

STATE PRACTICE REGARDING STRAIGHT BASELINES IN EAST ASIA – LEGAL, TECHNICAL AND POLITICAL ISSUES IN A CHANGING ENVIRONMENT

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Abstract

Baselines are fundamental to claims to maritime jurisdiction and, frequently, to the delimitation of maritime boundaries. This paper outlines the types of baseline that are claimable under the international law of the sea with particular emphasis on straight baselines. An overview and assessment of the straight baseline claims of the East Asian coastal States is then provided. Much of this State practice is highly questionable. The potential consequences and implication of such apparently excessive straight baseline claims are then explored.

Introduction

The primary significance of baselines lies in the fact that they provide a starting point for establishing a coastal State's claims to maritime jurisdiction. While often termed "territorial sea baselines", such baselines are fundamental to claims not only to the territorial sea, but all other maritime zones namely the contiguous zone, continental shelf, exclusive economic zone (EEZ). Consequently, the establishment of the location of a coastal State's baselines is a necessary precursor to defining the limits of its zones of maritime jurisdiction, as it is essential to determine the points from which the specified breadth of such zones are measured.¹ Baselines are also important because, just as baselines provide the starting line for the measurement of maritime zones offshore, equally they also represent the outer limit of a State's land territory² or internal waters landward of the baseline.³ Furthermore, basepoints along these baselines may be crucial to the delimitation of maritime boundaries with neighbouring States, especially those based on the construction of equidistance lines.

In the absence of other claims, a coastal State will have "normal" baselines coincident with the low-water line along the coast. However, there are several types of straight line baselines that may be drawn in accordance with international law as an alternative to normal baselines. Among

1 This issue is somewhat more complex when claims to extended or outer continental shelf rights are under consideration. Nonetheless, distance measurements from baselines, especially the 200 and 350 nautical miles limits are crucial to the determination of the limits of these claimed sovereign rights.

2 Where the low-water line, normal, baselines are used.

3 Where straight baselines and closing lines are applied (see below).

these various types of baseline, “straight baselines” have proved especially popular in the practice of coastal States. In many cases coastal States have applied the relevant provisions of international law in a liberal or flexible manner and this has arguably resulted in the drawing of excessive baseline systems. Indeed, State practice in respect of claims to straight baselines shows a remarkable divergence from the requirements laid down in the relevant international law conventions, most especially the provisions laid down in the United Nations Convention on the Law of the Sea (UNCLOS).⁴ This type of practice is especially evident in East Asia.⁵

As it is important to distinguish terms, this paper starts with an outline of the types of baseline that are claimable under the international law of the sea. Particular emphasis is placed on straight baselines and an overview and assessment of the claims of the East Asian states to straight baselines is provided. The clear disconnection between the criteria for claiming straight baselines and State practice in East Asia is highlighted. The potential implications of such claims are then explored. In particular, excessive straight baseline claims can have a significant impact on coastal State claims to maritime jurisdiction, by increasing the claimant State’s internal waters within defined straight baselines whilst simultaneously advancing the starting point for the measurement of maritime claims offshore. Such claims represent a form of “creeping jurisdiction” designed to significantly extend the area of national maritime jurisdiction beyond that which would apply if normal baselines had been used. This can, in turn, have operational implications, especially related to navigational rights and freedoms, and has the potential to complicate the delimitation of maritime boundaries. Potential legal issues, such as the possibility of a regional norm emerging in relation to straight baselines claims are also reviewed, as are possible impacts on oceans management. The paper concludes that as regional countries continue to grow economically, displaying greater political confidence and exercising increased maritime power, they are unlikely to step back from their straight baselines systems. This presents these States with both opportunities and challenges in terms of the maintenance and enforcement of their claims in a changing environment.

Types of Baseline

The international law rules concerning baselines, maritime claims and the delimitation of maritime boundaries are largely codified in the United Nations Convention on the Law of the Sea (UNCLOS),⁶ and its predecessors, notably the Conventions of 1958.⁷

Normal Baselines

A coastal State’s default baselines are its “normal” baselines in accordance with UNCLOS, Article 5. This provides that a coastal State’s normal baselines comprise “the low-water line

⁴ United Nations, *United Nations Conventions on the Law of the Sea*, Montego Bay, 10 December 1982 (in force 16 November 1994), U.N. Sales No.E.97.V.10 (1983). See 1833 UNTS 3, , available at <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

⁵ For the purposes of the present discussion the geographical scope of East Asia is taken to include both Northeast and Southeast Asia from Russia in the North to Burma in the Southwest.

⁶ United Nations, *United Nations Conventions on the Law of the Sea*, U.N. Sales No.E.97.V.10 (1983). See 1833 UNTS 3, entered into force 16 Nov. 1994, available at <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

⁷ Of the four conventions that were concluded following the first United Nations Conference on the Law of the Sea (UNCLOS I), held in Geneva in 1958, the Convention on the Territorial Sea and Contiguous Zone is of direct relevance to baselines. See, Convention on the Territorial Sea and Contiguous Zone, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964) (hereinafter “1958 Convention”).

along the coast as marked on large-scale charts officially recognized by the coastal State.” This represents a near verbatim repetition of Article 3 of the 1958 Convention on the Territorial Sea and Contiguous Zone. Such normal baselines account for the majority of the baselines applicable worldwide.

The low-water line is dependent on the choice of vertical datum. That is, the level of reference for vertical measurements such as depths and heights of tide. A key uncertainty associated with Article 5 of UNCLOS is that it does not specify a particular vertical datum and thus low-water line to be used. Consequently, there is no ‘wrong’ answer and the choice is left up to the coastal State.⁸ While most countries have selected Mean Low-Water Springs (MLWS) or the Lowest Astronomical Tide (LAT) as their preferred chart datum, it is, therefore, possible to select from a range of other low-water marks. This can be an important consideration because the lower the low-water line selected, the further seaward the normal baseline will lie.⁹ The choice of vertical tidal datum will also impact on the status of certain insular features, for example, whether a particular feature is an island or a low-tide elevation. This, in turn, can have significant implications in terms of the capacity of a particular feature to generate extensive maritime claims to jurisdiction.¹⁰ It is also worth noting in this context that normal baselines can change significantly over time and this necessarily has an impact on the generation of the outer limits of claims to maritime jurisdiction.¹¹

Straight Baselines

Where particular, restricted, geographical circumstances exist, international law allows states to depart from the application of normal baselines and measure maritime jurisdictional zones from straight baselines drawn along selected parts of their coastlines. The provisions on straight baselines contained in Article 4 of the 1958 Convention and, subsequently, Article 7 of UNCLOS were in large part inspired by the ruling of the International Court of Justice (ICJ) in the Anglo-Norwegian Fisheries case.¹²

⁸ See, Carleton, C. and Schofield, C.H. (2001) *Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits*, Maritime Briefing, 3, 3, Durham, International Boundaries Research Unit: 21-25. Having made that observation, it is nonetheless the case that the International Hydrographic Organization (IHO) favours use of lowest astronomical tide as the vertical datum for the construction of modern nautical charting. See, International Hydrographic Organization (with the International Oceanographic Commission and the International Association of Geodesy) (2006) *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea, 1982*, Special Publication no.51, 4th edition, (Monaco, International Hydrographic Bureau) (hereafter TALOS Manual, 2006).

⁹ This will serve to advance the starting point for maritime claims offshore, as well as increasing the area designated as ‘land’ or internal waters landward of the baseline. The impact of selecting a lower vertical datum on the extent of maritime claims tends to be limited, however, unless there is a significant tidal range or the coastline in question shelves particularly gently.

¹⁰ For example, while an island may, in accordance with LOSC Article 121(2), generate a full suite of maritime zones in an identical fashion to mainland coasts, a low-tide elevation, as provided by Article 13, may be used as a territorial sea basepoint, but only if it falls wholly or partially within the breadth of the territorial sea measured from the normal baseline of a State’s mainland or island coasts. A low-tide elevation’s value for maritime jurisdictional claims is therefore geographically restricted to coastal locations. See, Carleton and Schofield, 2001: 38.

¹¹ Prescott, J.R.V. and Schofield, C.H. (2005) *The Maritime Political Boundaries of the World*, Leiden/Boston, Martinus Nijhoff Publishers: 100-101.

¹² Anglo- Norwegian Fisheries case [1951] ICJ Rep.

As early as 1935 Norway established a series of straight baselines along joining the outer points of islands and rocks fringing part of its northern coastline for the purpose of establishing the limits of its 4nm exclusive fisheries zone. Enforcement of this fisheries zone resulted in several British fishing vessels being detained, a situation which led to the United Kingdom and Norway seeking a ruling on the issue from the ICJ. In finding in favour of Norway, and confirming the validity of the Norwegian straight baseline system, the Court stipulated that “where a coast is deeply indented and cut into...the baseline becomes independent of the low-water mark and can be determined by means of geometric construction”; and that, “the drawing of baselines must not depart in any appreciable extent from the general direction of the coast.”

