SECTION 5. *Counselling.* — Any person convicted under the provisions of Articles 282-A, 282-B or 282-C of the Revised Penal Code, as amended, may be required to undergo medical, psychological or psychiatric examination and treatment and enter and remain in a specific institution, when required for that purpose.

SECTION 6. *Bond for good behavior pending trial.* — A person charged with any of the crimes defined in Articles 282-A or 282-B of the Revised Penal Code, as amended, where evidence of guilt is strong, shall be required to post a bond, either personally in cash or upon presentation of two sufficient sureties, conditioned upon the undertaking of the accused that he will refrain from following or harassing the offended party pending trial.

The amount of the said bond shall be fixed at the discretion of the Court, before which the case has been filed, upon a finding that there is just cause to impose it, taking into consideration the seriousness of the harassments employed by the accused and the gravity of the threat, if any, made by him. The bond shall be ordered posted only after the filing of a written and verified motion, with proof of service upon the accused attached thereto, and a hearing on the motion to determine whether the evidence of the prosecution is strong. At this hearing, the accused may rebut the allegations and evidence of the offended party and proffer his own evidence showing that the imposition of the bond would be unjustified and oppressive.

SECTION 7. *Conditions of Probation.* — Should the stalking offender be entitled to and thereafter granted probation upon conviction under the provisions of Presidential Decree 968, as amended, or the *Probation Law*, the probation order shall impose the following conditions:

1. that the probationer will refrain from further molesting the offended party during the period of probation; and

2. that the probationer will undergo medical, psychological or psychiatric examination and treatment and enter and remain in a specific institution, when required for that purpose.

Any violation of the aforementioned conditions, when proved in a hearing for that purpose, shall be considered a "serious violation" within the purview of Section 15 of the Probation Law and will be sufficient ground to warrant the arrest of the probationer and his incarceration to serve his original sentence, unless another prosecution is instituted for acts of stalking committed by the probationer after his original conviction.

SECTION 8. *Separability of Provisions.* — If any provisions of this Act or the application thereof to any person or circumstance is held invalid or unconstitutional, the remaining provisions of this Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

SECTION 9. *Effectivity.* — This Act shall take effect fifteen (15) days after its publication in two (2) newspapers of general circulation.

Approved: ___ _____, 19 ___.



# THE LEGAL CONSEQUENCES OF THE CONCEPT OF ARCHIPELAGIC WATERS UNDER THE *1982* LAW OF THE SEA CONVENTION ON PHILIPPINE TERRITORIAL SOVEREIGNTY OVER ITS INTERNAL WATERS

AILEEN SARAH TAPIA TOLOSA*

ABSTRACT

*The Philippine archipelago is one of the world's largest archipelagos having around 7,100 islands and a considerably large area of water. Recognizing the historic legacy and economic value of their waters within the archipelago, the Filipinos take pride in proclaiming to the whole world that these waters are part of their heritage. This sentiment has been embodied in all the Constitutions of the Philippines. Although the phraseology of their provisions vary, the sentiment has remained that the waters "around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines."*

*To protect its claim over its waters, the Philippines, since the onset of the twentieth century, has unceasingly campaigned for the international acceptance of the "archipelagic principle." However, it was only on 10 December 1982, after three United Nations Conventions, when the international community acknowledged the peculiar geographical characteristics of archipelagic states and consented to giving them the right to draw straight baselines connecting the outermost points of their outermost islands. Thus, unlike the prior rule where each island of the Philippines had its own three mile territorial sea, under the Third Convention, the Philippines was no longer dismembered due to the straight baseline method which considered an archipelago as a whole unit.*

*This acceptance of the "archipelagic principle" was, nevertheless, subject to a qualification. Contrary to the Philippine claim, the Convention classified the waters within the baselines as archipelagic waters and not internal waters. Unlike internal waters, archipelagic waters are subject to the twin rights of innocent passage and archipelagic sealanes passage. As a result, there is a glaring conflict between the Philippine Constitution and the Third Convention on the Law of the Sea.*

*The solution most beneficial to the Philippines and most acceptable to the international community, is for the Philippines to adopt the regime of archipelagic*

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*waters by amending its Constitution at an opportune time. Under this situation, the exercise of sovereignty is not diminished, but is put to a test. Specifically, vigilance is required in order to effectively control the entry of vessels into Philippine waters without impairing both the rights of innocent passage and archipelagic sealanes passage.*

*As a final note, although an amendment to the Constitution is the best solution to the conflict, this may take several years. During the interim period, it would be wise for the Philippine Legislature to grant vessels of foreign states the rights of innocent and archipelagic sea lanes passage through its internal waters.*

## INTRODUCTION

### *A. Background of the Study*

In an earlier time, the struggle for power among the leading nations consisted of geographical dominance. Power was measured by the number of states conquered by each nation. Thus, brave souls, such as Christopher Columbus and Magellan, with the blessings of their respective monarchs braved the seas to subdue the inhabitants of the "New World." The smaller countries in the Southeast Asian region were a few of those placed under the sovereignty of the superpowers. The bodies of water surrounding and in between these smaller states provided entry points. The very waters which provided the peoples of these conquered states with food were the very same waters which enabled the superpowers to conquer them.

Despite the passage of time, the advances in technology, communication and travel, the waters of the world continue to play a very essential rôle. Although the conflicts between nations have shifted from politico-ideological divergence to the struggle for control over limited resources and for economic dominance,[1] the hard fact still remains, that the seas, oceans, rivers and lakes are the keys to the control of the trade markets all over the world. The nations of the world have all bonded together to form an international market where the exchange of goods, their importation and exportation, constitutes the lifeblood of each and every nation. Nations thrive on products, some of which are produced locally and a large portion thereof is imported.

At the same time, these waters provide routes for foreign military or war vessels. The freedom of innocent passage of the military vessels through these waters help maintain a balance of ballistic and naval power. Further, during times of war, these same waters provide the routes to furnish reinforcement, medical and food supplies to the wounded.

The essential role the waters of the globe play in international affairs and the increasing maritime traffic through these waters prompted the archipelagic states like the Philippines, Indonesia and Fiji, to begin their crusade towards the international acceptance of a regime on archipelagos. Under this regime, the peculiar geographical characteristics of the archipelagic states would be recognized and they will be given special rights and privileges. The archipelagic states embodied these principles, rights and privileges in what is known as the "archipelagic theory."

[1] The Philippines and the South China Sea Islands, Center for International Relation and Strategic Studies Foreign Service Institute 1 (1993).



The international recognition of the archipelagic theory took three United Nations Conventions on the Law of the Sea and between fifty to sixty years of campaign. On 10 December 1982, the members of the international community officially recognized and embodied the archipelagic theory into international law by virtue of the release of the final text of the Third United Nations Convention on the Law of the Sea.

Although the international community recognized the archipelagic theory, the principles embodied therein collided head on with the existing 1973 Philippine Constitution and other Philippine laws and regulations. This collision resulted in three points of conflict:

> *First*, the Convention provides for only a twelve mile territorial sea, while the Philippines by virtue of the Treaty of Paris is one of the 10 states from a total of 146 coastal states, which has a territorial sea of more than 200 nautical miles.[2] This is due to the fact that the Philippines claims a big area of this territorial sea as its own by virtue of "historic title," deriving from the Treaty of Paris. On the other hand, the Convention states: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention".[3]
>
> *Second*, the Philippine Constitution considers the waters within the baselines as internal waters where there is no right of innocent passage, while the Convention treats the same bodies of waters as archipelagic waters where the rights of innocent passage and archipelagic sea lanes are granted to all types of ships from all states.
>
> *Third*, under present Philippine legislation on the delimitation of the archipelagic baselines, three of the 80 baselines of the Philippines exceed the maximum limit of 125 nautical miles set by the Convention.

Despite these inconsistencies, the Philippine Government deemed it wise to ratify the Convention due to the benefits that would redound to the Philippines upon its entry effectivity. Thus, on 8 May 1984, the Philippine Government officially manifested its assent to the Convention.[4]

Notwithstanding the passage of time and the need to harmonize its laws with the provisions of the Convention, the Philippines, in adopting a new Constitution in 1987 continued to uphold its claims contrary to the Convention and, in fact,

[2] *Id.*

[3] U.N. Convention on the Law of the Sea, Part II, art. 3 (1982).

[4] Charlotte Ku, *The Archipelagic States Concept and Regional Stability in Southeast Asia*, 23 CASE W. RES. J. INT'L. L. 463 (1991) [hereinafter Ku].

decided to retain the language of the 1973 Constitution on internal waters. As a result, the Philippines continues to be faced with the conflicts enumerated above.

### *B. Objectives of the Study*

The author seeks to achieve the following objectives:

1. To have a thorough discussion of the regime of archipelagic states and the rights of innocent passage and archipelagic sea lanes passage established therein;

2. To conduct an analysis of the Philippine ratification of the Third United Nations Conference on the Law of the Sea and the consequences of such ratification;

3. To reconcile the Philippine Constitution and other Philippine laws with the United Nations Convention on the Law of the Sea on archipelagos by balancing the interests of both the Filipino people and the international community; and

4. To propose a method of adjusting the archipelagic baselines to conform to the United Nations Convention on the Law of the Sea.

### *C. Scope of the Study*

The study will deal with the resolution of the conflict between Philippine Law on internal waters and the United Nations Convention on the Law of the Sea on archipelagic waters. The controversy concerning the breadth of the territorial sea of the Philippines will not be dealt with in this paper and should be the subject of a separate study. Any mention of principles governing the territorial sea is for the purpose of enabling the reader to fully understand the archipelagic regime and to clarify the delimitation of Philippine waters.

Further, in Chapter V, any mention of the archipelagic waters of the Philippines does not mean that the Philippines has acquiesced to the demands of the Convention. The particular use of words is necessary to facilitate the discussion and to avoid any repetitious references.

Finally, any mention of the word "Convention" pertains to the Third United Nations Convention on the Law of the Sea.

### *D. Methodology*

In fulfilling the objectives stated above, a chronological approach will be used. The discussion opens in Chapter I with a description of Philippine Territory. Chapter II traces the development of the archipelagic doctrine in line with the Philippine campaign for its acceptance. The process of the Philippine ratification of the Convention and the Declaration the Philippines made under the Convention is the subject of discussion of Chapter III. Chapter IV brings the Philippine Constitution and the Convention together, presents the areas of controversy, and



enumerates the obligations of the Philippines in case it decides to conform to the Convention. In order to fully understand the obligations of the Philippines under the regime of archipelagos set forth by the Convention, the general principles of the right of innocent passage and archipelagic sea lanes passage are explained in Chapter V. Chapter VI gives a short update on the steps undertaken by the Philippines over the past few years in connection with the present conflict. Chapter VII evaluates and presents a critique of the Philippine situation. Finally, Chapter VIII completes the discussion with the conclusion and proposals of the author.

The general principles of international law governing treaties will be used as aids in arriving at possible solutions to the problem.

## I. THE PHILIPPINE ARCHIPELAGO

### *A. Delimitation of the Philippine Archipelago*

The Philippine archipelago constitutes one of the two geopolitical barriers for maritime movement between the Pacific and Indian Ocean, the other being the Indonesian archipelago.[5] At the outset, it is important to note that an archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.[6] From such a definition, it is not difficult to conclude that geographically the Philippines qualifies as an archipelago since it is composed of 7,107 compact and closely-knit group of islands. In fact, as early as the 15th century, even before the discovery of the Philippines, dominion over the Philippines as an archipelago was conferred through the Bulls of Pope Alexander VI in May and September of 1493. These Papal Bulls drew an imaginary line one league west of Cape Verde Islands and awarded "all lands, both islands and mainlands" found or discovered toward the east to Portugal; and those on the western side to Spain, "up to the eastern regions and to India." This demarcation line was moved to the west of the Cape Verde Islands by virtue of the Treaty of Tordesillas between Spain and Portugal on 7 June 1494. Thus, when Spain discovered the Philippines in 1525, Spain exercised dominion over the nation called the "*Philippine Archipelago.*"[7]

A look at the map will reveal that the Philippine archipelago has a triangular geographical configuration whose three angles are represented by the island of Luzon in the north, by the island of Palawan in the southwest, and the island of Mindanao in the south and southeast. The three sides of the triangle are bordered

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[5] Mark J. Valencia, *Access to Straits and Sealanes in Southeast Asian Seas: Legal, Economic, and Strategic Considerations*, 16 J. MAR. L. & COM. 513 (1985) [hereinafter *Access to Straits*].

[6] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 46. Under this definition even Batanes, not covered by the Treaty of Paris, is included.

[7] Jorge R. Coquia, *Philippine Territory Under the New Constitution*, in SELECTED ESSAYS ON THE LAW OF THE SEA 7 (1982) [hereinafter *Philippine Territory*].

by a string of islands and islets to form an almost continuous coastline.[8]

The metes and bounds of the Philippine Territory are clearly expressed in four well-crafted pieces of legislation. They are the 1987 Philippine Constitution, Republic Act 3046 as amended by Republic Act 5446, Presidential Decree Number 1596 and Presidential Decree Number 1599.[9]

Topping the list is the 1987 Philippine Constitution which provides:

> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.[10]

The 1987 Philippine Constitutional provision on the national territory adheres to the substance of the 1973 provision which states:

> 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 or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, 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.*[11] [Emphasis supplied.]

Of the remaining three statutes, Republic Act 3046 as amended by Republic Act 5446 is the most important for this particular study. Said Republic Acts establish the baselines which embrace the Philippine Archipelago. The Philippine's eighty archipelagic baselines have a total length of 8175.8974 miles. Three of these baselines or 2.4 per cent, exceed 100 miles in length, and one of these, measures more than 124 miles in length. This particularly long baseline is found in the Gulf of Moro, to the southeast of Mindanao and is estimated to be 140.05 miles in length.[12]

Presidential Decree No. 1596 expressly considers the Kalayaan Island Group part of the Philippine Territory although it is not within the baselines but is actually

[8] Arturo M. Tolentino, *On Historic Waters and Archipelagos*, in A COLLECTION OF ARTICLES, STATEMENTS AND SPEECHES 11 (1982) [hereinafter Historic Waters] .

[9] Interview with Consul Gilberto B. Asuque, Executive Officer of the Maritime and Ocean Affairs Unit, Department of Foreign Affairs (Dec. 13, 1995) [hereinafter Interview of Consul Asuque].

[10] PHIL. CONST. art I, §1 .

[11] PHIL. CONST. art. 1, §1 (1973).

[12] Barbara Kwiatkowski and Etty R. Agnes, *Archipelagic Waters: An Assessment of National Legislation* 17 (forthcoming September 1990) [hereinafter *Archipelagic Waters*]. Republic Act No. 5446, An Act to Amend Section One of the Republic Act Numbered Twenty Hundred and Forty Six, entitled "An Act to Define the Baseline of the Territorial Sea of the Philippines, §2 (1968).



a part of the continental margin of the Philippine archipelago. The government's claim is that the Philippines has established sovereignty over these islands by virtue of historic title and effective occupation.[13]

Finally, Presidential Decree No. 1599 establishes the 200 mile Exclusive Economic Zone to be measured from the baselines.[14]

After taking the laws enumerated above into consideration, it can be deduced that the archipelagic baselines embrace the Philippine archipelago in such a way that they are connected to each other from the outermost points of the outermost islands. Under the Philippine Constitution all the waters within these baselines are considered as internal waters where the Philippines has absolute sovereignty. As a result, all alien vessels may pass through these waters only with prior permission from the Philippine Government.

The territorial sea of the Philippines is measured from the archipelagic baselines. The Third United Nations Convention on the Law of the Sea provides for a twelve mile territorial sea.[15] However, the Philippines does not adhere to this twelve mile territorial sea due to its claim of "historic waters" established under the Treaty of Paris. This treaty was concluded by Spain and the United States on 10 December 1898. Under this treaty, Spain ceded to the United States the archipelago known as the Philippine Islands. A line was then drawn around the whole archipelago, the boundary line of which now marks the outer limits of the territorial sea of the Philippines. The United States, as the new sovereign, acknowledged the metes and bounds of these territorial waters by virtue of a law passed in 1932, which was signed and approved by the American Governor General, who represented the sovereignty of the United States in the Philippines at the time.[16]

Subsequent to the Treaty of Paris, the United States and Spain entered into another treaty, on November 7, 1900 the Treaty of Washington where Spain clarified all ambiguities in the Treaty of Paris. Thus, the islands of Cagayan, Suiu and Sibutu and their dependencies and other islands lying outside the lines drawn in the Treaty of Paris were included in the Philippine Territory.[17]

The Treaty between the United States and the United Kingdom signed on 2 January 1930 concerning the boundary between the Philippines and North Borneo, then under British rule, used the same method of delimiting the boundaries of the Philippine archipelago.[18]

[13] Presidential Decree 1596, Declaring Certain Area Part of the Philippine Territory and Providing for Their Government and Administration (1978).

