

United Nations Convention on the Law of the Sea: UNCLOS

A Commentary

Bearbeitet von

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difficult to assess because of their low-lying nature.⁴⁸ In fact, lowest astronomic tide ('LAT') is increasingly used in the world today as the most appropriate datum for LTEs (see below); but several other datums – such as mean low-water spring tide, mean low-water, low neap tide, mean lower low water – have also been evident in State practice,⁴⁹ with converse equivalents as to high tide datums (the latter of importance in gauging true insular status). The matter of relevant tidal datum has been most recently discussed by the arbitral Tribunal in the *Philippines v. China South China Sea Arbitration* (2016), which noted the use of the term 'high tide' in the definition of both LTEs and islands. The Tribunal stated that the term 'high tide' is 'not a technical term and is potentially subject to a number of different technical interpretations', noting that the International Hydrographic Organisation (IHO) made no recommendation about heights depicted on nautical charts except that highest astronomic tide should be used as the datum for vertical clearances.⁵⁰ The Tribunal concluded in the case that nothing in UNCLOS or customary international law would mandate that the 'status of low-tide elevations [...] be determined against any particular water datum'; so that, accordingly, the Tribunal considered that States are free under UNCLOS to claim a high-tide feature or island on the basis of any high-water datum (and presumably also any low-tide datum) that 'reasonably corresponds to the ordinary meaning of the term "high tide" (or, it would seem, also of low-tide) in Arts. 13 and 121; and that '[o]rdinarily, this would also be the height datum for nautical charts published by that State, above which rocks would be depicted as not covering at high tide'.⁵¹

It is curious that in the case of LTEs – in the light of this tidal datum ambiguity – the UNCLOS does not here make specific reference to officially recognized charts for depictive reference to such features, as does Art. 5 (in respect of evidencing the coastal 'low water line').⁵²

In the light of such State diversity – and the silence, as seen, as to the relevant tidal datum⁵³ for this purpose in the UNCLOS – adoption by one State of any of the more 'surface-stringent' datums than LAT (e.g. 'mean low-water'), could entail it viewing another State's claimed LTE formation (based on a more liberal test such as LAT) as not constituting such a formation at all because of its very periodic and spasmodic above-water appearances; whereas another State – using the most lax and beneficial low-water test, that of LAT – could argue that the same feature is a LTE because of (even) occasional appearances at such an extreme low-tide level.⁵⁴ Indeed use of LAT (recommended for low water datum use by the IHO)⁵⁵ may mean that often an elevation will not be visible at many, or most, states of the

⁴⁸ Cf. IHB Manual (note 39), Ch. 2-24.

⁴⁹ *Symmons* (note 4), 17; *Antunes* (note 6), 7.

⁵⁰ See *South China Sea Arbitration* (note 6), para. 310.

⁵¹ *Ibid.*, para. 311.

⁵² *Antunes* (note 6), 13–14, aptly remarks, though, that the phrase – 'may be used as the baseline for measuring the territorial sea' (in Art. 13) – can be seen as 'an implicit allusion to Article 5' which defines the normal baseline by reference to official charts, so that the 'low water datum [in the case of LTEs] should be the same as that indicated in Article 5'. Thus it has been argued that impliedly the term 'low-tide' here must refer to those levels 'shown on the officially-recognized charts' of the State concerned, *Peter B. Beazley, Maritime Limits and Baselines: A Guide to their Delineation* (2nd edn. 1978), 24; but cf. IHB Manual (note 39), Ch. 4-9, which includes LTEs as 'exceptions' to application of the 'normal' baseline. Compare, though, the analogous situation of Art. 6 on 'fringing reef' baselines, which refers expressly to their seaward low-tide limits having to be 'shown by the appropriate symbol on charts officially recognized by the coastal State' (emphasis added). More recently, the Report of the International Law Association Committee on Baselines under the Law of the Sea took the view that the 'normal baseline' (ie., low tide mark) may also be used under Arts. 6 and 13 of UNCLOS: ILA, Report of the Committee on Baselines under the International Law of the Sea, Sofia Conference (2012), 24.

⁵³ *Antunes* (note 6), 5.

⁵⁴ *Symmons* (note 4), 17–18; *Peter B. Beazley, Technical Aspects of Maritime Boundary Delimitations*, IBRU Maritime Briefing 1(2) (1994), 1, 6. This happened, for example, in French/Belgian delimitation agreements, as in the case of the formation called 'Banc Breedt', off the French coast: according to Belgian charts, using mean low water spring tides as chart datum, it was not a LTE, but according to French charts, using LAT datum, it was a LTE, cf. *Antunes* (note 6), 20.

⁵⁵ IHO, Regulations of the IHO for International Charts and Chart Specification of the IHO (September 2013), available at: http://www.iho.int/iho_pubs/standard/S-4/S-4_e4.4.0_EN_Sep13.pdf, B-405.3.