Article 4 of the Geneva Convention was therefore drafted with the ICJ’s 1951 decision in mind. The provisions of Article 4 were later largely repeated in Article 7 of the UNCLOS. Article 7 does, however, also provide guidance in relation to baselines on highly unstable coastlines and allows for the possibility of using low-tide elevations without lighthouses as basepoints in a straight baseline system so long as such lines have acquired general international recognition – provisions absent from Article 4. These provisions allow States to depart from the application of the normal baseline and measure maritime jurisdictional zones from straight baselines drawn along selected parts of their coastlines.¹³

The intention of LOSC Article 7 and its predecessor, Article 4 of the 1958 Convention, is, however, clear. These provisions are designed to deal with particularly complex coastal geography where the configuration of the coastline is such that using “highly irregular”¹⁴ normal baselines would result in similarly irregular maritime limits such as, for example, a complex mosaic of enclaves or pockets of non-territorial sea areas within a State’s territorial sea.¹⁵

The crucial criteria for drawing such baselines is contained in UNCLOS Article 7(1) which provides that straight baselines should only be applied 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.”¹⁶ Additionally, Article 7(2) allows the drawing of straight baselines “where because of the presence of a delta and other natural conditions, the coastline is highly unstable.”¹⁷ Moreover, in accordance with Article 7(3) “[t]he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently linked to the land domain to be subject to the regime of internal waters.”¹⁸ Article 7(4) also stipulates that straight baselines “shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.”¹⁹ Furthermore, Article 7(5) allows for

13 See, for example, Prescott and Schofield, 2005: 137-164.

14 TALOS Manual, 2006: Chapter 4, p.6.

15 United Nations (1989) Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, New York, Office for Ocean Affairs and the Law of the Sea, United Nations.

16 See, Prescott and Schofield, 2005: 142-147.

17 It does not appear that any of the deltas along the East Asian coast exhibit indications of being highly unstable in a way that would justify application of UNCLOS Article 7(2). It is also worth noting that Article 7(2) does not create a third justification for the drawing of straight baselines in addition to the two laid out in Article 7(1) (namely a deeply indented or cut into coastline or a fringe of islands). See, Prescott and Schofield, 2005: 148-149.

18 See, Prescott and Schofield, 2005: 154-156.

19 See, Prescott and Schofield, 2005: 157-158.

account to be taken of “economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.”²⁰ Finally, Article 7(6) states that a system of straight baselines may not be applied by a coastal State “in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.”²¹

The, at first glance, strict provisions set out in Article 7 of UNCLOS give rise to several significant queries, as precise definitions for key terms allowing the establishment of straight baselines are not provided. In particular it remains unclear how many and how deep the indentations need to be to constitute a “deeply indented and cut into” coastline, how many and how close islands need to be to one another in order to form a “fringe” of islands and at how far offshore such a fringe of islands may be yet still fulfil the requirement that they be in the coastline’s “immediate vicinity”, what is meant by the term “highly unstable”, and by what means is the “general direction” of the coastline and what angle represents divergence to an “appreciable extent” from that direction. Article 7 similarly fails to provide any specific rule for determining whether the sea area enclosed by a particular straight baseline system is “sufficiently closely linked to the land to be considered subject to the regime of internal waters” and is also silent with respect to how economic interests peculiar to a particular region are to be assessed or what period of time equates to “long-usage” of such areas by the coastal State.

As a result of these uncertainties, the seemingly strict criteria set out in Article 7 have been interpreted very flexibly, or even ignored in practice of many coastal States, resulting in a proliferation of excessive claims to straight baselines.²² This certainly appears to be the case in East Asia (see below). Numerous straight baseline claims have been subject to international protests on the grounds that they breach the terms of Article 7 by, for example, incorporating overly long baseline segments, using basepoints located substantially offshore or involve a “fringe” of islands that are similarly far offshore and/or widely dispersed, such that the straight baselines in question are not in the “immediate vicinity” of the coast, and the waters so enclosed cannot genuinely be considered as suitable for the regime of internal waters. The United States in particular routinely protests against any practice that it deems to be excessive or contrary to the provisions of UNCLOS.²³

Rivers

UNCLOS Article 9 provides that where a river “flows directly into the sea the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.” Article 9 does not, however, specify a length limit for a baseline closing a river mouth.

Bays

UNCLOS Article 10, is a near verbatim repetition of Article 7 of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958. At Article 10(2) it is stated that a bay must be “a well-marked indentation”, and “more than a mere curvature of the coast” terms which are clearly potentially open to flexible interpretation. Consequently, a clear and unambiguous geometric test for legal bay status is also provided, generally termed the ‘semi-circle test’. This formula is

²⁰ It should be noted, however, that Article 7(5) in isolation does not justify the drawing of straight baselines in the absence of a deeply indented or cut into coastline or the existence of a fringe of islands along the coast. See, Prescott and Schofield, 2005: 158.

²¹ See, Prescott and Schofield, 2005: 158-159.

²² See Prescott and Schofield, 2005: 139-166; see also, United Nations, 1989 and United States, 1987.

²³ For an excellent overview of such excessive claims, from a US perspective, see, Roach, J.A. and Smith, R.W. (1996) *United States Responses to Excessive Maritime Claims*, The Hague, Martinus Nijhoff: 57-161.

detailed in Article 10(3) where it is made explicit that the diameter of the semi-circle to be used to test the validity of a particular bay should be equivalent to the width of the mouth (or mouths) of the bay. The last paragraph of Article 10, Article 10(6), does, however, provide an notable exception to this robust rule, providing that “the foregoing provisions do not apply to so-called “historic” bays.”²⁴

Ports and Roadsteads

Article 11 of UNCLOS, dealing with ports, provides that “for the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast.” Such harbour works might include features such as a breakwater protecting the mouth of a port, but not connected to the coast. Offshore installations and artificial islands are, however, specifically excluded from consideration as permanent harbour works. UNCLOS Article 12 repeats the substance of Article 9 of the Convention of 1958 and allows “roadsteads normally used for loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea” to be included within the territorial sea. In light of the extension of territorial sea claims allowable under UNCLOS to 12 nautical miles, this Article can be considered of limited utility as most roadsteads will fall within the scope of such extended territorial sea claims.²⁵

Archipelagic Baselines

Territorial sea straight baselines are not to be confused with archipelagic straight baselines that are subject to different, and significantly more robust, rules. Firstly, and fundamental to archipelagic State claims to archipelagic baselines and archipelagic waters, Article 47(1) provides that an archipelagic State may draw baselines joining “the outermost points of the outermost islands and drying reefs of the archipelago.” Five key conditions are then laid down in Article 47: that the claimant state’s “main islands” must be included within the archipelagic baseline system;²⁶ that the ratio of water to land within the baselines must be between 1:1 and 9:1;²⁷ that the length of any single baseline segment must not exceed 125nm;²⁸ that no more

24 In this context the United States has taken the view that: “To meet the international standard for establishing a claim to historic waters, a State must demonstrate its open, effective, long-term, and continuous exercise of authority over the body of water, coupled with acquiescence by foreign States to the exercise of that authority. The United States takes the position that an actual showing of acquiescence by foreign States in such a claim is required, as opposed to a mere absence of opposition” (Roach and Smith, 1996: 31). The United States has also argued that, given the extension of coastal State territorial sea claims to 12 nautical miles under UNCLOS, “no new claim to historic bay or historic waters is needed to meet resource and security interests of the coastal State” (Roach and Smith, 1996: 37).

25 Carelton and Schofield, 2001: 46-47.

26 UNCLOS, Article 47(1). This represents the critical test of the validity of a system of archipelagic baselines. The intent of this provision appears to be to exclude both coastal States dominated by a few large islands and those whose islands are particularly dispersed, such as the United Kingdom and Kiribati respectively. For a discussion of how the 1 to 1 and 1 to 9 ratios were arrived at, see Jayewardene, H.W. (1990) *The Regime of Islands in International Law*, Dordrecht, Martinus Nijhoff: 145. Article 47(7) provides clarification as to what may be reasonably regarded as water and land in order to aid in the computation of the crucial water to land ratio, providing that for this purpose “land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.”

27 UNCLOS, Article 47(1).

28 *Ibid.*, Article 47(2).

than three percent of the total number of baseline segments enclosing an archipelago may exceed 100nm;²⁹ and, that such baselines “shall not depart to any appreciable extent from the general configuration of the archipelago.”³⁰

Of the two archipelagic states in East Asia, Indonesia and the Philippines, only Indonesia has established a full set of archipelagic baselines. While the relevant international law rules were codified in LOSC in 1982, Indonesia was a key pioneer of the archipelagic concept and it is notable that the provisions governing the drawing of such baselines in LOSC Article 47 appear to a considerable extent to have been inspired by the ‘prototype’ archipelagic baselines claimed by Indonesia in 1960.³¹ It should be noted that Indonesia is currently in the process of revising its archipelagic baselines.³² With regard to the Philippines, while it is clear that the islands which make up the Philippines constitute an archipelago and appear to be eminently well suited for a claim to archipelagic status and the application of Article 47, at present the Philippines appears to claim straight baselines rather than archipelagic baselines (see below).

