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Chapter Two

Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters

Tullio Scovazzi

1. *General Remarks on Baselines*

The baseline is the line from which the breadth of the territorial sea and other coastal zones (contiguous zone, exclusive economic zone, *etc.*) is measured. The juridical boundary between the land and the sea normally coincides with the natural one, that is the low water line, following the configuration and curvatures of the coastline. As provided for in Art. 5 of the United Nations Convention on the Law of the Sea (Montego Bay, 1982),[1] corresponding to Art. 3 of the previous Convention on the Territorial Sea and the Contiguous Zone (Geneva, 1958),[2] "the normal baseline for measuring the breadth of the territorial sea in the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State".[3]

However, in a number of special cases, straight baselines may be drawn by the coastal State, as allowed in the UNCLOS provisions on bays (Art. 10), mouths of rivers (Art. 9) and deeply indented coastlines (Art. 7).[4] Straight baselines run into the sea and connect appropriate points on land.

Under Art. 8(1) of UNCLOS, waters on the landward side of the baseline form part of the internal waters. This means that in such waters the right of innocent passage, which is a fundamental element of the territorial sea regime, does not apply. However, in the case of baselines drawn to enclose deeply indented coastlines and fringes of islands, the right of innocent passage is maintained if the straight baselines have the effect of enclosing as internal waters areas which had not previously been considered as such (Art. 8 (2)).

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[1] Hereinafter UNCLOS.

[2] Hereinafter TSC.

[3] The UNCLOS provisions on straight baselines are considered as belonging to customary international law.

[4] Other UNCLOS provisions that allow for the drawing of straight baselines concern ports (Art. 11) (by implication) and archipelagic baselines (Art. 47).

1.A. *Bays*

Art. 10 of UNCLOS, corresponding to Art. 7 of the TSC, defines a so-called juridical bay on the basis of two geometrical conditions which must concur in order to enclose it as internal waters. First, to distinguish it from a mere curvature of the coast, the bay must be a well-marked indentation, having an area as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the indentation (semi-circle rule);[5] second, the distance between the natural entrance points of the bay must not exceed 24 n.m. Both conditions can be usually ascertained with certitude, the only element sometimes questionable being the determination of the natural entrance points of the bay.

The provisions on juridical bays do not apply to the so-called "historic" bays. Under Art.10 (6) of UNCLOS, corresponding to Art. 7(6) of the TSC, it is stated "[t]he foregoing provisions do not apply to so-called 'historic' bays...".

UNCLOS does not specify what historic bays are or what provisions apply to them: but the assumption is that such bays can be closed even if they do not meet one or both the conditions set out for juridical bays. Some elements – namely the exercise of State authority, the long-lasting duration of this exercise, acquiescence by other States and, although less frequently, the existence of vital interests by the coastal State – are usually referred to in doctrinal works as the constitutive elements of a historic title over marine waters. However, the concept of historic bays or, more generally, historic waters, is rather difficult to grasp and several questions are still open to discussion.[6]

In any case, UNCLOS points out that its provisions do not apply to bays shared by more than one State. Under Art. 10(1) of UNCLOS, corresponding to Art. 7(1) of the TSC, it is stated: "[t]his article relates only to bays the coasts of which belong to a single State".

1.B. *Mouths of Rivers*

Under Art. 7 of UNCLOS, corresponding to Art. 13 the TSC,

> 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.

[5] Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 n.m., a straight baseline of 24 n.m. is drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

[6] *See* Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, in Hague Academy of International Law, *Recueil des Cours*, vol. 286 (2001), p. 200; Clive R. Symmons, *Historic Waters in the Law of the Sea – A Modern Re-Appraisal* (Nijhoff, Leiden, 2008).

The provision does not establish any maximum limit of the straight line to be drawn. Nor does it give any clarifications on the case in which a river can be considered as flowing "directly" into the sea. The question is complicated by the fact that the English and Spanish texts of the provision, which respectively use the adverbs "directly" and "directamente", do not fully coincide with the French text, which uses the words "sans former d'estuaire" ("without forming an estuary").

It seems to be implied from the reading of Art. 9 of UNCLOS that, if a river does not flow directly into sea, but forms an estuary, no closing line can be drawn and the ordinary rule of the low water line shall apply; though if the geographical conditions are met, the estuary itself may be closed as a juridical bay.

No provision in UNCLOS deals with the special case of a mouths of rivers shared by two States.

