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The law of the sea
third edition

R. R. Churchill and A. V. Lowe



Juris Publishing



MANCHESTER
UNIVERSITY PRESS

UAL-62

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First edition published 1983 by Manchester University Press
Reprinted with addenda 1985
Revised edition printed 1988

This edition published 1999 by
Manchester University Press
Oxford Road, Manchester M13 9NR, UK
<http://www.man.ac.uk/mup>

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

ISBN 0 7190 4381 6 *hardback*
0 7190 4382 4 *paperback*

First published in the USA and Canada by Juris Publishing, Inc.
Executive Park, One Odell Plaza, Yonkers, NY 10701

Library of Congress Cataloging-in-Publication Data applied for

ISBN 1 57823 029 2 *hardback*
1 57823 030 6 *paperback*

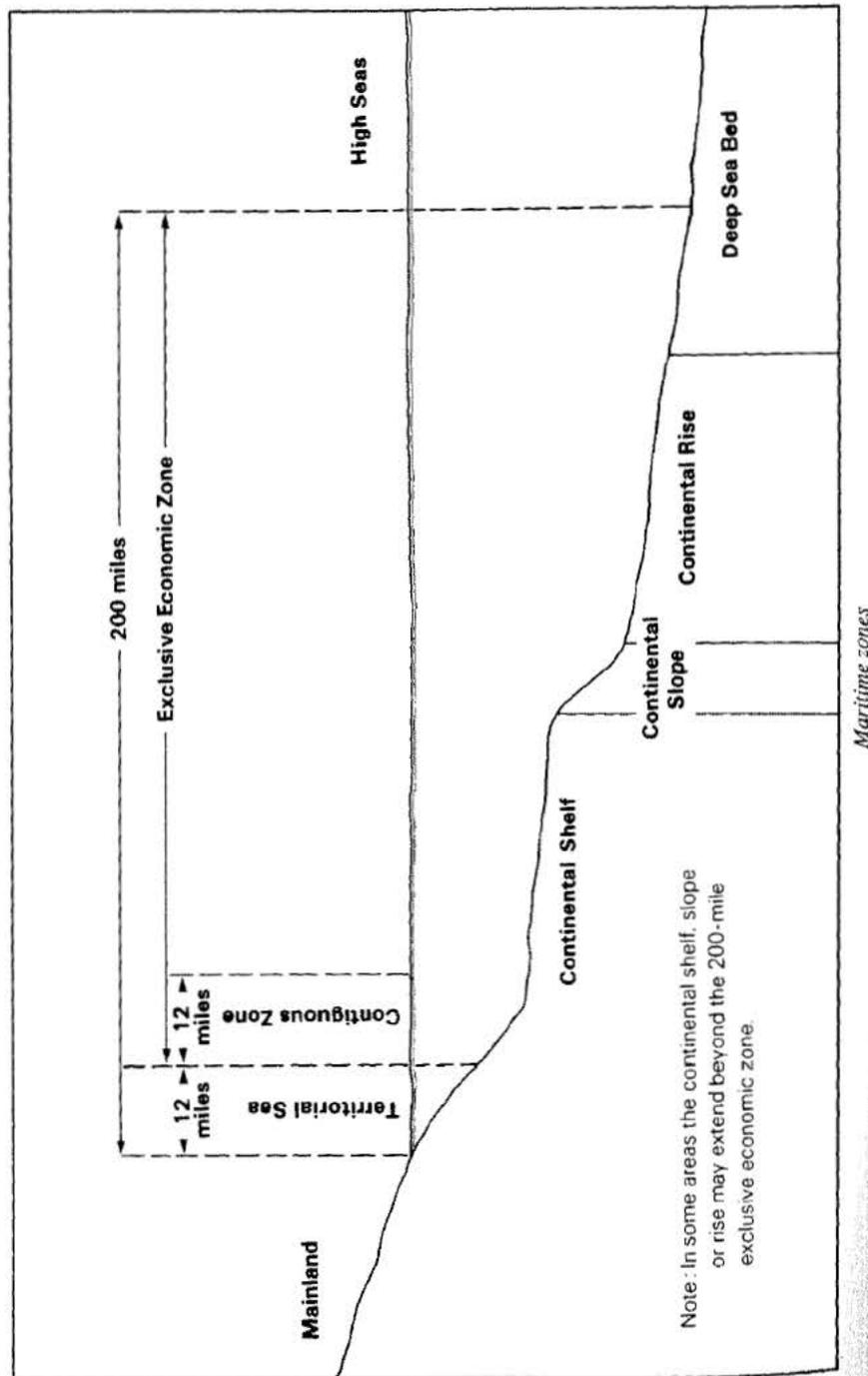
This edition first published 1999

06 05 04 03 02 01 00 99 10 9 8 7 6 5 4 3 2 1

Typeset in 10/12 pt Times
by Graphcraft Limited, Hong Kong
Printed in Great Britain
by Biddles Ltd, Guildford and King's Lynn

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Baselines

Introduction

In determining the extent of a coastal State's territorial sea and other maritime zones, it is obviously necessary first of all to establish from what points on the coast the outer limits of such zones are to be measured. This is the function of baselines. The baseline is the line from which the outer limits of the territorial sea and other coastal State zones (the contiguous zone, the exclusive fishing zone and the exclusive economic zone (EEZ)) are measured.¹ The waters on the landward side of the baseline are known as internal waters (see chapter three). Thus the baseline also forms the boundary between internal waters and the territorial sea. While this boundary does not mark the outer limit of a State's territory, since in international law the territorial sea forms part of a State's territory, it does represent the demarcation between that maritime area (internal waters) where other States enjoy no general rights, and those maritime areas (the territorial sea and other zones) where other States do enjoy certain general rights. Baselines may also be relevant in drawing maritime boundaries: where two neighbouring States agree that the boundary between their maritime zones is to be a line equidistant from both States, it is from the baselines of each State that such equidistance is normally calculated.

Traditionally both writers and international conventions (including the Law of the Sea Convention) have treated the rules relating to baselines as part of the body of law relating to the territorial sea. This was justifiable at the time when the territorial sea was the only zone of coastal State jurisdiction. But since the baseline is now used to measure not only the outer limit of the territorial sea, but also the outer limits of the contiguous zone, the exclusive fishing zone and the EEZ, and in some circumstances the continental shelf, it no longer seems appropriate

¹ One relatively recent, and so far as is known unique, exception to using the baseline as the point from which the outer limit of maritime zones is measured, is the 150-mile Falkland Islands Interim [Fisheries] Conservation and Management Zone established in 1986, which is measured from a single point in the middle of the Falkland Islands. See Proclamation No. 4 of 1986 of the Governor of the Falkland Islands, 9 *LOSJ* 19 (1987). The territorial sea, however, is measured from conventional baselines.

to consider baselines simply as part of the law relating to the territorial sea. Thus in this book we deal with baselines as a separate topic.

The question of baselines was considered at the 1930 Hague Codification Conference. As we saw in the previous chapter, this conference did not succeed in adopting any convention on the law of the sea.² Nevertheless the work done by the conference in respect of baselines formed a useful basis for the International Law Commission (ILC) when it came to consider the topic as part of its study of the law of the sea in the early 1950s. The Commission's deliberations resulted in a number of articles dealing with baselines being included in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. These provisions – articles 3 to 11 and 13 – were not only binding on parties to the Convention, but in most respects were also regarded, for reasons which will be explained later, as representing the rules of customary international law. Thus it is not surprising to find that the Law of the Sea Convention – in articles 4 to 14 and 16 – simply repeats most of the 1958 Convention's provisions *verbatim*, making only a few slight additions to cover geographical situations not considered by the ILC or the 1958 Geneva conference. At the same time it is regrettable that greater effort was not made in the Law of the Sea Convention to resolve the ambiguities and fill in the gaps in the 1958 rules: suggestions for improvements have not been lacking from commentators.³

If all coastlines were relatively straight and unindented, the question of ascertaining the baseline would be a simple one. All that would be necessary would be to select the high- or low-tide mark as the baseline. In practice, however, the position is not nearly so straightforward. Many coasts are not straight, but are indented or penetrated by bays, and have islands, sandbanks and harbour installations off them. It is necessary, therefore, to have rules on baselines which deal with a wide variety of geographical circumstances. At the same time, it is desirable that the rules should be formulated in as precise and objective a way as possible, so that two cartographers, asked to draw the baselines along a particular stretch of coast, would ideally both arrive at the same result. It is also desirable that the waters enclosed by baselines should be of such a nature that the regime of internal waters is as or more appropriate to them than the regime of the territorial sea or EEZ. These desiderata should be borne in mind in the discussion of the rules that follows. If the rules are not sufficiently precise, it may be possible for a State to draw its baselines in a generous manner, thus pushing the outer limit of its territorial sea and other zones farther seawards and bringing greater

² The report of the conference's Committee on Territorial Waters contained a set of draft articles on the territorial sea. Six of these articles were concerned with the problems of baselines and dealt with the low-water line, low-tide elevations, bays, harbour works, islands and river mouths. These draft articles are reproduced in S. Rosenne (ed.), *League of Nations Conference for the Codification of International Law [1930]* (Dobbs Ferry, N. Y., Oceana), 1975, pp. 833–6.

