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STRAIGHT BASELINES IN INTERNATIONAL LAW: A CALL FOR RECONSIDERATION

The seminar was convened at 8:30 a.m., April 22, 1988, by its Moderator, W. Michael Reisman.**

REMARKS BY PROFESSOR REISMAN

At Yale for the last two years, I've been working with Professor Gayl Westerman, sitting here on my right, who is a professor at Pace University School of Law and holds a doctorate from Yale on maritime boundaries. In the course of the last year, we have become more and more concerned with the complete deterioration of any disciplined regime with regard to baselines, and it has become quite apparent that the consequences are very deleterious for any effective public order of the oceans. We have been doing some work on this, and it seemed that it would be appropriate to present it to a group of experts in international law in general and specialists in international maritime law in particular, to see what the reactions might be. I know that many of you here are concerned with this problem in a professional or scholarly fashion, and I know that some of you share the concerns that Gayl Westerman and I have. The seminar might proceed best if I were given 25 or 30 minutes to set out the basic thesis of our concern, and perhaps a brief bibliographical review for those of you who are working on this, and then try to move our discussion on to an inquiry into a variety of problems that we think, as yet, are unresolved.

Since seminars, in my experience, tend to break down in terms of order and become a very productive anarchy, I'd like to set up the basic framework of the ideas I propose to develop just in case I don't get a chance to carry it that far in our discussion. I would like to demonstrate to you, by going back to the 1930 Codification Conference, that straight baselines from the third decade of this century on, though presented as a technique for rationalizing coastlines and, as a result, for smoothing all of the seaward boundaries that might be generated from those coastlines, in fact were being used primarily as a technique for establishing greater coastal jurisdiction over previously internationalized maritime areas. It's quite clear, and I think I'll have no difficulty demonstrating, that the 1951 *Anglo-Norwegian Fisheries* case was not about baselines at all, but was a precursor of an exclusive economic zone (EEZ) or a fishery zone. If

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one goes back and rereads that decision carefully, particularly the separate and dissenting opinions that provided an extraordinary prism into the thinking of the tribunal, it is very clear that the issue was not simply the smoothing out of coastal boundaries, but was in fact the giving of exclusive control to Norway over fishing resources that the Court was persuaded were more important for the population of certain regions in Norway than they were for long-distance English fishermen. I would like to show how the pressure for turning straight baselines into a coastal jurisdiction expansion method was pursued from 1951 on; to talk briefly about the discussions in the International Law Commission and the drafting of Article 4 of the 1958 Convention, the straight baseline article; and to show how by 1958 the expansionists had largely prevailed, whereas they had lost in 1930. By 1958 we were dealing with an institution that called itself a straight baseline and seemed to sound in the rationalization of boundaries, but in fact was concerned primarily with expanding coastal jurisdiction.

If you look at practice after 1958, what is striking is the promiscuous use of straight baselines largely to take bigger and bigger bites of waters proximate to the coastline and, as a result, to push the variety of other maritime zones further and further seaward. After 1975 and plainly by 1982, an international consensus had emerged that established as a general principle that states were entitled to exclusive economic zones and preferential fishing rights in the waters washing their shores out to 200 miles. It's clear that by 1982, the latent impetus of the *Anglo-Norwegian Fisheries* case, *i.e.* to expand coastal jurisdiction seaward, had been achieved, and straight baselines, as they were conceived in 1951, really became obsolete. Nevertheless, what has continued to happen, and I think the charts will demonstrate this, has been that coastal states have continued to use straight baseline delimitation in a very ambitious and very aggressive fashion. The consequences have been, first, to compromise international user rights for surface and subsurface passage in coastal waters by moving the line of internal waters and territorial waters significantly seaward. This is a major problem for all large states, particularly those that depend on navies for part of their security, and certainly for the United States for which the submerged part of the triad is a very important part of deterrent policy. The second consequence has been that the common heritage of mankind has been pushed further and further seaward, and this represents a net loss not simply for the major users, but for all nations that have a common interest in this common heritage. This result is, of course, inconsistent with the emerging public order of the oceans and should be another reason for the reconsideration of the straight baseline doctrine.

If I can make this particular point persuasive to you, I'd like then to turn the seminar around to a consideration of a possible new policy that might be adopted by the United States and other like-minded maritime users. This policy would involve, in the first place, the preparation of a detailed circular note saying that U.S. policy is henceforth in favor of a strict and disciplined interpretation of article 4 of the 1958 convention and, if it comes into force, article 7 of the 1982 convention¹ (which is substantially the same except for one provision); and second, the development of a praxis in which we would protest routinely and quite vigorously what seem to be illicit straight baselines as a way of stopping this erosion of the high seas and, in particular, stopping the erosion of use of key avenues for surface and submerged passage. The last part of the seminar, I hope, will be an examination of ways that we can develop an interpretation of article 4 of the 1958 convention and of the 1982 draft that is consis-

¹21 ILM 1261 (1982).

tent with those provisions, that does not appear to be an American imperial action, but one that nonetheless accomplishes the aim, which I think is in our interest and in the common interest, of imposing some discipline on the unilateral delimitation of straight baselines.

In 1927-28, in preparation for the Codification Conference on the Law of the Sea, the Preparatory Committee prepared a statement with regard to straight baselines. I'd like to read it to you very briefly because I think that it's an important starting point or, if you like, baseline for our discussions.

Mention should also be made of the line which limits the rights of dominion of the riparian state on the landward side. This question is much simpler. The general practice of the States, all projects of codification and the prevailing doctrine agree in considering that this line should be [*sic*] low-water mark along the whole of the coast.