1.C. *Deep Indentations*

For the first time in international practice, a straight baselines system was established by Norway along the northern part of the country on the basis of a Royal Decree adopted on 12 July 1935.[7] The Norwegian decree was the subject-matter of the judgment rendered on 18 December 1951 by the International Court of Justice (***Fisheries Case***; United Kingdom v. Norway). On the basis of a number of geographical, economic and historical peculiarities, the Court found that the method employed by the decree and the baselines fixed by it were "not contrary to international law".[8]

Under Art. 7 (1) of UNCLOS,[9] the method of straight baselines joining appropriate points may be employed "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 occurrence of one of the two situations specified (deeply indented coast or fringe of islands) is sufficient to allow for the drawing of straight baselines. Under Art. 7(3) of UNCLOS,[10] "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 régime of internal waters".

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[7] The 47 segments of the baseline join 48 fixed points located on the mainland, islands, islets or rocks. The longest segments are those closing Svaerholthavet (39 n.m.), Lopphavet (43.6 n.m.) and Vestfjord (40 n.m.).

[8] International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1951, p. 143.

[9] In the same sense, *see* Art. 4 (1) of the TSC.

[10] In the same sense, *see* Art. 4 (2) of the TSC.

No provision in UNCLOS deals with the special case of a deep indentation shared by two or more States. It is however evident that, under Art. 7 of UNCLOS (or Art. 4 of the TSC), the "appropriate points" which are joined by the segments of a straight baseline must be placed on the low water line (either of the mainland or of an island/or a qualifying low-tide elevation) and not in the water somewhere on the maritime lateral boundary between the two States concerned.[11] Otherwise, the baseline system would not be closed and it would be impossible in certain areas to distinguish the internal waters from the territorial sea. The United Nations Office for Ocean Affairs and the Law of the Sea has remarked, in general terms, that:

> Appropriate points must be located on the territory of the State drawing the baselines and should be located on or above the charted low-water line used in other parts of the coast as the normal baseline. Furthermore, the straight baseline system must be closed. This means that whether the baselines are drawn along the coast of an island or the mainland, the system must start and finish on or above the low-water line, and if the straight baselines are drawn to connect a fringe of islands to the mainland or a large island, all the intermediate basepoints must be located on or above the low-water line. Thus the internal waters which the straight baseline create must be totally surrounded by a combination of straight baseline segments, and islands where applicable, and the coastline to which the straight baseline system is joined.[12]

Considered as a whole, Art. 7 of UNCLOS prompts several critical remarks, as its wording does not contain sufficient geometrical precision. For instance, leaving aside the questions raised by fringes of islands, it may be asked when a coastline can be considered as deeply indented and cut into (in other words, what should be the ratio between the length of the closing line of the indentation and the distance between this line and the most internal point of the indentation?). It may also be asked how it is to be determined whether the drawing of straight baselines departs to any appreciable extent from the general direction of the coast or what is the general direction of the coast itself, as such a determination greatly depends on the scale of the chart used; and how the mysterious condition that the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters is to be interpreted. All the problems above would be solved, if UNCLOS had established a limit of maximum length for the segments of

[11] This can also be inferred from Art. 7(4) of UNCLOS (or Art. 4(3) of the TSC) which allows, but only in exceptional cases, the drawing of straight baselines to and from low-tide elevations.

[12] United Nations, Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, New York, 1989, p. 23.

straight baselines enclosing deeply indented coasts or fringes of islands; but this is not the case.

It is a matter of fact that today more than eighty coastal States have established straight baselines systems. In several cases the States in question are inclined towards rather liberal, if not dubious, applications of the UNCLOS rules on straight baselines systems. In deciding on 16 March 2001 the dispute between Qatar and Bahrain on *Maritime Delimitation and Territorial Questions*, the International Court of Justice pointed out that

> The method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively.[13]

However, if most coastal States apply the method of straight baselines in a liberal manner, can such a practice become wrongful only because the International Court of Justice says, in an *obiter dictum*, that a restrictive approach must be followed?

