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Legal and Technical Issues on Designating Archipelagic Sea Lanes Passage: Indonesia Experience

Kresno Buntoro¹

The archipelagic sea lanes passage is a new regime of navigation. There is no much provision in the LOSC², international law, or guidance from the international organization in how to designate an archipelagic sea lanes passage. Indonesia experienced that there are many issues left in designating the passage such as what constitute normal routes, how to apply the ten per cent rule, how to depict the axis lines, how to treat the non designated routes, what constitute 'normal mode'. The issues also reflected in the provisions of the Indonesian Government Regulation. Although the precise form of this new navigation system has not been fully worked out, the designation of the Indonesian archipelagic sea lanes passage brings Indonesia one step closer to implementing its right over and accepting its responsibilities for its archipelagic waters. The purpose of this paper is to provide an overview of the legal and technical issues in designation of archipelagic sea lanes passage based on the Indonesia experience.

Keywords: archipelagic sea lanes passage, regime of navigation, United Nations Convention on the Law of the Sea, archipelagic waters, Indonesia

I. Introduction

Indonesia designated the Indonesian archipelagic sea lanes passage by enactment of Government Regulation Number 37 of 2002³ on Rights and Responsibilities of Foreign Ships and Aircraft on Exercising Archipelagic Sea Lane Passage Right through and over Designated Archipelagic Sea Lane.⁴ Indonesia

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passed the Regulation after the adoption of Indonesian proposal by the International Maritime Organization (IMO).⁵ Indonesia believes that the designation of the archipelagic sea lanes passage is a critical component of enhancing security and protecting sovereignty of its archipelagic territory, as well as providing sea lanes of communication for user States.⁶

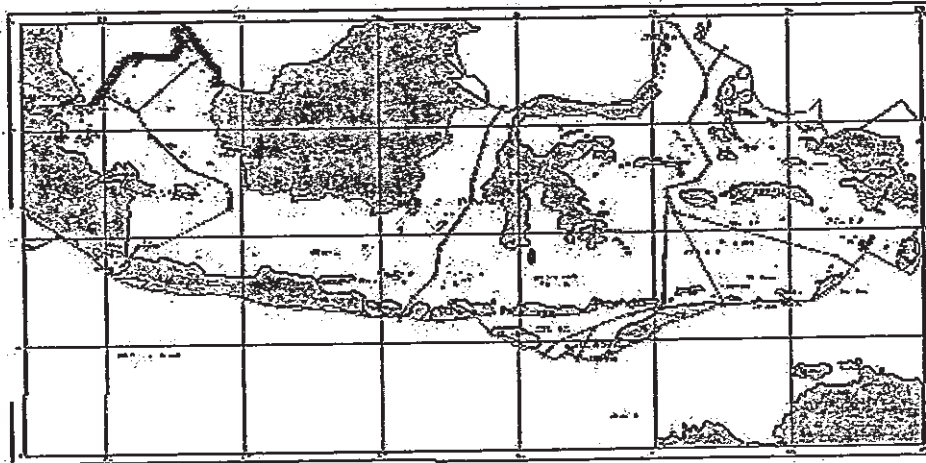


Figure 1. The Indonesian Archipelagic Sea Lane, Adopted by IMO MSC 72 (69)⁷

The adoption of the Indonesian proposal on archipelagic sea lanes by IMO and enactment of Government Regulation Number 37 of 2002 itself could be considered as a 'first State of practice on the archipelagic sea lanes passage'. The drafter of the Government Regulation believed that Indonesia has implemented the provisions of the LOSC properly and balanced the interest of user States and Indonesia. It could be seen in the provisions of the Government Regulation which always refers to the provisions in the LOSC.

² United Nations Convention on the Law of the Sea, opened for Signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (The LOSC), here in after the LOSC.

³ Government Regulation Number 37 Year 2002 on Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes (State Gazette Year 2002 No. 71, Supplementary State Gazette No. 4210). This Government Regulation is the implementation of the Act Number 6 Year 1996 on Indonesian Waters (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647).

⁴ This Government Regulation is an implementation of Article 20, Act Number 6 of 1996.

⁵ The International Maritime Organization (IMO) Maritime Safety Committee Resolution MSC 72(69), Adoption, Designation and Substitution of Archipelagic Sea Lanes, Adopted 19 May 1998.

⁶ General Explanation stated in the Elucidation of the Government Regulation Number 37 of 2002.

Designation of archipelagic sea lanes passage itself poses some issues and it would not be easy since it would involve questions as to how many sea lanes should be designated, how to designate them, and how to monitor and to regulate them in national legislation. Designation of archipelagic sea lanes is the right of the archipelagic State, but consultation with other States and international organizations⁸ would be well advised so as to accommodate the general interests of user States and the international community. Furthermore, environmental considerations in designating archipelagic sea lanes would need to be taken into account.

Article 3 (2) of Government Regulation Number 37 of 2002 provides that

"...to exercise the right of archipelagic sea lanes passage in other parts of Indonesian waters can be conducted after such sea lane has been designated in those waters for the purpose of transit." Some authors believe that this provision implies that ships transiting through other routes would be limited to innocent passage⁹ and accordingly, this provision is contrary to the provisions of the LOSC,¹⁰ the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes of IMO,¹¹ and the nature of the Indonesian designation which is a partial one. There are opinions to the effect that the right of archipelagic sea lanes passage is able to be exercised in all normal passage routes which are designated or are not yet designated.¹² Indonesia has argued there is no legal document which defines what constitutes as 'all normal passage routes used as routes for international navigation or overflight' that should be designated as archipelagic sea lanes and where the right of archipelagic sea lanes passage can be exercised.¹³

⁷ Source of Map in the Annex SN/Cir. 200, Res. MSC 72 (69) Adopted 19 May 1998 with author modification.

⁸ Law of the Sea Bulletin No. 31 Part III, Competence of Relevant International Organizations under the UN Convention on the Law of the Sea. See also, International Maritime Organization, Implication of the United Nations Convention on the Law of the Sea for the International Maritime Organization, LEG/MISC/S, 26 January 2005.

⁹ See, Semaphore, 'Indonesian Archipelagic Sea Lanes' (2005) 6(6) Semaphore, Newsletter of the Sea Power Centre-Australia; Martin Tsamenyi, Clive Schofield and Ben Milligan, 'Navigation through Archipelagos: Current State Practice' in Tommy T B Koh, John Norton Moore and Myron H Nordquist (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (2009) 413, 430-31.

¹⁰ Article 53 (4) of the LOSC provides that such sea lanes and air routes shall include all normal passage routes used as routes for international navigation or overflight.

¹¹ Paragraph 6.6 of Res. MSC 71 (69) IMO.

¹² These opinions are based on the interpretation of Article 53 (12) of the LOSC. See, Semaphore, above n 9, 2; Robin Warner, 'Implementing the Archipelagic Regime in the International Maritime Organization' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea*, (2000) vol 35, 170, 176.

¹³ Hasjim Djalal, 'The Law of the Sea Convention and Navigational Freedoms' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms, and the New Law of the Sea*, (2000) vol 35, 1, 8.

This paper will discuss legal and technical issues arise upon designation of Indonesian archipelagic sea lane passage. It describes how Indonesia interprets and implements provisions of the LOSC and the IMO Guidance on designation of archipelagic sea lane into the Government Regulation. Finally, it will discuss concerns arising from the designation in particular the issues deliberated in the Government Regulation.

