

the end of the 19th century. It examines their evolution through the Hague Codification Conference, the works of the International Law Commission and the three United Nations Conferences on the Law of the Sea. Secondly, the article analyses the detailed provisions outlined under Part IV of the Convention concerning the definition of archipelagic States and the establishment of archipelagic baselines. Subsequently, this paper analyses the current archipelagic baseline practices by categorising the States according to the year they claimed archipelagic status or established their archipelagic baselines. Notably, this analysis is only confined to the State practice of archipelagic States in relation to their archipelagic status and archipelagic baselines and, therefore, excludes considerations with respect to archipelagic sea-lane passage and navigation. Nevertheless, the recent *Mauritius v Maldives Maritime Boundary Delimitation Case* is closely examined in order to identify any new jurisprudence which can facilitate the clarification of the archipelagic baseline rules. The paper then concludes with the findings of the analysis and the legal effects of invalid archipelagic baselines.

EVOLUTION OF THE CONCEPTS OF ARCHIPELAGIC STATES AND ARCHIPELAGIC BASELINES

The prospect of a special status for archipelagos had entered the international arena as early as the late nineteenth century.²²⁴ However, the archipelagic issue was comparatively sidelined in relation to the delimitation of territorial waters. In fact, during the Conferences of the International Law Association,²²⁵ the issue of archipelagos was viewed as too

complex to attempt codification.²²⁶ States officially acknowledged the distinctive nature and specific needs of archipelagos during the 1930 Hague Codification Conference.²²⁷ Regrettably, the Hague Codification Conference²²⁸ failed to reach a consensus with respect to the matter of the territorial waters of the archipelagos.²²⁹ The majority of States still chose to maintain the status quo of only allowing territorial waters around each island, with high sea corridors in between islands further apart in an archipelago.²³⁰

The landmark ruling of the 1951 *Anglo-Norwegian Fisheries Case* is widely recognised as the crucial turning point in the legal recognition of the archipelagic problem.²³¹ For the first time, it was internationally recognised that certain coasts required exceptional baseline methods apart from the general low-water line rule, consequently strengthening the archipelagic baseline concept.²³² As a result, some governments, drafters, and publicists began the effort to apply the rules prescribed in the judgment to the issue of mid-ocean archipelagos.²³³

Nevertheless, the geographical factors unique to archipelagos continued to pose substantial complications, mainly because the traditional international law of the sea was only familiar with the rules related to continental land masses.²³⁴ Hence, the formulation of adequate legal rules for diverse archipelagos required extensive deliberation and decision-making. These challenges, along with the lack of technical information, led to the reluctance of the drafters at

²²⁴ Alexander Proelss and others (eds), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos 2017) 338.

²²⁵ International Law Association, 'About Us' https://www.ila-hq.org/en_GB/about-us accessed 4 July 2023.

²²⁶ International Law Association, 'Report of the Neutrality Committee' (International Law Association Reports of Conferences 34 1926) 60, 61, 66; Jens Evensen, 'Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos' (1958) Extract from the Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents) 291.

²²⁷ Charlotte Ku, 'The Archipelagic States Concept and Regional Stability in Southeast Asia' (1991) 23 *Case Western Reserve Journal of International Law* 463, 466 <http://scholarlycommons.law.case.edu/jil/vol23/iss3/4>.

²²⁸ International Law Commission, 'League of Nations Codification Conference' <https://legal.un.org/ilc/league.shtml> accessed 10 July 2023.

²²⁹ Michael A Leversen, 'The Problems of Delimitations of Baselines for Outlying Archipelagos' (1972) 9 *San Diego Law Review* 733,

738

<https://digital.sandiego.edu/cgi/viewcontent.cgi?article=2286&context=sdlr>; CF Amerasinghe, 'The Problem of Archipelagos in the International Law of the Sea' (1974) 23 *International and Comparative Law Quarterly* 539, 541 https://www.cambridge.org/core/product/identifier/S0020589300032097/type/journal_article accessed 11 December 2022.

²³⁰ League of Nations, 'Territorial Waters - Volume II of Bases of Discussions for the Conference, 1930, Drawn by the Preparatory Committee.' (League of Nations 1930) 48–50 <https://archives.unige.ch/947m-cab2-tny8> accessed 11 July 2023; Netherlands, Germany, Japan, Latvia, *ibid*.

²³¹ *Anglo-Norwegian Fisheries Case (1951) ICJ Rep. 133 (hereinafter Anglo-Norwegian Fisheries Case)*.

²³² Michael A Leversen (n 8) 741; Alexander Proelss and others (eds) (n 3) 339–340.

²³³ Mohamed Munavvar, 'Ocean States: Archipelagic Regimes in the Law of the Sea' (PhD thesis, Dalhousie University Halifax 1993) 102; Alexander Proelss and others (eds) (n 3) 340.

²³⁴ HP Rajan, 'The Legal Regime of Archipelagos' in Hugo Caminos (ed), *Law of the Sea* (Ashgate Publishing Limited 2001) 137.

the International Law Commission²³⁵ to take a firm stance on the issue of the territorial waters of mid-ocean archipelagos.²³⁶

Subsequently, the first and the second United Nations Conferences on the Law of the Sea (hereinafter UNCLOS I²³⁷ and UNCLOS II,²³⁸ respectively) were also unsuccessful in effectively resolving the archipelagic issue.²³⁹ However, these conferences did expose that this issue had gradually garnered substantial attention on a global scale. Moreover, they revealed the need to harmonise the interests of the major maritime States and the interests of the increasing number of archipelagos gaining independence.²⁴⁰

Eventually, the archipelagic regime began evolving as a separate legal subject during the preparatory work for the third United Nations Conference on the Law of the Sea (UNCLOS III).²⁴¹ The Seabed Committee²⁴² acknowledged that it was crucial to create a special regime dedicated to resolving the issues faced by archipelagic States²⁴³ and finally included it in the list of subjects and issues to be discussed at UNCLOS III.²⁴⁴ Nine draft articles or working papers submitted by States included references to archipelagic States and archipelagos.²⁴⁵ Inevitably, a clear division surfaced between the major maritime States that were hesitant to surrender their commercial and maritime navigational interests to creeping maritime claims and the group of newly independent

archipelagic States determined to utilise the archipelagic concept to preserve their economic, geographic, and territorial unity. Furthermore, certain continental States with mid-ocean archipelagos made attempts to expand the archipelagic concept to encompass their dependent archipelagos.²⁴⁶ Despite these efforts, the concept of dependent archipelagos failed to be legally recognised under the newly established archipelagic regime.²⁴⁷

After considerable discussion, debate, compromise, and revision, UNCLOS III eventually established a consensus on the new regime for archipelagic States. By the end of the Conference, several delegations, including the Bahamas, Cape Verde, the Solomon Islands, Papua New Guinea, the Philippines, and even the Netherlands Antilles, had shown their intention to claim archipelagic status.²⁴⁸ During the Final Session of UNCLOS III, numerous States made statements addressing the remarkable achievement gained by legalising the archipelagic principle under the framework of the LOSC.²⁴⁹

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Archipelagic States under the 1982 LOSC

²³⁵ International Law Commission, 'International Law Commission' <https://legal.un.org/ilc/> accessed 13 July 2023.

²³⁶ United Nations, Yearbook of the International Law Commission (1956) Volume II 270 https://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf; Jens Evensen (n 5) 293; Mohamed Munavvar (n 12) 152; Alexander Proelss and others (eds) (n 3) 340.

²³⁷ United Nations Office of Legal Affairs Codification Division, 'United Nations Conference on the Law of the Sea (Geneva, 24 February - 27 April 1958)' https://legal.un.org/diplomaticconferences/1958_los/ accessed 1 August 2023.

²³⁸ 'United Nations, 'Second United Nations Conference on the Law of the Sea (Geneva, 17 March — 26 April 1960)' https://legal.un.org/diplomaticconferences/1960_los/ accessed 7 August 2023.

²³⁹ DOALOS, Archipelagic States - Legislative History of Part IV of the United Nations Convention on the Law of the Sea (United Nations Publications 1990) 2.

²⁴⁰ United Nations, 'Summary Records of the 6th to 10th Meetings of the First Committee - United Nations Conference on the Law of the Sea' (1958) A/CONF.13/C.1/SR.6-10 14 https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_1_3/sr_6_10.pdf.

²⁴¹ 'Third United Nations Conference on the Law of the Sea (1973–1982)' https://legal.un.org/diplomaticconferences/1973_los/ accessed 7 August 2023.

²⁴² Ibid.

²⁴³ Mohamed Munavvar (n 12) 168; Alexander Proelss and others (eds) (n 3) 344.

²⁴⁴ DOALOS, Archipelagic States - Legislative History of Part IV of the United Nations Convention on the Law of the Sea (n 18) 5; Myron H Nordquist and others (eds), United Nations Convention on the Law of the Sea 1982: A Commentary, vol II (Martinus Nijhoff Publishers 1993) 401.

²⁴⁵ DOALOS, Archipelagic States - Legislative History of Part IV of the United Nations Convention on the Law of the Sea (n 18) 5–13.

²⁴⁶ Sophia Kopela, 'The Status of Dependent Outlying Archipelagos in International Law' (PhD thesis, The University of Bristol 2008) 40 <https://research-information.bris.ac.uk/files/34503773/495653.pdf>; United Nations, 'Ecuador: Draft Article on Archipelagos - Extract from the Official Records of the UNCLOS III, Volume III (Documents of the Conference, First and Second Sessions)' (1974) A/CONF.62/C.2/L.51 227 https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_1_3/a_conf62_c2_151.pdf.

²⁴⁷ Sophia Kopela (n 25) 45; Myron H Nordquist and others (eds) (n 23) 403.

²⁴⁸ Myron H Nordquist and others (eds) (n 23) 403.

²⁴⁹ DOALOS, Archipelagic States - Legislative History of Part IV of the United Nations Convention on the Law of the Sea (n 18) 106–115.

The archipelagic regime is outlined under Articles 46 to 54 of Part IV of the LOSC.²⁵⁰ The benefits and privileges granted to archipelagic States derive from their ability to abide by these provisions.²⁵¹ In the *Mauritius v Maldives Maritime Boundary Delimitation Case*,²⁵² the Special Arbitral Tribunal recognised the special status and benefits extending from this status by detailing the following:

“Under Part IV of the Convention, an archipelagic State enjoys a special status in two respects. First, it is allowed to draw straight archipelagic baselines joining the outermost points of an archipelago instead of drawing baselines around each island in the archipelago. Second, the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines described as “archipelagic waters”, the air space over such waters, as well as their bed and subsoil, and the resources contained therein.”²⁵³

Article 46 serves as the definition of the terms archipelagic States and archipelagos. Article 46(a) defines an archipelagic State as: “a State constituted wholly by one or more archipelagos and may include other islands.” According to Article 46(b), an archipelago means “a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.”

