

Chapter XIII

Archipelagic Sea Lanes Passage

Criteria

Most of the essential elements of the transit passage regime in non-archipelagic international straits apply in straits forming part of an archipelagic sea lane.¹ This right exists regardless of whether the strait connects high seas/EEZ with archipelagic waters (e.g., Lombok Strait) or connects two areas of archipelagic waters with one another (e.g., Wetar Strait).² All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lanes passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via archipelagic sea lanes.³ Archipelagic sea lanes include all routes normally used for international navigation and overflight, whether or not designated by the archipelagic nation.⁴ An archipelagic State may designate sea lanes and air routes suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters.⁵ Archipelagic sea lanes “shall include all normal passage routes . . . and all normal navigational channels . . .”⁶ Each sea lane is defined by a continuous line from the point of entry into the archipelago to the point of exit.⁷ Archipelagic sea lanes must conform to generally accepted international regulations,⁸ and shall be referred to the International Maritime Organization (IMO) as the “competent international organization with a view to their adoption.”⁹ None have yet been submitted to the IMO. When sea lanes have been designated, ships and aircraft in archipelagic sea lanes passage are required to remain within 25 miles to either side of the axis line and must approach no closer to the coastline than 10 percent of the distance between the nearest islands.¹⁰

Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of navigation and overflight for the sole purpose of continuous and expeditious transit through archipelagic waters, in the normal modes of operation, by the ships and aircraft involved.¹¹ This means that submarines may transit while submerged, and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft.¹² The right of archipelagic sea lanes passage cannot be impeded, or suspended by the archipelagic nation for any reason.¹³ The right of archipelagic sea lanes passage is recognized in the legislation of less than half the States that have claimed archipelagic status: Antigua and Barbuda, Fiji, Kiribati, St. Vincent and the Grenadines, Solomon Islands and Tuvalu,¹⁴ but not by the other states claiming archipelagic status: Cape Verde, Comoros, Indonesia,

Marshall Islands, Papua New Guinea, Philippines, Sao Tome and Principe, Trinidad and Tobago, and Vanuatu.

Innocent passage applies in other archipelagic waters seaward of the internal waters of the islands of the archipelago.¹⁵

If a State meets all the criteria but has not claimed archipelagic status, then high seas freedoms exist in all maritime areas outside the territorial seas of the individual islands; transit passage applies in straits used for international navigation; and innocent passage applies in other areas of the territorial sea.

Excessive Claims

In response to statements made during the December 1982 plenary meetings of the Third UN Conference on the Law of the Sea (UNCLOS III) asserting that the right of archipelagic sea lanes passage is a new right and that it may be exercised only in designated lanes, on March 8, 1983, the United States exercised its right of reply stating:

A small number of speakers [*e.g.*, Iran, 17 Official Records 106, at para. 69] asserted that archipelagic sea lanes passage . . . is a “new” right reflected in the Convention adopted by the Conference. To the contrary, long-standing international practice bears out the right of all States to transit . . . waters which may be eligible for archipelagic status. Moreover, these rights are well established in international law. Continued exercise of these freedoms of navigation and overflight cannot be denied a State without its consent.

One speaker [Philippines, 17 Official Records 69, at para. 52] also asserted that archipelagic sea lanes passage may be exercised only in sea lanes designated and established by the archipelagic State. This assertion fails to account for circumstances in which all normal sea lanes and air routes have not been designated by the archipelagic state in accordance with Part IV, including articles 53 and 54. In such circumstances, archipelagic sea lanes passage may be exercised through all sea lanes and air routes normally used for international navigation. The United States regards these rights as essential components of the archipelagic regime if it is to find acceptance in international law.¹⁶

In conjunction with the deposit of its instrument of ratification of the 1982 LOS Convention on May 8, 1984, the Government of the Philippines asserted certain rights over archipelagic straits inconsistent with international law. The Philippines stated its understanding that:

The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.¹⁷

The United States protested as follows:

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

...

The Government of the United States notes also the statement of the Government of the Republic of the Philippines respecting the sovereignty of the Philippines over sea lanes subject to the regime of archipelagic sea lanes passage. A coastal State properly claiming archipelagic waters may lawfully exercise sovereignty over archipelagic sea lanes through such waters, if such sea lanes encompassing all normal passage routes for international navigation are designated in accordance with international law, and if the regime of archipelagic sea lanes passage is applied. The Government of the United States wishes to point out, however, that customary international law, as reflected in the 1982 Law of the Sea Convention, only permits such a coastal State to apply to vessels and aircraft engaged in archipelagic sea lanes passage specified types of legislation concerning navigational safety and maritime traffic regulation, pollution prevention and control, prevention of unauthorized fishing, and prevention of certain acts in contravention of customs, fiscal, immigration or sanitary legislation. Furthermore, such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of archipelagic sea lanes passage.¹⁸

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

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

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

The Philippine Government, therefore, wishes to assure the Australian Government and the States Parties to the Convention that the Philippines will abide by the provisions of said Convention.¹⁹

In 1987, the United States sought from the Government of **Trinidad and Tobago** clarification of certain portions of its Archipelagic Waters and Exclusive Economic Zone Act, 1986, in relevant part as follows:

