STRAIGHT BASELINES AROUND INSULAR FORMATIONS NOT CONSTITUTING AN ARCHIPELAGIC STATE

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I. INTRODUCTION

The South China Sea (SCS) dispute has proven to be a hotbed for a variety of juridical quarrels, ranging from the extent of maritime zones[3], to territorial insular claims[4] and navigational rights.[5] One of the outlying issues that warrants closer examination concerns the baselines to be drawn around mid-ocean SCS islands.[6] As a starting position, one would surmise the applicability of the regime of normal baselines in accordance with the *United Nations Convention on the Law of the Sea*.[7]

Indeed, a reading of Art. 121(2):

> "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined *in accordance with the provisions of this Convention applicable to other land territory*." (emphasis added)

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[3] E.g. A.G. Oude Elferink, 'The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?', 32 *Ocean Development and International Law* (2001) 169.

[4] E.g. M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (Kluwer, 2000).

[5] E.g. E. Franckx, 'American and Chinese Views on Navigational Rights of Warships', 10 *Chinese Journal of International Law* (2011) 187.

[6] We will refrain from taking on the issue of ownership of the various insular features. Only the State to whom the islands belong can draw baselines that are opposable and recognized under international law. When studying island contentions it is important to distinguish sovereignty questions from other points. See R.W. Smith, 'Maritime Delimitation in the South China Sea: Potentiality and Challenges', 41 *Ocean Development & International Law* (2010) 214, at 220.

[7] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 *U.N.T.S.* 397 (entered into force on 16 November 1994) [*1982 Convention*].

in conjunction with Art. 5:

> "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

brings us to the conclusion that normal baselines, i.e. the low-water line of the coast, and possibly straight baselines, if circumstances so warrant, apply to of each island separately.[8]

There are however two noteworthy factors at play with respect to the SCS. Firstly, some of the mid-ocean features can be viewed as island groups and/or "archipelagos", which is a legal term of art defined in accordance with a set of historical-geographic and economic-political criteria.[9] Secondly, continental/mainland States[10], island States[11], as well as an archipelagic State[12] have formulated claims to these territories. The qualification of the State from the perspective of the law of the sea has important implications.

A key question consequently comes to the fore: can States enclose the islands (boxed together as a unit) in a system connecting the outward points of the group? The practical results are important, because the baseline indicates from where to start measuring the various maritime zones falling under the jurisdiction of the coastal State (seaward)[13] and which waters are to become internal or archipelagic (landward) depending on the regime applied.[14]

It should be pointed out that identifying the precise composition and characteristics of SCS island groups is a task better left to geographers not jurists. With a view to making a legal theoretical contribution to this problem, we will consider the applicable rules more generally.

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[8] See also M.H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol. III, Martinus Nijhoff, 1995), at 338.

[9] M. Tseggelidou, 'The Legal Regime of Archipelagos', 17 *Thesaurus Acroasium* (1991) 663, at 667.

[10] Brunei, Malaysia, People's Republic of China, Vietnam.

[11] As regards the Republic of China, we will not address its status under international law (see e.g. J. Crawford, *The Creation of States in International Law* (Oxford University Press, 2006), at 198-221).

[12] The Philippines. Since the Republic of China has proclaimed archipelagic baselines, this country could possibly be treated here.

[13] T. Scovazzi, 'Baselines', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, www.mpepil.com, at § 1.

[14] Internal waters: Art. 8 *1982 Convention*. See also C.J. Colombos, *The International Law of the Sea* (6th ed., Longmans, 1967): "In these waters, apart from special conventions, foreign States cannot, as a matter of strict law, demand any rights for their vessels or subjects although for reasons based on the interests of international commerce and navigation, it may be asserted that an international custom has grown in modern times that the access of foreign vessels to these waters should not be refused except on compelling national grounds." Archipelagic waters: Art. 47 *1982 Convention*. See also C.J. Piernas, 'Archipelagic Waters', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, www.mpepil.com, at §§ 14-18 (noting that archipelagic waters share with internal waters the characteristics that they fall under the sovereignty of the coastal State and are subject to the rights of innocent passage and transit passage but are further conditioned by additional rights and legitimate interests/activities of neighbouring States).

