An analysis of legal issues relating to navigational rights and freedoms through and over Indonesian waters

Kresno Buntoro
University of Wollongong
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AN ANALYSIS OF LEGAL ISSUES RELATING TO NAVIGATIONAL RIGHTS AND FREEDOMS THROUGH AND OVER INDONESIAN WATERS

A thesis submitted in fulfilment of the requirements for the award of the degree

Doctor of Philosophy

From

University of Wollongong

by

Kresno Buntoro, SH (Diponegoro, Indonesia), LLM (Nottingham, UK)

Australian National Centre for Ocean Resources and Security (ANCORS)
Faculty of Law
University of Wollongong
2010
CERTIFICATION

I, Kresno Buntoro, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Australian National Centre for Ocean Resources and Security, Faculty of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The Document has not been submitted for qualifications at any other academic institution.

Kresno Buntoro

3 May 2010
ABSTRACT

The United Nations Convention on the Law of the Sea (LOSC) provides a delicate balance between the interests of archipelagic States such as Indonesia and the international community with respect to navigation. Indonesia recognises three navigation rights and freedoms within Indonesian waters: innocent passage, transit passage and archipelagic sea lanes passage. In addition, Indonesia and Malaysia have negotiated an additional passage right not mentioned in the LOSC called access and communication passage.

The vagueness and ambiguity of the LOSC provisions on navigational rights and freedoms, as well as the absence of further guidance on their interpretation and implementation, have resulted in conflicting claims between Indonesia on one hand and the international community on the other.

This thesis aims to provide an analysis of the legal issues relating to navigation through and over Indonesian waters. In particular, it aims to examine inconsistencies between Indonesian navigational regimes and those permitted by the LOSC to ascertain if Indonesia has applied the LOSC correctly and, if necessary, to propose reforms to harmonise national legislation with international law. Specifically, the thesis will first, explain the extent, historical development and concept of navigational regimes in the LOSC and international law in general. Second, it will analyse the implementation of the navigational provisions of the LOSC by Indonesia. Finally, it will provide recommendations concerning the harmonisation of the Indonesian domestic legal framework with international law.
ACKNOWLEDGMENTS

This work is a reflection of my many years of work as an Indonesian Naval Officer, and the product of my long years of study and research as a law of the sea scholar. This thesis could not have been written without the help and support of others. The past three years have been more than about writing this thesis. Living in Australia was a good opportunity for my family and I to understand what family life really is all about. It was an important learning experience for all of us. The chance to gain knowledge from some of the most brilliant minds in the field, in a conducive academic environment, and to live in a place with such a diverse culture, is just some of the most valuable things out of this experience. I will always be grateful to all the people who have made this journey an excellent opportunity for growth, both academically and personally.

To Professor Martin Tsamenyi, my sincere gratitude for walking me through my thesis, for his encouraging words, the way he understands my background, and how he never fails to always give more than sufficient time for my work. There is not enough space on this page to list how he has shown his guidance, generosity, and concern for me and my family’s well-being over the years. Without him, I would not have finished my thesis and gained the research experience I need for my work. My thanks to Associate Professor Clive Schofield, for his supervision and his constructive suggestions. To Ms. Myree Mitchell, thank you for assisting me with everything. To Dr Chris Rahman and Dr Mary Ann Palma, thank you for your kind words of support and helpful comments; and to Mr Lowell Bautista, I thank you for all your help. I also wish to express my gratitude to the Australian Government through its Australian
Leadership Awards without which, living and studying in Australia would have been just a dream.

My sincere thanks to First Admiral (Ret) Adi Sumardiman (former member of Indonesian Delegation to some bilateral and multilateral negotiations), for helping me better understand the LOSC and its implementation in Indonesian laws and regulations, and providing me with valuable material which could have been difficult for me to gain access to. He is truly one of the few experts on the LOSC in the Indonesian Navy. He always supported and encouraged me to undertake PhD studies, for which I am grateful. I thank Rear Admiral (Ret) Sunaryo, former Chief of Legal Division of the Indonesian Navy Headquarters, for allowing and supporting me in taking this study. I say thank you to Professor Hasjim Djalal, for sharing his precious time to lecture me on the LOSC. To Professor Etty R Agoes, my gratitude for giving me a better perspective of the LOSC. I am grateful to my associates in the Indonesian Navy, my friends in the Indonesian Foreign Affairs for allowing me to have in-depth discussions on the LOSC.

To my fellow students at the Centre -- those who struggled writing their theses as I wrote mine, those who have already finished their degrees, and those who have just started their research. I admire your enthusiasm and diligence and I have been inspired by them. To my Indonesian friends in the Indonesian Community in Wollongong who have all made me and my family feel at home, I am very indebted to you.

Lastly, my family deserves more than what can possibly be mentioned here. I owe everything to Jussie Pawestri Krisnawati, my lovely wife, who lived with me through this challenging time. She always supported and encouraged me when I am down through her thoughtfulness and calm composure. My daughters, Agnianditya
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<th>Acronym</th>
<th>Full Form</th>
</tr>
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<tbody>
<tr>
<td>AALCC</td>
<td>Asian-African Legal Consultative Committee (AALCC)</td>
</tr>
<tr>
<td>AD</td>
<td>After Death</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
</tr>
<tr>
<td>ASG</td>
<td>Archipelagic States Group</td>
</tr>
<tr>
<td>ASL</td>
<td>Archipelagic Sea Lane</td>
</tr>
<tr>
<td>BC</td>
<td>Before Christ</td>
</tr>
<tr>
<td>Bakorkamla</td>
<td>Badan Koordinasi Keamanan Laut (Coordinating Body for Maritime Security)</td>
</tr>
<tr>
<td>DAC</td>
<td>Directorate General of Air Communication</td>
</tr>
<tr>
<td>DSC</td>
<td>Directorate General of Sea Communication</td>
</tr>
<tr>
<td>DDS</td>
<td>Department of Defence and Security</td>
</tr>
<tr>
<td>DFA</td>
<td>Department of Foreign Affairs</td>
</tr>
<tr>
<td>DOALOS</td>
<td>Division of Ocean Affairs and the Law of the Sea</td>
</tr>
<tr>
<td>DPD</td>
<td>Dewan Perwakilan Daerah (Regional Representative Council)</td>
</tr>
<tr>
<td>DPR</td>
<td>Dewan Perwakilan Rakyat (People’s Representative Assembly)</td>
</tr>
<tr>
<td>Dwt</td>
<td>deadweight tons</td>
</tr>
<tr>
<td>ECDIS</td>
<td>Electronic Chart Display and Information System</td>
</tr>
<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
</tr>
<tr>
<td>ENC</td>
<td>Electronic Navigational Chart</td>
</tr>
<tr>
<td>FIR</td>
<td>Flight Information Region</td>
</tr>
<tr>
<td>FON</td>
<td>Freedom of Navigation</td>
</tr>
<tr>
<td>GBHN</td>
<td>Garis-garis Besar Haluan Negara (Broad Guidelines of State Policy)</td>
</tr>
<tr>
<td>GNP</td>
<td>Gross National Product</td>
</tr>
<tr>
<td>GPASL</td>
<td>General Procedure on Archipelagic Sea Lanes Passage</td>
</tr>
<tr>
<td>GR</td>
<td>Government Regulation</td>
</tr>
<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
</tr>
<tr>
<td>IASL</td>
<td>Indonesian Archipelagic Sea Lanes</td>
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<tr>
<td>ICAO</td>
<td>International Civil Aviation Organisation</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICS</td>
<td>International Chamber of Shipping</td>
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<td>IDC</td>
<td>Inter-departmental Committee</td>
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<td>IDR</td>
<td>Indonesian Rupiah</td>
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<tr>
<td>IHB</td>
<td>International Hydrographic Bureau</td>
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<td>IHO</td>
<td>International Hydrographic Organisation</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IMO</td>
<td>International Maritime Organisation</td>
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<tr>
<td>IMSCB</td>
<td>Indonesia Maritime Security Coordinating Body (Bakorkamla)</td>
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<tr>
<td>INTERTANKO</td>
<td>International Association of Independent Tanker Owners</td>
</tr>
<tr>
<td>Km</td>
<td>Kilometre</td>
</tr>
<tr>
<td>LAT</td>
<td>Lowest Astronomical Tide</td>
</tr>
<tr>
<td>LNG</td>
<td>Liquefied Natural Gas</td>
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<tr>
<td>MEH</td>
<td>Marine Electronic Highway</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
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<td>----------</td>
<td>-----------------------------------------------------------------------------</td>
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<tr>
<td>MLLW</td>
<td>Mean Lower Low Water</td>
</tr>
<tr>
<td>MLWS</td>
<td>Mean Low-Water Springs</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>MPR</td>
<td>Majelis Permusyawaratan Rakyat (People's Consultative Assembly)</td>
</tr>
<tr>
<td>MSC</td>
<td>IMO Maritime Safety Committee</td>
</tr>
<tr>
<td>MSL</td>
<td>Mean Sea Level</td>
</tr>
<tr>
<td>NAV</td>
<td>IMO Sub-Committee on Safety of Navigation</td>
</tr>
<tr>
<td>NM</td>
<td>Nautical Miles</td>
</tr>
<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>PANKORWILNAS</td>
<td>Panitia Koordinasi Wilayah Nasional (Coordinating Committee for National Territory)</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>PNG</td>
<td>Papua New Guinea</td>
</tr>
<tr>
<td>PP</td>
<td>Peraturan Pemerintah (Government Regulation)</td>
</tr>
<tr>
<td>Sub-NAV</td>
<td>Sub Committee on Navigation</td>
</tr>
<tr>
<td>TZMKO</td>
<td>Territorial Zee een Maritime Kringen Ordonantie (Territorial Sea Maritime Regulation)</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCLOS</td>
<td>United Nations Conference on the Law of the Sea</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
</tr>
<tr>
<td>UU</td>
<td>Undang Undang (Act)</td>
</tr>
<tr>
<td>UUD</td>
<td>Undang Undang Dasar (Constitution)</td>
</tr>
<tr>
<td>UUDS</td>
<td>Undang Undang Dasar Sementara (Provisional Constitution)</td>
</tr>
<tr>
<td>WMD</td>
<td>Weapon Mass Destruction</td>
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*Lotus case*, PCIJ, series A, No. 10 (1927)

*Corfu Channel Case* (United Kingdom v. Albania) ICJ Reports 1949

*Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway), 1951 ICJ Reports 116


*Nicaragua Case* (*Nicaragua v United States*) [1986], ICJ Rep. 12

*Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), Judgment of 17 December 2002

*Saiga Case*, Case No. 2, Saint Vincent and the Grenadines v. Guinea, ITLOS
LIST OF CONVENTIONS AND AGREEMENTS

Montevideo Convention on Rights and Duties of States 1933, 165 LNTS 19

Convention on International Civil Aviation, opened for signature 7 December 1944, 61 Stat. 1180; 15 UNTS 295 (entered into force 14 April 1947)


Geneva Convention on the Territorial Sea and the Contiguous Zone, opened for signature 29 April 1958, 15 UST 1606; 516 UNTS 205 (entered into force 10 September 1964)


United Nations Convention on the Continental Shelf, 449 UNTS 331, (entered into force 10 June 1964)


Treaty between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Seas of the Two Countries in the Strait of Singapore, 1973


Treaty between the Republic of Indonesia and Malaysia on Legal Regime of the 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, signed in Jakarta, 25 February 1982
LIST OF INDONESIAN LAWS AND REGULATIONS

The Territoriale Zee een Maritime Kringen Ordonnantie 1939, Staatsblad 442
The Text of the Indonesian Proclamation of Independence 1945
The Constitution of the Republic of Indonesia (1945)
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Act Number 4 of 1960 on Indonesia Waters
Act Number 19 of 1961 on Ratification of Three 1958 Geneva Conventions on the Law of the Sea (State Gazette Year 1961 No. 276)
Act Number 1 of 1973 on Indonesian Continental Shelf (State Gazette Year 1973 No. 1, Supplementary State Gazette No. 2994)
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Act Number 5 of 1983 on Indonesian Exclusive Economic Zone (State Gazette Year 1983 No. 44, Supplementary State Gazette No. 3260)
Act Number 5 of 1990 on Conservation of Biological Resources and their Ecosystems (State Gazette Year 1985 No. 49, Supplementary State Gazette No. 3419)
Act Number 9 of 1990 on Tourism (State Gazette Year 1990 No. 78, Supplementary State Gazette No. 3427)
Act Number 9 of 1992 on Immigration (State Gazette Year 1996 No. 33, Supplementary State Gazette No. 3474)
Act Number 9 of 1992 on Quarantine of Agriculture, Cattle and Fish (State Gazette Year 1992 No. 56, Supplementary State Gazette No. 3483)
Act Number 10 of 1995 on Customs (State Gazette Year 1996 No. 75, Supplementary State Gazette No. 3612)
Act Number 11 of 1995 on Fiscal (State Gazette Year 1996 No. 76, Supplementary State Gazette No. 3613)
Act Number 6 of 1996 on Indonesian Waters (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647)
Act Number 23 of 1997 on Environmental Management (State Gazette Year 1997 No. 68, Supplementary State Gazette No.3699)
Act Number 41 of 1999 on Forestry (State Gazette Year 1996 No. 167, Supplementary State Gazette No. 3888)

Act Number 24 of 2000 on International Treaties (State Gazette Year 1997 No. 185, Supplementary State Gazette No. 4012)

Act Number 24 of 2003 on Constitutional Court (State Gazette Year 2003, No. 98, Additional State Gazette No. 4316)

Act Number 32 of 2004 on Regional Government (State Gazette Year 2004 No. 125, Supplementary State Gazette No. 4427)

Act Number 10 of 2004 on Law Making, (State Gazette Year 2004 No. 53, Supplementary State Gazette No. 4389)

Act Number 31 of 2004 on Fisheries (State Gazette Year 1996 No. 118, Supplementary State Gazette No. 4433)

Act Number 17 of 2006 on Amendment of Act Number 10 of 1995 on Customs (State Gazette Year 2008 No. 93, Supplementary State Gazette No. 4661)

Act Number 26 of 2007 on Spatial Planning (State Gazette Year 2007 No. 68, Supplementary State Gazette No. 4725)

Act Number 27 of 2007 on Management of Coastal Territory and Small Islands (State Gazette Year 2008 No. 84, Supplementary State Gazette No. 4739)

Act Number 39 of 2007 on Amendment of Act Number 11 of 1995 on Fiscal (State Gazette Year 2008 No. 105, Supplementary State Gazette No. 4755)

Act Number 17 of 2008 on Shipping (State Gazette Year 2008 No. 64, Supplementary State Gazette No. 4849)

Act Number 43 of 2008 on State Territory (State Gazette Year 2008 No. 177, Supplementary State Gazette No. 4925)

Act Number 1 of 2009 on Air Navigation (State Gazette Year 2008 No. 1, Supplementary State Gazette No. 4956)

Government Regulation Number 8 Year 1962 on Innocent Passage of Foreign Vessels in Indonesian Waters (State Gazette Year 1962 No. 36)

Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships on Exercising of Innocent Passage through Indonesian Waters (State Gazette Year 2002 No. 70, Supplementary State Gazette No. 4209)

Government Regulation Number 37 of 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)

Government Regulation Number 37 of 2008 on Amendment of Government Regulation number 38 Year 2002 concerning List of Geographical Coordinates of Indonesian Archipelagic Baselines (State Gazette Year 2008 No.77, Supplementary State Gazette No. 4854)

Government Regulation Number 38 of 2002 on List of Geographical Coordinates of Indonesian Archipelagic Baselines (State Gazette Year 2002 No. 72, Supplementary State Gazette No. 4211)
Government Regulation Number 61 of 1998 on *List of Geographical Coordinates of the Base Points of the Archipelagic Baselines of Indonesia in Natuna Sea* (State Gazette Year 1998 No. 100, Supplementary State Gazette No. 3768)

President Decree Number 16 of 1971 on Authority to Issue "Sailing Permits" for All Activities of Foreign Vessels in Indonesian Waters
Chapter One

Introduction

1.1. Background

The United Nations Convention on the Law of the Sea (LOSC)\(^1\) regulates, amongst other things, marine resources, the marine environment, science, technology and dispute settlement relating to the law of the sea. One of the concepts introduced by the LOSC is that of the archipelagic State.\(^2\) Under the LOSC, a State is considered as an archipelagic State if it is constituted wholly or partly by one or more archipelagos, which may include other islands.\(^3\) The archipelagic State concept was a new development in the LOSC, with its treaty provisions contained in Part IV of the LOSC. Since the entry into force of the LOSC, it can be argued that the concept has also become part of customary international law. This conclusion is based on the number of States claiming archipelagic State status and the lack of opposition by other States.\(^4\)

From a geographical point of view, an archipelago is a group of islands which forms a single unit; from an ordinary point of view, an archipelago is a body of water interspersed with many islands.\(^5\) The LOSC defines an ‘archipelago’ as “a group of

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\(^2\) Part IV, LOSC.
\(^3\) Article 46 (a), LOSC.
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. ⁶

Indonesia was active in the negotiation of the archipelagic State concept. ⁷ It was motivated by a desire to realise its aspirations for national unity, political stability, economic development, social justice and national security. ⁸ These aspirations were expressed as ‘nusantara’, a concept which falls somewhere between the traditional notion of ‘islands’ and ‘archipelago’. ⁹ The nusantara concept was further developed in the government’s maritime policy through ‘Wawasan Nusantara’ or the ‘Archipelagic Outlook’, which advocated and stressed Indonesian unity. ¹⁰ The adoption of the archipelagic State concept in the LOSC has given Indonesia the opportunity to address issues of national sovereignty and has granted the country jurisdiction over living and non-living resources as well as the right to extend its sovereignty and jurisdiction over large ocean areas.

Part IV of the LOSC, particularly Articles 47 to 52, deals with the extent of maritime jurisdiction, exploration, exploitation, conservation and utilisation of marine resources within Indonesia’s archipelagic waters. Indonesia, as an archipelagic State,

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⁶ Article 46 (b), LOSC.
⁹ The concepts brought to the fore in 1957 when Prime Minister, Mr Djuanda, declared that Indonesia is an archipelagic State.
has to fulfil certain obligations as stated in the LOSC, such as maintaining navigation safety,\textsuperscript{11} designating sea lanes for ships and aircraft traffic,\textsuperscript{12} and preserving and protecting the marine environment.\textsuperscript{13}

Indonesia, as the world’s largest archipelagic State, consists of 17,504 islands\textsuperscript{14} with approximately 7.73 million km\textsuperscript{2} of ocean space made up of substantial living and non living natural resources.

The international community as user States argue that Indonesia must leave open all routes normally used for international navigation and guarantee no interference with such passage.\textsuperscript{15} On the other hand, Indonesia wishes to secure its national interests. In this respect, the preservation of the unity of group of island is of key importance, along with jurisdiction over intervening waters and seabed areas. Thus, in certain cases, these interests are in tension with one another have resulted in conflict between Indonesia and the international community.\textsuperscript{16} Since Indonesian waters have many sea lanes of communication which are vital to world trade\textsuperscript{17} and military movement, Indonesia’s maritime policy regarding navigation will always be of interest to the international community.\textsuperscript{18}

\begin{footnotesize}
\begin{enumerate}
\item Articles 21, 52, LOSC.
\item Article 53, LOSC.
\item Article 192 (Part XII), LOSC.
\item Originally, Indonesia had 17,508 islands based on the publication of Indonesian Hydro-Oceanographic Office on Figures of Indonesian Territory; however, after the Republic of Timor Leste (hereinafter referred to as East Timor) gained its independence, two islands (Arturo and Yako Islands) were ceded to East Timor. Further to this, the International Court of Justice in 2002 decided that Sipadan and Ligitan Islands should become part of Malaysia. Indonesian Navy Hydrographic Office, 'Figures of Indonesian Territory' (Indonesian Navy Hydrographic Office, 2003), 4.
\item Interference to the passage will lead to time delay and extra costs for maritime transport. See, Kazumine Akimoto, 'Re-routing Options and Consequences' in Andrew Forbes (ed), The Strategic Importance of Seaborne Trade and Shipping: A Common Interest of Asia Pacific, Australian Maritime Affairs (2002) Vol. 10, 113.
\item The world shipping market is broadly divided into two categories, namely: bulk shipping and container shipping. A bulk carrier is a ship used to transport crude oil, iron ore and other bulk cargoes in large volumes. Cargoes are divided into two categories which are dry cargo and liquid cargo.
\item Reynolds B Peele, 'The Importance of Maritime Chokepoints' (1997) 27(2) Parameters 14, 70.
\end{enumerate}
\end{footnotesize}
Indonesian waters contain critical sea lanes of communication for sea-borne trade, naval movement, and other maritime interests.\(^\text{19}\) In Indonesian waters, there are at least six choke points, comprising the Malacca Strait, Singapore Strait, Sunda Strait, Lombok Strait, Makassar Strait, and Ombai-Wetar Strait all of which are used for international navigation.\(^\text{20}\) While Indonesia has strategic interests in commerce, peace, stability and security in the region, it must also address potential negative effects associated with international navigation such as marine pollution, degradation of marine resources and maritime criminal activities.\(^\text{21}\)

Although there are no exact statistics on the amount of sea and air traffic that pass through Indonesian waters,\(^\text{22}\) it is believed that such waters are highly strategic because of their geographical location.\(^\text{23}\) Indonesian waters connect States in two continents Asia\(^\text{24}\) and Australia;\(^\text{25}\) and two oceans the Indian and Pacific Oceans. Every year many ships pass through Indonesian waters using various straits\(^\text{26}\) carrying cargo ranging from crude oil to finished products from all over the world.\(^\text{27}\) These

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\(^{21}\) Indonesian Navy Doctrine in Indonesian Navy Headquarters, above n 19, 2-15.