³ See, for example, the works by Hodgson and Alexander, and Hodgson and Smith, referred to in 'Further reading' at the end of this chapter.

areas of sea within internal waters, thus reducing the areas of sea available for use by other States.

The normal baseline

Article 3 of the Territorial Sea Convention and article 5 of the Law of the Sea Convention provide in identical words that '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 recognised by the coastal State'. The effect of choosing the low-water line,⁴ rather than the high-tide line, is to push the outer limit of the territorial sea and other zones seawards, particularly on coasts where there is an extensive tidal range.

The rules in articles 3 and 5 were drafted with coasts which are relatively straight and unindented particularly in mind. The low-water line is described in both the Territorial Sea and Law of the Sea Conventions as the 'normal baseline'; but the variety of geographical circumstances for which special provisions are laid down makes it doubtful whether in practice the low-water line is the normal baseline for most States. The Law of the Sea Convention appears to recognise this situation, for in article 14 it provides that 'the coastal State may determine baselines in turn by any of the methods provided for . . . to suit different conditions'.

The special geographical conditions for which particular rules are laid down in the Geneva and Law of the Sea Conventions are: (i) straight baselines for coasts deeply indented or fringed with islands; (ii) bays; (iii) river mouths; (iv) harbour works; (v) low-tide elevations; (vi) islands; and (vii) reefs.⁵ Each of these will now be considered in turn. In the discussion of each type of baseline, it may be found useful to refer to the figure on p. 36.

Straight baselines

Customary rules

The law concerning straight baselines developed in the context of Norwegian baseline claims. Much of the coast of Norway is penetrated by fjords and fringed

⁴ There appears to be no uniformity in State practice as to whether the low-water line is represented by the mean low-water spring tide, the lowest astronomical tide or some other low-water line. See *Whiteman*, Vol. IV, p. 141; and *O'Connell*, Vol. I, pp. 171–85, *op. cit.* in 'Further reading' at the end of this chapter, in the general section.

⁵ One special geographical condition for which the Law of the Sea (and Territorial Sea) Conventions make no provision is permanent ice shelves, found in parts of the Arctic and Antarctic. Such shelves may be many miles in width. It is uncertain whether the baseline should be the outer edge of the ice shelf or the edge of the land. This issue was deliberately not discussed at UNCLOS III for fear of re-opening the question of the legal status of Antarctica. For further discussion of this issue, see *O'Connell, op. cit.*, Vol. I, pp. 197–8.

by countless islands, islets, rocks and reefs, known as the *skjaergaard* (a Norwegian word meaning literally rock rampart). In theory it would be possible to draw the baseline along the Norwegian coast by following the low-water mark around all the fjords, islands and rocks and by drawing lines across bays: but in practice this would be very cumbersome, and it would be difficult to ascertain the outer limit of the Norwegian territorial sea. Instead, from the mid-nineteenth century onwards, Norway used as the baseline a series of straight lines connecting the outermost points on the *skjaergaard*. In the 1930s the United Kingdom began to object to this method of drawing the baseline, arguing that it was contrary to international law. The United Kingdom's objections were motivated by the fact that the effect of using such straight lines, rather than the low-water mark, as the baseline was to extend farther seawards the outer limit of the Norwegian territorial sea, thus reducing the area of high seas open to fishing by British vessels. The ensuing dispute, which centred on a Norwegian decree of 1935 delimiting straight baselines north of 66°28.8' north, was referred by the United Kingdom to the International Court of Justice in 1949.

In its judgment in the *Anglo-Norwegian Fisheries* case (1951), the Court held that the Norwegian straight baseline system was in conformity with international law. The Court was much influenced by the geographical circumstances of the case. It observed that the *skjaergaard* was but an extension of the Norwegian mainland, and that it was the outer limit of the *skjaergaard*, not the mainland, that constituted the real dividing line between the land and the sea. The low-water mark to be used for constructing the baseline was therefore not that of the mainland, but the outer line of the *skjaergaard*. The Court then noted that 'three methods have been contemplated to effect the application of the low-water mark rule'⁶ – the *tracé parallèle* (i.e., drawing the outer limit of the territorial sea by following the coast in all its sinuosities), the *courbe tangente* (i.e., drawing arcs of circles from points along the low-water line) and straight baselines. Where a coast was deeply indented or fringed by islands, then, according to the Court, neither the *tracé parallèle* nor the *courbe tangente* method was appropriate. Instead, 'the baseline becomes independent of the low-water mark, and can only be determined by means of a geometric construction'.⁷ The straight baseline was such a geometrical construction, and had been used by several States without objection.⁸ In this connection the Court considered it of some importance that no objection had been made to the Norwegian system by the United Kingdom or other States between 1869 (when Norway had first begun applying a detailed system of straight baselines) and 1933 (when the United Kingdom had first objected to the system).

⁶ [1951] ICJ Rep. 116 at 128.

⁷ *Ibid.*, at p. 129.

⁸ The Court itself gave no examples of such States. States utilising straight baselines prior to the Court's judgment include Ecuador, Egypt, Iran, Saudi Arabia and Yugoslavia. See *Whiteman, op. cit.*, Vol. IV, p. 148 and Waldock, *op. cit.*, in the section entitled 'Straight baselines' in 'Further reading'.

Although it upheld the validity of straight baselines in international law, the Court made it clear that the coastal State does not have an unfettered discretion as to how it draws straight baselines, and it laid down a number of conditions governing the drawing of such baselines. First, such lines must be drawn so that they do 'not depart to any appreciable extent from the general direction of the coast'.⁹ Secondly, they must be drawn so that the 'sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters'.¹⁰ Thirdly – and here the Court seems to have been considering the way in which individual lines are drawn rather than the system as a whole – it is legitimate to take into account 'certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage'.¹¹

Conventional rules

At the time it was given, the Court's judgment was widely regarded as a piece of 'judicial legislation'. However, the rules enunciated by the Court were taken up by the ILC and eventually incorporated in the Territorial Sea Convention (art. 4), which closely followed the language of the Court's judgment. While the Court suggested that straight baselines were simply a special application of the low-water mark principle of constructing the baseline, the Territorial Sea and Law of the Sea Conventions more realistically recognise straight baselines as a distinct method of construction.

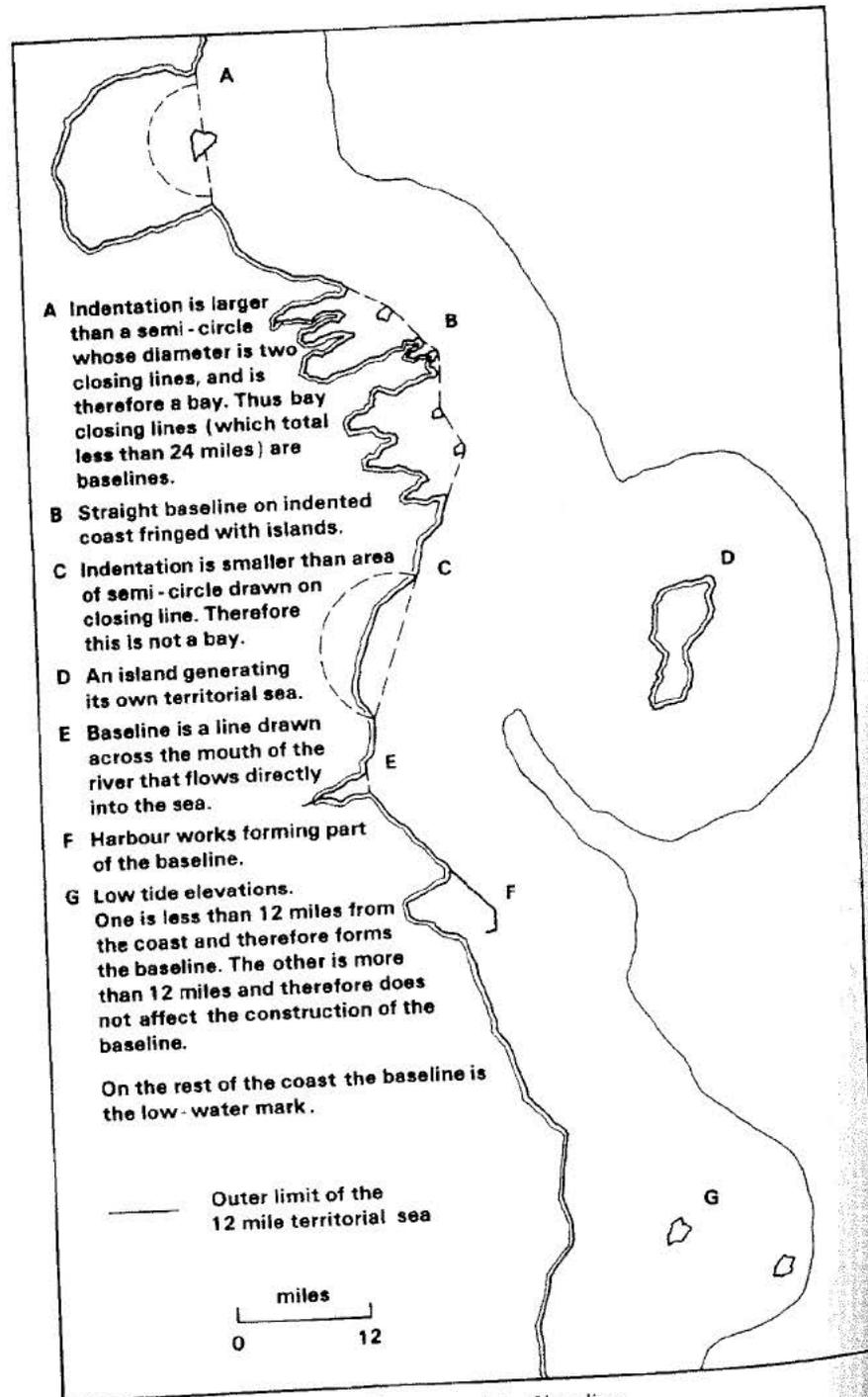
Under both Conventions a system of straight baselines 'may' be used 'in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity' (TSC, art. 4(1); LOSC, art. 7(1)). It is clear from the use of the word 'may' that even where a coast fulfils the requisite conditions a State has a choice as to whether it uses straight baselines or not. The USA, for example, does not use straight baselines on the coast of Alaska, although it is entitled to do so. In practice, however, most States do exercise their option and draw straight baselines, because the use of such lines is likely to place their baseline (and hence the outer limits of their various maritime zones) farther seawards than other methods of drawing the baseline, and makes the drawing of the outer limit of the territorial sea (and other zones) more straightforward.

