

# The Indonesian Archipelagic State Doctrine and Law of the Sea: “Territorial Grab” or Justifiable Necessity?

## Introduction

During the Third U.N. Conference on the Law of the Sea meetings in Caracas and Geneva over the past two years, the Indonesian delegation has been proceeding diligently and diplomatically to gain acceptance for an important exception to the heretofore generally recognized maximum limits of national jurisdiction of coastal states. This exception, which has been called the archipelagic state doctrine, has caused considerable concern among the major maritime powers as well as Indonesia's immediate neighbors in Southeast Asia, due to its possible impact on international navigation, territorial claims and rights to exploit the living and non-living resources of the sea. Simply stated, the archipelagic state doctrine holds that all waters contained within the baselines drawn around the outer islands of a state which is entirely formed by one or more archipelagoes are the internal waters of that state and subject to its sovereignty. If one considers that Indonesia stretches for approximately 3,200 miles across one of the most strategic and resource-rich stretches of ocean in the world, the possible inclusion of the archipelagic state doctrine in the final result of the U.N. Law of the Sea Conference assumes major importance. Although several other states, notably the Philippines and Fiji, have an interest in the acceptance of the doctrine, Indonesia stands to gain by far the largest benefits from its inclusion in any new convention on the law of the sea.<sup>1</sup> Thus, Indonesia has been the main proponent and supporter of the archipelagic state doctrine, and it is the Indonesian position to which we should turn for an analysis of the legal and geopolitical import of the doctrine.

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<sup>1</sup>According to rough estimates, Indonesia would gain over 3 million square kilometers of territory, almost tripling its present land area. See Kusumaatmadja, *Perkembangan Hukum Laut Indonesia Dewasa Ini*, 6 PADJADJARAN L.J., No. 1-2, at 9 (Jan.-April 1975).

The official government handbook on Indonesia states that Indonesia's history has "always been conditioned by geography" because of the strategic location of the Indonesian archipelago.<sup>2</sup> Such has also been the case with the Indonesian position on law of the sea in general, and the archipelagic state doctrine in particular, since the beginning of independence. It is thus understandable how Indonesia's unique position as the world's largest archipelago would lead to the development of a correspondingly unique legal doctrine to delimit the expanse of national territory.

The population of Indonesia, estimated at over 125 million people, is distributed over some 13,677 islands in the network of archipelagoes which constitutes the Republic of Indonesia. About 6,000 of these islands are inhabited, from Sumatra in the west to Irian Jaya (western New Guinea) over 3,000 miles to the east. Thus, the sea, as the link between these thousands of islands, constitutes an important element in the national consciousness of Indonesians.<sup>3</sup> Politically, the importance of the sea has been apparent from the early days of the Republic, both in its potential as a unifying factor and as a barrier. The latter potential was particularly evident to Indonesian nationalists because of the number of serious separatist uprisings challenging the authority of the central government on Java during the early years of independence.<sup>4</sup> The notion that the seas separating the major Indonesian islands are high seas not subject to national jurisdiction, which was the legal position inherited from the Dutch colonial legal system,<sup>5</sup> was perceived to lend support to the separatist claims for autonomy or sovereignty.

The economic significance of the ocean resources in and under the waters of the Indonesian archipelago has also been of no small significance in the development of the Indonesian position on the proper legal regime to govern them. Petroleum, the most important Indonesian export product, and seafood, a staple of the Indonesian diet, are only two of the many natural resources of the sea which are viewed as essential for Indonesian development. Thus, a broader claim to sovereignty over the ocean area surrounding the Indonesian islands has served an economic as well as a political purpose for the Indonesian government.

### **Development of the Archipelagic State Doctrine in Indonesia**

Historically, the archipelagic state doctrine is quite a new legal concept for the ocean regime in Indonesia. Since the Middle Ages at least, state practice

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<sup>2</sup>Republic of Indonesia, Department of Information, *INDONESIA HANDBOOK* (1974), at 9.

<sup>3</sup>See H. JONES, *INDONESIA: THE POSSIBLE DREAM* (1971) at 3.

<sup>4</sup>*Id.* at 69-71. See also A. SIEVERS, *THE MYSTICAL WORLD OF INDONESIA: CULTURE & ECONOMIC DEVELOPMENT IN CONFLICT* (1974) at 165, 176.

<sup>5</sup>See text to note 9 *infra*.

in the region, although later influenced by the European colonial powers, had recognized the existence of high seas between the islands, over which no state could exercise its sovereignty.<sup>6</sup> The arrival of the European powers, with their ambitions for colonial empire, brought with it the concept of *mare clausum* and significant inroads into the indigenous Asian maritime custom of freedom of the high seas.<sup>7</sup> However, the Dutch interest in the East Indies, supported by the legal doctrine of *mare liberum* developed by Grotius and others, necessitated advocacy of the principle of freedom of the high seas, in contradiction to the Portuguese and Spanish view.<sup>8</sup> With the gradual achievement of supremacy by the Dutch in the East Indies during the 18th and 19th centuries, the original customary law position came to be restored in the form of Dutch practice.

The law of the Dutch East Indies colony on the limits of national jurisdiction over coastal waters, which still applied in independent Indonesia until specifically repealed in 1963, provided that territorial waters in the colony extended three miles offshore, measured from the high-tide lines of the various islands.<sup>9</sup> Thus, all waters beyond the three-mile limit were legally a part of the high seas, both under the municipal law of the Indonesian islands and under international law. As a result, the major parts of the Sunda, Java, Celebes and Banda Seas, which form the "heart" of the Indonesian archipelago, were considered high seas, outside the national jurisdiction of the Dutch colonial government and its successor state, the Republic of Indonesia. As noted previously *supra*, the government of the newly independent Republic became increasingly uncomfortable with a legal regime for Indonesian waters which it perceived as a threat to its political and economic survival.

The first concrete action taken by the Indonesian government to alter the existing legal regime was the promulgation of a "Proclamation on the Territorial Waters of the Republic of Indonesia," in 1957.<sup>10</sup> The Proclamation, issued by Prime Minister Juanda with the approval of his Council of Ministers,

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<sup>6</sup>C. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (1967) at 64-65.

<sup>7</sup>*Id.* at 65. The Portuguese, especially, attempted to limit the access of competitors to the high seas in the East Indies.

