

Baselines, Islands, Rocks and Low-Tide Elevations

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Preview

- Baselines and Closing Lines
 - Normal baseline
 - Straight baselines
 - Straight closing lines
 - Straight archipelagic baselines
 - Other closing lines: river mouths, bays, reefs, ports, roadsteads
- Islands, rocks and low-tide elevations
- State practice and excessive claims
- Further training and assistance

What are baselines?

- Locations separating internal waters under the complete sovereignty of the coastal State from waters where rights are shared with other States
- Locations from which the breadth of the territorial sea (and other maritime zones) is measured
- Identifying the baseline is essential for public order

Baselines and Closing Lines

- Three types of lines in LOS Convention (LOSC):
 - Normal baseline (low-water line) (article 5)
 - Straight baselines (article 7)
 - Straight archipelagic baselines (article 47)
- Other straight closing lines
 - Mouths of rivers (article 9)
 - Bays (article 10)
 - Inside archipelagic waters (article 50)

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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” (LOSC article 5; TSC article 3)
- ICJ holds LOSC article 5 is customary international law (CIL) binding on all States (*Nicaragua v. Colombia*, Judgment, 2012 ICJ Rep. 97, para. 184)

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Must baselines be claimed?

- Normal baseline: NO. It is the default baseline.
- Other baselines and closing lines: YES
- Coastline, including low-water line, must be identifiable using
 - Nautical charts
 - Satellite imagery
- Straight baselines, closing lines, and territorial sea boundaries must be reported to the UN (article 16)
 - Deposit of legislation is not enough

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Purposes of Depositing

- Protect the sovereignty of the coastal State of and in its territorial sea, now and in future (effects of sea-level rise)
- Ensure the international community is adequately informed of the boundaries of the territorial sea, including the baselines, outer limit lines, and lines of delimitation
- Provide adequate information to ensure that international navigation does not unwittingly enter the territorial sea of a coastal State and infringe the rules of innocent passage

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What is to be Deposited @ UN

- Charts or list of coordinates
- Both often submitted to DOALOS that posts them on its maritime space web page for each State (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/_derived/re_gionslist.htm_cmp_bluepmt110_vbtn_a.gif)
- Must specify the geodetic datum (often WGS 84)
- Coastal State may create and publish its own charts or use charts published by a foreign hydrographic service if it is recognized "officially", e.g.
 - UK Hydrographic Office – Admiralty Charts (<https://www.admiralty.co.uk/charts>)
 - US Defense Mapping Agency/National Geospatial-Intelligence Agency Digital Nautical Charts (<http://msi.nga.mil/NGAPortal/DNC.portal>)

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Publicizing SBL

- Article 16(2) requires coastal States to deposit with the UN Secretary-General charts showing straight baselines, or list of geographical coordinates of points, specifying the geodetic datum
- These 29 coastal States have not deposited:
- Albania, Algeria, Angola, Barbados, Bulgaria, Cameroon, Canada, Dem. Rep. Congo, Denmark, Djibouti, Dominica, Egypt, Estonia, Guinea, Guinea-Bissau, Haiti, Iceland, Malaysia, Malta, Mauritania, Morocco, Mozambique, Oman, Portugal, Senegal, South Africa, Sweden, Thailand, Ukraine
- Deposit of legislation is not enough
- <http://un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm> (as of 5 September 2017)

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DOALOS Guidance on Deposit

- Deposit of charts or of lists of geographical coordinates of points with the UNSG is an international act by a State Party to the Convention in order to comply with the deposit obligations
- This act is addressed to the UNSG in the form of a note verbale or a letter by the Permanent Representative to the United Nations or other person duly authorized to do so, which should (i) be accompanied by the relevant information, (ii) clearly state the intention to deposit and (iii) specify the relevant article(s) of the Convention
- The mere existence or adoption of legislation or the conclusion of a maritime boundary delimitation treaty registered with the Secretariat, even if they contain charts or lists of coordinates, cannot be interpreted as an act of deposit with the Secretary-General under the Convention
- States parties are encouraged to provide all the necessary information for conversion of the submitted geographic coordinates from the original datum into the World Geodetic System 84 (WGS 84), a geodetic datum system that is used by the Division for its internal data storage
- http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/background_depo sit.htm (paragraphs 2 and 4)

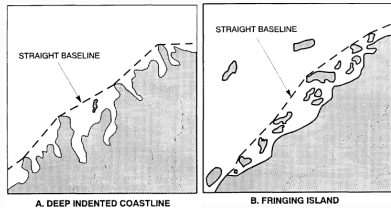
Deposits Not Required

- Normal baseline, although must be depicted on large-scale charts officially recognized by the coastal State
- Outer limit of the territorial sea measured from normal baselines
- However, with the advent of electronic navigation charts (ENCs), States need to draw the closing lines (river mouths and bays), and this may well trigger the depositing requirement

Straight Baselines (1)

