

Chapter IX Archipelagos

Archipelagic States

The law of the sea first recognized a special regime for archipelagic States in the 1982 Law of the Sea Convention. By definition, an archipelagic State is a State “constituted wholly by one or more archipelagos and may include other islands.”¹ Article 46 of the LOS Convention defines an “archipelago” as a

group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.²

In a letter dated April 4, 1989, David H. Small, Assistant Legal Adviser for Oceans and International Environmental and Scientific Affairs, noted:

Prior to the Third United Nations Conference on the Law of the Sea, international law did not permit archipelagic claims. Although the 1982 Law of the Sea Convention is not yet in force, the archipelagic provisions reflect customary international law and codify the only rules by which a nation can now rightfully assert an archipelagic claim. Recognition of Indonesia’s archipelagic claim by the United States in 1986 and reaffirmed in 1988 was conditioned on Indonesia’s commitment that its claim was then and would be in the future applied toward other States and their nationals in full conformity with international law.³

An exchange of notes accompanying the Tax Convention with **Indonesia**, set out and confirmed the agreed interpretation of Article 3(1)(a) of the Tax Convention, as follows:

In signing this Convention, it is the understanding of the Government of the United States of America that:

The United States recognizes the archipelagic States principles as applied by Indonesia on the understanding that they are applied in accordance with the provisions of Part IV of the 1982 United Nations Convention on the Law of the Sea and that Indonesia respects international rights and obligations pertaining to transit of the Indonesian archipelagic waters in accordance with international law and reflected in that Part.

The confirmation of this understanding by the Government of the Republic of Indonesia will constitute the agreed interpretation of Article 3(1)(a) of the Convention.

Under Article 3(1)(a) of this Tax Convention, for the purposes of this Convention only, unless otherwise required by the context, the term “Indonesia’ comprises the territory of the Republic of Indonesia and the adjacent seas which [sic] the Republic of Indonesia has sovereignty, sovereign rights or jurisdictions in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea.”⁴ (See Map 20.)

As of July 1994, the following sixteen States have claimed archipelagic status:⁵

Antigua & Barbuda	Kiribati ^a	Sao Tome & Principe
The Bahamas (pending) ^a	Marshall Islands ^a	Solomon Islands
Cape Verde	Papua New Guinea	Trinidad & Tobago
Comoros ^a	Philippines	Tuvalu
Fiji	Saint Vincent and the Grenadines ^a	Vanuatu
Indonesia		

^aHave not specified archipelagic baselines.

Island–Mainland States

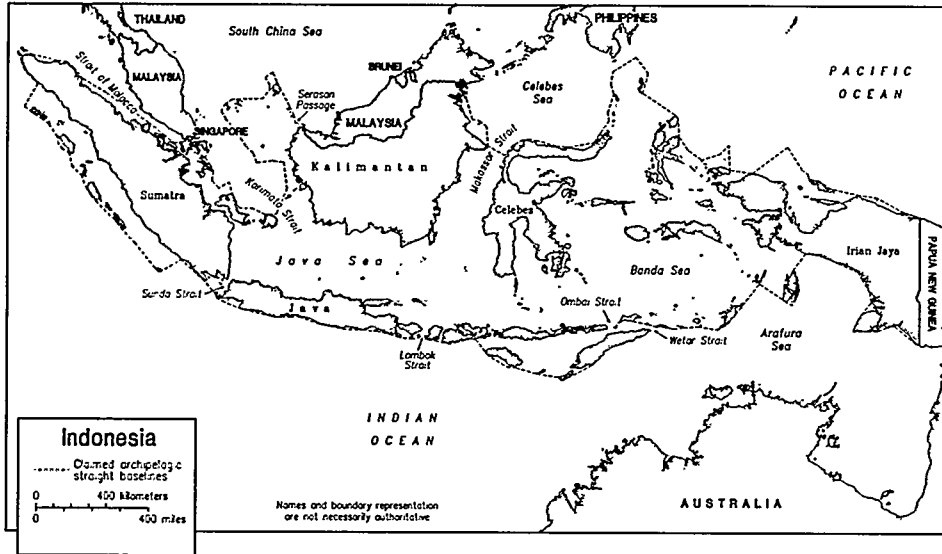
Since an archipelago must consist wholly of islands, a continental State that has offshore groups of islands may not claim archipelagic status for those islands. Nevertheless, several continental States with offshore groups of islands which may be geographically described as archipelagos but which do not meet the juridical definition set out in Article 46 of the 1982 Law of the Sea Convention, have sought to enclose those islands with straight baselines in a manner simulating an archipelago. Following adoption of the Law of the Sea Convention, the United States protested the claims of **Denmark, Ecuador, Portugal and Sudan**.⁶

