# OCEAN STATES:
# ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA

by

Mohamed Munavvar

Submitted in partial fulfillment of the requirements for the degree of Doctor in the Science of Law (J.S.D.)

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**ABSTRACT**

The United Nations Convention on the Law of the Sea, 1982, (LOSC) has legitimized ocean states. Ocean states are archipelagic states within which their archipelago constitutes the total state territory.

The development of a new concept in the international law of the sea, which created ocean states was necessary as traditional international law, which was mainly concerned with continental or land-based states, could not be properly applied to states which consisted of archipelagos. The geographic, economic, social, political and environmental circumstances of ocean states, therefore, require a more realistic definition of their territory. Such definition must also conform to the public perception of ocean states, formed through a lengthy process of interaction between the inhabitants of the state and their surrounding waters and inter-connecting islands. Accordingly, the archipelagic concept in the modern law of the sea has created an entirely new, yet eminently functional method of acquisition of territory in international law.

Nevertheless the archipelagic concept must not be viewed simply in terms of expanded coastal jurisdiction by certain states, but as a practical as well as functional basis for the determination of the territorial limits of such "ocean" states. In other words, the waters inter-connecting the islands of the archipelago <u>are</u> a constituent part of the <u>territory</u> of the archipelagic state. Furthermore, in the case of many smaller ocean states, their ocean areas are of greater importance than their land territory.

Although size, nature and requirements of the various ocean states differ greatly, the archipelagic concept provides the necessary <u>territorial</u> basis for their national unity, independence and integrity. Most critically, the new concept also determines the essential basis of such ocean states' sustainable development.

## ABBREVIATIONS

| | |
|---|---|
| ICJ | International Court of Justice |
| I.L.C. | International Law Commission |
| ILM | International Legal Materials |
| IMO | International Maritime Organisation |
| LOSC | United Nations Convention on the Law of the Sea, 1982 |
| Territorial Sea Convention | Convention on the Territorial Sea and the Contiguous Zone, Geneva, 1958 |
| U.N. | United Nations |
| UNCLOS I | First United Nations Conference on the Law of the Sea, 1958 |
| UNCLOS III | Third United Nations Conference on the Law of the Sea |
| U.N.T.S. | United Nations Treaty Series |

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Mohamed Munavvar

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# 1. INTRODUCTION

## 1.1 The Scope, Purpose and Methodology of the Study

Human societies have a strong attachment to territory and seek to exercise absolute control over areas that are regarded as vital living space.[1] Since very early times human beings have systematically partitioned the geographical space in which they lived. Today, the territory of a nation state outlines the geographical extent of its jurisdiction.

On the meaning and significance of territory Prof. Charles De Visscher wrote:

> "The firm configuration of its territory furnishes the state with the recognized setting for the exercise of its sovereign powers. The at least relative stability of this territory is a function of the exclusive authority that the state exercises in it and of the coexistence beyond its frontiers of political entities endowed with similar prerogatives.
>
> This stability is above all a factor of security , of the security that peoples feel in the shelter of recognized frontiers ___ a confidence that has grown in them with the consolidation, in a community of aspirations and memories, of the bonds uniting them to the soil that they occupy. It is this sentiment that explains the extreme sensitiveness of opinion to everything that touches territorial integrity."[2]

In agreeing with Prof. De Visscher, Prof. R.J. Jennings added:

> "The mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis."[3]

However, even today, many territorial claims of nations and nation states remain unresolved. This is despite the fact

that most of these claims are for land areas, and international law provides adequate mechanisms for determining the sovereignty of states over land areas.

The territorial claims of the peoples inhabiting ocean states comprised wholly of archipelagos have added a new dimension to the territorial question in international law. Such states seek to determine their territorial limits on the basis of unity of their islands and the waters interconnecting them.

The traditional international law, both customary and codified, was designed to deal with continental masses and not with groups of midocean islands. Thus, the concepts, categories and, indeed, the very terms of the traditional law of the sea, have been applied to archipelagos with great difficulty and often with unsatisfactory results.

International law has traditionally considered as territory of a state only its land areas. The sea was considered a res nullius, over which a coastal state could only exercise limited functional sovereignty. Even in the case of the territorial sea, some contend that a coastal state only has servitude rights in its territorial sea.[1]

However, the outlook and beliefs of the peoples and governments of ocean states are quite different. They consider the waters interconnecting and surrounding the islands of the archipelago as "territory". They do not consider the sea surrounding and interconnecting their islands

as a mere appendage to land territory. They consider it as an integral part of their territory and, in some cases, of more importance than the land areas. The Indonesian concepts of "wawasan nusantara" and "tanah air" and the definition of territory in the constitutions of archipelagic states illustrate the deep understanding of the peoples of archipelagic states as to what their territory is and how they perceive their national boundaries.

In this regard it is important to distinguish the question of archipelagos from that of individual islands in the international law of the sea. The question concerning the status of islands which had been raised in a number of international forums since 1881[5] deals with the allocation of maritime spaces to islands and the role of islands in the delimitation of maritime areas between states with opposite or adjacent coasts. The question of archipelagos which also had attracted the attention of lawyers as early as 1889,[6] however, is about considering a group of islands as a single entity on the basis of their geographical, economic, political, environmental and historical circumstances. Such particular circumstances of archipelagos and the special needs of archipelagic states as nation states merited the discussion of the question of archipelagos separate from that of islands in the law of the sea.

The question of archipelagos initially was not, however, adequately discussed by international bodies and jurists for

the simple reason that priority was given to other matters considered more crucial. Indeed, it was not until the middle of the present century, that the terminology and a rudimentary philosophy for the archipelagic concept made an appearance in official instruments and pronouncements.

Although the first United Nations Conference on the Law of the Sea, held in 1958, had before it a preparatory document on the question of archipelagos,[7] the Conference did not, in fact, take up this matter. However, Article 4 of the Convention on the Territorial Sea and the Contiguous Zone[8], adopted at the end of the Conference, recognized the principles enunciated by the International Court of Justice in the Anglo - Norwegian Fisheries Case[9], and provided a regime for coastal archipelagos.

The question of archipelagos, thus, was not considered, at length and in some detail, until the Third United Nations Conference on the Law of the Sea. This attention resulted from the appearance on the international scene of a number of states which were wholly comprised of islands and which proposed a number of new conceptual ideas to define their national territories.

The United Nations Convention on the Law of the Sea of 1982,[10] adopted by the Third United Nations Conference on the Law of the Sea, thus provides a special regime for states which are constituted wholly by one or more archipelagos. The Convention also lists certain geographic conditions which an

archipelago must be able to meet in order to proclaim the regime provided by it. As a result those archipelagic states, whose geographic situation does not allow them to claim the benefits of the regime established by the Convention, are excluded.[11]

Nevertheless, the Law of the Sea Convention (LOSC), by restricting the archipelagic regime to certain archipelagic states and by not addressing certain questions, such as the passage of vessels carrying dangerous, hazardous, noxious and pollutant cargoes through archipelagic waters, has fallen short of providing a comprehensive solution to the question of archipelagos. Accordingly a number of important questions remain to be resolved.

This study examines the law concerning the waters of different types of archipelagos, with particular emphasis on the nature, status and the regime of the waters of archipelagic states. This study further explores the scope of specific principles of the archipelagic concept adaptable for the different types of archipelagos and the boundaries of such principles within accepted international law.

The question of archipelagos is examined in this study from the following perspectives :

Firstly, ocean states, as sovereign states within which their archipelago constitutes the total state territory, require the determination of their national territory in the context of public perceptions as nations. The relationship

between sovereignty and territory is built upon a connecting link : the people in the territory, or if it is devoid of permanent settlement, at least the activities of people within the territory.[12] That link in the case of ocean states is the use of the waters interconnecting their islands by the people of such states and their activities in those waters and reliance on such waters for their sustenance and the sense of unity of the state provided by the interconnecting waters. Determination of the territorial limits of archipelagic states, as perceived by the inhabitants, is an essential first step towards nation-building and the socio-economic development of the communities of archipelagic states. In this respect, archipelagic states as nation states, require the same jurisdiction within their territorial boundaries as do continental states in theirs.

Secondly, other states carry out certain activities, including navigation and passage, in the water areas falling under the jurisdiction of archipelagic states. The rights to carry out such activities in the areas in which such activities have been carried out, is recognized under customary international law. However, archipelagic states need to regulate such activities not only for the purpose of carrying out their functions as states, but also because such activities may have negative impacts on them. Thus, it is important to determine the manner and scope of such regulation.

Thirdly, archipelagos and even archipelagic states, differ from each other geographically, economically, politically, ecologically and culturally. Though there is a similarity in the claims of archipelagos and the factors on which their claims are based, the requirements and the situation of each archipelago and, indeed, each archipelagic state, are different from each other. Some archipelagos, such as Indonesia are comprised of thousands of islands, some of which are larger than some continental states, and are spread over a large area and include many straits used for international navigation. Other archipelagos comprise only a few islands, the largest of which may barely be a square mile in area. Thus, it is inconceivable that the concerns of all archipelagos could be addressed by a few general legal provisions. Each archipelago has to be considered individually, taking into consideration its specific geographical, economic, ecological, social and political circumstances, the activities of its inhabitants, and of other users in the surrounding waters, in order to determine the territorial jurisdiction of the concerned archipelago.

Fourthly, among ocean states there are some very small and low lying states - archipelagos that are particularly vulnerable to environmental disasters and whose existence is already threatened by global climate change. The survival of such states depends on the sound management of the oceans and marine resources. Thus, the extent of their jurisdiction is

of prime importance to their national survival.

Further, the global environmental concerns of today and the responsibility of states for sustainable development of resources and environment place the archipelagic concept in a very contemporary and dynamic context. The archipelagic concept is a necessary foundation for the sustainable development of resources and environment of states comprising of archipelagos, particularly those archipelagic states whose existence and survival depend on the ocean and its resources.

Like some of the few other studies on the question of archipelagos, this work also focuses on the main aspects of the question of archipelagos : namely, the definition of archipelagos and archipelagic states; the nature and the status of archipelagic waters; the regime of archipelagic waters and passage through archipelagic waters.

Chapter I examines the archipelagic claims, the reasons for such claims and objections by other states to these claims.

Chapter II traces the history of the development of the archipelagic concept and doctrine in international law. This Chapter also looks at state practice relating to various types of archipelagos and the consideration of the question of archipelagos at various international fora, particularly the United Nations Conferences on the Law of the Sea.

Chapter III examines the definitions of archipelagos and archipelagic states, the definitions provided in the LOSC, and

the actual, existing circumstances of archipelagos and archipelagic states.

Chapter IV analyses the nature, status and the regime of archipelagic waters. Traditionally, waters landward of baselines are regarded as internal waters. In the case of archipelagic states, the LOSC provides a sui generis regime for such waters, while providing an internal waters regime for waters enclosed by coastal archipelagos. However, this study looks at the nature of archipelagic waters as forming an integral part of the territory of archipelagic states. This Chapter also examines the rights and activities of other states in the waters of archipelagos and the rights of archipelagos to regulate such activities.

As claims and practices of different states and their assessment are central to the subject of this study, it frequently employs a comparative method in its examination of the question of archipelagos in the international law of the sea.

However, at the outset it will be helpful to give a brief outline of the archipelagic concept itself.

## 1.2 The archipelagic concept

An archipelago, in the most general terms, has been defined as a group of islands. Islands encompass approximately 7 per cent of the land area of the earth and number over 500,000, covering an area of the Earth's surface

that exceeds 3,823,000 square miles.[13] They range in size from mere dots or pinnacles to extensive land masses and can be arranged geographically, in arcs, quadrangles, triangles, and various linear and quasigeometric patterns. Depending on the location, archipelagos have been categorized into coastal and midocean archipelagos.

As the term "archipelago" is geographical, it is necessary to ascertain the legal or juridical meaning assigned to the term. Some states have even tried to return to the original meaning of the term "archipelago", contending that an archipelago is essentially a body of water studded with islands, rather than islands with water around them.

The fundamental question with regard to midocean archipelagos in international law, is whether the territorial sea should be measured from the coast of each island, or a method may be applied under which the territorial sea would be considered as relating to a group of islands as a whole and would, therefore, be measured from some system of baselines drawn between the outer most islands.[14] Consequently, it may be said that the archipelagic concept, the archipelagic doctrine, or the archipelagic principle, __ whatever term one may use, is about a group of islands and the waters surrounding them as a single entity for the purpose of delimiting the maritime zones of the island group as a single unit.

Under customary international law, each island has its

own territorial sea, which is measured from the low water mark on shore. This position, traditionally, has been understood to have also been extended to islands of archipelagos.

The archipelagic concept envisages the method of drawing straight baselines -- a series of imaginary lines, between the outermost islands of an archipelago. The underlying basis of the archipelagic concept is the unity of land, water, the resources and the people into a single entity. Such a concept finds its justification in the relationship between the land, water and the people inhabiting the islands of the archipelago. The interaction of geography, economics, politics and, in some cases, history are important in this context of an archipelago.

In order to understand the archipelagic concept, it is essential to recall the manners in which it has been extended to different archipelagic types :

a) Coastal archipelagos : Coastal archipelagos have been integrated with the mainland territory of a particular state. The Norwegian straight baselines system is the classic example of this type. The law of the sea provides a basic system for the integration of coastal archipelagos into the maritime regimes of the continental territory of states;

b) Archipelagos with one or more dominating main islands: The second manner in which the problem has been dealt with is the method that has been adopted by states which are entirely insular in geography, but have one or more dominating

main islands. This system accepted in principle that the dominating main island or islands constitute "mainland" in a manner similar to that of coastal states with coastal archipelagos. Smaller, fringing islands are "tied to the "mainland" by a system of straight baselines. The United Kingdom, Cuba, Haiti, Iceland and many other states have employed this "concept";

c) Midocean archipelagos : The third manner of application of the archipelagic concept involves the consolidation of midocean archipelagos into a single unit by a system of straight baselines. Normally, this insular type differs from the second system in the scale of the archipelago. It covers a larger area than the second category and there is no single larger island that dominates the total land area of the archipelago.[15]

A new dimension to the concept of archipelagos was introduced at the Third United Nations Conference on the Law of the Sea. At this conference independent states, which were wholly comprised of islands, claimed a special archipelagic status which became the archipelagic state concept. Since then, archipelagic state concept has become the major subject of discussions on archipelagos and, in fact, is the one which is specifically addressed in the LOSC.

The LOSC defines an archipelago as a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such

Figure 1.1 Traditional concept: Territorial sea around each island

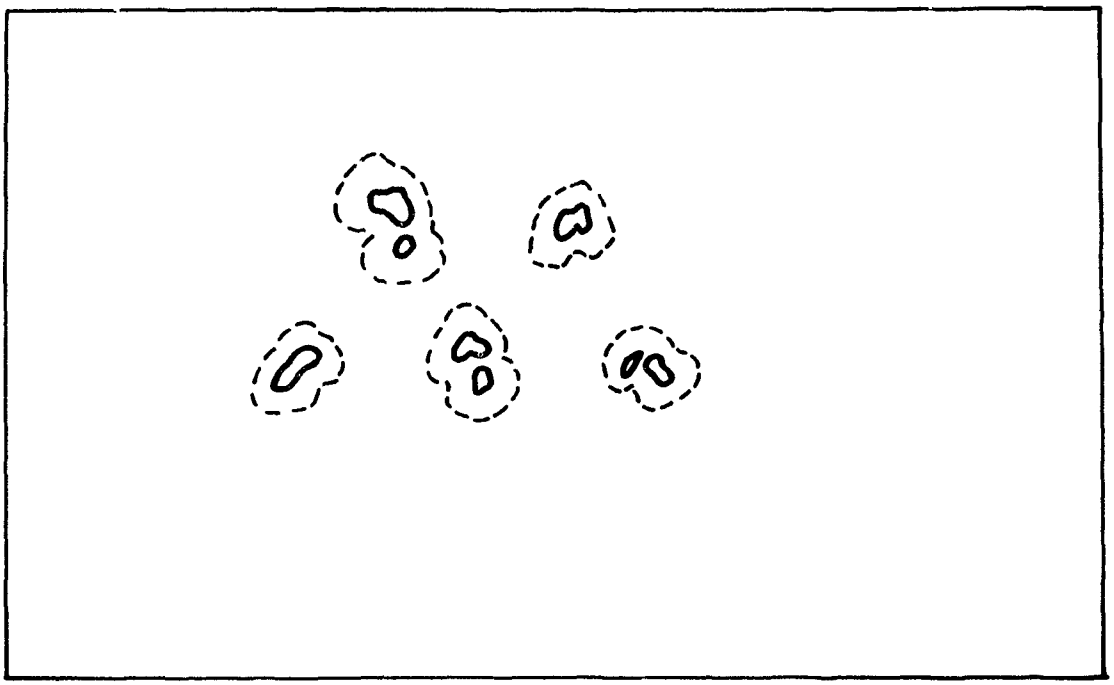
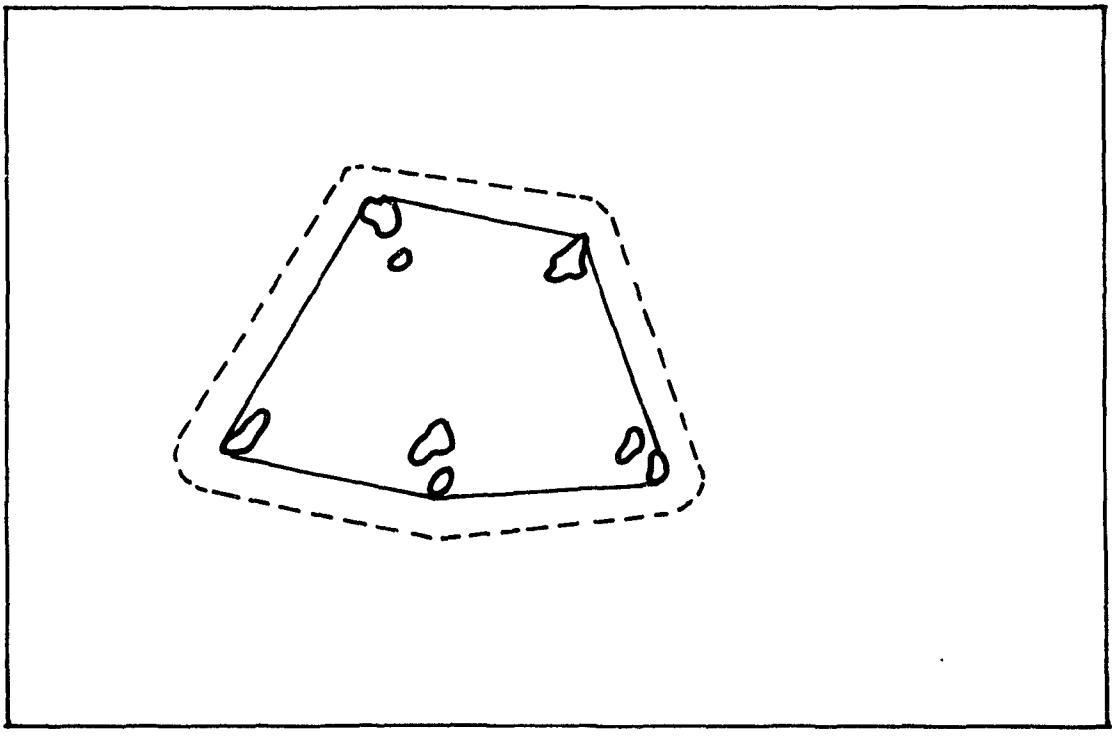


Figure 1.2 Archipelagic concept



islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.[16] This definition gives the criteria, according to which a group of islands may be considered an archipelago as : geographical, economic, and political, or historical. These are the same factors on which the claims of archipelagos for a special regime were based on. From this definition it can be inferred that a special regime may be justifiable for every archipelago.

However, the LOSC does not provide a special regime for every archipelago. It does so only to archipelagic states - states that are constituted wholly by one or more archipelagos. Thus, the main requisite for achieving a special regime for an archipelago would seem to be its statehood. But then again, it is not every archipelagic state that achieves the right to a special regime under the Convention. The LOSC gives that right only to those archipelagic states which are in a position to meet certain listed geographic conditions.[17] As the geographical situation of a state is something that states themselves are normally unable to alter, the archipelagic regime that is provided in the LOSC is applicable only to certain archipelagic states.

The essence of the archipelagic claim is that the waters between and around the islands that are inside the straight baselines, connecting the outermost islands of the

archipelago, are considered national or internal waters, as is the case with waters landward of baselines in other circumstances. Such a claim has not been generally recognized by other states and the LOSC provides only a sui generis regime for the waters of archipelagic states. This study examines the nature and status of the waters interconnecting the islands of archipelagos that constitute ocean states as forming a constituent part of the territory of such ocean states.

The archipelagic concept gives rise to two conflicting sets of interests. On the one hand, there are the interests of the archipelagic states for whom the preservation of the island group's unity is of key importance and which necessarily involve jurisdiction over intervening waters and seabed areas. On the other hand, there is the use of such waters by other states. Such use depends on existing international law and is based on the principle of freedom of the seas. Additional significance to this factor is given by the fact that some archipelagic states are either wholly strategically located or are interlaced with straits that are used for international navigation or both.[18] A straight baseline system would automatically place such straits under the jurisdiction of a single state and may thus hinder international navigation in certain straits or even result in the closure of some straits to international navigation.

The following Chapter examines in detail the interests

and claims of archipelagos and the interests of other states in the waters of archipelagos.

**END NOTES.**

1. For further details on the relationship between territory and society, see : Mellor, Roy E.H. Nation, State, and Territory : A Political Geography. London: Routledge, 1989, at 53.

2. De Visscher, C. Theory and Reality in Public International Law. Princeton: Princeton University Press, 1957, at 197.

3. Jennings, Robert Y. The Acquisition of Territory in International Law. Manchester: Manchester University Press, 1963, at 2.

4. See Ngantcha, Francis. The Right of Innocent Passage and the Evolution of the International Law of the Sea. London: Pinter Publishers, 1990, pp. 15 - 23.

5. See, United Nations, Office for Ocean Affairs and the Law of the Sea. The Law of the Sea: Regime of Islands. Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the sea. New York: U.N. Publication, 1988, at 2.

6. At the Hamburg meeting of the Institut de Droit International in 1889, the Norwegian jurist Aubert presented a report on the special conditions of the Norwegian coast for the delimitation of territorial waters. See, 11 Annuaire de L'Institut de Droit International, 1889, at 136-147

7. U.N. Doc. A/CONF. 13/18 of 29 November 1957, entitled, "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos.", by Jens Evensen.

8. 516 U.N.T.S. 205.

9. International Court of Justice, Fisheries Case (United Kingdom v. Norway), Judgment of December 18, 1951, Reports of Judgments, Advisory Opinions and Orders, at 116 et seq.

10. Hereinafter referred to as the Law of the Sea Convention or the Convention or LOSC. For a full text of the Convention see : United Nations, The Law of the Sea. United Nations Convention on the Law of the Sea, with Index and Final Act of the Third United Nations Conference on the Law of the Sea. New York: U.N. Publications, 1983.

11. For Example, Seychelles, Mauritius and Kiribati are too widely scattered to produce a ratio of water to land less than 9 : 1 as required by the Convention. See Prescott, J.R.V. The Maritime Political Boundaries of the World. London: Methuen, 1985, pp. 167, 185 and 338.

12. Gottmann, Jean. The Significance of Territory. Charlottesville: The University Press of Virginia, 1973, at 4.

13. Hodgson, Robert, D. Islands : Normal and Special Circumstances. The Geographer, Bureau of Intelligence and Research (INR). Washington, D.C., Dept. of State, RGES - 3, December 10, 1973, at 4.

14. Fitzmaurice, Gerald. "Some Results of the Geneva Conference on the Law of the Sea", 8 The International and Comparative Law Quarterly, 1959, at 88; and Jayewardene, Hiran W. The Regime of Islands in International Law. Dordrecht: Martinus Nijhoff Publishers, 1990, at 104.

15. Hodgson, Robert D. supra note 13 at 25.

16. Article 46, LOSC, supra note 10.

17. Article 47, LOSC, supra note 10.

18. For instance, Indonesia and the Philippines lie across important shipping routes. Several important sea routes from the Suez Canal and the Persian Gulf to China, Japan, North and South America, including the Sunda, Lombok and Macassar Straits pass through Indonesia.

## 2. CHAPTER I. ARCHIPELAGOS : THE PROBLEM

### 2.0 INTRODUCTION

The conflicting interests of insular control and maritime mobility form the core of the archipelagic question in international law of the sea. This conflict of interests is reflected in the claims for archipelagic status and objections to those claims. Thus, a thorough examination of these conflicting interests is essential for understanding the existing archipelagic regimes.

The interests of states making archipelagic claims differ among archipelagic types and they determine the nature of the claims of each archipelagic type. However, the rationale for the claims and the factors on which the claims are based by every state making an archipelagic claim are similar, if not the same. Though the importance given to individual factors by each state making the claim may be varied. Archipelagic claims, in general, are based on geographical, economic, political and historical factors.

Objections to archipelagic claims are made by the leading maritime powers and are based mainly on the threats posed by archipelagic claims to international navigation in the waters that would be enclosed by the straight baselines drawn around the outermost islands of archipelagos.

The archipelagic concept itself is a concept of geography which was borrowed from the science of geography by scholars

who in their own field of scholarship, had to deal with the archipelago but lacked the analytical tools with which to define its nature.[1] Since it is the geography of islands that makes a group of islands an archipelago in the first place, a brief examination of the geographical background of islands, atolls and archipelagos is essential before considering the rationales for archipelagic claims.

## 2.1 GEOGRAPHICAL BACKGROUND

### 2.1.1 Islands

An island is a piece of land surrounded by water.[2] In this respect, the continental land masses, which are commonly known as continents and not islands, may also be described as islands. The term "island", however, is usually reserved for relatively smaller land fragments.[3] Land territories that are smaller than continents[4], but situated above mean high water at all times and which can be defined generically as islands number more than half a million.[5] Approximately seven percent of the land area of the Earth is encompassed by oceanic islands and combined, islands cover an area of the Earth's surface that exceeds 3,823,000 square miles.[6] Islands range in size from mere dots or pinnacles to extensive land masses.[7]

Islands are situated in different manners and patterns. Some are located adjacent to continental masses and some are dispersed in midocean in singular isolation or in groups.

Many islands are arranged, geographically in arcs, quadrangles, triangles and various linear and quasigeometric patterns.[8]

Islands are associated with all the continents and all the open oceans and like other major surface features of the Earth are the result of plate tectonics.[9] Plate tectonics are the movements of large plates of the Earth's surface in relation to one another.[10] These plates, the larger half a dozen, each larger than a continent and many smaller plates that make up the Earth's surface are more or less completely separated along mappable geological lines.[11] The plates themselves are made up of an oceanic part, which consists mainly of basaltic rock, and a continental part, which consists mainly of granitic rock.[12] The oceanic areas cover about two thirds of the Earth's surface and the continental granitic areas cover the other third of the Earth's surface.[13] The islands on the oceanic parts of the plates are termed oceanic islands and those on the continental parts are called continental islands.[14]

Continental islands are usually recognizable from any map that shows the edge of the continental shelf.[15] The geological structure of continental islands is usually similar to that of parts of the main continent nearby and their size, shape and rocks reflect the processes of uplift and erosion of the major land masses.[16] Most of the larger islands of the world, such as Java, Borneo, Sri Lanka, Britain and

Newfoundland are continental.[17]

Oceanic islands rise to the surface from the basaltic parts of the Earth's plates and are formed as a result of a different set of processes, associated with the process of plate tectonics.[18] Three types of oceanic islands, oceanic ridge islands, hot spot islands, and the islands of island arcs, are distinguished as resulting from different tectonic processes.[19] In general terms, all three types are formed by volcanic processes, although the volcanic action itself may differ from case to case.[20]

Captain James Cook, after exploring the Pacific, identified two types of islands : "high islands" and "low islands".[21] High islands are of continental or volcanic rocks and could be volcanic with or without fringing or barrier coral reefs and some could have belts or terraces of elevated coral limestone on volcanic rock slopes.[22] Low islands are flat with their ground surface, at most, a few meters above mean low tide level and are of coral limestone and are found in tropical and subtropical seas.[23]

In addition to these, islands are also classified into; (a) volcanic islands, which are generally rather small and often very high and are generally in irregular clusters (e.g. Kerguelen, Fiji), or in arcuate loops, festoons or "island arcs" (e.g. Aleutians, Banda Arc); (b) low coral islands which appear either as accumulations of coral sand and shingle on the surface of a coral reef or as a slightly emerged

limestone platform of formerly living coral not more than three meters above mean low water; (c) emerged coral islands, which are constructed of coral and algal limestones, often dolomitized and partly phosphatized; (d) barrier islands, which are constructed entirely of terrigenous or bioclastic sands; (e) non-marine islands, these are various types of islands in nonmarine settings, such as ephemeral islands built up from gravel, sand and mud bars, delta islands of the same sort, and various lacustrine islands.[24]

A further classification of islands situated in the tropical and subtropical climates is into; (a) large islands, all of which are of continental origin; (b) small islands, continental and oceanic; (c) low islands, mostly oceanic and composed of coral limestone.[25] These three categories have in common coral reefs, mangrove swamps and warm weather.[26]

Small continental islands are in many ways similar to oceanic islands, but are likely to have a more complicated geology, to be less isolated, and to have a larger and more diverse bio-data.[27]

The most relevant classification of islands to the present study is the classification of islands into continental and oceanic, which to a certain extent influenced the classification of archipelagos into continental and midocean. Continental islands predominate in the regions in the Indo-Pacific known as Malesia and Melanesia, and in the Atlantic almost all of the West Indies are continental.[28]

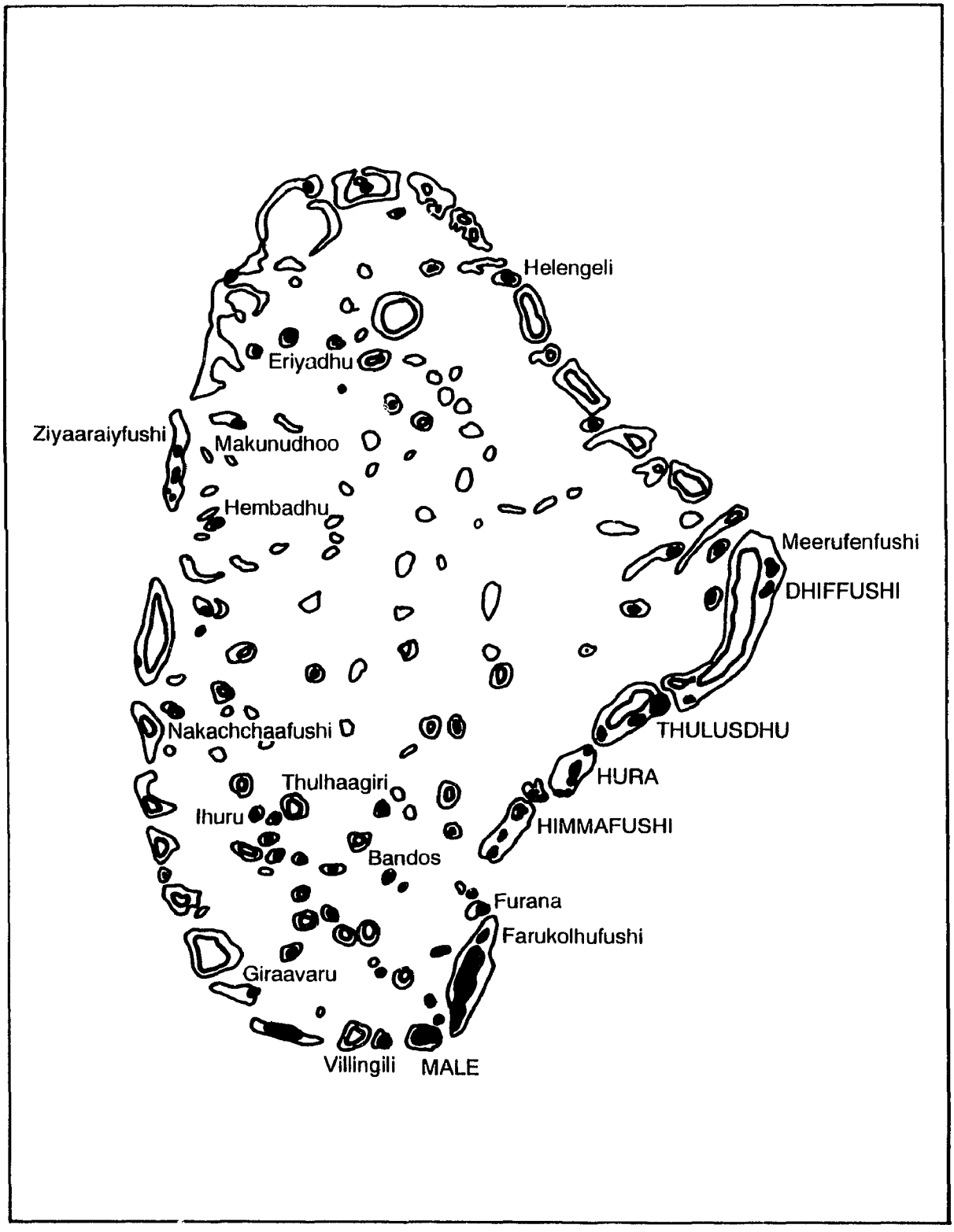
The principal oceanic island groups and regions are Polynesia, Micronesia, Macronesia, the Western Indian Ocean islands, the Galapagos, Juan Fernandez, possibly most of the Aleutians, and a few isolated islands that do not belong to any group or region, such as Clipperton, Cocos, Bermuda, St. Helena, Ascension, Tristan d'Acunha, etc.[29]

### 2.1.2 Atolls

An atoll[30] (Fig. 2) is an annular organic reef enclosing a lagoon.[31] The shapes of atolls range from circular to very irregular.[32] Atolls primarily consist of a chain of tiny, low limestone islets (motus) which partially crown a coral reef, which normally is submerged completely at high tide but heads dry at low water.[33] The continuity of the reef may be broken in places by channels, sometimes as deep as the lagoon.[34] The low, flat islands that crown the reefs, especially the smaller ones are susceptible to damage or even outright destruction by storms, but they have nevertheless been settled by oceanic peoples like the Maldivians, Polynesians, and Micronesians for many centuries.[35]

Atolls are the product of the final stage of a continuing upgrowth of reef around a sinking extinct volcanic island that had long since disappeared from view.[36] The reasons for subsidence are related to the geological nature of and the geological processes occurring in the ocean floors.[37]

Figure 2. An atoll (Kaafu Atoll, Maldives)




Source: Ministry of Tourism Maldives: Hotel & Resort Guide Malé: Ministry of Tourism, 1989.

Reefs are composed of reef limestone or reef rock. Reef rock is biohermal if it consists of a growth lattice of interlocking organisms and detrital if it consists of fragments of either attached or solitary organisms, or fragments of older consolidated reef rock.[38]

The upper surface of an atoll reef is an almost flat surface called the reef flat, located at or near low tide level.[39] On the windward side of atolls the reef flat is almost always planed behind the seaward growing edge; usually there is a zonation from biohermal reef rock on the seaward side to detrital reef rock on the lagoon-ward side. On the leeward side of atolls the reef flat may be either constructed or planed.[40] The reef on the leeward side may be incompletely constructed; i.e., long stretches of it may lie below low tide level and still be in the process of building upto present sea level.[41]

Most of the world's atolls are concentrated in the tropical Indo - Pacific region between latitudes 25 degrees North and 25 degrees South, although a few are in the Atlantic, off the coast of Brazil.[42] Atolls vary greatly in their dimensions. The large atolls of the Maldive Islands, for example, have diameters of as much as fifty or more miles.[43] Many of the Pacific atolls have diameters of about five miles.[44] In some instances small atolls have developed on the margin of a large atoll.[45] Good examples of such small atolls are to be found on the margins of Thiladhunmathi

Atoll in the Maldive Islands in the Indian Ocean.[46]

### 2.1.3 Archipelagos

The term "archipelago" originated from the Italian term "arcipelago", which was derived from "arci" - chief or most important, and "pelago" - sea or pool,[47] thus the literal translation being "chief sea". The term "archipelago", itself a term of geography, was originally used for the Aegean Sea between Greece and Asia Minor, and later to mean an island studded sea.[48] Since then, the term archipelago has been defined as "a group of islands",[49] a "sea studded with islands"[50] and an "expanse of water with many scattered islands".[51]

Despite the numerous existing definitions, it is clear that none of them conveys the real essence of the term, as the geographical characteristics of archipelagos vary widely depending upon the number, size, shape and position of islands as well as of islets, rocks and reefs.[52] However, it is said that, by transposition the term archipelago has come to refer to a group of islands within the sea and that the islands are the main component of an archipelago.[53] Jens Evensen, is his often cited paper entitled "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos", which was submitted to the First United Nations Conference on the Law of the Sea, defines an archipelago as a formation of two or more islands (islets or

rocks) which geographically may be considered as a whole.[54]

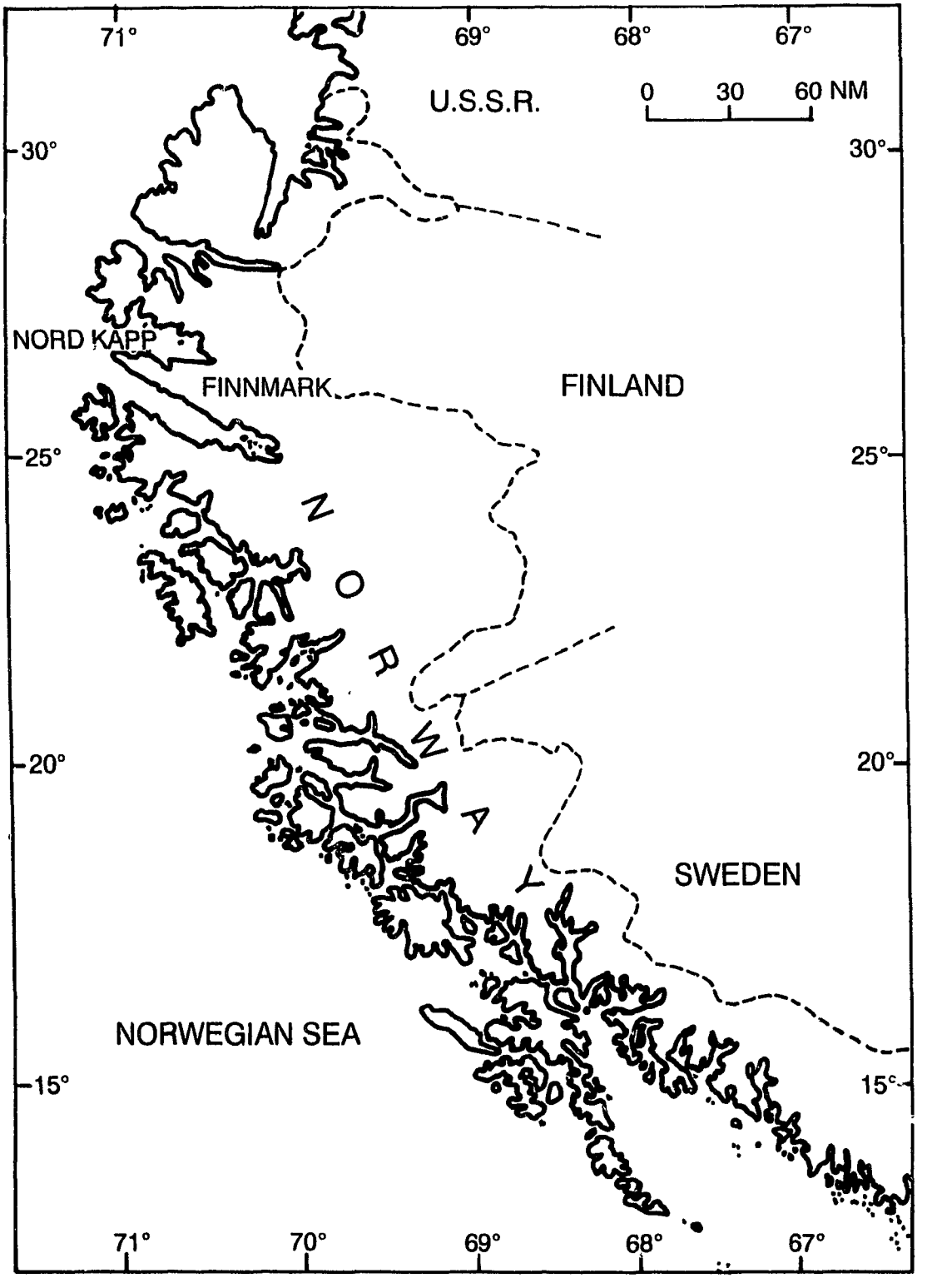
The physical characteristics of archipelagos differ very widely. As groups of islands, most archipelagos are associated with oceanic ridges, such as the Maldives and the Lakshadweep, or submerged areas which, at some geological time in the past, were part of continental territories, such as the Andaman and Nicobar, Indonesian and the Philippine groups.[55] In some cases, archipelagos form a fence or rampart for the mainland against the oceans, as for instance, the Norwegian "Skjaergaard", whilst in others they protrude from the mainland out into the sea like a peninsula or a cape, as for example, the Cuban Cays or the Keys of Florida.[56]

Geographically, a broad distinction is made between continental or coastal archipelagos and midocean or outlying archipelagos.[57] Midocean archipelagos are further divided on the basis of the political status of archipelagos into archipelagos forming the whole territory of states, i.e., archipelagic states and midocean archipelagos belonging to continental states.[58]

A. Coastal Archipelagos

Coastal or continental archipelagos are those situated so close to the mainland that they may reasonably be considered to be part and parcel thereof, forming more or less an outer coastline.[59] The Norwegian "Skjaergaard" (Fig. 3) and the archipelagos offered by the coasts of Finland, Greenland, Sweden, Yugoslavia and certain stretches of the coasts of

Figure 3. A coastal archipelago (Norwegian "Skjaergaard")




Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps, New York : U.N. Publication, 1989

Alaska and Canada are typical examples of coastal archipelagos.[60]

(i) The Norwegian Skjaergaard : The most typical example of a coastal archipelago is the Norwegian coastal archipelago called "Skjaergaard" which stretches out almost all along the coast of Norway forming a fence or a marked outer coastline towards the sea.[61] It consists of some 120,000 islands, islets and rocks, and lies along the whole of the coast of the mainland from the southern extremity to the North Cape. Within the "Skjaergaard", almost every island has its large and its small bays, countless arms of sea, straits, channels and mere waterways which serve as a means of communication for the local population which inhabits the islands and the coastal region of the mainland. The whole of this region is mountainous with comparatively shallow banks situated along the coast.

(ii) The Canadian Arctic Archipelago : The Canadian Arctic Archipelago is one of the largest in the world and consists of a labyrinth of islands and headlands of various sizes and shapes.[62] This triangular shaped archipelago consists of 73 major islands with an area of more than 50 square miles each, and some 18,114 smaller islands. The very large islands of this archipelago are Baffin, Devon and Ellesmere on its east side and Victoria, Banks and Melville on the west. Almost all the land formations of the Archipelago are mountainous in character. The mainland coast is broken by

large indentations in the form of bays and gulfs, including a huge inland sea, the Hudson Bay. Almost all of these bodies of water are seeded with countless islands, rocks and reefs.

To the north of Parry Channel, an east-west waterway crossing the middle of the Archipelago, the Queen Elizabeth Islands group, constituted of large and small islands of various shapes, virtually all of them deeply indented, is interspersed with bodies of water equally varied in size and shape. The northern section of the Archipelago is linked with the southern by a string of five islands lying in a zigzag fashion across west Barrow Strait in Parry Channel, forming inter-island passages varying from 8 to 15.5 miles.

(iii) The Mergui Archipelago : The Mergui Archipelago is a group of about 900 islands in the Andaman Sea off the Tenasserim coast of Lower Burma.[63] The cluster of islands of the archipelago begins with Mali Kyun in the north and ends beyond the southern limits of Burma. The archipelago includes Kadan, Thayawthadangyi, Daung, Sellore, Bentinck, Letsok-aw, Kanmaw, Lanbi, and Zadetkyi islands. The islands of the Mergui Archipelago are mountainous and jungle covered and their main inhabitants are Selungs or sea gypsies.

(iv) The Bijagos Islands : The Bijagos Islands, also called Bissagos Islands, lie 30 miles off the coast of Guinea-Bissau.[64] They constitute an archipelago of 15 main islands, which include the islands of Caravela, Carache, Formosa, Uno, Orango, Orangozinho, Bubaque, and Roxa. The

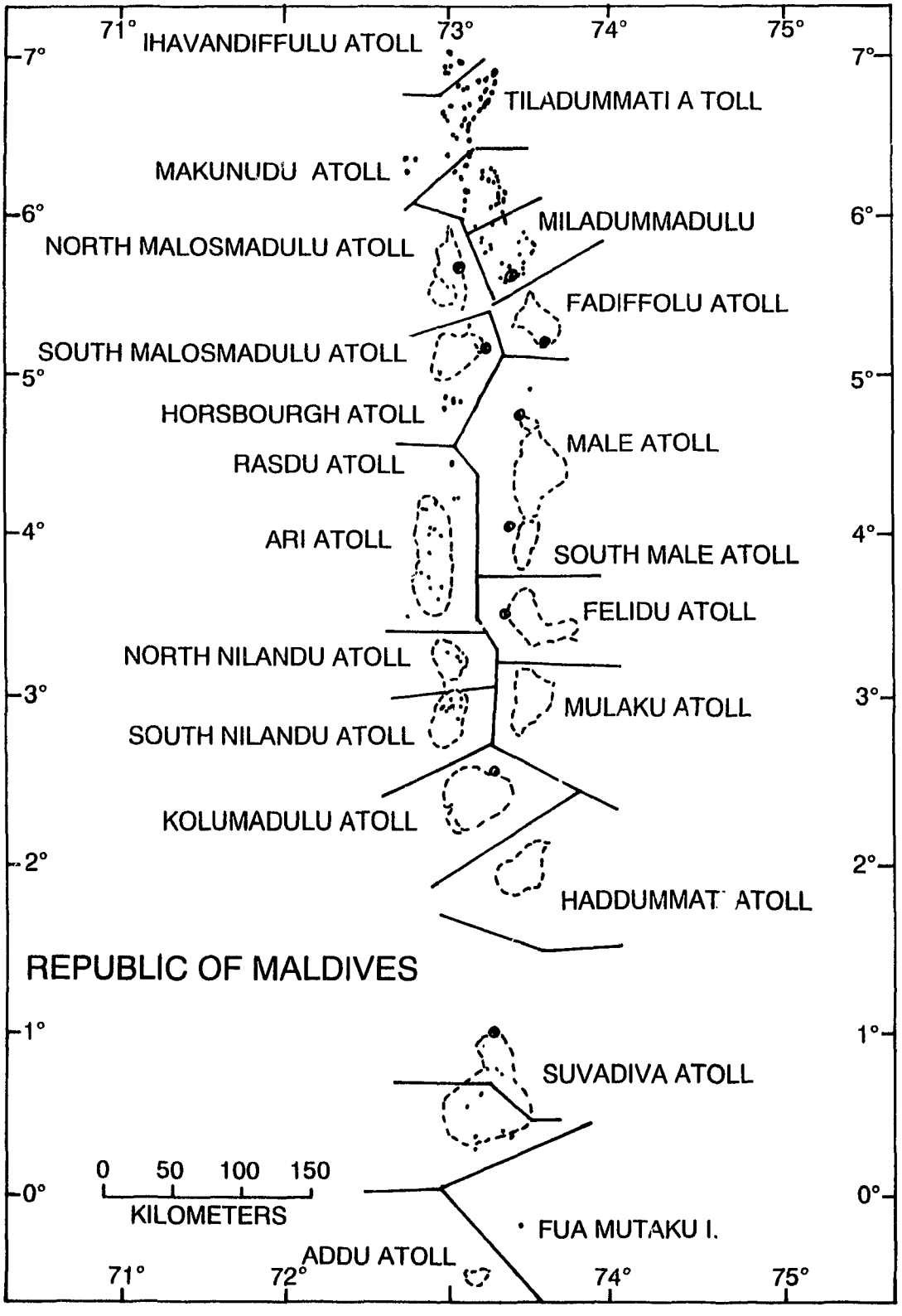
Bijagos Islands are covered with a lush vegetation and have a population of 25,713 (1979 est.).[65]

B. Archipelagic states

Midocean or outlying archipelagos are defined as groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of or outer coastline of the mainland.[66] Examples of midocean archipelagos are the Maldives (Fig. 4), Fiji, Galapagos, Hawaii, Indonesia and the Philippines. Distinction is usually made between midocean archipelagos belonging to continental states from those forming the whole territory of a state, i.e., archipelagic states. These two types of midocean archipelagos are considered separately in this study. Faeroe Islands are an example of a mid ocean archipelago belonging to a continental state and the Maldive Islands are an example of a midocean archipelago forming the whole territory of an independent state.[67] Archipelagic states within which their archipelago constitutes the total state territory are ocean states. The archipelagic concept as applicable to such ocean states is the main subject of this study.

The number of states which fall within the definition of an archipelagic state is somewhere between twenty five and thirty five.[68] The islands forming these ocean states are scattered over large expanses of the sea and each such state

Figure 4. A midocean archipelago (the Maldive Islands)




Source: Ministry of Foreign Affairs, Republic of Maldives.

has specific geographical features. We shall here discuss the geographical features of some of the main archipelagic states.

(i) Bahamas : Bahamas is an archipelago on the edge of the West Indies, spread across the tropic of cancer and about 90,000 square miles (233,000 square kilometers) of ocean in the Western Atlantic with a population of 235,000.[69] Bahamas consists of about 700 islands and cays and almost 2,400 low, barren rock formations, located off the south eastern coast of Florida, with a total land area of 5353 square miles. Only about 22 of these islands and cays are inhabited.

New Providence which houses the capital, Nassau, is the most important island, and the 104 mile long and 40 miles wid Andros is the largest.

The islands of the Bahamas are geologically composed of coral and other marine organisms. They are generally flat and mostly only a few feet above sea level. Most of the islands are long and narrow, each rising from the eastern shore to a low ridge, beyond which lie lagoons and mangrove swamps. Coral reefs mark the shorelines.

The Bahamas has narrow passages between islands of the group. The north west Provident Channel and the Crooked Island Passage are important shipping routes between the North and Central and South America.[70]

(ii) Fiji : Situated in the South West Pacific Ocean, Fiji has a total land area of 18,333 square kilometers (7,055

square miles), encompasses approximately 844 islands and islets and has a population of 715,375.[71] The major islands and island groups of Fiji are Viti Levu, Vanua Levu, Taveuni, Kadavu, Lomaiviti Group, Yasawa Group, Lau Group and Rotuma. The largest islands are Viti Levu, having a land area of 4,010 square miles and Vanua Levu, having a land area of 2,137 square miles.

The distance from the northern most to the southern most islands is around 1,200 kilometers and that from the western to the eastern extremities is about 650 kilometers.

The main Fiji archipelago lies between the 15th and 22nd degrees of South Latitude and between the 174th degree of East Longitude and the 177th degree of West Longitude from the meridian of Greenwich. The islands of Rotuma are geographically separated from the main archipelago and lie between the 12th and 15th degrees of South Latitude and between 175th and 180th degrees of East Latitude from the meridian of Greenwich.

The islands comprising the Fiji archipelago, with the exception of some islands in the Koro Sea, rise from two submerged platforms. The western platform, which is the broader of the two, gives rise to the islands of Viti Levu, Vanua Levu, Taveuni and the Lomaiviti and the Yasawa Groups. The island of Kadavu is based on a small portion of the platform which appears to have been broken away from the main platform. The numerous islands of the Lau Group, scattered

across more than 4,000 square miles, are based on the elongated and narrow eastern platform. The two platforms are separated in the south by the relatively deep waters of the Koro Sea and joined in the North by the Nanuku Passage.

The larger islands are "high" islands built mainly of ancient volcanic and andesite rocks and partly of Cretaceous and Tertiary sediments. The other islands vary greatly in structural form and a great number consist wholly or partly of limestone. These generally rise steeply from the shore and have flat topped profiles.

Coral reefs surround practically all of the islands, with barrier reefs occurring at the seaward edges of the submarine platforms and at the outer margins of the wide shore flats. The most extensive reef is the Great Sea Reef which extends, with only a few navigable passages, for nearly 300 miles in a protecting arc along the north western fringe of the archipelago.

Only a hundred of the islands of the Fiji archipelago are permanently inhabited but many more are used by the Fijian people for planting food crops or as temporary bases for the purpose of fishing expeditions.

Fiji is centrally placed among the other island territories of the South West Pacific and acts as a gateway to them. It also lies on the main air and sea routes between Australia, New Zealand, and the United States of America and Canada. Fiji is crossed by two important shipping routes -

the Nanaku Passage and the Kandayu Strait.[72]

(iii) Indonesia : Indonesia is the largest archipelagic state in the world and one of its most populous countries with a population of 147.5 million.[73] It is also one of the leading advocates of the archipelagic doctrine. The Indonesian archipelago is unique because of its peculiar shape and varied composition. It has some of the largest islands in the world which are separated from innumerable smaller and tiny islands by very shallow, as well as some of the deeper, waters of the world. These waters range from a few to some hundreds of miles in width.

Indonesia stretches some 5,120 kilometers from east to west across the equator, the greater part being below the equator. Indonesia consists of 13,677 islands, of which only 3,000 are inhabited, and has a land and sea area of 4.8 million square kilometers, of which only approximately 1.9 million square kilometers are land.

The Indonesian islands are commonly divided into four groups. the first of these is composed of the larger islands, formerly known collectively as the great Sunda Complex, consisting of Sumatra, Java, Borneo, and Sulawesi. The second group is made up of the islands east of Java from Bali to Timor, known as the little or lesser Sunda Islands. The Maluku Islands between Sulawesi and the lesser Sunda Islands comprise the third group; and the fourth group is Irian Jaya, the western part of the island of New Guinea.

Indonesia occupies a position of strategic importance between the Asian and Australian continents and within most of the important Asian waters. It forms a natural barrier separating the Indian Ocean, the South china Sea, and the Pacific Ocean. With Malaysia, it commands one of the busiest waterways of the world, the Strait of Malacca. Through the islands of Indonesia also pass other important sea routes from the Suez Canal and the Persian Gulf to china, Japan, North and South America, including the passages of Selat Sunda, Selat Lombok, and the Macassar Strait. Travel between Australia and East Asia, as well as to North America, must traverse the archipelago.

(iv) The Maldives : The Republic of Maldives is an archipelago of around 1,200 tiny coral islands spread over an area of 90,000 square kilometers of the Indian Ocean.[74] It has a population of 214,000. The islands of the Maldives are grouped in twenty six clusters or atolls forming a long narrow chain. It extends 820 kilometers in a north south direction and measures 120 kilometers from east to west. It is situated 644 kilometers south west of Sri Lanka and roughly the same distance from the Southern tip of India.

Although geographically there are 26 natural atolls and 200 inhabited islands, these are administered as 19 atolls and 202 island communities.

The islands of the Maldivian archipelago are flat, only rarely rising 1.5 meters above sea level. Most of them are

patches of coral or small sandbanks, with none of the islands exceeding 2.5 square kilometers in area. The total land area of the islands is 298 square kilometers.

The islands are covered with tropical vegetation, groves of breadfruit trees and coconut palms towering above dense shrubs and flowers. The soil is sandy, highly alkaline, and deficient in nitrogen, potash and iron, and thus agricultural potential is severely limited.

Fourteen of the Maldivian atolls have lagoons that afford anchorages for small vessels. East West passage through the islands is provided by a number of deep channels. Uncharted and unmarked reefs pose a hazard to boats travelling between islands especially at night.

Modern cargo vessels, including large oil tankers bound for Japan pass through the Eight Degree Channel between the northern extremity of the Maldives and India's Minicoy Island in the Laccadive Sea.

(v) The Philippines : The Philippine archipelago lies southeast of the Asian continent, separating South China Sea from Philippine Sea and Pacific Ocean beyond.[75] It occupies an area of approximately 1,788,000 square kilometers (520,170 square nautical miles) that stretches for 1,850 kilometers from north to south from about the fifth to the twentieth parallels north latitude and has a population of 50.4 million.

The Philippines consist of about 7,100 islands, islets and rocks above water, with a combined land area of 300,000

square kilometers (115,800 square miles). The principal islands of the Philippine archipelago are Luzon, Mindanao, Palawan, Samar, Leyte, Negros, Panay, Cebu, Bohal, Mindoro and Masbate. Most of the Philippine islands are separated by distances of less than 24 miles, a few by more than 50 miles but not any of those adjacent to each other on any side lie beyond 83 miles.

Only a thousand or so of the Philippine islands are populated, and fewer than one half of these are larger than 2.5 square kilometers. Eleven islands make up 94 percent of the Philippine landmass, and two of these - Luzon and Mindanao- measure 105,000 and 95,000 square kilometers, respectively.

Topographically, the Philippines is broken up by the sea, which gives it one of the largest coastlines of any nation in the World. Its coastline of 34,600 kilometers (21,500 statute miles) is highly irregular and fringed with numerous coral reefs, gulfs and lagoons.

As an archipelagic state, the Philippines is often claimed to be an island studded sea rather than a group of islands with necessary appurtenances of adjacent waters.[76] The distinction between these two geographic concepts, according to the Philippine jurist Miriam Defensor Santiago, is that as an island studded sea, an archipelagic state comprises sea which must have a territorial basis, and the delimitation of its metes and bounds must be determined

according to the modes of acquisition of state territory recognized by international law.[77] But were it merely a group of islands with necessary appurtenances of adjacent waters, the delimitation of their breadth seaward would have an international aspect in that the international validity of such delimitation would be necessarily governed by the principles of international law.[78] This seems to be true for almost all the archipelagic states, particularly the smaller ones with numerous islands.

C. Midocean Archipelagos of Continental States

(i) Faeroe Islands : The Faeroe Islands are located in the North Atlantic between Iceland and the Shetland Islands.[79] They form a self-governing community within the Kingdom of Denmark with a population of 44,800 (1984 est.). The Faeroes are comprised of 17 inhabited islands and numerous islets and reefs with a total area of 540 square miles (1,399 square kilometers). The principal islands of this archipelago are Streymoy, Eysturoy, Vagar, Sudhuroy, Sandoy and Bordhoy.

The islands comprise of volcanic rocks covered by a thin layer of maraine or peat soil and are high and rugged with perpendicular cliffs (highest at Slaettaratindur 2,894 feet or 882 meters on Eysturoy) and flat summits separated by narrow ravines. The coasts are deeply indented with fjords, and the narrow passages between islands are agitated by strong tidal currents.

The inhabitants of the Faeroe Islands live in small settlements almost all of which are on the coasts and their economy is based on fishing and related industries.

(ii) The Galapagos Islands : The Galapagos or the Colon Archipelago is a group of islands in the eastern Pacific Ocean.[80] It is administratively the Province of Galapagos of Ecuador. The Galapagos has a population of 6,094 (1982 est.). The Galapagos are a group of 16 islands with associated islets and rocks lying athwart the Equator 600 miles (1,000 kilometers) west of the mainland of Ecuador. The Galapagos Islands are scattered over an area of 23,000 square miles of ocean and have a total land area of 3,000 square miles.

The Galapagos Islands are formed of lava piles and dotted with volcanoes. The striking ruggedness of their landscape is accentuated by high volcanic mountains, craters, and cliffs.

The inhabitants of the Galapagos islands are mostly Ecuadorians who live in settlements on San Cristobal, Santa Maria, Isabela, and Santa Cruz islands.

(iii) The Andaman and Nicobar Islands and the Laccadive Islands : The Andaman and Nicobar Islands : The Andaman and Nicobar Islands form India's Union Territory of Andaman and the Nicobar Islands.[81] They consist of about 321 islands with an area of 8293 square kilometers and are spread over a length of 700 kilometers and a breadth of 250 kilometers in the Bay of Bengal with the Ten Degree Channel separating the

Andaman group of islands from the Nicobar group.

The Andaman and Nicobar Islands lie in a long and narrow broken chain approximately north-south sprawling like an arc. The distance from the Landfall Island, the northern most island in the Andaman group to the Little Andaman, the southern most is 352 kilometers. The Nicobar Islands stretching from Car Nicobar to Great Nicobar cover a distance of 262 kilometers. The distance between Little Andaman and Car Nicobar is 96 kilometers making a total of 700 kilometers.

The northern most island is 901 kilometers away from the mouth of Hoogly river in India and about 190 kilometers from Burma. The southern most island is Great Nicobar which is only 150 kilometers away from Sumatra in Indonesia.

Areawise the Andaman group is bigger than the Nicobar group. There are five big islands in the Andaman Group, namely North Andaman, Middle Andaman, Baratang, South Andaman and Rutland Islands. There are also five big islands in the Nicobar Group, namely Car Nicobar, Katchal, Nan Cowrie, Kamata and Great Nicobar.

The terrain of the Andaman Group of islands is generally mountainous with ranges of hills enclosing narrow valleys. The coasts of the Andamans are deeply indented forming a number of safe harbours and tidal creeks. The Nicobar group of islands are surrounded by coral reefs and shallow seas.

Only 38 of the Andaman and Nicobar islands are inhabited with a population of 188,741.

Laccadives Islands : The Union Territory of Lakshadweep of India, earlier known as Laccadive, Minicoy and Amindivi islands are coral islands scattered in the Arabian Sea.[82] With a total land area of only 32 square kilometers and a population of 40,249 they form the smallest Union Territory of India.

The Lakshadweep archipelago consists of 12 atolls, 3 reefs, 5 submerged banks and islands. Out of the 36 islands only 10 are inhabited. They are Kavaratti, Androth, Agatti, Kalpeni (Laccadive group), Amini, Kadmat, Kittan, Chetlat, Bitra (Amindivi group) and Minicoy. These inhabited islands cover an area of 26.2 square kilometers.