First, although sections 10–13 of Act Number 24 are generally in accord with Part IV of the 1982 Law of the Sea Convention, and recognize the right of innocent passage in claimed archipelagic waters, the legislation does not expressly recognize the right of archipelagic sea lanes passage as provided in customary international law and reflected in article 53 of the Law of the Sea Convention. The United States notes that Section 32 of the legislation enables the President to make regulations, “for the designation of archipelagic sea-lanes [passage].” . . . The United States further notes that the right of archipelagic sea lanes passage, as reflected in article 53 of the 1982 Convention on the Law of the Sea, is enjoyed by all States, in normal passage routes for international navigation and overflight, through and over archipelagic waters and the adjacent territorial sea. Because the right of archipelagic sea lanes passage is an indispensable one which is a necessary concomitant to an archipelagic State juridical regime, the United States would look forward to a clarification by the Government of Trinidad and Tobago that the legislation in question clearly provides for the right of archipelagic sea lanes passage.²⁰

On July 9, 1987, the Ministry of External Affairs of Trinidad and Tobago replied, in part:

With respect to the clarification sought by the Embassy that the legislation in question clearly provides for the right of archipelagic sea lanes passage, it is advised that paragraphs 1, 2 and 12 of Article 53 of the Convention provide that 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; that all ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes; and that if an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

The foregoing provisions are therefore explicit in that the right of archipelagic sea lanes passage is conditioned by certain actions either being taken or not being taken by the archipelagic State. In this respect, no action has been taken so far by the Government of the Republic of Trinidad and Tobago to designate any such sea lanes and air routes. It is intended that regulations made in this regard under section 32(5) of the Act will take into account article 53 of the 1982 United Nations Convention on the Law of the Sea to which Trinidad and Tobago is a contracting State.²¹

Notes

1. LOS Convention, article 54, applying *mutatis mutandis* articles 39 (duties of ships and aircraft during their passage), 40 (research and survey activities), and 42 and 44 (laws, regulations and duties of the bordering State relating to passage).

2. OFFSHORE CONSULTANTS, INC., NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT: GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES (L.M. Alexander, ed. Final Report under Defense Supply Service Contract 903-84-C-0276, Dec. 1986) at 155-56.

3. LOS Convention, article 53.

4. *Id.*, article 53(12).

5. *Id.*, article 53(1).

6. *Id.*, article 53(4).

7. *Id.*, articles 53(4), 53(5) & 53(12).

8. *Id.*, article 53(8).

9. *Id.*, article 53(9).

10. *Id.*, article 53(5).

11. *Id.*, article 53(3).

12. U.S. Department of the Navy, *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A)/FMFM 1-10 (1989) [hereinafter NWP 9 (Rev. A) ANN. SUPP.], para. 2.3.4.1.

13. LOS Convention, articles 54 & 44.

14. See U.N. LOS: Practice of Archipelagic States 8 (Antigua and Barbuda), 38 (Fiji), 59 (Kiribati), 89 (St. Vincent and the Grenadines), 103 (Solomon Islands), and 129 (Tuvalu). Australia has stated that it accepts the archipelagic regime set forth in Part IV of the LOS Convention. 11 Aust. Y.B. Int'l L. 238 (1991) (letter from Foreign Minister Hayden to the Australian Financial Review, Dec. 24, 1985).

15. LOS Convention, article 52(1). Consequently, "submarines must remain on the surface and fly their national flag. Any threat or use of force directed against the sovereignty, territorial integrity, or political independence of the archipelagic nation is prohibited. Launching and recovery of aircraft are not allowed, nor may weapons exercises be conducted. The archipelagic nation may promulgate and enforce reasonable restrictions on the right of innocent passage through its archipelagic waters for reasons of customs, fiscal, immigration, fishing, pollution, and sanitary purposes. [1982 LOS Convention, articles 52(1), 19(2), 20 & 21.] Innocent passage may be suspended temporarily by the archipelagic nation in specified areas of its archipelagic waters when essential for the protection of its security, but it must first promulgate notice of its intentions to do so and must apply the suspension in a nondiscriminating manner. [1982 LOS Convention, article 52(2).] There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes." NWP 9A (Rev. A) ANN. SUPP. at para. 2.3.4.2.

16. U.N. Doc. A/CONF.62/WS/37, 17 Official Records of the Third U.N. Conference on the Law of the Sea 244 (citations added).

17. The declaration made by the Government of the Philippines upon deposit of its instrument of ratification on May 8, 1984, may be found in U.N., Status of the United Nations Convention on the Law of the Sea 37. See also Chapter IX, text following n. 17. The text of the Philippine declaration referred to but not quoted above is as follows:

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

...

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 sovereignty, such as the Kalayaan Islands, and the waters appurtenant thereto

...

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.

18. Diplomatic Note delivered January 29, 1986, from American Embassy Manila, pursuant to instructions in State Department telegram 115912, Apr. 17, 1985. American Embassy Manila telegram 03261, Jan. 29, 1986.

19. U.N. Current Developments in State Practice No. II, at 98; 12 Aust. Y.B. Int'l L. 385 (1992).

20. Diplomatic Note No. 34 delivered in March 1987, from American Embassy Port of Spain, pursuant to instructions contained in State Department telegram 075631, Mar. 14, 1987. American Embassy Port of Spain telegram 00822, Mar. 23, 1987.

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21. Diplomatic Note No. 743 dated July 9, 1987, from the Ministry of External Affairs of Trinidad and Tobago, reported in American Embassy Port of Spain telegram 01973, July 14, 1987. Trinidad's Archipelagic Waters and Exclusive Economic Zone Act, 1986, may be found in U.N. Current Developments in State Practice No. II, at 36-47; and U.N. LOS: Practice of Archipelagic States 112-23.