[14] Presidential Decree 1599, Establishing an Exclusive Economic Zone and for Other Purposes (1978).

[15] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 3.

[16] *Id.*

[17] *Id.* at arts. 7-8.

[18] *Id.*

This was further acknowledged when President Franklin Delano Roosevelt approved the draft of the 1935 Constituion whose definition of territory specifically referred to the Treaty of Paris.

Presently, the territorial waters of the Philippines measures 270 miles at their widest portions from shore towards the Pacific, and 147 miles toward the China Sea. But towards the south, at their narrowest portion, the width is only two miles. These waters do not form a "belt" or strip of uniform width, but resemble two inverted or upside-down triangles facing each other, with their wide bases joined together in the north.[19]

The 200 mile exclusive economic zone is measured from the archipelagic baselines.[20]

Absent in the delineation of the Philippine Territory is the 24 mile contiguous zone which is likewise drawn from the archipelagic baselines.[21]

*B. Philippine Waters as Shipping Routes*

The waters between the islands of the Philippine archipelago play a significant role in global affairs. This strategic geographical location has earned the Philippines the title, "Pearl of the Orient." A glance at the map reveals the reason. On its north border Taiwan and Korea, in the northwest lies China. To the west are Malaysia, Singapore, Thailand, Burma, Vietnam, Cambodia and Laos. Farther west are its other Asian neighbors, India, Bangladesh, Pakistan, and Sri Lanka. Not to be omitted in the south is its neighboring archipelago, Indonesia. Down south, below Indonesia, are Australia and New Zealand. In the east are the Pacific Ocean and its island archipelagoes.[22]

The waters of the Philippines act as trade routes between Japan and the other countries of Northeast Asia and Australia and New Zealand. For example, Japan imports petroleum, iron ore, copper and other commodities from the Middle East and the West. As a result, the Philippines is a route of transit for Japan to and from the Middle East petroleum countries and its West European trade partners. The international north-south traffic also involves routes to and from the Soviet Union, the two Koreas and China.[23] The traffic to and from nations all over the globe will continue to rise due to the development of the Asia Pacific Cooperation Forum (APEC) which is presently campaigning for a free trade regime.[24]

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[19] *Philippine Territory, supra* note 7, at 7.

[20] Third U.N. Convention on the Law of the Sea, 10 Dec. 1982, art. 57.

[21] *Id.* at art. 33.

[22] 2 GREGORIO F. ZAIDE, THE PAGEANT OF PHILIPPINE HISTORY 6 [hereinafter Pageant] (1979).

[23] Archipelagic Waters, *supra* note 12.

[24] Donald R. Rothwell, *The Law of the Sea in the Asian Pacific Region: An Overview of Trends and Developments* (May 1995) (unpublished manuscript, on file with the University of the Philippines, Law Library) [hereinafter Rothwell].



A number of the major normal shipping routes through the Southeast Asian region run through the waters in between the islands of the Philippines archipelago. These critical passage routes are: 1) Makassar Strait - Celebes Sea - South of Mindanao; 2) Makassar Strait - Celebes Sea - Sibutu Passage - Sulu Sea; 3) Pacific Ocean - San Bernardino Strait - Verde Island Passage - South China Sea; 4) Pacific Ocean - Surigao Strait - Sulu Sea - Balabac Strait - South China Sea; 5) Pacific Ocean - Balintang Channel - South China Sea; 6) South China Sea - Palawan Passage - West of Luzon - South China Sea.[25]

## II. THE DEVELOPMENT OF THE ARCHIPELAGIC PRINCIPLE

The earnest efforts and seemingly endless campaigns of the archipelagic states finally reached a conclusion with the international acceptance of the "archipelagic principle." Unlike the prior rule whereby each island was considered a separate entity having its own three mile territorial sea, the present provision allows archipelagic states which are composed of several, at times even thousands of islands, to draw imaginary lines connecting the outermost points of the outermost islands, thus forming a single entity. But the lines, known as baselines are to be drawn thus:

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

2. The length of such baselines shall not exceed 200 nautical miles, except that up to three per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

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

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

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

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

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[25] *Access to Straits, supra* note 5, at 513-14.

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

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

9. The archipelagic State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.[26]

The recognition of the archipelagic principle entailed long years of hard work. The maritime powers were at first not ready to accept such a novel principle. A study of the development of the principle is of utmost importance in order to fully understand and appreciate the rights and obligations created by the principle.

### *A. Studies of International Bodies*

At the outset, it must be noted that these studies have no legal force but they are essential because they provided the framework and the foundation for the principles governing the regime of archipelagos. Without these studies, the international community would not have been made aware of the special needs of the archipelagic states.

#### 1. INSTITUT DE DROIT INTERNATIONAL

During the 1888 and 1889 sessions in Lausanne and Lambur respectively, the *Institut* took special interest in the delimitation of the territorial waters of both ordinary states and archipelagic states. Although these matters were brought up, no special consideration was given to them. It was only in the 1927 conference where a committee of the *Institut* proposed Article 5 regarding the regime of archipelagos. Said article stated that a group of islands belonging to one coastal state should be treated as a whole and that the extent of the marginal sea shall be measured from a line drawn between the outermost part of the islands.[27]

After a review of the Article and some amendments thereof, in the Stockholm Conference in 1928, the final form of Article 5 was approved by the *Institut* as follows:

> Where archipelagos are concerned, the extent of the marginal sea shall be measured from the outermost island or islets provided that the archipelago is composed of islands and islets not further apart from each other than twice the breadth of the marginal sea and also provided that the islands and islets nearest to the coast of the mainland are not situated further out than twice the breadth of the marginal sea.[28]

[26] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 47.

[27] Miriam Defensor-Santiago, *The Concept of Archipelagos*, in THE ARCHIPELAGIC CONCEPT IN THE LAW OF THE SEA: PROBLEMS & PERSPECTIVES 11 (1982) [hereinafter *Concept*].



#### 2. INTERNATIONAL LAW ASSOCIATION

The major proposition taken by this Association was the revolutionary proposal submitted by Prof. Alvarez, the Chairman of the "Neutrality Committee", the committee assigned to study the territorial waters.[29]

The Committee's draft failed to contain specific provisions concerning the territorial waters of archipelagos. However, Prof. Alvarez's proposal filled the vacancy left by the Committee's draft. He believed that an archipelago should be treated as one unit with a territorial belt drawn around the islands as a group rather than around each individual island. The recommendation he gave was characterized by a remarkable measure of "legal clairvoyance." As early as 1924, he already envisioned a possible difficulty that might arise concerning islands and archipelagos. In Article 4, he proposed a zone of marginal seas of six nautical miles from low-water marks, and in Article 5, he provided a twelve-mile maximum for baselines across the mouths of bays, without suggesting a maximum for the distance between the islands of an archipelago. Prof. Alvarez made specific mention of archipelagos by stating thus: "Where there are archipelagos the islands thereof shall be considered a whole, and the extent of the territorial waters laid down in Article 4 shall be measured from the islands situated most distant from the center of the archipelago."[30]

#### 3. AMERICAN INSTITUTE OF INTERNATIONAL LAW

Although the "Neutrality Committee" purposely did not mention the Alvarez proposal, said proposal found hospitable reception with the American Institute of International Law. The American Institute was one with the proposals previously submitted by the other international bodies in believing that "in case of an archipelago, the islands and keys composing it shall be considered as forming a unit." However, it did not provide for a maximum distance between the islands of an archipelago.[31]

#### 4. HARVARD RESEARCH IN INTERNATIONAL LAW.

This body turned down the archipelagic principle. In its comment on the draft articles already submitted, it gave the international community a piece of its

[28] *Id.*

[29] *Id.* at 13.

[30] *Id.*

[31] *Id.* at 14.

mind, expressly stating that "no different rules should be established for groups of islands or archipelagos except that if the outer fringe of islands is sufficiently close to form one complete belt of marginal sea, the waters within such belt should be considered territorial."[32]

*B. The Hague Codification Conference of 1930*

The rejection by the Harvard Research in International Law of the archipelagic principle did not hinder the Codification Conference from observing that "with regard to a group of islands (archipelagos) and islands situated along the coast... a distance of ten miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea..." The starting point for the ten-mile belt of territorial sea was proposed to be "the islands most distant form the center of the archipelago."[33]

The reactions to the observations and proposals mentioned above were varied. Some governments rejected the idea that "archipelagos should be considered as a single unit." Under this view, each island would have its own band of territorial waters. Other governments were more liberal. They maintained that a "single belt of territorial waters could be drawn around archipelagos provided that the islands and islets of the archipelago were not further apart than a certain maximum." A third position surfaced and stated that "archipelagos must be regarded as a whole where the geographical peculiarities warranted such treatment."[34]

Another essential point discussed by the Codification Conference was the question of whether the waters enclosed within the archipelago should be regarded as internal waters or marginal seas. The Preparatory Committee proposed a compromise under which archipelagos would be considered as a unit, but the maximum distance between its islands and islets of the group should be twice the breadth of marginal seas, and the enclosed waters should be considered marginal or territorial seas, and not internal or inland waters. Thus, there was a marked tendency to favor the introduction of a special rule for archipelagos, but, subject to a limit of width between the islands and with a strong reservation by some states against the waters being treated as internal waters.[35]

Despite the observations and proposal brought forth, the Conference failed to reach an agreement on the maximum distance between the islands of an archipelago and, in the end, the Conference abandoned the idea of drafting a definite text on territorial waters of archipelagos. It also failed to produce a practical definition of a group of islands, in terms of their numbers, size, and relative position.[36]

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[32] Jorge R. Coquia, *Development of the Archipelagic Doctrine as a Recognized Principle of International Law*, 58 PHILIPPINE LAW JOURNAL 14 (1983) [hereinafter *Development*].

[33] *Concept*, *supra* note 27, at 14-15.

[34] *Ku*, *supra* note 4, at 466.

[35] *Concept*, *supra* note 27, at 15.

[36] *Id.*



*C. The Anglo-Norwegian Fisheries Case*

Finally in 1951, the method of drawing straight baselines was juridically recognized by the the International Court of Justice. This major break-through for the archipelagic principle treated as valid the drawing straight baselines along the outermost points of the coastal islands and considered all waters enclosed therein as internal waters.[37]

The controversy between Norway and the United Kingdom arose due to the 1935 Norwegian Decree which delimited Norway's territorial sea. Under this decree, the territorial sea measured four (not three) miles wide and was measured not from the low-water mark at every point along the coast (as is the normal practice) but from straight baselines linking the outermost points of land along it. By using the straight baseline method, Norway enclosed a certain portion of waters as its territorial sea, which portion would have been high seas if the normal method of drawing baselines was used. In this case, the United Kingdom challenged the legality of Norway's straight baseline system and the choice of certain baselines used in applying it.[38]

The International Court of Justice ruled in favor of Norway and upheld the latter's right to use the straight baseline method. The Court accepted the "principle that the belt of territorial waters must follow the general direction of the coast." The Court was led to conclude in this manner due to the peculiar geography of the Norwegian coast. Even before the dispute arose, the straight baseline method had been consolidated by a constant and sufficiently long practice.[39]

The Court enumerated guidelines in drawing the baselines. They are the following: 1) the coastal State must not depart to any appreciable extent from the general direction of the coast, for the territorial sea has a close dependence on the land domain; 2) The choice of baselines is determined by a sufficiently close link between the sea areas lying within these lines and the land domain, such that the sea areas are subject to the regime of internal waters; 3) In adopting this particular system, the economic interests peculiar to a region, and its unusual geographical constitution must be taken into consideration.[40]

Again, it must be emphasized that the Court considered the waters lying between and inside the constituent islands of archipelagos as internal waters.[41]

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[37] *Development*, *supra* note 32, at 17.

[38] Anglo-Norweigian Fisheries (*U.K. v. Norway*) 1951 I.C.J. 116 reproduced in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 289 (1983).

[39] Miriam Defensor-Santiago, *The Juristic Approach to Archipelagos*, in THE ARCHEPELAGIC CONCEPT IN THE LAW OF THE SEA: PROBLEMS & PERSPECTIVES 61-63 (1982).

[40] *Id.*

[41] *Id.*

*D. First United Nations Conference on the Law of the Sea*

1. PREPARATORY WORK

Prior to the First United Nations Conference on the Law of the Sea, J.P.A. Francois, the special *rapporteur* of the International Law Commission, proposed that for a group of islands, a ten-mile line should be adopted as the baseline for measuring the territorial sea outward in the direction of the high seas, and that the waters included therein be constituted inland waters.[42]

Francois, took a more liberal step by proposing that straight baselines be used in cases of archipelagos as well as bays. The International Law Commission, however, ignored the suggestion of Francois and merely said that "every island has its own territorial sea," but at the same time recognized the importance of the question of archipelagos. The members of the International Law Commission realized that they were treading on unknown territory and it was suggested that an eight-year study on archipelagos be conducted to obtain necessary expert advice on the subject.[43]

This lack of technical know-how resulted in the Commission's simplistic statement that for isolated islands, "every island has its own territorial sea." It did not present specific provisions concerning archipelagos. Instead, it issued a statement requesting for additional scientific information concerning archipelagos:

> Like the Hague Conference for the Codification of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is similarly complicated by the different forms it takes in different archipelagos. The Commission was also prevented form stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject.[44]

2. THE CONFERENCE PROPER, 1958

It was at this juncture that the Philippines suggested that the method of straight baselines be applied to ocean archipelagos, those groups of islands situated out 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 an outer coastline of the mainland.[45] Moreover, the Philippines proposed that the waters within the baselines would be considered internal waters.[46] More specifically, the preparatory paper submitted by the Philippine delegation stated: "all waters around, between and

[42] *Development, supra* note 32, at 14.

[43] *Id.*

[44] *Concept, supra* note 27, at 19.

[45] *Id.* at 10.

[46] *Development, supra* note 32, at 15.



connecting different islands belonging to the Philippine Archipelago, irrespective of their width and 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."[47]

To strengthen its position, the Philippines gave a detailed discussion of its geographical characteristics and emphasized that the Philippine Archipelago consists of a continuous chain of islands and islets in such a way that straight baselines could easily be drawn between appropriate points on outer islands or islets so as to encircle the whole archipelago, without crossing unreasonably large expanses of water and without departing from the principles laid down in the Anglo-Norwegian case.[48]

Following suit, the Indonesian Government declared that the territorial sea of an archipelago should be measured from baselines drawn between the outermost islands. On 13 December 1957, the Indonesian Government transformed its declaration into law through a proclamation enclosing the whole Indonesian Archipelago, with straight baselines. The reason was that the treatment of the 3,000 or more islands of Indonesia as having its own territorial waters would create problems, especially in times of war when freedom of communication would be threatened even if the State itself was not a belligerent.[49]

In conclusion, when the First Convention of the Law of the Sea adjourned on 28 April 1958, it adopted as its article on the territorial sea, the criterion set by the International Court of Justice in the Anglo-Norwegian case as follows:

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, 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.

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.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region con-

[47] *Philippine Territory, supra* note 7, at 4.

[48] *Development, supra* note 32, at 16.

[49] *Id.*

cerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.[50]

Although the Convention clearly provided for rules to govern the territorial sea of coastal archipelagos, the concept of mid-ocean archipelagos continued to puzzle the members of the Convention. In the absence of sufficient technical knowledge and expertise on the subject, the Convention evaded the issue on mid-ocean archipelagos.[51]

### *E. The Second United Nations Convention on the Law of the Sea, 1960*

During the proceedings of the 1960 Convention, the Philippines reiterated its proposal for a rule on archipelagos. Again, the Philippines and the other archipelagic States were faced with indifference and, to a certain extent, rejection.

The continued failure of the international community to recognize the urgent needs of the archipelagic States left the Philippines with no choice but to refrain from signing the four Geneva Conventions approved in the Law of the Sea conference in 1958.[52]

Since the Philippines was not a party to the United Nations Convention, it had to assert its territorial rights and claims through municipal laws. In response to this need, the Congress of the Philippines on 17 June 1961, enacted Republic Act No. 3046 "An Act to Define the Baselines of the Territorial Sea of the Philippines." This Act was later amended by Republic Act No. 5446, passed on September 18, 1968,[53] To avoid whimsical amendments of the laws governing the Philippine Territory, the Philippine Government deemed it wise to include a provision on the metes and bounds of said territory in the 1973 Constitution which found its roots in the 1935 Constitution. The 1973 Constitutional provision stated:

> The national territory comprises the Philippine archipelago, with all the islands and water 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 insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters

[50] *Concept, supra* note 27, at 20.

