

WHAT VIETNAM COULD GAIN FROM REDRAWING ITS BASELINES

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INTRODUCTION

With the approach of the 50th anniversary of the straight baseline regime, the question that must still be asked is: What is the purpose of baselines? State practice sometimes gives the impression that it is to maximise maritime zones, while in theory the purpose is merely to simplify the delimitation of the territorial sea. The widespread utilisation of straight baselines, in areas where there is little or no justification in international law for doing so, makes it necessary to once more put the question of how to draw baselines on the agenda.¹

This article will first compare Vietnam's straight baseline system of 1982 with the rules established in UNCLOS, and discuss what arguments can be used to defend the Vietnamese practice. Following a largely negative conclusion to this exercise, the article will address the question of what Vietnam could gain from redrawing its baselines.

THE VIETNAMESE BASELINE SYSTEM

On 12 November 1982, the Socialist Republic of Vietnam (SRV) issued a declaration on its territorial waters, contiguous zone and extensive maritime zones using the legal terms introduced in UNCLOS, which Vietnam signed together with 118 other nations at Montego Bay a month later.² Straight baselines were drawn between 11 base points along the Vietnamese coast, stretching in a semi-circle from the island of Tho Chu (A1) in the Gulf of Thailand off the Vietnamese-Cambodian border to the island of Con Co (Tiger Island, A11) at the entrance to the Gulf of Tonkin. Vietnam's ten straight baseline segments run for a total of 846nm, enclosing an area of 27,000nm² as internal waters.³

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When evaluating whether or not it is legitimate to use straight baselines, the starting point should be to check if the coastline fulfils one of two preliminary tests. These tests are strictly geographical: Either the coastline must be “*deeply indented and cut into*” or there must be “*a fringe of islands along the coast in its immediate vicinity*” (UNCLOS Article 7 (1)). It is only legitimate to draw straight baselines if one of the preliminary tests gives a positive result.⁴ If neither of these criteria is met, the proper baseline will be identical with the low-water mark of the coast (UNCLOS Article 5), possibly intersected by shorter straight baselines to close the mouths of bays, rivers or estuaries (UNCLOS Articles 9, 10).

For areas along the coastline that fulfil one of the preliminary tests, the next step is to find appropriate base points between which the straight baseline can be drawn. The conditions regulating base points are found in UNCLOS Article 7, paragraphs 2-6. In addition to physically locating the base points, it must be established that three conditions are fulfilled. First, the general direction of the baseline should not depart from the general direction of the coast (paragraph 3). Second, the waters on the landward side of the baseline must be sufficiently close to the coast to be subject to the regime of internal waters (paragraph 3); and third, the baseline must not cut off the territorial sea of another state (paragraph 6).



The Vietnamese Baseline System of 1982

This map has been reprinted from a larger map in Nguyen Hong Thao (1997) *Nhung dieu can biet ve luat bien*, Hanoi: Nha xuất bản công an nhân dân, p. 92 (courtesy of Nguyen Hong Thao).

A straight baseline may still be drawn if there are “economic interests peculiar to the region.”

If all these three conditions are fulfilled the coastal state may utilise a straight baseline. If any of the conditions are not fulfilled then article 7, paragraph 5, provides for an additional possibility. A straight baseline may still be drawn if there are “*economic interests peculiar to the region.*” Since the Vietnamese coastline does not generally satisfy the three conditions and does not provide support for such a radical baseline system as the Vietnamese government drew in 1982, it is paragraph 5 that has been used to support Vietnam’s current baseline system.⁵ However, paragraph 5 must be seen in relation to the 200nm Exclusive Economic Zone (EEZ) introduced by UNCLOS. It seems reasonable to argue that the EEZ, the territorial sea and the contiguous zone already take care of coastal states’ economic interests. Article 7(5) may well be seen as a remnant from the period when coastal states had only territorial waters and no EEZ. Thus, the strong “*economic interests*” that are used to legitimate the subsummation of sea areas as internal waters and to push EEZ claims further out to sea, should be strong indeed. This point will be elaborated on in the following section.

