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## **The Archipelagic Status Reconsidered in light of the *South China Sea* and *Düzgit Integrity Awards*<sup>1</sup>**

**Alina MIRON<sup>2</sup>**

*Abstract: The archipelagic regime, one of the novel aspects of UNCLOS, is a quantum genris, combining characteristics of internal waters, territorial sea and straits used for international navigation. The present article assesses the relevant UNCLOS provisions, by themselves, and in light of the South China Sea and Düzgit Integrity awards. The former clarifies the conditions under which a State may draw archipelagic baselines, the second postulates that, beyond various obligations expressly provided for in the Convention, the archipelagic State must exercise its sovereignty respecting the principle of reasonableness and proportionality. It remains to be seen if these decisions correctly assess the state of the law and if their progressive development dimension will ripen into consensual interpretation of Part IV UNCLOS.*

### ***Table of contents***

#### § 1. Conditions Set Out for the Validity of Claims to an Archipelagic Status

##### A. The Necessity of a Formal Declaration

##### B. A Faculty Limited to Archipelagic States

##### C. The Validity of Archipelagic Baselines

#### § 2. The Regime of Archipelagic Waters

##### A. A Reasonable Exercise of Sovereignty

##### B. The Protection of Non-Navigational Rights and Interests of Third Parties

##### 1° Similarities and Differences between Article 51 and Article 47, paragraph 6

##### 2° Traditional Fishing Rights

##### C° Navigational Rights and Obligations: a Comparison between Innocent Passage and Archipelagic Sea Lanes Passage

1. The archipelagic claim and the freedom of the high seas have always entertained a conflictual relationship: the archipelagic status meaning full and unimpaired sovereignty over the large sea areas connecting the islands, it reduces the areas where the principle of *mare liberum* is applicable. The stakes are high particularly in the waters off South East Asia, where Indonesia's and the Philippines' claims include areas of high density of commercial navigation.

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<sup>1</sup> This contribution is a modified and updated version of an article published in French, in Forteau, M. *et al.*, (eds.), *Traité de droit international de la mer*, Paris, Pedone, 2018.

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2. Unsurprisingly, with its more than 14,000 islands,<sup>3</sup> Indonesia has always been linked to the evolution of the law of the sea in this respect. Interestingly, Grotius' *Mare liberum* of 1609, wrote upon a request of legal advice from Dutch East India Company after Santa Catarina's incident,<sup>4</sup> served justifying the end of the Portuguese trading monopoly in the Malucca archipelago. Centuries later, Indonesia's constant claims to an archipelagic status led to the introduction in UNCLOS of Part IV (Articles 46 to 54) concerning the rights and duties of Archipelagic States.<sup>5</sup> Their claim to a particular status reflects the deep connection between the land and the sea, essential to the identity of these States, but also essential for meeting their security concerns and their development needs.

3. The history of the introduction of the archipelagic status and regime has been comprehensively recounted elsewhere.<sup>6</sup> In a nutshell, prior to the 1951 seminal judgment of the ICJ in the *Anglo-Norwegian Fisheries* case, opposing views were expressed by States and the academia on the possibility for archipelagos to generate sovereignty over the waters surrounding and connecting them. The World Court's judgment established the possibility for States to draw straight baselines connecting the islands and rocks bordering the coast and to delineate their territorial sea from these lines. The waters thus enclosed enjoyed the status of internal waters.<sup>7</sup>

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<sup>3</sup> CIA, "Indonesia", The World Factbook, gives a figure of 13,466 (available online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>, last accessed on 17 October 2017, but the precise number varies according to the sources, and the inclusion or not of low-tide elevations.

<sup>4</sup> Santa Catarina was a Portuguese ship sailing from Macao to Malacca, with a great deal of wealth aboard. It was seized by three Dutch ships, off the coast of Singapore. The legality of this prize being fiercely contested, the Dutch East India Company called upon Grotius to draft a polemical defence of the seizure (cf. Y. Tanaka, *International Law of the Sea*, 2<sup>nd</sup> ed, CUP, 2015, p. 17; A. Kirchner, "Law of the Sea, History of", *MPEPIL* online, MN 10).

<sup>5</sup> For a comprehensive account on Indonesia's impulse for the development of the archipelagic status, see John G. Butcher and R.E. Elson, *Sovereignty and the Sea: How Indonesia Became an Archipelagic State*, NUS Press Singapore, 2017, 530 pp.

<sup>6</sup> J. Evensen, "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos", UN doc. A/CONF.13/18 (1957), *LoS Conferences, Official Documents*, vol. I, pp. 289-295, available online at: [http://legal.un.org/diplomaticconferences/lawofthesea-1958/vol/english/PrepDocs\\_vol\\_I\\_e.pdf](http://legal.un.org/diplomaticconferences/lawofthesea-1958/vol/english/PrepDocs_vol_I_e.pdf), last accessed on 17 October 2017; M. D. Santiago, "The Archipelago Concept in the Law of the Sea: Problems and Perspectives", *Philippine Law Journal*, vol. 49, 1974, pp. 322-336; M. Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea*, Martinus Nijhoff Publishers, 1993, pp. 53-97; A. Havas Oegroseno, "Archipelagic States: from Concept to Law", in D. Attard *et al.* (eds.), *The IMLI Manual on International Maritime Law. Volume I: The Law of the Sea*, OUP, 2014, pp. 125-136.

<sup>7</sup> ICJ, *Anglo-Norwegian Fisheries, Reports 1951*, pp. 128-129.

4. Inspired by this judgement, Indonesia and the Philippines attempted to introduce in the 1958 Geneva Conventions a similar principle for oceanic archipelagos. The Djuanda Declaration, of the then Prime-minister of Indonesia (1957),<sup>8</sup> is for the archipelagic status what was the Truman proclamation for the regime of the continental shelf: the starting point of the development of a customary rule. The declaration met with protests from major maritime powers and from Indonesia's neighbours. The time before the adoption of the convention proved too short to reconcile the opposing views, thus no provision relating to archipelagos found its way in the 1958 Geneva Conventions. This failure did not prevent Indonesia or the Philippines from declaring themselves archipelagic States in 1960, respectively 1961, a practice aimed at enhancing the chances for an international recognition of the archipelagic status.<sup>9</sup>

5. During the third UN Conference on the Law of the Sea, the maritime powers no longer opposed these claims as a matter of principle, but introduced amendments protecting their interests to the proposals put forward by Indonesia, the Philippines, Mauritius and Fiji.<sup>10</sup> The compromise was reached by limiting this particular regime to archipelagic States, defined as States "constituted wholly by one or more archipelagos and may include other islands" (Art. 46 (1) UNCLOS),<sup>11</sup> and by the introduction of a series of provisions preserving the navigational rights of the maritime powers.

6. If, at the time of its adoption, Part IV of UNCLOS clearly fell within the progressive development of international law, meanwhile it has become "a norm-creating provision which

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<sup>8</sup> The Declaration states: "all waters surrounding, between and connecting the islands . . . are parts of the internal or national waters . . . Innocent passage for foreign ships in these internal waters is granted so long as it is not prejudicial to or violates the sovereignty and security of Indonesia" (quoted in H. Caminos and V. P. Cogliati-Bantz, *The Legal Regime of Straits. Contemporary Challenges and Solutions*, CUP, 2015, p. 174).

<sup>9</sup> For Indonesia: Act No. 4 Concerning Indonesian Waters, 18 Feb. 1960, reproduced in DOALOS, *Practice of Archipelagic States*, 1992, pp. 45-53; for the Philippines: Republic Act No. 3046, An Act to Define the Baselines of the Territorial Sea of the Philippines, 17 June 1961, *ibid.*, pp. 75-83. In the *Pulau Ligitan and Pulau Sipadan* case, Indonesia clearly explained that the "Act of 1960 was prepared in some haste, which can be explained by the need to create a precedent for the recognition of the concept of archipelagic waters just before the Second United Nations Conference on the Law of the Sea, which was due to be held from 17 March to 26 April 1960." (ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Rep 2002, p. 680, para. 130).

<sup>10</sup> See Virginia Center for Oceans Law and Policy, *United Nations Convention on the Law of the Sea 1982. A Commentary*, Martinus Nijhoff Publishers, vol. II, 1993, pp. 401-403 (hereafter *Virginia Commentary*).

<sup>11</sup> On the distinction between archipelagic States and dependent archipelagos, see L. Lucchini, "L'Etat insulaire : l'impossible unité juridique", *RCADI*, vol. 285, 2000, pp. 277-288.

has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention”.<sup>12</sup> Several arguments stand for the customary value of Part IV provisions.

7. *First*, States have generally complied with these provisions, which shows that there is an *opinio juris* in favour of their binding character. Indonesia sought to bring its national legislation in conformity with them, even before the Convention entered into force.<sup>13</sup> The Philippines, which made a declaration hardly compatible with the Convention,<sup>14</sup> seek to minimize its effect potentially incompatible with the Convention.<sup>15</sup> More generally, the validity of proclamations of the archipelagic status and the domestic legislation giving effect

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<sup>12</sup> ICJ, *North Sea Continental Shelf*, ICJ Rep 1969, p. 41, para. 71. In the same vein, C. J. Piernas, “Archipelagic Waters”, in R. Wolfrum *et al.* (dir.), *The Max Planck. Encyclopedia of Public International Law*, vol. I, MN 23, available online at <http://opil.ouplaw.com/home/EPIL> (last accessed on 17 October 2017) (hereafter *MPEPIL*).

