

## The Concept of Archipelagic State and the South China Sea: UNCLOS, State Practice and Implication

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**Abstract:** How China will designate its baselines from the Spratlys (Nansha Islands in Chinese) and define the legal status of its claimed maritime zones will directly determine the navigation regimes in the waters to be included in its sovereign rights. Therefore countries directly involved in the territorial disputes as well as external countries are interested in making sure such practice is in line with the United Nations Convention on the Law of the Sea (UNCLOS) to guarantee their maximum interests. The authors in this paper explore the principles of Part IV of UNCLOS and their relations with oceanic archipelagos belonging to continental States. By doing so they suggest that certain principles practiced by archipelagic States could be applied in the Spratlys in order to balance two relations: first, the need of coastal States and that of many user States in this region and second, the rights of oceanic islands of archipelagic States and those of continental States.

**Key Words:** Archipelagic State; South China Sea; UNCLOS; State practices

### I . Introduction

China is called upon to clarify its claims in the South China Sea with the in-

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creasing tension in the region since 2009. One of the controversial issues is whether sovereignty and maritime disputes would hamper the freedom of navigation. How China will designate its baselines from the Spratlys (Nansha Islands in Chinese) and what is the legal status of its claimed maritime zones will directly define the navigation regimes in the waters to be included in its sovereign rights. If straight baselines are drawn along the Spratlys, as China has already done so in the Paracels (Xisha Islands in Chinese), then the waters within the baselines will enjoy the status of internal waters, which will impact the international navigation in certain areas in the South China Sea. That will be contradictory to China's position, as China, on many occasions, emphasizes that despite the disputes in the South China Sea, the freedom and safety of navigation has never been jeopardized in this region. The authors in this paper suggest that certain principles practiced by the archipelagic States could be applied in the Spratlys in order to balance two relations: first, the need of coastal States and that of many user States in this region and second, the rights of oceanic islands of archipelagic States and those of continental States.

This paper traces the drafting history of the regime of archipelagic States defined in the United Nations Convention on the Law of the Sea (UNCLOS), and analyzes the legal implication of the new concept of archipelagic baseline, legal status of archipelagic waters, right of innocent passage and right of archipelagic sea lanes passage. It then elaborates state practices of archipelagic States in the South China Sea, namely Indonesia and the Philippines. It goes on to discuss the controversial issue whether the oceanic islands of a continental State could enjoy archipelagic waters and its application in the South China Sea. It concludes by providing observations and policy recommendations.

## II . UNCLOS and Archipelagic States

### A. *History of Drafting*

The regime of "archipelagic States" was established in Part IV of UNCLOS. Article 46 defines archipelagic States as being "constituted wholly by one or more archipelagos and may include other islands." The International Law Association, the Institute of International Law, and the American Institute of International Law had suggested a special status for archipelagos as early as the 1920s. This idea of establishing an archipelago regime was also discussed at the Hague Codification Conference of 1930. However, the attempt to draft a text on the subject was abandoned because

of a lack of adequate technical information.<sup>1</sup>

Indonesia raised the question of archipelagos at the First UN Conference on the Law of the Sea (UNCLOS I), and Yugoslavia<sup>2</sup> and the Philippines<sup>3</sup> introduced the draft articles, which attempted to apply the method of straight baselines to archipelagos.<sup>4</sup> These proposals were eventually withdrawn<sup>5</sup>, due to some consideration on the subject.<sup>6</sup> Hence, the Conventions adopted by UNCLOS I did not contain any provisions dealing with archipelagos as such.

Before the Third UN Conference on the Law of the Sea (UNCLOS III), several States asserting their archipelagic status had claimed a special regime for waters of their archipelagos.<sup>7</sup> "Archipelagos" was included in the final list of subjects and issues drawn up by Sub-Committee II of the Sea-Bed Committee for UNCLOS III.<sup>8</sup> It then aroused substantive discussion at the 1973 session of the Sea-Bed Committee. A group of four archipelagic States submitted two proposals, which set out general principles concerning archipelagic States, and draft articles on archipelagos respectively.<sup>9</sup> In response to the discussion on archipelagos, the United Kingdom also submitted a proposal attempting to "establish objective criteria and to elaborate the legal status" of archipelagic States.<sup>10</sup> It showed a reflection of the acceptance by some maritime States of the concept of States with special archipelagic status.<sup>11</sup>

There had been back and forth debate during the second session of the Confer-

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- 1 See Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos, A/CONF.13/18, UNCLOS I, Vol. I, Official Records, p. 289 (Prepared by Jens Evensen (Norway)).
  - 2 See statements made by Indonesia at the seventh meeting of the First Committee in 1958, para. 5, UNCLOS I, Vol. III, Official Records, p. 15; and at the fifteenth meeting, paras. 1 ~ 10; see also *United Nations Convention on the Law of the Sea 1982: A Commentary II* (hereafter cited as *Commentary II*), 1993, Dordrecht: Martinus Nijhoff Publishers, p. 400.
  - 3 A/CONF.13/C.1/L.98 (1958), article 5, UNCLOS I, Vol. III, Official Records, p. 239 (Philippines); see also *Commentary II*, p. 400.
  - 4 *Commentary II*, p. 400.
  - 5 On the Yugoslav proposal see First Committee, 52nd meeting (1958), paras. 28, 40, UNCLOS I, Vol. III, Official Records, p. 162. On the Philippines proposal see First Committee, 48th meeting, para. 26; see also *Commentary II*, p. 400.
  - 6 First Committee, 52nd meeting (1958), para. 38, UNCLOS I, Vol. III, Official Records, p. 162; see also *Commentary II*, p. 400.
  - 7 *Commentary II*, p. 400.
  - 8 *Commentary II*, p. 401.
  - 9 See respectively, A/AC.138/SC.II/L.15, reproduced in IHSBC Report 1973, p. 1 (Fiji, Indonesia, Mauritius and the Philippines); and A/AC.138/SC.II/L.48. See also *Commentary II*, p. 401.
  - 10 A/AC.138/SC.II/L.44.
  - 11 *Commentary II*, p. 401.

ence in 1974 ( see analysis below ). At the end of the Conference, several delegations indicated that they were claiming the status of archipelagic States. These included the Bahamas, Cape Verde, Fiji, the Netherlands Antilles, Papua New Guinea, the Philippines, and the Solomon Islands.<sup>12</sup>

## *B. Legal Implication*

A State which qualifies as an archipelagic State under article 46 may exercise the right to draw archipelagic baselines in accordance with article 47. Once archipelagic baselines have been drawn, the remaining provisions of Part IV apply.

### **1. Archipelagic Baselines**

Article 47 of UNCLOS provides objective standards for drawing archipelagic baselines, including: maximum length of baselines; the minimum and maximum water-to-land ratios within those baselines; conformity of the baseline to the general configuration of the archipelago; and restrictions on the points to and from which baselines shall be drawn.<sup>13</sup>

A State which meets the criteria of article 46 could draw “straight archipelagic baselines,” and thereby formally constitute itself as an archipelagic State. “Any dispute as to whether the State is entitled to do it will come within the scope of Part XV on the settlement of disputes.” A State is not an archipelagic State defined by UNCLOS if it chooses not to draw straight archipelagic baselines, and then that State’s various geographical features are treated accordingly.<sup>14</sup>

### **2. Legal Status of Archipelagic Waters**

Article 49 provides that the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast. Article 49 also provides that the status of archipelagic waters is not affected by the regime of archipelagic sea lanes passage.<sup>15</sup>

Paragraph 2 of article 49 confirms that the sovereignty exercised over archipelagic waters extends also to “the air space over those waters, as well as to their bed and subsoil, and to the resources contained therein.”<sup>16</sup> This was important to the archipe-

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<sup>12</sup> Commentary II, p. 403.

<sup>13</sup> Commentary II, p. 418.

<sup>14</sup> Commentary II, p. 429.

<sup>15</sup> Commentary II, p. 438.

<sup>16</sup> Article 49 (2), United Nations Convention on the Law of the Sea (UNCLOS), 1982.

lagic States, as “their dependence on those resources formed one of the principal bases of their archipelagic claims.”<sup>17</sup>

### 3. Innocent Passage

Article 52 defines that ships of all States enjoy the right of innocent passage in all waters within archipelagic baselines except (i) those waters become internal waters through the application of article 50, or (ii) where the broader right of archipelagic sea lanes passage exists.<sup>18</sup>

At the fourth session in 1976, Indonesia suggested that “through the archipelagic waters” be replaced by “through routes customarily used for international navigation in archipelagic waters.”<sup>19</sup> “That proposal implied a return to the innocent passage approach, but there was insufficient support for it.”<sup>20</sup> Indonesia was echoed by the Philippines with a similar proposal,<sup>21</sup> coupled with the suggestion to exclude the words “whether coastal or not.” The Philippines’ suggestion was adopted. The International Chamber of Shipping also raised that the archipelagic State shall conform all its regulations to international rules and standards.<sup>22</sup> At the sixth session in 1977, both the Philippines<sup>23</sup> and Indonesia<sup>24</sup> stressed their attempts to reinstate the innocent passage regime but did not get approval.

### 4. Right of Archipelagic Sea Lanes Passage

Article 53 provides that all ships and aircraft enjoy the right of archipelagic sea lanes passage in sea lanes and air routes designated by the archipelagic State. Under the regime of archipelagic sea lanes passage, all ships and aircraft are expected to “navigate and overfly in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”<sup>25</sup>

Article 53 defines the rights and duties of the archipelagic State, and of ships and aircraft, with regard to archipelagic sea lanes passage.<sup>26</sup> An archipelagic State

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<sup>17</sup> Commentary II, p. 441.

<sup>18</sup> Commentary II, p. 456.