Baselines

To define the archipelago, a State must draw archipelagic baselines meeting certain requirements specified in Article 47. For example, the length of the baselines may not exceed 100 miles, except that up to 3 percent of the total number of baselines may be drawn to a maximum length of 125 miles.⁷ The baselines are to be drawn in such a manner that the area of water to area of land ratio enclosed by the baselines must be between 1:1 and 9:1.⁸ A State claiming itself an archipelagic State must give due publicity to charts or lists of coordinates that define the archipelago and deposit such charts or lists with the UN.⁹

Fiji’s archipelagic claim in its Maritime Spaces Act of 1977 & 1978, and associated Marine Spaces Orders, reveals that Fiji’s claim meets the Convention’s criteria for archipelagic baseline length and water-to-land ratio.¹⁰ The State Department has prepared a similar analysis of the archipelagic baselines constructed by **Sao Tome and Principe**.¹¹ At least one scholar has expressed the

Map 20



view that the straight baselines claimed by **Indonesia**,¹² **Vanuatu** and **Papua New Guinea**¹³ satisfy the requirements of Article 47.

Cape Verde claimed archipelagic baselines in 1977, through legislation which created 14 basepoints, which when connected comprise the archipelagic baseline system.¹⁴ Two baseline segments exceed the permissible maximum 125 mile length. The water area enclosed by the archipelagic baselines is 50,546 sq.km.; the Cape Verde land area is 4,031 sq.km. The resulting water:land ratio is 12.54:1, which exceeds the maximum allowable 9:1 ratio. Because of these technical flaws in the law, the United States protested Cape Verde's claim in 1980.¹⁵ Both elements can be corrected with some modifications to the baselines (*see* Map 21).¹⁶

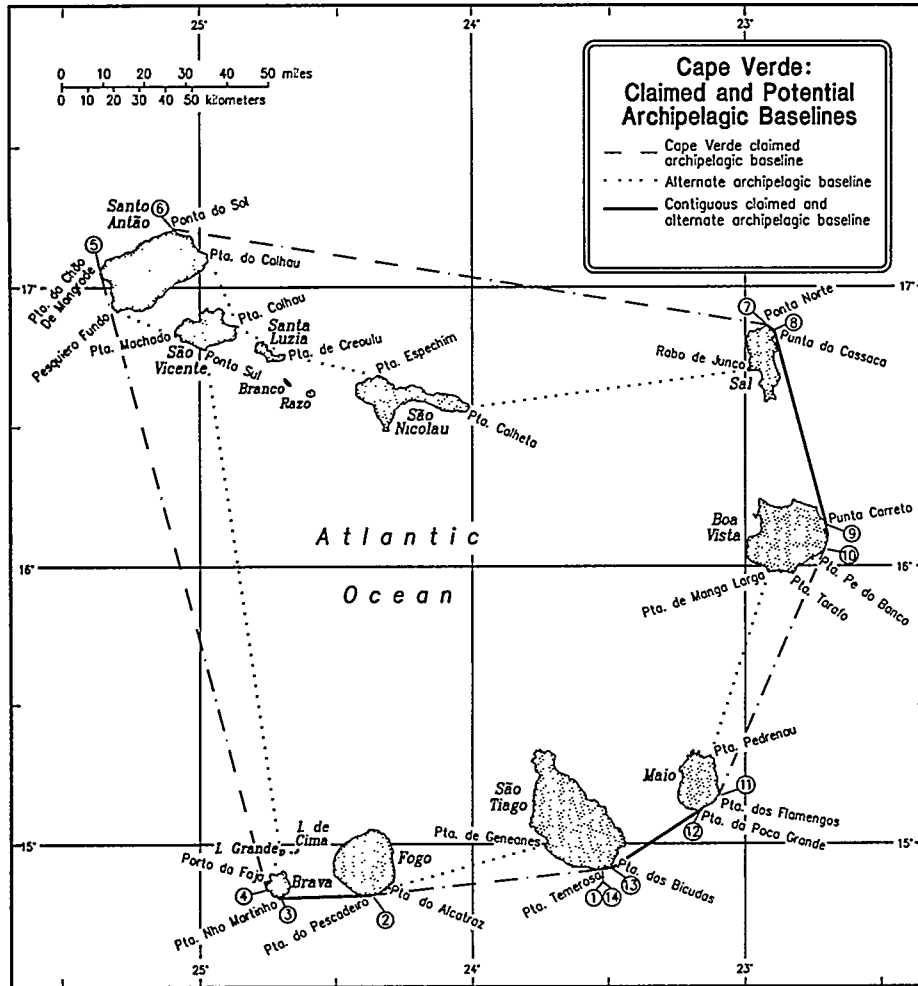
In 1961, the Government of the **Philippines** claimed the waters within the limits set out in Article III of the Treaty of Paris between the United States and Spain of December 10, 1898 as part of the territory of the Philippines (except the Spratlys). The longest segment measures 140 miles in the Gulf of Moro, but that segment could be adjusted without difficulty to reduce it to 125 miles. The land to water ratio is 1:1.8.¹⁷ The Philippines also claimed straight baselines connecting the outer points of its outer islands. (*See* Map 22.) The United States did not accept that claim in a 1961 note of which the following is an extract:

