

PROBLEMS AND PROSPECTS FOR THE TREATY ON THE CREATION OF A NUCLEAR-WEAPON-FREE ZONE IN SOUTHEAST ASIA

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Introduction

After an uneasy pause during the height of the Cold War, several efforts have been made in the recent past to establish nuclear-weapon-free (NWFZs) or nuclear-free zones (NFZs) in certain parts of the globe. In the events leading up to the end of the Cold War and in the aftermath of this costly and dangerous War, there has been a realisation that the security of humankind lies in the economic and environmental security rather than military security. Consequently, the 1990s has been an era of the revival of the concepts of Nuclear-Weapon-Free Zones (NWFZs) and Zones of Peace (ZOP)¹ which were conceptualised as early as the 1950s but did not receive so much acclaim at the time. In addition to the conclusion of a number of disarmament treaties in the 1990s such as the Convention on the Prohibition of Chemical Weapons in 1992,² the indefinite extension of the Nuclear Non-Proliferation Treaty in 1995,³ and the adoption of a Comprehensive Nuclear-Test-Ban Treaty⁴ in 1996, we have witnessed the conclusion of two regional NWFZ treaties relative to Africa⁵ and Southeast Asia⁶ respectively in 1995. The traditional military powers appear to be generally on the retreat as evidenced by the conclusion of a number of treaties among themselves to reduce the stockpile of their deadly chemical and nuclear weapons. They are being pushed further into reducing their spending on armaments by their own population who see their future more in economic and environmental security than in traditional military security.

It is in this context that we witnessed the creation of nuclear-weapon-free zones in Africa and Southeast Asia in 1995. A gathering of all ten Southeast Asian nations⁷ concluded a treaty in Bangkok in December 1995 to create a Nuclear-Weapon-Free Zone (NWFZ) in Southeast Asia to cover not only the land territory and territorial waters of the States of the region but also their 200-mile exclusive economic zones (EEZs) and the continental shelves.⁸ This is one of the most significant collective regional decisions taken for the cause of peace by the States of Southeast Asia, a region traumatised for so long by so many internal and external strife and ideological divisions. This treaty ranks fourth in the annals of regional treaties concluded to create a regional NWFZ in the region concerned. The first regional NWFZ was created in Latin America by the States of the region through the treaty of Tlatelolco⁹ in 1967, the second regional nuclear-free zone (NFZ) was created in the South Pacific through the treaty of Rarotonga¹⁰ in 1985 and the third NWFZ was created to cover the whole of the African continent in 1995.

Being the latest ones to create such a zone, the States of Southeast Asia appear to have benefited from the experiences of the States of these three other regions because the treaty of Bangkok appears to be the most comprehensive, ambitious and elaborate of all similar treaties. While the first two regional NWFZs were created in the context of the Cold War and the great

Power military rivalry, the Southeast Asian NWFZ and the African NWFZ have come into being perhaps as a 'peace dividend' after the end of the Cold War.

Outside interference in the affairs of the States of Indo-China began soon after the end of World War II and continued in one form or another until 1991. Although the internal conflict is still going on in Cambodia among various factions of the civil strife, direct external involvement in the internal conflict of this country was put to an end with the conclusion of the Accord of Paris in 1991. In effect, outside interference in the affairs of Cambodia ended with the end of the Cold War. Vietnam soon followed a policy of conciliation towards its Southeast Asian neighbours and became a party to the Treaty of Amity of 1976 concluded initially by the member States of the Association of the Southeast Asian Nations (ASEAN) to strengthen regional amity and fraternity. Now the members of the ASEAN have been joined by Cambodia, Laos and Myanmar (formerly Burma) in the conclusion of the treaty on the creation of the Southeast Asian NWFZ.

This step constitutes not only a very positive development for the long-term peace and harmony in the region but also a very encouraging process for the ultimate achievement of the global nuclear and general disarmament. Together with three other treaties on the creation of an NWFZ in Latin America, South Pacific, and Africa¹¹ respectively, the Treaty of Bangkok will have transformed a very large area of the globe into a nuclear-weapon-free zone. Antarctica was the first geographical region to be denuclearised: it was done through the 1959 Antarctic Treaty.¹² The whole of the deep sea-bed beyond national jurisdiction was denuclearised in 1971 through the Seabed Treaty¹³ and there are UN declarations and initiatives currently underway to transform both the entire Indian Ocean and the South Atlantic into Zones of Peace and Co-operation¹⁴ and to establish NWFZs in South Asia and the Middle East.¹⁵