Having established the situation where the use of straight baselines is permissible, the Territorial Sea and Law of the Sea Conventions go on to lay down a number of conditions governing the way in which straight baselines may be drawn. First:

⁹ [1951] ICJ Rep. 116 at 133.

¹⁰ *Ibid.*

¹¹ *Ibid.*, and cf. the Court's discussion of individual baselines of the Norwegian system at p. 142.



The construction of baselines

[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, art. 4(2); LOSC, art. 7(3))

This provision follows the *Anglo-Norwegian Fisheries* case almost *verbatim*. Second, straight baselines may not be drawn to or from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them, or, the Law of the Sea Convention adds, 'in instances where the drawing of baselines to and from such elevations has received general international recognition' (TSC, art. 4(3); LOSC, art. 7(4)). The point of this provision is presumably to prevent baselines being drawn too far seawards of the coast, and thus to reinforce the first condition. Third, a State may not draw straight baselines in such a way as to cut off from the high seas (or, the Law of the Sea Convention adds, the EEZ) the territorial sea of another State (TSC, art. 4(5); LOSC, art. 7(6)). This provision deals with highly exceptional situations, where a smaller territory is embedded in a larger territory (e.g., Monaco in France) or where small islands belonging to one State lie close to the coast of another State (e.g., Greek islands lying close to the coast of Turkey). Finally, a State utilising a straight baseline system must clearly indicate the lines on charts to which 'due publicity' must be given (TSC, art. 4(6); LOSC, art. 16).

Both the Territorial Sea and Law of the Sea Conventions follow the *Anglo-Norwegian Fisheries* case in providing that in determining particular baselines, 'account may be taken . . . of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage' (TSC, art. 4(4); LOSC, art. 7(5)). The most obvious such economic interest, and the interest at issue in the *Anglo-Norwegian Fisheries* case, is fishing. Neither the Territorial Sea Convention nor the Law of the Sea Convention contains any provision limiting the length of individual baselines (apart from 'archipelagic' baselines: see chapter six), although an unsuccessful attempt was made at UNCLOS I to introduce a maximum length of fifteen miles for any one baseline. In the *Anglo-Norwegian Fisheries* case the longest line, whose validity was upheld by the Court, was forty-four miles. (In this chapter, as elsewhere in this book, all references to 'miles' are to nautical miles unless otherwise stated.) It would seem, therefore, that there is in principle no restriction on the length of individual baselines, although obviously in practice the necessity for compliance with the general conditions set out above will be a restraining factor.

The Law of the Sea Convention contains a provision, dealing with a rather exceptional geographical situation, which has no equivalent in the Territorial Sea Convention. Article 7(2) provides that, '[w]here because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points [between which straight baselines may be drawn] may be selected along the furthest seaward extent of the low-water line'. This provision, inspired by a Bangladeshi proposal, is not very well drafted. It is not clear if this provision is laying down a third type of coastline, in addition to deeply indented

coasts and coasts fringed with islands, where straight baselines may be drawn, or whether it applies only to deltas on coasts which fall into the first two categories. The drafting history of the provision suggests the latter.¹² Nor is it wholly clear whether the use of the 'furthest seaward extent of the low-water line' is subject to the general rules about the use of low-tide elevations as basepoints for straight baselines, contained in article 7(4), or is an exception to such rules, although the better view is that it is subject to article 7(4). Furthermore, the meaning of the phrase 'and other natural conditions' is obscure, but appears to refer to causes of coastal instability other than deltas. Article 7(2) goes on to provide that where straight baselines are drawn along the furthest seaward extent of the low-water line of deltas, then 'notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with [the] Convention'. In general it is unlikely that this part of article 7(2) will have much practical application as most deltas advance rather than retreat: normally a retreating delta occurs only where heavy damming has taken place upstream. However, this provision may be important in the future if predictions of a significant rise in sea levels as a result of global climate change are fulfilled, although article 7(2) does, of course, require a State eventually to change its baselines. In practice there appears to be only one possible case of a State drawing straight baselines utilising article 7(2) (although some deltas are enclosed within straight baselines drawn on the basis of other criteria). In 1990 Egypt drew a system of straight baselines along its Mediterranean coast including the Nile delta (part of which is retreating at the rate of about forty metres a year). The baselines drawn around the Nile delta may be based on article 7(2). The USA objected to Egypt's action on the ground that the coastline concerned was neither deeply indented nor fringed with islands.¹³

State practice

Although both the International Court of Justice in the *Anglo-Norwegian Fisheries* case and the Territorial Sea and Law of the Sea Conventions regard the use of straight baselines as being limited to exceptional geographical circumstances, and although few States have a coastline that is anywhere near as indented or fringed with islands as that of Norway, some 55-65 States have in fact drawn straight baselines along all or part of their coasts,¹⁴ and a further fifteen States

¹² Prescott and Bird, *op. cit.* in 'Further reading' under 'Straight baselines', pp. 289-91, 295-6.

¹³ *Limits in the Seas* No. 116 (1994), see 'Further reading', under 'Straight baselines'.

¹⁴ The reason for the lack of precision about the number is that it is not always possible to tell if the use by a State of a straight line as the baseline is intended to be a straight baseline *stricto sensu* or a bay or river closing line. Most straight baselines are depicted, and reference to their legislative source given, in *Atlas of the Straight Baselines* and/or *Limits in the Seas*, both in 'Further reading'.

have adopted enabling legislation to draw straight baselines but have not yet drawn them.¹⁵

As we have seen, the rules governing the use of straight baselines laid down in customary and conventional law are relatively imprecise, and thus allow States a considerable latitude in the way they draw straight baselines. A good many States, however, do appear to have gone beyond the spirit and the vague wording of these rules. Studies by the Geographer of the US Department of State (in the *Limits in the Seas* series) and by Prescott (*op. cit.* in 'Further reading') suggest that of the straight baseline systems so far drawn, about two-thirds depart from the rules of international law in one way or another. First, some States (such as Albania, Cuba, Italy, Senegal and Spain) have drawn straight baselines along coasts which are not deeply indented. A particularly good example is Colombia, which has drawn a single straight baseline 131 miles in length along part of its Caribbean coast and enclosed a smooth coast with no fringing islands.¹⁶ A second form of departure is the drawing of straight baselines along coasts which possess some offshore islands but which do not form a fringe in the immediate vicinity of the coast. This has been done by, among others, Ecuador, Iceland, Iran, Italy, Malta and Thailand. Perhaps the most extreme example is Vietnam, which has used the isolated islet of Hon Hai, lying seventy-four miles from the mainland coast, as a basepoint for its straight baseline system, and connected it northwards to Hon Doi islet and southwestwards to Bay Canh islet, each of which is 161 miles away.¹⁷ A third form of breach is to draw straight baselines which depart to a considerable extent from the general direction of the coast. For example the straight baselines of Myanmar and Ecuador are in some places at an angle of 60° to the general direction of the coast¹⁸ (by comparison in the Norwegian baseline system, generally regarded as the standard model, the angle of deviation is never more than about 15°). Fourth, baselines are sometimes drawn so that the sea areas inside the lines are insufficiently closely linked to the land to be subject to the regime of internal waters. Again Myanmar's system is a good illustration: the 222-mile long line across the Gulf of Martaban is at one point seventy-five miles from the nearest land and encloses as internal waters an area the size of Denmark, and in Myanmar's system as a whole the ratio of land (i.e., islands lying within the baselines) to water is less than 1 : 50 (in comparison, the ratio in the Norwegian system is 1 : 3.5). Fifth, some States appear to accept the use of low-tide elevations as basepoints, regardless of whether lighthouses or similar installations have been built on them: see, for example, the enabling legislation

¹⁵ For a list of both categories, see J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims* (The Hague, Nijhoff), 2nd edn, 1996, pp. 77-81.

¹⁶ See *Limits in the Seas* No. 103 (1985).