2. *The Closing of Bays Shared by More Than One State*

The already quoted Art. 10(1) of UNCLOS has been understood to mean that the conditions for the closing of bays relate only to bays the coasts of which belong to a single State: so that the ordinary rule of the low-water line automatically applies to shared bays. Some elaboration on the legislative history of the provision is necessary here.[14]

The Committee of Experts for the progressive codification of international law, which in 1927 prepared drafts for the unsuccessful attempt to codify international law of the sea made by the League of Nations, proposed the following rule for bays:

> Pour les baies qui sont environnées de terre d'un seul Etat, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie, dans la partie la plus rapprochée de l'ouverture vers la mer où l'écart entre les deux côtes de la baie est de 12 milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande. Pour les baies qui sont environées de terres de deux ou plusieurs Etats, la mer territoriale suit les sinuosités de la côte (Art. 4).[15]

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[13] *ICJ Reports cit.*, para. 212 of the judgment.

[14] On the question, *see* Leo J. Bouchez, *The Regime of Bays in International Law* (Syhoff, Leiden, 1964) p. 116; and Mitchell P. Strohl, *The International Law of Bays* (Nijhoff, The Hague, 1963) p. 371.

[15] Société des Nations, Comité d'experts pour la codification progressive du droit international, *Rapport au Conseil de la Société des Nations*, Genève, 1927, p. 58.

The 'Basis of Discussion' prepared for the League of Nations' conference of codification, which was held in 1930, followed a similar approach, limiting the possibility of drawing a straight closing line to the case of bays bordered by only one State:

> Pour le baies dont un seul Etat est riverain, l'étendue des eaux territoriales sera mesurée à partir d'une ligne droite tirée en travers de l'ouverture de la baie; si l'ouverture de la baie excède dix milles, cette ligne sera tirée en travers de la baie dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excédera pas dix milles" (Base 7). "L'étendue des eaux territoriales sera mesurée à partir d'une ligne droite tirée en travers de l'ouverture de la baie, quelle que soit la largeur de celle-ci, si, d'après l'usage, cette baie relève de la seule autorité de l'Etat riverain; la preuve de cet usage incombe à cet Etat (Base 8).[16]

The explanation for this predominant attitude was that otherwise, if a closing line could be drawn in bays shared by more than one States, any of the bordering States could create an obstacle to the maritime communications of another bordering State and of third States. As explained by Gilbert Gidel:

> Presque tous les auteurs (lorsqu'ils ont expressément prévu l'hypothèse et c'est loin d'être le plus grand nombre) admettent que, dans les cas des baies dont deux ou plusieurs Etats sont riverains, le tracé de la ligne de base de la mer territoriale se fait d'après la laisse de basse mer et non pas à l'aide d'une construction géometrique d'une ligne tirée en travers de la baie; il en est ainsi même si la concavité considérée réunit tous les caractères de la baie. En réalité la chose s'explique parfaitement. La règle concernant le tracé est en étroite relation avec la question de la condition juridique des surfaces considérées. Lorsqu'une ligne transversale est tirée en travers d'une baie, cette ligne est à la fois la ligne de base de la mer territoriale et la ligne extrême des eaux intérieures. Toutes les eaux en deçà de cette ligne sont des eaux intérieures. La condition juridique des eaux intérieures comporte, au profit de l'Etat du territoire duquel elles font partie, le droit d'interdire même le simple passage dans ces eaux. Il en résulte que l'un quelconque des Etats riverains pourrait mettre une entrave absolue aux relations maritimes des autres etats riverains. En écartant la construction d'une ligne transversale dans le cas de pluralité de riverains, on ne laisse au-devant des territoires respectifs des etats riverains et de leurs laisses de basse mer qu'une bande de mer 'territoriale' (et non pas d'eaux intérieures): or il est de la nature juridique de la mer territoriale de comporter le droit de passage 'inoffensif'. La liberté des communications maritimes avec la mer ouverte des Etats riverains de la baie se trouve ainsi juridiquement assurée. Telle est la raison, simple et décisive, pour laquelle il y a lieu d'écarter la détermination de la mer territoriale à l'aide d'une ligne transversale tirée en travers de la baie, lorsque plusieurs Etats sont riverains de cete baie.[17]

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[16] Société des Nations, *Conférence pour la codification du droit international, Bases de discussion*, II, Genève, 1929, p. 45.

[17] Gilbert C. Gidel, *Le droit international public de la mer* (III, Recueil Sirey, Paris, 1934), p. 594.