Consequently, scholars can use such insights fruitfully when dealing with the particulars of the SCS. Moreover, we will centre our analysis on the situation of States other than archipelagic States (which deserves a separate treatment of their own), i.e. the so-called "mixed states".[15] We will consider from their perspective whether two alternative systems for drawing baselines around offshore island possessions have a sound juridical basis in international law: the archipelagic and straight baselines regimes. Addressing the applicability of these alternative approaches to normal baselines is certainly not a moot point in the context of the SCS. By way of illustration the PRC has enacted legislation in which it has applied a system of straight baselines to the Paracel Islands.[16]

II. ARCHIPELAGIC AND STRAIGHT BASELINES

A. Archipelagic Baselines

(i) 1982 Convention

There are a number of continental States around the globe that exert sovereignty over archipelagos, of which a definition can be found in Art. 46(b) *1982 Convention*:

> ""archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."

Bent on increasing their scope of jurisdiction, States will often be inclined to adopt a method that offers "better" results than drawing normal baselines. With respect to their archipelagic possessions the method of archipelagic baselines presents itself as a *prima facie* logical option. There is however a catch. Art. 47(1) *1982 Convention* stipulates that "*an archipelagic State* may draw straight archipelagic baselines (...)" (emphasis added), which harks back to

[15] Defined by Piernas, *o.c.*, at § 5 as "States situated on both continental land and on one or more oceanic archipelagos." See also P.E.J. Rodgers, *Midocean Archipelagos and International Law: A Study in the Progressive Development of International Law* (Vantage Press, 1981), at 165.

[16] For a succinct analysis, see D.J. Dzurek, 'The People's Republic of China Straight Baseline Claim', *IBRU Boundary and Security Bulletin* (Summer 1996) 77, at 84-85. The PRC has also declared that it will determine baselines for the Spratly Islands in due course. See K. Zou, *Law of the Sea in East Asia: Issues and Prospects* (Routledge, 2005), at 46.

"State[s] constituted wholly by one or more archipelagos and may include other islands."[17] Does this mean that mainland States with offshore archipelagos are excluded from this beneficial regime? At first blush it would seem the reasonable conclusion.[18] On the other hand, the aforementioned provision does not exclude continental States *expressis verbis*. In order to solve the issue, recourse can be had to the *travaux préparatoires* (preparatory works)[19] which paint a much clearer picture.

(ii) *Travaux préparatoires*

During the *Third United Nations Conference on the Law of the Sea* (*UNCLOS III*) attempts were made by mainland States with offshore possessions to avoid differentiating between their situation, that of coastal archipelagos, and archipelagic States proper. [20] The sentiment of the mixed States was well put by the representative of one of their members, Portugal:

> "[T]he arguments in favour of the establishment of a special regime for archipelagic states were also valid for archipelagos forming part of the territory of a coastal state, particularly with regard to the security and economic interests of such states. Application of a different regime to the latter would mean that the archipelagic part of the territory of mixed states would be regarded as second class territory."[21]

Nine of them launched a working paper in 1974 to push through their ideas. Most interesting was the following passage in the document:

> "ARCHIPELAGOS FORMING PART OF A COASTAL STATE
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> *Article 9*
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> 1. A coastal State with one or more off-lying archipelagos, as defined in article 5, paragraph 2, which form an integral part of its territory, shall have the right to apply the provisions of articles 6 and 7 to such archipelagos upon the making of a declaration to that effect.

[17] Art. 46(a) *1982 Convention*.

[18] L. Lucchini, 'l'Etat insulaire', 285 *Collected Courses of the Hague Academy of International Law* (2000) 251, at 307.

[19] See Art. 32 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 *U.N.T.S.* 331 (entered into force 27 January 1980) [*VCLT*].

[20] For an overview of the position of the mixed States during the development of the *1982 Convention*, see J.P. Losa (ed.), *El Archipiélago Oceánico: Regulación Jurídico-Marítima Internacional* (International Law Association (sección española), 1981), at 182-186 and 202-204.

