THE ARCHIPELAGIC REGIME UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: ITS DEVELOPMENT AND EFFECT ON AIR LAW

J. Madraiwiwi

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Institute of Air and Space Law
McGill University
Montreal

ABSTRACT

The archipelagic regime established under the United Nations Convention on the Law of the Sea 1982 recognized the sovereignty of archipelagic States over their constituent islands and surrounding waters subject to the right of transit passage for ships and aircraft.

The compromise resolved the concern for freedom of navigation and the failure to delimit archipelagic waters that beset codification attempts in the 1920s and the first U.N. Conference on the Law of the Sea held in 1958.

The third U.N. Conference on the Law of the Sea (1973-1982) succeeded in devising an archipelagic regime. It carefully sought to balance the interests of archipelagic States and the international community.

For air law, and the Chicago Convention in particular, the archipelagic regime extends the areas subject to municipal jurisdiction and establishes a scheme for transit by aircraft which represents an important development in that it modifies notions of sovereignty.

RESUME

Le régime des archipels, établi en 1982 par la Convention des Nations Unies sur le Droit de la mer, reconnaît la souveraineté d'un Etat archipel sur les îles le constituant ainsi que les eaux territoriales, mais en tenant compte du droit de passage pour les bâteaux et les avions.

Un compromis fut réalisé garantissant la liberté de navigation mais échouant dans la définition des eaux territoriales des archipels, ce qui eût des conséquences négatives sur les tentatives de codification en 1920 et la Première conférence des Nations Unies sur le Droit de la mer, tenue en 1958.

La Troisième conférence des Nations Unies sur le Droit de la mer (1973-1982) réussit à définir le régime des archipels en tenant compte des intérêts des Etats archipels et de la communauté internationale.

En ce qui concerne le Droit de la navigation aérienne, et particulièrement la Convention de Chicago, le régime des archipels élargit les zones assujetties aux lois municipales et établit des directives pour le passage des aéronefs, ce qui représente un progrès significatif dans la modification de la notion de souveraineté.

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ABBREVIATIONS

Am.J. of Int'l Law	American Journal of International Law
B.Y.I.L.	British Yearbook of International Law
C.Y.I.L.	Canadian Yearbook of International Law
I.A.T.A.	International Air Transport Association
I.C.A.O.	International Civil Aviation Organization
I.C.J. Reports	International Court of Justice Reports
I.C.L.A.	International Comparative Law Quarterly
IFALPA	International Federation of Airline Pilots' Associations
I.LC.	International Law Commission
I.L.M.	International Legal Materials
Ind.J. of Int'l L.	Indian Journal of International Law
J.A.L.M.	Journal of Air Law and Commerce
L.N.	League of Nations
Mal.L.R.	Malaya Law Review
N.Y.I.L.	Netherlands Yearbook of International Law
Oc.Dev. & Int'l L.	Oceans Development and International Law
Phil. Int'l L.J.	Philippines International Law Journal
Phil. L.J.	Philippines Law Journal
R.S.N.T.	Revised Single Negotiating Text
San Diego L.R.	San Diego Law Review
S.N.T.	Informal Single Negotiating Text
U.N.	United Nations
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
Vir.J. of Int'l L.	Virginia Journal of International Law
Wash.L.Rev.	Washington Law Review

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INTRODUCTION

Establishment of a regime for archipelagic States was one of the most important achievements of the United Nations Convention on the Law of the Sea (hereinafter the "Convention") which was concluded by one hundred and seventeen States at Montego Bay, Jamaica on 10 December, 1982. The Convention will enter into force upon ratification by sixty States.[1]

The central features of this regime are recognition of the territorial (and maritime) integrity of an archipelagic State and the concept of archipelagic sealanes passage. Sovereignty is exercised over its constituent archipelagoes, islands and interconnecting waters as a whole subject to the right of ships and aircraft to the right of transit passage across archipelagic waters. The Geneva Convention of 1958 on the Territorial Sea and Contiguous Zone recognized a territorial sea around individual islands but allowed the drawing of straight baselines to delimit the waters of coastal archipelagoes and deeply-indented coastlines. It made no provision for oceanic archipelagoes which are distinguished from their coastal cousins by being

> "... 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.2

The archipelagic concept is based on the unity and interdependence of the land (archipelagoes) and surrounding seas that are shaped and determined by geographical, economic and political factors. Straight baselines are drawn to connect the outermost points of the outermost islands of oceanic archipelagoes. The territorial sea is measured outwards from these archipelagic baselines. The waters within such baselines are characterised as archipelagic waters. Together with the seabed, subsoil and resources therein as well as the airspace above, archipelagic waters are subject to the sovereignty of the archipelagic State. This thesis will examine the development of the archipelagic concept and its effect on air law. The concept has extended sovereignty by encompassing areas of water that were previously high seas and also limited it in the waters and the airspace where the right of transit passage for ships and aircraft applies.

The definition of an archipelagic State is considered in Chapter I and the evolution of the concept prior to the Third United Nations Conference on the Law of the Sea (UNCLOS III) examined. The UNCLOS III proceedings relating to the archipelagic provisions of the Convention are discussed in Chapter II, the provisions analysed and the status of the archipelagic concept in international law evaluated. The effect of the concept on the Chicago Convention is considered in Chapter III in three areas: the status of the airspace above archipelagic waters, the right of transit and innocent

passage and the rules of the air over the high seas. Finally, the way in which air law has been modified by the archipelagic concept is considered by way of conclusion in Chapter IV.

FOOTNOTES

1. By 9 December, 1984, the closing date for signature, 155 States and 4 others (Cook Islands, European Economic Community, United Nations Council for Namibia and Niue had signed the Convention. As at 31 December, 1986, 31 States and 1 other (United Nations Council for Namibia) had ratified the Convention. (Source: 26 I.L.M., 1987).

2. J. Evensen, "Certain Legal Aspects Concerning the Delimitation of Territorial Waters of Archipelagoes", UNCLOS I, Official Records, vol. 1, U.N. Doc.A/Conf. 13/18, 289 at 290.

CHAPTER I

DEVELOPMENT OF THE ARCHIPELAGIC CONCEPT

1. Definition

An archipelagic State is defined in Article 46 of the Convention which provides:

> "For the purposes of this Convention:
> (a) "archipelagic State" means a State constituted wholly by one or more archipelagoes and may include other islands;
> (b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such".

Article 47 prescribes conditions for the baselines to be drawn around "the outermost points of the outermost islands and drying reefs" of an archipelago within which an archipelagic State exercises sovereignty. The main islands are required to be included within these baselines and the ratio of the area of water to land mass, including atolls, is between 1:1 and 9:1. The baselines must not exceed 100 nautical miles in length although three per cent of the total number of baselines enclosing any archipelago may exceed that length up to a maximum of 125 nautical miles. The baselines must "not depart to any appreciable extent from the general configuration of the

archipelago". Finally, an archipelagic State must not draw its baselines so as to exclude the territorial sea of another State from access to the high seas or the exclusive economic zone.

The most significant aspect of the definition is the unified concept of the archipelagic State. The rationale for the concept was succintly put in the Indonesian Declaration of 13 December, 1957 which stated in part:

> "For the purposes of territorial unity, and in order to better protect the resources of Indonesia, all islands and the seas in between must be regarded as one total unit".1

Article 46 defines an "archipelagic State" and an "archipelago". An archipelagic State must be formed wholly by one or more archipelagoes. Some flexibility is allowed by including other islands which are not part of an archipelago. Baselines delimiting archipelagic waters would be extended to such islands provided they fulfilled the criteria for baselines set out in Article 47. Oceanic archipelagoes which constitute States are clearly contemplated and are to be distinguished from coastal archipelagoes of mainland States for which provision was made in the Geneva Convention of 1958 on the Territorial Sea and Contiguous Zone and incorporated as Article 7 in the Convention. The significance of the former was that it provided some basis upon which an argument could be mounted for an archipelagic regime. It became increasingly difficult

to differentiate oceanic archipelagoes from similar consideration when the geographical and economic criteria cited to justify the drawing of straight baselines around coastal archipelagoes were equally valid for the former.[2] To those such as McDougal and Burke[3] who doubted whether the general direction of the coast was an appropriate consideration for baselines drawn around oceanic archipelagoes, O'Connell replies that:

> "... the general direction of the coast notion is merely a cryptic way of expressing the intrinsic relationship between a line of natural features and the land to which they form a barrier. The essence of the mid-ocean archipelago theory is that such a relationship exists which is analogous to that of a complex coast of a continental country".4

Archipelagoes are defined in paragraph (b) of Article 46. There are three criteria: there must be a group of islands, interconnecting waters and other natural features; the group of islands, interconnecting waters and other natural features must be closely interrelated; and this interrelationship must be such that the islands form an intrinsic geographical, economic and political entity or have been historically regarded in such terms. "Other natural features" is not defined but appears to include drying reefs, fringing reefs, atolls and "that part of a steep-sided oceanic plateau... enclosed... by a chain of limestone islands and drying reefs lying on the perimeter of the plateau" of which mention is made in Article 47.

There are certain unsatisfactory aspects of the phrase "other natural features". First, the distinction between "fringing reefs" and "drying reefs" is unclear. Second, the distinction between drying reefs and low-tide elevations (which do not have lighthouses or similar installations permanently above sea level) is questionable.[5] The former may be used in the drawing of archipelagic baselines while the latter may not, both in the case of archipelagic States and in the case of coastal archipelagoes. While differing geologically, drying reefs and low tide elevations appear above water at low tide.[6] Perhaps this apparent inconsistency may be explained by the special requirements of the archipelagic regime where drying reefs are so numerous a phenomenon that some account has to be taken of them. Third, atolls may be used to delimit the waters of an archipelagic State whereas Article 6 only allows the territorial sea to be measured from "the seaward low-water line of the reef" of islands situated on atolls.[7] Paragraph 7 of Article 47 distinguishes between islands and atolls. Although this is in relation to the computation of the ratio of water to land, the distinction suggests that atolls under the archipelagic regime do not share the limitations in Article 6 which only allows a territorial sea where atolls include islands.[8] The rationale for such a distinction appears to lie in the nature of the archipelagic regime which necessitates some form of calculation that will enable an archipelagic State to ful-

fill the prescribed ratios of water to land as well as including natural features which have always been considered part of an archipelagic State.

Notwithstanding the apparent inconsistencies ensuing from a consideration of the definition of archipelagoes, paragraph (b) of Article 46 makes it clear that the constituent islands of an archipelago comprising an archipelagic State must form 'an intrinsic geographical, economic and political unit'. These three criteria must be present for qualification as an archipelagic State. The manner in which they would be applied remains an open question. The term 'intrinsic' would indicate a strict application but thus far there has been little questioning of the archipelagic status of States such as Indonesia, the Philippines, Fiji and Tonga. However, this does not lessen the fact that the geographical criterion is vague, there being no elaboration of it. The same observation applies to the economic criterion.

An exception to the uniform application of all three criteria is 'other islands' referred to in paragraph (a) of Article 46. They are not part of the constituent archipelagoes and are therefore not an intrinsic geographic part of an archipelago. They may also not necessarily be an economic component The only criterion such islands must fulfill is the political. The definition of an archipelagic State appears to have been devised to take account of islands which while not forming part

of archipelagoes were nevertheless part of an archipelagic State.

As an alternative to the three criteria and a means of ameliorating those requirements, an archipelagic State may be comprised of a group of islands which has some historical claim to being regarded as an intrinsic geographical, economic and political entity. This must obviously be a claim recognized by international law and not merely an assertion of the State concerned, although this is not expressed in Article 46. However, the observations of the International Court of Justice in the Anglo-Norwegian Fisheries Case 1951 are relevant in this regard:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. 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".9

As for the application of archipelagic baselines, Article 47 may only be utilised once a State claiming archipelagic status has fulfilled the requirements of Article 46.

2. Evolution

a) Early Attempts at Codification

The first concrete proposals on the delimitation of waters around archipelagoes were presented to the 33rd meeting of the International Law Association at Stockholm in 1924 by Professor A. Alvarez. The Association had previously discussed issues concerning the territorial sea at its 1892 Geneva Conference, 1895 Brussels Conference and at the Paris Conference in 1912 but the question of archipelagoes was not addressed. A problem academic bodies faced in this regard was State practice in the nineteenth century, Professor D.P. O'Connell noting that there was:

> "... no nineteenth-century precedent that has yet come to light respecting the enclosure of archipelagic waters in virtue only of the intrinsic association of islands which lie adjacent to each other, so that when the learned societies began to reflect upon the law of the territorial sea they had no occasion to advert to the archipelagic problem". (emphasis added) 10

Professor Alvarez' proposals were made separately from the Report and Draft Convention of the Committee on Neutrality of which he was chairman. Article 5 of the Alvarez draft dealt with islands and archipelagoes, the relevant provisions stating:

> "Where there are archipelagoes, the islands thereof shall be considered a whole, and the

> extent of the territorial sea waters laid down in Article 4 shall be measured from the islands situated most distant from the centre of the archipelago". 11

The proposal did not prescribe a maximum distance between the islands and it did not distinguish between coastal and oceanic archipelagoes. The 34th meeting of the Association in Vienna in 1926 adopted a draft convention on "The Laws of Maritime Jurisdiction in Time of Peace" which contained no reference to archipelagoes. One distinguished jurist opined that the concept was too difficult and vague a term given the variations in types of archipelagoes.[12]

The American Institute of International Law drafted a set of articles on the National Domain in the same year.[13] Article 7 dealt with archipelagoes and closely resembled the Alvarez proposals of 1924. It similarly did not contain any limitation on the maximum distance between the islands of an archipelago.

The issue was also taken up by the Institut de droit international. It had first set down the matter for discussion at its Lausanne session in 1888. The problem in delimiting the waters of coastal archipelagoes was discussed by the Norwegian jurist Aubert with special reference to Norway at the Institut's Hamburg session in 1889.[14] However, the resolutions adopted by the Institut in 1894 at the Paris Conference made no mention of archipelagoes.[15] In 1927 the Fifth Committee of the Institut proposed the following provision in relation to

archipelagoes:

> "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".16

This proposal by the Fifth Committee with Professor Alvarez and Sir Thomas Barclay as Rapporteurs was recast at the 1928 Stockholm Conference of the Institut as follows in Article 5 paragraph 2:

> "Where archipelagoes 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". 17

This provision differed from the original Alvarez-Barclay proposal in loosely distinguishing between oceanic and coastal archipelagoes. It also stipulated a maximum distance between the islands of an archipelago of twice the breadth of the territorial sea and provided that coastal archipelagoes must not be further from the coast than twice the breadth of the territorial sea. The Institut substituted three nautical miles for the six miles proposed previously at its Stockholm meeting for the breadth of the territorial sea.

The League of Nations was also active in formulating proposals for archipelagoes. In 1927 a Committee of Experts for the Progressive Codification of International Law with Dr. Walter Schücking as Rapporteur submitted a provision on archipelagoes as Article 5 paragraph 2 which read in part:

> "...In the case of archipelagoes, 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 centre of the archipelago".18

The provision did not stipulate a maximum regarding the distance between the islands of an archipelago.

The 1929 Harvard Draft on the Law of the Territorial Sea made no mention of archipelagoes in Article 11 but the provision was formulated in such a way as to achieve a broadly similar result to the Institut's 1928 proposals. Article 11 stated:

> "Where the delimitation of marginal seas would result in leaving a small area of high seas totally surrounded by marginal seas of a single State, such area is assimilated to the marginal sea of the State".19

The commentary on the Harvard Draft acknowledged that because the coastline and island groupings:

> "are of infinite variety, there is no conceivable general rule for delimiting territorial waters which will not result in anomalies on the chart when the three mile limit is drawn".20

Where such anomalies arose, these pockets of high seas would be assimilated to territorial water but a single belt of waters would be limited to cases

> "...when a straight line not to exceed four miles in length would enclose a pocket larger in area than a certain minimum".21

A single belt of territorial waters was recognised in certain limited circumstances.

In the same year, the Preparatory Committee for the League of Nations Conference for the Codification of International Law (the 1930 Hague Conference) sought to rectify the omission of a maximum distance between the islands of an archipelago in the Schücking proposal. Members of the League of Nations were requested to reply to questions framed 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 water".22

The Preparatory Committee received replies from nineteen governments: nine rejected the single unit theory;[23] five accepted some form of single belt of territorial sea,[24] one concerned itself only with coastal islands,[25] and one accepted Rapporteur Schücking's proposal.[26] The lack of unanimity did not augur well for the 1930 Hague Conference. There was no agreement on the issue of a single belt of territorial sea for archipelagoes or groups of islands.

The Preparatory Committee made the following observations on the proposition that territorial waters must be determined by reference to a single unit where two or more islands

are sufficiently close to one another or to the mainland:

> "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. Some governments are in favour of twice the breadth of territorial waters: others do not advocate any particular distance but desire to take account of geographical facts which would make it possible to consider as a whole portion of land at much greater distance from one another, particularly in the neighbourhood of the mainland. This view, moreover, makes it possible to consider as a single whole, possessing its own belt of territorial waters, a group of islands which are sufficiently near one another at the circumference of the group although within the group the necessary proximity does not exist".27

The Preparatory Committee mentioned two criteria for considering waters around an archipelago as a unit: distance between the constituent islands and geographical considerations. However, the criteria were presented as alternatives which indicated no agreement even among States that supported the unitary theory of archipelagoes.

Favouring the unitary theory, the Preparatory Committee formulated the following proposition as a basis for Discussion No. 13, stipulating a maximum distance between the islands of an archipelago:

> "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.
> The same rule shall apply as regards islands which lie at a distance not greater than twice the breadth of territorial waters".28

In an attempt to assuage the concerns of those States that rejected the unitary theory of archipelagoes, the Preparatory Committee proposed that the waters within archipelagoes have territorial sea status.

However, the 1930 Hague Conference failed to reach agreement on the question of archipelagoes. The Second Sub-Committee on the Territorial Sea reported that:

> "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 10 miles should be adopted as a basis for measuring the Territorial Sea outward in the direction of the high sea. Owing to the 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 waters within the group".29

It would appear that little technical information on issues such as the interdependence of land and sea as well as the nature of the baselines to be drawn presented obstacles. Furthermore, the basic differences between States opposed to the unitary concept of archipelagoes and those in favour was probably an equally relevant factor. One important consideration to be borne in mind is the fact that the Second Sub-Committee at the 1930

Hague Conference, as with other codification attempts by other bodies, was preoccupied with the maximum distances between constituent islands and the length of baselines to be drawn. This was somewhat premature given that maxium distances could only be applied with any certainty when there was agreement on the archipelago as a geographical concept which took account of the interdependence of the islands and surrounding seas.

Leading publicists in international law of the time tended to support the unitary theory on the basis that the constituent islands constituted a whole. Several of them drew this conclusion from the various codification attempts in the 1920's.

Jessup was of the view that:

> "In the case of archipelagoes, the constituent islands are considered as forming a unit and the extent of territorial waters is measured farthest from the centre of the archipelago".30

Wheaton stated that:

> "Where there is an archipelago it is usually claimed, as for Norway and in the draft (Article 7) of the American Institute of International Law, that the measurement of territorial waters shall run from the islands at the greatest distance from the centre of the archipelago".31

Higgins and Colombos stated their views with some certainty saying that:

> "The generally recognized rule appears to be that a group of islands forming part of an archipelago should be considered as a unit and measured from the centre of the archipelago".32

Gidel, the French jurist, was more cautious:

> "In the case of an archipelago situated far from land (mid-ocean archipelago) the breadth of the territorial sea must be measured in accordance with the ordinary rules, individually around each island; exceptions to these rules may follow from the theory of historic waters".33

Gidel's approach was more in accord with the views of the United Kingdom, the leading maritime power of the time. In its reply to the Preparatory Committee, the United Kingdom stated as follows:

> "A belt of waters around an island will constitute territorial waters, whether an island is near the mainland or far from it. This belt will be three miles wide and will be measured from low waters following the sinuosities of the coast of the island. In the case of a group of islands, each island will possess its own belt of territorial waters, there will not be a single belt for the whole group".34

b) Anglo-Norwegian Fisheries Case 1951

While the codification attempts of leading academic bodies in the 1920s achieved little of substance, they had nevertheless focused attention on the archipelagic concept and laid a foundation which could be developed further. The Anglo-Norwegian Fisheries Case[35] in 1951 marked the next stage in the evolution of the archipelagic concept.

The case concerned a dispute between the United Kingdom and Norway over the delimitation of a Norwegian fisheries zone

by a Royal Decree dated July 12, 1935. The United Kingdom challenged the validity in international law of the straight baselines drawn pursuant to the Decree along a part of the deeply indented Norwegian coastline along which were many archipelagoes. The International Court of Justice upheld the validity of the baselines.

The importance of the case lies in the broad principles enunciated by the Court to determine the validity of a straight baseline system. The first consideration was:

> "The close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such 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".36

The second criterion formulated by the Court was:

> "... The more or less close relationship existing between certain sea areas and the land formation 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 to be subject to the regime of internal waters".37

The Court then referred to a non-geographical factor:

> "... one consideration not to be overlooked, the scope of which extends beyond purely geographical factors that of certain economic interest peculiar to a region, the reality and importance of which are clearly evidenced by long usage".38

The significance of the principles enunciated for the archipelagic concept lie in the emphasis on the interrelationship of the land domain and the surrounding seas that may be given an added dimension by economic interests evidenced by long usage. Such considerations suggested some direction for an archipelagic regime because they were equally applicable to oceanic archipelagoes. The principles enunciated by the Court were eventually incorporated into Article 4 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and applied to the drawing of straight baselines to delimit the waters of coastal archipelagoes and deeply-indented coastlines. While the possible status of archipelagic waters had serious implications for freedom of navigation, the principles enunciated by the Court could be applied, with modifications, to oceanic archipelagoes. This served to underline an anomalous situation that was not to be dealt with until UNCLOS III.

c) ILC Proposals, UNCLOS I and II

In the years leading up to the first United Nations Conference on the Law of the Sea (UNCLOS I) at Geneva in 1958, the International Law Commission (ILC) was active in formulating archipelagic proposals as part of a proposed draft Convention on the Territorial Sea.