\(^{22}\) It is difficult to find exact figures on the number of ships and aircraft which traverse Indonesian waters from the Department of Communication and Department of Marine and Fisheries of Indonesia. The Balance Sheet of Indonesian Trade indicates that the export and import are increased significantly up to 137,020.4 (export) and 129,197.3 (import) valued US$ Million in 2008. Indonesian Profile, Official Indonesian Government Website <http://www.indonesia.go.id> at 5 January 2009. Those exports and imports are related to Indonesian seaborne trade because sea is a major mode of transport for Indonesia.


\(^{24}\) Examples of emerging industrial countries in Asia are China, Japan, India, Taiwan, and South Korea.


\(^{26}\) The straits of Malacca, Singapore, Lombok, and Makassar are the most important straits for international seaborne trade and are also known as choke points within Indonesian waters.

\(^{27}\) Statistics of seaborne trade flow in the Asia-Pacific which also pass through Indonesia could be seen in Christopher Baldwin, *Seaborne Trade Flows in the Asia Pacific Present and Future Trends* (2001), 28.
Indonesian straits are known as the arteries of the world economy. Indonesian waters are also used for movement of military auxiliaries between the Indian Ocean and the Pacific Ocean.

Indonesian waters have become the focus of strategic considerations by user States due to a number of factors, which include economic, military and energy considerations. These factors are interrelated and exert distinct dynamic impacts and outcomes for all concerned States. The following section will explore the extent to which Indonesian waters have significant strategic implications from economic (particularly with regard to oil and gas) and military perspectives.

**1.1.1. Economic Importance of Indonesian Waters**

In ‘On the Principles of Political Economy and Taxation’ David Ricardo argues that States would benefit if they could use comparative advantages in the production and export of certain goods and if the transport costs of such exports do not exceed the profit margin. There is little doubt that current global commodity trade continues to grow (despite the recent global financial crisis) and, in certain aspects, has attained real strategic significance particularly in the trade of oil, gas and minerals.

Seaborne trade represents the most important mode of transport as it shortens the usually long distances between areas of the world where production costs differ significantly while also offering efficiency through the low cost of such transport.

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is the reason that seaborne trade has become centrally important to the international
economic system and a source of wealth. For example in 2006, according to the United
Nations Conference on Trade and Development (UNCTAD);

- There was strong growth in the world economy which continued a trend
  fuelled by the growth in the economies of several developing countries
  at a rate estimated to be between 6.9 and 7.5 per cent.
- The volume of world merchandise trade recorded robust growth,
  increasing by 8.0 per cent to 7.4 billion tons.
- Demand for maritime transport services increased by 5.5 per cent. The
  world merchant fleet capacity expanded to 1.04 billion deadweight tons
  (dwt) at the turn of 2007.
- The tonnage of oil tankers and dry bulk increased by 8.1 per cent and
  6.2 per cent respectively, representing a total increase of 72 per cent in
  total tonnage.

The expansion of the Gross Domestic Product (GDP) of developing countries is
further driving world economic growth and seaborne trade. Asia has experienced
strong and sustained growth of 7.6 per cent between 1997 and 2007, thereby increasing
its share of the world’s output and trade. It is estimated that by the year 2010, 34 per
cent of the world’s total output will be contributed by the Asian region, surpassing
Western Europe and North America by 26 per cent and 25 per cent respectively.
These figures indicate an increased level of prosperity and economic security which
will be enjoyed by Asian countries as well as those in the surrounding regions.

According to Baldwin, the key growth in seaborne trade trends for the Asia-
Pacific over the next 10 to 20 years will be due to increased trade in energy fuels,
mineral exports, value-added manufactures and agricultural produce such as grains and
meat. These commodities will be transported to other countries by sea with much of

31 UNCTAD Secretariat, United Nations Conference on Trade and Development, Review of Maritime
32 The United States Department of Commerce, Growth of the United States exports to ASEAN and
December 2008.
33 Christopher Baldwin, above n 27, 28-29.
this concern and arguably the majority, passing through Indonesian waters. Thus, Indonesian waters will have a strategic impact on the economy of not only the region, but also the entire world, as can be seen in Figure 1.

![Figure 1. Routes of Iron and Ore Carrier and Tankers in the Asia-Pacific](image)

According to a UNCTAD report dated 10 December 2001, energy is one of the most important drivers of economic development and is a key determinant for the quality of people’s daily lives. The 2008 International Energy Outlook projects total world consumption of marketed energy will increase by 50 per cent between 2005 and 2030. The rapid economic development of Asian countries comes with a heavy price: a high dependence on the import of raw materials, especially oil. For example, since 1993 China has had to import large volumes of crude oil to satisfy economic demands,

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35 Note by the UNCTAD Secretariat, TD/B/COM.1/46, 10 December 2001.
with at least 32 per cent of China’s oil imported from the Middle East.\textsuperscript{37} It is anticipated that this figure will rise considerably in coming decades.

Passage through Indonesian waters is therefore likely to increase as the bulk of the Middle Eastern oil to Northeast Asian economies such as China, Japan, Taiwan, and South Korea will pass through Indonesian waters such as the Straits of Malacca, Lombok, or Sunda. The uninterrupted flow of imported energy must therefore be secured so as not to jeopardise economic growth.

Moreover, in addition to oil, these countries also need coal and gas, including liquefied natural gas (LNG). For example, Australia is emerging as a major supplier of LNG to China and these shipments necessarily pass through Indonesian waters. Similarly, Australia is one of the world’s biggest exporters of coal and iron ore.\textsuperscript{38} Ships carrying coal and iron ore from Australia will also pass through Indonesian waters to get to key markets.\textsuperscript{39} Domestic transactions are also likely to increase because like Australia, Indonesia is an exporter of mineral resources to countries such as China, India, Japan and South Korea.

\subsection*{1.1.2. Importance of Indonesian Waters to Naval Movements}

There is no doubt that securing energy flow usually parallels a need to secure the movement of naval auxiliaries so that they may guarantee the security of energy


supply.\textsuperscript{40} In addition, regional stability also requires the presence of naval forces. Thus, in certain circumstances, States tend to build up their naval forces in order to secure their interests.\textsuperscript{41} While the presence of naval forces is necessary in certain circumstances, it may sometimes create tension if such a presence threatens the sovereignty or interests of a coastal State. According to Bateman,\textsuperscript{42} the maritime security scene in the Asia-Pacific region is currently volatile. This is due to threats of maritime terrorism,\textsuperscript{43} bilateral tensions that occasionally re-surface\textsuperscript{44} and the ongoing problem of law and order at sea. Security concerns which interfere with navigation are very broad, but they can be limited to several activities such as piracy, terrorism, undocumented migration, trafficking of narcotic drugs and psychotropic substances, illegal fishing and pollution.\textsuperscript{45} These concerns sometimes require the involvement of military presence to be dealt with effectively.

The United States naval bases in the Asia-Pacific region are in Hawaii, Guam and Japan.\textsuperscript{46} The United States also has naval bases such as Diego Garcia\textsuperscript{47} in the Indian Ocean, which are typically used to transfer warships and their auxiliaries to other United States naval bases for deterrence purposes.\textsuperscript{48} Moreover, the United States

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\textsuperscript{40} According to Sir Walter Raleigh, ‘Whosoever commands the sea commands the trade; whosoever commands the trade of the world commands the riches of the world, and consequently the world itself,’ cited in James E Toth, \textit{Military Strategy Note: Strategic Geography} (1995), 94.
\textsuperscript{43} This threat includes weapon of mass destruction (WMD).
\textsuperscript{44} It is due to disputed claims to sovereignty over islands (Spratley, Paracel, Takeshima/Tokdo islands) or offshore areas (off Sipadan and Ligitan Islands).
\textsuperscript{45} Philipp Wendel, above n 30, 16-48; Kazumine Akimoto, above n 15, 119.
\textsuperscript{46} Seventh Fleet Homepage <http://www.c7f.navy.mil/command-support.htm.> at 10 September 2009.
\textsuperscript{48} This is part of the United States military strategy as stated in U S Department of Defense, \textit{National Security and the Convention on the Law of the Sea} (2\textsuperscript{nd} ed, 1996) and the 1994 White Paper of the
\end{footnotesize}
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warships travelling to their allied countries such as Australia and Singapore usually pass through Indonesian waters. The policy of ‘places not bases’ developed by the United States Forces in the Pacific for Southeast Asia is intended to enhance the United States strategic interests in maintaining regional stability and a credible power projection capability in the region and beyond. This policy is also used to retain the United States influence in Asia on economic, capital and military access through the domination of sea lanes of communication.

The Freedom of Navigation (FON) Program initiated by the Carter administration in 1979 and continued under Presidents Reagan, Bush, Clinton, Bush and Obama, combines diplomatic action and the operational assertion of navigational rights. This program emphasises the use of naval exercises to discourage State claims inconsistent with customary international law, as reflected in the LOSC, and to demonstrate the United States resolve to protect navigational freedoms proclaimed in the LOSC.

The United States has always expounded the freedom of navigation as an important right for American military vessels while denying that same freedom to the former Soviet Union and China. Moreover, the growing naval power of developing nations with regional ambitions, such as China and India, are rapidly building open ocean, ‘blue water’ naval capability which increases the requirements for the United States Navy and the United States Marine Corps; George Galdorisi, 'An Operational Perspective on the Law of the Sea' (1998) 29(1) Ocean Development and International Law 43, 76-78.

49 The Changi Naval Base in Singapore has been newly expanded to accommodate Nimitz-class aircraft carriers and other large ships of the United States Seventh Fleet that are transiting from the Indian Ocean to the Pacific Ocean, <http://www.globalsecurity.org/military/facility/singapore.htm> at 26 July 2009.


States naval mobility.⁵⁴ According to Valencia, operational military flexibility of the United States regarding the sea lanes of communication of South Asia during the Cold War was designed to create options for the United States Navy to navigate its warships and submarines from east to west and vice versa.⁵⁵ Navies in the Asia-Pacific region travel from and to parts of the region in order to patrol or to perform courtesy or joint exercises.⁵⁶ These activities occur sometimes in Indonesian waters or adjacent to Indonesian’s exclusive economic zone (EEZ), so participating ships must first pass through Indonesian waters.

1.2. Objective of the Thesis

This thesis aims to provide an analysis of the legal issues relating to navigation through and over the Indonesian waters. The specific navigational rights and freedoms addressed in the thesis include: innocent passage through the territorial sea (see chapter 4), archipelagic sea lane passage through and over archipelagic waters (see chapter 5), transit passage through and over straits used for international navigation (see chapter 6), and access and communication passage through and over Indonesian archipelagic waters under a specific bilateral treaty with Malaysia (see 7). In particular, it aims to examine inconsistencies between Indonesian navigational regimes and those permitted by the LOSC. The thesis will also examine whether it is necessary, to propose reforms to harmonise national legislation with international law. Specifically, the thesis will explain the extent, historical development and concept of navigational rights and

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freedoms in the LOSC and international law in general. It will also analyse the implementation of the navigational provisions of the LOSC by Indonesia and provide recommendations concerning the harmonisation of the Indonesian laws and regulations with international law.

1.3. Significance of the Thesis

This thesis will identify and address practical and operational deficiencies in Indonesia’s application of the LOSC. The thesis will also examine academic considerations of such deficiencies, insofar as they relate to the conflicting interests of Indonesia and the international community represented by user States.

A comprehensive study of legal issues relating to navigational regimes in and over Indonesian waters has thus far not been undertaken.57 The existing literature largely focuses on the historical claims of Indonesia to archipelagic waters and does not address implementation and consistency of navigational regimes with LOSC provisions.58 A study and assessment of Indonesian navigational regimes has critical national, regional and international significance as shown by the discussion above on the strategic importance of navigation through Indonesian waters. Furthermore, there has been no study that directly addresses the question of the legal issues of


navigational regimes in Indonesian waters from both practical and operational perspectives, as well as from a legal perspective. This thesis fills the vacuum in academic literature by providing an important insight of legal issues on navigation regimes within Indonesian waters.

The contribution of the thesis also lies in the potential assistance it may offer to the Indonesian government in the formulation of State policy and a legal framework regarding maritime policy and in the reform of national legislation to conform with international law. The preparation required for drafting regulations and constructing policy requires substantial time, research and financial resources and they may be significantly reduced through the use of this thesis.

1.4. Research Questions

The thesis is based on the premise that international law has recognised Indonesia as an archipelagic State; thus, Indonesia should implement LOSC rules regarding navigational regimes of innocent passage, transit passage and archipelagic sea lanes passage. To address the issue, the thesis will concentrate on the following major research questions.

First, what are the challenges faced by Indonesia regarding the implementation of the LOSC? Understanding the challenges faced by Indonesia is essential. Such challenges arise from Indonesia’s geographical setting, its national interests and the international community interest in the region, particularly as Indonesia is sandwiched between two oceans (the Pacific Ocean and the Indian Ocean) and two continents (Australia and Asia).

Indonesia has realised that its geographical setting is a ‘gift’. It has resulted in Indonesia having many neighbouring States, islands, populations, and considerable
natural resources. This geographical setting has the potential to be both beneficial and burdensome. Indonesia is in a position to take advantage of its geographical setting from an economic perspective. Conversely, this advantage can give rise to many disadvantages such as environmental issues, national disunity, and depletion of natural resources.

Second, in which parts of Indonesian waters should navigational rights and freedoms apply? Indonesia has many maritime zones, including internal waters, archipelagic waters, territorial sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf. In all of these zones Indonesia exercises sovereignty or sovereign rights. The first three maritime zones are relevant to our discussion of navigational rights and freedoms. Problems might arise if Indonesia were to allow ships unrestricted passage in all these zones, or restrict navigation through these zones entirely on grounds of national security. The exercise of sovereignty on the one hand, and the obligation to provide sea lanes of communication for the international community on the other, invite the simultaneous projection of two sets of competing jurisdictions and interests.

Freedom of navigation is deeply rooted in State practice and universally recognised as customary international law. Furthermore, many historical, social and cultural factors have influenced the way in which Indonesia has asserted its sovereignty in its surrounding waters. Many Indonesians believe that user States have no navigational rights in Indonesian waters. This view has sometimes been reflected in national policy and has influenced relevant Indonesian legislation. At the same time,

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the sovereignty of coastal and archipelagic States over their waters is recognised by the LOSC. Based on the LOSC, coastal or archipelagic States have varying kinds of sovereignty over their internal waters, archipelagic waters and territorial seas. Each maritime zone implies different rights and obligations for the coastal State. The primary concern of user States in seaborne trade, for example, is finding the safest and shortest passage. On the other hand, Indonesia as a coastal State is concerned with the preservation of the environment, protection of commerce and maritime security. It is therefore necessary to examine the different navigational rights and freedoms applicable in the maritime zones of jurisdiction claimed by Indonesia.

Third, what are the legal issues relating to navigational rights and freedoms in Indonesian waters? Indonesia has enacted several pieces of legislation relating to navigational rights and freedoms. However, the international community believes that Indonesia has not adequately accommodated their interests. For example, there are several issues regarding archipelagic sea lane passage such as whether or not Indonesia should make other sea lanes available. Therefore, it is essential to examine the legal aspects of the navigational regimes in Indonesian waters within the context of domestic laws and regulations.

Fourth, how consistent are the navigational rights and freedoms in Indonesian waters with international law? Many experts believe that the LOSC is a ‘package deal’ which accommodates varying interests. As there are many conflicting interests

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60 Act Number 6 of 1996 on Indonesian Waters, Act Number 17 of 2008 on Shipping, Government Regulation Number 36 of 2002 on Rights and Obligation of Foreign Ships Exercising Innocent Passage through Indonesia, and Government Regulation Number 37 of 2002 on the Right and Obligation of Vessels and Aircraft while Exercising Archipelagic Sea Lanes Passage Rights in Designated Sea Lanes.
61 Semaphore, above n 57.
involved, many provisions of the LOSC have been left deliberately ambiguous. The LOSC provides only broad guidelines in implementing the navigational provisions of the Convention. Thus, the development of international law in this area will depend on State practice and guidelines within relevant international organizations. For example, in designating archipelagic sea lanes, Indonesia received guidance from the International Maritime Organization (IMO) and the International Hydrographic Organization (IHO). In addition, Indonesia has had formal and informal meetings with several user and neighbouring States. It is necessary to examine this guidance and State practice in order to gain a better understanding and interpretation of the LOSC.

Fifth, what steps should be taken by Indonesia to harmonise its domestic legal framework with the LOSC in relation to navigational rights and freedoms? In responding to this research question, the thesis will draw on the analysis in the various substantive chapters to present conclusions and to make appropriate recommendations.

1.5. Methodology

In order to analyse the Indonesian implementation of innocent passage, transit passage, archipelagic sea lanes passage and other navigational regime vis-à-vis the LOSC, the methodology used is the triangulated approach. It is based on archival data research, informal interviews, and the personal experience of the author. This thesis uses documents (archival data) such as Indonesian laws and regulations, reports of


conferences, reports of negotiations, academic journals, newspapers, newsletters, papers written by individuals or groups, and relevant textbooks.

The analysis of each navigational regime has its own uniqueness in terms of theoretical background, historical background, legal implication, characteristics, nature, significance, problems, and impact. In this context the thesis establishes a link among the four navigational regimes. Incidents involving foreign vessels and aircraft in Indonesian waters are also examined in order to derive relevant knowledge and techniques in exercising different navigational rights, and provide lesson learnt to avoid such incidents in the future.

A number of people involved in the process of developing Indonesian maritime laws have been interviewed informally in order to gain a comprehensive understanding of the interpretation and implementation of the LOSC.

The author had personal involvement as a member of working groups that formulated laws and regulations relating to navigational matters in Indonesia and was a member of the Indonesian Delegation to the IMO meetings. The author has been involved with the Indonesia Navy since 1989. As an officer, his involvement ranged from his postings to various sections and departments and assignment to several task forces and working groups.64 Through these various direct involvements in relevant work the author was able to gain relevant knowledge to be reflected in this thesis.

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64 From 1989 to 1991, the author was posted to the Indonesian Armed Forces Headquarters in personnel and operation sections; from 1991 to 1993 the author was in the Indonesian Navy Headquarters, Legal Service Division; from 1993 to 1998 the author was posted to the Indonesian Navy Hydro-Oceanographic Office; from 1998 to 2004 the author was posted to the Legal Bureau of the Department of Defence; in 2004 the author joined the Indonesian Navy Staff and Command College; from 2005 to 2007 the author was in the Indonesian Navy Headquarters, Legal Service Division.
1.6. **Structure of the Thesis**

The thesis is divided into three parts and comprises eight chapters including the introduction and conclusion. The first part is the foundation of the thesis which consists of Chapters One, Two and Three. Chapter One provides the background to the study, the research questions and the methodology. Chapter Two provides the historical context, an elaboration on geographical position of Indonesia, various concepts of the archipelagic State, and the involvement of Indonesia in the Third Law of the Sea Conference. Chapter Three examines the status of Indonesian waters. It explores the internal waters, archipelagic waters and territorial sea of Indonesia, how these maritime zones are defined and measured, and the sovereignty and sovereign rights of Indonesia in these maritime zones.

The second part of the thesis focuses on four navigational regimes in Indonesian waters. Chapter Four discusses the application of innocent passage in Indonesian waters and the nature and legal issues associated with such passage. It also examines the rights and obligations of both Indonesia and foreign ships in exercising innocent passage in Indonesian waters. Chapter Five analyses the legal issues relating to archipelagic sea lanes passage in Indonesian waters, including relevant background issues, critical legal analyses of such issues, the rights and obligations of Indonesia as well as the rights and obligations of foreign States, their ships and aircraft. Chapter Six examines navigational regime of transit passage and its application in Indonesian waters. Chapter Seven discusses access and communication passage for Malaysian ships and aircrafts in Indonesian waters. Finally, the thesis draws its conclusions in Chapter Eight which includes a summary of findings, reflections and recommendations from previous chapters.
Chapter Two

Indonesia and the Law of the Sea Convention: An Historical Perspective

2.1. Introduction

Traditional international law has only dealt with continental land masses or islands, not with groups of islands.¹ In traditional international law, territory is considered simply as land mass.² The traditional law of the sea, when applied to archipelagos, encounters great difficulties and produces inadequate results.³ The sea was considered res nullius where coastal States could only exercise limited sovereignty.⁴ However, over the passage of time, the law of the sea has developed to accommodate issues related to archipelagoes.

The outlook and opinions of archipelagic States such as Indonesia are also significant in the development of the archipelago concept. Indonesia believes that the waters surrounding the islands should be considered an integral part of the island and part of its total State territory.⁵ Thus, Indonesia considers the islands, waters, resources

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¹ Traditional international law, as used here, means international conventions and decisions of the Permanent Court of International Justice, before the 1930 Hague Conference on the Codification of International Law.
³ See, D P O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 British Year Book of International Law 1, 4-8; Hiran W Jayewardene, The Regime of Islands in International Law (1990), 106-10.
and people as part of a single entity. The relationship between people and territory is important. In certain parts of Indonesia, for example, the sea territory is regarded as more important than any nearby land mass. There is a strong link between human activity and sea territory. The relationship between the land, water and people inhabiting the islands of the archipelago was a justification for Indonesia proposing the archipelagic concept. In the development of the archipelagic concept, the interaction between the geographical configuration of Indonesia and its economy, history, culture and politics were important. Equally important is the archipelagic State concept enunciated in Article 46 (2) of the LOSC.