[21] Doc. A/CONF.62/C.2/SR.37, UNCLOS III, Official Records, vol. II, at 266.

2. The territorial sea of a coastal state with one or more off-lying archipelagos exercising its rights under this article will be measured from the applicable baselines which enclose its archipelagic waters."[22]

This[23] and other endeavours were met with fierce opposition from many States opposed to extending the archipelagic regime to the mid-ocean archipelagos of continental States.[24] A number of States, fearing widespread claims[25], insisted that extending the scope of the regime would run counter to the interests of the international community with respect to the freedom of navigation.[26] In the end, the mixed States' initiatives were torpedoed. Consequently, in light of the drafting history, the correct interpretation of the *1982 Convention* is that the archipelagic regime, and the concomitant ability to legally draw archipelagic baselines, remain exclusive to archipelagic States.

B. Straight Baselines

(i) Rationale behind their usage

Faced with the inapplicability of the archipelagic regime and resolved to enhance their maritime domain, several continental States have sought recourse to regular straight baselines for their archipelagos and/or island groups with a view to achieving comparable results.[27] This dubious practice contravenes the *1982 Convention* in spirit to say the least. In a noted study on straight baselines in international law, Reisman & Westerman develop a set of basic principles in order to give the apposite rules a sound legal interpretation faithful to the interpretative techniques enshrined in the *Vienna Convention on the Law of Treaties*. One such guideline is that "the regime of straight baselines must not be used to circumvent other

[22] Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway: Working Paper, Doc. A/CONF.62/L.4, UNCLOS III, Official Records, vol. III, at 81-83.

[23] The 1974 working paper failed to make it into the Informal Single Negotiating Text.

[24] J.R. Stevenson & B.H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session', 69 *American Journal of International Law* (1975) 763, at 785.

[25] H.W. Jayewardene, *The Regime of Islands in International Law* (Martinus Nijhoff, 1990), at 120.

[26] Although this was a major concern, there were other reasons behind the differentiated treatment, some political (decolonization context). For a critique of the latter, see R. Lattion, *L'archipel en droit international* (Payot, 1984), at 113-116.

[27] M. Tsamenyi, C. Schofield & B. Milligan, 'Navigation through Archipelagos: Current State Practice', in M.H. Nordquist, T.T.B. Koh & J. Norton Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff, 2009) 413, at 418, footnote 20.

established rules of international law."[28] Quite justifiably, they cite the archipelagos of mixed States as a powerful case in point.[29]

(ii) Exceptional method

The specific context that gave rise to the regime governing straight baselines was the emblematic World Court decision in *United Kingdom v. Norway*.[30] The fact pattern underlying the decision entailed islands in the vicinity of the Norwegian coast considered for use as end-points for drawing baselines. This is wholly different from the scenario currently under consideration, i.e. "self-contained groups not in such special relationship with the mainland".[31] There are other practical distinctions to be made. The expanse of water in the case of the mid-ocean archipelago is far greater than that of coastal archipelagos. In addition, the dependence to the mainland (geographic and physical) differs.[32]

Despite the particular situation that drove the World Court to acknowledge the international legal validity of the straight baselines rule, it was almost literally absorbed in Art. 4 of the *1958 Convention on the Territorial Sea and the Contiguous Zone*[33] and subsequently in Art. 7 of the *1982 Convention*. Because of its inclusion in a treaty regulating the law of the sea in a general sense, many States have seen this as an expansion of the (initially limited) scope of the rule, spawning novel and liberal interpretations in their practice. Nonetheless, these developments were reined in by the ICJ which reiterated the position that straight baselines, which deviate from normal baselines, are an exception and thus must only be used if the stringent criteria are met as stipulated in the *1982 Convention*:

[28] W.M. Reisman & G.S. Westerman, *Straight Baselines in Maritime Boundary Delimitation* (St. Martin's Press, 1992), at 102.

[29] *Id.*, at 103.

[30] *Fisheries (United Kingdom v. Norway)*, Judgment of 18 December 1951, at 116. For an in-depth analysis of the litigants' arguments before the Court as regards archipelagos, see Rodgers, *o.c.*, at 58-64.

