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The Archipelagic States Concept and Regional Stability in Southeast Asia

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I. THE PROBLEM OF ARCHIPELAGIC STATES

For the Philippines and Indonesia, adoption by the Third Law of the Sea Conference in the 1982 Law of the Sea Convention (1982 LOS Convention) of Articles 46-54 on "Archipelagic States," marked the capstone of the two countries' efforts to win international recognition for the archipelagic principle.[1] For both, acceptance by the international community of this principle was an important step in their political development from a colony to a sovereign state. Their success symbolized independence from colonial status and their role in the shaping of the international community in which they live.

It was made possible by their efforts, in the years before 1982, to negotiate a regional consensus on the need for the archipelagic principle, a consensus that eventually united the states of Southeast Asia at the Third Law of the Sea Conference (UNCLOS III). The concept was a critical one, because as Indonesian diplomat Noegroho Wisnomoerti wrote:

> The nationhood of Indonesia is built on the concept of unity between the Indonesian islands and the inter-connecting waters. Those seas are regarded as a unifying, not a separating element. . .It was the first political manifestation of the concept of national unity which had inspired the nationalist movement, started in 1908, to lead the national struggle for independence.[2]

Similarly, the Constitution of the Philippines links the archipelagic principle to the national unity of the country:

> The national territory consists of the Philippine Archipelago which is the ancestral home of the Filipino people, and which is composed of all

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1 *See* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 15-18 (1983) [hereinafter 1982 LOS CONVENTION].

2 Wisnomoerti, *Indonesia and the Law of the Sea* in THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE 392 (C. Park & J. Park eds. 1987). *See also* Hamzah, *Indonesia's Archipelagic Regime*, 8 MARINE POL'Y 32 (1984).

> the islands and waters embraced therein. . .[t]he waters around, between, and connecting the islands of the archipelago irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.[3]

The critical passage in the 1982 LOS Convention's provisions on archipelagic states comes in Article 46(b) " '[A]rchipelago' 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."[4]

The land portions of an archipelago pose few jurisdictional questions. However, the different attitudes which the European states adopted in the seventeenth century towards land and towards sea have made the legal status of the "interconnecting waters" included in archipelagos by Article 46 problematical. In the case of land, exclusivity has been the rule; while the sea has been viewed as a commonage since the end of the debate between Hugo Grotius and John Selden over open and closed seas.[5] Freedom of the seas became the norm and was enforced by the navies of the imperial powers.[6]

Despite a steady erosion of this principle in state practice since

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[3] As quoted in Wirajuda, Politico-Legal Implications of the 1982 Law of the Sea Convention to the ASEAN States 75 (unpublished S.J.D. dissertation, University of Virginia 1988).

[4] 1982 LOS CONVENTION, *supra* note 1, at 15. While the archipelagic principle has become most closely identified with the Philippines and Indonesia, they are not the only states which can lay claim to archipelagic status. *See* D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 247 (I. Shearer ed. 1982). Churchill and Lowe, for example, count between twenty-five and thirty-five states which would fit the Article 46 definition cited above. *See* R. CHURCHILL and A. LOWE, THE LAW OF THE SEA 92-93 (1985). Additional states which fit the definition, but do not consider themselves archipelagic states include the United Kingdom, Ireland, New Zealand and Japan. Conditions imposed by Article 47 of the 1982 LOS Convention further reduce the number of states claiming archipelagic status.

[5] *See* T. FULTON, SOVEREIGNTY OF THE SEA 1-22 (1911); Ku, *The Concept of Res Communis in International Law*, 12 J. HIST. EUR. IDEAS 459-77 (1990).

[6] Freedom of the seas was already the practice in the Indian Ocean where Alexandrowicz hypothesized that "[T]he advocacy of the freedom of the sea by Grotius might have been to a great extent the outcome of his inquiry into maritime practice in the Indian Ocean in which a regime of *mare liberum* prevailed." Alexandrowicz, *The Afro-Asian World and the Law of Nations*, 123 HAGUE RECUEIL DES COURS 162 (1968).

State practice since World War II, however, including that of such former imperial powers as the United States, has steadily extended a state's jurisdiction into the commonage for purposes of military security, environmental protection, customs control and exploitation of resources. *See, e.g.*, Proclamation 2668, 10 Fed. Reg. 12304 (1945).

