THE APPROACH BY FIJI—A MID-OCEAN ARCHIPELAGO—TO THE CONFERENCE ON THE LAW OF THE SEA†

by

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At a meeting held under the auspices of the United Nations, I was once asked by the senior representative of a major European power the question "Fiji—Where is it? What is it?". For the benefit of those who may be asking the same question it would perhaps be appropriate to first answer it, as the answer to it governs largely Fiji's approach to the law of the sea which it can only view in the light of the particular problems which are applicable to Fiji.

Fiji is an independent nation within the British Commonwealth having attained that status on the 10th of October, 1970, after a period of 96 years as a British Crown Colony since its cession to Queen Victoria by the Fijian people on the 10th of October, 1874.

Situated in the South-West Pacific Ocean, the newly independent nation of Fiji has a total land area of 7,055 square miles and comprises approximately 844 islands and islets. Only about a hundred of these islands are permanently inhabited but many more are used by the Fijian people for planting food crops or as temporary bases for the purposes of fishing expeditions. The largest islands are Viti Levu, having a land area of 4,010 square miles and Vanua Levu, having a land are of 2,137 square miles. The main Fiji archipelago lies between the 15th and 22nd degrees of South latitude and between the 174th degree of East longitude and the 177th degree of West longitude from the meridian of Greenwich. The islands of Rotuma are geographically separated from the main archipelago and lie between the 12th and 15th degrees of South latitude and between 175th and 180th degrees of East longitude from the meridian of Greenwich.

Fiji is centrally placed amongst the other island territories of the South-West Pacific and acts as a gateway to them. It also lies on the main air and sea routes between Australia, New Zealand, the United States of America and Canada.

The islands comprising the Fiji archipelago, with the exception of some islands in the Koro Sea, rise from two submerged platforms. The western platform is the broader and from it rise the islands of Viti Levu, Vanua Levu, Taveuni and the Lomaiviti and the Yasawa Groups. The island of Kadavu is based on a small portion of that platform which appears to have been broken away from the main platform. The numerous islands of the

† An amalgamation of statements prepared by the author and presented to the sessions of the United Nations Preparatory Committee on the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction on the 25th July, 1971 and 10th March, 1972.

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Lau Group, scattered across more than 4,000 square miles, are based on the elongated and narrow eastern platform. The two platforms are separated in the South by the relatively deep waters of the Koro Sea and joined in the North by a narrow ridge lying athwart the narrow declivity known as Nanuku Passage. Between the two platforms runs a submarine ridge in a North-South direction through the Koro Sea on which are based a number of small volcanic islands. The ocean floor drops steeply away from the outer edges of the two platforms to a depth of over 5,000 feet.

The larger islands are "high" islands built mainly of ancient volcanic and andesite rocks but partly of Cretaceous and Tertiary sediments. Generally speaking, soils are poor, and much of the hinterland is rugged and densely forested with sharp peaks and crags, rendering their interiors unsuitable for commercial agriculture. However, on the two main islands of Viti Levu and Vanua Levu there are conspicuous areas of reasonably fertile flat land on the coastal fringes and in the deltas which have been built up in the lower reaches of the main rivers.

The other islands of the Group vary greatly in structural form but a great number consist wholly or partly of limestone. These generally rise steeply from the shore and have flat topped profiles.

Coral reefs surround practically all of the islands, with barrier reefs occurring at the seaward edges of the submarine platforms and at the outer margins of the wide shore flats. The most extensive reef is the Great Sea Reef which extends, with only a few navigable passages, for nearly 300 miles in a protecting arc along the north-western fringe of the archipelago.

That, then, is the physical environment in which the multiracial population of some 525,000 people live. Approximately fifty percent are descendants of migrants from the sub-continent of India almost all of whom live in the urban areas, or on farmlands situated on the coastal flats and river deltas of the two main islands. The indigenous Fijian population, comprising some forty-two percent of the total, are scattered throughout the entire Group and are almost the only inhabitants of the outer islands. The remaining eight percent comprise persons of European, Chinese and mixed racial descent, living mainly in the towns.

Sugar has been the mainstay of the economy for many years, but production is of course limited by the International Sugar Agreement and the state of world markets. Strenuous efforts are therefore being made to diversify the economy, but the available acreage of arable land is strictly limited, while the small size of the local market and the apparent lack of major mineral resources on land are obstacles to industrialisation.