However a minority view was also put forward, to the effect that there is no reason why bays bordered by more than one State may not be closed by a straight baseline if there were an *agreement* to do so among all the bordering States. As explained by Antonio Sanchez de Bustamante y Sirven:

> Ces pays riverains se mettront d'accord entre eux pour la propriété et la jouissance des eaux. En échange, le droit international n'a aucun motif justifié pour remplacer une disposition par une autre uniquement parce que le propriétaire unique a eu pour successeurs deux ou plusieurs autres, généralement pas même en copropriété, mais chacun dans une partie déterminée de cette région maritime non internationale.[18]

As can be noted, Sanchez de Bustamante y Sirven also addresses a question that is still an open one today: namely, should a bay closing line lawfully established by a coastal State be cancelled only because afterwards, due to changes in sovereignty on land, the same bay becomes bordered by two States? For instance, to consider a recent instance, should the line drawn by the former Yugoslavia to close the Bay of Piran – which is a juridical bay – be withdrawn because, after the territorial changes occurring in that country, the bay is shared today by two successor States (Croatia and Slovenia)? The more logical and simple response is a negative one.

During the preparatory work for the first United Nations Conference on the Law of the Sea, a restrictive attitude was taken by the United Kingdom:

> The United Kingdom Government suggest further that the Commission might consider stating explicitly in the articles the principles that base lines cannot be drawn across frontiers between States, by agreement between these States, in a bay or along a coastline, in such a way as to be valid against other States. Although the consequences of the sovereignty of the State over internal waters are such that any attempted agreement of this kind would in fact lead to extremely complex legal difficulties, and probably prove impracticable, the United Kingdom Government nevertheless consider that the illegality of the process should be made explicit.[19]

The International Law Commission finally decided to limit the draft provision on bays only to those bordered by a single State: not because of any particular legal obstacle, but simply because of the lack of sufficient data:

> The Commission felt bound to propose only rules applicable to bays the coasts of which belong to a single State. As regards other bays, the Commission has not sufficient data at its disposal concerning the number of cases involved or the regulations at present applicable to them.[20]

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[18] Antonio Sanchez de Bustamante y Sirven, *La mer territoriale* (Paris, Recueil Sirey, 1930), p. 177.

[19] United Nations (1956) II *Yearbook of the International Law Commission*, p. 84.

[20] *Ibid.*, p. 269. The 'Brief Geographical and Hydrographical Study of Bays and Estuaries the Coasts of which Belong to Different States', prepared in 1957, by Comm. R.H. Kennedy, in

In 1958, during the discussions held at the first United Nations Conference on the Law of the Sea conference, the delegate of the Netherlands, Mr. Verzijl, made the following statement:

> His delegation was convinced that the only just solution to the problem of the regime of gulfs, bays and estuaries bordered by two or more States was to proclaim the principle of the free access of foreign ships to every port situated on their coasts, whether the water area in question included a central part which must be regarded as the high seas, or as being placed under the undivided co-sovereignty of the coastal States, or whether it was divided up into distinct territorial maritime zones.[21]

The amendment that later became Art. 7(1) of the TSC, was proposed by the United Kingdom.[22] As stated by the British delegate, Sir Gerald Fitzmaurice,

> The purpose of that amendment was to make it clear that, according to international law, a closing line could only be drawn across a bay in cases where the whole coastline belonged to a single State. The effect of drawing such a line was to make the waters of the bay in question internal waters, and the concept of internal waters had never been regarded as applicable to a bay belonging to more than one State. In the case of bays the coasts of which belonged to several States, those States could agree to treat each other's ships in a particular way, but that agreement would not affect the ships of other countries.[23]

In fact, the solution adopted in 1958 on bays bordered by more than one State was greatly influenced by the tension in the Middle East and the special case of the Gulf of Aqaba. This is a long and narrow bay bordered by Egypt and Saudi Arabia at the entrance and by Israel (only 6 m. of shore) and Jordan (only 3.5 m. of shore) at the bottom. The delicate political situation existing there is evident in the intervention made by the delegate of Israel, Mr. Comay:

> The International Law Commission had omitted any mention of the special problems arising in connexion with bays, gulfs and estuaries having more than one coastal State. For example, whatever might be decided about extending the territorial sea, no extension could be ever justify the appropriation by one coastal State of waters in an international gulf deemed to be part of the high seas, without regard for the rights of other States. Furthermore, the rule set forth in article 7 regarding the closing line for bays would be meaningless if the coast of more than one State lay behind the closing line the closing line of a bay. Again, the right to suspend innocent passage could not be exercised in such a manner as to deny access to ports within such a bay and the only feasible rule was free passage. (...).

United Nations, *Conference on the Law of the Sea* (1958) I *Official Records*, Geneva, p. 198, does not shed much light on the legal questions relevant for such bays.