It is important to note that, under the final archipelagic regime established under the LOSC, not all archipelagos qualify as archipelagic States. Article 46 encompasses the

legal criteria for an archipelago to gain the legal status of an archipelagic State.²⁵⁴ Overall, three criteria can be construed from the definition in Article 46: geographical, political, and economic unity.

Closely interrelated geographical features:

Two or more islands,²⁵⁵ including parts of islands²⁵⁶ interconnecting waters²⁵⁷ and other natural features, are to be geographically situated in the ocean in a manner that allows them to be considered as an interconnected single entity.²⁵⁸ According to this definition, even two islands can be referred to as an archipelago, as there is no specific numerical limit mentioned in the definition. Yet, some degree of closeness is required for the islands to be considered a group, thus essentially excluding remote islands.²⁵⁹

The inclusion of ‘other natural features’ in the definition signifies the allowance for the practical geographical circumstances of the archipelagos.²⁶⁰ Although there is no explicit definition of this phrase in the LOSC, there are some references in the LOSC to potential features that may fall under this notion.²⁶¹ Article 47 refers to ‘drying reefs’, ‘atolls’,²⁶² ‘fringing reefs’ and ‘low-tide elevations’.²⁶³ The Tribunal in the *Mauritius v Maldives Maritime Boundary Delimitation Case* determined that drying reefs are indeed included within the phrase ‘other natural features’ by asserting that:

“... such drying reefs amount to ‘other natural features’ within the meaning of article 46(b) of the Convention and, together with a group of islands and interconnecting waters, form the Chagos Archipelago.”²⁶⁴

²⁵⁰ United Nations Convention on the Law of the Sea (n 1) was adopted and opened for signature on 10 December 1982 and entered into force on 16 November 1994. See ‘Third United Nations Conference on the Law of the Sea (1973–1982)’ (n 20).

²⁵¹ Mohamed Munavvar (n 12) 207; Alexander Proelss and others (eds) (n 3) 335.

²⁵² *Dispute Concerning the Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (28 April 2023) ITLOS Case No. 28 (hereinafter Mauritius v Maldives Maritime Boundary Delimitation Case)*.

²⁵³ *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 179.

²⁵⁴ United Nations Convention on the Law of the Sea (LOSC) art. 47.

²⁵⁵ United Nations Convention on the Law of the Sea (LOSC) art. 121(1).

²⁵⁶ The phrase ‘parts of islands’ was included because some archipelagic States share parts of islands with other countries. For Instance, Indonesia shares the island of New Guinea with Papua New Guinea and the islands of Borneo with Malaysia and Brunei. See Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (2nd edn, Martinus Nijhoff 2005) 169; Proelss and others (n 3) 347, 349. However, this phrase does not refer

to circumstances where parts of a State are on the mainland, and the other part is as an archipelago. See Munavvar (n 12) 215.

²⁵⁷ This phrase was included in the definition to signify that the waters in between and surrounding these islands are a source of connection rather than a cause of disruption to the unity of the State. See Munavvar (n 12) 215; Nordquist and others (n 23) 413.

²⁵⁸ Rajan (n 13) 144.

²⁵⁹ Munavvar (n 12) 214. Nevertheless, whether an island is remote or not can be construed using the technical criteria under Article 47.

²⁶⁰ *ibid* 217.

²⁶¹ *ibid* 216.

²⁶² The word Atoll is derived from the Maldivian language, ‘Dhivehi’, from the phrase ‘atholhu’ used to refer to groups of coral islands in the Maldivian archipelago. See *ibid* 88; ‘Atoll Definition & Meaning’ (*Merriam-Webster Dictionary*) <<https://www.merriam-webster.com/dictionary/atoll>> accessed 4 September 2023.

²⁶³ LOSC, art. 47.

²⁶⁴ *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 245.

Political entity:

Under Article 46 (b), the next criterion an archipelago must meet in order to qualify as an archipelagic State is being a single political entity. This requirement disqualifies mid-ocean archipelagos under the sovereignty of continental States.²⁶⁵ The distinction in this regard is of sovereignty, control and authority over all persons and things within its boundaries, including the capacity to enter into international relations, declare war, and make peace with other States.²⁶⁶

Economic entity:

The third criterion is that the archipelago must be an intrinsic economic entity with a relative economic relationship between the land and the water.²⁶⁷ This requirement indicates that the inhabitants of the archipelago should have been dependent on the economic resources of the surrounding oceans for a considerable period of time.²⁶⁸

Finally, Article 46 also accommodates the historical factor by providing that, in any situation where the requirements mentioned above are not presently met, as long as they were historically regarded as being 'an intrinsic geographical, economic and political entity', that archipelago also qualifies as an archipelagic State. The insertion of this alternative criterion appears to be strange but can be linked to the uncertainty of the legal status of the archipelagic regime during UNCLOS III.²⁶⁹

²⁶⁵ Richard Barnes, 'Revisiting the Legal Status of Dependent Archipelagic Waters from First Principles' in James Kraska, Ronan Long and Myron H Nordquist (eds), *Peaceful Maritime Engagement in East Asia and the Pacific Region*, vol 25 (Brill | Nijhoff 2023) 181 <<https://brill.com/view/title/62957>> accessed 16 April 2023. Also see Proelss and others (n 3) 347.

²⁶⁶ Nancy Barron, 'Archipelagos and Archipelagic States under UNCLOS III: No Special Treatment for Hawaii' (1981) 4 *Hastings International and Comparative Law Review* 515.

²⁶⁷ Proelss and others (n 3) 351.

²⁶⁸ Amerasinghe (n 8) 565.

²⁶⁹ Proelss and others (n 3) 352.

²⁷⁰ Alina Miron, 'The Archipelagic Status Reconsidered in Light of the South China Sea and Düzgüt Integrity Awards' (2018) 15 *Indonesian Journal of International Law* 306, 312 <<https://scholarhub.ui.ac.id/ijil/vol15/iss3/2>> accessed 14 April 2023. This was also indicated in the judgment of the *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (hereinafter *Qatar v. Bahrain*), where the ICJ ruled that Bahrain did not have the right to use archipelagic baselines on its coast due to Bahrain's failure to declare itself an archipelagic State before the delimitation case. See *Qatar v. Bahrain*, 2001 ICJ Rep. 40, para. 183, 214.

²⁷¹ *ibid* 311; J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff Publishers 2012) 206.

Archipelagic status needs to be claimed by a formal, international proclamation or the adoption of national legislation establishing a system of archipelagic baselines, as it is not a status that exists *ipso facto*.²⁷⁰ However, the LOSC does not determine an explicit timeframe for claiming archipelagic status. To date, 22 States are reported to have declared themselves archipelagic States.²⁷¹ They are Indonesia, the Philippines, Maldives, Mauritius, Sao Tome and Principe, Fiji, Jamaica, Bahamas, Cape Verde, Dominican Republic, Trinidad and Tobago, Seychelles, Antigua and Barbuda, Comoros, Grenada, Solomon Islands, Vanuatu, Papua New Guinea, Tuvalu, Saint Vincent and the Grenadines, Marshal Islands, and Kiribati.²⁷²

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Article 46 and Article 47 are to be viewed as a package that collectively determines an entity's archipelagic status.²⁷³ The archipelago needs to have proclaimed itself as an archipelagic State in accordance with Article 46 in order to benefit from the drawing of archipelagic baselines.²⁷⁴ Article 47 establishes a comprehensive framework of legal and technical rules for drawing archipelagic baselines.²⁷⁵ These rules uphold the validity of the archipelagic baselines and the archipelagic status.²⁷⁶

²⁷² These are the States that have been mentioned in the list of archipelagic States in the UNDOALAS 'Table of Claims to Maritime Jurisdiction'. See Miron (n 49) 311. However, (as of 15th May 2024) this page is shown as 'temporarily unavailable / under review'. See UNDOALOS, 'Table of Claims to Maritime Jurisdiction' <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/claims.htm>> accessed 15 May 2024.

²⁷³ Sora Lokita, 'The Role of the Archipelagic Baselines in Maritime Boundary Delimitation' (Thesis for the Fellowship Programme 2009 -2010, Nippon Foundation 2010) 17.

²⁷⁴ Coalter G Lathrop, J Ashley Roach and Donald R Rothwell, 'Baselines under the International Law of the Sea - Reports of the International Law Association Committee on Baselines under the International Law of the Sea' (2019) 2 *Brill Research Perspectives in the Law of the Sea* 1, 122 <https://brill.com/view/journals/rpls/2/1-2/article-p1_1.xml> accessed 4 October 2023; Proelss and others (n 3) 337.

²⁷⁵ These provisions seem to have been inspired by the Indonesian 'prototype' archipelagic baselines. See Martin Tsamenyi, Clive Schofield and Ben Milligan, 'Navigation through Archipelagos: Current State Practice' in Myron H Nordquist, Tommy Koh and John Norton Moore (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, vol 13 (Brill | Nijhoff 2009) 420. See also JRV Prescott, *The Maritime Political Boundaries of the World* (1st edn, Methuen 1985) 163.

²⁷⁶ Tsamenyi, Schofield and Milligan (n 54) 6; Nordquist and others (n 23) 401.

According to Article 47, six essential requirements provide the objective standard for drawing archipelagic baselines.²⁷⁷ First, the baselines should be drawn connecting the outermost points of the outermost islands and drying reefs, and the main islands of the archipelago must be included.²⁷⁸ Second, the baselines should not depart to any appreciable extent from the general configuration of the archipelago.²⁷⁹ Third, the enclosed area of water within the baselines should be at least as large as the area of enclosed land, including atolls. However, the enclosed area of water should not be more than nine times larger than the enclosed land area. This means that the ratio of water to land should be between 1:1 and 9:1.²⁸⁰ Fourth, only 3% of the total number of baseline segments are allowed to exceed 125 nm. The rest of the segments are to be below 100 nm in length.²⁸¹ Fifth, according to Article 47(5), the archipelagic baselines should not cut off the territorial sea of a neighbouring State from the high seas or an exclusive economic zone (hereinafter EEZ).²⁸² Last but not least, the baselines should not be drawn to and from low-tide elevations. The exceptions to this rule are if the low tide elevation is situated wholly or partly within the territorial sea of the nearest island or if a lighthouse or a similar installation has been built on the feature.²⁸³ All of these requirements are to be met for the successful formation of valid archipelagic baseline systems.