Further erosion to the principle of freedom of the seas came as a result of the 1951 Anglo-Norwegian Fisheries Case which allowed for special considerations in the delimiting of a state's territorial sea. *See* Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116.

World War II and, since the 1951 Anglo-Norwegian Fisheries Case,[7] an increased acceptance of special circumstances in the delimiting of a state's jurisdiction over adjacent waters, Indonesia and the Philippines devoted decades to winning acceptance of the archipelagic principle. The magnitude of the problem for the two archipelagic states was well demonstrated in the conclusions of the 1957 report prepared by Jens Evensen of Norway for the First United Nations Law of the Sea Conference (UNCLOS I).[8] Neither treaties nor state practice confirmed the special political, economic and security concerns of archipelagic states by recognizing a special legal status for their land and water.

II. The Search for an International Framework

The 1957 report began by trying to identify an archipelago as "a formation of two or more islands (islets or rocks) which geographically may be considered as a whole,"[9] but hastened to add that "[o]ne glance at the map is sufficient to show that the geographical characteristics of archipelagos vary widely."[10] A distinction was then drawn between coastal and mid-ocean archipelagos. The problem of delimiting territorial seas for states with ragged coastlines made up of coastal archipelagos had been addressed by the International Court of Justice (ICJ) in the 1951 Anglo-Norwegian Fisheries Case.[11] While directly applicable only to the two parties of the case, the ICJ's decision had far-reaching effect in lending weight to the use of straight baselines to delimit the territorial sea for states with unusual coastlines.

The problem of delimiting the territorial sea in the case of archipelagos "situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of or outer coastline of the mainland,"[12] was another matter. The Evensen report noted that:

> In addition to the difficulties arising out of the wide variety of the geographical characteristics and the specific economic, historical and political factors involved in each case, the legal approach to the questions involved is further complicated by the fact that such a host of different legal principles—sometimes conflicting—may be involved for the concrete delimitation of territorial waters.[13]

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7 Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116.

8 Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of the Archipelagos, Report by Jens Evenson, 1 U.N. Conf. on the Law of the Sea (Preparatory Document No. 15) at 289 U.N. Doc. A/Conf. 13/18 (1958) [hereinafter Archipelagos].

9 *Id.* at 290.

10 *Id.* at 289-90.

11 Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116.

12 Archipelagos, *supra* note 8, at 290.

13 *Id.*

To illustrate these difficulties, the report included a survey of earlier studies addressing maritime issues beginning with the late 1880s.[14] The first formal proposal acknowledging the special character and needs of archipelagos came in 1930 at the Hague Codification Conference.[15] A draft convention, commissioned by the League of Nations, included the provision that "[i]n the case of archipelagos, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the center of the archipelago."[16] Reactions to this draft in 1930 were predictably varied with some governments rejecting the idea that "archipelagos should be considered as a single unit."[17] In this view, each island would have its own band of territorial waters. Other governments maintained that a "single belt of territorial waters could be drawn around archipelagos provided that the islands and islets of the archipelago were not further apart than a certain maximum."[18] But there was no agreement on a maximum distance. A third position was that "archipelagos must be regarded as a whole where the geographical peculiarities warranted such treatment."[19] With these views in mind, the Hague Conference proceeded by trying to set a maximum distance between islands, beyond which they could not be considered as a unit for purposes of delimiting their territorial sea. The waters contained in the unit would not be considered as internal waters, but as "marginal seas."[20] Conference participants, however, were unable to reach agreement on a maximum distance and nothing was included in the final convention on archipelagos.

In the years between the Hague Conference and the completion of the International Law Commission's (ILC) 1956 draft articles on the high seas and the territorial sea, there was little progress. No archipe-

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[14] *See id.* at 290-91. *See also* O'CONNELL, which notes that:

> The question of assimilating clusters of coastal reefs and cays for the purpose of determining sovereignty thereover (sic) arose on several occasions during the nineteenth century, notably in the cays of Florida and Cuba, and the reefs and banks of the Bahamas and Bermuda. However, these were not, strictly speaking, instances of the coherence of islands and, even as late as 1920, diplomatic practice utilized the archipelago concept only as a criterion for the *political assimilation* of islands, and not for territorial sea purposes. O'CONNELL, *supra* note 4, at 237-38 (emphasis added).

[15] League of Nations, Acts of the Conference for the Codification of International Law, held at the Hague from March 13th to April 12th, 1930, Doc. C. 351.M. 145. 1930. v (as cited in Charney, *Technology and International Negotiations*, 76-78, 82 (1982)) [hereinafter Hague Codification Conference].