The LOSC recognises the sovereignty of the archipelagic State in archipelagic waters. However, this sovereignty is limited in Article 2(3) of the LOSC which provides that sovereignty should be exercised subject to the Convention and to other rules of international law. There are similar limitations on State sovereignty in archipelagic waters such as the right of archipelagic sea lanes passage by foreign ships, overflight of foreign aircrafts and other marine activities.

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11 Article 46 (2) of the LOSC states that an ‘archipelago’ means a group of islands, including parts of islands, connecting 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.

12 Articles 2 (1) and 49, LOSC.
This chapter establishes the context of the thesis by providing an historical overview of the development of the concept of the archipelagic State. The chapter also discusses the consequences of Indonesia being an archipelagic State within the framework of navigational rights and freedoms under international law.

2.2. The Geography of Indonesia

The Republic of Indonesia is the largest archipelagic State in the world, consisting of 17,504 islands. It comprises five major islands (Sumatra, 473,606 km\(^2\); Java, 132,107 km\(^2\); Kalimantan, 539,460 km\(^2\); Sulawesi, 189,216 km\(^2\); and Papua, 421,981 km\(^2\)) and no less than 35 other smaller groups of islands, of which about 6,000 are inhabited. Indonesia extends along the equator, straddles the continents of Asia and Australia, and is flanked by the Indian and Pacific Oceans.

The territory of the Republic of Indonesia stretches from Pulau Rondo off the northern tip of Sumatra in the west longitude 94° 58’ East to Merauke, Papua in the east longitude 141° East and from Pulau Miangas in the north to Pulau Dana in the south. With an overall distance of more than 1,900 kilometres from east to west, Indonesia covers an area as vast as Europe; however, nearly 80 per cent of the area between the geographical extremities is made of seas. The total land area of Indonesia covers about 1,905,000 km\(^2\) which makes it the 14\(^{th}\) largest country in the world.

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13 Originally, Indonesia had 17,508 islands based on the publication of Indonesian Hydro-Oceanographic Office on Figures of Indonesian Territory. However, after the Republic of Timor Leste gained its independence in 1999, which included two islands (Arturo and Yako Islands) and the decision of the International Court of Justice (ICJ) on the sovereignty over Pulau Sipadan and Pulau Ligitan in 2002, where both islands were transferred to Malaysia. So Indonesia has 17,504 islands. Indonesian Navy Hydrographic Office, 'Figures of Indonesian Territory' (Indonesian Navy Hydrographic Office, 2003), 4.

The sea area claimed by Indonesia is approximately 7.73 million km², including its exclusive economic zone (EEZ). The comparative size of Indonesia and its neighbouring countries can be seen in Table 1.

Table 1. Indonesia and Neighbouring Coastal States: Comparative Sizes

<table>
<thead>
<tr>
<th>Country</th>
<th>Land Area (sq km)</th>
<th>Coastline (km)</th>
<th>Continental Shelf (sq km)</th>
<th>EEZ (sq km)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>7,686,300</td>
<td>36,740</td>
<td>1,636,000</td>
<td>7,006,500</td>
</tr>
<tr>
<td>India</td>
<td>3,280,500</td>
<td>9,000</td>
<td>45,500</td>
<td>2,014,000</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1,905,000</td>
<td>60,000</td>
<td>2,768,800</td>
<td>5,408,000</td>
</tr>
<tr>
<td>Malaysia</td>
<td>329,700</td>
<td>3,430</td>
<td>372,440</td>
<td>475,600</td>
</tr>
<tr>
<td>Papua NG</td>
<td>461,700</td>
<td>5,000</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Philippines</td>
<td>115,830</td>
<td>15,260</td>
<td>247,120</td>
<td>1,890,700</td>
</tr>
<tr>
<td>Singapore</td>
<td>600</td>
<td>60</td>
<td>470</td>
<td>300</td>
</tr>
<tr>
<td>Thailand</td>
<td>514,000</td>
<td>2,960</td>
<td>256,100</td>
<td>324,700</td>
</tr>
<tr>
<td>Vietnam</td>
<td>332,600</td>
<td>2,720</td>
<td>559,550</td>
<td>722,100</td>
</tr>
</tbody>
</table>

In 2007, the estimated population of Indonesia was about 225 million, making it the fourth most populous nation in the world. Such a large population, spread over such a vast and geographically-fragmented territory, displays wide variations, notably in ethnic type, religion and language. Indonesia consists of ethnic Malay, Papua, Arab, Chinese, and Indian populations. Islam is the dominant religion (85.2%). This is followed by Christianity (12.9%), Hinduism (1.8%), Buddhism (0.8%) and other religion (0.3%).

This diversity is reflected not only in the composition of the population, but also in Indonesia’s topography and its flora and fauna. Land beyond the cities is generally covered with thick tropical rainforest where fertile soils are continuously replenished by volcanic debris. There are more than 400 volcanoes throughout the

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15 Indonesian Navy Hydrographic Office, above n 13, 5.
17 Biro Pusat Statistik (Bureau of Central Statistic/BPS) of Indonesia <http://www.bps.go.id.> at 4 September 2007, Brief Analysis of Indonesia.
archipelago, with at least 129 still active. Indonesia experiences earthquakes at least three times daily and volcanic eruptions at least once a year.

The Indonesian islands were formed in the Miocene era (12 million years BC), Palaeocene era (70 million years BC), Eocene era (30 million years BC), and Oligocene era (25 million years BC). The islands are spread along the Australia and the Asia-Pacific Rim and are divided into three distinct geo-tectonic groups. The islands of Java, Sumatra and Kalimantan with small islands in between lie on the Sunda Shelf which is about 210 nautical miles in width. Water depths over the shelf do not exceed 200 meters. Papua and the Aru Islands lie on the Sahul Shelf, which is about 140 nautical miles wide, and the water depths exceed 7000 meters. Located between the two shelves is the island group of Nusa Tenggara, Maluku and Sulawesi. Water depths in the vicinity of these islands are known to exceed 3,000 meters.

During the glacial periods Java, Sumatra and Kalimantan on the Sunda Shelf were joined together and linked to the Asian mainland. On the other hand, Papua and Sulawesi on the Sahul Shelf was linked with the Australian continent which later separated. This geophysical separation perhaps explains why certain species in these island groups vary widely.

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22 Robert B Cribb, above n 19, 12-14.
23 J R Morgan and D W Fryer, above n 16, 13.
24 Ibid, 15.
26 Ibid, 10-11; Jean Gelman Taylor, above n 21, 7.
28 Nena Vreeland, above n 19, 62.
2.3. The Indonesian Archipelagic Outlook

From the first century AD, there has been continuous trade among people on the Indonesian archipelago, India and China. Trade created close relations in areas such as religion, arts, and government. The fact that Indonesia is located halfway between India and China has been an important factor in the formation of Indonesian culture. Indian and Chinese traders made stopovers to replenish their supplies of fresh water and food and Indonesians visited India and brought back Hinduism. In port cities in particular, Chinese and Indian traders influenced the local Indonesian culture. Evidence of Indian and Chinese culture and religion can still be found in certain parts of Indonesia, for example, in Indonesian drama, architecture, literature, textile design.

According to Caldwell, Indonesia has a unique ability to synthesise different ingredients, accepting the new without discarding the old, absorbing and blending rather than substituting. At the same time the sea barrier between the islands has resulted in the fact that each island developed uniquely, shaping and moulding its own cultures. The variety of Indonesian cultures can be found in many places and spread across the entire archipelago. For example traditional music instruments can be found in many islands, while batik can be found almost in all islands and ethnics.

With regard to the political evolution of Indonesia, many kingdoms and states rose and fell in various parts of the archipelago during the centuries preceding western

32 Nena Vreeland, above n 19, 11.
34 Donald Wilhelm, above n 30, 10.
35 Malcolm Caldwell, Indonesia (1968), 33.
Although most of these states had localised jurisdiction, there were two great kingdoms which stood out namely Majapahit and Sriwijaya. The Sriwijaya Empire, located in Sumatra, reigned from the 7th to the 13th century. The empire encompassed most of present-day Indonesia and included some parts of the Asian mainland. The empire became a great maritime and trading power as well as a centre for Buddhist learning. The Majapahit Empire, based in Java and founded in 1292, succeeded in uniting much of the archipelago. The latter empire was larger than Sriwijaya and had a great maritime fleet which played a large role in unifying all the islands. The Majapahit Empire lasted until the 16th century. Well before the decline of the Majapahit Empire, Indonesia was being affected by two new forces, Islam and the Europeans.

Islam was introduced by Arab traders soon after the birth of Islam in the 7th century. In the early 15th century, Malacca became a major Islamic trading centre and Islam spread more quickly to the whole archipelago. Although Islam spread rapidly, it took on new forms which were infusions, combinations and blends with old traditions and cultures that already existed, such as Hinduism, Buddhism and animistic practices.

Europeans came to the archipelago in 1292 with the arrival of Marco Polo, and was followed by Portuguese and Spanish explorers. The Portuguese and Spanish

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36 Ann Kumar, 'Development in Four Societies over the Sixteenth to Eighteenth Centuries' in Harry Aveling (ed), The Development of Indonesian Society (1979), 30-37.
38 Rosemary Brissenden, above n 29, 74; See, O W Wolters, Early Indonesian Commerce (1967).
39 G Moeldjanto, above n 37, 15.
41 Ibid, 3-16; Nena Vreeland, above n 19, 13-14.
42 Ibid, 4-16; Jean Gelman Taylor, above n 21, 60-114.
43 Donald Wilhelm, above n 30, 10.
44 Donald Wilhelm, above n 30, 11; Jean Gelman Taylor, above n 21, 116-20; Nena Vreeland, above n 19, 15-16.
captured various trading centres and occupied some Indonesian territory.\textsuperscript{45} The English and Dutch challenged the Portuguese and Spanish hold, which were gradually expelled from the archipelago.\textsuperscript{46} The English stayed on the Malacca peninsula while the Dutch occupied and controlled most of Java and others islands. The archipelago became known as the Dutch East Indies. For a period of five years, the British took over the archipelago from the Dutch, with Thomas Stanford Raffles as the British chief administrator in the archipelago.\textsuperscript{47} The Dutch resumed control of the archipelago and continued to convert land into plantations in order to produce export commodities. Java became a vast Dutch government plantation.\textsuperscript{48} Serious famine occurred in Java because the Dutch neglected to plant food crops and the people were forced to become labourers or slaves.\textsuperscript{49}

The independence movement began in 1629 when Sultan Agung, the King of Mataram, sent troops to attack the Dutch in Batavia.\textsuperscript{50} There were several revolts and uprisings which took place in Aceh, Bali, Java and many other parts of the archipelago. The movements failed because the Dutch used a ‘divide et impera’ system whereby the Dutch chose local rulers and used them to control areas. The system was economical and proved successful in the suppression of popular movements. During that time the Dutch allowed some young Indonesians, who had studied in Netherlands, to handle administrative jobs. But the students had also studied political movements and they proceeded to establish a political party.\textsuperscript{51} The Youth Pledge of 1928 expressed the

\textsuperscript{45} Ann Kumar, above n 36, 8.
\textsuperscript{46} Ibid, 9; Jean Gelman Taylor, above n 21, 142-55.
\textsuperscript{47} Peter B R Carey, 'Aspect of Javanese History in the Nineteenth Century' in Harry Aveling (ed), The Development of Indonesian Society (1979) 120, 57-59.
\textsuperscript{48} Jean Gelman Taylor, above n 21, 115-41.
\textsuperscript{49} Nena Vreeland, above n 19, 20-28.
\textsuperscript{50} Ibid, 18; Donald Wilhelm, above n 30, 15.
\textsuperscript{51} There were many political parties and student organisations established by young professionals and students of Indonesia, such as Indische Party, Budi Utomo, Sarekat Islam, Partai Komunis Indonesia, Indonesian Alliance of Students, Jong, Jong Jawa, Jong Ambon. See, Indonesia, Early Political
ideals of one nation, one language and one fatherland or Tanah air.\textsuperscript{52} It was the first political manifestation of the concept of national unity and was inspired by a nationalist movement which aimed to lead the national struggle for independence.

In 1942 the Japanese came to the archipelago and took over all systems of government. They set up some steps for independence such as allowing the use of the Indonesian flag, the national anthem and Bahasa Indonesia as the national language.\textsuperscript{53} But overall, the Japanese treated the native population worse than the Dutch.\textsuperscript{54} People were starving and there was famine everywhere. The Japanese established Indonesian officer armies and created quasi-military youth organisations which later formed the core of the Indonesian armed forces.\textsuperscript{55}

Indonesia declared its independence on 17 August 1945, two days after Japan surrendered to the Allies.\textsuperscript{56} However, the victorious powers allowed the Dutch to return and reclaim its former colony. In order to defend their independence, the Indonesian people had to fight better armed and trained Dutch soldiers. The poorly armed and trained Indonesian people were able to overcome the professional Dutch military forces because the Indonesian forces were fully supported by the native population throughout the lengthy guerrilla war.\textsuperscript{57} This experience made the country realise that Indonesian defence must rely on the unity between its armed forces and

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\textsuperscript{52} ‘Tanah Air’ means ‘Motherland’ in Indonesia Language. See, National Committee for Maritime Technology and Industrial Development, above n 25, 41.
\textsuperscript{53} Jean Gelman Taylor, above n 21, 310-21.
\textsuperscript{56} Japan surrendered to the Allied on 15 August 1945, with the surrender documents finally signed aboard the deck of the American battleship USS Missouri on September 2, 1945. See, Mark Donnely, \textit{Britain in the Second World War} (1\textsuperscript{st} ed, 1999), 43.
\textsuperscript{57} Nugroho Notosusanto, \textit{The National Struggle and Armed Forces in Indonesia} (Second ed, 1980), (in Indonesian), 6; G Moeldjanto, above n 37, 96-189.
\end{flushright}
civilian population. The revolutionary experience gave the nation a strong sense of self confidence in its ability to defend the country against a hostile foreign power. In addition, the experience shaped the defence and security outlook of Indonesia, focusing it on the unity of the nation.

The notion of national unity, known as ‘Wawasan Nusantara’ or the ‘Archipelagic Outlook or Principle’, unites the Indonesian archipelago into an indivisible ‘Tanah Air’ or ‘Place of Land and Water for all Indonesians.’ The archipelagic outlook clearly envisages the islands and the surrounding seas as a single unit.

The ‘Wawasan Nusantara’ doctrine was reflected in the geopolitical concern of Indonesia in its maritime territory. There were three catalysts for this doctrine. First, the Indonesian elite started to realise that Indonesia needed a new doctrine to integrate the maritime territory into its land territory as a single entity. Second, the location of Indonesia at the cross-roads of world trade puts Indonesia in both an advantageous and vulnerable position. Third, there was heightened concern surrounding foreign maritime passages within the archipelago. The last concern related specifically to the activities of the Dutch warships while Indonesia campaigned for the transfer of Papua (Irian Jaya) from Dutch to Indonesian rule from 1950 to 1962.

Having considered the location of Indonesia, the ‘Wawasan Nusantara’ doctrine developed along with understanding of Indonesia’s archipelagic outlook. Its

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58 The defence system which focuses on the unity of armed forces and the people is called Hankamrata (Total People’s Defence). The armed forces acted as a core to mobilise the entire population against the enemy.
59 Munadjat Danusaputro, above n 5, 31.
60 Indonesian National Defence Council, above n 6, 4–15.
61 Papua is the current official name of the territory known successively as Netherlands New Guinea, West New Guinea, West Irian and Irian Jaya. The Name of Papua will be used throughout for consistency, except for the name of Treaty.
62 In spite the fact that the Dutch Government did not recognise the independence of Indonesia, the Dutch still ruled in West Papua (Irian Jaya) until 1962. During that time, Dutch Navy passed through the Java Sea and waters surround the Indonesian islands.
geographical setting came to be considered with other aspects such as demography, natural resources, ideology, politics, economics, social and cultural aspects, as well as defence and security. Those aspects were known as ‘asta gatra’ which means ‘eight aspects’, the first gatra (aspect) of which is geographical setting.

The Wawasan Nusantara doctrine promoted both an inward and outward looking perspectives. At a national level (that is, the inward-looking perspective), it emphasises the notion of Indonesia as one political, economic and security entity. Internationally, the promotion of Wawasan Nusantara is designed to advance the security of Indonesian territorial waters. The Wawasan Nusantara doctrine would go on to provide substance to the perceptions and interests of Indonesia in maritime matters in subsequent years particularly with respect to maritime boundaries, navigational regimes, and managing natural resources.

2.4. Development of the Indonesian Maritime Policy

The arrival of the European powers, with their ambition for the expansion of their overseas colonial empires, brought with them the concept of mare clausum. However, the Dutch interest in the East Indies, supported by the legal doctrine of mare liberum developed by Grotius and others, necessitated advocacy of the principle of freedom of the high seas, in contradiction to the Portuguese and Spanish views on the matter. According to Alexandrowicz the Portuguese attempted to limit the access of

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63 ‘Astra gatra’/aspect is divided into two the categories namely three ‘gatra’/aspects and five ‘gatra’/aspects. The three aspects are known as tangible aspects and consist of the geographical position, natural resources, and population of Indonesia. The five ‘gatra’ include intangible aspects and comprise ideology, politics, economic, socio-cultural, defence and security.

64 Indonesian National Defence Council, above n 6, 5-16; Munadjat Danusaputro, above n 5, 10-27.

65 Ibid, above n 6, 7.

66 Ibid, 9.
competitors to the high seas in the East Indies. With the gradual achievement of supremacy by the Dutch in the East Indies during the 18th and 19th centuries, the original customary law position came to be restored in the form of Dutch practice in the East Indies.

The Dutch Government applied regulations in the territorial sea which conformed with the general practices of the law of the sea at that time. These regulations were based on the development of the law of the sea; for example, in 1893 there was Ordinance Number 261 regulating pearl fishery in the territorial sea of the Netherlands Indies. Second, in 1902, there was Ordinance Number 4 regulating pearl fishery within the distance of no more than three nautical miles off the coasts of the Netherlands Indies. Third, in 1905, the Government of Dutch East Indies declared Ordinance Number 436, which amended Ordinance Number 4 of 1902 and expanded the definition of the territory to include rocks, reefs and banks exposed at the low water line.

During the colonial era, the territorial waters of Indonesia inherited from the Dutch East Indies were fixed generally at three nautical miles from the coast, as stated in Article 1(1) of the Territoriale Zee en Maritieme Kringen Ordonatie of 1939. Consequently, Indonesia consisted of so many units of islands, each separated from others by the so-called high seas as shown in Figure 2. The colonial regulation was still

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68 Ibid, 65. He hypothesised that Grotius apparently derived support for his treaties from the original Asian practice.
70 Ibid, 31.
71 Ibid, 32.
in application after the independence of Indonesia due to the text of the Proclamation of 17 August 1945 and the 1945 Constitution of Indonesia which stated that ‘all existing regulations and administrative ordinance in as much as they are not incompatible with the transfer of sovereignty remain in force’. 73

![Illustrative Maps of the Indonesian Territory Based on the TZMKO 1939](image)

**Figure 2. Illustrative Maps of the Indonesian Territory Based on the TZMKO 1939**

Since some of the Indonesian islands or groups of islands lay more than six miles apart, the three nautical miles territorial sea could not enclose the archipelago within a single jurisdiction. Consequently, each island had their own respective territorial waters and there was a gap between islands which consisted of the high seas. As a result, the major part of Java, Banda, Maluku and Natuna Seas which form the heart of the Indonesian archipelago, were considered high seas areas. 75

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73 The Text of the Indonesian Proclamation of Independence 1945 and Article II of Additional Regulation of the Constitution of Indonesia 1945, UUD 1945 (the 1945 Constitution) provides that colonial law still applies unless specifically repealed under the 1945 Constitution. Therefore this ‘Transitional Article’ was ground for validity in subsequent regulations.


The colonial territorial arrangement did not favour Indonesian interests. The three nautical miles regulation was a long way from the objective of the independence movement, which was to unite Indonesia. This made it very difficult for the government to execute various functions of the government, such as defence and security, law enforcement, administration and economic development. Furthermore, the three nautical miles regulation placed Indonesia in a fragile situation in terms of territorial integrity, since the presence of pockets of open sea provide opportunities for hostile external elements which used the cover of the high seas to support local political unrest on the islands.

Economically, the three nautical miles territorial sea limit meant that Indonesia was vulnerable insofar as economic and fishing activities were concerned. Foreign fishing vessels invoking the right of fishing on the ‘high seas’ (seas between Indonesian islands) were coming within three nautical miles of the coast or even closer. The presence of foreign fishing vessels with modern equipment adversely affected the local fishermen due to their old-fashioned and traditional methods of fishing. The local fishermen were left unprotected from this foreign competition. For these reasons, the Indonesian government had to protect the fishermen and did not tolerate the activities of foreign fishing vessels. As stated by Mauna, ‘foreign States, which were much more advanced in their technology, could easily deplete our fisheries resources on our nearby seas.’