II. Background and Legal Regime of Archipelagic Sea Lanes Passage

The LOSC allows an archipelagic State to enclose its territory/archipelago by drawing archipelagic baselines joining the outermost points of the outermost islands and drying reefs¹⁴ and declaring the waters therein as archipelagic waters.¹⁵ Churchill and Lowe have characterized archipelagic waters as a new regime in international law and state that 'such waters are neither internal waters nor territorial sea, although they bear a number of resemblances to the latter.'¹⁶ An archipelagic State has sovereignty over its archipelagic waters, including the super-adjacent airspace, seabed and subsoil, and the resources therein.¹⁷ This sovereignty is not the same as sovereignty that which prevails over land as it is subject to a number of rights enjoyed by other States, such as the obligation to respect existing agreements with other States, recognize traditional fishing rights and other legitimate activities, and respect existing submarine cables and permit maintenance and replacement of such cables.¹⁸

Archipelagic States can distinguish the regimes applicable to passage in the LOSC. There are at least four types of passages, namely innocent passage,¹⁹ transit passage,²⁰ archipelagic sea lane passage²¹ and passage in accordance with regimes laid down in treaties, customary law or traditional law among neighbouring States.²² The right of archipelagic sea lanes passage is a new type

¹⁴ Article 47 of the LOSC.

¹⁵ Article 49 of the LOSC.

¹⁶ R R Churchill and A V Lowe, *The Law of the Sea* (3rd ed, 1999), 125.

¹⁷ Articles 2 and 49 (2) of the LOSC

¹⁸ Article 51 of the LOSC.

¹⁹ Article 52 of the LOSC. Part II section 3 of the LOSC is applicable to archipelagic waters.

²⁰ Although there are no provisions on Part IV of the LOSC specially mention about transit passage, but general practice as long as the archipelagic states have a strait considered under Part III section 2, the transit passage apply in archipelagic waters.

²¹ Articles 53 and 54 of the LOSC.

of passage introduced by the LOSC. Djalal points out that the exercise of archipelagic sea lane passage is in accordance with the rules of international law and is not in strict conformity with the LOSC since there has been no rule of international law in the past on this matter.²³

Provisions in the LOSC on passage through and over archipelagic waters are a compromise between the interests of archipelagic States and that of maritime user States.²⁴ The LOSC provides for the sovereignty of the archipelagic State over waters, interconnecting islands and other natural features; while maritime user States get a non-suspendable form of passage for ships and/or aircraft known as innocent passage,²⁵ transit passage²⁶ and archipelagic sea lanes passage.²⁷ The regime of archipelagic sea lane passage is based on the concept of passage for ships and aircraft through and over archipelagic waters and the adjacent territorial sea from entry to exit points, and *vice versa*.²⁸ The right of innocent passage in archipelagic waters is similar to that of innocent passage in the territorial sea.²⁹ This is evident by the cross referencing of the right of passage in archipelagic waters to the provisions stated in the Part II, section 3 of the LOSC, which deals with innocent passage in the territorial sea. In addition, the right of passage in archipelagic sea lanes is identical to the right of transit passage through straits used for international navigation which is provided under Article 54 of the LOSC.³⁰

²² Indonesia and Malaysia have reached an agreement in 1982 on access and communication in Natuna Sea which Malaysian could fish, lay submarine cable, and pass through Natuna Sea. See, Act Number 1 of 1983 on Ratification of Treaty between the Republic of Indonesia and Malaysia 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.

²³ Hasjim Djalal, above n 13, 5.

²⁴ See, Hugo Caminos and Michael R Molitor, 'Perspective on the New Law of the Sea: Progressive Development of International Law and the Package Deal' (1985) 79 *American Journal of International Law* 871; Barry Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' (1981) 75(2) *American Journal of International Law* 324.

²⁵ Article 52 (1) of the LOSC.

²⁶ Part III Section 2 of the LOSC.

²⁷ Article 53 of the LOSC.

²⁸ Article 53 (1) and (4) of the LOSC.

²⁹ Article 52 (1) of the LOSC.

³⁰ See, Jose Atonio de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (1991).

Article 53 (1) of the LOSC stipulates that, "An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea." There are five important points in the Article 53(1) of LOSC. First is the right of an archipelagic State to designate archipelagic sea lanes. Second, no air routes can exist without sea lanes thereunder. Third, sea lanes should be suitable for passage. Fourth, passage should be continuous and expeditious. Fifth, passage relates to foreign ships and aircraft. Thus, designation of archipelagic sea lanes is a *right* of archipelagic States, meaning there is no obligation for archipelagic States to designate sea lanes. It depends entirely on the archipelagic State whether it wants to designate one or not.³¹

Under Article 53 (1) of the LOSC, it seems that the archipelagic State has to designate the sea lanes first and then routes above the lane as routes for aircraft to exercise the right of archipelagic sea lanes passage. It is evident that sea lanes were originally restricted to be used by ships and not aircraft.³² Moreover, sea lanes that are designated by archipelagic States should be suitable for ships to be able to exercise passage in a continuous and expeditious manner. It means that the sea lanes must be safe and free of navigational obstructions.³³ So the provision requires archipelagic States to conduct marine research include hydrographic surveys before designing the sea lanes.³⁴ In addition, the passage should be continuous and expeditious. Continuous means the passage must be from one part of the high seas or exclusive economic zone to another part of the high seas or exclusive economic zone. So there is no calling port for ships to enjoy the right of archipelagic sea lanes passage. Expeditious means ships and aircraft should transverse speedily. There is no rule on certain speed limits available, so it will depend on the capability of the ships or aircraft them-

³¹ Hasjim Djalal pointed out that Designation of archipelagic sea lanes passage is not mandatory. Hasjim Djalal, 'Indonesia's Archipelagic Sea Lanes' in Robert B Cribb and Michelle Ford (eds), *Indonesia Beyond the Water's Edge: Managing an Archipelagic State (2009)* 59, 62.

³² The oldest right of ships pass through foreign waters is innocent passage. The innocent passage right is the right for ships only. See, Phillips P Jessup, *The Law of Territorial Waters and Maritime Jurisdiction (1927)*, 120.

³³ The word 'suitable' in Article 53 (1) of the LOSC reflects that archipelagic State has to provide some necessary efforts to guarantee it.

³⁴ There are a number of factor have to be taken into consideration include technical requirements before archipelagic State designates the sea lanes. Hasjim Djalal, above n 31, 63.

selves, geographical conditions and also weather conditions.³⁵ Finally, sea lanes may be used by all ships and aircraft.³⁶ This could include all categories of ships or aircraft regardless of type, cargo or means of propulsion, whether commercial or not, whether or not they are entitled to sovereign immunity;³⁷ they still enjoy the right of archipelagic sea lanes passage.

The LOSC requires that archipelagic sea lanes passage shall be defined by a series of continuous axis lines joining entry points with exit points and provides for a maximum deviation on either side of the axis line of 25 nautical miles.³⁸ In geographical situations where the sea lanes are narrower, ships and aircraft shall not navigate closer to the coast than ten per cent of the distance between the nearest points on islands bordering the sea lane.³⁹ In the absence of designated archipelagic sea lanes, the right of archipelagic sea lane passage may be exercised by foreign ships and aircraft through routes normally used for international navigation.⁴⁰

The LOSC emphasises that all ships and aircraft enjoy the right of archipelagic sea lane passage.⁴¹ Considering that the archipelagic sea lanes passage is for ships and aircraft which is important for the movement of military forces, so it could be argued that the archipelagic sea lane passage was formerly for the accommodation of the needs of military forces. Although there is no clear evidence that the archipelagic sea lane is dedicated to accommodate the movement of military forces, Djalal argues that the right of archipelagic sea lanes passage was formerly proposed for navigation of warships, including subma-

³⁵ During internal discussion in the Indonesian Navy, March 2003, there was an opinion on how to determine whether ships transit expeditious. All arguments came up, but there was an understanding that speed limit of the ship could not be determined because it depends on capability of the ships, geographical and weather conditions. The internal discussion was un-published.

³⁶ The terms 'ships and aircraft' could also be found in Articles 53 (2) and (5) of the LOSC.

³⁷ Elaboration on ships can find in Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, Hamburg Studies on Maritime Affairs (2006), 7-12.

³⁸ Article 53 (5), LOSC.

³⁹ Article 53 (5), LOSC.

⁴⁰ Article 53 (12), LOSC. It is argued that routes normally used for international navigation are depending on how many the routes normally taken by flag's States or on how long those routes have been used by flag's States.

