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# THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA AND AN ARCHIPELAGIC REGIME

## INTRODUCTION

The Third United Nations Conference on the Law of the Sea is somewhat unique in the annals of international law in that it does not seek to merely codify existing practices among nations. In March 1976, the third session of the Conference<sup>1</sup> will attempt to initiate or make law governing the vast expanses of the sea. One specific issue that will be discussed is the establishment of a regime<sup>2</sup> for the world's archipelagos.

The term archipelago originally referred to a broad sea (the Aegean) interspersed with many islands. Over the course of time, however, the land grouping itself came within the meaning of the term.<sup>3</sup> Although no precise definition exists due to the variety of formations inherent in such groupings,<sup>4</sup> it will suffice for the purposes of this Comment to characterize an archipelago as "a formation of two or more islands which geographically may be considered as a whole."<sup>5</sup>

During the past fifty years, considerable controversy has taken place concerning delineation of the legal boundaries of sea domain for the various archipelagos and, more importantly, classification

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1. Actually there have been three sessions of the Conference. The first session, which took place in New York in 1973, was procedural in nature. The two substantive sessions were convened in Caracas from June-August, 1974 and Geneva from March-May, 1975.

2. A regime is a form of government or administration.

3. Hodgson, *Islands: Normal and Special Circumstances*, in *LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS* 157 (Gamble & Pontecorva eds. 1973).

4. There is a conceptual difference, for example, between coastal and mid-ocean archipelagos. See notes 54-57 *infra* and accompanying text.

5. Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, U.N. Doc. A/CONF.13/18 (1957), reprinted in *I OFFICIAL RECORDS, UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA* 289, 290 (1958).

of waters included therein.<sup>6</sup> This Comment will examine the problem inherent in the question of boundary delimitations, explain the fruitless attempts at codification of a system of rules and then evaluate the impact of present proposals embodied in the Informal Single Negotiating Text.<sup>7</sup>

#### THE PROBLEM

In general, the territorial sea of a State is measured from the low-water mark of the coastline, and extends to a line which at every point is equidistant from the nearest land.<sup>8</sup> While appropriate to a land mass with a relatively regular coastline, this method may be impractical or dysfunctional when applied to irregular geographical circumstances.<sup>9</sup> In that case, a system of straight baselines may be drawn.<sup>10</sup> It has been contended that with regard to archipelagos the general rule is applicable, *i.e.*, each individual island exercises jurisdiction over its own belt of territorial waters.<sup>11</sup> But a growing body of opinion recognizes that within reasonable limits, a straight baseline method may be used to connect the outermost islands in the formation, until intervening waters are closed,<sup>12</sup>

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6. See generally O'Connell, *Mid-Ocean Archipelagos in International Law*, in *THE BRITISH YEARBOOK OF INTERNATIONAL LAW* 1 (1971).

7. This document, informal in nature, was intended to provide a meaningful basis for negotiation. It was the opinion of many participants in the Conference that a codification of principles in this form would account for the divergence in views without prejudice to negotiating positions. U.N. Doc. A/CONF.62/WP.8/Part II (1975). [hereinafter cited as Negotiating Text].

8. See Convention on the Territorial Sea and Contiguous Zone, done at Geneva, Apr. 29, 1958, arts. 3, 6, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

9. *E.g.*, "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity . . ." *Id.*, art. 4.

10. *Id.*

11. The United States in particular has been a proponent of this position. See, *e.g.*, *CAB v. Island Airlines Inc.*, 235 F. Supp. 990 (D. Hawaii 1964). There was a contention, in that case, on the part of an airline in Hawaii, that its ferrying of passengers between the islands of the chain was intrastate commerce. The federal court, recognizing United States policy in delimiting the boundaries of each island individually, concluded that the waters lying between the islands were high seas. Therefore the airline was subject to regulation as part of interstate commerce.

12. Klein, *The Territorial Waters of Archipelagos*, 26 *FED. B.J.* 317 (1966). The archipelagic nations, however, say that this should be applicable, irrespective of distance. *Id.* at 318.

from which the territorial sea may be measured. These baselines, in effect, become the artificial coastline of the State.<sup>13</sup>

Under a straight baseline approach, large portions of heretofore open sea areas would become subject to the control of the archipelagic State.<sup>14</sup> Not only is the extent of jurisdiction important, but also the degree of control which that jurisdiction entails. If, for example, archipelagic waters are considered internal, foreign States would not be allowed access in the absence of consent. Should the area be termed territorial sea, innocent passage would exist<sup>15</sup> but no right of overflight or submerged navigation would be allowed without authorization.<sup>16</sup> Any of the aforementioned rights are allowable in areas designated as high seas.<sup>17</sup> The gravamen of the problem involves the classification of waters rather than merely the extent of jurisdiction per se. Consequently, any solutions will necessarily involve not only the permissibility of delineation by the use of baselines, but also the designation of the contained waters.

#### ATTEMPTS AT CODIFICATION

Claims of archipelagic unity, in order to encompass waters outside of recognized territorial limits, are not new. In the 1890's, a dispute arose over the classification of waters lying within the Burmese archipelago. Burma was claiming exclusive use of the area in order to protect indigenous oyster banks. New Zealand pearling interests, on the other hand, contended this area was open seas and not subject to Burmese control. In that case, the law officers of the Crown decided that since the oyster banks were at a greater distance from shore than the permissible territorial limits (at that time three nautical miles from the nearest land), Burma was precluded from exercising dominion.<sup>18</sup>

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13. R. HODGSON & L. ALEXANDER, TOWARDS AN OBJECTIVE ANALYSIS OF SPECIAL CIRCUMSTANCES 23 (Law of the Sea Institute, Occasional Paper No. 13, Kingston, R.L., 1972).

14. Indonesia's claim, for example, encompasses an additional 98,000 square nautical miles. STATE DEP'T BUREAU OF INTELLIGENCE RESEARCH (Office of the Geographer), INTERNATIONAL BOUNDARY STUDY-SERIES A-LIMITS IN THE SEA, STRAIGHT BASELINES: INDONESIA, No. 35 at 1, 8 (1971).