<sup>13</sup> For an analysis of the changes in Indonesian legislation, see US State Department, *Indonesia: Archipelagic and other Maritime Claims and Boundaries, Limits in the sea*, No. 141, 2014.

<sup>14</sup> It states that: “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.

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.” The declaration basically entails that the Philippines could unilaterally modify the obligations arising from the Convention and suggests that the archipelagic status is equivalent to that of internal waters. Australia, Germany, Belarus, Netherlands, United Kingdom, Russia and Ukraine made objections to it.

<sup>15</sup> On the international level, the Philippines reacted to Australia’s objection in the following terms: “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 States Parties to the Convention that the Philippines will abide by the provisions of the said Convention.” (declaration made on 26 Oct. 1988, doc. UN ST/LEG/SER.E/25, vol. II, pp. 370 et 379). The statement makes clear that the Philippines do not consider that they hold different rights from the Convention and from general international law. In 2009, the Philippines modified its domestic legislation to bring it in conformity with the Convention (US State Department, *Indonesia: Archipelagic and other Maritime Claims and Boundaries, Limits in the sea*, No. 141, *The Philippines*, 2014, pp. 4-5). A 2011 decision of the Supreme Court of the Philippines recalled that UNCLOS provisions on innocent passage apply in Philippine’s archipelagic waters and that municipal law must comply with the Convention: “In the absence of municipal legislation, international law norms, now codified in UNCLOS III, operate to grant innocent passage rights over the territorial sea or archipelagic waters, subject to the treaty limitations and conditions for their exercise. Significantly, the right of innocent passage is a customary international law, thus automatically incorporated in the corpus of Philippine law. No modern State can validly invoke its sovereignty to absolutely forbid innocent passage that is exercised in accordance with customary international law without risking retaliatory measures from the international community.” (*Prof. Merlin M. Magallona, et.al. v. Hon. Eduardo Ermita, in his capacity as Executive Secretary, et al.* G.R. No. 187167, 16 July 2011, available online at <http://sc.judiciary.gov.ph/jurisprudence/2011/august2011/187167.html> (last accessed on 17 October 2017).

to them are always tested against the conditions set out by UNCLOS, which stands for evidence of a generalized *opinio juris*. Objections to archipelagic claims based on their incompatibility lead the interested States to modify their legislation to bring it into compliance with the Convention.<sup>16</sup>

8. *Second*, several States proclaimed their archipelagic status prior to the entry in force of UNCLOS<sup>17</sup> or before its ratification by them,<sup>18</sup> which shows that their claims are founded in general international law.<sup>19</sup> Up to the present, 22 States have proclaimed their archipelagic status,<sup>20</sup> 14 of which prior to the entry into force of the Convention.

9. *Third*, States which have not ratified UNCLOS recognize nonetheless the validity and the international opposability of archipelagic proclamations, provided that the conditions set out in Part IV are met.<sup>21</sup> This is for instance the position of the United States, as made public even before the Convention entered into force: “Although the 1982 Law of the Sea Convention is not yet in force, the archipelagic provisions reflect customary international law and codify the only rules by which a nation can now rightfully assert an archipelagic claim.”<sup>22</sup> Naturally, on this very ground, they can also challenge the validity of archipelagic proclamations or the measures adopted by the coastal archipelagic States, when exercising their sovereignty over the archipelagic waters.

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<sup>16</sup> For examples, see ILA, Baselines under the International Law of the Sea Committee, Working Session Report Washington 2014, paras. 76-78, available online at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1028> (last accessed on 17 October 2017). The final report is expected in 2018.

<sup>17</sup> Antigua and Barbuda, Cape Verde, Fiji, Grenade, Papua New Guinea, Indonesia, the Solomon Islands, the Philippines São Tomé and Príncipe, Vanuatu (see *Practice of Archipelagic States*, *op. cit.* note 9 and ILA, Baselines under the International Law of the Sea Committee, Working Session Report Washington 2014? available online at: <http://www.ila-hq.org/index.php/committee-single>, last accessed on 18 October 2017).

<sup>18</sup> The Maldives for instance.

<sup>19</sup> In the same vein, K. Baumert and B. Melchior, “The Practice of Archipelagic States: A Study of Studies”, *Ocean Development and International Law*, vol. 46, 2015, no. 1, pp. 76-77, notes 8 et 9. (the study by L. Baumert and B. Melchior is in fact a summary of the studies published by the US Department of State- see fn. 45 *infra*).

<sup>20</sup> See DOALOS, *Table of claims to maritime jurisdiction* (as of 15 July 2011), available online at: [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf) (last accessed on 17 October 2017).

<sup>21</sup> *Ibid.*, p. 75.

<sup>22</sup> David H. Small, Assistant Legal Adviser, U.S. Department of State, Letter of 4 April 1989, quoted in *Digest of United States Practice in International Law 1981–1988*, p. 2061. See also the position articulated by the US Department of State, which clearly refers to the conditions established by UNCLOS for asserting the validity of archipelagic claims, even in case of States which are/ were not party to the Convention (*United States Responses to Excessive National Maritime Claims, Limits in the Seas*, No. 112, 1992, pp. 48-51, available online at: <https://www.state.gov/e/oes/ocns/opa/c16065.htm>, last accessed on 17 October 2017).

10. If the conventional rules could successfully ripen in customary rules, this is largely due to the realism and viability of the compromise reached during the third conference. The clarity of the conditions of validity of archipelagic proclamations, set out in Articles 46 and 47, stand at the basis of this successful compromise. The first part of this study will revisit them in light of the recent jurisprudence. The second part shows that the success is more mitigated insofar as the regime for the use of archipelagic waters is concerned. The Convention attempts to find the balance between the sovereignty of the archipelagic States and the rights of the third parties (States, but also private parties). The relevant provisions (Articles 49, 51, 52, 53 and 54) are expressed in ambiguous terms and leave much space to negotiations among the interested States. Even if the recent *South China Sea* and *Düzgit Integrity* awards shed some light upon the interpretation of these provisions, many grey areas of the archipelagic regime are persistent.

## **§ 1. Conditions Set Out for the Validity of Claims to an Archipelagic Status**

### **A. The Necessity of a Formal Declaration**

11. The archipelagic status must be claimed and proclaimed; it does not exist *ipso facto*. This is what results from the *Qatar v. Bahrain* decision, where, in the absence of a formal proclamation, the ICJ examined Bahrain's baseline system in light of Article 7 of UNCLOS and not 46 et 47.<sup>23</sup> The proclamation of the archipelagic status is made either through a formal declaration of the highest authority of the State, notified on the international level,<sup>24</sup> or, more frequently, through the adoption of a system of archipelagic baselines.<sup>25</sup> The drawing of archipelagic baselines is nonetheless essential for the State to enjoy the benefits of the archipelagic status. Seawards, archipelagic baselines will provide the line from which the territorial sea is to be delineated (Article 48 of UNCLOS). Archipelagic baselines are also used in maritime delimitation, at least for the construction of the provisional equidistance line.

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<sup>23</sup> ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, merits, ICJ Rep 2001, pp. 96-97, paras. 180-184 and pp. 102-103, paras. 214-215.

<sup>24</sup> Kiribati, Bahamas and the Marshall Islands (ILA, Baselines under the International Law of the Sea Committee, *supra*, fn. 15, table in the appendix).

<sup>25</sup> *Ibid.*

<sup>26</sup> Landwards, they will provide the line enclosing and defining the archipelagic waters (Article 49 of UNCLOS). The mere proclamation of the archipelagic status is thus of limited practical effect, being mainly a preparatory act announcing the State's intention to adopt legislation drawing archipelagic baselines.

12. Both the formal proclamation and the legislation defining the archipelagic baselines are unilateral acts of the State, but their international validity is subject to Articles 46 and 47 of the Convention. Claims incompatible with these provisions are unopposable to other States and none of the consequences specified in Part IV of UNCLOS (full sovereignty over archipelagic waters, measurement of the breadth of the territorial sea) can derive from them.<sup>27</sup>

13. One may wonder if there is any time-line within which an archipelagic claim can be made. The answer appears to be in the negative, since late claims of an archipelagic status have not met with objections from other States.<sup>28</sup> The same can be said for the late drawing of archipelagic baselines.<sup>29</sup> However, the more a State delays it, the more the rights of third parties will be consolidated and protected by the archipelagic regime.

### **B. A Faculty Limited to Archipelagic States**

14. By its very title, Part IV clearly limits the benefit of the archipelagic status to archipelagic States. By the same token, it excludes the mid-ocean archipelagos dependent on a continental State. This exclusion is apparent from the definition of an archipelagic State, as

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<sup>26</sup> In *Barbados v. Republic of Trinidad and Tobago*, the arbitral tribunal used the archipelagic baseline of Trinidad and Tobago to construct the provisional equidistance (*Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, 11 April 2006, *RIAA*, vol. XXVII, pp. 244-245, para. 381). When determining the relevant coasts of the two States, for the purpose of appreciating their possible disparity as a relevant circumstance, the Tribunal however declined to substitute the archipelagic baselines to the geographic coasts (*ibid.*, p. 236, para. 334).