A questionnaire was sent out to states and of the states that responded, 17 agreed that the low-water mark was the technique for determining what "coast" was and for projecting further seaward maritime boundaries. Five of the responses are somewhat ambiguous, and only five states, quite a small minority, said straight baselines were the appropriate or were an appropriate method. As of 1930, it's quite clear that those states and those forces in the international political system that were anxious to maintain a broad high seas and a narrow coastal belt were still in the position of dominance. We now know, however, particularly from documents published recently in *Foreign Relations of the United States*, that by the 1930s the United States and the United Kingdom already were negotiating between themselves or clarifying views between themselves with regard to continental shelves. We were in the hydrocarbon age, technology was making hydrocarbon deposits offshore increasingly available, and it was not surprising that advanced industrial states would be looking to securing access to those areas and to making sure that those who might be hostile weren't close by. Although first place is usually given to the Latin American states for the effort to push national jurisdiction seaward, it seems to have been an effort that was much more widespread, even as early as the 1930s. Nonetheless, there was in fact no major expansion until the *Anglo-Norwegian Fisheries* case in 1951. I'd like to draw your attention to what seem to me to be the most salient features in this particular case.

In 1906, long-distance British fishermen reappeared in the waters rich in fish off the Norwegian coast. The Norwegian population was exercised by this, and interestingly enough, that's made explicit in the case. An attempt by the Norwegian Government to get the British fishermen to withdraw failed, and by 1935 the Norwegian Government had established a new set of straight baselines and fishing zones four miles beyond. Those straight baselines went out beyond previous claims. The British Government and the Norwegian Government negotiated, and after 1935 there was some discussion of submitting the matter to the Permanent Court of International Justice. After the Second World War, when it became clear that the matter was not going to be settled by diplomacy, British vessels were again picked up by the Norwegian Navy, and the case was brought to the Court by unilateral application of the United Kingdom in 1951. The question of the case was: "Is the method of straight baselines adopted by Norway lawful under international law?" If you look at a chart of the Norwegian coast, you can get some sense of what the consequences of the Norwegian straight baselines were.

The position of the United Kingdom was fairly classic in terms of the law of the sea and certainly very consistent with the position that had been confirmed in preparations for the 1930 Conference, *i.e.*, that the appropriate method for drawing baselines

was to use the low-water mark. Where you had an irregular coast, you could use the technique of tangents of circles that would be thrown at intervals from the coastline. The intersecting arcs would then be connected with a line that would follow the general direction of the coast. But in all cases, the United Kingdom argued, the method of straight baselines as developed by Norway was unlawful. There was no argument about the four-mile limit, and there was no argument about those configurations of the coast the United Kingdom was willing to accept as historic bays or historic waters.

The Court's response to this case was very interesting. The Tribunal began with an assumption, *i.e.*, that the coast of Norway is the *skjaergaard*, that unusual rock rampart that runs along Norway's outer perimeter. With regard to the question of baselines, the Court described three legitimate ways of determining what the coast will be for boundary delimitation purposes. The first was the *tracé parallèle*, that is, the drawing of a set of parallel traces, whatever the breadth of the territorial sea will be, that follows the sinuities of the coast. The Court concluded that this method was inappropriate for an irregular coastline such as Norway's. The second method the Court developed or acknowledged was the envelope of the arcs of circles method, the British recommendation, which the Court said was also a legitimate method. Then somewhat disingenuously the Court said the third acceptable method for deriving a coastal baseline was the creation of straight baselines. I say "disingenuously" because in this particular case, the straight baselines made no pretense whatever to being derived from the coast, but in fact departed from the low-water mark to create an entirely artificial coastline. I think that if you read the case carefully, you can see that in that particular step, pretending that this was a method consistent with the *tracé parallèle* and with the arcs of circles methods that were derived from the low-water mark, the Court was in fact making its actual decision. Having established the straight baseline method as legitimate, it proceeded simply to validate what Norway had done.

In my study of this case, I went back and looked at Manley O. Hudson's annual survey of the work of the International Court. He has a very superficial treatment of it, but he says this is an important decision reached by a very strong majority. That's not correct. There were only 12 judges on the Court at that time, and the decision about the lawfulness of straight baselines in general was 10 to 2; the decision about the lawfulness of the Norwegian baselines was 8 to 4. If you examine the separate opinions, it becomes clear that the majority was even slimmer than that. Judge Hackworth, the American, voted with the majority entirely on grounds of historic claims and did not express an opinion on the lawfulness of straight baselines. Judge Hsu, from the Republic of China, wrote a very learned and detailed separate opinion in which he said that he thought that for the unique configuration found on the Norwegian coast, straight baselines were appropriate, but it was not a general principle of law. Hsu also concluded that some of the baselines that were drawn, in particular a baseline of 44 miles and a baseline of 33 miles, should be disallowed, arguing that these were not consistent even with the theory that had been established by Norway itself, *i.e.*, that a baseline must conform to the general direction of the coast. Judge Alvarez, who voted with the majority and in some ways anticipated the Latin American position, in effect said: "I'm voting with the majority, but I think that under the new law of the sea, a coastal state is entitled to take any reasonable amount of the oceans that it needs. Notions like baselines, and so on, are just obsolete." Thus, if the numerical majority is examined carefully, it becomes clear that only five judges supported the general proposition of the lawfulness of the unilateral application of straight baselines in maritime boundary delimitation.

Few judgments of the International Court have been so clearly and directly responsible for a major change in international law. The 1951 judgment precipitated two lines of development. One was a veritable explosion of unilateral straight baseline delimitations. Coincident with this explosion was a codification and progressive development exercise, under the direction of the International Law Commission (ILC), that refashioned the ratio of the judgment. Its work was then adopted in treaty form. Let us consider each of these briefly.

Following the discussion at the Fourth Session of the ILC in 1952, Professor J.P.A. François, the Rapporteur, convened a Committee of Experts to deal with certain questions of a technical nature concerning the territorial sea. The Committee was composed of Professor L.E.G. Asplund of Stockholm, Whittemore Boggs of the U.S. Department of State, M.P.R.V. Couillault of the Central Hydrographic Service in Paris, Commander R.H. Kennedy of the Royal Navy and Vice-Admiral A.S. Pinke of the Dutch Royal Navy. The Committee met in The Hague in April 1953 and reported on a variety of questions posed by the Special Rapporteur. With regard to straight baselines, Professor François posed the following question:

If the low-water line may be replaced by straight baselines, [which is the] the system recognized by the International Court of Justice in the *Anglo-Norwegian Fisheries* case, what are the technical questions which may rise concerning

- A. The choice of the points between which the lines may be drawn?
- B. The length of these lines?
- C. The islands, rocks and drying rocks which may be found at least T miles from the coast? (T indicates the breadth of the territorial sea).

