

# Revisiting the Legal Status of Dependent Archipelagic Waters from First Principles

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## 1 Introduction

An archipelago is a ‘group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.’<sup>1</sup> For the most part the law on archipelagic States is well-settled. Part IV of the United Nations Convention on the Law of the Sea 1982 (LOSC) defines an archipelagic State and the status of archipelagic waters. It establishes rules for drawing baselines around the archipelago, and it delimits specific navigational and other rights within archipelagic waters. Churchill and Lowe observe that the law has worked well since the entry into force of the LOSC and that the regime appears to balance well the interests of archipelagic and maritime States.<sup>2</sup> Similarly, Davenport notes that the LOSC settled years of debate over the status of groups of islands and established an effective regime.<sup>3</sup> However, such remarks concern the regime of archipelagic States or mid-ocean archipelagos. This refers to groups of islands that are States in their own right, such as Indonesia, Philippines, Fiji, and Nicobar and Andaman. The law of the sea draws a distinction between archipelagic States and other archipelagos, namely coastal archipelagos and dependent or outlying archipelagos. Coastal archipelagos constitute fringes of islands and other features close to the coastline, such as the skjargard along Norway’s coast, and similar features along the coasts of Sweden, Finland and parts of Canada. Dependent archipelagos are groups of islands that form part of a State that is comprised mainly

1 Article 46(b), United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3.

2 RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, 1999), 130.

3 T Davenport, ‘The archipelagic regime’, in D.R. Rothwell, A. G. Oude Elferink, K.N. Scott and T. Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015) 134–158, 158.

by a continental landmass. Examples include the Azores (Portugal), Faroes (Denmark), Galapagos (Ecuador) and the Falkland Islands (UK). As a matter of treaty law, the LOSC regime on archipelagos applies only to archipelagic States. And only archipelagic States may enjoy the benefits of the special regime established under Part IV of the LOSC. Of course, coastal archipelagos are covered by the rules on straight baselines.<sup>4</sup> And so they may benefit in part from the inclusion of some littoral waters within the baseline as internal waters, as well as the seawards extension of their maritime zones.

In contrast to archipelagic States, the legal position of dependent archipelagos remains uncertain or as Davenport describes it: 'mired in uncertainty'.<sup>5</sup> Whilst it is clear that the LOSC only addresses archipelagic States, some writers take the view that under customary international law, dependent archipelagos are also entitled to make use of straight baselines to enclose waters with the island group.<sup>6</sup> Others, such as Roach, reject this, arguing that State practice is simply too inconsistent to satisfy the requirements for the formation of a customary rule.<sup>7</sup> Much of the recent debate has focused specifically on China's claims in the South China Sea Arbitration, which generated a slew of scholarship advocating China's rights to assert archipelagic status over various features in the South China Seas.<sup>8</sup> It is possible that the contentious nature of this particular set of claims may colour how the position of dependent archipelagos more generally should be considered. Indeed, a quick survey of the legal basis of such claims indicates that the question is not as clear cut as first appears.

The legal basis for archipelagic baselines can be traced to the *Fisheries case* (1951), where the ICJ acknowledged the use of straight baselines in certain

4 DR Rothwell and T Stephens, *The International Law of the Sea* (Hart, 2010) 183.

5 Ibid, p. 156. See further, S Kopela, *Dependent Archipelagos in the Law of the Sea* (Martinus Nijhoff, 2013).

6 See for example, Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17(2) *Chinese Journal of International Law* 207–748, at paras 558, 588.

7 JA Roach, 'Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim?' (2018) 49 *Ocean Development and International Law* 176–202.

8 See J Li and Z Jie, 'A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea' (2010) *China Oceans Law Review* 167–185; J Nan, 'On the Outlying Archipelagos of Continental States' (2012) *China Oceans Law Review* 41–57; H Nong, L Jianwei, and C Pingping, 'The Concept of Archipelagic State and the South China Sea: UNCLOS, State Practice and Implication' (2013) *China Oceans Law Review* 209–239; K-C Fu, 'Freedom of Navigation and the Chinese Straight Baselines in the South China Sea' in MH Nordquist, JN Moore, R Beckman and R Long (eds.), *Freedom of Navigation and Globalization* (Brill, 2015) 190–196.

exceptional circumstances.<sup>9</sup> Where a coastline is deeply indented, the baseline becomes independent of the low water mark and becomes determined by geometrical construction.<sup>10</sup> The *Fisheries case* is the general authority for the idea that exceptional geographic and other circumstances justify a departure from the ordinary rule that baselines must be drawn along the low water mark. Indeed, the Court observed that where the reasons for the exception become so many, then the normal rule would disappear under the exceptions.<sup>11</sup> The permissibility of drawing straight baselines is reflected in Article 7(1) of the LOSC: 'In localities where the coastline is deeply indented and cut into, or if there is a fringe, of islands, along, the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in the drawing of baselines from which the width of the territorial sea is measured'. Although this rule originally concerned coastal baselines, the acceptance of the principles underlying the exceptions opened the door to its application in other circumstances, specifically the case for a special regime of archipelagic waters.

During the negotiation of the LOSC, archipelagic States argued that their exceptional geographic and political situation merited the development of special rules that allowed them to assert a higher degree of control over the waters of the archipelago.<sup>12</sup> In general, the negotiations involved three connected elements. The first element focused on the special status of archipelagos, i.e., identifying which special circumstances justified special rules for archipelagos. The second element focused on how such claims were to be balanced against the interests of other States and in particular any reduction in navigational freedoms that would result from potential enclosure of large ocean areas within exclusive coastal State control. The third element focused upon how baselines should be drawn to ensure that they reflected such a balance of interests. These three elements of the negotiations ultimately resulted in a special regime for archipelagic States, as found in Part IV of the LOSC. All three elements are connected, but it is worth emphasising that whilst baselines are of utmost practical importance and will define the extent of the archipelago, the drawing of such lines is an entitlement that flows from a special status attaching to the State.

In recent years, it would appear that the debate about archipelagic claims has moved away from questions about the status of the archipelago to challenges

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9 *Fisheries Case (United Kingdom v Norway)* (1951) ICJ Reports 116, 128–132.

10 *Ibid.*, 128.

11 *Ibid.*, 129.