<sup>19</sup> Indonesia (1976, mimeo.), article 123 (ISNT II). Reproduced in IV Platzoder, p. 335. See also Commentary II, p. 460.

<sup>20</sup> Commentary II, p. 460.

<sup>21</sup> Philippines (1976, mimeo.), article 123 (ISNT II). Reproduced in IV Platzoder, p. 335.

<sup>22</sup> Commentary II, p. 460.

<sup>23</sup> Philippines (1977, mimeo.), article 124 (RSNT II). Reproduced in IV Platzoder, p. 472.

<sup>24</sup> Indonesia (1977, mimeo.), article 124 (RSNT II). Reproduced in IV Platzoder, pp. 476, 480.

<sup>25</sup> Article 53 (3), United Nations Convention on the Law of the Sea (UNCLOS), 1982.

<sup>26</sup> Commentary II, p. 465.

may designate sea lanes and air routes, and also the conditions under which that designation may occur.<sup>27</sup> In addition to that, traffic separation schemes may also be prescribed by the archipelagic State “for the safe passage of ships through narrow channels” in designated sea lanes. The competent international organization (in this case the IMO) shall coordinate in this regard.<sup>28</sup> When an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.<sup>29</sup>

The adoption of archipelagic sea lanes passage is to balance the legitimate interest of the archipelagic State with the requirements of global navigation. It is similar to the regime of transit passage in straits used for international navigation.

### C. “Archipelago” and “Archipelagic State”

Herman points out that the Law of the Sea Conference seems to have concentrated on “the issue of the legal status of the waters enclosed within archipelagic baselines and on the key question of the right of foreign vessels transit through those waters,”<sup>30</sup> while the meanings of “archipelago” and “archipelagic States” were not being fully discussed. According to Herman, there is “an interplay between these two terms and the technical provisions respecting the drawing of baselines that could lead to serious problems over baseline implementation among the growing number of states that have claimed archipelagic status.”<sup>31</sup>

Article 46(b) defines “archipelago” 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.” There are quite a few criteria in the definition for an island group to constitute an archipelago. First, there must be a group of islands which may include parts of islands, interconnecting waters, and other natural features; second, these features must be closely interrelated, in a way that they form an entity; third, the entity must be one with three types of characteristic, namely an intrinsic geographical entity, an

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<sup>27</sup> Article 53, United Nations Convention on the Law of the Sea (UNCLOS), 1982.

<sup>28</sup> Commentary II, p. 465.

<sup>29</sup> Commentary II, p. 465.

<sup>30</sup> L. L. Herman, *The Modern Concept of the Off-lying Archipelago in International Law*, *Canadian Yearbook of International Law*, Vol. 23, 1985, p. 172.

<sup>31</sup> L. L. Herman, *The Modern Concept of the Off-lying Archipelago in International Law*, *Canadian Yearbook of International Law*, Vol. 23, 1985, p. 174.

intrinsic economic entity, and an intrinsic political entity.<sup>32</sup>

Article 46 (a) provides that “archipelagic State” refers to a State constituted wholly by one or more archipelagos and may include other islands. Since any State that wishes to apply archipelagic baseline will have to meet the requirements for archipelagic status, the three “entity” criteria should be carefully considered.

Worth noting is that continental States, though they may possess archipelagos defined by article 46(b), do not qualify the status of “archipelagic States.” As a result, they do not enjoy the corresponding rights and obligations as archipelagic States, e. g. drawing archipelagic baseline.

In addition to that, maritime boundary delimitation issues might arise between archipelagic States and their neighbours as a result of the terms used in UNCLOS.<sup>33</sup> Which type of baselines to be adopted is critical in defining the territorial sea, exclusive economic zone and continental shelf.

#### D. “Archipelagic Baseline” and “Straight Baseline”

Article 47 of UNCLOS deals with the manner in which archipelagic baselines are to be drawn.

An archipelagic State may draw “straight baselines” joining the outermost points of the outermost islands and drying reefs of the archipelago. The “straight baselines” used in this provision is different from the “straight baseline” in article 7 of UNCLOS. Technically, by drawing straight baselines under article 7, States need to meet the criteria of “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*” (emphasis added). Legally, a straight baseline of article 7 gives a State different legal status from “straight baselines” of archipelagic States. Innocent passage applies for States adopting straight baselines. For archipelagic States, innocent passage applies in the archipelagic waters, while archipelagic sea lanes passage applies in the sea lanes and routes designated by the archipelagic States.<sup>34</sup>

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<sup>32</sup> L. L. Herman, The Modern Concept of the Off-lying Archipelago in International Law, *Canadian Yearbook of International Law*, Vol. 23, 1985, p. 178.

<sup>33</sup> L. L. Herman, The Modern Concept of the Off-lying Archipelago in International Law, *Canadian Yearbook of International Law*, Vol. 23, 1985, p. 178.

<sup>34</sup> Article 53, United Nations Convention on the Law of the Sea (UNCLOS), 1982.

### III. The South China Sea and State Practices of Archipelagic States

The members of the Group of Archipelagic States during UNCLOS negotiation were Indonesia, Fiji, Mauritius and the Philippines. Generally their common interest was to ensure that UNCLOS would recognize the special method of drawing archipelagic straight baselines connecting the outermost points of the outermost islands so as to create a sense of political unity. The territorial sea would be measured seawards from such baselines. Waters landwards from these baselines would be archipelagic waters over which the archipelagic States would exercise sovereignty analogous to internal waters. Specially, their objective was to adopt a common position on passage through archipelagic waters, on claims by neighbouring States for provisions on guaranteed access and communication and on fishing rights.<sup>35</sup>

#### A. Indonesia

As many other countries, Indonesia considers UNCLOS as one of the most—if not the most—spectacular achievements of the international community since the signing of the Charter of the United Nations in 1945. For Indonesia it is also the culmination of its effort during 25 years, to get the principle of the archipelagic State formally accepted as part of the law of the sea by the international community. When Indonesia became independent the Indonesian territorial waters were regulated by the “Territorial Zee en Maritieme Kringen Ordonantie 1939” (*Staatsblad* 422).<sup>36</sup> This ordinance established a three mile territorial sea around each island of the Indonesian archipelago, thereby virtually dividing Indonesia in many parts separated by water, some of which were governed by the regime of the high seas. Law number 1 of 1973, on the Continental Shelf of the Republic of Indonesia illustrates the concern of an archipelagic State with regard to its natural resources.<sup>37</sup> This same concern is also emphasized in the Declaration on the Continental Shelf of the Republic of Indonesia of 17 Febru-

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<sup>35</sup> Myron H. Nordquist ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, The Hague: Martinus Nijhoff Publishers, Vol. I, 1985, pp. 77 ~ 78.

<sup>36</sup> E. Hey and A. W. Koers eds., *The International Law of the Sea: Issues of Implementation in Indonesia*, Rijswijk: the Netherlands Institute of Transport, 1984, p. 12.

<sup>37</sup> E. Hey and A. W. Koers eds., *The International Law of the Sea: Issues of Implementation in Indonesia*, Rijswijk: the Netherlands Institute of Transport, 1984, p. 35.



ary 1969.<sup>38</sup> Indonesia has replaced its original archipelagic legislation, which accorded foreign ships a right only of innocent passage through its archipelagic waters (which were referred to as internal waters), in express recognition of the fact that the original legislation was contrary to UNCLOS; the new legislation fully conforms to UNCLOS. The provisions on the exclusive economic zone (EEZ) and continental shelf in UNCLOS reflect more of Indonesia's national aspirations than previous treaties on the law of the sea. In accordance with the provisions of this Convention, Indonesia, on 21 March 1980, adopted a declaration on the EEZ.

Under the legitimacy of UNCLOS, as an archipelagic State, Indonesia in 1996 replaced the Law Number 4/Prp. 1960 with the Law Number 6/1996 on the Indonesian Waters.<sup>39</sup> Indonesia also constructed its new archipelagic baselines, using the new definition of straight archipelagic baseline in UNCLOS, through the Government Regulation (GR) Number 38/2002 on the Geographical List of Coordinates of the Indonesian Archipelagic Baselines.<sup>40</sup> The law is one of the important instruments to protect Indonesia's territorial integrity. Besides that, it also becomes the basis of the Indonesian sea as a uniting factor of the archipelago. Due to various political developments and some special circumstances which occurred and influenced the configuration of Indonesian archipelagic baselines, on 19 May 2008, Indonesian Government established GR Number 37/2008 that replaced the GR Number 38/2002 on Geographical List Coordinates of Indonesia's Archipelagic Baselines.<sup>41</sup>

Indonesia is also the only State so far to have designated archipelagic sea lanes in accordance with UNCLOS by submitting them to the International Maritime Organization (IMO) for adoption.<sup>42</sup> On the other hand, it should be noted that article 53 (12) provides that even if an archipelagic State does not designate sea lanes, the right of archipelagic sea lanes passage may nevertheless be exercised through the routes normally used for international navigation. On 19 May 1998, the IMO adopted

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<sup>38</sup> E. Hey and A. W. Koers eds., *The International Law of the Sea: Issues of Implementation in Indonesia*, Rijswijk: the Netherlands Institute of Transport, 1984, p. 25.

<sup>39</sup> See respectively, Law No. 4 of 1960 concerning Indonesian Waters, 1960 (United Nations, *The Law of the Sea: Practice of Archipelagic States*, New York: United Nations, 1992), and Law No. 6 of 1996 concerning the Indonesian Territorial Waters, at <http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session6-Paper2-Patmasari.pdf>, 14 June 2013

<sup>40</sup> E. Hey and A. W. Koers eds., *The International Law of the Sea: Issues of Implementation in Indonesia*, Rijswijk: The Netherlands Institute of Transport, 1984, p. 12.