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tide. The lack of clarity in the law of the sea is well reflected in a *dictum* from a 1968 British domestic case, concerning a controversial sandbank in the Thames Estuary – *Post Office v. Estuary Radio* – where it was stated prophetically:

‘Upon these [international and municipal] definitions [of LTEs] interesting and difficult questions arise as to whether [a LTE] must be above water at all low tides, at mean low-water spring tides, at admiralty datum, at the lowest tides experienced from time to time (if so, how often?) in the course of a year, or at lowest astronomical tides. Someday some court, municipal or international, may have to decide this.’⁵⁶

- 15 There is also the analogous problem of ‘peripatetic appearance’ of an alleged LTE more generally, caused by constant movement of position (and often surface appearance), as also can happen in the case of so-called ‘occasional islands’.⁵⁷ The fact is that typically low-lying formations which may typically constitute LTEs – such as particularly sand and mud banks – may not only be prone to continual erosion through tide and weather (so that their appearance above low tide at one location may not occur on a regular basis), but may also be subject to constant change of position as ‘ambulatory’ seabed formations. It may be implicit from the above-mentioned *Dinkum Sands* case⁵⁸ where such problems arose, that like an island proper, a true LTE should also have a similar degree of ‘permanence’ and predictability of regular appearance in one location (eg., at least once every 24 hours, consequentially being covered half of every 24 hours);⁵⁹ and that if the formation does not so comply, it is merely part of the seabed.
- 16 Furthermore, the weasel phrase ‘rocks awash’ (at chart datum) is also one that has entered maritime terminology and charting practice; and it should be distinguished from a ‘drying rock’ which implies that the formation does emerge at low-tide datum.⁶⁰ Such low-lying types of formations may be especially subject to inadequate survey work;⁶¹ and even qualifying offshore LTEs may escape initial charting detection.⁶² Only drying rocks (or other similarly surfacing formations) will now constitute a LTE; though even here there may be a problem with changes in sea level due to global warming, with certain LTEs in danger of disappearing

⁵⁶ *Post Office v. Estuary Radio Ltd*, [1968] 2 QB 740, 761 (UK) (*per Diplock LJ*).

⁵⁷ *Clive R. Symmons*, When is an ‘Island’ not an ‘Island’ in International Law: The Riddle of Dinkum Sands in the Case of *US v. Alaska*, IBRU Maritime Briefing 2(6) (1999), 1, 12–13, 26–28.

⁵⁸ *US v. Alaska* (note 23); see *Symmons* (note 56), 12–13, referring to the US argument therein that there had been ‘dramatic movements of the exposed areas of Dinkum Sands’, often by hundreds of feet.

⁵⁹ A rare example of a ‘time’ factor being used in a multi-faceted way for defining low-water surfacing requirements can be seen in the legislation of Finland (in connection with basepoints for its straight baseline system) where there is reference to a formation having to be ‘above sea level more than one half day per year on the average, at low water levels during the ten-year period preceding when this law takes effect’, Arts. 3 and 4 of the Act on the Delimitation of the Territorial Waters of Finland, Act No. 463 (1956).

⁶⁰ *Jayewardene* (note 39), 6. It has been pointed out that if one changes the chart symbolization of ‘rock awash’ to that of a ‘low tide elevation’, the extent of maritime claim may ‘drastically change’, *Sandra H. Shaw/Daniel J. Dzurek*, Charts in the Law of the Sea, in: Dorinda G. Dallmayer/Louis DeVorse (eds.), *Deciding and Drawing Maritime Boundaries* (1989), 15, 18; see further the marginal LTE status of Middleton Reef located 125 NM from the Australian coast, which may be a LTE although allegedly periodically submerged; discussed by *Clive Schofield*, The Trouble with Islands: the Definition and Role of Islands and Rocks in Maritime Delimitation, in: Seoung-Yong Hong/Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea* (2009), 19, 34–35. *Gray* (note 11), 9, mentions that during 1982–1992, when Canada and Denmark were investigating an equidistance line between Canada and Greenland, Denmark submitted its list of basepoints, including many rocks just marked with crosses on charts, which Canada objected to because they were charted as being below low-water. On re-survey of these rocks, some were indeed found to be below low-water datum, but one was even found to have a drying height at high tide.

⁶¹ *Gray* (note 11), 6–7, who points out the four types of chart symbols which may apply in such situations and comments that ‘rocks awash’, if they were just a little higher, could be LTEs and need further survey observation. See the comment of the arbitral Tribunal on this in the *Philippines v. China* case: *South China Sea Arbitration* (note 6), para. 331.

