The Southeast Asian Archipelagic States: Concept, Evolution, and Current Practice

by Phiphat Tangsubkul
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William H. Matthews, Director
East-West Environment and Policy Institute
East-West Center
1777 East-West Road
Honolulu, Hawaii 96848
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Phiphat Tangsubkul

Research Report No. 15 • February 1984
East-West Environment and Policy Institute
PHIPHAT TANGSUBKUL was a Research Fellow with the East-West Environment and Policy Institute, Honolulu, Hawaii, from July 1979 to July 1980. He is a Research Associate at the Institute of Asian Studies, Faculty of Political Science, Chulalongkorn University, Bangkok, Thailand.

Library of Congress Cataloging in Publication Data
Phiphat Tangsubkul, 1943-
The Southeast Asian archipelagic states.
(Research report/East-West Environment and Policy Institute ; no. 15)
"February 1984."
Bibliography: p.
JX4149.P47 1984 341.4'48 83-25487

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Printed in the United States of America.
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FOREWORD

Changing national perceptions of the ocean are resulting in the unilateral extension of national claims to ownership of resources in the seabed and the water column up to 200 nmi from national baselines. Nevertheless, many marine resources such as fish, oil, and environmental quality are transnational in distribution; the ocean, a continuous fluid system, transmits environmental pollutants and their impacts; maritime activities such as scientific research, fishing, oil and gas exploration, and transportation often transcend the new national marine jurisdictional boundaries. Management policies for these national zones of extended jurisdiction may be developed and implemented with insufficient scientific and technical understanding of the transnational character of the ocean environment. Such policies thus may produce an increase in international tensions, misunderstandings, and conflicts concerning marine activities, resources, and environmental quality.

These issues form the conceptual framework for the EWEAPI Program Area, Marine Environment and Extended Maritime Jurisdictions: Transnational Environment and Resource Management in Southeast Asian Seas. The goals of the program area are to provide an independent, informal forum for the specific identification and exchange of views on evolving East-West ocean management issues and to undertake research designed to provide a knowledge base to aid in the international understanding of these issues.

Transnational ocean management issues have three fundamental components: the natural environment, political-socioeconomic factors, and the juridical regime, including jurisdictional boundaries, content, and disputes over management issues.

The superposition of a mosaic of national jurisdictional content—often with overlapping claims—on a continuous fluid medium containing and supporting transnational resources and activities is the background of ocean management issues. The juridical regime will determine the "how" and "who" of ocean management. The objectives of this part of the program area are: (1) to map and display in detail national claims to jurisdictional boundaries and jurisdictional content and (2) to analyze and summarize the jurisdictional claims and content with respect to present and potential disputes regarding management of transnational resources and activities.

The first task, then, was to set out and describe the various areal maritime claims of political entities bordering the South China Sea; this was accomplished by J. R. V. Prescott in his Maritime Jurisdiction in Southeast Asia: A Commentary and Map, Environment and Policy Institute Research Report No. 2, January 1981.
Given the geographic importance of archipelagos in the region, the logical next step was to trace the evolution of the archipelagic principle in international law and its juridical implications for various maritime activities of the countries within the region and using the region, which is the thrust of this report.

Dr. Mark J. Valencia
Program Area Coordinator
The Southeast Asian Archipelagic States: Concept, Evolution, and Current Practice

by Phiphat Tangsubkul

ABSTRACT

The terms “archipelago” and “territorial seas” are defined. To analyze the archipelagic state geojuridically requires an understanding of the territorial seas doctrine and the straight baselines method of delimiting territorial seas. The territorial seas doctrine is based on the concepts of ownership, sovereignty, and jurisdiction. The straight baselines method is a mathematical-geographic formula for delimiting territorial waters.

Development of the archipelagic principle is outlined through its juridical history. Investigation of legal principles and juridical status of marginal seas or territorial waters is made based on conclusions of international conferences, particularly between the two world wars, and on the opinions of international law publicists.

Countries began using the straight baselines method to delimit their territorial waters after the 1951 judgment of the International Court of Justice. This method and the territorial seas doctrine are hypothesized to have led to the midocean archipelagic concept. This new regime represents a compromise between the classical concept of total freedom of the high seas and movements by new nations to appropriate marine areas. However, the archipelagic principle still has not been incorporated into the international law of the sea. International law on archipelagos has been evolving instead through the municipal laws and constitutions of the archipelagic states and the international recognition of those claims.

The latest development of the midocean archipelagic state concept is its incorporation in the new Convention on the Law of the Sea adopted by UNCLOS III in 1982. Provisions of this convention function as a model against which the individual archipelagic concepts advocated by the two Southeast Asian states of Indonesia and the Philippines are investigated. This investigation encompasses not only the countries’ geographic factors but also their historical and juridical backgrounds.

Jens Evensen’s theory on midocean archipelagos, along with documents submitted to the U.N. and UNCLOS III, shows the similarities between Indonesia and the Philippines in the development of the archipelagic principle.
The histories of the development of the archipelagic principle in the two nations are then traced separately. National legislation; international laws, conferences, and conventions; military and economic considerations; and the political maneuvering and bargaining of individuals are shown to have influenced the different developments of the archipelagic principle in Indonesia and the Philippines.

DEFINING AN ARCHIPELAGO

Webster's New Collegiate Dictionary defines archipelago as, "an expanse of water with many scattered islands," or "a group of islands." The term originated from the Italian term *arcipelago*, which dates back to the Middle Ages and was derived from *arci* "most important," and *pelagus* "sea." Thus, the literal translation of *arcipelago* was, "important sea." Gradually the term came to be used for "a body of water containing islands," and finally evolved to mean, "a group of islands." The western languages adopted this final definition of archipelago and added the *h* to its spelling.¹

Throughout the evolvement of the definition of archipelago, one basic characteristic was retained: the islands were always considered one whole unit. If the archipelago were subdivided, there would only remain the form of an island and not the essence of an archipelago.²

The modern usage of the term archipelago requires geophysical, geomorphological, and geojuridical definitions. Jens Evensen, author of the most famous geojuridical analysis of an archipelago, describes various geographical formations of archipelagos. In some, the islands and islets are a compact, clustered group, while in others they are spread out. They may consist of a string of islands, islets, and rocks that form a rampart against the ocean for the mainland or protrude from it like a peninsula. He distinguishes between two basic types of archipelagos: coastal and outlying or midocean. Both types fall within Evensen's general definition of an archipelago: "An archipelago is a formation of two or more islands (islets or rocks), which geographically may be considered as a whole."³

The Geographer defines an archipelago as having the following characteristics:

1. A substantial number of relatively large islands are scattered in an areal, not a linear, pattern.
2. The islands relate geographically to each other and to others in the group (adjacency).
3. The political administration perceives the islands as a unitary whole.⁴
Robert D. Hodgson and Lewis M. Alexander, two well-known American geographers, have described an archipelago in terms of "special circumstances." They suggest that distinctions should be clarified between the terms archipelago and island group, and between coastal archipelago and outlying archipelago. They also point out the diverse conditions under which a special regime might be established for an outlying archipelago. First, these conditions include adjacency, in which the units are so located in relation to one another that the group may be considered a geographic whole. Second, a particular island group and its interisland waters may have traditionally been considered a single political unit, regardless of the adjacency factor. Third, the island people have a unique economic dependence on their coastal waters and thus are entitled to special considerations in the jurisdiction of these waters, regardless of physical geography or history.

The geojuridical aspect of an archipelago involves the delimitation of territorial waters and other maritime jurisdictional zones to determine sovereignty over them. A geojuridical analysis of an archipelagic state requires an understanding of the territorial sea doctrine and the straight baselines method used in delimiting the territorial sea.

**DEVELOPMENT OF THE TERRITORIAL SEA DOCTRINE**

What is meant by the expression territorial sea? What is the exact nature of the authority possessed by a coastal state over the waters adjacent to its coasts? What is the exact distance to which this authority can be exercised lawfully by a coastal state against foreign subjects and their property coming within such water zones? These are all important questions that must be examined either in the classical legal sense or in the modern trend of legal norm.

The classical theoretical aspect of the territorial sea doctrine is based on three fundamental concepts: dominium (ownership), imperium (sovereignty), and jurisdictio (jurisdiction). According to the famous French lawyer, André de Lapradelle, the three concepts are definitely separate, yet "it is not rare to see the partisans of ownership make use indiscriminately of the terms ownership and sovereignty and jurisdiction." He distinguishes these concepts as follows:

1. Ownership. The state has the same inherent sovereignty over the territorial sea as over any possession within the limits of its frontier.
2. Sovereignty. The state has the power merely to regulate the sea; the sea is not susceptible to appropriation.
3. Jurisdiction. The state is given a right sui generis composed of detached attributes of sovereignty.
De Lapradelle favors the concept of sovereignty that recognizes that a coastal state enjoys absolute sovereignty over the coastal sea subject to the recognition of the right of foreign vessels through it. He rejects the theory of *jurisdiction*, for "to refuse sovereignty, and then to attribute jurisdiction, is a manifest contradiction."

One of the most famous doctrines on the theory of the territorial sea is Cornelius van Bynkershoek's dissertation on the sovereignty of the sea. He described ownership as a special right of possession from which a man cannot be dislodged except by injustice; and as that right began with natural possession, so it continues only during the possession of the thing. He concluded that, by a law of nature, ownership and possession are on the same footing; when the latter is lost, the former is also lost. In other words, possession that began with seizure is continued further; and by the continuance of possession, ownership is continued.

On the issue of ownership and sovereignty over a maritime belt, van Bynkershoek stated: "Hence, we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory." Nonetheless, he confessed that it is hard to define the power necessary to have the sea subject to the mainland.

According to Imbart J. Latour in his book *La Mer Territoriale au Point de Vue Theorique et Pratique*, certain writers frequently use the words ownership or possession without ascribing to them any definite meaning. Because of his concern that international navigation and international trade should be safeguarded, he strongly opposed the dominion doctrine.

If we admit the dominium theory, and especially if we apply all its strict and logical consequences, we reach an inadmissible condition of things. The coastal State can no more prohibit innocent transit across its territorial waters by other States than it can exercise an absolute right of jurisdiction over them. This theory is false in its premises and dangerous in its final consequences. Therefore, we deem it our duty to maintain that the territorial sea is subject to the imperium of the coastal State.

In other words, the authority of coastal states over territorial waters should not be a right of *dominium* (ownership) but a matter of *imperium* (sovereignty).

According to M. Schücking, rapporteur for the Committee of Experts for the Progress Codification of International Law of the League of Nations, the most diverse theories postulated on the legal status of territorial waters fall into two general categories. One is based upon the idea of the dominion of the coastal state over the territorial sea, a dominion that must
be restricted by certain rights of common user in favor of other states. The other theory propounds the freedom of the sea and recognizes only certain restricted rights in favor of the coastal state in the domain of the territorial sea.\textsuperscript{13}

If the matter is examined more closely, however, it will be seen that the solution of this question of principle is not a matter of indifference in practice. If we accept the coastal State’s right of dominion, we must admit that the State would undoubtedly be legally entitled to extend its dominion in new directions, provided, of course, that such action did not conflict with the right of common user of other States or with the provisions of conventions already concluded.\textsuperscript{14}

Schücking interprets the idea of \textit{terrea dominium} as being synonymous with the idea of ownership, which in international law can only mean dominion over territory. It seems that Schücking accepts the \textit{dominium} concept if it does not create any obstacles to the common user rights of other states because, according to him, there will be no difference, ipso facto, whether a coastal state claims its authority over the marginal sea under the \textit{dominium} or the \textit{imperium} principle.\textsuperscript{15}

In general practice, however, coastal states do claim absolute control over their territorial waters like their land territories, subject to their international agreements or innocent passage arrangements. The degree of authority claimed by each state over the territorial sea during the classical period becomes evident only by comparing each state practice with the principle of innocent passage.

The Europocentrism of international law and theories relating to the law of the sea in the nineteenth and twentieth centuries constrains our legal investigation if it is explicitly based on their conceptions. Examination of the legal principles and juridical status of the marginal sea or the territorial waters requires reviewing the conclusions of international conferences conducted in particular between the two world wars as well as the work of international law publicists.

Project No. 10, “National Domain” (see the full text in Appendix A), adopted by the American Institute of International Law at Rio de Janeiro in April 1927, provided that the coastal state’s sovereignty right will be exercised not only over the water but also over the bottom and the subsoil of its territorial sea in assimilating some cases of bays, straits, channels, islands, and archipelagos.

The Draft Convention of the Committee of Experts for the Progressive Codification of International Law, amended by Schücking, contained provisions relating to the issue of territorial sea, its legal status, and its limitation as follows (see Appendix B for full text):
ARTICLE 1. The State shall have an unlimited right of dominion over the zone which washes its coast, in so far as, under general international law, the rights of common user of the international community or the special rights of any State do not interfere with such right of dominion.

ARTICLE 2. The zone of the coastal sea shall extend for six marine miles (60 to the degree of latitude) from the low-water mark along the whole of the coast.

The first period of the development of the theory of the territorial sea came to an end with the failure of the Hague Conference for Codification of International Law in 1930 to reach agreement upon the width of the territorial sea. However, certain principles of practice did result from the conference. Also, the concept of *imperium* (sovereignty) gained domination after a long period of argument among western international law publicists.

Sovereignty over this belt (territorial sea*) is exercised subject to the conditions prescribed by the present Convention and the other rules of international law. . . . The idea which it has been sought to express by stating that the belt of territorial sea forms part of the territory of the State is that the power exercised by the State over this belt is in its nature no way different from the power which the State exercises over its domain on land. This is also the reason why the term “sovereignty” has been retained, a term which better than any other describes the juridical nature of this power. Obviously, sovereignty over the territorial sea, like sovereignty over the domain on land can only be exercised subject to the conditions laid down by international law. As the limitations which international law imposes on the power of the State in respect of the latter's sovereignty over the territorial sea are greater than those it imposes in respect of the domain on land, it has not been thought superfluous to make special mention of these limitations in the text of the article itself. These limitations are to be sought in the first place in the present Convention; as, however, the Convention cannot hope to exhaust the matter, it has been thought necessary to refer also to other rules of international law.16

According to J. P. A. François, special rapporteur, in his report on the regime of the territorial sea that was submitted to the Second Committee of the 1930 Hague Conference, nearly all contemporary authorities recognized the sovereignty of the coastal state, although different terms were used such as *imperium, dominium, jurisdiction,* and even ownership. There were some authorities, notably in France, who on the basis of the ideas enunciated by de Lapradelle continued to deny the sovereignty of the coastal state and to attribute to it merely certain police or conservation rights.17

*Author's interpretation.
The arrival of the expansionism movement under the patrimonial sea principle of the Latin American countries strengthened the concept of 

*dominium*. And yet, the implementation of Southeast Asian states' claims to sovereignty over the maritime areas tended to assimilate, subject to the right of innocent passage of foreign vessels in international law, the concept of 

*dominium* with that of 

*imperium* rather than make a distinction between the two concepts.

From the post-Second World War period to the 1970s, the concept of sovereignty has been adopted in several major international conventions. The Convention on International Civil Aviation, adopted in Chicago on 7 December 1944, stated in Article 2:

> For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

The Treaty of Peace of 8 September 1951 between the Allied powers and Japan stipulated in Article 1(b) that “the Allied Powers recognize the full sovereignty of the Japanese People over Japan and its territorial waters.”


The efforts of the United Nations to codify the international law of the sea at the First Geneva Conference on the Law of the Sea (UNCLOS I) in 1958 were analogous to those of the League of Nations before the Second World War. However, the United Nations was able to call upon its International Law Commission, a permanently constituted body, to lay the groundwork for UNCLOS I, which opened in February 1958.

The conference faced an almost staggering range of claims. The issue of the territorial sea, especially its breadth, remained a serious and difficult one. Nevertheless, the conference finally produced four conventions, one of which, the Convention on the Territorial Sea and the Contiguous Zone, provided that “the sovereignty of a State extends, beyond its land territory and its internal waters, to the territorial sea which includes its air space, its seabed, and its subsoil. This sovereignty is exercised subject to other rules of international law.”

The Second Geneva Conference on the Law of the Sea (UNCLOS II) in 1960 also did not reach an agreement on the breadth of the territorial sea, but the state participants did agree on using the term “sovereignty” to indicate the authority the coastal state will exercise over its territorial waters.

The last and current Draft Convention on the Law of the Sea that was prepared in 1973 and adopted by the Third Geneva Conference on the Law of the Sea (UNCLOS III) on 30 April 1982 used almost the same language as the Geneva Convention on the Territorial Sea and the Contig-
uous Zone: "the sovereignty of a coastal State extends over its territorial sea." In addition, the new convention incorporated another portion of the marginal sea called archipelagic waters over which a coastal state could also exercise its sovereignty.

**Article 2. Sec. 1.** The sovereignty of a coastal State extends beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

After a long period of debate during the first half of the twentieth century, there is presently no significant challenge to using the term "sovereignty" to describe the authority a coastal state exercises over its marginal sea or, more specifically, its territorial waters; yet, the term is still somewhat ambiguous. The ambiguity is whether, in the revolutionary era of the international law of the sea, the concept of sovereignty incorporates the concepts of *dominium* and *imperium*, or whether sovereignty still retains the concept of territorial jurisdiction. Nevertheless, according to the International Court of Justice's decision in the Corfu Channel case of 1949, when the court referred to events in the territorial sea, it did not hesitate to apply to the territorial sea the rule that a state must not knowingly allow "its territory" to be used for acts contrary to the rights of other states. The definition of sovereignty needs to be clarified because it relates directly to the domain of archipelagic waters and also to the regime of archipelagic sea-lanes passage.