<sup>27</sup> See ICJ, *Anglo-Norwegian case*, *supra* fn. 7, p. 132.

<sup>28</sup> For instance, Mauritius ratified UNCLOS in 1994 and it was only in 2005 that it claimed archipelagic status. The Seychelles ratified UNCLOS in 1991 and claimed an archipelagic status in 2008 only (cf. ILA, *Baselines under the International Law of the Sea Committee*, *supra*, fn. 15, table in the appendix).

<sup>29</sup> Bahamas made the proclamation in 1993 and it is only in 2008 that it adopted the archipelagic baselines; les Comoros made the proclamation in 1982 and adopted the archipelagic baselines in 2010 (cf. V. Cogliati-Bantz, "Archipelagic States and the New Law of the Sea", in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea. Liber Amicorum Judge Hugo Caminos*, Brill/ Nijhoff, 2015, p. 306).



one formed only of islands.<sup>30</sup> This decision of the drafters was deliberate and it can hardly be said that there is a lacuna in the Convention on this point<sup>31</sup> or that “the Convention does not regulate the regime of outlying archipelago”.<sup>32</sup> These doctrinal positions are not only unsupported by the text of UNCLOS or its *travaux préparatoires*, but they also at odds with to its object and purpose, which is to establish “a legal order for the seas and oceans” (UNCLOS Preamble). In particular, the Convention was intended to provide a comprehensive set of rules concerning States’ titles to maritime spaces and the claim that States could invoke titles to maritime spaces which are not provided in the Convention might undermine the balance difficulty reached during the Third UN Conference on the law of the sea.<sup>33</sup>

15. The identification of an archipelagic State does not raise significant difficulties. If Article 46 of the Convention defines the “archipelago” as a “group of islands” and its interconnecting waters, the actual number of islands is unimportant. In the *Düzgit Integrity* award, the Tribunal simply noted, without any discussion, that “São Tomé is an archipelagic State within the meaning of Article 46 of the Convention, and consists of two main islands, ‘São Tomé’ and ‘Príncipe’, and some rocky islets”.<sup>34</sup>

16. The *South China Sea* award brought further clarifications on the scope of Part IV. First, the award draws the obvious conclusion that Part IV is only applicable to insular archipelagic States:

“The use of archipelagic baselines (a baseline surrounding an archipelago as a whole) is strictly controlled by the Convention, where Article 47(1) limits their use to ‘archipelagic states’. Archipelagic States are defined in Article 46 as States “constituted wholly by one or more archipelagos and may include other islands.’ The Philippines is an archipelagic State (being constituted wholly by an archipelago), is entitled to employ archipelagic baselines, and does so in promulgating the baselines

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<sup>30</sup> Quoted above in para. 5.

<sup>31</sup> For a different view, see S. Kopela, *Dependent Archipelagos in the Law of the Sea*, Martinus Nijhoff Publishers, 2013, pp. 112-189.

<sup>32</sup> Chinese Society of International Law, “The South China Sea Arbitration Awards: A Critical Study”, *Chinese Journal of International Law*, vol. 17, 2018-2, p. 486, § 473.

<sup>33</sup> On the constitutional value of the Convention, providing for a complete set of rules in terms of acquisition of maritime spaces: see *South China Sea (The Republic of Philippines v. People’s Republic of China)*, merits, 12 July 2016, paras. 245-246, 253-254, 262.

<sup>34</sup> The *Düzgit Integrity Arbitration (The Republic of Malta v. The Democratic Republic of São Tomé and Príncipe)*, award, 5 September 2016, PCA case no. 2014-07, para. 51. In the same vein, during the arbitral proceedings in *Barbados v. Trinidad and Tobago* case, there was no opposition as to the right of the latter to declare itself an archipelagic State, although it is only constituted of two main islands and a number of small islets (*Arbitration between Barbados and the Republic of Trinidad and Tobago*, supra, fn. 27, pp. 147-251).

for its territorial sea. China, however, is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State.”<sup>35</sup>

17. Thus the Tribunal makes plain that States cannot draw archipelagic baselines around mid-ocean, dependent archipelagos and that this is a mere consequence of the principle that Part IV applies exclusively to archipelagic States. The Tribunal’s appreciation is directed to reject China’s assertion that “the Spratly Islands should be enclosed within *a system of archipelagic or straight baselines*, surrounding the high-tide features of the group, and accorded an entitlement to maritime zones as *a single unit*”.<sup>36</sup> The Tribunal thus rejects here the possibility of applying the archipelagic regime to geographic archipelagos which are dependent on a continental State.

18. But the Tribunal goes even further and asserts that continental States cannot draw straight baselines around their outlying archipelagos, relying on other provisions of the Convention (in particular, on Article 7). This conclusion however does not automatically flow from any specific provision of the Convention and the Tribunal reached it based on a contextual interpretation of Articles 7 and 47 of the Convention. The Tribunal’s reasoning is built in two steps: on the one hand, Article 47 is directed to archipelagic States, which excludes dependent archipelagos, and by way of consequence, a continental State cannot rely upon it to draw straight baselines around mid-ocean archipelagos. On the other hand, Article 7 allows for the drawing of straight baselines connecting “a fringe of islands along the coast in its immediate vicinity”. According to the Tribunal, this formula excludes the oceanic/offshore archipelagos, away from the coast, from the possibility of using the system of straight baselines provided for in Article 7:

“Although the Convention does not expressly preclude the use of straight baselines in other circumstances, the Tribunal considers that the grant of permission in Article 7 concerning straight baselines generally, together with the conditional permission in Articles 46 and 47 for certain States to draw archipelagic baselines, excludes the possibility of employing straight baselines in other circumstances, in particular with respect to offshore archipelagos not meeting the criteria for archipelagic baselines. Any other interpretation would effectively render the conditions in Articles 7 and 47 meaningless.”<sup>37</sup>

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<sup>35</sup> *South China Sea (The Republic of Philippines v. People’s Republic of China)*, merits, 12 July 2016, para. 573, footnotes omitted.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, para. 575.

19. Thus the Tribunal draw the far-reaching conclusion that, notwithstanding “the practice of some States in employing straight baselines with respect to offshore archipelagos to approximate the effect of archipelagic baselines”,<sup>38</sup> there was “no evidence that any deviations from this rule have amounted to the formation of a new rule of customary international law that would permit a departure from the express provisions of the Convention.”<sup>39</sup> In short, according to the Tribunal, no customary rule has developed permitting States to draw straight baselines around offshore archipelagos. Since neither UNCLOS, nor customary law permit to enclose offshore archipelagos, claims to the contrary are incompatible with international law.<sup>40</sup> Furthermore, the Tribunal is firm in considering that no other provision in the Convention could be invoked for the purposes of drawing straight baselines: *tertium non datum*.

20. Alongside the definition of islands and rocks under Article 121, this is one of the most debated issues in the Tribunal’s decision on the merits, which might have an influence far beyond the case *sub judice*. The conclusion of the Tribunal can be and has been contested.<sup>41</sup> While it is ample demonstrated that continental States could not rely on Article 47 of the Convention to enclose their off-shore archipelagos into a system of archipelagic baselines, there is nothing in the Convention to exclude islands’ coastlines from the benefit of Article 7, or for the matter, of Articles 8 to 13 (provided that they meet the conditions established therein). The principle according to which the land dominates the sea has been considered applicable to continental coastline, but also to islands (cf. Article 121 of UNCLOS).<sup>42</sup> For the

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<sup>38</sup> *Ibid.* The Tribunal failed to mention the fact that this deviating practice met with strong opposition from other States, an argument which would have further supported its conclusions on the absence of any customary rule. See the objections by Spain, Greece and United Kingdom to Ecuador’s declaration under UNCLOS concerning the Galapagos; see also the objections to Canada’s system of enclosing the Arctic archipelago (mentioned in S. Kopela, *op. cit.*, fn. 31, pp. 207-225). For other examples of objections, see ILA, *Baselines under the International Law of the Sea Committee*, *supra* fn. 15, para. 39, J. A. Roach and R. Smith, *Excessive Maritime Claims*, 3<sup>rd</sup> ed., Martinus Nijhoff Publishers, 2012, pp. 108-115; T. Davenport, “The Archipelagic Regime”, in D. Rothwell *et al* (eds.), *The Oxford Handbook of the Law of the Sea*, 2015, p. 155.

<sup>39</sup> *Ibid.*, para. 576.

<sup>40</sup> See also E. Franckx and M. Benatar, “Straight Baselines Around Insular Formations not Constituting an Archipelagic State”, in C.J. Jenner and Truong Thuy Tran (eds.), *The South China Sea: A Crucible of Regional Cooperation of Conflict-making Sovereignty Claims*, CUP, 2016, pp. 186-201.

<sup>41</sup> The critics of the award on the merits by the Chinese Society of International Law focus mainly on this point (Chinese Society of International Law, “The South China Sea Arbitration Awards: A Critical Study”, *Chinese Journal of International Law*, vol. 17, 2018-2, p. 486

<sup>42</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I. C.J. Reports 1984, p. 246, para 157; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 3, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I. C. J. Reports 2001, p. 40, para. 185; *Territorial and Maritime Dispute*

first time, an international tribunal makes a definitive statement on this point of law debated in the international fora. Considering the interaction between judicial decisions and customary law, this conclusion of the Tribunal may be expected to act as a break for the development of any rule concerning offshore archipelagos.