[51] *Development, supra* note 32, at 17.

[52] *Id.*

[53] *Id.*



> around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.[54]

### *F. The Third United Nations Conference on the Law of the Sea.*

#### 1. PREPARATORY WORK

International law does not remain static. It grows with the changing times, responds to the present needs of the international community and most of all seeks to respond to the calls made by all nations, whether weak or strong. During the first two Conventions on the Law of the Sea, many questions and issues remained unanswered and unresolved. After the conclusion of the Second Convention, new matters developed, and new needs arose. A Third Convention was, therefore, necessary.

Eight years after the conclusion of the Second Convention or in 1968, the General Assembly of the United Nations established the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction. In 1971, the Philippines was made a member of one of the three sub-committees, particularly Sub-Committee II. As a member of the Committee, the Philippine delegation had a stronger voice compared to the previous Conventions.[55]

Estelito Mendoza, then, Solicitor General of the Philippines, faced the members of Sub-Committee II and presented to them the reasons why the over 7,000 islands of the Philippines should be treated as one whole unit. He likewise presented the sentiments of the Filipino citizenry regarding the archipelagic principle. His discourse went this way:

> More than seven thousand islands comprise the Philippines, ruled by one unitary government bound by a common heritage, beholden to the same traditions, pursuing the same ideals, interdependent and united politically, economically and socially as one nation. To suggest that each island has its own territorial sea and that baselines must be drawn around each island is to splinter into 7,000 pieces what is a single nation and a united state. One need only imagine a map of the Philippines with territorial seas around each island and with pockets of high seas in between islands to realize the absurdity of the resulting situation. Depending on the breadth of the territorial sea that may emerge, such pockets of high seas in the very heart of the country may be such small areas of no more than 5 or 10 or 15 square miles. And yet, on account of this, on the pretext of going to those pockets of high seas, any vessel may intrude into the middle of our country, between, for example, the islands of Bohol and Camiguin which from shore to shore are separated by no more than 29 miles.[56]

[54] PHIL. CONST. art I, §1 (1973).

[55] *Development, supra* note 32, at 19.

[56] *Philippine Territory, supra* note 7, at 6.

Subsequently, Arturo Tolentino, Chairman of the Philippine Delegation, in behalf of the Philippines and the other archipelagic states, presented the rules and regulations agreed upon by the archipelagic States, to govern the regime of archipelagos, namely:

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

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

3. Innocent passage of foreign vessels through the waters of the archipelagic State shall be allowed in accordance with its national legislation, having regard to the existing rules of international law. Such passage shall be through sealanes as may be designated for the purpose by the archipelagic State.[57]

Mr. Tolentino emphasized that the underlying basis of these principles is the unity of land, water and people which makes them into a single unit and it would highly dangerous to its security if the Philippine archipelago were splintered into separate islands. It is because of this basic desire for unity that there should be international recognition of the right of archipelagic States to draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago. Further, the waters within the baselines are subject to the absolute sovereignty of the archipelagic State. As a consequence thereof, under the third principle, innocent passage of foreign vessels through the waters of the archipelagic State shall be allowed in accordance with its national legislation, having regard to the existing rule of international law. Such passage shall be through designated sealanes. This principle sought to harmonize and reconcile the varied positions and interests of the archipelagic States and those of the international community.[58]

### 2. RESPONSE OF REGIONAL GROUPS

The campaign of the archipelagic States for the international acceptance of the archipelagic principle found greatest support from the African and Latin American states. The Organization of African Unity endorsed the principle by declaring that: "the baselines of any archipelagic State may be drawn by connecting

[57] *Development, supra* note 32, at 20.

[58] *Id.* at 21.



the outermost points of the outermost islands of the archipelago for the purpose of determining the territorial sea of the archipelagic State." The Latin-American States namely: Ecuador, Panama and Peru assented to the proposal submitted by the African States but went a step further by adding that the "waters enclosed by the baselines shall be considered internal waters though vessels of any flag may sail in them, in accordance with the provisions laid down by the archipelagic State." Likewise, the Asian African Legal Consultative Committee also expressed conformity to the archipelagic principle.[59]

### 3. OBJECTIONS TO THE ARCHIPELAGIC PRINCIPLE

The major opponents of the principle were the maritime powers led by the United States. Their main argument was that most of the island groups claiming to be archipelagic States lie astride some of the most important communication routes of the world and if the archipelagic principle is accepted they would enclose very substantial marine areas, thus hampering the passage of the maritime powers' vessels.[60]

Although the maritime powers objected to the archipelagic principle, they did not wholly reject the idea. They submitted their own proposals which in their opinion struck a middle ground, by balancing and taking into consideration the interests of the maritime powers and the archipelagic States. These proposals consisted of a precise definition and delimitation of the area to prevent the enclosure of far-flung islands to such an unreasonable extent that great expanses of water would be converted to internal waters. The maximum length of each baseline was suggested to be not more than eighty nautical miles.[61]

In order not to disturb the status quo, particularly the passage of their vessels, the maritime powers continued to insist on the right of navigation through archipelagic waters and overflight over said waters. They maintained that most of the waters which were formerly part of the high seas would, if the archipelagic principle was accepted, be converted to archipelagic waters and even internal waters. Thus, the right of innocent passage which was in existence before the acceptance of the principle should still be respected and in fact treated as a vested right.[62]

### 4. PHILIPPINE POSITION ON THE PROPOSALS

The Philippine Government asserted that the sovereignty exercised over the waters within the baselines should be real and meaningful. Thus, the Philippines refused to accept the proposition that customary routes for navigation and sealanes in archipelagic waters should be converted, in effect, into channels of high sea,

[59] *Id.* at 21-22.

[60] *Id.* at 22-23.

[61] *Id.* at 25.

[62] *Id.*

where foreign vessels of all types may pass freely, without control or regulation by the archipelagic state. Otherwise, the concept of sovereignty would be so diluted that it would be as if the archipelagic State were at the beck and call of the country of the flagship. However, in the interest of international maritime commerce, the Philippines was agreeable to allow foreign merchant ships or commercial vessels to exercise the right of innocent passage through all routes customarily used for international navigation.[63]

Once again, Mr. Tolentino succinctly put the position of the Philippines in the following words:

> From all these, it should be understandable that the Philippines, although willing to negotiate and accommodate, will certainly find it impossible to agree to qualifications of the archipelagic concept which would subvert the sovereignty of the archipelagic state within the baselines or nullify the archipelagic concept itself and render it empty and meaningless.[64]

### *G. The Informal Negotiating Text and the Proposed Amendments of the Philippines*

#### 1. LENGTH OF BASELINES

The Informal Negotiating Text provided that the maximum length of the baselines shall not exceed 80 nautical miles, although a certain percentage of the baselines may reach until 125 miles. The Philippines suggested that the maximum length should be changed from 80 nautical miles to 100 nautical miles. Although the Philippines has one baseline that is 140 nautical miles long, in a spirit of cooperation, it was amenable to adjusting the baseline to conform to the 125-mile maximum.[65]

#### 2. INNOCENT PASSAGE

The Informal Negotiating Text stated: "Ships of all states, whether coastal or not, shall enjoy the right of innocent passage through archipelagic waters.... " The Philippines was not willing to accede to this proposition on the ground that the archipelagic and the territorial waters should not be treated as if they were in the same category. The reason is that the territorial sea lies outside the land territory, while the archipelagic waters are inside the baselines and connect parts of the land territory and form an integral part of the territory. Thus, the passage of foreign ships through archipelagic waters cannot and should not be as free as passage through the territorial sea.

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[63] Arturo M. Tolentino, *Philippine Position on Passage Through Archipelagic Waters, in* THE PHILIPPINES & THE LAW OF THE SEA, A COLLECTION OF ARTICLES, STATEMENTS & SPEECHES 29-30 (1982).

[64] Arturo M. Tolentino, *The Waters Around Us,* in THE PHILIPPINES & THE LAW OF THE SEA, A COLLECTION OF ARTICLES, STATEMENTS & SPEECHES 28 (1982).

[65] Arturo M. Tolentino, *Sea Law and Geography,* THE PHILIPPINES & THE LAW OF THE SEA, A COLLECTION OF ARTICLES, STATEMENTS & SPEECHES 47 (1982) [hereinafter *Sea Law*].



The amendment submitted by the Philippines stated that the innocent passage of foreign ships may not be enjoyed over the archipelagic waters as a whole, but should be limited to all routes used for international navigation.

#### 3. ARCHIPELAGIC SEALANES

"Ships and aircraft of all states, whether coastal or not shall have the right of archipelagic sealanes passage in sealanes and air routes through the archipelago." The Philippines sought to limit the passage through sealanes "only in sealanes designated by the archipelagic state, subject to the laws and regulations promulgated by that state...." This amendment does not deny passage through the archipelagic waters to any type of vessel. But it recognizes the right of the archipelagic state to promulgate measures necessary for its protection in its archipelagic waters.[66]

#### 4. OVERFLIGHT

The Informal Negotiating Text provided for air routes over the archipelagic sea lanes through which the aircraft of all alien states had the right to pass without being subjected to the regulations applicable to innocent passage. The Philippines proposed to limit this passage to creation classes of aircraft. The amendment intended that vessels which are potentially dangerous to the security, environment or other interests of the archipelagic state shall be confined to sealanes designated by it.[67]

Majority of the amendments propounded by the Philippines clearly contradicted some of the essential elements of the regime of archipelagic waters which conditioned an acceptance of this regime by the major maritime states. These amendments were so revolutionary that the other archipelagic states who stood by the Philippines in support were suddenly silent. This silence symbolized their doubts as to the possibility of the acceptance of the proposed amendments. In fact, during informal discussions, Indonesia and Fiji seriously doubted that the Philippine amendments would be accepted by the major maritime powers and, unlike the Philippines, expressed their readiness to recognize submerged passage of submarines, both nuclear and conventional, as well as the right of overflight above their archipelagic waters. Ambassador Hasjim Djalal of Indonesia generally characterized the Philippine position as much "stronger and inflexible" than that of Indonesia. In his opinion, this was due to the "much more compact geographical set-up and historical factor" apparent in the case of the Philippines.[68]

### *H. The Final Text*

After several years of exchanging views, proposals and amendments the Third United Nations Convention on the Law of the Sea was finally signed in

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[66] *Id.* at 52.

[67] *Archipelagic Waters, supra* note 12, at 20.

[68] *Id.*

Montego Bay, Jamaica on 10 December 1982. "This marked the culmination of over 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems, and all degrees of socio-economic development."[69]

As mentioned earlier, the Convention in its final form provided a whole portion for the regime of archipelagic states. As a result, under the Third Convention on the Law of the Sea, archipelagic states are permitted to draw archipelagic baselines provided they follow the criteria set forth by Art. 47 of the Convention. To wit:

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

2. The length of such baselines shall not exceed 200 nautical miles, except that up to three per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

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

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

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

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

7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided

[69] Introduction given by Bernardo Zuleta, Undersecretary General, Special Representative of the Secretary General for the Law of the Sea.



oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs on the perimeter of the plateau.

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

9. The archipelagic State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.[70]

With the approval of the archipelagic principle came the creation of the archipelagic waters which are the bodies of water located inside or within the archipelagic baselines. A distinction was made between archipelagic and internal waters. Internal waters are located within the archipelagic waters, and are distinguished from the latter by drawing closing lines in compliance with the following guidelines:[71]

### 1. MOUTHS OF RIVERS

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.[72]

### 2. BAYS

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger that, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the dif-

[70] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 47.

[71] *Id.* at art. 46, 50.

[72] *Id.* at art. 9.

ferent mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four nautical miles, a straight baseline of twenty-four nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions do not apply to so-called "historic" bays, or in any case where the system of straight baselines provided for in article seven is applied.[73]

3. PORTS

For the purpose of delimiting the territorial sea, the outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbor works.[74]

The final text of the Convention did not reflect all the amendments submitted by the Philippines. The members of the international community struck a balance between the demands of the major maritime powers and the needs of the archipelagic states. While the archipelagic principle was accepted and the maximum length of the baselines increased to 125 nautical miles, the waters within the archipelagic baselines became subject to the twin rights of innocent passage and archipelagic sealanes passage.

The Convention thus provides: "Subject to article 53 and without prejudice to article 50, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3."[75] On archipelagic sealanes passage the final text is worded as follows:

1. An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.

[73] *Id.* at art.10.

[74] *Id.* at art. 11.

[75] *Id.* at art. 52.



2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

3. Archipelagic sea lanes passage means the exercise in accordance with this 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.

4. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary. ...[76]

Although not all of the proposals submitted by the archipelagic states were accepted by the international community, the Philippines still signed and ratified the Convention. The signing and ratification of the Convention were triggered by the concept of the "package deal." This concept encouraged each State to bargain for provisions in the Convention that were most desirable. While the developing nations focused on the exclusive economic zone, the continental shelf, and the international seabed mining regime, other pressing matters like the navigational articles were temporarily set aside. When they finally turned their attention to these matters, the bargaining and drafting processes had long been over. They could no longer amend the articles already drafted. More importantly, many States realized that the effectiveness of any resulting treaty would be severely diminished without universal or nearly universal acceptance. The major industrialized seafaring nations would never settle for lesser or more limited navigational freedoms. Thus, for the developing nations to secure full access to necessary technology for conducting their respective seabed mining operations, they had to attract, or at least not repel, seafaring nations by, in effect, incorporating into the Convention a primarily Western European view of international law regarding innocent passage and creating the new regimes of transit passage and archipelagic sea lanes passage.[77]

A number of the provisions embodied in the Convention are products of compromises, demands and sacrifices. Ideas, proposals, amendments had to be set aside by the negotiating State, in exchange for more favorable and necessary provisions.

This spirit of compromise was aptly described by Mr. Mallet of Sta. Lucia, in this manner:

[76] *Id.* at art. 53.

[77] F. David Froman, *Unchartered Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 642-43 (1984) [hereinafter *Unchartered Waters*].

> We shall sign not because we find all parts of the Convention entirely acceptable,... but because we believe that, in the spirit of compromise, it is the best that could be achieved at this time. And. just as international law has at times been looked at in a progressive manner, we are hopeful that the dynamic nature of the Convention will prevail over any static interpretation that may be placed upon it.[78]

In fact, Bernardo Zuleta, Under-Secretary-General of the United Nations, admitted that the concept of the "package" was the most significant quality of the Convention, and had "contributed most distinctly to the remarkable achievement of the Convention. The concept of the package pervaded all work on the elaboration of the Convention and was not limited to consideration of substance alone.[79]

## III. THE PHILIPPINE RATIFICATION OF THE CONVENTION

Amidst the criticism and demands of the major maritime powers, the Philippines stood tall and continued to insist on its claim to exercise absolute sovereignty over the waters within her baselines, thus eliminating the rights of innocent passage and archipelagic sea lanes passage through these waters. When the other archipelagic States succumbed to the desires of the world powers, she continued to submit her amendments to the negotiating text.

While the members of the Philippine delegation unceasingly campaigned in the international fora for what they thought the archipelagic doctrine should contain, in the Philippines, the President of the Philippines through Executive Order No. 738, dated 3 October 1981, created a Cabinet Committee on the Law of the Sea to assess the Philippine position vis-à-vis the Convention of the Law of the Sea.[80] Due to the highly technical nature of the study to be conducted, the Cabinet Committee was composed of men who were experts in their respective fields and whose knowledge was predicted to be helpful in the study. The Committee was constituted by the Minister of Foreign Affairs, as Chairman, with the Ministers of National Defense, Natural Resources, Energy and Justice; the Director General of the National Economic Authority (NEDA) and such other officials the President may designate.[81] In addition to the core group, the Committee organized study teams to deal with the specialized areas contained in the text of the Convention. For example, there was a team on archipelagos, another for the exclusive economic zone , and a third on the High Seas and Seabed Mining. However, only after a single conference held from the 19th to the 21st of February, and prior to

[78] *Id.* at 644.

[79] Statement made by Bernardo Zuleta, Undersecretary General, Special Representative of the Secretary-General for the Law of the Sea.

[80] Jose D. Ingles, *The U.N. Convention on the Law of the Sea: Implications of Philippine Ratification*, 9 PHIL. Y.B. INT'L L. 47, 59 (1983) [hereinafter *U.N. Convention*.]