In his First Report on the Regime of the Territorial Sea, Special Rapporteur François proposed the following provision on archipelagoes at the fourth session of the ILC in 1952:

> "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 be internal waters".39

In his Second Report to the fifth session of the ILC in 1953, Professor François altered the provision on archipelagoes to read as follows:

> "With regard to a group of islands (archipelago) and islands situated along the coast the ten-mile line shall be adopted as baselines".40

This was clearly contrary to the judgment of the International Court of Justice in the Fisheries Case which had rejected the submission that an established rule of international law limited the length of straight baselines in relation to coastal and oceanic archipelagoes. In his Commentary on the provision, Professor François stated that Article 10 did not reflect the position at international law. It had been inserted as a basis for discussion should the Commission wish to study a text envisaging the progressive development of international law on the subject.[41] A Committee of Experts met in 1953 at Professor François' invitation to examine certain technical issues including the question of groups of islands.

The findings of the Committee of Experts were set out in the Amendments to the Second Report.[42] The issue of archipelagoes was not discussed at the fifth session, but draft Article XII in Professor François' Third Report incorporated the views of the Committee of Experts. It provided:

> "1. The term 'group islands', in the juridical 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".43

The provision was discussed at the eighth session of the ILC in 1955, Article XII now becoming Article XI. It arose when Professor François raised the implication for 'fictive days' of the ILC's decision to adopt a twenty-five mile closing line for bays in place of a ten mile distance.[44] Article XII in essence created fictive bays in the delimitation of the waters of archipelagoes. Professor François pointed out that a distance of twenty-five miles would be substituted for ten miles in accordance with the ILC decision on the maximum length of a bay's closing lines. If a distance of more than five miles was adopted for the other baselines, freedom of the seas would be eroded to a large extent because of its wide application.[45]

The proposal envisaged waters enclosed within the baselines as internal waters. In discussion, Mr. Garcia Amador sought to delete the distance limitation on the ground it was arbitrary while Mr. Sandstrom observed that the difficulty with the draft provision was that it attempted to cover two different types of cases in one article and he proposed its deletion.[46] Sir Gerald Fitzmaurice agreed it would be difficult to cover the different types of cases in one article, and further observed that the islands must be close together if the waters were to be treated as internal waters. That meant that if no agreement could be reached on maximum distances the provision should be deleted. The provision was duly deleted although this was later altered to provisional deletion.[48]

The issue was next discussed by the ILC in 1956, when Professor François reported that the question of archipelagoes had been raised by the Philippines in relation to the high seas and by Yugoslavia in relation to straight baselines.[49] Discussion was inconclusive. Mr. Spiroulos submitted a form of law on archipelagoes was already in force and based his proposition on the acceptance by the Hague Conference of certain principles which had been embodied in literature.[50] Mr. Sandstrom felt the ILC lacked expert advice in geographical configurations to be able to apply straight baselines to States consisting exclusively of islands. Sir Gerald Fitzmaurice said the real difficulty was definitional but he added that a special

regime could be established where the islands comprising a group were sufficiently close to form a geographical and political entity but a maximum distance between the islands would have to be prescribed.[52] Mr. Zourek pointed out that a special regime was required where groups of islands were far from the coast and formed a geographical, economic and political unit and it would be unfair if a regime was established for coastal archipelagoes with no similar solution for States composed of islands.

In its report to the UN General Assembly in 1956 the ILC omitted any reference to archipelagoes or groups of islands.[54] The issue was again shelved as being too complex. The accompanying Commentary on draft Article 10 (relating to islands) was reminiscent of the observations of the Second Sub-Committee on the Territorial Sea at the 1930 Hague Conference:

> "The problem is singularly complicated by the different forms it takes in archipelagoes. The Commission was prevented from stating an opinion not only by disagreement on the breadth of the territorial sea but also by lack of information on the subject...".55

However there was at least some realisation that the problem was more than a question of specifying maximum distances between the islands of an archipelago. A proposal for archipelagoes would have to define the geographical and other criteria while also specifying technical details such as the length and type of baselines to be drawn. Some means would

also have to be found to harmonize the interests of those States with freedom of the seas.

The ILC's failure to devise a regime for oceanic archipelagoes was reflected at UNCLOS I in 1958. While Yugoslavia and the Philippines proposed amendments to the draft Convention on the Territorial Seas which sought to recognise the unity of oceanic archipelagoes, both were subsequently withdrawn. The proposals by the Philippines related to an amendment to Article 5 to allow baselines to be drawn around oceanic archipelagoes and an additional paragraph to draft Article 10 (on islands). It stated that:

> "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".56

The proposal represented some attempt to apply the principles in the Fisheries case to oceanic archipelagoes. The Yugoslav proposals concerned the application of draft Articles 4 and 5 to islands, and the drawing of straight baselines to be applied to oceanic archipelagoes as well. These amendments were to be incorporated in Article 10.

The Yugoslav proposal was withdrawn after the Philippines, the country most directly concerned with the issue, withdrew its amendments. The Danish delegate reintroduced the Yugoslav proposals saying the complexities of the problem would be lessened by the application of Article 5 (concerning straight baselines) to oceanic archipelagoes.[57] This was because of the limitation on the length of baselines and the preservation of innocent passage in the waters enclosed within those baselines.[58] The British delegate agreed the issue was important but he felt it required further study.[59] The issue was again shelved and the Geneva Convention of 1958 on the Territorial Sea and Contiguous Zones made no mention of oceanic archipelagoes.

UNCLOS II was also held in Geneva, two years later. It similarly failed to advance the issue any further. Both the Philippines and Indonesian delegates explained the archipelagic status claimed by their respective States in detail. However, the conference was preoccupied with the question of the breadth of the territorial sea and the establishment of a fishing zone by coastal States in the high seas contiguous to the territorial sea.

d) State Practice

While the archipelagic concept was not formally recognised until the Convention of 1982, the less contentious issue of delimiting the waters of coastal archipelagoes by the application of straight baselines was settled by the Geneva Convention of 1958 on the Territorial Sea and Contiguous Zone. Article 4 incorporated the principles enunciated in the Fisheries case.

However, even prior to these developments several States had acted to apply straight baselines to their coastal archipelagoes. Denmark enacted its Neutrality Decrees of 27 January, 1927 and 11 September, 1938 declaring the waters between and inside its coastal archipelagoes as internal waters. Sweden applied the straight baseline system to its coastal archipelagoes by Customs Regulations of 7 October, 1927 and Norway issued Royal Decrees of 12 July, 1935 and 10 December, 1937 respectively, the validity of which was upheld in the Fisheries case. Other States which applied a straight baseline system to their coastal archipelagoes before the Fisheries case included Cuba, Yugoslavia, Saudi Arabia and Egypt.

The underlying basis for these actions was the geographic nexus between the mainland coast, coastal waters and archipelagoes lying therein. Also relevant the protection of marine resources, the economic importance of which many coastal States had long realised. These considerations were discussed.

in the Fisheries case. The most important reason for the application of straight baselines to delimit the waters of coastal archipelagoes was the concern to avoid the likelihood of pockets of high seas which would fragment the exercise of sovereignty over coastal waters. These concerns were also relevant for the archipelagic concept but the issue was complicated. The implications for freedom of navigation, definitional problems given the variation in types of archipelagoes, differences over the status of waters enclosed within archipelagic baselines and lack of a consensus on the need for such a regime would first have to be resolved.

The Philippines and Indonesia were the first States to assert archipelagic status: the former being the first State to assert its claim and the latter being the first to enact legislation giving effect to its archipelagic claims. Although the straight baseline system had been applied to oceanic archipelagos such as the Svarlbad in 1920, the Galapagos in 1938 and 1951 and the Faroes in 1955, these archipelagoes were dependencies of mainland States. Iceland, which applied a straight baseline system by the Regulations of 19 March, 1952 Concerning Conservation of Fisheries is more an island with an archipelagic dependency rather than an archipelago in the geographical sense as in the cases of the Philippines and Indonesia.

The Philippines articulated its claims in a Note Verbale to the Secretary-General of the United Nations dated 7 March, 1955 which stated inter alia:

> "All waters around between and connecting different islards belonging to the Philippine Archipelago, irrespective of their width or dimension, 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".60

Legislative effect was given to the intentions of the Notes Verbales of 7 March, 1955 and 20 January, 1956 by the Republic Act No. 3046 of 17 June, 1961. The eighty baselines drawn pursuant to the Act have a total length of 8,174.8974 nautical miles (for an average length of 102.185 nautical miles), enclose an area of 247,845 square nautical miles (including 212,745 square nautical miles of water). They close the international passages of Surigao Sibutu Passage, Balbao Strait and Mindoro Strait by virtue of the status of the waters enclosed therein.[61]

The Philippines asserted its archipelagic claims on the basis of historical title and treaty rights. Senator Arturo M. Tolentino, head of the Philippine delegation, expressed the basis of the historical title and treaty rights as follows at UNCLOS II:

> "As a consequence of the Spanish-American war just before the close of the nineteenth century, the Philippines was ceded by Spain to the United States, under and by virtue

> of the Treaty of Paris of December 10 1898. Article III of that treaty described territory being ceded not only by the phrase 'archipelago known as the Philippine Islands' but also by metes and bounds indicating the latitudes and longitudes of the perimetric boundary of the said territory. About three decades later on January 21, 1930, in a treaty between the United States and the United Kingdom signed in Washington, D.C., concerning the boundary between the Philippines and North Borneo, the same method of delimiting the boundaries of the Philippine archipelago to 'the territory over which the present Government of the Philippine Islands exercises jurisdiction. The Government of the Philippine Islands then was a mere agency of the United States in exercising sovereignty over the Philippines. And through this agency, the United States asserted and exercised sovereignty and jurisdiction over all the territory, both land and sea, included within the boundary limits set forth in the Treaty of Paris of December 10, 1898".62

Senator Tolentino then went on to assert that the extent of the jurisdiction described devolved upon the Philippines at independence after approval of the Philippine Constitution. It incorporated the delimitation of the boundaries in the Treaty of Paris, by the U.S. Congress and its passage into law upon signature by President Roosevelt. He described the end result in the following terms:

> "And when finally, on July 4, 1946, the United States withdrew all her authority and sovereignty over this territory, the Republic of the Philippines succeeded in the exercise of such sovereignty and jurisdiction over the same territory. When the

> Filipino people ratified their Constitution in a plebiscite, they knew it contained the description and delimitation of this territory over which they would exercise sovereignty upon acquiring independence".63

The United States responded that the Treaty of Paris merely set out the limits the land area within which belonged to the Philippines. Moreover, Florentino P. Feliciano, a distinguished Filipino lawyer, questioned those grounds observing that:

> "It may be suggested that this interpretation is not the only possible, nor even the most plausible, reading of Article 3 of the Paris Treaty... The natural import of these words is, it is submitted, that what was intended to be ceded was the land area found within the said imaginary lines. The regular geometric nature of the line suggests that its purpose was not so much to mark a political boundary but rather to make certain that all the islands comprising the archipelago were included in the transfer. It would also seem open to doubt whether Spain had, prior to the Treaty of Paris, claimed and treated the waters within these imaginary lines as territorial waters of its colonial possession".64

As regards the Philippines' claim to historic title, Mr. Feliciano stated that:

> "Most international law scholars agree that the indipensable components of historic title include, firstly, long continuous usage under claim of sovereignty, and secondly, recognition and acquiescence on the part of other States... So far as I know... this kind of historic inquiry has yet to be done; our assertion has anticipated proof".65

The United States through the Department of State informed the American Embassy in Manila by telegram dated 4 January, 1958 of its position.[66] The U.S. delegate at UNCLOS II also indicated that the United States had made its position known through diplomatic channels and its silence there was not to be taken as acquiescence.[67]

Apart from historic title and treaty rights, the Philippines also relied on economic and geographical considerations.

Indonesia followed the Filipino Notes Verbales with a Declaration dated 13 December, 1957 in which it proclaimed the waters around its islands internal waters. After taking into account Indonesia's geographical position as an archipelago, the Declaration referred to considerations of territorial unity, the protection of Indonesia's resources and stated further:

> "that all waters surrounding, between and connecting the islands constituting the Indonesian State regardless of their extensions or breadth are integral parts of the territory of the Indonesian State and therefore parts of internal or national waters which are under the exclusive sovereignty of the Indonesian State. Innocent passage of foreign ships in these waters is granted as long as it is not prejudicial to the security and sovereignty of Indonesia".68

The Declaration was followed by Act. No. 4 of 18 February 1960 which enacted into law the principles set out in the Declaration. Paragraph 2 of the preamble to the Act stated that "since time immemorial the Indonesian archipelago has constituted one entity".

Indonesia had no historical basis for such an assertion unlike the Philippines which could at least marshal an argument on such grounds. A Dutch colony until 29 December, 1949, Indonesia's Dutch rulers never considered the myriads of islands they governed as one territorial unit in the archipelagic sense. To have done so would have been contrary to the position the Netherlands had developed and maintained as a leading advocate of freedom of the seas since the time of Grotius in the seventeenth century. The Netherlands had advocated a maximum distance of six miles between the islands of an archipelago in its response to the Preparatory Committee for the 1930 Hague Conference. The Territorial Sea and Maritime Districts Ordinance, 1939, prescribed a three mile distance between islands of an archipelago. Indonesia's claim therefore was more reliably grounded in geographical, economic and political factors.

Article 3 of the Act provided for innocent passage through Indonesian internal waters but paragraph (2) of the provision made it clear it was a discretionary right that 'shall be regulated by Government Ordinance'. Thus the straits of Sunda, Sumba, Lombuk, Molucca and Macassar became subject to this discretionary regime. The baselines drawn under Article 1 of the Act number 196 and the system extends for 8,167.6 nautical miles enclosing 666,000 square nautical miles of international waters.[69] The United States through its Embassy in Jakarta delivered a protest to the Indonesian Foreign Office on 31 December,

1957.[70] Japan, Australia and the United Kingdom also protested the effect of the Indonesian Declaration.

The protests in both cases were prompted by the perceived threat to freedom of navigation: the Filipino Notes Verbales and the Indonesian Declaration stated that the water enclosed within archipelagic baselines would be internal waters. The concern of the leading maritime powers was heightened by the strategic location of Indonesia between the Pacific and Indian Oceans and the Philippines in relation to China and North Vietnam. For the United States, whose status as the leading world power depended partly on the ability to project its naval power, acceptance of the archipelagic concept would limit its capacity for action. Trade routes to Asia were also an important consideration: the status of internal waters could hold merchant shipping hostage to demands by the archipelagic State as rerouting would be a costly proposition. Japan was concerned to protect the fishing rights it enjoyed far from its shores. The actions of the Philippines and Indonesia set unwelcome precedents. Australia saw Indonesia's claims not only as a threat to freedom of navigation but as evidence of its expansionist ambitions in the region. Reaction to assertions of archipelagic status by the Philippines and Indonesia clearly indicated that the concept was not yet considered part of customary international law.

Tonga, an independent kingdom in the South Pacific, has also claimed archipelagic status. It relied on a Proclamation of George Tupou I of 24 August 1887 delimiting the kingdom as

> "all islands, rocks, reefs, foreshores and waters lying between the fifteenth and twenty-third and one hundred and seventy-seventh degree of west longitude from the Meridian of Greenwich".71

Upon becoming independent in 1968, Tonga declared its continued adherence to the Geneva Convention on the Law of the Sea and in a letter to the Secretary-General of the U.N. cited the Proclamation:

> "as indicating, by reference to the co-ordinates herein designated, the legal extent of the national jurisdiction of the kingdom".72

Tonga also noted that the Proclamation, which had been addressed to the leading powers, had not been protested.[73] Tonga has a proud sea-faring tradition. Given its situation, a group of small islands in a vast expanse of sea, it has always been heavily dependent on the marine resources of the surrounding waters. Therefore its claims to the areas delimited by the Royal Proclamation of 1887 on the grounds of historic usage and acquiescence are an arguable case.

Mauritius by an Act dated 16 April 1970 provided for the drawing of straight baselines around its archipelagoes. The relevant provision stated:

> "5(b) Where islands are so situated in relation to one another so as to form an archipelago, the baseline shall be straight lines joining points in the line of the low water

> mark of the outermost islands and those points shall be chosen so as to enclose, when joined together by straight lines the maximum area of sea".

However, Mauritius is in geographical terms more similar to Iceland as a mid-ocean island with an archipelagic dependency. Although active in the early stages of UNCLOS III as a member of the Archipelagic Group of States, it later withdrew.

On 22 July 1971, the Fiji delegate to the United Nations Committee on the Peaceful Uses of Seabed and the Ocean Floor beyond the limits of National Jurisdiction declared his country's acceptance of the archipelagic concept.[73] In doing so, the delegate stressed Fiji's economic interests in the surrounding seas stating that:

> "It is of importance to such countries, and of vital concern to Fiji, to control the development of their marine environments in order to ensure that such development is in their best interests and to prevent any form of degradation or pollution that may endanger the environment or deplete its resources".74

Fiji is an archipelago of some eight hundred islands in the South Pacific. A colony from 1874 to 1970, its British rulers disavowed any common belt of territorial sea for the archipelago consistent with their strong advocacy of freedom of navigation. The archipelagic claims articulated by Fiji in 1971 had their genus in the unity and interdependence of land and sea as it related to the distribution of marine resources. This had important implications for control of both the resources and their environment.

This approach marked a change in emphasis from questions of sovereignty and security as stressed by the Philippines and Indonesia to economic considerations as raised in the control of the marine environment and its resources by the Fiji delegate to the Sea-Bed Committee. The change was underlined by Fiji's wish to preserve the right of innocent passage across waters enclosed within archipelagic baselines. On 6 August 1973, Indonesia, the Philippines, Mauritius and Fiji submitted formal proposals for an archipelagic regime to the Sea-Bed Committee.

Archipelagic claims rest on two important foundations: sovereignty and the control of economic resources. The Philippines and Indonesia emphasized security and territoriality as aspects of sovereignty. The Filipino position was expressed as follows in its Note Verbale dated 7 March 1955:

> "...for purposes of its fishing rights, conservation of its fishing reserves, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over these waters". (emphasis added).75

In his statement at UNCLOS II on 25 March, 1960 Senator Arturo M. Tolentino, head of the Philippine delegation made the following general remarks about his country's archipelagic claims:

> "...In some cases this assertion and exercises of sovereignty may be based on historic title, in others upon existing

> treaty, and in still others upon actual occupation. Any rule adopted now which would fail to recognize and respect these established rights would neither be totally acceptable nor just. Any proposal that would reduce or limit the extent of territorial waters over which these States now actually assert and exercise sovereignty would amount to an impairment of their territorial integrity. It would be equivalent to a reduction of the effective means which they consider essential to self-preservation or survival." (emphasis added).76

Indonesia's reasons for its archipelagic claims appear in the Declaration of 13 December, 1957 which stated in part:

> "For the purpose of territorial unity, and in order to protect the resources of Indonesia, all islands and the seas in between must be regarded as one unit". (emphasis added). 77

This was expanded upon by Indonesia's delegate to UNCLOS I who pointed out the problems created by the treatment of Indonesia's islands as separate entities: the exercise of State jurisdiction and maintenance of communications would be undermined by fragmented sovereignty.[78] Security would be threatened and the well-being of the State called into question. In the Explanatory Memorandum to Act No. 4 under the section "General Explanation" Indonesia's concerns were further elaborated:

> "... Pockets of high seas in the midst of or in between the land-territories (islands) of Indonesia were putting functionaries in a difficult situation as they had to observe all the time whether they were finding themselves in national waters or on the high sea, because their rights of taking any step depended on their present position.

> In case of war between two parties, with their battle fleets moving to and fro on the high seas between Indonesian islands, our unity would be threatened".79

For the Philippines and Indonesia the archipelagic concept was fundamental: it concerned the territorial integrity of the State. The retention of a territorial sea around each constituent island was unacceptable because it undermined the unity of the State. This had critical implications for the exercise of sovereignty, the capacity to do so by an archipelagic State being compromised in its attempts to exert its authority over constituent islands.

The second consideration underlying the archipelagic concept is the control of economic resources. Two factors are important in this regard: the first being the interrelationship between the islands and the surrounding waters: and the second being the control of economic resources as an adjunct of unified sovereignty. As to the first factor, the existence of natural resources in an archipelago is dependent upon the geological and ecological interdependence of land and water.[80] The control of economic resources follows upon the exercise of unified sovereignty implicit on the archipelagic concept. Both the Philippines and Indonesia also cited the control of marine resources as a basis for their archipelagic claims. The Indonesian delegate to UNCLOS I noted that modern means of destruction in interadjacent waters posed a threat to the

population and to marine resources.[81]

Generally, the Philippines and Indonesia saw the control of economic resources in archipelagic waters as a different aspect of the question of sovereignty. However, the emphasis shifted as smaller States such as Fiji saw the archipelagic concept in terms of the control of the marine environment and the exploitation of its resources. In an increasingly inter-dependent global economy, archipelagic status enabled a State to protect marine resources from pollution and other threats to the environment. It also allowed a State to deal on more equal terms with the developed States, competition with which for the exploitation of marine resources was one-sided given the economic strength of the latter. It was the economic aspect of the archipelagic concept that reinforced support for it on the eve of UNCLOS III as States which might qualify for such status were seized with the possibilities presented by the control of marine resources in surrounding waters.