[16] Amended Draft Convention prepared by Schücking for the Committee of Experts of the Hague Codification Conf. of 1930, League of Nations Doc. C-196 M-70 1927 at 72 (1927) (*quoted in* Archipelagos, *supra* note 8, at 292).

[17] Archipelagos, *supra* note 8, at 292.

[18] *Id.*

[19] *Id.*

[20] *Id.*

lagic principle was included in the draft the ILC presented to UNCLOS I. The commentary accompanying the draft, however, noted that the commission had intended to supplement its general treatment of islands in Article 10 "with a provision concerning groups of islands," but that like the 1930 Hague Conference, "the Commission was unable to overcome the difficulties involved."[21] "The problem is similarly complicated by the different forms it takes in different archipelagos. The Commission was also prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject. . . ."[22]

Unable to discern any pattern based on a survey of available scholarship and state practice, Evensen concluded in his report that "every case must be treated on its individual merits. . .The geographical configuration of the archipelago concerned will be of primary importance for such determination, though other factors—such as historical and economical factors—may play a role."[23] It was thus left up to the states to decide what, if anything, should be done with the claims of mid-ocean archipelago states. At the heart of the international community's difficulty in designing generally applicable standards for a variety of island groupings was concern over the implications for international shipping of recognizing territorial jurisdiction over large portions of the earth's waters. Moreover, this dispute between the political/security interests of the archipelagic states and the passage interests of the maritime states had a third dimension: it pitted newly independent states against more established ones, many of whom had been colonial powers. Alluding to this division of interests, the Indonesian delegate to the 1958 Geneva conference remarked in exasperation that: "The fact that the nations most directly interested in the question were few and comparatively weak was no reason for leaving the problem unsolved."[24]

III. Colonial Origins of the Philippine and Indonesian Claims to Archipelagic Status

Philippine claims to archipelagic status stem from two treaties concluded between Spain and the United States in 1898 and 1900. Article III of the 1898 Treaty of Paris states that "Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within" a specified line.[25] This was supple-

[21] *Id.* at 293.

[22] *Id.* at 293-94.

[23] *Id.* at 302.

[24] 1958 U.N. Conference on the Law of the Sea, Summary Records 44, Doc. A/Conf. 13/42 [hereinafter U.N.C.L.O.S.].

[25] Treaty of Peace, Dec. 10, 1898, United States-Spain, art. II, para. 1, 30 Stat. 1754, T.S. No. 343.

mented by the 1900 agreement, in which Spain also ceded to the United States islands claimed by Spain on behalf of the Philippines lying outside of the lines used to define the Philippine archipelago in the 1898 treaty.[26]

The practice of using the archipelagic principle to define the territory of the Philippines was continued by the United States in the years of U.S. control of that territory.[27] The Philippines' neighbors, however, were reluctant to recognize the Philippine archipelago based on historic title because of claims to disputed territory. These included disputes with Indonesia over the Island of Palmas and with Malaysia over Sabah. Furthermore, Philippine claims of historic archipelagic status could only date from 1898, since the earlier Spanish Law of Waters of 1866[28] provided for territorial seas to the width recognized by international law rather than an all-inclusive archipelagic boundary.[29]

The Philippines, however, in the 1950s, continued its campaign for international recognition of its special geographical circumstances. The Philippines clearly stated its position in a note of December 12, 1955 to the Secretariat of the United Nations. Responding to the International Law Commission's draft articles on the high seas and territorial sea:

> The position of the Philippine Government in the matter is that all waters around, between and connecting the different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.[30]

The Philippine claim was not accepted by the international community. The reaction of the United States:

> [W]ith reference to the position of the Philippine Government quoted *supra* was that the lines referred to in bilateral treaties between the United States and the United Kingdom and Spain merely delimited the area within which *land areas* belong to the Philippines and that they were not intended as boundary lines. The United States, in 1958, stated that it recognized only a 3-mile territorial sea for each island.[31]

Consequently, the Philippines tried in the 1960s and 1970s to establish further legal bases for its archipelagic claims by defining its territory as

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26 Nov. 7, 1900, United States-Spain, 31 Stat. 1942, T.S. No. 345.