However, there are States which have shown their reluctance to support the Southeast Asian NWFZ stating that the Bangkok Treaty may undermine certain principles of the international law of the sea. For instance, the U.S. has said that the treaty does not assure that the freedom of navigation will remain undisturbed by the Treaty. It is in this context that this paper aims to examine the relevant provisions of this Treaty and the concerns raised by certain nuclear weapon States who have a significant interest in the affairs of the region in the light of the existing principles of international law and the practice of States vis-à-vis other NWFZs. The paper will begin with a brief survey of the historical development of the concept of the NWFZ. Next, will be an analysis of the origins of the Southeast Asian NWFZ. The paper will then examine in some detail the international legal issues raised by the Bangkok Treaty creating the Southeast Asian NWFZ and explore the possible bases in international law for this Zone. In doing so, the paper will compare and contrast the provisions of the Southeast Asian NWFZ with other NWFZs.

The Concept of the NWFZ

One of the most innovative developments in the post-World War II period in managing international problems has been the creation of a variety of territorial regimes designed to meet

the challenge of militarisation and modern weapons technology. Consequently, this period has witnessed a tremendous growth in international instruments adopted for the progressive application to certain areas of the world of the principles of demilitarisation, denuclearisation and of exclusion of military competition of various forms. Among them are the measures adopted for the creation of NWFZs which seek primarily to insulate the areas within them from nuclear militarisation. The initiatives to set up NWFZs have been undertaken both inside and outside the UN.¹⁶

Smaller, weaker and strategically placed States, anxious about their very survival as independent and sovereign States, have since long pursued a variety of policies to safeguard their interests. While some of these States have adopted a policy of alliance with major powers, certain other States have pursued a policy of permanent neutrality. There is yet another group of such States which has opted for an NWFZ. The idea of an NWFZ, espoused first in relation to certain parts of Europe, was later applied in relation to other parts of the world.

The origin of the concept of an NWFZ may be traced to the efforts of the 1950s during which those States not willing to join either the NATO or the Warsaw Pact sought to prevent nuclear militarisation of those areas which had not yet seen the deployment of nuclear weapons but were likely to be pressurised into accepting the deployment of such weapons due to the escalation in the Cold War and the nuclear arms race. The post-WW II period was marked by an unprecedented arms race, during which States not willing to join the opposing Western and Eastern blocs sought to formulate new rules founded both on the traditional rules of neutrality and demilitarisation and on the principles of the Charter of the UN, Panch Shila, the Bandung Declaration and non-alignment. It is in this context that the concepts such as 'Nuclear-Weapon-Free Zones' can be said to have emerged.

While there were proposals in the 1950s for the creation of NWFZs in Scandinavia, Southern Europe and the Balkans, the Non-Aligned countries came up with their own proposals in the 1960s to establish such zones in their own regions, namely, in the whole of the African continent and in the Indian Ocean. The Second Conference of the Heads of State or Government of Non-Aligned Countries, held in Cairo in October 1964 supported the idea of the establishment of Nuclear-Weapon-Free Zones (NWFZs) in various parts of the world, including Asia. This idea was later broadened to exclude both nuclear and conventional weapons and foreign military bases from the Indian Ocean and defined as Zone of Peace rather than just an NWFZ. The Non-Aligned Movement sought in its early stages to close the territories of the Non-Aligned States to great Power conflicts and rivalries. The wish to deny the great Powers the use of the territory in question for nuclear military purposes seems to be the main motivation behind the proposals for the creation of NWFZs in various parts of the globe. As a result, currently there are four NWFZs in existence established through international treaties and the Southeast Asian one is one of them.

Origins of the Southeast Asian NWFZ

In the post-World War II period Southeast Asia witnessed many disruptive events caused by outside interference. Examples are the wars in Indo-China, especially the Vietnam War and the conflicts in Cambodia. Consequently, the States of the region have long sought to remain outside the traditional east-west confrontation and to insulate the region from any potential confrontation caused by the activities of outside Powers in the region. This idea found expression in the desire to neutralise Southeast Asia as early as in 1950s when several proposals were put forward to this effect during the Indo-China phase of the 1954 Geneva Conference. However, apparently owing to the U.S.' dislike of the idea of permitting States to become permanently neutral in the aftermath of WW II and especially in view of the collective security system of the Charter of the UN, the 1954 Geneva Conference on Indo-China omitted to deal with this issue. Soon after the Conference, however, Cambodia and Laos declared their intention to pursue a policy of permanent neutrality like Switzerland's.