Politically, after independence, Indonesia needed to strengthen national unity, political stability and national security. There were several separatist and regional

77 During the period 1950-1960 there was much political unrest as many islands wanted to become independent because the central government did not have enough power to control all the islands. See Boer Mauna, _Hukum Internasional_ (1987) (in Indonesian), 411.
78 Hasjim Djalal, above n 6, 298, 337.
79 Boer Mauna, above n 77, 412.
political movements which wished to secede from Indonesia. Domestic dissent was mostly caused by island sentimentality for the colonial regime, as the result of the colonial policy in the past which had favoured certain islands over others.80

The struggle to liberate Papua (West Irian/Irian Jaya) was also a prominent issue which supported the notion of the Indonesian archipelagic State concept. The pockets of sea known as ‘high seas’ between the Indonesian islands meant that the Dutch Navy could pass through such areas very easily and it was considered by Indonesia as provocation. The Dutch naval presence in Indonesian waters was well aware of this, as the Dutch strategy was maintaining sovereignty in Papua while keeping logistic communication between Papua and Holland. The Dutch Navy was operating on the Java Sea and the inland seas on the eastern part of the Indonesian territory by flying its flag and traversing between Papua and Holland.81 As stated by the Indonesian Foreign Ministry: ‘(t)he presence of pockets of open seas, due to its freedom of navigation, all states could conduct all kinds of activities there, even war.’82 This demonstrated the vulnerability of the Indonesian maritime territory for the purpose of defence.

2.5 Development of the Archipelagic State Concept of Indonesia

Between 1953 and 1957 there were many factors that highlighted the need for uniting the territory of Indonesia. These elements included growing unrest in regions outside Java, army commanders in a number of regions declaring martial law, Sukarno declaring martial law over the whole country, Sukarno setting up a ‘business cabinet’ headed by Djuanda Kartawidjaja, labour unions taking over Dutch enterprises as well

82 Boer Mauna, above n 77, 410.
as escalating tensions between Indonesia and the Netherlands over West New Guinea.\textsuperscript{83} In addition, in 1955 the Philippines submitted a \textit{note verbale} to the United Nations which stated that ‘all waters around, between and connecting different islands belonging to the Philippines Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines’.\textsuperscript{84} The Philippine position thus supported the Indonesian position.

On 13 December 1957, the Indonesian Prime Minister Djuanda Kartawidjaja made a Declaration to override the colonial maritime territorial regulations in favour of a completely new territorial concept. The territorial concept known as the \textit{Djuanda Declaration} asserted a radical approach to maritime claims:

\begin{quote}
The Government declares that all waters surrounding, between and connecting the islands constituting the Indonesian State, regardless of their extension or breadth, are integral parts of the territory of the Indonesian State and therefore, parts of the internal or national waters which are under the exclusive sovereignty of the Indonesian State. …The delimitation of the territorial sea (the breadth of which is 12 nautical miles) is measured from baselines connecting the outermost points of the islands of Indonesia.\textsuperscript{85}
\end{quote}

The Djuanda Declaration stated that Article 1(1) of the colonial maritime ordinance, concerning territorial and maritime boundaries, was no longer in accord with the needs of an independent Indonesia. The Declaration itself did not have the force of law under the former constitution.\textsuperscript{86} Nonetheless, it clearly stated the policy of the Republic in relation to its territorial integrity and protection of natural wealth.

\textsuperscript{83} Dino Patti Djalal, \textit{The Geopolitics of Indonesia's Maritime Territorial Policy} (1996), 84-88.
\textsuperscript{86} Articles 140-142, the 1950 Provisional Constitution of Indonesia, UUDS 1950.
Although not carrying the force of a formal repeal, this statement of policy might be considered sufficient evidence of conflict with principles embodied in the Indonesian Constitution such that the colonial law, on the limits of national jurisdiction in Indonesia waters, would have been held void by the Indonesian courts.87

The Declaration itself was a political statement and revoked certain provisions of the 1939 Territorial Sea and Maritime Areas Ordinance, so the Indonesian government had to create a legal basis for its new maritime assertion. The Indonesian government embodied the new territorial concept in national legislation Act Number 4 of 1960 on Indonesian Waters.88 The new law provided more details on the nature and extent of Indonesian waters compared to the Djuanda Declaration. Article 1 of the Act provided that the territorial sea extends 12 nautical miles outward from the baselines drawn around the outermost islands of the Indonesian archipelago. All waters enclosed by the baselines declared in Article 2 were regarded as internal waters. These internal waters and territorial sea were regarded as Indonesian waters within the meaning of the regulation. The law also provided that straits of less than 24 nautical miles width, which belonged to one or more foreign States, shall be divided at the mid-point. Article 3 provides that the government may regulate the innocent passage by means of executive regulation. Finally, Article 4 stated that the new law repealed the contradictory provisions of the Dutch colonial ordinance.

Having considered the interest of user States in navigational matters, the Government of Indonesia also took into account the innocent passage of foreign vessels in Indonesian waters by permitting such passage so long as it was not prejudicial to the security of Indonesia. The innocent passage regime was further

87 Article 142, the 1950 Provisional Constitution of Indonesia, UUDS 1950.
88 This Act latter has been amended by Act Number 6 of 1996 on Indonesian Waters (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647).
implemented through Government Regulation Number 8 of 1962 on Innocent Passage of Foreign Vessels in Indonesian Waters. The regulation clarified the conditions under which Indonesia would allow innocent passage. However, it seemed to contain some significant deviations from the innocent passage recognised by the international community. Article 1 of this Government Regulation guaranteed innocent passage, although the definition which had been used in subsequent articles narrowed the definition. Innocent passage was defined as ‘navigation with a peaceful purpose which travels through the territorial sea and internal waters of Indonesia from high seas to high seas’. This means that passage from the high seas to the territorial sea of foreign States was not considered innocent passage. Article 4 purported to grant the President power to temporarily suspend innocent passage in Indonesian waters, including straits used for international navigation. Finally, Articles 5, 6 and 7 placed restrictions on fishing, research and naval vessels of foreign States. These restrictions included permit requirements for research vessels and prior notice by naval and other vessels of foreign States.

The Indonesian archipelagic State concept elicited strong opposition from maritime powers such as the United States, France, Netherlands, the United Kingdom and Australia. These States believed that the new territorial limit was invalid and would jeopardise world seaborne trade. On the other hand, the Soviet

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89 D P O’Connell, above n 3, 39.
91 The United Kingdom stated that the term ‘archipelago’ applies only to a small, compact group of islands, while the straight baseline principle applies only to sharply indented coasts and fringes of islands. NAA: A 1838, 696/2/5 Part I.
92 Sahono Soebroto, Sunardi and Wahyono, ‘Konvensi PBB tentang Hukum Laut’, Sinar Harapan (Jakarta), 1983, vi, (in Indonesian). France submitted a formal protest on 8 January 1958; Netherlands on 7 January 1958; On 3 January 1958, Britain notified that the new territorial limit was invalid and thus not applicable to its citizens, ships, and airplanes. Australia followed suit on 3 January 1958.
Union and China supported the archipelagic concept. According to Djalal, their endorsement was because Moscow and Beijing naval forces were dedicated to their coastal defence, so they had no compelling strategic stake in the use of Indonesian seas.94

In the Djuanda Declaration and in its incorporation into municipal law, the Indonesian government did not draw any distinction between merchant ships and warships. It maintained initially that innocent passage of foreign ships in these internal waters was granted so long as it was not prejudicial to or violates the sovereignty of Indonesia, and subsequently, that innocent passage through the internal waters of Indonesia was open to foreign ships. It was clear that the interpretation of what constituted innocent passage was the prerogative of the Indonesian Government.

The archipelagic State concept was raised in the First United Nations Conference on the Law of the Sea (UNCLOS) in 1958 but it was not recognised. The joint proposal submitted by the Philippines and Yugoslavia concerning archipelagos was defeated.95 In UNCLOS II in 1960,96 held a few months after Indonesia made a unilateral action to enact Act Number 4 of 1960 on Indonesian waters, the question on the precise limits of the territorial sea and the unique concerns of archipelagos and island groups was also left unsettled. In late 1961 the Indonesian Government passed legislation ratifying the Geneva Conventions on the high seas,97 continental shelf98 and fishing99 without mention of the Convention on the Territorial Sea and the Contiguous

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94 Hasjim Djalal, above n 76, 63.
However, the Secretary-General of the United Nations refused to accept the ratification of Indonesia because the Geneva Conventions did not allow States to make a reservation when ratifying.\textsuperscript{101}

A further Indonesian statement on the archipelagic State doctrine appeared in the form of a Presidential Decree Number 103 of 1963 on Declaration of Indonesian Waters to be the Maritime Domain. The Decree was meant to overcome the discrepancy between the colonial ordinances and those which had revoked the decrees of the colonial Governor-General concerning the Maritime Domain. Act Number 4 of 1960 revoked portions of Article 1 of the Dutch East Indies colonial ordinance on the maritime domain, but the main body of law was left intact.\textsuperscript{102} Thus, under Indonesian law, most of the sea space formerly regulated by the colonial ordinances had become internal waters, but colonial law governing them was meant to apply to the high seas.

The other element of Indonesian positive law was enacted in 1971 and related to the archipelagic State doctrine and affected innocent passage rights of foreign ships. Presidential Decree Number 16 of 1971 provided further explanation of the transit requirements by foreign vessels in Indonesian waters. The Decree created two types of permits: ‘sailing permits’ and ‘security permits’.\textsuperscript{103}

The sailing permits applied to all non-military foreign vessels, except non-military vessels engaged in activities which may affect Indonesian security, such as hydrographic surveys or which require operation in ‘closed or restricted areas’.\textsuperscript{104} Non-military vessels engaged in such activities and all foreign military vessels were

\footnotesize{\textsuperscript{100} Act Number 19 of 1961 on Ratification of Three 1958 Geneva Conventions on the Law of the Sea (State Gazette Year 1961 No. 276).
\textsuperscript{101} The letter of Secretary General No. LE 139 (1-2) dated 12 September 1961.
\textsuperscript{102} The rest of the Articles of the TZMKO 1939 concerning law enforcement at sea are still valid, especially in the Procedural Criminal Code at Sea.
\textsuperscript{103} Article 1, Presidential Decree Number 6 of 1971.
\textsuperscript{104} Article 3, Presidential Decree Number 6 of 1971.}
required to obtain a ‘security clearance’ from the Minister of Defence and Security.\textsuperscript{105} Non-military vessels engaged in sensitive activities such as marine scientific research required both a sailing permit and a security clearance. This Presidential Decree will be further discussed in Chapter Four on innocent passage in Indonesian waters.


At the Third United Nations Conference on the Law of the Sea (UNCLOS III), Indonesia exerted considerable effort pursuing the concept of an archipelagic State included in the final text of the Convention. Indonesia set up a special task force to address issues discussed at the Law of the Sea Conference. The task force, known as the Coordinating Committee for National Territory (\textit{Panitia Koordinasi Wilayah Nasional/PANKORWILNAS}), was established by Presidential Decree Number 36 of 1971. The function of the Committee was to coordinate the various activities in all departments relating to maritime affairs. In addition, the Committee had to prepare the position of Indonesia for UNCLOS III.

In terms of strategy, the Indonesian government was careful to avoid a high profile campaign in advocating the archipelagic concept.\textsuperscript{106} The strategy was to coordinate advocacy of the Indonesian position as far as possible within the ‘Archipelagic States Group’ (ASG) activities.\textsuperscript{107} In addition, Indonesia lobbied with the members of the Group of 77 for wider support, the Asian-African Legal Consultative Committee (AALCC), the Islamic Conference, the Organization of

\textsuperscript{105} Article 2, Presidential Decree Number 6 of 1971.

\textsuperscript{106} Indonesian Foreign Affairs, \textit{Laporan Delegasi Republik Indonesia ke Konferensi PBB tentang Hukum Laut ke-III, 17 Maret - 9 Mei 1975} (1975) (in Indonesian). This report is not published. The author accessed it in the Indonesian Foreign Affairs Library; Jack Draper, above n 75, 151.

African Unity (OAU), and through bilateral approaches.\(^{108}\) For example Indonesia concluded bilateral agreements on economic, finance, social, and other matters.\(^ {109}\) The main purpose of these efforts was to convince other States to support the archipelagic State concept.

After considerable debate in UNCLOS III,\(^ {110}\) the archipelagic State concept was finally endorsed and became a new concept recognised under international law. Part IV of the LOSC incorporates the essential elements of the legal framework for archipelagic State. Although some of the provisions of Part IV are different from the Indonesian concept in the 1950s and 1960s, endorsement of the concept was a major diplomatic achievement for Indonesia and vindication of the Djuanda Declaration in 1957.

There are at least three differences between the provisions of the LOSC on the archipelagic regime and the Indonesian archipelagic State concept in the 1950s and 1960s. The Indonesian concept only recognised internal waters and territorial sea as maritime zones under the sovereignty of Indonesia, whilst the LOSC provides internal waters, archipelagic waters, and territorial sea as maritime zones under sovereignty of archipelagic States. Basically, the Indonesian concept utilised straight baselines used to encompass all Indonesian archipelagos whilst the LOSC provides for the use of a number of baselines such as normal baselines, straight baselines, and archipelagic baselines to enclose territory of archipelagic State. In terms of ‘navigation’ the Indonesian concept only recognised the right of innocent passage of foreign vessels in

\(^{108}\) Mochtar Kusumaatmaja, above n 9, 19, 21.


Indonesian waters. On the other hand, the LOSC provides at least three navigational regimes namely innocent passage, transit passage and archipelagic sea lanes passage that can be exercised in the maritime zones under the sovereignty of the archipelagic State.

One of the basic principles of the archipelagic State regime as incorporated in the LOSC is to allow archipelagic States like Indonesia, to draw straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago, thus creating archipelagic waters landward of the baselines. From the baselines, an archipelagic State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, its contiguous zone up to 24 nautical miles, its EEZ up to 200 nautical miles and its continental shelf to the outer edge of the continental margin. The archipelagic State has territorial sovereignty over the archipelagic waters enclosed by such baselines and over the 12 nautical miles territorial sea around the archipelago. It has sovereign rights over the natural resources of the EEZ and the continental shelf all the way to the outer edge of continental margin.

2.7. Conclusion

This Chapter has provided the historical context of the development of the Indonesian archipelagic State doctrine. The Chapter has shown that the development of the archipelagic State doctrine of Indonesia is based on its geographical setting, economic interest and national security. The maritime policy of Indonesia can be traced back to the Dutch colonial period which stated that the territorial limit was three nautical miles and defined the way by which those baselines were drawn. After the

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111 Article 47, LOSC.
independence of Indonesia, the colonial concept of its maritime territory was not favoured. Later, the struggle for Indonesian independence affected the way the country looked upon its own territory.

The archipelagic State doctrine is a new legal concept for ocean regimes around the world. The Indonesian archipelagic concept, as a maritime policy, began in 1957 through what is known as the Djuanda Declaration. This Declaration stated that the islands of Indonesia and the seas between the islands formed one integral unit. This political declaration was transformed into a legal concept through Act Number 4 of 1960 on Indonesian Waters. It could be said that the Djuanda Declaration and Act Number 4 of 1960 influenced the adoption of the archipelagic State concept in the LOSC.

The next chapter will explore the nature of internal waters, archipelagic waters and the territorial sea of Indonesia as well as the rights and obligations of Indonesia, and those of foreign ships and aircrafts in Indonesian waters.
Chapter Three
The Concept of Indonesian Waters

3.1. Introduction

The LOSC has placed various maritime areas under greater coastal State control and some areas under less coastal State control. Maritime zones were divided into different jurisdictions, reflecting a balance between the competing interests of coastal States and the user States. In internal waters, coastal States have more power than other maritime zones in exercising sovereignty. In archipelagic waters, an archipelagic State is entitled to exercise its sovereignty but must accommodate the navigational interests of the international community. In the territorial sea coastal or archipelagic States have the right to exercise sovereignty, but it must be accordance with LOSC such as providing and ensuring navigation rights of user States. Beyond these areas are the exclusive economic zone (EEZ), continental shelf and high seas. LOSC also recognises straits used for international navigation and enclosed or semi-enclosed seas which may fall within one or more of these maritime zones.

Indonesia has enacted Act Number 6 of 1996 on Indonesian Waters to implement the provisions of the LOSC. According to the Act, Indonesian Waters consist of internal waters, archipelagic waters and the territorial sea of Indonesia. Thus, Indonesia combines these maritime zones into a single term. Furthermore, the Act has

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1 Articles 8 and 50, LOSC.
2 Part IV, LOSC.
3 Part II, LOSC.
4 Part V, LOSC.
5 Part VI, LOSC.
6 Part VII, LOSC.
7 Articles 34 to 45, Part III, LOSC.
8 Articles 122 to 123, Part IX, LOSC.
been followed by several implementing regulations.\(^9\) It is believed by those who have
drafted these laws and regulations that the LOSC has been implemented faithfully and
consistently with international law. This is demonstrated by the preambles to the
abovementioned laws and regulations which assert that their basis is the LOSC as well
as the fact that each article of the Act refers to a corresponding article in the LOSC.

In order to define its territory, Indonesia has enacted regulations on determining
archipelagic baselines from where the maritime zones are measured. Government
Regulation Number 38 of 2002 on List of Geographical Coordinates of Archipelagic
Baselines of Indonesia as amended by Government Regulation Number 37 of 2008
provides legal and technical aspects on Indonesian archipelagic baselines. These
Government Regulations have been deposited with the Secretary-General of the United
Nations on 11 March 2009 as pursuant to Article 47 (9) of the LOSC.\(^{10}\)

This chapter will examine the nature of the sovereignty which Indonesia
exercises over its waters. It will illustrate the development of the concept of territory. It
will describe Indonesian archipelagic baselines, discuss the internal waters,
archipelagic waters and territorial sea of Indonesia as well as Indonesia rights and
obligations therein. Finally, it will analyse the jurisdiction of Indonesia over
Indonesian waters.

\(^9\) Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships on
Exercising of Innocent Passage through Indonesian Waters (State Gazette Year 2002 No. 70,
Supplementary State Gazette No. 4209); Government Regulation Number 37 of 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); Government Regulation Number 38 of 2002 on List of Geographical Coordinates of
Indonesian Archipelagic Baselines (State Gazette Year 2002 No. 72, Supplementary State Gazette No.
4211); Government Regulation Number 37 of 2008 on Amendment of Government Regulation Number
38 of 2002 concerning List of Geographical Coordinates of Indonesian Archipelagic Baselines (State
Gazette Year 2008 No.77, Supplementary State Gazette No. 4854).

\(^{10}\) Reference No. M.Z.N.67.2009.LOS (Maritime Zone Notification), dated 25 March 2009,
July 2009.
3.2. Legal Status of Indonesian Waters

The LOSC establishes the sovereignty of the coastal States in their internal waters, archipelagic waters and territorial sea. These maritime zones are cumulatively referred to by Indonesia as ‘Indonesian Waters.’ Act Number 6 of 1996 on Indonesian Waters states that Indonesia has sovereignty over the Indonesian waters.\(^\text{11}\)

Significantly, Indonesian waters do not include the EEZ and the continental shelf. The LOSC describes internal waters, archipelagic waters and territorial sea in different provisions, but Indonesia combines them together under a single term ‘Indonesian waters’ because Indonesia considers these maritime zones to be under its sovereignty.\(^\text{12}\) Thus, it will be useful to analyse the international legal basis for each of these maritime zones.

3.2.1. Internal waters of Indonesia

The Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958\(^\text{13}\) provides that ‘waters on the landward side of the baselines of the territorial sea form part of the internal waters of the state.’\(^\text{14}\) The LOSC reiterates this provision with an exception in the case of archipelagic States, where the waters landward of archipelagic baselines are considered archipelagic waters.\(^\text{15}\) Within archipelagic baselines, an archipelagic State can draw closing lines across river mouths, bays and harbours on individual islands in accordance with the normal rules concerning baselines.\(^\text{16}\) Closing lines can be drawn in accordance with Articles 9, 10 and 11 of the LOSC. These provisions repeat the judgment of the Anglo Norwegian Fisheries Case

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\(^{11}\) Article 3 (1), Act Number 6 of 1996.

\(^{12}\) Preamble, Act Number 6 of 1996.


\(^{14}\) Article 5 (1), the 1958 Territorial Sea Convention.

\(^{15}\) Article 8 (1), LOSC.