Claims to Straight Baselines in East Asia

Almost all East Asian coastal countries (i.e. Burma, Cambodia, China, Japan, North Korea, South Korea, Malaysia, the Philippines, Russian Federation, Taiwan, Thailand and Vietnam) have implemented a straight baseline system. In most cases, the use of straight baselines has been controversial and judged by the United States, in particular, to be “excessive”, and thus subject to diplomatic protest, as well as the operational assertion of navigational rights by U.S. ships under the Freedom of Navigation (FON) program.³³ This use of straight baselines in the region confirms the view expressed by Prescott in 1987 that the concept of straight baselines has been distorted beyond recognition by increasingly liberal interpretations of the key criteria in UNCLOS Article 7.³⁴ The following brief descriptions of the use of straight baselines by regional countries (in alphabetical order) demonstrate the issues that have arisen.

29 *Ibid.* It is worth noting that as it is the coastal State that constructs the archipelagic baseline system and as there is no restriction on the number of baselines that an archipelagic State might draw, it is usually possible to adjust the baseline system to overcome the no more than three per cent of baseline segments exceeding 100 nautical miles in length restriction and thus conform to the UNCLOS requirements. (UN Division for Ocean Affairs and the Law of the Sea (2000) *Handbook on the Delimitation of Maritime Boundaries*, New York, United Nations: 8).

30 For a more detailed analysis of claims to archipelagic baselines and archipelagic waters see, Tsamenyi, M.B., Schofield, C.H. and Milligan, B. (2008) ‘Navigation through Archipelagos: Current State Practice’, pp.413-454 in *Freedom of the Seas, Passage Rights and the 1982 Law of the Sea Convention*, The Hague, Martinus Nijhoff.

31 Indonesia, Act Concerning Indonesian Waters, Article 1, 20 January 1960. Reproduced in United States (1971) “Straight Baselines: Indonesia”, *Limits in the Seas*, No. 35, The Geographer, Bureau of Intelligence and Research, Washington DC.

32 Through Indonesia’s Law No.6 of 1996 and *Peraturan Pemerintah* (PP) [Government Regulation] No.38 of 2002. See, Schofield, C.H. and Arsana, I.M.A. (2000) ‘The Delimitation of Maritime Boundaries: A Matter of ‘Life and Death’ for East Timor?’, pp.67-85 in: D.Kingsbury, and M.Leach (eds), *East Timor: Beyond Independence*, Melbourne, MAI Press: 75-76.

33 See Roach and Smith, 1996 and also Roach and Smith (2000) “Straight Baselines: The Need for a Universally Applied Norm”, *Ocean Development and International Law*, Vol. 31: 47-80.

34 Prescott, J.R.V. (1987) “Straight and Archipelagic Baselines” in Gerald Blake (ed), *Maritime Boundaries and Ocean Resources*, London, Croom Helm: 40.

Burma

Burma (Myanmar) claimed a system of straight baselines on 15 November 1968 by means of a Ministry of Foreign Affairs statement. The claim was slightly amended by Law No.3 of 9 April 1977.³⁵ Burma's straight baselines claim extends for a total of 826.4 nautical miles, fronting the entirety of its coastline with the exception of an approximately 30nm long stretch of normal baselines extending southwards from the terminus of its land boundary with Bangladesh. Burma's claimed baselines appear to depart from the general direction of the coast to an appreciable extent and islands are used as turning points that are not in the immediate vicinity of the coast.³⁶ The claim also includes a single baseline segment across the Gulf of Martaban which is 222.3nm in length – the longest single straight baseline segment claimed worldwide.³⁷ The consequence of this claim is that at one point along the Gulf of Martaban closing line, the nearest Burmese land territory is over 75nm away whilst the mouth of the Sittang River is over 120nm distant.³⁸ This necessarily brings into severe question whether the waters so enclosed are “sufficiently linked to the land domain to be subject to the regime of internal waters”, as required under UNCLOS Article 7(3).

Burma justified its claim to straight baselines on the grounds of the “geographical conditions prevailing” along its coastline, together with the need to “safeguard the vital economic interest of the inhabitants of the coastal regions.” Unsurprisingly, however, the Burmese claim resulted in international protest.³⁹ While most protests and commentary on the Burmese straight baselines claim tend to focus on the extraordinarily long Gulf of Martaban closing line, other parts of the Burmese claim are also not above reproach.

Cambodia

Cambodia adopted its first system of straight baselines, which fronted the entirety of the Cambodian mainland coast, in 1957. Cambodia's claims to straight baselines were subsequently revised in 1972⁴⁰ and then again a decade later. Upon each revision, Cambodia's claims have become more excessive in character as insular features further and further offshore have been incorporated into the straight baselines system as basepoints. Cambodia's current claim to straight baselines, was declared in July 1982.⁴¹

35 Kriangsak Kittichaisaree (1987) *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, Singapore, Oxford University Press: 14 and Prescott, J.R.V. (1998) *The Gulf of Thailand*, Kuala Lumpur, Maritime Institute of Malaysia: 13-14.

36 Prescott, J.R.V. and Morgan, J.R. “Maritime Jurisdictions and Boundaries” in Morgan, J.R. and Valencia, M.J. (eds), *Atlas for Marine Policy in Southeast Asian Seas*, Berkeley, University of California Press, 1991: 44. See also Roach and Smith (1996: 124) regarding the US protest.

37 United States (1970) “Straight Baselines: Burma”, *Limits in the Seas*, No.14, Washington D.C., The Geographer, Bureau of Intelligence and Research, United States Department of State (14 March). See also, Prescott and Morgan, 1991: 14.

38 Roach and Smith, 1996: 123.

39 Notably from the United States. Roach and Smith, 1996: 123-124.

40 Through *Kret* no. 518/72/PRK dated 12 August 1972. The 1972 straight baselines system incorporated a number of islands, including the major island of Koh Tral (Phu Quoc to Vietnam), sovereignty over which was at the time disputed with Vietnam. The 1972 straight baselines claim therefore appears to have been designed to bolster Cambodia's territorial claims.

41 Through Council of State Decree dated 13 July 1982. In this legislation Cambodia's baselines were defined as being “straight baselines, linking the points of the coast and the furthest points of Kampuchea's [Cambodia's] furthest islands.” Available online: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1982_Decree.pdf>. A revision of the straight baselines declared by Cambodia in 1972 was necessitated by the conclusion of the *Agreement on Historic Waters of Vietnam and Kampuchea*, of 7 July 1982, which resolved the

Sections of these baselines depart appreciably from the general direction of the coast and include islands that are not in the immediate vicinity of the coast and it is extremely difficult to argue that the small, isolated islands or rocks used as basepoints in Cambodia's 1982 straight baseline claim constitute fringing islands. As these islands are also increasingly distant from the mainland coast, the sea area enclosed are similarly difficult to justify as being sufficiently closely linked to the land domain such that they are suitable for the regime of internal waters. A further criticism of Cambodia's 1982 claim to straight baselines (and also Vietnam's) that has been raised is that the two countries' straight baseline systems meet at a 'floating' basepoint, Point "O", out to sea.⁴² Perhaps unsurprisingly, Cambodia's straight baseline claim of 1982 gave rise to international protests.⁴³ As Roach and Smith put it, this system of straight baselines "patently does not comply with international law."⁴⁴ Similarly, Prescott has described Cambodia's straight baseline claims as "a remarkably liberal interpretation of the concepts of fringing islands and enclosed waters linked closely to the land domain."⁴⁵

China

In 1996, China claimed a system of straight baselines along most of its mainland coast and around the Paracel group of islands in the South China Sea. A detailed analysis of this baseline system by the U.S. Department of State was highly critical of the system as most of China's coastline does not meet the UNCLOS criteria for applying straight baselines.⁴⁶ There would seem to be little substance in China claiming that its entire coastline meets the criteria for employing straight baselines.⁴⁷ The straight baseline closing off the Eastern entrance to the Qiongzhou Strait between Hainan and the Chinese mainland is particularly objectionable in view of both its method of drawing and the implications for the freedom of navigation. In any case China has expressed the position that international shipping does not have a right of innocent passage in this strait.⁴⁸

two countries' sovereignty dispute over islands in the Gulf of Thailand. See, Schofield, C.H. and Tan-Mullins, M. (2008) 'Claims, Conflicts and Cooperation in the Gulf of Thailand', *Ocean Yearbook*, 22, Leiden/Boston, Martinus Nijhoff: 75-116, at 84-85 and 91-92. See also, Kittichaisaree, 1987: 22.

42 While the U.S. Department of State termed its use a "violation" of both the Geneva Convention on the Territorial Sea of 1958 and UNCLOS 1982, it has been pointed out by Prescott that other examples (for instance between Denmark and Germany, Norway and Sweden, and Finland and Sweden) of this practice do exist and do not appear to have excited adverse international comment. See United States (1983) "Straight Baselines: Vietnam", *Limits in the Seas*, no. 99, Washington, D.C., Bureau of Intelligence and Research (12 December): 7; and, Prescott, 1998: 10; Snidvongs, A. (1998) "The Oceanography of the Gulf of Thailand, Research and Management Priority," pp.1-68 in Johnston, D.M. (ed.) *SEAPOL Integrated Studies of the Gulf of Thailand*, vol. 1, Bangkok, Southeast Asian Programme on Ocean Law, Policy and Management (SEAPOL): 26-27.

43 The United States officially protested against the Cambodian claim in an *Assertion of Right* in 1986 (Roach and Smith, 1996: 77). Thailand also issued a protest note though it is worth noting that at that time Thailand did not recognize the legitimacy of the government in power in Cambodia and therefore refused to recognise that regime's declarations, including its maritime claims of 1982.