Apart from the tourist industry, there is thus little prospects for rapid economic growth in Fiji, unless major mineral discoveries are made.

Meanwhile, despite a vigorous and fairly successful family-planning campaign, the population continues to grow at just over two percent per annum. One of the results is a continuing and alas worsening problem of unemployment and underemployment.

In this situation of increasing population and limited prospects for economic activity on land, the importance of the sea and the seabed are obvious.

The indigenous Fijians have always been acutely aware of the importance of the sea. They are by tradition seamen and navigators, whose ocean-going canoes were once the largest vessels in the Pacific. Many are also skilful fishermen, and fish form a major source of protein in their diet. Until

relatively recently, most fishing was strictly for subsistence, for which purpose historic fishing rights have been established by various tribal units over areas of coastal waters and reefs.

In more modern times, with the great increase in population, and with growing urbanisation, the demand for fish has far outstripped the supply, with the result that Fiji currently imports about 10,000 tons of fish a year, mainly in canned form.

Active steps have been and are therefore being taken to develop a commercial fishing industry. These include research into catching techniques, the provision of cold-storage facilities, and the training of local crews. The UNDP is assisting in this project, and is training local seamen in the use of pole-fishing techniques for the taking of tuna.

One of Fiji's difficulties in thus trying to develop a viable local fishing industry, is that its vessels must compete with the fleets of foreign-owned ones which presently use the seas within the Fiji archipelago but outside the three-mile limit of territorial waters, for the large-scale taking of fish (mainly tuna) by long-line techniques.

The Fiji Government, as well as fostering the development of commercial fisheries, has encouraged intensive mineral exploration programmes which have been undertaken in the shallower offshore areas. Now a petroleum exploration programme is under way over a large part of the submerged platforms upon which the islands of the Group are based. To date, petroleum exploration concessions have been granted over a total of 15,000 square miles of offshore areas. Applications are under consideration for a further 12,000 square miles of such areas, and applications are being invited over a further 6,000 square miles; making a total of 30,000 square miles of offshore areas over which petroleum exploration concessions have been granted, applied for or made available for application.

The people of Fiji are, in consequence, deeply aware of the importance to them of their marine environment and the necessity for control over the resources of their archipelagic waters and of the seabed and subsurface of the seabed in the vicinity of the archipelago.

The position of Fiji as a mid-ocean archipelago is not unique, as there are many other small nations and emerging territories with roughly similar geographic features. However, Fiji is more dependent than most on the development of her marine environment for her economic improvement. It is of importance to such countries, and of vital concern to Fiji, to control the development of their marine environments in order to ensure that such development is in their best interests and to prevent any form of depredation or pollution that may endanger that environment or deplete its resources.

The case of Fiji is thus not an isolated but a common one, and it is considered by its Government as one which has not yet been given adequate consideration in the development of the law of the sea. Archipelagic claims have been considered in the past but have been tended to be regarded as legal aberrations rather than as serious problems. It is Fiji's contention that these claims must now be considered and a solution found for the problem of mid-ocean archipelagos. This, in Fiji's view, is one of the essential prerequisites to the revision of the Geneva Conventions and the establishment of any form of international regime for those areas of the sea and the seabed beyond the limits of national jurisdiction.

The Government of Fiji supports the concept of the establishment of such a regime provided that the thorny problems of determining the limits of the areas of national jurisdiction of archipelagic states can first be overcome and an acceptable solution found to the question as to the limits of the continental shelf.

As may be apparent, Fiji's primary concern is with the establishment of the limits of areas of national jurisdiction of archipelagic states. It does not seek any substantial departure from the existing rules set out in the Geneva Conventions but merely to obtain confirmation of the integration of the archipelagic principle into existing international law in such a way as to accommodate the interests of the archipelagic states without disproportionately affecting the interests of other states of the world at large.

What then is the present position in International Law as regards archipelagos?