\(^{16}\) Article 50, LOSC; R R Churchill and A V Lowe, The Law of the Sea (3rd ed, 1999), 125.
which considered the island, islets, rocks and reefs of the Norwegian coast as an extension of the Norwegian mainland and the outer line of the coastal features as constituting the coastline of Norway.\footnote{Fisheries (United Kingdom v Norway) (Merit) [1951] ICJ Rep 116, Judgment of December 18, 1951, Reports of Judgments, Advisory Opinions and Orders, at 116, 127.}

The sovereignty of a coastal State over its internal waters\footnote{Articles 2 and 50, LOSC. Article 2 of the LOSC states “The sovereignty of a coastal State extends, beyond its land territory and internal waters… to an adjacent belt of sea, described as the territorial sea.”} extends to the air space above, as well as the bed and subsoil thereof. A coastal State may exercise complete and absolute sovereignty in its internal waters as it does over its land territory. However, based on Article 8 (2) of the LOSC, the right of innocent passage still exists within those waters\footnote{R R Churchill and A V Lowe, above n 16, 61.} if the establishment of straight baselines has the effect of enclosing internal waters areas which were previously not considered as such.\footnote{Article 8 (2), LOSC.}

Thus, the LOSC divides internal waters into two categories for the purposes of navigation.\footnote{Francis Ngantcha, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990), 78.} First, a right of innocent passage exists in those internal waters which lie between the low-water mark along the coast and the straight baselines. Second, there is no such right in those internal waters which consist of parts of the sea lying landward of the low-water line and closing lines, and areas to which a State might have historical title.\footnote{Haijiang Yang, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea, Hamburg Studies on Maritime Affairs (2005), 73.}

Article 3 of Act Number 6 of 1996 stipulates that the internal waters of Indonesia includes all waters from the low-water mark of each coast and all parts of waters which lie landward of the closing line of rivers, estuaries, bays, lagoons and ports. Furthermore, the sovereignty of Indonesia in Indonesian waters extends to its territorial sea, archipelagic waters, internal waters as well as the air space over these...
areas together with the bed, subsoil and the natural resources contained therein.\textsuperscript{23} The provisions of Indonesian Act Number 6 of 1996 described above are therefore consistent with the LOSC.

Indonesia has not yet formally designated internal waters. However, as evident from Government Regulation Number 38 of 2002 on the List of Geographical Coordinates of Archipelagic Baselines of Indonesia, Indonesia has several normal baselines. Normal baselines are usually created from the low-water mark, such that waters landwards of the low water mark are considered internal waters.\textsuperscript{24} Thus, although Indonesia has not officially declared its internal waters through express legislative action, they exist as a consequence of Indonesia drawing its normal baselines.

### 3.2.2. Archipelagic Waters of Indonesia

The archipelago concept was enshrined in the LOSC and is defined ‘as a group 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.’\textsuperscript{25} According to Kusumaatmadja, there are no special criteria for defining a State as an archipelagic State.\textsuperscript{26} Mostly, archipelagic States have defined their claim to jurisdiction over a block of ocean which includes islands and intervening waters based on a variety of considerations such as geography, history, economic dependency,

\begin{itemize}
\item \textsuperscript{23} Article 4, Act Number 6 of 1996.
\item \textsuperscript{25} Article 46 (2), LOSC.
\item \textsuperscript{26} Mochtar Kusumaatmadja notes that the word archipelago is said to have derived from the Greek expression \textit{aegeon peleagos}, as expanse of water studded with small islands. Mochtar Kusumaatmadja, ‘The Legal Regime of Archipelagos: Problems and Issues’ (Paper presented at the Law of the Sea Institute Seventh Annual Conference, 1972), cited by Dale Andrew, ‘Archipelagos and the Law of the Sea: Island Straits States or Island-Studded Sea Space?’ (1978) 2(1) \textit{Marine Policy} 46, 47.
\end{itemize}
national security and concern for the environment. The main issue relating to an archipelagic State status is how to treat the waters around and between the islands which are considered as waters under the sovereignty of the archipelagic State.

The LOSC provides that waters landward of the archipelagic baselines are considered as archipelagic waters, regardless of their depth or distance from the coast. The drawing of archipelagic baselines itself can be problematic in terms of the technical terms which have been used by the LOSC, such as calculating the ratio between water and land masses, length of baselines and defining a general configuration of the archipelago. Furthermore, archipelagic baseline systems automatically place certain straits under the jurisdiction of a single State and may hinder international navigation in the straits or even result in the closure of straits to international navigation.

The LOSC provides a delicate balance between the rights and duties of archipelagic States and foreign ships with respect to navigation, so in determining archipelagic baselines, the archipelagic State has to consider the rights of other States in its archipelagic waters. First, an archipelagic State must respect the rights of other States which derive from existing agreements. Second, an archipelagic State must

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27 See, Mochtar Kusumaatmadja, 'The Concept of Indonesian Archipelago' (1982) 10 Indonesian Quarterly 12, 14; Dale Andrew, above n 26, 48; D P O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 British Year Book of International Law 1, 14-27.
28 'The issue whether sovereignty over an archipelago includes sovereignty over the inter connecting waters was traditionally determined by applying to islands the usual rules for establishing the territorial sea, that is, each islands had its own territorial sea’ in Satya N Nandan and Shabtai Roseanne, United Nations Convention on the Law of the Sea 1982: A Commentary (1993), 413.
29 Article 49 (1), LOSC.
30 Articles 47 (1), 49 (1), LOSC and Article 3, Act Number 6 of 1996.
31 Article 47 (1), LOSC.
32 Article 47 (2), LOSC.
33 Article 47 (3), LOSC.
36 Article 51 (1), LOSC.
recognise traditional fishing rights and other legitimate activities of neighbouring States.\textsuperscript{37} Finally, there are navigational rights of other States in archipelagic waters.\textsuperscript{38} Article 9 of the Indonesian Act Number 6 of 1996 states that the Indonesian Government shall respect and honour existing agreements with other countries over its archipelagic waters. Indonesia has approved the existing rights of Malaysia to fish in certain parts of the Natuna Sea.\textsuperscript{39} Indonesia has also recognised the traditional fishing rights for Papua New Guinea’s peoples in the Northern Part of Papua Island.\textsuperscript{40} Indonesia recognised the rights of Malaysia to pass over and through the Natuna Sea in order to transit between the Malaysia Peninsula and Malaysian Serawak.\textsuperscript{41} Indonesia has also recognised the right of Singapore to perform sea trials for ships that have been repaired in Singapore, although there is no formal bilateral agreement on this matter.\textsuperscript{42} All neighbouring States also have the right to lay underwater cables in the Indonesian archipelagic waters, providing they obtain prior consent.\textsuperscript{43}

Indonesia has to provide navigational rights to the international community. Act Number 6 of 1996 guarantees this innocent passage rights,\textsuperscript{44} archipelagic sea lane

\begin{footnotes}
\item[37] Article 51 (1 and 2), LOSC.
\item[38] Innocent passage stated in Article 52 of the LOSC and archipelagic sea lanes passage stated in Article 53 of the LOSC.
\item[39] Agreement between Indonesia and Malaysia on \textit{the Legal Regime of Archipelagic State and the Right of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea and Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia}, in 1982.
\item[41] This navigational right is based on the Agreement between Indonesia and Malaysia on the Legal Regime of Archipelagic State and the Right of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea and Archipelagic Waters and the Territory of the Republic of Indonesia lying between East and West Malaysia.
\item[42] Meeting between Indonesia and Singapore on Defence Cooperation 2006-2007 (un-published), author has personal experience as being a member of Indonesian Delegation; Notes by Hasjim Djalal during informal meeting on designation archipelagic sea lanes passage in Indonesian Foreign Affairs, 2001(un-published), author attended the meeting.
\item[43] Article 9 (5), Act Number 6 of 1996.
\item[44] Part (1) of Chapter III, Act Number 6 of 1996.
\end{footnotes}
passage rights,\textsuperscript{45} transit passage rights,\textsuperscript{46} and access and communication rights.\textsuperscript{47} These navigations rights will be analysed further in subsequent Chapters.

3.2.3. Territorial Sea of Indonesia

The LOSC provides the fundamental principle that ‘the sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.’\textsuperscript{48}

The development of Indonesian territorial sea as a maritime zone started after independence in 1945. Originally it extended up to three nautical miles from the baseline consistent with customary international law at that time. Through Act Number 4 of 1960 on Indonesian Waters, Indonesia changed the breadth of its territorial sea to 12 nautical miles and argued that the waters landward of the archipelagic baseline were the internal waters of the Republic of Indonesia. Article 1 Paragraph 2 of the Act states the following: ‘The Indonesian territorial sea is the sea belt of a width of twelve (12) nautical miles measured from the Indonesia archipelagic baseline.’\textsuperscript{49} Indonesia had two maritime zones under its sovereignty, namely: internal waters landward of the baseline, and territorial sea up to 12 nautical miles.\textsuperscript{50}

\textsuperscript{45} Part (2) of Chapter III, Act Number 6 of 1996.
\textsuperscript{46} Part (3) of Chapter III, Act Number 6 of 1996.
\textsuperscript{47} Part (4) of Chapter III, Act Number 6 of 1996.
\textsuperscript{48} Article 2 (1), LOSC.
\textsuperscript{49} The Act did not use the term archipelagic baselines, but simply used straight baseline measured from base points of normal baselines of every outermost islands. In the general elucidation of the Act, Indonesia mentions that the decision on the width of the territorial sea (12 nautical miles) was in accordance with the draft articles proposed by the International Law Commission at its 8th Meeting in 1957.
\textsuperscript{50} Article 1 (1), Act Number 4 of 1960. It is interesting to note that there was no single article in the Act mentions sovereignty. The provision on sovereignty of Indonesian waters (territorial sea and internal waters) was stated only in the Elucidation of Article 1 (3) of the Act Number 4 of 1960. It is believed that the provision on sovereignty should be placed on the main body of the Act. Second, Indonesian did not use the terms ‘archipelagic waters’ and ‘archipelagic baselines’ in the Act. So in 1960 there was no mention or reference to the term ‘archipelago’ in Indonesian laws and regulations.
Indonesia amended Act Number 4 of 1960 on Indonesian Waters with Act Number 6 of 1996 on Indonesian Waters. Article 3 Paragraph 2 of the Act states that: ‘The Indonesian territorial sea is the sea belt of a width of twelve (12) nautical miles measured from the Indonesia archipelagic baseline.’ Furthermore, the sovereignty of Indonesia over the territorial sea is stated in Article 4 of the Act, which provides:

The sovereignty of the State of the Republic of Indonesia in Indonesia waters comprises the territorial sea, the archipelagic waters and the inland waters as well as the airspace above … including the sources of natural wealth contained therein.

The sovereignty of the coastal State over its territorial sea is absolute, but it is restricted by the provisions of the LOSC as well as by other rules of international law. The sovereignty over the territorial sea differs in nature from that over land territory because the coastal State has to provide certain rights for user States. In the Indonesian Act, the sovereignty of Indonesia over its territorial sea has to be reconciled with the right of the international community to use Indonesian waters for navigation.

3.2.4. Outer Limit of Internal Waters, Archipelagic Waters, and Territorial Sea

An archipelagic State exercises varying jurisdictions over its internal waters, archipelagic waters and territorial seas, while the vessels of other States also have certain navigational rights and freedoms through these maritime zones. Thus, the boundaries between these maritime zones need to be clarified. The demarcation of the boundary between these maritime zones is carried out to determine the outer limit of

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51 Articles 2 (3) and 49 (3), LOSC
52 R R Churchill and A V Lowe, above n 16, 76; D P O'Connell, above n 27, 303-383.
53 Chapter III of Act Number 6 of 1996 provides that there are four regimes of navigation for foreign ships and aircraft which can be exercised in Indonesian Waters.
the internal waters and the inner limit of archipelagic waters or the territorial sea, and the outer limit of the archipelagic waters and the inner limit of the territorial sea.

Demarcation allows archipelagic States to determine what kinds of passage rights foreign vessels can exercise in the respective maritime zones. Determining the outer limit of the maritime zones is also relevant to determining the axis lines of archipelagic sea lanes. The right of archipelagic sea lanes passage is a right to be exercised in archipelagic waters, so designation of axis lines of archipelagic sea lanes should be drawn in archipelagic waters. But in certain cases, where the straits are so narrow, sometimes these axis lines are placed in internal waters. Thus, the exercise of the right of archipelagic sea lanes passage may occur in the internal waters of the archipelagic States as well.

The outer limit of maritime zones is important for Indonesia. It is because districts, municipalities and provinces of Indonesia have exclusive rights to manage internal waters, archipelagic waters, and the territorial sea up to 12 nautical miles for provinces and four nautical miles for districts.54 So having defined limits enable local governments to utilise the natural resources in their waters as well as respect the navigational rights and freedoms of foreign vessels.

3.3. Indonesian Archipelagic Baselines

The coastline of Indonesia, including all its islands, is estimated at almost 81,000 km.55 This coastline provides the basis for determining the Indonesian archipelagic baselines. The significance of the baselines lies in the fact that the various

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54 Article 18 (4), Act Number 32 of 2004 on Regional Government (State Gazette Year 2004 No. 125, Supplementary State Gazette No. 4427).
55 Indonesian Navy Hydrographic Office, 'Figures of Indonesian Territory' (Indonesian Navy Hydrographic Office, 2003), 5.
maritime zones of jurisdiction are all measured from defined baselines. Baselines also represent the outer limit of such a State’s internal waters, which lie landward of the baselines. But in the case of archipelagic States, baselines cannot be automatically considered as the limit of a State’s internal waters, because landward of the archipelagic baselines lie archipelagic waters.

The LOSC allows coastal States to use a variety of baselines in order to establish maritime zones in recognition of the fact that the geographical conditions of States vary. As noted by Alexander, there are three types of geographical issues in establishing offshore jurisdictional zones: the width of the various zones, the seaward and lateral limit of the zones, and the baselines along the coast from which the zones are measured. Alexander argues that the wide varieties of physical conditions which exist worldwide are only addressed by a few articles in the LOSC. Furthermore, he considers that these articles could lead to some ambiguities and apparent inconsistencies while States attempt to draw their baselines.

The baselines, whether normal, straight or archipelagic, or bay closing lines, have a direct bearing on the outer limits of maritime zones. There are at least two important issues surrounding this. First, how far coastal States can exercise sovereignty and when sovereign rights begin; and second, how States deal with maritime boundaries which often rely on special baselines for the purpose of negotiation.

56 Articles 3, 48, 57 and 78, LOSC.
57 R R Churchill and A V Lowe, above n 16, 31.
59 Ibid, 4.
60 Adi Sumardiman, Kumpulan Perjanjian-perjanjian International tentang Batas-batas Territorial dan Sumber Alam Indonesia (2007) (in Indonesian), 38. Adi Sumardiman further states that during negotiation on maritime boundaries each party must submit baselines. The Contracting party examines and evaluates the baselines. Sometimes the baselines are different to those published and also the baselines sometimes are not associated with the LOSC. According to Oegroseno, the normal procedure for formulating a negotiating position begins with the preparation on legal and technical studies, ministerial instruction of the basic national position, the agreed position in the negotiating table, analysis of each round of negotiation and report to the minister. Havas Arif Oegroseno, 'Indonesia's Maritime
The provisions for drawing baselines are contained in Articles 5 to 11, 13, 14 and 47 of the LOSC. These articles distinguish between normal baselines, straight baselines, closing lines for bays, straight lines for the mouths of rivers and archipelagic straight baselines which can only be employed by archipelagic States. Having considered that baselines can be used as a method to extend maritime jurisdiction, there are many concerns regarding the baselines system that is employed by any particular State. Such systems will significantly affect navigation, over-flight, naval movement and other maritime interests. 61

Based on Government Regulation Number 38 of 2002, Indonesia used two types of baselines, namely, archipelagic baselines and normal baselines within a single system to encompass all islands, reefs and geographical features. Indonesia may draw closing lines for the delimitation of its internal waters in accordance with Articles 9, 10 and 11 of the LOSC. 62 In certain cases 63 where archipelagic baselines could not be employed, Indonesia may draw straight baselines. 64

Although Indonesia has officially declared its baselines and the geographical coordinates of its base points, it is aware that the geographical coordinates of these base points may change because of natural or man-made conditions. Indonesia believes that the Government is unable to correct contemporaneously those base points as these changes take place. In such cases, existing geographical coordinates will prevail. 65 Article 10 of Government Regulation Number 38 of 2002 indicates that base points are subject to review based on facts on site. Considering the possibility of the changes of

61 Ashley J Roach and Robert W Smith, United States Responses to Excessive Maritime Claims (2nd ed, 1995), 57.
62 Article 50, LOSC and Article 7 (1), Act Number 6 of 1996.
63 Peculiar geographical conditions such as unstable coast and deep indention coast.
64 Article 5 (2), Act Number 6 of 1996.
65 Article 10, Government Regulation Number 38 of 2002.
the base points, Indonesia will review and resurvey the base points and baselines 
periodically. 66

3.3.1. Normal Baselines

Articles 5, 6 11 and 13 of the LOSC deal with normal baselines. Normal bases
elines are based on the low-water line along the sea shore and around islands, 
icluding the outer limits of permanent harbour works, the low-water line around 
certain low tide elevations, and the seaward low-water line of atoll reefs and of 
fringing reefs around islands. The normal baseline is ‘the low water line along the 
coast as marked in large scale charts officially recognised by the coastal State.’ 67 In the 
case of islands situated on atolls or of islands having fringing reefs, the baseline is the 
seaward low-water line of the reef. 68 In the case of a river flowing directly into the sea, 
the baseline is a straight line across the mouth of the river between points on the low 
water line of its banks. 69 If a low tide elevation is situated wholly or partly within the 
territorial sea, the low water line on that elevation may be used as the baseline for 
measuring the breadth of the territorial sea. 70 If a low tide elevation is wholly situated 
outside the territorial sea, it has no territorial sea of its own. 71

Based on Government Regulation Number 38 of 2002 and subsequent 
amendments, 72 Indonesia has 32 normal baselines. These baselines are usually on the 
outermost island and the tip of the general configuration of the archipelago.

66 Article 11, Government Regulation Number 38 of 2002.
67 Article 5, LOSC.
68 Article 6, LOSC.
69 Article 9, LOSC.
70 Article 13 (1), LOSC.
71 Article 13 (2), LOSC.
72 Government Regulation Number 37 of 2008 on Amendment of Government Regulation Number 38 of 2002 concerning List of Geographical Coordinates of Indonesian Archipelagic Baselines (State Gazette Year 2008 No.77, Supplementary State Gazette No. 4854).
3.3.2. Archipelagic Straight Baselines

Archipelagic baselines must include the main islands of the archipelago.\textsuperscript{73} The definition of ‘main island’ is not clear. According to the United Nations Group of Technical Experts on Baselines, main islands can mean the largest islands, the most populous islands, the most economically productive islands, or the islands which are pre-eminent in an historical or cultural sense.\textsuperscript{74} Indonesia has six major islands,\textsuperscript{75} which are surrounded by several thousand small islands. All the major islands are within Indonesia’s archipelagic baselines.

The LOSC provides that the length of archipelagic baselines shall not exceed 100 nautical miles, although up to three per cent of the total number of baselines may be up to 125 nautical miles.\textsuperscript{76} There is no limit to the number of baselines segments that may be drawn. The limit of three per cent of the total number of baselines is most likely quite strict. However, archipelagic States are easily able to increase the number of baselines on small segments, thus the total number of baselines is increased and the three per cent criterion is satisfied. In this way, the archipelagic State can get more baselines which are within the required length. The Indonesian archipelagic baselines system consists of 195 segments of which five baselines are between 100 and 125 nautical miles in length.\textsuperscript{77}

\textsuperscript{73} Article 47 (1), LOSC.
\textsuperscript{75} The six major islands are Sumatra, Java, Kalimantan, Sulawesi, Maluku and Papua islands.
\textsuperscript{76} Article 47 (2), LOSC.
\textsuperscript{77} Based on Government Regulation Number 37 of 2008, the Indonesian baselines consist of 28 segments between 0-12 nautical miles; 26 segments between 12-24 nautical miles; 34 segments between 24-40 nautical miles; 68 segments between 40-100 nautical miles; and 5 segments between 100-125 nautical miles.
An archipelagic State may draw baselines which do not depart to any appreciable extent from the general configuration of the archipelago.78 This provision is similar to the requirement in Article 7 of the LOSC that straight baselines should conform to the general direction of the coast. There is no particular method as to how to determine whether a baseline follows the general direction of the coast or the archipelago.

While the archipelagic State may draw baselines to join the outermost points of the outermost islands and drying reefs of the archipelago, it may not draw baselines to and from low-tide elevations unless lighthouses or similar installations, which are permanently above water, have been built on them.79 Indonesia does not seem to use these provisions, because there were no lighthouses or similar installations built at the time of the base point survey in 1999. However, based on the 2007 survey, there is one low-tide elevation known as the Karang Unarang Lighthouse in the Sulawesi Sea. Indonesian scholar Sumardiman believes Indonesia has many low-tide elevations.80

An archipelagic State is required to draw the baselines in such a manner that the system of archipelagic baselines should not cut off the territorial sea of another State from the high seas or its exclusive economic zone.81 This is important in the Indonesian context. The Indonesian archipelagic waters associated with the Natuna Sea (Kepulauan Anambas and Kepulauan Bunguran) geographically cuts off parts of Malaysia (the Malayan Peninsula, and Sarawak). In compliance with this limitation, in 1998, Indonesia slightly modified its archipelagic baselines system in the Natuna Sea area. These modifications of new baselines are represented by ‘blue lines’ which

78 Article 47 (3), LOSC.
79 Article 47 (4), LOSC.
80 Notes by the author from Adi Sumardiman’s on General Lecture on the Law of the Sea, September 2002 which was attended by the author. He argued that Indonesia only has one or two low-tide elevations, so he proposed that further hydrographical surveys must be undertaken.
81 Article 47 (5), LOSC.
replaced ‘red lines’ in the old baselines (as seen in Figure 3) have been communicated to the Government of Malaysia. Malaysia accepted the modifications and considered them as not affecting Malaysian interests mentioned in the Agreement between the Government of the Republic of Indonesia and the Government of 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. The adjustment has been codified in the Indonesian Government Regulation Number 61 of 1998 on the List of Geographical Coordinates of the Base Points of the Archipelagic Baselines of Indonesia in the Natuna Sea as seen in Figure 3.