Androth has the largest land area with 4.8 square kilometers and Bitra is the smallest inhabited island with an area of 0.1 square kilometers only.

The uninhabited islands have a total area of 2.3 square kilometers. Most of the Lakshadweep islands are long and narrow. Minicoy is the longest with 11 kilometers and width is greatest in Androth where it measures 2.4 kilometers across. Androth lying nearest to the Indian mainland, is 228 kilometers away from Calicut.

The islands do not show any major topographic features and are largely flat and generally rise to a height of only a few meters above sea level.

## 2.2. ARCHIPELAGIC CLAIMS AND REASONS FOR THEIR CLAIMS

In general, the various maritime zones of a state are measured from the low water mark of the coastline, and extend to a line which is, at every point equidistant from the nearest land.[83] This method of delimitation of maritime zones, while appropriate to a land mass with a relatively regular coastline, may be impractical or dysfunctional when applied to irregular geographical circumstances.[84] In which cases, a system of straight baselines may be more appropriate.[85]

The method of drawing of baselines from which the various maritime zones are to be measured is the fundamental question with regard to archipelagos.[86] Some contend that the applicable rule, in the case of archipelagos, is that each individual island should exercise jurisdiction over its own belt of territorial waters.[87] However, a growing body of opinion recognises that within reasonable limits, a straight baseline method may be used to connect the outermost islands in the formation, until intervening waters are enclosed, from which the territorial sea and the other maritime zones may be measured.[88] These baselines, in effect, become the artificial coastline of the state.[89]

### 2.2.1 Coastal Archipelagos

Many of the states with coastal archipelagos have drawn straight baselines joining the outermost islands of the coastal archipelago and from the archipelago to the mainland

"tying" the coastal archipelago to the mainland.[90] Such states base their claims on geographic, economic and historic factors. The preamble of the Norwegian Royal Decree of 1935 for delimiting Norway's Zone of exclusive fisheries off her northern coast, by way of justifying its provisions, recited (i) "the geographical conditions prevailing on the Norwegian coast", (ii) "the vital interests of the inhabitants of the northernmost part of the country", and (iii) "well established national titles of right " with particular reference to previous decrees of 1812, 1869, 1881, and 1889.[91]

A. Geographical Factors

States with coastal archipelagos claim that there is no clear division between the mainland coast and their coastal islands. They contend that the coastal islands, or rather, the outer most islands of the coastal archipelago form their coast. In highlighting the relationship between the coast of the mainland and a coastal archipelago, the International Court of Justice stated in the Anglo-Norwegian Fisheries case that:

> "The coastal zone concerned in the dispute is of considerable length...and it includes the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of "Skjaergaard" (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which, without taking any account of fjords, bays and minor indentations, is over 1,500 kilometers in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland: the Porsangerfjord, for instance, penetrates 75 sea miles inland. To the west, the

> land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small, which make up the "skjaergaard", is estimated by the Norwegian Government to be one hundred and twenty thousand. From the southern extremity of the disputed area of the North Cape, the "skjaergaard" lies along the whole of the coast of the mainland; east of the North Cape, the "skjaergaard" ends, but the coast line continues to be broken by large and deeply indented fjords.
>
> Within the "skjaegaard", almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjaergaard".[92]

Similarly, the islands and peninsulas of the Canadian Arctic Archipelago are fused together by ice formations most of the year to the extent that ice and land areas are often indistinguishable.[93] And it is contended that the Canadian Arctic Archipelago constitutes an immense rampart, protecting the continental part of Canada from the polar ice of the Arctic Ocean and in effect constitutes the outer coast of the country.[94]

B. Economic Factors

Another argument in favour of drawing straight baselines from the outer most islands of coastal archipelagos is based on specific economic interests of the region. In the Fisheries case Norway put forward the theory of the

"legitimate interests" of the coastal state to justify the system of straight baselines it has used.[95] Norway stated that in delimiting the territorial waters a coastal state must take into consideration the economic conditions and the vital interests of the population.[96] It was further contended that the waters accessory to the land are waters that a coastal state has the power to appropriate or occupy and the appropriation of which is justified by the vital interests of the coastal state.[97] The International Court of Justice, in its decision of the Fisheries Case, taking into account the fact that the only source of livelihood of the sparse population of the concerned region was fishing, stressed the economic importance of the surrounding seas to the local population by stating that :

> "Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments ("meds"), at points where two lines drawn between points selected on the coast or on islands intersected.
>
> In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing."[98]

Canada too has, in justification of its straight baselines system around Canada's Arctic Archipelago, referred to the economic interests of the Inuit people, the inhabitants of the region who have been fishing and trapping in the waters of the Archipelago and on the sea ice of most of the

Archipelago. It is stated that the Inuit people's traditional sea ice use has covered all the waters of the central and eastern Arctic, as well as those of the western Arctic as far west as Canada's boundary in the Beaufort Sea and in a northerly direction up to M'Clure Strait and Viscount Melville Sound.[99]

Further to the traditional hunting and trapping on the ice which is vital to the Inuit economy even today, many communities of this region rely on marine - related fur exports for a major part of their earned income and in addition, the marine mammals insure a high protein content in the diet of the Inuit. [100]

C. Historic Factors

"Historic waters" usually refer to waters which are treated as internal waters but which would not have that character were it not for the existence of an historical title.[101] Most states with coastal archipelagos have put forward arguments and presented evidence to claim and prove a historical title to the waters encompassed by the coastal archipelagos. Norway referred to the "well established national titles of right" recalling a number of Decrees issued by Norway at different times relating to the waters around its coast.[102] A substantial portion of the pleadings in the Fisheries Case consist of historical materials which occupy eight volumes. Norway maintained that the role of the historic element - that is, long usage - in an historic title

is merely to consolidate and confirm a claim which intrinsically is valid without the historic element.[103] A long usage merely confirms that the limits claimed by a coastal state correspond to its legitimate interests.[104] Norway, thus, denied that the consent of other states is necessary to the establishment of a claim exceeding what is generally accepted.[105]

Canada also claims to have exercised state authority in the waters of the Canadian Arctic Archipelago, which is to have begun after it obtained title to the islands in 1880, completing the consolidation of its title by 1930.[106] Although, however, the United States has consistently questioned Canada's exercise of such authority in the waters of the Canadian Arctic Archipelago, Canada has been considered to have an obligation to take protective measures for the waters of Lancaster Sound, recognized as one of the richest biological areas in the entire Arctic.[107]

### 2.2.2 Archipelagic States

Until mid twentieth century all the midocean islands and archipelagos were held by various continental states either in outright ownership or under colonial rule. It was not until the beginning of the process of decolonization that archipelagic states, the whole territory of which were comprised of islands, i.e., ocean states began to appear on the political map of the world. Ocean states emerged as

nation states from under colonial domination with a unique requirement to determine their territorial limits. Each state with a specific centuries old view as to what their national boundaries are. But remarkably similar in that every archipelagic state that emerged on the scene held a unifying view of the islands and the waters connecting and surrounding them.

Ocean states claim that their islands and the waters connecting and surrounding the islands are a single entity and they claim to draw their baselines by joining the outermost points of their outermost islands. Such claims enclose very vast expanses of water which would have under traditional law been regarded as high seas. While, for example, the approximate land area of the Philippines is 115,600 square miles, the area contained within its baselines measures 328,345 square miles, thus increasing the national "territory" approximately 2.8 times.[108] The largest expanse of water within the baselines of the Philippines is the Sulu Sea with an area of about 86,000 square miles.[109] The Indonesian claims enclose 666,110 square miles of water including a large part of the Java Sea. Other nations such as Fiji, Mauritius, and Tonga have also joined the Philippines and Indonesia in enforcing the archipelago concept through national legislation.[110]

The various arguments in favour of considering archipelagic states as single entities and according them a

special regime are based on geographical, historical, economic, socio-political and environmental considerations and the corresponding interests of archipelagic states, the importance of which are enhanced by their status and requirements as nation states.

A. Geographical Factors

Geographical factors have played a significant role in the establishment of maritime boundaries.[111] The mere existence of special rules for the measurement of the territorial sea of bays enclosed by a single state is a confirmation of the importance of geographical situations in the law of the sea.[112] Several other concepts in the law of the sea, such as, the continental shelf, have taken their geographical counterpart as the starting point for the formulation of norms which constitute the body of rules collectively known as the law of the sea.[113]

The first two attributes of the archipelagic state itself are geographical. The first attribute being that it consists of a large number of islands.[114] According to one commentator, "the real essence of an archipelago is the concept of a self-contained and relatively compact group, not a loose congeries of islands dotted over a large extent of sea".[115] The second attribute of the archipelagic state is that it considers the waters surrounding its component islands as being within its boundaries and an integral part of its heritage.[116]

Although the geographical characteristics of archipelagos vary widely, with the number, size and position of islands as well as of islets, the first and primary elements of the archipelagic concept and the rationale for the claims by archipelagic states for a special status in the law of the sea are based on geographical considerations.[117]

Ocean states contend that a special relationship exists between their land territory (islands) and the intervening water areas.[118] In fact, it can be said that in the case of islands forming the archipelago, the integration between land and sea is far more complete than it can ever be between the waters and the shores of a coastal state.[119] The existence and distribution of natural resources throughout an archipelago - both living and non-living - are the result of or dependent upon the geophysical and ecological unity and interdependence of the islands and the intervening waters.[120]

Indonesia argues that all the waters around and between the islands of Indonesia, regardless of their width, are the natural appurtenances of the land territory of the republic and formed part of the internal or national waters under its absolute sovereignty.[121] That concept emphasizes the unity of land and water territories of Indonesia.[122] As one Indonesian delegate stated at the Third United Nations Conference on the Law of the Sea :

> "... the Indonesian language equivalent for the word "fatherland" ... is "tanah air" meaning "land-

> water", thereby indicating how inseparable the relationship is between water and land to the Indonesian people. The seas to our mind, do not separate but connect islands. More than that, these waters unify our nation."[123]

The word "tanah air" was

> "not coined by lawyers who had made comparative studies, not by geographers, but this is a word that comes from the people who have lived in these islands and these archipelagos, and they feel it is part of them. The water is part of their every day lives. They depend on it for their living, and it is a very real thing..."[124]

In a note verbale to the United Nations Secretary General in 1955, the Philippines, emphasising the same point, stated:

> "All waters around, between and connecting the different islands belonging to the Philippine archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters subject to the exclusive sovereignty of the Philippines."[125]

In the case of ocean states whose geomorphology is such that a single submarine platform is common to all the islands of the archipelago, their particular geomorphological formation is also often cited to back their claims to be considered as a single unit.[126]

It is argued that the special relationship that exists between the land territory and the intervening water areas of archipelagic states entitles them to exercise the same authority over these water areas as they do over their internal waters, i.e., lakes, rivers, etc.[127] Ocean states further contend that the traditional low-water mark baseline which was designed for continents and single island states

cannot be applied to groups of islands without harmful results.[128] Indeed, for ocean states, it is their particular geographical configuration which serves as the basis for their other particular interests, namely their economical, socio-political, ecological and environmental interests.[129]

B. Historical Factors

The "historical argument" claims a special status for archipelagic states in the law of the sea on the basis that the islands of these states were historically considered as a single unit.

It is difficult to agree with the opinion that historical precedent does not provide much of an objective basis for using the archipelago principle.[130] Historical precedent is a strong argument in the case of smaller ocean states with numerous islands which are closely integrated and do not have very wide expanses of sea or passages between their islands that are used for international navigation. Many archipelagic states make general references to history in supporting their claims.

The representative of Tonga at the Third United Nations Conference on the Law of the Sea stated :

> "In 1887 King Tupou I had defined the boundaries of the Kingdom of Tonga by reference to the sea instead of by reference to the land. It was significant that neither in 1887, when the proclamation had been made, nor in 1971, when it had been circulated to all states members of the

> Sea-bed Committee, had there been any hint of criticism of its purport, for although it constituted a departure from the law of nations as framed in Europe, it had been legitimized by the very rules of that system by virtue of the passage of time."[131]

Indonesia, in its 1957 declaration and preamble to the 1960 Act asserted that, "since time immemorial the Indonesian archipelago has constituted one entity".[132]

The delegate of Bahamas at the Caracas session of the Third United Nations Conference on the Law of the Sea, while addressing the issue of special circumstances surrounding the Bahamas and claiming wide jurisdiction over shallow water areas of the Bahama Banks said :

> "Those areas of shallow water had historically been regarded as parts of the territory of the Bahamas: a grant, encompassing the banks as well as the islands and the cays, had been made to the Lord Proprietors by King Charles of England in 1670."[133]

The delegate of the Philippines, Senator Tolentino, speaking at the 1960 Geneva Conference on the Law of the Sea, contended that historic title applied in much the same manner to archipelagos as to historic bays.[134] He further argued that the Philippine archipelago from time immemorial has been considered as a single unit, and it had always been under a single sovereignty, first under the Spanish and now under the Republic of the Philippines.[135] Philippines also claims that its single unit status before its cession to the United States by Spain after the Spanish - American war is confirmed by Article III of the Treaty of Peace concluded at Paris on

December 10, 1889, in which Spain ceded to the United States "the archipelago known as the Philippine Islands and comprehending the islands lying within the following described lines..."[136] The Treaty then went on to describe a system of lines defined by parallels of latitude and meridians of longitude.[137] This cession was confirmed by the U.S. - Spanish treaty signed at Washington on November 7, 1900.[138] The U.S. - British Convention of January 2, 1930 also described in geographic terms the line separating the Philippine archipelago and North Borneo, a British protectorate.[139]

In a note verbale to the United Nations Secretary General in 1955, Philippines claimed that "all water areas embraced in the imaginary lines" described in the three U.S. - Spanish and US. - British treaties "are considered as maritime territorial waters of the Philippines..."[140] Philippines further pointed out that these limits of its archipelago were endorsed by the Tydings - Mc Duffie Act by the United States Congress which eventually gave independence to the Philippines and that its national territory is also defined with reference to the aforementioned treaties in its constitution, which was approved by the U.S. President.[141]

It is clear that most of the island groups claiming single unit status have been or were historically considered to be single units in one form or other. When these island groups were referred to, it has always implicitly included

their islands and the waters connecting them.

C. Economic Factors

Ocean states belong to the group of countries categorized as developing countries. Most of the archipelagic states, with the exception perhaps, only of Indonesia and the Philippines, are what are termed vulnerable "micro states". These small island states, because of their small population and small land size, are often subject to significant economic constraints. A fairly common feature of small states is a narrow resource base.[142] Small land area restricts mineral endowment, while undifferentiated climatic conditions and soil resources offer poor prospects for agricultural development.[143]

Smaller islands forming archipelagos or parts of archipelagos, in general terms, have the same features as smaller oceanic or continental islands which do not form part of an archipelago. These features have been summed up as follows :

> "They [the islands] are seldom well endowed with resources: land, minerals and other stores of energy, fresh water, flora and fauna, all tend to be limited in amount and variety. This natural condition of scarcity applies equally to the resources of upland, littoral and sublittoral zones, and even to the outer insular shelf. Because of their finite nature, island resources are particularly liable to over - exploitation, leading to degradation or complete destruction of the resource, a situation inevitably aggravated in such severely confined circumstances by increasing pressure as population grows. Islands have no hinterland except the seabed..."[144]

In these circumstances, the sea and its resources could play

a dominant role in the development efforts of these developing archipelagic states, which have an abundance of marine riches in the waters around their islands.[145] And it is therefore of no surprise that the major industries of archipelagic states are marine based. The economic system of the Maldives relies on the relatively well-endowed sectors : fishing, the lifeblood of the country, and tourism, which since it was begun in 1972, has grown rapidly and is on the verge of becoming the nation's paramount industry.[146] In the Bahamas, tourism accounts for as much as four-fifths of the Gross National Product and employs two-thirds of the work force.[147] This is true for almost all small archipelagic states. They claim a special status in order to protect their fishing resources and their tourist potential, i.e., unpolluted beaches, sea and the unspoilt submarine life around the islands.

The most enduring interest of all archipelagic states that claim a special status for their waters, lies in the exclusive exploitation of marine resources.[148] The importance of marine resources is directly linked to the physical condition of the land territory of the archipelago, i.e, the lack of natural resources, size and the barren nature of much of that territory.[149] These factors give rise to a special relationship between land and sea areas.

At the Third United Nations Conference on the Law of the Sea, the representative of Cook Islands, Sir Albert Henry

said:

> "The greatest drawback to the development of the Cook Islands had been its geographic position: a group of tiny islands scattered over the Pacific Ocean, remote and isolated. Communication and transport were difficult and expensive and hampered trading and economic development. The land mass was small and there were no minerals or similar products which could be used commercially to develop the economy.
>
> The sea was as important as the land to the people of small Pacific Islands, particularly on islands of coral atoll formation where there was very little soil or vegetation. Nearly half the Cook Islands were such atolls, although the principal island, Rarotonga, was volcanic in origin and contained good arable land. The sea provided the only source of protein, the bulk of food, and a small income from pearl shell and fish."[150]

For the developing archipelagic states, ocean resources in and under their waters are of vital economic importance. The fact of economic dependence on the surrounding ocean is a strong motivation for island nations in their claims.[151] They maintain that they are almost totally dependent on the surrounding marine environment, unlike continental nations which have resources on their land territory.[152] In order to promote economic development, it is necessary to reserve the resources of the waters of archipelagic states for their people, since competition in exploiting these resources with other states, particularly the technologically advanced nations under a regime of free access would create hardships for the inhabitants of archipelagic states and could undermine the only basis for economic development.[153]

The economic interests of ocean states lie mainly in the fishing resources of the seas within the archipelago as a

basic means of livelihood for their populations.[154] Fisheries of these states are basically subsistence types of fisheries, and fish is an important and the only feasible source of protein for the poor communities of archipelagic states.[155] The reliance of the populations of archipelagic states upon the biological resources of the sea is almost absolute and the resources are not sufficient to support both domestic and foreign fishermen.[156] They also are not in a position to compete for the same fish with technologically advanced fishing nations in the same waters.[157] Fish also has a further socio-economic value for these states, as hundreds of thousand of fishing families depend on it for their survival.[158]

The advent of proposals for an Exclusive Economic Zone has brought even greater interest in the economic implications of the archipelagic claims. For under such proposals states would, within a distance of 200 miles from their baselines, secure exclusive control over seabed resources and some degree of exclusivity over fishery resources.[159]

Another important socio-economic interest of the ocean states is intra-insular communications.[160] The great distances between islands of an archipelago naturally pose problems of communication among the different parts of the state. Archipelagic states perceive a need to reserve these interinsular highways for their people.[161] In this respect, archipelagic states are having in mind not big ships,

but small wooden craft, which are used by the islanders to go from one island to the other to visit their neighbours and to try to sell their produce.[162]

The development efforts of ocean states also require the establishment of infrastructures such as transportation and communication, which is not an easy task for a poor country, but would become extremely difficult in a state composed of scattered islands and where, to go from one island to another, pockets of high seas would have to be crossed.[163] These facts sufficiently illustrate the predicaments that an archipelagic state faces in protecting and administering an often extensive area without material and positive means with which to set up and pursue its development policies.[164] The one unit concept of the archipelago would facilitate these tasks considerably.[165]

Contemporary emphasis on economic needs and interests as one of the underlying factors of claims to the archipelagic regime has been triggered, inter alia, by the development of new technology which has made it more feasible for states to economically exploit offshore resources.[166]

Formerly, the economic question was mainly focused on resource exploitation that was required for the sustenance and welfare of the local inhabitants.[167] Some developing countries still limit their argument for special status to this self - sufficiency point.[168] The modern reality for most nations, however, is that oceanic land bases are an

important source of energy, both in the form of mineral resources, such as oil and natural gas, and natural forces, such as wave and wind and there may even be a greater potential for the exploitation of other resources which have not yet been fully developed.[169]

The archipelagic states seek to have greater control over their coastal waters and the resources they contain, with a view of meeting the demands of national development.[170] The resources, both living and non-living, are required to feed the people on the one hand and to stimulate socio-economic development of the islands on the other.[171]

Besides being a unifying factor between the islands, the sea also offers a great potential source for the economic development of the archipelago and the well being of its people. Thus, the use of the notion of economic needs and interests as a justification for claims to extended coastal state jurisdiction evolved into a concept which presently constitutes an important argument in not only the claim to the archipelagic regime, but also in other jurisdictional claims to adjacent marine areas.[172]

The tendency to protect the interests of the inhabitants by bringing the natural resources under the exclusive jurisdiction of the archipelagic state is therefore both understandable and reasonable.

D. Social and Political Factors

The political argument or the argument relating to

security is one of the most serious and popular, but also one of the most fickle and difficult to evaluate questions in the law of the sea.[173] The question is even more difficult in the case of archipelagic states due to their scattered island configuration.[174]

The most important reason for adopting the archipelagic principle, perhaps, is that of security, not necessarily security from military attack by a hostile power, but for protecting its coastal areas from piracy, illegal landing by aliens and smuggling of goods.[175] As the Philippine representative said, "we are probably incapable of meeting these problems adequately at the present time", but "the gargantuan problems to our national security which would result from splintering the Philippine archipelago into as many islands that compose it are hardly imaginable."[176]

The stability and well being of a society are necessary prerequisites for domestic security.[177] In reality, domestic security and external security are to some extent interdependent and due to their interconnection, threats to the security of ocean states may be either internal or external or both.[178] In many cases, the greater the degree of domestic security, the less is the vulnerability to external threat. Internal strife can come from a variety of causes or situations, such as militant political contentions, secessionist ambitions, economic deprivation due to national disasters or government inability to cope with economic

problems, the effects of influxes of migrant labour or of political refugees and major issues of human rights.[179]

Populations of many developing countries are multi ethnic and consist of different social groups.[180] These different ethnic and social groups which might have been kept in balance and at peace during the colonial era, have not in fact integrated into the national community.[181]

Achievement of independence by these countries did not always mean the end to conflicts between various social groups. It sometimes meant a continuation and even an escalation of such conflicts. Riots , insurgency, revolution and secessionist tendencies have been frequent in the newly independent countries seriously hampering the necessary process of nation building, and sometimes even endangering their chances of survival.[182] Although these tendencies are common in developing countries, the geographic composition of archipelagos with many hundreds, or even thousands, of large and small islands scattered over an extensive sea area, tends to perpetuate the plurality in the composition of the population increasing the tendency of local or regional groups to pursue their aspirations and secede from the nation.[183] Thus, in Indonesia, there were a number of separatist uprisings, challenging the authority of the central government, on Celebes, Java and Sumatra during the early years of independence.[184] Philippines has also experienced similar uprisings.[185] In Papua New Guinea there is an

ongoing crisis of secession by Bougainville, one of the resource-rich provinces of Papua New Guinea.[186] For this reason archipelagic states claim a single unit status for their archipelagos , which corresponds to the concept of unitary state to which most developing countries have expressed their allegiance.[187]

In terms of internal security, the single unit archipelago idea leads to the most comprehensive authoritative claims over all intervening waters.[188] From the point of view of security, this does not seem unreasonable especially if the intervening waters are not excessively wide. The notion that seas separating the major islands of archipelagos were high seas not subject to national jurisdiction was perceived to lend support to the separatist claims for autonomy or sovereignty.[189] The archipelagic concept was, therefore, favoured as a matter of national integrity and internal security.[190]

Further, insurrectionary movements might solicit and get support in the form of weapons and other materials on unguarded coastlines from neighbouring or distant hostile states.[191] Examples of agents, weapons and other materials being landed stealthily or even openly on unguarded coastlines for the benefit of local insurgents are numerous.[192] Such events have taken place in Cuba, Indonesia and the Philippines during the last two decades and recently in Seychelles and in the Maldives as recently as November 1988. In such a

situation when the country is falling apart it is a question of the very survival of the nation.[193] As the Indonesian delegate pointed out, they could not envisage Indonesia being carved up in several parts and the national territory and its air space "full of holes or gaps of high seas between the islands."[194] So the archipelago principle, it was contended, was the only answer for the political unity of Indonesia.[195]

Ocean states, particularly in the early stages of their development, face certain difficulties in establishing administrative control over outer islands.[196] As a result of poor communications along the water routes, central control tends to weaken and where large islands with substantial populations and resources exist, they develop as important regional centers of power in conflict with the capital.[197]

Although this may be true for many developing countries with poor infrastructures, these problems become more critical due to lack of adequate communication. Local centers of power that conflict with the central state's desires and efforts to unite the populace, weaken the concept of a single nation.[198] Indonesia and the Philippines are good examples. In Indonesia, the islands of Borneo, Sumatra, the Celebes, Java, and Western New Guinea have offered potentially divisive "mainlands". In the Philippines, the islands of Mindanao, Palawan, and Luzon all form large regional centers.

No one island geographically dominates either archipelago. Furthermore, the great dispersion of these islands restricts the use of the "mainland" option.[199] The problems of the ocean state become more complex and complicated when the islands of the archipelago are situated far from each other and wide corridors of sea separate them.[200] In such instances, archipelagic states require special jurisdiction in the waters between and around the islands of the archipelagic state for the purpose of fulfilling their national defence functions.[201] In archipelagic states the temptation is always great at worst to secede, and best to disregard the political jurisdiction of the center.[202] Component islands often possess different technoeconomic adaptations, social systems, and ideologies because of environmental diversity, differential outside contact, and isolation.[203] Such factors militate against socio-cultural integration. Poor communication exacerbates this centrifugal tendency.[204]

E. Environmental and Ecological Factors

The biological, chemical and physical interaction between land and sea is a permanent process establishing the interrelations that exist between all forms of coastal life and all forms of sea life.[205] One of the main endemic features of oceanic islands is their environmental fragility, of which perhaps one of the more obvious signs is vulnerability to the destructive effects of modern continentally scaled development technology.[206]

The seas and oceans of the world have for a very long time been regarded as unlimited stores of inorganic and organic resources.[207] They have also been used as seemingly bottomless dustbins for all the refuse and waste that humankind wants to dispose of, such as city garbage, industrial including nuclear waste, and tanker discharge.[208] Further, mishaps with great risks to environmental pollution have occurred, such as collisions between oil tankers, accidents with planes or submarines carrying nuclear weapons, and the frequency of such occurrences has been increasing.[209] The increasing size of the tanker fleets and the number of super tankers and the very large crude carriers have increased the number of accidents caused involving such tankers, causing extensive pollution of the sea by oil.[210]

The need to control and protect the quality of the marine environment within the archipelago is another recent reason put forward by archipelagic states in claiming sovereignty over the inter island waters.[211] Recent incidents of supertanker spills or ships leaking hazardous cargoes have reinforced these countries' desire to control certain kinds of navigation through archipelagic waters.[212] It is pointed out that pollution sources are likely to stay much longer and more difficult to clean in archipelagos because of the configuration of islands.[213] Indeed, the effect of oil spills can have disastrous consequences to the archipelagic people who rely on these waters as a source of food. This

need seems to confirm and strengthen the necessity to look at the archipelago as one unit, not only in geographical but also in environmental terms. For an archipelagic state, the protection of intervening waters is more essential than for other states. The risk of oil pollution is far greater and its effect more disastrous in or near the intervening waters of an archipelago than if it occurred on the high seas some distance from the shore.[214]

Developing countries, which do not possess advanced technology and experts with sophisticated monitoring devices, nor have the funds to procure such instruments, are inclined to defend themselves by moving the boundaries of their jurisdiction further away from their shores in a desperate attempt to prevent pollution approaching their territories.[215] With regard to extensive coastal jurisdiction in matters of pollution, archipelagic states have the example of Canada's Arctic Waters Pollution Prevention Act, of June 17, 1970, in which limited jurisdiction is extended to the waters of the Canadian Arctic Archipelago in order to meet the danger of pollution to the waters and to give necessary protection to Canada's off-shore marine environment, including its living resources.[216] Canada argued in this regard that its legislation does not constitute a unilateral interference with the freedom of the high seas but draws its justification from the assertion that the danger to its environment constitutes a threat to its security, thus

invoking self - defence as one of the justifications for its action.[217]

Archipelagic states such as, Indonesia, Fiji, the Bahamas and the Maldives, in particular have shown an increased concern over the hazards of oil pollution.[218] Ninety percent of Japan's oil supply, for instance is carried across Indonesia's archipelagic waters by super tankers, which find it difficult to navigate in the relatively shallow waters of the intervening channels.[219] Hence, Indonesia's concern over the hazards of oil pollution. The concerns of the Bahamas, Fiji and the Maldives stem from the fact that they are coral archipelagos, i.e., the constituent coral islands forming the archipelago are living land masses.[220] As D.P. O'Connell points out in the case of coral archipelagos :

> "The very survival of the nation is potentially menaced if local supervision is not possible. Coral islands are not dead land masses, even if the polyps that formed them are dead. The areas of intersection of land and sea are subject to the incessant biological and chemical interaction, whereby the land is preserved from ultimate destruction. Pollution of these areas can destroy the organisms that are essential for the coastal mud to retain its vitality and support the flora, notably mangroves, which in many instances constitute an essential rampart against the sea."[221]

Thus, in the case of coral islands it is essential for the continued existence of the islands that there should be pollution free water areas surrounding them.[222]

It is of vital concern to ocean states to control the development of their marine environment in order to ensure

that such development is in their best interest and to prevent any form of depredation or pollution that might endanger their environment or deplete the resources.[223] Full jurisdiction over the archipelagic waters would provide the archipelagic state with the necessary regulatory competence and control over activities taking place in its archipelagic waters that might endanger the environment. As one writer puts it, the developing archipelagic states which lack the mechanisms to defend and control waters by force and consequently cannot depend on the "law of force" would at least have the "force of law" to guarantee their rights.[224]

2.2.3. Midocean Archipelagos of Continental States

A number of continental states with midocean archipelagos have drawn straight baselines joining the outermost islands of their archipelagos.[225] The claims of such states are based on factors similar to those on which archipelagic states base their claims. In the words of the Portuguese representative to the Third United Nations Conference on the Law of the Sea:

> "...the arguments in favour of the establishment of a special regime for archipelagic states were also valid for archipelagos forming part of the territory of a coastal state, particularly with regard to the security and economic interests of such states. Application of a different regime to the latter would mean that the archipelagic part of the territory of mixed states would be regarded as second class territory."[226]

Ecuador, India and Spain, three continental states with midocean archipelagos, maintained at the Third United Nations Conference on the Law of the Sea that no distinction should be

made between archipelagic states and other midocean archipelagos.[227]

## 2.3. INTERESTS OF OTHER STATES IN THE WATERS OF ARCHIPELAGOS

The application of the archipelagic principle encloses within archipelagic and straight baselines, and thus under the sovereignty of archipelagic states and other states with archipelagos, large expanses of the sea which were earlier considered high seas under traditional international law, and in which, theoretically, archipelagic states and other states with archipelagos exercised the same rights as other states. However, in practice, due to the geographic situation of archipelagos, these waters are used by archipelagic states and other states with archipelagos more than other states do, for various marine activities. Archipelagic states and other states with archipelagos exercise jurisdiction in such waters to the extent required for carrying out such activities. Most of the inter island waters of archipelagos are of no significant interest to other states and they do not protest archipelagic jurisdiction in these waters. However, in certain areas, inter island waters are used by archipelagic states and other states with archipelagos together with other states. Such a sharing of inter island waters by a number of states necessitates the limitation and precise definition of their rights and duties. Such a situation is characteristic

for straits and routes in archipelagic waters that are used for international navigation.

2.3.1 Navigational Interests

The enclosure, within archipelagic baselines, of areas of sea that were formerly considered high seas, but which now would, under traditional international law, be internal waters subject to the absolute sovereignty of the coastal state, affects the passage of ships and aircraft in some areas of waters so enclosed.[228] Such extension of coastal state jurisdiction is absolutely intolerable to the big maritime powers.[229] They want to maintain their absolute freedom of navigation and absolute maneuverability in such waters.[230]

The maritime powers lead by the United States have expressed the view that most of the island groups claiming to be archipelagic states lie astride some of the most important communication routes of the world (Figures 5, 6 and 7) and if the archipelagic principle is accepted they would enclose very substantial marine areas.[231] They claim that a special treatment for archipelagos would threaten the interests of the major maritime and global military powers. In the words of C.F. Amerasinghe,

> "The countervailing interests of other states, particularly maritime states, in the seas within and surrounding archipelagos cannot be ignored in approaching the problem of archipelagos. Other states have inclusive claims based on the security need in seeing that large areas of ocean and airspace are not closed for shipping and aircraft. Such maritime powers as the United States of America have a special interest in this kind of claim. Equally, other states have commercial

> interests for their merchant vessels and aircraft on the high seas. Both these interests involve the freedom of navigation, unhampered transportation and communication, whether surface, subsurface or aerial."[232]

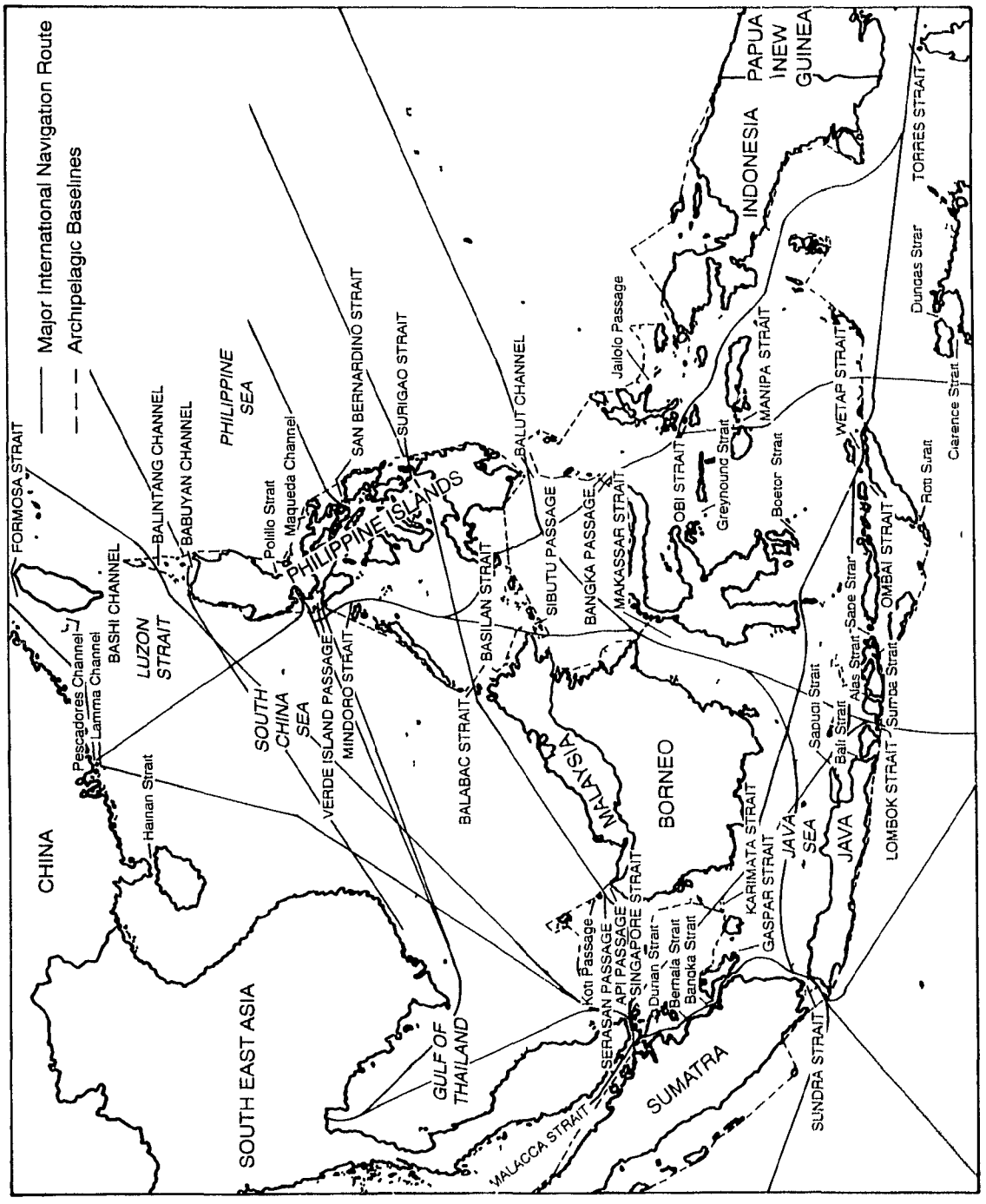
It is said that the security of the United States and its allies depends "to a very large extent on freedom of navigation on and overflight of the high seas". The representative of the United States said in the seabed committee that many nations depend "upon air and sea mobility in order to guarantee their ability to exercise the inherent right of individual and collective self defence", and expressed the doubt that "any state would wish to subject its sea communications or its defense preparedness to the consent or political goodwill of another state".[233]

Claims for special status advanced by Indonesia, the Philippines and other archipelagic states was met with protest from the maritime states, of which the United States, United Kingdom and the Soviet Union were the most vocal.[234]

Ambassador Elliot Richardson, head of the United States delegation to the Third United Nations Conference on the Law of the Sea expressed his opposition most clearly in terms of commerce and national security:

> "Ninety percent of United States international trade is carried on the oceans.... Protection of freedom of navigation for tankers and other commercial vessels is extremely important. Since our Armed Forces operate on a worldwide basis, the United States has a compelling interest in assuring global mobility and freedom to use the seas and the airspace above them for national security purposes. Most, but not all, countries recognize that our security interests and those of other

Figure 5. International navigation routes through Indonesia and the Philippines




Source:Navigational Restrictions Within the New LOS Context Geographical Implications for the United States Offshore Consultants, Inc., Rhode Island, 1986.

major powers must be satisfied if there is to be general agreement on a treaty."[235]

In particular, if the waters within the Indonesian and the Philippine archipelagos were closed to shipping, access to the Pacific Ocean from the Indian Ocean would be made considerably more difficult and costly.[236]

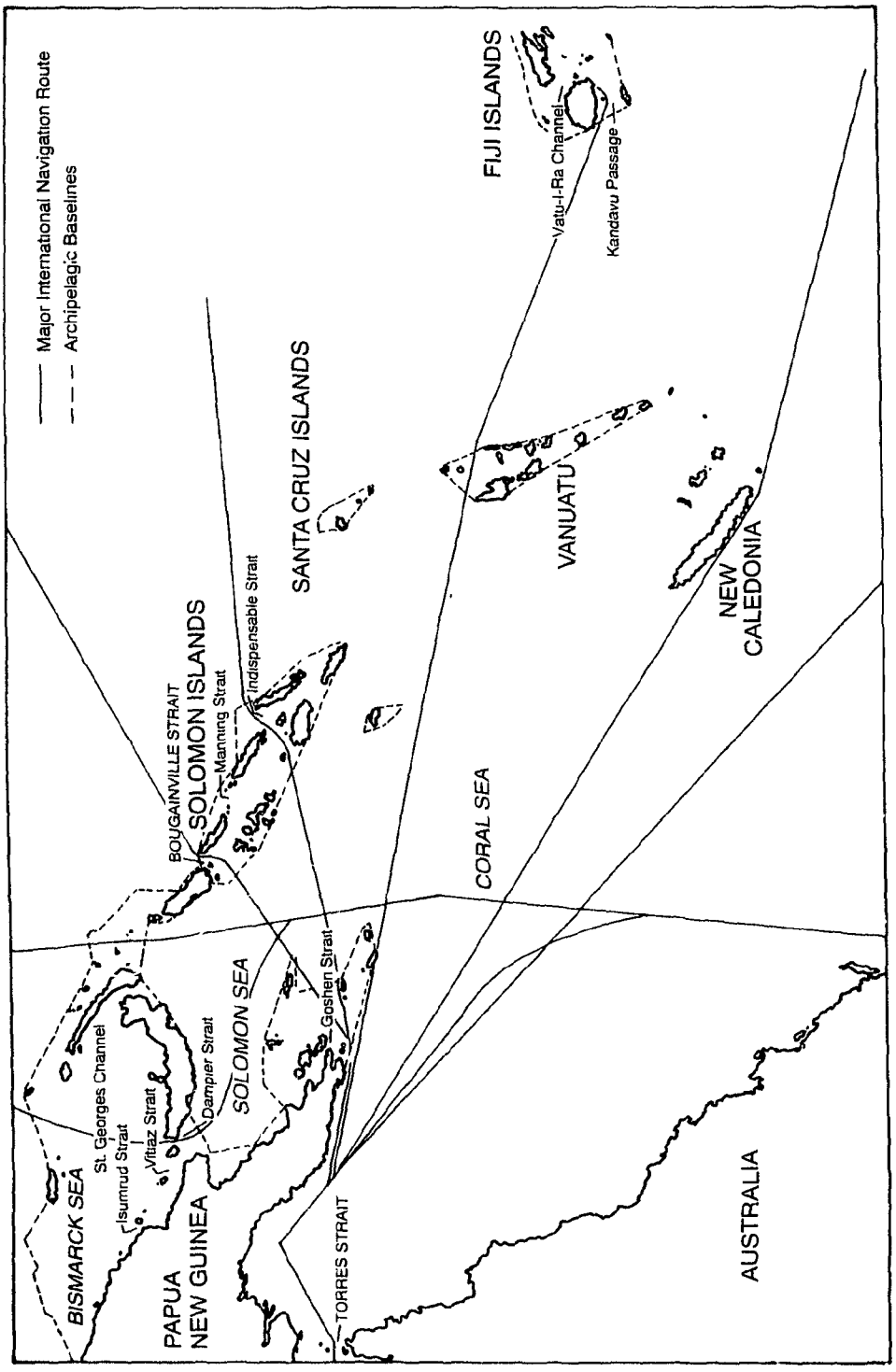
States with important navies and submarine fleets reacted vehemently against Indonesia's claim to close its waters, due to Indonesia's strategic position between the Pacific and the Indian Oceans.[237] Indonesia and the Philippines are situated at crossroads of some of the most important international straits of the world (Fig. 5). Indonesia extends for over 3,000 miles from Sumatra to Irian, and encloses within its baselines the Java, Flores, Molucca, Banda and Savu Seas and the important straits of Sunda, Sumba, Lombok, Ombai, Molucca and Macassar as well as numerous other internal passages.[238] Even under a twelve mile territorial sea, 13 strategic passages between islands lie within the territorial waters of Indonesia and three within the sovereignty of Indonesia and Malaysia.[239] Should the archipelagic principle apply, it was perceived that, not only could no ship pass without the permission of Indonesia through its straits and other waters, but overflight across its space would depend on the discretionary ruling of the Indonesian government.[240]

The Philippine baselines in effect close the important Surigao Strait, Sibutu Passage, Balbac Strait and several

other passages through the Philippine islands.[241] Similarly in the case of the Maldives, their island chain extends for over 1,000 miles from north to south and should the archipelagic principle apply, it could form a barrier to shipping and aviation in the region.[242] The naval powers feel that a sovereign archipelagic regime, with straits threatening as choke points, could represent a death blow to mobility.[243] They do not consider the right of innocent passage within archipelagic waters, whether internal or territorial waters, as sufficient for their need to preserve mobility, because innocent passage does not allow submerged passage by submarines or overflight.[244]

During the course of debates at the Caracas Session of the Third United Nations Conference on the Law of the Sea, many countries insisted on the right of free passage for ships through archipelagic waters and not merely innocent passage. For instance, the soviet delegate said that "the proposals made by the archipelagic states would be acceptable to his delegation only if they agreed to free transit for all ships through archipelagic straits and waters used for international navigation, and only if they recognized the right of unimpeded overflight".[245] The principle of "innocent passage" of ships through archipelagic waters and proposals for the possibility of restriction of passages, he said "were unrealistic" and not acceptable.[246]

Figure 6. International navigation routes in the Southwest Pacific




Source:Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States Offshore Consultants, Inc., Rhode Island, 1986.

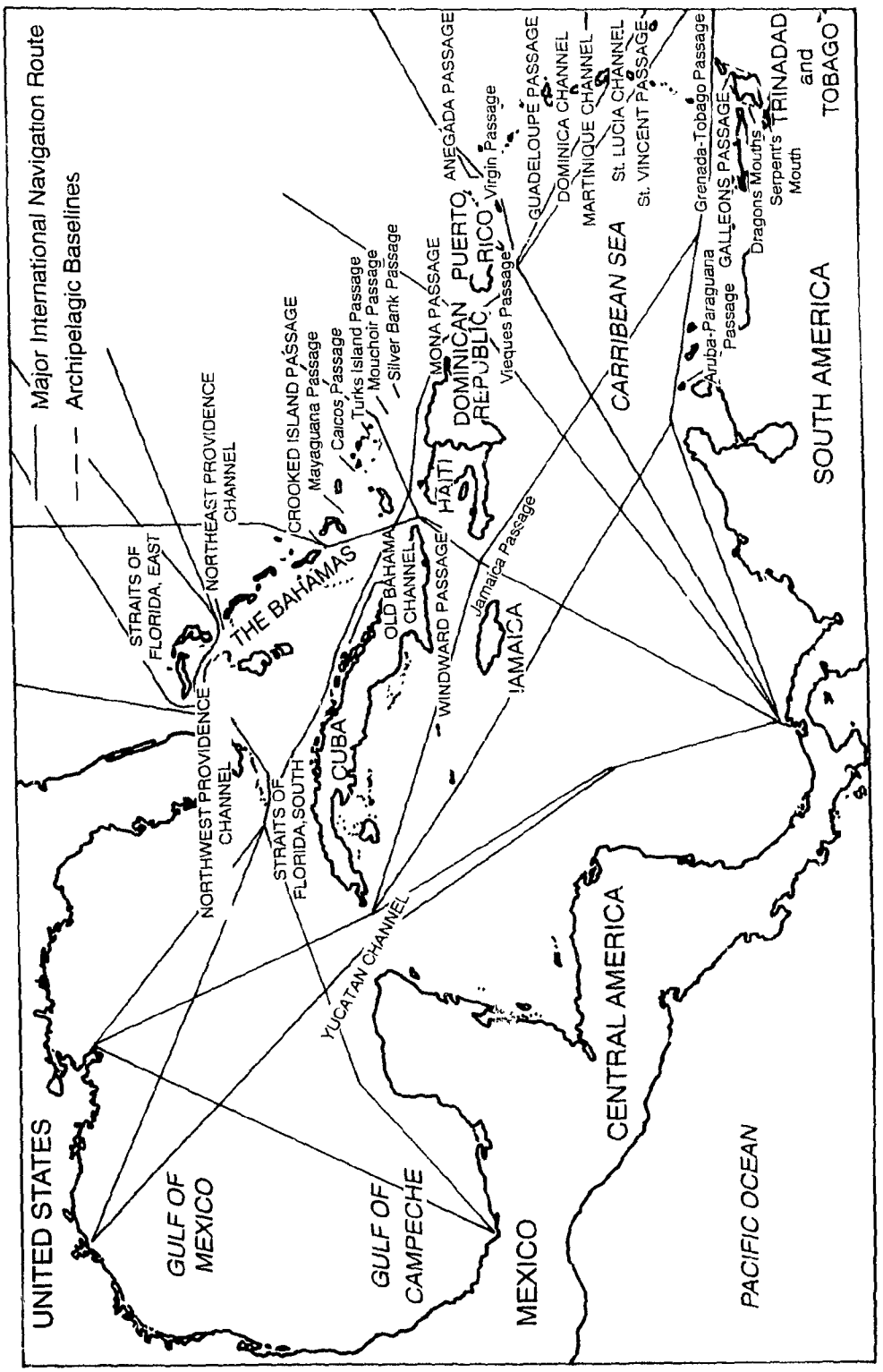
The Japanese delegate, giving a conditional support to the archipelago principle said:

> "The fact that some archipelagic waters were situated at the crossroads of vital inter-oceanic communications made it vital to provide for maximum, free and unimpeded passage. The right of passage through such waters should certainly be more than the simple right of innocent passage... the right of transit passage by foreign vessels should be provided for in respect of archipelagic waters used as routes for international navigation, and the right of innocent passage by foreign vessels, including fishing vessels, should be ensured in other parts of archipelagic waters."[247]

The delegate of Bulgaria maintained that free passage through archipelagic waters did not affect the economic interests and security of archipelagic states.[248] The delegate of the Netherlands felt that the archipelago concept should be no obstacle to the normal routes of international navigation exercised in archipelagic waters.[249]

The archipelagic states were opposed to the concept of free passage, which is not even recognized through territorial seas which are outside a nation's baselines.[250] They were also opposed to granting innocent passage through all the archipelagic waters.[251] It is considered that if all the waters within baselines are subject to innocent passage, "the baselines would be a useful superfluity" and if such wide "rights of passage permeate the waters of the archipelago, the archipelago concept is reduced to an exercise in rhetorics."[252]

Figure 7. International navigation routes in the Caribbean region




Source: Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States Offshore Consultants, Inc., Rhode Island, 1986.

In the view of the United States, maintaining a stable and peaceful international order requires freedom of navigation and overflight.[253] An important aspect of preserving the strategic nuclear balance in this view is the effectiveness of missile carrying submarines, and the stability of the strategic deterrence is premised on keeping their position concealed.[254] Hence, it is argued that they must be able to transit everywhere submerged.[255] They maintain that submerged transit through straits, even those under coastal state jurisdiction, is particularly important to them and freedom of mobility for naval forces requires high seas freedoms and the archipelagic principle poses a direct threat to this mobility.[256]

In relation to the question of free passage through archipelagic waters used for international navigation, the interests of archipelagic states themselves in free passage through the waters of each other must be noted. For example, for the Maldives, whose survival depends on imports, passage through the Indonesian archipelago which links the Indian and Pacific Oceans, is vital.

### 2.3.2 Interests of Neighbouring States

Apart from the question of navigation, other states carry out activities such as fishing, laying of submarine cables and pipelines and scientific research, in the waters of archipelagos. Such activities are mostly carried out by neighbouring states of archipelagic states and other

archipelagos. Certain objections were raised in this regard by the neighbouring coastal states of some of the archipelagic states and other archipelagos and by long distance fishing nations, who are affected by the archipelagic principle and wish to protect their traditional interests in the waters of archipelagos. In this regard, developing countries which were affected gave only a cautious support to the archipelagic principle as applicable to archipelagic states.

Malaysia, Thailand, Singapore and to some extent the Philippines, all have interests which conflict with Indonesian claims.[257] The effect of the Indonesian claim would be immense on Malaysia, whose direct access to the eastern Malaysian states of Sabah and Sarawak across the South China Sea would be interrupted, affecting its national unity, by the Indonesian claim of sovereignty based on the extension of baselines around the Natuna Islands archipelago.[258] Malaysia is also deeply concerned about the possible loss of traditional fishing rights enjoyed by its nationals in waters now enclosed by the Indonesian claims. In expressing his delegation's reservations to the Indonesian claims, while supporting in principle the call for a special treatment for archipelagic states, the delegate of Malaysia said:

> "Equity also demanded that in that treatment due account should be taken of the rights and interests of neighbouring states affected by the archipelagic claims."[259]

Thailand and Singapore too, while supporting the archipelagic claims of Indonesia and the Philippines in

principle, are concerned about the problem of fishing rights and about the effect of the archipelagic state doctrine on their transit rights to and from the high seas.[260] They insisted that the archipelagic status should be recognized "provided the legitimate interests of the neighbouring States" in regard to "communication and access to the open ocean space" on the one hand, and "living resources of the areas" hitherto regarded as part of the high seas on the other, were given due consideration and accommodation.[261]

## 2.4. CONCLUSION

Archipelagic states can be distinguished from other archipelagos by their statehood and national aspirations. The claims of archipelagic states for a special regime and for recognition as single entities can not be interpreted as mere claims for extended marine jurisdiction. But should be seen as a move towards the territorial integration and national unity of archipelagic states, which is one of the fundamental requirements for the socio-economic development of archipelagic states.

The activities of other states in the waters of archipelagos have a basis in customary international law. Such activities are carried out to the extent and in the manner that they have been carried out in the past. However, such activities pose a threat to the well being of the people of the states concerned and may negatively affect the

environment in which such activities are carried out. Thus, it is essential for states with archipelagos, archipelagic states in particular, to regulate the activities of other states in the waters enclosed by archipelagos in view of the increasing environmental concerns and global strategies for sustainable development. In this respect, small archipelagic states , the mere existence of which is threatened by global warming and sea level rise and are particularly vulnerable to any pollution of their waters have a particular interest in regulating the activities of other states in the waters encompassed by their baselines.

It is clear that the interests of national self determination and the need to function as states and to guarantee the national security of archipelagic states and the need of the international community for navigation in the world oceans have to be taken into account in considering the question of archipelagos in the law of the sea and in seeking a comprehensive solution to it. One group of interests cannot be recognized to the exclusion of the other. An enduring and rational solution to the problem of archipelagos will have to be based on an appropriate reconciliation of the interests involved.

END NOTES

1. Syatauw, J.J.G., "Revisiting the Archipelago - An Old Concept Gains New Respectability", 29 India Quarterly. 1973, at 104.

2. Cotter, Charles H. The Physical Geography of the Oceans. London : Hollis & Carter Ltd., 1970 at 59.

3. Ibid.

4. Africa, Antarctica, Australia, the Great Eurasian land mass, North and south America.

5. Hodgson, Robert D. Islands : Normal and Special Circumstances. The Geographer, Bureau of Intelligence and Research (INR). Washington, D.C., Dept. of State, RGES - 3, December 10, 1973, at 4.

6. Ibid., at 4 and 6.

7. Details see Hodgson, Robert D. supra note 5. Islands include such extensive land masses as Greenland with an area of more than 840,000 square miles, greater in size than all but 11 countries of the world. In fact, 62 islands have areas in excess of 1,000 square miles. At least 126 are larger in area than 1,000 square miles.

8. Hodgson, Robert, D. supra note 5 at 6.

9. Williamson, Mark. Island Populations. Oxford: Oxford University Press, 1981 at 1.

10. Ibid.

11. Ibid.

12. Some plates such as the Pacific, Nazca, and Cocos plates have no continental part.

13. Williamson, M. supra note 9 at 2.

14. Ibid.

15. Ibid. at 4.

16. Ibid., at 5.

17. Ibid., at 4.

18. Ibid., at 5.

19. Examples of these three types of oceanic islands are the Galapagos Islands (oceanic ridge islands), the Hawaiian Islands (hot spot islands) and parts of Indonesia facing the Indian Ocean (island arc islands). Supra note 9 at 5.

20. Oceanic ridge islands and hot spot islands are formed from volcanoes which arise from the depths of the ocean floor. These volcanoes are the result of upwelling of molten rocks from the interior of the earth caused by the moving apart of two plates which, if tall enough, rise through thousands of meters of sea to form islands. Hot spot islands are formed in the middle of a plate, and not at the edge, the hypothesis being that there is a fixed hot - spot in the depths of the earth which gives rise to a linear series of volcanic islands as the plate moves across it. Island arcs, according to prevailing theory, are formed where two lithospheric plates converge. Upon colliding, one of the plates - that bearing heavy, oceanic crust - buckles downward and is forced into the partially molten lower mantle beneath the second plate with lighter , continental crust. The descending plate, in such cases, gives rise to volcanic eruptions which produce a series of volcanoes at the surface of the upper of the two plates. The overriding plate often forms an arc with its convex side facing the descending plate, which can result in an arc of volcanic islands. See Broadbelt, Winnifred M. "The Archipelagic Regimes: An Alternative to Fragmentation for the Islands of Aruba, Curacao, and Bonaire." Thesis (L.L.M), Halifax: Dalhousie University, 1986 at 94. For a more detailed account of Volcanic processes and the formation of islands, see Williamson, M. supra note 9 at 4 - 9.

21. The Encyclopedia of Geomorphology. New York : Reinhold Book corp., 1968 at 569.

22. United Nations Environment Programme. Island Ecosystems. A Review, UNEP Report No.3. New York : United Nations Publication, 1980 at 2.

23. Ibid.

24. The Encyclopedia of Geomorphology, supra note 21 at 571.

25. United Nations Environment Programme, supra note 22 at 15.

26. Ibid., at 16.

27. Ibid., at 2.

28. Ibid.

29. Ibid., at 3.

30. The word "atoll" is derived from the Maldivian word "atholhu".

31. The Encyclopedia of Geomorphology, supra note 21 at 35.

32. Ibid.

33. Hodgson, R.d. supra note 5 at 36.

34. The New Encyclopaedia Britannica, Vol.1, 15th ed., Chicago: Encyclopaedia Britannica Inc., 1985 at 676.

35. Ibid.

36. For a detailed account of the geological and geomorphological processes associated with the formation and distribution of atolls, see Wiens, Herold J. Atoll Environment and Ecology. New Haven: Yale University Press, 1965 and The Encyclopedia of Geomorphology, supra note 21 at 35 - 40.

37. The New Encyclopaedia Britannica, supra note 34.

38. The Encyclopedia of Geomorphology, supra note 21 at 36.

39. Ibid.

40. Ibid.

41. Ibid.

42. Ibid.

43. Cotter, C.H. supra note 2 at 161.

44. Ibid.

45. Such small atolls are known as atollons.

46. Cotter, C.H. supra note 2 at 161.

47. It is a true Italian compound and not found in ancient or medieval Greek. Stamp, Dudley, L. ed., A Glossary of Geographical Terms. London: Longman, 1966 at 32.

48. Ibid.

49. Webster's Ninth New Collegiate Dictionary. Markham, Ont.: Thomas Allen & sons Ltd., 1983 at 101.

50. Moore, W.G. A Dictionary of Geography. London, 1967 at 10, quoted in Rajan, H.P., Infra note 52 at 138.

51. Webster's Ninth New Collegiate Dictionary, supra note 49.

52. Rajan, H.P. "The Legal Regime of Archipelagos", 29 German Yearbook of International Law, 1986, at 138.

53. Broadbelt, W.M. supra note 20, at 7.

54. Evensen, Jens. Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos. First United Nations Conference on the Law of the Sea, Official Records, Vol.I. New York: William S. Hein & Co. Inc., 1980 at 290.

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56. Evensen, J. supra note 54.

57. Mani, V.S. supra note 55, and Evensen, J. supra note 54.

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61. Details, see Evensen, J. supra note 54 at 290 and 295 and, International Court of Justice, Fisheries Case (United Kingdom v. Norway Judgment of December 18, 1951, Reports of Judgments, Advisory Opinions and Orders (hereinafter cited as I.C.J. Reports, 1951), at 127.

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63. The New Encyclopaedia Britannica, Vol.8, 15th ed., Chicago: Encyclopaedia Britannica Inc., 1985 at 35.

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65. Ibid.

66. Evensen, J. supra note 54.

67 Non-independent archipelagic territory is another geopolitical category of archipelagos. Non-independent states and special sovereignties that may yet not have had the opportunity to claim the rights under the contemporary juridical archipelagic regime, but which may well be regarded as archipelagos in the pure geographic sense, constitute insular political entities and some of them may, in the very near future, even fall into the category of independent archipelagic states.

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87. The United States has been a strong proponent of this position. See, for example, CAB v. Island Airlines Inc. 235 F. Supp.990 (D. Hawaii 1964).

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93. Pharand, D. supra note 62 at 160.

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95. Waldock, C.H.M. "The Anglo-Norwegian fisheries Case", 28 The British Yearbook of International Law. 1951, at 128.

96. Ibid.

97. Ibid.

98. I.C.J. Reports, 1951, supra note 61 at 127 - 128.

99. Pharand, D. supra note 62 at 164.

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101. I.C.J. Reports, 1951, supra note 61 at 130.

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111. Rodgers, Patricia Elaine Joan. Midocean Archipelagos and International Law. New York: Vantage Press, 1981 at 117.

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120. Kusumaatmadja, M. "The Legal Regime of Archipelagos" and "Supplementary Remarks", Lewis M. Alexander, ed., The Law of the Sea: Needs and Interests of Developing Countries. Kingston: University of Rhode Island, 1973, at 166.

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129. Ibid.

130. Andrew, D. supra note 126 at 48. Dale Andrew, in his article, states that historical precedent does not provide much of an objective basis for considering archipelagic states as single units.

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134. Second United Nations Conference on the Law of the Sea. Summary Record of Plenary Meetings. (Doc.A/CONF.19/8), 1960, at 7. Rodgers, P.E.J. supra note 111 at 107.

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171. Ibid.

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174. Ibid.

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176. Mendoza, E.P. supra note 75 at 632.

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178. Ibid.

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186. Rafiqul Islam, M. "The Bourgainville Secession Crisis in Papua New Guinea", 18 Melanesian Law Journal, 1990, at 31.

187. Syatauw, J.J.G. supra note 1 at 109.

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192. Ibid.

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194. Kusumaatmadja, M. supra note 120 at 176, and also see Third U.N. Conference on the Law of the Sea. Official Records. supra note 133 at 260.

195. Ibid.

196. Hodgson, R.D. supra note 5 at 25.

197. Ibid.

198. Ibid., at 26.

199. Ibid.

200. Syatauw, J.J.G. supra note 1 at 109.

201. Ibid.

202. La Flamme, A.G. supra note 114 at 361.

203. Ibid.

204. Ibid.

205. O'Connell, D.P. supra note 117 at 54-55.

206. United Nations Environment Programme, supra note 22 at 14.

207. Syatauw, J.J.G. supra note 1 at 110.

208. Ibid.

209. Ibid.

210. Accidents involving "Torrey Canyon" in 1967, "Amoco Cadiz" in 1978 and "Exxon Valdez" in 1989 are examples of such accidents which caused extensive pollution of the sea by oil.

211. Anand, R.P. supra note 136 at 216.

212. Ibid.

213. Ibid.

214. Rodgers, P.E.J. supra note 111 at 121.

215. Syatauw, J.J.G. supra note 1 at 110.

216. Lay, H., Churchill, R., Nordquist, M., (eds.). New Directions in the Law of the Sea, vol.I Dobbs Ferry, New York: Oceana Publications, 1973, at 119-210.

217. Ibid.

218. Rodgers, P.E.J. supra note 111 at 121.

219. Ibid.

220. Ibid.

221. O'Connell, D.P. supra note 117 at 54.

222. Rodgers, P.E.J. supra note 111 at 121.

223. Rajan, H.P. "Towards Codification of Archipelagos in International Law", 13 Indian Journal of International Law. 1973, at 470.

