DEVELOPMENT OF THE ARCHIPELAGIC DOCTRINE AS A RECOGNIZED PRINCIPLE OF INTERNATIONAL LAW *

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INTRODUCTION

Due to the adoption of the new Convention of the Law of the Sea by the Third United Nations Conference on the Law of the Sea, the Archipelagic Doctrine is now an accepted principle in international law.[1] Indeed the acceptance of the doctrine has come a long way. Although a number of island States such as Indonesia and the Philippines have practiced the doctrine in the past, embodying it in their respective municipal laws and constitutions, international treaty and customary law did not recognize the theory.

During the First and Second Conferences of the United Nations on the Law of the Sea in 1958 and 1960, representatives of the Philippines and Indonesia, supported by a number of jurists, made of record their official proposal for recognition that an archipelagic State is composed of groups of islands, with the waters within the baselines as internal waters. Maritime states, however, resisted said claims as a threat to the mobility of their commercial, fishing and war vessels.

Long before the 1958 United Nations Conference, the archipelagic principle had already been considered by a number of international institutions. During its sessions in 1888 in Lausanne and 1889 in Hamburg, scholars of the *Institut de Droit International* discussed the doctrine in relation to the delimitation of territorial waters. It was then suggested that islands forming a State should be treated as a unit.[2]

In its 34th conference at Vienna in 1926, the International Law Association also reviewed the same question but came to no decision.[3]

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[1] See United Nations Convention on the Law of the Sea, Part IV, Articles 46-54.

[2] See *Institut de Droit International* ANNUAIRE Hamburg Session, 1891, Vol. 11, p. 37, vol. 13; REPORT OF THE 33RD CONFERENCE, Paris session.

[3] See "Draft Convention Laws of Maritime Jurisdiction in Time of Peace" INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 34TH CONFERENCE (Vienna) 42 (1947).

In its preparatory work in 1930, the Hague Conference under the auspices of the League of Nations indicated possible agreement of treating certain island groups as a whole unit, but no final agreement was made on the issue due to lack of technical details.[4]

The Harvard Research Committee in International Law did not accept the archipelagic principle. In a comment on the draft articles on territorial waters the Committee stated that "no different rules should be established for groups of islands or archipelagos except that if the outer fringe of islands is sufficiently close to form one complete belt of marginal sea, the waters within such belt should be considered territorial."[5]

Likewise, in the article on archipelagos in the Draft Convention prepared by *rapporteur Schucking,* the Committee of experts of the League of Nations incorporated provisions for treating the islands of an archipelago as a whole, measuring the territorial sea "from the islands most distant from the center of the archipelago."[6]

The First United Nations Conference on the Law of the Sea

In the preparatory work for the First United Nations Conference in 1958, J.P.A. Francois, special *rapporteur* of the International Law Commission, proposed that for a group of islands, a ten-mile line should be adopted as the baseline for measuring the territorial sea outward in the direction of the high seas, and the waters included within the group be constituted inland waters.[7]

In a later report, he further suggested that straight baselines be used in cases of archipelagos as well as bays.[8] However, the International Law Commission declined to consider a provision for such coastal island groups and merely submitted a draft article providing: "That every island has its own territorial sea."[9] In its comments however, the Commission gave due recognition to the importance of the question of archipelagos and suggested that the conference give due attention to it.[10] One member suggested an eight-year study to obtain necessary expert advice on the subject. The prevailing opinion in the Convention was, at least, in favor of a continued customary development of the principle regarding archipelagic States.[11] The Commission's 1956 commentary on draft article 10 on "Islands" stated that:

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4 Report of the Second Commission, p. 13.
5 23 AM. J. INT'L. L. 275 (1929).
6 Report of the Committee of Experts, p. 72; 20 AM. INT'L. L. 141 (1926).
7 The Regime of the Territorial Sea, A/CN 4/53, April 5, 1952, 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 25 (1952).
8 U.N. Doc. A/CN 4/6-1 (1953, 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 57 (1953), U.N. DOC. E. N. 4/SER. A/1953/ADD. 7.
9 Art. 10 of the INTERNATIONAL LAW COMMISSION.
10 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 270 (1956).
11 2 INTERNATIONAL LAW COMMISSION YEARBOOK 253 (1956); U.N. Doc. A/CN 4/SER. A/1956/ADD. 1.

> The Commission had intended to follow up this article with a provision concerning groups of islands. Like the Hague Conference for the Codification of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it took in different archipelagos. The Commission was prevented from stating an opinion, not only by disagreement of the breadth of the territorial sea, but also by lack of technical information on the subject. It recognizes the importance of this question and hopes that if an international conference subsequently studies the proposed rules it will give attention to it.[12]

It was on this occasion that the Philippines suggested the method of baselines to be applied to ocean archipelagos whose component parts are sufficiently close to one another to form a compact whole and which have historically been considered collectively as a single unit. The waters within such baselines would be considered internal waters.[13] Denmark likewise proposed the straight baselines system provided such lines were limited to 15 miles and the waters enclosed therein were subject to innocent passage.

Consideration of the Concept During the 1958 Convention—Coastal Archipelagos

While the United Nations Conference in 1958 did not include a provision on Archipelagos, it did provide a rule for the delimitation of groups of islands along the coasts of a mainland, following the ruling of the International Court of Justice in the *Anglo-Norwegian Fisheries Case.*[14] Thus, the Convention in 1958 substantially followed the decision of the International Law Commission in not setting any maximum limit as to the number of straight baselines to be drawn along the outermost islands of coastal archipelagos. The baselines joining the approporiate points may be employed in drawing the baseline from which the breadth of the territorial sea is to be measured. The sea areas lying within the lines are subject to the regime of internal waters.[15]

Even before the *Anglo-Norwegian Fisheries* case, a number of States with archipelagic coasts had already adopted the method of straight baselines in delimiting their waters. In a study conducted by Jens Evensen at the request of the Secretariat of the United Nations,[16] it appeared that

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[12] 1956 Report, Art. 10, International Law Commission.

[13] UN Doc. No. A/Conf. 13c.1/L.98. See Synoptical Table, UN Doc. A/Conf. 13PC.1/L.11 Rec./1.

[14] I.C.J. REP. 116 (1951). This was incorporated in Article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. See also Article 5 of the Report of the International Law Commission Comments, 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 267 (1956).

[15] Article 4, pars. 1 and 2, Convention on the Territorial Sea and the Contiguous Zone.

[16] Certain Legal Aspects concerning the Delimitation of the Territorial Waters of Archipelagos, OFFICIAL RECORDS 289; Preparatory Document No. 15, A/Conf. 13/18, Nov. 29, 1957.

Evensen's paper also included the practices of mid-ocean archipelagos of the Faroes, north of the British Isles, the Svalvard Archipelago of Norway, Iceland,

Denmark,[17] Sweden,[18] Yugoslavia,[19] Saudi Arabia,[20] and Cuba had used straight baselines drawn along the outermost islands of the archipelagic coasts with the waters within such lines treated as internal waters.

Mid-Ocean Archipelagos

During the preparatory work for the first United Nations Conference in 1958, both the Philippines and Indonesia submitted proposals to treat mid-ocean archipelagos as one whole unit. In a position paper of March 7, 1955, the Philippines stated that "all waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension are necessary appurtenances of the land territory forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.[21]

In asserting its position, the Philippines maintained that the Philippine Archipelago consists of a continuous chain of the islands or islets in such a way that straight baselines could easily be drawn between appropriate points on outer islands or islets so as to encircle the whole archipelago, without crossing unreasonably large expanses of water and without departing from the principles laid down by the International Court of Justice in the *Anglo-Norwegian* case. Accordingly, it was proposed that a rule should be laid down under which outlying archipelagos like the Philippines may be treated as a single unit and the waters lying between and within the islands considered as internal waters.[22]

The Indonesian Government also declared that the territorial sea of an archipelago should be measured from baselines drawn between the outermost islands. Through a proclamation on 13 December 1957, the Indonesian Government enclosed the whole Indonesian Archipelago with a system of straight baselines. According to an official statement, to treat each of the 3,000 or more islands of Indonesia as having its own territorial waters would create problems. In times of war, especially, freedom of

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the Bermudas and the Galapagos of Ecuador which used consecutive lines for the delimitation of their waters. Other mid-ocean archipelagos are Fiji, Hawaiian Islands, Indonesia, the Philippines, and Solomon Islands. Examples of quasi-archipelagos are Bahrein, Barbados, Cuba, Cyprus, Jamaica, Japan, Madagascar, Malta, Mauritius, Nauru, New Zealand, Singapore, Sri Lanka, Tonga, Trinidad and Tobago, and Western Samoa. See J.J.G. Syatauw, *Revisiting the Archipelago; An Old Concept Gains a New Respectability*, INDIA QUARTERLY 112 (April 1973).