<sup>8</sup>*Id.* It is interesting to note that Grotius apparently derived support for his treaties from the original Asian practice. See ALEXANDROWICZ, *supra* note 6, at 65.

<sup>9</sup>Ordinance of April 18, 1939, Concerning the Territorial Sea and the Maritime Domain, (1939) Staatsblad 442 (Neth. Ind.). The Indonesian Constitution provides that colonial law still applies unless specifically repealed under the Constitution. U.U.D. 1945 (1945 Constitution), Transitional Articles, art. 2 (Indon. 1945). "Unconstitutionality" was made a ground for invalidity in subsequent regulations.

<sup>10</sup>December 13, 1957, Government Proclamation Concerning the Territorial Waters of the Indonesian Republic.

did not possess the force of law under the then applicable constitution.<sup>11</sup> Nonetheless, it clearly stated the policy of the Republic that for reasons of territorial integrity and protection of natural wealth, all islands of the archipelago and the sea between them must be regarded as an integral unit. The Proclamation also stated that Article 1, paragraph 1, of the colonial maritime ordinance, concerning territorial and internal waters boundaries, was no longer in accord with the needs of independent Indonesia. Although not carrying the force of a formal repeal, this statement of policy might be considered sufficient evidence of conflict with principles embodied in the Indonesian Constitution that the colonial law on the limits of national jurisdiction in Indonesian waters would have been held void by the Indonesian courts.<sup>12</sup>

Nonetheless, even if it did not effectively eliminate the constraints of the old legal order on the extent of Indonesian territorial waters, the Proclamation cast the mold for future Indonesian legal theory on the issue. This it did by the introduction of the novel concept which forms the core of the archipelagic state doctrine, i.e., that all waters contained within baselines drawn around the outermost islands of the archipelago are *internal* waters of the Republic of Indonesia, subject to its sovereignty with only a limited exception for innocent passage. Further, the Republic's *territorial sea* extends 12 miles outward from the baselines which delimit the internal seas, according to the Proclamation. The legal significance of the subtle difference between "territorial sea" and "internal" seas or waters should not be overlooked, for it is a qualitative difference of some importance, as will be demonstrated *infra*.

It should be noted that considerable international opposition to the Proclamation was immediately evident. The United States, Great Britain, the Netherlands and other states took exception to the Indonesian position as contrary to international law.<sup>13</sup> Because of this largely negative initial reaction, the Juanda government considered it the best policy to defer enacting the new principles into law until after the upcoming U.N. Law of the Sea Conference at Geneva in February 1958.<sup>14</sup> Indonesia's "wait-and-see" policy did not prove productive, as the 1958 Geneva Conference reacted unfavorably to the joint proposal by the Philippines and Yugoslavia concerning archipelagoes.

With the failure of the Geneva Conference to include a provision on archipelagoes, or island groups, in the Convention on the Territorial Sea and Contiguous Zone the Indonesian government was left with the options to withdraw

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<sup>11</sup>See U.U.D.S. 1950 (1950 Constitution), arts 89-100 (Indon. 1950).

<sup>12</sup>See note 9 *supra*. The 1950 Constitution, Article 142, which was in force until Pres. Sukarno's July 1959 Decree, contains no "unconstitutionality" grounds for invalidation of colonial law, however.

<sup>13</sup>Kusumaatmadja, *supra* note 1, at 6.

<sup>14</sup>*Id.*

from its earlier position or proceed unilaterally by enacting legislation on the basis of the Proclamation. Actually, until February 18, 1960, there was no further action taken by the government. Apparently, however, the pressures created by the PRRI separatist revolt and the worsening situation concerning the Dutch claim to Irian Barat (Dutch New Guinea) forced the government to enact new regulations unilaterally.<sup>15</sup>

On February 18, 1960, President Sukarno's new regulation on "Indonesian Waters" came into force.<sup>16</sup> The new law, which was actually an executive regulation in place of legislation, relied on the 1957 Proclamation for its basic provisions, while providing somewhat more detail where necessary. Article 1 provides that the territorial sea extends 12 nautical miles outward from the peripheral baselines contained in the cartographical appendix mentioned in Article 2. In practice this means from baselines drawn around the outermost islands of the Indonesian archipelago. All waters enclosed by the points declared in Article 2 are regarded as internal waters. These internal waters, plus the territorial sea, are regarded as "Indonesian waters," within the meaning of the regulation. The regulation also provides that straits of less than 24 nautical miles, on which Indonesia and one or more foreign states front, shall be divided at the midpoint.

The regulation does provide for innocent passage by foreign vessels through the expanded Indonesian territory, but apparently not as a vested right. Article 3 of the regulation states that the internal waters are "open to" foreign vessels, but not that their innocent passage is a right, or guaranteed. This interpretation becomes more compelling in light of the second paragraph of Article 3, which provides that the government may "regulate" innocent passage by means of executive regulations. Finally, Article 4 of the new regulation repealed the contradictory passages of the Dutch colonial maritime ordinance regarding the Indonesian territorial sea.<sup>17</sup>

The Second U.N. Conference on the Law of the Sea in 1960 at Geneva, which was held only a few months after Indonesia's unilateral action, again failed to settle either the question of the precise limits of the territorial sea or the related special problem of island groups. Therefore, Indonesia did not support the pending 1958 Convention on the Territorial Sea and the Contiguous Zone. In late 1961, the Sukarno government passed legislation ratifying the three Geneva Conventions on the high seas, continental shelf and fishing, without mention of the Convention on the Territorial Sea and the Contiguous Zone.<sup>18</sup>

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<sup>15</sup>*Id.*

<sup>16</sup>February 18, 1960, Government Regulation Replacing Law No. 4, Concerning Indonesian Waters, (1960) Lembaran Negara R.I. 22 (Indon.).

<sup>17</sup>See text to note 9 *supra*.

<sup>18</sup>September 6, 1961, Law No. 19, Concerning Ratification of Three 1958 Geneva Conventions on the Law of the Sea, (1961) Lembaran Negara R.I. 276 (Indon.).