The breadth of the territorial sea was never stipulated until the end of the 1970s. The history of the territorial sea doctrine indicates that the breadth of the territorial sea differed from period to period and country to country. In the nineteenth century during Britain's maritime supremacy, the British became champions of the 3-mile territorial sea limit. France subscribed to the same limit with respect to fishing. Although the United States did not become an avid proponent of the 3-mile limit until the twentieth century, it acknowledged the limit and on several occasions protested its violation. Spain tenaciously held to a 6-mile neutrality zone early during World War I. Holland confirmed her nineteenth century treaty commitments to the 3-mile limit through domestic acts in the twentieth century, namely, the neutrality declarations of 1904 and 1914. The few Asian states that retained their independence and made claims to territorial seas opted for the 3-mile limit. Japan proclaimed a 3-mile neutrality zone during the Franco-Prussian War. Siam adopted the 3-mile principle in the early twentieth century. Some countries, such as in Scandinavia, continue to claim 4, 6, 12, or even wider than 100-mile limits. As a result of
UNCLOS III, the majority of states now agree on a 12-nautical-mile (nmi) limit. However, according to Kelsen:

It is not possible to state that there is any specific width of territorial waters presently sanctioned by a general rule of international law. In our interpretation, there does not exist any unique rule of international law regarding the width of the territorial sea.  

DEVELOPMENT OF THE STRAIGHT BASELINES METHOD FOR DELIMITING TERRITORIAL SEAS

The straight baselines method of measuring the breadth of the territorial sea was first introduced in Norway when the Royal Norwegian Decree of 12 July 1935 was issued. Because Norway's northwestern coast is fringed with some 120,000 islands over a distance of 2414 miles (4000 km), Norway applied the straight baselines method for measuring its 4-mile territorial sea by connecting fringing islands, rocks, and islets. The skjaergaard, or outer fringe, of these islands became itself the coastline for measuring the territorial sea of Norway.

The straight baselines method was finally "approved" by the International Court of Justice in the Anglo-Norwegian Fisheries case of 1951. The traditional application of straight baselines in international law had been in accordance with the rule of the bay in which enclosed waters must meet the test of semicircularity. The court in the Anglo-Norwegian case specified this rule as the accepted physical reason for enclosing internal waters, but also recognized the case of "historic" waters by stating that it is necessary to consider the "close dependence of the territorial sea upon the land domain for it is, after all, the land which gives to the state rights to the adjacent sea."

Regarding the Norwegian claim for drawing straight baselines along its coast, the International Court of Justice noted:

When a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the skjaergaard along the western sector of the coast here in question, the baseline becomes independent of the low water mark [of the mainland]. Such a coast, viewed as a whole, calls for a different method.  

It is important to note here that when the court referred to the term archipelago, it was dealing specifically with coastal archipelagos. The court considered that owing to the geographical situation of Norway, it is legitimate for such a state to claim offshore areas including coastal archipelagos lying just off the coast of a continental mainland.
In analyzing the judgment, the International Court of Justice established certain guidelines that must be considered in determining whether the use of straight baselines is appropriate. The drawing of straight baselines (1) must not depart to any appreciable extent from the general direction of the coast or must follow the general direction of the coast; (2) must enclose certain sea areas that "are sufficiently closely linked to the land domain to be subject to the regime of internal waters," or only enclose waters genuinely possessing the character of internal waters; (3) must be based on certain economic interests evidenced by long usage particular to a region.\(^5\)

Since the use of the straight baselines method is considered to be a valid method for delimiting territorial waters, the question still remains whether midocean archipelagos have the same right to use this method. Dale Andrew warned that each factor in the court's decision must be carefully compared to the situation of oceanic archipelagos (midocean archipelagos). "The judgment of the Fisheries case cannot simply be transferred over, as many authors have done."\(^5\)

C. F. Amerasinghe, on the other hand, analyzed that the jurisprudence of the International Court of Justice did not lack in general principles on the law of the territorial sea that may be applied to midocean archipelagos with some modification.\(^7\) He extracted six "principles of possible relevance" from the Anglo-Norwegian case:

1. The Court considered economic interests peculiar to the region, the reality and importance of which had been clearly evidenced by long usage, in deciding that a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements.
2. One of the basic considerations mentioned by the Court for the delimitation of the territorial sea by reference to straight baselines and the drawing of straight baselines was the close relationship between the sea and the land domain.
3. The straight baselines method on a deeply indented coast and between islands of a coasted archipelago was approved provided the general direction of the coast was followed.
4. The Court rejected any general rule of law limiting the length of straight baselines to a specific distance, although there was some indication that a test of reasonableness could be applied to control such length.
5. The waters enclosed by straight baselines in the case of deeply indented coasts and coastal archipelagos were described as internal waters.
6. The Court did not have to deal with the status of waters which constituted a strait as a result of having been used by foreign vessels for navigation between areas of high seas or territorial waters, because it held that no section of the waters enclosed by straight baselines in the case had been so used, but it would seem that it was implied that in case waters within straight baselines constitute such a strait, the coastal State would be under
an obligation to accord innocent passage to foreign vessels through those waters.\textsuperscript{38}

Amerasinghe also confirmed that waters within the straight baselines of an archipelagic state are subject to the right of innocent passage for foreign vessels through areas hitherto used for international navigation.\textsuperscript{39}

Since the International Court of Justice issued its judgment in 1951, many coastal states, including the archipelagic states of Indonesia and the Philippines, immediately applied the straight baselines method to delimit their territorial waters. As of 1978 there were at least sixty-three coastal states that used this method, as shown in Table 1.

Table 1. Countries That Have Adopted Straight Baselines For Measuring Maritime Jurisdictional Zones

<table>
<thead>
<tr>
<th>Country</th>
<th>Document</th>
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<tbody>
<tr>
<td>Albania</td>
<td>&quot;Adriatic Pilot,&quot; 1 March 1960</td>
</tr>
<tr>
<td>Angola</td>
<td>Law No. 2130, 22 August 1966 (under Portugal)</td>
</tr>
<tr>
<td>Argentina</td>
<td>Joint Declaration (with Uruguay) 30 January 1961; Law No. 17094, 29 December 1966</td>
</tr>
<tr>
<td>Australia</td>
<td>Ministerial Statement, 31 October 1967</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Act No. XXVI of 1974</td>
</tr>
<tr>
<td>Brazil</td>
<td>Decree Law No. 56, 28 April 1969; Decree 1098 of 1970</td>
</tr>
<tr>
<td>Burma</td>
<td>Declaration, 15 November 1968</td>
</tr>
<tr>
<td>Cameroon</td>
<td>Ordinance 62-OF-30, 31 March 1962</td>
</tr>
<tr>
<td>Canada</td>
<td>Announcement, 4 June 1969; Act of 25 February 1971; Order-in-Council (1972) P.C. No. 966</td>
</tr>
<tr>
<td>Chile</td>
<td>Decree No. 416, 14 July 1977</td>
</tr>
<tr>
<td>China</td>
<td>Declaration, 4 September 1958</td>
</tr>
<tr>
<td>Cuba</td>
<td>Legislative Decree No. 1948, 25 January 1955; Decree Law 1, 24 February 1977</td>
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<tr>
<td>Denmark</td>
<td>Royal Decree, 21 December 1968 modified by Decree No. 189, 19 April 1978</td>
</tr>
<tr>
<td>Faeroes</td>
<td>Decree No. 156, 24 April 1967</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>Act No. 186, 6 September 1967</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Supreme Decree No. 959-A, 28 June 1971</td>
</tr>
<tr>
<td>Egypt</td>
<td>Royal Decree, 15 January 1951</td>
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<td>Indonesia</td>
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<td>Ireland</td>
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The straight baselines method became treaty law when it was incorporated in the Geneva Convention on the Territorial Sea and the Contiguous Zone at UNCLOS I in 1958.

**Article 3.** Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-
water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Art. 4, Sec. 1. In localities where the coastline 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.

Sec. 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 within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Art. 5, Sec. 1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

Sec. 2. Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Article 14 to 23, shall exist in those waters.

DEVELOPMENT OF THE MIDEOCEAN ARCHIPELAGIC STATE CONCEPT

The two hypotheses on the legal development of the theory of the midocean archipelagic state concept are (1) that it is a direct result of the development of the doctrine of the territorial sea and the straight baselines principle or (2) that it is a sui generis regime established in the second half of the twentieth century as a result of the law of the sea domain. Regarding the latter, the new regime represents a compromise between the classical concept of total freedom of the high seas and the movement of new nations to create a new economic order vis-à-vis national appropriation of marine
areas. Whether a special new regime relating to midocean archipelagos should or should not be internationally accepted depends upon the general reaction of the international community.

The very first movement regarding the legal status of archipelagos started when the Institute of International Law, which adopted its rules on the definition and regime of the territorial sea in 1894, put the question of delimiting the territorial waters of coastal archipelagos on its agenda. In 1911 Thomas Barclay, the rapporteur, demanded a revision of these rules. In 1919 several suggestions were placed before the institute and in 1925 there was a full discussion; however, no new resolutions were formally adopted.40

The International Law Association had adopted in 1895 the same rules with some modifications. The emerging concept of midocean archipelagos in international law that groups of islands should be assimilated to delimit the territorial waters and other maritime jurisdictional zones and to determine sovereignty over them was first proposed by Alvarez, chairman of the Committee on Neutrality, at the 33rd meeting of the International Law Association at Stockholm in 1924. He presented a report and draft convention that proposed that a 3-nmi territorial sea limit was insufficient for modern neutrality purposes and he recommended a 6-nmi territorial sea limit. In the case of islands situated beyond or at the edge of the territorial sea of a state, he proposed a 6-nmi territorial sea zone around each island; and in the case of an archipelago, he proposed the islands be considered as a unit and the extent of the territorial sea be measured from the islands situated farthest from the center of the archipelago.42

In 1925 the American Institute of International Law, on the invitation of the Pan American Union to assist in the task of codifying American international law, prepared some thirty projects for discussion. Project No. 10 "National Domain" stated with respect to islands that:

In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial sea referred to in Article 5 shall be measured from the islands farthest from the center of the archipelago.43

Both the Alvarez draft and Project No. 10 proposed that an archipelago be considered one unit when measuring its territorial sea.

The subject of maritime jurisdiction was referred back to the Committee of Neutrality by the plenary session of the International Law Association at Stockholm, and in 1926 at Vienna the committee presented a second draft convention. It affirmed the 3-mile limit for territorial waters and reiterated that in the case of islands the zone of territorial waters shall be measured around each of the islands. No reference was made to the issue of
Southeast Asian Archipelagic States

archipelagos or groups of islands off the coast of the mainland, and it is unclear from the draft whether the committee did not consider the issue or simply did not regard it as requiring separate mention.\(^4\)

In 1927 Alvarez with Thomas Barclay, rapporteur for the Institute of International Law, prepared a joint draft, "Project of Regulation Relating to the Territorial Sea in Time of Peace," that proposed a solution to the issue of a group of islands or coastal archipelago:

Where a group of islands belongs to one coastal State and where the islands of the periphery of the group are not further apart from each other than double the breadth of the marginal sea, this group shall be considered as a whole and the extent of the marginal sea shall be measured from a line drawn between the outermost parts of the island.\(^5\)

In 1928 the Institute of International Law adopted a resolution at its meeting in Stockholm that distinguished between a group of islands and an archipelago. A group of islands was identified as a midocean archipelago, and an archipelago was identified as a complex of islands found along and near the coast, or a coastal archipelago. It also provided that when a group of islands belongs to one state and the distance between each island in the periphery of the group does not exceed double the breadth of the territorial sea, this group should be considered a unit, and the breadth of the territorial waters should be measured from a line joining the outermost point of the islands. In the case of coastal archipelagos, the breadth of the territorial sea should be measured from the islands or islets situated farthest from the coast if the distance between the islands or islets does not exceed double the breadth of the territorial waters, and the islands or islets nearest the coast are not situated farther from it than twice the breadth of the territorial sea. The breadth of the territorial sea agreed upon was 3 nmi.

The Hague Codification Conference of 1930 failed to produce an article on the archipelago. The states could not agree whether each island should have its own territorial sea or the archipelago should be treated as one unit; they failed to agree upon the distinguishing characteristics between coastal and midocean archipelagos. There also was no concrete discussion on the system of baselines that could be applied to coastal or midocean archipelagos. Nevertheless, the preparatory work for this conference had a direct influence on the work of the International Law Commission on coastal and midocean archipelagic issues in the second half of the twentieth century.

Although the development of the archipelagic principle began essentially in the first half of the twentieth century, this principle still has not been incorporated into the international law of the sea. However, a custom-
ary norm of international law on archipelagos has been evolving through the municipal laws and constitutions of the archipelagic states and state recognition of the claims.

The Regime of the Archipelagic State

The latest development of the midocean archipelagic state concept is its incorporation in the new Convention on the Law of the Sea signed on 10 December 1982. Part 4 of the convention provides for the regime of the “archipelagic state.” Articles 46 to 54 distinguish between the terms archipelagic state and archipelago. An archipelagic state is constituted wholly by one or more archipelagos and may include other islands. An archipelago is a group of islands including parts of islands, interconnecting waters, and other natural features that are so closely interrelated that they form an intrinsic geographic, economic, and political entity, or one that has historically been regarded as such. This definition of an archipelago incorporates economic, political, and historic aspects; thus, it is different from the classical sense of a geojuridical term. This kind of definition was basically prepared to allow a midocean archipelagic state to claim its sovereignty rights over its archipelagic waters by incorporating this archipelagic state regime into the international law of the sea.

The convention provides that an archipelagic state (Article 47) may draw straight 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 area of the land, including atolls, is between 1:1 and 9:1. The length of the baselines shall not exceed 100 nmi; however, up to 3 percent of the total number of baselines enclosing any archipelago may exceed that length to a maximum length of 125 nmi. The baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations permanently above sea level have been built on them or a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island. The system of baselines shall not be applied by an archipelagic state to cut off the territorial sea of another state from the high seas or the exclusive economic zone (EEZ). If a portion 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 that the adjacent state has traditionally exercised in such waters and stipulated under agreement between those states shall continue to be respected. The breadth of the territorial sea, the contiguous zone, the EEZ, and the continental shelf shall be measured from the straight baselines (Art. 48).
Article 49 provides an important aspect to the juridical status of the regime: the sovereignty of an archipelagic state extends to the waters enclosed by the baselines, described as archipelagic waters, regardless of their depth or distance from the coast. In other words, an archipelagic state enjoys the same full sovereignty over its archipelagic waters as it does over its internal waters. Some international lawyers may argue, however, that an archipelagic state enjoys only those sovereign rights designated under the law of the sea, the same kind of sovereign rights a coastal state has over its EEZ, such as those regarding national security, economic uses, marine pollution prevention, and navigation.

Article 49 also provides for a duplicate regime, the regime of archipelagic sea-lanes passage, thus creating another regime within the regime of an archipelagic state. However, this same article clearly provides a different degree of juridical status between the regime of archipelagic state and the regime of archipelagic sea-lanes passage. The regime of archipelagic sea-lanes passage shall not affect in other respects the status of the archipelagic waters or the exercise by the archipelagic state of its sovereignty over such waters, the airspace, the bed and subsoil, and the resources contained therein. According to the new convention, an archipelagic state shall enjoy the right of sovereignty over its archipelagic waters subject to the recognition of the regime of archipelagic sea-lanes passage and the right of innocent passage of foreign ships of all states through its archipelagic waters outside the sea-lanes. The archipelagic state may, without discrimination in form or in fact among foreign ships, temporarily suspend in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security (Art. 52). The archipelagic state, however, shall not hamper transit sea-lanes passage, and there shall be no suspension of transit sea-lanes passage (Arts. 54 and 44).

Coastal states that consider themselves archipelagic states also have to recognize the traditional fishing rights of their adjacent states. Further, the duties of an archipelagic state are to permit the maintenance and replacement of submarine cables (Art 51, par. 2) and to give due publicity to baselines on charts of a scale or scales adequate for the safe passage of ships through narrow channels in such sea-lanes (Art. 53, par. 6). In addition, an archipelagic state has the right to designate sea-lanes and the air routes over them (Art. 53). In designating or substituting sea-lanes and prescribing or substituting traffic separation schemes, an archipelagic state shall refer proposals to the competent international organization for their adoption.

Although this new convention attempts to define the juridical status of the regime of archipelagic sea-lanes passage, there is still ambiguity regarding the status of waters within 50 nmi of any sea-lane found inside archipelagic waters. According to Article 53 (pars. 3 and 4), the archipe-
logic sea-lane water zone differs from the territorial waters and the high seas. The archipelagic sea-lane water zone is not considered territorial waters because coastal states cannot suspend the right of transit passage. The zone is not considered high seas because ships of all states must be in normal mode solely for the purpose of continuous, expeditious, and unobstructed transit (Art. 53, par. 3) and do not enjoy full freedom of their mode of navigation subject to the flag states’ agreements on the high seas. The ambiguity of the regime of archipelagic sea-lanes passage is whether the water found within the limit of each sea-lane is still under the sovereignty of an archipelagic state, as are other parts of its archipelagic waters, or under the absolute control of the international community as international zone de novo. However, it is certain that UNCLOS III tried to create a kind of sui generis regime based on the theory of special rights contingent upon concomitant responsibility.

The above provisions of the new convention function as the standard model for implementation of an archipelagic state against which the individual archipelagic concepts advocated by the two Southeast Asian archipelagic states, Indonesia and the Philippines, are investigated.

