

# ARCHIPELAGIC SEA-LANES IN INDONESIA – THEIR LEGALITY IN INTERNATIONAL LAW

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## 1. Introduction

In May 1996, Indonesia submitted the first (and only) proposal for the designation of three Archipelagic Sea Lanes (ASLs) within its archipelago to the International Maritime Organisation (IMO). The IMO has claimed the mandate of being the ‘*competent international organisation*’ referred to in the United Nations Convention on the Law of the Sea (LOSC)<sup>1</sup> for designating ASLs.<sup>2</sup> After significant protests from major maritime countries including Australia and the United States (a prominent non-signatory to the LOSC),<sup>3</sup> the IMO declared Indonesia’s submission a ‘*partial designation*’ of ASLs.<sup>4</sup> This has provided maritime countries a significant victory as the declaration has rendered the Indonesian ASLs practically useless because there is no compulsion for maritime countries to use them. Maritime countries, through their influence over the IMO, have maintained almost complete and unfettered access for shipping within the archipelagic waters of Indonesia. This paper examines the Indonesian submission to determine the validity of the IMO’s declaration at international law. Specifically, it examines the authority of the IMO as a self-professed ‘*competent international organisation*’, the role it has undertaken in the process, and the legality of its determination that Indonesia’s ASL submission was a ‘*partial declaration*’.

This paper makes three assertions. First, despite claims to the contrary,<sup>5</sup> the LOSC is not a universal codification of the law of the sea nor is it a ‘*Constitution for the Oceans*’.<sup>6</sup> It is a fundamental treaty which numerous states are bound to adhere through being signatories. However, numerous important non-signatories, the significant quantity of declarations on the interpretation of its provisions and the failure of the treaty to declare its jurisdiction over non-signatories mean the treaty is not a full embodiment of universally applicable customary law. The LOSC has universal application where it can be shown that it codifies existing customary law. However, the treaty has introduced significant new concepts such as the archipelagic state, archipelagic sea-lane passage (ASLP) and ASLs. To be universally applicable (that is applicable to all states, including non-signatories), it must be demonstrated that the international legal concepts pioneered by LOSC have been accepted as representing customary international law.<sup>7</sup> This paper argues that as there has been no complete implementation of the process for designating ASLs through the process designated by the LOSC, the process cannot be accepted as valid international customary law. Therefore the process is only binding on countries who are party to the treaty. Secondly, in the absence of being specifically named in the LOSC treaty, the IMO must show it has been recognised as having the mandate as the ‘*competent maritime authority*’ to designate ASLs.<sup>8</sup> It is argued that the IMO does not have this mandate yet, despite its declaration to the contrary. Finally, the paper analyses the conduct of the IMO in its consideration of Indonesia’s submission for recognition of ASLs within its territory and specifically the legality of its declaration of the submission as being a ‘*partial submission*’.

## 2. Historical Introduction

The Law of the Sea is a unique field of international law. From a practical point, legal regimes differ between the oceans and land due to their existence in fundamentally different environments. Today, it is an accepted concept that oceans are open and free to all users in the regions beyond the territorial control of any state (the ‘freedom of the seas

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<sup>1</sup> *United Nations Convention on the Law of the Sea (UNCLOS)*, opened for signature 9 Dec 1982, ATS 31, 21 ILM 1261, (entered into force 16 Nov 1994).

<sup>2</sup> *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, IMO Doc LEG/MISC.5 (2007) [Part II], <[www.imo.org](http://www.imo.org)> at 15 August 2009.

<sup>3</sup> Constance Johnson, ‘A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission’, (2000) 15(3) *The International Journal of Marine and Coastal Law* 326-327.

<sup>4</sup> *Ibid* 329.

<sup>5</sup> John O’Sullivan, ‘Lost is right: the U.S. should steer clear of the Law of the Sea treaty’ (2007) 59 *National Review* 16.

<sup>6</sup> Tommy Koh, *A Constitution for the Oceans*, <[http://www.un.org/Depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf)> at 16 November 2008.

<sup>7</sup> Peter Malanczuk, *Modern Introduction to International Law*, (7th ed, 2004), 44-5.

<sup>8</sup> David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea, Progress and Prospects* (2006), 12.

principle’).<sup>9</sup> There are two broad classes of state which hold diametrically opposing agendas when seeking to influence the law’s development. These are:

1. Coastal states - states with coastlines and a desire to protect their sovereignty as well as exploit the natural resources of the oceans in proximity to their coasts; and
2. Maritime states - states that benefit from maximising access to the world’s oceans for trade and strategic reasons.

Historically, it has been the inability of a state to enforce its authority over an area of the ocean, and the unwillingness of other states to recognise any authority of another state to exert this control over the ocean that has made this area of law unique.<sup>10</sup> The concept of sovereignty over the oceans has varied throughout history. Sometimes it was considered that sovereignty demanded the peaceful regulation of the oceans by the reigning state, but more commonly it was seen as the ability of a sovereign to control mercantile trade and generate income in the form of licenses and taxes.<sup>11</sup> Many attempts to exert control over the world’s oceans have been made without prolonged success.<sup>12</sup> The ancient Greek historian Herodotus referred to ‘*Minos the Cnossian*’ and ‘*Orates*’ as rulers who had made themselves ‘*masters of the sea*’.<sup>13</sup> Later in the 10<sup>th</sup> century, the English King, Edgar the Peaceful, declared himself to be the ‘*Sovereign of the Britanic Ocean*’.<sup>14</sup> In the 1300’s, Sweden claimed the Baltic Sea and Denmark claimed not only the Baltic Sea, but all the seas between Norway, Iceland and Greenland.<sup>15</sup> However, the greatest claim was ordained by Pope Alexander VI (a Spaniard), who after the discovery of the ‘*New World*’ by Columbus in 1493, divided the remaining undiscovered world between Spain and Portugal from north to south through a point ‘one hundred leagues<sup>16</sup> west of Cape Verdes’.<sup>17</sup>

The tension between states over sovereignty of the oceans continued for the next century. One famous incident occurred in 1580, after Sir Francis Drake completed his famous passage around the tip of South America. The Spanish Ambassador to England passionately complained to Queen Elizabeth of an ‘intrusion into the realm of his King’.<sup>18</sup> Queen Elizabeth replied that ‘the use of the oceans was open to all mankind, for the title to sea cannot be obtained in view of its nature, and because the public use of the oceans is required by all mankind.’<sup>19</sup>

However, the growth of maritime nations such as England, Portugal, Spain and the Dutch and their inability to prevent each other from utilising the oceans for trade, coupled with the increasing influence in the political and strategic communities of the growing mercantilist classes, caused the concept of the ownership of the oceans to gradually be replaced by a demand for its unlimited use.<sup>20</sup> The issue was debated vigorously and came to a head in the early 17<sup>th</sup> century. In 1609 James I of England issued a proclamation banning Dutch fisherman from operating near the shores of England. Coincidentally in the same year, the Dutch jurist Hugo Grotius published the seminal essay, ‘*Mare liberum seu de jure quod batavis comitit indicia commercial dissertation*’ (The Free Sea or an essay on the law applicable to the Dutch trade in the Indies).<sup>21</sup> Grotius argued that because the resources of the seas were inexhaustible and as the ocean could not be permanently ‘occupied’ by man, it could not be converted into private property. Therefore its use must have been intended to be free for all of mankind.<sup>22</sup>

