisions.¹³

III. Elements

1. 'The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship'

Art. 27 states that the coastal State 'should not' exercise criminal jurisdiction or stop or divert a foreign ship passing through the territorial sea. The phrase 'should not' is considered by most commentators to be 'hortatory only'.¹⁴ O'CONNELL explains that the theory behind 8

¹⁰ First Committee UNCLOS I, United States of America: Proposal, UN Doc. A/CONF.13/C.1/L.41 (1958), OR III, 221 (Art. 20).

¹¹ Luke T. Lee, *Jurisdiction Over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea*, AJIL 55 (1961), 77, 83-84.

¹² According to Nordquist *et al.*, this latter point brought the text into line with the Vienna Convention on Diplomatic Relations: Nordquist/Nandan/Rosenne (note 1), 242-243.

¹³ UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 9.

¹⁴ See Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, ICLQ 8 (1959) 73, 104; Daniel P. O'Connell, *The International Law of the Sea*, vol. II (1984), 960; Ivan A. Shearer, *Problems of*

the proposal was that since it was conceded in Art. 1 of the 1930 Draft Convention that the coastal State had sovereignty over the territorial sea, it was also legally competent to enforce its criminal law aboard foreign vessels in the territorial sea, including stopping and boarding them. He notes, however, that it 'should not' do so.¹⁵ FITZMAURICE argues that the phrase was 'intended to reflect the fact that the rule enunciated represents standard international practice rather than strict international law.'¹⁶ LEE highlights that the debate at the Geneva Conference reflected the 'long standing jurisprudential cleavage between the Anglo-American doctrine and that of France and its fellow continental countries.'¹⁷ The Anglo-American view claims that a State's jurisdiction over foreign ships in territorial waters is absolute, although on practical grounds (such as comity, convenience and usage) the State may disclaim jurisdiction in cases where only the internal order of the ship is involved and the tranquillity of the port is unaffected. Thus, s. 2 of the UK Territorial Waters Jurisdiction Act 1878 extends criminal jurisdiction to any offence committed by any person whether or not they are a UK subject.¹⁸ In contrast, the continental view is that in the absence of specific rules permitting the exercise of jurisdiction, matters of criminal law are left to the jurisdiction of the flag State. Recognizing the divergence in State practice, O'CONNELL further notes that there is no objective standard in legal doctrine to determine when jurisdiction to enforce is exercisable under Art. 27 (1). On this basis it must be assumed that determining whether or not to exercise criminal jurisdiction will be decided on a case-by-case basis according to the discretion of the coastal State. This, O'CONNELL suggests, is the significance of the replacing of 'may not' with 'should not'. It allows for a workable system of criminal jurisdiction within which divergent domestic approaches can be reconciled.¹⁹ This appears to be borne out in State practice. Thus, YANG's survey of practice indicates that States extend criminal jurisdiction in varying degrees to foreign ships in the territorial sea.²⁰

- 9 Art. 27 permits coastal States to take action against ships engaged in a range of illegal activities. Notably, this may include enforcement measures against ships suspected of carrying weapons of mass destruction (WMD), and ships engaged in people trafficking or the smuggling of illegal migrants.²¹ Interestingly, in the context of international efforts to control movements of WMD and related material, Security Council Resolution 1540 (2004) appears to place States under an obligation to act in such circumstances.²²
- 10 The permitted enforcement measures include arresting individuals and conducting a criminal investigation in respect of the crime committed on-board the ship.²³ Whilst Art. 27 (1) uses the phrase 'arrest of any person', in practice States may seize the relevant vessel as part of the investigative process and subsequent legal proceedings, subject to the requirements of Art. 27 (4). Whilst the detention of the vessel in such circumstances is not explicitly addressed in Art. 27 (1), this can be implied from later references to investigation on board a foreign ship in Art 27 (2). It may also be inferred from Art. 73 concerning arrest of ships for

Jurisdiction and Law Enforcement Against Delinquent Vessels, ICLQ 35 (1986), 320, 327. Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea (2009), 11–12; Yoshifumi Tanaka, The International Law of the Sea (2012), 95. Cf. Myres S. McDougal/William T Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (1962), 279–80; Herman Meyers, The Nationality of Ships (1967), 77–80.

¹⁵ O'Connell (note 14), 961.

¹⁶ Fitzmaurice (note 14), 104.

¹⁷ Lee (note 11), 84.

¹⁸ Territorial Waters Jurisdiction Act 1878 (41 & 42 Vict. c. 73), available at <http://www.legislation.gov.uk/ukpga/Vict/41-42/73?view=plain>. See also *Pianka v R* [1979] AC 107 (UK).

¹⁹ O'Connell (note 14), 961.

²⁰ Haijiang Yang, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2005), 253–256.

²¹ Tom Obokata, The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land Sea and Air, in: Bernard Ryan/Valsamis Mitsilegas (eds.), Extraterritorial Immigration Control (2010), 151, 162; Anne T. Gallagher/Fiona David, The International Law of Migrant Smuggling (2014), 237–239.

²² Guilfoyle (note 14), 240–243.

²³ Nordquist/Nandan/Rosenne (note 1), 242.

breach of laws and regulation in the EEZ. Under domestic law, enforcement authorities are generally empowered to conduct investigations on ships.²⁴ The precise conduct of such measures will be determined in accordance with domestic criminal procedures. However, there is some recognition of the benefits of harmonised or cooperative approaches to criminal investigations aboard ships.²⁵

Art. 27 does not deal specifically with the exercise of penal jurisdiction arising out of collisions. This is left to the 1952 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents. This convention reserves arrest, investigation and penal or disciplinary matters exclusively to the flag State.

2. ‘save only in the following cases’

Art. 27 (1) lists four circumstances where coastal States may take enforcement action against foreign vessels engaged in lateral passage. The use of the word ‘only’ suggests that the list of circumstances is exhaustive or to be construed restrictively.²⁶ However, this runs counter to the construction of ‘should not’ as noted above, which indicates a potentially wide residual enforcement jurisdiction. The preferable view is that the use of the word ‘only’ makes it clear that jurisdiction may only be exercised in these four types of circumstance. Of course these exceptions may then be interpreted narrowly or broadly according to how serious the coastal State considers the nature or consequences of the crime.

Whilst coastal States may take action to prevent passage that is non-innocent under Art. 25, there is nothing to prevent them taking alternative action under Art. 27. Thus, coastal States may exercise criminal jurisdiction over persons engaged in smuggling, illegal fishing, or any other matters regulated under Art. 21.

The first qualification concerns situations where the consequences of the crime extend to the coastal State under Art. 27 (1)(a). This may overlap with matters covered by Art. 27 (1)(b). Arguably, the distinction is between acts physically extending to the coastal State and acts which have social, moral or other disturbing consequences for the coastal State. An example of the former would be pollution harm resulting from a discharge from a ship.²⁷ An example of the latter might be the commission of a racially or politically aggravated offence that sparks protest or copycat offences in the coastal State.

The second qualification refers to crimes that disturb the ‘peace of the country or good order of the territorial sea’. A potential problem is the absence of a definition of ‘peace’ or ‘good order’. In the absence of an authoritative definition, this will be left to individual States and it may result in different approaches.²⁸ Art. 27 does not explain how the consequences or disturbance might extend to the coastal State, leaving such matters to be determined by the coastal State. In practice it may include the commission of serious crimes, crimes where the victim or perpetrator is a national of the coastal State, or crimes the physical effects of which extend to the coastal State.

The third qualification under Art. 27 (1)(c) refers to requests for assistance. Normally, the master is empowered to make an arrest or detain a person under the law of the flag State.²⁹

²⁴ See for example, the United Kingdom Merchant Shipping (Accident Reporting and Investigation) Regulations 2012, SI 2012/1743, available at <http://www.legislation.gov.uk/uksi/2012/1743/contents/made>.

²⁵ See IMO, The Collation and Preservation of Evidence Following an Allegation of a Serious Crime Having Taken Place on Board a Ship or Following a Report of a Missing Person from a Ship, and Pastoral and Medical Care of Victims, IMO Res. A.1058(27) of 20 December 2011.

²⁶ See: ITLOS, *The M/V ‘Saiga’ (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, Separate Opinion of Judge Laing, ITLOS Reports (1999), 10, para. 15.

²⁷ See generally *Alla Pozdnakova*, Criminal Jurisdiction Over Perpetrators of Ship-Source Pollution (2013).

²⁸ See for example the contrasting decisions on the significance of murder committed aboard vessels in port in the *Wildenhus Case*, 120 U.S. 1 (1897), and the *Antoni Case*, 6 El Foro 194 (Mexico), reproduced in: Manley O. Hudson (ed.), *Cases and Other Materials on International Law* (1929), 630.

²⁹ See for example, s. 105 of the Merchant Shipping Act 1995 (UK).

However, this may not be sufficient to deal with a serious incident and so external assistance may be requested. The master of a ship or diplomatic agent or consular officer of the flag State may request the assistance of coastal State authorities to arrest a person or conduct an investigation on-board the ship. The extent to which assistance encompasses the investigation and prosecution of offences is not set out, and presumably depends upon the agreement of the parties involved. Strictly speaking, in such circumstances this amounts to a delegation of the flag State jurisdiction, rather than an independent exercise of coastal State jurisdiction.

- 17 The final exception under Art. 27 (1)(d) relates to measures necessary to suppress drug trafficking. This has been one of the main reasons for coastal States exercising criminal jurisdiction over ships in territorial waters.

3. ‘to take any steps [...] for the purpose of an arrest or investigation on board a foreign ship’

- 18 Art. 27 (2) allows coastal States to arrest or investigate matters aboard outward-bound ships. This includes action in respect of crimes committed on-board vessels in port, or where an offender has embarked upon an outward-bound vessel, or where an offence is committed on board a vessel leaving port or territorial waters. The broad range of enforcement jurisdiction of the coastal State over outward-bound ships finds its justification in an analogy with the doctrine of hot pursuit (→ Art. 111).³⁰

4. ‘the coastal State shall [...] notify a diplomatic agent or consular officer of the flag State’

- 19 Art. 27 (3) requires the coastal State to notify the diplomatic or consular officers of the flag State before taking any steps, and to facilitate contact between such officers and the ship’s crew. In cases of emergency, this may be done at the same time as enforcement measures are being taken. This notification is contingent on the master’s request. This mechanism ensures that both flag State and coastal State can seek to ensure their respective interests are protected, as in the *Eisler Incident*.³¹ Here Poland protested the arrest, pursuant to an extradition request from the United States, of a German-born resident of the United States from a Polish flagged vessel located in British territorial waters. The UNCLOS does not indicate the consequences of a failure to notify the flag State. Presumably, the question of whether or not this failure to follow due process has prejudiced any legal proceedings will be an issue for the domestic courts to consider in the first instance. This would be consistent with the general requirement under international law to exhaust local remedies.³²

5. ‘due regard to the interests of navigation’

- 20 When deciding whether and how to effect an arrest, the coastal State, according to Art. 27 (4), shall have ‘due regard to the interests of navigation’. The meaning of this phrase is not explained, although it is similar to the language used in other parts of the Convention, notably Arts. 56 (2)³³ and 87 (2).³⁴ Presumably, this requires the coastal State to be aware of and to consider the interests of ships engaged in innocent passage through the territorial sea. It is further reinforced by the general requirement of good faith in Art. 300.³⁵ This would

³⁰ Yang (note 20), 250.

³¹ Noted by Robert Y. Jennings, *Extradition and Asylum*, BYIL 26 (1949), 468.

³² See further Treves on Art. 295.

³³ Due regard in Art. 56 (2) was interpreted as requiring ‘all possible consideration’ in the ITLOS, *M/V ‘Virginia G’ Case* (Panama/Guinea Bissau), Judgment 14 April 2014, para. 347, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr.pdf.

³⁴ See further Guilfoyle on Art. 87 MN 9.

³⁵ See generally O’Brien on Art. 300.

suggest that coastal States should not exercise their right to arrest ships in an arbitrary fashion, for reasons that do not relate to Art. 27, or in such a way that frustrates the Convention's aim to facilitate communication and navigation.³⁶

6. 'any crime committed before the ship entered the territorial sea'

Art. 27 (5) places a mandatory prohibition ('may not') on the coastal State exercising jurisdiction in respect of crimes committed beyond the territorial sea when a foreign vessel enters the territorial sea for lateral passage only. However, in practice, some coastal States have taken a flexible approach to dealing with crimes committed 'before' a vessel enters into territorial waters. For example, the French Cour de Cassation upheld jurisdiction over the prosecution of the Ukrainian crew for the execution of eight Cameroon stowaways aboard a Bahamas registered ship outside French waters.³⁷ Although the executions were carried out outside the territorial sea, the offence was deemed to have continued into French territorial waters when a ninth stowaways escaped and was hunted down as the ship came into territorial waters.

Art. 27 (5), by way of cross reference to Part XII and Part V of UNCLOS permits action in respect of the enforcement of environmental pollution laws and laws related to the EEZ respectively. This results in two further exceptions to the old Geneva formulation. First, States now have wide ranging enforcement jurisdiction in respect of marine environmental protection, as noted in Arts. 218 and 220 (3), (5) and (6). Second, under Art. 73, coastal States may take enforcement measures in respect of its conservation and management laws over the resources of the EEZ. The effect of this provision is to expand the circumstances in which the coastal State can take enforcement measures in the territorial sea.³⁸

Article 28

Civil jurisdiction in relation to foreign ships

1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea, ICLQ 8 (1959), 73–121; *David C. Jackson*, Enforcement of Maritime Claims (4th edn. 2005); *Nigel Meeson/John Kimbell*, Admiralty Jurisdiction and Practice (4th edn. 2011); *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990); *Daniel P. O'Connell*, The International Law of the Sea, vol. II (1982); *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Ivan A. Shearer*, Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels, ICLQ 35 (1986), 320–343; *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2005)

³⁶ See generally, Arts. 26 and 31 of the Vienna Convention on the Law of Treaties. On good faith, see generally *Bin Cheng*, General Principles of Law as Applied by International Courts and Tribunals (1987), 105–160.

³⁷ Cour de Cassation, *M/C 'Ruby' Case*, No. 95-80725, 3 May 1995 (France). See also *US v. Postal et al.* 589 F.2d. 862 (1979).

³⁸ See generally, *Harrison* on Art. 73.

Documents: ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.230.M.117.1930.V.9 (1930)

Cases: *Compañía de Navegación Nacional (Panama) v. United States*, Decision of 29 June 1933, RIAA VI, 382; *The ‘Trade Resolve’* [1999] 4 SLR 424 (Singapore)

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I. Purpose and Function

- 1 Art. 28 outlines coastal State civil jurisdiction in relation to foreign ships passing through the territorial sea. Civil jurisdiction, as opposed to criminal jurisdiction, generally concerns matters of contractual and non-contractual obligations, family law, employment law and land/property law. Art. 28 seeks to limit the grounds upon which a coastal State may interfere with ships in the territorial sea. It is the civil counterpart to Art. 27 on criminal jurisdiction. Art. 28 distinguishes between jurisdiction over persons on board vessels in the territorial sea, and jurisdiction over vessels. The former is covered by Art. 28 (1) which provides that the coastal State should not hinder the passage of a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to any person on board. Pursuant to Art. 28 (2), the coastal State has no authority to arrest or seize the ship itself for the purpose of civil proceedings unless in relation to obligations or liabilities incurred during its current passage, for example, collision, salvage, pilotage and towage. Any execution against or arrest of a ship must be in relation to obligations or liabilities during the current passage and not in respect of those which may have arisen previously.
- 2 More precise questions of jurisdiction over civil matters, for example cargo claims occurring on board ships, tort arising from collisions, towage, and salvage actions, are governed under rules of private international law.¹ These will determine the appropriate forum and law for the resolution of a private law dispute. However, international law remains concerned with such matters since this involves the coordination of domestic private law systems². Thus private maritime agreements remain contingent upon jurisdictional frameworks under public international law.