THE SOUTHEAST ASIAN ARCHIPELAGIC STATES

Development of the Southeast Asian Archipelagic State Principles

In investigating the term archipelago as it pertains to the Southeast Asian region that consists of several coastal archipelagos and two archipelagic states, Indonesia and the Philippines, it is necessary to consider not only its geographic sense but also its natural characteristics and, particularly, its historical background. In his Descriptive Dictionary of the Indian Islands & Adjacent Countries, John Crawfurd explained that the term used for Indonesia and the Philippines was Asiatic Archipelago and it was formed by two main archipelagos, the Malay (Indonesia) and Philippine archipelagos, and adjacent small islands and islets including the whole part of the peninsula that covers Burma, Thailand, Malaysia, and three Indochinese states. In other words, it covers the region now known as Southeast Asia (see Figure 1). This definition is based on the historical and sociological background of the Southeast Asian region rather than purely on the geographical aspects.

According to the history of Southeast Asia, although the Chinese and the Moghul emperors; the kings of Persia, Ceylon, Burma, and Siam; and several of the Indonesian sovereigns played an important role in the uses and control of the maritime area within Southeast Asia, a kind of mare clausum, or absolute control by any maritime power, never existed. Many
Figure 1. Asiatic Archipelagos. (Crawfurd, 1971)
writers agree that the general practice per se of nations in this region regarding the uses of the sea ipso facto was based on the implementation of "free trade in the free sea." Therefore, the implementation of absolute control of the Southeast Asian seas or any kind of practice relevant to the concept of *mare clausum* seems to have appeared only after the arrival in the region of the western colonizers, particularly the Portuguese, who were attracted by the wealth of the spice trade.

Furthermore, the traditional practices relating to the use of the sea could have influenced western lawyers or could have been used by them, especially Hugo Grotius, as sources of international law. According to Alexandrowicz, it is well known that the Grotius-Freitas controversy revealed the impact of the maritime regime of the Indian Ocean and the Southeast Asian seas on the development of international maritime law.\(^4^8\)

Although major sovereigns had claimed neither *dominium* nor *imperium* over the Southeast Asian seas, a kind of coastal control over the marginal sea, now known as territorial sea, did exist in Southeast Asia. Under the Hindu sovereigns dating from the fourth century B.C., the superintendent of ships, who was one of the regular officers in charge of maritime affairs, exercised control over seagoing ships within the area of his jurisdiction (i.e., the harbor as well as a certain maritime zone outside the inland waters). Moreover, the superintendent of ships had further power to control fisheries and to deal with pirate ships, ships from enemy countries, and ships that violated the customary regime of commercial harbors.\(^4^9\)

There is no doubt that the legal system, including jurisdiction governing the maritime territory along the coast of nations in Southeast Asia, had been long established. That is why during the first few centuries after their arrival, the Europeans that entered the region found themselves far from being able to deal with the local communities in a unilateral way and had to resort to their own classification of sovereignty to understand the local legal system and to establish bilateral relations with them.\(^5^0\) However, empirical legal actions, the instability of many minor local sovereigns, and political and military defeats all were essential factors that allowed the Europeans to establish their legal systems in the region in the nineteenth century.

The Dutch and the Americans who colonized Indonesia and the Philippines never applied the archipelagic concept for governing the seas between islands of the Asiatic archipelagos. On the contrary, both colonizers always kept their practices as maritime powers whose policies consisted of maintaining international waterways as much as possible for trading and naval maneuvering under the notion of "freedom of the high seas."

The implications of the theory of the territorial sea principle on the colonial powers within the Southeast Asian region were reflected in trea-
ties, orders, and local court decisions. The extent of maritime authority oscillated for more than three centuries between two extremes: a "closed" sea wrested by the East India Company from certain Indonesian realms through treaties, and an "open" sea that was so free in the second half of the nineteenth century that, according to a director of justice in 1870, foreign warships did not even have to observe a ligne de respect in the Bali and Sunda straits, although these two straits bordered exclusively on government lands on the Javanese side. Between those two extremes, various kinds of maritime territory were laid down for various kinds of persons and commercial relations as well as various limits for territorial seas.

The new era of ocean politics that began in 1945 has become more complex because advanced technology permits the exploitation of resources in the sea and the seabed to an extent not possible before the Second World War. This has resulted in a growing consciousness that the time for creation of new rules of the sea law has arrived.

Like other developing countries, the Southeast Asian states generally agree with the idea of the reestablishment of the law of the sea. Their claims in extended adjacent zones and their departure from the classical international law of the sea have been necessary to exploit the economic potential in their adjacent seas and continental shelves. The newly created republics of Indonesia and the Philippines have further claimed for national security and internal political integrity sovereignty over maritime areas found between the islands of their archipelagos, hitherto considered to be high seas and territorial waters.

The economic significance of the ocean resources in the sea and seabed of the Indonesian and Philippine archipelagos has developed into a politically important element in their unification and stability, as illustrated in the speeches of their government authorities. Mochtar Kusumaatmadja, Indonesian foreign minister, stated:

I think you can understand the way our politicians thought. They envisaged Indonesia being carved up into several parts. These rebellions were going on, supported from outside. Then they were confronted with these two drafts of the Territorial Waters Revision Committee, and were shown on the maps where one showed a solid unit of the whole Indonesian Archipelago, and the other map of the national territory full of holes—or gaps of "high seas" in between the islands. . . . ; as the politicians saw the country falling apart, they said, "We must have a concept that shows these simple people physically that we are one."

So I think the archipelago theory makes sense. The people had to be shown in simple symbols that Indonesia was one. We had gotten our independence, and we had all these big boys interfering, trying to keep us apart because they had their own designs. So this archipelago principle seemed to be a good thing for the important political unity of Indonesia.
Estelito P. Mendoza of the Philippines stated:

The seat of our government is in the City of Manila situated in the island of Luzon. The three primary branches of our government function from this city. Our Congress which is composed of representatives from all the provinces meets in Manila. This does not only symbolize the oneness and unity of our country but also stresses that to effectively function, our government must maintain unimpeded, complete and continuous communication among all the islands.

According to D. P. O'Connell, the Indonesian archipelagic claim must be evaluated against the politics of the Sukarno era when sensitivity about national security was high: "At that time Indonesia's expressed concern was with subversion, and her interest in enclosing the seas was strategic and not economic. Today the opposite is the case."

The legal position inherited from the Dutch legal system that the seas between the major islands of the archipelago are considered high seas lends support to the separatist claims for autonomy. Just as in Indonesia, the Philippine government is also faced with claims for autonomy by a Muslim rebellion in Mindanao Island. If the Philippines incorporated the legal claims inherited from the United States' practice during its control over the Philippine Islands that regarded each island as having a 3-mile limit of territorial sea, it would mean that one must cross pockets of high seas in traveling from one island to another. The Indonesian and Philippine governments have found that this practice supports neither their development planning nor their ideology of integrating the land and sea. As further stated by E. P. Mendoza:

The integration between land and sea is indeed far more complete as to the islands of an archipelago and the sea between them than it is between the waters that wash the shores of a coastal state. A state is vested with sovereignty over its territorial seas. Why should an archipelagic state have lesser rights, or share such rights with all other states, over waters between its islands?

**The Common Position of Indonesia and the Philippines**

Although the development of the midocean archipelagic concept in Southeast Asia is a direct result of the general development of the archipelagic principle, especially the Jens Evensen theory on outlying (midocean) archipelagos, the Southeast Asian concept is unique and fundamental. In any investigation of the Southeast Asian archipelagic issue it is necessary to study separately the cases of Indonesia and the Philippines. However, these
Southeast Asian Archipelagic States

two Southeast Asian archipelagic states do share some common ground on the archipelagic issue.

Generally both Indonesia and the Philippines endorsed Evensen's midocean archipelagic principles proposed at UNCLOS I,\(^7\) which can be described as follows:

1. The outlying (midocean) archipelago should not be disregarded as part of international law because of its peculiar geographic, historic, and economic aspects.
2. The outlying archipelago should be treated as a whole, which is frequently the only natural and practical solution.
3. The straight baselines method should be used for delimiting territorial waters. These straight baselines should be drawn from the outermost points of the archipelago—that is, from the outermost points of the constituent islands, islets, and rocks—and the seaward limit should be drawn at a specific number of nautical miles outside and parallel to such baselines.
4. Such treatment of an outlying archipelago depends largely on the geographical features of the archipelago.

The preceding general guideline must be considered together with Evensen's general postulation, which states:

In addition to the difficulties arising out of the wide variety of the geographical characteristics and the specific economic, historical and political factors involved in each case, the legal approach to the questions involved is further complicated by the fact that such a host of different legal principles—sometimes conflicting—may be invoked for the concrete delimitation of territorial waters. The rules of international law governing bays and fjords, the straight baselines system governing heavily indented coastlines, the rules governing international straits, the rules governing the territorial waters of isolated islands, the principle of the freedom of the seas; these and other principles must constantly be borne in mind in answering the question as to what rules of international law govern the concrete delimitation of the territorial waters of an archipelago.\(^8\)

Besides these general principles, Evensen also proposed an article on outlying archipelagos that reads:

1. In the case of an archipelago which belongs to a single State and which may reasonably be considered as a whole, the extent of the territorial sea shall be measured from the outermost points of the outermost islands and islets of the archipelago. Straight baselines (as provided for under Article 5) may be applied for such delimitation.
2. The waters situated between and inside the constituent islands and islets of the archipelago shall be considered as internal waters with the exceptions set forth under paragraph 3 of this article.

3. Where the waters between and inside the islands and islets of an archipelago form a strait, such waters cannot be closed to the innocent passage of foreign ships.\(^59\)

Evensen was careful to distinguish the case of coastal archipelagos from that of midocean archipelagos. According to his proposal regarding the midocean archipelagos, straight baselines may be used to delimit the territorial waters of an archipelago that may be looked upon as a whole; therefore, the waters of such an archipelago must be considered internal waters. But where the waters of such an archipelago form a strait, it is in conformity with the prevailing rules of international law that state that such a strait cannot be closed to traffic. In other words, the right of innocent passage must be respected through straits designated by enclosure by straight baselines as internal waters of coastal states. Whether or not a water passage is to be considered a strait must be decided in each specific case.\(^60\)

The common stand on the archipelagic issue of Indonesia and the Philippines is evident in three official documents that were submitted to the Seabed Committee and UNCLOS III.

1. **Archipelagic Principles**

The first document is the initial proposal, titled "Archipelagic Principles," presented by the delegations of Indonesia, the Philippines, Fiji, and Mauritius to the Seabed Committee at the United Nations General Assembly in 1973 (U.N. Doc. A/AC.138/SC.11/L.15). This document provided that:

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 seabed and the subsoil thereof, and the superjacent air space, 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 sea lanes as may be designated for that purpose by the archipelagic State.\(^61\)
This proposal would allow a midocean archipelagic state to apply the straight baselines method to delimit the territorial sea by connecting the outermost points of the outermost islands and drying reefs of the archipelago. Instead of using the term "internal waters" as Evensen did, this document uses broader language by providing that the waters found within the straight baselines are subject to the sovereignty of the archipelagic state. The right of innocent passage of foreign vessels through the archipelagic waters shall be recognized in accordance with national legislation based upon existing rules of international law.

This joint proposal could be considered one of the most important movements in the progress of the archipelagic principles after the First Geneva Conference on the Law of the Sea had rejected draft proposals concerning the issue prepared by the International Law Commission. Although it seems that Evensen's proposal was used as the basic groundwork for this document, the language used in this document is very broad and the proposal is a total departure from the classical types that had been made by international bodies and international publicists before UNCLOS I in 1958.

2. Proposals for a Midocean Archipelagic State

The second document (U.N. Doc. A/AC.138/SC.II/L.48) was submitted also in 1973 to the second committee of the Seabed Committee by Fiji, Indonesia, Mauritius, and the Philippines. It contains five articles that substantiate the archipelagic principles in their original proposal and deals only with the issues of a *midocean archipelagic state*. It provides that an archipelagic state may employ the method of straight baselines to delimit the territorial sea; however, straight baselines shall not be drawn to and from low-tide elevation unless lighthouses or similar installations have been built on them. The general drawing of straight baselines shall not depart to any appreciable extent from the general configuration of the archipelago, although the provision does not give specific distances between islands. Therefore, the legal status of waters found within straight baselines is subject to the sovereignty of the archipelagic state. The right of innocent passage of foreign ships is recognized; moreover, the archipelagic state may also prescribe traffic separation schemes for the passage of foreign ships through those sea-lanes taking into consideration the recommendations of competent international organizations. (See Figure 2.) Finally, an archipelagic state may make laws and regulations relating to the issue of navigation safety; environmental preservation; pollution prevention; preservation of the peace, good order, and security; and marine environmental research. The laws and regulations enacted by an archipelagic state shall be respected by all types of foreign ships including warships; if any warship
Figure 2. Major shipping routes.
does not comply with the laws and regulations, an archipelagic state may always suspend its passage and require it to leave the archipelagic waters.\textsuperscript{62}

Generally speaking, this joint proposal tends to employ the general state practice regarding internal waters that had been delimited by the straight baselines method. In this case, the right of innocent passage of foreign vessels must be recognized as contained in Article 5, paragraph 2, of the Geneva Convention on the Territorial Sea and the Contiguous Zone:

Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters.

3. Proposal to UNCLOS III

The third document (A/CONF. 62/C.2/L.49)\textsuperscript{63} relating to archipelagic states was submitted by Indonesia, the Philippines, Fiji, and Mauritius to the Second Committee of UNCLOS III on 9 August 1974. It provided draft articles largely based on proposals contained in the two aforementioned documents. However, the language used is more specific:

\textbf{ARTICLE 2, Sec. 5.} If the drawing of such baselines enclosed a part of the sea which has traditionally been used by an immediately adjacent neighboring State for direct communication, including the laying of submarine cables and pipelines, the continued right of such communication shall be recognized and guaranteed by the archipelagic State.

The provisions of this document became the fundamental proposal for which the Southeast Asian archipelagic states negotiated at UNCLOS III.

INDONESIA AND
THE ARCHIPELAGIC STATE PRINCIPLES

Geographically the Indonesian archipelago is comprised of six main islands and 13,661 small islands of which 6044 have names and 931 are inhabited.\textsuperscript{64} The six principal islands are Sumatra (164,000 mi\textsuperscript{2} [424,760 km\textsuperscript{2}]); the Greater Sunda Islands comprised of Java and Madura (51,000 mi\textsuperscript{2} [132,090 km\textsuperscript{2}]); Borneo (72 percent of which, or 208,000 mi\textsuperscript{2} [538,720 km\textsuperscript{2}] belongs to Indonesia and is known as Kalimantan); Sulawesi (formerly called Celebes, 73,000 mi\textsuperscript{2} [189,070 km\textsuperscript{2}]) and adjoining smaller islands; the Lesser Sunda Islands (Nusa Tenggara); the Maluku Islands (Moluccas); and New Guinea (159,375 mi\textsuperscript{2} [412,781 km\textsuperscript{2}] of the western
portion belongs to Indonesia and is known as West Irian or Irian Barat). The total land area of the Indonesian archipelago is about 735,267 mi² (1,904,345 km²). Indonesia is bounded by the South China Sea on the north, the Pacific Ocean on the north and east, and the Indian Ocean on the southwest. Strategically located as a bridge between the Indian and Pacific oceans and the Asian and Australian continents, Indonesia maintains a tremendously important position in ocean affairs.

According to M. Danusaputro, in the bibliography of Ancient India Indonesia is called Nusantara (or Dwipantara), which means "the islands between [continents]." The evolution of the concept of Nusantara instilled a national consciousness of Indonesia as islands in between continents and oceans, consequently forming the psychological basis for the archipelagic concept in Indonesia.

The name Indonesia, meaning "the islands of India," was given to the archipelago by a German ethnologist, and the term has been in use since 1884. Originally it was a geographical name indicating all the islands between Australia and Asia including the Philippines. The Indonesian nationalist movement adopted it and made it the official name for their republic in 1945 and 1949, preferring it to the less-known term Nusantara.

The Indian islanders' traditional use of the seas within the Southeast Asian region dates back to prehistory. As Crawfurd explains:

Favoured by the advantages of seas without tempests, so narrow that every voyage is nearly a coasting one; and by the certainty and steadiness of the periodical winds, the Indian islanders navigate in very slender barques the whole extent of the Archipelago, and among people so rude may be looked upon as the greatest of navigators. Yet their enterprise has never, if we except occasional voyages to Siam, the countries which lie between this last and China, and the well known voyages to the coasts of New Holland, extended beyond the limits of their own seas.

Therefore, geographically speaking, the Indian archipelago used to be considered a whole unit. However, the essential question is whether this concept existed at any time in the history of the region when these islands were politically organized as one unit, thus characterizing it as a midocean archipelagic state in the emerging sense of the term.

According to Indonesian history (or legend), in the fourteenth century Prime Minister Gajah Mada was believed to have united the whole of Indonesia. In Indonesia's struggle for the archipelagic concept, the question has been raised whether Gajah Mada tried only to conquer the people on each island of the archipelago or whether he attempted to unify the islands and surrounding waters into one unit. This kind of argument is important to Indonesia in proving to the world that the archipelagic concept was state
practice since the Majapahit period and that it was temporarily inter­
rupted by western colonization.

According to Jack A. Draper's historical analysis, the archipelagic state
doctrine is quite a new legal concept for the ocean regime in Indonesia.

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

Before Indonesia became independent, it applied the same principles
of the law of the sea as the Dutch to its maritime boundaries. The main laws
and regulations of that period were those in the Territorial Sea and Marit­
time Circles Ordinance of 1939. Examination of this ordinance is worth­
while because some sections still apply in the present Republic of Indo­
nesia. It defined the Netherlands Indies territorial sea as the sea area ex­
tending seaward 3 nmi from the low-water mark of the islands or part of
islands that belong to Netherlands Indies territory, subject to a few other
provisions, and lying within specific anchorage limits.