15. Innocent passage can be described as proceeding through the territorial waters of a State without consent, so long as it is not prejudicial to the peace, security or good order of the coastal State. Convention on the Territorial Sea and Contiguous Zone, *done at Geneva*, Apr. 29, 1958, art. 14, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

16. *E.g.*, *id.* para. 6: "Submarines are required to navigate on the surface and to show their flag."

17. Convention on the High Seas, *done at Geneva*, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

18. O'Connell, *supra* note 6, at 3-4.

In the early part of this century, a gradual shift of opinion was discernible in favor of the establishment of an archipelagic principle. In 1924, at the 33d Conference of the International Law Association, a proposal was made by Chairman Alvarez that island groupings should be considered a unit and territorial waters measured from the outermost islands.<sup>19</sup> But by the following year, when the final draft of articles concerning the territorial sea were made at the Association's 34th Conference, the archipelagic provision was no longer included, without mention as to reason.<sup>20</sup>

The Institute De Droit International in 1927, also discussed the problem and a draft article was prepared.<sup>21</sup> In the same year, as prestigious an international figure as Jessup, in his *Law of Territorial Waters*, also lent support to archipelagic unity theories.<sup>22</sup>

There was, therefore, considerable impetus for the establishment of an archipelagic regime at the Hague Codification Conference of 1930.<sup>23</sup> At that conference it was proposed 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."<sup>24</sup> But due to a lack of consensus on the subject, and absence of "technical details,"<sup>25</sup> the separate provision for archipelagos was abandoned.<sup>26</sup> It is worthy of note that there was some support for a ten nautical mile maximum distance for baselines connecting the islands. This was in conformity with established rules on the applicable length of closing lines for bays.<sup>27</sup>

19. REPORT OF THE 33D CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION, STOCKHOLM 259 *et seq.* (1924).

20. REPORT OF THE 34TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION, VIENNA 40 *et seq.* (1926).

21. Comment, *The Problems of Delimitations of Baselines for Outlying Archipelagos*, 9 SAN DIEGO L. REV. 733, 737 (1972).

22. P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 457 (1927).

23. "The Codification Conference was appointed by the League of Nations in 1924 to prepare a conference for the codification of international law." Comment, *supra* note 21, at 738 n.20.

24. 8 LEAGUE OF NATIONS OFF. J. 70, 72 (1927).

25. Among the "technical details" referred to were (1) distances between islands in the archipelagos and (2) amount of water to be encompassed by the territorial sea extending outward from the formation. *Id.* at 51.

26. Evensen, *supra* note 5, at 292.

27. Closing lines are used to connect the headlands of a bay, from which

In 1951, the International Court of Justice (I.C.J.) handed down an opinion which was to have a significant impact on the claims of archipelagic nations, the *Anglo-Norwegian Fisheries Case*.<sup>28</sup> At stake was valuable fisheries area off the coast of Norway and the court was called upon by the parties to decide the validity of the lines of delimitation that Norway was claiming as its coastline. The method used was straight baselines, connecting the outermost islets and rocks on the island fringe on Norway's west coast, known as "skjaergaard."<sup>29</sup>

Several important questions were presented for resolution of problem. The first one was whether the technique of straight baselines applied to island formations as Norway claimed. The court answered affirmatively, stating that although originally designed for jagged coasts, the *inter fauces terrarum*<sup>30</sup> character of the skjaergaard was amenable to the straight baseline approach.

Second, if straight baselines were to be deemed a legitimate method of delimitation, what was to be the recognizable length of the individual line segments? Britain, following the seed planted in the Hague Codification Conference, analogized the situation to that of bays, where ten nautical mile closing lines had been used. The court, rather than imposing a rigid maximum distance, allowed lines up to 42 nautical miles long. Instead of a specific distance, various criteria were espoused for determining the reasonableness of a baseline. One important factor is the dependence of the territorial sea on the land domain. There must be sufficient flexibility to account for idiosyncratic characteristics of the region without departing from the general direction of the coast.

Concomitant with that requirement, it must also be established that the areas of sea to be enclosed are "sufficiently closely linked" with the land domain so as to be considered internal waters. And finally, it must be shown that the baseline delineation is a necessary adaptation to the local conditions.

These prerequisites having been satisfied, the I.C.J. concluded that the Norwegian baselines were fair and reasonable. In addition, however, the decision also pointed to an historic claim to the disputed area. Since 1869, Norway had continuously asserted, and the

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the territorial sea may be measured. The issue of closing lines is relevant to the question of archipelagos because it represents a criterion for the maximum distance allowable to connect land areas. See generally R. HODGSON & L. ALEXANDER, *supra* note 13.

28. [1951] I.C.J. 116.

29. Literally, a skjaergaard means "rock rampart." *Id.* at 128.

30. The term means "within the jaws of land," and implies an intimate connection between land and water domain.

international community had tolerated, the exclusive control of the area within the skjaergaard.

The result, therefore, was that Norway was entitled to the use of straight baselines connecting the outermost points of the formation. As will be seen, this decision was hailed by the archipelagic States in subsequent forums,<sup>31</sup> and used to justify unilateral assertions of sovereignty. It will also be shown that the *Fisheries* case differs in marked degree from the claims of those nations.

During the 1950's, a resolution of the problem of archipelagic boundary determination was as elusive as ever. The International Law Commission did not give extensive treatment to the issue, although it did examine the possibility of using a "fictive bay" analysis and a ten nautical mile maximum for baselines.<sup>32</sup> Predictably, however, the lack of agreement on the length of baselines led to a deletion of the article,<sup>33</sup> the criticism of some members notwithstanding.

The Geneva Conference of 1958<sup>34</sup> did not, in fact, take up the specific question of archipelagos, although initiatives were made by the Philippines<sup>35</sup> and Yugoslavia.<sup>36</sup> When it is kept in mind that no agreement could be reached at that conference for the breadth of the territorial sea, omission of the more expansive and difficult questions regarding archipelagos is understandable.

A second Law of the Sea Conference convened two years later for the specific purpose of establishing the breadth of the territorial sea. At this gathering the Philippines tried to extricate itself from the predictable effects on its claims should a specific breadth be

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31. See, e.g., Statement of Mr. Nandan (Fiji) before Subcommittee II of the Third U.N. Conference on the Law of the Sea, U.N. Doc. A/AC.138/SC.II/SR.53, at 65 (1973).