⁴¹ Article 53 (2), LOSC.

⁴² Notes by Hasjim Djalal, during internal meeting on designation of Indonesian archipelagic sea lane passage, in Indonesia Foreign Affairs, Jakarta, March 1997. Notes are not available publicly.

rines, and the free navigation of aircraft.⁴² According to Judge Oda, the right of innocent passage appears adequate for commercial navigation through archipelagic waters and the non-applicability of the right of innocent passage to overflight would not hinder civil aviation.⁴³ Alexander also argues the United States and maritime user States need of specific passage rights to accommodate the movement of military forces, which usually consists of many ships and aircraft and the aircraft is for protecting its vessels to move on formation.⁴⁴

It is interesting to note that the LOSC requires archipelagic States to designate air routes above the sea lanes.⁴⁵ Since non-military aircraft would normally use routes designated by the International Civil Aviation Organization (ICAO),⁴⁶ the argument of overflight through the air routes is of particular importance to military aircraft. It would be difficult if civil aircraft use air routes in archipelagic sea lanes passage, as there are so many turning points which make it difficult for aircraft to navigate. Aircraft would have to slow considerably to navigate such turns and it would therefore not be economical for civil aircraft to follow archipelagic sea lanes. This argument conforms to the main purpose of designating sea lanes and air routes for the accommodation of military vessels and aircraft, although there is no such limitation.

III. Designation of the Indonesian Archipelagic Sea Lanes Passage

In May 1998, at the 67th Meeting of the Maritime Safety Committee, IMO adopted the "partial" designation of Indonesian archipelagic sea lanes passage routes as shown in Figure 1.⁴⁷ The Indonesian Archipelagic Sea Lanes consisted of three North-South lanes, namely the Archipelagic Sea Lanes Passage I, the Archipelagic Sea Lanes Passage II, and the Archipelagic Sea Lanes Passage III. The Archipelagic Sea Lanes Passage I had two spurs, namely Archipelagic Sea Lanes Passage I and I A which are located in the Karimata Strait. The Archipelagic Sea Lanes Passage I was intended to facilitate navigation

⁴³ Shigeru Oda, 'The Passage of Warships through Straits and Archipelagic Waters' in John M Van Dyke, Lewis M Alexander and Joseph R Morgan (eds), *International Navigation: Rocks and Shoals Ahead?* (1988), 155.

⁴⁴ Lewis M Alexander, *Navigational Restrictions within the new LOS context: Geographical Implications for the United States* (1986), 162.

⁴⁵ Article 53 (1), LOSC.

⁴⁶ Introduction of the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes. IMO MSC 71 (69), Adopted 19 March 1998, SN/Circ.199.

⁴⁷ Res. MSC 72 (69) Adopted 19 May 1998. SN/Cir.200.

from the Indian Ocean through the Sunda Strait and Natuna Sea and finally to the South China Sea. The Archipelagic Sea Lanes Passage II was intended for navigation from the Indian Ocean through the Lombok Strait to the Makassar Strait and then to the Sulawesi Sea and the Pacific Ocean and the Philippines waters. The Archipelagic Sea Lanes Passage III had a couple of spurs serving to facilitate navigation from the Timor Sea and the Arafura Sea to the Pacific Ocean through the Sawu Sea, the Banda Sea, the Seram Sea and the Maluku Sea.

In June 2002, Indonesia promulgated Government Regulation Number 37 of 2002 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes. Furthermore, in December 2002, Indonesia informed the IMO General Assembly that Indonesia enacted national legislation on archipelagic sea lanes passage as stated in the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes Paragraph 3.13 and that it would enter into force in December 2002.⁴⁸ There was a conflicting interpretation on the question of entry into force, between the Government Regulation and the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes especially Paragraph 3.13. A majority of the IMO's members believed that the provisions stated six months' time for entry into force should be calculated from the time Indonesia informed IMO. On the other hand, Indonesia believed that the six months should be calculated after promulgation of the national legislation. So the issue was brought to Sub-Committee Navigation MSC 49. The NAV meeting finally concluded that the meeting should amend the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes Paragraph 1.13.⁴⁹ Finally based on the amendment, Government Regulation Number 37 of 2002 would enter into force six month after Indonesia informed IMO.⁵⁰ So formulation of Articles 15 and

⁴⁸ SN/Circ.200/Add.1 dated 3 July 2003.

⁴⁹ Amendment SN/Cir. 199, Paragraph 3.13 become two paragraph, as follows:

3.13 After the adoption of the Archipelagic sea lanes by IMO, the Government of the Archipelagic State shall promulgate the designation of the sea lanes. The designation of the sea lanes shall be formally communicated to IMO.

3.14 Archipelagic sea lanes shall not come into effect until at least six months after the later of :1 designation of sea lanes as described in Paragraph 3.13 and; 2 publication of either notices to mariners to amend charts or revised charts to depict the sea lanes.

⁵⁰ Considering six month after the decision of the Sub NAV MSC, the Government Regulation Number 37 of 2002 started entry into force in December 2003.

16 of the Indonesia Government Regulation which have to be changed as well in order to implement the amendment of the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes.

IV. Issues Arising from Designation of Archipelagic Sea Lane Passage

The provisions in the LOSC are not easy to understand, because they contain many technical and operational terms that are rather complicated. The technical and operational terms may not always be readily understood by those seeking general information or by lawyers, hydrographers, land surveyors, cartographers and naval personnel. There are many practical difficulties with the implementation of the archipelagic sea lanes passage regime due to the lack of definition.

There are many issues in implementing an archipelagic sea lanes passage regime due to the lack of provisions in the LOSC. There are only two articles (Articles 53 and 54) regulating the archipelagic sea lane passage regime and four Articles (39, 40, 42 and 44) apply *mutatis mutandis* to archipelagic sea lanes passage in the LOSC. Furthermore, Indonesia may be the only archipelagic State that has already designated its archipelagic sea lanes, so there is no State practice could be used as reference. Thus, there are many issues arising out of designation of archipelagic sea lane passage.

Issues relating to the interpretation of Article 53 and 54 of the LOSC came up during informal meeting between Indonesia and user States such as Australia, the United Kingdom (UK), and the United States of America (US), and also international organizations such as IMO, ICAO, and International Hydrographic Organization (IHO).⁵¹ Those issues also discussed and examined by the Indonesian Working Group on designation of archipelagic sea lanes. The issues which arose included how to define all normal passage routes, the ten per cent rule, the lack of designation of sea lanes, partial designation, and technical aspects of designation of sea lane. The next paragraph will explore those issues in order to gain a better understanding of the issues, although it might be understand that it will not conclusively solve all the issues.

⁵¹ See, Robin Warner, above n 12, , 170; Johnson Constance, 'The IMO Consideration of the Indonesia Archipelagic Sea-Lanes Submission' (2000) 15(3) *The International Journal of Marine and Coastal Law* 15; Mark F Meyer, 'Archipelagic Sea Lane: Designation Factors and Effects on Operational Art' (Naval War College, 1999).

A. What constitutes 'all normal passage routes used as routes for international navigation or overflight'

Article 53(4) of the LOSC requirements of the designation of sea lanes through and over the archipelagic waters and goes on to say that:

Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include *all normal passage routes used as routes for international navigation or overflight* through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.⁵²

The issue which arises in this provision is what constitutes 'all normal passage routes used as routes for international navigation or overflight.' Article 53 of the LOSC uses different terms to define sea lanes or air routes, including, 'normal passage routes used as routes for international navigation or overflight',⁵³ 'all normal navigational channels',⁵⁴ and 'routes normally used for international navigation'.⁵⁵ The practical issues that would arise include whether the terms have the same meaning and why the LOSC uses different terms in the same article. The records of the preparatory committee of the Third UNCLOS provide no clarification on this matter.⁵⁶ It seems the States Party of the LOSC has to interpret the meaning of the terms.