⁶² *Gray* (note 11), 5–6, who cites the case of LTEs north of Cape Chidley (off Canada) on the Labrador Reef, consisting of two pinnacles of rock drying respectively to 2.4 and 2.7 metres which were initially overlooked by Canada in setting its baseline system, and were only later included in it as a territorial sea basepoint in 1986, although they lie only 2.5 NM from the nearest island.

entirely.⁶³ It may be noted here, though, that just as low-lying islands such as cays⁶⁴ may be overrun by waves in certain weather conditions (such as monsoon periods); so *a fortiori* may even lower lying LTEs be overswept by seas when weather is not calm.⁶⁵

In the light of all this, it has been rightly stated that the ‘most difficult issue’ with LTEs has been ‘determining whether a given feature extends above the low-water datum’, especially as even the very chart symbols used for these vary and are based on warning of navigational hazard on standard nautical charts.⁶⁶ Not surprisingly, several disputes have arisen for such reasons over the status of certain ‘marginal’ LTEs resulting from divergent (and evolving)⁶⁷ low-water datum practice; i.e., as to whether they are even LTEs and so part of the seabed. Equally problematic may be deciding the analogous question of the status of a formation falling between a LTE and an island properly so called. For example, in the *Qatar/Bahrain Case*, Qatar claimed that a small feature known as Qit’at Jaradah was merely a LTE,⁶⁸ but Bahrain argued that it was an ‘island’. In the case, on the basis of expert evidence from both States, the Court decided it was (marginally) an island under Art. 121 (1).⁶⁹

More recently, a similar question has arisen incidentally in the context of maritime delimitation. For in the *Eritrea/Yemen Arbitration Second Stage* in 1999, Eritrea argued that

⁶³ Cf. Second Report on the Regime of the Territorial Sea (note 2). An example of a former LTE later (due to man-created change in currents) losing this status, and thus not even being exposed at the lowest of spring tides off Nova Scotia, Canada, is the case of Bass Rock, see further *Gray* (note 11), 11–12; this new situation may cause loss to Canada of 0.4 square km of territorial sea in the area. Loss (through disappearance) of former LTE status may also, and more often, be due to **entirely natural conditions** and so cause jurisdictional problems: see ILA Report 2012 (note 52), 24, commenting that LTEs may be ‘highly susceptible to coastal change’. This Report (*ibid.*, 21) refers, as an example, to the two cases in the Netherlands of 29 June 2007 (cases 13/501817(A) and 13/500730-06(B)), where the defendants argued, when prosecuted for illegal fishing, that they were not in fact fishing within the Netherlands 12 NM zone because a LTE (named ‘Showwen’), although included on a then-current Dutch official large-scale chart, was actually **no longer in existence**. The District Court rejected this plea, and the official Netherlands position at the time was that a change in its actual coastline had no effect **until such time as it was taken note of in an official State chart**. Rising tides due to global warming constitute another particular problem for the status of LTEs: see, for example, *Clive Schofield & David Freestone*, Options to Protect Coastlines and Maritime Jurisdictional Claims in the Face of Global Sea Rise, 1, 6–7 (loss of ‘significant rights’): Research Online, University of Wollongong (2013), available at: <http://ro.uon.edu.au/lhapapers/1236>.

⁶⁴ See *David Hancox/John R. V. Prescott*, A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst those Islands, IBRU Maritime Briefing 1(6) (1995), 1, 3, 5, 7, 26, where descriptions of the various formations in the area evidence that many are below the sea surface (or rarely appear above it) or are often awash with water.

⁶⁵ *Ibid.*, 13. See, e.g., the *Nicaragua/Honduras Case* (note 10), 672 (para. 28), regarding cays in that case which were ‘small, low-lying islands composed largely of sand derived from the break-down of coral reefs by wave action and subsequent reworking by the wind’, the smaller ones of which are ‘extremely vulnerable to tropical storms’.

⁶⁶ *Reed* (note 15), 220, cites the case of Carpentaria Rock off the coast of California, in the case of which, despite having been subject of an extensive survey by both US federal and state authorities, no consensus was obtained as to its status, the rock surface lying as little as two inches either above or below mean low water (the usual US tidal datum for such determination).

⁶⁷ For one example, see *supra*, note 43. An example of a sudden change of datum use is the more recent reliance of Australia on LAT for LTE datum, changing from the more stringent ‘low-water spring tide’ test. This change may expose a number of new low-tide elevations within Australia’s territorial sea distance off its coasts which were earlier covered at former low water datum. *Antunes* (note 6), 14, refers to adoption of a ‘lower’ chart datum leading to ‘new’ LTEs on charts, just as charting updates generally may unearth new basepoints in the analogous case of status of ‘islands’ such as Dinkum Sands off Alaska in *US v Alaska*; see further *Symmons* (note 57), 1 *et seq.* *Gray* (note 11), 12–15, gives the example of a possible new external bank (‘Vissers Bank’) on a mudflat off the Suriname coast. On a possible solution to conflicting datums in an inter-State dispute, see also *supra*, note 43.

⁶⁸ *Qatar/Bahrain Case* (note 10), 104 (para. 219).