Figure 3. Baselines Adjustment in the Natuna Sea

82 The Treaty has been signed on 25 February 1982.
The Indonesian system of archipelagic baselines would also appear to have similar consequences with regard to the territorial sea of Singapore. But these consequences have been minimised with the maritime delimitation in 1973 by both countries. The International Court of Justice decided that Singapore has sovereignty over Horsburgh Rock or Pedra Branca/Pulau Batu Putih. However, it seems that Singapore would have difficulty in generating an exclusive economic zone in the South China Sea because of the proximity of Malaysia and Indonesia; furthermore, waters surrounding the rock give rise to issues regarding territorial sea boundaries between the three States as shown in Figure 4.

![Figure 4. Horsburg Lighthouse in the Straits of Singapore](image)

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84 Treaty between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Seas of the Two Countries in the Strait of Singapore was ratified by Indonesia in Act Number 7 of 1973. Indonesia and Singapore have concluded the extension of maritime delimitation in the western part of the Strait of Singapore in March 2009, but it has not yet ratified.

3.3.3. Development of Government Regulation Number 38 of 2002

Indonesia has undertaken several surveys in order to determine its base points and base lines. Between 1989 and 1994, the Indonesian Navy Hydro-Oceanographic Office undertook surveys along the Indonesian coastline based on national and international sources\(^{86}\) to determine base points.

The result of the survey was sent to several Indonesian departments and institutions related to maritime affairs, universities and was also presented to PANKORWILNAS (the National Coordinating Body for National Territory). There were several comments such as the need for clarification of geographical references in certain areas, the need for further determination of base lines and a need for the accuracy of the survey to be checked further.

From 1996 to 1999, Indonesia received loans and technical assistance from the Government of Norway to verify Indonesia’s base points. The Government of Indonesia appointed Bakosurtanal (the National Coordinating Body for Survey and Mapping Agency) and the Hydro-Oceanographic Office to verify the base points. These agencies performed the survey and found 244 points with higher accuracy which were suitable for determining baselines.

In 1998, after due consideration of the result of the survey of base points the Department of Justice set up a working group to create a draft government regulation on Indonesian baselines. The members of the working group consisted of representatives from departments, agencies, universities and non-government organisations. The working group had two tasks: first, to set up a draft government

\(^{86}\) The LOSC; Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, above n 74; International Hydrographic Bureau, above n 24; list of geographical coordinates in the Annex of Act Number 4 of 1960 on Indonesia Waters. List of coordinates stated in the Annex Act Number 4 of 1960 was not based on the field survey but it was only data from navigational paper charts or based on cartographic systems.
regulation; and second, to examine and determine baselines along the Indonesian coast where base points have been placed.

The working group faced many challenges. For example, there was the question as to whether the list of coordinates should be put in the body of the government regulation or put in the annex of the government regulation. Further, there was the question of whether Indonesia should use single-type baselines or a combination of baselines in order to encompass all the outermost points of the outermost islands. Lastly, there remained the issue of how to draw and define the baselines based on the result of the survey of base points which were consistent with the LOSC; that is, should Indonesia use a table of geographical coordinates or charts, and if Indonesia were to use a table of coordinates, which information should be included in this table.

The working group agreed that the list of coordinates would be put in the annex to the government regulation in order to accommodate future changes that might occur. The need to change the base points may arise because of natural events, such as the submergence of islands, decisions of international courts, or secession of territories within the State.

The working group developed a preliminary draft of government regulation. However, in 1999 East Timor obtained independence so it no longer formed part of Indonesian territory. This affected the draft government regulation. Some members were of the opinion that the working group had to undertake a survey in the Timor Island to find new base points. Other members believed that in the Timor Island the base points could be decided using a cartography system which would be easier, faster and cheaper, although it’s precision was questionable. In 2001, the Department of
Justice set up a new working group to finalise the existing draft and review the technical issues.

The working group was divided into two committees. The first committee would deal with the legal drafting of the government regulation and the second committee would examine the result of the survey of the base points in order to decide which type of baselines would be employed. The first committee faced the difficulty of ensuring the government was prepared to accommodate changes. In 2001, the committee finalised the draft and all members agreed that in certain areas in which land and sea borders were not yet negotiated, the base points would be determined on the basis of large scale charts. The members of the working group agreed that the body of the government regulation would be specific, but the annex which contains the list of coordinates would be made flexible in order to accommodate all future natural changes.

The second committee known as the technical committee faced much difficulty in drawing appropriate baselines because there were many possibilities open to them due to the diverse geographical conditions of the Indonesian coast line. The technical committee decided that 183 points would be used, consisting of 149 archipelagic baselines and 31 normal baselines. Indonesia only applied two types of baselines, the normal baseline and the archipelagic baseline.

The working group completed the task in December 2001 and Government Regulation Number 38 of 2002 on the List of Geographical Coordinates of Indonesian Archipelagic Baselines was promulgated in June 2002. This Government Regulation contains an Annex with the table of geographical coordinates.
3.3.4. **Changes to Government Regulation Number 38 of 2002**

After the enactment of the Government Regulation Number 38 of 2002 on the List of Geographical Coordinates of Indonesian Archipelagic Baselines, there were three significant conditions that led to the review of this Government Regulation. The first was the ICJ Decision on 17 December 2002 which awarded sovereignty of Pulau Sipadan and Ligitan to Malaysia.\(^{87}\) The second was the declaration of East Timor’s independence on 20 May 2002.\(^{88}\) The third was the disappearance of some islands because of erosion in the southern part of Java Island. These factors made the adjustment of base points and baselines around these areas imperative. The adjustment of those base points and baselines was made in Government Regulation Number 37 of 2008 which revised Government Regulation Number 38 of 2002 on the List of Geographical Coordinates of Base Points of the Archipelagic Baselines of Indonesia.

3.3.5. **Difficulties in Determining the Archipelagic Baseline**

Article 47 of the LOSC provides how an archipelagic State should draw its baselines. It also contains detailed requirements regarding the maximum length of baselines, the ratio between area of land and water to be enclosed within the baselines system, low-tide elevations and the general configuration of the archipelago. Determining archipelagic baselines is plagued by technical, legal and political challenges. The technical challenges relate to the lack of data and the necessary information to determine base points. Legal difficulties arise in interpreting the relevant LOSC articles, while political difficulties relate to government decision on specific policy issues.


\(^{88}\) After referendum on 30 August 1999, United Nations Transitional Administration in East Timor (UNTAET) was established to administer the transition period based on Security Council Resolution 1272 (1999) of 25 October 1999.
The technical complexities relate to the data that Indonesian should use, such as charts. The LOSC specifies that the baselines, the limits derived therefrom, and the outer limits of the territories between States shall be shown on charts of a scale or scale adequate for ascertaining their position.\footnote{Articles 16, 47, 53, 75 and 84, LOSC.} The charts referred to in the LOSC are nautical or navigational charts, which are defined as charts specifically designed to meet the requirements of maritime navigation.\footnote{See, definitions of ‘Chart’ and ‘Nautical Chart’ in Hydrographic Dictionary Part I SP-32, International Hydrographic Bureau, Part I ‘Glossary’ of Special Publication No 51, International Hydrographic Bureau, above n 24.} Indonesia has a limited number of navigational charts. Such charts were published a long time ago and their accuracy is doubtful. Furthermore, most charts are small scale and only a few ports or harbours have large scale charts.

Moreover, the charts themselves may refer to several possible geodetic data. Some charts use World Geodetic System 1984 (WGS ’84) data and local data. The LOSC specifies that baselines must be shown on charts or alternatively by a list of geographical coordinates of points, specifying the geodetic datum.\footnote{Article 16, LOSC.} This specification is to be used in order to maintain the correctness of baselines.

The legal challenges related to the drawing of archipelagic baselines include whether Indonesia should limit its baselines to the requirements of Part IV of the LOSC dealing with archipelagic States or whether Indonesia can indeed use all articles relating to baselines in the LOSC.\footnote{The discussion took place during meeting of the Working Group on Baselines in 1999-2000.} Some Indonesian commentators argue that Indonesia must adhere to Part IV of the LOSC instead of using Part II of the LOSC.\footnote{Department of Legal and Human Rights, ‘Report of Inter Department Working Group on Indonesian Baselines’ (Department of Legal and Human Rights, 2001), (In Indonesian) (unpublished). Author was one of the members of the Working Group.} They argue that Indonesia has already gained a significant advantage from the international community because of the acceptance of the archipelagic State concept.
Thus, they contend, Indonesia must implement the remainder of the LOSC in good faith. On the other hand, some scholars argue that the unique configuration of the Indonesian archipelago requires the drawing of many baselines in order to encompass all its features. After long debate, Indonesia settled on using all the relevant LOSC articles in drawing its baselines. Indonesia also decided to apply a single baseline system to include all islands within the main archipelago to preserve the unity and national integrity of Indonesia as an archipelagic State.

The political difficulties relate to the lack of understanding of the LOSC. Many Indonesians, even members of parliament, fail to accept the qualifications Indonesia has accepted to its internal waters, archipelagic waters and territorial sea under the LOSC. Thus, although Government Regulation Number 38 was promulgated in 2002, it was only deposited with the Secretary-General of the United Nations in March 2009.

3.4. Conclusion

This Chapter has provided an analysis of the concept of Indonesian waters. Sovereignty over these waters has been guaranteed by the provisions of the LOSC and other rules of international law. Nevertheless, while exercising its sovereignty, Indonesia has to consider provisions in the LOSC and in international law in order to balance and secure Indonesia’s interests, the interests of its adjacent neighbouring States, as well as the navigational interests of the international community.

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94 Ibid.
95 Ibid.
96 Article 5, Act Number 6 of 1996.
97 See, the Annex of Government Regulation Number 38 of 2002.
98 Informal discussion with members of Indonesian Parliament and some Indonesians in 2000-2006; Theses opinions arose during discussion by the Working Group on Indonesian Baselines in 2000-2002. Author was one of the members of the Working Group.
There are at least thirty obligations relating to the Indonesian waters as stipulated by the provisions of the LOSC (Parts II, III, and IV), which Indonesia must fulfil. The right granted to other States in Indonesian waters generally satisfy the specific interests of neighbouring States, for example, the fishing rights of Malaysia in the Natuna Sea, the fishing rights of Papua New Guinea in Indonesian waters and the rights of Singaporeans to conduct sea trials for ships in the Natuna Sea. Furthermore, Indonesia must accord certain rights to the international community regarding navigation; for example, by the designation of archipelagic sea lanes, and allowing innocent passage and transit passage though Indonesian waters. The rights granted to other States within archipelagic waters are based on pre-existing State practice in such waters.

The next chapter will analyse the right of innocent passage in the Indonesian waters context, including the history of innocent passage, its scope, definition, elements as well as the attached rights and obligations of Indonesia and of foreign ships exercising the right of innocent passage in Indonesian waters.

99 Part II, Articles 2 (3), 17, 21, 22 (3), 24, 26 (1), 27, and 28; in Part III, Article 54 insofar as it applies to Articles 39 and 34 (2), Article 54 insofar as it applies Articles 42 (1, 2, and 3), and Article 54 insofar as is applies Article 44; in Part IV, Article 47 insofar as it relates to Articles 48, 3, 4, 5, 6, 7, 9, 10 and 11; Article 48 insofar as it relates to Articles 3 - 15, 33 (2), 50, 57, 76; and Article 49 insofar as it relates to Article 2 (3); Articles 51 - 53.
Chapter Four

Innocent Passage in Indonesian Waters

4.1. Introduction

Freedom of navigation is a universally-recognised rule of international law. The principle has become well-established since its crystallisation in the 17th and 18th centuries. In addition to freedom of navigation applying to shipping on the high seas, rights of access to and from the high seas and between different maritime zones have also been recognised. For this reason, ships of all nations enjoy certain rights of navigation in some maritime zones which are subject to the sovereignty of coastal States.

As noted in Chapter 3, the maritime zones under the sovereignty of States consist of internal waters, archipelagic waters and territorial sea. However, in exercising its sovereignty, an archipelagic State is required to conform with the provisions of the LOSC and other rules of international law. Both the LOSC and other established rules of customary international law attempt to reconcile the opposing interests of archipelagic States and the international community in specific

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1 The freedom of navigation has always been attributed to the great works of Hugo Grotius which were later questioned by John Selden.
3 The LOSC recognised maritime zones which consist of internal waters, archipelagic waters, territorial sea, exclusive economic zone, and high seas.
5 Articles 2 (3) and 49 (3), LOSC.
maritime zones.\textsuperscript{6} Limitations on the exercise of sovereignty in the LOSC and international law are effected through the granting of navigational rights. One of such rights is the right of innocent passage.\textsuperscript{7}

The exercise of sovereignty and the duty to provide innocent passage to foreign ships result in two sets of competing interests, namely; the interests of coastal or archipelagic States and user States. On the one hand, coastal or archipelagic States wish to control their maritime zones in order to protect their national interests such as their economic well-being, the marine environment and security.\textsuperscript{8} On the other hand, user States or flag States want free and unimpeded use of the same maritime zones which will ensure maximum freedom of access to the ocean for transportation, communication, and the production and exchange of raw material and goods.\textsuperscript{9} This conflict of interest hinges on the issue of sovereignty and navigational rights.\textsuperscript{10} The LOSC and international law try to balance these competing interests by providing rules and guidance.

In order to accommodate the interests of user States on innocent passage, Indonesia has promulgated Act Number 6 of 1996 on Indonesian Waters\textsuperscript{11} and Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign

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\textsuperscript{6} Shekhar Ghosh, above n 2, 39.
\textsuperscript{7} Article 17, LOSC.
\textsuperscript{9} Based on the United States Department of State, Pub No. 112. The United States has a Freedom of Navigation (FON) Program. The rationale behind the FON Program, is as follows: Operations by the United States naval and air forces designed to emphasise internationally recognised navigational rights and freedoms complement the United States Diplomatic efforts. These assertions of rights and freedoms tangibly exhibit US determination not to acquiesce in excessive claims to maritime jurisdiction by other states.
\textsuperscript{11} Act Number 6 of 1996 on Indonesian Waters (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647).
\end{flushright}
Ships Exercising Innocent Passage through Indonesian Waters. Indonesia believes that these laws and regulations which deal with the rights and responsibilities of ships exercising the right of innocent passage are based on the LOSC. It could be seen that all provisions on those laws and regulations on innocent passage always refer to provisions in the LOSC. However, it is debatable whether Indonesia has indeed implemented the LOSC faithfully or whether there are any loopholes in its implementation which will create disputes in the future.

This chapter will analyse the laws and regulations of innocent passage in Indonesian waters. It will explore the definition and scope of innocent passage and identify special characteristics which differentiate it from other sea passage rights. It will analyse the rights and duties of Indonesia as an archipelagic State in implementing the rules on innocent passage. It will also examine the rights and duties of foreign ships exercising the right of innocent passage which pass through Indonesian waters. Finally, this chapter will address whether Indonesia’s implementation is consistent with the provisions of the LOSC will be ascertained.

4.2. Right of Innocent Passage

International law has evolved to limit the amount of sovereignty coastal States have over their coastal waters by introducing the right of innocent passage. The right of innocent passage is a right which is deeply rooted in State practice and universally

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12 Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships on Exercising of Innocent Passage through Indonesian Waters (State Gazette Year 2002 No. 70, Supplementary State Gazette No. 4209).
13 Act, government regulation, president decree, president regulation and regulation issued by minister are known as laws and regulations.
14 Reference to the articles of the LOSC is mentioned in the preambles and elucidation of the laws and regulations on innocent passage.
15 Phillip P Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), 120.
recognised as one of the main rules of customary international law. While the right of innocent passage is clearly established in international law and many States guarantee this navigational right, some States appear to recognise the right differently. As stated by Vattel:

A Nation may appropriate such things as would be hurtful or dangerous to it if open to free and common use… It is a matter of concern to their security and their welfare that there should not be a general liberty to approach so near their possession… these marginal seas, thus subject to a Nation, is part of its territory and may not be navigated without its permission. Access may not lawfully be refused to vessel when their purpose is innocent and they are not under suspicion.

The LOSC regulates the exercise of the right of innocent passage in extensive articles. There are two key terms in determining innocent passage, which are the terms ‘passage’ and ‘innocent’. According to Article 18 of the LOSC, ‘passage’ means navigation through the territorial sea in order to traverse the territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility. Article 19 (2) of the LOSC describes a passage as ‘innocent’ when it is not prejudicial to the peace, good order or security of the coastal State.

Article 19(2) of the LOSC lists twelve activities which render passage not innocent. Those activities are as follows:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(b) any exercise or practice with weapons of any kind;

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16 Ibid, 120; Francis Ngantcha, above n 2, 38.
18 Articles 17-26, 45, and 52, LOSC.
19 Article 18, LOSC.
20 Article 19 of the LOSC states that ‘Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.’
21 Article 19 (1), LOSC.
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of willful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
(l) any other activity not having a direct bearing on passage.22

The two words, ‘passage’ and ‘innocent’ are crucial in analysing whether the right of innocent passage can be lawfully exercised. Whereas the requirement of ‘innocence’ essentially safeguards the security of the coastal State, the word ‘passage’ relates more specifically to the foreign vessel which exercises that right. These criteria are considered as limitations to the freedom of navigation.

4.2.1. Definition of the Right of Innocent Passage

Essentially, innocent passage exists to permit the vessels of one State to use the coastal waters of another State for the purposes of navigation. The legal meaning of the term ‘passage’, which came up for the first time in the Hague Codification Conference in 1930,23 has not changed significantly. The most recent treaty which mentions the term ‘innocent’ in the context of the exercise of the right of innocent passage is the LOSC.

22 Article 19 (2), LOSC.
There are many arguments with respect to the forms of activities which contravene the exercise of the right of innocent passage. Some commentators argue on the one hand that the list is exhaustive; however on the other hand, others believe that it is restricted. Nonetheless the issue remains debatable and the evolution of the concept of innocent passage since the 1930s confirms the difficulties involved in interpretation.

The word innocent has always been defined negatively. Draft Article 3 (2) of the 1930 Codification Conference defined the term innocent in this manner:

Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy, or to the fiscal interest of that State.

After the Suez crisis and before the 1958 Geneva Conference on the Law of the Sea, the meaning of innocent passage was debated at length in the International Law Commission and in the General Assembly of the United Nations. Consistent with the approach in the 1930 Hague Codification draft, Article 15 (3) of the International Law Commission’s Draft also defined the term innocent negatively:

Passage is innocent so long as a ship does not use the territorial water for committing any acts prejudicial to the security of the coastal State or contrary to the present rules or to other rules of international law.

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24 Article 19 (2), LOSC.
25 There has been some debate as to whether the list of activities in Article 19 (2) of the LOSC is exhaustive or otherwise. See, F David Froman, 'Uncharted Waters: Non Innocent Passage of Warships in the Territorial Waters' (1983-84) 21(3) San Diego Law Review 66, 659; John W Rolph, 'Freedom of Navigation and the Black Sea Bumping Incident: How “Innocent” Must Innocent Passage Be?' (1992) 135 Military Law Review 137, 156.
27 LON Doc. C.351.M.145.1930.V, which contains most of the resolution and draft articles of the 1930 Codification Conference, which are quoted in full in UNCLOS General Assembly, Doc. 13/21 of 14 February 1958.
The definition stated above shows that it is the conduct of the ship which determines the nature of the passage. By relying on specific conduct during the passage to determine whether the passage is innocent or otherwise, these early provisions restricted the right of the coastal States to interfere with vessels whose passage could be deemed prejudicial to the security of that State.

Following the Suez Crises in 1956, there were two trends in defining ‘innocence’ in the UN General Assembly in 1957. The first trend was espoused by the Indian delegation which considered that right of innocent passage meant that one must prove innocence and is dependent on the character of the party claiming the passage; the purpose of the passage, and also the freight that is carried. The second trend, from the Italian delegation, set a high standard, postulating that coastal States should no longer have the duty of justifying their refusal of passage to a vessel on specific occasions nor offer specific reasons. Thus, the onus was on the vessel to prove that its passage was innocent. These two opposing opinions seem to differ on whether the coastal State can unilaterally decide whether a passage is innocent or not. Any subjective determination should be accompanied by domestic regulations which outline the right and the manner of proceeding. As Francis Ngantcha states, the right of innocent passage is extinguished when there is a contravention of local regulations which relate to passage in coastal waters.

Some delegations, such as France, New Zealand, Belgium, Canada, Sweden, United Kingdom and Italy, believed that the definition of innocent passage was too subjective and it would dangerously deny the right any real value. There were many efforts to change the definition of innocent passage prior to and during the 1958
Conference on the Law of the Sea. Article 14(4) of the Convention on the Territorial Sea and the Contiguous Zone stated:

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these Articles and with other rules of international law.\(^{34}\)

The meaning of the term ‘innocent’ and the term ‘right of innocent passage’ was debated at length in the Third United Nations Conference on the Law of the Sea in 1974. There were three draft proposals for discussion on the right of innocent passage. The first Draft was from the United Kingdom\(^{35}\) (Draft articles on the territorial sea and straits). The second Draft was from Malaysia, Morocco, Oman and Yemen\(^{36}\) (Draft articles on navigation through the territorial sea, including straits used for international navigation). The third Draft was from Fiji\(^{37}\) (Draft article relating to passage through the territorial sea). These three Draft Proposals clearly specified activities which would render passage not innocent. The LOSC reflects a combination of these three Drafts. Article 19(1) of the LOSC is a combination of the first paragraph of the three Drafts and Article 14(4) of the 1958 Geneva Convention. This provision stated: ‘Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage will take place in conformity with these articles and other rules of international law.’