OVERALL EVALUATION OF ECONOMIC INTERESTS PECULIAR TO THE REGION

The 1951 Fisheries Case between the UK and Norway established that economic interests peculiar to a region could warrant the utilisation of straight baselines even when the geographical criteria are not met.⁶ This became an integral part of international law and found its way into UNCLOS 7(5): “*Account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned.*” Fishery interests in waters close to the mainland or offshore islands could, for instance, justify the drawing of baselines further out than would otherwise be possible on the basis of the rules established in UNCLOS.

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Coastal states are of course interested in having full jurisdictional control of their immediate waters. They will therefore subsume as much sea as possible as internal waters, if this can be defended in international law, and thus gain acceptance from other nations. It should be emphasised, however, that the 1951 Fisheries Case was concerned with strong fishery interests that had existed along the Norwegian coast for centuries. “*Long usage*”, a criterion in paragraph 5, does not necessarily require such a long period, but it is important to prove a long-standing usage of resources in order to generate the required “*historical title.*”⁷

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It must be emphasised that economic interests peculiar to the region cannot be used to justify straight baselines in the absence of indented coasts or fringing islands; they can only be used to determine the alignment of parts of the baseline system where either or both of the preliminary tests have been passed.⁸ When the Vietnamese spokesman Hai Thanh (a pseudonym) defends Vietnam’s baselines by referring to UNCLOS 7(5) and argues that economic interests justify Vietnam’s straight baselines he is perhaps right in pointing out the presence of an “*historic title.*”⁹ However, it seems that he evades the basic question of whether the coast is either deeply indented or fringed with islands. Only then does the question of economic interests become relevant.¹⁰

Arguments supporting straight baselines based on the criteria of economic interests, without first making the preliminary test are therefore not acceptable in terms of international law. These arguments should rather be regarded as political statements following up the Vietnamese view in the preparatory work for UNCLOS where Vietnam held that: “*...baselines should be drawn between the outermost points of the national territory, whether continental or insular.*”¹¹ Vietnam (and Bangladesh) did not gain the necessary support for this view, and

have no right to follow up their minority view in practice while at the same time signing and ratifying a convention with a different set of rules.¹²

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The provision stated in UNCLOS 7(5) is unchanged from the 1958 *Convention on the Territorial Sea and Contiguous Zone*, which was based on the 1951 Fisheries Case. In 1958 there were no EEZs and the territorial sea generally measured only 3nm. The breadth of the territorial sea was strongly debated in political and legal circles, and the legal position of the 3nm zone remained uncertain. However, coastal states were dependent on sea resources to maintain coastal habitation and production. With only a 3nm territorial sea to secure coastal interests, the states had a legitimate reason to claim full jurisdiction in certain areas, and thus to push the territorial sea somewhat seawards. This was what justified the provision that later became article 7, paragraph 5 in UNCLOS. However, since the EEZ principle was also ratified as a part of UNCLOS, giving coastal states sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources within a 200nm zone, all strong economic interests seem already to have been satisfied. Thus it may be asked if the development of the EEZ regime makes the condition of economic interests peculiar to the region redundant?

The southeast baseline between base points A5 and A6 of southern Vietnam, which is 161.4nm long and situated more than 70nm from the coast, may be utilised to examine this question.¹³ Vietnam has here drawn a straight baseline far off the coast although the coastline does not seem to fulfil any of the preliminary criteria. The coast is not cut deeply into, and there is no fringe of islands. Thus the baseline, as it is, is illegitimate no matter how strong the economic interests might be. It is possible, however, that Vietnam could legitimately draw a less radical straight baseline here, based on indentations in the Mekong River delta (UNCLOS 7 (2)).¹⁴ It might be established that straight baselines could be drawn across river mouths in the delta and it might, on that basis, be asked whether there are strong economic interests peculiar to the region here. According to researchers studying Vietnamese fisheries, the area is shallow¹⁵ and contains a diversified biological system, which makes it important for the provision of seafood to the local population.¹⁶ It might be argued that the economic importance of this area legitimises the utilisation of straight baselines, to ensure that Vietnam can secure these resources. The question, then, is whether the provisions established by UNCLOS for the EEZ already satisfies the interest of securing seafood for the population and the livelihood of local fishermen. If this is the case, which seems likely, the purpose of the 'economic' criterion disappears.