Several of the leading publicists in international law who evaluated the archipelagic concept in the period between UNCLOS II and UNCLOS III recognized, with the possible exception of Colombos, that it was not part of customary international law. However, there were differing emphases in the relevance of the concept for the development of a new rule for oceanic archipelagos.

McDougal and Burke in appraising the concept stated that:

"It is clear no consensus has evolved for any particular system for delimiting the bounds of authority over the waters of archipelagic islands... The general relationship of the adjacent waters to the islands is, on the other hand, no doubt of policy relevance even if it requires considerable refinement. In the absence of accurate knowledge of the facts necessary for determing this relationship it is of course difficult to evolve concrete recommendations. The important question for policy is whether any or all these factors establish a need for comprehensive control authority over the adjoining ocean, as these States sometimes suggest, or whether more limited specially designed zones of authority might adequately protect exclusive interests".82

Brownlie opined that:

"Indonesia and the Philippines employ straight baselines to enclose such island systems, and it may be that a polygonal system is the only feasible one in such special cases. It is arguable that this is only a further application to special facts of principles of unity and interdependence inherent in the Fisheries case. The difficulty is to allow for such special cases without giving a general prescription which, being unrelated to any clear concept of mainland, will permit of abuse".83

Colombos was perhaps the most accommodating stating that:

"The generally recognised rule appears to be that a group of islands, forming part of an archipelago should be considered as a unit and the extent of territorial waters measured from the centre of the archipelago".84

However, Professor J.H.W. Verzijl took the orthodox view when he stated that:

> "... the legal status of such outlying archipelagoes and their enclosed maritime areas has remained under the sway of traditional customary law. This again would in my opinion mean that the substantive content of Article 10(2) would continue to apply outlying archipelagoes must be held to have remained subject to the traditional rule that every island has its own territorial sea, with the result that only in so far as the territorial sea areas overlap or just meet, can there be any question of a common littoral belt along them and, possibly, of an inclosed interior sea of internal water".85

O'Connell, after an exhaustive review of state practice in relation to coastal and oceanic archipelagoes, concluded that:

> "The history of maritime jurisdiction in archipelagic waters is not, therefore, likely to prove a serious encumbrance upon newly-independent countries for any great length of time, and they are likely to group themselves with the defenders of national jurisdiction wherever they are found. For this reason, it would be unreasonable to suppose that resistance to archipelagic claims can be successfully persisted in over a long period in the face of successful assertion and widespread political support. The only progressive approach then is to seek to integrate the archipelagic principle in existing international law in such a way as to accommodate the interests of the archipelagic State without disproportionately affecting the interests of the other States and the world at large".86

The latter part of O'Connell's conclusions was echoed by Dr. Mochtar Kusumaatmadja, later Indonesian Foreign Minister during much of UNCLOS III negotiations, who stated that:

> "A regime of archipelagoes as part of the international law of the sea, to be acceptable must strike a reasonable balance between the needs and interests of the archipelagic States on the one hand and the interest of the international community in the maintenance of freedom of navigation on the other".87

The archipelagic concept while not yet part of customary international law appeared to have gained some legitimacy on the eve of UNCLOS III. The assertion of archipelagic status by the Philippines and Indonesia reflected the process of decolonization that began after the Second World War. It marked the beginning of national attempts to secure recognition of a concept considered by some newly-independent States comprised of archipelagoes as vital for both their territorial integrity and economic well-being.

FOOTNOTES

1. J.J.G. Syatauw, Some Newly Established Asian States and the Development of International Law (The Hague: Martinus Nijhoff, 1961) 173.

2. D.P. O'Connell, "Mid-Ocean Archipelagoes in International Law", (1971) B.Y.L.L. 1 at 15.

3. M.S. McDougal and W.T. Burke, The Public Order of the Oceans (New Haven: Yale University Press, 1962) 417.

4. O'Connell, supra, note 2 at 15.

5. I.L. Herman, "The Modern Concept of the Off-Lying Archipelago in International Law" (1985) C.Y.I.L. 172 at 192.

6. Ibid., at 193.

7. Ibid., at 191.

8. Id.

9. I.C.J. Reports 1951, 116.

10. O'Connell, supra, note 2 at 4.

11. Report of 33rd Conference (1924), 66 et seq.

12. Report of 34th Conference (1926), 19 per Lord Phillimore.

13. Am.J.of Int'l L., Spec. Suppl. 20, 1926, 318, 319.

14. Annuaire de l'Institut de droit international, vol. II, 136 et seq.

15. Ibid., vol. 13, 328 et seq.

16. Ibid., vol. 33, part 1, 1927, 81.

17. Ibid., vol. 34, 673.

18. L.N. Doc. C.196 M.70, 1927 V, 72.

19. Am.J. of Int'l L., Spec. Suppl. 23, 1929, 241 at 276.

20. S. Whittemore Boggs, "Delimitation of the Territorial Sea - The Method of Delimitation proposed by the Delegation of the U.S. at the Hague Conference for the Unification of International Law", Am.J.of Int'l L., vol.24, 1930, 541 at 552.

21. Id.

22. L.N.Doc. C.74 M.39 1929 V.2, 48.

23. Australia, Bulgaria, Denmark, Great Britain, India, Italy, New Zealand, Romania and South Africa.

24. Germany, Latvia and the Netherlands suggested a maximum distance of not more than six miles; Japan proposed a distance of ten miles; and Finland redrafted the provision in terms of twice the breadth of the territorial sea.

25. Norway.

26. Estonia.

27. L.N. Doc., supra, note 22 at 51.

28. Id.

29. L.N. Doc. C351(b) 145(b) 1930 V 16, 219.

30. P.C. Jessup, Law of Territorial Waters and Maritime Jurisdiction (New York: G.A. Jennings Co.,1927) 449.

31. Quoted in M.D. Santiago,"The Archipelago Concept in the Law of the Sea: Problems and Perspectives", 49 Phil.L.J. (1974) 315 at 348.

32. A.P. Higgins and C.J. Colombos, International Law of the Sea (London: Longmans, Green and Co., 1943) 76.

33. G. Gidel, Le droit international public de la mer Vol. 3 (Chateauroux: Etablissement Mellottée, 1934).

34. L.N. Doc., supra, note 22 at 49.

35. See note 9.

36. Ibid., at 131.

37. Id.

38. Id.

39. U.N. Doc. A/CN.4/53; Yearbook of the ILC (1952-II) 36, 37.

40. U.N. Doc. A/CN.4/61; ibid., (1953-II) 69.

41. Id.

42. U.N. Doc. A/CN.4/61 Add. 1.

43. U.N. Doc. A/CN.4/77; Yearbook of the ILC (1954-II) 5.

44. Ibid., (1955-I) 217.

45. Id.

46. Ibid., 218.

47. Id.

48. Ibid., 252.

49. Ibid., (1956-I) 193.

50. Ibid., 194.

51. Id.

52. Id.

53. Id.

54. Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159).

55. Yearbook of the ILC (1956-II) 270.

56. U.N. Doc.A/CONF 13/c.1/L59.

57. UNCLOS I, 1958, Official Records, vol. 3, 162.

58. Id.

59. Id.

60. Official Records of the General Assembly, Tenth Session, Supplement No. 9, 36, 37.

61. B.H. Dubner, The Law of Territorial Waters of Mid-Ocean Archipelagoes and Archipelagic States (The Hague:Martinus Nijhoff, 1976) 62. 8,174.9 n.m. = 14,387.8 km.

62. Id.

63. Statement by Senator Arturo Tolentino at UNCLOS III quoted in J.R. Coquia, "The Territorial Water of Archipelagoes", 1 Phil.Int'l L.J. 1962 at 153.

64. F.P. Feliciano, "Comments on International Waters of Archipelagoes", 1 Phil.Int'l L.J. 1962, 163 at 166.

65. Ibid.,167.

66. 4 Whiteman's Digest of International Law, 283.

67. UNCLOS II, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, A.CONF.19/8, 22.

68. Syatauw, supra, note 1.

69. Dubner, supra, note 51 at 64. 8167.6 n.m. = 14,374.9 km.

70. Whiteman, supra,note 66 at 284.

71. O'Connell, supra, note 2 at 45.

72. Ibid., 47.

73. Ibid.

74. Quoted in M. Kusumaatmadja, "The Legal Regime of Archipelagoes: Problems and Issues", in Law of the Sea Institute, Seventh Annual Conference, 1972 Proceedings, 166.

75. U.N. Doc.A/2934, 1955, 52-53.

76. See note 63, supra.

77. Syatauw, supra, note 1.

78. See note 57, supra, at 44.

79. Syatauw, supra, note 1, at 184.

80. Kusumaadja, supra, note 74, at 170.

81. See note 7, supra, at 44.

82. McDougal and Burke, supra, note 3, at 416.

83. I. Brownlie, Principles of Public International Law (Oxford: Clarendon Press, 1966) 187.

84. C.J. Colombos, International Law of the Sea 6th ed. (London: Longmans, 1967) 120.

85. J.H.W. Verzijl, International Law in Historial Prospective vol. III (Leyden: A.W. Sijthoff, 1970) 72.

86. O'Connell, supra, note 2 at 75.

87. Kusumaatmadja, supra, note 74 at 167.

CHAPTER II

ARCHIPELAGIC STATES UNDER THE 1982 CONVENTION

1. The Archipelagic Concept in UNCLOS III

The first session of UNCLOS III opened in New York on 3 December, 1973. Eleven sessions were to be held over the next nine years before work was completed and the United Nations Convention on the Law of the Sea signed on 10 December, 1982.

UNCLOS III established three committees to deal with different aspects of the law of the sea. The First Committee was responsible for the establishment of an international regime for the use of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction. The Second Committee dealt with 'traditional law of the sea issues' including fisheries, the continental shelf, navigation, the delimitation of national boundaries and the high seas. The Third Committee dealt with the preservation of the marine environment and scientific research.

The preparatory work for UNCLOS III was done by the UN Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (the Sea-Bed Committee). However, it was unable to prepare a single preparatory text for UNCLOS III. Established as an

Ad Hoc Committee by UN Genral Assembly (UNGA) Resolution 2430(XXII) of 18 December 1967, the Sea-Bed Committee was formalised by UNGA Resolution 2467(XXIII) of 21 December, 1968. Its mandate was to devise a regime for the exploitation of resources of the sea-bed and ocean floor beyond the limits of national jurisdiction in the light of the principle of the common heritage of mankind. This was reflected in UNGA Resolution 2749(XXV) of 17 December, 1970 titled "A Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the limits of National Jurisdiction".

The first call for UNCLOS III was made in UNGA Resolution 2750(XXV) (Part C) of 17 December 1970. It was felt that issues dealt with by the Sea-Bed Committee affected many basic issues in the law of the sea. To that end, the Sea-Bed Committee was directed to act as a preparatory committee for UNCLOS III. This was affirmed by UNGA Resolution 3029 of 18 December, 1972. Finally, UNGA Resolution 3067(XXVIII) of 16 November, 1973, confirmed the date of the opening session of UNCLOS III, decided its mandate would be to adopt a convention on the law of the sea and dissolved the Sea-Bed Committee.

The archipelagic concept was substantially discussed at the second session of UNCLOS III which was held in Caracas, Venezuela in 1974. On 18 July, Fiji, Indonesia, Mauritius and the Philippines presented draft articles on the nature and characteristics of the territorial sea.[1] Paragraph 1 was as follows:

"The sovereignty of a coastal State extends beyond island territory and international waters, and in the case of archipelagic States, their archipelagic waters, over an adjacent belt of sea defined as the territorial sea".

On 9 August, 1974, Fiji, Indonesia, Mauritius and the Philippines presented draft articles relating to archipelagic States to the Second Committee.[2] These were based on draft articles submitted to the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction (the Sea-Bed Committee) on 6 August, 1973.[3] These appear as follows:

"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 archipelagoes.
3. For the purposes of these articles an archipelago is a group of islands and other natural features which are so closely inter-related 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 extent of 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 as 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 the provisions of 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 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 sealanes 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, and
d. the special characteristics of particular ships or their cargoes.

5. An archipelagic State may make laws and 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 installations 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 any warship does not comply with the laws and regulations of the archipelagic State concerning passage through any sealane 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."

The second set of draft articles presented by Fiji, Indonesia, Mauritius and the Philippines (the Joint Proposals) differed only slightly. Article 1 now appeared as follows:

"1. These articles apply only to an archipelagic State.
2. An archipelagic State is a State constituted wholly by one or more archipelagoes and may include other islands.

3. For the purposes of these articles an archipelago is 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."

In Article 2, paragraph 5 was added as follows:

"5. If the drawing of such baselines encloses a part of the sea which has traditionally been used by an immediately adjacent neighbouring State for direct communication, including the laying of submarine cables and pipelines, between one part of its national territory and another part of such territory, the continued right of such communication shall be recognized and guaranteed by the archipelagic State".

Article 4 was altered slightly and recast as follows:

"Subject to the provisions of article 5, ships of all States (whether coastal or not) shall enjoy the right of passage through archipelagic waters".

Finally, the phrase "inter alia" was omitted in paragraph 6 (formerly paragraph 5) of Article 5 and paragraph 9 (formerly paragraph 8) redrafted to omit prohibitions of passage of warships not complying with the rules and regulations of an archipelagic State.

The Joint Proposals to the Second Committee provided for the drawing of straight baselines between islands and drying reefs from which the breadth of the territorial sea was measured. Sovereignty was exercised within these baselines over a special regime which guaranteed innocent passage under Article 4 but was subject to extensive regulation as set out in Article 5.

The right of passage through archipelagic waters was more restrictive than the corresponding right in territorial waters under the Geneva Convention of 1958 on the Territorial Sea and Contiguous Zone. There was no express provision to allow ships to stop and anchor as incidental to ordinary passage or for reasons of force majeure or distress.[4] Secondly, the right of coastal States to designate sealanes and establish traffic separation schemes limited the freedom of foreign ships compared with passage through territorial waters.[5] Finally, the suspension of warships from passage through archipelagic waters for non-compliance with the regulations of a coastal State. The regime for archipelagic waters had serious implications for the leading maritime powers.

The Joint Proposals contrasted with the draft proposals on the Rights and Obligations of Archipelagic States which was submitted by the United Kingdom to the Sea-Bed Committee a year earlier on 2 August, 1973 and which remained as a basis for discussion. The proposals stated as follows:

"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 3 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 points of the outermost islands in such a way that:
(i) no territory belong to another State lies within the perimeter,
(ı) no baseline is longer than 48 nautical miles, and
(iii) the ratio of the area of the sea to the area of land territory inside the perimeter 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 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 provision of Articles... of this Convention apply to those routes (as well as 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 indicate 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. Such routes may be modified or new routes created only 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 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 depositary 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".

The proposals of the United Kingdom were more modest than the Joint Proposals: they sought to limit the archipelagic concept and preserve the right of passage through archipelagic waters with as few restrictions as possible. The specific limitation of forty-eight miles on the length of straight baselines meant that archipelagic waters would be less extensive than that provided for in the Joint Proposals. The straits regime was applied to archipelagic waters where they were used 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 significance of the British proposals was twofold: first, it constituted recognition of the archipelagic concept, albeit in limited form, by the United Kingdom which had hitherto taken the traditional view that each island had its own territorial seas; and second, the proposals reflected the concerns of the maritime powers over freedom of navigation.

Following upon the Joint Proposal, on 12 August Ecuador proposed that the baselines drawn for archipelagic States also be adopted for archipelagoes forming part of a State.[7] However, this was not to entail "any change in the natural regime of the waters of such archipelagoes or their territorial sea".

On the same day, Bulgaria, the German Democratic Republic and Poland proposed amendments to the Joint Proposal that specified limits on the sovereignty of the archipelagic State.[8] The substitute provision for draft Article 4 provided as follows:

> "All ships shall enjoy equally freedom of passage in archipelagic straits, the approaches thereto, and those areas in the archipelagic waters of the archipelagic State along which normally lie the shortest sealanes used for international navigation between one part and another part of the high seas".

In Article 5, the amendment to paragraph 8 of the Joint Proposal stated that foreign ships exercising the right of free passage "comply with the relevant laws and regulations made by the archipelagic State..." However, an archipelagic State

> "may not interrupt or suspend the transit of ships through its straights or archipelagic waters, or take any action which may impede their passage".9

At the same time, ships passing through the straits and waters of archipelagic States were enjoined not to endanger the security, territorial integrity and political independence of

such States.[10] Certain constraints were then imposed on warships passing through such waters[11] and all ships were requested to inform the archipelagic State of "any damage, unforeseen stoppage, or of any action rendered necessary by force majeure".

Thailand submitted draft articles on archipelagoes on 15 August which provided that where archipelagic waters had previously been considered high seas, the archipelagic State

> "shall give special consideration to the interests and needs of its neighbouring States with regard to the exploitation of living resources in these areas..."

The Thai proposals also included a right of innocent passage through archipelagic waters for "the sole benefit of such of its neighbouring States as are enclosed or partly enclosed by its archipelagic waters..." In both cases such arrangements were to be entered into at the neighbouring State's request.

Malaysia, whose concerns as a neighbouring State were similar to those of Thailand, proposed amendments to the Joint Proposals on 16 August.[12] The first concerned paragraph 5 of Article 2 and substituted "direct access and all forms of communication" for "direct communication". In addition, Article 4 which provided for innocent passage was not to apply to paragraph 5 of Article 2.

On 20 August, the Bahamas submitted draft articles on archipelagic States that adopted more liberal end-points for baselines.[13] The baselines would include "any non-navigable continuous reefs or shoals lying between such points".[14] Apart from this difference, its three draft articles on the definition, delimitation and status of archipelagic States closely resembled the Joint Proposals.

However, Cuba proposed amendments to the Bahamian proposals on 22 August, 1974.[15] Paragraph 1 of Article 2 limited the end points of straight baselines drawn to "the outermost points of the outermost islands of the archipelago, provided that these follow the general configuration of the main island or islands and are not drawn to and from isolated islets or reefs". Paragraph 2 then provided that:

> "2. The drawing of such baselines shall not enclose as archipelagic waters any waterways or straits used for international navigation or areas of sea traditionally used by a neighbouring and adjacent State for direct communication from one part of its territory to another part or between its territory and the high seas".

In the discussions of the Second Committee on the question of archipelagoes, there was general acceptance of the archipelagic concept.[16] However, certain reservations were expressed that related primarily to balancing the interests of archipelagic States with an acceptable regime of navigation for the international community.

On 24 August, the Second Committee issued an informal working paper on an archipelagic regime that was intended:

> "to reflect in generally acceptable formulations the main trends which have emerged from the proposals submitted either to the U.N. Sea-Bed Committee or to the Conference itself".17

The paper sought to draw together the various proposals using the Joint Proposals and the Draft Articles on the Duties of Archipelagic States submitted by the United Kingdom as the basis for archipelagic formulations. The nineteen provisions included alternative formulae proposed by the States and were incorporated in a working paper issued on 15 October, 1974. The paper reflected the main trends of issues considered by the Second Committee.[18]

At the third session of UNCLOS III in Geneva, held from 17 March to 9 May 1975, it became clear that the extension of the breach of the territorial sea to twelve miles and the exclusive economic zone was linked to other issues. Important among these was the issue of transit passage through both straits used for international navigation and archipelagic waters. The Chairman of the Second Committee had referred to this linkage in a statement to the 46th meeting of the committee on 28 Augst 1974.[19] The impasse regarding the straits issue centred on the United States and the Soviet

Union which demanded unimpeded transit and the straits States such as Spain and Indonesia that resisted any derogation from their right to regulate straits passage.

The linkage between straits and archipelagoes concerned three items: (1) the definition of international straits; (2) the capacity of the coastal State to prescribe conditions for passage; and (3) the applicability of the straits regime to archipelagic waters.[20] The archipelagic States took the position that while they accepted innocent passage, they wished to retain the right to designate special sealanes for warships and ships with special characteristics.[21]

Given the apparently irreconciliable positions of the maritime powers and the straits States, it fell to the United Kingdom and Fiji to seek a compromise at the third session of UNCLOS III in Geneva. Both formed a private group on straits on the basis of draft articles each had proposed relating to innocent passage. Fiji had submitted proposals titled "Draft Articles Relating to Passage through the Territorial Sea" to the Sea-Bed Committee[22] which were revised and resubmitted in Caracas.[23] The explanatory note to the Fiji proposals to the Second Committee stated that it "sought to establish general rules of a more objective nature for the passage of ships through the territorial sea". The proposals of the United

Kingdom were submitted on 3 July, 1974[24] and were to form the main basis of a compromise. Both the Fiji and UK proposals set out in detail activities which were inconsistent with "innocent passage".

The compromise reached approximated the right of innocent passage through archipelagic waters to that through territorial waters. In return for agreement on passage through straits used for international navigation which allowed transit passage between areas of high seas or the exclusive economic zone or between either without suspension of such right, the regime for archipelagic sealanes passage was adopted.[25] The concept of transit passage was a special regime for passage through straits and for international navigation.[26] The maritime powers had originally insisted on "unimpeded passage". However,the archipelagic States had to agree to refer their proposals for designating or varying sealanes to "a competent international organization".[27] Agreement was also reached on the ratio of land to sea. This allowed for a range between 1:1 to 1:9. It was more generous than the UK proposal which had stipulated a maximum of 1:5 and was devised to accommodate the Bahamas. At the same time it represented a moderation of the Joint Proposals which had omitted any limitation on grounds of arbitrariness.