⁶⁹ Though Judge Vereshchetin commented on the opposing views of the expert evidence and the fact that there was no ‘evidence whatsoever to the effect that Qit’at Jaradah ha[d] ever been shown on nautical charts as an island’, added to which allegedly ‘attempts had been made by both States to artificially change the upper part of its surface’, *Qatar/Bahrain Case* (note 10), Declaration of Judge Vereshchetin, 217, 220 *et seq.* (para. 13). Cf. *Kopela* (note 10), 512 (concerning the archipelagic baseline legislation of the Dominican Republic, where various banks have been used north of its archipelago; these may be wholly submerged features in an area which has not been fully surveyed, such as Mouchoir and Navidad Banks, and against the baseline use of which both the US and UK have protested).

a rocky formation contained in its straight baseline system (called Negileh Rock) should be taken into account for the purposes of fixing a median line; whereas Yemen argued that on the chart used in the proceedings, the rock was depicted as a ‘reef’ which appeared not to be above water at any state of the tide.⁷⁰ In its judgment the Court agreed with the Yemeni position; as the reef was ‘not proud of the water at low-tide’.⁷¹ Thus despite these evidential problems, the Court had to make a definitive decision on the issue.

2. ‘situated wholly or partly at a distance not exceeding the breadth of the territorial Sea’

- 19 The phrase ‘wholly or partly’ refers to the necessary intraterritorial location of a qualifying LTE as a basepoint,⁷² and causes no interpretational problems. However, it means in practice that in some marginal cases precise measurement will have to be made from the general shoreline to determine if any partial inclusion of a LTE, however slight, pertains within an existing general territorial sea distance from that shoreline. This proved to be a problem recently in the *Philippines v. China South China Sea Arbitration*: in terms of whether one of the many small reefs in issue, namely Subi Reef, was within 12NMs of a ‘high-tide feature, such that it could serve as a baseline for the territorial sea of that high-tide feature pursuant to Article 13(1)’ of UNCLOS⁷³. Presumably if an erstwhile LTE once near the outer perimeter of a territorial sea changes position (as is quite common in the case of such small formations) and becomes situate outside this perimeter, it then loses any continuing baseline value.⁷⁴
- 20 The locational requirement for baseline use of a LTE was well-described in the Qatari pleadings in the *Qatar/Bahrain Case* as being ‘strictly dependent’ on the distance of the LTE

⁷⁰ See *Llanos* (note 7), 267; PCA, *Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation* (Eritrea v. Yemen), 17 December 1999, RIAA XXII, 335, paras. 143 *et seq.*; Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Delimitation*, ODIL 32 (2001), 1, 9.

⁷¹ *Eritrea/Yemen Arbitration Second Stage* (note 70), para. 129 (note here the vagueness as to the meaning of ‘low tide’). Similarly, in the *Nicaragua/Colombia Territorial and Maritime Dispute* (note 36), 645 (para. 38), the ICJ there found that the sufficiency of evidence was not enough to prove that many ‘tiny maritime features [were] above water at [HAT]; nonetheless, as seen, they were all found on photographic evidence to be LTEs, seemingly without any tidal datum being specified in this instance’, even if it was not proveable in this instance that the formations were just a few centimetres above water at high tide, *ibid.*, 645 (para. 38). As the Court also stated in the *Nicaragua/Honduras Case* (note 10), 702 (para. 136), in addition to the four main insular cays, ‘there were a number of smaller islets, cays and reef in the same area, of which the physical status (such as whether they were completely submerged below sea level, either permanently or at high tide),[...] and consequently their legal status under Articles 6, 13 or 121 of [UNCLOS] [were] not clear’.

⁷² Cf. Whiteman (note 2), 306; unlike at the Hague Codification Conference in 1930, where there was some support for LTEs situate anywhere being able to generate maritime zones like islands; see *Elisio B. Jamine*, *Delimitation of the Mozambique Maritime Boundaries with Neighbouring States (Including the Extended Continental Shelf) and the Management of Ocean Issues*, in: UN DOALOS, *Maritime Boundaries Delimitation, Management and Dispute Settlement (2006–2007)*, 39. LTEs may be situate far out to sea: an example of such an isolated reef, which seems to mostly dry, but to be ‘barely emergent’ at low tide, is the coral atoll of Bassas da India in the Indian Ocean. As it is situate more than the territorial sea distances of both neighboring territories (France and Madagascar), it constitutes, if a LTE, an inadmissible basepoint for delimitation.

⁷³ *South China Sea Arbitration* (note 6), para. 369. In its conclusion (*ibid.*, para. 373), the Tribunal found Subi Reef to be within 12 NMs of nearby Sandy Cay (an above high-tide reef feature), so it could serve as a basepoint for that reef.

⁷⁴ Cf. *supra*, note 63, on an analogy with an intraterritorial LTE which later falls below low-tide: see *Michael Gagain*, *Climate Change, Sea Level Rise and Artificial Islands: Saving the Maldives’ Statehood and Maritime Claims through the ‘Constitution of the Oceans’*, *Colo. J. Int’l Envtl. L. & Pol’y* 23 (2012), 77, 98, stating that the same principle would apply if the island generating a territorial sea within which a LTE is situate disappears permanently or becomes a LTE itself, e. g., due to rising sea levels. A similar, more general, point is made in the ILA Report 2012 (note 52), 24, which comments that changes in coastal configuration of the nearest mainland or island to a LTE may also have an impact on the ‘location of the normal baseline’; and so place a previously-qualified LTE ‘outside the territorial sea’.