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Within its EEZ, Vietnam is obliged to share some of its fishing surplus with other landlocked states in the region that have title to receive fishing quotas after UNCLOS, Article 62. Consequently, the coastal state does not have the same absolute control of resources in the EEZ as it has in its internal waters. However, since the coastal state only needs to share its fishing *surplus*, and, provided that there is no surplus, does not need to allow others to actually fish in the area, the EEZ regime should be considered sufficient to give the coastal state control of its resources. This indicates that the provision for strong economic interests peculiar to the region cannot be used to legitimise the drawing of straight baselines further out than article 7 calls for. The case also seems to substantiate the general point that the "*economic interest*" condition must be given substantially less weight after the introduction of the EEZ than before the adoption of UNCLOS.

The questions of fiscal crime, environmental hazards, freedom of navigation and over-flight have yet to be considered. How does the rule which applies to

the territorial sea and contiguous zone compare to that of the internal waters regime? It should be noted that the territorial sea has been expanded to 12nm, thus giving the coastal state extended jurisdictional control. This ensures the littoral state full jurisdiction, except for a need to tolerate a general right to free navigation and over-flight. The interest of free navigation is also preserved in the internal water regime: in areas which are subsumed as internal waters by a new baseline regime, but were not previously considered as internal waters, a right to innocent passage exists according to UNCLOS 8(2). In addition, there is an extended 12nm contiguous zone, measured from the limit of the territorial sea, making the combined territorial sea and contiguous zone as much as 24nm. This should be enough to maintain the coastal state's interests with regard to security, fiscal control and environmental hazards. This also gives support to further reducing the weight attributed to concern for "*economic interests peculiar to the region.*" The question of relevance for the economic considerations in the straight baseline regime is still not answered. Strong support has been found, however, for regarding the EEZ and other extended maritime zones as replacements of the old consideration for "*economic interests peculiar to the region.*"

As a conclusion, it is suggested that the influence and importance of "*economic interests*" for coastal states when delimiting their territorial sea, must be re-evaluated in the context of the EEZ regime ensured by UNCLOS, and given less weight than in the past.

EVALUATION OF VIETNAM'S STRAIGHT BASELINES

In the Vietnamese baseline system, and in the baseline systems of China and Taiwan, all of which consist uniquely of straight baselines, the main problem is that the coastlines behind the baseline segments do not generally fulfil either of the previously mentioned preliminary tests. According to customary law the utilisation of straight baselines is an exception from the low-water mark rule, not the general principle. Straight baselines should not be used to increase countries' jurisdiction over adjacent sea areas.

The Vietnamese National Assembly has recently adopted a resolution that seems to open up the possibility of revising the baseline system.

Thorough analysis of the Vietnamese coast is not necessary to show that Vietnam has made illegitimate use of the straight baseline system. This is an established fact in the law of the sea literature, and even Nguyen Hong Thao, a Vietnamese specialist on the law of the sea, concedes in a doctoral thesis on Vietnam and its maritime zones that "*the straight baseline is not perfectly compatible with article 7.*"¹⁷ The Vietnamese National Assembly has recently adopted a resolution that seems to open up the possibility of revising the baseline system.¹⁸ A closer examination of the Vietnamese coast shows that only a small portion of it, in an area just south of base point A7 up to base point A9 (between 11° and 14° northern latitude), might justify a straight baseline by fulfilling one of the preliminary tests.¹⁹ The details of how straight baselines could be drawn legitimately around Vietnam's coastline will not be discussed here, but instead the analysis will turn to discussion of what Vietnam could gain, and possibly lose, from redrawing its whole baseline system in accordance with international law.

POSITIVE EFFECTS OF REDRAWING THE BASELINES

The discussion of what Vietnam can gain from redrawing its baseline system will concern three issues: (1) *Pacta sunt servanda*; (2) Vietnam's chance to settle its disputes with other states on the delimitation of maritime zones; and, (3) Vietnam's capability to defend its interests within its territorial waters and EEZ before and after the maritime disputes have been resolved.

Pacta Sunt Servanda

A treaty in force is binding upon the parties and they must perform the rights and obligations according to the treaty in good faith.²⁰ This leading principle of *pacta sunt servanda* is the cornerstone of international law since it ensures that treaties and agreements between states function as intended. The fact that some states, Vietnam included, do not fully comply with the obligations and responsibilities established in UNCLOS, reduces the value of the convention and undermines respect for international law in general.

The straight baseline regime is a good example of an area where state practice has marked a clear trend away from the agreed provisions and towards a more and more liberal practice.

