Baselines and Maritime Delimitation

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The United Nations Convention on the Law of the Sea presents an apparently exhaustive regime of baselines and maritime delimitation. However, on closer inspection it is riddled with exceptions – straight baselines, artificial islands, land reclamation, historic bays and more.[1]

As technology allowed states to expand their reach into the sea, so too have states fought each other to expand their authority accordingly. Traditional authority was expounded through imaginary lines draw on land to establish territorial sovereignty.[2] Maritime delimitation and the rules regarding baselines were created to resolve disputes about how each state was to measure its coastal sea territory and thus its sovereignty.[3] Baselines are the foundation of maritime delimitation.[4] The basic rule is that a state's baseline begins as the low-tide mark.[5] States, however, are not perfect geometric shapes with straight lines. While the baseline rule was meant to be a clean and relatively simple solution, some state's jagged coastlines necessitated some exceptions to the rule. The result was to allow for different rules regarding bays, inlets, fjords, jagged coastlines, islands, and even archipelagos.[6] These exceptions solved some problems, like creating clear sovereignty boundaries using scientific measurements, but also caused other problems like the politically motivated historical use exception creating unequal delimitations.[7]

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[1] Essay Prompt
[2] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 1
[3] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 1
[4] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 69
[5] United Nations Convention on the Law of the Sea 1982 (LOSC) Art. 5; (Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 73-74
[6] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 79
[7] United Nations Convention on the Law of the Sea 1982 (LOSC) Art. 15

One of the more contradictory things about maritime delimitation rules is the use of both science and politics to set baselines.[8] The 1958 United Nations Convention on the Law of the Sea (LOSC), which is the ruling instrument on sovereignty at sea, sets out scientific tests for boundary lines but then allows exceptions for political reasons couched as 'historical title or other special circumstances.'[9] These exceptions were perhaps intended as a compromise to encourage cooperation in ratifying the LOSC. In practice, they allow powerful states to expand their coastal sea territory.[10] The Hudson Bay in Canada was deemed to be an historical title due to colonialism while other historic uses have been denied.[11] If arbitration applied a strict scientific approach it would lessen the potential for bias and abuse. While low-tide lines and what constitutes an island instead of a rock are not always easily agreed upon, there are clear and impartial rules for each that can be applied equally without regard to whose history is correct. Science does not always provide a clear solution, as the potential for abuse of power is not the only problem facing the LOSC's system of delimitation and baselines.

Changing terrain and climate need to be taken into account when determining coastal sea territory as well. In India, the changing flows at the mouth of the Ganges River create a temporary island that alters the shape of the coastline.[12] Rising global temperatures are melting the polar ice caps.[13] The result is a rising sea level that pushes back the low-tide mark for determining a state's baseline.[14] Should either of these occurrences alter the coastal sea territory? Perhaps only those changes that alter the coastline permanently should be considered. How long must a geographic alteration last before it is considered a permanent change? In the case of the disappearing islands of silt

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[8] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 1
[9] United Nations Convention on the Law of the Sea 1982 (LOSC) Art. 5-15
[10] UN Secretariat, 'Judicial Regime of Historic Waters, Including Historic Bays', Document A/CN.4/143, (1962) 2 *YILC* 8 which laid out how and why political persuasion is important in claims of historical waters- '…the claim has to be combined with some form of recognition by the other States.'
[11] Common knowledge?
[12] Ask Professor for article
[13] Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77
[14] Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77

at the mouths of rivers, the change only exists for a few years so, in this context, it is temporary.[15] Rising sea levels are temporary from the standpoint that they will not be stable for some time; however they are permanent in the sense that they will never decrease, only increase. For this and similar issues, it may be that the best approach is to re-evaluate baselines at each decade or other time period yet to be determined. If the time period is set to every decade, then once every ten years a state would be required to submit a new report on the low-tide and baselines of its territory.[16] Consequently, the rising tide level would shrink the other territorial sea boundaries as well. State's delimitation lines with surrounding states would also need to be re-evaluated and adjudicated.[17] The truth is that the LOSC baseline and delimitation rules are fundamentally flawed. The sea is constantly moving and changing. Applying strict sets of rules to a territory that has such impermanent borders will always create problems. The bigger question is, are those problems worth it for the solutions that they do provide?

