

ORIGINAL ARTICLE



## Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim?

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### ABSTRACT

This article examines the conclusion in the decision of the Arbitral Tribunal in the South China Sea Case that straight baselines may not be used to enclose off-shore archipelagos unless they meet the criteria set out in Articles 46 and 47 of the Law of the Sea Convention.

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## Introduction

In its 2016 award on the merits in the matter of the South China Sea arbitration between the Philippines and China, the Arbitral Tribunal wrote:

The Convention also provides, in its Article 7, for States to make use of straight baselines under certain circumstances, and the Tribunal is aware of the practice of some States in employing straight baselines with respect to offshore archipelagos to approximate the effect of archipelagic baselines. In the Tribunal's view, any application of straight baselines to the Spratly Islands in this fashion would be contrary to the Convention. Article 7 provides for the application of straight baselines only "[i]n 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." These conditions do not include the situation of an offshore archipelago. Although the Convention does not expressly preclude the use of straight baselines in other circumstances, the Tribunal considers that the grant of permission in Article 7 concerning straight baselines generally, together with the conditional permission in Articles 46 and 47 for certain States to draw archipelagic baselines, excludes the possibility of employing straight baselines in other circumstances, in particular with respect to offshore archipelagos not meeting the criteria for archipelagic baselines. Any other interpretation would effectively render the conditions in Articles 7 and 47 meaningless. Notwithstanding the practice of some States to the contrary, the Tribunal sees no evidence that any deviations from this rule have amounted to the formation of a new rule of customary international law that would permit a departure from the express provisions of the Convention.<sup>1</sup>

The Award does not provide any further analysis to support these conclusions. This paper seeks to fill those gaps. After distinguishing "offshore archipelagos" from "archipelagic States," the paper examines the relevant provisions of the Law of the Sea (LOS) Convention and the negotiating history of Article 46 in Part IV of the Convention on archipelagic states.

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Thereafter, relevant state practice is reviewed, as well as the Philippines response to the Tribunal's question as to a customary international law right to draw straight baselines to enclose offshore archipelagos. Next, the possibility of enclosing the Spratlys (Nansha) with straight baselines is reviewed. Thereafter, writings that support enclosing offshore archipelagos with straight baselines are examined. The rules on the formation of customary international law are examined in this context. Possible remedies for judicial determination of enclosing offshore archipelagos with straight baselines are reviewed. Several conclusions are drawn from this analysis. Details of the practice of states in enclosing their offshore archipelagos with straight baselines are set out in the appendix.

### ***Offshore archipelagos***

The Arbitral Award speaks in terms of “offshore archipelagos.” This term is used in the Award to describe a group of islands geographically forming an archipelago belonging to a coastal or island state. This is in contrast to the definition of “archipelagic State” in Article 46 of Part IV of the LOS Convention, which reads as follows:

For the purposes of this Convention:

- (a) “archipelagic State” means a State constituted wholly by one or more archipelagos and may include other islands;
- (b) “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.

Article 46 thus limits the scope of the archipelagic regime to independent archipelagic states, of which there are less than two dozen today. Accordingly, in this paper, “offshore archipelagos,” which are not independent “archipelagic states,” are referred to as “is used” to distinguish them from “archipelagic states.”

### ***Does the convention permit the use of straight baselines to enclose offshore archipelagos?***

Article 5, Normal Baseline, of the LOS Convention provides:

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.

The introductory phrase “except where otherwise provided in this Convention” is taken from the introductory phrase of Article 3 of the 1958 Territorial Sea Convention on the normal baseline, which reads “except where otherwise provided in these articles.”<sup>2</sup> This phrase corresponds to Article 4 of the ILC draft article on the normal baseline, which reads “subject to the provisions of Article 5 and to the provisions regarding bays and islands.”<sup>3</sup> The textual changes to this introductory clause between 1956 and 1982 were merely drafting changes to reflect other developments in the treaty text.

As Article 121(2) of the LOS Convention provides that the maritime zones of islands “are determined in accordance with the provisions of this Convention applicable to other land

territory,” Article 7 straight baselines may be employed in localities on individual islands of a offshore archipelago that meet the applicable geographic criteria in Article 7.

The introductory phrase “except where otherwise provided in this Convention” also means that the final preambular paragraph of the Convention that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”<sup>4</sup> does not apply to the baseline regimes set out in the Convention, except Article 10(6) on historic bays and multi-state bays not included in Article 10(1).<sup>5</sup>

Accordingly, claims that a separate customary international law rule permits the drawing of straight baselines around offshore archipelagos are without a basis in law.<sup>6</sup> The analysis that follows elaborates on this conclusion.

### ***Negotiating history of LOS Convention article 46***

While it is true that the LOS Convention does not address offshore archipelagos,<sup>7</sup> that was the result of a lack of consensus on the issue at the Third Conference on the Law of the Sea (UNCLOS III). The negotiating history of Article 46, defining the term “archipelagic State,” which led to that outcome, is described next.

During the 1974 session of the conference, a number of states wished the archipelagic regime now in Part IV of the Convention to apply to offshore archipelagos.<sup>8</sup> Ecuador was a prime proponent for this regime to be applied to the Galapagos, as it had been in 1971.<sup>9</sup> During the same session other states, both archipelagic and coastal states, disagreed and proposed that the regime apply only to archipelagic states.<sup>10</sup>

Given these competing views, the 1974 Main Trends working paper of the Second Committee on archipelagos necessarily provided two alternate formulations for the application of the provisions on archipelagos. Formula A would apply the regime only to archipelagic states; Formula B would also apply the regime to offshore archipelagos.<sup>11</sup>

At the third session of UNCLOS III in 1975, the Informal Single Negotiating Text (ISNT) continued to present two alternate formulations.<sup>12</sup> However, at the fourth session in 1976, following further informal negotiations, the Revised Single Negotiating Text (RSNT) omitted the provision applying the archipelagic regime to offshore archipelagos.<sup>13</sup> The Virginia Commentary suggests “some decision had been reached regarding the status of oceanic archipelago belonging to continental States.”<sup>14</sup> The Introduction to Part IV in the Virginia Commentary is more direct: Dropping this provision “reflected the agreement which had been reached that the concept of an archipelagic State would only be applied to States composed of oceanic archipelagos, not to archipelagos belonging to a continental State.”<sup>15</sup> The Commentary correctly notes that no similar provision applying the archipelagic regime to offshore archipelagos “was included in any subsequent text.”<sup>16</sup>

### ***State practice***

In the portion of the Arbitral Award quoted at the beginning of this paper, the Tribunal’s reference to state practice was a conclusion. The Award did not explain how it arrived at its conclusion, although it may have drawn on the Philippines’ written answer to Question 16 posed by the Tribunal on December 16, 2014, which reads as follows:<sup>17</sup>

The Philippines is invited to address whether, as a matter of international law, an archipelago not pertaining to an Archipelagic State (as defined by Article 46 of the Convention) may be

subject to a system of straight baselines surrounding the archipelago as a whole. The Philippines is likewise invited to address whether the Spratly Islands may be such an archipelago pursuant to the application of the Convention, of historic rights or titles, or of general international law.

The Philippines answered these two questions as follows:

... an archipelago not pertaining to an Archipelagic State (as defined by Article 46 of the Convention) may be subject to a system of straight baselines surrounding the archipelago as a whole, but only if it conforms to the criteria for employing straight baselines set out in Article 7 of the 1982 Convention.

... the Spratly Islands are not such an archipelago pursuant to the application of the Convention, of historic rights or titles, or of general international law. There is no basis for drawing straight baselines around the Spratlys as a whole, nor have China or the Philippines applied their respective systems of straight baselines and archipelagic baselines to the Spratly Islands. Nor has Viet Nam, which claims sovereignty over all of the Spratly features, endeavoured to apply a system of straight baselines to them.<sup>18</sup>

Accordingly, this section lists state practice of enclosing offshore archipelagos with straight baselines (claims and protests) that is in the public domain, the details of which are set out in the appendix.

This state practice includes measures taken prior to the LOS Convention by Denmark for the Faroes in 1963 (revised in 1976 and 2002), Norway for Svalbard in 1970 (amended in 2001), Ecuador for the Galapagos in 1971 (repeated in 2012), Spain for the Canary Islands in 1977, and France for the Kerguelen Islands in 1978.

Claims made after the adoption of the Convention include Guinea-Bissau and Canada, the United Kingdom for the Turks and Caicos and the Falklands in 1989, Argentina for the Malvinas in 1991, China for Hainan Island in 1992 and for the Paracels in 1996, France for Guadeloupe in 1999 and for the Loyalty Islands in 2002, Myanmar for Co Co and Peparis Islands in 2008, and China for Diaoyu Dao (Senkaku Islands) in 2012 and a 2016 claim of the right to do so around the Spratlys.

For ease of reference, [Table 1](#) lists these claims, where they may be found and where they have been analyzed, and any publicly available reactions by states or publicists to those claims.

As can be seen from this table, six of the 15 claims to enclose offshore archipelagos have been protested by nine states, all but one of which are party to the LOS Convention. Several claims are by states that lost in their effort at UNCLOS III to have the archipelagic regime apply to offshore archipelagos.

This practice forms the basis for the argument that such practice may be or is becoming customary international law. However, those making that argument fail to acknowledge a number of relevant counter factors: opposition to such claims by state parties as well as the United States,<sup>19</sup> and the contrary practice by states with offshore archipelagos. A number of states with offshore archipelagos have not sought to enclose them with straight baselines, such as the United States with regard to Hawaii, India with regard to the Andaman and Nicobar Islands, and Spain with regard to the Balearic Islands. (It is notable that at UNCLOS III, India and Spain both supported permitting offshore archipelagos to be enclosed with straight baselines.) Other states that have enclosed their offshore archipelagos with straight baselines have nevertheless protested the claims of others, such as by Spain (which encloses its Canary Islands with straight baselines) with regard to Ecuador's 2012 reiteration of its claim to enclose the Galapagos with straight baselines, as described in paragraph 3 of the Appendix.