<sup>41</sup> At <http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session6-Paper2-Patmasari.pdf>, 14 June 2013.

<sup>42</sup> See *IMO News*, 1998, No. 2, p. 27. For comment, see C. Johnson, A Rite of Passage: the IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission, *International Journal of Marine and Coastal Law*, 2000, p. 332.

the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes ( GPASL ) as an offshoot of the first-ever designation of archipelagic sea lanes ( ASLs ) undertaken by an archipelagic State pursuant to the provisions of Part IV of UNCLOS. After a protracted serial of consultations and negotiations, Indonesia, the largest archipelagic State in the world, referred its ASLs designation for adoption by the IMO, and this eventually resulted in the approval of three ASLs through the Indonesian archipelago.

### *B. The Philippines*

The Philippines has retained its original archipelagic legislation<sup>43</sup> which accords the waters enclosed by archipelagic baselines that status of internal waters and says nothing about other States' navigational rights therein, although according to a Philippine note verbale of 1955<sup>44</sup> there is a right of innocent passage. When ratifying UNCLOS the Philippines made a declaration that the

*Provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lands and [...] that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high seas from the rights of foreign vessels to transit passage of international navigation.*<sup>45</sup>

In February 2009, the Philippine Congress passed a bill that spelt out the archipelagic baselines of the Philippines and claimed Scarborough Shoal ( Huangyan Island in Chinese ) and Spratlys as “ a regime of islands under the Republic of the Philippines ” ( known as Republic Act 9522 or the Philippine Archipelagic Baseline Law ). Act 9522 was enacted in time to meet the deadline of UNCLOS for countries and archipelagic States to submit their respective claims to their extended continental shelf, set on 13 May 2009. On 8 April 2009, the Philippines submitted to the Committee on

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<sup>43</sup> Republic Act No. 3046 of 17 June 1961, as amended by Republic Act No. 5446 of 18 September 1968 ( United Nations, *The Law of the Sea: Practice of Archipelagic States*, New York: United Nations, 1992 p. 75 ).

<sup>44</sup> Philippine note verbale of 7 March 1955 to the UN Secretary-General ( UN Doc. A/2934 (1955) ), reproduced in M. M. Whiteman, *Digest of International Law*, Vol. IV, Washington DC: US Department of States, 1963, pp. 52 ~ 53.

<sup>45</sup> United Nations, at United Nations, *Multilateral Treaties Deposited with the Secretary-General*, Vol. II, p. 279.

the Limits of Continental Shelf (CLCS) information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in the Benham Rise region.

#### **IV. The South China Sea and State Practices of Continental States**

Continental States may have two types of archipelagos, one fringing along the continental coast and the other in the ocean far away from the continent.<sup>46</sup> This part focuses only on the second type.

##### *A. Debates at UNCLOS III*

During UNCLOS III, three sessions have discussed the legal position and applicable principles for oceanic archipelagos belonging to continental States. At the second session in 1974, two groups of representative States were formed supporting divergent approaches on the issue. The first group represented by Fiji, Indonesia, Mauritius and the Philippines were in favor of the approach that the concept and principles of archipelagic States shall only apply to a State made up entirely of islands or parts of islands.<sup>47</sup> The other group represented by the nine States (Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway) supported the approach that the archipelagic principles should also apply to oceanic archipelagos of continental States.<sup>48</sup> Debates around the application issue led to omission of any content of the second approach in the ISNT/Part II.

At the third session in 1975, oceanic archipelagos of continental States appeared in Part VII of the ISNT/Part II, entitled “Archipelagos.” Two sections are dedicated to two types of archipelagos. Section 1 includes 14 articles and deals with oceanic archipelagos which form archipelagic States—definitions and applicable principles. Section 2 deals with oceanic archipelagos belonging to continental States. Its only Article, Article 131, reads,

*The provisions of section 1 are without prejudice to the status of oceanic archipela-*

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<sup>46</sup> Commentary II, p. 408.

<sup>47</sup> Commentary II, p. 402.

<sup>48</sup> Commentary II, p. 402.

*gos forming an integral part of the territory of a continental State.*<sup>49</sup>

Article 131 can be considered a result of compromise. “Without prejudice” was given no content. It is unclear whether it is “without prejudice” that archipelagic State principles apply in whole or part to oceanic archipelagos of a continental State. Or is it “without prejudice” that the same principles shall not apply? With opposition from several archipelagic and continental States, Article 131 was dropped from the revised version of the RSNT/Part III 1976.

The rights to be applied to oceanic archipelagos belonging to continental States attracted certain attention at the earlier stage of UNCLOS III. However it seems that the final version of UNCLOS leaves the issue out. There are no provisions clearly stating what principles should be applied to oceanic archipelagos of continental States in regard to their baselines, their maritime zones and relevant jurisdictional mechanisms, even though they have the similar nature of a closely-linked geographic entity as that of archipelagos belonging to archipelagic States. The title of Part IV indicates that principles provided therein—archipelagic baselines, archipelagic waters, and archipelagic sea lanes passage—apply only to archipelagic States. Until the 11th session in 1982, several continental countries showed their discontent with the omission in the final version of UNCLOS.<sup>50</sup> The debate continues after the conclusion of UNCLOS III.

### *B. Post-UNCLOS III Debates*

Different positions exist in regard to relations between Part IV of UNCLOS and the principles applicable to oceanic archipelagos of the continental States. It is generally agreed that the silence at UNCLOS III on the issue of oceanic archipelagos belonging to continental States resulted from balance of interests among countries representing different interest groups during the negotiation process<sup>51</sup> and the concept of an archipelagic State should only apply to States composed of archipelagos, and the concluded archipelagic principles should accordingly only apply to archipelagos of such States, not to archipelagos belonging to continental States.<sup>52</sup> Some Chinese and for-

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<sup>49</sup> Commentary II, p. 412.

<sup>50</sup> National Institute for South China Sea Studies (NISCSS) and Research Center for Oceans Law of Xiamen University (RCOL) eds., *Archipelagic Principles*, Haikou: National Institute for South China Sea Studies, 2004, pp. 197 ~ 199. (in Chinese)

<sup>51</sup> Jiang Li and Zhang Jie, *The Application of Archipelagic Principles and Delimitation of the South China Sea*, *China Oceans Law Review*, No. 1, 2010, p. 159. (in Chinese)

<sup>52</sup> Commentary II, p. 403.

eign experts on international law of the sea support this position. Chinese professors Zhao Lihai and Yuan Gujie were strongly against the position that the archipelagic principles in Part IV apply to China's four archipelagos in the South China Sea. Their stated reason is that "the concept of archipelagic principles in UNCLOS shall apply only to archipelagic States." South Korean Judge Choon-Ho Park of the International Tribunal of the Law of the Sea took the same position.<sup>53</sup> When commenting on some continental States' practice in drawing straight baselines for their oceanic archipelagos, there were scholars who criticized those practices as not being in line with UNCLOS.<sup>54</sup>

Another position is that although the principles of Part IV only apply to archipelagic States and their archipelagos, they do not exclude the option for the continental States to apply straight baselines to their oceanic archipelagos.<sup>55</sup> Churchill and Lowe believed that the limitation indicated in Part IV—the principles of archipelagic States including archipelagic baselines only apply to archipelagic States—"seems an unnecessary and unreasonable restriction."<sup>56</sup> They further stated that the recognition by other States of the practice of continental States in using straight baselines to draw their baselines around their oceanic archipelagos may lead those practices to become principles of customary international law.<sup>57</sup>

Kuen-chen Fu analyzed the relations between Part IV and the principles applicable to oceanic archipelagos of continental States from the perspective of the legal concept of archipelago. He commented that in international law the concept of archipelago was created by the consideration of their special geographic feature.<sup>58</sup> It is due to close inter-relation between all components of the archipelago—the group of islands—in their economic, political and security matters that an archipelago is treated as an enti-

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<sup>53</sup> Jiang Li and Zhang Jie, The Application of Archipelagic Principles and Delimitation of the South China Sea, *China Oceans Law Review*, No. 1, 2010, p. 159. (in Chinese)

<sup>54</sup> Lewis M. Alexander, Uncertainties in the Aftermath of UNCLOS III: The Case for Navigational Freedoms, *Ocean Development & International Law*, Vol. 18, Issue 3, 1987, p. 336.

<sup>55</sup> Jiang Li and Zhang Jie, The Application of Archipelagic Principles and Delimitation of the South China Sea, *China Oceans Law Review*, No. 1, 2010, p. 158. (in Chinese)

<sup>56</sup> R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd, Manchester: Manchester University Press, 1999, p. 120.

<sup>57</sup> R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd, Manchester: Manchester University Press, 1999, p. 120.

<sup>58</sup> Kuen-Chen Fu, *Legal Status of the South China Sea*, Taiwan: 123 Information, 1995, p. 137; (in Chinese) National Institute for South China Sea Studies (NISCSS) and Research Center for Oceans Law of Xiamen University (RCOL) eds., *Archipelagic Principles*, Haikou: National Institute for South China Sea Studies, 2004, p. 200. (in Chinese)

ty.<sup>59</sup> He therefore concluded that since the oceanic archipelagos of continental States have the same geographic features as those of the archipelagos of archipelagic States, they should apply similar principles. The fact that the oceanic archipelagos of continental States are excluded from Part IV is the result of international politics—the result of compromise of interests.<sup>60</sup> Other arguments supporting the same treatment of archipelagos of different types of States—archipelagic and continental—include, *inter alia*, fair treatment of all sovereign States in international law and practice, and comprehensive interpretation of the international treaty. Jiang and Zhang argued that if oceanic archipelagos have similar geographic features as those of archipelagic States but are treated differently because they belong to different type of States—archipelagic or continental, this will result in exaggeration of the impacts of geographic difference on individual sovereign States, and will lead to a *de facto* punishment on a group of States. The archipelagos of continental States will be treated unfairly as “second class” sovereign land.<sup>61</sup> The same experts also argued that Part IV does provide that the archipelagic principles apply only to archipelagic States, including its comprising archipelagos, but this Part does not deny any rights and principles to archipelagos belonging to continental States. What principles apply to them should be found in the general principles of UNCLOS.<sup>62</sup>

### C. State Practice and Responses

Although UNCLOS avoided giving explicit arrangements for oceanic archipelagos belonging to continental States, in practice, some continental States have used similar measures reflected in Part IV in drawing the baselines for their oceanic archipelagos before and after UNCLOS III. These States include Ecuador, Denmark, Norway, Spain and Portugal.