¹⁷ See *Limits in the Seas* No. 99 (1983).

¹⁸ See *Limits in the Seas* No. 14 (1970) (Burma - now Myanmar) and No. 42 (1972) (Ecuador). Minor amendments were made to Myanmar's system in 1977: see *UN Leg. Ser. B/19*, p. 42.

of Saudi Arabia and Syria.¹⁹ Sixth, in spite of the obligation not to draw straight baselines in such a way as to cut off the territorial sea of another State from the high seas or EEZ, Morocco's straight baselines do just that in respect of Spain's North African enclaves of Ceuta and Melilla.²⁰ Seventh, in spite of the obligation to publicise baselines, Haiti, North Korea and Malaysia have drawn the outer limit of their territorial sea in a way which presupposes that it is measured from straight baselines, even though such lines have not been published. Finally, some States have located basepoints for straight baselines in the sea. The leading example here is Bangladesh, which has drawn a straight baseline system all of whose basepoints are in the sea. For most of its course the line lies close to the ten-fathom isobath and in places is fifty miles from the nearest land.²¹ Less objectionable is the practice of some States in locating the terminus of their baseline system in the sea but on the boundary with the neighbouring State. Other anomalies in the drawing of straight baselines are the bizarre practice of locating the terminus of a system in another State's territory (as Ecuador has done in Colombia and Venezuela in Guyana); and not anchoring a straight baseline to the mainland coast, so that it is possible to sail into internal waters without crossing the baseline (as has been done by, amongst others, Bangladesh and Norway (in Spitsbergen)). Surveying State practice, Prescott concludes that abuse of the rules relating to straight baselines has been such that 'it would now be possible to draw a straight baseline along any section of coast in the world and cite an existing straight baseline as a precedent'.²² On the other hand, it should be noted that some of the straight baselines referred to above have provoked objections from other States: for example, Myanmar and India have objected to Bangladesh's baselines; France, Singapore, Thailand and the USA to those of Vietnam; and the USA has protested against the straight baselines of a further twenty-six States.²³ The question of the legality of baselines which do not appear to conform to the rules is further considered at the end of this chapter. In 1987 the US State Department published a study proposing guidelines for evaluating straight baseline claims for their conformity with international law.²⁴ Admirable though this study is, it seems unlikely that the criteria which it sets

¹⁹ See *Limits in the Seas* Nos 20 (1970) and 53 (1973), respectively.

²⁰ See *Atlas of the Straight Baselines*, p. 170.

²¹ *Ibid.*, p. 86.

²² Prescott, 'Straight and archipelagic baselines', *op. cit.* in 'Further reading' under 'Straight baselines', p. 38.

²³ Roach and Smith, *op. cit.* in footnote 15, pp. 18-19. For details see pp. 77-138, *passim*.

²⁴ *Limits in the Seas* No. 106 (1987). For a different approach to curbing straight baseline claims, see Reisman and Westerman, *op. cit.* in 'Further reading' under 'Straight baselines'. See also the US Government's view of the way in which art. 7 of LOSC should be applied, set out in its commentary on the Convention attached to the President's letter transmitting the Convention to the Senate for its advice and consent to ratification, reproduced in Roach and Smith, *op. cit.* in footnote 15, pp. 544-7 (and see also pp. 60-8).

forth (which relate to what is meant by a deeply indented coastline and fringing islands) have had or are likely to have any significant impact on the practice of States.

The effect of drawing straight baselines, even strictly in accordance with the rules, is often to enclose considerable bodies of sea as internal waters: for example, the whole of the Minches, lying between the Inner and Outer Hebrides off the west coast of Scotland, is enclosed by straight baselines and thus is internal waters. It should, however, be noted that in some such internal waters, including the Minches, there is a right of innocent passage given by the Conventions: see p. 61.

Bays

Pre-1958 customary rules

International law has always recognised that bays have a close connection with land and that it is more appropriate that they should be considered as internal waters than as territorial sea. Customary international law had, accordingly, recognised that the baseline could in principle be drawn across the mouth of bays, enclosing them as internal waters. But customary international law failed to provide clear rules on two essential points: the criteria by which an indentation of the coast would be recognised as a bay, and the maximum length of the closing line across a bay. As regards the first point, the deficiencies of customary international law can be seen in the *North Atlantic Coast Fisheries* case (1910), where the Permanent Court of Arbitration found that there was no general criterion of international law which defined a bay. Factors to be taken into account in deciding whether an indentation was a bay included the penetration of the bay inland and the security and economic interests of the coastal State therein. As regards the maximum length of closing lines for bays, the United Kingdom in the *Anglo-Norwegian Fisheries* case argued that customary international law had established ten miles as the maximum length for closing lines. This contention was rejected by the International Court on the ground that there was no uniformity of State practice on the question.

Conventional rules

The Territorial Sea Convention, in article 7, established clear and precise rules for determining both of these hitherto uncertain points, and these rules are repeated almost *verbatim* in the Law of the Sea Convention (art. 10). At the outset it should be noted that these rules do not apply to cases where straight baselines are used (see above), or to historic bays or bays whose coasts belong to more than one State (both of which are considered below). To establish whether an indentation is a bay in the legal sense the Conventions lay down a subjective

description and an objective geometric test. As regards the former, a bay is described as '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'. Such an indentation will nevertheless not be a bay in the legal sense unless it also fulfils the following geometric test (and see also points A and C in the figure in this chapter). First, a line should be drawn between the natural entrance points of the indentation. Next, a semi-circle having the diameter of this line should be constructed and its area measured. (Where the presence of islands means that an indentation has more than one mouth, the diameter of the semi-circle is a line as long as the sum total of the lengths of the lines across the different mouths.) Then the area of water between the line across the mouth of the indentation and the low-water mark around the indentation should be calculated: for this purpose any islands within the indentation are to be included in the area of water. If the area of water is larger than the area of the semi-circle, the indentation is a bay. Conversely, if the area of water is smaller, the indentation is not a bay. Once an indentation has been established as being a bay, a closing line can be drawn across it. If the length of the line between the natural entrance points of the bay (in the case of bays with more than one mouth, the total of the lengths of the lines across the different mouths) is less than twenty-four miles, this line is the closing line and, therefore, the baseline. If the line or lines are more than twenty-four miles in length, then a straight line of twenty-four miles is drawn within the bay in such a way as to enclose the greatest amount of water possible: this line then forms the baseline. Around the unenclosed part of the bay the baseline will be the low-water mark (unless any of the features that justify a different baseline are present).

These provisions, which the International Court of Justice in the *Land, Island and Maritime Frontier* case (1992) said 'might be found to express general customary law',²⁵ are obviously a great improvement on previous customary international law, but their practical application is not wholly free from difficulty. The main difficulty is that often it is not obvious which are the 'natural entrance points' of an indentation. An example of this problem can be seen in *Post Office v. Estuary Radio* (1968), where the English Court of Appeal had to decide whether the Thames estuary was legally a bay. Estuary Radio argued that the natural entrance points of the estuary were Orfordness and the North Foreland (in which case the estuary would not have been a bay because it would have failed the semi-circle test). The Post Office, on the other hand, argued that the natural entrance points were the Naze and Foreness (in which case the estuary was a bay). Although the Court of Appeal accepted the Post Office's contention, neither set of points seems very obviously to be the 'natural entrance points' of the estuary. Similarly, difficulties may arise in determining the extent to which rivers running into a bay, or other subsidiary features such as lagoons, should be taken into account in calculating the area of water within the bay. The application of

²⁵ [1992] ICJ Rep. 351 at 588.

the rules to bays with islands fringing, or lying just seaward of, the mouth may also be problematic.²⁶

Even where the application of article 7 of the Territorial Sea Convention has been free from difficulty, some States parties to the Convention have nevertheless failed to act in conformity with it. Thus, the Dominican Republic has drawn closing lines across four bays which do not meet the semi-circle test while the closing line in a Portuguese bay exceeds twenty-four miles.²⁷

Historic bays

We must now turn to consider the two types of bay to which the provisions of article 7 of the Territorial Sea Convention and article 10 of the Law of the Sea Convention do not apply – historic bays and bays whose coasts belong to more than one State. (The first of these will be dealt with in this section; the second in the next section.) Neither the Territorial Sea Convention nor the Law of the Sea Convention contains any provisions dealing with historic bays, although UNCLOS I had before it a memorandum on the subject prepared by the UN Secretariat (see the reference in 'Further reading' at the end of this chapter under 'Bays') and a draft article proposed by Japan,²⁸ and UNCLOS III had a draft article proposed by Colombia.²⁹ UNCLOS I did, however, adopt a resolution requesting the UN to arrange for the study of the juridical regime of historic waters, including historic bays.³⁰ Such a study was published by the UN Secretariat in 1962 (see the reference in 'Further reading'), but it has not led to any international legislative action. The position is therefore governed by customary international law. In the *Tunisia/Libya Continental Shelf* case the International Court stated that 'general international law . . . does not provide for a single "regime" for "historic waters" or "historic bays", but only for a particular regime for each of the concrete, recognised cases of "historic waters" or "historic bays"':³¹ thus, in one case only exclusive 'historic' fishing rights might exist, whereas in another the coastal State might enjoy full sovereignty. This approach was endorsed by the International Court in the *Land, Island and Maritime Frontier* case. Accordingly, claims to historic title must be approached with circumspection. However, the general criteria for the establishment of a historic title were addressed in the 1962 UN Secretariat study, according to which a State may validly claim title to a bay on historic grounds if it can show that it has for a considerable period of time

²⁶ For a discussion of these and other problems, see the works cited in the general section of 'Further reading' by Beazley (pp. 16–26), Hodgson and Alexander (pp. 3–21), Prescott (pp. 51–60), O'Connell (pp. 396–406) and United Nations (1989a) (pp. 28–31).