27 *See, e.g.*, Convention Delimiting the Boundary between the Phillippine Archipelago and the State of North Borneo, Jan. 2, 1930, United States-United Kingdom, 47 Stat. 2198, T.S. No. 856. "This treaty defined the Philippine Archipelago as: the territory acquired by the United States of America by virtue of the Treaties of December 10, 1898, and November 7, 1900, with Her Majesty the Queen Regent of Spain. . . ." *Id.*

28 O'CONNELL, *supra* note 4, at 247.

29 *Id.*

30 *As quoted in* 4 WHITEMAN D.G. INT'L L. 282-83 (1965).

31 *Id.* (emphasis added).

an archipelago in its domestic legislation and constitutions.[32]

For Indonesia, the archipelagic issue emerged at the time of independence in 1949, as the new state tried to define its national territory. The new government had decided that Indonesia would keep in force previously existing laws and regulations until new ones could be enacted. This included the 1939 Netherlands' Territorial Sea and Maritime Districts Ordinance (Territoriale Zee een Maritieme Kringen Ordonnantie)[33] which provided for a three mile territorial sea around each island of the Dutch East Indies—five large ones and several thousand smaller ones, of which four thousand are inhabited. This approach effectively chopped Indonesia into pieces, as the high seas between the islands were not subject to Indonesian jurisdiction. This maritime regime aggravated the difficulties Indonesia found in uniting an ethnically diverse country immediately following independence.[34]

Having won its independence from the Dutch, Indonesia was well aware of the importance of defining its territory in order to support political unification, and moved quickly to do so. As Wisnomoerti explained: "Such a foundation for our nationhood is indeed imperative for the survival of our nation, which consists of hundreds of ethnic origins with different cultural and social backgrounds as well as regional languages."[35] As Wisnomoerti further noted, Indonesia defines its national territory as "an inseparable land and water area [tanah air], of which ocean water is viewed as a unifying factor in an 'island studded sea space' of this vast archipelago."[36] There was practical necessity for this approach, as explained by the Indonesian delegate to UNCLOS I:

> The traditional method of measuring the territorial sea from the low-water mark was based on the assumption that the coastal State possessed a land territory forming part of a continent. In the case of archipelagos, such a system could not be applied without harmful effects. An archipelago being essentially a body of water studded with islands rather than islands with water around them, the delimitation of its territorial sea had to be approached from a quite different angle. In the opinion of the Indonesian Government, an archipelago should be regarded as a single unit, the water between and around the islands forming an integral whole with the land territory.[37]

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[32] Wirajuda, *supra* note 3, at 74-82.

[33] As cited in O'CONNELL, *supra* note 4, at 249.

[34] *See, e.g.*, Leifer and Nelson who write: "Governments in Indonesia have long exhibited an acute concern about the political integrity of an ethnically diverse archipelago which had no historical existence as a political entity before the administrative consolidation of the Netherlands East Indies." Leifer & Nelson, *Conflict of Interest in the Straits of Malacca*, 49 INT'L AFF. 190, 191 (1973).

[35] Wisnomoerti, *supra* note 2, at 392.

[36] *Id.*

[37] U.N.C.L.O.S, *supra* note 24, at 44.

Thus, in December 1957, the Indonesian Government issued the Djuanda Declaration, which called for the use of straight baselines joining together the outermost seaward points of the islands in the archipelago to outline the territorial limits of Indonesia including both islands and water. The declaration (Announcement on the Territorial Waters of the Republic of Indonesia) stated that:

> [H]istorically, the Indonesian archipelago has been an entity since time immemorial. In view of territorial entirety and of preserving the wealth of the Indonesian state, it is deemed necessary to consider all waters between the islands an entire entity.
>
> . . .On the ground of the above considerations, the Government states that all waters around, between and connecting, the islands or parts of islands belonging to the Indonesian archipelago irrespective of their width or dimension are natural appurtenances of its land territory and therefore an integral part of the inland or national waters subject to the absolute sovereignty of Indonesia.[38]

While the declaration had no legal effect, even for Indonesia domestically, it generated protests from France, the United States, the United Kingdom, Australia, the Netherlands, New Zealand and Japan. The Soviet Union and China, on the other hand, supported the claim as a gesture of friendship towards Indonesia, and because of their limited maritime interests at the time.[39]

In 1960, Indonesia acted to give substance to the Djuanda Declaration when it adopted Government Regulation No. 4 on Indonesian Waters, which called for "straight lines connecting the outermost points on the low water mark of the outermost islands" to delimit its territory.[40] The Philippines adopted similar internal legislation in 1961, calling for the use of straight baselines drawn by joining the outermost points of the outermost islands to establish the country's national territory.[41] The Philippines also removed references to historic title as the basis for its archipelagic claims.[42]

With this inconclusive background dating from their colonial past, the Philippines and Indonesia moved to gain recognition of the archipelagic approach at UNCLOS I. Their overtures were rebuffed in 1958 due to the Conference's inability to define an archipelago and to find a proper place within the existing framework of high seas and territorial sea for the waters included in an archipelago. Balancing the archipelagic states' political, security and economic needs that required exclusive jurisdic-

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38 Whiteman, *supra* note 30, at 284.