[81] 4 RECORD OF THE BATASAN 704 (1984) [hereinafter 4 BATASAN].



the finalization of its recommendation, the Philippines signed the Convention on 10 December 1982.[82]

Alas, once again the strong overpowered the weak. The Philippines, standing alone, was no match for the maritime powers, who threatened to scrap the rules agreed upon in the Convention, if the archipelagic States would deny them total mobility for their vessels and aircraft through the archipelagic waters. It was with regret, that the Philippine delegation set aside their proposals and joined the other archipelagic States in assenting to the conditions put forth by the maritime powers. In the words of Mr. Tolentino:

> When the final stage for formal amendments to the Convention came, we did not submit our proposals as formal amendments to be voted upon. We were afraid that an express rejection by the conference which was inevitable could have an adverse effect on our position in the future on the matter of security. So, we allowed our proposals which had been circulated to be forgotten in silence. Aside from being already alone, we figured that the interest of our national security did not really require us to risk or sacrifice the entire concept of the archipelago and the last chance perhaps for decades if not centuries to have the archipelago principle accepted as part of public international law.[83]

Thus, by virtue of an express authority from the President of the Philippines based on a favorable recommendation to that effect approved by the Cabinet at its meeting on 18 November 1982, the Philippine delegation, represented by Mr. Arturo Tolentino, on 10 December 1982, at Montego Bay, Jamaica, signed the Convention.[84]

The Philippine delegation should not be accused of selling out the interests of the Philippines. The concept of the package deal prompted the Philippines to sign the Convention. Without the archipelagic principle, the Philippines in the eyes of the international community would be a dismembered nation due to the pockets of high seas in between its islands. At least, with the creation of the regime on archipelagic states, the Philippines is now a unified whole. The Philippines is permitted to draw baselines around the archipelago connecting the outermost points of the outermost islands, and all the waters within this legal fence are considered as archipelagic waters and under the sovereignty of the Philippines regardless of their width or dimension. In effect, there would be an additional area of 141,800 square nautical miles inside the baselines that will be recognized by international law as Philippine waters.[85]

An additional benefit under the Convention is the 200 mile exclusive economic zone which is to be measured from the archipelagic baselines. Within this

[82] *U.N. Convention, supra* note 80, at 47, 59.

[83] *Id.* at 706.

[84] *Id.* at 704.

[85] *Id.* at 708.

zone, the Philippines exercises sovereign rights for the purpose of exploring and exploiting all the resources of the waters, the seabed and the deep subsoil. According to the computation of Mr. Tolentino, the exclusive economic zone of the Philippines measures about 395,400 square nautical miles. The area presently being claimed by the Philippines under the Treaty of Paris as the Philippines' territorial sea is estimated to be 263,300 square nautical miles. Thus, the exclusive economic zone is bigger than the territorial sea by 132,100 square nautical miles.[86]

### *A. Declaration of the Philippines*

In approving the final text of the Convention, the framers were aware that not all of the provisions were acceptable to all of the states. Some of these provisions were contrary to municipal law. This situation led the framers to provide a mechanism by which a signatory may draft reservations for the purpose of harmonizing its own laws with the rules set forth in the Convention. This mechanism is embodied in Articles 309 and 310 of the Convention. Article 309 provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by the other articles of this Convention."[87] On the other hand, Article 310 states:

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.[88]

In a last ditch effort to attempt to harmonize the interests and laws of the Philippines with that of the international community and to lessen the impact of the obligations demanded by the newly created regime of archipelagos, the Philippines made a declaration upon signing the Convention on 10 December 1982. The declaration was worded thus:

> The Government of the Republic of the Philippines hereby manifests that in signing the 1982 United Nations Convention on the Law if the Sea, it does so with the understandings embodied in this declaration, made under the provisions of Article 310 of the Convention, to wit:
>
> 1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;

[86] *Id.*

[87] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 309.

[88] *Id.* at art. 310.



> 2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of December 10, 1898, and the Treaty of Washington between the United States of America and Great Britain of January 2, 1930;
>
> 3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defense Treaty between the Philippines and the United States of America of August 30, 1951, and its related interpretative instrument; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party;
>
> 4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto;
>
> 5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decreed or proclamations pursuant to the provisions of the Philippine Constitution;
>
> 6. The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic state over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security;
>
> 7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic one or high sea form the rights of foreign vessels to transit passage for international navigation;
>
> 8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under Article 298 shall not be considered as a derogation of Philippine sovereignty.[89]

A few days after the signing of the treaty, the Cabinet Committee once again convened to review the findings of the various study teams and to formulate a recommendation to be submitted to the President for his consideration. The Committee met from 13 to 15 December 1982. The four study teams unanimously recommended the ratification of the Convention, except that the subgroup on shipping provided that the implications on security would have to be seriously studied because of the its potential effect on shipping.[90]

[89] THE PHILIPPINES AND THE LAW OF THE SEA 12-A (Pacifico Castro ed. 1983) [hereinafter CASTRO].

[90] 4 BATASAN, *supra* note 81, at 708.

In one of their meetings, Prime Minister Cesar E.A. Virata spoke before the Committee and expressed his support and affirmation of the newly-concluded Law of the Sea. He pointed out the advantages of being a party to the Convention. These advantages are the recognition of the archipelagic doctrine and the incorporation of the exclusive economic zone principle. These newly-acquired benefits have given the Philippines several hundred thousand square kilometers of additional maritime areas which are considerably more compared to the area covered by the country's territorial jurisdiction based on treaty limits. Thus, these increased maritime areas implied more territory for the Philippines to exploit and to generate energy by using tides, currents and the winds. However, Mr. Virata expressed a caveat in this manner:

> As we set our minds on the economic implications of the Convention, one caveat should be made and that is, that its security implications for the country should not be forgotten. We have agreed to be a party to the Convention ostensibly on the promise of anticipated economic benefits but it must be remembered that in the process we traded off to certain extent certain aspects of our national security. The right of innocent passage and the archipelagic sea lane passage are clearly unwelcome privileges but having been given as concessions, it is hoped that government agencies charged with the task of safeguarding our national security should take steps or adopt measures to minimize such potential dangers to our security.[91]

After evaluating all the positions taken by the study teams and the speeches delivered by respected and learned men on the field, the Cabinet Committee reached a general assessment which states that the benefits to be gained from adopting the Law of the Sea treaty far outweigh the obligations arising from it. "The Legal Committee concluded that the Convention provisions have no conflict with the Constitution and that the national security issues are not irremediable as they relate mainly to the problem of logistics."[92]

On this note, the Cabinet Committee decided to endorse the Executive Report to the President, with the recommendation that the President send the Treaty to the Batasan Pambansa for ratification. Moreover, the Committee submitted Resolution No. 633 endorsing the Law of the Sea treaty and further recommending that it be approved without amendment.[93]

### *B. Proceedings at the Batasan*

The members of the Batasan expressed their concern over the fact that under the terms of the Convention, the Philippines stands to lose a part of the territorial waters embraced within the limits prescribed by the Treaty of Paris due to the non-acceptance by the international community of the historic waters of the Philippines. Mr. Tolentino, who stood before the body, expressed that the situation was remedied by the Declaration made by the Philippines under Article 310 of the Convention, the text of which is written above. However, he also mentioned that:

> It is not actually a reservation that would be binding on all the signatories of the Convention. It is a declaration that would bind those who may agree and recognize the rights being embodied in the declaration of a country making such declaration. That was the stand of many of the delegations during the signing period of the Convention and we agreed with that position.[94]

In connection with the Declaration, the distinguished Mr. Hilarion Davide asked whether the ratification or concurrence of the Batasan Pambansa to the Convention can be subject to the approval and acceptance of the international community of the Declaration. Mr. Tolentino replied that the ratification should not be subject to any condition precedent. Making the ratification conditional will only create problems since it would be very difficult to determine when condition is deemed to have been fulfilled. This would unduly delay the ratification of the Convention, and will in turn suspend the application of the benefits established under the Convention. He further said that it would be wiser to append the Declaration to the instrument of ratification. Thereafter, these two documents should be simultaneously filed with the United Nations Secretariat. In turn, the Secretariat will circulate the Declaration.[95]

Going back to the extent of the Philippine territory, Mr. Fernandez posed this question: "In the light of the fact that our position as to our historic waters did not meet acceptance by the other countries of the world, was it advisable for us to sign the Convention? Would it not have been better for the country not to have signed the Convention at all and perhaps later resort to bilateral negotiations with respect to our historic waters?"

In defending the action taken by the Philippine delegation, Mr. Tolentino explained that after exhaustively studying the pros and cons of the problem, it was better and more advantageous for the Philippines and the Filipino people to sign and join the Convention. In his very words he explained:

> We believe that even if we vehemently assert our sovereignty over waters beyond what the Convention would recognize while the rest of the world will not recognize that claim or ours, they will continually violate our claim as they have been doing in the past and we cannot do anything about it. We have had experiences in the past where naval vessels have passed through our waters. The then Department of Foreign Affairs lodged diplomatic protest against this invasion of our sovereignty. When these naval vessels passed over our seas under our sovereignty, the answer invariably had been that they were passing over international waters....

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[91] CASTRO, *supra* note 89, at 2 & 4.

[92] BATASAN, *supra* note 81, at 704.

[93] *Id.* at 703-04.

[94] *Id.* at 717.

[95] *Id.* at 735.

> ...although we claim very strongly and believe very much our own claim to these waters, as long as international law does not recognize it, it will just be a claim that will be ignored by the rest of the world....
>
> Nevertheless, after the Convention comes into force, then it will be clear that no exceptions will be recognized anymore, unless provided for in the Convention itself. So, we will be placed in such a position that our claim will be more difficult than ever to assert after the Convention has come into force... Not being a party, we are not bound by the terms of the Convention so we will continue asserting our rights; but everybody will continue disregarding those rights and I do not think we are in a position to actually defend by force our rights. So, instead if the question of sovereignty being the determining point in whether we are signing the Convention or not, we thought to be pragmatic on whether it is more beneficial to the country or not. And the conclusion was, it will be more beneficial to the Philippines to join the Convention.[96]

The members if the Batasan eventually understood the benefits and obligations embodied in the Convention. Their doubts and fears were laid to rest by the exhaustive discussions and speeches delivered by Mr. Tolentino. Thus, the resolution submitted by the Cabinet Committee was approved by the Batasan on third reading, and the results showed that there were 138 votes in favor of the ratification, 1 against, and there were no abstentions.[97] The ratification was officially made on 8 May 1984.[98]

It is important to note that the ratification made by the Batasan Pambansa embodied and contained the declaration earlier made by the Philippine delegation upon signing the Convention.

### C. *Objections to the Declaration Made by the Philippines Upon Signing the Convention*

The declaration made by the Philippines did not escape the scrutiny of a number of nations which wasted no time in filing their objections with the United Nations Secretary-General, upon the ratification made by the Philippines. The objections started to pour in by 1985, and came from the following nations: Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Ukranian Soviet Socialist Republic, and Australia.[99]

All these nations unanimously claimed that the declaration contravenes and is in fact incompatible with Article 310 of the United Nations Convention which states that declarations are allowed under the Convention "provided that such declarations or statements do not purport to exclude or to modify the legal effect

[96] *Id.* at 720.

[97] 5 RECORD OF THE BATASAN 95 (1984).

[98] Ku, *supra* note 4, at 469.

[99] U.N. Report 7.



of the provisions of this Convention in their application to that State." The Declaration is likewise inadmissible under Article 309 of the Convention which provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."[100]

According to Bulgaria in its *note verbale* dated 3 May 1985 addressed to the Embassy of the Philippines in Belgrade, paragraph 6 of the declaration which seeks to equate archipelagic waters and internal waters is in contravention with Part IV on Archipelagic States of the Convention. In effect, "the Philippines not only has failed to harmonize its legislation with the Convention, but also is refusing to fulfill one of its fundamental obligations under the Convention, namely to respect the regime of archipelagic waters, which provides that foreign vessels enjoy the right of archipelagic passage through, and foreign aircraft the right of overflight over, such waters." Australia was more frank when it declared: "This indicates, in effect, that the Philippines does not consider that it is obliged to harmonize its laws with the provisions of the Convention. By making such an assertion, the Philippines is seeking to modify the legal effect of the Convention's provisions. " All the other objections substantially contained the same arguments.[101]

In addition to a statement of their arguments, the objecting nations expressly announced that the declaration made by the Philippines cannot be considered as valid and as having any legal force and effect even when the Convention comes into force and "that the provisions of the Convention should be observed without being made subject to the restrictions asserted in the declaration of the Republic of the Philippines."[102]

The Philippines, on 26 October 1988, through a declaration sent to the United Nations Secretary-General, responded to the objection made by Australia:

> The Philippine declaration was made in conformity with Article 310 of the United Nations Convention of the Law of the Sea. The declaration consists of interpretative statements concerning certain provisions of the Convention.
>
> The Philippine Government intends to harmonize its domestic legislation with the provisions of the Convention.
>
> The necessary steps are being undertaken to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention.
>
> The Philippine Government, therefore, wishes to assure the Australian Government and the State Parties to the Convention that the Philippines will abide by the provisions of said Convention.[103]

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

This response was, likewise, communicated to Member States by a depositary notification of the United Nations Secretariat.[104]

Although a number of states have manifested their view that the Declaration made by the Philippines is invalid and without legal force, it can be argued that the Philippine declaration does not necessarily imply a non-conforming conduct.[105] In fact paragraph 6 of the declaration which states: "The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic state over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security,"[106] reflects the provision of Article 49(2) of the Convention. Said article provides: "This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein."[107]

Also, paragraph 5 of the declaration says:

> The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippine Constitution.[108]

This can be construed as not going against the archipelagic regime adopted by the Convention, if an adequate amendment to Article 1 of the Constitution of the Philippines is effected. This was anticipated with respect to the 1973 Philippine Constitution. However, the concept of internal waters held under the former Constitution of the Philippines was recently reaffirmed in the new 1987 Philippine Constitution, except that the latter does not anymore explicitly mention "historic title" as the basis for its claims.[109]

## IV. THE PHILIPPINE CONSTITUTIONAL LAW ON PHILIPPINE WATERS AND THE THIRD UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Philippine constitutionalism accepts the principle that it is not the Constitution which definitely fixes the extent of Philippine territory. Pieces of legislation

[104] *Id.*

[105] *Archipelagic Waters, supra* note 12, at 23.

[106] CASTRO, *supra* note 89, at 12-A, Declaration of the Republic of the Philippines, par. 6.

[107] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 49(2).

[108] CASTRO, *supra* note 89, at 12-A, Declaration of the Republic of the Philippines, par. 6.

[109] *Archipelagic Waters, supra* note 12, at 23.



should be enacted by the legislature to define and expressly delimit the metes and bounds of Philippine territory. Further, since the constitution is considered as municipal law, it is binding only within the territorial limits of the sovereignty promulgating the constitution, in this case, the Philippines. Neither does a constitutional definition of territory have the effect of legitimizing a territorial claim not founded on some legal right protected by international law. Therefore, for purposes of settling international conflicts, a legal instrument purporting to set out the territorial limits of the state must be supported by some recognized principle of international law.[110] From the foregoing, it can be deduced that the binding power of the constitution is limited only to domestic or local affairs or controversies. This fact notwithstanding, a constitutional definition of the national territory is still essential for the Philippine Government to know the extent of the territory over which it can legitimately exercise jurisdiction, for the purposes of actual exercise of sovereignty.[111]

A very important portion of the national territory is the waters of the Philippines. A review of the 1935, 1973 and 1987 Constitutions and the debates behind them will reveal the efforts the Filipino people and constitutionalists undertook to go against prevailing international law in order to hold on to the legacy of waters, waters which were allegedly granted to them by both Spain and the United States. A study of the position the Philippines has taken and is presently taking will provide a better understanding on why there is a present controversy between Philippine Law and the Third United Nations Law of the Sea Convention concerning internal waters under the former and archipelagic waters under the latter.

### *A. The 1935 Constitution*

Absent in Article I of the 1935 Constitution was an express declaration on the status of the waters within the Philippine archipelago. The reason for this absence is that Article I merely reflected a historical purpose. The determinative factor which persuaded the 1935 Convention to include an article on national territory was the intent of the Convention to use the constitution as an international document binding on the United States. It was rather unusual that the then Philippine Government sought to extend the binding force of the constitution, mere municipal law, to the United States. This can easily be explained by the fact that the Tydings-McDuffie Law placed the condition that the effectivity of the Philippine constitution would depend partly on the acceptance of its provisions by the United States.[112]

As a result, the framers, in delimiting the territory of the Philippines simply enumerated the treaties which drew the metes and bounds of the territory, thereby

[110] 1 JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, A COMMENTARY 6-7 (1987) [hereinafter BERNAS].