Consequently, another peace conference was convened in 1962 in Geneva which, after 14-month long negotiations, issued the Declaration on the ~~Neutrality~~ of Laos. However, following the involvement of Laos and Cambodia in the Vietnam War, the multilateral agreement on Laos and unilateral declaration of Cambodia to pursue a policy of permanent neutrality became obsolete. During the Vietnam War several proposals were put forward for the neutralisation of Indo-China. It was in 1968 that Malaysian leaders came up with a proposal for the neutralisation of Southeast Asia. This was also the time when the U.K. had announced its plan to accelerate the process of withdrawal from its bases in Malaysia and Singapore and the Vietnam War had engulfed Cambodia and Laos. That is why Malaysia was keen to promote the idea of regional neutrality as a means of protecting the security of the ASEAN nations. This idea seems to be the driving force behind the resolve of the ASEAN countries to limit and eventually to eliminate foreign military bases already established in the region. Preambular paragraph 6 of the 1967 Bangkok Declaration of ASEAN States (it was this Declaration which established ASEAN) provides that:

“all foreign bases are temporary and remain only with the expressed concurrence of the countries concerned and are not intended to be used directly and indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development.”¹⁷

When the military involvement of the outside Powers in the region kept growing certain States of the ASEAN felt the need for the early neutralisation of Southeast Asia. Consequently, the Malaysian Deputy Prime Minister, Tun Abdul Razak, proposed the neutralisation of Southeast Asia at the Non-Aligned Summit in Lusaka in September 1970. His proposal consisted of two elements: the first was the collective neutralisation of Southeast Asia under a multilateral agreement between the U.S., the USSR and China and the second was that member States of the ASEAN pledged to work together to secure the recognition of, and respect for, Southeast Asia as a Zone of Peace.

Freedom, and Neutrality (ZOPFAN); this was adopted in a Declaration known as the 'Kuala Lumpur Declaration' on 27th November 1971 under which the foreign ministers of the ASEAN countries pledged to "exert efforts to secure the recognition of and respect for the neutrality of Southeast Asia as a Zone of Peace, Freedom, and Neutrality, free from any form or manner of interference by outside Powers."¹⁸

The main objective of this declaration seems to be to usher Southeast Asia onto the road to an Asian version of permanent neutrality. That is to say, it would be a neutrality not only based on classical rules of neutrality but also on the Bandung principles adopted in 1955 by the Asian and African States. Thus, it could be said that the concept of ZOPFAN is based primarily on non-interference by outside powers in the affairs of the zone and non-participation and observance of impartiality by the zonal States in all types of conflicts between other States.

In order to strengthen the institution of ZOPFAN the Southeast Asian nations adopted in 1976 a Treaty of Amity.¹⁹ Since the ASEAN comprises several States of Southeast Asia, the question of the implementation of the 1971 Kuala Lumpur declaration has embraced two elements: first, establishing co-operation among the States of the region on the basis of the principles of peaceful co-existence and the peaceful settlement of all disputes, and second, securing outside recognition of their policy of ZOPFAN. As far as the first objective is concerned, the adoption of the Treaty of Amity and Co-operation in Southeast Asia among the ASEAN members in 1976 has been regarded as the most significant achievement in this direction. As Hanggi writes, "the treaty is an original and indigenous Southeast Asian answer to the question of how to cope with intra-regional conflicts and disputes ... the treaty if signed by all Southeast Asian States, would constitute the regional foundations for regional neutrality."²⁰ It contains a code of conduct for regional States. Article 2 of the Treaty states that:

"[i]n their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles:

- a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- b. The right of every State to lead its national existence free from external interference, subversion and coercion;
- c. Non-interference in the internal affairs of one another;
- d. Settlement of differences or disputes by peaceful means;
- e. Renunciation of the threat or use of force;
- f. Effective co-operation among themselves."

The most significant of all is Article 10, which commits the ASEAN States to far more onerous undertakings towards each other than any of the international instruments concerning the prohibition on the use of force and non-intervention:

“Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party.”

Through Article 13, the States of Southeast Asia commit themselves to settle at all times the disputes likely to disturb regional peace and harmony among themselves through friendly negotiations. Accordingly, Article 14 constitutes a permanent body to settle such disputes through regional processes. The decisions of Vietnam and Laos to accede to the Treaty in the early 1990s and the conclusion of an international agreement on the neutralisation of Cambodia in Paris in 1991 seems to have helped to accelerate the achievement of the objectives of the 1971 Kuala Lumpur Declaration on ZOPFAN.