The third session at Geneva produced the informal Single Negotiating Text (SNT) that was to form the basis of further negotiations. Part VII of the SNT set out the provisions on archipelagic States (Articles 117 to 130) in much the same form it was to take in the Convention. Changes would include the removal of Articles 125, 126, 127 and 128 to the section on international straits although they would apply mutatis mutandis to archipelagic sealanes passage.

The other slight changes were the amendments proposed by Malaysia at the sixth session in New York and incorporated as Article 47(7) of the Informal Composite Negotiating Text (ICNT).[28] It provided:

> "If a certain part of the archipelagic waters of an archipelagic State lies between two parts of an immediately neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated under agreement between the States shall continue and be respected".

Included in the ICNT was agreement to allow archipelagic States to draw straight baselines of 100 miles (from 80 miles) and to have up to three per cent of their total number of baselines measure up to 125 miles in length. The ICNT which had succeeded the Revised Single Negotiating Text and the SNT as the basis of proposals was to undergo several metamorphoses before emerging as the Convention at the eleventh session of UNCLOS III.[29]

However, as pointed out earlier the provisions on archipelagic States were largely settled at the third session at Geneval in 1976 following upon agreement on the regime that was to apply to straits used for international navigation.

The compromise while grudgingly accepted by some of the more assertive archipelagic and straits States nevetheless represented a delicate balancing of interests: the development of an archipelagic regime consonant with the interests of the international community in freedom of navigation.

2. The Archipelagic Provisions of the Convention

The archipelagic regime is embodied in Part IV of the Convention (Articles 46 to 54). The provisions define an archipelagic State, establish the method by which its baselines are to be drawn, set out the status of the waters within such baselines and define the extent of sovereignty of archipelagic States over such waters.

Article 46 has already been discussed in Chapter 2. Suffice it to add that the definition of an archipelagic State excludes coastal States with archipelagoes and those with archipelagic dependencies. The phrase "interconnecting waters" in the definition of an archipelago was included to emphasize the unifying function of the surrounding waters while the words "closely interrelated" were considered a factor in determining whether a group of islands was an archipelago.[30]

Article 47 deals with the drawing of archipelagic baselines. Paragraph 1 provides for the drawing of straight baselines "joining the outermost points of the outermost islands and drying reefs of the archipelago..." Certain limitations are placed on the drawing of baselines in order to ensure that there is no abuse. The main islands are required to be included within archipelagic baselines and the ratio of land to sea is between 1:1 and 1:9. The absolute requirement of 1:1 ratio of water to land excluded island States dominated by one large island such as Ireland and Madagascar. Atolls were included as land area to enable some of the archipelagic States such as the Bahamas to fulfill the criterion. This is expanded upon in paragraph 7 which equates land with "waters lying within the fringing reefs of islands and atolls..." for the purposes of determining the ratio of land area to sea within archipelagic baselines.

Paragraphs 2, 3 and 4 set out future limitations on the drawing of straight baselines. Paragraph 2 provides that baselines shall not exceed 100 nautical miles although three per cent of the total number of baselines may exceed that length up to 125 nautical miles. The main concern of the States advocating the archipelagic concept was that baselines be sufficiently long to encompass their archipelagoes as a unit. The length of the baselines was agreed upon after it became certain it would allow that result. Other States such as

the United Kingdom were concerned to set limits to ensure archipelagic baselines were not drawn too widely. Paragraph 3 provides that the baselines not depart to "any appreciable extent from the general configuration of the archipelago". This provision was an adaptation of the drawing of straight baselines in respect of deeply-indented coastlines and coastal islands of mainalnd States where they were required not to "depart to any appreciable extent from general direction of the coastline..." This was first incorporated in Article 4 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and included in Article 7 of the Convention.

Paragraph 4 of Article 47 provides that baselines shall not be drawn to and from low-tide elevations unless permanent installations such as lighthouses, which are permanently above sea level have been built on them, or where a low-tide elevation is situated not more than the breadth of the territorial sea from an island. Article 47 does not define its terms which raises the issue of whether a drying reef in paragraph 1 is not also a low-tide elevation.

Paragraphs 5 and 6 of Article 47 represent part of the elaborate scheme devised to harmonise the interests of archipelagic States with that of the international community. These provisions are essentially directed to adjacent neighbouring States. Paragraph 5 provides that archipelagic baselines shall not be applied so as to exclude from the high seas

or exclusive economic zone, the territorial sea of another State. Paragraph 6 then states that where archipelagic waters lie between two parts of an immediately adjacent neighbouring State, all existing rights and interest traditionally exercised in such waters are preserved. This provision was an amendment introduced by Malaysia to protect traditional rights acquired by long usage vis-à-vis Indonesia.

Article 48 provides for the measurement of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf from archipelagic baselines. The provision implicitly recognizes archipelagic waters as a category separate from the territorial sea by the measurement of the former from archipelagic baselines.

The legal status of archipelagic waters is set out in Article 49. Paragraph 1 provides that sovereignty is exercised over the waters enclosed by archipelagic baselines drawn pursuant to Article 47. This unified sovereignty is the central aspect of the archipelagic regime and extends to the air space over archipelagic waters, the sea-bed and subsoil as well as the resources contained therein. However, sovereignty is not complete: paragraph 3 states that it is exercised subject to Part IV. Paragraph 4 then states that the regime of archipelagic sealanes passage, which in effect limits the exercise of archipelagic sovereignty, does not affect that sovereignty other than in that form.

Article 50 then provides that an archipelagic State may draw closing lines for the delimitation of international waters in accodance with Articles 9, 10 and 11. The provision was necessitated by the fact that those waters which may be classified as internal now lie within archipelagic waters whereas previously they were adjacent to the territorial sea.

Article 51, as with paragraphs 6 and 7 of Article 47, preserves the pre-existing rights of States vis-à-vis the archipelagic State. Thus paragraph 1 provides that an archipelagic State shall respect agreements with other States and recognize traditional fishing rights and other legitimate activities in certain areas within archipelagic waters. Such rights may be regulated by agreement upon request by any of the States concerned. However, the recognition and exercise of such rights are without prejudice to Article 49. This suggests that an archipelagic State may assert its sovereignty to derogate from such rights. This would appear to be borne out by the omission of the phrase "without prejudice to Article 49", in the other provisions limiting archipelagic sovereignty. Paragraph 2 then protects existing submarine cables laid by other States which pass through archipelagic waters without making landfall. Maintenance and replacement of such cables is permitted upon due notice of location and intention to repair or replace to the archipelagic State.

The right of innocent passage is conferred by Article 52. Paragraph 1 states there is a right of innocent passage through archipelagic waters in accordance with Part II, section 3 (Articles 17 to 32), but renders it subject to Article 53 and without prejudice to Article 50. Paragraph 2 provides that innocent passage may be temporarily suspended in specified areas of archipelagic waters if "such suspension is essential for the protection of its security". However, such suspension must be non-discriminatory and shall take effect only upon publication. The articles on innocent passage together with those concerning straits used for international navigation and archipelagic sealanes passage represented an integrated approach to navigation as well as an intricate weaving of competing interests: the maritime powers as against the archipelagic and Straits States. Passage is defined in Article 18 as follows:

> "1. Passage means navigation through the territorial sea for the purpose of
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
> (b) proceeding to or from internal waters or a call at such broadstead or port facility.

Paragraph 2 provides that passage shall be "continuous and expeditious" but it includes stopping and anchoring as far as the same are "incidental to ordinary navigation or are rendered necessary by force majeure or distress for the purpose of rendering assistance..."

Article 19 defines innocent passage as such "so long as it is not prejudicial to the peace, good order or security of the coastal States" in paragraph 1. Paragraph 2 then details a list of activities considered to be non-innocent such as the threat or use of force, any exercises or practice with weapons, collecting information to the prejudice of the defence or security of a coastal State, acts of propaganda aimed at the defence or security of a coastal State, launching, landing or taking on board of aircraft, wilful and serious pollution and fishing activities.

Article 20 states that submarines and other underwater vehicles are required to navigate on the surface and show their flag.

The regulatory powers of the coastal State are set out in Article 21 in relation to innocent passage and concern:

> "(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 coastal State;
> (f) the preservation of the environment of the coastal 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 coastal State".

However, Article 24 obliges the coastal State not to regulate in its areas of competence so as to impair innocent passage. Paragraph 2 of Article 21 exempts "the design, construction, manning or equipment of foreign ships" from laws of the coastal State unless reflective of international standards.

Article 22 provides for the designation of sealanes and traffic separation schemes in paragraph 1 for the regulation of the passage of ships but such an exercise must take into account the recommendations of the competent international organization and other relevant factors set out in paragraph 3.

The balance of interest is reflected further in Article 23. Foreign nuclear-powered ships and ships carrying inherently dangerous or noxious substances may exercise the right of innocent passage in the territorial sea but are required to carry documents and take precautionary measures in accordance with international agreements.

The suspension of innocent passage is provided for by paragraph 3 of Article 25, However, such suspension may only be temporary and it must be "essential for the protection of its security, including weapons exercises".

The rights and obligations of the coastal State and that of the foreign vessel is carefully balanced in the remaining articles of Part II, section 3. Articles 29 to 32 which are part of subsection C concern the conduct of warships and other government ships operated for non-commercial purposes.

Article 29 defines ownership. Article 30 then provides a coastal State may request a warship to leave the territorial sea immediately when it has disregarded a request for compliance with applicable laws. International responsibility is cast upon the flag State by Article 31 for loss or damage resulting from the non-compliance with laws concerning passage. However, Article 32 then sets out the immunity of warships and government ships operated for non-commercial purposes subject to the exceptions in Articles 30, 31 and subsection A of section 3. The pattern is familiar and once again echoes attempts to compromise competing interests.

Article 53 establishes a regime for archipelagic sea-lanes passage that is defined in paragraph 3 as:

> "...the exercise... of the rights of navigation and overflight in the normal mode safely for the purpose of continuous, expeditious and unobstructed transit between one port of the high seas or an exclusive economic zone and another port of the high seas or an exclusive economic zone" (emphasis added).

This provision together with Article 54 represents the most crucial aspect of the balancing of interests: that of the

archipelagic States against those of the maritime powers. Archipelagic sealanes passage is a right guaranteed to all ships and aircraft by paragraph 2. Paragraph 3 makes clear that submarines may remain submerged for passage compared with innocent passage by referring to "navigation ... in the normal mode!"

This right of transit through archipelagic waters cannot be suspended unlike the right of innocent passage in Article 52. However, it does not equate with "unimpeded transit" that was originally demanded by the leading maritime powers at UNCLOS III. Archipelagic States retain some discretion that gives them limited regulatory powers. Paragraph 1 allows them to designate sealanes in and air routes over archipelagic waters for the "continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters..." They may also prescribe traffic separation schemes under paragraph 6. Paragraph 7 allows the Archipelagic State to substitute other sealanes or traffic separation schemes for the safe passage of ships through narrow channels.

However, paragraph 8 provides that such sealanes and traffic separation schemes must conform to generally accepted international regulations. Proposals for designation of sealanes and traffic separation schemes must be referred to "the competent international organization with a view to their adoption". Paragraph 9 then continues by stating that the organization may only adopt designations agreed to by the

archipelagic State. The provision allows for consultation while removing the discretion to decide from the archipelagic State. There is no reference to aircraft in paragraphs 6 to 10.

Paragraph 4 of Article 53 sets out the types of sealanes and air routes that shall traverse archipelagic waters and the adjacent territorial sea. They "shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters..." Paragraph 5 then prescribes the delimitation of the sealanes and air routes through archipelagic waters. This is achieved by a series of continuous axis lines from which ships and aircraft shall not deviate more than twenty-five nautical miles on either sides provided that they shall not navigate closer to the coasts than ten per cent of the distance to the nearest point on land.

The archipelagic State is required by paragraph 10 of Article 53 to clearly indicate the axis of sealanes and the traffic seaparation schemes designated by it on charts. Due publicity mut be given to them. Paragraph 11 obliges ships in archipelagic sealanes passage to respect the sealanes and traffic separation schemes laid down in accordance with Article 53.

Article 54 applies Articles 39, 40, 41 and 42 mutatis mutandis to archipelagic sealanes passage. These provisions elaborate aspects of transit passage under Part III which con-

cerns straits used for international navigation.

Article 39 sets out the duties of ships and aircraft during transit passage. Under paragraph 1 they must proceed expeditiously through or over archipelagic waters, refrain from any threat or use of force against the archipelagic State and refrain from activities other than those incidental to normal modes of continuous and expeditious transit. An exception is made in the event of force majeure or distress. Paragraphs 2 and 3 set out the duties of ships and aircraft respectively. The former must comply with accepted international regulations, procedures and practices for safety at sea. In addition, ships must comply with international regulations for the prevention, reduction and control of pollution. Aircraft are required to observe the Rules of the Air established by the International Civil Aviation Organization (ICAO). State aircraft are to comply with safety measures set by ICAO. The radio frequency assigned by "the competent internationally designated air traffic control activity" or "the appropriate international distress radio frequency" must be monitored at all times.

Article 40 prohibits foreign ships such as marine scientific research and hydrographic survey ships from research or survey activities without prior authorization of the archipelagic State.

The regulatory powers of archipelagic States are set out in Article 42. These relate to the prevention, reduction and control of pollution by giving effect to international regulations as the discharge of noxious substances, the prevention of fishing by fishing vessels and other prevention of illegal smuggling of commodity, currency or persons. However, paragraph 2 states such laws and regulations must not discriminate against foreign ships neither must they impair transit passage. Foreign ships are obliged by paragraph 4 to comply with laws on transit passage. Paragraph 5 then provides for international responsibility for loss or damage to an archipelagic State where the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity acts contrary to the laws on transit passage.

Article 44 obliges archipelagic States not to hamper transit passage and requires them to publicize every danger to navigation or overflight within or over archipelagic waters. Transit passage cannot be suspended unlike innocent passage. This makes explicit what is implied in Article 53 by the omission of any references to suspension of passage.

Transit through archipelagic sealanes as set out in Articles 53 and 54 is an elaborate regime. Transit passage is preserved and regulation such as the archipelagic States may exercise does not affect the basic right of expeditious passage through archipelagic waters. At the same time,

archipelagic States may regulate the routes taken which are corridors of a prescribed width. Duties are cast upon both ships and the archipelagic States so as to delineate spheres of responsibility. The latter have a general obligation to regulate in their areas of competence without impairing transit passage and the former are required to proceed expeditiously through archipelagic waters.

3. Status of the Archipelagic Regime in International Law

Incorporation of an archipelagic regime in the Convention of 1982 has not as yet definitively determined its status at international law. The Convention, signed by 117 States at Montego Bay on 10 December 1982, is yet to come into force. This is compounded by the failure of the United States, the United Kingdom and the Federal Republic of Germany to sign the Convention which necessarily undermines the universality of the Convention.

Article 38 of the Statute of the International Court of Justice sets out the sources of international law. Paragraph 1 provides as follows:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by contesting States;

> (b) international custom, as evidence of general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (emphasis added).

Therefore in trying to consider whether the archipelagic regime is part of customary international law, State practice and the UNCLOS III negotiations will have to be examined.

Determination of the archipelagic regime as part of customary international law focuses attention on UNCLOS III proceedings that led to the adoption of an archipelagic regime in the Convention. It is clear that the archipelagic concept was not part of customary international law prior to UNCLOS III. It is clear that neither the Philippines nor Indonesia which first asserted archipelagic status could claim such assertions were "evidence of a general practice accepted as law". As was stated in the Asylum case:

> "The party which relies on a custom... must prove that this custom is established in such a manner that it has become binding on the other party... that the rule invoked... is in accordance with a constant and uniform usage practised by the States in question and that this usage is the expression of a right appertaining to the State granting asylum and a duty

> incumbent upon the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'".32

In recent years, the International Court of Justice has recognized the process whereby treaty provisions have become part of customary international law. It stated in the North Sea Continental Shelf cases that:

> "There is no doubt that this process is a perfectly possible one and does from time to time occur: It constitutes one of the recognized methods by which new rules of customary international law may be formed".33

The Court recognized in that case that customary law resulting from the codification process operated in three ways.[34] In the first case, the declaratory effect occurred when the text of the treaty merely restated a pre-existing rule of custom. In the second situation, the crystallizing effect resulted when the treaty text crystallized an emergent rule. In the third example, the generating effect occurred when a treaty provision served as a model upon which subsequent practice of states was patterned and evolved into a customary rule.

Treaty provisions then acquired the status of customary international law in fulfilling four conditions.[35] These were:

1) The existence of a "fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law";

2) a "very widespread and representative participation in the convention" including "that of States whose interests were specifically affected";

3) extensive and uniform State practice demonstrating "a general recognition that a rule of law or legal obligation is included"; and

4) the passage of time.

These requirements "flesh" out the provisions of treaties in that they provide the substance to what appear as enunciations of principle.

Of the conditions precedent mentioned, only the third leaves some room for doubt.[36] The archipelagic regime qualified under the first criterion. UNCLOS III was attended by over one hundred and forty States including those that claimed archipelagic status such as the Philippines, Indonesia, Fiji, Mauritius, the Bahamas and Tonga. UNCLOS III opened in 1983 and concluded in 1982. In the period in between, several States enacted legislation that laid claim to archipelagic waters.[37]

As regards State practice, legislation enacted by the Comoros,[38] Fiji,[39], Kiribati,[40], St. Vincent and the Grenadines,[41] the Solomon Islands,[42] Tuvalu,[43] and Vanuatu[44] provide that sovereignty extends to archipelagic waters, to the airspace above and to the sea-bed and the subsoil. This accords with Article 49 paragraphs 1 and 2.[45] They also provide for the drawing of archipelagic baselines. Tuvalu and the Comoros refer expressly to national resources and therefore adhere more closely to Article 49 paragraph 2.

The effect of the Convention is most clearly reflected in the legislation of Fiji, Kiribati, the Solomons and Tuvalu.[46] Sovereignty over archipelagic waters is made subject to international law. The Acts and Declarations of all seven States contain provisions concerning the right of innocent passage through archipelagic waters.[47] With the exception of the Comoros, the six States have established archipelagic sealanes passage in accordance with Article 53 paragraph 3 (definition), paragraph 6 (provision of traffic separation schemes) and paragraph 12 (the right of archipelagic sealanes passage where it has yet to be designated).[48]

The provisions enacted by these States do not fully reflect the archipelagic regime set out in the Convention.[49] However, they do assert sovereignty near archipelagic waters and provide archipelagic sealanes passage.[50] Significantly,

the States that enacted legislation did so after the negotiations on the archipelagic regime had largely been completed at Geneva in 1975. Thus, Fiji, which had first subscribed to the archipelagic concept in 1971 waited until 1977 to enact legislation establishing an archipelagic regime. Therefore an inference might be drawn that together with the other States, Fiji was implementing a rule of law.

However it has been argued that the archipelagic regime requires "particularized technical methods of application, such as the mathematical limitations on archipelagic baselines.."[51] Consequently,

> "Can such provisions become customary law independent of the fabric of the Convention when there is a paucity of independent State practice dehors the Convention?".52

Another writer has stated that:

> "The concepts of transit passage and archipelagic sealanes passage did not effectively predate the 1982 Convention. Therefore, while an earlier form of innocent passage exists in customary international law, the concepts of transit and archipelagic sealanes passage do not effectively exist in customary law outside of the 1982 Convention".53

As against those observations, it was said that:

> "The recent claims to archipelagic waters made since 1977 (Fiji) as well as the declaration of the Philippines upon ratify-

> ing the Convention on the Law of the Sea demonstrate that the regime of archipelagoes, as developed by the Third UN Conference as the Law of the Sea, has been accepted in the practice of States claiming archipelagic waters at least as far as its basic features are concerned. All the States having claimed archipelagic waters meet the requirements of Article 46 CLOS, that is, the State territories are constituted wholly by one or more archipelagoes. All of them applied the system of straight baselines so as to define the outer limits of the archipelagic waters and they have finally adhered to the principle of innocent passage as well as sealane passage. This was the major concession demanded from, and made by, archipelagic States in order to accommodate the interests of international navigation".54

This last observation focuses attention on the negotiating process itself and its role in determining the status of the archipelagic regime.

Thus it has been suggested that in relation to UNCLOS III:

> "once a consensus is reached at an international conference, a rule of customary international law can emerge without having to wait for the signature of the Convention. Once a convention is signed by a vast majority of the international community, its stature as customary international law is thereby strengthened, as such signatures are a clear evidence of an opinio juris that the convention contains generally acceptable principles".55

With all due respect, such an approach would be deficient without State practice. While possessing the virtue of clarity, it would be a licence for self-serving statements in the guise of opinio juris. Ultimately, the determining factor must remain the actions of States. In relation to UNCLOS III it is the negotiating process together with the actions of States that must be considered.