[111] *Id.*

[112] *Id.*

expressly adopting and embodying said treaties in Philippine municipal law. The provision was worded in this manner:

> 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 will 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 exercised jurisdiction.[113]

The treaties referred to in the above-mentioned provision are the following: 1) The Treaty of Paris concluded between the United States and Spain on 10 December 1898; 2) The Treaty concluded in Washington between the United States and Spain on 7 November 1900 wherein the islands of Cagayan, Sulu and Siboto which were omitted in the Treaty of Paris were thereto included and; 3) The Treaty concluded between the United States and Great Britain on 2 January 1930.[114]

### *B. The 1973 Constitution*

As time passed, the Filipino citizenry became bolder and more aggressive in claiming ownership over its territory. The manner in which the 1935 constitution was phrased was no longer attune with the times. The world was beginning to be transformed into an international trade market and traffic in the seas was becoming more congested. As more vessels passed through Philippine waters, a definition of these waters recognized by the international community was necessary.

This realization led the 1971 Constitutional Convention to spend a considerable amount of time debating on whether the upcoming Constitution should contain a definition of Philippine territory.[115]

The primary argument for the deletion of the entire article on National Territory came from Delegate Voltaire Garcia. He pointed out that the territorial definition of the Philippines was a subject of international law, not municipal law, and that Philippine territory was already defined by existing treaties. That the purpose for which the 1935 national territory provision, having been accom- plished, it was no longer necessary for the inclusion of said provision in the new Constitution.[116]

Supporting Garcia's proposition but advocating "nationalistic" arguments, Delegate Sorongon reasoned that the mention of the Treaty of Paris was a repulsive

[113] PHILIPPINE CONST. art I, §1 (1973).

[114] JOSE N. NOLLEDO, CONSTITUTION OF THE PHILIPPINES, ANNOTATED 10-11 (1968).

[115] BERNAS, *supra* note 110, at 9.

[116] *Id.* at 10.



reminder of the indignity of the Philippines' colonial past. In the same line of argument, Delegate Gunigundo evinced that the Treaty of Paris should not be given effect because Spain's cession of Philippine territory was illegal due to lack of consultation with the Philippine Government, and due to Spain's loss of control over the Philippines. He further argued that an inclusion of a provision on national territory will only legitimize an otherwise illegal act of Spain. He parted with the words that the ancestral home of the Filipino people might be larger than the Treaty of Paris would allow.[117]

On the other side of the debate were Delegates Roco, Nolledo and Quintero. Delegates Roco and Nolledo claimed that a clear definition of Philippine territory was necessary for the preservation of the national wealth, for the strengthening of national security, for the protection of natural resources and as a manifestation of the solidarity of the Filipino people. However, Delegate Quintero added that it must be expressly agreed upon that the definition of the Philippine Territory must be embodied in the Constitution itself.[118]

Further, it was emphasized that a definition of the national territory in the Constitution was necessary to claim ownership over the pockets of waters within and connecting the islands of the Philippine archipelago, which at this point of time were either considered by international law as territorial waters or the high seas. Thus, for the framers, a claim that the waters within the archipelago are considered internal waters was of utmost importance. Such a provision is a statement of an aspect of the archipelagic principle which the Philippines, along with Indonesia, had been espousing in international conference. In Committee Report No. 01 of 1973, it was expressed that: "The inclusion in the new Constitution of a provision spelling out the archipelagic principle of the Philippine Government will certainly strengthen our historical position and will help us in sustaining our archipelagic theory in the Convention on the Law of the Sea in 1973 and in any case that may possibly be ventilated before the World Court in the future."[119]

After much debate and discussion, the Constitutional Convention voted to retain a provision on the national territory. The final form of the provision was worded in this manner:

> 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 or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, 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.*[120] [Emphasis supplied.]

[117] *Id.*

[118] *Id.* at 11.

[119] *Id.* at 26.

[120] CASTRO, *supra* note 89, at 15.

The significance of the definition of internal waters is that large bodies of water connecting the islands of the archipelago, including the Sibuyan Sea, Mindanao Sea, the Sulu Sea are all considered by the Philippines as internal waters and are treated in the same manner as rivers and lakes situated in the islands.[121]

However, in this claim for internal waters, the Constitutional Convention was merely pursuing the Philippines' existing official policy of pushing for international acceptance of the archipelagic principle. Therefore, the members of the Convention were well aware that the claim must be submitted for determination by the international convention.[122]

*C. The 1987 Constitution*

In the 1973 Constitution, a clear claim over the internal waters of the Philippines was made, for submission to the international community to further strengthen the Philippine campaign for the acceptance of the archipelagic principle. In 1982, the Third United Nations Convention on the Law of the Sea was concluded. Under this Convention, the archipelagic principle was finally recognized and integrated into international law. However, the international recognition of the archipelagic principle only muddled the definition and delimitation of the internal waters of the Philippines due to the introduction of the concept of archipelagic waters through which the rights of innocent passage and archipelagic sea lanes passage are present. In the words of Commissioner Nolledo: "Even the meaning of 'internal waters' became nebulous because the Convention of the Law of the Sea mentioned the term 'archipelagic waters.'"[123]

This "nebulous" definition of the Philippine internal waters contributed to the reason why Commissioner Nolledo, the leading proponent of the Constitutional provision on internal waters, endorsed Committee Report No. 3 which "decided to adopt the definition of the national territory as set forth in the 1973 Constitution with slight modifications, taking into account the economic zone now recognized by the Law of the Sea of 1982." Thus, it was proposed that the internal waters of the Philippines be defined thus: "...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."[124]

Commissioner Nolledo gave a beautifully worded discourse on why the Philippines treasures its waters and is not ready to give up any of its present claims. The highlights of the discourse are phrased thus:

> The Philippines, Madam President, is justifiably jealous of its waters. We have fought for the adoption of the archipelagic principle in various conferences on the Law of the Sea, and for many years this principle has met serious resistance from the world powers particularly Japan and even the United States... . Our fight for the principle culminated in the Convention on the Law of the Sea signed at Jamaica on 10 December 1982.
>
> ...[I]f we are concerned with the preservation and development of our national patrimony, we must, by constitutional mandate, define that patrimony. We do not talk only of our natural resources on land; we have to protect as well our vast resources in the sea, for the wealth of the sea is enormous. The sea yields the great variety of fish that forms part of our diet. The sea is a source of minerals, like petroleum. It is a source of pearls that may win human hearts.... It is precisely the richness of the sea that makes the eyes of selfish powers bulge with condemnable envy and engulf them with the desire for territorial aggrandizement....[125]

Moreover, Commissioner Nolledo mentioned the suggestion given by Ambassador Arreglado during one of the sessions of the Committee referred to above. Ambassador Arreglado proposed that in drafting the provision on national territory there should be no reference made to the 1982 Law of the Sea because many of its provisions may prejudice in some way the territorial claims of the Philippines.

Commissioner Nolledo only partly agreed with the suggestion. He said that:

> If we adopt the pertinent provisions of the Law of the Sea, there is a possibility that innocent passage may be exercised across our national internal waters because they can be called archipelagic waters under the Convention. That was the reason Senator Tolentino had made several reservations, called "Understandings," before the Convention before he signed the Law of the Sea....
>
> ...Thus in reading the Law of the Sea, we will have to read also the understandings made by Senator Tolentino before he signed the Law of the Sea....[126]

However, Commissioner Nolledo explained further and said that the 1982 Law of the Sea cannot be wholly abandoned during the drafting of the provision on national territory due to the provisions on the 200 mile exclusive economic zone. This exclusive economic zone gives the Philippines sovereign rights to explore, manage, and exploit all the natural resources, living and nonliving, of the waters, the seabed and the subsoil. In effect, the provision on the exclusive economic zone will expand Philippine territory.[127]

Thus, in the final form of the provision on national territory, the 1973 version of the rule concerning internal waters was adopted in toto. The full text of the 1987 version states:

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[121] *Id.*

[122] BERNAS, *supra* note 110, at 29.

[123] 1 RECORD OF THE CONSTITUTIONAL CONVENTION 254 (1986) [hereinafter RECORD].

[124] *Id.* at 246.

[125] *Id.* at 246-47.

[126] *Id.* at 254.

[127] *Id.* at 255.

> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. *The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimension, form part of the internal waters of the Philippines.*[128] [Emphasis supplied.]

From the above provision, it is evident that the framers of the 1987 Constitution did not take into consideration the concept of archipelagic waters introduced by the 1982 Law of the Sea Convention. They adamantly insisted that even after the 1982 Law of the Sea, the waters within the Philippine archipelago remain to be internal waters. They simply relied on the legal force of the declarations made by Mr. Tolentino upon signing the Convention. In fact, Commissioner Nolledo during the proceedings of the Constitutional Convention quoted the noteworthy observations of Ambassador Arreglado concerning the Declaration. Ambassador Arreglado discussed the grounds justifying the validity of the Declaration made by Mr. Tolentino. The strongest and most convincing reasons he mentioned are:

> ...[1] It is not within the contemplation of the Law of the Sea Convention to prescribe rules for the regulation or limitation of the sovereign authority vested in, and exercised by, a State over the sea areas forming an integral part of its national territory for to do so would run counter to the fundamental rules of international law underlying the principles of consent, independence, sovereignty, equality of States, which are in the nature of *Jus Cogens* and beyond the competence of States to modify or abrogate by treaty....
>
> ...[2] Under international customary law and the juridical principles enunciated in various decisions of arbitral tribunals and international courts of justice, such international treaties involving changes and transfers of State territories and defining their frontiers are of general interest and concern, not only to the parties directly involved, but also to all Third States, and in case of silence on their part, such silence will be construed as a form of tacit consent or recognition of the existing situation; and that following the established international law principle of *quieta non movere*, said treaties have now become an integral part of the Law of Nations and thus binding upon all Members of the international Community of States, insofar as the delimitation of the national frontiers of the Philippine Archipelago is concerned....
>
> ...[3] [T]he series of Understandings embodied in the Philippine Declaration are simply statements of the interpretation placed by the Philippine Government upon certain provisions of the Law of the Sea Convention, which are deemed to be *per se* not applicable to the internal and territorial waters enclosed within the "international treaty limits" defining the territorial boundaries of the Philippine Archipelago, and cannot, therefore, in any manner "impair and prejudice" the sovereign rights exercised by the Republic of the Philippines over all the sea areas forming an integral part of its national territory as defined and delimited in the Philippine Constitution.[129]

[128] PHIL. CONST., art. I, §1.

[129] RECORD, *supra* note 123, at 269.



### *D. Internal Waters under the 1987 Constitution Versus Archipelagic Waters Under the Law of the Sea*

Retaining the phraseology of the 1973 Constitution on internal waters in the 1987 Constitutional provision covering the same, has created an anomalous situation. From the viewpoint of the Philippines, the provisions of the Law of the Sea governing archipelagic waters are wholly unacceptable and therefore cannot be embodied in its municipal law. On the other hand, the international community believes otherwise. The members of the international community have already expressly objected to the non-conformity of the Philippines with the Law of the Sea. They have made known their policy to ignore the declaration made by the Philippines and to conform with the rules set forth in the 1982 Law of the Sea Convention.

More specifically, the Law of the Sea radically revamps the territorial sovereignty of the Philippines over its internal waters in the following manner:

1. it reduces the area of internal waters into small pockets enclosed by straight lines drawn across the mouth of rivers directly flowing into the sea, in bays, and in permanent harbor works, including lagoons and inside reefs, if any;[130]

2. it transforms "all the waters around, between, and connecting the islands of the archipelago" into archipelagic waters. As archipelagic waters, all ships, whether commercial ships or warships have the right of innocent passage;[131] and

3. it gives all ships, including warships and other military vessels the right to pass through archipelagic sea lanes although these lanes are within Philippine internal waters. This right is coupled with the right of overflight for all aircraft above the designated sea lanes.[132]

This transformation by the Law of the Sea of the internal waters of the Philippines into archipelagic waters has brought about deleterious effects and has actually robbed the Philippines of part of its sovereignty due to the additional rights granted to ships when passing through archipelagic waters, and which rights are not present in internal waters. The distinctions between the rights present in archipelagic waters and internal waters are illustrated as follows:

[130] H.W. JAYEWARDENE, THE REGIME OF ISLANDS IN INTERNATIONAL LAW 98 (1990).

[131] Merlin M. Magallona, *Problems in Establishing Archipelagic Baselines for the Philippines: The UNCLOS and the National Territory*, in ROUNDTABLE DISCUSSION ON BASELINES OF PHILIPPINE MARITIME TERRITORY AND JURISDICTION 14-15 (1995) [hereinafter *Archipelagic Baselines*].

[132] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 53(9).

TABLE 1. *Rights of Aliens for Different Activities in Different Jurisdictional Zones*[133]

| *Activity* | *Internal Waters* | *Archipelagic Waters* |
|---|---|---|
| **Navigation** | Aliens have no freedom of navigation. In order to enter these waters, prior authorization must be obtained from the proper government agency. | Aliens have the right of innocent passage though the archipelagic state may designate sealanes for continuous and expeditious passage and may close certain areas temporarily for the protection of its security. (UNCLOS, Articles 52 & 53). Where archipelagic waters intrude between two parts of a neighboring state, existing traditional rights and interests will be preserved. (UNCLOS Article 47(7)) |
| **Overflight** | Aliens have no rights. | Aliens have overflight rights, although they might be restricted to designated corridors. (UNCLOS, Article 53). Aliens having traditional or agreed rights in waters prior to them being declared archipelagic waters shall have those rights respected through the concluding of bilateral treaties. (UNCLOS, Article 51) |

With the knowledge of the distinction between these two types of waters, in case the Philippine internal waters are transformed into archipelagic waters, the Philippines as an archipelagic state, aside from having to limit its sovereignty must likewise comply with the following obligations:

a) respect rights of other States in existing agreements;[134]

b) recognize "traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States", if these are within its archipelagic waters;[135] and

c) respect existing submarine cables laid by other States, which pass through its waters without making a landfall, and permit maintenance and replacement of the cables on certain conditions.[136]

[133] *Access to Straits, supra* note 5, at 42, 44 *citing* Prescott, Maritime Jurisdictions and Boundaries in Morgan and Valencia (eds.) Atlas for Marine Policy in Southeast Asian Seas, 42,44 (1983).

[134] Third U.N. Convention on the Law of the Sea, Deccmber 10, 1982, art. 49(1) .

[135] *Id.* art. 51.

[136] *Id.*



## V. THE TWIN RIGHTS: INNOCENT PASSAGE AND ARCHIPELAGIC SEA LANES PASSAGE

Although the Philippines does not adhere to the concept of archipelagic waters and, therefore, does not recognize the right of innocent passage and archipelagic sea lanes passage through what it classifies as its internal waters, a discussion of the basic principles of these two concepts is still essential. It is essential for the purpose of solving the conflict between the Philippine Constitution and the Third United Nations Convention on the Law of the Sea.

It is important to note that under the present Law of the Sea, the right of innocent passage through archipelagic waters are subject to the same rules and regulations as the right of innocent passage through the territorial sea.[137]

Any reference to the archipelagic waters of the Philippines in this Chapter, does not mean that the Philippines conforms with the Convention. This reference is merely done for purposes of discussion. Therefore, the Philippines still maintains the present delimitation of her internal waters.

### *A. The Right of Innocent Passage*

The right of innocent passage is a compromise reached by the major maritime powers, the archipelagic states, and the other coastal states. Innocent passage allows states to pursue their various policies of national sovereignty while, at the same time, maintaining global freedom of navigation by which other nations may pursue their economic and political objectives.[138]

#### 1. DEFINITION

First, a definition of passage. Passage is defined as navigation through the territorial sea for any of the following purposes: traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.[139]

Passage requires that the movement of the vessel be continuous and expeditious. However, said requirement is not an all encompassing rule. It entertains exceptions and permits anchoring or stopping under the following situations: when it is incidental to ordinary navigation; or rendered necessary by *force majeur* or distress; or when assistance is essential to persons; ships or aircraft which are in danger or in distress.[140]

[137] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 52(1).

[138] John W. Rolph, *Freedom of Navigation and the Back Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 138 (1992) [hereinafter *Freedom of Navigation*].

[139] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 18(1).

[140] *Id.* at art. 18(2).

Passage is considered innocent when it is not prejudicial to the peace, good order or security of the archipelagic state.[141] The right of innocent passage grants any type of foreign ship unhampered passage through archipelagic waters. This right is available at all times to ships of all states and cannot be denied or impaired by the archipelagic state. In connection with this, the archipelagic State shall not : "a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State."[142] This is the explanation why no prior authorization from the archipelagic state is required before a foreign vessel can enter its archipelagic waters. The right to give permission implies the right to deny it, and the right of innocent passage cannot be made dependent on the discretion of the archipelagic State.