Grotius’ work was met with hostility from many quarters including academics and heads of state.<sup>23</sup> The famous English jurist, John Seldon penned a riposte (*Mare clausum sive dominio maris* – the closed sea) to Grotius’ work (which was completed in 1613 but not published until 1640) which strongly criticised the concept.<sup>24</sup> Despite this criticism, the impossible task of enforcing sovereignty over the oceans saw the freedom of the seas principle being adopted. Instead, focus changed to the ability of states to control areas of ocean closer to land.<sup>25</sup> Once again Grotius featured prominently, arguing that although he asserted the seas were free, sovereignty could be exercised in areas such as bays and straits, but could not stop vessels exercising ‘innocent passage’. This concept was later refined in 1704 by

<sup>9</sup> Ram Amand, ‘Freedom of the Seas: Past, Present and Future’ in Hugo Caminos (ed), *Law of the Sea* (2001), 215.

<sup>10</sup> Gerard Mangone, *Law for the World Oceans* (1981), 20-21.

<sup>11</sup> Richard McNees, ‘Freedom of Transit through International Straits’ (1974-5) 6(2) *Journal of Maritime Law and Commerce*, 176.

<sup>12</sup> Gary Knight and Chiu Hungdah, *The International Law of the Sea: Cases Documents and Readings* (1991), 9-15.

<sup>13</sup> William Beloe, *Herodotus: Translated from the Greek, with Notes and Life of the Author* (1831), 177.

<sup>14</sup> Richard McNees, ‘Freedom of Transit through International Straits’ (1974-5) 66(2) *Journal of Maritime Law and Commerce*, 176.

<sup>15</sup> *Ibid.*

<sup>16</sup> A league is approximately three nautical miles – Oxford Dictionary Online, <[www.askoxford.com](http://www.askoxford.com)> at 27 November 2008.

<sup>17</sup> McNees, above n 11, 175.

<sup>18</sup> Mangone, above n 10, 17.

<sup>19</sup> *Ibid.* 5.

<sup>20</sup> McNees, above n 11, 177.

<sup>21</sup> Mangone, above n 10, 17.

<sup>22</sup> McNees, above n 11, 177.

<sup>23</sup> Mangone, above n 10, 17.

<sup>24</sup> *Ibid.* 17.

<sup>25</sup> *Ibid.* 20.

his countryman Cornelius Bynkershoek who defined the right of sovereignty to extend as far from the coast as a state's weapons could reach (and therefore permanently enforce sovereignty).<sup>26</sup> This became known as the '*cannon-shot rule*'.<sup>27</sup> The concept gradually developed and the zone was later acknowledged as a state's 'territorial sea'. The uncertainty of the range of the territorial limit was clarified in the late 1700's, when English prize courts and the United States established the extent of the territorial sea at three miles.<sup>28</sup> The three mile limit was used throughout the 1800's to adjudicate several contentious fishing disputes around Europe and despite numerous challenges to the three mile delineation, it continued for most of the 19<sup>th</sup> century. However by the end of the 19<sup>th</sup> century, it was becoming clear that the three mile limit was insufficient.<sup>29</sup>

Despite the pressures to extend territorial limits, the concept of the freedom of the seas combined with the rights of coastal states to control limited areas from its coast was accepted as customary international law. However there was little international agreement between nations on the details of the concept, with each nation seeking to maximise its own self-interest. Besides basic 'rules of the road' agreements, there was constant friction amongst nations over issues such as fishing rights, territorial limits and freedom of navigation. One of the most concerning consequences of this disagreement is illustrated by the inability of countries to agree to a universal buoyage system (navigation marks used for the safe transit of maritime vessels). Negotiations commenced in 1889 and a negotiated global system was only achieved in 1980 and still contains two almost completely opposite systems.<sup>30</sup>

The difficulties obtaining universal agreement over the regulation of the seas meant until the middle of the 20th century, the concept of the '*freedom of the seas*' could better be described as a '*laissez faire system of non-regulation*'.<sup>31</sup> Debate was controlled by the large maritime powers such as England, Germany, Russia, United States and Japan whose interests were firmly in maximising their influence on coastal nations through the projection of their maritime might. It was these countries that prevented the first codification of the law of the sea because of their aversion to increasing the territorial sea limit beyond three nautical miles.<sup>32</sup>

The impetus to change the acceptance of the three mile territorial limit was triggered by the United States in 1945 when oil was discovered off its coast. In what was labelled the '*Truman Declaration*', the United States claimed control over water extending to its continental shelf. Whilst the American claim did not affect navigation rights, it was used by other countries to push ever growing claims over the world's seas.<sup>33</sup> By 1958 there were 27 countries claiming territorial seas greater than 3 miles with a further six rejecting the three mile rule but not disclosing what the actual limits were.<sup>34</sup>

The subsequent confusion and rising tensions between maritime and coastal states began to threaten essential maritime international trade. It was this threat which led to the United Nations to attempt to codify an accepted regime for the international law of the sea. This would prove to be a Herculean task which would take nearly 40 years to accomplish through three of the largest and most complex conventions ever negotiated by the United Nations.

#### 4. Codification of the Law of the Sea

The three major attempts at codification of the Law of the Sea were:

1. UNCLOS I (1958) (which drafted four Conventions – The Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, The Convention on Fishing and Conservation of the Living Resources of the High Sea, and the Convention on the Continental Shelf)
2. UNCLOS II (1960), and
3. UNCLOS III (1973-1982) (which produced the LOSC).<sup>35</sup>

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<sup>26</sup> Ibid.

<sup>27</sup> Knight, above n 12, 14.

<sup>28</sup> Ibid. The unit 'miles' in this paper means 'nautical miles'.

<sup>29</sup> Mangone, above n 10, 17.

<sup>30</sup> Royal Navy Hydrographic Department, *The Mariners Handbook*, (5<sup>th</sup> ed, 1989), 156.

<sup>31</sup> Amand, above n 9, 268.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid 272.

<sup>34</sup> Ibid 268.

<sup>35</sup> Malanczuk, above n 7, 173.

These conventions were extremely wide ranging and were developed over many years of intense political, legal and diplomatic negotiations.<sup>36</sup>

#### 4.1 UNCLOS I and II

Many of the coastal states which emerged after WWII wanted to challenge the freedom of the seas principle which granted traditional maritime countries almost unfettered access to their coastal waters. Emergent coastal states especially resented that they were subjected to laws which they had no opportunity to influence. This resentment was fuelled by maritime nations using the doctrine to apply pressure on them by imposing a military presence in close proximity to their coast and populations (known as 'gunboat diplomacy').<sup>37</sup>

The first two conferences were dominated by two factional groups. One group comprised of emergent African and South American countries, supported by the Soviet Union. The other group was made of the traditional western maritime powers of Europe and the United States.<sup>38</sup> The existence of the two blocs of countries and the influence of the Cold War resulted in little progress towards reaching an agreed limit on the breadth of territorial seas. Noticeably no fixed declaration of a territorial limit was contained in the 1958 Convention on the Territorial Sea and the Contiguous Zone.