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<sup>59</sup> As article 46(b) of UNCLOS provides, “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.

<sup>60</sup> Kuen-Chen Fu, *Legal Status of the South China Sea*, Taiwan: 123 Information, 1995, pp. 137 ~ 138; (in Chinese) National Institute for South China Sea Studies (NISCSS) and Research Center for Oceans Law of Xiamen University (RCOL) eds., *Archipelagic Principles*, Haikou: National Institute for South China Sea Studies, 2004, p. 200. (in Chinese)

<sup>61</sup> Jiang Li and Zhang Jie, A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea, *China Oceans Law Review*, No. 1, 2010, p. 158. (in Chinese)

<sup>62</sup> Jiang Li and Zhang Jie, The Application of Archipelagic Principles and Delimitation of the South China Sea, *China Oceans Law Review*, No. 1, 2010, p. 200. (in Chinese)

### 1. Ecuador: Galápagos Islands

Ecuador is one of the early countries which declared using straight baselines for its oceanic archipelagos. On 28 June 1971, Supreme Decree No. 959-A was issued to prescribe straight baselines for the measurement of the Territorial Sea (1). This executive decree is to follow up the 1970 Civil Code. The beginning paragraph provides:

*Whereas article 628 of the Civil Code in force provides that the Ecuadorian territorial sea shall be measured in both the continental territory of the Republic and the Colón Archipelago (Galápagos Islands), from the straight baselines which will be determined for this purpose by Executive Decree.*

Paragraphs a to h of Article 1(II) describes in detail how straight baselines are drawn for the Galápagos Islands. Article 2 describes the nature of the sea areas lying within the baselines for the Galápagos Islands constituting internal waters.<sup>63</sup>

In 1986 Ecuador declared as an ecological protection zone a sea area with a distance of 15 nm from the straight baselines around the Galápagos Islands. At the same time it declared the coastal area and the internal waters of the Archipelago as a special zone for marine resource protection.<sup>64</sup> The 1986 declaration reaffirms its practice of drawing straight baselines around the Galápagos Islands. The relevant implementation will also send signal to such effects.

On 9 March 2011 Ecuador sent a note to the UN Secretary-General asking to record and disseminate its Executive Decree No. 450 of 2 August 2010, which approved and ordered publication of Ministerial Agreement 0081 of 12 July 2010 and Nautical Chart IOA42. The attached map clearly shows Ecuador's straight baselines around its oceanic Galápagos Islands (Fig. 1).

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<sup>63</sup> Supreme Decree No. 959-A of 28 June 1971 prescribing straight baselines for the measurement of the Territorial Sea (1), at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ECU\\_1971\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ECU_1971_Decree.pdf), 20 December 2012.

<sup>64</sup> National Institute for South China Sea Studies (NISCSS) and Research Center for Oceans Law of Xiamen University (RCOL) eds., *Archipelagic Principles*, Haikou: National Institute of South China Sea Studies, 2004, p. 206. (in Chinese)

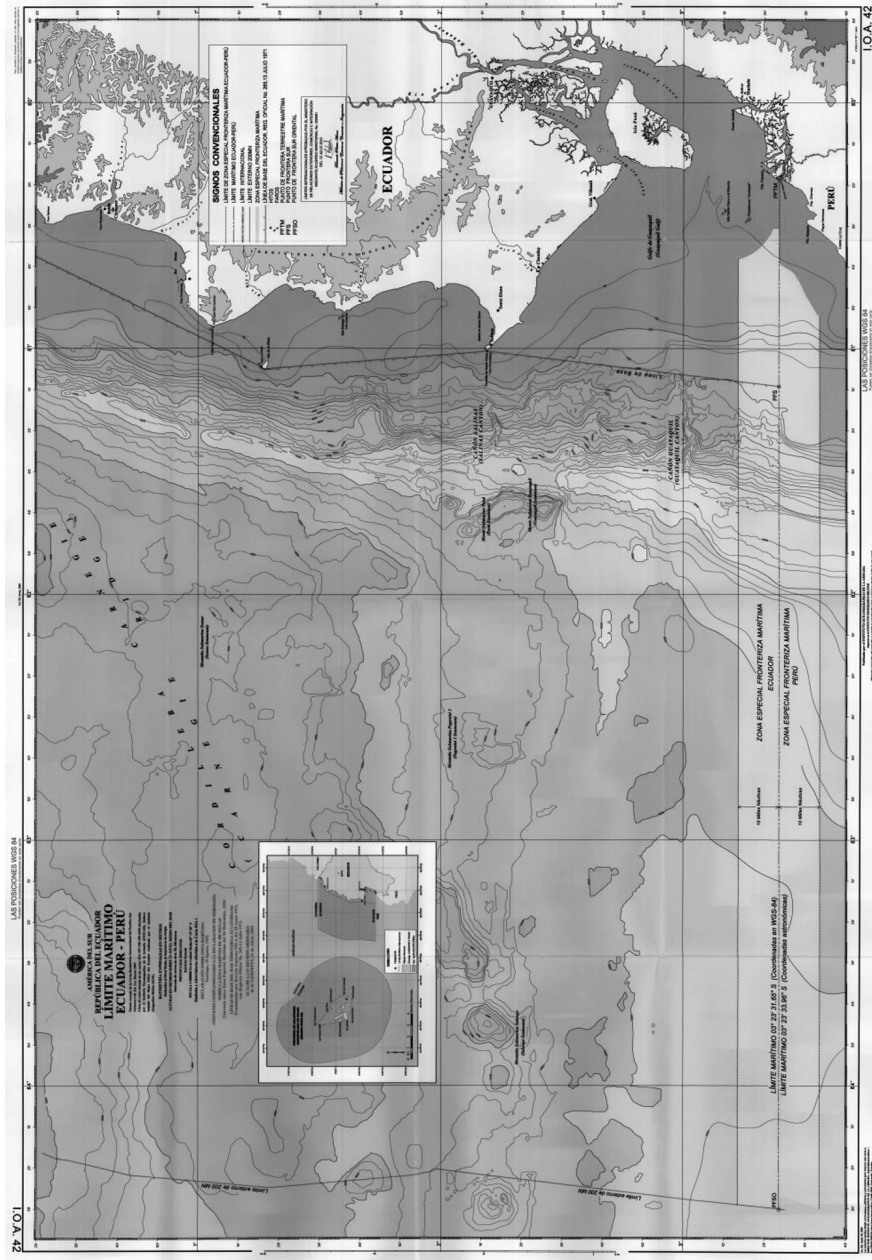


Fig. 1 Map Showing Ecuador-Peru Maritime Boundary

(Source: At [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/Maps/ecu\\_decreto450\\_2010.jpg](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/Maps/ecu_decreto450_2010.jpg), 14 June 2013.)



## 2. Denmark: Faeroe Islands

On 24 April 1963 the Denmark Prime Minister's Department issued Decree No. 156, entitled "Decree Respecting the Fishery Patrol in the Sea Surrounding the Faeroe Islands". Paragraph 2 of this Decree provides that the baselines from which the fishing zone where only Faeroese and other Danish nationals are authorized to fish shall be measured are drawn "between 13 points and consist of straight lines except for the line between point 13 and point 1" (Fig. 2).<sup>65</sup> Interpretation from this decree consists of two issues. First, the baselines described in Paragraph 2 are used to measure the fishery zone to regulate fishery patrol around the Faeroe Islands. This fishing zone is under Denmark's sole jurisdiction and utilization. Second, the method used is straight baselines together with one normal baseline. In 1970 the US Department of baseline State issued one commentary. The benchmark of this commentary is article 4 of the 1958 Convention on Territorial Sea and Contiguous Zone, in which principles for straight baseline are listed. The same document also pointed out:

*The so-called archipelago principle, which is not recognized under international law, has been utilized to delimit the Faeroese straight baselines.*<sup>66</sup>

On 21 September 1976 Denmark issued Decree No. 598 entitled "The Fishing Territory of the Faeroe Islands" in which it was declared that the baselines used for measuring the outmost limit of the fishing zone around the Faeroes Islands are straight baselines connecting 12 base points listed in Section 2.<sup>67</sup>

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<sup>65</sup> Bureau of Intelligence and Research, the U. S. Department of State, Straight Baseline: Faeroes, Limits in the Seas, Series A, No. 13, 1970, at <http://www.state.gov/documents/organization/62005.pdf>, 8 April 2012.

<sup>66</sup> Bureau of Intelligence and Research, the U. S. Department of State, Straight Baseline: Faeroes, Limits in the Seas, Series A, No. 13, 1970, at <http://www.state.gov/documents/organization/62005.pdf>, 8 April 2012.

<sup>67</sup> Decree No. 598 of 21 December 1976, The Fishing Territory of the Faeroe Islands, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK\\_1976\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1976_Decree.pdf), 8 April 2012.