224. Anand, R.P. "Mid-ocean Archipelagos in International Law: Theory and Practice", 19 Indian Journal of International Law. 1979, at 244.

225. Examples are Denmark with respect to the Faeroe Islands and Ecuador with respect to the Galapagos Islands.

226. Third U.N. Conference on the Law of the Sea. Official Records, supra note 133 at 266.

227. Ibid., at 267, 263 and 270.

228. Rajan, H.P. supra note 52 at 143.

229. Anand, R.P. supra note 136 at 220.

230. Ibid.

231. Stevenson, John, R. and Oxman, Bernard. "The Third United Nations Conference on the Law of the Sea; 1974 Caracas Session", 69 American Journal of International Law. 1975, at 1; see also McDougal and Burke, The Public Order of the Oceans, New Haven: Yale University Press, 1962, at 412.

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234. Amerasinghe, C.F. supra note 154 at 544.

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238. The Geographer, U.S. Department of State. International Boundary Study: Limits in the Seas - Indonesia. Issue No.25, July 20, 1971, at 7.

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245. Third U.N. Conference on the Law of the Sea. Official Records, supra note 133 at 267.

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251. Rajan, H.P. supra note 52 at 144.

252. Defensor, S.M. supra note 73 at 368.

253. Andrew, D. supra note 126 at 51.

254. Ibid.

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256. Ibid., and Anand, R.P. supra note 136 at 220 - 221.

257. Anand, R.P. supra note 136 at 222.

258. Ibid.

259. Third U.N. Conference on the Law of the Sea. Official Records, supra note 133 at 270.

260. Ibid., at 265 and 268.

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# 3. CHAPTER II. DEVELOPMENT OF THE ARCHIPELAGIC CONCEPT IN INTERNATIONAL LAW

## 3.0. INTRODUCTION

The question of archipelagos, which first attracted the attention of international jurists towards the end of the nineteenth century, was taken up mostly in connection with coastal archipelagos until the Third United Nations Conference on the Law of the Sea (UNCLOS III). At UNCLOS III, attention shifted to archipelagic States. This chapter traces the development of the archipelagic concept in international law of the sea prior to and at UNCLOS III.

The question of archipelagos has been addressed at various academic and governmental forums beginning with the 1888 session of the Institut de Droit International. However, not adequately or with any considerable results prior to UNCLOS III for the simple reason that priority was given to other matters considered more crucial. Indeed, it was not until the middle of the present century that the terminology and a rudimentary philosophy for the archipelagic concept made an appearance in official instruments and pronouncements.

The first important legal development regarding archipelagos was the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries case in 1951.[1] Although that case dealt with coastal archipelagos, that of the Norwegian coast in particular, some governments and

scholars put forward and maintained the view that the method of straight baselines should also apply to midocean archipelagos.

Following the decision of the International Court of Justice in the Fisheries case, the drawing of straight baselines to connect coastal archipelagos to mainlands and to consider them as integral parts of the mainland of coastal states was provided for in the Convention on the Territorial Sea and the Contiguous Zone adopted by the First United Nations conference on the Law of the Sea held at Geneva in 1958,[2] thereby narrowing down the scope of the discussions on archipelagos to midocean archipelagos.

Apart from the discussion and consideration of the question of archipelagos at international conferences, state practice also significantly influenced and continues to influence the development of the archipelagic concept. In this chapter, only state practice preceding UNCLOS III is discussed. State Practice following and during UNCLOS III is discussed in the subsequent chapters dealing with the status and the regime of the waters of archipelagos.

## 3.1. HISTORY OF THE QUESTION OF ARCHIPELAGOS IN INTERNATIONAL LAW OF THE SEA : PRE UNCLOS III

### 3.1.1. State Practice

State practice in delimiting the territorial waters of their archipelagos had a considerable bearing on the establishment of principles of international law in the case of archipelagos. Hence, an examination of state practice with regard to groups of islands is necessary in tracing the history of the development of the archipelagic doctrine in international law of the sea.

In this regard one can distinguish between the practices of states in relation to coastal archipelagos and in relation to midocean archipelagos. It is also important to differentiate the practice of continental states in respect of their midocean archipelagos from the practice of archipelagic states themselves. Regarding the practice of continental states in respect of their mid-ocean archipelagos, there is a certain ambiguity as to whether colonial powers considered their archipelagic colonies as single units for the purpose of delimiting their territorial sea and, if they did consider groups of islands as single units for the purpose of delimitation, as to what status they accorded to the enclosed waters therein. This seems to have been the case with Great Britain in respect of its colonies (Fiji, Seychelles, Tonga, Western Samoa, etc.) and Holland in respect of Indonesia, the

U.S.A. with respect to the Philippines and Portugal with respect to Cape Verde. Therefore, before beginning a general analysis of state practice concerning coastal archipelagos and state practice in relation archipelagic states and other midocean archipelagos, it may be appropriate to consider the state practice of the United Kingdom in relation to territorial delimitation of groups of islands. Britain, as the major colonial power, had dominance over most of the island groups and therefore is the main source of state practice with regard to island colonies.

In examining the British practice, attention will be focused on three elements of such practice, namely, the inter fauces terrae doctrine, the "natural appendage" doctrine and various delimitation instruments.

THE INTER FAUCES TERRAE DOCTRINE : The doctrine of inter fauces terrae, dating at the latest from the fourteenth century, serves in English municipal law to determine which sea areas fall under the jurisdiction of the common law courts rather than the Court of Admiralty.[3] Common law jurisdiction extended to harbours, estuaries, havens, bays and other arms of the sea, which were also regarded as being within the realm and thus as internal waters, whereas the jurisdiction of the Admiralty Court extended to territorial waters.[4]

A classic formulation of the doctrine of inter fauces terrae was made in the seventeenth century by Sir Mathew Hale

who stated that "that arm or branch of the sea which lies within the fauces terrae where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county and therefore within the jurisdiction of the sheriff or coroner".[5]

This doctrine remains as the principal common law test for "inland" waters, i.e., bays, gulfs and estuaries and has been applied extensively by the United Kingdom in her international practice as the test for "internal" waters.[6]

Although this doctrine itself was not applied to island groups in practice, according to Marston, the significance of this doctrine in the present context is that, on a wide interpretation of inter fauces terrae, the notion could encompass as internal waters those channels lying between offshore islands and the mainland or between islands in a group even though such channels connect two areas of open sea rather than lead into an area of land locked water.[7]

However, there would appear to be limits to this doctrine. The underlying test of this doctrine is visual, i.e., the ability to see from headland to headland.[8] This was a rather vague test as it could refer to the ability to see the opposite shore or more particularly, to actually discern activity on the opposite shore.[9] The question to be considered, therefore, is how wide or how extensive an area can be said to lie in between fauces terrae.[10] Although no clear cut conclusion can be made regarding the extent of water

areas lying between fauces terrae, it would appear that extensive appropriations of the sea could not have been included in the term, otherwise the concept would have been rendered meaningless as a means of limiting inland waters.[11]

THE "NATURAL APPENDAGE" DOCTRINE : The doctrine of "natural appendage" was first applied in respect of uninhabited and permanently exposed rocks or reefs adjacent to a "mainland" coast and in some cases lying outside the belt of territorial waters as measured from the coast.[12] During the period, roughly from the middle of the nineteenth century up until the 1920s, the question was whether such features (clusters of islands, cays and reefs) carried their own belt of territorial waters.[13]

The leading case in this matter in relation to British practice is that of The Anna, La Porte, decided by Sir William Scott (later Lord Stowell) in 1805.[14] This American ship on its way from the "Spanish Main" to New Orleans was captured by a British privateer off the mouth of the Mississippi river at a spot about a mile and a half from some small islets composed of earth and trees. In handing down his decision Sir William Scott stated:

> "The capture was made, it seems, within the boundaries of the United states. We all know that the rule of law on this subject is "terrae dominium finitur, ubi finitur armorum vis" and since the introduction of firearms, that distance has usually been recognised to be about three miles from the shore. But it so happens in this case that a question arises as to what is to be deemed the

> shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "no man's land"... I think that the protection of territory is to be reckoned from these islands and that they are the natural appendages of the coast on which they border, and from which they are formed... whether they are composed of earth or solid rock will not vary the right of dominium, for the right of dominium does not depend upon the texture of the soil"[15]

It was not clear as to how far from the mainland these mud islands actually were, although the capture appeared to have been made more than three miles from the mainland.[16] The point of the decision was that uninhabited mud islands off the Mississippi were islands of the United States, possessing territorial waters.[17]

This doctrine, which did not concern the status of waters lying between such features and the mainland but more than three miles from either, was extended to cover such waters by later opinions given to the British Government by the Law Officers of the Crown.[18] On November 3, 1864, Roundell Palmer and Collier, together with the Queen's Advocate, Robert Phillimore, replied to the Foreign Office which had asked them to advise on the distance to which the "maritime zone" of the British colonies was considered to extend. The reply ran in part:

> "... Her Majesty's Government, in accordance with the received usage and understanding of all the powers of Europe and America, down to the present time, consider Her Majesty's maritime territory to extend in all places under her dominium to the distance of three miles of sea,

> measured from the nearest point of land. That besides this general limit, Her Majesty's Government also claim as part of her dominium the whole waters of maritime creeks and inlets, and the mouths of rivers included between headlands part of her territory , although such headlands or some parts of the coasts included within them may be more than six miles apart from each other."[19]

Then, in words which have a particular significance in the present context, the opinion continued :

> "That in places where the possession of particular rocks, reefs, or banks, naturally connected with the mainland of any part of Her Majesty's territory, is necessary for the safe occupation and defence of such mainland, Her Majesty's Government also claim the waters enclosed between the mainland and those rocks, reefs, or banks, whatever may be the distance between them and the nearest mainland."[20]

This opinion too, like many of its type, did not clarify certain important points:[21]

i) The term "naturally connected" may have been meant as a physical connection, in which case the geographical feature would have resembled a bay, or it might have been meant as a less tangible connection, such as the physical use made of the outlying feature by the mainland territory.

ii) The opinion did not contain anything on the existence or otherwise of a belt of "maritime territory" extending three miles seaward of the outlying feature.

iii) The opinion did not indicate whether the waters so enclosed were territorial or internal waters.

iv) The opinion did not also indicate whether a reef or bank has to be above the level of the sea at all stages of the tide, or at low tide only, or whether it was enough that it

existed as a permanently submerged feature, in order for it to attract the enclosed area of waters under "dominion".

Some of these questions were clarified to a certain extent by an opinion given eight years later by different Law Officers in the context of islands off the coast of Queensland, Australia. On March 25, 1875, Bagallay and Holker stated that:[22] (i) land not submerged at ordinary high tides, independent of its size, could be classified as an island; (ii) reefs attached to an island and dry at low water were part of the island; (iii) reefs detached from any island and dry at low water only were not islands; (iv) local legislative authority existed over a distance of three marine miles from low water mark on each island as well as on the mainland. However, this opinion did not state whether the waters between the islands and the mainland, but more than three miles from either were or could be under the jurisdiction of the local legislature.

The "natural appendage" doctrine, as could be seen from the above and from other opinions given by various Law Officers, was interpreted as meaning that coastal islands constitute an outlying fringe of the mainland only under certain conditions. These "conditions" varied from one Law Officer's opinion to the next because the elaboration of the "natural appendage" theory was dependent upon the perceived interests involved in each particular circumstance.[23] Furthermore, for the purpose of this study, one should note

that there was some uncertainty with regard to the exact juridical status of the intervening water areas. In some instances, such water areas seemed to be regarded as internal and in others as territorial waters.[24]

THE "DELIMITATION" INSTRUMENTS : During the course of the nineteenth century, various territorial entities, particularly those made up of or containing islands, were delimited by instruments, purporting to have definite force. These instruments may be classified into three categories:[25]

a) Instruments promulgated unilaterally by the colonial power : The British Government, in delimiting the territorial limits of its colonies often resorted to prerogative instruments, such as Letters of Patent, which set out the "boundaries" of the respective colonies.[26] Many of these instruments, including those referring to the Cook Islands, New Zealand and even the mainly "continental" colony of Western Australia, defined the boundaries in terms of coordinates of latitude and longitude which had the effect of encompassing large areas of sea.[27] In general, the instruments stated that all "land" or "islands" within the coordinates fell within the boundaries of the colony in question. It is evident that many persons in the colonies and in official circles in London believed that the effect of these instruments was to place the entire water area thus enclosed under the jurisdiction of the colony as its

"territorial" or even as its "internal" waters.[28] However, in the late nineteenth century several opinions were given by the Law Officers of the Crown to the effect that this was not so and that the jurisdiction of the colonies thus delimited extended only to three miles from the mainland coast and from each separate island.[29]

b) Treaties : The delimitation of midocean archipelagos in several instances was made by treaty.[30] In 1874, the King and Chiefs of Fiji, by an instrument of cession, transferred to the British crown the territory of Fiji, which is described therein as lying between certain parallels of latitude and longitude and as including:[31]

> "... all ports, harbours, havens, roadsteads, rivers, estuaries, and other waters, and all reefs and foreshores within or adjacent thereto".

The specific mention of "other waters" and of "reefs" distinguishes this instrument from the unilateral proclamations by colonial powers and it is not surprising that some considered that the British crown had thereby acquired sovereignty over the entire water area within the parallels.[32] In Letters Patent of March 21, 1904, the definition of the colony was substantially repeated but with the addition of the term "and fisheries".[33] On January 31, 1914, however, new Letters of Patent were issued which dropped the terms "waters" and "fisheries" from the definition of the colony's extent within the given parallels of latitude and longitude.[34]

c) Self-delimitations : In the case of some midocean archipelagos, they themselves delimited their territories. For instance, on August 29, 1850, the Privy Council of the United Kingdom of Hawaii, following the text of a local statute of 1864, declared :

> "... the rights of the King as sovereign extend from high water mark a marine league to sea, and to all navigable straits and passages among the islands...".[35]

A similar proclamation was made by the Kingdom of Tonga on June 11, 1887.[36]

## A. State Practice Concerning Coastal Archipelagos

(i) Norway : Due to the special geographical peculiarities of the Norwegian coastline, the state practice of Norway concerning the delimitation of territorial waters of its coastal archipelago, the "Skjaergaard", is of particular interest.

The base points and straight baselines along the Norwegian coast have been fixed in detail by Royal Decrees of 12 July 1935 and 18 July 1952.[37] A total of 123 continuous baselines are drawn. The longest lines are 45.5 nautical miles. Fifty more baselines are ten nautical miles or more in length.

The main features of the so called Norwegian system or the straight baseline system for the delimitation of the

territorial sea are the following:[38]

a) A continuous line of straight baselines is drawn along the coast, using the outermost points of the coastal archipelago, including drying rocks as base points.

b) Each baseline is dependent upon the geographical configuration of the coastline and no maximum lengths are established for baselines.

c) The baselines follow the general direction of the coast.

d) There is no connection between the length of the baselines and the breadth of the territorial sea.

e) The waters inside the baselines are considered internal waters.

f) The outer limits of the territorial sea are drawn outside and parallel to such baselines at the distance of four nautical miles.

(ii) Iceland : Although it is difficult to categorize Iceland as an archipelago in the geographical sense of the word, Iceland is in a similar situation, with a number of islands associated with the principal one.[39] The Regulations of 19 March 1952 Concerning Conservation of Fisheries utilizes the straight baseline system for delimiting its waters, with forty-seven consecutive baselines drawn around the coasts of Iceland enclosing the waters of its coastal archipelagos, islands and rocks within these lines.[40] There is no

stipulated maximum length for these baselines, and they vary in length according to the particular geographic features.[41] The longest baselines are 66 and 41 nautical miles and fifteen more lines measure 20 miles or more.[42] The waters inside the baselines, including the waters inside or between the islands and islets of coastal archipelagos, are considered internal waters.[43]

(iii) Denmark : The waters between and inside the Danish coastal archipelagos are considered Danish internal waters by various Danish regulations and decrees.[44] Denmark seems to apply straight baselines , and a maximum length of ten miles for baselines is provided in certain of the enactments.[45] The three main passages to the Baltic formed in part or in whole by the Danish archipelagos[46] are considered international straits and are thus open to navigation, though these waters are situated between and inside the Danish archipelagos.[47]

(iv) Sweden : Sweden applies the straight baseline system for the delimitation of its territorial waters, enclosing within the baselines the waters between islands of a coastal archipelago and between the islands and the mainland.[48] No maximum length has been fixed for these baselines and some of them exceed ten miles in length.[49] The waters inside these baselines are considered internal waters.[50]

(v) Finland : Some islands of Finland are located in places related to the coast while others are located in places detached from the coast. The principal examples of the latter being the Aaland Islands which are treated as a unit for the purposes of their demilitarization by the Convention of 20 October 1921, but not for the purpose of delimitation of territorial waters, which were specified to extend for a distance of three miles from the low water mark of islands, islets and reefs not permanently submerged and lying within the coordinates specified.[51]

By Act of 18 August 1956, and by Presidential Decree of the same date, Finland established a baseline system for its coasts, the length of each baseline being twice the breadth of the territorial waters, which corresponded to eight nautical miles since the breadth of Finland's territorial waters was four nautical miles.[52] Coastal archipelagos which fell within these limits were enclosed in the continental coastline and Island groups which were situated too far out at sea to be included in the outer coastline of the mainland would have their own territorial waters.[53] Such outlying archipelagos were considered as a whole and baselines whose length equalled twice the breadth of the territorial sea, corresponding to six miles since the breadth of territorial seas for outlying archipelagos was three miles, were drawn around each archipelago.[54] The waters enclosed by the baselines were considered internal waters.[55]

(vi) Cuba : The Cuban Cays, a string of islands, islets and reefs extending out into the ocean along the Cuban mainland are regarded, by established practice, as Cuba's outer coastline and as expressed in various legislative enactments, the waters situated between the islands, islets or Cays and the mainland of Cuba are internal waters.[56]

(vii) United States of America : The United States has been one of the staunchest advocates of the view that archipelagos, whether coastal or otherwise, cannot be regarded in any way different from that applied to isolated islands as far as the delimitation of territorial waters is concerned. Thus, the practice of the United States in delimiting, for example, the waters of the archipelagos situated outside the coasts of Alaska is that each island of such archipelagos has its own territorial sea of three nautical miles and where islands are six miles or less apart, the territorial seas of such islands will intersect. But in no event are straight baselines used for delimitation.[57]

The fact that the Florida Keys have been considered a unit is actually no exception to this practice. The several islands of the Keys are situated so close together and the waters in between are so shallow that they must be considered as a continuous whole.[58]

B. State Practice Concerning Midocean Archipelagos of Continental States

The practices of continental states concerning their midocean archipelagos are also of considerable significance to the evolution of the archipelagic concept in international law. The highly varied practices of continental states concerning their midocean archipelagos clearly illustrate the confusion which existed in this area of the law of the sea. The following examples are meant to show the different views and approaches taken by various states with regard to the delimitation of the territorial waters of midocean archipelagos of continental states.

(i) The Faeroes : By an Order of 27 February 1903, Denmark reserved exclusively for Danish nationals fishing rights "in the waters adjacent to" the Faeroes Islands within a distance of three nautical miles measured from the outermost line along which the land is dry at low tide through out the extent of the coasts of the islands, together with the islets, rocks and shoals appurtenant thereto.[59]

By agreement of 22 April 1955 between Denmark and the United Kingdom, the exclusive fishery zone of the Faeroes was drawn up by treating the Faeroes as a unit, whereby the outer limit of territorial waters is drawn by a means of a mixed system of arcs and straight lines.[60] Straight lines are used to delimit the outer limits of the fishery zone, based on the

islands as a group, and arcs of circles have been applied to round off the limits where two straight lines meet.[61] This agreement was followed by a Danish Order issued on 20 May 1955 extending the Order of 1903 to the zone so established.[62]

(ii) The Galapagos : The first thorough-going archipelagic claim which was not based on double the territorial sea closing line principle was made by Ecuador with respect to the Galapagos Islands.[63]

By Congressional Decree of 21 February 1951 Ecuador defined its territorial sea, and provided in Article 3 of the Decree that:

> "Also considered as the territorial sea are those waters comprised within a perimeter of 12 nautical miles measured from the outermost promontories of the farthest islands of the Colon archipelago ...".[64]

Article 2 of the same Decree provides that:

> "For the purpose of sea fishing and hunting in general the territorial waters of the Republic will be considered to comprise 12 nautical miles, measured from the line of the lowest tide at the extreme points of the farthest islands forming the Colon archipelago."[65]

It is clear from the provisions of the Decree that Ecuador considers the Galapagos archipelago as a unit and delimits its territorial waters by drawing straight baselines between the outermost points of the outermost islands of the archipelago.[66] The lengths of the baselines applied to the group are respectively, 48, 62, 32, 124, 147, 76 and 47 nautical miles.[67]

Ecuador did not indicate its view with respect to the

status of the enclosed waters. However, according to D.P. O'Connell, since the archipelagic definition was merely a specific application of the territorial waters system of the whole country, it is to be assumed that it was intended that they should be internal waters.[68]

(iii) HAWAIIAN ISLANDS : Although the Kingdom of Hawaii, throughout the nineteenth century adapted different limits embodying ambiguous references to what came to be called the "channels" between the islands, it seems that the Hawaiian Islands were formerly considered as a whole as far as the delimitation of territorial waters was concerned.[69]

The King of Hawaii issued a Neutrality Proclamation on 16 May 1854, in which he required his neutrality to be respected to the full extent of his jurisdiction, which was defined as the waters of Hawaii "and all the channels passing between and dividing said islands from island to island and all its ports, harbours, bays, estuaries, gulfs and arms of the sea cut off by lines drawn from one headland to another."[70] Similarly, in a Neutrality Proclamation of 29 May 1877, it was provided that no hostile acts should be committed within the Kingdom, including "all its ports, harbours, bays, gulfs, skerries and islands of the seas cut off by lines drawn from one headland to another."[71]

However, the United States has rejected an archipelago formula for Hawaii. In 1964 Secretary of State Rusk addressed

a Memorandum to Attorney General Kennedy, as follows :

> "It is the traditional position of the United States that its territorial sea is three nautical miles in breadth measured from low water mark along its coasts. An island has its own territorial sea measured from the same baseline. It is therefore the Department's position that each of the islands of the Hawaiian Archipelago has its own territorial sea, three miles in breadth measured from low water mark along the coast of the island. It is our view that the waters seaward of these belts of territorial sea are high seas over which no state exercises sovereignty."[72]

The question of the status of Hawaiian waters arose for decision in the courts in 1964 in a suit for an injunction restraining an airline from maintaining inter-island flights in the State of Hawaii without procuring a federal certificate based on the Civil Aeronautics Board's position that the airline was a carrier engaged in inter-State transportation. An injunction was granted by the District Court of Hawaii, but on appeal the Ninth Circuit Court remanded the matter to the District Court with instruction to enter a new decree after determining the boundaries of Hawaii.[73] The District Court held the boundaries to be the islands plus a three mile belt around each of them.[74]

## C. State Practice of Archipelagic States

The Philippines and Indonesia are the only two archipelagic states with an established state practice prior to UNCLOS III regarding the delimitation of their territorial waters and determining the status of the waters around and

surrounding their islands. Most of the other archipelagic states gained their independence either during or after UNCLOS III and the national legislations of those archipelagic states are discussed in the subsequent chapters of the present study.

(i) PHILIPPINES : The Philippines claim that the waters in between and around the islands, and extending outwards to a perimetric boundary line, are their national waters. A system of straight baselines is drawn around the outer limits of the outer islands in order to enclose the waters inside as internal waters, and the territorial sea is drawn to the coordinates mentioned in the Treaty of Paris of 1898.[75] Article III of the Treaty of Paris of 1898 provided for the cession of "the archipelago known as the Philippine Islands", by Spain to the United States, specifying geographic coordinates for the area of the ceded territory.[76] It is claimed that this article indicates that what was ceded as territory was not just the land territory contained within the coordinates, but the seas as well.[77]

The Treaty of 1900 between the United States and Spain[78] sought to remove any misunderstanding involved in an interpretation of Article III of the Treaty of 1898. Its sole Article ceded to the United States "any and all islands belonging to the Philippine archipelago lying outside the lines described in Article III of that Treaty, and particularly to the islands of Cagayan Sulu and Sibutu and

their dependencies...".[79] The reference here, according to O'Connell, implies that the archipelago is comprised of islands only.[80]

The Philippines argue that their claims to the waters within the coordinates set out in the above treaties were recognized in the Treaty of 1930 between the United Kingdom and the United States regarding the boundary between the Philippines and North Borneo.[81] Article I referred to "the line separating the islands belonging to the Philippine archipelago ... and the islands belonging to the State of Borneo". Article 3 provided that "all islands to the north and east of the said line and all islands and rocks traversed by the said line, should there be any such, shall belong to the Philippine archipelago and all islands to the South and west of the said line shall belong to the State of Borneo."[82]

The Philippines further state that the Tydings-McDuffie Act of 1934 also recognizes their sovereignty over the waters within the coordinates set out in the treaties of 1898 and 1900.[83] That Act refers to "sovereignty" over the territory and people of the "Philippine Islands" rather than the expression "Philippine archipelago".[84]

In addition to the Tydings-McDuffie Act, the Philippines claim that the United States endorsed their claims by accepting the definition of the national territory contained in Article I of the Constitution of the Philippines.[85]

Section I of Article I reads :

> "The Philippine comprises all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the 10th day of December, 1898, the limits of which are set forth in Article 3 of said treaty together with all the islands embraced in the treaty concluded at Washington between the United States and Spain of the 7th day of November, 1900, and in the treaty concluded between the United States and Great Britain on the 2nd day of January, 1930, and all the territory over which the present Government of the Philippines exercises jurisdiction."[86]

The first mention of a claim to exclusive rights over the waters within the coordinates of the Treaty of Paris was made in 1955, when in a note verbale of 7 March to the Secretary General of the United Nations the Philippines claimed "all waters around, between and connecting different islands belonging to the Philippine archipelago, irrespective of their width or dimension" to be "necessary appurtenances of its land territory, forming an integral part of the national or inland water, subject to the exclusive sovereignty of the Philippines."[87]

Legislation of the Philippines, subsequent to the 1958 and the 1960 Conferences on the Law of the Sea, provided more precise details on the method of delimitation to be employed and on the precise areas of inland waters. The Act to Define the Baselines of the Territorial Sea of the Philippines of June 17, 1961, Republic Act NO. 3048 (as amended by republic Act No. 5446 of September 18, 1968) thus specifically defined and described the Philippine archipelagic baselines.[88] Straight baselines were to be drawn from the outermost points

of the archipelago. Precise lines as set out in the Act were not only drawn between islands but also between rocks. There were 79 baselines in all, averaging 35 miles each in length. The longest line is 140 miles long. The preamble to the Act describes the waters enclosed by these baselines as "inland or internal waters" placed under the exclusive sovereignty of the Philippines.[89]

Article I of the 1973 Philippine Constitution consequently defines the national territory as comprising :

> "...all the islands and waters and all other territories belonging to the Philippines by historic right or legal title including the territorial sea, the air space, the subsoil, the seabed, the insular shelves and other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines."[90]

Following the enactment of its 1961 legislation, the Philippines received protests from the United States, the United Kingdom and Australia, expressing the concern of these States about passage through the archipelagic waters, particularly with reference to warships.[91]

(ii) INDONESIA : Like the Philippines, Indonesia in 1957 proclaimed the waters within baselines linking the outermost islands to be inland waters and authorised the Indonesian navy to designate which straits might be used for transit.

Indonesia's Djuanda Declaration of December 13, 1957

clearly formulated its espousal of the archipelago concept.[92] In words bearing a striking similarity to the 1955 and 1956 Notes Verbale of the Philippines, it was declared that:

> "...all waters surrounding, between and connecting the islands constituting the Indonesian State, regardless of their extension and breadth, are integral parts of the territory of the Indonesian State and therefore parts of the internal or national waters which are under the exclusive sovereignty of the Indonesian State.
>
> Innocent passage for foreign ships in these internal waters is granted so long as it is not prejudicial to or violates the sovereignty and security of Indonesia.
>
> The delimitation of the territorial sea (the breadth of which is 12 miles) is measured from the baselines connecting the outermost points of the islands of Indonesia..."[93]

Briefly, the declaration states that as Indonesia is an archipelago, it must be treated as a unit, that the intervening waters are to be considered as internal waters regardless of their breadth, that the territorial sea is to be measured from the baselines connecting the outermost points of the islands of the archipelago, and that the right of innocent passage is guaranteed.

Formal enactment of legislation pertaining to the archipelago concept in Indonesia, as the case was with Philippines, was a consequence of the failure of the 1958 and 1960 Conferences on the Law of the Sea to provide a special regime for archipelagos.[94] In February 1960, the President of the Republic of Indonesia issued an Act Concerning Indonesian Waters (Act No.4), which confirmed his country's position as an archipelagic state and reaffirmed the

Indonesian archipelagic principles.[95]

In Article 1 of the Act Concerning Indonesian Waters, Indonesia claims sovereignty over all waters found within a maritime belt of a width of 12 nautical miles parallel to straight baselines that connect the outermost points of the outermost islands or part of such islands. This article distinguishes the legal status of waters found inside straight baselines as internal waters and waters found between straight baselines upto a maritime belt of 12 nautical miles as territorial waters. Article 2 of the Act stipulates the position of the points and baselines and article 3 provides for innocent passage through internal waters, which it says shall be subject to the laws and regulations issued by the Indonesian Government.[96]

Indonesia too received numerous protests to its claims from other nations, including Australia, U.K., U.S.A., Japan and the Netherlands.[97]

### 3.1.2. The International Court of Justice

The rules and principles laid down by the International Court of Justice in its judgment of 18 December 1951 in the Anglo - Norwegian Fisheries Case[98] are of paramount importance as regards the delimitation of territorial waters of archipelagos. This decision also became a major stepping stone in the development of archipelagic claims.[99] Although

some archipelagic claims did exist prior to the Fisheries Case, most later claims have been greatly influenced by the decision of the International Court of Justice in this case.[100]

The Case involved a dispute between Norway and the United Kingdom regarding fishery rights off the Norwegian coast.

Fisheries disputes between England and Norway had taken place as far back as the seventeenth century.[101] However, British fishermen had refrained from fishing in Norwegian coastal waters from 1616-1618 until 1906.[102] In 1906, a few British vessels appeared off the Norwegian coasts, and from 1908 onwards they returned in greater numbers.[103] In 1911 a British trawler was seized and condemned for infringing Norwegian fishing limits. Further incidents occurred and negotiations between the two governments were unsuccessful.[104]

In 1935 the Norwegian government by Royal Decree delimited the area of its coast reserved for the exclusive fishing of its nationals.[105] The limit of this area was defined by a line drawn four miles seaward of straight baselines linking some 48 base points on the extremities of islands and headlands of the coast.[106] The longest baseline was 44 miles, 23 baselines were longer than 10 miles and the remainder were less than 10 miles.[107] After many arrests and further unsuccessful discussions between the two governments, Britain placed the dispute before the

International Court of Justice.[108]

The basic issue before the Court was the correct method of determining the territorial sea, which both parties agreed to be four miles in breadth.

The United Kingdom challenged Norway's competence to extend its boundary beyond a line tracing the sinuosities of the coast, and the Court was asked to state whether the lines laid down in this 1935 Decree had or had not been drawn in accordance with international law.[109]

The United Kingdom maintained that international law does not give each state a right to choose arbitrarily the baselines for its territorial sea. The fundamental rule was that the territorial sea of a state must be measured from the actual coastlines by the method of the "envelope of the arcs of circles". Great Britain permitted only "historic titles" to "certain fjords and sounds" of the area in dispute, which fall within the definition of bays as "exceptions to the main rule, strictly limited by international law." In the view of the United Kingdom, therefore, straight baselines were permitted only across the openings of bays. A bay was defined as "a well marked indentation, whose penetration inland is in such proportion to the width of its mouth as to constitute more than a mere curvature of the coast." The baselines could not, in any case, exceed ten miles in length.[110]

The United Kingdom, therefore, contended that Norway's baselines were in conflict with what it regarded as an

accepted customary rule, namely, that the baselines should follow the low water mark along the coast or the proper coastline for bays.[111]

Norway, on the other hand, argued that there was no general hard and fast rule in international law concerning delimitation which would prescribe a ten mile limit across the mouth of a bay and also a three-, four-, six-, or twelve-mile limit for the territorial belt.[112] Rejecting the British contention of a historic title to exception, the Norwegian counsel stated that "the Norwegian Government does not rely upon history to justify exceptional rights to claim an area of sea which general law would deny", but "it invokes history, together with other factors, to justify the way in which it applies the general law".[113] To Norway, therefore, her method of delimitation, following "the general direction of the coast", was an application of the general rule.[114]

International Court of Justice, after deliberating for six weeks, delivered a surprisingly short judgment of twenty seven pages. The Court, by 10 votes to two, found that the method employed in the delimitation of the fisheries zone by the Norwegian Royal Decree of July 12, 1935, was "not contrary to international law", and found by eight votes to four, that the actual baselines fixed by the said decree in application of this method were "not contrary to international law".[115] As to when straight baselines may be used, the Court said:

> "Where a coast is deeply indented and cut into as is that of the Eastern Finmark or where it is

> bordered by an archipelago such as the "skjaergaard" along the western sector of the coast here in question the baseline becomes independent of the low water mark and can only be determined by means of a geometric construction. In such circumstances the line of the low water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which could be necessitated by such a rugged coast: the rule would disappear under the exceptions. Such a coast viewed as a whole calls for the application of a different method; that is the method of baselines which within reasonable limits may depart from the physical line of the coast."[116]

The Court, in placing restrictions on the use of straight baselines stated:

> "... while a state must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements the drawing of baselines must not depart to any appreciable extent from the general direction of the coast."[117]

and

> "The real question raised in the choice of baselines is in effect whether certain areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters."[118]

Another consideration that was found to be relevant to drawing straight baselines was "historic":

> "Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage."[119]

The Court further stated:

> "The delimitation of sea areas has always an international aspect ... although it is true that the act of delimitation is necessarily a unilateral act because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law."[120]

Rejecting the British contention that a ten mile rule be applied to govern the maximum length of a baseline established along the outermost points of the outermost fringing islands scattered all along the sinuosities of the Norwegian coast, the Court pointed out:

> "In this connection, the practice of states does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve miles), have not got beyond the stage of proposals. Furthermore, apart from any questions of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal state would seem to be in the best position to appraise the local conditions dictating the selection."[121]

Although the Court was specifically considering only the questions of straight baselines for the purpose of measuring the territorial sea off a deeply indented coast and off a coast with archipelagos, the Court in its decision stated some general principles on the law of the territorial sea, which are also of considerable importance to the question of delimitation of territorial waters of midocean archipelagos. C.F. Amerasinghe has extracted the following six principles from the case as having some relevance to midocean

archipelagos:[122]

i) Economic interests peculiar to the region, the reality and importance of which had been clearly evidenced by long usage, should be considered in deciding whether a state must be allowed the latitude necessary in order to be able to adapt its delimitations to practical needs and local requirements.[123]

ii) One of the basic considerations for the delimitation of the territorial sea by reference to straight baselines and the drawing of straight baselines is the close relationship between the sea and the land domain.[124]

iii) In drawing straight baselines along a deeply indented coast and between islands of a coastal archipelago, the general direction of the coast must be followed.[125]

iv) Although there was no general rule of law limiting the length of straight baselines to a specific distance, a test of reasonableness could be applied to control such length.[126]

v) In the case of deeply indented coasts and coastal archipelagos the waters that are enclosed by straight baselines are considered internal waters.[127]

vi) In cases where the waters within the straight baselines constitute a strait which has been used by foreign vessels for navigation between areas of high seas or territorial waters, the coastal state would be under an obligation to accord innocent passage to foreign vessels

through these waters.[128]

Since, as was mentioned earlier, the Court was dealing specifically with deeply indented coasts and coastal archipelagos, it is important to establish how far these principles could be applied to midocean archipelagos. In Amerasinghe's opinion all the principles stated above may need to be modified when applied to midocean archipelagos, considering the fact that midocean archipelagos completely surrounded by sea may be located in areas of the high seas which are particularly more open to navigation and general exploitation of resources, and thus, the interests of states other than archipelagic states and other states with midocean archipelagos might have to be taken into consideration.[129] Amerasinghe argued that while principles (i) to (iv) may apply to midocean archipelagos with minor modifications, it may not be possible to concede that the waters within the baselines should be regarded as purely internal waters subject to the right of innocent passage for foreign vessels through areas hitherto used for international navigation.[130]

The judgment in the Anglo-Norwegian fisheries case has given rise to a considerable number of comments and criticisms. Colombos, for example stated that:

> "... no exaggerated importance should be given to the Court's findings. It cannot be held that it created a precedent since it dealt with a unique geographical configuration of a coast which as the Court repeatedly said was exceptional."[131]

While it is true that the Norwegian coast is a "unique

geographical configuration", as Evensen has concluded, "the principles laid down in the decision may be of the greatest importance", and whatever view one has of the Court's decision, it is difficult to disregard the effect it has had on the development of archipelagic claims.[132]

Michael A. Leversen writing, almost ten years ago, in the San Diego Law Review on the legal consequences of the Fisheries Case to the delimitation of the territorial waters of midocean archipelagos pointed out that, while the decision is binding on the party litigants, it does not establish a precedent which other nations must follow.[133] This is so for two reasons.[134] First, international law does not recognize the principle of stare decisis. Second, Article 59 of the Court's statute provides that the decision of the court has no binding force except between the parties and in respect of that particular case. However, even though this judgment is not binding on other nations, its implications and ramifications upon what was thought to be established international law are great. For the first time the legality of the straight baseline method was recognized as a means of delimitation in certain circumstances.[135]

As O'Connell rightly points out, "the feature in the Court's judgment most relevant to a generic principle of archipelagos is the emphasis placed upon the economic interests peculiar to a region wherein sea and land intertwine in a complex fashion".[136]

If these interests are relevant to coastal archipelagos of the Norwegian type, they are equally, if not more highly, relevant to midocean archipelagos where the intertwining of the land and the water probably reaches the highest degree of geographical , ecological and economic unity.[137]

The Fisheries Case, as has been seen, was not concerned with midocean archipelagos but the delimitation of the territorial sea of Norway, a country possessing a deeply indented coast and a large number of coastal islands. However, the very inclusion of coastal islands within Norway's baseline system, a system which received the approval of the Court, has implications for the treatment of midocean archipelagos, for it raises the question of whether and under which circumstances a group of islands can be treated as a unit with a single territorial water belt measured from baselines joining up the outermost islands of the group.[138] The question to be considered, therefore, is to what extent the principles on coastal archipelagos laid down by the court apply equally to midocean archipelagos.[139]

### 3.1.3 Studies and Proposals by International Bodies and International Law Publicists

#### A. Institut de Droit International

The question of the extent and delimitation of

territorial waters was first placed on the agenda of the Institut de Droit International at its Lausanne Session in 1888.[140] The problems concerning the delimitation of the territorial waters of coastal archipelagos was raised at its Hamburg Session in 1889, by the Norwegian jurist Mr. Aubert, who stressed the importance for Norway, of the baseline from which the territorial sea was to be measured in view of Norway's peculiar geography.[141] He further pointed out that Norway's coastal islands were regarded as a continuation of the mainland and thus the impossibility of only following the mainland coast in all its sinuosities in the matter of drawing baselines.[142] However, the question of archipelagos was not discussed at the Hamburg Session and was not given any consideration until 1927.[143]

During the session of the Institut in 1927, the question of archipelagos arose out of a discussion concerning the maritime boundaries of islands situated outside a State's territorial waters.[144] The 5th Committee of the Institut, which had the task of drafting rules on the territorial sea which were to be submitted to the Plenary, with Sir Thomas Barclay and Professor Alvarez as joint Rapporteurs proposed the following, as Article 5 on the regime of the territorial waters of archipelagos:

> "Where a group of islands belongs to one coastal state and where the islands of the periphery of the group are not further apart from each other than the double breadth of the marginal sea, this group shall be considered a whole and the extent of the marginal sea shall be measured from

> a line drawn between the outermost parts of the islands".[145]

Since the rapporteurs had retained a six mile territorial sea, the maximum permitted distance between the outer islands of a group for the purpose of baselines for the measurement of the territorial sea would be twelve miles.[146]

With respect to coastal archipelagos, an amendment to Article 5 was proposed at the 1928 Stockholm Conference to the effect that:

> "In case an archipelago is situated along the coast of a country the extent of the marginal seas shall be measured from the outermost islands and rocks, provided that the distance of the islands and the islets situated nearest to the coast does not exceed the double breadth of the marginal seas."[147]

This proposed amendment did not state a maximum distance between the islands of an archipelago, but it did suggest a distance of twice the breadth of the territorial seas between the nearest island of the archipelago and the mainland. The basic flaw in this article, it seems, is that the outer fringe of the islands could conceivably extend hundreds of miles from the coastal state. The draftsmen apparently had in mind that the article would apply only to coastal archipelagos, i.e., to archipelagos located along the mainland coast of the State.[148]

In the final resolution adopted by the Institut at its meeting in Stockholm in 1928, a loose distinction was drawn in Article 5 between a "group of islands" and an "archipelago":

> "Where archipelagos are concerned, the extent

> of the marginal sea shall be measured from the outermost islands or islets provided that the archipelago is composed of islands and islets not further apart from each other than twice the breadth of the marginal sea and also provided that the islands and islets nearest to the coast of the mainland are not situated further out than twice the breadth of the marginal sea".[149]

In this Article the term "group of islands" referred to "midocean archipelagos" and the word "archipelago" referred to a cluster of islands off a continental coast.[150]

During the Stockholm Session the Institut substituted three nautical miles for the previously proposed six nautical miles as the breadth of the territorial sea, which was embodied in Article 2 of the resolutions.[151] It must also be noted that at the same session , there was some debate concerning the definition of an island for the purposes of the article and it was pointed out that low tide elevations would be considered as islands in this instance.[152]

B. International Law Association

The Executive Council of the International Law Association on January 8, 1924 appointed a Neutrality Committee, with Professor Alejandro Alvarez as its Chairman. The Committee was assigned the task of considering the question concerning territorial waters.[153]

At the Association's meeting in Stockholm in 1924, the Committee presented a report and draft convention on "The Laws of Maritime Jurisdiction in Time of Peace". Professor Alvarez,

differing in some respects from the Committee's proposals, submitted a special draft convention of his own,[154] thus advancing the first proposal to treat an archipelago of islands as one unit with a territorial belt drawn around the islands as a group rather than around each, individual island.[155]

The Committee's draft convention did not contain specific provisions concerning the territorial waters of archipelagos.[156] It merely provided in its Article 2 that states shall exercise jurisdiction over their territorial waters to the extent of three marine miles from low water mark at spring tide along their coasts. Article 3 of the draft provided that, in case of islands situated outside the territorial limit of a state, a zone of territorial waters shall be measured around each of the said islands. Article 4 proposed a twelve mile maximum for baselines across the mouths of bays.

Professor Alvarez, however, in Article 6 of his draft proposed the following, concerning islands and archipelagos:

> "As to islands situated outside or at the outer limit of a state's territorial waters, a special zone of territorial waters shall be drawn around such islands according to the rules contained in Article 4.
>
> Where there are archipelagos the islands thereof shall be considered a whole, and the extent of the territorial waters laid down in Article 4 shall be measured from the islands situated most distant from the center of the archipelago."[157]

In Article 4 of his draft, Professor Alvarez proposed a territorial sea of six nautical miles measured from low water

marks. Although he stipulated that the maximum length of a line permitted to be drawn across the mouth of a bay for the measurement of the territorial sea would be twelve nautical miles (Article 5), he placed no limitation upon the distance between the islands or the circumference of the group from which the territorial sea could be measured.

Although the territorial waters of archipelagos was discussed at the 34th Conference of the Association which was held in Vienna, in 1926, the draft convention, as amended by the Conference, contained no reference to archipelagos.[158]

C. American Institute of International Law

The American Institute of International Law, at the request of the Governing Body of the Pan American Union in 1925, to assist in the task of codifying American International Law, prepared some thirty projects for discussion.[159]

In Article 7 of the Project No.10 (National Domain) the American Institute of International Law proposed that:

> "In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial waters referred to in Article 5 shall be measured from the islands farthest from the center of the archipelago."[160]

This formula is very similar to the one suggested by Professor Alvarez to the International Law Association in 1924, and thereby also failed to provide for a maximum

distance between the islands of an archipelago.

D. Harvard Research in International Law

The Harvard Draft on the Law of Territorial Sea of 1929 did not contain any provisions on archipelagos. It provided in its Article 2 for a territorial sea limit of three miles measured from the low water mark. Article 7 of the Draft, concerning isolated islands stated:[161]

> "The marginal sea around an island, or around land exposed only at some stage of the tide, is measured outward three miles therefrom in the same manner as from the mainland."

The comments to Article 7 stated, in part:

> "If an island lies not more than six miles from the mainland the marginal sea will cover the entire area between the island and the mainland. Similarly, in any situation where islands are within six miles of each other the marginal sea will form one extended zone. No different rule should be established for groups of islands or archipelagos except if the outer fringe is sufficiently close to form one complete belt of marginal sea, the waters within such belt should be considered territorial; this situation is provided for in Article 11."[162]

Article 11 stated that:

> "Where the delimitation of marginal seas would result in leaving a small area of high sea totally surrounded by marginal seas of a single state, such area is assimilated to the marginal sea of that state"[163]

In the commentary to this Article it was pointed out that the proposition advanced in Article 11 did not state any existing rule of law, but it was felt that a situation

analogous to that of a bay, the mouth of which was narrow enough to be spanned by the territorial sea, could arise with respect to archipelagos, groups of islands off the coast or straits.[164]

The point that is being made here with regard to archipelagos is almost the same as that set out in the commentary to Draft Article 7. That is, if the delimitation of the territorial sea around each individual island of an archipelago results in leaving a small area of high seas within the group of islands enclosed by the over lapping maritime belts of the outer islands, then this enclosed area would be regarded as territorial sea.[165]

## E. The Hague Codification Conference of 1930

At the Hague Codification Conference of 1930 no proposal was finally made concerning the question of archipelagos, though in the committees the matter was discussed and some proposals were made.[166]

The first step in the preparation of the Conference was a report submitted to the Council of the League of Nations by a Committee of Experts on the Questions which Appear Ripe for International Regulation.[167] Questionnaire No.2 contained the terms of reference on territorial waters and was reported by a sub-committee consisting of Messrs. Schuking (the Rapporteur), de Magalhaes and Wickersham. The Draft Convention

Prepared by Schuking contained no mention of midocean archipelagos and dealt with the extent of the territorial sea in two articles.[168] Article 2 proposed a six mile territorial sea to be measured from the low water mark along the coast, and Article 5 concerned itself with coastal islands which might be taken into account in measuring the territorial sea. It stated:

> "If there are natural islands, not continuously submerged and situated off a coast, the inner zone of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland that they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself."

In his observations on Schuking's Draft, de Magalhaes noted the omission from the text of midocean archipelagos, i.e., archipelagos whose component islands were separated from the mainland by more than twice the width of the territorial sea. He considered that if this provision was intended to be applied to midocean archipelagos - in which case each island of such an archipelago would have its own territorial sea - , then this should be clarified in the text. De Magalhaes, himself, favoured the other solution, that of regarding the islands forming an archipelago as a single unit, and to measure the limit of the territorial sea from the islands farthest from the center of the archipelago.[169] As a result of the suggestion made by de Magalhaes, Schuking worded his draft Article 5 to provide:

> "In the case of archipelagos, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the center of the archipelago."[170]

Schuking's Draft Convention was submitted by the Committee of Experts to the Preparatory Committee of the Hague Codification Conference, which then circulated a request containing a Schedule of Points to various governments for information on territorial waters. Point 5 of the Schedule, which covered the question of territorial waters around islands was formulated as follows:

> "An island near the mainland. An island at a distance from the mainland. A group of islands; how near must islands be to one another to cause the whole group to possess a single belt of territorial waters?"[171]

Nineteen governments submitted replies to this question. The majority of them[172] rejected the notion of regarding groups of islands as single units. Some countries, including Germany and the Netherlands suggested that islands might be considered as a unit provided that the lines joining them were each not more than six miles in length. Japan suggested 10 miles as a length of such lines. Finland proposed a distance of not more than twice the breadth of the territorial sea and Norway referred only to coastal islands. The observation of the Preparatory Committee on these replies was that they showed "great diversity" and in relation to the suggestion that territorial waters must be determined by reference to the unit and not separately for each island,

thereby generating a single territorial sea, the Committee observed that:

> "This conception claims to be based on geographical facts. On the other hand, it raises more complicated questions than the other view. In the first place, it makes it necessary to determine how near the islands must be to one another or to the mainland..."[173]

The Committee's observations clearly highlighted the importance of two issues, the distance between the islands forming an archipelago and the scope of coastal state authority over the enclosed waters.[174] After examining the replies from governments, the Preparatory Committee drew up Bases of Discussion for the use of the proposed conference and Bases of Discussion No.12 and No.13 were formulated as follows:

> "Basis of Discussion NO.12: Each island has its own territorial waters.
>
> Basis of Discussion No.13: In the case of a group of islands which belong to a single state and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters."[175]

When the Conference met at the Hague in March 1930, Japan, Portugal and the United States circulated amendments to Basis of Discussion No.13. Japan's proposal was to substitute "ten miles" for "twice the breadth of the territorial sea",[176] and Portugal proposed that Basis No.13 be replaced by the following:

> "In the case of an archipelago, the islands forming the archipelago shall be deemed to be a

> unit and the breadth of the territorial sea shall be measured from the islands most distant from the center of the archipelago."[177]

The United States proposed the total deletion of the archipelago concept, and suggested that Bases No.12 and No.13 should be replaced by a single provision whereby each island had its own belt of territorial waters measured three miles from the coast.[178]

After a general discussion by the Preparatory Committee on the Bases of Discussion, two sub-committees were formed to examine these issues in greater detail. The Second Sub-Committee on the Territorial Sea and which discussed the Basis of Discussion No.13 reported to the Conference as follows:

> "With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the sub-committee was of opinion that a distance of ten miles (i.e., between them) should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea. Owing to lack of technical details, however, the idea of drafting a definite text on this subject had to be abandoned. The sub-committee did not express any opinion with regard to the nature of the waters included within the group."[179]

Thus, the subject of archipelagos was not discussed in the plenary meetings of the Conference.

## F. International Law Commission

The International Law Commission gave only cursory attention to the questions of archipelagos in drafting its text on the Law of the Sea.[180]

On submitting his First Report on the Regime of the Territorial Sea,[181] J.P.A. Francois, the Special Rapporteur on the subject, indicated that he had been inspired to a great degree by the Report of the Second Sub-Committee at the 1930 Hague Codification Conference,[182] and recalled the rejection by the International Court of Justice in the Anglo - Norwegian Fisheries Case of the ten mile rule for bays as established international law.[183]

In his First Report on "The Regime of the Territorial Sea", Professor J.P.A. Francois proposed that:

> "With regard to a group of islands (archipelago) and islands situated along the coast, the ten mile line shall be adopted as the baseline for measuring the territorial sea outward in the direction of the high sea. The waters included within the group shall constitute inland waters."[184]

For the baselines of archipelagos, he proposed that:

> "Nevertheless, where a coast is deeply indented or cut into, or where it is bordered by an archipelago, the baseline becomes independent of the low water mark and the method of baselines joining appropriate points on the coasts must be employed."[185]

However, in his Second Report,[186] the provision on baselines was amended in part:

> "As an exception where circumstances necessitate a special regime because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity, the baselines may be independent of the low water mark."[187]

Professor Francois departed from the governing principles of international law as expressed by the International Court of Justice in the Judgment of 18 December 1951 in the Anglo -

Norwegian Fisheries Case[188] and advocated a ten mile maximum both for baselines drawn across the mouths of bays and for baselines drawn between islands and islets of an archipelago. He amended Article 10 in his Second Report to reflect this, which read:

> "With regard to a group of islands (archipelago) and islands situated along the coast the ten mile line shall be adopted as to baselines."[189]

The intent of this amendment seems to be to limit the situations where islands could be grouped together as one unit. In proposing this amendment, Professor Francois stressed that Article 10 of his First Report and this amendment were not in accordance with the governing principles of international law as set forth by the International Court of Justice and said that the draft article was being submitted as a basis of discussion should the International Law Commission wish to study a text which envisaged the progressive development of international law on this subject.[190]

At the initiative of Professor Francois, a Committee of Experts, composed of geographers and hydrographers, met at The Hague in April 1953 to examine and report on certain technical questions arising out of the International Law Commission's First Draft Report on the Regime of the Territorial Sea. Part Three of that committee's report dealt with the technique for drawing straight baselines and the problem of island groups. The Committee of Experts considered that it was possible to draw straight baselines between two

islands situated at a distance of less than five miles from each other, and that in such a case the islands should constitute "a group", and that the enclosed waters should be treated as internal waters. They further recognized as a "special case", a situation in which the lines between the islands were less than five miles long except for one which would be less than ten miles long, thus creating a fictive bay.[191]

Although these proposals were embodied in the Amendments to Francois' Report,[192] the point was not discussed that year by the Commission, but appeared in a modified form as a draft Article 12 in Francois' Third Report the following year.[193] The amended Article 12 read as follows:

> "1. The term "group of islands" in the judicial sense, shall be determined to mean three or more islands enclosing a portion of the sea when joined by straight lines not exceeding five miles in length except that one such line may extend to a maximum of ten miles.
>
> 2. The straight lines specified in the preceding paragraph shall be the baseline for measuring the territorial sea. Waters lying within the area bounded by such lines and the islands themselves shall be considered as inland waters.
>
> 3. A group of islands may likewise be formed by a string of islands taken together with a portion of the mainland coastline. The rules set forth in paragraphs 1 and 2 of this Article shall apply pari passu."[194]

This draft article first defined the term "group of islands", as three or more islands enclosing a portion of the sea when joined by straight lines not exceeding five miles in length, except that one such line may extend to a maximum of ten miles.[195] There was no indication in the report as to

how the proposed maximum length of five miles for the straight baselines of archipelagos was arrived at, nor were any reasons given as to why only one line could be ten miles in length. In view of the wide variety of geographical differences and peculiarities where archipelagos are concerned, the rules proposed in the Third Report seem to be rather strict.[196]

When the International Law Commission adopted in 1954 its first draft of "Provisional Articles Concerning the Regime of the Territorial Sea",[197] it adopted provisions more or less similar to those suggested by the Rapporteur for straight baselines where a coast was deeply indented or cut into, or where islands were situated in the immediate vicinity, maintaining the ten mile distance as the maximum permissible length for straight baselines.

The Commission did not draft any provision on groups of islands during the Seventh Session of the Commission in 1955.[198] Discussion on the question arose incidentally when the Rapporteur pointed out that the decision to change the length of the maximum closing line for bays from ten miles to 25 miles could have implications for "fictive bays", such as those existing in the case of groups of islands, but added that the change should not be extended to the baselines of groups of islands in the interest of safeguarding the freedom of seas. However, members of the International Law Commission could not reach agreement on the text of an article regarding groups of islands.[199] It seems that finally the

International Law Commission came to grips with the problem of groups of islands but notably in terms of baselines and other traditional concepts as applicable to coastal archipelagos.[200] It was clear that uppermost in the minds of the members of the Commission was the situation of coastal archipelagos and there still seem to be no clear conception of what constituted a midocean archipelago.[201]

In 1956, at its Eighth Session, the International Law Commission adopted its final draft of "Articles Concerning the Law of the Sea",[202] with provisions for isolated islands:

> "Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high water mark."[203]

The Commission also in its final draft embodied for coastal archipelagos the principles laid down by the International Court of Justice in its 1951 Judgment in the Anglo - Norwegian Fisheries Case, and provided for the drawing of straight baselines "where circumstances necessitate a special regime because the coast is deeply indented or cut into, or because there are islands in the immediate vicinity."[204] The Commission also proposed a maximum of 15 miles for straight baselines drawn across the mouths of bays, except historic bays.[205]

The International Law Commission did not present any specific provisions concerning archipelagos and stated the following in its commentary to Article 10, concerning the territorial sea of isolated islands.

> "The Commission had intended to follow up this Article with a provision concerning groups of islands. Like the Hague Conference for the Codification of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagos. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject."[206]

It was an explanation that was to echo for many more years, as the family of nations grappled with the variety of rules and of state practice concerning the extent and delimitation of the territorial waters of archipelagos.[207]

G. International Law Publicists

Until the late 1950s, the views expressed by international law publicists concerning the territorial waters of archipelagos was limited to brief remarks made en passant, in the midst of general observations on the extent and delimitation of territorial waters. However scant the attention paid by these publicists to the territorial waters of archipelagos may be, it can be noted that they have at least followed the tendency to view archipelagos as units, and have accordingly pursued the applicable legal implications concerning the delimitation of waters.[208] The following is a brief account of the views of some international law publicists on the subject before the convening of the Third United Nations Conference on the Law of the Sea.

(i) Strupp: In his private codification of the law of the territorial sea, Strupp proposed that:

> "In the case of an archipelago which belongs to a single state, and where the distance from island to island in the periphery does not exceed three times the extent of the territorial sea, the group of islands is to be treated as a unity and the territorial sea is to be calculated from the line which links the outermost parts of the islands."[209]

(ii) Philip C. Jessup: Jessup, in his monograph, "The Law of Territorial Waters and Maritime Jurisdiction", adopted the draft of the American Institute of International Law and the Second Committee of the Hague Codification Conference of 1930 with slight modifications:

> "In the case of archipelagos, the constituent islands are considered as forming a unit and the extent of territorial waters is measured from the islands farthest from the center of the archipelagos."[210]

(iii) Charles C. Hyde: Hyde seems to be cautiously leaning in favour of the view that archipelagos may juridically be considered a unit. He states in his monograph, "International Law", that:

> "Where, however, a group of islands form a fringe or cluster around the ocean front of a maritime state it may be doubted whether there is evidence of any rule of international law that obliges such state invariably to limit or measure its claims to the waters around them by the exact distance which separates the several units."[211]

(iv) Gidel, G: Gidel is one of the few writers to give a detailed study of the subject.[212] With respect to coastal archipelagos, Gidel accepted the rule that such archipelagos shall be treated as a unit.[213] However, he favoured a

maximum of ten nautical miles for the baselines between the islands and islets of the group or between the mainland and the nearest island of the group. Longer baselines could be justified on "the theory of historic" waters.[214] He suggested that the waters lying between the islands forming the archipelago or between the archipelago and the mainland should be considered as territorial, not internal, in nature.[215] The views expressed by Gidel as to midocean archipelagos seem to be rather ambiguous. He states:

> "In the case of an archipelago situated far from land (midocean archipelago) the measuring of territorial waters must be made in conformity with the ordinary rules, individually around each island; exceptions to these rules may follow from the theory of historic waters. However, pockets of high seas inside the archipelago may be eliminated by the analogous application of the ten mile rule applicable to bays."[216]

With the suggestion to analogously apply the ten mile rule, there does not seem to be much difference between the suggestions made by the author as to the rule of law applicable to coastal archipelagos and midocean archipelagos respectively.[217]

(v) Georg Schwarzenberger: Schwarzenberger argued in 1949 that there may be certain circumstances where archipelagos could be regarded as a unit in law.[218] He later, in 1957, stated that in the case of archipelagos, the establishment of a territorial jurisdiction is a gradual process.[219] He argued that the judgment of the International Court of Justice in the Anglo - Norwegian Fisheries Case must be understood in

its context and he believed that the Court's observation that "the practice of states does not justify the formulation of any general rule of law",[220] "can hardly have been meant to affect the position of other than coastal archipelagos. This exception apart, waters between islands at a distance exceeding twice the breadth of the territorial sea remain part of the high seas."[221]

(vi) Myres S. McDougal and William T. Burke: They proposed the delimitation of territorial sea from straight baselines as a reasonable method of simplifying the zones of coastal authority in cases where the coastline is a complicated pattern of physical features including islands.[222]

Regarding midocean archipelagos they stated that:

> "The island groups involved here are those unconnected with a continental coast, such as the Philippine Islands, Indonesia, the Galapagos Islands of Ecuador, and the State of Hawaii in the United States. The major claim sometimes made is to delimit the territorial sea from a line connecting the outermost islands and to include all waters within the line as part of internal waters. The primary counterclaim asserts that an island in an archipelago does not differ from any other island and that each should have only its own belt of territorial sea; in this view, there would be no question of straight baselines or of internal waters. A possible alternative to either outcome would be to permit the use of a single territorial sea for the islands as a unit but to regard the waters within the baseline as part of the territorial sea."[223]

(vii) Colombos, C.J.: Colombos seems to have been quite categorical in his view favouring the archipelago concept. He states:

"The generally recognized rule appears to be

> that a group of islands forming part of an archipelago should be considered as a unit and the extent of the territorial waters measured from the center of the archipelago. In the case of isolated or widely scattered groups of islands, not constituting an archipelago, the better view seems to be that each island will have its own territorial waters , thus excluding a single belt for the whole group. Whether a group of islands forms or not an archipelago is determined by geographical conditions, but it also depends, in some cases, on historical or prescriptive grounds."[224]

Apart from these general works on international law and the law of the sea, since the 1958 Geneva Conference on the Law of the Sea, there has been a number of articles on specific archipelagic claims, particularly with regard to the Philippines and Indonesia. But in comparison with other issues little has been written on the problem of archipelagos, in general.

One of the few detailed articles on midocean archipelagos is by D.P. O'Connell who doubts whether geography is as important a factor in the matter of archipelagos as has been suggested.[225] In view of the fact that archipelagic claimants would have a large number of potential allies among the continental states with similar interests in marine resources and national security, he, therefore, advocates the integration of the archipelago principle in existing law in such a way as "to accommodate" the interests of the archipelagic state without disproportionately affecting the interests of other states and of the world at large".[226]

The articles written at the end of 1950s and at the beginning of the 1960s were mainly concerned with the application of straight baselines method of delimitation of territorial waters of midocean archipelagos. Towards the 1970s and during the course of UNCLOS III, the attention of the writers shifted to the question of archipelagic states.