II. Historical Background

- 3 Until the development of clear rules of international law, the extent of civil jurisdiction over vessels in the territorial sea remained uncertain, but potentially extensive. For example, jurisdiction on board foreign vessels in innocent passage in the territorial sea existed in English law from the enactment of the Merchant Shipping Act 1854 until 1956.³ The legislation authorized the arrest of a ship which caused injury in any part of the world to any property of the Crown or the Crown’s subjects, at any point after the damage is suffered,

¹ See generally *Nigel Meeson/John Kimbell*, *Admiralty Jurisdiction and Practice* (4th edn. 2011); *David C. Jackson*, *Enforcement of Maritime Claims* (4th edn. 2005).

² *Daniel P. O’Connell*, *The International Law of the Sea*, vol. II (1982), 859.

³ s. 527 Merchant Shipping Act 1854 (17 & 18 Vict c. 104). Also s. 688 Merchant Shipping Act 1894 (57 & 58 Vict c. 60), repealed by s. 7 (1) Administration of Justice Act 1956 (4 & 5 Eliz 2 c. 46).

if the ship entered United Kingdom waters out to 3 NM off the coast. This practice ended in 1956 as a result of developments occurring at UNCLOS I, as noted below.⁴

The issue of coastal State jurisdiction over civil matters was first addressed at the 1930 4 Hague Codification Conference. The Preparatory Committee to the Conference concluded that the exercise of civil jurisdiction, unlike that of criminal jurisdiction, did not seem to seriously threaten the innocent passage of foreign ships. The committee formulated the discussion on the basis of two proposals, first that coastal States would be permitted to arrest a person on board a ship within the territorial sea, and second, that coastal States would be restricted in their ability to arrest a person in such manner.⁵ The second basis was ultimately adopted and incorporated into Art. 9:

‘A Coastal State may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A Coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in course of or for the purpose of its voyage through the waters of the coastal State. The above provisions are without prejudice to the right of the coastal State in accordance with its laws to levy execution against, or arrest, a foreign vessel in the inland waters of the State or lying in the territorial sea, or passing through the territorial sea after leaving inland waters of the state, for the purpose of any civil proceedings.’⁶

With some textual amendments, this formed the basis for the provisions on civil jurisdiction 5 considered by the International Law Commission (ILC) in preparation for UNCLOS I. The deliberations of the ILC were also influenced by the adoption of the Brussels Convention 1952.⁷ Art. 2 of this provided that ‘a ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of *any maritime claim*[...]’ (emphasis added). Members of the ILC were generally of the view that the regimes needed to be compatible. However, incorporating the approach of the Brussels Convention, which included more extensive grounds for arrest, posed considerable difficulties, and so the ILC reverted to its previous position.⁸ Ultimately, States’ rights under different agreements would be safeguarded by Art. 25 of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ), which provided that the provisions of the CTSCZ do not affect agreements already in force between States parties.

The main provision of the CTSCZ dealing with civil jurisdiction is Art. 20. As noted below, 6 this influenced the drafting of Art. 28 of UNCLOS. Art. 20 provides that:

‘1. The coastal State *should not* stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.’⁹

The most important change from the Hague Draft was the substitution of ‘should not’ in 7 place of ‘may not’ in Art. 20 (1). This was the result of a US proposal which noted that no such limitation existed under international law; civil jurisdiction extended to the limits of the territorial sea. The proposal allowed a balance between this and the practice of refraining

⁴ See further O’Connell (note 2), 868 *et seq.*

⁵ Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2005), 257.

⁶ League of Nations, Acts of the Conference for the Codification of International Law, LN Doc. C.230.M.117.1930.V.9 (1930).

⁷ International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships.

⁸ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 20 (Art. 20).

⁹ Emphasis added.

from the exercise of jurisdiction against vessels traversing the territorial sea.¹⁰ Art. 28 (2) might be regarded as changing international law to the extent that it overruled the decision of the US-Panama General Claims Arbitral Tribunal in *The David* (1933).¹¹ Here the tribunal held that the arrest of a foreign ship in innocent passage was permitted in respect of a claim arising from a collision which occurred on a previous journey through territorial waters.

- 8 Art. 28 repeats almost verbatim Art. 20 Convention on the Territorial Sea and Contiguous Zone. At the Second Session of UNCLOS III in 1974, proposals by Fiji¹² and Bulgaria, the German Democratic Republic, Poland and USSR,¹³ suggested strengthening the wording of Art. 28 (1) further by substituting ‘should not’ with the more imperative ‘shall not’. This was not adopted and the text remained without significant changes until its final adoption.

III. Elements

1. ‘The coastal State should not stop or divert a foreign ship [...] for the purpose of exercising civil jurisdiction in relation to a person on board the ship’

- 9 Art. 28 (1) provides that a coastal State *should not* intervene for the purposes of exercising civil jurisdiction in relation to any person on board the ship. This is consistent with the approach taken to criminal jurisdiction in Art. 27. The obligation is hortatory, rather than strict, and contrasts with the language used in Art. 28 (2).¹⁴ In practice, coastal States have little reason for exercising civil jurisdiction over internal matters on board foreign ships.¹⁵

2. Jurisdiction Against Vessels

- 10 Art. 28 (2) provides that a coastal State *may not* levy execution against or arrest a ship for the purpose of civil proceedings. This is framed as an absolute obligation.¹⁶ There is an exception to this in respect of obligations or liabilities assumed or incurred by the vessel arising during the course of its voyage through the waters of the coastal State. This might include liability for negligence arising from a collision, or the receipt of towage or salvage services in the territorial sea. For States Parties to the International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952, an action for collision can only be brought in the courts of: (a) the place where the defendant has his habitual residence or place of business; (b), the place of arrest; or (c) the place of the collision when this occurred within port or internal waters.¹⁷ To the extent that pollution is classed as a civil matter, coastal States may rely on Art. 28 to take action against ships in the territorial sea if they are engaged in vessel source pollution.¹⁸
- 11 Art. 28 (2) refers only to acts that ‘levy execution against or to arrest’ a ship. This means coastal State authorities can still serve writs against vessels in the territorial sea.¹⁹ Other

¹⁰ First Committee UNCLOS I, United States of America: Proposal, UN Doc. A/CONF.13/C.1/L.42 (1958), OR III, 221.

¹¹ *Compañía de Navegación Nacional (Panama) v. United States*, Decision of 29 June 1933, RIAA VI, 382.

¹² Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 198 (Art. 9).

¹³ Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.26 (1974), OR III, 203, 204 (Art. 24).

¹⁴ O’Connell (note 2), 874; Gerald Fitzmaurice, Some Results of the Geneva Conference on the Law of the Sea, ICLQ 8 (1959), 73, 107; Ivan A. Shearer, Problems of Jurisdiction and Law Enforcement against Delinquent Vessels, ICLQ 35 (1986), 320, 328; Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 98.

¹⁵ Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 113.

¹⁶ Shearer (note 14), 329.

¹⁷ Art. 1 International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision.

¹⁸ See further Becker-Weinberg on Art. 229 MN 5–12.

¹⁹ *The ‘Trade Resolve’* [1999] 4 SLR 424, para. 40 (Singapore). Also, s. 22 (1)(a) of the Admiralty Act 1988 (Australia).

interpretative issues arise from the use of the phrase ‘the waters of the coastal State’ rather than territorial sea. O’CONNELL notes that ‘waters’ could refer to waters alongside the ship in port, internal waters, the territorial sea or high seas.²⁰ However, he takes the view that this refers to territorial waters given that the provision is located in the section on the territorial sea and relates to actions against vessels in innocent passage.²¹ However, it would seem logical that civil jurisdiction extend to waters where the coastal States has a genuine concern, such as damage occasioned to offshore installations in the exclusive economic zone (EEZ). Whilst this might fall within the scope of Arts. 56 and 60, the exercise of civil jurisdiction over vessels in the territorial sea for such matters would not offend against the balance of rights and duties in the territorial sea. ROTHWELL & STEPHENS are of the view that ‘waters’ includes the EEZ.²²

Art. 28 (3) preserves the coastal State’s right to exercise jurisdiction over ships when lying in the territorial sea or navigating though the territorial sea after leaving internal waters. 12

Subsection C

Rules applicable to warships and other government ships operated for non-commercial purposes

Article 29

Definition of warships

For the purposes of this Convention, ‘warship’ means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Bibliography: *David J. Bederman*, Congress Enacts Increased Protections for Sunken Military Craft, *AJIL* 100 (2006), 649–663; *David J. Bederman*, Rethinking the Legal Status of Sunken Warships, *ODIL* 31 (2000), 97–125; Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Bernard H. Oxman*, The Regime of Warships Under the United Nations Convention on the Law of the Sea, *VJIL* 24 (1983), 809–863; *J. Ashley Roach*, *Sunken Warships*, *MPEPIL*, available at: <http://www.mpepil.com>; *Dietrich Schindler/Jiří Toman*, *The Laws of Armed Conflicts* (1988)

Documents: ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994); US Navy, *The Commander’s Handbook on the Law of Naval Operations* (2007)

Cases: ITLOS, *The ‘ARA Libertad’ Case* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332

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²⁰ O’Connell (note 2), 873–874.
²¹ *Ibid.*
²² Donald R. Rothwell/Tim Stephens, *The International Law of the Sea* (2010), 425.

I. Purpose and Function

- 1 Art. 29 defines the term ‘warship’ for the purposes of the Convention. This definition is important since warships are distinguished from other vessels, and subject to specific rules set forth in Art. 30 (compliance with laws and regulations of the coastal State), Art. 31 (responsibility of the flag State for damaged caused by warships, Art. 32 (general immunities), Art. 95 (immunity on the high seas), Art. 107 (seizure of pirate vessels), Art. 110 (rights of visit on the high seas), Art. 111 (hot pursuit), and Art. 236 (exemption from provisions regarding the protection and preservation of the marine environment).

II. Historical Background

- 2 The definition of warship in Art. 29 was taken from Art. 8 of the Convention on the High Seas (High Seas Convention), which in turn was developed from Arts. 2–4 of the Convention relating to the Conversion of Merchant Ships into War-Ships 1907 (Convention VII).¹ The 1907 Hague Conference drafted a number of instruments, but did not specifically define warships. However, this was done indirectly in Convention VII, which enumerated the conditions to be met for the conversion of merchant ships into warships.² This set forth three main conditions for warships relating to marking, control and military crewing. The approaches of these agreements have since been followed in other instruments, including the Institute of International Law’s Manual on the Laws of Naval War.³
- 3 Art. 32 (2) of the International Law Commission’s 1956 Draft Articles on the Law of the Sea defined a warship as

‘a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.’⁴

This was incorporated directly into Art. 8 of the High Seas Convention. This definition was given for the purpose of ‘these articles’ indicating that it only pertains to the High Seas Convention, and not the Convention on the Territorial Sea and Contiguous Zone, which contains relevant provisions on the passage of warships. However, this appears to be a drafting omission resulting from the decision to produce four independent instruments, rather than a single consolidated instrument.⁵

- 4 Early proposals in the Sea-Bed Committee dealing with innocent passage did not include a definition of the term ‘warship’. A proposal by Fiji at the 1973 session was the first to include a definition, and this was copied verbatim from the definition in the High Seas Convention.⁶ During the Second Session of UNCLOS III, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, although it substituted the term ‘armed forces’ in place of references to ‘naval forces’

¹ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GOAR 11th Sess. Suppl. 9, 12, 26 (Art. 32).

² Convention Relating to the Conversion of Merchant Ships into War Ships, 18 October 1907, AJIL 2, No. 1/2 Suppl. (1908), 133–138.

³ Reproduced in: *Dietrich Schindler/Jiri Toman, The Laws of Armed Conflicts* (1988), 858–875.

⁴ ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 7 (Art. 32).

⁵ See *Bernhard H. Oxman, The Regime of Warships under the United Nations Convention on the Law of the Sea*, VJIL 24 (1983), 809, 812 (footnote 7).

⁶ Sea-Bed Committee, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 and CORR. 1 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 91, 97 (Art. 12 (1)), was replaced by: Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 198 (Art. 12 (1)).

or 'Navy List'.⁷ NORDQUIST *et al.* note this reflects a trend towards the integration of armed forces since the 1958 High Seas Convention.⁸ The final wording of Art. 29 was agreed following further amendment to broaden the scope of the definition for the purposes of the 'Convention' rather than 'articles'.⁹ A proposal by Argentina, Bangladesh, China, Democratic Yemen, Ecuador, Madagascar, Pakistan, Peru and Philippines to include submarines and other underwater vehicles in the Art. 29 was rejected.¹⁰

III. Elements

1. 'For the purposes of this convention'

The Art. 29-definition does not merely apply to the provisions on the territorial sea and contiguous zone but rather to the entire Convention. This was confirmed in the '*ARA Libertad*' Case: '[S]ome of the provisions in this Part [Part II] may be applicable to all maritime areas, as in the case of the definition of warships provided for in Art. 29 of the Convention.'¹¹ This is significant since warships enjoy certain privileges and powers in other parts of the Convention and are distinct from other government ships and vessels operated for commercial purposes. Thus, warships enjoy complete immunity on the high seas (→ Art. 96).¹² Warships, military aircraft and other duly authorized ships or aircraft may carry out seizures on account of piracy (→ Art. 107), exercise the right of visit on the high seas (→ Art. 110), and exercise the right of hot pursuit (→ Art. 111). Finally, warships, auxiliary craft or aircraft operated by the State on government non-commercial purposes are not subject to the provisions of the Convention relating to the protection and preservation of the marine environment (→ Art. 236).

2. 'warship'

Art. 29 does not require a ship to be armed to be considered as a warship.¹³ Unlike the High Seas Convention, neither does it require the ship to belong to the naval forces of a State and be under the command of an officer who appears in the Navy List and be manned by a crew who are under regular naval discipline. Instead it refers more generally to 'armed forces'. This allows for inclusion of ships belonging to different branches of armed forces, including the army, air force and coastguard.¹⁴ It excludes vessels operated by insurgent, rebel or secessionist groups since these entities are not States.

This definition of warship has been adopted in other operational instruments. For example, Art. 13 (g) of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1994 defines a warship as

'a ship belonging to the armed forces of a State bearing the external marks distinguishing the character and nationality of such a ship, under the command of an officer duly commissioned by the

⁷ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 185 (Art. 26 (1)).

⁸ Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 250.

⁹ Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192, 194.

¹⁰ Second Committee UNCLOS III, Informal Suggestion by Argentina *et al.*, UN Doc. C.2/Informal Meeting/30 (1978, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. V (1982), 39.

¹¹ ITLOS, *The 'ARA Libertad' Case* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332, para. 64.

¹² See *Guilfoyle* on Art. 96 MN 12-16.

¹³ *Oxman* (note 5), 813.