17 Neutrality Decrees of 1927 and 1938.

18 Customs Regulations of October 27, 1927; Royal Letter of May 4, 1934.

19 Enactment of December 1, 1948.

20 Royal Decree of May 28, 1946.

21 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 69-70 (1956). See Art. I, PHIL. CONST.

22 Note Verbale, dated January 20, 1956 from the Permanent Mission of the Philippines to the United Nations, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 70 (1956); See also GAOR, Tenth Session, 1955 Supp. No. 8A (A/2916), 137.

communication would be threatened even if the State itself was not a belligerent.[23]

At any rate the 1958 Convention on the Law of the Sea adopted the formulation set by the International Court of Justice in the *Anglo-Norwegian Fisheries case,*[24] but apparently evaded the issue on mid-ocean archipelagos,

Article 4 of the Convention on the Territorial Sea reads:

> 1. In locations 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, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
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> 2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying with the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
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> 3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.
>
> 4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.
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> 5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.
>
> 6. The coastal State must clearly indicate straight baseline on charts to which due publicity must be given.

The *Anglo-Norwegian Fisheries* case, however, can be considered as a break-through for the archipelagic principle as it recognized the validity of drawing straight baselines along the outermost points of the coastal islands and considered all waters enclosed therein as internal waters.[25]

The question of archipelagic States was again raised during the 1960 Conference on the Law of the Sea which was called to take up the breadth of the territorial sea. No agreement was reached on the primary issue, hence, neither was a decision made on the position of archipelagos.[26]

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[23] Statement of Mr. Subardjo of Indonesia, 14 March 1958 UN Conference of the Law of the Sea, OFFICIAL RECORDS Vol. III. p. 43, A/Conf. 13/39. The Indonesian delegation also introduced into the records, Act. No. 4 of the President of Indonesia dated February 10, 1960 the baselines encircling all islands [UN Doc. A/Conf. 19/5 add 1 1960)].

[24] [1951] I.C.J. 116.

[25] Jose Ingles, *What is an Archipelago?* AMBASSADOR JOURNAL 1973; McLoughlin, *The Approach by Fiji—a Mid-Ocean Archipelago to the Conference of the Law of the Sea,* MELANESIAN LAW JOURNAL 3 (1972).

[26] The U.S.-Canadian proposal for a 6-mile limit of the territorial sea *gained* wide support but the proposal failed to get the necessary approval by one vote. The Philippines abstained— UN Doc. A/Conf. 19/C.1/L/10 (1960). The Philippines also did not sign the four conventions of 1958 due to non-recognition of the archipelagic doctrine. See on this score Jorge R. Coquia, Territorial Waters of Archipelagos. 1 PHIL. INT'L. L. J. 139 (1962); YEARBOOK OF THE ALUMNI OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1960).

Opinion of Jurists

International law jurists have varied opinions concerning the treatment of archipelagos. According to C. J. Colombos, the recognized rule appears to be that a group of islands forming an archipelago should be considered as a unit and the extent of the territorial waters should be measured from the center of the archipelago.[27] Whether or not a group of islands form an archipelago is determined not only by geographical conditions but is also dependent in some cases on historical or prescriptive grounds.[28]

Philip Jessup opined that archipelagos should be considered as forming a unit and that the extent of the territorial waters be measured from the land farthest from the center. He did not propose any maximum distance between the islands.[29] Swarzenberger maintained that in case of islands forming a natural unit or archipelago, the establishment of territorial jurisdiction is necessarily a gradual process.[30]

Gidel in his treatise *Droit International Public de la Mer* accepts the view that archipelagos should be considered as a unit and that longer baselines may be justified on the theory of "historic waters."[31]

Argentine writers Podesta Costa[32] and Diaz Cisneros[33] also agree that groups of islands forming an archipelago should be considered as a unit and must have one territorial belt.

Hyde also stated:

> An island in the high sea, such as Puerto Rico or Crete has its own territorial waters in marginal sea, measured three marine miles outward therefrom in the same manner as from the mainland. Where, however, a group of islands forms a fringe or cluster along the ocean front of a maritime State, it may be doubted whether there is evidence of any rule of International Law that obliges such state invariably to limit or measure its claim to the waters around them by the exact distance of each unit.[34]

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27 INTERNATIONAL LAW OF THE SEA 90 (1954).

28 COLOMBOS, *op. cit.*, (1959 ed.) p. 104.

29 THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, 477 (1927).

30 1 INTERNATIONAL LAW 336 (1957), citing the case of Palmas Islands Arbitration 2 R.I.A.A. 829 (1928), where it was decided that if a State relies on continuous and peaceful display of its jurisdiction as evidence of its claim to a whole archipelago, it must prove the existence of effective jurisdiction over the whole area.

31 cf. Evensen, *op. cit.*, p. 18.

32 DERECHO INTERNATIONAL PUBLICO 227 (1955).

33 *Id.*, at p. 53.

34 1 INTERNATIONAL LAW. CHIEFLY INTERPRETED BY THE UNITED STATES 484 (1945).

For a study of the diverse conditions which could give rise to a special regime for a mid-ocean archipelago, see HODGSON AND ALEXANDER, TOWARDS AN OBJECTIVE ANALYSIS OF SPECIAL CIRCUMSTANCES; DUBNER, B. H., THE LAW OF TERRITORIAL WATERS OF OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES; Amerasinghe, C. F., *The Problems of Archipelagos in the International Law of the Sea*, 23 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 39 (1974).

Preparatory Work of the Third UN Conference

At its twenty-third session on 21 December 1968, the General Assembly established the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction and outlined such Committee's future work. Later, the General Assembly decided to enlarge the Committee. Among the new members was the Philippines. Other member States not appointed to the Committee were also invited to participate as observers and to be heard on specific points.

During its first session held in March 1971, the Committee formed three Sub-Committees one of which (Sub-Committee II) was allocated the task of preparing a comprehensive list of subjects and issues relating to the Law of the Sea, including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of breadth and the question of international straits) and the contiguous zone, fishing, and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States). The Sub-Committee was also requested to prepare the draft treaty articles thereon.

In its meetings in 1971, the Committee received a series of working papers, draft conventions and draft treaty articles relating to various parts of its work.

Of particular significance to archipelagic States was the reference made by Sub-Committee II to the special position of archipelagic States in international law and to the various criteria which should determine whether or not groups of islands constitute an archipelago. It was stated that the preservation of the political and economic unity of an archipelagic State and the protection of its security, the conservation of its marine environment and the exploitation of its marine resources justified the inclusion of the waters inside an archipelago under the sovereignty of the archipelagic State and the granting of a special status to such waters. Statements were made regarding passage through archipelagic waters and straits and the nature of such passage. It was also stated that the special status of archipelagic waters was an emerging concept and might be settled as part of an over-all solution of problems relating to the law of the sea.[35]

During the meeting of Sub-Committee II, Arturo Tolentino, Chairman of the Philippine Delegation, submitted for consideration the principles relating to archipelagic States, in behalf of the delegations of Indonesia, Fiji, Mauritius and the Philippines.

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[35] Report of the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction. Vol. 1, p. 55, Gen. Assembly, OFFICIAL RECORDS; 28th Session in 1974, the archipelagic principle was supported by the organization of African States, in their meetings in 1973 and 1974, by several Latin American States (Ecuador, Panama, Peru and Uruguay and the League of Arab States) (A/AC.138/A.C.II/L 27 & 24). See also statement of Estelito P. Mendoza, Solicitor-General of the Republic of the Philippines before Sub-Committee II on 20 August 1973, reprinted in 3 PHIL. Y. B. INTL. L. 39 (1974).

Basic Principles of Archipelagic States

These principles state:

1. An archipelagic State, whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically have or may have been regarded as such, may draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago from which the extent of the territorial sea of the archipelagic state is or may be determined.

2. The waters within the baselines, regardless of their depth or distance from the coast, the sea-bed and the subsoil thereof, and the superjacent airspace, as well as all their resources, belong to and are subject to the sovereignty of the archipelagic State.