Some authors have suggested that archipelagic states, such as the Philippines and Indonesia should be given special treatment for the delimitation of territorial waters.[227] Though there are various shades of opinion on the matter, these writers have generally considered the problem by reference to geography, history, politics and economics and support the position that territorial sea of archipelagic states should be measured from straight baselines drawn on and between the outermost islands, the waters within these baselines being internal waters.

### 3.1.4. The First and Second United Nations Conferences on the Law of the Sea

#### A. The First Conference, Geneva, 1958

On 21 February 1957, the General Assembly of the United Nations called for a conference of its members to "examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic, and political aspects

of the program, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate."[228] The First United Nations Conference on the Law of the Sea was convened in Geneva from February 24 to April 29, 1958. Despite its briefness, it adopted four conventions.[229]

The draft proposals of the International Law Commission[230] were adopted as a working basis of discussion at the Conference. The Conference also had before it a preparatory document on the question of archipelagos prepared by Mr. Jens Evensen, advocate at the Supreme Court of Norway, at the request of the United Nations Secretariat.[231] Having examined the problem of midocean archipelagos in his preparatory document, Mr. Evensen concluded his analysis along the following lines:[232]

i) Though a state must be allowed the latitude necessary in order to be able to adopt the delimitation of the territorial sea of its midocean archipelagos to practical needs and local requirements, such delimitation has international law aspects.

ii) The close dependence of the territorial sea upon the local domain of the archipelago will always be of paramount importance.

iii) The drawing of baselines must not depart appreciably from the general direction of the coast of the archipelago viewed as a whole.

iv) Although there was no fixed maximum as to the length of baselines, the drawing of exorbitantly long baselines, closing vast areas of sea to free navigation and fishing would be contrary to international law. In such cases, there could not be a sufficiently close dependence between the land domain and the water areas concerned.

v) The question as to whether the waters situated between and inside the constituent parts of an archipelago may be considered as internal waters would depend upon whether such areas are so closely linked to the surrounding land domain of the archipelago as to be treated in the same manner as the surrounding land.

vi) The waters situated between and inside the islands and islets of an archipelago shall be considered as internal waters and where such waters form a strait, such waters cannot be closed to the innocent passage of foreign ships.

However, the Geneva Conference of 1958 did not, in fact, take up the matter of archipelagos. On the few occasions when the subject was raised during the Conference, no progress was made toward a solution of the problem.

During the general discussion of the Draft on the Regime of the Territorial Sea as a whole, Indonesia expressed the hope that although the International Law Commission had been unable to formulate a draft provision on the subject, the content of Draft Article 10 would be completed by the insertion of a further provision concerning groups of islands

regarded as a whole and thus take into account the situation of midocean archipelagos.[233] The United States, while speaking generally, about the freedom of the seas stated that it would consider any attempts to delimit the islands of an archipelago by using straight baselines as an infringement of the freedom of the seas.[234]

At the outset of the Conference, Philippines and Yugoslavia offered fresh initiatives and submitted two proposals. In its proposal, the Government of the Philippines sought to add the following new paragraph with respect to draft Article 5:

> "When islands lying off the coast are sufficiently close to one another as to form a compact whole and have been historically considered collectively as a single unit, they may be taken in their totality and the method of straight baselines provided in Article 5 may be applied to determine their territorial sea. The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the group. The waters inside such lines shall be considered internal waters."[235]

Yugoslavia proposed that two new paragraphs be added to Article 10, the second of which stated that:

> "The method referred to in Article 5, of straight baselines joining appropriate points on the coast of islands facing the high seas shall be applied in the same way to groups of islands distant from the coast. The areas of sea within such lines and islands shall be considered as internal waters of the islands."[236]

Both these proposals, if adopted, would have had the effect of drawing straight baselines along the coasts of the outermost islands of midocean archipelagos, thereby making all

waters enclosed within the unit internal waters.[237] However, both the proposals were withdrawn before being debated or voted upon by the First Committee of the Conference. The Yugoslavian proposal was later reintroduced by a representative of the Danish delegation,[238] but again was withdrawn after statements were made by Sir Gerald Fitzmaurice suggesting that the matter required further study.[239]

Thus, the problem of midocean archipelagos was once again considered too complex for solution.[240] Nevertheless, certain attitudes with respect to archipelagos are discernible from the debates. Of those few countries which were involved in the discussions, even the countries with the most conservative views on the question of the waters of archipelagos were prepared to concede that a special regime needed to be worked out for such situations.[241] The delegates mainly saw the problem as concerned with the maximum length of lines which could be drawn linking groups of islands together.[242] A failure to agree on this point meant that they were unable to advance any solution to the problem.[243]

The withdrawal of both proposals on the delimitation of the territorial sea of midocean archipelagos left a lacuna in the Territorial Sea Convention.[244]

However, Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone that was adopted by the Conference provided a regime for coastal archipelagos.[245] According to that Article, where the

coastline is deeply indented or if there is a "fringe of islands along the coast in its immediate vicinity", a method of straight baselines joining "appropriate points" may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast and must not be drawn from low tide elevations unless lighthouses or other similar installation permanently above sea level have been built on them, and the sea areas lying within the lines so drawn "must be sufficiently clearly linked to the regime of internal waters." For the determination of particular baselines within the straight baseline system, account may be taken of "economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage." [246]

It is clear from the above that Article 4 recognizes the principles enunciated by the International Court of Justice in the Fisheries Case[247] as being applicable for deciding; (a) in what circumstances straight baselines may be used and, (b) what are the conditions governing the method of drawing particular baselines where the use of straight baselines is permissible.[248]

B. The Second Conference, Geneva, 1960

Although the 1958 Conference was successful in reaching agreements embodied in multilateral conventions on the law of

the sea,it had not solved several problems.[249] The United Nations General Assembly accordingly called the second Conference on the Law of the Sea to find a solution to these problems.

The Second United Nations Conference on the Law of the Sea which met in Geneva from March 17 to April 27, 1960, was primarily concerned with two problems: "(a) the breadth of the territorial sea bordering each coastal state, and (b) the establishment of fishing zones by coastal states in the high seas contiguous to, but beyond the outer limit of the territorial seas of the coastal states."[250]

At this Conference too, the subject of midocean archipelagos only arose incidentally thereto in relation to historic waters.[251] During the Conference, both the Philippine and Indonesian delegates spoke with respect to their special position as archipelagos.[252]

The Philippines reiterated its position for a special rule on midocean archipelagos, again invoking its claim to historic waters.[253] It introduced an amendment[254] to an eighteen power proposal,[255] which included Indonesia, to the effect that none of the provisions contained in the proposal regarding the breadth of the territorial sea would affect the juridical nature of historic waters. As the general assembly had resolved to embark upon a study of historic waters, it was felt by some delegations that the Philippine amendment was inopportune.[256]

These were the only indirect mentions of archipelagic waters during the 1960 Conference and no further consideration was given to archipelagic waters at the Geneva Conference of 1960.

## 3.2. THE QUESTION OF ARCHIPELAGOS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

There was little discussion at UNCLOS III on coastal archipelagos. The United Nations Convention on the Law of the Sea adopted by UNCLOS III merely incorporated the principles relating to coastal archipelagos established in the judgment of the International Court of Justice in the Fisheries case and those contained in Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958.

Archipelagic proposals at first did not contemplate distinctions of political status with regard to geographically united midocean island groups. It was only at UNCLOS III, that the debate turned to focus on accommodating the specific needs of archipelagic states. However, continental states with midocean archipelagos such as Ecuador, Portugal, India, and Spain argued that no distinction should be made between an archipelago that constituted a single state and an archipelago that formed an integral part of a coastal state, nor should an archipelago at some distance from the coastal state be treated differently from one located near a coastal state.[257]

At the second session of UNCLOS III, in 1974, several continental states with midocean archipelagos introduced a nine-nation working paper which contained provisions designed to extend the regime relating to archipelagic states also to midocean archipelagos forming part of a continental state.[258] The working paper provided that:

> "1. A coastal State with one or more off-lying archipelagos, as defined in article 5, paragraph 2, which form an integral part of its territory, shall have the right to apply the provisions of articles 6 and 7 to such archipelagos upon the making of a declaration to that effect.
> 2. The territorial sea of a coastal state with one or more off-lying archipelagos exercising its rights under this article will be measured from the applicable baselines which enclose its archipelagic waters."[259]

Although these provisions were incorporated neither in the Informal Single Negotiating Text[260] nor in the succeeding texts, states with midocean archipelagos maintained to the very end of the Conference their insistence on the inclusion of such territories in the archipelagic regime.[261] They argued that the special regime for archipelagos should be made applicable to all archipelagos, whatever their type and location, because in their view, problems relating to archipelagic states and archipelagos forming part of the territory of a continental state were closely related and had to be solved jointly.[262]

These moves to widen the applicability of the archipelagic principle were opposed by those who feared that a vague definition would lead to a proliferation of claims and

most of the states represented at UNCLOS III rejected the application of the archipelagic principle to midocean archipelagos of continental states and limited the definition of an archipelagic state only to a state which is constituted wholly by one or more archipelagos.[263]

Thus, UNCLOS III did not take up substantially the issue of midocean archipelagos belonging to continental states and the question at UNCLOS III with respect to archipelagos was mainly about granting a special status to the waters of archipelagic states and in guaranteeing the freedom of navigation through the waters of archipelagic states.

### 3.2.1. Archipelagic Proposals in the Seabed Committee

In 1967, the representative of Malta, Ambassador Pardo, suggested to the United Nations General Assembly to examine the question of "Reservation Exclusively for Peaceful Purposes of the Seabed and the Ocean Floor and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind."[264] To this end, he further proposed to the General Assembly to declare the ocean floor and its resources the "common heritage of mankind" and to take the necessary steps to embody this principle in an international treaty.[265]

For this purpose the General Assembly established an Ad Hoc Committee of thirty five members in 1967.[266] This Ad

Hoc Committee, the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction was requested to prepare a study which would include a survey of past and present activities of the United Nations and other intergovernmental bodies with regard to the seabed and the ocean floor, and of existing international agreements concerning those areas, giving an account of the scientific, technical, economic, legal, and other aspects of the item; and an indication as to practical means of promoting international cooperation in the exploration, conservation and use of the seabed and the ocean floor, and the subsoil thereof, as contemplated in the title of the item, and of their resources.[267]

Later, at its twenty third session on 21 December 1968, the General Assembly renamed the Ad Hoc Committee and established the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, reaffirming the mandate of the Committee and increasing its membership to 41.[268]

During its first session held in March 1971, the Committee formed three sub-committees allocating certain subjects and functions to each sub-committee.[269]

Sub-committee I was assigned to prepare draft treaty articles embodying the international regime including the international machinery for the area and the resources of the seabed and ocean floor, and the subsoil thereof, beyond the

limits of national jurisdiction, taking into account the equitable sharing by all states in the benefits to be derived therefrom.[270]

Sub-committee II was to deal with the "classical" issues of the law of the sea, such as the limits of the territorial sea, the contiguous zone, the limits of the legal continental shelf, navigation through straits and the regime of the high seas.[271]

Sub-committee III was to deal with the preservation of the marine environment and marine scientific research.[272]

In addition, the work of Sub-committee II included a review of state practice in each of the matters that it was to deal with as well as an analysis of the 1958 Geneva Conventions on the Law of the Sea. This Sub-committee was also given the task of compiling a list of subjects and issues to be taken up by the Law of the Sea Conference.[273]

The Seabed Committee deliberated for two years before it could agree on the list of subjects and issues to be discussed at the future conference.[274] The Committee recognized the special nature of archipelagos and included it in the list of "Subjects and Issues" which was to serve as a framework for the discussion and, eventually for the drafting of treaty articles at the forthcoming conference. The inclusion of archipelagos in that list is of considerable significance, as the subject of archipelagos is an issue which does not affect a large number of states.[275] Thus, in contrast to the 1958

and 1960 Conferences where the concept received little positive response, this time the subject of archipelagos was to be treated as a separate issue.

The readiness of the international community to undertake a serious study of the subject of archipelagos at UNCLOS III was due to the political and historical context of the time.[276] The decision making power involved in the development and establishment of new rules of international law has radically changed since 1930 and even 1958. The international community is now comprised of a large majority of countries which are relatively new states , many of which are, moreover, economically and technologically less developed. Archipelagic states number among this category.

It is of particular interest to note here, the reference made by the Sub-committee to the special position of archipelagic states in international law and to the various criteria which should determine whether or not groups of islands constitute an archipelago, while including archipelagos in the list of "Subjects and Issues" to be taken up at the forthcoming conference.[277] The committee stated that the unity of an archipelagic state and the protection of its security, the preservation of the political and economic unity of an archipelagic state , the preservation of its marine environment and the exploitation of its marine resources justified the inclusion of the waters inside an archipelago under the sovereignty of the archipelagic state

and the granting of a special status to such waters.[278] Statements were made on this question by various delegates regarding the passage through archipelagic waters and straits and the nature of such passage. It was also stated that the special status of archipelagic waters was an emerging concept and might be settled as part of an overall solution of problems relating to the law of the sea.[279]

With the setting up of the United Nations Seabed Committee, four archipelagic states, Fiji, Indonesia, Mauritius and the Philippines, began to work hard for world wide acceptance of the archipelagc principle.[280] After meeting among themselves in New York, Geneva and Manila, they worked in wider regional groups such as the Afro - Asian Legal Consultative Committee in 1971 and 1972.[281]

On March 14, 1973, Arturo Tolentino Chairman of the Philippine Delegation, submitted to the Seabed Committee for consideration, on behalf of the archipelagic states, Fiji, Indonesia, Mauritius and the Philippines, three principles relating to archipelagic states. The principles read:

> "1. An archipelagic state, whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically have or may have been regarded as such, may draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago from which the extent of the territorial sea of the archipelagic state is or may be determined.
>
> 2. The waters within the baselines, regardless of their depth or distance from the coast, the seabed and the subsoil thereof, and the superjacent airspace, as well as all their resources, belong to and are subject to the sovereignty of the

archipelagic state.

3. Innocent passage of foreign vessels through the waters of the archipelagic state shall be allowed in accordance with its national legislation, having regard to the existing rules of international law. Such passage shall be through sealanes as may be designated for the purpose by the archipelagic state."[282]

The underlying basis of these principles is the unity of land, water and people into a single entity.[283] According to Phiphat Tangsubkul, this statement of principles of March 4th, 1973 "could be considered one of the most important movements in the progress of the archipelagic principles after the First Geneva Conference on the Law of the Sea had rejected draft proposals concerning the issue prepared by the International Law Commission."[284]

The four archipelagic states mentioned above subsequently presented in the summer of 1973 at the Geneva Session of the Seabed Committee , Draft Articles which purported to elaborate and refine these three principles. This proposal was as follows:[285]

"Article I

1. These articles apply only to archipelagic States.

2. An archipelagic State is a State constituted wholly or mainly by one or more archipelagos.

3. For the purposes of these articles an archipelago is a group of islands and other natural features which are so closely interrelated that the component islands and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such.

Article II

1. An archipelagic State may employ the method

of straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago in drawing the baselines from which the territorial sea is to be measured.

2. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

3. 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 where a low tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

4. The system of straight baselines shall not be applied by an archipelagic State in such a manner as to cut off the territorial sea of another state.

5. The archipelagic State shall clearly indicate its straight baselines on charts to which due publicity shall be given.

Article III

1. The waters enclosed by the baselines, which waters are referred to in these articles are archipelagic waters, regardless of their depth or distance from the coast, belong to and are subject to the sovereignty of the archipelagic State to which they appertain.

2. The sovereignty and rights of the archipelagic State extend to the air space over its archipelagic waters as well as to the water column, the seabed and subsoil thereof, and to all of the resources contained therein.

Article IV

Subject to Article V, innocent passage of foreign ships shall exist through archipelagic waters.

Article V

1. An archipelagic State may designate sealanes suitable for the safe and expeditious passage of ships through its archipelagic waters and may restrict the innocent passage by foreign ships through those waters to those sealanes.

2. An archipelagic State may, from time to time, after giving due publicity thereto, substitute other sealanes for any s e a l a n e s previously designated by it under the provisions of this article.

3. An archipelagic State which designates

sealanes under the provisions of this article may also prescribe traffic separation schemes for the passage of foreign ships through those sealanes.

4. In the prescription of traffic separation schemes under the provisions of this article, an archipelagic State shall, inter alia, take into consideration:

a. the recommendation or technical advice of competent international organisations;

b. any channels customarily used for international navigation;

c. the special characteristics of particular channels;

d. the special characteristics of particular ships or their cargoes.

5. Any archipelagic State may make laws or regulations, not inconsistent with the provisions of these articles and having regard to other applicable rules of international law, relating to passage through sealanes and traffic separation schemes as designated by the archipelagic State under the provisions of this article, which laws and regulations may be in respect of, inter alia, the following:

a. the safety of navigation and the regulation of marine traffic, including ships with special characteristics;

b. the utilisation of, and the prevention of destruction or damage to, facilities and systems of aids to navigation;

c. the prevention of destruction or damage to facilities or installation for the exploration and exploitation of the marine resources, including the resources of the water column, the seabed and subsoil;

d. the prevention of destruction or damage to submarine or aerial cables and pipelines;

e. the preservation of the environment of the archipelagic State and the prevention of pollution thereto;

f. research of marine environment;

g. the prevention of infringement of the customs, fiscal, immigration, quarantine or sanitary regulations of the archipelagic State;

h. the preservation of the peace, good order and security of the archipelagic State.

6. The archipelagic State shall give due publicity to all laws and regulations made under the provisions of paragraph 5 of this article.

7. Foreign ships exercising innocent passage through those sealanes shall comply with all laws and regulations made under the provisions of this

> article.
>
> 8. If a warship does not comply with the laws and regulations of the archipelagic State concerning passage through any sealanes designated by the archipelagic State under the provisions of this article and disregards any request for compliance which is made to it, the archipelagic State may suspend the passage of such warship and require it to leave the archipelagic waters by such route as may be designated by the archipelagic State. In addition to such suspension of passage the archipelagic State may prohibit the passage of that warship through the archipelagic waters for such period as may be determined by the archipelagic State.
>
> 9. Subject to the provisions of paragraph 8 of this article, an archipelagic State may not suspend the innocent passage of foreign ships through sealanes designated by it under the provisions of this article, except when essential for the protection of its security, after giving due publicity thereto, and substituting other sealanes for those through which innocent passage has been suspended.
>
> 10. An archipelagic State shall clearly demarcate all sealanes designated by it under the provisions of this article and indicate them on charts to which due publicity shall be given."

This proposal is quite comprehensive and covers the whole spectrum of the archipelagic regime, totally departing from the various classical types of proposals made by international bodies and jurists before the First Conference on the Law of the Sea.[286] It also gives a clear and concise picture of the general position of states claiming the archipelagic regime. Both the statement of principles on the archipelagic regime and the draft articles on archipelagos provide for the drawing up of straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago for the purpose of delimiting the territorial sea while at the same time establishing a regime <u>sui generis</u> in

the waters inside the baselines.

At the same session of the Seabed Committee in Geneva, the United Kingdom introduced a "Draft Article on the Rights and Duties of Archipelagic States."[287] This proposal was largely representative of the views of the major maritime powers on the subject, and it received strong support in the Seabed Committee from Japan, U.S.S.R. and Australia. The proposal of the United Kingdom was as follows:[288]

> "1. On ratifying or acceding to this Convention, a State may declare itself to be an archipelagic State where:
>
> a. the land territory of the State is entirely composed of three or more islands; and
>
> b. it is possible to draw a perimeter, made up of a series of lines or straight baselines, around the outermost islands in such a way that:
>
> i. no territory belonging to another State lies within the perimeter,
>
> ii. no baseline is longer than 48 nautical miles, and
>
> iii. the ratio of the area of the sea to the area of land territory does not exceed five to one:
>
> Provided that any straight baseline between two points on the same island shall be drawn in conformity with Articles ... of the Convention (on straight baselines).
>
> 2. A declaration under paragraph 1 above shall be accompanied by a chart showing the perimeter and a statement certifying the length of each baseline and the ratio of land to sea within the perimeter.
>
> 3. Where it is possible to include within a perimeter drawn in conformity with paragraph 1 above only some of the islands belonging to a State, a declaration may be made in respect of those islands. The provisions of this Convention shall apply to the remaining islands in the same way as they apply to the islands of a State which is not an archipelagic State and references in this article to an archipelagic State shall be construed accordingly.
>
> 4. The territorial sea, (Economic Zone) and any continental shelf of an archipelagic State shall extend from the outside of the perimeter in conformity with Articles ... of this Convention.

5. The sovereignty of an archipelagic State extends to the waters inside the perimeter, described as archipelagic waters: this sovereignty is exercised subject to the provisions of these Articles and to other rules of international law.

6. An archipelagic State may draw baselines in conformity with Articles ... (bays) and ... (river mouths) of this Convention for the purpose of delimiting internal waters.

7. Where parts of archipelagic waters have before the date of ratification of this Convention been used as routes for international navigation between one part of the high seas and another part of the high seas or the territorial sea of another State, the provisions of Articles ... of this Convention shall apply to those routes (as well as to those parts of the territorial sea of the archipelagic State adjacent thereto) as if they were straits. A declaration made under paragraph 1 of this Article shall be accompanied by a list of such waters which indicates all the routes used for international navigation, as well as any traffic separation schemes in force in such waters in conformity with Articles ... of this Convention.

8. Within archipelagic waters, other than those referred to in paragraph 7 above, the provisions of Articles ... (innocent passage) apply.

9. In this Article, references made to an island include a part of an island and reference to the territory of a State includes its territorial sea.

10. The provisions of this article are without prejudice to any rules of this Convention and international law applying to islands forming an archipelago which is not an archipelagic State.

11. The depository shall notify all States entitled to become a party to this Convention of any declaration made in conformity with this Article, including copies of the chart and statement supplied pursuant to paragraph 2 above.

12. Any dispute about the interpretation or application of this Article which cannot be settled by negotiations may be submitted by either party to the dispute to the procedures for the compulsory settlement of disputes contained in Articles ... of this Convention."

This proposal does not include a definition of an archipelago in terms of geographical, political, economic and

historical conditions. The effect of the proposal in general is to restrict the rights and powers of archipelagic states and to widen the rights granted to other states in the waters of archipelagic states. The object of the Proposal of the United Kingdom, according to C.F. Amerasinghe, was to limit the area of the archipelagic sea and to make the regime of the archipelagic sea identical with that of the territorial sea, thereby extending the territorial sea of the archipelagic states inwards from the baselines to cover all enclosed waters.[289]

A comparative examination of the proposal submitted by the archipelagic states and the United Kingdom's draft on midocean archipelagos reveals two opposing and seemingly irreconcilable attitudes toward the definition of an archipelagic state, and the juridical regime for the enclosed waters.[290] The difficulty in finding a solution was posed by the question of passage of foreign ships through straits used for international navigation, which now would lie in archipelagic waters. Here there was a clear conflict of interest between the large maritime powers, who considered that a mere regime of innocent passage through straits is prejudicial to their own security interests, as it severely restricts their rights of navigation and overflights, and archipelagic states who regard a regime of free transit as derogating from their sovereignty over archipelagic waters, whereas innocent passage would give them the opportunity to

safeguard their vital interests.

When the Seabed Committee winded up its preparatory work for UNCLOS III, the task that lay ahead for the Conference with respect to midocean archipelagos was to achieve a satisfactory balance between the conflicting interests of archipelagic states and the maritime states.

### 3.2.2. The Third United Nations Conference on the Law of the Sea (UNCLOS III)

The subject of midocean archipelagos was dealt with at UNCLOS III by its Second Committee, the mandate of which covered the items which had been formerly dealt with by Sub-Committee II of the Seabed Committee.[291]

During the plenary session of the Conference in Caracas in 1974, many developing nations lent their support to the archipelagic cause.[292]

Both the draft of the archipelagic states and that of the United Kingdom served as points of departure for discussions and for the presentation of further draft articles at the Caracas Session of the Third Law of the sea Conference.[293] Indeed, much of the debate on archipelagos was a repetition of the Seabed Committee discussions. However, a few new proposals were made which are of some significance for the further development of the subject.

During the first session of the Conference, the four archipelagic states again submitted draft articles on the

subject which were largely based on their earlier proposal before the Seabed Committee. The amendments to their earlier proposal which were incorporated in the present proposal were related to the definition of an archipelago, the rights of neighbouring states in archipelagic waters and the right of innocent passage.[294] They were designed to meet as far as possible the criticisms directed at the initial Draft Articles without sacrificing the essence of the archipelago concept as conceived by the archipelagic states, i.e., "the dominion and sovereignty of the archipelagic state within its baselines."[295]

Three more nations, Tonga, Papua New Guinea and the Bahamas, aspired to recognition as archipelagic states. Bahamas introduced its own draft articles, to provide for its special situation of the shallow, but extensive Bahama banks, claiming that archipelagic baselines should join not merely the outermost points of the outermost islands and drying reefs, but also non-navigable continuous reefs or shoals.[296]

Amendments were introduced by Thailand and Malaysia to the archipelagic states' draft to provide for the special interests and needs of an archipelagic state's neighbouring states with regard to the living resources, and to guaranteed access and all forms of communications.[297]

The Soviet Union, while generally accepting the archipelago principle, was concerned about the navigation

rights through the archipelagic waters and introduced amendments to the draft articles of the archipelagic states which would guarantee "freedom of passage in archipelagic straits, the approaches thereto, and those areas in archipelagic waters of the archipelagic state along which normally lie the shortest sea lanes used for international navigation between one part and another part of the high seas."[298]

Towards the end of the Caracas session it became clear that the archipelagic principle was generally acceptable. However, the major maritime states were prepared to support the archipelagic principle only if innocent passage was guaranteed everywhere, and provided that through normal international navigation corridors, all vessels enjoyed the same unimpeded transit rights as when passing through international straits. The archipelagic states, while accepting innocent passage, insisted on their right to designate special sealanes for warships and ships with special characteristics. They further stated that warships and other dangerous ships would be subject to special laws and regulations and even prior notification or authorization. The Caracas Session of UNCLOS III ended with little movement towards an acceptable compromise on archipelagos.

The second substantive session of UNCLOS III was held in Geneva in 1975 and carried on the work from where the first session had left it. At this session there were few meetings

of archipelagic states and maritime powers about the question of passage through archipelagic waters. Several intricate definitional formulae were discussed to accommodate Bahamas as an archipelago, along with the other four original advocates of the archipelago principle.

On April 18, 1975, the Conference at its 55th meeting requested the Chairmen of its three Committees each to prepare a single text as a basis for future negotiations, on the subjects entrusted to each Committee on the basis of proposals submitted by the different delegations and taking into account the formal and informal discussions held until then.[299] Many delegations submitted language on particular articles for the Chairmen's consideration in drafting the single text of the Second Committee. The Bahamas and Indonesia each submitted articles on an archipelagic regime. The Bahamian version included a definition of archipelago based on baseline length and water to land ratios, and the provision for archipelagic transit acceptable to naval powers. Indonesia's suggestions for Committee II Chairman leaned toward coastal state control of archipelagic water passage, and particularly called for prior notifications for ships of "special characteristics."[300]

The three committee Chairmen reduced a wide variety of differing proposals into one three part Informal Single Negotiating Text. Although it was not really a negotiated text or accepted compromise, it did reflect an emerging trend and

the possible direction in which a consensus might be found.

After considering the various proposals submitted, the Second Committee included provisions in the Informal Single Negotiating Text prepared at the end of the Geneva Session in 1975 fixing a ratio of the water area to the area of the land, including atolls, between one to one and nine to one. The maximum length of the baselines shall in general not exceed eighty nautical miles, except for a certain percentage of these baselines, which may reach a length of 125 miles. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.[301]

These mathematical criteria were more generous than those proposed by the United Kingdom,[302] and constituted a compromise reached between the advocates of archipelagic theory, who desired no such restraints on their countries' maritime boundaries, and the powerful maritime states which wanted as little restriction of the high seas as possible. The compromise was reached through discussions at the Informal Working Group on Archipelagos[303] and the numerous behind the scene negotiations between the archipelagic states and the advanced maritime states in which the Chairman of the Second Committee, Mr. Andres Aguilar played an important mediatory role.[304]

The fifth session of UNCLOS III, held in New York from March to May 1976, produced a Revised Single Negotiating Text

which like the Single Negotiating Text was prepared under the responsibility of the Committee Chairmen. Andres Aguilar, Chairman of the Second Committee, indicated that on other than a few issues most needing negotiation he retained the language of the Single Negotiating Text, or included amendments on which there was a clear trend or he was given a mandate, and made drafting changes.[305] Archipelagos were not mentioned as one of the contentious issues and presumably even the few changes made can be taken as reflecting a wide consensus.[306]

The Revised Single Negotiating Text, like the Single Negotiating Text, provided for baselines of archipelagos not to exceed 80 nautical miles except one percent, which might extend to 125 nautical miles. Some archipelagic states tried at the 1976 session to increase the baselines length and have a greater allowable percentage of lines exceeding 80 miles in order to incorporate several segments longer than 80 miles into a baseline system.

During the sixth session of UNCLOS III held in 1977, the Conference produced the Informal Composite Negotiating Text Containing 303 articles and 7 annexes.[307]

Reproducing the provisions in the previous documents, the Informal Composite Negotiating text also stated that archipelagic states may draw straight baselines joining the outermost points of the outermost islands and the drying reefs of the archipelago provided that within such baselines are

included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between one to one and nine to one. The length of such baselines shall not exceed 100 nautical miles. The breadth of the territorial sea, the contiguous zone , the exclusive economic zone and the continental shelf shall be measured from such baselines.[308]

The Informal Composite Negotiating Text issued on April 211, 1980 carried the same provisions on archipelagic states.[309]

During the ninth session of the Conference which commenced on July 28, 1980, more revisions were made resulting in the "Draft Convention on the Law of the Sea (Informal Text)", issued on September 22, 1980.[310] This was further revised during the tenth session which was held in New York, March 9 to April 24, 1980 and continued in Geneva from August 2 to 28, 1981.[311] This text also carried the same provisions on archipelagic states. The text with some amendments was finally adopted as the United Nations Convention on the Law of the Sea (LOSC) by the Conference during its plenary session in New York on April 30, 1982.[312]

With the adoption of the LOSC, the archipelagic doctrine was finally accepted as a principle of international law. However, the application, in practice, of the archipelagic provisions contained in the LOSC are further complicated by the fact that the Convention has not yet entered into force

and some of the major maritime powers have not yet even signed the Convention.

The LOSC will enter into force 12 months after the receipt of the sixtieth instrument of ratification or accession. To date, the Convention has received an unprecedented 159 signatures, but only 55 ratifications or accessions, only one of which is from a developed country.[313] However, there appears to be a real possibility that the Convention may receive the required number of ratifications or accessions before too long. If the Convention enters into force, without having received any ratifications or accessions from the major maritime states, it would not achieve the universal character it was designed to acquire and may lead to a situation which could erode the delicate balance contained in the Convention.

Many states, however, are of the view that most of the provisions of the LOSC, including those relating to archipelagic states are already customary norms of international law. An Assistant Legal Adviser for Oceans and International Environmental and Scientific Affairs of the U.S. State Department, in stressing this point, has written that:

> "Prior to the Third United Nations Conference on the Law of the Sea, international law did not permit archipelagic claims. Although the 1982 Law of the Sea Convention is not yet in force, the archipelagic provisions reflect customary international law and codify the only rules by which a nation can now rightfully assert an archipelagic claim."[314]

However, although the LOSC is generally reflective of

customary international law of the sea, the same cannot be said of the provisions of the LOSC relating to the archipelagic regime. While there is a general acceptance and recognition of the right of archipelagic states to draw archipelagic straight baselines around their islands, the manner in which such baselines are to be drawn and the regime of the waters enclosed within such baselines do not appear to have achieved such a general acceptance.

## 3.3. CONCLUSION

The adoption of the provisions on archipelagic waters at UNCLOS III was facilitated by a number of factors. The main factor to be taken note of was the appearance on the scene as a result of the decolonization process, of a group of newly independent ocean states. The geographic characteristics of these states made it difficult for them to achieve political unity, security, and economic prosperity. Understandably, they sought to overcome this difficulty by using the archipelagic concept, thus changing the content of the problem of archipelagos in international law of the sea.

Apart from the archipelagic states, the appearance of a whole block of newly independent developing nations, to which archipelagic states also belonged, changed the circumstances and conditions of international treaty making in a radical way. The active and strong support received by ocean states for their interests and claims from this group of states,

which already constituted two thirds of the international community of states at UNCLOS III, was crucial to the inclusion of the subject of archipelagos in the agenda of the Conference and later in resolving the question at the conference.

It also needs to be emphasised that the success achieved in arriving at a solution to the question of archipelagic states is, to a great extent, related to, and due to the successful completion of UNCLOS III as a whole. In particular, the question of archipelagic states was discussed, negotiated, and resolved as a single packet, together with the issues relating to the breadth of the territorial sea, the legal status of straits used for international navigation, and a number of other issues.

However, it must also be noted that UNCLOS III, in this respect, addressed the concerns only of archipelagic states represented at the conference.[315] The concerns of many archipelagic states which became independent after the beginning of UNCLOS III and were unable to take part in the Conference due to financial and other reasons were not taken into account for the simple reason that such concerns were not voiced at the Conference.[316]

The concerns of ocean states which were not represented at UNCLOS III and the issue of midocean archipelagos of continental states are yet to be addressed and the practice of such states with respect to the waters of such archipelagos

are diverse and may provide new dimensions for further development of the archipelagic concept in international law.

END NOTES

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2. 516 U.N.T.S. 205.

3. Marston, Geoffrey. "International Law and Midocean Archipelagos", 4 Annales d'Etudes Internationales, 1973, at 173.

4. Rodgers, Patricia Elaine Joan. Midocean Archipelagos and International Law. New York: Vantage Press, 1981, at 4.

5. Hale, Sir M., De Jure Maris et Brachiorum eiusdem, Part I, ch. iv, p.10, cited in Colombos, J., The International Law of the Sea. Fifth Revised Edition, London: Longmans, 1962, at 166.

6. Marston, G., supra note 3 at 174.

7. Ibid.

8. Rodgers, P.E.J., supra note 4 at 4.

9. Ibid.

10. Ibid.

11. Ibid., at 5.

12. Marston, G., supra note 3 at 174.

13. Ibid. At the time when the problem first arose, the belt of territorial waters was narrow, in comparison with some latter claims, usually being one marine league or three nautical miles in breadth.

14. The Anna, La Porte (1805), 5 Christopher Robinson 373; See also McNair, A.D., (ed.), British International Law Cases, Vol.2, London: Stevens and Sons, 1965, at 696-701.

15. Ibid. McNair, A.D., at 699.

16. McNair, A.D., (ed.), International Law Opinions, Vol. I, Cambridge: Cambridge University Press, 1956, at 365.

17. Rodgers, P.E.J. supra note 4 at 6.

18. Some of these opinions have been reproduced by H.A. Smith and A.D. McNair in their respective compilations of British practice: Smith, H.A., Great Britain and the Law of Nations, Vol. II, London: P.S. King, 1935, at 221-241; McNair, A.D., supra note 14 at 363-374.

19. Smith, H.A., supra note 18 at 239 ; McNair, A.D., supra note 16 at 368.

20. Ibid.

21. Marston, G. supra note 3 at 175-176.

22. McNair, A.D. supra note 16 at 369.

23. Rodgers, P.E.J. supra note 4 at 6.

24. Ibid.

25. Marston, G. supra note 3 at 177.

26. Ibid.

27. Ibid.

28. Ibid.

29. See, for example, the opinion dated March 25, 1875 mentioned earlier. McNair, A.D. supra note 16 at 369.

30. Marston, G. supra note 3 at 177.

31. Fiji, Revised Laws, 1967, Vol.VI, at 3285.

32. Marston, G. supra note 3 at 178.

33. Ibid.

34. Ibid.

35. Cited in Civil Aeronautics Board v. Island Airlines, Inc. 235 F. Supp.990, 998 (D. Hawaii, 1964).

36. See Marston, G. supra note 3 at 179.

37. Evensen, Jens. Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos. United Nations Conferences on the Law of the Sea. Official Records, First Conference, 1958. Vol.I, New York: William S. Hein and Co., 1980, at 295.

38. Ibid.

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40. Evensen, J. supra note 37.

41. Lee, H.C. "An Archipelagic Claim for Papua New Guinea", 2 Melanesian Law Journal, 1974, at 99.

42. Ibid.

43. Ibid.

44. For example : Neutrality Decrees of 27 January 1927 and 11 September 1938, and Enactments Concerning Fishing and Hunting in Greenland Waters of 1 April 1925, 27 May 1950, 7 June 1951 and 11 November 1953. Evensen, J. supra note 37.

45. Evensen, J. supra note 37.

46. Namely, the Sound formed by the Swedish coast and the Danish island of Sjaeland, the Great Belt formed by Danish islands and the Little Belt formed by islands and Jutland.

47. Lee, H.C. supra note 41.

48. Ibid.

49. Ibid.

50. Ibid.

51. Article 2 (II) League of Nations Treaty Series, Vol.9, at 211.

52. Evensen, J. supra note 37 at 296.

53. O'Connell, D.P. supra note 39 at 22.

54. Ibid.

55. Ibid.

56. Evensen, J. supra note 37 at 296.

57. Ibid. at 297.

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59. U.N. Doc. ST/LEG/SER/. B/6, at 467.

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61. Ibid.

62. U.N. Doc. supra note 59 at 468.

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64. U.N. Doc. supra note 59 at 487.

65. Ibid.

66. See Evensen, J. supra note 37 at 298.

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77. Tangsubkul, Piphat. The Southeast Asian Archipelagic States: Concept, Evolution and Current Practice. Honolulu: East-West Environment and Policy Institute, 1984, at 37.

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91. See O'Connell, D.P. supra note 39 at 33 - 38.

92. For English Translation of the Djuanda Declaration, see Whiteman, M. supra note 72 at 284.

93. Ibid.

94. Rodgers, P.E.J. supra note 4 at 36.

95. For full text of the Act see Tangsubkul P. supra note 77, Appendix D.

96. Ibid.

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99. Lee, H.C. supra note 41 at 92.

100. Ibid.

101. Ibid.

102. Ibid.

103. Ibid.

104. Ibid.

105. Rodgers, P.E.J. supra note 4 at 50.

106. Ibid.

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108. Ibid.

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110. I.C.J. Reports, 1951, supra note 1 at 121, 122; See also International Court of Justice, Fisheries Case (United Kingdom v. Norway), Pleadings, Oral Arguments, Documents, 1951, (hereinafter cited as I.C.J. Pleadings, the Fisheries Case), vol.I at 57, 70.

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133. Leversen, Michael A. "The Problems of Delimitations of Baselines for Outlying Archipelagos", 9 San Diego Law Review. 1971-72, at 740.

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137. Mani, V.S. "National Jurisdiction: Islands and Archipelagos", R.P. Anand, (ed.), Law of the Sea: Caracas and Beyond. The Hague: Martinus Nijhoff, 1980, at 96.

138. Rodgers, P.E.J. supra note 4 at 55.

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140. Evensen, J. supra note 37 at 290; 10 Annuaire de L'Institut de Droit International, 1888.

141. 11 Annuaire de L'Institut de Droit International. 1889, at 136, 139 et seq.

142. Ibid.

143. No mention was made of archipelagos either coastal or midocean, in the Reports submitted to the Institut 1892 and 1894 by Sir Thomas Barclay or in the Resolutions adopted by the 1894 Paris Session. (12 Annuaire. 1892, p.104; 13 Annuaire. 1894, pp.328 et seq.). Article 2 of the resolutions of the Session of 1894 merely proposed that the extent of the territorial sea should be fixed at six nautical miles from low water marks all along the coast (13 Annuaire. 1894, p.329).

144. Rodgers, P.E.J. supra note 4 at 27.

145. 33 Annuaire de L'Institut de Droit International. 1927, at 81, as translated into English by Evensen, J. supra note 37 at 291.

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150. O'Connell, D.P. supra note 39 at 6.

151. This was adopted by a small majority of 23 - 21.

152. 34 Annuaire De L'Institut. 1928, at 648.

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155. Kusumaatmadja, Mochtar. "The Legal Regime of Archipelagos: Problems and Issues", Lewis M. Alexander, ed., The Law of the Sea: Needs and Interests of Developing Countries. Kingston: University of Rhode Island, 1973, at 167.

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160. 20 American Journal of International Law, Special Suppl., 1926 at 318-319.

161. 23 American Journal of International Law, Special Suppl., 1929, at 241 - 276.

162. Ibid., at 276.

163. Ibid., at 287 - 288.

164. Ibid.

165. Rodgers, P.E.J. supra note 4 at 26.

166. Amerasinghe, C.F. supra note 122 at 541.

167. League of Nations, Document C.196, M.70, 1927 v.

168. Ibid.

169. Ibid., at 72.

170. Ibid.

171. League of Nations, Document C.74, M.39, 1929 v.2, at 48

172. Australia, Bulgaria, Denmark, Great Britain, India, Italy, New Zealand, Roumania, South Africa.

173. League of Nations, Doc. supra note 171 at 51.

174. Rodgers, P.E.J. supra note 4 at 33.

175. League of Nations, Doc. supra note 171 at 50-51.

176. League of Nations, Document C.351(b), M.145(b), 1930 V.16 at 189.

177. Ibid., at 192.

178. Ibid., at 200.

179. Ibid., at 219.

180. This discussion includes all of the relevant preparatory work for the 1958 Geneva Conference on the Law of the Sea which was conducted under the direction of Professor J.P.A. Francois, Special Rapporteur of the International Law Commission on the Law of the Sea. The Commission made annual reports to the United Nations General Assembly on its work.

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182. Ibid., at 37.

183. Ibid.

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192. Ibid., at 75 - 79.

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195. Dubner, B.H. supra note 148 at 37.

196. Evensen, J. supra note 37 at 293.

197. U.N. Doc. A/2693, Report of the International Law Commission to the General Assembly, Yearbook of the International Law Commission, 1954, Vol.II, New York: U.N. Publication, 1959, at 153 - 162.

198. U.N. Doc. A/2934, Report of the International Law Commission to the General Assembly, Yearbook of the International Law Commission, 1955, Vol.II, New York: U.N. Publication, 1960. at 34 - 41.

199. A summary of the discussion that took place at the 319th meeting is located in the Yearbook of the International Law Commission, 1955, Vol.I, N.Y: U.N. Publication, 1960, at 217 - 218. One of the basic problems that could not be resolved was set forth by Mr. Garcia Amador. He said: "The Commission should be consistent...it was difficult to see how an archipelago which was linked to the

mainland by the geographical , economic or other ties which the I.C.J. had considered relevant could now be severed from it on the ground that the islands of which it was composed were more than five miles apart, simply because the Committee of Experts had so recommended."(Ibid., at 218). Mr. Sandstrom and Sir Gerald Fitzmaurice also thought that perhaps it would be impossible to cover two different kinds of case in a single article. Sir Gerald Fitzmaurice stated in part: "The whole idea of having special provisions for groups of islands was in order that the enclosed waters might be regarded as internal waters. The islands must therefore be reasonably together." (Ibid., at 218).

200. Dubner, B.H. supra note 148 at 38.

201. Rodgers, P.E.J. supra note 4 at 71.

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225. O'Connell, D.P. supra note 39 at 1.

226. Ibid., at 75.

227. See for Example: Coquia, R. Jorge, "Territorial Waters of Archipelagos", 1 Philippine International Law Journal. 1962, at 139 et seq; Kusumaatmadja, M. supra note 155, at 72 et seq; Syatauw, J.J.G. Some Newly Established Asian States and the Development of International Law. The Hague: Martinus Nijhoff, 1961, at 168 et seq.

228. U.N. General Assembly Resolution 1105 (XI) of 21 February 1957, Official Records of the General Assembly, 11th Session, Suppl. No. 17/A/3572, at 54.

229. (i) Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205; (ii) Convention on the High Seas, 450 U.N.T.S. 11; (iii) Convention on Fishing and Conservation of the Living Resources of High Seas, 559 U.N.T.S. 285; (iv) Convention on the Continental Shelf, 499 U.N.T.S. 311.

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260. U.N. Doc. A/CONF.62/WP.8/Part II.

261. See, for instance, statements made by the representatives of Ecuador and Spain at the closing session of UNCLOS III. Third United Nations Conference on the Law of the Sea. Official Records. Vol.XVII. New York: United Nations Publication, 1984, at 96 and 90.

262. Ibid., also see supra note 257.

263. See, for instance, statements made by the representatives of Japan, Bulgaria, Thailand, Algeria, and Turkey. UNCLOS III, Official Records, Vol. II, supra note 257 at 261, 261-262, 265, 271 and 272.

264. Memorandum presented by the Government of Malta to the United Nations Secretary-General, August 17, 1967; See also Statement by Ambassador Pardo of November 1, 1967 before the First Committee of the General Assembly, Doc.A/AC.1/PV.1515 & 1516

265. Ibid., U.N. Doc. A/AC.1/PV.1515 & 1516.

266. United Nations General Assembly Resolution 2340 (XXII); unanimously adopted by the General Assembly, 18 December 1967

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268. Hereinafter referred to as the United Nations Seabed Committee or simply as Seabed Committee, for convenience. See United Nations General Assembly Resolution 2467 A, B, C and D (XXIII)

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290. Rodgers, P.E.J. supra note 4 at 161.

291. U.N. Doc. A/CONF.62/29.

292. Before the Caracas Session the Organisation of African Unity had recognised the special position of archipelagos in 1973 in Addis Ababa and again in 1974 in Mogadishou - Third United Nations Conference on the Law of the Sea, Official Records, Vol.II, Second Committee, 36th meeting, at 269. Several Latin American States had supported the archipelago principle and four of them had introduced draft articles including provisions on archipelagos - Ecuador, Panama and Peru: U.N. Doc. A/AC.138/SC.II/L.27; Uruguay: Doc. A/AC.138/SC.II/L.24. The League of Arab States recommended that an archipelago's unity be conserved and its "geographical and political survival" be assured. - UNCLOS III, Official Records, Vol.II, supra note 257 at 268.

293. Rodgers, P.E.J. supra note 4 at 163.

294. U.N. Doc. A/CONF.62/C.2/L.49 of August 9, 1974, UNCLOS III, Official Records, Vol.III, supra note 258 at 226.

295. UNCLOS III, Official Records, Vol.II, supra note 257 at 264.

296. U.N. Doc. A/CONF.62/C.2/L.20.

297. Thailand: U.N.Doc. A/CONF.62/C.2/L.63; Malaysia: U.N. Doc. A/CONF.62/C.2/L.64.

298. U.N. Doc. A/CONF.62/C.2/L.52; Article 4.

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301. See Article 118, paragraphs 1-3, Informal Single Negotiating Text, Doc. A/CONF.62/WP.8/Part II.

302. Viz., water to land ratio of 5 to 1 and maximum baseline of 48 nautical miles.

303. The Informal Working Group on Archipelagos comprised the Archipelagic states of the Bahamas, Fiji, Indonesia, the Philippines, and on one occasion, Papua New Guinea, and the maritime powers of Japan, the U.S.S.R., U.K. and the U.S.A. The countries concerned met as a group on only two occasions.

304. See Miles, Edward, "An Interpretation of the Geneva Proceedings, Art.II", 3 Ocean Development and International Law. 1976 at 307.

305. "Introductory Notes" to U.N. Doc. A/CONF.62/WP.8/Rev.1/Part II.

306. Andrew, D. supra note 280 at 58.

307. U.N.Doc. A/CONF.62/W.P.10, July 15, 1977.

308. Ibid., Articles 46 - 48.

309. U.N. Doc. A/CONF.62/W.P.10/Rev.1 & 2.

310. Ibid.

311. Draft Convention on the Law of the Sea, U.N. Doc. A/CONF.62/L/78, August 28, 1981.

312. The LOSC was adopted by a vote of 130 in favour and 4 against with 17 abstentions. The negative votes were cast by Israel, Turkey, U.S.A. and Venezuela. For a full text of the Convention see : United Nations, The Law of the Sea. United Nations Convention on the Law of the Sea, with Index and Final Act of the Third United Nations Conference on the Law of the Sea. New York: U.N. Publications, 1983.

313. See, United Nations, Law of the Sea Bulletin, No.22, January 1993, at 1 - 2.

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## 4. CHAPTER III. DEFINITION OF ARCHIPELAGOS AND ARCHIPELAGIC STATES

### 4.0 INTRODUCTION

Definition is a key problem of the question of archipelagos in international law of the sea. Without the definition of archipelagos and archipelagic states it would be impossible to determine which states would have the right to apply the archipelagic concept and which groups of islands it would be applicable to.

Further, the enclosure, within archipelagic baselines, of waters would have the effect of removing such waters from the previous regimes and placing them under a new and more restrictive regime. Thus, other states, the major maritime states in particular, have an interest in restricting the derogation of the freedoms, which previously existed in such waters, due to a widespread use of the archipelagic principle for unitising all varieties of identifiable island groups. The primary method of restricting such a widespread and uncontrolled application of the archipelagic principle is through the adoption of a precise definition of the term "archipelago".[1] In the words of the Japanese delegate to the Third United Nations Conference on the Law of the Sea (UNCLOS III),

> "... the establishment of a regime of archipelagos should not result in the undue curtailment of the legitimate interests of other States or of the general interests of the international community. Those interests should be brought into harmony, first, by providing an objective and reasonable

> definition of an archipelagic state... It would be against the interests of the international community if, as a result of a vague definition of an archipelago, there was to be a proliferation of claims."[2]

The most fundamental question that arises with regard to definition relative to applicability is when islands are to be regarded as a unit, i.e., what is an archipelago for legal purposes? Here, the requisite criteria are to be drawn from factors emphasising the natural cohesion of the islands sought to be unitised, which is also the primary justification for archipelagic claims. These factors include certain geographical characteristics taken in combination with other indicators of unity such as economic, political and historical factors.

Attempts to define an archipelago have always been accompanied by attempts to devise a mechanism to delimit the waters of archipelagos. In fact, in most cases, the discussion was about how to delimit the waters, than to define what an "archipelago" was. At UNCLOS III too, along with the discussions on the definition of an archipelago, discussions were held on the delimitation of the waters of archipelagos and the drawing of straight baselines for the purpose.

The provisions of the United Nations Convention on the Law of the Sea of 1982 (LOSC) relating to the drawing of baselines for the delimitation of waters of archipelagos, both coastal and midocean, restrict the application of the archipelagic concept by island groups and practically

determine which groups of islands constitute archipelagos. These limitations or requirements for the drawing of straight baselines, thus, amount to being an essential element of the legal definition of archipelagos, and must, in this context, be considered in order to determine the applicability of the archipelagic concept to various island groups.

## 4.1 DEFINITION OF ARCHIPELAGOS

In the most general terms, an archipelago is defined as either "a group of islands"[3] or "an expanse of water with many islands".[4] The modern usage of the term archipelago requires geophysical, geomorphological, and geojuridical definitions.[5] Jens Evensen, author of the most famous geojuridical analysis of an archipelago, defines an archipelago as "a formation of two or more islands (islets or rocks), which geographically may be considered as a whole".[6]

Robert D. Hodgson, a well known American geographer defines an archipelago as having the following characteristics:[7]

a) A substantial number of relatively large islands should be scattered through out a marine area in an aerial and not a linear pattern;

b) The islands should be situated in such a manner that they can relate geographically to each other and to others in the group; and

c) The islands should be perceived a unitary whole due

to political administration.

By this definition, archipelagos would be restricted to a limited number of major island groups which are relatively concentrated and interrelated. Furthermore, by this definition, the islands should form a state in themselves.[8]

Robert D. Hodgson further pointed out that the above definition is too general and may be subject to many interpretations and to certain abuse.[9]

Thus, in order to overcome these shortcomings, Robert D. Hodgson, together with Lewis M. Alexander, another well known American geographer, has described an archipelago in terms of "special circumstances".[10] They suggest that distinctions should be clarified between the terms "archipelago" and "island group" and point out the diverse conditions under which a special regime might be established for an outlying archipelago.[11] First, these conditions include adjacency, in which the units are so located in relation to one another that the group may be considered a geographic whole. Secondly, a particular island group and its inter island waters may have traditionally been considered a single political unit, regardless of the adjacency factor. Thirdly, the island people have a unique economic dependence on their coastal waters and thus are entitled to special considerations in the jurisdiction of these waters, regardless of physical geography or history.[12] Hodgson and Lewis M. Alexander admitted that the concept of archipelago has various

connotations, but they stressed that the factor of adjacency is the key: "If the islands, islets, or rocks are located at a considerable distance from one another, then the inter island waters are hardly "adjacent" to the land."[13] Like many others, they also admit that it is more difficult to handle the case of midocean archipelagos, which exhibit a wide variety of physical manifestations and may warrant a special juridical regime, than coastal archipelagos.[14]

From the existing geographical definitions of an archipelago, one can extract three common component elements. They are that an archipelago is : (a) a considerable group of islands; (b) a compact group of islands; and, (c) a unitary group of islands.

The first element refers to the number of islands in an archipelago. Some writers are of the opinion that a group of islands could be considered an archipelago only when it consists of at least three islands, while others feel it sufficient even if an archipelago consists of two islands.[15]

The most important element of the geographical characteristics of an archipelago is the compactness or the adjacency of its islands.

Even during the very early attempts to define an archipelago in international law, proposals were made to include compactness as one of the main criteria of the archipelago concept. The delegation of the Philippines, at the First United Nations Conference on the Law of the Sea of

1958, thought it possible to consider compactness as the basis of the definition of an archipelago and proposed to consider as an archipelago any group of islands, the islands of which are situated sufficiently close to each other to form a compact whole.[16]

However, the geographical definition of compactness itself being conditional in practice, several attempts were made to make the geographical characteristics of compactness more precise by establishing limits to the distances between islands and by establishing a minimum number for islands that could form an archipelago.[17]

The basis for the third element of the geographical definition of an archipelago, unity, is provided by the genetic or the geomorphological similarity of its islands. However, the direct application of geomorphological characteristics did not receive a wide acceptance. The unity of archipelagos through the close connection between the islands and between the islands and the waters of the archipelago received a far wider application.

The International court of Justice in the Anglo-Norwegian Fisheries Case[18] recognized the relationship between the islands and the surrounding waters and of the mainland with respect to a coastal archipelago. After considering the proposals made by the archipelagic states themselves, and those made by other states, the majority of the participants at UNCLOS III recognized the existence of a relationship of a

special type between the islands and the sea of archipelagic states, i.e., the economic, geographical and political unity of the islands and the sea of such states.

In defining archipelagos, Article 46 of the LOSC repeats the definition proposed by the archipelagic states at UNCLOS III. According to Clause (b) of Article 46 :

> "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[19]

The legal concept of "archipelago" thus differs from its general geographical definition.[20] The legal concept is not limited to islands, but includes parts of islands . It requires the grouping to form an intrinsic geographical, economic and political entity, or to have been historically regarded as such. Not every group of islands scattered on the sea would be an archipelago under this legal concept.[21]

In analysing the definition of an archipelago contained in the LOSC, a distinction may be made between the natural features constituting an archipelago and the criteria determining the necessary degree of cohesion of those features.

### 4.1.1 The Natural Features

The various components of the part of the definition that identifies the natural features that may constitute an

archipelago are a group of islands, parts of islands, interconnecting waters and other natural features.

A. A group of islands

The main geographic feature of any definition of an archipelago is that it is a group of islands. An island is defined in Article 121 of the LOSC as "a naturally formed area of land, surrounded by water, which is above water at high tide."[22] The legal definition of an archipelago poses a question as to the minimum number of islands to be regarded as constituting an archipelago. The United Kingdom proposed at UNCLOS III to consider three or more islands as forming an archipelago.[23] However, this proposal was rejected by archipelagic states and their proposal avoided a numerical restriction.[24] The LOSC definition implies that even two islands may be considered as forming an archipelago. Some authors have suggested that in this context, the words "a group of islands" also have the function of excluding isolated islands, for the reason that, although archipelagic states may include other islands, which did not geographically form an integral part of the archipelago, the drawing of archipelagic baselines by an archipelagic state was limited to the archipelago proper.[25] However, it must also be noted that although, the words "a group of islands" imply a certain compactness of the islands, isolated and far flung islands may also be excluded from an archipelago for the reason that such islands do not have the necessary interrelationship with the

other islands to form a single geographical, economic and political entity. The question of such far flung or seemingly isolated islands would, in practice, be determined by other criteria such as the land water ratio and the permitted maximum length for baselines.

B. Parts of islands

Reference to parts of islands was not made in the original proposal of the archipelagic states, but were inserted in the revised articles submitted to the conference.[26] The words "parts of islands" were added "to take into account the political and geographical realities of archipelagic states."[27] Indonesia in respect of Borneo and Indonesia and Papua New Guinea in respect of New Guinea are examples of such cases. However, this does not provide for regarding parts of a state, which was on a continent or mainland as part of the archipelago.[28]

C. Interconnecting waters

The definition of archipelagos in the LOSC provides that an archipelago is "a group of islands, including parts of islands, interconnecting waters and other natural features..." [29] The words "interconnecting waters" had been added to emphasize the unifying function of the waters and relates to the waters that connect and surround the islands of the archipelago.[30] It is also important to note that the inclusion of interconnecting waters gives the definition and the archipelagic concept a unitary territorial context. For the

first time a combination of waters and islands is recognised as constituting the archipelago.

D. Other natural features

The remaining question with regard to the identification of the natural features constituting an archipelago would be to determine the meaning and scope of the term "other natural features". Given the definition of "island" in Article 121 of the Convention,[31] it may be concluded that "other natural features" constitute something less than, or at least other than islands.

Although the phrase "other natural features" is not defined any where in the LOSC, the Convention contains several specific references to features other than islands which assist in determining the features which may be included in the concept.

In the LOSC and in its Article 47 on archipelagic baselines in particular, references are made to "reefs", "atolls", and "low tide elevations".[32] However, these terms, except "low tide elevations", are not defined or otherwise explained in the Convention. A "low tide elevation" is defined in the Convention as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide."[33]

The term "reef" is generally understood to be an area of rock, coral, shingle or sand lying at or near the surface of the water.[34] Coral Reefs are a common feature of most of

the archipelagos of the Pacific and Indian oceans and are a part of the geographical whole thereof. In dealing with reefs the Convention refers to "drying" and "fringing" reefs. In terms of their biological and geographical formation and physical composition, there is little difference between drying reefs, fringing reefs and atolls.[35] Use of the adjective "drying" would mean that a distinction is to be made between reefs that are submerged all the time and those which are emergent at certain times, i.e., at low tide. A fringing reef generally refers to a coral reef, close to or attached to the shore, of a non-reef island or mainland.[36] Such a reef may extend as much as a mile from the shore, and there may be a narrow lagoon or passage between it and the land.[37] The presence of islets and islands on the reef and the shape of the reef distinguish atolls from other reefs.[38]

It is also important to note that all of these features are referred to in the Convention in relation to the drawing of baselines either with respect to the determining of baselines and base points or calculation of the land water ratio.

The primary reason for the inclusion of natural features other than islands in the concept of an archipelago is to provide for the actual geographic circumstances of the states claiming archipelagic status.[39] The delegate of Bahamas at UNCLOS III, in explaining the peculiar and unique circumstances of the Bahamas, contended that :

> "The Bahamas was a unique case which had long been regarded as a geological enigma. The islands comprised a realm of predominantly shallow waters which were largely non-navigable except by vessels of shallow draught. The Bahamas Banks presented a special problem of delimitation since both the ratio of very shallow water to dry land areas and the steepness of the slopes appeared to be unparalleled. If those unique physio-geographic conditions were disregarded and conventional baselines at low-water level were used, bizarre effects would result."[40]

The Bahamian delegate further stated that the Bahamas meant more than just the islands and cays to Bahamians, but also included both the Great and Little Bahamas Banks, which areas of shallow water had historically been regarded as parts of the territory of the Bahamas.[41] The main justification for the claim of the Bahamas appears to be the non-navigability of the waters and historical considerations.[42] Paragraph 7 of Article 47 of the LOSC accommodates the special situation of the Bahamas by providing for the inclusion within land areas of waters lying within parts of steep sided oceanic plateaux which are enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau, for the purpose of calculating the land water ratio.[43] This also raises the question whether non-navigability may serve as a criterion for determining certain natural features other than islands which may be included within the concept of an archipelago.

4.1.2 Criteria Determining the Cohesiveness of the Features

LOSC in the latter half of paragraph (b) of Article 46

sets out the criteria for determining whether a group of islands can be considered an archipelago in the legal sense. It requires a close and intrinsic unity of all the features that would constitute the archipelago. The Article requires the features to be "so closely interrelated" as to "form an intrinsic geographical, economic and political entity..."[44]

A. Geographical cohesion

The geographical argument lies at the very basis of the natural coherence theory and includes all factors emphasizing unity as a natural feature. Although the International Court of Justice, in the Fisheries Case which gave a considerable impetus to the development of the archipelago concept,[45] primarily utilized the geographic criteria, the emphasis, during and after the UNCLOS III process, has shifted from purely the geographic criterion to geophysical, political and economic criteria. Although the importance of the geographic criteria has been questioned by some, geography continues to constitute the basis and starting point for the archipelagic concept.[46]

One of the basic requirements of any group of islands claiming archipelagic status under the provisions of the LOSC is for such a group to be an intrinsic geographical entity. In geographic terms a requisite closeness implies a distance criterion. The main question that consequently would arise is as to what the distance between islands should be. Most of the early discussions on the question were focused on this

issue. The most commonly debated criterion was twice the breadth of the territorial sea between islands at the periphery.[47] However, various other distances were also proposed as alternatives.[48] While some proposals merely stipulated the distance between islands, others pointed out that the requisite distance applied to islands on the periphery. Those proposals specifying the distance between the islands on the periphery have a special significance since the archipelagic concept seeks to draw baselines connecting the outermost islands of a group. This indicates that there is to be a maximum permitted length for straight baselines drawn between the outermost islands of the archipelago and rules out any limitations to the internal distances between islands.