¹⁴ *Ibid.*; the United States expressly includes coastguard vessels in the definition of warships, see US Navy, *The Commander's Handbook on the Law of Naval Operations* (2007), para. 2.1.1.

government of that State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline'.¹⁵

This same definition is used in the United States Commander's Handbook on the Law of Naval Operations.¹⁶

- 8 The Convention is silent on the question of whether or not the definition applies to auxiliary craft, i.e. craft that are designed to support military vessels. Art. 13 (h) of the San Remo Manual defines these as vessels 'other than a warship, that are owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service'. This might indicate a separate status for such vessels. However, given the broad definition of warships and the scope for States to treat such vessels as warships, it is reasonable to include such vessels within the provisions on warships. In any event, such vessels are expressly included within Arts. 110, 111 and 236.
- 9 There is some doubt as to whether or not the definition of warship under Art. 29 includes sunken warships, since such vessels are, strictly speaking, no longer controlled or crewed. Whilst this does not matter from an operational perspective, it is of particular concern to the question of immunity from claims in respect of salvage or finds.¹⁷ The treatment of warships as underwater cultural heritage is not addressed directly by the Convention, although it is considered by the UNESCO Convention on the Protection of Underwater Cultural Heritage. There are divergent views on the immunity of sunken warships, with some arguing in favour of continuing immunity until abandonment,¹⁸ and others arguing that it is lost when the warship sinks and loses its function as a military vessel.¹⁹

Article 30

Non-compliance by warships with the laws and regulations of the coastal State

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

Bibliography: *William E. Butler*, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, *AJIL* 81 (1987), 331–347; *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 Law of the Sea Convention* (2005), 91–143; *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Ingrid Delupis*, Foreign Warships and Immunity for Espionage, *AJIL* 78 (1984), 53–75; *Erik Franckx*, The USSR Position on the Innocent Passage of Warships through Foreign Territorial Waters, *JMLC* 18 (1987), 33–65; *David Froman*, Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea, *San Diego LRev* 21 (1983), 625–689; *Shao Jin*, The Question of Innocent Passage of Warships: After UNCLOS III, *Marine Policy* 13 (1989), 56–67; *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of International Law of the Sea (1990); Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Daniel P. O'Connell*, *The International Law of the Sea*, vol. I (1982); *Bernard H. Oxman*, The Regime of Warships under the United Nations Convention on the Law of the Sea, *VJIL* 24 (1983), 809–863; *Ivan A. Shearer*, Problems of Jurisdiction and Enforcement Against Delinquent Vessels, *ICLQ* 35 (1986), 320–343

Documents: ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45

¹⁵ San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994).

¹⁶ US Navy Handbook (note 14), para. 2.1.3.

¹⁷ *David J. Bederman*, Congress Enacts Increased Protections for Sunken Military Craft, *AJIL* 100 (2006), 649–663.

¹⁸ *J. Ashley Roach*, Sunken Warships, *MPEPIL*, paras. 3, 46, available at: <http://www.mpepil.com>.

¹⁹ *David J. Bederman*, Rethinking the Legal Status of Sunken Warships, *ODIL* 31 (2000), 97–125.

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I. Purpose and Function

Art. 30 outlines the steps that may be taken to ensure that warships comply with the requirements of any laws and regulations that the coastal State may adopt concerning passage through the territorial sea under Art. 21. If a warship violates these requirements, the coastal State may request compliance and, if this is disregarded, require the warship to leave the territorial sea immediately. This article only refers to laws in relation to passage through the territorial sea. Compliance with criminal laws concerning activities on-board the warship or matters related to civil jurisdiction cannot be pursued through this article. Art. 30 is silent on what, if any, further steps can be taken to secure compliance, although Art. 25 may be assumed to apply. Flag State responsibility for any loss or damage to the coastal State that results from non-compliant behaviour by the warship is dealt with separately in Art. 31.¹

II. Historical Background

In the early part of the 20th century, the question of the right of warships to innocent passage remained contentious. Only once warships were recognised as enjoying the right of innocent passage did the question of compliance with rules concerning passage arise. Art. 30 has its origins in Art. 23 of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ), which provides that

'[i]f any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea'.

Initial proposals at the 1973 Session of the Sea-Bed Committee followed this basic approach.² Art. 23 CTSCZ was reiterated with minor drafting changes in a UK proposal and a joint proposal by Bulgaria, German Democratic Republic, Poland and USSR.³ Other proposals advanced the right of the coastal State to suspend the passage of warships, and require warships to leave the territorial sea by a route determined by the coastal State.⁴ At the Third Session of UNCLOS III, these proposals were combined to form a draft article, which read:

¹ See *Barnes* on Art. 31 MN 4–5.

² Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 3, 10 (Art. 23); Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 35, 49 (Art. 35).

³ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 185 (Art. 26 (1)); Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.26 (1974), OR III, 203, 205 (Art. 27).

⁴ Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192, 194 (Art. 17); Sea-Bed Committee, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 and CORR. 1 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 91; was replaced by Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 198 (Art. 12 (4)).

‘If any warship does not comply with the laws and regulations of the coastal State relating to passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may suspend the right of passage of such warship and may require it to leave the territorial sea by such safe and expeditious route as may be directed by the coastal State.’⁵

- 4 This was subsequently adopted as Art. 30 in the Informal Single Negotiating Text, but without any reference to the suspension of warship passage.⁶ Further modifications were made at the Fourth Session in 1976 as a result of several States expressing dissatisfaction with the requirement for a non-compliant warship to leave the territorial sea ‘by such safe and expeditious route as may be directed by the coastal State’.⁷ It was considered that the officer in command of a ship was in the best place to decide the appropriate route for departure of the territorial sea, and that warships could not be directed by States other than the flag State. As a result, the phrase was replaced by the word ‘immediately’ in the Revised Single Negotiating Text.⁸ There were no further substantive changes to the text which was adopted in the draft Convention.

III. Elements

1. ‘comply with the laws and regulations of the coastal State’

- 5 The immunity of warships, as provided for under Art. 32, means that coastal States may not exercise enforcement jurisdiction against such vessels in the territorial sea. However, this does not exempt warships from prescriptive jurisdiction: Warships are under a duty to comply with the requirements of innocent passage and such laws and regulations adopted by the coastal State in accordance with Art. 21.
- 6 It is important to distinguish between violation of coastal State laws and regulations (→ Art. 21) and non-innocent passage (→ Art. 19) because there are different sanctions, or at least stages in the process of responding to each breach.⁹ A violation of coastal State law does not necessarily render the warship passage non-innocent. Only violations of coastal States laws that are also conditions of innocent passage would render passage non-innocent. This includes infringement of customs, fiscal, immigration and sanitary laws and regulations (Art. 19 (2) (g), Art. 21 (1)(h)), pollution (Art. 19 (2)(h); Art. 21 (1)(f)), fishing activities (Art. 19 (2)(i); Art. 21 (1)(d)-(e)), and research activities (Art. 19 (2)(j); Art. 21 (1)(g)).¹⁰ Warships are only entitled to be present in third States territorial seas when exercising the right of innocent passage, so in such cases the coastal State is entitled to take steps in accordance with Art. 25, although this is essentially limited by Art. 30 to steps to remove the warship from the territorial sea. Of course, there is nothing in principle to prevent the coastal State from requesting the warship to ensure its passage remains innocent since its protective rights under Art. 25 are discretionary. In contrast, breaches of coastal State navigation and conservancy laws (i.e. Art. 21 (1)(a-c)) do not immediately result in non-innocent passage. In such cases, according to Art. 30, the coastal State is limited, in the first instance to informing the warship of the breach and giving it the opportunity to correct its conduct. Only if the warship fails to comply with this request can the

⁵ UNCLOS III, Consolidated Text on Innocent Passage, UN Doc. C.2/Blue Paper No.14 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IV (1982), 153, 159 (Provision 44).

⁶ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II, OR IV, 152, 157 (Art. 30).

⁷ Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 255.

⁸ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 158 (Art. 29).

⁹ David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, San Diego LRev 21 (1983), 625, 664.

¹⁰ See *Barnes* on Art. 19 MN 18–24.

coastal State require it to leave the territorial sea. This order may be issued regardless of whether or not the warship passage is innocent.

2. 'the coastal State may require it to leave the territorial sea immediately'

Art. 30 does not specify what further steps the coastal State may take to secure compliance with its request. Neither does the International Law Commission's Commentary on Art. 25 CTSCZ provide any assistance.¹¹ NORDQUIST *et al.* observe that requiring a warship to leave the territorial sea immediately is the 'sole recourse available to a coastal State'.¹² OXMAN notes this is the classic remedy available to the State lacking enforcement jurisdiction, and regards it equivalent to the remedy of expulsion from territory for misbehaving diplomats.¹³ However, this limitation may simply be a conventional one and other forcible measures may be taken under general international law, including countermeasures.

Art. 25 permits steps to be taken to prevent passage which is non-innocent. The key issue is then whether a warship's failure to comply with a request to leave the territorial sea renders its passage non-innocent. This interpretation is one that is open to the coastal State, although it seems reasonable to require some investigation of the situation by the coastal State, and to allow the warship an opportunity to correct its conduct. CHURCHILL & LOWE take the position that the coastal State 'may use any force necessary' to compel a warship to leave the territorial sea.¹⁴ Likewise, DELUPIS regards Art. 30 as appropriate for milder cases of violations of local laws, and that force may be used in more serious cases.¹⁵ If force is permissible, then it must necessarily comply with general requirements of necessity and proportionality. It is suggested that coastal States should first consider other appropriate measures, such as diplomatic protest before resorting to force.

3. Prior Notification

Neither Art. 30, nor any other provision in Part II, Section 3, requires the prior notification or authorization of entry into the territorial sea by warships for the purpose of exercising the right of innocent passage. The issue was vigorously debated during the conference proceedings.¹⁶ Although no consensus was reached on the matter, progress was secured by side-stepping the issue, leaving the matter to be addressed implicitly in Art. 19 on the meaning of innocent passage and Art. 25 on the rights of protection of the coastal States, as well as general international law. Prior authorisation indicates that coastal States may control the enjoyment of the right of innocent passage, and this is contrary to the other provisions of Section 3. Notification is not incompatible with the regulatory authority of the coastal State, under Art. 21, but remains indeterminate as a matter of conventional law. Hence, questions of prior notification should be considered according to the practice of States in light of the general provisions on innocent passage.¹⁷

¹¹ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GOAR 11th Sess. Suppl. 9, 12, 23 (Art. 25).

¹² Nordquist/Nandan/Rosenne (note 7), 255; see also *Ivan A. Shearer*, Problems of Jurisdiction and Enforcement Against Delinquent Vessels, ICLQ 35 (1986), 320, 325.

¹³ *Bernard H. Oxman*, The Regime of Warships under the United Nations Convention on the Law of the Sea, VJIL 24 (1983), 809, 817.

¹⁴ *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 99; also *Daniel P. O'Connell*, The International Law of the Sea, vol. I (1982), 297.

¹⁵ *Ingrid Delupis*, Foreign Warships and Immunity for Espionage, AJIL 78 (1984), 53, 73.

¹⁶ See *William E. Butler*, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, AJIL 81 (1987), 331-347; *Froman* (note 9), 639 *et seq.*; *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of International Law of the Sea (1990), 142 *et seq.*; *Erik Franckx*, The USSR Position on the Innocent Passage of Warships through Foreign Territorial Waters, JMLC 18 (1987), 33-65; *Shao Jin*, The Question of Innocent Passage of Warships: After UNCLOS III, Marine Policy 13 (1989), 56-67.

¹⁷ *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 Law of the Sea Convention (2005), 91, 111-114.

Article 31

Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes

The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.

Bibliography: James Crawford/Alain Pellet/Simon Olleson (eds.), *The Law of International Responsibility* (2010)

Documents: ILC, Report of the International Law Commission: Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011), GAOR 66th Sess. Suppl. 10, 54–68 (DARIO); ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex

Cases: ECtHR, *Behrami and Behrami v. France, Saramati v France, Germany and Norway*, Admissibility, Decision of 2 May 2007, available at: <http://hudoc.echr.coe.int/webservices/content/pdf/001-80830?TID=knhm-sepxft>; Gerechtshof, *Mustafic et al. v. the Netherlands*, Judgment of 5 July 2011, LJN: BR5386, available at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386>; Gerechtshof, *Nuhanovic v. Netherlands*, Judgment of 5 July 2011, ILR 153, 467; ITLOS, *The 'ARA Libertad' Case* (Argentina v. Ghana), Order of 12 December 2012, ITLOS Reports (2012), 332; Mexico/USA General Claims Commission, *Teodoro García and M. A. Garza (United Mexican States) v. United States of America*, 23 November 1926, RIAA IV, 119

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I. Purpose and Function

- 1 Art. 31 provides that the flag State shall be responsible for any loss or damage caused by warships or State vessels operated for non-commercial purposes resulting from non-compliance with the laws of the coastal State relating to passage through the territorial sea. It further extends this responsibility to non-compliance with other provisions of the Convention or rules of international law. This is noted as an exception to the general immunity of warships as described in Art. 32.¹

II. Historical Background

- 2 Until UNCLOS III, there was no conventional rule recognising the international responsibility of the flag State for any loss or damage to the coastal State resulting from non-compliance by a warship or public vessel. The 1958 Geneva Conventions were silent on this matter.
- 3 Art. 31 originated in a proposal by Fiji at the 1973 Sea-Bed Committee. This noted the responsibility of the flag State for non-compliance with coastal State laws, or provisions of the Convention or rules of international law, and which caused any damage to the coastal State, including its environment, facilities and property.² This was uncontroversial and was

¹ See generally *Barnes* on Art. 32.

² Sea-Bed Committee, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 and Corr. 1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-III), 91, 98 (Art. 14), was replaced by Second

followed in 1974, at the Second Session of UNCLOS III, by three similar proposals that contained only minor textual differences, including references to 'international responsibility', rather than 'liability'.³ The Revised Single Negotiating Text, as agreed in 1976, contained further minor drafting changes.⁴ It also omitted any reference to the objects of damage. This was unnecessary given the existing reference to 'any loss or damage'.

III. Elements

1. 'flag State shall bear international responsibility'

Art. 31 confirms flag State responsibility for the conduct of its warships and public vessels not engaged in commercial operations. It does not detail the mode of responsibility, leaving this to be determined by general rules on State responsibility.⁵ Of note is Art. 304, which provides that:

'provisions of the Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.'

Under general international law the acts of armed forces are attributable to the State.⁶ It is possible for warships to act under the control of another State or agency such as the North Atlantic Treaty Organization (NATO), especially during peacekeeping or maritime security operations.⁷ In principle, such entities may incur responsibility for the acts of warships where they have effective control over the conduct of the vessel.⁸ However, courts have been cautious about finding a lack of control by the State of nationality of armed forces in situations where there are multiple entities with control over an operation.⁹

2. Extent of Responsibility

Responsibility may arise for breaches of laws and regulations on innocent passage, namely Art. 21.¹⁰ Art. 31 is paralleled by Art. 42 (5)¹¹ concerning responsibility in respect of transit passage through straits. Although Art. 31 is located in the section on the territorial sea, it is relevant to the rest of the Convention, hence the general reference to other provisions of the

Committee UNCLOS III, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 198 (Art. 14).

³ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 185 (Art. 28); Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192, 194 (Art. 19); UNCLOS III Fiji: Draft Articles (note 2), 198 (Art. 14).

⁴ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1975), OR IV, 152, 158 (Art. 30).

⁵ See ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex (ASR); see generally, James Crawford/Alain Pellet/Simon Olleson (eds.), *The Law of International Responsibility* (2010).

⁶ See Mexico/USA General Claims Commission, *Theodor Garcia and M. A. Garza (United Mexican States) v. United States*, 23 November 1926, RIAA IV, 119, 132.

⁷ On the attribution of conduct to international organizations, see Chapter II of the Articles on the Responsibility of International Organizations: ILC, Report of the International Law Commission: Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011), GAOR 66th Sess. Suppl. 10, 54-68 (DARIO).

⁸ ECtHR, *Behrami and Behrami v. France, Saramati v France, Germany and Norway*, Admissibility, Decision of 2 May 2007, paras. 132-141; Art. 6 ASR.

⁹ See Gerechtshof, *Mustafic et al. v. the Netherlands*, Judgment of 5 July 2011, LJN: BR5386, available at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386>; Gerechtshof, *Nuhanovic v. Netherlands*, Judgment of 5 July 2011, ILR 153, 467.

¹⁰ For further information, see *Barnes* on Art. 21.

¹¹ See *Jia* on Art. 42 MN 19-20.