The remaining provisions under Article 47 relate to protecting the traditional and treaty-based rights and interests of the immediate neighbouring States.²⁸⁴ Along with the requirements concerning the publication of the relevant charts and coordinates demonstrating the archipelagic baselines.²⁸⁵

Practically speaking, the utilisation of these requirements may vary based on distinct geographical circumstances or divergent interpretations.²⁸⁶ For instance, the phrase ‘main islands’ under Article 47(1) and the phrases: ‘appreciable

extent’ and ‘general configuration of the archipelago’ under Article 47(3) may be subject to varying interpretations.²⁸⁷ The main islands might include the most densely inhabited, the largest, the most historically or culturally significant, or the most economically productive islands.²⁸⁸ The confusion with regard to this varying interpretation is evident from the *Mauritius v Maldives Maritime Boundary Delimitation Case*. In this case, Maldives submitted that the archipelagic baselines claimed by Mauritius depart to an appreciable extent from the general configuration of the Chagos Archipelago because Mauritius excludes the Great Chagos Bank and Nelson’s Island from its archipelagic baselines. According to the Maldives, they are core features of the Chagos Archipelago. Conversely, Mauritius maintained that Nelson’s Island was excluded as they did not regard it as a ‘main island’ by virtue of its small size and lack of recorded human habitation and hence does not result in Mauritius’ archipelagic baselines departing to any appreciable extent from the general configuration of the archipelago.²⁸⁹ Similarly, the requirement that only 3% of the total number of baseline segments are allowed to exceed 125 nm in length can be bypassed by altering the total number of baseline segments.²⁹⁰

Part IV also provides for the delineation of separate archipelagic baseline systems around distinct archipelagos under the sovereignty of a State. However, each of these baseline systems needs to meet the criteria specified under Article 47. They can also exclude some islands from the archipelagic baseline system to which normal and straight baselines can be applied.²⁹¹ Furthermore, a rock under Article 121(3), being a naturally formed area of land that is permanently above water at high tide, is considered to be an island for the purpose of generating baselines. Therefore,

²⁷⁷ Nordquist and others (n 23) 418.

²⁷⁸ LOSC, art. 47(1).

²⁷⁹ LOSC, art. 47(3).

²⁸⁰ LOSC, art. 47(1).

²⁸¹ LOSC, art. 47(2).

²⁸² LOSC, art. 47(5).

²⁸³ LOSC, art. 47(4).

²⁸⁴ LOSC, art.47(6), See Nordquist and others (n 23) 418.

²⁸⁵ LOSC, art. 47(8), (9).

²⁸⁶ Tsamenyi, Schofield and Milligan (n 54) 6; Kevin Baumert and Brian Melchior, ‘The Practice of Archipelagic States: A Study of Studies’ (2015) 46 *Ocean Development and International Law* 60, 75.

²⁸⁷ Tsamenyi, Schofield and Milligan (n 54) 7.

²⁸⁸ UNDOALOS, *The Law of the Sea. Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*. (United Nations Publications 1989) 37; Lathrop, Roach and Rothwell (n 53) 123.

²⁸⁹ *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 160.

²⁹⁰ Munavvar (n 12) 255; Tsamenyi, Schofield and Milligan (n 54) 421; Fedelyn A Santos, ‘Beating the Deadline: Archipelagic State Compliance under UNCLOS Article 47’ (Dissertation for the Degree of Master of Science in Maritime Affairs, World Maritime University 2008) 26 <https://commons.wmu.se/all_dissertations/165>; Yoshifumi Tanaka, *The International Law of the Sea* (4th edn, Cambridge University Press 2023) 142.

²⁹¹ *The Law of the Sea. Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*. (n 67) 38.

archipelagic states can also use rocks as basepoints, provided that the other requirements under Article 47 are fulfilled.²⁹²

Article 48 of the LOSC stipulates how to measure the maritime zones of an archipelagic State and states that: “The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.”²⁹³ This provision upholds that archipelagic baselines have the same function as normal and straight baselines.²⁹⁴ Overall, the provisions under Part IV are now viewed as part of customary international law, which makes them binding on all States,²⁹⁵ including States that are not parties to LOSC.²⁹⁶

STATE PRACTICE RELATED TO ARCHIPELAGIC STATUS AND ARCHIPELAGIC BASELINES

The development of the State practice related to archipelagic States began prior to the adoption of the LOSC in 1982. The literature on the state practice of archipelagic States has been steadily developing with the growing number of States that claim archipelagic status.²⁹⁷ To date, 22 States are known to have claimed archipelagic status.²⁹⁸ The Limits of the Seas Series conducted by the United States also includes 22 individual studies on archipelagic States.²⁹⁹ Nonetheless, the analysis of the State practice of archipelagic States remains crucial as their practice continues to evolve.³⁰⁰

The following analysis of the State practice of archipelagic States with regard to their archipelagic State proclamations and the establishment of their archipelagic baselines is demonstrated by classifying the archipelagic States into three categories. They are

States that claimed archipelagic status and enacted legislation concerning archipelagic baselines prior to the entry into force of the LOSC,

States that enacted legislation establishing archipelagic baselines without a prior proclamation of archipelagic status,

States that claimed archipelagic status but enacted legislation concerning archipelagic baselines years after the LOSC entered into force.

The distinct case concerning Palau's archipelagic status is also investigated. During the analysis, the invalidity of some of the archipelagic baselines established by the archipelagic States is discussed in detail. It is important to note that this paper is only concerned with the State practice of archipelagic States in relation to their archipelagic status and archipelagic baselines. Thus, the practice of archipelagic States in relation to archipelagic sea-lane passage and navigation will not be included in this analysis.

States that Claimed Archipelagic Status and Enacted Legislation Concerning Archipelagic Baselines Prior to the Entry into Force of the LOSC

There are twelve States that claimed archipelagic status and established their archipelagic baselines before the LOSC even came into force on 16th November 1994. These

²⁹² The use of rocks as basepoints can be observed from the State practice of the Bahamas, Grenada, Jamaica, Mauritius, Papua New Guinea, and Trinidad and Tobago. See Lathrop, Roach and Rothwell (n 53) 108, 109.

²⁹³ LOSC, art. 48.

²⁹⁴ Nordquist and others (n 23) 434. See also *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 186.

²⁹⁵ Robin R Churchill, Alan V Lowe and Amy Sander, *The Law of the Sea* (4th edn, Manchester University Press 2022) 190.

²⁹⁶ Baumert and Melchior (n 65) 61.

²⁹⁷ In Mohamed Munavvar's thesis, he analysed 9 Archipelagic States which had claimed archipelagic status at the time, though he predicted that 25 to 35 States could potentially meet the archipelagic definition under LOSC. The States that had claimed archipelagic Status at the time were Antigua and Barbuda, Cape Verde, Fiji, Indonesia, Papua New Guinea, Philippines, Sao Tome and Principe, Solomon Islands and Vanuatu. See Munavvar (n 12) 245; John RV Prescott, ‘Straight and Archipelagic Baselines’ in Gerald Henry Blake (ed), *Maritime Boundaries and Ocean Resources* (Rowman & Littlefield 1987) 46 <<https://books.google.com.my/books?id=Uv8WwsnLhsC&printsec=frontcover#v=onepage&q&f=false>>. Sophia Kopela, Martin Tsamenyi, Clive Schofield, Ben Milligan and Lokita Sora's analysis of archipelagic States does not include Grenada and Mauritius. Kevin

Baumert and Brian Melchior's 2015 research on the practice of archipelagic States excludes Kiribati and the Marshall Islands. See Kopela (n 25); Tsamenyi, Schofield and Milligan (n 54); Lokita (n 52); Baumert and Melchior (n 65). More recent assessments of archipelagic state practice can be found in Lathrop, Roach and Rothwell (n 53); Miron (n 49).

²⁹⁸ Lathrop, Roach and Rothwell (n 53) 102; Proelss and others (n 3) 335.

²⁹⁹ United States Department of State, Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State, ‘Limits in the Seas’ <<https://www.state.gov/limits-in-the-seas/>> accessed 13 December 2022. See No. 98 Sao Tome and Principe (1983), No. 101 Fiji (1984), No. 125 Jamaica (2004), No. 126 Maldives (2005), No. 128 The Bahamas (2014), No. 129 Cabo Verde (2014), No.130 Dominican Republic (2014), No.131 Trinidad and Tobago (2014), No. 132 Seychelles (2014), No. 133 Antigua and Barbuda (2014), No.134 Comoros (2014), No.135 Grenada (2014), No.136 Solomon Island (2014), No.137 Vanuatu (2014), No.138 Papua New Guinea (2014), No.139 Tuvalu (2014), No. 140 Mauritius (2014), No. 141 Indonesia (2014), No. 142 Philippines (2014), No. 144 Saint Vincent and the Grenadines (2019), No. 145 Marshal Islands (2020), No. 146 Kiribati (2020).

³⁰⁰ Baumert and Melchior (n 65) 75.

States are Indonesia, the Philippines, Dominican Republic, Fiji, Papua New Guinea, Solomon Islands, Sao Tome and Principe, Vanuatu, Antigua and Barbuda, Trinidad and Tobago, Cape Verde and Grenada. Some of the archipelagic baselines constructed by these States were incompliant with the LOSC provisions and thus received protests from other States. Subsequently, some archipelagic States have revised their archipelagic baselines, while some archipelagic baselines of States still require further revision.

Indonesia

The archipelagic State proclamations began when Indonesia and the Philippines declared themselves as archipelagic States through domestic legislation in 1960 and 1961, respectively.³⁰¹ Afterwards, both States revised their archipelagic baselines with new legislation.³⁰² Indonesia's current archipelagic baselines are specified under Government Regulation No. 37 of 2008, which was a revision of Government Regulation No. 38 of 2002.³⁰³ The revised Indonesian archipelagic baselines are consistent with Article 47 of the LOSC.³⁰⁴

The Philippines

The Philippines archipelagic baselines have gone through two legislative revisions. The current archipelagic baselines are defined under Republic Act No. 9522,³⁰⁵ enacted

on 10th March 2009, which was an Act to amend certain provisions of Republic Act No. 3046 of 17th June 1961,³⁰⁶ as amended by Republic Act No. 5446 of 18th September 1968.³⁰⁷ The Philippines archipelagic baselines are composed of 101 segments, 3 of which exceed 100 nm but do not exceed 125 nm. Likewise, the water-to-land ratio is within the LOSC criteria.³⁰⁸ Therefore, the revised Philippines archipelagic baselines are in accordance with Article 47 of the LOSC.³⁰⁹ Previously, the 1961 Philippines baseline system had a segment which exceeded the 125 nm limit.³¹⁰

Apart from the baselines, the domestic law on the Philippine archipelagic regime was scrutinised due to the provision stipulated under the Constitution of the Republic³¹¹ that referred to the waters enclosed by the Philippine baselines as internal waters instead of archipelagic waters.³¹² This provision, in essence, excludes the right of innocent passage and archipelagic sea lane passage through these waters.³¹³ A 2011 decision of the Philippines Supreme Court also noted this inconsistency with the LOSC. It ruled that the Philippines did have sovereignty over the enclosed waters within the baselines, provided that the sovereignty is exercised subject to international rules and principles, including the rules on navigation.³¹⁴ Subsequently, a Bill named 'An Act Declaring the Maritime Zones under the Jurisdiction of the Republic of

³⁰¹ Indonesia adopted Act No. 4 concerning Indonesian Waters in 1960, and the Philippines adopted Republic Act No. 3046, 'An Act to Define the Baselines of the Territorial Sea of the Philippines' in 1961. See DOALOS, *Practice of Archipelagic States* (United Nations Publications 1992) 45–53, 75–83.