44 Roach and Smith, 2000: 59

45 See Prescott, J.R.V. (1985) *The Maritime Political Boundaries of the World*, London, Methuen: 212-213.

46 United States (1996) "Straight Baseline Claim: China", *Limits in the Seas*, No.117, Washington D.C., U.S. Department of State, Bureau of Oceans and Environmental and Scientific Affairs: 3. Available at <<http://www.state.gov/documents/organization/57692.pdf>>.

47 Herriman, M. (1997) "China's Territorial Sea Law and International Law of the Sea", *Maritime Studies*, 92 (January-February): 16.

48 *Ibid.*: 17. See also Dzurek, D.J. (1996) "The People's Republic of China Straight Baseline Claim", *Boundary and Security Bulletin*, Vol.4, No.2 (Summer): 77-89. See also UNCLOS, Part III (Articles

The enclosing of the Paracel islands by China with apparent straight baselines would seem to be clearly contrary to international law. There is no provision in the UNCLOS for baselines around mid-ocean archipelagos that are not part of an archipelagic state (as opposed to a mainland or continental state such as China).⁴⁹ In any case, the Paracels would not qualify for archipelagic status under UNCLOS because the ratio of water to land in the group would exceed the 9:1 ratio prescribed in the UNCLOS. For these reasons, China has argued that these baselines are not *archipelagic* baselines but territorial sea straight baselines.⁵⁰ China's action in drawing straight baselines around the Paracels is particularly offensive to Vietnam which also claims sovereignty over these islands; and to Indonesia which jealously protects the regime of the archipelagic state and monitors carefully the claims of other countries in this regard. It is also understood that South Korea has protested against the length and extent of China's straight baselines in the Yellow Sea, and other countries, have also protested against China's actions.

Japan

Japan has established straight baselines in a number of locations. Originally these were well inside major indentations and were not controversial,⁵¹ but in its 1996 Territorial Sea and Contiguous Zone Law, Japan claimed a more extensive system of straight baselines some of which use islands that are well offshore as turning points.⁵² The analysis of these baselines by the US Department of State determined that many of the segments were not in accordance with UNCLOS Article 7.⁵³

North Korea

Prescott has noted that, while North Korea has not proclaimed any straight baselines, it is possible to deduce that such a baseline has been drawn along its East coast.⁵⁴ In 1977, a 50 mile maritime boundary was announced measured from a claimed territorial sea straight baseline in the Sea of Japan (East Sea), as well as a military maritime boundary coincident with the claimed EEZ limit in the Yellow Sea (West Sea).⁵⁵ The U.S. has protested these claims as having no basis in international law.⁵⁶

34-45), especially Articles 35(a) and 37-38. Article 35(a) has the effect that where straight baselines drawn in accordance with UNCLOS Article have the effect of enclosing as internal waters areas which had not previously been considered as such, the transit passage regime will continue to apply.

49 In the course of the Third United Nations Conference on the Law of the Sea a number of mainland coastal States did argue that the special rules applicable to archipelagos should also be applicable to their offshore island possessions, these proposals did not prove successful. See Jayewardene, 1990: 140-142 and Tsamenyi, Schofield and Milligan, 2008.

50 Chen Degong, "China and the Law of the Sea", *Occasional Paper*, Canberra, Northeast Asia Program, Research School of Pacific and Asian Studies, Australian National University, December 1996, p. 23.

51 Prescott, 1985: 239.

52 Smith, R.W. (1997) "Territorial Disputes over Offshore Islands: International Precedents and Practices" in Kim Young-Koo (ed), *Maritime Boundary Issues and Islands Disputes in the East Asian Region*, Proceedings of the 1st Annual Conference held 4 August 1997, Pusan, Centre for Social Science Research, Korea Maritime University: 27.

53 United States (1998) "Straight Baseline and Territorial Sea Claims: Japan", *Limits in the Seas*, No. 120, (30 April), Washington D.C., U.S. Department of State.

54 Prescott, 1985: 239.

55 Roach and Smith, 1996: 80.

56 *Ibid.*

South Korea

South Korea announced four segments of straight baselines in 1978 and then a much more extensive system of straight baselines around the South and West coasts in 1996.⁵⁷ Two segments in the East simply enclose juridical bays (points 1-2 and 3-4).⁵⁸ A third series of straight baselines extends for 237 nautical miles from a rock (point 5) in the Korea Strait to Sohuksan-do, an island in the southwest of the country (point 14). The fourth segment extends north from the north coast of Sohuksan-do to Taeryong-do (point 23), through a series of straight sectors totalling 199 nautical miles. A key issues in relation to the system of straight baselines claimed by South Korea is that many of the features used as turning points are not fringing islands in the immediate vicinity of the coast.⁵⁹

Additionally, the use of straight baselines along the South coast of South Korea has the effect of bringing the entire strait (known as Cheju Hachyop) between the south coast of the country and the large island Cheju-Do within either claimed internal waters or the territorial sea of South Korea.⁶⁰ While internal waters are claimed inside the baselines, the distance between Cheju-Do and the islands in the strait used as basepoints for the baselines is less than 24 nautical miles and thus the territorial seas overlap. However, Cheju Hachyop is a strait used for international navigation and thus the regime of transit passage applies.⁶¹ Problems then arise because South Korean legislation does not acknowledge this and furthermore, places restrictions on the freedom on navigation through its territorial sea by warships and government-owned vessels on non-commercial service.⁶²

The United States lodged a lengthy protest against the Korean baseline system in 1998 but Seoul responded that this system conformed to international law as its baselines did not depart to an appreciable extent from the general direction of the coastline.⁶³

Malaysia

Malaysia has not formally claimed straight baselines but from an examination of official maps one can infer that a system of straight baselines has been established.⁶⁴ Of particular importance in this context is a map issued by the Malaysian Directorate of National Mapping on 21 December 1979 in order to illustrate Malaysia's agreed maritime boundaries and the limits of Malaysia's unilateral territorial sea and continental shelf claims.⁶⁵ Similarly, Malaysia's

⁵⁷ Prescott, 1985: 239. See, Presidential Decree No. 15133, 31 July 1996. United States (1998) "Straight Baseline Claim: South Korea", *Limits in the Seas, No.121*, Washington D.C., U.S. Department of State, Bureau of Oceans and Environmental and Scientific Affairs: 3. Available at <<http://www.state.gov/documents/organization/57685.pdf>>.

⁵⁸ That is, bays which comply with the terms of UNCLOS Article 10, including the 'semi-circle test'.

⁵⁹ UNCLOS Article 7(1).

⁶⁰ Prescott, 1991: 28.

⁶¹ See UNCLOS, Part III (Articles 34-45), especially Articles 35(a) and 37-38; and, note 47 above.

⁶² United States, 1998: 11.

⁶³ Roach And Smith, 2000: 62

⁶⁴ Kriangsak, 1987: 17-18.

⁶⁵ *The Peta Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia* or "Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia," often referred to as the *Peta Baru* ["New Map"], published by the Malaysian Directorate of National Mapping in two sheets. Although no baselines are shown on these maps, the fact that in certain areas the outer limit of the Malaysian territorial sea claim is marked with straight lines allows the conclusion to be drawn that Malaysia has constructed a system of straight baselines. The location of these baselines may then be determined by drawing lines parallel to the outer limit of the Malaysian territorial sea claim but 12 nautical miles

maritime boundary agreements with Indonesia in relation to continental shelf rights and territorial sea of 1969 and 1971 respectively.⁶⁶ Indeed, the origins of this system appear to lie in the negotiations between Indonesia and Malaysia on a continental shelf boundary between the two countries when Malaysia argued an “archipelagic” baseline to match that being claimed by Indonesia. In one part in the Malacca Strait, the limit of territorial sea is more than 59 nautical miles from the nearest Malaysia land territory and extends from far offshore, isolated islands.⁶⁷ Malaysia’s apparent claims have not been subject to international protest though it appears that this has more to do with the fact that they have not been officially announced and publicised rather than because they necessarily meet the criteria set out in UNCLOS Article 7.

It is worth noting that Malaysia enacted the Baselines of Maritime Zones Act 2006 on 1 May 2007.⁶⁸ This legislation provides for the declaration of geographical coordinates of base points for the purpose of determining the territorial sea baselines of Malaysia and for other associated matters. No geographical coordinates are specified and while most of the Act appears to be unobjectionable, there appears to be a qualification that allows the outer limits of the territorial sea to be arbitrarily declared on the recommendation of the relevant Minister. This would seem to allow the existing situation to be preserved.

Philippines

The Philippines established baselines through Republic Act No. 3046 of 17 June 1961,⁶⁹ and subsequently amended them through Republic Act No. 5446 of 18 September 1968.⁷⁰ While this system of baselines certainly appears to be archipelagic in character, enclosing as they do the approximately 7,000 islands that constitute the Philippines, the relevant Philippines legislation refers to “straight baselines”. Additionally, it is worth noting that one of the baseline segments defined by the Philippines, that closing the Moro Gulf, measures approximately 141 nautical miles – a configuration that would breach the maximum archipelagic baseline segment length limit of 125 nautical miles set out in UNCLOS Article 47(2).