A further explication of the developing archipelagic state doctrine appeared in the form of an executive regulation issued by President Sukarno in 1962, purporting to regulate the innocent passage of foreign vessels through "Indonesian waters," a right claimed in the earlier 1960 regulation on Indonesian waters *supra*.<sup>19</sup> This new regulation spelled out much more clearly the conditions under which Indonesia would allow innocent passage. It contains some significant deviations from the generally accepted international law on innocent passage.

Article 1 of this regulation does "guarantee" innocent passage, although there is no mention of a "right" of innocent passage and the definition of the concept in subsequent articles is a rather narrow one. Article 2 defines innocent passage as "navigation with a peaceful purpose which travels through the territorial sea and internal waters of Indonesia from high seas to an Indonesian port and vice versa; (or) from high seas to high seas." This definition appears more restrictive than the provisions of the Geneva Convention in that, for example, navigation traversing Indonesian waters from the high seas to *foreign* territorial waters apparently would not be recognized by it as a form of innocent passage. Also, stopping, anchoring or navigating to and from "without a legal reason" in Indonesian waters or in "high seas near such waters," is not recognized as innocent passage. These restrictions also appear to be in contradiction of recognized international law. Further, Article 4 purports to grant the President power to temporarily suspend innocent passage in Indonesian waters, including straits used for international navigation from high seas to high seas. Finally, Articles 5, 6 and 7 place restrictions on fishing, research and naval vessels of foreign states. These include the requirements of permits for research vessels and prior notice by naval and other vessels of foreign states (unless they remain in pre-determined sea lanes), thus further restricting the right of innocent passage recognized by international law.

The seeming contradiction of enacting a law declaring parts of the high seas to be "internal waters," but nevertheless continuing to guarantee innocent passage of foreign vessels in and through those waters, did not deter the Indonesian government's actions.

In fact, another obvious contradiction in the development of the Indonesian legal position as an archipelagic state was not effectively eliminated until 1963. Government Regulation No. 4 of 1960 had repealed portions of Article 1 of the Dutch East Indies colonial ordinance on the maritime domain,<sup>20</sup> but the main body of law was left intact. Thus, under Indonesian law, most of the ocean

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<sup>19</sup>June 28, 1962, Government Regulation No. 8, Concerning Innocent Passage of Foreign Vessels in Indonesian Waters, (1962) Lembaran Negara R.I. 36 (Indon.).

<sup>20</sup>See text to note 17 *supra*.

space formerly regulated by the colonial ordinance had become "internal waters," but the still applicable colonial law governing them was meant to apply to high seas. A Presidential Decree was issued in 1963, to try to patch over the discrepancy, by declaring all "Indonesian waters" to be the "Maritime Domain" within the meaning of the colonial ordinance, and invalidating all decrees of the colonial Governor General concerning the Maritime Domain.<sup>21</sup>

The final component of the archipelagic state doctrine in Indonesian positive law affecting innocent passage rights of foreign ships was enacted in 1971, almost ten years after enactment of the initial legislation concerning innocent passage.<sup>22</sup> In the form of a Presidential Decree, this new legislation increased the restrictions on innocent passage by creating the requirement of "sailing permits" for "all activities" of foreign vessels in Indonesian waters.<sup>23</sup> The Decree actually creates two types of permits, one a so-called "sailing permit" and the other a "security clearance."<sup>24</sup> The former type of permit is sufficient for all non-military foreign vessels, except those engaged in activities which may affect Indonesian security, such as hydrographic surveys, or which require operation in "closed areas."<sup>25</sup> Non-military vessels engaged in such activities, and all military foreign vessels, are required to obtain the "security clearance" type of permit from the Minister of Security and Defense.<sup>26</sup> The non-military vessels engaged in sensitive activities must thus acquire both the sailing permit and security clearance.

Thus, the Decree constitutes a further encroachment on rights traditionally enjoyed by vessels in international navigation routes crossing the Indonesian archipelago. In view of its broad scope, the Decree appears to be in direct conflict with the spirit, if not the letter, of the Geneva Convention provisions on innocent passage.<sup>27</sup> Of course, Indonesia has never signed or ratified those provisions so the Decree is not illegal on that basis. It is, however, at the very least a significant encroachment on international law and practice. Its unilateral nature shows Indonesia's determination to support and expand upon the central premise of the archipelagic state doctrine: that the sea between the Indonesian islands is neither high sea nor territorial sea, but internal waters. A corollary of this premise, not explicitly stated or emphasized by the Indonesians, is that these waters are under the absolute sovereignty of Indonesia.

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<sup>21</sup>May 27, 1963, Presidential Decree No. 103, in Universitas Indonesia, *Kumpulan Peraturan & Perjanjian Mengenai Wawasan Nusantara* (1975) at 80 [hereinafter cited as *Kumpulan*].

<sup>22</sup>See note 19 *supra*.

<sup>23</sup>April 5, 1971, Presidential Decree No. 16, Concerning Authority to Issue "Sailing Permits" for All Activities of Foreign Vessels in Indonesian Waters, in *Kumpulan, supra* note 21, at 95.

<sup>24</sup>*Id.* (art. 1).

<sup>25</sup>*Id.* (art. 3).

<sup>26</sup>*Id.* (art. 2).

<sup>27</sup>See Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, (1961) 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205, arts. 14-23.

Since the realities of international relations would not allow the implementation of this most extreme form of the basic premise, the minimal concession of allowing some limited form of innocent passage has been selected apparently as a means of avoiding total confrontation.

## **The Indonesian Position in International Forums**

### *1. Bilateral Regional Negotiations*

Confrontation over Indonesia's position concerning its status as an archipelagic state, and the rights appurtenant thereto, has not been so easy to avoid. While taking unilateral action in the form of the laws described *supra*, the Indonesian government has gradually attempted to obtain approval, or acquiescence, from its neighboring states for the archipelagic state status. Virtually all of Indonesia's neighbors have at least some reservations about the system proposed by Indonesia, although they may not object in principle to the archipelagic state doctrine. Malaysia, Singapore, Thailand and to some extent the Philippines all have interests which conflict with Indonesia's claims. Although progress has been achieved in bilateral negotiations with these states on matters peripheral to the issues involved in the archipelagic state doctrine (e.g., continental shelf and straits boundaries)<sup>28</sup> no consensus has been reached with any of these states on the archipelagic state doctrine in the form of a bilateral agreement.