from the mainland or an island ‘by reference to the breadth of the territorial sea as adopted by the State concerned in conformity with international law’ (emphasis added).⁷⁵

Thus, as States change to a more extreme low-tide datum such as LAT, as well as adopting 12 NM territorial sea breadths,⁷⁶ these factors may individually, but particularly in combination, be a reason for erstwhile ‘marginal’ LTEs being brought into account by a ‘chain reaction’.⁷⁷ However, it is to be noted that the qualifying locational phrase – ‘from the mainland or an island’ – means exactly what it says; and it excludes LTEs within territorial sea distance of each other as successive seaward basepoints: the accompanying phrase relating to the low-water line ‘on that [first] elevation’ (emphasis added) supports this interpretation. Thus there can be no ‘leap-frogging’ process from the first (properly-qualifying) LTE out to the next in progressive fashion, as the reference here to an ‘island’ cannot include another LTE.⁷⁸ Indeed, this very process was disapproved of by the ICJ in the *Qatar/Bahrain Case* relating to the northern-sector feature called Dibal, where Bahrain had argued that it was within the territorial sea breadth of another (more landward) LTE it owned, namely Fasht al-Azm⁷⁹, saying:

‘Whereas a [LTE] which is situated within the limits of the territorial sea may be used for the determination of its breadth, this does not hold for a [LTE] which is situated less than 12 [NM] from that [LTE] but is beyond the limits of the territorial sea.’⁸⁰

If a LTE lies wholly beyond the general territorial sea belt, it merely forms part of the seabed, constituting a bank or reef in shallow water (despite any occasional above low-tide appearances); and so at most forms part of a continental shelf regime.⁸¹ However, LTEs

⁷⁵ *Qatar/Bahrain Case* (note 10), Reply of Qatar, para. 7.40, available at: <http://www.icj-cij.org/docket/files/87/11053.pdf>. The emphasised aspect of this *dictum* could apply where a State claims a territorial sea in excess of 12 NM or, more likely today, where a State has used other illegal baselines to make a LTE supposedly ‘intraterritorial’, or even where a LTE is measured from a valid straight-type baseline, see *infra*, note 75. In the case of the analogous rule for LTEs under Art. 47 (4) and qualifying archipelagic basepoints, see *Symmons* on Art. 47 MN 36–41. There are some cases where States have used LTEs lying outside territorial waters as such basepoints: cf. *Kopela* (note 10), 513, citing the Solomon Islands’ use of indispensable reef lying 40 NM from the nearest island for such purposes. By way of comparison, in the *Nicaragua/Colombia Territorial and Maritime Dispute* (note 36), 643 (para. 29), Colombia alleged that at least 20 LTEs were situated within 12 NMs of one or more of the near-lying islands. Thus the ICJ there found that that the one insular feature on Quitasueno reef (QS32) took in, within its 12 NMs envelope of arcs around it these intraterritorial LTEs to expand territorial sea jurisdiction of Colombia in the area: *ibid.*, 713 (para. 238). The Tribunal in the *Philippines v. China: South China Sea Arbitration* (note 6), para. 373, noted that in contrast to a rock or coral boulder, ‘it is possible that a sand cay may be dispersed by storm action and reform in the same location after a while’.

⁷⁶ As territorial seas limits have expanded in many cases from 3 NM to 12 NM, so consequentially has the jurisdictional effect of LTEs now contained in these broader zones, *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999), 48–49. Whereas some States have taken explicit advantage of this (see *infra*, note 65), others, such as Ireland, have seemingly not: cf. *Clive R. Symmons*, *Ireland and the Law of the Sea* (2nd edn. 2000), 42–43: e.g., off the South East Irish coast there lies, 4 NM from the coastline, a possible tiny LTE on the Arklow Bank, marked on a very dated Admiralty chart as ‘drying’, which is now within the expanded Irish 12 NM territorial sea. There is no indication that this feature is claimed as a basepoint there by Ireland.

⁷⁷ *Antunes* (note 6), 14–15. A good example of this is when the UK extended its territorial sea from 3 NM to 12 NM in 1987 which brought in new LTEs as relevant basepoints for the first time: see *Alan V. Lowe*, *The United Kingdom and the Law of the Sea*, in: Tullio Treves (ed.), *The Law of the Sea: The European Union and its Member States* (1997), 521, 523. *Robin R. Churchill*, *Law of the Sea*, ICLQ 37 (1988), 412, 413, has noted that when the UK tried to utilize new LTEs off its east coast, this led to protests from Belgian and French fishermen who claimed that the consequential attempted expansion of territorial waters violated their fishery rights under EU law.

⁷⁸ *Derek W. Bowett*, *The Legal Regime of Islands in International Law* (1979), 12. Some States, though, have implemented the above-discussed particular qualificatory principle in their maritime legislation: cf. the Bahamian Act respecting the territorial sea, archipelagic waters, internal waters and the exclusive economic zone, Act No. 37 (1993), S. 4 (4): ‘Where a [LTE] lies wholly or partly within the breadth of the territorial sea of The Bahamas if all [LTEs] were disregarded for the purpose of measurement of the breadth thereof, the low-tide elevation shall be treated as an island’ (emphasis added).

