Analysis of the rules of the international law of the sea governing the delimitation of maritime areas under national sovereignty

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by

FARHAD TALAIE (LLB, LLM)

FACULTY OF LAW
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This thesis is dedicated to the following people.

TO:

My parents, my sisters, and my brothers for their consistent prayers, love, encouragement and inspirations;

Mr. Anton J. Zweng, a wonderful friend who sincerely provided me with his knowledge and experience; and

Iranian people and friends (whether in my beloved country, Iran, or in any other part of the world) and all my friends in lovely Australia.
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Abstract

Analysis of the Rules of the International Law of the Sea
Governing the Delimitation of Maritime Areas Under
National Sovereignty

This thesis examines the rules of the international law of the sea governing the delimitation of maritime areas which fall under the sovereignty of States. These areas comprise internal waters, archipelagic waters and the territorial sea. Accordingly, this thesis analyses issues related to: (a) the delimitation of internal waters behind the normal and/or straight baselines; (b) the delimitation of single-State bays; (c) the delimitation of multi-State bays; (d) the enclosure of mid-ocean archipelagos; and (e) the delimitation of the outer limit of the territorial sea.

The thesis demonstrates how States have extended their sovereignty over adjacent maritime spaces by relying on different means mainly influenced by the rules developed in the contemporary law of the sea. These means include the use of straight baselines where normal baselines could be employed; the extension of national sovereignty over adjacent maritime areas on such bases as the protection of security, economic, and environmental interests, and in certain cases on the basis of historic title; and the extension of the outer limit of the territorial sea to 12 nautical miles.

In addition, the thesis shows that some developments in the international law of the sea have also contributed to the inclusion of larger maritime spaces into maritime areas under national sovereignty. Examples are the recognition of a closing line of 24 nautical miles length for the enclosure of single-State bays, and the adoption of a new legal regime for the enclosure of mid-ocean archipelagos.

The thesis demonstrates that the law of the sea has always developed in a manner to accommodate the interests of coastal States and those of international community, and concludes that the developments in
the rules of the delimitation of maritime areas under national sovereignty show that:

(a) the law of the sea has developed rules for such delimitation parallel to the tendency of States to claim larger maritime areas; while

(b) the law of the sea has, at the same time, taken into account the traditional rights of the international community in these areas. Examples are the maintenance of navigational rights in the maritime areas which were newly enclosed by straight baselines, the preservation of the right of passage through archipelagic waters, and the consolidation of the right of innocent passage in territorial seas.
Table of Contents

Declaration Relating to Disposition of the thesis ...............................................................i
Certification............................................................................................................................ii
Dedication...............................................................................................................................iii
Acknowledgments..................................................................................................................iv
Abstract..................................................................................................................................vi
Table of Contents....................................................................................................................viii
List of Acronyms and Abbreviations......................................................................................xiv
List of Figures..........................................................................................................................xvii
List of Maps.............................................................................................................................xix
List of Tables...........................................................................................................................xx
List of Cases............................................................................................................................xxi
List of International Conventions and Treaties....................................................................xxiii

Introduction...........................................................................................................................p.2

Chapter 1 Resolving Competitive Interests of States Over the Seas: An Historical Analysis.................................................................p.11

I. Introduction..........................................................................................................................p.11

II. Historical Background of the Law the Sea.................................................................p.11

1. The Controversial Issue of the Exclusive Division of the Seas...........p.14
2. The Classical Theories on the Status of the Seas.................................p.16

A. Grotius’ Theory of the Freedom of the Seas.................................p.18
B. Selden’s Theory of Closed Seas.......................................................p.22
C. Responses to the Classical Theories................................................p.25

III. The Concepts of Res Communis and Res Nullius concerning the Seas .........................................................p.27

IV. The Issue of Competing Interests: The Interests of Maritime Nations versus Those of Maritime Powers.................................p.30

1. Interests of Maritime Nations: Major Reasons for Expansion of National Jurisdiction over Adjacent Waters.........................p.31
2. Interests of Maritime Powers: Major Reasons for Favouring the Free Seas............................................................p.35
3. Efforts Made by the International Community to Reconcile Competing Interests of States................................................p.38
Chapter 2 Delimitation of Inner Boundary of Maritime Zones: Normal and Straight Baselines

I. Introduction

II. Baselines of the Territorial Sea and Other Maritime Zones: General Examination and Functions of Baselines

III. The Normal Baseline: The Low-Water Mark

IV. Baselines Applied for Indented Coasts or Those with Fringing Islands: Straight Baselines

1. Definition and Historical Background
2. The ICJ Judgement on the 1951 Fisheries Case (UK v. Norway)
3. Dissenting Opinions in the 1951 Fisheries Case
4. Influence of Straight Baselines on Encroachment upon the Seas
5. The UN Conferences and Conventions and the Issue of Straight Baselines
6. Straight Baselines and State Practice

V. Conclusion

Chapter 3. Delimitation of Single-State Bays

I. Introduction

II. General Definition of Bays and Gulfs

III. Historical Background of the Issue of the Delimitation of Bays

1. The Views of Publicists on the Delimitation of Bays: The Period between 1800 to 1900
2. The Limit Adopted for the Territorial Bays in Bilateral and Multilateral Treaties in 19th and 20th Centuries
3. The Moray Firth Case (1906): Application of the Ten Mile Limit ........................................... p. 113
4. The 1910 North Atlantic Coast Fisheries Case and the Issue of the Delimitation of Bays ...................................................... p. 114
5. The Views of the International Institutions on the Issue of the Delimitation of Bays ...................................................... p. 118
   A. Institut de Droit International .................................................. p. 118
   B. International Law Association .................................................. p. 119
   C. American Institute of International Law ........................................ p. 120
   D. Japanese Society of International Law .................................... p. 120
   E. Remarks on the Work of International Institutions Concerning the Delimitation of Bays ..................................................... p. 120
6. The 1930 Hague Conference on the Codification of International Law ........................................................................... p. 121
   A. Views of Governments on the Issue of the Delimitation of Bays ................................................................. p. 122
   C. The American and French Proposals for the Delimitation of Bays ................................................................. p. 127
7. The ICJ’s View on the Issue of Bays ............................................ p. 131
9. The UNCLOS I and the Issue of Bays .................................................. p. 136

IV. Reasons Advanced for the Special Treatment of Bays ........................................................................... p. 138

V. Status of Waters within Bays ........................................................................... p. 142

VI. Analysis of Article 7 of the TSC (Article 10 of the LOSC): Rules on the Enclosure of Waters within Bays ........................................................................... p. 145
   1. Definitional Criteria in Identifying Legal Bays ........................................... p. 146
   2. The Issue of Tributary Bays Concerning the Application of the Semi-Circle Test ................................................................. p. 152
   3. The Issue of Identifying Natural Entrance Points of Bays .... p. 153
   4. The Issue of the Delimitation of Multi-Mouthed Indentations ........ p. 158
   5. The Issue of Islands as Headlands of Bays .................................................. p. 160
6. Some Other Issues Concerning the Delimitation of Bays........p.164

VII. Rules Governing the Delimitation of Bays: Extension of National Jurisdiction and Impacts on the Free Seas....p.166

VIII. Conclusion..................................................................p.174

Chapter 4 Delimitation of Multi-State Bays..................p.178

I. Introduction...........................................................................p.178

II. General Rules Governing the Multi-State Bays........p.178

III. The Issue of the Multi-State Bays at the 1930 Hague Conference for the Codification of International Law.................................................................p.183

IV. The UN Conferences on the Law of the Sea: The Lack of any Concrete Solution for the Problem of Multi-State Bays In Positive Law.................................................p.186

V. Analysis of the Rights of Navigation in Multi-State Bays......................................................p.188

1. Where States are entitled to enclose a multi-State bay........p.189
2. Where States are not entitled to enclose a multi-State bay........p.193

VI. Claiming Multi-State Bays on the Basis of Historic Title.........................................................p.195

VII. Case Study: The Case of the Gulf of Fonseca..........p.200

VIII. Conclusion........................................................................p.210
Chapter 5 Special Regime for Delimitation of Mid-Ocean Archipelago: Archipelagic Baselines

I. Introduction

II. Historical Background and Development of the Issue of Mid-Ocean Archipelagos

1. International Institutions and the Issue of Mid-Ocean Archipelagos
   A. Institut de Droit International
   B. International Law Association
   C. American Institute of International Law
   D. The Harvard Research in International Law

2. The 1930 Hague Conference
3. International Law Commission
5. The Declarations of the Philippines and Indonesia
6. The UNCLOS I and the Issue of Mid-Ocean Archipelagos
7. The Issue of the Mid-Ocean Archipelagos and the UNCLOS III: Final Resolution of a Long-Standing Issue

III. Legal Definition of the Terms "A Mid-Ocean Archipelago" and "An Archipelagic State"

IV. The Enclosure of Internal waters of Mid-Ocean Archipelagos

V. Essential Conditions Required in the Drawing of Archipelagic Baselines

VI. Reasons for Establishing a Special Regime for Mid-Ocean Archipelagos

1. Geographical Reasons
2. Historical Reasons
3. Political Reasons
4. Economic Reasons
5. Security Reasons
6. Environmental Reasons
7. Other Reasons
VII. The Mid-Ocean Archipelagos and State Practice........p.262

VIII. The Issue of Offshore Islands of Continental States...p.268

IX. Conclusion.................................................................................p.272

Chapter 6 Delimitation of the Outer Limit of
the Territorial Sea.............................................................................p.275

I. Introduction.................................................................................p.275

II. Historical Development in the Delimitation of
the Outer Limit of the Territorial Sea.............................................p.275

1. The Era Before the 1930 Hague Conference......................p.276
2. The 1930 Hague Conference on the Codification of
   International Law..........................................................................p.278
3. The First United Nations Conference on the Law
   of the Sea (Geneva, 1958).............................................................p.281
   of the Sea (Geneva, 1960).............................................................p.283
5. The Third United Nations Conference on the Law

III. The Twelve Mile Rule: A Contractual or Customary
   Rule of International Law.............................................................p.287

1. The Twelve Mile Rule: A Contractual Rule of
   International Law..........................................................................p.287
2. The Twelve Mile Rule: A Customary Rule of
   International Law..........................................................................p.288

IV. Concluding Remarks on the Breadth of the
   Territorial Sea...............................................................................p.296

General Conclusions........................................................................p.301

Bibliography.....................................................................................p.309

List of Publications...........................................................................p.334
### List of Acronyms and Abbreviations

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.C.</td>
<td>The Law Reports, Appeal Cases</td>
</tr>
<tr>
<td>AIIL</td>
<td>American Institute of International Law</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>ALR</td>
<td>Australian Law Reports</td>
</tr>
<tr>
<td>Ann. Dig.</td>
<td>Annual Digest and Reports of International Law Cases</td>
</tr>
<tr>
<td>Art.</td>
<td>Article</td>
</tr>
<tr>
<td>ATS</td>
<td>Australian Treaty Series</td>
</tr>
<tr>
<td>BYIL</td>
<td>British Yearbook of International Law</td>
</tr>
<tr>
<td>CACJ</td>
<td>Central American Court of Justice</td>
</tr>
<tr>
<td>CAG</td>
<td>Commonwealth of Australia Gazzette</td>
</tr>
<tr>
<td>Ch.</td>
<td>Chapter</td>
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<tr>
<td>CLR</td>
<td>Commonwealth Law Reports</td>
</tr>
<tr>
<td>Cmnd.</td>
<td>Command Papers (United Kingdom)</td>
</tr>
<tr>
<td>Doc.</td>
<td>Document</td>
</tr>
<tr>
<td>Dodson</td>
<td>Dodson's English Admiralty Reports</td>
</tr>
<tr>
<td>EEZ(s)</td>
<td>Exclusive Economic Zone(s)</td>
</tr>
<tr>
<td>ER</td>
<td>English Reports, Full Reprint (1220-1865)</td>
</tr>
<tr>
<td>Ex. D.</td>
<td>The Law Reports, Exchequer Division</td>
</tr>
<tr>
<td>ICAO</td>
<td>International Civil Aviation Organisation</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICJ Pleadings</td>
<td>International Court of Justice, Pleadings, Oral Arguments and Documents</td>
</tr>
<tr>
<td>ICJ Reports</td>
<td>Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice</td>
</tr>
<tr>
<td>ICNT</td>
<td>Informal Composite Negotiating Text (1977)</td>
</tr>
<tr>
<td>ILA</td>
<td>International Law Association</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
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<td>---------</td>
<td>-------------</td>
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<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>ILR</td>
<td>International Law Reports</td>
</tr>
<tr>
<td>IMCO</td>
<td>Inter-Governmental Maritime Consultative Organisation (1948-1981)</td>
</tr>
<tr>
<td>IMO</td>
<td>International Maritime Organisation</td>
</tr>
<tr>
<td>ISNT</td>
<td>Informal Single Negotiating Text (1975)</td>
</tr>
<tr>
<td>L ed</td>
<td>United States Supreme Court Reports, Lawyers’ Edition (New York)</td>
</tr>
<tr>
<td>L Ed 2d</td>
<td>United States Supreme Court Reports, Lawyers’ Edition (New York), Second Series</td>
</tr>
<tr>
<td>LNTS</td>
<td>League of Nations Treaty Series</td>
</tr>
<tr>
<td>Misc.</td>
<td>Miscellaneous</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>SOLAS</td>
<td>International Convention for Safety of Life at Sea (IMCO, 1974)</td>
</tr>
<tr>
<td>TSC</td>
<td>The League of Nations Conference on the Codification of International Law</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>UNGAOR</td>
<td>United Nations General Assembly Official Records</td>
</tr>
<tr>
<td>UNRIAA</td>
<td>United Nations Reports of International Arbitral Awards</td>
</tr>
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UNTS  United Nations Treaty Series

U.S.  United States Supreme Court Reports

W.L.R.  Weekly Law Reports (English)

YILC  Yearbook of the International Law Commission
List of Figures

Figure 1.1. Division of the Seas between Spain and Portugal based on the 1493 Papal Decree and the 1494b Treaty of Tordesillas........................................p.15

Figure 2.1. Different Impacts of Low-Tide and High-Tide on the Inner Limit of the Territorial Sea..............................................................p.55

Figure 2.2. Changes in Straight Baseline Claims Over Time (Line Graph)...........................................................................................................p.99

Figure 2.3. Changes in Straight Baseline Claims Over Time (Bar Chart).............................................................................................................p.100

Figure 3.1. An indentation which is considered as a bay based on the American Proposal........................................................................p.128

Figure 3.2. An indentation which is not considered as a bay based on the American Proposal........................................................................p.129

Figure 3.3. French Proposal..................................................................................................................................................................................p.129

Figure 3.4. The application of the semi-circle test to various coastal indentations........................................................................................p.150

Figure 3.5. An example of a tributary bay.........................................................................................................................................................p.153

Figure 3.6. The issue of natural entrance points of a bay..............................................................................................................................p.156

(a) A bay with multiple entrance points
(b) A bay with only one entrance point
(c) A bay with no definite entrance point

Figure 3.7. Wandered Bay, Guadalcanal.........................................................................................................................................................p.156

Figure 3.8. Gulf of Cutch in India.................................................................................................................................................................p.156

Figure 3.9. Baie Anarua, French Polynesia.........................................................................................................................................................p.156

Figure 3.10. Method of determining natural entrance points of a bay...........................................................................................................p.157

Figure 3.11. Islands within and outside a bay.......................................................................................................................................................p.160

Figure 3.12. The impact of certain coastal islands on the creation of bays.................................................................................................p.163

Figure 3.13. Long Island (New York, United States of America)
An example where an island is located on one side of a bay................p.164

Figure 3.14. Graciosa Bay (Santa Cruz Islands): An example of a bay extended by the existence of coastal islands........................................p.164

Figure 3.15. Moray Firth (Scotland): The Impact of the 24 nautical mile closing line and the 12 nautical mile territorial sea on the enclosure of more areas of water.................................p.170
Figure 4.1. Navigation through a Multi-State Bay............................................p.190

Figures 5.1 and 5.2. Examples Illustrating the Impact of the Application of Archipelagic Baselines on the Enclosure of Additional Areas of the Seas...........p.241

Figure 6.1. Comparison of Claims to 3, 12, and 200 Nautical Mile Limits from 1900 to 1995 (Bar Chart).................................p.298

Figure 6.2. Comparison of Claims to 3, 12, and 200 Nautical Mile Limits from in 1995 (Bar Chart)................................................p.298

Figure 6.3. Number of States Claiming a 3 Nautical Mile Limit from 1900 to 1995 (Line Graph).................................................p.298

Figure 6.4. Number of States Claiming a 12 Nautical Mile Limit from 1900 to 1995 (Line Graph)................................................p.299

Figure 6.5. Number of States Claiming a 200 Nautical Mile Limit from 1900 to 1995 (Line Graph).............................................p.299

Figure 6.6. Number of States Claiming 3, 12, and 200 Nautical Mile Limits (1900 to 1995) (Line Graph)........................................p.299
List of Maps

Map 2.1. The 1604 Straight Baseline System of England..........................p.59
Map 2.2. Norway’s Straight Baseline System (North Coast of Norway).......p.60
Map 2.3. Guinea Bissau’s Straight Baselines...........................................p.79
Map 2.4. Albania’s Straight Baselines.....................................................p.80
Map 2.5. Burma’s Straight Baseline System............................................p.87
Map 2.6. North Korea’s Straight Baseline..............................................p.89
Map 2.7. China’s Straight Baselines (Mainland and Hainan Island)...........p.92
Map 2.8. China’s Straight Baselines (Xisha (Paracel) Islands)...............p.93
Map 2.9. Canadian Arctic Archipelagic Baselines.................................p.97
Map 4.1. The Gulf of Fonseca.................................................................p.200
Map 4.2. The 1900 Maritime Boundary in the Gulf of Fonseca
(Honduras - Nicaragua)........................................................................p.205
Map 5.1. The enclosure of waters within the Hawaiian Islands based on
the Proclamation of the King of Hawaii on 16 May 1854......................p.216
Map 5.2. Madagascar’s Baseline System..................................................p.244
Map 5.3. Malta’s Baseline System.............................................................p.244
Map 5.4. Indonesia’s Archipelagic Baselines...........................................p.246
Map 5.5. The Philippines’ Archipelagic Baselines.....................................p.247
Map 5.6. Solomon Islands’ Archipelagic Baselines................................p.263
Map 5.7. Fiji’s Archipelagic Baselines.......................................................p.264
Map 5.8. Cape Verde’s Archipelagic Baselines.........................................p.264
Map 5.9. Portugal’s Straight Baselines (Azores Islands)............................p.271
Map 5.10. Faeroes Islands’ Baseline System (Denmark)..............................p.272
Map 5.11. Galapagos Islands’ Baseline System (Ecuador)............................p.272
List of Tables

Table 2.1. List of States Proclaiming Straight Baselines Along All or Part of Their Coast............................................................p.81

Table 2.2. Changes in Number of States Proclaiming Straight Baselines Over Time............................................................p.99

Table 3.1. Bays whose areas of internal waters were increased as a result of the application of Article 7 of the TSC (1958)........p.171

Table 3.2. Bays which came under the regime of juridical bays as a result of the incorporation Article 7 on bays into the TSC (1958)........p.172

Table 4.1. A List of Multi-State Bays..............................................................p.182

Table 5.1. States Proclaiming Archipelagic Status for Establishing Archipelagic Straight Baselines.......................................................p.267

Table 6.1. Territorial Sea Claims Over Time (1900-1995).................p.280

Table 6.2. Percentages of Various Claims of States to the Territorial Sea Over Time (1900-1995).................................................................p.284

Table 6.3. Examples of Claims to the Breadth of the Territorial Sea as of 1974 (At the time of the first substantive session of the Third United Nations Conference on the Law of the Sea)........p.286

Table 6.4. States Claiming the Twelve Mile Territorial Sea (52 States - As of 1973).................................................................p.290

Table 6.5. Analysis of Territorial Sea Claims Based on Regional Groups (As at 16 June 1995)..............................................................p.292
List of Cases


- *Lotus Case* (France v. Turkey), the *Permanent Court of International Justice Reports*, Ser.A, No.10, 1927.


- *Varanger Fjord Case* [1933-1934], *Ann. Dig.* 136 (No. 51).


- *Minquiers and Ecrehos Case*, *ICJ Reports*, 1953.


- Rann of Kutch Arbitration 7 ILM (1968).


- A. Raptis & Son v. South Australia Case (1977), 15 ALR 223


- Continental Shelf Case (Tunisia/Libya), ICJ Reports, 1982.

- Gulf of Maine Case (Canada/USA), ICJ Reports, 1984.


List of International Conventions and Treaties


Introduction
**Introduction**

Delimitation issues have always been among the most important issues in the law of the sea. The significance of these issues springs from the competing interests over the seas: the exclusive interests of coastal States *versus* the inclusive interests of the international community. The delimitation of maritime areas of coastal States is particularly important because it determines the boundaries of different maritime areas over which these States exercise different degrees of authority, from absolute sovereignty to sovereign rights. The most important aspect of the delimitation of maritime areas is the interaction between the enclosure of these areas and its impact on the high seas and the freedoms exercised there. It is because of this impact that the ICJ in the *Fisheries Case* emphasised that the delimitation of maritime areas has two aspects: national action and international recognition. As the ICJ recognised:

> 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.\(^1\)

To ensure the proper demarcation of maritime areas by States, the law of the sea has developed rules and standards to regulate the conduct of States in the delimitation of these areas. Despite the codification of these rules, many States have adopted liberal approaches to these rules, and have included larger areas under their control. In addition, the lack of precise rules and, in some cases, the lack of any rules at all, have created opportunities for coastal States to rely on their own policy for demarcation of maritime areas adjacent to their coasts. This policy has mostly been in favour of inclusion of larger maritime spaces into the areas under the authority of coastal States. This thesis studies these issues in detail and demonstrates how the liberal interpretation of rules on delimitation of adjacent maritime areas, and also the inadequacy of these

---

\(^1\) *Fisheries Case* (UK v. Norway), ICJ Reports, 1951, p.132. The ICJ also pointed out that while a coastal 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 base-lines must not depart to any appreciable extent from the general direction of the coast." Ibid., p.133. As regards the factors which may be taken into account in appraisal of lawful delimitation of maritime areas, Evensen asserted that various factors of a geographical, economical, historical and political nature "may play an important role in determining the legality under international law of concrete acts of delimitation of territorial waters". Evensen, Jens, 'Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos', UN Doc. A/CONF/13/18, in *UNCLOS I, Official Records*, Vol.1, 1958, pp.289-290.
rules in certain cases, have given chances to States to extend their jurisdiction over adjacent maritime areas.

It is in this context that the thesis discusses the rules of the international law of the sea on the delimitation of maritime areas adjacent to coasts of States which fall under their sovereignty. The water areas which are covered by this study include: (a) internal waters behind the low-water mark and straight baselines; (b) national waters within single-State bays and those within multi-State bays\(^2\); (c) waters within archipelagic baselines (archipelagic waters); and (d) waters within the extent of the territorial sea.

In general, delimitation issues are not limited to these areas but also include issues related to those areas such as the EEZs and the continental shelves over which States have sovereign rights for exploitation of living and non-living resources.\(^3\) In fact, States have two types of control power over their maritime zones: "sovereignty" and "sovereign rights." Those maritime areas which are subject to sovereignty of States are internal waters, the territorial sea, and archipelagic waters (in the case of archipelagic States).\(^4\) The maritime areas which are subject to sovereign rights of States include the EEZ and the continental shelf (beyond the limit of 12 nautical miles).

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\(^2\)There are also issues related to the claims of States over certain adjacent waters on the basis of historic title. These waters are generally called "historic waters" which include historic bays. Bouchez defines historic waters as follows: "Historic waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States." Bouchez, Leo J., *The Regime of Bays in International Law*, A. W. Sythoff, Leyden, 1964, p.281. Historic claims to bays or other bodies of waters are made because these claims cannot be justified under the normal legal rules governing the delimitation of these maritime areas. Large areas of waters have been enclosed by historic claims and this has impacted on the size of the high seas available for the use of all States. This why strict requirements have been set up for proving historic titles to bays or other bodies of waters. Whether there will be an end to the fresh claims over maritime spaces on historic basis remains to be seen. What is apparent is that States have always had the desire to extend their maritime zones and bring larger maritime spaces under their control, preferably under their sovereignty. The doctrine of historic waters is an obvious example where there is no restriction on the size of a maritime area a coastal State can claim if the requirements for establishment of historic titles over such maritime area are met.

\(^3\)Delimitation of maritime areas (including territorial seas, the EEZs, and the continental shelves) between adjacent and opposite coastal States are also important issues.

\(^4\)What all these areas have in common is that the authority of States over these areas is described by the concept of sovereignty, although the degree of this sovereignty is not the same. While States have full sovereignty over internal waters behind the normal and straight baselines as well as closing lines of bays, the sovereignty of States over the territorial sea and archipelagic waters is modified by recognition of the right of international community to exercise peaceful passage through these waters. Compared with the territorial sea, sovereignty over archipelagic waters is more modified by the recognition of the right of archipelagic sea lanes passage where there are internationally used straits within archipelagic waters.
It is important to clarify the distinction between the concepts of “sovereignty” and “sovereign rights.” The concept of sovereignty of a State over the land and maritime areas under its national jurisdiction (internal waters, the territorial sea, and archipelagic waters), includes, *inter alia*, the following rights:

[The rights] ... to legislate concerning its interests, to administer its services, to enforce its laws and regulations, and to determine the jurisdiction and competence of its courts.\(^5\)

However, the concept of “sovereign rights” with respect to the EEZ and the continental shelf is defined as follows:

“Sovereign rights” are related to one or more specific purposes. The term conveys ... [that] the coastal State does not have full sovereignty as on its land territory or in the territorial sea, but has a right of jurisdiction which is related to certain purposes.\(^6\)

The purposes for which States have sovereign rights include: (a) exploration and exploitation of living and non-living resources; (b) conservation and management of living and non-living resources; (c) the conduct of marine scientific research; (d) the protection of marine environment; and (e) some activities such as the production of energy from the seas and installation of artificial islands or other facilities for the purpose of exploitation of the resources.\(^7\) Therefore, “sovereign rights” are a limited version of the rights which are included under the concept of “sovereignty.”

States also have some limited rights over the Contiguous Zone. Although States have the right to prevent violation of their customs, fiscal, immigration or sanitary laws in the Contiguous Zone (which extends up to 24 nautical miles from the baseline), they do not have sovereignty over this zone.\(^8\) The zone, however, is overlapped by the

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\(^5\) Westerman, Gayl S., *The Juridical Bay*, Oxford University Press, Oxford, 1987, p.20. Therefore, the recognition of the concept of sovereignty over certain adjacent maritime areas empowers coastal States to prescribe laws and to enforce these laws within these maritime areas.


\(^7\) See Articles 56 and 77 of the LOSC.

\(^8\) Article 33(1) of the LOSC (Article 24(1) of the TSC) provides that in the Contiguous Zone “the coastal States may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws regulations within its territory or territorial sea; (b) punish infringement of the above laws regulations committed within its territory or territorial sea.”
EEZ (which extends up to 200 miles from the baseline), and by the continental shelf where States have sovereign rights for exploration and exploitation of living and non-living resources.\(^9\)

The issues related to the theme of this thesis are discussed in six chapters as follows.\(^{10}\) Chapter One presents a historical background to the approaches on the rights of States over the seas, from ancient times to the contemporary law of the sea. In particular, the chapter analyses the concepts of *mare liberum* and *mare clausum* as well as the theories of *res communis* and *res nullius*. The chapter also analyses competing interests of coastal States in extending their jurisdiction over the adjacent seas and those of maritime powers in keeping the areas of the high seas as large as possible. The chapter addresses the efforts made at the international level to reconcile these competing interests and to establish rules that, on one hand, would satisfy new trends of States in having control over larger maritime areas adjacent to their shores, and, on the other hand, would avoid unnecessary encroachment upon the high seas.

Chapter Two of the thesis is devoted to the role of the baselines in the delimitation of maritime areas. These baselines are called normal baselines and straight baselines. The chapter defines these two independent baselines and discusses where these baselines are employed. The chapter analyses the ICJ’s decision in the 1951 *Fisheries Case*, where the validity of straight baseline system used by Norway was under examination. Although the ICJ recognised the Norwegian baseline system due to particular geographical conditions of the Norwegian coasts, it set up rules for the application of the straight baselines, so as to prevent unnecessary enclosure of the high seas into maritime areas under national sovereignty. The chapter also analyses the provisions of the TSC and the LOSC on the application of normal and straight baselines and studies the practices of States in use of these baselines. As the chapter will demonstrate, many coastal States have employed straight baselines around their coasts, even

\(^9\)It should be pointed out that no State may exercise jurisdiction on the high seas, except in cases stipulated by the international law of the sea. See, for example, Article 22 of the 1958 High Seas Convention and Article 110 of the LOSC.

\(^{10}\)In analysing the rules for the delimitation of maritime areas under the scope of the present study, the thesis examines all sources of international law of the sea including international conventions (most importantly the TSC and the LOSC) and customary law, the judgments of the ICJ and arbitral tribunals and the views of publicists. The documents of the international conferences on the law of the sea are also taken into consideration, since they are *travaux préparatoires* and evidence of the position of States.
where the coastal conditions do not justify the use of straight baselines. This has resulted in encroachment upon the high seas.

Chapter Three discusses the issue of the delimitation of single-State bays. It defines the concepts of bays and gulfs in geographical and legal terms\textsuperscript{11} and also presents the historical background to the development of the rules governing the delimitation of bays located on the coast of a single State. It examines the process of establishing geographical and mathematical criteria for a legal definition of bays. The codification of provisions on single-State bays in the TSC (1958) was a turning point in removing uncertainty and controversy over the delimitation of these bays. The chapter analyses the provisions of Article 7 of the TSC (Article 10 of the LOSC) and provides reasons why bays meeting the legal criteria (geographical and mathematical criteria) are treated in a special way. As part of the national territory of coastal States, waters within the closing lines of legal bays are internal waters, and are subject to the same rules as land territories. The chapter examines the shortcomings and ambiguities in the codified provisions on the delimitation of single-State bays. The chapter demonstrates how the rules on delimitation of single-State bays, particularly the adoption of a closing line up to 24 nautical miles, have impacted on the reduction of high seas areas.

The focus of Chapter Four is on the issue of the delimitation of multi-State bays. Multi-State bays are those bays which are located in the coast of more than one coastal State. The chapter identifies the general rules which apply to multi-State bays. These rules are presented on the basis of general principles of international law, views expressed by governments, and the main trends found in the views of publicists. Neither the TSC nor the LOSC contains any provision on the delimitation of bays which are situated in the shores of more than one State. This raises the issue as to whether multi-State bays can be enclosed in the same manner as single-State bays. The chapter points out that the enclosure of multi-State bays is another step towards the reduction of the areas falling under the legal regime of the high seas. It discusses how the right of navigation within these bays can be affected depending on whether or not they are subject to enclosure. The chapter also examines the question as to

\textsuperscript{11}Not all bays or gulfs can be qualified as legal bays. A body of water may be described as a bay or a gulf from a geographical viewpoint, but might not be considered as a legal bay.
whether multi-State bays can be closed on the basis of historic title and, in this connection, it studies the case of Gulf of Fonseca.

Chapter Five discusses a newly recognised system of delimitation for mid-ocean archipelagos - archipelagic baselines. It includes the historical study of the issue and examines codification efforts made by the international community to establish rules for the enclosure of mid-ocean archipelagos as independent units which would be different from the rules governing the delimitation of islands. The chapter analyses the study undertaken on the delimitation of territorial waters of archipelagos for the UNCLOS I, and examines the practice of certain States consisting of individual islands before and after the UNCLOS I. The chapter also reviews the efforts made at the UNCLOS III to establish the new legal regime for the delimitation of mid-ocean archipelagos. The legal definitions for mid-ocean archipelagos and archipelagic States are also identified and analysed.

The recognition of a new legal regime for the enclosure of mid-ocean archipelagos by archipelagic baselines has led to the enclosure of vast areas of the high seas into archipelagic waters, that is waters within archipelagic baselines which are under the sovereignty of archipelagic States. However, archipelagic States were not left to employ archipelagic baselines at their own discretion. Essential requirements were incorporated into the LOSC (Art.47) for archipelagic baselines to ensure a balance between the needs of archipelagic States and the maintenance of rights enjoyed by international community, whether within archipelagic waters or on the high seas. The chapter also discusses the various reasons by which the enclosure of mid-ocean archipelagos was justified. They include geographical, historical, political, economic, security, and environmental reasons. The chapter examines the practice of island States after the UNCLOS III and argues that although the legal regime of archipelagos as adopted in the UNCLOS III reflects a balance between competing interests of archipelagic States and those of other States, the enclosure of mid-ocean archipelagos has had a direct impact on the reduction of areas of the high seas.

13As the case of bays, not all archipelagos are legally qualified as mid-ocean archipelagos, while they are considered so from a geographical viewpoint.
Finally, Chapter Six is an examination of the issue of delimitation of the outer limit of the territorial sea which has long been one of the most controversial issues in the contemporary law of the sea. It is sufficient to say that the 1930 Hague Conference and the two United Nations conferences on the law of the sea (the UNCLOS I (Geneva, 1958) and the UNCLOS II (Geneva, 1960)) failed to resolve the issue. It was not until the UNCLOS III (Caracas Session, 7 March 1975) that the issue was eventually resolved by the recognition of a twelve mile limit for the extent of the territorial sea. The chapter studies the nature of the issue in historical perspective and examines the developing trends in State Practice before and after the UNCLOS III. The chapter also examines the status of the twelve mile rule as the maximum permissible limit for the territorial sea from two viewpoints: as a contractual rule and as a customary international law rule. It demonstrates that the twelve mile rule has acquired the status of customary international law. The chapter points out that the significant support for the twelve mile rule resulted from the balance struck between the competing interests of coastal States and the international community by the adoption of this rule, and simultaneous agreements on some other interrelated issues such as the guaranteed right of navigation through straits used for international navigation.

As the opening paragraph of this introduction observed, the examination of the issues related to the delimitation of maritime areas under national sovereignty is important due to the competing interests involved: the exclusive interests of coastal States and the inclusive interests of the international community. Although the TSC and the LOSC include essential rules for the delimitation of adjacent maritime areas, there are still a number of shortcomings and ambiguities in the present relevant rules of the international law of the sea. These ambiguities and shortcomings may encourage coastal States to delimit maritime areas under their sovereignty in a manner inconsistent with the interests of other States. This action may result in conflict among the States concerned. The nature and the degree of this conflict depend on a wide range of factors from the importance of the maritime area for international navigation to the political relations between the coastal State and the opposing State. The dispute between the USA and Libya over the delimitation of the Gulf of Sidra (which led to a military conflict) is a clear example that issues related to the delimitation of areas under sovereignty of States are among the most sensitive issues in the
international law of the sea. This sensitivity shows the importance of a thorough understanding of the issues involved in such delimitation, as the first step, and the avoidance of disputes among States through proper interpretation and implementation of the rules concerned, as the second step.

Against this background, this thesis: (a) identifies issues arising from the delimitation of maritime areas under national sovereignty; (b) shows the ambiguities in the rules of the international law of the sea governing the delimitation of maritime areas under national sovereignty; (c) addresses the shortcomings in these rules; and (d) demonstrates the impact of these ambiguities and shortcomings on the enclosure of larger parts of the high seas, and the necessity of formulating new rules to clarify the ambiguities and to remove the shortcomings. The thesis, particularly, demonstrates that a liberal application of the present rules of the international law of the sea on the delimitation of maritime areas under national sovereignty has led to the enclosure of large parts of the high seas into these areas. The thesis, however, concludes that in the delimitation of their adjacent maritime areas, coastal States are bound to observe the requirements of the rules concerned while taking the interests of the international community into account.
Chapter One

Resolving Competitive Interests of States

Over the Seas:

An Historical Analysis
Chapter 1
Resolving Competitive Interests of States Over the Seas: An Historical Analysis

I. Introduction

The purpose of this introductory chapter is: (a) to present an analysis of the classical theories and doctrines with respect to the rights of States over the seas and oceans; (b) to discuss the competing interests of States over ocean spaces, namely the interests of coastal States in extending the maritime areas under their sovereignty versus the interests of user States in maintaining free seas as large as possible; and finally (c) to review the international efforts made to reconcile these competing interests for establishing a new world order for the uses of oceans. This introductory chapter will, therefore, present a background for the discussion of issues concerning the delimitation of maritime areas under national authority.

II. Historical Background of the Law of the Sea

In general, two principles have mainly constituted the foundations of the law of the sea: the principle of the freedom of the seas; and the principle of the rights of a coastal State over adjacent seas for protection, as well as other legitimate interests. They constitute the foundations of the most controversial classical theories regarding the right of navigation in particular and rights over the seas in general. These theories are the theory of *res communis versus* the theory of *res nullius*, which will be discussed in this chapter.

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1 The principle of the freedom of the seas has played a significant role in the history of the law of the sea. Anand states that 't[he] history of the law of the sea is to a large extent the story of the development of the “freedom of seas” doctrine and the vicissitudes through which it has passed over years.' Anand, R. P., ‘Changing Concepts of Freedom of the Seas: A Historical Perspective’, in Van Dyke, Jon M., Durwood Zaekke and Grant Hewison (eds.), *Freedom for the Seas in the 21th Century: Ocean Governance and Environmental Harmony*, Island Press, Washington D.C., 1993, p.72. Although the sovereignty of coastal States over territorial seas was recognised, it was an essential exception to the general rule of the freedom of the seas. Such a recognition was primarily due to the importance of security for these States, though other interests were also expressed to justify the necessity of granting rights to shore States in their adjacent seas.
The long-established principle of the open seas can be traced as far back as the time of Rhodians (200-300 B.C.). Rhodes was among the defenders of the freedom of the seas and protected the merchant shipping in the Mediterranean region for regional and international sea trade. Romans were also supportive of the free seas. Roman jurists were of the opinion that the seas were common to all human-beings (commune omnium) and all nations were free to use the seas. This view was the foundation of the theory which was later known as mare liberum. This theory was then opposed by a few countries (mainly Spain and Portugal) in the fifteenth century. These countries claimed exclusive rights over ocean spaces and regarded the seas as closed to other nations, thus introducing the theory of mare clausum. However, the revised version of the Roman approach on the free seas was presented in the early seventeenth century as a reaction to extensive and exclusive claims of some nations over the seas.

Like other aspects of the relationship among ancient nations, the uses of the seas were subject to primary rules and principles common among the nations. The development of the law of the sea’s principles is, in fact, an integral part of the broader process of the development of international law. Although there was a series of laws in the classical times on the relations of primitive form of States, there was no international legal system in those times. Some historical evidence acknowledges that certain principles existed within the framework of the ancient civilisations including Persia, Rome, and Greece that were applied to foreigners. For example, there was a series of principles - jus gentium - applicable to the relations between the independent cities of Athens in regard to their citizens. Also there were

3 Before being an independent State, Rhodes (a small Aegean island) was a colony of Phoenicians (1500 B.C.) and later became part of the Persian Empire (397-88 B.C.). Ibid., p.10.
4 Ibid. As the Roman historian Starbo writes "by her continental and successful wars with the pirates, who at that time disturbed the peace of the seas in great bands, Rhodes had become the protectress and refuge of merchant shipping in "Eastern Waters"." Ibid., p.11.
5 For example, Ulpian argued that the Sun, air and waves are naturally free to be used by all and no one has sovereignty over them. Ovid and Cicero also expressed similar view. Brown, Joan et al, Case Studies in Oceanography and Marine Affairs, published by Pergamon Press in association with The Open University, Oxford, 1991, p.40. Romans were of the view that the freedom of the seas included navigation in rivers and access to ports. Ibid.
6 The concept of commune omnium was lost after the collapse of the Roman Empire and it was Grotius who revived the concept by the introduction of the Mare Liberum theory. Anand, op. cit., 1993, p.72. Also see Meurer, Christian, The Program of the Freedom of the Sea, Translated by Leo Franctenberg, 1919, pp.4-7.
7 See Anand, op. cit., 1993, pp.72-73.
8 As opposed to jus civile.
some established principles to govern relations of States in the maritime realms, though the scope of application was limited to certain regions. It is clear that one can talk about international law when there are independent States which have relationships in as broad a range as necessary. This apparently happened when the Roman Empire disintegrated into independent States in the sixteenth century. This is what has been called "birth of territoriality". This has been a major event in establishing principles of international law in general. It has also had its impacts on the formation of principles of the law of the sea. For example, after the formation of the independent States it was accepted that coastal States have regulatory rights in the adjacent seas. Also as Smith writes "... from very early times the needs of commerce had made necessary the acceptance of some agreed rules for the conduct of maritime trade".

The law of the sea developed as the law of nations developed in general. The modern origins of the law of nations are mainly attributed to developments in Western Europe at the end of the Middle Ages when there was a need to establish a common code of conduct for the independent entities. The law of the sea also evolved during this period of time when some written codes for the use of the seas originated from the Mediterranean. The old maritime codes of "Rhodian Sea Law (the Sea Laws of Rhodians)" in the eighth century and the "Consolato del Mare" in the fourteenth century are examples of the written codes for maritime conduct. Also, the freedom of the seas has been exercised in the Asian

10Ibid.
12Along with the process of this development, one thing became clear that rules and principles governing the relations of the nations in the time of peace is different from those applicable in the time of war and the law of the sea was no exception.
14As regards the importance and value of maritime codes, Colombos holds that although these codes did not promulgate by any sovereign authority, they "gradually assumed a binding character freely recognised by the merchants and traders of all nations alike. Their outstanding value in this connection is that they contained rules found by practice to be suitable to the needs of a community which knows no national boundaries- the international community of seafarers." Colombos, C. John, The International Law of the Sea, Sixth Revised Edition, Longmans, London, 1967, p.31.
15The Rhodian Sea Law was primarily codified in 200-300 B.C. It is said that Rhodian Sea Law "laid the foundation of the modern maritime jurisprudence" and "gave rise to several maritime codes". Anand, op. cit., 1982, p.11.
16Smith, op. cit., p.2. Among embodied rules in the "Consolato del Mare" was the rule that "in time of war enemy goods are liable to capture under the neutral flag." Ibid. Also the freedom of the seas was among rules adopted by the Rhodian Maritime Code. Anand, op. cit., 1993, p.73. Some other old maritime codes include the Basilika (7th century) "a code of Byzantine law regulating the commerce of Levant", the Rolls of Oleron (12th century) in the Atlantic, the Hanseatic code (17th century) in the
region, particularly in the Indian Ocean, for navigation and commercial shipping for many centuries. The maritime codes of Macassar and Malacca in the thirteenth century cited the principle of freedom of the seas.

1. The Controversial Issue of the Exclusive Division of the Seas

Although there had been instances of appropriation of some parts of the sea in earlier times, it was in the fifteenth century that the issue of exclusive jurisdiction over the seas became more controversial. The question was whether the seas may be appropriated by States and if so whether this appropriation was limited exclusively to some States. The problem of exclusive appropriation became crucial in 1493 when Pope Alexander VI, Federigo Borgia, issued his four decrees (the so-called Papal Bulls) one of which was to draw a demarcation line from the North to the South Pole dividing the "undiscovered world" between Spain and Portugal. Although there were religious reasons behind such a division, particularly for the purpose of religious missions, and while there was no primary intention of "a reservation of the seas", Spain and Portugal relied on the decree for preventing foreign ships from sea trade in the divided

Baltic, the *Guidon de la Mer* (17th century) in the Mediterranean. See Colombos, *op. cit.*, pp.30-36. There are also modern maritime codes such as British manual of prize law. *Ibid.*, pp.36-45.


19 For example, Colombos writes that in the tenth century, English King Edgar claimed to be "Sovereign of the Britanic Ocean". This claim was followed by his successors but in 1322 was encountered by a protest from the king of France to English King Edward II. In his protest, the King of France complained to Edward II against those "who call themselves the custodians of the sea on your behalf." Colombos, *op. cit.*, p.48. Also Brown refers to the claim of Venice over the whole Adriatic in the thirteenth century and the later claims of Genoa in the Ligurian Sea and of the Scandinavians in the Baltic. Brown, *op. cit.*, p.41.

20 Before 1493, there were also two bulls issued by the attempts of Portuguese to gain title over territories "along the African coast toward India". These two decrees were the decree of Pope Nicholas V in 1454 and its confirming decree of Pope Calixtus II on March 13, 1456. Anand, *op. cit.*, 1982, pp.43-44.

areas. Following the Papal decree and by the Treaty of Tordesillas (7 June 1494) Portugal and Spain determined the range of their domain over "undiscovered world". (See Figure 1.1 below.)

Figure 1.1
Division of the Seas between Spain and Portugal based on the 1493 Papal Decree and the 1494 Treaty of Tordesillas


Following the division of the seas by Pope Alexander VI between Spain and Portugal, Philip III, King of Spain sent a letter to Don Martin Alfonso, his Councillor and Viceroy for the East Indies on 28 November 1606. In his letter, he, *inter alia*, wrote that:

I prohibit all commerce of foreigners in India itself, and in other regions across the seas.

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22 O'Connell, op. cit., p.2. As Fulton in 1911 wrote "Spain claimed the exclusive right of navigation in the western portion of the Atlantic, in the Gulf of Mexico, and in the Pacific. Portugal assumed a similar right in the Atlantic south of Morocco and in the Indian Ocean." Fulton, Thomas W., The Sovereignty of the Sea. William Blackwood and Sons, Edinbourgh, 1911, p.5.


As far as the effects of the division are concerned, it was in no way in accordance with basic principles of the use of the seas for all nations. This is because the division deprived other States from enjoying equal access to the divided areas. It was inevitable that the exclusive division of the seas would be challenged by other States having interests in the divided areas. In 1580 when Drake sailed the *Golden Hind*, its passage was challenged by Spain. Spain was of the view that the Drake’s voyage was a violation of its sovereignty over the Indian and Pacific Oceans. In response, Queen Elizabeth I, in echoing the Roman jurists, stated that:

> neither nature nor public interest permit the exclusive possession of the sea by a single nation or private individual; the ocean is free to everybody; no legal titles exist whatever that would grant its possession to anyone in particular; neither nature nor usage permit its seizure; the domains of the sea and of the air are common property of all men.

It was in this context that Spain and England concluded the Treaty of London (18-24 August 1604) in which free navigation on the seas was preserved.

2. The Classical Theories on the Legal Nature of the Seas

The classical history of the law of the sea presents a divergence of views on the nature of jurisdiction of States and the degree of their control over the seas and oceans. Basically, there were uncertainties as to whether States have any competence to exercise their domain over the maritime spaces and whether the seas and oceans belong to specific States entitling them to exclude others from using them.

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25Smith, *op. cit.*, p.3.
26Anand, *op. cit.*, 1982, p.95. In 1602, Queen Elizabeth I stated that “property of seas in some small distance from the coast may yield some oversight and jurisdiction” but she excluded fishing and navigation from enforcement of jurisdiction by the coastal power. This view was asserted in a case with Denmark. O’Connell, *op. cit.*, p.3 (footnote 7). The Danish claim covered the seas between Norway, Iceland, and Greenland. Brownlie, Ian, *Principles of Public International Law*, Fourth Edition, Clarendon Press, Oxford, 1995, p. 233 (footnote 9). Although Britain was in favour of freedom of the high seas, it claimed jurisdiction over maritime areas around the Britain in seventeenth century. In 1633, Boroughs asserted that “Princes may have an exclusive property in the sovereignty of the several parts of the sea, and in the passage, fishing and shores thereof.” (emphasis added) O’Connell, *op. cit.*, p.6. The term “British Seas” was an indicative of the English property doctrine that vested the property rights over the British Seas to the Crown. This term was used in some treaties between England and some other countries. As far as the treaties were concerned, the Court of Admiralty (1719) held that the term “British Sea” referred only to the English Channel. *Ibid.*, p.7.
Examination of the history of the law of the sea demonstrates that the dominant theme is "the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas". As a result, it was not until recent times that positive international laws put an end to the issue of the nature of States rights over the maritime zones. However, the recent history of the law of the sea has also witnessed the extension of jurisdiction of States over their adjacent seas what is now known as the "creeping jurisdiction", which has had implications for international shipping. The next chapter shows how States have extended their domain over the marginal waters, which has resulted in making the passage of foreign ships in some areas (such as internal waters) subject to the consent of littoral States or to the requirement that passage must be innocent.

Throughout history the seas and oceans have been dominated by two conflicting interests: on one side the interests of coastal States and on the other side the interests of maritime powers. Coastal States have attempted to extend their exclusive sovereignty over maritime areas in the vicinity of their coastlines and maritime powers have struggled to establish a free usage of the seas.

These competing interests were also reflected in seventeenth century theories of free seas versus closed seas. These two opposite approaches on jurisdiction of States over maritime areas reveal different tendencies and trends of States in the classical history of the law of the sea. The views asserted by Grotius and Selden are particularly illustrative of the battle of thoughts on the legal nature of the seas. Although their views were primarily asserted in line with the existing interests of their countries, these views reflect the conflicting practice of States in seventeenth century.

Huig de Groot (Hugo Grotius, Dutch jurist, 1583-1645) is known as the new founder of the principle of open seas. However, some writers had earlier asserted their opposition to the claims of some States in exercising


29 For example, see Article 1 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (TSC) and Article 2 of the 1982 United Nations Convention on the Law of the Sea (LOSC) regarding the concept of sovereignty over the territorial sea.
sovereignty over a vast maritime area. Among these were the sixteenth century Spanish writers Ayala, Vitoria (1480-1546), and de Soto. These writers rejected the legality of claims by States to have the right of ownership over the seas, such as those of the Italian Republics in the Mediterranean waters, Denmark and Sweden in the Baltic, and Spain and Portugal in the Atlantic. When the Scottish King, James VI, became James I of England in 1603, he continued claiming exclusive fishing rights over some seas. It is interesting to note that during this period Gentili (1552-1608), who was as a Professor of law at Oxford and previously favoured the freedom of the seas, supported the idea that not all seas are free for the use of all States.

The exclusive claims over the seas were contrary to the Dutch commercial interests in the seas. In particular, as a consequence of exclusive claims made by Spain and Portugal in the Atlantic and Eastern Seas, the freedom of sea trade for the Dutch in these seas and also its rights to fish in the North Sea were threatened. These restrictions on the seas for the Dutch led to legal analysis of the theory of the freedom of the seas by Grotius.

A. Grotius’ Theory of the Freedom of the Seas

In 1609, Grotius supported the principle of freedom of the seas in his work entitled *Mare liberum sive de jure quod batavis competit ad indicana commercia dissertatio* (The Freedom of the Seas, or the law governing

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31 O'Connell writes that the Swedish claim over the Baltic was to exclude foreign vessels from sea trade in the Baltic as a closed sea, unless they were ready to pay tolls. O'Connell, *op. cit.*, p.3.

32 Wilson, *op. cit.*, p.5. To these claims, the British claims in the seventeenth and eighteenth centuries over some seas can be added. These claims were made over the North Sea, the Channel, the Irish Sea, and parts of the Atlantic as “British seas”. Mangone, *op. cit.*, p.20. On the claims of certain States over vast areas of the seas see also Momtaz, Djamchid, ‘The High Seas’, in Rene-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea*. Vol.1, Ch.7, Martinus Nijhoff Publishers, Dordrecht, 1991, pp.383-423, at 386.

33 James I, in fact, followed the Scottish view that “the King of Scotland was deemed to possess whatever lay within the range of vision of a ship in sight of the coast”. O'Connell, *op. cit.*, p.3.

34 Wilson, *op. cit.*, p.6.


36 This book was originally Chapter XII of the earlier treatise of Grotius, *De Jure Praedae* (On the Law of Prize), written in 1604-5. It was in 1864 that after discovery of this treatise the aforementioned fact was found. Mangone, *op. cit.*, p.18. "On the Law of Prize" was written on the request of the Dutch East India Company (formed in 1602) to justify the involvement of this company in trading with the East Indies, since the Portuguese excluded ships of the company from engagement in sea trade in that region. Churchill, *op. cit.*, p.5. Although in the early seventeenth century the Dutch were at war with Spain, there was no war between the Dutch and Portugal. However, at the time Spain and Portugal
the Dutch trade in the Indies) or *Mare Liberum* for short. He stated that no state has exclusive sovereignty over the seas. He also mentioned that all states have equal right of shipping and navigation. Indeed, Grotius attempted to establish a regime of free navigation which cannot be denied.

In his book, *The Freedom of the Seas*, Grotius used a number of reasons to defend the principle of freedom of the open sea in response to the claims of Spain and Portugal in the early seventeenth century, particularly as far as navigation is concerned. While Spain claimed the Pacific Ocean and the Gulf of Mexico, Portugal claimed the Atlantic south of Morocco and Indian Ocean. The major purpose for such claims was to exclude foreign ships from traversing or entering these waters. Grotius challenged the division of the seas by the Pope and argued that:

> ... since *neither the sea nor the right of navigating it can become the private property of any man*, it follows that it could not have been given by the Pope, nor accepted by the Portuguese. *(emphasis added)*

Grotius was also of the opinion that States have no right to deprive ships of other States from navigating through the seas because "if they have any right at all upon the sea, it is merely one of jurisdiction and protection". This was in response to the positions of Spain and Portugal claiming exclusive right of shipping on the seas and excluding other nations from traversing the Indies waters. Grotius rejected the claim that the right of navigation to the East Indies belonged only to the Portuguese because of prescription or custom. Grotius asserted that "*[p]rescription is..."
a matter of domestic law" and domestic law cannot be relied upon to prevent other nations from exercising their rights under the law of nations. Grotius pointed out that a domestic law is not reliable "when it is in conflict with that which always is stronger than municipal law, namely, the law of nature or nations". In addition, prohibition of other nations from navigating the seas is not only considered "contrary to the [existing] laws, but is contrary also to natural law or the primary law of nations". (emphasis added)

Grotius considered the seas as res communis, including for the purpose of navigation. Accordingly, no one can exclude others from navigating the seas. This is because "no man has a right nor can acquire a right over the seas and waters which would be prejudicial to their common use".

Another reasoning applied by Grotius to support his doctrine was the principle of freedom of trade among nations in the law of nations, that is to say, "[e]very nation is free to travel to every other nation, and to trade with it". This was why the Portuguese claim to exclusive sea trade with the East Indies was rejected by reliance on the freedom of trade. Even discovery or occupation of the East Indies by the Portuguese did not create any exclusive right of trade. Grotius did not accept that the "Papal Donation" or non-involvement of other nations in trading with the East Indies form any foundation for the Portuguese to make the sea trade with the East Indies exclusive. In addition, the principle of equity enables nations to get involved in sea trade on a free and equal bases.

Grotius concludes that the freedoms of navigation to and sea trade with the East Indies for the Dutch and other nations is a reflection of the principles of law and equity. He suggests that there are three possibilities

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43 Grotius, op. cit., p.47.
44 Ibid.
46 Ibid., p.55.
48 Ibid., p.61 & 65.
49 Ibid., pp.69-71. Although Grotius directed his arguments against the Portuguese, the same reasoning could be also advanced against the position of Spain in monopolising trade in the West Indies. Brownlie, op. cit., p.233.
50 Despite his reasoning to defend the right of free sea trade, Grotius was asked to argue for the Dutch monopoly to trade with Spice Islands. In March 1613, Grotius accompanied the Dutch diplomatic mission to England to discuss issues over prevention of English seafarers to trade with the Spice Islanders. Grotius argued that the right of the Dutch to monopolise the trade with the Spice Islands was
to remove any obstacles to these freedoms: by peaceful discussions, by concluding a treaty, or by war.\textsuperscript{51} Alternatively, the case could be taken to a court for determination.

Although Grotius is a supporter of the freedom of the seas, he confirms that countries can have the right of jurisdiction and protection over offshore areas.\textsuperscript{52} This shows a confirmation of Roman independent States theory on the regulatory powers of coastal States.\textsuperscript{53} As Churchill underlines: “Grotius ... did not claim that all the seas were open to use by all men”.\textsuperscript{54} This should not be interpreted as saying States might claim some of the seas (if not all the seas); rather that States might have some rights in the marginal seas while the freedom of the seas is not impaired. In 1625 Grotius argued in his book on the Law of War and Peace (\textit{De jure belli ac pacis}) that the seas should be open to all nations for sailing, fishing, and other uses such as those for commercial purposes. However, he recognised that an adjacent maritime area may fall under the jurisdiction of coastal States for security purposes.\textsuperscript{55}

In fact, like Baldus (an Italian civil lawyer of the fourteenth century), Grotius made a distinction between the right of ownership (\textit{dominium}) and the right of jurisdiction (\textit{imperium}).\textsuperscript{56} This is clear from the view of Grotius in \textit{De Jure belli ac pacis} in which, despite reconfirmation of freedom of the seas, he made clear that coastal States can

\textsuperscript{51}See Grotius, \textit{op. cit.}, pp.72-76. Cicero states that “[t]here are two ways of settling a dispute; first, by discussion; second, by physical force; we must resort to force only in case we may not avail ourselves of discussion”. \textit{Ibid.}, p.75.

\textsuperscript{52}Grotius writes that those supporting the principle that Romans had rights over a certain sea did not mean to establish the concept of ownership regarding the seas but to give the rights to Romans for jurisdiction and protection purposes. \textit{Ibid.}, p.35.

\textsuperscript{53}The legal position of the Roman Empire over the seas before its division was mainly based on the view of the Roman legal scholar, Domitius Ulphianus (A.D. 228). This scholar was of the opinion that “the sea by its nature is open to everyone.” Mangone, \textit{op. cit.}, pp.7-8.

\textsuperscript{54}Churchill and Lowe, \textit{op. cit.}, p.53.


\textsuperscript{56}Grotius also made such a distinction in his two other works: \textit{Defensio} and \textit{De jure belli ac pacis}. In the former, he did not discuss \textit{imperium et jurisdictio} as, in his view, it was not related to \textit{dominium} and \textit{jus piscandi}. As O’Connell understands from the distinction made in the latter, the idea is that “there may be \textit{imperium} over a public way (the seas) but no \textit{dominium} because it is common”. See O’Connell, supra note 15, p.16.
have sovereignty over bays and straits and also over adjacent waters as long as "innocent passage" of foreign ships is not disrupted.\(^5\) This theory was later developed by Bynkershoek, arguing that the sovereignty of coastal States is limited to the power of its artillery at the shores.\(^6\)

It is necessary to point out that the principles of the freedom of the seas and the freedom of navigation originated from the traditional law of the sea but do not necessarily represent the same concept. Although the former contains the notion of free navigation, it is not limited to the right of shipping. In fact, the freedoms of the high seas are discussed in a broad context which covers free navigation through these seas. However, the effective exercise of the freedom of navigation has required the passage of foreign ships through territorial waters of littoral States. Accordingly, it is argued that navigation through territorial waters is a result of the adoption of the freedom of the high seas and this freedom exists because of "the absence of any territorial sovereignty over the high seas".\(^5\)

### B. Selden’s Theory of Closed Seas

In contrast to the theory of open seas, Selden (in an effort to disprove the theory of "mare liberum") propounded the theory of "mare clausum" in 1635.\(^6\) Based on this theory, coastal States have exclusive sovereignty over a maritime area adjacent to their coastlines. His book, entitled *Mare clausum sive dominio maris*\(^6\) was written to justify the claims made by England over the seas around this country in the seventeenth century.\(^6\)

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\(^5\) Mangone, *op. cit.*, 1981, p.20. Grotius argued that "... the sea can also be acquired by him who holds the land on both sides, even though it may extend above as a bay or above or below as a strait, provided that the sea in question is not so large that when compared with the lands on both sides, it does not seem a part of them". II *De jure belli ac pactis*, Chapter III, Section VIII. Cited in Mangone, *op. cit.*, 1989, p.111 (footnote 1).

\(^6\) It is stated that the doctrine of the sovereignty over the seas was first asserted by Bodin in his treaties on sovereignty in 1582. This doctrine was considered to be a reflective of the traditional enforcement of jurisdiction by Italy over its adjacent waters. O’Connell, *op. cit.*, pp.2-3.

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\(^7\) Selden’s book, *Closed Seas or Mare Clausum*, was presented to King James in 1618. It was revised and then published in 1635 following the order of King Charles. It was published to support British claims over certain seas. Anand, *op. cit.*, 1982, p.105.

\(^8\) For short *mare clausum*.


\(^10\) Churchill and Lowe write that the *mare liberum* was regarded as a threat to "contemporary British claims to control the seas around Great Britain". Churchill and Lowe, *op. cit.*, p.5. Unlike Selden who mainly relied on philosophical arguments, some authors tried to disprove Grotius’s theory based on theological bases, particularly "the theological concept of property in the sea." For example,
Although English claims over the seas were not as extensive as those of Spain and Portugal, England claimed “the high seas to the south and east of England, as well as to undefined regions to the north and west”.\textsuperscript{64} It is notable that while Queen Elizabeth I was defending the principle of open sea in the sixteenth century against the protest of Spain relating to violation of its domain by the British vessel, Britain’s position changed in the seventeenth century following the expansion of its colonies overseas.\textsuperscript{65} In fact, at this time, Britain followed a position similar to that of Spain and Portugal over the seas, \textit{inter alia}, monopolising maritime commerce.\textsuperscript{66} Selden prepared his series of arguments to defend the theory of closed sea as a justification of British interests.

Selden first outlined the existing theories regarding the seas and wrote that “[t]here are among foreign writers, who rashly attribute your Majesty’s (King Charles I) more southern and eastern sea to their princes. Nor are there a few, who following chiefly some ancient Caesarian lawyers, endeavour to affirm, or beyond reason too easily admit, that all seas are common to the universality of mankind”.\textsuperscript{67} Selden relied on the practice of some nations in appropriating certain parts of the seas to argue that there is a custom to claim maritime sovereignty. For example, he referred to such ancient people as Romans, Carthaginians, Cretans, Lidyans, Tharcians, Phoenicians, Egyptians, as well as some European States.\textsuperscript{68} Accordingly, Selden considered the seas as private property in contrast to Grotius who argued that the seas are common property of mankind and are free for navigation, sea trade and fishing of all nations. Selden noted:

... the sea, by the law of nature or nations, is not common to all men, but capable of private dominion or property as well as land.\textsuperscript{69}

\textsuperscript{64}Scott, James Brown, Introductory Note to \textit{Mare Liberum} (The Freedom of the Seas), \textit{op. cit.}, p.viii.

\textsuperscript{65}This is an indication of how the positions of States may alter depending on their changing interests in the seas. See, for example, Anand, \textit{op. cit.}, 1993, p.76.

\textsuperscript{66}It is mentioned that England made such a claim in order to protect its fisheries interests by exclusion of others from fishing in certain maritime areas. It was to this end that England expressed its intention to enclose, \textit{inter alia}, “the English Channel and the whole of the North Sea up to the north of Norway”. Birnie, P.W., “The Law of the Sea Before and After UNCLOS I and UNCLOS II”, in R. P. Barston and Patricia Birnie (eds.), \textit{The Maritime Dimension}, George Allen & Unwin, London, 1980, p.8.

\textsuperscript{67}Quoted by Scott, \textit{op. cit.}, p.ix.

\textsuperscript{68}Anand, \textit{op. cit.}, 1982, p.105.

\textsuperscript{69}Scott, \textit{op. cit.}, p.ix. Accordingly, Selden concludes that “... the King of Great Britain is the lord of the sea flowing about, as an inseparable and perpetual appendant of the British Empire”. \textit{Ibid}. Dr. James
Selden argued that the claims of Spain and Portugal were not acceptable because their claims were not based on "legitimate title" and they lacked adequate naval forces to exercise their sovereignty on the claimed seas.70 This indicates that Selden gave an important role to the navy for asserting sovereignty over the seas. Although Selden maintained that peaceful navigation and commerce should be free, he considered this as a matter of "humanity" and asserted that it was not inconsistent with the law of nature and the law of nations to prevent navigation and commerce in certain parts of the seas.71 Selden then argued that England had exercised its sovereignty over the adjacent seas by preventing foreigners to fish and navigate therein.

Selden's doctrine was supported by some scholars while others refuted his work. Two Dutch jurists, Dirck Graswinckle and Pontanus (1637), argued against Selden's doctrine while Boroughs supported his view to justify the claims made by Britain to enclose waters of several seas subject to exclusive use. Boroughs stated:

That princes may have an exclusive property in the soveraigntie of the several parts of the sea, and in navigation, fishing and shores thereof, is so evidently true by way of fact, as no man that is not desperately impudent can deny it.72

Although the doctrines of free seas and closed seas were primarily the products of the interests of individual countries73, arguments for and against these doctrines became part of academic discussion in the following

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71 Ibid.
73 Potter states that "the works of Grotius and Selden and their coadjutors were products of personal and national desires rather than works of pure and unbiased juristic science". Quoted in Anand, op. cit., 1982, pp.106-107.
centuries. However, even these discussions were affected by the practices of States in expressing their rights over the seas.

C. Responses to the Classical Theories

Despite extreme claims made over the seas by some countries in the fifteenth, sixteenth, and seventeenth centuries, it became clear that it was impracticable to impair navigation of other States vessels on the high seas. This is evidenced by the failure of Spain and Portugal in preventing foreign vessels from passing through maritime areas claimed by them which in fact were part of the high seas.

Pontanus in Holland, Welwood in Scotland, and Meadows in England were among authors who favoured the right of ownership of States over the marginal seas. These authors argued that it is because of property rights of States over the adjacent seas that they have jurisdiction over these seas. This jurisdiction, in turn, is for the purpose of protection of these States and to exclude foreigners from the use of the adjacent seas as property of coastal States. Accordingly, the marginal belts might be appropriated while other parts of the seas are open to use for all. The major difference between the theory of Grotius and the above mentioned authors is that these authors argue the States have the right of *dominium* in the marginal seas while Grotius considered this as *imperium*.

According to O’Connell, “[b]y 1700, there were only echoes of the sovereignty of the seas to be heard, and the only question was the extent of coastal waters”. (emphasis added) It was in 1702 that Cornelius van

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75 Shalowitz states that the maintenance of claims over the seas depended on the ability of claimant States to preserve such claims in practice. In his words, in the Middle Ages “each nation asserted such claims as seemed warranted in its own eyes, and obtained recognition of them in proportion to its power to defend them”. (emphasis added) Ibid.

76 Churchill and Lowe, *op. cit.*, p.53. In 1665, Codrington reiterated the Selden’s argument. See O’Connell, *op. cit.*, pp.6-7. O’Connell names authors such as Gothoferus (1637) and Loccenius (1650) among those who consider a close link between the notions of *imperium* and *dominium*. Ibid., p.17.

77 Jessup’s view is “[a]s far as the littoral power extended seaward, so far could the sea be claimed as under the imperium of the neighbouring state.” Jessup, Philip, *The Law of Territorial Waters and Maritime Jurisdiction*, G. A. Jennings Co., INC., New York, 1927, p.5.

78 O’Connell, *op. cit.*, p.10. In another part of his book, O’Connell refers to the view of interrelation of *imperium* (the power to rule) and *dominium* (the power of ownership of the sea) by 1700. This view is that “the power to rule and to legislate, which is the power of *imperium*, could extend only so far as the ruler and legislator possessed *dominium*, or the rights of an owner”. Ibid., p.15.
Bynkershoek (a Dutch jurist) wrote his book, *De dominio maris dissertatio* (Sovereignty over the Sea), relying on "the actual practice of states" instead of depending on "the principles of the law of nature".\(^79\) Bynkershoek asserted that the seas are free for all States but coastal States have full sovereignty over the seas adjoining their shores.\(^80\) This full sovereignty enabled coastal States to deprive foreign ships from having access to the marginal seas. Although it was accepted that coastal States should have sovereignty over the territorial waters, authors like Vattle (1758, *Le droit des gens*), were of the view that foreign ships have to become entitled to navigate through the marginal seas.\(^81\)

While the nature of navigation and the kind of vessels entitled to navigate in the marginal waters became subject to some debates, the principle of navigation through these waters was not rejected and since the early nineteenth century this principle has become part of customary international law.\(^82\) This was due to the fact that acceptance of the theory of sovereignty of States over the marginal seas resulted in division of seas into territorial waters and the high seas.\(^83\) With the prevalence of the cannon-shot rule in the late eighteenth century\(^84\), the extensive claims over the seas ceased and in the nineteenth century the principle of freedom of the seas, particularly for naval and commercial purposes, gained British, French, and American support.\(^85\)

It should be noted that the sovereignty of England over its territorial waters beyond three nautical miles from the English shore was rejected by Lord Stowell (formerly Sir William Scott) in the case of *The Louis*

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\(^79\)Mangone, *op. cit.*, 1981, p.20. The reliance on State practice is the milestone of the positivist view developed in the eighteenth and nineteenth centuries. Positivism was a response to the natural law theory. Accordingly, positivists were "more concerned with what nations actually do than with what it might be thought they should do". Brown, *op. cit.*, p.42.

\(^80\)Churchill and Lowe, *op. cit.*, p.54.

\(^81\)Ibid.

\(^82\)Ibid.

\(^83\)Developments in State practice with respect to maritime zones in recent decades have created new principles on division of the seas. The seas (including their submerged lands) are now divided into the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, and the high seas with special principles governing them.

\(^84\)By the late eighteenth century Spain and Portugal stopped proclaiming vast areas of the seas as their national domains. For example, Spain claimed a six mile limit in 1760. Brownlie, *op. cit.*, p.234 (no. 12).

\(^85\)Ibid., p.234. The Russian support for the freedom of the sea was first expressed in 1587. Ibid., p.233 (no.9).
In line with the developments in the law of the seas, Lord Stowell argued, inter alia, that:

... all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.87 (emphasis added)

The concept of freedom of the seas has also been supported in the practice of the United States courts since the early nineteenth century. In The Mariana Flora case, Justice Story held that “... upon the ocean in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there”.88 (emphasis added) A similar view was expressed by the United States Supreme Court in United States v. Louisiana in 1960 when it stated “... the high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation”.89

III. The Concepts of Res Communis and Res Nullius

The history of the law of the sea also reflects the battle between the concepts of res nullius and res communis.90 For many centuries, the

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86 Le Louis was a French ship which was involved in African slave trade, while this trade was declared to be unlawful in accordance with French laws and the treaty between Great Britain and France. The Louis was seized by the British cutter, the “Queen Charlotte” on 11 March 1816. This seizure occurred because the Louis refused to permit the British cutter to search it. In dealing with this case, Lord Stowell stated that “I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals”. Le Louis (1817), 2 Dodson 210, 165 ER 1464. It is now recognised that a warship can board a foreign ship on the high seas if such ship is engaged in piracy, slave trade, and unauthorised broadcasting, or the ship is without nationality or refuse to show its flag. See Article 110 (Right of Visit) of the LOSC.

87 Scott, op. cit., p.x. It was in 1876 that Great Britain legislated the Customs Consolidation Act and claimed the three mile limit, thus taking its new position in favour of the freedom of the seas. By this Act invalidated the Hovering Acts which extended the control power of Great Britain up to twelve miles from its coast. Jessup, op. cit., p.4 (also no. 7).


90 Brittin defines the concept of res communis as “[s]omething enjoyed by everyone and not subject to exclusive acquisition.” Brittin, Burdick, International Law for Seagoing Officers, Fourth Edition, US Naval Institute Press, Annapolis, 1981, p.460. Therefore, the concept of res nullius, in contrast, means something which is subject to exclusive acquisition.
dispute over these concepts brought about conflicts of interests among States. This is because the implementation of these concepts led to different legal consequences. These two concepts have opposite meanings. As far as the seas are concerned, the concept of res communis means that the seas are the common possession of all nations and, therefore, open for their uses. Accordingly, the seas are not subject to appropriation by any means. In contrast, the concept of res nullius means that the seas belong to no State and are the property of no one. Therefore, based on this concept the seas are susceptible to occupation and they become property of the first occupiers.

In fact, there is an interrelation between the concepts of res communis and res nullius regarding the legal status of the seas and the theories of mare liberum and mare clausum. When Grotius argued that the seas are free for the use of all nations, he considered the seas as res communis. In the same manner, when Selden favoured the idea of the mare clausum, he applied the theory of res nullius to the seas.

While many States supported the concept of res communis concerning the seas, others (mostly maritime powers) adhered to the concept of res nullius, based on their own interests. This resulted in conflicts between the interests of coastal States and those of maritime powers. However, the recent developments in the law of the sea, particularly in the 1960s, led to the adoption of the theory of res communis.

In the modern law of the sea, the battle between the theories of mare liberum (res communis) and mare clausum (res nullius) finally was concluded by the clarification of the scope of the former theory and the modification of the latter. Also there have been some developments in State practice in the past decades reflecting, to some extent, the tendency towards the theory of mare clausum. There now exist international conventions on the law of the sea which recognise the concept of sovereignty over the territorial sea as forming part of the territory of coastal States (and also sovereignty over archipelagic waters). These universal

91 Although the theories of res communis and res nullius emerged when the seas were only used for navigation and fishing, the impacts of these theories on the modern law of the sea are still observable. The concepts of territorial sovereignty over adjacent seas and the common heritage of mankind regarding the resources on seabed and in subsoil thereof, beyond the national jurisdiction, reflect these theories.

92 Notwithstanding the theory of res nullius preserved its effect, though in a limited way. This effect is evident in acceptance of a narrow adjacent sea for coastal States, known as the territorial sea.
treaties also grant control powers over the contiguous zone (extending up to twenty-four nautical miles seaward of the baselines); and accord sovereign rights to coastal States in the Exclusive Economic Zones (EEZs, limited to 200 nautical miles seaward of the baselines) and on the continental shelves (up to 200 nautical miles and in certain circumstances up to 350 nautical miles seaward of the baselines).

There is also a new trend which does not limit the approaches towards the nature of the seas to *mare liberum* or *mare clausum*. A new perspective is that the seas are *mare nostrum*. Allott is among those who look at the seas as *mare nostrum*. He writes that:

> The sea is naturally neither *mare liberum* (Grotius) nor *mare clausum* (Selden) but rather *mare nostrum* (our sea). ... The sea is our sea because we find ourselves to be cohabitants with the sea on the Planet Earth and because all human beings naturally share its potentialities.\(^93\)

Although the seas may *naturally* be considered as *mare nostrum*, not all seas may legally be considered so. A more accurate view is that the seas now fall into three main categories from a legal perspective: (a) *mare clausum* (internal waters), *mare liberum* (the high seas) and *mare nostrum* (territorial seas, archipelagic waters, and EEZs). The concept of certain seas as *mare nostrum* means that these maritime areas 'basically “belong” to the adjoining coastal state with clearly stated limited rights of access -- they are *mare nostrum* with a right-of-way.'\(^94\)

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\(^93\)Allott, *op. cit.*, p.56.

IV. The Issue of Competing Interests: The Interests of Maritime Nations v. Those of Maritime Powers

The law of the sea has been developed through the interaction of interests of States. In 1983, Burke and Deleo wrote that "the recent history of the law of the sea continues to reflect conflicts between states seeking unhampered navigation and utilisation of resources and other states seeking exclusive control over adjacent seas". In many cases, State practice has reflected divergent views. As long as States’ efforts are focused on securing their own interests over the seas and oceans, there will always be a possibility of conflicts over the use of ocean spaces.

Like any other branch of international law, the law of the sea has played a determinant role in reconciling conflicts of States in the use of the seas. While many States have been seeking to gain control rights over a relatively wide maritime area, a few States with large interests in the seas have been struggling to keep the seas as free as possible. It is important to examine how these competing interests have been co-existing or reconciling in the light of developments in the law of the sea. This review is essential because it will assist to find out how the rights of navigation have been affected by a wide range of claims over the seas.

95The term “maritime nations” used here is to represent most of coastal States in contrast to those maritime nations known as “maritime powers”. Some use the terms “maritime nations” or “maritime states” referring to “maritime powers” but this usage does not seem to be appropriate since all coastal States are maritime nations and States, though with different capabilities and potentials to use the seas. It seems the term “maritime States” may refer to those States with a considerable commercial and military fleets but not as large as maritime powers. Although the term “maritime powers” is used in many texts, there is no recognised definition for this term. Brown writes that maritime power is “the active shipping State as opposed to the relatively passive coastal State.” Brown, op. cit., p.2. It is, however, debateable that countries like Liberia, Panama, and Singapore representing flag of convenience countries can be considered in the category of maritime powers. Also, McNees defines maritime States (maritime powers) as those States “whose merchant and naval ships make more than localised use of the seas.” McNees, op. cit., p.187. Some countries such as the USA, Russia, the UK, France, and Japan seem to be placed in the category of maritime powers with very similar interests. There still exists a question as to whether countries such as Liberia with the large number of ship registration can be regarded as maritime powers. This seems questionable even despite their common interests with maritime powers in free and unrestricted navigation through the seas.


98Despite the impacts of national claims on the rights of navigation, the right of peaceful navigation has its foundation in the customary law of the sea. In addition, the law of the sea has struck a balance between legitimate demands of coastal States and the navigational interests of maritime powers.
1. Interests of Maritime Nations: Major Reasons for Expansion of National Jurisdiction over Adjacent waters

A relevant question concerns the interests of coastal States in extending their jurisdiction over a large area of the sea adjacent to their coasts. As early as 1910, Judge Root presented his view on the issue jurisdiction of coastal States over adjacent seas, though at that time the physical range of such jurisdiction was not as extensive as it is now. Judge Elihu Root in the 1910 North Atlantic Fisheries Case relied on a number of factors, particularly the necessity of protection of coastal States, to justify jurisdiction of these States over adjacent seas in order to narrow the scope of the principle of high seas freedom. Judge Root argued that:

The sea became, in general, as free internationally as it was under the Roman law. But the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and sole basis on which is established the territorial zone that is recognised in the international law of today.  

Although coastal States’ interests may be differently affected by such factors as geographical locations and conditions, as well as their strategic policies, they have, more or less, expressed concerns about the security, economic, and environmental issues regarding maritime spaces adjacent to their coasts. These interests can be examined from various aspects, the most significant of which are considered here.

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100 For example, while the extension of the exclusive fishing zone was so important for Norway and Iceland due to the rich fish stocks around their coasts, what was of more importance for Israel was to have access to the high seas through the Strait of Tiran. This indicates how political and economic factors have had their impacts on the codification of legal rules, since there are now international provisions recognising the exclusive economic interests of coastal States up to 200 nautical miles and unimpaired passage through international straits.
101 Colombos (1967) classifies the reasons for the expansion of sovereignty of coastal States over adjacent waters in the following three categories:

(i) the security of the State demands that it should have exclusive possession of its shores and that it should be able to protect its approaches; (ii) for the purpose of furthering its commercial, fiscal and political interests, a State must be able to supervise all ships entering, leaving or anchoring in its territorial waters; (iii) the exclusive exploitation and enjoyment of the products of the sea within a State’s territorial waters is necessary for the existence and welfare of the people on its coasts. Colombos, op. cit., p.87.
The most important concern of the majority of coastal States has been security. Hall justifies the necessity of control power of coastal States over adjacent waters on the basis of their security interests. He argues that "unless the right to exercise control were admitted, no sufficient security would exist for the lives and property of the subjects of the State upon land." Protection and defence are vital needs of each State to guarantee its continued existence. However, States have different potential and capabilities to defend themselves. In addition, there are different strategies which are taken by States in their territories depending on the avenues available to them. Maritime boundaries present a special situation since the territory of States is not limited to lands. Coastal States need to control their maritime territory for security purposes. However, many coastal States are yet to become fully equipped to patrol their maritime territories, particularly where these areas are of significant size.

If a coastal State lacks adequate military equipment to protect and support its maritime boundaries, the only precautionary action it can take is to extend its exclusive sovereignty to the maritime area adjacent to its coasts. This makes the passage of foreign ships subject to the condition of innocent passage. In particular, many coastal States are concerned about the passage of warships which may be used as a means for political pressure on them. Extending the maritime territory would lessen and weaken this sort of pressure and may guarantee the security of coastal States. In addition, neutrality is a means of protection on which many coastal States rely in time of armed conflicts at seas. These States have been seeking to preserve their waters as neutral in time of war as well as to avoid impacts of sea war on their land territories. Broader coastal waters

102 Ibid.
103 It was during the period of the cold war that the East and the West took different positions on the strategic importance of the seas and oceans. While the West attempted to guarantee free passage in wider areas of the seas and oceans, the East was of the view that coastal States were entitled to have "a wider territorial sea than the traditional law of nineteenth century permitted" because it is essential "for the defence and protection of the coastal State". Kenneth, Bailey, 'Australia and the Geneva Conventions on the Law of the Sea', in D. P. O'Connell (ed.), International Law in Australia, Ch. X, The Law Book Company Limited, Sydney, 1967, p. 231.
104 It is now recognised that no foreign ship may pass through territorial seas, if its purpose is to adversely affect the sovereignty, territorial integrity, and political independence of the coastal State.
105 Prescott writes that "[t]he development of large navies, by countries such as France, Great Britain and Holland, and their frequent use as instruments of policy, caused many small states to seek for means of preserving their neutrality". Prescott, J. R. V., The Political Geography of the Oceans, Douglas David & Charles, Vancouver, 1975, p. 33.
would make it more likely that the neutrality of coastal States, particularly small States, would be respected.  

A second interest of coastal States is their economic interest. Access to a large maritime area can play an important role in their economy. Exploitation of living or non-living resources of maritime areas in the vicinity of the coastline can meet the essential needs of their population and can be a major source of their revenue. This interest is particularly important for those coastal States which are not industrialised. Coastal areas are rich in terms of fish stocks and other living sea resources. The sea-bed in offshore areas is also significant for exploitation of petroleum and minerals. These areas can be better protected by enforcing national jurisdiction over a wide maritime zone. This would allow coastal States to restrain other States (particularly industrialised States) from exploiting their marine resources. Claims over a wider maritime area were particularly prompted by technological advances which enabled certain developed

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106 In contrast, some States (such as the United States of America) were of the view that, in time of war, a broader area of neutrality of adjacent waters may provide a wide zone of free attack for submarines of belligerents, particularly where the coastal States is unable to detect these submarines in its territorial waters. Bowett, D. W., ‘The Second United Nations Conference on the Law of the Sea’, International and Comparative Law Quarterly, Vol.9, 1960, p.416.