Archipelagic proposals have now been considered for many years. The first proposal that a group of islands should be assimilated for the purpose of delimiting the territorial sea was made by Alvarez at the 33rd meeting of the International Law Association at Stockholm in 1924. Alvarez, who was Chairman of the Committee on Neutrality, in presenting draft regulations for determining the limits of the territorial sea proposed that a zone of six miles should be drawn around islands and that in the case of an archipelago the islands should be considered as forming a unit and that the extent of the territorial waters should be measured from the islands situated farthest from the centre of the archipelago. He placed no limitation upon the distances permissible between the islands or the circumference of the group from which the territorial sea could be measured.

No conclusion was reached by the International Law Association in relation to those proposals and it is not clear whether the Committee either did not consider the question or simply did not regard it as requiring separate mention.

The question was again raised in 1927 before the Institut de droit International and a resolution passed by the Institut at its meeting in Stockholm in 1928. In that resolution the Institut drew a distinction between coastal archipelagos and mid-ocean archipelagos providing in the case of the former for the length of the territorial sea to be measured from the islands or islets situated farthest from the coast, provided that the archipelago was composed of islands, the distance between which did not exceed double the breadth of the territorial sea, and that the islands nearest to the coast were not situated farther from it than twice the breadth of the territorial sea. In the case of the latter, namely mid-ocean archipelagos, the resolution provided that a group of islands should be considered as a unit if the distance between each island on the circumference does not exceed double the breadth of the territorial sea and that the length of the territorial sea should be measured from a line joining the outer extremities of the islands.

Further attempts made to formulate rules relating to archipelagos in the 1920's accepted the concept of treating the islands comprising an archipelago as a unit but were unable to agree as to the permissible distance between each island on the circumference. Some postulated a maximum distance of twice the breadth of the territorial sea; and others three times the breadth of the territorial sea.

The question was discussed by the preparatory committees established for the purpose of drawing up the bases of discussions for the Hague

Codification Conference in 1930 and by the Second Sub-Committee of that Conference, namely the Sub-Committee on the Territorial Sea. The results were however so inconclusive that the idea of drafting a definite text on the subject was abandoned.

The results of the Hague Conference revealed that no agreement was then possible in relation to the territorial waters of island groups without previous agreement on either the extent of territorial waters or the nature of the waters enclosed within the baselines. However the majority of Governments who expressed opinions on the latter assumed that these would not be inland waters but territorial waters and as such subject to a right of innocent passage. In the academic considerations of the outcome of the discussions at the Hague Conference support is to be found from Gidel for the conclusion that if in the progressive development of the law of the sea any elimination of high seas resulted from the enclosure of an archipelago the waters so enclosed would be transformed into territorial waters and not into inland waters so that the freedom of innocent passage would not be negated.

With regard to the question as to the extent of territorial waters the report to the Hague Conference of the Second Sub-Committee on the Territorial Sea was to the effect that the opinion of the majority of that Sub-Committee was that a distance of ten miles should be adopted as the basis for measuring the territorial sea outward in the direction of the high seas. The proposal for this ten mile territorial sea was in fact made by Japan in an attempt to resolve the archipelagic question by treating archipelagos as fictive bays, but in turn depended upon general agreement on a ten mile closing line for coastal sinuosities.

The next important step in relation to the development of the law of the sea in its application to archipelagos resulted from the judgment of the International Court in the *Anglo-Norwegian Fisheries Case* in 1951 which gave approval to the principle that in determining the points in relation to the coast line from which the breadth of the territorial sea is to be measured, straight base lines may be drawn following the general direction of the coast instead of following all of the sinuosities of the coasts.

The importance of this part of the decision lies in the rejection by the Court of the previously commonly held opinion, that the maximum closing distance permissible for bays and other sinuosities of the coast was ten miles, thereby destroying the very basis upon which the ten mile base lines for the delimitation of archipelagic waters rested. In fact the Court accepted base lines as long as 44 miles.

Other important aspects of the judgment in that case was that the Court set out the considerations which may be taken into account in testing the validity of delimitations within territorial limits of waters previously considered to have formed part of the high seas. These considerations included:— the dependence of the territorial sea upon the land domain; the question whether sea areas lying within the baselines are sufficiently linked to the land to be subject to the regime of internal waters; and the economic interests peculiar to the region, the reality and importance of which are clearly evidenced by long usage. The test that would appear to emerge from that judgment is that the islands comprising an archipelago must be linked either as an intrinsic geographical or geomorphological entity and/or as an intrinsic economic unit.