In considering the activities in the Article 19(2) of the LOSC, such as ‘…any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.’, it seems that the

\(^{34}\) Doc. A/CONF.13/L.52, dated 28 April 1958, 6.
wording is very vague. The broadest category is phrased as ‘any other activity not having a direct bearing on passage.’ These broad descriptions could lead coastal States to characterise acts as non-innocent and could also give coastal States more opportunity to justify its individual description of the passage. Rothwell said that ultimately the question becomes whether the coastal State’s interpretation of the innocent passage provisions is always to be accepted or whether maritime States are able to question an interpretation which limits navigational freedoms. 

It is possible to see that in a number of instances under Article 19(2) of the LOSC, difficult questions may be raised as to whether a prejudicial act has taken place. For example, Article 19(2)(d) of the LOSC deals with any act of propaganda aimed at affecting the defence or security of the coastal State. However, it does not describe what constitute acts of propaganda.

William Burke comments on the possibility of coastal States giving a broader meaning to innocent passage:

Concern for the broad, community interest (including the coastal State interest as a flag State in other contexts) justifies establishing limits on coastal State discretion by providing that the innocent or lack thereof, of passage must be determined only by specific acts occurring during the passage in territorial sea itself.

Thus, the right of a coastal State to decide subjectively whether the passage is innocent is limited. The coastal State should consider that the foreign ship itself has a right to passage in the waters.

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38 Article 19 (2) (l), LOSC.
42 Karin M Burke and Deborah A DeLeo, above n 10, 395.
The elusive nature of the word ‘innocent’ within the innocent passage regime in coastal waters requires taking into consideration both the objective and subjective significance of the term. The discretionary power of coastal States to determine subjectively the meaning of innocent passage is far-reaching. It is very difficult to find a balance between the protection of the right of innocent passage and the interest of coastal States. The LOSC seeks to maintain a balance between a coastal State’s right and the interests of the international community in exercising the right of innocent passage. Finally, it may be said that the right of innocent passage is simply the right of ships of all States to traverse innocently through the territorial sea of a coastal State.

4.2.2. Components of the Passage

The legal significance of passage, within the context of the right of innocent passage, has not changed dramatically since the term was defined in international fora. Article 3 of the Adopted Draft Text of the Second Committee (Territorial Sea) of the 1930 Codification Conference:

> Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

In the commentary on this Article the Second Committee stated that:

> When a State has undertaken international obligations relating to freedom of transit over its territory, either as a general rule or in favour of particular states, the obligations thus assumed also apply to the passage of the territorial sea. Similarly, as regard access to ports or navigable waterways, any facilities the state may have granted by virtue of international obligations concerning free access to ports or shipping on the said waterways, may be restricted by

43 W Michael Reisman, above n 41, 65.
measures taken in those portions of the territorial sea which may reasonably be regarded as approaches to the said ports or navigable waterways.45

The word ‘passage’ in the Hague Codification draft Article and Commentary depicts more than continuous movement from one part of the territorial waters to another part without entry into the territorial waters of the coastal State. Passage is also defined as movement into ports or waterways and also from ports to the high seas. Gidel categorised the three passages in order to clarify the 1930 Draft provisions on innocent passage. He categorised them as follows: passage lateral, involving no direct contact with the inland waters of the coastal State; passage d’entrée, involving access to internal waters and harbor; and passage de sortie, or the departure from a harbor or internal waters, heading for the high seas or on account of force majeure or distress.46

The lateral passage is the most typical passage within the context of the right of innocent passage. It involves entering the territorial waters at one point and leaving them at another point, without calling at a port, navigable river or other shore locality. Some delegations made clear statements on this point; for example, the United States delegation stated ‘…the vessel of another state is not in innocent passage when it is approaching the port of a State through its marginal seas or when she is entering or leaving a port of that state.’47 The British delegation stated ‘the right of innocent passage is the right of a foreign ship not proceeding either to or from a port of a coastal State to enter and navigate the territorial waters of that state for the purpose only of passing through them.’48 In practice, if vessels traverse coastal waters and have to anchor or enter the coastal waters because of weather conditions or some other

46 G Gidel, Le droit international public de la mer (1932-34), 204 cited in Francis Ngantcha, above n 2, 53.
47 Shabtai Roseanne, above n 23, 1260.
48 LON, Doc. C.351 (b).M.145 (b). 1930.V, which contains most of the resolutions and the draft article of the 1930 Codification Conference, which are quoted in full in UNCLOS General Assembly, Doc. 13/12 of 14 February 1958 in Shabtai Roseanne, above n 23, 1264.
emergency, and do not pass through it and leave at another point, it is still considered as lateral passage.49

Second, in the passage to or from internal waters or departure from a harbour, it is likely that a coastal State would permit entry into or departure from its inland waters and at the same time denies or disrupts access to its territorial sea. The existing literature on this issue appears to be contradictory. A significant number of authors support the view that there is a general right of access of vessels to foreign ports. Colombos suggests that customary international law imposes a general duty to promote commercial intercourse, navigation and trade.50 This view is supported by many scholars,51 some of whom state that international law merely places the duty on a port State to exercise its discretion on granting access to its ports on a non-discriminatory basis.52 However, many scholars believe that there is no legal obligation on the port State to allow access to foreign vessels in its ports and therefore there can be no unequivocal right of access of vessels to foreign ports.53

The drafters of the commentary to Draft Article 3 considered the connection between the transit of land locked States and their right of access to the seas and also navigation exercised between the sea and ports situated on an international river as falling within the scope of river navigation and consequently under the regime of that navigation.54 The jurisdictional issues for ships entering or leaving internal waters cast doubt on whether this type of passage can substantially be compared to the lateral

50 C J Colombos, above n 2, 7.
passage referred to earlier. In this case, coastal States have the power to take all necessary steps against any breach of the conditions imposed on vessels who are intending to dock at port.\textsuperscript{55}

Furthermore, stopping and anchoring cannot be considered as part of exercising the right of innocent passage if the purpose of passage is entering into territorial waters. It could be argued that if the vessel anchors or stops in the territorial sea of another State, the passage is disrupted and the vessel may be regarded as within the territorial sea for purposes other than those of innocent passage. But, stoppage and anchorage could be considered as part of passage in exceptional situations in which ships would probably require assistance from the coastal State, such as force majeure and distress.

The Draft of the International Law Commission concerning definition of passage stated ‘…a vessel passing through territorial waters en route to or from a port of the coastal State is considered to be exercising a right of innocent passage. Access to port should …properly be considered a topic separate from innocent passage.’\textsuperscript{56} The LOSC strongly restricts innocent passage, which includes anchoring and stopping, and gives the coastal State the right to take necessary steps to prevent any breach in the conditions of passage; the passage itself must be continuous and expeditious.\textsuperscript{57} Furthermore, the LOSC states that passage means navigation through the territorial sea for the purpose of traversing the sea (archipelagic waters or territorial sea) without entering internal waters or calling at a roadstead or port facility outside internal waters, or proceeding to or from internal waters or a call at such roadstead or port facility.\textsuperscript{58}

\textsuperscript{55} Article 5 of the 1930 Draft Article, in Shabtai Roseanne, above n 23.
\textsuperscript{57} Articles 18 (2) and 25(2), LOSC.
\textsuperscript{58} Articles 18 and 52(1), LOSC.
Moreover, the extension of the right of innocent passage to voyages to and from ports was sanctioned by the ICJ in the Nicaragua case \(^{59}\) and has now been established in customary international law. \(^{60}\)

### 4.2.3. Scope of the Right of Innocent Passage

The right of innocent passage depends on where the right is exercised. For example, the right of innocent passage can be suspended within internal waters, \(^{61}\) archipelagic waters \(^{62}\) and territorial seas, \(^{63}\) but it may not be suspended in straits used for international navigation. \(^{64}\) Second, it is based on the concept of free access where ships can pass through different maritime zones in order to navigate from one point to another in the shortest, safest and cheapest way. Thus, ships may enter from the territorial sea or a strait, go to archipelagic waters and then proceed to the internal waters of a coastal State.

#### 4.2.3.1. Internal Waters

Coastal States exercise complete and absolute sovereignty over internal waters as they do over their land territory, subject to the right of innocent passage which applies to certain internal waters. Internal waters may be divided into two areas in terms of navigation; the first area consists of the waters lying between the low-water line along the coast and the land territory where there is no right of innocent passage. The second part is waters between the low-water line and straight baseline. In these waters innocent passage rights continue to exist. \(^{65}\)

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\(^{59}\) Nicaragua Case (Nicaragua v United States) [1986], ICJ Rep.12, 111.


\(^{61}\) Article 8, LOSC.

\(^{62}\) Article 52, LOSC.

\(^{63}\) Article 25, LOSC.

\(^{64}\) Article 45, LOSC.

\(^{65}\) Article 8 (2), LOSC.
Given that Indonesia did not use straight baseline to enclose the archipelago, it follows that there is no right of innocent passage in Indonesian internal waters.

4.2.3.2. Archipelagic Waters

The right of innocent passage can be exercised in archipelagic waters. Having considered the history of the concept of archipelagic waters, the archipelagic principles which were introduced by Fiji, Indonesia, Mauritius, and the Philippines during the Third Conference on the Law of the Sea stated that the innocent passage of foreign vessels through the waters of the archipelagic State shall be allowed in accordance with national legislation, having regard to existing international law. Thus, in archipelagic waters, there are two types of navigational regimes: innocent passage based on Article 52(1) of the LOSC and archipelagic sea lane passage based on Articles 53 and 54 of the LOSC. According to Article 52(1) of the LOSC, the provisions in Part II, Section 3 of the LOSC apply in archipelagic waters in order to regulate the right of innocent passage. This effectively adopts the innocent passage framework in the territorial sea for archipelagic waters.

4.2.3.3. Straits

A strait is a narrow passage of sea separating or connecting two parts of the high seas or exclusive economic zone. Straits are found either between an island and the mainland or at the narrowing of two continents. There are two types of straits; first, there are straits which connect one part of the high seas or an EEZ to another part of

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66 Indonesia has used normal baselines and archipelagic straight baselines. See Chapter 3 of this thesis.
67 Article 52 (1), LOSC.
69 Article 52 (1) of the LOSC stipulates that 'subject to Article 53 and without prejudice to Article 50, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, Section 3'.
the high seas or an EEZ. Second, there are straits which link the high seas or economic exclusive zone with the territorial waters of a foreign State. These straits considered are by the LOSC to be straits used for international navigation, must accord to foreign ships the non-suspendable right of innocent passage.\footnote{Article 45, LOSC.} This term was used for the first time in the \textit{Corfu Channel} case. Because Indonesia has only recognised the Strait of Malacca and Singapore\footnote{Elucidation of Article 20 (2), Act Number 6 of 1996.} as straits used for international navigation, only in those straits will the non-suspendable right of innocent passage be guaranteed.

\subsection{4.2.3.4. Territorial Sea}

The right of innocent passage formerly could only be exercised in territorial seas, now the right can be exercised in the various maritime zones. The LOSC has described the right of innocent passage in articles dealing with passage rules, the rights and obligations of coastal States and user States, and in a variety of other instances.\footnote{Part II, Section 3, Sub Section A, LOSC.} At least 16 articles\footnote{Articles 17 to 32, LOSC.} regulate the right of innocent passage. These articles also differentiate the types and purposes of ships.

\section{4.3. Rights and Obligation of Coastal States with regard to the Right of Innocent Passage}

The idea that the coastal State should have some kind of authority over seas adjacent to their land is well established.\footnote{D P O'Connell, 'The Juridical Nature of the Territorial Sea' (1971) 45 \textit{British Year Book of International Law}, 303-83.} A coastal State, in the exercise of their jurisdiction and authority over adjacent seas, has to consider the provisions of the LOSC and other rules of international law.\footnote{Article 2, LOSC.} As Judge Winiarski stated in the \textit{Corfu Channel} case.
Channel Case, a State cannot exercise its sovereignty in its territory in such a way that amounts to a denial of the exercise therein of the legally recognised rights of other States.\(^{77}\) As a territorial sovereign, a coastal State has a universally recognised competency within its territorial sea as regards matters of policy and control over such waters.\(^{78}\)

A coastal State has rights to adopt laws and regulations regarding the safety of navigation and the regulation of maritime traffic; protection of navigational aids and facilities and other facilities or installations; protection of cables and pipelines; conservation of the living resources of the sea; prevention of infringement of the fisheries laws and regulations of the coastal State; preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; marine scientific research and hydrographic surveys; prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.\(^{79}\) The coastal State is required to publish all such laws and regulations, and shall not discriminate in its implementation.

### 4.3.1. Rights of a Coastal State

A coastal State has rights over vessels which are exercising innocent passage in their internal waters, archipelagic waters, strait and territorial sea. Some of these rights include the right to suspend innocent passage; the right to enforce anti-pollution measures; and the right of hot pursuit. The next paragraph will describe these rights in order to clarify the rights of innocent passage.


\(^{78}\) Shekhar Ghosh, above n 2, 45.

\(^{79}\) Articles 19 and 21, LOSC.
4.3.1.1. Right to Suspend

The coastal State has the right to suspend innocent passage in certain areas of its territorial sea. The reasons for suspension of innocent passage may include weapons exercises to which the coastal State is directly or indirectly a party. The United States delegation in the 1930 Hague Codification stated that it is a common practice for the coastal State to close a portion of its territorial waters when it is necessary for national security purposes, since in principle, the right of a coastal State to use a portion of the territorial sea is superior to the right of innocent passage.

The right of suspension granted to the coastal State is subject to important qualifications. As pointed out by Ngantcha, the coastal State’s right to suspend innocent passage is subject to the following conditions:

(a) Non-discriminatory: all foreign vessels must be banned from the suspension areas. If this condition were to be applied strictly, joint manoeuvres involving vessels in the portion of the territorial sea where passage is suspended would lead to discrimination against third State.
(b) The suspension must be temporary and thus not involve the permanent closure of portions or of the entire territorial sea. In the absence of any indication as to what constitute temporary suspension, successive notifications of suspension of innocent passage in alternative portions of the territorial sea could in effect permanently deprive foreign vessels from traversing these waters, without any perceived violation of the rules by the coastal State.
(c) Suspension may only cover specific areas of the territorial sea. This carries implication that the suspension should at no time cover the entire territorial sea.
(d) The suspension should be essential for protection of coastal State security, including weapon exercises. The suspension must be essential and necessity to the coastal State. Such as marine pollution, construct artificial islands, installations, deep water ports could and has been used to justify the suspension of the right of innocent passage in portions of the territorial sea.
(e) The suspension should be published before it become effective. This is also a prerequisite for all coastal State laws and regulations concerning navigation in the territorial sea.

80 Article 25 (3), LOSC.
82 Francis Ngantcha, above n 2, 166.
Furthermore, if passage is not innocent, under Article 25 of the LOSC, the coastal State has the right to take certain steps to prevent the passage. This right could be executed by force in the case of vessels which are proceeding to internal waters. There is no procedure expressly outlined in the LOSC on how the coastal State may suspend the right of innocent passage. However there are several common methods on how to publish such suspension of the right of innocent passage, for example declaration in notices to mariners83 and through diplomatic channels.

4.3.1.2. Right to Enforce Anti Pollution Measures

Prior to the LOSC, the exercise of jurisdiction and the enforcement of anti-pollution laws have always been based on flag State competence and not on any sovereign rights of the coastal State.84 A coastal State affected by pollution due to a ship which was exercising its right of innocent passage had no power to investigate the ship itself. Consequently, there were many agreements in which coastal States were assigned the secondary role of investigating alleged pollution offences and of supplying the flag State with the necessary evidence for the purposes of prosecution. The lack of competence was exacerbated by the fact that, despite acknowledgment of coastal State sovereignty, there had been no direct reference in earlier conventions to any coastal power to enforce anti-pollution measures in the territorial sea.85

Under the LOSC, the power to enforce anti-pollution laws is extended to the port State in cases where the ship has entered the port of a foreign State and to the

83 Indonesian notices to mariners are usually published weekly. The author’s experience when posted in the Indonesian Naval Hydrographic Office.
85 Daniel Bondansky, above n 84, 720-23.
coastal State in whose waters the ship may be exercising the right of innocent passage. The LOSC contains an innovation which is crucial for the powers of coastal States in regulating ships which exercise the right of innocent passage. Article 21 of the LOSC provides the following:

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of […]
   (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.
2. Such laws and regulations shall not apply to the design, construction, Manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.
   […]
4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Furthermore, Article 211 (4) of the LOSC, stipulates that:

Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

From the Articles above, it becomes clear that the LOSC introduced a general right for the coastal State to legislate for the prevention of marine pollution. However, such legislation must not in any way extend beyond the framework set by international law; and, specifically when it comes to issues of design, construction and the Manning or equipment of foreign vessels, it must not extend beyond the generally accepted international standards.86 In other words, the coastal State has a right to legislate and seek enforcement of such legislation over issues with the limit being the standards which are generally accepted by the international community. For example, the

86 This international standard includes the International Atomic Energy Agency (IAEA) Code on Trans-boundary Movement of Radioactive Waste. Article III (3) of the Code stated that it is the sovereign right of every State to prohibit the movement of radioactive waste into, from, or through its territory.
standards set by competent international organisations such as the International Maritime Organisation (IMO)\textsuperscript{87} are relevant in determining such standards.

The growing concern regarding preservation of the environment allowed a coastal State to take proactive action to monitor the movements of ships passing through their waters.\textsuperscript{88} However, pro-active monitoring by coastal State may only be carried out in compliance with the requirements of international law and within the framework of rights and duties of coastal State established in the LOSC.\textsuperscript{89} Article 218 of the LOSC gives coastal State jurisdiction to carry out inspections and institute proceedings for discharge violations committed on the high seas and in other States’ coastal waters under certain circumstances. Furthermore, there are agreements which give port State power to control a vessel which is a potential risk to the environment.\textsuperscript{90}

4.3.2. Obligations of Coastal States

Coastal States are bound to observe two specific obligations to foreign ships exercising the right of innocent passage over its waters: obligations related to passage and obligations related to the safety of navigation.

4.3.2.1. Obligations related to the Passage

The obligation of coastal States is not to hamper, prohibit or discriminate in the exercise of innocent passage through its territorial sea, as prescribed in Article 24 (1) of the LOSC as follows:


\textsuperscript{88} There are several incidents such as Exxon Valdez, Erika, Prestige, which highlighted awareness on marine environment protection.


\textsuperscript{90} Daniel Bondansky, above n 84, 759.
The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

(b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

This obligation is the first and only obligation which was acknowledged at the 1930 Hague Codification Conference, the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, and Article 24 of the LOSC. This obligation was aimed at limiting the powers of the coastal State in terms of protecting interests in the territorial sea. The coastal State, when exercising its legislative powers or its economic rights through anti-pollution measures or the building of structures in the territorial sea, must ensure the right of other States to navigate through its territorial sea. If coastal States build installations intended for the exploitation of the seabed and subsoil of the territorial sea, it must not be located in narrow channels or in sea lanes which are essential for international navigation. On the other hand, the clause ‘except in accordance with this Convention’ seems to imply that the duty not to hamper has been weakened. This implies that the right of innocent passage may be subject to other rules embodied elsewhere in the LOSC, such as suspension of innocent passage, civil and criminal jurisdictions and environmental protection.

Furthermore, Article 24(1) (b) of the LOSC prohibits discrimination in the application of the right of innocent passage. In practice, there are at least two types of discrimination: discrimination against the nationality of ships and discrimination

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91 Article 4 in the Final Act of ILC provided that ‘a coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea’.
92 Article 15 (1) of the United Nations Convention on the Territorial Sea and Contiguous Zone, 516 UNTS 205 (The 1958 TSC) stated that ‘the coastal State must not hamper innocent passage through the territorial sea’.
against the State of departure, State of destination or State owning the cargo. The special treatment granted by one State to another State based on bilateral or multilateral treaties cannot be considered as discrimination and used as a ground for claiming special treatment. Moreover, the rule of non-discrimination is also underlined in Articles 25(3), 26(2), and 227 of the LOSC insofar as the right of innocent passage is concerned.

4.3.2.2. Obligations relating to Safety of Navigation

The decision of the International Court of Justice in 1949 in the Corfu Channel case between United Kingdom and Albania stated that a coastal State has a duty to inform other States of any inherent dangers to navigation within its territorial sea. The duty to inform others of real or possible dangers in the territorial sea has subsequently been included in all the law of the sea conventions such as the Final Draft of the International Law Commission (ILC), the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, and the LOSC. Article 24(2) of the LOSC stated that ‘the coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.’ According to Yang, the duty of providing information should be understood as not beyond the appropriate publishing of relevant information. It does not imply that the coastal State is obliged to ensure the safety of navigation by, for example, investigating wrecks in the territorial sea and removing them at its own expense. However, the coastal State is expected to maintain some basic navigational aids essential for ordinary shipping activities, such as lighthouses and rescue capability.