107 A wider maritime area under the control of coastal States also enables them to apply their laws on smuggling in a more extensive area. Accordingly, coastal guards are able to prevent smuggling more effectively. This has had an economic impact on coastal States because smuggling deprives coastal States of revenue. In fact, due to the increase of trade among nations, duties and taxes on goods and products are among major sources of revenue for States.

108 For example, the Japanese delegate at the UNCLOS I stated that “the Japanese people obtain almost 9% of their animal protein requirements from the living resources of the sea. Moreover, the fishing industry plays an important role in Japan's foreign trade, because a part of the fishery products is exported, enabling Japan to import foodstuffs and raw materials which are not available domestically.” UN Doc. A/CONF/13/39, p.24.

109 In the past decades, some Latin American States (such as Ecuador, El Salvador, and Peru) even claimed a very wide territorial sea of 200 nautical mile limit to ensure that maritime resources within their adjacent waters would be reserved for their nations to guarantee their economic development. This was, in fact, a response to the 1945 Truman Proclamation on the rights over the continental shelf which is very narrow in the case of these American Latin countries.

110 As Kenneth writes “the richest stocks of fish are to be found in the waters nearest the land”. Kenneth, op. cit., p.230.

111 The trend to enclose a wider maritime area is not limited to developing countries. For example, Canada has recently claimed a large maritime area as historic waters to change the status of waters of the area to internal waters. This maritime area, which is called the Canadian Arctic Archipelago, is formed by a number of islands. Canada drew straight baselines around this Archipelago which was not accepted by some States such as the United States of America. The result of the application of these straight baselines is an extension of sovereignty or sovereign rights of Canada to the high seas that affects the fishing and navigational activities of other States. The basis of these baselines is the Order respecting geographical co-ordinates of points from which Baselines may be determined, Privy Council 1985-2739, 10 September 1985, The Law of the Sea - Baselines; National Legislation With Illustrative Maps, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, pp.86-98. The area enclosed by this Order is called “Area 7”. Canada has already applied straight baselines in six other areas along its coasts.
countries to exploit not only the living resources in distant waters, but also the non-living resources on or under the deep sea-bed.

Another interest of coastal States is the marine environment. Coastal States' maritime areas have always been exposed to marine pollution. One of the major sources of the pollution has resulted from passage of foreign ships, whether because of mere passage, particularly if the power source is nuclear power, or as a result of discharging their waste materials, including oil, into the sea. These actions also endanger the life of living resources and seabirds. Some maritime incidents involving supertankers were also among causes of pollution of the marine environment. For example, the *Torrey Canyon*\(^{112}\) and the *Amoco Cadiz*\(^{113}\) accidents caused marine pollution by oil with disastrous effects on the marine life and environment. Following these incidents efforts were made to formulate more effective rules for the prevention of marine pollution, particularly from oil discharge into the seas. These incidents, along with other types of marine pollution, brought about stronger incentives among coastal States to combat the issue of marine pollution in the seas and oceans, particularly in their territorial seas and coastal areas. By extending the maritime areas under new jurisdiction, coastal States can enact necessary regulations to protect their marine environment in a wider area and expand the range of their enforcement powers to prevent marine pollution.\(^{114}\) In particular, coastal

\(^{112}\) *Torrey Canyon* was a supertanker registered in Liberia with 120,890 deadweight tons capacity. On 18 March 1967, *Torrey Canyon* (while heading Milford Haven in Wales) foundered in the high seas near the coast of England. It was carrying thousands tons of crude oil and the accident caused marine pollution of the English and French coasts. The pollution had extensive adverse effects on fish and the marine life. Brittin, *op. cit.*, p.94. The damage to the marine environment was so extensive that the UK called the IMCO (now IMO) to hold a meeting to discuss the legal and technical issues concerning marine pollution. Two conventions were the main outcomes of the IMCO efforts after the *Torrey Canyon* incident. These conventions were the 1973 Convention on Marine Pollution (the so-called MARPOL) and the 1974 Convention on Safety of Life at Sea (the so-called SOLAS).

\(^{113}\) *Amoco Cadiz* was another supertanker registered in Liberia but under American ownership. It was a supertanker with 237,000 deadweight tons capacity. On 16 March 1978, *Amoco Cadiz* broke into two parts after colliding with rocks near the coast of Brittany (France) in the severe storm conditions. The incident resulted from the loss of steering control attributed to the lack of sufficient training. Although some other incidents occurred before 1978, the *Amoco Cadiz* incident was the largest oil spill and caused extensive damage to marine environment and marine life. For more details on the *Amoco Cadiz* incident see Nixon, Dennis W., *Marine and Coastal Law: Cases and Materials*, Ch.10: Marine Pollution Law, Praeger Publishers, London, 1994, pp.338-339. Among other main supertankers incidents occurring between the *Torrey Canyon* incident (1967) and the *Amoco Cadiz* incident (1978) were: (a) the *Olympic Bravery* incident off the coast of Cuesant Island near Brittany (January 1976); (b) the *Bohlen* incident off Sein Island and Brittany (October 1976); and (c) the *Argo Merchant* incident off Nantucket. Brittin, *op. cit.*, p.95. One of the recent accidents is the *Exxon Valdez* which grounded in navigable waters on the Alaskan coast in 1989. Nixon, *op. cit.*, p.330.

\(^{114}\) With the adoption of the twelve nautical mile limit as the maximum extent of territorial sea, there has been a question as to whether coastal States are able to claim a wider maritime area for marine environmental purposes. For example, following its Decree of 12 November 1984, the Federal Republic of Germany (then claiming three nautical miles for its territorial sea) extended its territorial sea in parts of the North Sea by establishing a polygonal area in the German Bight to control marine
States are entitled to enact appropriate provisions on the safety of navigation to prevent or reduce collisions of ships which are likely to cause marine pollution.

2. The Interests of Maritime Powers: Major Reasons for Favouring the Free Seas

Maritime powers have specific interests in the seas. It is apparent that maritime powers also have security, economic, and environmental interests with respect to maritime areas adjacent to their coasts. However, these powers also claim other interests that draw a distinction between them and other coastal States. The major interests of maritime powers include free navigation, free overflight, and free utilisation of the resources of the seas.

Free navigation, free overflight, and free exploitation of the resources of the seas have primarily been derived from the principle of freedom of the seas. According to this principle every State may use the seas for every purpose without any restriction except under international rules. Maritime powers have claimed that their basic interests depend on free utilisation of the seas. They have stated that free navigation and overflight are necessary for their commercial and military purposes. These powers have particularly been concerned that the extension of territorial waters might affect the right of navigation, resulting in longer voyages and causing extra costs for countries largely involved in maritime trade. There is no doubt that wider territorial seas would also cause some costs for all coastal States. This is particularly true because coastal

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pollution in its coastal waters. The Decree entered into force on 16 March 1986. See the Decree on the extension of the territorial sea in the North Sea for preventing tanker casualties in the German Bight of 12 November 1984, The Law of the Sea: Current Developments in State Practice. Office of the Special Representative of the Secretary-General for the Law of the Sea, United Nations, New York, 1987, pp.20-22. Due to the fact that this has resulted in extending the territorial sea of the Federal Republic of Germany in North Sea, at some areas up to 16 nautical miles, some countries (such as the United States and Belgium) protested against it. See, for example, Limits in the Seas (No.112). Office of Geographer, Bureau of Intelligence and Research, the United States Department of State, Washington D.C., 1992, pp.28-29. Germany now claims a twelve nautical mile limit for its territorial sea but the effect of the 1984 Decree has so far remained unchanged.


117 Ibid.

States have obligations to maintain the safety of navigation in their territorial seas. For this purpose, they have to install necessary navigational aids such as buoys. Maritime powers have also argued that not only their fleets need to enjoy free navigation and overflight for transportation, communication and enforcement of military manoeuvres, but the world community can take advantage of these freedoms, particularly for international trade.\textsuperscript{119}

In addition, maritime powers have justified exploitation of the sea resources by saying that effectiveness of their industries depends on extracting raw materials existing in the seas, including the seabeds and subsoils.\textsuperscript{120} They have been arguing that mineral and other resources of the seas are necessary for production of manufactured products and commodities, both for their domestic needs as well as for export purposes.\textsuperscript{121} Maritime powers with large fishing fleets (such as the USA and Japan) have expressed the view that expansion of territorial seas will negatively affect their economies.\textsuperscript{122} This is because they have been fishing in areas of the high seas which have now become part of territorial waters or EEZs where no right exists for foreign vessels to engage in fishing.

Finally, there is a strategic interest in the use of the seas by some maritime powers. They consider that free seas, particularly free navigation, is necessary for their strategic interests. This is one of the most controversial issues in the relations of maritime powers and coastal States with the former claiming a vital interest in maintaining the strategic balance and the latter expressing concern about their essential security interests.\textsuperscript{123}

\textsuperscript{119}For example, the USA argues that not only is maritime trade commercially important for it, but also all nations of the world are commercially interdependent, particularly through sea trade. See Grunawalt, Richard J., ‘United States Policy on International Straits’, \textit{Ocean Development and International Law,} Vol.18, No.4, 1987, p.446.

\textsuperscript{120}Ibid.

\textsuperscript{121}Ibid.

\textsuperscript{122}For example, in 1958 the UK considered that it could not produce all food necessary for its population and needed to import some foodstuffs. This meant that it had to spend money for food exports with impacts on its economy. Fish seemed to be freely available “without spending foreign currency”. Accordingly, the UK argued that free access to fish stocks in a large area of the seas “played a very important part in balancing the United Kingdom’s economy. And a major part of the country’s supply of fish was provided by its distant-water and middle-water fishing fleets, which would be grievously affected by a twelve-mile zone of exclusive fishing”. UNCLOS I (1958). \textit{Official Records}, Vol.3, p.104. See also Oda, Shigeru, ‘Japan and the United Nations Conference on the Law of the Sea’, \textit{The Japanese Annual of International Law,} Vol.3, 1959, pp.65-86, at 66.

\textsuperscript{123}Some maritime powers have claimed that in time of war “weak neutral states would experience difficulties in preserving the neutrality of wide territorial seas”. Prescott, \textit{op. cit.,} p. 77.
It can be concluded that maritime powers claim a wide range of interests with respect to the oceans. Notwithstanding, their interests “are best served by maximum freedom of access to the oceans for transportation, communication, military purposes, and the production and exchange of raw materials and goods.”

The conflict of interests among maritime powers and coastal States raises the question of what role the law of the sea has played to resolve these issues. Recent history shows that the role of the law of the sea has always been to moderate claims of States in order to balance these interests. The law of the sea has, in fact, developed in a manner to strike a balance between competing interests by sharing the seas. An example is the role of the 1982 United Nations Convention on the Law of the Sea in striking a balance between interests of coastal States and those of maritime powers with respect to navigational issues. The result of this balance has been the incorporation of two rights of passage through waters under national sovereignty into the Convention: the right of innocent passage and the right of transit passage. This process of reconciling competing interests became possible through the efforts of the international community in the framework of the League of Nations and the United Nations. It is, therefore, useful to present a background of these international efforts which were the avenues of achieving a balanced system of interests in the uses of the seas, including the rights of navigation.

124Burke et al, op. cit., p.391.
125The established concepts in the modern law of the sea have, in fact, been the outcomes of centuries interaction among competing or even conflicting interests of coastal States and other States. It is in this context that “the special exclusive interests of the coastal state are expressed in such familiar concepts as ‘internal waters’, ‘territorial sea’, ‘contiguous zone’, ‘continental shelf’, ‘hot pursuit’ and so forth; while the more general inclusive interests of all other states find expression in such generalizations as ‘freedom of navigation and fishing’, ‘innocent passage’, ‘freedom of overflight and so on.” McDougal and Burke, op. cit., p.545.
126As McDougal and Burke wrote, the law of the sea has been developing to establish “a public order in the shared use of, and shared competence over, the oceans”. McDougal, Myres S., and William T. Burke, “The Community Interest in a Narrow Territorial Sea: Inclusive Versus Exclusive Competence Over the Oceans”, Cornell Law Quarterly, Vol.45, 1960, p.171.
127The right of innocent passage is exercised within the territorial sea while the right of transit passage is exercised within certain straits defined as "international straits". In this context, reference should also be made to the right of innocent passage within archipelagic waters, as well as the right of archipelagic sea lanes passage through these waters.
3. **Efforts Made by the International Community to Reconcile Competing Interests of States**

The 1930 Hague Conference for the Codification of International Law was the first international effort to reconcile conflicting State practice in order to codify uniform rules of international law, including those related the law of the sea.\(^{128}\) This Conference was convened and held under the auspices of the League of Nations. Three issues were on the agenda of the Conference: Territorial Waters, Nationality, and State Responsibility for Damage done in their Territory to the Person or Property of Foreigners.

The Conference attempted to achieve a convention on territorial waters. Despite its efforts, the Conference was unable to conclude such a convention mostly because of the failure to reach agreement on the breadth of the territorial waters. However, the bases of discussion, draft articles, and final act of the Conference were later used by the international community in achieving recognised rules on such issues as baselines of territorial seas, innocent passage, and jurisdiction of coastal States over the seas adjacent to their coasts.\(^{129}\)

The first successful effort to provide a reconciliation between two major groups of conflicting interests, that is the interests of coastal States

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\(^{128}\)The initial concern over the need for codification of international law was expressed through the Resolution of 22 September 1924 of the Assembly of the League of Nations. It aimed at preparations for “progressive codification of international law”. The resolution was a basis for setting up a Committee of Experts (Committee of Experts for the Progressive Codification of International Law) to, *inter alia*, work on those areas of international law which were “sufficiently ripe” to be codified. The Assembly also adopted another Resolution on 27 September 1927, that is after the Committee of Experts completed four sessions of its work. This Resolution recalled attempts to codify international law for the first time. It stated that “it is material for the progress of justice and the maintenance of peace to define, improve and develop international law”. (emphasis added) In addition, it provided the basis for the Preparatory Committee composed of five persons with “a wide knowledge of international practice, legal precedents, and scientific data”. This Committee consisted of Professor Jules Basdevant (France) (Chairman), M. Carlos Castro-Ruiz (Chile), M. J. P. A. Francois (The Netherlands), Sir Cecil Hurst (Great Britain), and M. Massimo Pilotti (Italy). The Committee was required, *inter alia*, to prepare bases of discussions for the first Codification Conference. Accordingly, these prepared bases of discussions forwarded to States were the raw materials for the negotiations of delegates at the 1930 Hague Codification Conference. For detailed information on the preparation of the 1930 Hague Codification Conference see: Rosenne, Shabtai (ed.), Foreword, *League of Nations Conference for the Codification of International Law [1930]*, Vol.1, Oceana Publications INC., Dobbs Ferry, New York, 1975, pp.xiii-xlvii.

\(^{129}\)The draft articles on other aspects of territorial seas were prepared by the Committee on Territorial waters and sent to States for their consideration. These draft articles can be found in Rosenne, Shabtai (ed.), *League of Nations Conference for the Codification of International Law [1930]*, Vol.3, Dobbs Ferry, New York, 1975, pp.828-836. The work of the 1930 Hague Conference was greatly used by the First United Nations Conference on the Law of the Sea (Geneva, 1958) for the preparation of the TSC, even though no mention was made on the recognised breadth for the territorial sea.
and those of maritime powers, was the codification of four international conventions on the law of the sea at the First United Nations Conference on the Law of the Sea (UNCLOS I) held in Geneva in 1958.130 These were: the Convention on the Territorial Sea and Contiguous Zone (TSC)131; the Convention on the High Seas132; the Convention on Fishing and Conservation of the Living Resources of the High Seas133; and the Convention on the Continental Shelf134. Also a protocol was approved for the settlement of disputes arising from interpretation or application of the conventions: Optional Protocol of Signature concerning the Compulsory Settlement of Disputes135.

The conventions contain a wide variety of rules relating to the seas. They have played a considerable role in decreasing conflicts between coastal States and maritime powers. However, since there remained some unresolved issues, such as the breadth of the territorial sea and the extent of exclusive fisheries zones, some conflicts were inevitable. Reconciling these conflicts required detailed discussions and some compromises. Accordingly, the Second United Nations Conference on the Law of the Sea (UNCLOS II) was convened and held in Geneva in 1960136 to deal with these issues.137 Many proposals were submitted to the conference for consideration but none was successful in creating a compromise among participants to reach agreement on the extents of the territorial sea and the

130 The conference was held from 24 February to 27 April 1958 and was attended by representatives of eighty-five countries.
136 The conference was held from 17 March to 27 April 1960 and was attended by eighty-seven States. The conference was convened by a resolution of the UNGA of 10 December 1958. UN Doc. No. A/RES/1307 (XIII), 1958 in Yearbook of the United Nations, 1958, pp.381-383.
137 See Dean, op. cit., p.752. Also see Bowett, op. cit., pp.421-433.
exclusive fishing zone. The failure of the Conference in producing a convention was due to the inability of proposals to accommodate the interests and needs of coastal States, the most important of which was to monopolise the exploitation of resources in the adjacent seas.

The failure of the 1958 and 1960 conferences to settle the outer limits of the territorial seas and exclusive fishing zones, along with the developments and evolutions in the law of the sea and changes in the global political composition, necessitated a thorough review of all rules governing the seas. Its purpose was to achieve a single international convention containing rules for all uses of the seas. This required convening another international conference on the law of the sea: the *Third United Nations Conference on the Law of the Sea* (UNCLOS III), beginning in 1973 and concluding in 1982. The outcome of the UNCLOS III was agreement on a document of considerable length: the *United Nations Convention on the Law of the Sea* (the Law of Sea Convention (LOSC)). The LOSC finally resulted from compromises made among groups of States advancing competing interests in the UNCLOS III. This convention, among others:

- contains basic principles and provisions of the four Geneva conventions;
- clarifies the ambiguities existing in these documents (for example with respect to the outer limit of the continental shelf);
- supplements them by incorporation of provisions such as those establishing the breadths of the territorial sea and the exclusive economic zone; and
- introduces and develops such issues as right of passage through maritime areas under the authority of States; the exploitation of the high seas

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138 See *ibid.*, pp.772-782.
139 At the UNCLOS III the interest groups were no longer limited to coastal States and maritime powers. A number of new interests were also claimed in the UNCLOS III. These included the interests of land-locked States and geographically disadvantaged States. The reference should also be made to the “Group of 77”, which operated as the strong arm of developing countries to ensure that the UNCLOS III would safeguard their essential interests.
resources; protection of the marine environment; and the methods for dispute settlement.\textsuperscript{141}

Although some ambiguities in the LOSC need clarification, it has considerably reduced conflicts since its conclusion in 1982. The LOSC has also had an impact on harmonisation of State practice. In fact, some aspects of its draft provisions were crystallised in State practice before its adoption.\textsuperscript{142} However, the codification of the LOSC has not yet put an end to certain conflicts.\textsuperscript{143} These conflicts may arise due either to the lack of adequate provisions in the LOSC, or to the ambiguities existing in its provisions. Conflicts will continue to exist, unless States give a priority to the interests of the world community and attempt to act in a manner consistent with the spirit of the LOSC.

V. Conclusion

The classical history of the law of the sea demonstrates that a number of nations proclaimed certain seas and oceans as their exclusive domain to prevent other nations from using them. It soon became clear that these unilateral claims could not be maintained because they were contrary to the rights of other nations over the seas. The history of the law of the sea clearly indicates that such claims were never effective and were impossible to enforce. Despite this fact, exclusive claims over the seas led to the creation of various theories on the uses of the seas that primarily focused on the right of navigation.

\textsuperscript{141}The LOSC also includes provisions to meet the economic needs of certain States, including landlocked and geographically disadvantaged States (for example provisions of Articles 69, 70, and 125 of the LOSC.)

\textsuperscript{142}For example, the concept of the exclusive economic zone was reflected in State practice before the UNCLOS III. The origin of this concept is found in claims over areas beyond the territorial sea that were termed exclusive fishing zones or economic zones. See the Fisheries Jurisdiction Case (UK v. Iceland, Federal Republic of German v. Iceland), ICJ Reports, 1974 where the Court ruled that the twelve mile exclusive fishing zone is a rule of customary international law and recognised that coastal States have preferential rights over fish resources in the adjacent maritime areas beyond the twelve mile limit.

\textsuperscript{143}For example, there is a question as to whether the passage of warships through the territorial sea is subject to the requirements of prior notification or authorisation. Although the LOSC appears to recognise peaceful passage of warships through the territorial sea, there are still a large number of coastal State applying these requirements. These States argue that the LOSC does not prevent them from imposing such requirements. The differences between States on this issue may result in military incidents. The case of the Gulf of Sidra (1982) is an example which indicated that a maritime power like the United States of America may seek military means for resolving existing differences over the seas.
The development of the law of the sea in the past few centuries contributed to the most appropriate workable theory consistent with the interests of all nations and enforceable in practice. In particular, this century has witnessed significant advancements in the regulation of the uses of the seas and oceans and developments in the law of the sea. The 1958 Conventions and the LOSC are examples of the international regulation which established a world order for ocean spaces. Despite the fact that the LOSC removed a number of ambiguities and inadequacies in the 1958 Conventions, there are still some provisions of the LOSC open to different interpretations, including those related to delimitation of maritime zones under national control. This illustrates the need for continued development of the LOSC.
Chapter Two

Delimitation of Inner Boundary of
Maritime Zones:

Normal and Straight Baselines
Chapter 2

Delimitation of Inner Boundary of Maritime Zones: Normal and Straight Baselines

I. Introduction

This chapter will examine the issue of drawing baselines for the measurement of the territorial sea and other maritime zones. The chapter will demonstrate how coastal States have enclosed ocean spaces either by liberal interpretation of codified rules on baselines, or by relying upon a number of factors to justify deviations from these rules. Such national claims have had implications for navigation since they have reduced the ocean spaces available for free navigation. Accordingly, it is important to address the legality of claims laid over the seas from a navigational perspective.

The freedom of the high seas is recognised as one of the fundamental principles of international law. Although the range of this freedom is considered to be extensive, such a freedom is formulated and regulated by international conventions. The principle of freedom of the high seas grants rights to all nations to navigate through these seas, to fish, to overfly the seas, and to put submerged cables and pipes. However, the high seas are no longer under the regime of absolute freedom and unlimited use. Accordingly, no State may involve in overfishing, polluting, monopolising living and non-living resources in the high seas and these seas should be used for peaceful purposes. If a ship engages in an act which is contradictory to the principle of freedom of the high seas, it is the responsibility of its flag State to take action against this ship. The jurisdiction of flag States over their ships in the high seas is in fact a corollary of the principle of the high seas. However, the evolutions in State

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3 See Article 2 of the 1958 Geneva Convention on the High Seas and Article 87 of the LOSC on the freedom of the high seas.
practice in the field of maritime spaces brought about a need for a new balance in the use of the seas.

As far as the freedom of the high seas is concerned, it is noted that "the necessary regulation of this freedom may best be effected by a change in its geographical scope - by extending the area of national maritime jurisdiction." This allows coastal States to enact necessary legislation and to enforce their laws against ships abusing the freedom of the high seas, at least to the extent that these open seas were converted to the maritime areas under the control of coastal States. However, as a corollary to the principle of freedom of the high seas, it is the flag State which has jurisdiction over its ships on the high seas for any violation of international rules to prevent the abuse of the freedom. In general, as far as the navigation through maritime zones is concerned, there exists the question of the nature and scope of "freedom versus restraint", "the interests of coastal States versus those of shipping States", and "national jurisdiction versus international regulation".

In 1948 Smith wrote that "of the vast water area of the globe only a very small proportion falls within the national jurisdiction of the sixty or seventy independent states." The political developments in the world along with evolution of the law of the sea in the past decades demonstrate that as a consequence of increase in number of independent States and their desire to expand the national jurisdiction over the seas, considerable parts of the seas and oceans now fall within the control of coastal States. In fact, coastal States have been attempting to bring vast areas of the high seas into their control and jurisdiction for different purposes. These claims have had impacts on reducing the sea areas where freedoms of the high seas have been performed. As a result of new developments in the law of the sea "[i]t is roughly estimated that ... one third of the oceanic space will come under national jurisdiction." This implies a partial change in the contemporary law of the sea towards the theory of *mare clausum*. This evolution in the trends of coastal States indicates how the high seas can be affected by changes in practice of coastal States.

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Notwithstanding, the expansion of national jurisdiction is far away from the theory of *mare clausum*. This is mainly because the modern law of the sea puts limitations on such an expansion. However, coastal States have relied on various means to extend their jurisdiction over the high seas by one way or another. This is why it is stated that the doctrine of the freedom of the seas “has been slowly modified in the last sixty-five years, and new theories about the use of the oceans by modern states are gradually being translated into law.”

In particular, the rights of navigation have been influenced by the extension of control powers of coastal States over the seas. Free navigation is one of the essential outcomes of the freedom of the high seas and even its continuity through territorial waters of coastal States is traditionally guaranteed by the customary rule of the innocent passage (*passage inoffensif*). It is true that the nature of passage through waters under control of coastal States and the range of powers of these States have developed during the past decades. However, what is more important is that the continuation of navigation was never seriously hindered in peace time, particularly with respect to commercial ships. This is mainly because of interdependence of countries in the use of the seas and oceans for trade and economic objectives.

It is worthy of attention that some claims, which led to the extensions of the ocean areas under the control of littoral States, were recognised by the ICJ (as it is clear in the 1951 *Fisheries case*), State practice, and international conferences on the law of the sea. This chapter intends to demonstrate how the development of State practice and claims have impacted on the right of navigation. It is clear that the method chosen for drawing baselines would affect the area covered by national waters and would lead to the movement of territorial seas towards the high seas. The chapter focuses on the examination of baseline issues with respect to normal and irregular coasts. It discusses the issues related to the employment of the normal and straight baselines.

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10 As Teclaff writes the high seas are shrunk “not only by increasing the width of the territorial sea, but also by pushing seaward the baseline from which the extent of territorial sea is measured.” Teclaff, Ludwik A., ‘Shrinking the High Seas by Technical Methods - From the 1930 Hague Conference to the 1958 Geneva Conference’, *University of Detroit Law Journal*, Vol.39, 1962, p.660.
II. Baselines of the Territorial Sea and Other Maritime Zones: General Examination and Functions of Baselines

The issue of the baseline has been one of the fundamental aspects of the law of the sea. This is because, for the purpose of delimitation of coastal States maritime zones, there has been a need to clarify where each zone begins and where it ends. Baseline systems were, in fact, introduced as starting lines for the measurement of the maritime zones. Baselines are composed of a series of joined base points along the shores or on lands of littoral States. Baselines have a multi-functional character. This is because baselines are applied for a variety of reasons.

The introduction of baselines was mainly to produce three practical consequences: (a) to constitute the boundary line between inland waters

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12 It is now recognised that for non-archipelagic States a baseline system may include: a low-water line for normal coasts, straight lines for deeply indented coasts or those fringed with islands in their immediate vicinity, and closing lines across the mouths of bays, rivers and harbours. Archipelagic States are now allowed to draw archipelagic straight lines in accordance with requirements incorporated into the LOSC (which will be discussed in chapter 5).

13 There has been an uncertainty over the definition of "shore" (or its equivalent, the term "coast"), that is what the shore is and where is the precise location of the shore. No definition of the term "shore/coast" is provided in the conventions on the law of the sea. In the Soult v. L'Africaine Case (22 Fed. Cases, 1789-1800, Case No. 13179), the court held that the use of the term "coasts" in the 1794 Neutrality Act of the United States is not defined but it interpreted the term as "to mean land as far as low-water." However, in the Alaska Boundary Case (U.N. Rep., Vol.XV, 481, at 496, 498), Lord Alverstone stated that there has been no recognised definition for the term "coast" in international law.

O'Connell, D. P., The International Law of the Sea, Vol.1, Edited by: I. A. Shearer, Oxford University Press, Oxford, 1982, p.170 (also nos. 1&2). According to Shalowitz, the term "coast" implies two interrelated meanings: "A zone of land of indefinite width (perhaps 1 to 3 miles) bordering the sea"; and "the land that extends inland from the shore." Shalowitz, Aaron L., Shore and Sea Boundaries, Vol.1, United States Government Printing Office, Washington D. C., 1962, p.283. It is stated that "coast" is "a general term for the zone of contact between the land and sea". Prescott, J. R. V., The Maritime Political Boundaries of the World, Methuen & Co. Ltd., London, 1985, p.361. This definition is similar to definition of the term "coastline or shoreline" provided by Shalowitz as to mean "t[he line of contact between land and sea". Shalowitz, op. cit., p.283. This is why the term coastline may be used as a Synonym for COAST". Prescott, op. cit., p.362. The coast or the sea-shore is also defined as "t[he narrow strip of land in immediate contact with any body of water, including the area between high and low-water lines." (Italics supplied) The Law of the Sea - Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, p.50. (Hereinafter The Law of the Sea - Baselines) The Submerged Lands Act of the United States of America defines the term "coast line" as "the line of ordinary low water along the portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters". Submerged Lands Act, Section 1301 (Definitions), in Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/SER.B/6 (December 1956), United Nations Publication, New York, 1957, pp.54-56, at 55. It seems the discussion has been more of theoretical aspects and in practice there has been no practical difficulty in the determination of the shoreline.

14 The waters landward of the baselines are also called national or internal waters over which costal States have full authority including the right to regulate transit of foreign ships to ports of these States. This transit is subject to national laws and regulations unless there are bilateral or multilateral agreements
(such as bays, inlets, estuaries) and territorial sea; (b) to present points or lines from which the territorial sea and other maritime zones are measured; and (c) to form the basis for the median lines in the case of opposite coastal States with overlapping maritime zones and for the equidistance lines in the case of adjacent coastal States. According to the first function, baselines constitute the outer limit of inland waters on one hand and the inner limit of the territorial sea and other maritime zones on the other.

The method of drawing baselines is important because they may be drawn in such a manner as to be far away from the coast resulting in two consequences: “first, expansion of the area of inland waters lying between the coast and the baseline(s) [over which coastal States have exclusive jurisdiction without any inclusive right for foreign ships, including navigation]; second, placing the outer limit of the territorial sea, which is measured from the baseline, at great distances from the coast [thus reducing the areas of the high seas where the freedom of the seas, including the free navigation, are exercised].” This indicates how important the

among States. These agreements are usually in the framework of Agreement on Friendship, Navigation, and Commerce. As Churchill clarifies, the boundary line between internal waters and the territorial sea “does not mark the outer limit of a State’s territory, it does represent the demarcation between the maritime area (internal waters) where other States enjoy no general rights, and those maritime areas (the territorial sea and other zones) where other States do enjoy certain general rights.” Churchill, Robin Rolf, and Alan Vaughan Lowe, The Law of the Sea. Manchester University Press, Manchester, 1983, p.25.

It is also possible that baselines may have effect on the right of hot pursuit. As regards the effect of closing line of the bays on the extension of jurisdiction of coastal States, the case of the U.S. v. Carrillo (1935) is worthy of mention. In this case, a Federal district court held that the ship was not on the high seas “because it was situated within a line joining the headlands of the Bay of San Pedro in California.” McDougal, Myres S., and William T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea. Second Printing, Yale University Press, New Haven, 1965, p.321 (and no.2).

According to the LOSC, the territorial sea extent is limited to 12 nautical miles (Article 3), the contiguous zone to 24 nautical miles (Article 33), the exclusive economic zone to 200 nautical miles (Article 57), and the continental shelf to 200 nautical miles and in some locations to 350 nautical miles or to 100 nautical miles from the 2,500 metre isobath (Article 76(1, 5)). All of these limits are measured from the baselines.

Shalowitz points out that “[t]he fixing of a baseline is fundamental in determining how far seaward a coastal nation may exercise a given form of jurisdiction”. Shalowitz, op. cit., p.28.

Leech, Noyes E. et al, The International Legal System: Cases and Materials, University Casebook Series, Foundation Press, January 1976. p.153. Smith refers to two major elements to be taken into account in determining a baseline system: “the essential interests of the shore state” and “prevention of unreasonable encroachment upon the high seas”. Smith, op. cit., p.6. The uncertainty on the definition of baselines had been a source of many incidents at sea. Ibid. Although with the development of the law of the sea since 1948 the baseline systems have been defined, the uncertainties now lie on the proper application of these defined systems of baselines. In fact, the use of improper baseline systems may result in conflicts among States, particularly because of their influence on the right of navigation and other freedoms of the seas. This was the case in the 1981 and 1986 incidents between Libya and the USA regarding the Gulf of Sirte. The incidents arose as a consequence of enclosure of the gulf mouth by Libya on the historic grounds, thus forbidding foreign vessels to enter the gulf. The USA rejected the claim in accordance with its interest to guarantee the right of navigation for its vessels.
proper application of baselines is. Without doubt the improper delimitation of inner limit of the territorial sea would impact on navigation through the seas. Such an impact was emphasised by the UK in the Fisheries Case where its representative held that:

Any departure of the base-line from the coast involves an encroachment to inland waters upon the sea, which constitutes an even more serious derogation from the freedom of the seas than the extension of territorial waters. For the customary right of innocent passage has no application to inland waters.19 (Italics supplied in the original text)

The issues of baselines were first internationally dealt with in the 1930 Hague Conference for the Codification of International Law, as part of efforts made for codification of rules on various aspects related to territorial sea (territorial waters), in which certain principles on the application of baselines were prepared.20 However, no international rules on baselines were put into effect, since the conference failed to reach agreement on the conclusion of a convention on territorial sea. This failure was mainly because of the lack of consensus on the breadth of the territorial sea.21

However, the ILC, in the preparation of draft conventions on the law of the sea for the First United Nations Conference on the Law of the Sea (Geneva, 1958 - UNCLOS I)22, used, inter alia, drafts prepared by the 1930 Hague Conference. In fact, the ILC's work on baselines was mainly based on the work of the 1930 Hague Conference on baselines as well as the judgement of the ICJ on the 1951 Fisheries Case.

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20 Among draft articles prepared by the Committee on Territorial waters of the 1930 Hague Conference, six articles were dedicated to the issues of baselines, including the low-water line, low-tide elevations, bays, harbour works, islands, and river mouth. For draft articles on baselines see Rosenne, Shabtai (ed.), League of Nations Conference for the Codification of International Law [1930], Vol.3, Oceana Publications, INC., Dobbs Ferry, New York, 1975, pp.833-836.
The development of principles on the baselines has contributed to the enclosure of more parts of the seas coming within the exclusive authority of littoral States.23 This is mostly because of a broad interpretation of these principles made by maritime nations to enclose offshore waters as much as possible. The unilateral actions of States in establishing baseline systems around their coasts have, in turn, increased national encroachment upon the high seas. In particular, the incorporation of newly-established principles of baselines in the TSC (following the judgement of the ICJ in the 1951 *Anglo-Norwegian Fisheries Case*) paved the way for coastal States to review their position on the system of the baselines applied to their shores. The result was to spread the national jurisdiction over the oceans, thus subjecting navigation in wide areas to such a jurisdiction.24 This tendency was followed in the last few decades. This is why it is stated that “most coastal States have drawn their baselines in the most advantageous manner possible using whatever method is most suitable to their coastline and national interests.”25 This has raised the issue of legitimacy of existing baselines which have been employed in a manner contrary to the concept of *proper application of baselines*.

As will be shown, the problem arises mostly in relation to improper application of straight baselines around shores where the normal baselines (low-water marks) are to be used. The major cause of the problem lies in the presumption that it is a coastal State that has the discretion in the establishment of a baseline system as it deems suitable for its shorelines. In practice, this discretion has particularly led to a unilateral approach of coastal States in employment of *straight baselines* to meet their national interests. Consequently, parts of the territorial seas have been converted into internal waters and parts of high seas became territorial seas. The

23McDougal and Bourke point out that “the most significant effect of seaward extension of the baseline ... is to increase the total area of water over which the coastal state possesses the most comprehensive authority and to decrease the total area within which coastal and non coastal states share authority and use.” McDougal and Burke, *op. cit.*, p.316.

24It is also argued that claiming waters as internal gives a great power of control over the marine resources. Knight asserts that “[b]y claiming an area as internal waters, the coastal state obviates the need for arguing the niceties of the juridical content of the territorial sea, fisheries zones, and areas of continental shelf. It has absolute jurisdiction over resources in internal waters or the seabed below them.” Knight, Gary and Hungdah Chiu, *The International Law of the Sea: Cases, Materials, and Readings*, Elsevier Applied Science, London, 1991, p.53.

25Larson, *op. cit.*, p.134. Larson asserts that there is an interrelation between the movement of baselines towards the seas with the increase in possibility of arising conflict. *Ibid.*, p.133. For example, this possible conflict would occur in the case of deprivation of foreign ships in exercising the right of peaceful navigation through the waters affected by baselines drawn inconsistent with the law of the sea rules.
most important effect of such a change (in the status of waters) is on
navigation and overflight.26

III. The Normal Baseline: The Low-Water Mark

This part of the chapter relates to the historical development of the
normal baseline and its application to ordinary coasts. Such a normal
baseline is often referred to as the low-water mark.

As a general rule (established by practice of States), it is the
configuration of the coast in regular coastlines that would determine the
directions of the baselines.27 In regular coastlines, that is the coastlines
which are relatively straight without fringing islands or other coastal
features, the baseline is a low-water mark (low-water line).28 This
baseline29, known as “normal baseline”, follows the sinuosities of the coast
and in fact is a reflection of the coast configuration and is, therefore,
parallel to it. This method of drawing baseline is also mentioned as the
trace parallele.30 Although the low-water mark was not the only method
for drawing baselines along the coast31, it became the dominant method for
the normal baselines.

The reference to the rule of “low-water mark” was made as early as
the first half of the nineteenth century. The first reference to this method

26 As McDougal and Burke assert “[t]he effects of baseline claims on consequential inclusive uses (such
as navigation and overflight) may thus be seen to range from complete prohibition to a substantial
increment in exclusive authority to control and to regulate certain activities (in the seas).” McDougal
and Burke, op. cit., p.318.
27 As Shalowitz writes “[w]here the coastline is relatively straight, or where slight curvatures exist, there
is general agreement that the baseline follows the sinuosities of the coast as defined by a tidal plane.
This is known as the “rule of the tidemark”. Shalowitz, op. cit., p.28.
28 There is no provision in the conventions on the law of the sea defining the term “low-water line” and it
is not clear what the level of low-water should be. However, an internationally agreed concept of
“chart datum” may be used as a standard. This concept is applied to refer to the level for the low-water
line on a maritime chart. The chart datum is “a plane so low that the tide will not frequently fall below
29 O’Connell calls this baseline as “standard baseline”. O’Connell, op. cit., p.171. This baseline was not
used by Romans. Instead, they applied the high-water mark on the shore. Ibid. Churchill comments
that “the variety of geographical circumstances for which special provisions are laid down makes it
doubtful whether in particular the low-water line is the normal baseline for most States.” (emphasis
added) Churchill and Lowe, op. cit., p.27.
30 As is opposed to the method of the courbe tangante or “envelopes of arcs of circles,” following the line
London, 1967, p.113 (no. 2). It is, however, more accurate to consider these methods as determining
the outer limit of the territorial sea (and other maritime zones).
31 Other criteria included the high-water mark, the tide at the time of the case, the point at which the sea is
navigable, the discretion of coastal States in determining the standard, and the outermost point at
which canons could be placed on the shore. O’Connell, op. cit., p.172.
can be found in the 1825 Treaty between Russia and Great Britain on Alaska.\textsuperscript{32} Later on the low-water line was inserted in the Fishery Convention (1839) between Great Britain and France.\textsuperscript{33} It was followed by its incorporation into the North Sea Fisheries Convention (1882).\textsuperscript{34} The method was finally adopted by European countries as a "practical standard".\textsuperscript{35}

In the 1930 Hague Conference, the issue of the baselines was widely discussed.\textsuperscript{36} The Second Committee of the Conference (Territorial Waters)\textsuperscript{37} established two sub-committees. The first sub-committee (\textit{Legal Sub-Committee}) was set up to examine the issues of the breadth of territorial waters and the concept of the contiguous zone. Its second sub-committee (\textit{Technical Sub-Committee}) was asked to work on the issues of the baseline of the territorial sea and rights of coastal and user States within territorial waters. As regards the baselines, the main question facing the second sub-committee was whether the low-water mark had to constitute the basis for drawing the baselines, or the baseline had to be drawn in a manner to link certain points on lands or coastal features, or in any other manner.\textsuperscript{38} A remarkable majority of States (eighteen States) responding to the Preparatory Committee of the 1930 Conference were in favour of the low-water line along the coast.\textsuperscript{39} Norway, Sweden, and Poland had a different view proclaiming the validity of straight lines connecting points on headlands.\textsuperscript{40} The United States suggested a compromise formula for

\textsuperscript{32}Teclaff, \textit{op. cit.}, p.661. According to Teclaff, there were three suggestions on where the line following sinuosities had to begin. They included the high tide line, the low tide line, and the line at which the sea becomes navigable. \textit{Ibid.}

\textsuperscript{33}O'Connell, \textit{op. cit.}, p.172.

\textsuperscript{34}Teclaff, \textit{op. cit.}, p.661. The 1882 Fisheries Convention was concluded among Belgium, Denmark, France, Germany, Great Britain, and The Netherlands.

\textsuperscript{35}O'Connell, \textit{op. cit.}, p.172. The support given to the standard of the low-water mark in the common law was later confirmed by the civil law. It was in 1894 that the \textit{Institut de Droit International} adopted the low-water mark as basis for the normal baseline. \textit{Ibid.}

\textsuperscript{36}As Boggs (Geographer, the United States State Department) mentions of the 28 "bases of discussion" prepared by the Preparatory Committee of the 1930 Conference "one-half related to the delimitation of territorial waters (including baselines), while the other half related to legal rights and obligations." Boggs, S. Whittemore, 'Delimitation of the Territorial Sea', \textit{AJIL.} Vol.24, 1930, p.541.

\textsuperscript{37}The First and Third Committees of the 1930 Conference respectively dealt with the issues of "Nationality" and "Responsibility of State for damage done in their territory to the Persons or Property of Foreigners".

\textsuperscript{38}Bases of Discussion II (Territorial Waters), Point IV, in Rosenne \textit{op. cit.}, Vol.2., p.253.

\textsuperscript{39}\textit{Ibid.}, pp.253-256. The response of Germany reflected the existing divergences in State practice in the application of the low-level tide. Germany stated that States have used such methods as the line of mean low-water spring tides, the spring-tide low water during the equinoxes, mean water, and mean sea level. The Germany's view indicates that the differences in practice of States in fixing low-water mark existed even before the 1930 Hague Conference. \textit{Ibid.}, p.253.

\textsuperscript{40}\textit{Ibid.} (Bases of Discussion), pp.255-256.
delimitation of the territorial sea that also might be used for the determination of baselines. The US proposal was to draw arcs of circles from all points, while the radii of these circles would be equal to the breadth of the territorial sea.\textsuperscript{41}

In its draft for the Conference, the Preparatory Committee had stated that, except in regard to bays and islands, a low-water mark line following all the sinuosities of the coast would constitute the basis for drawing baselines.\textsuperscript{42} Similarly, the Technical Sub-Committee of the Second Committee of Conference finally viewed that "subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast."\textsuperscript{43} Accordingly, islands and bays were excepted from mandatory rule of the low-water mark. This meant that islands and bays had to be treated differently, as far as the issue of baselines was concerned. The Sub-Committee accepted that States have used different criteria for demonstrating the low-water marks on their maritime charts, but it suggested the line of mean low-water springs as the basis.\textsuperscript{44} It proposed that other lines should not appreciably depart from this line.\textsuperscript{45}

Despite detailed discussion on the delimitation aspects of the territorial sea, the 1930 Conference was unable to codify a convention on the territorial sea due to divergent views expressed by participants States. To achieve a convention on the territorial sea, it was necessary to reach agreement on all three aspects of delimitation of the territorial sea: its baseline, its breadth, and the method of drawing the seaward boundary line.\textsuperscript{46} However, delimitation of the inner limit of the territorial sea was not dependent on the determination of the breadth of the territorial sea.

\textsuperscript{41}Acts of the Conference (Minutes of the Second Committee), in Rosenne, \textit{op. cit.}, Vol.4, p.195.
\textsuperscript{42}Basis of Discussion No.6, in Rosenne, Vol.2., \textit{op. cit.}, p.257. In the view of Boggs (the Special Adviser on Geography to the United States State Department), the method of envelope of arcs is a combination of straight line and the line following all the sinuosities of the coast. Teclaff, \textit{op. cit.}, p.662. The application of the envelope of arcs enable sailors to find their position to the coast. This is particularly of importance for sailors to find whether they are in the territorial sea because the legal regime of territorial sea is different from that of the high seas. \textit{Ibid.}
\textsuperscript{44}As McDougal and Burke write "[t]his provision was intended to prevent adoption of a line which unreasonably extended the outer limit of the territorial sea. McDougal and Burke, \textit{op. cit.}, p.323. In the observation, the Sub-Committee indicated that the requirement of non-departure from low-water spring tide was considered "[t]he necessity of guard against abuse". Report of Sub-Committee No.II, in Rosenne, Vol.3, \textit{op. cit.}, p.833.
\textsuperscript{45}\textit{Ibid.}
\textsuperscript{46}Boggs, \textit{op. cit.}, pp.541-542.
In the Anglo-Norwegian Fisheries Case, the International Court of Justice recognised the low-water mark as "a general practice of States" and emphasised its impact in making a close relation of territorial waters and mainlands. The Court held that it had

no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low water mark as opposed to the high water mark, or the mean between two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory.47 (emphasis added)

The Court indicated that the application of the low-water mark is "the most favourable to the costal State", in comparison to other criteria, such as the high-water mark.48 This is because the use of low-water mark results in extension of the maritime domain of coastal States over the seas more than what other standards such as the high-water mark (the shore line) can produce.49 In some cases, "there might be a very marked difference between a low-water line and the high-tide line."50 For example, one writer refers to a case where the difference between low-water line and high water line is five miles.51 The different effects of the application of low-water mark and the high-water mark on the shore is well indicated in Figure 2.1.53

47*Fisheries Case* (United Kingdom v. Norway), *ICJ Reports*, 1951, pp.116-144, at 128. [Hereinafter ICJ Reports, 1951.]

48 There are a range of tidal levels which are used for hydrographical purposes. According to Admiralty Tide Tables (Vol.III, p.xxiv.), these tidal levels are: (a) lowest astronomical tide and highest astronomical tide; (b) mean low-water springs and mean high-water springs; (c) mean high-water neaps and mean low-water neaps; (d) mean-sea level; (e) mean higher high-water; (f) mean lower high-water; (g) mean lower-low water; and (h) mean higher low-water. For definition of these tidal levels, see O'Connell, *op. cit.*, pp.173-174.

49 Prescott states that "[t]he advantage of selecting a low-water mark is that the coastal State secures the widest possible area of sea". Prescott, *op. cit.*, 1985, p.46.

50 According to Shalowitz, "[s]ome early writers supported the high-water mark as the baseline for measuring the territorial sea. The basis for this probably was that the line of high-water mark was the dividing line between land and water on the nautical charts and using it as baseline represented the least encroachment on the freedom of the sea doctrine." Shalowitz, *op. cit.*, p.28 (no. 18). There also exists a question as what the baseline would be where there is no tide. It is suggested that "the baseline is located at the average water line found on the coast in question." McDougal and Burke, *op. cit.*, pp.326-327.


53 The effect of the use of low-water mark in pushing maritime areas under national jurisdiction is particularly considerable "on coasts where there is an extensive tidal range." Churchill and Lowe, *op. cit.*, p.26.
The application of various low-water datums\(^{54}\) can also have different results. It is stated "some low-water lines might be located considerably further seaward than other possible low-water lines"\(^{55}\). In the case of the \textit{U.S. v. California} (1947), it was mentioned that in many coastal areas there was a "substantial distance" between lower low water and higher low water.\(^{56}\) It seems that it is left to the discretion of coastal States to choose a particular low-water line or high-water line for their coasts.\(^{57}\)

Following the Court's judgement, the ILC opined that "according to international law in force, the extent of the territorial sea is measured either from the low-water line along the coast, or, ... from straight baselines independent of the low-water mark."\(^{58}\) Although the low-water mark was recognised as the foundation for establishing baselines for regular coasts, there still exists the issue of multi-application of low tides. Due to the existence of different tidal levels around coastlines with different

\(^{54}\)For standard low-water levels see The Law of the Sea - Baselines, \textit{op. cit.}, Annex I, p.42.
\(^{55}\)McDougal and Burke, \textit{op. cit.}, p.321.
\(^{56}\)See ibid., p.321 (no.40).
\(^{57}\)Ibid., p.327. McDougal states that it is unlikely to find a coastal State choosing the high-tide line "since the low-water line permits the inclusion of broader areas within the boundaries of the state". \textit{Ibid.}
geographical characteristics, there is no single level to be used for the low-water mark as a uniform standard.\(^{59}\) This fact was endorsed by the ILC holding that "[t]he traditional expression ‘low-water mark’ may have different meanings; there is no uniform standard by which States in practice determine this line."\(^{60}\) Accordingly, no specific level for application to the low-water marks is imposed by international conventions upon coastal States.\(^{61}\) This is why "the low-water line used by one country will not necessarily be the same as that chosen by others."\(^{62}\) Depending on which level is used by a coastal States for the low-water mark, there would be different results. Although the application of different levels of the low-water mark does not have a significant effect on the extension of maritime zones, this effect would be significant in relation to some coastlines where the case of overlapping claims arise.\(^{63}\)

Following a series of events (the discussions in the 1930 Hague Conference, the ICJ’s view in the *Fisheries Case*, and draft prepared by the ILC) Article 3 of the TSC finally provided that "except where otherwise provided (in this Convention) ... the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast marked on large scale charts officially recognised by the coastal State."\(^{64}\) Article 5 of the LOSC contains the same provision. The provision does not clarify a case where there is no chart indicating the low-water mark.\(^{65}\) One question

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59 In the coastal areas of some countries, such as Denmark and Sweden, where there exists “little or no tidal range”, the “meteorological tide” is employed for the level of low-water line on the nautical charts. *Maritime Limits and Baselines: A guide to their delineation*, Special Publication No.2, Third Edition, The Hydrographic Society, Essex, June 1987, p.7 (footnote 11). (Hereinafter Maritime Limits and Baselines)


61 Smith (1948) asserts that with respect to regular coastlines “there is a general agreement that the territorial belt must be measured from the low water mark of spring tides. (emphasis added) Smith, op. cit., p.5. In British view, this baseline is the line of mean low-water spring tides. Colombos, op. cit., p.113. Brown holds that “international law leaves the choice to the discretion of the coastal State”. Brown, E. D., *The International Law of the Sea*, Vol.1: Introductory Manual, Dartmouth, Aldershot, 1994, p.23.


63 *Ibid.*, Para.5.7.

64 It is useful to define the term chart referred to in the provision, particularly for practical purposes. The chart is defined as “a nautical chart intended for use by mariners as an aid to navigation. Only nautical charts show all the relevant features such as low-waters lines, low-tide elevations, drying reefs, etc.” *The Law of the Sea - Baselines*, op. cit., p.1. The existing contractual provisions do not provide what would be the normal baseline for an ice-covered coast. In such a coast the low-water line is not determinable because it is covered by ice. In this case, it is recommended to use “the ice-foot of glacier or ice-cap” as a substitution for the low-water mark. In places where the ice-foot is changing over the time, “a mean position” would be applicable. *Ibid.*, pp.3-4.

65 In the *Li Chia Hsing v. Rankin* Case (1978), the applicant argued that there was no large-scale chart officially declared by Australia to show the line of low-water mark, including its coastline in the Gulf of Carpentaria. The applicant was arrested on the basis that he was involved in fishing in the
which arises from this provision is what scale can be regarded as "large scale”. This seems to be a technical matter but has a practical effect, thus requiring clarification. As Shalowitz suggests this is a "relative term". However, “a scale of 1:80,000 (approximately 1 nautical mile to the inch) would probably be the upper limit of such classification.” It is also suggested that in general the scale of the chart “should be within the range 1:50,000 to 1:200,000.”

In a number of cases, coastal States have shown their desires to use the lowest-low water mark for their shores thus extending their territorial sea towards the high seas. For example, the low-water is defined as “Lowest Astronomical Tide” in the Schedule introduced in 1983 in pursuance to section 7(2-b) of the Seas and Submerged Lands Act 1973 of Australia. Also the lowest-low water mark has been considered for delimitation agreements. For instance, Article 1 of the Agreement of 24 October 1968 between Iran and Saudi Arabia relating to the Persian Gulf Islands and Delimitation of the Continental Shelf refers to the “lowest-low water mark” as the basis for application of median line.

Australian fishing zone in contradiction with the Fisheries Act 1952. The High Court of Australia was in the view that the existence of territorial sea (and similarly fishing zone) is not dependent on the existence of official large scale charts. It was held that in the absence of such charts, the low-water line continues to be the baseline. However, it was adopted that in the case of using straight baselines the existence of charts is necessary. *Li Chia Hsing v. Rankin*, High Court of Australia (1978) 141 CLR 182. The High Court referred to the Case of *New South Wales v. The Commonwealth* as an evidence of long-established existence of the territorial sea.

As far as Coast and Geodetic Survey is concerned, “scales up to and including 1:20,000 would be considered large scales, those between 1:20,000 and 1:80,000 would be classed as intermediate scales, and scales smaller than 1:80,000 would fall into the category of small scales.” *Ibid.*, Vol.2 (1964), p.105.

It is also stated that “the desirability of maximising the area of the State’s maritime domain would suggest that Mean Low-Water Springs is to be preferred to Mean Low-Water Neaps because the former falls further than the latter”. (emphasis added) Brown, 1994, op. cit., p.23.

The Proclamation of the Governor-General of Australia on the Baseline of the Territorial Sea (4 February 1983), Schedule, No.S29, CAG. 9 February 1983, p.2. This proclamation established the baselines for all coastlines of Australia (excluding its external territories for which the proclamation does not provide specific baselines). Prior to this proclamation, the 1974 Proclamation was in existence which only provided baselines for the southern coast of New South Wales and the eastern coast of Tasmania. Proclamation No.89A and 89B (24 October 1974), CAG. 31 October 1974. The lowest-low water mark has also been incorporated into national legislation of some countries such as Venezuela (Act of 1941 s.2), Sudan (Decree of 1970). The mean low-water mark and mean low-water springs are among other categories of the low-water mark used by countries. Example of the former is New Zealand (Territorial Sea and Fishing Zone Act No. 11 of 1965 s.9) and example of the latter is Samoa (Territorial Sea Act No. 3 of 1971 s.8). O’Connell, op. cit., p.178 (no.32).

Agreement on Sovereignty over the Islands of Farsi and Al-arabi and the Delimitation of the Continental Shelves of Iran and Saudi Arabia, 24 October 1968, *ILM*, Vol.8, p.493. Prescott writes that “[a] survey of 60 declarations about baselines showed that 42 countries simply referred to the low-water mark without providing any further detail. Only Australia used the lowest astronomic tide, although seven countries in either the Middle East or West Africa referred to the lowest low-water mark or the lowest ebb tide”. It is also stated that “[o]nly Ethiopia defined its baseline a the maximum
If all coastlines were simple, lacking complex configuration and coastal features, the low-water mark would be the only permissible baseline to be drawn around the shore. However, in reality some coastlines are cut into or indented, having coastal features such as islands and islets in their vicinity. These geographical conditions have been relied upon to introduce another method for drawing baselines - straight baseline system. This system, in practice, endows larger internal waters to coastal States with expansion of shore areas under the control of coastal States. Such an effect requires the legal examination of the system used for certain coasts on the basis of geographical circumstances.

IV. Baselines Applied for Indented Coasts or Those with Fringing Islands: Straight Baselines

This part of the chapter discusses the issues related to the employment of straight baselines. In this connection particular attention will be made to the ICJ’s view in the 1951 Fisheries case, the UN documents on the law of the sea, and to the present State practice.

1. Definition and Historical Background

The straight baseline system is a method of applying straight lines joining the outermost points (base points) on indented coasts and/or fringing islands.\(^1\) The initial application of straight lines dates back to

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\(^1\) This method is assimilated to the headland method, that is drawing a straight line from one headland to another. The headline theory is, in fact, used in the context of legal bays. As Shalowitz states the straight line between the headlands of a legal bay “is to be distinguished from straight baselines.” “Such a line, where applicable, applies to a single coastal configuration and may be encountered along any coast. Straight baselines, on the other hand, constitute a system that is permissible only where the unique geography of a coast justifies a departure from the rule of the tide mark.” An practical difference between these two types of baselines is that “in the case of a bay the waters enclosed are allocated to the inland waters of the coastal state, whereas in the case of straight baselines the waters enclosed, while inland, are subject to the innocent passage of vessels”. Shalowitz, op. cit., pp.28 & 30 (no. 33). See Article 5(2) of TSC and Article 8(2) of LOSC. In practice, there is a question as to which existing straight baseline systems are subject to the residual right of innocent passage through enclosed waters. It is worth to refer to Prescott’s view concerning the main distinction between closing lines on one hand and straight and archipelagic baselines on the other. Prescott maintains that while closing lines are used for “single features” and are “generally short”, straight and archipelagic baselines are applied in the case of “multiple features and may extend over long distances”. Prescott, J. R. V., ‘Straight and Archipelagic Baselines’, in Gerald Blake (ed.), Maritime Boundaries and Ocean Resources, Croom Helm, London and Sydney, 1987, p.39.
early 17th century when England applied these lines around its coast.\textsuperscript{72} (See Map 2.1 below.) It was in 1604 when King James I issued a decree establishing straight lines among headlands along the English coast.\textsuperscript{73} Twenty-seven headlands on the mainland or on adjacent islands were connected by twenty-six straight lines to enclose waters which were considered “neutral zones”, thus prohibiting belligerents from involving war actions.\textsuperscript{74}

Map 2.1
The 1604 Straight Baseline System of England


The straight lines around the English coast were employed to be the outer limit of neutral zones and were not to be the interior limit for territorial waters. However, the purpose for which the new system of

\textsuperscript{72}Brown, Joan \textit{et al.}, \textit{Case Studies in Oceanography and Marine Affairs}. Published by Pergamon in association with The Open University, Oxford, 1991, p.45.

\textsuperscript{73}Teclaff, \textit{op. cit.}, p.661.

\textsuperscript{74}Brown, Joan (1991), \textit{op. cit.}, p.45. The waters inside the headlands were considered “king’s domain” or “king’s chambers”. This proclamation was not accepted by the arbitral tribunal (1854) dealing with a dispute between the United States and Great Britain arisen in relation to the ship \textit{Washington}. Teclaff, \textit{op. cit.}, p.661. In 1886, the American Secretary of State, Bayard, declared the opposition of the United States with the theory that “the seaward boundary is to be drawn from headland to headland”. However, in 1930 Kent commented that due to “the great extent of the line of the American coasts” the United States was entitled to “a liberal extension of maritime jurisdiction” to control waters of the coasts “though included within lines stretching from quite distant headlands, as, for instance, from the Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi.” Shalowitz, \textit{op. cit.}, p.29 (also no. 21).
straight baselines was used in nineteenth century was to constitute the interior limit for territorial waters. In fact, a new application of straight baselines can be found in the Norwegian Decrees concerning the issue of baselines around the Norwegian coasts first of which was issued in 1812 (the Danish-Norwegian Royal Decree). As part of this Decree, it was declared that the Danish-Norwegian sovereignty “shall be recognised as extending for one ordinary league (four nautical miles) measured from the islands and islets furthest from the mainland not covered by the sea.” (emphasis added) Although there were a number of incidents between the UK and Norway stemming from the decrees, the Norwegian system of baselines was mainly challenged by the United Kingdom when Norway issued the Decree of 1935 (as modified by the Decree of 10 December 1937) applying straight baselines linking coastal islands and islets with points on the Norwegian mainland. (See Map 2.2: North Coast of Norway.)

Map 2.2
Norway’s Straight Baseline System (North Coast of Norway)


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75 The preamble of the 1935 Norwegian Decrees refers to the decrees of the 22nd February, 1812 as well as of the 16th October, 1869, the 5th January, 1881, and the 9th September, 1889 concerning the Norwegian baselines. The Norwegian system of baselines is a general application of straight baseline connecting lands, island and rocks. However, in the earlier case of The Anna, it was only certain islands that formed the basis for discussion whether they can be relied upon for the measurement of the territorial sea. The Anna was an American ship seized by a British privateer at a point where was more than three miles of the American mainland, but almost two miles from its adjacent island of Alluvian near the Mississippi. Lord Stowell held that the islands constituted “natural appendages of the coast”, irrespective of “the texture of the soil.”. He considered the islands as “a kind of portio to the mainland” and accordingly concluded that the seizure occurred in the American waters where there is the right of the protection of he territory. This led to the release of the Anna. Colombos, op. cit., pp.113-114.

The main purpose of the decree was to establish the new fisheries zone of Norway in northward of 66° 28'8" North latitude. The decree, inter alia, provided that "lines of delimitation towards the high seas of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28' 8" North latitude ... shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks ...". The decree was a source of conflict between the UK and Norway over the right of fishing in the areas affected by the decree. However, as a consequence of arrangements made for settling the dispute between the two countries, the decree was not fully enforced until the late 16 September 1948 when Norway informed the UK of its decision to enforce the decree in full.

Although the 1935 Decree did not contain any certain limit for the fisheries zone to be measured from the baselines, it was argued that the Norwegian Decrees of 1812, 1869, and 1889 already established the extent of such a zone to be four nautical miles. The 1935 Decree provided a straight baseline system to be enforced around the Norwegian coasts. The reaction of the UK was due to the impact of the Norwegian decree on inclusion of maritime areas (in which English fishermen were involved in

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77The preamble of the 1935 Decree contains bases for applying the system of baselines mentioned therein. These bases include "well-established national titles of right"; "the geographical conditions prevailing on the Norwegian coasts"; and "the safeguard of the vital interests of the inhabitants of the northernmost parts of the country". English Translation of the Norwegian Royal Decree of 12 July 1935, in Pleadings, ICJ (1951), op. cit., p.14. The 1935 Royal Decree of Norway can also be found in the Unite Nations Legislative Series: Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/SER.B/6, op. cit., pp.35-37.

78ICJ Reports, 1951, p.125.

79Following the 16th September 1948 some British fishing vessels were arrested in the Norwegian fishing zone measured from the straight baselines drawn in accordance with the 1935 Decree.

80See the Statement of September (24th September, 1949) of the Legal Adviser to the Foreign Office (UK) to the Registrar of the Court, Sir Eric Beckett, in Pleadings, ICJ (1951), op. cit., p.9. The Decree of 1812 (which was then applicable to Norway and Denmark) reads, inter alia, that "[i]t is our wish to lay down a rule that whenever determining limits of our territorial sovereignty at sea, this sovereignty shall be recognised as extending for one ordinary nautical mile, measured from the island or islet farthest from the mainland and not covered by the sea." (emphasis added) Translation made by the Registry of the ICJ. Ibid.

81Many straight lines were employed and some were as large as 30 miles and the longest line amounted 44 miles. Harris, D. J., Cases and Materials on International Law, Sweet & Maxwell, London, 1991, p.355. The straight baselines were drawn among 48 fixed points on the mainland, islands or rocks prescribed in the Schedule annexed to the 1935 Norwegian Decree. This decree was slightly amended by the 1937 degree. The 1930 Decree concerned those parts of Norwegian coasts "extended from Norwegian-Russian border on the south shore of Varanger-Fjord northwards along the east coast of Finnmark to the North Cape and thence southward along the west coast as far as Traena (66° 28.8' N.), a little to the south of Vestfjord." Colombos, op. cit., p.114. For the fixed points between which the Norwegian straight baselines were drawn in accordance with the Schedule appended to the Decree of 12 July 1935, see Pleadings, ICJ (1951), op. cit., Annexes to British Memorial, Annex 17, pp.199-204.
fishing) as Norwegian exclusive fisheries zone.\(^{82}\) This was contrary to the fishing interests of the UK because it would deprive its fishing vessels from the right to fish in the new Norwegian waters.

Although Norway (like other Scandinavian countries) was applying the four mile limit\(^{83}\) for its territorial sea, the United Kingdom (which claimed three mile limit as the maximum limit for the territorial sea) did not challenge this limit\(^{84}\), particularly as far as fisheries purposes are concerned. What concerned the UK was the method used by Norway for drawing baselines around its coasts. The UK argued that "the limits of the Norwegian fisheries zone prescribed in the 1935 Decree are incompatible with international law and refused to accept the 1935 line as applicable to British fishing vessels."\(^{85}\) In view of the UK the baselines had to be drawn from the low-water mark around the coast or properly across the bays\(^{86}\), while the Norwegian system was to apply straight baseline connecting the outermost points on or off the Norwegian coast, including on islands or any other similar feature around the coast such as drying-rocks\(^{87}\). The UK contended that the decree would close "to British fishing vessels considerable areas of sea off the coast of Norway which under international law are high seas and, as such, open to the fisheries of all nations."\(^{88}\) Norway was in disagreement with the UK and rejected that the rule of low-tide mark and the maximum limit of ten nautical miles for delimitation of bays had become customary rules. In particular, Norway claimed that its

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\(^{82}\) Although the 1935 Norwegian Decree does not directly refer to the concept of territorial sea but refers to the fisheries zone, it is understandable that "the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea." ICJ Reports, 1951, op. cit., p.125.

\(^{83}\) This was known as the Scandinavian marine league which was different from the European-American marine league equalling three miles. The equivalent Norwegian word for the Scandinavian marine league is "mil".

\(^{84}\) See for example ICJ Reports, 1951, pp.120 and 128. Although the Court held that the question of the extent of the Norwegian territorial sea (four nautical miles) was not the subject of adjudication in the case, it confirmed that "the 4-mile limit claimed by Norway was acknowledged by the United Kingdom in the course of the proceedings." Ibid., p.126.

\(^{85}\) Pleadings, ICJ (1951), op. cit., p.10. Although the first seizure of a British trawler by Norwegian patrol vessels occurred in 1911, as a consequence of the 1935 Decree, the number of seizures increased. See ICJ Reports, 1951, op. cit., pp.124-125.

\(^{86}\) In the case of bays, the UK views that a proper closing line should be employed to link "the natural geographical entrance points where the indentation ceases to have the configuration of a bay," (emphasis added) ICJ Reports, 1951, p.120. In general, the position of the UK appeared to be in line with the rules drafted at the 1930 Hague Conference which were then viewed by the UK as "declaratory of existing international law". Teclaff, op. cit., p.664.

\(^{87}\) The Norwegian coast is very cut into and contains a range of coastal features such as islets, reefs, islands, drying rocks (known as skjaergaard) in its vicinity. See Map 2.2.

\(^{88}\) Pleadings, ICJ (1951), op. cit., p.11.
exclusive fishing rights over the coastal areas were already recognised by the UK at the time of King Edward IV.⁸⁹

Since the dispute between the UK and Norway was not resolved between them, the UK submitted the dispute to the ICJ on 28 September 1948 for adjudication.⁹⁰ The major question was whether the Norwegian baselines prescribed in the 1935 Decree for the application to the northern coast of Norway are consistent with the principles of international law regarding the baselines. This question relates in general to the question as to whether the baselines should follow the "actual configuration of the coast" or whether straight baselines should be drawn between points "on the mainland, on the adjacent islands or on rocks". The court was also asked to "declare the principles of international law to be applied in defining the base-lines."⁹¹

2. The ICJ Judgement on the 1951 Fisheries Case (UK v. Norway)

After full examination of merits in the Fisheries Case, the ICJ issued its judgement on 18 December 1951. The ICJ confirmed that it is the low-water mark which forms the basis for drawing baselines around the shore of coastal States. However, the question was whether the low-water mark on the shore of the mainland of Norway was the basis for drawing baselines or the basis would be the low-water mark on what is called "skjaergaard (rock rampart)" in the Norwegian language. This term refers to the whole coastal features of Norwegian coast, including islands, islets, rocks and reefs.⁹² The Court considered that the Norwegian mainland does not present "a clear dividing line between land and sea".⁹³ It then relied on the adjacency of the skjaergaard to the mainland and held that it is in fact the outer line of the skjaergaard which constitutes the baseline of the territorial sea.⁹⁴ The Court disagreed with the UK's view that straight

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⁸⁹Norway's counter-memorial in the Fisheries Case (United Kingdom v. Norway), Pleadings, ICJ (1951), para.32.
⁹⁰The Court was competent to deal with the case because Norway and the United Kingdom had issued declarations in accordance with Article 36(2) of the Court Statute, thus accepting the jurisdiction of the Court.
⁹¹Ibid., p.11.
⁹²The number of these physical and coastal features are estimated to be around 120,000. This indicates that the Norwegian coast is highly fringed with these features such as islands and islets. It is because of these facts and the length of the Norwegian coast (over 1,500 kms) that the Court described the Norwegian coast as a "very distinctive configuration". ICJ Reports, 1951, p.127.
⁹³Ibid.
⁹⁴Ibid.
baselines can only be drawn across well-defined bays. Instead, it stated that straight baselines can also be drawn between islands, islets and rocks if they are situated "between the island formations of the "skjaergaard", inter fauces terrarum".95

In the Court’s opinion, Norway and the UK were relying on the same method of drawing the baselines, namely the use of the low-water mark, but they have applied the method in different ways.96 This means that the Court made no distinction between the low-water mark and straight lines as two separate systems of baselines.97 However, the Court viewed where coasts are deeply indented or cut into “the baseline becomes independent of the low-water mark, and can only be determined by means of a geometric construction”98, that is by drawing straight baselines between appropriate points. In fact, the Court held that “three methods have been contemplated to effect the application of the low-water mark rule”.99 These three methods are the trace paralléle (that is to draw the baseline in a manner to follow the contours of the land), the courbe tangente 100 (that is to draw arcs of circles from points along the low-water line), and straight baselines.101

Accordingly, the Court concluded that:

the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12, 1953, is not contrary to international law. ... (and) that the base-lines fixed by the said Decree in application of this method are not contrary to international law.102

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95Ibid., p.130.
96Ibid., p.128. The Court was in the view that the question was whether “the relevant low-water mark is that of the mainland or of the “skjaergaard”. (emphasis added) Ibid.
97The TSC (and later the LOSC) deals with these systems of baselines separately, recognising them as two independent system of baselines employed in different geographical conditions. In this connection, Churchill states “[w]hile the Court suggests that straight baselines are simply a special application of the low-water mark principle of constructing the baseline, the Territorial Sea and Law of the Sea Conventions more realistically recognise straight baselines as a distinct method of construction.” Churchill and Lowe, op. cit., p.28.
98ICJ Reports, 1951, op. cit., p.129.
99Ibid., p.128.
100The courbe tangente (envelopes of arcs of circles) was first proposed by the United States delegation at the 1930 Conference. It is a method used for finding the outer limit of the territorial sea, thus assisting seafarers to find their ships' position at sea. This method is particularly used to determine whether a ship is in the territorial sea.
101Ibid., pp.129-130.
102Ibid., p.143. By 10 to two, the Court recognised the validity of the baseline system used by Norway, whereas the legitimacy of all Norwegian baselines was confirmed by 8 to 4. Ibid. Judge Hasckworth agreed with the judgement on the ground that “the Norwegian Government had proved the existence of an historic title to the disputed areas of water.” (emphasis added) Ibid., p.144. Judge Alvarez also confirmed the judgement by arguing that the 1935 Decree “is not contrary to any express provisions.
The Court, in fact, maintained that the Norwegian baseline system was not "an exceptional system", but it was "the application of general international law to a specific case".\textsuperscript{103} The Court justified its opinion on the basis of "geographic realities" and "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage".\textsuperscript{104} It further accepted that "certain economic interests peculiar to a region" can be taken into account for applying straight baselines if the reality and importance of these interests "are clearly evidenced by a long usage".\textsuperscript{105}

Although the Court accepted that the straight baselines can be used to enclose internal waters and to measure the extent of the territorial sea (and other maritime zones), it deemed necessary to take some requirements into account for the application of the straight baseline system. The essential requirements laid down by the Court on the validity of the straight baselines are as follows.

(a) "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast".\textsuperscript{106}

(b) "whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters".\textsuperscript{107}

\textsuperscript{103}\textit{Ibid.}, p.131. The Norwegian Government argued that the straight baselines system introduced by the 1935 Decree "does not infringe the general law; it is an adaptation rendered necessary by local conditions." \textit{Ibid.}, p.133.

\textsuperscript{104}\textit{Ibid.}, pp.128 and 133.

\textsuperscript{105}\textit{Ibid.}, p.133.

\textsuperscript{106}\textit{Ibid.} Despite the existence of such a criterion, there exist some technical questions to be responded. The main question, however, is what forms the "general direction of the coast". As the ICJ pointed out that the line of general direction of the coast "is devoid of any mathematical precision". \textit{Ibid.}, p.142. As an attempt to use the Norwegian straight baseline system as a model, it is stated that this system did not deviate from the general direction of the coast by more than 15°. Hodgson, R. D., and L. M. Alexander, \textit{Towards an Objective Analysis of Special Circumstances}, Occasional Paper No.13, Law of the Sea Institute, Rhode Island, 1972, p.37.

\textsuperscript{107}ICJ Reports, 1951, \textit{op. cit.}, p.133.
These requirements were established to prevent the enclosure of the seas by unjustified employment of straight baselines. This clearly shows that the Court was well aware of the impact of these baselines on the extension of jurisdictional zones of coastal States that restricts the long-established freedoms of the seas such as navigation and overflight. Although the Court set up some requirements to be met in applying the straight baselines, some States have proclaimed these baselines in a manner contrary to the requirements. States, in practice, made a very liberal interpretation of the Court’s decision.

Although the Court accepted that in certain circumstances straight baselines can be drawn along the coast, there was a question of the maximum length of a permissible straight baseline. Again, the Court rejected the view of the UK that straight baselines should be of certain length. While the UK was of the opinion that the length of straight baselines should not exceed ten miles, the Court was not convinced that there is any rule in international law to limit such a length. In its words, the Court asserted that:

In this connection [the maximum length of ten miles for the straight baseline], the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve miles), have not got beyond the stage of proposals.

As regards the question of the number of straight baselines, the Court held that several lines may be used and left such a determination with the coastal States. The Court opined that “the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.” Accordingly, it seems that the Court has left considerable discretion to coastal States to apply straight baselines as they consider reasonable for their coasts.

108 At the UNCLOS I, the Japanese delegate asserted that “unless a maximum permissible length for the straight baseline is fixed, there is always the possibility that a considerable area of the sea might be placed within such lines, amounting to the coastal States subjecting a part of the high seas to their sovereignty. Therefore, it would be necessary to fix the maximum permissible length, in order to ensure the freedom of the high seas.” See UN Doc. A/CONF.13/39, p.156.
109 Ibid., p.131.
110 Ibid.
3. Dissenting Opinions in the 1951 *Fisheries Case*

Although ten judges of the ICJ confirmed the validity of the method of straight baselines introduced by the 1935 Norwegian Decree under international law, two judges argued in contrary and submitted their dissenting views.

Judge McNair of the UK and Judge Read of Canada were two judges who disagreed that the Norwegian baseline system was in accordance with established principles of international law on baselines. These judges were of the view that the rule of international law for the baseline is that it should be drawn parallel to the contours of the coast. The main purpose of their arguments in favour of a baseline following sinuosities of the coast was to prevent the extension of States jurisdiction over the high seas where a more liberal legal regime than that of the territorial sea is applicable that guarantees the traditional freedoms of the high seas. Judge McNair, confirming the UK stance in the case, argued that:

There is an overwhelming consensus of opinion amongst maritime States to the effect that the base-line of territorial waters, whatever their extent may be, is a line which follows the coast-line along low-water mark and not a series of imaginary lines drawn by the coastal State for the purpose of giving effect, even within reasonable limits, to its economic and other social interests and to other subjective factors.112

Judge Read was of the view that “the power of a coastal State to delimit its maritime domain” is valid, provided such a power is not used to impair rights and privileges conferred by international law to other States or the international community. Accordingly, Judge Read dissented the judgement of the Court on the ground that “the power of a coastal State to mark out its maritime domain cannot be used so as to encroach on the high seas and impair these rights and privileges. Its power is limited to the marking out of areas already subject to its sovereignty.”113

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113 Ibid., Dissenting Opinion of Judge Read, pp.186-206, at 190.
4. Influence of Straight Baselines on Encroachment upon the Seas

As is clear from the dissenting opinions in the *Fisheries Case*, the main reason for the rejection of the straight line system has been its impact on advantages existing on the wider high seas available for the world community.114 This is particularly true with respect to those States having major interests in accessing vast areas of the seas specially for navigational and resource exploitation purposes.115

The effect of employment of straight baseline to the extension of jurisdictional zones of coastal States is pointed out by Judge Hsu Mo. The effect would be more significant if a straight line is improperly drawn. Judge Hsu Mo in his statement stressed that:

To leave out all the points on land which interpose between the two extreme points Nos. 11 and 12 (that is Savertholthavet and Lophavet) and to enclose the whole concavity of the coast by drawing one excessively long line is tantamount to using the straight line method to extend seaward the four-mile breadth of the territorial sea. The application of the method in this manner cannot be considered reasonable.116 (Italics supplied)

Accordingly, even where certain circumstances such as exceptional geographical configuration justify deviation from the general rule of drawing baseline at low-tide, the employment of a straight line between “two extreme points” may invalidate the application of such a baseline.

Judge McNair in his dissenting opinion pointed out that the acceptance of straight baseline system may have a major influence in enclosing the seas, thus depriving wide maritime areas from application of freedoms of the seas among which is unrestricted right of navigation. In his words, Judge McNair expressed that:

The delimitation of territorial waters made by the Norwegian Decree of 1935 is in conflict with international law and its effect will be to

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114 As Prescott argues there are three reasons for the use of straight baselines: “to simplify the administration of regulations governing offshore areas”; “to increase the area of the seas claimed; and “to secure an advantage over a neighbouring state in the negotiation of a common international maritime boundary”. Prescott, *op. cit.*, 1985, p.50.

115 Even in 1930 Boggs pointed out that in the delimitation of territorial sea (including its baselines) two interests were mainly involved: navigation and fishing. Boggs, *op. cit.*, 1930, p.542. As far as navigation was concerned, Boggs was in the view that difficulties in delimiting the territorial sea arose mainly because “the problem has generally been considered from the viewpoint of a man on the land rather than the viewpoint of the navigator.” *Ibid.*, p.543.

injure the principle of the freedom of the seas and to encourage further encroachments upon the high seas by coastal States.\textsuperscript{117} (emphasis added)

Judge Read disagreed with the Norwegian system because “[it] purports to exclude all other States from areas of the high seas”\textsuperscript{118} where all States enjoy rights and privileges. The Norwegian system is an extension of Norwegian sovereignty over the seas and discredits the existing rights and privileges of the high seas affected by the Norwegian Decree. Judge Read holds that:

No question of \textit{res nullius} or annexation arises in the case of the sea. All nations enjoy all rights and all privileges in and over all of the sea beyond the limit of territorial waters.\textsuperscript{119}

Judge Read disapproved the use of straight lines for demarcation of inner limit of territorial sea, because this method of delimitation would bring parts of the high seas into control of coastal States and accordingly deprives all nations to freely benefit from broader seas as \textit{res communis}.

As was already mentioned, although Judge Mo accepted the decision of the Court regarding the validity of the Norwegian system, he did not view that all straight lines used by Norway were valid. His statement indicates that it is important to draw straight lines (where permissible) \textit{properly}. Otherwise, the result would be unreasonable extension of national jurisdiction towards the seas restricting their free uses.

5. The UN Conferences and Conventions and the Issue of Straight Baselines

Despite the fact that the judgement of the ICJ has binding force only upon the parties to the dispute before the Court\textsuperscript{120}, the effect of the Court’s judgement in the 1951 \textit{Fisheries Case} was not limited to the UK and Norway but the judgment became a basis for codification of a series of provisions on straight baselines.\textsuperscript{121} The ILC used the Court’s decision in

\textsuperscript{117}Ibid., Dissenting Opinion of Judge McNair, p.185.
\textsuperscript{118}Ibid., p.189.
\textsuperscript{119}Ibid., p.190.
\textsuperscript{120}Article 59 of the Statute of the ICJ stipulates that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”
\textsuperscript{121}In fact, the Court’s decisions and judgements have had implications for international community reflected in State practice or in international treaties. There have been many cases submitted to the
the preparation of its draft articles that were finally incorporated into the TSC (Article 4). Accordingly, the ILC not only accepted the general rule of normal baseline for regular coasts, as it was the case at the 1930 Hague Conference, but it also recognised the use of straight baselines in the case of irregular coasts. This was one example in which the Court’s decision gained the legislative power (i.e. judicial legislation) and indicated the role of the Court in developing and establishing rules and principles of international law.

Despite the acceptance by the ILC of the straight baselines in appropriate cases (Article 5 of the its Draft Articles), there was a question of the status of navigation through waters enclosed by these

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122 Although the ILC finally drafted articles on the straight baselines on the basis of the ICJ judgment in the Fisheries Case, the decision of the Court was subject to some discussion since the establishment of the committee of experts to work on draft articles for the UNCLOS I. For example, this committee suggested some restrictions on the use of straight baselines. These restrictions included the maximum length of ten mile limit for each straight baseline and the maximum distance of five miles between a salient point on the coast and an adjacent island for drawing a straight baseline from the coast to the such island. Also, the committee held that the high tide should be the basis for drawing baselines if no chart is available. Teclaff, op. cit., p.666. Also see Rapport du Comité d'Experts sur Certaines Questions d'Ordre Technique Concernant la Mer Territoriale, Annex to Document A/CN.4/61/Add.1, YILC, Vol.2, 1953, pp.77-79. At its seventh session, the ILC accepted the view of a number of States (such as Norway and Sweden) arguing that limiting the length of straight baseline to ten miles is inconsistent with the Court decision in the Fisheries Case. See ILC, Report of 7th Session, YILC, Doc. A/CN.4/Ser.A/Add.1, 1955, p.34, and Comments by governments on the provisional articles drafted by the ILC concerning the regime of the territorial sea, Ibid., pp.43-62.