. . . [I]ts purpose is to reduce to Philippine sovereignty large areas of sea which are regarded by the United States and all other nations as part of the High Seas. The Embassy, therefore, considers it necessary to point out that there is no recognition in international law of any special regime for archipelagoes, and no warrant for attempting to reduce to national sovereignty large areas of high seas between the islands of an archipelago, through the device of drawing baselines connecting the outermost islands and claiming as internal waters all of the waters within such baselines.

Due to its complexity, the subject of archipelagoes was left pending at The Hague Conference of 1930, and by the International Law Commission in its studies which preceded the First Law of the Sea Conference in Geneva in 1958. Proposals dealing with the subject were introduced at the First Law of the Sea Conference, but were not pursued because it was felt that the subject needed further study.

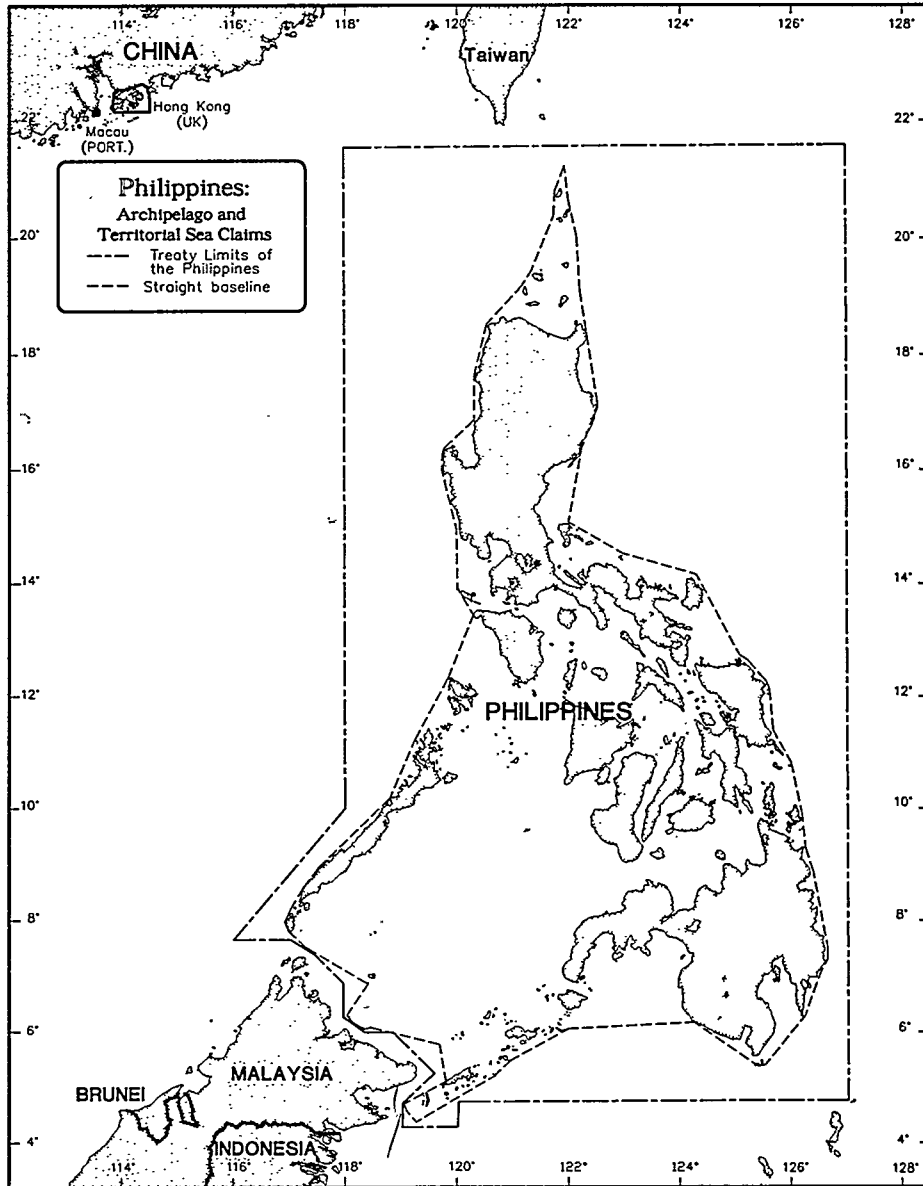
The Philippine Government is also aware that the United States Government does not share its view concerning the proper interpretation of the provisions of the Treaty of Peace of December 10, 1898, between the United States and Spain, and the Treaty of Washington of November 7, 1900, by which Spain ceded the islands of the Philippine archipelago to the United States. Moreover, neither of the Parties to the Convention of January 2, 1930, between the United States and the United Kingdom, defining the boundary between the Philippines and North Borneo agrees with the Philippine interpretation of the provisions of that Convention relied on as one of the bases for the proposed legislation.¹⁸

