Chapter Six

Legitimacy of the Archipelagic Regime and Future Developments

6.1 Introduction

According to the conclusions reached in Chapter 4, the emerging customary rule regarding the application of straight baselines was found to concern closely-knit archipelagos, that is, groups of islands which enclose a small maritime space and whose component geographical features are located at close distances. On the contrary, the majority of states are using the low-water mark for the measurement of the maritime zones of their broadly-scattered archipelagos. The political decision during UNCLOS III to exclude dependent archipelagos from the newly created special protective regime of the LOSC seems both unjustified and unsatisfactory, and the absence of such a system for these archipelagos may be perceived as a lacuna de lege ferenda in international law. The potential application of the archipelagic regime to broadly-scattered dependent archipelagos would be a continuation of the emerging customary international rule discussed in Chapter 5. The differentiating factor between the archipelagic regime of the LOSC and the emerging customary rule is the acceptance of further concessions in favour of third states in archipelagic waters. In this respect, the analogical application of the conditions of Part IV would legitimise the attempts of states to apply straight archipelagic baselines in their broadly-scattered archipelagos.

This chapter examines the legitimacy of the archipelagic regime and especially the justification of its analogical application to dependent broadly-scattered archipelagos. The first part of the chapter examines whether the existing rule, namely the low-water mark, is, indeed, unsatisfactory for the case of dependent broadly-scattered archipelagos. In the framework of this question, two issues are explored: first, whether the element of statehood justifies the differentiation in the legal treatment between these two types of archipelagos; and second whether a special regime is redundant as any potential needs are covered by the EEZ regime. Furthermore, the implications of the application of the archipelagic regime to archipelagic dependencies are examined, especially with respect to

1 See Chapter 4, p. 183 et seq.
the existence of threats to the inclusive rights of the international community. The last subsection assesses the potential application of the archipelagic regime to two dependent archipelagos, the Canary Islands and French Polynesia.

6.2 Contemporary Relevance of the Archipelagic Regime: Part IV of the LOSC and Dependent Outlying Archipelagos

A. The Archipelagic Concept and the Element of Statehood

I. Legal Definition of Archipelagos according to the LOSC

According to this article 46 (b) LOSC ‘archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such’. Dependent outlying archipelagos may qualify as legal archipelagos on the basis of this definition. In terms of geography, archipelagic states and dependent outlying archipelagos present the exact same characteristics, namely they are composed of closely inter-related islands and other natural features. Dependent outlying archipelagos may also compose an economic unity in the same way an archipelagic state does. The economic unity of an archipelago mainly reflects the close dependence of the inhabitants of the islands upon the resources of the archipelago and is irrespective of the political status of the archipelago. Finally, political unity refers to the administration of the archipelago, either as an independent administrative region or as a region administered as a part of a larger unit according to the political system of the state, and does not presuppose that the archipelago is a single state. Therefore, both archipelagic states and midocean archipelagos can qualify as legal archipelagos, as long as they satisfy the ‘entity’ test.

II. Statehood as a Means of Distinguishing Archipelagos

The distinction adopted during UNCLOS III on the basis of the political status of archipelagos is certainly a political one. As argued in Chapter 1, statehood

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