Convention.¹² Of relevance are the seizure of suspected pirate vessels without adequate basis in law (→ Art. 106), the unfounded exercise of right of visit (→ Art. 110 (3)), and the unjustified interdiction of vessels in hot pursuit (→ Art. 111 (8)). The reference to international law reaffirms that potential responsibility is not merely limited to conventional rules.

Article 32
Immunities of warships and other government ships operated for non-commercial purposes

With such exceptions as are contained in subsection A and in Articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Bibliography: *James Crawford*, Execution of Judgments and Foreign Sovereign Immunity, AJIL 75 (1981), 820–869; *Ingrid Delupis*, Foreign Warships and Immunity for Espionage, AJIL 78 (1984), 53–75; *Hazel Fox*, The Law of State Immunity (2008); *Don W. Greig*, Specific Exceptions to Immunity under the International Law Commission’s Draft Articles, ICLQ 38 (1989), 560–588; *Douglas Guilfoyle*, Article 16, in: Roger O’Keefe/Christian Tams (eds.), The United Nations Convention on the Immunities of States and their Property: A Commentary (2013), 259–276; *Bernard H. Oxman*, The Regime of Warships under the United Nations Convention on the Law of the Sea, VJIL 24 (1983), 809–863; *Thamarappallil Kochu Thommen*, Legal Status of Government Merchant Ships in International Law (1962); *Xiaodong Yang*, State Immunity in International Law (2012)

Documents: US Navy, The Commander’s Handbook on the Law of Naval Operations (2007)

Cases: *The Charkeih* [1873] LR 4 A&E 59 (UK); *The Prins Frederik* [1820] 4 Dods. 451 (UK); *The Parlement Belge* [1880] 5 PD 197 (UK); ITLOS, *The ‘ARA Libertad’* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332; *Chung Chi Cheung v. The King*, [1938] 4 All ER 786 (UK); *Rechtsbank Amsterdam* (District Court of Amsterdam), *Wijsmuller Salvage BV v. ADM Naval Services*, Judgment of 19 November 1987, NYIL 20 (1989), 294; *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)

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I. Purpose and Function

- 1 This article restates the immunity under general international law for warships and vessels operated for government non-commercial purposes. This position continues except as provided for in Arts. 30 and 31.
- 2 It is not clear if Art. 32 regulates immunity or merely references an existing rule of general international law. It can be contrasted with Art. 95,¹ which clearly stipulates that warships on the high seas enjoy complete immunity from States other than the flag State. Art. 32 is more complex since it does not explicitly state a right of immunity, but rather relies upon the existence of a general right and subjects this to certain conventional exceptions. This aspect of Art. 32 was at issue in the ‘ARA Libertad’ Case.² The Tribunal decided that it had *prima*

¹² See for example the Tribunal’s remarks in respect of Art. 31 in the ITLOS, *The ‘ARA Libertad’ Case* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332, para. 64.

¹ See Guilfoyle on Art. 95 MN 5–7.

² ITLOS, *The ‘ARA Libertad’ Case* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332.

facie jurisdiction to deal with provisional measures, since Ghana and Argentina were in dispute about the meaning of Art. 32, but it did not explicitly determine the meaning of Art. 32.³ However, Judges WOLFRUM and COT issued a strongly worded disagreement with the Tribunal's reasoning in their Joint Separate Opinion, which explicitly categorized Art. 32 as a rule of reference and not a rule of incorporation.⁴

As indicated in the commentary on Arts. 30 and 31, the Convention does not except 3 certain public vessels from the prescriptive jurisdiction of the coastal State.⁵ As such, warships and other non-commercial government vessels remain subject to the requirements of innocent passage under Arts. 19-21, and coastal State laws and regulations adopted in conformity with Arts. 21 and 22.⁶ They also remain subject to the coastal State's right of protection against non-innocent passage under Art. 25.

II. Historical Background

Domestic courts have recognised the immunity of State-owned or operated vessels since 4 the early nineteenth century, although the precise scope and operation of this immunity was subject to variations arising from the peculiarities of domestic law.⁷ The first clear recognition of this immunity was made by the US Supreme Court in *The Schooner Exchange v. McFaddon*.⁸ This was followed in a number of important English cases including *The Prins Frederik*,⁹ *The Charkeih*,¹⁰ and *The Parlement Belge*.¹¹

In the early part of the twentieth century, a number of treaties dealing with the liabilities of 5 ships under private maritime law generally excluded warships and vessels on public service from their application.¹² A general regime relating to the immunity of State vessels was set forth in the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships.¹³ Although it received limited ratifications, it helped influence domestic practice on immunity of State vessels. The general principle of immunity was recognised by the Institut de Droit International Resolutions of 1928.¹⁴ When the 1930 Hague Codification Conference failed to produce an agreement on the law of the sea, the matter received no further attention until the International Law Commission began its preparatory work for UNCLOS I.

The Convention on the Territorial Sea and the Contiguous Zone (CTSCZ) was developed 6 against a background of increasing restrictions on the immunity of public vessels. In the light

³ *Ibid.*, paras. 62-66.

⁴ *The 'ARA Libertad' Case* (note 2), Separate Opinion of Judge Wolfrum and Judge Cot, paras. 38-46, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Wolfrum-Cot_E_corr.pdf.

⁵ See: *Barnes* on Art. 30 MN 5; *Barnes* on Art. 31 MN 4.

⁶ See *Bernard H. Oxman*, *The Regime of Warships under the United Nations Convention on the Law of the Sea*, VJIL 24 (1983), 809, 818; see also *Barnes* on Art. 21 MN 25.

⁷ See the commentary on draft Art. 19 in: ILC, Sixth Report on Jurisdictional Immunities of States and Their Property by Mr. Sompong Sucharitkul, Special Rapporteur, UN Doc. A/CN.4/376 and ADD. 1 and 2 (1984), 6, 53.

⁸ *The Schooner Exchange v. McFaddon*, 11 US 116 (1812).

⁹ *The Prins Frederik* [1820] 4 Dods. 451 (UK).

¹⁰ *The Charkeih* [1873] LR 4 A&E 59 (UK).

¹¹ Court of Appeal, *The Parlement Belge* [1880] 5 PD 197 (UK).

¹² See Art. 11 of the International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, 23 September 1910, CTS 212, 178; Art. 14 of the International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, 23 September 1910, UKTS 4 (1914) Cd. 6667; Art. 13 of the Geneva Statute on the International Regime of Maritime Ports, 9 December 1923, LNTS 58, 287.

¹³ International Convention for the Unification of Certain Rules concerning the Immunity of State-Owned Ships of 10 April 1926, LNTS 176, 199.

¹⁴ Art. 26 of *Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix*, available at: http://www.idi-ii.org/idiF/resolutionsF/1928_stock_02_fr.pdf.

of this, Art. 22 of the CTSCZ, from which Art. 32 originated, was designed to ensure nothing in the Convention would affect the immunity of government vessels not used for commercial purposes.¹⁵

- 7 The next significant developments were at UNCLOS. At the 1973 session of the Sea-Bed Committee, proposals by a group of eight States and a separate proposal from Malta largely repeated the wording from the CTSCZ.¹⁶ In 1974, a Fijian proposal introduced a new element on warships, providing that ‘nothing in these articles affects the immunities which warships enjoy under the provisions of these articles or other rules of international law’.¹⁷ As a result two parallel provisions on the immunity of warships and government vessels operated for non-commercial purposes formed the basis of discussion. The approach remained largely the same after the Second Session of UNCLOS III in 1974, and the two parallel provisions were used in the Main Trends Working Paper.¹⁸ Separate provisions were retained in the Informal Single Negotiating Text.¹⁹ At the Fourth Session in 1976, the two articles were amalgamated to form what is now Art. 32.²⁰ The text remained unchanged until its final adoption.
- 8 The immunity of certain public vessels has since been addressed in Art. 16 of the 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property. This provides a more detailed framework for immunity than Art. 32.²¹

III. Elements

1. ‘nothing in this Convention affects the immunities of’

- 9 Although Art. 32 is located in Part II, dealing with the territorial sea, it is also applicable to other maritime zones. The phrase ‘nothing in this Convention’ indicates that it is not limited to Part II. This interpretation is reinforced by the ITLOS decision in the ‘ARA Libertad’ Case, which found the provision to be at issue in a dispute concerning the arrest of a warship in internal waters, at least as regards providing a basis for jurisdiction.²² It further seems logical to hold it applicable to the contiguous zone, straits used for international navigation and archipelagic waters. However, given that Art. 95 specifically relates to immunity of vessels on the high seas (and by virtue of Art. 58,²³ the exclusive economic zone), it seems redundant to hold it applicable to the high seas.²⁴
- 10 Immunity only extends to relevant vessels, which for the time being are used on governmental non-commercial service. Although Art. 32 does not refer to any timeframe,

¹⁵ UNCLOS I, Preliminary Meetings, UN Doc. A/CONF.13/38 (1958), OR II, 66 (Art. 22).

¹⁶ Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-III), 3, 9 (Art. 20); Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-III), 35, 48 (Art. 31).

¹⁷ Sea-Bed Committee, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/AC.138/SC.II/L.42 and CORR. 1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-III), 91, 98 (Art. 14); was replaced by Second Committee UNCLOS III, Fiji: Draft Articles Relating to Passage through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), OR III, 196, 198 (Arts. 11 and 13).

¹⁸ UNCLOS III, Statement of Activities of the Conference During Its First and Second Sessions, UN Doc. A/CONF.62/L.8/REV.1 (1974), OR III, 93, 114.

¹⁹ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 157 (Arts. 28 and 31).

²⁰ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 158 (Art. 31).

²¹ Douglas Guilfoyle, Article 16, in: Roger O’Keefe/Christian Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013), 259–276.

²² *The ‘ARA Libertad’ Case* (note 2), paras. 62–63.

²³ See *Proelss* on Art. 58 MN 11–15.

²⁴ *Oxman* (note 6), 816.

this is implicit in the operational aspect of immunity. Such vessels cannot be boarded without the permission of the commanding officer. Vessels are immune from local taxes. Immunity applies to both the vessel and to personnel, weapons, stores or other property onboard the vessel.²⁵ As indicated in the United Nations Convention on the Jurisdictional Immunities of States and their Property, immunity may be invoked in respect of proceedings arising out of collisions and navigational accidents, salvage operations, repairs to the ship and other contracts relating to the vessel, and pollution incidents.²⁶

2. ‘government ships operated for non-commercial purposes’

Art. 32 refers to ‘government ships operated for non-commercial purposes’. This would appear to include vessels ancillary to warships, such as troop carriers, supply ships, and hospital ships. Other vessels serving a public function include: coastguard vessels, icebreakers, customs and immigration vessels, public operated hydrographic survey and research vessels, royal and presidential ships. Art. 32 adopts a functional approach, rather than one based upon the ownership of the vessel. This is in line with Art. I of the 1934 Protocol to the Brussels Convention, which refers also to ‘ships on charter to a State, whether for time or for voyage, while exclusively engaged on governmental and non-commercial service’. A proposal referring to ships ‘owned or operated by a State’ was rejected during the drafting of Art. 32.²⁷

A functional test for ‘non-commercial purposes’ may be difficult to apply in practice. For example, it may be questioned whether immunity extends to vessels carrying commercial cargo when engaged in technical assistance or emergency aid, or more general developmental activities.²⁸ In practice, this will depend upon how courts seized of a matter will construe the extent of immunity under domestic law. The doctrine of restrictive immunity may serve to restrict the extension of immunity to a wider range of vessels, at least in the absence of clear legislation or direction from the State.

3. Immunity of Vessels under General International Law

The immunity of warships and other non-commercial public ships is well established in international law.²⁹ Although the precise contours of immunity have varied over time, the general principle has been widely accepted in domestic legal proceedings.³⁰ It is a specific incidence of the general immunity of States from foreign courts’ adjudicative and enforcement jurisdiction. This flows from the equality and independence of States. As with State immunity in general, this serves to facilitate a State’s capacity to perform its public functions. International law supports a doctrine of restrictive immunity, meaning that immunity does not extend to private or commercial transactions.³¹ Given that Art. 32 is to be understood in light of general international law on immunity, care should be taken to appreciate trends in this dynamic area of law.

²⁵ US Navy, *The Commander’s Handbook on the Law of Naval Operations* (2007), para. 2.1.1; also Art. 1 of the Additional Protocol of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels, 24 May 1934, LNTS 179, 199, which refers to cargoes aboard vessels.

²⁶ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151 (Art. 16 (3)).

²⁷ UNCLOS III, Report of the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.57/REV.1 (1980), OR XIV, 114, 118 (Section VI).

²⁸ *Don W. Greig*, Specific Exceptions to Immunity under the International Law Commission’s Draft Articles, ICLQ 38 (1989), 560, 579–582.

²⁹ *Thamarappallil Kochu Thommen*, Legal Status of Government Merchant Ships in International Law (1962), 3–8; *James Crawford*, Execution of Judgments and Foreign Sovereign Immunity, AJIL 75 (1981), 820, 862; *Ingrid Delupis*, Foreign Warships and Immunity for Espionage, AJIL 78 (1984), 53, 55.

³⁰ *Chung Chi Cheung v. The King* [1938] 4 All ER 786 (UK); *Rechtsbank Amsterdam, Wijsmuller Salvage BV v. ADM Naval Services*, Judgment of 19 November 1987, NYIL 20 (1989), 294.

³¹ *Hazel Fox*, *The Law of State Immunity* (2008), 230–232; *Xiaodong Yang*, *State Immunity in International Law* (2012), 11–19.

Section 4 Contiguous zone

Article 33 Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

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Cases: *Church v. Hubbard* (1804), U.S. Supreme Court, 6 U.S. 2 Cranch 187 (1804); *Croft v. Dunphy* [1933] AC 156 (UK); *El Salvador v. Nicaragua*, Central American Court of Justice, Judgment of 9 March 1917, AJIL 11 (1917), 674; *Le Louis* [1817] 165 ER 1464 (UK); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Owners, Officers and Men of the Wanderer* (Great Britain v. United States), Award of 9 December 1921, RIAA VI, 68; *Petit Jules* [1850] 39 FOCP 2633 (UK); *Re Martinez* (1959), Court of Cassation (Italy), ILR 28 (1963), 170; *The M/V 'SAIGA' (No. 2) Case* (*Saint Vincent and the Grenadines v. Guinea*), ITLOS; Judgement of 1 July 1999, ITLOS Reports (1999), 10; *United States v. F/V Taiyo Maru*, 395 F.Supp. 413 (D. Me. 1975); *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985)

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I. Purpose and Function

- 1 Debates on law of the sea issues have always very much revolved around just one, albeit complex question: Do States dispose of jurisdictional prerogatives in waters adjacent to their coast, and if so, what is the nature of these prerogatives and for which purpose(s) and to what outer limits may they be exercised? Art. 33 is part of the *de lege lata* answer by which UNCLOS III undertakes to balance the various conflicting interests which oscillate in the tension between ‘control by the littoral State’ and ‘liberty of the sea’.
- 2 In this epic controversy, issues and problems regarding the area and subject-matter today covered by the single article contained in Part II Section 4 of the Convention, soon emerged into the very core of the intellectual battlefield. What caused such conflict was not so much the big issues of principle, which ‘waxed and waned through the centuries’¹ ever since the early 17th century when HUGO GROTIUS and JOHN SELDEN became the main protagonists in probably the first great doctrinal dispute in the history of international law.² Rather, what remained in limbo and caused increasing doubts was whether such a clear-cut but rather simple bipartite ‘all or nothing’ legal regime really provided an adequate response to the legitimate interests of all relevant stakeholders, in particular those of coastal States. And in fact, from its very beginning, the law of the sea landscape was very much dominated by questions concerning the grey area in between the Territorial Sea (“State Domain”) and the (remote parts of the) High Sea (“res omnium commune”). After a long (political and law-making) process, it was only in the second half of the twentieth century that in these ‘intermediate waters’ three zones, in which coastal States may possibly exercise jurisdiction for limited purposes only, gained general recognition: The contiguous zone, the exclusive economic zone (EEZ) (→ Part V) and the continental shelf (→ Part VI). Whereas the latter two maritime zones have found a rather elaborate treatment in the Convention, the codification of the legal regime of the contiguous zone remains amazingly concise, and perhaps imprecise, thus leaving several issues open to debate.