The Convention was negotiated as a package deal of interrelated compromises. Ambassador Arias-Schreiber of Peru made this clear in addressing a plenary session of UNCLOS III on behalf of the Group of 77:

> "In negotiating and adopting the Convention, the Conference had borne in mind that the problems of ocean space were closely interrelated and had to be dealt with as a whole. The "package deal" approach ruled out any selective application of the Convention. According to the understanding reached by the Conference from the outset and in conformity with international law, no State or group of States could lawfully claim rights or invoke the obligations of third States by reference to individual provisions of the Convention unless that State or group of States were themselves parties to the Convention. States which decided to become parties to the Convention would likewise be under no obligation to apply its provisions via-a-vis States that were not parties. That held true both for the new rules laid down by the Convention for areas under national jurisdiction (inland waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, archipelagic waters and straits used for inter-

> national navigation resolutions), and for the regime instituted by virtue of the Convention and the relevant resolutions adopted by the Conference, for the use of the area of the sea-bed beyond the limits of national jurisdiction".56

However others would argue this integrated approach is only partly reflected in the navigational articles which constitute a balancing of interests in themselves.[57] This could be contrary to the views expressed by U.S. delegates to UNCLOS III. Ambassador John R. Stevenson stated the U.S. position on a package deal on 11 July 1974 at the second session. The United States, he said was

> "prepared to accept, and indeed we would welcome general agreement of a 12-mile outer limit for the territorial sea and a 200-mile outer limit for the economic zone, proved it is part of an acceptable comprehensive package including a satisfacory regime within and beyond the economic zone and provision for unimpeded transit of straits used for international navigation".58

There was thus an American acceptance of the package deal approach. However to suggest as many have done that, therefore, the Convention could only apply to signatories is to deny that it partly codified existing customary law that is binding on non-State parties to the Convention. Moreover this exclusive approach thereby tends towards the instant creation of customary law approach. The International Court of Justice itself stated in the 1985 Judgment on the ocean

boundary between Libya and Malta that:

> "It is of course axiomatic that the method of customary international law is to be looked for primarily in the actual practice and opinio juris of States even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".59

The significance of those new rules is they were delivered three years after the Convention was signed. Notwithstanding the broad agreement on the Convention and the package deal, the Court stressed the importance of State practice.

As regards the archipelagic regime, the provisions on transit passage were adopted only after long and exhaustive negotiations. The extension of territorial waters as reflected in a twelve mile territorial sea and the archipelagic regime was accepted on the basis that transit passage for ships and aircraft would be retained as of right. This new concept sought to preserve as far as possible freedom of navigation and overflight which followed from the previous status of those waters as high seas. From this compromise, there was little dissent but grudging acceptance on the part of some straits and archipelagic States involved. This consensus cannot necessarily be taken as broad intervention support for the concept. In this regard it has been pointed out:

> "That the consensus favouring the inclusions of a particular rule as a part of the overall package may mask opposition to the rule taken by itself. A number of provisions in the area of the more traditional law of the sea, as well as acceptance of compulsory judicial and arbitral settlement, were, for example, concessions by developing States to which acceptance of the deep sea-bed regime was a necessary counterweight. Paradoxically, the attempt at consensus may, in the event, have hindered the development of customary international law in some cases".60

While accepting the observations as regards the role of consensus vis-à-vis the provisions of the Convention, its role complicates rather than hinders the development of customary international law. For while it is difficult to ascribe positions to States on the basis of a consensus approach, it only serves to re-emphasize the importance of State practice. Ultimately,it is the actions and reactions of States over a period of time toward each other that determines whether a treaty provision has acquired customary law status. The broad support for the archipelagic regime was only attained when the impasse between the unimpeded transit passage demanded by the United States and the Soviet Union, and the increased regulatory powers on transit passage for coastal States sought by Indonesia among others, was broken. It was not until this had been finalized that the States directly affected, acted.

As seen earlier, six States claiming archipelagic status have enacted legislation reflecting in broad terms the archipelagic provision of the Convention. There has been no adverse reaction. On 10 March 1983 President Reagan issued a statement on the United States Ocean Policy in which he stated that:

> "The United States is prepared to accept and act in accordance with the balance of interests relating to traditional issues of the oceans such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States".61

The Reagan Policy clearly indicated that the United States, at least as a non-party,was prepared to accept the archipelagic regime. However this in itself does not suggest it was part of customary law. The statement did not admit the archipelagic regime was binding as such but rather that the United States was prepared to accept it in return for transit passage negotiated under the Convention.

The status then of the archipelagic regime in customary international law is not as yet settled. It is in the process of becoming part of that body of rules. While the States directly affected have acted to implement the provisions of the archipelagic regime, there is as yet little

concrete evidence to suggest it is binding as a customary rule of international law.

At the same time it has progressed far beyond the position it occupied on the eve of UNCLOS III. It has metamorphosized into a special regime under the Convention. States directly affected have enacted legislation. It has broad support in the international community. However the process described by the International Court of Justice by which the continental shelf became part of customary international law does not quite equate with the present case. The following remarks on State practice by the Court seem apposite:

> "Although the passage of only a short period of time is not necessarily,or of itself, a bar to the formation of a new rule of customary international law on the basis of what was a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected should have been extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way to show a general recognition that a rule of law or legal obligation is invoked". (emphasis added).

In the present case, the archipelagic regime has generally elicited little comment or action from States apart from the regulations that led to its incorporation in the Convention. Further the binding aspect of the regime remains an open question. What will probably confirm its status as part of customary international law is the effluxion of time and further development of State practice.

FOOTNOTES

1. UN Doc. A/CONF.62/c.2/L.13.
2. UN Doc. A/CONF.62/c.2/L.49.
3. UN Doc. A/AC. 138/sc.II/L.48.
4. C.F. Amerasinghe, "The Problem of Archipelagoes in the International Law of the Sea", I.C.L.Q., vol. 23, 1973, 539 at 553.
5. Id.
6. UN doc. A/AC. 138/sc.II/L.44.
7. UN Doc. A/CONF.62/c.2/L.51.
8. UN Doc. A/CONF.62/c.2/L.52 Covr.1.
9. Art. 5, para.10.
10. "...Warships passing through such straits and waters may not engage in any exercise or gunfire, use any form of weapon, launch or take an aircraft, carry out hydrographic surveys or engage in any similar activity unrelated to their passage..." (Art. 5, para. 9).
11. Id.
12. UN Doc. A/CONF.62/c.2/L.64.
13. UN Doc. A/CONF.62/c.2/L.70.
14. Art. 2. para. 1.
15. UN Doc. A/CONF.62/c.2/L.73.
16. R. Platzöder (ed.) Third United Nations Conference on the Law of the Sea: Documents, vol. v (New York:Oceana Publications, 1984), 396-409.
17. Informal Working Paper No. 8/Rev.2.
18. A/CONF.62/c.2/WP.1.
19. R. Platzöder, supra, note 16 at 1932.

20. E. Miles, "An Interpretation of the Geneva Proceedings Part II", Oc.Dev.& Int'l L. vol. 3, 1976, 303 at 306.

21. R.P. Anand, "Mid-Ocean Archipelagoes in International Law: Theory and Practice", Ind.J.of Int'l L., vol. 19, 1979, 228 at 251.

22. UN Doc. A/AC.138/SC.II/L.42.

23. UN Doc. A/CONF.62/c.2/L.19.

24. UN Doc. A/CONF.62/c.2/L.3.

25. E. Miles, supra, note 20 at 307.

26. Id. T. Koh, "Negotiating a New World Order for the Sea", Vir.J.of Int'l L., vol. 24, 1984, 761 at 769.

27. See note 25.

28. UN Doc.A/CONF.62/c.2/L.92.

29. The various texts produced in chronological order are as follows:
Single Negotiating Text (3rd Session, Geneva) (1975);
Revised Single Negotiating Text (4th Session, New York)(1976);
Informal Composite Negotiating Text (ICNT) (6th Session, New York) (1977);
ICNT/Rev.1 (8th Session, Geneva) (1979);
ICNT/Rev.2 (9th Session, Geneva) (1980);
ICNT/Rev.3 (9th Session, Geneva) (1980);
Draft Convention on the Law of the Sea (10th Session, New York) (1981);
Convention on the Law of the Sea (11th Session) (1982).

30. Platzöder, supra, note 16 at 396.

31. Robert D. Hodgson and Robert W. Smith, "The Informal Single Negotiating Text (Committee II): A Geographical Perspective", Oc.Dev. & Int'l L., vol.3, (1976), 243.

32. I.C.J. Reports, 1950, 276.

33. I.C.J. Reports, 1969, 3 at 41.

34. E.J. de Aréchaga, "Customary Law and the Law of the Sea", Essays in Honour of Judge Manfred Lechs (The Hague: Martinus Nijhoff, 1984) 577.

35. North Sea Shelf Cases 1969, I.C.J. Reports 3 at 41-44.

36. L.T. Lee, "The Law of the Sea and Third States", Am.J. of Int'l L., vol. 77, 1983, 541 at 563.

37. Comoros, Fiji, Kiribati, St. Vincent and the Grenadines, Solomons, Tuvalu and Vannatu.

38. Law No. 82-005 relating to the delimitation of the marine zones of the Islamic Federal Republic of the Comoros 6 May, 1982 R.W. Smith (ed.) Exclusive Economic Zone Claims: An Analysis and Primary Documents, (1986) 103.

39. Marine Spaces Act 1977, Act. No. 18 of December 1977 as amended by the Marine Spaces (Amendment) Act 1978, Act No. 15 of 6 October 1978, Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order 1981, Smith, supra, note 38 at 85.

40. Marine Zones (Declaration) Act, Smith, supra, note 38 at 245.

41. Maritime Areas Act 1983, Smith, supra, note 38 at 399.

42. Delimitation of Marine Waters Acts, Act. No. 32, 14 August 1979, Smith, supra, note 38 at 413.

43. Maritime Zones (Declaration) Ordinance 1983, Smith, supra, note 38 at 459.

44. Maritime Zones Act No. 23 of 1981, Smith, supra, note 38 at 471.

45. R. Wolfrum, "The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea", N.Y.I.L., 1987, 121 at 124.

46. Id.

47. Ibid., 125.

48. Id.

49. J. Grolin, "The Future of the Law of the Sea: Consequences of a Non-Treaty or Non-Universal Treaty Oc.Dev. & Int'l L., vol. 13, 1983, 1 at 8.

50. Wolfrum, supra, note 45 at 126.

51. J. I. Charney, "International Agreements and the Development of International Law",Wash.L.Rev., vol 61, 1986, 971 at 989.

52. Id.

53. D. L. Larson, "Innocent, Transit and Archipelagic Sea-Lanes Passage", Oc.Dev. & Int'l L., vol. 18, 411 at 427.

54. Wolfrum, supra, note 45 at 124.

55. L.B. Sohn, The Law of the Sea: Customary International Law Developments, American University Washington College of Law Edwin A. Moors Lecture (11 October, 1984) Am.L. Rev., vol. 34, 271 at 278, 279.

56. UN Doc.A/CONF.62/SR.183, at 3, 4 (1982).

57. R.J. Grunawalt, "United States Policy on International Straits", Oc.Dev. & Int'l.L., vol. 18, 1987, 445 at 457.

58. Quoted in H. Cominos and H.R. Molitor, "Progressive Development of International Law and the Package Deal", Am.J. of Int'l L., vol. 79, 1985, 871 at 875.

59. Continental Shelf Case (Malta v Libyan Arab Jamahiriya), I.C.J. Reports, 1985, 13.

60. D. Harris, Cases and Materials in International Law 3rd Ed., 1983, 286.

61. Quoted in S. Navaretta, "Part V Chapter III, Restatement of the Foreign Relations Law of the United States: An Analysis of Tentative Draft No. 6", Oc.Dev. & Int'l L., vol. 18, 343 at 382.

62. See note 33, supra, at 41.

63. Ibid., 41.

CHAPTER III

THE ARCHIPELAGIC REGIME AND THE CHICAGO CONVENTION

1. The Legal Status of the Airspace above Archipelagic Waters

The legal status of the airspace above archipelagic waters represents an important and novel aspect of developing international law as it establishes another legal regime in the airspace above the territorial waters of archipelagic States. Given the specialized nature of this regime, it has some bearing on certain assumptions underlying the Chicago Convention.

The Chicago Convention recognizes two legal regimes in airspace: the exercise of "complete and exclusive sovereignty" in the airspace above the territory of a State including its territorial waters, and the freedom of flight over the high seas". This is an implication that flows from the first proposition and is borne out by Article 12, concerning the flight and maneouvre of aircraft, which states in part as follows:

> "Over the high seas the rules in force shall be those established under this Convention".

The parties to the Chicago Convention conceded regulatory powers in this area to the Council of the International Civil Aviation Organization (ICAO), pursuant to Article 37 paragraph (c), Article 54 paragraph (l) and Article 90 of the

Chicago Convention. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone by Article 2 provided that freedom of the high seas comprised, inter alia, the freedom to fly over the high seas which was incorporated in Article 87 of the Convention.

Articles 1 and 2 of the Chicago Convention provide as follows:

> Article 1
> "The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.
>
> Article 2
> For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, protection or mandate of such State". (emphasis added).

These provisions were interpreted by one leading publicist of international air law as follows:

> "Since the airspace above the territorial sea is wholly assimilated to the airspace above the territory, the movements of aircraft (flight, take-off and landing) in both spaces are subject to identical conditions. Aircraft do not enjoy in the airspace above the territorial sea, the right of innocent passage enjoyed by ships in the territorial sea itself".1

The provisions concerning sovereignty are basic to the Chicago Convention and they permeate the articles which concern the movement of aircraft and the obligations of the parties to the Convention.

Thus the Chicago Convention does not apply by virtue of Article 3 paragraph (a) to State aircraft. These are aircraft used in military, customs and police services[2] which represent the enforcement powers of a State, a vital aspect of sovereignty. State aircraft in turn are prohibited from overflight of foreign territory without authorization.[3]

As regards overflight or transit flight by civil aircraft, Articles 5 and 6 which deal with non-scheduled and scheduled services respectively, remain subject to conditions that leave the State to be overflown with final approval. Paragraph 1 of Article 5 makes non-scheduled flight "subject to the observance of the terms of this Convention" and "subject the right of the State flown over to require landing", and Article 6 makes reference to "except with the special permission or other authorization of that State...".

Further indications of sovereignty appear in Articles 8 and 9 concerning military aircraft and the establishment of prohibited areas respectively. This latter provision will be considered more fully when transit passage through and over archipelagic waters is discussed. Both Articles 9 and 10, which concern war and emergency conditions, authorise the suspension of flight under certain conditions.

Article 11 concerns the applicability of air regulations. The State has the power to apply its laws on de-

parture from and admission to its territory to "aircraft engaged in international air navigation or to the operation and navigation of such aircraft within its territory". This is made subject to the non-discriminatory application of such laws and "subject to the provisions of this Convention".

States undertake to enact measures relating to the flight and maneuvre of aircraft in Article 12. Uniformity with standards established under the Chicago Convention is sought but not made mandatory. The significance of this provision lies in the mandatory application of these rules "established from time to time under this Convention" over the high seas. Article 38 then allows States to file differences to standards established by ICAO.

These provisions reflect the basic intention "that international civil aviation may be developed in a safe and orderly manner and that international transport services may be established on the basis of equality of opportunity..." consistent with the reservation to the state of its sovereign powers to safeguard its basic interests.

Under the Convention, the status of archipelagic waters is described in Article 49 which states:

> 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 airspace 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 sealanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sealanes, or the exercise by the archipelagic State of its sovereignty over such waters and their airspace, bed and subsoil and the resources contained therein". (emphasis added).

There are therefore three aspects to the sovereignty conferred by Article 49. First, it protects the political interests of archipelagic States by consolidating territorial unity and therefore security.[4] In this regard it encloses areas of water that were previously high seas. Second, it safeguards their economic interests by entitling them to sovereign rights to the resources of the sea, the sea-bed and the subsoil thereof.[5] Third, it makes such sovereignty subject to the innocent passage established by Article 52 and the regime of archipelagic sealanes passage that is set out in Article 53 and Articles 39, 40, 42 and 44 which apply mutatis mutandis to archipelagic sealanes passage by virtue of Article 54.

Article 53 paragraph 3 defines archipelagic sealanes passage as follows:

> "Archipelagic sealanes 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 exclusive economic zone and another part of the high seas not an exclusive economic zone". (emphasis added).

Paragraph 2 confers this right on all ships and aircraft. This right of archipelagic sealanes passage is the crucial distinction between the nature of the territorial sea and archipelagic waters. The former only concedes a right of innocent passage by Article 17 that differs from archipelagic sealanes passage in three important respects: it only applies to ships;[6] it has a broader application in that it may include proceeding to or from internal waters and stopping and anchoring subject to certain conditions;[7] and it may be temporarily suspended for security reasons.[8] Most importantly, the abuse of innocent passage allows the coastal State to take unilateral action pursuant to Articles 25 and 30.

Transit passage as detailed in Article 39 separates flag State duties and State of registry duties from transit passage rights[9] and contravention of the former does not result in suspension of passage.

In a study by the Secretariat of ICAO, titled "United Nations Convention on the Law of the Sea - Implications, if any for the application of the Chicago Convention, its Annexes and other international air law instruments",[10] the pro-

visions of the Convention were considered. It was prepared in response to the directives of the twenty-fifth session of the ICAO Legal Committee. The effect of the Convention on the Chicago Convention was analysed and the result presented for discussion at the twenty-sixth session of the ICAO Legal Committee in 1987. In considering the issue of archipelagic waters, the study concluded that

> "Without any need for a textual amendment of the Chicago Convention, its Article 2 will have to read as meaning that a territory of a State shall be the land areas, territorial sea adjacent thereto and its archipelagic waters".11

This view was shared by Sir Arnold Kean, the Rapporteur appointed to consider the study and the responses to it. In his report he observed that:

> "Articles 1 and 2 already recognize the sovereignty of States over the airspace above the territorial sea. These provisions of UNCLOS can be accommodated by the Chicago Convention as it stands without need for it to be amended".12

The Rapporteur had commented earlier on Article 2 as follows:

> "The Convention does not specify the extent of those waters but leaves it to be determined by general international law. The resulting flexibility is such that an amendement of the Chicago Convention will not be necessary in order to take account of the provisions of UNCLOS as to the extent of the territorial sea".13

Some thirty-eight States and two international organizations [14] responded to ICAO's request for comment on the study. Pakistan was the one of two States to raise the question of amendment.[15] This related particularly to Article 2, Pakistan pointing out that if archipelagic waters fell within the terms of that provision, then an archipelagic State must have "complete and exclusive sovereignty over the airspace above its territory" as set out in Article 1 of the Chicago Convention. Pakistan concluded:

> "It is therefore for consideration whether the concept of sovereignty of State over its territory given in the Chicago Convention requires some adjustment in view of the new regime of archipelagic waters and restricted sovereignty over its airspace introduced under the Convention".16

Canada suggested that an interpretive declaration might be required to clarify the fact that the airspace over archipelagic waters was subject to the same sovereignty exercised by the coastal State over airspace above territorial waters.[17] Egypt wished to have the issue of archipelagoes referred to the Legal Committee for further detailed study.[18] The Philippines reaffirmed in the strongest terms the sovereignty of the archipelagic State over its archipelagic waters and adjacent territorial sea.[19] Both Turkey and Brazil declined to accept a twelve mile territorial sea for reasons of national policy and claimed it was not part of customary international law. Turkey stated that:

> "it is not possible to speak of a rule of customary international law in cases where the application of such a rule constitutes an abuse of right".20

Brazil on the other hand asserted that its claim to a two hundred mile territorial sea "was established in accordance with international law".[21]

In his report, the Rapporteur in discussing the difficult question of which parts of the Convention reflected customary international law opined that:

> "It would not serve any useful purpose for the Sub-Committee or for the Legal Committee to attempt to determine this general question for itself without regard to matters other than civil aviation. For this reason, if the Legal Committee is to continue to examine UNCLOS, it might be advisable for it to consider the text of UNCLOS and, without taking a position on the difficult question how far it is or may become binding customary law, to examine the implications of those provisions for the Chicago Convention". (emphasis added).22

The Rapporteur then endorsed the observations by the Federal Republic of Germany to the following effect:

> "... at least at the present time the Legal Committee could restrict its activities to an exact indication of the present implications of the Convention on the Law of the Sea relative to air law, adding the legal opinion of the Committee in the few cases where this is necessary".23

The observations by the Federal Republic of Germany, with respect, differ slightly from the Rapporteur's own observations. They open with "Since an amendment to the Chicago Convention is not considered to be necessary" which when read with the rest of

the sentence suggest that the Federal Republic was referring to those parts of the Convention which reflect customary international law. This is supported by the fact that the Federal Republic of Germany was one of the leading economic powers that declined to sign the Convention.

While acknowledging the validity of observations by Czechoslovakia, that the implications of the Convention for the Chicago Convention "cannot be definitely considered now because the Convention has not entered into force",[24] the issue of State sovereignty needs to be considered more closely. This is because of the manner in which aspects of sovereignty have been both diminished and extended in archipelagic waters, straits used for international navigation, the contiguous zone and the exclusive economic zone. In this regard the following observations made in relation to the need for changes to the Chicago Convention to reflect technological change seem apposite:

> "A preliminary inquiry into the Chicago Convention reveals that some of its basic premises have undergone change. Even the basic postulates of national economy and security, on which the Convention is primarily based, are increasingly being recognized as interdependent entities encompassing interests in the world community at large".25

Thus the principle of complete and exclusive sovereignty over the airspace above national territory no longer appears valid for a certain number of States. At the same time there has

been a general extension of control by the State beyond territorial States as reflected in the contiguous and exclusive economic zones. Paradoxically, both developments represent attempts to harmonize State interests with those of the international community.

As discussed in Chapter II, the archipelagic regime balanced the sovereignty of archipelagic States with the regime of archipelagic sealanes passage for aircraft and ships. This in effect preserved rights that had previously existed when archipelagic waters were part of the regime of the high seas. However it also derogated from the concept of sovereignty as set out in Article 1 of the Chicago Convention.

First, a band of water dissecting archipelagic waters is established by Article 53 paragraph 4. Consisting of sealanes and air routes that "shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes and as routes for international navigation or overflight". Over these waters Article 39 paragraph 3 provides that aircraft in transit passage shall follow the Rules of the Air established by ICAO.