In the case of a group of two or more islands, the 3-mile limit is mea­
sured from straight lines connecting the outermost points of the low-water
marks of the islands on the outer edge of the group at the point where the
distance between these points does not exceed 6 nmi.

In the case of a bay, if the mouth of the bay does not exceed 10 nmi, the
territorial waters are measured from a straight line across the mouth of the
bay. If the width of the mouth is more than 10 nmi, the same line shall be
drawn as close as possible to the entrance at the first point at which the
width of the mouth is not more than 10 nmi.

In the case of straits with a width not exceeding 6 nmi, and connecting
two areas of the high seas of which the Netherlands Indies is not the sole
coastal state, the dividing line between the territorial waters of both states
will be drawn through the middle of the straits. Where the Netherlands
Indies is the sole coastal state, “the part of the straits enclosed by two lines
drawn between the two shores at either end of the straits, as close as possi­
ble to the high seas at the first point where the breadth of the straits does
not exceed six nautical miles, shall be deemed to be territorial sea, even if at
other points within the two lines the breadth of the straits should be greater."

The ordinance defined the following terms:

*Netherlands Indies Sea Territory*: The Netherlands Indies territorial sea and those parts of the coastal waters, bay waters, arms of the sea, river and canal mouths that are situated landward of the territorial sea.

*Netherlands Indies Internal Waters*: All waters in the Netherlands Indies situated landward of the Netherlands Indies territorial sea including rivers, canals, lakes, and pools.

*Netherlands Indies Waters*: Netherlands Indies territorial sea including the Netherlands Indies internal waters.

After Indonesia became independent on 29 December 1949, the question arose whether the former Netherlands Indies provisions of the laws of the sea still applied in the newly created Republic of Indonesia. The question became a case of the transfer of sovereignty. The following provision was made at the Round Table Conference of 1949 at The Hague in the Agreement on Transitional Measures:

> All provisions in existing legal regulations and administrative ordinances in as much as they are not incompatible with the transfer of sovereignty . . . remain in force without modification, as regulations and ordinances of the Republic of the United States of Indonesia . . . as long as they are not revoked or modified by competent organs.79

This provision was subsequently adopted by the Constitution of the United States of Indonesia (Article 192), and since 1950 it has become Article 142 of the Provisional Constitution of the Republic of Indonesia.84 The Territorial Sea and Maritime Circles Ordinance of 1939 was not revoked and thus remained the basic document pertaining to the laws of the sea in Indonesia. These laws now remain in force not as Netherlands Indies enactments but purely as Indonesian laws.

The adoption of these maritime laws by transitional legislation does not imply that Indonesia adhered permanently to all those principles of the Netherlands Indies laws. By definition, transitional legislation is of a temporary nature, and the adopted regulations are therefore subject to subsequent modification or revocation.85 Such a revocation was the Djuanda Declaration or the Proclamation on the Territorial Waters of the Republic of Indonesia (see full text in Appendix C) issued by the Indonesian government on 13 December 1957, four months before the First Law of the Sea Conference convened in Geneva.86 It stated that the policy of the republic in preserving territorial integrity and protecting natural wealth must regard all islands of the archipelago and the sea between them as an integral unit.87
This proclamation is the first official legal document of the Republic of Indonesia claiming the archipelagic concept since this archipelagic state became independent in 1946. However, in making legal arguments, one must investigate the legitimacy of such a claim to the archipelagic concept through three approaches. Using the classical or orthodox approach, it is necessary to prove that there has always existed, or at least existed before the arrival of the westerners in the fifteenth century, a traditional practice in the use and control of the waters around these groups of islands in Southeast Asia. This evidence could ipso jure be more legitimate for an archipelagic state to claim sovereignty over waters around its archipelagos.

Using a more progressive approach, the claims of the archipelagic concept could be regarded as based on the perception that:

in the absence of a rule of international law, each State has the prerogative to determine, in the exercise of its sovereignty, the external limits of its jurisdiction according to the requirements of national security, integrity, and economic survival. Therefore, this kind of practice remains legal and justifiable as long as the international community has not adopted a rule forbidding it.78

On the other hand, if we took a revolutionary approach like some Latin American countries, an argument could be concluded that:

in the absence of custom with respect to a unique rule on the limits of the territorial sea and contiguous zone, the argument of those who contend that the limit of 200 miles (as a new type of claim) is arbitrary; because, if this reasoning were accepted, no matter what width was fixed by a State, be it 3, 12, 50 or 100 miles, it would also be arbitrary.79

This kind of basic argument could apply mutatis mutandis to the case of the claim of the archipelagic concept; if one agrees with those who contend that the regime of exclusive economic zone is arbitrary, since it is a newly claimed regime, one must also agree that the other newly claimed regimes, including the regime of an archipelago, should also be arbitrary. Certainly, this kind of analysis is arguable and can be challenged very easily, especially in the case of the exclusive economic zone concept, which has been already accepted as customary international law by several distinguished lawyers and by numerous state recognitions and practices. How about the case of “Archipelagic State”?

The study of the archipelagic principles of Indonesia requires the examination of three documents issued by the Republic of Indonesia since 1957:

1. Proclamation on the Territorial Waters of the Republic of Indonesia of 13 December 1957;
2. Act Concerning Indonesia Waters (Act No. 4) issued 18 February 1960; and
3. Presidential Decree No. 8 Concerning Innocent Passage of Foreign Vessels in Indonesian Waters, signed by President Sukarno on 25 June 1962.

Djuanda Declaration

The Proclamation on the Territorial Waters of the Republic of Indonesia, also known as the Djuanda Declaration, was based on history, geopolitics, and economics. It stipulated inter alia that:

Historically, the Indonesian archipelago has been an entity since time immemorial.
In view of territorial entirety and of preserving the wealth of the Indonesian state, it is deemed necessary to consider all waters between the islands an entire entity . . .
On the ground of the above considerations, the Government states that all waters around, between and connecting, the islands or parts of islands belonging to the Indonesian archipelago irrespective of their width or dimension are natural appurtenances of its land territory and therefore an integral part of the inland or national waters subject to the absolute sovereignty of Indonesia. The peaceful passage of foreign vessels through these waters is guaranteed as long and insofar as it is not contrary to the sovereignty of the Indonesian state or harmful to her security.
The delimitation of the territorial sea, with a width of 12 nautical miles, shall be measured from straight base lines connecting the outermost points of the islands of the Republic of Indonesia.

Act Concerning Indonesian Waters

In February 1960 the president of the Republic of Indonesia issued the Act Concerning Indonesian Waters (Act No. 4) (see full text in Appendix D), which confirmed his country's position as an archipelagic state and reaffirmed the Indonesian archipelagic principles as follows:

1. The geographical configuration of Indonesia as an archipelagic state that consists of thousands of islands has its own characteristics and peculiarities. [geographical considerations]
2. Since time immemorial, the Indonesian archipelago has constituted one entity. [historical consideration]
3. In the interest of the territorial integrity of the Indonesian state, all the
islands and the waters lying between those islands should be regarded as a single unit. [geopolitical consideration]

4. The delimitation of the territorial waters as provided for in Article 1, paragraph 1, of the Territorial Sea and Maritime Circles Ordinance of 1939 is not in accordance with the above considerations, as it divided the territory of Indonesia into separate parts having their own territorial sea.

5. It is therefore deemed necessary to enact the Act Concerning the Indonesian Waters in accordance with the above considerations.

In Article 1 of the Act Concerning Indonesian Waters, Indonesia claims sovereignty over all waters found within a maritime belt of a width of 12 nmi parallel to straight baselines that connect the outermost points of the outermost islands or part of such islands, for example, Borneo Island and Timor Island. This article distinguishes the legal status of waters found inside straight baselines as internal waters and waters found between straight baselines up to a maritime belt of 12 nmi as territorial sea.

Article 2 stipulates the position of the points and baselines. The entire Indonesian straight baselines system extends for 8167.6 nmi and encloses approximately 666,000 nmi² of internal waters including the important seas and straits of Sunda, Sumba, Lombok, Ombai, Molucca, and Macassar, as well as numerous internal passages within the Indonesian archipelago. The system contains 196 individual segments.

In Article 3 the innocent passage through the internal waters is allowed only by following laws and regulations issued by the Indonesian government. Other interpretations are that the internal waters are open to foreign vessels, but innocent passage is not a right or guarantee. This interpretation becomes more compelling in light of the second paragraph of this article, which provides that the government may "regulate" innocent passage with executive regulations.

Nevertheless, the government also issued an article-by-article clarification of the regulations with standard definitions.

Article 4 repeals the contradictory passages of the Dutch colonial Territorial Sea and Maritime Circles Ordinance of 1939 regarding the Indonesian territorial sea. It stipulates that the territorial sea area extends 12 nmi from straight baselines connecting the outermost points of the outermost islands of the archipelago rather than 3 nmi from the low-water mark of each island.

Decree Concerning Innocent Passage

On 25 June 1962 President Sukarno signed Presidential Decree No. 8, Concerning Innocent Passage of Foreign Vessels in Indonesian Waters (see
the original Indonesian-language text in Appendix E). The issuance of this executive regulation was further explication of the developing archipelagic state doctrine and more clearly stipulated the conditions under which Indonesia would allow innocent passage of foreign ships through her internal waters.

Article 1 of this presidential decree provides the guarantee for "peaceful passage in the 'internal waters' of Indonesia from one part of the high seas to another part of the high seas."

Article 2 defines innocent passage as navigation with a peaceful purpose that travels through the territorial sea and internal waters of Indonesia (a) from high seas to an Indonesian port and vice versa and (b) from high seas to high seas. Therefore, stopping, anchoring, or navigating to and from without justifiable cause in Indonesian waters or in "high seas near such waters" is not recognized as innocent passage.

Article 3 explains that navigation is considered peaceful if it neither jeopardizes the peace nor is contrary to the security, public order, or interest of the Republic of Indonesia.

Article 4 grants power to the president to temporarily suspend innocent passage in Indonesian waters, including straits used for international navigation, from high seas to high seas for security reasons.

Articles 5, 6, and 7 provide restrictions on fishing, scientific research, and navigation of foreign navies. These include the requirements of permits for research and of prior notification by foreign warships and other governmental ships of foreign states. Furthermore, submarines are required to transit on the surface.

Kusumaatmadja's Role

One of the main architects of the Indonesian archipelagic theory is the Foreign Minister Mochtar Kusumaatmadja. At the Seventh Annual Conference of the Law of the Sea Institute at Kingston, Rhode Island, U.S.A., in 1972, Kusumaatmadja explained the circumstances of promulgation of the Djuanda Declaration of 1957 and the Indonesian archipelagic principle as a whole:

Recent developments in the technology of natural resources exploitations, and the resultant dangers to the environment, seem to further strengthen the case for considering an archipelago as one unit. While recognizing the good reasons for a special regime for archipelagoes seen from the point of view of the archipelagic states, the extension of jurisdiction involved raises problems with regard to one of the most fundamental
principles of contemporary law of the sea, i.e., the freedom of navigation and the exercise thereof in archipelagic waters.

The regime of archipelagos as part of the international law of the sea, to be acceptable, must strike a reasonable balance between the needs and interests of the archipelagic states on the one hand and the interest of the international community in the maintenance of freedom of navigation on the other. The unilateral actions taken by archipelagic states—as part of a general tendency of claims for more extensive state jurisdiction over adjacent seas—must be seen as an attempt to correct a situation which from an archipelagic state's point of view can no longer be accepted.

Kusumaatmadja endorses the Evensen proposal for the development of the concept of archipelagos. However, he commented on the use of straight baselines:

The rule that "the drawing of such baselines must not depart to any appreciable extent from the general direction of the coast..." is hard to apply to mid-ocean archipelagos, as it envisages coastal archipelagos only, i.e., island formations forming part of a (continental) land mass.

In an article on the regime of mid-ocean archipelagos, this provision should be replaced by one that would require that the drawing of such baselines shall not depart to any appreciable extent from the general contour of the archipelago. Once such a general contour has been determined, baselines may be drawn around the archipelago, regarding it as one unit.

He suggested that the use of the terms internal waters, territorial seas, and territorial waters is confusing; but since these terms have definite meanings in the contemporary international law of the sea, it may perhaps be better to replace them with the term archipelagic waters. Therefore, archipelagic waters would be comprised of both the internal waters and the territorial waters as they become a regime sui generis. Regarding passage through the archipelagic waters, Kusumaatmadja stated:

If freedom of navigation is to be guaranteed in these waters [archipelagic waters]—as it should—one could by convention agree to have the right of innocent passage through archipelagic waters. This could or could not be restricted to certain sea lanes. The archipelagic waters would then become a concept "sui generis," as in traditional terms it would be internal waters [being on the inward side of straight baselines] while being subject to the right of innocent passage [thus having the status of territorial waters in traditional terms].

Kusumaatmadja presented this semi-official speech as an official statement at UNCLOS III.
THE PHILIPPINES AND
THE ARCHIPELAGIC STATE PRINCIPLES

The Treaty of Paris

Our studies confirm that provisions contained in the Treaty of Paris of 10 December 1898, which concluded the Spanish-American War, provided the first development of the Philippine archipelagic principle. When the peace commissioners of the U.S. delegation recommended that the U.S. annex the whole Philippine Islands, it was the original attempt to treat the Philippine Islands as one unit.

At the conference of 31 October 1898, the American commission presented a proposal providing for cession of "the archipelago known as the Philippine Islands" by Spain to the U.S., specifying geographic coordinates for the area of the ceded territory.* This proposal was based on the idea introduced by Commander R. B. Bradford before the United States Peace Commission in 1898. He gave three fundamental reasons for the United States to annex the whole Philippine Islands: military, economic, and geopolitical.

1. [Military] I think the entire group would be a very valuable acquisition for naval and commercial purposes. The group is composed of over 400 islands, excluding rocks and uninhabited islands. These islands are so crowded together that anyone would in time of war require a large force for its defense if the neighboring islands were in the possession of an enemy. It would be less difficult to defend the entire group under such circumstances than a single island. . . . These command all the entrances to the China Sea from the north end of Luzon to Borneo.

2. [Economic] So far as I can ascertain, coal is found in almost all of the large islands of the Philippine group. Its presence in the islands of Negros and Cebu has been known for a long time. . . . Coal is found in the northern and southern parts of Luzon; also in Masbate and Batan. It is thought to exist in Samar and Mindanao. . . . Speaking from a commercial point of view, I believe the Philippine Islands are capable of great development and valuable trade. They possess about 8,000,000 inhabitants, and are rich in products. . . . Their mineral wealth is unknown, but we do know that there are valuable minerals in these islands.

3. [Geopolitical] I am positive, if this country is to possess any colonies, however insignificant, in the vicinity of the China Sea, that coaling stations are absolutely necessary in the Pacific along the route of communication from our coast. I do not think that the facilities afforded by the Ladrone Islands are sufficient for this purpose.

England has made herself mistress of the seas and grown very rich by her colonial enterprise, and other countries are profiting by her example. Even
Southeast Asian Archipelagic States

little Holland has colonies with 30,000,000 inhabitants which yearly export products valued from $125,000,000 to $150,000,000. The proximity of other islands of the Philippine group. There are over 400 islands in the group, crowded together. A cannon shot can be fired from one to another in many instances. To illustrate, we have the Hawaiian Islands. Suppose we had but one, and the others were possessed of excellent harbors, coal mines, valuable products, and minerals; suppose also that the others were in the hands of a commercial rival, with a different form of government and not overly friendly. Under these circumstances we should lose all the advantages of isolation.

Another element that convinced Commander Bradford to persuade the American commission to take over the whole group of the Philippine Islands was his fear of the Germans trying to get Palawan. This German movement, according to him, could be a real menace if the United States decided to claim only Luzon island or some parts of the archipelago.

The main objective of the American commission in making the cession proposal giving specific coordinates surrounding the Philippine archipelago was to demarcate the area the United States intended to control. This proposal could not be assimilated to the same legal action of the midocean archipelagic claim in the emerging sense of the law of the sea. There are no references to issues such as the legal status of the water column found within the given coordinates because at that time there was no knowledge of the straight baselines method for measuring the territorial sea and other jurisdictional zones.

One might always argue, however, that this proposal also claimed de facto the entire space, or at least the land area and water area, found within straight lines set forth by the given coordinates. Such an argument could be based on the very fact that an island by nature is always surrounded by water. Practically, it was not necessary for the United States to claim explicitly "waters found between islands of the Philippine archipelago." This proposal was one of the first official documents that introduced a legal claim over a midocean archipelago, making the United States the first country in the modern world that implied a midocean archipelago claim. Moreover, it is almost certain that this kind of proposal became a fundamental element that motivated the Philippine Republic to draw its archipelagic concept in the 1930s.

The Fisheries Act

In 1932, when the Philippines was still under the control of the United States, the Fisheries Act was enacted by the Philippine Senate and House of Representatives to amend and compile the laws relating to fish and other
aquatic resources of the Philippine Islands. Generally, the Philippines claimed ownership over living resources of waters within the coordinates set out in the treaties of 1898 and 1900.

This legal action could be considered one of the first steps of the archipelagic claim made by the Philippines. Although the terms sovereignty or sovereign rights were not explicitly mentioned, they were ipso facto such rights over national waters or territorial waters that a coastal state enjoyed. Therefore, it seems the main objective of issuing this act was to provide a kind of limited sovereignty different from the emerging sense of archipelagic claims by which coastal states extend their sovereignty over the water column, seabed, subsoil, and even the airspace. Yet, the Philippines called this kind of claim the "archipelagic principle of territorial sea." This also can be regarded as one of the most extensive claims of national jurisdiction and one of the first by a developing state of the world.