The Nature and Scope of the Southeast Asian Nuclear Weapon-Free Zone

The idea of the creation of an NWFZ in Southeast Asia as a step towards the realisation of the goals of a ZOPFAN had been on the agenda of the ASEAN for sometime. After a lengthy process of consultation among the members of the ASEAN themselves and other States of the region, the States of Southeast Asia sought international approval of their idea, especially from major maritime powers since the Southeast Asian NWFZ would cover a vast area of the waters of Southeast Asia, including the territorial waters and archipelagic waters of the regional States which would include some of the busiest and strategically important international straits such as the Strait of Malacca. When the U.S., a State long opposed to the idea of an NWFZ in Southeast Asia, indicated in the beginning of 1995 that it would change its stance in favour of regional NWFZs,²¹ the Southeast Asian nations decided to seize the opportunity.

Accordingly, a committee of senior ASEAN officials which had been considering a draft treaty on the NWFZ prepared by it some years ago was quick to come up with a final draft on the creation of an NWFZ in Southeast Asia. The final draft agreement was then adopted by a summit meeting of the States of the ASEAN and other States of the region held in Bangkok on 15 December 1995.

(i) The 1995 Bangkok Treaty

The Preamble to the Treaty recalls the 1971 Kuala Lumpur Declaration on ZOPFAN and the ASEAN's Programme of Action of 1993 on the realisation of the 1971 Declaration and states that the NWFZ is an essential component of the ASEAN's ultimate objective to transform Southeast Asia into a ZOPFAN. The preamble also identifies the legal basis of the Treaty in Article VII of the Nuclear Non-Proliferation Treaty (NPT),²² which recognises the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories, and several other international instruments including the UN General Assembly resolutions.

Article 1(a) of the Treaty defines the Southeast Asian NWFZ to include the area comprising the territories of all States in the region and their respective continental shelves and exclusive economic zones. According to Article 1(b) of the Treaty, the term ‘territory’ means the land territory, internal waters, territorial sea, archipelagic waters, the seabed and the sub-soil thereof and the airspace above them. Article 1 (a) and (b) of the Treaty provide that:

- (a) “Southeast Asia Nuclear Weapon-Free Zone”, hereinafter referred to as the “Zone”, means the area comprising the territories of all States in Southeast Asia, namely, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, and their respective continental shelves and Exclusive Economic Zones (EEZ);
- (b) “territory” means the land territory, internal waters, territorial sea, archipelagic waters, the seabed and the sub-soil thereof and the airspace above them.

Furthermore, Article 2(1) of the Treaty reads that, “This Treaty and its Protocol shall apply to the territories, continental shelves, and EEZ of the States Parties within the Zone in which this Treaty is in force.” In this respect the Southeast Asian NWFZ differs significantly from other NWFZs since, unlike others, it includes in the geographical definition of the Zone the EEZ and the continental shelf of the States party to the treaty. Since this definition covers an extensive area of the Southeast Asian region, the declared nuclear Powers have expressed their concern that the Treaty could place new restrictions on the right of free passage through the Zone’s seas and airspace for nuclear-powered or nuclear-armed vessels, or aircraft carrying nuclear arms.²³ For instance, the African NWFZ created also in 1995 does not cover areas beyond 12-mile territorial waters in the definition of the NWFZ. Article 1 of the African Treaty defines the NWFZ in the following terms:

- (a) “African nuclear-weapon-free zone” means the territory of the continent of Africa, island States members of the OAU and all islands considered by the Organisation of the African Unity in its resolutions to be part of Africa;
- (b) “Territory” means the land territory, internal waters, territorial seas and archipelagic waters and the airspace above them as well as the sea bed and subsoil beneath.

However, the ASEAN States appear to have tried to address the concern on the part of the nuclear Powers in Article 2(2) of the Treaty which makes it clear that:

“[n]othing in this Treaty shall prejudice the rights or the exercise of these rights by any State under the provisions of the United Nations Convention on the Law of the Sea of 1982, in particular with regard to freedom of the high seas, rights of innocent passage, archipelagic sea lanes passage or transit passage of ships and aircraft, and consistent with the Charter of the United Nations.”

Under Article 3, the ten States of Southeast Asia have undertaken not to, anywhere inside and outside the Zone, develop, manufacture or otherwise acquire, possess or have control over nuclear weapons, station or transport nuclear weapons by any means, or test or use nuclear weapons or allow, in their territory, any other State to engage in such activities. Thus, while the active obligations undertaken by the States of the region applies to the whole area of the Zone, the passive obligations undertaken *vis-à-vis* third States applies only to the area within national jurisdiction.