The impact of the Indonesian archipelagic state doctrine in its extreme form would probably be greatest on Malaysia, whose direct access to the eastern Malaysian states of Sabah and Sarawak across the South China Sea would be interrupted by the Indonesian claim of sovereignty, based on the extension of baselines around the Natuna Islands archipelago, which is now Indonesian territory. Malaysia is also concerned about the possible loss of traditional fishing rights enjoyed by its citizens in waters affected by the Indonesian claims. The Republic of Singapore is similarly concerned about the problem of fishing rights. Thailand has reservations about the effect of the archipelagic state doctrine on its transit rights to and from the high seas as well as concerns about fishing rights. Even the Philippines, which supports the idea of an archipelagic state and claims to be such a state itself, differs with Indonesia over some aspects of the doctrine,<sup>29</sup> as well as over fishing rights and some territorial claims in the area of northern Borneo.

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<sup>28</sup>Bilateral treaties on strait waters exist with Malaysia (March 17, 1970) and Singapore (May 25, 1973). Continental shelf treaties exist with Malaysia (October 27, 1969), Thailand (December 17, 1971) and Australia (February 12, 1973). See Kumpulan, *supra* note 21, at 82-170. A shelf treaty was also signed with India on Aug. 8, 1974.

<sup>29</sup>See text to note 102 *infra*.



## 2. Multilateral Negotiations:

### *The U.N. Law of the Sea Conference*

In view of the variety of differences with its various neighboring states and the difficulty of reaching bilateral agreements with them all individually on an archipelagic state status for the Indonesian islands, Indonesia has attached increasing importance to the multilateral forum available in the Third U.N. Conference on the Law of the Sea. Since the passage of the first U.N. resolution calling for preparations for a third Law of the Sea Conference, the Indonesian government has concentrated considerable effort on having the concept of an archipelagic state included in any convention resulting from the Conference. The informal, if not official, position of the Indonesian government is that most states have already recognized the doctrine as applying to Indonesia. One report of the Indonesian delegation, after the spring 1975 meeting in Geneva, noted that no state had as yet declared itself completely *opposed* to the archipelagic state doctrine. There is, however, substantial dispute over the specific characteristics of an "archipelagic state," as the Indonesian delegation to the Conference realizes. Not only have several maritime powers and Third World countries made proposals conflicting with Indonesia's position, but also the members of the "Archipelagic States Group" (Indonesia, the Philippines, Fiji and Mauritius) are not in complete agreement. The current position of Indonesia contrasted with those of the various other delegations to the Conference will be examined *infra*.

There are a number of difficult legal and technical issues confronting Indonesia in its advocacy of an archipelagic state exception to international law concerning the high seas and the limits of national jurisdiction. With the understanding of the development of law in the Indonesian national legal system obtained *supra*, we can proceed to an analysis of the Indonesian proposals made to the international community, the problems raised by them and possible solutions.

On the surface, it may seem difficult to identify a purely "Indonesian" legal position on archipelagic states, since the Indonesian government has studiously avoided a high profile in advocating an archipelagic state article for the proposed law of the sea convention. Rather, the strategy has been to co-ordinate advocacy of the Indonesian position as far as possible with the "Archipelagic States Group" (A.S.G.) activities, combined with lobbying members of the "Group of 77" for wider support of positions developed in the smaller group. However, Indonesia has played the leading role in developing proposals issued by the A.S.G. Thus, it is fair to state that the positions taken by it are practically identical with those of Indonesia, with some compromises on issues particularly vital to the other three member states.

The first international proposals concerning law on archipelagic states were

made by Indonesia and the other A.S.G. states to the U.N. Seabed Committee in August 1973. The proposals consisted of a statement of general principles,<sup>30</sup> followed by an initial set of draft articles<sup>31</sup> on the subject. The statement of general principles put forth the broad policy arguments relied upon by the A.S.G. members as justification for their legal position. These principles consist mainly of political arguments of a national security nature and economic necessity arguments similar to those which support the "economic zone" principle. The initial draft articles consisted of five parts, which: (1) defined "archipelagic state"; (2) provided the method of delimiting the territory of such a state; (3) declared sovereignty of the archipelagic state over ocean and air space within that territory; (4) recognized the necessity of "innocent passage"; and (5) proposed a framework for regulation of activities of foreign vessels in "archipelagic waters."

At the Caracas session of the U.N. Conference on the Law of the Sea in the summer of 1974, Indonesia was requested by the "Coastal States Group" to develop a more detailed set of draft articles for discussion by that group, which had already agreed to consider the archipelagic state concept in its first meeting at Geneva in August 1973. Indonesia prepared the new draft articles<sup>32</sup> and submitted them at Caracas, with the co-sponsorship of the other A.S.G. members. These revised draft articles were somewhat more detailed than the draft articles submitted to the U.N. Seabed Committee, upon which they were based.<sup>33</sup> They narrowed the concept of "archipelagic state" to exclude coastal states not consisting entirely of islands, refined the method of drawing boundaries and included the concession that those boundaries "shall not depart to any appreciable extent from the general configuration of the archipelago."<sup>34</sup> Also, in a concession aimed mainly at decreasing Malaysian opposition,<sup>35</sup> the new draft articles included a provision that if the drawing of archipelagic state boundaries encloses parts of a sea traditionally used by an "immediately adjacent neighboring state" for "direct communication" between portions of its national territory, then those rights are to be guaranteed by the archipelagic state involved.<sup>36</sup> Finally, amendments were made so that innocent passage would be recognized as a "right" and that the right of the archipelagic state to regulate foreign vessels in archipelagic waters would have specified limitations. Both of these latter amendments were meant to widen the acceptability

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<sup>30</sup>U.N. Doc. A/AC.138/SC.II/L.15 (1973).

<sup>31</sup>U.N. Doc. A/AC.138/SC.II/L.48 (1973).

<sup>32</sup>U.N. Doc. A/CONF.62/C.2/L.49 (1974) [hereinafter cited as Document L.49].

<sup>33</sup>See note 31 *supra*.

<sup>34</sup>Document L.49, *supra* note 32, art. 2(2).

<sup>35</sup>See note 10 *supra*.

<sup>36</sup>Document L.49, *supra* note 32, art. 2(5).

of the new draft by eliminating the two major objections raised to the earlier draft articles.