²⁷ See *Limits in the Seas* Nos 5 (1970) and 27 (1970), respectively. It is not clear whether these claims are still in force.

²⁸ UNCLOS I, *Official Records*, Vol. III, p. 241.

²⁹ UNCLOS III, *Official Records*, Vol. V, p. 202. Cf. also the discussion of historic bays in Vol. II, pp. 100–11 and Vol. IV, p. 196.

³⁰ *Op. cit.* in footnote 28, Vol. II, p. 145.

³¹ [1982] ICJ Rep. 18 at 74 (emphasis in the original).

claimed the bay as internal waters and has effectively, openly and continuously exercised its authority therein, and that during this time the claim has received the acquiescence of other States. The United States Supreme Court has applied these criteria in *US v. Louisiana* (1969) and *US v. Alaska* (1975), and they were implicitly accepted by the International Court in the *Land, Island and Maritime Frontier* case. Where title to a historic bay has been acquired, a closing line may be drawn across the mouth of the bay which will then form the baseline. There appear to be no rules as to the maximum permissible length of such lines, and it would seem that if good title has been acquired, the closing line may be of any length.

The need for authority to have been effectively exercised over a claimed historic bay for a considerable period of time is a condition which is objected to by many recently independent developing States, which argue that it is impossible for them to produce evidence of an uninterrupted exercise of authority. While in fact it would seem possible for such States to cite the practice of both the colonial and pre-colonial period (Sri Lanka's claim to Palk Bay as historic waters is based not only on acts of the British, Dutch and Portuguese colonial administrations but also on authority exercised by the pre-colonial kings of Ceylon), some developing States have argued for a theory of 'vital bays' under which vital security or economic interests would justify title to a bay independently of any true historic title. Such a doctrine, whose origins can be traced back to the early part of the twentieth century, has naturally been rejected by the traditional maritime States, such as the United Kingdom and the USA, because of the ease with which it would allow a State to claim large areas of sea as internal waters, at the expense of the international community.

In the case of historic bays strictly so called, the question whether a State has acquired good title to a claimed historic bay is likely to depend largely on whether other States have acquiesced in its claim. At the present time some twenty States claim historic bays.³² Examples of such claims include those by Russia to Peter the Great Bay (although several States, including the United Kingdom and the USA, do not accept it as a historic bay),³³ by Canada to Hudson Bay (although the USA does not accept it as a historic bay),³⁴ by Thailand to the inner part of the Gulf of Thailand,³⁵ and by Vietnam to parts of the Gulfs of Thailand and Tonkin (to which claims a number of States, including France, Thailand, China and the USA, have objected).³⁶ As these examples show, historic

³² For a list of claimed historic bays, see Roach and Smith, *op. cit.* in footnote 15, pp. 33-4.

³³ See *Whiteman, op. cit.*, Vol. II, pp. 250-7 and Roach and Smith, *op. cit.* in footnote 15, pp. 49-50.

³⁴ *Ibid.*, pp. 236-7.

³⁵ Declaration of 22 September 1959. *UN Leg. Ser. B/16*, p. 34.

³⁶ See *Limits in the Seas* No. 99 (1983) and Roach and Smith, *op. cit.* in footnote 15, pp. 39-40, 52-3. For other historic bays which the USA has protested, see *ibid.*, pp. 35-53, *passim*.

bays are likely to be larger than bays governed by article 7 of the Territorial Sea Convention and article 10 of the Law of the Sea Convention, partly because in the case of smaller bays it is simpler for a State to close a bay under the conventional rules rather than risk a claim to historic status that may be disputed.

Perhaps the most controversial claim to a bay on historic grounds is that of Libya to the Gulf of Sidra (Sirte). In 1973 Libya claimed the Gulf as a historic bay and drew a closing line across it which is 296 miles in length. This action evoked protests from several States, including Australia, France, Norway, the United Kingdom, the USA and the USSR. The USA not only sent a note of protest but passed through the Gulf with a naval squadron. Further displays of naval strength by the USA to demonstrate its objections to the Libyan claim and its assertion that the Gulf remains high seas have taken place, notably in 1981 (when two Libyan aircraft were shot down by the USA) and in 1986. There seems little evidence to support Libya's claim to have exercised sovereignty over the Gulf 'through history' and much evidence of objections from other States. The conclusion must be, therefore, that the Gulf of Sidra is not a historic bay. Conceivably it might be claimed as a 'vital bay', but such a claim would only have any validity as against those States that accept the doctrine of vital bays.³⁷ Lest it be thought that such claims are confined to recently independent States, it may be noted that the Italian claim to the Gulf of Taranto is in many respects similar to this Libyan claim, and has elicited rejections from States such as the United Kingdom and the USA.³⁸

Bays bordered by more than one State

As with historic bays, bays which are bordered by more than one State are not dealt with by either the Territorial Sea Convention or the Law of the Sea Convention. There are over forty such bays in the world. Examples include Lough Foyle (bordered by Ireland and the United Kingdom), the Bay of Figuiet (France and Spain) and Passamaquoddy Bay (Canada and the USA). The normal rule of customary international law in relation to such bays would appear to be that unlike bays governed by article 7 of the Territorial Sea Convention and article 10 of the Law of the Sea Convention, or historic bays, they cannot be closed by a line drawn across their mouth. Instead the baseline is constituted by the low-water mark around the shores of the bay. The matter, however, is not free from

³⁷ For fuller discussion of Libya's claim, see F. Francioni, 'The Gulf of Sidra Incident (*United States v. Libya*) and international law', 5 *Italian Yearbook of International Law* 85-109 (1980-1); Symposium on Historic Bays of the Mediterranean, *op. cit.* in 'Further reading' under 'Bays', pp. 311-26; and J. M. Spinnato, 'Historic and vital bays: an analysis of Libya's claim to the Gulf of Sidra', 13 *ODIL* 65-85 (1983). For a skilful defence of the Libyan position, see F. A. Ahnisch, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford, Clarendon Press), 1993, chapter 7.

³⁸ Roach and Smith, *op. cit.* in footnote 15, pp. 43-4.

controversy. Exceptionally it may be possible for the riparian States to show that the position is different by reason of historic title. Such is the case with the Gulf of Fonseca, bordered by El Salvador, Honduras and Nicaragua. In *El Salvador v. Nicaragua* (1917) the now defunct Central American Court of Justice held that the Gulf was a historic bay, thus having the character of internal waters, and that the three riparian States were co-owners of its waters except for the innermost three miles which was the exclusive property of each. In the *Land, Island and Maritime Frontier* case, decided some seventy-five years later, the International Court reached a similar conclusion as to the Gulf's status, observing that the juridical status of the waters subject to co-ownership was *sui generis*, although essentially that of internal waters, through which nevertheless third States had a right of innocent passage. On the other hand, in a dissenting opinion Judge Oda vigorously denied that it was possible for a multi-State bay to be treated as a historic bay. A more controversial treatment of a multi-State bay is the 1988 Boundary Agreement between Mozambique and Tanzania under which a closing line is drawn across Ruvuma Bay, which does not appear to have been claimed as a historic bay, with the Bay then being divided between the two States as internal waters.

River mouths

Article 13 of the Territorial Sea Convention and article 9 of the Law of the Sea Convention provide in almost identical wording that:

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, art. 9. TSC has 'low-tide']

No limit is placed on the length of such a river closing line. The provision, in the absence of any qualification to the contrary, would appear to apply both to rivers with a single riparian State as well as to rivers with two riparian States, although the latter application is apparently not accepted by some States, such as the USA.³⁹

Estuaries

It should be noted that articles 13 (TSC) and 9 (LOSC) apply only to rivers that flow 'directly' into the sea. Most large rivers do not flow directly into the sea but enter it via estuaries. In such cases the question of the baseline should be governed by the provisions concerning bays (as we earlier saw was done with the Thames estuary in *Post Office v. Estuary Radio*). The original ILC draft did in fact contain a specific provision to this effect, but it was deleted at UNCLOS I because of the difficulty of defining an estuary.

³⁹ See *Whiteman, op. cit.*, Vol. IV, pp. 250-7.