³⁰² Lokita (n 52) 22.

³⁰³ The List of Geographical Coordinates of Points of the Indonesian Archipelagic Baselines based on Government Regulation of the Republic of Indonesia No. 38 of 2002, as amended by the Government Regulation of the Republic of Indonesia No. 37 of 2008, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/idn_mzn67_2009.pdf>

³⁰⁴ United States Department of State, 'Limits in the Seas No. 141 - Indonesia: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 11.

³⁰⁵ Republic Act 2009 (Act 9522) available at <https://lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html>

³⁰⁶ Republic Act 1961 (Act 3046) available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf>

³⁰⁷ Republic Act 1968 (Act 5446) available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1968_Act.pdf>

³⁰⁸ United States Department of State, 'Limits in the Seas No. 142 - Philippines: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3.

³⁰⁹ *ibid* 4.

³¹⁰ Tsamenyi, Schofield and Milligan (n 54) 442.

³¹¹ The Constitution of the Republic of the Philippines 1987, available at <<https://www.officialgazette.gov.ph/constitutions/1987-constitution/>>

³¹² Article 1 of the Constitution of the Republic of the Philippines 1987 states: "... The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines."

³¹³ Tsamenyi, Schofield and Milligan (n 54) 442; 'Limits in the Seas No. 142 - Philippines: Archipelagic and Other Maritime Claims and Boundaries' (n 87) 4; Baumert and Melchior (n 65) 71.

³¹⁴ Prof. Merlin M. Magallona, et.al. v. Hon. Eduardo Ermita, in his capacity as Executive Secretary, et al. G.R. No. 187167, 16 July 2011, en banc (Carpio, J.) available at <https://lawphil.net/judjuris/juri2011/aug2011/gr_187167_2011.html>

the Philippines' was prepared by the Philippine Congress with the aim of clarifying the geographical extent of the Philippines' maritime zones.³¹⁵ Under Section 4 of this Act, the internal waters of the Philippines refer to (a) the waters on the landward side of the archipelagic baselines not forming part of archipelagic waters under Section 5 of this Act and delineated in accordance with Article 50 of the LOSC, and (b) the waters on the landward side of the baselines of the territorial sea of territories outside of the archipelagic baselines, drawn in accordance with Article 8 of the LOSC.³¹⁶ Meanwhile, the archipelagic waters of the Philippines refer to the waters on the landward side of the archipelagic baselines except as provided for under Section 4 of this Act. According to this Act, the Philippines exercises sovereignty and jurisdiction over its archipelagic waters and airspace, as well as its seabed and subsoil, in accordance with the LOSC and other existing laws and treaties. The proposed provisions under this Bill appear to be more in line with the LOSC. Both Houses of the Philippines Senate passed the bill on 19th March 2024.³¹⁷

Dominican Republic

The archipelagic status of the Dominican Republic is uncertain. The Dominican Republic has also revised its former legislation, Act No. 186 of 13th September 1967,³¹⁸ with Act 66-07 of 22nd May 2007.³¹⁹ Nevertheless, according to the analysis of the United States in the Limits in the Seas Series, even the amended archipelagic baseline system fails to comply with the requirements mentioned under the LOSC.³²⁰ It was

previously predicted that the Dominican Republic would not be able to meet the water-to-land requirement due to the size of its main island.³²¹ In order to sidestep the water-to-land ratio and increase the enclosed maritime area, the Dominican Republic has now placed basepoints on three low-tide elevations which have no lighthouses or similar installations and exceed the breadth of the territorial sea from the nearest island.³²² This way of low-tide elevation use as basepoint is contrary to Article 47(4). Hence, the archipelagic status of the Dominican Republic has been protested by the United States, the United Kingdom and Japan.³²³

Some commentators hold a different opinion and consider that drying reefs under Article 47(1) are not subject to the conditions stipulated under Article 47(4). According to this theory, archipelagic States can thus draw baselines from drying reefs even though they are not situated within the 12 nm limit.³²⁴ The Special Chamber of the ITLOS considered this issue during the *Mauritius v Maldives Maritime Boundary Delimitation Case* when Mauritius argued that Article 47(4) did not apply to the drawing of its archipelagic baselines on Bleinheim Reef, which can also be categorised as a drying reef under 47(1).³²⁵ Conversely, Maldives maintained the opposite. The Tribunal's decision pronounced that the inclusion of the term 'drying reef', as opposed to 'low-tide-elevation' under Article 47(1), did not necessarily mean that Article 47(4) was not applicable to Article 47(1).³²⁶ The ITLOS specified that:

"The use of the different terms in paragraphs 1 and 4 may be understood to mean that paragraph 1 permits only drying

³¹⁵ '19th Congress - House Bill No. 7819 - Senate of the Philippines' (*Senate of the Philippines*) <https://legacy.senate.gov.ph/lis/bill_res.aspx?congress=19&q=HB N-7819> accessed 27 April 2024.

³¹⁶ An Act Declaring the Maritime Zones under the Jurisdiction of the Republic of the Philippines (House Bill No. 7819), available at <<https://legacy.senate.gov.ph/lisdata/4190338159!.pdf>>

³¹⁷ '19th Congress - House Bill No. 7819 - Senate of the Philippines' (n 94).

³¹⁸ Act No. 186 of 13 September 1967 on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DOM_1967_Act.pdf>

³¹⁹ Act 66-07 of 22 May 2007 (Proclaiming Archipelagic Status of the Dominican Republic and containing the lists of Geographical Coordinates of Points for Drawing the Archipelagic Baselines and the Outer Limits of the Exclusive Economic Zone) available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DOM_2007_Act_frombulletin65.pdf>

³²⁰ United States Department of State, 'Limits in the Seas No. 130 - Dominican Republic, Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans

and International Environmental and Scientific Affairs, US Department of State 2014) 3.

³²¹ Tsamenyi, Schofield and Milligan (n 54) 440; Lokita (n 52) 23.

³²² 'Limits in the Seas No. 130 - Dominican Republic, Archipelagic and Other Maritime Claims and Boundaries' (n 99) 3.

³²³ Roach and Smith (n 50) 24; 'Limits in the Seas No. 130 - Dominican Republic, Archipelagic and Other Maritime Claims and Boundaries' (n 99) 2; Miron (n 49) 318; Baumert and Melchior (n 65) 61; Lathrop, Roach and Rothwell (n 53) 104.

³²⁴ See Sophia Kopela, '2007 Archipelagic Legislation of the Dominican Republic: An Assessment' (2009) 24 *The International Journal of Marine and Coastal Law* 501, 510–515 <<https://brill.com>> accessed 21 September 2023; Prescott and Schofield (n 35) 170; Ricardo Paredes, 'Analysis of the Legitimacy of the Declaration of the Dominican Republic as an Archipelagic State and Its Legality under the United Nations Convention on the Law of the Sea (UNCLOS) and the International Law' (Thesis for the Fellowship Programme 2017-2018, Nippon Foundation 2018) 45–49.

³²⁵ *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 220.

³²⁶ *ibid* para 224.

reefs, not all low-tide elevations, to be eligible for drawing straight archipelagic baselines, but that such drying reefs are subject to the requirements of paragraph 4, as every drying reef is also a low-tide elevation.³²⁷

The Tribunal also maintained that the structure of Article 47 reinforced this view because Paragraph 1 outlines the general provision for drawing archipelagic baselines, while the subsequent paragraphs detailed the specific requirements.³²⁸ Consequently, ITLOS found that the requirements under Article 47(4) regarding low-tide elevations should also apply in the drawing of archipelagic baselines in accordance with Article 47(1).³²⁹ Therefore, this new jurisprudence also reveals the inaccuracy of the archipelagic baselines drawn by the Dominican Republic and adds to the doubts regarding the entitlement of the Dominican Republic to its archipelagic status.

Papua New Guinea

Papua New Guinea claimed archipelagic status through The National Seas Act of 7th February 1977.³³⁰ Later on, the official archipelagic baselines were established under 'The Declaration of the Baselines by Method of Coordinates of Base Points for Purposes of the Location of Archipelagic Baselines', which was issued on 25th July 2002.³³¹ The archipelagic baselines of Papua New Guinea under that Declaration were not consistent with LOSC.³³² The starting and ending points of its archipelagic baseline system did not connect with the island of New Guinea, making the baseline system contrary to Article 47(1), which requires that 'the

outermost points of the outermost islands and drying reefs of the archipelago' are joined. Besides this error, one baseline segment was 174.78 nm. This length was longer than the maximum allowable limit of 125 nm specified under Article 47(2).³³³ These basepoints have since been reviewed,³³⁴ and the updated archipelagic baselines of Papua New Guinea are now defined under The Maritime Zones Act of 2015.³³⁵ The revised archipelagic baselines are now in accordance with the LOSC.³³⁶

Solomon Islands

The Solomon Islands proclaimed archipelagic status on 21st December 1978 via The Delimitation of Maritime Waters Act No. 32.³³⁷ The coordinates of the Solomon Islands archipelagic baselines were publicised under The Legal Notice No. 41 of 1979: Declaration of Archipelagic Baselines.³³⁸ According to the Limits in the Seas study, one of the five archipelagic baseline systems of the Solomon Islands did not conform to the water-to-land ratio under Article 47(1).³³⁹ The rest of the baseline systems of the Solomon Islands are consistent with Article 47.³⁴⁰

The remaining archipelagic States that had claimed archipelagic status and designated archipelagic baselines before the LOSC entered into force are Cape Verde, Sao Tome and Principe, Fiji, Vanuatu, Antigua and Barbuda, Trinidad and Tobago and Grenada. The archipelagic baselines of Cape

³²⁷ *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 224.

³²⁸ *ibid* para 223.

³²⁹ *ibid* para 229.

³³⁰ National Seas Act 1977 (Act 7) available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PNG_1977_Act7.pdf> An interim delimitation of archipelagic waters was conducted under Schedule 2 of this Act in 1977.

³³¹ Declaration of the Baselines by Method of Coordinates of Base Points for Purposes of the Location of Archipelagic Baselines 2002 available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PNG_2002_Declaration.pdf>

³³² United States Department of State, 'Limits in the Seas No. 138 - Papua New Guinea: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3; Baumert and Melchior (n 65) 63, 65.