II. Historical Background

1. The Origin of the Concept

- 3 The shaping of what today constitutes the legal essence of Art. 33 is not the result of a ‘battle of books’.³ This provision rather owes its existence to almost 300 years of claims and counter-claims by States, seconded and driven by hard, primarily economic facts: At times, smuggling seriously impaired revenues from customs, offshore fishing by ships under foreign flags endangered local income and tax revenues, the uncontrolled influx of merchandise constituted a considerable threat to national health and economic stability, unregulated immigration, for various reasons, ran counter to national politics, and finally, the approach of unrecognized vessels constituted a potential threat to national security.
- 4 Although history knows of a number of early attempts to bring parts of the sea beyond a generally accepted narrow off-shore belt under the control or jurisdiction of the littoral State,⁴ with good reasons one may fix the origins of the development of the modern concept

¹ Daniel P. O’Connell, *The International Law of the Sea*, vol. I (1982), 1.

² Triggered by *Hugo Grotius*’ seminal work ‘*The Freedom of the Seas*’ (1608) and countered by *John Selden*’s ‘*De mare clausum*’ (1635, translated 1663).

³ The expression ‘*bataille des livres*’ for the Grotius/Selden controversy was coined by *Ernest Nys*, *Les origines du droit international* (1894), 262.

⁴ E.g. Venice in the Adriatic, symbolized by an annual picturesque ceremony of ‘espousing’, see *Giulio Pace*, *De dominio maris adriatico* (1619); Genoa on part of the Ligurian Sea, see *Petri B. Borgo*, *De dominio serenissimae genuinsis reipublica in mari ligustico* (1641); for details *Jan Hendrik W. Verzijl*, *International Law*

of the contiguous zone to the early eighteenth century, when Great Britain unilaterally claimed functional legislation for very precise purposes in clearly defined waters adjacent to its territorial sea. The 1719 Act for Preventing Frauds and Abuses in the Public Revenues of Excise, Customs, Stamp Duties, Post Office, and House Money, effective as of 1 August 1720, was the first⁵ in a whole series of legislation on the subject and authorized the search and seizure of small-size⁶ smuggling ships 'found at anchor or hovering within two Leagues from the Shore'.⁷ It is interesting to note that in 1802 a statutory provision extended the respective distance to eight leagues,⁸ thus bringing it exactly to the 24 NM line which today constitutes the outermost limit of the contiguous zone, in accordance with. Art. 33 (2).

From an international law perspective, these so-called Hovering Acts⁹ always stood on 5 shaky ground, as did all other forerunners of the legal regime enshrined in Art. 33.¹⁰ As early as 1817, the most carefully argued landmark decision in the *Le Louis*¹¹ case vigorously rejected the escalating State practice of visitation and search of foreign ships on the open sea as running contrary to positive international law. Furthermore, the court stated that it could not find any proper legal basis for 'our hovering laws, which [...] within certain limited distances more or less moderately assigned, subject foreign vessels to such examination', and was thus constrained to resort to the rather sweeping concept of 'the common courtesy of nations'.¹² By the mid-nineteenth century, ancient claims under the Hovering Acts encountered not only sharp criticism by scholars,¹³ but also growing resistance by other States. In the case of the seizure in 1850 of the French smuggling lugger *Petit Jules* 23 miles off the Isle of Wight, the British Government also saw itself deprived of the hitherto steadfast support on the part of its own legal authorities.¹⁴ Finally, and probably most importantly, 'that very embarrassing international question'¹⁵ proved more and more obstructive to the hegemonic aspirations of the rising British Empire itself. Therefore, it is not surprising that at this stage the leading seafaring nation of the time, in a startling volte-face, not only gave up its former claims to extra-territorial jurisdiction,¹⁶ but went on to become one of the most fervent

in Historical Perspective, vol. IV (1971), 11 *et seq.*; on the so-called King's Chambers and other claims to the Dominion of the British Seas, see still unmatched *Thomas W. Fulton, The Sovereignty of the Sea* (1911), offering amazingly rich insights into relevant 17th to 19th century State practice.

⁵ The very earliest acts on the subject from the first decade of the 18th century, such as 8 Anne cap. 7 (1709), still lacked any specification with regard to distance.

⁶ Up to a tonnage of 50 tons, see also *Christopher J. French, Eighteenth-Century Shipping Tonnage Measurements*, *Journal of Economic History* 33 (1973), 434 *et seq.*

⁷ 6 Geo. I cap. 21, XXXI. LXII; in the English usage, a league was equivalent to three nautical miles (5,556 km). For subsequent legislation see in particular Act of 1736 (now also applying to bigger ships), the preamble of which recalls 'several laws already made to prevent the unlawful importing and clandestine landing and running of prohibited and uncustomed goods' (9 Geo. II cap. 35); Acts of 1763, 1784, 1802, 1825 and 1833; for exact references, see *Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction* (1927), 77 *et seq.*

⁸ 42 Geo. III cap. 82; see also Chief Justice *Marshall* in *Church v. Hubbard* (1804), U.S. Supreme Court, 6 U.S. 2 Cranch 187, 234 (1804): "state's power to secure itself from injury may certainly be exercised beyond the limits of its territory" as an "universally acknowledged" principle.

⁹ *Bill Gilmore, Hovering Acts*, MPEPIL, available at <http://www.mpepil.com> (with further references).

¹⁰ For references from State practice, including in particular US liquor laws, *cf. Jessup* (note 7), 80 *et seq.* and for a concise analysis of the (U.S.) jurisprudence on the extent and limits of visit and search rights beyond the 3 mile limit under the National Prohibition Act: *Wesley A. Sturges, National Prohibition and International Law*, *Yale Law Journal* 32 (1923), 259–266.

¹¹ *Le Louis* [1817] 165 ER 1464 (UK).

¹² *Ibid.*

¹³ *Henry Wheaton, Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels Suspected to be Engaged in the African Slave-Trade* (1842), 145 *et seq.*: 'The assertion of Lord Stowell, that no [...] authority can be found [which gives any right of visitation or interruption over the vessels of foreign States] must be considered as conclusive against its existence'.

¹⁴ *Petit Jules* [1850] 39 FOCF 2633 (UK), the Queen's Advocate held that 'the seizure of the French vessel the "Petit Jules" upon the high seas [...] was not warranted by the Law of Nations'; see further *Alan V. Lowe, The Development of the Concept of the Contiguous Zone*, *BYIL* 52 (1981), 109, 111.

¹⁵ Then British Foreign Secretary Lord Palmerston, cited after *Lowe* (note 14), 112.

¹⁶ It was, however, only in the 1952 Customs and Excise Act (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), a complete re-write of the pertinent law, that the 'Hovering Acts' were formally repealed; in this regard incorrect *Hugo*

advocates of the three-mile rule as the only legitimate limit of maritime jurisdiction – and clung to this position for almost a century. The 1921 arbitral award in the *Wanderer* case is a perfect reflection of the Anglo-American position on the issue, and it was at the time highly influential for the law-making process in the international arena:

‘The fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement.’¹⁷

- 6 However, in the real world, this ‘fundamental principle’ had already become increasingly strained. British practice itself, shared by a number of other States, always allowed for at least two more exceptions to the strict three-mile interception limit: a) ships were held liable for unlawful acts committed by boats sent within that limit (doctrine of constructive presence),¹⁸ and b) ships suspected for good reasons of having violated local law may be pursued and arrested (doctrine of hot pursuit)¹⁹. Lively controversies among scholars and learned societies,²⁰ ambiguities in both national as well as international²¹ jurisprudence²², and finally – probably again most importantly – State practice far from uniformity, had always kept the entire issue on the international legal and political agenda.²³ By the 1930s, the still somewhat contourless concept of a ‘contiguous zone’, e.g. a zone of jurisdiction for limited purposes adjacent to the territorial sea, had become widely accepted in academia and jurisprudence.²⁴ However, a number of important maritime States, including *inter alia* Great Britain and Japan, were not (yet) prepared to make the first step on the path into a legal future, which would see a scramble for State control over great parts of the open sea, hitherto free for the use of all. Thus, the state of law on the matter remained unsettled, and no ‘international custom, as evidence of a general practice accepted as law’ could be established yet.²⁵ On the contrary, late nineteenth and early twentieth century State practice witnessed a confusing variety of claims of different width to maritime areas adjacent to the territorial zone for security reasons, customs control and other purposes.²⁶

Caminos, Contiguous Zone, MPEPIL, para 4 (available at: <http://www.mpepil.com>), who holds that these Acts were already ‘repealed in 1876 by the Customs Consolidation Act’, available at: <http://www.mpepil.com>.

¹⁷ *Owners, Officers and Men of the Wanderer* (Great Britain v. United States), Award of 9 December 1921, RIAA VI, 68, 71; probably the most prominent of such treaty exceptions was the Convention between the United States of America and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, 23 January 1924, LNTS 27, 182; similar treaties followed e.g. with Chile on 27 May 1930 and with Poland on 19 June 1930, where the Contracting Parties ‘declare their firm intention to uphold the 3 marine miles principle’.

¹⁸ See with complete references *Nicholas M. Poulantzas*, *The Right of Hot Pursuit in International Law* (2nd edn. 2002), 243 *et seq.*

¹⁹ *Ibid.*; and see further *Guilfoyle* on Art. 111 MN 4–14.

²⁰ The ‘Institut de Droit International’ dealt with the subject since 1891, see Hamburg Session, *Annuaire* 11 (1891), 133 *et seq.*; and the International Law Association since its 27th Session (Paris, 1912, *ILA Report* (1912), 81 *et seq.*).

²¹ In favor of the existence of a ‘contiguous zone’, see Central American Court of Justice, *El Salvador v. Nicaragua*, Judgment of 9 March 1917, AJIL 11 (1917), 674, 706; and already in 1891 *Manchester v. Massachusetts*, 139 U.S. 240, 258.

²² The contiguous zone does not hold a prominent place in the more recent jurisdiction of national and international Courts. The quite extensive listing of ICJ rulings on the subject by *Barbara Kwiatkowska*, *Decisions of the World Court Relevant to the UN Convention on the Law of the Sea: A Reference Guide* (2010), 33–34, is somewhat misleading, since references provided here are primarily to opinions of Judges (Individual/Separate/Dissenting) or statements of Counsel before the Court rather than to actual findings of the Court itself.

²³ For a meticulous account, see *Lowe* (note 14), 133 *et seq.*

²⁴ See e.g. the *obiter dictum* of the Privy Council in *Croft v. Dunphy* [1933] AC 156 (UK): ‘[...] it has long been recognized that for certain purposes, notably those of policy, revenue, public health, and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.’; see also *James L. Brierly*, *The Doctrine of the Contiguous Zone and the Dicta in Croft v. Dunphy*, BYIL 14 (1933), 155 *et seq.*; it is reported that the British Foreign Office tried (in vain) to have this passage omitted before the Award was officially published in the *Law Reports*, cf. *Lowe* (note 14), 149.

²⁵ Cf. Art. 38 Statute of the Permanent Court of International Justice and Art. 38 Statute of the International Court of Justice respectively.

²⁶ *Caminos* (note 16), MN 6 *et seq.*

2. Legislative History

a) **The Hague Codification Conference (1930).** In a questionnaire for the Conference's agenda item 'Territorial Sea'²⁷, States were asked to answer *inter alia* the following questions:

'Does the state claim to exercise rights outside the territorial waters subject to its sovereignty? If so, what precisely are those rights? On what are they founded? Are they claimed within a belt of fixed width or within an indeterminate area of the waters adjacent to the coast but outside the territorial sea? Does the state admit any claim by any foreign state to exercise such rights outside the territorial waters subject to the sovereignty of the latter state?'²⁸

Whereas some States, among them notably Great Britain and the United States, took an unambiguously negative stance on the matter ('there is no jurisdiction outside the 3-mile limit'), several others were more sympathetic to the proposal made by the Rapporteur, WALTHER SCHÜCKING, according to which '[b]eyond the zone of sovereignty, states may exercise administrative rights on the ground either of custom or of vital necessity. There are included the rights of jurisdiction necessary for their protection.'²⁹ This draft, though rudimentary, anticipated essential elements of the future 'contiguous zone.'³⁰ Despite long and learned discussions,³¹ it proved impossible to reconcile (often diametrically opposed) positions on crucial issues. Reaching far beyond the fundamental 'to be or not to be'-question, disaccord included namely the list of matters of possible rights of States in the envisaged zone as well as the nature of rights, which might eventually be conceded to littoral States (only enforcement or also legislative jurisdiction), and finally, the width of the zone under discussion.

Although the 1930 Conference produced no immediate results on the issue, but rather explicitly postponed the elaboration of a draft convention to a later date,³² intellectual work done both in the preparatory phase and during the Conference itself, was not at all wasted: The discussions not only identified the general direction in which the law would very likely develop³³ and had a strong influence on subsequent State practice,³⁴ but also provided most valuable material for future deliberations on the subject.³⁵

²⁷ For a summary of the Conference and its results, see *Hunter Miller*, The Hague Codification Conference, AJIL 24 (1930), 674 *et seq.*; for important preliminary studies with an extensive account of State practice, see Harvard Law School, Draft Convention and Comments on Territorial Waters, AJIL 23, Suppl. No. 2 (Codification of International Law) (1929), 243, 333 *et seq.*

²⁸ League of Nations, LN Doc. C.74.M.39.1929.V (1929), 22; replies printed in: AJIL 22, No. 1 Suppl. (Codification of International Law) (1928), 8 *et seq.*

²⁹ League of Nations, LN Doc. C.196.M.70.1927.V (1927), Annex to Questionnaire No. 2.

³⁰ Although occasionally used already before, this terminology gained general recognition at the 1930 Conference only; *Gilbert Gidel*, *Le droit international public de la mer: Tome 3: La mer territoriale et la zone contiguë* (1934, reprinted 1981), 361 *et seq.*

³¹ League of Nations, LN Doc. C.351(b).M.145(b).1930.V (1930), 11 *et seq.*; the British Delegate *Sir Maurice Gwyer* complained about the strong academic presence of no less than thirty professors of law: 'The presence of these learned Gentlemen' being 'curiously ineffective in debate and lacking readiness and tactical sense [...] is not always conducive to the expeditious conduct of business.', cited after *Lowe* (note 14), 146. *Gilbert Gidel* (France), however, was expressly exempted from this critique. The lesson was learnt for future conferences on the topic.

³² League of Nations, LN Doc. C.351(b).M.145(b).1930.V (1930), 221 (Appendix 4).

³³ 'The states which did not express a desire for a contiguous zone for one purpose or another formed a small minority'; *Jesse S. Reeves*, The Codification of the Law of Territorial Waters, AJIL 24 (1930), 486, 494.

³⁴ Cf. e.g. Declaration of Panamá of 3 Oct. 1939, Consultative Meeting of Foreign Ministers of the American Republics, AJIL 34, Suppl. No. 1 (1940), 1, 17-19, which proclaimed a non-combatant zone of vast extent in waters adjacent to the American continent. Highly controversial, the measure was justified with the 'principle of protective jurisdiction', which was deemed to be firmly anchored in the *opinio juris*, see *Philip Marshall Brown*, Protective Jurisdiction, AJIL 34 (1940), 112, 114 *et seq.*, with express reference to the 1930 conference and earlier statements of scholars and learned societies.