**Table 1.** Offshore archipelagos enclosed by straight baselines.

Feature	State/date	Analysis	Reaction	Date
Faroes	Denmark 1959	LIS 13 LIS 13	United States Prescott and Schofield, p. 141; Kopela, pp. 126, 195–200	1991
	1963: Decree No. 156 of April 24, 1963	EMC 3, pp. 108–109n	Munavvar, p. 126;	
	1976: Ordinance No. 599	Kopela, p. 126	Elferfink, 14 IJMC, L pp. 541, 549	
	2002: Executive Order No. 306, LOS Bull., No. 68, pp. 13–16			
Svalbard	Norway 1970: Royal Decree, September 25, 1970	LIS 39	Kopela, p. 134	
	2001: LOS Bull., Nos. 46, pp. 72–80; 54, p. 94	Kopela, pp. 119–120		
Galapagos	Ecuador 1951 Legislative Decree, February 21, 1951	LIS 42; II <i>Cumulative Digest</i> , pp. 1791–1792	United Kingdom	1951
	1971:	LOS Bull., No. 83, pp. 16 and 18	United States	1951,
	Supreme Decree No. 959-A, June 28, 1971	Kopela, pp. 125–126	Germany	1986, 2005, 2013
	Kopela, p. 279		Belgium, Spain, Sweden	1986
Canary Islands	2012		Reisman and Westerman, p. 156; Munavvar, p. 126; Kopela, pp. 200–207	2013
	LOS Bull., No. 80, p. 14	Kopela, pp. 127–130	Kopela, pp. 247–252	2013
	Spain 1977			
	Royal Decree No. 2510/1977, Map 207			
	Law 44/2010, December 30			
Kerguelen Islands	Kopela, p. 283	Kopela, p. 117	Kopela, p. 117	
	France 1978: Decree No. 78–112 (II)			
	Durante & Rodino pp. 3–4)			
	2015: Decree No. 2015–635,			
Azores	LOS Bull., No. 89, pp. 26–27	II <i>Cumulative Digest</i> , pp. 2068–2069	United States	1986
	Portugal Decree Law No. 495/85, November 29, 1985,			
	Tables III, IV, and V			
Falklands	United Kingdom 1989	Kopela, pp. 122–123	Kopela, p. 131; Munavvar, p. 126	
	Kopela, p. 276			
Turks and Caicos	United Kingdom 1989	Kopela, pp. 132–133	Kopela, p. 133	
Malvinas	Kopela p. 281	Kopela, p. 122	Kopela, p. 123	
	Argentina 1991			
	Act No. 23.968 Annex 1 at 9–11 Maps H-410, H-411			
	Kopela, p. 277			

(Continued on next page)

**Table 1.** (*Continued*)

Feature	State/date	Analysis	Reaction	Date
Hainan, Paracels	China 1992, 1996  Kopela, p. 288	LIS 117, pp. 7–8 LOS Bull., No. 38, pp. 54–55	United States United States, Philippines, Vietnam Kopela, pp. 138–139 Kopela, p. 124	1996 1996  1998
Guadeloupe	France 1999 Decree 99–324, article 2, Kopela, p. 278	Kopela, p. 124	Kopela, p. 124	
Loyalty Islands New Caledonia	France 2002 LOS Bull., No. 53, pp. 58–64, 66; Kopela, p. 285	Kopela, p. 134	Kopela, p. 134	
Co Co and Preparis Islands	Myanmar Law No. 8/2008 LOS Bull., No. 69, pp. 69–71; Kopela, p. 286	LOS Bull., No. 70, p. 61	Bangladesh Kopela, pp. 136–137	2009
Diaoyu Dao/Senkaku Islands	China 2012 LOS Bull., No. 80, pp. 30–31	2013 <i>Digest</i> , pp. 369–370	United States Roach, <i>ASIL Insight</i>	2013

The response by the Philippines to the Tribunal's question regarding general international law addressed some of these points, as follows (most footnotes omitted):

16.17. The objections to this argument are as obvious as they are compelling. First, it is simply inconsistent with the 1982 Convention. The Convention does not leave the matter open for further development: it regulates it definitively.<sup>20</sup> Article 5 provides that “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”. The drawing of straight baselines is “otherwise provided” for in Articles 7, 9, 10, and 46 [sic] of the Convention. Unless the drawing of straight baselines can be justified by reference to one or more of those provisions, the normal baseline referred to in Article 5 applies. Anything else is contrary to the Convention.

16.18. Second, as noted earlier, the extension of archipelagic status to offshore oceanic archipelagos was discussed at UNCLOS III and rejected. The limitation of Part IV to archipelagic States was part of the consensus package deal. It is not open to States Parties to derogate unilaterally from the Convention's agreed terms. The regime of straight baselines and archipelagic waters set out in Parts II and IV of UNCLOS has not been amended by the States Parties; it is not the subject of any implementing agreement; there are no relevant UN General Assembly resolutions or informal understandings of the States Parties; there are no inter se agreements dealing with the matter.

16.19. Third, even if it could be accepted (but only for the sake of argument) that State practice could in theory evolve into customary law displacing provisions of the Convention, a change of this kind cannot be brought about unilaterally, any more than Iceland could change treaty provisions on fisheries jurisdiction unilaterally. It would require, if not the agreement of other States, then at least their tacit consent or acquiescence. There is no such tacit consent or acquiescence to any extension of the archipelagic waters regime. Inter alia, the US, UK, and Germany have protested at the straight baselines drawn around the Galapagos Islands. The US, Philippines and Viet Nam have protested the straight baselines China has drawn around the Paracels. The US has also objected to straight baselines drawn around the Faroe Islands and the Azores. At the same time, the

United States has conspicuously refrained from drawing straight baselines around the Hawaiian Islands; France has similarly not done so around Polynesia [author's note: but has done so around the Kerguelen, Loyalty, and Guadeloupe islands].

16.20. Fourth, the practice of States which have drawn straight baselines around offshore archipelagos is not sufficiently consistent, uniform or widespread to establish customary international law on the subject. On the contrary, the contours of the alleged rule are fundamentally uncertain. Is it an expression of the requirements of Article 7? Or of Article 47? Or of some *mélange* of the two? Or is it stricter than either of those provisions? Or less strict? Or just different? Without some authoritative articulation of the rule, State practice alone is not capable of expressing consistent normative content. Moreover, if the practice of non-parties is considered significant, then it supports the consensus agreed at UNCLOS III, not the evolution of some new rule.

16.21. Fifth, if on the other hand we interpret the practice of the States using straight baselines around offshore archipelagos as largely confined to groups of closely linked islands, where not much ocean space is enclosed, and sea routes normally used for international navigation are not affected, then it is clear that the Spratly Islands would fall outside any such rule on all three counts. The features which might be used as archipelagic basepoints are tiny and widely dispersed. There is simply no scenario where a series of straight baselines could cordon off a maritime area whose water/land ratio is anywhere near 9:1. The total land area for the entire Spratly Island region is less than 4 square kilometres, which means that any straight baseline system could only enclose within these features a total of 36 square kilometres of water—less than the territorial sea to which the high-tide features are already entitled. Moreover, the South China Sea, including the area straddled by the Spratlys, is a major international shipping lane, not a remote area of unused ocean. Preventing the enclosure of areas of this kind was exactly the reason for the opposition of maritime States to extending the archipelagic waters regime to offshore archipelagos.

In addition to these points made by the Philippines, it would be inaccurate to conclude from the lack of public protest of certain claims noted in [Table 1](#) that states have necessarily acquiesced in those claims, as some have written.<sup>21</sup> In the experience of this author, most diplomatic correspondence of this sort is most frequently conveyed through private or classified channels, both informally and formally, and is not made public. It may also be noted that many states will not protest unless and until their national interests are directly affected.<sup>22</sup> Therefore, in the absence of further evidence, one does not know to which additional claims, if any, there has been opposition or acquiescence, and thus it would be incorrect to assume acquiescence merely on the basis of failure to object publicly.<sup>23</sup>

### ***Possible straight baselines enclosing the Nansha Islands (Spratlys)***

In the 2016 Award in the Philippines/China arbitration, the Arbitral Tribunal addressed the possibility of China drawing straight archipelagic baselines in the Spratlys:

573. ... China's statements could also be understood as an assertion that the Spratly Islands should be enclosed within a system of archipelagic or straight baselines, surrounding the high-tide features of the group, and accorded an entitlement to maritime zones as a single unit. With this, the Tribunal cannot agree. The use of archipelagic baselines (a baseline surrounding an archipelago as a whole) is strictly controlled by the Convention, where Article 47(1) limits their use to "archipelagic states". Archipelagic States are defined in Article 46 as States "constituted



wholly by one or more archipelagos and may include other islands.” The Philippines is an archipelagic State (being constituted wholly by an archipelago), is entitled to employ archipelagic baselines, and did so in promulgating the baselines for its territorial sea. China, however, is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State.

574. In any event, however, even the Philippines could not declare archipelagic baselines surrounding the Spratly Islands. Article 47 of the Convention limits the use of archipelagic baselines to circumstances where “within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.” The ratio of water to land in the Spratly Islands would greatly exceed 9:1 under any conceivable system of baselines.<sup>24</sup>

In response to this possibility, in December 2016 the United States delivered a *note verbale* to China referring to China’s three July 12–13, 2016, statements reacting to the Tribunal’s award regarding the maritime zonal entitlements of its claimed features in the South China Sea.<sup>25</sup> Referring to paragraph III of the Chinese government statement and paragraph 70 of the Chinese white paper, the note stated:

... to the extent China’s claim to “internal waters” contemplates waters within straight baselines around any South China Sea island, the United States objects for reasons including but not limited to those set forth in ... *Limits in the Seas* #117 ... Consistent with international law as reflected in the Law of the Sea Convention, including Articles 5, 7, 46, and 47, China cannot claim straight or archipelagic baselines in the Paracel Islands, Pratas Island, Macclesfield Bank, Scarborough Reef, or the Spratly Islands.

Similarly, China’s claims related to what it calls “Nanhai Zhudao (the South Sea Islands)” and to “Dongsha Qundao (the Dongsha Islands), Xisha Qundao (the Xisha Islands), Zhongsha Qundao (Zhongsha Islands) and Nansha Qundao (the Nansha Islands)” would be unlawful to the extent they are intended to include any maritime claim based on grouping multiple islands together as a single unit for purposes of establishing internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf or any other maritime claim.