⁷⁹ *Qatar/Bahrain Case* (note 10), Counter-Memorial of Qatar, 31 December 1997, 272 *et seq.* (paras. 8.52 *et seq.*).

⁸⁰ *Qatar/Bahrain Case* (note 10), 102 (para. 107); *Llanos* (note 7), 271.

⁸¹ *Kopela* (note 10), 505. In the *Philippines v. China: South China Sea Arbitration* (note 6), the Philippines in its pleadings stressed the distinction, pursuant to Art. 13 (1) between LTEs falling wholly or partially ‘within the

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within the territorial sea distance of ‘rocks’ under Art. 121 (3) may be used, insofar as such rocks constitute technical ‘islands’ under Art. 121 (1) and implicitly generate their own autonomous territorial seas.⁸² Controversially also, by a reading together of Art. 13 with Art. 7 (4), LTEs situated within territorial sea limits might be considered to be permissible as basepoints for a straight baseline system under Art. 7, despite the fact that they have no installations on them or have not otherwise received any international recognition as such.⁸³

- 23 By contrast, under Art. 7 a low-tide elevation which lies outside the 12 NM limit, may still be used as a basepoint for a straight baseline system⁸⁴ (or as an archipelagic basepoint under Art. 47 (4)) where it has a lighthouse or similar above-high tide installation built on it, or alternatively, has received ‘international recognition’ as a basepoint.⁸⁵
- 24 Another possible exception to the territorial sea distance requirement is where a ‘fringing reef’ is involved under Art. 6⁸⁶ which makes the low-water line of such a relevant baseline implicitly useable, even if not within the territorial sea distance of its generating atoll-type ‘island’; and despite the fact that such reefs may in most cases also fall under the definition of LTEs under Art. 13 insofar as they may only appear at low tide.⁸⁷ The fact that there is a reference to a ‘seaward’ low-water line makes no substantive difference here, as in effect it is also only the seaward limit of any LTE which is critical in generating further external maritime zone therefrom.
- 25 The reference to ‘breadth’ of the territorial sea in Art. 13 (1) could include (on a literal interpretation) a breadth measured not only from the low-tide mark, but also from any permissible **straight baselines** (particularly under Arts. 7 and 10); though this is controversial.⁸⁸ Thus in such areas where LTEs lie outside such straight lines, any such formations less than 12 NM seaward of **these** lines may arguably be the actual territorial sea basepoints in that area; and so may add a ‘bulge’ to an otherwise straightish limit line.⁸⁹ In US practice⁹⁰ LTEs within the territorial sea distance of bay closing lines have been taken into account.⁹¹

territorial sea of a high-tide feature’ and ones beyond the territorial sea which have ‘no capacity to generate claims to maritime jurisdiction’; and incapacity to have any ‘independent entitlement to maritime zones’: *ibid.*, paras. 281, 291.

⁸² *Llanos* (note 7), 56, endorses this viewpoint.

⁸³ See *Daniel P. O’Connell*, *The International Law of the Sea*, vol. I (1982), 211. Note that the 2014 Report of ILA Committee on Baselines under the Law of the Sea announced an expanded mandate to consider interpretation and State practice of Art. 13 of the UNCLOS relating to methods adopted by States in relying on LTEs in drawing straight baselines; and consistency with Art. 7 (4): ILA, Report of the Committee on Baselines under the International Law of the Sea, Washington Conference (2014), para. 5.

⁸⁴ *Kopela* (note 10), 6. Cf. UN DOALOS Baselines Study (note 17), 72.

⁸⁵ *Symmons* (note 4), 6. Although generally such a formation must, as stated, have an artificial construction on it which is ‘above sea level’ to be an ‘Art. 7 basepoint’, this need not be the case where the LTE has otherwise received ‘international recognition’ as a basepoint under Art. 7 (4), which is clearly, from use of the disjunctive phrase, taking in an alternative situation where there may be no artificial construction (which is permanently above high tide) on such LTE.

⁸⁶ The term ‘fringing reefs’ is not defined in Art. 6, but the very word ‘fringing’ implies propinquity of such coral-type structures to the relevant island; see the definition of such ‘reefs’ in the Glossary of the IHB Manual (note 30), Appendix 1-22, para. 74 (formations attached ‘directly to the shore’ or located in its ‘immediate vicinity’).

⁸⁷ *Peter B. Beazley*, *Reefs and the 1982 Convention on the Law of the Sea*, *IJECL* 6 (1991), 298, 311, states that ‘there is no limit on the distance that the reef may lie from the island’, but Art. 6 ‘probably achieves nothing that could not be effected under Article 13’.

⁸⁸ See *Beazley* (note 43), 25, who argues to the contrary, based on a ‘strict interpretation’ of the provision where the LTE is not overlapping the straight baseline; but he also admits that US practice seems to indicate otherwise. Note that the wording of Art. 13 (1) does not here refer to the qualifying distance as emanating from the mainland/island ‘low-tide’ mark as such, but this is arguably implicit.