Map 21



Names and boundary representation are not necessarily authoritative

Map 22



On May 8, 1984, the Philippines deposited, with its instrument of ratification of the 1982 LOS Convention, a declaration reaffirming certain understandings regarding the Convention made in 1982 when the Philippines signed the Convention. The declaration read in part:

1. By signing the Convention the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;

2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of December 10, 1898, and the Treaty of Washington between the United States of America and Great Britain of January 2, 1930;

...

5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippines Constitution;

...

7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines and removes straits connecting these waters with the economic zone or high seas from the rights of foreign vessels to transit passage for international navigation.¹⁹

In January 1986, the United States protested this declaration, stating with regard to the first statement and statement number 5 that:

The Government of the United States wishes to point out, however, that, with respect to other states and the nationals of such other states, the rights and duties of states are defined by international law, both customary and conventional. The rights of states under international law cannot be enlarged by their domestic legislation, absent acceptance of such enlargement by affected states. In this regard, the Government of the United States notes that the Constitution of the Philippines declares, "The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines." The Government of the United States further notes that customary international law, as reflected in the 1982 Law of the Sea Convention, does not apply to such waters the regime of internal waters. Therefore, the Government of the United States renews its protests, made in 1961 and 1969, of the claim by the Government of the Republic of the Philippines that

such waters constitute internal waters, and the Government of the United States reserves its rights and those of its nationals in this regard.

With regard to the second understanding:

the Government of the United States does not share its view concerning the proper interpretation of the provisions of those treaties, as they relate to the rights of the Philippines in the waters surrounding the Philippine Islands. The Government of the United States continues to be of the opinion that neither those treaties, nor subsequent practice, has conferred upon the United States, nor upon the Republic of the Philippines as successor to the United States, greater rights in the waters surrounding the Philippine Islands than are otherwise recognized in customary international law.

With regard to understanding number 7:

The Government of the United States wishes to observe that, as generally understood in international law, including that reflected in the 1982 Law of the Sea Convention, the concept of internal waters differs significantly from the concept of archipelagic waters. Archipelagic waters are only those enclosed by properly drawn archipelagic baselines and are subject to the regimes of innocent passage and archipelagic sea lanes passage. The Government of the United States further wishes to point out that straits linking the high seas or exclusive economic zone with archipelagic waters, as well as straits within archipelagic waters, are, if part of normal passage routes used for international navigation or overflight through or over archipelagic waters, subject to the regime of archipelagic sea lanes passage.²⁰

Notes

1. LOS Convention, article 46.

2. The concept of archipelagos is examined in detail in CHURCHILL & LOWE, *THE LAW OF THE SEA* 98-111 (2d rev. ed. 1988); Herman, *The Modern Concept of the Off-Lying Archipelago in International Law*, *Can. Y.B. Int'l L.* 1985 at 172; 1 O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA*, 236-258 (1982); RODGERS, *MID-OCEAN ARCHIPELAGOS AND INTERNATIONAL LAW* (1981); SYMMONS, *THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW* 68-81 (1979); DUBNER, *THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES* (1976); and O'Connell, *Mid-ocean Archipelagos*, 45 *Brit. Y.B. Int'l L.* 1 (1971). The *travaux préparatoires* of the archipelagic articles of the LOS Convention may be found in U.N. Office for Ocean Affairs and the Law of the Sea, *Archipelagic States: Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (U.N. Sales No. E.90.V.2 (1990)); and in a series of articles by the principal U.S. negotiators: Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 *Am. J. Int'l L.* 1, 12-13 (1974); *id.* *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 1, 21-22 (1975); *id.* *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 *Am. J. Int'l L.* 763, 784-85 (1975); and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 *Am. J. Int'l L.* 57, 63-66 (1978).