The Committee of Experts was of the view that the maximum permissible length of a straight baseline should be 10 miles. Such baselines could be drawn between promontories on the coast, or between a promontory on the coast and an island on condition that the island was situated less than 5 miles from the coast or, finally, between islands, on the condition that the promontories and/or islands be no further apart than 10 miles.

Professor François also asked the Committee of Experts to address the question of how one would implement technically the restriction that a straight baseline not depart "appreciably" from the "general direction of the coast." The committee found it impossible to establish the general direction of a particular coast, for efforts in this regard, it believed, would turn on questions about the proper scale of the charts to be employed and a prior decision, necessarily rather arbitrary, regarding the length of the segment of the coast to be used in establishing a general direction. Taking account of that reservation, the committee noted that the recommendation that the maximum length of the straight baseline be 10 miles was the best answer it could give to this question. The committee acknowledged that in exceptional cases, when international law permitted it, one could allow longer baselines. But in no case could these lines extend more than five miles from the coast. It seems obvious, from these responses, that the Committee of Experts was quite hostile, as was François, to an expanded use of the straight baseline option.

If you examine carefully the drafts that Professor François prepared in consecutive years, 1953-55, you'll see that there was a steady attenuation of François' program. François had wanted to temper substantially what the International Court had done in 1951, and his early drafts mirror the recommendations of the Committee of Experts, none of which is to be found in the *Anglo-Norwegian Fisheries* case. As you recall, the Court rejected all the claims that were put forward by the United Kingdom and gave a very broad and subtle interpretation to Norwegian aspirations. Even

though Professor François said several times in the debate that he was inspired by the *Anglo-Norwegian* case, I think the word "inspiration" was being used in a very ambiguous fashion. He plainly was trying to temper it. In the course of the discussion in the ILC, the Commission's majority gradually moved away from François and ultimately insisted on a draft formulation that almost tracked *Anglo-Norwegian Fisheries*, as is evident from the early draft texts of article 4 and the ILC Commentaries.

The discussion in the Commission is instructive of the matters with which the members were concerned. The Scandinavian countries resisted a 10-mile limit to straight baselines. Some members thought the issue turned on the breadth of the territorial sea. Hsu suggested that a 200-mile territorial sea would obviate the question of the length of straight baselines, a precursor to one of our points today. Sir Hersch Lauterpacht, who appears extraordinarily prescient in these discussions, seemed to anticipate the adoption of rules allowing extended national jurisdiction and sought to reserve transit rights in waters that thus would be enclosed.

In the long debate, the battle-lines became clear: those states that sought to use straight baselines as a way of extending national jurisdiction, on the one hand, and those states that sought to restrict the use of straight baselines as much as possible and to preserve a broad high seas, on the other. This latter group's rearguard action sought to deprive waters on the landward side of the straight baselines of the character of internal waters. Obviously, if you will examine the final draft in 1955, you will see that the expansionists prevailed.

By 1958, the final ILC draft had become article 4 of the Territorial Sea Convention:

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
2. The drawing of such 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.
3. Baselines shall not be drawn to and from low-tide elevations, unless light-houses or similar installations which are permanently above sea level have been built on them.
4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.
5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.
6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

The language has become extremely permissive. Though there is a geographical test in paragraph 1, paragraph 2 is extraordinarily soft in the modern use of the term. The drawing of baselines "must not depart to any appreciable extent from the general direction of the coast." What is "general direction of the coast?" What is a departure? What is an appreciable departure? These are extremely soft terms that give great range to the subjective appreciation of the coastal state. The consequence of the adoption of this provision was to move very rapidly to a system of widespread use of straight baselines in coastal delimitations. Another thing of note in article 4 of the 1958 convention is that Professor François' effort to make straight baselines an exceptional usage was for all intents and purposes dropped. You recall from our discussion that he had language in the earlier drafts that said "in exceptional circumstances" and

"where required," and so on. All of that language was suppressed by the Commission with the result that even though the convention headings refer to normal baselines and straight baselines, what really emerges in 1958 is an optative regime in which there are two types of normal baselines, either one to be selected at the discretion of the coastal state. There would have been nothing wrong with this if the baseline practice had in fact been undertaken by states with a sense of self-discipline and an appreciation that a balance always must be struck between international interests on the one hand and coastal state interests on the other. Unfortunately, nothing like that happened. What emerged was, in our view, an extremely profligate use of the straight baseline option, with little protest.

The equivalent provision in the 1982 convention, article 7, relaxes whatever restraint remained in the 1958 convention even further. Paragraphs 1, 3, 5 and 6 replicate the earlier convention. Paragraph 2 deals with unstable coastlines and, in effect, allows baselines to be established offshore:

Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line, . . . the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

Paragraph 4 relaxes the prohibition on using as basepoints phenomena that are not consistently above water:

Straight baselines shall not be drawn to and from low-tide elevations, unless light-houses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of base-lines to and from such elevations has received general international recognition.

Baseline rules with regard to archipelagos go beyond this discussion, but these rules have been cited as further evidence of the relaxation of restraints on the unilateral description of straight baselines in international law.

Perhaps we can pause for a moment and mention a few bibliographical sources for those of you who are working in this area. I will be drawing fairly freely on charts prepared by an Italian scholar, Tullio Scovazzi, who has published two books on this subject. I also will draw on *New Directions in the Law of the Sea*, produced by the Geographer of the Department of State, whose work in this area is superlative. If you are interested in the legislation enacted by individual states, I think the best collection is *National Legislation and Treaties Relating to the Law of the Sea*. It's part of the U.N. Legislative Series, and it has come out now in five successive volumes. If you examine the five volumes going back, I believe, to 1953 you get an extraordinary diachronic picture of changing claims in the aggregate. It's interesting to see how individual states reconsidered and, in some cases, expanded their coastal jurisdictions seaward as they appreciated the opportunities presented by the successive ILC drafts and finally by article 4 of the 1958 convention. That particular series is extremely useful, and I will quote one or two selections from it that give you some sense of how states began to use the language produced in 1958. I think even more useful is the *Limits in the Sea* series published by the Geographer of the Department of State, which again is superlative. In addition to noting the national legislation, this series also has the coordinates projected on maps. It also has the various baselines assessed in terms of their nautical miles, which is very useful for comparative purposes. In some cases, the series includes a very cautious—which is appropriate for the State Department in this function—appraisal of the lawfulness of the lines, done in extremely indirect fashion.