39 *Id.* at 284-85. *See also* Wirajuda, *supra* note 3, at 249.

40 As quoted in Wirajuda, *supra* note 3, at 38. *See also* Hamzah, *supra* note 2, at 30.

41 Republic Act No. 3046, An Act to Define the Baselines of the Territorial Sea of the Philippines (*cited in* Wirajuda, *supra* note 3, at 56).

42 Wirajuda, *supra* note 3, at 90-91.

tion, with the need to keep well-travelled sea lanes open and available to the world's shipping states proved impossible. The problem remained unresolved through UNCLOS II in 1960 which was unable to establish an acceptable width of the territorial sea. The archipelagic issue, which had been linked to the territorial sea issue since the 1930 Hague Codification Conference,[43] was once again put aside. After 1960, dissatisfied with the results of these two multilateral negotiations, the Philippines and Indonesia turned to bilateral negotiations within Southeast Asia to provoke movement on the international community's recognition of archipelagic states.

IV. THE ARCHIPELAGO PACKAGE

This reciprocal demand for recognition of sovereignty and safeguarding of user rights constituted the basis of the compromise finally struck on the archipelago issue at UNCLOS III and spelled out in Part IV of the 1982 LOS Convention.[44] The conference outcome reflected the separate arrangements made by the archipelagic states to win support for the archipelagic concept in the years leading up to UNCLOS III.[45] The 1982 LOS Convention's provisions on archipelagos contained three levels of assurance, the first and most specific of which was given to Malaysia in Article 47:

> If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.[46]

Secondly, a more general assurance was given to states in the region of the two archipelagic states—specifically, Singapore, Thailand and Japan—in Article 51, paragraph 1. The wording of this provision illustrated the nature of the linkage made:

> Archipelagic States shall respect existing agreements with other

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[43] League of Nations, *supra* note 15.

[44] United Nations, *supra* note 1.

[45] Indonesia, for example, concluded fifteen maritime boundary treaties with its neighbors prior to UNCLOS III. Less activity was required of the Philippines, whose archipelagic claim did not affect as wide a range of interests as did that of Indonesia. The 1947 Bases Agreement and the 1951 Mutual Defense Treaty between the Philippines and the United States took care of the major shipping and access to waterway concerns of the United States For texts, *see* Philippines Mutual Security, Jan. 4, 7, 1952, 3 U.S.T. 4644, T.I.A.S. No. 2617; Philippines Mutual Defense, Aug. 30, 1951, 3 U.S.T. 3947, T.I.A.S. No. 2529; Military Bases, Mar. 14, 1947, 61 Stat. 4019, T.I.A.S. No. 1775. [hereinafter 1947 Military Bases Agreement]. *See also* McDorman, *Implementation of the LOS Convention: Options, Impediments and the ASEAN States*, 18 OCEAN DEV. & INT'L L. 279-303 (1987).

[46] 1982 LOS CONVENTION *supra* note 1, at 15.

> States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions of the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.[47]

And finally, assurance was given to all parties in Article 52, in providing that "ships of all States enjoy the right of innocent passage through archipelagic waters. . . ." Paragraph 2 of Article 52 addressed the chief concern expressed by the archipelagic states—that of security:

> *The archipelagic State may*, without discrimination in form or in fact amongst foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships *if such suspension is essential for the protection of its security.* Such suspension shall take effect only after having been duly published.[48]

To safeguard, in explicit terms, the general balance struck by the above articles between the need for passage through the area (other than straits used for international navigation) and the archipelagic state's need for security, Article 53 gave the archipelagic state the right to regulate where and how ships and aircraft pass through its territory by designating specific sea lanes. Rights of passage through these archipelagic sea lanes are regarded as those of transit passage:

> (1) An archipelagic State may designate sea lanes and air routes thereabove, suitable for the safe, continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.
>
> (2) All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.
>
> (3) Archipelagic sea lanes passage is the exercise in accordance with the present Convention of the rights of navigation and overflight 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.[49]

Unlike bilateral agreements which specify and confirm the rights and duties of the archipelagic states vis-á-vis their "immediately adjacent" neighbors, the formula outlining the rights of passage for the wider international community, contained in Articles 52 and 53, remains

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[47] *Id.* at 16.