[21] *Ibid.*, III, p. 144.

[22] *Ibid.*, III, p. 228.

[23] *Ibid.*, III, p. 144.

> With reference to the statement by the representative of Saudi Arabia, he pointed out, firstly, that international law knew nothing of Arab coasts and waters any more than it did of Slav or Anglo-Saxon waters. International law dealt with relations between States. The description of the gulf of Aqaba as 'closed Arab waters under exclusive Arab jurisdiction' was based neither on law nor on fact, since there were four coastal States on it. Secondly, if the suggestion were accepted that where a normal atmosphere did not prevail international law could be suspended, international law would become meaningless and the peace of the world would be destroyed.[24]

No particular discussion took place during the Third United Nations Conference on the Law of the Sea on the issue of bays. The only reference to the subject matter of bays shared by more than one State is in a draft provision in an informal paper circulated in 1975 and relating to "bays and other historic waters":

> A bay whose coasts belong to two or more States and which meets the requirements laid down in Article... shall be regarded as historic only by agreement between the coastal States. Such agreement shall specify the closing line of the bay and the limits of the respective maritime spaces.[25]

With no substantive changes, Art. 7 of the TSC became Art. 10 of UNCLOS.

2.A. *International Practice*

In several instances, bays shared by two or more States have not been closed, even though they would meet the geographical conditions required for the closing of juridical bays.[26] This is so in the case of the already-mentioned Gulf of Aqaba but also of the Gulf of Trieste, shared between Croatia, Italy and Slovenia, and of Loughs Foyle and Carlingford, shared by Ireland and the United Kingdom.[27]

In some cases, however, a closing line has been drawn. For example, Art. 1 of the the treaty signed at Bayonne on 30 March 1879 by France and Spain provides for the division in three parts of the waters of the border Bay of Figuier, namely those put under the jurisdiction of Spain, those put under

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[24] *Ibid.*, III, p. 35.

[25] Text in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea* (Dobbs Ferry, 1982–1985, IV), p. 121.

[26] A very special case is the Bay of Algeciras, where Gibraltar is located, shared by Spain and the United Kingdom. For a long time a dispute has existed between Spain and the United Kingdom as to whether Gibraltar, ceded by Spain to Great Britain under Art. X of the Treaty of Utrecht of 13 July 1713, is entitled to its own territorial sea.

[27] *See* Clive R. Symmons, 'The Maritime Border Areas of Ireland, North and South: An Assessment of Present Jurisdictional Ambiguities and International Precedents Relating to Delimitation of "Border Bays"', (2009) 24 *International Journal of Marine and Coastal Law*, p. 457.

the jurisdiction of France and those belonging to the common waters ("eaux communes"). A closing line composed of three segments separates the internal waters of the bay from the sea:

> Une ligne transversale ABCD partant du point extrème (A) du cap Figuier sur la côte espagnole et aboutissant à l'extrémité (D) de la côte française, à la pointe du Tombeau, déterminera la baie du côté de la mer, conformément au plan annexé' (Art. 2). 'La ligne transversale dont l'étendue est de 2055 mètres et qui déterminera la limite de la baie, sera divisée en trois parties égales (Art. 5).

The agreement signed on 28 December 1988 in Maputo by Mozambique and Tanzania provides for the drawing of a line closing the border Bay of Ruvuma and the delimitation of the internal waters inside this bay:

> The outer limit of the internal waters of the two countries is delimited by means of a straight line drawn across the mouth of the Ravuma Bay, from Ras Matunda, located at latitude 10°21'32" S and longitude 40°27'35'E, to Cabo Suafo, located at latitude 10°28'14" S and longitude 40°31'33'E"
>
> All waters on the landward side of this line constitute the internal waters of the two countries' (Art. II).

The treaty of maritime delimitation signed on 30 January 1981, in Paris by Brazil and France provides for the closing of the Bay of Oyapock, located at the border between Brazil and the French Guyana:

> Le point de départ [*i.e.*, of the line of maritime delimitation] défini dans le présent article est à l'intersection de la frontière en la baye d'Oyapock, frontière établie lors de la cinquième Conférence de la Commission mixte, et de la ligne de fermeture de cette baie établie lors de la sixième Conférence de la Commission (Art. 1).