The States of the region have subjected themselves to more onerous obligations than the obligations expected from third States with regard to their respect and recognition of the Zone concerned. They have committed themselves, *inter alia*, to using nuclear energy exclusively for peaceful purposes, and to subject their peaceful nuclear energy programme to rigorous nuclear safety assessment conforming to guidelines and standards recommended by the International Atomic Energy Agency (IAEA). There are other provisions in the Treaty designed to facilitate the implementation of its provisions such as the establishment of a Commission and an Executive Committee to oversee the implementation of the Treaty, mechanisms for reporting, exchange of information and fact finding as well as a control system for the purpose of verifying compliance with the obligations of the States Parties under the Treaty.

Article 2(1) envisages the conclusion of a Protocol to secure recognition of principles of the Zone of the nuclear Powers. The protocol is expected to require the nuclear Powers to refrain from, *inter alia*, stationing, testing or use of nuclear weapons in against the States within the Zone as well as from dumping at sea or discharging into the atmosphere within the Zone any radioactive material.

(ii) The Concern of the Nuclear Powers

Since Article 2(1) of the Treaty states that the Treaty and its Protocol shall apply to the territories, continental shelves and the exclusive economic zones (EEZs) of the States Parties to the Treaty and under Article 3(1) every Contracting Party has undertaken not to, *inter alia*, station or *transport* nuclear weapons by any means, the nuclear Powers, especially the U.S.,²⁴ seems to be concerned that this provision may be invoked by the States of Southeast Asia to deny free passage for nuclear-armed or nuclear-powered ships in the territorial waters as well as in the archipelagic waters and the EEZs of the States of the region.

However, what should be noted here is that this obligation applies to the activities of the State Party to the Treaty concerned and not to the activities of third States within the Zone. When spelling out the obligations of a State Party to the Treaty *vis-à-vis* the activities of third States in its territory, the word 'transport' has been omitted in Article 3(2). Thus, a State Party to the Treaty is not required to prohibit the transport of nuclear weapons through its territory by a third State, provided that the transportation is permissible under the international law of the sea and especially the 1982 Convention on the Law of the Sea (LOSC).²⁵

Moreover, as stated earlier, since Article 2(2) makes it clear that nothing in the Bangkok Treaty shall prejudice the rights of States under the LOSC, the whole question of the transport of

nuclear weapons through the Southeast Asian NWFZ depends on how the rules of the law of the sea, especially the provisions of the LOSC, are interpreted.²⁶ From this perspective, the Bangkok Treaty seems to alter little so far as the freedom of navigation, the right of innocent passage, the right of transit passage and the right of archipelagic sea lanes passage are concerned. The concern of the nuclear Powers about the effects of an NWFZ for Southeast Asia seemed to have stemmed because of the tendency of certain States of the region to interpret narrowly the right of transit and archipelagic sea lanes passage.

However, since the Bangkok Treaty itself provides that the establishment of an NWFZ in Southeast Asia will not affect port calls, transit and overflights by nuclear-armed vessels and aircraft or innocent passage through archipelagic waters of the zone, it can be said that the zone of application of the Treaty is not intended to affect the law of the sea regime of navigation. It is worth mentioning that similar regional initiatives, namely, the Treaty of Tlatelolco as well as the Rarotonga Treaty, contain similar provisions to safeguard the navigational rights of other States in the waters covered by the treaties concerned and all nuclear Powers have decided to endorse both of these NWFZs. There seems to be no reason why the nuclear Powers should take a different view of the Bangkok Treaty. After all it was in October 1995 that France, the U.K. and the U.S. stated their belief that:

“internationally recognised nuclear weapon free zones, on the basis of arrangements freely arrived at among the States of the region concerned, can contribute to international peace and security. The 1995 NPT Review and Extension Conference recognised this fact and encouraged the creation of such zones as a matter of priority. The Conference also recognised that the co-operation of all the nuclear weapon States and their respect and support for the relevant protocols are necessary for the maximum effectiveness of such nuclear weapon free zones and the relevant protocols.”²⁷

With regard to the U.S. concern about possible restriction on port visits and landing rights of foreign vessels and aircraft by regional States, the treaty itself does not impose any restrictions on such activities but leaves the matter on the discretion of the regional States concerned. Article 7 of the Treaty provides that:

“Each State Party, on being notified, may decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships through its territorial sea or archipelagic waters and overflight of foreign aircraft above those waters in a manner not governed by the rights of innocent passage, archipelagic sea lanes passage or transit passage.”