3. Innocent passage of foreign vessels through the waters of the archipelagic State shall be allowed in accordance with its national legislation, having regard to the existing rules of international law. Such passage shall be through sealanes as may be designated for the purpose by the archipelagic State.[36]

The underlying basis of these principles is the unity of land, water and people into a single entity. The archipelagic concept finds its justification in the relationship between the land, the water and the people inhabiting the islands of the archipelago. It is for the purpose of achieving, maintaining, and preserving this unity that an archipelagic state is conceived as one whose component islands and other natural features form an intrinsic geograpical, economic and political entity, and historically have or may have been regarded as such. The interrelation of geography, economics, politics and in some cases, history are important in this context of the archipelago.[37]

An archipelago must be basically considered as an integral entity, strengthened by political and economic unity and, in some cases, sustained through the years by historical continuity from which it derives its identity. Thus, an archipelago may have some or all of these factors but the fundamental consideration is that they must have always been identified as distinct entities. These essential elements of unity cannot be overstated as the basis of the desire of an archipelagic state to preserve its identity as

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[36] Document A/AC, 138/SC, 11/L.15, Report of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, 3 UNITED NATIONS GENERAL ASSEMBLY RECORDS, 28th Session Supplement 21, pp. 1-2. An explanatory note to said document reads: This paper is submitted by Fiji, Indonesia, Mauritius and the Philippines for consideration by this Committee with a view to the principles enunciated therein being incorporated into the convention on the law of the sea. These principles are designed to accommodate not only the interests of States but also other States and of the international community as a whole.

[37] In the case of Indonesia and the Philippines their geographical location makes them susceptible to subversive activities from external sources [D.P. O'connell, *Mid-Ocean Archipelagos in International Law* 35 B.Y.I.L. 53 (1971)].

one, as many islands compose it, with the consequent fragmentation of the nation and the State itself.[38]

It is because of this basic desire for unity that there should be international recognition of the right of archipelagic States to draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago. The extent of the territorial sea of the archipelagic State should then be determined from these baselines. Within the baselines, the waters, regardless of their depth or distance from the coast, the sea-bed and the subsoil thereof and the superjacent airspace as well as all their resources, belong to and are subject to the sovereignty and exclusive jurisdiction of the archipelagic State. This follows from the accepted principles of International Law on State sovereignty and jurisdiction.

Under the third principle, innocent passage of foreign vessels through the waters of the archipelagic State shall be allowed in accordance with its national legislation, having regard to the existing rule of international law. Such passage shall be through designated sealanes. This is to reconcile and harmonize the peculiar national interest of the archipelagic States and those of the international community.[39]

Attitude of Regional Groups

In the Declaration on the "Issues of the Law of the Sea" presented to the Sea-Bed Committee in 1973 the Organization of African Unity endorsed the archipelagic principle stating that: "the baselines of any archipelagic State may be drawn by connecting the outermost points of the outermost islands of the archipelago for the purpose of determining the territorial sea of the archipelagic State."[40]

Some Latin-American states, namely: Ecuador, Panama and Peru cosponsored an article which reads:

> The area of sovereignty and jurisdiction of an archipelagic State may be measured from straight baselines joining the outermost points of the outermost islands and reefs of the archipelago.
>
> In such cases, the waters enclosed by the baselines shall be considered internal waters though vessels of any flag may sail in them, in accordance with the provisions laid down by the archipelagic State.[41]

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[38] See Statement of Vicente Abad Santos, Co-Chairman of the Philippine Delegation at the plenary session, Caracas, 1 OFFICIAL RECORDS, p. 114.

[39] See remarks of Kusumaatmadja, Indonesian delegate to the Sea-Bed Committee, UN Doc. A/AC. 138/SC 1/SR. 16, 6 August 1971, p. 200.

[40] A/Conf. 62/33. OFFICIAL RECORDS, Vol. III p. 63, Report of the Committee on Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction, Vol. 2, p. 5. The endorsement was prepared by 41 African Ministers and endorsed by their respective heads.

[41] See also Report, *op. cit.*

> An archipelago as an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it.[42]

The background and *rationale* of the archipelagic doctrine has been the subject of a number of studies by Philippine writers.[43]

The Asian African Legal Consultative Committee also expressed conformity to the archipelagic principle.[44]

Objections to the Archipelagic Concept

The maritime powers led by the United States have expressed the view that most of the island groups claiming to be archipelagic States lie astride some of the most important communication routes of the world and if the archipelagic principle is accepted they would enclose very substantial marine areas.[45]

Offering a recognition of the archipelagic principle but with some conditions to protect the interests of maritime powers, the United Kingdom submitted its own draft articles as follows:

> 1. On ratifying or acceding to this Convention a State may declare itself to be an archipelagic State where:

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[42] *Id.* p. 72; A/AC 138/SCII/34 a similar proposal was also made by Thailand (A/CONF. 62, C.2/L. 63).

[43] Arturo M. Tolentino, *On Historic Waters and Archipelagos,* 3 Phil. Y. B. INT'L. L. 31 (1974); J. R. Coquia, *Third U.N. Conference on the Law of the Sea,* 4 PHIL. Y. B. INT'L. L. 1 & 5 PHIL. Y. B. INT'L. L. 1 (1976); 6 PHIL. Y. B. INT'L. L. 1 (1977); J. R. Coquia, *Territorial Waters of Archipelagos,* 1 PHIL. Y. B. INT'L. L. 57 (1962); L. O. Ridao, *The Philippine Claims to International Waters and Territorial Sea,* 3 PHIL. Y. B. INT'L. L. 57 (1974); M.D. Santiago, *The Archipelagic Concept in the Law of the Sea: Problems and Perspectives,* 49 PHIL. L.J. 315 (1974); J.M. Arregaldo, *Philippine Territorial Waters,* unpublished MSS (1956); Q. P. Evangelista, *The Regime of Archipelagic Waters,* U.S. NAVAL WAR COLLEGE STUDIES (1961); C. P. Romulo, *The Archipelagic Principle,* 3 Ambassador J. 90 (1973); A. M.. Tolentino, *Principles Relating to Archipelagic States,* 3 PHIL. Y. B. INT'L. L. 28 (1974); Estelito P. Mendoza, *The Baselines of the Philippine Archipelago,* 46 PHIL. L. J. 628 (1971); J. D. Ingles, *The Archipelagic Theory,* 3 PHIL. Y. B. INT'L. L. 23 (1974); J. R. Coquia, *Territorial Waters of Archipelagos,* 1960 Y. B. of the Alumni of the Hague Academy of Int'l. L. See map of the Philippines (p. 41) as an illustration of an ideal archipelagic State.

[44] See Reports of AALC 1971 and 1972.

[45] John R. Stevenson and Bernard Oxman, *"The Third UN Conference of the Law of the Sea; 1974 Caracas Session"* 69 AM. J. INT'L. L. 1 (1975). See also McDougal and Burke, *The Public Order of the Oceans,* p. 412. Chief opponents of the doctrine are the United States, United Kingdom, Japan USSR, Australia and the Netherlands. The U.S.A., Australia, the United Kingdom and Japan protested the claim of Indonesia over the waters inside its baselines proclaimed in 1957. See D. P. O'connell, *"Mid-Ocean Archipelago in International Law",* 45 BRIT. Y. B. INTL. L. 1 (1971).

After the second United Nations Conference on the Law of the Sea, Arthur Dean, Chairman of the Conference wrote: "Under international law, foreign vessels may not pass through internal waters as of right, even if their passage is innocent. It is for this reason that we do not recognize the validity of this extensive and unilateral archipelago theory" (*The Second Geneva Conference on the Law of the Sea, The Fight for Freedom of the Seas,* 54 Am. J. Int'l. L. 51 (1960).

a) the land territory of the State is entirely composed of three or more islands; and
b) it is possible to draw a perimeter, made up of a series of lines or straight baselines, around the outermost points of the outermost islands in such a way that:
   (i) no territory belonging to another State lies within the perimeter,
   (ii) no baseline is longer than 48 nautical miles, and
   (iii) the ratio of the area of the sea to the area of land territory inside the perimeter does not exceed five to one

provided that any straight baseline between two points on the same island shall be drawn in conformity with articles ... of the Convention (on straight baselines).

2. A declaration under paragraph 1 above shall be accompanied by a chart showing the perimeter and a statement certifying the length of each baseline and the ratio of land to sea within the perimeter.

3. Where it is possible to include within a perimeter drawn in conformity with paragraph 1 above only some of the islands belonging to the State, a declaration may be made in respect of those islands. The provisions of this Convention shall apply to the remaining islands in the same way as they apply to the islands of a State which is not an archipelagic State and references in this article to an archipelagic State shall be construed accordingly.