The Tydings-McDuffie Law

Despite the fact that the Philippines never seriously implemented and enforced its sovereignty, it maintained that its sovereignty over such waters was recognized by the Tydings-McDuffie Law of 1934. Legal arguments have resulted from differences of interpretation of the use of the term "Philippine Islands" rather than "Philippine Archipelago." For some lawyers, the Tydings-McDuffie Law referred to sovereignty over the territory and the people of the Philippine Islands. The Philippine lawyers and authorities considered the names Philippine Islands and Philippine Archipelago interchangeable. When the American commissioners at the Paris Peace Conference in 1898 presented their first proposition regarding the Philippine Islands, the language used was "Spain hereby cedes to the United States the archipelago known as the Philippines Islands." The Americans, since then, have always regarded the Philippine Islands as one unit and, it can be said, as an "island-studded sea," the classical definition of Philippine Archipelago. Nevertheless, these two expressions, Philippine Islands and Philippine Archipelago, were never officially and explicitly distinguished. Many U.S. government documents and Senate documents interchangeably use both terms. Thus, it is necessary to see if a distinction between them has in fact evolved.

In the 1934 constitutional convention, a provision defining the Philippine national territory was embodied to protect the unity of the Philippine archipelago. According to delegate Justino Hermoso, there had been a move to separate Mindanao from the Philippines by granting independence from the United States only to Luzon and Visayas. To prevent such
unwarranted dismemberment, delegate Vicente Singson Encarnacion insisted on a provision for the delimitation of the national territory.

And you should not forget that at this time the United States is in the best of mood and temper and goodwill to give us that which is ours. Nevertheless, we could not be sure that such a goodwill would still exist in the future when the officials of the United States would not be in such a good temper as they are now. These same islands which they secured from the treaty of Washington (including Mindanao island [author's note]) might be discussed over again because in the future the new officials elected by the American people might say that, since they were not included in the Tydings-McDuffie Law, they should not form part of our territory. But if we include them now and the inclusion would be approved by the President of the United States, no official of the United States elected by the American people could say in the future that these islands were not included because they were not found in the Tydings-McDuffie Law.91

However, there were many other delegates at the 1934 constitutional convention who opposed such a proposal. Delegate Aruego was the one who supported the suppression of Article I, which defined the national territory:

Personally I would still object to the inclusion of an article on national territory in the constitution that we are drafting because I feel that we should not perpetuate in this historic document the national humiliations of a tragic past. I feel that we should not embody in this priceless legacy to the coming generations of Filipinos the history of our subjugation as a race, the history of our frustrated attempts to set ourselves free.92

The Constitutional Convention of 1934 finally adopted an article on the national territory that became Article I, Section 1, of the 1935 Constitution of the Philippines:

The Philippines comprises all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits of which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington, between the United States and Spain on the seventh day of November, nineteen hundred, and in the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction.93

The main reason the majority of delegates to the 1934 Constitutional Convention favored the inclusion of a delimitation of the national territory was for territorial integrity. Based on historical background, the southern
part of the Philippines was never, strictly speaking, really integrated into the archipelago.

This first constitution of the Philippines confirmed the "archipelagic principle of territorial sea" and became the fundamental source of the present archipelagic claim made by the Republic of the Philippines.

Notes Verbale of 1955

In 1955 when the United Nations was preparing for the First Conference on the Law of the Sea, the ministry of foreign affairs of the Philippines delivered a Note Verbale dated 7 March 1955 in response to the U.N. secretary-general's communication (LEG 292/9/01) of 3 February 1955. This Note Verbale drew the secretary-general's attention to the report of the International Law Commission covering the work of its seventh session, held in Geneva. On 20 January 1956 another Note Verbale that described the Philippines' position on the Law of the Sea was delivered from the permanent mission of the Philippines to the United Nations (Doc. A/CN.4/99). These official documents contain the country's general position on the law of the sea issues, namely, the regime of the high seas, draft articles on the regime of the territorial sea, and particularly the concept of the archipelagic regime. Through this Note Verbale, the Philippines became the first country to declare to the world community that it relied on the archipelagic state concept:

All the waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of Commonwealth Act "No. 4003" and article 1 (this was inadvertently given as article 2 in the note verbale of 7 March 1955) of the Philippine Constitution, are considered as maritime territorial waters of the Philippines for the purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defense and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters. All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries,
belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign states over those waters.94

Without mentioning the application of the straight baselines method in this Note Verbale, the Philippines claimed its exclusive sovereignty over “all waters around, between and connecting every island which belongs to the Philippine Archipelago.” By not giving any exact limits of the Philippine archipelago, all waters found around, between, and connecting different islands belonging to the archipelago were considered by the Philippines as “national or inland waters.” However, the Philippine government took the opportunity to reaffirm its claim of territorial sea over water areas found within lines described in the Treaty of Paris of 1898, the treaty of 1900 between the United States and Spain, and the treaty of 1930 between the United Kingdom and the United States regarding the boundary between the Philippines and North Borneo as stipulated in Article 1 of the 1935 Constitution.

The Philippines have always interpreted the Treaty of Paris as a conveyance from Spain to the United States of the waters as well as the land elevations within the treaty limits, juridically transferring the sovereignty exercised over such water area and land area to the Philippines.

The Note Verbale of 7 March 1955 presented a new perspective on the movement of national appropriation of maritime areas and became one of the basic documents that has directly influenced, after twenty-two years, the new Draft Convention of the Law of the Sea. Moreover, one may also consider that this proposal is one of the very first documents that introduced the use of the straight baselines method.

**UNCLOS I and II**

At the First Conference on the Law of the Sea in 1958 the Philippine government strongly espoused the archipelagic concept. On 1 April 1958, the Philippine delegation submitted a document (U.N. Doc. A/CONF.13/C.1/L.98) to the first committee that made two proposals:

1. The method of straight baselines shall also be applied to archipelagos, lying off the coast, whose component parts are sufficiently close to one another to form a compact whole and have been historically considered collectively as a single unit. The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the archipelago. The waters within such baselines shall be considered as internal waters.

2. When islands lying off the coast are sufficiently close to one another as to form a compact whole and have been historically considered collectively as a single unit, they may be taken in their totality and the method of straight
baselines provided in Article 5 may be applied to determine their territorial sea. The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the group. The waters inside such baselines shall be considered internal waters.

This proposal ended with the statement: “If one of these proposals is adopted, the other is automatically withdrawn.”

However, the preparatory document for this 1958 conference (U.N. Doc. A/CONF.13/18) described outlying (mid-ocean) archipelagos as “groups of islands situated in the ocean at such distance from the coasts of firm land as to be considered as an independent whole rather than forming part of the outer coastline of the mainland,” thus distinguishing them from coastal archipelagos. Moreover, the document concluded that frequently the only natural and practical solution is to treat such outlying archipelagos as a whole for the delimitation of territorial waters by drawing straight baselines from the outermost points of the archipelago, that is, from the outermost points of the constituent island, islets and rocks—and by drawing the seaward limit of the belt of marginal seas at a distance of X nautical miles outside and parallel to such baselines.

The First Geneva Conference on the Law of the Sea rejected the archipelagic state concept for a number of reasons. The maritime power countries that dominated the conference tended to limit territorial waters or to oppose the extension of any national jurisdiction over the sea space and this concept inherently implied extensive marine area appropriation. Timing was also very important because this concept represented profoundly diverse geographical, economic, political and strategic aspects.

In 1958 the juridical value of the claims of states was still a subject of caution. For the great maritime powers the question of the breadth of territorial waters and the exclusive fishing zone has never been governed solely by the national jurisdiction of a coastal State. . . . In the opinion of the International Court of Justice [Fisheries case] the validity of delimitation in maritime areas with respect to other States is governed by international law; in other words, the limits fixed in conformity with the internal law of the coastal State cannot exceed the maximum limits authorized by international law. . . . The delimitation of maritime areas always has an international aspect; it should not depend solely on the will of the coastal State as expressed by its internal law. If it is true that the act of delimitation is necessarily a unilateral act, because the coastal State is the only party qualified to effect it, on the other hand, the validity of the delimitation relative to other States falls within the province of international law.
This citation is often used by the opponents of the extension of national jurisdiction to 200 nmi. Certain medium power and developing countries, including the Philippines, considered that “in the absence of a rule of international law [that of 3 nautical miles being outdated for some time] each State has the prerogative to determine, in the exercise of its sovereignty, the external limits of its jurisdiction according to the requirements of national security and economic survival. This practice will remain legal and justifiable as long as the international community has not adopted a rule forbidding it.”


1. For national integrity and security, straight baselines were to be drawn from the outermost points of the outermost islands around the Philippine archipelago for forming an integral part of the national or inland waters that are subject to the exclusive sovereignty of the Philippines.

2. To protect fishing rights, conserve fishery resources, and enforce revenue and anti-smuggling laws, the Philippine territorial sea limits were to be drawn from the straight baselines up to the limit as described in the Treaty of Paris of 10 December 1898; the treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900; the agreement between the United States and the United Kingdom of 2 January 1930; and the convention of 6 July 1932 between the United States and Great Britain.

Under this proposal, the width of the territorial waters of the Philippines would have exceeded the 12-nmi limit, and at some points would have extended to over 200 nmi from the straight baselines.

Although the Philippine proposal assured the right of innocent passage to friendly foreign vessels within the archipelagic waters, it was still premature for the First Conference to accept a package proposal that claimed an extension of a coastal state's sovereignty up to a distance of more than 200 nmi, while the negotiation for a territorial sea limit of 12 nmi could not be settled. The lack of support in the conference for the archipelagic state concept forced the Philippines to withdraw its proposal.

At the Second Geneva Conference on the Law of the Sea in 1960 the Philippines continued to plead for recognition of the unique position of archipelagos and for legal confirmation of its territorial sea limits through acknowledged geographical and historical criteria. At the conference Arturo M. Tolentino, the Filipino delegate, stated that
from time immemorial, the Philippine archipelago has been considered as a single unit. It is composed of over 7000 small islands, the largest of which is only a little over 40,000 square miles. It is a compact and closely-knit group of islands connected together by a single submarine platform. Historically, these islands have always been under a single sovereignty: first, under Spain, then under the United States, and now under the Republic of the Philippines. And from the waters between and around the different islands, numberless generations of Filipinos have drawn a large part of their food supply. Based on this historic title, supported by considerations of geography and economics, all the waters around, between and connecting the various islands of the Philippine archipelago, irrespective of their width or dimension, have always been considered as necessary appurtenances of the land territory, forming part of the inland waters of the Philippines. The biggest of these inland waters is the Sulu Sea, with a total surface area of about 86,000 square miles, which, by the way, is insignificant as compared to the about 500,000 square miles of the Hudson Bay, which Canada now claims as part of its national waters under historic title.99

With respect to the territorial sea limit, the Philippine delegation pleaded that, "because the circumstance and conditions of States vary, there can be no absolute uniformity in their respective claims of the breadth of the sea adjoining their coasts which should be subjected to their sovereignty and jurisdiction."100 Delegate Tolentino argued that the territorial sea limit is not a mere juristic concept; it is vitally linked with the political and economic security of the coastal states. The reasons he gave that justify the extent of a state's sovereignty over the territorial sea are (1) national security; (2) commercial, fiscal, and political interests; and (3) natural ocean resources benefits. Furthermore, he argued, the political and economic considerations are the predominant factors that determine the extent of territorial sea.101 Tolentino continued to appeal the unique position of his country:

The territorial sea of the Philippines over which my country exercises sovereignty and jurisdiction by virtue of a legal and historic title is therefore comprised of all the waters beyond the outermost islands of the archipelago but within the boundaries set forth in the Treaty of Paris. The case of the Philippines is thus sui generis, and cannot be covered by any general rule that may now be formulated on the breadth of the territorial sea. . . . It is our hope that this Conference can look with sympathetic consideration towards embodying a saving clause in any rule we may adopt on the breadth of the territorial sea, which would expressly recognize existing established rights, which would include that of my country.102

Unfortunately, the archipelagic concept again was not adopted at UNCLOS II; this partly explains why the Philippines did not sign the four Geneva Conventions adopted in 1958.
The Tolentino Bill

On 17 June 1961 the Philippines issued Republic Act No. 3046 entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines," also known as the Tolentino Bill (Philippines Senate Bill No. 541). This act reconfirmed the Philippines' claim over the national territory as set forth in the treaty limits and clarified the Philippines' straight baselines method in delimiting its territorial sea. It declared that all waters around and connecting the various islands of the Philippine archipelago "have always been considered as necessary appurtenances of the land territory forming part of the inland or internal waters of the Philippines" and that all the waters beyond the outermost islands of the archipelago, but within the treaty limits, comprise the territorial sea of the Philippines. Under this act, the baselines consist of seventy-nine straight lines joining eighty designated points on the outermost points of the outermost islands of the archipelago.

The Philippines, however, did not apply the straight baselines method to delimit its territorial waters because its territorial waters already had been claimed as set out by the Treaty of Paris of 1898 and two other treaties. Nevertheless, the baselines set forth by this act were to be used for measuring other national jurisdictional zones, such as the exclusive economic zone.

According to Congressman Montano, the main reason for the issuance of Act No. 3046 was that the Philippine delegation that was responsible for negotiating matters of navigation in Japan needed to back their bargaining position by defining the baselines of the territorial sea of the Philippines.

Because of the highly technical nature of the act, the speaker of the house moved to suspend its consideration. The proposal for the bill was brought up again in May 1961. However, before the House of Representatives adopted it at the third reading, a serious exchange of speeches occurred, and it was that session's debate that reflected the Philippine lawmakers' opinion and concept regarding the archipelagic principles.

There were three reasons that some lawmakers opposed the Tolentino Bill. First, they believed that the act that defined the maritime boundaries should be based upon international agreements rather than on a unilateral decision. Second, they were concerned about the constitutional aspects that merely adopting such legislation could not change the legal status of waters as defined in the constitution. Third, they were anxious that adoption of such a law could adversely affect the Philippine claims over North Borneo and Freedom Island.

The congressmen who favored the Tolentino Bill felt that it was necessary to define the country's baselines because the definition of the national territory in the 1935 Constitution was vague. By doing so, the country's internal waters and territorial waters would be distinguished, and the Phil-
**Tolentino Amendments**

At the Sixth Congress of the Republic of the Philippines, Senate Bill No. 945 entitled “An Act to Amend Section One of the Republic Act No. 3046 Entitled ‘An Act to Define the Baselines of the Territorial Sea of the Philippines’” was introduced again by Senator Tolentino, who stated that “this bill aims to rectify typographical errors in the technical information” found in the Republic Act No. 3046. The main purpose of this amendment was to include Sabah (North Borneo) as part of the Philippine archipelago from which the baselines should be drawn. Senate Bill No. 954 was passed and became Republic Act No. 5446 on 18 September 1968. Section 2 of Act No. 3046 as amended by Republic Act No. 5446 reads:

> The definition of the baselines of the territorial sea of the Philippine archipelago as provided in this Act is without prejudice to the delineations of the baselines of the territorial sea around the territory of Sabah, situated in North Borneo, over which the Republic of the Philippines has acquired dominion and sovereignty.

This parliamentary action is very important because it represents the will of the people of the Philippines to unite their national territory, which embraces not only the archipelago but also territorial waters beyond the straight baselines. However, at the international level this movement can...
indeed create a deadlock situation for the Philippines if the concept of historic waters or of the archipelagic state is not adopted at UNCLOS III. In fact, until now the validity of both the archipelagic theory and the Philippine claim to a territorial sea extending to its treaty limits under international law has been questioned.

At Geneva on 16 August 1971 before Subcommittee II of the U.N. Seabed Committee, Philippine delegate Estelito P. Mendoza reemphasized the archipelagic state concept. The context of his statement is similar to previous texts submitted to UNCLOS I and II except on the issue of innocent passage through the archipelagic waters.

Regarding innocent passage, U.N. document A/CN.4/99 (also in the Note Verbale of 7 March 1955) stated:

All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries, belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters.

According to this text, the Philippine government firmly guaranteed innocent passage through archipelagic waters. However, Mendoza's statement appeared less committed:

We are aware of the apprehension that this may impede the accessibility of certain waters used for international navigation. We are not sure that the resulting impediment is of any significance but we may suggest that, convinced of the importance and need of the passage of international navigation in certain areas, our government may give thorough consideration and undertake the closest study of such passage and under certain arrangements.

Mendoza's position was also adhered to by the Philippine Navy guidance in enforcing the Philippine municipal laws. The new Philippine Constitution reaffirms this position.

The Constitutional Convention

The Constitutional Convention in 1971-1972 set up a Committee on National Territory to prepare a draft on national territory. The archipelagic principles of the Philippines were again discussed and reshuffled by this convention.

Article I, Section 1, of the national territory provision in the new constitution uses totally different language from Article I, Section 1, of the 1935 Constitution:
The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title, including the territorial sea, the air space, the subsoil, the seabed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. 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.

According to Eduardo T. Quintero, chairman of the Committee on National Territory, the main reason for such change was that a great portion of Article I of the 1935 Constitution was taken from treaties concluded among the colonial powers—Spain, the United States, and Great Britain. The very first sentence states that “the Philippines comprises all the territory ceded to the United States” by Spain. The idea conveyed is that the Philippines acquired a territory because of a cession made by one colonial power to another. The new constitution turned over the territory to the Filipinos in an act of liberality.

The historical fact is ignored that our ancestors owned all this territory and that they have been living here long before Magellan landed in Cebu in 1521 and long before the defeat of Spain at the hands of the Americans in the Battle of Manila Bay in 1898. That is the reason for the criticism that Article I of the 1935 Constitution is “inherently and totally colonial.” That is the reason for the move that said Article I should be deleted.