Thus, so far as the right of foreign States to port visits, landing and overflight within national jurisdiction is concerned, it is a sovereign right of every State to decide whether to allow such visits within its territory including internal waters. Therefore, the first section of Article VII makes very little difference for non-regional States. However, the term "on being notified" in the first sentence of this Article seems to imply the recognition of the existence of a principle that non-regional States have to notify the regional States if their warships are going to traverse the territorial waters or archipelagic waters of the regional States.

Since many Southeast Asian States maintain that it is not inconsistent with international law to require foreign States to notify the coastal States or even obtain prior approval before sending a warship through the territorial waters or archipelagic waters of the coastal States, major maritime and in particular nuclear Powers, who for security reasons, have a habit of neither confirming nor denying that their ships and aircraft are carrying nuclear weapons, are concerned that the right of innocent passage and the archipelagic sea lanes passage may be restricted by this Treaty since the nuclear Powers maintain that under the current rules of the law of the sea no such requirement of notification or prior approval could be sought by coastal States. Hence, in their view, supporting this Treaty may mean permitting in the future certain restrictions on the right of innocent passage and archipelagic sea lanes passage through the strategically as well as economically important routes of navigation of Southeast Asia.

Here again, it is not the Bangkok Treaty but the interpretation of the right of innocent passage under the law of the sea which will determine the future status of the freedom of navigation in the geographical areas covered in the Southeast Asian NWFZ. No provision of the Treaty itself seems to place any direct restrictions on the rights of other States recognised under international law in the waters and airspace of the NWFZ. Another concern of the U.S. was that the Bangkok Treaty did not prohibit Southeast Asian countries from possessing any nuclear device for whatever purpose.²⁸

However, given the nature of commitments undertaken by the Southeast Asian nations to use nuclear energy exclusively for peaceful purposes and to subject themselves to rigorous international inspection and safeguard measures, these nations do not appear ready to accept the demand of the U.S. that they should renounce the possession of all types of nuclear devices since they have created an NWFZ in Southeast Asia and not a nuclear-free zone. Of course, the difference in the U.S. position vis-à-vis the South Pacific Treaty and the Southeast Asian Treaty is that while the former treaty requires the States parties to the Treaty not to possess, manufacture, or acquire any type of nuclear explosive devices, the Southeast Asian Treaty, like the Latin American Treaty, forbids only nuclear weapons, leaving it open to the States party to the Treaty to acquire, possess and manufacture nuclear devices for peaceful purposes. What is more, the Southeast Asian nations have tried to use through the provisions of Article 7 their own interpretation of the freedom of navigation and the nature of the right of innocent passage since not all maritime powers accept that they have to notify the coastal States before they could send their warships and aircraft through the territorial waters of the coastal States. This is what appears to be objectionable to the U.S. and a few other major maritime Powers.

Conclusion

Owing to its strategic value and economic potential, Southeast Asia is, and will remain, vulnerable to major Power interference in the absence of a multilateral agreement between major Powers to respect the wishes of the people of Southeast Asia to transform their region first into an NWFZ and then ultimately into a ZOPFAN. Not only all declared and potential nuclear Powers but also all major maritime Powers and especially the U.S., the U.K., Russia, China, Japan, India, Australia and New Zealand, have considerable interests and certain ones of them also have military involvement in the affairs of the region. Therefore, it is important to secure international recognition of the NWFZ for its success.

Moreover, since the absence of foreign military bases and abrogation of military pacts with outside Powers seem to be among the principal characteristics of the ZOPFAN, the States of the region will have to withdraw from military alliances with other States and terminate agreements regarding bases concluded with foreign States to make Southeast Asia an NWFZ. Although the Philippines terminated its base agreements of 1947 with the U.S. and required the U.S. to close down its military bases in the Philippines, other ASEAN countries have not yet formally terminated their defence pacts with foreign Powers.²⁹

The Southeast Asian States encouraged by their high economic growth are reported to have entered into an era of arms build up.³⁰ Of course, every State is perfectly within its rights to upgrade its stockpile of self-defensive arms and acquire new arms in line with changing regional and global political climate. However, it somehow does not seem proper for Southeast Asian nations to engage in arms build up, albeit conventional, and conclude expensive arms purchase agreements from those very Western Powers³¹ from who they are seeking recognition of the NWFZ and ultimately of a ZOPFAN in Southeast Asia. No region can be a “Zone of Peace” if the very States of the region engage themselves in an arms build up. Moreover, the States of the region should be able to demonstrate that they are capable of resolving all potentially explosive territorial or other disputes by peaceful means. They have done so through the Treaty of Amity of 1976 with regard to any dispute between the member States of the ASEAN itself.