In more general terms, the "close interrelation" of the natural features sufficient to form a single entity may also be indicated by the factors of propinquity or adjacency.[49] Furthermore, ecological and environmental factors may also serve as indicators of the close relationship between the islands and other natural features and the interconnecting waters of the island group.

The LOSC, in resolving the question of distance between islands and adjacency, has set limitations to the length of straight baselines connecting the outermost islands of the archipelago and has provided for a ratio of the area of water to the area of land that may be included within the

baselines.[50]

B. Economic cohesiveness

The economic factor which was put forward in justification of archipelagic claims has emerged as a criterion for the determination or definition of an archipelago complementary to the geographic factor. The relevance of economic considerations was emphasised in the Anglo-Norwegian Fisheries Case, as regards the question of assimilability of interstitial waters in the land domain.[51] The economic unity of a group of islands had generally been regarded as a definitive factor.[52] However, no specific objective content can be attributed thereto since almost any archipelagic entity may point to economic reasons for unity.[53] The economic criterion is therefore relative in its application and assumes a subjective character.

The economic criterion requires a close economic relationship between and among the islands themselves as well as economic unity of the islands and the interconnecting waters. The extent of the use of the interconnecting waters by the inhabitants of the islands for economic purpose, including the exploitation of the resources thereof and communication and the degree of dependency of the islanders on the resources of the interconnecting waters would indicate the close interrelationship of the islands and the waters connecting and surrounding them.

C. Political cohesiveness

In order to consider a group of islands and other features as a single political entity, it is necessary that all the islands of the entity should be under the same sovereignty. Some early proposals expressly stipulated that the archipelago belonged to a single state.[54] It would appear that this is an essential element of the definition of an archipelago for legal purposes.[55] However, Paragraph (b) of Article 46 of the Convention does not contain any restriction which indicates that the political entity should be a state.[56] It could also, thus, be an autonomous territory or dependency of a state, as is the case with many midocean archipelagos belonging to continental states.

The Case of the Spratly Islands in the South China Sea, claimed by several states in the region and where different states seek to exercise sovereignty over different islands of the group,[57] is an example of a group of islands which otherwise may be a single entity that would not qualify as a single political entity.

D. Historical criterion

The historical criterion is not framed as a complementary element, but rather, as an alternative criterion.[58] The implication, therefore, is that even where the entity does not constitute an intrinsic geographical, economic and political unity, it may, on an historical basis, be considered an archipelago. This emphasizes the adverse character and

elements of acquiescence present in the process of historical consolidation.[59]

The historical criterion primarily provides an alternative basis for evaluating the situation of archipelagos which putforward historical basis to justify their claims, such as the Philippines and also perhaps Tonga, although neither of these states appears to lack the necessary requirements to establish an intrinsic unitary identity. Similarly, most groups of islands which historically have been regarded as archipelagos are also intrinsic geographical, economic, and political entities. However, historical factors would assist in establishing whether an island group constitutes a geographical, economic and political entity.

## 4.2 COASTAL ARCHIPELAGOS

### 4.2.1 Definition

Coastal archipelagos do not by themselves form single geographical, economic and political entities. They seek unity with the coastal or mainland states, the coasts of which such archipelagos fringe and integral parts of which they constitute. Thus, the definition of archipelagos contained in Article 46 of the LOSC does not encompass coastal archipelagos.

Neither the LOSC nor the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958[60] provides a definition of coastal archipelagos. Even the words "coastal

archipelago" do not appear in any of the two Conventions mentioned. The phrase used in the Territorial Sea Convention and the LOSC with respect to coastal islands is "a fringe of islands along the coast in its immediate vicinity".[61] This appears to be a widening of the phrase used in the judgment of the International Court of Justice (ICJ) in the Fisheries Case "or where it (a coast) is bordered by an archipelago such as the "skjaergaard".[62]

While there is no legal definition of a coastal archipelago or a uniformly identifiable objective test which will identify islands that constitute a fringe in the immediate vicinity of a coast, guidance maybe sought from the general spirit of Article 7 of the LOSC and the principles of the decision of the ICJ in the Fisheries Case.

Article 7 of the LOSC, which deals with straight baselines and is the main article of the LOSC that relates to coastal archipelagos, states that:[63]

> " 1. 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, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> 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.
>
> 3. The 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 closely linked to the land domain to be subject to the regime of internal waters.
>
> 4. 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.
>
> 5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.
>
> 6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone."

Three geographical requirements or elements can be identified from this Article and from the corresponding Article 4 of the Territorial Sea Convention that a group of coastal islands must satisfy in order to qualify for the regime of straight baselines and thus, of coastal archipelagos provided by the Conventions.[64] The geographical requirements that a coastal group of islands must so meet are: (i) the islands must form a fringe; (ii) they must be along the coast, and (iii) the islands must be in the immediate vicinity of the coast. In addition to these geographical requirements, Article 7 of the LOSC and Article 4 of the Territorial Sea Convention require a close link between the land and the sea sought to be enclosed by the straight baselines. An analysis of these four elements is necessary to determine which groups of coastal islands could be enclosed within a straight baseline system under the LOSC.

A. Fringe of islands

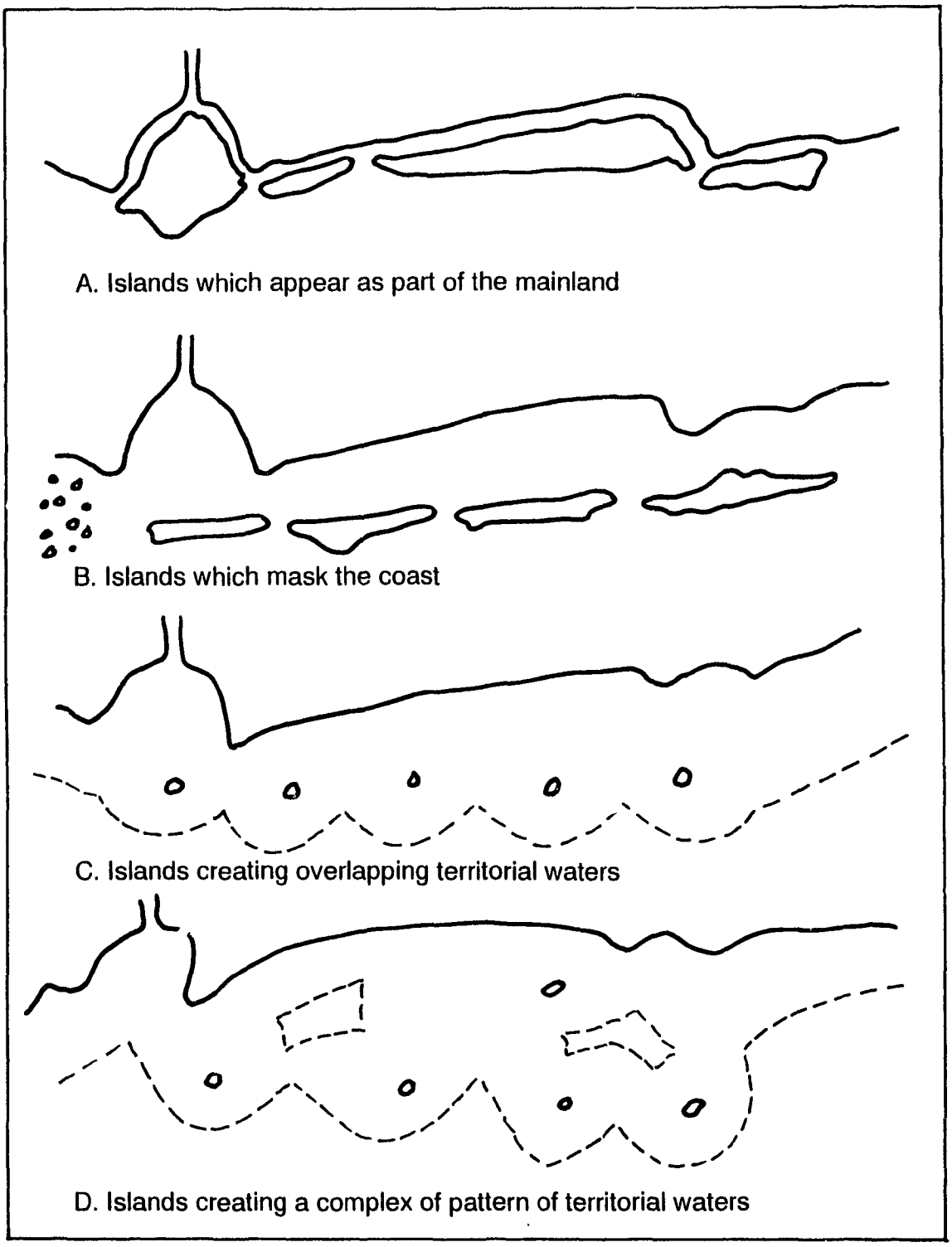
The word "fringe" in relation to islands is neither a legal nor a geographical term of art.[65] The general meaning of "fringe", according to the Oxford Dictionary, is "a border or edging, especially one that is broken or serrated".[66]

The term "fringe of islands" implies a number of off-lying islands spread over some distance so as to form a continuous fringe along the coast.[67] It is clear that the fringe must constitute of more than one island. However, it is difficult to specify any particular minimum number. According to Beazley, the exact number would depend partially on size.[68] Thus, for instance, three large islands might constitute a fringe where three islets over the same area would not.[69]

The term "fringe of islands", however, is considered to be reasonably accurate to describe the "skjaergaard"[70] and the Norwegian Skjaergaard would provide an inspiration, if not the direct source for the interpretation of the term.

The Norwegian Skjaergaard is the classic example of a coastal archipelago or a fringe of islands along which straight baselines may be drawn. The reasoning underlying the decision of the ICJ appears to have been that, where a continuous island fringe is so closely related to the mainland that the coast of the latter "does not constitute ... a clear dividing line between the land and the sea" on account of the existence of the island fringe, it is the fringe which must be

Figure 8. Situations in which islands might be considered to fringe the coast




Source: Prescott, J.R.V. in : Brown, E.D. and Churchill. R.R. eds., The UN Convention on the Law of the Sea: Impact and Implementation. Honolulu: The Law of the Sea Institute, 1987, at 296.

regarded as constituting the coast.[71] However, considerable difficulty may, in an objective sense, be encountered in deciding what constitutes a "fringe".

It has also been pointed out that while some coastal islands bear analogies with the coast of Norway, other coastlines to which the method of straight baselines have been applied could hardly be described as complicated, and the off-shore islands could only questionably be described as "fringes".[72] In certain cases, a small island every 20 or 30 miles has been deemed "fringing", while in others reefs and shoals, both submerged or drying features, have been utilized in national law as parts of the systems.[73] In contrast, the Norwegian islands masked , on the average, nearly two thirds of the length of the coastline.[74] Thus, the eligibility of a group of coastal islands for drawing straight baselines and whether they form "a fringe" for the purpose can be determined only by resorting to other tests, including whether they are along the coast, their proximity to the mainland, and whether they have the required close relations with the mainland.

B. Along the coast

The requirement that the fringe of islands be "along the coast" refers to the spatial relationship between the islands and the coast. The distribution must be essentially parallel, i.e., "along" the coast, rather than at an acute angle, moving away from the coast.[75] This would rule out the cases where islands are arranged like stepping-stones, at right angles to

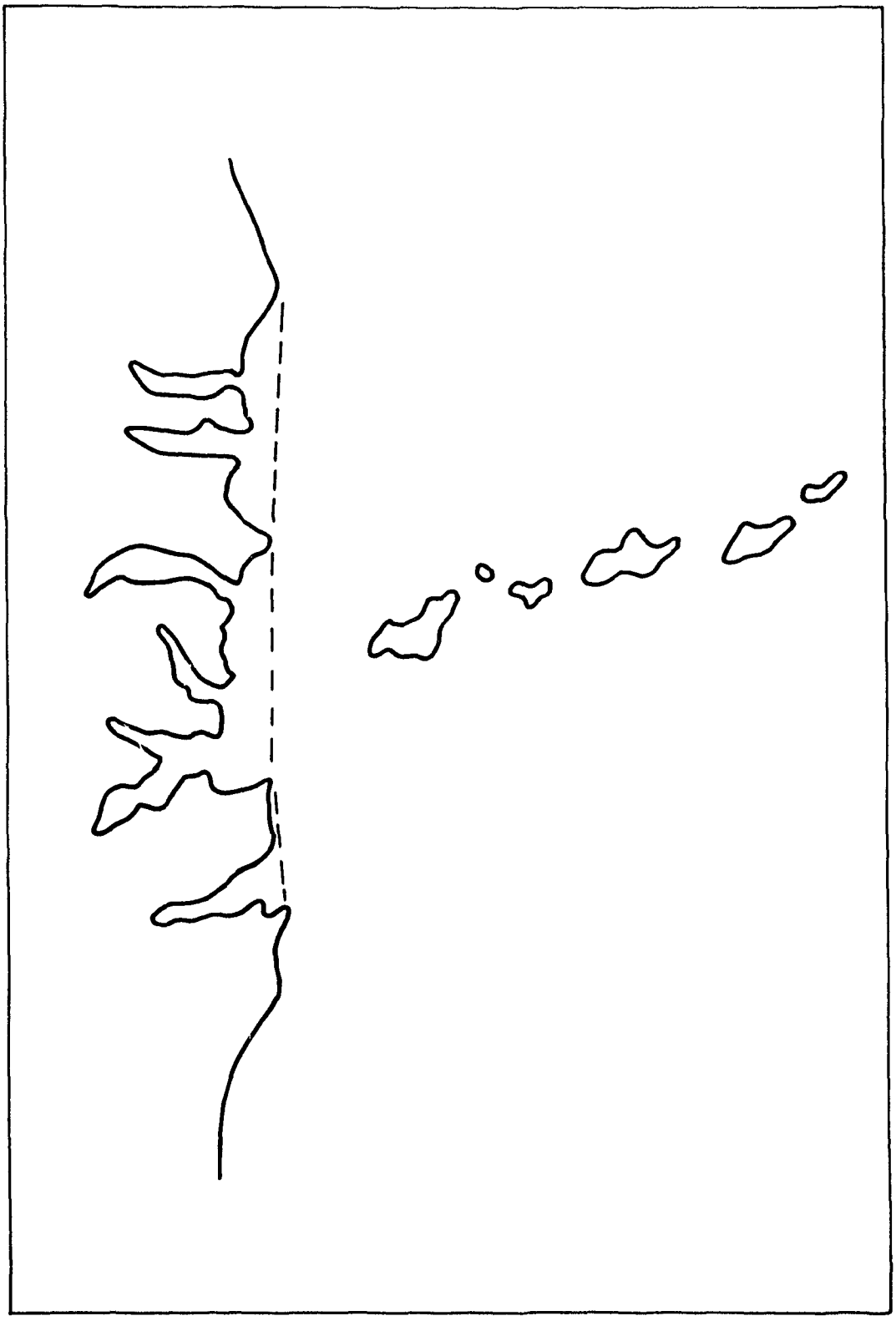
the general direction of the coast.[76]

The questions that arise with respect to the requirement of along the coast are to what degree such islands may deviate from the coast and what percentage of coast they must cover or mask. As mentioned earlier, a group of islands situated perpendicular to a coast would not meet the requirement since it does not run along the coast (See, Fig. 9). Even a 45 degree deviation from the coast would represent a significant divergence from the direction of the coast, because for every mile that the island group may be said to follow the direction of the coast, it can also be said to depart from the direction of the coast by a mile.[77] Thus, it has been proposed that a reasonable deviation angle would lie somewhere between 45 degrees and 10 degrees.[78]

The U.S. State Department study on straight baselines points out that a string of small rocks or islets essentially paralleling the coast, no more than 24 nautical miles away from each other, may still not justify the use of straight baselines and the masking requirement is intended to address this kind of situation.[79]

Neither Hodgson and Alexander[80] nor Beazley[81] is specific about the size or area relationship, if any, that must exist between the land mass of a fringing island group and the land mass of the opposite mainland. The masking requirement is to help ensure that the establishment of the straight baseline system which will become, for all practical

Figure 9. Islands perpendicular to the coast



purposes, the new coastline, is premised on a significant relationship between the islands and the mainland coast.[82] Hodgson suggests a quantification of a test for measuring the relationship between the islands and the opposite mainland coast by referring to the Norwegian situation :[83]

> "In the Norwegian example the islands masked, on the average, nearly two thirds of the length of the coastline. In many areas, the mainland was totally obscured from the sea by continuous and overlapping lines of islands. The Norwegian guide should be paramount."

However, it would be difficult to hold other countries to the standard which Norway met by virtue of the proliferation of islands along its coast, since it is not easy to find a perfect replica of the Norwegian situation elsewhere in the world. Thus it would seem appropriate to choose a number less than two thirds as the criterion for effective masking. The study of the U.S. State Department suggests the figure of 50% as a reasonable compromise between the need for a significant island-to-coast land mass ratio and a desire not to burden coastal states unduly.[84]

C. Immediate vicinity

In addition to being "along" the coast, the islands are required to meet an additional test of proximity to the coast. The islands must be "in its (the coast's) immediate vicinity".[85] The word "vicinity" imports physical closeness and the word "immediate" imports a connection between two things involving a direct relation without any intervening medium.[86] The combined phrase "immediate vicinity", thus,

signifies a direct relationship or connection, without any intervening medium, to a physical space or region.[87]

The words "in its immediate vicinity" would serve as a major qualification to and reduction of the permissible distance between the islands in question and the coast. Although the intention and the meaning of the provision is fairly clear, no numerical or precise test is provided to determine when a fringe is in a coast's immediate vicinity. Few among the principal authorities on baselines have expressed an opinion on this issue. Prescott has suggested that:[88]

> "Vicinity" suggests the neighbourhood and "immediate" indicates a restriction of that area. But the terms have no absolute meaning. Probably everyone would agree that a fringe of islands three nautical miles from the coast was in its immediate vicinity. Equally, everyone would probably concur that a fringe of islands 100 nautical miles from the coast was outside its immediate vicinity. Unfortunately, it would not be possible to predict with confidence what the majority thought of a fringe of islands twenty-five, forty, or sixty-five nautical miles from the coast."

The criterion of immediate vicinity would help eliminate from straight baseline consideration island groupings that stretch seaward for extensive distances. It is generally agreed that with a 12 mile wide territorial sea, a distance of 24 nautical miles would satisfy the conditions.[89] However, the distance that has been proposed as a general rule in the study of the U.S. State Department is 48 nautical miles.[90] As justification for the selection of a 48 nautical mile limit it has been provided that it would be difficult to argue that

islands are too far removed from the coast if territorial seas measured from their low water marks would overlap with territorial seas measured from the low water mark along the mainland coast.[91] And a 48 nautical mile rule would allow, in the extreme case, an expanse of high seas of equal width between the two hypothetical territorial sea areas, to be included in within the baselines.[92] This selection of 48 nautical miles however, appears to be arbitrary and the justification put forward does not reflect the relationship between the island group and the mainland, as it should.

Considering the fact that by drawing straight baselines the coastal state converts the intervening waters from territorial sea to internal waters, it is difficult to justify a distance between the mainland and the outermost island that would not reflect or is not based on the relationship between the islands and the coast.

Whatever maximum distance that may be chosen, it should be measured from the landward side of the island.[93] If the measurements were to be made to the seaward side of the island, a wide island that otherwise appeared satisfactorily close to the mainland would be deemed unacceptable because it stretched beyond the suggested limit.

D. Close link between the land and the sea

Paragraph 3 of Article 7 of the LOSC and paragraph 2 of Article 4 of the Territorial Sea Convention, following the Fisheries Case model, also provide that "the sea areas lying

within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters".[94] This criterion applies to the identification of a fringe of islands that may be considered for drawing straight baselines as well as to the drawing of straight baselines themselves. In explaining this criterion, the ICJ stated that :[95]

> "Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters."

The ICJ, in its decision, was primarily emphasising the peculiar geography of the region, i.e., the physical link between the islands and the mainland. The Court, it must be noted, described the "Skjaergaard" as "constituting a whole with the mainland".[96]

Beazley suggests a rule-of-thumb to determine whether a baseline system around a fringe of islands could be said to enclose an area "sufficiently linked to the land domain to be subject to the regime of internal waters". He suggests that if the islands having most influence in determining the general direction of the baselines are contained within a continuous belt of territorial sea measured from low water line along the mainland and the islands themselves, then the criterion is likely to be satisfied.[97]

A further consideration that should also be taken into account is that the concept of a fringe of islands together with the provision on the regime of internal waters implies a degree of enclosure of the intervening waters perhaps analogous to the waters of a juridical bay, which suggests that the length of the fringe along the coast should be significantly greater than the breadth of the intervening waters.[98]

Although it has not proved possible to develop a mathematical test to justify the application of this rule, the spirit of the rule is clearly that internal waters must be in fairly close proximity to land represented by islands as well as the coastal mainland. Sweden , in a statement to the International Law Commission, expressed the view that the criterion of the sufficient link means that "...the expanse of water in question is so surrounded by land, including islands along the coast, that it seems natural to treat it as a part of the land domain".[99]

### 4.2.2. Straight Baselines

Article 7 of the LOSC and Article 4 of the Territorial Sea Convention deal with straight baselines. In dealing with straight baselines they list the circumstances in which straight baselines may be applicable. Among those circumstances are the cases of coasts with a fringe of islands. In addition to the elements that define island

Table 1. Straight baselines drawn around fringing islands

| State | Date | Location |
|---|---|---|
| 1. Australia | 14 Feb. 1983 | Archipelago of the Recherche, the Great Barrier Reef and Southern Tasmania |
| 2. Canada | 08 Nov. 1967 | Labrador and Newfoundland |
| | 25 Sept. 1969 | Nova Scotia and British Columbia |
| | 10 Sept. 1985 | Arctic archipelago |
| 3. Chile | 14 Jul 1977 | The coast south of 41 degrees South |
| 4. Denmark | 14 Sept 1978 | The Fyn Group bordering the Store Baelt |
| 5. East Germany | 19 Feb 1964 | Rogen Group off Straslund |
| 6. Finland | 18 Aug. 1956 | Gulf of Bothnia |
| 7. France | 19 Oct. 1967 | Iles d'Hyeres Southeast of Toulon |
| 8. Guinea Bissau | 22 Aug. 1966 | Archipelago dos Bijagos |
| 9. Ireland | 01 Oct 1959 | Coasts of the Counties Mayo and Galway |
| 10. Mozambique | 22 Aug. 1966 | The coasts north of Porto Amelia |
| 11. Norway | 12 July 1935 | The north coast |
| | 18 July 1952 | The south coast |
| 12. South Korea | 20 Sept. 1978 | The west and south coasts |
| 13. Sweden | 03 June 1966 | The Baltic coast |
| 14. Tunisia | 02 Aug. 1973 | Iles Kerkenna |
| 15. U.K. | 25 Sept. 1967 | Hebrides |
| 16. West Germany | 1970 | Ostfriesische Inseln |
| 17. Yugoslavia | 23 April 1965 | Adriatic coast |

Source: Prescott, J.R.V. in : Brown, E.D. and Churchill, R.R., eds., The UN Convention on the Law of the Sea: Impact and Implementation. Honolulu: The Law of the sea Institute, 1987, at 297-298.

fringes or coastal archipelagos which may be tied to the coastal mainland by using the method of straight baselines, Article 7 and Article 4 of the respective Conventions also provide rules for the drawing of straight baselines. These rules governing the drawing of straight baselines determine how and where such baselines may be drawn, thus in turn determining to an extent which coastal island groups may qualify for the regime envisioned for coastal island fringes. Article 7 of the LOSC lays down four such general principles which should govern the construction of straight baselines along coasts with a fringe of islands or a coastal archipelago.

A. Baselines should not depart to any appreciable extent from the general direction of the coast

Paragraph 3 of Article 7 of the LOSC requires that straight baselines should not depart to any appreciable extent from the general direction of the coast.[100] The ICJ which originated this principle in the Anglo-Norwegian Fisheries Case noted that it "is devoid of any mathematical precision".[101] However, attempts have been made to add precision by an analysis of the Norwegian baseline system. Hodgson and Alexander have noted that apart from a solitary exception the Norwegian straight baselines did not deviate from the general direction of the coast by more than 15 degrees.[102] The study of the U.S. Department of State on straight baselines suggests a maximum of 20 degrees as a

general rule, while making allowance for the case of a fringe which may, as a whole, be parallel to the coast and therefore the configuration would be such that the lines joining such a fringe of islands to the coast must form an angle greater than 20 degrees.[103]

Apart from the lack of agreement on an exact angle for deviation, there is also difficulty in agreeing on a general direction of the coast. Different geographers have proposed the use of different lengths of coast and the use of charts of different scales to determine the general direction of the coast.[104] The ICJ in its judgment of the Fisheries Case only offered the advice that except in cases of manifest abuse it was unsatisfactory to examine one sector alone or to rely on impressions gained from large scale charts.[105] Nevertheless, most agree that there should be some limit to the extent of coastline to be considered when judging any particular line. The U.N. Group of Experts' study on baselines suggests that perhaps this could be related to the maximum length of baselines considered to be acceptable.[106]

B. Economic interests peculiar to the region concerned

Paragraph 5 of Article 7 of the LOSC provides that in drawing straight baselines, account may be taken of "economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage."[107] Unlike the other criteria, this criterion is

not mandatory and can only be used to determine the alignment of parts of the baseline system where the other conditions have been satisfied. Economic interests cannot be used to justify straight baselines where the requisite geographical circumstances are absent.

This criterion was invoked by the ICJ in the Fisheries Case to reinforce its conclusion with respect to the 62 mile line across the Lopphavet basin, that "the divergence between the baseline and the land formations is not such that it is a distortion of the general direction of the Norwegian coast"[108] and therefore, valid. The court further continued,

> "Even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon an historic title clearly referable to the waters of the Lopphavet, namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt. Commander Erich Lorch under a number of licences."[109]

On how such rights could be taken into account in validating a particular line, the Court stated that,

> "Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to have been kept within the bounds of what is moderate and reasonable."[110]

By this reference to the historic fishing and hunting rights of the local population, the court was not only adding to the probative value of the line across the Lopphavet, but also justifying the length of that line.[111]

Although the fishing economic interests along the Norwegian coast which prompted this concern by the ICJ had existed for centuries, "long usage" would not necessarily require such a lengthy time scale in every case and it may not be fair to apply such a standard to countries which have only existed for twenty or thirty years.[112]

In addition to fishing, other activities which may constitute such economic interests would include the use of such waters for communication purposes, mining of sand and gravel from the seabed for the building industry and tourism.

An important interest that is not covered by paragraph 5 of Article 7 is the environmental and ecological interest of the region concerned. With the growing environmental concerns of coastal communities, this appears to be an interest that would be taken into consideration in almost every case in the construction of straight baselines.

C. Low-tide elevations

Paragraph 4 of Article 7 of the LOSC provides with regard to the use of low-tide elevations as basepoints in a straight baselines system, that low-tide elevations may not be used unless light houses or similar installations, which are permanently above sea level, have been built on them or except in cases where the use of such low tide elevations as basepoints has received general international recognition.

In interpreting the first of these two circumstances provided for by paragraph 4 of Article 7 where a light house

or similar installation which must be permanently above sea level is required to be built, the U.N. Group of Experts suggests that installations similar to a light house might include towers and buildings which look like a lighthouse without serving any purpose specifically connected with navigation, as well as installations, the functions of which are similar to those of lighthouses, which is to warn navigators of dangers and assist them in fixing their position.[113] However, opinions have been expressed opposing such an interpretation which would support the notion that a mock lighthouse would fulfil the requirement of Article 7.[114] It appears that Article 7 is referring to installations which perform a function akin to that of a lighthouse.

The second circumstance allows low-tide elevations to be used in the construction of baselines if their use for that purpose has received general recognition. This stipulation was added at the request of Norway because their system of straight baselines accepted by the ICJ in the Fisheries Case included the use of low-tide elevations which had nothing built on them.[115]

D. Non-exclusion of the link between the territorial sea of another state and the high seas or an exclusive economic zone

Paragraph 6 of Article 7 of the LOSC is clear and need no explanation. It provides that coastal states may not draw

straight baselines which will cut off the territorial sea of a neighbouring state from the high seas or an exclusive economic zone. This provision was not borrowed from the judgment of the ICJ in the Fisheries Case and first appeared in a slightly different form in paragraph 5 of Article 4 of the Territorial Sea Convention.[116]

Situations where the circumstances of this rule may occur include cases where small countries are embedded in the coast of larger territories and cases where small islands belonging to one country are located close to the coast of another state.[117]

As observed by Beazley, this matter, in practice, would be subject to bilateral agreement depending on the particular circumstances of each case.[118]

## 4.3 ARCHIPELAGIC STATES

### 4.3.1 Definition

In defining an archipelagic state, Article 46 of the LOSC repeats the definition proposed by the archipelagic states. According to Article 46(a) :

> "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands".[119]

The main characteristic that distinguishes archipelagic states from other midocean archipelagos is that of sovereignty. A state, rigidly defined, is "one body politic exercising, through the medium of an organized government,

independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations".[120] Thus, it would exclude all archipelagos that are not independent and fully sovereign. The State of Hawaii, the territory of which is wholly comprised of an archipelago, for example, would not be an archipelagic state. Although the State of Hawaii exercises a certain territorial sovereignty, it is incapable of asserting itself in foreign affairs and U.S. national boundary limitations preempt the state's own territorial claims.[121]

The LOSC definition of an archipelagic state requires an archipelagic state to be constituted wholly by one or more archipelagos. This would, similarly, exclude continental states which possess midocean archipelagos, such as Denmark (the Faeroes), Ecuador (the Galapagos) and Portugal (the Azores).

In addition to these, a number of other aspects should be noted about the definition of an archipelagic state. First, the provision that an archipelagic state may be constituted wholly by one or more archipelagos was adopted to reflect the actual situation of some states which were making archipelagic claims. For instance, according to the National Seas Act of 1977 of Papua New Guinea, Papua New Guinea comprises a main archipelago and two other archipelagos, Tauu and Nukumanu.[122] Similarly, the provision that

archipelagic states may include other islands provides for the cases of archipelagos with far flung islands. Fiji, for instance, has the islands of Cevi-i-Ra and Rotuma situated far from the main Fijian archipelago. However, it must also be noted that many of the archipelagic states, such as Indonesia, the Philippines and the Maldives consist of only one archipelago.

Secondly, every archipelago constituting an archipelagic state must meet the requirements of the definition of an archipelago contained in Article 46(b) of the LOSC.[123] If a group of islands and the interconnecting waters are not so closely interrelated as to form an intrinsic geographical, economic and political entity, or have not been historically regarded as such, such a group of islands would not be able to constitute an archipelagic state.

Thirdly, the definition of archipelagic states appears to include some states, such as Japan, New Zealand, and the United Kingdom, which do not normally consider themselves to be archipelagic states.[124] While it is not clear whether states have a choice as to whether they consider themselves to be archipelagic states, the LOSC provides archipelagic states with the option whether to draw archipelagic baselines[125] and through the rules for drawing archipelagic baselines the LOSC determines which states can draw archipelagic baselines.

Even if states such as Japan and the United Kingdom, which do not consider themselves to be archipelagic, are

excluded, a substantial number of states (between twenty five and thirty five) would still fall within the definition of archipelagic states contained in the LOSC.[126]

4.3.2 Archipelagic Baselines

A. General

Paragraph 1 of Article 47 of the LOSC provides that "an archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago".[127] These lines serve as baselines from which the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of archipelagic states are measured.[128]

In Article 47 of the LOSC, the right to draw "straight archipelagic baselines" is confined to an archipelagic state within the definition contained in Article 46. It is immediately apparent that this introduces a new element which is political and not geographical.[129] It means that an archipelagic claim can only be made by an archipelagic state as defined, so that, for example, whereas states like the Philippines, Indonesia, Tonga, Fiji or Mauritius are such states, the entire category of midocean archipelagos, which belong to a continental or mainland state, is excluded.[130] Thus, there can be no archipelagic claim in respect of the Faeroes, Svalbard, or the Galapagos.[131]

This means that archipelagic baselines cannot be drawn around midocean archipelagos belonging to continental states,

Table 2. Archipelagic states

States which cannot draw archipelagic baselines because they cannot meet the minimum 1:1 ratio of water to land

| | | |
|---|---|---|
| 1. Australia | 6. Japan | 11. Sri Lanka |
| 2. Cuba* | 7. Madagascar | 12. Taiwan |
| 3. Haiti* | 8. Malta* | 13. Trinidad & T. |
| 4. Iceland | 9. New Zealand | 14. U.K. |
| 5. Ireland | 10. Singapore | 15. Western Samoa |

* These states have drawn straight baselines around their entire coast.

States which cannot enclose their entire archipelago within a single archipelagic baseline system due to the maximum 9:1 water to land ratio

| | | |
|---|---|---|
| 1. Tuvalu | 2. Mauritius | 3. Kiribati |

States which could declare archipelagic baselines around some of their islands

| | | |
|---|---|---|
| 1. Fiji* | 3. Seychelles | 5. Tonga |
| 2. Papua New Guinea* | 4. Solomon Islands* | |

* These states have already drawn such baselines

States which can enclose their entire territory within a single archipelagic baseline system

| | | |
|---|---|---|
| 1. Antigua* | 5. Grenada | 9. Philippines* |
| 2. The Bahamas | 6. Indonesia* | 10. Sao Tome & Principe* |
| 3. Cape Verde* | 7. Jamaica | 11. Vanuatu* |
| 4. Comoros | 8. Maldives | |

* These states have already drawn such baselines

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Source: Prescott, J.R.V. in: Blake, G. ed., Maritime Boundaries and Ocean Resources. London: Croom Helm, 1987, at 47.

nor would it be justifiable under the LOSC to draw straight baselines around such archipelagos.[132] However, it may be noted that archipelagos of this type, such as the Faeroes and the Galapagos Islands are currently bounded by a series of straight lines which serve as baselines.[133]

There is, however, a vital point that must be taken note of in terms of the relationship between Article 46 which defines an archipelago and an archipelagic state and Article 47 which prescribes the rules governing the construction of archipelagic baselines. A mere compliance with the criteria respecting the manner of delineating archipelagic baselines would not necessarily render the baseline system valid under the Convention.[134] Although it may be possible to draw straight baselines around a group of islands satisfying the geographic criteria contained in Article 47, if the group of islands does not meet the legal definition, then there would be no point to the baselines and the claim should be abandoned. If a state fails to qualify under the legal definition of an archipelagic state, there would be no ground for a system of archipelagic baselines of such a state ab initio, and it does not matter whether or not requirements as to maximum length and land to water ratio can be met.[135]

Although nothing is said in the definitions of an archipelago and an archipelagic state contained in Article 46 of the LOSC about the number or size of islands or the distance between the islands, and thus, the definitions appear

rather wide and imprecise, some of the difficulties and questions which might arise as a result are in practice avoided by a more clear and strict formulation of the rules governing the construction of archipelagic baselines around archipelagos.

## B. Rules governing the construction of archipelagic baselines

Article 47 of the LOSC deals with the manner in which archipelagic baselines are to be drawn. It contains detailed requirements, inter alia, on the maximum length of archipelagic baselines and the water to land ratio of the area to be enclosed within the baselines system. An analysis of the principles or rules to which the drawing of the baselines are subject to, two of which are mathematical and precise, while the remaining are more general and less precise,[136] is essential for determining which archipelagic states may, in practice, draw archipelagic baselines and around which archipelagos they would be able to do so.

### (i) Location of basepoints

One of the main aims of an archipelagic claim is to encompass the whole of an archipelago within a single baseline system, thereby including all the islands, water areas and other natural features that constitute the archipelago, seeking the widest possible geographic scope for the baselines. This is included in paragraph 1 of Article 47,

which states that "an archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago ...".[137] Such baselines, thus, do not have to be drawn between the nearest points of the outermost islands and drying reefs, but could link the salient or outermost points of such islands and drying reefs. While this may have a merit of simplicity in determining the jurisdictional limits of the archipelagic state from the mariner's point of view,[138] it would also assist archipelagic states in maximising the benefit they would get under the archipelagic regime.

(ii) The inclusion of main islands

Archipelagic baselines should be drawn in such a way as to include all the main islands of the archipelago within the archipelagic baselines.[139] According to the U.N. Group of Technical Experts on Baselines, main islands could mean the largest islands, the most populous islands, the most economically productive islands, or the islands which are pre-eminent in an historical or cultural sense.[140]

This provision is a product of informal negotiations at UNCLOS III, and is premised on the geopolitical distinction between the "mainland" and outlying territorial increments of an archipelagic state.[141] It also aims together with other requirements to exclude the application of the archipelagic baseline system to outlying islands and island groups of an insignificant nature in terms of political status and size.

The practical effect of the application of this provision would be the exclusion from the composite baseline around the archipelagic "mainland", those islands which would correspond with outlying archipelagos and islands belonging to continental states.[142]

(iii) The requisite water-land ratio

Archipelagic baselines should be drawn in such a way, so that the ratio of the area of the water to the area of the land is between 1 to 1 and 9 to 1.[143] For the purpose of calculating this ratio, paragraph 1 of Article 47 of the LOSC provides for the inclusion of atolls in computing the relevant area of land. Thus, within the "land area", would be included the total area enclosed by the baseline of the atoll, thereby including the reefs and lagoons comprising the atoll along with the constituent islands. In addition, the land areas may also include waters lying within fringing reefs of islands and atolls, including the superjacent waters of that part of a steep sided oceanic plateau which is enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau, as in the case of the Bahamas.[144]

The ratio of water to land within an archipelagic baseline system has emerged as a measure of reasonableness of the enclosure and corresponds to the geographic requirement of compactness.[145] However, the precise numerical ratio to be adopted was subject to considerable discussion during the early stages of UNCLOS III. A ratio of 5 : 1 was suggested in

the proposal of the United Kingdom,[146] which was to be taken together with a maximum length for baselines.[147] Archipelagic states indicated that such a combination would be acceptable only if it met their requirements.[148] Negotiations resulted in the present formulation of the ratio of water to land, of between 1:1 and 9:1, which had been carried from the Informal Single Negotiating Text.[149]

This ratio appears to meet the requirements of the principal advocates of the regime at UNCLOS III,[150] which, of course, explains why these figures were adopted. However, it does not seem to accommodate all states entitled to avail themselves of the regime in terms of Article 46 of the LOSC.

The minimum requirement of 1:1 ratio of water to land would deprive those archipelagic states which consist predominantly of one large island of the possibility of drawing archipelagic baselines. States such as Cuba, Iceland, Ireland, and Madagascar would thus be excluded.

While states such as Indonesia and the Philippines which comprise of a number of large major islands and several thousand smaller islands and are relatively closely situated are easily able to meet the water-land ratio, producing an exceptionally low water-land ratio,[151] the maximum requirement of 9:1 would exclude those states comprised of relatively small islands which are widely dispersed. For instance, Mauritius, one of the original members of the archipelagic states group, which is comprised of several

widely dispersed small island groups, can not draw a composite baseline around itself.[152] Similarly, Seychelles in the west Indian Ocean and Tonga in the South Pacific are also too widely scattered and would not be able to enclose their entire archipelagos within a single baseline system in conformity with the maximum water-land ratio set by the LOSC.[153]

The maximum requirement of 9:1 water to land ratio would also prevent, along with the criterion of maximum permissible length for archipelagic baselines, the drawing of archipelagic baselines around very distant islands in the archipelago.

Another aspect of the water-land ratio that would need to be borne in mind would be the consequences of sea level rise and the resultant decrease in land area and how that would affect the water-land ratio.[154] Several archipelagic states, such as the Bahamas, Kiribati, the Maldives and Tuvalu are very low-lying states and would loose a considerable portion of their land areas to a rise in sea level. One solution to such a potential situation may be for states to agree to maintain the position of baselines as they are drawn prior to such a shifting of baselines landward as a result of a rise in sea level.

(iv) Length of baselines

Paragraph 2 of Article 47 of the LOSC provides that the length of archipelagic baselines should not exceed 100 nautical miles, except that upto 3 percent of the total number of lines enclosing the archipelago may be between 100 and 125

nautical miles in length.[155]

During the discussion of this question at UNCLOS III, archipelagic states maintained that the adoption of any arbitrary figures would violate the unity of the archipelagic state and may lead to the severing off of parts of archipelagic waters.[156] It was noted that such a limit may fundamentally be inconsistent with the archipelago concept of unifying an island group which constitutes a composite unity. This is reflected in the statement of the representative of the Bahamas, who indicated that the length of baseline criterion became irrelevant when applied to the unique circumstances of the Bahama Islands and Banks and was therefore unacceptable.[157] Other states were of the opinion that the absence of any limits in this regard might lead to a situation whereby the necessary degree of proximity and relationship between the islands and the water areas may not be achieved.[158]

During the early stages of the negotiations at UNCLOS III, considerable support was received by the British proposal to fix the maximum length of baselines as 48 nautical miles.[159] This was based, on one hand, on the fact that it is equal to four times the permissible breadth of the territorial sea and, on the other hand, the judgment of the ICJ in the Fisheries Case,[160] which accepted the drawing of straight baselines of 40 miles in length with respect to coastal archipelagos.

The Informal Single Negotiating Text provided for baselines of 80 miles in length, with an unidentified percentage of lines which may extend upto 125 miles in length.[161] The percentage of such lines which may extend upto 125 miles in length was later fixed as 3 percent of the total number of baselines in the Informal Composite Negotiating Text.[162] According to Churchill and Lowe, the fact that these figures changed so considerably during the course of the negotiations suggests that their choice is not based on any objective geographical, ecological or oceanographic factors.[163]

However, the present LOSC formula apparently satisfies the claims of Indonesia and the Philippines and most of the other archipelagic states that have drawn archipelagic baselines have been able to do so within its requirements. For instance, the Indonesian baseline system consists of 196 segments, of which five baselines are between 100 and 125 nautical miles in length.[164] In the case of the Philippines, three baseline segments out of a total 80 exceed 100 nautical miles in length and one segment is 140 nautical miles in length.[165] Another case that does not conform to the requirement of the LOSC is that of Cape Verde, which has two out of a total of 14 baselines that exceed 125 nautical miles in length with the longest segment measuring 137 nautical miles.[166] According to Prescott, it would be possible for both the Philippines and Cape Verde to redraw

their longest lines to conform to the requirements of the LOSC.[167] States which may face difficulty in satisfying the maximum limit of baseline criterion include the Mauritius and Micronesia.[168]

Although the requirement that only 3 percent of baseline segments may exceed 100 nautical miles in length appears to be strict, it has been pointed out that since there is no limit to the number of segments a country may draw, it would not be difficult for a state to increase the number of segments exceeding 100 nautical miles by increasing the number of shorter segments and hence, the total number of baseline segments.[169]

(v) General configuration of the archipelago

Paragraph 3 of Article 47 of the LOSC stipulates that the drawing of archipelagic baselines should not "depart to any appreciable extent from the general configuration of the archipelago".[170] This provision is similar to the requirement in Article 7 of the LOSC that straight baselines should conform to the general direction of the coast and was proposed in relation to archipelagic baselines by the archipelagic states in an apparent attempt to assuage international concern as to the expansive character of their claims.[171]

The question as to whether the majority of archipelagic states have an ascertainable configuration, however, is arguable. In any case, archipelagic baselines which are drawn

around the archipelago, joining the outermost points of the outermost islands determine, in general, the configuration of the archipelago.[172]

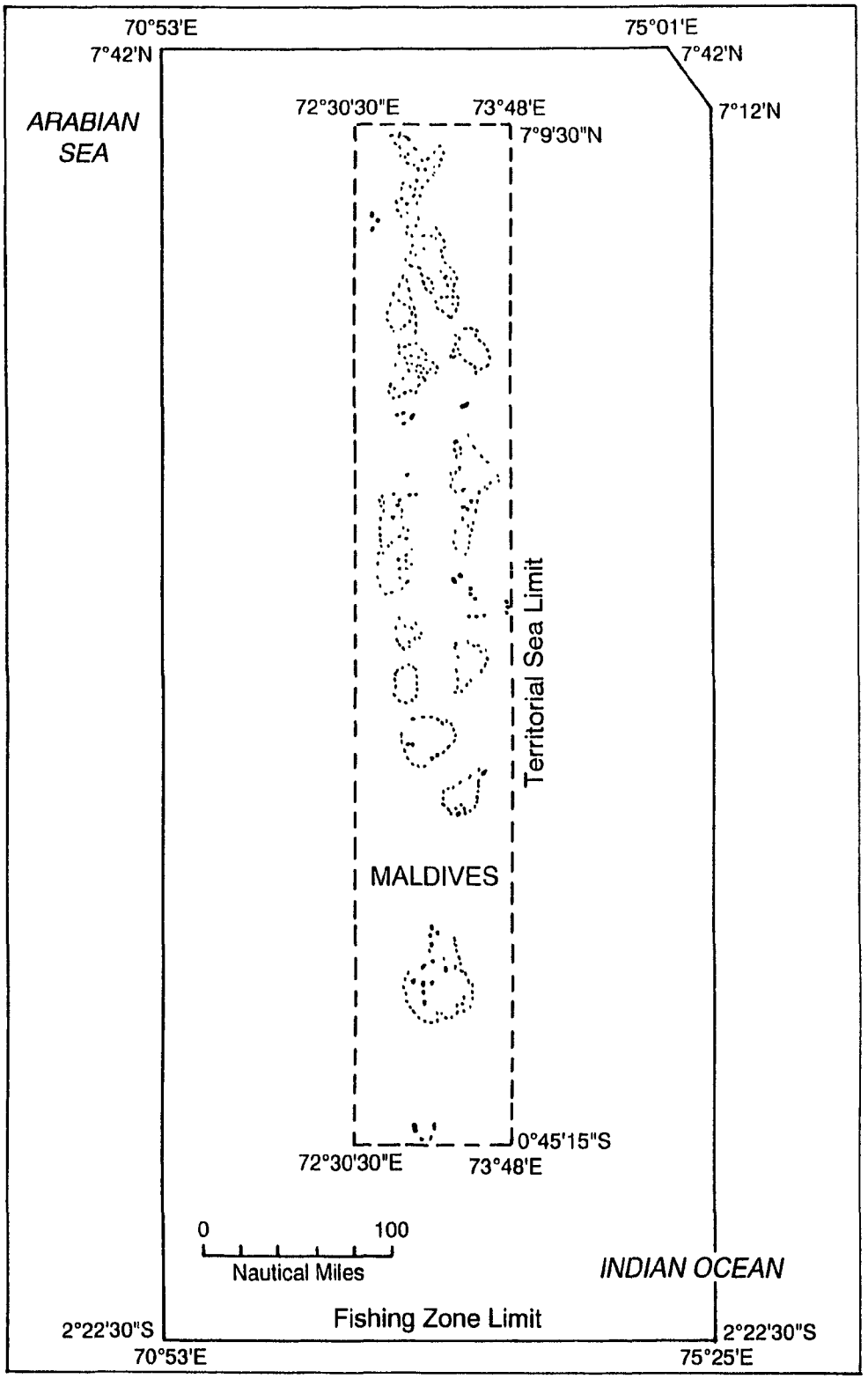
The practice of the Maldive islands is of interest in this regard. The Maldives has one of the more exceptional baseline systems (Fig. 10), which has enclosed its entire archipelago within a so called "constitutional rectangle" defined by geographical coordinates, none of which touches land and so is not in conformity with the LOSC.[173] However, the Maldivian "constitutional rectangle", due to the linear configuration of the Maldive Islands appears to comport with the requirement that archipelagic baselines should not deviate to any appreciable extent from the general configuration of the archipelago.[174]

(vi) Low-tide elevations

Archipelagic baselines may be drawn to and from low-tide elevations only if lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.[175]

According to Beazley, this treatment of low-tide elevations with respect to archipelagic baselines is different from that provided for in Articles 7 and 13 of the LOSC.[176] This rule of archipelagic baselines, in fact, combines the provisions of both Articles 13, paragraph 1 and 7, paragraph

Figure 10. The delineation of the maritime zones of the Maldives




Source: Reisman, W. Michael and Westerman, Gayl, S.Straight Baselines in Maritime Boundary Delimitation. New York: St. Martin's Press, 1992, at 162.

4. Thus, archipelagic baselines, unlike straight baselines drawn under Article 7, may be drawn to those low-tide elevations that form part of the low-water line baseline as well as to other low-tide elevations on which lighthouses or other similar installations which are permanently above sea level have been built.[177]

(vii) Non-exclusion of the link between the territorial sea of another state and the high seas or an exclusive economic zone.

Archipelagic baselines may not be drawn in such a way as to cut off the territorial sea of another state from the high seas or from its exclusive economic zone.[178] This provision would ensure that the drawing of archipelagic baselines would not cut off the territorial sea or the exclusive economic zone of another state. Such a situation could arise with respect to Indonesian archipelagic waters associated with the Kepulauan Anambas and Kepulauan Bunguran which are located between the east coast of the Malayan Peninsula and the coast of the Malaysian territory of Sarawak.[179]

The Indonesian system would also appear to have a similar consequence with regard to the territorial sea of Singapore. On the other hand, it is questionable whether Singapore would have been able to generate an exclusive economic zone, even without the Indonesian system of baselines.[180] In cases like this, where such consequence does not depend on the

application of the rule in paragraph 5 of Article 47, the drawing of baselines by archipelagic states would seem to be justified, although a strict reading of paragraph 5 would seem to suggest that in such cases archipelagic baselines should not be drawn.[181]

(viii) Public notification of baselines

Archipelagic states are required to clearly indicate their archipelagic baselines on charts of a scale or scales adequate for ascertaining their position.[182] As an alternative, they may provide lists of geographical co-ordinates of points, specifying the geodetic datum.[183] In either case, archipelagic states are required to give due publicity to such charts or lists of geographical co-ordinates and to deposit a copy of each such chart or list with the Secretary-General of the United Nations.[184]

This requirement is similar to other cases where delimitation is of a unilateral nature.[185] Archipelagic baseline system establishes a complex regime comprised of a number of concentric jurisdictional zones. The various criteria such as the water-land ratio and length of baselines, upon which such baseline systems are based are not easily determined objectively.[186] Thus, considering the unilateral nature of the delimitation and the nature of the navigational rights within the enclosed waters, it would be in the best interest of both the archipelagic state and the maritime states that use archipelagic waters for navigation,

to give due publicity to the system employed to delimit archipelagic waters.

C. Baseline options of archipelagic states

LOSC appears to permit archipelagic states to draw archipelagic baselines around their islands in a number of ways. Three main such variants for enclosing the islands and the interconnecting waters of archipelagic states within straight baseline systems can be identified from existing state practice that is not inconsistent with the provisions of the LOSC.

i. Single baseline system : The first and, perhaps, ideal option would be to include all the islands and other natural features and the interconnecting waters that constitute the archipelagic state within a single composite baseline system. Antigua and Barbuda,[187] Cape Verde,[188] Indonesia,[189] the Philippines,[190] Sao Tome and Principe,[191] and Vanuatu[192] each has enclosed its entire archipelago within a single baseline system. The Maldives, and the Bahamas are among archipelagic states which could enclose their entire archipelago within such a single archipelagic baseline system, but which are yet to do so.[193] States such as Fiji, which encloses its main archipelago within a single archipelagic baseline system, but has far flung islands which cannot be included within its baseline system also would be included in

this group.[194]

The single baseline system would best meet the requirements of unity and national integrity of archipelagic states.

ii. Multiple baseline systems : It is not necessary for an archipelagic state to attempt to include all its islands within a single system of archipelagic baselines. Article 46 of the LOSC provides that an archipelagic state may consist of a number of archipelagos.[195] In such cases, archipelagic baselines may be drawn around each archipelago forming the archipelagic state. Each such archipelago should meet the requirements of the definition of an archipelago contained in Article 46(b) and each enclosure should satisfy the requirements of Article 47 with respect to the drawing of archipelagic baselines.[196]

Solomon Islands has proclaimed itself as an archipelagic state consisting of five archipelagos and has drawn archipelagic baselines around its five archipelagos : Main Group Archipelago; the Rennell, Bellona and Indispensable Reef Atoll Archipelago; the Ontong Java Group Archipelago; the Santa Cruz Islands Archipelago; and the Duff Islands Archipelago.[197]

Archipelagic states such as Tonga, Kiribati, and Tuvalu which have a water to land ratio higher than 9 : 1 would also have difficulty in meeting the maximum length criteria for baselines. Such states could also resort to the option of

multiple archipelagic baseline systems, provided that each archipelago to be enclosed by an archipelagic baseline system meets the requirements of the definition of an archipelago contained in Article 46(b) of the LOSC. According to Prescott, Tonga could draw archipelagic baselines around Tongatapu Islands, with the longest segment of archipelagic baselines being 11 nautical miles and a water to land ratio of 2.3 : 1.[198] In addition to the Tongatapu Islands, Tonga could also draw archipelagic baselines around the Uta Vava'u Group which would yield a water to land ratio of 5:1 with its longest segment of baseline measuring 20 nautical miles.[199] A similar approach could also be utilized for Kiribati.

iii. Non-archipelagic straight baseline system : States which fall within the definition of archipelagic states and predominantly consist of one large island may declare that the lines they draw around their islands are not archipelagic baselines, but are straight baselines which tie the coastal islands to the main island, analogous to mainland coasts that are fringed by coastal islands or coastal archipelagos. Cuba, Iceland and Madagascar have, in fact, already enacted legislation along this line.[200] The advantage of this practice is that, in such cases, the waters inside the straight baselines then become internal waters rather than archipelagic, where the rights of the archipelagic state are less extensive.

## 4.4 MIDOCEAN ARCHIPELAGOS OF CONTINENTAL STATES

Midocean archipelagos which do not constitute archipelagic states as defined in Article 46(a) of the LOSC have been classified and termed as "state archipelagos",[201] "non-state archipelagos",[202] and as "archipelagos forming part of a coastal state".[203] From these terms and classifications three elements can be identified which characterise such archipelagos. Namely : a) they are midocean archipelagos; b) they do not constitute the whole territory of an independent and sovereign state; and c) they are under the sovereignty of a continental state.

Such archipelagos, nevertheless, meet the requirements of the definition of an archipelago provided in Article 46(b) of the LOSC. Most midocean archipelagos belonging to continental states are single geographical, economic, and political entities and have been historically regarded as archipelagos. However, the LOSC is silent as regards midocean archipelagos of continental states and excludes such archipelagos from the application of the archipelagic regime provided in the LOSC.

Nevertheless, the practice of many states with midocean archipelagos do not conform to the provisions of the LOSC. Among others, Denmark with respect to the Faeroes,[204] Ecuador with respect to the Galapagos,[205] Norway with respect to Spitzbergen[206] and Spain with respect to the eastern group of Canary Islands[207] have drawn straight baselines joining the outermost points of the outermost

Table 3. Midocean archipelagos of continental states around which straight baselines have been drawn

| State | Date | Archipelago |
|---|---|---|
| 1. Ethiopia | 25 Sept. 1952 | Danlac Archipelago |
| 2. Ecuador | 13 July 1971 | Galapagos Islands |
| 3. Denmark | 1959 | Faeroe Islands |
| 4. Spain | 5 Aug. 1977 | Ibiza and Formentera, Eastern Islas Canarias |
| 5. Australia | 9 Feb. 1983 | Furneaux Group, Houtman Abrolhos Islands |

Source: Prescott, J.R.V., in: Brown, E.D. and Churchill, R.R. The UN Convention on the Law of the Sea: Impact and Implementation. Honolulu: The Law of the Sea Institute, 1987, at 314-315.

islands of the respective archipelagos. The Ecuadorian claim, as originally made in 1951, was protested the same year by the United Kingdom and the United States.[208]

It has also been noted that midocean archipelagos of continental states can be surrounded by ordinary straight baselines if one main island is deemed to be fringed by the other islands in the group.[209] This is the case, for instance, with Furneaux Group in Bass Strait between the Australian mainland and northeast Tasmania.[210]

It is also necessary to distinguish non-self governing archipelagic territories from the other archipelagos of continental states. They are archipelagos which do not qualify as archipelagic states and cannot under the LOSC legitimately enjoy the archipelagic regime until they become independent. The states administering such archipelagos have not claimed archipelagic status for such archipelagos, in part because it is not in the interest of the metropolitan state, whose interest would be in preserving the freedom of navigation. The Netherlands Antilles, New Caledonia and Cook Islands are examples of non-self governing archipelagos.

The only factor that is preventing Netherlands Antilles from claiming archipelagic status appears to be the present dependent status of the Antilles. The Leeward Islands of the Netherlands Antilles comprised of Aruba, Curacao and Bonaire Islands would otherwise qualify as an archipelagic state.[211] These islands would meet the length criteria and

the criteria of water to land ratio set forth in Article 47, paragraphs 1 and 2 of the LOSC for archipelagic baselines.[212]

Similarly, upon independence, New Caledonia would also be in a position to claim the status of an archipelagic state. Although New Caledonia may not be able to claim a single set of archipelagic baselines, since its Chesterfield Islands and South Bellona Reefs and Hunter and Mathew Islands are all more than 125 miles from the main group, according to Prescott, if a baseline was drawn around the main group from Huon Island in the north to the island of Pines in the south, the longest segment would measure 70 nautical miles, while the water to land ratio would be 3.1 : 1.[213] And if the Walpole Island was included in the main archipelago then the longest baseline would be 76 nautical miles, and the water to land ratio would be raised to 3.6 : 1, in which cases the length of baselines and the ratio of water to land would conform to the LOSC.[214]

## 4.5 CONCLUSION

The definition of an archipelago contained in Article 46(b) of the LOSC emerged as a formula commanding widespread support at UNCLOS III and with the greatest prospect for securing a consensus.

Many of the features of the definition, such as the inclusion of "parts of islands" and "other natural features"

reflect the geographical realities of the ocean states represented at UNCLOS III and the trend to accommodate widely differing natural circumstances. However, the geographic circumstances of those ocean states which, due to different reasons were not able to participate in the UNCLOS III process did not get any adequate reflection in the provisions of the LOSC.[215] Consequently, such archipelagic states remain excluded from the benefits of the archipelagic regime provided in the LOSC.

The LOSC has no mention by name of coastal archipelagos or midocean archipelagos of continental states. However, the Convention provides for coastal archipelagos by allowing for the method of straight baselines for coasts fringed with islands.[216] The definition of archipelagos which is applicable only to midocean archipelagos does not itself differentiate between archipelagic states and other midocean archipelagos, although the definition does not appear to have as an objective the inclusion within it of midocean archipelagos belonging to continental states. Nevertheless, several continental states with midocean archipelagos continue to enclose their archipelagos by drawing straight baselines analogous to those of archipelagic baselines.[217]

Considering the complexity of the question, Article 47, on the methods of drawing archipelagic baselines, appears to be one of the most impressively drafted in the entire LOSC.[218] Although, this Article includes something

borrowed and something new, its originality is evidenced in the system of precise mathematical measurement developed in paragraphs 1 and 2 and in the geological refinement of paragraph seven.[219]

The feasibility of the formula for the delineation of archipelagic baselines contained in Article 47 depends to a great extent on the archipelagic states themselves. These states would have to apply it upon ratification of the Convention and thus, the future of this is governed by the future of the regime of archipelagic waters as a whole.[220]

Although the provisions of the LOSC regarding the archipelagic baselines are a compromise in comparison to the initial position of the archipelagic states that did not want any limitations in this regard, the provisions generally meet the requirements of the main archipelagic states, particularly those represented at UNCLOS III. Nevertheless, these provisions would require some ocean states to exercise a new delineation for their waters or to revise existing baselines systems.

**END NOTES**

1. See Jayewardene, Hiran, W. The Regime of Islands in International Law. Dordrecht: Martinus Nijhoff, 1990, at 134.

2. Office for Ocean Affairs and the Law of the Sea. Law of the Sea: Archipelagic States. Legislative History of Part IV of the United Nations Convention on the Law of the Sea. New York: United Nations, 1990, at 40.

3. Webster's Ninth New Collegiate Dictionary. Markham, Ont.: Thomas Allen & Sons Ltd., 1983, at 101.

4. Ibid.

5. Tangsubkul, Phiphat. The Southeast Asian Archipelagic States: Concept, Evolution and Current Practice. Honolulu: East West Environment and Policy Institute, 1984, at 2.

6. Evensen, Jens. "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos", United Nations Conferences on the Law of the Sea, Official Records, First Conference, 1958, Vol.I, New York: William S. Hein & Co., 1980, at 290.

7. Hodgson, Robert, D. Islands : Normal and Special Circumstances. Washington, D.C.: The Geographer, Bureau of Intelligence and Research, Dept. of State, December 10, 1973, at 27.

8. Ibid.

9. Ibid.

10. Hodgson, Robert, D. and Alexander, Lewis, M. Towards an Objective Analysis of Special Circumstances, Occ. Paper No.13, Law of the Sea Institute, University of Rhode Island, 1972, at 45.

11. Ibid.

12. Ibid., at 45 and 46.

13. Ibid., at 45.

14. Ibid. See also Tangsubkul, Phiphat and Dzurek, Daniel J. "The Emerging Concept of Midocean Archipelagos", 3 Ocean Yearbook, 1982, at 393.

15. U.N. Doc. A/Ac.138/SC.II/L.44 of August 2, 1973; See also Shinkaretskaya, G.G. Gosudarstvo na Archipelagakh. Mezdunarodno-Pravovoi Regime. Moscow: Mezdunarodnie Otnosheniya, 1977, at 17.

16. United Nations Conference on the Law of the Sea, 1958, Official Records, Vol.III, at 239.

17. Shinkaretskaya, G.G. supra note 15.

18. International Court of Justice, Fisheries Case (United Kingdom v. Norway), Judgment of December 18, 1951, Reports of Judgments, Advisory Opinions and Orders (hereinafter cited as I.C.J. Reports, 1951), at 116 et seq.