It could be argued that a particular point of law, such as that of the straight baseline regime, is not important for the overall international reputation of a state and does not affect the general appreciation of its ability to uphold its international obligations. It may well be that Vietnam considers article 7 of UNCLOS to be less important than other parts of the convention, or that it held this view in 1982, when the baselines were drawn. Vietnam may therefore have interpreted the legal regime of baselines more liberally than the *Vienna Convention on Treaties* calls for. However, such practices could be used as precedents for other states, to interpret the article in a similarly liberal way. Since *pacta sunt servanda* is the basis for the legitimacy of international law, a questionable interpretation by one country may well start a process of legislative disintegration of the whole legal regime. The straight baseline regime is a good example of an area where state practice has marked a clear trend away from the agreed provisions and towards a more and more liberal practice.

The principle of pacta sunt servanda provides a strong support for those advising Vietnam to redraw its baselines in accordance with the clauses established in UNCLOS.

By upholding a strict appliance of *pacta sunt servanda*, states would enhance the normative authority of UNCLOS. Does Vietnam have an interest in the preservation of UNCLOS? It certainly does. UNCLOS protects coastal states by giving them rights they can use to defend their interests against other states with strong merchant and military marines. By securing littoral states' sovereign rights to enormous natural resources in and under the sea, UNCLOS has established a strong legal protection for a country like Vietnam. Since Vietnam is not a strong naval power, and also does not have a strong and competitive fishing fleet, it is in great need of the legal protection that UNCLOS provides.

The principle of *pacta sunt servanda* provides strong support for those advising Vietnam to redraw its baselines in accordance with the clauses established in UNCLOS. By redrawing its baselines, Vietnam would show regional states and the international community that it is taking its obligations seriously not only in matters of the law of the sea, but also with regard to other international obligations and would undoubtedly enhance its international reputation.

Chances Of Settling Disputes

Vietnam has signed and ratified agreements with Thailand and Malaysia concerning maritime delimitation in the Gulf of Thailand. Vietnam also signed a delimitation agreement with China on the delimitation of the Gulf of Tonkin and the establishment of a fisheries regime therein on 25 December 2000. These agreements form part of a Vietnamese attempt to consolidate its territorial position, secure marine resources and ensure control of its maritime space. Much, however, remains to be done. Vietnam has not resolved its dispute with Cambodia in the Gulf of Thailand. It has a dispute with Indonesia over an important area between its southern coast and the Indonesian Natuna Island. It has a sovereignty conflict with China concerning the Paracel Islands (south of the Chinese Hainan Island, and east of central Vietnam), and it is involved in a complex dispute with China, Taiwan, the Philippines, Brunei and Malaysia over sovereignty to the Spratly Islands and the delimitation of maritime zones in the central part of the South China Sea.²¹

[Baselines]...are intended to be a simplification of the coastline, so as to facilitate negotiations between the involved parties.

All parties involved in these disputes have stated publicly that they will seek a peaceful resolution of their disputes based on UNCLOS and other parts of international law. During all of these negotiations the baselines are needed as the point of departure for measuring the territorial waters and the EEZ. They are intended to be a simplification of the coastline, so as to facilitate negotiations between the involved parties. If a baseline is drawn incorrectly, time and effort is wasted when one or both parties have to clarify why they do not accept the other party's point of departure. Not only can these efforts be time consuming, but they may also negatively influence the negotiation climate by forcing countries to retreat on matters that have been decided by national legislation.

In the case of the treaties Vietnam has signed with Thailand and Malaysia, the negotiators seem to have ignored the published baselines and to have used as the point of departure, a set of virtual or implicit baselines that were never published. The agreement between Vietnam and Thailand on the delimitation of the Gulf of Thailand was signed on 9 August 1997 and ratified by both parties on 28 February 1998.²² A question to be asked concerning this agreement is whether the Vietnamese baseline between base points A1 and A2 (and between A1 and 0 outside the area which Vietnam considers as shared Vietnamese-Cambodian historical waters), was used as the point of departure when calculating the median line between Vietnam and Thailand. This does not seem to have been the case.²³ By analysing the charts it can be seen that both the Vietnamese and Thai straight baselines must have been ignored, and that they are equally flawed. Thailand cannot have accepted the Vietnamese baselines and probably insisted that the point of departure for measuring the median line should be the low water line along the coast of Vietnam. Since Vietnam apparently accepted this in practice, if not formally, the Vietnamese baselines did not serve their purpose of being the basis for negotiations.

