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INDONESIAN ARCHIPELAGIC SEA LANES

Indonesia is, both geographically and legally, an archipelagic nation. The concept that the nation is a single entity comprised of the entirety of the archipelagoes, their individual islands and surrounding waters, is a core Indonesian belief, known as *Wawasan Nusantara* (archipelagic outlook).¹ With this fundamental belief rooted in its national psyche, Indonesia was one of several states that successfully advocated special recognition for archipelagic states during a series of international negotiations, which culminated in the 1982 United Nations Law of the Sea Convention (LOSC). Indonesia was the first archipelagic nation to take advantage of the archipelagic regime provided by LOSC. Accordingly, Indonesia's initial proposal to designate *archipelagic sea lanes* (ASL) compelled the international community to consider how the theoretically derived legal provisions of the Convention were to be implemented.

LOSC represents a compromise between the growing jurisdiction of coastal states over their adjoining waters and the desire of other states to retain their historical freedom of the seas. This compromise is neatly illustrated in Part IV of LOSC, which deals with archipelagic states. It recognises the archipelagic state's sovereignty over its archipelagic waters, but requires that this sovereignty be subject to the regime of *archipelagic sea lanes passage*. For an archipelagic state to benefit from the regime in Part IV, it must meet two criteria. Firstly, it must satisfy the definition of an archipelagic state, and secondly it must draw its baselines in accordance with the LOSC provisions.

Article 46 of LOSC defines an archipelagic state as one that is 'constituted wholly by one or more archipelagos' and which may include other islands. An archipelago means a group of islands and other natural features which 'are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.' In many respects, this definition embodies the *Wawasan Nusantara* concept.

An archipelagic state may draw straight baselines joining the outermost points of the outermost islands and drying reefs. The baselines must enclose the main islands of the archipelago, and the enclosed water to land ratio must be between 1:1 and 9:1. This requirement prevents island countries such as New Zealand or the United Kingdom, which are made up of a few dominant islands, from claiming archipelagic status. It also ensures that states with widely dispersed archipelagoes such as Kiribati and Tuvalu cannot draw baselines around small distant islands.² The waters within the straight baselines are called *archipelagic waters*. Each straight baseline must be less than 100nm in length but up to 3 per cent of the total number of baselines can be up to a maximum length of 125nm. This rather complex formula was designed with

Indonesia's circumstances in mind, as Indonesia's longest straight baseline is 124nm.

An archipelagic state enjoys sovereignty over its archipelagic waters, and two passage regimes apply in all archipelagic waters: those of *innocent passage* and *archipelagic sea lanes passage*.

All vessels, including warships, enjoy the right of *innocent passage* through archipelagic waters, but the archipelagic state may temporarily suspend innocent passage, on a non-discriminatory basis, through specified areas when the suspension is essential for the protection of the state's security. Innocent passage requires a vessel to conduct continuous and expeditious transit in a manner that is not prejudicial to the peace, good order or security of the archipelagic state.

An archipelagic state may designate ASL, and corresponding air routes, which are suitable for continuous and expeditious passage through the archipelago. Article 53(9) of LOSC requires a cooperative approach between the archipelagic state and the international community before ASLs can be formally promulgated. If it wishes to designate ASLs, the archipelagic state must refer the proposal to the 'competent international organisation' with a view to their adoption. That organisation may only adopt such ASLs as may be agreed with the archipelagic state, after which the archipelagic state may designate them.

The phrase 'competent international organisation' is not explained in the text of LOSC but in 1994 the UN Division of Ocean Affairs and Law of the Sea published a list of UN bodies expert in particular subject areas. The International Maritime Organisation (IMO) was acknowledged as the relevant competent organisation for the purposes of LOSC Article 53. The IMO was created by international convention to assist states in adopting 'the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships'.³ The IMO provides guidance on ships routing systems, which includes guidance on the adoption, designation and substitution of ASL.

An archipelagic state does not have to designate ASL, but if it does, LOSC Article 53(4) requires that the designation include all normal passage routes used for international navigation. It is this requirement to designate all routes that came under special scrutiny in light of Indonesia's proposal.

The passage regime that applies in ASLs - archipelagic sea lanes passage (ASLP) - permits transiting vessels to operate in their *normal mode*. Normal mode is a more lenient regime than innocent passage. For example, a submarine can transit submerged through an ASL but must transit on the surface while undertaking innocent



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passage, and a ship may launch and recover aircraft in an ASL but may not do so on innocent passage. Importantly, while an archipelagic state may suspend innocent passage on a temporary basis for security reasons, it cannot suspend ASLP under any circumstances.

Until an archipelagic state has completely designated its ASLs, vessels can exercise ASLP through all routes normally used for international navigation. Once a complete ASL designation has been made, vessels are restricted to exercising the right of ASLP through those lanes, and can only conduct innocent passage through the remaining archipelagic waters.