There is also a new book, a monograph published by Tullio Scovazzi and some of his associates in Italy, called *The Straight Baseline in International Law*, which has appeared just this past year (1987). Scovazzi and his colleagues also have put out a volume called *Atlas of Straight Baselines* from which I've taken many of the charts we'll be looking at today. I should say most of his charts come from the *Limits in the Sea* series, but his cartographers obviously reduced them in various ways so they would be consistent in a single volume. *New Directions in the Law of the Sea* is, of course, very useful. I don't think the charts are quite as good as some of the others, but the coordinates are reproduced in that looseleaf series. Also, Soviet claims are set out there, and I don't think they're available in many other places.

One book that is absolutely indispensable in all of this is Westerman on *The Juridical Bay*. I'm not saying that to be polite to a collaborator. This is a book that Oxford University Press has published just recently. The juridical bay regime set forth in article 7 of the Territorial Sea Convention is an extremely important companion concept. To some extent, if you understand the regime established for delimiting the juridical bay, you can get a better sense of how straight baselines have been abused. In Gayl Westerman's book there is also an examination of basic concepts of coast and low-water mark, and so on, which I think is the most up-to-date and readable presentation of this material.

For purposes of our policy discussion today, a detailed examination of any of these diachronic series is impossible. I propose, instead, to examine a range of national claims as a way to demonstrate what has become of the straight baseline practice and to set out the major contours of the policy problem.

Some straight baseline use has been designed to circumvent the 24-mile limit of article 7 regarding juridical bays. Thus, in a ministerial statement by the Attorney General of Australia on October 31, 1967, regarding territorial sea baselines, the government said:

The Convention authorizes the drawing of straight baselines up to 24 miles in length across bays that meet the criteria specified in the Convention . . . three deep indentations around the Australian coast . . . all of which are "bays" under the criteria specified in the Convention, would not be completely enclosed by baselines 24 miles in length. . . . But in any event, the Convention authorizes the drawing of straight baselines exceeding 24 miles in length where a coastline is deeply indented or cut into, provided that no appreciable departure from the general direction of the coast is involved. Straight baselines will accordingly be drawn across the entrances to Shark Bay and to South Australian Gulfs. (St/Leg.Ser.B/15 at 46 (1970))

The Australian position (and it is not unique) does not necessarily do violence to the language of the convention, but it is at least unusual to find two provisions in the same instrument, one of which can be used to frustrate the purpose of the other.

In Burma's declaration of November 1968, the Revolutionary Council stated:

Where it is necessary by reason of the geographical conditions prevailing on the Union of Burma coasts, and for the purposes of safeguarding the vital economic interests of the inhabitants of the coastal regions, to establish the system of straight baselines drawn between fixed points on the mainland, on islands or rocks, the breadths of the territorial sea shall be measured from such baselines.

Note that this exercise is justified by geographical as well as economic interests.

Historic title increasingly has been used as a justification for extensive straight baselines. A detailed consideration of historic title to maritime areas is beyond our inquiry. But it will suffice to note that most of the claims based on alleged historic title

have not demonstrated in any palpable fashion the trend of sovereign control on which the title is supposedly based.

A number of examples of the emerging pattern of straight baselines should indicate how far this practice has gone.² Burma's baseline is constructed of 21 segments. The longest segment is 222.3 miles (nmi). In the absence of historic title, that line arbitrarily closes the Gulf of Martaban to international traffic. The Gulf could be closed as a juridical bay only in the final segment, where a closing line would not exceed 24 miles. If the baseline in question were deemed dispositive of the coast of Burma for purposes of a competitive boundary delimitation with India's Andaman Islands, which are in a situation of coastal opposition, the resulting EEZ/continental shelf boundary would shift substantially toward India, discriminating against the ocean areas of the Andaman Islands. Even with the vexing elasticity of article 4 of the 1958 convention and article 7 of the 1982 convention, it is doubtful if many of the baselines used in the northerly section of the Burmese coast are consistent with the language of the conventions. On the other hand, the coastal configuration in the southerly section, which is similar to some parts of the Norwegian coast, would appear to be appropriate for straight baselines. It is not apparent, however, that the lines actually used by Burma strike an appropriate balance between the interests of the coastal state and the interests of international users.

Next, we have two situations in Vietnam, both the result of 1982 legislation. The north-south line that closes the Gulf of Tonkin and seems to bend at sea is more than 200 miles in length. The intersecting line that runs on to Hon Co Island is more than 60 miles long. All of the Gulf of Tonkin is closed to international traffic; and here again, a secondary consequence is that in a competitive boundary delimitation with China, the sovereign of Hon Co Island, this line enormously discriminates in favor of Vietnam. Finally, of course, any collective international claims to what would otherwise be a common heritage are reduced proportionately as one moves all the Vietnamese boundaries seaward. If you look at a chart of Vietnam's boundaries in the South China Sea, again you will see rather long lines.

The Gulf of Thailand, the Argentinian claims to the Gulfs of San Jorge, San Matias, and Nuevo—all these involve straight baselines that close bays, or configurations that look like bays, that far exceed the permissible maximum available under the juridical bay regime of article 7. The Gulf of Thailand closing line is approximately 60 nmi long. The line closing the Gulf of San Jorge is 130 nmi; of San Matias, 60 nmi. In my view, only Nuevo Gulf qualifies as a juridical bay. Clearly, article 4 is being used here to circumvent the article 7 regime in areas of the coast that are neither "deeply indented" nor "fringed with islands" as article 4 requires.