A major obstacle against extending the limits of territorial waters was the concern of maritime countries that many of the world's most important straits would be converted from high seas into territorial seas with the potential for access to be denied to maritime countries.<sup>39</sup> These included the Dover Strait, Malacca Strait, Straits of Hormuz, the Bering Straits and all passages within the Indonesian Archipelago.<sup>40</sup> The United States as a vocal dissenter of the concept, claimed this would enable belligerent states to close off these straits and this could cause problems to 'United States warships steaming to quell trouble in a localised flare-up ... [and be] subjected to additional travel time – as much as 2-3 days – to avoid penetrating the waters of a non-belligerent state'.<sup>41</sup> It was also argued the 'spaciousness of the world's oceans would not prove sufficient to absorb without jeopardy to shipping and security, the total area necessary to comprise a 12 mile territorial sea'.<sup>42</sup> Therefore whilst some progress was made in UNCLOS I and II, it can be said that their primary success lay in the introduction of significant new concepts such as archipelagic nations, the width of territorial seas and the need for codified transit regimes. It would be the successful negotiation of these issues that would lead to the production of the LOSC in UNCLOS III.

#### 4.2 UNCLOS III

The third convention, approximately three times larger than the previous conventions, had over 144 participants and 8 specialised agencies participating.<sup>43</sup> It was undertaken over nine years and was finally closed for signature in 1982.<sup>44</sup> Once again the issue of passage through straits was a major issue – the maritime states saw an increase of territorial limit as potentially excluding their passage through 100 straits used for international navigation.<sup>45</sup> Coastal states insisted straits should be designated as territorial seas and consequently vessels should be required to transit them only under restrictive 'innocent passage' regime.<sup>46</sup> The result was a compromise, which produced a new concept that combined the traditional regime of innocent passage through territorial waters with freedom of navigation on the high seas. The new concept, 'transit passage', required concessions from both sides.

Included in the negotiation process was the demand by island nations such as Indonesia and the Philippines for recognition of 'archipelagic status'. This concept was intricately linked with the issues surrounding transit regimes and the extension of territorial waters of coastal states to 12 miles.

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<sup>36</sup> Ibid, 174.

<sup>37</sup> Haslim Djalal, *Indonesia and the Law of the Sea* (1995), 33.

<sup>38</sup> Arthur Dean, 'The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas' (1960) 54 *The American Journal of International Law* 4,771-789.

<sup>39</sup> G. Etzel Percy, 'Geographical Aspects of the Law of the Sea' (1959) 49(1) *Annals of the Association of American Geographers* 1,3.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid, 4.

<sup>42</sup> Ibid, 4.

<sup>43</sup> Malanczuk, above n 7, 173.

<sup>44</sup> Knight & Hungdah, above n 27, 22.

<sup>45</sup> United Nations Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)*, <[www.un.org/Depts/los/convention\\_agreements](http://www.un.org/Depts/los/convention_agreements)> at 10 November 2008.

<sup>46</sup> Ibid.

## 5. The Law of the Sea Convention's (LOSC'S) Position in International Law

UNCLOS III's success was borne out in its production of the Law of the Sea Convention (LOSC). LOSC was a fundamental point in the development of the law of the sea. Several states including the United States (a non signatory which refused to sign due to disagreements over the commercial exploitation of the sea-bed) have consistently claimed that the LOSC has been an embodiment of customary law since it came into force.<sup>47</sup> These claims are premature.

First, whilst 157 states have ratified LOSC,<sup>48</sup> over 40 member states of the United Nations have not.<sup>49</sup> This challenges its claim of being universally accepted as being binding on all states and therefore not customary law. Secondly, LOSC introduced fundamental new concepts of law which were not previously recognised in treaty or customary international law (a major area being the archipelagic concept)<sup>50</sup> and therefore the entire treaty cannot claim to be a codification of customary law. Thirdly, whilst reservations were not permitted, a number of countries provided declarations as to how they interpreted specific clauses of the LOSC and how they intended to implement them, once again detracting from the claim of universal acceptance.<sup>51</sup> Finally, when it entered into force in 1994, the LOSC was not automatically applicable to non-ratifying states. Under Article 35 of the Vienna Convention on Treaties,<sup>52</sup> any treaty which is intended to be binding on third parties must be expressly stated in its text. Additionally any third party willing to be bound by the terms of a specific treaty when they are not a signatory must do so in writing.

The LOSC does not explicitly state that it was intended to bind third party states nor have any third parties states indicated in writing that they are willing to be bound by its terms. Therefore, LOSC is only binding on third party states through customary international law. That is, it is necessary to show that that the general practices contained within the treaty are *opinio juris*<sup>53</sup> (that there is a conviction felt by the international community that there is a legal obligation to follow the terms of the LOSC and therefore that it reflects valid international law). Now the treaty has been in effect for 15 years, various parts of the more common practices conducted under the treaty can be shown to have been accepted by states as being valid customary international law.

## 6. Navigation Regimes in LOSC

Navigational regimes were a vigorously debated issue in the production of the LOSC. Specifically:

1. Archipelagic states wanted to be recognised as complete and encompassing nations,
2. Coastal states wanted to increase the limit of their territorial seas, and
3. Maritime countries were determined to retain their vital commercial and strategic access to sea lanes through these coastal states.

The result was an introduction and codification of three navigational regimes. These were:

1. Innocent Passage,
2. Transit Passage; and
3. Archipelagic Sea Lanes Passage (ASLP).

### 6.1 Innocent Passage

'Innocent Passage' applies only to the territorial seas of a state. LOSC provides strict restrictions on the behaviour of vessels in the innocent passage regime.<sup>54</sup> Specifically, this means a vessel must not engage in conduct which is '*prejudicial to the peace, good order or security of the coastal state.*'<sup>55</sup> Coastal states may prevent vessels from

<sup>47</sup> John O'Sullivan, 'Lost is right: the U.S. should steer clear of the Law of the Sea treaty' (2007) 59 *National Review* 16.

<sup>48</sup> United Nations, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 25 September 2008*, <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_agreements.htm](http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm)> at 31 October 2008).

<sup>49</sup> Malancuzak, above n 7, 174.

<sup>50</sup> A fact recognised by the United Nations <[http://www.un.org/Depts/los/convention\\_agreements](http://www.un.org/Depts/los/convention_agreements)> at 30 October 2008.

<sup>51</sup> Robin Churchill, and Alan Lowe, *The Law of the Sea* (2<sup>nd</sup> ed, 1988), 17.

<sup>52</sup> *Vienna Convention on the Law of Treaties 1969*, opened for signature 23 May 1969, 1155 UNTS 331, (entered into force 27 January 1980).