### C. The Validity of Archipelagic Baselines

21. Article 47 of the Convention establishes a series of conditions for the validity of archipelagic baselines, which are far more detailed than those set out in Article 7 for straight baselines. Some are geographic, objective, conditions; others are legal constraints preserving the position of the neighbouring States. Among the former, the ratio between the land of water and the area of land (Art 47(1)), which must be in between 1:1 and 9:1 in favour of the water, “ensures that the archipelagic State is one in which there is a focus upon the ocean spaces which connect the islands, rather than a State which is dominated by large island land masses”.<sup>43</sup> Two other conditions tend to prevent excessive claims: one establishes that the length of such baselines shall not exceed in any way 125 miles (Art. 47(2)) and their configuration will follow the general configuration of the archipelago (Art. 47(3)). Like for straight baselines (Art. 7 (4)), archipelagic baselines “shall not be drawn to and from low-tide elevations » (Art. 47 (4)) unless they are situated within the territorial sea of an island or if they are harbouring navigational installations.<sup>44</sup>

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*between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 659, paras. 113 and 126; Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, para. 77; Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, PCA, Award of 7 July 2014, Case n° 2010-16, para. 279; Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18, para. 73; Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh v. Myanmar), Judgment, ITLOS Reports 2012, p. 4, para. 185.*

<sup>43</sup> ILA, Baselines under the International Law of the Sea Committee, *supra*, fn. 15, par. 74.

<sup>44</sup> It is on this basis, that the US and UK challenge the validity of the archipelagic baselines of the Dominican Republic (Text of a joint demarche undertaken by the United Kingdom of Great Britain and Northern Ireland and the United States of America in relation to the law of the Dominican Republic number 66-07 of 22 May 2007, done on 18 October 2007, *Law of the Sea Bulletin*, vol. 66, 2008, p. 98).

22. It is relatively simple to verify compliance with these objective conditions with appropriate cartographic software.<sup>45</sup> In the *South China Sea* award, the Tribunal could note without much discussion that:

“[t]he Philippines could not declare archipelagic baselines surrounding the Spratly Islands. Article 47 of the Convention limits the use of archipelagic baselines to circumstances where ‘within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.’ The ratio of water to land in the Spratly Islands would greatly exceed 9:1 under any conceivable system of baselines.”<sup>46</sup>

Moreover, this system including the disputed islands and rocks would have been contrary to paragraph 3 of Article 47, which provides that “the drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago”. In any case, the discussion is purely theoretical, since in 2009, the Philippines adopted archipelagic baselines only around the main islands, not around the small islands claimed by several States in South China Sea.<sup>47</sup>

23. The second category of constraints aims at protecting the rights of the neighbouring States. Article 47, paragraph 5 ensures that the neighbouring State is not enclaved by the archipelagic baselines.<sup>48</sup> Article 47, paragraph 6 applies when “a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State”. In this case, the “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” (*ibid*). These two paragraphs offer to this particular neighbouring State the legal basis to challenge the validity of archipelagic

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<sup>45</sup> The US Department of State conducted 20 analysis of the compatibility of archipelagic baselines with the objective requirements (US Department of State, *Limits in the Seas*, No. 98 (São Tomé -et-Principe) (1983), No. 101 (Fiji) (1984); No. 125 (Jamaica) (2004); No. 126 (Maldives) (2005) ; and 14 studies published in 2014 : No. 128 (Bahamas); No. 129 (Cap-Vert); No. 130 (Dominican Republic); No. 131 (Trinity-and-Tobago); No. 132 (Seychelles); No. 133 (Antigua et Barbuda); No. 134 (Comoros); No. 135 (Grenade); No. 136 (Solomon Islands); No. 137 (Vanuatu); No. 138 (Papua New Guinea); No. 139 (Tuvalu); No. 140 (Mauritius); No. 141 (Indonesia); No. 142 (Philippines); et No. 144 (St. Vincent and the Grenadines). Resuming these studies, K. Baumert and B. Melchior, *op. cit.* fn. 19, pp. 60-80).

<sup>46</sup> *South China Sea* award, *supra* fn. 35, para. 574.

<sup>47</sup> Act No. 9522 to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines and for Other Purposes (Mar. 10, 2009), [Law of the Sea Bulletin](#), No. 70, p. 32. See also fn. 15 above.

<sup>48</sup> On this account, Timor-Leste protested two segments of Indonesia’s archipelagic baselines: Timor-Leste, Note NV/MIS/85/2012, 6 Feb. 2012, available online : [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn67\\_2009\\_tls.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn67_2009_tls.pdf) (last accessed on 17 October 2017).

baselines, for the violation of its rights and interests. This would appear to induce an obligation for the archipelagic State to consider these claims and, if they are correct, to modify its archipelagic baselines to accommodate them. However, this provision is of limited application, Malaysia being the only example of a State whose territory between the Malay Peninsula and Northern Borneo is separated by the archipelagic waters of Indonesia. And since, in the aftermath of the adoption of UNCLOS, Malaysia and Indonesia concluded a treaty in which their respective interests are met,<sup>49</sup> Malaysia has not challenged the validity of Indonesia's archipelagic baselines.

## § 2. The Regime of Archipelagic Waters

24. Article 2 of UNCLOS refers to a unitary, indivisible concept of sovereignty.<sup>50</sup> However, the coastal State's sovereignty over the archipelagic waters is not absolute, but subject to a number of obligations, specified in Articles 51 to 53 of the Convention. They relate to the regime of navigation, to the protection of non-navigational rights of third parties, and to cooperation with the international organizations competent for maritime and air navigation. The *Düzgit Integrity* tribunal considered that, beyond the servitudes expressly mentioned in the Convention, the sovereignty of the archipelagic State must be exercised in compliance with general principle of law, in particular the principle of reasonableness.

### A. A Reasonable Exercise of Sovereignty

25. When an activity or situation is situated within a particular maritime space, it is governed by the international and domestic rules applicable to it. In the *Düzgit Integrity* arbitration, the Tribunal logically rejected the argument that a ship to ship transfer commenced in the territorial sea and continued in the archipelagic waters would fall under the territorial sea regime:

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<sup>49</sup> Treaty between Malaysia and the Republic of Indonesia relating to the legal regime of archipelagic State and the rights of Malaysia in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of the Republic of Indonesia lying between East and West Malaysia, 25 February 1982, reproduced in *Practice of Archipelagic States*, *op. cit.* note 9, pp. 144-155.

<sup>50</sup> "1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

“The Tribunal finds that the relevant events in this dispute occurred within the archipelagic waters of São Tomé and that therefore the relevant provisions of the Convention are those contained in Part IV. The Tribunal rejects Malta’s submission that by virtue of the *Duzgit Integrity*’s passing through São Tomé’s territorial sea on its way to São Tomé’s archipelagic waters, the legal regime applicable to São Tomé’s territorial sea was invoked and remained applicable to the events that occurred within São Tomé’s archipelagic waters.”<sup>51</sup>

26. Beyond the limitations established in the Convention, sovereignty functions as a presumption that the coastal State enjoys exclusive and full jurisdiction over all the activities and situations situated within. This covers both prescriptive and enforcement jurisdiction. The plenitude of sovereignty entails that the State can submit certain activities to a requirement of notification or authorisation, insofar this does not violate its obligations and does not impair the rights enjoyed by third parties in its archipelagic waters. However, in relation to navigation, the Convention limits considerably enforcement jurisdiction, and prescriptive jurisdiction to a certain extent too.<sup>52</sup>

27. It is incumbent upon the users of the archipelagic waters to inform themselves of the domestic regulations applicable therein. Even if the archipelagic State must give them due publicity, this requirement does not imply that it must send an individual notification of the applicable legislation to any user. This line of reasoning was applied by the Tribunal in the *Duzgit Integrity* arbitration:

“Master knew that *Duzgit Integrity* had an obligation to obtain permission prior to entering São Tomé’s waters for making any transshipment. There was no obligation on São Tomé to inform *Duzgit Integrity* of that obligation separately, or to advise *Duzgit Integrity* to leave São Tomé’s waters rather than arrest the ship after it had started preparing STS operations with *Marida Melissa*.”<sup>53</sup>

28. The main input of the award comes from the introduction of the principle of reasonableness as a new limit to the exercise of archipelagic sovereignty:

“The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality. These principles do not only apply in cases where States resort to force, but to all measures

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<sup>51</sup> [The \*Duzgit Integrity\* Arbitration \(Malta v. São Tomé and Príncipe\)](#), *supra* fn. 34, paras. 300-301.

<sup>52</sup> Cf. Articles 52 and 53 of the Convention, which refer back to provisions on innocent and transit passage. See also paras. 58-59 *infra*.