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In sum, the existing Vietnamese baselines seem to be a nuisance rather than a help in negotiations. If Vietnam were to retract its excessive claims to internal waters and redraw its baselines in accordance with international law, this would facilitate negotiations. A revision of Vietnam's baselines might also induce other countries to do the same. It could therefore be argued that Vietnam's capability to reach international settlements on problematic maritime issues would be facilitated by redrawing its baselines.

Securing Vietnamese Interests

Another positive gain to be made from redrawing the baselines is likely to be increased respect for Vietnamese territorial waters by other nations.

Vietnam's interests as a developing country with a long coast, rich fishing grounds, important reservoirs of oil and gas, and an as yet little developed navy, merchant fleet and fishing fleet are, among others, to open up to international commerce, attract foreign investment in the exploitation of resources under the seabed, manage its live resources in a sustainable way, and prevent the fishing fleets of other nations from fishing illegally in the Vietnamese EEZ. This package of interests can only be realised if Vietnam is able to enter maritime delimitation agreements with all of its neighbours. If the regional states remain unable to tackle their disputes in the central part of the South China Sea, Vietnam's capability to manage and exploit its resources will be severely curtailed. It is therefore in Vietnam's direct interest to adopt measures that can create the necessary preconditions for fruitful international negotiation. Every measure to improve inter-state relations in the region is one step towards a solution. A redrawing of Vietnam's baselines will remove some of the disagreements between the states, thereby creating a better foundation for negotiations.

Another positive gain to be made from redrawing the baselines is likely to be increased respect for Vietnamese territorial waters by other nations. Vietnamese

regulations on shipping, promulgated on the basis of an illegitimate baseline regime, are unlikely to be accepted and respected by the subjects of other states. Even if Vietnam were able to uphold respect for its radical baselines among parties subject to Vietnamese law, an international party could claim that any action taken outside a legitimate border in accordance with international law is inappropriate. Such a claim could be made by the country in which the ship was registered or the country where its owners resided. Therefore it could be asked what purpose a line, which does not stand the test of international law, is meant to fulfil.

NEGATIVE EFFECTS OF REDRAWING THE BASELINES

Three possible negative effects of redrawing the baselines will be discussed: (1) the increased complexity of the territorial sea; (2) the reduction of the EEZ claim; and, (3) the possibility that other states' radical baselines might gain acceptance after Vietnam had abandoned its own.

The Complexity Of The Territorial Sea

Baselines drawn between the outermost points of the national territory, encompassing islands far from the coast, will produce a straight territorial sea border with few complexities. Vietnam's current baselines do indeed leave the territorial sea border without any complexities. It is easy to map. Thus, the baselines fulfil the purpose of simplifying the delimitation of maritime zones.

A baseline drawn at the low water mark would on the contrary produce a territorial sea around each insular feature which is under Vietnamese jurisdiction, such as Tho Chu (base point A1), Hon Tai Lon (A3), Hon Bong Lan (A4), Hon Bay Canh (A5) and Hon Hai (A6). These circles of 12-nautical-mile territorial seas would not intersect with the territorial sea of the mainland since they are more than 24 nautical miles away from the coast. Therefore they would tend to produce a complex pattern of maritime jurisdiction, making it more difficult for ship captains to navigate along the coast and know the jurisdictional status of the waters they are sailing in and thus provide ocean management challenges to the Vietnamese authorities. One might leave the territorial sea when sailing from a port, and then enter another section of the territorial sea when passing one of the islands. Ships using the area for navigation, fishing or control functions are required to be aware of whether they are inside the territorial sea or not.

The question then is what UNCLOS has to say about the degree of complexity required to warrant the construction of straight baselines.

The question then is what UNCLOS has to say about the degree of complexity required to warrant the construction of straight baselines. Does the presence of islands and separate territorial zones in themselves constitute sufficient complexity? The answer is not obvious, as UNCLOS does not specifically refer to the purpose of baselines in article 7. To make the territorial sea less complex is, however, not the only purpose of such baselines.