4. The territorial sea/economic zone/and any continental shelf of an archipelagic State shall extend from the outside of the perimeter in conformity with articles... of this Convention.

5. The sovereignty of an archipelagic State extends to the waters inside the perimeter, described as archipelagic waters; this is excercised subject to the provisions of these articles and to other rules of international law.

6. An archipelagic State may draw baselines in conformity with articles ... (bays) and ... (river mouths) of this Convention for the purpose of delimiting internal waters.

7. Where parts of the territorial sea have before the date of ratification of this Convention been used as routes for international navigation between one part of the high seas and another part of the high sea or the territorial sea of another State, the provisions of these articles... of this Convention apply to those routes (as well as to those parts of the territorial sea of the archipelagic State adjacent thereto) as if they were straits. A declaration made under paragraph 1 of this article shall be accompanied by a list of such waters which indicates all the routes used for international navigation, as well as any traffic separtion schemes in force in such waters in conformity with articles ... of this Convention. Such routes may be modified or new routes created only in conformity with articles ... of this Convention.

8. Within archipelagic waters, other than those referred to in paragraph 7 above, the provisions of articles... (innocent passage) apply.

9. In this article, references to an island include a part of an island and reference to the territory of a state include its territorial sea.

10. The provisions of this article are without prejudice to any rules of this Convention and international law applying to islands forming an archipelago which is not an archipelagic State.

> 11. The depository shall notify all States entitled to become a party to this Convention of any declaration made in conformity with this article, including copies of the chart and statement supplied pursuant to paragraph 2 above.
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> 12. Any dispute about the interpretation or applications of this article which cannot be settled by negotiations may be submitted by either party to the dispute to the precedures for the compulsory settlement of disputes contained in articles ... of this Convention.[46]

In reply, the four archipelagic States submitted draft articles setting forth in more detail the archipelagic principles previously formulated.[47]

B.H. Dubner, in his treatise, *THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES* (1976), said that:

> ..."[S]pecial interests" of the archipelagic States constitute sufficient reason for the adoption of special law of the sea rules. A review of the conventional international law that is applicable to coastal States and coastal archipelagos would suggest that these special interests are customs, fiscal policy, immigration, sanitation, communications (both internal and external), illegal entry of aliens, pollution control and natural resources (e.g. fishing and minerals).
>
> A similar review would include, under the "general interests" of the maritime, the four freedoms in Article 2, Convention of the High Seas. To these rights, it is believed that this book has established that the more important editions of the "inter alia" list of Article 2 are resource allocation (e.g., fishing and mineral) and baseline deliminative formulae.

On August 9, 1974, the four archipelagic States submitted further draft articles in order to accommodate the interests of the maritime community.[48]

In the informal meetings between the archipelagic States and the maritime States, the latter offered proposals as conditions for the inclusion of the regime of archipelagos in the Convention of the Law of the Sea. Aside from a precise definition and limitation of the area to prevent the enclosure of far-flung islands to such an unreasonable extent that great expanses of water would be converted to internal waters, the maritime powers suggested that there must be a fairly reasonable land to water ratio and a fixed maximum length of baselines, which length was proposed to be not more than 80 nautical miles. A reasonable combination of the two would at least insure compactness and a reasonable unity of islands.

After considering the said proposals, the Second Committee included provisions in the Informal Single Negotiating Text prepared at the end of the Geneva session in 1975 fixing a ratio of the water area to the area

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[46] UN Doc. A/AC. 138/SC II/L-44.
[47] UN Doc. A/AC. 138/SCII/L. 48, OFFICIAL RECORD, Supplements 21, p. 99 A/9021.
[48] UN Doc. A Conf. 62.C2/L.49 OFFICIAL RECORDS Vol. III, p. 26.

of the land, including atolls, between one-to-one and nine-to-one. The maximum length of the baselines shall in general not exceed eighty (80) nautical miles, except for a certain percentage of these baselines, which may reach a length of one-hundred-twenty-five (125) miles. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.[49] The Revised Single Negotiating Text during the Fourth Session of the Conference later fixed this percentage to one percent.[50] More changes were made until in the Informal Composite Negotiating Text which was drafted during the Sixth Session of the Conference, the length of baselines was increased by one hundred (100) miles, three percent of which may be up to 125 miles in length. In addition, Art. 53(5) laid out the delineation of sea lanes from which ships and aircraft were not to deviate by more than twenty-five (25) miles. Thus the Text permitted the inclusion of a greater number of islands within the archipelagic State and extends the area of that State's exclusive competence (and further limits the inclusive rights and privileges of the maritime State sand the community) due to its extended baselines. It also aimed to further regulate navigation by permitting archipelagic States to impose strictly controlled channels through which only foreign ships would be permitted to exercise their right of innocent passage.[51]

Maritime powers continued to insist on the right of navigation through archipelagic waters and overflight over said waters. The main basis of their demand is that most waters which should have been high seas are converted to archipelagic waters and considered as internal waters. They contend that traditional doctrines such as innocent passage are objectionable for the same reasons that exist in connection with straits. On the other hand, some island states have expressed their concern over the desire of certain maritime powers for complete freedom of navigation and overflight.

In his report to the International Law Association's Manila Conference (1978), *rapporteur* L.F.E. Goldie said that it is clear that in the climate of world opinion which has now emerged the traditional maritime powers can no longer maintain the privileges and immunities they have enjoyed in recent centuries. The exclusive claims of coastal and insular States, among them archipelagic States, can no longer be ignored. These states are aware that they can only proceed effectively if they compromise in terms of the equities of the sides of both the traditional maritime States and the geographically disadvantaged States.

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[49] See article 118, par. 1-3, Informal Single Negotiating Text, A/Conf. 62/WP.8/Part II. Norway suggested 3·5 to 1 water to land ratio and 5 to 1 ratio for the United Kingdom with a 48 mile maximum baseline (UN Doc. A/AC 138/SC.II/L.44 UNCA OFFICIAL DOCUMENTS, p. 99).

[50] UN Doc. A/Conf. 62/WP9/Rev. a (RSNT) 15 OFFICIAL RECORDS, p. 125.

[51] 54 UN Doc. A/Conf. 62/WP 10 (1977).

With the clarification of the problems of freedom of passage, fishery resources and the continental shelf, the status of the archipelago under international law can be settled.[52]

Geographic Features of the Archipelagic States

The archipelagic States finally agreed to a reasonable criterion suggested by most maritime powers in order to have a precise definition of an archipelagic State. As defined in the principles of archipelagic States, an archipelago is a group of islands, including parts of islands, interconnecting waters and other natural features which form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

The Philippines

The Philippine archipelago consists of 7,100 islands, islets and rocks above water, with a combined land area of 300,000 sq. km. (115,800 sq. statute miles). Using the boundaries set by international treaty limits, its total area is approximately 1,788,000 sq. km. (520,170 sq. nautical miles). The approximate ratio of water to land is about 5:1.

Its coastline of 34,600 km. (21,500 statute miles) is highly irregular and fringed with numerous coral reefs, gulfs and lagoons. It is because of this heavily indented coastline with fringes of islands along the coast that the Philippines has adopted the method of straight baselines as the basis for defining the inner boundary of its territorial sea. Republic Act No. 3046 (1961), as amended in 1968 by Republic Act No. 5446, delineates a series of straight baselines connecting the outermost points of the outermost islands or rocks in the entire archipelago. The shortest of these lines is only about 178 meters and the longest 259.4 km. (140 nautical miles) off the Moro Gulf area. The average length of line is equal to 64 km. or 35 nautical miles. The waters within the baselines are to be internal waters of the Philippines under the exclusive sovereignty and jurisdiction of the country. The total area included in the baselines is approximately 884,000 sq. km. (257,400 sq. nautical miles). This means that the ratio of water to land within the baselines of the Philippines is approximately 1:9:1. This figure is significant because the ratio of water to land inside archipelagic baselines has been frequently mentioned in discussions in the U.N. Preparatory Committee.[53]

Indonesia

Indonesia, one of the foremost advocates of the archipelagic doctrine, consists of over 3,000 islands and islets with a total land area of 1.9 million sq. km. (575,450 sq. miles). On December 13, 1957, the Indo-

[52] Stevenson and Oxman, *op. cit.*, p. 22.