[31] G. Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea. Part I. The Territorial Sea and Contiguous Zone and Related Topics', 8 *International and Comparative Law Quarterly* (1959) 73, at 89-90.

[32] C.F. Amerasinghe, 'The Problem of Archipelagoes in the International Law of the Sea', 23 *International and Comparative Law Quarterly* (1974) 539, at 570.

[33] Art. 4(1) *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 *U.N.T.S.* 205 (entered into force on 10 September 1964). See R.D. Hodgson, 'Islands: Normal and Special Circumstances', J. King Gamble, Jr. & G. Pontecorvo (eds.), *Law of the Sea: The Emerging Regime of the Oceans* (Ballinger Publishing Company, 1973) 137, at 153 (lamenting that "probably no other article of the Convention based on islands has been so used and perhaps misused by the states of the world.").

> "The Court observes that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively."[34]

Bearing this in mind, it would seem hard to apply the straight baselines logic to mid-ocean archipelagos.[35] Nonetheless, there appears to be at least one situation somewhat analogous to the factual elements underpinnings *United Kingdom v. Norway* and the wording of Art. 7 of the *1982 Convention*: an insular group composed of a main island fringed by smaller islets.[36] Hence, it has been argued that the Furneaux Group in the Bass Strait (between Tasmania and the rest of Australia)[37], and certain subgroups within the Paracels[38] could fall within the remit of the rule.[39]

III. STATE PRACTICE

A. The Legal Relevance of State Practice

Despite the theoretical objections formulated in the preceding paragraphs, subsequent state practice has the capacity to change the way conventional norms are interpreted. This follows from Art. 31(1) and 31(3)(b) of the *VCLT*:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (…) There shall be taken into

[34] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 March 2001, at 103, § 212.

[35] For a nuanced approach attempting to extract more general lessons from the *Anglo-Norwegian* precedent that are transposable to mid-ocean archipelagos, see Amerasinghe, *o.c.*, at 544-546.

[36] V. Prescott & C. Schofield, *The Maritime Political Boundaries of the World* (2nd ed., Martinus Nijhoff, 2005), at 169. "Fringing" implies "more than a few islands, distributed in a continuous plane in front of the coast in the manner of a fringing reef." (Reisman & Westerman, *o.c.*, at 86). *Contra* Li & Z. Jie, 'A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea', 11 *China Oceans Law Review* (2010) 167, at 177 (arguing that the method of drawing straight baselines around mid-ocean archipelagos is not specifically regulated by the *1982 Convention* and in accordance with the Preamble must be regulated by customary international law (requiring them to see if state practice and *opinion juris* supports this approach)).

[37] J.R.V. Prescott, 'Straight and Archipelagic Baselines', in G. Blake (ed.), *Maritime Boundaries and Ocean Resources* (Croom Helm, 1987) 38, at 45.

[38] Dzurek, *o.c.*, at 85.

[39] See also V. Prescott, *Limits of National Claims in the South China Sea* (ASEAN Academic Press, 1999), at 18 (considering that France's Kerguelen Islands constitute "the benchmark for straight baselines around mid-ocean archipelagos", which can be found in T. Scovazzi & G. Francalanci, D. Romano & S. Mongardini (eds.), *Atlas of the Straight Baselines* (2nd ed., Guiffrè, 1989), at 135).

account (…): *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*." (emphasis added)

Not only is it an excellent clue as to what the parties meant by the chosen wording[40], it can also adapt the interpretation considerably.[41] Essential in this provision is the segment "the agreement of the parties" which implies that other State parties must concur, either overtly or implicitly.[42] Moreover, state practice, if constant and uniform[43] coupled with *opino juris*, can generate a new customary rule of international law[44] that supplants the old conflicting conventional norm. It is thus of the utmost importance to consider the conduct of States subsequent to the adoption of the text. The ingredients of the mechanism that determines whether state practice becomes legally relevant is an action-reaction paradigm which connects assertions of rights (e.g. via domestic legislation), protests (i.e. formal objection for the purpose of preserving rights and which can contribute to block the emergence of general practice accepted in law)[45], and acquiescence (i.e. consent).

