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Nancy Barron

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Archipelagos and Archipelagic States under UNCLOS III: No Special Treatment for Hawaii

By Nancy Barron
Member of the Class of 1981.

I. INTRODUCTION

More than a decade of negotiations among 158 nations has produced a treaty concerning the law of the sea of unprecedented scope and complexity. Responding to the mandate of United Nations Resolution 3067 "to adopt a convention dealing with all matters relating to the law of the sea . . . bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole," delegates decided to negotiate by consensus. Inherent in this process is the danger of resulting unclarity, as where consensus on a particular issue represents a tenuous majority, or where consensus on the language reflects differing constructions of material terms. One such area of consensual difficulty is the boundary status of archipelagos and archipelagic states, the subject matter of this Note.

Traditionally, political dominion terminated at the shoreline. In recent history, customary international law has evolved the three mile territorial sea. The UNCLOS III Treaty revolutionizes


4. Borgese, Introduction, PACEM IN MARIBUS 18 (E. Borgese ed. 1972). In his landmark
this encroachment of national coastal control over the international domain of ocean space by the institution of expanded maritime zones. Accordingly, states with lengthy coastlines are protective of their newfound geopolitical advantage. The more than 500,000 islands of the world epitomize this concept insofar as they acquire territorial gain disproportionate to their minimal land mass. Clusters of islands present special problems, leading one commentator to note that “[t]he archipelago doctrine . . . is the difficult case which exposes the inadequacies of existing rules.” Where conceptual interaction between land and sea is at a maximum, archipelagos magnify a general weakness in the attempt of UNCLOS III to identify a jurisdictional margin between land and sea, and in particular, to reconcile opposing interests of maritime powers and coastal states.

The archipelagic state provisions found their present form at the Caracas session of UNCLOS III in 1974. While no country voiced dissent to the criteria defining an “archipelago,” there was considerable difference of opinion expressed on the narrower term “archipelagic state.” An archipelago may comprise a sovereign independent entity, or a territorial entity governed by a continental state. In either case, it is a single political unit. While definitional consensus was lacking at the Caracas session, it was nonetheless decided that special status would be limited to “archipelagic states.”

“Special status” refers to a method of delimiting seaward

essay Mare Liberum (1609) Grotius espoused the concept of freedom of the seas. In contrast, Bijnkershoek’s De Dominion Maris (1702) argued for a territorial sea extending one marine league (i.e., three miles) from shore.

5. Maritime zones are defined in terms of miles from shore. A coastal state may designate a territorial sea of twelve miles, a contiguous zone of twenty miles, and an exclusive economic zone of two hundred miles from shore. ICNT, supra note 1, pts. 2, 5.


9. B. Dubner, supra note 6, at 20-22.

10. See notes 38-52 and the accompanying text, infra.

boundaries. By use of the "straight baseline" method, an archipelagic state measures maritime zones outward from a perimeter drawn from the outermost points of the outermost islands.\textsuperscript{12} The area within this perimeter is designated "archipelagic waters" under sovereign control of the archipelagic state.\textsuperscript{13} Thus, special status confers upon the archipelagic state the right to acquire large tracts of ocean surface over which it may exert jurisdictional damage control. Naturally, archipelagos prefer to define themselves within the meaning of "archipelagic state." Since many archipelagos are in the process of transition from colonial status to complete autonomy, emerging state practice indicates that something less than traditional notions of sovereignty may be sufficient to qualify them for special status.\textsuperscript{14}

This question of whether an archipelago qualifies for special status directs inquiry towards a number of issues. At what point in the process of political independence does an archipelago become an archipelagic state? Assuming that point in political time is determinable, why should the rationale for granting special status to archipelagic states not also apply to archipelagos? What counter-vailing policies justify the distinction? There are no simple answers to these questions, and indeed, delegates to UNCLOS III were not in perfect accord.\textsuperscript{15}

The United States finds itself in an ambivalent position. On the one hand, it is a major maritime power, yet on the other, an integral portion of its territory constitutes a mid-ocean archipelago.\textsuperscript{16} Although the United States might have argued against political distinctions narrowing the archipelago rule in favor of a rule which would have included Hawaii as a mid-ocean archipelago within the protective scope of special status, national maritime policy favoring global mobility and freedom of the seas presented a

\textsuperscript{12} ICNT, \textit{supra} note 1, art. 47 states that "[a]n archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands."

\textsuperscript{13} \textit{Id.} art. 49(1): "The sovereignty of an archipelagic state extends to the waters enclosed by the baselines, described as archipelagic waters, regardless of their depth or distance from the coast."


\textsuperscript{15} Official Records, \textit{supra} note 8, at 260-73.

\textsuperscript{16} For example, Hawaii is a mid-ocean archipelago. Consensual negotiating strategy requires consideration of the United States position as a dual coastal nation gaining accession to its Atlantic and Pacific shores, and also as a technological giant with unparalleled ability to exploit natural resources. The State Department may have been concerned that stretching the limit on every issue might appear "grasping."
strong argument for the competing view. To understand fully our government's stance in not arguing for maximum territorial extension for all mid-ocean archipelagos, we must factor into the foregoing substantive considerations the procedural predicate of this conference, namely consensus. The treaty was seen as a total package, a comprehensive ocean policy. To this end, conciliation on many points was imperative to achieve desired consensus on the whole.

This Note focuses on the archipelagic state issue, using Hawaii as an example of the distinctions between an archipelago and a mere group of separate islands; and, further, the distinction between an archipelago and archipelagic state.

II. HISTORY OF THE ARCHIPELAGIC REGIME

The concept of an archipelagic regime is a relatively recent development in Law of the Sea negotiations. Textwriters have attempted to trace origins of the concept back to the early conventions, beginning with the 1930 Hague Conference, but without much success.

Norwegian jurist and scholar Jens Evensen was the first legal writer to give well-reasoned consideration to the mid-ocean archipelago as a single unit, arguing as early as 1957 that archipelagos isolated in mid-ocean merit a separate scheme of territorial waters. Taking up where Evensen left off, the 1974 UNCLOS III treaty drafting sessions in Caracas initiated serious discussion of such a scheme. Until that time, existing treaty law in the 1958


18. Jaenicke, supra note 3, at 453.

19. Malone, U.S. Policy and the Law of the Sea, 81 DEP'T STATE BULL. 48 (July, 1981). The major industrial and maritime powers invoked consensus over voting as a procedural method because they feared the so-called "Group of 77" developing countries would form a majority coalition to defeat their interests. Jaenicke, supra note 3, at 446.

20. ICNT, supra note 1, art. 46.


Geneva Convention on the Territorial Sea and Contiguous Zone,\(^2\) and in the Geneva Convention on the High Seas,\(^2\) gave special treatment only to island chains which followed the contour of a continental coastline. These sessions sought to extend special treatment to independent islands lying well offshore, completely surrounded by high seas.\(^2\)

Case law on the matter pre-dates the 1958 conventions. In 1951, the International Court of Justice (I.C.J.) decided the Anglo-Norwegian Fisheries Case which involved foreign fishing rights in the interstitial waters of the island-studded coastline of Norway.\(^2\) The I.C.J. reasoned that special treatment should be given to geopolitical and economic interests peculiar to a region wherein sea and land intertwine in a complex fashion.\(^2\) The Court went on to lay out the criteria to be applied in considering boundaries enclosing insular waters. These criteria were incorporated into article 4 of the Geneva Convention on the Territorial Sea and Contiguous Zone\(^2\) and later into the archipelagic state clauses of the ICNT.\(^3\)

However, because of the unique historical and geographical circumstances of the Norwegian case, the holding did not solve difficult definitional distinctions. The set of islands involved was not a separate legal, juridical, or political entity, but rather an integral part of Norway. Moreover, those islands formed an extension of the continental coast, not a mid-ocean constellation of islands.