Since the regime is constructed to satisfy several interests, it is required that the baseline system should not unduly increase an area under full national jurisdiction. The criteria established in article 7 were meant to create a balance between the interests of the coastal state and the interests of seafaring nations. The intent of not giving the coastal state the possibility to unduly increase its maritime zones was clearly evident when the straight baseline regime was adopted. States were required to prove that one of the preliminary tests was fulfilled before they could use straight baselines. Therefore, the complexity is only sufficient to warrant straight baselines when the coast is deeply indented or cut into, or fringed by islands. As mentioned, it is generally recognised that the coast of Vietnam does not meet any of the preliminary tests. This shows that the complexity produced by the islands used as base points in the Vietnamese

baseline system is not sufficient to warrant the drawing of straight baselines under international law.

Reduction in Vietnam's EEZ Claim

Since the EEZ measures 200nm from the baseline, a redrawing of baselines will necessarily lead to a smaller EEZ than the one Vietnam could claim on the basis of its current baselines. In the area between base points A5 and A6, the baseline is up to 74.2nm from the coast. With redrawn, legitimate baselines, the EEZ that Vietnam could claim in the area between Vietnam and East Malaysia, would therefore be smaller, but Vietnam could of course also extend a 200nm claim from the Ton Hai and Hai Lon islands even though they are not used as base points for a straight baseline system. The claim is unlikely to have the same weight as a claim based on a mainland coast, if it overlaps with a claim from another state, but since the distance between the Vietnamese islands and the coast of East Malaysia is more than 400nm, the redrawing of the Vietnamese baseline is not likely to have much negative effect on the Vietnamese EEZ claim. It may also be possible for Vietnam to make a continental shelf claim beyond 200nm, on the basis of natural prolongation in this area.

The question of what Vietnam could lose from redrawing its baselines cannot be answered definitively. It will depend on how the baselines are treated by other parties.

The next baseline segment, between Hon Hai (A6) and Hon Doi (A7), is even more important, since the EEZ and continental shelf claims off this baseline include the western part of the Spratly area, where Vietnam and China have issued rival concessions for exploring oil and gas. Here the same argument can be made as above. When redrawing its baseline, Vietnam can make an EEZ claim based on the baseline it draws around its offshore islands, and extend this to almost the same distance as if it used its straight baseline as point of departure. This is unlikely to give less weight to the EEZ claim than if it were based on an illegitimate baseline. Also, there will not here be any overlaps with the legitimate EEZ claims of other nations, on the proviso that no other states than Vietnam gains sovereignty to the Spratly islands and makes an EEZ claim on the basis of these islands.²⁴ It is important to make the point that any reduction in the EEZ claim caused by a revision of baselines would not mean anything if the area lost would at any rate have no chance of being attributed to Vietnam through negotiations or a court decision.

The question of what Vietnam could lose from redrawing its baselines cannot be answered definitively. It will depend on how the baselines are treated by other parties. Today it looks as if Vietnam has overlapping claims not only with Cambodia and Indonesia, but also with Malaysia, Brunei, the Philippines and China (and Taiwan). Since the probable starting point for negotiations with all or some of these states is the low-water mark of the coast, with some weight being given to offshore islands, it does not, however, seem likely that Vietnam has much to lose from redrawing its baselines. What is certain is that the area of overlapping claims will be somewhat reduced if Vietnam chooses to redraw its baseline. This will facilitate negotiations by eliminating parts of the Vietnamese claim that would at any rate be highly unlikely to get support from a court or other parties.

The Risk That Other States May Take Advantage

Even if Vietnam modifies its baselines in conformity with international law, it is not certain that other states in the region will do the same. China and Taiwan have also drawn straight baselines along sections of their coasts which do not fulfil any of the preliminary tests. Malaysia has not yet published any baselines. However, the existence of such baselines is implicit in the fact that Malaysia's official maritime map of 1979 shows straight edges to its territorial sea limits. By redrawing its own baselines, Vietnam might induce Malaysia to follow international law. On the other hand, there might be a risk that Malaysia could

adopt an even more radical system of baselines than Vietnam, even including some of the southernmost islands in the Spratly area.