[40] A. Aust, *Modern Treaty Law and Practice* (2nd ed., Cambridge University Press, 2007), at 241.

[41] Y. Dinstein, 'The Interaction between Customary International Law and Treaties', 322 *Collected Courses of the Hague Academy of International Law* (2006) 243, at 408.

[42] Aust, *o.c.*, at 241.

[43] E.g. *Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, at 40; *Asylum (Colombia/Peru)*, Judgment of 20 November 1950, at 277. There does not however have to be in "absolutely rigorous conformity" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, at 98, § 186).

[44] See Art. 38(1)(b) Statute of the International Court of Justice.

[45] C. Eick, 'Protest', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, www.mpepil.com, at §§ 1 and 13.

B. Overview of Mixed States that have drawn Straight Baselines around their Insular Groups (Non-Exhaustive List)[46]

States	Insular Features	Domestic Legislation
Australia	Houtman Abrolhos and Furneaux	Proclamation of the Inner Limits (the Baseline), 4 February 1983
Denmark	Faroe	Royal Ordinance No. 599, 21 December 1976
Ecuador	Galapagos	Supreme Decree No. 959-A, 28 June 1971
Norway	Svalbard	Royal Decree (2001) (changing coordinates established in 1970 and enclosing the remaining part of the archipelago).
Portugal	Azores and Madeira	Decree Law No. 495/85, 29 November 1985
PRC	Paracels	Declaration on the Baseline of the Territorial Sea, 15 May 1996
Spain	Balearic and Canary	Act No. 20/1967, 8 April 1967 and Royal Decree No. 2510/1977, 5 August 1977

[46] This table draws upon information retrieved in *inter alia*: United Nations – Office for Ocean Affairs and the Law of the Sea, *Baselines: National Legislation with Illustrative Maps* (1989); U.S. Department of Defense, *Maritime Claims Reference Manual* (2005), www.jag.navy.mil/organization/code_10_mcrm.htm; United States, Department of State – Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, www.state.gov/g/oes/ocns/opa/convention/c16065.htm; M. Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Martinus Nijhoff, 1995), at 137. A brief mention should be made of Andaman and Nicobar Islands. For several years, India restricted international shipping around and in the waters. This restriction was however lifted. (See Jayewardene, *o.c.*, at 171-172; Munavvar, *o.c.*, at 174). In the case of Australia, Denmark, Ecuador and Portugal the enclosed waters seem to be considered as internal waters (E.J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International, 1998), at 349).

C. Analysis

Below some reasons will be enumerated that diminish the value of the state practice regarding straight baselines enclosing mid-ocean insular groups in challenging the current regime.

(i) Dubious legality

It would exceed the scope of this presentation to discuss the finer geographical attributes of the examples given in the table. A number of scholars have gone about this task. Accepting as their premise that archipelagic baselines are not a valid option, they apply the straight baselines rules to the domestic legislation of mixed States. None of the abovementioned illustrations have been free of criticism as to their conformity with the law of the sea. Except for Furneaux (see above), they were found to exceed the scope of Art. 7 *1982 Convention* (the "fringing" scenario).[47] Consequently, these violations pose a challenge to the apposite rules. Even so, could they instigate the onset of a new legal trend?

[47] Findings of non-conformity.

Australia: Prescott (I), *o.c.*, at 45 ("This argument (…) does not work for Houtman Abrolhos off Western Australia (…)); B. Kwiatkowska & E.R. Agoes, 'Archipelagic Waters: An Assessment of National Legislation', in R. Wolfrum (ed.), *Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Régime* (Duncker & Humblot, 1991) 107, at 113.

Spain: S.R. Langford, 'Straight Baselines and Maritime Boundary Delimitation in the Mediterranean', in H.D. Smith & A. Vallega (eds.), *The Development of Integrated Sea-Use Management* (Routledge, 1991) 73, at 75 (noting that the Ibiza and Majorca (in the Balearic) are not fringed by smaller islands in the vicinity of their respective coasts); Reisman & Westerman, *o.c.*, at 156 and 158; Kwiatkowska & Agoes, *o.c.*, at 112 (Canary Islands); Prescott (I), *o.c.*, at 45 (Canary Islands); V.L.G. Castillo, 'Análisis del sistema de líneas de base español a la luz de la Convención de Naciones Unidas sobre el Derecho del Mar de 1982', in J.M.S. Heredia (ed.), *Mares y Océanos en un Mundo en Cambio: Tendencias Jurídicas, Actores y Factores* (Tirant Lo Blanch, 2007) 171, at 189-193 (Canary and Balearic Islands).