- Text of LOS Convention article 7:
- "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" (TSC article 4.1)
- "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" (TSC article 4.2)

Straight Baselines (2)



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Straight Baselines (3)

- "4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition"
- ICJ has found LOS Convention article 7.4 and TSC article 4.3 to be CIL binding on all States (*Qatar v. Bahrain*, Judgment, 2001 ICJ Rep. 102, para. 208)
- "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" (TSC article 4.4)

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Straight Baselines (4)

- "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." (new in LOSC)
- Inspired by Bangladesh, which in 1974 drew SBL along the 10 fathom line, not in accordance with article 7(2)
- In 2015 Bangladesh changed its baselines, using SBL across the mouths of the Ganges and used the low water line south along its western border

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Straight Baselines: State Practice (1)

- “The Court [ICJ] 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 or conditions are met.
- “This method must be **applied restrictively**.
- “Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in the immediate vicinity.”
- *Maritime Delimitation and Territorial Question between Qatar and Bahrain*, Merits, Judgment, 2001 ICJ Rep. 40, at 67, para. 212

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Straight Baselines: State Practice (2)

- Of the 153 coastal and island States, 82 States have drawn straight baselines (SBL)
- Many of the straight baselines do not appear to conform to one or more of the requirements of article 7 LOSC
- State practice table of SBL segments is on the ILA Baseline Committee page at ila-hq.org

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SBL Segment Lengths: State Practice

- No specific maximum length decided in 1951 *Fisheries* case and none specified in 1958 Territorial Sea Convention or 1982 LOSC
- Maximum length approved by ICJ in 1951 was 40 nm
- 35 of 82 coastal States have drawn no segments > 40 nm
- 47 States have one or more segments > 40 nm (+ Taiwan)
- Total number of SBL segments > 40 nm worldwide = 258 (+ 7 by Taiwan)

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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”
 - New in LOSC, article 6
- Drying reefs of an archipelagic State may be used as basepoints for straight archipelagic baselines (article 47(1))
- Fringing reefs of islands and atolls, including drying reefs lying on the perimeter of a steep-sided oceanic plateau, may be treated as land for the purposes of the land:water ratio (article 47(7))
- “Atoll” means a reef with or without an island situated on it surrounded by the open sea, that encloses or nearly encloses a lagoon

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”
 - LOSC article 9; TSC article 13
- A river means a relatively large natural stream of water flowing on, under, or through land territory
- Rivers do not include estuaries, i.e., a tidal area of a water-denominated “river” where ocean tides meet fresh water (e.g., the River Plate)

Article 10 Bays (1)

- “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.”

Article 10 Bays (2)

- “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.”

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Article 10 Bays (3)

- “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.”

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Article 10 Bays (4)

- “1. This article [10] relates only to bays the coasts of which belong to a single State”
 - E.g., does not apply to the Gulf of Fonseca
- “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”
- CIL status of article 10 (*Gulf of Fonseca* case, 1992 ICJ Rep. 588, para. 383)

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Ports

- “For the purpose of delimiting the territorial sea, the outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast”
 - LOSC article 11; TSC article 8
- “Off-shore installations and artificial islands shall not be considered as permanent harbor works”
 - New in LOS Convention, article 11

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Roadsteads

- If normally used for the loading, unloading and anchoring of ships
- and otherwise be situated wholly or partially outside the outer limit of the territorial sea,
- those roadsteads **are** included in the territorial sea

LOSC Article 12

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Combination of Methods

- The coastal State may determine baselines in turn by any of the methods provided for in the foregoing articles [5-13] to suit different conditions (new in LOS Convention, article 14):
 - Normal baseline (article 5)
 - Reefs (article 6)
 - Straight baselines (article 7)
 - Mouths of rivers (article 9)
 - Bays (article 10)
 - Ports (article 11)
 - Roadsteads (article 12)
 - Low-tide elevations (article 13)
- China does not permit the use of the normal baseline (1992 Territorial Sea Law, article 3)

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Part IV Archipelagic States

- “For the purposes of this [LOS] Convention:
- “(a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;
- “(b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.”
- Does not include dependent archipelagos (e.g. Galapagos) or large island States (e.g. Japan)

Archipelagic States

ANTIGUA & BARBUDA	MAURITIUS
THE BAHAMAS	PAPUA NEW GUINEA
CAPE VERDE	PHILIPPINES
COMOROS	ST VINCENT AND THE GRENADINES
FIJI	SAO TOME & PRINCIPE
GRENADA	SEYCHELLES
INDONESIA	SOLOMON ISLANDS
JAMAICA	TRINIDAD & TOBAGO
KIRIBATI	TUVALU
MALDIVES	VANUATU
MARSHALL ISLANDS	
DOMINICAN REPUBLIC (US & UK OBJECT)	