12 See generally Kopela (n 5).

to the validity of baselines drawn by archipelagic States, and whether they are drawn in a way that is consistent with the LOSC. Arguably this shift has gone so far as to marginalize consideration of the basic requirements justifying archipelagic status. Thus, the enjoyment of specific rights focuses mostly upon the drawing of baselines rather than special features of the archipelago.<sup>13</sup> Or, in other words, it has shifted to the practice of States making claims rather than any considered assessment of the justification or legal basis for making such claims. The legal justification of the claims is either skipped over or given superficial consideration. However, logic dictates that any legal rights in archipelagic waters are enjoyed because of the special status attaching to the archipelago. As Su correctly notes, the drawing of baselines is merely a technical step in determining the extent of such rights.<sup>14</sup> However, if this is the case, and the debate on dependent archipelagic claims is collapsed into an assessment of baselines, then it is not clear the extent to which the features of an archipelago, i.e., the geographic, economic and political unity of the archipelago, can or should continue to play a role in the critical first stage of the process – determining the permissibility of archipelagic claims per se.

This paper seeks to revisit this aspect of claims to archipelagic waters to consider the extent to which the geographic, economic, and political unity of the archipelago can and should influence dependent archipelagic claims. These conditions are important for two reasons. First, the requirements for geographic, economic, political, and historical unity serve to ensure there is a material connection between legal claims or maritime jurisdiction and the underlying social, economic and geopolitical reality. This is critical because, as I argue elsewhere, law must be sensitive to the material conditions at play in our oceans.<sup>15</sup> At an ontological level, law of the sea must relate to the physical world and be part of a constructive process. This means that the law should respond to the fluid and dynamic nature of ocean systems, as well as reflect the contingent relationship between humans and resource systems. In an

13 See for example the papers cited at footnotes 7 to 8.

14 See J Su, 'The Unity of Status of Continental States' Outlying Archipelagos' (2020) 35 *IJMC* 801–835, 819. However, Su then appears to analyse the simple assertion of baselines as evidence of a unity, or at least taking this as an implication that a unity exists (pp. 819–23).

15 See further R Barnes, 'Environmental Rights in Marine Spaces' in S Bogojevic and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart, 2018) 49–85; R Barnes, 'The Construction of Ocean Space in Areas beyond National Jurisdiction. A fisheries perspective' in V De Lucia, L Nguyen and AG Oude Elferink (eds) *International Law and Marine Areas beyond National Jurisdiction: Reflections on Justice, Space, Knowledge and Power* (Brill, 2022) 275–315.

archipelagic context this is importance because it is reflected in the idea of a fundamental relationship between the islands and ocean spaces, and with the peoples who live in those spaces. Second, since there is no discreet legal basis for dependent archipelagos under Part IV of the LOSC, I argue that any special status they enjoy must arise under customary international law. Furthermore, I argue that customary international law permits claims to dependent archipelagos. However, such claims should demonstrate the geographic, economic and political unity of mid-ocean archipelagos. This is because such claims must be consistent with the existing legal framework that frames such entitlements. These arguments are advanced in the second part of the paper. In the third part of the paper, the geographic, economic, political, and historical requirements for an archipelago are unpacked. The purpose here is to consider how such factors play a role in mediating claims to offshore archipelagos.

## 2 Claims to Archipelagic Waters for Dependent Archipelagos

If Part IV of the LOSC is not exhaustive of archipelagic claims, then there are two possibilities for the use of straight baselines around dependent archipelagos. The first is for the general provisions on straight baselines in Article 7 to be applied to dependent archipelagos. The second is to identify a rule on dependent archipelagos under customary international law. In this latter case, then the requirements for the existence of a rules of customary international law must be satisfied.

Either approach appears to be ruled out by the tribunal in the *South China Sea* arbitration. Here the tribunal noted the existence of practice by some States using straight baselines around offshore archipelagos to approximate the effect of archipelagic baselines but rejected this as applicable to the Spratly Islands.<sup>16</sup> The tribunal explicitly rejected the application of Article 7 to offshore archipelagos, observing that Article 7 applies only to islands that fringe the main coastline. The tribunal accepted that there were other situations where straight baselines could be used but observed that this does not include offshore archipelagos. The tribunal reasoned that to extend Article 7 further would effectively render the provisions of Articles 7 and 47 meaningless. The reasoning on this point was unclear, but presumably it was meant that that this would render straight baselines generally applicable rather than exceptional.

<sup>16</sup> *In the Matter of the South China Sea Arbitration* (The Republic of the Philippines v The People's Republic of China), Award, 12 July 2016, [575].

The tribunal summarily dismissed the notion that deviations from the rules in the Convention amounted to a new customary rule permitting departure from the express provisions of the Convention.<sup>17</sup> However, the reasoning behind this finding was unclear. Underlying the tribunal's decision appears to be the assumption that the Convention dealt exhaustively with baselines. Or perhaps that the Convention intended to freeze developments on this issue outside of the Convention. However, given the paucity of reasoning of the tribunal on these points, these assumptions should be challenged.

First, there is nothing in the language of Article 7 that limits its application to continental coastlines. The logic of Article 7 is to account for complex geography and economic factors in the drawing of baselines; it is intended to simplify the drawing of baselines along deeply indented coastlines. This provision is derived from the *Fisheries case*, where the Court considered the specific situation of a mainland coastline. However, there is nothing in the judgment to suggest that the Court's reasoning was limited only to continental coastlines. Indeed, as the Court concluded, 'The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway'.<sup>18</sup> Norway was an exemplar of a more general recognition that exceptional geographic conditions required exceptional treatment in law.

Secondly, as observed in the wider literature on the law of the sea, the LOSC is a living instrument, one that is intended to adapt to changed circumstances.<sup>19</sup> This adaptability is particularly important in respect of matters not directly addressed by the Convention. According to this understanding of LOSC, we should accommodate legal developments that go with the grain of the LOSC.<sup>20</sup> Arguably, this includes the position of dependent archipelagos. The LOSC favours exceptions to the ordinary rules on baselines and indeed the delimitation of maritime entitlements when geographic or exceptional conditions justify this. There is some State practice in support of this as regards dependent archipelagos. Furthermore, a review of the *travaux préparatoires*

17 Ibid., 576.

18 *Fisheries case* (n 9), 133.

19 See the contributions in J Barrett and R Barnes (eds) *Law of the Sea. UNCLOS as a Living Treaty* (BIICL, 2016).

20 M Wood, 'Reflections on the United Nations Convention on the Law of the Sea: A Living Instrument', in Barrett and Barnes, *ibid.*, LXXVII–LXXXII.

makes it clear that States' opinions were divided on how to deal with offshore archipelagos. All that can be concluded was that the exclusion of rules on dependent archipelagos was a consequence of a lack of agreement on how to regulate such archipelagic claims and not a deliberate decision to preclude the application of alternative rules. Even if one cannot read the text of the LOSC to accommodate dependent archipelagos, this cannot and should not rule out the development of customary rules on dependent archipelagos.