Whilst the judgment of the Court in the case, applied to coastal archipelagos, the Fiji Government considers that the principles utilized by the Court should not be confined only to coastal archipelagos but are of equal application to mid-ocean archipelagos. For example, the condition that a baseline must not depart to any appreciable extent from the general direction of the coast is of equal application to mid-ocean archipelagos if it is recognised that this is in itself merely a method of expressing the requirement for an intrinsic relationship between a line of natural features and the land to which those features form a barrier. The essence of a mid-ocean archipelago is that an intrinsic relationship exists between the natural features comprising the archipelago so that the situation is analogous to that of a complex coast of a continental country. A group of islands cannot be considered as an archipelago without a centripetal emphasis giving coherence to the group as a whole and expressing itself as an outer periphery which is the equivalent of the general direction of the coast as applied to coastal archipelagos.

It is accordingly argued that the rules applicable to coastal archipelagos are of equal application to mid-ocean archipelagos, and that the effect of the judgment of the Court was to emancipate the entire archipelagic question from the confines of precise limits and shapes and from the abstract definition into which all previous discussions on the question had sought to retain it.

Although a number of archipelagic claims have been made there has in fact been no significant advance in the solution of the archipelagic question since the *Anglo-Norwegian Fisheries Case*. The principal reason for this was that the question was excepted from the text of the 1958 Geneva Convention. The subject was in fact given only cursory attention by the International Law Commission in drafting its text on the Law of the Sea and after a brief and somewhat superficial debate it was agreed that whilst the Commission recognised the need to deal with the question it lacked the time and the requisite assistance to experts. The question was accordingly shelved with a recommendation that the Geneva Conference of 1958 should try to solve the complex and controversial problem of archipelagos.

Although three countries, namely the Philippines, Yugoslavia and Denmark, did initiate moves to take up the question at the Geneva Conference in 1958, they were unsuccessful.

The Philippines submitted a proposal to add a new paragraph to Article 10 which, if adopted, would have had the effect of permitting the drawing of baselines along the coasts of the outermost islands and rendering all waters so enclosed as internal waters. This was, however, subsequently withdrawn.

A similar proposal by Yugoslavia was also withdrawn to be taken up again by Denmark but again withdrawn after it was stated by Fitzmaurice, supported by Bartos, that whilst the question was important it required considerably more study. That is where the matter still stands today, and we are now concerned to see that it is taken up and a solution found to it.

As Fiji sees it, one of the fundamental difficulties in finding a solution to the archipelago problem is in relation to the right of passage through archipelagic waters. This difficulty arises from the acceptance in the course of the debates in the International Law Commission of the view that waters enclosed within archipelagic base lines would become internal waters with the consequential closure of those waters to the right of international

passage. This view does not in fact accord with that generally accepted in the debates at the Hague Codification Conference of 1930. In those debates the view taken was that the waters enclosed by archipelagic baselines would become territorial waters and in consequence subject to the right of innocent passage. The same view has been taken by the jurists who have in the past supported the archipelagic principle.

It is this latter view that is adopted by the Government of Fiji. As indicated earlier in this paper, it is Fiji's concern to see that the interests of archipelagic states are accommodated without disproportionately affecting the interests of other states or of the world at large. This it feels can be achieved if there is acceptance of the view that the enclosure of waters by archipelagic baselines does not have the effect of depriving other states of their right of innocent passage through those waters. This right is, however, in Fiji's view, subject to the regulations of the archipelagic state respecting police, customs, quarantine and control of pollution and without derogation from the exclusive right of that state in respect of the exploration and exploitation of the natural resources of the waters so enclosed and of the subjacent seabed and subsoil of the seabed.

Fiji is appreciative of the problems which underlie the unrestricted right of innocent passage but feels that these are not insurmountable.

Account must be taken of the need to keep open shipping channels, the closure of which by an archipelagic state may have serious economic consequence on other states. Fiji considers that this can be achieved by acceptance of the principle that the waters so enclosed are to be regarded as territorial waters subject to the right of innocent passage.