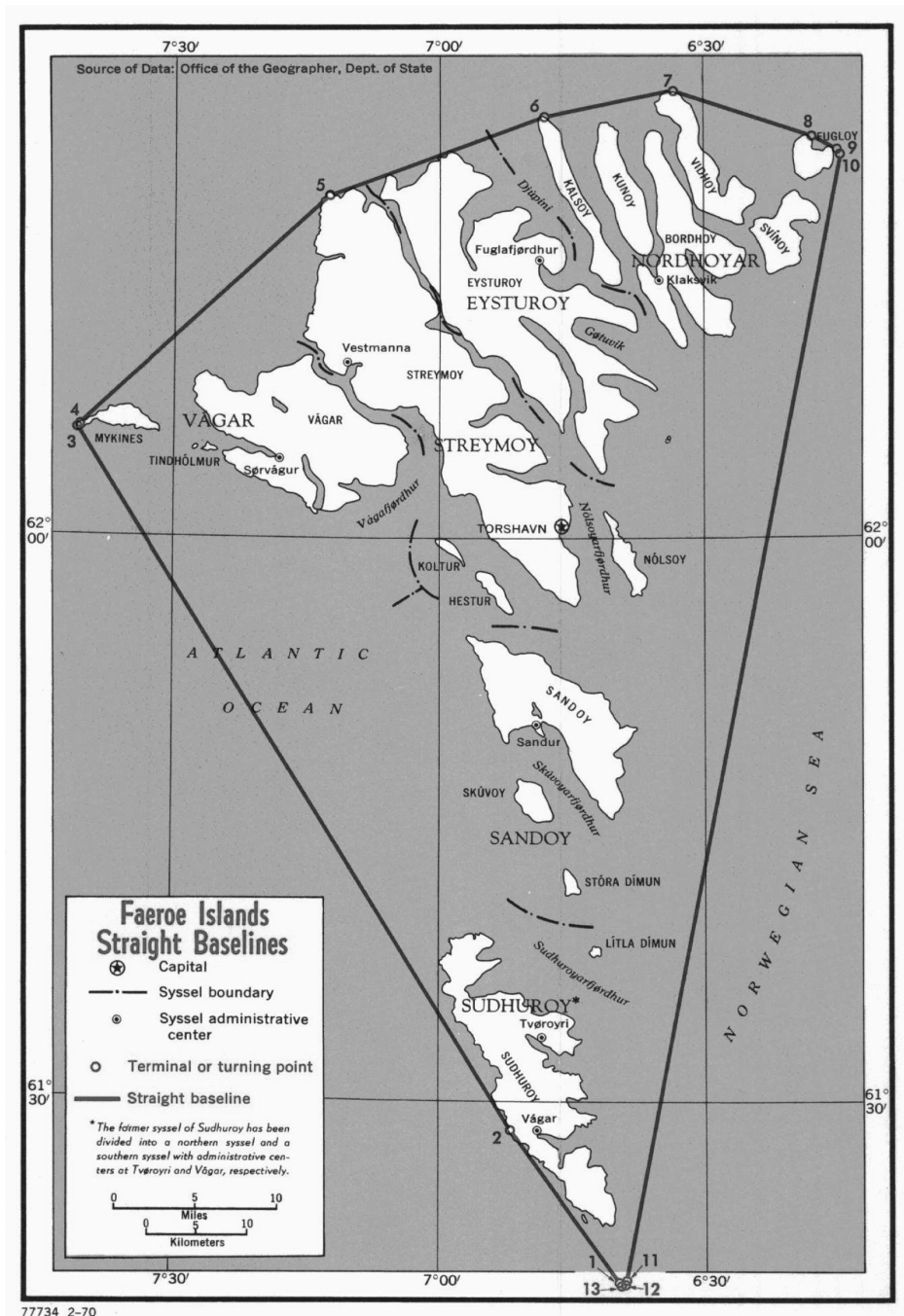


Fig. 2 Baselines of Faeroe Islands

(Source: Bureau of Intelligence and Research, the U. S. Department of State, Straight Baseline: Faeroes, Limits in the Seas, Series A, No. 13, 1970, p. 5, at <http://www.state.gov/documents/organization/62005.904>, 8 April 2012.)

Comparing with the 1963 Decree, there are several obvious differences. First, the 1976 baselines comprise solely of straight lines of 12 sections while the 1963 ones used both straight baseline and normal baseline methods. Second, there are 12 base points (low-water mark at mean spring tide) rather than 13 of the previous ones. Third, the locations of all the base points are similar to the previous ones but more accurate. On 21 December 1976 Denmark issued the Ordinance No. 599 on the Delimitation of the Territorial Sea Around the Faroe Islands. Section 2 repeats the baseline principle as well as geographic coordinates of the 12 points listed in Denmark's No. 598 Ordinance.<sup>68</sup> Both No. 598 and No. 599 ordinances further consolidated the method of using straight lines to draw baselines around the Faroe Islands.

On 7 April 1999 Denmark issued Royal Decree for the Faroe Islands of Act No. 200 on the Delimitation of the Territorial Sea, by which the breadth of the territorial sea of Denmark was extended from 3 to 12 nautical miles. This took effect for the Faroe Islands from 1 June 2002, which was facilitated by Decree No. 240 of 30 April 2002, Decree on the Coming into Force of the Act on the Delimitation of the Territorial Sea for the Faroe Islands, and Executive Order No. 306 of 16 May 2002 by Denmark Foreign Ministry, Executive Order on the Delimitation of the Territorial Sea of the Faroe Islands. By Decree No. 240, the 1976 No. 599 Ordinance is repealed.<sup>69</sup> Paragraph 2(3) of Decree No. 240 reads:

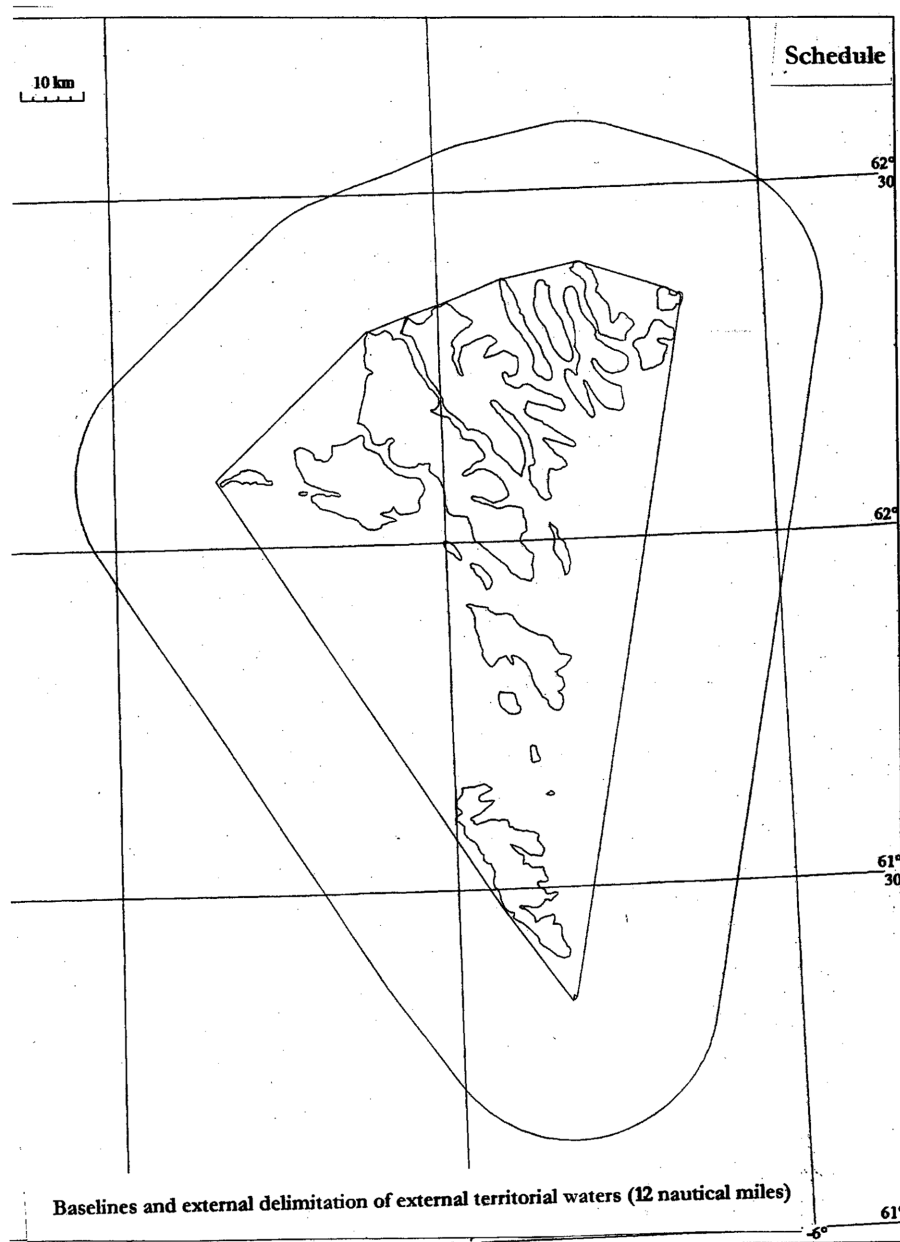
*The Minister for Foreign Affairs shall lay down and shall promulgate the outer limits of the external territorial waters and the baselines on which the measuring of these outer limits shall be based in pursuance of section 1.*<sup>70</sup>

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<sup>68</sup> Ordinance No. 599 of 21 December 1976, on the Delimitation of the Territorial Sea Around the Faroe Islands, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK\\_1976\\_Ordinance599.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1976_Ordinance599.pdf), 8 April 2012.