If we look at the development of customary rules, then I would argue that as long as the practice accords with the general tenor of the LOSC then this is an acceptable development in the law of the sea. However, what is critical here is that the developments are in line with the same general constraints that apply to coastal and archipelagic States. These constraints should extend to offshore archipelagos. This means at a minimum ensuring consistency with existing principles so that 'the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters'.<sup>21</sup> It also means that the preconditions of Article 46 are respected, i.e. that dependent archipelagos manifest some geographic, economic, political and historical connection, and, finally, that baselines respect the rules in Article 47.

If one looks at the literature on archipelagic claims, then it appears that the assessment of customary entitlements to dependent archipelagic waters is something of a numbers game. Below is Table 10.1, indicating the range of current claims to dependent archipelagos, alongside the claimant State, those States in the nearest geographic vicinity, protesting States, and a final column indicating whether there is some geographical, political, economic or historical connection between the archipelago and the metropolitan territory.

Of 15 claims to dependent archipelagos, eight seem to have been protested. In seven of these cases, the protest was by the US alone. The US was joined on two occasions by other States. In light of this, Roach argues that State practice fails to support a rule in favour of dependent archipelagic waters.<sup>22</sup> Whomersley interprets this practice differently, arguing that since the sole objector in most cases was the US, and that most other States have not objected to the claims, this suggests that State practice favours the recognition of offshore archipelagic claims.<sup>23</sup> It is always going to be a challenge to conclusively determine the meaning of State practice. Accordingly, a more nuanced conclusion from the

21 LOSC, Art. 7(3).

22 Roach, above (n 7).

23 C Whomersley, 'Offshore Archipelagos Enclosed by Straight Baselines: A Reply to J. Ashley Roach' (2018) 49 *Ocean Development & International Law* 203–207.

TABLE 10.1 Dependent archipelagic claims (based on data from Roach 2018)<sup>a</sup>

	Feature	Claimant State	Neighbouring States/entities	Protests	Unity features
1	Faroes	Denmark	UK, Iceland, Norway, Denmark	US	Arguable
2	Diayou/Senkaku	China/Japan	Japan, Taiwan, South Korea, Philippines	US	Sovereignty dispute
3	Azores	Portugal	Morocco, Western Sahara, Spain	US	Arguable
4	Falklands	UK	Argentina, Chile	US	Arguable
5	Hainan	China	Vietnam, Philippines	US	Arguable
6	Xisha/Paracel	China	Vietnam, Philippines	US, Philippines, Vietnam	Sovereignty dispute
7	Galapagos	Ecuador	Colombia, Peru, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, and Mexico.	US, UK, Germany, Belgium, Spain, Sweden	Arguable
8	Coco and Preparis	Myanmar	Bangladesh, India, Thailand, Malaysia, Indonesia	Bangladesh	Arguable
9	Svalbard	Norway	Russia, Greenland, Iceland	No objections	Arguable
10	Canary Islands	Spain	Morocco, Western Sahara, Portugal, Mauritania	No objection. IMO PSSA	Arguable
11	Kerguelen Islands	France		No objections	Arguable
12	Malvinas	Argentina	Chile	No objection?	Sovereignty dispute



TABLE 10.1 Dependent archipelagic claims (based on data from Roach 2018) (*cont.*)

	Feature	Claimant State	Neighbouring States/entities	Protests	Unity features
13	Turks and Caicos	UK	Cuba, Dominican Republic, Haiti, United States	No objections	Arguable
14	Guadeloupe	France	Dominica, St Lucia, British Virgin Islands, Puerto Rico, Barbados, Grenada	No objection	Arguable
15	Loyalty Islands	France	Vanuatu, Fiji	No objection	Arguable
16	Hawaii	US		Not claimed	Arguable
17	Andaman and Nicobar	India	Thailand, Myanmar, Indonesia, Bangladesh	Not claimed	Arguable
18	Balearic Islands	Spain	France, Italy, Tunisia	Not claimed	Arguable

a The final column, unity features refer to the existence of some or all of the three elements for archipelagic status: geographic, economic or political. In some cases this is difficult to discern due to an ongoing sovereignty dispute over the islands. This at least cast doubt on the connectivity of the islands with one or more of the disputing States.

data is that practice remains inconclusive, but it certainly does not rule out the permissibility of offshore archipelagic claims.

Furthermore, if, as it seems to be the case, the existence of a customary rule on dependent archipelagos is a numbers game, then I would suggest that this game, like in a casino, is stacked in favour of the house. And the house is the State asserting a claim to an offshore archipelago. First, in terms of mere self-interest, it seems reasonable to assume that States with a geographical configuration favourable to a claim are likely to make their own claims and recognise similar claims by other States. Furthermore, such claimant States will seek to maximise their advantage by pushing the boundaries of what is legally

permissible. It may also be noted that States are not compelled to claim archipelagic status and so a failure to extend a claim cannot automatically be taken as negative position on such an entitlement.

Second, the dynamics of practice, including that of specially interested States, is likely to favour support for a rule of custom allowing dependent archipelagic claims. The formation of customary international law requires a generality of practice, and this might suggest that relatively small amounts of practice, as noted above, are inconclusive. However, any evaluation of practice would likely give more weight to the practice of the most interested States, i.e., those possessing dependent archipelagos. Even if the rules on the formation of custom do not quite give specially interested States a greater say in the formation of a rule, they do require that the assessment of State practice must include that of specially interested States.<sup>24</sup> At the end of the day, States with the most to gain or lose will be most active in the framing of any claim to expanded maritime jurisdiction. Thus, States with dependent archipelagos will push hard for recognition of such claims, and States unaffected or not in the vicinity of such claim areas are likely to have little interest in protesting such claims. Indeed, most States are silent on archipelagic claims, and this can easily be construed as acceptance or acquiescence. Treating silence as acquiescence is supported by the *Fisheries case*, where the Court took the view that a toleration of a certain practice may indeed serve as evidence of acceptance of something as law if it represents concurrence in that practice.<sup>25</sup>

Of course, this assumption about acquiescence needs to be qualified. The ILC has stated that two requirements must be satisfied to ensure that tolerance is connected to the practice in question.<sup>26</sup> First, a reaction should generally be called for in the sense that the practice is one that directly or indirectly affects another State and so should cause a response. Second, the acquiescent State should be able to react, meaning it must have had knowledge of the practice and sufficient time and ability to act. It could be argued that maritime delimitation always has an international aspect, and so this demands a more general reaction from States.<sup>27</sup> However, to assume that specific delimitation

24 *North Sea Continental Shelf cases, Judgment*, (1969) 1CJ Reports 3, at p. 43, para. 74.

25 *Fisheries case* (n 9), 139.