Moreover, Macclesfield Bank is an entirely submerged feature; it and other features in the South China Sea that are not “islands” as reflected in Article 121(1) of the Law of the Sea Convention are not subject to appropriation and do not generate any entitlement to a territorial sea, contiguous zone, exclusive economic zone or continental shelf under the international law of the sea.<sup>26</sup>

Notwithstanding the foregoing, China has continued to assert its right under customary international law to enclose the Spratlys with straight baselines and has been supported by scholars whose writings are discussed in the next section.

### ***Writings supporting the right to draw straight baselines enclosing offshore archipelagos***

There are at least nine scholars (eight of whom are mainland Chinese) who have supported China’s right to draw straight baselines enclosing the Spratly (Nansha) Islands: Jiang Li and Zhang Jie; Jia Nan; Hong Nong, Li Jianwei, and Chen Pingping; Zhang Hua; Chris Whormseley; and Yuxiao Han. Their articles are discussed chronologically in this section.

Perhaps the first article to examine the question of whether the archipelagic regime could be applied in the South China Sea was a co-authored article published in 2010, “A



Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea.”<sup>27</sup> After examining the negotiating history of Article 46, Li and Jie correctly conclude that “the archipelagic regime was excluded from applying to the mid-ocean archipelagos,” that is, offshore archipelagos. However, these authors then state that “[n]either the legislative process nor the specific provisions of the Convention give a clear indication as to the legal status” of offshore archipelagos and that so far “no final conclusion on this issue has been made in the circle of the international maritime law” (page 171). After explaining the views of scholars pro and con on this issue, the authors conclude that while the archipelagic regime cannot be applied to offshore archipelagos, the regime of straight baselines can be applied to them as a whole, and also to the four groups of islands in the South China Sea, relying on the practice of states that have done so (pages 174–185). This article does take account of opposition to those states’ claims and contrary state practice.

A second article, “On the Outlying Archipelagos of Continental States,” appeared in 2012.<sup>28</sup> Jia Nan continues the theme that the regime concerning offshore archipelagos “remains unsettled,” treating offshore archipelagos as separate categories of archipelagos (coastal and mid-ocean). He notes that the uncertainty continues “to this day, due to diverging state practices and various theories of publicists” (page 45). He reviews state practice and the views of publicists separately for each of his categories of offshore archipelagos (pages 46–56) and concludes straight baselines can be used to enclose “outlying” (mid-ocean) offshore archipelagos (page 57). Jia’s article suffers from the same deficiencies as the first article discussed in the preceding, in particular his recognition of “diverging state practices” undercuts claims for a new, permissive, customary law rule.

In 2013 a third and more detailed analysis appeared in the co-authored article, “The Concept of Archipelagic State and the South China Sea: UNCLOS, State Practice and Implication.”<sup>29</sup> After recounting the existing archipelagic states regime in Part IV of the Convention, and briefly reviewing the negotiations over whether to include offshore archipelagos in the archipelagic state regime, the authors rely on the fact that “the final version of UNCLOS leaves the issue out,” asserting that there are “no provisions clearly stating what principles should be applied to oceanic archipelagos of continental States in regard to their baselines, their maritime zones and relevant jurisdictional mechanisms” (page 220). The authors concede that the negotiating history demonstrates that there was a deliberate decision in the Second Committee and the Conference to apply the archipelagic state regime only to independent archipelagic states meeting the criteria in Article 46. The authors point to Chinese and other Asian scholars who support this conclusion, while summarizing the positions of other Chinese scholars who disagree (page 222).

Further, these authors, like those before them, do not mention the constraints imposed by Article 5, Normal Baseline, to limit all relevant baseline provisions to those contained in the Convention. In addition, no mention is made of Article 121(2), which provides that the maritime zones of islands (other than rocks) “are determined in accordance with the provisions of [the] Convention applicable to other land territory.”

The authors draw support for their argument to apply straight baselines to China’s features in the South China Sea from a lengthy description of the practice of Ecuador (Galapagos), Denmark (Faroe Islands), Norway (Svalbard), Spain (Canary Islands), and Portugal (Azores) (pages 223–237). The authors fail to take note of the opposition to those claims and the contrary practice described earlier in this paper (in the fifth section) that was publicly available at the time of writing of their article. Similarly, the description of China’s

practice in using (only) straight baselines in the South China Sea does not mention opposition to their use along the mainland, Hainan Island, the Paracels, and the Diaoyu Dao/Senkakus (pages 237–239). The paper concludes by raising the possibility that China will apply the straight baseline regime to the Nansha/Spratly and Zhongsha/Maccelsfield Bank<sup>30</sup> island groups (page 239).

Another scholar suggesting China draw archipelagic straight baselines in the South China Sea, without making specific reference to the Spratlys, was Dr. Kuen-chen Fu in a short article entitled “Freedom of Navigation and Chinese Straight Baselines in the South China Sea,” based on his presentation at the Center for Oceans Law and Policy 2013 conference in Seoul, Republic of Korea. There, Dr. Fu, then dean of the South China Sea Institute, Xiamen University, recounts in some detail the negotiating history in 1974–1976 of failed attempts to extend the archipelagic state regime to offshore archipelagos. After concluding it would be infeasible to amend the Convention, he suggests that the best course of action for China would be to apply “the principle of archipelagic waters” unilaterally to the Paracels and other locales in the South China Sea while delineating sea lanes “to allow foreign vessels and aircrafts to sail through and fly over the internal waters created by its straight territorial sea baselines in the region.”<sup>31</sup>

A fifth scholar writing on this subject is Zhang Hua, a lecturer at Nanjing University Law School. In 2014, he published an article (in Chinese) entitled “On the Legality of Applying Straight Baselines to China’s Mid-Ocean Archipelagos: A Perspective from Customary International Law.”<sup>32</sup> There are two weaknesses to his argument.

First, while acknowledging there is no specific provision in the LOS Convention on the application of straight baselines to offshore archipelagos, his brief, one short paragraph, review of the negotiating history at UNCLOS III (page 137 of the original) merely notes some of the proposals to permit straight baselines to enclose offshore archipelagos. He then assumes that the matter is not regulated by the Convention and therefore “judging the legality of this type of straight baseline naturally cannot resort to the provisions of UNCLOS” (page 138). He then asserts that the legal basis for applying straight baselines to offshore archipelagos “originates from customary international law, and is ‘sui generis’ ... and naturally cannot be compared with normal straight baselines and archipelagic straight baselines” (pages 139, 141). He fails to consider the full history recounted earlier in this paper (in the fourth section) and the effect of the introductory phrase to Article 5 “except where otherwise provided in this Convention” discussed in the preceding (third section).

Second, his recount of and reliance on state practice are incomplete and unconvincing. He describes 12 of the claims in [Table 1](#), but mentions only the U.S. reactions to those claims. He fails to acknowledge protests by others, all state parties, identified in the preceding and detailed in the appendix, as well as the contrary state practice described in the fifth section of this paper. He concludes that the United States is a mere “persistent objector” that cannot prevent the development of customary international law. He makes this assertion on the unproven claim that the “international society has adopted a silent attitude toward the use of straight baselines for” offshore archipelagos (page 138); as stated earlier in this paper, there is no evidence of the actions by states in nonpublic diplomatic correspondence.

A sixth scholar supporting China’s right to draw straight baselines enclosing offshore archipelagos in the South China Sea is Chris Whomersley, a former deputy legal adviser in the United Kingdom’s Foreign and Commonwealth Office. His article “The Award on the

Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique” is, however, prepared in his personal capacity.<sup>33</sup>

Whomersley’s analysis is deficient on three grounds. First, while he correctly notes that China has not drawn straight baselines around the Spratly (Nansha) Islands, he concludes that the “point is hypothetical” and questions whether the Tribunal should have given its view at all. Indeed, noting that the *Dispositif* contained no decision on this issue, he states the Tribunal’s attention to it was “entirely gratuitous ... and must in any event be *obiter dicta*” (para. 50). He fails to acknowledge that because China failed to appear, the Tribunal was obliged to consider all possible objections that China could have pled or argued. It was, of course, for this reason, based on Article 9, Default of Appearance, of Annex VII to the Convention, that the Tribunal felt obliged to consider this issue.

Second, he asserts “no clear reason was given as to why ultimately States decided not to incorporate a specific provision on offshore archipelagos into UNCLOS,” citing Kopela’s view “that the Conference found it difficult to find a suitably worded provision.” He correctly concludes that Article 7 on straight baselines can be applied to such archipelagos, but seems to argue that straight baselines can be used to enclose the whole of the archipelago, citing some state practice (paras. 56, 58). On both points he fails to consider the analysis of Article 5 in the third section of this paper, the *travaux préparatoires* described in the fourth section of this paper, and the whole of the state practice summarized in the fifth section of this paper and detailed in the appendix.

Third, he postulates that if China were to draw straight baselines enclosing the whole of the Spratlys, “it seems unlikely that this would elicit significant objection from other States, except, one assumes, from the United States, though presumably the Philippines and Vietnam might object on the basis of their own territorial claims” to the islands (para. 59). He fails to acknowledge the objections in 2013 to Ecuador’s 2012 declaration regarding the Galapagos listed earlier in this paper and detailed in the appendix.

One week after the Arbitral Tribunal’s award on July 12, 2016, the *PLA Daily* published on July 18 the article “China does not accept the jurisprudential legitimacy of the SCS arbitral tribunal’s decision.” The article was apparently authored by the Central Party School Center for Research on the Theoretical System of Socialism with Chinese Characteristics. It stated, inter alia, that “UNCLOS did not provide rules for the issue of territorial sea baselines for continental countries’ archipelagos,” apparently without further explanation.<sup>34</sup>

An eighth scholar supporting China’s position is Han Yuxiao, a PhD candidate in international law at Wuhan University Institute of International Studies and Collaborative Innovation Center for Territorial Sovereignty and Maritime Rights. His article “An Analysis on the Determination of the Nature of Some Islands Individually as Requested by the Philippines in the *South China Sea Arbitration*” recommends China should, “with the least possible delay, establish a mid-ocean archipelago regime in the SCS region.”<sup>35</sup> His analysis is similarly deficient.

