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 [1], to territorial insular claims [2] and navigational rights.

One of the outlying issues that warrants closer examination concerns the baselines to be drawn around mid-ocean SCS islands.

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.

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)
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. [6]

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. [7]

Secondly, continental/mainland States [8], island States [9], as well as an archipelagic State [10] 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) [11] and which waters are to become internal or archipelagic (landward) depending on the regime applied. [12]

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. 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”. 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.

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 “State[s] constituted wholly by one or more archipelagos and may include other islands.”

[15] Does this mean that mainland States with offshore archipelagos are excluded from this beneficial regime? At first blush it would seem the reasonable conclusion.

[16] 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)

[17] 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.

[18] 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.” [19]

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

Article 9

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.

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.” [20]

This [21] 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. [22]

A number of States, fearing widespread claims [23], 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. [24]

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. 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 established rules of international law.” Quite justifiably, they cite the archipelagos of mixed States as a powerful case in point. 

(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. 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”. 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.

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 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:

“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.”

Bearing this in mind, it would seem hard to apply the straight baselines logic to mid-ocean archipelagos. 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.

Hence, it has been argued that the Furneaux Group in the Bass Strait (between Tasmania and the rest of Australia), and certain subgroups within the Paracels could fall within the remit of the rule.

(continuing)

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[4] 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.


[9] 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).

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


[12] 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).

[13] 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, *Mid Ocean Archipelagos and International Law: A Study in the Progressive Development of International Law*.


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


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

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.


*Id.,* at 103.

*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.

Straight baselines around insular formations not constituting an archipelagic state, by Erik Franckx & Marco Benatar

Comparative Law Quarterly
(1959) 73, at 89-90.


[33] 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.


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)).


[36] Dzurek, o.c., at 85.

[37] 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).