123 At the 1930 Hague Conference, except with respect to legal bays, the general baseline system recognised was based on the low-water mark.

124 The impact of the ICJ judgement on the work of the ILC was apparent from the beginning of its work on the regime of the territorial sea. For example, its Special Rapporteur incorporated the application of straight baselines in Article 5 of its first draft on the regime of the territorial sea, as an exception to the general rule of low-tide mark and where coastlines are indented. See Francois, M. J. P. A. (Rapporteur Special), Regime of the Territorial Sea (in French), Document A/CN.4/53, YILC, Vol.2, 1952, pp.25-43. As Prescott views "[t]he original intention of substituting straight lines for the low-water mark was to avoid situations where the territorial waters are penetrated by deep corridors of non-territorial waters or surround enclaves of such waters". Prescott, op.cit., 1987 (Straight and Archipelagic Baselines), p.39. As regards to the role of straight baselines in simplifying the outer limit of territorial seas in certain coastal areas (when compared with the use of low-water mark for the same coastal areas), see The Law of the Sea - Baselines, Figures 11 and 12, op. cit., pp.18 & 19.

125 As a result of the adoption of straight baselines by the ICJ for certain circumstances and the subsequent incorporation of provisions on straight baselines into the TSC and the LOSC, it is argued that Article 4 of the TSC and Article 7 of the LOSC are reflective of customary international law, binding upon parties as well as non-parties to these conventions.

126 Article 5(1) of the ILC's Draft included that where a coastline is "deeply indented or cut into or because there are islands in its immediate vicinity", the coastal State can use straight baselines for such coastline.
baselines. The replies of governments to the Draft Articles prepared by the ILC indicated some concerns over the right of passage existing within waters which would be converted into internal waters by the use of new straight baselines.\footnote{127} Among the replies, the British view was one of the most critical ones. The UK Government expressed that:

\begin{quote}
[it is] imperative that, in any new code which would render legitimate the use of baselines in proper circumstances, it should be clearly stated that the right of innocent passage should not be prejudiced ... (Accordingly) the Commission would be performing a most useful function if it were to give mature consideration to the problem how the use of baselines is to be reconciled with existing rights of passage. For their part, Her Majesty's Government can only say at this stage that, in their view, in case of conflict, the right of passage, as a prior right and the right of the international community, must prevail over any alleged claim of individual coastal States to extend the areas subject to their exclusive jurisdiction.\footnote{128} (emphasis added)
\end{quote}

Following concerns of some governments with respect to the use of new straight baselines and their potential impacts on the right of navigation, the ILC discussed the issue of passage through waters surrounded by these baselines.\footnote{129} There existed a dispute of viewpoint in the ILC over the issue as to whether the same right of passage as available in the territorial sea had to be maintained within waters affected by the use of new straight baselines. The majority of the ILC were in support of maintaining such right.\footnote{130} Consequently, the ILC added a new paragraph (Paragraph 3) to Article 5 the Draft before its submission to the UNCLOS I. This paragraph states:

Where the establishment of a straight baseline has the effect of enclosing as internal water areas which previously had been

\footnote{128}{Ibid., pp.43-44.}
\footnote{129}{The issue was also discussed in the 1954 session of the Institut de Droit International at Aix-en-Provence. See Institut de Droit International Annuaire, Vol.1, 1954, pp.113-173. In response to the report prepared by F. Castberg on the distinction between territorial waters and internal waters, Sir Gerald Fitzmaurice held that “all waters inside the baseline from which territorial waters are measured, are internal waters; but that a further distinction is to be drawn between those waters which are genuinely inland waters (e.g. rivers, creeks, island, lakes, canals etc.) and those which are not (e.g. large bays and waters between the mainland and islands off the coast) ... Generally speaking, there is no right of passage through the former waters, but there is, or there should be, through the latter... Under no circumstances should the extension of internal waters made possible by the new baseline method operate so as to impede the right of innocent passage through what would be territorial sea if the older coast-line (or tide mark) rule were still applied”. Ngantcha, Francis, The Right of Innocent Passage and the Evolution of the International Law of the Sea; The Current Regime of 'Free' Navigation in Coastal Waters of Third State, Printer Publishers, London, 1990, p.75.}
\footnote{130}{YILC Vol.II, 1956, p.268.}
considered as part of the territorial sea or of the high seas, a right of innocent passage, ... through those waters will be recognised by the coastal State in all those areas where the waters have normally been used for international traffic.131 (Italics supplied)

As part of its comments on Article 5(3), the ILC clearly indicated that the provision was considered to prevent any adverse effects on the right of navigation that may be caused by the application of certain straight baselines. The ILC commented that “if a State wished to make a fresh delimitation of its territorial sea according to the straight baseline principle, thus including in its internal waters part of the high seas or of the territorial sea that had previously been waters through which international traffic passed, other nations could not be deprived of the right of passage in those waters. Paragraph 3 of the article is designed to safeguard that right”.132 (emphasis supplied) The focus of the ILC was, however, on the impact of new straight baselines on water areas where there has already existed a right of passage. This raises a question whether there is a right of navigation through waters enclosed by fresh straight baselines but no passage was previously exercised therein. One argues that the right of passage is not limited to the cases “where the waters have normally been used for international traffic”.133 This is because when construction of a new straight baseline leads to conversion of the territorial sea or the high seas into internal waters, such construction would eliminate passage through waters already were subject to legal regime of the territorial sea or the high seas. Accordingly, as far as navigation is concerned, there are two kinds of internal waters. Those internal waters created by the use of the low water mark where there is no right of passage, and those created by the use of new straight baselines where the international community is entitled to the right of navigation.134

The proposal of the ILC (Article 5(3) of its Draft) was examined in the UNCLOS I and its wording was changed as appeared in Article 5(2) of

133 Ngantcha, *op. cit.*, p.77.
134 Due to importance of maritime communication, the same reasoning has been extended to bays and islands. It is, therefore, argued that “a coastal State with an indented coast, islands, and bays could exercise the discretion to draw the limits of its internal waters differently for different purposes. But where it chooses the method of straight baselines, the internal waters so created, to the limit of the low-water mark, do not prejudice the right of innocent passage of other States”. *Ibid.*, p.78.
the TSC. The TSC recognised the right of navigation previously existed through newly defined internal waters where a fresh employment of straight baselines has resulted in creation of these new internal waters. However, unlike the ILC's focus on internal waters "where the waters have normally been used for international traffic", Article 5(2) does not contain this clause. Accordingly, no distinction was made between the status of international navigation within those newly internal waters which were not formerly used for maritime communication and those traditionally used for international navigation.

At the UNCLOS I, the work on the territorial sea was delegated to the First Committee. At its 48th, 51th, and 52nd meetings, the Committee discussed the issue of straight baselines. Although in the Fisheries Case, the ICJ rejected that any maximum limit for the length of straight baselines was set up by State practice, Britain suggested to the Committee to consider the maximum length of ten miles. In addition, such countries as the Federal Republic of Germany, Greece, Italy, Japan, and the United States reiterated the limitation introduced by the committee of experts. They suggested that no straight baseline can be drawn from a point on the mainland to an adjacent island, if the island is located further than five miles from the point on the mainland. These proposals could not achieve adequate support for adoption. A Swedish proposal also failed to be accepted. It suggested considering the maximum length of fifteen miles for straight baselines. This proposal was put to the vote following the request of Canada, the Soviet Union, Norway, and Indonesia but was not adopted. The final result of discussion on the issue of the straight baselines in the UNCLOS I was the incorporation of Article 4 into the TSC.

Paragraphs 1 and 2 of Article 4 of the TSC (also paras. 1 & 3 of Article 7 of the LOSC having the same content) contain the direct language of the Court as follows. Those parts made in *italics* are the wording of the Court.

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135 Article 5(2) of the TSC provides that "[w]here the establishment of a straight baseline ... has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage ... shall exist in those waters".

136 The same rule was maintained in the LOSC as incorporated into its Article 8(2).


138 Ibid., p.228.

139 Ibid., pp.35-252.

1. In localities\textsuperscript{141} where the coastline is deeply indented and cut into\textsuperscript{142}, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.\textsuperscript{143}

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.\textsuperscript{144}

Although the TSC (and also the LOSC) reflects essential parts of the ICJ opinion in the Fisheries Case, a number of additional provisions were incorporated in the TSC with respect to straight baselines. These provisions were incorporated to prevent, \textit{inter alia}, improper enclosure of the high seas. For example, only those low-tide elevations can be taken into account as basepoints for straight baselines upon which there are lighthouses or similar facilities permanently above sea level.\textsuperscript{145} Despite fringing islands towards which straight baselines can be drawn, low-tide elevations are in general unqualified for the same purpose save in exceptional cases.\textsuperscript{146} In addition, the TSC (and the LOSC) provides that

\textsuperscript{141}The term "in localities" implies that the use of straight baselines is limited to the coastlines which qualify for application of these baselines. Accordingly, the qualified straight baselines are exceptions to the general rule of the normal baselines.

\textsuperscript{142}ICJ Reports, 1951, pp.128-129.

\textsuperscript{143}As far as geographical aspects are concerned, there is a question as to what purpose the straight baselines were permitted to replace the low-water line. In response, it is stated that "[t]he concept of straight baselines is designed to avoid the tedious application of rules dealing with the normal baselines and the mouths of rivers and bays, where their application would produce a complex pattern of territorial seas." The Law of the Sea - Baselines, \textit{op. cit.}, p.17. The straight baselines, then, play a major role in simplification of baseline systems in indented coasts or coasts which are cut into or fringed with islands. For such an effect see \textit{ibid.}, Figures 11 and 12 at pp.18 & 19.

\textsuperscript{144}ICJ Reports, 1951, p.133. Article 4(4) of the TSC and Article 7(5) of the LOSC contain the provision on the use of "regional economic interest" in accordance with the ICJ decision in the Fisheries Case for application of straight baselines.

\textsuperscript{145}Article 4(3) of the TSC. It is argued that provision of Article 4(3) of the TSC was included "to meet the case of Norway where two of its basepoints on the 1935 line approved by the Court were on low-tide elevations". Prescott, \textit{op. cit.}, 1987 (Straight and Archipelagic Baselines), p.41. Article 7(4) of the LOSC also considers another possibility for taking low-tide elevations into account as defined points for drawing straight baselines, that is to say "where drawing of baselines to and from such elevations has received general international recognition." (emphasis added) In this regard, Prescott holds that "[a] country could now announce its baseline and use some low-tide elevations and then announce after a few years that the absence or low level of criticism constitute evidence of general international recognition". \textit{Ibid.}

\textsuperscript{146}Although it has generally been accepted that low-tide elevations and islands have their own special legal regimes, there have been cases where no agreement existed as to whether a geographical feature is a low-tide elevation or an island. This was particularly discussed in the Anglo-French Continental Shelf Case (1987-1988). As far as the case was concerned, the analysis of the issue was of significance because while islands can have continental shelf, rocks cannot. (See Article 121 of the LOSC) It was for the purpose of the delimitation of the boundary between their continental shelves that the United Kingdom and France agreed to submit the matter to arbitration. The dispute was over the status of the Eddystone Rock located eight miles from the British mainland. The UK was of the
"[t]he system of straight baselines may not be applied by a State in such a manner to cut off from the high seas (or an exclusive economic zone, as added in the LOSC) the territorial sea of another State."

The approval of the Norwegian baseline system by the ICJ and its following acceptance in the UNCLOS I clearly recognised the straight baseline system, where drawn properly. However, the general rules on straight baselines gave a broad discretion to coastal States. This broad application of straight baselines was resulted from two major inadequacies: the uncertainty as to what constitutes departure from direction of the coast; and the lack of an international body to examine straight baseline system for their validity. Although drawing baselines is left to coastal

view that the Rock was to be considered an island since they fell into the definition of an island in accordance to the 1964 Territorial Waters Order. According to this Order, an island is a geographical feature that is uncovered “at mean high water springs”. Therefore, the Rock can be regarded as an island because they “only cover entirely at mean high water spring”. In contrast, France did not agree that the Eddystone Rock is an island. France stated that “[n]o difference is made in customary law ... between types of tide as the criterion for distinguishing between an island and a low-tide elevation. On the contrary, as soon as a reef does not remain uncovered throughout the year, the French Government claimed that it has to be ranked as a low-tide elevation”. The Court of Arbitration did not express its opinion over the different views on the status of the Eddystone Rock as a low-tide elevation or an island.

However, the Court relied on the French recognition of the British fisheries zone established in accordance with Articles 2 and 3 of the 1964 European Fisheries Convention. The Court held that “[i]n other words, it was in the context of a baseline of the territorial sea, as well as in the context of fisheries, that the French Republic in 1964-1965 acknowledged the relevance of the Eddystone Rock as a basepoint.”


147 Article 4(5) of the TSC and Article 7(6) of the LOSC. As an example, Churchill refers to the Aegean of Turkey “where it would be possible for Turkey to draw straight baselines in such a way as to cut off the territorial sea of Greek islands that fringe its coast from the high seas”. Churchill and Lowe, op. cit., p.29. Also, the sections 28-29-30 of the straight baselines system proclaimed by China on 15 May 1996 has the effect of enclosure of Hong Kong and Macao. Accordingly, these segments can be valid when Hong Kong and Macao would come under the sovereignty of China in 1997 and 1999 respectively. See Prescott, Victor, The South China Sea: Limits of National Claims. MIMA (Marine Institute of Malaysia), Kuala Lumpur, 1996, pp.14-15.

148 There is an opinion that “[t]he straight baseline system now seems to be valid erga omnes, irrespective of the opposition or agreement of other states.” Dixon, Martin, and Robert McCorquodale, Cases and Materials on International Law, Blackstone Press Limited, London, 1991, p.355. It should, however, be noted that these baselines should be employed properly by a coastal State to be protected against opposition from other States.

149 According to Prescott, “by the end of 1972 47 countries out of 118 had proclaimed straight baselines along part or all of their coast.” Prescott, J. R. V., The Political Geography of the Oceans, Douglas David & Charles Limited, Vancouver, 1975, p.78. This calculation does not contain some countries, mainly archipelagic States.

150 Prescott names Beazley (1978) and Shalowitz (1962) as asserting that the Norwegian straight baselines can be regarded as a standard “against which all straight baselines should be tested.” Prescott, J. R. V., ‘Straight Baselines: Theory and Practice’, in E. D. Brown and R. R. Churchill (eds.). The UN Convention on the Law of the Sea: Impact and Implementation, Proceedings of Nineteenth Annual Conference of the Law of the Sea Institute (1985, Cardiff, South Glamorgan), The Law of the Sea, Honolulu, 1987, p.307. It is also asserted that in the absence of fringing islands where all basepoints are situated on the mainland “it is very difficult to argue that the general direction of the coast has not been preserved.” Ibid.
States, their legitimacy depends on international recognition.\textsuperscript{151} This fact is confirmed by the ICJ which made it clear that:

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, \textit{the validity of the delimitation with regard to other States depends upon international law.}\textsuperscript{152} (emphasis supplied)

The issue of baselines (including the straight baselines) was not made subject to detailed discussion in the UNCLOS III. It seems that it was supposed that the rules on the baselines had achieved a wide recognition.\textsuperscript{153} The main concern was to apply the rules in a manner consistent with the rationale behind them and not to misuse these rules. Accordingly, the LOSC, except for a few changes\textsuperscript{154}, repeated the same wording of the TSC on baselines in general and on straight baselines in particular.\textsuperscript{155}

\textsuperscript{151}In fact, the ICJ applied a two dimensional approach to the issue of “delimitation of sea areas” (including enclosing internal waters by drawing baselines). Two elements constitute the grounds of such an approach: national action and international recognition. Accordingly, where, because of “local conditions” a coastal State draws straight baselines around its coasts, the reaction of the international community towards such baselines plays an important role in evaluating their validity.

\textsuperscript{152}ICJ Reports., 1951, p.132. As regards the range of discretion of coastal States in the delimitation of the territorial sea, the Court opined that while a coastal 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 base-lines must not depart to any appreciable extent from the general direction of the coast.” \textit{Ibid.}, p.133. The view of Evensen concerning the role of relevant factors in delimitation of territorial sea is also worthy of mention. In his memorandum prepared for the UNCLOS I in 1957, Evensen wrote that various factors of a geographical, economical, historical and political nature “may play an important role in determining the legality under international law of concrete acts of delimitation of territorial waters”. Evensen, Jens, Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos, UN Doc. A/CONF/13/18, in \textit{UNCLOS I. Official Records}, Vol.1, 1958, pp.289-290.

\textsuperscript{153}The only completely new provision on the straight baselines in the LOSC (in comparison to the TSC) is Paragraph 2 of Article 7 which relates to “unstable coasts”. The Paragraph allows the use of straight baselines for deltas and other natural conditions which make the coastline highly unstable. It provides that in the case of “subsequent regression of the low water line, the straight baselines shall remain effective until changed by the coastal State in accordance with the Convention”. This provision was particularly incorporated following the request of Bangladesh whose coastline is unstable due to the presence of deltas. Other examples of unstable coasts are volcanic coasts and tundra coasts.

\textsuperscript{154}For example, see Article 7(2) of the LOSC (see above). This provision does not exist in the TSC.

\textsuperscript{155}Part I - Section II (Articles 3-13) of the TSC deals with the subject of “Limits of the Territorial Sea” and, \textit{inter alia}, establishes rules on the use of baselines for various coastlines. (See Articles 3,4,7, and 13) Part II - Section II contains similar provisions on baselines under the same heading. (See Articles 5, 7, 9, and 10)
6. Straight Baselines and State Practice

There are now many States, as many as half of coastal States\textsuperscript{156}, which proclaim and use straight baselines.\textsuperscript{157} While some of these baselines can be justified in the context of the ICJ's judgement regarding the Norwegian coast, others are hard to justify.\textsuperscript{158} In some cases, the lines have been drawn in a manner that depart from the general direction of the coast.\textsuperscript{159} It is apparent that "[t]he effect of drawing straight baselines, even strictly in accordance with the rules, is often to enclose considerable bodies of sea as internal waters".\textsuperscript{160} It is, therefore, evident that derogation from the rules enhances such an effect bringing more parts of the seas into control of coastal States.\textsuperscript{161} This, in turn, restricts the freedoms of the seas

\textsuperscript{156}Zhang, \textit{op. cit.}, p.851.
\textsuperscript{157}Coastal States have applied the method of straight baselines to bring wider maritime areas under their control for the same reasons as they argued to extend the breadth of their territorial seas, \textit{i.e.} for economic, environmental, and security reasons. Currently the position of the USA is to apply the line of low-water mark as its baseline and not straight baselines. In response to the request of the Canadian government for a list of coordinates of the basepoints for the baselines of the USA territorial sea and the EEZ, the USA stated that "no such list exists" and that the USA baseline is the low water along the coast which is "marked on large-scale charts issued by the National Ocean Service of the Department of Commerce". United States \textit{Aide-Memoire} to Canadian government, March 19, 1984 (Department of State file P84-0012-1925). Cited in \textit{Limits in the Seas} (No. 112), Office of the Geographer, Bureau of Intelligence and Research, The United States Department of State, 1992, p.17 (and no.35). In the \textit{United States v. California Case}, the USA Supreme Court made the application of straight baselines subject to approval of the federal government because it argued that the use of straight baselines in accordance with to determine "inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." \textit{United States v. California}, 381, U.S. 139, 167-169 (1965). Also see the \textit{Louisiana Boundary Case}, 349 U.S. 11, 36-38 (1969), and the \textit{Alabama and Mississippi Boundary Case}, 470 U.S. 93, 99 (1985).

\textsuperscript{158}It is said that "the state practice of straight baseline delimitation has, in many instances, distorted the rules for drawing straight baselines. The effect of an illegal straight baseline is a claim that \textit{detracts from the international community's rights to use the oceans}." It is also added that [o]ne result has been that \textit{these straight baseline systems remain have purported to create large areas of internal waters which legally remain either territorial sea or areas in which the freedoms of navigation and overflight may be exercised}." (emphasis added) \textit{Limits in the Seas} (No.112), \textit{op. cit.}, pp.19-20.

\textsuperscript{159}Although many of straight baselines systems were established before the LOSC, this convention incorporated the provisions of the TSC on baselines (including straight baseline), with a few additional provisions. Accordingly, the provisions on baselines are of contractual and customary value that should be complied with in good faith.

\textsuperscript{160}Churchill and Lowe, \textit{op. cit.}, p.31. The straight baselines were also used by some States for resource purposes. In this connection, Anand writes that "[s]ome countries sought to achieve the same purpose without extending their territorial waters or fisheries jurisdiction by adopting straight baselines for measuring the territorial sea joining outermost islands, islets, or rocks off their coasts." Anand, \textit{op. cit.}, p.79. An example of such application for fisheries resources is the 1935 Norwegian baseline system. The area enclosed by the use of this system includes several thousands square miles. This resource concern is still strong enough to persuade countries in proclaiming straight baselines.

\textsuperscript{161}It was due to this effect that Smith (1948) was in the view that "[i]t is impossible that such a claim (the 1935 Norwegian straight baseline system) should be generally accepted, and it is not likely to be pressed." Smith, \textit{op. cit.}, p.5. Although the ICJ confirmed this system of baselines, it was due to exceptional circumstances existed with respect the Northern coast of Norway. Notwithstanding, the ICJ judgement was a means for increasing the application range of straight to similar geographical conditions, and even to some coasts where there are no special geographical features.
and, *inter alia*, subjecting navigation of foreign ships to the discretion of shore States.

The *Fisheries Case* was concerned with two conditions existing on the Norwegian coasts: one is the fact that the Norwegian coast is very indented and cut in; and the second one is that the Norwegian coast is fringed with many islands, islets, and rocks. These two conditions were used by other States to justify straight baseline for their coasts. However, it is asserted that there are a number of coastal States which employ straight baselines while geographical conditions of their coasts do not present any clear fringing island system or are not very indented coast. Accordingly, it is not clear on what basis or justification these systems were applied. Examples of these States include, but are not limited to, Albania, Burma, Cuba, Ecuador, Guinea, Haiti, Madagascar, Mauritania, Mexico, Portugal, Senegal, Thailand (in Phangan I), and Venezuela.

In general, Prescott asserts that States have employed five inappropriate methods in drawing straight baselines:

- where the coast is smooth rather than deeply indented;
- where straight baselines link islands which are not regarded as fringing islands;
- where the basepoint or the terminus is located at the sea rather than on or above the low-water mark;
- where straight baselines are drawn around offshore islands by continental States; and
- where straight baselines are not published and are considered as *imaginary straight baselines*.

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162 Examples of relatively similar coastlines to the Norwegian coastline are those of Scandinavian countries, that is Denmark, Finland, Iceland, and Sweden.

163 Examples of coastal States drawing straight baselines on the basis of their indented coasts are Chile, Finland, France, Iceland, Ireland, Sweden, Turkey, United Kingdom. Examples of coastal States using straight baselines on the basis of fringing islands around their coasts are Denmark, Germany, Guinea-Bissau, Mozambique, South Korea, Thailand (regarding islands of Phuket and Chang), (the former) Yugoslavia. Prescott, *op. cit.*, 1985, p. 66.

164 *Ibid.* Prescott names the Australian baseline system among those cases where straight baselines have been drawn along coasts “which are smooth rather than deeply indented.” Prescott, *op. cit.*, 1987 (Straight and Archipelagic Baselines), p. 41.

165 See Prescott, *op. cit.*, 1987 (Straight and Archipelagic Baselines), p. 41-46. Prescott gives examples for each of these five cases, though not all are inconsistent with the existing rules on straight baselines.
Table 2.1 presents a large list of existing proclamation of straight baselines by coastal States. It provides some data forming a useful basis for evaluating of the correctness of the way straight baselines were applied. Some proclamations are lawfully able to be recognised, while others need modifications or revision, if they are to be regarded as legitimate on the basis of the existing principles of the law of the sea. There are even some cases where coasts are not indented or cut into or fringed with islands, but the States concerned have nonetheless applied a straight baseline system. In this context, it is relevant to compare the straight baseline systems of Guinea-Bissau and Albania. In the former, there are many islands fringing the coast (the Bigagos coastal archipelago) but in the latter case the coastline is not fringed with islands, thus making the Albanian straight baseline difficult to justify.166 (See Maps 2.3 and 2.4 below.)

Map 2.3
Guinea Bissau’s Straight Baselines


166Prescott, op. cit., 1985, p.68. Even in the case of the straight baseline system of Guinea-Bissau (Act No. 2/85, 17 May 1985), Senegal declared its protest to this system and stated that articles 1 (containing defined points for using straight baselines) and 2 of the Act No. 2 of 17 May 1985 “are manifestly contrary to international law.” In response, Guinea Bissau asserted that, like other coastal States, it “is justified in exercising its right to establish by an act of its domestic legislation the delimitation of its territorial waters in accordance with a system of straight baselines”. It added that “the straight baselines established by the Guinean Act of 17 May 1985 are in no way in contravention of the rules of international law contained in article 7 of the United Nations Convention on the Law of the Sea”. Guinea-Bissau further maintained that it is the task of the arbitral tribunal established for delimiting the maritime boundary between them to deal with the issue. The Law of the Sea: Current Developments in State Practice (No. I). Office of the Special Representative of the Secretary-General for the Law of the Sea, United Nations, New York, 1987, pp.36-40.
Map 2.4
Albania's Straight Baselines


In addition to the requirements stipulated by the Court, there are a number of factors which should be taken into account when assessing each individual straight baseline system. These factors include: (a) the length of the straight line; (b) number of straight lines employed; (c) the distance of the straight line from the nearest coast; and (d) the water areas enclosed by straight baselines (the ratio of land to water). The contractual provisions do not provide any guidelines for these factors and it is not certain what the international standards are for appraisal of a straight baseline system.

167 The TSC and LOSC contain no provision as to what the maximum permissible length is for a straight baseline; how many straight baselines can be applied; what maximum distance should be between a straight baseline and nearest coast; and what maximum area can be enclosed by application of straight baselines. Although some of these factors are referred to in the LOSC regarding archipelagic baselines, none of them is mentioned as regards straight baselines. It seems for the same purpose that some restrictions were incorporated for the use of archipelagic baselines (such as the length of these baselines), namely prevention of unnecessary enclosure of the seas, some standards should be established for assessing the legality of straight baseline systems. With regard to maximum length for straight baselines, there are some authors suggesting a range of extents from 24-45 nautical miles. These authors include Roach and Smith (24 nautical miles), Hodgson and Lewis (45 nautical miles), Beazley (45 nautical miles). Also a limit of 48 nautical miles has also been suggested. The U.S.A. position is that the maximum limit for straight baselines is 24 nautical miles. See Limits in the Seas, No.117 (1996), p.4.

168 An analogy can be made to the Commission on the Limits of the Continental Shelf. Article 76 (8) of the LOSC empowers the Commission (set up under Annex II to the LOSC) to assess the claims of States on continental shelf beyond 200 nautical miles. The legality of such claims depends on their recognition by the Commission. It is the Commission which is an international competent body to assess the claims and make a decision on their legitimacy. There is no similar international body to assess the straight baseline system. Although there are many cases to be dealt with, but the existence of such a body would contribute to the prevention of disputes and conflicts among States regarding the straight baseline systems. Such disputes may result in military confrontations. This is because in the view of maritime powers some straight baseline system are considered to be unjustified and have a significance influence on the reduction of the free sea areas depriving foreign vessels and aircraft to exercise free navigation and overflight in certain areas.
<table>
<thead>
<tr>
<th>State</th>
<th>Information Available on the Baselines</th>
<th>Official Basis of the Proclamation</th>
<th>Source Containing the Proclamation</th>
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<tr>
<td>Algeria</td>
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<td>Decree No. 84-181 of 4 August 1984 defining the baselines for measuring the breadth of the maritime zones under national jurisdiction</td>
<td>Journal Officiel de la Republique Algerienne of 7 August 1984 (cited in Francalanci^5)</td>
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<td>Angola</td>
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<td>Decree-Law No. 47,771 of 27 June 1967 (enacted by Portugal)</td>
<td>U.N., ST/LEG/SER.B/15d, p.112-113</td>
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<td>Argentina</td>
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<td>Act No. 23.968 of 14 August 1991</td>
<td>National Legislation on the Territorial Sea, p.28</td>
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<tr>
<td>Australia</td>
<td>No. of Segments: 396</td>
<td>Proclamation of 4 February 1983</td>
<td>Commonwealth of Australia Gazette No. 29 of February 1983</td>
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<td>Bangladesh</td>
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<td>Declaration of 13 April 1974</td>
<td>New Directions^1 Vol.V, p.290</td>
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<td>Burma</td>
<td>No. of Segments: 21</td>
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<td>The Law of the Sea, p.107-111</td>
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<td>Cyprus</td>
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<td>Verbal Note to the UN, 13 November 1985</td>
<td>United States Responses to Excessive Maritime Claims, p.78.</td>
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<td>Djibouti</td>
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<td>Law No. 52/AN/78 concerning the territorial sea, the contiguous zone, the exclusive economic zone, the maritime frontiers and fishing, 9 January 1979</td>
<td>The Law of the Sea, pp.149-151</td>
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<td>Act No. 186 of 13 September 1967 on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf, as amended by Act No. 573 of 1 April 1977</td>
<td>The Law of the Sea, pp.152-153</td>
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<td>Presidential Decree No. 27 concerning the baselines of the maritime zones, 9 January 1990</td>
<td>Current Developments in State Practice - No. III^1, pp.32-38</td>
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<td>Country</td>
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<td>16.24 n.m.</td>
<td>39.4 n.m.</td>
<td>13 n.m.</td>
<td>Decree of 28 August 1968 Delimiting the Mexican Territorial Sea within the Gulf of California (U.N., ST/LEG/SER.B/16, p.17, Limits in the Seas, No. 4 (1970))</td>
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<td>Morocco</td>
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<td>Decree No. 2-75-311 of 21 July 1975 defining the Coting Lines of Bays on the Coasts of Morocco and the Geographical Co-ordinates of the Limit of Territorial Waters and the Exclusive Fishing Zone (The Law of the Sea, pp.224-229)</td>
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<td>453.4 n.m.</td>
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<td>Legislative Decree No. 47,771 of 27 June 1967 (enacted by Portugal) (U.N., ST/LEG/SER.B/15, p.113, Limits in the Seas, No. 29 (1970))</td>
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<td>(i) U.N., ST/LEG/SER.B/6, p.35, Royal Decree of 18 July 1952 (ii) U.N., ST/LEG/SER.B/6, p.552</td>
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<td>Decree-Law No. 495/85 of 29 November 1985 (The Law of the Sea, pp.260-266)</td>
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<td>Act concerning the Legal Regime of the Internal Waters, The Territorial Sea and the Contiguous Zone, 7 August 1990 (Current Developments in State Practice - No. III, pp.104 &amp; 115)</td>
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<td>Decree No. 72-765 of 6 July 1972 (Limits in the Seas, No. 54 (1973))</td>
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<td>Spain</td>
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<td>Royal Decree No. 2510/1977 of 5 August 1977 (U.N., ST/LEG/SER.B/19, p.112)</td>
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<td>Sri Lanka</td>
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<td>Act concerning the Territorial Waters of Sweden of 3 June 1966 (as amended in 1978 and 1979: amendments No. 959 and No. 1140) (The Law of the Sea, pp.299-305)</td>
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<td>Tunisia</td>
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<td>621 n.m.</td>
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<td>9 n.m.</td>
<td>Territorial Waters Law, No. 476 of 15 May 1964 (The Law of the Sea, pp.313-314)</td>
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<td>11.25 n.m.</td>
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<td>Territorial Waters Order in Council 1964 (U.N., ST/LEG/SER.B/15, p.129, Limits in the Seas, No. 23 (1970))</td>
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<td>Declarations No. 4450 and No. 4604 (The Law of the Sea, pp.315-353)</td>
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<td>Act of 27 July 1956 concerning the Territorial Sea, Continental Shelf, Fishery Protection and Air Space (The Law of the Sea, pp.381-383)</td>
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<td>Declaration of 12 November 1982 on the Territorial Sea Baseline of Viet Nam (Law of the Sea Bulletin, No. 1, 1983, n.74, Limits in the Seas, No. 99 (1983))</td>
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</tr>
</tbody>
</table>

*The table contains sixty-one proclamations on straight baselines. The list does not include those States which have not delimited their straight baselines and those which have considered the future application of straight baselines. The former consists of Syria and Saudi Arabia and the latter includes Barbados,
Brazil, Bulgaria, Cote d'Ivoire, Dominica, Lithuania, Somalia, United Arab Emirates, and Yemen. Also, the list does not include States proclaiming archipelagic straight baselines for which provisions of Article 47 of the LOSC would govern. Information on archipelagic baselines will be presented later. - The above-mentioned States currently claim the following breadths for their territorial seas.

(i) Twelve nautical miles: Albania, Algeria, Argentina, Australia, Bangladesh, Burma, Canada, Chile, China, Colombia, Cuba, Djibouti, Dominican Republic, Egypt, Finland, France, Germany, Guinea, Guinea-Bissau, Haiti, Iceland, Iran, Ireland, Italy, Japan (three nautical miles within the Straits of Soya, Tsugaru, and Osumi and within the Eastern and Western Channels of the Tsushima/Korea Strait), Kampuchea, Kenya, Korea - Republic (three nautical miles in the Korea/Tsushima Strait), Madagascar, Malta, Mauritania, Mexico, Morocco, Mozambique, Netherlands, Oman, Portugal, Romania, Russian Federation (as the successor of the USSR), Senegal, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey (also three nautical limit in certain areas), United Kingdom, Venezuela, Viet Nam, Yugoslavia.

(ii) Four nautical miles: Norway; (iii) Three nautical miles: Denmark; (iv) Twenty nautical miles: Angola;
(v) Fifty nautical miles: Cameroon; (vi) Two hundred nautical miles: Ecuador

Sources: Information obtained from the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York regarding territorial sea limits (as at 16 June 1995)

Sources of the Table:
(d) National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas, and to Fishing and Conservation of the Living Resources of the Sea, United Nations, New York, 1970.
(h) Limits in the Seas, Office of the Geographer, Bureau of Intelligence and Research, United States Department of State, Washington D.C..

- For the maps of the straight baselines see Francalanci, op. cit., and The Law of the Sea - Baselines: National Legislation and Illustrative Maps, op. cit.
All these requirements and factors must be taken into account when judging the application of a specific straight baseline system. For example, a system may be formed by many small straight lines but it does not enclose a wide area when compared with a system containing a few straight lines but enclosing a broad area. In general, the issue of baselines is of a technical nature and should be dealt with accurately. Once the technical aspects of baselines have been made clear, the issue of legality of these baselines should then be addressed.

Some States have directly proclaimed straight baselines while some other States have considered the possibility of the use of these baselines along their coasts. For example, Article 1 (Sole Paragraph) of the 1993 Brazilian Law provides that “[i]n localities where the coastline is deeply indented into or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines, joining appropriate points, will be employed in drawing the baseline from which the breadth of the territorial sea is measured.”\(^{169}\) (emphasis added) The Law does not provide any list of geographical co-ordinates for the purpose of drawing straight baselines. It is the same in the case of Bulgaria which only uses different wording but the approach is identical.\(^{170}\) Similar ideas are found in legislation of other States. Many States have used a combination of methods (that is low-water mark, straight baselines, and closing lines) for shaping their baseline system. This is generally permitted by the contractual provisions.\(^{171}\) However, State practice is clearly reflecting the fact that States do not hesitate to apply straight baselines for their coasts if they wish to do so.\(^{172}\) Leaving aside the ICJ (which in a few cases, directly or indirectly, dealt with the issue of baselines), baseline systems of States have not been subject to international appraisal. Currently, no international mechanism is effective enough to stop using improper straight baselines. If a baseline case is not made subject to adjudication (particularly by the

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\(^{170}\) Article 16(2), Bulgarian Act of 8 July 1987 governing the ocean space. Ibid., p.63.

\(^{171}\) See Article 14 of the LOSC (Combination of methods for determining baselines).

\(^{172}\) There are some instances in which coastal States recognise the validity of their straight baselines. For example, Article 11 of the Treaty of Peace and Friendship between Argentina and Chile (18 October 1984), provides that “the Parties mutually recognise the straight baselines drawn by them in their respective territories.” The Law of the Sea: Current Developments in State Practice (No.I), op. cit., p.173. It is apparent that this kind of bilateral agreements do not have impact on third States. Accordingly, the international recognition of straight baseline system is dependent on the consistency of such a system with established rules of the international law of the sea for drawing baselines.
ICJ\textsuperscript{173}, the only mechanism available is to protest against such a baseline. The effectiveness of such protest, to some extent, depends on political and/or military power of protesting State. However, the application of military force is itself in contrast to the use of peaceful means for removing conflicts among nations.

According to an analysis of the straight baseline systems in 1970, twenty-two States out of thirty-seven States under examination (leaving Indonesia, Philippines, and Faeroes aside following the acceptance of archipelagic baselines in UNCLOS III), do not comply with the rules established for the use of straight baselines.\textsuperscript{174} According to information available in 1992, the number of inconsistent uses of straight baselines has increased.\textsuperscript{175} In some cases, there are extreme departure from the coasts. For example, consider the cases of Burma, Colombia\textsuperscript{176}, Ecuador\textsuperscript{177}, Vietnam and Haiti\textsuperscript{178}. (See information available on their straight baseline systems in Table 1.) Their longest straight baselines are 222.3 n.m., 130.5 n.m., 136 n.m., 161.8 n.m., and 111 n.m. respectively.\textsuperscript{179} Also, the

\textsuperscript{173}Even the ICJ is not always desired to comment on baseline systems (if not necessary). For example, in 1985 Case concerning the Continental Shelf the ICJ held, \textit{inter alia}, that “[t]he Court does not express any opinion on whether the inclusion of Filfla in the Maltese baseline was legally justified ...”. (\textit{emphasis added}) Judgement of June 3, 1985, Case concerning the Continental Shelf (Libyan Arab Jamahiria / Malta), ICJ Reports, 1985, p.48.

\textsuperscript{174}See Limits in the Seas, No. 14 (1970), Office of the Geographer, Bureau of Intelligence and Research, United States Department of State, Washington DC.

\textsuperscript{175}See Limits in the Seas (No.112), \textit{op. cit.}, p.20. According to its Freedom of Navigation Program, the USA is considering a number of measures from diplomatic protests to operational assertions of rights of navigation with respect to the excessive claims in the view of its government. For the reaction of the USA to straight baseline systems existing up to 1992, see \textit{ibid}, Table 2: Claims Made to Straight Baselines, pp.22-24. It is now viewed that “of the straight baseline system, over half depart from the rules of international law in one way or another”. Brown, \textit{op. cit.}, 1994, p.41 (no.24).

\textsuperscript{176}For an analysis of the straight baseline system of Colombia see Straight Baselines: Colombia, Limits in the Seas No.103. The Office of Geographer, Department of State, The United States Government, Washington DC, 1985.

\textsuperscript{177}One criticises the Ecuador’s straight baseline, as “an extreme example”, on four bases. “First, the coast of Ecuador is neither deeply indented nor fringed with islands ... Secondly, the lines do not conform with the general direction of the coast ... Thirdly, one of the reference points used is Isla La Plata, an isolated island 14 miles from the coast ... ; and finally, the southermost leg actually ends at Cape Blanco in Peru, and not in Ecuador at all (the internal waters so enclosed are split between Ecuador and Peru.” Brown, Joan, \textit{op. cit.}, p.50. For the map of Ecuador’s straight baseline system see \textit{ibid.}, p.49.


\textsuperscript{179}Prescott writes that the straight baseline proclaimed by Denmark on 1 June 1963 on the west coast of Greenland is one of the largest straight baselines. The length of this straight baseline is 1,380 nautical miles. Denmark uses straight baselines due to the geographical circumstances existing along its coast including deeply indented coastline and fringing islands. Prescott, \textit{op. cit.}, 1987 (‘Straight Baselines: Theory and Practice”), p.289.
maximum distance between baseline and nearest coast with respect to Burma, Ecuador and Haiti is 75 n.m., 52 n.m., and 40 n.m. respectively.

The ratio of land to water is also a significant factor in assessment of straight baseline system. While this ratio in the case of Norway is 1:3.5, the ratio with regard to Burma is 1:50\textsuperscript{180}, that is the water area enclosed by the Burma's system (49,000 sq. kilometres) is approximately fifteen times more than that of Norwegian system. (See Map 2.5.)

Map 2.5
Burma's Straight Baseline System


Although the ICJ did not mention the ratio of land to water among criteria to be taken into account for assessing a straight baseline system, it is clear that this ratio is quite relevant when evaluating whether such a system departs from the general direction of the coast.\textsuperscript{181} Certain straight

\textsuperscript{180}Prescott, op. cit., 1985, p.68. This ratio for the United Kingdom is similar to that of Norway, namely 1:3.5 and the ratio for eastern part of Thailand coast is 1:5. Prescott, op. cit, 1975, p.81.

\textsuperscript{181}Prescott suggests an index system as a means for evaluation of straight baseline systems. The index indicates that how the use of straight baselines increase national waters in comparison to low-water mark. The calculation of the index is based on the width claimed by the concerned State. The areas
baseline systems have faced protests from other States because of the direct impact of these baselines have had on the enclosure of the seas being used by those States. For example, in 1982 the USA indicated its disagreement with the straight baseline system established by Burma in 1977 that enclosed the Gulf of Martaban.182

France, Singapore, and Thailand also protested against the Vietnamese proclamation of 12 November 1982 on the straight baselines on the ground that these baselines do not comply with the relevant rules embodied in the TSC and LOSC.183 China has also stated, inter alia, that the Vietnamese proclamation is “to appropriate a vast area of the Beibu Gulf”.184 In defence, Vietnam has relied on Article 7(5) of the LOSC (Art.4(4) of the TSC) for justification of its straight baseline system.185 This provision enables States to draw straight baselines on the basis of “economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage.” It appears that Vietnam relied on fisheries interests to indicate that there are were economic interests which justify the drawing of straight baselines.186 North Korea also established a straight line in 1977 to constitute the inner limit of its “military” or “security” zone in the Sea of Japan extending to 50 miles seaward of this line. This straight line does not fall into the category of straight baseline systems as it is not explicitly claimed by North Korea. Notwithstanding, the line (which is almost 300 miles in length) is

of the seas enclosed by straight baselines in comparison to the application of low-water mark are calculated and then the result is divided by the length of baselines. This forms the index which indicates the additional areas of inland waters in square miles for each nautical mile of straight baseline. If the index demonstrates a high value, it can be an indication that the straight baseline system was drawn inconsistent with the contractual and customary rules for straight baselines. For example, while the index for Senegal and Guinea-Bissau is 0.5 and 1 respectively, the index for Haiti and Venezuela is 10.6 and for Ecuador is 13. See Prescott, op. cit., 1985, pp.68-69.

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considered to be at variance with the general direction of the coast.\textsuperscript{187} In a protest to the 1977 announcement of North Korea, the United States of America reiterated, \textit{inter alia}, its position on the issue of the baselines. It was stated that “unless exceptional circumstances exist, baselines are to conform to the low-water line along the coast”.\textsuperscript{188} (See Map 2.6.)

\textbf{Map 2.6}

North Korea’s Straight Baseline


\textsuperscript{188}The United States of America Note (4 January 1990) communicated to the United Nations, The Law of the Sea: Current Developments in State Practice No. III, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, 1992, p.145. In its note, the United States of America also expressed that according to customary international law and the LOSC the maximum breadth of the territorial sea is 12 n.m. “measured from properly drawn baselines” and that the LOSC “does not recognise the right of coastal States to assert powers or rights for security purposes in peacetime which would restrict the exercise of the high seas freedoms of navigation and overflight beyond the territorial sea.” (emphasis added) Ibid.
China issued a Declaration on 15 May 1996 identifying the basepoints for the straight lines used as baselines of its territorial sea.\textsuperscript{189} China first claimed the straight baseline system on 4 September 1958 when it promulgated a declaration - "Declaration of the Government of the People's Republic of China on China's Territorial Sea". This declaration was announced after the ICJ Judgement in the \textit{Fisheries Case} (1951) and the conclusion of the 1958 Geneva Conventions (particularly the TSC which contains provisions on the use of straight baselines). Paragraph 2 of the 1958 Declaration provided that the baseline of the Chinese territorial sea is "the line composed of the straight lines connecting base-points on the mainland coast and on the outermost of the coastal islands".\textsuperscript{190} The Declaration did not define the basepoints for the straight baselines. Although China did not have a delegation in the UNCLOS I, it seems that China has relied on the ICJ's decision in the \textit{Fisheries Case} and on straight baseline provisions of the TSC to announce its baseline method. As its first basic law on jurisdictional sea areas, China (the National Congress) enacted the "Law of the Territorial Sea and the Contiguous Zone" on 25 February 1992. This law reaffirmed the baseline method announced by the 1958 Declaration. Article 3 of the Law asserts that "[t]he baseline of the territorial sea of the People's Republic of China is designated with the method of straight baselines, formed by joining the various basepoints with straight baselines".\textsuperscript{191}

The Law does not include any provision on the use of the low-water mark around the Chinese coastline. This indicates that China has intended to enclose as much maritime areas as possible by drawing straight baselines. Without doubt such delimitation of inner limit of the territorial sea (and other maritime areas) would impact on the freedoms of the seas, particularly the right of navigation.\textsuperscript{192} The Law did not define the

\begin{itemize}
\item \textsuperscript{190}\textit{The Law of the Sea - Baselines: National Legislation With Illustrative Maps}, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, p.104. Paragraph 2 of the 1958 Declaration also states that "[t]he water areas inside the baseline, including Pohai Bay and Chiuanghai Straits, are Chinese inland waters. The islands inside the baseline including Tungyin Island, Kaoteng Island, the Matsu Islands, the Paichuan Islands, Wuchiu Islands, the Greater and Lesser Quemoy Islands, Tatan Island, Erhatan Island and Tungting Island, are islands of the Chinese inland waters". \textit{Ibid.}
\item \textsuperscript{191}\textit{The Law of the Sea: National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone, op. cit.}, p.86.
\item \textsuperscript{192}This is especially the case with regard to the passage of foreign warships through the Chinese territorial sea since China requires prior authorisation from the Government of China before
\end{itemize}
basepoints for the claimed straight baselines. These basepoints, however, were declared by China on 15 May 1996 in the pursuance of Article 15 of the Law.

The 1996 Chinese Declaration contains geographical coordinates for the straight baselines of part of China's mainland (and the Hainan Island) territorial sea (49 basepoints) and those of Xisha (Paracel) Islands territorial sea (28 basepoints). The former is drawn from the northern section of the Chinese coast to the west of the Hainan Island, totalling 1,734.1 miles in length and the total length of the latter is also 282.1 miles. Since the official declaration of the straight baseline system of China, this system has been analysed by a number of writers. With regard to the former set of straight baseline, although parts of Chinese coastline are deeply indented and fringed with islands, some basepoints are deemed inappropriate for the reason that no particular geographical circumstances justify their use as an alternative for the low-water mark. Also the use of certain low-tide elevations by China as the basepoints is considered to be inconsistent with the provisions of Articles 7(4) and 13(1) of the LOSC (also Articles 4(3) and 11(1) of the TSC).

In addition, there is a question as to whether the western line of the Hainan Island is a segment of newly declared Chinese straight baselines or is a separate line. (See Map 2.7.) It was on 8 June 1964 that China proclaimed the waters located within the Hainan Strait as internal waters on historic grounds. The proclamation established the eastern and western exercising such passage. See Article 6 of the 1992 Chinese Law of the Territorial Sea and the Contiguous Zone. Ibid. p.87.

The Declaration ends by stating that the remaining baselines of the territorial sea of China will be declared in another time. The Declaration does not provide the baseline from the Chinese land territory with North Korea to point 1 of the Declaration (including the Bo-Hai area), along its coast in the Gulf of Tonkin, or around other islands in the South China sea claimed by China. Limits in the Seas, No.117, Ibid., op. cit., p.1.

Ibid., pp.3 & 16. Smith opines that in the area of the segments 8-9, 9-10, and 10-11 the appropriate baseline is low-water mark. By the application of these segments, about 1,995 sq.nm (6,831 sq.km.) of the high seas are converted into the Chinese territorial sea and about 550 sq.nm (1,880 sq.km) of the Chinese territorial sea into its internal waters. Ibid., p.6.


 Authorities in China have also excluded the use of certain low-tide elevations by China to the baselines, and the segment 31-32 is also viewed by Smith as to "cut off the eastern approaches to Hainan Strait, an international strait". Ibid., pp.7 & 8.

According to Smith, there are eight low-tide elevations off China's coast which are not located within 12 miles of the mainland or an island, and also there are no lighthouses or similar installations on them. Ibid., p.6.
lines connecting the Hainan Island to the Chinese mainland.\textsuperscript{198} Since 1964 China has made navigation through the Strait of Hanian subject to its provisions on internal waters. Accordingly, China has excluded foreign warships from exercising navigation through the strait. In addition, foreign non-military vessels intending to pass through the strait have been required to inform the Chinese Government two days before their voyage. Provided that the permission is granted, foreign non-military vessels are entitled to navigate through the strait.

**Map 2.7**

China’s Straight Baselines (Mainland and Hainan Island)


The separate straight lines drawn around the Xisha (Paracel) Islands\textsuperscript{199} have been criticised on the basis that this group of islands is situated far away from the mainland and that the normal baseline for the scattered islands of a continental State is the low-water mark.\textsuperscript{200} China’s view is that it does not use archipelagic baselines which are only applicable to archipelagic States but it applies straight baselines around the Xisha

\textsuperscript{198}The eastern line connects points 20°9.62’N;110°41’E and 20°26’N;110°30.37’E and the western line links points 20°13.5’N;109°55.5’E and 20°00.37’N;109°42.1’E. Prescott, *op. cit.*, 1996, p.16.

\textsuperscript{199}The Xisha (Paracel) Islands are composed of two main groups of islands - Crescent and Amphitrite, three isolated islands - Triton, Passu Keah and Lincoln, four large reefs - Bombay, Vulladore, Discovery and North, and Pyramid Rock. *Ibid.*

\textsuperscript{200}It is held that it is possible for an island to have straight baselines, if the requirements of Article 7 of the LOSC are met. *Limits in the Seas, No.117, op. cit.*, p.8.
islands. Accordingly, these straight baselines are not subject to the requirements made by Article 47 of the LOSC for the validity of archipelagic baselines, including the limitations on the maximum permissible length for such baselines. Although China relies on the straight baselines method for the Xisha Islands to avoid criticism of the baselines on the ground of the application of archipelagic baselines, the Chinese reasoning appears to be questionable.

Map 2.8
China’s Straight Baselines (Xisha (Paracel) Islands)


The main question which arises from the enclosure of the Xisha (Paracel) Islands is the status of navigation and overflight in and over waters located between the islands. The use of lines to enclose the waters within the islands lead to the conversion of waters from the high seas or territorial seas status to internal waters where foreign ships generally have no right of navigation and no foreign aircraft may fly over these waters without permission of the sovereign power. Although it may be said that

201 This view was expressed during a discussion with Professor Chen Degong on the Chinese straight baselines at the University of Wollongong on 1 November 1996. Professor Degong of the China Institute for Maritime Development Strategy was a visiting scholar at the Australian National University (August - October 1996). As regards the use of the low-tide elevations as basepoints for the Chinese straight baselines, Professor Degong also asserted that there are lighthouses on these elevations which may justify the use of straight baselines. However, these low-tide elevations do not meet the requirement of Article 13 (1) of the LOSC (Article 11(1) of the TSC).
the maritime spaces within the islands are not suitable for navigation due to their shallowness, and even though there are shipping routes around the islands, these facts do not justify the use of lines connecting outermost points of outermost islands in the island group of Xisha (Paracel). Further, if navigation may not practically be possible in waters within islands, flight over the waters may be practicable. Therefore, it should be made clear what the legal status of waters within the islands is, particularly due to the provision of Article 8(2) of the LOSC (Article 5(2) of the TSC) which stipulates that “[w]here establishment of a straight baseline ... has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage ... shall exist in those waters”.

One recent instance is the new Omani straight baseline system in the strait of Hormuz. Following Article 2(c) of its Royal Decree of 10 February 1981, Oman issued the Notice of 1 June 1982 describing geographical coordinates for application of straight baselines. This Decree mainly led to two main reactions from interested States, namely those of Iran (1983) and the United States of America (1991). In its Note of 4 February 1983, Iran describes the Omani Note as “the unilateral extension of the internal waters and territorial sea of Oman”. Relying on provisions of Articles 4 and 5 of the TSC and Article 8 of the LOSC, Iran asserts that:

the notification (Omani Note of 1 June 1982) shall not alter the legal nature of this area in connection with the passage right of the third countries’ ships, that they have exercised traditionally and historically. (emphasis added)

The United States of America used the same reasoning for its disagreement to Omani straight baselines as it did with regard to the 1977

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202Royal Decree of Oman concerning territorial sea, contiguous zone, continental shelf, and exclusive Zone, 10 February 1998. Article 2(c) states that Oman will apply straight baselines in certain areas of its coast according to the incoming directive for such a purpose. Ibid., p.78.

203The Law of the Sea: Current Developments in State Practice (No. I), op. cit., pp.80-81. The geographical coordinations are described for four sections.

204Ibid., p.82.

205Article 8(2) of the LOSC (and also Article 5(2) of the TSC) provides that “[w]here establishment of a straight baseline ... has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage ... shall exist in those waters”. In this regard, Smith writes that “[p]reservation of innocent passage carries over pre-existing rights in waters that were territorial in nature before the application of straight baselines”. (emphasis added) Limits in the Seas, No.117, op. cit., p.5.

206The Law of the Sea: Current Developments in State Practice (No. I), op. cit., p.82.
North Korea proclamation, that is the baselines should follow the low-water line along the coast. The United states of America pointed out the legal requirements for application of the baselines and argued that these requirement were not met with regard to the Omani coast. 207

While the TSC (Article 4(3)) and the LOSC (Article 7(4)) do not allow for the drawing straight baselines from and to low-tide elevations208 except in certain circumstances209, the 1958 Decree of Saudi Arabia considers the possibility of the use of low-tide elevations as base points for linking straight baselines without referring to these circumstances. The provision states “where a shoal is situated not more than 12 nautical miles from the mainland or from a Saudi Arabian island, lines [may be] drawn from the mainland or the island and along the outer edge of the shoal.”210

Some European countries such as Belgium, Bulgaria, Greece, Poland and Romania are stated to have drawn straight baselines which depart from the general direction of the coast.211 While some European countries use straight baselines only for parts of their coasts (like the United kingdom and the Netherlands), certain European coastal States have drawn straight baselines in all or major parts of their coasts. The clear example of the latter is Norway whose baseline system was recognised by the ICJ in 1951.212 The USSR (now Russia) has also applied straight baselines which

208A low-tide elevation is defined as “a naturally-formed area of land which is surrounded by and above water at low tide but submerged at high tide.” (Art. 11(1) of the TSC and Art. 13(1) of the LOSC) The difference between a low-tide elevation and an island is that the former is only above sea level at low-tide but the latter is always above sea level, even at high tide. The similarity between them is both are “naturally-formed area of land”. For definition of an island see Art. 10(1) of the TSC and Art.121(1) of the LOSC. Cf Art.121(3) with respect to status of rocks unable to sustain human inhabitants or economic life of their own.
209Whereas the TSC allows the consideration of low-tide elevations only where there are lighthouses or similar installations permanently above sea level thereupon, the LOSC also allows the drawing baselines to and from these elevations where it has been generally recognised by international community.
210Article 5(c) of the Decree No. 33 of 6 February 1958.
211The Law of the Sea: Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, 1994, p.121. (Hereinafter The Law of the Sea: Practice of States) In 1991 the European Court of Justice examined the baselines of the United Kingdom for fisheries purposes in accordance with EEC Regulation No. 170/83. The Court held that the application of low-tide elevations by the United Kingdom after the adoption of the Regulation is not to be taken into account for delimitation of fisheries zone. Accordingly, the existing baselines at the time of the adoption of the Regulation should be taken into account. See the Judgement of the European Court of 9 July 1991, Case C-146/89, Journal Officiel des Communautes Europeenes, 11 July 1991, No. C 201/9.
212For an analysis of the straight baseline system of Iceland of 11 March 1961 and of 14 July 1972 (the revised baseline system) see Straight Baselines: Iceland, Limits in the Seas No.34 (In two series),
are considered to be extensive. A list of geographical coordinates was provided by the Decree of the USSR Council of Ministers (7 February 1984) to apply straight baselines along the coasts located in the Pacific Ocean, the Sea of Okhotsk and the Bering Sea.213 In its Decree of 15 January 1985, the Council of Ministers provided a new list of geographical coordinates for the application of straight baselines along the coasts of the Arctic Ocean, the Baltic and the Black Seas.214

Canada has proclaimed the application of straight baselines for parts of its coasts in different times - in 1967 for Labrador and Newfoundland, in 1969 for Nova Scotia, Vancouver and Queen Charlotte Islands, and in 1985 for the Arctic islands.215 The most controversial Canadian straight baselines were those drawn around its Arctic archipelago. (See Map 2.9 below.) This baseline proclamation faced protests from the United States and the European Community.216 Canada does not consider that the enclosure of waters inside its Arctic islands is a matter of applying archipelagic baselines. It, in fact, justifies its claim on the close relation between the Canadian mainland and the islands (particularly because of persistent frozen waters) and on historic titles.217

In a protest to the 1985 Canadian claim on the Arctic archipelago, the USA particularly stated it cannot accept such claim "because to do so would constitute acceptance of full Canadian control of the Northwest Passage and would terminate U.S. navigation rights through the Passage under international law."218 (emphasis added) Also the European Community did not accept that the Canadian baselines around its Arctic coast are justifiable (even by relying on historic title) and accordingly reserved the rights of its members "in the waters concerned according to international law".219 The European Community pointed out that:

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214 Ibid.
215 Limits in the Seas (No.112), op. cit., p.20. All the Canadian claims on the use of straight baselines have been protested by the USA. See ibid., p.25.
218 State Department File No. P86 0019-8641. Cited in Limits in the Seas (No.112), op. cit., p.25 (no.45).
219 British High Commission Note No. 90/86 of July 9, 1986. Cited in Limits in the Seas (No.112), op. cit., p.25 (no.46).
The validity of the baselines with regard to other states depends upon the relevant principles of international law applicable in this case (the Canadian coast in the Arctic), including the principle that the drawing of baselines must not depart to any appreciable extent from the general direction of the coast.220

Map 2.9
Canadian Arctic Archipelagic Baselines


V. Conclusion

The existence of a large number of straight baseline systems inconsistent with established rules has generally raised a question as to what has persuaded States to proclaim such systems where the normal baselines should have been employed. As was made clear, coastal States prefer to use straight baselines because their application place “the outer limit of their various maritime zones farther seawards than other methods of drawing the baseline.”221 (emphasis added) In addition, a number of interests are involved in persuading coastal States to extend their control

220 Ibid.
221 Churchill and Lowe, op. cit., p.29.
over the seas by applying straight baselines. The main interests are of political, security, and economic interests. Any of these interests individually or a combination of them might be relied upon by claimant States to use straight baselines for different purposes.

Although the essential rules on straight baselines were established by the ICJ in 1951 and later incorporated into the TSC and the LOSC, these rules are not precise enough to prevent derivations thereof. As Churchill states this inaccuracy gives “a considerable latitude (to coastal States) in the way they draw straight baselines.”

In addition, the rules on straight baselines were set up for being used in exceptional cases similar to that of Norwegian coast. Notwithstanding, many coastal States have applied straight baselines, in whole or in part, along their coasts. Accordingly, many maritime spaces have been enclosed by national claims that have reduced the extent of the free seas and have impacted on the right of navigation. (For the development of States’ claims on straight baselines over time see Table 2.2 and Figures 2.2 and 2.3 below.)

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222For examination of geographical, economic, and historic factors justifying the employment of straight baselines with respect to coastal archipelagos see, for example, Munavvar, Mohamed, Ocean States - Archipelagic Regimes in the Law of the Sea, Martinus Nijhoff Publishers, Dodrecht, 1995, pp.24-26.

223 Prescott writes that the improper use of straight baselines “is primarily designed to increase the width of the combined zone of internal and territorial waters for security purposes”. (emphasis supplied) Prescott, J. R. V., op. cit., 1987 (Straight and Archipelagic Baselines), p.39. It is also added that these baselines are used to obtain an advantageous position in regard to the “common boundaries” where there is a need for negotiation among States concerned. Ibid.

224 Churchill asserts that the rules on baselines “should be formulated in as precise and objective a way as possible, so that two cartographers, asked to draw baselines along a particular stretch of coast, would both arrive at the same result.” Churchill and Lowe, op. cit., p.26.

225 Ibid., p.30. The significant interests of coastal States to proclaim straight baselines in comparison to other baseline methods is that “the use of such lines is likely to place their baseline (and hence the outer limit of their various maritime zone) further seawards than other methods of drawing the baseline.” Ibid., p.29.

226 As a consequence of the lack supervisory authority and of the widespread use of straight baselines, Prescott maintains that “it would now be possible to draw a straight baseline along any section of coast in the world and cite an existing straight baseline as a precedent”. Prescott, J. R. V., op. cit., 1987 (Straight and Archipelagic Baselines), p.38. Although it might not be a legal strong basis to rely on any other baseline system as a justification for validity of a new baseline system, Prescott’s view indicates the generalisation of the application of the straight baselines without paying attention to the point that these baselines were supposed to be applied in coastlines with special geographical features.
### Table 2.2
Changes in Number of States Proclaiming Straight Baselines Over Time

<table>
<thead>
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<th>Year</th>
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<td>1935</td>
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<td>1945</td>
<td>1</td>
<td>1985</td>
<td>54</td>
</tr>
<tr>
<td>1955</td>
<td>1</td>
<td>1995</td>
<td>61</td>
</tr>
<tr>
<td>1965</td>
<td>11</td>
<td>...</td>
<td></td>
</tr>
</tbody>
</table>

*The figures do not include those States which have not yet delimited their straight baselines and not those States which have considered the future application of straight baselines. These two groups of States amount to twelve States. Taking into account these States, the total number of States claiming straight baseline systems would be some 73 States, that is to say more than half of coastal States.

### Diagrams of Changes in Straight Baseline Claims Over Time

**Figure 2.2**
Figure 2.3

Number of States

Years

1935
1945
1955
1965
1975
1985
1995

0 10 20 30 40 50 60 70
Chapter Three

Delimitation of Single-State Bays
Chapter 3
Delimitation of Single-State Bays

I. Introduction

This chapter examines the long-standing issue of the delimitation of bays in the law of the sea. The focus of this chapter will be on the discussion of issues related to the delimitation of bays which are bordered by single States (single-State Bays). Many States have extended their jurisdiction over adjacent areas through enclosure of certain coastal indentations. This chapter will demonstrate how States have relied on many means to even enclose more larger bays.

Although the role of the law of the sea has been to regulate the delimitation of bays, this regulation is mainly related to those located in the coasts of single States. In addition, there are many ambiguities or shortcomings in the conventional rules which have paved the way for liberal interpretations or discretion by coastal States. Despite these problems, the creation of rules on the delimitation of bays has brought about a large degree of certainty and uniformity to the enclosure of coastal indentations and has prevented any larger enclosure of regular bays.

As one author points out, the question of national sovereignty in bays has been “one of the unsettled questions in the law of the sea.”¹ The issue of the delimitation of bays has, in fact, been part of the overall problem of competing interests in the law of the sea, those of exclusive interests versus inclusive interests.² This is why it is truly viewed that such an issue as part of the issue of the delimitation of internal waters has been developed through “the constant and nearly universal contest between those who defend the principle of freedom of the seas and those

²This is due to the different effects created by enclosure or non-enclosure of bays. As one author writes “if a bay can be enclosed by a baseline across its mouth, this is advantageous to the coastal state in that it results in an extension of the territorial sea and means that waters on the landward side of the closing line are internal. If, however, the starting point for measurement of the territorial sea is the low-water mark around the coast of the bay, the area of the territorial sea is correspondingly reduced.” Dixon, Martin, *Textbook on International Law*, 2nd Edition, Blacstone Press Limited, London, 1993, p.191.
who espouse enlarging the exclusive sovereignty of States over coastal waters.”

There have been two elements concerning the delimitation of bays: particular element, the exclusive interests of coastal States, and the general element, the exclusive interests of other States. In this context, the role of the law of the sea has been to strike a fair and stable balance between these competing interests. The main task has been to find a solution which meets the essential interests of coastal States while the freedoms of the seas are reasonably protected. The question has been whether the interests of costal States had to be modified for the benefit of the international community or vice versa. Bouchez suggests three ways of approaching the issue, that is:

(a) establishment of general rules for the uniform application in all parts of the world through which sovereignty of coastal States is respected;

(b) examination of bays individually on the basis of case by case to meet the special interests of coastal States; and

(c) creation of general rules but being flexible to respond to certain cases as exceptions to general rules.

Bouchez argues that the third approach has been supported and put into effect by the contemporary law of the sea. He argues that “the guiding principle in dealing with claims to bays should be that the general element prevails over the particular, although in the interest of an equitable solution sometimes the reverse may be preferable.”


5 Ibid., pp.25-26. For appraisal of these approaches see ibid.

6 Ibid., p.26. This is the trend followed by Article 7(5, 3, and 6) of the TSC. Article 7(6) excludes the historic bays for which "the particular element prevails over the general." Ibid.
II. General Definition of Bays and Gulfs

Before discussing the issues related to the delimitation of bays, it is useful to provide a general definition of the term “bay”. As will be seen, the law of the sea has also introduced a legal definition for this term as a legal bay.

Bays are categorised as one of the geographical features of the coastline. They are formed as “the result of erosion activities by ocean waves and currents.” Shalowitz defines the term “bay” as “a subordinate adjunct to a large body of water; a penetration of that large body of water into the land; a body of water between and inside of two headlands.” The arbitral tribunal in the North Atlantic Fisheries Case (1910) defined a bay in its geographical sense. The tribunal said that in a geographical sense “a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.”

Although general dictionaries make a distinction between bays and gulfs, in practical sense the distinction line is not a clear one. A “bay” is defined as “a small indentation of the coast” while a “gulf” is defined as “a

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7 Other terms generally used for the coastal indentations include inlets, locks, firths, and estuaries.
8 Other terms have also been used to imply the same meaning as that of legal bays. These terms include “juridical bays”, “bona fide bays”, “true bays” and “actual bays”. A legal bay whose mouth is completely closed by the application of a closing line is called a closed bay (that is a bay whose waters are national or interior waters) and a bay which does not fall into the category of closed bays is called open bay: (that is a bay whose waters are part of the territorial sea). Those legal bays which are not entirely closed by the use of permissible line of 24 nautical miles can be called semi-closed bays. While waters behind the twenty-four mile line are internal waters, waters of the bay not covered by such a line constitute part of the territorial sea.
12 Award of 7 September 1910, The North Atlantic Coast Fisheries Case (United States of America/Great Britain), Permanent Court of Arbitration, Reports of International Arbitral Awards, Vol.11, 1910, pp.174-202, at 198. [Hereinafter Award of 7 September 1910] The arbitral tribunal also enumerated a number of factors which had to be taken into account in determination of an indentation as a bay. These factors were (a) the relation of the width of a bay to the length of its penetration inland, (b) the possibility and the necessity of its being defended by the State in whose territory the bay is indented, (c) the special value which the bay has for the industry of the inhabitants of its shores, (d) the distance which the bay is secluded from the highways of nations on the open sea and “other circumstances not possible to enumerate in general.” Ibid., p.199.
large indentation of the coast." In practice, there are cases where small indentations are known as gulfs, and indentations with a large size are called bays. For instance, the area of the Hudson Bay is larger than the Gulf of St. Tropez whose entrance is only four kilometres. This is a problem of terminology and all indentations of coasts are examined on their legal merits regardless of their geographical name.

III. Historical Background of the Issue of the Delimitation of Bays

Classical international law had not resolved the issue of the delimitation of bays bordered by single States in a concrete way. Although it was part of customary law that true bays could be enclosed there were no definite rules to govern the regime of demarcation of bays. There was an uncertainty in determination as to what bays could be enclosed. This uncertainty lasted until 1958 when the codification of the TSC ended the controversy over issues existed in the traditional law of the sea concerning the demarcation of bays.

As Strohl writes, history evidences that since early times many people settled around coastal indentations. Westerman also states that the first positive laws on the seas provided protection for such coastal areas which were vulnerable against any external attack. The first recorded document which contained the term “bay” was the treaty concluded between the Emperor Charles V and King Francis I on 2 August 1521. However, the early agreements on bays did not provide a

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14 Judge McNair recognised the exclusion of indentations which constitute landlocked waters from the delimitation rule of the low-water mark, “by whatever name they may be called.” He then pointed out that “[i]t is usual and convenient to call them “bays”, but what really matters is not their label but their shape.” (emphasis added) Dissenting Opinion of Judge McNair, Fisheries Case (United Kingdom v. Norway), ICJ Reports, 1951, p.163. [Hereinafter ICJ Reports, 1951.]


16 For the examination of the concept of bays and gulfs in geographical and legal contexts see Bouchez, op. cit., pp.16-19.

17 For the origins of the issue of bays in historical context see Strohl, op. cit., pp.8-20.

18 Ibid., p.20.


20 Strohl, op. cit., p.8.
clear definition of this term and they only referred to this term in a vague way.

Throughout the seventeenth century to the twentieth century, a process of reconciliation between the theory of open seas and closed seas was shaping. Part of this process was the range of exclusive rights of coastal States and that of inclusive rights of international community in certain waters adjacent to land mass of coastal States. Notwithstanding, inland waters in general and bays in particular were recognised as being completely under absolute sovereignty of coastal States. For example, even Grotius, as the defender of the classic theory of *mare liberum*, excluded from the application of the theory “inland seas, bays, straits, and as large a sea as can be sighted from land. ... In *De Jure Belli et Pacis* (1625) he reiterated that a bay or strait may be occupied by the state which owns the land on both sides unless the bay is so large in relation to the surrounding land mass that it cannot be considered a part of it.”21

Writers following Grotius argued that, in the case of a deep indentation of the coast where there is a close relation between land and the body of water within the indentation, the freedom of the high seas may not be relied upon since in the case of such indentation “the social, economic, and defense interests of the coastal state become paramount.”22 For example, Cauchy (1862) writes that:

... a state of liberty, of free navigation, of common and indivisible enjoyment is the normal, natural, and actual status of the sea just as private possession, cultivation, or division constitutes the natural, normal, or actual state of land. But this first principle of maritime law is transformed and modified where the sea approaches the land and becomes almost confuse with it. Reasons upon which liberty of the open sea is founded no longer apply with the same force to either bays or gulfs by which the sea penetrates into the land.23 *(emphasis added)*

The view of Creasy (1876) is also worthy quoting. He maintained that:

Those portions of the sea, which are landlocked, and almost enclosed within the territories of a State, which are *inter fauces terrae* ... are clearly within the exclusive territorial jurisdiction of the state whose lands gird them round. In the case also of bays, or portions of the sea not so completely enclosed, but which is a line drawn from one

22Ibid., p.46.
promontory or other excrescence of land to another, the State whose territories thus clap these oceanic waters, claims and exercises jurisdiction over them.24

In 1877, the [British] Privy Council in the case of Direct United States Cable Co. v. The Anglo-American Telegraph Co. advised that “the general law of nations, as indicated by the text of writers on international jurisprudence” demonstrates that there was “an universal agreement that harbours, estuaries and bays landlocked belong to the territory of the nation which possesses the shores round them”. However, there was no “agreement as to what is the rule to determine what is ‘bay’ for this purpose.”25

It was not until nineteenth century that jurists tried to identify the juridical nature of bays by distinguishing their waters from those of open seas. In the nineteenth century, the distinction was however made by the use of such terms as “territorial”, “littoral, or “jurisdictional” waters.26 In addition, there still existed the problem of the area of waters which can be enclosed under the rule established for bays. In fact, due to the geographical characteristics of bays as arms of the sea and their close relationship with land mass, no limits were primarily placed for the area of the waters within bays.27 However, by the introduction of the doctrine of territorial waters (now territorial sea), jurists started to lay limits on the size of bays which could be enclosed.28 This particularly was required since the closing line of bays had been accepted to play the role of baseline for the measurement of the territorial sea.29

In accordance with the existing trends in the 1920s, Jessup (1927), states that three suggestions were developed with regard to enclosure of bays:

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26Westerman, op. cit., p.47. See also the view of Lord Hale in ibid., no.53.
27In fact, there existed then only such inaccurate criteria as the range of vision from one shore to another.
28Ibid.
29By the introduction of the doctrine of territorial sea, the clear distinction between internal waters and territorial waters (that is the territorial sea) was also achieved.
(a) the strict application of the three mile limit for the territorial sea to
the case of the delimitation of bays, that is the method of double range of
this limit (six miles) as permissible length of the closing line of bays;

(b) the rule which developed in certain conventions that mouths of
territorial bays should not be longer than ten miles; and

(c) the headland theory according to which all bays are territorial and
can be enclosed by drawing a line between headlands, regardless of the
width of the mouth. An example of the application of the headland
theory is the case of Russia which drew such a line 120 miles long
between the capes of Swietor and Kanin in the Barents Sea in 1910.

Although there was no uniform practice on the maximum permissible
length of the closing line of a true bay, there was a minimum standard.
The validity of the twice three-mile limit as a minimum limit was not
challenged and bays whose mouths were six miles or less were
undoubtedly considered as territorial.

The following parts will discuss the trends reflected in (a) the
opinion of authors, (b) the agreements between States on the issues related
to the delimitation of bays belonging to single coastal States, (c) views of
tribunal and judicial bodies, and (d) the international efforts in finalising
these issues.

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30 For example, Oppenheim asserted that bays with an entrance from the sea not more than six miles wide
are certainly territorial while those that have an entrance too wide to be commanded by coastal batteries
further states that "[b]y custom, however, and by treaty and in special convention the six mile limit has
frequently been extended to more than six miles." Jessup, Philip, *The Law of Territorial Waters and

31 Ibid., pp.355-356 and 358. Jessup further makes a distinction among two groups of authors who
favoured the headland theory. Both groups were in common that a line should be drawn from
promontory to promontory. However, one group (which was composed of such authors as Azuni, Von
Liszt, Creasy, and Halleck) was in the opinion that the waters seaward the line are part of the high seas
while the other group was of the view that waters outside the line up to three miles are part of the
territorial sea and the high seas would fall beyond this limit. Ibid., pp.358-359.


34 For a detailed examination of the developments on the treatment of bays in the historical context before
the UNCLOS I see Westerman, Chapter III (The Historical Treatment of Bays), pp. 32-74, where the
author examines the history of general practices with respect to bays from ancient time (including
Roman practice), to the nineteenth century, and finally to the twentieth century up to 1951 when the
Fisheries Case was dealt with by the IJC. Also for navigational, economic aspects of bays for the
periods of the Roman Empire, the fall of Rome to 1800, and from 1800 to 1963 see Strohl, *op. cit.*, pp.19-53, 97-138, and 139-182 respectively.
1. The Views of Publicists on the Delimitation of Bays: The Period between 1800 to 1910

The issue of the legal regime for treatment of bays was one of the concerns of the publicists in the nineteenth century and it also continued to be so in the twentieth century. In the period between 1800 and 1910 many legal scholars expressed their views on why certain coastal indentations should be treated in a special way different from other parts of coastlines. They were in agreement that because of close relationship between the land and waters within bays, these coastal indentations could be considered as part of national territory of coastal States. Meanwhile, these scholars were concerned that the unregulated and unilateral enclosure of wide indentations might impact on the size of the open seas available to all countries. This was why a number of methods were suggested to restrict the enclosure of coastal indentations to a specific limit.

Although some publicists were convinced that bays were susceptible of enclosure as part of the territory of a coastal State, they did not propose any rule on finding those bays which should be treated so. For example, in his book The Law of Nations (1916), Vattel (of Switzerland) maintained that “[a] bay, entrance into which can be prevented, may be possessed and made subject to the laws of the sovereign” but he did not mention what bays were to be subject to national domain. Bluntschli (of Germany) also argued that “[c]ertain parts of the sea are so closely united to the land that they ought, in a certain measure at least, be considered as

35Lapradelle of France (1898), for example, maintained that harbors, roadsteads and bays “form part of what may be called the national sea, in order to express the idea that the waters that penetrate thus closely into the land form a body within the territory and are associated with it forming the country. Strohl, op. cit., 190.

36For example, Testa of Portugal (1886) asserted that ports, creeks, and bays which could be defended by the cross-fire of artillery “belong, under the title of property to the nation which is mistress of the shore” and “the right of property gives rise to a right of domain ...” Ibid., pp.193-194. Also Westlake (1910) was of the view that as regards bays “if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question - that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth - there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand.” (emphasis added) Quoted in the dissenting opinion of Dr. Luis M. Drago, Grounds for the Dissent to the Award On Question V by Dr. Luis M. Drago, The North Atlantic Coast Fisheries Case (United States of America/Great Britain), Permanent Court of Arbitration, Reports of International Arbitral Awards, Vol.11, 1910, pp.203-211, at 205. [Hereinafter Grounds for the Dissent to the Award On Question V by Dr. Luis M. Drago (1910)]

37For example, Rivier (1896) was of the view that “[a] gulf, even though surrounded by a single State, is a free sea if its entrance is too wide to be dominated from the shore.” Strohl, op. cit., p.193.

38Ibid., p.188.
a part of the territory of the adjacent State." He did not provide any precise limit for the entrance of a bay but made it clear that an exception to the general rule of the liberty of the seas was only possible on serious grounds and when the extent of the bay is small. (emphasis added)

Notwithstanding, there were scholars who not only argued that bays had special geographical character but proposed various ways to distinguish eligible indentations for the enclosure purpose from those which were too large to be enclosed. The problem, however, was that some of the suggestions on the delimitation of bays were not of certain limit. This uncertainty proved to cause some difficulties in determining an indentation as a bay. For instance, uncertain proposals included: "those bays which could be defended by cannon" (Cussy of France, 1856), "cross-fire of guns" (Testa of Portugal, 1886 and Calvo of Argentine, 1896), cannon shot rule or range of cannon shot (Hautefeuille of France, 1868, Kleber of Germany, 1874, Liszt of Germany, 1907, and Despagnet of France, 1910), double range of cannon but not more than ten miles (Latour of France, 1889). Since there was no uniform practice on the method of delimitation of bays, some writers referred to a number of ways which could be used in the delimitation of bays. For instance, Ortolan of France (1853), inter alia, suggested that bays which were not larger than twice range of cannon or those whose entrance may be controlled by artillery were qualified to be closed. There also existed proposals based on specific limits. These proposals were made at the end of the nineteenth century or early twentieth century when it became clear that there had to be a precise criterion for the maximum width for the entrance of those bays which could be qualified as closed bays. The proposals included such distances as ten miles (Rivier of Switzerland, 1868).

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39 Ibid.
40 Ibid.
41 In the case of Direct United States Cable Co. v. The Anglo-American Telegraph Co. (1877), the [British] Privy Council referred to different opinions expressed by writers. See Phillimore, op. cit., Vol.1, pp.289-290.
43 Liszt described the cannon shot rule with respect to bays in the following words: "The border of the inner portion of bays and inlets is determined by drawing an imaginary straight line from headland to headland at the width of the bay where the middle point of the line can be reached by the cannons placed upon both headlands of the shore." Strohl, op. cit., p.191.
44 Ibid., pp.188, 189, 190, and 193.
45 Ibid., p.192. Nys of Belgium also proposed three distances for the mouth of those bays susceptible to enclosure. These distances were ten miles, 12 miles, and the distance twice cannon range. Ibid., p.191.
2. The Limit Adopted for the Territorial Bays in Bilateral and Multilateral Treaties in 19th and 20th Centuries

Although States applied different limits for the enclosure of their bays, there was a trend in the nineteenth century, which was followed in the early twentieth century, to include the ten mile limit for the delimitation of bays. Many agreements, in particular fisheries agreements, were concluded in the nineteenth and early twentieth centuries that adhered a limit of ten miles for the delimitation of bays. It seems that at that time it was supposed that the ten mile limit would be a proper basis for striking the balance between the interests of coastal States and those of international community of States. However, the rule was not internationally followed to be a rule of international law. This was due to the fact that such limits as twelve miles were also used for the maximum width of territorial bays. The main bilateral and multilateral agreements which provided a maximum length of ten miles for the width of national bays were:

(a) The 1839 Franco-British Treaty on Fisheries (2 August 1839);
(b) Regulations between Great Britain and France, 24 May 1843\(^{50}\);
(c) Treaty between Great Britain and France, 11 November 1867\(^{51}\);
(d) Agreement between Great Britain and North German Federation (British Notice to fishermen by the Board of Trade, November 1868.)\(^{52}\);
(e) Great Britain and German Empire, British Board of Trade, December 1874\(^{53}\);
(f) The Fisheries Agreement of 1880 between Germany and Denmark\(^{54}\);
(g) The 1882 North Sea Convention (6 May 1882): [Treaty between Great Britain, Belgium, Denmark, France, Germany and the Netherlands for regulating the police of the North Sea Fisheries, May 6, 1882]\(^{55}\);
(h) The 1893 Treaty of Commerce and Navigation between Spain and Portugal (27 March 1893)\(^{56}\); and

\(^{50}\)These Regulations were agreed to put into effect the provisions of the 1839 Convention between France and Great Britain. Article II of the Regulations provided that: "The limits, within which the general right of fishery is exclusively reserved to the subjects of the two kingdoms respectively, are fixed with the exception of those in Granville Bay at 3 miles distance from the low water mark. With respect to bays, the mouths of which do not exceed ten miles in width, the 3 mile distance is measured from a straight line drawn from headland to headland." Hertslet's Treaties and Conventions. Vol.VI, p.416. Colombos writes that the 1839 Anglo-French Convention, the 1843 Anglo-French Fisheries Regulations, and the 1882 North Sea Fisheries Convention were denounced by Great Britain in 1964 when the European Fisheries Convention came into being. Colombos, op. cit., p.179, no.1.