<sup>69</sup> Decree on the Coming into Force of the Act on the Delimitation of the Territorial Sea for the Faroe Islands, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk\\_2002\\_order\\_and\\_decrees.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk_2002_order_and_decrees.pdf), 20 December 2012.

<sup>70</sup> Decree on the Coming into Force of the Act on the Delimitation of the Territorial Sea for the Faroe Islands, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk\\_2002\\_order\\_and\\_decrees.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk_2002_order_and_decrees.pdf), 20 December 2012.



**Fig. 3 Baselines and External Limits of Territorial Sea of Faroe Islands**

(Source: Decree on the Coming into Force of the Act on the Delimitation of the Territorial Sea for the Faroe Islands, p. 5, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk\\_2002\\_order\\_and\\_decrees.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk_2002_order_and_decrees.pdf), 14 June 2013.)

The Executive Order No. 306 released by Denmark Foreign Ministry illustrates new baselines (Fig. 3). Paragraph 2(1) provides that the baselines from which the external territorial waters of the Faroe Islands are determined shall be the coastline and straight lines between the 10 listed base points.<sup>71</sup> Once again, combined methods of normal and straight baselines are used. Except for the section from point 8 to 9 being coastline, the remaining 9 sections are straight lines between the sequence base points. Again Denmark's legal documents reconfirm its practice of drawing the straight baselines around its oceanic archipelago, the Faroe Islands. No protests are seen from the international community.

### 3. Norway: Svalbard Islands

On 9 February 1920, by a collective decision through the Spitsbergen Treaty, Norway acquired sovereignty over the Svalbard Islands. By a Royal Decree of 25 September 1970, it established straight baseline systems about Bjarnbya (Bear Island), Hopen, and the western and southern shores of the Svalbard archipelago. There are 83 base points. The points No. 1–17 of the Decree delimit the Bjørndya system; No. 18–25, Hopen; and the remainder cover Svalbard.<sup>72</sup>

On 1 June 2001 the Regulations relating to the limits of Norwegian territorial sea around the Svalbard was issued, in which Paragraph 1 states:

*The limit of the Norwegian territorial sea around Svalbard is to be drawn four nautical miles ... outside and parallel to the straight lines between the points listed below by coordinates. No line is to be drawn between islands that are given separate headings in the list below.*<sup>73</sup>

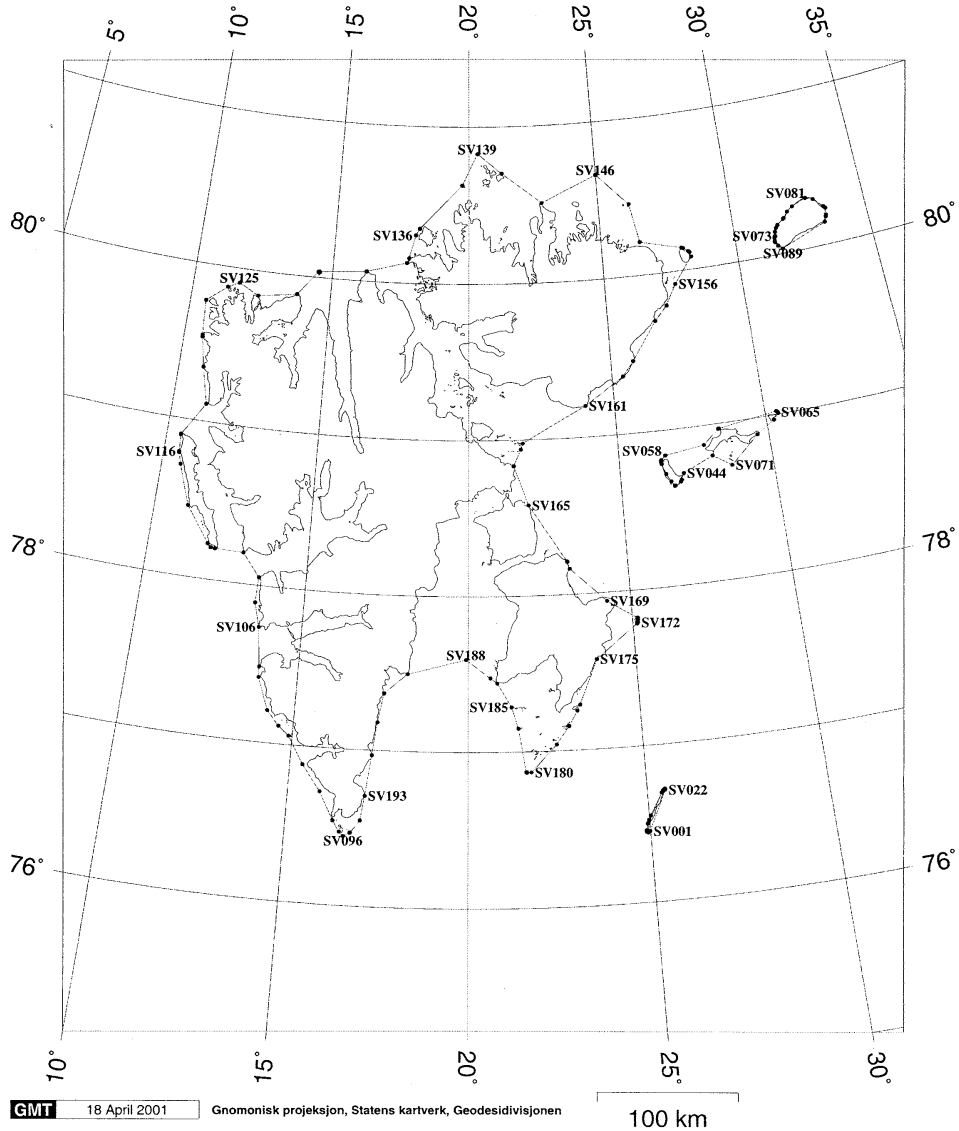
Within the Regulations a map is attached to illustrate the base points and baselines (Fig. 4).

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<sup>71</sup> Executive Order on the Delimitation of the Territorial Sea of the Faroe Islands, at [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk\\_2002\\_order\\_and\\_decrees.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk_2002_order_and_decrees.pdf), 20 December 2012.

<sup>72</sup> Department of State of the United States, No. 39 Straight Baselines: Svalbard, at <http://www.state.gov/documetns/organization/61539.pdf>, 8 April 2012.

<sup>73</sup> The Regulation of 1 June 2001 relating to the limits of Norwegian territorial sea around Svalbard, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/nor\\_mzn38\\_2001.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/nor_mzn38_2001.pdf), 8 April 2012.



**Fig. 4 Map of Baseline of Svalbard Islands Illustrated by the 2001 Regulation**

(Source: The Regulations of 1 June 2001 relating to the limits of Norwegian territorial sea around Svalbard, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/nor\\_mzn38\\_2001.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/nor_mzn38_2001.pdf), 8 April 2012.)

The practice by Norway's 2001 Regulations shows that possibly depending on the distance among the islands or other insular features of the Svalbard Archipelago the 196 base points around the Svalbard are grouped into 5 sections: Hopen, Bjørnøya, Kong Karls Land, Kvitøya and Spitsbergen/Nordauslandet/Edgeøya and others. The points No. 1–22 of the Regulations delimit the Hopen system; No. 23–43, Bjørnøya; No. 44–72, Kong Kars Land, No. 73–95, Kvitøya and the remainder cover Spitsbergen/Nordauslandet/Edgeøya and others (Fig. 4). Comparing with the 1970 Decree, Norway continues to use straight lines to draw the baselines for the Svalbard to determine its territorial sea of the Svalbard.

Pursuant to article 16, paragraph 2 of UNCLOS, on 3 December 2003, Norway deposited the list of geographical coordinates of points to the Secretary-General of the U. N. In the deposit it stipulates that the breadth of Norway's territorial sea is 12 nm measured from the baselines.

Responding to Norway's the 1970 decree in relation to its baselines, the United States issued an analysis in 1972,<sup>74</sup> in which comments on the baselines around the Svalbard Islands state:

*Svalbard's straight baselines extend from the northern cape of Ny Fries Land on Vestspitsbergen along the entire western coast of the island. The coastal areas are heavily fjorded and fringed with many small islands and rocks. The southeast coast, in contrast, is relatively smooth and lacks deep embayments. Of interest, several of the straight baselines intersect glaciers which project seaward of the baselines ...*

*The final sector of the system serves to 'tie' the island of Edgeøya to Vestspitsbergen. The segments continue southward to include the isolated, detached, and small islets of the Tusenøyane within the Svalbard internal waters. The land/water ratio in this section would be exceedingly small.*

The analysis on the final sector seems to accept the method of straight lines to draw baselines around the Svalbard and the issue concerned is the land/water ratio.

In 2006, an agreement was signed between Denmark and Norway on the Delimitation of Fisheries Zones and the Continental Shelf. In 2010, another treaty was reached between Norway and Russia on the delimitation of the maritime zones in the

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<sup>74</sup> Bureau of Intelligence and Research, the U. S. . Department of State, Straight Baselines; Svalbard, No. 39 of Limits in the Sea, 1972, at <http://www.state.gov/documents/organization/61539.pdf>, 8 April 2012.

Barents Sea. Both bilateral treaties took into account the effects from the relevant coastline of Svalbard, which would support the view that Svalbard can and does generate a continental shelf in the same manner as other groups of islands.<sup>75</sup> In the latter agreement, a map is attached (Fig. 5).