The premise of Han’s argument is that “the issue concerning mid-ocean archipelagos of continental States is a legal vacuum left by the UNCLOS” (pages 253–254). He argues that “the ICJ [International Court of Justice] judgment of the *Fisheries Case* and Article 4 of the Convention on the Territorial Sea and the Contiguous Zone provide the legal basis for continental States to adopt straight baselines to encircle their mid-ocean archipelagos” (pages 262–263), notwithstanding the fact that they address only “fringing islands along the coast in its immediate vicinity.” He asserts the LOS

Convention did not “deny the continental States of their right to construct an archipelagic regime for their mid-ocean archipelagos” (page 268). Nowhere in his paper does he address Article 3 of the Territorial Sea Convention or Article 5 of the LOS Convention as addressed in the third section of this paper or the *travaux préparatoires* of Article 46 discussed in the fourth section of this paper.

Han then states that the practice of continental states in enclosing their offshore archipelagos with straight baselines “has become stable state practices” (page 263) and “generally adopted in the practice of States” (page 271). He fails to take into account the opposition of many to those claims and contrary state practice addressed in the fifth section of this paper.

In summary, these nine papers arguing in favor of enclosing offshore archipelagos with straight baselines are neither well documented nor persuasive. None of them refers to Article 5 of the LOS Convention, to the full *travaux préparatoires* of Article 46, to inconsistent state practice, or to the provisions of the Vienna Convention on the Law of Treaties (which is discussed in the next section). The later articles also make no mention of the Philippines response to the Tribunal’s questions in this regard.<sup>36</sup>

### **Identification of customary international law**

Since the preceding section sets out claims relying on customary international law to justify the drawing of straight or archipelagic baselines enclosing offshore archipelagos, it seems appropriate to consider what the relevant rules are. The preamble to the Vienna Convention on the Law of Treaties provides that its text, adopted in 1969, was then both a codification and progressive development of the law of treaties; the Vienna Convention is now widely accepted as reflecting customary international law of treaties. Given the supporters of a customary law rule that permits the enclosing of offshore archipelagos with straight baselines, one should turn to the provisions of the Vienna Convention on the interpretation of treaties. Of relevance is Article 31 on the interpretation of treaties. It reads as follows:

#### Article 31, GENERAL RULE OF INTERPRETATION

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) Any relevant rules of international law applicable in the relations between the parties.

Of particular relevance is Article 31(3)(b), which addresses “subsequent practice” that establishes “agreement of the parties” regarding its interpretation. It is clear from the

description the fifth section of this paper of the differing practices of states both with and without offshore archipelagos that no “agreement of the parties regarding its interpretation” has been established. Therefore, there is no common interpretation of Article 7 of the LOS Convention that straight baselines may be used to enclose the whole of an archipelago, and thus there can be no rule of customary international law to that effect.

Since 2010, the International Law Commission has been considering the impact of subsequent state practice on the interpretation of treaty provisions.<sup>37</sup> It has developed 16 “draft conclusions” that were adopted by the Commission on first reading in 2016. (Further action by the ILC awaits the receipt of comments and observations of governments by January 1, 2018.) As stated in the draft commentaries, these conclusions “seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined.” The conclusions are “a structured and careful process of legal analysis and evaluation ... to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination.”<sup>38</sup>

Initially, it must be noted that none of literature surveyed in the seventh section of this paper even refers to the Vienna Convention on the Law of Treaties or to the work of the ILC, much less seeks to employ the structured approach suggested by the ILC for establishing the “two constituent elements of customary international law: a general practice and its acceptance as law (also referred to as *opinio juris*).”<sup>39</sup> As noted in the Commentary to draft Conclusion 2, where the existence of a general practice as law cannot be established, “the conclusion will be that the alleged rule of customary international law does not exist,” *opinio juris* to the contrary notwithstanding. As the Commentary observes, “the presence of only one constituent element does not suffice for the identification of a rule of customary international law.”<sup>40</sup> This deficiency appears to be present in the situation being examined in this paper.

The following additional excerpts from the ILC’s draft Commentary are those of most relevance to this paper.

With regard to draft Conclusion 3, Assessment of evidence for the two constituent elements, the Commentary states the assessment must be of “any and all available evidence” and must be “careful and contextual.” The Commentary, paragraph 5, also states:

The significance of a State’s failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an *immediate negative impact on its interests*. And practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law.<sup>41</sup>

It should be noted that the literature examined in the seventh section of this paper is incomplete when reviewing the reactions of states to enclosing offshore archipelagos with straight baselines.

The Commentary on draft Conclusion 3, paragraph 7, continues: “acts forming the relevant practice are not as such evidence of acceptance as law.” This is particularly true when there are contrary acts.

With regard to draft Conclusion 5, Conduct of the State as State practice, the draft Commentary paragraph 5 states:

Practice must be publicly available or at least known to other States in order to contribute to the formation and identification of rules of customary international law. Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is revealed.

Although not clearly stated in this commentary, the proviso seems to indicate only that conduct by a state that it keeps confidential and to itself is not useful for the identification of rules of customary international law. Again, the literature in the seventh section of this paper does not identify all the evidence of state practice that is publicly available, as is set out in the appendix.

With regard to Commentary 8, The practice must be general, the Commentary provides several useful nuggets of guidance:

- (2) .... First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency.... In each case, however, the practice should be of such a character as to make it possible to discern a constant and uniform usage.
- (3) .... It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule. It is important that such States are representative of the various geographical regions and/or various interests at stake.
- (5) The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist.

As has been demonstrated, the requisite consistency simply does not exist in this case.

With regard to draft Conclusion 10, Forms of evidence of acceptance as law (*opinio juris*), the Commentary advises:

- (7) Paragraph 3 provides that, under certain conditions, failure by States to react, within a reasonable time, may also, in the words of the International Court of Justice in the *Fisheries case*, “[bear] witness to the fact that they did not consider ... [a certain practice undertaken by others] to be contrary to international law.” Toleration of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in order to ensure that it does not derive from causes unrelated to the legality of the practice in question. First, it is essential that a reaction to the practice in question would have been called for: this may be the case, for example, where the practice is one that (directly or indirectly) affects—usually unfavourably—the interests or rights of the State failing or refusing to act. Second, the reference to a State being “in a position to react” means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.



The discussion in the fifth section of this paper explains why there is not more public reaction by states to these claims.

As also discussed in the fifth section of this paper, states have inconsistent positions on the permissibility of wholly enclosing offshore archipelagos with straight baselines. Therefore, there can be no customary international law rule permitting this use of straight baselines, notwithstanding the assertions of the scholars discussed in the seventh section of this paper.

## **Remedies**

Part XV of the LOS Convention provides a comprehensive, albeit complex, system for the settlement of disputes. Any state party to the Convention that believes enclosing offshore archipelagos with straight baselines is unlawful could protest—and some eight have protested—those claims, and if not able to resolve the disputes through negotiation (as is the case), may proceed unilaterally to compulsory dispute settlement (CDS) before the applicable court (International Court of Justice [ICJ] or International Tribunal for the Law of the Sea [ITLOS]) or arbitral tribunal under Annex VII (the default forum).

Section 1, General Provisions, of Part XV of the LOS Convention provides in Article 279 “States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.”

Subject to the limitations and exceptions in Section 3 of Part XV of the LOS Convention, Section 2 of Article 286 provides that “any dispute concerning the implementation or application of this Convention shall, where no settlement has been reached by recourse to section 1 [General Provisions], be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.” Article 288(1) refers to “submitted ... in accordance with this Part,” thereby incorporating by reference the preconditions of Part XV, Section 1, Articles 281–283.

None of the limitations and exceptions in Section 3 apply to disputes over the use of straight baselines to enclose offshore archipelagos that are inconsistent with Articles 7 and 47 of the LOS Convention. Accordingly such disputes are subject to compulsory dispute resolution without exception.

In addition, a number of states having so employed straight baselines have done so even after their efforts at UNCLOS III failed to authorize that practice, or have not withdrawn earlier claims as they should have done to remain consistent with the Convention.

Indeed, this implicates Article 300 of the LOS Convention, which requires state parties to “fulfil in good faith the obligations assumed under [the] Convention and [to] exercise the rights, freedoms and jurisdiction recognized in [the] Convention in a manner which would not constitute an abuse of right.” It would seem probable that continuing to assert maritime claims not authorized by the LOS Convention when the Third Conference declined their attempts to permit such claims is inconsistent with the obligations assumed in Article 300 of the Convention.<sup>42</sup>

## **Conclusions**

Using straight baselines to enclose offshore archipelagos—that do not qualify as archipelagic states under Article 46 of the Law of the Sea Convention—is not authorized by



the Convention or customary international law.<sup>43</sup> Their use is an excessive maritime claim subject to compulsory dispute resolution pursuant to Part XV of the Convention.

Straight baselines may, however, be employed in respect of individual features in an off-shore archipelago in accordance with the provisions of the Convention.

The conclusions stated by the Arbitral Tribunal in paragraphs 575 and 576 of its Award quoted at the beginning of this article were fully justified and correct.