If you look at the Canadian baselines around Newfoundland, under Canadian legislation, you will see features described as areas II and III. I think these are interesting because, though the configuration in certain places certainly reflects the irregularity and deep indentation contemplated under article 4, one of the questions is whether or not the lines themselves are not too generous in cutting off areas of the high seas.

Next is the Italian closing of the Gulf of Taranto.

A speaker from the floor asked as to the historic basis of the Italian claim in this area.

²Professor REISMAN here drew attention to a series of charts detailing various straight baseline claims, all of which can be located in the sources previously cited in his remarks.

GAYL S. WESTERMAN:* The Italians have failed to justify their claim to the Gulf of Taranto under either juridical bay or historic bay status, because the length of time of the claim has not run fully, and therefore, they're now claiming it under article 4. I wrote an article about this last year, *The Juridical Status of the Gulf of Taranto: A Brief Reply*, in which I termed this practice shocking. You fail to state a claim under article 7 because the closing line exceeds 24 miles; you fail to state a claim as an historic bay because you do not meet those tests, but all is not lost. You just move back in the convention, call this a deeply indented coastline and close your failed bay under article 4. This cannot be a correct interpretation.

Professor REISMAN: It's very easy to say this is an historic bay and to some extent, if you say it and other people accept it, it becomes self-fulfilling. There are many examples in which states increasingly have used historic claims for justification, because such claims appear to be much more impregnable to criticism. I don't think the Soviet Union is the worst violator or exploiter of the ambiguous language in article 4, but it's very interesting to find that all the recent straight baselines that the Soviet Union has drawn have been justified simply as enclosing historic waters with no real explanation of them. There are two problems in all this. When someone says that these are historic waters, what tests shall we use internationally? Shall we use, for example, the Cook Inlet Test that was developed by our Supreme Court, or the more traditional tests that have been worked out by a number of scholars, most comprehensively by Yehuda Blum, or shall we use a much more permissive and flexible conception. Similarly, when we talk about economic interests, which is another way of justifying a straight baseline that doesn't sound in article 4, shall we talk about potential economic interests, or shall we talk about demonstrated economic interests that have a long history or some history? If you go through the U.N. National Legislation Series, in some cases it's quite clear that states are not referring in their preambles to old economic interests, but anticipated economic interests. Burmese legislation, for example, is quite clear on this point. I think it's true that we're going to find more and more states using the word "historic." The question is, is there something that backs it up, and if there's not much there, what criteria are we going to use to appraise such claims?

If you look at the Gulf of Sidra, the closing line there is more than 300 miles in length. Clearly, we do not have a juridical bay here nor do we have a deeply indented or fringed coast for article 4 purposes. As to the question posed above in regard to historic waters, there very well may be good arguments for an historic bay claim in the Gulf of Sidra; it may be an arguable case. But the question then is going to be what are the criteria for this? And we don't have clear criteria for testing such claims.

Consider also the line that Mauritania has used to close off part of the coast of West Africa, right below the hump. This area does not qualify as a juridical bay, and certainly, given the line here, this configuration doesn't sound in article 4, because it does not meet the criteria of article 4(1). Nevertheless, it's a claim that has not been the subject of much protest.

If you examine Colombian claims to straight baselines, one on the Caribbean front and the other on its Pacific front, you find again very long lines, though they seem to follow the general direction of the coast. What is puzzling is that in most cases they don't seem to have the necessary deep indentation of the coastline that is required whether under article 4 or article 7.

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The now-lapsed claim of Guinea with regard to its straight baseline was an incredible claim, which simply ran a straight line from Sene Island to Tamata Island along the entire length of the coast of Guinea. The claim was withdrawn by Guinea in the course of the litigation between Guinea and Guinea-Bissau, and now Guinean baselines follow the low-water mark. Guinea-Bissau, Guinea's neighbor, has used straight baselines to enclose the Bijagos Archipelago. I don't think that this is particularly problematic, but if you look at the line that descends from the Senegalese/Guinea-Bissau border and then drops to Umbocomo Island, you find a line more than 70 miles long that doesn't seem to follow what one would call the general direction of the coast, even in a generous sense.

The Iranian straight baseline follows the general direction of the coast. But why in the world do the Iranians have a straight baseline? Is it a deeply indented, irregular coast? Article 4 says the coastline must be deeply indented or have a fringe of islands in the immediate vicinity.

There are more examples of claims that represent abuses of the limitations of the juridical bay provisions with respect to Kenya, closing Formosa Bay, and Mexico, closing the upper reaches of the Gulf of California.

I'd like to summarize the remaining situations quickly, so as to move on to our policy discussion. There are many examples of the increasing use of historic claims that are not substantiated to extend coastal jurisdiction seaward. There's nothing new about Peter-the-Great Bay. That claim goes back to 1957. The chart from Scovazzi doesn't give the impression that a great deal of water has been cut off, but actually an enormous part of the high seas has been internalized by that claim. You also may wish to examine a few charts from *New Directions in the Sea*. One is the chart of Kamchatka Peninsula. Consider also the consequences of decrees of 1983, 1984, and 1985 in the Barents Sea, the 44-mile closing line in Cheshskaya Guba, and two closing lines that internalize waters through the Kara Strait. The closing lines themselves are 29 and 32 nmi in length.

The trend that is emerging, though there are variations in justifications, has resulted in serious consequences for international users in maritime areas relatively close to coasts as well as serious consequences for what remains of the common heritage, the high seas beyond the most seaward legitimate boundary. We're not the first people who remarked on this trend and were concerned about it. As early as 1973, Arvid Pardo, who was becoming more and more desolate at the thought of what was happening to his notion of common heritage, said in a conference:

Unfortunately, a number of key terms in the text of the Convention were not properly defined and as a result of that vagueness, a large majority of coastal states had, by elastic interpretations of Article 4(1) and (2), established their baselines in such a way as to give them the maximum area of territorial sea. Their actions, which have passed largely unnoticed and undisputed, had resulted in probably over one million square kilometers of what had been territorial waters or high seas in 1958 being claimed as internal waters. As the matter stood, there was every likelihood that more international sea areas would become internal waters within the next few years.