However, the disputes relating to the Spratly and Paracels islands located within the geographical definition of the NWFZ involve a militarily powerful nuclear State - China - which has expressed its concern about the geographical definition of the NWFZ which includes a vast area of the South China Sea; parts of these group of islands are also claimed by Vietnam, Malaysia, the Philippines, and Brunei.³² The ASEAN members will have to persuade China to accept that any dispute concerning the disputed islands can only be resolved by peaceful means in accordance with international law and that China will respect the NWFZ status not only of Southeast Asia but also of its own territory included within the NWFZ definition of the Bangkok Treaty. Therefore, a protocol envisaged under the Bangkok Treaty will have to accommodate not only the security and navigational interests of nuclear Powers but also the territorial concerns of China.

In conclusion, the creation of an NWFZ in Southeast Asia is a good news not only for the people of the region but also for all other States since many observers³³ had started to express their concern that buoyed by rapid economic growth, the States of the region may enter into an arms race ultimately drawing China, Japan, the U.S. and possibly India too at a later stage to a broader arms race in the region. This would be yet another tragedy for international peace and security after the end of the arms race between the eastern and western bloc countries spanning four decades and resulting in a huge stockpile of both conventional and nuclear weapons at the expense of the poor people of the world. It is in view of this broader interest of humanity that all States should encourage the creation of such NWFZs and Zones of Peace in different parts of the world and endorse the Southeast Asian NWFZ under which the States of the region have subjected themselves to more onerous undertaking than those sought from other States. The concept of NWFZ is designed not only to impose limitations on certain military activities of the major naval Powers such as the U.S., Russia, the U.K. and France, but also to restrict certain military activities of regional powers themselves such as India, China, Argentina, and Australia which also have significant navies. That is where lies the significance of the concept of NWFZs, including that of Southeast Asia.

What is more, the ASEAN's NWFZ is a significant contribution towards the campaign for a world-wide elimination and ultimately outlawing of nuclear weapons. Here, it should be noted that the International Court of Justice stated in its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". The World Court went on to say that: "There exists an obligation [presumably on the part of all States] to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."³⁴ In a way, such views of the World Court accord credibility to all measures designed to keep nuclear weapons at bay and increase the legitimacy of regional NWFZs such as the one adopted by the ASEAN. After all, the regional approach to disarmament and denuclearisation such as the creation of regional NWFZs is likely to make a significant contribution to the ultimate achievement of global and general disarmament, a goal long cherished by the peace-loving world!

Notes

¹ For a thorough examination of the concepts of Zones of Peace see Subedi, 1996.

² U.N. Doc.A/47/27

³ "United Nations: Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons", 11 May 1995 in 34 ILM 959 (1995).

⁴ 35 ILM 1439 (1996). The original text of the treaty is contained in a resolution of the UN General Assembly (A/RES/50/245). When voting took place in the UN on this resolution

there were 158 States in favour, 3 against (India, Libya, Bhutan) and 5 abstentions (Cuba, Lebanon, Mauritius, Syria and Tanzania).

⁵ 35 ILM 698 (1996). The African Nuclear-Weapon-Free Zone Treaty was adopted under the auspices of the Organisation of African Unity at Addis Ababa in June 1995 and the Treaty was opened for signature at Cairo on 11 April 1996.

⁶ 35 ILM 635 (1996).

⁷ These ten States are: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

⁸ 35 ILM 635 (1996).

⁹ United Nations Treaty Series 9068

¹⁰ United Nations Treaty Series 24592.

¹¹ A treaty on the creation of an NWFZ in the African continent was concluded by forty-three African States in April 1996. See UN Doc.A/50/426. See also UN resolution A/RES/50/66 of 12 December 1995 and *The Times* (London) of 12 April 1996.

¹² United Nations Treaty Series 5778.

¹³ Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof, 1971. United Nations Treaty Series, 13678.

¹⁴ See Subedi, 1997, pp.366-384.

¹⁵ There are proposals to create an NWFZ in South Asia and the Middle East. See UN Resolution A/RES/50/66 of 9 January 1996 on the Middle East and A/RES/50/67 of the same date on South Asia.

¹⁶ See generally for earlier works on NWFZs and NFZs: Freestone and Davidson, 1987, pp.176 ff; McFadden, 1986, pp.217 ff; Sutherland, 1986, pp.218 ff; Pitt and Thompson 1987; Rosen, 1996, pp.44-61, and the U.S. Department of the Navy, 1987, para 2.4.6, pp.2.32- 2.37.