32. YEARBOOK OF THE INT'L LAW COMMISSION 217 (1955).

33. *Id.* at 195.

34. The results of the United Nations Conference on the Law of the Sea were embodied in four conventions; the High Seas, Territorial Waters and Contiguous Zone, Continental Shelf, and Fisheries.

35. The suggested Philippine addition to article ten was

[w]hen islands lying off the coast are sufficiently close to one another as to form a compact whole and have been historically considered collectively as a single unit, they may be taken in their totality and the method of straight baselines provided in Article 5 may be applied to determine their territorial Sea. O'Connell, *supra* note 6, at 20.

36. *Id.*

agreeable to the world community. It proposed, therefore, that no territorial water delimitation would be applicable to its "historic waters."<sup>37</sup> Though this proposal was rejected,<sup>38</sup> the issue became moot when the members of the Conference once again failed, this time by one vote, to agree on a territorial sea breadth.

#### UNILATERAL CLAIMS

"The delimitation of sea areas necessarily is always international in scope. It cannot be dependent merely upon the will of the coastal State expressed in municipal law."<sup>39</sup>

In light of the singular failure of international organizations to establish a regime for archipelagos, however, it is not surprising that several archipelagic States acted unilaterally during the latter part of the 1950's. The reasonableness of those claims with respect to competing interests must be subjected to careful scrutiny.

At the outset, it must be emphasized that the problems related to the establishment of an archipelagic regime are not solely geographic in nature; there are economic, political, environmental and military ramifications as well.<sup>40</sup> Underlying it all, "the extension of jurisdiction involved raises problems with regard to one of the most fundamental principles of contemporary law of the sea, *i.e.*, the freedom of navigation, and the existence thereof in archipelagic waters."<sup>41</sup>

Several arguments may be marshalled in defense of archipelagic unity. First, it is asserted that an economic interdependency between land and water exists to a greater degree than with most continental States. Inter-island travel and communication depends upon the unhampered use of intervening waters.<sup>42</sup> Fishing within the archipelago is of enormous importance and the impact of pollution on that major industry would have extraordinary consequences.<sup>43</sup>

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37. *Id.* This took the form of an amendment to a proposal excluding the applicability of any provisions of the territorial sea regime relating to historic waters.

38. The vote was 39 to 36, with 13 abstentions. OFFICIAL RECORDS, SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 151 (1960).

39. [1951] I.C.J. 116, 132.

40. Statement of Senator A. Tolentino, SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 70, 75 (1960) (verbatim Record of the Committee of the Whole).

41. Kusumaatmadja, *The Legal Regime of Archipelagos: Problems and Issues*, in THE LAW OF THE SEA: NEEDS AND INTERESTS OF DEVELOPING COUNTRIES 166-67 (Proceedings of the Seventh Annual Conference of the Law of the Sea Institute, 1972).

42. See generally A. CUTSHALL, THE PHILIPPINES 84 *et seq.* (1964).

43. Kusumaatmadja, *supra* note 41, at 166.



In addition, there are several political considerations. Stability in the State could be undermined should anyone desiring to promote unrest be given freedom of mobility within archipelagic waters. And the prevalence of smuggling, already a threat to the political and economic stability of certain States, would be likely to increase if sanctuaries are available within the archipelago.<sup>44</sup>

It is for some or all of the foregoing reasons that countries such as Indonesia, Mauritius, Ecuador (with regard to the Galapagos Islands) and the Philippines have claimed extended jurisdiction. Nevertheless, the arguments militating against the unity theory are not insubstantial.<sup>45</sup> Archipelagos have historically been shown to be a fertile ground for world-wide fishing interests. The waters contained within archipelagos provide vital conduits for commercial transportation to many parts of the world.<sup>46</sup> Finally, the military importance of sea and air mobility between strategic areas cannot be overlooked.<sup>47</sup>

To further elucidate these conflicting interests, the claims of the archipelagic nations of Indonesia and the Philippines, the two major proponents of an archipelagic regime, are examined in detail.

The Indonesian archipelago consists of over 13,000 islands, 3,000 of which are inhabited.<sup>48</sup> This formation, in its distribution of area, is approximately 3,000 nautical miles at its greatest length, and 1,300 nautical miles at its greatest width.<sup>49</sup>

Indonesia's claim was asserted by the Council of Ministers December 13, 1957. It stated:

The waters around, between and connecting the islands or parts of islands belonging to the Indonesian archipelago, irrespective of

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44. Grandison & Meyer, *International Straits, Global Communications and the Evolving Law of the Sea*, 8 VAND. J. TRANS. L. 393, 421 (1975).

45. M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 412 (1962).

46. See generally Kennedy, *A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic*, U.N. Doc. A/CONF.13/6 & Add.1 (1957).

47. See, e.g., Statement of the Soviet representative to Subcommittee II of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction (more commonly referred to as the Seabed Committee), U.N. Doc. A/AC.138/SC.II/SR.6, at 18 (1971).

48. McConnell, *The Legal Regime of Archipelagoes*, 35 SASK. L. REV. 121 (1970).

49. Klein, *supra* note 12.

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.<sup>50</sup>

To put this in terms of extent of control, the entire baseline system surrounding the archipelago is 8,167 nautical miles and encloses over 666,000 square nautical miles of sea.<sup>51</sup> As stated in the proclamation above, this entire area is considered to be subject to the regime of internal waters. The area enclosed by the baseline system is estimated at three and one-half times the amount of sea enclosed without baseline construction.<sup>52</sup> Further, it should be noted that some lines range up to 124 nautical miles in length.<sup>53</sup>

As stated previously, Indonesia supports the validity of its baseline construction in part on the basis of the *Fisheries* decision. This raises the question of the precedential value of the *Fisheries* case with respect to the situation of Indonesia. To answer that question a comparison must be made between coastal and mid-ocean archipelagos.

A coastal archipelago is one in which an island grouping or fringe is so closely associated with a land mass as to be considered part of it.<sup>54</sup> This is in contrast to the mid-ocean variety, which are formations without connection to a continental land mass.<sup>55</sup> In analyzing the *Fisheries* case it is important that the distinction be kept in mind.