\(^{51}\)Article I of the Treaty was as follows: "British fishermen shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark, along the whole extent of the coasts of the British Islands. The distance of 3 miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width be measured from a straight line drawn from headland to headland. The miles mentioned in the present convention are geographical miles whereof 60 make a degree of latitude." Hertslet’s Treaties and Conventions. Vol.XII, p.1126.

\(^{52}\)The Agreement, inter alia, stated that: "1. The exclusive fishery limits of the German Empire are designated by the Imperial Government as follows: that tract of the sea which extends to a distance of 3 sea miles from the extremest limits which the ebb leaves dry of the German North Sea Coast of the German Islands or flats lying before it, as well as those bays and incursions of the coast which are ten sea miles or less in breadth reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of North Germany." Hertslet’s Treaties and Conventions, Vol.XIV, p.1055.

\(^{53}\)The content of the notice is the same as the text of the Agreement of November 1868 between the two countries and the only difference is the words “German Empire” were replaced by the words “North Germany”. See Hertslet’s Treaties and Conventions, Vol.XIV, p.1058.

\(^{54}\)Fulton, Thomas W., The Sovereignty of the Sea, William Blackwood and Sons, Edinburgh, 1911, p.652.

\(^{55}\)Article II of the 1882 North Sea Convention provided that: "II. Les pecheurs nationaux jouiront du droit exclusif de peche dans le rayon de 3 miles, a partir de la laisse de basse mer, le long de toute l’etendue des cotes de leurs pays respectifs, ainsi que des iles et des bancs qui en dependent. Pour les baies le rayon de 3 milles sera mesure a partir d’une ligne droite, tiree, en travers de la baie, dans la partie la plus rapprochee de l’entree, au premier point ou l’ouverture n’excedera pas 10 milles." Hertslet’s Treaties and Conventions, Vol.XV, p.794. The same rule was incorporated into the Anglo-Danish Convention of 24 June 1901 with respect to fisheries in the Faeroes Islands and Iceland. Colombos, op. cit., p.179.

\(^{56}\)Appendix 6, Fisheries, Article 2: ... "As regards bays the aperture of which is not more than 10 miles, the 6 miles (fisheries zone) may be reckoned from a straight line drawn fro one point to the other." Strohl, op. cit., p.160.
(i) The 1901 Convention between Great Britain and Demark for regulating the fisheries outside territorial waters in the ocean surrounding the Faroe Islands and Iceland (24 June 1901).

3. The Moray Firth Case (1906): Application of the Ten Mile Limit

Moray Firth is located on the northeast coast of the mainland of Scotland. Its mouth is as wide as 73 miles and the depth of the firth penetration into land is around 20 miles. For centuries local fishermen have been involved in fishing inside the bay in a sustainable manner. However, the developments in shipping industries and the production of very large fishing vessels brought about the concern that the fish stock in the Firth would be in danger of depletion if no regulations were made to manage its fish resources. The concern over the possible depletion of fish resources was also intensified by the fact that many fishing vessels registered in Norway were fishing inside the firth, while the ownership of these vessels belonged to British citizens. It was in line with these facts that the British Parliament enacted the Herring Fisheries Act in 1889. At this time, Britain had claimed a ten mile limit for the closing line of the Firth from which the three mile territorial sea was measured.

The Moray Firth Case of 1906 (Mortensen v. Peters) resulted from the involvement of a fishing vessel, the Catalonia inside the Firth after the enactment of the 1889 Act. The Catalonia was registered in Norway and was claimed to be in the three mile territorial sea of Britain which was measured from a closing line of ten mile length linking the headlands of the Firth. Accordingly, Mortensen, the Captain of the vessels, was arrested and put on the trial. One issue was whether the 1889 Act could apply to foreign ships as well as British ships. The court held

57 Article 2: ... As regards bays, the distance of 3 miles (territorial waters) shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed 10 miles." Ibid., p.160. Also see the British Order in Council (23 October 1877) where the range of the application of the order also included bays less than 10 miles wide. Hertslet's Treaties and Conventions, Vol.XIV, p.1032. The ten mile limit was also mentioned in the unratified Treaty of 1888 Between the United States and Great Britain (Article 1) With respect to the ten mile limit, the Government of the United States was of the view that "[t]he width of ten miles was proposed not only because it had been followed in Conventions between many other powers, but also because it was deemed reasonable and just in the present case [the case of the Treaty of 1888] ... ." Cited in Grounds for the Dissent to the Award On Question V by Dr. Luis M. Drago (1910), op. cit., p.210.
58 Strohl, op. cit., p.162.
59 For the examination of the case see Hurst, Cecil, 'The Territoriality of Bays', BYIL, Vol.3, 1922-1923, pp.44 et seq.
that the English laws would apply not only to British citizens but also to foreigners [in the British territory].\textsuperscript{60} Mortensen rejected that the vessel was in the British territorial sea on the basis that Norway was not a party to the 1882 North Atlantic Coast Fisheries Convention which recognised a ten mile limit for enclosure of bays. The court did not accept that such fact would prevent it from proceeding. Mortensen was then convicted and his appeal was unsuccessful. The court finally held that the whole part of the Moray Firth was a bay and the ten mile limit was only an "arbitrary and artificial" boundary limit.\textsuperscript{61}

Following the case, many similar incidents involving Norwegian-flag vessels occurred in the Firth. Since the captains of the vessels were arrested, tried and convicted, the Norwegian Foreign Ministry took actions by sending delegates to the British Foreign Ministry to resolve the matter. Subsequently, the captains were released and no fines were paid. The incidents in the Moray Firth and the following judicial decisions led to a discussion in the British House of Lords. In the House the British Government expressed that the extent of sovereignty in bays is "an unsettled matter" in international law.\textsuperscript{62} It then held that the court's interpretation of the 1889 Act is inconsistent with international law and other States would not easily consider the Moray Firth as a territorial bay.\textsuperscript{63}

4. The 1910 North Atlantic Coast Fisheries Case and the Issue of the Delimitation of Bays

The trend to enclose certain bays and to implement the ten mile limit for the enclosure of bays was strengthened by the award of an international arbitral tribunal in the North Atlantic Coast Fisheries Case which is subject of the following examination. The award was an

\textsuperscript{60}Colombos, \textit{op. cit.}, p.183. \\
\textsuperscript{61}Strohl, \textit{op. cit.}, p.163. \\
\textsuperscript{62}\textit{Ibid.} \\
\textsuperscript{63}\textit{Ibid.} In another case which occurred in the Bristol Channel, the view expressed by the British Foreign Office demonstrated that the Bristol Channel was not entirely located in the domain of Britain. The case arose as a result of a collision which occurred within the Channel where the distance between the shores were 20 miles. The case was brought before a British Court of Appeal in 1927. However, as a result of the view of the British Foreign Office that the place of the collision did not fall into the British domain, the Court agreed that the matter to be decided by the Foreign Office. The Office was possibly of the view that the closing line of the channel would be located where the width of the channel would not be larger than six miles. This British position appears to have been part of its then policy to narrow the claims over bays to the utmost possible. Smith, H. A., \textit{The Law and Custom of the Sea}, Stevens & Sons Limited, London, 1948, p.11.
important source of analysis of the issue of the delimitation of bays at the
time when the case brought before the tribunal. In particular, the
tribunal presented a general definition for those bays qualified as national.

The disputes between United States and Great Britain on fisheries
around British maritime territories can be traced back to nineteenth
century. In the history of these disputes a turning point was the
conclusion of the Treaty of Ghent between these two countries on
fisheries in Canadian bays in order to end their fisheries conflicts.
According to this treaty (which was concluded on 20 October 1818)
American fishermen were permitted to fish in certain waters around
British maritime territories. Article I of the treaty defined the areas
where American fishermen could fish. This article stated that "the United
States hereby renounce forever, any liberty therefore enjoyed or claimed
by the inhabitants thereof, to take, dry, or cure fish on, or within three
marine miles of any of the coasts, bays, creeks or harbors of His
Britannic Majesty’s dominions in America and included within the above
mentioned limits." (emphasis added)

Although the 1818 Treaty was a step forward to possible settlement
of fisheries disputes between the United States and Great Britain, it
proved unsuccessful to put an end to such disputes. In fact, Great Britain
continued to exclude American fishermen from all bays, no matter how
wide their mouths were. The British Government’s position was that all
bays could be enclosed by drawing a line linking the headlands of the bays
from where the three miles of territorial waters were to be measured
from. Although the United States protested against the British claims over
bays, only the Bay of Fundy was excluded from the headland theory in
1845.\textsuperscript{64}

In the period before the arbitral award in 1910, two cases were
dealt with under the Claims Convention of 8 February 1853. These cases
resulted from the capture of two American ships by Britain on the basis
of the headland theory. In the first case, the \textit{Washington}, an American
ship, was seized in the Bay of Fundy\textsuperscript{65} where it was at a distance of ten

\begin{footnotesize}
\begin{itemize}
\item[64]Jessup, \textit{op. cit.}, p.365.
\item[65]The Bay of Fundy is from sixty-five to seventy-five miles wide and one hundred thirty to one hundred
forty miles long. \textit{Ibid.}
\end{itemize}
\end{footnotesize}
miles from the British shore. In the view of the British Government the Bay of Fundy was a “bay” within the meaning of the treaty 1818 and it maintained that its jurisdiction would extend to a three mile limit from a line drawn from headland to headland on the shores of the bay. This contention was rejected on the basis of the following argument:

[The] doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2nd August 1839, in which ‘it [was] agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

The arbitral tribunal also held that the word “bay” as applied to the Bay of Fundy “has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty.” ... It has been noted that the British Government itself had already abandoned its headland claim in regard to this body of water. The second case was that of the Argus, seized for fishing within a line drawn from headland to headland from Cow Bay to Cape North, though the schooner was twenty-eight miles from the nearest land. In this case two thousand dollars damages were awarded.

A number of other incidents also occurred in the period of 1886 to 1888 which resulted in seizure of such American vessels as David J. Adams, the Everett Steele, the Marion Grimes. It was in 1888 that the United States of America and Great Britain signed a treaty clarifying that as regards bays the three mile limit of territorial waters under the treaty of 1818 the ten mile rule would apply, though certain bays were treated differently. This treaty did not come into effect since it was not ratified. It was finally on 27 January 1909 that the Unites States of America and Great Britain signed an agreement under the General Arbitration Treaty of 4 April 1908 to resolve their disputes on fisheries around then British maritime domains.

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66 For the facts on the Washington Case see Moore, J. B., International Arbitrations (A History and Digest of the International Arbitrations to which the United States has been a Party), 6 Volumes, 1898, Vol.IV, p.4342. The award on this case can be found in Moore, J. B., A Digest of International Law, Washington, 8 Volumes, 1906, Vol.I, p.785.
68 Ibid., p.366.
69 Ibid., p.367.
70 Ibid.
An arbitration tribunal was established by the Permanent Court of Arbitration at the Hague to deal with the case. Seven questions were asked of the tribunal. The fifth question related to the issue delimitation of bays in accordance with the Treaty of 1818. The question was ‘[f]rom where must be measured the “three marine miles of any of the coasts, bays, creeks, or harbours” referred to in the said Article [Article I of the Treaty of 1818]?’

The view of the United States was that the term “bays” was included in the treaty as to mean very small indentations which could be categorised in the same class as creeks and harbours. In other words, the contention of the United States of America was that the words “coasts, bays, creeks or harbours” are used in the 1818 Treaty ‘only to express and be equivalent to the word “coast”, whereby the three marine miles would be measured from the sinuosities of the coast and the renunciation would apply only to the waters of bays within three miles.”

The tribunal did not agree with this view on a number of grounds including its understanding of the term “bays” in geographical sense.

However, the British position was that the term “bays” in geographical sense means the large indentations which are identified on maps. Great Britain was also of the opinion that “there was [then] no principle of the law of nations under which the meaning [of the term “bays”] could be limited to bays of a certain extent only.”

On the question as to where the closing line should be drawn across a bay for the purpose of measurement of the territorial waters (territorial

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71 Award of 7 September 1910, op. cit., p.195.
72Jessup, op. cit., p.368
73 See Award of 7 September 1910, op. cit., p.198. The United States representative, Mr. Root held that there was no question of the British sovereignty over those bays on the British coasts which were not more than six mile wide. However, in his view, bays wider than six miles at the mouth were not to be considered territorial bays and American fishermen were entitled to fish in these bodies of waters in accordance with the 1818 Treaty. Mr. Root, however, excluded those bodies of waters larger than six miles at the mouth to be claimed on the ground of prescriptive rights. Jessup, op. cit., p.368. This position seems to have been resulted from the fact that the United States itself had then claimed sovereignty over Chesapeake and Delaware Bays on historic bases. The entire argument of the representative of the United States of America, Mr. Root, in the North Atlantic Fisheries Case was edited by Bacon and Scott and was published in 1917.
74 Award of 7 September 1910, op. cit., p.198.
75 Jessup, op. cit., p.368
76 Ibid., p.373.
sea), the tribunal ruled that “[i]n case of bays, the three marine miles [then the most applied limit of the territorial sea] are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay.” 77 At all other places the three marine miles are to be measured following the sinuosities of the coast.” 78 (emphasis added)

It was in line with the existing practice and trend that the arbitral tribunal finally recommended, inter alia, to the parties that “[i]n every bay ... shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.” 79 This indicates that the tribunal did not find the headland theory as an established rule in State practice and recommended the specific limit of ten miles for the closing line across a bay. Although the tribunal recognised the criterion of the ratio of penetration of body of water to the width of the entrance and also suggested a ten mile limit for the length of the closing line, it did not lay down any practical formula for the determination of an indentation as a true bay.

5. The Views of the International Institutions on the Issue of the Delimitation of Bays

A. Institut de Droit International

The Institut de Droit International adopted a set of draft articles on the legal regime of the territorial sea at its Paris session in March 1894.

77 As regards the concept of “configuration of a bay”, Drago in his dissenting opinion asserted that although the arbitral tribunal considered the configuration of a bay as an essential element in enclosing a bay, “no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose the characteristics of such.” Grounds for the Dissent to the Award on Question V by Dr. Luis M. Drago (1910), op. cit., p. 211.

78 Award of 7 September 1910, op. cit., p.199.

79 Ibid. The outcome of the award of 7 September 1910 was the conclusion of an agreement between the United States of America and Great Britain on 20 July 1912 in Washington, that is the Agreement between the United States and Great Britain Adopting with Certain Modifications the Rules and Method of Procedure Recommended in the Award of September 7, 1910, of the North Atlantic Coast Fisheries Arbitration. Article 2 of the Agreement adopted the ten mile rule for the bays contiguous to the territory of the Dominion of Canada while, in accordance of the award, it excluded the Baie des Chaleurs, the Bay of Miramichi, the Egmont Bay, St. Ann’s Bay, Barrington Bay, Chedabucto and St. Peter’s Bays, the Mira Bay, and St. Mary’s Bay from the rule. For these bays base points for the closing lines are defined in Article 2 according to the award. It was also asserted that the award did not cover Hudson Bay. Ibid., pp.222-226, at 225. It should, however, be pointed out that in 1913 the United States Naval War College recommended a line to be drawn across bays “where the distance first narrows to twelve miles.” Jessup, op. cit., p.360.
Article 3 of this draft was devoted to the issue of the delimitation of bays for the purpose of the establishment of the inner part of the territorial sea. The Institut was of the view that:

"In the case of bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward sea, where the distance between the two shores of the bay is twelve nautical miles ...."\(^8^1\)

The Institut accepted that the baseline of bays should differ from the one used for other parts of the coasts and viewed that bays can be closed if the width of their mouth would not exceed twelve miles.\(^8^2\) This implies that in the view of the Institut an ordinary bay could not be closed by a straight line if its mouth is more than twelve miles. With regard to this kind of bay, the baseline appeared to be the low-water mark following the sinuosities of the coast. In its draft on the territorial sea adopted at the Stockholm session in 1928, the Institut maintained the same provision in Article 3 of the draft provisions except it changed the maximum permissible length of the closing line from twelve miles to ten miles.\(^8^3\)

**B. International Law Association**

The International Law Association adopted its draft articles on territorial waters at its Brussels session in 1895. Article 3 of this draft provisions dealt with the issue of delimitation of bays in the same manner as the Institut de Droit International (Article 3, Paris Draft Articles on the Territorial Sea, 1894).\(^8^4\) The only difference was that the ILA considered a ten mile width as the maximum width for the mouth of bays if these coastal indentations were to be enclosed by a straight line.\(^8^5\)

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\(^8^0\)It seems that in practical sense the territorial sea would not follow the sinuosities of the coast if it is measured from the closing line of bays. This is because such a line is a straight line which does not follow the pattern of the coast.

\(^8^1\)Art.3, Règles sur la définition et le régime de la mer territoriale, Annuaire de L'Institut de Droit International (1894-1895), Vol.13, p.329.

\(^8^2\)The twelve-mile limit was adopted by the Institut as the double limit of the breadth of the territorial sea since the Institut in its meeting of 1894 adopted the breadth of six marine miles for the territorial sea.


\(^8^5\)Also see ILA, Report of the Thirty-fourth Conference, Vienna, 1926.
C. American Institute of International Law

The Commission established by the American International Law to codify rules of American International Law presented its work (Project No.10) in 1925. Article 6 of this project contained the principle of closing line for bays without indicating the maximum permissible width for the purpose of enclosing them. However, the provision was clear with respect to its application only to those bays located in the coast of a single State. In its words, Article 6 provided that:

For bays extending into the territory of a single American Republic the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the point nearest the opening into the sea where the two coasts of the bay are separated by a distance of -- marine miles ... .

D. Japanese Society of International Law

The Japanese Society of International Law prepared a draft set of rules in its 1926 session. As part of this work, a provision was included on the delimitation of bays and gulfs. Article 4 of the draft stated that "[i]n the case of bays and gulfs, the coasts of which belong to the same State, the littoral waters extend seawards at right angles from a straight line drawn across the bay or gulf at the first point nearest the open sea where the width does not exceed ten marine miles ... ." The inclusion of a ten mile limit for the width of bays in Article 4 was in agreement with Article 3 of the 1895 draft articles of the International Law Association.

E. Remarks on the Work of International Institutions Concerning the Delimitation of Bays

As is clear from quotations above, there has been a general agreement among international institutions that bays should be treated differently from regular parts of the coast due to their close relation with

87 The 1957 UN Memorandum, op. cit., p.15
88 The Third Committee of the Second Hague Peace Conference also recommended a ten mile limit for the closing lines of bays in relation to "the laying of automatic submarine contact mines." Jessup, op. cit., p.361. See also Report to the Hague Conference of 1899 and 1907, p.604.
the land territory. It was apparent that special treatment of bays would be limited to those bays found in the coast of a single State. The main divergence of view, however, was on the maximum permissible length of the closing line for these water penetrations into the land. In addition, one major shortcoming of the texts prepared by the international institutions was the lack of any provision to precisely define the concept of “bay”.

6. The 1930 Hague Conference on the Codification of International Law

The Preparatory Committee of the 1930 Hague Conference (13 March - 12 April 1930) prepared a set of bases of discussion, 26 in total, on territorial waters. These bases of discussion were prepared after governments reflected their views in response to the questionnaire No.2 (on territorial waters) prepared by the Committee of Experts.

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91 Bases of Discussion Nos. 7, 8, and 9 were respectively related to the issues of bays which belong to single States, historic bays, and bays located in the coasts of two or more coastal States. Following the submission of the Bases of the Discussion to the 1930 Hague Conference, debates were made on all points raised by these Bases toward reaching a possible agreement on all related issues.

92 In its resolution of 27 September 1927, the Assembly of the League of Nations called the League Council to appoint a Preparatory Committee in order to prepare bases of discussion within the scope of the first Codification Conference. The Committee was thus established in accordance with the resolution of 28 September 1927 of the Assembly of the League of Nations. The Committee examined the responses of governments to the questionnaires prepared by the Committee of Experts. The Committee of Experts was set up in accordance with the resolution of 22 September 1924 of the Assembly of the League of Nations to advise the League Council on the questions of international law which were ripe enough to be codified. On the basis of the work done by the Committee of Experts, the Assembly decided that a conference be convened to examine three issues for the purpose of codification. These issues were: (1) Nationality; Territorial Waters; and (3) Responsibility of States for Damage done in their Territory to the Persons or Property of Foreigners.

93 The Committee of Experts adopted seven questionnaires in its session of January 1926 on certain aspects of international law which in its view were ripe enough to be codified. These questionnaires were circulated among States on 29 January 1926. Questionnaire No.2 was devoted to the issue of territorial waters. The documents enclosed with the questionnaire were a memorandum of the rapporteur of the Sub-Committee (Territorial Waters), Mr. Schucking, a draft convention and its amended version. As regards bays, the view of the Committee of experts was “in the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except that it
With respect to bays, the question submitted to governments was to answer how the territorial sea had to be measured “in front of bays (taking into account the breadth of the bay)”, “historic bays”, and “bays whose coast belong to two or more States.”

A. Views of Governments on the Issue of the Delimitation of Bays

The views expressed by the governments indicated that there was a general agreement that ordinary bays could be enclosed, but the debate was about how this enclosure had to be done. In particular, the questions of what indentations can be regarded as bays and what had to be the maximum permissible width for bays were at stake. Certain governments presented their views as follows.

Australia was of the view that bays may be enclosed where their mouth do not exceed six miles, though it expressed its readiness to consider the ten mile limit if States were generally prepared to adopt such a limit. Belgium referred to “double the limit of breadth to be adopted for territorial waters” for enclosing bays, while it suggested three mile limit for the breadth of territorial waters. The view of Denmark was that “[b]ays not exceeding ten nautical miles in width at their entrance, or having islands not more than ten nautical miles apart at their entrance, are

shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea, where the distance between two shores of the bay is 12 marine miles, unless a greater distance has been established by continuous and immemorial usage.” Article 4, Draft Convention on Territorial Waters as Amended by M. Schucking the Rapporteur the Committee of Experts for the Progressive Codification of International Law in consequence of the Discussion in the Committee of Experts, in Rosenne, op. cit., Vol.2, Annex, p.411. Jessup described the formula suggested by the Committee of Experts as an application of the headland theory in “its restricted form.” Jessup, op. cit., p.362. The view of the Committee of Experts was identical to that of the Institut de Droit International. See the view of Institut de Droit International above.

94It is asserted that at the time of the 1930 Hague Conference, the agreement of the international community on three main issues concerning the delimitation of bays was a prerequisite for establishing international legal rules to fill the gap resulted from the lack of such rules. These three issues were: (a) the issue of historic bays (those bays which were already claimed by certain States irrespective of their width; (b) the issue of permissible width of closing lines for bays other than historic bays; and (c) the issue of establishing a method of measurement to identify a bay as the one entitled to be enclosed by a closing line across its mouth. See Hyde, Charles Cheney, International Law Chiefly As Interpreted and Applied by the United States. Vol. 1, Second Revised Edition, Little, Brown and Company, Boston, 1945, p.478. Another issue should be added to this list: the issue of the delimitation of bays whose mouths belong to two or more coastal States.

95Certain governments also addressed the issue of historic bays in their replies that will be discussed infra.

considered as national waters."\textsuperscript{97} Estonia indicated its agreement with the formula included into Article 4 of the draft convention prepared by the Committee of Experts.\textsuperscript{98} Finland replied that the formula of the Committee was acceptable but "the question of the maximum width between the two shores of the bay should be left open, as the settlement of this question would depend on the breadth adopted for the territorial sea."\textsuperscript{99}

France listed a number of agreements and conventions which applied a limit of ten miles for the width of bays entitled to be enclosed. While some documents France was referring to stated that "the baseline consists of a straight line from one cape to the other", other documents provided that "the baseline adopted for bays is a straight line drawn across the bay in the part nearest the entrance, at the first where the opening no longer exceeds ten miles."\textsuperscript{100} The former included the Fisheries Convention of 2 August 1839 between France and Great Britain (Article 9) and the Fisheries Regulations of 24 May 1843 between the same countries (Article 2). The latter included the North Sea Fisheries Convention of 6 May 1882 (Article II); Article I of the French Law of 1 March 1888 on fishing in territorial waters, and Article 2 of the Decree of 18 October 1912 concerning the application of the Hague Convention XIII of 1907. Germany relied on its Prize-Law Regulations to demonstrate the German practice with respect to the delimitation of bays at the time of the 1930 Hague Conference. These regulations provided that "a bay is only regarded as forming part of the inland waters of the coastal States provided the width of the entrance does not exceed six nautical miles. ... If the width of the entrance of the bay exceeds six nautical miles, the boundary between inland and territorial waters is formed by a line drawn within the bay at the point where the width of the bay ceases to exceed six nautical miles."\textsuperscript{101}

Germany also referred to the North Sea Fisheries Convention of 6 May 1882 which included a maximum three nautical miles for the line enclosing a bay for fisheries purposes as follows: "In bays, the zone of three nautical miles shall be calculated on the basis of an imaginary

\textsuperscript{97}Ibid., p.258.  
\textsuperscript{98}Ibid.  
\textsuperscript{99}Ibid., p.259.  
\textsuperscript{100}Ibid.  
\textsuperscript{101}Ibid., p.257.
straight line drawn in the part of the bay nearest the entrance, from one shore to the other, at the place where the width of the entrance no longer exceeds ten nautical miles.”102 Great Britain pointed out that the baseline with respect to bays is the one which passes across their mouth “from the land on one side to the land on the other side” and emphasised that a bay had to be “something more pronounced than a mere curvature of the coast” and “[t]here must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width.”103 While Great Britain was in favour of a six mile limit for bays closing lines, it was ready to consider the ten mile limit.104

Italy suggested a breadth of twenty miles for the line to be drawn across a bay as the baseline.105 Japan expressed its opinion in the following words: “In the case of a bay or gulf, the coast of which belongs to a single State, the territorial waters extend seawards at right angles from a straight line drawn across the bay or gulf at the first point nearest the open sea where the distance between the two coasts does not exceed ten nautical miles.”106 Japan was of the view that in the case of a bay or a gulf whose mouth is larger than ten nautical miles “the territorial waters follow the trend of the whole of the coast of the bay or gulf.”107 Latvia was in favour of twelve miles (6+6) for the maximum width of a line for the purpose of enclosing bays.108 Although Latvia used the term territorial waters in reference to waters behind such a closing line, these waters are those which are now termed internal waters.

Due to the particular geographical conditions found in Norwegian coasts, the response of Norway was different from other governments. Expressing that there was no rule in Norway to limit the length of baselines, it stated that “all fjords, bays, and coastal inlets [located on Norwegian coasts] have always been claimed as part of the Norwegian maritime territory, whatever the width at their mouth and no matter whether they are formed by the mainland or by developments of the

102Ibid.
103Ibid., p.259.
104Ibid.
105Ibid., p.260. Although Italy suggested the twelve mile rule at the 1930 Hague Conference, the Italian Law of 16 June 1912 on regulation of passage of merchant ships had considered the distance of ten miles for the closing lines of bays. Jessup, op. cit., p.361.
107Ibid.
108Ibid.
“Skjaergard.”109 In the opinion of the Netherlands, the inner limit of bays and sounds was “a line drawn across the bay or sound as near as possible to the entrance, at the first point where the width of the bay no longer exceed ten nautical miles.”110 Poland, proposing a breadth of twelve nautical miles for the bays closing lines, held that “[s]hould the shores of a bay opening out into the sea be so close to each other that the bay is obviously under the sovereignty of the coastal State, it should form part of the territory of that State.”111

Portugal suggested the formula of “at least three times of the breadth fixed [at the 1930 Hague Conference] for territorial waters” for the closing lines of bays. In the view of Portugal, “[a]ll bays the width of which reckoned along a line joining their outermost points is less than at least three times the breadth fixed for territorial waters should be regarded as part of the territory of the State to which the shores of the bay belong.”112 Sweden stated that no Swedish law laid down any limit for bays and added that “[t]here is also no international regulation generally accepted which provides a maximum breadth [for the bays closing lines].”113 South Africa was of the view that the closing lines of bays had not to be longer than six miles.114 The United States of America did not propose any particular limit for bays but it referred to the ten mile limit in the Convention of 2 August 1839 (between France and Great Britain) and also to the cases of the Washington and the Alleganee with respect to the Delaware Bay and Chesapeake Bay as historic bays to which no limit was laid down.115

109 Ibid., pp.260-261.
110 Ibid., p.261. The Dutch neutrality proclamation of 5 August 1914, inter alia, provided that “[a]s regards inlets, this distance of 3 nautical miles [for the coastal waters] is measured from a straight line drawn across the inlet at the point nearest the entrance where the mouth of the inlet is not wider than 10 nautical miles, reckoning 60 to the degree of latitude.” Jessup, op. cit., pp.360-361. The 1904 neutrality proclamation of the Netherlands, which was issue during the Russian-Japanese war, included the same provision. Ibid., p.360.
112 Ibid.
113 Ibid., p.262.
114 Ibid., p.257.
115 See ibid., pp.258-259. Jessup also refers to Article 2 of the Uruguayan neutrality declaration 4 August 1914 which, inter alia, provided that “... With regard to bays, the distance of five miles [of territorial waters] will be measured along a straight line run across the bay at the point nearest its entrance.” Jessup, op. cit., p.362.
B. The Formula Prepared by the 1930 Hague Conference on the Issue of Bays

From the views asserted by governments, it was clear that the general rule of low-water mark following sinuosities of coasts would not be extended to bays due to their geographical conditions as coastal indentations.\textsuperscript{116} However, no uniform practice was found in the responses of the governments as to what was the recognised width for the closing lines of bays. There was a divergence of views in this regard, though there was a trend towards the ten mile limit. One major concern expressed by governments was to distinguish between a mere curvature and a true bay.\textsuperscript{117} This was why the Preparatory Committee stated that it was the function of the conference to formulate a certain proportion between the breadth of the entrance of a bay and its depth of penetration into the coast.\textsuperscript{118} According to the trends indicated by governments, the Preparatory Committee finally designed the Basis of Discussion No.7 as follows.

In the case of bays the coasts of which belong to a single State, the belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles.\textsuperscript{119}

The Second Sub-Committee of the Second Committee of the 1930 Hague Conference (Territorial Sea) finally included the same formula in its report. In its observations, the sub-committee considered that “[i]n the case of an indentation which is not very broad at its opening, such a bay should be regarded as forming part the inland waters.”\textsuperscript{120}

\textsuperscript{116}One author writes that the trends existed at the 1930 Hague Conference indicated that an straight line could be used to enclose bays with certain width. Such rule was described to be “an exception” to the general rule that baseline should follow the sinuosities of the coastline. Teclaff, \textit{op. cit.}, p.668.

\textsuperscript{117}Boiggs writes that a number of proposals on the configuration of bays were submitted to the 1930 Conference. For example, the German proposal was based on “measuring the maximum depth of a bay in proportion to its breadth from headland to headland” while the British proposal was to take into account “the ratio between average depth and breadth by measuring the area.” Boiggs, S. Whittemore, ‘Delimitation of the Territorial Sea’, \textit{American Journal of International Law}, Vol.24, July 1930, p.550.

\textsuperscript{118}Rosenne, \textit{op. cit.}, Vol.2, Observations, p.262.

\textsuperscript{119}Bases of Discussion Drawn up by the Preparatory Committee, in Rosenne, \textit{op. cit.}, Vol.4, Annex I, p.179. The text of the Basis of Discussion No.7 was similar to the draft convention prepared by Mr. Schuckung (rapporteur of the Committee of experts).

\textsuperscript{120}Bays (Observations), Report of Sub-Committee No.II, in Rosenne, Vol.3, \textit{op. cit.}, p.833. As regards the formula, the sub-committee stated that such system of delimitation of bays was already incorporated into the North Sea Fisheries Convention of 6 May 1882. \textit{Ibid.}, p.834. The Report of the Second Committee (Territorial Sea) of the 1930 Hague Conference, Annex I (“The Legal Status of the Territorial Sea) has also been reprinted in the \textit{AJIL}, Vol.24, Supplement, 1930, pp.248-250.
committee noted the divergence of the views on the length of closing lines of the bays and commented that "[m]ost Delegations agreed to a width of ten miles, provided a system were simultaneously adopted under which slight indentations would not be treated as bays."\textsuperscript{121} (emphasis added)

C. The American and French Proposals for the Delimitation of Bays

In the 1930 Hague Conference, concerns were raised with respect to generalisation of the rules for bays to all indentations into coasts, irrespective to the extent of their penetrations into the land mass. These concerns mainly originated from the potential effects of enclosure of these coastal indentations on reducing the areas of the high seas where such freedoms as free navigation and overflight were already being exercised. Although the effects of enclosure of bays on the high seas are not as significant as the impacts of improper application of straight baseline systems, the existence of many indentations around the coasts of coastal States necessitated the application of a recognised method to exclude those indentations which are not adequately deep.

It was necessary to develop a practical way for distinguishing a real bay from a mere curvature. In this regard, the first efforts were made at the 1930 Hague Conference and two main suggestions were advanced by the United States of America and France.\textsuperscript{122} Although the merits of both methods were identical in nature, the approaches were different. Both American and French proposals were based on a mathematical method to identify whether an indentation is a bay or only a simple indentation. The purpose of defining a bay by a geometric means was to achieve an international recognition for a uniform method of delimiting bays. This would facilitate the incorporation of a mathematical method into an international treaty by which a legal bay can be distinguished from a geographical bay.

\textsuperscript{121}Report of Sub-Committee No.II, in Rosenne, Vol.3, \textit{op. cit.}, p.834. Wang expresses the importance of providing an accurate definition for bays in the following words: "Bays, as a coastal feature, need a more precise definition from a legal point of view because controversies have developed involving fishery rights and the historic uses of the bays by coastal states." \textcite{Wang}, \textit{op. cit.}, p.8.

\textsuperscript{122}Dupuy writes that although the 1930 Hague Conference adopted the ratio between the width of the entrance of a bay and the depth of penetration into the land as a criterion for finding true bays, no agreement was reached on a mathematical definition to establish such ratio. \textcite{Dupuy}, \textit{op. cit.}, p.266.
The American proposal was based on the application of a method of “envelope of the arcs of circles.” The formula was in accordance with the following procedure:

(a) first step was to draw a straight line across the mouth of the bays where the distance between the entrance points is equal to ten nautical miles;
(b) second step was to draw an envelope of arcs of circles with a radius of one-fourth of the straight line (2.5 miles) from all points on the coast of mainland;
(c) third step was to draw a semi-circle whose diameter is equal to one-half the length of the straight line (5 miles); and
(d) the last step was to compare the area of waters enclosed within the straight line and the envelope of the arcs of circles. If the area enclosed within the straight line and the envelope of the arcs of circles exceeded the area covered by the semi-circle, the bay would be a true bay and waters of the bay would be regarded as interior waters (internal waters). Otherwise the waters would be considered as territorial.

(See the following figures.)

Figure 3.1
An indentation which is considered as a bay based on the American Proposal


124Boggs writes that “[t]he American proposal avoids the definition of such words as “bay” and “estuary” in a geographical sense. It simply undertakes to determine when an indentation of the coast is sufficiently great to regard the waters within the indentation as national waters, which are to be separated from territorial waters by a straight line drawn across the entrance.” Boggs, op. cit., p.550. The French proposal also lacked a geographical definition of terms “bay” or “estuary”. However, both pointed out that the mathematical test had to be applied to a bay the coasts of which belong to a single State. The American proposal is attributed to S. W. Boggs who was the head of the US delegation at the 1930 Hague Conference. He was also the Geographer of the US Department of State.
125See also Figures 2 and 3 as part of the United States of America proposed amendments to Bases of Discussion Nos.7, 8, 9, and 18.
Figure 3.2
An indentation which is not considered as a bay based on the American Proposal


The French delegation proposal (Compromise-Proposal) was submitted to the 1930 Hague Conference with a view to providing a compromise formula based on a geometric solution. The French proposal provided that “In order that an indentation may be properly termed a bay, the area comprised between the curve of the coast and its chord must be equal to or greater than the area of the segment of the circle the centre of which is situated on the perpendicular to the chord in its middle, to a distance from the chord equal to one half of the length of this chord and of which the radius is equal to the distance which separates this point from one end of the curve.”126 The method can be described by reference to the Figure 3.3 below as follows.

Figure 3.3
French Proposal


126Compromise-Proposal of the French Delegation [Concerning the delimitation of bays], Report of Sub-Committee No.1, in Rosenne, op. cit., Vol.3, p.834. Like the American proposal, French proposal suggested a maximum width of ten miles for the bays closing lines. Ibid.
The French proposal can be described as follows. OP is the perpendicular bisector of DE. OD is the radius of the arc DAE. According to the French proposal, DAE is considered as "the border line case".\textsuperscript{127} Since the area of DCE is larger than the area of DAE, according to the French proposal the indentation DAE is regarded as a true bay. However, the application of the United States of America's proposal for the same indentation would have an opposite result, that is to say DAE would not be qualified as a true bay. There is no doubt that the case of the indentation DBE is so clear that under both proposals such indentation would be a true bay.\textsuperscript{128} Accordingly, while waters within the segment of DBE are considered as internal waters under both proposals, waters within the segment DAE are internal waters under the French proposal but part of territorial waters (territorial sea) under the American proposal. In general, both proposals would result in the enclosure of vast area of waters and would contribute to the extension of the territorial seas of coastal States towards the high seas in many cases.

Although the American and French proposals could form bases for adopting a system of delimitation for bays, the 1930 Hague Conference was unable to codify any rules with respect to the delimitation of bays, mainly because it was unsuccessful in resolving another related issue, that is to say the issue of the breadth of the territorial sea. However, the proposals provided the background for resolution of the issue of enclosing bays in the future. In fact, the geometric approach was adopted by the ILC which seems to have agreed with the nature of mathematical proposals introduced at the 1930 Hague Conference.

Although the governments submitted their views to the 1930 Hague Conference on the issue of delimitation of outer limit of internal waters and inner limit of the territorial sea, including those on the delimitation of bays, no provisions on such delimitation were included in the Final Act of the 1930 Hague Conference.\textsuperscript{129} The provisions included in the Act

\textsuperscript{127}Boggs define "the border line case" as a semi-circle which is used to make a distinction between an open bay whose waters are territorial waters and a closed bay whose waters are national waters. Boggs, \textit{op. cit.}, p.550.

\textsuperscript{128}Shalowitz, \textit{op. cit.}, pp.41-42.

\textsuperscript{129}Part B. Territorial Sea, Final Act of the Conference for the Codification of International Law (Hague-1930), in Rosenne, \textit{op. cit.}, Vol.3, pp.867-871. The uncertainty on the method of delimitation of bays continued after the 1930 Hague Conference as States demonstrated different practices. For national legislation on this issue after the 1930 Hague Conference see generally Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/SER.B/6 (1957). For example, Iceland legislation (Act No. 33 of 9 January 1935 Governing Intoxicating Beverages, Article 5), provided a length of 12 miles
were related to the legal status of the territorial sea, including the sovereignty of coastal States over territorial seas and the right of innocent passage for foreign vessels.

7. The ICJ's View on the Issue of Bays

In dealing with the *Fisheries Case* in 1951, the ICJ presented its views on certain aspects of delimitation on bays. The *Fisheries Case* was not primarily related to the issue of delimitation of bays. However, this issue had to be addressed as part of evaluation of the baseline system used by Norway. The reason for addressing the issue of bays was that, in applying its straight baseline system, Norway drew straight lines across certain indentations of its coasts which in some cases were more than ten miles in length. The UK considered this practice as inconsistent with international law in existence at that time. The view of the UK was that the ten mile limit as the maximum permissible length for the closing line had acquired the status of a customary rule of international law applicable to all coastal States. The ten mile width was not, however, accepted as customary rule by the ICJ but it was declared that the rule was not a general rule of international law. In its words, the Court held that:

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130 With respect to different existing practices on the treatments of bays at the time of *Fisheries Case* (1951) see Dissenting Opinion of Judge Read, *ICJ Reports*, 1951, p.188 and Dissenting Opinion of Judge McNair, *ibid.*, pp.163-166.

131 Judge McNair was in agreement with the ICJ's view that the ten mile limit did not form part of a rule of customary law but he pointed out that "the fact that there is no agreement upon the figures does not mean that no rule at all exists as to the closing line of curvatures possessing the character of a bay; and that a State can do what it likes with its bays ... if any State alleges that this belt [the belt of the territorial sea] ought not to come inside a particular bay and follow its configuration, then it is the duty of that State to show why that bay forms an exception to this general rule [the low-water mark rule]." Dissenting Opinion of Judge McNair, *ICJ Reports*, 1951, p.164.

132 At the time of the *Fisheries Case*, in addition to bilateral and multilateral treaties among States (mainly on fisheries) the following examples of State practice on the length of the bays closing lines with respect to fisheries had been recorded in the United Nations legislative series.

- Denmark: ten nautical miles (Art.1, Order No.29 of 27 February 1903 respecting the Supervision of Fisheries in the Sea Surrounding the Fowe Islands and Iceland outside the Danish Territory. The same limit was also mentioned in para.2(1), Decree No.230 of 29 June 1933 and later in Art.1(2), Notice No.292 of 11 November 1953).
- France: ten miles (Art.1er, *Loi ayant pour objet d'interdire la pêche aux étrangers dans les eaux territoriales de France et d'Algerie du 1er Mars 1888 comme modifiée par la loi du 30 Mars 1928 et par la loi du 16 Avril 1933*).
- Morocco: 12 miles (*Titre 1er, Art.2, Reglement du 31 Mars 1919 sur la Peche Maritime modifie par le Danir du Juin 1924*).
- Netherlands (New Guinea): ten nautical miles (General Regulations of 29 April 1927 for the Hunting of Whales within three nautical miles of the oasts of the Netherlands Indies, as amended).
- Sweden: not wider than 10 minutes of distance (Royal Order No.282 of 2 June 1933 on Fishing on the Frontier Waters of Sweden and Denmark).
... although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.133

The ICJ further made it clear that even if the ten mile limit were to be considered as a rule of customary international law, it would not apply to Norway as this country has consistently indicated its disagreement with the rule and rejected its applicability to itself in different occasions. The Court’s opinion was that “[i]n any event the ten-mile rule would appear to be inapplicable as against Norway insasmuch a she has always opposed any attempt to apply it to the Norwegian coast.”134

Although the ICJ rejected the ten mile limit as a maximum permissible limit for the closing lines of bays, it did not introduce any other limit which could be used as the maximum permissible width for a legal bay. The lack of any suggestion by the ICJ of a specific limit for the bays might have the implication that “there should be no limit on internal waters.”135 Another issue which was not addressed by the Court was the definition of a bay. Accordingly, the judgment of the ICJ in the Fisheries Case did not provide what constitutes a bay and what criteria were to be applied in appraisal of a costal indentation as a juridical bay.

Brazil and Ireland also applied the following limits for delimitation of bays in their customs regulations.

Brazil: Maximum 12 miles (Ch. III, Regulations Concerning Port Officers Annexed to Decree No.5796 of 11 June 1940).
Ireland: 12 nautical miles (Act No.33 of January 1935 governing intoxicating beverages).

The information on State practice concerning the delimitation of bays at the time of the Fisheries Case is not limited to the above information. More information are also found in the national legislation related to the territorial sea. For example, Iran in its legislation of 19 July 1934 on the delimitation of the territorial sea and the contiguous zone included a limit of ten miles for the length of the bays closing lines (Art.2, Loi du 24 Tir 1313 (19 Juillet 1934) relative a la des eaux Territoriales et a la Zone de Supervision et de Controle). It seems that although there was no consensus on the maximum width of the entrance for bays which could be enclosed, at the time of the Fisheries Case, the ten mile limit was the one which was used more than any other limit.


133ICJ Reports, 1951, p.131. Also see the Note of 8 February 1870 of the Norwegian Ministry of Foreign Affairs to the French Government where it was stated that “the quite arbitrary distance of 10 sea miles ... would not appear to ... have acquired the force of an international law.” The Norwegian Government stated that it “does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors to justify the way in which it applies general rule.” Ibid., p.136.

134Ibid., p.131
135Westerman, op. cit., p. 163
8. International Law Commission and the Issue of the Delimitation of Juridical Bays

The Regime of Territorial Waters was one of the fourteen topics which were selected by the ILC for codification at its first session in 1949. The issue of the delimitation of bays was taken into account in the framework of the formulation of rules on territorial waters. In his first report to the ILC, Francois (Special Rapporteur) included an article on bays which reflected the same formula as presented by the Preparatory Committee of the 1930 Hague Conference (see supra).

It was the Committee of Experts of the ILC which presented a definition for a juridical bay on geographical and geometric bases and suggested ten mile limit for the closing line of bays. In fact, the Committee of Experts, which met in 1953, had a number of questions before it. The responses from the Committee mainly constituted the structure of the formulae on bays which were regulated by the ILC in its following sessions, though certain changes were made including the permissible limit for the closing line. As regards its suggestion of the ten mile limit, the Committee considered that this limit was suggested as “being twice the range of vision to the horizon in clear weather, from the eye of a mariner at a height of five meters.” This limit was included in

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137 In accordance with Article 13 of the UN Charter with respect to progressive development and codification of international law, the UNGA passed a resolution on 21 November 1947 establishing a permanent body which was called the International Law Commission. The UNGA also adopted the Commission’s Statute. See UN Document A/519. The Commission is composed of fifteen members who are nominated by governments and elected by the UNGA. The role of the Commission is to contribute to the progressive development and codification of international law. For the definition of the terms “progressive development of international law” and “codification of international law” see Article 15 of the Statute of the Commission.
138 See YILC. Vol.II, 1952, p.35 (in French). For English translation see UN Document A/C.6/L.378. In the preparation of his first report to the ILC, Francois had relied upon the work of the 1930 Hague Conference on territorial waters. He did so on the ground that there was a general agreement on all issues related to territorial waters at the 1930 Hague Conference, except on the issue of the breadth of the territorial sea. See Strohl, op. cit., p.216.
139 It was pursuant to the suggestion of Francois that a Committee of Experts held sessions from 14 to 16 April 1953 to discuss technical questions related to the issue of the delimitation of bays. The members of this Committee were Francois (the Netherlands), Asplund (Sweden), Boggs (United States of America), Couillault (France), Kennedy (United Kingdom), and Pinke (the Netherlands). Ibid., p.218.
140 For the questions and the Committee of Experts’ responses thereto see UN Document A/CN.4/61/Add.1. The questions and responses can also be found in ibid., pp.218-219.
the report of 18 May 1953 (Article 6(4)) submitted to the ILC by Francois.\footnote{See \textit{ibid.}, UN Doc. A/CN.4/61/Add.1. This document was a draft on bays submitted to the fifth session of the ILC after consultation with the Committee of Experts. The draft article contained seven paragraphs as follows: (1) A bay is a bay in the juridical sense, if its area is as large as, or larger than that of the semi-circle drawn on the entrance of the bay. Historical bays are excepted; they shall be indicated as such on the maps. (2) If a bay has more than one entrance, this semi-circle shall be drawn on a line as long as the sum-total of the length of the difference entrances. (3) Islands within a bay shall be included as if they were part of the water area of the bay. (4) The closing line across a (juridical) bay shall not exceed 10 miles in width, this being twice the range of vision to the horizon in clear weather, from the eye of a mariner at a height of 5 meters. In cases of considerable tidal differences the low-water lines shall be taken as the shorelines between which the width of the bay shall be computed. (5) If the entrance of a (juridical) bay is split into a number of smaller openings by various islands, closing lines across these openings may be drawn, provided that none of these lines exceeds 5 miles in length, except one which may exceed up to a maximum of 10 miles. (6) In case the entrance of the bay does not exceed 10 miles in width, the line \textit{inter fauces terrarum} shall constitute the delimitation between inland waters and the territorial sea. (7) In case the entrance of the bay exceeds 10 miles, a closing line of this length shall be drawn within the bay. When different lines of this length can be drawn that line shall be chosen which encloses the maximum water area within the bay.} In fact, the Francois’ report of 1953 to the fifth session of the ILC was a restatement of the views of the Committee of Experts extracted from its meetings in 1953.

In Article 8 of the 1954 draft submitted to the sixth session of the ILC, Francois included that waters within the closing line of a bay are considered internal waters (para.1). In this draft, the reference to historic bays was removed. The mathematical method remained unchanged and the ten mile limit was again recommended for the closing line of bays.\footnote{Article 8 of the Francois’ Report on the Regime of the Territorial Sea, 4 February 1954, UN Doc. A/CN.4/77, \textit{YILC}, Vol.II, 1954, p.4. In the preparation of the 1954 draft, Francois not only took into account the report of the Committee of Experts but also considered the observations made by certain governments. See UN Documents A/CN.4/71 and Add.1 and Add.2. Also see Strohl, \textit{op. cit.}, pp.220-221.} The 1954 draft article on bays was not subject to discussion at the 1954 session of the ILC. In its seventh session, the ILC finally agreed to incorporate a twenty-five mile limit into its draft of 1955.\footnote{Commentary, \textit{YILC}, Vol.II, 1955, p.36.} The ILC was of the view that the length of the closing line had to be longer than 10 miles in accordance with then existing tendencies of States. To this end, the ILC stated that “[a]s an experiment, the Commission suggests a distance of twenty-five miles; thus, the length of the closing line will be slightly more than the permissible maximum width of the territorial sea ... [as then was proposed by the ILC to be 12 miles].”\footnote{\textit{Ibid.}, p.37.} The suggestion of 25 mile limit faced protests from five
States and the limit was discussed at the eight session of the ILC in 1956 and did not gain adequate support.

Many other proposals were put forward suggesting different limits for the length of the closing line, including 10 and 12 miles, and even one proposal suggested that the closing line should not be limited to any specified length. Fitzmaurice maintained that the rejection of ten mile limit by the ICJ was not to mean that there should not be any limit on internal waters and in his view 15 miles would be appropriate length to cover those indentions which have configuration of bays. Relying on the 1910 North Atlantic Coast Fisheries Case, the Czechoslovakian delegate was of the view that the application of a mathematical method for delimiting of internal waters is not appropriate for all geographical situations. The delegate stated that such method should be supplemented by other factors such as economic importance of the bay for the local people and its distance from international navigation routes. Fitzmaurice, however, was of the view that the economic factor is an ambiguous element in delimitation of bays and the closing line is the only solution to the issue of delimitation of bays. Finally, the limit of 15 miles gained the support of majority of the ILC at its eighth session and this limit was incorporated into Article 7 of the 1956 ILC Draft. In its commentary, the ILC stated that:

146 These States were Brazil, Turkey, Israel, the United Kingdom, and the United States. In contrast, China was completely in favor of the 1955 Draft articles, including the 25 mile limit. See the 1955 Draft Articles, UN Doc. A/CN.4/99. Also see the view of the Norwegian Government, Commentary, YILC. 1956, Vol.I, p.190 where this Government argues that the ILC was considering lex frenda in proposing 25 mile limit.


148 Ibid., p.192.

149 See ibid., pp.191, 193, 195-196.

150 Ibid., p.196.

151 The 1956 Draft of the work of the Inter-American Council of Jurists on the delimitation and juridical regime of bays is also worth mentioning. At its fourth plenary session on 3 February 1956, the Inter-American Council of Jurists adopted a draft on the legal status of sea areas (Resolution xiii: Principles of Mexico on the Juridical Regime of the Sea). Part E of the draft was devoted to Bays which contained the following paragraphs: (1) A bay is a well-marked indentation whose penetration inland in proportion to the width of its mouth is such that its waters are inter fauces terrae, constituting more than a mere curvature of the coast. (2) The line that encloses a bay shall be drawn between its natural geographical entrance points where the indentation begins to have the configuration of a bay. (3) Waters comprised with a bay shall be subject to the juridical regime of internal waters if the surface thereof is equal to or greater than that of a semi-circle drawn by using the mouth of the bay as a diameter. (4) If a bay has more than one entrance, this semi-circle shall be drawn on a line as long as the sum total of the length of different entrances. The are of the islands located within a bay shall be included in the total area of the bay. (5) So-called “historic bay” shall be subject to the regime of internal-waters of the coastal State or States. Reprinted in Strohl, op. cit., p.229. This draft did not propose any limit for the closing line of a bay as a juridical bay and it is understood that in the view of the drafters all bays which could satisfy the semi-circle test would be a bay in a legal sense, no matter how wide the entrance of the bay or in other words the diameter of the semi-circle would be.
The proposal to extend the closing line to 25 miles had found little support; a number of Governments stated that, in their view, such an extension was excessive. By majority, the Commission decided to reduce the twenty-five miles figures, proposed in 1955, to fifteen miles. While appreciating that a line of 10 miles had been recognized by several Governments and established by international conventions, the Commission took account of the fact that the origin of the 10 mile line dates back to a time when the breadth of the territorial sea was much more commonly fixed at 3 miles than it is now. In view of the tendency to increase the breadth of the territorial sea, the majority of the Commission thought that an extension of the closing line to 15 miles would be justified and sufficient.152

In addition, the ILC's 1956 draft (para.1) included both geographical and mathematical criteria for the determination of a juridical bay153 which later constituted the formula incorporated into paragraph two of Article 7 of the TSC. However, the limit of fifteen miles in Article 7(3) of the 1956 draft was replaced by twenty-four mile limit in accordance with the trends in the UNCLOS I. The twenty-four mile limit was incorporated into Article 7(4 & 5) of the TSC. Article 10 of the LOSC reiterates the same provisions on juridical bays as those incorporated into the TSC.154

9. The UNCLOS I and the Issue of Bays

At the UNCLOS I, the First Committee undertook discussion on Article 7 of the 1955 ILC's draft concerning the delimitation of bays. Almost all proposals and discussions which were made at the ILC on the length of the bays closing lines were advanced again at the UNCLOS I but none achieved essential support.155 In this context, a proposal was supported by the delegates of Bulgaria, Poland and the Soviet Union156 which was strengthened by a similar proposal submitted by the delegate of

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152Report of the International Law Commission to the General Assembly, UNGAOR, Vol.11, Supplement No.9, UN Doc. A/3159, 1956, pp.15-16. Most of the members of the ILC were of the view that the length of the closing line of bays "should be expressed numerically in order to give it more exact meaning." Teclaff, op. cit., p.671.
154It should be noted that the LOSC replaced the word "miles" with "nautical miles" in reference to the maximum permissible length for the bays closing lines (24 nautical miles) to provide a more precise measurement. See paras. 4 and 5 of Article 10 of the LOSC.
155See for example the proposals of the range of vision and of ten mile limit, UN Doc. A/CONF.13/39, UNCLOS I, Official Records, Vol.III, 1958, pp.144-145. Great Britain proposed to the First Committee to consider two changes to Article 7 of the ILC's draft: one was to include a paragraph clearly stating that the whole article applies only to those bays the coasts of which belong to a single coastal States and another was to reduce the length of the closing line to ten miles. The First Committee adopted the first suggestion but did not agree with the second suggestion. Ibid., p.228.
156UN Doc. A/CONF. 13/C.1/L/103.
Guatemala. The formula was to extend the limit of the closing line to twenty-four miles, which in the view of the supporters, reflected an established international practice and was an appropriate limit to safeguard vital interests of States. The formula was based on three facts that:

(a) the ILC suggested twelve miles for the territorial sea and the formula of twice such limit would be reasonable length for the closing line;

(b) the ten mile rule was not recognised internationally; and

(c) the ILC first recommended twenty-five mile limit, even though it later replaced it with fifteen mile limit.

It was at the First Committee of the UNCLOS I (Committee on Territorial Sea and Contiguous Zone) that the limit of twenty-four nautical miles was finally adopted. In the UNCLOS I (as was also the case at the ILC), the American and French proposals providing a mathematical method to identify an indentation as a legal bay were taken into account as a model. Considering these geometric systems of the delimitation of bays, the UNCLOS I adopted the formula which was incorporated into Article 7(2) of the TSC and later reiterated in Article 10(2) of the LOSC. The purpose of this geometric solution for the delimitation of bays was to provide an objective criteria and prevent uncertainties which might have stemmed from a subjective approach to determining whether an indentation can be considered as a bay. Finally, in the formulation of international rules for bays, the UNCLOS I considered several interests which have been involved in the developments.

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157 UN Doc. A/CONF. 13/C.1/L/105.
158 UN Doc. A/CONF.13/39, UNCLOS I, Official Records, Vol.III, 1958, p.145. Westerman writes that none of economic, defence or any other rationale was raised in the proposals submitted to the First Committee on the issue of the closing line of bays. It is also stated that “the twenty-four mile limitation was proposed as a logical extension of the twelve-mile limit for the territorial sea, even though the logic of such a relationship had never been shown ... “. Westerman, op. cit., pp.167-168.
159 The twenty-four nautical mile rule was adopted by a vote of 31 in favor, 27 against, and 13 abstentions. UNCLOS I, Official Records, Vol.3, 1958, p.146. One author points out that the twenty-four mile line was adopted by the UNCLOS I “[i]n harmony with broadening claims to territorial waters.” Corbett, op. cit., p.73. Dupuy writes that the final solution of 24 nautical miles limit was reproduced in the LOSC “since it amounted to twice the extent of the territorial sea, fixed at 12 miles by the 1982 Convention itself.” Dupuy, op. cit., p.266. The 24 nautical miles limit is the maximum permissible length for the closing lines of bays. However, as one author points out “States are always free to apply baselines of lesser size.” Bouchez, op. cit., p.303. States are usually unwilling to employ a shorter line for bays where they are legally permitted to employ longer lines for the enclosure of bays.
160 Teclaff, op. cit., p.670.
of rules for delimitation of bays, attempting to create a balanced legal regime for bays which would be able to properly reconcile the then existing competing interests.161

IV. Reasons Advanced for the Special Treatment of Bays

There had been reliance on a number of factors in arguing why a special method of delimitation had to be created for the delimitation of bays, the method which is distinct from the one employed for normal coastlines. These factors vary from geographical justification to fiscal, customs, economic, security, and environmental interests.162 As early as 1896 Kent, an American publicist, asserted why certain coastal indentations should be enclosed. He presented the following view for justifying the American claims over certain coastal areas. Kent maintained that:

Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, etc.163 (emphasis added)

In his book (The Principles of International Law, 1913), Lawrence (an English writer) relied upon three various bases to justify the legitimacy of enclosing certain bays as territorial. Lawrence argued that “when a valuable fishery is retained for native fishermen by the assertion of sovereignty over a bay of considerable size, or when considerations of self-protection or political advantages are prominent ... States insist upon and often obtain recognition of their demands, some of which are based on very ancient precedent.”164 In the North Atlantic Fisheries Case (1910), the arbitral tribunal also maintained that:

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161 It is stated that the 24 mile rule was suggested after a careful examination of competing interests and reaching the conclusion that “a twenty-four-mile line was optimal and necessary in order to preserve the exclusive and inclusive interests of all states.” Westerman, op. cit., p.169.

162 As regards the motives of coastal States on which they have laid claims over bays, Bouchez classify these motives into four categories: (1) economic factors; (2) strategical and security considerations; (3) political factors; and (4) geographical factors. See Bouchez, op. cit., pp.282-296.

163 Strohl, op. cit., p.189. Teclaff (1962) was of the view that there have been three reasons for the enclosure of bays: “security of the coastal state; protection of fisheries; and long usage.” Teclaff, op. cit., p.668.

164 Strohl, op. cit., p.191.
the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to more intimate and important extent than do those connected with the open coast. *Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned* with the control of the bays penetrating the national coast line.¹⁶⁵ *(emphasis added)*

In a dissenting opinion in the *Fisheries Case* (1951), Judge Read argued that waters within bays were of territorial nature. He maintained that considering waters as part of the open sea “would bring smugglers and foreign warships and fishermen into the interior of the coastal State, to the prejudice of its security and vital interests.”¹⁶⁶

The existing trends of States demonstrated that the three traditional interests of geographical, economic, security nature, and the new trend of environmental protection constituted the foundations for claims of States over waters of bays as territorial. In general, the core of reasoning for special treatment of bays is based on the geographical character of bays as the projection of waters into the land, creating a maritime area which is unique in its extremely close relationship with the land territory. The more that waters within bays would have the landlocked character, the stronger the argument of geographical character would be. Apart from this geographical necessity for the treatment of bays similarly to land territory of coastal States, these States have rested their national claims upon other reasons to further strengthen the foundations for such special treatment. Economic importance of the area of bays for local people, the significant role of bays in the national security, and the environmental concerns form the most fundamental reasons in the enclosure of bays as unique coastal zones.

Bays are economically important for coastal States in different ways. However, there are two main reasons for the economic importance of bays:

First one is bays are maritime areas providing a means of coastal communication and waterborne commerce and trade. It is sometimes

¹⁶⁵ *Award of 7 September 1910, op. cit.*, p.196. The arbitral tribunal referred to a number of elements such as the ability of coastal State concerned to defend its territory, the importance of bay for the local industry among other elements to be taken into account in the determination of an indentation to the coast as a bay. *Ibid.*, p.199.

¹⁶⁶ *Dissenting Opinion of Judge Read, ICJ Reports, 1951*, p.188.
more economic and convenient for local people to carry their goods and products through the waterways within bays than to carry them through the land mass. In addition, there are local liners engaging in transferring goods and passengers along the coasts of bays. Such an economic activity in turn contributes to the economic growth of local areas.

Second, there exist living and non-living resources in the water column or on the submerged lands of bays. The exclusive exploitation of living and non-living resources of bays will contribute to the development of local economy of coastal States or, on a larger scale, to the economy of these countries in whole. No doubt the minerals and other non-living resources of the sea bed and subsoil of bays are of high economic value. However, the rights over fisheries resources were primarily the main concern of coastal States in advancing the doctrine of special treatment of bays. One of the reasons for this concern was that sea food and fish products were the main source of food for local population in many coastal countries.

The history of fisheries disputes among coastal States and distant-fishing countries clearly reflects that many of these cases occurred in coastal areas, particularly within bays. It was for the purpose of reserving the fisheries resources for local inhabitants that the doctrine of enclosure of bays was further supported. This economic aspect was in particular intensified where local dwellers were economically dependent on the coastal fisheries resources and where there was a risk of depletion of these resources.167

Security and strategic interests have also constituted another ground for the claims advanced by coastal States in enclosing coastal indentations.168 The defense and security concern of coastal States can

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167 For the reasons of the importance of bays as natural shelter in the process of harvesting marine sources see Strohl, op. cit., p.26. As regards the use of economic justification by States to extend their sovereignty over the adjacent waters, including those of bays, one author viewed in 1963 that “...it can reasonably be predicted that States will make ever-widening claims to sovereignty over the seas when it appears in their economic interest to do so, and under international law the most that can be done is for other States to seek a regularization and rationalization of the claims.” Ibid., p.24.

168 As regards the roots of economic and security aspects of bays in the history, Westerman writes that “[i]n every era, bays and other internal waters have generally recognised as so vitally interconnected with the economic and security interests of shore inhabitants as to become natural extensions of the land itself and thus susceptible to claims of exclusive authority by the littoral state. Every era has also witnessed opposition on such claims when it was feared that, carried to excess, they would impinge upon communal uses of the oceans.” Westerman, op. cit., p.33.
clearly be understood by paying attention to the first methods suggested for the delimitation of bays such as the range of cannon-shot, the range of vision, and the range of artillery on the shore. All these suggestions indicate that the concern over bays has originated from the ability to defend the country.\textsuperscript{169} This means that national security and defence formed the vital interests of coastal States and one of the main grounds in developing claims over bays. Consideration of the water of bays as part of the high seas could bring about potential dangers to the security and stability of coastal States. This may particularly be the case as a result of the presence of foreign warships or foreign submerged submarines in strategically located bays, which may be detrimental to the security of littoral States.\textsuperscript{170} Bays with their special geographical character as a deep indentation pose a greater security risk than any other part of coastline if some areas within them could be considered as the high seas. Bays are also used as the base for naval forces of coastal States and the larger the bays can be, the more warships can anchor within the bay.\textsuperscript{171} These coastal indentations are also used for naval operations and training.\textsuperscript{172} In general, the claims over bays as enclosed waters prevent the entrance of any foreign ship to waters within them without the permission of coastal States. In addition, the enclosure of bays has the impact of extending the territorial sea towards the high seas. In the territorial sea, coastal States still have the power to regulate passage of warships.

One of the most recent reasons added to the arguments of national claims over coastal indentations as legal bays has an environmental basis. Coastal waters are environmentally among the most vulnerable parts of the seas and oceans. This means that marine pollution could cause disastrous impacts on the living resources and on the health of local inhabitants. Bays are particularly in danger of these impacts. In many cases bays contain landlocked waters which are easily affected by

\textsuperscript{169}For the importance of bays for coastal States from a military point of view see Strohl, \textit{op. cit.}, p.48.

\textsuperscript{170}Some countries have closed some of their bays for security reasons not only to foreign warships but also to foreign merchant ships. For a list of these areas and their limits see the Second Report of the ILC on the Regime of the Territorial Sea, UN Doc. A/CN.4/61 at pp.11-17. An example is the United States which has established the areas which are called the Defensive Sea Areas. Strohl, \textit{op. cit.}, p.51.

\textsuperscript{171}In this connection, Strohl views that “a bay containing an expanded area of internal waters is very much a matter of a State’s defense interest.” \textit{Ibid.}, p.53.

\textsuperscript{172}Bays are stated to be of importance for the readiness of naval forces of coastal States particularly for the following reasons: “providing quiet waters for research and development of weapons and detection equipment, actual conduct of training exercises, calibration of equipment, and certain maintenance such as degaussing. \textit{Ibid.}, p.53.
pollutants. No matter what the source of pollution is, the important fact is waters within the bays are not resistant against pollution. One of the reasons of this vulnerability is the character of waters within the bays as landlocked. These waters do not have adequate mobility to transfer the whole or part of pollution to the open seas. Living resources, in particular those marine resources whose habitats are exclusively in marine environment of bays, are most adversely affected by marine pollution. All these marine environmental degradations have contributed to the creation of modern claims of coastal States for the delimitation of bays.

Since one of the sources of marine pollution is ship-based pollution, claims over parts of costal waters as bays empower costal States to control over foreign ships entering waters of bays under their sovereignty. Bays are part of internal waters of coastal States. This means that these States have more power over foreign vessels than where these vessels are found in the territorial sea. It is why bays are among most claimed maritime areas by coastal States. Accordingly, claiming certain indentations as legal bays is in the interest of coastal States to protect the marine environment of their bays and their living resources. However, States rarely choose not to make these claims.

V. Status of Waters within Bays

The history of the international law of bays indicates that for quite a long time the legal status of waters within bays uncertain. Once there was a discussion as to whether waters within bays of a single State should be part of the high seas or part of waters of this State. This controversy ended when State practice proved that waters of bays were part of waters of coastal States. However, an uncertainty about the nature of waters within bays remained to be resolved. The uncertainty was whether waters within bays are part of internal waters or territorial waters. Some authors clearly believed that waters in a bay were part of internal waters. For example, Lapradelle of France (1898), maintained that harbours, roadsteads and bays “form part of what may be called the national sea.”

However, a number of authors considered that the line across bays was

173_Ibid., p.190.
the outer limit of the territorial sea. Examples of these authors are Carnazza-Amri, Despagnet, and Hall.  

The debate in the British Parliament related to the Moray Firth Case is a clear example of uncertainty which existed in relation to the legal status within a bay. The debate reflected the view that waters within bays constituted part of territorial waters, which also included bodies of water now recognised as internal waters. This approach is clear from the response of the British Foreign Office to a question asked in the British Parliament on 21 February 1907 with respect to the *Moray Firth Case*. The British Foreign Office stated that:

> according to the view of the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade and the Board of Agriculture and Fisheries, the term “territorial waters” was deemed to include waters extending from the coast line of any part of the territory of a State to three miles from the low-water mark of such coast line and the waters of all bays, the entrance of which is not more than six miles, and of which the entire land boundary forms part of the territory of the same state.  

(emphasis added)

Basis of Discussion No.18 in the 1930 Hague Conference clearly stated that “[t]he base-line from which the belt of territorial waters is measured in front of bays, ports and roadsteads forms the line of demarcation between inland and territorial waters.” However, there were a number of national laws enacted after the 1930 Hague Conference that defined territorial waters (the territorial sea) as to include those waters behind as well as beyond the closing line of bays. For example, Article 5 of the Act No. 33 (1935) of Iceland, *inter alia*, provided that “all that part of bays and inlets lying to landward of a straight line ... and the area extending seaward for four miles from that line, shall be deemed to be within territorial waters.” The Italian legislation of 1942 implied that the closing line of bays is the outer limit of the territorial sea. The Swedish Royal Decree of 1945 defined the Swedish territorial waters as

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including lakes, watercourses, canals, harbours, harbour entrances, bays, and the territorial sea.\textsuperscript{179} The Ecuadorian Legislation of 1950 also provided that national territorial waters comprise the territorial sea and “the inner waters of the gulfs, bays, straits and canals.”\textsuperscript{180} There were also national laws which clearly indicated that waters within bays were to be considered as internal waters of coastal States. Examples are Article 6 of the 1947 Constitution of the Dominican Republic\textsuperscript{181}, the 1948 Act of Yugoslavia\textsuperscript{182}, the 1951 Decree of Bulgaria\textsuperscript{183}, and the 1959 Act of Iran\textsuperscript{184}.

The development in approaches towards the issue of the delimitation of bays and the nature of waters within bays, from the traditional practice to the modern practice, has been clearly shown by McDougal and Burke. They write that:

\begin{quote}
[the closing line] across the indentation was not conceived as separating an area of internal waters on the landward side from an expanse of territorial sea measured seaward of the line. \textit{All of the waters on both sides of the “line” were regarded as part of the territorial sea.} Latter, states generally came to claim, as they continue to do, that \textit{the closing line in the indentation marks the baseline from which the territorial sea begins and the waters on the landward side are internal waters.}\textsuperscript{185} (emphasis added)
\end{quote}

Gradually, more authors drew more attention to the distinction between waters within bays belonging to single States and their territorial seas. For example, Shalowitz (1962) made it clear that waters within a bay have the character of inland waters because “they are situated within the body of the land.”\textsuperscript{186} Also Bouchez (1964) maintained that “[i]f a State is entitled to exercise sovereignty over a bay the enclosed water area

\begin{itemize}
\item \textsuperscript{179}Article 2, Royal Decree No. 31 of 9 February 1945 Concerning Provisions Related to Navigation in Swedish Waters, as Amended. \textit{Ibid.}, p.245.
\item \textsuperscript{180}Article 3, Civil Code of 1950. \textit{Ibid.}, p.13.
\item \textsuperscript{181}Article 6, Section II: The Territory, Constitution of the Dominican Republic of 1947, as Amended. \textit{Ibid.}, p.12.
\item \textsuperscript{182}Article 3 of Act of 1 December 1948 Concerning the Coastal Waters of the Federal People’s Republic of Yugoslavia. \textit{Ibid.}, p.313.
\item \textsuperscript{183}Para. 2, Decree of 10 October 1951 Concerning the Territorial and Inland Waters of the People’s Republic of Bulgaria. \textit{Ibid.}, p.80.
\item \textsuperscript{185}McDougal and Burke, \textit{op. cit.}, p.311.
\item \textsuperscript{186}Shalowitz, \textit{op. cit.}, p.220, no.28.
\end{itemize}
has the status of internal waters. In other words, the water are involved does not constitute part of the high seas, and is not subject to the principle of the freedom of the Seas.”187 It became clear that waters behind the closing line were an integral part of internal waters of these States. As McDougal and Burke have asserted, State Practice and national legislation gradually indicated a clear picture that waters within the closing lines have no other status but being part of internal waters, like any other maritime areas within baselines in general.

It was the TSC which finally put an end to the uncertainty about the legal nature of waters within bays belonging to a single State. Article 7(4) of the TSC (Article 10(4) of the LOSC) provides that the waters which are entirely enclosed by the closing line of a bay are considered “as internal waters.” Also the provision of Article 5(1) of the TSC (Article 8(1) of the LOSC under the heading “Internal waters”) can be relied upon in recognition of the legal nature of waters within juridical bays. This article states that “[w]aters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.” This provision extends to the waters within legal bays because the bays closing lines are classified among baselines of the territorial sea.

VI. Analysis of Article 7 of the TSC (Article 10 of the LOSC): Rules on the Enclosure of Waters within Bays

After the work of the ILC on different aspects of the legal regime of the territorial sea, including its delimitation aspects, the UNCLOS I adopted the definition suggested by the ILC in identifying legal bays. This definition was then incorporated into the TSC and was later maintained in the LOSC.188 The main purpose of introducing a precise definition for a legal bay was to prevent unjustified enclosure of certain areas of coastal waters as bays which would deprive international community from having access to areas in which they enjoy inclusive interests.189

187Bouchez, op. cit., p.15
188Article 7(1) of the TSC (Article 10(1) of the LOSC) makes clear that the provisions on the delimitation of bays relate “only to bays the coasts of which belong to a single State.”
189It should be noted that the enclosure of true bays is a right and not an obligation. This means any State may wish to establish the method of low-water mark with respect to the baseline within bays. In general, however, no State appears to have excluded itself from enjoying the right to enclose its bays in accordance with the international positive law.
1. Definitional Criteria in Identifying Legal Bays

Definitional criteria for identifying juridical bays are provided in Article 7(2) of the TSC (Article 10(2) of the LOSC). According to this provision, a bay is defined as:

a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

This definition of a juridical bay is made upon two main criteria: the geographical criterion and mathematical criterion. The first part of the definition reflects the geographical test and the second part of the definition reflects the geometric test. The geographical criterion is applied to assist in finding that an indentation is not a mere curvature of the coast. To find whether an indentation is a mere curve or a true bay from a geographical viewpoint, three guidelines are suggested.

• Firstly, the indentation should be “well-marked”.

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190 Shalowitz states that this part of the definitional criterion of a legal bay “sets forth the important concept of landlocked waters, or waters situated within the body of the land, for an indentation to qualify as a bay.” Shalowitz, op. cit., pp.218-219. Prescott writes that “[t]he reference to a bay being a well-marked indentation and more than a mere curvature of the coast convey the same message.” Prescott, J. R. V., The Maritime Political Boundaries of the World. Methuen & Co. Ltd., London, 1985, p.51. For example, Prescott mentions that the Brunei Bay is a well-marked indentation while there is a gentle curve in the east of Tanjong Baram which cannot be considered a bay under the TSC’s definition of a bay. Ibid.

191 The above-mentioned definition of a bay was first suggested by the ILC to the UNCLOS I and was then incorporated into Article 7(1) of the 1956 ILC draft articles. Article 7 of the 1956 ILC Draft was reprinted in Strohl, op. cit., p.224. It is emphasised that “[t]his definition [definition of “bay” in Article 7(2) of the TSC and Article 10(2) of the LOSC] is purely legal and is applicable only in relation to the determination of the limits of maritime zones. It is distinct from and does not replace the geographical definitions used in other contexts.” The Law of the Sea - Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea. Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, p.50.

192 In its commentary, the ILC maintained that the provision on the definition of a bay established “the conditions that must be satisfied by an indentation or curve in order to be regarded as a [legal] bay.” See the ILC’s Commentary on Draft Article 7, YILC, Vol.II, 1956, p.269. (Hereinafter ILC’s Commentary on Draft Article 7, 1956) In the United States v. Louisiana Case (Louisiana Boundary Case, 1969), the Court disagreed with the Louisiana’s view that it is sufficient for a bay to only satisfy the semi-circle test to be considered as a bay. The Court described the semicircle test as “a minimum requirement” and held that other requirements should be met. These requirements, among others, are that an indentation should be well-marked and to enclose landlocked waters. United States v. Louisiana (Louisiana Boundary Case, 1969), 394 U.S. 11, p54. 22 L Ed 2d 44, p.79.
• Secondly, the ratio of the depth of the penetration to width of the indentation should be such that the indentation is surrounded by land mass, except in its mouth.

• The third element is that the indentation should contain landlocked waters. The third element is, in fact, associated with the second element in the sense that if the indentation has a deep penetration into the land, it will probably contain landlocked waters.

Although the geographical criterion gives an overall evaluation of an indentation as a bay or as a mere curve, it is unable to provide a final solution in the cases where there are different views as to whether a particular indentation is to be considered a bay or a mere curve. Such determination has significant effect since there are different legal regimes for the delimitation of internal waters and the territorial sea on the basis of the nature of the indentation. For these reasons, a mathematical criterion was designed to give a more precise and practical solution in the cases of uncertainties over the legal nature of a coastal indentation. The mathematical method was in a sense introduced to prevent any abuse by coastal States in enclosing mere curvatures of the coast.

The essence of the mathematical criterion is the application of a semi-circle test. This quantitative formula is used to accurately find the character of an indentation on a mathematical basis for legal purposes. To apply the semi-circle test, the first step is to draw a line across a bay.

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193 As one author points out the conventional provisions present no guidance to find how landlocked an indentation should be to be distinct from a mere curve. Shalowitz, op. cit., p.219. As one author points out the term “landlocked waters” should be interpreted liberally because this term in its literal meaning implies that a bay should have “an entrance channel from the sea that is curved in such a manner as to enter upon a body of water that is truly landlocked.” If only this literal meaning is taken into account a few bays in the world will fall into the meaning. Examples of the bays which may satisfy the character of landlocked waters are the Purvis Bay (Solomon Islands); The Gulf of Corinth (Greece); Trondheimfjord (Norway); Galveston Bay (Texas); The North Gulf of Evvoia (Greece); the Port Philip Bay (Australia); and the Lake Maracaibo (Venezuela). Strohl, op. cit., p.56.

194 The ILC was aware of this problem that it provided a geometric solution. In fact, in its commentary view, the ILC stated that: “(3) ... The majority [of the ILC] considered that it was not sufficient to lay down that the waters must be closely linked to the land domain by reason of the depth of penetration of the bay into the mainland, or otherwise by its configuration, or by reason of the utility the bay might have from the point of view of the economic needs of the country. These criteria lack legal precision. (4) The majority of Commission took the view that the maximum length of the closing line must be stated in figures and that a limitation based on geographical or other considerations, which would necessarily be vague, would not suffice....” (emphasis added) ILC’s Commentary on Draft Article 7, 1956, op. cit., p.269.

195 This view was explicitly expressed by the ILC when it commented that the provision on the definition of a legal bay “was calculated to prevent abuse.” Ibid.

196 As Prescott asserts in a strict legal sense the semi-circle test “should only be applied after it has been decided that the bay is a well-marked indentation.” Prescott, op. cit., 1985, p.53.
which links the natural entrance points on the shores. Then a semi-circle whose diameter is the line drawn across the bay will be drawn within the bay. If the area of water within the bay is as large as, or larger than, the area of the semi-circle, the bay will be a juridical bay which then will be subject to other provisions on the delimitation of bays. The area of an indentation or a bay for the purpose of comparing its size with the semi-circle is defined as the water area "lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points." If there are islands located within an indentation, they are included as part of the water area within the indentation.

When it becomes clear that an indentation, which satisfies the semi-circle test, may be described as a legal bay, then the rules on the enclosure of bays apply to it. The question as to whether a legal bay may entirely or partially be enclosed depends on the distance between natural entrance points on the shores of such bay. If this distance is not longer than 24 nautical miles, then a closing line up to maximum 24 nautical miles may be drawn between low-water marks on the shores to enclose the whole area of the bay. In this case, all waters within the bay are parts

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197 As Brown writes, at this stage "the length of the line drawn across the mouth of the indentation (whether, in particular, it is more or less than 24 miles) and the size of the area enclosed by the line are irrelevant." Brown, E. D., The International Law of the Sea. Vol.1: Introductory Manual, Dartmouth, Aldershot, 1994, p.28.

198 Article 7(3) of the TSC (Article 10(3) of the LOSC).

199 Article 7(3) of the TSC (Article 10(3) of the LOSC). As early as 1930, the Swedish Government, inter alia, asserted that "islands situated at the entrance of a bay should also be regarded as forming part of the bay." Part of Reply of the Swedish Government to the Questionnaire 2 of the Committee of Experts (1926), Rosenne, op. cit., Vol.2., p.262. In its "Observations" to the Basis of Discussion No.6, the Preparatory Committee of the 1930 Hague viewed that "where islands belonging to the coastal State lie at the entrance of a bay, the breadth of the opening of the bay is to be measured from the coast to the island or from one island to another." Rosenne, op. cit., Vol.2., p.263. Strohl states that the provision of Article 7(3) of the TSC (Article 10(3) of the LOSC) "would appear to favor the littoral State in converting bay waters into internal waters." Strohl, op. cit., p.61. In the United States v. Louisiana Case (1969), the United States Supreme Court stated that the purpose of the provision of Article 7(3) of the TSC is to prevent islands within bays "to defeat the semi-circle test by consuming areas of the indentation." United States v. Louisiana (1969), 394 U.S. 11, p.53. 22 L Ed 2d 44, p.78. Edeson views that permanent harbour works should also be taken into account as part of the indentation for the purpose of the application of the semi-circle rule. For reasons on such interpretation see Edeson, W. R., 'Australian Bays', Australian Yearbook of International Law, Vol.5, 1968-1969, pp.5-54, at 37.

200 Closing line is defined as "the line marking the boundary between internal waters of a bay and the marginal bet [territorial sea]. It is used where the boundary is drawn between the natural entrance points." Strohl, op. cit., p.70. It is also maintained that straight baseline is applied for the same purpose as the closing line for bays but the closing line is used to distinguish between the boundary when drawn with respect to a juridical bay with the boundary created by the straight baseline. Ibid., p.71.

201 Article 7(4) of the TSC (Article 10(4) of the LOSC).
of the internal waters of the coastal State. Where the distance exceeds
the limit of 24 nautical miles, a line with the length of 24 nautical miles
will be drawn across the bay "in such a manner as to enclose the
maximum area of water that is possible with a line of that length." In
this case a question arises as to whether the area enclosed by a line of 24
nautical miles should also satisfy the semi-circle test. It seems that no
such a requirement exists since no conventional rule provides the double
application of the semi-circle test with respect to an indentation as a legal
bay. It should also be added that the use of 24 mile line in the case of
bays whose mouths are larger than 24 miles does not always follow the
fact that such a line should link one headland to the other. This means
that in some cases there only exists a need to find one natural entrance
point on the shore as a terminus point while the other basepoint is not
located on the other shore but on the water within the bay. This applies if
no closing line with the length of 24 nautical miles can be constructed by
linking two points on the shore. In a sense, in such cases the 24 mile line
is independent of the rule to adjoin two natural entrance points.