³⁵ The 1956 ILC commentary on Art. 66 (Contiguous Zone) makes twice explicit reference to the 'Preparatory Committee of The Hague Codification Conference (1930)', see ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 39-40.

- 10 b) **The International Law Commission and UNCLOS I (1958).** Immediately after World War II, the international legal community resumed work on a new and comprehensive law of the sea regime. At its very First Session (1949), the International Law Commission (ILC) took up the topic of the high seas, including the issue of possible rights of States in a zone adjacent to the territorial sea.³⁶ Clearly basing its work on the presumption that the concept of the contiguous zone as such had already grown into the corpus of customary international law,³⁷ at its 1950 (Second) Session already the Commission agreed as follows:

‘CONTIGUOUS ZONES. 195. The Commission took the view that a littoral State might exercise such control, as was required for the application of its fiscal, customs and health laws, over a zone of the high seas extending for such a limited distance beyond its territorial waters as was necessary for such application.’³⁸

- 11 Other proposals, at least in part heralding the upcoming scramble for extended State control over the oceans, were in particular directed at a broadening of the prerogatives of coastal States to further areas (fishing, conservation of living resources, immigration and emigration, security).³⁹ However, none of these proposals found a majority in the Commission⁴⁰ and it was thus the (rather narrow) substance of the early 1950 accord which eventually entered the 1956 draft text for presentation to the Geneva Conference (UNCLOS I):

‘1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.’⁴¹

- 12 An attempt by the British Government to further narrow the State’s enforcement jurisdiction in the zone by omitting the right to ‘punish’ (para. 1 (b)) remained unsuccessful.⁴² Indeed, in conceding to British pressure, the Commission would have inevitably marginalized the entire concept, not only from a legal, but probably even more so from a policy perspective.
- 13 At the time, the granting of a twelve mile ‘control’ zone (also) served as some sort of outlet for the increasing pressure of States to extend their offshore jurisdiction, in particular through the enlargement of their territorial seas. However, the Commission made it unambiguously clear that it was not prepared to allow the concept of a zone of limited jurisdiction to encroach upon the traditional legal dichotomy of maritime spaces:

³⁶ Designation of *J. P. A. François* as Special Rapporteur, who eventually delivered six reports, which served as the basis for deliberations on the entire topic at seven consecutive ILC-Sessions (1950–1956).

³⁷ ‘International law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea.’, ILC Law of the Sea Articles with Commentaries (note 35), 39 (para. 1).

³⁸ ILC, Report of the International Law Commission, UN Doc. A/1316 (1950), GAOR 5th Sess. Suppl. 12, reproduced in: ILC Yearbook (1950), vol. II, 364, 384.

³⁹ ILC Law of the Sea Articles with Commentaries (note 35), 39–40 (paras. 4–7); for an insightful account of pre-1930 State practice regarding jurisdiction and control on the high seas adjoining territorial waters, see *Jessup* (note 7), 75 *et seq.*

⁴⁰ In the case of ‘security’, objections were raised in particular with regard to the ‘extreme vagueness’ of the term, which would ‘open the way for abuses’. And it was argued that ‘the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to secure the security of the State’, ILC Law of the Sea Articles with Commentaries (note 35), 39–40 (para. 4).

⁴¹ ILC Law of the Sea Articles with Commentaries (note 35), 39.

⁴² ‘[...] cannot accept that the coastal State is entitled to exercise anything more than purely preventive control in its contiguous zone.’, ILC, Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea adopted by the International Law Commission at its Seventh Session in 1955, UN Doc. A/CN.4/99/ADD.1 (1956), reproduced in: ILC Yearbook (1956), vol. II, 80, 88.

'It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal State [...].'⁴³

Although initially intended as an interim solution only (until a consensus was reached on the extent of the territorial sea),⁴⁴ reference to the baseline (para. 2) was to turn into a pioneering concept for the measurement of all maritime zones alike. The very idea underlying the manner in which the maximum breadth of the zone was to be defined is of enduring relevance, too: 'States which have claimed extensive territorial waters have in fact less need for a contiguous zone than those which have been more modest in their delimitation.'⁴⁵ However, the formula eventually adopted did nothing to clarify the exact nature and juridical character of the rights granted to the coastal State.⁴⁶ On this crucial point, the Commission was simply unable to produce a united view.

The manner in which the contiguous zone regime was shaped at the 1958 Geneva Conference (UNCLOS I) to some extent foreshadowed the rather non-transparent UNCLOS III negotiation process.⁴⁷ When being addressed by the Conference's First Committee, ILC-Draft Art. 66 suffered considerable changes, in particular resulting from a Polish amendment, adopted by a narrow majority of 33 to 27 with 15 abstentions.⁴⁸ However, following a last-minute American proposal,⁴⁹ the plenary, with the overwhelming majority of 60 votes to 0 with 13 abstentions, reversed the First Committee text and again came back to something very close to the original draft.

In its final version, Art. 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ) contained indeed but two new elements: The inclusion of 'immigration' into the catalogue of para. 1 (a) and – following a Yugoslav proposal – a new third paragraph:

'Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.'

Art. 24 (2) CTSCZ confirmed the ILC Draft's twelve mile limit, which – in view of the futile efforts to reach consensus on the maximum breadth of the territorial sea – may have been considered at the time as some sort of provisional or substitute arrangement for the determination of a generally acceptable outer limit of State control over coastal waters.

c) UNCLOS III (1982). Not surprisingly, the general recognition of a twelve mile territorial sea under Art. 3⁵⁰ and the emergence of the EEZ (→ Part V) raised the question whether these legal developments would not render the continued existence of a contiguous zone superfluous at all.⁵¹ It was also argued that an extension of the contiguous zone beyond the twelve mile limit would seriously encroach upon international communication and the freedom of naviga-

⁴³ ILC Law of the Sea Articles with Commentaries (note 35), 39 (para. 1).

⁴⁴ *Ibid.*, 40 (para. 9).

⁴⁵ *Ibid.*

⁴⁶ For a comprehensive account of views expressed and positions taken on this issue, see *Shigeru Oda*, *The Concept of the Contiguous Zone*, ICLQ 11 (1962), 131, 138 *et seq.*

⁴⁷ It is believed that the contiguous zone regime was earmarked to become part of a package deal on the territorial sea, a deal which in the end did not materialize, *cf. Lowe* (note 14), 165.

⁴⁸ For references, see First Committee UNCLOS I, Annexes, UN Doc. A/CONF.13/L.28/REV. 1 (1958), OR II, 116 *et seq.* (para. 26); the revised Article in its entirety, however, was adopted by the rather vast majority of 50 votes to 18 with 8 abstentions.

⁴⁹ First Committee UNCLOS I, Annexes, UN Doc. A/CONF.13/L.31 (1958), OR II, 126.

⁵⁰ See *Trümpler* on Art. 3 MN 11–13.

⁵¹ Very explicit in this sense e.g. the Cameroon position: '[T]he extension of the zone of national jurisdiction [...] rendered the concept of a contiguous zone void and superfluous', Second Committee UNCLOS III, 9th Meeting, UN Doc. A/CONF.62/C.2/SR.9 (1974), OR II, 122; similar Kenya, *ibid.*, 121; however, among African States, too, opinions were split on this issue, for full references, see *Nasila S. Rembe*, *Africa and the International Law of the Sea* (1980), 112 *et seq.*

tion.⁵² The prevailing view at the Conference, however, was that, first, an enlarged territorial sea would in no way compromise the rationale of creating an adjacent ‘prevent and punishment zone’, and second, the envisaged legal regime of the EEZ was intended to cover entirely different subjects, and that there were thus no overlap in substance between these two maritime zones.⁵³ Whereas the latter reasoning is rather convincing, this is not the case with the argument in favour of the coexistence of an enlarged territorial sea and a contiguous zone: As the essential *raison d’être* of the contiguous zone being the protection of the shore and its hinterland from certain threats, one may with very good reasons argue that the full sovereign powers accorded to coastal States in the new twelve mile zone do in effect provide adequate and sufficient space and means to accomplish these protective tasks.⁵⁴ With no more than 90 States – including a number of non-States Parties to UNCLOS⁵⁵ – having made a respective claim in the last more than 30 years, one may indeed wonder whether States really consider the contiguous zone as an essential element in the modern law of the sea.

- 18 In order to make the legal blueprint for the contiguous zone of Art. 24 CZSCZ fit into the new and complex law of the sea regime established by UNCLOS III, three modifications were deemed necessary:⁵⁶ (a) adaption of the maximum extent of the zone to 24 NM; (b) deletion of the words ‘of the high seas’; and (c) deletion of para. 3. Unfortunately, the Conference did not seize the opportunity to remove another major ambiguity, which lies in the phrase ‘within its territory or territorial sea’ used in both para. (a) and (b) of the provision.⁵⁷
- 19 The duplication of the maximum outer limit of the contiguous zone from 12 to 24 NM under Art. 33 (2) and the deletion of the reference to the ‘high seas’ in the provision’s headline were direct and imperative consequences of the evolution of the law of the sea: Given the extension of the territorial sea to 12 NM, the contiguous zone (delimited pursuant to Art. 24 (2) CTSCZ) would have otherwise lost virtually its entire territorial scope, and the recognition of the EEZ had – subject only to very special circumstances – resulted in a cutting of the contiguous zone’s former connection with the high sea (*cf.* Art. 86).⁵⁸
- 20 The motives for the omission of a provision regarding the delimitation of the contiguous zone between States with opposite of adjacent coasts (Art. 24 (3) CTSCZ) are far less clear: It has been suggested that – ‘since the nature of control to be exercised in the contiguous zone does not create any sovereignty over the zone or its resources’⁵⁹ – a possible overlap of control

⁵² Second Committee UNCLOS III, 30th meeting, UN Doc. A/CONF.62/C.2/SR.31 (1974), OR II, 234 (paras. 34–36 [German Democratic Republic]); for a brief account of the UNCLOS III discussion of the contiguous zone, *cf.* Louis B. Sohn/John E. Noyes, *Cases and Materials on the Law of the Sea* (2004), 447 *et seq.*

⁵³ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 270 (MN 33.4), with further references.

⁵⁴ Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 114 *et seq.*; this was obviously also the gist of the argument put forward by the representative of the (former) GDR during the negotiation process, UNCLOS III, Second Committee/30th meeting (note 51), 234 (para. 34); a position which was also shared by many African States, see *Rembe* (note 51), 113.

⁵⁵ For Cambodia, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1982_Decree.pdf; for Islamic Republic of Iran, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf; for Syrian Arab Republic, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/syr_2003e.pdf; for United Arab Emirates, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARE_1993_Law.pdf; for the USA, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1999_Proclamation.pdf; for Venezuela, see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VEN_1968_Decree.pdf.

⁵⁶ See also Janusz Symonides, *Origin and Legal Essence of the Contiguous Zone*, ODIL 20 (1989), 203, 207 *et seq.*

⁵⁷ See *infra*, MN 22; and Tommy T. B. Koh, *The Territorial Sea, Contiguous Zone, Straits and Archipelagos under the 1982 Convention on the Law of the Sea*, *Malaya Law Review* 29 (1987), 163, 174 *et seq.*, with further references.

⁵⁸ Although under no obligation whatsoever either to extend their coastal waters to the maximum breadth of twelve miles (Art. 3) or to claim an EEZ at all (Arts. 55 *et seq.*), with very few exceptions States have made use of their enlarged range of action to its fullest extent.

⁵⁹ Commonwealth Secretariat, *Ocean Management: A Regional Perspective – The Prospects for Commonwealth Maritime Cooperation in Asia and Pacific* (1984), 39; in the same vein, *Moritaka Hayashi*, *Japan: New Law of the Sea Legislation*, *IJMC* 12 (1997), 570, 572.

activities by two (or more) States was not only acceptable, but was *de facto* perfectly legally sound.⁶⁰ It is further argued that the lack of a provision corresponding to Art. 16 (publication and notification of claims to territorial waters), also aptly demonstrates the functional rather than territorial character of the legal regime enshrined in Art. 33. One may wonder whether this very academic approach really stands the test of practice, and States are actually poised to accept neighbouring States exercising control rights emanating from the legal regime of the contiguous zone on the ‘wrong’ side of a (virtual) median line. Hence, it is probably more correct (and realistic) to assume that the drafters of UNCLOS III, guided by the desire to streamline the voluminous text of the Convention, simply considered Arts. 74 and 75 a sufficient substitute for the deleted paragraph. And, in fact, the delimitation of the EEZ routinely includes delimitation of the contiguous zone, if only implicitly.⁶¹ However, although it is highly recommendable to establish one single delimitation line in disputed waters, the resource oriented quest for an ‘equitable solution’ (Art. 74 (1))⁶² is obviously not the most appropriate approach for the delimitation of the contiguous zone. One should thus seriously consider and, if occasion arises, possibly even give preference to the Yugoslav position on the issue:

‘Due to the fact that the provisions of the Convention relating to the contiguous zone (article 33) do not provide rules on the delimitation of the contiguous zone between States with opposite or adjacent coasts, [...] Yugoslavia considers that the principles of the customary international law, codified in article 24, paragraph 3 of the [1958 Convention], will apply [...]’.⁶³

The non-existence of a specific and explicit delimitation technique – or probably even 21 better so, a *de jure* equidistance rule – is regrettable: Due to the resource-oriented character of both the legal regimes governing the EEZ and the continental shelf, the delimitation of these maritime zones is all too often subject of disagreement and conflict between adjacent or opposite States. Lengthy and arduous negotiations are the best case scenario, belligerent confrontation the worst. Unfortunately, the question of the lateral or seaward delimitation of the contiguous zone – although virtually irrelevant from an economical or strategic perspective – becomes inextricably bound to the solution of conflicts which have in fact nothing to do with the (limited) purposes for which a contiguous zone may be established. Thus, unfortunately enough, in order not to prejudice or otherwise weaken their legal position in an actual or potential conflict over EEZ or continental shelf claim lines, the drawing of ‘mere’ contiguous zone lines, also remains undone.

III. Elements

1. Territorial Scope of the Contiguous Zone

According to Art. 33 (2), the maximum breadth of the contiguous zone is 24 NM 22 measured from the baselines (→ Art. 5; Art. 7; Art. 9; Art. 10; Art. 11; Art. 13). However, Art. 33 (1) further explains this maritime zone to comprise only a belt of water ‘contiguous to its territorial sea’ in a seaward direction. Since the vast majority of States has exercised their right under Art. 3 to claim a territorial sea of 12 NM, the *de facto* breadth of the contiguous zone thus amounts – as a rule – to no more than 12 NM.⁶⁴ A contiguous zone may not only

⁶⁰ See also *Umberto Leanza*, *Le régime juridique international de la méditerranée*, RdC 236 (1994), 127, 249.

⁶¹ As *Nuno Marques Antunes*, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (2003), 101 *et seq.*, rightly remarks: ‘State practice on contiguous zone delimitation is virtually negligible’, with an insightful critical discussion on the entire issue.

⁶² See *Tanaka* on Art. 74 MN 16–24.

⁶³ UN, UNCLOS Declaration made by Yugoslavia upon ratification of the UNCLOS, which has been explicitly confirmed upon succession by Serbia and Montenegro and again by Montenegro, available at: <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSOnline&msgid=XXI-6&chapter=21&Temp=mtmsg3&language=en#Participants>.