26 Conclusion 2. ILC, *Draft conclusions on identification of customary international law, with commentaries* (2018), UN Doc A/73/10. Reproduced in *Yearbook of the International Law Commission*, 2018, vol. 11, Part Two. Available at [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf).

27 *Fisheries case*: 'The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law

settlements require more widespread level of support does not reflect what happens in practice. With the notable exception of the United States, most States have a limited capacity or interest in responding to distant maritime claims. A single State making a marginally excessive or exceptional claim to maritime entitlements, such as to a dependent archipelago, is unlikely to provoke responses from distant States, especially if this has no direct impact on their fishing, navigation, or resource interests. Of course, this begs a question as to which States would be affected by such a claim. This would seem to include States with navigation interests, neighbouring States, and States with similar claims. Obviously, the latter group of States is likely to support claims to dependent archipelagic waters since this provides a precedent for making their own such claims. If the waters subject to archipelagic status are not in significant navigation routes, then there is likely to be little cause for concern by other States, even those with general navigational interests. This leaves neighbouring States as being the most interested States and having the most to lose by a potential claim. However, these States are likely to be few in number. In many instances, offshore archipelagos are at a distance from other territories and so baselines may have little impact upon other States' maritime claims. As such, other States may have no interest in protesting a claim to draw baselines around a dependent archipelago. In summary, these factors tend to help stack the odds in favour of the claimant State having its claim recognised, or at least not protested.

So far, the focus has been on practice. Little has been said about *opinio juris*. *Opinio juris* is important in this context since, as I argue below, not only is it required to identify a rule of custom, but it also helps to shape how such a rule is framed. In the literature on dependent archipelagos, practice and custom are treated closely. Kopela considers *opinio juris* by way of inference from State practice, or in the context of protest or acquiescence by other States to particular claims.<sup>28</sup> Similarly, Roach considers this mainly in the context of protests.<sup>29</sup> Whomersley does not mention it at all.<sup>30</sup> In practice, explicit statements about the legal basis for a claim to dependent archipelagic waters are uncommon, so this light touch approach to assessing *opinio juris* is understandable. It is consistent with common understandings of how custom operates, and it seems

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... the validity of the delimitation with regard to other States depends upon international law'. Above (n 9), 132.

28 Kopela, (n 5) 166–181.

29 Roach, (n 7), 189–90.

30 Whomersley (n 23).

to favour a traditional approach to identification of *opinio juris* by focusing on some evidence of a subjective belief as manifest through statements made by a State.<sup>31</sup> Here what matters is not so much the genuine nature of the belief, but that it is asserted as a belief, explicit or otherwise.

Here I take a different approach and argue for a more robust assessment of *opinio juris*. I take the view that emergent claims to customary international law should also be formulated in a systemic fashion, that is to say, it must be formed with reference to existing rules of law about what is legally permissible. *Opinio juris* entails a sense of legal entitlement or duty, and this can only be meaningful if one refers to the existing legal context within which the alleged customary rule is situated. As the ILC Draft conclusions state: *opinio juris* 'must be accompanied by a conviction that it is permitted, required or prohibited by customary international law'.<sup>32</sup> In the *North Sea Continental Shelf* cases, the court referred to *opinio juris* as conforming to what amounts to a legal obligation: 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.<sup>33</sup> This speaks again to the idea of coherence with existing standards of conduct. The ILC Draft Conclusions do not explicitly refer to coherence with existing rules in the context of *opinio juris*, but this must be implicit in the nature of *opinio juris*. Otherwise, the idea of a sense of obligation would collapse into pure, unmitigated subjectivity. Accordingly, *opinio juris* cannot be pure belief – it must connect to and be reasoned in accordance with some sense of legal entitlement based upon an existing legal framework. Although States do not have to explain their reasons or motives, the fact that the rules on the formation of customary international law exclude other non-legal motives such as comity, political expedience or convenience means that the basis of a State's belief or reasoning is fundamentally relevant to its claims.<sup>34</sup> This approach, which focuses on the systemic coherence of *opinio juris*, makes it possible to assess novel claims. It is consistent with the reason-based nature

31 See for example, M Akehurst, 'Custom as a Source of International Law' (1974–75) 47 *BYIL* 1, 36.

32 ILC, above (n 26) Commentary on Conclusion 9, p. 138.

33 Above (n 24) para 77.

34 ICJ in the *North Sea Continental Shelf* cases: 'The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty'. *Ibid.*

of law and the idea of intelligible argument in law.<sup>35</sup> It is consistent with the view that law should be a coherent system of rules (i.e. lack of rule conflicts).<sup>36</sup> Notably, the ILC Draft conclusions do acknowledge the importance of coherence elsewhere – observing that this justifies the application of a two-element approach across all areas of international law, noting that international law ‘is a single system’.<sup>37</sup>

It follows that a claim to dependent archipelagic waters must manifest some degree of coherence with the existing legal basis for claims to mid-ocean archipelagic waters and the rationales applicable to the use of straight baselines since these are the most relevant contexts for assessing such claims. There is some precedent for this. Thus, Danish claims to draw baselines around the Faroe Islands were rationalised on the basis of the ‘compact nature of the group of islands, as well as the economic interests (in fishing) peculiar to the region, and as evidence by long usage’.<sup>38</sup> This connects to the so-called unity requirements set forth in Article 46 of the LOSC. These requirements are examined next.

### 3 What Claims to Archipelagic Status Are Permissible?

Under the LOSC, an archipelago is defined as ‘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’.<sup>39</sup> This sets out the concept of an archipelago which is distinct from an archipelagic State, which is further defined as a ‘State constituted wholly by one or more archipelagos and may include other islands’ Part IV only applies to what are termed mid-ocean archipelagos, thereby excluding coastal archipelagos and dependent archipelagos from its provisions on baselines, status of waters and rights therein. From Article 46 of the LOSC, we

35 See H Marcos, ‘A Reason-Based Approach to Coherence in Customary International Law’ (September 1, 2021). Interpretation of Customary International Law: Methods, Interpretative Choices and the Role of Coherence. 2nd TRICI-Law Conference, 2nd and 3rd of December 2021, The Hague, Available at SSRN: <https://ssrn.com/abstract=3930018>.

36 See further M Adenas et al, (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2019).

37 ILC, above (n 26), Commentary on Conclusion 2, p. 126.

38 American Embassy Copenhagen telegram 07435, 24 October 1991, discussed in Kopela (n 5) 168.

39 LOSC, Art 46(b).

can derive three key elements of an archipelago: of geographic, economic, and political factors. These three elements must meet two qualitative thresholds of being closely interrelated and intrinsic. Cumulatively, these conditions reflect the underlying reasons for the special status granted to archipelagic States. The elements are by no means discreet since the ideas of integration and forming 'an intrinsic ... entity' point to the sum (or unity) of these elements as being important, rather than them being alternative, individual conditions. A separate and additional criterion is that of historic recognition.