⁸⁹ As in case of the Netherlands territorial sea limits, where some LTEs even eclipse the effect of Dutch straight baselines: see *Harm M. Dottinga/Alfred H. A. Soons*, *The Netherlands and the Law of the Sea*, in: *Tullio Treves* (ed.) *The Law of the Sea: The European Union and Its Member States* (1997), 365, 368.

⁹⁰ *United States v. Louisiana*, 363 U.S. 1 (1960).

⁹¹ *Reed* (note 16), 61, 218, citing Hanus Reef, Alaska, within 3 NM of a closing line there.

3. Function of the Low-Water Line of the Elevation

The identical phrase to that in Art. 5 – ‘low-water line’ – is again used here in Art. 13 (1) 26 (and without any specified tidal datum as is also the case concerning Art. 5). Anomalously, in the case of a LTE, the very entity (LTE) that creates this baseline – the low-tide mark – is by definition destined at regular intervals to disappear completely from view at high tide; so that the LTE itself may be *pro tempore* without then any visible tide-line at all, unlike a mainland or insular coast.⁹²

An added complication is that some States (such as has the UK) may even use different 27 tidal datums for this low-tide purpose compared to that which they use to gauge the ‘vertical height qualification’ of an actual LTE above low tide⁹³ As seen above, insofar as a LTE forms a basepoint from which the territorial sea may be drawn (if it is wholly or partly within mainland or insular-generated limits), this may potentially push out the outer limits of that zone in the area a further 12 NM or so in proportion to its seaward position from the shore; and also potentially do the same in respect of any limits in the area of the 24 NM contiguous zone, EEZ⁹⁴ or (to the extent relevant), the outer continental shelf.⁹⁵ This is so whatever the size of the LTE.⁹⁶

4. LTEs and Publicity

Considering the abovementioned zone-creating capacity of LTEs, it is perhaps strange that 28 though not being, as seen,⁹⁷ strictly part of a mainland or insular normal low-tide line, there is no explicit ‘publicity’ requirement for use of LTEs as baselines under Art. 16 or elsewhere in this Convention. Art. 16, for example, refers back, in terms of baselines, only to Art. 7 (straight baselines), Art. 9 (rivers) and Art. 10 (bays). There is seemingly also no specific obligation on a State to indicate such basepoints on its charts anywhere else in the UNCLOS, for example, even under Art. 5 (the normal baseline, i. e., the low-water line), unless, as seen, by implication.⁹⁸ Technically, the low-water line as described in Art. 13 (1) is arguably not the same thing as the ‘normal baseline – the ‘low-water line along the coast’ (emphasis

⁹² See *Llanos* (note 7), 67, who comments on this aspect.

⁹³ Such as respectively LAT/mean low spring tide; cf. *Eddie D. Brown*, *The International Law of the Sea*, vol. I (1994), 33–34, pointing out that the British Territorial Order-in-Council of 1964 defined a LTE by reference to ‘mean high-water spring tides’, but did not define ‘low-water line’, the latter presumably depending on British Admiralty chart datum which anomalously nowadays (at least) is based on LAT and so ‘more favourable’ to the UK.

⁹⁴ See *Llanos* (note 7), 67. Some commentators seem to have doubted this generative power on an analogy with ‘rocks’ under Art. 121 (3), LTEs being less visible areas of land, even where they are ‘proximate’ to the coast; for example, *Lavalle* (note 8), 60, seems (at times at least) to doubt that LTEs ‘lying on the edge of the territorial sea’ can generate major maritime zones, the reason apparently being that LTEs are not truly ‘autonomous’ entities; but see also his clearer (albeit inconsistent) statement on not confusing capacity to generate maritime areas autonomously with ‘capacity to do so by serving as a basepoint of a straight baseline system’. He gives a list of reasons why LTEs should be used to generate more extensive maritime zones, whilst also mentioning the ‘down-grading’ of such formations in the *Qatar/Bahrain Case*. Other commentators, however, such as *Llanos* (note 7), 53 and 58 (footnote 41), rightly note that while Art. 13 (1) does not expressly grant capacity to LTEs to generate EEZ/continental shelf regimes like the mainland baseline of a State, the wording seems to imply this capacity: so that, for example, ‘[if] full generating capacity were attributed to [LTEs] a bulge would be added to the outer edges of the EEZ’.

⁹⁵ *Antunes* (note 6), 13.

⁹⁶ However, the size of a formation may be of relevance in delimitation of boundaries between States; cf. the *Qatar/Bahrain Case* (note 10) and the formation called *Facht al Jarim*, a feature relatively far out to sea, which Qatar argued was a LTE, though Bahrain had incorporated as a basepoint in its supposed archipelagic baseline system. The ICJ finally decided not to take it into account, *inter alia*, because ‘at most a minute part of it was above water at high tide’ (emphasis added), *ibid.*, 115 (para. 248); see also *Llanos* (note 7), 270.