<sup>53</sup> *Nicaragua v USA (Merits)* (1986) ICJ REP 14.

<sup>54</sup> UNCLOS, above n 1, Art.19.

<sup>55</sup> *Ibid.*

transiting their waters if they fail to comply with these requirements.<sup>56</sup> Coastal states may also temporarily suspend all innocent passage rights in all territorial seas except international straits for security reasons.<sup>57</sup> Passage must be continuous and expeditious except for anchoring in normal cases of navigation, in 'force majeure' (distress), or when assisting another vessel.<sup>58</sup> International trade traffic suffers little disruption from the requirements of innocent passage as commercial pressures will dictate that transits are conducted in a direct and expeditious manner as a matter of course.

However, this is not necessarily the case for naval vessels whose training and security requirements often demand individual and task group formations conduct internal and external exercises which require variations of course and/or speed as well as the use of organic aircraft and weapon systems. These are significantly restricted under the '*innocent passage*' regime. Importantly for maritime powers, submarines are required to transit on the surface and display its national flag. The most controversial concept of '*innocent passage*' is the demand by more than 40 countries (including Indonesia and the Philippines) for prior notification of warships entering their territorial waters.<sup>59</sup> This claim lacks substantial weight due to the number of objections to this claim and the refusal from other maritime nations to comply with this requirement.<sup>60</sup> This requirement was not included in the LOSC treaty despite persistent submissions by many states.<sup>61</sup> Additionally, the literal interpretation of the sections addressing '*innocent passage*' in LOSC (ss.17-26),<sup>62</sup> specifically states that there shall be no discrimination between ships of the state and ship's carrying cargoes and the ability of coastal states to regulate '*innocent passage*'. This precludes the ability to demand notification.<sup>63</sup> Nevertheless '*innocent passage*' remains the most restrictive of the navigational regimes.

## 6.2 Transit Passage

'*Transit passage*' is a regime which provides for the non-suspendable right of passage through straits used for international passage from one part of the high seas to another, or territorial seas of another state.<sup>64</sup> Importantly, there is no differentiation between warships and commercial traffic – meaning that there is no restriction on transit provided it is 'continuous and expeditious'.<sup>65</sup> This means the restrictions of '*innocent passage*' on military activities and submarines are not applicable. The '*transit passage*' concept did not have a high profile in customary international law prior to UNCLOS III. This was largely because until UNCLOS III, territorial seas only extended three miles from a state's baselines and therefore did not affect many international straits. However in UNCLOS III the issue of non-suspendable rights of transit through international straits came to a head when territorial seas were agreed to be extended from three miles to twelve miles. This resulted in many international straits becoming fully covered by one or more states' territorial waters. To break the deadlock between the maritime and coastal states, the United Kingdom introduced the concept of '*transit passage*'.<sup>66</sup>

The arguments for legitimacy included the customary practice of seafaring nations of non-suspendable passage of international straits and the numerous treaties between states including large multilateral treaties (such as the Territorial Sea Convention<sup>67</sup> and UNCLOS III). Many non-signatory countries to these treaties (such as the United States) claim these are codifications of customary law of '*transit passage*'. However until UNCLOS III there were several coastal states, including Indonesia and the Philippines which did not accept this regime (for example in 1988, Indonesia closed Sunda Strait for military exercises). The transit rights law created in UNCLOS III was a new law and therefore only immediately binding on signatory states. However since UNCLOS III, '*transit passage*' has acquired a general legal validity from the international community. '*Transit passage*' was not customary law prior to UNCLOS III and was not legitimised by the LOSC treaty itself, because it was new law and the convention did not provide specifically for the rights to be applicable to non-signatory state. However its consensual acceptance by the international community of the universal legality of the '*transit passage*' concept espoused in UNCLOS III since the treaty came into effect in 1994 has provided it with growing legitimacy in international customary law and can now be considered as universally applicable.

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<sup>56</sup> Ibid Art.25.

<sup>57</sup> Malanczuk, above n 7, 176-7.

<sup>58</sup> UNCLOS, above n 1, Art.19.

<sup>59</sup> Feestone, above n 8, 368.

<sup>60</sup> David Froman, 'Uncharted Waters: Non-Innocent Passage of Warships in Territorial Seas' (1984) 21 *San Diego Law Review* 625.

<sup>61</sup> Ibid 629-631.

<sup>62</sup> UNCLOS, above n 1, Arts.17-26.

<sup>63</sup> Ibid Art.24(1b).

<sup>64</sup> Ibid Section II.

<sup>65</sup> Ibid Art.36.

<sup>66</sup> Phiphat Tangsubkul, and Francis Lai Fung-wai, 'The New Law of the Sea and Development in South East Asia' (1983) 23:7 *Asian Survey*, 863.

<sup>67</sup> *Convention on the Territorial Sea and the Contiguous Zone 1958*, opened for signature 29 April 1958, 516 UNTS 205 (Entered into force 10 September 1964), Article 16(4).

## 7. Indonesia's Historical Claim for Archipelagic Status

Indonesia is comprised of 17,508 islands and has a territorial area of 5 193 250 square kilometres.<sup>68</sup> It is the world's largest archipelagic state and is located in the heart of South East Asia. Consequently, all maritime traffic transiting South East Asia must enter Indonesian waters at some point.<sup>69</sup> Indonesia has a well documented history for claiming to be an archipelagic nation. Indonesia's word for 'fatherland' - '*tanah air*', means 'the land and the water'.<sup>70</sup> Historically, Indonesia has always regarded the seas within its archipelago as internal waters and has resented '*historical colonial powers transiting through its waters without regard to its sovereignty*'.<sup>71</sup>

Since Indonesia's independence in 1945 it has faced significant threats from numerous internal separatist struggles. Insurgencies in Aceh, West Papua and Timor have at times threatened to significantly destabilise the nation. In 1957 during a particularly volatile period, Indonesia announced the policy of '*Wawasan Nusantara*' (Unity/Archipelagic Outlook) to provide a symbol of unity.<sup>72</sup> This has remained official government policy ever since.