Whilst the status of an archipelago should be distinct from the question of how baselines are drawn, in practice this distinction is not easy to maintain. Although the ICJ stated in the *Qatar/Bahrain* case that archipelagic status must be *claimed* before a State is able to enjoy the rights of an archipelagic State,<sup>40</sup> it is not clear how the Court arrived at this conclusion since there is strictly speaking no requirement within the LOSC for a State to claim archipelagic status. Furthermore, the benefits of archipelagic status are somewhat contingent upon the drawing of baselines in order to delimit archipelagic waters under Article 47. However, this seems to be more of practical requirement than a formal legal precondition as to status. Rothwell and Stephens observe that even if a State meets the criteria of Article 46, a failure to comply with the rules on drawing baselines will compromise its ability to proclaim archipelagic status. However, this has not stopped some States from maintaining archipelagic waters contrary to the requirements of Article 47.

Let us consider these elements in turn.

### 3.1 *The Geographic Requirement*

The principal geographic feature of an archipelago is that it is a group of islands, but beyond this, things become less certain. The development of archipelagic waters was based heavily on arguments of geography.<sup>41</sup> In the *Fisheries case*, the ICJ was strongly influenced by the geographic realities of Norway's coast. Here the ICJ focused on the 'more or less close relationship existing between certain sea areas and the land formations which divide or surround them',<sup>42</sup> and it held that baselines around coastal archipelagos 'must not depart to any appreciable extent from the general direction of the coast'.<sup>43</sup> Thus we are concerned

40 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, (2001) ICJ Reports p. 40, paras. 180–183 and 214.

41 See T Markus 'Article 46' in A Proelss (ed.), *United Nations Convention on the Law of the Sea. A Commentary*, p. 351, para 40.

42 *Fisheries Case* (n 9), 133.

43 *Fisheries Case* (n 9), 133.

with the physical idea of a space and a relationship within that space. Space is a social construct, and so it is not a given that it must be perceived in a particular way.<sup>44</sup> However, it is important to note that the way space is conceived in archipelagos speaks to a close relationship between land, water and the people in those spaces. Indeed, archipelagos have been described as a body of waters studded with islands, rather than islands surrounded by waters,<sup>45</sup> thus emphasising the fundamental importance of the waters to the identity of the State.

At a minimum, there must be two or more islands. Presumably some of the island group must fit with the definition of islands per Article 121 of the LOSC. However, this does not preclude other maritime features being regarded as part of an archipelago because Article 46 refers to 'other natural features', such as low tide elevations or rocks, in the definition of the archipelago.

The islands must be located in a way that makes them a geographic entity. Yet, quite what a 'geographic entity' means is anyone's guess. Indeed, it is the significant diversity of geographic conditions that seems to have presented most challenges for the development of a complete legal regime for archipelagos. Here variables appear to include the number, size and shape of islands, or their relative proximity. The islands may also share a common submarine platform.<sup>46</sup> Beyond referring to some physical situation, no more specific geographical or geological criterion have been articulated in law. This openness of definition favours treating each case on its own merits, but there should be some limits to keep the notion of archipelago meaningful. Amerasinghe suggests the conditions need to be exceptional – in the sense that they distinguish archipelagos from other features.<sup>47</sup> But without knowing what the measure of a geographic relationship is, this is unhelpful. Instead, Markus suggests that geographic factors refer to propinquity or adjacency.<sup>48</sup> However, he soon concedes that the criterion of geography is too vague. This reflects the earlier views of O'Connell who understood the limits of geography, remarking that: 'It is, however, doubtful whether geography is as important as the lawyers have, on occasions, suggested, particularly in the matter of the vexed question of archipelagos'.<sup>49</sup>

44 See Barnes (n 15).

45 JR Coquia, 'The Problem of the Territorial Waters of Archipelagos' (1959) 7 *Far Eastern Law Review* 435.

46 D Andrew, 'Archipelagos and the Law of the Sea: Island straits states or island-studded sea space?' (1978) 2 *Marine Policy* 46–64, 47–8.

47 CF Amerasinghe, 'The Problem of Archipelagos in International Law' (1974) 23 *ICLQ* 539–575, 564.

48 Markus, above (n 41) para 40.

49 DP O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 *BYIL* 1–77, 1.

Even though we accept the relevance of geography, we should note that it is a necessary but insufficient condition for archipelagic status. According to Miron, unlike the continental shelf, archipelagic waters do not exist ipso facto; it is a status that must be claimed.<sup>50</sup> This is reinforced by the decision of the ICJ in the *Qatar/Bahrain* case.<sup>51</sup> This indicates that simple physical facts cannot be determinative of legal status. Despite this, the literature keeps returning to geographic elements.<sup>52</sup> It also reflects the views of some States.<sup>53</sup> This seems to collapse the test of geography into a test of proximity. Perhaps this explains the emphasis on Article 47 of the LOSC in the literature to assess the validity of archipelagic claims because geography bleeds so easily into Article 47's focus on the ratio of land to waters and the maximum length of baselines.

In summary, what appears to be common across accounts of geographic criteria is a need for some special degree of closeness or interrelationship between land and sea.<sup>54</sup> This favours assessing claims according to some notion of proximity between the islands, and on seeking a link between the islands and surrounding sea space. In the case of dependent archipelagos, most can satisfy these criteria since the islands form identifiable and proximate geographic groups.

### 3.2 *The Economic Requirement*

Some archipelagic States have claimed that the seas between their islands are an important source of food and other resources for their inhabitants.<sup>55</sup> This economic dependence has only increased as populations have grown. Economic dependence has focused on three main resources. First, there are fisheries, principally as a means to provide livelihoods for local populations.<sup>56</sup> A particular concern was that local fishermen would find it difficult to compete with better developed distant water industrial fleets. Archipelagic waters

50 A Miron, 'The Archipelagic Status Reconsidered in Light of the *South China Sea* and *Düzgit Integrity Awards*' (2018) 15(3) *Indonesian Journal of International Law* 306–340, 312.

51 Above note (40).

52 See for example, G Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea. Part I. The Territorial Sea and Contiguous Zone and Related Topics' (1959) 8 *ICLQ* 73–121, 88; Kopela above (n 5) 110.

53 Statement of the Philippines, United Nations Conference on the Law of the Sea 1958, Official Records, vol 3, p. 239.

54 Amerasinghe above (n 47) at 564; H P Rajan, 'The Legal Regime of Archipelagos' (1986) 29 *German Yearbook of International Law* 137, 145.