[48] *Id.* at 16-17 (emphasis added).

[49] *Id.* at 17.

largely unspecified and untested beyond the convention itself. Indonesia's temporary closing of the Sunda and Lombok Straits for military exercises in September 1988 began what will likely be a long process of testing and challenge to give both form and substance to the 1982 LOS Convention's mutually dependent concepts of archipelagic waters and archipelagic sea lanes passage.

Confusion stems, in part, from the three separate legal bases for passage through the narrow waters enclosed within the Indonesian and Philippine archipelagos. The three are: *innocent passage* (articles 17-32);[50] *transit passage* in straits used for international navigation (articles 34-44);[51] and *archipelagic sea lanes passage* through archipelagic waters and the adjacent territorial sea (articles 53 and 54).[52] The 1982 LOS Convention addresses all three legal bases, but does not establish a hierarchy in case of conflict.

The confusion is greatest in the case of Indonesia, which contains waters through which the regime of passage is innocent, straits through which the passage is transit, and archipelagic waters through which passage is archipelagic sea lanes. In all three cases, passage is allowed, but the right of the coastal state with jurisdiction over the waters in question to control passage varies depending on the regime. Of the three passage regimes, the least restrictive for the maritime states is transit passage through and over a strait used for international navigation because it allows the coastal state the least discretion in controlling passage.[53]

Both innocent passage and archipelagic sea lanes passage allow the coastal state discretion over how and when passage will take place.[54] In order to limit arbitrary disruptions to either the rights of transit passage or of archipelagic sea lanes passage, Articles 41 and 53 of the 1982 LOS Convention require states to work with "the competent international organization"—the International Maritime Organization (IMO) in the case of shipping and the International Civil Aviation Organization (ICAO) in the case of aircraft—prior to putting any restrictive regulations into effect.

The 1988 Sunda and Lombok straits' closing provided an example of the issues which will arise from implementation of the 1982 LOS Convention. Indonesia's unilateral action caused particular alarm, not only because the straits are commonly used shipping lanes, but also because of their strategic importance. Leifer noted:

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50 *See* 1982 LOS CONVENTION, *supra* note 1.

51 *Id.*

52 *Id.*

53 *Id.* arts. 37-38, at 12.

54 While passage over archipelagic sea lanes may be transit in character, designation of the sea lanes is left to the state with jurisdiction over the waters, including the option of not designating any such lanes at all.

> That of Sunda provides the most direct route between the U.S. naval base at Subic Bay in the Philippines and its military and communications facility at Diego Garcia in the Indian Ocean. The deep water Lombok Strait—together with that of Makassar to its north—provides an alternative route to that of Malacca for deep draught oil tankers en route from the Gulf to South Korea and Japan.[55]

Indonesia justified the action based on its "sovereign right to close the straits"—precisely the kind of unilateral action the 1982 LOS Convention tried to foreclose in Article 53—but tried to have it both ways.[56] On the one hand, it claimed rights over archipelagic waters, a specific creation of the 1982 LOS Convention. On the other hand, Indonesia maintained that it need not concern itself with the obligations of the 1982 LOS Convention because it was not yet in force. As Leifer pointed out, Indonesia "cannot deny the validity of the Law of the Sea Convention without also jeopardising (sic) its archipelagic status."[57] The inherent link made in the 1982 LOS Convention allowed for extensions of jurisdiction by the archipelagic states into areas previously regarded as the high seas *on the necessary condition* that rights of transit passage be maintained.

The question remains whether states which exercise rights of passage through such waters are required by the same inherent link to recognize archipelagic status even though they are not party to the 1982 LOS Convention. Two such states are the United States and the United Kingdom, which have refused to become parties to the convention, yet insist on rights of passage. The actions and arrangements of all concerned will ultimately determine the future integrity of the archipelago package.