It may not always be easy to distinguish between a river entering the sea directly and one entering the sea via an estuary; and in any case the distinction is open to abuse. Nor is it always easy to determine exactly where the mouth of a river is located, especially on a coast with an extensive tidal range. An example of these problems can be seen in the action of Argentina and Uruguay in 1961 in drawing a line 120 miles in length across the mouth of the river Plate between Punta del Este in Uruguay and Cabo San Antonio in Argentina.⁴⁰ This action, which has met with protests from a number of other States, including the United Kingdom and the USA, is said by Argentina and Uruguay to be based on article 13,⁴¹ although few cartographers would be likely to choose the location of the above line as the mouth of the river Plate or indeed say that the river entered the sea 'directly': furthermore, the river Plate estuary has in the past been claimed, inconsistently with the present claim, as a historic bay.⁴²

Deltas

Where a river enters the sea via a delta, it is unlikely that articles 13 and 9 will be applicable. Instead the baseline is likely to be constituted by the low-water mark or in some cases by straight baselines (as the Law of the Sea Convention with its provision on deltas on highly unstable coastlines, referred to above, provides). In addition, in many instances, the provisions on low-tide elevations and islands (considered below) will be applicable.

Harbour works

Article 8 of the Territorial Sea Convention provided that the 'outermost permanent harbour works which form an integral part of the harbour system' (such as jetties and breakwaters) were to be regarded as forming part of the coast and thus could serve as the baseline. Article 11 of the Law of the Sea Convention repeats article 8 almost *verbatim*, but makes it clear that harbour works must be attached (or at least very close) to the coast if they are to be used as baselines, by adding that 'off-shore installations and artificial islands shall not be considered as permanent harbour works'. Although the Conventions do not make provision for such an eventuality, it would seem reasonable for coastal States to be able to draw a straight line across the mouth of a harbour (although such a line would normally have a negligible influence on the extent of the territorial sea). Support for such a position is provided by article 50 of the Law of the Sea Convention which permits archipelagic States to draw closing lines across harbours (see p. 125 below). In the *Dubai/Sharjah Border Arbitration* (1981) the

⁴⁰ Text of the Argentina-Uruguay Declaration in *Limits in the Seas* No. 44 (1972).

⁴¹ In fact, however, neither Argentina nor Uruguay is a party to the Territorial Sea Convention, although both have signed it.

⁴² See *Whiteman, op. cit.*, Vol. IV, pp. 240, 342-3.

tribunal implied that the provisions of articles 8 and 11 were part of customary international law.⁴³

Where roadsteads which are 'normally used for the loading, unloading and anchoring of ships' lie not only beyond the baseline but also wholly or partly outside the territorial sea, they are included in the territorial sea, though they do not otherwise affect its delimitation (TSC, art. 9; LOSC, art. 12). Strictly speaking these provisions (which appear to have very limited practical application, a rare example being their probably illegitimate invocation by the Federal Republic of Germany in 1983 to justify extending its territorial sea to sixteen miles in one area⁴⁴) have nothing to do with baselines, and are only included here for the sake of completeness.

Low-tide elevations

A low-tide elevation is defined in the Conventions as 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide' (TSC, art. 11(1); LOSC, art. 13(1)). Low-tide elevations are often referred to in older books and treaties as 'drying rocks' or 'banks'. The effect of low-tide elevations on the delimitation of the territorial sea was uncertain under customary international law before 1958, but clear rules were laid down in article 11 of the Territorial Sea Convention, which are repeated *verbatim* in article 13 of the Law of the Sea Convention. Under these provisions:

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.

Where, however:

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.

This is so even if such a low-tide elevation is situated at a distance less than the breadth of the territorial sea from another low-tide elevation, which in turn is situated less than the breadth of the territorial sea from the mainland: i.e., it is not possible to 'leapfrog' from one low-tide elevation to another. The now-general recognition of a twelve-mile territorial sea gives low-tide elevations a much

⁴³ 91 *ILR* 543 at 661-2.

⁴⁴ J. Van Dyke *et al.* (eds), *International Navigation: Rocks and Shoals Ahead* (Honolulu, Hawaii, Law of the Sea Institute), 1988, pp. 103-5. In 1994 Germany modified its claim, enclosing the roadstead concerned as territorial sea, with the waters between that and the normal twelve-mile outer limit of the territorial sea reverting to EEZ: see Roach and Smith, *op. cit.* in footnote 15, pp. 126-8.

greater potential for extending the outer limit of the territorial sea seawards than when the territorial sea was more commonly three miles in breadth. Thus, in an extreme case, where a low-tide elevation is twelve miles from the mainland, the outer limit of the territorial sea will be twenty-four miles from the mainland.

Finally, it should be noted that in limited cases low-tide elevations can be used as basepoints in constructing a straight baseline system (see above).

Islands

An island is defined in the Conventions as 'a naturally formed area of land, surrounded by water, which is above water at high tide' (TSC, art. 10(1); LOSC, art. 121(1)). This definition removes the doubts which had existed in customary international law before 1958 as to whether in addition an island had to be capable of effective occupation, by making it clear that this is not a necessary condition. The Conventions go on to provide that the territorial sea of an island is measured in accordance with the general rules on baselines (TSC, art. 10(2); LOSC, art. 121(2)). This means that every island, no matter what its size has a territorial sea (which appears also to have been the position in customary international law before 1958). With large islands, such as Great Britain, Greenland and Madagascar, there are obviously no problems. But it also means that every islet or rock, no matter how small in size, has a territorial sea, i.e., the islet or rock, or rather the low-water mark around it, will serve as part of the baseline. The question then arises whether this is the baseline for the territorial sea only, or the baseline for all maritime zones.

The Territorial Sea Convention mentioned only the territorial sea specifically, but by implication it also included the contiguous zone (see TSC, art. 24(2)). State practice after 1958 suggested that it also included the twelve-mile exclusive fishing zone.⁴⁵ (The continental shelf, the only other kind of maritime zone in existence before UNCLOS III, was not, under customary international law or the Continental Shelf Convention, measured from the baseline.) The Law of the Sea Convention, on the other hand, specifically provides that all islands in principle can serve as the baseline for all maritime zones, viz. the territorial sea, contiguous zone, EEZ and continental shelf⁴⁶ (LOSC, art. 121(2)), but makes a partial exception for 'rocks which cannot sustain human habitation or economic life of their own': such 'rocks' can serve as the baseline only for the territorial sea and contiguous zone, but not for the EEZ or continental shelf (LOSC, art. 121(3)).

⁴⁵ Although Ireland objected to the United Kingdom claiming a twelve-mile fishing zone around the minuscule islet of Rockall. See Symmons, *op. cit.* in 'Further reading' under 'Islands', pp. 101-2.

⁴⁶ Under the Law of the Sea Convention, unlike the Continental Shelf Convention or pre-UNCLOS customary international law, the outer limit of the continental shelf is in many, but not all, cases measured from the baseline. See art. 76 and the discussion in chapter 8, pp. 148-9.

This provision is poorly drafted. It does not define what a 'rock' is or suggest any dividing line between 'rocks' and other islands. In addition, the question of whether any particular 'rock' can sustain 'human habitation' or 'economic life' is one that may admit of more than one answer because of the vagueness of the phrases used.⁴⁷ The effect of article 121(3), which is further analysed in chapters eight and nine (see pp. 150–1 and 163–4), is to create a situation – the one situation – where the baseline is not the same for all maritime zones. It also has the rather anomalous result that a low-tide elevation can sometimes generate an exclusive economic zone, whereas an uninhabitable 'rock' cannot, even though the latter will usually be a much more visible manifestation of land. On the other hand, as long as the other conditions for the drawing of straight and archipelagic baselines are satisfied, it would appear permissible to use an uninhabitable 'rock' as a basepoint in constructing a straight baseline or archipelagic baseline system, and in such a case the limitations of article 121(3) could be circumvented. In practice most 'rocks' lie immediately offshore, and thus if article 121(3) is applied and they are discounted as basepoints for delimitation of the EEZ and continental shelf, the extent of those zones will not be greatly affected. However, the few isolated oceanic 'uninhabitable rocks' that do exist (and exactly how many will depend on what criteria, if any, emerge as to the size and habitability of 'rocks') – such as Rockall (off the United Kingdom), St Peter and St Paul Rocks (off Brazil) and L'Esperance Rock (off New Zealand) (all less than 0.01 square miles in area) – are likely to give or have already given rise to difficulties and disputes (see further chapter nine).

Archipelagos

Where islands are grouped so as to form an archipelago, the Law of the Sea Convention provides that, in addition to any baselines drawn along individual islands to delimit internal waters, straight lines may be drawn around the outermost points of the archipelago itself (archipelagic baselines). Such archipelagic baselines form the baseline from which the territorial sea and other zones are measured. This matter is discussed more fully in chapter six.