The developments at and preceding the Caracas negotiating session described *supra* are important as background to the more fully developed Indonesian legal position which emerged at the Geneva meeting of the U.N. Conference from March to May 1975. It was at Geneva that the Indonesian delegation presented its own proposal for an archipelagic state provision to the A.S.G. and other parties.<sup>37</sup> Let us turn to an analysis of the contents of this draft provision.

The draft articles prepared for the Geneva session of the U.N. Conference by the Indonesian delegation may be described as the "median" negotiating text for Indonesia. They do not appear to depart too far from Indonesia's basic interests in the archipelagic state doctrine, yet they do make some significant concessions to objectivity and restraint in the application of that doctrine to the formation of a legal regime. An article-by-article examination of these most recent Indonesian draft articles should illustrate this point.

On the general definition of "archipelagic state" and "archipelago," the Indonesian draft is virtually identical to the earlier, A.S.G.-sponsored draft.<sup>38</sup> It defines "archipelagic state" as a state which is "constituted wholly by one or more archipelagoes and may include other islands."<sup>39</sup> The key characteristic of an "archipelago" for purposes of the Indonesian draft is that it is a group of islands "so closely interrelated that such islands, (the surrounding) waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."<sup>40</sup>

In the matter of "archipelagic baselines," which are to be drawn around the "archipelagic state" *supra* as its national boundaries, the Indonesian draft varies substantially from the earlier A.S.G. draft presented at Caracas. First, the continental shelf is added explicitly as one of the areas of special jurisdiction which may be measured outward from the baselines.<sup>41</sup> Then, the Indonesian draft departs from the A.S.G. draft articles by inserting three paragraphs aimed at mathematically calculable, objective limitations on the permissible expanse of the baselines.<sup>42</sup> The new provisions create two basic formulas for limiting baselines, one a length limitation and the other a land-to-water ratio limitation. The former limitation places a 100-nautical-mile limit on baselines

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<sup>37</sup>Republic of Indonesia, Lampiran Laporan Delegasi Republik Indonesia ke Konperensi P.B.B. tentang Hukum Laut ke-III di Jenewa, 17 Maret - 9 Mei 1975 (1975), at 269 [hereinafter cited as Lampiran].

<sup>38</sup>*Compare* Lampiran, *supra* note 37, at 269 (art. 1), with Document L.49, *supra* note 32, art. 1.

<sup>39</sup>Lampiran, *supra* note 37, at 269 (art. 1(2)(a)).

<sup>40</sup>*Id.*, (art. 1(2)(b)).

<sup>41</sup>*Compare* Lampiran, *supra* note 37, at 269 (art. 2(1)), with Document L.49 *supra*, note 32, art. 2(1).

<sup>42</sup>*Compare* Lampiran, *supra* note 37, at 269 (art. 2), with Document L.49, *supra* note 32, art. 2.

drawn between islands, with the exception that up to 5 percent of the baselines may exceed that limit, but by no more than 25 nautical miles.<sup>43</sup> The latter land-to-water formula provides that the ratio of land to water in the area enclosed by the "archipelagic baselines" shall not be "less than one to one and shall not exceed one to nine."<sup>44</sup> These objectively determinable limitations were apparently inserted in response to criticisms from many states, including the U.S., that the "archipelagic state" concept was overly subjective.<sup>45</sup> The land-to-water ratio formula conforms to the opinion of the Indonesian delegation leader that the water area of an archipelagic state must *necessarily* be greater than the land area.<sup>46</sup> Finally, the Indonesian draft broadens the accommodation intended for Malaysia<sup>47</sup> by allowing for "direct access and all forms of communication" between parts of a neighboring state separated by the waters of an archipelagic state, instead of only "direct communications," as provided in the Caracas A.S.G. draft articles.<sup>48</sup>

As another amendment at Geneva, the Indonesian draft inserts a clause excepting any law of the sea convention articles concerning the regime of bays, deeply indented coastlines and archipelagoes belonging to a coastal state from the application of principles of sovereignty over "archipelagic waters."<sup>49</sup> Otherwise, the draft makes the same claim as the earlier Caracas article that all waters enclosed by archipelagic baselines "belong to, and are subject to the sovereignty of, the archipelagic state to which they appertain."<sup>50</sup> The Indonesian draft also inserts a new Article 4, concerning fisheries. The new article provides that fishing "activities" or "rights" (both terms are included, for negotiation) of immediately adjacent neighboring states' nationals in archipelagic state waters shall be recognized. This principle, according to the Indonesian draft, would be implemented by bilateral agreements between the individual states concerned. This new article also appears to be an attempt to accommodate Indonesia's neighboring states, all of which are concerned about the loss of fishing rights as a result of the archipelagic state doctrine.<sup>51</sup>

Concerning navigation through the "archipelagic waters," the Indonesian

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<sup>43</sup>Lampiran, *supra* note 37, at 269 (art. 2(2)).

<sup>44</sup>*Id.*, (art. 2(3)).

<sup>45</sup>See p. 22 *infra*.

<sup>46</sup>Statement by Leader of the Indonesian Delegation, Third U.N. Conference on the Law of the Sea, Caracas, July 15, 1974.

<sup>47</sup>See p. 12 *supra*.

<sup>48</sup>Compare Lampiran, *supra* note 37, at 270 (art. 2(9)), with Document L.49, *supra* note 32, art. 2(5).

<sup>49</sup>Lampiran, *supra* note 37, at 270-71 (art. 3(1)).

<sup>50</sup>*Id.*

<sup>51</sup>See p. 10 *supra*.

draft makes some major amendments to the A.S.G. Caracas draft provisions.<sup>52</sup> The most important amendment is connected with the suspension of innocent passage rights for reasons of security. The Indonesian draft article maintains that as long as there is no discrimination among foreign vessels, the archipelagic state, to protect its security, may "temporarily" suspend innocent passage "in specified areas."<sup>53</sup> Furthermore, there is no mention of any duty to designate alternative routes to replace those in any suspended areas, as there was in the A.S.G. Caracas draft article.<sup>54</sup> Another important difference in the Geneva Indonesian draft is that so-called "normal commercial vessels" are separated from "non-commercial vessels" for purposes of navigation through archipelagic waters. The former are to continue to enjoy the right of innocent passage through archipelagic waters, while the latter are granted only so-called "sealanes passage" through designated sealanes.<sup>55</sup> Thus, two different types of passage for foreign vessels are created: innocent passage through routes customarily used in international navigation for merchant vessels; and "sealanes passage," only through sealanes designated by the archipelagic state, for surface warships, submarines, etc. Both types of passage are classified as "archipelagic transit passage."