That was 1973. The situation is even more aggravated now in light of the recent trends.

It is useful to keep the original impetus of straight baselines in mind in assessing the propriety of their future use. The original impetus for Norway's claim in 1951 was fishing. The Court says quite specifically that it acknowledges that the purpose of the law had been to deal with popular concern about overfishing in an area that was eco-

nomically important to some regions, and the Court goes out of its way to explain that this is what it's resonating to. By 1988, when we have 200-mile fishing zones and exclusive economic zones with primary rights granted to the coastal state, the demands that would have necessitated or justified a straight baseline in 1951 no longer exist. The Romans used to say that if the purpose of a law ceases, if the justification for a law ceases, the law itself should cease. This concept has been used frequently in common law. It seems to me that we ought to rethink what's happened in straight baselines. If the purpose has ceased, and it largely has been accomplished by other less disguised, less fictitious techniques, maybe we ought to go back and rethink our own reaction to straight baselines so that we can preserve the ocean interests that are important to us, to other international users, and to anyone who participates in what's left of the common heritage.

A number of other deleterious consequences have flowed from the profligate use of article 4. One of these is that such use has completely vitiated any possibility of making predictions about maritime boundaries. Many of you are practicing lawyers. You are obliged to give opinions about presumptive boundaries in areas that have not yet been settled. An international user can't wait until states sort these things out. The resources of the ocean, to some extent, will not be available to an entire generation if we don't have some way of making presumptions about approximately where boundaries will be set. If you tease out the jurisprudence of the International Court, you see that the Court itself, in trying to establish some principles for determining where maritime boundaries are, has excluded straight baselines from their deliberations completely. You can see this beginning in 1969 in the *North Sea Continental Shelf* case,³ and continuing in 1977 in the *Channel* arbitration.⁴ By 1985, the Court says very explicitly in *Libya v. Malta*,⁵ a case of coastal opposition, that the baselines as determined by coastal states are not per se identical with the points that will be chosen by the Court in order to calculate the area of continental shelf pertaining to those states. By 1985, the very Court responsible for the regime of straight baselines in 1951 is saying states may in fact be drawing straight baselines, and maybe under article of the 1958 Continental Shelf Convention such baselines are to be used in determining maritime boundaries, but the Court will ignore them when it makes its decisions. This development points to a straight baseline system that has gotten completely out of control.

For all these reasons, it's important that we begin to rethink what should be done with straight baselines. I think we should go back to the original function of straight baselines, *i.e.*, a technique for rationalizing a coastline when it's deeply indented or fringed with islands, and forget about the latent function that was a technique for the extension of coastal jurisdiction seaward before that was generally acceptable. We should state clearly that the normal baseline is the low-water mark. In some circumstances, we will depart from it; but when we do so, we will insist on a strict compliance with the terms of article 4. I'm putting this forward as a policy recommendation, and though I hope it will be adopted by the United States and other maritime users, I think we ought to consider the reasons for such a policy. The technique of straight baselines has become inequitable for a number of reasons.

First, it disturbs the package deal—the essential *do ut des* in which major maritime users yielded in their opposition to seaward extensions of jurisdiction in return for

³8 ILM 340 (1969).

⁴17 ILM 634 (1978).

⁵24 ILM 1189 (1985).

guaranteed surface and subsurface user rights over traditional parts of the high seas that might thereafter become subject to some form of coastal jurisdiction. It disturbs the bargain by nationalizing more of the seas while allowing free surface and subsurface transit on less of the seas.

Second, it disturbs the essential equality that the new public order of the oceans has sought in the allocation to coastal states of parts of the hydrosphere that formerly were high seas. Each coastal state was assured 200 miles of EEZ (if it faced the open seas) and continental shelf, or if it was not endowed with one, ocean floor. The use of straight baselines permits individual states to take more than that, proportionately reducing the common share of the high seas and the relative value of the nationalized areas pertaining to all other states.

Third, the use of straight baselines now introduces further complexities into maritime boundary delimitation. While it is difficult to state what the operational code applied by the International Court with regard to maritime boundary delimitations is, the consequence of the recent cases appears to be a system of provisional equidistance adjusted for special circumstances. All users of the high seas who must make provisional assessments of boundaries pending third-party decisions cannot perform their task as long as there is a question about the lawfulness or propriety of particular uses of straight baselines.

For all these reasons, the toleration of the widespread practice of the undisciplined use of straight baselines should be reconsidered. Such a reconsideration should begin with a policy clarification and then examine relevant legal communications and instruments to see whether they are susceptible to interpretations and applications more consistent with a cogent contemporary policy.

I would suggest that we rethink what the objective of straight baselines is, and that the United States as a major maritime user consider a new policy position in which it does not accept, nor does it encourage others to accept, what seem to be excessive uses of article 4. Though the techniques for protesting particular abuse of uses will be very complicated, I think the time has come and that this is quite consistent with international law. First, it seems to me that international law has long recognized what the French call *actualisation*, a process that involves making old treaties contemporary—taking an old agreement that was drafted in a certain context that is no longer relevant and refashioning that agreement so that it ceases to be mortmain, a dead hand of the past, and now serves contemporary purposes. The International Court talks about this quite openly in the *Southwest Africa* case.⁶ There is a fair amount of literature in international law about the permissibility of reinterpreting as a way of bringing instruments up to date. If you insist on a strict interpretation according to practice, where we have long-term agreements but a rapidly changing environment, law will become a clog on development and ultimately cease to serve the purposes for which it was formed. I don't think we have to apologize for saying: "Things have changed; we are entitled to another interpretation."

The question is: "How are we entitled to reinterpret article 4?" As major consumers of treaty law and as major reliers on treaties, we don't want to establish a precedent for an interpretation that radically departs from the language of a treaty, though it might serve our purposes in this particular case. Such an approach could come back to haunt us in a variety of other cases. Can you make a legal case for reinterpretation?

⁶⁵ ILM 932 (1966).