This has obvious implications for Article 11 of the Chicago Convention. It provides for the application of national air regulations concerning admission and departure from national airspace, as well as the operation and navigation of

foreign aircraft while within the territory of a State. The regime of archipelagic sealanes passage will prevail over such a provision which now becomes subject to the Rules of the Air.

The mandatory application of the Rules of the Air over archipelagic sealanes passage has two important consequences. First, it extends the geographical application of the rules to areas that fall within the sovereignty of an archipelagic State. The terms of Article 12 of the Chicago Convention are altered by virtue of Article 39 paragraph 3(a) of the Convention. Second, the right to file a difference to the Standards established by ICAO that is conferred by Article 38 of the Chicago Convention is rendered of null effect. The ICAO study and the report of the Rapporteur focused attention on the compatibility of "archipelagic waters" with the phrase "territorial waters" set out in Article 2. Be that as it may, the effect of the archipelagic regime on general and specific aspects of sovereignty is fundamental in nature. It removes the power to regulate and the discretion to take certain actions that is concommittant with the exercise of sovereignty.

Thus while Article 49 paragraph (4) states that archipelagic sealanes passage "shall not in other respects affect the status of the archipelagic waters... or the exercise by the archipelagic States of its sovereignty over such waters and their airspace", it still represents a significant diminution

of sovereignty in areas where it applies. The discretion that archipelagic States retain appears to relate only to the designation of sealanes and air routes by Article 53 paragraph 1.

One of the most significant features of archipelagic sealanes passage is that it cannot be suspended. This has obvious implications for the power to declare prohibited areas in Article 9 and the war and emergency conditions of Article 89 that free States from the ambit of the Chicago Convention.

Discussion of the regime applying over archipelagic sealanes and air routes has tended to obscure the fact that, over archipelagic waters outside the transit regime, archipelagic States retain full sovereignty. Moreover, within archipelagic sealanes regime, archipelagic States continue to exercise rights over such "waters and their airspace, bed and subsoil, and the resources contained therein". But this cannot in any way hamper the transit regime which thus removes any effective regulation in that area.

Under the archipelagic regime, the extension of sovereignty over archipelagic waters and airspace outside the regime of archipelagic sealanes passage is an important development. In these areas the archipelagic State now exercises sovereignty akin to that over the territorial sea.

This reduces the areas of airspace subject to mandatory application of the Rules of the Air under the Chicago Convention. Consequently, it allows archipelagic States to file differences to those Rules under Article 38 of the Chicago Convention. Given that the regime of archipelagic sealanes passage applies to only a small proportion of the waters and airspace of archipelagic waters, this significant extension of sovereignty may have influenced the conclusion of the ICAO study. The diminution in sovereignty over archipelagic sealanes passage was seen as a very special solution to the special problems posed by the need to preserve freedom of navigation and overflight. However, as has been pointed out, regardless of the relatively limited application of archipelagic sealanes passage, its significance lies in the manner in which it has affected archipelagic sovereignty and entrenched transit passage.

The status of airspace over archipelagic waters can perhaps be better considered in relation to the contiguous zone and the exclusive economic zone (EEZ). The relevance of both for archipelagic airspace lies in the fact that an integrated approach (the "package deal") was taken to resolving these issues in UNCLOS III in a manner acceptable to various competing interests.

Article 33 of the Convention provides that a coastal State may exercise control in a zone contiguous to its territorial sea. This provision was first incorporated in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Coastal State control is limited to preventing contravention of customs, fiscal, immigration or security laws within its territory or territorial sea.[26] The coastal State may also punish infringements of laws committed within its territory or territorial sea.[27] The contiguous zone extends up to twenty-four miles from the baselines from which the territorial sea is measured.[28]

The ICAO study concluded that:

> "The formulation of this provision would not rule out an action against a foreign aircraft (hydroplane) on the surface of the waters within the contiguous or, even interception of such an aircraft in flight in that zone..."29

The study qualified this conclusion by pointing out that the Council of ICAO had stated that "interceptions of civil aircraft are, in all cases, potentially hazardous."[30] The study concluded that as the control exercised was not sovereign it:

> "would be hardly justified if it were to take a forcible action against a civil aircraft in flight over the contiguous zone for any of the reasons stipulated in the Convention..."32

However, Article 33 paragraph 1(b) refers to "infringements" committed within the territory or the territorial sea which

would give the coastal State the right to punish infringements committed within jurisdiction.[33] This control is quite clearly short of sovereignty, Articles 1 and 2 of the Chicago Convention stipulating the limits of State sovereignty over the airspace. Under the Convention, the contiguous zone is no longer considered part of the high seas but the regime which applies would appear to be that of the EEZ. This follows from the provisions of Articles 55 and 86 of the Convention. Article 55 states that the EEZ is an "area beyond and adjacent to the territorial sea..." which would include the contiguous zone. Article 86 then sets out the application of Part VII (High Seas) and omits any reference to the contiguous zone. The inference can thus be drawn that the contiguous zone is part of the EEZ.

The EEZ extends up to two hundred miles from the baselines from which the breadth of the territorial sea is measured.[34] Article 55 provides that:

> "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention".

Article 58 paragraph 1 provides for freedom of navigation and overflight "subject to the relevant provision of this Convention". This is done by incorporating "the freedom re-

ferred to in Article 87 of navigation and overflight". Article 58 paragraph 2 then applies Articles 88 to 115 and "other pertinent rules of international law" to the EEZ "in so far as they are not incompatible with this Part". Paragraph 3 obliges States to have regard for the rights and duties of the Coastal State.

The freedom of navigation and overflight is to be considered with Articles 56 and 60. Article 56 paragraph 1(a) provides that a coastal State has "sovereign rights" for the exploration of resources in the waters, sea-bed and subsoil of the EEZ. It also has "jurisdiction" with regard to the establishment and use of artificial islands,[35] installations and structures; marine science research;[36] and protection of the marine environment.[37] In exercising its rights and duties in the EEZ, the coastal State is obliged to have regard for the rights and duties of other States.[38] This includes the right of navigation and overflight provided in Article 58.

Article 60 expands on Article 56 paragraph 1(b)(i) by defining the rights of coastal States regarding artifical islands, installations and structures in the EEZ. It has the exclusive right to conduct, authorise and regulate the "construction, operation and use of": artificial islands;[39] installations and structures for the purposes of Article 56;[40]

and installations and structures which may interfere with the exercise of the rights of the coastal State in the EEZ.[41] In relation to these artificial structures the coastal State has "exclusive jurisdiction" including jurisdiction over customs, fiscal, health, safety and immigration laws.[42] Article 60 paragraph 4 then provides a coastal State may establish safety zones around such structures for the safety of both navigation and those structures. Only ships are obliged to respect these safety zones.[43]

Freedom of navigation and overflight in the EEZ is therefore qualified by Articles 56 and 60.[44] The rights of an aircraft or vessel would largely depend on the activity in which it was engaged.[45] Thus a coastal State might be justified in enquiring about overflight of an aircraft engaged in the exploration of its resources in the EEZ.[46] Furthermore, there is no equivalent provision to Article 39 paragraph 3(a) that makes transit passage over archipelagic waters subject to the mandatory application of the Rules of the Air.[47] There is therefore no clear indication of whether the Rules of the Air apply mandatorily or whether coastal States may file differences.[48] In this regard the ICAO study concluded that:

> "The status of the airspace over the EEZ must be clarified by an interpretation in order to understand the

> possible implication of this profound development of international law of the sea for the instruments of international air law." 49

Several States expressly supported this approach in their responses to the ICAO study.[50] Other States wanted the matter to be studied further.[51]

Canada in its response observed:

> "It is perhaps overstating the situation in paragraph 11.7 to say that the coastal State has no jurisdiction in the airspace over artificial islands, installations and structures in the exclusive economic zone. In practical terms, if the coastal State has exclusive jurisdiction with respect to airports or heliports constructed on installations in the EEZ, some control within approach airspace is necessary for the coastal State".52

The Canadian response then went on to comment on the ICAO study proposal to define the status of the airspace over the EEZ. It stated that

> "...it might be easier to comply to reach a decision as to which Rules of the Air should apply in the EEZ rather than attempt to define either the status of the airspace under EEZ or the status of the EEZ itself... Any attempt to equate the status of the EEZ to the high seas may meet with substantial opposition".53

This is because many States claiming EEZ appear to interpret their rights broadly and are interested in minimising navigation rights in their EEZ. As to control over aircraft,

Canada pointed out that the coastal State would probably exercise control over aircraft engaged in the exploration of natural resources in the EEZ.[55]

Against these considerations, the right of overflight extant over the high seas does apply over the EEZ by virtue of Article 58 paragraph 1. Furthermore, Article 89 which provides that "no State may validly purport to subject any part of the high seas to its sovereignty" applies by an application of Article 58 paragraph 2. Thus only sovereign rights are granted to States in the EEZ.[56] However, the application of the Rules of the Air remains unresolved.[57] As pointed out by Canada, any attempt to equate the EEZ with the high seas would be opposed by many States notwithstanding the position taken by the United States. That no agreement was reached on the status of the EEZ is reflected in Article 59.[58] This provides for conflicts between coastal States and other States to be resolved on "the basis of equity and in the light of all relevant circumstances".

What is clear is that there is a right of overflight in the EEZ. Equally, the rights granted to coastal States in the EEZ can be characterised as economic rights relating to the resources in the zones rather than to the zone itself.[59] This appears to have been stressed repeatedly during UNCLOS

III.[60] There is also the regime of archipelagic sealanes passage itself which is relevant in this regard. The regime would be rendered ineffective if archipelagic States in particular were able to exercise and regulate control over transit passage in the EEZ which is restricted in certain areas over archipelagic waters. It is unlikely that the exercise of "sovereign rights" and "jurisdiction" by archipelagic States in the EEZ would be as substantive as its powers over archipelagic waters, over which it has sovereignty subject to the regime of archipelagic sealanes passage.

The relevance of the regime of the EEZ for the status of archipelagic waters lies in clarifying the extent of the powers of the archipelagic State. Thus while its capacity to regulate transit passage over archipelagic waters is limited, it is broader than that it could claim over the EEZ where the right of overflight applies through that zone (subject to certain qualifications). Furthermore, when seen as part of the integrated approach taken at UNCLOS III, the regime of archipelagic sealanes passage was safeguarded and the rights of coastal States in the EEZ recognized. Therefore, the extension of archipelagic sovereignty was broadly consistent with the expansion of coastal State control over surrounding waters.

Thus the legal status of the airspace over archipelagic waters is a hybrid. It consists of two regimes: one over archipelagic sealanes passage that is regulated by the Rules of the Air; and the other in which the archipelagic State essentially enjoys complete sovereignty. The former was guaranteed in return for the recognition of the archipelagic regime and coastal State rights in the EEZ. It is the result of balancing State interests against the concerns of the international community but it has in turn focused attention on the fundamental assumptions that underpin the Chicago Convention. Certainly the provisions of the Chicago Convention do not affect the diminution in sovereignty over archipelagic sealanes passage and neither does the definition of territorial waters. Given these circumstances it is perhaps appropriate that ICAO consider amending the Chicago Convention to more accurately reflect the developments in international law that have occurred since 1944.

2. Rights of Innocent and Transit Passage

The right of innocent passage of ships in the territorial sea was long part of customary international law before it was first codified in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. It was reincorporated, albeit in more detailed form,[61] as Articles 17 to 33. Transit passage appears as a new concept in the Convention. It applies to straits used for international navigation and archipelagic sealanes passage and consists of navigation and overflight "in the normal mode" for the sole 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".[62]

Innocent passage only extends to ships as recognized in Article 17 of the Convention. This is reflected in the Chicago Convention: Articles 5 and 6 which relate to transit passage for non-scheduled and scheduled services respectively attach conditions to the granting of transit passage. Article 3 paragraph (c) prohibits overflight of a State by foreign State aircraft without prior authorization. In considering the right of innocent passage in air law, S.F. Macbrayne stated as follows:

> "The theory of free transit with rights of self-preservation for the subjacent State was the theory that Fauchille endeavoured to implant in the air. In 1906 Professor Westlake took the stand that there was sovereignty in the air but that, notwithstanding, there was also, as in the marginal sea, the right of innocent passage.
> States completely discarded the theory of Fauchille prior to the outbreak of World War I and what remains of Westlake's proposition is sovereignty, complete and absolute, without the right of transit, unless there be consent".63

These observations accord with those of Professor John Cobb Cooper who said that:

> "International law has never accepted the view that the right of passage through one part of the transport medium automatically carries with it the right of passage through ther parts of the same medium. For example, even though the right of all States to use the airspace over the high seas is universally accepted, the right of each State to deny entry into its airspace of foreign aircraft approaching its shores has been equally accepted and enforced".64

Articles 5 and 6 of the Chicago Convention state:

> Article 5
> Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to further prescribed routes, or to obtain special permission for such flights.
>
> Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarcation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.
>
> Article 6
> No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization".
> (emphasis added).

Article 53 paragraph 2 sets out the right of archipelagic sealanes passage and provides:

> "All ships and aircraft enjoy the right of archipelagic sealanes passage in such sealanes and air routes".

Paragraph 3 then defines archipelagic sealanes passage as follows:

> "Archipelagic sealanes 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 exclusive economic zone and another part of the high seas or an exclusive economic zone".

Article 53 paragraph 2 entrenches such passage as a right which is further buttressed by Article 44 as follows:

> "States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. <u>There shall be no suspension of transit passage</u>". (emphasis added).

The relevant provisions of the Chicago Convention are Article 3 paragraph (c), Articles 5 and 6. Article 3 paragraph (c) states as follows:

> "No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof".

The implications of transit passage were referred to by the Rapporteur of the ICAO Legal Committee.[65] First, non-scheduled services would enjoy the right of transit passage through territorial airspace independently of Article 5 of the Chicago Convention.[66] Scheduled services would also enjoy the same right without having to seek authorization pursuant to Article 6 of the Chicago Convention or pursuant to the International Air Services Transit Agreement.[67] Third, the right of non-suspendable transit passage as provided by Article 44 of the Convention could not be affected by Article 89 of the Chicago Convention (relating to war and emergency conditions).[68] Finally, the right of archipelagic States to create restricted or prohibited areas under Article 9 of the Chicago Convention could not be exercised so as to restrict or hamper transit passage.[69]

The archipelagic sealanes passage regime leaves little discretion to the archipelagic State. Article 39 paragraph 3(a) provides that the Rules of the Air established by ICAO are to apply in transit passage to civil aircraft; State aircraft "will normally comply with such safety measures...". This removes any discretion it possessed under Articles 5 and 6 of the Chicago Convention. Furthermore the absence of regulatory powers over aircraft in transit passage as compared with the provisions of Article 42 paragraph 1 of the Con-

vention suggest that Article 39 paragraphs 1 and 3 encapsulate the applicable regime. Article 42 paragraph 1 authorizes the State to regulate all or any of the following: the safety of navigation;[70] the prevention of pollution by applying international regulations regarding the discharge of oil;[71] the prevention of fishing by fishing vessels;[72] and loading or unloading any commodity, currency or person in contravention of customs, fiscal, immigration or sanitary laws.[73] These regulatory powers only relate to ships.

The extent of the archipelagic State's discretion appears to be as set out in Article 53 paragraph 1 which states:

> "An archipelagic State may designate sealanes 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".

However this discretion is limited and the mandatory aspect of the regime is further reflected in Article 53 paragraph 12 which states:

> "If an archipelagic State does not designate sealanes or air routes, the right of archipelagic sealanes passage may be exercised through the routes normally used for international navigation".

This prevents any archipelagic State from frustrating the regime of transit passage by refusing to act under Article 53 paragraph 1.

Article 53 paragraph 4 then describes the course of archipelagic sealanes and air routes stating in part that:

> "Such sealanes 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...".

Therefore the archipelagic regime not only establishes a legal regime that applies in specific areas of archipelagic waters and varies from that pertaining to the airspace above territorial waters, it also creates rights of transit passage over the adjacent territorial sea. While this is of course a geographical necessity to give effect to archipelagic sealanes passage, it places the territorial sea of archipelagic States in a separate category from that of the coastal States. This represents perhaps one of the most obvious modifications of the exercise of sovereignty in Article 1 of the Chicago Convention.

Article 53 paragraph 5 delimits the course sealanes and air routes are to take by "a series of continuous axis lines from the entry points of passage routes to the exit points." It also prescribes conditions for transit passage by obliging ships and aircraft not to "deviate more than twenty-five nautical miles to either side of such axis lines during passage". This is subject to a proviso:

> "that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points in islands bordering the sealane". (emphasis added).

The omission of a reference to "air route" at the end of the proviso complicates the question of whether it applies to aircraft in the air lane.[74] The omission may have been an oversight given that the provision appears to contemplate aircraft by first referring to "sealanes and air routes" and then to "ships and aircraft in archipelagic sealanes passage".

Paragraphs 6 to 10 of Article 53 only make reference to ships in sealanes. It would therefore appear that the prescription of traffic separation schemes by archipelagic States only applies to ships.[75] However the Netherlands, in its response to the ICAO study on this issue stated that:

> "In the system of navigation of regulations on archipelagoes and the navigation through and overflight over archipelagic sealanes, the regulations on navigation and overflight have been drafted, without much consideration for the difference between navigation and overflight".76

There is little support in the text for such an interpretation. Paragraphs 1 to 5 of Article 5 refer to "sealanes and air routes" which suggests the omission of air routes from paragraphs 6 to 10. The ICAO study noted that:

> "for purely practical reasons of co-ordination the archipelagic States would present their proposals on air routes to the Regional Air Navigation Conference

for inclusion into the appropriate Regional Air Navigation Plan for eventual approval by the ICAO Council".77

The duties of ships and aircraft in transit through and over archipelagic sealanes passage are governed by Article 39. Paragraphs 1 and 3 provide as follows:

"1. Ships and aircraft, while exercising the right of transit passage shall:
(a) proceed without delay through or over the strait;
(b) refrain from any threat of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(c) refrain from any activities other than those incident 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 this Part.

2...

3. Aircraft in transit passage shall
(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".

First, the provisions set out in paragraph 1 detail general duties that are to apply generally to ships and aircraft in transit passage. This contrasts with references to "impose such regulations, conditions or limitations as it may consider desirable" in the second paragraph of Article 5 of the Chicago Convention; and the phrase "except with the special permission or other authorization of that State...", in Art. 6. Similar conditions apply to transit passage of State aircraft in Article 3 paragraph (c).

Having set out the general duties in paragraph 1, paragraph 3 of Article 53 then sets out specific obligations for aircraft in transit passage. Mandatory observation is required of the Rules of the Air established by ICAO. State aircraft are required to "normally comply with such measures and will at all times operate with due regard for the safety of navigation". The latter part of the formulation applying to State aircraft is modelled after Article 3 paragraph (d).[78]

The second duty concerns the continuous monitoring of the radio frequency "assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency". Under Standard 3.6.5.1 of the Rules of the Air this duty is set out in part as follows:

> "An aircraft operated as a controlled flight shall maintain continuous listening watch on the appropriate radio frequency of, and establish two-way communication as necessary with the appropriate air traffic control unit..."

The ICAO study concluded that:

> "Since the duty to maintain continuous listening watch of the ATC frequency applies, under Annex 2, only to controlled flights, it must be concluded that in view of Article 39, paragraph 3 of the U.N. Convention no uncontrolled flights are contemplated for transit passage over straits used for international navigation".79

However this appears to be at odds with the provisions of Article 39 paragraph 3(b). As this obligation is independent of that in paragraph 3(b). To construe such a limitation would in any case be inconsistent with the right of transit passage which applies to ships and aircraft without apparent qualification.

The Netherlands raised this issue and cited Standards 4.7 and 5.3.2 of the Rules of the Air which refer to uncontrolled (VFR[80] and IFR[81]) flights:

> "within or into areas, or along routes, designated by the appropriate ATS authority in accordance with 3.3.1.1.2.1.c) or d)".82

Standard 3.3.1.1.2.1. c) and d) contain standards relating to the requirements to submit a flight plan to be submitted prior to:

> "c) any flight within or into designated areas, or along designated routes, when so required by the appropriate ATS authority to facilitate the provision of flight information, alerting search and rescue operations;

> d) any flight within or into designated areas , or along designated routes, when so required by the appropriate ATS authority to facilitate co-ordination with appropriate military units or with air traffic services units in adjacent States in order to avoid the possible need for interception for the purpose of identification;..." (emphasis added).

Accordingly it asserted that Paragraph 3(b) of Article 53 applied to uncontrolled flights if the competent authority required a flight plan for the measures set out in Standard 3.3.1.1.2.1.c) and d) respectively.[83]

The Netherlands further submitted that Article 53 paragraph 3(b) was not meant to be cumulative as maintained by the ICAO study.[84] The term "air traffic control authority" in the Convention was synonymous with the "appropriate ATS authority" in the Rules of the Air and Annex 11.[85] The duty of aircraft to monitor the international emergency frequency was asserted by the Netherlands as "hardly a "firmly established practice"" (as maintained by ICAO).[86] The reference to Annex 10, Volume II (in addition to the Rules of the Air) was incomplete as:

> "The standard applies only to aircraft "on long over-water flights over designated areas over which the carriage of survival radio equipment or emergency location beacon-aircraft (ELBA) is required". Such requirements for aircraft are based on ICAO Annex 6 (Operation of Aircraft) and refer to aeroplanes used over routes on which they may be over water and at a certain distance away from land suitable for making an emergency landing".87

This distance varied from 740 km (400 nm) to 185 km (100 nm) and was dependent on the type of aircraft and operation.[88]

The second point raised by the Netherlands on this issue was an exception clause in the standard that greatly diluted its effect.[89] It stated that:

> "except for those periods when aircraft are carrying out communications on other VHF channels or when airborne equipment limitations or cockpit duties do not permit simultaneous guarding of two channels".