The I.C.J. was presented with a configuration in which over 120,000 islands, islets and bare rock dotted the waters adjacent to the Norwegian coast. In the words of the court, "[t]he coast of the mainland does not constitute, as it does in most countries, a clear dividing line between land and sea. *It is the edge of the skjærgaard which really constitutes the coast.*"<sup>56</sup>

In the context of the unique situation before it, the court in the *Fisheries* case took cognizance of the fact that, in all practical respects, the archipelago formation was part of the Norwegian coastline, and therefore upheld the validity of the use of baselines. No such consideration is present in the case of mid-ocean archipelagos. The *Fisheries* case, for that reason, cannot be said to stand

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50. Reprinted in U.N. Doc. A/CONF.19/51 Add.1, at 3-4 (1960).

51. STATE DEP'T BUREAU OF INTELLIGENCE RESEARCH, *supra* note 14, at 8.

52. *Id.*

53. By comparison, the longest baseline drawn in the *Fisheries* case was 42 nautical miles. R. HODGSON & L. ALEXANDER, *supra* note 13, at 42.

54. Evensen, *supra* note 5, at 290.

55. *Id.*

56. [1951] I.C.J. 116, 127 (emphasis added).

for the proposition that all island groupings may employ baseline construction.

Assuming that the technique of baseline construction is applicable, the assertions of Indonesia and other archipelagic states fail on substantive grounds. In its opinion, the I.C.J. stressed the requirement of water being "sufficiently closely linked" with the land domain to be subject to the regime of internal waters.<sup>57</sup> The vast expanses of sea enclosed by the Indonesians cannot realistically be characterized as analogous to rivers, bays and other traditional examples of internal waters.

A second basis for asserting a straight baseline enclosure of archipelagic waters is the peculiar vulnerability of the nation.<sup>58</sup> For example, studies on the impact of pollution in the Straits of Malacca due to oil spills revealed serious resulting consequences to Indonesian communities who rely on those waters as a food source. Indonesia, therefore, in conjunction with Malaysia and Singapore, claimed a right to control tanker traffic in this area in 1971.<sup>59</sup>

There is a legitimate interest here, but legitimacy of the action depends not only upon Indonesian interests, but also the interests of the world community. This strait is an important link between Middle East oil fields and Japanese industry.<sup>60</sup> It has been estimated that should a threatened restriction on oil tanker transit become a reality, the cost of oil would increase approximately \$22 per barrel.<sup>61</sup> The implications of this rise in price are international in scope, due to the accompanying rise in the cost of Japanese products.

The resolution of this problem of conflicting interest is not easy. The point, however, is that solutions to international problems

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57. The inquiry cannot end at this point. Further distinction must be made as to the applicability of an innocent passage regime or the less rigorous rules of transit passage.

58. The Indonesian government has blamed a decline in their fishing industry on the transit of supertankers in its waters. U.N. Doc. A/AC.138/SC.II/SR.31, at 111-12 (1972).

59. Leiffer & Nelson, *Conflict of Interest in the Straits of Malacca*, 49 INT'L AFF. 190, 195 (1972).

60. Japan receives 80 percent of its oil from the Middle East. See Grandison & Meyer, *supra* note 44, at 417.

61. Miller, *Indonesia's Archipelago Doctrine and Japan's Jugular*, in U.S. NAVAL INSTITUTE PROCEEDINGS 26 (Oct. 1972).

cannot legitimately be grounded on unilateral action, even though well intentioned.

Philippine claims to areas of the sea as part of its sovereign territory make Indonesian claims pale by comparison. The Philippine archipelago consists of 7,104 islands (800 are inhabited),<sup>62</sup> and occupies an area which, at its greatest length and width, is 1,152 nautical miles by 688 nautical miles.<sup>63</sup> The baseline system employed differs from that of other archipelagic nations insofar as it rests, to some degree, upon historic grounds.<sup>64</sup>

In *notes verbales* sent to the International Law Commission in 1955<sup>65</sup> and 1956,<sup>66</sup> the Philippines claimed vast areas of the Pacific and South China Sea, in addition to waters lying within the archipelago. The second *note verbale*, dated January 20, 1956, states:

All waters around, between and connecting different islands belonging to the Philippines Archipelago, irrespective of their width or dimension, 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. All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington D.C. between the United States and Spain on 7 November 1900, the Agreement between the United States and Great Britain, as reproduced in section 6 of the Commonwealth Act No. 4003 and article 1 of the Philippines Constitution, are considered as maritime territorial waters of the Philippines . . . without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters.<sup>67</sup>

There are two areas of this claim which must be examined. The first deals with the sufficiency of the claim to a categorization of "inland" waters.<sup>68</sup> The interests to be protected here by the Philippines are those previously invoked on behalf of Indonesia, *i.e.*, economic dependency, security and political unity. The countervailing interests, in this case, are the mobility of military forces, as espoused by the United States and the Soviet Union,<sup>69</sup> and unhampered international commerce.

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62. Dellapenna, *The Philippines Territorial Water Claim in International Law*, 5 J. INT'L L. & ECON. 45, 46 (1970).

63. STATE DEP'T BUREAU OF INTELLIGENCE RESEARCH (Office of the Geographer), INTERNATIONAL BOUNDARY STUDY—SERIES A—LIMITS IN THE SEA, STRAIGHT BASELINES: THE PHILIPPINES, No. 33 at 8 (1971).

64. See C. COLOMBOS, INTERNATIONAL LAW OF THE SEA 122 (6th ed. 1967).

65. Reprinted in 10 U.N. GAOR Supp. 9, at 36 (1955).

66. Reprinted in Dellapenna, *supra* note 62, at 47.

67. *Id.*

68. The term "inland waters," for the purposes of this discussion, is synonymous with internal waters.

69. The Soviet Union favors a preservation of "customary rights" in these

One of the areas claimed by this country as inland waters is the Sulu Sea, covering an area of roughly 86,000 square nautical miles.<sup>70</sup> Baselines cutting off this area are approximately 140 nautical miles long. Much of this archipelagic nation's economy rests upon fishing in the area.<sup>71</sup> Additionally, the Philippines has constantly been plagued by smuggling in the more remote areas of the domain. The exclusion of foreign vessels in the area, therefore, is of substantial importance to the government.