Total: 22 as at December 2016

Archipelagic Waters

- Waters enclosed by straight archipelagic baselines drawn in accordance with article 47
- Waters are under sovereignty of archipelagic State (LOSC article 49)
- TS, CZ and EEZ measured seaward from those baselines (LOSC article 48)

Archipelagic Straight Baselines (1)

- "1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
- "2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
- "3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

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Archipelagic Straight Baselines (2)

- "4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
- "5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

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Archipelagic Straight Baselines (3)

- "6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected."
- E.g. Malaysia
- "7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau."
- E.g. The Bahamas

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Archipelagic Straight Baselines (4)

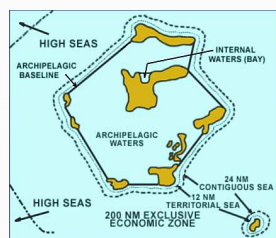
- “8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.
- “9. The archipelagic State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.”
- Only Malaysia has not met this obligation

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Delimitation of Internal Waters

- “Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11.”
- LOS Convention article 50

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Archipelagos: State Practice

- Most archipelagic States meet the criteria in
 - Article 46: only exception is Dominican Republic
 - Article 47 for archipelagic baselines
 - 1:1 ~ 1:9 water-land ratio except Kiribati, Seychelles, Solomon Islands
 - Segment lengths NTE 100 nm, except
 - Segment lengths <3% 100-125 nm except Maldives
 - Segment lengths <125 nm except PNG
 - Turning points on outermost islands and drying reefs: for exceptions see Baumert & Melchior study of studies in ODIL online:
<http://www.tandfonline.com/doi/full/10.1080/00908320.2015.995970>

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Islands, Rocks and Low-tide Elevations

- Islands, rocks and low-tide elevations have one physical characteristic in common, they arise from the seabed (i.e., are naturally formed) and are surrounded by water
- Islands, rocks and low-tide elevations differ from each in relation to tidal level, other physical characteristics and legal consequences
- Islands (and rocks) differ from low-tide elevations, in that the former are above water at high tide, while low-tide elevations are below water at high tide but above water at low tide
- Distinguished from features that are always submerged even at low-tide

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Legal Consequences – zonal entitlements

- Islands that can sustain human habitation or have an economic life of their own are entitled to the full suite of maritime zones: territorial sea, EEZ and continental shelf (article 121(2))
- Rocks that cannot sustain human habitation or have an economic life of their own are entitled only to a territorial sea and cannot have an EEZ or continental shelf (article 121(3))
- Low-tide elevations have no maritime zones of their own (article 13(2)), but can be used as TS basepoints if within 12 nm of island or mainland (13(1))
- While islands (including rocks) are subject to appropriation (ownership or sovereignty), low-tide elevations are not as they form part of the continental shelf from which they rise
- Features that are submerged even at low tide are not subject to appropriation and have no maritime zones of their own

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How distinguish rocks from other islands (1)

- Article 121 provides no detailed guidance by which to decide if a feature is a rock or a 121(2) island
- The arbitral award of 12 July 2016 between the Philippine and China set out criteria applicable to the situation in the South China Sea (paras. 540-551)
- “Rock” does not limit the provision to features composed of solid rock
- Status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own
- “Human habitation”: the critical factor is the non-transient character of the inhabitation

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How distinguish rocks from other islands (2)

- “Economic life” in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features. Economic life must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea
- Maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community. One exception to that view should be noted for the case of populations sustaining themselves through a network of related maritime features
- Determination of the objective capacity of a feature is not dependent on any prior decision on sovereignty

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How distinguish rocks from other islands (3)

- Capacity of a feature to sustain human habitation or an economic life of its own must be assessed on a case-by-case basis. Principal factors that contribute to the natural capacity of a feature would include the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time
- Capacity of a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life, excludes a dependence on external supply
- Evidence of physical conditions is insufficient for features that fall close to the line. Most reliable evidence of the capacity or economic life of such a feature will usually be the historical use to which it has been put

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Rocks v. Islands State Practice

- Arbitral Tribunal's Award limited to Spratly Islands
- UK treats Rockall as 121(3) rock, as does Mexico wrt Alijos Rocks
- Japan should treat Okinotorishima as a 'rock'
- Practice of States in Pacific Ocean, Atlantic Ocean and Caribbean Sea is contrary to Award's criteria where States claim EEZ/CS from many features that would be 'rocks' if Award criteria applied to them
 - Claims by Australia, Brazil, Fiji, France, Kiribati, Mexico, Norway, Portugal, Venezuela, USA not protested
 - Many maritime boundary agreements give full effect to small high-tide features
 - Most not protested. Exception: Aves Island

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Further Training and Sources of Assistance

- DOALOS
- Commonwealth Secretariat
- South Pacific Forum
- Training programs
 - Rhodes Academy
 - CIL-ANCORS
 - IBRU
- Expert consultants
 - Geographers, cartographers, lawyers

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Thank you for your attention.
Questions?

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