The rules discussed above can be better understood by examining
different indentations. The following figure shows the application of the
semi-circle test for various types of coastal indentations, from an slight
one to a landlocked one. The cases illustrated are hypothetical, and in
most cases the bays are not circular, but these cases can be applied by

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202 This is because a legal bay can be excluded from application of the normal low-water mark rule and a
deviation from this rule can be justified.

203 Article 7(4) of the TSC (Article 10(4) of the LOSC). It was the ILC which first suggested that if the
mouth of a legal bay is wider than the maximum permissible width (in its draft fifteen miles), the
closing line should be drawn in a way to cover as much water as possible to be enclosed. In this
connection, the ILC commented that this rule will in practice be applied to the cases where it is
possible to draw more than one closing line of the same length across the mouth but on different parts
Commission to the General Assembly, UNGAOR, Vol.11, Supplement No.9, UN Doc. A/3159,
1956, p.16. In short, there are three stages for identifying an indentation as a legal bay. The
indentation should first meet the definitional criterion. Secondly, it should comply with the
measurement rules. Finally, it should be enclosed by a closing line of maximum 24 nautical miles in
length.

204 Shalowitz argues that in the case of bays whose mouths are larger than 24 miles, that part of the bay
which is enclosed with a line of 24 miles should also meet the requirement of the semi-circle test.
See Shalowitz, op. cit., pp.220 and 222-223. For a discussion of this issue and the opposite view see
Westerman, op. cit., pp.170-175. For opposite view see Edeson, op. cit., pp.41-42. With respect to
the relevance of the issue to Australia, Edeson writes that: "The question could become important to
Australia as the Gulf of Carpentaria has the configuration of a bay but considerably exceeds the
maximum width. A 24 mile baseline drawn within the Gulf under paragraph 5 [of Article 7 of the
TSC] to enclose the maximum area of internal waters conceivably may not satisfy the semi-circle test.
Ibid., p.42.
analogy to real geographical circumstances around coastlines. Part A of the figure indicates a landlocked bay which is almost completely surrounded by the land mass while part B of the figure demonstrates a slight indentation of the coast. In fact, these two indentations are the extreme examples of coastal indentations from a mere curve to a very deep indentation. In the case A the indentation is obviously a legal bay and the indentation in the case B is obviously a non-legal bay. Thus the former can be described as "a closed bay" and the waters within this bay are considered inland or internal waters while the latter is a clear example of "an open bay". There are also indentations which place between the extreme cases of A and B. For example, the indentations in the cases of E and D are respectively regarded as a non-juridical bay and a juridical bay. The case C illustrates an indentation exactly with the size of the semi-circle and is also considered as a bay in law because it is as large as the semi-circle.

Figure 3.4
The application of the semi-circle test to various coastal indentations


Shalowitz is in opinion that "considering the nature of the problem [problem of delimitation of bays] and the infinite variety of coastlines and indentations that might be encountered, no mathematically perfect method is possible. The semicircular method avoids an arbitrary solution and affords at least a rational approach to the inland waters problem." Shalowitz, op. cit., p.41. The view of McDougal and Burke is worthy of mention. They are of the view that although the application of the semi-circle formula "may contribute to attaining a fairly uniform characterization of indentations", "it does not permit account to be taken of particular instances which fail to fall within the formula but which nevertheless might properly, because of the intensity of genuine exclusive interests, be claimed as internal waters." McDougal and Burke, op. cit., p.330.
If a bay does not meet the geographical and mathematical requirements, it will not be a legal bay under Article 7 of the TSC (Article 10 of the LOSC), irrespective of the width of its entrance. Therefore, the bay would not be a legal bay and its waters are not internal waters over which coastal States have exclusive sovereignty. If, however, the mouth of the bay is more than 24 nautical miles and the bay cannot be enclosed by a closing line of 24 nautical miles in length, the waters inside the bay may have two separate legal status. Those waters covered by the closing line will be internal and the other parts of the bay will be part of the territorial sea (up to 12 nautical miles from the low-water mark) where there is the recognised right of innocent passage for foreign ships, even though the area may not be of interest for international shipping. This right is reserved for peaceful passage.

As is clear, in the case of bays whose mouths are larger than 24 nautical miles and meet the semi-circle test, a line is drawn within the bays to enclose the entire bays or some portion of them. This line is termed “straight baseline” in Article 7(5) of the TSC (Article 10(5) of the LOSC). It appears that the term “straight baseline” was used by the drafters of the TSC to distinguish between the line which is drawn in the case of bays larger than 24 nautical miles in width and the closing line which is employed to enclose bays with maximum 24 nautical miles in width. However, the use of the term “straight baseline” in the context of delimitation of bays can cause confusion with the straight baseline systems which are used in the case of deeply indented and cut off coasts or coasts with fringing islands. Although in both cases the baselines are used for the purpose of separating internal waters from the territorial sea, they are two different methods of delimitation designed for different coastal features. To resolve this problem of terminology and to avoid the confusion caused by the use of similar term, one author suggests the term

206Churchill and Lowe state that “around the unclosed part of the bay the baseline will be the low-water mark (unless any of the features that justify a different baseline are present).” Churchill, R. R., and A. V. Lowe, The Law of the Sea. Manchester University Press, Manchester, 1983, pp.31-32.
207This is in the cases where there are no other base points on the shores to construct a 24 nautical mile closing line and the geographical circumstances are in a way that the bay cannot be enclosed by a line with the maximum length of 24 nautical miles.
208Compare Article 7(5) of the TSC (Article 10(5) of the LOSC) where the term “straight baseline” is used with Article 7(4) of the TSC (Article 10(4) of the LOSC) where the term “closing line” is used.
"boundary line" to replace the term "straight baseline". By doing so, Article 7(5) of the TSC (Article 10 (5) of the LOSC) would read:

Where the distance ... exceeds twenty-four miles, an internal waters boundary line of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

2. Tributary Bays and the Application of the Semi-Circle Test

One issue concerning the calculation of the semi-circle created by a closing line is whether the areas of tributary bays or subsidiary bays can be taken into account as part of primary bays. This issue was addressed in the United States v. Louisiana Case (Louisiana Boundary Case) which was brought before the United States Supreme Court in 1969. Louisiana believed that Outer Vermilion Bay and Ascension Bay in its coasts were true bays. Louisiana argued that in the case of applying the semi-circle test to Outer Vermilion Bay, the area of Vermilion Bay had also to be included. It also expressed the same view concerning the Barataria Bay-Caminada Bay complex as part of the Ascension Bay. Only by taking the above-mentioned areas into account, Outer Vermilion Bay and Ascension Bay could satisfy the semi-circle test. The United States Government agreed that certain tributary waters may be taken into account for the purpose of the semi-circle test but it did not agree that "all tributary waters are so includible." It asserted that Vermilion Bay and Barataria Bay-Caminada Bay could be includible because in its view they were "wholly separate from the outer body of water and linked only by narrow passages or channels. The Court finally reached to two different conclusions about the status of Outer Vermilion Bay and Ascension Bay.

210Westerman, op. cit., p.162.
211Shalowitz writes that "[i]n the application of the semi-circle rule to an indentation containing pockets, coves, or tributary waterways, the area of the whole indentation (including pockets, coves, etc.) is compared with the area of a semi-circle." Shalowitz, op. cit, p.219.
212The case was among a series of cases which brought before the Supreme Court of the United States of America as a result of disputes between the federal government and many state governments over submerged lands. In the United States v. Louisiana Case (1969) the issue was over the baseline from which the three mile limit of submerged lands of Louisiana had to be measured.
213United States v. Louisiana (1969), 394 U.S. 11, pp.48-49. 22 L Ed 2d 44, pp.76-77. Louisiana argued that the phrase "between the low-water mark around the shore of the indentation" in Article 7(2) of the TSC means "to follow the low-water line wherever it goes, including into other indentations, in drawing the perimeter of the primary bay." United States v. Louisiana, 394 U.S. 11 (1969), pp.50-51. 22 L Ed 2d 44, p.77.
While the Court considered that Outer Vermilion Bay was neither a bay nor part of a larger bay, it held that the water area of Ascension Bay "does include the Barataria Bay -Caminada Bay complex and therefore meets the semi-circle test."215

The United Nations Study on the issue of baselines, among other things, addressed the issue of tributary or subsidiary bays in the application of the semi-circle bays. The study maintained that if the shoreline of subsidiary bays forms part of the low-water mark and is part of penetration of the sea into land, "there appears to be no reason why it should not be counted as part of the area of the bay."216 The following figure illustrates an example where a subsidiary bay may be taken into account as part of the main bay. Although in this example, the main bay itself satisfies the semi-circle test, in some cases the subsidiary bays play a determining role in recognising a bay as a juridical one.

Figure 3.5
An example of a tributary bay


3. The Issue of Identifying Natural Entrance Points of Bays

Although the conventional provisions on the delimitation of bays provide that the closing lines of bays should link "the natural entrance

215United States v. Louisiana (1969), 394 U.S. 11, p.52. 22 L Ed 2d 44, p.78. The Court stated that the Barataria Bay -Caminada Bay complex (as inner bays) 'were separated from larger "Ascension Bay" only by the string of islands across their entrances.' Ibid.

216The Law of the Sea - Baselines, op. cit., pp.28 & 30. It seems that New Zealand has taken into account the area of the tidal Onoke Lake for the purpose of satisfying the semi-circle test to enclose Palliser Bay as a legal bay. Ibid., p.41, no.19.
points” on shores of bays, there are no guidelines as to what points on the shore should be considered as natural entrance points. The lack of any guidelines in the TSC and the LOSC may lead coastal States to choose points on the shores of bays in a manner: (a) to enclose bays which do not normally fall in the category of legal bays; or (b) in a manner to enclose more waters within the closing line where bays can be classified as legal bays but can be enclosed by drawing a more proper closing line choosing appropriate points as natural entrance points. These practical problems may in practice result in the enclosure of more parts of the high seas and so limit navigation rights of foreign ships to innocent passage.

In this connection, the case of Post Office v. Estuary Radio is worthy of examination. In this case, the English Court of Appeal was asked to determine natural entrance points for the Thames estuary. The importance of this determination was to find whether the Thames estuary is a legal bay. There was a dispute as to where the natural entrance points are located. Two different series of points on the shores were put before the Court that would lead to two different outcomes. While Estuary Radio was of the view that Ordordness and the North Foreland were to be considered as the natural entrance points of the Thames estuary, the Post Office claimed that the natural entrance points were the Naze and Foreness. The result of the use of the points suggested by Estuary Radio was that the Thames estuary would not satisfy the semi-circle test and therefore would not be qualified as a legal bay to be enclosed. In

217 Natural Entrance points are defined as “the points at which the coastline can most reasonably be said to turn inward to form an indentation or bay.” Strohl, op. cit., p.68.

218 The other terms which are used for implying the same meaning as the entrance points are boundary points, termini at headlands and landmarks. The term headland, in common usage, mean “a land mass having considerable elevation, something that the navigator can see from offshore”. However, in the context of the law of the sea a headland can be considered as “the point of maximum extension of a portion of the land into water; or a point on the shore at which there is an appreciable change in direction of the general trend of the coast.” Shalowitz, op. cit., pp.63-64.

219 Prescott mentions Mabo Harbour on Malaita in the Solomon Islands and Gwadar West Bay on the coast of Pakistan as examples of bays which have well-marked points. Prescott, op. cit., 1985, p.53. It is stated that if an indentation qualifies the geographical criterion incorporated into Article 7(2) of the TSC, that is to say if an indentation is a well-marked one, and if it contains landlocked waters, and if it is more than a mere cure, then “the bay will almost inevitably have natural entrance points, which are easily discernible.” Strohl, op. cit., p.62.

220 [1967] 1 W.L.R. 847. In this case, the Post Office was attempting to indicate that pirate broadcasting was operated within the Thames Estuary as part of the territory of the UK and accordingly subject to the provisions of the Wireless Telegraphy Act 1949. The issue of the rivers and creeks flowing into the indentations or forming estuaries as part of the area to be considered for the area of the indentations was also addressed in the Post Office v. Estuary Radio Case. See ibid., pp.847-848 and also Edeson, op. cit., 1968-1969, pp.38-39.

contrast, the application of the points proposed by the *Post Office* would lead to the conclusion that the Thames estuary would be categorised as a legal bay and accordingly could be enclosed. The Court finally agreed with the view of the *Post Office* and the Thames estuary was considered to fall into category of legal bays as it could thus satisfy the requirement of the semi-circle test.

The issue of uncertainty in finding natural entrance points of a bay was also raised in the case of *United States v. Louisiana* (1969). In this case, one dispute was on the line drawn across the East Bay by Louisiana. The United States Government did not recognise this line on the ground that 'the area within East Bay enclosed by Louisiana’s proposed line does not constitute a bay because there is no “well-marked indentation” with identifiable headlands which encloses “landlocked” waters.'

The uncertainty of determining natural entrance points in a number of possible cases is addressed in the United Nations study on baselines. The study states that “it is not clear how to identify the natural entrance points of a bay. Some bays will possess a number of points which might be used, some will have only one natural entrance point, and others may possess smoothly curved entrances on which no single point is distinguished.” (See the following figures illustrating examples of real cases.) In the case of a bay indicated on Figure 3.6 (a), coastal

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222 The Court's view was expressed after the examination of related maps and the evidence presented by a group of cartographers, hydrographic surveyors and specialist navigators. *Ibid.*, p.43.

223 [1967] 1 W.L.R. 848. The difficulty in finding the natural entrance points in certain cases is even intensified where there is no agreement on the most appropriate points for the termini of the closing lines. For example, Churchill and Lowe view that neither the points suggested by the *Estuary Radio*, nor those proposed by the *Post Office* would be regarded as natural entrance points. Churchill and Lowe, *op. cit.*, p.32.

224 *United States v. Louisiana* (1969) a, 394 U.S. 11, p.54. 22 L Ed 2d 44, pp.79. The United States Supreme Court did not present its view on the question as to whether the designated portion of the East Bay were in consistent with the requirements pointed out by the Federal government. However, the Court generally expressed that these requirements should be met if an indentation is to be considered as a bay. *Ibid.*

225 For example, in the case of Wanderer Bay on Guadalcanal in the Solomon islands there are six series of entrance points which produce six different possible closing lines. Prescott, *op. cit.*, 1985, pp.53-54.

226 Examples of bays falling into this category are Port Waitangi on Chatham Island in the south Pacific Ocean, Encounter Bay in South Australia, Saint Helena Bay in Cape Province of South Africa, and Walvis Bay in southwest Africa. *Ibid.*, pp.54-55.

227 An example of these kinds of bays is Baie Anarua on the coast of Rapa Iti in French Polynesia. *Ibid.*, pp.55-56.

228 The Law of the Sea: Baselines, *op. cit.*, p.28. The study also comments that: “A number of tests have been proposed for objectively identifying natural entrance points. Some may find those tests helpful but others may prefer to use other criteria. Article 10 [of the LOSC] is silent on this point.” *Ibid.*
Figure 3.6
The issue of natural entrance points of a bay
(a) A bay with multiple entrance points*

(b) A bay with only one entrance point*

(c) A bay with no definite entrance points*


Figure 3.7
Wanderer Bay, Guadalcanal


Figure 3.8
Gulf of Cutch in India


Figure 3.9
Baie Anarua, French Polynesia


States are usually willing to enclose more waters within the bay if the bay meets the requirement of the semi-circle test and all closing lines do not exceed 24 nautical miles.

With respect to bays whose entrance points are not clear, the method suggested by Shalowitz can be used as a solution. Shalowitz's method is to find the entrance point on the shore of a bay which is rounded or smooth. In his words, "[w]here the headland is of considerable extent with a gently rounded and featureless shore, a satisfactory solution may be reached by bisecting the angle formed by a line coinciding with the general trend of the low-water mark along the open coast and a line coinciding with the general trend of the low-water mark along the bay or tributary waterway. Where this bisectrix intersects the low-water mark will be the point sought."229 (See Figure 3.10 below)

Figure 3.10
Method of determining natural entrance points of a bay


It appears that Shalowitz's method can be used for either (a) bays with only one clear entrance point while the other point is not clear due to geographical character of the shore as shown in Figure 3.6(b)230, or (b)

229 Shalowitz, op. cit., pp.64-65. The basis of Shalowitz's method is on the fact that "[t]he shores of the headlands are formed by two different groups of forces - those of the ocean and those of the estuary or tributary waterway. The points sought [for the termini of headlands] are where the shores resulting from thee forces meet. Therefore, each terminus of the headland-to-headland line is taken as a point at the outermost extension of the headland from which it is drawn." Ibid., p.64.

230 If in such a case the Shalowitz's method is not responsive, the method suggested by Edeson can be used. Edeson suggest the following solution for the cases where there is a clear headland on one side of a bay while the other side presents a gentle curve. He states that in such cases the solution is "to
bays with no clear and definite entrance points on either shore as indicated in Figure 3.6(c).

4. The Issue of the Delimitation of Multi-Mouthed Indentations

One issue which should be considered is related to the case where there are islands within the mouth of an indentation, that is to say the issue of multi-mouthed bays.\textsuperscript{231} The question is whether these bays are susceptible to enclosure if they meet the requirements of a legal bay with a single mouth or they are not to be enclosed at all. The solution is found in Article 7(3) of the TSC (Article 10(3) of the LOSC) which provides that "[w]here, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths."\textsuperscript{232} This means all bays are subject to the semi-circle test, no matter whether they are single or multi-mouthed bays. The only difference is the way the length of the diameter on which the semi-circle is drawn is calculated on different basis.\textsuperscript{233}

As indicated above, the rules of Article 7 are not strictly used in the case of bays with islands in the mouth. These rules have been made flexible by considering the sum of the length of the mouths between the islands. In fact, the drafters were of the view that "the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio

\begin{footnotesize}
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\item draw the closing line from the clearly marked headland to the nearest point of land on the opposite shore, or, if that line is greater than 24 miles, then to draw a baseline within the bay so as to enclose the maximum area of internal waters in accordance with paragraph 5 [of Article 7 of the TSC]." Edeson, \textit{op. cit.}, 1968-1969, p.43.
\item An example of bays with islands on their mouths is Narragansett Bay, Rhode Island. Strohl, \textit{op. cit.}, p.60.
\item One writer argues that the provision "is not free of ambiguity and raises the question as to whether the sum of the widths of the several entrances may exceed the length of the closing line" or whether this total sum of the widths should comply with the maximum limit of 24 nautical miles. Shalowitz, \textit{op. cit.}, p.220. It seems that in the case where the sum total of the widths is wider than 24 nautical miles, a line should be drawn landward of the mouth of the bay where the width does not exceed 24 nautical miles. See Brown, \textit{op. cit.}, 1994, p.30. See also Shalowitz's interpretation which suggests that the maximum limit for the closing line should be applied to both single-mouthed bays and multi-mouthed bays. Shalowitz, \textit{op. cit.}, p.221. Shalowitz also states that if the total sum of the entrances of an indentation would exceed 24 nautical miles, the indentation would not be a legal bay on the ground of islands located at its mouth. In this case, the indentation "would have to be tested by the rule for indentations wider than the closing line." \textit{Ibid.}, p.222.
\item Strohl points out that in the case of a multi-mouth bays how lines are to be drawn "can make a significant difference in the total numerical value of ... [the] closing line, with which the area of the bay is to be compared." Strohl, \textit{op. cit.}, p.60.
\end{itemize}
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between the width and the penetration of the indentation.” It is in line with these justifications that Westerman writes that “the strict geographical and mathematical requirements set forth under paragraph two [Article 7 of the TSC] are relaxed for multi-mouthed bays.” In some cases a bay which is a multi-mouthed bay would not be a legal bay if no island or islands were not located in its mouth. This is because the total length of the mouth would be less in the case of a multi-mouthed bay in comparison to the same bay if it were a single-mouthed bay. Accordingly, the diameter of the semi-circle would be smaller in the case of a multi-mouthed bay compared with a bay with the same size but without islands in its mouth. Whatever the justification has been for making such a rule for multi-mouthed bays, the recognition of this rule has contributed to the enclosure of more areas of waters as internal waters. If such a provision were not be included in the conventions on the law of the sea, the pattern of maritime zones of the coastal States concerned would change and less waters would be subject to the legal regime of internal waters. In addition, the ILC presented a comment which was not taken into account by the UNCLOS I in the codification of the provisions of the TSC. The ILC’s view was that in the case of a multi-mouthed bay ‘islands at the mouth of a bay cannot be considered as “closing” the bay if the ordinary sea route passes between them and the coast.” (emphasis added)

One issue which arises from the existence of the fringing islands across the mouth of a bay is what the status of these islands would be where they are not completely on a direct line across the mouth of the bay. (See the following figures) For example, if these islands are slightly located seaward of the mouth whether it is still possible to take the islands into account in the enclosure of the mouth of a bay. The provision of Article 7(3) of the TSC appears to include only the islands which are located across the mouth of a bay but as one author points

234 Paragraph 2, ILC’s Commentary on Draft Article 7, 1956, op. cit., p.269.
235 Westerman, op. cit., p.179. Also Shalowitz asserts that the rules for the delimitation of bays were liberalised in the case of multi-mouthed bays. Shalowitz, op. cit., pp.220-221.
236 Paragraph 2, ILC’s Commentary on Draft Article 7, 1956, op. cit., p.269.
237 Even when the islands are on a direct line between two shores, drawing lines to or from these islands on the direction of mouth would touch the islands in a way that part of them will be inside the bay and the other part will be in outside the bay.
238 See, for example, Edeson, op. cit., 1968-1969, p.40.
239 For example, the view of the United States Supreme Court in the United States v. Louisiana Case (1969) is useful to note. The Louisiana’s contention was that in the cases of islands located outside the mouth of the bay, the closing lines were to be drawn “between the mainland headlands and the
out “nature has not seen fit to arrange islands in a convenient line across bays.”

The following figures demonstrate the impact of the location of islands on the method of the drawing the closing line. In case (a), it is obvious that the proper closing line is to link the headlands by a direct line (as indicated). In case (b), there are two possible way to draw the closing line: (i) to link the headlands by a direct line, or (ii) to draw a line from a headland to the island and then from the island to the other headland. Shalowitz suggests that in case (b) the appropriate closing line would be the latter line.

**Figure 3.11**
Islands within and outside a bay

(a) The island is situated within the bay.  (b) The island is situated outside the bay


5. The Issue of Islands as Headlands of Bays

One issue in the delimitation of certain bays is whether islands can constitute the headlands of bays. This issue mainly arises in the cases where a bay is either formed by two islands or by the mainland and an island. The law of the sea conventions do not provide any explicit...
provision to include these cases. In the United States v. Louisiana Case (1969), the federal government was of the opinion that according to the TSC a bay is an indentation into land and it cannot be formed by islands located on the coast. It argued that a true bay is only open in its mouth and because of the opening between mainland and islands the indentation lacks the character of a true bay as enclosing "landlocked waters". The United States Supreme Court, however, was of the view that neither Article 7 of the TSC or any other provision of this Convention prohibits the use of coastal islands as headlands. The Court held that the existence of the geographical fact that there is an opening between islands and the mainland would not deprive the waters enclosed by islands and mainlands from being considered as "landlocked." Although it may be argued that islands are able to form natural entrance points for bays created by two islands or the mainland and an island, certain factors should be taken into account in adopting certain islands as qualified for the purpose of delimitation of such bays. Accordingly, the United States Supreme Court enumerated a number of factors to be considered in appraisal of certain coastal islands as headlands of bays. The Court stated that:

While there is little objective guidance on this question [question of islands as headlands] to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. (emphasis added)

243In the United States v. Maine (1985), the Supreme Court of the United States held that "[t]here is nothing in the Convention [TSC] or in the Submerged Lands Act [1953 Act of USC] that indicates whether islands may or may not be treated as extensions of the mainland for the purpose of forming a headland of a juridical bay." United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985), p.515. 83 L Ed 2d 998, p.1007.

244United States v. Louisiana (1969), 394 U.S. 11, pp.60-61. 22 L Ed 2d 44, pp.82-83. The federal government stated that only a line can be drawn from the mainland to an island if the line is continued from the other side of the island to reach the other part of mainland. In this case, the closing line is a link between one part of the mainland the other part of the mainland. Prescott, op. cit., 1985, p.56.


246United States v. Louisiana (1969), 394 U.S. 11, p.66. 22 L Ed 2d 44, p.85. Bearing in mind these factors and other relevant criteria the Special Master was asked by the Court to examine whether the islands designated by Louisiana as headlands of bays were "so integrally related to the mainland that they are realistically part of the "coast" within the meaning of the Convention on the Territorial Sea and Contiguous Zone." Ibid. This approach was reaffirmed in the United States v. Maine (1985). The Supreme Court also did not agree with the federal government that the islands should be treated as headlands "only in a few narrow situations." The Court held that "the proper approach is to consider each case individually in determining whether an island should be assimilated to the mainland." United States v. Maine (1985), 469 U.S. 504, p.517. 83 L Ed 2d 998, pp.1008-1009.
In the *U.S. v. Maine Case* (1985), there was also a question as to whether Long Island could be regarded as an extension of the mainland in order to constitute a headland. *(See Figure 3.13 below.)* This question had to be answered before determining whether Long Island Sound and Block Island Sound could create a juridical bay. As the United States Supreme Court stated “unless Long Island is considered to be part of the mainland and provides one of the headlands, neither Long Island Sound nor Block Island Sound satisfies Article 7’s [of the TSC] requirements.”

It finally adopted the opinion expressed by the Special Master in considering Long Island as a headland. The Court relied upon two factors to consider the Long Island as part of the mainland and to subsequently conclude that the Long Island Sound is a juridical bay. The factors were the general configuration of the Long island and the character of the channel on the western side of the island as a very narrow waterway.

According to Prescott, there are four possible situations where the existence of islands may lead to formation of particular bays. These situations are:

(a) where a bay is formed by two islands on the coast (an example is the coast of Finnmark Kaloyo and Seiland);

(b) where an island is located near the mainland in a way which creates a bay (an example is the Fraser Island creating the Hervey Bay on the coast of Queenslands in Australia, and another example is the Long Island Sound on the coast of New York created as a result of the existence of the Long Island);

(c) where the existence of an island within an indented coast creates two coastal indentations (an example is Menivai Bay in the Santa Cruz Islands which is created by the Tevaii Island); and

\[\text{248} \text{United States v. Maine (1985), 469 U.S. 504, pp.517-519. 83 L Ed 2d 998, p.1009. Also see the Louisiana v. Mississippi Case where the Court held that the peninsula of St. Bernard form an integral part of the Louisiana’s coast. Louisiana v. Mississippi, 202 U.S. 1, pp.45-46. 50 L Ed 913.}\]
\[\text{249} \text{Strohl mentions the case of a bay where there are a string of islands along a gentle curve. An example of this kind of bay is the Buzzards Bay in Massachusetts. Strohl, op. cit., p.60.}\]
(d) where the existence of the island on the coast may result in the extension of a bay (an example is the Graciosa Bay in the Santa Cruz Islands which is extended by the existence of the Black Rock and Te Motu Islands). These four situations are illustrated below.

**Figure 3.12**

The impact of certain coastal islands on the creation of bays


The United Nations Study on the issue of baselines confirmed the lack of provision in the LOSC for the question an island as a headland. It referred to two cases where islands may be considered as headlands: where an island forms one side of a bay and where an island extends a bay. *(See the following figures)* The study states that in these cases “it might be justifiable to use a point on the island as one of the natural entrance points.”

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250 See Prescott, op. cit., 1985, pp.59-60. In the United States v. Maine Case, the federal government disagreed with the Special Master’s recommendation that Long Island be regarded a part of the mainland. The position of the federal government was that the view of the Supreme Court in the United States v. Louisiana Case (1969) had to be interpreted restrictedly. It asserted that an island should only be treated as a headland: “When the island is separated from the mainland by a genuine “river”; when the island is connected to the mainland by a causeway; when the island is connected to the mainland by a low-tide elevation; or when, as in the Louisiana Boundary Case, the shoreline is deltaic in nature.” United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985), p.517. 83 L Ed 2d 998, p.1008.

Figure 3.13
Long Island (New York, United States of America)
An example where an island is located on one side of a bay


Figure 3.14
Graciosa Bay (Santa Cruz Islands)
An example of a bay extended by the existence of coastal islands


6. Some Other Issues Concerning the Delimitation of Bays

A single straight line cannot be employed to enclose two or more coastal indentations. For any indentation, except in the case of multi-mouthed bays, there should be only one closing line, if the indentation is
to satisfy the established rules on identifying a legal bay. This is because in most cases the enclosure of two or more indentations is only possible by drawing a quite long line. Such a lengthy line has more impact on the inclusion of the high seas as part of the waters under the authority of coastal States than the impact which a short line may have upon the high seas and its freedoms.

Attention should also be paid to Article 7(6) of the TSC (Article 10(6) of the LOSC). This provision excludes the application of rules on legal bays to the locations where according to Article 4 of the TSC (Article 7 of the LOSC) straight baselines are employed.

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252 McDougal and Burke, op. cit., p.329.
253 See Churchill and Lowe, op. cit., p.31. The TSC (Article 7(6)) and the LOSC (Article 10(6)) also exclude historic bays from their application on the delimitation of bays and allow extension of sovereignty over larger bays if it is substantiated that there is a historic title over these coastal indentations, irrespective of the width of their entrance. Although Article 7(6) of the TSC (Article 10(6) of the LOSC) excludes historic bays from the general rules governing the delimitation of single-State bays, it does not provide a definition for an historic bay. In 1951, the ICJ held that 'by” historic waters” are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.” Fisheries Case (UK v. Norway), ICJ Reports, 1951, p.130. However, the ICJ did not explain what the criteria are for the establishment of historic titles to adjacent waters. It should be noted that historic bays are a particular category of historic waters. “Historic bays” are, in fact, the most common bodies of waters which have been claimed on an historic basis. So far codification efforts to provide the definition and requirements of historic waters and bays have failed. See, for example, discussion on the issue of historic bays in the 1930 Conference, in Rosenne, op cit., Vol.2, pp. 257-262, Vol.4., Annex I, pp.1390-1391 and 1393, and Vol.4, Annex II, p.1394; YILC, 1956, Vol.II, pp.257 and 269; UNCLOS I. Official Records, Vol.III, 1958 pp.17, 68, 69, 74, 145, 241, and 252; and UNCLOS III. Official records, Vol.II, pp.101-102, 104, 106-108, 111, and UNCLOS III. Official Records, Vol.IV, 1977, p.202 (the Colombian proposal). The Committee of Experts for the 1930 Hague Conference recommended that an Internal Waters Office to be established in order to register all bays validly claimed as historic. This was proposed to prevent the formation of any more historic title over bays. The office was never established. Now, historic waters and bays are subject to the rules of customary international law for their delimitation. In assessing whether a State has acquired historic title to an adjacent maritime area, it should be determined: (1) whether the claimant State has exercised sovereignty over a bay or a maritime area claimed as historic; (2) whether the exercise of sovereignty by the claimant State over the bay or the maritime area continued over a reasonable period of time; and finally and most importantly (3) whether other States have acquiesced in the claim of the claimant State over the bay or the maritime area as historic. In particular, see the UN studies on historic waters and bays - 'Historic Bays' (Memorandum by the Secretariat of the United Nations, UN Document A/CONF.13/1, (Preparatory Document No.1), 30 September 1957, UNCLOS I. Official Records, Vol.1 (Preparatory Documents), New York, United Nations, 1958, pp.1-38) and ‘Juridical Regime of Historic Waters, Including Historic Bays’ (Study Prepared by the Secretariat of the United Nations, Document A/CN.4/143, YILC, Vol.2, United Nations, New York, 1962 pp.1-26). These documents examine State practice, arbitral and judicial decisions, codification projects and the opinion of writers on the definition and requirement of historic waters and bays. Also see the US cases dealing with the issues related to the concepts of historic waters and bays. These cases include: Islands Airways Inc. v. Civil Aeronautics Board 235 Federal Supplement (USA) 990, at 1007 (1964); United States v. State of California (Decided 17 May 1965), 381 U.S. 139, 14 L Ed 2d 296 [1966]; United States v. State of California (Supplemental Decree, 31 January 1966, 382 U.S. 448, 15 L Ed 2d 517 [1966] (For Report of Special Master on the dispute between the US Federal Government and the State of California see 57 ILR (1980) 54.); United States v. State of Louisiana et al (Decided 8 March 1969), 394 U.S. 11, 22 L Ed 2d 44 [1970]; United States v. Florida (Decree, Issued 24 May 1976), 425 U.S. 791, 48 L Ed 2d 388 (1977); United States v. State of Alaska (Decided 23 June 1975), 422 U.S. 184, 45 L Ed 2d 109 [1976]; United States v. Maine et al (Rhode Island and New York Boundary Case) (Decided 19
Notwithstanding, some argue that in some parts of the coast, it may be possible to use straight baselines to enclose waters larger than the area enclosed by the closing line. One basis of this view seems to be the ILC’s view that “should straight baselines be drawn covering the coast of the bay, the special rules relating to bays would no longer be applicable.”\textsuperscript{254} The correctness of this interpretation seems to be questionable.\textsuperscript{255}

It appears that the provision is simply making a distinction between a straight baseline and a closing line, each one being employed for certain areas of coastlines. This interpretation is confirmed by a publicist who distinguished the two regimes of delimitation in the following words: “[w]hile both regimes result in the delimitation of the baseline separating internal and territorial waters, Article 4 [of the TSC] is much broader in concept and more inclusive in scope than Article 7 [of the TSC], which is limited to a single geographic feature.”\textsuperscript{256}

**VII. Rules Governing the Delimitation of Bays: Extension of National Jurisdiction and Impacts on the Free Seas**

The trend of coastal States in increasing maritime areas under their control can be easily understood by the content of rules adopted for the delimitation of bays.\textsuperscript{257} The effects of these rules on the reduction of the high seas and on the scope of free navigation and other freedoms of the high seas have been the main impacts on the rights of international community. One of the main features of such trend is reflected in the recognition of 24 mile rule. Westerman views that:

> the twenty-four-mile limitation ... is merely arbitrary, a manifestation of the desire of many coastal states to gain the greatest amount of sovereignty over water areas which had previously been considered...

\textsuperscript{February 1985}, 469 U.S. 504, 83 L Ed 2d 998 [1987]; US v. Louisiana et al. (Alabama and Mississippi Boundary case) (Decided 26 February 1985), 760 U.S. 93, 84 L. Ed. 2d 73 [1985], 86.\textsuperscript{254}

UN Doc. A/CONF.13/C.1/L.104, UNCLOS I. Official Records. Vol.III, 1958, p.147. However, the ILC’s comment on Article 7 of its 1956 draft indicates a different approach to the issue. In relation to the semi-circle test as part of the definition of a legal bay, the ILC expressed that such a provision “was necessary in order to prevent the system of straight baselines from being applied to coasts whose configuration does not justify it, on the pretext of applying the rules for bays.” (emphasis added) ILC’s Commentary on Article 7(10) of the 1956 ILC draft. YILC. Vol.II, 1956, p.269.


\textsuperscript{In this line, Strohl asserts that : “Since sovereignty over a bay ... has gradually come to have a quality more absolute than that of the marginal belt, an assertion of such sovereignty appears especially attractive.” Strohl, op. cit., p.24.
It cannot be denied that the rule is a reflection of a general tendency among states to approve an ever increasing sovereignty over adjacent waters and the resources which they provide. (emphasis added)\textsuperscript{258}

The main point of delimiting maritime areas of coastal States is to gain a reasonable balance between the inclusive interests of international community and exclusive interests of coastal States.\textsuperscript{259} In general, the potential impacts of claims of coastal States to establish the baselines, including the closing line of bays, are on the inclusive interests of international community.\textsuperscript{260} As one source pointes out, the most obvious examples of these interests are navigation, flight, and exploitation of resources which may be influenced by the claims of States to enclose sea areas through the application of baselines.\textsuperscript{261}

The case of bays has in particular led to the conversion of large areas of the seas into internal waters or the territorial sea.\textsuperscript{262} The practical impact of such change in the legal regime of waters on the right of navigation is quite clear because coastal States enjoy certain powers in the territorial sea, including those of regulatory rights and the right to exclude foreign ships in certain circumstances. These powers are much stronger in internal waters to the extent that coastal States have absolute sovereignty over these waters, which are not even subject to the right of peaceful passage.\textsuperscript{263}

\textsuperscript{258}Westerman, \textit{op. cit.}, p.169.

\textsuperscript{259}Although the provisions of Article 7 of the TSC appear to be in the interests of coastal States in the final analysis, they can be justified because of the close relation of waters within bays to the land territory of coastal States. Westerman maintains that the purposes of the international community in the creation of rules on the uses of the seas, including bays, have been: "to define the rights of the parties, to reduce the likelihood of conflict, to provide guidelines for mariners, thereby ensuring that those who use the oceans for navigation and fishing with certainty determining their location with respect to the reach of coastal power, and to make an equitable allocation of ocean space and resources which may serve both the exclusive and inclusive interests of all states." \textit{Ibid.}, pp.30-31.

\textsuperscript{260}Such an impact exists because of the recognition of a special method for the delimitation of bays, that is the application of closing line rule. As Strohl writes: "Since the closing line of a bay is recognised as part of the system of baselines, the nation State asserting sovereignty over a bay extends its marginal belt seaward and thereby gains a qualified sovereignty over an additional area of what was previously high seas." Strohl, \textit{op. cit.}, p.24.

\textsuperscript{261}McDougal and Burke, \textit{op. cit.}, p.317.

\textsuperscript{262}It should be noted that the extension of baselines towards the sea has the effect of the enlargement of internal waters while moving the territorial sea towards the sea. However, the extension of the territorial sea breadth has only the effect of enlargement of territorial sea where there is a right of peaceful passage for foreign ships.

\textsuperscript{263}As regards one of the main reasons for the extension of national domains through claims to baselines, McDougal and Burke express the following view: "Claims to extend coastal competence primarily for control over access, more generally, would focus attention more intensely upon the coastal interests alleged to warrant greater control over navigation." \textit{Ibid.}, p.319. This is why they maintain that
The analysis of the developments in the delimitations of bays from nineteenth century clearly shows that the creation of new rules in the law of the sea in one way or another has enlarged water areas of bays as internal waters.\textsuperscript{264} In other words, the conventional rules have presented definitional rules in a way which resulted in the extension of coastal States sovereignty over bays in various parts of the world. In particular, the final adoption of a closing line of 24 nautical miles has impacted on the enclosure of considerable parts of the seas as waters under national authority.\textsuperscript{265} Also the provisions of Article 7 of the TSC (Article 10 of the LOSC) include some indications which permit the enclosure of more possible waters as parts of bays. In this connection, the following examples can be mentioned:

(a) taking islands within bays into account as part of the area of bays for the purpose of application of the semi-circle test;

(b) excluding islands across bays from being considered in calculation of the maximum length of 24 nautical miles; and

(c) the wording of Article 7(4) of the TSC (Article 10(4) of the LOSC) in applying a line of 24 nautical miles, \textit{i.e.} "in such a manner as to enclose the maximum area of water that is possible with a line of that length."\textsuperscript{266}

In addition, certain shortcomings or ambiguities in the provisions may lead to either liberal interpretation of the provisions by coastal States or to delimitation of some indentations or similar coastal features on the discretion of these States. Examples of these shortcomings and ambiguities are:

(a) the lack of a provision as to what constitutes "natural entrance points";

\textsuperscript{264}This has in fact resulted from State practice because \"[c]oastal States would like to include in their internal waters certain extensive maritime spaces which would thereby withdrawn from the regime of innocent passage of foreign ships.\" Dupuy, \textit{op. cit.}, p.266.

\textsuperscript{265}This is because, as one author points out, the distance of 24 nautical miles is "large enough to cover a great many cases." \textit{Ibid.}

\textsuperscript{266}This is an example where the TSC and the LOSC clearly encourage the extension of coastal States waters towards the seas and oceans.
(b) uncertainty as to whether islands can form a bay or can be taken into account as a headland; and

(c) ambiguity as to whether certain bays can be enclosed under the rules on the straight baseline systems.

The delimitation of bays has had undeniable implications for freedom of the high seas. As far as navigation is concerned, the enclosure of bays has had effects on the areas available for a right of passage, in two main ways:

(a) whether by enclosure of the areas within bays which have been important for international navigation\(^{267}\); or

(b) by the movement of internal waters and the territorial sea further towards the high seas.\(^{268}\)

The extent of the latter impact can be illustrated in the following figure. As a result of the definition of a bay provided by the TSC (which was reiterated in the LOSC) the number of bays falling into the category of legal bays increased, and the areas of internal waters widened in a number of other bays. The following figure (Moray Firth) is an example of the impact of the TSC on the enclosure of bays where the effect of the 24 nautical mile closing line and the 12 nautical mile territorial sea on the enclosure of more areas of water is clearly demonstrated.

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\(^{267}\)In the cases of bays where there has already been a right of peaceful passage for international community, the enclosure of bays does not affect such right. The basis for this contention is Article 5(2) of the TSC (Article 8(2) of the LOSC) whose application can be extended to bays. According to this provision, “where the establishment of a straight baseline ... has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage ... shall exist in those waters.” See Strohl, \textit{op. cit.}, p.26.

\(^{268}\)The range of this effect depends on the length of the closing line used for enclosing a bay. As it is pointed out “the longer the line which may be drawn, the longer is the area included within internal waters and the further seaward the outer limit of the territorial sea.” McDougal, and Burke, \textit{op. cit.}, p.328. Even there are some cases where the opening of a bay is narrow but because it widens into mainland, the bay can include a large are of water.
There have been two main categories of bays whose sovereignty status has undergone remarkable change as a result of the TSC. The first category includes those bays which were considered among juridical bays before the adoption of the TSC but whose areas of internal waters have been enlarged by the application of Article 7 of the TSC. The second category contains those bays which could not have been considered bays before the TSC, but whose waters have entirely become internal as a result of the TSC. Bays which have fallen into these two groups of bays have been illustrated in Tables 3.1 and 3.2 below.
Table 3.1

Bays whose areas of internal waters were increased as a result of the application of Article 7 of the TSC (1958)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>1. Tasman Bay, New Zealand</td>
<td>17. Saronikos Kolpos, Greece</td>
</tr>
<tr>
<td>2. Spencer Gulf, Australia</td>
<td>18. Lakonikos Kolpos, Greece</td>
</tr>
<tr>
<td>5. Maccluer Gulf(^a), Dutch New Guinea(^b)</td>
<td>21. Delagoa Bay, Mozambique</td>
</tr>
<tr>
<td>6. Labuk Bay, North Borneo(^c)</td>
<td>22. St. George’s Bay, Canada (^g)</td>
</tr>
<tr>
<td>7. Darvel Bay, North Borneo(^d)</td>
<td>23. Liverpool Bay, Canada (^h)</td>
</tr>
<tr>
<td>11. Skjalfandi, Iceland</td>
<td>27. Baia do Marajo, Brazil</td>
</tr>
<tr>
<td>13. Aarbus Bugt, Denmark</td>
<td>29. Kara Bay, USSR (Russia)</td>
</tr>
<tr>
<td>16. The Jade, Germany</td>
<td></td>
</tr>
</tbody>
</table>

(a) Or Teluk Berau.
(b) Now part of Irian Jaya (Indonesia).
(c) Now part of Malaysia.
(d) Now part of Malaysia.
(e) Gulf of Tadjoura, now part of Djibouti.
(f) Now Mauritania.
(g) In Newfoundland.
(h) In Northwest Territories.

The words Bugt (Danish), Kolpos (Greek), Golfo (Italian, Spanish, and Portuguese), Baie (French), Baia (Portuguese, similar to Italian) seem to be equivalents to the terms “bay” and “gulf”.

Table 3.2

Bays which came under the regime of juridical bays as a result of incorporation of Article 7 on bays into the TSC (1958)

<table>
<thead>
<tr>
<th>No.</th>
<th>Bay Name</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Huraki Gulf, New Zealand</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Gulden Bay, New Zealand</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Van Dieman Gulf, Australiaa</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Exmouth Gulf, Australiab</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>King Sound, Australia</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Goodenough Bay, Papua New Guinea</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Wide Bay, New Britain, U.S.A.</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Astrolabe Bay, Papua New Guinea</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Burnei Bay, Borneoc</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Gulf Alaminos, Philippines</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Lagonay Gulf, Philippines</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Sibuguey Bay, Philippines</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Suraga Wan, Japan</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Uchiaru Wan, Japan</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Toyama wan, Japan</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Nemuro Wan, Japan</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Tokchok Kundo, South Korea</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Kinchow Wan, Manchuria</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Baie de Kompong Som, Cambodia</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Ao Ban Don, Thailand</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>The Wash, England</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Lubecker Bucht, Germany</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Baia de Setubal, Portugal</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Golfo dell’Asinara, Sardinia, Italy</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>Golfo di Galiari, Sardinia, Italy</td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>Golfo di Napoli (Bay of Naples), Italy</td>
<td></td>
</tr>
<tr>
<td>27</td>
<td>Messinakos Kolpos, Greece</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>Corisco Bay, French Equatorial Africa</td>
<td></td>
</tr>
<tr>
<td>29</td>
<td>False Bay, Republic of South Africa</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>George Bay, Nova Scotia, Canada</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Cape Cod Bay, Massachusetts, U.S.A.</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Bahia de Banderas</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>Ensenada de la Broa, Cuba</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>Bahia Camerones, Argentina</td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Gulf of Iskenderum, Turkey</td>
<td></td>
</tr>
<tr>
<td>36</td>
<td>Sea of Azov, U.S.S.R. (Russia)</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>Bay of Cancale, France</td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>Bay of Chaleur, Canada</td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>Conception Bay, Canada</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Miramichi Bay, Canada</td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>Trinity Bay, Canada</td>
<td></td>
</tr>
<tr>
<td>42</td>
<td>Chesapeake Bay, U.S.A.</td>
<td></td>
</tr>
<tr>
<td>43</td>
<td>Delaware Bay, U.S.A.</td>
<td></td>
</tr>
</tbody>
</table>

(a) The increase in the areas of internal waters as a result of islands in the mouth of the Gulf. (b) The increase was resulted from the geographical characteristic of the Gulf as a multi-mouthed bays. (c) Now part of Malaysia (Sabah). (d) The Equatorial Africa was dissolved in 1958. (e) The False Bay is now known as Valsbaai. The Corisco Bay is presently located between Gabon and Equatorial Guinea. (f) In Newfoundland.

The words Wan (Japanese), Kundo (Korean), Bucket (German), Baie (French), Ao (Thai), Baia (Portuguese, similar to Italian), Golfo (Italian, Spanish, and Portuguese), Kolpos (Greek), Bahia (Spanish) appear to be equivalents to the terms “bay” and “gulf”. It should be noted that some bodies of waters mentioned in the above table were claimed as historic bays before the codification of new rules on bays (Article 7 of the TSC) and subsequently fell under the legal regime of juridical bays as a result of the adoption of the 24 mile limit for bays closing lines Examples of these bodies of water are Sea of Azov, Bay of Cancale, Bay of Chaleur, Conception Bay, Miramichi Bay, Chesapeake Bay, and Delaware Bay.

It is also useful to find out how large a maritime area within an indentation may be enclosed by a semi-circle with the maximum diameter of 24 nautical miles. To do so, a mathematical calculation should be undertaken. The mathematical formula for the calculation of the area of a circle is as follows: \( S = \pi r^2 \) (In this mathematical formula \( \pi \) approximately equals 3.14 and \( r \) is radius of the circle and \( S \) is the area covered by the circle.) Accordingly, the area of a semi-circle would be calculated by the following formula: \( S = \frac{\pi r^2}{2} \). Therefore, for a semi-circle with a diameter of 24 nautical miles the radius would be 12 nautical miles and the maritime area covered by such semi-circle would be \( S = 3.14 \times (12)^2 / 2 \). The final result is approximately 226 square miles. If a nautical mile is considered equivalent to 1852 meters, the area approximately would be 775,432,696 square meters. These figures clearly indicate how the adoption of a semi-circle test with a maximum diameter of 24 nautical miles has resulted in the enclosure of vast areas of the seas and their inclusion of these areas into internal waters of coastal States.

Another problem which has arisen from the enclosure of larger bays and the extension of the territorial sea is the problem mariners have in finding the position. It is important for navigators to determine whether they are navigating in the high seas, the exclusive economic zone, the territorial sea, or in internal waters. As far as the delimitation of bays is concerned, knowledge of the location of boundary line between internal waters and the territorial sea is important because coastal States have different rights over foreign ships in these waters. It is, therefore, important for mariners to find where their ships are located because of the existence of jurisdictional zones from internal waters to the high seas.\(^{269}\) As a result of enclosure of larger bays, mariners have encountered more difficulties in finding their positions in relation to the coasts, even though there have been technological developments in navigational equipment used by mariners (such as the use of radar and electronic aids).\(^{270}\) Although coastal States have used some navigational aids, this equipment is mainly used to warn the mariners about dangers to navigation, or to guide them to follow a specific route or channel.

\(^{269}\)For the examination of navigation problems for mariners which may arise from the delimitation of bays see Strohl, op. cit., pp.31-47.

\(^{270}\)As Strohl points out "as the boundaries of the marginal belt and internal waters are moved to seaward, making it more difficult for mariner to fix accurately his position ..., the mariner may find himself confronted with the choice of remaining even farther out at sea or incurring greater risk of arrest (in the case of fishermen) by reason of imperfect navigation." Ibid., p.39.
Accordingly, navigational aids (such as lighthouses and buoys) were not primarily installed for indicating the boundaries of jurisdictional zones, in particular the boundary between internal waters and the territorial sea. Most coastal States are not willing to use signs for their jurisdictional zones because of the high cost involved. This is particularly the case for those States with longer coastlines and wider maritime zones. However, a practical assistance to mariners may be provided by illustrating enclosed bays on maps for mariners.

VIII. Conclusion

In general, coastal States have been granted the right of sovereignty over larger bays by the new developments in the law of the sea and State practice. However, States were not left free to delimit bays at their discretion. Certain legal requirements were defined in the convention on the law of the sea to prevent unnecessary enclosure of large areas of water. In particular, the adoption of a mathematical formula ended legal uncertainties as to what forms a juridical bay. An indentation should satisfy these requirements before becoming qualified as a juridical bay. Although many bays were enclosed by the new rules, there are still many other bays which are unable to satisfy the semi-circle test, even by the use of a 24 nautical miles line. The only way for enclosing these bays is on the basis of “historic title”. However, claims over bays as historic ones have not been without controversy and in modern days it is rare to find historic claims over bays which have not been protested by other States. As a result of adoption of a closing line with the maximum

271 This is particularly due to the fact that “[t]he determination of what constitutes a “bay” and the location of the baseline in the bay quite obviously affect the extent of the sea area left open to navigation and to fishery exploitation.” (emphasis added) McDougal, and Burke, op. cit., p.329.

272 It is in line with this objective that one author asserts: “The question must be asked whether every bay in the legal sense falls under the sovereignty of the coastal State. The answer must be in negative in order to prevent that the sphere of the operation of the principle of the freedom of the seas would be seriously limited.” Bouchez, op. cit., p.23.


274 For bays to which States have claimed historic title see the 1957 UN Memorandum, p.3 (no.4), and pp.9-10, Jessup, op. cit., pp.383-439, and Colombos, op. cit., pp.186-188 (for bays in North Atlantic). For the examination of the Soviet Union’s claim to Peter The Great Bay as historic see Strohl, op. cit., Chapter Eight (Peter The Great Bay, A Current Issue), pp.332-367, and Scovazzi, T., ‘Developments Concerning Soviet Straight Baselines’, International Journal of Estuarine and Coastal
length of 24 nautical miles, a considerable number of bays claimed as historic fell under the category of juridical bays.\textsuperscript{275} Examples of these bays are Sea of Azov (Russia), Bay of Cancale (France), Bay of Chaleur (Canada), Conception Bay (Canada), Chesapeake Bay (USA), and Delaware Bay (USA).\textsuperscript{276} In these cases, it is clear that coastal States

\textsuperscript{275}Westerman states that “[m]ost indentations previously considered historic bays have become judicial bays under the generosity of the twenty-four-mile rule.” Westerman, \textit{op. cit.}, p.30.

\textsuperscript{276}Also among these bays are a number of Australian bays which were mentioned in the 1957 UN Memorandum. These bays include Buckingham Bay (20 miles), Blue Mud Bay (15 miles), Van Diemen Gulf (16 miles) in Northern Territory; Broad Sound (15 miles); Upstart Bay (10 miles); Moreton Bay (10 miles) in Queensland; Coffin Bay (12 miles), Streaky Bay (14 miles) in South Australia; Oyster Bay (15 miles); Storm Bay (13 miles) in Tasmania; and Exmouth Gulf (13 miles), Roebuck Bay (14 miles), and Shark Bay (14 miles) in Western Australia. There were three bays mentioned in the Memorandum whose mouth exceed 24 nautical miles. These are Hervey Bay (38 miles) in Queensland, Spencer Gulf (48 miles) and Investigator Strait with St. Vincent’s Gulf (28 miles) in South Australia. See the 1957 UN Memorandum, \textit{op. cit.}, p.8. However, Professor Charteris, relying on the letter of 26 April 1936 from the Secretary of the Australian Navy Office in Melbourne, refers to only four Australian bays as historic - Van Dieman Gulf (Northern Australia), Moreton Bay (Queensland), Exmouth Gulf (Western Australia), and Shark Bay (Western Australia) which now fall into category of legal bays by the inclusion of 24 mile closing line in the TSC and the LOSC. Charteris, A. H., \textit{Chapters on International Law}, Law School, University of Sydney, Sydney, 1940, p.99, no.1. Australia has recently claimed Anxious Bay, Encounter Bay, Lacepede Bay, and Rivoli Bay as historic. For analysis of the Australian claims on an historic basis over certain bays see O’Connell, D.P., ‘Problems of Australian Coastal Jurisdiction’, \textit{BYIL}, Vol.35, 1958, pp.233-
insisting on their historic claims which require more restricted standards in convincing international community to recognise such claims.277


At present, historic waters and bays are governed by customary international law. According to customary rules developed and established through State practice, arbitral and judicial tribunals and the opinion of publicists, there are three main elements in the formation of historic titles to maritime areas. These constituent elements of an historic title are: (a) the exercise of sovereignty, (b) the continuity of this sovereignty over sufficient period of time, and (c) acquiescence from other States. In certain recent claims to bays on an historic basis, there has also been a reference to vital interests of States in advancing the claims. Although such vital interests as significant economic and strategic interests strengthen the claims which were validly consolidated through history, most publicists state that vital interests per se do not constitute sufficient basis for developing an historic title to maritime areas. The burden of proving the existence of the foregoing requirements is upon the claimant State. These requirements clearly demonstrate that the rules for proving historic titles are strict. For the definition and examination of constituent elements of historic waters and bays see Gidel, op. cit., Vol.3 (1934); Bourquin, Maurice, ‘Les Baies Historiques’ in Mélanges Georges Sauser-Hall, Facultés de Droit des Universités de Genève Neuchâtel, Geneva, Switzerland, 1956; Strohl (1963), op. cit., pp.251-331 (Ch.7: The Concept of the Historic Bay); Bouchez (1964), op. cit., pp.199-302 (Ch.IV: Historic Bays); Blum, Historic Titles in International Law, Martinijhoff. The Hague, 1965, pp.241-342 (Ch.VI: Judicial Aspects Specifically Related to the Formation of Maritime Historic Titles); Colombos (1967), op. cit., p.180-188; Pharand, Donat, “Historic Waters in International Law with Special Reference to the Arctic”, University of Toronto Law Journal, Vol.XXI, 1971, pp.1-14; O’Connell, D. P., The International Law of the Sea, Vol.1, Edited by: J. A. Shearer, Oxford University Press, Oxford, 1982., pp.417-438 (Ch.11: Historic Waters); Goldie, L. F. E., ‘Historic Bays in International Law - An Impressionistic Overview’, Syracuse Journal of International Law and Commerce, Vol.11, 1984, pp.211-273; Scovazzi, Tullio, “Bays and Deeply Indented Coastlines: The Practice of South American States’, Ocean Development and International Law, Vol.26, No.2, 1995, pp.161-174, at 163-165. The following cases also include discussion on the legal nature of historic titles to maritime areas and conditions for the formation of these titles: The North Atlantic Coast Fisheries Case (United States of America/Great Britain), Permanent Court of Arbitration, Reports of International Arbitral Awards, Vol.11, 1910, pp.173-202 (also see dissenting opinion of Dr. Luis M. Drago, ibid., pp.203-211); Fisheries Case (UK v. Norway), ICI Pleadings, Oral Arguments and Documents, Vol.I, pp.556 and 564 et seq; Vol.II, pp.621, 643, 645-646, 654, 302; and Vol.III, p.462; Fisheries Case (UK v. Norway), ICI Reports, 1951, pp.121 (para.5 & 11), 122 (para.9(a)), 123, 127, 130-131, 133, and 136-139; Individual opinion of Judge Alvarez, ibid., pp.145-153, at 151-152; Separate opinion of Judge Hsu Mo, ibid., pp.154-157, at 157; Dissenting opinion of Judge McNair, ibid., pp.158-185, at 164-166; and Dissenting opinion of Judge Read, ibid., pp.185-206, at 188 & 191; English Channel Continental Shelf Case (UK/France), Decisions of the Court of Arbitration of 30 June 1977 and 14 March 1978, Misc, No.15, Cmnd. 7438, p.91 (para.188); Continental Shelf Case (Tunisia/Libya), ICI Reports, 1982, p.74; Gulf of Maine Case (Canada/USA), ICI Reports, 1984, para.130; and Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), ICI Reports, 1992, pp.588-605 (para.384-412) and Dissenting Opinion of Judge Oda, ibid., pp.735-747 (Part II: “Bay” or “Historic Bay”: Legal Concepts under the Law of the Sea, paras.7-26).
Chapter Four

Delimitation of Multi-State Bays
Chapter 4
Delimitation of Multi-State Bays

I. Introduction

As was discussed in the previous chapter, the issue of delimitation of bays was one of the complex issues in the law of the sea which was subject to extensive debate among States since early this century. It was in the UNCLOS I that States finally reached agreement on a set of rules to govern the delimitation of bays. Although these rules were incorporated into the TSC for the first time, they were to be applied only to single-State bays, that is bays which were bordered by a single State.\(^1\) No rules were included to clarify the uncertainty over the issue of the delimitation of multi-State bays. This uncertainty resulted in a divergence of views among States, and publicists become divided on this issue. The issue was, in fact, left to be governed by the *status quo* and the customary international law. The main problem, however, was the uncertainty which existed in customary international law with respect to the issue of the delimitation of multi-State bays.\(^2\) Although there is a prevailing trend with respect to the status of multi-State bays, there seems that efforts should be made to codify uniform rules governing the delimitation of these bays.

II. General Rules Governing the Multi-State Bays

Although there are long established rules governing the delimitation of single-State bays, there is no general contractual provision governing bays with several coastal States (and also historic bays\(^3\)). Why are single-State bays and multi-State bays subject to different legal rules? McDougal and Burke consider two factors which distinguish a single-State bay from a multi-State bay: (a) although a multi-State bay is an indentation which penetrates into the land mass "the political boundaries

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\(^1\) Article 7 of the TSC and Article 10 of the LOSC. The latter repeats the language of the former.

\(^2\) The case of historic bays also presents similar difficulties, though these bays are subject to different rules.

\(^3\) According to Article 7(6) of the TSC and Article 10(6) of the LOSC, the provisions of these Articles "do not apply to so-called 'historic' bays". Claims to historic bays not only include bays located in a single State but may include bays shared with more than one coastal State. The number of claims in the former case is much higher than the latter one.
are such that the land territory does not compose one political entity”; and (b) a multi-State bay is “very likely to be used for international transport” whether in the case of a foreign ship heading to a port of one of the riparian States, or travel within the bay from one riparian State to another. In addition, Strohl is of the view that the fundamental difference between a single-State bay and a multi State bay is that in the case of a single-State the littoral State “exercises sovereignty erga omnes” while in the case of a multi-State bay, the bordering States “are, by their geographical proximity, forced to share the shores of the bay.”

The discussions on multi-State bays indicate that two issues constitute the core of debates on their legal aspects: (a) whether multi-State bays are susceptible to enclosure as is the case with legally qualified bays belonging to a single State; and (b) if multi-State bays cannot be enclosed on the basis of normal legal rules for bays bordered by a single State, whether multi-State bays can be claimed by their respective coastal States on the ground of historic title. It should be noted that these two issues arise mainly in the case of those multi-State bays which are not covered by territorial seas of bordering States. Although no closing line is used in these cases, the waters of these multi-State bays are subject to the legal regime of the territorial sea where there is a right of innocent passage. This means coastal States have almost full range of sovereignty over portions of these bays up to the boundary line (which is usually a median line), subject to recognition of the right of peaceful passage of foreign ship.

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4 In this connection, Strohl writes that “[b]y reason of the differences in geography, natural resources, economy, and political structure, the bay in question may be of greater importance to one of the littoral States than to another: one might have a port elsewhere and the other State might have its only port on the bay in question. One State may be sovereign over most of the shore line while another is sovereign over very little. One State may have a rich hinterland and the other a very poor one. The two or more State may, respectively, pursue policies that are antithetical.” Strohl, Mitchell P., The International Law of Bays. Martinus Nijhoff, The Hague, 1963, p.372.

5 McDougal, Myres S. and William T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea. Second Printing, Yale University Press, New Haven, 1965, p.438. With respect to the second factor, McDougal and Burke are of the view that “no single state of those surrounding an indentation can be considered competent to incorporate all the area as internal waters, or, for that matter, as territorial sea. “They add that”[n]or should any factional group of these states be permitted to combine to claim these waters at the expense of another adjacent state.” Ibid. This latter part of their view seems to refer to the case of the Gulf of Aqaba where once access to the open seas through such Gulf was denied to Israel by the other coastal States bordering either side of the Gulf.

6 Strohl, op. cit., p.372. As regards of the problems which may rise with respect to a multi-State bay which may never arise in relation to a single-State bay. See ibid.

7 As Bouchez views the main question which concerns the multi State bays is “whether and to what extent it is desirable to limit the operation of the principle of the freedom of the seas” within these bays as well as within those bays claimed on historic title. Bouchez, Leo J., The Regime of Bays in International Law. A. W. Sythoff, Leyden, 1964, p.15.
In general, bays with several coastal States are now considered as not being part of internal waters, though there have been different viewpoints among jurists and learned institutions on this issue. For example, Jessup was of the view that a bay with more than one coastal State "is clearly not a part of the high seas, and is properly considered by the bordering states as their common property."\(^8\) Oppenheim did not consider these bays as a common property of the coastal States and wrote that "all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, ... are in time of peace and war open to vessels of all nations."\(^9\) The Harvard Law School Research on Territorial Waters contained a provision that "[w]hen the waters of a bay or river-mouth which lie within the seaward limit thereof are bordered by the territory of two or more states, the bordering states may agree upon a division of such waters as internal waters ... ."\(^10\) (emphasis added) The American Institute of International Law also held the view that the "territorial sea follows the sinuosities of the coast, unless there exists a convention to the contrary."\(^11\)

According to a study undertaken for the UNCLOS I, *A Brief Geographical and Hydrographical Study of Bays and estuaries the Coast of Which Belong to Different States*, there are more than forty multi-State bays in the world.\(^12\) Multi-State bays with two bordering States are more common than those belonging to more than two States. The greater the number of coastal States around a multi-State, the more complex the legal situation within the bay may be. Examples of multi-States bays with two coastal States bordering the bays are Lough Foyle (between Ireland and the United Kingdom), the Bay of Figuier (between France and Spain), and Passamaquoddy Bay (between Canada and the USA).\(^13\) Examples of

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\(^10\) McDougal and Burke, *op. cit.*, p.441.


\(^12\) For information on various multi-State bays and estuaries see the survey made by Kennedy for the UNCLOS I. Kennedy, R. H., "A Brief Geographical and Hydrographical Study of Bays and estuaries the Coast of Which Belong to Different States", Document A/CONF. 13/15, *UNCLOS I, Official Records*, Vol.1, pp.198 *et seq.* In addition to bays, the Study also included cases which are categorised as rivers and estuaries rather than being classified as bays. An example is the case of the River Schelde whose shores belong to the Netherlands.

\(^13\) Churchill and Lowe, *op. cit.*, p.33.
multi-State bays with more than two coastal States are the Gulf of Fonseca (El Salvador, Honduras, and Nicaragua, where the headlands are controlled by El Salvador and Nicaragua), and the Gulf of Aqaba\(^{14}\) (between Egypt, Israel, Jordan, and Saudi Arabia, where the headlands are controlled by Egypt and Saudi Arabia). (For a list of multi-State bays see Table 4.1.)

The study undertaken on bays bordered by several States also included the case of bays where one of the coastal States has no shore on the headlands where the bay connects to the territorial sea or the high seas. In addition to the Gulf of Fonseca and the Gulf of Aqaba, the study showed that these bays include: (a) The Tanga Lagoon bordered by Ghana and The Ivory Coast where the latter controls the headlands; (b) Chetumal Bay in Central America bordered by Honduras and Mexico where the latter controls the headlands.\(^{15}\)

The Bay of Fundy is another example of multi-nation bays. It is bordered by Canada and the United States of America. Although the Canadian coast covers most of the entire shores of the bay, a limited area of its coastline belongs to the United State of America. However, these States each control one of the two headlands. In the case of Washington (an American ship which was seized by a Canadian patrol ship within the Bay of Fundy, ten miles from the Canadian shore on 10 May 1843) the main question was to find whether the Bay of Fundy is a territorial bay or part of the high seas. Since the Claims Commission established under the Anglo-American Convention of 8 February 1853 could not resolve the dispute, the case was referred to an umpire, Mr. Joshua Bates, to present the final opinion.\(^{16}\) The umpire referred to the fact that one of the headlands is located in the territory of the United States of America, and the bay is not entirely surrounded by the Canadian land territory. In concluding his arguments in finding the Bay of Fundy as part of the high seas, the umpire relied on two main facts: (a) the large size of the bay, which prevents claiming the bay as a restricted body of waters; and (b) the existence of two States bordering the bay, even though one only

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\(^{14}\)In its eighth report as the special rapporteur (1956), Francois considered the case of the Gulf of Aqaba as an exceptional case and possibly unique. However, Strohl asserts that although the case of multi-State bays where one bordering State has no control over headlands is not very common and is an exceptional case, such a case is not unique to any of such particular bays. Strohl, op. cit., p.375.

\(^{15}\)Kennedy, op. cit., pp.198 et seq.

\(^{16}\)Strohl, op. cit., p.381.
Table 4.1
A List of Multi-State Bays

<table>
<thead>
<tr>
<th>Bay/Gulf/Estuary</th>
<th>Bordering States</th>
<th>Continent</th>
<th>Bay/Gulf/Estuary</th>
<th>Bordering States</th>
<th>Continent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bay of Figuier (Hendaya)</td>
<td>Spain and France</td>
<td>Europe</td>
<td>Gulf of Trieste</td>
<td>Italy and Croatia</td>
<td>Europe</td>
</tr>
<tr>
<td>Bay of Gwuttur</td>
<td>Persia and Pakistan</td>
<td>Asia</td>
<td>Head of Botteniviken</td>
<td>Finland and Sweden</td>
<td>Europe</td>
</tr>
<tr>
<td>Bay of San Juan del Norte (on the Caribbean Sea)</td>
<td>Costa Rica and Nicaragua</td>
<td>America</td>
<td>Honduras Bay</td>
<td>Honduras and Guatemala</td>
<td>America</td>
</tr>
<tr>
<td>Chetumal Bay</td>
<td>Belize and Mexico</td>
<td>America</td>
<td>Jdefjord</td>
<td>Sweden and Norway</td>
<td>Europe</td>
</tr>
<tr>
<td>Dixon Entrance</td>
<td>Alaska (USA) and Canada</td>
<td>America</td>
<td>Khor Abdullah</td>
<td>Iraq and Kuwait</td>
<td>Asia</td>
</tr>
<tr>
<td>Dollart</td>
<td>The Netherlands and Germany</td>
<td>Europe</td>
<td>Kuski Zaliv (Kurisches Haff)</td>
<td>Poland and Lithuania</td>
<td>Europe</td>
</tr>
<tr>
<td>Ems</td>
<td>The Netherlands and Germany</td>
<td>Europe</td>
<td>Lough Carlingford</td>
<td>Irish Republic and Northern Ireland</td>
<td>Europe</td>
</tr>
<tr>
<td>Estuary of Gambia River</td>
<td>Gambia and Senegal</td>
<td>Africa</td>
<td>Long Foyle</td>
<td>Irish Republic and Northern Ireland</td>
<td>Europe</td>
</tr>
<tr>
<td>Estuary of Rio Muni</td>
<td>Equatorial Guinea and Gabon</td>
<td>Africa</td>
<td>Macao Area</td>
<td>Macao and China</td>
<td>Asia</td>
</tr>
<tr>
<td>Estuary of the Sundarbans (Hariahanga and Rimangal Rivers)</td>
<td>India and Pakistan</td>
<td>Asia</td>
<td>Manzanillo Bay</td>
<td>Haiti and Dominican Republic</td>
<td>America</td>
</tr>
<tr>
<td>Estuary of Tana or Tendo River</td>
<td>Ghana and Cote d'Ivoire (Ivory Coast)</td>
<td>Africa</td>
<td>Panguapi Bay</td>
<td>Colombia and Ecuador</td>
<td>America</td>
</tr>
<tr>
<td>Flensburger Fjord</td>
<td>Denmark and Germany</td>
<td>Europe</td>
<td>Passamaquoddy Bay</td>
<td>Canada and the United States of America</td>
<td>America</td>
</tr>
<tr>
<td>Fundy Bay</td>
<td>Canada and the United States of America</td>
<td>America</td>
<td>Rio de la Plata</td>
<td>Uruguay and Argentina</td>
<td>America</td>
</tr>
<tr>
<td>Gulf of Aqaba</td>
<td>Egypt, Israel, Jordan, and Saudi Arabia</td>
<td>Asia</td>
<td>Salinas Bay (on the Pacific coast)</td>
<td>Costa Rica and Nicaragua</td>
<td>America</td>
</tr>
<tr>
<td>Gulf of Fonseca</td>
<td>El Salvador, Honduras, and Nicaragua</td>
<td>America</td>
<td>San Juan del Fuca Strait</td>
<td>Canada and the United States of America</td>
<td>America</td>
</tr>
<tr>
<td>Gulf of Menton</td>
<td>France and Italy</td>
<td>Europe</td>
<td>Viro Lachti Area</td>
<td>Finland and Russia</td>
<td>Europe</td>
</tr>
<tr>
<td>Gulf of Paria</td>
<td>Venezuela and Trinidad and Tobago</td>
<td>America</td>
<td>Wester Schelde</td>
<td>The Netherlands and Belgium</td>
<td>Europe</td>
</tr>
<tr>
<td>Gulf of Sollum</td>
<td>Libya and Egypt</td>
<td>Africa</td>
<td>Zalw Wislany (Frisches Haff)</td>
<td>Poland and Lithuania</td>
<td>Europe</td>
</tr>
</tbody>
</table>

A number of other bays are also mentioned among multi-State bays. These include Lübecker Bucht, Travemünder Reede, Bay of Kleh, Sibuko Bay, Cowie Bay, Deep Bay, and Mirs Bay. Source: Bouchez, Leo J., *The Regime of Bays in International Law*, A. W. Sthoff, Leyden, 1964, 118-170. For State practice concerning the above-mentioned multi-State bays and some other bays see ibid. It should be noted that political geography of the world has changed after 1964 (when Bouchez wrote his book). Accordingly, some of the said multi-States bays are presently located in the territory of one State. For example, the Sibuko bay is now part of the Philippines and falls into the category of single-State bays. This is also the case with respect to Deep Bay and Mirs Bay (between Hong Kong and China) after returning Hong Kong to China. In addition, bays such as Green Bay (between American States of Michigan and Wisconsin), Mississippi Sound and Lake Borgne (between American States of Mississippi and Louisiana) are part of the USA and do not fall into the categories of multi-State bays because the American States are not independent countries.
controls a small portion of the shores of the bay.\textsuperscript{17}

Strohl considers the Gibraltar Bay as those belonging to two States (Spain and Britain) since Britain seized the Rock (Gibraltar) as part of the shore of the bay in 1704.\textsuperscript{18} This bay is about five miles wide at its mouth between Europa Point and Carnero Point. The bay is as deep as six miles. The main ports on the shores of the bay are the Spanish port of Algeciras and the British port of Gibraltar.\textsuperscript{19} The bay is not included among the forty-eight bays mentioned by Kennedy in his study on bays with several States.

III. The Issue of the Multi-State Bays at the 1930 Hague Conference for the Codification of International Law

At the 1930 Hague Conference, the issue of multi-State bays was not discussed by many States.\textsuperscript{20} However, it seems that the issue was addressed more than at any other future conferences especially designed for the codification of rules on the law of the sea. Those which presented their views on the issue of multi-State bays at the 1930 Hague Conference took different positions as to what should be the rule for the baseline of these bays. Two main approaches were: (a) territorial waters should be measured from a low-water mark along the coast of States bordering a multi-State bay; and (b) a multi-State bay may be enclosed, regardless of the width of its mouth, and the waters within the bay should be divided among bordering States. As far as freedom of the seas are concerned, these views would produce different results. It is clear that these views primarily concerned those multi-State bays which were not overlapped by territorial waters of bordering States. Some States referred to the method of delimitation for those multi-State bays which were, wholly or partly, overlapped by territorial waters of States bordering such bays.


\textsuperscript{18}The British rule over Gibraltar was ceded to Britain in accordance with Article X of the Treaty of Peace and Friendship between Spain and England in July 1713. The British rule over Gibraltar was later confirmed by the following treaties between the two countries. These treaties included the Treaty of Sevill (1729), the Treaty of Aix-La-Chapelle (1748), and the Treaties of Paris (1763 and 1783). Strohl, \textit{op. cit.}, pp.385-386.

\textsuperscript{19}The geographical information on the Bay of Gibraltar was extracted from \textit{ibid.}, pp.383.

\textsuperscript{20}Article 4 of the Draft Convention on Territorial Waters as Amended by M. Schucking the Rapporteur had, \textit{inter alia}, provided that “[i]n the case of bays which are bordered by the territory of two or more States, the territorial sea shall follow the sinuosities of the coast.” Rosenne, \textit{op. cit.}, Vol.2, Annex, p.411.
Denmark favoured the enclosure of multi-State bays. It was of the view that "[t]he waters of bays whose coasts belong to two or more States must be divided among those States, either according to the general rule of international law, or, it may be, by treaty. The ten-mile rule does not apply automatically in such a case."\(^{21}\) On the other hand, Latvia was of the opinion that "[w]hen the coasts of a bay belong to more than one State, the territorial waters should follow the sinuosities of the coast or be fixed by conventional means."\(^{22}\) Japan also took the position that "[i]n the case of a bay or gulf the coast of which belongs to two or more States, the territorial waters follow the trend of the coast according to the general rule." Considering three nautical mile as the breadth of territorial waters, it added that "[i]n those portions of such bay or gulf where the distance between the two coasts does not amount to six nautical miles, the dividing line between the respective territorial waters shall, as a rule, be the middle line measured from the two coasts."\(^{23}\)

Based on the replies of the governments to the issue of the delimitation of bays, the Preparatory Committee of the 1930 Hague Conference stated that "[w]here two or more States touch the coast of a bay, the Government replies are ... in favour of the method of measuring the breadth of territorial waters from the line of low-water mark along the coast."\(^{24}\) Accordingly, the Committee proposed the following basis of discussion for the issue of the delimitation of multi-State bays.

**Basis of Discussion No.9**

If two or more States touch the coast of a bay or estuary of which the opening does not exceed ten miles, the territorial waters of each coastal State are measured from the line of low-water mark along the coast.\(^{25}\)

During the 1930 Hague Conference, there were again different views on the method of delimitation of bays bordered by more than one State. In response to the above basis of discussion, Denmark suggested that the reference to "ten miles" should be replaced by "six miles or less" and where this is the case, the multi-State bay would be under the


\(^{22}\)Ibid., p.260.

\(^{23}\)Ibid.

\(^{24}\)Observations, *ibid.*, p.263.

\(^{25}\)Ibid., Vol.4, Annex I, p.179.
exclusive authority of the coastal States bordering the bay.\textsuperscript{26} It further stated that the provision would not affect those multi-State bays which had already been delimited by existing treaties between States concerned.\textsuperscript{27}

The Delegation from Great Britain and Northern Ireland also suggested the removal of "ten miles" from the Basis of Discussion No. 9 and proposed that the following paragraph be added to its content: "Where the width at the opening of the bay is less than twice the breadth of the belt of territorial waters, the territorial waters of each coastal State shall in principle extend as far as the median line."\textsuperscript{28} Iceland also suggested that a similar paragraph be added to the text of the Basis of Discussion No. 9.\textsuperscript{29} The Delegation from the United States of America proposed that in the case of multi-State bays where the delimitation of territorial waters would result in "a small area of high sea" within the bay and wholly surrounded by territorial waters, this area would have the legal status of territorial waters of bordering States.\textsuperscript{30}

Since the discussion on multi-State bays did not concern many States, only a few States addressed the issue, and no definite rule resulted from the limited discussion on the issue. Although the Sub-Committee II of the Second Committee of the 1930 Hague Conference included in its report a provision on bays which belong to a single State\textsuperscript{31}, the report did not include any provision on the issue of multi-State bay.\textsuperscript{32} The Conference, subsequently, left the issue to be governed by customary international law, but this customary law was not reflective of a uniform treatment of multi-State bays.\textsuperscript{33}

\begin{footnotesize}
\textsuperscript{26}Observations and Proposals Regarding the Bases of Discussion Presented to the Plenary Committee by Various Delegations, \textit{ibid.}, Vol.4, Annex II, p.1386.
\textsuperscript{27}\textit{Ibid.}
\textsuperscript{28}\textit{Ibid.}, p.1390.
\textsuperscript{29}\textit{Ibid.}, p.1391.
\textsuperscript{30}\textit{Ibid.}, p.1403.
\textsuperscript{32}This is also the case regarding historic bays. Judge Oda regarded the lack of reference to multi-State bays in the report of the Sub-Committee of the Second Committee as indicating that multi-State bays should follow "the general rule whereby the territorial sea of each riparian State is measured from the State's own coastline." He added that "the lack of reference to a historic bay in those draft articles [in the report] was presumably due to the difficulty of generalizing historical elements that could have justified giving the status of a bay to certain coastal configurations which would otherwise not be regarded as bays because of their larger measurement at the mouth." Dissenting Opinion of Judge Oda in the \textit{Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening)}, \textit{ICJ Reports}, 1992, pp.732-761, at 742. (Hereinafter Dissenting Opinion of Judge Oda, \textit{ICJ Reports}, 1992.)
\textsuperscript{33}Dupuy wrote that problems related to multi-State bays are associated with the nature of relations between the coastal States. Such a relationship is reflected in the practice of these States. He adds that
\end{footnotesize}
IV. The UN Conferences on the Law of the Sea: The Lack of any Concrete Solution for the Problem of Multi-State Bays In Positive Law

None of the ILC\textsuperscript{34}, the UNCLOS I\textsuperscript{35}, and the UNCLOS III presented any definite answer to the question of legal status of bays surrounded by two or more States.\textsuperscript{36} This is why no provision on multi-State bays exists either in the TSC or the LOSC. McDougal and Burke believe that the content of the existing conventions on the law of the sea and the failure to provide provisions for these sort of bays, supported the idea that "the several states indented by a bay are not regarded as authorized jointly to claim these areas as internal waters as a single state could do in the same circumstances."\textsuperscript{37} Accordingly, the baseline in these bays is the low-water mark from which the maritime zones of the States bordering the bays are measured.\textsuperscript{38} The lack of any special provision in the TSC and the LOSC applying to the multi-States bays may also mean that the multi-nations bays cannot be enclosed by the enclosure of their mouths.\textsuperscript{39} These bays are similar to the enclosed/semi-enclosed seas, in

\begin{quote}
\textit{"[e]ven when they are not engaged in conflict, the coastal States may experience difficulties in apportioning the waters of the bay among themselves."} Dupuy, Rene-Jean, 'The Sea Under National Competence', in Rene Jean Dupuy and Daniel Vignes, A Handbook on the New Law of the Sea, Vol.1, Ch.5, Martinus Nijhoff Publishers, Dordrecht, 1991, p.267. As a general rule, all littoral States have the freedom of access to the bay, whether for the purpose of leaving the bay towards the high seas or vice versa. In the case of Gulf of Aqaba, Egypt and Saudi Arabia as the States located at the entrance attempted to deprive Israel from having access to the high seas through the Gulf of Aqaba, while a right of innocent passage for Jordan was not denied. This was the case until 1967 when Egypt and Israel signed the peace treaty of 26 March 1979 by which the Strait of Tiran at the entrance of the Gulf of Aqaba was recognised as international waterway. The case of Gulf of Aqaba is an example how the nature of relationship between littoral States of a multi-State bays my affect the state of affairs in these bays. It is no longer possible for some littoral States bordering such bays to exclude the other littoral bays.
\end{quote}

\textsuperscript{34}In its report of 1956, the ILC attributed the lack of any draft article on the delimitation of multi-State bays to the lack of data on the issue and of sufficient time to deal with the issue. See YILC, 1956, Vol.II, p.269, para.7. However, as Prescott points out, no definite solution for this issue has so far been included in any international convention on the law of the sea. Prescott, J. R. V., The Maritime Political Boundaries of the World. Methuen & Co. Ltd., London, 1985, p.51.

\textsuperscript{35}Although the Kennedy's Study on multi-State bays was available at the time of the UNCLOS I , no provision was adopted to determine how multi-State bays should be treated. It seems that the UNCLOS I followed the view of the ILC that there were no sufficient data to present a definite rule for the issue of the delimitation of multi-State bays.