Regarding the sealanes, which may be designated, altered, or substituted by the archipelagic state "after giving due publicity," the Indonesian draft adds that "traffic separation schemes" for them may be created and altered similarly.<sup>56</sup> Another new provision of the Indonesian draft articles is a width limitation on the sealanes. Under this provision, sealanes may not exceed "20 nautical miles or 30 percent of the width of the relevant waters, whichever is the narrower."<sup>57</sup> Also, a paragraph has been added stating that passage of "non-commercial" vessels through sealanes "shall not be hampered," subject to several requirements.<sup>58</sup> Prior notification of the archipelagic state is required of vessels which are nuclear-powered or carrying nuclear weapons "or other dangerous substances."<sup>59</sup> Non-nuclear submarines cruising below the surface are also "required" or "recommended" (both terms are inserted, for negotiation) to give prior notification to the archipelagic state.<sup>60</sup>

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<sup>52</sup>*Compare* Lampiran, *supra* note 37, at 271-74 (arts. 5-6), with Document L.49, *supra* note 32, arts. 4-5.

<sup>53</sup>Lampiran, *supra* note 37, at 271-72 (art. 5(3)).

<sup>54</sup>*Compare* Lampiran, *supra* note 37, at 271-72 (art. 5), with Document L.49, *supra* note 32, art. 5(10).

<sup>55</sup>*See* Lampiran, *supra* note 37, at 271-73 (arts. 5(2), 6(2), 6(8)).

<sup>56</sup>Lampiran, *supra* note 37, at 272 (art. 6(4)).

<sup>57</sup>*Id.*, at 272-73 (art. 6(6)).

<sup>58</sup>*Id.*, at 273 (art. 6(8)).

<sup>59</sup>*Id.*, (art. 6(8) (c)).

<sup>60</sup>*Id.*, (art. 6(8) (b)).

Non-nuclear warships, fishing vessels, research vessels and oil tankers would be allowed to pass through the sealanes without giving prior notification,<sup>61</sup> although authorization "may" be required of them for passage through archipelagic waters outside the sealanes.<sup>62</sup> In a completely new area, the Indonesian draft includes regulations for overflight of archipelagic waters by "state aircraft."<sup>63</sup> These "state aircraft" are given the "privilege of overflight" over the same sealanes as those used by ships, as long as the overflight is above 45,000 feet.<sup>64</sup> For any overflight between 35,000 and 45,000 feet, prior notification is required as well as continuous radio contact with air traffic controllers of the archipelagic state.<sup>65</sup> Below 35,000 feet, overflight by state aircraft requires "authorization" by the archipelagic state and is "at all times subject to control" by its air traffic controllers.<sup>66</sup> Finally, the Indonesian draft articles provide that none of the innocent or sealanes passage provisions "shall be construed as (limiting) (prejudicing) the sovereignty of the archipelagic state over its archipelagic waters."<sup>67</sup>

In Article 7 of the Indonesian draft articles, entitled "Rights of the Archipelagic States," the right of enacting laws and regulations for navigational safety, research and exploration, resource conservation, sanitation and enforcement of local customs, fiscal and immigration law is claimed, as it was in the A.S.G. draft articles at Caracas. Regarding requirements for ships exercising the right of passage through archipelagic waters, the Indonesian draft articles add a specific list of prohibited activities to the general restrictions which were included in the Caracas A.S.G. draft articles. Ships and aircraft are admonished to "proceed without delay," "refrain from any threat or use of force," and "remain within the designated sealanes," while in transit through archipelagic waters.<sup>68</sup> Furthermore, it is provided that ships and aircraft "shall not engage in" a list of thirteen specified activities, including military maneuvers, scientific research or surveys, loading or unloading cargo or people, environmental pollution and stopping, hovering or anchoring, unless made necessary by *force majeure*, distress or rescue efforts.<sup>69</sup> As in the Caracas A.S.G. draft articles, a right to "suspend" passage of warships through archipelagic waters and order their withdrawal in cases of non-compliance with any requirements in the draft articles is included.<sup>70</sup> However, the Indonesian draft articles provide

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<sup>61</sup>*Id.*, (arts. 6(8) (a), 6(8) (d)).

<sup>62</sup>*Id.*, at 274 (art. 6(9)).

<sup>63</sup>*Id.*, at 273 (art. 6(8) (c)).

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*, at 274 (art. 6(10)). Parentheses are from the original text.

<sup>68</sup>*Id.*, at 275 (art. 8(2)).

<sup>69</sup>*Id.*, at 275-76 (art. 8(3)).

<sup>70</sup>*Id.*

that the archipelagic state "may not suspend . . . passage of foreign ships through the archipelagic sealanes," unless suspension is "essential" for the protection of national security, due publicity is given and alternative sealanes are substituted for those affected by suspension.<sup>71</sup>

The final two articles in the Geneva Indonesian draft articles deal with liability and compensation for losses suffered by the archipelagic state through accidents or violations of the provisions of the draft articles and the reservation of rights concerning the regime of bays and treaty-making with other states on matters regarding the archipelagic waters.

It is declared that an archipelagic state shall be compensated for "any damage or loss, direct or indirect" to it which results from "accident (sic) or activities in contravention of" the provisions of the draft articles.<sup>72</sup> Furthermore, it is stated that liability "shall be strict" and payment of compensation shall be "prompt," with the flag state liable for payment of compensation if the ship or aircraft owner is "unable to render immediate and full compensation."<sup>73</sup> Any damage caused by ships or aircraft "entitled to sovereign immunity" is to be "borne by the flag state" also.<sup>74</sup> The final article declares that the provisions of the Indonesian draft articles are without prejudice to the regime concerning bays, indented coastlines and archipelagoes forming part of a continental coastal state, as well as the "right" of an archipelagic state to conclude agreements with other states regarding exploitation of resources and innocent passage in archipelagic waters.<sup>75</sup>

Although some of the more extreme provisions of the Indonesian draft articles were not subsequently included in the A.S.G. draft articles submitted to the chairman of the Second Committee for his consideration in drafting an "informal single negotiating text" at the Geneva meeting of the U.N. Law of the Sea Conference in May 1975, the basic Indonesian position was followed.<sup>76</sup> In the actual "single negotiating text" of a draft treaty which was issued at Geneva,<sup>77</sup> the Indonesian position was not included on a number of important issues. In fact, the Indonesian delegation complained that the provisions on archipelagic states relied mainly on the draft articles presented by the Bahamas, which were viewed as representing the interests of the maritime powers, especially the United States. The technical and legal problems confronting the

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<sup>71</sup>*Id.*, at 277 (art. 9). Brackets are from the original text.