Taking both factors into account the Netherlands concluded that:

> "The duty to monitor the international emergency frequency in accordance with Annex 10 is only applicable at a minimum distance of 185 km from land and is therefore not applicable to straits which are narrower than 24 n.m.
> Consequently, the duty of the aircraft to monitor either one appears to be correct. The alternative of a listening watch on the international emergency frequency appears to apply only in the case of an uncontrolled flight (VFR or IPR), for which a listening watch on an assigned ATS-frequency is not required by the appropriate ATS authority (Annex 2 para.4.7 and 5.4.2)".[90]

The Rapporteur in his report felt he was "not qualified to consider such a technical matter, which is perhaps better dealt with by the Air Navigation Commission".[91] He also drew attention to:

> "the comments of the Netherlands, which do not agree with the Secretariat's belief that UNCLOS is in error, or that "it is a firmly established practice that the aircraft must monitor the international emergency frequency"".[92]

As regards the nature of the general duties set out in Article 53 paragraph 1, those obligations are not linked to the right of transit passage.[93] However it has been argued that:

> "Though Article 39 speaks of user duties, it necessarily imports coastal rights. It must be construed as allowing the coastal States a broad prescriptive and applicative competence with regard to transit passage unless we are to assume that the "duties" are no more than moral imprecations".9

The argument continues as follows:

> "In order for passage to be "transit passage", it must be effected without delay, not to be a "threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits... and not "in any other manner in violation of the principles of international law" embodied in the Charter of the United Nations. Because these are legal duties and hence require characteristics that the coastal State must assess "transit passage" takes on many of the features of innocent passage".95

These arguments can be easily related. First, "Transit Passage" is established as a section of a separate part III dealing with straits used for international navigation.[96] Second, Article 39 paragraph 1 in the duties set out there obliges aircraft and ships to "comply with other relevant provisions of this Part"[99] thereby excluding any possible application of the regime of innocent passage.[98] The regime of archipelagic sea-lanes passage established by Article 53 contrasts with the

regime of innocent passage that by Article 52 paragraph 1 is made subject to Article 53 and applies outside the ambit of that provision in the remainder of archipelagic waters. Finally, the attempts by several countries, notably Spain, Morocco and Greece to alter the draft proposals of the Convention on the straits regime were unsuccessful.[99] Those States, among others, sought to remove or restrict overflight rights and confer on straits States the power to regulate overflight.[100]

The foregoing demonstrates the opposing interests that had to be reconciled. This was done with the package deal approach discussed in Chapter II which resulted in the general, if somewhat grudging (on the part of some States) acceptance of the archipelagic and straits regimes. The only residual power that the archipelagic State may be said to possess is the right of self-defence pursuant to Article 51 of the United Nations. While an argument could be mounted to assert an archipelagic State retained the right of unilateral action in respect of vital security interests, the absence of enforcement provisions similar to Articles 20 and 25 in respect of innocent passage undermine that proposition. Moreover, Article 42 paragraph 5 provides for international responsibility where a flag State of a ship or State of registry of an aircraft entitled to sovereign immunity has acted "in a manner contrary to such laws

and regulations or other provisions of this Part...". In relation to aircraft in transit passage it can only refer to the contravention of its duties pursuant to Article 39 paragraph 1.

Transit passage of aircraft over archipelagic sea-lanes passage is thus entrenched under Articles 42 and 53 of the Convention. This corresponds with a significant limitation of the sovereign powers of archipelagic States in order to ensure that such transit passage is as unimpeded as possible. By conferring the right on "all ships and all aircraft" and making it non-suspendable, the Convention has achieved in some part what the Chicago Convention was perhaps less successful in attempting. Notwithstanding that it will only directly affect a relatively few States over which the international community now has transit rights, it will focus new attention on the legal regimes established under the Chicago Convention and the need to reflect the varying exercises of sovereignty and sovereign rights that now exist.

Rules of the Air

Article 39 paragraph 3(a) of the Convention provides that aircraft in transit passage (over archipelagic sea-lanes passage established under Article 53) shall follow the Rules of the Air established by ICAO.

ICAO is responsible for the adoption of international standards and recommended practices and procedures pursuant to Article 37 of the Chicago Convention to ensure:

> "The highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation".

The provision enumerates areas of air navigation in which ICAO may adopt international standards and recommended practices and procedures although these are not exhaustive.[101] Article 37 paragraph (c) concerns rules of the air and air traffic control practices. Article 54 sets out the mandatory functions of the Council of ICAO, paragraph (l) stating that it shall:

> "Adopt in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention and notify all contracting States of the action taken".

Article 90 then establishes the procedure for the adoption and amendment of Annexes. "Standards" and "recommended pract-

ices" are not defined in the Convention but these terms are self-explanatory.[102] A standard suggests a rule to be complied with, whereas a recommended practice is a guide that is not obligatory in character.[103]

The adoption and amendment of Annexes has been described as a quasi-legislative function.[104] They are not binding on member States of ICAO against their will.[105] The sole exception to this rule is the Rules of the Air (designated as Annex 2 to the Chicago Convention) which apply mandatorily over the high seas pursuant to Article 12 which states:

> "Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneouvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable". (emphasis added).

In adopting the Rules of the Air in April 1948, and Amendment No. 1 to the Annex in April 1951, the Council of ICAO resolved that it constituted Rules relating to the flight and maneouvre of aircraft within the meaning of Article 12 of the Chicago Convention. Consequently, these rules apply mandatorily over the high seas.

Under the Convention, the Rules of the Air are extended to apply mandatorily in the airspace over straits used for international navigation and over archipelagic waters where the regime of archipelagic sealanes passage applies. Article 39 paragraph 3(a) provides:

> "Aircraft in transit passage shall
> (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;..." (emphasis added).

The ICAO study commented on the provision as follows:

> "These specific provisions on the right of transit passage of aircraft over straits have a direct implication for the Chicago Convention and for Annex 2 thereto which contains the Rules of the Air which are made mandatory by a special cross-reference in Article 39, paragraph 3, of the Convention on the Law of the Sea". (emphasis added).106

It follows that archipelagic States cannot file differences to the Rules of the Air.

In his report, the Rapporteur endorsed this conclusion and stated that he:

> "agrees with... the Secretaria't study that the reference to Annex 2 as adopted and amended by the ICAO Council, without taking account of the difference filed by contracting States under Article 38 of the Chicago Convention".107

The Rapporteur went on to point out that:

> "The inability to rely on differences filed against Annex 2 is a new departure, bearing in mind that coastal States previously had the right to rely on such differences in respect of flight over their territorial waters. This new departure may perhaps be welcomed, as increasing the area in which the Rules of the Air established by ICAO are uniformly applied, which can be conducive to safety". 108

Brazil was dubious about the conclusions reached in the ICAO study. It doubted whether the "Council's provisions relative to the high seas specifically in Article 12 extended to straits by deliberation of the Council".[109] It expressed similar views in relation to archipelagic States and felt the matter required further study and perhaps an amendment to the Chicago Convention.[110]

In its submission the International Air Transport Association (IATA) expressed concern about possible ambiguities in the application of the Rules of the Air. IATA referred to Standard 2.1.1. of the rules which states:

> "The rules of the air shall apply to aircraft bearing the nationality and registration marks of a contracting State wherever they may be, to the extent that they do not conflict with the rules published by the State having jurisdiction over the territory over the airspace".111

The Rapporteur acknowledged this point but observed that no ambiguity would arise as the Council of ICAO had already stated

that the rules would apply without exception over the high seas.[112] They would, therefore, apply similarly over archipelagic waters. A possible problem could arise in relation to Standard 3.1.9 of the Rules of the Air relating to prohibited areas and restricted zones. It provides aircraft shall not fly over such areas "except in accordance with the conditions... of the State over whose territory the areas are established". As transit passage cannot be suspended such a provision probably has no effect.

The first consequence of Article 39 paragraph 3(c) is to extend, in one sense, the geographical application of the Rules of the Air from the high seas to the airspace above archipelagic waters where the regime of archipelagic sealanes passage applies. Interestingly, the actual area to which the Rules of the Air now apply has decreased by virtue of the archipelagic regime which extends the sovereignty of archipelagic States to what were previously areas of high seas.

The scope of the Rules of the Air in regulating transit passage over archipelagic waters then raises important questions. First, what powers of regulation do archipelagic States retain? A consideration of this issue serves to clarify the application of the Rules of the Air. If such regulatory powers are limited in scope can the implication be drawn that the Rules of the Air may fill the "vacuum"?

In examining the regulatory powers of archipelagic States over archipelagic sealanes passage, it must be remembered that the exercise of sovereignty is subject to this regime.[113] Article 53 paragraph 1 allows an archipelagic State to designate sealanes and air routes for "the continuous and expeditious passage" of ships and aircraft through or over archipelagic waters. In relation to ships, archipelagic States may also prescribe traffic separation schemes[114] and substitute other sealanes or traffic separation schemes for any previously designated by it.[115]

Article 42 paragraph 1 sets out the laws and regulations an archipelagic State may make in relation to transit passage. These relate to the safety of navigation,[116] the prevention of pollution,[117] the prevention of fishing by fishing vessels[118] and the contravention of customs, fiscal, immigration or santiary regulations by the loading and unloading of any commodity, currency or person.[119] However paragraph 3 makes clear that these regulatory powers only apply to ships by stating in part:

> "Such laws and regulations shall not discriminate in form or in fact among foreign ships...".

It has been suggested that paragraph 5 implies that archipelagic States have certain regulatory powers.[120] It provides for international responsibility for loss or damge to be borne

by the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity" which acts in a manner contrary to such laws and regulations or other persons of this Part...". However the reference to "such laws and regulations" is to those set out in paragraph 1 of Article 42. Therefore no implication can be drawn from Article 42 about the regulatory powers of archipelagic States over aircraft in transit passage.

As archipelagic sealanes passage does not "in other respects" affect the status of archipelagic waters...", aircraft remain subject to the general jurisdiction of the archipelagic State.[121] However the applicability of its laws will depend on whether they "hamper" transit passage which cannot be suspended.[122] Thus while the crew and passengers remaining on aircraft are subject to the criminal and civil jurisdiction of the archipelagic State, specific laws relating to standards to be observed by aircraft, passengers and crew would intrude on Article 39 paragraph 3(a).[123] This would not preclude the right of self-defence guaranteed by the U.N. Charter if an archipelagic State were forced to respond accordingly.

Generally, the capacity of the archipelagic State to regulate transit passage is extremely limited. Where the laws of an archipelagic State apply as a consequence of its

sovereignty, they cannot hamper or suspend transit passage.

The Rules of the Air relate to the "flight and manoeuvre of aircraft". The interpretation given to the phrase has been stated by one commentator as follows:

> "The first method of interpretation which comes to mind is to compare the rules referred to in Article 12 to the rules of the road. This would probably narrow these rules to the shortest set. But a broader view could be taken and it might be argued that all rules imposed upon airmen which affect the conduct of the flight relate to flight and manoeuvre. It should, however, not be forgotten that the underlying purpose of Article 12 is to ensure the uniform application of rules considered as essential for the safety of navigation".[124] (emphasis added).

Given the limited regulatory powers of the archipelagic States, does this suggest that the Rules of the Air may apply as a complete scheme for regulating transit passage? The question is not as obtuse as it might appear. Article 42 paragraph 1 enumerates the regulatory powers of archipelagic States in relation to the transit passage of ships. As Article 53 paragraph 3(a) provides that aircraft in transit passage shall observe the Rules of the Air, is ICAO to be equated with having similar regulatory powers over aircraft in transit passage?

Given the application of the Rules of the Air and that the adoption of international standards and procedures by ICAO is to "facilitate and improve air navigation", there

is some support for this proposition. The scope of Article 12 is not limited to the standards prescribed in the Rules of the Air.[125] While the Council of ICAO has resolved that the Rules of the Air (Annex 2) constitute the rules contemplated by Article 12, the provision itself suggests a wider application.[126] This issue arose in relation to the adoption of Air Traffic Services Standards (Annex 11) in 1950. The Council of ICAO decided not to make these Standards mandatory over the high seas. The decison was taken on practical grounds: the existence of two sets of Standards of a State deviated from the one applying over the high seas over its own territory; and that States might be deterred from supplying much-needed services over the high seas.[127]

Therefore, the Rules of the Air could set out regulations relating to the "flight and manoeuvre of aircraft" that went beyond their present scope. Moreover, these Rules would not derive their validity from the implication that might arise from Article 42 paragraph 1 of the Convention but apply on their own terms. The only possible limitation in relation to transit passage would be that these Rules would have to apply uniformly over the high seas and the relevant areas over archipelagic waters, the regime of transit passage being complicated by the unclear demarcation between it and the sovereignty of the archipelagic State.

Notwithstanding those considerations, the terms of Article 39 can be construed to establish a viable regime that applies the Rules of the Air and paragraph 1 of Article 39. No implication can be drawn from the provisions of Article 42 paragraph 1 to suggest that the Rules of the Air apply mutatis mutandis to aircraft. Article 42, with the exception of paragraph 5 only applies to ships. The absence of similar provisions for the regulation of aircraft by the Rules of the Air leads to a consideration of Article 39, paragraph 1. The general duties set out here complement the Rules of the Air which aircraft must observe. They establish duties against which the conduct of the transiting aircraft may be objectively determined. As such they provide the other limb to the regulation of transit passage. The Rules of the Air will apply to ensure the highest possible standards in air navigation over archipelagic waters and the standards and duties in paragraph 1 will govern the conduct of aircraft. Paragraph 3(a) in dealing with State aircraft refers to "such safety measures", which in that context can only refer to the Rules of the Air.

This interpretation would be consistent with the balancing of interests that so preoccupied negotiations at UNCLOS III. The Rules of the Air would apply to aircraft in transit passage in establishing standards of safety, but the

actual conduct of aircraft would be governed by Article 39, paragraph 1. In this way, archipelagic States, having been effectively restricted from regulating transit passage of aircraft, could at least have recourse to objective standards set out in the Convention. In considering the provision on the right of navigation and the right of overflight generally, it has been pointed out that:

> "There is no implication from those differing textual provisions that either the right of navigation or the right of sovereignty is superior to the other. The differences result from differences in the history and practice of surface and aerial navigation. It is clear that the drafter intended to place overflight of straits used for international navigation on the same legal plane as surface navigation".128

That would certainly appear to be the case, with the wider regulatory powers conferred on archipelagic States in relation to ships due in large part to the nature of shipping.

The practical problems which arise from the mandatory application of the Rules of the Air relate to the existence of two regimes in the airspace of both archipelagic waters and the territorial sea. The Rules of the Air will apply over archipelagic sealanes passage that cross both archipelagic waters and the territorial sea. On either side of this corridor, the archipelagic States retain their sovereignty and the right to file differences with ICAO standards pursuant to to Article 38 of the Chicago Convention. Consequently, air-

craft exercising the right of transit passage will be obliged to follow the Rules of the Air whereas the aircraft either using the same air routes for domestic services or for flight to and from the archipelagic State are required to follow standards set by the archipelagic State. This possible conflict of rules has serious consequences for international flight and could increase safety hazards such as possible collisions. The Rapporteur drew particular attention to this problem in his report.[129]

The second limb of Article 53 paragraph 3(a) concerns State aircraft. This is not defined in the Convention but may be taken to have the same meaning as set out in Article 3 paragraph (b) of the Chicago Convention.[130] The Rules of the Air are not obligatory for State aircraft as reflected in the use of the phrase "will normally" to qualify observance of such rules. Greece sought to argue in its reponse to the ICAO study that State aircraft were obliged to follow the Rules of the Air, a proposition that appears difficult to support.[131]

The ICAO study concluded that:

> "The same "rules of the air" do not apply automatically to State aircraft, i.e., aircraft used in military, customs and police services, in the airspace over the straits; such aircraft nevertheless, should have due regard for the safety of navigation and the ultimate regard could be secured by compliance with the Rules of the Air".132

The conclusions in the ICAO study do not sufficiently reflect the significance of the provisions relating to State aircraft. The phrase "will normally" does allow State aircraft discretion to differ from the Rules of the Air.[133] However, the application of the Rules of the Air to State aircraft, no matter how tentative, is an important development. The phrase "will normally" while not implying an obligation suggests that the State aircraft will be expected to comply with the Rules of the Air on most occasions. Article 3 paragraph (c) of the Chicago Convention expressly states that it "shall not be applicable to State aircraft".

It should be remembered that attribution of international responsibility in Article 42 paragraph 5 to the State of registry of aircraft entitled to sovereign immunity, emphasizes the significance of the conditional application of the Rules of the Air to State aircraft. Such responsibility arises where an aircraft acts in a "manner contrary to... other provisions of this Part...". Therefore, a State aircraft may in certain instances be accountable for failing to observe the Rules of the Air. In this regard the construction of "will normally" in Article 39 paragraph (a) is assisted by reference to the "normal modes of continuous and expeditious transit...". This in no way affects the right of transit passage of State aircraft but it does indicate that sovereign

immunity is considered, in some slight form, as not being sufficient to exempt a State from its responsibilities. This view is supported by the existence of a similar scheme in relation to ships. There, the flag State of the ship entitled to immunity would be held internationally responsible for failing to observe international regulations relating to pollution as set out in Article 39 paragraph 2(b). The provision regarding State aircraft is likely to assume added importance given the issue of sovereignty. It is unlikely that State aircraft of foreign States would needlessly depart from the Rules of the Air while in transit passage for expedient political reasons. This could then build up a practice of State aircraft adhering to those Rules.

Therefore, the Rules of the Air have been significantly affected by the Convention to necessitate reconsideration of the Chicago Convention itself. They now apply over a small but important portion of territorial waters in a way that alters the exercise of sovereignty by archipelagic States. That augurs well in some respects for further standardization of the Rules of the Air, but it poses serious practical problems where different standards would be applied by the archipelagic State in the adjacent airspace. The reference to high seas itself needs to be re-examined given the general trend towards increasing coastal State authority and control over

increasing areas of sea. In this regard the regime of archipelagic sealanes passage was a departure from this trend. At the same time, it represented a particular solution to a particular problem within the framework of UNCLOS III but ought not to obviate the fact that the Rules of the Air now apply to a smaller area of airspace. The preservation of rights that existed prior to the archipelagic regime, as reflected in archipelagic sealanes passage being equated to the high seas and the consequent application of the Rules of the Air, has nevertheless altered the application of the Rules of the Air. It has significantly affected the rights of certain States, and modified provisions of the Chicago Convention which therefore needs to be reappraised accordingly.

FOOTNOTES

1. E. Pépin, "The Law of the Air and the Draft Articles concerning the Law of the Sea adopted by the International Law Commission at its Eighth Session", UNCLOS 1 Official Records, vol. 1: Preparatory Documents; UN Doc.A/CONF.13/37, 64 at 66.

2. Art. 3, para. (b).

3. Art. 3, para. (c).

4. P. Iswandi, The Rights and Duties of States in the Airspace adjacent to their Coasts: Reflections on the U.N. Convention on the Law of the Sea, unpublished Master's Thesis, Montreal, 1985, 220.

5. Id.

6. Art. 17.

7. Art. 18.

8. Art. 25, para.2.

9. J.N. Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea", Am.J.of Int'l L. vol. 74, 1980, 77 at 103.

10. ICAO Doc. LC/26-WP/5-1.

11. Ibid., 16, 17.

12. ICAO Doc. LC/26-WP/5-41, 7.

13. Ibid., 2.

14. IATA and IFALPA.

15. ICAO Doc.LC/26-WP/5-24, 2, 3. Brazil was the other State.

16. Id.

17. ICAO Doc.LC/26-WP/5-5, 1.

18. ICAO Doc.LC/26-WP/5-9, 1.

19. ICAO Doc. LC/26-WP/5-26,1.

20. ICAO Doc. LC/26-WP/5-32, 3.

21. ICAO Doc. LC/26-WP/5-4, 1.

22. See note 12, supra, at 2.

23. ICAO Doc. LC/26-WP/5-12, 1.

24. ICAO Doc. LC/26-WP/5-7.

25. S. Bhatt, "Some New Perspectives on Air Law", Ind. J. of Int'l L., vol. 12, 1972, 219.

26. Art. 33, para.(1)(a).

27. Ibid., para.(1)(b).

28. Ibid., para.2.

29. See note 10, supra, at 11.

30. Id.

31. Id.

32. Id.

33. G.W. Ash, "1982 Convention on the Law of the Sea. Its Impact on Air Law", A.F.L.Rev., vol. 26, 1987, 35 at 51.

34. Art. 57.

35. Art. 56, para.1(b)(i).

36. Ibid., para. 1(b)(ii).

37. Ibid., para.1(b)(iii).

38. Ibid., para.2.

39. Art. 60, para.1(a).

40. Ibid., para. 1(b).

41. Ibid., para. 1(c).

42. Ibid., para.2.

43. Ibid., para.6.

44. D.J. Attard, The Exclusive Economic Zone in International Law (Oxford: Clarendon Press, 1987) 79.

45. Ibid., 80.

46. K. Hailbronner, "Freedom of the Air and the Convention on the Law of the Sea", Am.J. of Int'l L., vol.77, 1983, 490 at 506.

47. Ibid., 508.

48. P.H. Heller, "Airspace over Extended Jurisdictional Zones", in Law of the Sea: Neglected Issues (J. Gamble Jr., Ed., 1979) 135 at 145.