⁹⁷ *Supra*, note 42.

⁹⁸ *Antunes* (note 6), 13; cf. *Llanos* (note 7), 57 (footnote 41), who remarks, somewhat strangely in the light of the actual wording of Art. 16 (1), that nonetheless a State can ‘take [its LTEs] into account in implementing Art. 16 (1)’ (emphasis added). The ILA Report 2012 (note 41) takes the position that the charting requirements under Art. 5 of the UNCLOS apply equally to Art. 13, as is also the opinion of this commentator (see note 88).

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added) – used for ‘measuring the breadth of the territorial sea’ as described in Art. 5. So there may even, and anomalously, be no express obligation on a State utilizing such a LTE basepoint to mark (or publicise) such basepoints on charts;⁹⁹ i.e., on ‘large-scale charts’ officially recognised by it under Art. 5; but it would obviously be to its own advantage to do so for the sake of clarity.

- 29 An analogy can certainly be made with the publicity requirements relating to ‘reefs’ as baselines under Art. 6, where, specifically, the similarly-worded phrase ‘seaward low-water line of the reef’ has expressly to be shown ‘by the appropriate symbol on charts officially recognised by the coastal state’ under that article.¹⁰⁰

5. Waters Behind and Seaward of LTEs

- 30 Unlike waters in a ‘straight line’ type of baseline system, waters landward of a LTE do not constitute internal waters, merely part of the general territorial sea.¹⁰¹ To this extent they are like off-shore islands (to which some State maritime legislation has likened them)¹⁰² whose insular-generated territorial sea limits simply coalesce with those independently-generated by a mainland or other islands. As seen, as part of the general baseline system linking in with (by the above-mentioned sort of coalescence) territorial sea following the normal low-tide mark rule, such a basepoint generates for its owner not only a territorial sea, but also implicitly other zones outside it in a seaward direction (a contiguous zone, including an EEZ¹⁰³, but nothing shorewards behind it).¹⁰⁴ By way of contrast, insofar as ‘reefs’ under Art. 6 may also be LTEs, they not only in this capacity constitute baselines to generate a territorial sea if fringing an atoll-type island, but also here seemingly may enclose internal waters.¹⁰⁵

6. Low-Tide Elevations and Maritime Delimitation

- 31 In a few decided cases, LTEs have been taken into account as basepoints in maritime delimitation between States. For example, in the 1982 *Case Concerning the Continental Shelf*, the question of the effect of LTEs in the Gulf of Gabes and the island of Djerba and the Kerkennahs had to be considered by the ICJ; which held that although relevant in terms of size and location, they should respectively be only given less than full effect or ‘half-effect’.¹⁰⁶ In other cases, LTEs have been both, on occasion, taken into account or discounted, as in the *Qatar/Bahrain Case*.¹⁰⁷

⁹⁹ *Churchill/Lowe* (note 76), 53, on LTEs and charting obligations.

¹⁰⁰ One may speculate why there seems to be a discrepancy in this regard between Art. 6 and Art. 13, but it seems to this commentator that the omission to insert a similar express publicity obligation to that found in Art. 16 into Art. 13 resulted from a simple oversight at UNCLOS II, inherited from the situation *ante quo* in Art. 11 CTSCZ; and it may be argued in a general sense, as seen, that the phrase in Art. 5 (‘low-water line *along the coast*’ (emphasis added) implicitly includes, or approximates to, the similar phrase in Art. 13 (‘low-water line’ on a LTE), the latter also being (albeit in a looser sense) ‘along the coast’. So that in the latter case there is logically an obligation under Art. 5 (but not Art. 16) to give such baselines publicity.

¹⁰¹ In any event, there would be no clear lateral limits of any internal waters if this were not the case.

¹⁰² *Supra*, note 2; and, for example, see S. 5 (2) Trinidad and Tobago Territorial Sea Act, Act No. 38 (1969), according to which an intraterritorially located LTE shall be ‘treated as an island’.

¹⁰³ But see now the Philippines v. China Award: *South China Sea Arbitration* (note 6), para. 308, where the Tribunal states that although Art. 13 (2) does not ‘expressly’ say that a LTE is not entitled to an EEZ or continental shelf, this ‘restriction is necessarily implied’ in UNCLOS; so that if a LTE is not entitled to a territorial sea, it is also not entitled to an EEZ/continental shelf.

¹⁰⁴ Like a normal baseline, a LTE does not generate internal waters immediately behind it like straight-type baselines, despite the fact that Art. 8 (1) defines ‘internal waters’ as all ‘waters on the landward side of the baseline of the territorial sea’ (emphasis added).

¹⁰⁵ *Jayewardene* (note 39), 95 (‘according to established principles’); *Churchill/Lowe* (note 76), 52, state that any ‘gaps’ of open water between the various reefs may be notionally closed with extra straight lines, as has been done by several States to box in landward waters.

¹⁰⁶ *Llanos* (note 7), 266–267.

¹⁰⁷ *Ibid.*, 270.