Look at article 31 of the Vienna Convention on the Law of Treaties,⁷ and also article 4 of the 1958 convention. I'd like to invite you now to explore how we can take that language in the light of article 31 and come up with an interpretation that is more consistent with what we think are the common interests of ocean users.

JOSEPH J. DARBY* suggested that one might make use of the concept of the general heritage of mankind and the peaceful uses of ocean space.

Professor REISMAN answered that one could look profitably to the object and purposes of the law of the sea.

RAINER LAGONI** said that as of early 1988 many countries with straight baseline claims had not ratified the 1958 convention, specifically in order to avoid conflict between their claims and articles 4 and 7. Perhaps, therefore, we could make better use of customary law for a reinterpretation. He also asked what the consequences were of violating either the customary law or the 1958 convention, and what the rights of third states or their ships were.

Professor REISMAN answered that the questions posed were very relevant. Since the 1958 convention used the "baseline" as the basis for all maritime claims, what were a state's options if it decided that it would not accept a "bad" baseline? Send its ships into protested waters? Diplomacy? The issuance of clear policy statements? All had implications for political relationships.

HOWARD STRAUSS*** said that as of early 1988 many countries had not ratified the 1982 convention, including the United States. How could the United States argue on the basis of a "package of rights" when it had not ratified the package?

Professor REISMAN agreed that the United States might have a hard time arguing that it liked one part of the package but not another.

A speaker from the floor asked whether some of these claims had not gone too far. How could third states really oppose them at this point?

Professor REISMAN replied that things had indeed gone too far. The process could be reversed by clarifying and implementing, through all the means available, a new policy. He concluded by saying that he felt it was worth pursuing.

Another speaker from the floor said that he thought the United States could not pursue this unilaterally. It would need a large number of maritime states to join the protest. Many U.S. protests in the past, he noted, had not been joined by other states.

Professor LAGONI noted that when the Federal Republic of Germany (FRG) had extended its territorial sea to 16 miles, it had consulted the United States. The United States had said: "You can't do it." After the FRG had agreed to a U.S. request not to sign the convention in 1982, there were no more protests from the United States on the 16-mile territorial sea. On a bilateral basis, he continued, political reasons often lay at the base of policy.

J. ASHLEY ROACH† said that the United States had taken a public position on baseline claims in the President's Oceans Policy Statement. It viewed the 1982 navigation articles as representing a fair balance of interests and would operate in a manner consistent with these provisions. Also, internal to the U.S. Government, there was a process for identifying excessive claims and for determining how to oppose them.

⁷8 ILM 679 (1969).

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A speaker observed that the United States needed to be universal in this; *i.e.*, it needed to have the same policy in regard to friends and foes. One of the origins of the archipelagic claims was that it was never seen in the U.S. interest to be a good time to protest such claims. Now they were a reality.

Another speaker responded that the policy of the U.S. Government was to be even-handed in its opposition to claims. Many states had asked the United States not to protest certain claims, but U.S. CINCPAC did it anyway.

Professor LAGONI said if we were to take this matter seriously, we must ask, what was the "regular" coastline? The language of article 4 was too vague and served as an invitation to states to take as much as they could. Wouldn't it have been better just to state that all methods of delimitation must be reasonable or equitable? State practice, he continued, might show exactly that law failed to regulate the process properly, so there was no use in turning back to article 4 for a reinterpretation.

Professor REISMAN responded that article 4 was flexible for both sides in a controversy. Shouldn't we take these vague terms and try to interpret them more strictly?

DAVID BATEMAN* said that the comments of Professors Lagoni and Reisman reflected the two basic modes of delimitation—the legal and the geographical. Geographers wouldn't accept article 4 as a basis for maritime delimitations. Didn't we just need a completely new rule?

Professor REISMAN said that we couldn't get to the new rule in a conference. None was likely to be convened in the near term. The question was, could we produce a new rule consistent with policy by interpretation.

Mr. BATEMAN suggested using the mathematical principles of the archipelagic provisions as an avenue to reinterpreting article 4.

Captain ROACH said that in the archipelagic regime, there had been a prior understanding of which states were and were not to come under the provision. Article 4 had no such list.

Mr. STRAUSS said that in 1987 there had been a conference on straight baselines under the aegis of the U.N. Law of the Sea Secretariat. Further meetings of this group might provide a useful forum in which to consider the rules applicable to the drawing of straight baselines.

EDWARD COLLINS** said that the opportunity to define the article 4 terms more carefully had been there before the 1982 convention. The United States had offered no proposals. Could it now possibly disavow anything less than the Norwegian baselines?

A speaker noted that one of the problems to be faced in a reinterpretation would be getting the attention of policymaking officials. They did not see this issue as central. The law of the sea often had to "give" to other more urgent policies.

Professor REISMAN responded that this would be an educational task for lawyers and others concerned with the problem.

JOHN SPENCER*** asked whether there might possibly be pressures in the United States and in other federations to move the baselines from the low-water to the high-water mark, as in civil law countries following the Roman law tradition. By moving the line between internal and territorial waters landward, the federal jurisdiction could capture more of the resources of the oil-rich coastal areas. (Admittedly, constitutional problems would arise in the case of the United States but probably not elsewhere.)

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Professor REISMAN noted the political impediments to such an innovation and thought it unlikely to be pressed.

Professor SPENCER asked how the economic provisions should be interpreted, to which Professor REISMAN replied, "very strictly."

Professor REISMAN: In conclusion, I would suggest the following ways to reinterpret article 4 consistent with article 31 of the Vienna Convention and customary law:

1. Where correct application of the provisions regarding juridical bays (article 7 of the 1958 convention or article 10 of the 1982 convention), eliminates a particular indentation from juridical status, the United States should resist putative applications of the article 4 straight baseline provision, the effect of which is to exceed the 24-mile limit that was agreed upon as the maximum permissible length of a closing line in a coastal configuration constituting a bay. Article 31 of the Vienna Convention on the Law of Treaties instructs that interpretation be effected "in accordance with the ordinary meaning to be given to the terms of the treaty in their context," and "context means" *inter alia*, its text. In a single instrument in which great efforts have been made to limit the length of closing lines in certain configurations, it is absurd to allow an interpretation of a nearby provision that renders the effort at limitation completely nugatory.