## Notes

1. *In the matter of the South China Sea Arbitration (Philippines v. China)*, award, July 12, 2016, at p. 237 paras. 575–576, [pcases.com/web/sendAttach/2086](https://pcases.com/web/sendAttach/2086). Reference is to the United Nations Convention on the Law of the Sea 1982, 1833 U.N.T.S. 397 (hereinafter, LOS Convention).
2. Article 3 of the 1958 Territorial Sea Convention was considered at the 52nd session of the First Committee, where the meaning of this phrase was not discussed. *Official Records of the United Nations Conference on the Law of The Sea, Volume III (First Committee (Territorial Sea and Contiguous Zone))*, Summary Record of 52nd meeting, 161, [www.legal.un.org/diplomaticconferences/1958\\_los/vol3.shtml](http://www.legal.un.org/diplomaticconferences/1958_los/vol3.shtml).
3. ILC, “Articles concerning the Law of the Sea with commentaries 1956,” *Yearbook of the International Law Commission 1956*, volume II, at p. 266, [www.legal.un.org/ilc/texts/instruments/english/commentaries/8\\_1\\_8\\_2\\_1956.pdf](http://www.legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf).
4. The Commentary on the LOS Convention by the Center for Oceans Law and Policy, University of Virginia, on the Preamble advises that similar formulations appear in many of the ILC’s draft codification conventions. Switzerland is quoted as saying such a provision was “to ensure the most effective application of the provisions of the future convention by establishing a set of rules without any lacunae.” The Commentary states that many delegations regarded the final text of this preambular clause “as stating the obvious.” M. Nordquist, S. Nanden, and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, volume I (Dordrecht: Martinus Nijhoff, 1985), at p. 465, para. 15(d) (hereinafter, *Va Commentary*).
5. According to the Virginia Commentary, this introductory phrase “indicates there are other methods for determining baselines besides the low-water line” in the Convention. The Commentary lists articles 7 (straight baselines), 9 (mouths of rivers), 10 (bays), and 13 (low-tide elevations) as examples, noting that Article 14 permits a combination of methods. *Va Commentary*, volume II, at p. 89, para. 5.4(a).
6. The Philippines made this point in paragraph 16.17 of its written reply to the Tribunal’s December 2014 written question quoted at the end of the fifth section of this paper. The discussion of Article 5 by K. Trümpler in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C.H. Beck, 2017), at p. 48, does not address this aspect of Article 5.
7. M. Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Dordrecht: Martinus Nijhoff, 1995), at p. 136, merely notes that “the LOSC is silent as regards mid-ocean archipelagos of continental states and excludes such archipelagos from the application of the archipelagic regime provided in the LOSC.”
8. At meetings of the Second Committee during the second session of the Third Conference in 1974, nine delegations spoke in favor of applying the archipelagic regime to offshore archipelagos, as recorded in the *Official Records of the Third UN Conference on the Law of the Sea* (hereinafter, *Official Records*), vol. II: India (II Official Records, at p. 263, paras. 38–43), France (II Official Records, at p. 263, paras. 44–47), Honduras (II Official Records, at p. 263, paras. 48–56), Portugal (II Official Records, at p. 266, paras. 1–6), Peru (II Official Records, at p. 268, paras. 21–24), Spain (II Official Records, at p. 270, paras. 39–43), Chile (II Official Records, at p. 270, paras. 56–58), Canada (II Official Records, at p. 271, paras. 59–64), and Argentina (II Official Records, at p. 272, paras. 82–86), in addition to Ecuador as described in the text.
9. II Official Records, 37th Second Committee meeting, August 12, 1974, at pp. 267–268, paras. 17–21; vol. III, doc. A/CONF.62/C/2/L.51, August 12, 1974, at p. 227; vol. XIII, 126th Plenary

- meeting, April 2, 1980, at p. 19, para. 115; vol. XVII, 190th Plenary meeting, December 8, 1982, at p. 96, para. 196.
10. Indonesia (II Official Records, at p. 260, para. 3), Japan (II Official Records, at p. 261, para. 15), Bulgaria (II Official Records, at p. 262, para. 22), Fiji (II Official Records, at p. 262, para. 35), Philippines (II Official Records, at p. 264, para. 59), Thailand (II Official Records, at p. 265, para. 69), Burma (II Official Records, at p. 266, para. 7), USSR (II Official Records, at p. 267, para. 14), Mauritius (II Official Records, at p. 269, para. 35), Algeria (II Official Records, at p. 271, para. 67), and Turkey (II Official Records, at p. 272, para. 72).
  11. Document A/CONF.62/L.8/REV.1, October 17, 1974, III Official Records, Appendix I, p. 136, regarding Provision 202.
  12. ISNT/Part II articles 117 and 131, IV Official Records, at pp. 152, 168.
  13. RSNT article 118, A/CONF.62/WP.8/Rev.1/Part II, V Official Records, at pp. 151, 170.
  14. *Va Commentary*, volume II, at p. 412, para. 46.4.
  15. *Va Commentary*, volume II, at p. 403, para. IV.10. The Philippines made this point in paragraph 16.18 of its written reply to the Tribunal's December 2014 written question, quoted at the end of the fifth section of this paper. *Accord*, Carlos Jiménez Piernas, "Archipelagic Waters," in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, volume I (Oxford: Oxford University Press, 2012), at p. 554 (August 2009).
  16. *Va Commentary*, volume II, at p. 412, para. 46.4.
  17. "Request for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure," December 16, 2014. The Philippines' written response to this and other questions posed at the time is dated March 16, 2015, and appears as "The Philippines' Supplemental Written Submissions—Volume I" in the PCA Case View, [files.pca-cpa.org/pcadocs/Supplemental%20Written%20Submission%20Volume%20I.pdf](https://files.pca-cpa.org/pcadocs/Supplemental%20Written%20Submission%20Volume%20I.pdf). The full response to question 16 appears on pages 89–98. The response to the question of general international law appears on pages 93–96, paras. 16.16–16.21. The Philippines' material includes some of the information in this paper.
  18. Page 89, paras. 16.1 and 16.2. The Philippines' analysis in support of these conclusions is quoted at the end of this section.
  19. T. Markus, "Article 46" in Proelss, *supra* note 6, at p. 347, para. 27 and note 109; S. Kopela, *Off-shore Archipelagos in the Law of the Sea* (Leiden and Boston: Nijhoff, 2013), at pp. 112–147; R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd ed.) (Manchester: Juris, 1999), at pp. 120–121.
  20. Contrast Articles 74 and 83, which do leave open the possibility of further development of the law on maritime boundary delimitation through customary international law. (Footnote in the Philippine original.)
  21. Kopela, *supra* note 19, at pp. 178–181, 199, 204, 222; Churchill and Lowe, *supra* note 19, at p. 11. See the eighth section of this paper for a discussion of the ILC's Conclusion 5 on the Conduct of the State as State practice. Paragraph 5 of the ILC's Commentary on this Conclusion addresses the requirement that state practice be publicly available "or at least known to other States in order to contribute to the formation and identification of rules of customary international law." UN doc. A/71/10, at p. 91.
  22. For example, in a situation where a vessel flying its state's flag is arrested for navigating in an area where it believes it has a right of navigation but the coastal state claims it does not because the foreign vessel was in an area enclosed by a straight baseline, if the flag state believes the baseline was not drawn consistent with Article 7 of the Convention, the flag state may then object to the arrest or even invoke a compulsory dispute settlement procedure under Part XV of the Convention. The Court or Tribunal might well declare the baseline system not lawful. Hence coastal states drawing straight baselines in geographic locations that do not meet the criteria of Article 7 run the risk of adverse reactions if they seek to enforce those doubtful straight baselines. See further in the eighth section of this paper for the discussion of the ILC's commentaries on its draft Conclusions on this point.
  23. It should be noted that this situation does not call for objection as in the case of impermissible reservations. See Vienna Convention on the Law of Treaties, adopted 23 May 1969 (entered into

- force 27 January 1980), 1155 *U.N.T.S.* 332, article 20(5) (VCLT). China acceded to the VCLT on September 3, 1997.
24. *In the Matter of the South China Sea Arbitration (Philippines/China)*, supra note 1, paras. 573–574. It should be recalled that China declined to participate in the arbitration and that the Arbitral Tribunal was required by Article 9, Default of Appearance, of Annex VII to the LOS Convention, “before making its award, ...to satisfy itself ... [that] the claim is well founded in fact and law.”
  25. “Chinese gov’t statement on China’s territorial sovereignty and maritime rights and interests in S. China Sea,” July 12, 2016, available at [news.xinhuanet.com/english/2016-07/12/c\\_135507754.htm](http://news.xinhuanet.com/english/2016-07/12/c_135507754.htm); “Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines,” July 12, 2016, available at [www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1379492.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm); State Council Information Office of the People’s Republic of China, white paper entitled “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea,” July 13, 2016, available at [english.gov.cn/state\\_council/ministries/2016/07/13/content\\_281475392503075.htm](http://english.gov.cn/state_council/ministries/2016/07/13/content_281475392503075.htm).
  26. 2016 *Digest of United States Practice in International Law*, at p. 522, [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm); “Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea July 12, 2016,” [www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1379493.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379493.shtml).
  27. Jiang Li and Zhang Jie, “A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea,” 2010 *China Oceans Law Review*, at pp. 167–185. Jiang Li was identified as an assistant research fellow with the National Marine Data and Information Service. Zhang Lie was listed as an engineer with the same service.
  28. Jia Nan, “On the Outlying Archipelagos of Continental States,” 2012 *China Oceans Law Review*, at pp. 41–57. Jia Nan was affiliated with Wuhan University Institute for International Studies.
  29. Hong Nong, Li Jianwei, and Chen Pingping, “The Concept of Archipelagic State and the South China Sea: UCLOS, State Practice and Implication,” 2013 *China Oceans Law Review*, at pp. 209–239. Hong Nong was at the time an associate research professor at the National Institute for South China Sea Studies, Hainan, China. Li Jianwei and Chen Pingping were identified as a research fellow and an assistant research fellow, respectively, at the same institute.
  30. It should be recalled that Zhongsha/Maccelsfield Bank is entirely submerged and therefore is not an island or island group capable of having either normal or straight baselines.
  31. Kuen-chen Fu, “Freedom of Navigation and the Chinese Straight Baselines in the South China Sea,” in M. H. Nordquist, J. N. Moore, R. Beckman, and R. Long (eds.), *Freedom of Navigation and Globalization* (Leiden and Boston: Brill, 2015), at pp. 190–196.
  32. (2014) *Foreign Affairs Review*, No. 2, at pp. 129–143 (in Chinese), translated by the China Maritime Studies Institute, U.S. Naval War College (copy on file with author).
  33. (2016) 16 *Chinese Journal of International Law*, at paras. 48–59, doi:10.1093/chinesejil/jmx023.
  34. Andrew Chubb, “China Comments on the South (China) Sea Disputes,” in southseaconversations, July 20, 2016 (translating the original Chinese), [southseaconversations.wordpress.com/2016/07/20/defining-the-post-arbitration-nine-dash-line-more-clarity-and-more-complication/](http://southseaconversations.wordpress.com/2016/07/20/defining-the-post-arbitration-nine-dash-line-more-clarity-and-more-complication/).
  35. 2017 *China Oceans Law Review*, at pp. 248, 252–254, 256–277 (translated into English).
  36. Perhaps these weaknesses are explained by reference to Anthea Roberts, “China’s Strategic Use of Research Funding on International Law,” November 8, 2017, online: [www.lawfare.blog.com/chinas-strategic-use-research-funding-international-law](http://www.lawfare.blog.com/chinas-strategic-use-research-funding-international-law).
  37. The Chinese member of the ILC is Huikang Huang.
  38. ILC, *Report on the Work of the Sixty-Eighth Session* (2016), Chapter V, Identification of customary international law, A/71/10, 74, 79 para. 63(1), [legal.un.org/ILC/reports/2016/](http://legal.un.org/ILC/reports/2016/).
  39. *Ibid.*, at p. 80 para. 63(2).
  40. *Ibid.*, at p. 83 para. (3).
  41. Emphasis added.
  42. See A. Kiss, “Abuse of Rights” in Wolfrum (ed.), supra note 15, at pp. 20–26 (December 2006), and M. Kotzur, “Good Faith (Bona Fides),” in *ibid.*, volume IV, at pp. 508–516 (January 2009).