Indonesia has been consistently critical of the role of customary international law in the law of the sea. It regards customary law as the mechanism which colonial powers used to justify their continued intrusion and dominance of developing countries such as Indonesia for over 300 years.<sup>73</sup> It is also critical of having to accede to laws that it has had no opportunity to influence, develop or accept.<sup>74</sup> As a result, along with many developing nations, Indonesia was eager to participate in the UNCLOS conventions to '*correct the imbalances of the past*'.<sup>75</sup> It saw the UNCLOS process as an opportunity to reduce the dominance of the traditional seafaring nations. It was especially enthusiastic to regain control over water it considered its sovereign territory which, until the LOSC, had not been recognised by the rest of the world.<sup>76</sup>

## 8. The Archipelagic Concept and LOSC

The archipelagic concept was brought to prominence in the *Anglo-Norwegian Fisheries Case*<sup>77</sup> in 1951 which upheld the right to use baselines to enclose islands that were located near the mainland.<sup>78</sup> Island states such as Indonesia lobbied over many years to develop this concept and gain legal recognition of their right to enclose their archipelago and be recognised as an archipelagic state.<sup>79</sup> On 18 February 1960, Indonesia enacted domestic legislation<sup>80</sup> declaring it an archipelagic state and prescribed baselines around all Indonesia's islands and enclosed all waters within the island chains. Indonesia claimed a territorial sea of 12 nautical miles and claimed all waters within its designated baselines as 'internal waters'. It demanded that all international vessels transit its designated internal waters under the regime of '*innocent passage*'.<sup>81</sup> This declaration was met with almost universal international condemnation.<sup>82</sup>

The declaration was ignored by maritime states and Indonesia did not choose to enforce it.<sup>83</sup> During UNCLOS I and II, Indonesia unsuccessfully argued for recognition of the archipelagic concept. Indonesia saw UNCLOS III as another opportunity to pursue acceptance of the archipelagic concept in international law.<sup>84</sup>

The maritime nations were wary of the motivations of the archipelagic nations in their pursuit of recognition of archipelagic status and were concerned if the concept was recognised, their access to archipelagic waters would be significantly restricted. Intense negotiations resulted in a compromise. The LOSC recognised a coastal state's right to draw baselines around its outer lying islands and to be recognised as an 'archipelagic state' thereby reinforcing its unitary nature.<sup>85</sup> Strict conditions apply to qualify as an 'archipelagic state'. LOSC defines an archipelago as '*a group*

<sup>68</sup> Barbara Kwaitowska, 'The Archipelagic Regime in Practice in the Phillipines and Indonesia - Making or Breaking International Law' (1991) 6 *International Journal of Estuarine and Coastal Law* 1, 14.

<sup>69</sup> *Ibid.*

<sup>70</sup> Djalal, above n 37, 294.

<sup>71</sup> *Ibid.* 32.

<sup>72</sup> Kwaitowska, above n 68, 15.

<sup>73</sup> Djalal, above n 37, 32.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.* 256.

<sup>76</sup> Above n 12, 31-35.

<sup>77</sup> *Anglo-Norwegian Fisheries Case (UK v Norway) (Merits)* [1951] ICJ Rep 116.

<sup>78</sup> Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South East Asia* (1987), 153.

<sup>79</sup> *Ibid.* 156-159.

<sup>80</sup> Republic of Indonesia, *Indonesian Government Regulation No.4, Act Concerning Indonesian Waters*, 18 February 1960.

<sup>81</sup> Kwaitowska, above n 68, 13.

<sup>82</sup> *Ibid.*

<sup>83</sup> Kwaitowska, above n 68, 16.

<sup>84</sup> Kittichaisaree, above n 78, 153.

<sup>85</sup> Robin Churchill and Alan Rowe, *The Law of the Sea*, (2<sup>nd</sup> ed, 1988), 98.

of islands, including parts of islands, interconnecting waters 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.’<sup>86</sup> There are three dominant prerequisites for a nation to qualify as an archipelagic state under LOSC:

1. Archipelagic baselines must be no more than 100 nautical miles long, with 3 percent being no longer than 125nm.
2. Baselines must not deviate greatly from the general configuration of the archipelago; and
3. The ratio of water to land must be between 1:1 and 9:1.<sup>87</sup>

The fact that Indonesia meets this requirement almost perfectly, demonstrates that baseline requirements defining archipelagic states under LOSC were specifically tailored to meet its geographical circumstances<sup>88</sup>.

Whilst not immediately giving it the force of law outside of the LOSC signatories, the inclusion of the archipelagic concept in such an important treaty gave the concept significant standing. Signatories to the LOSC were bound to accept it but as time has progressed, the archipelagic concept has received acceptance by the international community as being valid in customary international law. Indonesia has claimed archipelagic status since 1957 and until the LOSC this was denied by many nations. Since LOSC these protests have ceased and in 1996,<sup>89</sup> 1998<sup>90</sup> and 2002,<sup>91</sup> Indonesia enacted legislation declaring its status as an archipelagic state which has received no protests from other nations (including non-LOSC signatories). In total, 19 nations have claimed archipelagic status.<sup>92</sup> Their claims have been analysed directly against the provisions of UNCLOS III and accordingly accepted or rejected. For example the United States (as a non-ratifying nation) released an analysis rejecting a claim by Trinidad and Tobago for archipelagic status based solely on the LOSC criteria.<sup>93</sup> This is a strong indication that with the passage of time the archipelagic status concept as defined and introduced in the LOSC has been accepted as legitimate in customary international law.

## 9. Archipelagic Sea Lanes (ASLs) and Archipelagic Sea Lanes Passage (ASLP)

Article 53 of the LOSC outlines the requirement of a state wishing to establish ASLs. This section outlines that an archipelagic state may designate ASLs within its archipelagic waters for the purpose of continuous and expeditious and unobstructed transit between one part of the high seas and another.<sup>94</sup> In designating the ASLs, the archipelagic state ‘shall refer proposals to the competent international organization with a view to their adoption’.<sup>95</sup> It also encourages the archipelagic states to designate ASLs by including the right of maritime countries to exercise archipelagic transit in the routes normally used for international navigation in the absence of any designation.<sup>96</sup>

Whilst superficially, this process appears straightforward, an examination of this process reveals some concerning flaws in the process of designating ASLs which seriously undermine the legitimacy of the process in international law.

The greatest area of conflict is clear – an archipelagic state will want to minimise the number of designated ASLs because all other areas within its archipelago will be considered ‘internal waters’. This gives the coastal state the maximum control over its waters by demanding international vessels comply with the suspendable right of ‘innocent passage’. On the other hand, maritime states want to maximise the number of ASLs to secure the greatest level of

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<sup>86</sup> UNCLOS, above n 1, Art.46.

<sup>87</sup> UNCLOS, above n 1, Art.47(1-3).

<sup>88</sup> Kwaitowska, above n 68, 14.

<sup>89</sup> Republic of Indonesia, *Act No.6 of 8 August 1996 regarding Indonesian Waters*, <[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN\\_1998\\_Regulation61.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1998_Regulation61.pdf)> at 21 July 2009.

<sup>90</sup> Republic of Indonesia, *Indonesian Government Regulation No.61 of 1998 on the List of Geographical Coordinates of the Base Points of the Archipelagic Baselines of Indonesia in the Natuna Sea* <[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN\\_1998\\_Regulation61.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1998_Regulation61.pdf)> at 21 July 2009.

<sup>91</sup> Republic of Indonesia, *Indonesian Regulation Number 38 of 2002 List of Geographical Points of Indonesian Archipelago Baseline* <[http://www.un.org/Depts/los/doalos\\_publications/LOSBulletins/bulletinpdf/bulletin52e.pdf](http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin52e.pdf)> at 9 November 2008.

<sup>92</sup> United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Law of the Sea Bulletin Number 54 Table of Claims to Maritime Jurisdiction (as at 24 October 2007)* <[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf)> at 9 November 2008.