The extent to which the rationale and result of the Norwegian Fisheries Case would extend to offshore archipelagos under UNCLOS III was unclear. The archipelagic state distinction was thought inadequate by many. Commentators remarked upon the fact that since both archipelagic states and non-archipelagic states were using the term "archipelagic state", a definition of the term


\(^{26}\) Convention on the Territorial Sea and the Contiguous Zone, supra note 24, art. 49 states that "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed . . . such baselines must not depart to any appreciable extent from the general direction of the coast . . . ."  


\(^{28}\) Id. at 133.

\(^{29}\) Convention on the Territorial Sea and the Contiguous Zone, supra note 24, art. 4.

\(^{30}\) ICNT, supra note 1, pt. IV.
did not solve the problem of delimitation.\(^3\) In fact, this concern lingered on through Caracas in 1974, at which time the current language was adopted (by questionable consensus according to the record) into the treaty draft.\(^3\)\(^2\) While wording of the text is now fixed, it still merits clarification. Two years after the present draft was completed, one seasoned writer on the subject found that consensus had not been arrived at for any particular system of delimiting the bounds of authority over the waters of mid-ocean archipelagic islands. There is, therefore, no relevant rule on the nature of mid-ocean archipelagic waters.\(^3\)\(^3\)

One reason for the confusion lies in disadvantages of the treaty-making method itself. Consensus tends to represent the absence of expressed disagreement rather than an affirmative statement of accord.

Another reason for the confusion lies in fluctuating political situations common to many mid-ocean archipelagos. Neither Evensen, nor the Conventions of 1958, addressed this problem because at that point in time the distinction was largely premature. Colonial rule was prevalent until the mid-sixties and seventies, when many islands in Oceania and elsewhere gained independence and quickly found influential international voices.\(^3\)\(^4\) Fiji, for example, which under British rule was given no special treatment as a single unit with juridical control over inter-island waters,\(^3\)\(^5\) became one of the drafting nations of the present provisions.\(^3\)\(^6\) As the decolonization trend continues and until it reaches political equilibrium, there shall exist great variations in the degree of autonomy among island groups.

III. DEFINITIONS OF "ARCHIPELAGO" AND "ARCHIPELAGIC STATE"

Article 46(b) of the ICNT sets out guidelines by which a group of islands may claim to be an archipelago.

"Archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other nat-

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32. ICNT, supra note 1, pt. IV.
33. B. Dubner, supra note 6, at 41.
34. See generally Krueger & Nordquist, supra note 14, at 321.
35. Amerasinghe, supra note 21, at 544.
ural features, form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.\textsuperscript{37} This definition has not proved troublesome, because the geographical, political, economic and historical factors\textsuperscript{38} applied as a balancing test determine whether, as a practical matter, the islands and inter-island waters are best viewed as a whole.

Nevertheless, not every archipelago is an archipelagic state.\textsuperscript{39} The issue is one of sovereignty. Rigidly defined, a state is “one body politic exercising independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations”\textsuperscript{40} The State of Hawaii, for example, is not a state in the international sense. It exercises a certain territorial sovereignty, but is incapable of asserting itself in foreign affairs and national boundary limitations preempt the state’s own territorial claims.

Hawaii is not alone in the Pacific in this respect; it merely represents one extreme end of a spectrum of dependent-independent states vis-à-vis a continental state. Degrees of sovereignty vary. Mid-ocean archipelagos have status ranging from a nation state (Indonesia), a United Nations trust (Pacific Trust Territory of Micronesia),\textsuperscript{41} a colonial territory (French Polynesia),\textsuperscript{42} to a national park (Galapagos Islands of the Colon Archipelago).\textsuperscript{43} This nomenclature is more political than geographical and represents a sliding scale of territorial sovereignty determined by domestic standards. Thus, to give one category special international treatment while denying such to another evidences an arbitrary preference for one internal distinction over another. Nonetheless, the attempt of a few states to raise their island colonies to the status of archipelagos for purposes of straight baseline boundaries met with little success at UNCLOS III.\textsuperscript{44}

\textsuperscript{37} ICNT, \textit{supra} note 1, art. 46(b).
\textsuperscript{38} In the Fisheries Case (United Kingdom v. Norway) [1951] I.C.J. 116, the court held that a state must be allowed the latitude necessary to adapt its delimitation to practical needs and local requirements. The notion of straight baselines was predicated on an intimate and inseparable relationship between the land and sea domain.
\textsuperscript{39} ICNT, \textit{supra} note 1, art. 46(a) defines any archipelagic state as one “constituted wholly by one or more archipelagos and may include other islands . . . .”
\textsuperscript{40} \textit{Black’s Law Dictionary} 1262 (5th ed. 1979).
\textsuperscript{41} Krueger & Nordquist, \textit{supra} note 14, at 360.
\textsuperscript{42} \textit{Id}. at 340.
\textsuperscript{43} \textit{Official Records}, \textit{supra} note 8, at 267.
\textsuperscript{44} Jaenicke, \textit{supra} note 3, at 477.
A. Drafting the Language of the Treaty

During the 1974 drafting meetings in Caracas, most delegations expressed a need for clearer definition of an “archipelagic state.” The different drafts, which had been tabled at previous sessions, were discussed.

The first draft defined an archipelagic state as one consisting “wholly or mainly” of one or more archipelagos, adding “A coastal state with one or more off-lying archipelagos,” may employ the method of straight baselines and enjoy the sovereignty and rights of an archipelagic state. The subsequent draft articles submitted by the four representative archipelagic states deleted “or mainly” from the previous draft. Apparently, the four-nation committee proposing the draft intended to exclude those archipelagos politically appended to a continental state. Nonetheless, consensus of the entire forum on this issue was clearly lacking.

A careful reading of each country’s statement produces the following tally: Of thirty-two nations, only twelve expressly maintained that the definition should exclude offshore archipelagos belonging to a coastal state. Eleven countries expressly stated that an archipelagic state regime should include archipelagos which form an integral part of a single coastal state, even though the archipelago is not an independent sovereign. To these latter, Greece and Colombia added their vote elsewhere in the proceedings, bringing the number favoring a liberal construction of “archipelagic state” to thirteen nations. Nine states expressed no prefer-

45. ICNT, supra note 1, Art. 46(a).
46. A third draft, proposed by the United Kingdom as the purported representative of the maritime powers, was not discussed. For an analysis of this rejected proposal, see Amerasinghe, supra note 21, at 540-43.
49. Id. at 260-73.
50. In his opening remarks to the Caracas Conference, Mr. Theodoropoulos, representing the Greek delegation, said that the fact that islands formed an intrinsic geographical unit had led to widespread recognition of the right to draw straight baselines and unite closely linked islands, irrespective of whether an archipelago was part of a state also possessing a continental territory or formed a state itself. Third United Nations Conference on the Law of the Sea, Official Records, 1 UNCLOS III (32nd mtg.) 129, U. N. Doc. A/Conf. 62/Z/1 (1974).
ence in their appraisal of the articles. The United States did not formally voice its view at these meetings.