A strict and literal application of the Convention will lead to the conclusion that in the exercise of the right of innocent passage, no distinction is made between commercial or merchant ships, oil tankers, warships, submarines, nuclear-powered vessels, and those carrying nuclear or dangerous materials.[143]

However, a number of States continue to insist that warships be treated differently from commercial or merchant vessels due to the substantial distinctions between said types of vessels. For one, warships are manned by a crew subject to naval discipline and they are commanded by a duly commissioned naval officer.[144] More importantly, while merchant vessels are neutral in character, warships are identified as belonging to the naval forces of a State. These differences contribute to the fact that warships, unlike merchant vessels may pursue an "aggressive policy" and may use innocent passage to conceal demonstrations of military force against smaller states.[145]

The major maritime powers are the strong proponents adhering to the strict interpretation of the Convention and strongly opine that since there is no provision in the Convention which states that a warship must request authorization for or give prior notification of, its exercise of the right of innocent passage through another state's archipelagic waters, such prior notification is not necessary and should de dispensed with.[146] In fact, in a Joint 1989 Innocent Passage Statement of the United States and the Soviet Union, they took the position that innocent passage of warships and ships with special characteristics through archipelagic waters is guaranteed under general international law as reflected in the Convention. thus, not subject to a prior authorization or notification.[147]

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[141] *Id* at art 19 .

[142] *Id.* at art. 17, 24 .

[143] *Id.* at art. 17.

[144] *Unchartered Waters, supra* note 77, at 632.

[145] W.E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AM.J. INT'L. L. 346 (1987).

[146] *Freedom of Navigation, supra* note 138, at 155.

[147] *Archipelagic Waters, supra* note 12, at 39.



On the opposite end of the spectrum, the archipelagic States' argument runs in this manner:

> As far as the passage of ships (including warships) through the territorial sea is concerned,... no final definitive conclusion may as yet be drawn from State practice. Although there is no indication that the definition of innocent passage as enshrined in Article 19 CLOS will not, in the long run, be accepted by State practice, *it seems to be rather unlikely that such a development will cover warships.* In so far as the lack of uniformity of national legislation is concerned, this will probably prevail despite the regulations of the Convention on the Law of the Sea" [Emphasis supplied.][148]

This argument finds support in the fact that the maritime powers eventually agreed to the requirement of prior authorization or notification with respect to the passage of their warships and/or nuclear-powered ships. It was likewise observed that in practice, "it is common for states asserting a right of innocent passage for warships to give low-level notification of intended passages, informally and without admission of legal obligation, to coastal states insisting upon prior notification or authorization for passage by warships."[149]

Thus, the right of innocent passage through archipelagic waters, though seemingly settled in actuality, continues to be the subject of controversy and debate.

### 2. HOW "INNOCENT" SHOULD INNOCENT PASSAGE BE?

The Law of the Sea provides a framework which aids states in determining whether the passage through their waters is truly innocent. This framework enumerates the instances when the peace, good order, or security of the state is disturbed, and when the *prima facie* presumption of innocent passage is transformed into a presumption of non-innocent passage. The burden of identifying and proving the non-innocent act lies with the enforcement authority, the coastal state. The following are the non-innocent activities of a foreign ship which must be an actuality and not a mere possibility:[150]

a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

b) any exercise or practice with weapons of any kind;

c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;

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[148] *Id.*

[149] *Id.*

[150] *Id.* at 658.

d) any act of propaganda aimed at affecting the defense or security of the coastal State;

e) the launching, landing or taking onboard of any aircraft;

f) the launching, landing or taking onboard of any military device;

g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

h) any act of willful and serious pollution contrary to this Convention;

i) any fishing activities;

j) the carrying out of research or survey activities;

k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

l) any other activity which does not have a direct bearing on passage.[151]

The addition of a broad, catch-all provision suggests that the list was meant to be exhaustive, not merely exemplary.[152] However, the presence of this umbrella provision has not clarified the issue on the manner by which the right of innocent passage of submarines is exercised. The Convention prescribes that in the archipelagic waters, "submarines and other underwater vehicles are required to navigate on the surface and to show their flag."[153] It is contended that the failure of the framers of the Convention to specifically include the provision on submarines in the enumeration of instances of non-innocent passage, is indicative of the absence of a drive to make the surface operation a requirement of innocence for submarines and other underwater vehicles.[154] Presently, there is no clear cut rule and the issue is actually a potential subject of controversy which may be brought before the International Court of Justice.

### *B. Responding to Non-Innocent Passage*

When passage has been determined by the archipelagic State to be non-innocent, it may take the necessary steps in order to prevent the non-innocent passage through its archipelagic waters.[155] One of these protective measures is to

[151] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 19(2).

[152] *Unchartered Waters, supra* note 77, at 659.

[153] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 20.

[154] *Unchartered Waters, supra* note 77, at 663.

[155] Third U.N. Conv. on the Law of the Sea, December 10, 1982, art. 25(1).



demand that the guilty vessel leave the archipelagic waters. It has also been decreed that differences over the exercise of innocent passage should be settled through diplomatic or other agreed means. In no instance should the settlement of disputes be made through the use of force. Thus, the archipelagic State should not resort to "bumping" the guilty vessel.[156] A state's "bumping" a foreign vessel out of its territorial sea, or any similar use of force, for an alleged violation of that state's sovereignty is not a dispute settlement technique contemplated by the drafters of the Convention. This use of force to compel compliance is actually a violation of the fundamental tenets of all international instruments regulating the conduct of international interaction. In fact, the Convention has reproduced verbatim the United Nations Charter provisions on the use of force.[157] In lieu of the use of force, the Convention provides for compulsory arbitration or adjudication of disputes between states when its provisions are in contest.[158] Third-party settlement is resorted to for the resolution of conflicts over the exercise of the freedoms and rights of navigation when it is alleged that a state, in exercising said rights, acted in contravention of the Convention.[159] Moreover, the archipelagic state "may, without discrimination in form or in fact, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises."[160]

### *C. Environmental Pollution*

An offshoot of the right of innocent passage through archipelagic waters is the increasing concern expressed over the transboundary movement of hazardous wastes, goods and materials.[161] Tankers loaded with crude petroleum from the Arabian Gulf Area pass through the waters of Lombok Straits and the Celebes Sea in the south of Mindanao. The greatest source of tanker-related oil pollution is the discharge of tank washings. Between .35 and .50 percent of a tanker's cargo settles out during long sea voyages and unscrupulous operators discharge this residual into the sea. The Philippines is fortunate because the route of tankers passing through Philippine archipelagic waters is merely an alternate route, the normal route being through the straits inside the archipelagic waters of Indonesia. The Philippines is very fortunate since it is spared from the tanker pollution because in Southeast Asia, this phenomenon results in major concentrations of ballast discharge at each end of the Malacca Strait, in the west of Madura, off Balikpapapan, and off Brunei and Sabbah. Tank washings are likewise generated along the two major tanker routes.[162]

[156] *Unchartered Waters, supra* note 77 at 665-66 & *Freedom of Navigation, supra* note 138, at 163.

[157] *Freedom of Navigation, supra* note 138, at 161-62.

[158] Third U.N. Conv. on the Law of the Sea, December 10, 1982, arts. 281-86.

[159] *Id.* at 297 (1)(2).

[160] *Id.* at 25(3).

[161] Rothwell, *supra* note 24, at 20.

[162] *Access to Straits, supra* note 5, at 528, 531.

The main concern of the Philippines lies in the vulnerable and valuable marine resources which coexist with the occurrence of pollution or its threatened occurrence. Valencia and Marsh vividly and dramatically described the danger imposed in each normal shipping route through archipelagic waters in this manner:

> The Palawan Passage route passes between coral fringed small islands with seabird and major sea turtle nesting colonies in Kalayaan, and close to southern and northern Palawan and the Calamian islands, which host pristine mangrove forests, major sea turtle nesting areas, and endangered crocodile species and dugong.... Balabac and Calamian islands are already areas concern due to pollution and resource use conflicts.
>
> The Sibutu Passage cuts directly through one of the world's major sea turtle nesting areas, which also has pristine mangrove forests and coral reefs, and two marine reserves. The route through the Mindoro Strait passes Sumilon marine reserve and through one of the heaviest fishing grounds in the archipelago. The San Bernardino Strait-Verde Island route passes successively through pristine coral reef and mangrove forest areas, heavy fishing grounds, sea turtle nesting areas and several marine reserves, including Puerto Galera.... Areas along this route are already of concern, due to pollution. The Batan Islands just north of the Balintang channel is a priority area for protection and management.[163]

Steps have been taken by the international community to address the problem of pollution. In 1989, the international community adopted the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal. This Convention regulates the export of hazardous wastes and ensures that states of import have appropriate mechanisms to deal with the disposal of such wastes upon arrival.[164]

Although there have been a number of regional initiatives designed to control and actually prohibit the export of hazardous material, there is very little international law that actually regulates vessels that are shipping hazardous cargoes. Even the provisions found in the 1982 Law of the Sea are insufficient and merely refer back to existing international standards.[165]

One of these inadequate provisions is worded as follows: "Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through archipelagic waters, carry documents and observe special precautionary measures established for such ships by international agreements."[166] The provision just quoted, does not provide any protective measure or any enforcement mechanism to help prevent pollution.

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[163] *Id.* at 535-36.

[164] Rothwell, *supra* note 24, at 20.

[165] *Id.*

[166] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 23 (1982).



Further, Article 19 of the Convention, defining innocent and non-innocent passage denies the archipelagic State the legal authority to prohibit passage of vessels actually discharging pollution unless the discharge is "willful." This standard poses a problem because the polluter's state of mind is not relevant to the fundamental question of the magnitude and character of the threat to the archipelagic State. "[T]he consequences, including harm to marine resources, amenities, and other... resource interests, can be just as prejudicial if a foreign ship with 'gross negligence' or even merely 'accidentally' or 'inadvertently' causes them.[167]

Unlike the other non-innocent activities listed in Article 19, such as weapons exercise, launching, landing or taking on board aircraft or military devises, in which intention is an inherent aspect, pollution presents a threat which can occur without any element of intent. Thus, pollution alone constitutes sufficient threat to the archipelagic state's vital interests to justify the Status's authority to protect these interests.[168]

Another standard to be contended with is the "serious" standard. Before action may be taken against pollution, the pollution must be serious. Again, this standard is ambiguous and dangerous because it does not provide a precise definition of the adjective "serious." This lack of definition may lead to the exclusion of certain instances of pollution which actually jeopardizes the archipelagic State's interests.[169]

Finally, the express mention of the word "activities" in Article 19 of the Convention, mandates that passage may be denied only when the threatening activity actually occurs. This produces a rather anomalous situation because there have been instances when the ship's design is inadequate and mere presence of the ship is already prejudicial to the archipelagic State's interest. Therefore, to prevent this threat from turning into reality, the archipelagic State should be allowed to deny the right to such presence. However, this right of prevention is denied under the Convention.[170]

### *D. Response to the Threat of Pollution*

Due to the stringent standards imposed by the Convention concerning pollution, the archipelagic States concerned must actually wait for their archipelagic waters to be polluted with oil, tanker wastes and other hazardous or toxic materials before they can take action against the guilty vessel. One way to effectively protect their archipelagic waters is to strengthen and make more effective the laws and

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[167] Brian Smith, *Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection*, COLUM. J. TRANSNAT'L. L. 85 (1982) [hereinafter Smith].

[168] *Id.* at 85-86.

[169] *Id.* at 86-88.

[170] *Id.* at 86-89.

regulations for the prevention, reduction and control of pollution.[171] However, the archipelagic State in enacting these regulation must never impair the right of innocent passage. These rules should balance the interests of both the archipelagic state and the flag of the passing vehicle.

### *E. The Archipelagic Sea Lanes Passage*

After a review of their rights under the regime of innocent passage through archipelagic waters, the maritime powers realized that the manner of passage of their submarines and other underwater vehicles needed to be clarified. Thus, they further conditioned their acceptance of the archipelagic doctrine on the satisfaction of their demand that submarines and other underwater vehicles be given the right to pass through the archipelagic waters in their normal mode, meaning, submerged.

It did not have to take great power of persuasion for the other members of the international community to grant this demand of the superpowers. The right of archipelagic sea lanes was immediately created under the Convention. The maritime powers got a very good deal, and received more than what they asked for. Under this new right, both 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, are assured.[172] Thus, submerged passage of submarines and the flight of military aircraft in archipelagic waters are permitted provided these activities are done within the designated archipelagic sea lanes. Judge Shigeru Oda of the International Court of Justice observed and commented that:

> ...the new regime on the passage through straits and archipelagic waters was introduced... in particular, to maintain uninterrupted navigation of warships – including submarines – and the free navigation of military aircraft. The U.S. Navy would only accept the archipelagic concept on the condition that the undetected and uninterrupted passage of submarines would be guaranteed throughout archipelagic waters.[173]

Particularly on overflight over archipelagic sea lanes, Kwiatkowska and Agoes had this to say:

> The requirement that the air routes must be above archipelagic sea lanes was dictated not by need of civil air navigation but by necessity to provide maneuvering possibilities for military aircraft while the naval forces of a particular fleet are passing through the sea lanes....

[171] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 23(1)(f), (3).

[172] *Id.* at art. 53(3).

[173] Magallona, *supra* note 131, at 17.



> ...a general right of free overflight above archipelagic waters can – due to its strict application to the air space above the archipelagic sea lanes – be implemented in practice only by military aircraft. Civil aircraft could clearly not fulfill the condition of zigzagging above the archipelagic sea lanes and of overflying archipelagic waters without passing above archipelagic land (island) territory.[174]

#### 1. DESIGNATION OF ARCHIPELAGIC SEA LANES

Archipelagic states have the right to designate archipelagic sea lanes according to the guidelines set by the Convention and these guidelines consist of the following points:

1. An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.

2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

3. Archipelagic sea lanes passage means the exercise in accordance with this 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.

4. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary....[175]

However, the power given to archipelagic states to designate sea lanes is superficial for the following reasons: for one, the guidelines to be followed are so numerous and detailed that little choice is left with the archipelagic state; another is the fact that failure of the archipelagic states to designate sea lanes, for whatever reason, allows foreign submarines and military aircraft to exercise the passage through routes normally used for international navigation.[176] More importantly, the choice of sea lanes by the archipelagic state is subject to approval of the

[174] *Id.* at 18.

[175] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 53.

[176] *Id* at art. 53(12).

competent international organization.[177] Presently, the competent international organization is the IMO. However, as of May 1995, no archipelagic sea lanes have been designated and this has resulted in some debate through which routes the right may be exercised.[178]

### 2. ARCHIPELAGIC SEA LANES PASSAGE V. TRANSIT PASSAGE

Although both of these passages have a few similarities such as, the non-suspendability of both passages, the right of submarines to navigate submerged, and the right of overflight, which in practice is restricted to archipelagic sea lanes,[179] these two concepts should not be interchanged because there are some instances when the rules governing one type of passage are not applicable to the other. The table below illustrates these differences.

**TABLE 2.** *Distinctions between Archipelagic Sea Lanes Passage and Transit Passage.*[180]

| *Point of Difference* | *Archipelagic Sea Lanes Passage* | *Transit Passage* |
|---|---|---|
| **Regulation** | The archipelagic state has the right to make rules and regulations, including special requirements for nuclear and hazardous substances. | No restrictions may be imposed. |
| **Passage** | Continuous, expeditious and unobstructed. | Continuous, expeditious and unimpeded. |
| **Manner of delimiting lanes** | Sea lane must be indicated on a chart, with an axis and a maximum width of 50 nautical miles and must be approved by the International Maritime Organization. | No such requirements. |

### 3. SECURITY DIMENSION

There is one concern which stands out when it comes to archipelagic sea lanes passage. Unlike the right of innocent passage which can be suspended for security reasons, this right cannot be suspended, and due to this non-suspendability, the security dimension of the archipelagic sea lanes passage of nuclear-armed submarines and the undersea deployment or emplacement of nuclear-weapon deterrent

[177] *Id.* art. 53(9).

[178] Rothwell, *supra* note 24, at 12.

[179] *Archipelagic Waters*, *supra* note 12, at 40.