<sup>93</sup> United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas Number 125 Jamaica's Maritime Claims and Boundaries*, <<http://www.state.gov/documents/organization/57677.pdf>> at 9 November 2008.

<sup>94</sup> UNCLOS, above n 1, Art.53(1) and (2).

<sup>95</sup> *Ibid* Art.53(9).

<sup>96</sup> *Ibid* Art.53(12).

access to their vessels and aircraft, free from the rigors of ‘innocent passage’.<sup>97</sup>

Indonesia’s proposal for three ASLs in 1996 was the first and only attempt by an archipelagic state to delineate ASLs within its territory. As Indonesia is the world’s largest archipelagic state, a successful submission would provide significant evidence of the process being accepted as part of customary international law.

The nature of ASLP is clearly outlined in Article 53 of the LOSC.<sup>98</sup> An archipelagic state *may* designate ASLs, which allow the continuous and expeditious passage of foreign ships and aircraft through its waters.<sup>99</sup> If it chooses to do so - the archipelagic state must include ‘*all normal passage routes ...used for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigation channels.*’<sup>100</sup>

When exercising ASLP a vessel may transit in its ‘normal mode’ provided it is continuous, expeditious and unobstructed.<sup>101</sup> Submarines may travel submerged and warships may transit in formation and launch and operate aircraft. This is a substantial relaxation from the requirements of ‘*innocent passage*’.

The concept of ASLP has been accepted by both archipelagic and maritime states and therefore is valid at both treaty and customary law. However whilst the concept of archipelagic status and the right of ASLP has received validity in customary international law over the period since the introduction of the LOSC, the status and designation of ASLs in which ASLP is to be practiced is much more uncertain. This is the crux of the issue as to whether Indonesia’s ASLs are valid at international law.

## 10. The Competent International Organisation - The Role of the International Maritime Organisation (IMO)

The IMO was established in 1958 by the United Nations Convention on the International Maritime Organisation.<sup>102</sup> It currently has 168 members which it claims to represent over 98 percent of global shipping.<sup>103</sup> The LOSC was developed specifically as an umbrella treaty, with the intention of allowing international organizations to develop the detailed technical rules and standards that will be generally accepted internationally.<sup>104</sup> The term ‘*competent international organization*’ in article 53 (9) is a direct reference to the IMO. This was confirmed in 1994 when the United Nations announced a list of ‘*competent international organizations*’ and their areas of responsibilities which endorsed the IMO’s position.<sup>105</sup> Accepting this announcement, the IMO produced two major papers which concluded that the global nature of the IMO, and the inability of any other competent organisation able to take up the responsibility for the designation of ASLs, was conclusive evidence of its mandate to assume this role.<sup>106</sup>

The IMO claims its mandate and responsibility to implement the detailed and specific requirements of the treaty<sup>107</sup> means its declarations and treaties acquire validity because they implement the provisions of the LOSC. It claims this is further enhanced by the endorsement of its member nations and the high level of representation of the international maritime community of its member States.<sup>108</sup> The IMO has recognized the sensitivities of its approval role on issues of jurisdictional issues about the designation of ASLs<sup>109</sup> although the issue is still an area of contention.<sup>110</sup> It appears the consensus is that the LOSC obliges signatory states to accept the jurisdiction of the IMO, but that this is only enforceable if the states concerned are also signatories to the relevant IMO conventions.<sup>111</sup> This is further complicated by the IMO’s policy of tacit acceptance, which means that unless a sufficient number of members

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<sup>97</sup> Sam Bateman, ‘Security and the Law of the Sea in South East Asia: Navigational Regimes’ in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea, Progress and Prospects* (2006), 363.

<sup>98</sup> UNCLOS, above n 1, Art.53.

<sup>99</sup> Ibid Art.53(1).

<sup>100</sup> Ibid Art.53(4).

<sup>101</sup> Ibid Art.53(4).

<sup>102</sup> Churchill and Rowe, above n 85, 17.

<sup>103</sup> International Maritime Organization, *Frequently Asked Questions*, <<http://www.imo.org>> at 28 November 2008.

<sup>104</sup> Freestone, above n 8, 11.

<sup>105</sup> Rosenne Shabtai ‘The International Maritime Organization Interface with the Law of the Sea Convention’ in Myron Nordquist, and John Moore (eds), ‘*Current Maritime Issues and the International Maritime Organization*’ (1999), 259-261.

<sup>106</sup> Ibid 259.

<sup>107</sup> Agustin Blanco-Bazan, *IMO Interface With The Law Of The Sea Convention, 6-9 January 2000*, A paper presented to the 23<sup>rd</sup> Annual Seminar of the Centre for Ocean Law and Policy, (2000), <<http://www.imo.org>> at 15 August 2009.

<sup>108</sup> International Maritime Organization, *Implications Of The United Nations Convention On The Law Of The Sea For The International Maritime Organization*, IMO Ref: LEG/MISC.5,31 January 2007 <<http://www.imo.org>> at 21 July 2009, 2.

<sup>109</sup> IMO, above n 103.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

object to an IMO treaty, it is considered to have been accepted.<sup>112</sup> This places the IMO's mandate in a vulnerable position. If it rigidly enforces its mandate, it has the potential to alienate individual states who have been detrimentally affected by the IMO's decision. This could cause that state to refuse to ratify or acknowledge the major IMO treaties. This in turn could reduce the overall credibility of the IMO as a '*competent international organization*' if several high profile countries disavowed their recognition of the IMO's mandate.

The IMO has sought to avoid alienating countries by developing its mandate through a successful implementation of the ASL delineation process. By completing a practical application of the principle, the IMO can argue that the process has been accepted by the international community, thus gaining its mandate through customary rather than treaty law. This will permit the universal applicability of the process and remove the vulnerability of the process if left reliant on treaty law. This demonstrates the importance of the Indonesian submission to the IMO for approval of the designation of ASLs through its archipelago.

Indonesia was hesitant in bringing a claim for the delineation of ASLs within its waters before the IMO.<sup>113</sup> It was aware that as one of the largest archipelagic nations, if it submitted a proposal for the adoption of ASLs, this would provide the IMO with an increased legitimacy in customary law to determine future cases of ASLs.