\textsuperscript{36}At the UNCLOS II, the main discussions were focused on the issues of the breadth of the territorial sea and the fisheries zone. No debate was made on the issue of the multi-State bays.

\textsuperscript{37}McDougal and Burke, op. cit., pp.442 & 443.

\textsuperscript{38}Some commentators explicitly stated that "if more than one state were involved (with respect to bays) the territorial sea must be delimited from the coastline of the indentation." Ibid., p.441.

\textsuperscript{39}Dixon states that bays with several States "may not be capable of enclosure under customary law, unless a local custom or treaty between the neighbouring states establishes otherwise." Dixon, Martin, Textbook on International Law. Blackstone Press Limited, London, 1990, p.136. Dixon considers the possibility that a multi-States bay can be enclosed, if the littoral States would agree to do so. Also, Brownlie is of the opinion that the provision of Article 15 of the 1982 Convention (Article 12(1) of the 1958 Convention), is applicable to the bays bordered by two or more States. Brownlie, Ian,
some aspects, such as right of navigation\textsuperscript{40}, delimitation, marine environmental concerns, and security interests.

The bays enclosed by more than one State would only fall under the sovereignty of coastal States concerned if it is recognised that these bays are historic waters.\textsuperscript{41} This particularly has been the case concerning the Gulf of Fonseca. However, the question as to whether a multi-State bay can be qualified as a historic bay is controversial. When a bay with several coastal States is categorised as a historic bay, a number of questions arise concerning the establishment of a mechanism for enforcing authority of the coastal States in the bay. There are three possible alternatives.

- The first one is to divide the maritime area into different parts, each one belonging to one State. In this case, the problem is the method which should be applied to divide the area. A number of relevant factors, including special geographical circumstances, should be taken into account to ensure that the delimitation of the bay leads to equitable consequences.

- The second one is to establish a system of common sovereignty and jurisdiction (\emph{condominium}) in the entire areas of the bay. This requires the creation of competent authority or committee composed of representatives of the coastal States bordering the bay. Undoubtedly, there should be an agreement among the coastal States that provides essential matters such as the scope of functions and legal status of such an authority or committee.

\textsuperscript{40}In the \textit{Case Concerning the Land, Island, and Maritime Frontier Dispute}, the ICJ, \textit{inter alia}, stated that "an enclosed pluri-State bay presents the need of ensuring practical rights of access from the ocean for all the coastal States; and especially so where the channels for entering the bay must be available for common user, as in the case of an enclosed sea." \textit{Case Concerning the Land, Island, and Maritime Frontier Dispute} (El Salvador / Honduras; Nicaragua intervening), \textit{ICJ Reports}, 1992, pp.351-618, at 590. (Hereinafter \textit{ICJ Reports}, 1992.)

\textsuperscript{41}At the request of the Secretariat of the United Nations and at the time of the First United Nations Conference on the Law of the Sea, a list of forty-eight bays and estuaries the coasts of which belong to different States was prepared by Commander R. H. Kennedy. This list includes the Gulf of Fonseca, the Gulf of Paria, the Gulf of Aqaba, the Hong Kong Area, and the Gulf of Trieste. This list does not seem to be comprehensive since Strohl places the Bay of Fundy and the Bay of Gibraltar in the same category. Knight, Gary, and Hungdah Chiu, \textit{The International Law of the Sea: Cases, Materials, and Readings}, Elsevier Applied Science, London, 1991, p.133.
The last alternative is to subject the bay to two different mechanism of sovereignty: individual sovereignty; and joint sovereignty. This means the coastal States may agree to have exclusive limits to a certain distance from the coasts, and to have a common dominium over the maritime area beyond the exclusive limits of the coastal States. The coastal States are sovereign in all aspects related to their exclusive limits. However, the control of the common area should be exercised by a joint authority or committee of the coastal States.

V. Analysis of the Rights of Navigation in Multi-State Bays

There has been no uniform practice of States concerning the treatment of waters within multi-States bays and legal scholars have presented different views on the issue. However, the main trend which now prevails is that these bays are normally not under the control of bordering States unless waters within these bays fall into the legal regime of territorial seas. By the extension of territorial seas to twelve nautical miles, more multi-State bays are covered by territorial seas. Since there is not yet any conventional rule concerning recognition or rejection of sovereignty of States bordering multi-State bays, it is useful to examine the rights of navigation for coastal States and other States in two situations:

(i) where sovereignty of States bordering multi-State bay is recognised with respect to all waters within these bays even where they include the EEZs or the high seas; and

(ii) where such sovereignty is rejected where central areas of multi-State bays are part of the EEZs or the high seas.42

In both cases, the following part of the chapter will examine the navigational issues with respect to two situations:

• where there are only two bordering States both controlling the headlands (most of multi-State bays fall into this category); and

• where there are more than two bordering States one of which has no control over the headlands.

42For discussion of navigational rights within multi-State bays see also Bouchez, op. cit., pp.174-175 and 177-181.
1. Where States are entitled to enclose a multi-State bay

In this case, coastal States concerned are permitted to enclose a multi-State bay and assume sovereignty over entire waters within it. The recognition of this sovereignty means that there will be no EEZs or high seas routes within the bay, even though the size of the bay is wider than double breadth of the territorial sea. The status of waters within the bay, therefore, will be subject to the legal regime of internal waters or that of the territorial sea in exceptional cases.

If there are only two bordering States and both are located at one side of the entrance, there would not generally be any navigational problem hindering their access to the high seas. These States may decide not to divide the bay into two sections and instead they may assume joint sovereignty over the bay. Having joint authority implies that they have the equal rights of navigation in all parts of the bay, including through main navigational routes. The entry into the bay by foreign ships is regulated by the bordering States, which should reach agreement on this regulation. If the bay is made divided, no navigational problem arises where the navigational route is situated in the middle of bay. In other words, the main mechanism for division of the bay is a median or equidistance line (or both, where the coasts are not only opposite but are also adjacent in some areas of the bay). Thus, both States may share the same route equally to access the high seas. The problem is whether there is a right of access by a State to the waters of the other State if the essential navigational route is located in these waters. It seems that such a State should be entitled to use the navigational route in waters of the other States on the basis of the principle of free communication. Foreign ships should respect the rules of entry to the waters of the bay which have been regulated by the bordering States for either part of the bay. Where the essential navigational route exists in the waters of one bordering State, foreign ships should observe rules laid down by this bordering State for the use of the route. In any event, foreign ships require permission from bordering State(s) to enter into the bay to anchor at a port.

If the bay is bordered by more than two States, at least one of which does not own one of the headlands, the status of waters within the bay again depends on whether the bay is made subject to joint authority,

43For discussion of the issue of the delimitation of a multi-State bay see ibid., pp.188-198.
or is divided among bordering States. As far as access to the high seas is concerned, the main difficulty affects the bordering State in the central part of the bay, which does not have direct contact with the high seas. Ships of this State usually need to cross the waters of the State or States located at the entrance to reach the high seas. Bouchez suggests that all bordering States may have free access to the high seas, if the waters of the bay are divided so that these States can have sovereignty over part of the entrance. For example, if the bay is surrounded by three States, Bouchez’s suggestion is illustrated in the following figure. To what extent this suggestion may work depends on the relations between bordering States, and on the degree to which the suggestion will satisfy the interests of these States.

**Figure 4.1**

Navigation through a Multi-State Bay


If bordering States are entitled to joint sovereignty over the bay, there exists a question as to whether: (a) they have joint sovereignty over all parts of the bay; or (b) they exercise independent sovereignty over the bay up to a certain distance from their coast and they have only shared control over waters in the central part of the bay (as is the case with respect to the Gulf of Fonseca).

If littoral States have shared sovereignty over entire waters of the bay, the waters within the bay are regarded as internal waters of these States and these States have navigational rights through these waters to access the high seas. Accordingly, the littoral State, which is not located at either side of the opening of the bay, will not be isolated from the high seas. The littoral States should set up uniform rules for entry of foreign ships into the bay, to avoid practical problems. Foreign ships should acquire prior permission for entry into the bay either by a general
agreement with a littoral State (or all littoral States) or on the basis of case by case.

Where the status of the bay is such that riparian States have independent sovereignty over waters adjacent to their coasts and have joint authority in the central part of the bay, navigation will still occur in the bay without any problem. For example, if there are three riparian States, the bay will have four sections: three sections are exclusive waters of riparian States and the central section includes waters belonging to all riparian States. The existence of central part, where all riparian State enjoy equal rights, removes any possible navigational problem for riparian States, particularly for the one which does not have the privilege of controlling one of the headlands. In general, riparian States will regulate the access of foreign ships through the central part of the bay and the entry of these ships into the exclusive waters of each riparian State is subject to conditions establish by this State.

If the bay is divided among bordering States, a number of navigational problems would be created, in particular for the States not having a headland at the entrance. Since waters of the bay have the status similar to that of internal waters, there is no primary right of navigation, including the right of innocent passage. It is apparent that littoral States controlling the headlands normally encounter no difficulty with respect to navigation. However, the State without a headland may experience problems if its navigational needs are not met. The principle of free communication is the foundation for meeting the navigational needs of this State. As Bouchez argues, there are three reasons why such a State is entitled to navigation through waters of the other littoral States to access the high seas.

The first reason is based on Article 3 of the 1958 Geneva Convention on the High Seas. This Article, among others, provides that "[i]n order to enjoy the freedom of the seas on the equal terms with coastal States, States having no sea-coast should have free access to the

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44It should be noted that the main purpose of enclosing a multi-State bay is to give the status of internal waters to this bay, except in exceptional cases where the status is assimilated to that of the territorial sea. Here the examination is based on the main trend which regards waters within a multi-State bay entitled to enclosure as internal waters of riparian States.

45See ibid., pp.178-181.
sea.” 46 Bouchez asserts that when land-locked States have a right of free access to the high seas, a coastal State bordering a multi-State bay but not located at the entrance, should \textit{a fortiori} be entitled to free access to the high seas.

The second reason is based on an analogy with the provision of Article 5(2) of the TSC (Article 8(2) of the LOSC). This Article provides that where a new straight baseline system is established while the waters within this new system have already been part of the territorial sea, the right of innocent passage will apply in these enclosed waters. Bouchez asserts that this provision applies if a multi-State bay is divided among littoral States, one of which has no direct access to the high seas. In other words, the enclosure of a multi-State bay by drawing a line between its headlands is similar to the enclosure of coastal waters by straight baselines. Where there is a new claim enclosing the entrance of a multi-State bay, a right of innocent passage will apply in the waters enclosed by the closing line. This means that there is a guarantee of access to the high seas for the State not having a headland at the entrance.47

The third reason is based of “the right of servitude.”48 This right was primarily developed with respect to land territory but it was later extended to maritime areas as well.49 For example, the rights of navigation of Finland through the River Neva were guaranteed before the 1939-1940 war between Finland and Russia occurred. In addition, the rights of navigation of Costa Rica through San Juan River (over which Nicaragua possesses sovereignty) were ensured by the Cañas-Jerez Treaty (15 April 1858)50 and the judgment of 30 September 1916 of the CACJ.

46 Part X of the LOSC is devoted to the right of access of land-locked States to and from the sea and freedom of transit (Articles 124-132.). In particular Article 125(1) states that “[l]andlocked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind.”

47 The same argument may be extended to the case of foreign ships. If a right of innocent passage is going to survive in the waters of the bay, foreign ships can exercise this right to cross the bay before entering internal waters of each littoral States. Foreign ships normally exercise this right after getting permission from one of the littoral States to enter its internal waters to anchor at one of its ports.


50 This Treaty was concluded between Nicaragua and Costa Rica. Article 6 of the Treaty, \textit{inter alia}, reads: “The Republic of Nicaragua shall have exclusive dominion and the highest sovereignty over the waters of the San Juan River from their issue out of the lake to their discharge into the Atlantic; but the Republic of Costa Rica shall have in those waters perpetual rights of free navigation from the said mouth of the river up to a point three English miles below Castillo Viejo, for purposes of commerce
The CACJ held that “[i]t is clear, therefore, that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute nor unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica.”\(^5\)

Therefore, it can be argued that where a State bordering a multi-State is not at the entrance, the right of passage to access the high sea and vice versa should be granted to such State on the ground of the right of servitute.

2. Where States are not entitled to enclose a multi-State bay

This bay should be subject to the normal rules of the law of the sea for delimitation of maritime zones. Accordingly, the baseline for this bay is the low-water mark on coastline. The navigational rights depend on the size of a multi-State bay and the location of bordering States. Littoral States may claim sovereignty over the waters of these bays under the concept of territorial seas, but they may not enclose these bays and claim their waters as internal.

Bordering States have sovereignty over waters of the bays, if the bays are covered by territorial seas of littoral States. This is consistent with the current law of the sea and legal scholars have recognised this sovereignty. In this case, if there are only two littoral States which own the entrance, ships of either State have the right of innocent passage in the territorial sea of the other State. This is particularly a matter of necessity where essential navigational routes are located in the territorial sea of another State.\(^2\) Ships of the littoral States have the same right where they are heading from a national port to a port of the other State. When exercising this right of passage, these ships make themselves subject to the absolute sovereignty of the other State when they enter its internal waters.

\(^{51}\) See Vall, op. cit., pp.151-152.

\(^{52}\) Bouchez states that there are direct and indirect communications between all coastal States within multi-State bays and the high seas. He writes that “[t]here is direct and free communication, if ships navigating from the coastal State to the high seas and vice versa do not have to pass through the territorial sea of one of the other coastal States. On the other hand, if ships must navigate through the territorial sea of one of the other coastal States situated on the bay in order to reach the high seas, there is only indirect communication.” He adds that “passage through the territorial sea of the other coastal State may be necessary if the navigable channel runs through the territorial sea of the other.” Bouchez, op. cit., p.174.
It is clear that ships of littoral States have no difficulty in using the territorial seas of their respective States to reach a port or heading the high seas. Foreign ships have also right of innocent passage through waters of either State. Foreign ships exercise the right of innocent passage to reach ports of littoral States and are subject to full authority of a littoral State in its internal waters.

There is also another case about multi-State bays whose entrance overlapped by territorial seas of littoral States but there is also another coastal State which is not located at the entrance. A question, then, arises as to what are navigational rights of this State through the entrance. The principle of free access to the high seas (principle of free communication with the high seas) is the main basis of the navigational rights for a State which is cut off the high seas by maritime zones of other States, including territorial seas. In the above-mentioned situation, the concept of free communication is reflected in the right of innocent passage through the territorial seas of the littoral States controlling the headlands.

It is true that the law of the sea has permitted coastal States to temporarily suspend the right of innocent passage in certain areas of their territorial seas. However, such suspension by States controlling the headlands of a multi-State bay should not affect the access routes to a State which does not have control over the entrance of this bay. This is a corollary of the principle of free communication which prohibits taking any measure which may hinder free access to the high seas. Bouchez also relies on the provision of Article 16(4) of the TSC guaranteeing a continued right of innocent passage for the States not being at the entrance. This Article provides that innocent passage through straits used for international navigation between two parts of the high seas or one part of the high seas and the territorial sea of a foreign State must not be suspended. By analogy, Bouchez maintains that the case of a multi-State bay, with one State not being located at the entrance, is similar though the entrance of a bay is not as narrow as a strait. Bouchez, therefore, asserts that "if it is not permitted to suspend the right of innocent passage in the

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53 Article 16(3) of the TSC and Article 25(3) of the LOSC.
54 See also Part III (Straits Used for International Navigation) of the LOSC in general and its Articles 38(1) and 45(2) in particular.
case of straits, it is a fortiori prohibited to suspend that right in the case of [multi-State] bay.”55

If the entrance of a multi-State bay is considerably larger than the double breadth of the territorial sea, the problem of overlapping of territorial seas does not occur. This means that there would be a route of EEZs or the high seas in the central parts of the entrance where littoral States do not have authority to restrict navigation and overflight. In this situation, there would be no difficulty for the exercise of right of navigation. It is evident that there exist three navigational regimes in the waters of this bay: (a) freedom of navigation and flight in the EEZs or the high sea parts of the bay; (b) the right of innocent passage in the territorial sea of the riparian States; and (c) passage through internal waters of riparian States under the conditions regulated by these States.

In conclusion, whether or not a multi-State bay is susceptible to enclosure, navigational rights of littoral States and international community are not affected. Although the scope and nature of the right of passage through multi-State bays vary depending on recognition or non-recognition of enclosure of these bays, these bays have never been closed to local or international navigation. The case of Gulf of Fonseca (examined infra) is a typical example of multi-State bays where navigational rights have been guaranteed.

VI. Claiming Multi-State Bays on the Basis of Historic Title

Given that multi-nation bays are not subject to enclosure under the rules codified for single-nation bays, may bordering States rely upon historic title to enclose certain multi-State bay? Two studies of the United Nations have briefly examined this issue. The 1957 UN Memorandum pointed out that the previous studies by the League of Nations, learned institutes, and the ILC only considered the issue of historic titles concerning single-nation bays. The Memorandum contains a few cases which (except with respect to the Gulf of Fonseca) reflected the idea that multi-State bays are not susceptible to enclosure by any means, including by reference to historic title. Even in the case of the Gulf of Fonseca, the Memorandum stresses that although the CACJ recognised the historic character of the Gulf, it “does not attribute to ... [the waters within the

55Bouchez, op. cit., p.181.
Gulf] the characteristics of internal waters; rather it tends to class them as territorial sea." This case to be of exceptional character and is the only gulf bordered by several States which acquired recognition of its historic character by the CACJ (1917) and the ICJ (1992).

As Blum points out the decision in the case of Gulf of Fonseca was not followed in any other similar cases. In fact, none of claims made by bordering States of multi-State bays on historic title became successful. For example, in the case of Gulf of Aqaba, a historic claim was made by Arab States bordering the Gulf for the main purpose of cutting off the access of Israel to the high seas though the Strait of Tiran towards the Red Sea. It was in 1957 when Saudi Arabia claimed the Gulf of Aqaba as a closed sea. However, this claim was challenged by a number of States. States such as the USA, France, the UK, Italy, the Netherlands, Belgium, Sweden, Denmark, and Canada indicated their opposition to the historic claim made to the Gulf of Aqaba particularly because of its effect on the rights of navigation. Although Egypt joined Saudi Arabia in claiming the Gulf of Aqaba as historic and as a closed sea without any right of navigation for Israel, the claim proved to be unsuccessful and the 1967 Peace Treaty between Egypt and Israel weakened the basis of the claim. The 1957 UN Memorandum does not mention the Gulf of Aqaba as a historic bay.

In addition, Article 16(4) of the TSC also extend the right of non-suspendable innocent passage to straits which link the high seas to the territorial sea of a foreign State. This provision was particularly incorporated into the TSC to guarantee the right of Israel to have access to the high seas through the Gulf of Aqaba and the Strait of Tiran.

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57 For the discussion of this issue see Strohl, op. cit., pp.389-397.
58 For the statement of the representative of Saudi Arabia concerning the Gulf of Aqaba, see UNGAOR, 12th Session, 1957, Plenary Meeting, p.233, and UNGAOR, 14th Session, Sixth Committee, 1959, pp.227 et seq. The same claim was also made in the UNCLOS I. See UNCLOS I. Official Records. Vol.III (First Committee), 1958, p.3.
59 See UNGAOR, 11th Session, 1957, Plenary Meeting, pp.1277-1278, 1280, 1284, 1287, 1288, 1296, 1303. For example, France asserted that “the Gulf of Aqaba, by reason partly of its breadth and partly of the fact that its shores belong to four different States, constitutes international waters.” Ibid., p.1280. The USA also states that it “believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto.” Ibid., p.1277-1278. The Gulf of Aqaba is about six mile wide at its entrance and include two narrow channels as a result of the existence of the two islands of Tiran and Sanafir in the mouth of the Gulf.
Hypothetically, the Gulf of Aqaba could be claimed as historic, if all four littoral States had claimed the Gulf as historic, taking into account the interests of all bordering States, whether at the entrance or in the central parts of the Gulf.⁶⁰ Even this claim would not have been guaranteed success under the general rules governing multi-State bays.

A number of justifications may be found in certain cases on the question as to why multi-State bays cannot claimed as historic. One justification concerning certain single State bays for being qualified as historic is that these bays are not linked to any foreign nation.⁶¹ Multi-State bays lack this character.⁶² This rationale was also taken into account by the Second Court of the Commissioners of Alabama Claims in the case of Alleganean (1885). As part of its reasoning in favour of the Chesapeake Bay as historic, the Court held that “[Chesapeake Bay] is entirely encompassed by ... [the territory of the United States] ... It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another.”⁶³ In the case of multi-State bays, these areas of waters do constitute a roadway from one nation to another or to the high seas. This is due to this fact that Blum comments that “multinational bays have generally come to be regarded as parts of the open sea, except the marginal belt to which each of the littoral States is entitled in accordance with the general rules of international law.”⁶⁴ It should be noted that if a bay is not large enough to contain an area of the EEZ or the high seas and accordingly it is overlapped by the territorial seas of littoral States⁶⁵, the bay is subject to the legal regime of the

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⁶⁰In 1957, the Secretary State of the United States of America, Mr. John Foster Dulles, stated in a news conference that “[i]f the four littoral states which have boundaries upon the gulf [of Aqaba] should all agree that it should be closed, then it could be closed.” News Conference Statement of 19 February 1957, Department of State Bulletin, No.36, January-June 1957, p.404.


⁶²Blum writes that “one of the major considerations which permit a given [single-State] bay to be turned into an historic bay is the fact that by its incorporation into the national domain of the littoral State no harm is done, or is likely to be done, to another State and that the rights of such a State are not affected thereby.” Blum, Yehuda Z., Historic Titles in International Law, Martinus Nijhoff, The Hague, 1965, p.270.


⁶⁴Blum, op. cit., p.270.

⁶⁵In such cases, the delimitation of territorial seas within bays will be subject to the provisions of Article 12(1) of the TSC (Article 15 of the LOSC) where the median line (with respect to opposite coasts) and the equidistance line (with respect to adjacent coasts) are the methods of delimitation in normal circumstances. The provision, however, recognises that deviation from these methods may be made where there are special circumstances or historic titles.
territorial sea. In this case, although the bay is not part of the high seas, it is not part of internal waters either.

In the case of Washington (1843), the umpire was asked to decide whether the capture of this American Ship by a British vessel in the Bay of Fundy was lawful. To answer this question, the umpire needed to decide whether the Bay of Fundy was a British Bay. The umpire concluded that the bay is not British because "[o]ne of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it." 

Despite the views asserted in these cases and those reflected in the 1957 UN Memorandum, the 1962 UN study presents a new approach. The study is entitled "Juridical Regime of Historic Waters, Including Historic Bays." This study was also undertaken by the Secretariat of the UN following a request by the ILC to prepare a more comprehensive research on the issue of historic waters, including historic bays. The study examined two cases: (a) where littoral States agree that the bay is historic; and (b) where littoral States do not in agree with respect to the nature of waters within a bay as historic waters.

In the first case (the 1957 UN Memorandum), the study showed that if all littoral States agree that a bay is historic, the bay may be regarded as historic in the same manner as a single-State bay may be claimed as historic. Then, all requirements for proving the historic nature of a single-State will apply to such a multi-State bay claimed as

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66See McDougal and Burke, op. cit., p.441.
67Moore, Vol.IV, 1898, op. cit., pp.4342 et seq, at p.4344. Referring to the decision made in the case of Washington, Dana presented his view to the Halifax Fishery Commissioners (which was set up by the Washington Treaty of 1871 between Great Britain and the United States of America). Dana maintained that "the real ground [for the decision in the case of Washington] was that one of the headlands belonged to the United States, and it was necessary to pass the headland in order to get to one of the ports of the United States." See Phillimore, R. J., Commentaries upon International Law. Third Edition, Butterworths, London, Vol.I, 1879, pp.287-289. Fauchille also presented the similar view. He wrote that the principal basis of the arbitral award in defining the bay of Fundy as an open bay was that "its coasts do not all belong to a single State; one of its headlands is situated in the territory of the United States, the other in the territory of Great Britain [now part of Canada]." Fauchille, Paul, Traité de droit international public. Vol.I, Part II, Paris, 1925, p.384.
69Ibid., p.21.
Therefore, riparian States should indicate that they have peacefully exercised continuous sovereignty over the bay for a long period, without opposition from other States. This is what has been considered to be the case concerning the Gulf of Fonseca but this case is not to be extended to other geographically similar bodies of water. The study seems to have considered that any multi-State bay can be claimed as historic if bordering States jointly lay a claim over the bay by historic title. However, it is not the mere claim of littoral States which determines the status of a multi-State bay as historic. The mere claim produces nothing. These States should substantiate the historic character of a multi-State bay. As one of the most important factors in recognising a historic claim over a body of water, it should be demonstrated that all interested States have not opposed such claim. In the current status of the law of the sea, it does not appear that new claims on historic bases may be made successfully over multi-State bays. This is because the main trend towards these bays is to maintain the status of their waters as free for international navigation. Accordingly, it will not be surprising if these claims prove void.

Concerning the second case (the 1962 UN study), the study rejected any possibility of claiming a multi-State bay as historic, where littoral States are not in agreement concerning the status of waters within the bay as historic waters, no claim can be laid over the bay as historic. The study is flexible in advancing a historic claim over a multi-State bay only if all littoral States agree that the bay is historic. In general, opposition from one or two States may be regarded as not having significant adverse effect on establishing a historic claim over a body of water like a single-State bay, if other foreign States have acquiesced. However, it is not the case with respect to a multi-State bay, if the persistent opposition comes from one or more littoral States against the claim laid over such bay by the other littoral States. This is because in assessing whether affected States

70The study states one problem which in the case of a multi-State bay arises is "whether sovereignty over the bay must during the required period have been exercised by all the States claiming title or whether it is sufficient that during that period one or more of them exercised sovereignty over the bay." Ibid.

71Gidel states that even where all littoral States are in agreement to enclose a multi-State bay, it is not legally possible to enclose the bay unless other States recognise such enclosure or at least acquiesces to it. Gidel, Gilbert, Le Droit International Public de la Mer en Temps de Paix, Paris, Vol.3, 1934, p.604.

72Blum writes that "it would be far more in accordance with the prevailing concepts of modern maritime international law if the waters surrounded by more than one littoral State would be considered as falling ex definitione outside the category of historic bays, and if the waters beyond the marginal belts of each of the littoral States were regarded as part of the high seas." Blum, op. cit., p.310.
have shown tolerance towards historic claim over a multi-State bay, the opposition of some littoral States against the historic claims by the other littoral States is of “great if not decisive importance.”

VII. Case Study: The Case of the Gulf of Fonseca

The Gulf of Fonseca is a typical example of a bay which represents two characteristics. It is geographically classified as a multi-State bay, while it is also categorised as a historic bay. The Gulf of Fonseca is located on the Pacific coast of central America and is surrounded by the three countries of El Salvador in the north-west, Nicaragua in the south-east, and Honduras in the central part of coasts within the Gulf. El Salvador and Nicaragua own the headlands of the Gulf, and Honduras is located in the central part of the Gulf without headlands. (See Map 4.1 below.) The mouth of the Gulf is slightly more than nineteen miles wide and is fifty miles long.

Map 4.1
The Gulf of Fonseca

Source: Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening, ICJ Reports, 1992, p.587.

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73Ibid.
74Honduras has approximately a coastline of forty miles in the Gulf of Fonseca. Strohl, op. cit., p.376.
75This width is where the two headlands of the Cosiguina Point on the mainland of Nicaragua and the Amapala Point on the mainland of El Salvador are used as natural entrance points of the Gulf of Fonseca. Colombos, C. John, The International Law of the Sea, Sixth Revised Edition, Longmans, London, 1967, p.188.
Until 1821 Spain had authority and control over the Gulf of Fonseca. Then this authority over the Gulf was transferred to the Federal Republic of Central America that lasted until 1839 when the new three States of El Salvador, Nicaragua, and Honduras (as the successor States) formed the new coastal States around the Gulf.

The Gulf of Fonseca has been subject to a decision of the Central American Court of Justice (Republic of El Salvador v. Republic of Nicaragua, March 9, 1917). The question was whether the Gulf could be considered as historic waters and, if so, whether the Gulf had to be divided among the three coastal States or the Gulf was indivisible and had to be subject to the common dominium (joint ownership). The case was brought before the Court as a result of the conclusion of the Bryan-Chamorro Treaty of 5 August, 1914 between the USA and Nicaragua. According to Article II of the Treaty, the USA was granted a right to establish a naval base in the Nicaraguan coast in the Gulf of Fonseca for ninety-nine years. This Treaty was challenged by El Salvador by arguing that the Treaty would affect the interests of other littoral States of the Gulf and, and as far as the Gulf was concerned, Treaty should have been concluded with the consent of all the three littoral States. The reasoning of El Salvador was that the Gulf was a historic bay, like other claimed historic bays such as Chesapeake and Delaware Bays. The problem was that the Gulf was not bordered by a single State. El Salvador argued that the existence of the three littoral States did not change the

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76 Strohl, op. cit., p.376.
77 The Central American Court of Justice was set as a result of the Central American Peace Conference at Washington on 20 December 1907.
78 The text of the decision of the Court (English Translation) is found in "Judicial Decisions Involving Questions of International Law," AJIL, Vol.11, 1917, pp.674-730.
79 For information on the preparation of the Treaty see Flinch, George A., 'The Treaty with Nicaragua granting Canal and other rights to the United States', AJIL, Vol.10, 1916, pp.344-351. The text of the Treaty can be found in International Law Documents, U.S. Naval War College, 1924, pp.31-34.
80 Nicaragua gave a right to the USA, for a period of ninety-nine years, "to establish, operate, and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select." (Article II of the Bryan-Chamorro) The Treaty was also optional for the extension. In addition, the USA was granted a right to build a inter-oceanic canal. Jessup, op. cit., p.398. Jessup refers to two other names used for the Gulf of Fonseca. These are the Gulf of Amapala and the Gulf of Conchagua. Ibid.
81 Jessup states that the grants given to the USA by Nicaragua faced opposition of both El Salvador and Costa Rica and they asked the Central American Court of Justice to declare the nullification of the Treaty. Ibid. Honduras also protested against the Treaty. See, for example, Gonzalez, Salvador R., 'Neutrality of Honduras and the Question of the Gulf of Fonseca', AJIL, Vol.10, 1916, pp.509-544.
82 The 1914 Treaty came to the end in 1971 and the USA never established the naval base in the Gulf of Fonseca. Prescott, op. cit., 1985, p.254.
status of the Gulf as a historic bay since these States had once been "a single international political entity." 83

Nicaragua accepted the nature of the Gulf as "closed or territorial bay", but it stated that it was the small size of the Gulf which gave the territorial nature to this maritime area, not the historic rights over the Gulf. 84 The Court held that the Gulf of Fonseca "belong[es] to the category of historic bays and to be possessed of characteristics of a closed sea." 85 The Court also stated that the Gulf was "property belonging to the three countries that surround it." 86 Nonetheless, the Court provided a three mile limit from the coast for the waters of each littoral States in accordance with the practice of the bordering States. 87 Only the area beyond the three mile limits were undivided in which common jurisdiction was accepted. The Court indicated that one of the effects of common ownership of the Gulf (condominio) is that none of the coastal States could "lawfully alter, or deliver into the hands of an outsider, or even share with it, the use and enjoyment of the thing held in common" if it did not obtain the consent of other two countries.

In regard to the reasons for possession of the Gulf by its littoral States, the Court ruled:

[I]t combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have described as essential to territorial waters, to wit, secular or immemorial possession accompanied by animo domini both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that these States should possess the

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83 Jessup, op. cit., p.399. As regards to the use of the term “territorial waters” by the Central American Court of Justice in referring to the body of water inside the closing line but beyond the three-mile maritime limits, the ICJ’s view is note worthy. The ICJ commented that the Central American Court of Justice referred to “territorial” not to mean territorial sea but to present that those waters “were not international and were on historical grounds claimed à titre de souverain by the three coastal States.” ICJ Reports, 1992, p.604.

84 AJIL, Vol.11, 1917, p.705.

85 Ibid., p.707. The ICJ viewed that by “closed sea” the Central American Court of Justice referred to “territorial” not to mean territorial sea but to present that those waters “were not international and were on historical grounds claimed à titre de souverain by the three coastal States.” ICJ Reports, 1992, p.591.

86 This was the opinion of the majority of Judges, composed of Medial, Oreamuno, Castro Ramirez, and Bocanegra. However, Judge Gutierrez Navas stated that "the ownership of the Gulf of Fonseca belongs, respectively, to the three riparian countries in proportion. Jessup, op. cit., p.400. See also AJIL, Vol.11, 1917, p.716.

87 Although a limit of three miles was considered as the area of exclusive sovereignty of each coastal State, a right of innocent passage through this maritime area was granted to the other coastal States on a mutual basis. ICJ Reports, 1992, p. 590.
Gulf fully as required by these primordial interests and interest of national
defence.88 (emphasis added)

The Court, by considering the three factors of geography, history
of the Gulf, and the vital interests of the littoral States, concluded that El
Salvador, Honduras and Nicaragua are co-owners of waters of the Gulf,
"except as to the littoral marine league which is the exclusive property of
each.(littoral State)."89 This marine league limit applies to the mainland
and islands within the Gulf as well. The decision of the Court did not
meet any adverse reactions from non-littoral countries and it was
recognised in practice.90

Although the Court granted historic title to the Gulf of Fonseca, it
recognised the right of innocent passage (the right of uso inocente) within
the Gulf for all nations.91 This primarily seems to be in contrast with the
normal legal status defined for internal waters, including juridical bays
and those bays claimed on historic grounds, where no right of innocent
passage exists. However, as the ICJ in the Case Concerning the Land,
Island and Maritime Frontier Dispute pointed out rules and principles on
bays belonging to a single State do not necessarily apply to a bay which is
a pluri-State bay and is also an historic bay. The ICJ, in particular,
referred to the right of navigation within the Gulf and held that:

the Gulf being a bay with three coastal States, there is a need for
shipping to have access to any of the coastal States through the main
channels between the bay and the ocean. That rights of innocent
passage are not inconsistent with a regime of historic waters is clear,
for that is precisely now the position in archipelagic internal waters and

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88AJIL. Vol.11, 1917, p.705. To give authority to its judgement, the Central American Court of Justice
referred to the Arbitral Award of 7 September 1910 of the Permanent Court of Arbitration in the North
Atlantic Fisheries Case and the comments made by Dr. Drago in relation to question V put before the

89AJIL. Vol.11, 1917, p.694. The Central American Court of Justice also recognised that each of the
three coastal States has the right to exercise police power for fiscal and national security purposes in an
area of 9 miles beyond the exclusive limits of the coastal States. ICJ Reports, 1992, p.595.

90With reference to the 18 February 1914 note of the Department of State of the USA in response to the
protest of El Salvador, the Court argued that the note was a recognition of common sovereignty of the
coastal States in the Gulf of Fonseca. See also ICJ Reports, 1992, p.593. The note, inter alia,
contained that "[i]n your protest [Honduras' protest] the position is taken that the Gulf of Fonseca is a
territorial bay whose waters are within the jurisdiction of bordering States. This position the
Department is not disposed to controvert." Strohl, op. cit., p.378, no.7. It should be also mentioned
that Article 7 of the 1950 Constitution of El Salvador contains a provision which provided that "[t]he
Gulf of Fonseca is an historic bay subject to a special regime." Laws and Regulations on the Regime
of the Territorial Sea, United Nations Legislative Series, ST/LEG/SER.B/6 (December 1956), United

91AJIL. Vol.11, 1917, p.715.
indeed in former high seas enclosed as internal waters by straight baselines.\textsuperscript{92} 

The ICJ reconfirmed this approach in another part of its 1992 judgment on the bases of “historic reasons” and “practical necessities.” To indicate the necessity of rights of navigation for either coastal States or third States wishing to access a port of any bordering State of the Gulf of Fonseca, the ICJ argued that:

Since the practice of the three coastal States still accepts that there are the littoral maritime belts subject to the single sovereignty of each of the coastal States, \textit{but with mutual rights of innocent passage}, there must also be rights of passage through the remaining waters of the Gulf, not only for historical reasons but because of the practical necessities of a situation where those narrow Gulf waters comprise the channels used by vessels seeking access to any one of the three coastal States. Accordingly, these rights of passage must be available to vessels of third States seeking access to a port in any one of the three coastal States; such rights of passage being essential in a three-State bay with entrance channels that must be common to all three States. The Gulf waters are therefore, if indeed internal waters, \textit{internal waters subject to a special and particular regime, not only of joint sovereignty but of rights of passage.}\textsuperscript{93} (emphasis added)

Despite the recognition of the Gulf of Fonseca as a historic bay which cannot be divided, El Salvador and Honduras disputed their maritime delimitation.\textsuperscript{94} This dispute arose due to the existence of a number of islands in adjacent areas to the coasts of these countries and within the Gulf. A boundary line was already drawn within the Gulf by a

\textsuperscript{92}ICJ Reports. 1992, p.593. As far as navigation rights are concerned, the view of Honduras is also noteworthy. It prefers the idea of “community of interests” instead of the “condominium”. To support its argument, Honduras relied on the judgement of the PCU in the case of the \textit{Territorial Jurisdiction of the International Commission of the River Oder} (1929) where the Court held that “[when] a single waterway traverses or separates the territory of more than one State ... a solution of the problem has been sought not in the idea of a right of passage for upstream States, but in that of a community of interest of riparian States.” The Court further elaborated that “[t]his community interest in a navigable river becomes the basis of a common legal right \textit{communaute de droit}, the essential features of which are the perfect quality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.” \textit{Territorial Jurisdiction of the International Commission of the River Oder Case}, Judgement No.16, PCIJ Series A. No.23, 1929, p.27. Also see ICJ Reports. 1992, p.602.

\textsuperscript{93}Ibid., p.605. Cf Judge Oda’s opinion where he stated that “[u]nder the contemporary concept of the law of the sea, the sea-waters adjacent to the coasts of States are either territorial sea or, otherwise, internal waters. There cannot be any other category for such offshore sea-waters.” Dissenting Opinion of Judge Oda, ICJ Reports. 1992, p.734. In another part of his dissenting opinion Oda asserted that the decision of the ICJ in establishing a three mile maritime limit for each of the three coastal State is not consistent with the legal nature of a historic bay as internal waters. \textit{Ibid.}, p.750.

\textsuperscript{94}Due to the geographical features of the Gulf of Fonseca, the ICJ emphasised that “mere delimitation without agreement on questions of passage and access would leave many practical problems unresolved. It is not easy to conceive of a satisfactory final solution without participation of all three States together in the creation of a suitable regime, whether or not including delimitation of separate areas as internal waters.” ICJ Reports. 1992, p.603.
joint commission between Nicaragua and Honduras in March 1900.\textsuperscript{95} (See Map 4.2 below.) However, El Salvador and Honduras could not resolve their differences and submitted their boundary disputes, including maritime boundary within the Gulf, to the ICJ on 11 December 1986 for settlement.\textsuperscript{96}

**Map 4.2**
The 1900 Maritime Boundary in the Gulf of Fonseca (Honduras - Nicaragua)

![Map of the 1900 Maritime Boundary in the Gulf of Fonseca](image)


A Chamber of the ICJ which dealt with the *Case Concerning the Land, Island and Maritime Frontier Dispute* accepted the status of the Gulf of Fonseca as a historic bay, consistently with the judgment of the CACJ in 1917. In line with the common dominium of the three littoral States, the Chamber rejected the division of the Gulf among these States.\textsuperscript{97} The case was finally concluded by the judgment of the ICJ in 1992. The ICJ endorsed the legal status of the Gulf of Fonseca as defined by the 1917 judgment of the CACJ and issued, *inter alia*, the following judgement on 11 September 1992:

\textsuperscript{95}Prescott, *op. cit.*, 1985, p.254. Honduras still considers the 1900 boundary line as valid. However, Nicaragua and El Salvador are in the opinion that the Gulf is indivisible. *Ibid.*

\textsuperscript{96}Knight and Chiu, *op. cit.*, p.134.

\textsuperscript{97}The Chamber did not regard the 1917 decision of the Central American Court of justice "as res judicata since Honduras had not been a party to those proceedings and Nicaragua was only an intervener in the present proceedings." Strake Qc, J.G., *Introduction to International Law*, Tenth Edition, 1989, Butterworths, London, p.174, no.10.
the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf, that is to say, between a point on that line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosiguina, are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected ... (emphasis added)

Generally, multi-State bays are not considered to have the characteristic of a historic bay under the customary law. In cases where historic titles over certain bays were subject to debates, these bays were entirely within the territory of one coastal State.100 However, the existence of this fact did not prevent the ICJ from confirming the historic status of the Gulf of Fonseca in accordance with the 1917 judgment of the CACJ. In fact, the ICJ was convinced that before 1839 when the Gulf of Fonseca was bordered by only a single State (the Federal Republic of Central America), the Gulf acquired the status of a historic bay and its disintegration into three States did not change the historic status of the Gulf. In its words, "there seems no reason in principle why a succession

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98 As regards the concept of condominium, the ICJ gave the example of joint jurisdiction of France and Spain in the Baie du Figuier under the 1879 Declaration on the Atlantic boundary between France and Spain. The Declaration considered three sections in the bay for jurisdiction purposes, "la troisième formant des eaux communes." ICJ Reports, 1992, p.600. Judge Oda in his dissenting opinion asserted that the case of the Baie du Figuier cannot be used as a precedent for the Gulf of Fonseca because there was an agreement between France and Spain on the condominium in the Baie du Figuier while no agreement has ever concluded among the three riparian States of the Gulf of Fonseca. He added that the mouth of the Baie du Figuier is about 3,000 meters wide which means that "it could by the mere distance criterion have been under the jurisdiction of either State [France and Spain]." Dissenting Opinion of Judge Oda, ICJ Reports, 1992, pp.754-755.

should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States." The ICJ referred to the 1962 United Nations Study to support its view that certain multi-State bays may fall into historic bays if certain conditions exist. As regards the issue of multi-State bays and historic titles, the Study asserted that "[i]f all the bordering States act jointly to claim historic title to a bay, it would seem that in principle what has been said ... regarding a claim to historic title by a single State would apply to this group of States."  

Judge Oda in his dissenting opinion in the Case Concerning the Land, Island, and Maritime Frontier Dispute (1992), however, argued that there has been no rule in international law which permits a claim over a multi-State bay on any grounds, including on historic basis. Judge Oda was of the view that the Gulf of Fonseca is no exception and accordingly it may not be enclosed by reliance on historic title. Judge Oda did not agree with the findings of the CACJ and those of the majority of the judges of the ICJ on the legal status of the Gulf of Fonseca as a historic bay on the ground that the findings are inconsistent with traditional and contemporary law of the sea. In fact, the main argument of Judge Oda was that any reference to the Gulf of Fonseca as a historic bay was after the 1917 judgment of the CACJ, a judgment which was, in his view, based on the mere views of the judges and was not a proper decision in accordance with the traditional and contemporary law of the sea. He asserted that the 1957 and 1962 Studies of the UN Secretariat have also relied on the same judgment and have given the Gulf of Fonseca "a somewhat special treatment without offering any

101ICI Reports. 1992, p.598.
102The 1962 UN Study, op. cit., p.21, para.147.
104Dissenting Opinion of Judge Oda, ICI Reports. 1992, p.745. Judge Oda, further, stated that waters of a multi-State bay cannot be considered as internal waters and be divided among riparian States. He argued that such an approach "is tacitly confirmed by the absence of any provision concerning the delimitation or division of internal waters either in the 1958 or the 1982 Conventions; the internal waters of one State cannot abut the internal waters of another State." Ibid., p.746.
105In his comment on the decision of the CACJ concerning the status of waters within the Gulf of Fonseca, Gidel was of the view that the CACJ's opinion was inconsistent with normal rules governing historic bays. Gidel asserted that the CACJ "attributes to the waters of the gulf the characteristics not of internal waters, which their status as historic have normally required, but of the territorial sea. This is a truly remarkable departure from the logical rules governing historic bays." Ibid., op. cit., Vol.II, p.627.
106Ibid., p.748.
107Ibid., p.750.
sufficiently convincing reasons." As regards the positions of the parties to the case before the ICJ, Oda stated that they have only relied upon the 1917 judgment of the CACJ and they have not demonstrated that there are 'any established rules governing a "historic bay" bordered by the land of two or more States.'

Judge Oda then defined what in his view is the legal status of waters within the Gulf of Fonseca. He stated that the practice of States in Latin America after the Second World War indicated a trend towards a 12 mile limit for the territorial sea. It should, however, be noted that many of Latin American States favoured a much larger limit of 200 miles for their territorial seas. As far as the littoral States are concerned, Honduras currently claims a 12 mile territorial sea while El Salvador and Nicaragua (situated on the headlands of the Gulf) claim a 200 mile territorial sea. As a universally adopted limit for the territorial sea, Judge Oda considered the 12 mile limit as the basis for the case of the Gulf of Fonseca and argued that the legal status of the Gulf's waters can be defined as follows:

the Gulf of Fonseca must now be deemed to be totally covered by the territorial seas of the three riparian States ... [Accordingly] ... the waters within the Gulf of Fonseca now consist of the territorial seas of three riparian states, without leaving any maritime space beyond 12-mile distance from any part of the coasts.

Thus Oda concluded that Honduras and foreign ships enjoy the right of innocent passage to and from the Pacific Ocean through overlapping territorial Seas of El Salvador and Nicaragua under the

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108 Ibid., pp.748-479.
109 According to Oda, the practice of the riparian State of the Gulf of Fonseca in the early this century indicates that they claimed one league for their territorial seas and a distance of 4 leagues for exercising their police powers. Ibid., p.757. See, for example, the 1860 Civil Code of El Salvador in UN ST/LEG/SER.B/1, p.71, the 1933 Navigation and Maritime Act of El Salvador in ibid., and also UN ST/LEG/SER.B/6, p.126, and the 1906 Civil Code of Honduras in UN ST/LEG/SER.B/1, p.71.
110 Dissenting Opinion of Judge Oda, ICJ Reports, 1992, p.749. Oda also referred to the period when Spain (until 1821) and the Federal Republic of Central America (until 1839) had certain authority over the Gulf of Fonseca. According to Oda, although Spain and the Federal Republic of Central America may have exercised certain control powers over the waters of the Gulf, there is no evidence to indicate that "at times prior to 1821 or 1839 Spain or Federal Republic of Central America had any control in the sea-waters beyond the traditionally accepted rule of the range of the cannon-shot in the Gulf." Ibid., p.753.
111 Ibid., p.758.
protected right by international law of innocent passage in the territorial sea of other States.112

As a general rule, it appears that the view of Judge Oda reflects the position of multi-State bays in international law. There is no ground in international law upon which a multi-State bay can be enclosed, whether on historic reason or any other justification. However, the case of the Gulf of Fonseca is mentioned by many jurists as an exception to the general rule due to its particular circumstances from Oppenheim (1920)113 to Brown (1994)114. The ICJ confirmed the 1917 judgment of the CACJ since it was of the view that there was adequate evidence to qualify the Gulf of Fonseca as a historic bay at the time it was first under the control of a single authority, whether Spain (until 1821) or later the Federal Republic of Central America (until 1839). The basis of the ICJ's view was the principles governing the concept of State succession, that is to say according to such concept "territorial sovereignty passes from one State to another State."115 In the case of the Gulf of Fonseca, the territorial sovereignty passed from the Federal Republic of Central America in 1839 to the three riparian States of El Salvador, Honduras, and Nicaragua.

Although there might be different approaches on the legal status of the waters within the Gulf, there would not be any change on the nature of the rights of navigation through the Gulf. A right of innocent passage of ships belonging to the riparian States or other States is protected either under the established practice of the riparian States or under the regime of the territorial sea.

112Ibid., p.760. As far as maritime areas outside the closing line of the Gulf is concerned, unlike the ICJ, Oda was of the view that due to geographical location of Honduras, it cannot lay claim over the territorial sea, the EEZ, and the continental shelf outside the closing line. He, however, emphasised that "Honduras is fully guaranteed access to the high seas of the Pacific Ocean outside the Gulf of Fonseca by the unchallenged concept of innocent passage through the territorial seas of the two neighbouring States both within and without the Gulf." (emphasis added) Ibid. Although Honduras has its own EEZ on the Atlantic coast, Oda does not exclude the possibility of considering it as a geographically disadvantaged State in the Pacific side to participate in the exploitation of surplus of living resources in the EEZs of El Salvador and Nicaragua under the provisions of the LOSC (Art. 69(1), Art. 70(1), and Art. 70(2)). Ibid., p.761.


114Brown, op. cit., 1994, p.31. Brown is in the opinion that "[u]nder international customary law (and, it would seem, under the two Conventions, since they qualify neither the normal baseline rule nor the bays rule in this respect), the presumption must be that the normal baseline rule applies. Although one such bay, the Gulf of Fonseca, has been recognised as an exception to this rule, it was on the basis that it constituted a historic bay." Ibid.

115ICJ Reports, 1992, p.598
There seem to be no other multi-State bays which have the same circumstances as the case of the Gulf of Fonseca. Accordingly, the exceptional case of the Gulf of Fonseca should not be taken into account as a precedent for other multi-State bays. This is particularly due to the impact of such claims on the free seas. Although the rights of navigation were guaranteed in the whole area of the Gulf of Fonseca in accordance with the concept of innocent passage, there may be no guarantee that new claims on the enclosure of multi-State bays do not make the rights of navigation subject to more restrictive rules.

VIII. Conclusion

The law of the sea has not yet codified any rules on the issue of multi-State bays. This has, in turn, resulted in uncertainty as to whether the determination of the status of waters within these bays should be left to the littoral States concerned, or whether there should be international rules for delimitation of these bays. In particular, there has been a debate on the establishment of a balance between the exclusive rights of States bordering multi-State bays and the inclusive rights of international community. In addition, the scope of rights of littoral States surrounding multi-State bays have been subject to extensive debate. The main issue has been the status of navigation through waters within multi-State bays, whether by ships belonging to the littoral State not located at the entrance, or by foreign ships.

The prevailing trend is that multi-States bays may not be enclosed and claimed as internal waters. In fact, the status of their waters is determined by their size: whether they are wider than double the breadth of the territorial sea (24 nautical miles) or not. The waters of multi-State bays are subject to the legal regime of the territorial sea if they are wholly covered by territorial seas of littoral States. If they are wider than 24 nautical miles, they may also include the EEZs and the high seas. Accordingly, the rights of navigation, whether for littoral States

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116It appears that Churchill and Lowe are of the view that it is still possible for certain multi-State bays to be claimed as historic as they write that [e]xceptionally it may be possible for the riparian States to show that the position is different by reason of historic title", even though they only refer to the case of the Gulf of Fonseca as an example. Churchill and Lowe, op. cit., p.33. This view is, however, questionable under the general rules of international customary law governing historic bays and waters.

117Multi-State bays also contain internal waters behind the low water mark along the coast or behind straight baselines, if certain circumstances exist along the coast to justify the use of strait baselines.
of multi-State bays or for foreign ships, are guaranteed under the concepts of innocent passage or freedom of navigation under the legal regimes of the EEZ and the high seas.
Chapter Five

*Special Regime for Delimitation of Mid-Ocean Archipelagos: Archipelagic Baselines*
Chapter 5
Special Regime for the Delimitation of Mid-Ocean Archipelagos:
Archipelagic Baselines

I. Introduction

In the framework of the law of the sea, there are two main categories of archipelagos: coastal archipelagos (adjacent archipelagos) and mid-ocean archipelagos (outlying or oceanic archipelagos). These archipelagos have similar geographical definition since both are composed of groups of islands. The only physical difference between them is mainly related to their geographical location. While coastal archipelagos are situated in close distance to coastlines of mainlands, mid-ocean archipelagos are not groups of fringing islands and are mainly far away from mainlands spreading out over vast areas of the seas and oceans. As Evensen (1957) pointed out "geographical characteristics of all these archipelagos vary widely". Evensen considering an archipelago as a formation of two or more islands (islets or rocks) writes that:

(archipelagos) vary as to the number and size of the islands and islets as well as with regard to the size, shape and position of the archipelagos. In some archipelagos the islands and islets are clustered together in a compact group while others are spread out over great areas of water. Sometimes they consist of a string of islands, islets and rocks forming a fence or rampart for the mainland against the ocean. In other cases they protrude from the mainland out into the sea like a peninsula or a cape, like the Cuban Cays or the Kays of Florida.

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1The word “archipelago” is stated to have originated from the Greek term “aegeon pelagos” which means a sea studded with islands. The Aegean Sea has derived from this term. Kwiatkowska, Barbara, and Etty R. Agoes, Archipelagic State Regime in the light of the 1982 UNCLOS and State Practice, Netherlands Cooperation with Indonesia in Legal Matters, Bandung, April 1991, p.61, no.2.
2In addition, there are island States which are not archipelagic States but have used straight baseline system to link smaller islands to their principal island. Examples of these island States are Madagascar and Iceland. O’Connell, D. P., The International Law of the Sea, Vol.1, Edited by: I. A. Shearer, Oxford University Press, Oxford, 1982, p.236. One question then arises as to what the difference is between an island State and a mid-ocean archipelago from geographical perspective. The difference “is, from a geographical point of view, merely one of degree: the comparison is between a principal island and its satellites, and a number of islands of similar size which form a group”. Ibid.
4Ibid.
Therefore, the geographical distinction of coastal archipelagos and mid-ocean archipelagos can be better understood by the definitions of these notions as introduced by Evensen. While coastal archipelagos are "those situated so close to a mainland that they may reasonably be considered part and parcel thereof", mid-ocean archipelagos are "groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of or outer coastline of the mainland". Meanwhile, it is argued that with respect to outlying archipelagos, it is the factor of adjacency which plays an important role and ‘if the islands, islets, or rocks are located a considerable distance from one another, then the inter-island waters are hardly “adjacent” to the land.’ Despite their literally geographical similarity, coastal and mid-ocean archipelagos are legally treated differently and there are special legal regimes for them.

Although the issue of the coastal archipelagos was dealt with by the ICJ in the Fisheries Case (1951), there was no reference to the issue of the mid-ocean archipelagos in this case. As a general rule incorporated into the LOSC, the baseline of islands located in the oceans (in all areas of the seas not in vicinity of coasts) is drawn in a manner similar to the coasts of mainlands. In parts of the coast of these islands where the coastline is smooth and straight, the low-water mark is the recognised baseline. However, if there is a true bay in the coast of these islands, the closing lines can be drawn across the mouth of these bays in accordance with provisions of Article 10 of the LOSC (Article 7 of the TSC) on the

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5Ibid. Evensen (1957) gave some examples of these archipelagos. For example, the coasts of Finland, Greenland, Iceland, Sweden, Yugoslavia, Alaska, and Canada were mentioned as those containing coastal archipelagos. As regards the mid-ocean archipelagos, the Faeroes, Fiji Islands, Galapagos, Hawaiian Islands, Indonesia, Japan, Philippines, Solomon Islands, and the Svalbard archipelago were given as instances. Ibid., pp.290-291. It should be noted that the new law of the sea has established rules that prevent some States from employing archipelagic principles. This means that such archipelagos (whether part of a continental State or an island State) as Japan, Hawaiian Islands, the Faeroes, Galapagos are not legally considered as archipelagos to be subject to special legal regime for mid-ocean archipelagos.


7The reason for the lack of provisions for mid-ocean archipelagos in the classical international law rests on the fact that “traditional international law of the sea, both customary and codified, was designed to deal with [maritime spaces of] continental masses, not with groups of mid-ocean archipelagos.” Anand, R. P., ‘Mid-Ocean Archipelagos in International Law: Theory and Practice’, Indian Journal of International Law, Vol.19, 1979, p.228.

8Article 121(2) of the LOSC provides that "... the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with provisions of this Convention applicable to other land territory". (emphasis added)
enclosure of juridical bays. Other geographical features located around coastlines of islands will also be treated in the same manner as the coasts of mainlands for the purpose of drawing baselines. In addition, it appears that straight baselines might be drawn with respect to those parts of the islands which are deeply indented. Although islands with irregular coastlines might be qualified for the application of straight baselines, there has been a question as to whether these islands could be connected by straight lines. This question is particularly related to those islands forming mid-ocean archipelagos. Although there are some States consisting only of mid-ocean islands, there are other States which possess mainland as well as mid-ocean islands. This fact raised a question that if special provisions were to be accepted for the baselines of mid-oceans archipelagos whether these provisions could be applied to all mid-ocean archipelagos or only to those which constitute the whole territory of a State (known as an archipelagic State).

II. Historical Background and Development of the Issue of Mid-Ocean Archipelagos

An historical examination of the problem of groups of islands located in the oceans shows that different aspects of these islands were considered in the gradual process of developing the concept of the mid-ocean archipelago (which was first known as a group of islands). Aspects such as unity of these groups of islands and the sovereignty of island States constituted the initial concerns over scattered islands in the seas.

One of the classic examples of claims over waters within outlying islands can be found in the history of the Kingdom of Hawaii with respect to the Hawaiian Islands. It was in 1846 that King Kamehameha III claimed its authority over the component islands and over their territorial waters up to one marine league (three nautical miles). It was also declared that:

The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands.

9 Another example is the Royal Proclamation of Tonga which was issued by King Tubou I in 1887. This proclamation included “all islands, rocks, reefs, foreshores and waters” within defined co-ordinates as part of Tongan territory. Bowett, D. W., The Legal Regime of Islands in International Law, Dobbs Ferry, New York, 1979, Ch.4 (Archipelagos), p.95.
and dividing them, which shall extend from Island to Island.\textsuperscript{10} (See Map 5.1 below.)

**Map 5.1**
The enclosure of waters within the Hawaiian Islands based on the Proclamation of the King of Hawaii on 16 May 1854


In addition, it was in the nineteenth century that the issue of sovereignty over "clusters of coastal reefs and cays" was addressed. The issue was particularly raised with respect to "the cays of Florida and Cuba and the reefs and banks of the Bahamas and Bermuda".\textsuperscript{11} The main trend towards these scattered islands and geographical features was to develop the concept of unity which could only be guaranteed by linking islands together.

Further, the first indications of an understanding of the special characteristics of mid-ocean archipelagos can be found in some treaties in early this century and in some international bodies since the 1920s. For example, the Treaty of 1902 on the Faeroe Islands between Denmark and

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\textsuperscript{10}Schmitt, Robert E. \textit{et al}, The Hawaiian Archipelago: Defining the Boundaries of the State. Working Paper No.16, University of Hawaii, Honolulu, 1975, p.63. The 1846 Act was confirmed by the 1950 Privy Council Resolution and the 1984 and 1977 Neutrality Declarations of the King of Hawaii. \textit{Ibid.}, p.66. In 1964, the USA took the position that the component islands of Hawaii have their own territorial sea expressing that the waters beyond these territorial seas are the high seas. \textit{Ibid.}, p.64. Further, in the same year (1964), the issue of the legal nature of the waters between the Hawaiian Islands was subject of a judicial decision by a Court of Appeals. In the case of \textit{Island Airlines} \textit{v. Civil Aeronautics Board}, the Court of Appeals of the Ninth Circuit Court rejected the archipelagic status for the Hawaiian Islands on the ground that the recognition of the Islands as an archipelago would lead to encroachment upon large areas of the high seas. O'Connell, D. P., "Mid-Ocean Archipelagos in International Law", \textit{BYIL}, Vol.45, 1971, pp.1-77, at 45.

Britain, the 1920 Treaty of Paris on the Spitsbergen Islands, and the Convention of October 20, 1921 on the Aaland Islands situated in the Baltic dealt with groups of Islands ("the mid-ocean islands"). These agreements recognised the special characteristic of the group of islands as independent units. Although they were related to sovereignty and fishery matters, they did not contain any reference to application of a particular baseline for the group of islands.

This historical background indicates that the initial concerns on mid-ocean archipelagos were related to the baselines and the territorial seas of these archipelagos. Non-governmental organisations did not deal with other aspects concerning mid-ocean archipelagos, such as the issues of sovereignty of archipelagic states and navigation through and within these archipelagos. These issues were left to be resolved when the concepts of "mid-ocean archipelagos" and "archipelagic States" were developed and recognised.

1. International Institutions and the Issue of Mid-Ocean Archipelagos

The issue of mid-ocean archipelagos formed one of the bases of academic discussion in non-governmental organisations such as the International Law Association, the American Institute of International Law, and the Institute of International Law (the Institut de Droit International) since 1920s. The discussion on the issue of mid-ocean archipelagos then was addressed by governmental forums but was not finalised until the UNCLOS III. The following is an overview of the efforts made by the learned societies to tackle the issues related to groups of islands.

A. Institut de Droit International

The first discussion on the problem of territorial sea of the archipelagos was undertaken within the Institut de Droit International (French Institute of International Law) at its Hamburg meeting in 1889, nearly one century before the resolution of the issue in the UNCLOS III.
and inclusion of Part IV (*Archipelagic States*) into the LOSC. However, the first studies were focused on the territorial sea of the archipelagos belonging to coastal States. No provision was proposed for States which entirely consisted of a series of islands, that is to say archipelagic States. It was in this context that in 1927 the Fifth Committee of the *Institut* presented its proposal for the *group of islands belonging to a coastal State* as follows:

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 (now territorial sea), this group shall be considered a whole and the extent of the marginal sea shall be measured from a line drawn between the uttermost parts of the islands.\(^{14}\) *(unofficial translation)*

The proposal was that the maximum distance between islands had to be equal to double breadth of the territorial sea, if a group of islands was to be qualified for the rule incorporated into the proposal. However, it was not clear what was the recognised breadth of territorial sea. As far as the *Institut* was concerned, at the time of proposal, the limit of six nautical miles was accepted for the territorial sea. Although the special treatment for the archipelagos described in the proposal was apparent, even general recognition of the rule would not be sufficient for uniform implementation of the proposal. This is because the uniform implementation of the proposal would depend upon the international resolution of the issue of the breadth of territorial sea, which was not resolved until the UNCLOS III.

It was in 1928 (the Stockholm Conference), that is only within one year after the first proposal, that the *Institut* introduced a reviewed formula for the mid-ocean archipelagos belonging to continental States. At the Stockholm Conference, a relative majority was in favour of the three nautical mile limit against the six nautical mile limit for the territorial sea. The new proposal was stricter than the first one as it reads:

Where archipelagos are concerned, the extent of the marginal sea shall be measured from the outermost islands or islets provided that the archipelago is composed of islands and islets not further apart from each other than twice the breadth of the marginal sea and also provided that the islands and islets nearest to the coast of the mainland are not situated further out than twice the breadths of the marginal sea.\(^{15}\) *(unofficial translation)*


\(^{15}\)Ibid.
B. International Law Association

The initial discussion about the territorial sea of archipelagos in the International Law Association (ILA) dates back to 1892 (15th Conference, Genoa) when the report submitted to the *Institut de Droit International* constituted the core of primary discussion on the issue.\(^{16}\) This discussion was followed at the 1895 Brussels Conference\(^ {17}\) and later in the 1912 Paris Conference\(^ {18}\). In the 1924 Stockholm Conference of the ILA, two draft articles were prepared by the “Neutrality Committee” and by Professor Alvarez (who played the role of the Chairman for the Committee). The Committee’s draft articles - *The Laws of Maritime Jurisdiction in Time of Peace*, did not provide any provision on the territorial sea of archipelagos. However, Professor Alvarez (a Chilean jurist) addressed the issue in his separate draft articles. He was of the view that groups of islands which constitute an economic and political entity should be considered as a group for the purpose of the demarcation of their territorial waters.\(^ {19}\) Article 5 of his draft articles was devoted to islands and archipelagos:

As to islands situated outside or at the outer limit of a State’s territorial waters, a special zone of territorial waters shall be drawn around such islands according to the rules contained in article 4 (where it was mentioned that the breadth of the marginal sea was six nautical miles from low-water mark).

Where there are archipelagos the islands thereof shall be considered a whole, and the extent of the territorial waters laid down in article 4 shall be measured from the islands situated most distant from the centre of the archipelago.\(^ {20}\) unoffi"##0 translation"

Although the issue of archipelagos once again was discussed in the 1926 Vienna Conference in the context of the starting line of the territorial sea, the consequent draft convention prepared by the ILA did not include any provision on the issue.\(^ {21}\)

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\(^{16}\)See Report of the 15th Conference of the ILA, Genoa, 1892, pp.182 et seq.

\(^{17}\)See Report of the 17th Conference of the ILA, Brussels, 1895, pp.102 et seq.


\(^{21}\)See Report of the 34th Conference of the ILA, Vienna, 1926, pp.40 et seq.
C. American Institute of International Law

As part of its project No.10 (National Domain), the American Institute of International Law (AIIL) addressed the issue of archipelagos. In Article 7 of the project, it is stated:

In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial waters referred in article 5 shall be measured from the islands farthest from the centre of the Archipelago.\(^{22}\)

Unlike the 1927 proposal of the *Institut de Droit International*, the above article does not contain any clause to limit its application to only *archipelagos belonging to coastal States*. This might be considered that in the view of the AIIL the rule included into Article 7 could be applied to mid-ocean archipelagos. However, no reference was made to maximum permissible distance between islands within archipelagos.

D. The Harvard Research in International Law

In 1929, the Harvard Research in International Law prepared a draft convention on territorial waters. This draft convention did not, however, suggest any rule for the purpose of delimitation of the territorial sea of archipelagos. The only reference to the issue was in the comments made to Article 7 of the draft convention which provided that the territorial sea of an island (three mile limit) would be measured in the same manner as the mainland. In relation to islands and archipelagos, the Harvard Research comment on Article 7 was as follows.

In any situation where islands are within six miles of each other the marginal sea will form *one extended zone*. No different rule should be established for groups of islands or archipelagos except if the outer fringe of islands is sufficiently close to form one complete belt of marginal seas.\(^{23}\) (emphasis added)

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\(^{22}\) *AIIL*, Special Supplement 20, 1926, pp.318-319.

2. The 1930 Hague Conference for the Codification of International Law

The views of governments submitted to the Preparatory Committee of the 1930 Hague Conference showed that there existed no uniform approach towards the issue of baselines for islands and groups of islands. There was no dispute that islands can have their own territorial waters but two questions needed discussion.

The first question was where a number of islands are close to each other or to the mainland, what principle governs the baselines for territorial waters. Some States argued that territorial waters of islands had to be established in "ordinary way." Others argued that where the islands or the islands and the mainland are sufficiently near each other, they form a unit on the basis of geographical facts and "[their] territorial waters must be determined by reference to the unit and not separately for each island; there will thus be a single belt of territorial waters".

The second question was what the legal status of waters between a group islands or between the island and the mainland would be, if they would be considered as a unit. There were two different opinions in this regard. Some States asserted that the waters have the legal status of inland water. However, the majority of governments considered the waters are territorial waters and subject to rules for the legal regime of territorial waters. It is evident that "[t]he first opinion [was] based on the interests

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24The issue of archipelagos was also addressed by Schucking (German jurist), who was a member of the Committee of Experts. In his view, archipelagos were to be considered as a whole and their territorial waters to be measured from "the islands most distant from the centre of the archipelago." See League of Nations Document C-196, M-70, 1927, V., p.72. See also AJIL, Special Supplement No.20, 1926, p.142. As an initial proposal, the Expert Committee of the 1930 Conference proposed that mid-ocean archipelagos be considered as independent units. This proposal faced different reactions. Some States did not recognise the unity characteristic of mid-ocean archipelagos. The United Kingdom and the United States of America rejected the application of straight baselines around the mid-ocean. Some States adopted the unity of these archipelagos but proposed that the distance between islands should be limited. Others considered that if geographical characteristics make it appropriate to treat mid-ocean archipelagos as units, there should not be any maximum distance restriction between islands. These divergent opinions demonstrate that, at the 1930 Conference, the issue of mid-ocean archipelagos was very controversial and there was no uniform approach on this issue. Amerasinghe, C. F., 'The Problem of Archipelagos in the International Law of the Sea', International and Comparative Law Quarterly, Vol.23, Part 3, July 1974, p.541.


26Ibid., p.269.

27Ibid.
of the coastal State; the second [was] more favourable to freedom of navigation.”

The final text put forward for the discussion in the 1930 Hague Conference was a formula which indicated a compromise of different views as to the issue of baselines of islands and the legal nature of waters surrounded by these baselines. The Preparatory Committee suggested that the following formula to form the basis of discussion among participants on the issue. It proposed that:

In 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 the 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 from the mainland not greater than twice the breadth of territorial waters.

The compromise formula recognised the concepts of coastal and mid-ocean archipelagos, but this recognition was limited to those satisfying the requirement of interconnection. Accordingly, those groups of islands separated by a distance more than “twice limit of territorial waters” were not eligible to be considered as a unit. The formula also raised a question as to what would be the limit of “twice the breadth of territorial waters”. This question was part of a general discussion on the issue of the maximum permissible breadth for the territorial sea, for which the 1930 Hague Conference provided no resolution. Although the Second Sub-Committee of the 1930 Hague Conference deal with, among others, the issue of territorial waters of archipelagos, it was not able to introduce any concrete solution for the problem, and it finally decided not to draft any provision on the issue. In its Report No. II, the Second Sub-Committee only defined the concept “island” and confirmed that each island can create its own territorial waters. The Report did not propose a provision on the baseline issue of groups of islands and the matter was not discussed in the plenary meetings of the conference. However, the following “Observations” with relation to “groups of Islands” were recorded by the Sub-Committee:

28 Ibid.
29 Ibid.
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 included within the group.30

Although the 1930 Hague Conference was not successful in advancing rules governing groups of islands (archipelagos), the main failure of the conference was its inability to develop a convention which could contain established rules on the law of territorial waters. As far as the issue of groups of islands were concerned, the conference’s efforts were focused on those groups of islands belonging to “a single State”. This term can be extended to continental States as well as those which are now known as archipelagic States. However, it does not seem that the idea of archipelagic States had any merits at the time of the 1930 Hague Conference. This means that the term “a single State” was used to refer to a continental State which enjoyed sovereignty over a group of islands located quite far away from the mainland and could not be considered as part of the mainland. Notwithstanding, the modern rules on the law of archipelagos were established to govern States made up wholly of one or more archipelagos. The same rules do not apply to the mid-ocean archipelagos of continental States. In addition, the use of word ”single” was to exclude the situation where several States claimed sovereignty over islands in an archipelagic formation.

3. International Law Commission

In the ILC, the issue of baselines of islands and a group of islands was discussed as part of general discussion on various legal aspects of the territorial sea. As its Special Rapporteur, Professor J. P. A. Francois (who also worked as the Rapporteur for the Second Committee (Territorial Sea) of the 1930 Hague Conference) prepared a set of three reports on “The Legal Regime of the Territorial Sea”. The first report (4 April 1952)31 and the second report (19 February 1953)32, *inter alia*, included draft provisions

on the issue of islands and a group of islands located along the coast\textsuperscript{33}, and also contained a provision on isolated islands.\textsuperscript{34} However, his third report (4 February 1954)\textsuperscript{35} was of more relevance to the issue of outlying archipelagos since it introduced a set of principles for baselines and territorial sea of these archipelagos. Draft Article 12 (Groups of Islands) in the third report provided that:

1. The term ‘groups of islands’, in 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 baselines 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 \textit{pari passu}.\textsuperscript{36}

For the purpose of enclosing outlying archipelagos by special baselines, the above draft article (para.1) developed certain criteria in identifying a group of islands as an outlying archipelago in a legal sense. It required that the following criteria had to be met before application of an archipelagic straight baseline system:

(a) the group of island had to be formed by at least three constituent islands; and

(b) the maximum distance between islands had to be five miles, except in one case where the maximum distance could be ten miles.

The second criterion limited the length of straight lines. It also limited the maximum distance between constituent islands. Although the draft article laid down limitations on the length of straight base lines of the

\textsuperscript{33}For example see Articles 5(2) (where Francois considered the enclosed waters as inland waters) and 10 of the first report.

\textsuperscript{34}For example Article 9 of the second report provided that each island can have its own territorial sea. According to this Article, an island is an area of land which is surrounded by water and is permanently above water at high water mark. This is the same provision adopted by the Second Sub-Committee of the 1930 Hague Conference. See Report of Sub-Committee No.II, in Rosenne, Vol.3, \textit{op. cit.}, p.835. Draft Article 10 of the ILC provided similar provision on the territorial sea of islands. \textbf{YILC,} Vol.II, 1956, p.270.


\textsuperscript{36}English Version of Draft Article 12, in Evensen, Preparatory Document No.15, \textit{op. cit.}, p.293.
archipelagos, it did not provide any restriction as to the maximum permissible number of these baselines. As Francois proposed (para. 2), the legal status of waters enclosed by the straight lines would be subject to the legal regime of inland waters.

In the Commentary on its Draft Article 10 for the UNCLOS I on the territorial sea of islands, the ILC relied on the same difficulties that the 1930 Hague Conference faced to justify the lack of any draft provision on the delimitation of archipelagos. As regards groups of islands, the ILC commented that:

Like the Hague Conference for the Codification of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagos. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject ... 37

Although the draft articles prepared by the ILC for the UNCLOS I contained no provision on mid-ocean archipelagos, the issue of coastal archipelagos was adequately dealt with (as was discussed in relation to the straight baselines). Despite the lack of any provision on the issue of delimitation of archipelagos in the draft articles of the ILC, a study (which was undertaken in 1957) addressed the issue. The study was on the issue of archipelagos: Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos.38 This study was undertaken by the Norwegian Jurist Jens Evensen (the 1957 Preparatory Document on the Issue of Archipelagos). The study examined the works of international bodies and jurists, State practice in relation to coastal and outlying (mid-ocean) archipelagos, and the ICJ’s decision in the 1951 Fisheries Case.39 Since the study presents an overview of the issue on the eve of the UNCLOS I, it would be useful to examine the findings of the study. This would assist to understand the main issues existed in relation to mid-ocean archipelagos at the time of the UNCLOS I.

39The study was ready at the time of UNCLOS I as a “Preparatory Document” and could be a basis for codification of some provisions on the issue of mid-ocean archipelagos. It seems, however, that the time was not yet ripe for inclusion of special rules on mid-ocean archipelagos into an international agreement.

The purpose of preparing the 1957 Preparatory Document was to present the existing trends and practices over the issues of the baselines and territorial seas of archipelagos, whether coastal or mid-ocean archipelagos. At the time of the preparation of his study on the issue of archipelagos (1957), Evensen reached a conclusion that there were no “hard and fast rules” to govern the delimitation of territorial waters of archipelagos. This was attributed to the fact that State practice and international bodies presented “little or no guidance” on the governing principles of international law in relation to the territorial waters of archipelagos (including mid-ocean archipelagos).

Despite uncertainties in State Practice and in the work of international bodies towards the issue of the delimitation of mid-ocean archipelagos, Evensen held that “the only natural and practical solution” for the issue of the delimitation of the territorial waters of out-lying archipelagos is to consider them as a unit and then draw straight baselines around “the outermost points of the constituent islands, islets and rocks”. Accordingly, he suggested that where a mid-ocean archipelago belongs to a single State, this archipelago “may reasonably be considered as a whole” and its territorial sea can be measured “from the outermost points of the outermost islands and islets of the archipelago”. While recognising such a baseline system for out-lying archipelagos, Evensen considered a number of criteria for proper establishment of such system as follows.

(a) although a State concerned has discretion to draw the archipelagic straight baselines with due consideration to “practical needs and local requirements”, such delimitation would also have “international law aspects”;

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40bid., p.301.
41bid., p.300.
42bid., p.302. As far as outlying archipelagos were concerned, the study did not make a distinction between continental States and those wholly constituted by islands. This might imply that rules proposed for application to mid-ocean archipelagos might also extend to those belonging to continental States. As a consequent of developments in the law of the sea, it is now argued that the established principles for mid-ocean archipelagos would not apply to archipelagos belonging to continental States.
43bid.
44bid.
(b) the territorial sea created by the archipelagic straight baseline system should be more or less dependent upon “the land domain of the archipelago”;

(c) when viewed as a whole, the baselines applied to enclose the archipelagos “must not depart to any appreciable extent from the general direction of the coast of the archipelago”;

(d) although there was no maximum limit for the length of the baselines, the application of “exorbitantly long baseline, closing vast areas of sea to free navigation and fishing, was contrary to international law”\(^{45}\) (emphasis added);

(e) the legal status of the waters enclosed as internal waters generally depends on the close link between the land domain of the archipelago and the enclosed waters taking into account the geographical configuration of the archipelago, and also realising that each case should be examined individually with due attention to such factors as historical and economical; and

(f) where enclosed waters can be considered as internal waters and where they also contain a strait, these waters would be ‘subject to the rules of international law governing “straits” established for the benefit of free navigation and innocent passage of foreign ships’. (emphasis added)

5. **The Declarations of The Philippines and Indonesia\(^{46}\)**

In 1955 and 1957, the archipelagic States of the Philippines and Indonesia respectively announced for the first time their intention to

\(^{45}\)It is argued that the inconsistency with international law in such cases is due to the fact that “there will not be a sufficiently close dependence between the land domain and the water areas concerned”. *Ibid.*

\(^{46}\)Although the Philippines and Indonesia claimed a developed form of the archipelagic concept in the 1950s, preliminary archipelagic claims can be traced back to the second half of the nineteenth century. For example, following the 1854 Neutrality Proclamation of the Kingdom of the Hawaiian Islands, Hawaii employed straight line connecting its constituent islands. See Whiteman, Marjorie, *Digest of International Law*, Vol.4, U.S. Government Printing Office, Washington DC, 1965, at p.277. Also, when the Fijian Islands came under the control of the UK through a treaty in 1874, the treaty included the coordinates defined for the land territory as well as waters and reefs. Marston, Geoffrey, ‘International law and “mid-ocean” archipelagos’, *Annales d’Études Internationales*, 1973, pp.177-178.

Further, in 1887 the King of Tonga placed claims on land and water within a series of defined coordinates. The Maldives Islands also claimed a territorial sea on the same ground. See *Limits and Status of the Territorial Sea, Exclusive Economic Zones, Fishery Conservation Zones and the Continental Shelf*, Legal Office, Food and Agriculture Organization, Rome, 1975, p.9 & 13. In addition, the Philippine claim on historical title over its territorial waters is made on reliance on the 1898 Paris Treaty, the 1900 Treaty between the USA and Spain, and the 1930 and 1932 Agreements between the USA and the UK which contain geographical coordinates for the areas of waters. See Whiteman, *op. cit.*, Vol.4, p.283. Although not being an archipelagic State, Ecuador has treated the Galapagos Islands as a unit since 1938 and has drawn straight baselines linking the outermost points of the outermost islands within the Galapagos Islands. Presidential Decrees of 1938 and 1951, in *ibid.*, p.276.
enclose waters inside their archipelagos by drawing straight baselines around the archipelagos. Although the judgment of the ICJ in the 1951 *Fisheries Case* related to the coasts where there are islands in their immediate vicinity, the claims of the Philippines and Indonesia were based on the ICJ’s judgment and also on the view of the ILC, which suggested that special rules to be adopted for the baselines of oceanic archipelagos. In its 1955 declaration (which also found its expression in the 1960 Philippine Act), the Philippine government, *inter alia*, declared that:

all waters around, between and connecting the different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions are necessary appurtenances of its land territory, forming an integral part of the national or inlands waters, subject to the exclusive sovereignty of the Philippines.

Following the 1955 Declaration of the Philippines, the Indonesian government issued a declaration on 13 December 1957 (the Djuanda Declaration) for the same purpose. The basis of the declaration is made upon the “territorial unity” and upon the “protection of resources”. The


49 The Philippine archipelago is composed of 7104 islands which are located on either side of a triangle formed by the three islands of Luzon in the North, Palawan in the Southwest, and Mindanao in the Southeast. Kwiatkowska and Agoes, *op. cit.*, p.16.


declaration invalidated the "Territorial Sea and Maritime Districts Ordinance of 1939 (Official Gazzette, 1939, no. 442, Art.1, para.1)" which provided that each constituent island of Indonesia has its own territorial waters. Therefore, the Indonesian Government declared that:

all waters surrounding, between and connecting the islands constituting the Indonesian state, regardless of their extension or breadth, are integral parts of the territory of the Indonesian state and therefore, parts of the internal or national waters which are under the exclusive sovereignty of the Indonesian State. The delimitation of the territorial sea (the breadth of which is 12 miles) is measured from baselines connecting the outermost points of islands of Indonesia.

The Indonesian Government stressed that its land, waters and people are inseparably linked to each other: "the survival of the Indonesian nation depended on the unity of these three elements." The Indonesian Government also asserted that Indonesian waters should not be considered "pockets of so called 'high seas', open to activities which might endanger...

52 Before the 1957 Declaration of the Indonesian government, Indonesia in particular and other regional countries followed the practice established by European colonial powers with respect to the use of the seas. Although the indigenous people of the Pacific and Indian Oceans region had practised the concept of freedom of the seas as a principle of the Asian maritime law, the European influence over the region brought with itself the notion of mare clausum. This particularly was promoted by Portugal to prevent other European countries to have access to the East Indies. However, such approach over the seas was confronted by the Grotius's theory of mare liberum which later found more support in the region and other parts of the world. The concept of mare liberum was the dominant approach over the seas in the region and maintained unchanged until the archipelagic state doctrine was introduced and followed by certain island States in the region, including Indonesia and the Philippines. For example, before the introduction of the doctrine Indonesia applied a three mile limit for the territorial waters of its constituent islands, which was measured from the high-tide lines. (Ordinance of 18 April 1939 Concerning the Territorial Sea and Maritime Domain) All waters beyond such a limit were regarded as the high seas. Draper, Jack A., "The Indonesian Archipelagic State Doctrine and Law of the Sea: "Territorial Grab" or Justifiable Necessity?", International Lawyer, Vol.11, No.1, Winter 1977, p.145.

53 Indonesia consists of 13,677 islands of which 6000 islands are inhabited from Sumatra in the west to Irian Jaya (western New Guinea) in the east. Ibid., p.144.

54 The Declaration also included that "[innocent passage of foreign ships in these internal waters is granted as long as it is not prejudicial to or [does not] violates the sovereignty and security of Indonesia." See Syatauw, op. cit., pp.173-174. The declaration admitted the right of innocent passage in the newly established Indonesian internal waters provided that such a passage was not "prejudicial to or violates the sovereignty and security of Indonesia."