<sup>53</sup> [The \*Duzgit Integrity\* Arbitration \(Malta v. São Tomé and Príncipe\)](#), *supra* fn. 34, para. 235.

of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention.”<sup>54</sup>

29. The case thus illustrates the tendency of UNCLOS tribunals to apply law exterior to the Convention.<sup>55</sup> In *Düzgit Integrity* case, the arbitrators seemed to consider that they could not rely upon human rights instruments, although they were possibly more appropriate for assessing the lawfulness of São Tomé’s conduct.<sup>56</sup> By contrast, the general principles of law may possibly irrigate many of the provisions in the Convention, in particular those concerning the coastal State’s jurisdiction to take enforcement measures. Accordingly, the Tribunal held that:

“The disproportionality is such that it renders the cumulative effect of these sanctions incompatible with the responsibilities of a State exercising sovereignty on the basis of Article 49 of the Convention.”<sup>57</sup>

30. Thus, though a default legal basis, the principle of reasonableness actually constituted the legal ground upon which the Tribunal found that São Tomé had breached its international obligations. The Tribunal made a distinction between the enforcement measures which, being necessary and proportionate, did not infringe the principle of reasonableness and those which did. The criteria used by the Tribunal for assessing disproportionality were the normality of the sanctions imposed, and the motives provided by the authorities in support:

“The Tribunal finds that São Tomé had the right to ensure respect for its sovereignty by initially detaining the vessel, requesting the Master to come onshore to explain the circumstances, and to require the payment of charges and fines. The Tribunal does not consider the IMAP fine as unreasonable or disproportionate; it was *the normal legal penalty for the type of infringement* committed by *Duzgit Integrity*. The authorities *provided reasoning* for the components of the fine to the agent of the vessels (the fine was increased due to operational and administrative expenses). The Tribunal finds that this measure fell well within the exercise by São Tomé of its law enforcement jurisdiction and must be given deference.”<sup>58</sup>

31. By contrast, “when considered together, the prolonged detention of the Master and the vessel, the monetary sanctions, and the confiscation of the entire cargo, cannot be regarded as proportional to the original offence or the interest of ensuring respect for São Tomé’s

<sup>54</sup> *Ibid.*, par. 209. See also, *ibid.*, para. 254.

<sup>55</sup> See also *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA, Award on the merits, 14 August 2015, Case n° 2014-02, paras. 197-199; *The M/V “Norstar” Case (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, *ITLOS Case n° 25*, para. 110.

<sup>56</sup> [The Düzgit Integrity Arbitration \(Malta v. São Tomé and Príncipe\)](#), *supra* fn. 34, paras. 207-209.

<sup>57</sup> *Ibid.*, para. 261.

<sup>58</sup> *Ibid.*, para. 255, emphasis added.



sovereignty (including São Tomé’s interest in demonstrating that such conduct will not be tolerated in future cases).”<sup>59</sup>

32. Reasonableness is thus a principle which protects both the archipelagic State’s prescriptive and enforcement sovereignty (which were not contested as such) and the users of archipelagic waters from an arbitrary exercise of the sovereign powers. However, the most substantial restrictions to the exercise of sovereignty over archipelagic waters come undoubtedly from the text of the Convention itself, and they bear the mark of the competing interests which the drafters needed to reconcile.

## **B. The Protection of Non-Navigational Rights and Interests of Third Parties**

### *1° Similarities and Differences between Article 51 and Article 47, paragraph 6*

33. The non-navigational rights and interests of third parties are mainly protected by Article 51 of the Convention, entitled *Existing agreements, existing traditional fishing rights and existing submarine cables*.<sup>60</sup> Its interpretation is highly problematic: several of its core terms are not defined and there is little State or judicial practice which could give guidance.<sup>61</sup> Moreover, it appears to duplicate Article 47, paragraph 6, which also protects the rights and interests of third States.<sup>62</sup> However the two provisions are different in scope and effect. They can be cumulatively invoked by the States fulfilling the conditions set out therein. But Article 47 provides to the beneficiary States (not many...)<sup>63</sup> a formidable tool for challenging the

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<sup>59</sup> *Ibid.*, para. 260.

<sup>60</sup> Article 51 provides that: “1. Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

2. An archipelagic State shall respect existing submarine cables laid by other States and passing through its waters without making a landfall. An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.”

<sup>61</sup> Several authors underlined the vagueness and confusing drafting of Article 51 (M. Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea*, Martinus Nijhoff, 1995, p. 160; S. Kopela, *Dependent Archipelagos in the Law of the Sea*, Martinus Nijhoff, 2013, p. 246; H. Caminos and V. Cogliati-Bantz, *op. cit.* fn. 7, p. 274).

<sup>62</sup> See para. 23 above.

<sup>63</sup> *Ibid.*

validity of archipelagic baselines proclamation. Lack of compliance with Article 51, on the other hand, it's only a basis for invoking the responsibility of the archipelagic State.

34. The scope of Article 51 is considerably larger than the one of Article 47, paragraph 6. *Ratione personae*, Article 51 protects the conventional rights of “other States” (in general), and the traditional and legitimate rights and interests of the “immediately adjacent neighbouring States”, which are the States who have a border with the archipelagic State.<sup>64</sup> Article 47, paragraph 6 on the other hand only applies to those “immediately adjacent neighbouring States” whose territory is separated by the archipelagic waters.<sup>65</sup>

35. *Ratione materiae*, article 51, paragraph 1 protects the “existing agreements with other States”. On a superficial reading, this guarantee would appear as a mere restatement of the principle of *pacta sunt servanda*. However, “[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect”.<sup>66</sup> The *effet utile* of this provision is to provide a guarantee for preserving the continuing validity of existing agreements from the application of the principle of *lex posterior* or that of Article 311 of UNCLOS, both of which may lead to conclude that obligations under UNCLOS supersede pre-existing conventions incompatible with it.<sup>67</sup>

36. Whereas Article 47, paragraph 6 solely protects rights and interests “traditionally exercised” in those waters, Article 51 goes beyond to guarantee the “legitimate interests”. These interests may be pre-existing or may appear after the proclamation of archipelagic waters. In short, Article 47 protects an existing, consolidated legal situation, whereas Article 51 opens the gate to the invocation by the neighbouring State of new considerations. The

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<sup>64</sup> In the same vein, “[t]here is no ambiguity with respect to the fact that the States concerned must share a border with the archipelagic State” (H. Caminos and V. Cogliati-Bantz, *op. cit.* fn. 7, p. 274).

<sup>65</sup> Compare the different positions of two of Indonesia’s immediately adjacent neighbours: Malaysia benefits from both Article 47, paragraph 6 and Article 51, whereas Singapore benefits only from the latter.

<sup>66</sup> *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, *ICJ Reports* 1949, p. 24 ; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *ICJ Reports* 1994, p. 25, para. 51 ; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, *ICJ Reports* 2011, p. 125, para. 133.

<sup>67</sup> In the same vein, R. Churchill and V. Lowe, *Law of the Sea*, 1999, p. 125 ; *Virginia Commentary*, *op. cit.* fn. 10, p. 453; Barnes and Massarella, “Commentary of Article 51”, in A. Proelss (ed.), *UNCLOS. A Commentary*, Beck, Hart, Nomos, 2017, p. 386.

reference to rights “traditionally exercised” and the use of the verb “continue” in Article 47, give textual support in favour of this interpretation. By contrast, there is no such mention in Article 51, in relation to activities other than fishing.

37. Article 51 protects the “legitimate activities” of third States, however no definition is provided for this vague term. It may be argued that the word “legitimate” refers both to a legitimate purpose and to the modalities under which these activities are carried out, which must respect international law. It is generally recognized that security interests are legitimate,<sup>68</sup> if they are pursued in a manner compatible with the international obligations of the State, in particular the prohibition of the use of force.<sup>69</sup> Likewise, the protection of the marine environment is not only a legitimate motive for the adoption of prescriptive and operative measures,<sup>70</sup> but even an obligation of parties to UNCLOS. The legitimate purpose and the modalities of its realization may change in time,<sup>71</sup> and this likelihood of evolution pleads in favour of an interpretation of Article 51 open to the future.

38. Articles 47 and 51 come into operation differently. Since it is exclusively turned towards the protection of vested rights of a very limited number of States, Article 47 comes into operation *ipso jure*. By contrast, Article 51 has both a retrospective and prospective scope. Thus, the operation of this provision is made contingent upon the subsequent conclusion of an agreement between the neighbouring State and the archipelagic State. The necessity of the conclusion of an agreement clearly stems from the text:

“The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them.” (Article 51, paragraph 1)

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<sup>68</sup> *Inter alia*, ICJ, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Reports 2009, p. 128, para. 204.

<sup>69</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Reports 1986, paras. 212-214.

<sup>70</sup> *Dispute regarding Navigational and Related Right (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, p. 250, para. 89.

<sup>71</sup> *Cf. mutatis mutandis*, the Court’s evolutive interpretation of a 19<sup>th</sup> century treaty between Costa Rica and Nicaragua, in order to meet contemporary needs: “the interests which are to be protected through regulation in the public interest may well have changed in ways that could never have been anticipated by the Parties at the time.” (*Ibid.*, p. 250, para. 89).

39. This constitutes a real *pactum de contrahendo*,<sup>72</sup> as the repetitive use of the verb “shall” suggests (“shall recognize”; “shall be regulated”), and its violation may be denounced via the mechanism of dispute settlement established by the Convention.