A well-known instance of bay shared by more than one State and delimited seaward by a closing line is the Gulf of Fonseca. According to the decision rendered on 9 March, 1917, by the Central American Court of Justice in the dispute between El Salvador and Nicaragua on the *Gulf of Fonseca*, this Gulf is a historic bay the waters of which are held jointly in sovereignty by the three bordering States (El Salvador, Honduras and Nicaragua), with the exclusion of a 3 n.m. belt being under the exclusive sovereignty of each of the coastal States. In 1992, the International Court of Justice decided that the closing line of the Gulf of Fonseca constituted the baseline of the territorial sea and that entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line, joining Punta Amapala (El Salvador) and Punta Cosigüina (Nicaragua), appertained to all the three States bordering the Gulf, including Honduras which is enclaved within it.[28]

[28] Judgment of 11 September 1992 on the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras [1992] ICJ Reports, 94.

3. *The Closing of Mouths of Rivers*

A well known case of disputed application of the provision on mouths of rivers relates to a body of water shared by two States: Argentina and Uruguay consider the River Plate (Rio de la Plata) as a river[29] the mouth of which is closed by a straight baseline, 118 n.m. in length, joining Punta del Este in Uruguay and Punta Rasa del Cabo San Antonio in Argentina.[30]

The baseline of the Rio de la Plata has given rise to protests by France, the Netherlands, the United Kingdom and the United States. The latter stated, in a note of 12 December 1962, that "in the case of a multi-national bay the waters of the bay outside the territorial sea along the coasts must be regarded as high seas"; that "agreements between the coastal States of a multi-national bay cannot be considered to be binding on other than the parties to such agreements or to affect the rights of non-parties under international law"; and that Art. 13 of the TSC "relates to rivers which flow directly into the sea which is not the situation of the River Plate which flows into an estuary or bay".[31]

4. *The Closing of Deep Indentations Shared by More Than One State*

4.A. *The Codification Treaties*

No provision of the TSC or UNCLOS deals with the case of a deep indentation shared by two or more States.

In 1956, during the discussion within the International Law Commission of the draft that later became part of the TSC, Mr. Fitzmaurice stated that:

> He thought it was clear that baselines drawn across frontiers between States by an agreement between those States, in a bay or along a coastline, would as a matter of law, be illegitimate, or at any rate not opposable to other States. A baseline must be drawn off the coast of the State itself.[32]

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[29] According to Hector Gros Espiell, 'Le régime juridique du Rio de la Plata', in (1964) 10 *Annuaire Français de Droit International*, p. 729 : "La détermination de la nature géographique du Rio de la Plata et, par conséquent, de son régime juridique, est depuis l'époque de sa découverte, en 1516, une question difficile, toujours controversée. Les termes fleuve, baie, golfe et estuaire ont été utilisés à l'égard du Plata. L'imprécision propre à ces notions a concouru à ce qu'il en soit ainsi.... En réalité, le Rio de la Plata possède, à la fois, certains caractères presque marins, tels que la salinité de ses eaux et la présence des marées, et certains caractères propres aux fleuves, comme l'existence de courants et la déclivité de ses côtes. Du point de vue géographique il présente des traits hybrides, ce qui n'apporte pas une solution véritablement claire au litige".

[30] Joint declaration made on 30 January 1961 and treaty between them on River Plate and its maritime limits, signed in Montevideo on 19 November, 1973.

[31] (1963) 57 *American Journal of International Law*, p. 403.

[32] United Nations, *Report of the International Law Commission*, I, 1956, p. 156.

In reply, Mr. Sandström pointed out that:

> There was in force an international agreement between Sweden and Norway in which a straight baseline had been drawn between two islands, one being Swedish and the other Norwegian territory. That, however, was a special case which did not affect the essential principle.[33]

Reflecting this discussion, the commentary prepared by the International Law Commission made the following remark:

> Straight baselines may be drawn only between points situated on the territory of a single State. An agreement between two States under which such baselines were drawn along the coast and connecting points situated on the territories of different States, would not be enforceable against other States.[34]

4.B. *International Practice*

In State practice, the drawing of a straight baseline across a deep indentation shared by two States has occurred in a limited number of cases: in particular between Denmark and Germany (both in the North Sea and the Baltic Sea),[35] between Norway and Sweden[36] and between Finland and Sweden.[37]

An instance concerning Ecuador is particularly interesting. Under Supreme Decree No. 959-A of 28 July 1971,[38] Ecuador established a straight baselines system. It provides for the drawing of straight baselines along the whole continental coast of the country (four segments) and around the Galapagos archipelago (seven segments). The northernmost (points 1–2, closing the Ancón de Sardinas Bay) and southernmost (points 4–5, closing the Gulf of Guayaquil) segments of the Ecuadorian continental baseline join points on the coast of Ecuador (respectively Punta Galera and Punta Santa Elena) with points located in the sea, at the intersection with the maritime boundary with a neighbouring State (respectively Colombia and Peru). Only recently, by means of Presidential Decree No. 450 of 2 August 2010, Ecuador approved Nautical Chart IOA 42, which depicts the baselines described in Decree No. 959–A.