19. Article 46 of the United Nations Convention on the Law of the Sea of 1982 (LOSC). For a full text of the Convention see : United Nations, The Law of the Sea. United Nations convention on the Law of the Sea, with Index and Final Act of the Third United Nations Conference on the Law of the Sea. New York : U.N. Publications, 1983.

20. Tolentino, Arturo, M. "Archipelagos under the Convention on the Law of the Sea", 28 Far Eastern Law Review, 1984, at 1.

21. Ibid.

22. Article 121, LOSC, supra note 19.

23. U.N. Doc. A/AC.138/SC.II/L.44 of August 2, 1973.

24. The proposal made on behalf of the archipelagic states by Fiji, Indonesia, Mauritius and the Philippines is contained in U.N. Doc. A/AC.138/SC.II/L.48 of August 6, 1973.

25. Jayewardene, H.W. supra note 1 at 136.

26. U.N. Doc. A/CONF.62/C.2/L.49, Article 1, paragraph 3.

27. Third United Nations Conference on the Law of the Sea. Official Records. Vol.II. New York: United Nations Publication, 1975, at 260.

28. Ibid., at 264, paragraph 59.28.

29. Article 46, paragraph (b), LOSC, supra note 19.

30. Third United Nations Conference on the Law of the Sea. Official Records, supra note 27 at 260.

31. Article 121, LOSC, supra note 19.

32. Articles 6, 13, and paragraphs 1, 4, and 7 of Article 47, LOSC, supra note 19.

33. Article 13, LOSC, supra note 19.

34. See, Beazley, P.B. Maritime Limits and Baselines; a guide to their delineation. Third edition, revised. London: The Hydrographic Society, 1987, at 11.

35. See, Herman, L.L. "The Modern Concept of the Off-Lying Archipelago in International Law", 23 The Canadian Yearbook of International Law, 1985, at 191.

36. Beazley, P.B. supra note 34 at 12.

37. Ibid.

38. See, Beazley, P.B. Ibid., at 11.

39. See, Sanger, C. Ordering the Oceans. The Making of the Law of the Sea. Toronto: University of Toronto Press, 1987, at 72.

40. Third U.N. Conference on the Law of the Sea. Official Records, Vol. II, supra note 27, at 265.

41. Ibid.

42. Ibid., also see, Third United Nations Conference on the Law of the Sea. Official Records. Vol.I. New York: United Nations Publication, 1975, at 132.

43. Article 47, Paragraph 7, LOSC, supra note 19.

44. Article 46, Paragraph (b), LOSC, supra note 19.

45. I.C.J. Reports, 1951, supra note 18 at 116 et seq.

46. See, Jayewardene, H. W. supra note 1 at 138.

47. For instance, see Article 5 of the draft of the Institut de Droit International, 33 Annuaire de L'Institut de Droit International, 1927, at 81, as translated into English by Evensen, J. supra note 6 at 291; and Basis of discussion No.13 of the Preparatory Committee of the Hague Codification conference of 1930, League of Nations, Doc. C 74, M.39, 1929 V.2, at 50-1.

48. Strupp, for instance, proposed three times the extent of the territorial sea, see section 3.1.3 G (i) of the present study. A wide variety of views were also expressed in the replies of governments to the Preparatory Committee of the Hague Codification Conference of 1930, see section 3.1.3 A of the present study.

49. Jayewardene, H.W. supra note 1 at 138.

50. Paragraphs 1 and 2, Article 47, LOSC, supra note 19.

51. I.C.J. Reports, 1951, supra note 18 at 133.

52. See Yearbook of the International Law Commission, 1956, Vol.I. New York: U.N. Publication, Kraus Reprint Co., 1973, at 195.

53. Jayewardene, H.W. supra note 1 at 139.

54. See, Basis of Discussion No. 13 of the Preparatory Committee of the Hague Codification Conference of 1930, supra note 47.

55. Amerasinghe, C.F. "The Problem of Archipelagoes in the International Law of the Sea",23 International and Comparative Law Quarterly, 1974, at 557.

56. Paragraph (b), Article 46, LOSC, supra note 19.

57. For details regarding the claims of various states over the Spratly Islands see, Bennett, Michael. "The Peoples' Republic of china and the Use of International Law in the Spratly Islands Dispute", 28 Stanford Journal of International Law, 1992, at 425 - 450.

58. The representative of Mauritius at UNCLOS III explained that, any state which had historically been regarded as an archipelagic state would not be deprived of that status. Third U.N. Conference on the Law of the Sea, Official Records, supra note 27 at 269.

59. Jayewardene, H.W. supra note 1 at 139.

60. Hereinafter referred to as the Territorial Sea Convention. For a full text of the Convention see: 516 U.N.T.S. 206 - 224.

61. Paragraph 1, Article 4, Ibid., Paragraph 1, Article 7, LOSC, supra note 19.

62. I.C.J. Reports, 1951, supra note 18 at 129.

63. Article 7, LOSC, supra note 19. This Article is much indebted to the judgment of the ICJ in the Anglo-Norwegian Fisheries Case for its language and the concepts. See I.C.J. Reports, 1951, supra note 18, at 116 et seq. Paragraphs 1 and 3 of Article 7 were incorporated without change from Article 4 of the Territorial Sea Convention, supra note 60. Paragraphs 4, 5 and 6 of Article 7 were transferred from Article 4 of the Territorial Sea Convention with only slight changes in expression which did not change the meaning or operation of the version of the Territorial Sea Convention. Paragraph 2 of Article 7 is an entirely new provision.

64. In addition to groups of coastal islands or coastal archipelagos, Article 4 of the Territorial Sea Convention and Article 7 of the LOSC also provide for the drawing of straight baselines along coastlines that are deeply indented and cut into. However, such geographic circumstances are outside the scope of the present study.

65. See, Reisman, W. Michael and Westerman, Gayl, S. Straight Baselines in Maritime Boundary Delimitation. New York : St. Martin's Press, 1992, at 86.

66. The Oxford English Dictionary. Second Edition. Vol. VI. Oxford: Clarendon Press, 1989, at 200.

67. See, Kapoor, D.C. and Kerr, Adam J. A Guide to Maritime Boundary Delimitation. Toronto : Carswell, 1986, at 34.

68. Beazley, P.B. supra note 34 at 13.

69. Ibid.

70. See, Pharand, Donat. Canada's Arctic Waters in International Law. Cambridge : Cambridge University Press, 1988, at 134.

71. See, I.C.J. Reports, 1951, supra note 18 at 127.

72. See, O'Connell, D.P. The International Law of the Sea. Vol. I, Oxford: Clarendon Press, 1984, at 212. O'Connell mentions the cases of Iran, Dominican Republic, Ecuador, Gabon, Guinea, Guinea Bissau, Haiti, Kenya, Mauritius, Mozambique, Portugal, Saudi Arabia, Somalia, Sudan, Syria, Tanzania, and Venezuela as examples of states that have drawn straight baselines connecting questionable "fringes" and mentions Burma, Denmark, Finland, Malaysia, Maldives and Yugoslavia as examples of countries with complex coasts bearing analogies with the coast of Norway. Also see, Prescott, J.R.V. "Straight and

Archipelagic Baselines", in Blake, Gerald (ed.). Maritime Boundaries and Ocean Resources. London : Croom Helm, 1987, at 43. Prescott mentions cases where straight baselines have been drawn to connect islands which could not be considered to fringe the coast, mainly because islands are too few in number or too distant from the coast to possess the characteristics of a fringe in the immediate vicinity of the coast. The cases of Colombia, Ecuador, France, Guinea, Iceland, Iran, Italy, Malta and Vietnam are given as examples of coasts along which or along parts of which such baselines have been drawn.

73. Hodgson, R.D. supra note 7 at 23.

74. Ibid.

75. See, Reisman, W.M. and Westerman, G.S. supra note 65 at 88.

76. United Nations. Office for Ocean Affairs and the Law of the Sea. The Law of the Sea. Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea. New York : U.N. Publication, 1989, at 21.

77. U.S. Department of State. Limits in the Seas. No.106. Developing Standard Guidelines for Evaluating Straight Baselines. Washington, D.C.: U.S. Department of State. Office of Ocean Law and Policy, 1987, at 19.

78. See, Ibid.

79. Ibid., at 25.

80. See, Hodgson, R.D. and Alexander, L.M. supra note 10.

81. See, Beazley, P.B. supra note 34.

82. U.S. Department of State. Limits in the Sea, No.106, supra note 77 at 28.

83. Hodgson, R.D. supra note 7 at 23.

84. U.S. Department of State. Limits in the Seas, No. 106, supra note 77 at 28.

85. Paragraph 1, Article 7, LOSC, supra note 19.

86. Reisman, W.M. and Westerman, G.S. supra note 65 at 89.

87. Ibid.

88. Prescott, J.R.V. "Straight Baselines: Theory and Practice", in Brown, E.D. and Churchill, R.R. (eds.). The UN Convention on the Law of the Sea: Impact and Implementation. Proceedings of the Nineteenth Annual Conference of the Law of the Sea Institute. Honolulu: The Law of the Sea Institute, University of Hawaii, 1987, at 299.

89. U.N. Office for Ocean Affairs and the Law of the Sea. Baselines, supra note 76 at 22.

90. U.S. Department of State. Limits in the Seas, No.106, supra note 77 at 22.

91. Ibid.

92. Ibid.

93. Prescott, J.R.V. supra note 88.

94. Paragraph 3, Article 7, LOSC, supra note 19, and Paragraph 2, Article 4, Territorial Sea Convention, supra note 60.

95. I.C.J. Reports, 1951, supra note 18 at 133.

96. Ibid., at 132.

97. Beazley, P.B. supra note 34 at 14.

98. Ibid.

99. Yearbook of the International Law Commission, 1955, Vol.II. New York: U.N. Publication, 1960, at 54.

100. Paragraph 3 Article 7, LOSC, supra note 19. Paragraph 2 of Article 4 of the Territorial Sea Convention also requires straight baselines to follow the general direction of the coast, supra note 60.

101. I.C.J. Reports, 1951, supra note 18 at 142.

102. Hodgson, R.D. and Alexander, L.M. supra note 10 at 37.

103. See, U.S. Department of State. Limits in the Seas, No. 106, supra note 77 at 19 - 21.

104. Hodgson and Alexander do not discuss a maximum length for the segment of coast to be considered for determining the general direction of the coast, but do suggest that no straight baseline should exceed 40 nautical miles. See, Hodgson, R.D. and Alexander, L.M. supra note 10 at 42.

Beazley suggests that the length of the coastline to be considered when assessing the general direction of the coast should depend on the length of the baseline being considered. He supports 45 miles as an acceptable length for straight baselines. See, Beazley, P.B. supra note 34 at 14. The U.S. State Department's study proposes to increase the length of the general direction line to 60 nautical miles and suggests the use of charts having a scale of approximately 1: 1,000,000. See, U.S. Department of State. Limits in the Seas, No.106, supra note 77 at 32.

105. I.C.J. Reports, 1951, supra note 18 at 142.

106. U.N. Office for Ocean Affairs and the Law of the Sea. Baselines, supra note 76 at 26.

107. Paragraph 5, Article 7, LOSC, supra note 19. Also paragraph 4, Article 4, Territorial Sea Convention, supra note 60.

108. I.C.J. Reports, 1951, supra note 18 at 142.

109. Ibid.

110. Ibid.

111. Pharand, D. supra note 70 at 138.

112. See, Prescott, J.R.V. supra note 88 at 310.

113. See, U.N. Office for Ocean Affairs and the Law of the Sea. Baselines, supra note 76 at 25.

114. See, Reisman, W.M. and Westerman, G.S. supra note 65 at 93.

115. Three of the basepoints of the Norwegian straight baseline of 1935 were located on rocks which were covered by the high tide. The ICJ approved (I.C.J. Reports, 1951, supra note 18 at 140) the continued use of these three low tide elevations as basepoints. See, Prescott, J.R.V. supra note 88 at 309.

116. Paragraph 5, Article 4 of the Territorial Sea Convention states that "the system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another state". Supra note 60.

117. For instance, Gambia and Brunei are embedded in the coast of the larger territories of Senegal and Malaysia.

118. See, Beazley, P.B. supra note 34 at 15.

119. Clause (a), Article 46, LOSC, supra note 19.

120. Black's Law Dictionary, Sixth Edition. St. Paul, Minn: West Publishing Co., 1990, at 1407.

121. Barron, Nancy, "Archipelagos and Archipelagic States under UNCLOS III: No Special Treatment for Hawaii", 4 Hastings International and Comparative Law Review, 1980-81, at 515.

122. See, National Seas Act, 1977, Act No. 7 of 7 February 1977 of Papua New Guinea, in Nordquist, M., Houston Lay, S., Simmonds, R.K., (Joint Comp. & ed.), New Directions in the Law of the Sea, Documents, Vol. VII. New York: Oceana Publications, 1980, at 485 -492.

123. See section 4.1 of this study.

124. Churchill, R.R. and Lowe, A.V. The Law of the Sea, Second Edition, Manchester: Manchester University Press, 1988, at 100.

125. Paragraph 1 of Article 47 of the LOSC states that "an archipelagic state may draw straight archipelagic baselines." See Churchill, R.R. and Lowe, A.V. Ibid.

126. Ibid., at 101. See also, Prescott, J.R.V. supra note 72 at 47.

127. Paragraph 1, Article 47, LOSC, supra note 19.

128. Article 48, LOSC, ibid.

129. Bowett, Derek, W. The Legal Regime of Islands in International Law, Dobbs Ferry, N.Y.: Oceana Publications, 1979, at 106.

130. Ibid.

131. Ibid.

132. Churchill, R.R. and Lowe, A.V. supra note 124.

133. Ecuador: Supreme Decree of 28 June 1971 Prescribing Straight Baselines for the Measurement of the Territorial Sea; See United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, ST/LEG/SER.B/18, New York: U.N. Publication, 1976, at 15; Denmark: Order of 21 December 1976 on the Fishing Territory of the Faeroes; See, Churchill, R., Nordquist,

M. and Houston Lay, S. (Joint comp. and ed.), New Directions in the Law of the Sea, Documents, Vol. V, New York: Oceana Publications, 1977, at 111 - 112.

134. Herman, L.L. supra note 35 at 186.

135. Ibid.

136. Churchill, R.R. and Lowe, A.V. supra note 124 at 101.

137. Paragraph 1, Article 47, LOSC, supra note 19.

138. See, Jayewardene, H.W. supra note 1 at 144.

139. Paragraph 1, Article 47, LOSC, supra note 19.

140. United Nations, Baselines, supra note 76 at 37.

141. Jayewardene, H.W. supra note 1 at 144.

142. Ibid., at 145.

143. Paragraph 1, Article 47, LOSC, supra note 19.

144. Paragraph 7, Article 47, LOSC, supra note 19. The reference in Paragraph 7 to "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", as noted by Kapoor and Kerr, appears to be an attempt at defining an atoll. See, Kapoor, D.C. and Kerr, A.J. supra note 67 at 54. The intention behind the passage appears to be to reconfirm that relatively large features, such as some of the atolls in the Maldives which measure 50 nautical miles in diameter, as well as more typical smaller features may be included within "land areas" in computing the water to land ratio. See also, Beazley, P.B. supra note 34 at 30.

145. See, Jayewardene, H.W. supra note 1 at 145.

146. U.N. Doc. A/AC.138/SC.II/L.44, Article 1(b), subclause (iii).

147. Ibid., a length of 48 nautical miles was proposed for baselines in subclause (ii) of Article 1(b).

148. See the statement of the representative of Indonesia, UNCLOS III, Official Records, supra note 42 at 187.

149. U.N. Doc. A/CONF.62/WP.8/Part II.

150. Indonesia (1.2 : 1); Philippines (1.8 : 1); Fiji (1.1 : 1).

151. See preceding note. See also, Prescott, J.R.V. The Maritime Political Boundaries of the World, London : Methuen, 1985, at 211.

152. Prescott, J.R.V. ibid., at 167.

153. Ibid., at 167 and 186.

154. For details on potential consequences of a rise in sea level to maritime limits, see, Soons, A.H.A. "The Effects of a Rising Sea Level on Maritime Limits and Boundaries", 37 Netherlands International Law Review, 1990, at 207 - 232.

155. Paragraph 2, Article 47, LOSC, supra note 19.

156. UNCLOS III, Official Records, Vol. I, supra note 42 at 113, 124-125, 132, and 187-188.

157. UNCLOS III, Official Records, Vol.II, supra note 27 at 265.

158. See, for instance, the statement made by the Japanese delegate, ibid., at 261.

159. U.N. Doc. A/AC.138/SC.II/L.44 of August 2, 1973.

160. I.C.J. Reports, 1951, supra note 18.

161. U.N. Doc. A/CONF.62/WP.8/Part II. The Third United Nations Conference on the Law of the Sea, Official Records, Vol.IV, at 152-171.

162. U.N. Doc. A/CONF.62/WP.10

163. Churchill, R.R. and Lowe, A.V. supra note 124 at 102.

164. Kapoor, D.C. and Kerr, A.J. supra note 67 at 54.

165. Jayewardene, H.W. supra note 1 at 148.

166. Prescott, J.R.V. supra note 151 at 318.

167. Ibid., at 211 and 318.

168. Jayewardene, H.W. supra note 1 at 149.

169. For example, a state which has 100 baselines may have three baselines which extend to a maximum length of 125 nautical miles. However, if that state increases the number of baselines to , say 130, by shortening the length of individual segments, then such a state may draw four baselines which may extend to 125 nautical miles in length. See, Kapoor, D.C. and Kerr, A.J. supra note 67 at 54.

170. Paragraph 3, Article 47, LOSC, supra note 19.

171. Jayewardene, H.W. supra note 1 at 149.

172. See, Kapoor, D.C. and Kerr, A.J. supra note 67 at 55.

173. Reisman, W.M. and Westerman, G.S. supra note 65 at 160.

174. Ibid., at 163.

175. Paragraph 4, Article 47, LOSC, supra note 19.

176. Beazley, P.B. supra note 34 at 30.

177. Ibid.

178. Paragraph 5, Article 47, LOSC, supra note 19.

179. United Nations, Baselines, supra note 76 at 37 - 38.

180. Churchill, R.R. and Lowe, A.V. supra note 124 at 102.

181. Ibid.

182. Paragraph 8, Article 47, LOSC, supra note 19.

183. Ibid. For details regarding the geodetic datum, see, technical comment (vi) in U.N. Doc. A/CONF.62/L.76 of 18 August 1981.

184. Paragraph 9, Article 47, LOSC, supra note 19.

185. See, Articles 16, 75 and 84 of the LOSC, supra note 19.

186. Jayewardene, H.W. supra note 1 at 153.

187. Maritime Areas Act, 1982, United Nations, Office for Ocean Affairs and the Law of the Sea, The Law of the sea: Practice of Archipelagic States. New York: U.N. Publication, 1992, at 1.

188. Decree-Law No. 126/77 of 31 December 1977. Ibid., at 17.

189. Act No.4 concerning Indonesian Waters, 18 February 1960. Ibid., at 45.

190. Republic Act No.3046 of 17 June 1961 and Republic Act No. 5446 of 18 September 1968. Ibid., at 75 and 76.

191. Decree-Law No.48/82. Ibid., at 97.

192. The Maritime Zones Act, 1981. Ibid., at 131.

193. See, Prescott, J.R.V. supra note 151 at 161 and 338.

194. Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order, 1981, and Marine Spaces (Territorial Seas) (Rotuma and its dependencies) Order, 1981. United Nations, supra note 187 at 40 and 43.

195. Article 46(a), LOSC, supra note 19.

196. See, Beazley, P.B. supra note 34 at 29.

197. Declaration of Archipelagos of Solomon Islands, 1979 and Declaration of Archipelagic Baselines, 1979. United Nations, supra note 187 at 105.

198. Prescott, J.R.V. supra note 151 at 186.

199. Ibid.

200. Cuba: Act of 24 February 1977 Concerning the Breadth of the Territorial Sea of the Republic of Cuba; See, Nordquist, M. et al, supra note 122 at 23; Iceland: Law of 1 June 1979 Concerning the Territorial Sea, the Economic Zone and the Continental Shelf; See, United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, ST/LEG/SER.B/19, New York: U.N. Publication, 1980 at 43; Madagascar: Decree No. 63-131 of 27 February 1963 establishing the limits of the territorial Sea of the Malagasy Republic; See, United Nation Legislative Series, ST/LEG/SER.B/15 at 99.

201. Jayewardene, H.W. supra note 1 at 140.

202. Kwiatkowska, Barbara, "Archipelagic Waters Regime in the Light of the 1982 UN Law of the Sea Convention and Practice of States", Faculty of Law, University of Utrecht, The Netherlands, 1990, at 7.

203. Third United Nations Conference on the Law of the Sea. Official Records. Vol.III. New York: U.N. Publication, 1975, at 82.

204. Ordinance No.599 of 21 December 1976 on the Delimitation of the Territorial Sea around the Faroe Islands. United Nations, Office for Ocean Affairs and the Law of the Sea, The Law of the Sea. Baselines: National Legislation With Illustrative Maps, New York: U.N. Publication, 1989, at 131.

205. Supreme Decree No. 959-A of 28 June 1971 prescribing straight baselines for the measurement of the Territorial Sea. Ibid., at 154.

206. Royal Decree of 25 September 1970 concerning the Delimitation of the Territorial Waters of Parts of Svalbard. Ibid., at 244.

207. Royal Decree No.2510/1977 of 5 August 1977. Ibid., at 281.

208. O'Connell, D.P. "Mid-Ocean Archipelagos in International Law", 45 British Yearbook of International Law, 1971, at 61.

209. See, Prescott, J.R.V. supra note 88 at 315.

210. Ibid.

211. Kwiatkowska, B. supra note 202 at 6.

212. Ibid.

213. Prescott, J.R.V. supra note 151 at 190.

214. Ibid.

215. See, Prescott, J.R.V. supra note 72 at 48.

216. Article 7, LOSC, supra note 19.

217. See supra notes 204-207.

218. Johnston, Douglas M. The Theory and History of Ocean Boundary-Making. Montreal and Kingston: McGill - Queen's University Press, 1988, at 117.

219. Ibid.

220. Ibid., at 118.

## 5. CHAPTER IV. THE NATURE, STATUS AND THE REGIME OF ARCHIPELAGIC WATERS

### 5.0 INTRODUCTION

The question of the status of waters enclosed by a system of archipelagic baselines is one of the major issues arising from the archipelagic concept. As one Indonesian authority observed, "it is the status of the waters enclosed by the archipelagic baselines which constitutes the most essential element of the concept rather than the method of drawing straight archipelagic baselines, in as much as it gives meaning to the concept of unity."[1]

Ocean states have been concerned with preserving their territorial integrity and have insisted on maximum control and assimilation as in the case of internal waters, while maritime powers have sought to preserve the widest possible freedoms in respect of these areas.

Traditionally, under international law, waters landward of baselines from which territorial sea is measured are internal waters, areas of complete state jurisdiction, where foreigners would require prior permission for passage or any other activity. In the case of archipelagos too, several attempts were made to apply traditional concepts of the law of the sea to the waters enclosed by baselines drawn around archipelagos. However, neither the category of internal waters nor that of territorial sea met the concerns of both

the archipelagic states and the other maritime users of the waters of archipelagos.

As a result of the work of the Third United Nations Conference on the Law of the Sea (UNCLOS III), a totally new, hitherto non-existent marine zone -- archipelagic waters -- was introduced to the international law of the sea, the juridical characteristics of which are contained in Part IV of the United Nations Convention on the Law of the Sea of 1982 (LOSC).[2]

However, the LOSC restricts the application of the concept of archipelagic waters. According to Paragraph 1 of Article 47 of the LOSC, only an archipelagic state can draw archipelagic baselines to delineate archipelagic waters and only waters so delineated by archipelagic baselines could be archipelagic waters.[3]

Although the waters enclosed within the baselines of archipelagos other than archipelagic states are not included within the concept of archipelagic waters, coastal archipelagos have been accommodated under Article 7 of the LOSC dealing with straight baselines and several continental states with midocean archipelagos continue to enclose the waters of their midocean archipelagos within straight baselines systems,[4] although under the LOSC there is no basis for the application of the archipelagic concept to midocean archipelagos of continental states.

Thus, in addition to the nature and regime of

archipelagic waters, for purposes of comparison, the nature and regime of the waters of coastal archipelagos and midocean archipelagos of continental states will also be briefly examined in this chapter.

## 5.1 WATERS OF COASTAL ARCHIPELAGOS

### 5.1.1 Juridical Nature

The territorial waters of coastal archipelagos are delineated by drawing straight baselines around and connecting the coastal archipelago to the coastal state.

Article 5, paragraph 1 of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 (the Territorial Sea Convention) provides that "waters on the landward side of the baselines of the territorial sea form part of the internal waters of the state".[5] Paragraph 1 of Article 8 of the LOSC repeats this provision, making an exception in the case of archipelagic states. Consequently the waters on the landward side of baselines drawn around and connecting coastal archipelagos to the mainland are internal waters.

These provisions reflect the position taken by the International Court of Justice (ICJ) in its judgment of the Anglo-Norwegian Fisheries Case.[6] The ICJ, in its decision, considered the islands, islets, rocks and reefs off the Norwegian coast known as the Norwegian "skjaergaard" as an extension of the Norwegian mainland and the outer line of the

"skjaergaard" as constituting the coastline of Norway.[7]

Further, one of the qualifications for a coastal state to draw straight baselines around and connecting the islands of a coastal archipelago is for the sea areas lying within the baselines to be sufficiently closely linked to the land domain to be subject to the regime of internal waters.[8] This question has already been discussed elsewhere in this study.[9]

The status of the waters of coastal archipelagos as internal waters appears to be sufficiently well established both in customary and treaty law. Thus, the remaining question in this context is that relating to the legitimacy of the baselines delineating such waters. The United States, for instance, has protested against the Canadian straight baselines around and connecting the Canadian Arctic Archipelago, under which the Northwest Passage would be included among the internal waters of Canada.[10] Similarly, the validity of the Burmese straight baselines around the Mergui Archipelago has also been questioned. None of the basepoints of the Burmese straight baselines is situated on the mainland of Burma and the baseline in the Gulf of Martaban measures 222.3 nautical miles in length.[11]

### 5.1.2 Legal Regime

Traditionally, coastal states would exercise complete and absolute sovereignty over their internal waters as they do over their land territory. However, despite the fact that the

right of innocent passage was conceived of as characterising only the legal status of territorial waters proper, generally excluding internal waters,[12] the right of innocent passage is considered operational in internal waters which would not have been regarded as such prior to their enclosure by straight baselines.[13]

The first judicial consideration of the right of passage through waters enclosed by straight baselines came in the Anglo-Norwegian Fisheries Case of 1951 (Fisheries Case).[14] Although the International Court of Justice (ICJ), in its judgment of the Fisheries Case did not pronounce, and did not have to, on navigational rights in internal waters,[15] the United Kingdom did, in its submissions, raise the issue of navigation through waters enclosed by straight baselines. The United Kingdom argued that part of the waters enclosed by straight baselines were territorial waters, particularly the navigational route known as "Indreleia", which was open to the right of innocent passage.[16] The court, however, held that the Indreleia was not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway.[17]

Following the decision of the ICJ, the question of passage through waters enclosed by straight baselines was extensively dealt with by the I.L.C. This question was first raised at the I.L.C by the replies of governments to the Draft Articles prepared by the I.L.C.[18] in preparation for the

First United Nations Conference on the Law of the Sea of 1958. Article 5 of the Draft recognized the use of straight baselines as a delimitation criterion in appropriate circumstances but did not address the question of navigation through the enclosed waters. The reply of the British Government is of particular interest in this regard since it was the most articulate of the comments submitted. The British government's reply stated that:

> "Her Majesty's Government regard it as imperative that, in any new code which would render legitimate the use of baselines in proper circumstances, it should be clearly stated that the right of innocent passage should not be prejudiced thereby, even though this may involve that, in certain cases, this right shall become exercisable through internal as well as through territorial waters. Her Majesty's Government consider that the Commission would be performing a most useful function if it were to give mature consideration to the problem how the use of baselines is to be reconciled with existing rights of passage. For their part, Her Majesty's Government can only say at this stage that, in their view, in any case of conflict, the right of passage, as a prior right and the right of the international community, must prevail over any alleged claim of individual coastal states to extend the areas subject to their exclusive jurisdiction."[19]

The revised Article 5 of the I.L.C. put forward for consideration at the First United Nations Conference on the Law of the Sea of 1958 (UNCLOS I) contained a paragraph which incorporated these views[20] and Paragraph 2 of Article 5 of the Territorial Sea Convention adopted at UNCLOS I stated that:[21]

> "Where the establishment of straight baselines ... has the effect of enclosing as internal waters areas which previously had been considered as part

> of the territorial sea or of the high seas, a right of innocent passage ... shall exist in those waters."

The LOSC incorporated this provision in its Article 8(2), thus dividing the waters enclosed within coastal archipelagos into two navigational portions.[22] One portion of internal waters so enclosed would consist of the waters lying between the low-water line along the coast and the new straight baselines joining appropriate basepoints, in which area a right of innocent passage would exist. In the other portion of internal waters consisting of parts of the sea lying landward of the low-water line and closing lines and areas to which a state might have historical title, there would be no such right. However, both portions as internal waters would form an integral part of the national territory of the coastal state. Thus, the drawing of straight baselines around and joining coastal archipelagos to the mainland and the creation of internal waters would not prejudice previously existing right of innocent passage through waters so enclosed.

Questions have been raised in this regard relating to the timing of the drawing of straight baselines and the delimitation thereby of internal waters. The U.S. geographer Lewis M. Alexander asks whether all waters enclosed by straight baselines but beyond the "normal" baseline of a country are subject to a regime of innocent passage dating all the way back to Norway's 1935 delimitation or whether the provision applies only to the date of the adoption of the LOSC

in December 1982, or whether it would apply only when the Convention enters into force - and then only to states signatory to the Convention.[23] In this regard coastal states would need to identify and establish title to areas of the sea which would be internal waters of such states even if those areas were not enclosed by straight baselines.

None of the states which have drawn straight baselines around and connecting coastal archipelagos to their respective mainlands has yet provided, through national legislation, for innocent passage in internal waters which previously were not regarded as such.

A case in point is the Canadian Arctic archipelago. The voyages of U.S. flag vessel "Manhattan" in 1969 and 1970 through the Northwest Passage raised concerns of Canadian jurisdiction in the waters of the Arctic archipelago and prompted the Canadian Government to assert its jurisdiction in the archipelago.[24] The initial response of the Canadian Government, in this case, however, was not to assert absolute jurisdiction but to approach the problem functionally with the primary goal of protecting the unique environment of the Arctic that might be harmed by regular passage of oil tankers or other vessels incapable of navigating in ice-infested waters.[25] This approach was embodied in the 1970 Arctic Waters Pollution Prevention Act which established a 100 nautical miles wide pollution prevention zone around the Arctic archipelago within which Canada could legislate and

enforce construction and design standards for vessels navigating in it.[26]

Fifteen years after the voyage of "Manhattan", in July and early August of 1985 the U.S. Coast Guard ice breaker "Polar Sea" passed through the Northwest Passage, again drawing attention to the question of the status and the right of passage through the Canadian Arctic archipelago.[27] Soon after this incident the Canadian Government established straight baselines around the Arctic archipelago which became effective as of January 1, 1986.[28]

Many countries including the U.S. protested the Canadian claims and the United States has consistently insisted that since prior to the voyage of "Manhattan", the Northwest Passage is an international strait.[29] The position taken by Canada, however, is that the waters of the entire Arctic archipelago were historic internal waters.[30] Canada further insists that the known traffic through the Northwest Passage has been insignificant and thus the Northwest Passage is, in fact, not a "strait used for international navigation", and that if it were to be such a strait, the actual use has to be considerable.[31]

Nevertheless, opinion is not unanimous even among Canadian writers as to whether Canada could claim the waters of its Arctic archipelago as historic. A number of writers point out that Canada's claim to internal waters in the Arctic on the basis of historical title has not been well

articulated.[32] The foremost authority on the Canadian Arctic, Dr. Pharand writes that if Canada draws its baselines according to either the Territorial Sea Convention or the LOSC,[33] Canada would be required to provide for the right of innocent passage through the waters enclosed by such baselines.[34] Dr. Pharand, thus, suggests that in drawing baselines around its Arctic archipelago, Canada should rely on the decision of the ICJ in the Fisheries Case, under which there would be no navigational rights in the waters enclosed by straight baselines.[35] It must, however, be pointed out that the ICJ, in its decision in the Fisheries Case[36] did not rule on the navigational aspects of the waters enclosed by the Norwegian baselines and cannot be said to form customary law with respect to navigation within waters enclosed by straight baselines as suggested by Dr. Pharand.

Despite the Canadian insistence that the waters of its Arctic Archipelago were internal waters, Canadian policy, has not been directed towards discouraging the use of the Northwest Passage by vessels of other states. Canadian policy on this question is reflected in a statement by the Secretary of State for External Affairs to the House of Commons regarding the matter, which stated that:

> "The policy of this government is to encourage the development of navigation in Canada's Arctic waters. Our goal is to make the Northwest Passage a reality for Canadian and foreign shipping, as a Canadian waterway. Navigation, however, will be subject to the controls and other measures required for Canada's security, for the preservation of the environment, and for the welfare of the Inuit and

other inhabitants of the Canadian Arctic."[37]

## 5.2 ARCHIPELAGIC WATERS

### 5.2.1 Geographical Limits

Archipelagic waters are those waters that are enclosed within archipelagic baselines drawn by archipelagic states, regardless of their depth or distance from the coast.[38] The inward limit of archipelagic waters is marked by the baselines of individual islands or the closing line of internal waters. The baselines of individual islands would be the low-water line along the coast of each island.

Article 50 of the LOSC provides for archipelagic states to draw closing lines across river mouths, bays and ports of individual islands in accordance with Article 9, 10, and 11 of the LOSC for the delimitation of internal waters.[39] However, it is silent as regards Article 7 of the LOSC which deals with straight baselines drawn along deeply indented coastlines and around coastal island fringes. Article 7 itself does not restrict the application of straight baselines by archipelagic states do delimit its internal waters, thereby raising the question whether archipelagic states could employ the straight baseline method in appropriate circumstances to determine the internal boundary of archipelagic waters. It has been pointed out that the specific mention of Article 9 to 11 in Article 50, which is headed "Delimitation of Internal Waters" appears to suggest that Article 7 together with the

other provisions of Section 2 of Part II of the LOSC headed "Limits of the Territorial Sea" would not apply to Part IV, "Archipelagic States".[40] The distinguishing factor being that the relevant provisions of Part I Section 2 deal with the internal boundary of territorial waters, whereas Article 50 is concerned with the internal water boundary of archipelagic waters.[41]

Further, the application of Article 7 within archipelagic waters to complex coastlines of individual islands would tend to weaken the claims of archipelagic states for a single territorial entity combining the islands and the interconnecting waters thereof. During the UNCLOS III process, archipelagic states argued that they deserved a special treatment in a manner similar to that of states with coastal archipelagos or deeply indented coasts since the geographic circumstances of the archipelagic states were similar to those of states with complex coasts. In the words of the Fijian representative at the United Nations Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction (Sea-Bed Committee) :

> "The essence of the midocean archipelago ... is that such a relationship exists between the features themselves so that the situation is analogous to that of a complex coast of a continental country. A group of islands cannot be considered as an archipelago without a centripetal emphasis giving coherence to the group as a whole and expressing itself as an outer periphery which is the equivalent of the general direction of the coast as applied to coastal archipelago."[42]

The purpose of the application of Article 7 within

archipelagic waters also is not clear since its application would not change the regime of the waters so enclosed and would not give archipelagic states any significant additional rights.[43]

A significant omission from the provisions concerning internal waters of archipelagic states is the status of lagoons lying within the coral reefs and atolls. Paragraph 7 of Article 47 states that these waters are considered as land areas for the purpose of calculating the ratio of water to land inside archipelagic baselines. It would seem that these lagoons of reefs and atolls, which do not have any relevance to other states and which being enclosed within atolls are used for communication between islands of the atoll and for fishing and other economic purposes solely by the atoll inhabitants, could only be classified as another category of internal waters. The LOSC itself appears to have so presumed by going even further, by considering them as part of the land territory of archipelagic states.[44] Further confirmation of this position can be found in Article 6 of the LOSC which states that in the case of islands situated on atolls or of having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low water line of the reef. Beazley, in his guide to the delineation of maritime limits and baselines, states that it would be highly artificial to suggest that in the majority of cases the lagoon waters are not internal waters, and is of the opinion that in

some cases, lagoon waters may indeed be claimed as internal waters on historical grounds.[45]

5.2.2 Juridical Status

Various terms have been used in the past to describe the status of waters enclosed within the straight baselines system of midocean archipelagos. Logically, just as in the case of waters enclosed landward of the straight baselines system under the Territorial Sea Convention[46] and the LOSC,[47] whereby waters enclosed within the baselines system of coastal archipelagos are described as "internal", the waters landward of straight archipelagic baselines should also be described in the same manner.[48]

This indeed was the description that was chosen for the enclosed waters created by the early claimants of archipelagic rights. Indonesia and the Philippines, for instance, claimed even prior to UNCLOS I that the waters enclosed within their baselines were internal.[49]

However, the earliest trends in the doctrine of archipelagic regimes indicated that the waters enclosed by archipelagic straight baselines were territorial waters.[50] Thus, the Preparatory Committee for the 1930 Hague Codification Conference drafted as Basis for Discussion No.13, the case of a group of islands belonging to a single state at the circumference not separated from one another by more than twice the breadth of territorial waters, and suggested that not only should the territorial waters be measured from the

outermost islands of the group, but also that "waters within the group" should be "territorial waters".[51] But Gidel in 1934 opined that de lege ferenda there was a tendency inclining towards treating the enclosed waters as internal rather than territorial.[52]

The contemporary jurists who have expressed their opinions regarding the juridical status of the waters of archipelagos are more inclined to consider such waters as internal. The Indonesian jurist W. Prodjodikoro, making a parallel with the provision of the Territorial Sea Convention, which stipulates that the waters lying inside straight baselines are internal waters, stated that all the water areas of the Indonesian archipelago fall into this category, i.e., internal waters, as these water areas too lie inside straight baselines.[53]

After examining the doctrinal and conventional attempts to find a solution to the question of archipelagos, M. Sorensen wrote that proposals to apply the straight baselines system usually imply that the water areas inside such a system should have the status of internal waters.[54] Recalling that the Territorial Sea Convention similarly decided the question relating to waters inside the baselines of deeply indented or cut into coasts and coastal archipelagos and also those of bays, M. Sorensen concluded that a different decision cannot be justified for midocean archipelagos.[55]

Russian jurist O.V. Bozrikov considers it more

appropriate to give archipelagic waters the status of internal waters and writes that in such cases, one should not only take into account the interests of archipelagic states, but also those of states other than archipelagic,[56] obviously referring here to the question of freedom of navigation in archipelagic waters. Another Russian jurist, L.V. Speranskaya, also considers as internal, those waters which are inside legally drawn straight baselines.[57] However, She considers it necessary to separate from the general water areas of archipelagos the routes which are used for international navigation and points out the unsuitability of the concept of innocent passage as applicable to the waters of such routes.[58]

Advocating the total separation from archipelagic waters, of the international shipping routes which would otherwise fall within archipelagic waters, Burke and McDougal posed a question as to whether all the geographical, economic and political circumstances do necessitate the inclusion of all the water areas of an archipelago under the exclusive sovereignty of the archipelagic state.[59] In their opinion, the answer to this question need not necessarily be positive. They write that it is possible to satisfy the interests of archipelagic states by providing more limited and clearly defined zones to their sovereignty.[60]

It was only in the deliberations of the International Law Commission (ILC) prior to UNCLOS I that a tendency to treat

the waters enclosed by archipelagic baselines as "internal" began distinctly to emerge. The Special Rapporteur of the International Law Commission on the regime of the Territorial Sea in his Third Report, in stipulating that one straight baseline of an archipelagic system could extend to a maximum distance of 10 miles, seemed to be analogizing with the rule relating to bays where the landward waters are unquestionably "internal".[61] Although the ILC was, in the end, unable to make any recommendations on an archipelagic regime, it has been concluded from their deliberations that there was "unquestionable acceptance of the view" that the waters enclosed "within archipelagic lines would be internal waters, with consequences to international shipping".[62]

The preparatory document produced by Evensen for UNCLOS I, "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos" also contemplated that waters so enclosed and closely linked to the surrounding land domain of the archipelago, might be regarded as "internal".[63] Although, the question of midocean archipelagos was not considered in detail at UNCLOS I, two proposals were made, which inter alia addressed the question of the status of archipelagic waters. Yugoslavia, in its proposal suggested to consider the waters lying between the islands of an archipelago as internal.[64] Although the proposal of the Philippines did not directly address the issue, it was suggested in that proposal to provide

archipelagic states with the right to a special delimitation.[65] However, by the time this proposal was being made, the Philippines and Indonesia had already declared in their legislation that water areas of their archipelagos form part of their internal waters. Thus, it is obvious that the Philippine proposal presumed the status of internal waters.

These proposals regarding the status of the waters of midocean archipelagos were neither discussed in detail, nor put to a vote at UNCLOS I. It would, thus, seem that the participants of the conference, both, those who were in favour of the archipelagic concept and those who were against it, considered it to their advantage, at the time, to leave the question as it was, to be dealt with through customary practice.

At the Third United Nations Conference on the Law of the Sea (UNCLOS III), with the emergence of new archipelagic states as a result of the decolonization process, a new approach to the application of the archipelagic concept was adopted by the archipelagic states. This new approach reflected the national outlook of the archipelagic states as nation states and their aspirations to achieve national and territorial unity, which was a departure from the traditional concepts of the law of the sea.

It is argued, for instance, that the Indonesian people, from time immemorial have regarded all of their islands and

the waters around and interconnecting these islands as one entity.[66] It was also pointed out that the nationhood of Indonesia is built on the concept of unity between the Indonesian islands and the interconnecting waters and that the seas are regarded as a unifying factor rather than a separating element.[67]

The archipelagic state concept, thus, is put forward as a basis for the territorial framework for the national philosophical outlook of archipelagic states. In the case of Indonesia, that national philosophical outlook is known as the "Wawasan Nusantara", the concept of the unity of the land, the waters and the people.[68]

The Philippine Constitution also links the territorial limits of the Philippines with the archipelagic concept. According to Article 1 of the Constitution of the Philippines,

> "The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title, including, the territorial sea, the air space, the subsoil, the seabed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction."[69]

Similarly, Article 1 of the constitution of the Maldives too, includes within the definition of national territory all the islands, other insular features and the interconnecting waters that constitute the Maldives archipelago.[70]

During the course of UNCLOS III, reflecting the concerns of archipelagic states for territorial unity and those of

other states with respect to navigation through the waters of archipelagic states and in order to avoid the difficulty of applying traditional concepts to archipelagic situations, a new term, "archipelagic waters", emerged to describe the regime of water areas within archipelagic straight baselines. Paragraph 1 of Article III of the proposal of archipelagic states to the Sea-Bed Committee designated the enclosed waters as "archipelagic waters" subject to the sovereignty of the archipelagic state, regardless of their depth or distance from the coast.[71] Explaining the character of "archipelagic waters" to the Sea-Bed Committee, the Indonesian delegate said:

> "...the sponsors had introduced a new concept, according to which the waters inside the baselines would be known as "archipelagic waters" or "waters of the archipelagic state", having an attribute of internal waters - namely sovereignty over the waters and their resources - and an attribute of territorial sea - the recognition of innocent passage through sea lanes. Unlike the concept of "internal waters", the concept of archipelagic waters admitted the existence of innocent passage. Unlike the concept of "territorial sea", it admitted innocent passage only through sea lanes, and not through the whole body of archipelagic waters."[72]

The juridical characteristics and even the configuration of archipelagic waters are totally different from those of all the other marine zones. Territorial waters are a belt of sea, while internal waters are an area either surrounded by the land territory of one and the same state or which on one side is delineated by a closing line. Archipelagic waters, on the other hand, according to Article 49 of the LOSC are waters

which are delineated by archipelagic baselines, drawn in accordance with Article 47 of the LOSC.

According to Article 49 of the LOSC, the sovereignty of an archipelagic state extends to the archipelagic waters enclosed by archipelagic baselines, regardless of their depth or distance from the coast, the air space over them, as well as to their bed and subsoil, and the resources contained therein.[73] This sovereignty of archipelagic states is subject to certain safeguards to preserve and protect the rights of other states within these waters.[74] In view of the rights granted to other states, the right of archipelagic sea lanes passage in particular, paragraph 4 of Article 49 of the LOSC reconfirms the sovereignty of archipelagic states by stating that the regime of archipelagic sea lanes passage would not affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic state of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein. In this context, mention must also be made of Paragraph 1 of Article 2 of the LOSC, which states that,

> "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."[75]

The words "archipelagic state ..." were added to this Article at the insistence of archipelagic states, who argued that in determining the sovereignty of the coastal state, reference to

archipelagic waters cannot be omitted, and must be taken into account in every such case.[76]

Some writers have, however, expressed doubts regarding the sovereignty of archipelagic states over archipelagic sea lanes. According to Phiphat Tangsubkul:

> "the archipelagic sea lane water zone is not considered territorial waters, because coastal states cannot suspend the right of transit passage and it is not considered high seas because ships of all states must be in normal mode solely for the purpose of continuous , expeditious, and unobstructed transit and do not enjoy full freedom of their mode of navigation... The ambiguity of the regime of archipelagic sea lanes passage is whether the waters found within the limit of each sea lane is still under the sovereignty of an archipelagic state, as are other parts of its archipelagic waters, or under the absolute control of the international community as international zone de novo. However, it is certain that UNCLOS III tried to create a kind of sui generis regime based on the theory of special rights contingent upon concomitant responsibility."[77]

However, as rightly noted by Arturo M. Tolentino of the Philippines, the establishment of archipelagic sea lanes and of passage therein does not detract from the sovereignty of the archipelagic state.[78] The LOSC expressly confirms the sovereignty of the archipelagic state over the archipelagic sea lanes in view of the navigational rights of other states through such sea lanes.[79] Tolentino further states that in the exercise of this sovereignty, the archipelagic state may, therefore, adopt such measures and activities that it deems proper in the sea lanes for its protection and benefit, so long as there is no impairment or denial of the right of archipelagic sea lanes passage or overflight.[80]

Archipelagic states, that have proclaimed archipelagic status, with the exception of Indonesia and the Philippines, have provided in their legislation for archipelagic waters in conformity with the LOSC. Antigua and Barbuda,[81] Fiji,[82] St. Vincent and the Grenadines,[83] the Solomon Islands,[84] Trinidad and Tobago,[85] and Vanuatu[86] have defined the waters enclosed within their archipelagic baselines as archipelagic waters. Although Indonesia and the Philippines have ratified the LOSC, laws enacted before the LOSC continue to be in force in those two countries and the waters enclosed within their baselines are classified as internal waters.[87] In fact, the Philippines, upon ratification of the LOSC, declared that:

> "The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high seas from the rights of foreign vessels to transit passage for international navigation."[88]

A number of states have protested this declaration of the Philippines and its apparent refusal to amend its national legislation to conform with the provisions of the LOSC.[89]

### 5.2.3 Regime of Archipelagic Waters

Discussions on archipelagos, prior to the emergence on the scene of archipelagic states, were more concerned with the question of the drawing of straight baselines and the definition of "archipelagos", than with the nature or the

regime of the enclosed waters. Thus, during the work of the Preparatory Committee of the Hague Codification Conference of 1930, it was only Germany that referred to the possible infringement of navigational rights which might arise from the enclosure of an island group within a single baseline system.[90] As O'Connell remarks, "it is surprising that the Conference did not exhibit more awareness of this fundamental issue, and it is no less surprising to find that the authors who in the years following the conference attempted to grapple with the technical questions ... did not pay more attention to this aspect of the matter."[91]

However, when the problem of archipelagos came to be considered by the I.L.C., in the early 1950s, the potential conflict of an archipelagic regime with rights of international navigation began to be realized.[92] The claims of the Philippines and Indonesia in this period to archipelagic regimes and similar claims by other emerging archipelagic states during the following years highlighted the crucial question of whether even innocent passage could still be exercised in their respective enclosed areas of seas.

Consequently, the task before UNCLOS III was to accommodate and achieve an equitable balance between the concerns of archipelagic states and the interests of other states in archipelagic waters. Such a balance was achieved at UNCLOS III through negotiations and compromise, and is reflected in the regime of archipelagic waters contained in

the LOSC.

According to Article 49 of the LOSC, the sovereignty of an archipelagic state extends to its archipelagic waters, the air space over them as well as to their bed and subsoil and the resources contained therein. This sovereignty, however, is to be exercised subject to Part IV of the LOSC.[93] The regime of archipelagic waters, thus, is determined by the sovereignty of archipelagic states and the requirement to provide for the rights of other states in archipelagic waters, which were exercised by such states prior to the proclamation of archipelagic status of the concerned waters.

The LOSC provides for two groups of rights of other states in archipelagic waters[94] : navigational and non-navigational. Non-navigational rights are those previously agreed to by archipelagic states in agreements and the right of immediately adjacent neighbouring states to carry out activities which they have been carrying out in certain areas of archipelagic waters since prior to their becoming archipelagic waters. With regard to navigational rights of other states in archipelagic waters, the LOSC provides for the rights of innocent passage and archipelagic sea lanes passage. The right of innocent passage in archipelagic waters is similar to the right of innocent passage through the territorial sea and the right of archipelagic sea lanes passage, although a new concept in the law of the sea, has certain similarities with the right of transit passage through

straits used for international navigation.

A. Non-navigational Rights

i. Existing agreements

Archipelagic states, under paragraph 1 of Article 51, are required to respect existing agreements with other states, i.e., they should respect the rights obtained by other states under such agreements.[95] At the first glance, this provision may appear to be superfluous in view of the general norm of international law - pacta sunt servanda. However, it appears to have been included to avoid any potential contradiction between the rights of archipelagic states contained in the Convention and their obligations under prior agreements.[96]

A question that may arise from this provision relates to a potential conflict between the provisions of an existing agreement and those of the LOSC, particularly those agreements which may be more restrictive than the LOSC. The breadth of the navigational corridor stipulated in the Treaty Between Malaysia and the Republic of Indonesia Relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying Between East and West Malaysia, of 25 February 1982 (the Jakarta Treaty)[97]

has been cited as an example in this regard.[98] It has been pointed out that in the Jakarta Treaty the parties have agreed to a 20 mile corridor while under the LOSC other states would be able to exercise their navigational rights through a 50 mile corridor.[99] However, it must also be noted that the 50 mile corridor or the archipelagic sea lanes for international passage envisaged in the LOSC[100] are different from the corridors stipulated in the Jakarta Treaty for navigation between two parts of an immediately adjacent neighbouring state,[101] which appear to be governed by Articles 47(6) and 51(1) of the LOSC relating to the existing rights of neighbouring states in archipelagic waters rather than Article 53 of the LOSC which deals with the right of archipelagic sea lanes passage.

ii. Rights of immediately adjacent neighbouring states

One of the contentious issues relating to the regime of archipelagic waters at UNCLOS III was the possible effect of the application of the archipelagic principle on the interests of immediately adjacent neighbouring states of an archipelagic state. Such neighbouring states were concerned that their traditional rights - rights of local access, rights to the resources therein, rights pertaining to the laying and maintenance of submarine cables and pipelines - may be curtailed. Hence, certain neighbouring states of main archipelagic states made their acceptance of the archipelagic concept conditional on a satisfactory accommodation of their

interests.[102]

This issue, however, is specific to the case of Indonesia and its neighbours. In view of its geographic circumstances and those of its neighbours, Indonesia has always held the view that in the application of the regime of the archipelagic state, certain legitimate interests of immediately adjacent neighbouring states should be taken into account.[103] On this basis, Indonesia negotiated with its neighbours at UNCLOS III and the concerned states agreed to the provision in Article 51 and paragraph 6 of Article 47 of the LOSC, which deals specifically with the case of the maritime area between West and East Malaysia which would be enclosed by the Indonesian archipelagic baselines as part of Indonesian archipelagic waters.[104]

Paragraph 6 of Article 47 and Paragraph 1 of Article 51 of the LOSC which deal with the interests of immediately adjacent neighbouring states, are similar in many respects. The beneficiary of the rights, the geographic scope thereof and the nature of the protection offered, are essentially the same, although paragraph 6 of Article 46 deals with them in a more general manner.[105]

Paragraph 6 of Article 47 stipulates that, if a certain part of the archipelagic waters of an archipelagic state lies between two parts of an immediately adjacent neighbouring state, existing rights and all other legitimate interests which the latter state has traditionally exercised in such

waters and all rights stipulated under agreements between those states shall continue and be respected. The inclusion of this provision in Article 47, the article dealing with the drawing of archipelagic baselines, casts some doubt as to its real implications and significance. It does not appear to restrict the drawing of archipelagic baselines in anyway and the rights referred to could be preserved even if the sea areas in respect of which they are exercised are included within the baselines. However, if these rights could be interpreted to indicate that the enclosure of such waters within archipelagic baselines is totally incompatible therewith, then such rights would take precedence to the exclusion of the baselines, which would have to be modified accordingly.[106]

Paragraph 1 of Article 51 requires archipelagic states to,

> "recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring states in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the states concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third states or their nationals."[107]

This provision does not extend to areas seaward of the archipelagic baselines and does not deal with future requirements.[108] Its application is restricted to archipelagic waters and existing rights within such waters.

However, since such activities are to be regulated through bilateral agreements, it does admit a certain degree of flexibility with respect to the areas outside the archipelagic baselines and future requirements.[109]

Some of the terms used in this provision are rather ambiguous and may lead to practical difficulties with their implementation and application.[110] For instance, the scope of the term "immediately adjacent neighbouring state" is not clear, given the geography of archipelagic states. Would it, for instance, in the case of Indonesia include Malaysia, Singapore, and Papua New Guinea, or would it also include Thailand? Here, the determinants would presumably be a common sea border and the fact of legitimate activities being carried out in areas of the sea to be enclosed within archipelagic baselines. Another term that appears ambiguous is the term "other legitimate interests". The question with respect to the term "other legitimate interests" is whether it includes all the activities of the immediately adjacent neighbouring state in the archipelagic waters and if not, which of those activities should be regarded as legitimate. The Jakarta Treaty of 1982 between Indonesia and Malaysia relating to the Malaysian interests within waters enclosed by Indonesian archipelagic baselines covers alongside traditional fishing, such activities as submarine cables and pipelines, search and rescue, and marine scientific research.[111]

Some archipelagic states have undertaken studies to

determine the scope and content of "traditional fishing rights", "legitimate activities" and the "area" to which such rights and activities are applied.[112] One such study which examines what exactly constitutes traditional fishing rights, describes the term as referring to the fishermen themselves, their catch, their equipment and the area in which they operate.[113] It further states that in order to qualify for traditional fishing rights, one might be required to meet the following conditions:[114]

> "1. The fishermen in order to be protected under this category must have been fishing for a sufficient length of time in the area; thus, new comers could not be regarded to have "traditional fishing rights".
> 2. Their equipment must be sufficiently "traditional"; thus, fishermen using modern technology could not be regarded as falling under the definition of "traditional fishing rights"; otherwise, local and poor fishermen using traditional equipment would be placed at a tremendous disadvantage.
> 3. Since the catch of "traditional fishing" is normally not very substantial, the notion of "traditional fishing rights" excludes the possibility of a sharp increase in the catch by using modern equipment and methods or by establishing large scale joint ventures with "non-traditional" fishermen.
> 4. The area or the fishing ground of traditional fishing rights must have been frequented for a sufficient length of time; the area, therefore, should be relatively easy to determine by observing the actual practice."

Again, as Djalal points out, "traditional fishing rights" must be distinguished from the traditional right to fish. According to him:

> "While it can be argued that under the defunct international law every state has "traditional right" to fish on the "high seas", which may or may

> not become part of the regime of archipelagic waters or of the exclusive economic zone, regardless of whether such right has been actually exercised or not, under the notion of "traditional fishing rights" such right would only be recognised if it has been actually traditionally exercised for a sufficient length of time."[115]

Bilateral agreements are to be concluded at the request of any concerned party to regulate the activities of immediately adjacent neighbouring states in archipelagic waters.[116] Such agreements could cover all aspects of such activities including measures for the management of the living resources of the areas concerned. The rights granted to immediately adjacent neighbouring states are only for the benefit of such states and their nationals. The immediately adjacent neighbouring states can not transfer or share such rights with third states or their nationals.[117]

The Jakarta Treaty signed between Indonesia and Malaysia on February 25, 1982 and which entered into force on May 25, 1984[118] is an important development in the implementation of Article 47(6) and Article 52(1) of the LOSC. It defines and regulates the legitimate interests of Malaysia in the territorial sea and the archipelagic waters as well as the airspace thereabove of Indonesia lying between East and West Malaysia. It is interesting to note that the Jakarta Treaty goes, indeed, beyond the requirements of the LOSC in recognizing the previously existing rights of Malaysia in the Indonesian territorial waters and in the Indonesian air space above its territorial sea and the archipelagic waters.[119]

The Jakarta Treaty designates a fishing area where Malaysian traditional fishermen may continue to exercise their traditional fishing rights.[120] It also provides for the right of access and communication of Malaysian government ships, merchant ships and fishing vessels, including foreign fishing vessels which must be exercised through two designated corridors defined by a series of continuous axis lines, where permissible deviation is ten nautical miles to either side of the axis lines, provided that the ships shall not navigate closer to the coasts than three nautical miles.[121] The Jakarta Treaty further provides for the access and communication of state and civil aircrafts, and for the interests of Malaysia relating to the promotion and maintenance of law and order, search and rescue operations and marine scientific research in the Indonesian archipelagic waters lying between East and West Malaysia.[122]

The Jakarta Treaty, the only one of its kind, underscores the specific character of the provisions of the LOSC relating to the interests of immediately adjacent neighbouring states in areas of archipelagic waters. It must also be noted in this regard that none of the countries which have claimed archipelagic waters has yet provided for the interests of immediately adjacent neighbouring states in their national legislation and no archipelagic state other than Indonesia is likely to do so, since this may not be an issue in the case of other archipelagic states.

iii. Existing submarine cables

The LOSC states in its Article 51 that an archipelagic state must :

> "respect existing submarine cables laid by other states and passing through its waters without making a landfall. An archipelagic state shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them."[123]

This provision refers only to cables, and not pipelines, and then only to existing cables. There is no mention any where of new cables New Cables would presumably have to be laid outside the archipelagic territory even though the shortest route might be through the territory.[124] The laying of new cables and pipelines will, therefore, totally depend on the consent of archipelagic states.

The draft articles relating to archipelagic states submitted at the second session of UNCLOS III by four archipelagic states which inter alia sought to guarantee certain rights of communication of immediately adjacent neighbouring states,[125] and the amendments to those draft articles proposed by Malaysia[126] both included the right of neighbouring states to lay submarine cables and also pipelines, where this right had traditionally been exercised. However, paragraph 2 of Article 51 of the LOSC does not mention pipelines and is restricted only to existing submarine cables. Further, the LOSC does not require such cables to be between two parts of a single country although the draft articles contained a restriction to the effect that the forms

of communications to be protected, including the laying of cables and pipelines should be between one part and another part of a single state.[127] The absence of such a restriction in the LOSC is perhaps, due to the fact that the Convention does not provide for the laying of new submarine cables and deals only with existing cables.

With respect to existing pipelines, a question may arise as to whether an archipelagic state could demand the removal of such pipelines.[128] It would appear that Article 49 and paragraph 2 of Article 51, suggest such a possibility if the state owning such pipeline is a party to the LOSC. If the state owning such pipeline, however, is not a party to the Convention, then the relations between such state and the archipelagic state would be based on customary international law.[129]

The Jakarta Treaty between Malaysia and Indonesia relating to the interests of Malaysia within certain areas of the Indonesian archipelagic waters grants Malaysia the right to protect, maintain, repair and replace existing submarine cables or pipelines and also provides for the laying of new submarine cables and pipelines.[130] However, at present, there is only one submarine communication cable linking East and West Malaysia passing through the archipelagic waters of Indonesia.[131] The Kuantan-Kuching cable which passes through the Indonesian archipelagic waters forms the backbone of Malaysia's communication links between its two

territories. Any rupture of this link would therefore cut off communication between the two territories.[132]

The Jakarta Treaty also provides for the establishment of safety zones for the protection and safety of submarine cables and pipelines of Malaysia passing through the Indonesian archipelagic waters and requires Indonesia to take the necessary measures including legislative measures for the protection of such cables and pipelines.[133]

B. Navigational Rights

Since archipelagic states started advocating their claims, the main objections to their claims have been based on the potential threat to navigational rights through waters enclosed within the baselines. Concerns with navigational rights through archipelagic waters, in fact, was the main stumbling block in the gaining of international acceptance of the archipelagic concept. Such concerns were based on the fact that traditionally, waters enclosed within baselines become internal waters within which no rights of passage are available for foreign vessels. Attempts were made at first to resolve the question of passage through archipelagic waters by regarding the enclosed waters as territorial waters, within which the right of innocent passage applied. However, such a solution would not have resolved the concerns of archipelagic states regarding their territorial integrity, and the concept of territorial waters was deemed inappropriate in view of the

claims of archipelagic states. The way to a solution was subsequently opened by the Fisheries case, the deliberations of the I.L.C. on the question, and Article 5 of the Territorial Sea Convention which recognized the continuance of existing rights of navigation in waters enclosed within a straight baseline system. The solution to the problem lay in achieving a proper balance between the concerns of archipelagic states for their national unity and territorial integrity and those of other states with respect to navigation through archipelagic waters.