Only a narrow construction would assuage the maritime powers’ worry, articulated by Japan, that “as a result of a vague definition of an archipelago, there was to be a proliferation of claims.”

On the other hand, Portugal pointed out that “arguments in favor of the establishment of a special regime for archipelagic States were also valid for archipelagos forming part of the territory of a coastal State, particularly with regard to the security and economic interests of such States.” India noted “the archipelagic State concept recognized the geographical, economic and political unity of the archipelagos constituting a single State . . . (and) acknowledged the right of a coastal State having archipelagos which formed an integral part of its territory to apply the principles applicable to archipelagic States . . . .”

Outspoken Ecuador was the first continental country to assert archipelagic “special status” in the case of its famed Galapagos Islands comprising the Colon Archipelago. Supporting the French view concerning the indivisibility of sovereignty, the Ecuadorian delegation asserted that “[s]ince its independence, Ecuador has exercised sovereignty over that group of islands: they were part of a single geographical, economic and political entity and had always been regarded as such.” France had argued earlier against proposals “aimed at establishing a distinction between the sovereignty exercised by the State over islands and that exercised over parts of a continent. Such an approach would be a legal monstrosity because it would lead to a division of the sovereignty of the State.” Honduras concurred. By designating the Islas de las Bahias a “department,” Honduras gave that group of islands the highest possible legal status, and an acknowledgement of their geographical, political and economic relationship with the mainland.

This legislative history of international lawmaking reveals a persistent uncertainty as to a final, firm definition of “archipelagic state,” an element essential to the application of Part IV of the ICNT. Varying degrees of dominance asserted by continental

52. Official Records, supra note 8, at 261.
53. Id. at 266.
54. Id. at 263.
55. Id. at 267.
56. Id. at 263.
57. Id.
58. ICNT, supra note 1, pt. IV.
governments are as troublesome as the varying degrees of sovereignty asserted by the island groups themselves.

B. Abstract of the Archipelagic State Clauses

The sum and substance of the archipelagic state clauses is that the archipelago may measure its maritime boundaries from straight, rather than normal, baselines, where the criteria of article 46 are met.59 "Straight" baselines result in a single perimeter drawn around the outermost points of the group as a whole, enclosing all waters and other islands within. "Normal" baselines draw a low-tide perimeter around each island individually.60

Seas enclosed by straight baselines are archipelagic waters. All other maritime zones extend outward from the baseline,61 rather than from the shoreline. Whereas the Territorial Sea extends to a maximum of twelve miles from shore,62 the Contiguous Zone, a maximum of twenty-four miles,63 and the Exclusive Economic Zone (EEZ), up to two hundred miles,64 there is no designated mile limit on the area of archipelagic waters.65

Above archipelagic waters the coastal state has sovereignty over the airspace (overflight).66 Beneath archipelagic waters it enjoys exclusive rights to the resources of the seabed and subsoil.67 The coastal state has control over domestic and foreign navigation in the channels between islands, including the right to temporarily suspend innocent passage.68 Likewise article 52 provides: "The archipelagic State may, without discrimination in form or in fact amongst foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security".69

To understand the advantage of "special status"70 for archipelagic states, it is helpful to contrast the rights attaching to archipe-
logic waters with those characteristic of other maritime zones, particularly the Territorial Sea and the Exclusive Economic Zone.

With respect to rights of passage, rules concerning the Territorial Sea are similar to those concerning archipelagic waters, except that the latter comprise a more precise scheme for designation of sea lanes and traffic separation patterns,\(^1\) while providing measures against ships' deviation from such sea lanes.\(^2\) Comparable to the control of a coastal state over its Territorial Sea, the island state has considerable discretion in navigational safety control in these sea lanes, provided it conforms to customary norms of international navigation.

By comparison, the designation of an area as an Exclusive Economic Zone gives considerably less control to the coastal state than that attaching to archipelagic states. The text of the treaty, Part V, grants "[s]overeign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or nonliving, of the seabed and subsoil and the superjacent waters . . . ."\(^3\) In the EEZ, however, foreign states enjoy the freedoms "of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea . . . ."\(^4\) The foregoing are implicit in traditional notions of freedom of the High Seas.

In sum, like the EEZ, an archipelagic waters model favors economic interests of the island state; but unlike the EEZ it favors security interests of the island state over navigational concerns of the maritime powers. The EEZ may be as much as a two hundred mile radius; thus, in any archipelago,\(^5\) the EEZs of any archipelago's individual islands overlap even if drawn from normal baselines. Therefore, it is the control over inter-island navigation rather than an exclusive right to exploit resources which distinguishes the archipelagic state from other political designations.

1. Effect of Special Status

The concept of special treatment for island groups\(^6\) was

\(^{1}\) ICNT, supra note 1, art. 53.
\(^{2}\) Id. art. 53(5).
\(^{3}\) Id. art. 56(1)(a).
\(^{4}\) Id. art. 58.
\(^{5}\) Id. art. 46.

\(^{6}\) Fisheries Case (United Kingdom v. Norway) [1951] I.C.J. 116. See generally Hodgson & Smith, The Informal Single Negotiating Text (Committee II): A Geographical Per-
spawned by the economic interests peculiar to archipelagos. However, at the Caracas meeting which drafted these articles there was an articulated emphasis upon the political, strategic and security concerns of archipelagic states arising from their vulnerability to isolation and partition in case of attack. In peacetime the pendulum is apt to swing toward economic concerns, i.e., energy, fishing rights, and other resources. The stance of each nation must be interpreted against the background of its own self-interest.

The protection of both economic and security interests is effected by coastal state control over archipelagic waters, particularly inter-island channels. Straight baselines, providing continuity from island to island establish corridors of coastal control across ocean channels. Such control is necessary to guarantee the prudent long-term use of ocean resources. This has been a concern of the United States since President Truman issued a Presidential Proclamation in 1945 asserting the United States' control over its own continental shelf. Commentators observed:

The effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore... self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources... As inter-island traffic increases, the ability to explore, exploit, and protect natural resources becomes difficult without the concurrent ability to regulate navigational patterns in a reasonable manner. To this end the increased control afforded by straight baselines is far superior. The archipelagic state has the right to designate sea lanes and separation schemes for maritime traffic.

Another significant effect of giving an archipelagic state special status to define its boundaries by straight baselines lies in the area of national security. “[W]arships on the High Seas have complete immunity from the jurisdiction of any State other than the flag State” of the vessel itself. The three mile limit is traditionally premised on the “cannon ball rule,” the distance of a typical

78. See generally Hodgson & Smith, supra note 76.
81. ICNT, supra note 1, art. 53.
82. Id. art. 95.
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18th Century weapon trajectory. Obviously the rule is obsolete. Nevertheless, the underlying security interest is not to be ignored in modern analysis.

An archipelagic state can suspend innocent passage\(^8\) for good cause. Such measures, which ease the island state’s task of defense and surveillance, are afforded an archipelagic state precisely because of its inherent vulnerability in terms of national security. Absent special status, island groups cannot do so unless their twelve mile Territorial Seas overlap.

Thus, archipelagic state status confers two basic advantages: (1) in terms of economic interests it provides protection of natural resources, and (2) in terms of political interests, it provides protection of national security interests.