55 Wang, James C. F., Handbook on Ocean Politics & Law, Greenwood Press, New York, 1992, p.46. Although the Soviet Union supported the Indonesian claim, the 'archipelago principle' developed by Indonesia faced protests from maritime States with significant interest in free navigation, particularly in South East Asia (including Indonesia). These States included the United States, Great Britain, Australia, the Netherlands, and Japan. See Keesing's Contemporary Archives, 1-8 March 1958, p.16043. Due to the importance of sea routes within archipelagos in the South East Asia for Australia and Japan, these States would be more affected by the enclosure of archipelagic waters and the consequent system of unregulated control over navigation through these archipelagos.
the Country's unity, security, and territorial integrity". The 1957
Indonesian Declaration was followed by the 1960 Indonesian Act.

At the time, these unilateral claims lacked any support on a legal
basis and were necessitated on historical, geographical, economic,
political, and security reasons. This was why these two States were
seeking to achieve legal justification for their baseline system in United
Nations conferences on the law of the sea.

6. The UNCLOS I and the Issue of Mid-Ocean Archipelagos

In the UNCLOS I (1958), the Philippines and Indonesia insisted on
codification of special provisions for delimitation of mid-ocean
archipelagos. They endeavoured to convince maritime powers that the
drawing of straight baselines around their archipelagos is essential for
preservation of the entity and unity of their archipelagos. During the
UNCLOS I the Philippines suggested the following formula to be included
in the works prepared by the ILC for the discussion:

The method of straight baselines shall also be applied to archipelagos,
lying off the coast, whose component parts are sufficiently close to
one another to form a component whole and have been historically
considered collectively as a single unit. The baselines shall be drawn
along the coast of the outermost islands, following the general
configuration of the archipelago. The waters within such baselines
shall be considered as internal waters.

56Wang, op. cit., p.46.
57'Act Concerning Indonesian Waters' (Act No.4), 18 February 1960. Reprinted in Straight Baselines:
Act contains a preamble and four articles.
58Although economic motives were of importance for archipelagic States in pursuing a new and special
baseline system, the recognition of the EEZ eliminated these motives. This led to the belief that the
principal motives of archipelagic States in enclosing waters within their constituent islands were
security motives. In this connection, O'Connell (1982) writes that "the possibilities of degradation of
the freedom of passage have been enhanced because security interests tend to demand control of
shipping generally, while economic interests would tend towards the control of only certain types of
59Wang, op. cit., p.46. In fact, the 1957 Declaration of Indonesia which referred to the concept of
"territorial unity" made clear that the position drawn in the declaration will be followed in the 1958
A few other similar proposals on the issue of the baselines of groups of islands were submitted to the
UNCLOS III by Yugoslavia and Denmark but were finally withdrawn. The main reason for such
withdrawal was the need for undertaking more studies on the issue. See U.N. Doc.
163 (paras.40-41), and 227. In a response to a Yugoslav proposal to extend the application of straight
baselines to groups of scattered islands, Sir Gerald Fitzmaurice viewed that such application "would
enclose huge areas of water wholly out of proportion with the land area." Ibid., p.162 (para.38).
The Indonesian delegate at the UNCLOS I also referred to several factors which required the Indonesian Government to proclaim the archipelagic concept. The Indonesian delegate stated:

Indonesia consists of some 13,000 islands scattered over a vast area. To treat them as separate entities each with its own territorial waters, would create many serious problems. Apart from the fact that the exercise of state jurisdiction in such an area was a matter of great difficulty, there was the question of the maintenance of communication between the islands.

If each of Indonesia's component islands were to have its own territorial sea, the exercise of more effective control would be made extremely difficult. Furthermore, in the event of an outbreak of hostilities, the use of modern means of destruction in the interjacent waters would have a disastrous effect on the population of the islands and on the living resources of the maritime areas concerned. This is why the Indonesian government believes that the seas between and around the islands should be considered as forming a whole with the land territory, and that the country's territorial sea should be measured from baselines drawn between the outermost points of the outermost islands.61

The archipelagic concept was against the interests of those States which had essential benefits from maintaining the areas of the high seas as large as possible.62 In the UNCLOS I maritime powers argued that the drawing of straight baselines around the mid-ocean archipelagos would result in converting a large area of the high seas and waters of some straits into internal waters.63 They stated that such a result might mean that would be no right of navigation through waters inside the archipelagos, because there would not exist a right of navigation through internal waters. In particular, the representative of the United States expressed the following view on the issue.

If you lump islands into an archipelago and utilize a straight baseline system connecting the outermost points of such islands, and then draw a 12 mile area around the entire archipelago, you unilaterally attempt to convert into territorial waters or possibly even internal waters, vast

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61 Statement by the Indonesian delegate, Subargo, at the 15th meeting of the First Committee of the UNCLOS I, 14 March 1958.

62 As O'Connell points out "if the enclosure of archipelago by means of straight lines" was to be considered "as a particular application in unconventional circumstances of the baseline principle designed for complex continental coastlines" the maritime areas enclosed would be considered as internal waters and "the territorial sea drawn on the outer side of the closing lines would then be the only area subjected to a right of innocent passage." O'Connell, op. cit., 1971, p.69.

areas of the high seas formerly free used for centuries by the ships of all countries.\(^{64}\)

In response to these concerns, some proposals were submitted to maintain the right of international community to navigate through waters which would be enclosed by archipelagic straight baselines.\(^{65}\) These proposals included a right of innocent passage through the enclosed waters to ensure that the use of a new baseline system for mid-ocean archipelagos would not deprive international community of the right of peaceful passage. As one author writes that the right of innocent passage through the enclosed waters was suggested in line with the study undertaken by Evensen on the issue of archipelagos for the UNCLOS I.\(^{66}\) Although Evensen found that an outlying archipelago could be enclosed as a whole by the application of straight baselines around the archipelago and the enclosed waters could be described as internal waters, he emphasised that the right of innocent passage would apply within the archipelago where there is an international waterway. In his words,

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\text{where the waters of such an archipelago [an archipelago belonging to a single State] form a strait, it is in conformity with the prevailing rules of international law that such a strait cannot be closed to traffic [as there would be a right of innocent passage therein].}\(^{67}\)
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The maritime powers did not consider that innocent passage, whether through a strait within an archipelago or through other parts of interisland-waters, is an adequate guarantee for navigation through waters within mid-ocean archipelagos. The UNCLOS I succeeded in reaching agreement on straight baselines for special geographical characteristics, including coastal archipelagos. However, disagreements on the legal status of waters within mid-ocean archipelagos prevented the UNCLOS I from obtaining adequate support for the establishment of a special legal regime for their delimitation. Since no compromise was made in the UNCLOS I


\(^{66}\)Ngantcha, op. cit., p.27.

\(^{67}\)Evensen, Preparatory Document No.15, op. cit., p.302. As regards to the question of identifying a waterway as a strait, Evensen commented that "[w]here a water passage is to be considered a strait or not, must be decided in each specific case. Though no definition is universally accepted, a strait is usually defined as a water passage connecting two stretches of open sea with the territorial waters of a State". Ibid. However, Evenson refers to the ICJ Judgement in the Corfu Channel Case where certain criteria were applied by the ICJ for definition of a water way as an international strait.
on the issue of archipelagic straight baselines, the TSC does not contain any provision on mid-ocean archipelagos. Accordingly, the regime of islands was considered to be applicable to those islands located within a mid-ocean archipelago. The territorial sea and other maritime zones of every individual island were to be measured from low-water mark along the coast of the island or from a closing line in case of a well-marked indentation (juridical bays). This analysis is confirmed by the provision of Article 10(2) of the TSC which states "[t]he territorial sea of an island is measured in accordance with the provisions of these articles (that is the other articles of the TSC regarding the delimitation of the territorial sea of mainlands)." This is confirmed by the position of the UK Government in 1958 when it maintained:

Article 10 of the Territorial Sea Convention gives each island its own territorial sea and affords no justification for the practice, in connection with archipelagos or group of islands, of joining them up by base-lines from which the territorial sea is measured in a seaward direction, all the waters behind the baselines and within the group of islands becoming internal waters.69

After the failure of the UNCLOS I to adopt provisions on mid-ocean archipelagos and in the eve of the UNCLOS II, Indonesia enacted legislation reflecting the notion of archipelagic baselines and treating waters enclosed thereby as national waters.70 The Indonesian Act, Act Concerning Indonesian Waters (Act No.4), was adopted on 18 February 1960.71 The Act included the concepts introduced by the 1957 Indonesian declaration. It provided that the Indonesian waters are composed of its

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68Evensen was of the view that "in answering the question as to what rules of international law govern the concrete delimitation of the territorial waters of an archipelago", such principles of international law as the rules "governing bays and fjords, the straight baseline system governing heavily indented coastlines, the rules governing international straits, the rules governing the territorial waters of isolated islands, (and) the principle of the freedom of the seas ... must constantly be borne in mind". Ibid., p.291.


70Due to the lack of any special provision on the baselines limits of the territorial sea of mid-ocean archipelagos in the TSC, Indonesia did not sign or ratify this Convention while it ratified the other three 1958 Geneva Conventions on the high seas, the continental shelf, and fishing and conservation of the living resources of the high seas in late 1961 (Law No.19 Concerning Ratification of Three 1958 Geneva Conventions on the Law of the Sea, 6 September 1960). Draper, op. cit., p.147. Likewise, the Philippines did not become a party to the TSC. Bowett, op. cit., p.94. In addition, ocean States, in general, viewed the provision of the TSC regarding separate territorial sea for each island as "destructive of their integrity." Anand, op. cit., p.229.

71For the text of the Indonesian Act see Whiteman, op. cit., p.284. The Act was also reprinted in International Boundary Study. No.35. Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State, Washington D.C.
territorial sea and the internal waters (Article 1(1)) and described the Indonesian internal waters as those waters lying within the straight baselines connecting the outermost points of the outermost islands (Article 1(3)). The Act also extended the territorial sea of Indonesia to 12 nautical miles (Article 1(2)). Article 3(1) of the Act guaranteed the right of innocent passage in Indonesian internal waters created by the application of the aforementioned straight lines, but added that such a passage shall be regulated by “Government Ordinance (Article 3(2)).”

The archipelagic concept was again discussed in the UNCLOS II. However, there were no detailed discussions of the issues related to mid-ocean archipelagos in the UNCLOS II and these issues were left unresolved. Pursuant to the failure of the UNCLOS II in achieving its objectives (determination of extents of the territorial sea and the fisheries zone) and the lack of adequate support for the concerns of archipelagic States, the Philippines also enacted its legislation, An Act to Define the Baselines of the Territorial Sea of the Philippines, on 17 June 1961. According to the Preamble of the 1961 Philippine Act, the waters between the Philippine Islands, “irrespective of their width or dimension”, were considered as “necessary appurtenances of the land territory”, thus “forming part of the inland or internal waters of the Philippines”. This is reiterated in Section 2 of the Act which provides: “All waters within the (Philippines) baselines ... are considered inland or internal waters of the Philippines.”

72 According to Article 1(2) of the Act, in the case of straits whose width is less than 24 nautical miles and are not bordered only by Indonesian coasts, “the outer limit of the Indonesian territorial sea shall be drawn at the middle of the strait.”

73 The Act provided that the right of innocent passage of foreign ship was subject to prior notification. However, the Government Regulation No. 8 (1962) stated that “prior notification is not required if the right of innocent passage is exercised through the designated sea lanes.” Wisnumurti, Nugroho, 'Some Impacts of the 1982 Convention on the Law of the Sea on Maritime Jurisdiction: An Indonesian Perspective', in John P. Craven et al (eds.), The International Implications of Extended Maritime Jurisdiction in the Pacific, Proceedings of the 21st Annual Conference of the Law of the Sea Institute (3-6 August 1987, Honolulu), The Law of the Sea Institute, Honolulu, 1989, p.46.

74 It is stated that the issue of mid-ocean archipelagos was not resolved at the UNCLOS I and the UNCLOS II, "owing to the continuing disagreement on the delimitation of the breadth of territorial waters in general". Dupuy, op. cit., p.271. For the responses of the United States Government to the Philippine and Indonesian archipelagic claims see Whiteman, op. cit., Vol.4, pp.283-291.

Relying on the Treaties of 10 December 1898 (Article III) and of 7 November 1900 between the United States and Spain and the Treaty of 2 January 1930 between the United States and Great Britain, the Act states that “the baselines from which the territorial sea of the Philippines is determined consist of straight lines joining appropriate points of the outermost islands of the archipelago”.

The Philippine baselines were defined under Section one of the Act which was amended by the Act of 18 September 1968. Section 1 of the new Act provides that the Philippine baseline system is as defined in this Act.

7. The Issue of the Mid-Ocean Archipelagos and the UNCLOS III: Final Resolution of a Long-Standing Issue

The UNCLOS III was another opportunity for archipelagic States to insist on incorporating provisions on archipelagic straight baselines in the new Convention on the Law of the Sea. In the Conference, some other newly independent States (such as Fiji and Mauritius, Tonga, and the Bahamas) joined the Philippines and Indonesia and formed the archipelagic States group. The support given to the notion of archipelagic system was resulted from the emergence of a number of independent States in the period between the UNCLOS I and the UNCLOS III, some of which were States consisting entirely of islands or groups of islands. This led to the formation of a group with common interests, i.e. the group of archipelagic States, in the UNCLOS III. These States submitted a series of provisions on the notion of mid-ocean archipelagos as early as the 1973 Caracas

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78In 1972, namely before the first session of the UNCLOS III was held in Caracas, the four archipelagic States of the Philippines, Indonesia, Fiji, and Mauritius organised a meeting in Manila to further a common stance in the UNCLOS III. Dupuy, op. cit., p.271. In 1973 these States issued a declaration containing archipelagic principles. The revised version of the declaration (particularly regarding the passage through archipelagic waters) was later submitted to the UNCLOS III. Burke, William T., Contemporary Law of the Sea: Transportation, Communication and Flight, Occasional Paper Series No.28, Law of the Sea Institute, University of Rhode Island, Kingston, 1975, p.6.
79Brown writes that the existence of four factors paved the way for adoption of some provisions on the mid-ocean archipelagos in the UNCLOS III: (a) increase in the number of independent archipelagic States and their concern for the inter-island integrity; (b) the sympathy of developing countries with archipelagic States most of which fell into category of developing countries; (c) the existing escalation in territorial sea claims; and (d) reconsideration of right of navigation through territorial seas and international straits as a result of international claims over territorial seas which consequently raised the question of status of mid-ocean archipelagos. Brown, E. D., Passage through the Territorial Sea, Straits Used for International Navigation and Archipelagos, University College, London, December 1973, p.34.
session of the UNCLOS III which became the basis of discussion on the issue. In particular, Fiji, Indonesia, Mauritius and the Philippines submitted a draft provisions on archipelagos to the UNCLOS III on 9 August 1974. Most parts of the draft provisions were incorporated into Part IV (Archipelagic States) of the LOSC. This includes partial incorporation of Article 2(1) of the draft into Article 47(1) of the LOSC which provides that “[a]n archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago ... .”

As a consequence of the negotiations during the UNCLOS III, the parties concerned were prepared to make a compromise on a special regime for mid-ocean archipelagos. Maritime powers were prepared to accept the archipelagic baseline system (which was later called archipelagic baselines) if the rights of navigation and overflight through waters inside the archipelagos were guaranteed. In the view of maritime powers, such guarantees had to be extended to both commercial and government ships and aircraft. The involvement of competing interest groups over the issue

80 For example see documents A/AC.138/SC.II/L.15 of 14 March 1973 (Reprinted in ILM, Vol.XII, 1973, pp.581 et seq) and A/AC.138/SC.II/L.48 on archipelagic principles which were submitted to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction in 1973. The principles were reflective of the three main aspects of the archipelagic concept: (a) recognition of the right of archipelagic States to draw special straight baselines termed as “archipelagic baselines”; (b) recognition of sovereignty of archipelagic States over archipelagic waters, the sea-bed and the subsoil thereof, and the superjacent airspace; and (c) recognition of the right of innocent passage through archipelagic waters, including through designated sea-lanes.

81 Draft Articles relating to Archipelagic States, Document A/CONF.62/C.2/L.49. UNCLOS III, Official Records, Vol.II, p.226. See also ibid., p. 260 et seq. See also the UK proposal which were submitted to meet the interests of maritime powers. The proposal suggested a maximum length of 48 nautical miles for archipelagic baselines and the maximum ration of 5:1 for the area of water to land. It also proposed the exercise of the right of innocent passage in the archipelagic waters and the right of passage through internationally used routes located within archipelagos to be governed by the legal regime of passage through straits used for international navigation. See UN Document A/AC.138/SC.II/L.44.

82 As regards the concerns of maritime powers over the issue of mid-ocean archipelagos, two are of importance: (a) their interests in seeking as little limitation as possible to the right of navigation through archipelagic waters; and (b) the abuse of archipelagic regime by coastal States possessing archipelagos. Dupuy, op. cit., p.271. In contrast, archipelagic States were struggling to achieve a new legal regime for archipelagic waters different from that of the high seas. For example, Indonesia has always been concerned that “the status of marine areas in the international sea lanes or sea routes within the archipelagic waters cannot be applied mutatis mutandis to high seas.” This was why Indonesia proposed the phrase “the right of navigation” in Article 53 of the ICNT to substitute the phrase “the freedom of navigation” through archipelagic waters. Tansubkul, op. cit., p.53.

83 In the view of the USA, the freedom of navigation and overflight is a requirement for "maintaining a stable and peaceful international order." US Delegation Briefing Book, Third United Nations Conference on the Law of the Sea, June-August 1974, Department of State. Maritime powers are particularly concerned about mobility of their naval forces. They considered that the adoption of archipelagic concept may endanger the efficiency of their naval forces, specially if such concept would represent that submerged passage is forbidden in archipelagic waters which also includes some important narrow waterways. For example, the USA has expressed that four straits out of five straits
of the mid-ocean archipelagos made one to suggest that the issue "revived the fundamental debate between the champions of State sovereignty over maritime spaces and the proponents of freedom of navigation and overflight"\textsuperscript{84}. It was due to the adoption of two regimes of passage through waters inside the archipelagos (\textit{i.e.} innocent passage and archipelagic sea lanes passage) that the use of straight baselines to enclose waters inside the archipelagos (which was later called archipelagic waters) was finally accepted. This became possible due to the concessions made to establish a balance between interests of the parties concerned (mainly archipelagic States and maritime powers) that consequently made a compromise on the special provisions concerning mid-ocean archipelagos possible. Thus, the agreement on the issue of mid-ocean archipelagos was achieved as part of the 'package deal' nature of the LOSC.

III. Legal Definition of the Terms "A Mid-Ocean Archipelago" and "An Archipelagic State"

Although the employment of archipelagic baselines by archipelagic States was recognised at the UNCLOS III, one important task was to define the concepts of "mid-ocean archipelagos" and "archipelagic States".\textsuperscript{85} The definition of these terms is important in order to decide which States may construct archipelagic baselines. The first article (Article 46) of Part IV of the LOSC (Archipelagic States) is devoted to the definition of the notions of "archipelago" and "archipelagic State". According to Article 46 (a) of the LOSC an archipelagic State is:

a State constituted \textit{wholly} by one or more archipelagos and may include other islands.\textsuperscript{86} (\textit{emphasis added})

\textsuperscript{84}Dupuy, \textit{op. cit.}, p.271.

\textsuperscript{85}The LOSC does not refer to terms as "coastal archipelagos" and "mid-ocean archipelagos". However, these terms have been used to provide a distinction between fringing islands along the coasts and groups of islands located in the oceans. This distinction is essential since the LOSC provides a new special regime for mid-ocean archipelagos.

\textsuperscript{86}The definition indicates that a State can be qualified as an archipelagic State, even such State is constituted only by one archipelago. An archipelagic State may also consist of one or more archipelagos while it has also control over some other individual islands which do not fall under the archipelagic principle. It is clear that the archipelago is itself composed of a number of islands. Accordingly, a State comprising of only an island, whatever its size might be, is not practically within the scope of archipelagic States. In addition, the definition provided in Article 46(a) excludes coastal archipelagos belonging to a continental State. This is because continental States are not constituted
Following the definition of an archipelagic State, Article 46(b) provides the definition for an archipelago which forms the foundation of an archipelagic State. The provision states that 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. (emphasis added)

It is important to take these definitions into account when deciding whether a State may be included among archipelagic States for the purpose of the LOSC. Although archipelagic States are given special rights in enclosing a large area of maritime spaces, certain obligations are also imposed upon them. Despite the differences among archipelagic States and coastal States (non-archipelagic States), they have certain common rights and duties which are the resulted from their geographical locations as maritime nations.

IV. The Enclosure of Internal Waters of Mid-Ocean Archipelagos

Archipelagic States are not limited to the use of archipelagic baselines. They may also use closing lines across the mouth of rivers, bays or ports located on each individual island within archipelagos, thus creating

wholly by one or more archipelagos. According to one estimate, some between twenty-five to thirty States may fall into definition of an archipelagic State. Wang, op. cit., p.48.

In 1957, Evensen defined the term archipelago as “a formation of two or more islands (islets or rocks) which geographically may be considered as a whole”. Evensen, Preparatory Document No.15, op. cit., p.290. This definition was provided from a geographical viewpoint.

It seems that the incorporation of “including parts of islands” was necessitated by the fact that a few archipelagic States on one hand enjoy full sovereignty over certain islands, and on the other exercise partial sovereignty with respect to some other islands. For example, one part of Indonesia is New Guinea which is western part of the main island bordered by Papua New Guinea on the eastern side.

This provision emphasises that a group of islands, as a whole, should either constitute intrinsically a geographical, economic, and political unit to be considered as an archipelago or historically have been considered an archipelago. As a result, if a group of islands does not qualify these characteristics, it may not be regarded as an archipelago. The provision does not contain restrictions on the number of islands in each group. Moreover, an archipelagic State can have islands outside its archipelagic system which are governed by the general legal regime for individual islands.

It is estimated that “there are 35 archipelagic states which could be considered to meet the definition of Article 46”. Prescott, op. cit., 1987 (Straight and Archipelagic Baselines), p.46. However, it is not sufficient to be qualified as an archipelagic State for the purpose of the LOSC, if an island State does not comply with all requirements incorporated into Article 47. This is particularly true with regard to the requirement of the proportion of land to water area. This means that if a State is geographically considered as an archipelagic State, it is not an archipelagic State for legal purposes, if the ratio of land to water area does not fall between the ratios of 1:1 and 1:9.

Dupuy writes that the concept of archipelagic States “constitute the most remarkable phenomenon of the explosion of sovereignties which, starting from islands, are spreading over the oceans and over vast expanses of maritime space”. Dupuy, op. cit., p.269.
water areas under the legal regime of internal waters. Accordingly, two main baseline systems might be used with respect to mid-ocean archipelagos - one which encloses internal waters of archipelagic States and one which encloses archipelagic waters of these States - each with their own distinct legal regime. In the case of those islands located outside of archipelagic system, the baseline system would be created under the legal regime of islands in general, which essentially is the same as the system employed for creating internal waters of each single island inside mid-ocean archipelagos.

It is obvious that in creating internal waters, archipelagic States should comply with the established rules in drawing baselines across bays, rivers, and harbours or ports. For example, bays existing in the coasts of islands within archipelagos should qualify as legal bays in accordance with provisions of Article 10 of the LOSC (Article 7 of the TSC) to be enclosed by a closing line (limited to a maximum of 24 n.m.). The provisions do not apply to historic bays. However, if an archipelagic State claims a bay on historic title, that State must substantiate the validity of its claim under the established rules on historic claims.

Although it was accepted that archipelagic States may use special straight baselines to join "the outermost points of the outermost islands and drying reefs of the archipelago", some requirements were regarded to be met with respect to these straight baselines. In other words, archipelagic States do not have an absolute right to draw archipelagic baselines. Although these requirements restrict discretion of archipelagic States in drawing archipelagic baselines, they standardise these baselines. As a

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92 As has been set out by provisions of Articles 9 (mouths of rivers), 10 (bays), and 11 (ports). It is stated that so far "The Philippines and Indonesia have not created any internal waters within their archipelagic waters by drawing closing lines across the mouths of bays, rivers or ports". Prescott, op. cit., 1996, p.9.
93 Part VIII of the LOSC is headed "Regime of Islands" which only contains one article (Article 121) with three paragraphs. Article 121(2) provides that "the territorial sea, contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the Convention applicable to other land territory". (emphasis added) As a requisite for demarcation of the maritime zones of islands, baselines should be drawn. For this purpose, similar rules to coasts of mainland may be used for the determination of baselines of islands. It should be noted that Article 121(3) excludes rocks unable to sustain human habitation or economic life of their own from creating the exclusive economic zone or continental shelf.
94 Article 50 (Delimitation of Internal Waters) of the LOSC provides that "[w]ithin its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9 (Mouths of Rivers), 10 (Bays) and 11 (Ports)." The wording "may" implies that the use of the closing lines is optional for archipelagic States and they may choose to employ the low-water mark for enclosing their internal waters.
95 Article 47(1) of the LOSC.
result, there are some bases to be used in assessing validity of archipelagic baseline systems.

V. Essential Conditions Required in the Drawing of Archipelagic Baselines

As was indicated, the UNCLOS III was an international forum in which a wide range of compromises was made between participating States to guarantee its success towards concluding a new and single treaty on the law of the sea for universal application. One of these essential compromises made at the UNCLOS III was a product of the discussion on the application of special straight baseline with respect to mid-ocean archipelagos - a new baseline system known as archipelagic baselines. In fact, the adoption of the concept of archipelagic States was a result of the evolution of the new law of the sea.

Although the legal foundation of archipelagic baselines was set up in the UNCLOS III, the use of these baselines was not left to the discretion of archipelagic States. Certain rules were considered to ensure the proper application of archipelagic baselines. These rules were particularly incorporated into the LOSC to avoid unreasonable exclusion of freedoms of the high seas, most importantly navigation and overflight. For example, the following figures demonstrate how the employment of archipelagic baselines has resulted in the enclosure of much wider area of oceans in comparison to the use of normal baseline for offshore or mid-ocean islands. As the figures show, those black areas are the additional areas of the territorial sea that archipelagic States can get from the recognition of the archipelago concept.

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96 As Brown clarifies “the quality of being an archipelagic State is not sufficient in itself” to enable an oceanic State to employ archipelagic straight baselines and “treat the enclosed waters as archipelagic waters.” Such a State should comply with rules in Articles 47 of the LOSC to entitle to enclose archipelagic waters. Brown, op. cit., 1994, p.108.

97 As one author points out “most objections to the archipelagos’ claims” were made “because of the threat to freedom of navigation.” This is because “[i]mportant shipping lanes pass between member islands of several archipelagos, including Indonesia and the Bahamas.” Andrew, Dale, ‘Archipelagos and the law of the sea: Island straits states or island-studded sea space?’, Marine Policy. Vol.2, January 1978, p. 50 (also no.27).
Figure 5.1

Examples Illustrating the Impact of the Application of Archipelagic Baselines on the Enclosure of Additional Areas of the Seas.


Article 47 of the LOSC is specifically devoted to the issue of the archipelagic baselines. It sets out certain requirements in the employment of the archipelagic baselines. Some of these requirements are special in respect of archipelagic baselines and others are similar to those applied to assess the correctness of straight baselines drawn around coastal archipelagos (as embodied in Article 7 of the Convention). These requirements are six in total which are discussed here.

The first requirement is that the main islands of the archipelago should be included within archipelagic baselines. This requirement is based on the geographical characteristics of mid-ocean archipelagos, while such characteristics do not exist in coastal archipelagos. The term "the main islands" is not quite clear. The LOSC does not provide any definition for "main islands of an archipelago". It is obvious that the

98 Article 47(1) of the LOSC.
99 The UN study on baselines states that "[f]or different countries the main islands might mean the largest islands, the most populous islands, the most economically productive islands, or the islands which are pre-eminent in an historical or cultural sense." The Law of the Sea - Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1989, p.35.
largest islands are usually considered in this category. However, in some cases when the size of some islands are close to each other, a question arises as to what criteria are to be taken into consideration for identifying the main islands. It would appear that economic, political, and demographic factors are relevant factors to this identification. Prescott considers a number of geographical, economic, and historical and cultural factors in identifying the main islands. As he views:

The ‘main’ could apply to the largest islands, the most populous islands, the islands which are most economically productive or the islands which are pre-eminent in an historical or cultural sense. (Italics supplied)

The second requirement has been set up on mathematical basis. It is one of the special criteria in recognising the legal validity of existing archipelagic baselines. The requirement concerns the ratio of the water area to the land area within archipelagic baselines. This requirement along with the third requirement represent the importance of two factors which should be in existence before an oceanic archipelago becomes entitled to enjoy a special legal regime. These two factors are “adjacency and integration.” This is why it is argued that “[s]ome degree of adjacency and integration should be exhibited among different islands before they define an archipelago.” The ratio of water to land is laid down to assist in finding whether there is the element of integration among the constituent islands of a mid-ocean archipelago. During the UNCLOS III, the United Kingdom suggested that the maximum ratio of water to land should be five to one. The United Kingdom’s proposal did not contain a minimum ratio of water area to land area. Article 47(1) of the LOSC provides minimum ratio of 1:1 and maximum ratio of 9:1 for the ratio of water area to land

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100 For example, according to Dubner, Indonesia is composed of six main islands and 13,661 smaller islands totalling 13,667 islands. The main islands include Sumatra (164,000 sq. miles); the Greater Sunda Islands consisting of Java and Madura (51,000 sq. miles); Borneo (72% of this main island, namely 208,000 sq. miles, is part of Indonesia and also known as kalimantan); Sulawesi (formerly Celebes, 73,000 sq. miles) with the Lesser Sunda (Nusa Tenggara) Islands and the Maluku Islands (Moluccas); and New Guinea (the western part with the area of 159,375 sq. miles, also known as West Irian and Irian Barat). Dubner, Barry Hart, The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States, Nijhoff, The Hague, 1976, p.62.


102 Andrew, op. cit., p. 47.

103 Dupuy, op. cit., p.272.

Therefore, the area of water enclosed by archipelagic baselines should be at least equal to the area of the land. The maximum ratio has been considered to prevent unilateral extension of the archipelagic waters, but it is not apparent what has been the basis for incorporating the minimum ratio. The result of such a ratio is that if an island State does not geographically qualify the requirement of minimum ratio, it will not be considered as an archipelagic State. As examples, the ratio of water area to land area regarding the Philippines and Indonesia is estimated at 1.2:1 and 1.8:1 respectively.\footnote{Churchill, R. R., and A. V. Lowe, *The Law of the Sea*, Manchester University Press, Manchester, 1983, p.93. The land area of Indonesia amounts to 735, 267 square miles or 1,904, 345 square kilometres. The area of waters within the Philippine archipelagic baselines is 328,345 square miles. Also maximum length and width of the Philippine archipelago are 1152 miles and 668 miles respectively.}

The incorporation of minimum and maximum ratios of 1:1 and 9:1 with respect to the proportion of water to land prevented certain countries being regarded as archipelagic States. Although some of these countries might geographically be deemed as archipelagic countries in a broad sense, they are not recognised as archipelagic countries from the law of the sea perspective. There exist some fifteen countries which are located in ocean spaces but are not qualified as legal archipelagic States since the area of water enclosed by the application of archipelagic baselines to the area of land is less than 1:1. According to Prescott, these countries are Australia, Cuba, Haiti, Iceland, Ireland, Japan, Madagascar, Malta, New Zealand, Singapore, Sri Lanka, Taiwan, Trinidad and Tobago, the United Kingdom, and Western Samoa.\footnote{Prescott, op. cit., 1987 (Straight and Archipelagic Baselines), p.47. Notwithstanding Cuba (Verbal Note of 13 November 1985 to United Nations) and Trinidad and Tobago (Archipelagic Waters and Exclusive Economic Zone of 11 November 1986) have employed archipelagic baselines.}

(See, for example, maps of Madagascar and Malta below.) There are also some other countries which are archipelagos from a geographical perspective but they do not satisfy the maximum limit of the ratio of water to land, that is to say the employment of archipelagic baselines for these countries would lead to the enclosure of water area nine times larger than land area. Tuvalu, Mauritius\footnote{Following its 1970 legislation, Mauritius has employed straight baselines and has accordingly enclosed large areas of water as internal waters. The 1977 Maritime Zones Act No.13 with the 1984 Government Notice No.199 indicate that Mauritius has used “ordinary straight baselines”. Notwithstanding, the 1987 Report of the Secretary-General on the Law of the Sea (UN Doc.} and Kiribati are in this

\footnote{Article 47(7) of the LOSC provides that ”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.” Prescott states that this provision was incorporated into the LOSC for the benefit of The Bahamas. Prescott, op. cit., 1987 (Straight and Archipelagic Baselines), p.47.
group. However, these island States have claimed archipelagic status (See Table 6.1). This is also the case with regard to Trinidad and Tobago.

Map 5.2
Madagascar’s Baseline System

Map 5.3
Malta’s Baseline System


The third requirement also has a mathematical nature and is another special criterion in evaluating archipelagic baselines. It relates to the maximum possible length for archipelagic baselines. The requirement has been taken into account to ensure that the element of adjacency exists among the component islands within a mid-ocean archipelago. In the UNCLOS III, efforts were made to provide a restriction on the length of the

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A/42/688, at 6, para.10) contains that Mauritius has applied the concept of archipelagic state in its legislation. Kwiatkowska and Agoes, op. cit., pp.2-3 &6, no.10.

At the UNCLOS III, archipelagic States were in opposition to restrict the archipelagic concept by the application of numerical methods such as establishing a maximum limits for archipelagic baselines or a maximum distance between constituent islands. For example, the Philippines was of the view that application of these methods is inconsistent with the objectives of the archipelagic principles. See UN Document A/AC.138/SC.II/SR.53, pp.63-64. Fiji also stressed that "...differences of opinion had arisen over attempts to apply additional tests, such a the distance between the islands or the land-to-water ratio, which would have the effect of nullifying the very validity of the established criteria of geographical, political and economic unity." Ibid., p.64. In fact, at the UNCLOS III the prospective archipelagic States were in favour of a non-numerical approach such as the consideration of the notion of adjacency. Brown, op. cit., 1994, p.111. However, it was Indonesia that suggested two numerical methods for drawing archipelagic baselines in order to ensure the inclusion of the archipelagic concept in the LOSC. In its draft articles on mid-ocean archipelagos submitted to Geneva Session of the UNCLOS III (17 March - 9 May 1975), Indonesia introduced two mathematical criteria for establishing valid archipelagic baselines: the maximum length of 100 nautical miles (except for 5% of the total number of the baselines for which the maximum length would be 125 nautical miles; and the establishment of the ratios of water to land between 1:1 to 9:1. Introducing such ratios by Indonesia was in line with its view that the water area of an archipelagic State should exceed its land area. Draper, op. cit., pp.153-154.
archipelagic baselines to prevent further conversion of the high seas into waters which are now defined as of archipelagic waters. Countries such as the Federal Republic of Germany and the Netherlands suggested that the length of the archipelagic baselines should not increase more than twofold the breadth of the territorial sea. The United Kingdom also proposed that a maximum of 48 miles is applied as a criterion for maximum length of archipelagic baselines. It is in this context that Article 118(2) of the Informal Single Negotiating Text (ISNT), which was prepared by the Second Committee of the UNCLOS III, contained the limit of 80 miles as the maximum length for archipelagic baselines. It also provided that "an unspecified percentage" of archipelagic baselines might have a length as far as 125 miles.

Article 47(2) of the LOSC now allows a maximum length of 100 nautical miles for archipelagic baselines and adds that "... 3 per cent of total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 miles." The purpose of inclusion of these limitations on the length of archipelagic baselines are said to "rule out certain island groups, such as Micronesia, which are made up of very small atolls, separated by great distances. Such groups require long baselines to join the member islands and enclose relatively huge areas of water." The Indonesian archipelagic baseline system includes 196 lines five of which have lengths ranging 100 to 125 miles and the remaining 191 lines are less than 100 miles. In practice, the mathematical criterion is not always easy to follow precisely. For example, the result of considering 3 per cent

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111 Dupuy, op. cit., p.272.
112 Ryan, op. cit., p.411.
113 Article 119(2) of the 1976 Revised Single Negotiating Text (RSNT) included the same limit of 80 miles. However, unlike the ISNT, the RSNT provided that "up to one per cent of total number of baselines enclosing any archipelago may exceed ... [the length of 80 nautical miles], up to a maximum length of 125 nautical miles." The full text of the RSNT can be found in Report of the Australian Delegation to the Third United Nations Conference on the Law of the Sea, Fourth Session (New York), 15 March to 7 May 1976, Australian Government Publishing Service, Canberra, 1976, Appendix J.
115 Prescott describes this rule as having "superficial exactness". Prescott, op. cit., 1987 (Straight and Archipelagic Baselines), p.46. The UN study on baselines points out that "[s]ince there is no restriction on the number of segments a country can draw, and since the more segments used the closer the system is likely to be to the general configuration of the archipelago, it will usually be possible to adjust the number of segments to secure the necessary number of very long baselines." The Law of the Sea: Baselines, op. cit., p.35.
116 Andrew, op. cit., p. 47, no.8.
117 Churchill and Lowe, op. cit., p.94. Wisnumurti writes that "[i]n some places, the lengths of some of the [Indonesian] straight baselines have to be adjusted to conform with the rule on the maximum length of straight baselines provided in Article 47 paragraph 2 [of the LOSC]." Wisnumurti, op. cit., p.46.
of the 196 archipelagic straight baselines of Indonesia is 5.88. Accordingly, the five Indonesian baselines, which exceed more than 100 miles but are less than 125 miles comply with the above provision.\footnote{The UN study on baselines states that "it is easy to calculate that systems with 2 to 33 segments may not have any individual lines more than 100 nautical miles long while systems with 167 to 199 segments may include 5 lines with lengths greater than 100 nautical miles." The Law of the Sea: Baselines, op. cit., p.35.} (The Indonesian archipelagic baselines are illustrated below.)

Map 5.4
Indonesia’s Archipelagic Baselines

\[\text{Map image}\]


The Philippine baseline system also consists of 80 lines of which two have a length between 100 and 125, and one line is 140 miles, and 77 lines are less than 100 miles.\footnote{Churchill and Lowe, op. cit., p.94.} Two lines are bigger than 100 miles but less than 125 miles which conforms 3 per cent of 80 lines (namely 2.4 percent). However, the Philippines has employed a line in the Gulf of Moro which is 140 miles in length.\footnote{Prescott, op. cit., 1996, p.9. According to Prescott, the 1990 draft Bills Numbers 232 and 206 of the Senate of The Philippines included an amendment to its archipelagic baselines "to reduce the longest baseline in the Gulf of Moro to 119.98 nm, 5 nm shorter than the maximum limit". \textit{Ibid.}} Accordingly, this line is not considered to be in accordance with Article 47(2) of the LOSC because it exceeds the maximum length 125 miles.\footnote{Since the Philippines ratified the LOSC on 8 May 1984, it has been obliged to remove its existing inconsistent rules and laws with the Convention. This was why Bill No. 206 was submitted to the Philippines Senate in order to make necessary adjustment on its baselines for their conformity with the requirement of Article 47(2) of the LOSC.} (See the Philippine archipelagic baselines below.)
The next issue is how to treat the result if it is not a whole number. For example, if the result is 5.45 or 5.55 should it be treated as 5 or 6? The above provisions do not contain any answer to this problem and it is open to different interpretations. It seems that the figures from 5.5 to 5.99 can be considered as equal to 6 and those between 5.01 to 5.49 may be regarded as equal to 5. Although it may appear that in practice the problem might not be of essential importance, the consequence might be considerable given the fact that one extra archipelagic baseline line with a maximum length of 125 nautical miles might be employed.\textsuperscript{122} This would, in turn, result in the enclosure of more areas of the high seas.\textsuperscript{123}

\textit{The fourth requirement} has been embodied in Article 47(3) of the LOSC. It emphasises that "[t]he drawing of such baselines [archipelagic baselines] shall not depart to any appreciable extent from the general configuration of the archipelago."\textsuperscript{124} (emphasis added) In this connection

\textsuperscript{122}O'Connell asserts that "the inherent subjectivity" in such a percentage basis for longer archipelagic baselines "is clear from the fact that any claimant could, by merely multiplying the basepoints, achieve the required percentage. O'Connell, op. cit., 1982, p.257.

\textsuperscript{123}Although unlike straight baselines the LOSC establishes a maximum length for archipelagic baselines, it does not contain any provision on the number of archipelagic baselines which may be employed by archipelagic States.

\textsuperscript{124}This provision is similar to Article 7(3) of the LOSC concerning straight baselines which are used in coastlines with special geographical conditions, including coastal archipelagos. Article 7(3) reads that "[t]he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast ...." (emphasis added) It also provides that "... the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal
one argues that '[w]hether most archipelagos have an ascertainable “configuration” may be doubted.'

Accordingly, there is a need to identify an international authority which is competent to examine the above requirement in regard to each archipelagic baseline system.

The fifth requirement is that archipelagic baselines must 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."

Article 47(5) of the LOSC contains the last requirement. It provides that an archipelagic State should not draw archipelagic baselines "... in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State." One example appears to be the effect of the Indonesian baseline system on the territorial sea of Singapore. Notwithstanding, Churchill and Lowe state that because "it is doubtful whether Singapore would have been able to generate an exclusive economic zone" the Indonesian baseline system seems to be permissible.

Besides the above requirements, the LOSC imposes a duty on archipelagic States to prepare maritime charts or lists of geographical co-ordinates of points with respect to their archipelagic baselines. It also requires these States to "... give publicity to such charts or lists of geographical co-ordinates ..." and to "... deposit a copy of each such charter

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125 Churchill and Lowe, op. cit., p.94.
126 As it is the case with respect to the existing straight baselines which was already pointed out in the analysis on the issue.
127 Article 47(4) of the LOSC. Compare with provision of Article 7(4) of the LOSC which reads that "[s]traight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances which the drawing of baselines to and from such elevations has received general international recognition." (emphasis added)
128 This provision is similar to the provision of Article 7(6) of the LOSC which reads that "[t]he system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone." (emphasis added)
129 Churchill and Lowe, op. cit., p.94.
130 Ibid.
131 Ibid.
132 Article 47(8) of the LOSC.
or list with the Secretary-General of the United Nations. Article 47(6) of the LOSC also reserves existing rights and all other legitimate interests of an immediately adjacent neighbouring State, "[i]f a part of the archipelagic waters of an archipelagic State lies between two parts of [that State] ... ."

Although the requirements have created a framework for the construction of legitimate archipelagic baselines, no doubt the use of these baselines would have an exponential effect on the enclosure of ocean spaces. This is why it is acknowledged that the notion of mid-ocean archipelagos introduces "the most remarkable case of the appropriation of maritime spaces".

VI. Reasons for Establishing a Special Regime for Mid-Ocean Archipelagos

In supporting their doctrine of archipelago principle, island States (now known as archipelagic States) relied upon a number of reasons to justify their claims. These States expressed that their claims are based on geographical, historical, political, economic, security, environmental, cultural, and customs reasons. Due to their different geographic and geopolitical situations, the significance of any of these reasons vary from one island State to another. However, island States were all of the view that these essential reasons necessitated the recognition of a special legal regime to enable them to enclose waters located within their archipelagos. The reasons for archipelagic claims appear infra.

1. Geographical Reasons

Geographical factors are the essence of archipelagic claims. In fact, it is the geography of archipelagos which has in a practical sense resulted in emerging the doctrine of linking islands to one another. In the case of coastal archipelagos, it is the element of adjacency that justifies the

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133 Article 47(9) of the LOSC.
134 Dupuy, op. cit., p.273.
135 As Andrew states the interests and rationale of archipelagic States in introducing the concept of archipelago principle are based upon "a variety of considerations: geography, history, economic dependency, national security and concern for the environment." Andrew, op. cit., p.47.
136 This is why it is argued that it is particular geographical configuration of archipelagic States "which serves as the basis for their other particular interests, namely their economical, socio-political, ecological and environmental interests. Munavvar, Mohamed, Archipelagic Regimes in the Law of the Sea, Martinus Nijhoff Publishers, Dordrecht, 1995, p.29.
integration of these islands with mainlands. However, there is no such a geographical characteristic in the case of mid-ocean archipelagos which are located independently from mainlands, though the element of adjacency also plays an important role in the legal definition of these archipelagos. Despite the fact that outlying archipelagos vary, they are similar in the sense that their component islands are all linked by interconnecting or insular waters. This interconnection makes the archipelagos geographical units which are surrounded by waters as integral part of the archipelagos. This is why it has been asserted that “the real essence of an archipelago is the concept of a self-contained and relatively compact group, not a loose conglomeries of islands dotted over a large extent of sea.”

Since the emergence of the doctrine of archipelago principle, archipelagic States have argued that waters within their islands are inseparable parts of their territory as these waters are geographically more integrated into their islands than any other land formation, including mainlands. The Philippines in its Declaration of 1955 stated that “all waters around, between and connecting the different islands belonging to the Philippine Archipelago ... are necessary appurtenances of its land territory ...”. (emphasis added) The 1957 Indonesian Declaration also considered the interconnecting waters within constituent islands of the Indonesian archipelago as constituting “integral parts of the territory of the Indonesian state.” These examples demonstrate how geographical realities were relied upon by archipelagic States to support their doctrine of archipelago principle.

2. Historical Reasons

Archipelagic States have been attempting to put their claim on a historical basis arguing that their constituent islands have been historically
considered as a single unit.\textsuperscript{141} The element of history is not limited to archipelagic claims and it has been used with respect to many claims in the law of the sea, such as those related to historic waters. As part of their argument, archipelagic States relies on historical considerations to strengthen their claims.\textsuperscript{142} However, not all archipelagic States were able to demonstrate the existence of a long term treatment of their archipelagos as a single unit, even though they have used such expressions as "time immemorial".

In its 1955 Declaration, the Philippines, \textit{inter alia}, referred to some treaties for the basis of its claim as having the element of long passage of time.\textsuperscript{143} The Philippines declared that "... water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington D.C., between the United States and Spain on 7 December 1900, the Agreement between the United States, and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932, between the United States and Great Britain as reproduced in section 6 of Commonwealth Act No. 4003 and Article 1 of the Philippine Constitution, are considered as maritime territorial waters of the Philippines ...".\textsuperscript{144} To support its claim, the Philippines also referred to Article III of the Paris Treaty of Peace (10 December 1889) between Spain and the United States which defined the territory of the Philippines as "the archipelago known as the Philippine Islands and comprehending the islands lying within the following described lines ... [namely lines defined in the Treaty by reference to a series of latitudes and longitudes]."\textsuperscript{145}

\textsuperscript{141}While Andrew holds that "historical precedent provides little objective basis for using the archipelago principle", Munavvar does not agree with this view and writes that "historical precedent is a strong argument in the case of smaller ocean islands with numerous islands which are closely integrated and do not have very wide expenses of sea or passages between their islands that are use for international navigation." See Andrew, \textit{op. cit.}, p. 48 and Munavvar, \textit{op. cit.}, p.29.

\textsuperscript{142}It is stated that archipelagic States may claim their island groups as a single political unit on the basis of historical evidence, putting aside the factor of adjacency. However, it raises the question as with whom the burden of proof of such historic claims rests. Hodgson, \textit{op. cit.}, p.46. It seems apparent that in case of historic claims the burden of proof rests with the claimant State.

\textsuperscript{143}It is viewed that "the Philippines rely to a great extent upon historical justification for the delimitation of the extent of heir maritime domain." O'Connell, \textit{op. cit.}, 1971, p.30.

\textsuperscript{144}See UN Doc.A/2934, 1955, pp.52-53. O’Connell views that "[a]llthough the \textit{Note verbale} of 1955 founded the Philippine claim on the interpretation of the Treaty of Paris, and thus on the argument that Spain had sovereignty over the waters which is alleged to have conveyed to the United States, there is no historical evidence of an assertion, or exercise, of jurisdiction over the relevant waters by either Spain or the United States." O’Connell, \textit{op. cit.}, 1971, p.29.

\textsuperscript{145}See Munavvar, \textit{op. cit.}, p.30.
The Indonesian proclamation did refer to history. Following the 1957 Indonesian Declaration, the preamble of the 1960 Indonesian Act, without demonstrating any historical evidence, expressed that "since time immemorial the Indonesian archipelago has constituted one entity."\textsuperscript{146} To justify the use of archipelagic baselines, Micronesia has also made its claims, among others, on the existence of "political entities" in its component islands before the arrival of the European explores.\textsuperscript{147}

At the UNCLOS II, the delegate of the Philippines, Senator Tolentino, stated that the Philippine archipelago since time immemorial has been a single unit and under a single sovereignty, whether at the time of Spanish dominance or under the Republic of the Philippines. At the Caracas session of the UNCLOS III, the delegate of the Bahamas made its statement on an historical basis to justify the jurisdiction of Bahamas over a wide maritime areas. This delegate stated that "[t]hose areas of shallow waters had \textit{historically} been regarded as parts of the territory of the Bahamas: a grant encompassing the banks as well as the islands and the cays, had been made to the Lord Proprietors by King Charles of England."\textsuperscript{148} (\textit{emphasis added}) Also at the UNCLOS III Tonga referred to the 1887 Proclamation by King Tupou I arguing that the proclamation established the boundaries of Tonga "by reference to the sea instead of by reference to the land."\textsuperscript{149} Further, it stated that the lack of protest to such delimitation of Tongan island and the passage of time had established a legitimate basis for enclosing waters within the Tongan archipelago. As the Tongan delegate asserted:

... neither in 1887, when the proclamation had been made, nor in 1971, when it had been circulated to all states members of the Sea-bed Committee, had there been any hint of criticism of its purport, for although it constituted a departure from the law of nations as framed in Europe, it had been legitimized by the very rules of that system by virtue of the passage of time.\textsuperscript{150}

As is clear, historical considerations have constituted part of the arguments of archipelagic States. They claimed that their archipelagos have always been considered as a single unit in their history. It should be

\vspace{1em}\footnotesize
\textsuperscript{146}See Syatauw, \textit{op. cit.}, p.175.
\textsuperscript{147}Nakayama, Masao, and Fredrick Ramp, \textit{Micronesian Navigation, Island Empires and Traditional Concepts of Ownership of the Sea}, Saipan, Mariana Islands, 1974, p.64.
\textsuperscript{149}\textit{Ibid.}, p.108.
\textsuperscript{150}\textit{Ibid.}. 

noted that the element of history is not adequate evidence for claims in the law of the sea. However, States have realised that history plays an essential role in supporting their claims, if they are able to indicate the existence of such an element.

3. Political Reasons

Political reasons are part of the arguments presented by archipelagic States to gain sympathy from other States in recognition of a special legal regime for delimitation of mid-ocean archipelagos. The essence of political rationale lies in the element of unity of scattered island forming an archipelago. The integration of islands as a single unit has been regarded as a necessity for the idea of one nation within the concept of archipelago. In fact, the unity of islands within archipelagos has been an important factor in advancing the doctrine of archipelago principle. As one writer points out “the very fact of statehood and the need to contain centrifugal tendencies and cement the elements of the nation together were being put forward as circumstances demanding a special regime for the waters of the archipelagic State.” 151

In 1973, the Philippine delegate stressed the element of unity for mid-ocean archipelagos as necessity. This delegate asserted that

That essential element of unity formed the basis of the desire of an archipelagic State to preserve its identity as one State and one nation, for otherwise an archipelago might be splintered into many islands as composed it, with the consequent fragmentation of the nation and the State. 152 (emphasis added)

At the Caracas session of the UNCLOS III (1974), the Philippine delegate (Minister Arturo Tolentino) argued that the essence of the archipelagic concept is “the dominion and sovereignty of the archipelagic State within its baselines, which were so drawn as to preserve the territorial integrity of the archipelago by the inseparable unity of the land and water domain.” 153 This delegate then added that such an essence of the archipelagic concept should be taken into account in the establishment of a legal regime for archipelagos. In addition, at the closing session of the

152 UN Document A/AC.138/SC.II/SR.73, p.10.
UNCLOS III, the Cape Verde Delegate stated that its country “consider that recognition by the Convention of the concept of archipelagic State is a major achievement for the protection of the legitimate interest in preserving the unity and integrity of its territory.”

The political element reflects the idea of preserving the unity of the constituent islands of an archipelago as a whole. Consideration of this element of unity is of significance in building up a nation whose territory consists of islands separated by marine spaces. It appears that at the UNCLOS III many States were aware of the importance of the political element of unity for archipelagic States and were prepared to meet this need of archipelagic States while the interests of international community were also preserved in the interconnecting waters in the archipelagos.

4. Economic Reasons

Regardless of physical geography, history, or political motive, the element of economic dependence has formed the basis of one of the main arguments in favour of archipelagic concept. Archipelagic States have argued that their people living in a large number of islands are economically dependent on the living and non-living resources existing in and under sea. This is particularly confirmed by the fact that “major industries of archipelagic states are marine based.” They have maintained that “they are almost totally dependent on the surrounding marine environment, unlike continental nations which have resources on their land territory.”

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155 Munavvar holds that [b]esides being a unifying factor between the islands, the sea also offers a great potential source for the economic development of the archipelago and the we being of its people.” Munavvar, op. cit., p.33.
156 As part of findings of a survey on oceanic islands, it is stated that these islands “are seldom well endowed with resources: land, minerals and other stores of energy, fresh water, flora and fauna, all tend to be limited in amount and variety.” McEachern, John and Edward L. Towe, Ecological Guidelines for Island Development. Morges: International Union for Conservation of Nature and Natural Resources Publications, 1974, p.14. Sir Albert Henry, the representative of the Cook Islands at the UNCLOS III, focusing on the component islands of the Cook Islands asserted that “[t]he land mass was small;; and there were no minerals or similar products which could be used commercially to develop the economy. ... The sea provided the only source of protein, the bulk of food, and a small income from pearl shell and fish.” UNCLOS III. Official Records. Vol.1, 1975, p.200.
157 Munavvar, op. cit., p.31. For example, the economy of Maldives is basically dependent on two sectors: fishing and tourism. Ibid.
158 Andrew, op. cit., p.48. Fiji, the Bahamas and Mauritius had expressed their essential need to have exclusive access over fisheries resources in waters around their islands. Ibid.
The Philippines has claimed exclusive interests in exploitation of the fisheries and other biological resources found in waters surrounding the Philippine islands. It has argued that the marine resources are not sufficient to respond to the need of its local population and foreign countries whose citizens are involved in fishing within waters around the Philippine islands. In addition, the 1955 Philippine Declaration clearly included the objectives of “protection of its fishing rights, conservation of its fishery resources ...” among the purposes for creating an archipelagic system.

Indonesia also emphasised the importance of fisheries resources for inhabitants of archipelagos whose survival considerably depends on these resources. It, particularly, expressed that:

our people are very much dependent on marine resources and fisheries, especially those which have a close connection with the shelf and the land. Our fisheries are basically subsistence type of fisheries, and fish is an important source of protein.

Archipelagic States primarily focused on the biological resources for their economic development. However, they later advanced their economic argument to include non-living resources (such as minerals and petroleum) arguing that the exploitation of these resources is essential for their economic growth. In particular, they claimed that there is a need to have exclusive control over the marine resources to exclude other countries (mostly industrialised and technically developed countries) to access these resources. This exclusion was motivated by the marine technological gap between developed countries and archipelagic States belonging to developing countries. Maritime developed countries enjoy a high standard of marine technology enabling them to exploit living and non-

160 Ibid.
161 Anand, op. cit., p.240.
162 For example, the Philippine Proclamation of 20 March 1968 was issued to reserve all the resources in the continental shelf of the Philippines, covering the maritime area within the geographical co-ordinates defined by the 1898 Treaty of Paris. Bowett, op. cit., pp.103-104. Also Indonesia issued an proclamation on 17 February 1969 claiming exclusive sovereignty and jurisdiction over the continental shelf in and around its archipelago. See O'Connell, op. cit., 1971, p.42.
163 For example, Indonesia pointed out that the involvement of advanced fishing countries, with access to modern techniques, in exploitation of living resources in and around archipelagos “made us afraid that there was just no possibility of having an equal opportunity.” This was why archipelagic States were struggling to make resources within their archipelagic waters subject to their exclusive jurisdiction. Anand, op. cit., p.240.
living resources more efficiently. This imbalance in marine technology led to concerns among archipelagic States to guarantee their exclusive rights over the resources within their archipelagos by enclosing waters therein.

At the UNCLOS III, archipelagic States developed their economic argument in the context of the discussion on the new international economic order by which the wealth of the world will be distributed more equitable. They maintained that “their future depended in large measure on the utilization of the sea and the exploitation of its resources and claiming that new rules must be worked out in order to safeguard what they considered relevant to their vital interests and rights.”164

The economic argument of archipelagic States appears to have had a positive effect on advancing the doctrine of archipelago principle. Since these ocean States were (and still are) greatly dependent on whatever the marine environments have to for their economic development, such reliance on marine resources was a cause for gaining some sympathy from other States. Accordingly, the element of economy played a constructive role in strengthening the foundation of the doctrine of archipelagic concept.

5. Security Reasons

The security and strategic reasons have been at the core of the concerns of archipelagic States in introducing the doctrine of archipelagic notion.165 The security reason consists of two aspects: internal security and external security.166 These internal and external securities have impacts on one another. In particular, the existence of adequate internal security within archipelagos has an effect on the stability of archipelagos and enable them to better cope with the threats to their security from external sources.

164Dupuy, op. cit., p.271.
165Anand views that security reason has been the most important reason for advancing the archipelagic principle. Anand, op. cit., p.240. Andrew, however, is of the view that “... security is only one of the motivations for the archipelagic claim of sovereignty: other interests are equally salient.” Andrew, op. cit., p.49. In general, it is more accurate to say that: while some factors may be of more significance for certain archipelagic States, other factors may be more essential for the other archipelagic States. For example, O'Connell writes that [t]he motives for the policies of the Philippines and Indonesia were in the first instance strategic... But in the cases of the other aspirants, due to their geographical situations and absence of serious security problems, the motivation is exclusively economic ...” O'Connell, op. cit., 1982, p.254.
166As Anand points out the security reason developed by archipelagic States is not “necessity security from military attack by a hostile power, but for protecting ... coastal areas from illegal landing by aliens and smuggling of goods.” Anand, op. cit., p.240.
The newly established archipelagic States have formerly been under colonial regimes. These States have been experiencing some internal security problems which resulted from a variety of reasons. These States are mostly composed of a number of ethnic and social groups which are difficult to integrate. Since the independence of archipelagic States there have been conflicts among these groups that have led to unrest in these countries, endangering the internal security of these States and affecting their external security.

For example, in the early years of independence Indonesia faced an internal security problem which came from separatists on Celebes, Java, and Sumatra islands. It was not easy for the central government to handle this security problem for two reasons. First, the lack of adequate authority over these islands because of the high seas pockets separating the islands from the capital island. Secondly, these movements could be supplied with military equipment by external sources, particularly because the central government had no power over interconnecting waters of the islands which were parts of the high seas. The Philippines has also experienced some unrest causing difficulties for its government to encounter the security problem.

Since the introduction of the archipelagic principle it has been clear that the security interest has been one of the main interests for archipelagic States. For instance, the 1955 Philippine Declaration contained the following purposes for establishing an archipelagic regime:

... [the waters within the Philippine islands are maritime territorial waters of the Philippines] for purposes of protection of its fishing rights, conservation of its fishing reserves, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels.
Further, in response to the protests made by some maritime powers to the archipelago principle proclaimed by Indonesia in 1957, Indonesia emphasised the importance of the archipelagic regime for efficient maintenance of its security.\textsuperscript{173} It asserted that by keeping the \textit{status quo} concerning the waters between islands of archipelagos, it would be difficult for foreign vessels to find out whether they are in the high seas or national waters. In particular, activities of vessels in conflict within the high sea parts of archipelagos may have adverse effects on these archipelagos. In its words, Indonesia asserted that:

\begin{quote}
In case of war between two parties, with their battle-fields moving to and fro on the high seas between Indonesian Islands, our unity would be threatened.\textsuperscript{174}
\end{quote}

It was for the importance of security interests that such archipelagic States as Indonesia and the Philippines required prior authorisation for the passage of warships after advancing the doctrine of archipelago principle.\textsuperscript{175} In some cases, the Philippines refused to permit the passage of foreign warships which impacted on the passage of these ships within the routes between Australia and South-East Asia.\textsuperscript{176} Indonesia also closed certain areas of its waters to foreign ships (including warships) as a result of conflict with the Netherlands over West Irian in 1958.\textsuperscript{177}

The internal and external security issues challenging archipelagic States were among the reasons for the idea of archipelagos as single units. This was particularly favoured to protect “national integrity” and “internal security”.\textsuperscript{178} Even after the recognition of the archipelagic concept and its incorporation into the LOSC, certain archipelagic States are still concerned

\textsuperscript{172}See UN Doc. A/2934, 1955, pp.52-53.
\textsuperscript{173}In the declaration Indonesia had provided that “[i]ncautious passage of foreign ships in these internal waters [archipelagic waters] is granted as long as it is not prejudicial to or does not violate the sovereignty and security of Indonesia.” Rogers, P. E. J., \textit{Mid-ocean Archipelagos in International Law}, Vintage Press, New York, 1981, p.63.
\textsuperscript{174}Syatauw, \textit{op. cit.}, p.184.
\textsuperscript{175}As Andrew views Indonesia and the Philippines have particularly been “adamant that free passage of warships through their waters may threaten their security.” Andrew, \textit{op. cit.}, p.48. See also \textit{Report of Asian-African Legal Consultative Committee}, Thirteenth Session, 18-25 January 1972, p.216.
\textsuperscript{176}See O’Connell, \textit{op. cit.}, 1971, pp.32-36.
\textsuperscript{177}Bowett, \textit{op. cit.}, p.99.
\textsuperscript{178}Anand, \textit{op. cit.}, p.241.
about the protection of strategic and security interests.\textsuperscript{179} This is why these States have been attempting to control passage through archipelagic waters. Although the security concerns of archipelagic States are understandable, the right of international community for peaceful passage through archipelagic waters should be respected in accordance with the LOSC.

6. Environmental Reasons

Environmental reasons have been among new arguments of archipelagic States for backing their claims on enclosing waters within their archipelagos.\textsuperscript{180} The marine environmental concerns of archipelagic States especially arose following a number of accidents which occurred in waters around their mid-ocean islands.\textsuperscript{181} In particular, incidents caused by supertankers and ships carrying hazardous substances brought about the need for more control over these vessels to prevent serious marine pollution in archipelagic waters. Discharge of oil by ships, dumping of waste, and spiling hazardous substances into the seas have been the main sources of marine pollution in mid-ocean archipelagos.\textsuperscript{182}

The marine ecosystem of mid-ocean archipelagos is very fragile and it is vulnerable to any pollution, particularly chemical pollution. Many of mid-ocean archipelagos are formed by coral reefs and islands. Although corals are not completely living creatures, they are not totally dead and would react against any harmful substance to marine life like oil pollution.\textsuperscript{183} In fact, pollution "could well destroy the coral."\textsuperscript{184} In addition, it is pointed out that because of the random configuration of islands in an archipelagic, "pollution sources are more likely to stay within

\textsuperscript{179}For example, in its Declaration upon signing and ratifying the LOSC, Cape Verde declared that the Convention "recognises the right of coastal States to adopt measures to safeguard their security interests, including those relating to the innocent passage of warships through archipelagic waters." Kwiatkowska and Agoes, \textit{op. cit.}, p.15.

\textsuperscript{180}Hodgson, \textit{op. cit.}, p.46.

\textsuperscript{181}Andrew, \textit{op. cit.}, p.48. See also Syatauw, \textit{op. cit.}, p.110. The marine environmental concerns of archipelagic States have mainly cause because of the carriage of considerable amount of oil through their archipelagos. For example, ninety percent of oil supply to Japan are carried through Indonesian archipelagic waters that is not without risk of oil pollution. Rogers, \textit{op. cit.}, p.121.

\textsuperscript{182}As O'Connell writes "[a]rchipelagos are particularly susceptible to damage from discharge of oil or the dumping waste, partly because of their geography and partly because many archipelagic groups are composed of coral islands." O'Connell, \textit{op. cit.}, 1982, pp.254-255.

\textsuperscript{183}As O'Connell states "[c]oral islands are not dead land-masses, even if the polyps that formed them are dead. The areas of intersection of land and sea are subject to incessant biological and chemical reaction, whereby the land is preserved from ultimate destruction." O'Connell, \textit{op. cit.}, 1971, p.54.

\textsuperscript{184}Bowett, \textit{op. cit.}, p.104, no.92. The Bahamas, Fiji, and the Maldives are examples of coral archipelagos. These countries have expressed their concerns over marine pollution due to its adverse effects on coral islands. Rogers, \textit{op. cit.}, p.121.
the waters than to wash away." These special characteristics of marine environment of mid-ocean archipelagos make them more vulnerable against pollution than other parts of marine environment of the world. Accordingly, archipelagic States are at greater risk than other coastal States in the case of serious pollution like oil spillage.

One important adverse effect of pollution of archipelagic waters is on living resources upon which local people depend, whether as economic assets or as sources of food. It is also the case with respect to mangroves which have been considered as valuable biological and economic resources. Marine pollution has destructive effect on mangroves. They are found in the coastlines of coral reefs and islands of archipelagos. Pollution in the marine environment of these reefs and islands "can destroy the organisms that are essential for the coastal mud to retain its validity and support the flora, notably mangroves, which in many instances constitute an essential rampart against the sea."

Thus, archipelagic States have been making efforts to achieve the recognition of an archipelagic regime to protect the marine environment within their archipelagos. The adoption of archipelagic principle has considerably given a regulatory competence to archipelagic States to control pollution within their archipelagos which are sensitive marine environments. Although the marine environment pollution has been a major concern of all States, whether within their waters under their sovereignty or sovereign rights or on the high seas, such a pollution control was taken with special consideration into account due to the fragility of marine ecosystems of mid-ocean archipelagos.

7. Other Reasons

To give more support to their archipelagic claims, archipelagic States have put forward some other arguments. One argument is based on the need to facilitate communications and transportation between constituent

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185 Andrew, op. cit., p.48.
186 Munavvar, op. cit., p.36.
187 Such an impact on the marine resources are said to "confirm and strengthen the necessity to look at the archipelago as one unit, not only in geographical but also in environmental terms." Ibid.
188 O'Connell, op. cit., 1971, p.54.
189 Waters of mid-ocean archipelagos are not the only marine environments which were given special consideration with respect to environmental aspects. Some other marine environments such as closed and semi-closed seas were also given necessary protection against pollution.
islands of an archipelago. This need is particularly intensified due to the fact that "[t]he great distances between islands of an archipelago naturally pose problems of communication among the different parts of the state." Accordingly, archipelagic States were attempting to reserve the interinsular waters for the local vessels. Convenient maritime communications between the islands within an archipelago have an economic impact. This is because many local people are involved in trading with people living in other islands and the only efficient way of their communications is through the sea. The establishment of archipelagic waters will facilitate and guarantee the feasibility and safety of these communications.

Archipelagic States have also held that the establishment of archipelago principle is required for a more efficient control over foreign or local vessels for customs purposes. It has been difficult for archipelagic States to prevent smuggling and illegal trades. The enclosure of insular waters gives these States the authority necessary to deal with these problems and also to avoid such problems as illegal entry.

In short, the main reasons for the introduction of a new legal regime for the enclosure of mid-ocean archipelagos can be understood in the following passage which formed part of the report of the Seabed Committee to the General Assembly of the United Nations stating that:

"the preservation of the political and economic unity of an archipelagic State and the protection of its security, the preservation of its marine environment and the exploitation of its marine resources justified the inclusion of the waters inside an archipelago under the sovereignty of the archipelagic State or the granting of a special status to such waters."

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190 It is stated although distribution of products among the islands is not easy for developing archipelagic States, it would be more difficult "if to go from one island to another pockets of high seas would have to be crossed." Mendioza, Estelito P., 'The baselines of the Philippines archipelago', Philippines Law Journal, Vol.46, 1971, p.632.
191 Andrew, op. cit., p.48.
192 As one points out "[t]o distribute and market the products of various islands, an integrated and complete transportation network is indispensable. Anand, op. cit., p.239.
VII. The Mid-Ocean Archipelagos and State Practice

States concerned have indicated a divergence of practice in applying the conventional rules to their archipelagos. In general, Article 47(1) of the LOSC states that an archipelagic State may use archipelagic baselines to enclose its archipelagic waters. For example, Tonga and Seychelles consisting respectively of more than 150 islands and some 90 islands scattered in a wide area of water are able to construct archipelagic baselines. This is because the ratio of water to land for these States falls between 1:1 and 9:1. However, these States have not yet proclaimed archipelagic baselines.

In addition, some other States, like the United Kingdom, New Zealand, and Japan, which may qualify for the definition of archipelagic States, do not consider themselves in the group of archipelagic States. It seems that even if these States may fall into category of archipelagic States, they may prefer to keep the status quo governing their waters. This may be due to the fact that waters behind the straight baselines drawn around constituent islands of these countries are considered as internal waters, while waters enclosed by archipelagic baselines are archipelagic waters. As a recognised principle of international law, States have complete sovereignty in their internal waters whereas such a strong position of coastal States does not exist in regard to archipelagic waters. For example, while there is no right of passage for foreign ships through waters behind coastal archipelagos' baselines, i.e. internal waters, without permission of coastal States, foreign ships are entitled to exercise passage through archipelagic waters under the legal regimes of innocent passage and archipelagic sea lanes passage. It seems that each island State takes different factors (such as geographical, political, economic factors) into

195Jamaica in the Caribbean region and Bahrain in the Persian Gulf are also regarded as those States for which the ratio of water to land falls within the accepted limit by Article 47(2) of the LOSC. Kwiatkowska and Agoes, op. cit., p.3.
196As was mentioned before, Prescott disregards the possibility of considering these countries as archipelagic States because they do not meet the requirement of minimum ration of water to land which is 1:1. The issue of uncertainty over the status of some States as archipelagic States is a sensitive issue. This is because adoption of a State as an archipelagic State is, in most cases, in the interest of such State while it is in contrary to the interests of some other States (particularly maritime powers). Accordingly, this may lead to some controversy in practice.
197Churchill and Lowe, op. cit., pp.92-93. In the view of Kwiatkowska, the reason that such countries as Cuba, Iceland, Madagascar, New Zealand and the UK are not considered archipelagic States is because these countries do not meet the requirement of minimum ratio of 1:1 for the area of water to that of land. Kwiatkowska and Agoes, op. cit., p.2.
account to find out whether it is in its interest to proclaim an archipelagic status.

There also exist a few cases where ocean States have not been able to construct archipelagic baselines in accordance with the LOSC to enclose all constituent islands within a single archipelago. However, the LOSC has empowered these States to form a multi-archipelagic baseline system. This enables the States concerned to employ archipelagic baselines around more than one archipelago while complying with the requirements included in the LOSC for any constituent archipelago. The legal basis for such possibility comes from Article 46(a) which stipulates that an archipelagic State may constitute "wholly by one or more archipelagos and may include other islands." Examples of States which are able to construct a multi archipelagic baseline system include Fiji, Seychelles, Solomon Islands, and Tonga. At the present, such countries as Solomon Islands and Fiji have employed such a system. (See maps of Solomon Islands and Fiji below.)

Map 5.6
Solomon Islands' Archipelagic Baselines


198 In addition, as Brown asserts "it is theoretically possible that State A might consist of A1 and A2, both of which satisfied the definition of an archipelago in Article 46(b), but only one of which (A1) would be entitled to adopt a system of archipelagic baselines." Brown, op. cit., 1994, p.109.

199 This means that the territory of an archipelagic State includes one or more archipelagos and also some islands located outside these archipelagos. It is clear that these islands are governed by the general legal regime for islands as included in Part VIII of the LOSC.
Further, there are some archipelagic States which have drawn archipelagic baselines in a way that is not in conformity with the LOSC. For example, Cape Verde has employed 14 archipelagic straight baselines, two of which are longer than the maximum permitted length of 125 miles for such baselines and the length of one baseline (which connects Ponta Prainha and Ponta Preta) amounts to 137 miles.\textsuperscript{200} (See map of Cape Verde below.) Maldives is an archipelagic State which has not complied with the rules of the LOSC (Art. 47(2)) whether regarding the ratio of water to land or the length of baselines.\textsuperscript{201}

\textbf{Map 5.8}

Cape Verde’s Archipelagic Baselines


\textsuperscript{200}Kwiatkowska and Agoes, p.15.
\textsuperscript{201}Ibid., pp.15-16.
There are some groups of islands which may in general qualify as legal archipelagos (within the definitions and requirements incorporated into the LOSC) but are not self-governing entities. These groups of islands are dependent territories of certain continental States which do not wholly consist of islands. This dependency prevents these groups of islands from relying on archipelagic status.\textsuperscript{202} If these groups of islands become fully independent and self-governing, they are able to rely on the archipelagic rules introduced by the LOSC. This is because once the islands become independent countries, they are no longer part of continental States and are eligible to benefit from archipelagic principles. The islands are then only required to comply with the provisions incorporated into the LOSC, as is the case with other existing independent archipelagos. Examples of these groups of islands are Antilles (the Netherlands), New Caledonia (France), Micronesia (the USA), Cook Islands and Tokelau Islands (New Zealand).\textsuperscript{203}

Another issue is related to the status of waters enclosed by archipelagic baselines. It is particularly the case with respect to the Philippines. Although the LOSC describes the waters within archipelagic baselines as “archipelagic waters”, the Philippines has considered waters within its archipelagic baselines as “internal waters”. At the time of depositing its instrument of the ratification of the LOSC (8 May 1984), the Philippines stated that “[t]he concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines ...”.\textsuperscript{204} This statement was countered by a number of States, including Australia, Byelorussia, the former Czechoslovakia, the Ukraine, the United States and the former USSR.\textsuperscript{205}

\textsuperscript{202}Putting aside the element of dependency, the United States of America and New Zealand are among certain continental States which “may have preferred not to make use of the rules applicable to archipelagic regime due to their vital interest in preserving freedom of navigation.” \textit{Ibid.}, p.5.
\textsuperscript{203}\textit{Ibid.}, p.4. Other examples of this category of groups of islands are American Samoa (the USA); Anguilla, Turks and Caicos Islands (the UK); the Azores and Madeiras Island (Portugal); Dahlac Archipelago (Ethiopia); Falkland Islands (the UK); Guadeloupe (France); Jan Mayen (Norway). Alexander, L. M., \textit{Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the United States}. Offshore Consultants Inc., Peace Dale, Rhode Island, December 1986, p.91 (Table 10B). In general, provisions of Articles 46 and 47 of the LOSC imply that there are three kinds of archipelagos: (i) archipelagic States which qualify under the Convention for archipelagic baselines; (ii) archipelagic States which do not so qualify under the Convention; (iii) dependent archipelagos which do not so qualify under the Convention.” Brown, \textit{op. cit.}, 1994, p.109.
\textsuperscript{204}\textit{Multilateral Treaties Deposited With the Secretary-General}. United Nations, New York, 1984, p.682. Article 1 of the new 1987 Philippine Constitution states: “The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the \textit{internal waters} of the Philippines.” (emphasis added)
\textsuperscript{205}See \textit{Ibid.}, pp.866-868.
The main argument against the Philippine claim is based on the fact that coastal States generally enjoy exclusive and absolute rights in internal waters where there are no internationally guaranteed rights for foreign ships and aircraft. This is in contradiction to the legal regime established for archipelagic waters where the rights of international community are guaranteed in the form of innocent passage and the archipelagic sea lanes passage. In addition, reliance on historic title over the waters within the Philippines’ archipelago does not appear to be recognised since such a recognition would deprive international community of accessing some important waterways. This is why (following an Australian objection over the position of the Philippines concerning the waters within the Philippine archipelagic baselines) the Philippines submitted a declaration to the UN Secretary-General on 26 October 1988. This declaration asserted the Philippines’ intention to make its legislation in harmony with the LOSC. The declaration, *inter alia*, included that “[t]he necessary steps are being taken to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention [LOSC].”

Table 5.1 shows the current status of non-continental States proclaiming archipelagic baselines. There are also other States which may lay claims on the ground of having archipelagic status. However, not all claims comply with the LOSC.

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208 According to one source, States with archipelagic status can presently be divided into two main categories: actual claimants and potential claimants. The former category includes Indonesia (1.2:1), Philippines (1.8:1), Comoros (3.9:1), Papua New Guinea (1.3:1), Kiribati, Solomon Islands, Tuvalu, Vanuatu (4.7:1), Antigua and Barbuda (6.6:1), Grenada (1.4:1), St. Vincent and the Grenadines (1.3:1), Trinidad and Tobago (1.4:1), Cape Verde (2:1), Sao Tome and Principe 3:1). The latter category includes: (a) in Indian Ocean: Bahrain (1.2:1), Maldives, Mauritius, and Seychelles; (b) in South Pacific: Tonga (2.3:1 or 8.9:1); (c) in Caribbean: Jamaica (1.2:1), St. Kitts and Nevis (0.8:1), Bahamas, and Cuba; (d) in Mediterranean: Malta (0.64:1). (The figures in the parentheses indicate the ratio of water to land.) Kwiatkowska and Agoes, op. cit., p.60.
<table>
<thead>
<tr>
<th>State</th>
<th>Official Source of the Proclamation</th>
<th>Source Containing the Proclamation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antigua and Barbuda</td>
<td>Maritime Areas Act, 1982</td>
<td>The Law of the Sea, pp.13-15</td>
</tr>
<tr>
<td>Cape Verde</td>
<td>Decree Law No. 126/77 of 31 December 1977</td>
<td>The Law of the Sea, pp.99-100</td>
</tr>
<tr>
<td>Comoros</td>
<td>Law No. 82-005 relating to the delimitation of the maritime zones</td>
<td>Practice of Archipelagic States, pp. 20-22 (particularly Article 1)</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Act No. 4 (Straight Baselines) of 18 February 1960</td>
<td>Limits in the Seas, No.35, 20 July 1971</td>
</tr>
<tr>
<td>Kiribati</td>
<td>Maritime Zones (Declaration) Act, 1983 - Act of 19 May 1983</td>
<td>Practice of Archipelagic States, p.56-60</td>
</tr>
<tr>
<td>Marshall Islands</td>
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<td>Limits in the Seas (No.112), p.45.</td>
</tr>
<tr>
<td>Papua New Guinea</td>
<td>National Seas Act, 1977 - Act No. 7 of 7 February 1977</td>
<td>Practice of Archipelagic States, pp.61-74</td>
</tr>
<tr>
<td>Sao Tome and Principe</td>
<td>Decree-Law No. 48/82, 2 December 1982</td>
<td>The Law of the Sea, pp.271-273</td>
</tr>
<tr>
<td>Solomon Islands</td>
<td>The Delimitation of Marine Waters Act (No. 32 of 1978), Declaration of Archipelagic Baselines, 1979</td>
<td>U.N., ST/LEG/SER.B/19f, pp.107-109</td>
</tr>
<tr>
<td>Trinidad and Tobago</td>
<td>Archipelagic Waters and Exclusive Economic Zone Act, 1986 - Act No. 24 of 11 November 1986</td>
<td>Practice of Archipelagic States, pp.112-123 (particularly p.114)</td>
</tr>
<tr>
<td>Tuvalu</td>
<td>Marine Zones (Declaration) Ordinance, 1983 - National Limits of Jurisdiction</td>
<td>Practice of Archipelagic States, pp. 124-130 (particularly pp.126-127)</td>
</tr>
</tbody>
</table>

(e) National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas, and to Fishing and Conservation of the Living Resources of the Sea. United Nations, New York, 1970.

- Comoros, Kiribati, Marshall Islands, Saint Vincent and the Grenadines, Trinidad and Tobago, and Tuvalu have not yet provided maps illustrating their archipelagic baselines. Prescott maintains that The Bahamas, Grenada, Jamaica, and Maldives are eligible to draw archipelagic baselines. Prescott, J. R. V., 'Straight and Archipelagic Baselines', in Gerald Blake (ed.), Maritime Boundaries and Ocean Resources. Croom Helm, London and Sydney, 1987, p.47. Brownlie also considers Mauritius and Seychelles as archipelagic States. See Brownlie, Ian, Principles of Public International Law. Clarendon Press, Oxford, 1990, p.193 (no.75). The Mauritius’ Act of 16 April 1970 (S.5(b)) provided an archipelagic baseline system for those islands forming an archipelago. See International Boundary Series, published by the Geographer to the U.S. Department of State, Ser.A, No.41. Cuba is not mentioned among archipelagic States in the source mentioned in paragraph (b) above. However, Cuba has employed straight lines in a way that assimilates to archipelagic baselines. For example, the map produced on page 118 of the source mentioned in paragraph (a) is named “Cuba- Archipelagic Baselines”. See Verbal Note to the United Nations, 13 November 1985 in the source mentioned in paragraph (a), pp.112-118. In assessing such claims, the provisions of Article 47 of the LOSC should be kept in mind as determinant elements in finding whether a State is an archipelagic State within the framework of the LOSC.
VIII. The Issue of Outlying Islands of Continental States

Despite the fact that the provisions on archipelagic baselines were designed for merely legal archipelagic States as defined in Article 46 of the LOSC\(^{209}\), some continental States have applied straight baselines around groups of their offshore islands.\(^{210}\) These baselines connect the outermost points of outermost islands indicating that the baselines play the same role as the archipelagic baselines.\(^{211}\) The continental States with outlying archipelagos were seeking at the UNCLOS III to gain a recognition for the application of the new archipelagic regime to their archipelagos.\(^{212}\) These States expressed their "interests in the resources of the seas and national security" to justify the archipelago principle for their archipelagos.\(^{213}\) Although efforts made during the UNCLOS III to extend the applicability of the new archipelagic baseline system to offshore islands of continental States\(^{214}\), no provision was adopted for this purpose.

\(^{209}\) Article 1(1) of the 1974 proposed articles by Fiji, Indonesia, Mauritius, and the Philippines on archipelagos stated that "these articles apply only to archipelagic states." UN Document A/CONF.62/C.2/L.49.