40. Paragraph 2 of Article 51 applies to the submarine cables laid down by all third States, be they neighbours or not. The archipelagic State must respect them and allow for their maintenance. However, these operations can only be made after prior notification.<sup>73</sup> Unlike Articles 79 and 112, Article 51 makes no reference to pipelines. There is no freedom or right to install pipelines in the archipelagic waters.

### *2° Traditional Fishing Rights*

41. Traditional fishing rights are protected by Article 51. The term “traditional” is however open to interpretation. On the one hand, it may refer to the longstanding usage of fish resources by neighbouring States and it would then be synonym of customary rights.<sup>74</sup> On the other hand, the word “traditional” in Article 51 may refer to the modalities of fishing, being thus synonym of artisanal. The owner of such rights is equally ambiguous: it may be either the neighbouring State or its nationals. The existing case-law has not entirely dispelled these ambiguities.<sup>75</sup> For instance, the *Barbados v. Trindade and Tobago* award did not exclude that non-artisanal fishing by ice boats could have constituted “traditional fishing” under UNCLOS, provided that it had been undertaken for long enough to give rise to a tradition.<sup>76</sup> And in the *Eritrea/ Yemen* decision, the commission considered that artisanal

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<sup>72</sup> On the distinction between the obligation to negotiate (*pactum de negociando*) and the obligation to conclude (*pactum de contrahendo*), see, PCIJ, *Railway Traffic between Lithuania and Poland*, Series A/B, n° 42, p. 116 ; ICJ, *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports 1985, pp. 218-219, para. 48; *Arbitration between Barbados and the Republic of Trinidad and Tobago*, supra fn. 27, p 227, para. 292.

<sup>73</sup> See J.-P. Quéneudec, *Chronique du droit de la mer. II. Câbles sous-marins*, AFDI, 1981, p. 679 ; L. Savagado, “Le régime international des câbles sous-marins”, *JDI (Clunet)*, vol. 140, 2013, n° 1, pp. 45-82.

<sup>74</sup> This is the meaning which stems out from the *travaux préparatoires*, but also from use of the word “traditional” in Article 47, paragraph 6. “The idea is not to infringe upon rights acquired through longstanding use by neighbouring States of archipelagic States of areas pertaining now to archipelagic waters when they were the high seas. Malaysia, Singapore, and Thailand, whose interests were adversely affected by the establishment of archipelagic baselines, demanded this safeguard in exchange for their acceptance of, and support for, the archipelagic claims of neighbouring States in the region, particularly Indonesia.” (C. J. Piernas, *op. cit.* note 12, para. 15).

<sup>75</sup> *The Government of Sudan / The Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, award, 22 July 2009, paras. 754 -762.

<sup>76</sup> *Arbitration between Barbados and the Republic of Trinidad and Tobago*, supra fn. 27, p. 222, para. 266. Barbados claimed traditional rights not in Trinidad’s archipelagic waters, but in its EEZ (as a relevant circumstance for shifting the equidistance line).

fishing did not exclusively refer to fishing according to methods of another age. It merely contrasted artisanal fishing to industrial fishing:

“[T]he term ‘artisanal’ is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. ‘Artisanal fishing’ is used in contrast to ‘industrial fishing’. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States in the Red Sea, whether small-scale or industrial.”<sup>77</sup>

42. The *South China Sea* award considerably restricts the meaning of “traditional fishing” in Article 51. First, it makes clear that:

“The legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears (...). *These are not the historic rights of States, as in the case of historic titles, but private rights.*”<sup>78</sup>

43. Second, for the *SCS* Tribunal, “traditional” refers to “artisanal” fishing. And unlike the *Eritrea/ Yemen* commission, the Tribunal did not leave open the possibility for changes and improvements in the modalities of fishing:

« [T]raditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community (...), but not to industrial fishing that departs radically from traditional practices. (...) [T]he Tribunal notes that the methods of fishing protected under international law would be those that broadly follow the *manner of fishing carried out for generations*: in other words, artisanal fishing in keeping with the traditions and customs of the region.”<sup>79</sup>

44. And unlike the *Eritrea/ Yemen* Commission and the *Barbados v. Trinidad and Tobago* Tribunal, the *SCS* Tribunal considered that “traditional fishing rights” were superseded by the adoption of the Convention, except when they were specifically protected by one of its provisions. Thus, they could subsist in the archipelagic waters (by virtue of Article 51) and in the territorial sea (by virtue of Article 15), but not in the exclusive economic zone.<sup>80</sup> The justification provided by the Tribunal is that “the exercise of freedoms permitted under

<sup>77</sup> *Eritrea/Yemen*, Arbitral Award, Second Stage of the Proceedings, 17 December 1999, *RIAA*, vol. XXII, p. 360, para. 106.

<sup>78</sup> *South China Sea* award, *supra* fn. 35, para. 798, emphasis added.

<sup>79</sup> *Ibid.*, para. 798 and para. 806, emphasis added.

<sup>80</sup> *Ibid.*, paras. 803-804.

international law cannot give rise to a historic right”.<sup>81</sup> This rationale would seem to apply not only to fishing, but also to other liberties which States may seek to qualify as historic rights.

### **C° Navigational Rights and Obligations: a Comparison between Innocent Passage and Archipelagic Sea Lanes Passage**

45. Subsistence of navigational freedoms is another essential component of the archipelagic compromise. The maritime powers obtained a double protection of their navigational rights and freedoms: first, Article 52 of UNCLOS provides for a right of innocent passage through archipelagic waters; second, Article 53 of UNCLOS creates a further right of archipelagic sea lanes passage (ASLP) in areas of archipelagic waters designated to that effect. Accordingly, Part IV incorporates by reference provisions relating to innocent passage through the territorial sea (namely Articles 17 to 32).<sup>82</sup> As far as ASLP is concerned, Article 53 defines it in terms similar if not identical to those applying to transit passage through straits used for international navigation.<sup>83</sup> Moreover, Article 54 in Part IV incorporates by reference Part III of the Convention dealing with transit passage.<sup>84</sup> The interpretation of provisions relating to innocent passage and transit passage becomes thus highly relevant for understanding the corresponding provisions in Part IV of the Convention. For the moment however, there is little judicial guidance on either innocent or transit passage.

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46. Obvious differences separate the two rights of passage. *Ratione personae*, innocent passage applies to “ships of all States” (Art. 52 (1)) ; ASLP is larger, since it covers “all ships and aircraft” ((Art. 53 (2)). The terms “ships of all States” and “all ships” cover thus both civil and military ships (and aircrafts in case of ASLP). As underlined by H. Caminos and V.

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<sup>81</sup> *South China Sea* award, *supra* fn. 35, para. 268.

<sup>82</sup> *Cf.* Article 52, paragraph 1: “Ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3” (emphasis added). See also *The Düzgüt Integrity Arbitration (Malta v. São Tomé and Príncipe)*, *supra* fn. 34, 51 para. 310.

<sup>83</sup> Compare Art. 53 and Art. 38. H. Caminos and V. Cogliati-Bantz, identified very small drafting differences, which do not impact upon substance, *op. cit.* fn. 7, pp. 185-186.

<sup>84</sup> Article 54 (Duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic State and laws and regulations of the archipelagic State relating to archipelagic sea lanes passage) “Articles 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes passage.”

<sup>85</sup> The *Corfu Channel* judgment of the ICJ remains the reference, but it predates UNCLOS. The *Enrica Lexie* arbitration (pending) is also expected to engage with the interpretation of UNCLOS articles on innocent passage through the territorial sea and freedom of passage on the high seas.

Cogliati-Bantz, “this granting clause makes no distinction between categories of ships and aircraft, their nationality or ownership, their status as warships or merchant ships, or civil or State aircraft. The right of transit passage applies literally to all types of ships and aircraft regardless of their individual characteristics”.<sup>86</sup>

47. *Ratione loci*, innocent passage applies in archipelagic waters, e.g. the waters landwards of the archipelagic baselines (Art. 49), and in the territorial sea, e.g. an area of 12 NM maximum measured seawards from the archipelagic baselines (Art. 48). If an archipelagic State has not drawn archipelagic baselines, the right of innocent passage will only apply in its territorial sea. ASLP is exercised in ASL, which are defined as a series of continuous axis lines from the entry to the exit points of passage routes. Ships passing through the archipelagic sea lanes should not deviate more than 25 nautical miles to either side of these axis lines (Art 53 (5)). Archipelagic sea lanes are thus constituted by a 50 NM navigational corridor where ASLP applies. In the absence of designation of ASL by the coastal State, the right of ASLP “may be exercised through the routes normally used for international navigation” (Art. 53 (12)).

48. *Designation of Archipelagic Sea Lanes (ASL)*. Whereas the coastal State can unilaterally determine the archipelagic baselines (if it complies with Article 47 of the Convention)<sup>87</sup>, Article 53, paragraphs 9 provides that the designation of ASL shall be done with the approval of the competent international organization. A similar provision can be found in Article 41, paragraph 7, applying to transit passage. So far, only Indonesia designated ASL,<sup>88</sup> but this precedent is significant on more than one account.

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<sup>86</sup> H. Caminos and V. Cogliati-Bantz, *op. cit.* fn. 7, p. 211.

<sup>87</sup> See paras. 21-23 above.