The potential for abuse of restrictive rights is strong. The effect of a proliferation of claims would be to balkanize the world’s oceans so as to erect an obstacle course for maritime routes. Both warships and merchant marine might have to confront adjoining blocks of archipelagic waters. Thus, it is a small wonder that maritime powers uniformly discourage such creeping territorial aggrandizement.

2. Conflicting Interests of Maritime Powers and Archipelagic States

Special treatment for archipelagos threatens the interests of the major maritime and global military powers. C.F. Amerasinghe, former President of UNCLOS, recognized these differences, and in a thoughtful and comprehensive article he urged compromise:

The countervailing interests of other States, particularly maritime States, in the seas within and surrounding archipelagos cannot be ignored in approaching the problem of archipelagos. Other States have inclusive claims based on the security need in seeing that large areas of ocean and airspace are not closed to shipping and aircraft. Such maritime powers as the U.S.A. have a special interest in this kind of claim. Equally, other States have commercial interests for their merchant vessels and aircraft on the high seas. Both these interests involve the freedom of navigation, unhampered transportation and communication, whether surface, subsurface or aerial.\(^8\)

Early assertions of special status advanced by Indonesia, the Phil-

\(^8\) Id. art. 52(2).
\(^8\) Amerasinghe, supra note 21, at 558.
ippines, and Ecuador met with protest from the maritime states, of which the United States, the United Kingdom, and the USSR, were most vocal.85

Ambassador Elliot Richardson, head of the United States delegation to UNCLOS III, expressed this opposition most clearly in terms of commerce and national security:

Ninety percent of US international trade is carried on the oceans . . . . Protection of freedom of navigation for tankers and other commercial vessels is extremely important. Since our Armed Forces operate on a worldwide basis, the United States has a compelling interest in assuring global mobility and freedom to use the seas and the airspace above them for national security purposes. Most, but not all, countries recognize that our security interests and those of other major powers must be satisfied if there is to be general agreement on a treaty.86

In particular, the restriction of passage through the seas surrounding the islands of Indonesia and the Philippines would make access between the Pacific and Indian Oceans more difficult and costly.87

At the Caracas meetings, the archipelagic states responsible for drafting the relevant treaty provisions argued persuasively that their own national security depends on control of inter-island waters.88

It is the inadequate reconciliation of these conflicting interests—maritime mobility versus insular control—that has led to the definitional difficulties in the archipelagic state clauses. In drafting a rule to cover geographical claims, no two of which are identical, each state sought to define archipelagic state as narrowly as possible, yet just broadly enough to include itself. Each interpreted the final language consistent with its own self interest.

IV. THE UNITED STATES POSITION PERTAINING TO HAWAII

The United States has not attempted to argue that the Hawaiian Islands' minimal autonomy as a state of the Union might give it archipelagic state status. It would be contrary to national policy to strain the treaty language which the concept of mare liberum

85. Id. at 544.
86. Richardson, United States Interests and the Law of the Sea, supra note 17, at 656.
87. Amerasinghe, supra note 21, at 569.
would favor narrowing. The State Department has consistently maintained its position against further balkanization of the world oceans, preferring to deny archipelagos special status insofar as any grant of jurisdiction would further encroach upon freedom of the High Seas.

The debate is not new. In 1951, in remonstrative response to Ecuador's declaration of archipelagic boundaries for the Galapagos Islands, the State Department released this statement:

The United States has, in common with the great majority of other maritime nations long adhered to the principle that the belt of territorial waters extends three marine miles from the coasts. This principle, when applied to insular possessions, contemplates a separate belt of territorial waters for each island, excepting where the water distance is less than six marine miles. Both the purported establishment of a belt of Ecuadorian territorial waters twelve nautical miles in breadth, and the assertion of a claim to a single belt of territorial waters around the entire Colon Archipelago, contravene this principle of international law.9

Thirty years later, that premise of customary international law may be superseded by treaty, where an archipelago can identify itself under the rubric of archipelagic state. Ecuador has made it clear that it intends to do just that vis-à-vis the Galapagos Island of Colon.90

In spite of the State Department's strict stance against special archipelagic boundaries for the Hawaiian Islands, the entire archipelago is surrounded by a single Fisheries Management Zone with a 200 mile radius.91 Nonetheless, because none of the islands is more than 400 miles apart, overlapping zones drawn around each island could constitute a single unit overall. To this limited extent, the United States, too, has contributed to mare clausum, but did not have to resort to special archipelagic state status to do so.

A. Federal Pre-emption

The Hawaiian archipelago is one of the fifty states of the United States. It is home for over a million Americans; primary base for the Pacific fleet and headquarters of major military instal-

89. United States Dep't of State Note of Protest dated June 7, 1951, reprinted in B. Dubner, supra note 6, at 43.
lations; port of call and processing center for a thriving deep water fishing industry; recreational center for millions of travellers each year and commercial crossroads of East-West trade. Its significance in the mid-North Pacific is undeniable.

Nonetheless, in spite of this significance, Hawaii may not assert on its own behalf a more extensive claim against the High Seas than the United States asserts for it. The Supreme Court addressed this issue in United States v. California in determining that the Federal Government has paramount rights to submerged lands in the Santa Barbara Channel:

"[T]he Convention [on the Territorial Sea and Contiguous Zone] recognizes the validity of straight base lines used by other countries, Norway for instance, and would permit the United States to use such base lines if it chose, but that California may not use such base lines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States."

The court reasoned that:

an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves.

United States v. Louisiana is similar to United States v. California in that it concerned the Federal Government's efforts to control offshore areas despite conflicting state claims of sovereignty. There, the Supreme Court clarified the separation of powers between federal and state governments as well as between branches of the Federal Government.

The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other na-

94. Id. at 167-68 (emphasis in original).
95. Id. at 168.
tions. Any such determination is, of course, binding on the States.97

On the other hand, "the national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus, a contraction of a State’s recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable."98

Hawaiian case law holds that there is no historic claim to the channels.99 Thus, the Federal Government’s determination of international boundaries limits Hawaiian state claims by the doctrine of federal pre-emption.

V. THE HAWAIIAN ARCHIPELAGO

Were Hawaii an independent, sovereign state, it would undoubtedly prefer to assert archipelagic state status to obtain the advantages of an increased maritime zone area and increased control over inter-island channels. As it is instead a mere political appendage to a continental nation, a narrow construction of "archipelagic state" would not include Hawaii. Indeed, similar claims by Spain and India vis-à-vis their offshore territories have not been accepted by the international community.100

Definitional analysis of "archipelagic state" has two components. We have concluded Hawaii is not an archipelagic state. But, is it even an archipelago under the terms of the treaty at hand?

The answer to this question brings into focus the uniqueness of this geopolitical division, and permits elucidation of the logic for conferring special treatment in the first place.

The islands and inter-island waters of an archipelago must "form an intrinsic geographical, economic and political entity, or historically have been regarded as such."101 A four-point test derived from the reasoning of the Fisheries Case102 is used to determine intimate interaction of land and sea.

97. Id. at 35.
100. Jaenicke, supra note 3, at 477.
101. ICNT, supra note 1, art. 46(b).
The rationale behind special treatment for islands which form a single political group is based on the integrity of the body as a whole. The four point test sets out the following criteria: (1) *Economic viability* requiring cooperation, transportation, and inter-island commerce; (2) *political stability and security* requiring control and communication; (3) *cultural continuity* requiring an historical commonality advanced in part by (4) *geographical proximity*. These are elements essential to the functioning of a group of people as a whole.