43. Munavvar, *supra* note 7, at p. 184, concludes: “In fact, the considerations which justify a special regime for archipelagic states cannot be invoked with respect to island groups which do not constitute a state and which do not possess any of the attributes of a state.”
44. The Prime Minister’s Department Decree No. 156 of April 24, 1963, is analyzed in *Limits in the Seas* No. 13, *Straight Baselines: Faeroes* (1970). The *Limits in the Seas* are available at [www.state.gov/e/oes/ocns/opa/c16065.htm](http://www.state.gov/e/oes/ocns/opa/c16065.htm).
45. Ordinance No. 599 of 21 December 1976 on the Delimitation of the Territorial Sea around the Faroe Islands, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK\\_1976\\_Ordinance599.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1976_Ordinance599.pdf).
46. American Embassy Copenhagen Notes Nos. 061 and 065 of July 12 and 18, 1991. State Department telegram 223707, July 9, 1991; American Embassy Copenhagen telegram 02435, October 24, 1991; J. A. Roach and R. W. Smith, *Excessive Maritime Claims* (3rd ed.) (Leiden and Boston: Brill/Nijhoff, 2012), at pp. 108–109n. *Accord*, Munavvar, *supra* note 7, at 126. Ordinance No. 599 of December 21, 1976, on the delimitation of the territorial sea around the Faroe Islands, may be found in Office for Oceans Affairs and the Law of the Sea, *Baselines: National Legislations with Illustrative Maps* (New York: United Nations, 1989), at pp. 131–132. The same coordinates were used in Ordinance No. 598 establishing fishing limits around the Faroes, which may be found in the U.S. Navy’s *Maritime Claims Reference Manual*, [www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](http://www.jag.navy.mil/organization/code_10_mcrm.htm). The Danish Ministry of Foreign Affairs replied in a *note verbale* dated October 3, 1991, which stated, in part: These baselines are permitted in international law in view of the compact nature of the group of islands involved. The islands, 18 in all, are lying so close together, that a hypothetical 3 mile limit, drawn around each separate island without the use of any straight baseline would create a continuous outward boundary around the island group as a whole. In consequence, the Danish Government has since 1927, without meeting with any protest, declared the sounds between the islands to be internal waters. Cf. Ordinance No. 4 of 21 February 1927 concerning access of foreign warships to Danish waters and harbours in peacetime. The baselines laid down in Ordinances Nos. 598 and 599 were determined in accordance with Article 4 of the above mentioned [1958] Geneva Convention [on the Territorial Sea and the Contiguous Zone]. Article 4(4) states that in determining the particular baselines account may be taken of the economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage. This is highly relevant to the Faroe Islands in view of their dependence on fisheries in the areas defined by the baselines. It may be recalled that a special resolution was adopted on 26 April 1958 in connection with the Convention of 29 April 1958 on fishing and conservation of the living resources of the high seas designed to safeguard the interests of countries or territories heavily offshore on fisheries in waters bordering their territorial seas. At the introduction of this resolution it was underlined that among others it referred in particular to the Faroe Islands. American Embassy Copenhagen telegram 07435, October 24, 1991.
47. Executive Order No. 306 of 16 May 2002: Executive Order on the Delimitation of the Territorial Sea of the Faroe Islands, UN, *Law of the Sea Bulletin* (UN, *LOS Bull.*), No. 68, at pp. 13–16. Kopela has pointed out that “there are some parts of the archipelago where application of straight baselines on the basis on article 7 of the LOSC seems justifiable,” pointing to basepoints 5–7, but not elsewhere. Kopela, *supra* note 19, at p. 126. V. Prescott and C. Schofield, *The Maritime Political Boundaries of the World* (2nd ed.) (Leiden and Boston: Martinus Nijhoff, 2005), at p. 141, note that the two long sides of the archipelago “do not conform to the general direction of the coasts of the outermost islands.” The *Law of the Sea Bulletins* are available at [www.un.org/Depts/los/doalos\\_publications/los\\_bult.htm](http://www.un.org/Depts/los/doalos_publications/los_bult.htm).
48. The Royal Decree of September 25, 1970, concerning the demarcation of the sea territory for parts of Svalbard is examined in *Limits in the Seas* No. 39, *Straight Baselines: Svalbard* (1972).
49. Kopela, *supra* note 19, at pp. 119–120 (“it is difficult to assume that the baselines joining the large islands of the archipelago together are compatible with article 7 of the LOSC”).
50. Kopela, *supra* note 19, at p. 134.
51. American Embassy Quito Note delivered February 24, 1986. State Department telegram 033256, February 3, 1986; American Embassy Quito telegram 01651, February 25, 1986; M. L. Nash, *Cumulative Digest of United States Practice in International Law 1981–1988*, volume II

- (Washington, DC: U.S. Department of State, 1993), at pp. 1791–1792. *Accord*, Munavvar, *supra* note 7, at p. 126. The Federal Republic of Germany also protested this claim in November 1986. V. Prescott, *Maritime and Political Boundaries of the World* (London/New York: Methuen, 1985), at pp. 202–203, notes it has “never been conclusively established that baselines may be drawn by coastal states around offshore archipelagos” such as the Galapagos. M. Reisman and G. Westerman, *Straight Baselines in International Boundary Delimitation* (MacMillan, 1992), at p. 156, concur, stating the baseline is invalid under both the Territorial Sea Convention and LOS Convention. Kopela, *supra* note 19, at p. 207, concludes the Ecuadoran claim either has been accepted or has been considered as historical rights. The Ecuadoran Supreme Decree No. 959-A may be found in Limits in the Seas No. 42 (1972), which also provides a detailed segment-by-segment analysis of the straight baseline system; in UN Legislative Series B/18, at p. 16; and in *Baselines: National Legislation*, *supra* note 46, at pp. 154–156. The exclusion of offshore archipelagos of continental states from the archipelagic provisions was one reason Ecuador refused to sign the LOS Convention. 16 Official Records, p. 155, para. 30; 17 *id.*, p. 97, para. 200. The United States had previously protested an Ecuadoran decree of February 21, 1951, delimiting a territorial sea around the Galapagos Islands by a note dated June 7, 1951 (M. J. Whiteman, *Digest of International Law*, volume 4 (Washington, DC: U.S. Department of State, 1965), pp. 800–801), as did the United Kingdom in its note of September 14, 1951 (*Anglo-Norwegian Fisheries Case*, Pleadings, volume 4, pp. 587–590). For the objections to Ecuador’s 2012 declaration reaffirming this claim, see note 53 and accompanying text.
52. *Report of the Maritime Safety Committee on its Eightieth Session*, IMO doc. MSC 80/24, p. 118, para. 23.20. See also *Report to the Maritime Safety Committee*, p. 12, para. 3.22, recalling the United States statement at MSC 80 to the same effect.
  53. The Ecuadorian declaration appears in the Division for Ocean Affairs and the Law of the Sea (DOALOS) webpage, “Declarations or Statements upon UNCLOS Ratification.” The objections appear in UN, LOS Bull., No. 83, at pp. 16 and 18 (2014).
  54. Royal Decree No. 2510/1977, 5 August 1977, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP\\_1977\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1977_Decree.pdf).
  55. Kopela, *supra* note 19, at pp. 247–252.
  56. IMO resolution MEPC.134(53), July 22, 2005.
  57. Decree No. 78-112, January 11, 1978. F. Durante and W. Rodino (eds.), *Western Europe and the Development of the Law of the Sea*, volume II (Dobbs Ferry, N.Y.: Oceana, 1979), at pp. 3–4. Kopela, *supra* note 19, at p. 117, opines that much of the main island would qualify for Article 7 straight baselines, and the system as a whole reflects the archipelagic concept in that “the outermost points of this archipelago have been joined by straight baselines.”
  58. Decree No. 2015-635 of 5 June 2015 defining the baselines from which the breadth of the French territorial sea adjacent to the Kerguelen Islands (French Southern and Antarctic Territories) is measured, UN, LOS Bull., No. 89, at pp. 26–27, and M.Z.N.117.2015.LOS, November 12, 2015.
  59. Portugal Decree-Law No. 495/85, November 29, 1985, Tables III, IV, and V, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRT\\_1985\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRT_1985_Decree.pdf). Kopela, *supra* note 19, at p. 131, asserts the decree provides that these baselines are archipelagic baselines, but no such provision appears in the texts cited.
  60. American Embassy Lisbon Note delivered in the fall of 1986, State Department telegram 266998, August 25, 1986; *Cumulative Digest*, *supra* note 51, at pp. 2068–2069. *Accord*, Munavvar, *supra* note 7, at p. 126. In its reply, the government of Portugal stated: A reading of the geographic coordinates cited in the Annex to this Decree-Law demonstrates that the procedure adopted in locating the relevant baselines of the Azorean and Madeiran archipelagos was not predicated on Part IV of the Convention, but rather the authority comes from its article 121 (Part VIII), which refers to the applicable dispositions of geographic formations in general. Portuguese Ministry of Foreign Affairs Note DSA 3057 33/EUA/3 of November 28, 1986, to American Embassy Lisbon, *Cumulative Digest*, *supra* note 51, at p. 2069. It should be noted that Article 121 provides that the territorial sea of an island is determined in accordance with the provisions of the LOS Convention “applicable to other land territory,” and that these straight baselines do not meet the preliminary criteria for drawing straight baselines under Article 7 of the LOS Convention.