[53] Manansala, *The Philippines and the Third Law of the Sea Conference: Scientific and Technical Impact*, 3 PHIL. Y. B. INT'L. L. 135 (1974).

nesian Government issued a declaration including all waters surrounding, between, and connecting the islands consisting the Indonesian archipelago as internal waters, and claiming a twelve mile territorial water belt. Innocent passage was allowed through Indonesian waters subject to regulation.[54]

By a later decree, dated February 18, 1960, Indonesia established baselines of over 8,167.6 nautical miles on the outermost islands enclosing approximately 666,100 sq. nautical miles including important straits of Sunda, Sumba, Molucca and Macassar. The total area would be approximately 3.5 times the territorial sea which Indonesia would claim under the 12-nautical mile territorial limit if there were no straight baselines.[55] Within the baselines, Indonesia would have a land to water ratio of 1 to 1.4. It has a strategic position as its archipelagic waters lie among the major shipping lanes between the Middle East and the Far East.

It is evident from its declaration of 1957 that Indonesia reserves to itself the right to refuse the passage of any foreign ship. Moreover, as a result of the twelve mile territorial sea, almost the whole length of the Malacca Straits is covered. Foreign powers which use Sundra and Lombok straits for their warships give prior notice to Indonesia.[56] The Indonesian delegate to the Seabed Committee reiterated his country's stand that passage of warships through straits forming part of the territorial sea of a State would be subject to regulations by that State.[57]

With the limit of territorial waters raised from 3 to 12 miles, it is estimated that at least 121 straits would cease to be international.[59] Of these, the straits of Malacca, Selat, Lombok, Obrai and Sunda, all of high strategic importance, fall squarely within the archipelagos. Any additional increase in the breadth of territorial waters would only further complicate the matter. The twelve mile limit is at present being claimed by a considerable majority of States and is soon likely to be accepted as a recognized breadth of territorial waters. As regards the question of free navigation, the archipelagic States already grant the right of innocent passage to foreign vessels through their straits. For example, the joint statement issued by the Governments of Indonesia, Singapore and Malaysia concerning the Malacca Straits provides:[59]

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[54] Quoted in J. J. G. Syatauw, Some Newly Established Asian States and the Development of International Law 173 (The Hague, 1961).
(Indonesia became an independent state on Dec. 27, 1949).

[55] International Boundary Studies, Straight Baselines of Indonesia No. 35, Bureau of Intelligence and Research, U.S. Department of State.

[56] O'Connel, note 37 at 42.

[57] UN Doc. A/AC. 138/SC. 1/SR. 16, August 6, 1971.

[58] See the map issued by the Office of the Geographer in the U.S. Department of State, "World Straits Affected by 12 Mile Territorial Sea."

[59] Compared to 13 States which claimed a 12-mile territorial water belt in 1960, already 52 States claimed a 12-mile limit while another 11 States claimed between 18 to 200 miles. See R. P. Anand, *Tyranny of the Freedom of the Sea Doctrine*, 12 INTERNATIONAL STUDIES 423.

> Since the straits of Malacca is an important pasasge linking the Indian Ocean and the South China Sea, we guarantee the right of innocent passage to all ships. By innocent passage we mean passage that is not detrimental to the coastal States.[60]

Mauritius

Mauritius, situated 800 kilometers east of Madagascar is of volcanic origin, with a land area of 2,054 sq. km. (790 sq. miles). By an Act of Parliament, the Government of Mauritius, on April 16, 1970, established straight baselines.[61]

The principal island is Mauritius. Rodriguez Island is about 300 nautical miles eastward from Mauritius. The Cargados Carajos shoals, a true atoll, is approximately 220 nautical miles north-east of Mauritius and the Agalega Islands, a linearly aligned group nearly 650 nautical miles north of Mauritius.[62]

Because of the great distances of the islands, Mauritius may not qualify under the criteria of the ratio of land to water in the Convention. It has been suggested, however, that the system of straight baselines may be applied to separate groups of islands to make Mauritius an archipelagic State comprising several archipelagos as defined in Art. 117, par. 2(a), of the Informal Single Negotiating Text now Article 47 of the Convention.

Fiji

Fiji consists of 844 islands and islets with a total land area of 18,272 sq. km. (7,055 sq. miles). The largest of the islands is Vitti Levu with an area of 4,010 sq. miles.[63]

Fiji is crossed by two important shipping routes—the Nanuku Passage and the Kandayu Strait.[64]

Fiji adopted the straight baselines but considers the waters within the archipelago as territorial seas, hence innocent passage is unrestricted. Fiji became a party to the 1958 Convention on the Territorial Sea, and Contiguous Zone, High Seas, Fishing and Conservation of Living Resources, and Continental Shelf in 1971.[65]

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60 Statement issued by the Ministry of Foreign Affairs of Malaysia, 16 November 1971.

61 Territorial Sea Act, Section 5(a) and (b).

62 INTERNATIONAL BOUNDARY STUDIES, *Straight Baselines Mauritius,* No. 41, Bureau of Intelligence and Research Department of State, US.

63 The islands lie between 15° and 22° S. Lat. and 177° w. long. The next largest island is Vanau Levu with an area of 2,137 sq. miles.

64 World Shipping Lanes Map, Office of the Geographic, Department of State, Washington D.C.

65 Letter of the Prime Minister for Foreign Affairs to the UN Sec. Gen. dated March 19, 1971. Fiji was the first State to ratify the Convention of the Law of the Sea.

Bahamas

Bahamas, which has also declared itself an archipelagic State, consists of 700 islands at the southeast coast of Florida, 22 of which are inhabited. It has a land area of 13,590 sq. km. (5,386 sq miles). The Bahamas has narrow passages between islands of the group. The northwest Provident Channel and the Crooked Island Passage are important shipping lanes between the North Atlantic and Central South America.

There are surface protuberances of two oceanic banks, the Little Bahamas Bank and the Great Bahamas Bank.

Bahamas proposed a system of straight baselines with a maximum length of 80 nautical miles and a water to land (including atolls) ratio of 9 to 1.

Papua New Guinea

Papua New Guinea, with an area of 461,691 sq. km. (178,260 sq. miles), proclaimed its archipelagic baselines and other maritime limits in a legislation dated March 30, 1978.[66]

The baselines' longest boundary stretches 120 nautical miles between the Northern terminus of the land boundary between Papua New Guinea, Indonesia and Wuvulu Islands and includes the tiny island of Mauwm as well as the Southern Nuguria Islands.

The mainline of the archipelago is represented by a line connecting Tanga, Ferri, Green and Buka Islands. Papua New Guinea has also proclaimed its archipelagic baselines around Tavu and Nukumanu Islands consisting of 23 and 40 coral islets on atoll reefs.[67]

There are seven other territories where archipelagic baselines may be considered. They are Australia, New Caledonia, New Hebrides, New Zealand, Western Samoa, Solomon Islands and Tonga.

The Issue of Passage Through Archipelagic Waters

The most pivotal issue in connection with the adoption of the archipelagic doctrine was the claim of maritime powers of the right of unimpeded passage through archipelagic waters and freedom of overflight over said waters. The United States view is that in the maintenance of a "stable and peaceful international order, there must be freedom of navigation and overflight."[68] The maritime powers contend that the waters enclosed are high seas or at least territorial waters. Such a view stems from the perceived need to preserve the balance of power of nuclear states. U.S. and Soviet

[66] Papua New Guinea Government, Offshore-Sea Proclamation 1978, No. 7.

[67] See also Territorial Sea and Continental Shelf Boundaries: Australia, Papua New Guinea and Indonesia, *US Department of State, Bureau of Intelligence and Research* No. 87.

[68] U.S. DELEGATION BRIEFING BOOK, Third United Nations Conference on the Law of the Sea (1974) Department of State.