Those delegates who opposed the retention of Article I of the 1935 Constitution and proposed to delete the provision on national territory from the new constitution argued that its retention was only a reminder of the country’s colonial past and would prevent the Philippines from acquiring new territories in the future. Also, in international law, a state has an unquestioned right to exercise sovereign authority throughout the extent of its territory; there is no rule in international law, traditional or conventional, requiring a state to delimit its territorial boundaries in its constitution. Retention of the old article could also hinder the Philippines’ pending claim to the territory of Sabah and similar claims in other territories in the future.

Delegate Garcia (V) stated that a definition of national territory in the constitution would not bind other countries. He stressed that more important than territorial delineation was the exercise of sovereignty over territories. Deletion of the article on national territory would not be an abandonment of the archipelagic theory and the present interpretation of the country’s territorial boundaries. He pointed out that the draft article
would virtually mandate the government to adopt an expansionist policy and lay claim to other territories.¹¹¹

Those delegates who proposed deletion of the language used in Article I of the 1935 Constitution but wanted the new constitution to contain a provision on national territory felt that a complete absence of such a provision might weaken the position that the Philippines had taken on its claim to Sabah and Batanes. Moreover, they believed that the best way of giving notice to the whole world was through the constitution.

Quintero, the chairman of the Committee on National Territory, who favored maintaining a provision on national territory in the new constitution, finally stated that "in view of the foregoing reasons relating to question of national claims over Sabah, Batanes, national interest, and national security, the Committee on National Territory recommended to the Constitutional Convention in plenary session that the new Constitution should contain a description of national territory."¹¹²

The Committee on National Territory recommended the following draft article on national territory:

SECTION 1. The national territory of the Philippines shall be the archipelago of that name, the historic home of the Filipino people from its beginnings, whose boundaries are set forth in Article III of the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety eight, together with all the islands embraced in the treaty concluded at Washington between the United States and Spain on the seventh day of November, nineteen hundred and thirty, and in the convention concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all other territories over which the Government of the Philippines has been exercising jurisdiction or over which it has a right.

SECTION 2. All the waters around, between and connecting the various islands of the Archipelago, irrespective of their widths or dimensions, are considered necessary appurtenances of the land territory, forming part of the inland or internal waters of the Philippines.

SECTION 3. All the waters beyond the outermost islands of the archipelago within the boundaries set forth in the treaties and convention mentioned in Section one hereof comprise the territorial sea of the Philippines.

SECTION 4. The sovereignty of the Philippines extend beyond its land territory and its internal waters, to a belt of the sea adjacent to its coast, described as the territorial sea. Said sovereignty also extends over the air space above its land areas, its internal waters and territorial sea as well as to its sea bed and territorial sea.

SECTION 5. The National Assembly shall define the control that the Philippines shall exercise in the contiguous zone and in the superjacent waters of the continental shelf.¹¹³
The new Philippine constitution, ratified by village assemblies and signed by President Marcos on 17 January 1973, adopted the following article on national territory:

**ARTICLE I.** The national territory consists of the Philippine Archipelago, which is the ancestral home of the Filipino people, and which is composed of all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, the continental shelf and other submarine areas over which the Philippines has sovereignty or jurisdiction. 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.¹¹⁴

**UNCLOS III AND THE SOUTHEAST ASIAN ARCHIPELAGIC STATES**

At UNCLOS III, the Philippines delegation continued to plead for recognition of its unique archipelagic position. At the plenary meetings on 8 July 1974 of the Caracas Session (2nd Session), Abad Santos, the cochairman of the delegation, stated that it was time for the international community to revise the customary rules of the law of the sea and for the Philippines to recall to the conference its claim as an archipelagic state. He pleaded that although Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone allowed the use of the straight baselines method by continental states, he saw no reason for making this method inapplicable to archipelagos.

Furthermore, Santos introduced the Philippines’ position in a general prospectus. It had been rightly pointed out that the uses of the sea could be classified basically into two categories, resource-oriented and nonresource-oriented. The establishment of an exclusive economic zone or patrimonial sea, which had been strongly advocated by the African and Latin American States, was directed principally at the living and nonliving resources of the sea. His delegation recognized the concept of the economic zone and supported its inclusion in the new law of the sea, as the delegates believed that it would contribute in no small measure to the improvement of the economy and well-being of the developing countries. The delegation also was sensitive to the reasonable aspirations of the land-locked and other geographically disadvantaged States to an equitable share in the benefits to be derived from the resources and uses of the sea.¹¹⁵

One major point Santos made dealt with the Kalayaan Islands: "With regard to the claims made during the general debate over groups of islands
situated in the South China sea, the Philippines wished to state that it maintained its claims to the islands known as Kalayaan, over which it had effective control and occupation.\textsuperscript{116}

At the plenary meeting of the 2nd session of UNCLOS III on 15 July 1974, Foreign Minister Kusumaatmadja, as head of the Indonesian delegation, after firmly supporting the principle that the resources of the sea beyond the limits of national jurisdiction should be used for the benefit of all mankind, introduced the basic elements of the archipelagic state concept as follows:

1. For national unity, territorial integrity, and political and economic stability, an archipelagic state was entitled to draw straight baselines connecting the furthest points of the outermost islands and drying reefs of the archipelago.
2. The archipelagic state exercised sovereignty over the waters within the baselines, the airspace above those waters, the water column, the seabed and the subsoil thereof, and the resources contained therein.
3. The territorial sea and economic and other jurisdictions of the state with regard to the sea around it should be measured from those baselines.
4. The legitimate interests of the international community concerning passage through the archipelagic waters for the purpose of transit from the high seas to the high seas should be respected on the basis of the principle of innocent passage through archipelagic waters or designated sea-lanes, provided that such passage did not prejudice the peace and security of the archipelagic state.\textsuperscript{117}

Although the traditional rules and principles of innocent passage were recognized by the Indonesian delegation, the conference was required to produce a convention that clearly distinguished between merchant vessels and vessels with special characteristics, including warships and submarines with right of passage through the archipelagic waters.\textsuperscript{118}

The Philippines, Fiji, Indonesia, and Mauritius submitted to the second committee of UNCLOS III three sets of jointly prepared draft articles. The first set, submitted on 18 July 1974, was on the characteristics of the territorial sea (Doc. A/CONF.62/C.2/L.13). These draft articles incorporated the term archipelagic waters into the same classification as internal waters:

\textbf{Article 1}. The sovereignty of a coastal State extends beyond its land territory and internal waters, and in the case of archipelagic States, their archipelagic waters, over an adjacent belt of sea defined as the territorial sea.
ARTICLE 3. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

The second draft articles, (Doc. A/CONF.62/C.2/L.49) submitted on 9 August 1974, were largely based on the proposals in documents submitted to the Seabed Committee in 1973. The main points of the provisions were:

ARTICLE 2. An archipelagic State may employ the method of straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago in drawing the baselines from which the extent of the territorial sea, economic zone, and other special jurisdictions are to be measured.

ARTICLE 3. The waters enclosed by the baselines, which waters are referred to as archipelagic waters . . .

ARTICLE 4. Ships of all States shall enjoy the right of innocent passage through archipelagic waters.

ARTICLE 5. An archipelagic State may designate sea lanes suitable for the safe and expeditious passage of such ships . . . and may also prescribe traffic separation schemes for the passage of such ships through those sea lanes.

The third draft article on the high seas (Doc. A/CONF.62/C.2/L.69) was submitted on 19 August 1974 and distinguished the legal status of the archipelagic waters from the high seas.

The Philippines alone submitted a revised draft article on the historic waters and delimitation of the territorial sea (Doc. A/CONF.62/C.2/L.24/Rev. 1), also on 19 August 1974. The main points of this draft article were:

1. The territorial sea could include waters held by a state as such through historic right or title.
2. The maximum limit provided in this convention for the breadth of the territorial sea could not apply to historic waters held by any state as its territorial sea.
3. Prior to the approval of this convention, any state that had already established a territorial sea with a breadth more than the maximum provided in this article was not subject to the limit provided herein.

Nevertheless, the Philippine proposal on historic waters had been indirectly rejected by its neighboring state, Indonesia, when Indonesia submitted to the second committee another draft article on historic waters (Doc. A/CONF.62/C.2/L.67) (see Appendix F).

At UNCLOS III the Philippines was very active on the issues of settlement of dispute, national security, and marine environmental protection. The Filipino representative to the fourth session of the conference described his country's position to the plenary meetings on 7 April 1976. His
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delegation supported efforts to provide for a peaceful settlement of disputes in a future convention through the establishment of a special seabed tribunal based on the following:

1. A dispute settlement system should form an integral part of the future convention.
2. An effective dispute settlement system should include compulsory jurisdiction leading to a binding decision by the jurisdictional organ concerned.
3. The scope of the dispute settlement system should be as broad as politically possible in supplementing traditional bilateral negotiations.
4. Compulsory jurisdiction would require sufficient assurances that a state's vital interests were adequately safeguarded.
5. Special procedures might also open the door to other dispute settlement systems and competing jurisdictions.
6. Access to the system should generally be limited to states.
7. The progressive development of the law of the sea should entail a corresponding development of the dispute system.¹¹⁹

On the issues of marine environmental protection and national security, a Filipino delegate made a remarkable speech at the plenary meetings of the fourth session on 26 April 1976:

In a number of resolutions, the General Assembly had stressed the need for establishing nuclear-free zones to prevent the proliferation of nuclear weapons and to help to eliminate the danger of a nuclear holocaust . . . The Conference had then a mandate from the General Assembly and could not avoid discussing the basic issues relevant to the peaceful uses of ocean space and zones of peace and security. While it might be true that the negotiating texts already attempted to regulate what it was conceded might be allowed in the territorial sea, in straits used for international navigation, in the economic zone and on the high seas, they did not exhaust the broad question of what could not be done, in order to preserve the peaceful character and ensure the peaceful use of ocean space.¹²⁰

He added that on 27 November 1971 the ministers for foreign affairs of the Association for Southeast Asian Nations (ASEAN) had issued a declaration in Kuala Lumpur to initiate efforts necessary to secure the recognition of Southeast Asia as a zone of peace, freedom, and neutrality. The concept had been approved by the heads of state of ASEAN at a summit meeting on 23–24 February 1976. The intention was to exclude interference by outside powers and to insulate the region from the rivalries of the
great powers, to eliminate foreign military bases, and to prohibit the presence, passage, storage, or testing of nuclear weapons in the area.\textsuperscript{121}

By 1972 the efforts of the Philippines and other archipelagic countries were beginning to bear fruit. The archipelagic state concept that was on the agenda of UNCLOS III had by then more or less gained recognition in the conference, as shown by several statements and no less than eight proposals from African, Asian, Latin American, and even western European states.\textsuperscript{122}

The fight for gaining recognition of the archipelagic state concept in UNCLOS III seems to have been quite positive since the majority of the participants were developing countries that favored extensive marine area appropriation. Another important step was when the archipelagic state principles were incorporated in 1975 as part of the informal negotiating text. Consequently, this issue became Part IV of the Convention on the Law of the Sea, which was adopted by the Third Conference on the Law of the Sea on 30 April 1982 by an overwhelming majority of the approximately 140 delegations attending, including almost all Southeast Asian states. In the legal sense, even if the new Convention on the Law of the Sea could not be enforced for any reason, the archipelagic state concept would still become part of customary international law of the sea.

Ipso facto, in case the archipelagic state concept becomes part of customary international law of the sea as interpreted by the Filipino delegate, the geo-legal situation of Southeast Asia would be totally changed. That is, more than ten major international sea routes will be found within the archipelagic waters of these two Southeast Asian archipelagic states (as shown in Figure 2).

\section*{CONCLUSION}

At this stage, we may conclude that the concept of midocean archipelagos evolved as an attempt to balance the territorial integrity and national security of the archipelagic states with the right of transit through passageways that would fall within the archipelagic waters. The latter was "a key issue because the two major naval powers, the United States and the U.S.S.R., insisted early in the conference's preparatory work on the necessity of an assured right of transit for all vessels and aircraft through and over straits [including straits within the archipelagic waters]. As negotiations proceeded, it was made plain to all concerned that this question was paramount for these two powers."\textsuperscript{123}

The initial proposal of the archipelagic states—Indonesia, the Philippines, Fiji, and Mauritius—to the Seabed Committee designated the archipelagic waters as "subject to the sovereignty of the archipelagic State"
instead of describing them as "internal waters." The right of innocent passage of foreign vessels through these waters was recognized, but in "accordance with national legislation." This joint proposal was one of the most important developments relating to the concept of archipelagos since UNCLOS I rejected proposals prepared by the International Law Commission. Although the Evensen proposal appears to have served as the basic groundwork for this joint proposal, the language is broader, and this proposal is a total departure from the classical types made by international bodies and publicists before UNCLOS I.

A revised proposal was submitted by the same states to the Second Committee in 1973. It referred specifically to a "mid-ocean archipelagic State" and claimed sovereignty over the archipelagic waters. With regard to the question of passage through the archipelagic waters, the right of innocent passage of foreign ships is recognized. Moreover, the archipelagic state may designate sea-lanes and traffic separation schemes and make laws and regulations regarding safety of navigation, preservation of the environment, and so forth. Warships were to be subject to these laws and regulations, and their passage could be suspended. On 9 August 1974, the four archipelagic states submitted articles that were more compromising and specific insofar as the problem of pollution was concerned.

The two major maritime powers, on the other hand, sought special provisions for transit passage through straits, including those that fall within archipelagic waters, to secure a right for submarines and aircraft to pass under and over straits and to eliminate the competence of the coastal state to characterize a vessel's passage as noninnocent and, therefore, subject to exclusion.

In the convention, articles 52 and 53 relate directly to the issue of passage through archipelagic waters. Article 52 provides the right of innocent passage through archipelagic waters for ships of all states. Such passage may be suspended "temporarily in specified areas of (the state's) archipelagic waters ... if such suspension is essential for the protection of its security."

Article 53 establishes the right of archipelagic sea-lanes passage: "Archipelagic sea lanes passage is the exercise in accordance with Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious, and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." Note that the term "in the normal mode" raises the possibility of submerged passage for submarines. The right of sea-lanes passage, as with the right of straits-transit passage, shall not be hampered by the riparian state. Thus, through the new re-
gime of archipelagic sea-lanes passage and, to a lesser extent, the suspen-
dable right of innocent passage, the legal status of archipelagic waters is
restricted from the classical idea of “sovereignty” enjoyed by a state within
its internal waters.

The archipelagic concept is no longer controversial because the mari-
time powers, which played such important roles at UNCLOS III, have se-
cured the rights of “transit passage” through straits used for international
navigation and “sea lanes passage” through archipelagic waters. However, small countries in a region such as Southeast Asia where other states
claim archipelagic waters are now faced with significant restrictions on
their formerly free use of these waters, in apparent violation of some of the
basic assumptions of UNCLOS (i.e., the Convention “will contribute to the
realization of a just and equitable international economic order which
would take into account ... the interests and needs of mankind as a whole
and, in particular, the special interests and needs of developing coun-
tries,”131) and in spite of the frequent call for regional approaches and re-
gional solutions132 by reason of their unique nature and characteristics.

The marine areas of each region belong to the peoples of those regions.
The applications of such a mare clausum concept would mean closing the
sea to other countries for the exploitation of resources, for the protection
and conservation of the environment, for the joint promotion and regula-
tion of marine activities, for scientific research, for the adoption of effec-
tive measures to combat marine pollution, and for regional security. The
compromise in the Convention has struck a balance between the economic
and security needs of the archipelagic states and the commercial and secu-
ritv needs of the major maritime powers. A new, balanced formulation of
the archipelagic concept should benefit not only the archipelagic states but
the region as a whole. In striking this balance, UNCLOS III has lost sight
of the equitable distribution of benefits to neighboring nonarchipel-
lagic developing states and the usefulness of regional solutions to special
circumstances.

Nevertheless, for the developing archipelagic states, the economic sig-
nificance of ocean resources in and under their waters is of no small impor-
tance. Politically, the seas between the islands of the archipelagos have “po-
tential as a unifying factor and as a barrier.” The international accept-
ance of the archipelagic concept and its instrumentalities — the use of
straight baselines, the legal status of archipelagic waters, and the right of
archipelagic sea-lanes passage — will have regional benefit because of in-
creased security of the archipelagic state. However, further refinement of
the concept is needed to advance equity in the distribution of marine re-
sources to neighboring states and for regional cooperation.
APPENDIX A

Project No. 10 on “National Domain” — 1927

Project No. 10 on “National Domain,” submitted to the International Commission of Jurists at Rio de Janeiro, April 1927, by the American Institute of International Law.

The American Republics . . ., desirous of stating in conventional form the nature and extent of the elements forming their national domain, have agreed upon the following articles:

SECTION I. — GENERAL PROVISIONS

ARTICLE 1

Every nation exercises its sovereignty in an area of land and water within definite boundaries and in the space above the said area.

ARTICLE 2

The boundaries of a nation may be natural or artificial. They are natural, such as the free sea, or artificial, such as a parallel of latitude.

SECTION II. — THE TERRITORIAL SEA

ARTICLE 5

By territorial sea is meant the extent of the ocean which washes the coasts of the American Republics to a distance of . . . marine miles measured from the lowest point of low-water mark.

ARTICLE 6

For bays extending into the territory of a single American Republic the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the point nearest the opening into the sea where the two coasts of the bay are separated by a distance of . . . marine miles, unless a greater width shall have been sanctioned by continued and well-established usage.

In the case of an international bay whose coasts belong to two or more different countries, the territorial sea follows the sinuosities of the coast, unless there exists a convention to the contrary.

ARTICLE 7

With regard to islands and keys possessed by an American Republic outside or within the limits of its territorial sea, each shall be surrounded by a zone of territorial sea coming within the definition of Article 5.
In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial sea referred to in Article 5 shall be measured from the islands farthest from the center of the archipelago.