The Philippines baseline claims are also complicated by its historical claims associated with its 1961 declaration that the territorial sea of the Philippines comprised the waters lying between these baselines and the limits set out in the 1898 Treaty of Paris between the U.S. and Spain and by which Spain ceded sovereignty over the Philippines to the United States.⁷¹ Thus, in accordance with the Philippines Constitution of 1973,⁷² the waters landward of these baselines

landward of the straight line limits of the Malaysian territorial sea claim. See, Schofield and Tan-Mullins, 2008: 86-87 and M.J. Valencia, “Validity of Malaysia’s baselines and territorial sea claim in the northern Malacca Strait,” *Marine Policy* 27 (2003): 367-373.

66 See United States (1970) “Continental Shelf Boundary: Indonesia-Malaysia”, *Limits in the Seas*, no. 1, Washington, D.C., Bureau of Intelligence and Research, U.S. Department of State (21 January): 2.

67 Valencia, M.J. (1991) *Malaysia and the Law of the Sea*, ISIS Malaysia, Kuala Lumpur: 20.

68 Forbes, V.L. (2007) “The Territorial Sea Datum of Malaysia”, *MIMA Bulletin*, Vol.14, No. 4: 3-8.

69 See, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf>.

70 An Act to Amend Section One of the Republic Act Numbered Thirty Hundred and Forty-Six, Entitled An Act to Define the Baselines of the Territorial Sea of the Philippines’. See, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1968_Act.pdf>.

71 *A Treaty of Peace Between the United States and Spain*, U.S. Congress, 55th Cong., 3d sess., Senate Doc. No. 62, Part 1 (Washington, Government Printing Office, 1899), pp. 5-11. The text of the Treaty may be viewed at <<http://www.yale.edu/lawweb/avalon/diplomacy/spain/sp1898.htm>>. See also, Roach and Smith, *Excessive Maritime Claims*, p.134.

72 Constitution of the Republic (in force since 17 January 1973), Article 1 at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1973_Constitution.pdf>.

were claimed to be the *internal waters* of the Philippines. Subsequently on ratifying UNCLOS, the Philippines declared that signature did not affect the sovereign rights of the Philippines under the Treaty of Paris and that the concept of archipelagic waters in the LOSC was similar to the concept of *internal waters* under the Philippines Constitution.⁷³ The Philippines does not, therefore, recognise the right of innocent or archipelagic sea lanes passage through the waters enclosed by its declared baselines.⁷⁴ The U.S. and other countries have protested these claims by the Philippines.⁷⁵ Attempts to revise and update the Philippines baseline claims and bring them into line with UNCLOS have been consistently bedevilled not only by these historical claims, embedded as they are in the nation's constitution, but also by the Philippines claims to sovereignty over the Kalaayan Islands (that is, some of the Spratly Islands) in the South China Sea, and to Sabah.⁷⁶ Most recently, efforts were made to revise and update the Philippines baselines system in 2008 but the Bill considered by the Philippines Congress failed to pass.⁷⁷

Russian Federation

The former USSR claimed a system of straight baselines in the Pacific Ocean and the Sea of Japan, which has been protested by the United States.⁷⁸

Taiwan

Taiwan claimed a system of straight baselines in 1999.⁷⁹ Specific baselines were claimed for three areas: the main island of Taiwan and “appurtenance” islands, the Pratas Islands and the Macclesfield Bank.⁸⁰ A comprehensive analysis of this system by the US State Department concluded that:

In summary, Taiwan uses straight baselines in many areas where the normal baseline, the low-water mark, should be used. While the mainland coast has some indentations, most do not meet the geographic standards, as set forth in the LOS Convention, for using straight baselines. In addition, the offshore features Taiwan uses as turning points for the straight baselines are not physically close enough to the mainland to justify incorporation. For the most part, the waters enclosed by the straight baseline system do not have the close relationship with the land as needed, but rather reflect the characteristics of the territorial sea or high seas. In these areas it would be appropriate to use the normal baseline, the low-water mark along the coastline.⁸¹

73 *Ibid.*, p. 137.

74 See, Tsamenyi, Schofield and Milligan, 2008.

75 *Ibid.*, pp. 134-138.

76 See the discussion in the papers in Institute of International Legal Studies, *Roundtable Discussion of Philippine Maritime Territory and Jurisdiction*, Diliman, Quezon City, University of the Philippines Law Center, 1995.

77 “Report Card: Senate Passes 30 bills; House, 253”, Newsbreak, 15 June 2008 <http://newsbreak.com.ph/index.php?option=com_content&task=view&id=4927&Itemid=88889051>. Agreement has, however, been reached to redefine the baselines of the Philippines “pursuant to the archipelagic doctrine in the UNCLOS” by May 2009. See, “Congress vows to meet May 2009 deadline on RP baselines”, Newsbreak 7 August 2008 <http://newsbreak.com.ph/index.php?option=com_content&task=view&id=5208&Itemid=88889051>.

78 Roach and Smith, 2000: 60.

79 *Ibid.*: 65.

80 United States (2005) “Taiwan’s Maritime Claims”, *Limits in the Seas No. 127*, Washington DC, US Department of State U.S. Department of State (15 November): 11. Available at <<http://www.state.gov/documents/organization/57674.pdf>>.

81 *Ibid.*: 15.

Thailand

Thailand has a long-standing claim to historic bay status in respect of the Bight of Thailand, that is the northernmost extension of the Gulf of Thailand. Thailand defined a 53 nautical mile long closing line for the Bight of Thailand in 1959 on the grounds that the area enclosed was “a historical gulf” and that “Thailand has so held since time immemorial.”⁸² Thailand’s historic bay claim to the Bight of Thailand has not excited any international protests.

With regard to straight baselines, Thailand claimed straight baselines in relation to three sectors of its coastline, two, Areas 1 and 2, in the Gulf of Thailand and one, Area 3, on the Andaman Sea in June 1970⁸³ and subsequently defined an additional sector, Area 4, in the Gulf of Thailand in August 1992.⁸⁴ The straight baselines declared by Thailand in 1970s are, in the East Asian context at least, relatively conservative.⁸⁵ The 1992 claim to Area 4 is more problematic.

Thailand’s 1992 claim to straight baselines effectively extends its Area 2 claim near Ko Tao in the western Gulf southwards via the Thai islets of Kra and Losin to the intersection of the Thai-Malaysia land boundary with the coast. The three baseline segments so defined are long,⁸⁶ and the basepoints in question, Kra and Losin, are very small isolated rocks,⁸⁷ distant not only from one another but also from the Thai mainland coast. It is therefore extremely hard to characterise these features as “fringing islands” or to maintain that the waters enclosed within Area 4 are sufficiently closely linked to the land to be considered subject to the regime of internal waters. The U.S. Department of State analysis of this extension to Thailand’s claimed straight baselines stated categorically that “clearly this is an excessive maritime claim.”⁸⁸

82 Thailand, Royal Gazette, 22 September 1959. See also Schofield and Tan-Mullins, 2008: 90-91.

83 The announcement of the Prime Minister’s Office concerning straight baselines and internal waters of Thailand was published in the Official Gazette, Special Volume 87, Chapter 52, 12 June 1970, available online: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_1970_Announcement.pdf>. An additional area in the Andaman Sea in the vicinity of the Thai-Myanmar boundary was apparently contemplated but was not defined in view of boundary delimitation problems between Thailand and Myanmar. See, Kriangsak, 1987: 18.

84 *UN Law of the Sea Bulletin* 25 (June 1994): 82–84. Available online: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_1992_Announcement.pdf>.

85 For example, Area 1, in the Northeast Gulf of Thailand, encloses a complex and numerous group of islands and rocks in the immediate vicinity of and masking approximately three-quarters of the relevant part of the Thai mainland coast. This was acknowledged in the U.S. analysis of these baselines. However, some concerns were raised concerning Area 2 in the Western Gulf of Thailand in the vicinity of Ko Tao and Samui Islands. Although this assessment acknowledged that the southern group of islands enclosed in Area 2 were fringing islands, with regard to the northern section of Area 2 the U.S. analysis stated that “the land/water ratio would be judged excessively high.” See U.S. Department of State, *Straight Baselines: Thailand*, LIS no. 31, (Washington, D.C., Bureau of Intelligence and Research, 24 March 1971), pp. 5 and 8. See also, Schofield and Tan-Mullins, 2008: 87-88.

86 The three baseline segments defined in Thailand’s 1992 Area 4 straight baselines claim are (from north to south) approximately 79, 95 and 63 nautical miles long respectively.

87 Kra is the more substantial of the two islets at 161 m (530 ft) elevation but both are small features with no human habitation and no man-made structures other than light beacons. Losin in contrast is 1.5 m (5 ft) high and steep-to all round.

88 United States (2000) “Straight Baseline Claim: Thailand”, *Limits in the Seas*, no. 122, Washington, D.C., Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State (8 September): 9.