When populations are segmented by navigable waters, a reasonable degree of control over those waterways is arguably necessary to the integrity of the state as a single unit. Therefore, even as an island group satisfies the criteria which define it as an archipelago, this result establishes from the outset the island group’s best argument for special treatment in terms of jurisdictional boundaries granted to a state of archipelagic status.

The Hawaiian Archipelago serves as a good example to apply the four-fold test. It illustrates that not every group of islands is an archipelago for international purposes, and the distinguishing features point out the purpose of granting special status to true archipelagos. The eight most familiar islands—Oahu, Kauai, Maui, Niihau, Lanai, Molokai, Kahoolawe, and the “Big Island” of Hawaii—cover only about a third of the length of the island chain. These are called the Main Group.

Unknown to most Americans is the fact that at least eight other outer islands, atolls, and reefs skip like stepping stones across 1100 nautical miles, out to Midway Island. This is the Leeward Group, extending westward and slightly northward along the Trade Wind route: Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Laysan, Lisianski, Pearl and Hermes Reef. The two groups of the Hawaiian Archipelago are contrasted for purposes of this analysis.

A. Geographical Requirements

The committee which drafted the ICNT set out limiting guidelines which archipelagic baselines must meet. These measurements also define the geographical meaning of “cohesiveness.” Article 47(1) allows baselines to be drawn

103. *Id.*
joining the outermost points of the outermost islands . . . pro-
vided that within such baselines are included the main islands
and an area in which the ratio of the area of the water to the area
of the land, including atolls, is between one to one and nine to
one.\textsuperscript{104}

Article 47(8) further clarifies this provision with the following
language:

for the purposes of computing the ratio of water to land under
paragraph 1, land areas may include waters lying within the fring-
ing reefs of islands and atolls . . . .\textsuperscript{105}

Thus, inner lagoons are measured as land. This allowance for atolls
is important for thousands of otherwise insignificant islets, thin
slices of coconut palm-strewn sand scant in acreage, but encircling
a lagoon many times the dimension of land.

The geomorphical relationship of the islands to one another
and the geographical relationship of land mass to surrounding sea
distinguish the Main Group from the Leewards.

Among the Leeward Islands, which are geologically older than
the Main Group and thus characterized by outer reefs circumscrib-
ing gigantic lagoons, land-sea ratio is minimal; French Frigate
Shoals covers 107,707 acres of shallow water, but only a total of 65
acres of terra firma; Lisianski covers 382.6 acres of land and 95,506
acres of shallow, reef-laced shoal.\textsuperscript{106} How much of this ought to be
included in “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,” as required by
article 47(8)\textsuperscript{107} is information presently unavailable. It is clear,
however, even without precise figures, the Leeward Islands do not
constitute sufficient land mass to satisfy the intimate land-sea rela-
tionship contemplated by the articles. The combined land area of
the Leewards amounts to a mere 1755.5 acres,\textsuperscript{108} and even if this
figure were to be abundantly increased by adding lagoons and dry-
ing reefs, the fact that the island chain spans 1100 miles of open
ocean means the Leewards could not meet the nine-to-one ratio

\textsuperscript{104} ICNT, \textit{supra} note 1, art. 47(1).
\textsuperscript{105} \textit{Id.} art. 47(8).
\textsuperscript{106} Letter from Elizabeth Cummings, Acting Refuge Manager, United States Dep't of
the Interior, Fish and Wildlife Service, to the author (Oct. 10, 1979) [hereinafter cited as
Cummings Letter].
\textsuperscript{107} ICNT, \textit{supra} note 1, art. 47(8).
\textsuperscript{108} Cummings Letter, \textit{supra} note 106.
required by article 47(1).\textsuperscript{109}

The eight islands of the Main Group, however, consist of a much broader land base. The "Big Island," Hawaii, is over 4000 square miles.\textsuperscript{110} Unlike the Leewards, which appear on the nautical charts as mere flecks scattered across multiple meridians of open sea, the Main Group constitutes a substantial presence. Although figures are unavailable for the area which would be encompassed by straight baselines, it is clear that the nine-to-one ratio is easily met. The linear configuration of the chain and the lack of any stray islets which would conflict with the provision that "baselines shall not depart to any appreciable extent from the general configuration of the archipelago" result in a low land-sea ratio.\textsuperscript{111}

Article 47 contains a second major limitation designed to determine the geomorphical cohesiveness of the island group in question. Section (2) states:

\begin{quote}
The length of such baselines shall not exceed 100 nautical miles, except that up to three percent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.\textsuperscript{112}
\end{quote}

While not a single pair of islands in the Leeward Chain satisfies this provision, in contrast, every channel between the islands of the Main Group falls within this limitation. The widest is the Kauai Channel, 64 miles in width.\textsuperscript{113}

Among the geographical limitations of article 47 are two factors of lesser importance which nonetheless deserve consideration. Article 47(5) states:

\begin{quote}
The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.\textsuperscript{114}
\end{quote}

Section (7) adds that existing rights of "an immediately adjacent neighboring State" are to be respected.\textsuperscript{115} The entire Hawaiian ar-

\begin{footnotesize}
\textsuperscript{109} ICNT, supra note 1, art. 47(1).
\textsuperscript{110} State of Hawaii Dep't of Accounting and General Services, Survey Division, Memorandum Re: The Islands Now Included in the State of Hawaii (1967) [hereinafter cited as Survey Division Memorandum].
\textsuperscript{111} ICNT, supra note 1, art. 47(3).
\textsuperscript{112} Id. art. 47(2).
\textsuperscript{113} C.A.B. v. Island Airlines, Inc., 235 F. Supp. 990, 993 n.6 (D. Hawaii 1964), aff'd, 352 F.2d 735 (9th Cir. 1965); Amerasinghe, supra note 21, at 561.
\textsuperscript{114} ICNT, supra note 1, art. 47(5).
\textsuperscript{115} Id. art. 47(7).
\end{footnotesize}
chipelago, including both the Leewards and the Main Group, are so remotely situated in the middle North Pacific, sprawling along the Tropic of Cancer between 154°W and the International Dateline at 180°, that even the 200 mile fisheries zone shown on National Oceanic and Atmospheric Administration Chart No. 19019 neither encroaches upon the Territorial Sea of a neighboring nation, nor brings Hawaii into conjunction with another maritime zone of a neighboring nation.\footnote{N.O.A.A. Chart No. 19019.}

It is clear from the foregoing that the Main Group of Hawaiian Islands fits the geographical formula for archipelagic status. Hawaii's substantial land-sea ratio, proximity of the islands, linear configuration requiring little open ocean to be enclosed by base lines, and distinct isolation from the territorial claims of any other nation, make this island group a perfect example of the single unit theory which argues for the special treatment of boundary delimitation under an archipelagic regime.

The Leewards, on the other hand, form too insubstantial a representation of solid ground above sea level to meet the geographical prerequisites.

B. Political Criteria

The political question immediately divides the Hawaiian Archipelago into two sections. The eight islands of the Main Group comprise the State of Hawaii. As a State of the Union, this insular unit is entitled to the same rights and sovereignty as any of the other 49 United States. Upon statehood, Hawaii attained the highest possible legal status—an acknowledgment of its geographical, political, and economic relationship with the mainland.