Artificial islands

The definition in the Conventions of an island as being 'naturally-formed' excludes artificial islands, although the distinction between a 'naturally-formed' and an 'artificial' island may not always be easy to make in practice: for example, if a State constructs some kind of barrier in the sea so that sand being moved by currents piles up against it, with the result that eventually an island is formed, is

⁴⁷ For a fuller discussion of the meaning of art. 121(3), see E. D. Brown, 'Rockall and the limits of national jurisdiction of the UK', 2 *Marine Policy* 181 (1978) at 205–8 and Kwiatkowska and Soons, *op. cit.* in 'Further reading' under 'Islands', pp. 150–73.

this a 'naturally-formed' or an artificial island? The only provision on artificial islands in the 1958 Geneva Conventions was article 5(4) of the Continental Shelf Convention, which provided that installations connected with the exploration and exploitation of the shelf's natural resources and located on the continental shelf 'do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.' The implication would seem to be that no artificial island is entitled to a territorial sea or, therefore, to serve as a basepoint. The Law of the Sea Convention reinforces this conclusion. First, article 11 provides, as we have already seen, that 'offshore installations and artificial islands shall not be considered as permanent harbour works' and therefore do not, *qua* harbour works, form part of the baseline. Secondly, articles 60(8) and 80 provide that artificial islands and installations constructed in the EEZ or on the continental shelf have no territorial sea of their own nor does their presence affect the delimitation of the territorial sea, EEZ or continental shelf. Thirdly, even though the construction of artificial islands on the high seas is now recognised as a freedom of the high seas (LOSC, art. 87), the prohibition on States from subjecting any part of the high seas to their sovereignty (LOSC, art. 89) prevents the establishment of any maritime zones around artificial islands on the high seas. This principle is spelt out for that part of the high seas overlying the International Sea Bed Area. Under article 147(2) stationary installations used for the conduct of activities in the Area have no territorial sea of their own, nor do they affect the delimitation of the territorial sea, EEZ or continental shelf.

Reefs

The coral reefs of atolls present a problem in that they may be continuously submerged or, if exposed at low tide, may be situated at a distance greater than the breadth of the territorial sea from the islands of the atoll: in neither case, therefore, under the rules so far considered could such reefs serve as the baseline. And yet it is desirable for a variety of reasons, principally ecological, that the territorial sea should be measured from the outer limit of the reef so that the lagoon inside the reef, which normally constitutes the main source of food for the inhabitants of an atoll, has the status of internal waters. The problem of coral reefs was recognised and discussed by the ILC in the earlier stages of its work⁴⁸ but no provision on the subject was contained in its final draft, nor does the matter appear to have been discussed at UNCLOS I. With the emergence into independence since 1958 of many States formed of atolls in the Caribbean and Indian and Pacific Oceans, such as the Bahamas, the Maldives and Nauru, there has come greater political impetus for a specific rule for coral reefs, and such a rule is now contained in the Law of the Sea Convention. Article 6 provides that:

⁴⁸ See *Whiteman, op. cit.*, Vol. IV, pp. 297–300, 306.

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.

A number of points may be noted about this provision. First, it is not limited in its application to atolls or coral reefs (unlike an early draft provision in the ILC).⁴⁹ Secondly, it suggests that only reefs exposed at low tide, and not wholly submerged reefs, may be used as baselines (again unlike the early ILC draft, which had provided that 'the edge of the reef as marked on . . . charts should be accepted as the low-water line'): in practice, however, there is in most cases only a short distance between the low-water line and the seaward limit of the reef. Thirdly, it is not clear whether the term 'fringing reef' is used in its technical geomorphological sense as meaning a reef extending outwards from the shore from which it is not separated by a channel, or whether it also includes a barrier reef which lies parallel to the shore from which it is separated by a wide and deep lagoon. A UN study of baselines stated in 1989 that 'it may be assumed that the reference to fringing reefs in article 6 can be applied without distinction to any reefs, including barrier reefs, which are separated from the low-water line of the island and form a fringe along its shore'.⁵⁰ Even so, it is not clear whether there is any limit that should be placed on the distance a fringing reef which is to serve as a baseline may lie from the coast of an island. A further problem is that article 6 does not specify what is to happen where there is a gap in the fringing reef. The obvious solution is to draw a straight line across the gap, and this appears to be the growing practice of States: see, for example, the legislation of Fiji,⁵¹ Nauru⁵² and of New Zealand in respect of the Tokelau Islands.⁵³ This solution is more problematic, however, where the gap is extensive, and would not seem possible at all where the reef fringes only part of the island.⁵⁴ Finally, many atolls form part of archipelagos. In such cases it will often be simpler and more advantageous for the archipelagic State to use archipelagic baselines as the baseline (see chapter six) than to construct baselines in accordance with the provisions of article 6. Furthermore, as Beazley points out, with the now-general acceptance of a twelve-mile territorial sea, article 6 achieves little that could not be achieved by the provisions on low-tide elevations.⁵⁵

⁴⁹ However, Beazley, *op. cit.* in 'Further reading' under 'Reefs', p. 298, argues that the terms 'atoll' and 'fringing reef' used in art. 6, together with the *travaux préparatoires*, point to art. 6 being limited in its application to coral reefs only.

⁵⁰ United Nations (1989a), *op. cit.* in 'Further reading', in the general section, p. 9.

⁵¹ See *Limits in the Seas* No. 101 (1984), which, however, questions whether in some cases this has not been done somewhat arbitrarily, particularly because of the use of submerged reefs.

⁵² Interpretation Act 1971. *UN Leg. Ser. B/16*, p. 19.

⁵³ Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, s. 5. *ND VII*, p. 468.

⁵⁴ For suggestions as to what should be done in this situation, see United Nations, *op. cit.*, pp. 11-13.

⁵⁵ Beazley, *op. cit.*, pp. 303-4, 311.

Charts and publicity

Under the Territorial Sea Convention the only baselines which the coastal State was required to indicate on charts and publicise were straight baselines (TSC, art. 4(6)). Under the Law of the Sea Convention this obligation is extended to closing lines across river mouths and bays, and there is now an obligation to deposit a copy of a chart showing such baselines (or alternatively a list of geographical co-ordinates) with the UN Secretary General (LOSC, art. 16). Presumably the reason why the list of baselines to be indicated on charts and publicised has not been extended to the low-water line and low-tide elevations is partly that such features are constantly changing as the result of tides and currents, and partly that the low-water line is the normal baseline which the coastal State must adopt if it does not choose man-made baselines such as river and bay closing lines and straight baselines and which must be marked on 'large-scale charts officially recognised by the coastal State' (TSC, art. 3; LOSC art. 5).

Article 16 of the Law of the Sea Convention should introduce greater precision and certainty into the drawing of baselines. This is particularly important for mariners and fishermen wanting to know whether they are in any of a coastal State's maritime zones and, if so, which. The requirement of publicity may also help to reduce some of the past abuse of straight baselines and river mouth and bay closing lines which we have noted above.

It might seem that once a State has exercised the full range of options provided by the Conventions in drawing baselines and has duly charted and publicised such baselines, that would be the end of the matter. However, if there is a significant rise in sea levels over the coming decades as a result of global climate change, as is widely predicted, this is likely to cause a number of States to redraw their baselines as the low-water line on some coasts moves appreciably landwards, some low-tide elevations disappear, and some islands become low-tide elevations or disappear completely.⁵⁶

Present-day customary international law relating to baselines

Given the number of States parties to the Territorial Sea Convention and/or the Law of the Sea Convention (and at the time of writing only twenty-seven coastal States did not come into one or other or both of these categories), the question of what is the customary international law relating to baselines is one of diminishing importance, although it may of course still be significant in the context of a specific dispute.

⁵⁶ For fuller discussion of this issue, see A. H. A. Soons, 'The effects of a rising sea level on maritime limits and baselines', 37 *NILR* 207-32 (1990), especially at 216-26, and D. Freestone and J. Pethick, 'Sea level rise and maritime boundaries' in G. H. Blake (ed.), *Maritime Boundaries* (London, Routledge), 1994, pp. 73-90.

We will begin by considering whether the provisions of the Territorial Sea Convention and the corresponding provisions of the Law of the Sea Convention have, to the extent that they differ from the customary rules before 1958, passed into customary international law. There is considerable evidence that this has indeed happened. There are three main arguments to support this view. First, the Territorial Sea Convention's provisions on baselines were incorporated *in toto* and unchanged into the Law of the Sea Convention, with little discussion and no opposition at UNCLOS. Secondly, the Territorial Sea Convention's rules on baselines have been incorporated by reference into other treaties, the parties to which include States which are not parties to the Territorial Sea Convention.⁵⁷ Thirdly, there is the legislation of States enacted at a time when they were not bound, *qua* parties, by either the Territorial Sea Convention or the Law of the Sea Convention. This legislation generally reflects the Conventions' provisions (practice on straight baselines reflects the provisions less faithfully than practice on other matters). We have discovered and examined some ninety pieces of such legislation. Of this legislation, only fourteen pieces (for example, the legislation of Ireland,⁵⁸ Kuwait,⁵⁹ New Zealand,⁶⁰ Samoa,⁶¹ Sri Lanka⁶² and Sudan⁶³) refer to most or all of the types of baseline dealt with by the Conventions: in these cases the legislation is generally in accordance with the Conventions' provisions. The majority of States, however, simply refer in their legislation to the low-water mark and/or straight baselines, or, in one or two cases, to baselines being delimited in accordance with international law or the Conventions: a few States provide only for archipelagic baselines (on which see chapter six). Of individual types of baseline, we have already commented on the legislation relating to straight baselines earlier in this chapter. As regards bays, only four States (New Zealand,⁶⁴ Papua New Guinea,⁶⁵ Samoa⁶⁶ and Vanuatu⁶⁷) have legislation reflecting the Conventions' provisions. In the case of the other twenty-four States whose legislation mentions bays, the legislation either fails to define a bay and/or fails

⁵⁷ For example, the 1962 and 1969 amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, Annex A and art. II respectively; the 1964 European Fisheries Convention, art. 6; and the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor, art. II.

⁵⁸ Maritime Jurisdiction Acts, 1959 and 1964. *UN Leg. Ser. B/15*, p. 90.