As stated above, the interests to be protected in the Philippine archipelago by other nations is that of free transit, including the rights of submerged navigation and overflight.<sup>72</sup> The closing of these waters could, for example, make it more difficult and costly for American naval forces in the South Pacific (e.g., New Zealand) to reach Southeast Asia.<sup>73</sup> World travel could also be seriously impaired by the cutting off of East/West air routes in the central Pacific.<sup>74</sup>

Japan especially would be adversely affected by the categorization of waters as inland, since this precludes even customary rights of innocent passage. Exclusion from these routes of travel dramatically increases the cost of transportation of goods, and ultimately the prices of those goods.<sup>75</sup>

The other aspect of the Philippines' claim which warrants attention is that portion of the *notes verbales* dealing with an "historic claim." This additional area of asserted jurisdiction is, in some places, 285 nautical miles from the nearest land, thereby making it the most extravagant of seaward claims.<sup>76</sup>

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areas. U.N. Doc. A/AC.138/SC.II/SR.58, at 7 (1973). For the position of the United States, which envisions international regulation of transit, see statement of Mr. J. Stevenson before Subcommittee II of the Seabed Committee, U.N. Doc. A/AC.138/SC.II/SR.7, at 26 (1972).

70. Dellapenna, *supra* note 62, at 47.

71. CUTSHALL, *supra* note 42, at 8.

72. On the importance of the mobility of U.S. submarines, see Cohen, *The Erosion of Surface Naval Power*, 49 FOREIGN AFFAIRS 330 (1971).

73. Wilkes, *The Use of World Resources Without Conflict: Myths About the Territorial Sea*, 14 WAYNE L. REV. 441 (1968).

74. *Id.* at 466.

75. Grandison & Meyer, *supra* note 44, at 417.

76. Dellapenna, *supra* note 62, at 48. This outdistances even the 200-mile claims of Chile, Ecuador and Peru. See U.N. Doc A/AC.138/80, at 16 (1972).

Two justifications for the claim are put forth. The first is the description of boundaries in treaties, and the second is the *Fisheries* case. The Treaty of Paris at the conclusion of the Spanish-American War ceded all territories consolidated by Spain to the United States.<sup>77</sup> In order to avoid the necessity of naming each island individually, the parties delineated coordinates on a map, within which all land was transferred. It is the contention of the Philippines that these coordinates circumscribed the nation as a whole.<sup>78</sup> Consequently, when the Philippines acquired its independence from the United States in 1946, the area in question devolved to its control. The problem with this contention is that the documents purport to give *land* expressly within the coordinates, not *area*.<sup>79</sup>

The second attempt at justification is equally untenable. In the *Fisheries* case, Norway's claim to the area in question dated back almost 80 years, and the court emphasized this "long usage."<sup>80</sup> The Philippines' claim, by contrast, dates at best from 1955, as no mention of it can be found prior to that time. The United States had not made any such claim during the time of its possession of the archipelago. The intent to exclude is not greeted with toleration or acquiescence by the world community. The United States, for example, specifically rejects the contention<sup>81</sup> and the submerged navigation of the Triton through the Suriago Strait and the Mindanao Sea particularly illustrates this point.<sup>82</sup> The Philippines counters the argument by asserting that the voyage of the Triton was within the broad grant of consent embodied in the Agreement between the two nations concerning military bases.<sup>83</sup> But the Triton's voyage was a circumnavigation of the globe, not a visit to an American base in the Philippines. Therefore, the American position appears to be stronger.

It seems, at any rate, that unilateral attempts at establishing an archipelagic regime have not been wholly satisfactory. The impact

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77. For an extensive explanation of the Philippines historical claim, see statement of Senator A. Tolentino, *supra* note 40.

78. *Id.*

79. O'Connell, *supra* note 6, at 27.

80. [1951] I.C.J. 116, 133.

81. Klein, *supra* note 12, at 320.

82. Dellapenna, *supra* note 62, at 51.

83. Article four of the Agreement states:

It is mutually agreed that United States public vessels operated by or for the war or Navy Departments, the Coast Guard or the Coast and Geodetic Survey, and the military forces of the United States, military and naval aircraft and the Government-owned vehicles, including armor, shall be accorded free access to and movement between ports and United States bases throughout the Philippines . . . . 61 Stat. 4019, T.I.A.S. 1775.

of present negotiations in the law of the sea, to some extent, has been to alleviate some of the problems engendered by them.<sup>84</sup>

#### OTHER CLAIMS OF EXTENDED JURISDICTION

In 1945, an event occurred which was to have a profound impact on the law of the sea. That was a proclamation by President Truman, extending national jurisdiction to the resources of the continental shelf out to a depth of 200 meters.<sup>85</sup> This claim, it should be noted, was not an extension of American boundaries per se; its purpose was to create and preserve a right on the part of the United States to explore and exploit the seabed resources, particularly oil, off its shores.

Other nations, picking up on the theme espoused by America, also began making claims of extended jurisdiction. These new claims, however, were not necessarily confined to resources in the seabed. One important example of a variation on the American theme was the Declaration of Santiago, made by the nations of Chile, Ecuador and Peru.<sup>86</sup> That document purported to vest sovereign rights to an exclusive economic zone (primarily for the protection of fisheries) in an area extending 200 nautical miles seaward of the South American continental mass. This in turn led to an inexorable push for unilateral claims of extension by many nations in the 1950's and 1960's, with regard not only to economic zones but territorial jurisdiction as well.<sup>87</sup>

In a speech before the General Assembly of the United Nations in 1967, Mr. Arvid Pardo voiced a concern over the proliferation of claims to the use of the seabed beyond national jurisdiction. While noting the great potential of wealth to be derived therefrom, his central concern was that the ocean floor would be appropriated

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84. See, e.g., classification of archipelagic waters, *infra* note 95.

85. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Sept. 28, 1945; 59 Stat. 884.

86. Agreements between Chile, Ecuador and Peru, signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, Aug. 18, 1952, U.N. Doc. A/AC.138/80 (1955).