Missile-carrying submarines, the existence of which is viewed as a strategic deterrence, such as the need to keep their position concealed, if they are to remain effective. Hence, it is argued, they must be able to transit everywhere submerged. Submerged transit through straits, even those under coastal-state jurisdiction, is particularly important. Freedom of mobility for naval forces, then, requires high seas. The archipelagic principle poses a direct treat to this mobility because claims by strategically-located archipelagos would restrict unannounced and submerged movement of submarines.[69]

The basic principle of an archipelagic State is that all waters within such baselines regardless of their depth or distance from the coast belong to and are subject to the sovereignty of the archipelagic State. The sovereignty and rights of the archipelagic State extend to the air space over its waters as well as to the water column, the seabed, the subsoil, and to all of the resources contained therein. These waters are integral parts of the archipelago. The waters within the baselines are distinct and separate from the territorial sea which are located outside said baselines. The rights of the archipelagic State over the waters within the baselines cannot possibly be less but in fact should be greater than those over the territorial sea.[70]

While article 49 of the Convention acknowledges the sovereignty of an archipelagic State over the waters enclosed within the baselines, the air space and subsoil thereof,[71] such concept of sovereignty is substantially reduced by the succeeding provisions on passage. Thus, Article 52 provides for the right of innocent passage through archipelagic waters subject to the provisions of Article 53 which allows archipelagic States to designate sea lanes and air routes suitable for the safe and expeditious passage of foreign ships and aircraft. The archipelagic sea lanes passage, as defined in Article 53, paragraph 3, allows the "rights of navigation and overflight in the normal mode for the purpose of continuous and expeditious transit through an archipelago." But the normal mode of transit of a submarine, for example, is through submerged passage. Such normal mode is therefore more liberal than the ordinary passage through territorial waters under the innocent passage concept. Moreover, sea lanes and air routes used for

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[69] According to a recent study, four of the five straits 24 miles wide or less, which would be essential for the passage of US SSBNs, are under Indonesian sovereignty or are shared by Indonesia and a neighbor (Robert E. Osgood, 'National Security.' TOWARD A NATIONAL OCEAN POLICY: 1976 AND BEYOND US Government Printing Office, Washington D.C., 1976). Indonesia's strategic position astride the passage between the Pacific and Indian Oceans causes those states with important navies, and submarine fleets in particular to react vehemently against any proposal which would recognize sovereignty over a block of ocean area. If straits threaten as choke points, a sovereign regime for archipelagos could represent a death blow to naval mobility, it is claimed.

[70] Estelito P. Mendoza, *Statement Before the Asian-African Legal Consultative Committee on January* 9, 1974, 3 PHIL. Y. B. INT'L. L. 142 (1974). See also Tolentino, *Principles Relating to Archipelagic States,* 3 PHIL. Y. B. INT'L. L. 28.

[71] Formerly Art. 120, A/Conf. 62 WP. 8/Part II.

international navigation or overflight through the archipelago, and within such routes are all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be accessory.

There is not much difference between the regimes of the designated sea lanes and the waters of states without designated sea lanes. Paragraph 12 of Article 53 of the ICNT states that if an archipelagic State does not designate sea lanes, the right of archipelagic sea lane passage may be exercised through the archipelagic water routes normally used for international navigation. The designated sea lanes in paragraph 4 refer to the "normal mode" while paragraph 12 provides for the routes normally used for international navigation.

Paragraph 9 of Article 53 also directs the archipelagic State to designate sea lanes or traffic separation schemes which should be referred to a competent international organization.

To be consistent with the concept of sovereignty and to accommodate vessels that have to pass through archipelagic waters, the archipelagic States led by the Philippines agreed to grant innocent passage to foreign merchant vessels through designated sea lanes suitable for safe and expeditious passage. The archipelagic State however, may restrict the passage of particular vessels such as warships and vessels with special characteristics.[72]

In designating sea-lanes, archipelagic States may take into account the recommendations or technical advice of competent international organizations as to the channels customarily used for international navigation and the special features of particular channels and ships.

The Philippines also objected to the consideration of overflight as it is not a proper subject of the convention on the law of the sea. Any overflight is subject to ground control by the archipelagic State.[73]

A Revised Single Negotiating Text was later submitted by the Second Committee, headed by Andres Aguilar (Venezuela) during the 1976 session of the Conference.[74]

This text reproduced the provisions on archipelagic States. An archipelago is defined as a group of islands, including parts of islands, interconnecting and other natural features closely related with such islands, and

[72] Statement of Arturo M. Tolentino before the Second Committee at Caracas Session, 2 OFFICIAL RECORDS, p. 2664.

[73] See Article 125 of the Single Negotiating Text. The United States had proposed a compromise by allowing overflight over archipelagic sea lanes along three altitude tunnels or blocks. The Philippines did not accept this proposal. Considering the very narrow archipelagic sea lanes, most of which are very curvaceous, it is practically impossible for fast travelling jet planes to follow said air channels.

[74] Doc. A/Conf. 62/W.P. 8/Rev. 1/Part II.

waters and other natural features which form an intrinsic geographical, economic and political entity, or which historically have been regarded as such. The archipelagic State has sovereignty over all waters enclosed within the baselines, regardless of their depth or distance from the coast. This sovereignty extends to the air space over the archipelagic waters, the seabed and subsoil thereof, and to the resources contained therein.[75]

All States enjoy the right of innocent passage through archipelagic waters in acordance with Part II section 3, of the convention.[76]

However, the archipelagic State may designate sea lanes and air routes suitable for the safe, continuous and expeditious passage of foreign ships and aircraft across or over its archipelagic waters and the adjacent territorial sea.

All ships and aircraft enjoy the right of archipelagic sea lane passage. Archipelagic sea lane passage means the right of navigation and overflight in the normal mode for the purpose of continuous and expeditious transit from one part to another of the high seas or an exclusive economic zone. If the archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea-lanes passage may be exercised through the routes normally used for international navigation.[77]

Objections of the Philippines to Some Provisions of the Revised Text

Speaking for the Philippines, Ambassador Arturo M. Tolentino expressed reservations regarding the provisions on territorial sea claimed under historic title as well as some provisions on the chapter on archipelagic States in the Revised Negotiating Text.

The Philippines, supported by the Peoples Republic of China and several other delegations, reiterated its stand on the issue of passage through territorial waters, arguing that there should be a distinction between the passage of merchant ships and that of warships or vessels of special characteristics. Merchant ships may be allowed innocent passage but warships can pass only upon prior notification and/or consent of the coastal State. Warships and nuclear powered vessels and vessels carrying nuclear or other dangerous or noxious materials should, as regards passage through archipelagic waters, also be subject to consent and/or prior notification.

Ambassador Tolentino proposed that a single regime, that of innocent passage, be applied to normal or customary routes of international navigation.

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75 Art. 49 of the Convention, formerly Art. 119.
76 Art. 52 Part II Section 3, refers to innocent passage through territorial waters.
77 Art. 53.

The Philippine delegation also pointed out some inconsistencies in the Revised Text.

Paragraph I of Article 53 of the Convention empowers the archipelagic State to designate sea lanes. Under paragraph 4 of said article, however, the sea lanes must include normal passage routes for international navigation or overflight. Moreover, under paragraph 9 a competent international organization has the final decision in the determination of the sea-lanes to be designated. If no sea lane is approved, it is deemed that no sea lane is designated, meaning that all routes normally used for international navigation will be the sea lanes.[78]

With respect to the territorial sea, however, the coastal State may establish sea lanes without the approval of any international organization.[79]

Under paragraph 2, Article 22, coastal States of the territorial sea may require tankers, nuclear-powered vessels, and ships carrying nuclear or other inherently dangerous or noxious substances to confine their passage to the sea lanes established in the territorial sea. This right, however, is not given to the archipelagic State in its archipelagic waters.

Under Article 22, paragraph 2 foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances, when exercising innocent passage through the territorial sea, must carry documents and observe precautionary measures established for such ships by international agreement. Again, no such provisions appear for passage through archipelagic waters.

As evidenced by the above, the Revised Single Negotiating Text had imposed even more limitations on the sovereignty of the archipelagic State over its waters than the coastal State's sovereignty over the territorial sea. This is a legal anomaly, according to Philippine delegation Co-Chairman Arturo M. Tolentino, because the archipelagic waters are between the islands and inside the baselines and are therefore in effect an integral part of the State. In legal principle, the sovereignty of an archipelagic State over its archipelagic waters should have lesser limitations than the coastal State's sovereignty over the territorial sea.[80]

The Informal Composite-Negotiating Text

During the sixth session of the Third United Nations Conference held in 1977, the Conference produced the Informal Composite Text containing 303 articles and 7 annexes.[81]

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[78] See par. 12 of Art. 125, R.S.N.T., now Art. 53, par. 9 of the Convention.
[79] Art. 22, R.S.N.T.
[80] The text of Ambassador Tolentino's statement is published in 5 PHIL. Y.B. INT'L. L. 38 (1976).
[81] A/Conf. 62/W.P. 10, July 15, 1977, cited as ICNT.