³³³ 'Limits in the Seas No. 138 - Papua New Guinea: Archipelagic and Other Maritime Claims and Boundaries' (n 111) 3.

³³⁴ 'Papua New Guinea-Pacific Maritime Boundaries Dashboard' (*Pacific Data Hub*) <<https://pacificdata.org/dashboard/maritime-boundaries/papua-new-guinea>> accessed 27 September 2023.

³³⁵ Maritime Zones Act 2015 (Act 47) available at <http://www.paclii.org/pg/legis/num_act/mza2015175.pdf>

³³⁶ Malakai Vakautawale (Maritime Boundaries Advisor for the Geoscience, Energy and Maritime Division of Pacific Community, personal communication during the CIL-ANCORS Workshop on Maritime Boundary Delimitation held from 27th to 28th February 2024.

³³⁷ Delimitation of Marine Waters Act, 1978 (Act 32) available at <http://www.paclii.org/sb/legis/consol_act/domwa293/>

³³⁸ Legal Notice No. 41 of 1979: Declaration of Archipelagic Baselines available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SLB_1979_Notice.pdf>

³³⁹ United States Department of State, 'Limits in the Seas No. 136 - Solomon Islands: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3.

³⁴⁰ *ibid* 4.

Verde,³⁴¹ Sao Tome and Principe,³⁴² Fiji,³⁴³ Vanuatu,³⁴⁴ Antigua and Barbuda,³⁴⁵ Trinidad and Tobago³⁴⁶ and Grenada³⁴⁷ are all reported to be valid under Article 47.

³⁴¹ In 1977, Cape Verde proclaimed archipelagic baselines with the Decree-Law No. 126/77, available at <<https://faolex.fao.org/docs/pdf/cvi8269E.pdf>>. However, this Law was deemed inconsistent with Article 47 and, therefore, was revised by Law No. 60/IV/92 of December 21, 1992, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CPV_1992_Law.pdf>. The Limits in the Seas analysis of Cape Verde is based on the later Law and claims that apart from failing to specify the geodetic datum for the coordinates as required in Article 47(8), the Cape Verde archipelagic baselines are now consistent with LOSC. See United States Department of State, 'Limits in the Seas No. 129 - Cabo Verde - Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3.

³⁴² Sao Tome and Principe established straight baselines and claimed sovereignty over the enclosed archipelagic waters within the straight baselines through Decree-Law No. 14/78 (Repealed by Decree-Law No. 148/82), available at <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC004349/>>. Limits in the Seas analysis on Sao Tome and Principe conducted in 1982 was based on Decree-Law No. 14/78, see United States Department of State, 'Limits in the Seas No. 98 - Archipelagic Straight Baselines: Sao Tome and Principe' (Office of the Geographer Bureau of Intelligence and Research 1982) 2. This Law was repealed by Law No. 1/98 on the Delimitation of the Territorial Sea and the Exclusive Economic Zone of 1998, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/STP_1998_Law.pdf>. It appears that the geographical coordinates have not been changed. See Baumert and Melchior (n 65) 76.

³⁴³ Fiji established itself as an archipelagic state by the Marine Spaces Act 1977 (Act 18) as amended by the Marine Spaces (Amendment) Act 1978 (Act 15) available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/FJI_1978_Act.pdf>. Subsequently Fiji published the geographical coordinates of its archipelagic baselines via the Legal Notice No. 117 of 1981 titled the Marine Spaces (Archipelagic Baseline and Exclusive Economic Zone) Order, see DOALOS, 'Law of the Sea Bulletin - No. 66' (United Nations 2008) 67 <https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin66e.pdf> accessed 17 October 2023. For the validity of Fiji's archipelagic baselines, see United States Department of State, 'Limits in the Seas No. 101 - Fiji's Maritime Claims' (Office of the Geographer Bureau of Intelligence and Research 1984) 3.

³⁴⁴ Vanuatu first established its archipelagic baselines via The Maritime Zones Act 1981 (Act 23), available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VUT_1981_Act.pdf>. The Limits in the Seas analysis of Vanuatu was based on Vanuatu's Maritime Zones Act [CAP 138],

States that Enacted Legislation Establishing Archipelagic Baselines without a prior Proclamation of Archipelagic Status
Unlike the other States, some of the current archipelagic states established their archipelagic baselines

Amendments of the Schedule, Order No. 81 of 2009, available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/vut_mzn78_2010.pdf>. Mathew Island and Hunter Island's sovereignty is disputed between France and Vanuatu; however, as Vanuatu draws normal baselines around them, the archipelagic baselines are not affected by this dispute. United States Department of State, 'Limits in the Seas No. 137 - Vanuatu: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 2.

³⁴⁵ Antigua and Barbuda established archipelagic baselines via Maritime Areas Act 1982 (Act 18), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ATG_1982_18.pdf> also at DOALOS (n 80) 1. For the validity of its archipelagic baselines, see United States Department of State, 'Limits in the Seas No. 133 - Antigua and Barbuda: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 2.

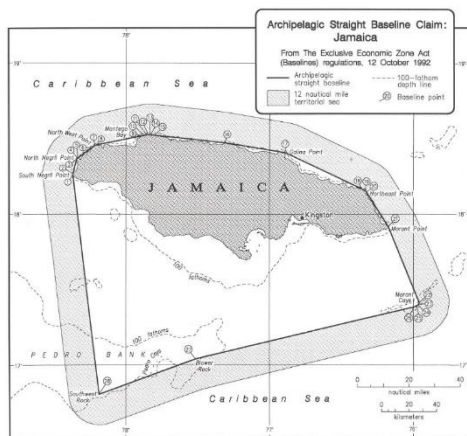
³⁴⁶ Trinidad and Tobago declared archipelagic status through Archipelagic Waters and Exclusive Economic Zone Act 1986 (No. 24) available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TTO_1986_Act.pdf> and established its archipelagic baselines via Archipelagic Baseline of Trinidad and Tobago Order, 1988 (Notice No. 206) available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TTO_1988_Order.pdf>. For the validity of its archipelagic baselines, see United States Department of State, 'Limits in the Seas No. 131 - Trinidad and Tobago: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3.

³⁴⁷ Grenada claimed archipelagic status via The Grenada Territorial Seas and Maritime Boundaries Act 1989 (Act 25) available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/grd_act_25_1989.pdf>. Subsequently, the Grenada Territorial Sea and Maritime Boundaries (Archipelagic Baselines) Order of 1992 set forth coordinates for Grenada's archipelagic baselines and bay closing lines. See DOALOS, 'Law of the Sea Bulletin - No. 71' (United Nations 2010) 36 <https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin71e.pdf> accessed 17 October 2023. For the validity of Grenada's archipelagic baselines, see United States Department of State, 'Limits in the Seas No. 135 - Grenada: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 2.

without a prior proclamation or declaration of archipelagic status via national legislation. They are Jamaica, the Maldives and Mauritius.

Jamaica

Jamaica appears to have first established its archipelagic baselines, followed by an official proclamation four years later. In 1992, Jamaica enacted the Exclusive Economic Zone Act (Baselines) Regulations,³⁴⁸ which specified the geographical coordinates of the basepoints to be joined by archipelagic baselines. In 1996, Jamaica officially declared its archipelagic status through the Maritime Areas Act of 28th November 1996.³⁴⁹ At first glance, Jamaica does not resemble an archipelagic State. However, while drawing its archipelagic baselines, Jamaica connected its rocks and cays located to its south, successfully establishing a valid archipelagic baseline system. This baseline system is also within the permissible range of water-to-land ratio under the LOSC.³⁵⁰



³⁴⁸ The Exclusive Economic Zone Act (Baselines) Regulations 1992, available at <<https://faolex.fao.org/docs/pdf/jam22356.pdf>>

³⁴⁹ The Maritime Areas Act 1996 (Act 25) available at <<https://faolex.fao.org/docs/pdf/jam7862.pdf>>

³⁵⁰ United States Department of State, 'Limits in the Seas No. 125 - Jamaica's Maritime Claims and Boundaries' (Office of Oceans Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2004) 4.

³⁵¹ Munavvar (n 12) 256; Lokita (n 52) 24; Prescott (n 54) 161; Roach and Smith (n 50) 123.

³⁵² The 1964 Constitution of the Maldives, available at <<https://mvlaw.gov.mv/dv/legislations/231/consolidations/728>>

³⁵³ The Maldivian Exclusive Economic Zone Law 1976 (Law 30/76) available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDV_1976_Law30.pdf>

³⁵⁴ The Maritime Zones of Maldives Act 1996 (Act 6/96) available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDV_1996_Act.pdf> Even prior to 1996, Maldives

(“Limits in the Seas No. 125 - Jamaica's Maritime Claims and Boundaries”, p 7)

Maldives

The initial attempt to clarify the geographical extent of the Maldivian maritime zones was considered quite unusual and deviated from the evolving straight baseline principles of the time.³⁵¹ The 1964 Constitution of the Maldives defined the territory of the Maldivian Monarchy as archipelagos, including the seas and airspace connected to these archipelagos, which were situated within a rectangle created using meridians and parallels.³⁵² Subsequently, the Maldives enacted the Maldivian Exclusive Economic Zone Law 1976 (Law 30/76)³⁵³ on 27th November 1976. The coordinates defined in this Act appeared to surround the Maldivian archipelago in the shape of a rectangle. They claimed the enclosed waters within the coordinates as waters exclusive for the Maldivian economic use.

The Maldivian Exclusive Economic Zone Law of 1976 was repealed and replaced by the Maritime Zones of Maldives Act 1996 (Act 6/96).³⁵⁴ This Act finally established the archipelagic baselines of the Maldives using appropriate basepoints as required for an archipelagic State under Article 47 of the LOSC. However, the Maldivian archipelagic baselines are reported to be inconsistent with Article 47(2) because three baseline segments exceed the 100 nm limit. The Maldivian archipelagic baseline system is composed of 37 segments. Thus, as per Article 47(2), only one segment of the Maldivian baseline segments would be allowed to exceed the limit.³⁵⁵ According to the ‘Counter-Memorial of the Republic of Maldives’ submitted to the Tribunal, the Maldivian

viewed itself as an archipelago; see Article 1 of the 1964 Constitution of the Maldives, available at <<https://mvlaw.gov.mv/dv/legislations/231/consolidations/728>> and Article 1 of the 1968 Constitution of the Republic of Maldives, available at <<https://mvlaw.gov.mv/dv/legislations/232/consolidations/729>>.

However, no specific declaration of archipelagic status was announced before the enactment of the official archipelagic baselines in 1996 under the Maritime Zones of Maldives Act 1996 (Act No. 6/96). Afterwards, Article 2 of the 1998 Constitution of the Republic of Maldives, available at <<https://www.refworld.org/docid/3ae6b59618.html>> and Article 3 of the 2008 Constitution of the Republic of Maldives, available at <<https://faolex.fao.org/docs/pdf/mdv136135.pdf>> explicitly referred to the archipelagic baselines of Maldives in defining the Maldivian territory.