61. Statutory Instrument 1989 No. 1993, The Falkland Islands (Territorial Sea) Order 1989, November 1, 1989, [www.legislation.gov.uk/uksi/1989/1993/contents/made](http://www.legislation.gov.uk/uksi/1989/1993/contents/made), (1990) 60 *British Yearbook of International Law*, at pp. 657–658.
62. Reisman and Westerman, *supra* note 51, at p. 163, note 93.
63. Statutory Instrument 1989 No. 1996, The Turks and Caicos Islands (Territorial Sea) Order 1989, November 1, 1989, [www.legislation.gov.uk/uksi/1989/1996/made](http://www.legislation.gov.uk/uksi/1989/1996/made) (as amended previously by Statutory Instrument 1998/1260); amended by Statutory Instrument 2007 No. 2917, The Turks and Caicos Islands (Territorial Sea) (Amendment) Order 2007, October 10, 2007, [www.legislation.gov.uk/uksi/2007/2917/contents/made](http://www.legislation.gov.uk/uksi/2007/2917/contents/made).
64. Act No. 23.968, 14 August 1991, pages 9–12, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ARG.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ARG.htm), and Maps H-410, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/arg\\_mzn10\\_1996\\_00033.jpg](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/arg_mzn10_1996_00033.jpg), and H-411, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/arg\\_mzn10\\_1996\\_00034.jpg](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/arg_mzn10_1996_00034.jpg).
65. “Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea, May 15, 1996,” Article I, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1996\\_Declaration.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf); Limits in the Seas No. 117, *Straight Baselines Claim: China*, at p. 8 (1996).
66. Roach and Smith, *supra* note 46, at pp. 76, 98, and note 103. The U.S. protest is excerpted in Roach and Smith, “Straight Baselines: The Need for a Universally Applied Norm,” (2000) 31 *Ocean Development and International Law*, at pp. 47, 62–63.
67. “Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea, May 15, 1996,” Article II, *supra* note 71.
68. Limits in the Seas No. 117, *Straight Baselines Claim: China*, at p. 8 (1996).
69. *Ibid.* The 1998 Chinese EEZ law appears in *id.* at pp. 29–31.
70. U.S. protest is quoted in Roach and Smith, “Straight Baselines,” *supra* note 72, at pp. 62–63. The Philippines’ protest of May 17, 1996, appears in UN, LOS Bull., No. 32, at p. 88 (1996). The Vietnam protest of June 6, 1996, appears in UN, LOS Bull., No. 32, at p. 91 (1996), UN doc. A/68/980, Annex para. 2, Aug. 22, 2014, and repeated in Vietnam *note verbale* dated August 6, 1998, UN, LOS Bull., No. 38, at pp. 54–55 (1998).
71. French Decree 99-324, April 21, 1999, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FRA\\_1999\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FRA_1999_Decree.pdf).
72. Kopela, *supra* note 19, at p. 124.
73. Decree No. 2002-827, May 3, 2002, Decree defining the straight baselines and closing lines of bays used to determine the baselines from which the breadth of French territorial waters adjacent to New Caledonia is measured, Article 1(II); UN, LOS Bull., No. 53, at pp. 63–63, 66 (map) (2004); Wikipedia, “Loyalty Islands.”
74. Kopela, *supra* note 19, at p. 134.
75. State Peace and Development Council Law No. 8/2008, December 5, 2008, supplementing Burma’s 1977 Territorial Sea and Maritime Zones Law, UN, LOS Bull., No. 69, at pp. 69–73 (2009).
76. Bangladesh *note verbale* dated July 6, 2009, UN, LOS Bull., No. 70, at p. 61 (2009).
77. Kopela, *supra* note 20, at pp. 136–137.
78. See the chart at [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/chn\\_mzn89\\_2012.jpg](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/chn_mzn89_2012.jpg).
79. Text of the Chinese 2012 statement on the Senkakus straight baselines appears in UN, LOS Bull., No. 80, at pp. 30–31 (2013).
80. 2013 *Digest of United States Practice in International Law*, at pp. 369–370, [www.state.gov/documents/organization/226409.pdf](http://www.state.gov/documents/organization/226409.pdf). See also Roach, “China’s Straight Baseline Claim: Senkaku (Diaoyu) Islands,” *ASIL Insight*, Vol. 17, No. 7, 13 February 2015, available at [www.asil.org/insights/volume/17/issue/7/china%E2%80%99s-straight-baseline-claim-senkaku-diaoyu-islands](http://www.asil.org/insights/volume/17/issue/7/china%E2%80%99s-straight-baseline-claim-senkaku-diaoyu-islands). Japan also protested this claim in a *note verbale* dated 24 September 2012, UN, LOS Bull., No. 80, at p. 39 (2013).

## Appendix: State Practice in the Public Domain

The information in this appendix is taken from the third edition of *Excessive Maritime Claims*, as revised in the fourth edition, which is in preparation.

1. The Faroe Islands is an offshore archipelago of Denmark consisting of 18 relatively compact islands. Denmark drew baselines around the Faroes in 1959 and 1963 as part of its fisheries patrol legislation.<sup>44</sup> In 1976, Denmark revised its straight baselines enclosing the Faroe Islands.<sup>45</sup> The United States protested this claim in a note of which the following is an extract:

The United States observes that the baselines around the Faeroes are not straight baselines around individual islands, but are lines connecting the outermost islands and drying rocks of the Faeroes archipelago. Archipelagic States recognized under customary international law, as reflected in the LOS convention, do not include mainland states, such as Denmark and the United States, which possess non-coastal archipelagos. Therefore, straight baselines cannot be drawn around mainland states' coastal archipelagos, such as the Faeroe Islands.

The United States also observes that straight baselines could be employed, consistent with international law, in certain localities of some of the Faeroe Islands which are deeply indented and cut into, or themselves fringed with islands along the coast. Furthermore, some of the islands contain juridical bays that could lawfully be enclosed by straight baselines. However, in localities where neither criteria is met, the method of straight baselines may not be used; rather, in those areas the low water line, as depicted on official charts, must be used.<sup>46</sup>

The straight baselines were slightly modified in 2002.<sup>47</sup>

2. Svalbard is an offshore archipelago of Norway north of the Arctic Circle composed of three main islands close together and a number of smaller offshore features. Much of the coastline of two of the main islands, Spitzbergen and Nordaustlandet, would seem to meet the criteria of Article 7 for straight baselines. In 1970, Norway established straight baselines about Bjørnøya (Bear Island), Hopen (island), and the western and southern shores of the Svalbard archipelago.<sup>48</sup> These baselines were repealed in 2001 and replaced with straight baselines enclosing Spitzbergen, Nordaustlander, Barentsøya, and Edgeøya islands together. The 2001 scheme has been criticized by scholars, noting that applying straight baselines to join the outermost points of the main archipelago "does reflect the archipelagic concept."<sup>49</sup>

The 2001 Royal Decree also enclosed the smaller group of Kong Karls Land, Kongsøya, Abeløya, and Svenskøya with straight baselines. The location of these islands in a line precludes the application of Article 7 and the encirclement reflects the archipelagic concept.<sup>50</sup>

There appears to be no objection to these claims in the public record.

3. The Galapagos offshore archipelago consists of 18 main islands, three smaller islands, and 107 rocks and islets at some distances from the main islands. They all are suitable for application of the normal baseline. However, in 1971, through Supreme Decree No. 959-A, the government of Ecuador claimed a system of straight baselines around the Galapagos Islands. The United States, in a note of which the following is an extract, protested as follows:

With regard to the straight baselines drawn around the Galapagos Islands, such straight baselines, which purportedly represent archipelagic baselines as contained in article 47 of the 1982 Law of the Sea Convention, may only be employed by an archipelagic state, defined in article 46 of the 1982 Law of the Sea Convention as "a state constituted wholly by one or more



archipelagoes and may include other islands.” As Ecuador is a continental state and the Galapagos Islands constitute part thereof, the United States does not recognize as valid the straight baseline system around the Galapagos Islands, for the purpose of delineating internal waters, territorial sea, economic zone or continental shelf.<sup>51</sup>

In 2005 at the International Maritime Organization (IMO) Maritime Safety Committee, when considering Ecuador’s proposal for associated protective measures in connection with its request that the Galapagos Archipelago be designated as a particularly sensitive sea area, the United States “stated that it did not agree with the baselines used for the area.”<sup>52</sup>

Declaration VI of Ecuador’s declaration accompanying the deposit of its instrument of accession to the LOS Convention on September 24, 2012, provided:

Ecuador reiterates the full force and validity of Supreme Decree No. 959-A, published on 28 June 1971 in Official Register No. 265 of 13 July 1971, by means of which it established its straight baselines in accordance with international law. It reaffirms that the said lines in the Galapagos Archipelago are determined by the common geological origin of those islands, their historical unity and the fact that they belong to Ecuador, as well as the need to protect and preserve their unique ecosystems.

Among the 12 objections leveled against some of Ecuador’s 18 declarations by the European Union (EU) and individual member states, Belgium, Spain, and Sweden specifically objected in October 2013 to Declaration VI. Belgium stated that it “is also concerned about the references to the baselines around the Galapagos islands, which do not correspond to the prescriptions of the Convention.” Spain said, “In particular, Spain does not recognize the drawing of baselines that were not made as required by the Convention.” Sweden was more detailed:

The Government of Sweden has studied the baselines described by Ecuador in its Declaration. According to the provisions of UNCLOS the normal baseline is the low-water line along the coast. Straight baselines may be employed if the coast is deeply indented or cut into, or if there is a fringe of islands along the coast in its immediate vicinity. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast. The Ecuadorian coastline is stable and even, and the baselines described by Ecuador deviate from the main rules included in UNCLOS provisions. The baselines of islands shall be drawn according to the same criteria. The baselines surrounding the Galapagos Islands, creating a large area of internal waters not connected to the mainland is not in accordance with UNCLOS.<sup>53</sup>

4. The Canary Islands are an offshore archipelago of Spain consisting of seven large islands and four small islands in the shape of a banana over 350 miles long. In 1977, Spain enclosed all of them with a series of straight baselines.<sup>54</sup> It appears Spain has deliberately applied the archipelagic state regime to the Canary Islands, an autonomous region of Spain.<sup>55</sup> In 2005, the IMO designated the Canary Islands as a particularly sensitive sea area.<sup>56</sup> There appears to be no objection to this claim in the public record.
5. Kerguelen Islands, an offshore archipelago of France and part of the French Southern and Antarctic Territories, consists of a main island, Grande Terre, and 300 smaller islands and islets in the southern Indian Ocean. In 1978, France established a straight baseline system enclosing these features.<sup>57</sup> This decree was replaced in 2015 by a series of straight and normal baselines enclosing all but the outlying islands (l’Îlot du Rendez-Vous, les Roches du Salamanca, Le Diamant, les îles de Boynes, l’île Ronde, les Rochers Trémarec, les Roches Mengam, les Îles de la Fortune, and l’Îlot Solitaire), for which the low-water line is used.<sup>58</sup> There seems to be no objection in the public domain to this claim.