Vietnam

Vietnam made a claim to straight baselines in 1977,⁸⁹ which was implemented in 1982.⁹⁰ The system of straight baselines defined by Vietnam in 1982 has been termed particularly “radical”.⁹¹ Vietnam’s claimed straight baselines start in the north and extend for a distance of approximately 850 nautical miles to enclose the entire Vietnamese coast south of the Gulf of Tonkin.⁹² The islands used as basepoints for Vietnam’s claimed straight baselines are small, scattered and largely distant from the mainland coast such that of the nine turning points defined, five are more than 50 nautical miles offshore. It is therefore exceedingly difficult to see how Vietnam’s straight baseline claims accord with UNCLOS Article 7’s requirements. Vietnam’s straight baselines claims have been subject to a highly critical assessment by the U.S. Department of State⁹³ and have been subject to U.S.⁹⁴ and Thai protests.⁹⁵

Additionally, as previously noted, the straight baseline systems of Cambodia and Vietnam meet at an as yet undefined point, Point “O,” out to sea on a straight line joining the Cambodian islands of the Poulo Wei group and the Vietnamese Poulo Panjang group of islands, which also forms the seaward limit of the two countries’ joint Historic Waters area. This point was designated as the western end of Vietnam’s 1982 straight baseline system.⁹⁶

Summary

It is abundantly clear from the foregoing review that most of the coastal States of East Asia have claimed excessive straight baselines. Indeed, Churchill and Lowe have identified eight situations where the conventional rules for drawing straight baselines appear not to have been observed by countries when establishing their straight baseline systems. These are:

1. Baselines have been used in localities where the coastline is not deeply indented.
2. Baselines have been used in localities where there is not a fringe of islands along the coast.

89 Through Vietnam’s *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf* of 12 May 1977. Available online: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf>.

90 *Declaration on Baseline of Territorial Waters* of 12 November 1982. Available online: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf>.

91 Kriangsak, 1987: 16. See also, Schofield and Tan-Mullins, 2008: 89.

92 United States (1983) *Straight Baselines: Vietnam*, Limits in the Seas, no. 99, Washington D.C., Bureau of Intelligence and Research, U.S. Department of State (12 December): 5.

93 *Ibid.* In particular the U.S. analysis highlighted that the longest distance between basepoints is 161.8 nautical miles, (the average being 84.6 nautical miles), that island basepoints averaged 39.4 nautical miles offshore with a maximum of 80.7 nautical miles offshore, and that the internal waters claimed total approximately 27,000 square nautical miles (93,000 km²).

94 The U.S. note of protest stated that “there is no basis in international law for the system of straight baselines provided in the declaration of November 12, 1982” (Roach and Smith, 1996: 102).

95 The Thai note, dated 9 December 1985, stated that between points 0 and A7, Vietnam’s claimed straight baselines were “at variance with the well-established rules of international law,” referring to both the 1958 and 1982 Conventions, and concluded that: “the Government of Thailand reserves all its rights under international law in relation to the sea areas in question and the airspace above them.” See *UN Law of the Sea Bulletin 7* (April 1986): 111.

96 The U.S. takes exception to the use of this ‘floating’ point in the sea, unrelated to any high or low tide elevation. See, Roach and Smith, 1996: 73.

3. Baselines depart to an appreciable extent from the general direction of the coast.
4. The sea areas within the lines are not sufficiently closely linked to the nearby coast to constitute internal waters.
5. Baselines are drawn to or from low-tide elevations without lighthouses or similar installations permanently above water being built upon them.
6. Baselines cut off the territorial sea of another State from the high seas or EEZ.
7. The coastal State has not clearly indicated the baselines on its navigational charts.
8. Where basepoints for the baselines have been established in the sea.

When the eight conditions outlined above are applied to straight baseline systems adopted by East Asian countries, it becomes clear that many of the conditions laid down in UNCLOS Article 7 have been breached. These breaches are summarised in Table 1. The most commonly misused rules are those requiring straight baselines only to be used when the coast is deeply indented or there is a fringe of islands adjacent to the coast, and for the baselines not to depart to any appreciable extent from the coast. However, as noted, problems of definition arise with the criteria contained in Article 7 and countries have tended to adopt a flexible approach with regard to the interpretation of phrases such as “deeply indented or cut into” and “a fringe of islands”. There is no objective test available to assess compliance with these phrases. Thus countries, such as South Korea, are able to argue that their systems do, in fact, comply.

Table 1
East Asian Straight Baseline Systems

Country	Max. length of baseline (nm)	Max. distance from coast (nm)	Conditions not met
Burma	222		1, 2, 3
Cambodia	52		1, 2, 3, 8
China	107		1, 2
Japan	62	55	1, 2
North Korea	-		7
South Korea	60	24	2
Malaysia	-		1, 2, 3, 7
Philippines	141		1, 2, 3
Russia	106		
Taiwan	109		1, 2
Thailand	98		1, 2, 3
Vietnam	161	80	1, 2, 3, 8

Source: Adapted from Prescott and Schofield, *Maritime Boundaries of the World*, Table 7.1

Of particular note in this context is the United States Department of State 1987 study which proposes a set of guidelines for evaluating straight baseline claims for their conformity with international law.⁹⁷ The study dealt mainly with the two basic concepts of deep coastal

⁹⁷ United States (1987) “Developing Standard Guidelines for Evaluating Straight Baselines”, *Limits in the Seas, No.106*, Washington D.C., U.S. Department of State, Bureau of Oceans and Environmental and

indentations and fringing islands. The proposed guidelines covered factors such as the maximum length for each baseline segment, minimum number of indentations in each baseline segment, the maximum distance offshore of individual islands and the maximum distance between islands. The aim of the US study was to suggest standard guidelines in order to allow a “reasoned evaluation” of straight baseline systems claimed around the world making it possible to identify “with a certain degree of confidence” those straight baseline systems conforming to international law and those which do not.⁹⁸

It must be emphasised, however, that these US suggestions are by no means universally accepted. Indeed, as the preamble to the study itself states, the guidelines suggested “do not have international standing as benchmarks against which all such systems should be measured”, and are not offered as “unequivocal yardsticks of the legality of straight baseline systems” but instead as “reasonable and defensible standards” which may be applied “with a realistic recognition of the fact that, in some cases, straight baseline systems having minor deviations from such standards can still be in general conformance with international law.”⁹⁹

Churchill and Lowe, however, are of the opinion that these guidelines have not had and are unlikely to have any significant impact on the practice of States.¹⁰⁰ In this context it is also unfortunate that the United States has not always been consistent in its criticism of the straight baselines of other States.¹⁰¹

Implications of Claims to Straight Baselines

Impacts on Maritime Jurisdictional claims

There are some important consequences of using straight baselines. Perhaps the most salient potential impact of excessive straight baseline claims is that they can, if accepted by other States, significantly increase the maritime areas over which the claimant coastal States have sovereignty and sovereign rights and to decrease the total area where coastal and non-coastal States share authority and use through the high seas and deep seabed regimes.¹⁰² However, as Roach and Smith have noted, properly drawn straight baselines in strict accordance with the UNCLOS rules, would not allow for a significant increase in the territorial sea.¹⁰³

Straight baselines have the potential to increase the geographical scope of coastal State maritime claims in two key ways. Firstly, such claims can increase, potentially significantly, the area of sea enclosed as internal waters. Secondly, as a direct consequence of the baselines for measuring maritime jurisdictional zones being shifted seawards, so the area of such zones may be

Scientific Affairs, U.S. Department of State (August): 3. Available at <<http://www.state.gov/documents/organization/59584.pdf>>.

98 Ibid.: 2.

99 Ibid: 2. See also, United Nations (1989) *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, New York, Office for Ocean Affairs and the Law of the Sea, United Nations.

100 Churchill, R.R. and Lowe, A.V. (1999) *The Law of the Sea*, 3rd ed., Manchester, Manchester University Press: 41.

101 Prescott and Schofield cite the example of the State Department’s differing responses to the straight baseline systems of China and Iceland. Prescott and Schofield, 2005: 148-149.

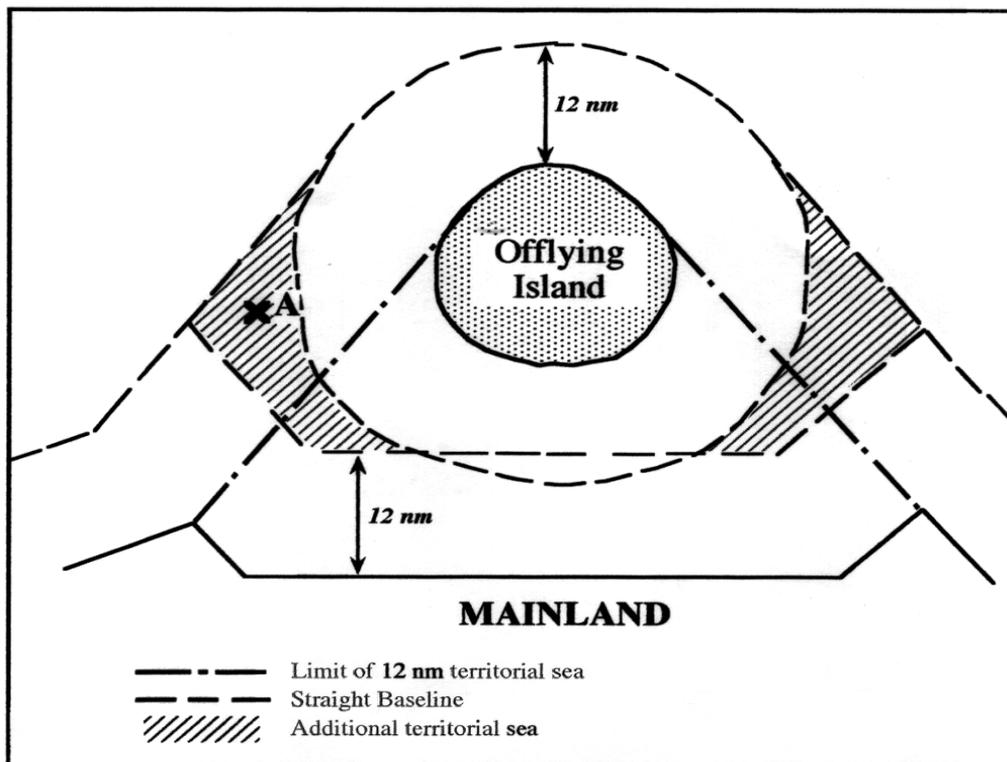
102 McDougal, M.S. and Burke, W.T. *The Public Order of the Oceans – A Contemporary International Law of the Sea*, New Haven, New Haven Press, 1987, p. 316