Indonesia had legitimate concerns about recognizing the IMO's mandate. Its primary concern was that the IMO is an organisation whose role is to promote international shipping and trade.<sup>114</sup> The IMO's current mission statement declares its purpose '*is [to promote] safe, secure and efficient shipping on clean oceans.*'<sup>115</sup> The Indonesian government pointed out the designation of ASLs was as much a matter of strategic and territorial sovereignty, as one for international shipping and trade.<sup>116</sup> It was also concerned that if it recognised the IMO's mandate, this would enable countries such as the United States who had not ratified LOSC, but were influential members of the IMO to determine the validity of an archipelagic state's submission.<sup>117</sup> It validly argued that being provided a mandate for the designation of ASLs should not be determined by the qualification of being the only international maritime organization.<sup>118</sup>

In 1996 after considerable negotiation with the IMO,<sup>119</sup> Indonesia submitted a proposal to the IMO for recognition of three ASLs within its Archipelagic Waters. It reserved the right to withdraw its application.<sup>120</sup> The application included three north/south sea lanes through the Indonesian Archipelago and immediately generated strong objections from several maritime countries including Australia and the United States.<sup>121</sup> The objections were based on the requirement of any submission to include '*all normal passage routes used as routes for international navigation*'.<sup>122</sup> The Indonesian submission arguably falls short of this requirement because it does not include an east/west ASL through the southern part of the archipelago.<sup>123</sup> The maritime countries argued Indonesia's submission proposed a significant reduction in the traditional access of maritime trade through the archipelago. The two differing positions are demonstrated in the diagram attached as an annex to this article. Indonesia qualified this shortfall by acknowledging the right of nations to exercise the right of archipelagic transit in normal passages used for international navigation under article 53(12).<sup>124</sup> Indonesia's submission placed the IMO in a difficult position. The LOSC required an ASL submission to contain '*all normal passage routes*'. However, the IMO needed Indonesia's submission to demonstrate demonstrate archipelagic states' acceptance it was the the '*competent international organisation*' referred to in article 53 (8) of LOSC.

To ensure they did not face a potentially restrictive archipelagic transit regime, influential maritime states such as Australia and the United States combined to present the IMO with an effective 'way out' of this dilemma. During the consideration of the proposal, Australia submitted that there was a need for the IMO to develop a detailed process for

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<sup>112</sup> International Maritime Organization, *Conventions*, <[http://www.imo.org/Conventions/mainframe.asp?topic\\_id=148](http://www.imo.org/Conventions/mainframe.asp?topic_id=148)> at 21 July 2009.

<sup>113</sup> Djalal, above n 37, 412.

<sup>114</sup> *Ibid.*

<sup>115</sup> IMO Mission Statement, <[www.imo.org](http://www.imo.org)> at 28 November 2008.

<sup>116</sup> *Ibid* 238-240.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Republic of Indonesia, *Safety Of Navigation Designation Of Certain Sea Lanes And Air Routes Therabove Through Indonesian Archipelagic Waters*, Submission to the Maritime Safety Committee of the IMO MSC 67/7/2, 30 August 1996.

<sup>120</sup> *Ibid.*

<sup>121</sup> These included Australia, USA, France, Russia United Kingdom, China, Germany, South Korea, Vietnam, Malaysia, South Africa and Thailand, Ghana, Greece, Jamaica, Japan, Mexico and New Zealand.

<sup>122</sup> UNCLOS, above n 1, Art.53(4).

<sup>123</sup> Penny Campbell, Indonesian Archipelagic Sea Lanes (2005) Papers in Australian Maritime Affairs No.16 <<http://www.navy.gov.au/spc/maritimepapers/piama16/lanes.html>>, 116-7.

<sup>124</sup> *Ibid.*

the adoption of ASLs.<sup>125</sup> The IMO accepted this submission and developed a system of 'General Provisions'.<sup>126</sup> During the consideration of the Indonesian proposal, the United States raised the concept of a 'partial designation'.<sup>127</sup> The IMO accepted this approach and consequently introduced the concept of 'partial proposals' in its system of 'General Provisions', despite it being clearly against the provisions of Article 53(4) of LOSC.<sup>128</sup> Utilising this Nelsonian approach, the IMO placed heavy reliance on a clause in Indonesia's submission that it would submit further ASLs for consideration after completing surveying programs to ensure vessel safety<sup>129</sup> as evidence that the submission was a 'partial declaration'.<sup>130</sup>

This was a significant victory for the maritime states and the Indonesian fears of the United States' influence over the IMO were realised. The IMO's 'partial designation' provided almost unfettered access to archipelagic waters as it ensured that archipelagic states such as Indonesia could not compel shipping to utilise ASLs until the IMO declared a submission to be complete. As can be seen in the Annexure, Australia's proposal for the requirements for a full designation would provide considerable access through the Indonesian archipelago via some routes that may be questioned as to whether they meet the requirements of being 'normal international routes'.

## 11. Archipelagic Sea Lanes - a guarantee of access

ASLs grant maritime nations unsuspendable rights of passage through an archipelago. If Indonesia's submission was accepted as is, maritime countries would still have access through the archipelago through the ASLs. It must also be remembered that waters outside the ASLs are not 'off limits', they are simply subject to 'innocent passage'.

If Indonesia accepted the IMO's capacity to declare 'partial designations' it gives significant opportunity for other nations' merchant and naval forces to transit through its archipelagic waters under ASLP. It will also enable other countries to press the IMO for an expansive interpretation of 'normal passage routes used for international navigation'. It is interesting that since the IMO's introduction of the 'partial designation' concept, countries such as Australia have urged Indonesia to accede to their demands to recognise their proposals for ASLs.<sup>131</sup> This may be unsurprising, given that IMO members are predominantly maritime and shipping nations. An example of position of maritime nations can be seen through the recent paper published by the highly respected Australian academic, Stephen Kaye. The paper clearly unquestioningly accepts and endorses the validity of the partial designation policy.<sup>132</sup> It also calls upon other maritime nations to disregard Indonesia's three ASL proposal.<sup>133</sup> This clearly articulates the arguments maritime nations employ to influence maritime debates and organisations such as the IMO, to shape customary law in their favour. Also concerning is the inability or unwillingness of coastal states such as Indonesia to demand the adherence to the literal treaty requirements of the LOSC to which most maritime countries, including Australia, are signatories.

Indonesia's response to the IMO's proposal of a 'partial designation' has been guarded. It has not withdrawn its recognition of the IMO as the 'competent international organization', but has not submitted any further proposals since 1996. As time progresses, this increasingly demonstrates that at best Indonesia has lost confidence in the IMO as a neutral arbiter of ASLs, and at worst that it has rejected the IMO's mandate. In 2002, Indonesia enacted domestic legislation which outlines the three original ASLs as a full designation of ASLs and asserted all traffic outside of the three ASLs is subject to 'innocent passage' only.<sup>134</sup> This is a significant rejection of the IMO's mandate as a 'competent international organisation' for the purposes of the designation of ASLs under article 53(9) of the LOSC.

Indonesia's decision not to pursue its ASL application further further extensively reduces the IMO's mandate as a 'competent international organisation' and seriously questions the 'partial designation' policy's validity at international law because:

1. The LOSC treaty does not make any provision for the adoption of a partial designation.

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<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid 322.

<sup>128</sup> Bateman, above n 97, 4.

<sup>129</sup> Republic of Indonesia, above n 121.

<sup>130</sup> Johnson, above n 3, 321.

<sup>131</sup> Ibid.

<sup>132</sup> Stephen Kaye, 'Freedom of Navigation in the Indo Pacific Region' (2008), <[www.navy.gov.au/w/images/PIAMA22.pdf](http://www.navy.gov.au/w/images/PIAMA22.pdf)> 16, 17 at 15 August 2009.

<sup>133</sup> Ibid.

<sup>134</sup> Republic of Indonesia, Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes (28 June 2002), 52 *Law of the Sea Bulletin* 2.