More precisely, in Decree 959-A, the first segment of the baselines is defined as follows:

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[33] *Ibid.*

[34] *Ibid.*, II, 1956, p. 268.

[35] *See* the relevant maps and references in Tullio Scovazzi, Giampiero Francalanci, Daniela Romanò & Sergio Mongardini, *Atlas of the Straight Baselines* (2nd ed., Milan, 1989) pp. 114 and 142.

[36] *Ibid.*, p. 184 and 220.

[37] *Ibid.*, p. 126 and 220.

[38] Text (English translation) in United Nations, *National Legislation and Treaties Relating to the Law of the Sea*, New York, 1976, p. 15.

> La línea partirá del punto de intersección de la frontera marítima con Colombia, con la recta Punta Manglares (Colombia) – Punta Galera (Ecuador) (Art. 1, para. I, a).

In other words, this segment of the Ecuadorian baseline is a portion of a longer segment which joins a headland in Ecuador with another headland located in an adjacent State (Colombia). The longer segment serves the purpose of giving the direction of the shorter segment which goes as far as the point of intersection with the maritime boundary between Colombia and Ecuador.

The southernmost segment of the Ecuadorian straight baselines is defined in Decree 959-A as follows:

> Recta desde la Puntilla de Santa Elena en dirección al Cabo Blanco (Perú), hasta la intersección con el paralelo geográfico que constituye la frontera marítima con el Perú (Art. 1, para. I, d).

Here again, a segment of the Ecuadorian baseline is a portion of a longer segment which joins a headland in Ecuador with another headland located in an adjacent State (Peru). The longer segment serves the purpose of giving the direction of the shorter segment which goes as far as the point of intersection with the maritime boundary between Ecuador and Peru. This point is located at sea, 46 n.m. from the nearest Ecuadorian territory (Santa Clara Island).

This situation has been considered as not complying with the relevant international law provisions. According to the United States Department of State:

> The selection of Cabo Maglares (Point 1) as a basepoint is unique because it is in Colombia and not Ecuador. (...)
>
> Point 5 on the Ecuador-Peru maritime boundary is again a rather unique basepoint on which to base a system of straight baselines. First, the use of Point 5 does result in a radical departure of the baseline from the general direction of the coast. Second, the basepoint is contrary to Article 4 (3) of the aforementioned convention [TSC] in that the basepoint is not a high-tide elevation or a low-tide elevation possessing a permanent facility that is above high tide. Rather, Point 5 is nothing more than a point on the ocean surface.[39]

The fact that the Ecuadorian straight baselines system ended at sea on the Ecuador-Peru maritime boundary was included in the protest sent on 24 February 1986 by the United States to Ecuador.[40]

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[39] United States Department of State, *Limits in the Seas*, No. 42, *Straight Baselines: Ecuador*, 1972, p. 6.

[40] Ashley Roach & Robert Smith, *United States Responses to Excessive Maritime Claims* (2nd ed., Nijhoff, The Hague, 1996) p. 129. Others have pointed out that the placing of basepoints in water is not allowed, mentioning the specific case of Ecuador (Tullio Scovazzi, *La linea di base del mare territoriale*, Milan, 1986, p. 119; Tullio Scovazzi, 'Bays and Deeply Indented Coastlines: The Practice of South American States', in (1995) 26 *Ocean Development and International Law*, p. 166); or that the placing by Ecuador of the northern and southern terminal

It appears that, at the time of adoption of Decree 959-A, the points located at the intersection with the maritime boundaries of the two neighbouring States had been unilaterally determined by Ecuador, without any agreement between the States concerned.