The benefits to allowing political solutions to maritime delimitation, in addition to the strict scientific rules, are that things like historical title and equity in arbitration allow issues to be settled even when the scientific measurement is in flux. It provides answers for issues like rising sea levels due to climate change. For instance, if it is decided that baselines can be fixed in an historical time, then no state need fear losing sovereignty rights over the exclusive economic zone (EEZ) that they currently exercise.[18] The strict scientific nautical mile limits would flex to accommodate the rising sea levels essentially expanding the volume of a state's coastal sea territory without reducing the final delimitation lines inward on the sea floor.[19] This would be something to which most states would feasibly agree, as it is exceedingly rare for a state to voluntarily give up

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[15] Ganges article
[16] Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77-78
[17] Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77
[18] Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77-78
[19] Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77-78

sovereign rights.[20] There is, unfortunately, a competing interest as matters of disputed sovereignty are rarely easily resolved.

If the scientific rules were strictly applied with relevant required re-evaluation periods, states would retain the same relative volume of coastal sea territory. The nautical mile limits would not increase (or decrease); rather they would be applied to the new baselines.[21] The state's relative volume of both land and sea territory would shrink as the sea devours the land. While this seems like a nightmare for any state, the truth is that it could be a good thing for states from the Global South or those without a seacoast. Shrinking a state's overall volume of land and sea territory causes the high seas to increase in volume and thus give poor or landlocked states access to more sea-based resources.[22] This is best illustrated in an example. Say state A has 350 nautical miles of sovereign rights over its continental shelf (CS), and 200 nautical miles of sovereign rights to its EEZ- including fisheries. State B has only 200 nautical miles of both CS and EEZ. States A and B share a maritime delimitation border. If the sea level rises over time to create a space of ten nautical miles of high seas between the two. Each state would retain their existing volume of territory- state A with 350 nautical miles of CS and 200 nautical miles of EEZ; state B with 200 nautical miles of CS and EEZ. However, state B would then have more access to resources such as the fish stocks and mineral deposits found at the edge of what had previously been state A's CS and EEZ. Consider this earth's way of resource, and thus wealth, redistribution. In such cases, it would benefit state B to agree to a regime of periodic monitoring and altering the baselines based on scientific calculations according to rising sea levels.

These are just a few of the issues facing states when applying the LOSC's baseline and maritime delimitation rules. Abuse of power and bias in arbitration

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[20] UN Secretariat, 'Judicial Regime of Historic Waters, Including Historic Bays', Document A/CN.4/143, (1962) 2 *YILC* 7 summarizing this selfish interest on the part of states- 'In other words, considerable maritime areas over which States claimed and exercised sovereignty would, if the codification were accepted, fall outside the jurisdiction of these States and belong instead to the high seas. It is obvious that a codification having such consequences would not commend itself to the States affected.'

[21] Coalter G Lathrop, 'Baselines' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 77

[22] United Nations Convention on the Law of the Sea 1982 (LOSC) Art. 87 which grants all states equal rights to the exploitation of high seas resources.

negotiations involving exceptions such as an historical title are issues that could be solved with an equal application of impartial scientific measurements. Rising sea levels and changing coastal terrain raise issues that can be aggravated when strict scientific measures are used to resolve the disputes. The truth is that there is simply no better option for the law of the sea than a balance between scientific and political considerations. Strict adherence to either method, science or politics, for the whole of the LOSC simply aggravates existing problems rather than solving them. The current system applies politics when it should apply science and science when politics offers the more egalitarian answer. The challenge is figuring out where the balance lies.