\(^{210}\) One views that "if the islands in question constitute in fact a closely related group, geographically separate and distinct from the coastal state, it is somewhat difficult to see why the mere fact of being related to a coastal state should prevent the drawing of archipelagic baselines." Vicuna, Francisco Orrego, 'International Ocean Law Developments in the Southeast Pacific: The Case of Chile', in John P. Craven et al (eds.), The International Implications of Extended Maritime Jurisdiction in the Pacific, Proceedings of the 21st Annual Conference of The Law of the Sea Institute (3-6 August 1987, Honolulu), The Law of the Sea Institute, Honolulu, 1989, p.228. Also see Brown, op. cit., 1994, pp.123-124.

\(^{211}\) As one source states 'several continental states, including Denmark, Ecuador, Portugal, and Spain, have established straight baselines around their islands in a manner simulating an archipelago. Limits in the Seas. No.112. Office of Geographer, Bureau of Intelligence and Research, the United States Department of State, Washington D.C., 1992, p.44.


\(^{213}\) O'Connell, op. cit., 1971, p.1. Anand also writes that Ecuador and India have claimed archipelago status for their outlying islands "for practically the same security and economic reasons" as were relied upon by the archipelagic States. Anand, op. cit., p.255. For the political and economic reasons of the exclusion of "archipelagic dependencies" from the employment of archipelagic baselines see Bowett, op. cit., pp.106-107.

\(^{214}\) See for example Articles 9-11 of the Working Paper prepared by Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand, and Norway at the UNCLOS III. UN Doc. A/CONF.62/L.4, 26 July 1974. At the UNCLOS III, these countries (except Indonesia which later preferred to follow its own criteria) along with such other continental countries as Ecuador, France, Portugal, and Spain (which all possess groups of offshore islands) were advocates of inclusion of a provision applying archipelagic regime to these islands. However, the UNCLOS III did not adopt such an inclusion mainly due to its effects on free navigation.
Currently there are a number of continental States (those coastal States which are not wholly composed of groups of islands) which have applied straight baselines around their offshore islands with the effect of archipelagic baselines.215 These States include Australia (Houtman Abrohols and Furneaux), China (Xisha (Paracel) Islands), Denmark (Faeroes Islands)216, Ecuador (Galapagos (Colon) Islands)217, France (Kerguelen Islands), India218 (Andaman Islands and Nikobar Islands, and

215 Although straight baselines and archipelagic baselines may be assimilated in the sense that they both enclose a wide area of waters, their applications are governed by different legal rules. In addition, straight baselines have a longer history while archipelagic baselines have their legal foundations in the new convention on the law of the sea (LOSC, 1982). There are only a limited number of legal archipelagos whereas there are many coastlines for which the use of straight baselines has been justified. This fact has led to a wider application of straight baselines in comparison with archipelagic baselines.

216 Denmark issued a decree on 12 March 1964 and applied 13 straight baselines with the total length of 163 nautical miles around the Faeroes Islands and considered the whole islands as a single unit. See Dubner, Barry Hart, ‘A proposal for accommodating the interests of archipelagic and maritime States’, International Law and Politics, Vol.I, 1975, p.58. The ratio of water to land in the case of the Faeroes Islands is said to be 2:1. Bowett, op. cit., p.91.

217 As the first country which laid claims over ocean islands as a single unit, Ecuador drew baselines between the outer most points of the outermost islands in the Galapagos. The basis for this measures was the Presidential Decree of 2 February 1938 on Fisheries which was completed by the Presidential Decree of 22 February 1951. See Evensen, op. cit., pp.298. Then, the Ecuadorian Decree of 28 June 1971 enclosed the Galapagos islands (including the Darwin Island) by drawing eight straight baselines resulting in a high ratio of water to land. Bowett, op. cit., p.92. In addition, following a Presidential Decree of No. 1810-A on 29 April 1986, Ecuador established a marine resource reserve consisting of the waters, seabed and subsoil of the Galapagos Islands within the baselines drawn in 1971 and outside of these baselines up to 15 miles. According to its Preamble of the Decree, the measure was taken on “ecological, economic, scientific, educational, and political reasons.” Vicuna, op. cit., p.228. The Reserve area covers a marine area of 70,000 km² of which 50,000 km² are internal waters enclosed by archipelagic baselines and the other 20,000 km² are located in the 15 mile area (the buffer zone). Brown (1991), op. cit., p.212. It is also stated that “[t]he length of protected coastline is greater than the total coastline of continental Ecuador.” Ibid.

218 According to the 1976 Act of India on its maritime zones, Andaman and Nicobar Islands and Lakshadweep Islands are considered as single units that is the core of the archipelago principle. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act (1976), Reprinted in Indian Journal of International Law., Vol.16, p.447. Khodie is of the view that as far as the Andaman and Nicobar Islands and Lakshadweep (Laccadive) Islands are concerned, India is regarded as an archipelagic State and the sovereignty of India extends over archipelagic waters and territorial seas of these islands. Although Article 297 of the Constitution of India does not refer to archipelagic waters, Khodie relies on this Article to extend the rights of India over resources of maritime areas located within the islands on an archipelagic status. Khodie, Narmada, ‘International Maritime Law and India’s State Practice’, in Satish Chandra et al (eds.), The Indian Ocean and Its Islands: Strategic, Scientific and Historical Perspectives, Sage Publications, New Delhi, 1993, p.98.

In contrast, Sharma writes that despite its efforts at the UNCLOS III to treat archipelagos forming part of continental States in a manner similar to those of archipelagic State, “India was not able to persuade the Conference to accord the status of an archipelago to a group of islands of a continental coastal state such as the Andaman and Nicobar Islands or the Lakshadweep group of islands.” Sharma, O. P., ‘India and the United Nations Convention on the Law of the Sea’, Ocean Development and International Law, Vol.26, 1995, p.398. There are two main effects arising from refusing the Andaman and Nicobar Islands as legal archipelagos: (a) India would not enjoy sovereignty or sovereign rights over a maritime area of 23,000 km²; (b) the passage of foreign ships through the Ten Degree Channel would not be subject to “the restrictive regime of innocent passage or archipelagic sealanes passage.” Ibid. For the view of the Indian Delegate on the extension of archipelagic regime to Andaman and Nicobar Islands see UNCLOS III, Official Records, Vol.II, p.263 (para.40).
Lakshadweep Islands), Norway (Spitsbergen (Svalbard archipelago)), Portugal (Azores Islands), Spain (Balearic and Canary Islands), and Sudan (Suakin Archipelago). (See for example maps of Azores Islands, Faeroes Islands, and Galapagos Islands below.)

Prescott argues that claims of continental States over their outlying archipelagos may be justified if there is a large island surrounded by other small islands. Prescott refers to the Kerguelen archipelago as a clear example where there exists a principal island to justify the use of straight lines to connect islands surrounding the principal island.

Whatever the justification for the use of archipelagic baselines by certain continental States might be, it seems that the provisions of the LOSC on archipelagic baselines were engineered to be only applied to real archipelagic States and it was not intended to extend these provisions to non-archipelagic States. Adoption of the notion of legal archipelagos

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219The sovereignty of Norway over the Svalbard Islands was recognised by the Spitsbergen of 9 February 1920. Norway has considered the islands as a single unit connecting the outermost islands by a series of straight baselines. According to Bowett, the Norwegian Decree of 25 September 1970 set up two separate straight baseline system for the islands of Svalbard, Bear (Bjornoya), and Hopen. with “a very low water/land ratio.” Bowett, op. cit., p.91.

220Prescott, op. cit., 1996, p.18; Roach and Smith, op. cit., p.23; Churchill and Lowe, op. cit., p.92, and Kwiatkowska and Agoes, op. cit., p.6. Brown also names some other mid-ocean archipelagos which are part of continental States. These archipelagos are the Aleutians, Florida Keys, and Hawaiian Islands (the USA); the Bermudas (the UK); and Tuamotu (France). Brown, op. cit., 1994, p.107. Other examples are: Gilbert Island, Ellice Islands, Falklands, and Chagos Archipelago (British); Ryukyu Islands (Japan); New Hebrides (British/French Condominium); Wallis and Futuna (French); Cocos (Australia); and Kermadee (New Zealand). Bowett, op. cit., p.93. In the case of the Arctic Islands of Canada, Canadian Government decided to link the Islands (including Queen Elizabeth Islands, located in the north of the Parry Channel) to the Canadian mainland by drawing lines around outer side of the islands. By doing this, waters between islands were enclosed by straight baselines. The Canadian Government did not claim archipelagic status for its Arctic Islands and did not employ archipelagic baselines for these islands. For background information on State practice concerning outlying (mid-ocean) archipelagos, including the Faeroes, the Svalbard Archipelago, the Bermudas, the Galapagos, Cook Islands, and Hawaiian Islands see Evensen, Preparatory Document No.15, op. cit., pp.297-299. For information on some other archipelagos see O’Connell, op. cit., 1982, pp.246-254. In the Fisheries Case (1951), the UK rejected the application of any archipelagic baseline system for the Cook Islands and Fiji Islands. See Fisheries Case (UK v. Norway), ICL, Pleadings, Vol.II, 1951, pp.523-524. Also see ibid., p.532 with respect to the Bermudas Islands.

221Prescott, op. cit., 1987 (Straight and Archipelagic Baselines), p.45. Prescott states that the argument may work for the Furneaux Group in Bass Strait but it does not work for Houtman Abrolhos off Western Australia, the Islas Canarias or the Islas Galapagos. Ibid.


223In the Caracas Session of the UNCLOS III (10 July 1974), the Thai delegation opposed to the application of archipelagic principles to those archipelagos “which do not have the status of States.” Two reasons were forwarded for such opposition: “The first reason is that, if the same principles should apply, why should there be the concept of archipelagic states at all. ... The second reason ... is that if theses principles should apply to all archipelagos, which may again have their territorial waters and other jurisdictional zones, how much will be left for the international area. In that case, we may ask ourselves if we are really serious with the principle of common heritage of mankind, we know uphold. We may also ask ourselves that while we challenge the principle of mare liberum, whether
has already resulted in conversion of a vast area of the high seas into archipelagic waters. Thus, it would not be reasonable to enclose offshore archipelagos of continental States by the application of the straight lines which have the same impact as archipelagic baselines. Otherwise, such enclosure would exclude the freedom of navigation and overflight in a wider area of waters which would not be consistent with the balance of interests achieved by the adoption of the LOSC.224

Map 5.9
Portugal’s Straight Baselines (Azores Islands)


we are no swinging back to the other extremity of *mare clausum.*” Statement by Dr. Arun Panupong (Head of the Thai Delegation at the UNCLOS III), Caracas Session of the UNCLOS III, 10 July 1974.

Sharma points out that the reason why the UNCLOS III did not adopt the extension of archipelagic rules to the ocean islands of continental States was “a fear of interference with the freedom of navigation through vast tracts of archipelagic waters that would be created if the off-lying islands of continental coastal states were to be granted archipelagic status.” Sharma, *op. cit.*, p.398.
IX. Conclusion

It is apparent that although the drawing of archipelagic straight baselines is permitted by the LOSC in the case of island States qualified as archipelagic States, some requirements were incorporated into the Convention for the validity of these baselines. These requirements must completely be met if the baselines are to be recognised. Although these requirements restrict the unilateral drawing of archipelagic baselines, the application of the archipelagic baselines, even in compliance with the provisions of the LOSC has a significant impact on the enclosure of large areas of the seas. This has, in turn, had adverse implications for the free navigation in the seas. For example, Fiji and Mauritius (which enjoy small area of land) have been able to claim a very large sea area with reliance on the archipelagic State concept. Due to the effects of the archipelagic baselines on the enclosure of the high seas and their freedoms, it is

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225 As regards the binding force of Article 47 of the LOSC, it is mentioned that certain archipelagic States (like Kiribati) are of the view that compliance with the provisions of Article 47 is “arbitrary” and they do not have binding force for those archipelagic States which were not involved in the preparation of these provisions. Prescott, 1987 (Straight and Archipelagic Baselines), p.48.

226 Dupuy, op. cit., p.273.
therefore necessary to draw these baselines in conformity with rules and spirit of the LOSC.

It should, however, be noted that although certain rights were granted to the legally qualified archipelagic States (including the right to employ proper archipelagic baselines), inclusive rights of third States and the international community were preserved. In fact, the provisions on mid-ocean archipelagos in the LOSC show a balance between the competing interests of archipelagic States and user States. The obvious example is the adoption of archipelagic baselines in return for acceptance of innocent passage\textsuperscript{227} in archipelagic waters and the new right of archipelagic sea lanes passage\textsuperscript{228} through straits within archipelagic waters which have been traditionally used for international navigation and flight.\textsuperscript{229} The existence of these rights makes the legal status of the archipelagic waters \textit{sui generis}. While in normal situations waters within baselines are internal waters, in the case of the mid-ocean archipelagos, waters within archipelagic baselines are considered “archipelagic waters” where there are certain rights of transit for third States.\textsuperscript{230}

\textsuperscript{227}According to Article 19(1) of the LOSC, the right of innocent passage is a right of passage which will not be prejudicial to the peace, good order or security of coastal or archipelagic States. Article 19(2) of the LOSC provides a lists of activities which are considered to be prejudicial to the peace, good order or security of coastal or archipelagic States.

\textsuperscript{228}Article 53(3) of the LOSC provides that "[a]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."

\textsuperscript{229}Article 53(12) of the LOSC.

\textsuperscript{230}In addition to the maintenance of the rights of navigation and overflight, there are some other preserved rights for third States. Article 51(1) of the LOSC requires archipelagic States to respect their agreements previously concluded with other States and to recognise "traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters." Article 51(2) of the LOSC also contains another right for third States in the archipelagic waters. It states that the recognition of the new legal regime for the mid-ocean archipelagos does not affect the existing submarine cables in the archipelagic waters. These cables may be maintained and replaced or repaired provided that the State concerned submits a notice to the archipelagic State which includes the place of the cables and the intention to do so. This does not apply, if these cables make a landfall. It seems that because in this case the cables enter the land territory of the archipelagic State, this State is more involved and it is the only authority which has competence to make a decision concerning these cables.
Chapter Six

*Delimitation of the Outer Limit of the Territorial Sea*
Chapter 6
Delimitation of the Outer Limit of the Territorial Sea

I. Introduction

The issue of delimitation of the outer limit of the territorial sea\(^1\) has been one of the most controversial issues in the recent history of international law in general, and of international law of the sea in particular.\(^2\) The main reason for this controversy has been the implication of extension of territorial seas for the freedom of navigation and other freedoms of the high seas.\(^3\) The national claims over territorial seas covered a wide range, from 3 nautical miles to 200 nautical miles, although the latter excessive claims failed because of their impacts on the right of navigation since they would restrict the freedom of navigation by subjecting it to national discretion. The following part of this chapter will show how the international community went through the process of compromising between national interests of coastal States and the maintenance of the freedom of the high seas. This is, for example, evident in the acceptance of twelve nautical miles for the maximum limit of the territorial sea and the adoption of the right of transit passage through international straits.

II. Historical Development in the Delimitation of the Outer Limit of the Territorial Sea

The history of the extent\(^4\) of the territorial sea is, in fact, part of the history of the territorial sea which constitutes maritime territory of coastal States. It is essential to study the development of the extent of this maritime territory in historical context to present a comprehensive

\(^1\) It was the Second Committee of the 1930 Hague Conference (Committee on Territorial Waters) which introduced the term "Territorial Sea" as an appropriate substitute for the term "Territorial Waters". The term "Territorial Waters" was previously used to include inland waters and waters beyond the inland waters to a certain extent.

\(^2\) The extension of the territorial sea breadth was a controversial issue (a) particularly because of its impacts on passage through international straits; and (b) because the freedom of navigation in some parts of the high seas would become subject to the limited right of innocent passage.

\(^3\) As Harris writes "the extension of the territorial sea to 12 miles has important consequences for the right of innocent passage for ships; it also affects aircraft which have no right of innocent passage over the territorial sea. Harris, *Cases and Materials on International Law*, Fourth Edition, Sweet & Maxwell, London, 1991, pp.353-354.

\(^4\) The words "extent", "breadth", and "limit" are used interchangeably in this thesis.
approach towards the final resolution of this issue in the modern law of the sea and the impacts on the right of navigation.

1. The Era Before the 1930 Hague Conference

The traditional law of the sea had recognised that coastal States have sovereignty over a maritime belt adjacent to their coasts. However, the controversial issue has been the determination of the permissible extent for such a maritime area. Ngantcha argues that "[t]he main obstacle to reaching agreement (on the issue of the breadth of the territorial sea) has always been the link made by most States between the legal status of the territorial sea and the issue of its maximum permissible outer limit." It has been clear that the extension of territorial sea would restrict the scope of the principle of the freedom of high seas. Therefore, attempts have been made to reconcile competing interests of coastal States and user States. The history of the law of the sea demonstrates that for a long time States were not able to agree on a specific limit ensuring the economic and security interests of coastal States on one hand and the freedoms of the high seas on the other.

In the seventeenth century, there was no doubt that a coastal State was entitled to exercise a degree of jurisdiction in its adjacent maritime belt despite the existing conflicts of opinions on the scope of freedom of the seas. Some criteria were suggested in order to determine the extent of such a jurisdictional area. One of the primary criteria for the extent of the marginal waters was the vague method of "the range of visibility". However, the first physical method proposed for the determination of the territorial sea limit was based on the cannon-shot rule. In the eighteenth century, the range of cannons was approximately equivalent to a marine league or three nautical miles. The application of the method was an outcome of the theory created by Grotius and Bynkershoke, that is

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6 In this thesis a reference to the measure unit of "mile" is a reference to "nautical mile". Different measures have been cited for a nautical mile, such as 1852 and 1853 meters. In 1929 the International Hydrographic Bureau adopted an International Nautical Mile as being equivalent to 1852 meters. This measure was later accepted by the International Bureau of Weights and Measures. State practice has indicated a wide recognition of this measure. Maritime Limits and Baselines: A guide to their delineation. Special Publication No.2, Third Edition, The Hydrographic Society, Essex, June 1987, p.6.

sovereignty of a coastal State ends at a point being the final range of a cannon-shot.\(^8\) However, advances in military technology and production of modern cannons proved that such a theory was not reliable. This was because changes in the developments of cannons equalled changes in limits of the territorial waters. It was later realised that the limit of territorial sea had to be fixed.

It was Galiani, an Italian jurist, who in 1782 suggested three nautical miles for the width of the territorial waters for the first time. At the time of emergence of such a rule, it became acceptable for a number of States such as the United Kingdom and the United States of America. For example, the USA officially declared three nautical miles as the breadth of its territorial sea in its 1793 proclamation for neutrality purposes.\(^9\) This limit gradually attracted the attention of many States and in the beginning of the twentieth century it obtained the most support. This led to an idea that the three-mile rule was in the process of transformation into a customary rule. This limit was considered as traditional limit for the breadth of territorial sea. Although this limit was largely supported by some States, it was not the sole existing limit for territorial waters. According to Churchill the three-mile limit "was never unanimously accepted."\(^10\) Ngantcha also states that "the three-mile rule was not universally accepted as the limit of territorial waters in international law."\(^11\)

Among other limits applied to the territorial sea were four and six nautical miles. The four nautical miles extent was recognised by Scandinavian countries such as Norway and Sweden. It could be considered as a regional custom. As Smith writes, the existence of the four nautical mile claim dates back to the eighteenth century\(^12\), that is before the emergence of three nautical mile claims.\(^13\) The six nautical mile limit was another classic claim to the territorial sea, though not as old as the four

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\(^8\)In 1744, Cornelius van Bynkershoek, the Dutch jurist, stated: 'Potestatem terrae finiri, ubi finitur armorum vis' (... the control from lands ends where the power of men's weapons ends.) Bynkershoek, Cornelius van, De dominio maris dissertatio, 1774, cap II. (English Translation: Magoffin, R van. D., The Classics of International Law. No.11. Edited by J. B. Scott, Oxford University Press, 1923, p.44.

\(^9\)Churchill and Lowe, op. cit., p.59.

\(^10\)Ibid.

\(^11\)Ngantcha, op. cit., p.15. In 1927, Jessup found that at that time the three mile limit was an established rule of international law. Jessup, Philip C., The Law of Territorial Waters and Maritime Jurisdiction. G. A. Jennings Co., INC., New York, 1927, p.66.


\(^13\)In the World War I, Norway established a four mile limit as its neutral waters. However, the United Kingdom and Germany did not accept four miles for neutrality purposes. Ibid.
nautical mile limit. The six mile limit was adopted by such countries as Italy, Greece, Portugal and Spain. Such claims indicated that the three mile limit was not an absolute rule for the breadth of the territorial sea. In fact, it has been argued that there exists no "single limit for territorial sea claims existing at any one time."14

State practice in the nineteenth century illustrated that there was no claim less than three nautical miles for the breadth of the territorial waters and there was no dispute on the minimum breadth of the territorial sea. However, the controversy was on its maximum limit.15 There was no agreement on the maximum breadth of such adjacent waters. Such a dispute lasted until the UNCLOS III (when the establishment of the twelve mile limit was adopted as the maximum limit for the territorial sea). One example of the conflicts which arose among the supporters of different limits for territorial sea is "the Anglo-Spanish dispute".16 The determination of the outer limit of territorial waters was important for the avoidance of conflicts among coastal States and user States. Such tensions might result in military conflicts. At the beginning of the twentieth century, the three nautical mile limit obtained the support of a larger number of States, but it was not officially recognised for universal application.

2. The 1930 Hague Conference on the Codification of International Law

At the time of League of Nations Conference for the Codification of International Law (the 1930 Hague Conference), there was strong support for the three nautical mile limit in comparison to other existing limits for territorial sea.17 Maritime States of Belgium, Canada, Denmark, Germany, Japan, the UK and the USA supported the three mile limit.18 The

14Churchill and Lowe, op. cit., p.60. As an exceptional case, Lebanon did not put any claim on its adjacent waters, known as territorial sea until quite recently. Lebanon ratified the LOSC on 5 January 1995 and it now claims 12 nautical miles for its territorial sea. The lack of claim to the territorial sea by Lebanon led to a number of uncertainties on the rights and responsibilities of Lebanon as a coastal State. See, for example, Dissenting Opinion of Judge McNair, ICJ Reports, 1951, p.160.
15In 1907, Westlake was in the opinion that there is universal agreement on three mile limit "as a minimum", but "[a]s a maximum the agreement is not universal." Quoted in Jessup, op. cit., p.65.
16Churchill and Lowe, op. cit., p.60.
17The Conference was convened by the League of Nations to discuss three issues of international law, namely Nationality; Territorial Waters; and Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners. See Resolution of 27 September 1927, the Assembly of the League of Nations. The Conference was held at The Hague, the Netherlands, from 13 March to 12 April 1930.
Scandinavian countries relied on their traditional four mile limit.\textsuperscript{19} The Union of Soviet Socialist Republics (USSR) favoured the twelve mile limit for the breadth of the territorial sea.\textsuperscript{20} As is shown in Table 6.1, at the time of the 1930 Conference twenty States were in favour of the three mile limit, four States in support of a four mile limit, twelve States in favour of a six mile limit (particularly Mediterranean countries), and one State in favour of the twelve mile limit.\textsuperscript{21}

In the last session of the Territorial Waters Committee of the Conference, the three mile limit could not achieve the required majority of votes for its adoption as the maximum limit of the territorial sea.\textsuperscript{22} As is well-known, this failure was the major reason the Conference could not approve any draft articles on the breadth of territorial sea. After the Conference, the divergence in State practice continued.\textsuperscript{23} In such a situation, in 1934 Gidel contended that there existed no definite rule for delimitation of the territorial sea.\textsuperscript{24} If the Conference had accepted three nautical miles, it would possibly have become well-established rule for the breadth the territorial sea in international law.

After World War II the controversy on the extent of the territorial sea became wider. This is because a number of the newly-emerged countries claimed a variety of limits for the territorial sea ranging from three to two hundred nautical miles.\textsuperscript{25} Smith considered that in the

\textsuperscript{19}These countries included Norway, Sweden, Finland and Iceland. Boggs, \textit{op. cit.}, p.542.
\textsuperscript{20}The origin of the Soviet Union claim of the twelve mile limit dates back to the 1909 Russian claim for customs purposes along its coast. Oda, \textit{op. cit.}, p.15.
\textsuperscript{21}Boggs writes that at the 1930 Conference it was pointed out that “four-fifths of the shipping of the world” was conducted by nations which applied three nautical miles for their territorial sea. Boggs, S. Whittemore, 'Delimitation of the Territorial Sea', \textit{American Journal of International Law}, Vol.24, July 1930, p.542.
\textsuperscript{22}Churchill and Lowe, \textit{op. cit.}, p.60.
\textsuperscript{23}Akehurst writes that "[t]he failure of a codification scheme may cast doubt on customary rules which were previously well established. (This is what happened to the three-mile rule concerning the width of the territorial sea after the failure of the 1930 conference.)" Akehurst, Michael, \textit{A Modern Introduction to International Law}, Sixth Edition (3rd impression), Harper Collins Academic, London, 1991, p.33.
\textsuperscript{24}\textit{Ibid.}
\textsuperscript{25}Major reasons for the extension of the territorial sea have been economic and security reasons. Having a wide territorial sea would ensure fishing and security interests of coastal States, particularly those of developing States. This is because the only right available for foreign ships in the territorial sea is the right of innocent passage. No fishing activities by foreign ships are permitted in such a maritime zone. The interests of States opposing the extension of the territorial sea have also been based on the same grounds but with different approaches. On this point see Bowett, D. W., 'The Second United Nations Conference on the Law of the Sea', \textit{International and Comparative Law Quarterly}, Vol.9, 1960, pp.416-421.
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(a) At the time of the Hague Conference for the Codification of International Law. (b) At the time of the First United Nations Conference on the Law of the Sea (Geneva). (c) At the time of the Second United Nations Conference on the Law of the Sea (Geneva). (d) At the time of the Third Nations Conference on the Law of the Sea (Caracas, Venezuela). (e) United Arab Emirates (UAE) also applied a 12-mile limit to Sharga. (f) The 6-mile territorial sea of Turkey applies to the Aegean Sea. Turkey also claims a 12-mile limit in the Mediterranean and Black Seas. (g) Excluding UAE and Turkey. (h) Excluding UAE and Turkey. (i) Recent practice of States (As at 16 June 1995). (j) Including Belize, Japan, and UAE. Belize applies a 3-mile limit from the mouth of the Sarstoon River to Ranguana Caye. Japan also applies a 3-mile limit to the Tsugaru Strait, the eastern and western channels of the Tsushima Strait and the Osumi Straits. (k) There are 151 coastal States in the world, including the Cook Islands and Nieu. However, as of 16 June 1995, 146 States have enacted legislation on the breadth of the territorial sea. The remaining five States are Bosnia and Herzegovina, Eritrea, Georgia, Philippines, and Slovenia. There also exist 42 land-locked States in the world. *Total Number of States.

period after the World War II the three nautical mile limit developed as "a
general rule of law." However, the coming years proved that such a limit
was not able to become a general rule of international law. For example,
the 1956 session of the Council of Jurists of the Organisation of American
States was a forum in which an opposite view was expressed. In this
session the Council of Jurists maintained that the three mile limit for the
maximum breadth of the territorial sea was not a general rule of
international law. Thus, it was suggested that the conflicts resulting from
divergent claims over the territorial sea need to be resolved through
diplomatic channels.

   (Geneva, 1958)

Prior to the UNCLOS I, the ILC was asked to prepare a draft for
the basis of discussion on different issues related to the law of the sea. To
this end, the Commission performed an extensive study through period of
1950-56. One of the issues was about the breadth of territorial sea. In its
1956 report to the United Nations General Assembly, the Commission
stipulated that at the time "there was no uniformity as regards the three-
mile limit of territorial sea." The Commission expressed that "the
extension by a State of its territorial sea to a breadth between three and
twelve miles" was not considered "as a breach of international law." However, the Commission pointed out that international law did not
recognise the territorial seas of larger than twelve miles.

In the UNCLOS I, it became clear that the three mile limit would not
achieve a consensus among the participants. This was why a number of
proposals were submitted to bring about compromises among States
enabling the conference to reach an agreement on the limit of the territorial
sea. Efforts were made to recognise a fixed limit for the territorial sea.

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26 Smith, *op. cit.*, p.15.
29 The International Law Commission was set up by the General Assembly of the United Nations in
1947. Its major duty is to promote codification and progressive development of international law. This
Commission presently has thirty-four members who are elected by the General Assembly from
different geographical regions.
33 The USA was primarily in favour of a three mile limit. Its representative at the UNCLOS I argued for
such a limit as follows. "One of the merits of the three mile limit was that it was safest for navigation."
The issue was complicated because there were a number of purposes for claiming adjacent maritime areas that were different from those for claiming territorial sea. Claims to fisheries zones and also to certain zones for customs, immigration, and fiscal and sanitary purposes are examples of different purposes for various maritime areas adjacent to coastal States. The various proposals submitted to the Conference for the delimitation of the outer limit of the territorial sea included three mile limit, six mile limit\textsuperscript{34}, twelve mile limit, and the right to fix the territorial limit up to twelve miles. None of these proposals was accepted at the Conference. Accordingly, although Article 1 of the TSC recognises the sovereignty of a coastal State over the territorial sea, it does not define the outer limit of the territorial sea.

The failure of the first conference to make a final decision on the issue had an impact on State practice. After the conference a number of States extended their territorial sea, mainly up to twelve nautical miles. Since the TSC lacked provisions on the extent of the territorial sea and fishery zone, a second conference on the law of the sea was convened to deal with these issues.


The major aim of this conference was to specify a limit for the territorial sea and a limit for the fishing zone. It was apparent that the issues of the extents of these maritime areas are interrelated\textsuperscript{35} and these issues had to be resolved together. Like in the UNCLOS I, major maritime

\textsuperscript{34}In an attempt to reach a compromise, the USA proposed a six mile limit for the territorial sea and a further six mile limit for a fishery zone, provided that States engaging in fishing in the fishery zone for the past five years could continue to do so. Canada also suggested a twelve mile exclusive fishing zone. See, for example, Heinzen, Bernard G., "The Three-Mile Limit: Preserving the Freedom of the Seas", \textit{Stanford Law Review}, Vol.11, 1959, pp.652-655.

\textsuperscript{35}Oda writes "... under traditional and existing concepts, the extent of the territorial sea prima facie coincides with the monopoly of marine resources by the coastal State. It is, consequently, of great importance to the fishery interests of every State to determine how far the territorial sea should extend from the coast." Oda, \textit{op. cit.}, p.13.
States (excluding the Soviet Union which was among the advocates of the twelve mile limit) supported the three nautical mile limit to guarantee the freedoms of the high seas. However, it became clear in the UNCLOS II that the three mile limit would be no longer a basis for a compromise on the extent of the territorial sea. The problem was similar to that of the UNCLOS I in 1958.

To achieve a compromise on the issues, the USA, being one of the traditional sponsors of the three mile limit again presented its formula called "six plus six", but this time in the UNCLOS II. This formula was rejected. Canada suggested a similar formula but without any rights for foreign States in the fishing zone. The USA joined the Canadian proposal to pave the way for adoption of a fixed limit for the territorial sea. This joint proposal was similar to the USA proposal with the difference that the joint proposal limited the rights of the foreign fishing States to fish in the six mile fishing zone to a period of ten years. This proposal was considerably favoured but it did not gain a two-thirds majority of votes. The proposal needed just one more vote in favour to succeed. Accordingly, the UNCLOS II was unable to produce any official agreement on the major issues on its agenda.

The number of States extending their territorial seas dramatically increased when the UNCLOS II could not determine a limit for territorial sea. It became clear that the three mile extent no longer could be a

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38 In relation to the Canadian/United States proposal at the UNCLOS II to establish a territorial sea as narrow as possible, the representative of Byelorussia stated that "[t]he main objective of the champions of the six-mile limit was to obtain for their naval forces unconditional, so-called legitimate, access to foreign waters close to coasts in which they were interested for strategic or political reasons. (emphasis added) UN Doc. A/CONF.19/C.1/SR.17, p.13.
39 In relation to the failure of the UNCLOS I and the UNCLOS II to establish the outer limit of the territorial sea, Harris writes that the existence of such disagreement "reflected the uncertainty which has existed in customary international law for a number of years." Harris, op. cit., p.353. Also Brown maintains that the failure of the UNCLOS II made clear that "it would no longer be possible to maintain one boundary marking the outer limit of both the coastal State’s territorial sea and its exclusive fishing zone". Brown, E. D., The International Law of the Sea, Vol.1: Introductory Manual, Dartmouth, Aldershot, 1994, p.19.
40 In general, Anand endorses the fact that "[t]he trend to curb the freedom of the seas by extending coastal states jurisdiction for protection of security and economic interests of the coastal states increased after 1960. By the end of 1973, nearly 35 percent of the ocean, an area equal of the land mass of the planet, was claimed by the coastal states. Deploring this trend, some well-meaning jurists regretfully felt that the era of mare liberum “may now be drawing to a close.” Anand, R. P., ‘Changing
foundation for the outer limit of territorial sea, because of the increasing support for twelve and two hundred mile limits. While at the time of the Second Conference (1960) forty States claimed a three mile limit for the territorial sea, at the time of the UNCLOS III (1973) there were twenty-six States in favour of such a limit. (See Table 6.1.) This indicates that the number of supporters of the three mile limit declined in the period of 1960-1973. (See Table 6.1.) By comparison, at the time of the Second Conference the twelve mile limit was supported by sixteen States, while at the time of the UNCLOS III this limit obtained the support of fifty-two States. These data demonstrate a twenty-eight percent increase in support for the twelve mile limit in the same period. (See Table 6.2 below.)

Table 6.2
Percentages of Various Claims of States to the Territorial Sea Over Time (1900 - 1995)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NAUTICAL MILES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3</td>
</tr>
<tr>
<td>1900</td>
<td>95%</td>
</tr>
<tr>
<td>1930</td>
<td>50%</td>
</tr>
<tr>
<td>1958</td>
<td>55%</td>
</tr>
<tr>
<td>1960</td>
<td>51%</td>
</tr>
<tr>
<td>1973</td>
<td>24%</td>
</tr>
<tr>
<td>1988</td>
<td>8%</td>
</tr>
<tr>
<td>1990</td>
<td>7%</td>
</tr>
<tr>
<td>1995</td>
<td>4%</td>
</tr>
</tbody>
</table>

The two hundred mile limit was first claimed by the Latin American States. The terms epi-continental sea and patrimonial sea reflect these claims. However, there were two approaches on the claim of two hundred

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41The majority of the supporters of the twelve and two hundred mile limits are developing countries some of which came into being after the World War II. Akehurst writes that these new States are "economically and militarily weak, and therefore favour an extension of their territorial seas." Akehurst, op. cit., p.175.

42Although the extent of 200 nautical miles was claimed, national legislation containing such a claim provided that the claim would not affect the freedom of navigation and overflight. For example, Article 1 of the Law No.17,094-M 24 (29 December 1966) of Argentina set up a 200 nautical miles for its territorial sea. However, Article 3 of the Law stipulated that "this law shall not affect freedom of navigation or of air traffic." UN Doc. ST/LEG/SER.B/15, p.45.
nautical miles. One approach was that the territorial sea extends up to twelve miles, but the coastal States have sovereignty over the maritime belt adjacent to States up to two hundred miles for the purposes of exploration and exploitation of natural resources (patrimonial approach). Ecuador, Panama, and Peru are examples of these States. Another approach was towards a two hundred mile territorial sea in which the right of innocent passage was recognised (territorial approach). Examples of these States are Colombia, Haiti, Jamaica, Mexico, Trinidad and Tobago, and Venezuela.


The UNCLOS III began its work in 1973 and ended with the codification of the 1982 Convention on the Law of the Sea, opening for signature on 10 December 1982 in Montego Bay, Jamaica. The first substantive session of the Conference was held in 1974. (Examples of Claims to the Breadth of the Territorial Sea, as of 1974, are presented in Table 6.3.)

It was in the UNCLOS III that the twelve mile limit, as the maximum extent of the territorial sea, was finally adopted in order to be incorporated into the forthcoming convention. The maximum limit of twelve miles emerged in the draft Convention in Caracas session on 7 March 1975. This adoption was in line with a number of compromises made in the conference to achieve "a package deal".

The twelve mile limit was codified mainly because it was agreed to establish a new regime of passage through international straits. Maritime powers favouring the three mile limit for the territorial sea were afraid of

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43In August 1952 delegates of the Latin American States of Chile, Ecuador, and Peru attended the Santiago Conference (Chile) to discuss resource issues in the South Pacific. Subsequently, a declaration was made, the so-called Santiago Declaration. According to this Declaration sovereignty and jurisdiction of these three States extended to a 200 mile maritime zone adjacent to their coasts in which the right of innocent passage was recognised. A second Conference was held in Lima (Peru) in December 1954 in which the Santiago Declaration was confirmed. Oda, op. cit., pp.21-22.

44Although Ecuador attempted to convince the delegates at the UNCLOS III to accept the limit of 200 nautical miles for the breadth of the territorial sea, its attempt failed to succeed. See UNCLOS III, Official Records, Vol.IV, pp.75-80.


46The method of decision-making at the UNCLOS III was different from the method at the past two conferences on the law of the sea. Whereas in the First and the Second Conferences decisions were made by two-thirds majority, the Third Conference adopted the method of consensus for the procedure of decision-making.
Table 6.3
Examples of Claims to the Breadth of the Territorial Sea as of 1974 (At the time of the first substantive session of the Third United Nations Conference on the Law of the Sea)

<table>
<thead>
<tr>
<th>STATE</th>
<th>N.M.¹</th>
<th>NATIONAL LEGISLATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>200</td>
<td>Decree Law No.1098 of 25 March 1970 Altering the Limits of the Territorial Sea, Article 1.</td>
</tr>
<tr>
<td>Canada</td>
<td>12</td>
<td>Territorial Sea and Fishing Zone Act of 16 July 1964, as Amended by Act of 1970, 3(1).</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>3</td>
<td>Information concerning Constitutional Provisions and Definition by Courts of the Breadth of the Territorial Waters.</td>
</tr>
<tr>
<td>Equatorial Guinea</td>
<td>12</td>
<td>Information concerning Presidential Decree No. 17/70 of 24 September 1970, Extending the Breadth of the Territorial Waters</td>
</tr>
<tr>
<td>Ghana</td>
<td>30</td>
<td>Information concerning the Extension of the Territorial Waters</td>
</tr>
<tr>
<td>Iran</td>
<td>12</td>
<td>Act of 12 April 1959 Amending the Act of 15 July 1934 on the Territorial Waters and Contiguous Zone of Iran, Article 3.</td>
</tr>
<tr>
<td>Jamaica</td>
<td>12</td>
<td>Territorial Sea Act, 1971, 3(2).</td>
</tr>
<tr>
<td>Libyan (AR)</td>
<td>12</td>
<td>Act No. 2 of 18 February 1959 concerning the Delimitation of Libyan Territorial Waters, Article 1.</td>
</tr>
<tr>
<td>Malaysia</td>
<td>12</td>
<td>Emergency (Essential Powers) Ordinance, No.7, 1969, as Amended in 1969, 3(1).</td>
</tr>
<tr>
<td>Maldives</td>
<td>Not Specific ²</td>
<td>Constitution of the Republic of Maldives</td>
</tr>
<tr>
<td>Malta</td>
<td>6</td>
<td>Territorial Waters and Contiguous Zone Act, 1971</td>
</tr>
<tr>
<td>Mexico</td>
<td>Int'l Law ³</td>
<td>Decree of 28 August 1968 Delimiting the Mexican Territorial Sea within the Gulf of California, V.</td>
</tr>
<tr>
<td>Nauru</td>
<td>12</td>
<td>Provision of the Interpretation Act 1971 Defining the Territorial Waters</td>
</tr>
<tr>
<td>Nigeria</td>
<td>30</td>
<td>Territorial Waters Decree 1967, as Amended in 1971, 1(1).</td>
</tr>
<tr>
<td>Norway</td>
<td>4</td>
<td>Royal Decree of 25 September 1970 concerning the Delimitation of the Territorial Waters of Parts of Svalbard</td>
</tr>
<tr>
<td>Oman</td>
<td>12</td>
<td>Decree of 17 July 1972 concerning the Territorial Sea, Continental Shelf and Exclusive Fishing Zones of the Sultanate of Oman, Article 2.</td>
</tr>
<tr>
<td>Peru</td>
<td>200</td>
<td>Supreme Resolution No.23 of 12 January 1955 Determining the Peruvian 200-Mile Maritime Zone, 1.</td>
</tr>
<tr>
<td>Spain</td>
<td>Not Specific ⁴</td>
<td>Coasts Act of 26 April 1969</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>12</td>
<td>Proclamation by the Governor-General of 7 January 1971 concerning the Extent of the Territorial Sea, (i).</td>
</tr>
<tr>
<td>USSR</td>
<td>12</td>
<td>Regulations of 5 August 1960 for the Protection of the State Frontier of the Union of Soviet Socialist Republics, as Amended in 1971, Article 3.</td>
</tr>
</tbody>
</table>

(a) Nautical Mile.
(b) As of 1974 the Constitution of the Republic of Maldives did not establish the breadth of territorial sea of this Republic.
(c) The Decree provides that the limits of the territorial seas are "established by international law and by domestic maritime law."
(d) This specific Act does not define the breadth of the territorial sea of Spain. Spain traditionally was in favour of six nautical miles for such a breadth. However, Spain now claims twelve nautical miles for its territorial sea limit.

the impact of acceptance of the twelve mile rule on many international straits. Many international straits are less than twenty-four nautical miles making the passage through them under the control of strait States within the concept of innocent passage. This was not desirable for maritime powers. Accordingly, these powers were seeking a concession from supporters of the twelve mile limit to accept specific provisions on international straits in return for adoption of such a limit.

The compromise was made on the issue of the breadth of the territorial sea because of a need for a unanimous agreement on this issue and at the same time on the issue of navigation through international straits. This was necessary for achieving a "package deal". Subsequently, the twelve mile limit was endorsed as the maximum permissible breadth for the territorial sea. Article 3 of the LOSC explicitly permits the extension of the territorial sea up to twelve nautical miles. It is said that the Convention sets this limit "in accordance with the clearly dominant trend in State practice."47

Although there still exists a number of States applying limits other than the dominant limit of twelve nautical miles, "it seems likely that the practice of all States will, in the near future, be brought into line with this limit."48

III. The Twelve Mile Rule: A Contractual or Customary Rule of International Law

In line with the development of State practice, a question has arisen as to whether the recognition of the twelve mile limit originates from conventional or customary law. This issue is examined below from both viewpoints.

1. The Twelve Mile Rule: A Contractual Rule of International Law

There is no doubt that a treaty is binding and in force for its parties. The only way for a State to limit the range of application of a treaty with respect to itself, is to make a reservation. This is possible if the treaty explicitly permits States to make reservations. The foundation of

47 Churchill and Lowe, op. cit., p.61.
48 Ibid.
reservation is found in the 1969 Vienna Convention on the Law of Treaties. Article 19 of this Convention provides that a State may make a reservation to a treaty save in the following cases:

(a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 309 of the LOSC makes it clear that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." (emphasis added) This means that the range of possible reservations to the Convention is limited to the cases that the Convention explicitly refers to. In principle, if there is no reference to the matter of reservation in a provision of the Convention, it is implied that no reservation is possible. This is the case concerning Article 3 of the Convention allowing States to have a territorial sea up to twelve nautical miles. This provision does not fall in the cases to which reservations may be made. In addition, in the line with Article 19(c) of the 1969 Vienna Convention on the Law of Treaties, it may be argued that a reservation made to Article 3 is "incompatible with the object and purpose" of the 1982 Convention on the Law of the Sea, if due attention is paid to the "package deal" nature of the Convention. It is, therefore, certain that from a contractual law viewpoint Article 3 of the LOSC will apply to all the parties.

2. The Twelve Mile Rule: A Customary Rule of International Law

The second viewpoint in relation to the twelve mile limit is that such a limit became part of customary international law even before the LOSC came into being. This view argues that the drafters of Article 3 of the Convention codified the existing customary law on the breadth of the territorial sea, and in fact it is declaratory of customary law. Such a claim is supported by the evidence (including statistical information) presented below.

To prove the second viewpoint, the essential elements of the formation of customary rule expressed by the international Courts should be taken into account. The constituent elements of a rule of customary international law are State practice and opinio juris. In modern
international law there is a necessity to identify the existence of State practice and *opinio juris* before relying on a rule as a customary one.\(^\text{49}\) As the ICJ asserted in the *Asylum Case*, the burden of proof is on the shoulder of the claimant State relying upon an alleged rule of customary law.\(^\text{50}\) As a result, the claim that the twelve mile limit had been crystallised into customary law must be proved.

As regards State practice, the factors of duration, repetition, consistency, and generality should be investigated with respect to the twelve mile limit rule. Despite the fact that duration and repetition are not essential factors in the creation of State practice, these factors can be traced in the history of the twelve mile rule. There is no precise definition for duration.\(^\text{51}\) It is, for example, said that a considerable period of time is necessary for the formation of a customary rule. However, such a period may be different depending on the existing circumstances for each individual case.

The twelve mile limit was first claimed by Russia in 1909. In the following years, the limit attracted the attention of a number of States. In 1930, the limit acquired the support of ten States. There was a slight increase on the number of States seeking the twelve mile limit between 1930 and 1960. A sharp rise in the number of States supporting the twelve mile limit occurred when the UNCLOS II failed to resolve the problem of the outer limit of the territorial sea.\(^\text{52}\) In 1973, that is at the time of the UNCLOS III, the most supported limit for the breadth of the territorial sea was the twelve mile limit. Since then the number of States applying the twelve mile limit for their territorial sea has been ever-increasing.


\(^\text{50}\)In the *Asylum Case*, the Court maintained that "[t]he Party which relies on a custom of this kind (regional custom) must prove that this custom is established in such a manner that it has become binding on the other Party." \((\text{emphasis added})\) *Asylum Case (Colombia v. Peru)*, *ICJ Reports*, 1950, p.276. See also *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands)*, *ICJ Reports*, 1969, pp.44-45.

\(^\text{51}\)In common law, it is referred to "time immemorial", while in civil law the period of thirty to forty years is sufficient to change the nature of a behaviour or usage as a custom. Shaw, Malcolm N., *International Law*, Third Edition, Cambridge University Press, Cambridge, 1991, p.64.

\(^\text{52}\)O'Connell writes that after the failure of the 1958 and 1960 Conferences to determine the outer limit of the territorial sea, it was predictable that "the progression to twelve miles as the majority limit would be fairly rapid and persistent." O'Connell, *op. cit.*, pp.165-6.
As of 16 June 1995, 121 States claimed territorial seas of twelve miles. Although the year 1909 can be regarded as the time for the first claim of the twelve mile limit, the major contribution of States to the extensive application of the limit was made after 1960. In fact, the beginning of the 1960s was the turning point in the acceptance of the twelve mile limit by many States. (See Table 6.1.) It seems that the era between 1960 -1973 was a reasonable period of time in which the actual State practice relating to the twelve mile limit was formed. As Table 6.4 shows 52 States expressed their claims over the twelve mile territorial seas in the period between 1953-1973. These claims made in different times are indicative of repetition of State practice in passage of time.

### Table 6.4
States Claiming The Twelve Mile Territorial Sea
(52 States - As at 1973)

<table>
<thead>
<tr>
<th>State</th>
<th>Date</th>
<th>State</th>
<th>Date</th>
<th>State</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>1970</td>
<td>India</td>
<td>1967</td>
<td>Romania</td>
<td>1951</td>
</tr>
<tr>
<td>Algeria</td>
<td>1963</td>
<td>Indonesia</td>
<td>1957</td>
<td>Saudi Arabia</td>
<td>1958</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>1966</td>
<td>Iran</td>
<td>1959</td>
<td>Senegal</td>
<td>1968</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>1951</td>
<td>Iraq</td>
<td>1958</td>
<td>Somalia</td>
<td>1967</td>
</tr>
<tr>
<td>Colombia</td>
<td>1970</td>
<td>Kuwait</td>
<td>1967</td>
<td>Tanzania</td>
<td>1967</td>
</tr>
<tr>
<td>Cyprus</td>
<td>1964</td>
<td>Libya</td>
<td>1959</td>
<td>Togo</td>
<td>1964</td>
</tr>
<tr>
<td>Dahomey</td>
<td>1968</td>
<td>Madagascar</td>
<td>1963</td>
<td>Tonga</td>
<td>1972</td>
</tr>
<tr>
<td>Egypt</td>
<td>1958</td>
<td>Malaysia</td>
<td>1969</td>
<td>Trinidad &amp;b</td>
<td>1969</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1953</td>
<td>Mexico</td>
<td>1969</td>
<td>Venezuela</td>
<td>1956</td>
</tr>
<tr>
<td>France</td>
<td>1971</td>
<td>Morocco</td>
<td>1973</td>
<td>Yemen (AR)</td>
<td>1967</td>
</tr>
<tr>
<td>Guatemala</td>
<td>1934</td>
<td>Nauru</td>
<td>1971</td>
<td>Yemen(PDR)</td>
<td>1970</td>
</tr>
<tr>
<td>Haiti</td>
<td>1972</td>
<td>Oman</td>
<td>1972</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Honduras</td>
<td>1965</td>
<td>Pakistan</td>
<td>1966</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(a) Equatorial Guinea. (b) Trinidad and Tobago.  

As far as the twelve mile limit is concerned, State practice demonstrated major consistency even before the UNCLOS III. The practice of the 52 States supporting the twelve mile limit prior to the Conference illustrated a uniform and consistent practice of the use of such a limit. In 1973, there still was inconsistency in State practice concerning the outer limit of the territorial sea. However, the twelve mile limit had the
most support in comparison to other existing limits. It may be said there was major consistency about the twelve mile limit for the territorial sea's breadth, though there was minor inconsistency in this regard. Akehurst with reference to the *Fisheries Case* writes that "[m]inor inconsistencies (that is a small amount of practice which goes against the rule in question) do not prevent the creation of a customary rule."^{53}

As regards the generality, the twelve mile limit was supported worldwide before the UNCLOS III. The twelve mile rule was not in the category of rules classified as regional or local customs, even though this rule obtained greater support in some regions, such as in Asia. The number of States claiming twelve mile territorial sea increased from 16 in 1960 to 52 in 1973. (See Table 6.1.) This indicates an increase of 28 percent for the support of the twelve mile limit among existing States within thirteen years. (See Table 6.2.) Meanwhile, during the same period, there was a sharp drop in the number of States supporting the classic limit of three miles from 40 in 1960 to 26 in 1973, a decrease of 27 percent for its support among existing States. (See Tables 6.1 and 6.2.)

In 1973, the 52 States advocating the twelve mile rule were from all five regional groups in the world defined by the United Nations. As at 1973, the twelve mile limit was supported by 16 African States, nineteen Asian States, 4 Eastern European States, 9 Latin American and Caribbean States, and 4 Western European States and Others totalling 52 States.^{54} Recent data available, as of 16 June 1995, illustrate that these numbers have changed to 26 African States, 41 Asian States, 10 Eastern European States, 23 Latin American and Caribbean States, and 17 Western European States and Others. (See Table 6.5 below.)

There is no doubt that the twelve mile limit for the breadth of the territorial sea became well-established in State practice before the UNCLOS III. The question is whether the twelve mile rule achieved recognition as law to become a customary rule before the UNCLOS III. This means whether *opinio juris* was crystallised into the rule prior to the UNCLOS III. *Opinio juris* implies that States believe that a rule should be respected in their relations because of an existing legal obligation to behave

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53 Akehurst, op. cit., p.28.
The question is how such a belief can be substantiated. There are a number of ways to identify whether there is a subjective conviction towards a certain State practice.

### Table 6.5
Analysis of Territorial Sea Claims Based on Regional Groups (As at 16 June 1995)

<table>
<thead>
<tr>
<th>Territorial Sea's Breadth (N.M.)</th>
<th>African States</th>
<th>Asian States</th>
<th>Eastern European States</th>
<th>Latin American and Caribbean States</th>
<th>Western European and Other States</th>
<th>Total Number of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>--</td>
<td>3</td>
<td>--</td>
<td>1</td>
<td>1</td>
<td>5</td>
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<tr>
<td>4</td>
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<td>2</td>
<td>1</td>
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<td>6</td>
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<td>1</td>
<td>2</td>
<td>3</td>
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<tr>
<td>12</td>
<td>26</td>
<td>41a</td>
<td>10</td>
<td>23</td>
<td>17</td>
<td>117b</td>
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<td>1</td>
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<td>6</td>
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<td>11</td>
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<tr>
<td>200</td>
<td>5</td>
<td>--</td>
<td>--</td>
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<td>--</td>
<td>11</td>
</tr>
</tbody>
</table>

(a) Including Belize, Japan, and UAE and excluding Turkey (see Table 1, g and k).
(b) Estonia, Israel, South Africa, and the USA also claim twelve nautical miles for their territorial seas. As at 24 May, 1995 these States were not members of any regional groups. United Nations Handbook, 1995, New Zealand Ministry of Foreign Affairs and Trade, p. 21.

The Philippines has not yet declared the extent of its territorial sea in accordance with Article 3 of the LOSC. It claims that its territorial waters consist of the water areas defined by the 1889 and 1901 Treaties between Spain and the United States and the 1933 Convention ratified by the United Kingdom and the United States. Accordingly, the current extents of territorial waters of The Philippines range from 1 n.m. in the Sulu Sea (between Pearl Bank and Babuan Islands) to 285 n.m. in the northeast of Amianan Island (the most northerly point of The Philippines territory).

It is not always easy to prove the psychological element. Nevertheless, *opinio juris* can be inferred from actual intentions of States. For example, when a State enacts legislation, the purpose is to enforce that legislation. The issue is whether, to reflect State practice, this legislation should actually be enforced. Judge Read's opinion in the Fisheries

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55 In the *North Sea Continental Shelf Cases*, the ICJ referred to the rule of the "*opinio juris sive necessitatis*". The Court held that not only there is a need for a "settled practice", but States should feel "a legal obligation" in conducting a certain behaviour. See *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands), *ICJ Reports*, 1969, p. 44.

Jurisdiction Cases was that State practice concerning a given claim is established when it enforces such a claim in practice.\textsuperscript{57} However, \textit{the ICJ accepted that State’s claims are adequate to create customary rules.}\textsuperscript{58} It appears that the ICJ did not mean the existence of the psychological element is not necessary to form a custom, but the ICJ intended to show that \textit{opinio juris} may be found in the claims of States and from their real intentions. When States reflect their claims in their national legislation, or issue a declaration or statement reflecting their claims, they intend to make their claims legally binding on other States. Although at the primary stage of the formation of a customary rule, States’ claims may be asserted unilaterally, the amount of support given to such claims by other States would play a significant role in the process of transition of a rule into customary law.

As Table 6.4 indicates, as of 1973, fifty-two States enacted national legislation or issued a declaration or statement establishing twelve miles as their territorial sea. By taking such a measure, these States demonstrated that they believed that their twelve mile territorial sea had to be respected since the limit was supported by State practice and it was legally binding on other States. Although such claims faced a number of protests from some States, mainly the United Kingdom and the United States of America, there was no change in the positions of supporters of the twelve mile rule. The effect of such protests was that the rule could not be enforced against persistent objectors. However, it can be argued that since the twelve mile limit was widely crystallised into State practice, it can be considered as a customary rule. There is no need for argument that customary law is formed by common consent of States, whether expressly or tacitly.

As was seen, the practice of States in the period of 1960-1973 paved the way for the transition of the twelve mile rule into a customary rule. This is mainly supported by statistical information and national legislation or States’ declaration.\textsuperscript{59} As a result, it could be claimed that the twelve mile

\textsuperscript{57}See \textit{Fisheries Case} (United Kingdom v. Norway), \textit{ICJ Reports}, 1951, Dissenting Opinion of Judge Read, p.191.

\textsuperscript{58}See \textit{Fisheries Jurisdiction Cases} (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), \textit{ICJ Reports}, 1974.

\textsuperscript{59}In 1950 the International Law Commission named a number of instances as evidence of customary international law among which was national legislation. See \textit{YILC}, 1950, Vol.II, pp.368-372.
limit was a customary rule, or at least it was in the process of becoming a rule of customary international law before the UNCLOS III, in 1973.60

The ever-increasing support of the twelve mile limit for the territorial sea in the UNCLOS III resulted in the incorporation of the maximum limit of twelve miles in the ISNT on 7 March 1975.61 This later became Article 3 of the LOSC. Accordingly, it may be assumed that Article 3 is one of those provisions of the Convention reflecting the customary law. The customary nature of the twelve mile rule means that it may be enforced against either parties or non-parties to the LOSC, as it was so before codification of the Convention. Therefore, the rule is not a

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61 Following this event, Japan (which traditionally was in favour of three nautical miles) enacted a law in 1977 accepting the extent of twelve nautical miles for its territorial seas except within the straits around Japan for which the extent of three nautical miles remained unchanged. See Japanese Law, Law No.30 on the Territorial Sea, 9 May 1977, in United Nations Legislative Series No.19: National Legislation and Treaties Relating to the Law of the Sea, UN ST/LEG/SER.B/19, 1980, pp.59-62. There are some other cases in which States apply a combination of limits for their territorial seas based on the geographical location of these adjacent seas. For example, Chile and Argentina have adopted twelve nautical miles for their territorial seas. However, in regard to the maritime delimitation in the Sea of the Southern Zone these countries apply three nautical miles as being valid only among them. Article 8 of the Treaty of Peace and Friendship between Argentina and Chile (18 October 1984) provides that “in the area comprised between Cape Horn and the easternmost point of Isla de los Estados the legal effects of territorial waters are limited, in their mutual relations, to a three-nautical-mile strip measured from their respective baselines.” It added that in the area described above “each Party may invoke vis-a-vis third States the maximum width of territorial waters permitted under international law.” The Law of the Sea: Current Developments in State Practice (No.1), op. cit., pp.169-191, at 173. Article 5 of the 1982 Law of the USSR on the State Frontier established a twelve nautical mile limit for the territorial sea of the USSR but provided that “[i]n individual cases, a different breadth for the territorial waters (territorial sea) may be established by international treaties concluded by the USSR, and in the absence of treaties, in accordance with the generally recognised principles and norms of international law.” Law of the Union of Soviet Socialist Republics on the State Frontier of the USSR - 24 November 1984, in ibid., pp.96-102, at 97. The application of different limits by a coastal State to its territorial sea raises a question as to whether international law of the sea enables such State to do so. Article 3 of the LOSC only provides the maximum limit for the territorial sea and does not include any provision to restrict coastal States to use a single limit for their territorial sea. Accordingly, it appears that coastal States might apply a number of limits for their territorial seas. Current practice of some coastal States indicates that they have used a combination of three and twelve nautical miles for their territorial seas. The three nautical mile limit has mainly been applied to straits surrounding the States concerned in order to change the legal regime of navigation in the straits in accordance with the interests of such States. For example, Sweden has extended its territorial sea from four to twelve nautical miles on 1 July 1979. However, after consulting with Denmark (which still claims three nautical miles for its territorial sea), Sweden considered three nautical mile limit for its territorial sea within certain straits located between its land territory and Denmark in the Baltic Sea region). Alexandersson, Gunnar, The Baltic Straits, in the series of International Straits of the World, Gerard Mangone (ed.), Martinus Nijhoff Publishers, The Hague, 1982, pp.84-85.
contractual rule but its applicability goes beyond the limited range of contractual provisions.

If there was any doubt about the validity of the customary nature of the twelve mile rule before the codification of the LOSC, it is now certain that the rule is among rules of customary international law. This claim is strongly supported by looking at the recent data available. As of 16 June 1995, there were 151 coastal States, of which 146 States have enacted national legislation encompassing the outer limit of the territorial sea. Out of 146 coastal States, 121 States now support the twelve mile limit, eleven States are in favour of the two-hundred mile limit, and only five States claim the three mile limit. This indicates that as of 16 June 1995, 83 percent of coastal States' claims to the territorial sea are to the twelve mile limit. (See Figures 6.1 and 6.2 below.)

This overwhelming State practice leaves no doubt that the twelve mile rule has become a customary rule. Therefore, the rule can be enforced against all States with the exception of the persistent objectors. It seems that there are no longer any persistent objectors, since the twelve mile limit was already adopted by the major objectors to the rule, that is the UK and the USA, and Australia. The UK recognised the twelve mile limit as the breadth of the territorial sea by incorporating such a limit in the Territorial Act 1987. Also the USA officially adopted the twelve mile limit in 1988. The Presidential Proclamation on the Territorial Sea of the United States of 27 December 1988 provides that "[t]he territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law." Also Australia adopted the twelve mile limit for its territorial sea on 20 November 1990.

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62 For the diagrams of changes to the number of States supporting three, twelve and two-hundred miles over time see Figures 6.3, 6.4, 6.5, and 6.6.
64 Ibid., p.83. In fact, the USA and Japan declared their readiness for accepting twelve nautical miles in 1970 and in 1971 respectively. However, they expressed pre-conditions for such adoption. For example, the USA concern was to guarantee the free navigation through international straits while Japan was interested in limiting the exclusive fishing rights of coastal States to twelve nautical miles beyond which coastal States would only enjoy preferential fishing rights. See Oda, Shigeru, 'Proposals Regarding a 12-Mile Limit for the Territorial Sea by the United States in 1970 and Japan in 1971: Implications and Consequences', Ocean Development and International Law, Vol.22, 1991, pp.189-197.
65 Burmester, Henry, 'Australian Policy and the Law of the Sea', Proceedings of the Conference on Continuing Legal Education, Faculty of law, The University of Sydney, 1991, p.2. See also the Proclamation of the Governor-General (9 November 1990) in pursuance to s.7(2-a) of the Seas and
In fact, adoption of the rule by these States is evidence that the rule has been strongly established in State practice and has become customary rule. Thus, it is a legal obligation for States to respect such a limit. If a foreign ship entering the territorial sea of a State claiming twelve mile limit violates international rules and regulations recognised for the territorial sea, the State can intervene to end such violations.

IV. Concluding Remarks on the Breadth of the Territorial Sea

Since the UNCLOS I and the UNCLOS II were unable to set up a uniform breadth for the territorial sea at the time of the Conferences, the solution was left to be found in the customary law on the issue. As was argued, the twelve mile limit was well-established in State practice and became a customary rule before the UNCLOS III. This means that Article 3 of the LOSC is declaratory of customary international law. Even if there has been any dispute on the customary value of the twelve mile rule, it is now certain that the twelve mile limit is supported by customary law as well as conventional law. Therefore, the rule is may be enforced against non-parties based on its customary nature. As a result, it is a legal obligation for those few States claiming territorial seas less than twelve nautical miles to respect the twelve mile territorial seas, unless these States have been persistent objectors to the twelve mile limit. Also, it may be argued that the rule also implies that in the customary international law of the sea the maximum permissible breadth of the territorial sea is twelve nautical miles.

Submerged Lands Act 1973. Although Australia extended its territorial sea to 12 n.m. in 1990, it did not affect the extent of the territorial sea of its islands within the Torres Strait, north of seabed jurisdiction line with Papua New Guinea. According to Article 3 of the 1978 Torres Strait Treaty (the 1978 Treaty between Australia and Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters) the extent of the territorial sea of the above-described islands is 3 n.m.. This treaty was signed on 18 December 1978 and came into force on 15 February 1985 (after the conclusion of LOSC in 1982). ATS. (1985), No.4.


As was stated "[i]nternational agreements constitute practice of States and as such can contribute to the growth of customary law." Knight, Gary, and Hungdah Chiu, The International Law of the Sea: Cases, Documents, and Readings, Elsevier Applied Science, London, 1991, p.35. An example of this is Article 3 of the LOSC that contributed to the firm establishment of the twelve mile limit as a customary rule.

miles. Accordingly, the limits of more than twelve miles are not recognised in international law and these limits are only enforceable against States with identical claims.

In conclusion, the history of the development of the breadth of the territorial sea illustrates that it is State practice, or in fact, common consent of States, which plays a definite role in the establishment of the international rules and also in developing such rules. Such State practice was developed through striking a balance between the interests of coastal States and the interests of international community, most importantly by maintaining the right of innocent passage in territorial seas and introducing a more liberal right of passage - transit passage - through overlapping territorial seas which comprise international straits.

Akehurst is of the opinion that if a small number of States behave in a manner in opposition with the existing major practice on the same subject-matter, these States "will probably soon fall into line with the practice of the majority." Akehurst, op. cit., p.31. This is true with respect to the twelve mile limit.

According to the Limits in the Seas, the excessive claims over the territorial sea have been expressed by the following countries: Angola (20 n.m. - Decree No. 159/75, 6 November 1975), Benin (200 n.m. - Decree No. 76-92, 2 April 1976), Brazil (200 n.m. - Decree Law No. 1098, 27 March 1970), Cameroon (50 n.m. - Law No. 74/16, 5 December 1974), Congo (200 n.m. - Ordinance No. 049/77 20 December 1977), Ecuador (200 n.m. - Decree Law No. 1542, 11 November 1966), El Salvador (200 n.m. - Constitution, 7 September 1950), Germany (16 n.m. - Federal Gazette, 16 March 1985), Liberia (200 n.m.- Act, 5 May 1977), Nicaragua (200 n.m. - Act No. 205, 19 December 1979), Nigeria (30 n.m - Decree No. 38, 26 August 1971), Panama (200 n.m., Law No. 31, 2 February 1967), Peru (200 n.m. - Supreme Decree, 1 August 1947), Philippines (Rectangle - Act No. 3046, 17 June 1961), Sierra Leone (200 n.m. - Interpretation Act, 19 April 1971), Somalia (200 n.m. - Law No. 37, 10 September 1972), Syria (35 n.m. - Law No. 37, 16 August 1981), Togo (30 n.m. - Ordinance No.24, 16 August 1977), Uruguay (200 n.m. - Decree 604/969, 3 December 1969). The USA has protested to all these claims. See Limits in the Seas (No.112), op. cit., p.31. However, some States claiming more than twelve nautical miles reduced their claims to this limit before or after the coming into existence of the LOSC in 1982. These States are Albania (1990), Argentina (1991), Cape Verde (1977), Gabon (1984), Ghana (1986), Guinea (1980), Guinea-Bissau (1978), Haiti (1977), Madagascar (1985), Maldives (1976), Mauritania (1988), Senegal (1985), Tanzania (1989), Tonga (1972). The year in the parentheses in front of the name of the States is the year in which they reduced their territorial sea claim to twelve nautical miles.) Ibid., 32. Also see the Law of Chile (Law No. 18.565 of amending the Civil Code with regard to maritime space) by which Chile, inter alia, replaced 200 n.m. by 12 n.m for its territorial sea. See The Law of the Sea: Current Developments in State Practice (No.1), op. cit., p.7.
Diagrams of Changes in Territorial Sea Claims Over Time for the Three Limits of 3, 12, and 200 Nautical Miles (Analytical Comparison)

Figure 6.1

[Bar chart showing percentage of states claiming different limits from 1900 to 1995]

Comparison of Claims to 3, 12, and 200 Nautical Mile Limits from 1900 to 1995.

Figure 6.2

Comparison of Claims to 3, 12, and 200 Nautical Mile Limits in 1995.

Figure 6.3

Number of States Claiming a 3 Nautical Mile Limit from 1900 to 1995.
Figure 6.4

Number of State Claiming a 12 Nautical Mile Limit from 1900 to 1995.

Figure 6.5

Number of States Claiming a 200 Nautical Mile Limit from 1900 to 1995.

Figure 6.6

Comparison of the Number of States Claiming 3, 12, and 200 Nautical Mile Limits (1900 to 1995).

The figures are not based on a strict time scale.
General Conclusions
General Conclusions

This thesis has investigated the rules of the international law of the sea governing the delimitation of maritime areas which are subject to the sovereignty of coastal States, and has discussed issues related to such delimitation. The scope of the thesis included issues related to: (a) the delimitation of internal waters by the application of normal and/or straight baselines; (b) the delimitation of single-State bays; (c) the delimitation of multi-State bays; (d) the enclosure of mid-ocean archipelagos; and (e) the delimitation of the outer limit of the territorial sea.

As detailed in Chapter One, the study of the historical development of the law of the sea demonstrates that States have claimed adjacent maritime areas since many centuries ago. Although the theory of mare liberum prevailed over the theory of mare clausum, States continued to claim larger maritime spaces adjacent to their coasts for a variety of reasons. In its Memorandum of 14 July 1950 on the Regime of the High Seas, the United Nations Secretariat clearly asserted that “the Grotian idea of the freedom of the high seas is losing the paramountcy which, generally speaking, has survived fairly well down to the present day.”1 With new developments in the law of the sea since 1950, more areas of the high seas have become subject to the authority of coastal States. In particular, in the past few decades, many States have significantly extended their control over adjacent maritime areas.2 Although this practice was once opposed by other States favouring the exclusion of the free seas from jurisdiction of States, the practice was finally confirmed by the international community, though with some modifications.3 As one author writes:

What one cannot overlook ... is that the evolution of the Law of the Sea in the past three decades has been marked by the repeated assertion of claims based on special interests and circumstances of a geographic, economic, or environmental nature. Moreover, while strongly contested

2Reasons which have motivated States to widen their maritime areas are based upon security, economic, and environmental interests of these States.
3Ahnish points out that “[t]he principle of the freedom of the seas has never been considered so immutable as to preclude investigation into possibilities of its adaptation to the legitimate interests of coastal States.” Ahnish, Faraj Abdullah, The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea, Clarendon Press, Oxford, 1993, p.197.
at the beginning, these claims have actually prevailed over the competing general interest of the freedom of the seas.\textsuperscript{4}

The thesis, however, demonstrated that while the international law of the sea has responded positively to the trend of States by formulating rules which can satisfy the concerns of these States, certain standards were created to prevent unreasonable enclosure of the free seas by coastal States. Chapter Two, in particular, examined the use of the straight baselines and its impact on the enclosure of vast areas of adjacent maritime areas as internal waters. Although the ICJ recognised the Norwegian straight baseline system, this recognition was due to particular geographical conditions of the Norwegian coasts. Meanwhile, the ICJ was aware of the impact of these baselines on the encroachment upon the high seas, and accordingly, it set up certain requirements for the use of the straight baselines.\textsuperscript{5} In addition, the TSC (and the LOSC) only allows the employment of straight baselines in those coastlines which are deeply indented and cut into, or are fringed with islands.\textsuperscript{6} All these requirements were established to prevent unnecessary enclosure of the high seas areas into maritime areas under national jurisdiction. However, the use of straight baselines by as many as half of coastal States raises the question as to whether the requirements have been met in all cases. In addition, since there is no mention of the maximum length for a straight baseline in the TSC and the LOSC, certain States have employed remarkably long straight baselines.

Chapter Three discussed issues concerning the delimitation of single-State bays. The chapter demonstrated how the adoption of the 24 nautical mile closing line for the enclosure of bays converted large parts of the high seas into waters under national sovereignty.\textsuperscript{7} As was calculated, a bay covering a semi-circular area with a diameter of 24

\textsuperscript{5}These requirements are: (a) "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast"; and (b) sea areas lying within these lines should be "sufficiently closely linked to the land domain to be subject to the regime of internal waters." Fisheries Case (UK v. Norway), ICJ Reports, 1951, p.133.  
\textsuperscript{6}Article 4(1) of the TSC and Article 7(1) of the LOSC.  
\textsuperscript{7}Although the adoption of the 24 mile closing line for the enclosure of legal bays decreased the number of claims over maritime areas on the basis of historic title, there have still been some recent cases where States have relied on historic titles to enclose large bodies of water, particularly large bays. Examples are the Canadian claim to the Arctic Archipelago; Libya’s claim to the Gulf of Sidra; Tunisia’s claim to the Gulf of Gabes and the Gulf of Tunisia; Italy’s claim to the Gulf of Taranto; and Australian claim to Anxious Bay, Encounter Bay, Lacepede Bay, and Rivoli Bay.
nautical miles includes a maritime area of 775,432,696 square meters. Although the limit of 24 nautical miles was included in the TSC and maintained in the LOSC, certain criteria were incorporated into these conventions to avoid unlawful enclosure of bays.\(^8\) Also, no line longer than 24 nautical miles could be used for the enclosure of single-State bays. Although the adoption of 24 nautical miles and the definitional criteria gave certainty to the delimitation of single-State bays, there are still shortcomings and ambiguities in the TSC (and the LOSC) with respect to the delimitation of single-State bays. These ambiguities and shortcomings are evidenced in situations such as: (a) where there is a tributary bay within a bay and the question is whether the tributary bay should be taken into account in conducting the semi-circle test (mathematical criterion); (b) where there are not clear natural entrance points and the question is how to determine the proper natural entrances for drawing the closing line; (c) where there are islands located near but out of the mouth of a bay and the question is whether the island may be taken into account for satisfying the semi-circle test; and (d) where there are coastal islands which, due to their location, may form headlands of bays. These ambiguities and shortcomings have left the interpretation and decision to the discretion of coastal States concerned. States make best use of this situation, either by a liberal interpretation of the provisions, or by making their own decision where there are no provisions at all, thus enclosing larger areas of the free seas into the waters of bays.

Another issue examined in Chapter Four was the question of the delimitation of multi-State bays, bays which are located in the shores of more than one State.\(^9\) The international law of the sea has not codified rules on the delimitation of multi-State bays. Those rules established for the use of a closing line were to be applied to those bays situated in the coasts of individual coastal States. However, certain coastal States attempted to enclose multi-State bays by drawing a closing line, no matter how wide their entrance may be. Regardless of whether the mouth of a multi-State bay is wider or narrower than 24 nautical miles, according to

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\(^8\)To assess whether a body of water is a bay in legal sense, two sets of criteria must be satisfied: the geographical criterion and the mathematical criterion. The geographical criterion includes the following requirements: (a) the indentation should be "well-marked"; (b) the ratio of the depth of the penetration to width of the indentation should be such that the indentation is surrounded by land mass, except in its mouth; and (c) the indentation should contain landlocked waters. The mathematical criterion is based on a semi-circle test.

\(^9\)There are more than forty multi-State bays in the world. For a list of multi-State bays see Table 4.1 (Chapter Four).
most publicists, it is not subject to enclosure. This is so when international navigation plays a significant factor in some multi-State bays. In addition, the enclosure of multi-State bays reduces the free seas available to all States. However, certain States have relied on historic title to enclose some multi-State bays.\(^{10}\)

**Chapter Five** discussed the issue of the enclosure of mid-ocean archipelagos. The chapter demonstrated that although the TSC contributed to the enclosure of large areas of the high seas by its provisions on straight baselines and single-State bays, the LOSC reinforced this contribution by recognising a special regime for the enclosure of mid-ocean archipelagos.\(^{11}\) This recognition was mainly a response to the strategic, economic, and environmental concerns of those States which consist wholly of islands. The LOSC grants a right to legally qualified archipelagic States to link their outermost islands by drawing straight lines, so-called archipelagic baselines.\(^{12}\) Under Article 47(2) of the LOSC, an archipelagic baseline may be as long as 100 nautical miles, with the possibility of 3% of the total number of archipelagic baselines being as long as 125 nautical miles. Accordingly, the use of archipelagic baselines encloses large areas of the free seas. Again, like the case of straight baselines and bays, although the international law of the sea has developed rules for the enclosure of archipelagic waters (waters within archipelagic baselines which are subject to sovereignty of archipelagic States), the delimitation of these waters has not been left to the discretion of island States. There are certain requirements to be met.

First of all a State should be legally qualified as an archipelagic State, which is a State constituted wholly by a series of islands as archipelagos.\(^{13}\) Only those States which meet the legal definition of an archipelagic State may employ archipelagic baselines. Even being qualified as an archipelagic State does not permit these States to apply archipelagic baselines. Article 47 of the LOSC details the essential

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\(^{10}\) The case of the Gulf of Fonseca is usually considered as an exception to the general rules governing multi-State bays, where the claim of coastal States (El Salvador, Honduras, and Nicaragua) was also based on historic title. See the Decision of the Central American Court of Justice (Costa Rica v. Nicaragua), in Judicial Decisions Involving Questions of International Law, *AJIL*, Vol.11, 1917, the *Case Concerning the Land, Island, and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening). *ICL Reports*, 1992.

\(^{11}\) See Figures 5.1 and 5.2 in Chapter Five.

\(^{12}\) For a list of States proclaiming archipelagic status see Table 5.1 (Chapter Five).

\(^{13}\) See Article 46(a & b) for definition of an archipelagic State and an archipelago.
requirements for a validly drawn archipelagic baseline system. Like the delimitation of single-State bays, there are geographical and mathematical tests to be used for the application of archipelagic baselines. In particular, Article 47(3) of the LOSC provides that the drawing of archipelagic baselines "shall not depart to any appreciable extent from the general configuration of the archipelago" and Article 47(4) stipulates that archipelagic baselines must not be drawn "... in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State."

The case of mid-ocean archipelagos is another indication of how the international law of the sea has responded to the needs of States, while taking the interests of the international community into consideration. This is why the right of innocent passage was maintained within archipelagic waters, and the right of archipelagic sea lanes passage was designed to be applied to those straits within archipelagic waters which have been used for international navigation. Despite the fact that the principles for the enclosure of mid-ocean archipelagos were developed exclusively for those States consisting entirely of archipelagos, a number of continental States with outlying islands have enclosed these islands by employment of archipelagic baselines. This may affect the delicate balance created by the international law of the sea. The maintenance of a fair balance of interests among coastal States and the international community requires States to respect the rules of the international law of the sea.

As the final chapter, Chapter Six of the thesis reviewed the issue of the delimitation of the outer limit of the territorial sea, as one of the most controversial and long-standing issues in the international law of the sea. This long-lasting issue was finally concluded by the acceptance of a 12 nautical mile limit as the maximum limit of the territorial sea into Article 3 of the LOSC. The main reason for the controversy over the extent of the territorial sea has been its direct impact on the enclosure of the high seas. Greater territorial seas result in less high seas available to States.14

The traditional supporters of 3 nautical miles for the territorial sea were

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14The significance of a proper delimitation of the territorial sea can be understood by what Fitzmaurice has emphasised. In his words, [The law governing the territorial sea] is essentially a compromise between the necessities and interests of the coastal State in the water off or near its shores, and the general concern of all States with the freedom of the seas -- freedom of navigation, of communication and passage, of reasonable exploitation of the living and other resources, and of use for experiment and research. Fitzmaurice, G., 'The Law and Procedure of the International Court of Justice, 1950-54: Points of Substantive Law', BYIL, Vol.31, 1954, at 371-2.
concerned about the effects of the enclosure of the high seas. However, the practice of many States in proclaiming a 12 nautical mile limit for their territorial seas strengthened the support for that limit.\(^{15}\) In addition, some Latin American countries (such as Ecuador, Panama, and Peru) even based their claims on the so called patrimonial approach. According to this approach, the territorial sea could extend up to 200 nautical miles, which did not gain approval of the international community. The international law of the sea then adopted the moderate extension of the territorial sea to a limit of 12 nautical miles.\(^{16}\) In addition, where the application of the 12 mile limit would result in converting all waters of straits used for international navigation into territorial seas, the LOSC recognised the right of transit passage through these straits.\(^ {17}\) These developments reflect the role of the international law of the sea as a body of law whose main purpose is to accommodate the competing interests of coastal States and those of the community of nations.

In conclusion, developments in the rules for the delimitation of maritime areas under national sovereignty show that:

(a) The international law of the sea has recognised the need of coastal States to enjoy larger maritime areas on the basis of their strategic, economic, and environmental interests;

(b) The international law of the sea has developed rules for delimitation of maritime areas (particularly those under national sovereignty) parallel to the tendency of States to claim larger maritime areas;

(c) Despite the developments of rules favouring the extension of maritime areas under national authority, the international law of the sea has taken into account the traditional rights of international community in these areas. These rights are reflected in the maintenance of navigational rights in the maritime areas which were newly enclosed by straight

\(^{15}\) For the development of State practice over time (from 1900 to 1995) see Table 6.1 in Chapter Six.

\(^{16}\) In fact, the support given to this limit by an ever-increasing number of States over time has crystallised it as a rule of the customary international law.

\(^{17}\) Article 38(2) of the LOSC defines transit passage as "the exercise ... of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. ... ". It is obvious that transit passage applies to straits completely overlapped by territorial seas. If a strait used for international navigation is wider than 24 nautical miles and includes an EEZ area or an area of the high seas, then navigation in these areas will be subject to the legal regime of the EEZ or the high seas respectively.
baselines, in the preservation the of right of passage through archipelagic waters, and in the consolidation of the right of innocent passage in the territorial waters. This demonstrates that the international law of the sea has struck a fair balance between the exclusive interests of coastal States and the inclusive interests of the international community in the maritime areas under national jurisdiction; and

(d) Despite the recent trends of States to extend their sovereignty over maritime spaces, and the contribution the international law of the sea has made to this enlargement, the modern international law of the sea has not revived the theory of *mare clausum*, although it has modified the theory of *mare liberum*. The reality is that maritime spaces subject to *mare liberum* have decreased as a result of creeping jurisdiction of States. This, however, has been a result of developments in State practice recognised by the international community.

Finally, what will be the future challenges to the rules of the international law of the sea on the delimitation of maritime areas under national jurisdiction? Will there be more encroachment upon the free seas by the future claims of States, or will States attempt to keep the *status quo*? The practice of States with respect to the seas and oceans, in the past few decades, reflects a gradual inclusion of larger parts of these maritime spaces. This practice may continue in the future, particularly because of the strategic and economic importance of adjacent maritime areas. It is clear that States prefer to have full sovereignty in maritime areas to better enjoy their rights in these areas. However, States should realise that any change in the rules governing the delimitation of maritime areas should be recognised by the international community. Unilateral actions of States in delimiting maritime areas without considering the interests of the community of nations will not be in line with the new world order for the seas and oceans through which the interests of all competing parties are met. States should also consider the legitimate interests of other States in the uses of the seas by respecting the rules of the international law of the sea on the delimitation of maritime areas, particularly those under their sovereignty.
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