¹⁷ ASEAN Documents Series: 1967-1988 (3rd edn., 1988), p.27.

¹⁸ Ibid., p.34.

¹⁹ 27 ILM 610 (1988).

²⁰ H. Hanggi, 1991, pp.31-32.

²¹ See "U.S. Drops Its Objections to Asia Nuclear-Free Zone" in *International Herald Tribune* of 1 August 1995, p.1.

²² United Nations Treaty Series 10485.

²³ See Richardson, 1995, p.4.

²⁴ See "U.S. Hesitant About Nuclear-Free Zone" in *International Herald Tribune* of 8 February 1996, p.4.

²⁵ 21 ILM 1261 (1984).

²⁶ See for an interpretation of the law of the sea rules on the subject matter, Subedi, *op.cit. supra* note 1, Chapters II and III.

²⁷ See the statement of these three States together with a press release released on 20 October 1995 in *Arms Control Text* issued by the Office of Public Affairs of U.S. Arms Control and Disarmament Agency, Washington, D.C.

²⁸ See *International Herald Tribune* of 11 December 1995, p.1.

²⁹ For instance, the U.S. still has mutual defence pacts with Thailand and the Philippines.

³⁰ See "Asia's Rush to New Weapons Resembles an Arms Race" in *International Herald Tribune*, 9-10 December 1995, p.7.

³¹ See "New Deal in Asia Arms Sales" in *International Herald Tribune* of 17 August 1994, p.8.

³² See generally on disputes relating to these islands, Cordner, 1994, p.61; Gao, 1994, p.347; Bennett, 1991-92, p.429.

³³ See for instance a report "Southeast Asia Caught up in Arms Race" in *le Monde*, as translated and published in the *Guardian Weekly* of 7 January 1996.

³⁴ 35 I.L.M. 809 (1996), at 831. This was stated by the Court in its Advisory Opinion on two separate requests received from the World Health Organisation and the General Assembly of the United Nations, respectively, relating to the legality of Nuclear Weapons under international law. For a succinct analysis of the Opinion see Bekker, 1996, pp.1-4.

References

Bekker, Peter, H.F. 1996. "Advisory Opinions of the World Court on the Legality of Nuclear Weapons." *American Society of International Law Newsletter: ASIL Insight*, November-December, pp. 1-4.

Bennett, Michael. 1991-92. "The People's Republic of China and the Use of International Law in the Spratly Islands Dispute." *Stanford Journal of International Law*, Vol.28, pp. 425-450.

Cordner, Lee G. 1994. "The Spratly Islands Dispute and the Law of the Sea." *Ocean Development and International Law*. Vol.25, pp. 61-74.

Freestone, David and Scott Davidson. 1987. "Nuclear Weapon Free Zones." In I. Pogany, ed. *Nuclear Weapons and International Law*. Avebury: Aldershot. pp. 176-217.

Gao, Zhiguo. 1994. "The South China Sea: From Conflict to Co-operation?" *Ocean Development and International Law*. Vol.25, pp. 345-359.

Hanggi, H. 1991. "ASEAN and the ZOPFAN Concept." In *Pacific Strategic Papers*. Singapore: Institute of Southeast Asian Studies.

McFadden, E. 1986. "Nuclear Weapon Free Zones: Towards an International Framework." *Case Western International Law Journal*. Vol. 16, pp. 217-249.

Pitt, D. and G. Thompson. 1987, eds. *Nuclear Free Zones*. London, New York, Sydney: Croom Helm.

Richardson, Michael. 1995. "ASEAN Treaty Bars Nuclear Arms as Big Powers Demur." *International Herald Tribune*. 16-17 December, p. 4.

Rosen, Mark E. 1996. "Nuclear-Weapon-Free Zones." *Naval War College Review*. Vol. XLIX No. 4, Autumn, pp. 44-61.

Subedi, Surya P. 1997. "The United Nations and the Indian Ocean and the South Atlantic as Zones of Peace and Co-operation." *Ocean Yearbook*. Vol.13, pp. 366-384.

Subedi, Surya P. 1996. *Land and Maritime Zones of Peace in International Law*. Oxford: Oxford University Press.

Sutherland, W. 1986. "South Pacific Nuclear Free Zone Treaty." *International Journal of Estuarine and Coastal Law*. Vol. 1, No. 2, pp. 15-28.

U.S. Department of the Navy. 1987. *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*. NWP 9 (Rev.A)/FMFM 1-10, Washington, D.C.