Although the archipelagic states have generally claimed for an exclusive regime within baselines, they have generally acknowledged the need to permit passage. Thus, the issue has been about the precise nature and extent of the concession.[134]

i. The right of innocent passage

According to Article 52 of the LOSC, ships of all states enjoy in archipelagic waters the same right of innocent passage as they enjoy in the territorial sea.[135] In the exercise of this right, a foreign ship may pass through the archipelagic waters without entering internal waters or any port facility, or proceed to or from such internal waters or port facility, provided the passage is continuous and expeditious.[136] Submarines and other under water vehicles are required to navigate on the surface and show their flag.[137]

The right of innocent passage in archipelagic waters may be suspended temporarily by the archipelagic state in specified areas of its archipelagic waters, if such suspension is necessary for security reasons.[138] Such suspension is to be carried out without discrimination in form or in fact among foreign ships and after due notice has been given.[139] However, an archipelagic state does not have to clarify its decision should it decide for security reasons to suspend innocent passage following notification of intention.[140]

Passage through archipelagic waters would be innocent so long as it is not prejudicial to the peace, good order or security of the archipelagic state.[141] If a foreign vessel engages in any of the following activities in archipelagic waters, the passage of such vessel would be considered prejudicial to the peace, good order or the security of the archipelagic state and thus, non-innocent:[142]

a) any threat or use of force against the sovereignty, territorial integrity or political independence of the archipelagic state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

b) any exercise or practice with weapons of any kind;

c) any act aimed at collecting information to the prejudice of the defence or security of the archipelagic state;

d) any act of propaganda aimed at affecting the defence

or security of the archipelagic state;

e) the launching, landing or taking on board of any aircraft;

f) the launching, landing or taking on board of any military device;

g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the archipelagic state;

h) any act of wilful and serious pollution contrary to the LOSC;

i) any fishing activities;

j) the carrying out of research or survey activities;

k) any act aimed at interfering with any systems of communication or any other facilities or installations of the archipelagic state;

l) any other activity not having a direct bearing on passage.

The archipelagic state may, according to the LOSC, adopt laws and regulations relating to the innocent passage through archipelagic waters in respect of:[143]

a) the safety of navigation and the regulation of maritime traffic;

b) the protection of navigational aids and facilities and other facilities or installations;

c) the protection of cables and pipelines;

d) the conservation of the living resources of the sea;

e) the prevention of infringement of the fisheries laws and regulations of the archipelagic state;

f) the preservation of the environment of the archipelagic state and the prevention, reduction and control of pollution thereof;

g) marine scientific research and hydrographic surveys;

h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the archipelagic state.

Foreign ships exercising the right of innocent passage through archipelagic waters are required to comply with all such laws and regulations of the archipelagic state and all generally accepted international regulations relating to the prevention of collisions at sea.[144]

The regime of innocent passage provided for in Section 3 of Part II of the LOSC appears to be applicable to all ships.[145] There does not appear to be any exclusion of warships,[146] although submarines and other underwater vehicles are required to navigate on the surface and to show their flag.[147]

However, questions have been raised with respect to the application of the right of innocent passage to warships and ships with special characteristics, such as nuclear powered ships and ships carrying nuclear or other dangerous or noxious substances. In practice, most of the archipelagic states, including states that have already claimed the status of

archipelagic states and those which are yet to do so, require prior authorization for, or notification on, the innocent passage of warships. Antigua and Barbuda and St. Vincent and the Grenadines, both require prior permission for foreign warships to navigate in their archipelagic waters and would consider the passage of a foreign warship without such permission prejudicial to their peace, good order or security.[148] Cape Verde and Sao Tome and Principe, upon signing of the LOSC reserved the right to adopt laws and regulations relating to the innocent passage of foreign warships through their territorial sea and archipelagic waters.[149] Although some archipelagic states are yet to clearly provide in their national legislation for the right of innocent passage in archipelagic waters,[150] it does not appear likely that those states requiring the prior authorization for the innocent passage of warships would amend their legislation to conform to the LOSC.

Many archipelagic states have also expressed concern with the unauthorized passage of nuclear powered ships and ships carrying nuclear or other dangerous or noxious substances through their archipelagic waters.[151] Although such ships, under Article 23 of the LOSC, are obliged to carry documents and to observe special precautionary measures established for such ships by international agreements, archipelagic states would be under the constant threat of an accident involving such a vessel. Although archipelagic states would have the

right to designate sea lanes for the innocent passage through archipelagic waters by tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials and such ships would be required to confine passage to such sea lanes,[152] a single accident involving a tanker could wipe out the livelihood of the inhabitants of a small developing archipelagic state that may totally be dependent on fishing and tourism for its survival. Furthermore, paragraph 2 of Article 21 of the LOSC stipulates that coastal states cannot enact laws and regulations relating to the design or construction of ships exercising the right of innocent passage through the territorial sea unless they are giving effect to generally accepted international rules or standards. While this provision may be justified for innocent passage through the territorial waters, it does not appear adequate for such passage in archipelagic waters. The nature of archipelagic waters and the ecological fragility of smaller archipelagic states whose existence depends on the proper protection and preservation of their environment require something more than the jurisdiction of a coastal state in territorial waters with respect to innocent passage.

In this regard archipelagic states would also be able to refer to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989, which provides for the prior approval of the state through the

territory of which such waste is to be transported.[153] It would appear that if hazardous wastes are to be transported through the territory, including archipelagic waters, of an archipelagic state, party to the Basel Convention, prior approval of the archipelagic state would be required.

ii. Archipelagic sea lanes passage

A very important component of navigational rights granted to states in archipelagic waters and the archipelagic regime itself is the right of archipelagic sea lanes passage.

The regime of the waters of an archipelagic state is juridically not the same for all the water areas enclosed within the baseline system. Nor are the rules governing navigation by foreign ships in different areas of the seas of archipelagos.

As was already mentioned, innocent passage is allowed in archipelagic waters. While there was general agreement regarding the right of innocent passage in all areas of archipelagic waters, as was proposed in the various drafts that were submitted at UNCLOS III, there was no such agreement regarding the question of navigation through straits which were intensively used for international navigation. Views of states on this question varied widely; from proposals to make such routes analogous in their regime to international straits, to refusals to even slightly differentiate the regime of such routes from that of internal waters.

The proposal submitted by the United Kingdom stated that in cases where, before the date of ratification of the Convention, parts of archipelagic waters were used as international routes between two parts of high seas or between the territorial sea of another state, the provisions of the Convention regarding international straits shall be applied to such international routes as if they were international straits with all the consequences arising thereof.[154]

Paragraph 2 of Article 3 of the working paper submitted by three Latin American states proposed that in such cases the waters lying on the landward side of the baselines should be considered internal, although ships of any state may pass through them in accordance with the provisions enacted by the archipelagic state.[155]

The regime of archipelagic sea lanes passage evolved as an attempt to balance the territorial integrity and national security of the archipelagic states with the right of transit through passageways which would fall within the archipelagic waters. The latter was a key issue because the major naval powers, including the United States insisted early in the conference's preparatory work on the necessity of an assured right of transit for all vessels and aircraft through and over straits, including straits within archipelagic states.[156] As the negotiations proceeded, it was made clear to all concerned that this question was paramount for the main maritime powers.[157]

a. Right of archipelagic sea lanes passage

According to Article 53 of the LOSC, ships and aircraft of all states have the right to continuous, expeditious and unobstructed passage in the normal mode through or over archipelagic waters and the adjacent territorial sea for the purpose of transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. This passage is to be exercised only through sea lanes and air routes thereabove designated for the purpose by the archipelagic states.

Archipelagic sea lanes and air routes are to be defined by a series of continuous axis lines from the entry points of passage routes to the exit points and ships and aircraft exercising the right of archipelagic sea lanes passage would not be permitted to deviate more than 25 nautical miles to either side of such axis lines during passage.[158] Further, ships and aircraft exercising archipelagic sea lanes passage, should not navigate closer to the coast than 10 per cent of the distance between the nearest points on islands bordering the sea lane.[159]

According to paragraph 2 of Article 53, all ships and aircrafts enjoy the right of archipelagic sea lanes passage. However, many are of the view that archipelagic sea lanes passage was introduced mainly to maintain uninterrupted navigation of warships, including submarines, and the free navigation of aircraft. According to Judge Shigeru Oda, the

right of innocent passage appears adequate for commercial navigation through archipelagic waters and the non-applicability of the right of innocent passage to overflight would not hinder civil aviation.[160] Furthermore, the right to proceed through archipelagic sea lanes "in the normal mode" is interpreted as referring to the right of submarines to pass submerged and to the specific modes of passage of military ships, such as the need for an aircraft carrier and its protecting vessels to move in formation.[161] This right of submarines to pass submerged through archipelagic sea lanes is considered by some as the biggest "give away" by the archipelagic states at UNCLOS III.[162]

The question of overflight through designated air routes is of particular importance to military aircraft, since non-military aircraft would normally be accommodated within the civil aviation regime.[163] In fact, it would not be technically or commercially viable to alter existing international air routes to take into account, except in extreme cases, archipelagic sea lanes passage.[164] It is also interesting to note in this regard that the LOSC requires archipelagic states to designate air routes above sea lanes, while the air routes used for international navigation may be different from the sea lanes used for maritime navigation.[165] This further confirms the main purpose of designating sea lanes and air routes as the facilitation of unobstructed passage of military vessels and aircraft. One

Indonesian authority writes that the air routes above the sea lanes are not at all intended for civil, scheduled commercial aircraft but only for military aircraft and that the whole notion of sea lanes was devised for that purpose.[166]

b. Establishment of sea lanes and air routes

Article 53 of the LOSC provides for archipelagic states to establish sea lanes and air routes thereabove and stipulates that they should be suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial waters. The initial proposal of the archipelagic states to UNCLOS III merely required archipelagic states to take into account any channels customarily used for international navigation, when designating sea lanes.[167] However, paragraph 4 of Article 53 is more restrictive of the discretion of archipelagic states in this regard:

> "Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary."[168]

This provision substantially reflects the view point of the maritime states expressed in the proposal of the United Kingdom[169] and has far reaching implications for archipelagic states since all normal passage routes and navigational channels therein are to be preserved.

An archipelagic state may, for the purpose of ensuring the safety of passage of ships through narrow channels in archipelagic sea lanes, prescribe traffic separation schemes and may also, when circumstances require, after due publicity thereto, substitute other sea lanes or traffic separation schemes for any of those it has previously designated.[170] Ships in archipelagic sea lanes passage are required to respect the limits of the sea lanes and the traffic separation schemes therein.[171]

However, archipelagic states are not totally free to designate sea lanes and to prescribe traffic separation schemes at their will. Sea lanes and traffic separation schemes prescribed by archipelagic states, are required to conform to generally accepted international standards and archipelagic state are required to refer their proposals for designating or substituting sea lanes or prescribing or substituting traffic separation schemes to the competent international organization with a view to their adoption.[172] Although the competent international organization is not specifically mentioned in the LOSC, it would seem quite obvious that the Convention is referring to the International Maritime Organization (IMO), which has jurisdiction over the questions of shipping and navigation and which already deals with the questions of shipping routes and traffic separation schemes in international straits. The LOSC further provides that the organization may adopt only such sea

lanes and traffic separation schemes as may be agreed with the archipelagic state.[173]

The requirement that archipelagic states, in designating or substituting sea lanes or prescribing or substituting traffic separation schemes, should submit their proposals to the competent international organization "with a view to their adoption" has given ground to many interpretations and much controversy.[174] Some view this provision as a veto given to the competent international organization on the designation of sea lanes by archipelagic states, while others refer to the following provision in paragraph 9 of Article 53, which requires agreement of the archipelagic state for the adoption of any sea lanes or traffic separation schemes by the international organization, thus making it a mutual right of veto.[175] The essence of these provisions, however, seems to be in the fact that the archipelagic state could designate sea lanes only if they have been mutually agreed upon by the archipelagic state and the international organization concerned. Such a mutual agreement would, presumably, be arrived at through consultations.

It must however, be noted that the function or role assigned to the international organization does not appear to be to guarantee the right of passage through archipelagos or to compel archipelagic states to designate sea lanes, but to ensure that the sea lanes designated by the archipelagic states are suitable for the continuous and expeditious

passage, that they include all normal passage routes used for international navigation and that such sea lanes and traffic separation schemes conform to generally accepted international standards and regulations.

On the other hand, in designating sea lanes and prescribing traffic separation schemes, it would be important for an archipelagic state to take into account its legitimate economic and security interests as well as concerns for the protection of its environment.[176] With regard to the security interests, archipelagic states may wish to limit the number of sea lanes designated, and may wish to designate the shortest possible routes.[177] It would also be in the interest of archipelagic states to limit certain types of vessels or vessels carrying certain types of cargo to certain sea lanes. This may be of particular importance to archipelagic states in protecting environmentally sensitive areas or the economic activities in certain areas as well as the safety of the vessels concerned. The national marine transportation or the inter-island shipping of the archipelagic state would be an important economic activity that would have to be considered in designating archipelagic sea lanes and prescribing traffic separation schemes.[178]

In designating sea lanes and prescribing traffic separation schemes the archipelagic state should take into account not only its national interests but also the interests of foreign ships. Archipelagic states should, for instance,

specify areas of its archipelagic waters which are not suitable for certain types of ships due to the geographical features of such areas, which may include the shallowness of the sea, the width of certain straits, and the existence of submerged rocks.[179] The failure to consider such physical and geographical features in designating sea lanes would invite accidents that could endanger the safety of ships as well as the environment of the archipelagic state.[180]

Factors such as these, that an archipelagic state would need to take into account in designating and substituting sea lanes and in prescribing or substituting traffic separation schemes will obviously require extensive consultations with the competent international organization. In most cases, such consultations may likely be directed towards obtaining the necessary technical advise and assistance than mere agreement or approval of the international organization. It must be noted that most of the developing archipelagic states may lack the technical information and expertise necessary to undertake the complex task of the designation of sea lanes and traffic separation schemes pursuant to the LOSC.

Another concern of archipelagic states with respect to the designation of archipelagic sea lanes is the question of non-parties to the LOSC. The few states that did not sign the LOSC and those that have not yet ratified the Convention include major maritime powers which have special interests in the designation of the archipelagic sea lanes. Some

archipelagic states have expressed reluctance to submit proposals relating to the designation of sea lanes to IMO since such a submission would subject their proposals, and thus, the designation of the sea lanes to the influence of states which are not parties to the LOSC.[181]

Several archipelagic states have provided in their respective legislations for the establishment of archipelagic sea lanes.[182] However, there is no evidence that such sea lanes have actually been designated and no archipelagic state has yet presented any proposals to IMO relating to the designation of sea lanes for its consideration.

c. Non-designation of archipelagic sea lanes

Archipelagic states have the right to but are not obliged to designate sea lanes and air routes. However, paragraph 12 of Article 53 of the LOSC stipulates that if an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation. The wording of this provision is rather ambiguous because of the omission of a reference to overflight at the end of the sentence.[183] This provision, assuming that it applies to aircraft is quite important, for without it aircraft would have no guaranteed right to overfly archipelagic states, since aircraft, unlike ships, do not enjoy the right of innocent passage.[184]

It also appears that if the proposals of an archipelagic

state concerning the designation of sea lanes are not adopted by the competent international organization and agreement is not reached between the archipelagic state and the international organization, and consequently the archipelagic state does not designate sea lanes, Paragraph 12 of Article 53 would apply and archipelagic sea lanes passage may be exercised through routes normally used for international navigation.

However, if there are no routes normally used for international navigation through an archipelagic state, and the archipelagic state does not designate sea lanes, archipelagic sea lanes passage cannot be exercised through such an archipelagic state. A question also arises here as to whether an archipelagic state would be required to designate sea lanes if there are no routes used for international navigation traversing such archipelagic state. The archipelagic state, in such a case, may not be required to designate sea lanes, since the purpose of the archipelagic sea lanes passage appears to be to ensure passage through straits and routes used for international navigation, which lie within archipelagic waters.

d. Duties of ships and aircraft during their passage and duties, laws and regulations of the archipelagic state

Article 54 of the LOSC concerning the duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic state and laws and regulations of

the archipelagic state relating to archipelagic sea lanes passage simply cross refers to the corresponding articles relating to transit passage through straits which are used for international navigation.[185]

Ships and aircraft, while exercising the right of archipelagic sea lanes passage would be required to :[186]

a) proceed without delay through or over the archipelagic sea lane;

b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the archipelagic state, or in any other manner in violations of the principles of international law embodied in the Charter of the United Nations;

c) refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;

d) comply with other relevant provisions of Part III of the LOSC relating to straits used for international navigation.

Ships exercising the right of archipelagic sea lanes passage would be further required to :[187]

a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;

b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

Aircraft, while exercising the right of archipelagic sea lanes passage, would be required to:[188]

a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;

b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

Archipelagic states may adopt laws and regulations relating to archipelagic sea lanes passage in respect of:[189]

a) the safety of navigation and the regulation of maritime traffic;

b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the archipelagic sea lane;

c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

d) the loading or unloading of any commodity, currency

or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of the archipelagic state.

Foreign ships exercising the right of archipelagic sea lanes passage are required to comply with such laws and regulation of archipelagic states and archipelagic states would be required not to hamper archipelagic sea lanes passage and to give appropriate publicity to any danger to navigation or overflight within or over archipelagic sea lanes, of which they are aware.[190] Furthermore, archipelagic states would not be able to suspend archipelagic sea lanes passage unlike in the case of innocent passage.[191]

e. Differences between archipelagic sea lanes passage and transit passage

Archipelagic sea lanes passage is essentially the same as cransit passage through straits which are used for international navigation. The rights and duties of archipelagic states and other states are the same, mutatis mutandis, as the rights and duties of states bordering straits and other states in respect of transit passage.[192]

However, several writers have noted a number of differences between the two regimes. Dr. Djalal of Indonesia notes the following:[193]

a) Article 38(2) of the LOSC relating to transit passage through straits used for international navigation refers to "freedom of navigation" through straits, while Article 53

concerning archipelagic sea lanes passage refers to "rights of navigation". The term "freedom of navigation" has the connotation of the freedom of high seas while "rights of navigation" implies a more limited competence of foreign ships and aircraft than they would exercise under "freedom" of navigation. Thus, the "rights" of navigation would be subject to more restrictive laws and regulations than would the "freedoms" of navigation.

b) In archipelagic sea lanes, the right of navigation is qualified with the words, "normal mode of navigation", which is not the case with respect to transit passage, where there is no classification of how vessels would transit. However, it is difficult to accept this as a difference, since sub-paragraph (c) of Article 39(1) of the LOSC clearly implies a normal mode of transit for transit passage through straits used for international navigation.[194]

c) Paragraph 3 of Article 53 refers to "unobstructed" passage through archipelagic sea lanes, while paragraph 1 of Article 38 relating to transit passage states that passage through straits used for international navigation should not be "impeded". Neither of these terms is further defined in the LOSC, but it has been suggested that the term "unimpeded" may be subject to more liberal interpretation than the term "unobstructed".

d) Archipelagic sea lanes are to be defined by a series of continuous axis lines with restrictions for ships and

aircraft not to deviate more than 25 nautical miles to either side of such axis lines during passage and not to navigate closer to the coast than 10 per cent of the width of the waterways. Such a restriction does not exist in the straits regime.

Barbara Kwiatkowska and Etty R. Agoes add another item to this list, stating that while the states bordering straits are obliged to refer their proposals on sea lanes to the competent international organization "before" designating or substituting sea lanes, archipelagic states are obliged to do so "in", thus, not necessarily "before" designating or substituting sea lanes.[195]

## 5.3 WATERS OF MIDOCEAN ARCHIPELAGOS OF CONTINENTAL STATES

In the case of midocean archipelagos of continental states, neither the Territorial Sea Convention nor the LOSC provides for drawing straight baselines around and connecting the islands of such archipelagos or for the enclosure of the waters interconnecting the islands of such archipelagos.

The territorial sea is to be measured from the normal baselines of each individual island which according to Article 5 of the LOSC, would be the low-water line along the coast of the island as marked on large scale charts officially recognized by the coastal state.[196]

However, the practice of many states do not conform to the Conventions. Several continental states have drawn

straight baselines connecting the outermost islands of their midocean archipelagos and have declared the enclosed waters to be internal waters.[197] Ecuador, for instance, states in its Supreme Decree No.959-A of 28 June 1971 prescribing straight baselines for the measurement of the territorial sea, that :

> "The sea areas lying between the lines described in article 1(I) and the coast line on the continent, and within the lines described in article I(II), in the Colon Archipelago, shall constitute internal waters."[198]

The Ordinance No.599 of 21 December 1976 of Denmark on the Delimitation of the Territorial Sea around the Faeroe Islands includes the waters situated within the baselines drawn around the Faeroe Islands among its internal waters, along with water areas such as harbours, harbour entrances, roadsteads, bays, fjords, sounds and belts.[199]

These claims, however, have not been without protest. The attitude of maritime powers is reflected in the note of protest sent by the United States to the Government of Ecuador at the time when Ecuador originally made its claim. It was stated in the note that :

> "The United States has, in common with the great majority of other maritime nations long adhered to the principle that the belt of territorial waters extends three marine miles from the coasts. This principle, when applied to insular possessions, contemplates a separate belt of territorial waters for each island, excepting where the water distance is less than six marine miles. Both the purported establishment of a belt of Ecuadorian territorial waters twelve nautical miles in breadth, and the assertion of a claim to a single belt of territorial waters around the entire Colon

Archipelago, contravene this principle of international law."[200]

However, none of the continental states that have drawn straight baselines around their midocean archipelagos and have proclaimed the enclosed waters to be internal provides for any rights, navigational or otherwise, of other states within the waters so enclosed.

The Government of Ecuador, for instance, has declared the coast and internal waters of the Galapagos archipelago a special area to be avoided by international traffic in order to protect the ecological system of the islands.[201]

The special area of the Galapagos, according to the declaration of the Ecuadorian Government is defined by lines apparently drawn between the outermost points on the outermost islands of the group. International traffic and ships engaged in international traffic are required to avoid this area and are restricted to two mandatory navigation routes established by Ecuador to keep vessels at least 78 miles north and 145 miles south of the Galapagos archipelago.[202] Within the special area, internal traffic is subject to special arrangements.[203]

India too, for many years, restricted international shipping in and around the waters of Andaman and Nicobar Islands, in a manner similar to the practice of Ecuador with respect to the Galapagos.[204] However, it appears that the relevant notice by India to mariners has now been abrogated.[205]

## 5.4 CONCLUSION

The recognition of the sovereignty of archipelagic states over the waters enclosed within archipelagic baselines, as well as in the air space above them and over their seabed and subsoil gives a legal basis to the territorial integrity of ocean states and to their concerns to safeguard and protect their geographical, political and economic unity.

A strict juridical analysis of the text of the LOSC would show that archipelagic waters are neither internal waters nor territorial waters, but waters sui generis and an integral part of the territory of the ocean state.

The regime for archipelagic waters provided in Part IV of the LOSC is a compromise reached between the archipelagic states represented at UNCLOS III and the other concerned states in arriving at an equitable and acceptable balance between the interests of archipelagic states and those of other states in archipelagic waters. The regime of archipelagic waters recognizes the sovereignty of an archipelagic state over archipelagic waters and secures the interests of the immediately adjacent neighbouring states as well as the navigational interests of the international community within archipelagic waters.

Thus, for instance, the designation of sea lanes and the establishment of a specific regime thereof, is directed, on one hand, to satisfying the interests of archipelagic states by giving them the authority to limit navigation by foreign

ships to certain areas of archipelagic waters and to control the behaviour of ships that might cause damage to the interests of the archipelagic state, while on the other hand, the archipelagic regime attempts to protect the interests of international shipping and navigation in archipelagic waters by guaranteeing unobstructed passage through archipelagic sea lanes.

The rights granted to other states in archipelagic waters should satisfy the specific interests of neighbouring states and the navigational and communications interests of the international community in archipelagic waters. However, it would seem incorrect to consider that such rights would be more or wider than those they enjoy in the territorial waters of archipelagic states, which lie to the side of the high seas from its archipelagic waters.

The rights granted to other states within archipelagic waters are based on pre-existing practice and rights of such states in the waters enclosed within archipelagic baselines. No such rights would exist in areas where such rights did not exist prior to the declaration of the archipelagic status. Furthermore, Such rights cannot be said to prejudice the sovereignty of the ocean state within its territorial limits. The nature of the sovereignty of the ocean state over and within its territory reflects the special characteristics of the ocean state and its territory, which is comprised of islands and the waters interconnecting them.

**END NOTES**

1. Wisnumurti, Nugroho. "Archipelagic Waters and Archipelagic Sea Lanes", in Van Dyke, Jon M., Alexander, Lewis, M., and Morgan, Joseph R., eds., International Navigation: Rocks and Shoals Ahead? A Workshop of the Law of the Sea Institute, Honolulu, Hawaii, January 13 - 15, 1986. Honolulu: The Law of the Sea Institute, 1988, at 201.

2. Part IV of the United Nations Convention on the Law of the Sea of 1982 (LOSC) is called "Archipelagic States". This title does not seem to be very appropriate, as Part IV of the LOSC deals with archipelagic waters and not archipelagic states as such, which of course cannot be a category of the law of the sea. Thus, it would have been more logical and appropriate to name the concerned part of the Convention "Archipelagic Waters".
For a full text of the LOSC see: United Nations, The Law of the Sea : United Nations Convention on the Law of the Sea, with Index and Final Act of the Third United Nations Conference on the Law of the Sea. New York: U.N. Publications, 1983.

3. Paragraph 1, Article 47 and Paragraph 1, Article 49, LOSC, Ibid.

4. For example : Ecuador with respect to the Galapagos; Denmark with respect to the Faeroe Islands; Spain with respect to the Canary Islands.

5. Paragraph 1. Article 5, Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, on 29 April 1958, (hereinafter referred to as the "Territorial Sea Convention"), 516 U.N.T.S. at 206 - 224.

6. International Court of Justice, Fisheries Case (United Kingdom v. Norway), Judgment of December 18, 1951, Reports of Judgments, Advisory Opinions and Orders (hereinafter cited as I.C.J. Reports, 1951), at 116 et seq.

7. Ibid., at 127.

8. Paragraph 2, Article 4, Territorial Sea Convention, 516 U.N.T.S. 208; Paragraph 3, Article 7, LOSC, supra note 2.

9. See section 4.2.1 D of this study.

10. United States Department of State. Limits in the Seas, No. 36. National Claims to Maritime Jurisdictions. January 3, 1990, at 27.

11. See, Ibid., at 24, and also, United States Department of State, Limits in the Seas, No.14. Straight Baselines: Burma, March 14, 1970.

12. See Articles 2(1), 7(3), 8(1) and 17 of the LOSC, supra note 2.

13. Paragraph 2, Article 8, LOSC, ibid.

14. See, I.C.J. Reports, 1951, supra note 6 at 116 et seq.

15. In the Fisheries case, the ICJ was asked to decide whether the Norwegian Royal Decree of 12 July 1935, which delimited the Norwegian fisheries zone by applying straight baselines, was in conflict with the rules of international law. Ibid., at 118 - 124, and 143.

16. Ibid., at 132.

17. Ibid.

18. See, Report of the I.L.C. to the General Assembly on the Work of its Seventh Session, United Nations General Assembly, Official Records, 10th Session, Supplement No. 9, Doc. A/2934, New York, 1955, pp. 25 - 49.

19. Ibid., at 43-44.

20. Paragraph 3, Article 5 of "Articles Concerning the Law of the Sea", U.N. Doc. A/3159, Report of the International Law Commission to the General Assembly, Yearbook of the International Law Commission, 1956, Vol.II, New York: U.N. Publication, Kraus Reprint Co., 1973, at 257.

21. Paragraph 2, Article 5, Territorial Sea Convention, supra note 5 at 210.

22. See, Ngantcha, Francis. The Right of Innocent Passage and the Evolution of the International Law of the Sea. London: Pinter Publishers, 1990, at 78.

23. Alexander, Lewis, M. Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the United States. Peace Dale, Rhode Island: Offshore Consultants Inc., 1986, at 38.

24. See, McDorman, Ted L. "In the Wake of the "Polar Sea": Canadian Jurisdiction and the Northwest Passage", 10 Marine Policy, 1986, at 243.

25. Ibid., at 245.

26. Revised Statutes of Canada (R.S.C.), 1970 (1st Supp.), c.2.

27. See, McDorman, T.L. supra note 24.

28. Order Respecting Geographical Co-ordinates of Points from which Baselines may be Determined, Privy Council 1985-2739, 10 September 1985, United Nations, Office for Ocean Affairs and the Law of the Sea, The Law of the Sea. Baselines: National Legislation With Illustrative Maps. New York: U.N. Publication, 1989, at 86.

29. McDorman, T.L. supra note 24 at 251.

30. See, Statement in the House of Commons by the Secretary of State for External Affairs, September 10, 1985, in 24 I.L.M. 1985, at 1725.

31. Pharand, Donat, Canada's Arctic Waters in International Law. Cambridge: Cambridge University Press, 1988, at 215 and 225.

32. See, ibid., Chapter 8; and also McDorman, T.L. supra note 24 at 249.

33. Canada has not yet ratified either the Territorial Sea Convention or the LOSC.

34. Pharand, D. supra note 31 at 155.

35. Ibid., at 228-229.

36. See, I.C.J. Reports, 1951, supra note 6 at 116 et seq.

37. Statement in the House of Commons by the Secretary of State for External Affairs, September 10, 1985, supra note 30 at 1725-1726.

38. Paragraph 1, Article 47 and Paragraph 1, Article 49, LOSC, supra note 2.

39. Article 50, LOSC, supra note 2.

40. Jayewardene, Hiran, W. The Regime of Islands in International Law. Dordrecht: Martinus Nijhoff Publishers, 1990, at 154.

41. Ibid.

42. Statement made by the delegate of Fiji at the Sea-Bed Committee on July 22nd, 1971, quoted in Symmons, Clive, R. The Maritime Zones of Islands in International Law. The Hague: Martinus Nijhoff Publishers, 1979, at 63.

43. Paragraph 2 of Article 8 of the LOSC states that a right of innocent passage will exist in areas enclosed as internal waters by applying Article 7, which had not previously been considered as internal waters. A similar right of innocent passage is provided in archipelagic waters.

44. Paragraphs 1 and 7, Article 47, LOSC, supra note 2.

45. Beazley, P.B. Maritime Limits and Baselines. A Guide to their Delineation. Third Revised Edition. London: The Hydrographic Society, 1987, at 11.

46. Paragraph 1, Article 5, Territorial Sea Convention, supra note 5.

47. Paragraph 1, Article 8, LOSC, supra note 2.

48. Symmons, C.R. supra note 42 at 68.

49. See, note verbale from the Philippine Government to the Secretary General of the United Nations dated March 7, 1955, U.N. Doc. A/2934, 1955; and Djuanda Declaration of December 13, 1957 of Indonesia, for English translation see, Whiteman, M. Digest of International Law. Vol.4, Washington: U.S. Government Printing Office, 1965, at 284.

50. Symmons, C.R. supra note 42 at 68.

51. League of Nations, Doc. C.74, 39, 1929, V.2, at 50 - 1.

52. Gidel, G. Le Droit International Public de la Mer, Vol. III, Paris: Sirey, 1934, at 711.

53. Prodjodikoro, W. "Hukum Laut Bagi Indonesia", Jakarta, 1970, h.7, cited in Shinkaretskaya, G.G. Gosudarstvo na Arkhipelagakh. Mezdunarodno-Pravovoi Regime. Moscow: Mezdunarodnie Otnosheniya, 1977, at 40.

54. Sorensen, M. "The Territorial Sea of Archipelagos", in Varia Juris Gentium - Liber Amicorum - J.P.A. Francois. Leiden: Sijthoff, 1959, at 362.

55. Ibid.

56. Bozrikov, O.V. Pravovie Voprosi Delimitatsi Territorialnovo Moriya. Moscow: Nauka, 1973, at 94.

57. Speranskaya, L.V. "Mezdunarodno-Pravovoi Regime Vod Arkhipelagov", 9 Sovietskoe Gosudarstvo i Pravo, 1973, at 114.

58. Ibid.

59. McDougal, M., Burke, W.T., The Public Order of the Oceans. New Haven: Yale University Press, 1962, at 415.

60. Ibid.

61. Yearbook of the International Law Commission, 1954, Vol.II. New York: U.N. Publication, 1960, at 1 - 6.

62. O'Connell, D.P. "Mid-Ocean Archipelagos in International Law", 45 British Yearbook of International Law. 1971, at 19.

63. Evensen, Jens. "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos", U.N. Doc. A/CONF.13/18, Preparatory Document No.15. United Nations Conferences on the Law of the Sea. Official Records, First Conference, 1958. Vol. I. New York: William S. Hein and Co., 1980, at 289.

64. United Nations Conference on the Law of the Sea, Geneva, 1958, Official Records. Vol. III, at 227.

65. Ibid., at 239.

66. See, Wisnomoerti, Noegroho, "Indonesia and the Law of the Sea", in Park, Choon-ho, and Park, Jae Kyu, eds., The Law of the Sea: Problems from the East Asian Perspective. Proceedings of Two Workshops of the Law of the Sea Institute held in Seoul, Korea. Honolulu: The Law of the Sea Institute, 1987, at 392.

67. Ibid.

68. Ibid., at 393. "Wawasan" means outlook, and "Nusantara" means archipelago.

69. United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, ST/LEG/SER.B/18. New York: U.N. Publication, 1976, at 30.

70. The Constitution of the Republic of Maldives. Male': 1968, at 3.

71. U.N. Doc. A/AC.138/SC.II/L.48 of August 6, 1973.

72. U.N. Doc. A/AC.138/SC.II/SR.73 of August 20, 1973, at 12.

73. Paragraphs 1 and 2, Article 49, LOSC, supra note 2.

74. See, Paragraph 3, Article 49 and Articles 51 - 53, LOSC, supra note 2.

75. Paragraph 1, Article 2, LOSC, ibid.

76. See, Third United Nations Conference on the Law of the Sea. Official Records. Vol.II. New York: U.N. Publication, 1975, at 114.

77. Tangsubkul, Phiphat. The Southeast Asian Archipelagic States: Concept, Evolution and Current Practice. Honolulu: East-West Center, 1984, at 18.

78. Tolentino, Arturo, M. "Archipelagos under the Convention on the Law of the Sea", 28 Far Eastern Law Review, 1984, at 8.

79. See, Paragraph 4, Article 49, LOSC, supra note 2.

80. Tolentino, A.M. supra note 78.

81. Maritime Areas Act, 1982, Antigua and Barbuda. United Nations, Office for Ocean Affairs and the Law of the Sea. The Law of the Sea: Practice of Archipelagic States. New York: U.N. Publication, 1992, at 1.

82. Marine Spaces Act, 1977, Fiji, ibid., at 23.

83. Maritime Areas Act, 1983, Act No.15 of 19 May 1983, Saint Vincent and the Grenadines, ibid., at 86.

84. The Delimitation of Marine Waters Act, 1978, Act No. 32 of 21 December 1978, Solomon Islands, ibid., at 100.

85. Archipelagic Waters and Exclusive Economic Zone Act, 1986, Act No. 24 of 11 November 1986, Trinidad and Tobago, ibid., at 112.

86. The Maritime Zones Act, 1981, Vanuatu, ibid., at 131.

87. See, Act No. 4 Concerning Indonesian Waters, 18 February 1960 of Indonesia and Republic Act No. 3046 of 17 June 1961 of the Philippines, ibid., at 45 and 75.

88. United Nations. Law of the Sea Bulletin, Special Issue I. March 1987, at 6.

89. See the objections to the declaration made by the Philippines expressed by Bulgaria, Byelorussian S.S.R., Czechoslovakia, Ukrainian S.S.R and the U.S.S.R., ibid., at 9, 11 - 14.

90. League of Nations, Doc. C.74, M.39, 1929, V.2, at 48.

91. O'Connell, D.P. supra note 62 at 11.

92. Symmons, C.R. supra note 42 at 71.

93. Paragraph 3, Article 49, LOSC, supra note 2.

94. See, Articles 51 - 53, LOSC, supra note 2.

95. Paragraph 1, Article 51, supra note 2.

96. See, Churchill, R.R. and Lowe, A.V. The Law of the Sea. Second Edition. Manchester: Manchester University Press, 1988, at 103.

97. Hereinafter referred to as the "Jakarta Treaty", see full text in United Nations, Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Practice of Archipelagic States. New York: U.N. Publication, 1992, at 144 - 155.

98. Hamzah, B.A. "Indonesia's Archipelagic Regime: Implications for Malaysia", 8 Marine Policy, 1984, at 33.

99. Ibid.

100. Paragraph 5 of Article 53 of the LOSC states that sea lanes for passage through archipelagic waters should be along axis lines and that vessels in passage may deviate upto 25 nautical miles to either side of such axis lines, supra note 2.

101. Article 7, Jakarta Treaty, supra note 97.

102. See statements made by the representatives of Malaysia, Thailand and Singapore, UNCLOS III, Official Records. Vol.II, supra note 76 at 198, 265, 268, and 270.

103. Statement of the Indonesian delegate, ibid., at 260, also see, Wisnomoerti, N. supra note 66 at 398.

104. Ibid.

105. See Jayewardene, H. W. supra note 40 at 157.

106. Ibid., at 152.

107. Paragraph 1, Article 51, LOSC, supra note 2.

108. The draft articles on archipelagos submitted by Thailand had also included territorial waters and referred to the interests and the needs of neighbouring states. The"needs", clearly referring to future requirements. However, these aspects of the Thai proposal were not incorporated into paragraph 1 of Article 51 of the LOSC. See, U.N. Doc. A/CONF.62/C.2/L.63.

109. See, for example, the Jakarta Treaty, which inter alia provides for the interests of Malaysia in certain areas of the Indonesian territorial waters and also for certain future requirements of Malaysia in the concerned area, supra note 97; see also Jayewardene, H.W. supra note 40 at 157.

110. See, Kwiatkowska, Barbara and Agoes, Etty R. Archipelagic State Regime in the Light of the 1982 UNCLOS and State Practice. Bandung: ICLOS, UNPAD, 1991, at 41.

111. Article 2, Jakarta Treaty, supra note 97.

112. Rajan, H.P. "The Legal Regime of Archipelagos", 29 German Yearbook of International Law, 1986, at 149.

113. Djalal, Hasjim, "Indonesia and the New Extensions of Coastal State Sovereignty and Jurisdiction at Sea", in : Johnston, Douglas M. (ed.), Regionalisation of the Law of the sea. Proceedings of the Eleventh Annual Conference of the Law of the Sea Institute, University of Hawaii, November 14-17, 1977. Cambridge, Mass.: Ballinger Publishing Co., 1978, at 284.

114. Ibid.

115. Ibid.

116. Paragraph 1, Article 51, LOSC, supra note 2.

117. Ibid.117.

118. See, supra note 97.

119. See, Paragraph 2, Article 2, Jakarta Treaty, supra note 97.

120. Sub-paragraph (e), Article 2(2); and Part V (Traditional Fishing), ibid.

121. Sub-paragraphs (a) and (b), Article 2(2), ibid.

122. Sub-paragraphs (c), (d), and (g) - (i), Article 2(2), ibid.

123. Paragraph 2, Article 51, LOSC, supra note 2.

124. See, Hamzah, B.A. supra note 98 at 34.

125. Draft articles relating to archipelagic states submitted by Fiji, Indonesia, Mauritius and the Philippines, U.N. Doc. A/CONF.62/C.2/L.49.

126. U.N. Doc. A/CONF.62/C.2/L.64.

127. See, U.N. Docs. A/CONF.62/C.2/L.49 and L.64.

128. Churchill, R.R. and Lowe, A.V. supra note 96 at 104.

129. Ibid.

130. Sub-paragraph (f) of Article 2(2) and Part VI (Submarine Cables and Pipelines) of the Jakarta Treaty, supra note 97.

131. See Hamzah, B.A. supra note 98 at 40.

132. Ibid., at 41.

133. Paragraphs 2 and 3, Article 16, Jakarta Treaty, supra note 97.

134. See, Jayewardene, H.W. supra note 40 at 158.

135. Innocent passage in archipelagic waters is also to be exercised in accordance with the provisions contained in Section 3 of Part II of the LOSC regarding innocent passage in territorial waters; Paragraph 1, Article 52, LOSC, supra note 2.

136. See, Article 18, LOSC supra note 2.

137. See, Article 20, LOSC, ibid.

138. Paragraph 2, Article 52, LOSC, ibid.

139. Ibid.

140. Hamzah, B.A. supra note 98.

141. Paragraph 1, Article 19, LOSC, supra note 2.

142. Paragraph 2, Article 19, LOSC, ibid.

143. Article 21, LOSC, ibid.

144. Paragraph 4, Article 21, LOSC, ibid.

145. Article 17, LOSC, ibid.

146. This implied by Articles 17, 19(2) and 29-32 of the LOSC, ibid. Also see, Bowett, Derek, W. The Legal Regime of Islands in International Law. Dobbs Ferry, N.Y.: Oceana Publications, 1979, at 101-102 and 110-111.

147. Article 20, LOSC, supra note 2.

148. Articles 14(2) and 15(2) of the Maritime Areas Act of 1982 of Antigua and Barbuda; Sections 10(2) and 11(2) of the Maritime Areas Act of 1983 of St. Vincent and the Grenadines, U.N. The Law of the Sea: Practice of Archipelagic States, supra note 81.

149. See, United Nations, Law of the Sea Bulletin, No.5, July 1985, at 8 and 20.

150. For instance, the Philippines has yet to provide, in its legislation, for the right of innocent passage through its waters and Indonesia would need to specify that innocent passage through archipelagic waters is a right and not a "facility" or a "privilege". In the Article by Article clarification of Act No.4 of Indonesia concerning Indonesian waters states that innocent passage through Indonesian internal waters is guaranteed by Indonesia as a "privilege" or "facility", which can be withdrawn by Indonesia. See, O'Connell, D.P. supra note 62 at 40.

151. See, statement made by the representative of the Philippines at the 11th session of UNCLOS III, United Nations, Office for Ocean Affairs and the Law of the sea, The Law of the Sea: Archipelagic States. Legislative History of Part IV of the United Nations Convention on the Law of the Sea. New York: U.N. Publication, 1990, at 106; also see, Kwiatkowska, B. and Agoes, E.R. supra note 110 at 41.

152. Article 22, LOSC, supra note 2.

153. See, Articles 2(3), 2(12), and 6(4) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989, 28 I.L.M. 1989, at 649 - 686.

154. U.N. Doc. A/AC.138/SC.II/L.44 of August 2, 1973.

155. Working paper submitted by Ecuador, Panama and Peru, U.N. Doc. A/AC.138/SC.II/L.27.

156. See, Burke, William T. "Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text", 52 Washington Law Review. 1976 - 1977, at 193 - 220.

157. Ibid.

158. Paragraph 5, Article 53, LOSC, supra note 2.

159. Ibid.

160. Oda, Shigeru, "The Passage of Warships Through Straits and Archipelagic Waters", in : Van Dyke, J.M., Alexander, L.M., and Morgan, J.R., eds., International Navigation: Rocks and Shoals Ahead? A Workshop of the Law of the Sea Institute, Honolulu, Hawaii, January 13-15, 1986. Honolulu: The Law of the Sea Institute, 1988, at 155.

161. See, Alexander, L.M. supra note 23 at 162.

162. See, Narokobi, Camillus, S.N. "The Regime of Archipelagoes in International Law", in : Van Dyke, J.M. et al, eds., supra note 160 at 232.

163. Scheduled and non-scheduled international air services of civil aircrafts are carried through the air space over the territory of states through air routes established in bilateral air services agreements concluded pursuant to the Chicago Convention on International Civil Aviation of 1944. For details see, Lentsch, P. de Vries, "The Right of Overflight over Strait States and Archipelagic States: Developments and Prospects", 14 Netherlands Yearbook of International Law, 1983, at 170 -172.

164. De Mestral, Armand, "International Civil Aviation: Law of the Sea Issues", in: Soons, Alfred, H.A. ed., Implementation of the Law of the Sea Convention Through International Institutions. Proceedings of the 23rd Annual Conference of the Law of the Sea Institute, June 12-15, 1989, Noordwijk aan Zee, The Netherlands. Honolulu: The Law of the Sea Institute, 1990, at 255.

165. See, comment by Komar Kantaatmadja during the Panel Discussion on Archipelagos and Archipelagic Sea Lanes Passage at the Workshop of the Law of the Sea Institute held in Honolulu, Hawaii, January 13-15, 1986, in: Van Dyke, J.M. et al, eds. supra note 160, at 268.

166. Djalal, Hasjim, "Commentary", Panel II: Navigation, in: Soons, A.H.A. ed., supra note 164, at 268.

167. U.N.Doc. A/AC.138/SC.II/L.48 of August 6, 1973.

168. Paragraph 4, Article 53, LOSC, supra note 2.

169. U.N. Doc. A/AC.138/SC.II/L.44

170. Paragraphs 6 and 7, Article 53, LOSC, supra note 2.

171. Paragraph 11, Article 53, LOSC, ibid.

172. Paragraph 9, Article 53, LOSC, ibid.

173. Ibid.

174. See, the panel discussion on archipelagos and archipelagic sea lanes passage at the workshop of the Law of the Sea Institute held in Honolulu, Hawaii, January 13-15, 1986, in : Van Dyke, J.M., et al. eds., supra note 160, at 260 - 269.

175. Ibid.

176. See, Muhjiddin, Atje Misbach, "Some Aspects that should be Considered in Designating Indonesia's Sea Lanes", in Van Dyke, J.M., et al. eds., supra note 160, at 216.

177. See, Wisnumurti, N. supra note 1, at 207.

178. Muhjiddin, A.M. supra note 176 at 217.

179. Ibid., at 216.

180. Ibid.

181. See, Djalal, H. supra note 166, and Wisnumurti, N. supra note 1, at 207.

182. See, for instance, Section 20C of the Maritime Areas Act, 1982, of Antigua and Barbuda; Section 9A of the Marine Spaces (Amendment) Act, 1977 of Fiji; Section 12 of the Maritime Areas Act, 1983 of St. Vincent and the Grenadines; Section 10 of The Delimitation of Marine Waters Act, 1978 of Solomon Islands; and Section 11(2) of the Marine Zones (Declaration) Ordinance, 1983 of Tuvalu, U.N. The Law of the Sea: Practice of Archipelagic States, supra note 81, at 13, 38, 88, 103, and 129.

183. Churchill, R.R. and Lowe, A.V. supra note 96 at 105.

184. Ibid.

185. Articles 39, 40, 42 and 44 of the LOSC, supra note 2.

186. Paragraph 1, Article 39, LOSC, ibid.

187. Paragraph 2, Article 39, LOSC, ibid.

188. Paragraph 3, Article 39, LOSC, ibid.

189. Paragraph 1, Article 42, LOSC, ibid.

190. Paragraph 4, Article 42, and Article 44, LOSC, ibid.

191. Article 44, LOSC, ibid.

192. Indonesia did not like the reference in Article 54 of the LOSC, mutatis mutandis to Articles 39, 40, 42 and 44. Indonesia was of the opinion that such a reference would suggest that straits used for international navigation and archipelagic sea lanes are the same and argued that mutatis mutandis would confuse the difference between the rules on straits with the rules of archipelagic sea lanes. However, Indonesia agreed to retaining the reference as it is, because without mutatis mutandis the article would be too long. See, Djalal, H. supra note 166 at 266.

193. Djalal, H. supra note 166 at 267.

194. See, Sub-Paragraph (c), Article 39(1), LOSC, supra note 2.

195. Kwiatkowska, B. and Agoes, E.R. supra note 110 at 52.

196. Also see, Article 121 of the LOSC which deals with the regime of islands, supra note 2.

197. See supra note 4.

198. U.N., ST/LEG/SER.B/18, supra note 69 at 16.

199. Ordinance No. 599 of 21 December 1976 on the Delimitation of the Territorial Sea around the Faeroe Islands, Denmark. United Nations, Office for Ocean Affairs and the Law of the Sea, The Law of the Sea. Baselines: National Legislation with Illustrative Maps. New York: U.N. Publication, 1989, at 131.

200. Note of the United States to the Government of Ecuador dated 7 June 1951; quoted from International Court of Justice. Fisheries Case (United Kingdom v. Norway),

Pleadings, Oral Arguments, Documents, 1951, Vol. 4, at 603.

201. See note submitted by the Government of Ecuador to the 42nd session of the Maritime Safety Committee of IMCO dated 2 May 1980, IMCO Doc. XLII/INF.2.

202. Ibid.

203. Ibid.

204. Jayewardene, H.W. supra note 40 at 171.

205. Ibid., at 172.

## 6. CONCLUSION

This study has examined the archipelagic concept as applied in practice and in the international law of the sea to three archipelagic types, i.e., its application to coastal archipelagos, to midocean archipelagos of continental states and, with particular emphasis, to archipelagic states. It has also been shown that the application of the archipelagic concept to these three different archipelagic types, the implications and consequences thereof and, in fact, the manner in which they have been treated under international law differ significantly from each other.

### 6.1 Coastal Archipelagos

Although coastal archipelagos are not mentioned by name, provisions relating to coastal archipelagos could be found both in the Convention on the Territorial Sea and the Contiguous Zone of 1958[1] and in the United Nations Convention on the Law of tne Sea of 1982 (LOSC)[2] as well as in customary law. They are dealt with in the conventions as a circumstance of a complex coastline, to which straight baselines may be applied to delineate the territorial waters of coastal states. The use of the straight baselines method to enclose the islands of a coastal archipelago and the waters interconnecting them has the effect of granting the status of internal waters to the waters so enclosed.

However, coastal archipelagos are not included in the definition of archipelagos provided in the LOSC and there is

no clear definition as to which coastal island groups could be regarded as qualifying for the drawing of straight baselines around them. Many aspects of the definition of coastal island groups or fringes and the drawing of straight baselines around and connecting them to the mainland, such as the adjacency and the compactness of the islands and their location in relation to the coast of the mainland remain open to interpretation.

6.2 Midocean Archipelagos of Continental States

With respect to midocean archipelagos of continental states, the law of the sea does not provide any special regime for midocean archipelagos of continental states, and implies the application of the regime of islands to each individual island of the archipelago. However, several continental states, including Denmark, Ecuador and Spain, have enclosed their midocean archipelagos within straight baselines drawn from and connecting the outermost points of the outermost islands of such archipelagos.

Most of the midocean archipelagos of continental states fall within the definition of archipelagos given in the LOSC. The LOSC definition of an archipelago envisages unity of the islands as a group and thus, excludes coastal archipelagos which seek unity with the coastal mainland. However, although, midocean archipelagos of continental states can theoretically be included within the LOSC definition of archipelagos, the aim of the provision does not appear to include such archipelagos within its scope. Its purpose is to

define archipelagos which could constitute archipelagic states. The LOSC distinguishes archipelagic states on the basis of their statehood from other midocean archipelagos. In fact, the considerations which justify a special regime for archipelagic states cannot be invoked with respect to island groups which do not constitute a state and which do not possess any of the attributes of a state.

6.3 Ocean States and the Archipelagic Concept

Ocean states are archipelagic states in which their archipelago or archipelagos constitute the whole territory of the state. Such states have a special relationship with the waters interconnecting the islands of their archipelago and the integration between land and sea areas of such ocean states is far more complete than it can ever be between the waters and the shores of a continental state.

The waters interconnecting the islands of the ocean state provide the necessary sense of unity to the dispersed islands, rather than separate them. The islands and the intervening waters of ocean states form single geographical, economical and political entities. Since time immemorial, archipelagic states such as Indonesia and the Maldives have constituted such single entities and when they were referred to, it has always implicitly included their islands and the interconnecting waters.

Besides being a unifying factor between the islands, the sea also offers a great potential source for economic

development of the ocean state and the well being of its people.

Ocean states belong to the group of countries categorized as developing countries. Most of the archipelagic states, with the exception perhaps only of Indonesia and the Philippines, are what are termed vulnerable "micro states". These small island states, because of their small population, small land size and narrow resource base are often subject to significant economic constraints.

In these circumstances, the sea and its resources are of vital economic importance for developing ocean states and the major, if not all, industries of most of such ocean states are marine based. Unlike continental nations which have resources on their land territory, ocean states are almost totally dependent on the surrounding marine environment.

Communication and transport between the tiny, scattered and remote islands of the ocean state are difficult and expensive and hamper trading and economic development.

Further, the geographic composition of archipelagos with many hundreds, or even thousands, of large and small islands scattered over an extensive sea area, poses serious problems to the national security of the ocean states and tends to perpetuate the plurality in the composition of the population increasing the tendency of local or regional groups to pursue their aspirations and secede from the nation.

Another endemic feature of ocean states is their

environmental fragility. Ocean states are especially vulnerable to environmental disasters and their configuration makes it more difficult to clean sources of pollution in the waters interconnecting their islands. In this respect, small archipelagic states, the mere existence of which is threatened by global warming and sea level rise have a particular interest in regulating the activities of other states in the waters interconnecting their islands.

These geographical, economic, political and environmental circumstances of ocean states sufficiently illustrate the predicament that an archipelagic state faces in protecting its territorial integrity and in pursuing its development policies. In order to overcome such predicaments and to preserve their territorial integrity archipelagic states have insisted on maximum control and assimilation as in the case of internal waters, while maritime powers have sought to preserve the widest possible freedoms in respect of these areas.

However, the traditional law of the sea which was designed to deal mainly with the maritime zones of land-based or continental states could not be properly applied to the specific circumstances of ocean states. The traditional law of the sea concepts of territorial waters and internal waters could not adequately address the socio-economic and security interests of ocean states in the waters interconnecting their islands or the navigational interests of the major maritime nations in such waters. Thus, making it necessary to develop

a new approach and new concepts to deal with the specific features and characteristics of archipelagic states.

The archipelagic concept which was developed as a result, is more than just a legal concept or a legal regime to archipelagic states. It is the legal and territorial manifestation of the philosophical outlook of archipelagic states.

The LOSC defines an archipelago as a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.[3] The LOSC, thus, for the first time, defines an archipelago as comprised of islands and the sea areas interconnecting the islands and puts the archipelagic state in a territorial context. This definition of an archipelago and the restriction of the application of the archipelagic regime contained in the LOSC only to archipelagic states comprised of such archipelagos legitimizes ocean states.

The definitions of an archipelago and an archipelagic state contained in the LOSC also reflect the public perceptions of ocean states as to what their territorial limits are. The people of ocean states consider the waters and the seas surrounding and inter-connecting the islands of their archipelago as a constituent part of the territory of

the archipelagic state. In fact, many smaller ocean states consider the waters interconnecting their islands as more important than the islands themselves. These public perceptions of ocean states have been formed through a lengthy process of interaction between the inhabitants of the state and the waters interconnecting their islands and are based on the unity of the people, the islands and the interconnecting sea.

The archipelagic concept in providing for the territorial determination of the archipelagic state has, thus, created an entirely new, yet eminently functional method of acquisition of territory in international law.[4] The archipelagic states, by applying the archipelagic concept and drawing archipelagic baselines joining the outermost points of the outermost islands and drying reefs of their archipelagos, thereby determining their territorial boundary, transform the waters interconnecting their islands into constituent parts of the territory of the ocean state. The water and land areas of archipelagic states within the archipelagic baselines drawn in accordance with the LOSC, thus, constitute the "territory" of the ocean state.

However, the archipelagic concept as applied to archipelagic states should not be regarded as driven by simple acquisitiveness, but is based on the same feelings for national unity that the people of a large continental state might have. Thus, rather than merely extending the coastal

jurisdiction of the archipelagic state, the archipelagic concept determines the territorial limits of the archipelagic state.

Although size, nature and requirements of the various ocean states differ greatly, the archipelagic concept provides the necessary territorial basis for the national unity, independence and integrity of ocean states. The recognition of the sovereignty of archipelagic states over the waters enclosed within archipelagic baselines, as well as in the air space above them and over their seabed and subsoil gives a legal basis to the territorial integrity of archipelagic states and to their concerns to safeguard and protect their geographical, political and economic unity.

Further, the archipelagic concept as applied by ocean states determines the essential territorial basis for the sustainable development of such ocean states. It provides ocean states with the necessary framework for the establishment of their jurisdiction and control necessary to achieve their goals of sustainable development in view of the increasing environmental concerns and global strategies for sustainable development.

Issues relating to the sustainable development of ocean states, particularly those relating to the smaller ocean states, are being debated by the international community in the preparations for the Global Conference on the Sustainable Development of Small Island Developing States scheduled to be

held in 1994. The archipelagic concept as applied by ocean states and the regime thereof, undoubtedly provides the Global Conference with a sound basis for developing strategies and measures to enhance their sustainable development.

The LOSC, in recognising the sovereignty of archipelagic states within archipelagic baselines, also secures the interests of the immediately adjacent neighbouring states of archipelagic states as well as the navigational interests of the international community within archipelagic waters. However, the rights granted to other states to protect such interests are based on activities that such states carried out in the archipelagic waters. Some of these rights, thus, are specific to the existing situation of certain archipelagic states. The rights of neighbouring states, for instance, appear to be to satisfy the requirements of the immediately adjacent neighbouring states of Indonesia, particularly those of Malaysia. A similar situation does not appear to exist with respect to any other archipelagic state.

Navigational rights of other states in archipelagic waters are also based on previously existing rights of innocent passage through waters which would have otherwise been territorial waters and archipelagic sea lanes passage is based on navigational rights of other states through routes used for international navigation. Thus, for instance, for an archipelagic state to designate an archipelagic sea lane, the concerned navigational route must be a route normally used for

international navigation. An archipelagic state would not be required to provide for such rights of other states in cases where such rights did not exist prior to the proclamation of the archipelagic status of the waters concerned.

However, these rights granted to other states cannot be said to prejudice the sovereignty of the archipelagic state within its territorial limits. The nature of the sovereignty of the ocean state within its territory reflects the specific characteristics of the ocean state and its territory, which is comprised of islands and waters interconnecting them.

The acceptance of the archipelagic state concept by the international community and provision of a special regime for archipelagic waters, the waters enclosed within the archipelagic straight baselines drawn by archipelagic states, is the result of the hardwork of the representatives of a number of archipelagic states - Indonesia, Philippines, Fiji, Bahamas, and Mauritius - at the Third United Nations Conference on the Law of the Sea (UNCLOS III).

Further, the appearance of a whole new block of newly independent developing nations, to which archipelagic states also belonged, changed the circumstances and conditions of international treaty making in a radical way. The active and strong support received by archipelagic states for their interests and claims from this group of states, which already constituted two thirds of the international community of state, at UNCLOS III, was crucial to the inclusion of the

subject of archipelagos in the agenda of the conference and later in resolving the question at the conference.

It also needs to be emphasised that the success achieved in arriving at a solution to the question of archipelagic states is, to a great extent, related to, and due to the successful completion of UNCLOS III as a whole. In particular, the question of archipelagic states was discussed, negotiated, and resolved as a single packet, together with the issues relating to the breadth of the territorial sea, the legal status of straits used for international navigation, and a number of other issues.

It must also be emphasised that the resolution of the question of archipelagic states, like all other major questions on the agenda of UNCLOS III, was made possible by the readiness of the participant states to arrive at compromises and to mutually consider and take into account each other's interests. Specifically agreement on the part of the archipelagic states regarding freedom of navigation in archipelagic waters and also to the protection of the interests of the neighbouring states in archipelagic waters, were of paramount importance.

A number of questions relating to the archipelagic regime, nevertheless, remain to be resolved and appear likely to be raised and addressed at any future negotiations on the law of the sea.

First, a number of archipelagic states cannot draw

archipelagic baselines around their archipelagos due to the 9:1 maximum water-land ratio. Although such archipelagos may draw a number of archipelagic baseline systems around several archipelagos in such a case, each such island group must qualify as an archipelago according to the LOSC definition. This would also lead to a question with respect to midocean archipelagos of continental states. If an archipelagic state could draw several archipelagic baselines systems, consideration may need to be given to midocean archipelagos of continental states.

Secondly, several small archipelagic states claim that specific circumstances relating to their environmental and ecological vulnerability has not been taken into account. Such states have expressed their concerns particularly with respect to the passage of vessels carrying dangerous, hazardous, noxious and pollutant cargoes through archipelagic waters. This vulnerability needs to be emphasised in the light of the recent accidents involving the tankers "Exxon Valdez", "Aegian Sea", "Braer" and "Maersk Navigator". Any such accidents within the waters of a small archipelago could wipe out fisheries and tourism, the two main sources of income of such small ocean states. Since such small developing ocean states do not have the resources or the expertise to deal with such emergencies, the best option may be to limit the types of vessels and the types of cargo carried through the waters of such small archipelagic states.

**END NOTES**

1. Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, on 29 April 1958. For a full text of the Convention, see: 516 U.N.T.S. 206 -224.

2. For a full text of the LOSC, see: United Nations, The Law of the Sea. United Nations Convention on the Law of the Sea, with Index and Final Act of the Third United Nations conference on the Law of the Sea. New York: U.N. Publications, 1983.

3. Article 46(b), LOSC, ibid.

4. The principal modes of acquisition of territory in international law, derived from Roman law are : Occupation, accretion, conquest, cession and prescription. For a detailed discussion of these modes and other aspects of acquisition of territory in international law, see: Jennings, R.Y. The Acquisition of Territory in International Law. Manchester: Manchester University Press, 1963; and Brownlie, Ian. Principles of Public International Law. Oxford: Clarendon Press, 1973, at 134-172.

# APPENDIX I : ARCHIPELAGIC PROVISIONS CONTAINED IN THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 1982

## PART IV

## ARCHIPELAGIC STATES

### Article 46

### Use of terms

For the purposes of this Convention:

(a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;

(b) "archipelago" means a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

### Article 47

### Archipelagic baselines

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area

of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that upto 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, upto a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such 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 where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

7. For the purpose of computing the ratio of water to

land under paragraph 1, 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.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical co-ordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Article 48

Measurement of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.

Article 49

Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil

1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.

2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.

3. This sovereignty is exercised subject to this Part.

4. The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein.

Article 50

Delimitation of internal waters

Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11.