⁶⁴ From the outer limit of the territorial sea to the 24 NM line. The respective table published by the UN Division for Ocean Affairs and the Law of the Sea (‘Breadth of the zone in nautical miles: 24 nm’) is therefore

be proclaimed with respect to mainland territory and islands, but, in pursuance of Art. 121 (2),⁶⁵ but also around rocks (*argumentum e contrario* Art. 121 (3)).⁶⁶

2. Legal Status

- 23 The contiguous zone does not form part of State territory (*argumentum e contrario* Art. 2 (1)).⁶⁷ Therefore, unanimity prevails that in the maritime belt adjacent to its territorial sea, States may only exercise limited jurisdictional powers. Given the manner in which the provision is constructed, one must even come to the conclusion that in case of doubt a presumption exists in favor of the freedom of the seas and the non-existence of coastal State jurisdiction in that very zone. The nature of the jurisdictional prerogatives enumerated exhaustively in Art. 33 (1) (a) and (b), however, is less clear.⁶⁸ According to the unambiguous wording of the provision (and its forerunner Art. 24 CTSCZ), States are merely entitled to ‘prevent and punish’ infringements committed within the territory of the coastal State (including its territorial sea).⁶⁹ Accordingly, the legal regime established by Art. 33 accords no right whatsoever to extend to or enact specific regulations for the contiguous zone itself, let alone to enforce such regulations against those (ships) suspected of having violated them beyond the seaward limit of the territorial sea. A literal reading in accordance with generally recognized rules of interpretation (*cf.* Art. 31 (1) VCLT: ‘ordinary meaning rule’) leaves no doubt: UNCLOS allows for no legislative powers at all,⁷⁰ but only for a limited enforcement jurisdiction in the contiguous zone. The object and purpose underlying the normative concept of Art. 33 provides further support for this restrictive interpretation: Preventive and punitive measures were deemed to protect the (onshore) public order against very specific dangers emanating from inward or outward movement of ships. Maritime traffic in mere transit beyond the twelve mile limit was (and is) indeed very unlikely to have such a negative impact. Hence, although the presence of foreign naval vessels in the contiguous zone, for example of (disputed) islands and rocks, may well be perceived as a serious threat to national security, it certainly does not in itself constitute an infringement of the rights of the littoral State under Art. 33.⁷¹
- 24 However, State practice has not always been in compliance with this strict reading of the legal regime contained in Art. 33.⁷² Practice in national court is far from uniform in this

somewhat misleading (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf). See also Trümpler on Art. 3.

⁶⁵ *Cf.* Talmon on Art. 121 MN 53–55.

⁶⁶ *Cf.* e.g. Jonathan I. Charney, Rocks That Cannot Sustain Human Habitation, AJIL 93 (1999), 863, 866, with further references.

⁶⁷ See Barnes on Art. 2 MN 16–19.

⁶⁸ For a full discussion see Churchill/Lowe (note 54), 116–118.

⁶⁹ Lowe (note 14), 167, commenting on the 1958 formula, which suffered no changes at UNCLOS III, was undoubtedly right when concluding: ‘The final treaty text on the contiguous zone has a plain meaning when its words are read in their ordinary sense. This is that the “crimes” in relation to which the powers of prevention and punishment are given to the coastal State must be committed within the territory or territorial sea of the coastal State’.

⁷⁰ In this sense also John E. Noyes/William J. Clinton, Current Legal Developments: United States – Establishment of a 24-Mile US Contiguous Zone, IJMCL 15 (2000), 269, 271.

⁷¹ Although the passage on June 9, 2016 of a Chinese naval frigate through the contiguous zone in the area of the disputed Senkaku/Diaoyu Islands (*cf.* LOSIC No. 28, October 2008, 17: Chinese protest against depictions on charts deposited by Japan pursuant to Art. 16 (2) [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn61.pdf], Japanese reply: LOSIC No. 28, October 2008, 18) provoked an immediate and harsh diplomatic reaction from Japan (‘[...] vehemently protest[s] the Chinese side’s stance of unilaterally heightening tension’), under UNCLOS in general (and Art. 33 in particular) there was absolutely no basis to protest the presence of the Chinese vessel – and reference to hard law was thus carefully avoided by the Japanese authorities.

⁷² In fact, in the early years, e.g. before the entry into force of UNCLOS III, many unilateral claims to a contiguous zone did not (explicitly) differentiate between enforcement and legislative jurisdiction and claims to the latter were not unusual at all.

respect⁷³ and it also seems that the occasional claim to and exercise of some sort of (limited) legislative jurisdiction by coastal States in their contiguous zone has met with little resistance in the international community – in particular when generally outlawed activities are at stake (traffic in illegal narcotics, smuggling of arms, terrorist activities, (eco-) “piracy” etc.).⁷⁴ In recent years, the emergence of an ever denser network of international legal rules entitling States to intervene in offshore waters on behalf and in the common interest of all States (in relation to piracy, terrorism, pollution), may have contributed to a blurring of the rather clear conventional limits of jurisdictional prerogatives in the contiguous zone. A further obstacle to the rigorous observance of the limits of jurisdictional powers enshrined in Art. 33 results from the fact that, as the law stands today, States do in fact dispose of and exercise quite extensive legislative powers in the area at stake, deriving, however, from other legal regimes (EEZ and continental shelf, Arts. 56 and 70 respectively).⁷⁵ Hence, it has become increasingly difficult if not, at least in certain constellations, virtually impossible, to always apply a bright-line test for distinguishing permissible and impermissible legislative activities of States in the contiguous zone.⁷⁶ Potential disputes on this and other competence-related issues under Art. 33 fall within the scope of Part XV (Arts. 279–299).

One of these latter issues is the lingering ambiguity of the formula ‘within its territory or territorial sea’, used in both paras. (a) and (b). A more restrictive reading of these provisions confines the scope of application of para. (b) (‘jurisdiction to punish’) to outgoing ships. Since ‘no offence against the laws of the coastal State is actually being committed at the time’ of an intervention by coastal State authorities, to subject incoming maritime traffic heading towards the territorial sea to punitive measures (arrest, fines, imprisonment etc.) would, according to this view, be in blatant disregard of the clear wording of Art. 33 (1)(b).⁷⁷ Mere preventive measures under para. (a) – visit, search and eventually a refusal to let a suspicious ship enter the territorial sea – were thus the only lawful remedies the Convention has placed at the disposal of coastal States *vis-à-vis* ships not yet having entered the territorial sea. Protagonists of a more liberal interpretation advocate for the application of Art. 33 (1)(b) to outgoing and incoming ships alike, arguing both with the legislative history and a long-standing State practice, demonstrating a clear tendency towards the equal treatment of inbound and outbound traffic.⁷⁸ Whereas practical needs and State practice may possibly speak in favor of this liberal interpretation,⁷⁹ the problem with the legislative history is not

⁷³ A number of (controversial) rulings of national Courts even suggest that Art. 24 CTSCZ and Art. 33 may not have eliminated preexisting rights under customary law wider than those granted by the conventional regime, see e.g. *United States v. F/V Taiyo Maru*, 395 F.Supp. 413 (D. Me. 1975) (US); *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985) (US); Court of Cassation, *Re Martinez* (1959), ILR 28 (1963), 170 (Italy).

⁷⁴ See, however, *infra*, MN 34 on excessive claims relating to security.

⁷⁵ See also *Maria Gavouneli*, Functional Jurisdiction in the Law of the Sea (2007), 61 *et seq.*

⁷⁶ A more recent example of the uncertainties which still prevail in this respect is found in the ITLOS, *The M/V ‘SAIGA’ (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999, Separate Opinion of Judge Vukas, ITLOS Reports (1999), para. 3: ‘Guinea proclaimed also its contiguous zone; in the proceedings, it even claimed that the Saiga supplied gas oil to the fishing boats in its contiguous zone off the coast of the island of Alcatraz. However, in the course of the proceedings, its reference to its contiguous zone became sporadic and inconsistent. It finally based its claims only on its alleged rights to enforce its customs legislation in its exclusive economic zone’; and thus Judge Laing in his Separate Opinion, *ibid.*, para. 2 concludes: ‘[i]n view of the uncertainty attending Guinea’s apparent invocation of the Convention’s provisions on the contiguous zone in support of its actions, the Tribunal has not made a decision about that question.’ He further on his part addresses in a singularly careful manner some key issues regarding the scope and limits of the powers granted under Art. 33, *ibid.*, paras. 9–16; see also *David Anderson*, Coastal State Jurisdiction and High Sea Freedoms in the EEZ in the Light of the Saiga Case, in: Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 105.

⁷⁷ *Gerald Fitzmaurice*, Some Results of the Geneva Conference on the Law of the Sea, ICLQ 8 (1959), 73, 114. Fitzmaurice served as vice-president of the UK delegation to the 1958 Geneva Conference and his position concurs with the official British position on the subject.

⁷⁸ See in particular, most carefully argued, *Oda* (note 46), 131 *et seq.*

⁷⁹ See e.g. The Netherlands Understanding of Art. 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: ‘[...] to the extent that vessels navigating in the contiguous zone act in infringement of the Coastal State’s customs and other regulations, the Coastal State is entitled to exercise,

resolved: The issue was in fact discussed extensively at the 1958 Conference, but an initiative to delete the words ‘within its territory or territorial sea’⁸⁰ did not find the necessary majority and thus the original wording of the ILC draft prevailed. If one takes the basic rules of interpretation seriously (Art. 31 (1) VCLT), it seems indeed difficult to extend para. (b) to ships not yet having committed any infringements within the meaning of that provision.

3. Catalogue of Purposes

- 26 The jurisdictional prerogatives which a coastal State may exercise in the contiguous zone are limited to a narrow band of laws, namely those in respect of customs, fiscal matters, immigration and sanitary matters. This catalogue is exhaustive.⁸¹ It finds an equivalent in Art. 19 (2)(g) and Art. 21 (1)(h). The Proliferation Security Initiative (PSI), a multinational response to the challenge posed by the threat of the proliferation of weapons of mass destruction launched in 2003⁸² and today (2016) actively run by 21 States⁸³ (“the Operational Experts Group (OEG)”) and politically supported by 105 States (October 2015), gives rise to a number of legal questions, including the respect for the limits imposed by Art. 33 on the authority of coastal States in their contiguous zone.⁸⁴ Para. 4 (d) of the 2003 Interdiction Principles⁸⁵ calls upon participating States *inter alia*

‘[t]o take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified [...]’

The bundling together in this provision of three distinct geographical areas (internal waters, territorial sea, contiguous zone), each governed by a decisively different legal regime, is certainly unfortunate. Of course, from a policy perspective, the strengthening of the combined efforts of the world community to combat trafficking of weapons of mass destruction (and related materials) is legitimate. However, it was always a key understanding of participating States, and should continue to be so in the future, that interception activities must scrupulously respect the limits imposed by relevant international legislation. Indeed, in order to secure consistency with UNCLOS rules in general, and Art. 33 in particular, the wording of para. 4 (d) of the 2003 PSI Statement allows for a (narrow) interpretation of the ‘right’ to impede and stop shipments. The correct understanding of the above paragraph is thus that reference made to maritime zones is not only to geographical areas but also to the legal regime intimately and inseparably connected with it. Undoubtedly, the PSI itself has no

in conformity with the relevant rules of the international law of the sea, jurisdiction to prevent and/or punish such infringement’, the full text of the Understanding is available at: http://treaties.un.org/Pages/ViewDetails.aspx?mtidsg_no=VI-19&chapter=6&lang=en#EndDec.

⁸⁰ Advanced, *inter alia*, by the Italian Government, ILC, Comments by Governments on the Provisional Articles Concerning the Régime of the High Seas and the Draft Articles on the Régime of the Territorial Sea adopted by the International Law Commission at its Seventh Session in 1955, UN Doc. A/CN.4/99/Add. 8 (1956), reproduced in: ILC Yearbook (1956), vol. II, 60.

⁸¹ Misleading or at least unclear therefore the Preamble of the Act of the Kingdom of the Netherlands Relative to the Establishment of a Contiguous Zone, Staatsblad No. 387 (2005), 1: ‘[...] Whereas We have considered that, mainly [sic] in order to prevent the infringement of regulations governing customs, taxation, immigration, public health or historic objects’.

⁸² US Department of State, Proliferation Security Initiative (PSI): Statement of Interdiction Principles of 4 September 2003, available at: <http://www.state.gov/t/isn/c27726.htm>; for a brief account of the background of the initiative, cf. Michael Byers, Policing the High Seas: The Proliferation Security Initiative, AJIL 98 (2004), 526 *et seq.*; and for up to date information, see <http://www.psi-online.info>.

⁸³ At present OEG comprises: Argentina, Australia, Canada, Denmark, France, Germany, Greece, Italy, Japan, Republic of Korea, The Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Singapore, Spain, Turkey, United Kingdom, United States.

⁸⁴ Christer Ahlström, The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles, SIPRI Yearbook (2005), 741–767.

⁸⁵ PSI: Statement of Interdiction Principles (note 82).

law-making power and due to the persistent resistance of major sea faring nations (including in particular China and India), a customary law-making process aiming at a modification (and thus expansion) of State prerogatives in the contiguous zone has not been set into motion.⁸⁶ It has rightly been pointed out that ultimately such a change in the law would also run counter to the well-understood interests of States participating in the initiative.⁸⁷

Some 300 years ago, smuggling activities were the very point of departure for the establishment of contiguous zones and the development of their legal regime.⁸⁸ Therefore, it is not surprising that there has never been any serious discussion, neither in the ILC nor later at UNCLOS I or III, that customs and fiscal regulations constitute core elements on the list of subjects for which a contiguous zone could be established.

The same unanimity prevailed when it came to add to the list 'health' or, as this item was later named for purely linguistic reasons, 'sanitary' purposes.⁸⁹ Although there can be no doubt as to the traditional and rather narrow meaning and purpose of this term (protection of a coastal State's public health against disease), in recent years attempts were made to extend the meaning of the term to include in particular pollution, as at least an indirect threat to public health. This discussion was fueled by statements and national legislation accompanying the 1999 US Contiguous Zone proclamation, which suggests an interpretation of US government authorities equating sanitary with 'pollution'. The ordinary meaning of the term 'sanitary' and the legislative history cast serious doubts on the *de lege lata* admissibility of such a broad understanding.⁹⁰ However, the discussion shows that with respect to certain areas and new challenges there might indeed exist a lack of fine-tuning between the legal regimes of the contiguous zone on the one hand and the EEZ and others, such as the International Convention for the Prevention of Pollution from Ships (MARPOL) on the other. An all too narrow interpretation of the purposes enumerated in Art. 33 should therefore not stand in the way of effectively combatting new and serious threats, for example those originating in vessel-source pollution.

The question as to whether or not to explicitly include 'immigration' as a separate item on the list lead to lengthy and controversial discussions during the mid-1950s deliberations on the subject by the ILC. At that time, many members were not at all at ease with the traditional proposition that immigration was sufficiently covered by the term 'customs regulation' and the view prevailed that a future legal regime should no longer equate the movement of people and the trading of goods. However, the majority of the Commission, driven by human rights considerations, was not willing to accept the idea, launched *inter alia* by HERSCH LAUTERPACHT,⁹¹ that the concept of immigration should (implicitly) cover the notion of emigration, too.⁹² Clearly, for many members tragic experiences from an all too recent past were still very much alive. In the words of SIR GERALD FITZMAURICE:

⁸⁶ For an in-depth discussion and obviously a slightly different approach, see Byers (note 82), 532 *et seq.*

⁸⁷ *Ibid.*, 527: 'That [UNCLOS high seas] regime forms the legal foundation for the global mobility of U.S. forces.', with further references.

⁸⁸ See *supra*, MN 3–5 with further references.

⁸⁹ On the initiative of Manley Hudson, see ILC, Summary Records of the Meetings of the 2nd Session, ILC Yearbook (1950), vol. I, 204–205 (paras. 111–112): 'Mr. Hudson said that within that zone a sovereign State had also the right to protect its sanitary interests. A number of American States set great store by that principle. He asked Mr. Amado to agree to the word "sanitary" being inserted in his text ["principles" which constituted the basis for discussion in the Commission on the topic]. Mr. Amado agreed to the insertion'.