On 27 November 2006 Norway made to the CLCS its Continental Shelf Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea. As stated in the submission, “[t]he data and information contained in this submission are intended to enable the establishment of the outer limits of the continental shelf where those limits extend beyond 200 nautical miles from the baselines in three separate maritime areas in the North East Atlantic and the Arctic.”<sup>76</sup> The three areas are the Loop Hole in the Barents Sea, the Western Nansen Basin in the Arctic Ocean and the Banana Hole in the Norwegian Sea. Three figures in the submission, Figures 1, 2 and 4, have shown the 200 nautical miles limits of Norway in relation to the three areas, from which we see the baselines of the Svalbard Archipelago have been used to measure. Following the submission, Denmark, Iceland, Russia and Spain made their individual note to the UN Secretary-General in 2007.

In its statement, the Danish Government together with the Government of the Faroes confirms that they do not object to Norway’s request that the Commission consider the documentation in its submission relating to the southern part of the Banana Hole and make its recommendation on the basis of this documentation, without prejudice to the submission at a later stage of documentation by Denmark/the Faroe Islands or to the delimitation of the continental shelf between Denmark/the Faroe Islands and Norway.<sup>77</sup> On 29 January 2007 Iceland made a similar note.<sup>78</sup> Both notes do not make any comment on the three included maps in which the 200 nautical miles limits are measured from the straight baselines around the Svalbard.

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<sup>75</sup> Tore Henriksen and Geir Ulfstein, *Maritime Delimitation in the Arctic: The Barents Sea Treaty*, *Ocean Development & International Law*, Vol. 42, Issue 1 ~2, 2011, p. 9.

<sup>76</sup> Continental Shelf Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/nor\\_exec\\_sum.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf), 18 November 2012.

<sup>77</sup> Permanent Mission of Denmark to the UN, Note Verbale (Ref. no. 119, N. 8), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/dnk07\\_00218.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/dnk07_00218.pdf), 18 November 2012.

<sup>78</sup> Permanent Mission of Iceland to the UN, Note Verbale (Ref. FNY0701008/97.B.512), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/isl07\\_00223.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/isl07_00223.pdf), 18 November 2012.



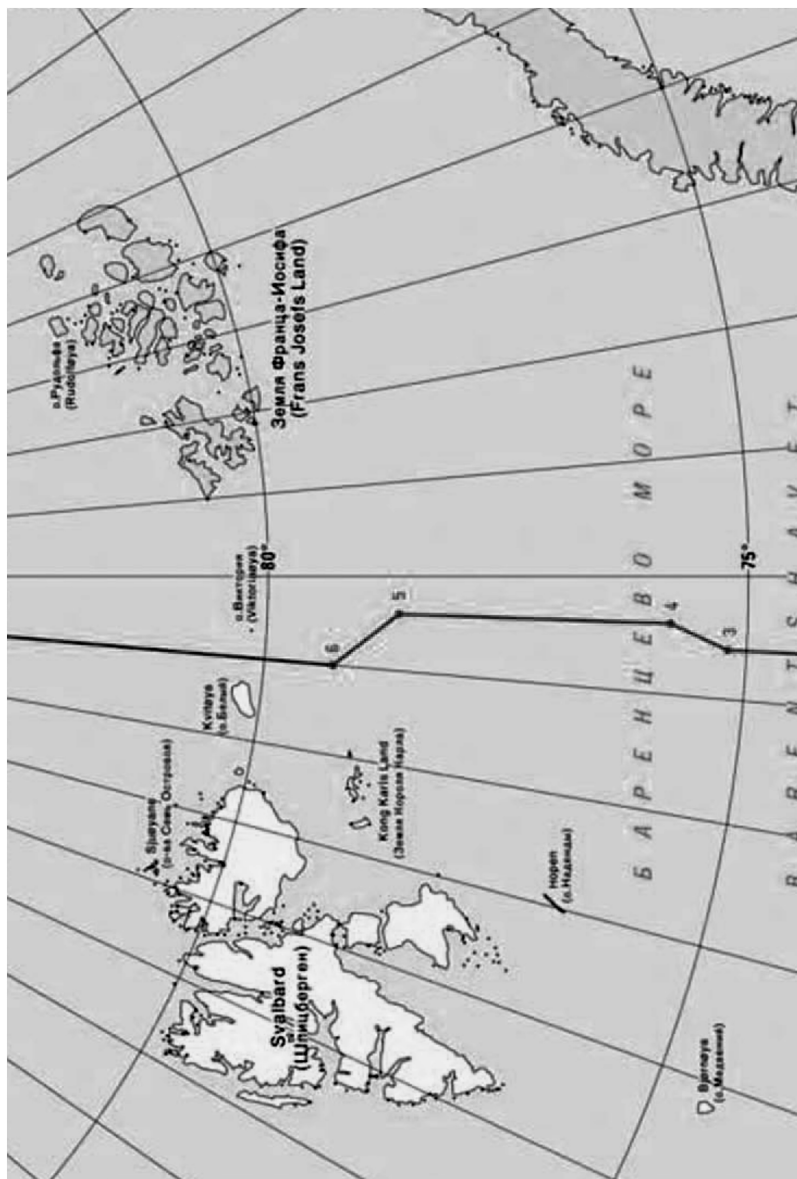


Fig. 5 A Map Illustrating the Maritime Boundary of the 2010 Treaty

(Source: Reproduced of the map in Tore Henriksen and Geir Ulfstein, Maritime Delimitation in the Arctic: The Barents Sea Treaty, *Ocean Development & International Law*, Vol. 42, Issue 1-2, 2011, p. 3. From point 3 to 4 and point 5 to 6, it seems that the existence of the Svalbard archipelago affects the delimitation by moving the line eastward to the Russian side. In particular the direction of point 5 to 6 gives the impression that the straight baseline in the relevant part of the Svalbard was accepted.)

There are two other responding notes from Russia and Spain respectively. Russia consented in its note that the Commission go ahead with its examination of the Norwegian submission, but Russia emphasized that “any action of the Commission shall ... not prejudice matters relating to the delimitation of the continental shelf between Norway and the Russian Federation.”<sup>79</sup> Spain’s note on 3 March 2007 states that it reserves its rights concerning the exploitation of the resources on the continental shelf endowed by the 1920 Spitsbergen Treaty. Therefore Russia and Spain are concerned more about their access right to the maritime waters generated by the Svalbard than the straight baseline used by Norway.

#### 4. Spain: Canary Islands

On 5 August 1977, Spain issued the Royal Decree No. 2510/1977.<sup>80</sup> Article 1 states that Spain use straight lines to delimit its jurisdictional waters. According to the Decree, straight baselines are formed between the 13 chosen base points on the six islands of Lanzarote, Fuerteventura, Alegranza, Graciosa, Montana Clara and Lobos. For the other four bigger islands, Gran Canaria, Tenerife, Hierro and La Palma, straight lines are used to draw the baselines to measure their own territorial sea.

On 20 February 1978, Act No. 15/1978 on the Economic Zone was released. Paragraph 2 of article 1 states:

*In the case of archipelagos, the outer limit of the economic zone shall be measured from straight baselines joining the outermost points of the islands and islets forming the archipelagos, so that the resulting perimeter conforms to the general configuration of each archipelago.*<sup>81</sup>

On 11 May 2009 Spain submitted to the CLCS the preliminary information on the limits of its continental shelf. This preliminary information refers also to the west of the Canary Islands and on page 27 a map shows the 200 nm and 350 nm lines to the east of Canary Islands. The shape of the two lines show the effects of the straight baselines drawn around the Canary Islands, although no baselines appear in this map. After this submission was released, Morocco made a note to the UN on 16 May

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<sup>79</sup> Permanent Mission of Russian Federation to the UN, Note Verbale (No. 82), at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/rus\\_07\\_00325.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf), 18 November 2012.

<sup>80</sup> Royal Decree No. 2510/1977 of 5 August 1977, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP\\_1977\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1977_Decree.pdf), 18 November 2012.

<sup>81</sup> Article 1 of Act No. 15/1978 on the Economic Zone of 20 February 1978, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP\\_1978\\_Act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1978_Act.pdf), 20 December 2012.

2009, reserving its rights for further notice to the UN at a later stage. The note only comments on whether the Canary Islands can generate extended continental shelf, without any comment on the effect on the 200 nm line from the baselines of the Canary Islands.

### 5. Portugal: Azores Islands

On 29 November 1985 Portugal passed Decree-Law No. 495/85 which supplement the normal baseline for measuring the breadth of the territorial sea established in Base I of Law No. 2130. This Decree shows that the baselines for the Azores and the Madeira Archipelagos are formed with two methods, normal baselines and straight baselines. Article 1, supported by Tables III to V, shows that the closing lines and straight baselines supplement the normal baselines for the Autonomous Region of the Azores, formed by the Azores Archipelago.<sup>82</sup> Depending on locations and distances between the islands and insular features, the Azores are divided into three groups, around each of which three groups of closing lines and straight baseline are linked by chosen base points. The Eastern Group<sup>83</sup> consists of 4 straight baselines, the Central Group 12, the second Western Group 3.<sup>84</sup> Article 1, supported by Table II, shows the straight baselines to supplement the normal baselines for the Madeira Archipelago.<sup>85</sup>

Such methods for drawing baselines for the two archipelagos are protested by the U. S. According to the U. S. analysis, Portugal established straight baselines around their islands in a manner simulating an archipelago, which according to Part IV can only be used by archipelagic States.<sup>86</sup>

On 11 May 2011 Portugal made a submission on outer continental shelf to the CLCS.<sup>87</sup> The map on page 7 (Fig. 6) shows the outer limits of the extended continental shelf of Portugal. On the same map, the baselines for Portugal's two Atlantic archipelagos together with the 200 nm line drawing from them are illustrated. The maps on pages 8 and 9 again show clearly the two straight baseline systems and their effects on the 200 nm line in Portugal's practice. Such practice on the attached maps

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<sup>82</sup> Article 1 of Decree-Law No. 495/85 of 29 November 1985, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRT\\_1985\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRT_1985_Decree.pdf), 20 December 2012.