<sup>88</sup> The Philippines have also initiated domestic consultations for the designation of ASL, but in their present form, the proposals are incompatible with the Convention (see K. Baumert and B. Melchior, *op. cit.* note 19, p. 73; J. Kraska, R. Pedrozo, *International Maritime Security Law*, Martinus Nijhoff, 2013, pp. 273-274; Alberto A. Encomienda, Archipelagic Sea Lanes Passage and the Philippines Situation, Myron H. Nordquist, Tommy T. B. Koh and John Norton Moore (eds.), *Freedom of the Seas, Passage Rights and the 1982 Law of the Sea Convention*, Leiden: Martinus Nijhoff Publishers, 2008, pp. 393-394).

49. First, it made clear that the International Maritime Organization is the only international organization competent for that purpose.<sup>89</sup> At first, Indonesia contested this monopoly,<sup>90</sup> but it finally agreed in 1996 to submit a proposal to the IMO,<sup>91</sup> drafted after consultations with its neighbouring countries and certain maritime powers. Following this episode, the General Provisions on Ships' Routing recognize that the "IMO is recognized as the competent international organization responsible for adopting archipelagic sea lanes".<sup>92</sup>

50. Second, the validity of the Indonesian proposal was challenged on grounds that it did not "include all normal passage routes used as routes for international navigation or overflight" (Art. 53 (4)). The main vexed issue was the lack designation of an East/West sea lane through the archipelago via the Java Sea, while three North/South lanes were designated.<sup>93</sup> The choice made by the IMO Security Committee was to consider Indonesia's proposal as partial,<sup>94</sup> which allowed for its adoption.<sup>95</sup> However, with this partial designation, third States may still argue that they enjoy ASLP "through the routes normally used for international navigation" (Art. 53 (12)). Indonesia was thus encouraged to complete the designation

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<sup>89</sup> On the role of IMO under UNCLOS in general, see IMO Secretariat, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, doc. LEG/MISC.8 du 30 janvier 2014, disponible en ligne: <http://www.imo.org/fr/OurWork/Legal/Documents/LEG%20MISC%208.pdf>. H. Oxman, "Environmental Protection in Archipelagic Waters and International Straits – The Role of the International Maritime Organisation", *International Journal of Marine and Coastal Law*, vol. 10, 1995, p. 480

<sup>90</sup> Indonesia was reluctant to submit the question an organization where the US have great influence, although they are not party to UNCLOS (see C. Johnson, "A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission", *The International Journal of Marine and Coastal Law*, vol. 15, No. 3, 2000, pp. 317-332; C. Forward, "Archipelagic Sea-Lanes in Indonesia. Their Legality in International Law", *Australian and New Zealand Maritime Law Journal*, vol. 23, 2009, n° 2, pp. 143-156, available online: <http://www.austlii.edu.au/au/journals/ANZMarLawJl/2009/15.pdf> (last accessed on 17 October 2017); A. Havas, "Archipelagic Sea Lanes Passage Designation: The Indonesian Experience", in M. H. Nordquist *et al* (eds.), *Freedom of the Seas, Passage Rights and the 1982 Law of the Sea Convention*, Brill-Nijhoff, 2009, pp. 385-391 and 455-457.

<sup>91</sup> C. Forward, *op. cit.*, p. 152.

<sup>92</sup> IMO Resolution A.572(14), Annex 2 (General provisions for the adoption, designation and substitution of archipelagic sea lanes) adopted on 19 May 1998. See also IMO, Report of the Maritime Safety Committee on its 69<sup>th</sup> Session, 19 May 1998, IMO Doc. MSC. 71(69).

<sup>93</sup> Indonesia refrained from designating ASL in the Java Sea because of security and environmental concerns (see H. Caminos and V. Cogliati-Bantz, *op. cit.* fn. 7, p. 215).

<sup>94</sup> A Partial archipelagic sea lanes proposal is defined by IMO General provisions as "An archipelagic sea lanes proposal by an archipelagic State which does not meet the requirement to include all normal passage routes and navigational channels as required by UNCLOS." (IMO Resolution A.572(14), Annex 2, above fn. 92, Article 2.2.2). Furthermore, the same text provides that : "When adopting a proposed archipelagic sea lane, IMO will ensure that the proposed sea lane is in accordance with the relevant provisions of UNCLOS and determine if the proposal is a partial archipelagic sea lanes proposal. IMO may adopt only such archipelagic sea lanes as may be agreed by the Government of the proposing archipelagic State." (Art. 3.2).

<sup>95</sup> IMO, Maritime Safety Committee, 19 May 1998, Resolution MSC. 72(69).



process, which the Government Regulation No. 37/2002 sought to achieve.<sup>96</sup> However, this regulation legislates for the three North/South ASLs,<sup>97</sup> but it still fails to identify East/West sea lanes. While Art. 3 seems to imply that further ASLs may be designated, it also restricts the application of ASLP to the designated ASLs, an approach hardly compatible with Art. 53 (12) of UNCLOS.

51. The partial designation created difficulties, for instance in 2003, when the US asserted that its aircrafts had a right to exercise ASLP in the East/West routes normally used for international navigation. In July 2003, the US sent near the island of Bawean in Java Sea, the aircraft carrier *USS Carl Vinson* and five fighter aircrafts on manoeuvres, which were intercepted by the Indonesian authorities.<sup>98</sup> The incident raised two different questions: on the one hand, could the US military aircraft exercise ASLP through these routes? Considering the letter of Art. 53 (12) of UNCLOS and the IMO practice, the answer appears to be in the positive. On the other hand, it is doubtful that military, provocative manoeuvres are covered by ASLP.<sup>99</sup>

52. The *ratione materiae* differences between innocent passage and ASLP are equally substantial. The regime of innocent passage being considered insufficiently protective of their interests, the maritime powers sought to add to it the ASLP during the Third Conference. Innocent passage regime contains indeed several limitations: Coastal States can suspend it (*cf.* Art. 25(3) and Art. 5(2)), submarines are “required to navigate on the surface and show their flag” (Art. 20) and the coastal State may adopt laws and regulations applying to innocent passage, with a view to protecting their legitimate interests (Art. 21). ASLP on the other hand, is “unobstructed” transit through ASL, by all ships and aircraft navigating “in their normal mode” (Art. 53 (3)).

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<sup>96</sup> Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, 28 June 2002, *Law of the Sea Bulletin*, no. 52, p. 20).

<sup>97</sup> *Ibid.*, Art. 11.

<sup>98</sup> On this incident, see V. Cay, “Archipelagic sea lanes passage and maritime security in archipelagic Southeast Asia”, 2010, *The Maritime Commons*, pp. 47-48, available online at: <http://commons.wmu.se/> (last accessed on 17 October 2017); S. Bateman, “Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zones”, in D. Freestone *et al.* (eds.), *The Law of the Sea: Progress and Prospects*, OUP, 2006, pp. 365-387.

<sup>99</sup> See paras. 56-56 below.

53. Several grey areas subsist in relation to the substantive scope of innocent passage and of ASLP. The most vexed issues concern the military ships and aircrafts. Several States impose a requirement of *notification or even prior authorisation for military engines*. It is quite common for archipelagic States to impose in their domestic legislation a requirement of prior notification or even authorisation for the passage of warships. Antigua and Barbuda, Maldives, Seychelles, Saint Vincent and the Grenadines and Vanuatu require prior authorization for warships, whereas the Dominican Republic, Mauritius, Maldives and Seychelles impose similar conditions on ships carrying nuclear or inherently dangerous or noxious substances.<sup>100</sup>

54. While the authorization - notification requirement are generally treated together,<sup>101</sup> there is room for distinguishing between the two: according to its ordinary meaning, an authorization is “a document giving official permission”,<sup>102</sup> whereas the notification consists of “informing (someone) of something, typically in a formal or official manner”.<sup>103</sup> Thus, the authorization implies that the coastal State holds the power to decide whether a military ship or aircraft should be granted permission to transit through ASL (or even territorial sea). This would be incompatible with the right of transit and innocent passage. In the *Corfu Channel* case already, the ICJ held the authorisation requirement to be incompatible with the right of transit through straits:

“It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.”<sup>104</sup>

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<sup>100</sup> See the comprehensive “Table 1: State Practice on Limitations to Navigation” compiled by S. Kaye, “Freedom of Navigation in a post 9/11 World: Security and Creeping Jurisdiction”, in *The Law of the Sea: Progress and Prospects*, *op. cit.* fn. 98, pp. 347-364.

<sup>101</sup> See for instance H. Caminos and V. Cogliati-Bantz, *op. cit.* fn. 7, p. 181.

<sup>102</sup> *Oxford English Dictionary* (online: <https://en.oxforddictionaries.com/>, last visited on 17 October 2017).

<sup>103</sup> *Ibid.*

<sup>104</sup> *Corfu Channel* case, Merits, *ICJ Reports* 1949, p. 28. Some authors note that the Court only referred to passage through straits, not through the territorial sea, while they also conclude that its conclusions probably apply to the regime of innocent passage (N. Ronzitti, “Military Uses of the Sea”, D. Attard *et al.* (eds.), *The IMLI Manual on International Maritime Law. Volume III: Marine Environmental Law and Maritime Security Law*, OUP, 2016, pp. 543-545).