The Philippines and Indonesia form a case apart. Their status, recognised in UNCLOS, as archipelagic states gives them a right to have straight archipelagic baselines. It may seem unjust that the Philippines and Indonesia can use complete systems of straight baselines, while continental states such as Vietnam, China and Malaysia, even though they have several insular features off their coasts, may not do so. But this is how UNCLOS is. For special reasons, a few states did receive a special status as archipelagic states. This does not give continental states a right to violate the general baseline regime. Then also the offshore islands of the continental states do come into consideration, albeit with less weight than a mainland coast, when the principle of proportionality is applied to the delimitation of maritime zones.

One risk which Vietnam must consider, is that China could use its power to induce other countries in the region to accept the straight baselines around Hainan and Taiwan, and even the one that encircles the Paracel Island group, even though Vietnam had revised its baseline system. This seems to be a real risk. However, one should take into consideration that Vietnam has, arguably, an even more radical baseline system than China, and would probably not be able to negotiate effectively on the basis of its existing baselines anyway. Secondly, if Vietnam shows diffidence in applying UNCLOS provisions, it may be easier to induce even China, as a great power, to do the same. Vietnam may even have discussed the matter with China in conjunction with its recent negotiations about the Gulf of Tonkin.

CONCLUSIONS

Both Vietnam and China – and also Taiwan have taken great liberties in their interpretation of UNCLOS when drawing baselines along their coasts, and one state (Malaysia) has withheld its publication of baselines. Vietnam started off the process of undermining Article 7 in UNCLOS, even before UNCLOS had been signed, by adopting its radical baseline system in November 1982. Vietnam now has an interest in reversing the process, and may again find it desirable to take the initiative. Since UNCLOS is now generally recognised by the states around the South China Sea, and has reached the status of customary international law, it does seem possible that Vietnamese action could unleash a general process of redrawing baselines.

When analysing which legal position is legally justifiable within the framework of UNCLOS Article 7, and what the implications of such a position are, an individual state is left with wide discretionary power to distort the international norm, making it more difficult to reach settlements of disputes on the basis of a correct interpretation of the law.²⁵ The responsibility of securing the legitimacy of UNCLOS and other important treaties is therefore completely in the hands of the states. A study recently undertaken by this author refutes the idea that a regional regime of straight baselines is evolving, and that Vietnam's baselines can be justified in international law.²⁶

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Vietnam's reputation as a state living up to its international obligations by upholding *pacta sunt servanda*, its ability to settle disputes, and its ability to protect its national interests within the territorial waters and the EEZ would all benefit from a more acceptable baseline regime. It is therefore recommendable that Vietnam redraws its baselines.