⁵⁹ Decree of 17 December 1967 regarding the Delimitation of the Breadth of the Territorial Sea of Kuwait. *UN Leg. Ser. B/15*, p. 96.

⁶⁰ Territorial Sea and Exclusive Economic Zone Act, 1977. *UN Leg. Ser. B/19*, p. 65.

⁶¹ Territorial Sea Act, 1971. *UN Leg. Ser. B/18*, p. 33.

⁶² Maritime Zones Law No. 22 of 1976 and Presidential Proclamation of 15 January 1977. *UN Leg. Ser. B/19*, pp. 120, 124.

⁶³ Territorial Waters and Continental Shelf Act, 1970. *UN Leg. Ser. B/16*, p. 30.

⁶⁴ *Op. cit.* in footnote 60, ss. 2 and 6.

⁶⁵ National Seas Act, 1977, Schedule 1. *ND VII*, p. 486.

⁶⁶ *Op. cit.* in footnote 61, ss. 2 and 6.

⁶⁷ Maritime Zones Act No 23 of 1981, ss. 1 and 4. *Smith, op. cit.* in the general section of 'Further reading', p. 471.

to prescribe the maximum limit of the closing line. One should not conclude from this, however, that the practice of these States is necessarily contrary to the Conventions. What is essential in determining this question is how these States in practice draw baselines across bay mouths, and on this we have very little information. Three cases, however, have come to our attention where closing lines appear to have been drawn across bays contrary to the rules of the Convention. These are certain of the bay closing lines utilised by Angola, Argentina and France.⁶⁸ In the case of river-mouth closing lines, only seven States have legislation referring to such baselines and all but possibly one of these pieces of legislation (that of Cameroon⁶⁹) is in accordance with the Conventions. Nineteen States have legislation dealing with harbour works: in each case the legislation conforms to the Conventions. Of the fifteen States whose legislation refers to low-tide elevations, all but one follow the Conventions, the exception being Saudi Arabia,⁷⁰ which appears to allow low-tide elevations wherever situated to generate a territorial sea. Eighteen States have legislation dealing with islands: generally it follows the Conventions (although in some cases an island is not defined), but Saudi Arabia⁷¹ allows artificial islands to generate a territorial sea, while Iran⁷² provides that the waters between islands less than twenty-four miles apart have the status of internal waters and, in rather similar fashion, the United Arab Emirates⁷³ includes as internal waters the waters between islands less than twelve miles apart or between islands and the mainland where they are less than twelve miles apart. Lastly, in assessing whether the provisions of the Conventions have passed into customary law, it must not be forgotten that (as pointed out earlier) international courts and tribunals have suggested that the Conventions' provisions on bays and harbour works represent customary international law.

Finally, it remains to consider whether the two significant additions to the Territorial Sea Convention's provisions on baselines made by the Law of the Sea Convention – dealing with straight baselines on highly unstable coasts (art. 7(2)) and reefs (art. 6) – have passed into customary law. (The third principal change made – the inability of uninhabitable rocks to generate a continental shelf and

⁶⁸ *Limits in the Seas* No. 28 (1970) (Angola); J. R. V. Prescott, *The Maritime Boundaries of the World* (London, Methuen), 1985, pp. 279, 313 (Argentina and France).

⁶⁹ Decree No. 71/DF/416 of 26 August 1971, art. 1. *UN Leg. Ser. B/19*, p. 131. It is not clear whether the lines drawn across certain specified river mouths are river-mouth closing lines, bay closing lines, straight baselines or an illegitimate use of roadsteads as the baseline.

⁷⁰ Royal Decree concerning the Territorial Waters of the Kingdom of Saudi Arabia (Royal Decree No. 33 of 16 February 1958), arts. 1 and 5. *UN Leg. Ser. B/15*, p. 114.

⁷¹ *Ibid.*

⁷² Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993, art. 3. 24 *LOS* 10 (1993). For protests by the USA, the EU and Qatar, see 25 *LOS* 101 (1994), 30 *LOS* 60 (1996) and 32 *LOS* 89 (1996), respectively. For Iran's responses, see 26 *LOS* 35 (1994), 31 *LOS* 37 (1996) and 33 *LOS* 87 (1997).

⁷³ Federal Law No. 19 of 1993 in respect of the Delimitation of the Maritime Zones of the United Arab Emirates, art. 2. 23 *LOS* 94 (1994).

EEZ – will be considered in chapters eight and nine.) As regards article 7(2), there is, as we saw earlier, little or no practice on this matter, and it would therefore seem that this provision has not (yet) passed into customary law. In the case of reefs, thirteen States – Belize,⁷⁴ Fiji,⁷⁵ Kiribati,⁷⁶ Maldives,⁷⁷ Marshall Islands,⁷⁸ Micronesia,⁷⁹ Nauru,⁸⁰ New Zealand (in respect of the Cook Islands, Niue and the Tokelau Islands),⁸¹ Solomon Islands,⁸² (Southern) Yemen,⁸³ Tonga,⁸⁴ Tuvalu⁸⁵ and the United Kingdom (in respect of Bermuda and the Cayman Islands)⁸⁶ – enacted legislation before the entry into force of the Law of the Sea Convention which is wholly or broadly in accord with article 6. Given the relatively limited number of States to which article 6 is potentially applicable and the fact that a number of these States have drawn archipelagic baselines in such a way as to obviate the need to invoke article 6, the above practice, coupled with the apparent absence of any protest, would suggest that article 6 has passed into customary law.

Validity of baselines

In those cases where a State either has a discretion as to which kind of baseline it chooses and/or has to construct an artificial line to serve as the baseline – namely, straight baselines, bay and river-mouth closing lines and low-tide elevations – the coastal State's action in exercising its discretion and constructing lines remains subject to international law. As the International Court of Justice put it in the *Anglo-Norwegian Fisheries* case in an oft-quoted dictum:

⁷⁴ Maritime Areas Act, 1992, s. 4(4). 21 *LOS* 3 (1992).

⁷⁵ Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order, 1981, s. 4(c). *Smith*, p. 139.

⁷⁶ Maritime Zones (Declaration) Act, 1983, s. 2. *Smith, op. cit.*, p. 245.

⁷⁷ Constitution of the Republic, art. 1. *UN Leg. Ser. B/18*, p. 28.

⁷⁸ Maritime Zones Declaration Act, 1984, s. 2(1). United Nations, *The Law of the Sea. National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* (New York, United Nations), 1995, p. 210.

⁷⁹ Act of 1988 to amend title 18 of the Code of the Federated States of Micronesia, s. 1. *Ibid.*, p. 224.

⁸⁰ *Loc. cit.* in footnote 52.

⁸¹ Territorial Sea and Exclusive Economic Zone Act, 1977, s. 4(5) (Cook Islands). *Smith, op. cit.*, p. 325; Territorial Sea and Exclusive Economic Zone Act, 1978, s. 6 (Niue). *Smith, op. cit.*, p. 335; *loc. cit.* in footnote 53 (Tokelau Islands).

⁸² Delimitation of Marine Waters Act, 1978, s. 5(3). *Smith, op. cit.*, p. 143.

⁸³ Act No. 45 of 1977 concerning the Territorial Sea, Exclusive Economic Zone, Continental Shelf and Other Marine Areas, art. 5. *UN Leg. Ser. B/19*, p. 21.

⁸⁴ Territorial Sea and Exclusive Economic Zone Act, 1978, s. 5(1). *Smith, op. cit.*, p. 441.

⁸⁵ Marine Zones (Declaration) Ordinance, 1983, s. 2. *Smith, op. cit.*, p. 459.

⁸⁶ Bermuda (Territorial Sea) Order, 1988, S.I. 1988, No. 1838; Cayman Islands (Territorial Sea) Order, 1989, S.I. 1989 No. 2397.

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.⁸⁷

Thus, where a baseline is clearly contrary to international law, it will not be valid, certainly in respect of States which have objected to it, although a State which has accepted the baseline (for example in a boundary treaty) might be estopped from later denying its validity. In border-line cases – for example, where there is doubt as to whether a State's straight baseline system conforms to all the criteria laid down in customary and conventional law – the attitude of other States in acquiescing in or objecting to the baseline is likely to prove crucial in determining its validity.⁸⁸ Having said this, it must, however, be pointed out that few doubtful baselines have encountered active opposition or led to serious disputes, the Norwegian straight baseline system prior to 1950 and the Gulf of Sidra closing line being notable exceptions. Most States, it seems, do not bother to protest against baseline claims which are not in conformity with international law, the major exception being the USA.⁸⁹ It may be that the widespread toleration of much of the practice described in this chapter which clearly appears to contravene the relevant rules of international law (particularly as regards straight baselines) will in time lead to a modification of those rules themselves.

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⁸⁷ [1951] *ICJ Rep.* 116 at 132.

⁸⁸ For an example of this, see the *Anglo-French Continental Shelf* case (1977), paras 121–44, where France was estopped from denying that Eddystone Rock (whose status as an island was in doubt) could be used as a basepoint because of its previous acquiescence in the use of the Rock as a basepoint.

⁸⁹ For US protests, see Roach and Smith, *op. cit.* in footnote 15, chapters 3 and 4, *passim*.

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