⁹⁰ See in particular James Carlson, Presidential Proclamation 7219: Extending the United States' Contiguous Zone – Didn't Someone Say This Had Something to Do with Pollution?, University of Miami Law Review 55 (2001), 487, 496 *et seq.* and 520 *et seq.*, with further references; further Noyes/Clinton (note 70), 272; see also Erik J. Molenaar, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 281, who, however, comes to the conclusion: 'The regime for the contiguous zone in the LOSC seems irrelevant for coastal State jurisdiction over vessel-source pollution.'

⁹¹ ILC, Summary Records of the Meetings of the 5th Session, ILC Yearbook (1953), vol. I, 167.

⁹² The comment on the article did indeed comprise an explicit reference to emigration. See also ILC, Report of the International Law Commission, UN Doc. A/2456 (1953), GAOR 5th Sess., reproduced in: ILC Yearbook (1953), vol. II, 200, 220 (para. 111): '[...] in addition, the Commission thought it necessary to amplify the formulation previously adopted by referring expressly to immigration – a term which is also intended to include emigration'.

‘While it will be reasonable to control immigration, regulation of emigration may lead to abuse – for example, to the arrest, outside the territorial sea, of political refugees leaving a country on a foreign ship.’⁹³

- 30 The proposal to include ‘immigration’ was eventually rejected by the narrow majority of 10 votes to 8 with 1 abstention: The time was not yet ripe to take a decision with unpredictable implications⁹⁴ on such a human rights sensitive issue. It was thus only at the 1958 Conference that, adopting a proposal made by the Philippines and Ceylon, ‘immigration’ was added to the catalogue of Art. 24 (1)(a) CTSCZ, which was eventually – in 1982 – to become Art. 33 (1)(a). Migration having evolved into one of the most pressing problems on today’s international agenda, the prevention of illegal immigration has become a matter of top priority for the legislative and law enforcement activities of many coastal States, particularly in the developed world.⁹⁵ Unfortunately, for a number of States interception operations in the contiguous zone have become a suitable means to prevent migrants from claiming refugee status under national or international legislation. As JOHN HOWARD, then Prime Minister of Australia, frankly admitted in the context of the 2001 *MV Tampa/HMS Manoora* incident off the Australian coast:

‘At no stage did this latest vessel reach Australian territorial waters. It did enter the contiguous zone, but it did not enter the territorial waters and as a result questions of application for asylum status do not arise.’⁹⁶

That being said, it follows from the wording and the context of Art. 33 that the coastal State is not authorized to exercise sovereign rights in the field of immigration but is restricted to exercising control over the contiguous zone.⁹⁷ From a refugee law standpoint this might result in an unsatisfactory situation, but the relevant prerequisites of international refugee law do not address this situation in positive terms.⁹⁸

4. Hot Pursuit

- 31 In codifying a well-established rule of customary international law, Art. 111 provides that hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of

⁹³ ILC, Summary Records of the Meetings of the 8th Session, ILC Yearbook (1956), vol. I, 75; support by A. E. F. Sandström: ‘In the case of emigration [...] what was involved was the liberty of the individual, whose right to leave his country as he wished should not be infringed, as was clearly stated in Article 13 of the Universal Declaration of Human Rights’, *ibid.*, 76.

⁹⁴ Cf. Shushi Hsu: ‘To assimilate emigration to immigration would certainly involve a violation of human rights. In view of the disturbed state of the world, the question could not yet be finally settled, however.’, *ibid.*, 76.

⁹⁵ See for just one example, New Zealand Department of Labour, Immigration Operational Manual (updated 24 March 2014), available at: <http://www.immigration.govt.nz/opsmanual/>, Y3.60 Powers of entry and search by immigration officers, members of the Police, and Customs officers: ‘[...] d. A member of the Police or a Customs officer undertaking immigration duties may enter and search any ship or other sea-borne vessel within the contiguous zone or territorial sea of New Zealand, if they believe on reasonable grounds that there is on board a person who, if they land in New Zealand, will commit an offence against the Immigration Act 2009, or be liable for deportation, or be or likely to be liable for turnaround.’

⁹⁶ Cited after: http://articles.cnn.com/2001-09-09/world/aust.immigrants_1_manoora-asylum-seekers-indonians?s=PM:WORLD; for a detailed discussion on the various legal issues involved, in particular the highly controversial practice of towing back vessels out of the contiguous zone or even back to the waters of the origin of the vessels, which may indeed hardly be justified with the rights emanating from the Art. 33 legal regime, see the contributions in: Bernard Ryan/Valsamis Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), with a rich account both of the applicable legal regime and State practice; on interception operations in the contiguous zone, see in particular Anja Klug/Tim Howe, *The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures*, in: Ryan/Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 69, 93; and Richard Barnes, *The International Law of the Sea and Migration Control*, in: Ryan/Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 103, 126 *et seq.*

⁹⁷ Alexander Proelss, *Rescue at Sea Revisited: What Obligations Exist Towards Refugees?*, SIMPLY 376 (2008), 1, 29.

⁹⁸ *Ibid.*, 33.

that State.⁹⁹ This provision makes a twofold reference to the contiguous zone: It provides, first, that such (uninterrupted) pursuit may not only be commenced when the foreign ship is (still) in the territorial (or archipelagic) waters, but also when it is within the contiguous zone of the pursuing State according to Art. 111 (1) cl. 2. And, second, Art. 111 (1) cl. 4 makes it unambiguously clear that in the latter scenario the pursuit may only be undertaken if a violation of the rights for the protection of which the contiguous zone was established has actually already been committed.¹⁰⁰ Thus, in accordance with a long series of case-law,¹⁰¹ a prior violation of local law (including legislation under the legal regime of the EEZ and the continental shelf under Art. 111 (2)) constitutes an indispensable premise for the taking of enforcement measures via hot pursuit beyond the seawards limits of the territorial sea. Ships in transit within the contiguous zone or inbound ships merely suspected of a possible future violation of local laws (e.g. migrant vessels) may thus under no circumstances be made subject to measures under Art. 111.¹⁰²

5. Article 33 and Article 303

As technological progress in marine archaeology opens access to ever deeper, previously virtually inaccessible sites, for a number of States, the protection of the underwater cultural heritage has evolved into one of the major incentives to establish a contiguous zone.¹⁰³ Due to the rather cryptic reference in Art. 303 (2) to Art. 33, it is difficult to determine the precise relationship between the former provision, aiming at granting coastal States certain prerogatives regarding archaeological and historical objects found at sea, on the one hand and the legal regime of the contiguous zone on the other. This question is not only subject of a lively doctrinal debate,¹⁰⁴ but uncertainty also prevails regarding State practice on the issue.

6. State Practice

Unlike the legal regime governing the territorial sea (→ Art. 16) and other maritime zones (→ Arts. 75 and 84), the Convention knows of no publicity requirements regarding the existence, the territorial extent and the exact purposes for which a contiguous zone is established. It is hardly surprising, therefore, that difficulties arise in a number of cases when it comes to verifying the actual state of the law.¹⁰⁵ At present, around 90 States have

⁹⁹ For details, see *Guilfoyle* on Art. 111 MN 4–5 and *Hildebrando Accioly*, *La zone contiguë et le droit de poursuite en haute mer*, in: *Mélanges en l'honneur de Gilbert Gidel* (Paris 1961), 1 *et seq.*

¹⁰⁰ Arguably, the term 'violation' may comprise – in accordance with the national law at stake and within the limits flowing from generally recognized rule of law principles – criminal liability for preparatory acts as well.

¹⁰¹ See *Poulantzas* (note 18), 62 *et seq.*

¹⁰² For recent developments, which cast some doubts on the enduring unanimous acceptance of this rigid position in State practice, see *ibid.*, ix *et seq.*: 'Recent Developments Relating to Hot Pursuit at Sea'.

¹⁰³ See e.g. *Marina Vokić Žužul/Valerija Filipović*, *Vanjski pojas Republike Hrvatske* (The Contiguous Zone of the Republic of Croatia), *Poredbeno pomorsko pravo* (Comparative Maritime Law) 49 (2010), 73 *et seq.*; it is, however, highly doubtful whether the legal regime of the contiguous zone authorizes States to use their competences arising from Arts. 33 and 303 to extend the geographical scope of the relevant national legislation, as was done e.g. by the Netherlands, see *Harm M. Dotinga/Alex G. Oude Elferink*, *The Netherlands: Establishment of a Contiguous Zone*, *IJMC* 22 (2007), 317, 323 *et seq.*; and for further details *Scovazzi* on Art. 303 MN 9–11.

¹⁰⁴ See also *Scovazzi* on Art. 303 MN 11–15; and for an in-depth discussion, cf. *Rainer Lagoni*, *Marine Archäologie und sonstige auf dem Meeresboden gefundene Gegenstände*, *AVR* 44 (2006), 328, 331 *et seq.*, with further references.

¹⁰⁵ E.g. Belgium's claim to a contiguous zone 'hidden' in Art. 47 of the Act Concerning the Exclusive Economic Zone of Belgium in the North Sea of 22 April 1999, *Belgian Official Journal* of 10 July 1999 and France's insertion by virtue of Art. 9 of the Act Concerning the Campaign Against Drug Trafficking and Amending Certain Provisions of the Penal Code of an Art. 44bis in the Customs Code of 31 December 1987, *Official Gazette* 5 January 1988, 159; see also *Jean-Pierre Quéneudec*, *La France et le droit de la mer*, in: *Tullio Treves/Laura Pineschi* (eds.), *The Law of the Sea: The European Union and its Member States* (1997), 151, 167 *et seq.*; although comprised in the DOALOS list, no pertinent legislation at all could be proved to exist in the case of the Republic of Congo, Somalia and Tunisia.

claimed a contiguous zone,¹⁰⁶ which, in view of a total of about 150 coastal States, is still a rather modest number.¹⁰⁷ However, since the adoption in 1982 of UNCLOS, the number of claimant States having tripled,¹⁰⁸ a clear trend towards a growing awareness and acceptance of the contiguous zone can be discerned. It is noteworthy that in recent times even a considerable number of States not party to the Convention have decided to make a claim to a contiguous zone extending beyond the twelve mile limit from coastal state baselines, including, in particular, the United States.¹⁰⁹ This must be seen as a clear indicator that the concept of an enlarged contiguous zone has grown into the corpus of customary international law.

- 34 The overwhelming majority of States making claims to a contiguous zone do so to the maximum breadth permissible under Art. 33 (83 out of 90 States). None of the claims of the remaining (seven) States exceeds the 24 NM limit.¹¹⁰ With the exception of North Korea,¹¹¹ the few other earlier pretensions of jurisdictional prerogatives beyond this line have been given up, not at least due to strong and explicit protest by other States.¹¹² However, what is still a matter of concern on the international agenda are the excessive claims made by certain States with respect to security matters. For fear of possible abuse, this matter was explicitly excluded from the catalogue of purposes for which the contiguous zone may be established.¹¹³ Nonetheless, a number of States have included (certain aspects of) national security interests in their national legislation regarding the contiguous zone.¹¹⁴ These claims are

¹⁰⁶ The overwhelming majority of these claims is available under: <http://www.un.org/Depts/los/index.htm>; see further States with a full 12 NM Contiguous Zone, Georgia: <http://faolex.fao.org/faolex/index.htm> (key words: 'contiguous zone Georgia'), Ireland: <http://faolex.fao.org/docs/pdf/ire66426.pdf>, Japan: <http://faolex.fao.org/docs/pdf/jap1703.pdf>, Mozambique: <http://faolex.fao.org/docs/pdf/moz22054.pdf>, New Zealand: http://www.legislation.govt.nz/act/public/1977/0028/latest/DLM442579.html?search=ts_act%40bill%40regulation%40deemedreg_-Territorial+Sea_resel_25_h&p=1, Nicaragua: <http://legislacion.asamblea.gob.ni/Normaweb.nsf/> (Ley de Espacios Marítimos de Nicaragua – Ley No. 420), Oman: http://www.wipo.int/wipolex/en/other_treaties/remarks.jsp?cntry_id=6724C, Portugal: <http://faolex.fao.org/docs/pdf/por65641.pdf>, Tuvalu: <http://faolex.fao.org/docs/pdf/tuv2191.pdf>; for states with a Contiguous Zone of less than 12 NM, see Bangladesh: <http://faolex.fao.org/docs/pdf/bgd4587.pdf>.

¹⁰⁷ It has been suggested that many States have not claimed contiguous zones 'possibly relating to a lack of understanding or appreciation of the utility of the powers enjoyed therein [...]', *Aldo Chircop et al.*, The Maritime Zones of East African States in the Law of the Sea: Benefits Gained, Opportunities Missed, *African JICL* 16 (2008), 121, 132; the long list of absentees includes, *inter alia*, States such as Germany, Greece, Poland, Sweden, and the United Kingdom, as well as Indonesia and the Philippines (with a coastline of 54,716 KM and 36,289 KM, respectively, information available at: <https://www.cia.gov/library/publications/the-world-factbook/>).

¹⁰⁸ J. Ashley Roach/Robert W. Smith, *Excessive Maritime Claims* (3rd edn. 2012), 151.

¹⁰⁹ See also Noyes/Clinton (note 70), 272.

¹¹⁰ For Finland (2 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_1995_Decree.pdf; for Gambia (6 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GMB_1969_Act.pdf; for Saudi Arabia (6 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SAU_1958_Decree.pdf; for Sudan (6 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SDN_1970_Act.pdf; for Venezuela (3 NM), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VEN_1968_Decree.pdf; for Lithuania (defined by coordinates), see: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/doalos_publications/LOS-Bulletins/bulletinpdf/bulletin61e.pdf; for Bangladesh (6 NM), see: <http://faolex.fao.org/docs/pdf/bgd4587.pdf>.

¹¹¹ By virtue of a proclamation of 1 August 1977 by the Supreme Command of the Korean People's Army North Korea claimed a 50-mile military maritime boundary, see for the English text *Choon-Ho Park*, The 50-Mile Military Boundary Zone of North Korea, *AJIL* 72 (1978), 866 (footnote 1); this excessive claim was unanimously rejected by all interested States, for references see *Roach/Smith* (note 108), 157 (footnote 20); and *Park Hee Kwon*, The Law of the Sea and Northeast Asia: A Challenge for Cooperation (2000), 33 *et seq.*; however, North Korea has still not formally given up this claim, which is 'without precedent in international law, and has no counterparts in other areas of the world', *Lewis M. Alexander*, International Perspective on Maritime Boundary Disputes Involving Korea, Japan and China, *Korea Observer* 30 (1999), 1, 6.

¹¹² For details *Roach/Smith* (note 108), 156 *et seq.*

¹¹³ See *supra*, note 40.

¹¹⁴ In particular Bangladesh, Burma, China (see as just one concrete example from Chinese State practice: Art. 13 of the 1992 Law on the Territorial Sea and the Contiguous Zone of 25 Feb. 1992, Collection of the Sea Laws and Regulations of the People's Republic of China, Office of Policy, Law and Regulation, State Oceanic Administration (1998), 189), India, Haiti, Iran, Pakistan, Sri Lanka, Sudan, Syria, Venezuela, Vietnam, Yemen.

obviously not only inconsistent with Art. 33, but are also widely and consistently protested against,¹¹⁵ so that these States cannot invoke an authorization under customary international law. Although having an immediate effect on the territorial scope and thus the legality of the exercise of rights under Art. 33, too, the fact that coastal States quite frequently draw baselines that are inconsistent with the relevant provisions of the Convention is not a problem that is specific to the legal regime of the contiguous zone.

¹¹⁵ For a meticulous account of U.S. State practice, *Roach/Smith* (note 108), 154 *et seq.* (footnote 16), with occasional references to protests by other States, too.