Ecuador: Reisman & Westerman, *o.c.*, at 154-156; Kwiatkowska & Agoes, *o.c.*, at 112; Prescott (I), *o.c.*, at 45.

Denmark: Kwiatkowska & Agoes, *o.c.*, at 112; Dzurek, *o.c.*, at 85 (calling the baselines around the Faroe Islands "questionable").

Norway: Kwiatkowska & Agoes, *o.c.*, at 112.

Portugal: Dzurek, *o.c.*, at 85 (calling the baselines around the Azores "questionable").

PRC: Prescott (II), *o.c.*, at 17-19 ("Because the 28 segments join the islands together the Chinese interpretation must be that some or all of the islands form a fringe in the immediate vicinity of another islands. This is not a reasonable interpretation of this rule and these straight baselines are in breach of the Law of the Sea Convention.").

(ii) Lack of clarity as to the assertion

An overview of state practice regarding mid-ocean archipelagos also makes it apparent that States' legislation regarding the selected baselines is not always entirely clear. This poses problems for adapting the *1982 Convention* with a view to establishing a more flexible regime whether via interpretation (subsequent practice) or via the rise of new custom. After all, it is only possible to have a practice or a form of conduct validated in international law, if it is clear to all what the State is claiming. Understandably the at time ambiguous situation has led scholars to offer diverging views on domestic legislation. A stark illustration would be to contrast the following observations regarding PRC regulation of the Paracel Islands:

> "In May 1996 China publicized part of its baselines along the mainland coast and the Paracel Islands by the method of straight baselines. China decided 28 basepoints to encircle the Paracels and the surrounding waters. *The waters within the baselines are internal waters* and from the baselines outward there is also a belt of territorial sea of 12 nm."[48] (emphasis added)
>
> "Despite the controversy over China's straight baselines for the Paracel Islands, foreign vessels can enjoy innocent passage under the LOS Convention within the waters encircled by China and treated as China's internal waters [thereby referring in a footnote to Art. 8(2) *1982 Convention* which constitutes part of the *straight baselines* regime]."[49]
>
> and
>
> "The PRC has delimited *archipelagic baselines* around the Paracels (…)" (emphasis added) [50]

(iii) The bigger picture

The "other" group of mixed States should not be left out of the analysis, namely those who refrain from drawing expansive straight baselines and comply with the letter and spirit of the *1982 Convention*. The United States abstains from claiming a special status for Hawaii[51] so as to adhere to its principled freedom of navigation discourse. Mention can also be made of New Zealand (Tokelau and Cook Islands), the Netherlands (Netherlands Antilles (which was dissolved in 2010)) and France (New Caledonia).[52] Canada's practice in the Arctic, despite

[48] Zou, *o.c.*, at 46.

[49] K. Zou, *China's Marine Legal System and the Law of the Sea* (Martinus Nijhoff, 2005), at 48.

[50] Dzurek, *o.c.*, at 84.

[51] See N. Barron, 'Archipelagos and Archipelagic States under UNCLOS III: No Special Treatment for Hawaii', 4 *Hastings International and Comparative Law Review* (1981) 509, in particular 526-536 (applying the archipelagic criteria (economic, political, geographical, historic) to Hawaii); Amerasinghe, *o.c.*, at 544.