There is a compelling argument for political integrity among the islands of the Main Group, the State of Hawaii. Kauai, Maui, Hawaii, Molokai, Lanai, and Niilau look to the state capitol of Honolulu on Oahu for political leadership. An entity equal in stature and voice to the other 49 members of the Union, Hawaii is entitled to territorial sovereignty and national security protection of its citizens. While foreign affairs power lies with the Federal Government, interests of the individual states most directly affected by any given international proposal are factors that must be weighed in the exercise of the treaty-making power. In the case of Hawaii, federal and state interests in national security measures
By contrast, the islands identified as the Leewards have the territorial status of federal lands; they comprise the Hawaiian Islands National Wildlife Refuge. Although they do not now belong to the State of Hawaii, they did at one time when Hawaii was merely a possession of the United States. Former official surveyor of the Territory of Hawaii, Robert D. King, writes: “With the exception of Midway Islands, which have always been considered as belonging to the United States, these islands have all, from time to time, been annexed by Hawaii, and hence became the property of the United States with the acquisition of that territory”. 117 That acquisition occurred in 1898. Any question of jurisdiction was decided and codified in Executive Order No. 1019 which President Theodore Roosevelt signed into law February 3, 1909:

It is hereby ordered that the following islets and reefs, namely: Cure Island, Pearl and Hermes Reef, Lysianski [sic] or Pell Island, Laysan Island, Mary Reef, Dowsetts Reef, Gardiner Island, Two Brothers Reef, French Fregate [sic] Shoal, Neckar Island, Frost Shoal and Bird Island, situated in the Pacific Ocean at and near the extreme western extension of the Hawaiian archipelago . . . are hereby reserved and set apart, subject to valid existing rights, for the use of the Department of Agriculture as a preserve and breeding ground for native birds. 118

Various state and federal sources disagree as to the inclusion of all these islands, but do agree that at least eight are still considered part of the National Wildlife Refuge. 119

While at various times jurisdiction over the Leeward Islands was arguably under Hawaiian state authority, current National Oceanic and Atmospheric Administration charts indicate: “The Hawaiian Islands National Wildlife Refuge is under the jurisdiction of the U.S. Fish and Wildlife Service, Department of the Inte-

119. Survey Division Memorandum, supra note 110. Compare this memorandum and Exec. Order No. 1019 (1909) with the Cummings letter, supra note 106, wherein it is noted that:

the islets & reefs listed in the 1909 Executive Order differ somewhat from the list in our current refuge boundaries . . . Dowsetts Reef, Two Brothers Reef, & Frost Shoal are no longer included based on U.S. Coast & Geodetic Survey Charts; & Kure (formerly Cure Island) is now a state refuge & site of a Coast Guard Loran C Station & no longer part of the Hawaiian Island [National Wildlife Refuge].”
rior." It remains in federal hands, detached from any Hawaiian state agency.

Isolated, inhospitable to human habitation, and populated solely by breeding albatross and other endangered species, the Leewards lay no claim to being a political unit of any kind. While the Leewards currently serve no military purpose, except for a single weather station on tiny Tern Island, the potential for a string of land bases stretching 1100 miles across the Pacific is not an insignificant prospect for national security interests. Nevertheless, no installation now exists.

The Main Group is another story, serving as the site for a proliferation of military bases. While the largest concentration of personnel is on Oahu, Koolahawe is used exclusively for military functions, and other islands are locations for training activities. Pearl Harbor is headquarters for the Pacific Fleet, and the west end of Oahu is occupied by Naval Air Defense. National security requires that inter-island channels be protected by regulation and surveillance of foreign ships passing through them.

Discussing Hawaii’s role in the security interests of the United States, Senator Spark Matsunaga recently stated that he had no doubt that:

an attack on California would have been attempted later in the war (WWII) if the United States had not been able to regroup and launch a counter-attack from Hawaii. The USS Arizona memorial at Pearl Harbor is a constant reminder of the important role which Hawaii played in the defense of this country during World War II, and of the importance of maintaining our presence in the Pacific.

C. Economic Concerns

The economic factor involves requirements of human habitation, exploitation of non-living resources, commerce, conservation, and controlled harvesting of living resources.

Formerly, the economic question focused on resource exploitation required for the sustenance and welfare of the local inhabi-

120. N.O.A.A. Chart Nos. 19004, 19016, 19019, 19022, 19401, 19402, 19421, 19441, 19442, 19461, 19481, 19483.
121. Gaffney, The “Other” Hawaiian Islands, SEA MAGAZINE, August 1979, at 52, 53.
122. Cummings Letter, supra note 106.
tants. Some developing countries still limit their argument for special status to this self-sufficiency point. The modern reality for most nations, however, is that oceanic land bases are an important source of energy and mineral resources, and hold potential for the exploitation of other resources yet to be fully developed.

Under the regime of islands, designated in article 121(3), "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." This is not to say that uninhabited islands may not form a part of an archipelago; they often do. Micronesia, for example, "comprises a series of small islands which, due to poor soil and lack of mineral resources, do not have a viable economic land base." A similar situation prevails in French Polynesia, where baselines touch atolls consisting solely of sand which are completely submerged during hurricanes. The deciding factor is that the archipelago as a whole must offer a viable economy supporting, at least in part, a local population.

The Leeward Islands of Hawaii fail the test, because there is no indigenous population. In 1979, the United States Department of the Interior reported that only one of the Rogue Islands is inhabited permanently at this time; Tern Island, one of the small sandy islands included in French Frigate Shoals, is the residence of a Refuge manager and site of a former Coast Guard Loran station. These facilities also are occasionally used by researchers.

To the extent that the Leewards comprise a National Wildlife Refuge, ecological preservation arguably constitutes a viable economic interest in protecting surrounding waters. However, the United States Supreme Court rejected this argument in the case of United States v. Alaska. In that instance, the Court found that an environmental interest in protecting wildlife preserves was insufficient to declare Cook Inlet as internal waters. Similarly, the economic interests of the Leeward Islands would likely be found insufficient to compel a finding that this group could declare archipelagic waters.

Again, the Main Group presents an entirely different picture. The eight islands sustain a substantial population. Honolulu is the

125. ICNT, supra note 1, art. 121.
127. Cummings Letter, supra note 106.
most important mid-ocean port in the Pacific. It is the location of an international airport. It is the crossroads of commercial activity between East and West. It connects Japan and China with United States trade. Moreover, inter-island transport across the channels is absolutely essential to the state economy. The waters are generously harvested for local consumption, shipment to the mainland and international export. Relatively small native fishing vessels, as well as the behemoths of the tuna fleet, ply the channel waters in search of schools of ahu, ono, mahimahi and a myriad of other varieties of fish. Since the days when Lahaina, Maui, was every Pacific whaler’s port of call, the economy of these islands has been intimately entwined with the living resources of the sea.

The commercial cohesiveness of this archipelago is firmly established. From the outer islands to the port of Honolulu on Oahu or to the port of Hilo on Hawaii, all goods and produce must be shipped by boat, barge, or air for refining, processing, manufacturing, packaging, and further shipment. Likewise most necessities are shipped to one of the major ports before distribution by inter-island transport. In this sense the islands of the State of Hawaii are totally dependent on one another, totally dependent on open channels of communication and commercial interaction between themselves. Hawaii has a very strong economic interest in protective rights of navigation and regulation of shipping in the channels of water severing the eight islands of the Main Group. This is better served by drawing straight baselines, rather than by measuring territorial seas around each island independently.

The State of Hawaii illustrates the degree to which economic needs of mid-ocean archipelagos are met only by effective inter-island interaction, regardless of their political integration with the government of a continental state.