Article 51

Existing agreements, traditional fishing rights and existing submarine cables

1. Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

2. An archipelagic State shall respect existing submarine cables laid by other States and passing through its waters without making a landfall. An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.

Article 52

Right of innocent passage

1. Subject to article 53 and without prejudice to article 50, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II,

section 3.

2. The archipelagic State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

Article 53

Right of archipelagic sea lanes passage

1. An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.

2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

4. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over

archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.

5. Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane.

6. An archipelagic State which designates sea lanes under this article may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.

7. An archipelagic State may, when circumstances require, after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by it.

8. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

9. In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption. The

organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State, after which the archipelagic State may designate, prescribe or substitute them.

10. The archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given.

11. Ships in archipelagic sea lanes passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

12. If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

Article 54

Duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic State and laws and regulations of the archipelagic State relating to archipelagic sea lanes passage

Articles 39, 40, 42 and 44 apply mutatis mutandis to archipelagic sea lanes passage.

## APPENDIX II. ILLUSTRATIVE MAPS

A. Coastal Archipelagos

1. Canadian Arctic archipelago
2. Mergui archipelago
3. Bijagos archipelago
4. Norwegian "Skjaergaard"

B. Archipelagic States

1. Antigua and Barbuda
2. Cape Verde
3. Fiji
4. Indonesia
5. Papua New Guinea
6. Philippines
7. Sao Tome and Principe
8. Solomon Islands
9. Vanuatu

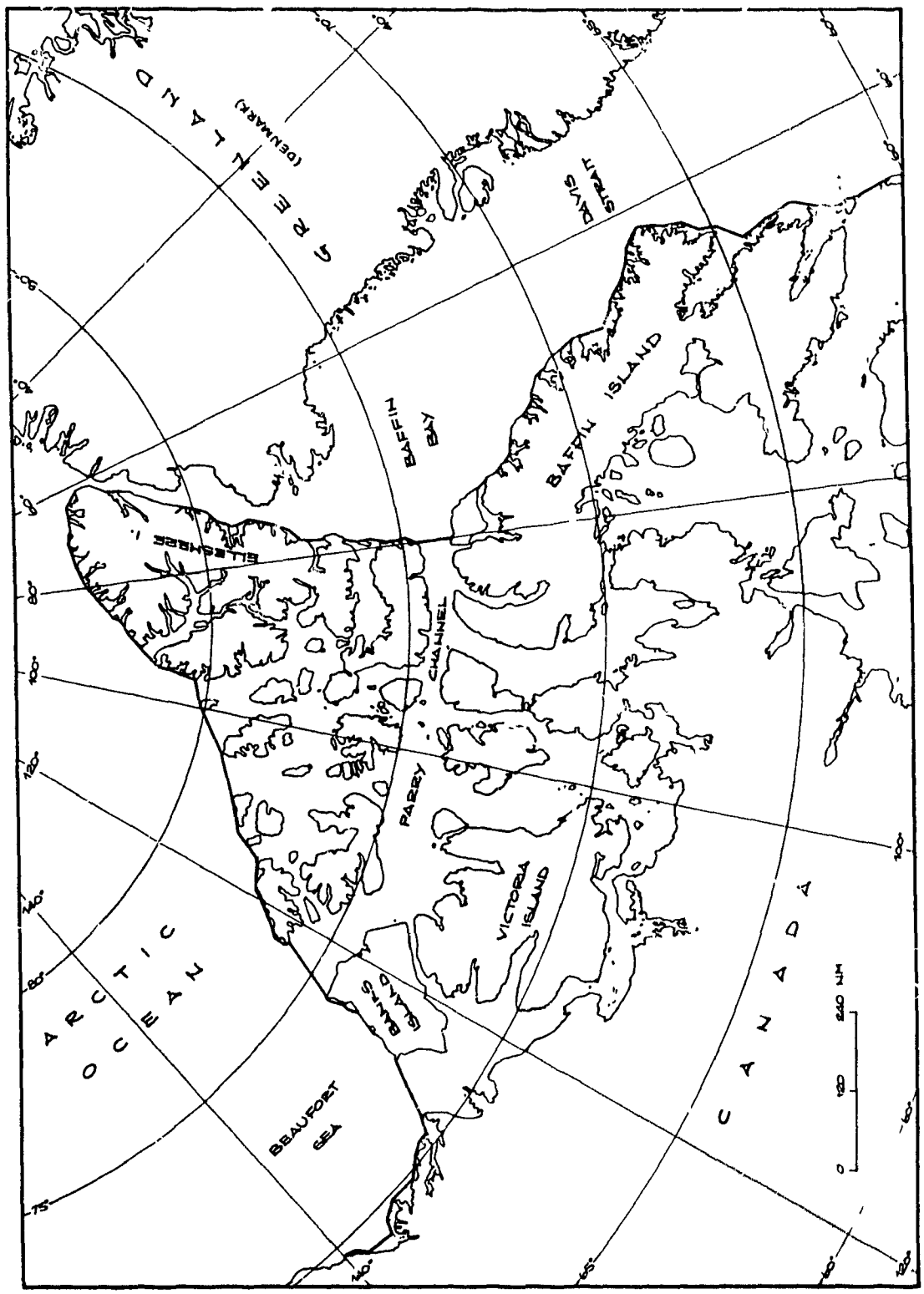
C. Midocean Archipelagos of Continental States

1. Faeroe Islands
2. Galapagos Islands
3. Canary Islands

A. Coastal Archipelagos

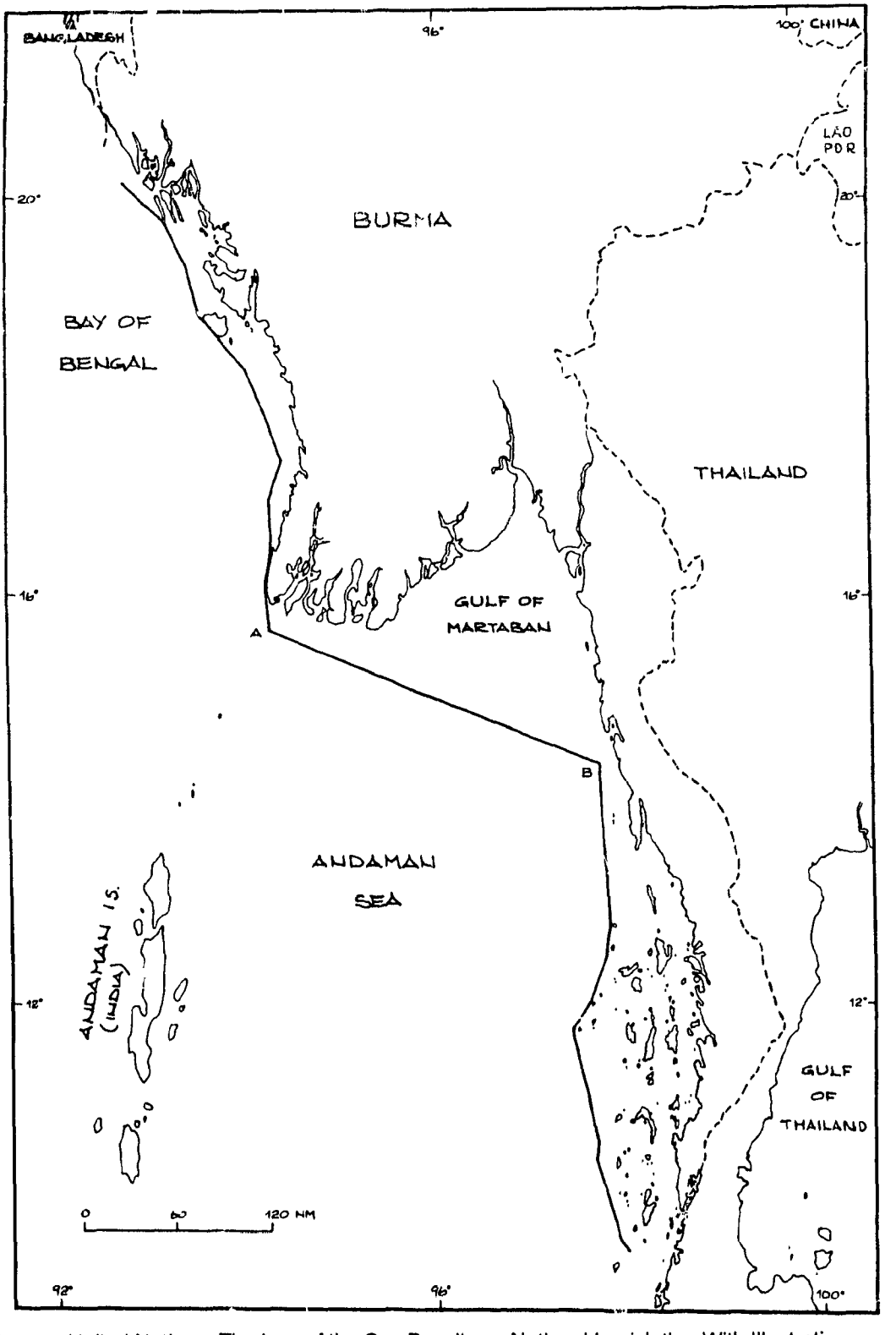
1. Canadian Arctic archipelago
2. Mergui archipelago
3. Bijagos archipelago
4. Norwegian "Skjaergaard"

1. Canadian Arctic archipelagos



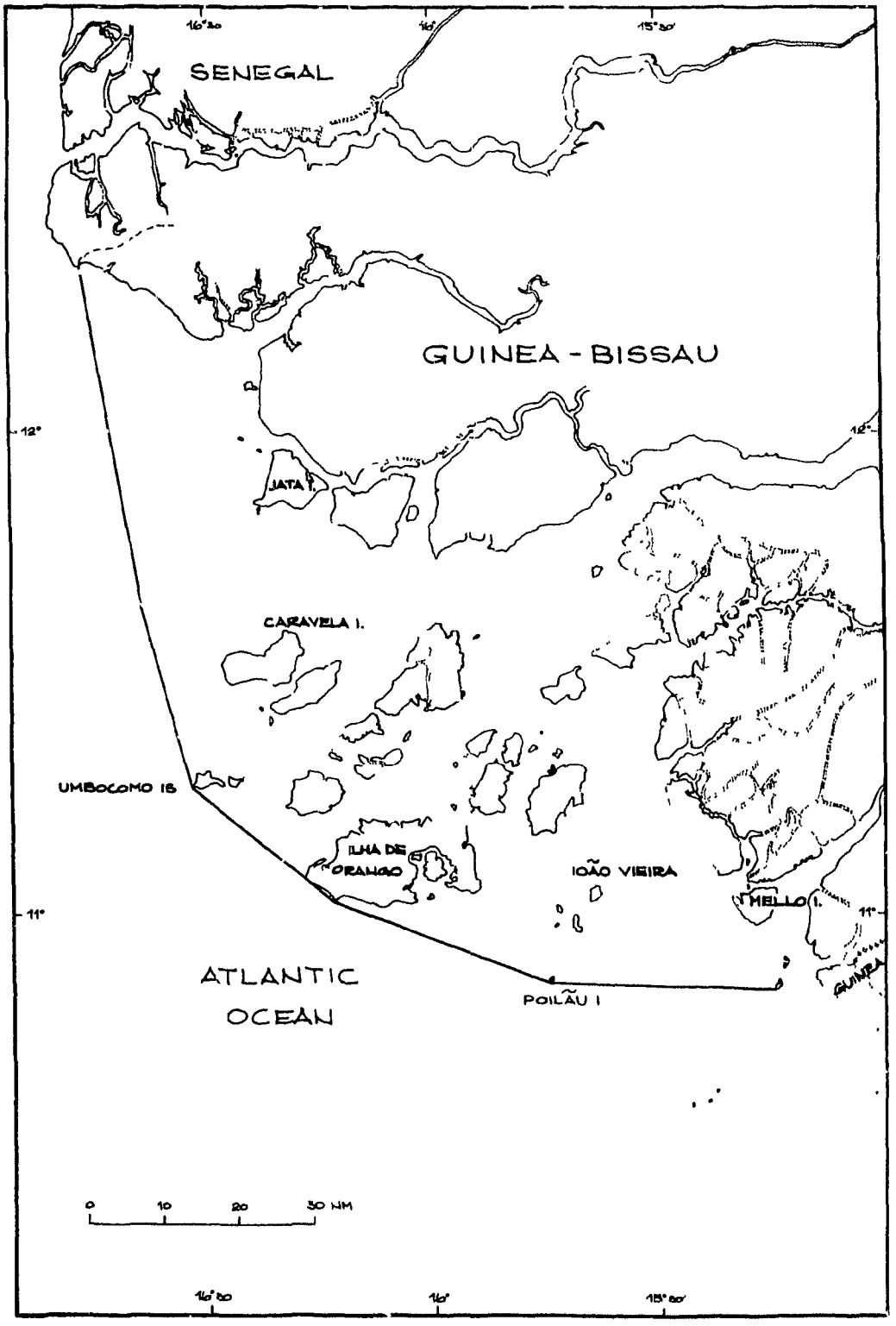

Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

2. Mergui archipelago



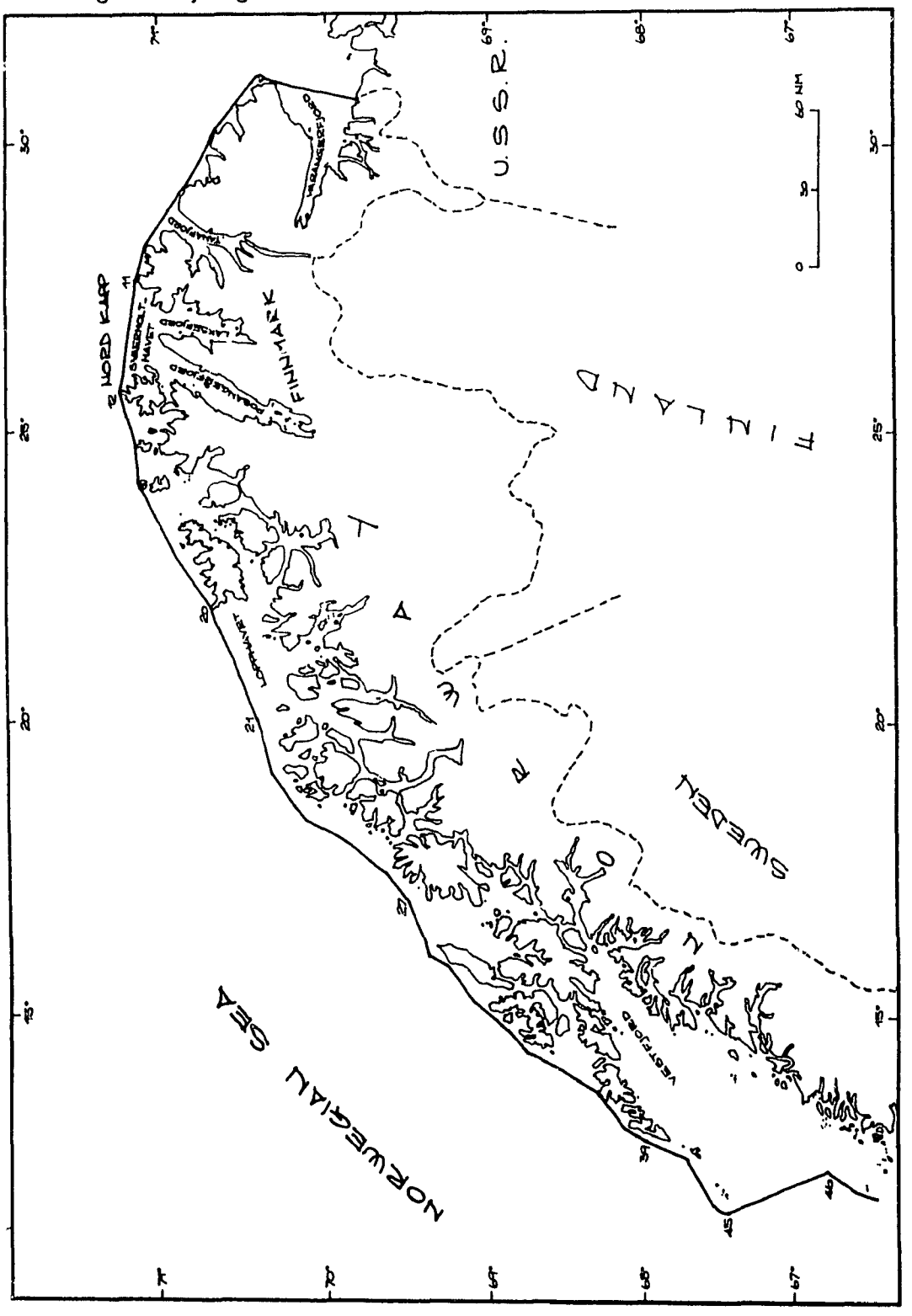

Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

3. Bijagos archipelago




Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U N. Publication, 1989

4. Norweigian "Skjaergaard"

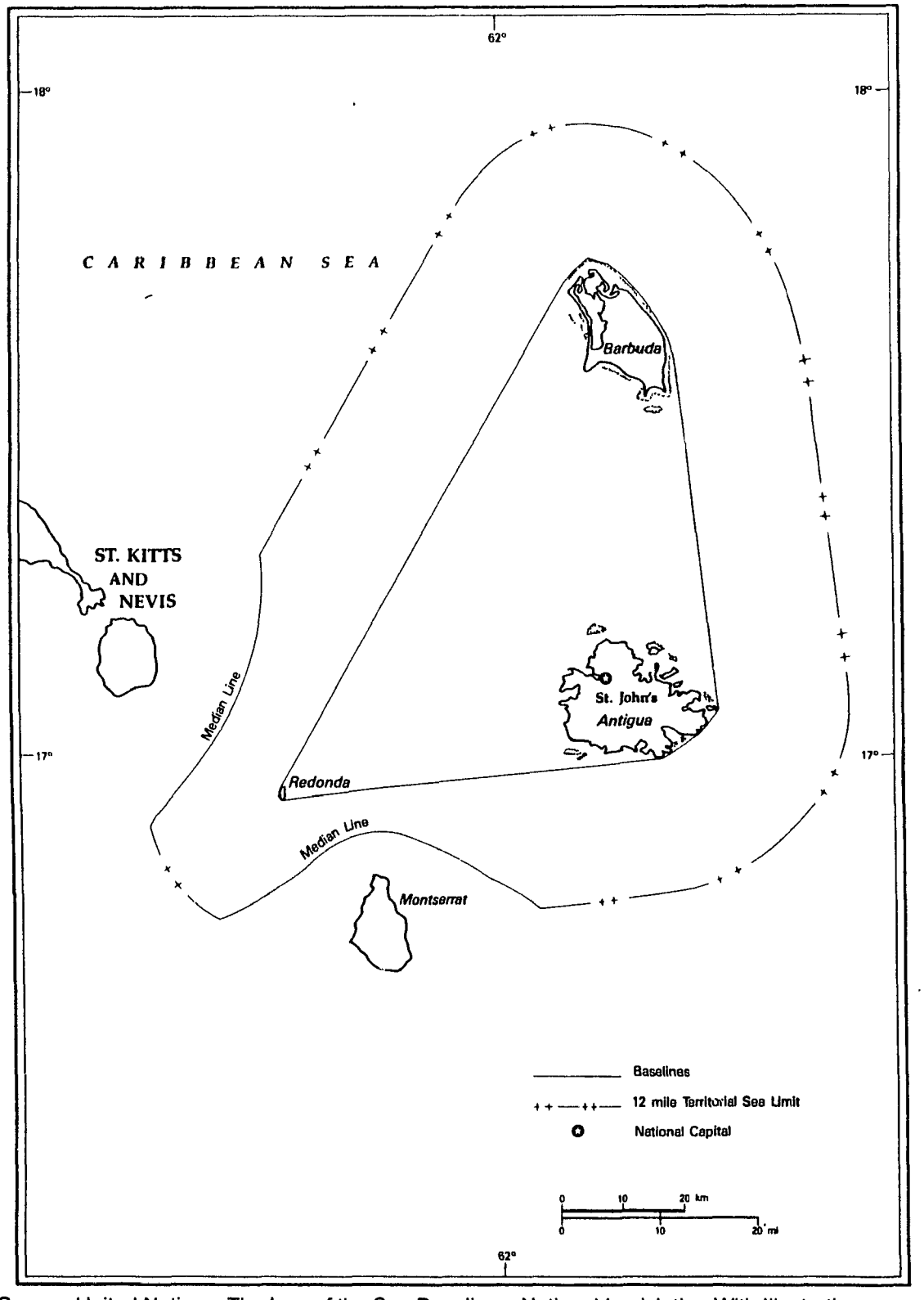



Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

B. Archipelagic States

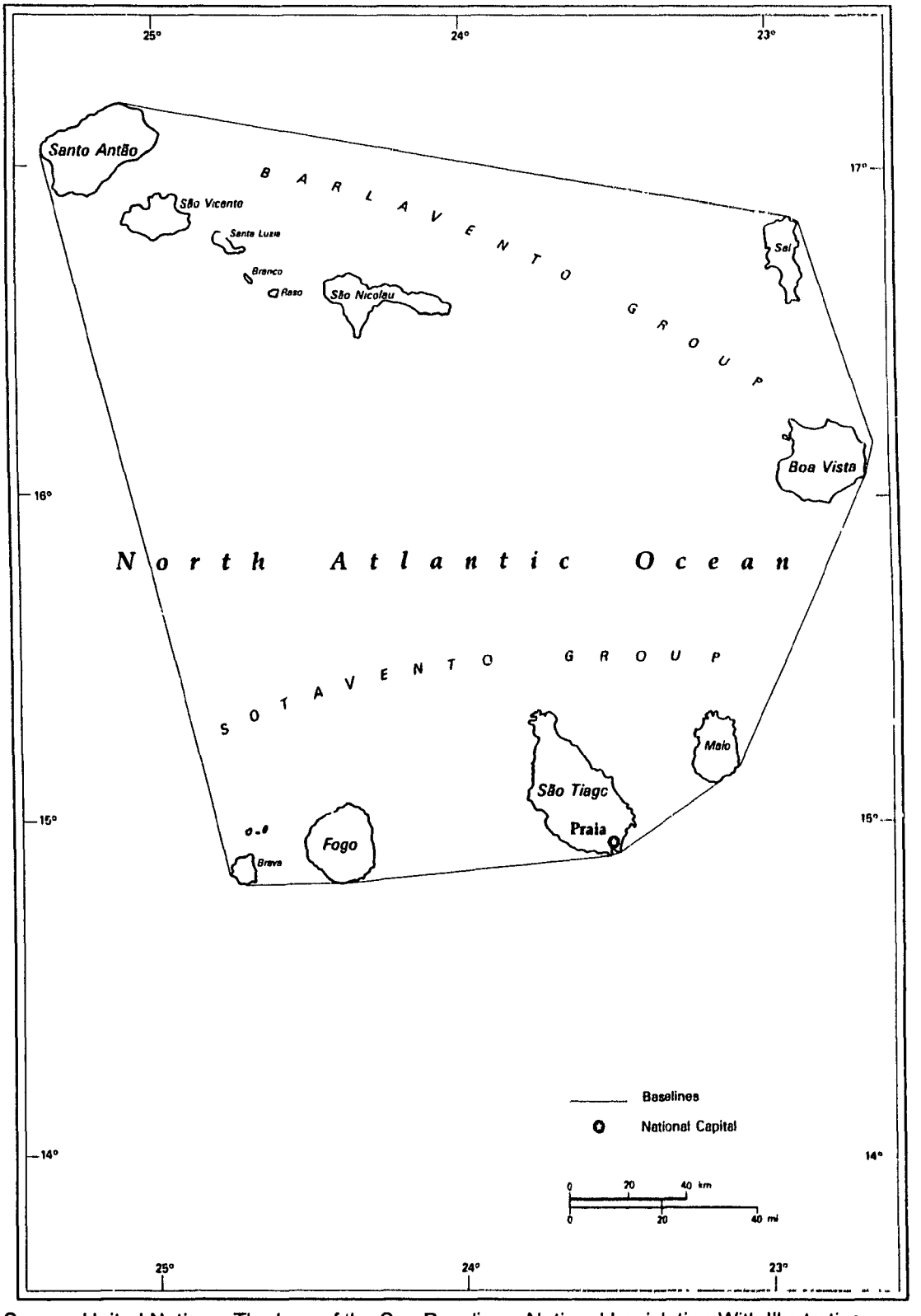
1. Antigua and Barbuda
2. Cape Verde
3. Fiji
4. Indonesia
5. Papua New Guinea
6. Philippines
7. Sao Tome and Principe
8. Solomon Islands
9. Vanuatu

1. Antigua and Barbuda



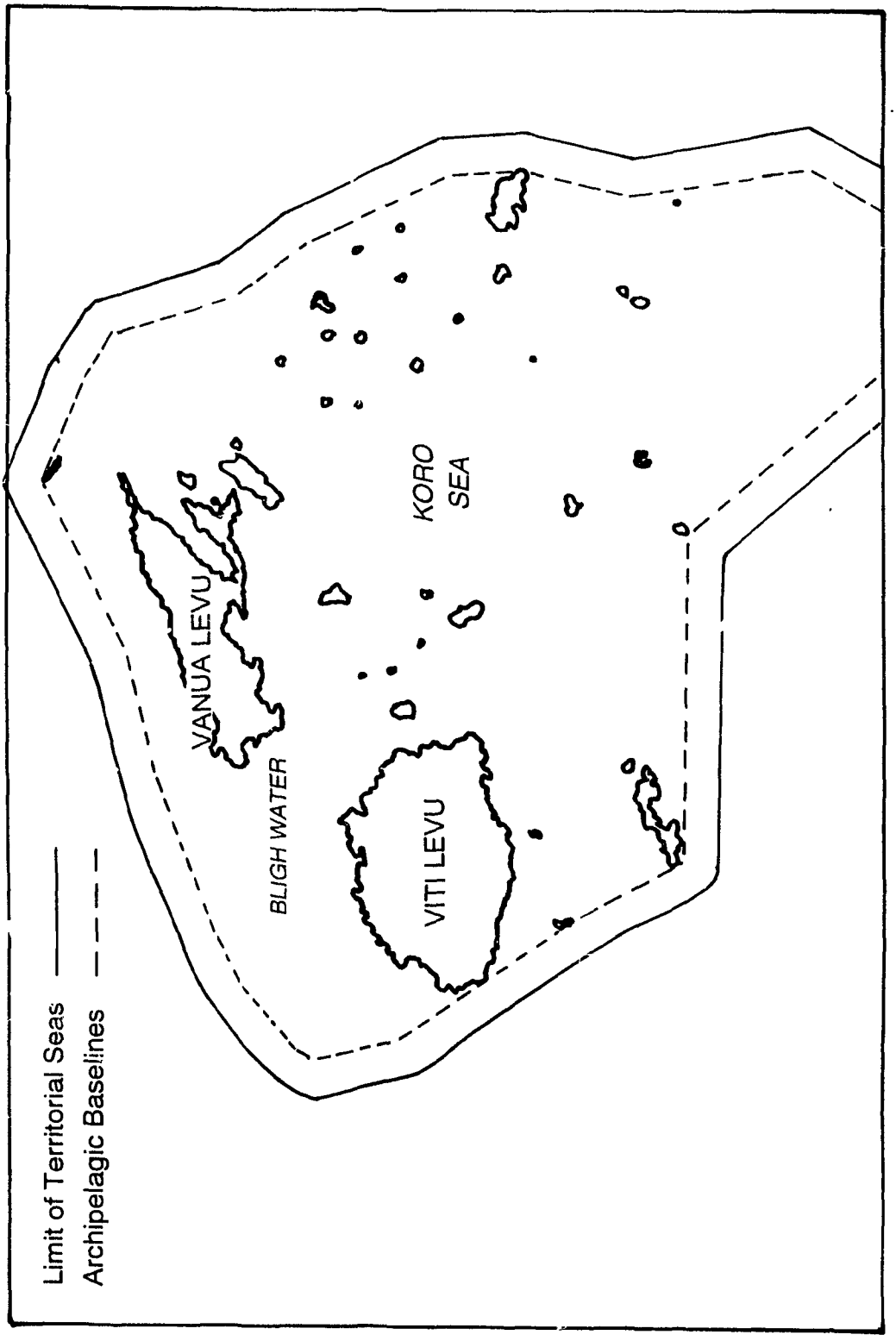

Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

## 2. Cape Verde



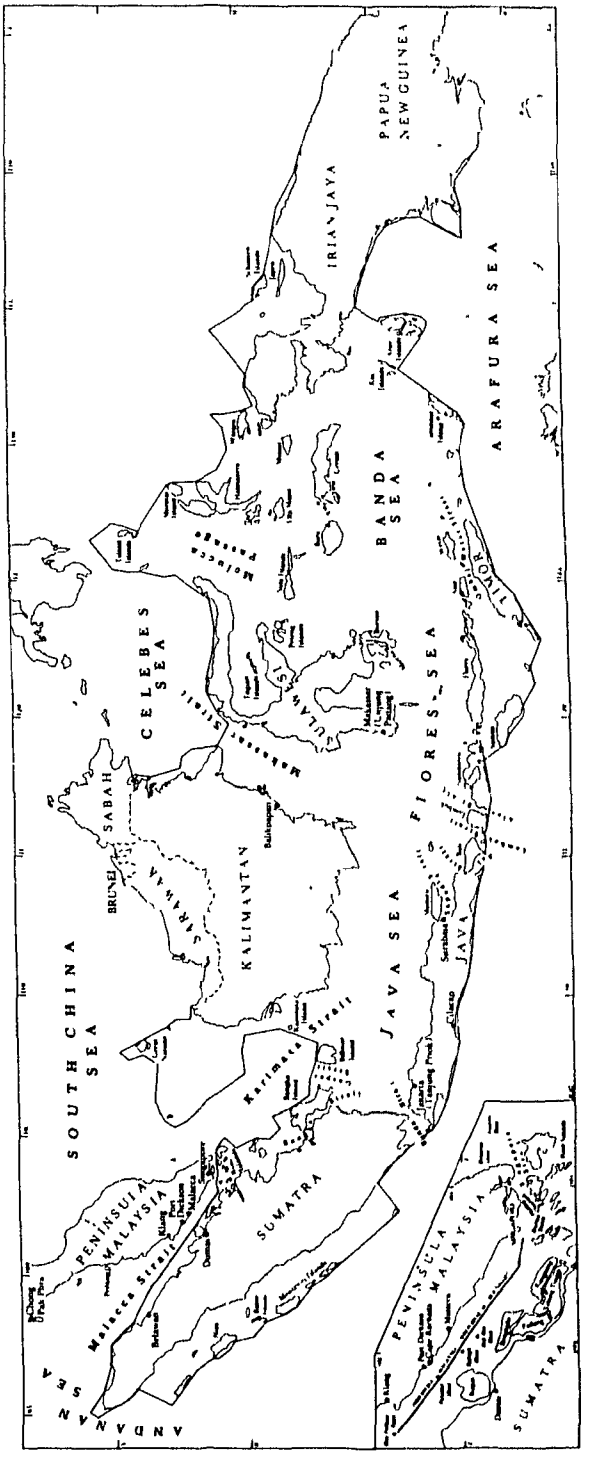

Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

3. Fiji



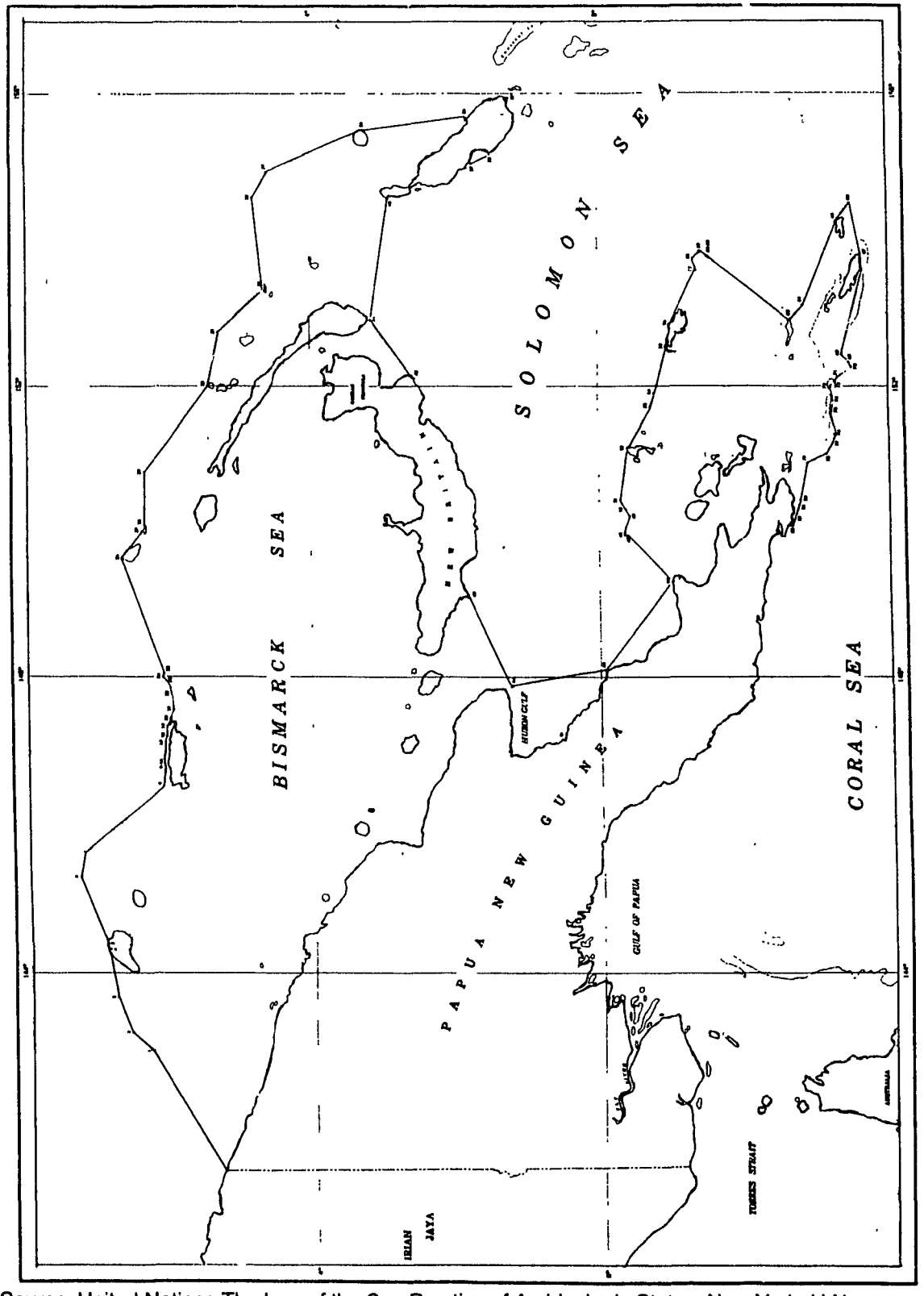

Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

## 4. Indonesia



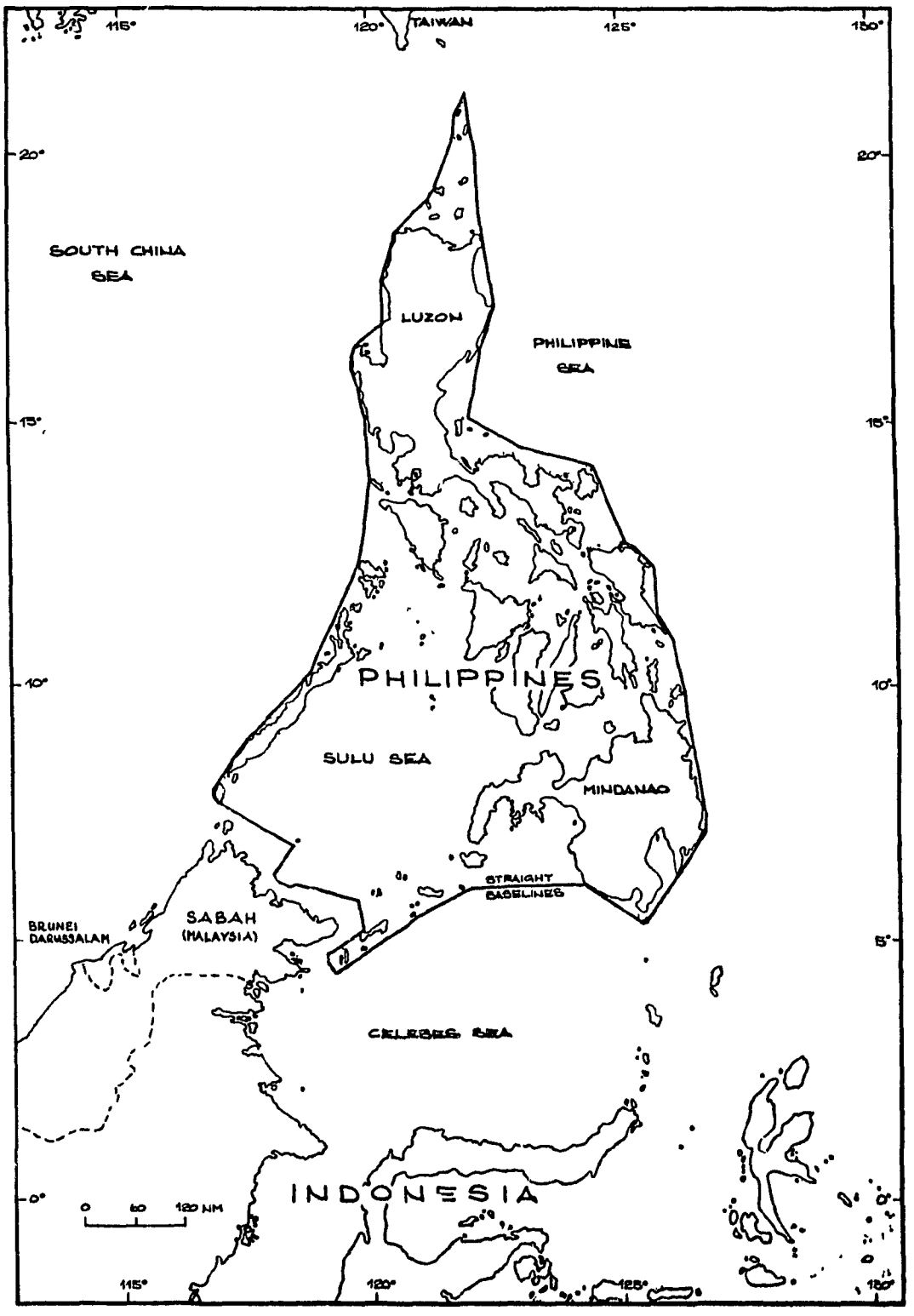

Source: Leifer, M. International Straits of the World Malacca, Singapore, and Indonesia. Alphen aan den Rijn: Sijthoff & Noordhoff, 1978, at 18.

5. Papua New Guinea



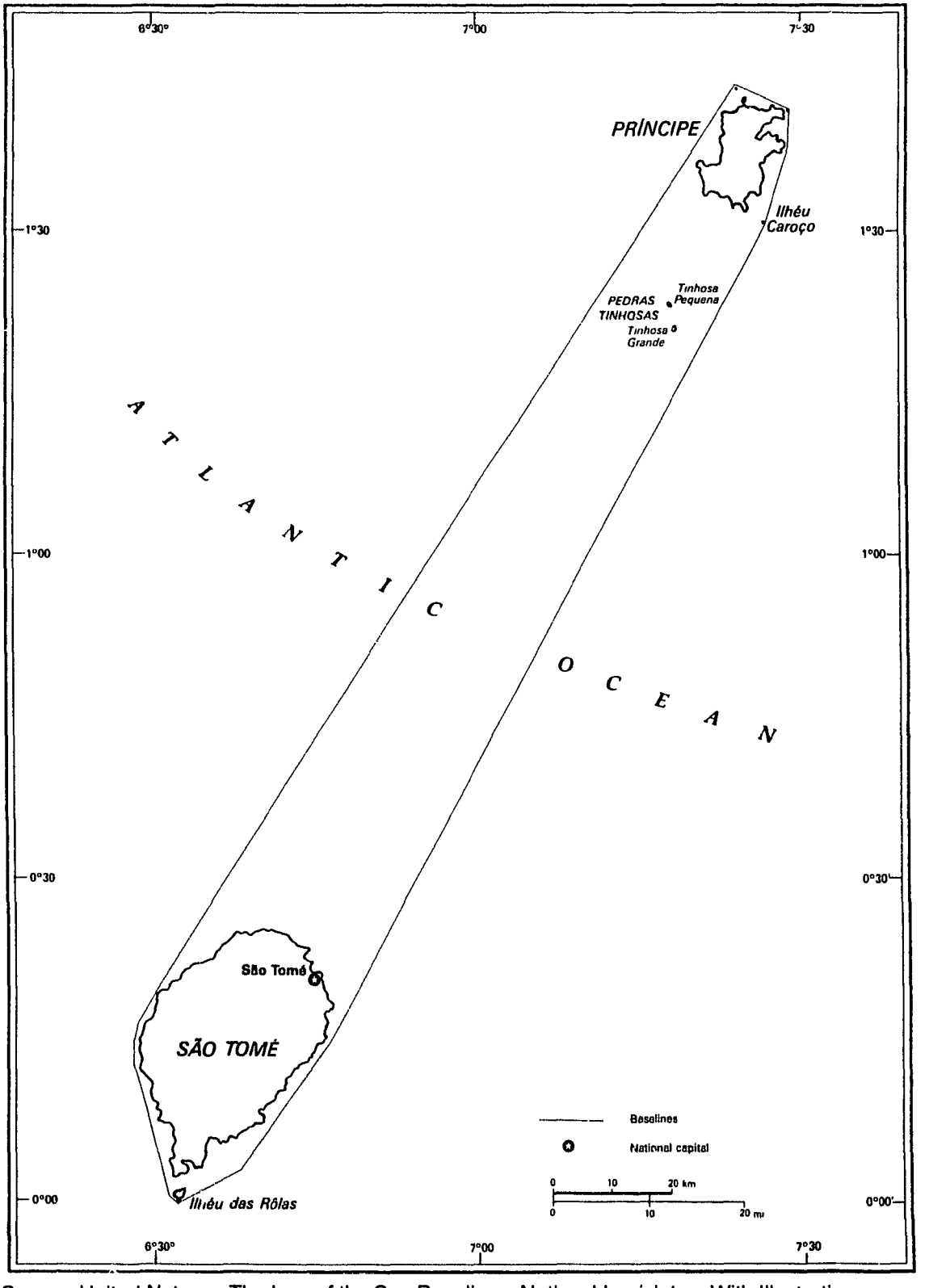

Source: United Nations The Law of the Sea Practice of Archipelagic States. New York: U.N. Publication, 1992.

6. Philippines



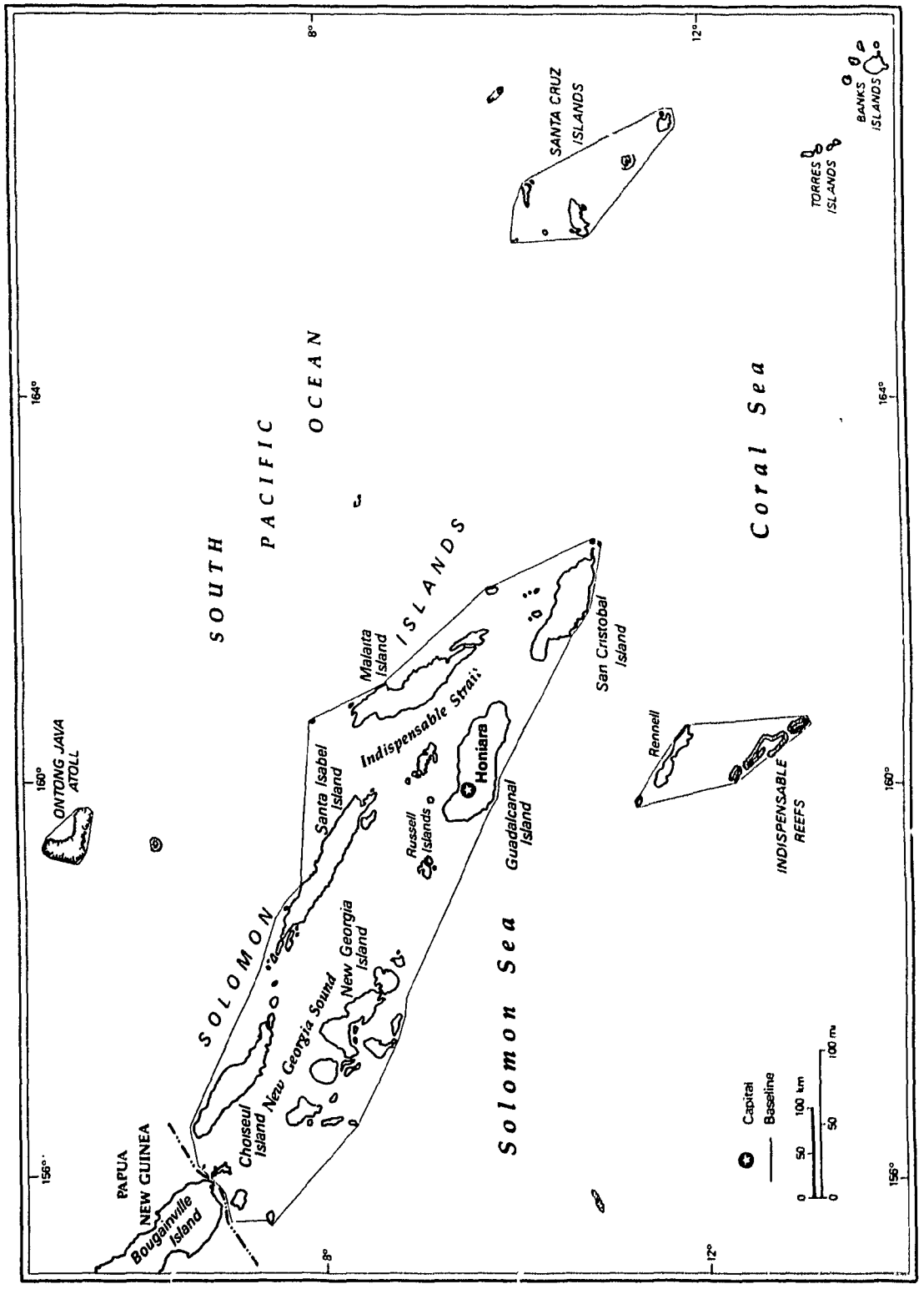

Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

7. Sao Tome and Principe



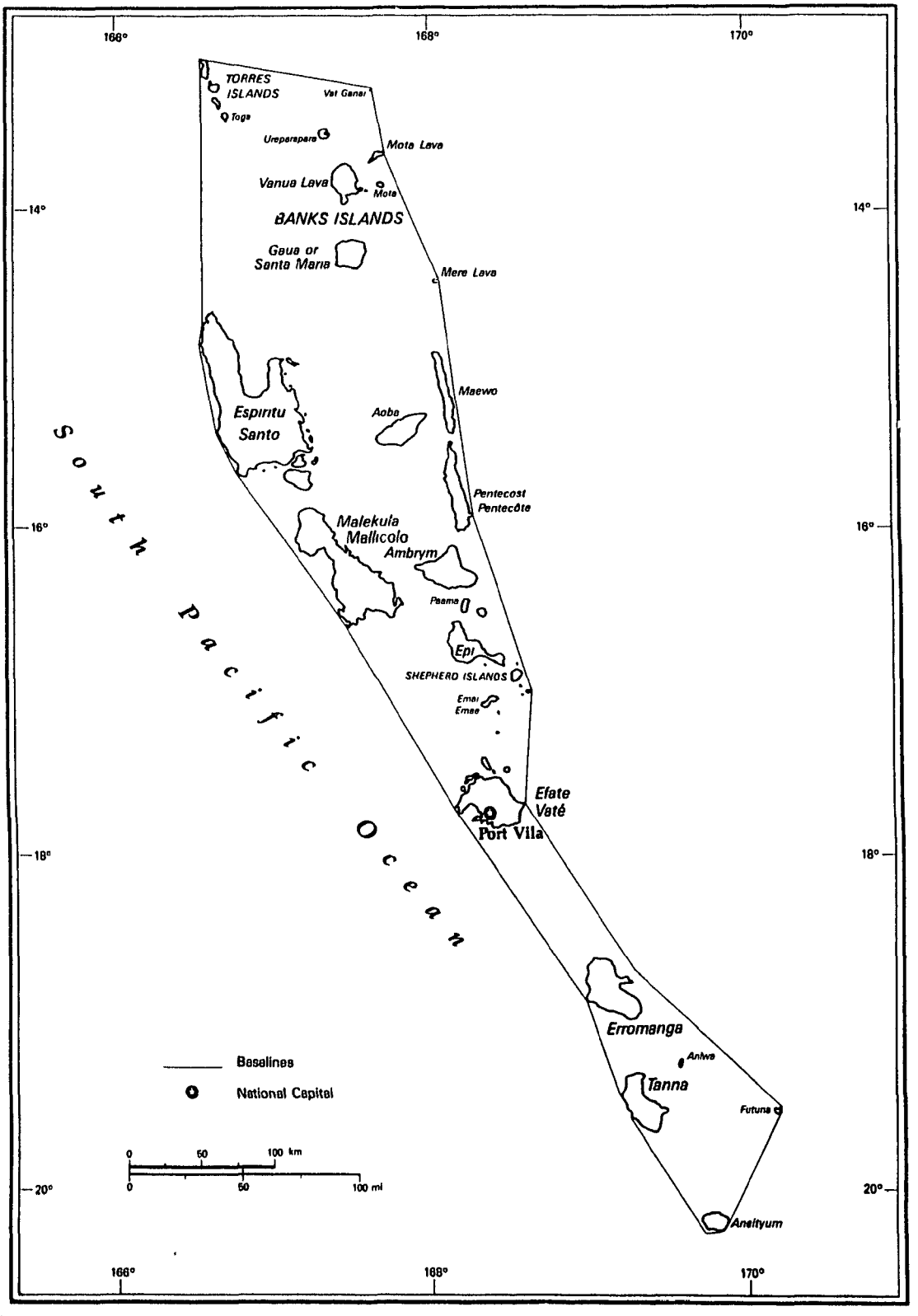

Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps, New York : U.N. Publication, 1989

8. Solomon Islands




Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

9. Vanuatu

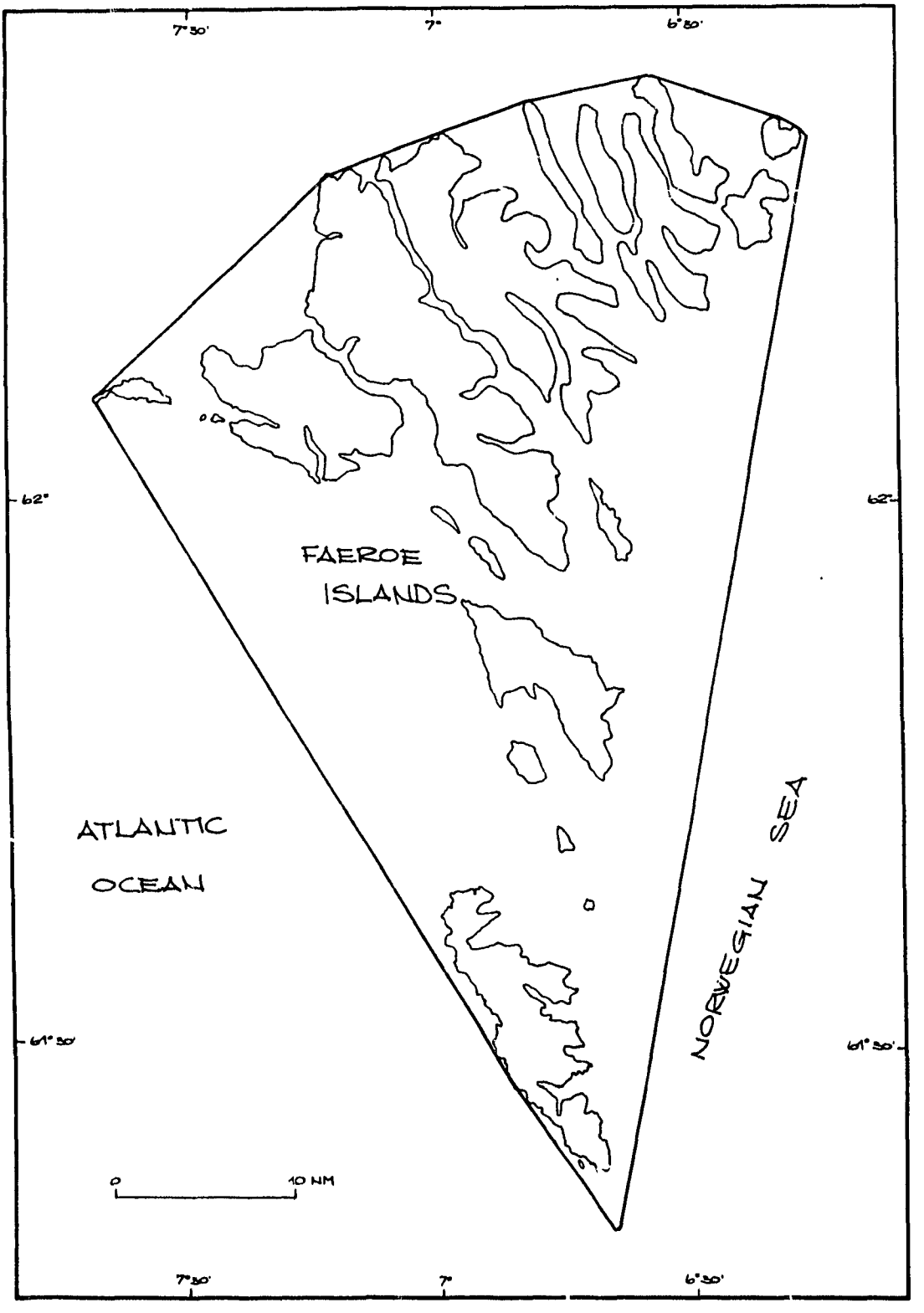



Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

C. Midocean Archipelagos of Continental States

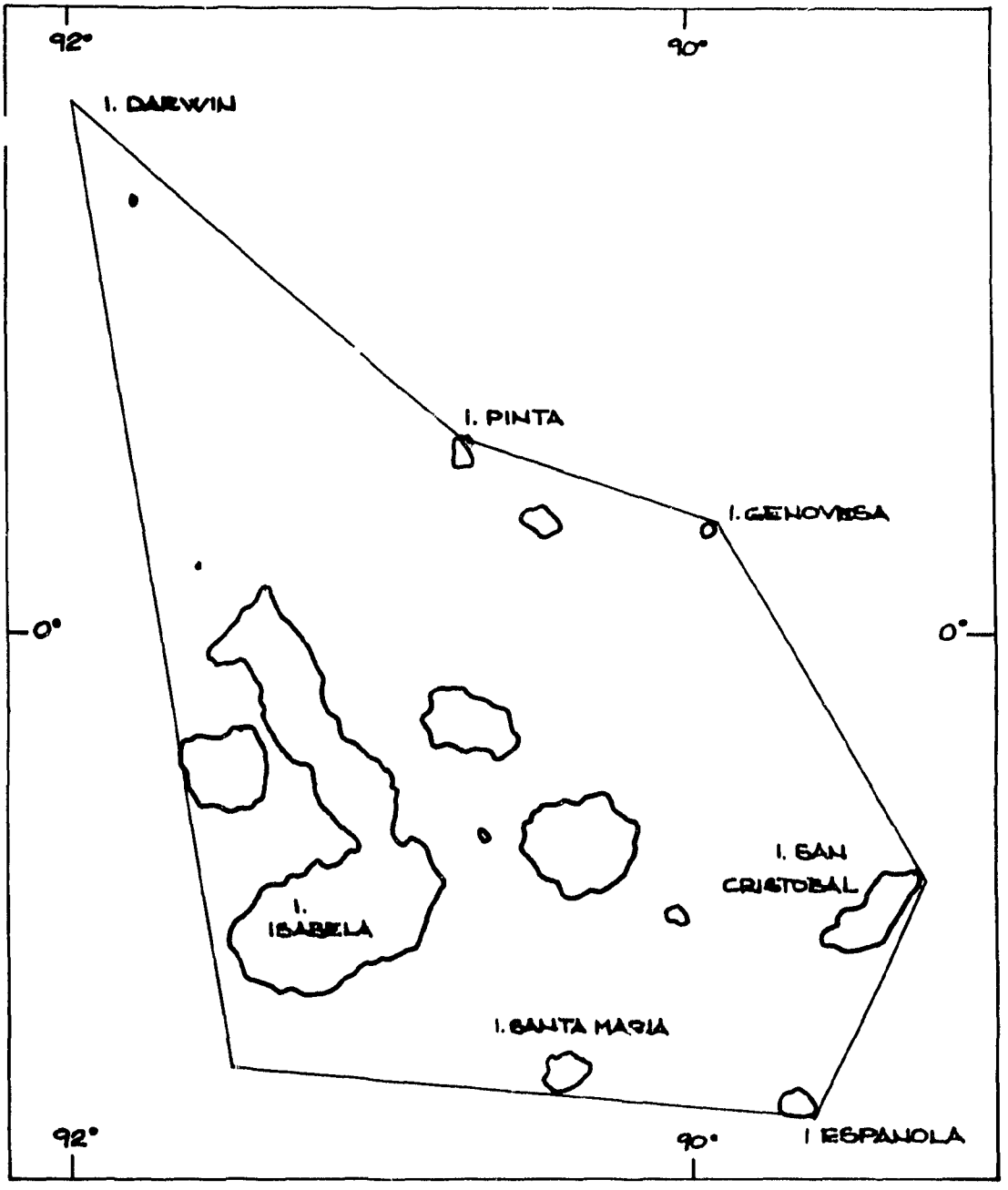
1. Faeroe Islands
2. Galapagos Islands
3. Canary Islands

1. Faeroe Islands




Source: United Nations The Law of the Sea Baselines: National Legislation With Illustrative Maps. New York : U.N. Publication, 1989

2. Galapagos Islands

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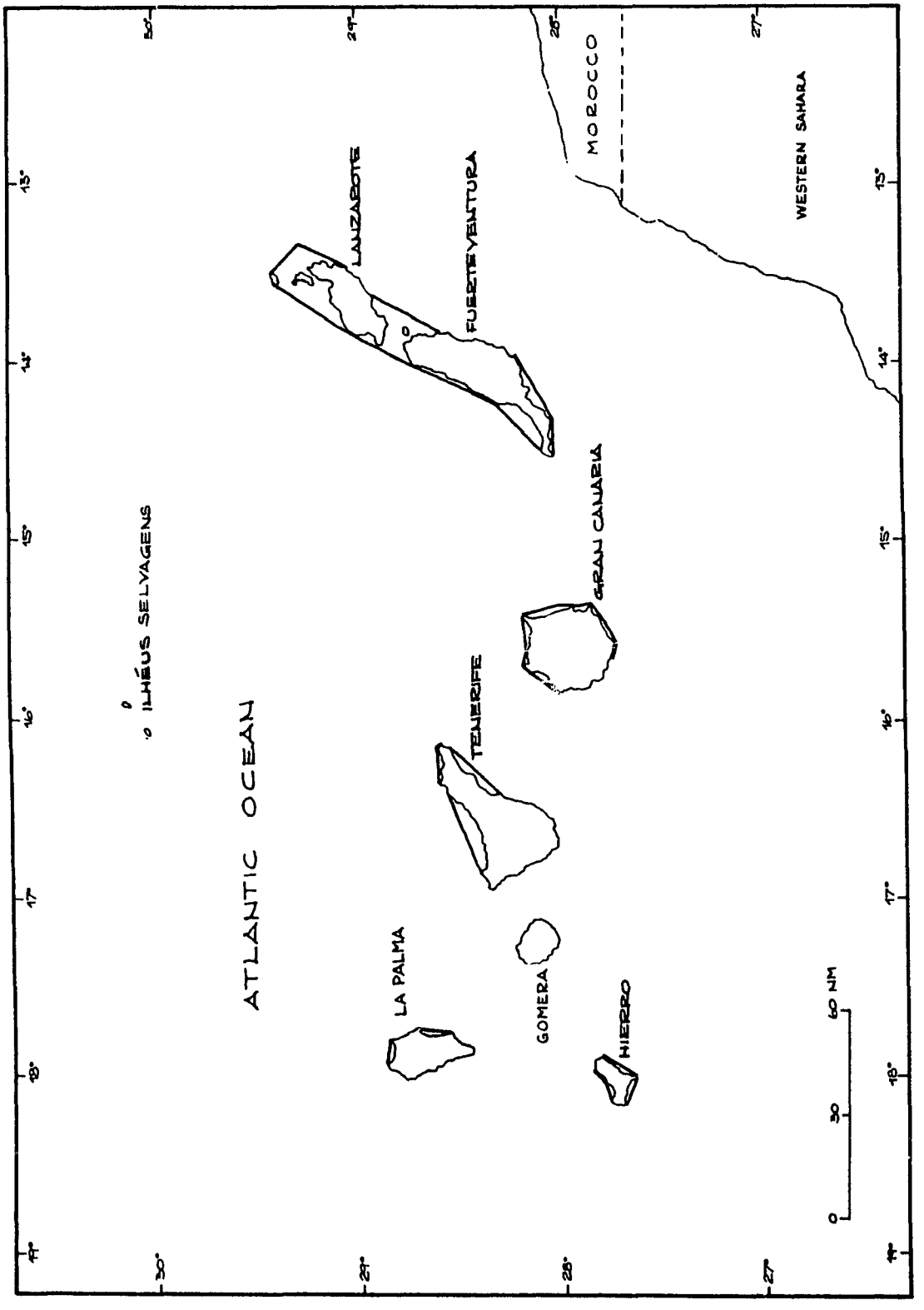
3. Canary Islands

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