6. The Azores offshore archipelago consists of nine volcanic islands and an islet cluster, in three main groups. These are Flores and Corvo, to the west; Graciosa, Terceira, São Jorge, Pico, and Faial in the center; and São Miguel, Santa Maria, and the Formigas Reef to the east. They extend for more than 600 km (370 miles) and lie in a northwest–south-east direction. In November 1985, the government of Portugal claimed a system of straight baselines enclosing each of the three main groups, except for two islands in the central group (Graciosa and Terceira).<sup>59</sup> In 1986, the U.S. government, in a note of which the following is an excerpt, protested:

Certain of the baselines around the Madeira and the Azores Islands groupings are objectionable for the same reasons, i.e., they do not lie in localities where the coastlines are deeply indented and cut into nor do they connect a fringe of islands along a coast in its immediate vicinity. Moreover, insofar as concerns the Madeira and the Azores Island groupings, archipelagic baselines cannot be justified under customary international law as reflected in Part IV the 1982 Law of the Sea Convention as Portugal is not an “archipelagic state,” but in fact comprises a mainland continental state with island components.<sup>60</sup>

7. The Falkland Islands consist of two main islands, East Falkland and West Falkland, separated by Falkland Sound, and 776 smaller islands. In 1989, the United Kingdom drew straight baselines enclosing the whole of the Falklands using its outermost islands.<sup>61</sup> The coastlines of both main islands are deeply indented and cut into in many locations, suitable for Articles 7 and 10 straight baselines and bay closing lines. Scholars have criticized the straight baselines drawn by the United Kingdom enclosing both main Falkland Islands as “a pregnant rectangle ... extremely inconsistent with the provisions of the 1958 and 1982 Conventions.”<sup>62</sup> The United States has made known its concerns with these straight baselines to the United Kingdom.
8. The Turks and Caicos Islands are an offshore archipelago consisting of eight main islands and more than 299 smaller islands. The largest four of the main islands are close together in a line. In 1989, the United Kingdom established a straight baseline system for the Turks and Caicos Islands, revised in 2007.<sup>63</sup> This claim, however, does not meet the straight baseline criteria. It appears to be more an archipelagic straight baseline claim, which would not be appropriate given that the Turks and Caicos Islands is not an independent island state. There appears to be no objection to this claim in the public record.
9. In 1991, Argentina drew straight baselines enclosing each of the two main Malvinas (Falklands).<sup>64</sup> The straight baselines employed by Argentina connect the outermost features of the two island groups separately as described in Article 47(1) of the Convention, a regime that, however, cannot apply to them as offshore archipelagos. There appears to be no objection to this claim in the public record.
10. Hainan Island is a large feature south of the Chinese mainland just east of Tonkin Gulf. The 1996 Chinese straight baseline system along almost the entire coastline facing the South China Sea also enclosed the eastern and southern coasts of Hainan Island with straight baselines joining the island with the mainland and thus cutting off the eastern approach to the Hainan Strait, as well as access along the south coast of the island.<sup>65</sup> The United States protested this claim in 1996.<sup>66</sup>
11. In 1996, China also claimed straight baselines around the Xisha/Paracels.<sup>67</sup> The Paracel Islands comprise about a dozen small islands and reefs scattered over an area approximately 120 miles by 100 miles. The largest islands in the Paracels,

Woody Island and Pattle Island, are only 1.62 km<sup>2</sup> (400 acres) and 0.26 km<sup>2</sup> (64 acres), respectively. The remaining features in this area are smaller islets, rocks, and reefs, some of which are depicted as being above the tidal datum. As stated in Limits in the Sea No. 117, “While it is possible for an island to meet the requirements of Article 7 and to have straight baselines drawn, these standards are not met here. The proper baseline would be the low water line of the islands and reefs.”<sup>68</sup> This claim was repeated in Article 2 of China’s 1998 Law on the Exclusive Economic Zone and the Continental Shelf.<sup>69</sup> The United States, the Philippines, and Vietnam have protested this claim.<sup>70</sup>

12. In 1999, France drew straight baselines around Guadeloupe, an offshore archipelago, as well as Saint-Martin, Saint Barthelemy, and Martinique. The Guadeloupe baselines enclose the main islands of Grande-Terre and Basse-Terre, and the smaller Iles des Saintes, Marie Galante, Iles des Petite Terres, and Le Désirade.<sup>71</sup> Kopela has commented that this system could be justified “on the basis of a liberal interpretation of article 7.”<sup>72</sup> There appears to be no objection to this claim in the public record.
13. In 2002, France drew straight baselines enclosing four small islands, two atolls, and a reef comprising the Loyalty Islands, an offshore archipelago, about 100 km (62 mi) east of and parallel to New Caledonia. Each feature is about the same distance (50 km) from the nearest features. The Loyalty Islands together measure about 300 km from northwest to southeast. Their combined land area is 1,981 km<sup>2</sup> (765 sq mi).<sup>73</sup> Kopela has noted that France has not “applied a common straight baseline system around the whole archipelago” but just around some of the features. Kopela has commented that the Article 7 conditions regarding a fringe of islands along the coast are “apparently not met.”<sup>74</sup> There appears to be no objection to this claim in the public record.
14. In 2008, Myanmar drew straight baselines around two groups of islands, Co Co and Preparis Islands in the Andaman Sea.<sup>75</sup> Each set of islands is relatively far apart, with straight baselines separately joining two smaller islands with the main Co Co and Preparis Islands. On July 6, 2009 Bangladesh protested these baselines as contrary to Article 7 of the LOS Convention and Article 4 of the Territorial Sea Convention.<sup>76</sup> Kopela has commented that “despite this modest application, the compatibility with article 7 LOSC is rather doubtful,” adding, “it would take a very loose interpretation for the smaller islands to be considered as fringing” Preparis’s western coast.<sup>77</sup>
15. In 2012, China claimed baselines of the territorial sea around the Diaoyu Dao/Senkaku Islands.<sup>78</sup> On March 7, 2013, the United States sent a diplomatic note to the Ministry of Foreign Affairs of the People’s Republic of China regarding a “Statement of the Government of the People’s Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands,” dated September 10, 2012 (“Statement”).<sup>79</sup> The U.S. diplomatic note protests the establishment by China of straight baselines around the Senkaku Islands, contrary to customary international law as reflected in the UN Convention on the Law of the Sea. The baseline rules in international law distinguish between “normal baselines” (following the low-water mark along the coast at low tide) and “straight baselines,” which may only be employed in certain limited geographic situations. The 2013 *Digest of United States*

*Practice in International Law* noted that the United States has lodged diplomatic protests regarding excessive straight baseline claims of many countries, including a previous protest to China regarding its assertion of straight baselines around mainland China (including Hainan Island) and the Paracel Islands. Excerpts follow from the March 7, 2013, U.S. diplomatic note to China:

The Government of the United States notes that the Statement lists 17 base points that connect to create two straight baseline systems around two groups of islands known collectively in the United States as the Senkaku Islands (China refers to the islands as the Diaoyu Islands). The first system of straight baselines consists of 12 segments enclosing Uotsuri Shima (Diaoyu Dao), Kuba Shima (Huangwei Yu), Minami Kojima (Nanxiao Dao), and certain other features. The second system of straight baselines consists of 5 segments surrounding one island, Taisho To (Chiwei Yu) and its surrounding features.

The United States recalls that, as recognized in customary international law and as reflected in Part II of the 1982 United Nations Convention on the Law of the Sea, except where otherwise provided in the 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. As provided for in Article 7 of the Convention, only 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, may the coastal State elect to use the method of straight baselines joining appropriate points in drawing the baseline from which the breadth of the territorial sea is measured.

The Senkaku Islands comprise several small features spread over an area of approximately 46 square nautical miles. The United States takes no position on the ultimate sovereignty of the Senkaku Islands. Irrespective of sovereignty claims, international law does not permit the drawing of straight baselines around these features. The Senkaku Islands do not meet the specific geographic requirements for the drawing of straight baselines because their coastline is not deeply indented and cut into and they do not constitute a fringe of islands along the coast in its immediate vicinity.

To the extent that the Statement might be intended to suggest that archipelagic baselines may be drawn around the Senkaku Islands, this also would be inconsistent with international law. Under customary international law, as reflected in Part IV of the Law of the Sea Convention, only “archipelagic States” may draw archipelagic baselines joining the outermost points of an archipelago. Coastal States, such as China and the United States, do not meet the definition of an “archipelagic State” reflected in Part IV of the Convention. China, therefore, may not draw archipelagic baselines enclosing offshore islands and waters, and the proper baseline for such features is the low-water line of the islands.

Accordingly, with regard to the Statement and baselines set forth therein, the United States is obliged to reserve its rights and those of its nationals. These baselines, as asserted, impinge on the rights, freedoms, and uses of the sea by all nations by expanding the seaward limit of maritime zones and enclosing as internal waters areas that were previously territorial sea.

The United States requests that the Government of China review its current practice on baselines, explain its justification under international law when defining its maritime claims, and make appropriate modifications to bring these claims into accordance with international law as reflected in the Law of the Sea Convention. The United States is ready to discuss this and other related issues with China in order to maintain consistent dialogue on law of the sea issues.<sup>80</sup>

From the foregoing descriptions of the geography of these offshore archipelagos, they can be listed in one of two categories.

The first category can be described as three or more features well separated from the mainland enclosed by straight baselines, such as the Galapagos, the Azores, the Canary Islands, Co Co Islands and Peparis Islands, the Loyalty Islands, the Paracels, and the Senkakus (and the Spratlys if claimed).

The second category could be those offshore archipelagos composed of one or more large islands with smaller offshore features together enclosed by straight baselines, such as the Faroes, Svalbard, Guadeloupe, Kerguelen Islands, the Falklands/Malvinas, and the Turks and

Caicos Islands. A variant is Hainan Island, partially enclosed by straight baselines connected to the mainland.

The United States' reaction to the possibility of China drawing straight baseline to enclose the Spratlys is discussed in the sixth section of this paper.

Regardless of their geographic configuration, as explained in this paper, there is no basis in international law wholly to enclose offshore archipelagos with straight baselines except those meeting the criteria set out in Article 7.