<sup>72</sup>*Id.*, at 277 (art. 10(1)).

<sup>73</sup>*Id.*, (art. 10(2)).

<sup>74</sup>*Id.*, (art. 10(3)).

<sup>75</sup>*Id.*, at 278 (art. 11).

<sup>76</sup>The articles of the Indonesian draft which were deleted or substantially amended include: Article 2(2)-(4), Article 3(1), Article 4, Article 5(1)-(2), Article 6(2), (8), (9) and Article 8(3). Compare Lampiran, *supra* note 37, at 269-78, with Lampiran, *supra* note 37, at 280-87.

<sup>77</sup>See U.N. Document A/CONF.62/WP.8 (part II), 14 INT'L. LEGAL MATERIALS 682, 737 (May 1975) [hereinafter cited as Negotiating Text].

Indonesian archipelagic state proposals, in light of international law and the positions of other states concerned, require more careful analysis *infra*. If the hopes of a number of nations, including the United States,<sup>78</sup> for the achievement of an early final result in the U.N. Conference are to be realized, it is doubly important to have a clear understanding of the problems inherent in the archipelagic state concept and the controversial issues at stake in it.

### **Legal and Related Problems of Indonesia's Archipelagic State Doctrine**

From the standpoint of international law, the archipelagic state doctrine proposed by Indonesia is at present a novel concept. The argument that expanses of sea hundreds of miles from any shoreline are the internal waters of a state appears to run contrary to general principles of international customary law as well as the Geneva Conventions concerning the high seas and the territorial sea and the contiguous zone. As demonstrated *supra*,<sup>79</sup> this concept may perhaps be said to contradict international custom in the Southeast Asian region even to a greater extent than general international custom concerning freedom of the high seas. Thus, the initial question seems to be what legal arguments can Indonesia marshal to elevate its archipelagic state doctrine above the level of a unilateral national claim.

It is an elementary principle of international law that a state may not unilaterally create law which alters existing international law or attempts to bind other sovereign states without their consent.<sup>80</sup> Therefore, the municipal law on the archipelagic state doctrine enacted by the Indonesian government itself may not be appealed to as support for the doctrine under international law, especially since there were explicit exceptions taken to the Indonesian position by a number of states at the time of the promulgation of the laws and regulations.<sup>81</sup> However, at least one Indonesian legal scholar has suggested that several arguments based on international law are supportive of the archipelagic state doctrine. These include "contiguity," "maximum value" and "acquisitive prescription" theories.<sup>82</sup> It is argued that the concept of "contiguity," as applied in the determination of rights to the continental shelf, as well as by several Latin American and other states to claim sovereignty over up to 200 miles of offshore waters, supports the Indonesian claim to sovereignty over offshore waters located between its component islands.<sup>83</sup>

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<sup>78</sup>See Address by Secretary Kissinger, ABA Annual Convention, August 11, 1975.

<sup>79</sup>See p. 3 *supra*.

<sup>80</sup>SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* (1967) at 64-66.

<sup>81</sup>See p. 5 *supra*.

<sup>82</sup>See DANUREDJO, *HUKUM INTERNASIONAL LAUT INDONESIA* (1971) at 99-127.

<sup>83</sup>*Id.*, at 103-04.



The "maximum value" theory proposed as support for the archipelagic state doctrine is considerably more nebulous, resting on the argument that principles of international law may be derived from the highest goals and inspirations of international society (i.e., its "maximum values"). Thus, maximum values expressed by international society concerning law of the sea (e.g., legal and political developments on the continental shelf, economic zone, etc.) are of the same nature as those embodied in the archipelagic state doctrine.<sup>84</sup> Therefore, according to this argument, the archipelagic state doctrine does not violate international law, but is an outgrowth of it. The third main argument submitted rests on an analogy to the acquisition prescription of land territory. It is argued that Indonesia as an archipelagic state may acquire title to the waters between its island parts similar to the way land is acquired by prescription.<sup>85</sup> However, this argument flies in the face of several centuries of international recognition that the high seas may not be made subject to the sovereignty of any state. Furthermore, the analogy of acquisitive prescription of ocean waters to that of land is a poor one since it is difficult to exert the kind of effective control over ocean space that is required in acquisitive prescription. Even if it were possible, Indonesia probably has not succeeded in exerting effective control to the exclusion of other states in the waters concerned.

In view of the lack of recognized principles of international law supporting the Indonesian position, it is apparent why the forum of the U.N. Conference on the Law of the Sea is receiving so much attention from the Indonesian government. If an archipelagic state provision is not included in a final international convention, Indonesia's unilateral actions in enacting laws purporting to annex the sea between its islands would remain supported essentially only by expediency. However, assuming that Indonesian influence at the U.N. Conference will be sufficient to achieve some form of an archipelagic state provision, an examination of the legal and technical issues raised by the more controversial portions of the archipelagic state proposal should prove useful.

Perhaps the most controversial legal issue raised by the archipelagic state doctrine is that of how and to what extent freedom of navigation and overflight through the archipelagic waters will be preserved for the international community. The Indonesian and A.S.G. articles would represent a substantial departure from present international law and practice on this issue. Provisions for restricting certain classes of ships to archipelagic "sealanes" only,<sup>86</sup> temporary suspension of innocent passage,<sup>87</sup> and requiring prior notification or

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<sup>84</sup>*Id.*, at 106-10.

<sup>85</sup>*Id.*, at 113-23.

<sup>86</sup>See text to note 55 *supra*.