³⁵⁵ United States Department of State, 'Limits in the Seas No. 126 - Maldives Maritime Claims and Boundaries' (Office of Oceans Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2005) 3; Baumert and Melchior (n 65) 65; Lathrop, Roach and Rothwell (n 53) 104.

government is considering the revision of the Maldivian archipelagic baselines by ‘inserting two new base points to the north-west and east of the Maldives’.³⁵⁶

Mauritius

Throughout UNCLOS III, Mauritius was one of the leading advocates for the archipelagic concept and submitted proposals together with Indonesia, the Philippines and Fiji.³⁵⁷ Yet, Mauritius claimed archipelagic status only on 28th February 2005 under the Maritime Zones Act 2005.³⁵⁸ Mauritius enacted its archipelagic baselines in August of the same year under its Maritime Zones (Baselines and Delineating Lines) Regulations 2005.³⁵⁹ Mauritius archipelagic baselines include two systems: one around Saint Brandon and the second around Chagos Archipelago.³⁶⁰ Both of these archipelagic baseline systems were considered consistent with Article 47 according to the US Limits of the Seas analysis.³⁶¹

Nevertheless, in light of the recent judgment of the *Mauritius v Maldives Maritime Boundary Delimitation Case*, the published archipelagic baselines of Mauritius surrounding the Chagos archipelago seem to be in need of a review. In the proceedings before the Tribunal, Mauritius asserted that the Blenheim Reef encompassed multiple parts or patches that were connected through an underwater structure and, thus, should be considered as a single low-tide elevation.³⁶² However, the Tribunal declared that:

“Article 13, paragraph 1, of the Convention, defines a low-tide elevation as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.” The Special Chamber considers that Mauritius’ argument relating to “underwater structure” is not in conformity with the definition of a low-tide elevation. There is nothing in this definition that indicates that separate “parts”

or “patches” exposed at low tide, connected through an “underwater structure”, constitute a single low-tide elevation.”³⁶³

The Tribunal held that Blenheim Reef did consist of a number of low-tide elevations, many of which were situated beyond 12 nm of the nearest island, Île Takamaka.³⁶⁴ Therefore, the Tribunal established that ‘the 200 nm limit of Mauritius must be measured from a low-tide elevation of Blenheim Reef that is situated wholly or partly within 12 nm of Île Takamaka’.³⁶⁵ Consequently, it is safe to conclude that the archipelagic baseline system established around the Chagos Archipelago needs to be revised in compliance with Article 47(7).

States that Claimed Archipelagic Status but Enacted Legislation Concerning Archipelagic Baselines Years After the Entry into Force of the LOSC

Some States opted to claim archipelagic status via national legislation in advance and enacted the legislation establishing official archipelagic baselines years later.³⁶⁶ They are the

³⁵⁶ Republic of the Maldives, ‘Counter-Memorial of the Republic of Maldives - Volume 1 - Dispute Concerning the Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean’ (Republic of the Maldives 2021) 17 <https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Pleadings/C28_Counter_memorial_of_Maldives.pdf>.

³⁵⁷ See, for instance, *Archipelagic States - Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (n 18) 11–13.

³⁵⁸ The Maritime Zones Act 2005 (Act 2) available at <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/82676/90732/F101858%202086/MUS82676>>

³⁵⁹ Maritime Zones (Baselines and Delineating Lines) Regulations 2005, available at <<https://faolex.fao.org/docs/pdf/mat62133.pdf>>

³⁶⁰ United States Department of State, ‘Limits in the Seas No. 140 - Mauritius: Archipelagic and Other Maritime Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and

International Environmental and Scientific Affairs, US Department of State 2014) 4.

³⁶¹ United States, in its Limits in the Seas Series, did protest the archipelagic baseline around the Chagos archipelagos by virtue of the sovereignty dispute between Mauritius and the United Kingdom over the archipelagos. See *ibid* 5. Negotiations over the handover of Chagos to Mauritius is ongoing, however the practical resolution of this dispute still remains uncertain. See ‘Human Rights Watch Letter to Lord David Cameron’ (*Human Rights Watch*, 25 January 2024) <<https://www.hrw.org/news/2024/01/25/human-rights-watch-letter-lord-david-cameron>> accessed 22 May 2024.

³⁶² *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 215.

³⁶³ *ibid* para 216.

³⁶⁴ *ibid* para 219.

³⁶⁵ *ibid* para 229.

³⁶⁶ Miron (n 49) 313.

Bahamas,³⁶⁷ Seychelles,³⁶⁸ Comoros,³⁶⁹ Tuvalu,³⁷⁰ Kiribati,³⁷¹ Saint Vincent and the Grenadines³⁷² and the Marshall Islands.³⁷³ These States were only symbolically regarded as archipelagic States before they established their archipelagic baselines via legislation. Similarly, they could only utilise the baseline methods stipulated under Articles 4 and 7 of the LOSC until proper archipelagic baselines were established and published by these States.³⁷⁴ This meant that they only had territorial waters and EEZs around each island and lacked the advantages of archipelagic waters.

Four of these State's archipelagic baselines are in accordance with the provisions under Article 47. They are the

³⁶⁷ Bahamas declared archipelagic status in 1993 via Archipelagic Waters and Maritime Jurisdiction Act 1993 (Act 37), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BHS_1993_37.pdf> and established archipelagic baselines in 2008 under The Archipelagic Waters and Maritime Jurisdiction (Archipelagic Baselines) Order, 2008, available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/bhs_mzn65_2008.pdf>

³⁶⁸ Seychelles declared archipelagic status in 1999 under the Maritime Zones Act, 1999 (Act 2), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SYC_1999_Act2.pdf> This Act was amended by the Maritime Zones Act 2009 (Act 5), available at <<https://faolex.fao.org/docs/pdf/sey158827.pdf>> Seychelles established the coordinates of its normal and archipelagic baselines in 2008 set forth under Seychelles' Maritime Zones (Baselines) Order, 2008 available at <<https://faolex.fao.org/docs/pdf/sey139170.pdf>>

³⁶⁹ Comoros declared archipelagic status in 1982 under Law No. 82-005 Relating to the Delimitation of the Maritime Zones of the Islamic Federal Republic of the Comoros of 6 May 1982, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/COM_1982_Law.pdf> Comoros established its archipelagic baselines in 2010 under Comoros Presidential Decree Establishing the limits of the Territorial Sea of the Union of The Comoros, Decree No. 10-092/PR of August 13, 2010, available at <<https://faolex.fao.org/docs/pdf/com158709.pdf>>

³⁷⁰ Tuvalu declared archipelagic status in 1983 under Marine Zones (Declaration) Act 1983, available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUV_1983_Act.pdf> This Act was repealed in 2012 by the Maritime Zones Act 2012, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/tuv_maritime_zones_act_2012_1.pdf> Pursuant to this Act, Tuvalu designated the coordinates of its archipelagic baselines in 2012 under Declaration of Archipelagic Baselines 2012 (LN No. 7), available at

<https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/tuv_declaration_archipelagic_baselines2012_1.pdf>

³⁷¹ Kiribati claimed the archipelagic status via Marine Zones (Declaration) Act, 1983 (Act 7), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KIR_1983_Act.pdf> This Act was repealed by the Maritime Zones (Declaration) Act, 2011, available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KIR_2011_Act.pdf> The archipelagic baselines of Kiribati were established in 2014 under The Baselines around the Archipelagos of Kiribati Regulations 2014, available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KIR_2014_archipel_baselines_regulations.pdf>

³⁷² Saint Vincent and the Grenadines declared archipelagic status in 1983 under Maritime Areas Act 1983 (Act 15), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VCT_1983_Act.pdf> Pursuant to this Act, the coordinates for its archipelagic baselines and bay closing lines were established in 2014 under Government Notice No. 60 of 2014, entitled Archipelagic Closing Lines and Baselines of Saint Vincent and the Grenadines, available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/VCT_2014_147_Gazette.pdf>

³⁷³ Marshall Islands claimed archipelagic status under Marine Zones (Declaration) Act 1984, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MHL_1984_Act.pdf> This Act was revoked by The Republic of the Marshall Islands Maritime Zones Declaration Act 2016, available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/mhl_mzn120_2016_1.pdf> The coordinates for the archipelagic baselines of the Marshall Islands were established in 2016 under the Baselines and Maritime Zones Outer Limits Declaration 2016, available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/mhl_mzn120_2016_2.pdf>

³⁷⁴ Tsamenyi, Schofield and Milligan (n 54) 452; Lokita (n 52) 26.

Bahamas,³⁷⁵ Tuvalu,³⁷⁶ Kiribati,³⁷⁷ Saint Vincent and the Grenadines.³⁷⁸ Meanwhile, as described below, the rest of the three States are reported to have some deficiencies in their archipelagic baselines.

Seychelles

Seychelles has established four archipelagic baseline systems. Overall, there are two issues with the archipelagic baselines designated by Seychelles. Firstly, according to the US Limits of the Seas study, only one group (Group 4) fits the water-to-land ratio required under Article 47(1). Groups 2 and 3 can qualify if the underwater banks they are located on are viewed as “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 stated under Article 47(7). However, Group 1 does not appear to fit this criterion and consequently cannot benefit from this Article when calculating the water-to-land ratio.³⁷⁹ The second issue is that in all four baseline systems, Seychelles has positioned basepoints on open waters where there are neither islands, drying reefs or low-tide elevations.³⁸⁰ Such basepoint placements clearly deviate from the Article 47 requirements.

Comoros

³⁷⁵ United States Department of State, ‘Limits in the Seas No. 128 - The Bahamas: Archipelagic and Other Maritime Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3.

³⁷⁶ United States Department of State, ‘Limits in the Seas No. 139 - Tuvalu: Archipelagic and Other Maritime Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3. A noteworthy and inspiring inclusion in the recent Constitution of Tuvalu 2023 is the provision addressing the geographical impacts of climate change on the statehood and territory of Tuvalu. Article 2(1) of the 2023 Constitution of Tuvalu declares that: “The State of Tuvalu within its historical, cultural, and legal framework shall remain in perpetuity in the future, notwithstanding the impacts of climate change or other causes resulting in loss to the physical territory of Tuvalu.” Whereas Article 2(3) states that: “The baseline coordinates declared by Schedule 6 shall remain unchanged, notwithstanding any regression of the low water mark or changes in geographical features of coasts or islands, due to sea-level rise or other causes, until and unless otherwise prescribed by an Act of Parliament.” See Constitution of Tuvalu 2023, available at <https://www.tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1986/1986-0001/ConstitutionofTuvalu_2.pdf>

³⁷⁷ United States Department of State, ‘Limits in the Seas No. 146 - Republic of Kiribati: Archipelagic and Other Maritime Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2020) 4.