87. See generally STATE DEPT. BUREAU OF INTELLIGENCE RESEARCH, (Office of the Geographer), INTERNATIONAL BOUNDARY STUDY—SERIES A—LIMITS IN THE SEA, NATIONAL CLAIMS TO MARITIME JURISDICTION, No. 36 (rev. 1973).

by the major Cold War powers for military purposes (such as submerged missile sites).<sup>88</sup> To deal with this problem, he proposed the establishment of a committee under United Nations auspices.<sup>89</sup> As a result, the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction was organized.<sup>90</sup> This committee grew in the ensuing years, becoming a permanent United Nations committee which decided that a law of the sea conference was necessary to resolve many of the issues relating to national jurisdiction. The Third United Nations Conference on the Law of the Sea was then set for 1973, with preparatory sessions beginning in 1970.<sup>91</sup> One of the specific problems on the agenda was the classification and extent of waters to be encompassed by an archipelagic regime.<sup>92</sup>

At the first session of the Conference in Caracas, draft proposals were submitted by the interested nations. As with many other substantive issues, a wide divergence of opinion regarding the archipelagic regime was apparent. Therefore "[a]t its 55th plenary meeting on Friday 18 April 1975, the Conference decided to request the Chairmen of its three Main Committees each to prepare a single negotiating text covering the subjects entrusted to his Committee."<sup>93</sup> This document was to provide a basis for negotiation, incorporating, as much as possible, the positions of the interested parties.<sup>94</sup>

#### THE INFORMAL SINGLE NEGOTIATING TEXT

Part VII of the Second Committee's Negotiating Text deals specifically with archipelagic states. It defines one 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

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88. U.N. Doc. A/AC.1/P.V.1515, at 6 (1967).

89. Kildow, *The Law of the Sea: Alliances and Divisive Issues in International Ocean Negotiations*, 11 SAN DIEGO L. REV. 558, 561 (1974).

90. G.A. Res. 2340 (XXLL), Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Vol. 1, No. 21 (A/9021), at 1 (1973).

91. G.A. Res. 2750C, 25 U.N. GAOR Supp. 28, at 26 (1970).

92. U.N. Doc. SC.II/WG/Paper No. 4, at 3 *et seq.* (1970).

93. Note by the President of the Conference, Negotiating Text, *supra* note 7, at 1.

94. The aim of the Conference in adopting the new method for the future stage of its work would have been defeated had all trends been retained in this text. It was possible to amalgamate some of the alternative formulations but in other cases it was necessary to choose between conflicting proposals. In certain cases, a middle course was adopted. *Id.* at 2.



an intrinsic geographic, economic and political entity, or which historically have been regarded as such.<sup>95</sup>

In order to establish the entity described above, a method of straight baselines may be used.<sup>96</sup> There are, however, two restrictions for the drawing of these baselines. First, the area of water contained inside the baselines cannot exceed that of the land domain by a greater ratio than 9:1. Secondly, the prescribed maximum for baseline length is 80 nautical miles, but a certain percentage of the total number of lines (undetermined at present) may be longer, up to a maximum of 125 nautical miles.<sup>97</sup>

Both of these criteria weigh heavily in favor of the archipelagic states. They not only acknowledge the applicability of a straight baseline delineation of boundaries, but also give tremendous flexibility by their generous terms.<sup>98</sup> When it is remembered that, in addition to encompassing archipelagic waters, these lines are also used to measure the breadth of the territorial sea, contiguous zone and exclusive economic zone, the huge expanses of sea capable of enclosure become apparent.<sup>99</sup>

The term "archipelagic waters" is ostensibly a compromise designation. Whereas archipelagic nations favor a categorization of waters as internal, major maritime powers have fought for increased navigational rights. This distinct categorization of waters within the baselines, when taken in conjunction with other important provisions in the Text, seems to have combined the essential arguments of the polar views into a workable formula. Preliminary to an analysis of provisions dealing with the archipelagic waters, there-

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95. This alteration in the wording contrasts markedly from its fore-runners (e.g., Evensen, *supra* note 5). This definition distinguishes archipelagic status, for whom the provisions are applicable, and other island groupings i.e., coastal archipelagos and mid-ocean chains belonging to a coastal State (e.g., Hawaii).

96. Negotiating Text, *supra* note 7, art. 118, at 42.

97. This would seem to preclude some lines drawn by the Philippines, which are up to 140 nautical miles in length. This maximum distance, however, is negotiable, and there is a possibility it will be increased to accommodate the Philippines.

98. Hodgson, *supra* note 3, at 164. The author there suggests that a maximum ratio of 5:1 would be appropriate to ensure a close relationship between water and land. See also R. HODGSON & L. ALEXANDER, *supra* note 13, at 42, with regard to baseline length.

99. See note 14 *supra*.

fore, it will first be necessary to examine the relevance of the classification of other sea areas.

Within the area designated archipelagic waters, the archipelagic State may, in accordance with the provisions of the Text, draw closing lines for the delineation of internal waters.<sup>100</sup> Although this classification only refers to rivers emptying in the sea, bays, and permanent harbor works, it still allows a small measure of security to the archipelagic state. Moreover, when this provision is viewed in the context of the other elements of the archipelagic regime (e.g., the exclusive economic zone), it will not have as drastic effect on archipelagic interests as might first appear to be the case.

Outside the area delineated as archipelagic waters, the territorial sea, extending twelve nautical miles from the baseline system, is characterized by the traditionally recognized right of innocent passage.<sup>101</sup> As stated previously, innocent passage allows for the expeditious traversing of the territorial sea without consent, so long as it is not prejudicial to the peace, good order, or security of the coastal State. The Text may also vest a great deal of power and discretion in the coastal State as to what is to be considered innocent.<sup>102</sup> Submerged navigation and overflight here, as with internal water, is prohibited.<sup>103</sup> This belt of water surrounding the archipelagic formation acts as a protective buffer between archipelagic waters and the outlying areas of exclusive economic zone and high seas.

An exception to this general categorization of rights in the territorial sea is the right of transit passage in straits used for international navigation.<sup>104</sup> This concept is germane to the topic of archipelagos even though it applies to waters outside the straight baselines because it affects interests within (e.g., pollution problems). Transit passage entitles foreign ships and aircraft freedom of navigation and overflight, respectively, in transversing a strait

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100. Negotiating Text, *supra* note 7, art. 121, at 43.

101. *See id.* arts. 14-21.