D. Historical Factors

The historical element is less clearly defined under customary international law than political and economic requisites. It is not entirely certain whether the term means that there exists a traditional assertion of territorial claim to the seas between islands, as in the case of Indonesia, Fiji, and the Philippines, or in the broader sense, that the islands have been considered traditionally as a unit, whether or not that unit included sovereignty over inter-island
The latter interpretation has broader application because the former is based on prescriptive right theory which would allow no interruption in claim over territorial sea. Uninterrupted political policy is rare in the South Pacific where colonial rule superseded native rule in most cases.

Hawaii did not escape colonialism unscathed. The difference between Hawaii and other Pacific pockets of colonial paradise is that Hawaii joined, rather than severed itself from the nation which succeeded its native monarchy. O'Connell notes that in 1854 the reigning Hawaiian monarch defined the full extent of his jurisdiction to be "the waters of Hawaii and all the channels passing between and dividing said islands from island to island and all its ports, harbours, bays, estuaries, gulfs and arms of the sea cut off by lines drawn from one headland to another". The king was referring here to the islands of the Main Group only; there is no evidence of any historical claim encompassing the Leeward chain.

The full extent of our jurisdiction, . . . by our fundamental laws is to the distance of one marine league surrounding each of our islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai, and Nihiu, commencing at low-water mark on each of the respective coasts of said islands, and includes all the channels passing between and dividing said islands from island to island.

These claims were based on earlier assertions under Kamehameha III: "The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands, and dividing them; which jurisdiction shall extend from island to island." However, any marginal claims under the monarchy were conceded at the Constitutional Convention, where the channel status was discussed and it was decided that upon statehood Hawaii asserted no seaward claim beyond the three mile limit extending from the low-water mark on each island.

At the federal level, policy has been to deny Hawaii territorial

130. The Kingdom's Neutrality Proclamation of 1877, O'Connell, supra note 7 at 43, citing CROCKER, EXTENT OF THE MARGINAL SEA 595 (1919 ed.).
133. 235 F. Supp. at 1001-05.
seas extending across the channels. A 1964 State Department memorandum declared its position on the matter:

Each of the islands of the Hawaiian Archipelago has its own territorial sea, three miles in breadth measured from low-water mark along the coast of the island. It is our view that the waters seaward of these belts of territorial sea are high seas over which no State exercised sovereignty.\(^\text{134}\)

However, at the time of that statement, neither the Geneva Convention on the Territorial Sea and Contiguous Zone\(^\text{135}\) nor customary international law recognized the archipelagic baseline theory. The emerging regime of archipelagic states has not to date changed State Department positions.\(^\text{136}\)

About the time Secretary of State Dean Rusk issued the above memorandum, the courts produced a similar statement holding that inter-island channels constitute international waters. In the leading case, *C.A.B. v. Island Airlines*,\(^\text{137}\) the question was whether an inter-island airline ever left the state in its cross-channel over-flight pattern, thereby becoming subject to federal regulation. In this decision, the court held that flights crossed over international waters mid-channel and were therefore within C.A.B. regulatory powers. The court relied on then existing international law and Hawaiian constitutional commentary. Since statehood, Hawaii has asserted no channel claim. To satisfy the historical right factor, one must look back to the claims of the monarchy superseded by a hundred years of intervening events.

The Court found that nineteenth century monarchial claims were inconsistent. While King Kamehameha III claimed the channels in the Neutrality Proclamation of 1854,\(^\text{138}\) his successor King Kalakauau repealed prior acts of Kamehameha issuing his own Neutrality Proclamation in 1877,\(^\text{139}\) by which “Kalakauau” apparently contented himself with claiming jurisdiction over the waters within one marine league (3-mile limit) of the low-water mark of

\(^{134}\) 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 281 (1963).

\(^{135}\) Convention of the Territorial Sea and Contiguous Zone, *supra* note 24.

\(^{136}\) The Reagan Administration has announced State Department policy regarding UNCLOS III is under reconsideration. Malone, *supra* note 19, at 49-50.

\(^{137}\) *C.A.B. v. Island Airlines*, 235 F. Supp. 990 (D. Hawaii 1964), aff’d, 352 F.2d 735 (9th Cir. 1965).


the respective island’s sea shores.”140 The Hawaiian Organic Act makes no express mention of the channel waters.141 At the Hawaii State Constitutional Convention, it was decided that “[t]he words ‘territorial waters’ are meant to include those rightful areas as incurred in the Hawaiian Organic Act . . . which includes not only the three-mile limit but the territorial waters between the named islands.”142

A half century later, the Hawaii State Admissions Act, giving the islands statehood, allowed: “The State of Hawaii shall consist of all the islands together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of the enactment of this Act.”143 Since “territorial waters” under international law at the time of statehood did not include the concept of archipelagic waters as it might today, Hawaii could not claim existing historic right.144

E. Summary

Of the four factors defining an archipelago, the historical position is the weakest in Hawaii’s favor. Nonetheless the other three factors—economic, political, and geographical—provide strong grounds for finding the Main Group an archipelago under international law, while the Leeward Group falls short of the definitional standard.

Analysis of the difference between an archipelago and a mere group of islands brings out the rationale for treating the former as a single unit. Yet at the same time it would appear that the same reasoning could be argued on behalf of any archipelago. Indeed, at the Caracas conferences145 and elsewhere in the textual commentaries,146 authorities have argued just that.

Only the archipelagic state distinction narrows the application of the single unit theory. Meanwhile, emerging state practice in the Pacific is in a state of flux evidencing many inconsistencies in the customary international law in the pre-UNCLOS III period.

140. 235 F. Supp. at 999.
143. 235 F. Supp. at 1007.
144. Id. at 1004-07.
145. Official Reports, supra note 8, at 260-73.
VI. EMERGING PRACTICE IN THE PACIFIC

After strong initial protest over the notion of a 200 mile Exclusive Economic Zone, the United States followed the lead of other coastal nations in passing domestic legislation, namely, the Fishery Conservation and Management Act of 1976\(^\text{147}\) This was solid recognition of the political and economic reality of evolving state practice of other coastal nations and insular territories.

An excellent and exhaustive overview of comparative territorial practice in the Pacific Basin indicates that the great majority of archipelagos now claim a 200 mile EEZ of varying dimensions.\(^\text{148}\) Most, however, do not claim archipelagic waters between islands. Varying in degree of sovereignty, few are independent states, although the trend continues in that direction. With a few notable exceptions, the boundary is either expressly or impliedly measured from normal baselines. Few groups include islands more than 400 miles apart, so that the 200 mile zone measured around each island frequently overlaps the adjacent one, forming a single jurisdictional zone. Archipelagos utilizing this model include: the Cook Islands, the French Pacific Island Territories, New Zealand, and Western Samoa.\(^\text{149}\)

Others assert an extended fisheries zone. The emerging pattern, according to the text writers, is for the coastal state to chart out an extended fisheries zone prefatory to the more comprehensive claim of an Exclusive Economic Zone for all purposes. This is the current status of the United States claim. Similar approaches are taken by Chile, Japan, Micronesia, and Tuvalu.\(^\text{150}\) The 200 mile zone of the United States applies, not only to Hawaii, but to Guam, American Samoa, and the Pacific West Coast.