It is Fiji's contention that the rules applied by the International Court of Justice for drawing straight baselines around coastal archipelagos are of equal application to oceanic archipelagos and that likewise the rules applicable to the closure of coastal waters that were formerly considered to be high seas. Acceptance of this argument would result in the application to oceanic archipelagic waters of the general principle of the Law of the Sea that rights of communication over waters that were formerly considered part of the high seas should be preserved. That principle is now contained in Article 5(2) of the 1958 Convention on the Territorial Sea and Contiguous Zones.

So long as the limits of national jurisdiction remain uncertain Fiji feels that no solution can be reached concerning the exploitation of the seabed beyond those limits. It accordingly seeks an early solution of the archipelagic question. Its own proposal is to draw a base line in the form of a polygon around the outer extremity at low-water-mark of all of the islands or drying reefs of the Fiji Group between which an intrinsic relationship may reasonably be deemed to exist. This would result in the inclusion of all of the Fiji Islands with the exception of the remoter islands, namely the Rotuma Group; the Ono-i-Lau Group; and the islands of Vatoa; and Conway Reef. Fiji proposes that the limits of its territorial sea should be at a distance of three miles outward from these base lines and that an exclusive fisheries zone should be established within an area bounded by lines at a distance of 12 miles outward from these base lines.

With regard to the islands of the Rotuma Group, the Ono-i-Lau Group, Vatoa, and Conway Reef, it is proposed to establish the territorial waters and exclusive fishing zone at distances of 3 miles and 12 miles respectively

around them, the breadth in each case being measured from low-water-mark around the coasts or drying reefs of these islands.

The principal question with which the Law of the Sea Conference is faced, namely that relating to the establishment of an equitable regime for the area of the seabed beyond the Limits of National Jurisdiction, Fiji actively supports the establishment of such a regime and assures its wholehearted co-operation, in achieving this aim. As Fiji sees it the two important questions with which the Conference is faced in this respect are, firstly, to determine the limits of national jurisdiction beyond which the regime is to apply, and secondly, to determine the scope, status, composition, functions and powers of the regime and the machinery required for its effective implementation. In Fiji's view it would, ideally, have been preferable to first determine the limits of national jurisdiction on the grounds that until these are known it is difficult to envisage the exact nature of the regime and the machinery that would be appropriate to it. As against that ideal view, however, it is appreciative of the necessity for the establishment of the regime as soon as practicably possible and, if that is to be achieved, it is essential to proceed now to decide upon the details relating to the regime leaving the question of limits of national jurisdiction to be arrived at in the course of the discussions relating to the establishment of the regime. Fiji accepts this as being the only practical approach to the problem as a whole if, in fact, an effective regime is to be established within a reasonable time.

From a strictly legal view point, having regard to the decision of the International Court of Justice in the *North Sea Continental Shelf Case*, the true test to be applied in determining a country's continental shelf limits is a morphological one i.e. by reference to the natural prolongation of the land mass beneath the sea so as to coincide with the true geographic shelf. Fiji is appreciative, however, that the application of such a test can only tend to result in uncertainty as to boundaries, as very few, if any, countries have access to, or can afford, the complicated, expensive and highly technical surveys required for the determination of boundaries by the application of this test. There is also a strong possibility of the necessity for re-determination of boundaries as techniques and knowledge of the submarine topography and geology are improved. One aspect that is apparent to Fiji, however, is that to establish boundaries by reference only to depth of water without regard to natural physical characteristics could well lead to serious anomalies. The test of exploitability can only result in the expansion of boundaries. Whereas 200 metres was only a few years ago the limit of exploitability potential, this is now extended to 500 metres; and 1000 metres is well within that potential. In fact it is expected that drilling rigs will be available by 1975 to carry out commercial operations in waters to that depth. In the interests therefore of simplicity and certainty it would appear to be preferable to resort to the application of a single test based on a fixed distance to be determined from a fixed reference point e.g. from low-water-mark on the coast, or, where baselines are used, from those baselines. Fiji does not hold any strong views as to the distance from the coast, or baselines, as the case may be, at which the outer limits of the area of national jurisdiction is to be fixed.