49. See note 10, supra, at 19.

50. Finland, Netherlands, Singapore, Sweden and Uganda.

51. Brazil, Norway, Pakistan, Philippines and the Seychelles.

52. See note 17, supra, at 2.

53. Id.

54. Id.

55. J.I. Charney, "The Exclusive Economic Zone and International Law", Oc.Dev & Int'l L., vol. 15, 1985, 233 at 255.

56. Ash, supra, note 33 at 62.

57. Ibid., 53.

58. Hailbronner, supra, note 46 at 62.

59. B. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1977 New York Session", Am.J. of Int'l L., vol. 72, 1978, 52 at 72.

60. Id.

61. For a detailed discussion see, T. Koh, "The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea", Mal. L.R., vol. 29, 1987, 163.

62. Art. 37, 38, 39; Art. 53, 54.

63. S.F. Macbrayne, "Right of Innocent Passage: Argument for or against an International Right of Innocent Passage Through all Usable Space (Flight Space), Irrespective of Treaty". Term Paper, McGill, Institute of Air and Space Law, 1954, 3.

64. J.C. Cooper, Exploration in Aerospace Law (I.A. Vlasic, ed.) 306 at 308.

65. See note 12, supra, at 4.

66. Id.

67. Id.

68. Id.

69. Id.

70. Art. 42, para.1(a).

71. Ibid., para.1(b).

72. Ibid., para.1(c).

73. Ibid., para.1(d).

74. G.W. Ash, supra, note 33 at 54.

75. Art. 53, para.6.

76. ICAO Doc. LC/26-WP/5-22, 4.

77. See note 10, supra, at 16.

78. "The Contracting States undertake when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft".

79. See note 10, supra, at 14. ATC stands for Air Traffic Control.

80. VFR is the symbol used to designate the Visual Flight Rules.

81. IFR is the symbol used to designate the Instrument Flight Rules.

82. See note 31, supra, at 2.

83. Id.

84. Chicago Convention, Annex 2, Rules of the Air, Standard 3.6.5.1 and Annex 10, Aeronautical Telecommunications, Vol. 11 3d ed. July 1972, Std. 5.2.2.1.1.1.; Id.

85. Id.

86. See note 10, supra, at 14.

87. See note 41, supra, at 3.

88. Id.

89. Id.

90. Id.

91. See note 12, supra, at 6.

92. Id.

93. Moore, supra, note 9.

94. W. Michael Reisman, "The Regime of Straits and National Security: An Appraisal of International Lawmaking", Am.J. of Int'l L., vol. 74, 1980, 48 at 69.

95. Ibid., 70.

96. Moore, supra, note 9 at 90.

97. Art. 39, para.1(d).

98. Moore, supra, note 9 at 90.

99. Hailbronner, supra, note 46 at 495.

100. Ash, supra, note 39 at 49; Ibid., 500.

101. Art. 37, paras (a) to (k).

102. Carroz, J., "International Legislation on Air Navigation over the High Seas", J.A.L.C., vol. 26, 1959, 158 at 166.

103. Id.

104. B. Cheng, Law of International Transport (London: Stevens & Sons Ltd., 1962), 64.

105. Id.

106. Note 1, supra, at 13.

107. See note 12, supra, at 5.

108. Id.

109. See note 21, supra, at 2.

110. Id.

111. ICAO Doc. LC/26-WP-/5-39, 2.

112. See note 12, supra, at 6.

113. Art. 49, paras 3 & 4.

114. Art. 53, para. 6.

115. Art. 53, para.7.

116. Art. 42, para.1(a).

117. Ibid., para.1(b).

118. Ibid., para.1(c).

119. Ibid., para.1(d).

120. Ash, supra, note 39 at 48.

121. Hailbronner, supra, note 46 at 498.

122. Art. 44.

123. Hailbronner, supra, note 46 at 498.

124. Carroz, supra, note 67 at 164.

125. T. Buergenthal, Law-making in the International Civil Aviation Organization (New York: Syracuse University Press, 1969) 83.

126. Carroz, supra, note 101 at 171.

127. Ibid.

128. H.P. Robertson Jr., "Passage through International Straits", Vir.J. of Int'l L., vol. 20, 1980, 801 at 843.

129. See note 12, supra, at 6.

130. "Aircraft used in military, customs and police services shall be deemed to be State aircraft".

131. ICAO Doc. LC/26-WP/5-13, 1.

132. See note 10, supra, at 14.

133. Hailbronner, supra, note 46 at 501.

CHAPTER IV

AIR LAW AS MODIFIED BY THE ARCHIPELAGIC REGIME

The archipelagic regime established under the Convention is close to recognition as part of customary international law. Its importance for international flight lies in the accommodation by archipelagic States of the right of non-suspendable passage by ships and aircraft across archipelagic waters. This was the concession sought by the international community in return for recognition of archipelagic sovereignty.

The extension of sovereignty implicit in the archipelagic regime has reduced the areas of high seas through and over which the freedom of navigation and overflight respectively, apply. Outside the areas where the regime of archipelagic sealanes passage applies, the archipelagic State exercises complete sovereignty. Therefore the extension of archipelagic sovereignty reduces the airspace through which aircraft may fly and confines overflight to the designated passages.

Although transit passage for aircraft is assured, the omission of provision for new air routes may hinder air navigation in future.[1] The archipelagic States will therefore be in an influential position to determine air navig-

ation given their extended sovereignty under the archipelagic regime. This extension of sovereignty is part of a trend towards increasing coastal State control of surrounding waters that is reflected in the EEZ. These developments together with the implications for sovereignty of the archipelagic regime would perhaps suggest some need for reappraisal of the Chicago Convention.

Seen in the context of coastal States claims to surrounding waters, the regime of archipelagic sealanes passage is a special response to a specific situation that concerned a relatively small number of States. That may in part account for the relative equanimity with which ICAO has greeted the establishment of the archipelagic regime. Notwithstanding that consideration, the regime modifies what has been considered the underlying assumption of the Chicago Convention: the primacy of State sovereignty.

To ensure the effectiveness of overflight, the archipelagic State's regulatory powers are substantially reduced. Transit passage cannot be suspended and the application of municipal law determined by whether it hampers, interferes or limits transit passage. Transit passage itself is governed by the general duties set out under the Convention and the Rules of the Air formulated by ICAO. The entrenchment of transit passage for aircraft is significant as there is no

is no such right in general air law. Transit passage is usually subject to State approval. The passage of the regime into customary international law ahead of the Convention taking effect, could point the way for a regime of innocent passage for aircraft generally. This could also be prompted in part by the increasing interdependence of the global economy.

Transit passage itself applies to both civil and State aircraft. In that sense it is an extensive right particularly as an overflight occurs over the waters of archipelagic States. While it was primarily sought by the United States and the Soviet Union for strategic reasons, the application of the regime to both civil and State aircraft is significant. It at least raises the possibility, no matter how slight, of moving towards a common regime for governing both in some aspects of air navitation.

This is illustrated by the application of Rules of the Air to transit passage. Although State aircraft clearly have an obligation to follow the Rules of the Air, the relevant provisions of the Convention suggest general compliance. Moreover, the existence of the regime in territorial airspace is an important factor in determining adherence to the Rules of the Air by State aircraft. It is more likely to be observed for pragmatic political reasons. This could in turn

develop State practice in this regard. An analogy might be drawn here with the shooting down of KAL007 by a Soviet fighter aircraft in 1983. Although the Soviet Union was within its rights in doing so, it nevertheless attracted much international opprobrium and led to the adoption of Article 3 bis in the Chicago Convention.

As for the Rules of the Air, their extended application to part of territorial airspace is a welcome development as far as air safety standards are concerned. However, it may also create practical problems where the archipelagic State has filed differences under the Chicago Convention which would apply in the airspace adjoining air transit corridors.

Therefore the archipelagic regime will modify air law in several respects. Perhaps the most important of these lies in the delicate balancing of archipelagic sovereignty with the interest of the international community in freedom of navigation and overflight. In an increasingly interdependent world, that is a not unhopeful sign and may yet form the basis for extending transit passage further in the interests of the international community.

FOOTNOTE

1. G.W. Ash, "The 1982 Convention on the Law of the Sea - Its Impact on Air Law", A.F.L.Rev., vol. 26, 35 at 55. (see ft 133).

APPENDIX I

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, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Article 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 up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to 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

Article 39
Duties of ships and aircraft during transit passage

1. Ships and aircraft, while exercising the right of transit passage, shall:

(a) proceed without delay through or over the strait;

(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) refrain from any activities other than those incident 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 this Part.

2. Ships in transit passage shall.

(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.

3. Aircraft in transit passage shall.

(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.

Article 40
Research and survey activities

During transit passage, foreign ships including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

Article 41
Sea lanes and traffic separation schemes in straits used for international navigation

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships

2. Such States may, when circumstances require, and 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 them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits 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 States bordering the straits, after which the States may designate, prescribe or substitute them.

5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall co-operate in formulating proposals in consultation with the competent international organization

6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given

7 Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

Article 42

Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41,

(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 strait;

(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 States bordering straits

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

Article 43
Navigational and safety aids and other improvements and the prevention, reduction and control of pollution

User States and States bordering a strait should by agreement co-operate.

(a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and

(b) for the prevention, reduction and control of pollution from ships.

Article 44
Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

SECTION 3. INNOCENT PASSAGE

Article 45
Innocent passage

1. The régime of innocent passage, in accordance with Part II,section 3, shall apply in straits used for international navigation.

(a) excluded from the application of the régime of transit passage under article 38, paragraph 1; or

(b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.

APPENDIX III

TABLE OF SIGNATURES AND RATIFICATIONS AS OF 31 DECEMBER 1986

STATE	FINAL ACT SIGNATURE	CONVENTION SIGNATURE a/	CONVENTION RATIFICATION
Afghanistan		18/3/83	
Albania			
Algeria* b/	x	x	
Angola*	x	x	
Antigua and Barbuda		7/2/83	
Argentina*		5/10/84	
Australia	x	x	
Austria	x	x	
Bahamas	x	x	29/7/83
Bahrain	x	x	30/5/85
Bangladesh	x	x	
Barbados	x	x	
Belgium*	x	5/12/84	
Belize	x	x	13/8/83
Benin	x	30/8/83	
Bhutan	x	x	
Bolivia*		27/11/84	
Botswana	x	5/12/84	
Brazil*	x	x	
Brunei Darussalam		5/12/84	
Bulgaria	x	x	
Burkina Faso	x	x	
Burma	x	x	
Burundi	x	x	
Byelorussian SSR*	x	x	
Cameroon	x	x	19/11/85
Canada	x	x	
Cape Verde*	x	x	
Central African Republic		4/12/84	
Chad	x	x	
Chile*	x	x	
China	x	x	
Colombia	x	x	
Comoros		6/12/84	
Congo	x	x	

STATE	FINAL ACT SIGNATURE	CONVENTION SIGNATURE	CONVENTION RATIFICATION
Costa Rica*	x	x	
Côte d'Ivoire	x	x	26/3/84
Cuba* ** c/	x	x	15/8/84
Cyprus	x	x	
Czechoslovakia	x	x	
Democratic Kampuchea		1/7/83	
Democratic People's Republic of Korea	x	x	
Democratic Yemen	x	x	
Denmark	x	x	
Djibouti	x	x	
Dominica		28/3/83	
Dominican Republic	x	x	
Ecuador	x		
Egypt**	x	x	26/8/83
El Salvador		5/12/84	
Equatorial Guinea	x	30/1/84	
Ethiopia	x	x	
Fiji	x	x	10/12/82
Finland*	x	x	
France*	x	x	
Gabon	x	x	
Gambia	x	x	22/5/84
German Democratic Republic*	x	x	
Germany, Federal Republic of	x		
Ghana	x	x	7/6/83
Greece*	x	x	
Grenada	x	x	
Guatemala		8/7/83	
Guinea*		4/10/84	6/9/85
Guinea-Bissau**	x	x	25/8/86
Guyana	x	x	
Haiti	x	x	
Holy See	x		
Honduras	x	x	
Hungary	x	x	
Iceland**	x	x	21/6/85
India	x	x	
Indonesia	x	x	3/2/86
Iran (Islamic Republic of)*	x	x	
Iraq*	x	x	30/7/85

STATE	FINAL ACT SIGNATURE	CONVENTION SIGNATURE	CONVENTION RATIFICATION
Ireland	x	x	
Israel	x		
Italy*	x	7/12/84	
Jamaica	x	x	21/3/83
Japan	x	7/2/83	
Jordan	x		
Kenya	x	x	
Kiribati			
Kuwait**	x	x	2/5/86
Lao People's Democratic Republic	x	x	
Lebanon		7/12/84	
Lesotho	x	x	
Liberia	x	x	
Libyan Arab Jamahiriya	x	3/12/84	
Liechtenstein		30/11/84	
Luxembourg*	x	5/12/84	
Madagascar		25/2/83	
Malawi		7/12/84	
Malaysia	x	x	
Maldives	x	x	
Mali*		19/10/83	16/7/85
Malta	x	x	
Mauritania	x	x	
Mauritius	x	x	
Mexico	x	x	18/3/83
Monaco	x	x	
Mongolia	x	x	
Morocco	x	x	
Mozambique	x	x	
Nauru	x	x	
Nepal	x	x	
Netherlands	x	x	
New Zealand	x	x	
Nicaragua*		9/12/84	
Niger	x	x	
Nigeria	x	x	14/8/86
Norway	x	x	
Oman*	x	1/7/83	
Pakistan	x	x	
Panama	x	x	

STATE	FINAL ACT SIGNATURE	CONVENTION SIGNATURE	CONVENTION RATIFICATION
Papua New Guinea	x	x	
Paraguay	x	x	26/9/86
Peru	x		
Philippines* **	x	x	8/5/84
P[illegible]nd	x	x	
Portugal	x	x	
Qatar*		27/11/84	
Republic of Korea	x	14/3/83	
Romania*	x	x	
Rwanda	x	x	
Saint Christopher and Nevis		7/12/84	
Saint Lucia	x	x	27/3/85
Saint Vincent and the Grenadines	x	x	
Samoa	x	28/9/84	
San Marino			
Sao Tome and Principe*		13/7/83	
Saudi Arabia		7/12/84	
Senegal	x	x	25/10/84
Seychelles	x	x	
Sierra Leone	x	x	
Singapore	x	x	
Solomon Islands	x	x	
Somalia	x	x	
South Africa*		5/12/84	
Spain*	x	4/12/84	
Sri Lanka	x	x	
Sudan*	x	x	23/1/85
Suriname	x	x	
Swaziland		18/1/84	
Sweden*	x	x	
Switzerland	x	17/10/84	
Syrian Arab Republic			
Thailand	x	x	
Togo	x	x	16/4/85
Tonga			
Trinidad and Tobago	x	x	25/4/86
Tunisia**	x	x	24/4/85
Turkey			
Tuvalu	x	x	
Uganda	x	x	

STATE	FINAL ACT SIGNATURE	CONVENTION SIGNATURE	CONVENTION RATIFICATION
Ukrainian SSR*	x	x	
Union of Soviet Socialist Republics*	x	x	
United Arab Emirates	x	x	
United Kingdom	x		
United Republic of Tanzania**	x	x	30/9/85
United States of America	x		
Uruguay*	x	x	
Vanuatu	x	x	
Venezuela	x		
Viet Nam	x	x	
Yemen*	x	x	
Yugoslavia**	x	x	5/5/86
Zaire	x	22/8/83	
Zambia	x	x	7/3/83
Zimbabwe	x	x	
TOTAL FOR STATES	140	155	31
OTHERS (Art. 305 (1)(b),(c),(d),(e) and (f))			
Cook Islands	x	x	
European Economic Community*	x	7/12/84	
Namibia, (United Nations Council for) Namibia)	x	x	18/4/83
Niue		5/12/84	
Trust Territory of the Pacific Islands	x		
West Indies Associated States			
TOTAL FOR STATES AND OTHERS	144	159	32

OTHER ENTITIES WHICH SIGNED THE FINAL ACT OF THE CONFERENCE

African National Congress
Netherlands Antilles
Palestine Liberation Organization
Pan Africanist Congress of Azania
South West Africa People's Organization

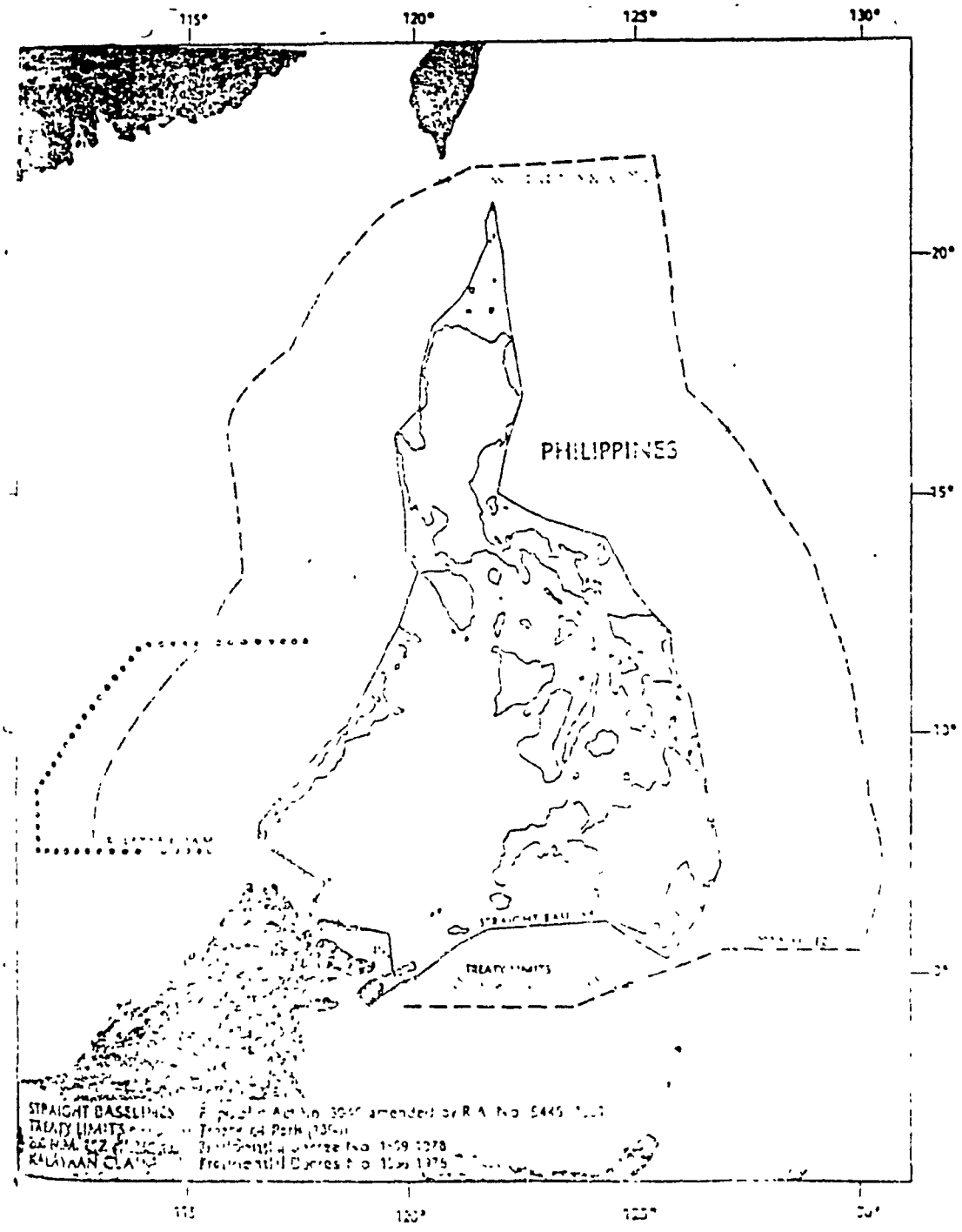
Notes

a/ Those States which signed the Convention on 10 December 1982 are indicated by an "x". Those which signed at a later date are indicated by that date.

b/ Those States which made declarations at the time of signature of the Convention are indicated with an "*".

c/ Those States which have made declarations at the time of ratification of the Convention are indicated with a "**".

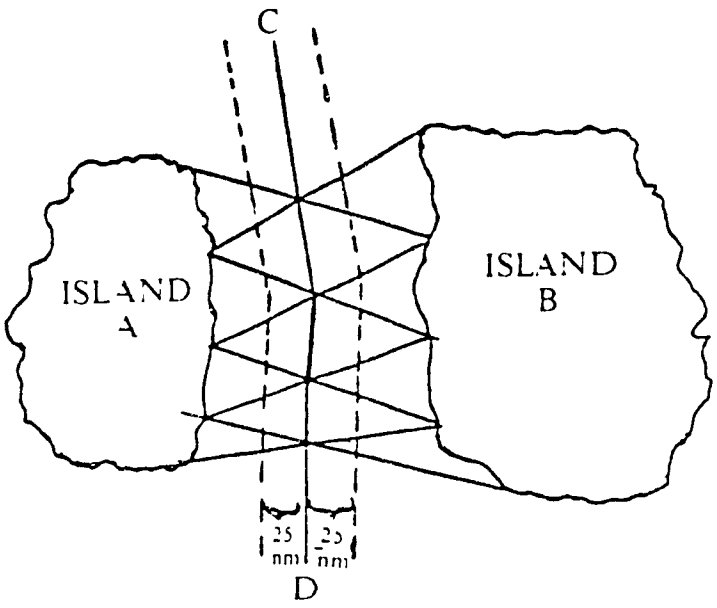
APPENDIX IV



Baselines of the Philippines Archipelago

APPENDIX V

Archipelagic Sealanes Passage



Legend

C-D - Axis lines

A-B - Constituent islands of an archipelago

¦¦ - Archipelagic sealanes

25 n.m. Deviation permitted

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