[180] *Access to Straits*, *supra* note 5, at 517-18.



systems is of a higher magnitude than in plain archipelagic waters subject only to the right of innocent passage.[181]

A possible solution to this security problem is the establishment of a nuclear-free zone in Southeast Asia. This nuclear-free zone would at least in theory, ban nuclear-weapon bearing U.S. and Russian surface vessels, submarines and aircraft from the region. A nuclear- weapons free zone could likewise apply to aircraft overflying a state's land and marine airspace.[182]

## VI. THE PHILIPPINE RESPONSE TO THE LAW OF THE SEA

### *A. Philippine Senate Bill No. 206*

The most significant move of the Philippines towards harmonizing its laws with the Convention, came in the form of Senate Bill No. 206, sponsored by former Senator Leticia Ramos-Shahani, filed on November 18, 1987. This bill sought to delineate the archipelagic baselines in accordance with the special mode set forth in the Convention. Under this bill, all of the archipelagic baselines embracing the Philippine archipelago were within the maximum limit of 125 nautical miles set by the Convention. The longest baseline measured only 120.82 nautical miles.[183]

The Shahani Bill was not passed during the Eighth Congress because it was met with opposition by some government agencies, most especially the Department of Foreign Affairs. Consul Asuque expressed the sentiment of the Department in this manner:

> The Department of Foreign Affairs objected to that proposed legislation because it totally abandons the Treaty of Paris and the Department feels that the people should be consulted on what they want to do with the Treaty of Paris. If you are going to pass a law which you eventually have to submit to the U.N. Secretary-General, as required by the Convention and that law changes the existing baselines of the Philippines, to conform with the Convention of the Law of the Sea, meaning that you repeal RA 3046 as amended by RA 5446, there is a strong indication or implication, that you will abandon the Treaty of Paris because if you have baselines that are in accordance with the Convention, then, your territorial sea will only be 12 nautical miles. It is not the 250 nautical miles that you have in the northwestern side of the Philippines.[184]

As a result of the opposition, the Shahani Bill was archived and, to the present day, has remained a mere proposal.

[181] Magallona, *supra* note 131, at 18.

[182] *Access to Straits*, *supra* note 5, at 551.

[183] Philippine Senate Bill No. 206, §1 (1987).

[184] Consul Asuque, *supra* note 9.

*B. National Marine Policy*

The entry into force on 16 November 1994 of the Third United Nations Convention on the Law of the Sea, prompted the Philippine government to adopt and pass its National Marine Policy. This policy is primarily a "developmental and management program" designed to respond to the obligation set forth by the Convention.[185]

The Philippine National Marine Policy states:

1. Emphasize the archipelagic nature of the Philippines in developmental planning;
2. View coastal marine areas as a locus of community, ecology and resources;
3. Implement UNCLOS within the framework of the National Marine Policy;
4. Coordinate and consult with concerned and affected sectors through the Cabinet Committee on Maritime and Ocean Affairs; and
5. Address the following priority concerns:
   - extent of the national territory;
   - protection of the marine ecology;
   - management of the marine economy and technology; and
   - maritime security.[186]

Preparatory to the adoption of this policy, was the President of the Philippines' move to expand the powers of the Cabinet Committee on the Law of the Sea and at the same time renaming it as the Cabinet Committee on Maritime and Ocean Affairs by virtue of Executive Order No. 186. The expanded powers include the "formulation of practical and viable policies and addressing the various concerns which affect the implementation of the United Nations Convention on the Law of the Sea and other marine related matters.[187]

In line with President Ramos' directive that the Cabinet Committee shall "encourage the participation of government and private academic institutions,"[188] the Department of Foreign Affairs conducted consultations in six regions, explaining to these citizens the conflict between the Philippine Constitution and the Law of the Sea, and subsequently asking them for their suggestions on how to resolve

[185] National Marine Policy, Cabinet Committee on Maritime and Ocean Affairs (1994).

[186] *Id.*

[187] Executive Order No. 186, §1 (1994).

[188] *Id.* §3.



the conflict taking the Treaty of Paris into consideration. In response, a majority of these citizens said that the Treaty of Paris should not be set aside because it is the national heritage of the Filipino people and it is not for this present generation of bureaucrats to forego or to abandon the Treaty of Paris.[189]

The Philippine Government in responding to its obligations under the Law of the Sea Convention should not have a self-centered view in dealing with the problem. In providing for a solution, a balance of the interests of both the Filipino people and the international community should be maintained.

*C. Requirement of Prior Permission and Illegal Entry Report*

Since the Philippines continues to claim the archipelagic waters under the Convention, as her internal waters, prior permission from the proper government agency is necessary for the entry of foreign vessels into Philippine internal waters. Warships or research vessels have to obtain permission from the Department of Foreign Affairs through the transmission of a note. On the other hand, commercial ships have to seek a clearance from the Philippine Coast Guard.[190]

Although the above mentioned rule has been made clear to countries all over the globe through their respective embassies in the Philippines, there have been cases of illegal entry into Philippine internal waters.

TABLE 3. Reported Cases of Illegal Entry from 1993-1994.[191]

| *Country* | *No. of Vessels* | *No. of Nationals* |
|---|---|---|
| Peoples Republic of China | 18 | 352 |
| Vietnam | 4 | 67 |
| Taiwan | 1 | 3 |
| Korea | 2 | 20 |
| Hongkong | 2 | 11 |
| *Total* | 30 | 452 |

Most of these apprehended illegal entrants used *force majeure* as their defense.

Despite the arrests made as a result of illegal entry, there have been instances when vessels without prior authorization have successfully passed through the Philippine internal waters and have evaded arrest.

Kwiatkowska and Agoes described the conforming conduct of the Philippines in this manner:

[189] Consul Asuque, *supra* note 9.

[190] *Id.*

[191] Report of the National Committee on Illegal Entrants, Department of Foreign Affairs.

> The Philippines appears to conform in practice with the navigational regime set forth in the Convention by allowing foreign warships (submerged) and other ships to pass without notification or authorization through the routes used customarily for international navigation within its waters.... [A] practical compliance by the Philippines with the Convention's rules... can be regarded as resulting to important extent from the present lack of enforcement capacity. Therefore, and in view of the restrictive official position taken by the Philippines with respect to navigational regime within its archipelagic waters... the adequate long-term guarantee of unimpeded navigation in accordance with the Convention would require amendment of the Philippine Constitution and other laws.[192]

As early as the time when the U.S. Bases Agreement was in force, the Philippines allowed the Americans to navigate through Philippine internal waters without need of prior authorization. This was clearly a derogation of Philippine sovereignty, yet, the Philippine government gave its assent.[193]

From the above, it is evident that the Philippines does not regard the status of its internal waters as something to perpetually fight for and as the end all and be all of the Philippine Territory. The degree of importance which the Philippines seemed to place on her claim has dwindled. The regime of internal waters, once put on a pedestal, has been removed therefrom and has begun to be transformed into the regime of archipelagic waters defined in the Convention.

## VII. AN EVALUATION OF THE PHILIPPINE SITUATION

### *A. The Philippine Declaration*

At first glance, the Declaration made by the Philippines at the time of the signing of the Convention on 10 December 1982 at Montego Bay, Jamaica, was a brilliant solution to the controversy between the Philippine Constitution and the Convention. However, a more thorough examination of the Declaration will yield a contrary conclusion.

Notwithstanding the clear language of Article 310 of the Convention which states:

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.*[194] [Emphasis supplied.]

the Philippine delegation went ahead and pronounced that:

[192] *Archipelagic Waters, supra* note 12, at 24-25.

[193] Interview with Prof. Rafael Lotilla, University of the Philippines, School of Law (Dec. 18, 1995).

[194] Third U.N. Convention on the Law of the Sea, December 10, 1982, art. 310.



> The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamation of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamation pursuant to the provisions of the Philippine Constitution.[195]

This particular provision of the Declaration clearly violates the rule enunciated by Article 310. By categorically stating that the Philippines maintains its present Constitutional Law and reserves the right to amend the provisions of the Convention to conform to its municipal law, the Declaration definitely fails to harmonize Philippine Law with the Convention. In fact, it does not modify the legal effects of the provisions in the Convention, it simply ignores the rights established under the Convention. The Declaration fails to accept and honor the newly-created regime of archipelagic waters and the rights of innocent passage and archipelagic sea lanes passage established therein.

Although the provisions made were entitled as the "Declaration" of the Philippines, such a title should not be controlling. Substantially, the provisions are reservations since they possess the very elements thereof. The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State."[196] Clearly the statements made by the Philppine delegation particularly statement number five which provides that the Convention will not be construed as amending any pertinent laws of the Philippines, sought to exclude or render nugatory the rights of innocent passage and archipelagic sea lanes passage through archipelagic waters, which rights were the very reasons why the major maritime powers acceded to the creation of a new regime on archipelagos.

Even assuming *arguendo* that the Declaration conforms to Article 310, still, it cannot be considered to have any legal force and effect on the international community due to the objections filed by several states with the United Nations Secretary General. Mr. Tolentino, in his speech before the Batasang Pambansa, explicitly stated that the Declaration would bind only those who manifested their consent to it. Thus:

> It is not actually a reservation that would be binding on all the signatories of the Convention. It is a declaration that would bind those who may agree and recognize the rights being embodied in the declaration of the country making such declaration.... And so, as far as the Philippines is concerned, we took the position that we filed this declaration to give notice to other countries signing the Declaration that we have claims which may not be completely in harmony with the provisions of the Convention but which we set forth as interpretative of the Convention in relation to our domestic legislation. Now, if other countries should accept this, then it would be binding between the Philippines and that

[195] CASTRO, *supra* note 89, at 12-A.

[196] Vienna Convention on the Law of Treaties, 1969, arts. 11 and 13.

other country as some kind of a bilateral understanding or agreement between them qualifying as between those parties the terms of the Convention but not with respect to other parties.[197]

From the explanation given by Mr. Tolentino, it can be deduced that the objections filed by Russia, Australia, Bulgaria and the others are valid, and their pronouncement that they will treat the waters within the archipelagic baselines of the Philippines as archipelagic waters, is binding on the Philippines. Therefore, with regard to said states, the Declaration has no legal effect.

*B. The Philippine Ratification.*

Since the validity of the Declaration made by the Philippines can easily be impugned by simply filing an objection and non-acceptance thereof with the United Nations Secretary-General, the Philippine Government should, at this stage, be aware of the consequences of its ratification of the Convention.

Before going any further, it is important to emphasize that the Philippines, as a member of the international community, is required to comply with its obligations established under the system of laws regulating the relations of the members of the international community with one another.[198] In addition to the duty to comply is the responsibility of the Philippines to assure that its Constitution and other laws enable its government to carry out its international obligations.[199]

The Convention is another system of law which the Philippines must comply with. The Philippine ratification of the Convention was the formal act by which it manifested its consent to the provisions and promised to adhere to the responsibilities found therein. By voluntarily choosing to be a party to this treaty, the Philippines cannot plead its own law or deficiencies in that law as an excuse for non-compliance or as a justification for a breach of the Convention.[200] In 1887, Secretary of State Bayard explained:

> [I]t is only necessary to say, that if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules.[201]

[197] 4 BATASAN, *supra* note 81, at 717.

[198] D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 1 (2nd ed. 1979) [hereinafter HARRIS].

[199] LOUIS HENKIN *ET AL.*, INTERNATIONAL LAW 149 (1993) [hereinafter HENKIN].

[200] Vienna Conention on the Law of Treaties, 1969, art. 28.

[201] HENKIN, *supra* note 198, at 149.



> short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules.[201]

This statement of Secretary of State Bayard was reiterated in the *1931 Polish Nationals in Danzig* case which declared that: "It should be observed that... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[202]

Why does the Constitution of the Philippines have to take a back seat to the provisions of the Law of the Sea? The answer to this question lies in the understanding of the two schools of thought which dominate the relationship of municipal and international law.

The first school of thought is known as *Monism*. This doctrine asserts the supremacy of international law over municipal law even within the domestic sphere. However, this principle is not well-received in the international fora because it is antipathetic to the legal corollaries of the existence of sovereign states, and reduces municipal law to the status of a pensioner of international law.[203]

The second and more acceptable school of thought which has been adopted by the Philippines is known as *Dualism*. This school believes that international and municipal law differ primarily in the fact that the two systems regulate different subject-matter. International law is a law between sovereign states while municipal law applies within a state and regulates the relations of its citizens with each other and with the executive. Thus, in case of a conflict between international law and municipal law the dualist would assume that a municipal court would apply municipal law.[204]

In applying the dualist theory to the Philippine situation regarding the force and effect of the Convention, a difficulty arises. While the Philippines may arrest the foreign ships which have illegally entered the "internal waters" of the Philippines, in the international fora, said arrests may be deemed invalid since the International Court of Justice or the other international tribunals will definitely apply the principles of innocent and archipelagic sea lanes passage.

How does the Philippines avoid such an anomalous situation? The 1987 Constitution states: "The Philippines... adopts the generally accepted principles of international law as part of the law of the land..."[205] By making this statement, the Philippines manifests its adherence to the *dualist* theory but at the same time bridges

[202] Polish Nationals in Danzig (1931) PCIJ, §A/B no. 44, 24, as reproduced in IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 36 (4TH ED. 1990).

[203] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32 (4TH ED. 1990) [hereinafter BROWNLIE].

[204] *Id.*

[205] PHILIPPINE CONST., art 11, §2.

[206] JOAQUIN G. BERNAS, FOREIGN RELATIONS IN CONSTITUTIONAL LAW 17 (1995).

As a result of said constitutional declaration, the Philippines cannot insist on its present claim of internal waters and the accompanying restrictions thereof since it will run counter to the Constitution itself. Even assuming that the national territory provision operates an exception to the adoption of the generally accepted international principles rule, due to the *dualist* theory, the Philippines can insist on its claim of internal waters but cannot compel the other states to honor such claim. The net effect would be that notwithstanding the requirements set forth by the Philippines regarding entry into its internal waters, foreign vessels will continue to criss-cross through these waters without prior permission, since under international law these very same waters are considered as archipelagic waters subject to the right of innocent passage.

Further, the Philippines must observe the principle of *pacta sunt servanda*, which means that "every treaty in force is binding upon the parties to it and must be performed in good faith."[207] Under this principle, the Philippines must amend or repeal its laws in order to conform to the Convention. The continued failure of the Philippines to harmonize its laws with that of the Convention will eventually amount to bad faith, and this eventuality will definitely have deleterious effects on the Philippines. This will most likely stigmatize the Philippines, especially if the other contracting parties see it fit to invoke the influence of world opinion as a means of enforcing compliance.[208]

In fact, not only is the threat of stigmatizing the Philippines a potential danger, but it is an imminent one due to the fact that the continued non-compliance by the Philippines may amount to a material breach of the Convention. Such a material breach entitles the other party or parties to a treaty, to invoke the breach as the ground of termination or suspension. This is an accepted sanction to guarantee faithful observance of treaties.[209] If this sanction is applied to the Philippines, the net effect would be that bodies of water between and surrounding the islands of the Philippines will be treated as high seas and all foreign nations will have the freedom to exploit and explore the natural resources of the Philippines within the 200 mile exclusive economic zone since there will be no EEZ to talk about.

With this in mind, the Philippines should no longer delay the fulfillment of the promise it gave to Australia and the other states in its *note verbale* in 1988. In said *note*, it assured the international community that it intends to harmonize its domestic legislation with the provisions of the Convention, and that: "The necessary steps are being undertaken to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention."[210]

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[207] Vienna Convention on the Law of Treaties, 1969, art. 1.

[208] ISAGANI A. CRUZ, INTERNATIONAL LAW 177-78 (1985) [hereinafter CRUZ].

[209] BROWNLIE, *supra* note 203, at 618.

[210] *Archipelagic Waters*, *supra* note 12, at 24.



In fact, the United Nations in 1994, through Resolution 50-94 reiterated its earlier mandate that the non-conforming states should double their efforts in reconciling their laws with the principles and rules embodied in the Convention.

### C. *Philippine Response to the U.N. Order*

In response to this call, Professor Haydee Yorac, the Philippine Candidate to the International Tribunal on the Law of the Sea, last 4 December 1995, announced to the international community that the Philippines is taking steps towards the harmonization of its laws with that of the Convention. However, she requested that, due to the complexities and the highly-sensitive issues involved, the Philippines be given more time in achieving the task set before it.[211]

### D. *Theories on How to Resolve the Conflict*

The most popular view among those tasked with resolving the conflict is that the Philippines cannot be compelled by the international community to draw archipelagic baselines in accord with the Convention and to adopt the regime of archipelagic waters due to the delimitation of Philippine waters established under the Treaty of Paris. To recapitulate, the Treaty of Paris was entered into and signed by the United States and Spain on 10 December 1898, and it was in this treaty where Spain ceded to the United States the Philippine Archipelago. It is further argued that since the Treaty of Paris is still in effect, the Third United Nations Convention on the Law of the Sea, likewise a treaty, cannot supersede it. As a result, the territory given to the Filipino people by the United States based on the Treaty of Paris is a heritage which the lawmakers and even the President cannot take away.