[52] Kwiatkowska & Agoes, *o.c.*, at 110; See also D.W. Bowett, *The Legal Regime of Islands in International Law* (Oceana Publications/Sijthoff & Noordhoff, 1979), at 93.

being known as an area where creeping jurisdiction is rampant, with respect to its island groups militates in favour of maintaining the current regime. Having considered the archipelagic option for its Arctic offshore possessions, it finally decided not to opt for this approach because it would be inconsistent with the *1982 Convention*.[53]

(iv) Paucity of protest

Protests against excessive straight baselines are few and far between. It should be highlighted that generally speaking a sizeable group of States trespass upon the stringent criteria for drawing straight baselines (outside of the context currently discussed). As a result, in many instances openly criticizing or passing judgment on another State will open the door to heightened scrutiny of one's own conduct.[54] The major exception is the US which actively sends acts of protest to States making pathological claims (often coupled with operational assertions).[55] Brubaker opines that it can be assumed that others do pass judgment, albeit quietly.[56] There could be additional reasons, such as the remote location of oceanic features and limited international navigation through the islands.[57] Nonetheless, making juridical inferences from silence should always be viewed with suspicion. As stated by the predecessor of the ICJ, the Permanent Court of International Justice, "only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom."[58]

[53] D. Vignes, 'La conformité au droit de la mer des lignes de base droites tracées par le Canada au Nord du 70ème parallèle Nord', in Y. Dinstein (ed.), *International Law at a Time of Complexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, 1989) 1005, at 1010 *et seq*. See also D. Pharand, *The Law of the Sea of the Arctic: with Special Reference to Canada* (University of Ottawa Press, 1973), at 93-98 who analyses the possibility of applying straight baselines to the Canadian Arctic Archipelagos. Backtracking somewhat on his previous position (the possibility of drawing two series of straight baselines, see D. Pharand, 'The Waters of the Canadian Arctic Islands', 3 *Ottawa Law Review* (1969) 414), he acknowledges as the starting point of his analysis the importance of the criteria fleshed out in *United Kingdom v. Norway*.

[54] Reisman & Westerman, *o.c.*, at 190 memorably refer to this phenomenon as a "conspiracy of silence."

[55] J.A. Roach & R.W. Smith, *United States Responses to Excessive Maritime Claims* (2nd ed., Martinus Nijhoff, 1996), at 112-122 (US protest against straight baselines around mid-ocean archipelagos). For an analytic overview of US Freedom of Navigation Operations, see J. Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press, 2011), at 431-441.

[56] Brubaker, *o.c.*, at 206.

[57] Rodgers, *o.c.*, at 91 (discussing the Galapagos).

[58] *Lotus*, Judgment of 7 September 1927, Series A n° 10, at 28.

IV. CONCLUSION

The SCS is located in a part of the world where normal baselines are not that normal, but are rather becoming something of an exception, despite vocal US protest.[59] A regional phenomenon has taken hold that has been pithily described as "bad baselines beget bad baselines."[60]

As regards the treatment of mid-ocean insular features, it appears that countries in diverse parts of the world have partaken in a similar dynamic. Having briefly discussed this occurrence, we conclude that straight baselines, often in an attempt to emulate the archipelagic regime, around these territories are contrary to the spirit and letter of the *1982 Convention* and thus should be avoided. While it has been suggested that this practice could be viewed as a development that could guide mixed States in their drawing of baselines[61], we are of the opinion that the available state practice is subject to criticism, thereby questioning its value in modifying the interpretation of the current rules and/or contributing to the formation of new customary norms. Hence, we submit that continental States are well-advised to faithfully pay heed to the conditions for straight baselines set out in the *1982 Convention* if their desire is to uphold the law of the sea regime as a pillar of inter-State stability.

[59] K. Zou, 'Law of the Sea Issues between the United States and East Asian States', 39 *Ocean Development & International Law* (2008) 69, at 73-75.

[60] J.A. Roach & R.W. Smith, 'Straight Baselines: The Need for a Universally Applied Norm', 31 *Ocean Development & International Law* (2000) 47, at 53.

[61] Li & Jie, *o.c.*, at 180; See also R.R. Churchill & A.V. Lowe, *The Law of the Sea* (3rd ed., Manchester University Press, 1999), at 121 ("To the extent that such claims [straight baselines drawn by mainland States around their non-coastal archipelagos] have been recognised by other States (as those of the Faroes have been, for example [referring to fishing agreements between Denmark on the one hand and the EC, Norway and the former USSR on the other hand]), they must be regarded as being valid under customary international law.").