55. However, this statement does not cover the requirement of prior notification. Moreover, the distinction between authorization and notification was envisaged during the discussions on the 1958 Geneva Convention on the territorial sea, where the majority of States were “favourable to a right of access of warships, subject only to a duty to notify the coastal State of intended passage”.<sup>105</sup> There are also examples of State practice of prior notification, even if they are presented as the expression of a rule of comity and not as an international obligation.<sup>106</sup>

56. *Activities during passage by military ships and the concept of “transit in their normal mode”.* Another vexed question concerns the types of activities which may be undertaken by military ships while in innocent or transit passage. Some States<sup>107</sup> claim that, since ASLP implies that ships and aircraft can navigate in their normal mode, this may imply military manoeuvres in the ASL.<sup>108</sup> State practice does not necessarily support this view. Apart from the numerous domestic regulations imposing restrictions on military activities, the 19 Rules agreed to by the United States, Australia and Indonesia on the exercise of archipelagic sea lanes passage provide that “foreign warships and foreign military aircraft are not allowed to conduct war exercises or use live ammunition, nor to conduct a war game”.<sup>109</sup>

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<sup>105</sup> M.S. MacDougal, W.T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, New Haven Press, 1962, reprinted in 1985, p. 220.

<sup>106</sup> See US Department of Defense, Commander in Chief, U.S. Pacific Commander, “Implications [of] Indonesia’s *Mare Nostrum*”, CINCPAC MSG 102244Z OCT 64 Parts I and II, Oct. 19, 1964, quoted in J. Kraska, R. Pedrozo, *International Maritime Security Law*, Martinus Nijhoff, 2013, pp. 272-273. According to the 19 Rules agreed to by the United States, Australia and Indonesia “foreign warships, as well as ships using nuclear energy, passing through sea lanes, are recommended to inform the Indonesian Government . . . in advance” (quoted in H. Caminos and V. Cogliati-Bantz, *op. cit.* fn. 7, p. 195).

<sup>107</sup> US Freedom of Navigation Assertions Program (this is described in the following terms: “Freedom of navigation operational assertions (FONAs) are a mission carried out mainly by the U.S. Navy. The mission is to ensure that when other nations impose what the United States considers excessive restrictions on the freedom of navigation (FON) in any place in the world, the Pentagon will send naval ships or aircraft to demonstrate that the United States will not accept such restrictions.” (A. Etzioni, “Freedom of Navigation Assertions: The United States as the World’s Policeman”, *Armed Forces & Society*, 2015, pp. 1-2). See also U.S. Department of Defense Freedom of Navigation Program Fact Sheet? March 2015, available online at: [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20\(March%202015\).pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf), last accessed: 17 October 2017).

<sup>108</sup> The Resolutions of Advice and Consent approved by the U.S. Senate Foreign Relations Committee (SFRC) in 2004 and 2007 include the following definition: “(B) “normal mode” includes, inter alia – (i) submerged transit of submarines; (ii) overflight by military aircraft, including in military formation; (iii) activities necessary for the security of surface warships, such as formation steaming and other force protection measures; (iv) underway replenishment; and (v) the launching and recovery of aircraft;” (quoted in A. Roach and R. Smith, *Excessive Maritime Claims*, *op. cit.* fn. 38, pp. 274-275).

<sup>109</sup> This was a discussion document during the IMO negotiations on designation, by Indonesia, of ASL. They are not meant to be a binding instrument. They are partially quoted by H. Caminos and V. Cogliati-Bantz, *op. cit.* fn. 7, pp. 193-195. Indonesian Government Regulation No. 37/2002 Article 4(4) uses the same formulation.

57. More importantly, military activities in transit are hardly compatible with the meaning of “passage”. Article 18 of UNCLOS defines “passage” as “continuous and expeditious” navigation through the territorial sea. Article 38, paragraph 2 uses similar terms for defining transit passage: “2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight *solely for the purpose of continuous and expeditious transit* of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”.<sup>110</sup> Consequently, the *Düzgit Integrity* tribunal noted, in relation to innocent passage in archipelagic waters, that “the notion of ‘passage’ requires continuous and expeditious navigation through the territorial sea or archipelagic waters. Stopping or anchoring are only covered by ‘passage’ if these are incidental to ordinary navigation”.<sup>111</sup> Consequently, “foreign ship may not commence STS [ship to ship] operations in the waters under sovereignty of a coastal State without authorisation”.<sup>112</sup>

58. *Prescriptive and enforcement jurisdiction.* The Tribunal did not put into question the prescriptive jurisdiction of São Tomé to submit to authorisation activities which are not covered by the right of innocent passage. It equally considered that the coastal State was entitled to take enforcement measures to ensure compliance with its regulations:

“The Tribunal considers that São Tomé acted lawfully and in accordance with its *law enforcement jurisdiction resulting from its sovereignty over its archipelagic waters* in relation to *Düzgit Integrity* on 15 March 2013. The Master knew that *Düzgit Integrity* had an obligation to obtain permission prior to entering São Tomé’s waters for making any transshipment. (...) In the Tribunal’s view, the measures taken by São Tomé were necessary to ensure compliance with its laws and regulations adopted in conformity with the Convention.”<sup>113</sup>

59. The Tribunal was referring to enforcement jurisdiction in archipelagic waters. The discussion as to whether States can adopt enforcement measures against ships exercising ASLP needs careful analysis within the framework of enforcement jurisdiction under UNCLOS and general international law and goes beyond the scope of this article. In a

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<sup>110</sup> Emphasis added.

<sup>111</sup> *The Düzgit Integrity Arbitration*, *supra* fn. 34, para. 310.

<sup>112</sup> *Ibid.*, para. 237.

<sup>113</sup> *Ibid.*, paras. 235-236.

nutshell, there are two opposing views. Some may argue that innocent passage and transit passage differ in this respect too. While Article 25(1) on innocent passage confers upon the coastal State the right “to prevent passage which is not innocent”, there is no equivalent provision for transit passage or ASLP. Notably, Article 42 provides that the coastal State can adopt regulations in respect of the safety of navigation, pollution, fishing, loading or unloading of goods and persons, but it contains no express enforcing empowerment. Hugo Caminos considers this to be a compelling argument denoting the absence of enforcement jurisdiction against ships exercising transit passage and ASLP.<sup>114</sup>

**60.** However, “under general international law the coastal state may take any steps necessary to enforce compliance with its law and regulation”<sup>115</sup>, unless a prohibitive rule provides it from doing so (like the rules on immunities). In this respect, in relation to military ships, Article 42, paragraph 5 provides for the international responsibility of the flag State “of a ship (...) or aircraft entitled to sovereign immunity”. Thus, a coastal State could not adopt enforcement measures in relations to military ships exercising transit or archipelagic sea-lanes passage. This provision may be interpreted as providing for the only mechanism available to archipelagic States for putting an end to violations of their laws by military aircraft. By contrast, there is no equivalent provisions for commercial ships. Therefore, the archipelagic (or transit) State can reasonably consider that they do not enjoy any form of “immunity” from enforcement jurisdiction, if they violate its laws and regulations.

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**61.** It is often said that the archipelagic regime is a “*tertium genus*”<sup>116</sup> (or even *quartum genus*) combining characteristics of internal waters, territorial sea and straits used for international navigation. But this *genus* is still to be clarified. Before 2016, the archipelagic status has marginally been addressed by the ICJ or any arbitral tribunal. Only two decisions, the 2001 ICJ judgment in *Qatar v. Bahrein* and the 2006 arbitral award in *Barbados v.*

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<sup>114</sup> H. Caminos, “Enforcement jurisdiction under the United Nations Convention on the Law of the Sea. An overview”, in *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum*, vol. I, Martinus Nijhoff Publishers, 2012, pp. 752-753.

<sup>115</sup> J. Crawford, *Bronwlie’s Principles of Public International Law*, 8<sup>th</sup> ed., OUP, 2012, p. 268. UNCLOS tribunals have already had the occasion to consider that a coastal State enjoys the inherent power to enforce its laws and regulations, validly applicable in its EEZ: *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, paras. 251-254, 308; *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, *op. cit.* fn. 55.

<sup>116</sup> C. J. Piernas, *op. cit.* fn. 12, para. 13.

*Trinidad and Tobago*, referred incidentally to Part IV of UNCLOS, without any in-depth analysis of its provisions. The 2016 vintage is exceptional: the *South China Sea* award and the *Düzgit Integrity* award bring welcome clarifications on the conditions set out for assessing the validity of archipelagic proclamations (Articles 46 and 47 of UNCLOS) and, to some extent, on the rules governing activities in archipelagic waters. Some of the judicial conclusions set out therein were foreseeable, since the text of the provision to be interpreted left little room for doubt. Others are more audacious, either because they depart from existing case-law (like the *South China Sea* interpretation on traditional fishing rights) or because they import into the Convention other rules of general international law (as the *Düzgit Integrity* Tribunal did in relation to the general principle of reasonableness). It remains to be seen if these decisions correctly assess the state of the law and if their progressive development dimension will ripen into consensual interpretation of Part IV UNCLOS. As it remains to be seen if the numerous deliberate ambiguities, concerning the protection of legitimate interests of neighbouring States or the navigational rights and obligations, will be dispelled by convergent State practice or some other judicial decisions.

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