55 Coquia (n 45) 435.

56 See arguments by JR Coquia, 'The Territorial Waters of Archipelagos' (1962) 1(1) *Philippine International Law Journal* 139, 155ff; JW Dellapenna, 'The Philippines Territorial Water Claim in International Law' (1970) 5 *Journal of Law and Economic Development* 45, 57.



secure a degree of exclusive access to waters for local fishing communities. Second, there are mineral resources. At an early stage, both Indonesia and the Philippines asserted exclusive control over mineral resources of the seabed and sub-soil as a benefit of the archipelagic principle.<sup>57</sup> The third economic benefit is communication, as indicated by the ICJ in the *Fisheries case*.<sup>58</sup> Thus, waters serve as arteries of economic life, or inter-islands transport and communication. This is particularly important for local communities. Indeed, Lucchin and Voelckel link this to the Faroe Islands, Galapagos and the Kergeuelan Islands,<sup>59</sup> and Kopela identifies this as important in the cases of Loyalty Islands, Turks and Caicos, and Svalbard.<sup>60</sup>

Amerasinghe suggests there must be more than a superficial economic relationship.<sup>61</sup> Further, he argues there are three factors of importance.<sup>62</sup> First, there must be a strong dependence of the inhabitants of the islands on the economic resources of the oceans surrounding them. Second, such dependence must be established for all the islands in respect of all the oceans. It is not sufficient for individual islands to be dependent on individual surrounding oceans. Third, such economic interests should be proven to have been enjoyed for a period of time (unspecified). Rajan follows Amerasinghe's approach.<sup>63</sup> O'Connell reflecting on the *Fisheries case*, highlighted the specific relevance of economic considerations when assessing archipelagic claims.<sup>64</sup> These were key criteria in respect of coastal archipelagos, and he argued that they would be no less relevant to mid-ocean archipelagos. He suggested that to draw any distinction between them as regards the importance each State attaches to marine resources would be artificial.<sup>65</sup> This distinction can helpfully be used to distinguish populated islands that are subject to substantial economic activities from highly dispersed islands where little economic activity exists, and so mediate more expansive claims to archipelagic waters. In any event, there seems to be no reason why arguments based upon economic dependency should not extend to dependent archipelagos. To treat such economic interests differently would be discriminatory and artificially selective.

57 See O'Connell above (n 50) 37, 42.

58 *Fisheries case*, above (n 9) 127–8.

59 L Lucchini and M Voelckel, *Droit de la mer: La mer et son droit; Les espaces maritimes* (Paris: Pedone, 1990) 381–2.

60 Kopela (n 5) 185.

61 Amerasinghe above (n 47) at 564.

62 Rajan above (n 54) at 146.

63 Rajan, *ibid.* 146.

64 O'Connell, above (n 49) 15.

65 *Ibid.*, 15–6.

### 3.3 *The Political Requirement*

The third requirement is for there to be political connection between the islands. At a basic level this requires the archipelago to be part of a single State and this clearly excludes island groups that form more than one sovereignty from being treated as an archipelago – as is the case of the Caribbean. The literature offers little guidance on what further meaning might be given to the political dimension of unity, other than to connect it to security concerns. Thus, Rajan indicates that the political requirement is linked to security noting that the islands under the sovereignty of a single State mean ‘that security considerations, apart from the consideration of unity among the inhabitants of the island, become cogent’.<sup>66</sup> Amerasinghe observes that exclusive control of waters would enable protection of the archipelagic State’s interests, for example to control smuggling or illegal entry.<sup>67</sup> O’Connell also noted that for Indonesia and Philippines, economic considerations were used to reinforce security-based arguments, whereas for other archipelagos, where there was no security concern, economic motives were more important.<sup>68</sup> This suggests that political concerns may not be critical, other than the single sovereignty requirement. Even if more nuanced security concerns have to be demonstrated, it would not be a difficult case for any State claiming dependent archipelagic waters to show such concerns existed.

In most cases dependent archipelagos are not disputed territories, so this minimal level of political connection seems unlikely to be determinative of entitlement to claim archipelagic waters. Although some dependent archipelagos may enjoy a degree of autonomy from the metropolitan territory (e.g., Faroe Islands), this does not significantly interrupt the political connections between parts of the State.

### 3.4 *The ‘Unity’ Requirement*

Article 46 requires a close and intrinsic unity of the foregoing three features in order to constitute a legal archipelago. Thus, the features should be ‘so closely related’ as to ‘form an intrinsic geographical, economic and political entity ...’. Underpinning the above requirements is the idea that the integrity or unity of the archipelago should be protected. As Senator Tolentino, a strong advocate of the Philippines’ archipelagic claims argued: ‘it is unthinkable and impossible for us to lend our support to any proposal which may be interpreted, even more remotely, as impairing any of our historic rights, and which

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66 Rajan, above (n 54) 146.

67 Amerasinghe, above (n 47) 557.

68 O’Connell, above (n 49) 53.

may be used as an excuse by foreign vessels and fishermen to penetrate with impunity into the very heart of our archipelago'.<sup>69</sup> A similarly strong reason for integration is reflected in Indonesian practice. Thus, the Indonesian delegate to the Conference stated that 'Indonesian language equivalent for the word "fatherland" ... is "tanah air" meaning "land-water", thereby indicating how inseparable the relationship is between water and land to the Indonesian people. The seas, to our mind, do not separate but connect islands. More than that, these waters unify our nation'.<sup>70</sup> This idea of unity is something that is deeply rooted in cultural practices and serves to distinguish archipelagic claims from other claims to extended maritime jurisdiction. It also suggests that it is not merely one or other of the elements that should exist, but some degree of all three. This is reflected more generally in the requirement that there should be a close connection between the waters within a baseline and the land domain.<sup>71</sup>

In geographic terms, this implies some degree of proximity. However, Munawar also suggests that 'ecological and environmental factors may also serve as indicators of the close relationship between the islands and other natural features and the interconnecting waters of the island group'.<sup>72</sup> Economic coherence is generally recognised as relevant, but as discussed, it lacks a precise objective content since any archipelagic entity may point to some economic reasons for unity. As such, economic unity becomes a relative and subjective criterion. Accordingly, higher degrees of economic activity within and across the archipelago will strengthen any claims to archipelagic status. Alongside the political dimension, it points towards the survival of the State. Political coherence goes little beyond requiring the features of the archipelago to belong to the same State. This means that disputed features such as the Spratly Islands cannot be considered as meeting this requirement.

### 3.5 *Historical Requirement*

The historical criterion is framed as an alternative, rather than complementary criterion for archipelagic status. This means that even where the entity does not meet the intrinsic geographic, economic and political criteria, it may still be considered as an archipelago if it has historically been considered as an

69 Official Records of the Second United Nations Conference on the Law of the Sea, (Committee of the Whole – Verbatim Records of the General Debate), p. 77.