102. Article 16(2) provides in part “[p]assage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state, if it engages in . . . [certain enumerated activities and] . . . any other activity not having a direct bearing on passage.” *Id.* art. 16, at 8-9. Although it is unclear at this time the activities included within this provision, it is certainly going to be construed literally by the archipelagic States.

103. *Id.* art. 17, at 9.

104. *Id.* art. 38(2), at 16. This is in marked contrast to the provision for innocent passage in the 1958 Convention. *See* Convention on the Territorial Sea and Contiguous Zone, *done at* Geneva, April 29, 1958, art. 16, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

which is completely enveloped by territorial sea. It would seem, therefore, that maritime interests have acquired a valuable concession in favor of international communication. But this right is subject to several conditions. The right is only assertable when transit is from one area of the high seas or economic zone to another area of high seas or economic zone.<sup>105</sup> Any strait not conforming to this condition is subject to "other provisions", i.e., innocent passage. This condition would, in effect, retain the provision for straits embodied in the 1958 Convention on the Territorial Sea, which allowed for innocent passage to and from the territorial sea of a foreign state. Moreover, if another route of "similar convenience" exists in either an exclusive economic zone or high seas, ships traveling through the strait will only be entitled to innocent passage.<sup>106</sup>

Another important element of the provision on straits is the power given to the strait State to promulgate regulations concerning safety of navigation, and other interests.<sup>107</sup> It was just this type of regulation which was attempted in the Straits of Malacca mentioned above.<sup>108</sup> It would appear then, that transit passage is not as free as it might first appear and could pose a serious stumbling block in the negotiations. The archipelagic States are given a modicum of control here, but if viewed in the totality of provisions in the new archipelagic regime, it is not insubstantial.

The contiguous zone, up to 24 nautical miles from the baselines described above, is designed to allow the coastal State to prevent and punish the infringement of customs, fiscal, immigration or sanitary regulations of a coastal State in that area.<sup>109</sup> Originally this concept was designed to prevent smuggling and other illicit activities just outside the territorial waters of a State, and for this reason was embodied in the 1958 Geneva Convention.<sup>110</sup> With the advent of exclusive economic zone theory and the powers given

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105. Negotiating Text, *supra* note 7, art. 37, at 15.

106. *Id.* art. 36, at 15.

107. This includes; a) safety of navigation, b) prevention of pollution, c) prevention of fishing, etc. *Id.* art. 41, at 17.

108. See notes 59-61 *supra*.

109. Negotiating Text, *supra* note 7, art. 33, at 14.

110. Convention on the Territorial Sea and Contiguous Zone, *done* at Geneva, April 29, 1958, art. 24, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

coastal States with regard to policing that area, the concept of a contiguous zone, to a great extent, will have outlived its usefulness.<sup>111</sup> In any event, it is at least theoretically beneficial to the archipelagic State to have such a zone as an added protection against infringements upon its sovereignty.

Probably the most fundamental change in the law of the sea which the United Nations Conference is seeking to achieve is that dealing with an expanse of water extending seaward a distance of 200 nautical miles, known as the exclusive economic zone. Basically, this concept involves an exercise of national jurisdiction for the purpose of establishing an exclusive right to resources (both living and nonliving) within that area.<sup>112</sup> It is relevant to the questions relating to a regime for archipelagos in three respects.

The first point of interest is that it renders moot the perennial problem of the delineation of baselines, insofar as they relate to economic interests within the archipelagic waters. Even in the absence of a strait baseline approach, a separate economic zone for each island (including areas of overlapping zones) would be more than enough to encompass the entire area of intervening waters. A major archipelagic concern, economic dependence on these waters, is thereby alleviated.

To a somewhat lesser extent, the concept of an economic zone also lessens much of the force of arguments regarding areas outside the straight baselines. A distinct zone for each individual island would encompass much of the area which now comes under archipelagic control with the use of straight baselines. Therefore, at least with respect to economic interests, the long-standing issue of baselines seems to have lost much of its controversial character.

Secondly, the economic zone provides for coastal State exclusivity in the area of resources.<sup>113</sup> Archipelagic States will have this

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111. Aguilar, *The Patrimonial Sea or Economic Zone Concept*, 11 SAN DIEGO L. REV. 579, 597 (1974).

112. See generally Johnson & Gold, *The Economic Zone in the Law of the Sea: Survey Analysis of Current Trends*, in *THE LAW OF THE SEA: NEEDS AND INTERESTS OF DEVELOPING COUNTRIES* 7 (Proceedings of the Seventh Annual Conference of the Law of the Sea Institute, 1972).

113. Negotiating Text, *supra* note 7, art. 48 providing for exclusive rights to construction of offshore facilities, scientific research, allowable catch of living resources etc.

The Negotiating Text also provides that there should be an optimum utilization of the zone. Where full utilization is not realizable by the coastal State, foreign States may be allowed access consistent with the national interests of the coastal State. In practice, however, the coastal State will be able to effectively exclude outside interests under the broad grants of power discussed herein.

interest protected and, in addition, will receive the benefit of a protective buffer for living resources within the archipelago itself. Migratory species of fish indigenous to archipelagic waters will not be as susceptible to foreign fishing fleets outside the archipelago, due to the greater distances involved.

Finally, the economic zone will, in all likelihood, contribute to the domestic security of the archipelagic State. Article 60 provides in part:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations enacted by it in conformity with the provisions of the present Convention.<sup>114</sup>

The ramifications of this statement are considerable when it is remembered that certain undesirable activities, smuggling for example, are largely centered in that area just outside coastal State jurisdiction. Power to board, inspect and arrest in this zone should, to a substantial degree, have a deterrent effect.

As for the archipelagic waters itself, nowhere is the dilemma of choosing between competing interests more apparent. In economic terms, the archipelagic States have succeeded in preserving a unified whole. And although the interests in security are in great measure supported by various other provisions in the area of archipelagic waters, security interests defer, to some extent, to the competing claims of the world community. The principal focus here is upon the issue of passage. Article 123 of the Negotiating Text states: "Subject to the provisions of Article 124, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through archipelagic waters."<sup>115</sup>

This position undeniably favors the economic interests of the world's sea powers as it allows for international shipping. But although this provision undercuts the claims of States desiring the categorization of such waters as internal, it is not inconsistent with the actual practice of those States.<sup>116</sup> The article also includes

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114. *Id.* at 25.