The Informal Composite Negotiating Text reproduced the provisions allowing archipelagic States to draw straight baselines joining the outermost islands and drying reefs of the archipelago, provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between one to one and nine to one. The provisions on length and the determination of the baselines were reiterated.[82]

The Informal Composite Negotiating Text issued on April 30, 1978 and revised on April 11, 1980 carried the same provisions on archipelagic States.[83]

Adoption of the Convention

During the Ninth session which commenced on July 28, 1980, more revisions were made resulting in the "Draft Convention on the Law of the Sea (Informal Text)" issued on September 22, 1980.[84] This was further revised during the Tenth Session which was held in New York, March 9 to April 24, 1980 and continued in Geneva from August 2 to 28, 1981.[85] The text with some amendments was finally adopted by the Conference during its plenary session in New York on April 30, 1982.

With the adoption of the Convention of the Law of the Sea, the archipelagic doctrine was finally accepted as a principle in conventional international law.

Some of the important provisions on archipelagic States are as follows:

Article 46
Use of Terms

For the purposes of this Convention:

(a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;

(b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

The ratio of water to land within the archipelagic baselines is provided in Article 47 of the Convention which reads:

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[82] Articles 46-48, ICNT.
[83] A/Conf. 62/W.P. 10/Rev. 1 & 2.
[84] A/Conf. 62/W.P. 10/Rev. 1 & 2.
[85] Draft Convention on the Law of the Sea. A/Conf. 62/L/78, August 28, 1981. The Convention was adopted by a vote of 130 in favor and 4 against and 17 abstentions. The negative votes came from the United States, Turkey, Israel and Venezuela.

Article 47
Archipelagic baselines

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the sea of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas of the exclusive economic zone the territorial sea of another State.

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

7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

The archipelagic State has sovereignty over all waters enclosed by the baselines as archipelagic waters regardless of their depths and distances from the coast, as well as their seabed, subsoil and resources and the air space above said waters.[86]

As a means of preserving international navigation, especially through waters which were formerly high seas but have been converted to archi-

[86] Article 49, Convention on the Law of the Sea. The exercise of said sovereignty, however, is without prejudice to existing agreements with other States including traditional fishing rights and other legitimate activities of the immediately adjacent States in certain areas falling within the archipelagic waters. These also include existing submarine cables laid by other States passing through said waters without making any landfall. Under the present Convention, Indonesia, the Philippines, Fiji, Papua New Guinea, and Bahamas qualify as archipelagic States.

pelagic waters enclosed by archipelagic baselines, the Convention provides that all ships of States enjoy the right of innocent passage through the archipelagic waters in accordance with Part II, section 3,[87] subject to further provisions with respect to the designation of sea lanes.[88] For this purpose, the archipelagic State may, without discrimination in form or in fact as to foreign ships, suspend the right of innocent passage temporarily in specified areas when it is essential for the protection of its security. Such suspension takes effect only after due publication thereof.[89]

All ships and aircraft enjoy the right of archipelagic sea-lane passage, which means the right of navigation and overflight in the normal mode for the purpose of continuous and expeditious transit between one part and another part of the high seas or an exclusive economic zone. If the archipelagic State does not designate sea lanes, passage may be exercised through the routes normally used for international navigation.[90]

The sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. The archipelagic State may also prescribe traffic separation schemes for the safe passage of ships through channels in sea-lanes which schemes must conform to generally accepted international regulations.[91]

Entry of foreign vessels into archipelagic waters is exclusively for transit passage, hence, the Convention imposes duties on ships and aircrafts during their passage, research, and survey activities similar to those provided for states bordering international straits. Archipelagic States are thus empowered to adopt laws and regulations relating to transit passage through archipelagic waters for the prevention of fishing; loading and unloading of any commodity, currency, or person in contravention of the customs, fiscal, immigration or sanitary laws. Foreign vessels passing through the archipelagic waters shall comply with such laws. The flag State of a ship or the State of registry of an aircraft which acts in a manner contrary to such laws and regulations shall bear international responsibility for any loss or damage which results to the archipelagic State.[92]

Analysis of the Archipelagic States Provisions of the Convention

The concept of the archipelagic State conceived by both jurists and the original proponents of the doctrine has not been fully realized in the Convention.

The basic concept of the archipelagic doctrine is that all waters within the archipelagic baselines are internal waters and are part and

87 Innocent Passage through Territorial Waters.
88 Article 53.
89 Article 52.
90 Article 53, pars. 1-4.
91 Article 53, pars. 5-7.
92 Article 42, Draft Convention in Relation to Article 54.

parcel of the national territory. The Convention classifies these waters "archipelagic waters," and categorizes them as neither internal nor territorial waters. The regime over archipelagic waters is quite distinct. The sovereignty over these waters is quite restricted particularly to transit passage of foreign vessels.

In the course of negotiations during the conference, insistence of maritime powers on the unimpeded passage through archipelagic waters caused a number of archipelagic States to take the position that strait States have the right to designate sea-lanes for warships and vessels of special characteristics. The archipelagic State claimed that passage in said straits should be subject to regulation with prior notification or authorization. In the interest of international navigation the strait States offered innocent passage through designated sea-lanes only to commercial vessels. This resulted in the eight-power proposal of draft articles on navigation through the territorial sea, including straits used for international navigation.[93] The alignment of the archipelagic States with the strait States has led one writer to comment that the archipelagic States have played the "straits game" and neglected the battle for the archipelagic principle.[94]

Conclusion

Even before the Third United Nations Conference on the Law of the Sea, the maritime powers had objected to the archipelagic doctrine as an accepted principle in international law, as it restricted the mobility of their war vessels. In the face of overwhelming support from the international community, however, the maritime powers have finally accepted the principle on conditions specifying a maximum water to land ratio, the number of and maximum lengths of baselines, and the transit passage and overflight through and over archipelagic waters.[95]

The battle waged by the archipelagic States has therefore not been completely won. Not fully developed and small in number and size, these States faced great odds considering the strong opposition from big and influential maritime powers. The original concept of an archipelagic State, with all waters within the archipelago's baselines as internal waters, was not fully achieved. Implementation of the Convention on the Law of the

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[93] A/AC. 138/SC II/118 by Cyprus (Greece, Indonesia, Malaysia, Morocco, Philippines, Spain & Yemen. Proposals were made as amendment to the Draft Convention during the Eleventh session. Said proposed amendment was however withdrawn.

[94] Dale Andrew, *Archipelagos and the Law of the Sea*, 2 MARINE POLICY (No. 1) 46 (1978).

[95] The archipelagic States were not altogether united during the final negotiating stage of the conference. On this issue, they did not stand together in pursuing their position on the archipelagic principles they originally presented in the seabed committee. With the exception of the Philippines, the archipelagic States relaxed their position fearing that the archipelagic doctrine might not be accepted.

Sea will show how the international Community will react to this newly recognized doctrine.

Some provisions of the Convention, however, do preserve the sovereignty of the archipelagic State. Under Articles 39, 41, and 43, the archipelagic State can regulate the rights of transit passage of foreign vessels, empowering the archipelagic State to adopt laws and regulations relating to said transit passage.

The archipelagic State has complete economic jurisdiction over the resources within its archipelagic baselines except where the immediately adjacent states would enjoy certain traditional fishing rights and could carry out other legitimate activities. The archipelagic State also has rights over 200 miles of exclusive economic zone (EEZ) extending outward from the baselines.[96]

On environmental protection, ships in transit are bound to comply with generally accepted international regulations, procedures and practices concerning pollution.[97]

Nonetheless, during the signing of the Convention at Montego Bay, Jamaica on 10 December 1982, the Philippines, pursuant to Article 310 of Convention, made the following declaration:

> "The Government of the Republic of the Philippines hereby manifests that in signing the 1982 United Nations Convention on the Law of the Sea, it does so with the understandings embodied in this declaration, made under the provisions of Article 310 of the Convention, to wit:
>
> 1. The signing of the Convention by 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;

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[96] Some States have felt that this jurisdiction in addition to that of the enclosed archipelagic waters was unduly expansive. However, an EEZ measured from baselines which are less than 200 miles long results in only slightly more ocean being placed under archipelagic state jurisdiction than under a system of EEZs measured around each island. In fact, a system of archipelagic baselines decreases the area of EEZ compared with the regime of a separate resource zone drawn around each island, since the waters between islands under a regime not recognizing the archipelago principle are EEZ in character but acquire the status of archipelagic waters as soon as baselines joining islands are allowed. R. Hodgson, US Department of State Geographer, estimates that with the archipelago principle, the external EEZ would be increased by 1-2%, assuming baseline and water-to-land restrictions similar to those in the RSNT (Hodgson and Smith, *op. cit.*, Ref. 62 p. 244). See however this author's article, *Development of the Doctrine of the Exclusive Economic Zone,* 52 PHIL. L.J. 60 (1978).