2. Despite its declaration of a universal mandate, no archipelagic states have definitively accepted the IMO as the '*competent international organisation*' in respect to the designation of ASLs.
3. Indonesia's actions since the '*partial designation*' ruling demonstrate a rejection of the IMO's mandate.

The IMO's declaration of Indonesia's submission to be a '*partial delineation*', has overstepped the IMO's remit to 'implement international law' and has caused it to venture into the grounds of 'making international law'. The LOSC makes no provision for the partial declaration of ASLs. Article 53(4) specifically states that such sea lanes '*shall include all normal passage routes*'. Clearly if the IMO was to act with the mandate of the '*competent international authority*' its role is to determine whether the submission meets the criteria prescribed in article 53. If the submission does not meet the requirements then the IMO cannot validly accept the submission.

Some observers point to clause 11 of Indonesia's submission to the IMO, where it accepts the rights of vessels to continue to transit the archipelago under the archipelagic transit regime whilst it continued to survey other ASLs for designation.<sup>135</sup> However this was prior to the announcement of the IMO's '*partial designation*' policy. With the benefit of hindsight, this inclusion by the Indonesian Government must be considered an error of judgment. However, by including this provision it indicates that it was probably unaware of the IMO's intention to introduce the partial designation concept and its implications for Indonesia.

## 12. Conclusion

This paper has highlighted the traditional and ongoing tension between coastal and maritime states over law of the sea concepts. This is particularly evident when analyzing the sensitive issue of the relatively new concept of ASLs, which were incorporated into LOSC after UNCLOS III.

LOSC was a significant step towards providing a clear determination of international law for the sea. Whilst it has now been accepted as being an expression of customary international law in many areas, this is not the case with the designation of ASLs. The archipelagic concept appears to have been accepted as settled by the international community, however there has not been a successful designation of ASLs since the treaty came into force. Controversy has dogged the IMO on this issue with maritime member countries exerting pressure on it to maximize their access to the waters of archipelagic states. This influence of maritime states over the IMO has prevented the IMO from implementing the literal requirements of the LOSC in a way that will assist coastal or archipelagic states and is outside the provisions of article 53(4) of the LOSC.

The IMO's position demonstrates it is unlikely to declare any designation to be complete until maritime nations are provided with largely unfettered access to Indonesia's archipelagic waters. Therefore, it must come as no surprise that Indonesia has chosen not to pursue its ASL proposal with the IMO. By enacting domestic legislation declaring the three proposed ASLs as being the only ASLs within Indonesian waters and demanding vessels transiting outside of these ASLs to be subject to 'innocent passage'. Indonesia has demonstrated that it has rejected the IMO's '*partial declaration*' policy.

It is asserted that it would be unwise for Indonesia to attempt to progress its claim for the recognition of ASLs until the IMO undertakes to return to the legally valid position of accepting only full designations. The current '*partial designation*' policy of the IMO is illegal in treaty law as it contravenes article 53(4) of LOSC, and Indonesia's tacit rejection of the policy in the only attempt to prescribe ASLs in international law has removed any basis for the concept to be considered customary international law.

As time passes, if no progress is made regarding Indonesia's proposal, the validity of the IMO's mandate as the '*competent international organization*' responsible for the designation of ASLs and its '*partial designation*' concept must be questioned. The increased pressure of maritime states such as Australia for Indonesia to accept the IMO's partial designation policy demonstrates they are also aware of the IMO's slipping credibility in its role as the '*competent international organisation*' for the declaration of ASLs.

This places an ever growing pressure on the IMO, which will only increase if further progress has not been made to obtain a 'full declaration' of Indonesia's submission. If the stalemate continues it is concluded the current '*partial designation policy*' will become increasingly recognized as an illegitimate concept and the mandate of the IMO as a '*competent international organization*' for the determination of ASLs must be seriously questioned.

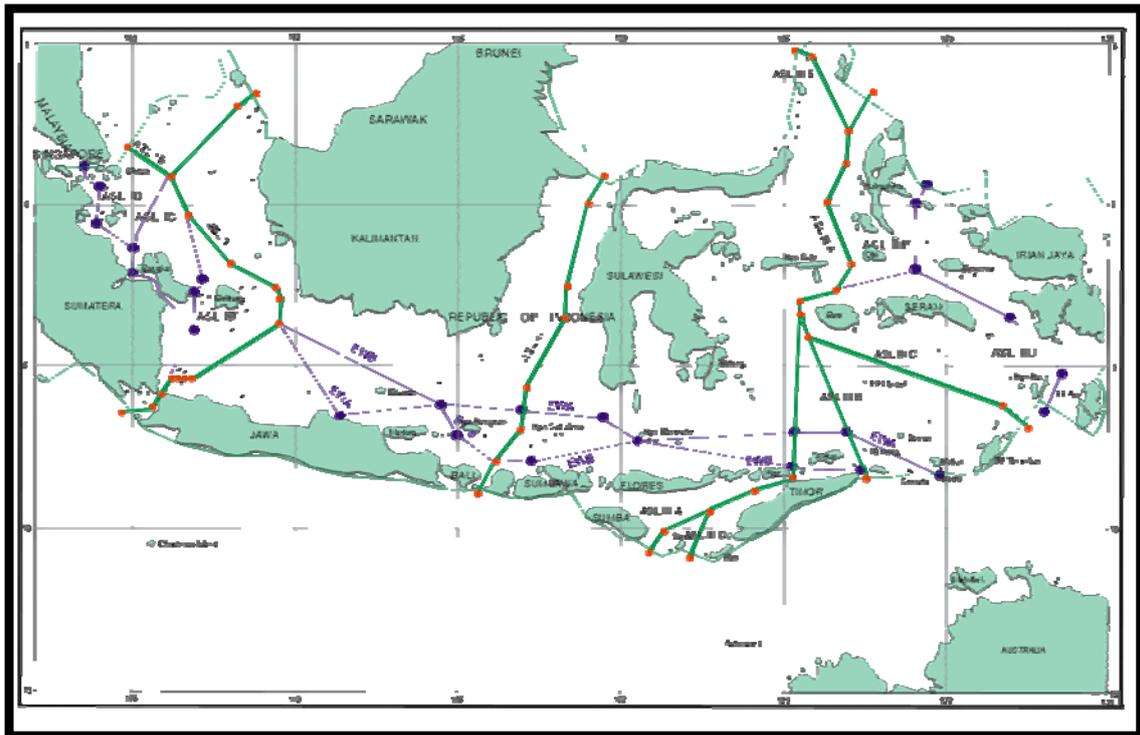
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<sup>135</sup> Johnson, above n 3, 320.



## Annex to Archipelagic Sea-Lanes in Indonesia – Their legality in International Law

Indonesia's sea lane submission superimposed with Australia's claimed 'normal international sea passages'



Source: Penny Campbell, Indonesian Archipelagic Sea Lanes (2005), *Papers in Australian Maritime Affairs No.16*  
<<http://www.navy.gov.au/spc/maritimepapers/piama16/lanes.html>>