115. *Id.* at 43.

116. In effect, innocent passage is the prevailing practice in these waters today. Dellapenna, *supra* note 62, at 48-49. But their categorization as in-

the power to suspend innocent passage when necessary to protect the State's "security"<sup>117</sup>—a rather encompassing phrase—which helps to preserve the interest in having secure waters.

The Negotiating Text then purports further to erode archipelagic security interests with a rather large exception to the regime of innocent passage. This is called the right of "sealanes passage."<sup>118</sup> Sealanes passage is to archipelagic waters what transit passage is to the territorial sea. The archipelagic State may (not "will") designate sealanes and air routes in its water "for the safe, continuous and expeditious passage of foreign ships and aircraft . . ."<sup>119</sup> On the other hand, there is also a provision that if no such sealanes or air routes are designated, "passage may be exercised through the routes normally used for international navigation."<sup>120</sup>

The import of sealanes passage obviously favors the maritime powers. Rights of submerged passage and overflight, long contended a *sine qua non* of the negotiations (at least as far as the United States was concerned),<sup>121</sup> is thereby established, even without archipelagic State approval.

Upon closer scrutiny, however, all is not one-sided in sealanes passage. The exception is subject to qualifications of its own. For example, a restricting feature of the provision is that it applies only to transit between one part of the high seas or economic zone and another part of the high seas or economic zone.<sup>122</sup> In excluding the right of sealanes passage to or from the territorial sea or inland

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ternal implies that passage is predicated upon consent rather than right. Therefore, the new regime is necessary to guarantee these rights.

117. Negotiating Text, *supra* note 7, art. 123(2), at 43.

118. *Id.* art. 124, at 43-44.

119. *Id.*

120. *Id.* This is a reference to those routes established by State practice. See note 116 *supra*. But these provisions are couched so that additional sealanes are not introduced without archipelagic State approval.

121. This is equitable with the United States position on international straits. See, e.g., Statement of Leigh Ratiner (Chairman of the Defense Advisory Group on the Law of the Sea) at the *Hearings on Territorial Sea Boundaries, before the Subcomm. on Seapower of the House Comm. on Armed Services, 91st Cong., 2d Sess., at 9291 (1970)*. Indicative of the strong stand the United States would take should movement of its military forces be restricted, he said:

We do not recognize the 12-mile territorial sea, and it is doubtful that if we fail to obtain the necessary protection through international straits at a conference, that we could accept the territorial sea. We would as a matter of high national security priority have to maintain that we are only bound to recognize the 3-mile limit . . . . *Id.*

122. Negotiating Text, *supra* note 7, art. 124(3), at 44. This is consistent with a similar provision dealing with international straits. See note 104 *supra*.

waters of a foreign State, the drafters minimized the number of areas subject to this regime. Presumably, only the regime of innocent passage would then be applicable.

An additional mitigating factor favoring archipelagos is the retained ability on the part of the archipelagic State to promulgate regulations which would protect key concerns. Illustrative of this point is article 125 which provides, in part, a restriction on "the taking on board or putting overboard of any commodity, currency, or person in contravention of the customs, fiscal, immigration or sanitary regulations of the archipelagic State."<sup>123</sup> Compliance with these regulations, mandated in the same article,<sup>124</sup> should serve to counterbalance the sway in favor of the maritime, developed States.

#### CONCLUSION

In this analysis of the status of archipelagos at the Third United Nations Conference on the Law of the Sea, two central questions have been addressed. The first deals with the extent of archipelagic jurisdiction through the establishment of a system of straight baselines. Probably of greater importance, though, is the second question—the various classifications of waters in the delineated areas. These classifications necessarily relate to the competing interests of the developed maritime States and the developing archipelagic States.

After decades of debate and disagreement concerning the status of archipelagos, the Informal Single Negotiating Text has provided a regime. The history of the dispute, from the early 1900's, through several international conferences and up to the present, might, at first, lead one to conclude that this formulation of rules is also doomed. Several important considerations, however point to a different outcome.

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123. Negotiating Text, *supra* note 7, art. 125, at 44-45. Further, the archipelagic State may make regulations substantially similar to those enumerated in provisions relating to the exclusive economic zone. See note 112 *supra*. This is contrary to the wishes of the developed countries, who are seeking international controls. Statement of Mr. J. Stevenson before Subcommittee II of the Seabed Committee, U.N. Doc. A/AC.138/SC.II/SR.7, at 26 (1972).

124. Negotiating Text, *supra* note 7, art. 128(4), at 46.

Initially, it must be remembered that several archipelagic nations have already taken steps, unilaterally, to ensure a degree of sovereignty in the waters surrounding them. In this respect the Negotiating Text must fashion a regime without forcing those States to retreat too much from positions embodied in their national law. Absent resolution by the Conference, the issue may indeed be overtaken by events.

Crucially important to evaluating the feasibility of an archipelagic regime is an understanding of the various interests in the world community generally. This is an age where many traditional concepts of international law are being called into question. The developing nations of the world, intent on reaching parity with the more developed nations, see this Conference as a golden opportunity. The flavor of the Negotiating Text reflects this attempt to seize that opportunity. Many sections of the document bend in favor of the developing nations, from the extension of coastal State jurisdiction generally, to the specified provisions related to control over those areas.

The regime for archipelagos must be viewed in light of the tension engendered by this change in circumstances. While once considered expansive in allowing large areas of sea to become controlled by the archipelagic State, it is now only a reflection of the greater trend in the recent negotiations. On the other side of the coin, the reservation of certain rights within archipelagic waters, *i.e.*, sealanes passage, is but one aspect of the developed nations' insistence on freedom of navigation. The archipelagic regime is therefore indicative of a trade-off, a compromise between the interests of the developing and developed factions.

The foregoing points to the underlying fact that an archipelagic regime is inextricably bound to a new world order with respect to the sea. The ultimate success or failure of the archipelagic regime therefore hinges upon agreement in many other aspects of the negotiations. To that extent nothing is certain. But given the impetus of a growing number of unilateral claims and a present consensus on the necessity of a unified law of the sea, the probabilities are in favor of a regime for archipelagos. Should a regime be established, its provisions, in all likelihood, will bear a substantial similarity to those discussed herein.

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