However, one question remains unanswered. What did the United States actually pass on to the Philippines upon granting the latter its independence? Since the United States, and not the Philippines, was a party to the Treaty of Paris upon the transfer of territory from the former to the latter, the latter was merely subrogated to the rights of the United States under the Treaty. The Philippines cannot claim more than what the United States had possessed. Thus, the declaration by the delegate of the United States during the proceedings of the Convention, concerning this issue is essential to the claim posited by the Philippines. The delegate had this to say:

> [W]e wish to state that the United States adheres to the three-mile limit of territorial sea, and in the Philippines we never exercised sovereignty beyond that limit. *The Treaty of Paris did not transfer to us any waters; only the land areas was ceded to us and it was over such land area that the United States exercised sovereignty. We did not acquire or exercise sovereignty and we did not transfer any sovereignty over any area of sea beyond the three-mile limit.*[212] [Emphasis supplied.]

This categorical statement from the United States, if correct, renders nugatory the so called "historic claim" of the Philippines over its internal and territorial waters.

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[211] Consul Asuque, *supra* note 9.

[212] *Historic*, *supra* note 8, at 15.

Since only land, was given to the Philippines, the delimitation of its waters always followed that which is defined by international law. It can safely be concluded that contrary to popular Filipino belief, the Treaty of Paris cannot be invoked in claiming the present delimitation of the internal and territorial waters of the Philippines.

Another theory suggests that the conflict between the Philippine Constitution and the Convention is merely superficial. This theory finds its basis in Article 47 (1) of the Convention which uses the phrase "*may* draw straight archipelagic baselines" in directing archipelagic states to delimit their waters. It is espoused that the order of the Convention is merely directory and not mandatory. Thus, the international community cannot compel the Philippines to draw archipelagic baselines in harmony with the Convention.[213]

The theory discussed above, is a very microscopic and literal interpretation of the rule on archipelagic baselines. In interpreting said rule, the other provisions governing the regime on archipelagos and the proceedings of the Convention should be taken into consideration. It has been proved that during the proceedings of the approval of the archipelagic principle, the maritime powers were adamant in demanding for the right of innocent passage through the newly-created archipelagic waters. Without the presence of this right, said powers would never have given their affirmative votes for the archipelagic theory. Therefore, in framing the principle on the drawing of the archipelagic baselines, the members of the international community intended the provision to be mandatory.

Even assuming *arguendo* that drawing the baselines is a mere option for the archipelagic states, an examination of Article 47 will disclose that once the archipelagic state decides to draw the baselines, it is left with no choice but to follow the rules set by the Convention. Thus, the baselines must conform to the limits set forth. The act of drawing the baselines is optional, but once this option is availed of, the manner in which these baselines are drawn is mandatory.

The Philippines is left with no alternative but to draw archipelagic baselines in accord with the rules set by the Convention, since it is a party to the Convention and, more importantly, it already exercised its option to draw archipelagic baselines.

Experts on the Law of the Sea have advocated various recommendations for the resolution of the conflict. The most conservative view states that the ratification made by the Philippine government is null and void since it ran contrary to the Philippine Constitution. If this view is adopted, the Philippines will exist on its own, oblivious to the events around it, with its islands treated as separate entities with their respective internal waters, territorial and high seas. Therefore, instead of gaining more rights, the Philippines would lose the little she has.

Although others do not believe that the ratification was void, they opt to abandon the Convention and merely rely on customary international law. This means that the Philippines will treat each island as having its own three mile

[213] *Id.*



territorial sea, or granting that the 12 mile limit has attained the status of a custom, then each island will have its own 12 mile territorial sea.

This view or option should not be entertained because even with the increased area of 12 miles, there are still some islands of the Philippines which are separated by at least 29 miles of water. Thus, there will be pockets of high seas which measure more or less 15 miles.

Another point to consider in adopting customary international law is the image the Philippines will project once it abandons the treaty. The Philippines is a developing country and it aims to attract investors from around the globe to put their money in the Philippines. An abandonment of the Convention will give other countries reason to pull out their investments since the Philippines will be known as a fickle-minded country which cannot honor its obligations and which chooses the coward's way out.

Moreover, it is proposed that the Philippines rely on the doctrine enunciated in the *Anglo-Norwegian Fisheries* case which considered as internal waters the waters within the baselines. Although judicial decisions have had decisive influence on general international law, some discretion is needed in handling these decisions. This is due to the fact that, strictly speaking, the Court does not observe a doctrine of precedent while, at the same time, it strives to maintain judicial consistency. In fact, there have been instances wherein the International Court declined to apply judicial precedents due to the difference in the circumstances involved. "In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carrier Case.[214]

There is a stark difference between the *Fisheries* case and the present Philippine situation which warrant the non-applicability of the doctrine in the *Fisheries* case. It is very essential to remember that Norway is considered as a coastal archipelago while the Philippines is an outlying archipelago. This geographical difference is what was referred to earlier. Coastal archipelagos are those situated so close to a mainland that they may reasonably be considered as part and parcel thereof, while outlying archipelagos are groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered independent whole rather than as forming part of an outer coastline of the mainland.[215] Since Norway has less water between its archipelago and mainland than the Philippines has between and surrounding its islands, it is much more acceptable to treat the waters of Norway as internal waters.

On the other side of the spectrum, are the liberalists who propose an amendment to the Constitution and other Philippine laws. The Filipino people, most especially the Philippine Government should wean themselves from the idea that this particular proposal would work to the disadvantage of the Philippines. In fact, looking at all the options available, this is perhaps the best solution to the problem.

[214] *Id.* at 20-23.

[215] *Concepi, supra* note 27, at 9-10.

Since there are no historic waters to speak of, if indeed what the American officials say is correct, there is likewise no legacy of waters to hold on to. Without the Treaty of Paris to rely on, the present Philippine claim over its internal and territorial waters is no more than an empty right based only on municipal law bereft of legal force before the international community. To protect its national sovereignty and territory, the Philippines must respond to the demands set forth by the Convention to which it is a signatory. Otherwise, the Philippines would be brought back to its status prior to the acceptance of the archipelagic principle. This means that the Philippines would have as many three mile territorial seas as there are islands in its archipelago. The Philippines cannot again allow itself to be dismembered.

It is wiser for the Philippines to sacrifice a part of its sovereignty by classifying its present internal waters into archipelagic waters and subjecting them to the rights of innocent passage and archipelagic sea lanes passage, than risk losing a large portion of said waters by having pockets of high seas between the Philippine islands.

## VIII. CONCLUSION AND RECOMMENDATION

The Philippine Delegation to the Third United Nations Convention on the Law of the Sea (UNCLOS), the experts on the Law of the Sea, the distinguished gentlemen, Mr. Cesar Virata and Mr. Carlos Romulo, the members of the Batasang Pambansa were all aware of the obligations of the Philippines to the international community under the UNCLOS. They have, time and again, emphasized that the sacrifices the Philippines would make under the Convention would be minimal compared to the benefits it would reap.

Likewise, the framers of the 1987 Constitution were not ready to abandon the Convention. In fact, during the proceedings of the 1987 Constitutional Commission, Commissioner Nolledo rejected the proposal of Ambassador Arreglado to abandon the Convention due to the "nebulous" meaning it gave to internal waters. However, although the text presented by Nolledo which explicitly mentioned the Convention on the Law of the Sea was not accepted, there is nothing in the debates which shows rejection of the Convention. The debates indicate that very little attention was given to the Law of the Sea because the members of the Commission became engrossed in the emotional topic of Sabah.[216]

Since the Philippines is not willing to relinquish its rights under the Convention, it has no other option but to comply with the obligations established therein. The Philippines has always acknowledged its responsibilities. This is strengthened by the fact that the ratification made by the Batasang was independent of the Declaration made by the Philippines in 1982. In effect, the Philippine Government was aware that the subsequent nullity of the Declaration will not render void its ratification and the benefits and obligations established by the Convention.

However, the Philippines must stop making empty promises that it will harmonize its legislation with the Convention. It must stop skirting the issue and

[216] BERNAS, THE INTENT OF THE 1986 CONSTITUTION WRITERS (1995).



meet the problem head on. This continuous hesitation to face the problem, has led to inconsistent practices adopted by the Philippines. There have been instances when the Philippine Government has apprehended foreign vessels which have entered the Philippine internal waters without prior authorization from the Philippine Government. But there have also been instances when the absence of prior authorization did not lead to arrest, and these foreign vessels were able to pass through the internal waters without difficulty. As mentioned earlier, "the Philippines appears to conform in practice with the navigational regime set forth in the Convention by allowing foreign warships (submerged) and other ships to pass without notification or authorization through the routes customarily used for international navigation within its waters."[217]

The Philippines must take a firm stand by taking into consideration the interests of both the Filipino people and the international community. In taking its stand, the Philippine Government must be ready to meet with opposition either from the local or international front. But any kind of opposition should not lead to a change of mind. The Philippine Government must be confident with its position.

As a result of all the foregoing discussions, it is proposed that the Philippines, at an opportune, time should amend its present constitution and adopt the regime of archipelagic waters instead of limiting itself solely to internal waters concerning those bodies of water within the archipelagic baselines. The amendment should provide thus: "...The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the *archipelagic waters of the Philippines, and within these archipelagic waters are the internal waters delimited in accordance with the rules set by international law.*"

It is admitted that an amendment to the Constitution can be very hard to achieve and may entail a long and tedious process due to the fact that the Filipinos treasure their heritage and as Commissioner Nolledo said, "are extremely jealous of their waters." As a result, it is best to use the "package deal" approach. In other words, the amendment of the national territory provision will accompany other proposed constitutional amendments which the Filipinos themselves are desperate to have approved.

If an amendment to the Constitution is truly undertaken, it should be followed by an amendment to Republic Act 5446, the law which defines the baselines of the Philippine Archipelago. This will not be a very difficult task due to the Senate Bill No. 206 filed by former Senator Leticia Ramos Shahani on 18 November 1987. Under this proposed bill, all the archipelagic baselines should conform to the limits prescribed by the Convention. The three baselines, which previously exceeded the maximum limit of 125 nautical miles set by the Convention, have been adjusted, and under this bill, the longest baseline measures 107.21 nautical miles. This bill should be taken from the archives of Congress and filed again before the present body of lawmakers.

The proposal is revolutionary and, to the nationalists and the average Filipino, may seem to be anti-Filipino and should, therefore, be rejected. However, national-

[217] *Archipelagic Waters, supra* note 12, at 24-25.

ism should not be given a very narrow definition. Nationalism should be equated with any action which will preserve the heritage, territory and sovereignty of the Filipino people. This means choosing that which gives more rights to the Philippines, not one which diminishes what it now possesses. From what has been said, the Philippines stands to gain more by adhering to the Convention. Moreover, giving more navigational and maritime rights to foreigners does not necessarily and automatically deprive the Philippines of sovereignty over its waters. The exercise of control over the entry of ships through the waters within the baselines will be minimized, but the Philippines continues to maintain the power to order any vessel exercising non-innocent passage to leave the territorial premises of the Philippines and to take any further action against said state provided said action is not through force or violence .

From the previous discussions on the twin rights of innocent passage and archipelagic sea lanes passage, it can be concluded that the Philippines is permitted to enact rules and regulations concerning these rights without, however, modifying or curtailing them. To maximize the power of this right, the Philippines should have a very effective enforcement mechanism. A committee should be formed to study the rules and regulations to be imposed, and to implement said rules. The members of the committee should be vigilant to the latest developments and the status of the vessels exercising the twin rights.

In order to further protect its interests, the Philippines should enter into agreements with the other Southeast Asian nations, especially the other archipelagic states, concerning measures to prevent pollution of their waters and to enforce their individual legislations regarding environmental and security concerns.

Finally, it must be remembered that international law is not sacrosanct. It is open to developments and amendments. It is not static. Therefore, what may be applicable today, may not necessarily be applicable tomorrow. The Philippines should not stop in campaigning for the further development of the archipelagic theory. After all, it is a novel principle which is open to change.

Considering that an amendment of the Constitution may take a long time, what should the Philippines do in the meantime? The Philippine Legislature should enact a law which will restrict or limit the sovereignty of the Philippines over its "internal waters." This limitation will consist of waiving the right of requiring authorization from either the Department of Foreign Affairs of the Philippine Coast Guard prior to the entry of foreign ships into Philippine internal waters. In short, the right of innocent passage and archipelagic sea lanes passage will be granted to all types of ships of all countries. Such power of the legislature is derived from the fact that the Philippines, being a sovereign state has the power to restrict its sovereignty both over its land area and its waters. In fact, this doctrine was clearly explained in the case of *Reagan v. Commissioner of Internal Revenue*:

> It is to be admitted that any state may, by its consent, express or implied, submit to a restriction of its sovereign rights. There may thus be a curtailment of what otherwise is a power plenary in character. That is the concept of sovereignty as autolimitaion, which, in the succinct language of Jellinek, "is the property of a state-force due to which it has the exclusive capacity of legal self-determination and self-restriction." A state then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence.



> Its laws may as to some persons found within its territory no longer control. Nor does the matter end there. It is not precluded from allowing another power to participate in the exercise of jurisdictional right over certain portions of its territory. If it does so, it by no means follows that such areas become impressed with an alien character. They retain their status as native soil. They are still subject to its authority. Its jurisdiction may be diminished, but it does not disappear. So it is with the bases under lease to the American armed forces by virtue of the military bases agreement of 1947. They are not and cannot be foreign territory.
>
> Decisions coming from petitioner's native land, penned by jurists of repute, speak to that effect with impressive unanimity. We start with the citation from Chief Justice Marshall, announced in the leading case of *Schooner Exchange v. M'Faddon*, an 1812 decision: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the same extent in that power which could impose such restriction." ... "All exceptions therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source...."
>
> As a matter of fact, the eminent commentator Hyde in his three-volume work on International Law, as interpreted and applied by the United States, made clear that not even the embassy premises of a foreign power are to be considered outside the territorial domain of the host state. Thus: "The ground occupied by an embassy is not in fact the territory of the foreign State to which the premises belong through possession or ownership. The lawfulness or unlawfulness of acts there committed is determined by the territorial sovereign. If an attaché commits an offense within the precincts of an embassy, his immunity from prosecution is not because he has not violated local law, but rather for the reason that the individual is exempt from prosecution. If a person is not so exempt, or whose immunity is waived, similarly commits a crime therein, the territorial sovereign, it secures custody of the offender, may subject him to prosecution, even though its criminal code normally does not contemplate the punishment of one who commits an offense outside the national domain. It is not believed therefore, than an ambassador himself possesses the right to exercise jurisdiction, contrary to the will of the State of his sojourn, even within his embassy with respect to acts there committed. nor is there apparent at the present time any tendency on the part of the States to acquiesce in his exercise of it.[218]

It is, therefore, suggested that the law contain the following provisions and take this form:

AN ACT TO GRANT FOREIGN VESSELS
THE RIGHTS OF INNOCENT PASSAGE
AND ARCHIPELAGIC SEA LANES PASSAGE
THROUGH PHILIPPINE INTERNAL WATERS

WHEREAS, the Constitution of the Republic of the Philippines proclaims the national territory as comprising the Philippine Archipelago, with all the islands

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[218] 30 SCRA 968, 973-75 (1969).

and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas;

WHEREAS, the Constitution treats the waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions as the internal waters of the Philippines;

WHEREAS, the Philippines exercises absolute sovereignty over these internal waters and thus the right of innocent passage is not granted;

WHEREAS, the Philippines signed the United Nations Convention on the Law of the Sea on 10 December 1982, and subsequently ratified said Convention on 8 May 1984;

WHEREAS, under the United Nations Convention on the Law of the Sea, the regime of archipelagic waters was created which includes the internal waters of the Philippines under the Constitution and where the rights of innocent passage and archipelagic sea lanes passage are granted;

WHEREAS, the Constitution declares as among its Principles that the Philippines adopts the generally accepted principles of international law as part of the law of the land;

WHEREAS, the Philippines is obliged to harmonize its laws with the provisions of the United Nations Convention on the Law of the Sea. Now, therefore,

*Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:*

SECTION 1. By virtue of its sovereign power, the Philippines grants all vessels of all nations the right of innocent passage through its internal waters, those waters landward of the baselines.

SECTION 2. In line with the right of innocent passage, the Philippines likewise grants to all vessels of all nations the right of archipelagic sea lanes passage through the routes specifically designated by the Philippine Government for said purpose.

SECTION 3. In the event that the passage of said foreign ships be deemed as non-innocent according to the criteria and guidelines set forth by the United Nations Convention on the Law of the Sea, the Philippine Government reserves the right to arrest the vessel including its crew.

SECTION 4. This Act shall take effect upon its approval.

In short, by enacting this law or amending the Constitution, the Philippines will not be physically giving up part of its territory, it will only be restricting the exercise of its sovereignty over the areas it is claiming as internal waters. In harmonizing its laws with the provisions of the Convention, the Philippines will be adopting an act of self-preservation, rather than an act of disunity or dismemberment.