3. 83 *Am. J. Int'l L.* 559 (1989), State Department File No. P89 0049-0148.

4. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Related Protocol and Exchange of Notes, July 11, 1988, United States-Indonesia, T.I.A.S. No. 11593, entered into force Dec. 30, 1990, *quoted in* 83 *Am. J. Int'l L.* 559-61 (1989), State Department File No. P89 0049-0148, and confirmed by Indonesia in the protocol of exchange of instruments of ratification, Nov. 30, 1990. Malaysia recognized Indonesia's claim to archipelagic status in the Treaty

between Malaysia and the Republic of Indonesia relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia, Feb. 25, 1982, the text of which may be found in U.N. Law of the Sea: Practice of Archipelagic States 144, U.N. Sales No. E.92.V.3, (1992) [hereinafter U.N. LOS: Practice of Archipelagic States]. For reactions to Indonesia's initial archipelagic claim in 1957, see 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 284-85 (1965) [hereinafter WHITEMAN], and O'Connell, *Mid-Ocean Archipelagos in International Law*, 45 Brit. Y.B. Int'l L. 38-42, 62.

5. See *Antigua and Barbuda*, U.N. Office for Ocean Affairs and the Law of the Sea, Baselines: National Legislation with Illustrative Maps (U.N. Sales No. E.89.V.10 (1989) at 13-15 [hereinafter U.N. Baselines: Legislation 13-15]; U.N. LOS: Practice of Archipelagic States 1-16; *The Bahamas*, legislation pending; *Cape Verde*, U.N. Baselines: Legislation 99-100; U.N. LOS: Practice of Archipelagic States 17-19; *Comoros*, Law No. 82-005, U.N. National Claims to Maritime Jurisdiction, U.N. Sales No. E.91.V.15 (1992), at 31; U.N. LOS: Practice of Archipelagic States 20-22; *Fiji*, U.N. Baselines: Legislation 157-61; *Limits in the Seas No. 101* (1984); U.N. LOS: Practice of Archipelagic States 23-44; *Indonesia*, U.N. Baselines: Legislation 187-93; *Limits in the Seas No. 35* (1971); U.N. LOS: Practice of Archipelagic States 45-55; *Kiribati*, Maritime Zones (Declaration) Act, 1983; SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS 245 [hereinafter SMITH, EEZ CLAIMS]; U.N. LOS: Practice of Archipelagic States 56-60; *Marshall Islands*, Marine Zones Declaration Act, 1984, MCRM p. 2-284 (1990); *Papua New Guinea*, Offshore Seas Declaration 1978, SMITH, EEZ CLAIMS 363; U.N. LOS: Practice of Archipelagic States 68-74; *Philippines*, U.N. Baselines: Legislation 250-59; *Limits in the Seas No. 33* (1971); U.N. LOS: Practice of Archipelagic States 75-85; *Saint Vincent and the Grenadines*, Maritime Areas Act, 1983, Smith, EEZ Claims 399; U.N. LOS: Practice of Archipelagic States 86-92; *Sao Tome and Principe*, U.N. Baselines: Legislation 271-73; *Limits in the Seas No. 98*; U.N. LOS: Practice of Archipelagic States 93-99; *Solomon Islands*, U.N. Baselines: Legislation 277-280; U.N. LOS: Practice of Archipelagic States 100-108; *Trinidad and Tobago*, LOS Bull. No. 9; U.N. LOS: Practice of Archipelagic States 109-23; *Tuvalu*, Marine Zones (Declaration) Ordinance, 1983, U.N. LOS: Practice of Archipelagic States 124-30; *Vanuatu*, U.N. Baselines: Legislation 376-80; U.N. LOS: Practice of Archipelagic States 131-35.