2. Where the configuration is that of a bay regulated by the provisions on juridical bays, and a state wishes to exceed the maximum permissible limit of the closing line on the grounds that the bay is historic, the United States should insist that there be a persuasive demonstration of historic title. Where necessary, the United States should undertake its own examination of the claim of historic title before acquiescing in it.

3. With regard to the interpretation of article 4 of the Territorial Sea Convention (or article 7 of the 1982 convention), the geographical conditions in Paragraph 1 should be deemed to be the prerequisite for proceeding. Thus, if the coastline is not "deeply indented and cut into," one should simply not proceed further to determine whether straight baselines may be drawn. The text of the convention establishes that as a prerequisite, and if it is not fulfilled, one cannot proceed. The language of the provision plainly contemplates more than irregularity and, indeed, indentation. A coast must be deeply indented and, it would appear, deeply cut into. Parties to the 1958 convention (and to the 1982 convention) are entitled to rely on the language of the provision when encountering straight baseline claims by other states. The reference to "coast" should be understood to mean the mean low-water mark of the most landward interface of the hydrosphere and terra firma. Coast should, in short, mean coast and not a construct of coast. To accept the second meaning would circumvent any possible limitation to be found in paragraph 1.

Similarly, if there is no "fringe of islands along the coast in its immediate vicinity", there is no warrant to proceed. The words "immediate vicinity" are susceptible to a disciplined interpretation if "immediate" is construed to mean within the distance of the territorial sea from the low-water mark, i.e., not more than 12 miles seaward. That interpretation is justified both by the etymology of the word "vicinity" and its qualification "immediate." Islands found outside the "immediate vicinity" of the coast are entitled to an appropriate enclave, but they are not entitled to drag a general front-wide national jurisdiction with them beyond the immediate vicinity. While such an interpretation might have been resisted in 1958, the subsequent elucidation by the International Court, and by the Tribunal in the *Channel* case, regarding the enclaving of islands and the general depreciation of the juridical value of islands in maritime boundary delimitation now justifies this interpretation.

Only if these geographical tests are met should one proceed to the next stages.

4. Basepoints should be scrutinized for their conformity to the letter and spirit of the convention. The word "appropriate" in paragraph 1 imports a juridical test. One illumination of it is offered in article 7(4) of the 1982 text that precludes the use of low-tide elevations unless permanent structures on them put them permanently above sea level. Since the method proposed here already has required that islands used as basepoints be, in fact, in the "immediate vicinity", the possibility of "island-hopping" seaward is contained. No basepoint may be beyond 12 miles from the low-water mark. Hence no straight baseline can ever be more than 24 miles from the low-water mark. In addition, the qualification of immediate vicinity should, it is submitted, require that no basepoint be more than 12 miles from another such point. That value is adopted from the maximum permissible length of the territorial sea in the 1982 convention, which one may take as a consensus. The addition, in the 1982 convention, permissible use of low-tide elevations if the usage "has received general international recognition" can be contained in operation by withholding such recognition and by insisting that there be a substantial demonstration of its existence in cases where the exception is sought to be used.

5. A major problem of the formulation of the International Court in 1951 was the essential tautology of the words "general direction of the coast" and the elasticity of a test of appreciable departure from it. The Court, as we saw, took the baselines themselves as an indication of the general direction of the coast. The Committee of Experts convened by Professor François ultimately acknowledged defeat in the effort to try to introduce some clarity and precision into these terms. It would be possible for the United States to declare that in general it will oppose any part of a straight baseline whose vector departs more than, let us say, 25 degrees from the coast as conceived by reference to the low-water-mark line. This would be a substantial addition to the conventions and would, unquestionably, arouse enormous resistance for its necessary arbitrariness. We would counsel against it. Under the interpretation developed here, the importance of "general direction of the coast" declines to a vanishing point. Since the geographical preconditions for the use of straight baselines has now been set out with greater precision, basepoints are tested for their permissibility and the length of baselines is now tempered by the length of the territorial sea, little would be gained by trying to provide sharper reference to terms like "general direction" and "appreciable departure." Curiously enough, general direction is now required, in the jurisprudence of the Court, in boundary delimitation for the more seaward zones, since the Court does not rely on straight baselines described by the parties themselves. In performing that task, an applier can use the "squint" test, which appears to have been adopted by the Court, or a vector can be established by a more systematic geometric test. I would suggest that in the future "general direction of the coast" be tested by the normal baseline method, *i.e.*, the low-water mark on the terra firma. Using that constructive line, the arcs of circles method, employing a diameter equivalent to the claimed breadth of the territorial sea, may be deemed to provide a vector that is the general direction of the coast corrected for gross irregularities.

The text of the convention does not, as said, propose any numerical test for the words "appreciable departure," and it would appear to be difficult to justify any numerical value here. If the basepoints themselves must be located within a maximum of 12 miles of the low-water mark, however, some tempering of more excessive claims can be achieved.

6. All of the previous geographical and vectoral tests are provisional, within the conception of articles 4 and 7. They are to be tested by the *raison d'être* of the entire institution: that the waters enclosed are in fact internal. It should be noted that arti-

cle 7, like article 4 before it, uses words that suggest some judgment. They do not require that the waters have been, in fact, internal, but only that they are sufficiently closely linked to the land to warrant internalization. Here again, it may be appropriate for the United States to develop a test, involving criteria of practice through time and intensity of use. Some precedent for this may be adapted from the International Court's examination of traffic in the straits of Corfu.

7. The language of article 7(5) imports an *in esse* test rather than an *in posse* test with regard to economic interests. Since the utilities of the sea are becoming greater and more and more accessible, any test of potential interest that is not disciplined by a demonstration of long usage will be meaningless.

These criteria, in ensemble, can be used to direct attention toward a decision as to whether or not to accept a claim of all or part of a straight baseline claim. They allow for a measure of appreciation that should take account of the long usage of economic interests in the area in question.

GAYL S. WESTERMAN
Reporter