V. REGIONAL INTERESTS

Having ratified the 1982 LOS Convention, the two chief proponents of the archipelago principle, Indonesia and the Philippines, are now obligated to enact national legislation to delimit their waters, to designate archipelagic sea lanes, and to ensure passage through these waters.[58] However, in the designation of archipelagic sea lanes, neither country has yet moved to inform the IMO of its designation of such sea lanes. They may be waiting for the entry into force of the 1982 LOS Convention before acting, but conflicts are brewing in the area, as both states already claim privileges derived from archipelagic status.[59]

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[55] Leifer, *Indonesia Waives the Rules*, 1989 FAR E. ECON. REV. 17 (Jan. 5, 1989).

[56] *Id.*

[57] *Id.*

[58] The Philippines ratified the 1982 LOS Convention with a declaration on May 8, 1984. Indonesia ratified the convention on Feb. 3, 1986. *See* 26 I.L.M. 1109-10 (1987).

[59] *See, e.g.*, the closure of the Lombok and Sunda Straits by Indonesia as discussed *supra* note 56, at 18-19.

In the case of the Philippines, fulfilling the terms of Article 53 on archipelagic sea lanes passage may require changes in the country's constitution, which rejects the concept of passage through its "internal waters."[60] Historically, this assertion has generated little objection from the major maritime powers, the one power with major interests here, the United States, having assured its navigational rights through bilateral treaties.[61] This situation may change, however, given expanded Soviet naval interests in the region and the current renegotiation of the U.S. bases agreements, due to expire in 1991. An indicator of changing Soviet attitudes was the U.S.S.R.'s objection to the Philippine ratification of the 1982 LOS Convention, accompanied by a declaration, permitted by Article 310 of the convention.[62] The Soviet Union, Bulgaria, Czechoslovakia, Byelorussia and the Ukraine objected that, in fact, the Philippines had made a reservation, which was expressly forbidden by Article 309.[63] They particularly objected to paragraphs 6 and 7 of the Philippine Declaration which stated that:

> 6. 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 lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security;
> 7. The concept of archipelagic waters is similar to the concept of in-

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[60] Constitution of the Republic of the Philippines, art. 1, sec. 1, *reprinted in* Constitutions of the Countries of the World (A.P. Blaustein & G.H. Flanz eds. 1991). Article 1, Section 1 of the 1973 and 1987 Constitutions of the Philippines states that: "The waters around, between, and connecting the islands of the archipelago [irrespective in 1973 version] [regardless in 1987 version] of their breadth and dimensions, form part of the internal waters of the Philippines."

[61] *See* Article IV of the 1947 Military Bases Agreement, *supra* note 45, which states that:

> United States vessels operated by or for the War or Navy Department, the Coast Guard or the Coast and Geodetic Survey, and the military forces of the United States, military and naval aircraft and Government owned vehicles, including armor, shall be accorded free access to and movement between ports and United States bases throughout the Philippines, including territorial waters, by land, air, and sea. . . .

D.P. O'Connell points out that, despite these assurances, the movement of nuclear powered ships and use of U.S. bases for military maneuvers may not be covered by the agreements and may require prior authorization from the Philippine government. *See* O'Connell, *Mid-Ocean Archipelagos in International Law*, 45 BRIT. YBK. INT'L L. 32-37, (1971).

[62] Article 310 states that:

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

1982 LOS CONVENTION, *supra* note 1, at 106.

[63] *See* 26 I.L.M. 1116-22 (1987); Gamble, *The 1982 U.N. Convention on the Law of the Sea: A "Midstream" Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV. 627 (1987).

> ternal waters under the Constitution of the Philippines, and removes straits connecting this water with the economic zone or high seas from the rights of foreign vessels to transit passage for international navigation.[64]

In practical terms, the Philippine Declaration does not contravene the convention, because the waters within the Philippine archipelago connect neither parts of the high seas nor exclusive economic zones and thus are not subject to the rights of transit passage as provided for in Article 53. Unlike Philippine waters, Indonesian archipelagic waters connect parts of the high seas and exclusive economic zones at several points: the Malacca, Sunda, Lombok, Ombai and Timor Straits. Wirajuda pointed out that this geographic reality had already prompted Indonesia to adopt something like archipelagic sea lanes through domestic legislation in 1962.[65] He also speculated on whether Indonesia's unilateral actions in 1988 to close its straits were taken to put the country in the best bargaining position when it came time formally to designate sea lanes through the IMO.[66] Despite the interests of the two countries, there has been no coordination between the Philippines and Indonesia to ensure expeditious passage for international shipping in the region.[67]

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[64] *Id.* at 1114.