During informal meetings on the designation of Indonesian archipelagic sea lanes passage,⁵⁷ there were at least three maps showing that normal routes could be used to designate archipelagic sea lane. The British Admiralty Chart is shown in Figure 2, the United States Chart is shown in Figure 3, and the Australian Chart is shown in Figure 4.

⁵² Emphasis added. The only qualification to this requirement is that the archipelagic State need not designate duplicate routes of similar convenience between the same entry and exit points.

⁵³ Article 53 (4), LOSC.

⁵⁴ Article 53 (4), LOSC.

⁵⁵ Article 53 (12), LOSC.

⁵⁶ Article 22 (3) (b) of the LOSC on innocent passage uses a different term as well, such as 'channel customarily used for international navigation.'

⁵⁷ Informal meetings between Indonesia and user States such as the United States, Australia, the United Kingdom. Indonesian Navy Working Group, 'Evaluation on Designation of the Indonesian Archipelagic Sea Lanes Passage' (Indonesian Navy, 1996) (in Indonesian).

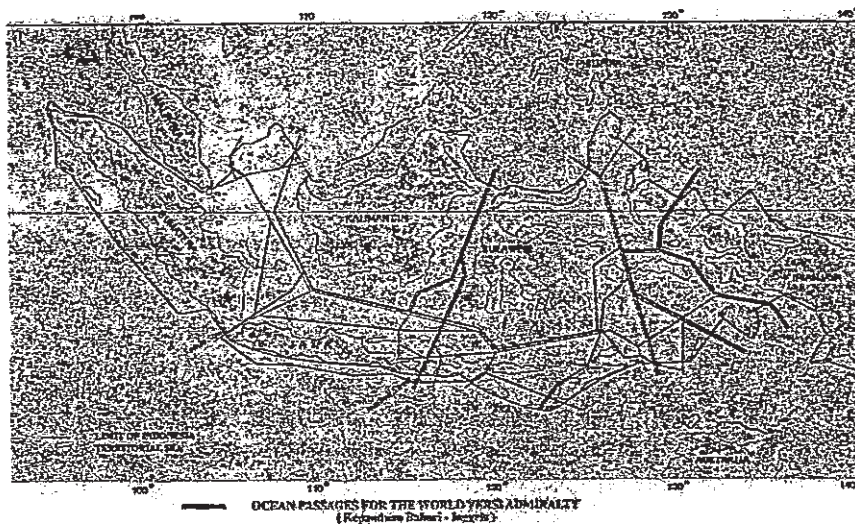


Figure 2 Ocean Passage in Indonesian Waters⁵⁸

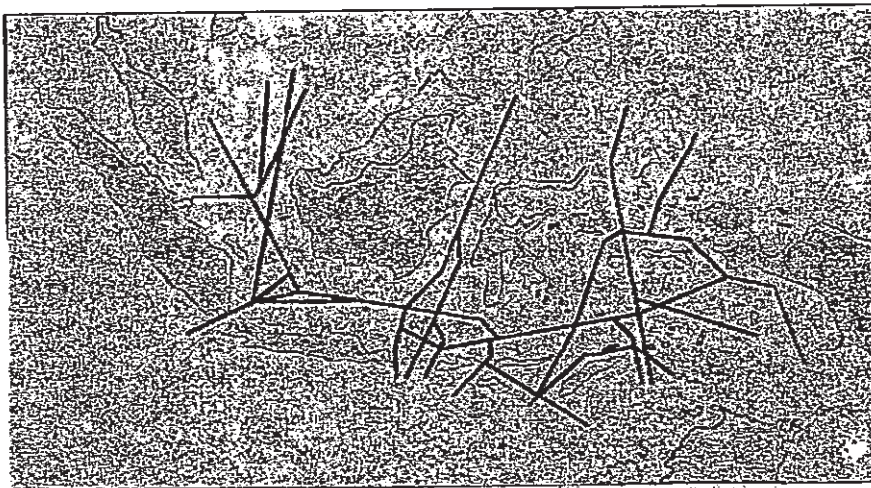


Figure 3. Normal Routes Proposed by the US during Informal Meeting in 1982 and 1984⁵⁹

⁵⁸ Map is used during informal discussion on archipelagic sea lanes passage. Map shows a compilation of navigation routes (normal routes) in Indonesian waters.

⁵⁹ Map is used during informal meeting. The Map is presented in several seminars on archipelagic sea lanes passage, in Indonesia.

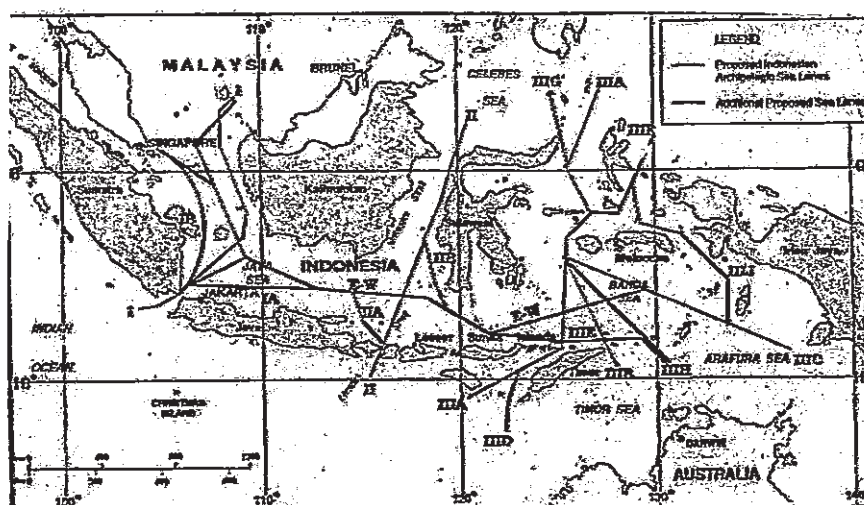


Figure 4. Normal Routes Proposed by Australia⁶⁰

The three maps show that although there are similar routes which are depicted on all maps, there are also significant variations among them. Thus, it appears impossible for Indonesia to designate all normal routes to satisfy the interests of all user States. It is also practically difficult for Indonesia to designate all routes suggested in the maps which look like a “spaghetti bowl”⁶¹ as archipelagic sea lanes.

Indonesia agreed that most of the sea lanes in the maps are routes that have been used for international navigation.⁶² But the issue here is whether those sea lanes could be justified as ‘normal passage routes’,⁶³ ‘any channels customarily used for international navigation’⁶⁴ or ‘routes normally used for international navigation’.⁶⁵ Thus, it would appear impossible for Indonesia to designate all those sea lanes for exercising the right of archipelagic sea lanes passage as required by Article 53(4) of the LOSC.

⁶⁰ Map is used during informal meeting between Indonesia and user States. The Map is presented in several seminars on archipelagic sea lanes passage, in Indonesia.

⁶¹ This term came up during informal meetings between Indonesia and the United States, Australia and United Kingdoms which indicated that there were so many routes (overlapping) that should be designated as axis lines of archipelagic sea lanes.

⁶² Personal experience of the author attended the internal discussion in the Indonesian Navy, March 2003. All participants believed that those routes commonly used by merchant ships and contained in the Indonesian sailing directions. Report of the discussion is not published.

⁶³ Article 53 (4), LOSC.

⁶⁴ Article 22 (3) (b), LOSC.

⁶⁵ Article 53 (12), LOSC.

Additionally, the suggested sea lanes may be categorised as normal passage routes used for exercising the right of innocent passage, but it is doubtful if they may also be used for exercising the right of archipelagic sea lanes passage. It could be argued if Indonesia has to designate all these sea lanes as archipelagic sea lane passage, there would appear to be no difference between innocent passage and archipelagic sea lane passage.

B. The Application of Ten Per cent Rule

Article 53(5) of the LOSC provides at least three important points.⁶⁶ First, sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points to the exit points of passage routes. Second, ships and aircraft shall not deviate more than 25 nautical miles to either side of the axis lines during passage. Last, ships and aircraft shall not navigate closer to the coasts than ten per cent of the distance between the nearest points on islands bordering the sea lane.