<sup>83</sup> In the Decree it is written as the Western Group. From the map we induce that it is a spelling mistake.

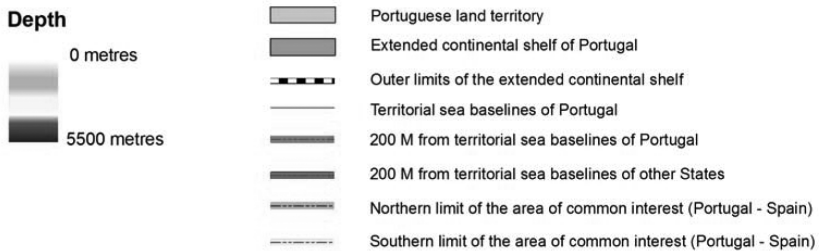
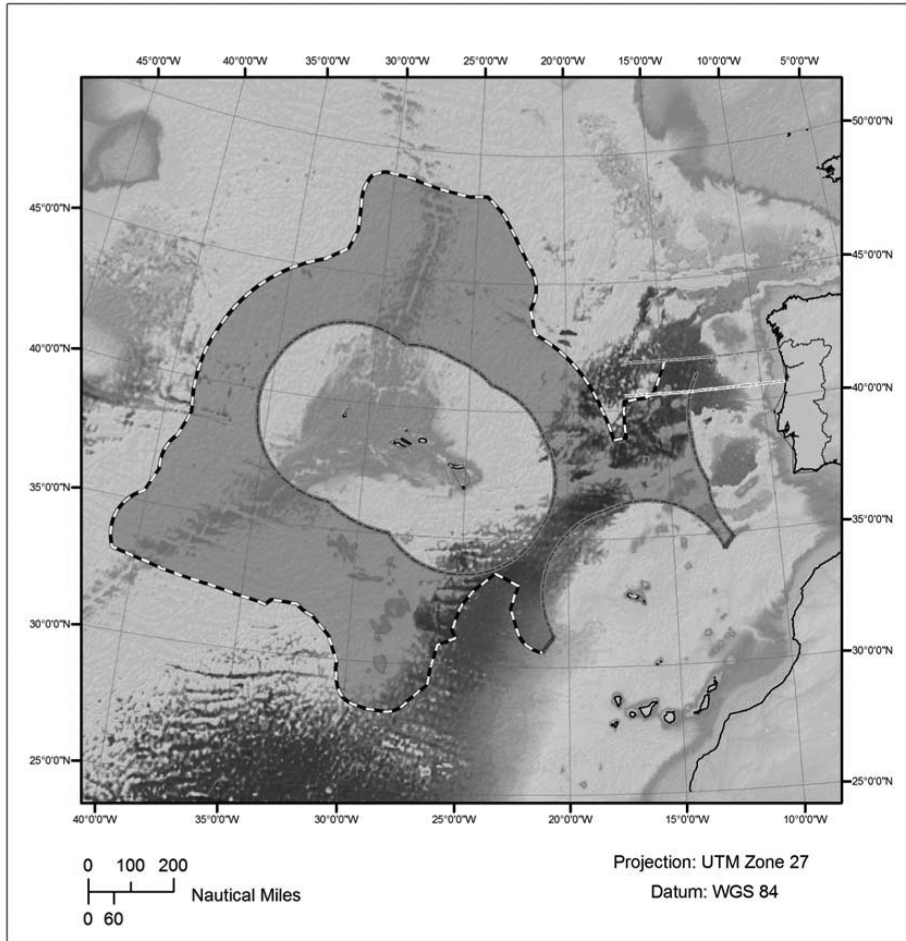
<sup>84</sup> Decree-Law No. 495/85, *Op. cit.*

<sup>85</sup> Decree-Law No. 495/85, *Op. cit.*

<sup>86</sup> Bureau of Intelligence and Research, the U. S. Department of State, *Limits in the Seas: United States Responses to Excessive National Maritime Claims*, No. 112, 1992, p. 49.

<sup>87</sup> Continental Shelf Submission of Portugal, Executive Summary, at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/prt44\\_09/prt2009executivesummary.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/prt44_09/prt2009executivesummary.pdf), 20 December 2012.

with their baselines can be considered that Portugal re-declared its mixed measures using straight and normal baselines to draw the baselines for the Azores and Madeira.



**Fig. 6 A Map of the Outer Limits of the Extended Continental Shelf of Portugal**

(Source: Continental Shelf Submission of Portugal, Executive Summary, [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/prt44\\_09/prt2009executivesummary.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/prt44_09/prt2009executivesummary.pdf), 18 June 2013.)

Following Portugal's submission, Morocco and Spain made their individual notes to the UN Secretary-General on 16 May and 10 June 2009 respectively. Morocco reserved its right to make further comment and emphasized its objection to unilateral action of establishing continental shelf.<sup>88</sup> Spain conveyed its consent to the CLCS for considering Portugal's submission.<sup>89</sup> Both notes do not comment on the baselines shown in the submission.

## V. Implication for China in the South China Sea

China is one party to the South China Sea disputes, in which six parties—the other five being China Taiwan, Vietnam, the Philippines, Malaysia and Brunei—have laid claims to part or the whole of the Nansha Islands, and three parties—China Mainland, China Taiwan and Vietnam—have laid claims to the Xisha Islands. The disputes also involve overlapping maritime claims. As a key member of the South China Sea dispute, China's position in regard to the South China Sea may have implication on the future resolution of the disputes. Meanwhile practices by other continental countries may have impact on China's practice in the South China Sea, including its position on its oceanic islands such as the Nansha and Xisha islands.

Starting from 1958 China officially recognized the method of straight baselines as its position to define the baselines for its land territory including the four archipelagos in the South China Sea. This position first appeared in China's 1958 declaration on territorial sea,<sup>90</sup> and was reaffirmed when China promulgated the Law on Territorial Sea and Contiguous Zone (LTSCZ) in 1992. Paragraph 1 of article 3 of LTSCZ reads,

*The extent of the PRC's territorial sea measures 12 nautical miles from the baseline of the territorial sea. The PRC's baseline of the territorial sea is designated with the method of straight baselines, formed by joining the various base points with straight lines.*<sup>91</sup>

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<sup>88</sup> Morocco's note to the UN (No/NV/188/09), at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/prt44\\_09/mar\\_re\\_prt2009e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/prt44_09/mar_re_prt2009e.pdf), 16 December 2012.

<sup>89</sup> Spain's note to the UN (No. 381 AV/ot), at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/prt44\\_09/esp\\_re\\_prt2009\\_2e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/prt44_09/esp_re_prt2009_2e.pdf), 16 December 2012.

<sup>90</sup> Wu Shicun ed., *Collection of Documents Relating to South China Sea Issues*, Haikou: Hainan Publishing House, 2000, pp. 51 ~ 52. (in Chinese)

<sup>91</sup> Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1992\\_Law.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf), 3 April 2012.

In 1996 China issued a declaration on China's baselines for measuring its territorial sea, in which straight baselines were used for the Xisha Islands. This is the first time that China in practice used straight lines to determine the baselines for its oceanic islands. Such practice was adopted again in September 2012 when China issued the Statement on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands.<sup>92</sup>

There is some difference in the two cases. For the Xisha Islands, China drew straight baselines by connecting the 28 base points chosen from the insular features to enclose all the features. For the Diaoyu Dao case, the Chinese straight baselines enclose the two groups of the Diaoyu Islands. The baselines of the territorial sea adjacent to the first group, Diaoyu Dao, Huangwei Yu, Nanxia Dao, Beixiao Dao, Nan Yu, Bei Yu and Fei Yu, are the straight lines joining the chosen 12 base points. Those of the second group, Chiwei Yu, Wangchi Dao, Xiaochiwei Dao, Chibeibei Dao and Chibeidong Dao, are straight lines joining 5 chosen base points.<sup>93</sup>

## VI. Concluding Remarks

Part IV of UNCLOS adopted in 1982, establishes a regime of archipelagic States and defines the rights and obligations arising therefrom. Many analysts on the law of the sea agree that a continental country which has oceanic islands does not enjoy the legal status of archipelagic State, and therefore the principles in Part IV do not apply to the oceanic archipelagos belonging to continental States. Another position is that Part IV does not deny any rights or principles to archipelagos belonging to continental States and that the principles applicable to them should be found in the general principles of UNCLOS.

Lack of specific arrangements for oceanic islands of continental States is the result of a compromise during the process of negotiations at UNCLOS III. Some continental States including China have practiced using straight lines for drawing baseline for their oceanic archipelagos, which may indicate that principles applicable to oceanic archipelagos of continental States are still in evolution. These practices will im-

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<sup>92</sup> Statement of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn\\_mzn89\\_2012\\_e.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf), 22 December 2012.

<sup>93</sup> Statement on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands, at [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn\\_mzn89\\_2012\\_e.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf), 16 November 2012.

pact on China's future practice in the South China Sea.

This paper is written in a context of increasing difference of territorial and maritime disputes in the South China Sea. One of the hot issues between claimant States and user States is the essence of freedom of navigation. China's practice on how to draw baselines in the South China Sea has implications for the developments of the South China Sea disputes as well as relevant impacts on the navigation therein. Disputant countries and maritime powers will pay close attention to China's practice in such regard. Meanwhile, as in the case of dispute over Diaoyu Dao and its affiliated islands, the perceived negative developments by China over the South China Sea disputes may push China to announce its baselines for the Nansha and Zhongsha island groups as a response. During the time when China is making efforts to keep the South China Sea disputes under control, any sensitive move will be observed by other disputant countries as a unilateral action to consolidate its historical control over the island groups.