Five Pacific Island nations have asserted archipelagic state status, setting up similar regimes of jurisdiction over archipelagic waters: Fiji, Tonga, Philippines, Indonesia, and Papua, New Guinea.\(^\text{151}\) All are sovereign states. While all five nations delimit their waters on the basis of straight baselines under the ICNT model, the nature of claims to those waters differs. Fiji defines for itself an EEZ adjacent to the Territorial Sea, measured a total of 200 miles out from straight baselines. Tonga asserts claim to living


\(^{148}\) Krueger & Nordquist, supra note 14, at 550.

\(^{149}\) Id. at 339-49.

\(^{150}\) Id. at 358-62.

\(^{151}\) Id. at 349-51.
and non-living resources within an archipelagic area determined by historical criteria. The Philippines uses a hybrid of the straight baseline method plus divergent lines satisfying historical claims to define its extensive seaward perimeter within which it claims a Territorial Sea. Indonesia uses a straight baseline method to claim archipelagic waters; twelve miles out from that it claims its Territorial Sea.\textsuperscript{182}

Ecuador, whose case relating to the Galapagos is most analogous to Hawaii in geopolitical terms, asserts the most exclusive claim of all, and the least likely to be recognized by the international community. While other countries assert a narrow margin of highly exclusive Territorial Sea around the archipelago as a whole, or else a broad facing of less restrictive overlapping EEZ’s around each island, Ecuador combines the two methods to its enormous advantage. It claims that “[t]he territorial sea shall also comprise the waters within a perimeter of 200 nautical miles measured from the outermost extremities of the outermost island of the Galapagos (Colon) Archipelago.”\textsuperscript{183}

The Galapagos claim of Ecuador, asserting a 200 mile Territorial Sea, is the most extreme instance of creeping jurisdiction in the Pacific. Promulgation of regulations pertaining to foreign vessels under this claim would be unduly restrictive internationally and unenforceable domestically. Nevertheless, Ecuador has expressed in the plenary session of the Law of the Sea conferences its unwillingness to relinquish its claim.

In viewing the total picture in the Pacific Ocean, one encounters vast amounts of ocean thus nationalized on a unilateral basis, simply expropriated from the ocean commons. Islands in particular are responsible for the diminution of High Seas freedom. Instant territoriality adds, for example, four million square miles of exclusive fisheries jurisdiction to primitive French Polynesia\textsuperscript{184} and 86,000 square miles of Territorial Sea to the Philippines.\textsuperscript{185} Enforcement of these limits is an astronomical task, impracticable for many newly independent nations. Nonetheless, this does not seem to deter the initial assertion of EEZ claims. Many of

\begin{footnotes}
\item[152.] Id. at 335-50.
\item[153.] Id. at 334.
\item[154.] Veslind, Tahiti and Beyond: The Society Islands, Sisters of the Wind, 155 NATIONAL GEOGRAPHIC 843, 859 (1979).
\item[155.] Rajan, Toward Codification of Archipelagos in International Law, 13 INDIAN J. INT'L LAW 468, 469 n.13 (1973).
\end{footnotes}
the islands from which boundaries are drawn outward do not satisfy the habitation and economic viability requirements of article 121, the Regime of Islands.\textsuperscript{156} Apparently, therefore, these claims are based on the inclusion of outer islands in the archipelagic constellation as a whole, even where normal baselines are applied.

Prior to the UNCLOS III treaty, in the absence of a firm rule of international law, the tendency has been to assert some form of EEZ which defines the archipelago as a single unit, but not yet to delimit and assert the more restrictive characteristics of archipelagic state status.

For example, Hawaii’s assertion of a 200 mile Fisheries Management Zone is a conservative claim, but not inconsistent with current practice in the Pacific. Furthermore, it has opened the possibility of expanding this to a more comprehensive Exclusive Economic Zone. In terms of its island state, federal policy has shown care not to appear “grasping,” and has conservatively declined to assert archipelagic waters in the region.

At the same time, Hawaii would argue that the Federal Government should leave open to itself the option of later asserting claims not inconsistent with evolving practice elsewhere. Hawaii, finding itself in geographical circumstances similar to other mid-ocean archipelagos, should be allowed the choice to assert similar claims. The sliding scale of independence descriptive of South Pacific archipelagos presents an uncertain future. Additionally, Hawaii would further argue the irony that, territorially at least, it would be better off as an isolated nation than as one of the fifty States of the Union.

\section*{VII. CONCLUSION}

The Law of the Sea Treaty is of the nature of a constitution broad enough in its terms to provide a foundation for long term application and achieve the necessary two thirds approval of participating delegations. A certain amount of purposeful ambiguity is indicative of this preliminary goal in establishing a world order for the oceans.

Negotiation of multilateral treaties has been likened to haggling in a rug bazaar. The idea is not to pick threadbare the knap and fiber of the product before it is sold: sold, that is, in plenary

\textsuperscript{156} ICNT, \textit{supra} note 1, art. 121.
session of the United Nations conference and sold by congressional or parliamentary ratification back home. Yet, just as in a contract for the sale of goods, consent of the parties must be predicated on mutual understanding of the contract terms. Purposeful ambiguity has limited utility.

It is clear that the delegates at the drafting sessions of the archipelagic clauses had trouble with the meaning and the distinguishing particulars of "archipelagic state"; it is not entirely clear that the ambiguities have been resolved.

The United States, ideally, would like to see the doctrine of mare liberum upheld; mare clausum through creeping territoriality imposes restrictions on freedom of the High Seas, and poses many problems for maritime nations. As newly independent island nations continue to emerge from the archipelagic clusters of colonial Oceania and elsewhere in the South Seas, state practice could evolve in the Pacific to produce an archipelagic regime as the standard. Hawaii would be the distinct minority as an archipelago without archipelagic state status.

The position of the United States as a maritime state requires careful weighing of competing considerations. Our national security and economic welfare depend on unrestricted overflight and navigation through international straits and maximum access unimpeded through sea lanes everywhere. Due to the pervasiveness of United States naval and merchant marine activity, the United States has a compelling interest in assuring global mobility and freedom to use the seas and the air space above them for national security purposes. In discouraging unprecedented control over oceans traditionally open to international traffic, the United States consistently has set an example by limiting its own assertion of jurisdiction over ocean space.

At the same time, we should not ignore the complications of doing so. Hawaii presents the defensive aspect of the national se-

157. See E. Richardson, LAW OF THE SEA: A TEST FOR THE UNITED NATIONS, supra note 17. See also Jaenicke, supra note 3, at 438-52.
158. Official Reports, supra note 8, at 260-63.
159. Id.
161. Currently the United States asserts a three mile Territorial Sea, a twelve mile Contiguous Zone, and a 200 mile EEZ only for the limited purpose of fisheries control. 16 U.S.C. § 1811.
curity question and the protection of natural resources and economic interests. Vulnerability characterizes insular possessions; history has proven Hawaii to be no exception. The inhabited islands of the Hawaiian Archipelago require a greater measure of security precautions than does the continental coast. The greater control afforded under the archipelagic state clauses is addressed specifically to this special need.

Developments in the Pacific Basin in the last decade have brought to the fore issues and conflicting interests that set maritime powers in opposition to newly emerging island nations. The process is incomplete; it is impossible to determine at the present time the extent to which emerging archipelagic states will assert their newly found special status under UNCLOS III.

Under the proposed treaty, the Hawaiian Islands would remain an archipelago without special status. Whether the United States is prepared to accept the archipelagic state limitation is a concern which warrants careful review of competing policies.

162. *E.g.*, the bombing of Pearl Harbor, Dec. 7, 1941.