A series of continuous axis lines usually consists of several turning points, while entry or exit points are situated at the intersection of the axis lines and the boundary or edge of the territorial sea. The series of axis lines, turning points and exit or entry points shall be depicted on the nautical charts and provided as a list of geographical coordinates. Furthermore, the width of the sea lane of 25 nautical miles either side may be measured from axis lines.

During meetings between Indonesia and the United States,⁶⁷ it was agreed that the outer limits of the width of the archipelagic sea lanes on each side of the axis line should not necessarily be depicted in charts. Indonesia believed that the depiction of such lanes would create the false impression that the sea lanes were corridors.⁶⁸

⁶⁶ Article 53 (5) of the LOSC stipulates that '...sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than ten per cent of the distance between the nearest points on islands bordering the sea lane.' *Emphasis added.*

⁶⁷ Meeting held in Jakarta, on 23-27 October 1997.

⁶⁸ Indonesian position during informal meeting between Indonesian and the United States, 23-27 October 1997. See, Indonesian Navy Working Group, 'Evaluation on Designation of the Indonesian Archipelagic Sea Lanes Passage' (Indonesian Navy, 1996), 21; Hasjim Djalal, above n 13, 7.

The application of the ten per cent rule is relatively easy if there is plain water on the other sides of the axis lines for 25 nautical miles. Difficulties arise in the application of the provision in the case there are islands bordering the axis lines are less than 25 nautical miles apart. The issues are how to consider the islands bordering the axis lines or within sea lanes, how to measure the distance from axis lines and how to define the ten per cent rule which ships and aircraft must avoid. These issues arose when Indonesia had informal meetings with Australia and the United States on the preparation of designation of Indonesian archipelagic sea lanes. There are many islands bordering the axis lines of the archipelagic sea lanes proposed by Indonesia that could have the effect of invoking the ten per cent rule.

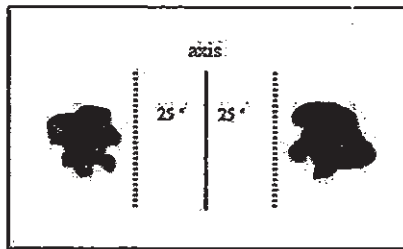


Figure 5. No Island within the sea lanes⁷¹

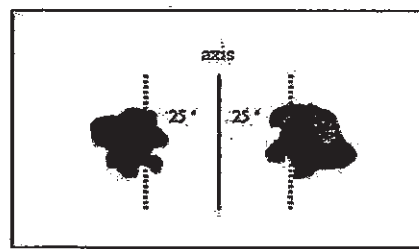


Figure 6. Islands bordering the sea lanes⁷²

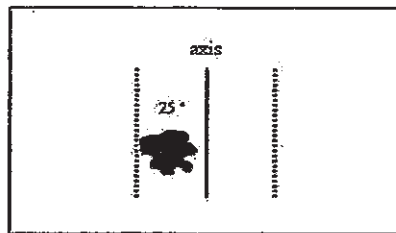


Figure 7. Island within the sea lanes⁷³

There are many opinions on how to define and apply the ten per cent rule. For example, there is the view that the ten per cent rule has to be measured between islands across the axis lines.⁶⁹ Another view is that the ten per cent rule has to be measured from adjacent coast to the axis lines.⁷⁰ The complexi-

⁶⁹ This opinion based on interpretation Article 53 (5) of the LOSC states ‘...between the nearest points on islands bordering the sea lane.’ Emphasis added. So the ten per cent rule is resulted from the distance of islands across the axis lines.

⁷⁰ Andrian J Halliwell, ‘Indonesian Archipelagic Sea Lanes and the Charting Issues’ (Paper presented at the ABLOS Tutorials and Conference, Monaco, 18-30 October 2003), 3.

ties in implementing the ten per cent rule under different geographical situations are shown in Figure 5, Figure 6, and Figure 7.

IMO provides guidance for ships transiting archipelagic waters using archipelagic sea lanes. The guidance includes an explanation and diagrammatic representation of the ten per cent rule.⁷⁴ But it seems that the guidance only accommodates islands bordering the archipelagic sea lanes. IMO did not provide any further guidance on how to determine the ten per cent rule if there are islands within archipelagic sea lanes or there is only one island within the sea lane. There is no guidance, as well, on how to work out the ten per cent rule if these bordering islands are not directly opposite each other or how to deal with the water area inboard the midstream island bordering the archipelagic sea lane.⁷⁵

Indonesia, Australia and the United States⁷⁶ have different interpretations on the geographical situations depicted in the figures 5, 6, 7. Indonesia argues that all islands (bordering and within) the sea lanes have the effect of invoking the ten per cent rule and the waters/area inboard of the midstream island may not be used to exercise archipelagic sea lanes passage rights, as illustrated in Figure 8.⁷⁷ On the other hand, the United States is the view that only islands which border the sea lanes would have the effect of invoking the ten per cent rule, while the islands within the sea lanes could not have the effect of invoking the ten per cent rule as illustrated in Figure 8.⁷⁸ It seems that the United States

⁷¹ Diagram was presented by Adi Sumardiman during Internal discussion in Indonesian Navy Headquarters, March 2003.

⁷² Diagram was presented by Adi Sumardiman during Internal discussion in Indonesian Navy Headquarters, March 2003.

⁷³ Diagram was presented by Adi Sumardiman during Internal discussion in Indonesian Navy Headquarters, March 2003.

⁷⁴ IMO's SN/Circ.206, issued in January 1999.

⁷⁵ These issues came up during informal meetings between Indonesia and the United States and Australia. The existence of the island/s will affect to the width of the sea lanes as part of application the ten per cent rule.

⁷⁶ The United States did not accept a buffer of uniform breadth no matter how close the island was to the axis line. Summary of the United States -Indonesia Consultations on Archipelagic Sea Lanes, Jakarta, 23-27 October 1997. Copy of this summary is on file with the author.

⁷⁷ The Indonesian position was supported by the International Hydrographic Bureau. But this position was challenged by the United States stated that the United States could not accept the interpretation that there was no right of archipelagic sea lanes passage on the outboard side of such islands from the axis line. Summary of the United States -Indonesia Consultations on Archipelagic Sea Lanes, Jakarta October 23-27, 1997 (un-published). Author has a copy of this summary.

view was to take maximise sea space in the sea lanes and air space thereabove. But there was issue left on how to treat the island/s within the sea lanes. Australia's position is that all islands would invoke the ten per cent rule as illustrated in Figure 8. The island within the sea lanes would have a buffer zone through implementation of the ten per cent rule, if there is area inboard the midstream island indicating that additional waters could be used to exercise the right of archipelagic sea lanes passage.⁷⁹ Warner notes that Australia preferred a method which took the distance between the axis lines and the bordering island as the relevant distance for calculating the ten per cent rule prescribed in Article 53 (5) of the LOSC.⁸⁰

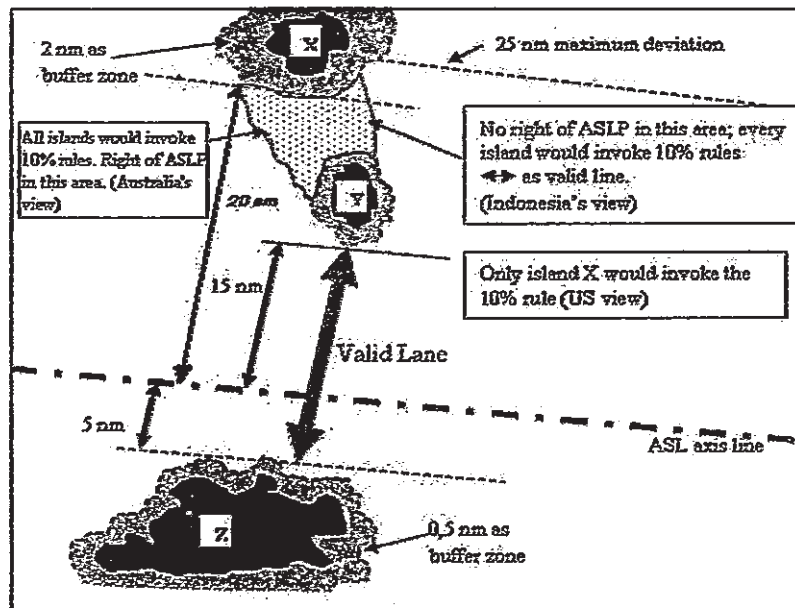


Figure 8. Indonesia, Australia and the United States interpretation of the application of the ten per cent rule involving islands bordering archipelagic sea lanes⁸¹

⁷⁸ During informal meeting between Indonesia and the United States, it seems the United States relucted to the proposal that as locating the axis lines along those routes would frequently and significantly reduce the sea room and air space available to the United States Forces exercising their rights' passage. Summary of US-Indonesia Consultations on Archipelagic Sea Lanes, Jakarta October 23-27, 1997 (un-published). Author has a copy of this summary.