³⁷⁸ United States Department of State, ‘Limits in the Seas No. 144 - Saint Vincent and the Grenadines: Archipelagic and Other Maritime

Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2019) 3.

Comoros used a submerged feature called the Banc Vailheu as part of its archipelagic baselines. The US, in their Limits in the Seas Series, emphasises that it is neither an island nor a drying reef or low-tide elevation, as there are no land or drying reefs near this completely submerged feature.³⁸¹ This placement of basepoints for archipelagic baselines is inconsistent with Article 47(1). Additionally, the location of this basepoint, more than 10 nm from the closest point on the island of Grand Comore, results in the departure of the baseline from the general configuration of the archipelago to an appreciable extent, which is in violation of Article 47(3).³⁸² Apart from the use of this submerged feature as a base point, Comoros also enclosed the island of Mayotte into its archipelago while drawing its archipelagic baselines. Mayotte is administered as an overseas department and region of France, but the sovereignty of Mayotte is contested between Comoros and France. France has protested the 13 base points used to enclose Mayotte, maintaining that these archipelagic baselines would imply that Mayotte is under the sovereignty of Comoros, which is ‘not compatible with the status of Mayotte and is without legal effect’.³⁸³ Afterwards, France

Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2019) 3.

³⁷⁹ United States Department of State, ‘Limits in the Seas No. 132 - Seychelles: Archipelagic and Other Maritime Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 3; Lathrop, Roach and Rothwell (n 53) 103.

³⁸⁰ ‘Limits in the Seas No. 132 - Seychelles: Archipelagic and Other Maritime Claims and Boundaries’ (n 160) 4; Lathrop, Roach and Rothwell (n 53) 103.

³⁸¹ United States Department of State, ‘Limits in the Seas No. 134 - Comoros: Archipelagic and Other Maritime Claims and Boundaries’ (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2014) 2 <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn82_2011_fra_re_com_e.pdf>; Lathrop, Roach and Rothwell (n 53) 104.

³⁸² Baumert and Melchior (n 65) 77.

³⁸³ Permanent Mission of France to the United Nations, ‘Note Verbale No. 961 to the United Nations’ (*Division for Ocean Affairs and the Law of the Sea*, 4 February 2012) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn82_2011_fra_re_com_e.pdf> accessed 10 October 2023.

published their own straight baselines around Mayotte in 2013.³⁸⁴

Marshall Islands

The Marshall Islands claimed archipelagic status in 1984, but the coordinates for their archipelagic baselines were established in 2016.³⁸⁵ The archipelagic baselines established by the Marshall Islands comprise two archipelagic baseline systems, one of which exceeds the water-to-land ratio set forth in Article 47(1). Therefore, this baseline system is inconsistent with the LOSC.³⁸⁶

Special Case of Palau

Palau claimed archipelagic status in 1981 via Palau's Constitution of 1981 and also demarcated its straight archipelagic baselines under Article 1 (Section 1) of the Constitution.³⁸⁷ However, the literature review on the practice of archipelagic States reveals that previous studies have not included Palau in the lists of archipelagic States. The United Nations Division of Ocean Affairs and Law of the Sea (UNDOLAS) list of archipelagic States had not included Palau as having claimed archipelagic status as well.³⁸⁸

Palau's 1981 Constitution was written during the same time the LOSC and the related archipelagic baseline regulations were developing. Regrettably, the baselines finalised under the Palau Constitution were not consistent with the final archipelagic state regime established under Part IV of the LOSC.³⁸⁹ On May 1, 2020, Palau held a referendum in which voters chose to remove the section in the Constitution relating to straight archipelagic baselines.³⁹⁰ This amendment aimed to create a separate legislation concerning the archipelagic baselines rather than strictly fixing them in their Constitutional document, which makes it harder to revise the baselines if required.³⁹¹

Currently, Palau is in the process of updating its archipelagic baselines via domestic legislation in accordance with the LOSC.³⁹² Therefore, Palau's archipelagic baselines are under development. Nonetheless, Palau can be classified as a symbolic archipelagic State depending on its proclamation of 1981, making the total number of archipelagic states 23.

LEGAL EFFECT OF INVALID ARCHIPELAGIC BASELINES

According to the LOSC, it is essential for a State to establish its archipelagic baselines in compliance with Article 47 in order to be recognised as an archipelagic State. If the archipelagic baselines are not valid, the State may not be able to benefit from its archipelagic status and enjoy the rights and advantages associated with it. Hence, States that protest against invalid archipelagic baselines have the option of refusing to recognise the rights and entitlements derived from Part IV of the LOSC for that particular archipelagic State.³⁹³ For instance, sovereignty over their claimed archipelagic waters.

Additionally, the LOSC enable States to utilise the dispute settlement mechanisms outlined under Part XV of the LOSC in cases of conflict vis-à-vis a provision of the Convention. This would include the archipelagic baseline requirements stipulated under Part IV of the LOSC.³⁹⁴ However, to date, no State has filed a case against an archipelagic State purely on the grounds of the invalidity of its archipelagic baselines.

Up until now, the analysis of the archipelagic baselines made by international courts and tribunals has only been conducted within the context of other significant disputes between the parties involved.³⁹⁵ For instance, the *Qatar v.*

³⁸⁴ Decree No. 2013-1177, of Dec. 17, 2013, Concerning the Baselines for Measuring the Breadth of the Territorial Sea of the Department of Mayotte, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDF_FILES/DEPOSIT/fra_mzn101_2014.pdf.

³⁸⁵ See (n 152)

³⁸⁶ United Nations, 'Limits in the Seas No. 145 - Republic of the Marshall Islands: Archipelagic and Other Maritime Claims and Boundaries' (Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State 2020) 4.

³⁸⁷ Palau's Constitution of 1981 with Amendments through 1992, available at < <https://faolex.fao.org/docs/pdf/pau132833.pdf>>

³⁸⁸ Ted L McDorman and Clive Schofield, 'Federated States of Micronesia - Palau (Report Number 5-31)' in DA Colson and R.W. Smith (eds), *International Maritime Boundaries*, vol VI (Brill, Nijhoff 2011) 4353

<https://referenceworks.brill.com/display/entries/MBOO/IMBO-Book-5_45.xml?rskey=sm9wkH&result=1>.

³⁸⁹ Island Times Staff, 'Evolving Law of the Sea Mandates Flexibility; Reasoning for the Change' (*Island Times*, 14 April 2020) <<https://islandtimes.org/evolving-law-of-the-sea-mandates-flexibilityreasoning-for-the-change/>> accessed 20 November 2023.

³⁹⁰ Leilani Reklai, 'National Referendum on Nat'l Boundary Passed by All States' (*Island Times*, 5 May 2020) <<https://islandtimes.org/national-referendum-on-natl-boundary-passed-by-all-states/>> accessed 20 November 2023.

³⁹¹ 'Evolving Law of the Sea Mandates Flexibility; Reasoning for the Change' (n 173).

³⁹² Powers and Vakautawale (n 2) 4.

³⁹³ Lathrop, Roach and Rothwell (n 53) 104.

³⁹⁴ *ibid.*

³⁹⁵ *ibid* 113.

Bahrain Case, the South China Sea Arbitration,³⁹⁶ the *Barbados v. Trinidad and Tobago Delimitation Case*,³⁹⁷ and the *Mauritius v Maldives Maritime Boundary Delimitation Case*.

In the *Mauritius v Maldives Maritime Boundary Delimitation Case*, the Tribunal did not analyse the legality of Mauritius's and Maldives' archipelagic baselines, even though both States submitted objections in their written submissions to the Tribunal regarding the validity of the other State's archipelagic baselines.³⁹⁸ The Tribunal did not find the need to determine whether these States were legally entitled to utilise archipelagic baselines or not. Thus, the Tribunal did not address the legality of their respective archipelagic baselines. The Tribunal merely relied upon their respective archipelagic claims and proceeded with the maritime delimitation, treating them as archipelagic States under the LOSC.

The only instance where the Tribunal assessed the validity of an archipelagic basepoint was when the Tribunal examined the basepoint placed by Mauritius on Blenheim Reef. This assessment was necessary in order to determine the 200 nm limit of Mauritius and the overlap between the Mauritius EEZ and the outer continental shelf (hereinafter OCS) claimed by Maldives. The Tribunal explained that:

“The Special Chamber observes at the outset that, since it decides not to place any base points on Blenheim Reef, the question of how to draw Mauritius’ straight archipelagic baselines is not directly relevant to the construction of the provisional equidistance line. However, this question still matters in two respects. First, it is relevant for drawing the 200 nm limit of Mauritius, as such limit is to be measured from archipelagic baselines in accordance with article 48 of the

Convention. Second, it is also relevant for the purpose of identifying the precise area of overlap between Mauritius’ claim to the exclusive economic zone and the Maldives’ claim to the continental shelf beyond 200 nm.”³⁹⁹

On the other hand, in the *Qatar v Bahrain Case*, the ICJ ruled against Bahrain vis-à-vis its claimed ‘*de facto* archipelagic status’.⁴⁰⁰ The final maritime delimitation, in this case, was concluded without reference to the effects of archipelagic status on the maritime delimitation at all. In fact, the Court affirmed that:

“The fact that a State considers itself a multiple-island State or a *de facto* archipelagic State does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met.”⁴⁰¹

Therefore, it seems to indicate that, as long as a State has officially declared itself an archipelagic State, its archipelagic status will not come into question unless it directly impacts the case being decided. Courts or Tribunals only analyse the entitlement of a State to the archipelagic status and the validity of its archipelagic baselines if it is directly relevant to the issue which the Court or Tribunal is dealing with.

In practice, States tend to prefer diplomatic dispute resolution rather than resorting to judicial means, as stipulated under Part XV of the LOSC. This tendency can also be observed regarding baseline disagreements.⁴⁰² It is important to highlight that some diplomatic protests may not be publicly accessible and might be resolved using ‘bilateral exchanges at a diplomatic or Ministerial level’.⁴⁰³

FINDINGS FROM THE ANALYSIS OF STATE PRACTICE

³⁹⁶ *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award (UNCLOS Annex VII Arb. Trib. July 12, 2016).

³⁹⁷ *Delimitation of the Exclusive Economic Zone and the Continental Shelf between Barbados and the Republic of Trinidad and Tobago* (2006). 45 ILM 800.

³⁹⁸ Republic of Mauritius, ‘Memorial of Mauritius - Volume 1 - Dispute Concerning the Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean’ (Republic of Mauritius 2021) 19 <https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Pleadings/C28_Memorial_of_Mauritius.pdf>; ‘Counter-Memorial of the Republic of Maldives - Volume 1 - Dispute Concerning the Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean’ (n 135) 19.