**ARTICLE 8**

The American Republics exercise the right of sovereignty not only over the water but over the bottom and the subsoil of their territorial sea.

By virtue of that right each of the said Republics alone can exploit or permit others to exploit all the riches existing within that zone.

The American Republics may also enact all laws and regulations which they may deem necessary to assure the observance of measures of hygiene, security, police, and customs in so far as they are in accordance with the international conventions concluded by them. The said laws and regulations should be communicated to the Pan American Union.

**SECTION III. — STRAITS AND NATURAL CHANNELS CONNECTING TWO SEAS**

**ARTICLE 9**

In straits and natural channels connecting two open seas and separating two or more Republics — either on two continents, a continent and an island, or two islands — the limit of the territorial waters of each Republic shall be the middle of the strait or channel separating them, if the width of this is less than . . . miles. In such case each one of the said Republics has within its own zone the right of sovereignty and jurisdiction which it possesses over its territorial sea.

**ARTICLE 10**

If the strait or channel is more than . . . miles in width, the right of the riparian American Republics shall extend for . . . miles from their respective coasts. Outside this limit navigation shall be entirely free, but only if each entrance to the strait is more than . . . miles in width; otherwise, navigation in the said zone shall be subject to the regulations of the riparian Republics.

**ARTICLE 11**

If the strait or channel separates two coasts of the same Republic, the said Republic shall be the sole proprietor and navigation shall be subject to its regulations.
SECTION IV.—CANALS

Article 12
Canals constructed for the purpose of connecting two seas by a Republic exercising sovereignty on both banks or by two or more adjacent Republics shall be governed by the regulations drawn up by the said Republics in accordance with the principle of free navigation. These regulations shall be communicated to the Pan American Union.

Article 13
If the canal has been constructed by an American Republic or by a corporation on the territory of another Republic and with the consent of the latter, its régime shall be determined by the act of concession and communicated to the Pan American Union.

SECTION V.—LAKES

Article 14
Lakes lying entirely within the territory of an American Republic shall form a part of its national domain, even if their waters flow into a sea, strait, or international river.

Article 15
When a lake separates two or more Republics, these Republics shall have a common right to the waters of the said lake. Regulations pertaining to the use of the lake should be drawn up with the mutual consent of the riparian Republics, who shall communicate them to the Pan American Union.
APPENDIX B

Draft Convention of the Committee of Experts for the Progressive Codification of International Law

ARTICLE 1
The character and extent of the rights of the riparian State.

The State shall have an unlimited right of dominion over the zone which washes its coast, in so far as, under general international law, the rights of common user of the international community or the special rights of any State do not interfere with such right of dominion.

The right of dominion shall include rights over the air above the said sea and the soil and subsoil beneath it.

ARTICLE 2
Extent of the rights of the riparian State.

The zone of the coastal sea shall extend for six marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast.

The rights of other States which have been exercised by virtue of the common right of user of the high seas or of special treaties shall not be affected. States may exercise their rights of dominion by virtue of usage, and within the limits of such usage, beyond the zone of dominion in the following domains: the police measures to prevent the possibility of military exercises being carried out by other States, and measures of Customs and sanitary control. Other rights beyond the zone of dominion may only be accorded to the riparian State by the body mentioned in Article 3 if they are demonstrated to be urgently necessary. Such grant shall in no case include rights of exclusive economic user outside the territorial sea.

ARTICLE 3
International Waters Office and registration in the International Waters Register.

The States signatory to the Convention undertake to establish an International Waters Office.

The duty of this Office is to compile a register of rights possessed by the different States in the fixed zone of foreign riparian States, or by the riparian States themselves outside the fixed zone.

The registration of a right in the International Waters Register kept by the International Waters Office in favour of any State in a foreign territorial sea shall be in favour of all States, if such right is founded upon common usage.

A time-limit of . . . shall be fixed by the International Waters Office for the submission of all applications for such rights, as also for rights claimed by a riparian State outside its fixed zone by virtue of usage.
The relevant legal instruments must be presented and registered. The onus of proof shall be upon the State applying for registration of a right in its favour. Applications must be communicated to all the States parties to the Convention.

Applications may be opposed within a time-limit to be fixed. If an application is opposed, the question is decided, in the first instance, by a mixed commission of experts and jurists. Appeal lies from decisions of this commission to the Permanent Court of International Justice. All States shall be informed of the registration of a right. The register shall be published.

The same procedure shall apply in cases in which a State claims to have an urgent new need outside the sphere of its dominion over the territorial sea. It must apply to the International Waters Office, which may only grant a right after publication of the application, and provided that it is not opposed. In the event of opposition, the question shall go before a mixed commission, before which the State claiming the right must prove that it cannot otherwise protect the interests affected. In this case also, appeal lies to the Permanent Court of International Justice.

The International Waters Office shall also be responsible for publishing maritime charts showing the zones of the territorial sea.

**ARTICLE 4**

*Bays.*

In the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea, where the distance between the two shores of the bay is 12 marine miles, unless a greater distance has been established by continuous and immemorial usage.

In the case of bays which are bordered by the territory of two or more States, the territorial sea shall follow the sinuosities of the coast.

As regards the recognition of rights which are in contradiction with the tenor of the general rules, the provisions of Article 3 concerning presentation and registration in the International Waters Register shall be applicable. It shall not be possible to acquire such rights in the future.

**ARTICLE 5**

*Islands.*

If there are natural islands, not continuously submerged, situated off a coast, the inner zone of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland they they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself.
ARTICLE 6

Straits.
The region of straits at present subject to special conventions is reserved.

In Straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds 12 miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding 12 miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line.

ARTICLE 7

Pacific passage.
All vessels without distinction shall have the right of pacific passage through the territorial sea. In the case of submarine vessels, this right shall be subject to the condition of passage on the surface. The right of passage includes the right of sojourn in so far as the latter may be necessary for navigation. For the sojourn of warships, see Article 12.

The right of free passage includes the right of passage for persons and goods independently of the right of access to the foreign mainland.

ARTICLE 8

Coasting trade.
A riparian State has the right of reserving for its own flag the transport of passengers and goods loaded at one port situated under its authority and unloaded at another port also situated under its authority. A State which does not reserve the above-mentioned transport to its own flag may nevertheless refuse the benefit of equality of treatment with regard to such transport to a co-riparian which does reserve it.

ARTICLE 9

Jurisdiction.
Vessels of foreign nationalities passing through territorial waters shall not thereby become subject to the civil jurisdiction of the riparian State.

Further, crimes and offences committed on board a foreign vessel passing through territorial waters by persons on board such vessels against persons or things also on board shall, as such, be exempt from the jurisdiction of the riparian State.

Offences, the consequences of which are not confined to the vessel or the persons belonging to it, are subject to the criminal jurisdiction of the riparian State, in so far as they constitute offences against its established law and its tribunals have competence to deal with them.
ARTICLE 10

Regulations.

Within its territorial waters, the riparian State shall have the power of legislation and administration for the following purposes: regulation of navigation, preservation of marine signals and lighthouses, prevention of shipwreck, regulation of pilotage, protection of submarine cables, regulation of Customs, inspection including the inspection of prohibited imports and exports, supervision of fisheries, health control, assistance at sea and collisions.

The riparian State shall have the right to extend its legislative and administrative action to other domains when interests deserving of its protection in territorial waters are affected.

Within the limits of the riparian State’s right of legislation and administration, it shall be granted also the right to employ the necessary means of constraint to enforce its jurisdiction in order that it may be able to deal with offences.

The riparian State shall have the right to continue on the high seas the pursuit of a vessel commenced within its territorial waters and to arrest and bring before its Courts a vessel which has committed an offense within its territorial waters. If, however, the vessel is captured on the high seas, the State whose flag it flies shall be notified immediately. The pursuit shall be interrupted as soon as the vessel enters the territorial waters of its own country or of a third Power. The right of pursuit is extinguished as soon as the vessel has entered a port of its own country or of a third Power.

Within the territorial waters no dues of any kind may be levied, except dues intended solely to defray expenses of supervision and administration. Such dues or charges shall be levied under conditions of equality.

All regulations issued by riparian States regarding their territorial waters shall be registered and published by the International Waters Office.

ARTICLE 11

Riches of the sea, the bottom and the subsoil.

In virtue of its sovereign rights over the territorial sea, the riparian State shall exercise for itself and for its nationals the sole right of taking possession of the riches of the sea, the bottom and the subsoil.

ARTICLE 12

Warships.

The exercise by warships of the right of free passage may be subjected by the riparian State to special regulations. Foreign warships when admitted to territorial waters must observe the local laws and regulations, particularly those relating to navigation, anchoring and health control. If a serious and continued offence is committed, the commander of the vessel shall
receive a semi-official warning in courteous terms and, if this is without effect, he may be requested, and, if necessary, compelled, to put to sea. The same dispositions shall apply if the local authorities consider that the presence of the vessel threatens the safety of the State. Except in cases of extreme urgency, however, these stringent measures shall only be taken upon the instructions of the central Government of the country.

In the case of minor offences, the diplomatic channel shall be used.

ARTICLE 13

Jurisdiction over foreign merchant vessels in maritime ports.

In maritime ports, foreign merchant vessels shall be subject without restriction to the civil and non-contentious jurisdiction of the riparian State. The criminal jurisdiction of the riparian State shall be restricted to the punishment of offences committed on board which are not directed against a member of the crew or against passengers and their property. Its criminal jurisdiction shall further be restricted to cases in which the captain of the vessel has asked the port authorities for assistance and cases in which the peace or public order in the port has been disturbed.

ARTICLE 14

Settlements of disputes.

All disputes arising out of the application or interpretation of this Convention shall be subject to compulsory settlement by the Permanent Court of International Justice or by a court of arbitration constituted by agreement between the parties.
APPENDIX C

Proclamation on the Territorial Waters of the Republic of Indonesia — 1957

Ministerial Decree of Dec. 13, 1957 Concerning Indonesian Waters

KABINET PERDANA MENTERI
REPUBLIK INDONESIA
JAKARTA

PENGUMUMAN PEMERINTAH
MENGENAI
WILAYAH PERAIRAN NEGARA REPUBLIK INDONESIA*

Dewan Menteri, dalam sidangnya pada hari Jum'at tanggal 13 Desember 1957 membicarakan soal wilayah perairan Negara Republik Indonesia.

Bentuk geografi Indonesia sebagai suatu Negara kepulauan yang terdiri dari (beribu-ribu) pulau mempunyai sifat dan corak tersendiri.

Bagi keutuhan tentorial dan untuk melindungi kekayaan Negara Indonesia semua kepulauan serta laut yang terletak diantaranya harus dianggap sebagai suatu kesatuan yang bulat.

Penentuan batas laut teritorial seperti termaktub dalam “Territoriale Zee en Maritime Kringen Ordonnantie 1939” (Stbl. 1939 No. 442) artikel 1 ayat (1) tidak lagi sesuai dengan pertimbangan-pertimbangan tersebut di atas (karena membagi wilayah daratan Indonesia dalam bagian-bagian yang terpisah dengan perairan teritorialnya sendiri-sendiri).

Berdasarkan pertimbangan-pertimbangan itu maka Pemerintah menyatakan bahwa segala perairan disekitar, diantara dan yang menghubungkan pulau-pulau yang termasuk Negara Indonesia dengan tidak memandang luas atau lebarnya adalah bagian-bagian yang wajar daripada wilayah daratan Negara Indonesia dan dengan demikian bagian daripada perairan pedalaman atau Nasional yang berada dibawah kedaularan mutlak Negara Indonesia. Lalu lintas yang damai di perairan pedalaman ini bagi kapal-kapal asing dijamin selama dan sekedar tidak bertentangan dengan/mengganggu kedaularan dan keselamatan Negara Indonesia.

Penentuan batas lautan teritorial (yang lebarnya 12 mil) diukur dari garis yang menghubungkan titik-titik ujung yang terluar pada pulau-pulau Negara Indonesia.

*) mamakai eyd
Ketentuan-ketentuan tersebut di atas akan diatur selesa-selesanya dengan Undang-undang.

Pendirian Pemerintah tersebut akan dipertahankan dalam konferensi internasional mengenai hak-hak atas laut yang akan diadakan dalam bulan Februari 1958 di Geneva.

Jakarta, 13 Desember 1957
PERDANA MENTERI

ttd.

H. DJUANDA.

APPENDIX D

Act Concerning Indonesian Waters
(Act No. 4)—1960

STRAIGHT BASELINES: INDONESIA

Summary

The Republic of Indonesia has established straight baselines based upon the so-called archipelago theory which is not recognized in international law. The system extends for over 8,000 nautical miles about the outermost points of the Indonesian outer islands and encloses approximately 666,100 square nautical miles of internal waters and 98,000 square nautical miles of territorial sea. The totals are approximately 3.5 times the territorial sea which Indonesia would claim under a 12 nautical mile territorial limit had there been no use of straight baselines.

Introduction

The Government of Indonesia, on February 18, 1960, decreed straight baselines for the republic. The straight baseline system connects the outermost points of the islands of the archipelago, except as noted below, enclosing extensive areas as internal seas and overlapping many important straits of the region. The text of the law is as follows:

INDONESIA

Act No. 4

The President of the Republic of Indonesia

Considering:
1. that the geographical configuration of Indonesia as an archipelagic State which consists of thousands of islands has its own characteristics and peculiarities,
2. that since time immemorial the Indonesian archipelago has constituted one entity,
3. that in the interest of the territorial integrity of the Indonesian State all the islands and the waters lying between those islands should be regarded as a single unit,
4. that the delimitation of the territorial waters as provided for in article 1, paragraph 1 of the Territorial Sea and Maritime Circles Ordinance of 1939 (Government Gazette 1939 No. 442) is not in accordance with the above considerations, as it divided the territory of Indonesia into separate parts having their own territorial sea,
5. that it is therefore deemed necessary to enact an Act concerning the Indonesian waters in accordance with the above considerations,
Having regard to:
Article 5 paragraph 1 of the Constitution of the Republic of Indonesia,

Having heard:
The deliberations of the Cabinet of Ministers of 20 January 1960,

Decides to enact:

Act Concerning Indonesian Waters:

Article 1
(1) The Indonesian waters consist of the territorial sea and the internal waters of Indonesia.
(2) The Indonesian territorial sea is a maritime belt of a width of 12 nautical miles, the outer limit of which is measured perpendicular to the baselines or points on the baselines which consist of straight lines connecting the outermost points on the low water mark of the outermost islands or part of such islands comprising Indonesian territory with the provision that in case straits of a width of not more than 24 nautical miles and Indonesia is not the only coastal state the outer limit of the Indonesian territorial sea shall be drawn at the middle of the strait.
(3) The Indonesian internal waters are all waters lying within the baselines mentioned in paragraph (2).
(4) One nautical mile is one sixtieth of a meridian.

Article 2
On the map annexed to this Act is indicated the position of the points and baselines mentioned in article 1 paragraph (2).

Article 3
(1) Innocent passage through the internal waters of Indonesia is open to foreign vessels.
(2) The innocent passage as mentioned in paragraph 1 shall be regulated by Government Ordinance.

Article 4
(1) This Act comes into force on the date of its promulgation.
(2) Article 1 paragraph 1 sub-paragraph 1 to 4 of the Territorial Sea and Maritime Circles' Ordinance of 1939 is no longer valid as from the date mentioned in paragraph 1.

In order that the Act be known to everybody whomsoever it is instructed that this Act be promulgated by publication in the Government Gazette.
Southeast Asian Archipelagic States

Promulgated at Djakarta on 18 February, 1960

Done at Djarkarta on 18 February, 1960

Minister of Justice
sd. (SAHARDJO)

President of the Republic of Indonesia
sd. (SOEKARNO)

Published in Government Gazette No. 22, 18 February 1960.

Indonesia has adopted the so-called "archipelago principle" in drawing straight baselines about its island territory. The legislation is based upon earlier Dutch law (Royal Territorial Sea Ordinance of 1939) which, while more restrictive, did enclose certain water bodies. The extensive Indonesian system has produced five separate sectors:

a) Extending from Bintan Island, east of Singapore, to the western coastal terminus of the Indonesia-Malaysia land boundary, on Borneo, the first sector joins the outermost points of the most seaward islands and serves to close the northern entrances into the Java Sea. The thirty-five segments measure 1,333.2 nautical miles and have an average length of 38.09 nautical miles. The shortest segment, 1-1a, extends approximately 12 n.m. while the longest, 15-16, extends about 83.5 nautical miles. From points 16 through 34, the straight baseline system encloses several isolated and detached island groups of Indonesia. Point No. 23, for example, lies within 60 nautical miles of the Malaysian mainland but is nearly 230 nautical miles from Borneo.

b) Extending from the eastern terminus of the Indonesian-Malaysian land boundary on Borneo to the Indonesian-New Guinea boundary, the second sector closes the northern entrances to the Flores, Molucca and Banda Seas. The 49 segments, from point No. 36-81, have a total length of 2,260.5 nautical miles. The average extent of a segment is 46.13 nautical miles. The maximum and minimum lengths are approximately 124.0 (No. 59-60) and 4.0 (No. 36-36a), respectively. Point No. 56 is on the Indonesian island of Miangas (Palmas) which is within the claimed territorial sea of the Philippines (See IBS Series A, No. 33). The point is 52 miles off Mindanao and 215 nautical miles from Halmahera.

c) Extending from the southern terminus of the Indonesia-Papua land boundary to a point near Portuguese Timor, the third sector encloses the eastern entrances to the Banda Sea. The thirty-two segments, from No. 82 to 113, measure approximately 1,436.5 nautical miles. The average length of a segment is 44.8 nautical miles while the longest (No. 88-89) and shortest (105-106) are approximately 103.9 and 8.8 nautical miles, respectively.

d) The fourth sector is a single straight line segment lying approximately 12 nautical miles offshore from the Portuguese Timor exclave of Ocussi. While represented on the attached map by lines joining the points...
to the seaward termini of the Indonesia-Portuguese Timor land boundary, it is not apparent that this is the intent of the law. Rather it appears that the two artificial points are chosen to limit Portuguese Timor to a narrow territorial sea belt. Lateral boundaries, presumably, will be negotiated later. The single segment measures 25.8 nautical miles.

e) Extending from the southern terminus of the Portuguese-Indonesian boundary on Timor to Point No. 1, the final sector of the Indonesian straight baseline system closes the southern entrances to the Savu, Flores and Java Seas. The seventy-nine segments extend 3,111.6 nautical miles with an average length of 39.3 nautical miles. The longest (No. 186-187) and shortest (190-191) segments measure 100.8 and 2.6 nautical miles, respectively.