⁷⁹ Robin Warner, above n 12, 179 and 182.

⁸⁰ Robin Warner, above n 12, 184.

⁸¹ Source of map with author's modification in Robin Warner, above n 12, 170.

The IMO Guidance SN/Circ 206,⁸² provides that “where an island borders the sea lane, ships exercising the right of archipelagic sea lanes passage may not navigate closer to the coast than ten per cent of the distance between the nearest point on the island and the axis line of the sea lane”. Based on the diagram in the annex (as seen in Figure 9) to the circular shows that the distance of the ten per cent rule at the nearest point of island to the axis lines is maintained along the whole of its coast where it falls within the sea lane. SN/Circ.206 did not specify how to deal the geographical complexities, such as an island/s within the sea lanes, islands which are not directly opposite.

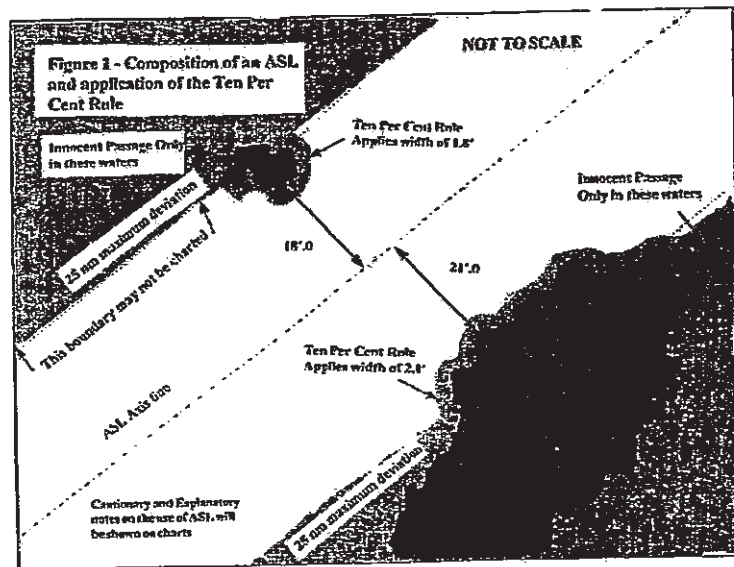


Figure 9. Composition of an ASL and Application of the Ten Per cent Rule⁸³

The creation of the ten per cent rule’s area would be applied to the distance from the axis lines to the adjacent coast; consequently the ten per cent area (buffer zone) varied. It will create difficulties in determining the buffer zones, although it may give greater safety margins further from the axis lines. Based on

⁸² IMO’s SN/Circ.206, issued in January 1999, available at <www.imo.org/includes/blastData.asp/doc_id=894/206C1.PDF>, at 15 December 2009.

⁸³ Sources of Diagram in the Annex to the SN/Circ.206.

⁸⁴ The Indonesia interpretation of the ten per cent rule has been depicted on the respective navigation charts which include notes for exercising the right of archipelagic sea lanes passage.

Indonesian navigation charts to where the areas of the ten per cent are depicted,⁸⁴ it seems that Indonesia construes the ten per cent rule as the distance from the axis lines to the adjacent coast. This method is shown in Figure 10, AB is the distance between axis lines and island, AC is the area of ten per cent rule applied, and BC as valid sea lanes. This interpretation seems consistent with the guidance of IMO SN/Circ.206.⁸⁵

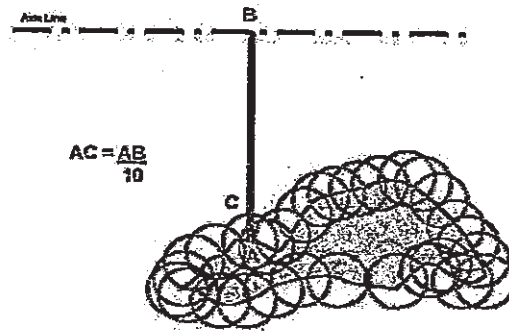


Figure 10. Application of the ten per cent rule⁸⁶

Another practical implication on the application of the ten per cent rule is treatment of island falling wholly within the lanes, which could be passed by either side.⁸⁷ Based on the depiction of the axis lines in the Indonesian navigational charts as shown in Figure 11, there is no access through the area outboard of the particular island, although the width of the waters is still less than 25 nautical miles. The Indonesian position is that, while exercising the right of archipelagic sea lanes passage, ships and aircraft must navigate following the axis line and outside of the ten per cent area represented by “bowler hat” symbols. An illustration of the exercising of the right of archipelagic sea lanes passage can be seen in Figure 11 which shows that ships and aircraft can exercise the right represented with ‘A arrow’ and ships and aircraft cannot navigate through additional water inboard of the midstream island (Pulau Panaitan)⁸⁸ as

⁸⁵ IMO’s SN/Circ.206, issued in January 1999.

⁸⁶ Source of map with author’s modification in Andrian J Halliwell, above n 70, 6.

⁸⁷ IMO’s SN/Circ.206 does not regulate this issue.

⁸⁸ Pulau means island.

depicted by the 'B arrow'. This position means that ships and aircraft cannot pass through the Strait of Panaitan (Selat Panaitan). The limit of the areas in which the ten per cent rule applies is shown in a distinctive symbol combining a short peck with solid half circle indicator which covers Pulau Panaitan and Ujung Kulon. The indicator is to distinguish one side of the line from the other and to ensure that the implication of the line is clear when the actual reason for the line falls outside the limit of the chart (as seen in Figure 11). This Indonesian interpretation is contrary to the United States and Australia views.⁸⁹

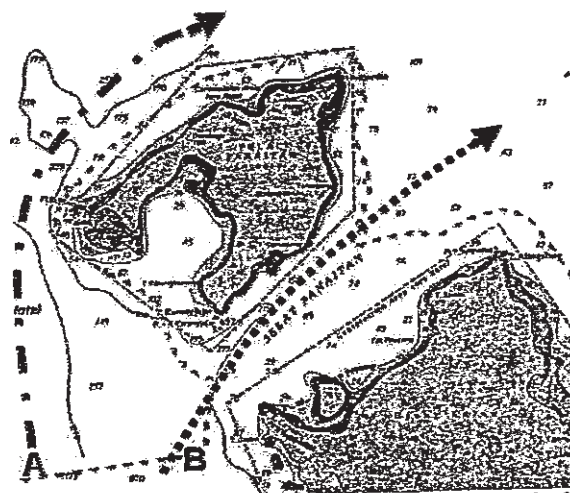


Figure 11. Exercising the right of archipelagic sea lane passage in the Sunda Strait⁹⁰

C. Axis Lines and its Depiction

There are two articles in the LOSC concerning axis lines and the depiction of axis lines which are Articles 53 (5) and 53 (10). Article 53(5) of the LOSC provides that 'Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points...' and Article 53(10) provides that 'The archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given'. Thus, the LOSC

⁸⁹ According to Halliwell, the Indonesian position will close the area which is usually used for navigation. Andrian J Halliwell, above n 70, 6-8.