103 Roach and Smith, 2000: 49.

increased. In this context it is, however, it is important not to overstate the case. It is worth acknowledging that the islands often used as turning points in the construction of the straight baselines system will be capable of generating claims to maritime jurisdiction in their own right. Thus, with respect to territorial sea claims for example, the coastal State will ‘only’ gain additional territorial sea measured from straight baselines beyond 12 nautical miles from valid normal baselines. The acquisition of such additional areas of territorial sea through the use of straight baselines is shown by the shaded areas on Figure 1.

It is also the case that liberal or excessive claims to straight baselines do not necessarily translate into impressive gains with respect to continental shelf or EEZ claims. This is, again, because the islands that often provide the anchoring basepoints for baseline systems can themselves provide normal basepoints along their low-water lines¹⁰⁴ and because of the geometric reality that the greater the breadth of the maritime zone being measured, the fewer the basepoints will be required such that the impact of straight baselines is likely to be reduced further offshore. Additionally, the reality for many coastal States, and this certainly applies to many in East Asia, the proximity of maritime neighbours and the configuration of relevant coastlines means that 200 nautical mile maritime jurisdictional claims tend to converge and overlap well before the 200 nautical mile limit is achieved. Rather than having a potential impact on such limits, therefore, straight baselines may instead have a role to play in maritime boundary delimitation (see below).¹⁰⁵

Figure 1
Use of Straight Baselines



¹⁰⁴ However, this in itself raises the issue of whether the features in question can themselves be considered to be islands capable of generating claims to continental shelf and EEZ rights in accordance with UNCLOS Article 121(2) or whether they are, in fact, “rocks” incapable of generating such claims, in line with Article 121(3).

¹⁰⁵ See, Prescott and Schofield, 2005: 156-157.

International Legal Implications

A key question that arises in the context of the extravagant use of straight baselines by coastal States is whether this will influence customary norms of international law. With regard to the liberal or excessive claims to straight baselines prevalent in East Asia, might these ultimately lead to the emergence of a more liberal regional standard? Undoubtedly, as clearly demonstrated by the overview and assessment of State practice above and as indicated in Table 1, virtually all East Asian coastal States that have claimed straight baselines along all or part of their coastline have favoured distinctly flexible interpretations of UNCLOS Article 7.¹⁰⁶ This seems to indicate a clear trend in regional State practice with the potential to establish a more liberal standard for the application of straight baselines in the region.

There are, however, a number of arguments to set against this view. First and foremost, there is little doubting that the spirit and intent of Article 7 is clear: straight baselines are only to be applied in specific and restricted geographical circumstances and not in order to substantially increase the maritime space claimed by coastal States. Furthermore, all of these excessive claims made by coastal States in East Asia (and elsewhere) have been formally and often vigorously protested by the United States. Importantly, while the United States is the most frequent and systematic objector to what it views as excessive straight baseline claims, it is not alone as a number of protests on the part of other interested coastal States have been lodged against excessive straight baseline claims.¹⁰⁷ It is also worth noting that as it is unclear whether claimed rights related to liberal straight baseline claims, especially in respect of restrictions on navigation, are actually enforced (see below), little can be read into lack of protest on the part of many States, as their rights do not appear to have been compromised. Furthermore, international courts have indicated that straight baselines are not to be applied liberally. Modern international law regarding straight baselines, as reflected in UNCLOS, has its origins in the *Anglo-Norwegian Fisheries* case.¹⁰⁸ In this case, the United Kingdom challenged the right of Norway to use straight baselines along its coast, which is penetrated by deep fjords and with extensive offlying islands, rocks and reefs. The ICJ upheld the Norwegian position. However, the Court made clear that the coastal State does not have an unfettered discretion with drawing its straight baselines.¹⁰⁹ More recently, in its 2001 decision in the *Qatar v. Bahrain* case, the ICJ affirmed that the rules for drawing straight baselines in UNCLOS Article 7 should be “applied restrictively”.¹¹⁰

Scholarly opinion is divided on this issue. For example, Scovazzi has suggested that there is a customary trend toward more flexible and liberal criteria in drawing straight baselines and that

106 In the case of claims made prior to the conclusion of UNCLOS in 1982 and its subsequent entry into force in 1994, it can be observed that such claims are equally contrary to the terms Article 4 of the 1958 Convention. It is also the case that whilst many of the straight baselines claims made by East Asian coastal States predate their becoming parties to UNCLOS, these States have not ‘roled back’ their claims to bring them into conformity with the terms of Article 7 of UNCLOS.

107 For example both Thailand and Singapore protested against Vietnam’s 1982 straight baselines claim and Germany (acting on behalf of the European Union) issued a protest in relation to Thailand’s Area 4 claim of 1992.

108 *Anglo-Norwegian Fisheries* case [1951] ICJ Rep.

109 Churchill and Lowe, 1999: 35.

110 Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001 ICJ Rep, paras. 184-185, 210-215, available at <<http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>>. as cited in US Department of State, “Taiwan’s Maritime Claims”, *Limits in the Seas No. 127*, Washington DC, 15 November 2005, p. 7.

the United States is the only country resisting this trend.¹¹¹ Conversely, Roach has argued strongly for a conservative or restrictive reading of UNCLOS Article 7.¹¹² More generally, Churchill and Lowe have taken the view that the rules regarding straight baselines have passed into customary international law.¹¹³ In reaching this conclusion, however, a global, rather than regional, view was taken, and they acknowledge that widespread toleration of misuse of the rules, such as is the case in East Asia, could lead in time to a modification of the rules themselves.¹¹⁴

Maritime Boundary Issues

Despite the old adage that “good fences make good neighbors,”¹¹⁵ sometimes it proves extremely difficult, if not impossible, for a variety of reasons, to build good fences, particularly in the sea. This is the case in East Asia, mainly because the geography of the region, with its semi-enclosed seas, concave areas of coast, numerous islands (sovereignty over many of which is contested) and as a consequence of lack of political will, coupled with longstanding historic claims. This means that many maritime boundaries in East Asia remain unsettled. However, it is also the case that the liberal interpretation by regional countries of the principles in UNCLOS for drawing straight territorial sea baselines tends to hamper efforts towards the delimitation of regional maritime boundaries.

The construction of strict equidistance or median lines is often the starting point for the delimitation of maritime boundaries. Excessive straight baseline claims can be particularly problematic in this context because they have the potential to significantly deflect the line of equidistance to the distinct advantage of the state that constructed them.¹¹⁶ Although the other party in a maritime boundary delimitation will inevitably question the legitimacy of questionable straight baseline claims, such claims can complicate maritime boundary delimitation negotiations.

Such assertive claims have the potential to prompt further excessive claims where the party lacking straight baselines may insist on drawing its own straight baselines to match those of its neighbour. This appears to have been the case in the Malaysia-Indonesia continental shelf boundary negotiations.¹¹⁷ Similarly, Thailand’s decision to declare an additional set of straight baselines in the Gulf of Thailand in 1992, Area 4, appears to have been largely motivated by a desire to balance the straight baseline claims of Cambodia and Vietnam on the opposite side of the Gulf ahead of anticipated maritime boundary negotiations.¹¹⁸ There are cases, however, when one State does not recognize the straight baselines of another State and then the two States

111 Scovazzi, T. “The Establishment of Straight Baselines Systems: The Rules and the Practice” in Davor Vidas and Willy Ostreng, eds., *Order for the Oceans at the Turn of the Century* (Dordrecht, The Fridtjof Nansen Institute, 1999), pp. 445–56.

112 Roach, J.A. “Salient Issues in the Implementation of Regimes under the Law of the Sea Convention: An Overview,” in Vidas and Ostreng, (eds.) *Order for the Oceans*: 436.

113 Churchill and Lowe, 1999: 54.

114 *Ibid.*, p. 57.

115 From Robert Frost’s 1915 poem “Mending a Wall”. See, J.M. and M.J. Cohen, *The Penguin Dictionary of Quotations*, 1st ed., (Harmondsworth, Penguin Books, 1960), p. 163.

116 Prescott, J.R.V. and Schofield, C.H. (2001) “Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean”, *Maritime Briefing*, Vol.3 No.1: 3.

117 *Ibid.*.