Two small islands lie seaward of segments 104-105 and 139-140 and it may be that the intent of the law is to enclose them within the system. Problems involving positioning undoubtedly cause the apparent exclusion.

The entire Indonesian straight baseline system extends for 8,167.6 nautical miles. The system encloses approximately 666,000 square nautical miles of internal waters including the previously mentioned seas and the important straits of Sunda, Sumba, Lombok, Ombai, Molucca and Macassar as well as numerous internal passages within the Indonesian archipelago. The system contains 196 individual segments with an average length of 41.67 nautical miles. Appendix I gives the approximate lengths of each segment.

Since the Indonesian territorial sea claim extends seaward for 12 nautical miles from the straight baselines, an additional 98,000 square nautical miles of water would theoretically fall under Indonesian sovereignty.

The United States Government has not recognized the so-called "archipelago principle" as an accepted principle of international law.

Indonesia is not a party to the Geneva convention on the Territorial Sea and the Contiguous Zone.
APPENDIX E

Presidential Decree No. 8 Concerning Innocent Passage of Foreign Vessels in Indonesian Waters — 1962

No. 266. KENDARAAN AIR ASING. LALU LINTAS LAUT DAMAI PE­RAIRAN INDONESIA. Pendjelasan Peraturan Pemerintah No. 8 tahun 1962, tentang lalu lintas laut damai kendaraan air asing dalam perairan Indonesia.

PENDJELASAN
ATAS
ERATURAN PEMERINTAH No. 8 TAHUN 1962 tentang
LALU LINTAS LAUT DAMAI KENDARAAN AIR ASING DALAM PERAIRAN INDONESIA.

I. UMUM.

Hai lalu lintas laut damai didjamin oleh hukum internasional dilaut wilajah (territorial seas) sesuatu negara dan bukan perairan pedalaman (internal waters), ketjuali kalau perairan pedalaman ini merupakan akibat dari tjara-tjara menarik garis dasar (baselines) yang baru, sebagai pangkal untuk mengukur laut wilajah. Karena itu tidak disemua perairan pedalaman hak lalu lintas laut damai ini didjamin oleh hukum internasional.

Tetapi pasal 3 Undang-undang No. 4 Prp tahun 1960 mendjamin hak lalu lintas laut damai ini diperairan pedalaman Indonesia dalam tidak membedakan lebih lanjut antara perairan pedalaman yang dahulu (jaitu perairan pedalaman sebelum belakunja Undang-undang No. 4 Prp tahun 1960 dimana tidak bela hak lalu lintas laut damai menurut hukum internasional) dan perairan pedalaman yang baru yang terjadi karena tjara-tjara menarik garis dasar berdasarkan pasal 1 ajat (2) Undang-undang No. 4 Prp tahun 1960 dimana hak lalu lintas laut damai didjamin.

Olehkarena pasal 3 ajat (2) Undang-undang No. 4 Prp tahun 1960 mujatakan, bahwa hak lalu lintas laut damai akan diatur selanjutnya oleh Peraturan Pemerintah, maka sudah sepantasnjalah kalau Pemerintah Indonesia mengeluarkan peraturan yang membedakan perairan pedalaman dalam laut pedalaman (internal seas) dimana hak lalu lintas laut damai didjamin dan perairan daratan (coastal waters) dimana tidak ada hak lalu lintas damai ini.

Pemerintah menganggap perlu untuk mengeluarkan Peraturan Pemerintah ini karena tidak adanja ketentuan-ketentuan yang djelas dalam hal tersebut menimbulkan kesulitan-kesulitan bagi petugas-petugas Pemerintah dilaut. Ketentuan-ketentuan yang djelas ini djuga perlu untuk mendjamin kelantjaran pelajaran internasional. Dengan Peraturan Pe-
merintah ini diharapkan agar hak-hak dan kewajibannya dihargai dan diberlakukan lebih jelas dan tegas dan karena itu menghilangkan atau setidak-tidaknya mengurangi penjelewengan-penjelewengan dilaut oleh kendaraan-kendaraan air asing.

II. PASAL-DEMI PASAL.

Pasal 1.

Dalam pasal ini ditegaskan, bahwa hak lalu lintas laut damai kendaraan air asing hanya didijamin di perairan pedalaman Indonesia yang sebelum berlakunya Undang-undang No. 4 Prp tahun 1960 merupakan laut wilayah atau laut bebas. Perairan pedalaman ini disebut *laut pedalaman* (internal seas). Dilaut pedalaman yang dahulu, jaitu sebelum berlakunya Undang-undang No. 4 Prp tahun 1960, tidak ada hak lalu lintas laut damai. Perairan pedalaman yang kedua ini disebut *perairan daratan* (coastal waters).

Sebelum berlakunya Undang-undang No. 4 Prp tahun 1960, teluk-teluk, anak-anak laut, dan muara-muara sungai dianggap sebagai perairan daratan kalau garis jang menghubungkan kedua titik pada mulutnya tidak lebih dari sepuluh mil. Kalau pada waktu ini internasional pada umumnya telah mengakui jarak dua puluh empat mil untuk garis lurus jang menghubungkan kedua titik pada mulut teluk, anak laut, dan muara sungai, maka sudah sepantasnya kalau teluk-teluk, anak-anak laut, dan muara-muara sungai jang mulutnya tidak lebih dari dua puluh empat mil laut diterima sebagai perairan Indonesia dimana tidak ada hak lalu lintas laut damai ini.

Pasal ini juga berarti, bahwa lalu lintas damai terbuka bagi kendaraan air asing dilaut wilayah Indonesia seperti yang dimaksudkan oleh Undang-undang No. 4 Prp tahun 1960 dengan pengertian, bahwa ketentuan-keketentuan dalam Peraturan Pemerintah ini ditepati.

Pasal 2.

Dengan pengertian lalu lintas laut damai dimaksudkan semua pelajaran dari laut bebas kesesuatu pelabuhan Indonesia dan semua pelajaran dari suatu pelabuhan Indonesia menujutu laut bebas untuk tudjuan-tudjuan damai, serta semua pelajaran dari dan kelaut bebas dengan melintasi perairan Indonesia. Pelajaran-pelajaran ini haruslah dilakukan tanpa berhenti. Karena itu berhenti, membuang sauh dan atau mondar-mandir tanpa dengan tiada beralasan jang sah (hovering unnecessarily) diperairan Indonesia atau dilaut bebas jang „berdekatan” dengan perairan Indonesia dilarang, ketjuali sekadar hal-hal tersebut perlu untuk kepeningan pelajaran jang lazim atau karena keadaan memaksa (force majeure).

Istilah „berdekatan” dalam pasal ini dapat berarti seratus mil laut dari perairan Indonesia, kalau petugas-petugas Indonesia dilaut menganggap
bahwa berhenti, membuang djangkar, dan atau mondar-mandir tanpa alasan yang sah itu dapat merugikan kepentingan-kepentingan Indonesia.

Pasal 3.

Lalu lintas laut tersebut didalam pasal 2 hanja akan diijinkan selama bersifat damai, jaitu selama tidak bertentang dengan kepentingan Indonesia. Kalau Pemerintah Indonesia beranggapan, bahwa suatu lalu lintas laut kendaraan air asing diperairan Indonesia akan membahayakan perdamaian, keamanan, ketertiban umum dan kepentingan negaranya, maka lalu lintas tersebut tidak lagi dianggap damai dan karena itu tidak lagi didijamin.

Pasal 4.

Pendjagaan kedaulatan dan keselamatan Negara dilaut adalah terutama tugas Angkatan Laut Republik Indonesia karena hal ini rapat hubungannya dengan keamanan dan pertahanan Negara. Oleh sebab itu Presiden Republik Indonesia berwenang untuk menutup untuk sementara waktu bagian-bagian tertertu dari perairan Indonesia bagi pelajaran kendaraan-kendaraan air asing kalau penutupan ini dianggap perlu untuk mendjaga keamanan dan pertahanan Negara. Tetapi pengumuman ini haruslah dilakukan dengan suatu pengumuman yang wadjar, misalnya berupa suatu pengumuman kepada pelaut-pelaut (notices to seamen).

Pasal 5.


Dalam melakukan pelajaran dari dan kelaut bebas ini mereka diharuskan mentaati peraturan-peraturan yang telah dan atau akan dibuat guna mentjegah mereka mengambil kekajaan-kekajaan perairan Indonesia.

Didalam melakukan lalu lintas laut damai dari dan kelaut bebas melintasi perairan Indonesia kendaraan-kendaraan-air-pengangkap-ikan asing diharuskan djuga berlajar melalui alur-alur (sea lanes) yang telah atau akan
ditetapkan oleh Menteri/Kepala Staf Angkatan Laut guna mentjegah mereka melakukan penjelewengan-penjelewengan diperairan Indonesia.

Kalau mereka tidak mentaati ketentuan-ketentuan Peraturan Pemerintah ini, maka pelajaran kendaraan-kendaraan-air-pengangkap-ikan asing tersebut tidak lagi dapat dianggap damai.

Pasal 6.
Pemerintah Indonesia, dalam hal ini Presiden Republik Indonesia dapat memberikan idjin kepada kendaraan-kendaraan-air asing baik kepunjaan negara maupun kepunjaan warga asing, untuk melakukan penjelidikan-penjelidikan ilmiah diperairan Indonesia dengan ketentuan, bahwa penjelidikan penjelidikan ini djangan hendak dipergunakan untuk merugikan pertahanan dan kepentingan negara. Dalam memberikan idjin ini Presiden Republik Indonesia dapat menuntut agar wakil Pemerintah Indonesia ikut dalam penjelidikan-penjelidikan tersebut guna mengawasi djalannja penjelidikan supaja tidak membahajakan kepentingan-kepentingan negara Indonesia.

Pasal ini djuga berarti bahwa Pemerintah Indonesia dengan sendirinya dapat mengadakan perdjandjian-perdijandjian kerda sama dengan badan-badan partikeler atau pemerintah negara asing guna melakukan penjelidikan-penjelidikan ilmiah diperairan Indonesia.

Pasal 7.

Tetapi kalau kapal-kapal tersebut berlajar diluar alur-alur yang telah atau akan ditetapkan oleh Menteri/Kepala Staf Angkatan Laut, pelajaran itu harus diberitahukan terlebih dahulu kepada Menteri/Kepala Staf Angkatan Laut.

Kapal-kapal selam asing yang berlajar diperairan Indonesia diwad-jibkan (required) berlajar dipermukaan air. Kalau kapal-kapal negara asing ini tidak mematuhi ketentuan-ketentuan Peraturan Pemerintah ini, maka mereka dapat diminta untuk dengan segera meninggalkan perairan Indonesia, karena mereka tidak dapat dianggap melakukan lalu lintas laut damai.

Pasal 8.
Tidak memerlukan pendjelasan.

Diketahui:
Sekretaris Negara,
MOHD. ICHSAN.
APPENDIX F


Indonesia: draft article on historic waters

[Original: English]
[16 August 1974]

No claim to historic waters shall include land territory or waters under the established sovereignty, sovereign rights or jurisdiction of another State.
NOTES

References to "n." indicate notes in this work. References to notes in a particular citation are preceded by "note."

2. Ibid., p. 17.
7. Ibid.
8. Ibid., Crocker, p. 200.
10. Ibid., p. 43.
12. Ibid., p. 11.
15. At its first meeting at Geneva, the Committee of Experts for the Progressive Codification of International Law requested its subcommittee, to which M. Schücking was appointed rapporteur, to consider whether there were any problems in the law of the territorial sea that could be resolved with conventions.
22. Ibid.
23. *International Court of Justice Reports* (1949), pp. 18, 22.
25. Ibid., p. 76.
27. Crocker, n. 6, p. 607.
28. Swarztrauber, n. 24, p. 76.
32. Hodgson and Alexander, n. 5, p. 23.
33. Ibid.
36. Andrew, n. 31.
38. Ibid., p. 545.
39. Ibid., p. 546.

41. Ibid.


44. O’Connell, n. 40, p. 6.

45. Ibid.


49. Ibid., pp. 61–62.

50. Ibid., p. 224.


55. O’Connell, n. 40, p. 41.

56. Mendoza, n. 53.

57. Evensen, n. 3.

58. Ibid., p. 6.

59. Ibid., p. 38.

60. Ibid., p. 38.

These "General Principles" had been reconfirmed by a joint government agreement of Fiji, Indonesia, and the Philippines in a meeting of their representatives on 25–26 May 1972 at Manila.

62. Ibid., pp. 102–103.


64. List of island names by the Directorate of Naval Hydrography, "Pusat Dokumentasi Ilmiah Nasional" (Jakarta, 1975).


69. Encyclopedia Britannica, 15th ed, s.u "Gajah Mada."

70. It was referred to as the Southeast Asian region.

71. Draper, n. 51.


75. Syatauw, n. 72, p. 173.

76. H. Djuna was prime minister of the Republic of Indonesia in 1957.

77. This proclamation issued by Prime Minister Djuanda with the approval of his Council of Ministers did not possess the force of law under the then applicable constitution. Therefore, although not carrying the force of a formal repeal, this statement of policy might be considered sufficient evidence of conflict with principles embodied in the Indonesian Constitution that the colonial law on the limits of national jurisdiction in Indonesian waters would have been held void by the Indonesian courts. See Draper, n. 51, p. 146, and full text of Djuanda Declaration in Appendix C.


81. Draper, n. 51, p. 147.
82. Kusumaatmadja, n. 52, pp. 166—177.
83. Ibid., pp. 166—177.
84. Ibid., pp. 166—177.
87. Ibid., pp. 479—480.
90. On 24 March 1934, the United States Congress passed the Tydings-McDuffie Law providing for (1) the complete independence of the Philippines and (2) the adoption of a constitution and a form of government. See Miriam Defensor Santiago, The 1972 Constitution (Quezon City, Philippines 1973), p. 4.
93. Enrique Fernando, The Constitution of the Philippines, 2d ed. (Quezon City, Philippines, 1977), Appendix B.
97. International Court of Justice Report, n. 34, p. 132.
98. Tolentino, n. 77.
100. Ibid.
101. Ibid., p. 72.
102. Ibid.
103. In 1960 when the Philippine delegation went to Japan to negotiate the bilateral treaty, "Treaty of Amity, Commerce and Navigation between the Republic of the Philippines and Japan" (signed on 9 December 1960 at Tokyo), it asked the Philippine government to propose such a bill; otherwise, the delegation could not reply to its Japanese counterpart with the precise limitation between the internal waters and the territorial sea. See also Haydee B. Yorac, comp., "Philippine Treaty Series," vol. IV (Manila: University of the Philippines, 1959–65), pp. 383–390.
104. In 1961 the Philippines were still governed by the Constitution of 1935.
106. Santiago, n. 89, p. 12. The dispute that started in 1962 between the Philippines and Malaysia became more and more delicate. By the time the Bangkok talks collapsed in July 1968, stalemating the Philippine claim, the relationship was strained between the Philippine and Malaysian governments; a general tension hung over the Southeast Asian states. In the Philippine Congress efforts were exerted to pass legislation designed to express full congressional support for the claim to Sabah. This resulted in a new statute redefining the baselines of the Philippine archipelago to include the disputed territory of North Borneo. The pertinent provision of this statute is Republic Act No. 3046 as amended by Republic Act No. 5446. See Ferdinand E. Marcos, "Breaking the Stalemate — Towards a Resolution of the Sabah Question" (Philippines: National Media Production Center, 1977), p. 48.
111. Ibid.
113. Ibid., p. 12.
116. Ibid., p. 302.
117. Ibid., p. 187–188.

In any case, the difficult problem of the passage of warships, submarines, nuclear-powered vessels or ships carrying nuclear weapons was of special interest to only a few powers; it was of little or no interest to the majority states, and in particular to the developing countries . . . World peace and security would therefore be best protected if states were to think less in terms of power politics and more in terms of development politics.


120. Ibid, pp. 64–65.

121. Ibid., pp. 64–65.

122. See stenographic transcript of TV interview with Foreign Affairs Secretary Carlos P. Romulo on the archipelagic concept (29 August 1973).


124. "(1) An archipelagic State, whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically 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 seas 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 seabed and the subsoil thereof, and the superjacent air space, 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 sea lanes as may be designated for that purpose by the archipelagic State" (United Nations, General Assembly, 28th sess. Official Records, suppl. no. 21 [A/9021], 1973, p. 1). These “General Principles” were reconfirmed by the three governments (Fiji, Indonesia, and the Philippines) in their representatives meeting of 25–26 May 1972, Manila.


129. Convention, 44 and 54.

131. Ibid., p. xxiii.

132. Ibid., arts. 61, 63–70, 118 and 119, 123, 125, 197, 272, 276 passim.

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