⁹⁰ Source of map in Andrian J Halliwell, above n 70, 7 with author's modification.

requires archipelagic States to take responsibility for the charting of the archipelagic sea lanes passage and also the positioning of the axis lines in archipelagic sea lanes. The axis lines should be depicted on charts and the turning points stated in geographical coordinates. It follows that the depiction of the axis lines and the application of the ten per cent rule should be depicted on charts and there should be a list of geographical coordinates of the turning points.⁹¹

Several methods have been used for positioning of the axis lines of archipelagic sea lanes, as the LOSC does not provide much guidance on how to draw the axis lines.⁹² Considering the normal passage routes expose a number of different tracks used by ships in the same general direction both north/south and east/west through Indonesian waters rather than a single visible line, it is rather complicate to positioning the axis lines. This is because the master of a ship has the right to decide which routes will be used and which one is convenient for a particular journey. Thus, it is hard for the archipelagic State to determine axis lines or even to determine shipping routes normally used by the masters of ships.

Australia and Indonesia have similar views on the positioning of axis lines, using a system based on the examination of the usage patterns of vessels passing through certain areas combined with a concern for the safety of navigation.⁹³ It is believe that the axis lines should represent the routes normally used for international navigation⁹⁴ and should comply with safety requirements for maritime navigation and preservation of marine environment, as regulated by IMO.⁹⁵

⁹¹ Indonesia has used navigational charts to depict the axis lines and tables of list of geographical coordinates of turning points. LOSC only prescribe navigational charts for depicting the axis lines of the archipelagic sea lanes.

⁹² Robin Warner, above n 12, 177-78.

⁹³ Based on informal meeting between Indonesia and Australia that the axis lines should be placed coincide with the deep water routes for safe passage, in order to facilitate their commercial shipping.

⁹⁴ Robin Warner, above n 12, 178-79. Indonesia designation proposal submitted to MSC 69, IMO Doc MSC/69/S/2, 6 February 1998, Paragraph 9 specifies that, "The axis lines approximate the normal passage routes used for international navigation and pass over water which is suitable for navigation."

⁹⁵ The adoption of Indonesian axis lines by IMO seems it was not verified on their navigation safety, although Indonesia consulted and brought the depiction of the axis lines on the Indonesian navigational charts to IMO and IHO prior its adoption.

Contrary to the positions by Australia and Indonesia, the United States supports the position that axis lines be based on a combination of data concerning vessels movement in Indonesian waters and the principle that the positioning of axis lines should maximise the sea space available to user States' vessels and aircraft.⁹⁶ The United States' preferences for axis lines avoid areas within the Indonesian archipelago where the ten per cent rule would apply. There are significant differences between the Indonesia and Australia views, and the United States view; for example, the axis lines based on the United States view can be placed in the shallow waters, whereas the Indonesia and Australia views it is placed in the deep waters. The axis lines based on the United States view can be easily noticed because it tends to take distance from the island; whereas the Indonesia and Australia views, the axis lines are not always.

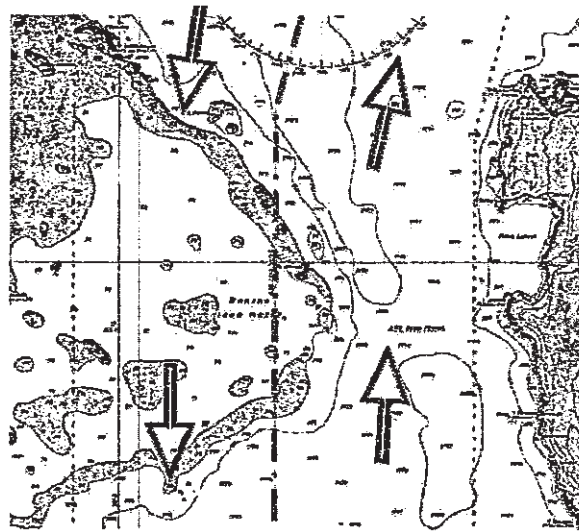


Figure 12. Position of the Axis Line in Makassar Strait⁹⁹

⁹⁶ Robin Warner, above n 12, 178.

⁹⁷ Proposal of Indonesia during meetings with user States.

⁹⁸ There is only Article 53 (5) of the LOSC related to creation of sea space under the ten per cent rule for exercising the right of archipelagic sea lanes passage.

⁹⁹ Source of map with author's modification in Andrian J Halliwell, above n 70, 13.

The practical implication of the United States view can be seen clearly in the Indonesian Archipelagic Sea Lane II which passes through the Makassar Strait. Formerly, the axis line was close to the Sulawesi Island because of the depth of the sea lanes and concerns for the safety of navigation,⁹⁷ but based on the United States preferences, the axis line has been moved to the middle of the Strait. As shown in Figure 12 the axis lines are on the sand banks and shallow waters. The United States also argued that the provisions of the LOSC do not provide requirements that the axis lines should be determined based on the depth of waters or navigable channel.⁹⁸

After long discussion and consideration of all possibilities, Indonesia and Australia followed the United States view that the axis lines would be placed wherever possible to take full advantage of 25 nautical miles on each side of the axis lines was available for exercising the right of archipelagic sea lanes passage. Australia and Indonesia also agreed to the view that this should be, wherever possible, an approximation of the normal route for vessels travelling north/south through the Indonesian archipelago.¹⁰⁰

In order to be consistent with this approximation approach, Indonesia revised the proposal submitted to the Maritime Safety Committee of IMO (MSC/69). But the final Maritime Safety Committee document titled General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes¹⁰¹ does not include any guidelines in relation to the positioning of axis lines. The absence of guidance in the positioning of axis line will leave open for an archipelagic State which is considering proposals for the designation of archipelagic sea lanes to adopt different principles.

Based on the United States preference, the axis lines could be placed in shallow waters which could endanger ships. In order to avoid misinterpretation of axis lines, MSC 69 added a statement in the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes to the effect that axis lines "do not indicate the deepest water, any routes or recommended track" as defined in Part A of IMO Publication on Ships Routing.¹⁰²

¹⁰⁰ Robin Warner, above n 12, 178.

¹⁰¹ The Document was adopted by the 69th Meeting of the Maritime Safety Committee (MSC) in May 1998 and form Part H of IMO Ships Routing System Publication.

¹⁰² Paragraph 7.1 of the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes.

This statement would appear to be contrary to Article 53(1) of the LOSC which states that the archipelagic sea lane passage should be 'suitable' for continuous and expeditious passage.¹⁰³ There is no clear definition what constitute as 'suitable', but it seems that the archipelagic State was obliged to guarantee the navigational safety of archipelagic sea lanes before proposed the archipelagic sea lanes to IMO for consideration and adoption.¹⁰⁴

Article 53 (10) of the LOSC stipulates, "archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given." For example, Indonesia would set up a traffic separation scheme in the Strait of Makassar, the Indonesian Archipelagic Sea Lanes II, this will mean that the traffic separation scheme will be on only one side of archipelagic sea lanes which is deep waters as seen in Figure 13. It is interesting to note that the sea space and the air space for exercising the right of archipelagic sea lane passage are not coinciding.

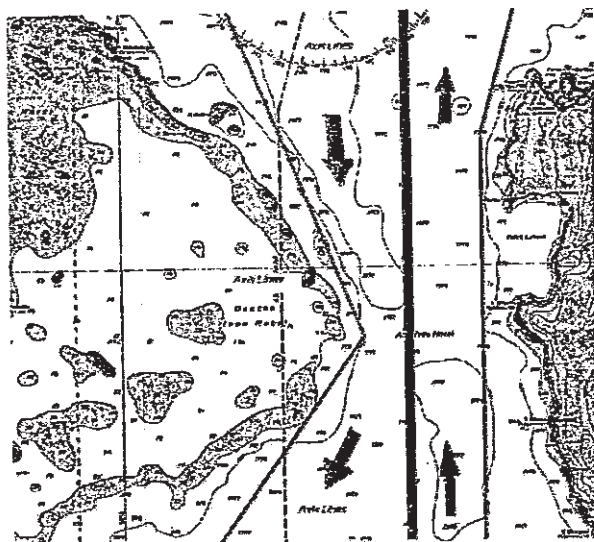


Figure 13. The Possibility of Traffic Separation Scheme in Strait of Makassar¹⁰⁵

¹⁰³ The Australian delegation prompted the need of navigational safety to the NAV 43 and MSC 69.