[65] Wirajuda observed: "A close examination of the Government Regulation No. 8 of 1962 which governs such passage, reveals that it actually contains more than simply either a right or a facility of innocent passage. Its sealane [sic] provisions provide a genesis of what is now called the archipelagic sealanes passage." Wirajuda, *supra* note 3, at 136.

[66] *Id.* at 177.

[67] *Id.* Geographic logic, as well as strategic and technological necessity, may ultimately narrow the field of potential sea lanes in the two countries to those identified by Valencia and Marsh:

Major normal routes through Philippine archipelagic waters include:

1. Makassar Strait—Celebes Sea—*South of Mindanao*;
2. Makassar Strait—Celebes Sea—*Sibutu Passage*—Sulu Sea;
3. Pacific Ocean—*San Bernardino Strait—Verde Island Passage*—South China Sea;
4. Pacific Ocean—*Surigao Strait*—Sulu Sea—*Balabac Strait*—South China Sea;
5. Pacific Ocean—*Balintang Channel*—South China Sea;
6. South China Sea—*Palawan Passage*—West of Luzon—South China Sea.

Major normal passage routes through Indonesian archipelagic waters include:

1. *Malacca-Singapore Strait*—Java Sea;
2. *Malacca-Singapore Strait*—Natuna Sea;
3. Indian Ocean—*Sunda Sea—Gaspar Strait*;
4. Indian Ocean—*Lombok Strait—Makassar Strait*; 5. Timor Sea—*Ombai—Wetar Straits*—Banda Sea;
6. *Torres Sea*—Arafura Sea—*Ceram Sea—Halmahera Sea.*

Relative costs associated with the use of certain routes add an economic dimension to the importance of these waterways. Valencia and Marsh, for example, estimate that it would cost over U.S. $100 million a year to reroute Japan-bound oil tankers to the Lombok-Makassar Straits from the Malacca Strait. Valencia & Marsh, *Access to Straits and Sealanes in Southeast Asian Seas: Legal, Economic, and Strategic Considerations*, 16 J. MAR. L. & COM. 514-7 (1985).

VI. CONCLUSION

Acceptance of the archipelagic principle by the international community through the 1982 Law of the Sea Convention was not only the product of hard and persistent bargaining by the Philippines and Indonesia. It was also an expression of the international community's awareness of the two states' need to find appropriate means of defining their national territory and exercising jurisdiction over that territory. Like all states which achieved independence in the rush to decolonization after World War II, both value highly the ability to chart their national courses without outside interference. Their concern for freedom of action is characteristic of the nations of the entire Southeast Asian region, where states, with the single exception of Thailand, were at one time, subjects of European colonial rule.

The same desire to achieve freedom from outside interference found expression in the 1976 Association of Southeast Asian Nations (ASEAN) declaration of the region as a Zone of Peace, Freedom and Neutrality (ZOPFAN). A Malaysian initiative, the declaration was based on a belief that "regional peace and stability can only be achieved if the region is free from outside interference and big power rivalries."[68] The lengths to which ASEAN members (currently Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand) go to avoid conflict within the region is indicative of their recognition that regional conflicts which are not solved by powers within the region will be solved by powers from outside the region. The Philippines and Indonesia clearly recognized, in the evolution of the concept of archipelagic states within the 1982 Law of the Sea Convention framework, that an effective balancing of regional interests and a regional consensus on the rights of archipelagic states were necessary preconditions to success on the international front.[69] Their efforts, through bilateral treaty frameworks, to arrive at a *modus vivendi* with their neighbors and principal partners, paid off in the Southeast Asian consensus at UNCLOS III. Recognition by the international community of the Philippine and Indonesian archipelagos fulfilled the two states' desire for international acceptance of an exception to the norm in defining their territory.

As a result, the development of the concept of archipelagic states was not only a benchmark in the codification of international law, but also a further step towards the integration of new states into the Westphalian system. The concept acknowledged the special needs of some states with regard to their territorial integrity and political stability. However, opportunities for both conflict and cooperation continue to exist as a result of the acceptance of the archipelagic principle. The ability

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[68] *Id.* at 549.

[69] *See* Wirajuda, *supra* note 3.

of the Philippines and of Indonesia now to maintain that political stability and to advance their interests while maintaining regional harmony will be the test of their strength and vitality as independent states.