6. For details see *supra* Chapter IV, text accompanying nn. 51-54.

7. LOS Convention, article 47(2).

8. LOS Convention, article 47(1).

9. LOS Convention, article 47(9).

10. PRESCOTT, MARITIME AND POLITICAL BOUNDARIES OF THE WORLD 186 (1985). The Fiji documents may be found in *Limits in the Seas No. 101*, Fiji's Maritime Claims (1984). Fiji's Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order, 1981, may also be found in U.N. Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone, U.N. Pub. E.85.V.10 (1986) at 96-100.

11. *Limits in the Seas No. 98. Accord*, PRESCOTT, *supra* n. 10, at 318 (longest baseline measures 99 miles; water to land ratio is 3:1).

12. PRESCOTT, *supra* n. 10, at 163. See *supra* n. 5.

13. *Id.* at 185.

14. Cape Verde's Decree Law No. 126/77, may be found in U.N. Baselines: Legislation 99 and SMITH, EEZ CLAIMS 96.

15. State Department Note dated June 2, 1980, File No. P80 0073-0828.

16. See PRESCOTT, *supra* n. 10, at 318.

17. *Id.* at 211.

18. American Embassy Manila Diplomatic Note no. 836 of May 18, 1961, State Department File No. 796.022/5-2461. See also *Limits in the Seas No. 33* (March 26, 1971) and 4 WHITEMAN 283, 286-87. The Philippine Act No. 3046 of June 17, 1961 defining the baselines of the territorial sea of the Philippines may be found in U.N., Legislative Series B/15, at 105; U.N., Baselines: Legislation 250; and *Limits in the Seas No. 33*. Article III of the Treaty of Peace, Paris, Dec. 10, 1898, 30 Stat. 1754, T.S. 343, 11 Bevans 616, reads in part "Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line ..." (emphasis added); Article I of the Treaty between the United States and the United Kingdom concerning the Boundaries of the Philippines and North Borneo, Washington, Jan. 2, 1930, 47 Stat. 2198, T.S. 856, 12 Bevans 474, states in part "the line separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand shall be and is hereby established as follows ..." (emphasis added). By American Embassy Manila Note No. 169 of Mar. 10, 1969, the United States similarly protested Republic Act No. 5446, signed Sept. 18, 1968 amending Republic Act No. 3046 (which may be found in U.N., Baselines: Legislation 251-58). State Department File POL 33-4 PHIL. For other protests of the Philippines archipelagic claim, first made in 1955, see 4 WHITEMAN 286-87 and O'Connell, *Mid-Ocean Archipelagos in*

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International Law, 45 Brit. Y.B. Int'l L. 25-38, 60-61. Prescott is of the view that it is "certain" that the Philippines has failed to win international approval for this historic claim. PRESCOTT, *supra* n. 10, at 230.

19. The Philippines statement on signature of the LOS Convention may be found in U.N., Status of the United Nations Convention on the Law of the Sea 22 (1985). The Philippines declaration accompanying deposit of its instrument of ratification on May 8, 1984, may be found in *id.* at 37.

20. American Embassy Manila Note delivered Jan. 29, 1986. State Department telegram 115912, Apr. 17, 1985; American Embassy Manila telegram 03261, Jan. 29, 1986.

Several other nations have also protested the Philippine declaration, including Australia, Bulgaria, Byelorussia, Czechoslovakia, the Ukraine and USSR. Thereafter, on October 26, 1988, the Secretary-General received from the Government of the Philippines a declaration concerning the Australian objection which reads in part:

The Philippine Government intends to harmonize its domestic legislation with the provisions of the Convention.

The necessary steps are being taken to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention.

The Philippine Government, therefore, wishes to assure the Australian Government and the States Parties to the Convention that the Philippines will abide by the provisions of said Convention.

U.N., Status of the United Nations Convention on the Law of the Sea 41-43 (objections by Byelorussia and Czechoslovakia), 44-45 (objection by the USSR); U.N., Current Developments in State Practice No. II, at 95-98 (objections from Australia and Bulgaria, and Philippine response); 12 Aust. Y.B. Int'l L. 383-85 (1992) (same); U.N. LOS BULL. Special Issue I: Status of the United Nations Convention on the Law of the Sea 13-14 (Ukrainian objection) (Mar. 1987). As of January 1994, the Philippines has not reformed its legislation.

Subject to the provisions of Part IV of the LOS Convention, an archipelagic State may claim sovereignty over the waters, airspace, seabed and subsoil enclosed by the archipelagic baselines (Article 49). Within the archipelago, the State may claim internal waters, in accordance with articles 9 (mouths of rivers), 10 (bays) and 11 (ports).