¹⁰⁴ Robin Warner, above n 12, 179; Paragraph 4.2 of the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes.

¹⁰⁵ Source of map with author's modification in Andrian J Halliwell, above n 70, 14.

The United States' preference on the positioning of sea lanes suggests that the terms "normal passage routes" and "routes normally used for international navigation" in the LOSC Articles 53 (4) and 53 (12) has different meanings. This would suggest that the right of archipelagic sea lanes passage could not automatically be implemented in normal passage routes if it has not been designated by the archipelagic State and adopted by IMO.

D. Non Designation of Archipelagic Sea Lanes

Designation of Indonesian Archipelagic Sea Lanes Passage is partial designation.¹⁰⁶ It indicates that Indonesia would or may designate additional sea lanes to be full designation. Article 53(12) of the LOSC provides that 'If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation'. So the issue is what rights are to be exercised in the non-designated sea lanes.

There are different potential interpretations¹⁰⁷ of the provision in the LOSC Article 53(12). The omission of a reference to overflight in the Article results in a possible argument that if archipelagic States do not designate sea lanes or air routes the right of archipelagic sea lane passage could be only be exercised by ships, because there are no air routes for aircraft in archipelagic waters and since aircraft do not have the right of innocent passage. It can also be argued that if foreign ships resort to routes used for international navigation within archipelagic waters, which could very well be within a strait, the right of archipelagic sea lanes passage is implied for both ships and aircraft instead of the right of innocent passage in archipelagic waters. Another plausible view is that the right of passage provided for in Article 53(12) implies a right of transit passage comparable to the right of transit passage in straits used for international navigation as provided under Articles 37 and 38 of the LOSC. It can also be argued that the right of passage under Article 53(12) includes the right of passage for government aircraft to enjoy the right of transit passage in archipelagic sea lanes (unlike over land territory).

¹⁰⁶ Resolution MSC 72 (69) IMO.

¹⁰⁷ Kim Young Koo, 'The Law of the Sea, Archipelagoes, and User States: Korea' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 158, 162.

Additionally, it appears that if proposal of the archipelagic State concerning the designation of archipelagic sea lanes is not adopted by IMO and agreement is not reached between the archipelagic State and IMO, and consequently the archipelagic State has not designated sea lanes yet, Article 53(12) of the LOSC would apply and archipelagic sea lanes passage right may be exercised through routes normally used for international navigation which might be contrary to the archipelagic States' interests. This would suggest that IMO has more power to designate archipelagic sea lanes passage compared with the archipelagic State itself, which it is contrary to Article 53(1) of the LOSC which the right should be left to the archipelagic State.

Indonesia did not want all normal routes usually used for navigation to be used for exercising the right of archipelagic sea lanes passage.¹⁰⁸ During preparations for the designation of Indonesian archipelagic sea lanes, there were several arguments concerning the implementation of Article 53(12) of the LOSC, including arguments as to whether, based on Article 53(12) of the LOSC, foreign ships and aircraft could automatically exercise the right of archipelagic sea lanes passage.¹⁰⁹ Based on the Indonesia experience, there are many considerations to be taken into account before the archipelagic State can designate an archipelagic sea lane. For example, the archipelagic State must undertake a hydrographic survey in the proposed sea lanes, consult with user States, follow decisions of international organizations, and depict the axis lines on the proper navigational charts, make a list of geographical coordinate of turning points and publish it. These requirements indicate the right of archipelagic sea lane passage is not automatically exercisable, although the right might be still exists.

Furthermore, if the archipelagic State designated the archipelagic sea lane partially and is adopted by IMO, it could be difficult to justify the other normal passage routes which have not been yet designated. Because States have different interpretations as to what constitutes a normal passage route is.¹¹⁰ The designation of archipelagic sea lanes by an archipelagic State can be problem-

¹⁰⁸ The main reason why Indonesia designated the archipelagic sea lane is because Indonesia did not want foreign ships and aircraft pass through Indonesian waters freely, uncontrolled and undetected. General explanation of the Elucidation of Government Regulation Number 37 of 2002.

¹⁰⁹ This argument came up during discussion in the Inter Department Working Group on Designation Archipelagic Sea Lanes, in 2001. Personal understanding of the author as members of Working Group.

¹¹⁰ See discussion in Section 5.3.1.

atic. It seems IMO has the power to determine whether the archipelagic State has made a full or partial designation of archipelagic sea lanes.¹¹¹ Again, the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes gives IMO the power to do this.¹¹²

In addition, if user States do not agree the sea lanes that have been designated by the archipelagic State and adopted by IMO as partial designation, the ships/aircraft of user States will use different routes and insist that they enjoy the right of archipelagic sea lanes passage in the other routes. This will end up in conflict at an operational level. It seems that partial designation is ineffective, because ships/aircraft of States can use other sea routes and pretend or declare that they enjoy the rights of archipelagic sea lanes passage. A partial designation is akin to no designation at all. This argument was one of the reasons why Indonesia formulated the provisions in Articles 3(2) and 15 of Government Regulation Number 37 of 2002. Article 3 (2) of the Government Regulation states, "Pursuant to this Regulation, to exercise the right of archipelagic sea lanes 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." Article 15 of the Government Regulation states, "Six months after the entry into force of this Government Regulation, foreign ships and aircraft can exercise the right of archipelagic sea lanes passage only through the designated Indonesian archipelagic sea lanes as stipulated in this Government Regulation."

V. Conclusion

The archipelagic sea lanes passage is a new passage regime introduced by the LOSC. Until now, only Indonesia as an archipelagic State has designated archipelagic sea lanes. There are still many issues which arise while designating sea lanes, such as what constitutes normal passage routes or routes normally used for international navigation, does the IMO have a right to allow archipelagic States to designate a partial designation, how to deal the non designation of archipelagic sea lanes and how to interpret the ten per cent rule.

¹¹¹ IMO retains jurisdiction if there is partial designation of archipelagic sea lanes. Paragraph 3.5, General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes, Resolution A 572 (14), MSC 71 (69) IMO.

¹¹² Paragraph 3.2. of the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes, Res. MSC 71 (69), adopted 19 May 1998.

The designation of the IASLP was a long process of consultation and negotiation between Indonesia, international organizations and user States and could be considered as adding to some aspects of the LOSC provisions on archipelagic regimes. For example, the positioning of the axis lines in the final package reflected an accommodation and compromise between Indonesia and user State and it indicated the axis line was not the navigable track for ships. Furthermore, the positioning of the axis lines also indicated that such routes were not routes normally used for international navigation.

Indonesia has enacted Government Regulation Number 37 of 2002 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes. There are many objections to the Regulation. Some States argue Indonesia is not being consistent with the LOSC by introducing the provisions that the right of archipelagic sea lanes passage may only be exercised on the designated sea lanes, that Indonesia does not indicate that the designation is partial and that Indonesia has to substitute or change the sea lanes in the Ombai and Leti Straits. But Indonesia believes that the Government Regulations has consistent with the provisions of the LOSC. The absences of the further guidance, ambiguous of the provisions of the LOSC have made Indonesia difficult to adopt all user States' interests.

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Act Number 6 Year 1996 on *Indonesian Waters* (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647)

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United Nations Convention on the Law of the Sea, opened for Signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (*The LOSC*)

Resolution MSC 72(69), Adoption, Designation and Substitution of Archipelagic Sea Lanes, Adopted 19 May 1998, SN/Circ.1998.