As regards the northern segment, later, on 23 August 1975, Colombia and Ecuador concluded an agreement relating to their maritime boundary. Art. 4 of it provides that the Parties agree to:

> Reconocer el derecho que asiste a cada uno de los países para proceder al señalamiento de las líneas de base a partir de las cuales debe medirse la anchura del mar territorial, mediante el método de líneas de base rectas que unan los puntos más salientes de las costas y respetar las disposiciones que hayan adoptado o que adoptaron para tal efecto.[41]

It seems that this provision implies recognition by Colombia of the straight baselines system claimed by Ecuador,[42] including the segment 1 2. However, no agreement dealing with the last segment of the Ecuadorean straight baselines has so far been concluded between Ecuador and its other neighbour, Peru.

An approach similar to that of the Ecuadorean legislation seems to have been taken recently by the Democratic Republic of Congo (Law No. 09/002 of 7 May 2009).[43] Segment 22 23 of the baseline joins a headland on the coast of Congo with a point located in the sea, on the closing line of a bay shared by Angola and Congo and located at the mouth of the river Congo.

5. *Concluding Remarks*

The most common answer to the question whether bays either juridical or historic, mouths of rivers, or deep indentations, shared by more than one State, can be closed by a baseline is in the negative; but a somewhat different answer can also be envisaged, based on the existence of an agreement among all the bordering States.

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points at 18 n.m. and 52 n.m. from the land boundaries with, respectively, Colombia and Peru is not justified (Victor Prescott & Clive Schofield, *The Maritime Political Boundaries of the World* (2nd ed., Nijhoff, Leiden, 2005), p. 150).

[41] Text, in English translation, in Jonathan Charney & Lewis M. Alexander (eds.), *International Maritime Boundaries*, (vol. I, Nijhoff, Dordrecht, 1993), p. 815.

[42] For the time being, it seems that the Colombian straight baselines system, as established by Decree No. 1436 of 13 June 1984 (text, in English translation, in United States Department of State, *Limits in the Seas*, No. 103, *Straight Baselines: Colombia*, 1985), reaches its last segment, Punta Manglares, without proceeding further.

[43] Text in United Nations, *Law of the Sea Bulletin*, No. 70, 2009, p. 40.

The lack of specific provisions in the codification treaties does not necessarily mean that such bodies of waters cannot be closed and are automatically excluded from the sovereignty of the bordering States. In international practice there are cases where straight closing lines have been drawn by the bordering States concerned; they have not always led to protests by other States; and one of them has been endorsed also by the International Court of Justice.

In addition to what Sanchez de Bustamante y Sirven has written about bays,[44] another scholar has expressed the opinion that the drawing of a straight baseline across a shared deep indentation may be justified, provided that there is an agreement between the bordering States concerned and that the deep indentation is included in a coastline which meets the geographical conditions for the drawing of straight baselines.[45] This conclusion seems to meet the needs of logic and reasonableness and could be extended also to bays bordered by two or more States, at least where they do not include waters that have the status of an exclusive economic zone or high seas.[46] In other words, the question of whether or not a shared body of water can be closed by a straight line depends on the relationship between the bordering States and can be solved through an agreement concluded by these States themselves.[47] Third States have little say in such a matter; nor can they claim that a different and more restrictive regime applies to a certain bay arising merely from the fact its is shared by more than one State, provided that all the relevant legal and geographical conditions to close it are met.[48]

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[44] *Supra*, note 18.

[45] "On voit mal pourquoi on empêcherait que deux Etats dont les côtes échancrées sont limitrophes fassent ce qu'on Etat côtier peut faire seul": Lucius Caflisch, 'Les zones maritimes sous juridiction nationale, leurs limites et leur délimitation', in (1980) 84 *Revue Générale de Droit International Public*, p. 71.

[46] Otherwise, in the highly hypothetical case of an agreement to do so among the twenty-seven coastal States concerned (including those bordering the Black Sea), the Mediterranean Sea, which meets the geographical conditions required for a bay, could be closed by a straight line at the entrance of the Strait of Gibraltar! *See* Gayl S. Westerman, *The Juridical Bay* (Clarendon Press, Oxford, 1987, p. 79), who remarks that Art. 7, para. 1, UNCLOS "is necessary in order to prevent large bodies of water such as the Mediterranean or the Baltic seas from technically becoming juridical bays under Article 7".

[47] This agreement could deal with other questions of common interest, such as delimitation of internal waters, navigation, fishing, *etc.*

[48] As early as 1929, Art. 6 of the *Research in International Law: Territorial Waters*, prepared by the Harvard Law School proposed that "where the waters of a bay or river mouth (...) are bordered by the territory of two or more States, the bordering States may agree on a division of such waters as inland waters" (1929) 23 *American Journal of International Law, Supplement*, p. 243).