³⁹⁹ *Mauritius v Maldives Maritime Boundary Delimitation Case*, para 213.

⁴⁰⁰ *Qatar v. Bahrain*, para. 183 and 214.

⁴⁰¹ *ibid* para. 183 and 213.

⁴⁰² See, for instance, France’s protest of the archipelagic baselines drawn by Comoros around Mayotte. See ‘Note Verbale No. 961 to the United Nations’ (n 166). Timor Leste protested two segments of the Indonesian Archipelagic Baselines. See Permanent Mission of the Democratic Republic of Timor-Leste to the United Nations, ‘Note No. NV/MIS/85/2012 to the United Nations’ (6 February 2012) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn67_2009_tls.pdf> accessed 20 November 2023. The UK in 2009 protested the inclusion of the Chagos Archipelago within the archipelagic baselines of Mauritius. See United Kingdom Mission, ‘Note No: 26/09’ (19 March 2009) <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn63_2008_gbr.pdf> accessed 20 November 2023. The US, even though it is not a party to LOSC, is very proactive in submitting diplomatic protests to invalid baselines. The US also routinely undertakes operational assertions using government vessels to claim freedom of navigation in disputed seas. See Lathrop, Roach and Rothwell (n 53) 113.

⁴⁰³ Lathrop, Roach and Rothwell (n 53) 113.

The following findings can be derived from this review of the practice of archipelagic States with regard to their claims of archipelagic status and the drawing of their archipelagic baselines.

As of date, 23 States (including Palau) have claimed archipelagic status. This number may continue to increase as other States, such as Bahrain⁴⁰⁴ or Tonga,⁴⁰⁵ decide to claim archipelagic status officially in the future.⁴⁰⁶ Some States claimed archipelagic status and established their archipelagic baselines within a few years; meanwhile, some States took longer to establish their archipelagic baselines even though they had claimed archipelagic status years prior. Nevertheless, within the last two decades, all the States that have claimed archipelagic status so far (with the exception of Palau) have managed to legislate their archipelagic baselines. 13 States⁴⁰⁷ established their archipelagic baselines before the LOSC entered into force. This fact adds to the notion that the archipelagic regime had gained recognition as an international custom.

Five States⁴⁰⁸ have created more than one archipelagic baseline system within their archipelago. This practice is not contrary to the provision under Part IV.⁴⁰⁹ Some archipelagic States, namely: Fiji,⁴¹⁰ Vanuatu,⁴¹¹ the Marshall Islands,⁴¹² the

Philippines,⁴¹³ Mauritius,⁴¹⁴ and Comoros,⁴¹⁵ have unresolved sovereignty disputes over territories with their neighbours.

As demonstrated above, 15 archipelagic baselines formed by the archipelagic States conform to the provisions under Article 47. As per this analysis, the archipelagic baselines that still require some revisions belong to the Dominican Republic, the Solomon Islands, Mauritius, the Maldives, Comoros, the Marshall Islands and Seychelles. The *Mauritius v Maldives Maritime Boundary Delimitation Case* has also facilitated the analysis of the validity of archipelagic baselines, particularly in relation to the Dominican Republic and Mauritius archipelagic baselines.

Some of the archipelagic States that had established archipelagic baselines in variation with the LOSC provisions have revised their archipelagic baselines to conform to the LOSC. They are Cape Verde, Indonesia, the Philippines, Papua New Guinea and the Dominican Republic (although the Dominican Republic's baselines are still invalid by virtue of Article 47). Likewise, it has been reported that Maldives is also attempting to make some revisions.

Meanwhile, States that do not recognise an archipelagic state's archipelagic Status have the option to utilise diplomatic or adjudicative dispute settlement methods described in the LOSC. Nevertheless, it should be noted that, apart from a few

⁴⁰⁴ Bahrain had argued that it had *de facto* archipelagic status during the *Qatar v Bahrain Case*. See *Qatar v Bahrain*, para. 183 and 214. However, Qatar has not officially claimed archipelagic status to date (as of May 2024).

⁴⁰⁵ Tonga is reported to have aspired to become an archipelagic State during UNCLOS III, see Munavvar (n 12) 179. Tonga could be able to draw legitimate archipelagic baselines and claim archipelagic waters. See Roach and Smith (n 50) 208.

⁴⁰⁶ Lokita (n 52) 71; Proelss and others (n 3) 338.

⁴⁰⁷ They are: Indonesia, the Philippines, Dominican Republic, Fiji, Papua New Guinea, Solomon Islands, Sao Tome and Principe, Vanuatu, Antigua & Barbuda, Trinidad and Tobago, Cape Verde, Grenada and Jamaica.

⁴⁰⁸ They are: the Solomon Islands, Mauritius, Seychelles, Kiribati and the Marshall Islands.

⁴⁰⁹ Lathrop, Roach and Rothwell (n 53) 123.

⁴¹⁰ Tonga claims sovereignty over two submerged atoll reefs situated inside Fiji's EEZ called Minerva Reefs. See Michael Field, 'Fiji, Tonga War over Minerva Reef' (*Stuff*, 15 May 2011) <<https://www.stuff.co.nz/world/south-pacific/5008060/Fiji-Tonga-war-over-Minerva-Reef>> accessed 3 November 2023.

⁴¹¹ Vanuatu and France contest the sovereignty of Matthew and Hunter Islands, which are located to the south of Vanuatu's main islands but outside Vanuatu's claimed archipelagic baselines. See 'Limits in the Seas No. 137 - Vanuatu: Archipelagic and Other Maritime Claims and Boundaries' (n 123) 2.

⁴¹² The United States and the Marshall Islands both claim sovereignty over Wake Island, located in the North Pacific Ocean. See 'Wake Island' (*The World Factbook*) <<https://www.cia.gov/the-world-factbook/countries/wake-island/>> accessed 3 November 2023.

⁴¹³ The Philippines has several unresolved territory disputes with its neighbours. For instance, the dispute over the Spratly Islands with China and the other claimants and the dispute over the Sabah Region with Malaysia. See 'What Is the South China Sea Dispute?' (*BBC News*, 13 June 2011) <<https://www.bbc.com/news/world-asia-pacific-13748349>> accessed 3 November 2023; 'Malaysia-Philippines Land Boundary' (*Sovereign Limits*) <<https://sovereignlimits.com/boundaries/malaysia-philippines-land>> accessed 3 November 2023.

⁴¹⁴ Mauritius claims sovereignty over Tromelin Island, which is the fifth district of the French Southern and Antarctic Lands, a French Overseas Territory. See Pierre-Emmanuel Dupont, 'The South China Sea Moves to the Indian Ocean: Conflicting Claims Over the Tromelin Islet and Its Maritime Entitlements' (*EJIL: Talk!*, 8 February 2017) <<https://www.ejiltalk.org/the-south-china-sea-moves-to-the-indian-ocean-conflicting-claims-over-the-tromelin-islet-and-its-maritime-entitlements/>> accessed 3 November 2023.

⁴¹⁵ The sovereignty of the island of Mayotte is contested between the Comoros and France, which is a French overseas department. See Ministère de l'Europe et des Affaires étrangères, 'The Union of the Comoros and Mayotte' (*France Diplomacy - Ministry for Europe and Foreign Affairs*) <<https://www.diplomatie.gouv.fr/en/country-files/regional-strategies/indo-pacific/the-indo-pacific-a-priority-for-france/france-in-the-south-west-indian-ocean/article/the-union-of-the-comoros-and-mayotte>> accessed 3 November 2023.

countries such as the US, States have not taken any active measures to protest against invalid archipelagic baselines. Diplomatic protests have only been made by neighbouring States or States that are directly affected by invalid archipelagic baselines.

Mohamed Munavvar highlighted in his thesis, prepared in 1993, that the feasibility of the formula for archipelagic baselines under Article 47 depended mainly on the archipelagic States themselves.⁴¹⁶ Based on the current state practice of archipelagic States in terms of establishing archipelagic baselines, it is apparent that archipelagic States have adhered more to the strict requirements stipulated under Article 47 compared to the States that have conformed to the rules under Article 7 in relation to straight baselines.⁴¹⁷ The majority of archipelagic States meet the water-to-land ratio requirement and the maximum 125 nm baseline rule.⁴¹⁸ Additionally, the conventional rules related to archipelagic States and archipelagic baselines are alleged to be part of customary international law.⁴¹⁹ Therefore, based on the current State practice, it appears safe to say that the Article 47 technical formula has been effective in legalising the archipelagic regime in practice.

CONCLUSION

The establishment of the archipelagic regime under the framework of a multilateral treaty marked a momentous milestone in the codification of international law. It is the legal materialisation of decades of painstaking consideration given to the issues faced by archipelagos in securing their maritime rights due to their unique geographical peculiarities. It was undoubtedly the result of extraordinary diplomatic efforts by a handful of States that secured benefits for all the potential archipelagic States. This fact enhances the vitality of adherence to the provisions of Part IV of the LOSC in proclaiming archipelagic status, drawing archipelagic baselines, and the ensuing delimitation of maritime boundaries.

According to the above analysis of the State practice of archipelagic States with regard to their archipelagic baselines, all the States that have claimed archipelagic status so far, with the exception of Palau, have now enacted legislation in order to establish their archipelagic baselines. 15 of the 23 archipelagic States conform to the Article 47 provisions, including 4 States that have successfully revised their archipelagic baselines. Meanwhile, 7 States require more revision in order to comply with the Article 47 provisions entirely. In fact, a close examination of the 2023 *Mauritius v Maldives Maritime Boundary Delimitation* case revealed that the Dominican Republic and the Mauritius archipelagic

baselines with respect to the Chagos Archipelago are still in need of revision due to their dependence on low-tide elevations outside the 12nm range from the nearest island.

With respect to invalid archipelagic baselines, other States have the right to employ the peaceful settlement mechanism under the LOSC if they wish to protest such practices. This includes diplomatic and adjudicative means of dispute settlement. However, State practice indicates that States usually prefer handling such disputes by simply sending diplomatic notes. Moreover, based on past international jurisprudence concerning archipelagic baselines, a court or tribunal analyses the validity of an archipelagic baseline only up to the extent it directly relates to the issue being heard.

The unilateral delineation of baselines is the first step in delimiting a State's maritime boundaries and establishing its maritime entitlements. Therefore, the drawing of baselines, including archipelagic baselines, needs to be completed with precision, accuracy and compliance with the prescribed baseline regulations under the LOSC.

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⁴¹⁶ Munavvar (n 12) 268.

⁴¹⁷ Prescott and Schofield (n 35) 181.

⁴¹⁸ Lathrop, Roach and Rothwell (n 53) 103, 104.

⁴¹⁹ Baumert and Melchior (n 65) 61; Miron (n 49) 311.

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