<sup>87</sup>See text to note 53 *supra*.

authorization of the archipelagic state for certain types of vessels navigating through archipelagic waters,<sup>88</sup> are three important deviations from existing international law. The counter-position, embodied in the "single negotiating text" developed at the Geneva session, recognizes sovereignty of the archipelagic state over archipelagic waters but reserves a "right of archipelagic sealanes passage" for the international community, outside the control of the archipelagic state.<sup>89</sup> This position balances the interests of the archipelagic state with those of the international community in maintaining the important "innocent passage" principle of international law in the context of the archipelagic state doctrine.<sup>90</sup>

Another important issue raised by the archipelagic state doctrine is that of the extent of permissible incursion on the regime of the high seas through the definition and delimitation methods proposed by the Indonesian and A.S.G. draft articles for determining the expanse of the archipelagic state. In the case of Indonesia, these proposed methods will result in the conversion of over three million square kilometers of what were formerly high seas into "archipelagic waters." Since this conversion represents a significant loss of rights previously enjoyed by other states in these waters, there is a desire of many states to confine the area of archipelagic states to the minimum necessary to create a unified entity. The Indonesian draft articles are mostly in accord with these desires in their proposals for maximum and minimum land-to-water ratios,<sup>91</sup> confinement of the baselines to the "general configuration" of the archipelago,<sup>92</sup> and the prohibition of drawing baselines from most low-tide elevations.<sup>93</sup> The Indonesian Geneva draft articles' position differs significantly, however, from that of most maritime states on the limitation of baseline length between connecting points.<sup>94</sup> The A.S.G. Geneva draft articles are less flexible on this issue than the Indonesian draft, providing only for the "general configuration" limitation on baselines.<sup>95</sup>

The definition of what constitutes an "archipelagic state" is the other aspect of the technical problem raised by efforts to confine the doctrine as narrowly as possible. This problem is particularly acute because the geographic configuration of a number of continental states might allow them to claim that

<sup>88</sup>See text to notes 60-62 *supra*.

<sup>89</sup>Negotiating Text, *supra* note 77, art. 124(2).

<sup>90</sup>The draft articles on archipelagic states submitted by the Bahamas, largely supported by the U.S., incorporate this approach.

<sup>91</sup>See text to note 44 *supra*.

<sup>92</sup>See Lampiran, *supra* note 37, at 270 (art. 2(5)).

<sup>93</sup>See text to note 43 *supra*.

<sup>94</sup>While the Indonesian proposal (*supra* p. 14) is for 100 mile baseline limits, most maritime states support 80 mile limits.

<sup>95</sup>See Lampiran, *supra* note 37, at 280-81 (art. 2).

island groups forming part of their territory are entitled to archipelagic state treatment.<sup>96</sup> The positions of the Indonesian, A.S.G. and Bahamas draft articles are, however, virtually identical on this issue, in providing that archipelagic state status applies only to states constituted wholly by archipelagoes or island groups.<sup>97</sup> Thus, the problem is mainly a tactical one of distinguishing the status of the continental states *supra* from that of the "true" archipelagic states.<sup>98</sup>

Another legal issue of major importance at stake in the archipelagic state doctrine is that of the status of preexisting rights of other states in the seas which are to become "archipelagic waters."<sup>99</sup> These would include navigation, research, fishing and other rights which had been enjoyed over a long period of time prior to the emergence of the archipelagic state doctrine. In the case of Indonesia, some progress was made at the Caracas and Geneva meetings in reaching an accord with Singapore and Thailand on fishing rights, at least in principle. The Indonesian-A.S.G. draft articles presented at Geneva, however, provide that the fishing rights recognized in principle are to be implemented by bilateral agreements between the contending states.<sup>100</sup> Thus, some states may be hesitant to relinquish existing rights for a promise of compensating rights to be negotiated bilaterally in the future. Malaysia is apparently one such state, since its amendment to the A.S.G. Caracas draft articles seeks to preserve not only fishing rights but all other preexisting rights for "immediately adjacent neighboring states," without recourse to any future bilateral agreements.<sup>101</sup> The Malaysian position is of great concern to the Indonesian and Fijian delegations because it is viewed as threatening the basis of the whole archipelagic state scheme.

The Philippines is apparently willing to compromise its differences over territorial claims with Indonesia within the A.S.G. However, an important point of contention which has emerged centers around the "historic waters" proposal made by the Philippines at the Caracas meeting.<sup>102</sup> As to fishing rights, the Philippines is also in agreement with the Indonesian-A.S.G.

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<sup>96</sup>India and a number of other states have taken this position in regard to portions of their territory, to Indonesia's dismay.

<sup>97</sup>See text to note 39 *supra*. Compare Lampiran, *supra* note 37, at 280 (art. 1), with Lampiran, *supra* note 37, at 289 (art. 1).

<sup>98</sup>See Republic of Indonesia, Laporan Delegasi Republic Indonesia ke Konperensi P.B.B. ke-III Mengenai Hukum Laut di Caracas, Venezuela (1975), at 18.

<sup>99</sup>See pp. 10-11 *supra*.

<sup>100</sup>Compare Lampiran, *supra* note 37, at 271 (art. 4), with Lampiran, *supra* note 37, at 281 (Art. 4).

<sup>101</sup>See U.N. Document A/CONF.62/C.2/L.64/Rev.1 (1974). This proposal was made to amend Articles 2(5) and 4, of Document L.49, *supra* note 33.

<sup>102</sup>See U.N. Document A/CONF.62/C.2/L.24/Rev.1 (1974). Indonesia in turn introduced its own proposal. See U.N. Document A/CONF.62/C.2/L.67 (1974).

proposals. Finally, all Indonesia's immediately adjacent neighbors, with the possible exception of Malaysia, apparently rely on the inclusion of some form of innocent passage rights in any final convention article on archipelagic states, to protect their interests in transit through Indonesian archipelagic waters.

The positions of all the groups of states concerned with the archipelagic state doctrine are now sufficiently clear that the stage is set for final deliberations on the concept. If Indonesia is willing to make some further compromises, especially in the area of freedom of overflight and navigation, it appears that the international sanction for archipelagic state status which eluded it in the 1958 and 1960 Geneva Conventions on law of the sea may now be attained. Without such international recognition, the weakness of Indonesia's position under international law will leave an opening for continued charges that the "archipelagic state" rubric is little more than camouflage for unilateral territorial expansion.