- 1 I would like to thank Professor Stein Tønnesson and the participants at the
conference “Human and Regional Security around the South China Sea”, Oslo
2-4 June 2000, for their many comments and suggestions for improvements to
an earlier version of this article.
- 2 Epsy Cooke Farrell (1998) *The Socialist Republic of Vietnam and the Law of
the Sea. An Analysis of Vietnamese Behavior Within the Emerging
International Oceans Regime*, The Hague: Martinus Nijhoff: 16.
- 3 Robert W. Smith (1989) ‘Global Maritime Claims’, *Ocean Development and
International Law (ODIL)*, volume 20, number 1: 83-103, 90.
- 4 United Nations, Office for Ocean Affairs and the Law of the Sea (1989)
*Baselines: An Examination of the Relevant Provisions of the United Nations
Convention on the Law of the Sea*, New York: United Nations (Hereafter United
Nations. “Baselines:... ”): 22.
- 5 Nguyen Hong Thao (1998) *Le Vietnam face aux problèmes de l’extension
maritime dans la Mer de Chine méridionale*, Villeneuve d’Ascq: 119.
- 6 The Fisheries Case, United Kingdom vs Norway. International Court of Justice
(1951) December 18th, 1951, General List no. 5.
- 7 United Nations, “Baselines:... ”, section 59: 26.
- 8 *Ibid.*, section 58: 26.
- 9 Hai Thanh as quoted in Nguyen Hong Thao, 1998: 118.
- 10 Reference is made to UNCLOS 7 (5) which states that *where the method of
straight baselines is applicable under paragraph 1, account may be taken, in
determining particular baselines... Paragraph 1 sets the bar for the preliminary
tests.*
- 11 Second Summary Records, 7th Meeting (1974), R. Platzöder (1982) *Third
United Nations Conference on the Law of the Sea, Documents*, New York,
Oceana, vol. 4: 389, as cited in Nguyen Hong Thao, 1998: 121.
- 12 Epsy Cooke Farrell, 1998: 64.
- 13 US Department of State (1983) “*Straight Baselines: Vietnam*”. *Limits in the
Seas*, number 99, 12 December: 6.
- 14 UNCLOS Article 7 (2): “*Where because of the presence of a delta and other
natural conditions the coastline is highly unstable, the appropriate points may
be selected along the furthest seaward extent of the low-water line and,
notwithstanding subsequent regression of the low-water line, the straight
baselines shall remain effective until changed by the coastal State in
accordance with this Convention.*”
- 15 The depth in this area is from 10 to 33 fathoms (approximately 18 to 60
metres), found on Defence Mapping Agency Hydrographic / Topographic
Center (Base: Chart No. 550, 6. Edition. Washington D.C.) (15 May 1982).
- 16 Personal communication with researcher Berit Aasen formerly at NIBR,
University of Oslo, February 1999.
- 17 “*Quoi que soit l’argument évoqué, on ne peut dire que le trace de la ligne de
base droite vietnamienne n’est pas parfaitement compatible avec l’article 7 de
la Convention de Montego-Bay*” (Nguyen Hong Thao, 1998: 138). Nguyen
Hong Thao has also hinted in a monograph published in Vietnam that the
government might consider redrawing its baselines: *Nhung dieu can biet ve
luat bien*, Hanoi: Nha xuat ban cong an nhan dan, 1997.
- 18 “*The National Assembly entitles [authorises] the National Assembly’s Standing
Committee and the Government to review all relevant national legislation to
consider necessary amendments in conformity with the 1982 UN Convention
on the Law of the Sea, and to safeguard the interests of Vietnam... localities
where the coastline is deeply indented and cut into, [...] the method of straight
baselines [...] may be employed in drawing the baseline from which the
territorial sea is measured*” (UN Multilateral Treaties Deposit 886); UN, Law
of the Sea Bulletin, No. 28: 5 (1995), cited after Roach and Smith (1996)
United States Responses to Excessive Maritime Claims, Second Edition,
Boston: Martinus Nijhoff, 146, footnote 13.
- 19 Johan Henrik Nossum (2000) *Straight Baselines of Vietnam*, Master Thesis of
Law, Centre for Development and the Environment, University of Oslo
(Spring).
- 20 Ian Brownlie (1992) *Principles of Public International Law*, Fourth Edition,
Oxford: Oxford University Press: 616.

- ²¹ See Ramses Amer (1995) 'Vietnam and Its Neighbours: The Border Dispute Dimension', *Contemporary Southeast Asia*, vol. 17, no. 3 (December): 298-318.
- ²² *Bangkok Post*, 29/5/98. Voice of Vietnam (Hanoi, 15/2/98 (SWB FE/3153) reported that instruments of ratification would be exchanged during Thai Foreign Minister Surin Phitsuwan's visit to Vietnam on 27-28 February 1998. It was subsequently reported in *The Nation* on 3 March that the exchange had been made and the agreement had gone in to effect "last weekend" (28 February-1 March 1998). As the Thai Foreign Minister left Hanoi on 28 February (Voice of Vietnam, Hanoi, 28/2/98 (SWB FE/3166)) it can be deduced that the ratification took place on that day. I would like to thank Dr Clive Schofield for providing me with this information.
- ²³ Why is the Thai-Vietnamese boundary aligned as it is? Of the total area, 1,718nm² (5,893km²), of the Thai-Vietnamese overlapping claims, Thailand secured 1,145nm² (66.6%) while Vietnam secured 573nm² (33.3%). At first glance it therefore appears that Thailand and Vietnam agreed to an uneven division of their area of overlapping claims. The probable reason is that the negotiation disregarded illegitimately drawn baselines and calculated the median line from the coastlines themselves, taking only some account of offshore islands. I would like to thank Dr Clive Schofield for having clarified this for me.
- ²⁴ For an argument to the effect that the Spratly islands do not have a right to an EEZ or a continental Shelf zone, see Marius Gjetnes' article in this issue of *ODIL*.
- ²⁵ Kriangsak Kittichaisaree (1987) *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, New York: Oxford University Press: 4.
- ²⁶ Nossun, Johan Henrik (2000), *Straight Baselines of Vietnam*, Centre for Development and the Environment, University of Oslo, Spring 2000.