Indonesia is the first and, to date, only archipelagic state to seek to designate its ASLs. Indonesia formally submitted its ASL proposal to the 67th session of the Maritime Safety Committee (MSC) of the IMO in May 1996. It worked closely with the United States and Australia, representing all user states, in formulating this proposal for three north-south ASLs through the archipelago.⁴ Because key routes such as an east-west passage were not included, Indonesia's approach was not entirely consistent with the requirement of Article 53(4) to propose 'all normal routes used for international navigation.' Nonetheless, the IMO accepted that the proposal would be a partial designation only and that, until such time as Indonesia had designated all normal routes as ASL, the right to ASLP would continue to apply in the remaining non-designated routes. In 1998, the IMO formally adopted this partial system of ASL in Indonesian waters,⁵ thus demonstrating its willingness to accommodate individual cases within the apparent confines of the LOSC.

Indonesia proclaimed the three north-south ASLs in Government Regulation No. 37 of 2002. Article 15 of this Regulation states that foreign ships and aircraft may *only* exercise the right of ASLP through the routes designated in that Regulation. Article 3 paragraph 2 states 'the right of archipelagic sea lane passage in other parts of Indonesian waters can be conducted *after* such a sea lane has been designated in those waters for the purpose of this transit.'⁶ This implied that ships transiting through other routes would be limited to innocent passage. This view appeared to be supported by the 'elucidation' of Regulation 37 annexed to the IMO's Safety of Navigation Circular, which stated 'foreign ships planning to navigate [through the archipelago] may do so with the exercise of the right of innocent passage in the Indonesian waters equally within the archipelagic sea lanes or beyond the archipelagic sea lanes.'⁷

The implications for maritime states' merchant and military fleets caused some concern and several nations raised the issue through diplomatic channels. During the MSC meeting in June 2003, the Indonesian delegate read from a prepared statement confirming that the nature of the Indonesian designation was a partial one and that Indonesia had confirmed this on repeated occasions in various IMO fora.⁸ The delegate noted Indonesia's responsibility for the safety of shipping transiting its waters and stated that much more technical and hydrographic work needed to be done before the designation of all normal routes of passage as ASLs could be completed. However, the delegate did refer to the 'basic problem' of identifying what constitutes a normal route.

In the international arena, Indonesia maintains that its ASL designation is only partial and accepts the right of ASLP is available to transiting vessels that navigate through normal routes used for international navigation. However, documents such as Regulation 37 and notices to mariners⁹ take a clearly contrary view: Indonesian law states that the only right of passage outside the three designated ASLs is that of innocent passage. This disparity between Indonesia's international and domestic position poses a difficulty for transiting vessels.

The MSC has stated that the 'IMO shall retain continuing jurisdiction over the process of adopting archipelagic sea lanes until such time that sea lanes including all normal passage routes have been adopted.'¹⁰ Where a partial designation has been adopted, the archipelagic state is obliged to periodically advise on its plans for conducting further surveys and 'is ultimately required to propose for adoption archipelagic sea lanes including all normal passage routes and navigational channels'. No time frame is given for this to occur.

It is in Indonesia's interests to designate all normal routes as ASLs. Once it has fully designated its ASLs, transiting vessels will be restricted to exercising ASLP only in those ASLs, and will be limited to innocent passage through the rest of the archipelago. Until this is completed, Indonesia will have difficulty in enforcing its domestic law against transiting vessels.

Further work on the designation of its ASLs would reassure the user states that Indonesia is moving to resolve the differences between its international obligations and its domestic law.

¹ Adhuri, Dedi Supriadi, 'Does the Sea Divide or Unite Indonesians? Ethnicity and Regionalism from a Maritime Perspective', *Resource Management in Asia-Pacific*, Working Paper No. 48, Research School of Pacific and Asian Studies, Australian National University, Canberra, 2003, p. 4.

² Churchill, R.R. & Lowe, A.V., *The Law of the Sea - 3rd edition*, Manchester University Press, 1999, p. 123.

³ *Convention on the Intergovernmental Maritime Consultative Organisation*, 1948, Article 1(a). The Organisation became the International Maritime Organisation in 1982.

⁴ The first north-south ASL runs from the South China Sea or Singapore Strait through the Natuna Sea, Karimata Strait, the western Java Sea and Sunda Strait; the second, from the Sulawesi and Celebes Seas through the Makassar Strait, Flores Sea and Lombok Strait; the third through the Molucca, Ceram and Banda Seas with spurs to the Savu, Timor and Arafura Seas.

⁵ Resolution MSC 72(69), *Adoption, Designation and Substitution of Archipelagic Sea Lanes*, adopted 19 May 1998.

⁶ *Indonesian Government Regulation No. 37 of 2002*, as annexed to IMO Memo SN/Circ.200/Add.1, 3 July 2003 (emphasis added).

⁷ 'Elucidation of Regulation Number 37', *Official State Gazette of The Republic of Indonesia*, No. 4210, as annexed to IMO SN/Circ.200/Add.1, 3 July 2003.

⁸ *Report of the Maritime Safety Committee on its Seventy-seventh Session*, MSC 77/26 dated 10 June 2003, para. 28.40, p. 128, and Annex 27.

⁹ For example, para 2 of Indonesian Notice to Mariners No 08/2003 states 'Foreign ships and airplanes which pass through Indonesian waters must utilize the Archipelagic Sea Lanes as established.'

¹⁰ Resolution MSC 71(69), *Adoption of Amendments to the General Provisions on Ships' Routing*, adopted 19 May 1998.