As regards the scope, status, composition, functions and powers of the regime and the machinery required for its effective implementation, Fiji feels that, as these questions are to be determined before the limits of

national jurisdiction are fixed, the regime and machinery to be established must be such as to be cabale of application to any of a number of widely differing circumstances. It is their view that what is required is the establishment of general framework which is capable of being adapted to meet any of a number of different circumstances should the occasion arise. They agree that the regime should comprise an Assembly, which is open to all states who become parties to the treaty and that each member state should have only one vote in all deliberations of the Assembly. They are also of the view that there should be a smaller executive council and that all decisions of that council on substantial questions should be by a 2/3 majority of its members. As to the composition of the executive council they support the concept of representation of interest groups provided that archipelagic states are included as one of such groups. As an alternative they suggest that the composition of the council be determined by geographical regional groups.

They are of the opinion that it is necessary to establish a secretariat for the regime but that it is not necessary to establish a management organ in addition to that secretariat. It is their view that the treaty should make provision empowering the regime to explore and exploit the area falling within its jurisdiction but that the regime should not exercise those powers on its own behalf until such time as it is in a position to finance such operations from its own resources. They feel that this view, if accepted, would enable the establishment of the regime on a basis which would permit of its operating either as a simple regulatory authority administering the area within its jurisdiction through the agency of individual states, or group of states, on a revenue earning basis, or, in the event of its revenues becoming sufficient to justify it, to itself enter the field of exploration and exploitation of the area within its jurisdiction, or any part thereof, as a direct participant. The latter could be either on its own account or in the form of a joint venture with any individual state or group of states.

Another aspect of the Law of the Sea which falls for review of the Law of the Sea Conference, namely fisheries, is also of considerable importance to Fji in common with many other countries. Fiji is vitally concerned in the development of its commercial fishing industry. One of the difficulties that is has encountered in trying to develop a viable local fishing industry is the fact that Fiji vessels must compete with fleets of foreign owned ones which use the sea within and around the Fiji archipelago for the large scale taking of fish.

Fish is a major source of protein in the diet of the people of Fiji and until such time as a viable commercial fishing industry can be established Fiji will continue to be a substantial importer of fish. It is of considerable importance for Fiji to ensure that the fishery resources of the waters surrounding the archipelago are effectively managed so as to ensure against their over exploitation. Whilst Fiji recognises that some fisheries resources may be renewable it is also conscious of the fact that the fishery resources of the waters in and around the Fiji archipelago are comparatively small and are very sensitive to over exploitation. In the event of such resources becoming depleted the vessels of distant water fishing countries can move elsewhere whereas Fiji's vessels cannot. Fiji is therefore equally concerned to see that, outside its proposed exclusive fisheries zone, there should be established a fisheries management zone in which Fiji should have preferential, but not exclusive, rights and with powers of management of all

fisheries carried out in such zone so as to ensure against the over exploitation of its fisheries resources. In this regard it suggests that having regard to the essentially migratory nature of the fisheries resources of the area, the outer limits of such zone should be determined by a simple distance test, without relation to any depth criteria.

With regard to the protection and preservation of the marine environment and the conduct of scientific research it is Fiji's view that power should be vested in coastal states to enable them to exercise control over the waters adjacent to their coasts for the purpose of the prevention of damage to the environment from pollution. In view of the important work done at the Stockholm Conference on the Human Environment it is Fiji's view, however, that the Law of the Sea Conference should not duplicate the work of the Stockholm Conference or of the Specialised Agencies of the United Nations but should confine itself to the formulation of broad rules relating to the preservation of the marine environment and that those rules should form the framework into which can be fitted the results of the Stockholm Conference and the work done by the Specialised Agencies of the United Nations. Those rules, Fiji suggests should include not only the concept of the right of the coastal states to exercise control but should also seek the establishment of internationally agreed standards to be applied both on land and in territorial waters with an obligation on the part of coastal states to comply with those standards.

As regards scientific research, whilst Fiji supports the concept of widespread freedom of scientific research it feels that coastal states should be enabled to impose controls for the purpose of the preservation of the marine environment, and rules should be formulated incorporating an element of responsibility by states for the imposition of such controls for the purpose of avoiding damage to the marine environment of other states or of the high seas. This is a field in which Fiji and the other countries of the South Pacific have a particuar interest especially in relation to the conduct by other countries of nuclear or other tests within the region, which may result in damage to the environment of any of the countries of the region.