[97] Article 39 in relation to Article 54.

3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defense Treaty between the Philippines and the United States of America of August 30, 1951, and its related interpretative instruments; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party;

4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto;

5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of thePhilippines; 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 Philippine Constitution;

6. The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic state over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security;

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

8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under Article 298 shall not be considered as a derogation of Philippine sovereignty.[98]

[98]Text reprinted in PHIL. YRBK. INT'L. L. (1983).

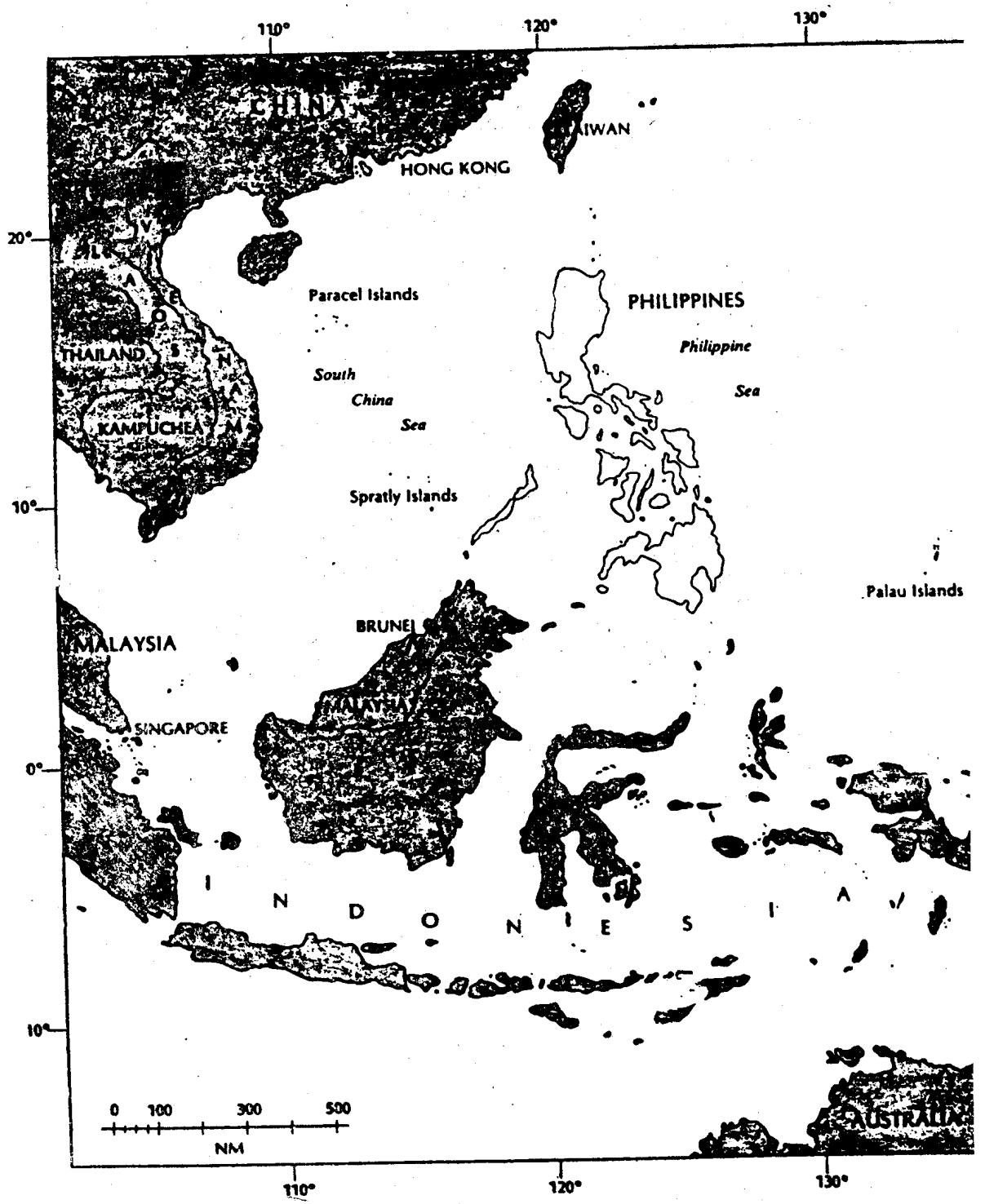

Figure II. The Republic of the Phiilppines in Regional Context.

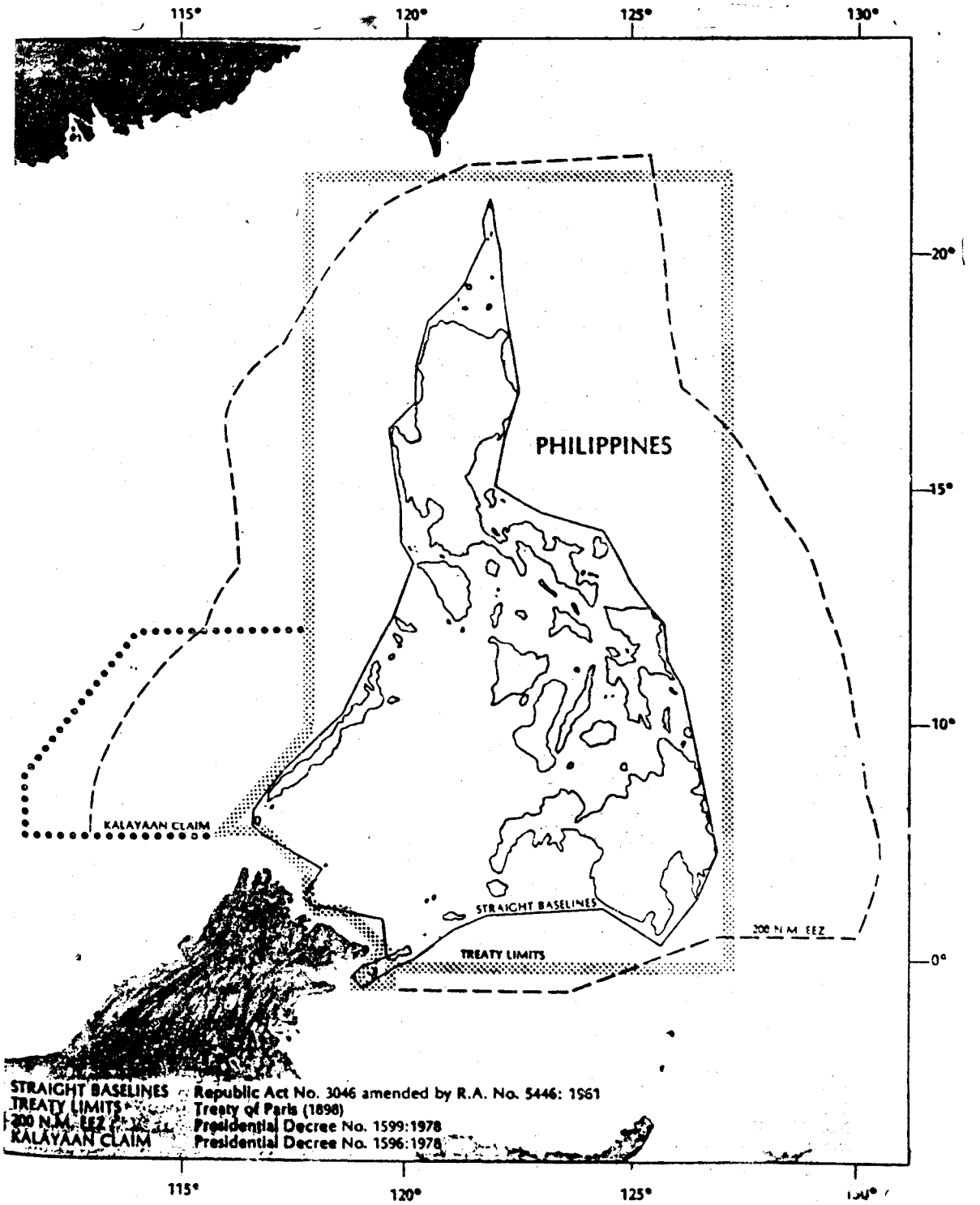

Figure I. Republic of the Philippines, showing marine jurisdictional boundaries. (Source: Georgraphic coordinates as listed in legislation and treaties cited above, as well as the "working map" of the Philippines' EEZ Claim (1979), as provided by Dr. Mario Manansala of the Bureau of Coast and Geodetic Survey in the Ministry of Defense, Republic of the Philippines).