70 Mochtar Kusumaatmadja, UNCLoS III, Official Records, vol. I, 187.

71 See the comment by ICJ in the *Fisheries case* cited above (n 18).

72 M Munawar, *Ocean States, Archipelagic Regimes in the Law of the Sea*, (Martinus Nijhoff Publishers 1995) 113.

archipelago. This requirement is important because it brings into play questions of recognition or acquiescence. In practice most archipelagos meet the other pre-requisites, but historical recognition may be important in respect of aspects of archipelagic claims that are not consistent with the core definition, such the inclusion of distant outlying islands or the drawing of baselines around the archipelago that are not consistent with Article 47.<sup>73</sup> There is no reason in principle why historic title cannot apply also to dependent archipelagos. Title on this basis is recognised in a range of exceptional claims, at least in combination with other factors.<sup>74</sup> However, for present purposes, the historic basis of the claim is unlikely to add much value to an assessment of claims to archipelagic waters based on a sense of legal entitlement as a matter of *opinio juris* since historic claims must be evidenced by constant and long usage and so becomes inseparable from acts of State practice.

### 3.6 Other Requirements

Not unrelated to security is the argument that non-exclusive control of the waters within the archipelago could result in the environmental degradation of such waters. Historically, environmental factors played a major role in helping to justify claims to archipelagic waters *per se*.<sup>75</sup> Thus, several States have advanced a desire to control the movements of tankers in coastal waters during the negotiation of the LOSC.<sup>76</sup> More generally, Fiji asserted that it was vital to control the development of its marine environment to ensure it was in its best interests and would prevent any form of depredation or pollution of the marine environment.<sup>77</sup> There is scientific evidence to support the claim that archipelagic waters are more vulnerable to pollution.<sup>78</sup> This could be used to justify wider authority to protect such waters and to extend such protections around the vulnerable ecosystems. For example, Ecuador has used

73 See for example the inclusion of the Darwin and Wolf islands as part of the Galapagos. See US State Department, *Limits in the Seas No 42 Straight Baselines: Ecuador* (1972) 10.

74 See for example, the Norwegian arguments in the *Fisheries case*: 'The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history together with other factors, to justify the way in which it applied the general law'. Above (n 9) 133.

75 See Kopela, above (n 5) 237ff; O'Connell (n 49) 54.

76 Kopela, above (n 5) 29.

77 Ibid.

78 AR Farhan and S Lim, 'Vulnerability assessment of ecological conditions in Seribu Islands, Indonesia' (2012) 65 *Ocean & Coastal Management* 1–14; D Ferrol-Schulte et al 'Coastal livelihood vulnerability to marine resource degradation: A review of the Indonesian national coastal and marine policy framework' (2015) 52 *Marine Policy* 163–171.

this argument to justify its claims to archipelagic status for the Galapagos: 'It reaffirms that the said lines in the Galapagos Archipelago are determined by the common geological origin of those islands, their historical unity and the fact that they belong to Ecuador, *as well as the need to protect and preserve their unique ecosystems*'.<sup>79</sup> However, neither the legal basis nor the extent of archipelagic waters is connected to any quality of the marine ecosystem or its vulnerability.

It is possible to link environmental concerns to geographic conditions. Here we should recall the perceptiveness of O'Connell who remarked upon the special nature of coral islands, which are of particular relevance to archipelagos: 'The areas of intersection of land and sea are subject to incessant biological and chemical interaction, whereby the land is preserved from ultimate destruction. Pollution of these areas can destroy the organisms that are essential for the coastal mud to retain its vitality and support the flora, notably mangroves, which in many instances constitute an essential rampart against the sea.'<sup>80</sup> This points to a more nuanced physical relationship between the land and sea. There is in principle, no reason why such arguments should not extend to dependent archipelagos where such waters are particularly vulnerable to harm.

That said, environmental conditions alone are not something advanced within the specific provisions on archipelagos in the LOSC, neither is it a concern that is exclusive to archipelagos. All States have an interest in and duty to protect the marine environment.<sup>81</sup> Notably, the LOSC does not differentiate archipelagic waters for special treatment in this respect either in Part IV or Part XII. Whilst some degree of natural connectivity between coastal and oceanic systems may be particular to an island group, it would be difficult to extrapolate from this a generalisable basis for claiming dependent archipelagic waters. At best, it provides an additional political reason for claiming archipelagic waters that taps into more widely recognised concerns about the need for improved environmental protection. It is suggested that environmental considerations ought primarily to be focused on ensuring that any specific vulnerability of archipelagos be addressed through stronger regulation on activities in coastal waters. There is a range of tools available to support this including designation of marine protected areas or particularly sensitive sea areas.

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79 Para VI of Declaration made when Ecuador Acceded to the Convention (24 September 2012). Emphasis added.

80 Connell above (n 49) 54.

81 See LOSC, Part XII.

### 3.7 *Evaluating the Requirements*

Following her review of State practice, Kopela argues that geographic considerations should be determinative of the regime of archipelagos since this is the most common feature referred to in practice.<sup>82</sup> This is perhaps a compelling conclusion given the principal focus on drawing of baselines around geographic features. However, it is possible to counter this conclusion, especially since there are so few explicit references to geography being the actual basis of claims. Kopela's conclusion is drawn from an implicit assessment of the general geography of the claimed features.<sup>83</sup> If one reviews the legislation claiming archipelagic waters, then one sees that geography is seldom cited as the basis of the claim. Denmark's legislation on the Faroe Islands baselines makes passing reference only to exclusive fisheries within the baseline.<sup>84</sup> China's legislation for the Diaoyu Islands,<sup>85</sup> and the Hainan and Xisha Islands<sup>86</sup> make no reference to any characteristic of the islands – other than to describe the features. The same applies to Portugal's legislation on the Azores,<sup>87</sup> UK legislation for the Falkland Islands<sup>88</sup> and Turks and Caicos Islands,<sup>89</sup> Ecuador for the Galapagos Islands,<sup>90</sup> Myanmar for the Coco and Preparis Islands,<sup>91</sup> Norway for Svalbard,<sup>92</sup> and Spain for the Canary Islands.<sup>93</sup> Most States simply delimit waters around such island groups using straight baselines or a combination of straight baselines and low water marks. Indeed, few States make explicit reference to the criteria for archipelagos in the LOSC, with Indonesia somewhat exceptionally referring to the reciprocal relationship between land and waters, and singular geographical, economic, security and defence and political unity

82 Kopela, above (n 5), p. 147.

83 Kopela, *ibid.*, chapter 3.

84 See Prime Minister's Department Decree No. 156 of April 24, 1963. Available at <https://2009-2017.state.gov/documents/organization/62005.pdf>.