118 Schofield and Tan-Mullins, 2008: 88.

may agree on alternative basepoints to those used for establishing straight baselines.¹¹⁹ The 1997 maritime boundary agreement concluded between Thailand and Vietnam provides a good example of this practice. Even though both sides claimed straight baselines, when the agreement came to be negotiated, both sides agreed not to use their straight baselines in the construction of a boundary line.¹²⁰

Straight baselines may also be advantageous in maritime boundary delimitation although Sohn found that systems of straight baselines were explicitly taken into account in rather less than one-third of the boundary agreements negotiated.¹²¹ As Prescott has explained:

It seems probable that the unjustified use of straight lines is primarily designed to increase the width of the combined zone of internal and territorial waters for security purposes. States may also use such lines to gain an advantage in negotiating common boundaries with neighbouring states.¹²²

Ultimately, though, there is no guarantee that straight baselines will prove influential in the delimitation of a maritime boundary.

Political Issues

Excessive and unlawful use of territorial sea straight baselines represents a form of “creeping jurisdiction” and a manifestation of the enduring political struggle between the coastal States and the maritime (or user) states for the control of maritime space. Used conservatively and in the spirit of Article 7, straight baselines allow coastal States to eliminate unnecessarily complex patterns maritime jurisdictional claims that would have resulted from claims from normal baselines as a result of especially convoluted coastal geography. However, coastal States also have a powerful incentive to employ straight baselines in a flexible manner as this enables them to maximise the extent of their claims to maritime jurisdiction. However as Roach and Smith have pointed out, an illegal straight baseline “detracts from the international community’s right to use the oceans and superjacent airspace”, creating a source of tension between coastal States keen to enhance the extent of their maritime claims on the one hand, and the international community, concerned with preserving areas beyond national jurisdiction and thus part of the common heritage on the other.¹²³ Major maritime States, most notably though not only the U.S., also have a crucial vested interest in ensuring freedoms of navigation are preserved and these are threatened by expansive straight baseline claims (see below).

The balance of maritime power in the world is shifting towards East Asia.¹²⁴ This is apparent in terms of both strategic and economic power, and associated manifestations with the size of regional shipping fleets, the leading role of the region in international shipbuilding and the

119 United Nations (2000) *Handbook on the Delimitation of Maritime Boundaries*, New York, United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, UN Publication Sales No. E.01.V.2: 32.

120 Schofield and Tan-Mullins, 2008: 98-99.

121 Sohn, L.B. (1992) “Baseline Considerations” in Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries*, Vol. 1, Dordrecht, Martinus Nijhoff Publishers: 157.

122 Prescott, J.R.V. (1987) “Straight and Archipelagic Baselines” in Blake, G.H. (ed.) *Maritime Boundaries and Ocean Resources*, London, Croom Helm: 39.

123 Roach and Smith, 2000: 48.

124 Ho, J. (2004) “The Shifting of Maritime Power and the Implications for Maritime Security in East Asia”. *Working Paper No. 68*, Singapore, Institute of Strategic and Defence Studies (June).

growth of regional navies. The political influence of the region is growing and as the focus of global maritime power shifts towards Asia, Asia will increasingly help shape the international order for both maritime security and customary international law of the sea. This trend could come to have an impact upon whether or not regional practice with straight baselines might impact upon customary international law. It also further strengthens the belief that regional countries are unlikely to resile from their positions on straight baselines.

Paradoxically, East Asia had little influence in determining the rules for territorial sea straight baselines during the negotiation of UNCLOS or its predecessor in this regard, the 1958 Convention on the Territorial Sea and the Contiguous Zone. The so-called “Asian Group” was rather ineffectual at the Third UN Conference on the Law of the Sea (UNCLOS III) when UNCLOS was negotiated,¹²⁵ and with the notable exception of the archipelagic State regime, probably achieved little in terms of furthering regional interests in the law of the sea. A somewhat different UNCLOS may have resulted if it had been negotiated in recent years (rather than in the 1970s) when Asian countries may have presented a more coordinated approach (for example, on territorial sea straight baselines) although achieving the necessary consensus would still have been difficult.

Operational Implications

There are several important operational implications of straight baseline systems. First, they restrict the freedoms of navigation and overflight available to other countries, and increase the maritime area where disputes might occur. Secondly, they complicate maritime law enforcement by placing higher demands on navigational accuracy and evidential requirements. For example, an incident may occur outside radar range from the coast and the issue of whether or not a vessel was inside the territorial sea of the coastal State is more likely to be in dispute. Thirdly, additional demands are placed on operators. Straight baselines may result in areas of territorial sea over 12 nm from the coast (such as Point A in Figure 1) where the innocent passage regime applies with no right of overflight. This means that the aviator or surface/sub-surface navigator cannot simply rely on distance from a shore to assess whether or not he/she is outside the sovereign jurisdiction of the coastal State. This becomes a very important consideration in many areas of East Asia where straight baselines have been used and as consequence, there are potential risks of misunderstandings and even conflicts. Nonetheless, it should also be noted that where the high seas or territorial sea are converted into internal waters by straight baselines, the right of innocent passage is preserved through those waters, in accordance with UNCLOS Article 8(2). Fourthly, there is the consideration whether or not countries enforce their straight baseline systems strictly. Anecdotal reports would suggest that some regional countries, such as Burma, Malaysia and Vietnam, do not although this might also be a matter of lack of capacity.

The United States has evolved the Freedom of Navigation (FON) Program to challenge “non-compliance” with customary rules of international laws such as those relating to straight baselines. This program involves bilateral consultations with the offending country and diplomatic protests, as well as the operational assertion of rights by ships and aircraft transiting in contravention of the jurisdiction claimed by the other country. The belief is that unless the U.S. exercises its rights freely to navigate and overfly international waters, straits and archipelagic waters, it may lose those rights and others, at least as a practical matter.¹²⁶

¹²⁵ Miles, E.L. (1998) *Global Ocean Politics – The Decision Process at the Third United Nations Conference on the Law of the Sea 1973 – 1982*, The Hague, Martinus Nijhoff Publishers: 24.

¹²⁶ Galdorisi, G. (1994) “The US Freedom of Navigation Program Preserving the Law of the Sea”, *Ocean and Coastal Management*, Vol.25: 182. Also, Galdorisi, G. (1996) “The United States Freedom of

Operational assertions against what the United States views as the misuse of straight baselines have been conducted in recent years against Cambodia, Philippines, Taiwan and Vietnam but not apparently against China.¹²⁷

The impact of straight baselines on the transit passage regime for straits used for international navigation should also be considered. UNCLOS Article 35 provides that where straight baselines drawn in accordance with UNCLOS Article have the effect of enclosing as internal waters areas which had not previously been considered as such, the transit passage regime will continue to apply. This is relevant to both the Cheju Hachyop off South Korea and the Quiongzhou Strait between Hainan and mainland China but both South Korea and China have national legislation in place to deny this right.

Oceans Management

East Asia aspires to a stable maritime regime for managing regional seas and national maritime interests.¹²⁸ Such a regime permits the free flow of seaborne trade and ensures that nations can pursue their national maritime interests and develop their marine resources in a ecologically sustainable manner in accordance with agreed principles of international law and without the risks of tension or conflict at sea. The use and abuse of straight baseline systems is a significant barrier to a stable maritime regime in the region. Excessive use of straight baselines inhibits both regional cooperation and the conclusion of maritime boundary agreements which in turn provide jurisdictional certainty and promote maritime stability.

Conclusions

As regional countries continue to grow economically, displaying greater political confidence and exercising increased maritime power, they are unlikely to step back from their straight baselines systems. This presents these States with both opportunities and challenges in terms of the maintenance and enforcement of their claims in a changing environment, and potentially has implications for emerging norms in regional state practice and, ultimately customary international law.

In virtually all cases, the use of straight baselines by East Asian countries might be regarded as beyond that which appears acceptable under international law. Some though are more objectionable than others. Very little basis can be found, for example, for the extreme use of straight baselines by Burma, Cambodia, Malaysia, and Vietnam. Those adopted by Japan, South Korea, Russia and Taiwan are arguably rather less objectionable. The Chinese system includes some segments that may be acceptable but others appear well outside customary rules, for example the baselines around the Paracel Islands and across the Quiongzhou Strait.

A key area of possible further research is the more detailed analysis of State practice with the law of the sea in East Asian seas. There are many examples of where State practice in the region appears to be diverging from the conventional and traditional law of the sea. Examples include

127 Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea”, *Ocean Development & International Law*, Vol.27, No.4: 402.
<http://www.defenselink.mil/policy/sections/policy_offices/gsa/fon_fy00-03.html> (accessed 17/08/2008).

128 Bateman, S. (2007) “Building good order at sea in Southeast Asia – The promise of international regimes” in Kwa Chong Guan and John K. Skogan (eds), *Maritime Security in Southeast Asia*, London, Routledge: 97.

the use of territorial sea straight baselines and claims to deny rights of navigation and overflight beyond the limits of the territorial sea. It is unclear, however, quite to what extent coastal States enforce their claimed rights within expansive straight baseline claims. It is also unclear whether this State practice will ultimately gain legitimacy and acceptance as customary law. Suffice to note, however, that we are dealing with issues where the United States, as the principal guardian of the traditional law of the sea through its publication of excessive claims and the FON program, may already be falling behind what is emerging State practice.