85 Statement of the Government of The Peoples' Republic of China on the Territorial Sea Baselines for Diaoyu Dao and Its Affiliated Islands 10 September 2012. Available at <http://www.chinese-embassy.org.za/eng/zt/topic1/t971217.htm>.

86 Declaration of the Government of the People's Republic of China on the Baseline of the Territorial Sea of the People's Republic of China 15 May 1996.

87 Decree-Law No. 495/85 of 29 November 1985.

88 The Falkland Islands (Territorial Sea) Order 1989.

89 The Turks and Caicos Islands (Territorial Sea) Order 1989.

90 Supreme Decree No. 959-A on June 28, 1971 (Official Register No. 265 of July 13, 1971).

91 The Law amending the Territorial Sea and Maritime Zones Law (The State Peace and Development Council Law No.8/2008), 5 December 2008.

92 Regulations relating to the limits of the Norwegian territorial sea around Svalbard (Royal Decree of 1 June 2001).

93 Royal Decree No. 2510/1977 of 5 August 1977.

of intrinsic nature of the archipelago.<sup>94</sup> However, as discussed above, there does not appear to be any reason why the elements of geographic, economic and political connection between island and water space to justify mid-ocean archipelagos cannot be extended to dependent archipelagos. The main distinction in this case is that the idea of unity becomes somewhat detached in cases where the dependent archipelago is located at an extended distance from the metropolitan State. For some dependent archipelagos this is not an issue (e.g., Svalbard, Hainan, Xisha/Paracel, and Coco and Preparis). For others the islands are at least the closest to the metropolitan State (e.g., Azores). In others, the territories tend to be distant dependencies. However, applying the unity requirement robustly depends on one taking the view that unity must extend to the whole of the State. This would appear to suggest that international law demands that the territories of States must have some degree of proximity. This is clearly not the case in all situations.

There are at least two arguments that could be used to counter my argument that the preconditions for archipelagic status (i.e., the unity requirement) should play a role in evaluating dependent archipelagic claims, and more specifically as helping to frame the sense of legal entitlement to such a claim as a matter of customary international law. The first is that archipelagic status must be claimed and proclaimed. As Miron notes, archipelagic status does not exist *ipso facto* in the same way that a continental shelf exists.<sup>95</sup> As such it is contingent upon some further act, and this may weaken the relevance of the unity requirement. It places emphasis on the claim, rather than the basis of the claim. Second, the review of the literature above suggests that there is no mathematical method capable of determining the content of the unity requirement. Rather, each requirement is a merely a broad basis upon which claims for archipelagic status may be advanced. This allows flexibility, but at the price of uncertainty, and this is manifest in the variety of claims advanced to archipelagic status. As Jayewardene suggests, the diverse motives advanced by some States to support their claims for special status have had the result of making it more difficult to evaluate those claims.<sup>96</sup> If there are no determinable measures of geography, politics or economics that can be used to set a threshold for archipelagic status then this renders application so variable as not to be a meaningful determinant of any claim. Ultimately, legal rules

94 Article 1(3) of the Act on Indonesian Waters 1996.

95 A Miron, 'The Archipelagic Status Reconsidered in Light of the *South China Sea* and *Düzgit Integrity Awards*' (2018) 15(3) *Indonesian Journal of International Law* 306–340.

96 HW Jayewardene, *The Regime of Islands in International Law* (Martinus Nijhoff, 1990) 110.

require a degree of precision if they are to function effectively. Of course, just because something is difficult does not mean it is impossible and that it should not be attempted.

Article 46 is a provision that operates qualitatively. It provides a wider range of contextual factors that can be used by States to assess archipelagic claims. Unlike mathematically precise rules, these allow space for nuance and compromise. For example, in the face of challenges to the drawing of baselines around some maritime features, some States have revised their baselines. Fifty years ago, when assessing the criteria for coastal archipelagos advanced by the ICJ in the *Fisheries case*, O'Connell concluded that to exclude economic factors would be to wrongly constrain the scope for legal evaluation of claims.<sup>97</sup> The Court's judgement 'cannot but be regarded as emancipating the archipelagic question from the confines of precise limits, specific shape and abstract definition in which all previous discussion has sought to enmesh it ...'.<sup>98</sup> In short, these criteria remain important in framing the assessment of claims. Returning to my initial observation about the importance of ensuring a connection between legal regimes and the underlying material reality, this recognition of the importance of a wider legal assessment of claims remains critical in ensuring that legal claims are not divorced from physical, political, and economic realities, and that such claims are consistent with existing laws.

#### 4 Concluding Thoughts

The drawing of baselines is an important step in determining the extent of maritime entitlements. However, in the case of archipelagos this can only be done after it has been established that there is a justifiable basis in law for treating an island group as an archipelago. This means establishing that there are islands which comprise a geographic, economic, and political unity, or have been historically regarded as such. The LOSC applies these conditions to archipelagic States. Assuming that dependent archipelagos are permissible under custom, it is inconceivable that dependent archipelagos could be claimed under customary international law without meeting the same requirements for archipelagic status under the LOSC. Otherwise, they would potentially be treated more favourably than mid-ocean archipelagos. As argued above, the requirement of geographic, economic, and political unity satisfies both the

97 O'Connell, above (n 49) 15–6.

98 *Ibid.*, 16.



need for a strong material connection between the islands and surrounding waters and further justifies their exceptional status in the law of the sea.

When we consider the process and requirements of custom formation, and apply this to the claims to dependent archipelagic waters, it is difficult to resist the argument that States have an entitlement to draw straight baselines around dependent archipelagos. Practice as well as the structural bias towards claimant States tend to favour this. Additionally, when we consider the systemic fit of such claims within the relevant body of rules on the law of the sea, either pertaining to the use of straight baselines or archipelagic status, then it also is difficult to argue that claims to dependent archipelagos should be treated differently than mid-ocean archipelagos. In most such cases there exist the same geographic, economic or political connection between the islands. Kopela concludes her study by noting that the considerable variations in the geography mean that it is difficult to develop a highly uniform regime.<sup>99</sup> She also notes that as far as possible, law should treat like cases alike. It is difficult to disagree with these findings. Of course, this means trying to achieve a balance between flexibility and coherence. By focusing on the core elements that justify the special treatment of archipelagos, we at least ensure that the development of a regime for dependent archipelagos is based upon similar limiting factors. This may not provide categorical answers to questions of entitlement, but it does at least ensure some degree of coherence in the dialogue about the legitimacy of maritime claims.

99 Kopela (n 5) 260.