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94 Corfu Channel (United Kingdom v. Albania), (Merit) Judgment of 9 April 1949, ICJ Reports 1949, 22.
95 Article 16 (2), Final Draft of ILC.
97 Haijiang Yang, above n 26, 183.
4.4. Rights and Duties of Passing Ships on Innocent Passage

In view of the sovereignty of coastal and archipelagic States over their internal waters, archipelagic waters and territorial sea, foreign vessels exercising the right of innocent passage are subject to more obligations than there are rights themselves.98 General international law recognises that wherever a merchant ship is not endangered and will not endanger a coastal State’s security or other interest, or wherever a warship is given consent to navigate in the coastal State’s waters, they have a right to navigate in these maritime zones.

4.4.1. Rights of Passing Ships

The provisions of the LOSC provide that ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea,99 straits used for international navigation100 and archipelagic waters.101 The phrase ‘all States’ means a State which is not a party to the LOSC enjoys the same rights of innocent passage. The term ‘ships’ include merchant ships, government ships and warships. The right of innocent passage may be exercised in almost all the maritime zones of coastal States. It seems that the innocent passage right is the only right which may be exercised in all waters of coastal States as long as it remains innocent. The right of innocent passage accords vessels lesser freedoms compared with the rights of transit passage and archipelagic sea lanes passage.102

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98 Francis Ngantcha, above n 2, 172.
99 Article 17, LOSC.
100 Article 45, LOSC.
101 Article 52 (1), LOSC.
102 The innocent passage doctrine seems to give coastal States more power to control vessels compared to the other passages.
4.4.2. Duties of Passing Ships

Despite the fact that the right of innocent passage is an independent right in the international law of the sea, foreign ships exercising the right of innocent passage are still subject to some duties described in the LOSC and international law. The right of innocent passage is not an absolute right and the right is to be exercised in the waters where coastal States have sovereignty. There are other areas that merit further examination such as duty to observe laws and regulations of coastal State, duty of compliance with sea lanes and traffic separation scheme and duty to pay for specific services.

4.4.2.1. Duty to Observe Laws and Regulations

Ships exercising the right of innocent passage must observe local laws and rules in spite of the fact that they are exercising an independent right. The situation would be different if these vessels were on the high seas, for example, where the vessels have an independent extra-territorial right.103

While exercising the right of innocent passages a foreign vessel remains under the jurisdiction of its flag State, however the vessel has duties toward the coastal State as well.104 The LOSC states that ‘foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.’105 Furthermore, the LOSC establishes additional obligations for foreign nuclear powered ships or ships carrying nuclear or other inherently dangerous or noxious

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103 The vessel is only subject to the laws and regulations of flag States.
104 Article 6 of the Final Act of the 1930 Hague Codification Conference and Article 18 of the Final Draft of ILC.
105 Article 21 (4), LOSC.
substances. It provides that when exercising the right of innocent passage these types of vessels must carry documents and observe special precautionary measures.  

### 4.4.2.2. Duty of Compliance with Sea Lanes and Traffic Separation Schemes

Foreign ships exercising the right of innocent passage shall comply with laws and regulations concerning the safety of navigation, the regulation of maritime traffic and all generally accepted international regulations respecting collision prevention.  

Article 22 of the LOSC further develops this duty by stating that foreign ships shall confine their innocent passage to the designated sea lanes and traffic separation schemes established by the coastal States in accordance with the LOSC. In practice, although the sea lanes and traffic separation scheme are established by the coastal States, but IMO must also adopt the designation of the sea lanes and traffic separation schemes. Before IMO adopts the designated sea lanes, these proposals must be discussed by all members of IMO. Then the adoption has to be published in an IMO publication or resolution. Thus, the IMO’s members have to be aware of the existing adopted sea lanes and/or traffic separation scheme. In order to be effective in promoting the safety of navigation, domestic ships have to comply with the sea lanes and traffic separation schemes rules, as well.

### 4.4.2.3. Duty to Pay for Specific Services

Article 26(2) of the LOSC states that ‘charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship.’ It seems that there are differences between general and specific services. Although there is no consensus as to what constitutes general and specific services,

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106 Article 23, LOSC.
107 Articles 21 (1) (a) and 21 (4), LOSC.
some writers consider general services include those that are basically provided for any ships passing by, such as the erection of lighthouses, placement of buoys, and operation of other navigation aids. On the other hand, specific services are those directed at a particular ship or ships, for example pilotage, towage, pushing services, salvage, waterway dredging for given ships, etc.

4.4.3. Innocent Passage of Warships or Submarines

The requirements of prior notice and/or authorisation for warships intending to exercise the right of innocent passage were part of long debate and controversy. This was because the major naval powers sought maximum freedom of manoeuvre for their warships in order to secure their interests, while other States, mostly coastal States sought to deny foreign warships close access to their shores in order to protect their security. As noted by Elihu Root, counsel for the United States in the North Atlantic Coast Fisheries Arbitration in 1910, ‘Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten.’

The 1930 Hague Conference provided that ‘as general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require authorisation or notification, although the coastal State has the right to regulate the

108 Haijiang Yang, above n 26, 179; Informal discussion with Director of Navigation of the Indonesian Department of Transportation, March 2008.
109 Even before the Conference, there were long debates. See, the Third UNCLOS, Official Records, Vol. II, 99-142. There were long debates during 3rd-15th Meetings on prior notification and/or authorisation for warships exercising the right of innocent passage.
110 Erick Franckx noted that ‘the Positions of USSR and USA concerning the innocent passage of warships through the territorial sea have not always been consistent over the years’, in Erik Franckx, ‘Innocent Passage of Warships: Recent Development in US-Soviet Relations’ (1990) 14(6) Marine Policy 484, 484.
111 In 1910, the United States was not yet considered a major naval power.
conditions of such passage,’ and if foreign warships do not comply with the regulation of the coastal State and disregards any request for compliance, the coastal State may require the warship to leave the territorial sea. 113 Previously, Jessup stated that ‘As to warships, the sound rules seems to be that warships should not enjoy an absolute legal right to pass through a State’s territorial waters any more than an army may cross the land territory.’ 114 While the Corfu Channel case developed the right of warships to exercise innocent passage through straits, it did not mention passage in the territorial sea. 115 Hall also declared that warships do not enjoy a right of innocent passage. 116 The International Law Commission (ILC) noted that many States have municipal laws which required notification and/or authorisation. 117 In the plenary session, there were two groups which required authorisation or at least notification, while the other groups opposed the requirements. Articles in the 1958 Geneva Convention on Territorial Sea and Contiguous Zones contained no express provision on the matter because there was no consensus. 118 The Convention only contained general rules applicable to all ships, but no special provision on the innocent passage of warships.

In the Third UNCLOS, States which opposed the requirement of prior notification and/or authorisation justified it by arguing that the 1958 Geneva Convention did not contain such a requirement, and that such a requirement would not be desirable and would expose coastal States to pressures to which they would not

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114 Phillips P Jessup, above n 15, 20.
115 Corfu Channel (United Kingdom v. Albania), (Merit) Judgment of 9 April 1949, ICJ Reports 1949, 28 and 30.
117 During the Seventh Session of the ILC in 1955 Mr Krylov, the Soviet member, stated that there was a considerable measure of agreement that warships required prior authorisation because ‘they threaten’. In Summary of the 307th meeting, Yearbook of International Law Commission, Vol. I, 1955, 145. UN Doc A/DN.4/SER.A/1955.
118 Article 23 of the 1958 Geneva Convention on Territorial Sea and Contiguous Zones stated that ‘if any warship does not comply with the regulations of the coastal State concerning passage trough the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea’.
otherwise be subject. Furthermore, they argued that it was unrealistic to entertain proposals which would discriminate against the navigation rights of warships. There were also arguments raised based on the exercise of individual and collective defence embodied under the United Nations Charter. The maintenance of navigation rights for warships was not only consistent with the United Nations Charter but was the only policy consistent with global realities and international stability.

In the Third UNCLOS, there were several draft proposals on navigation through the territorial sea presented by many delegations. They contained provisions permitting coastal States to require prior notification and/or authorisation for the passage of warships through the territorial sea and straits used for international navigation. Coastal States which believed that the warships should fulfil the requirements while exercising the right of innocent passage argued on considerations of sovereignty and national security; thus, prior notification and/or authorisation by coastal State was seen as the prerequisite for the maintenance of peace, good order and security. These requirements did not intend to go against flag State jurisdiction but against intention and policy. Furthermore, based on State practice, the innocent passage of warships is a controversial issue and coastal States have been reluctant to permit passage without prior authorisation or at least notification. One of the coastal States’ reasons is that warships are of an inherently dangerous nature.

119 Article 51, United Nations Charter.
120 Third United Nations Conference on the Law of the Sea, Official records, Vol. II, 135. Some States who opposed the requirement such as the United Kingdom, the United States, Germany, Bulgaria, Poland and the Soviet Union. The United Kingdom proposed draft article on the territorial sea and strait including the rule of the ships of all States enjoy the right of innocent passage through the territorial sea shall apply to warships. UN Doc 1/A/CONF. 62/C.2/L.3, Official Records, Vol. III, 185.
123 USSR became one of the States which adopted laws requiring prior authorisation for warships before entering the territorial sea. The USSR Council of Ministers on April 28, 1983 under the title ‘Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR,’ English translation in W E Butler, Basic Documents on the Soviet Legal System (1983), 270-
During the negotiations, some coastal States proposed amendments on the requirements of prior notification and/or authorisation. For example, if any warship in the territorial sea disregards any request for compliance made to it by the coastal State, the warship may be required to leave the territorial sea. This proposal became known as Formula A. In Formula B, the coastal State may suspend the right of passage of such warships and may require them to leave the territorial sea through a safe and expeditious route as may be directed by the coastal State. Formula C allowed the coastal State to require prior notification to or authorisation by its competent authorities for the passage of foreign warships through its territorial sea, in conformity with regulations in force in such a State. Finally, these formulae were combined in the 1975 Caracas Session as the consolidated text on innocent passage and put it in Part II of the Informal Single Negotiating Text (ISNT 1975). During the 1975 and 1977 sessions, the ISNT remained unchanged and placed in the Informal Composite Negotiating Text (ICNT 1977), but in the Ninth Session, many States expressed their dissatisfaction of the provisions on warships found in the ICNT 1977. At the final session in April 1982, there was no consensus in formulating the provisions. So at the final plenary sessions of the Conference, the President of the Conference stressed the ‘package deal’ as consistent with the nature of the whole Convention. The President sought and obtained this result by stating that the delegations concerned ‘... would like

284. Indonesia required prior notification for warships which traverse Indonesian waters, based on Presidential Decree Number 16 of 1971. This Presidential Decree will be discussed in Section 4.5.3.1.
124 Warships have been made as a platform of war and certain warships carry nuclear substances which are dangerous to a coastal State.
to reaffirm that the decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interest, in accordance with Article 19 and 25 as provided for in the Convention.¹³⁰

Consequently, some States which already require prior notification and/or authorisation of warship passage in their national legislation said that they found no incompatibility between their position and the provisions in the LOSC.¹³¹ The Iranian delegation believed that there was implicit recognition for prior notification and/or authorisation in the provisions of LOSC in light of customary international law and Articles 21, 19, and 25 of the LOSC which implicitly recognised the right of coastal States to take measures to safeguard their security interest, including the adoption of laws and regulations regarding, inter alia, the requirement of prior notification and/or authorisation for warships willing to exercise the right of innocent passage through the territorial sea.¹³² There were similar statements made by other delegations at the signing ceremony further reaffirming the requirement of notice or consent for the passage of warships in foreign territorial waters.¹³³

Submarines and other underwater vehicles which are given special treatment in the LOSC must navigate on the surface and show their flags.¹³⁴ The provision seems not to be directed to the type of vessel but to the passage itself. It is because submarine or underwater vehicles could be civil/commercial submarines or underwater vehicles and it is not merely military vessel. The obligation to navigate on the surface and show the flag indicates that the submarine tends to be non-innocent.

¹³¹ Indonesia has a national legislation on the requirement of prior notification and/or authorisation for warships and research vessels in exercising innocent passage in Indonesian Waters which is Presidential Decree Number 16 of 1971.
¹³⁴ Article 20, LOSC.
Some authors believe that submarines may exercise innocent passage not only on the surface but also while they are submerged.\textsuperscript{135} Thus, innocent passage is not made dependent on the compliance of the condition of it being on the surface.\textsuperscript{136} On the other hand, there were opinions that navigation on the surface is a prerequisite of innocent passage for submarines.\textsuperscript{137} However, the United States delegation expressed the view that, since submarines were equipped to travel submerged, that was the safest way for them to exercise the right of innocent passage and avoid collision. This is because submarines on the surface tend to lie low in the water and sometimes are not easily visible.\textsuperscript{138}

4.4.4. Non-Compliance with Obligations

It is clear that the coastal State has a duty to avoid disrupting the exercise of the right of innocent passage by foreign vessels in its waters. On the other hand, foreign vessels are required to obey laws and regulations of coastal States. The LOSC provides for sanctions for foreign ships which do not comply with the coastal State’s laws and regulations. The failure of a foreign ship exercising the right of innocent passage to fulfil obligations stated in the laws and regulations of the coastal State could constitute non-innocent passage.\textsuperscript{139} Another type of passage which is non-innocent, according to the LOSC, is the failure to pay charges levied upon services rendered to the ship by the coastal State.\textsuperscript{140}

\textsuperscript{135} Sir Gerald Fitzmaurice, above n 49, 98.
\textsuperscript{136} F David Froman, above n 25, 663.
\textsuperscript{137} The opinions came up during Third UNCLOS, Official Records, Vol. II, 135.
\textsuperscript{138} Third UNCLOS, Official Records, Vol. II, 137.
\textsuperscript{139} Article 21, LOSC.
\textsuperscript{140} Article 26, LOSC.
4.4.4.1. Non-Compliance with Coastal State Laws and Regulations

Article 19 of the LOSC describes the meaning of innocent passage which is based on generally accepted international regulations. Moreover, Article 21 of the LOSC states that in order to be innocent, the ships should obey laws and regulations of the coastal State. The overlap of definitions between Articles 19 and 21 seems to complement each other. It is unclear whether a ship which does not comply with the laws and regulations of the coastal State automatically renders its passage non-innocent. The laws and regulations of the coastal State must conform to and elaborate on activities mentioned in Article 19 of the LOSC, which means that if a ship does not obey the laws and regulations of coastal State, it will automatically not obey the provision in Article 19 of the LOSC. However, the interpretation may be made in a different way since Articles 19 and 21 of the LOSC contain different sets of standards: national and international. Thus, ships will be considered innocent if they obey both laws and regulations of coastal States and also the international regulations which are mentioned in Article 19 of the LOSC. The failure of the ship to do so will render the passage non-innocent.

The connection between activities which are prejudicial to the peace, good order, or security of the coastal State, and any other activity not having a direct bearing on passage and the issues of passage that could be covered by coastal States laws and regulation requires a joint reading of the common sanctions. So it is almost impossible for non-innocent passage to occur which is at the same time in compliance with coastal State laws and regulations.

\[141\] Article 19(2), LOSC.
4.4.4.2. Failure to Pay Coastal Navigational Charges

Foreign ships which exercise the right of innocent passage and are rendered assistance or services by the coastal State are supposed to pay the charges. Article 26(1) of the LOSC stipulates that ‘no charge may be levied upon foreign ships by reason only of their passage through the territorial sea.’ Thus, if a ship fails to pay charges for services rendered, it does not mean the passage is not innocent. But there is opinion that if ships do not pay the charges it will affect the status of the passage.\(^{142}\)

The creation of Article 26 of the LOSC can be traced from the 1930 Hague Codification Conference. The 1930 final text stated that ‘Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel’. These charges shall be levied without discrimination.\(^{143}\) The article tends to exclude any charges in respect of general services to navigation, and to allow payment to be demanded only for special services rendered to the vessel such as pilotage, towage etc. Furthermore, the Article includes the case of compulsory anchoring in the territorial sea.\(^{144}\) Ships which fail to pay the charges may receive a penalty and their right of innocent passage affected. Furthermore, the provision empowers the coastal State to withhold services in the event of non-payment and hinder the exercise of the right of innocent passage.

Article 18 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone inserted the non-discrimination clause, although ILC tried to drop the clause.\(^{145}\) Thus, those who drafted the 1958 Convention did not recognise special rights in the framework of general obligations to pay charges to the coastal State. The

\(^{142}\) Haijiang Yang, above n 26, 179.
\(^{143}\) LON Doc.C.230.M.117.1930,V, 8
\(^{145}\) The commentary of the Commission recognised that there were special rights granted by one State to another. ILC, *Yearbook* 1956, Vol. II, 274.
provisions of the LOSC were taken from the 1958 and the 1930 texts and have accepted their interpretation as well. As a result, ships which do not pay the charges levied by the coastal State may prejudice the exercise of their right of innocent passage.

4.4.4.3. International Responsibility

The increasing concern over flags of convenience raises such issues as which State should bear international responsibility. It may be assumed that the flag State may be internationally responsible towards the coastal State for the conduct of ships exercising the right of innocent passage. However, there are no provisions in the LOSC for the international responsibility of coastal States regarding flag of convenience ships in its territorial sea.

The LOSC only recognises that ‘The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.’ Unlike the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, the responsibility is borne by the flag State. So if foreign ships cause damage to the coastal State when exercising the right of innocent passage, the coastal State can legitimately withdraw the ship from continuing to exercise that right.

The LOSC reaffirms that warships have complete immunity, it establishes the international responsibility of the flag States for injuries caused by them, and

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146 Article 31, LOSC.
147 Article 32, LOSC.
148 Article 31, LOSC.
also permits a coastal State to require warships to immediately leave its territorial sea if they fail to comply with its laws and regulations and disregard any request for compliance.\(^{149}\) Ngantcha pointed out that, in the absence of provisions concerning requirement notification and/or authorisation, it is necessary to draw analogies with the rules of diplomatic law.\(^{150}\) The immunities enjoyed by warships and diplomatic missions are similar; accordingly similar remedies are applied in cases of abuse of those immunities. When warships are required to leave the territorial sea, the host State has an ultimate remedy to call for immediate closure of the offending mission.\(^{151}\) The immediacy required in complying with the measure is the utmost that can be done and nothing more. This is because diplomatic missions need the consent of the host State to be within its territory. For this reason, it seems appropriate that warships should be required to notify and/or be authorised before they can enter foreign territorial seas. Furthermore, the Preamble to the LOSC may be referred to in order to clarify permissions or prohibitions as far as warships are concerned. The Preamble explicitly refers to customary international law on unsettled issues such as the passage of warships in foreign territorial seas by stating that ‘…matters not regulated by this Convention continue to be governed by the rules and principles of general international law…’

4.5. Legal Analysis of Indonesian Laws and Regulations on Innocent Passage

Indonesia regulates innocent passage under several laws and regulations. Act Number 6 of 1996 on Indonesian Waters is the umbrella legislation for regulating navigational regimes in Indonesian waters which includes innocent passage.

\(^{149}\) Article 30, LOSC.
\(^{150}\) Francis Ngantcha, above n 2, 147.
Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships Exercising Innocent Passage through Indonesian Waters is considered as the main regulation on innocent passage. Furthermore, Indonesia also promulgated many laws and regulations at the technical and operational levels for the guidance of officers in the field, for example Presidential Decree, Decision of Minister of Defence, Letters of Chief of Armed Forces.

To understand whether Indonesian laws and regulations are consistent with the provisions of the LOSC and other international law, detailed analysis of the laws and regulations are required. The analysis will apply a comparative methodology between the previous sub chapters on the relevant provisions of the LOSC and the Indonesia laws and regulations which relate to innocent passage.

4.5.1. Act Number 6 of 1996

Act Number 6 of 1996 on Indonesian Waters which regulates innocent passage comprises only seven articles\textsuperscript{152} compared with 12 articles\textsuperscript{153} in the LOSC. But as noted above, the Act is just regulating general provisions and the detailed provisions are to be regulated further under other government regulation or other laws and regulations. Description of innocent passage in the Act is similar to the LOSC provisions as seen in Table 2. It seems that the Act is just duplicating provisions of the LOSC.

\textsuperscript{152} Articles 11-17, Act Number 6 of 1996.
\textsuperscript{153} Articles 17-26, 45, and 52, LOSC.
Table 2. Relationship between the Articles of Innocent Passage in Act Number 6 of 1996 and the LOSC

<table>
<thead>
<tr>
<th>No</th>
<th>6/1996</th>
<th>Innocent Passage Denotation</th>
<th>LOSC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Art 11(1)</td>
<td>Right of innocent passage</td>
<td>Art 17, 52</td>
</tr>
<tr>
<td>2</td>
<td>Art 11(2)</td>
<td>Meaning of passage</td>
<td>Art 18(1)</td>
</tr>
<tr>
<td>3</td>
<td>Art 11(3)</td>
<td>Limitation of passage</td>
<td>Art 18(2)</td>
</tr>
<tr>
<td>4</td>
<td>Art 12(1)</td>
<td>Meaning of innocent passage</td>
<td>Art 19(1)</td>
</tr>
<tr>
<td>5</td>
<td>Art 12(2)</td>
<td>Limitation of non-innocent activities</td>
<td>Art 19(2)</td>
</tr>
<tr>
<td>6</td>
<td>Art 12(3)</td>
<td>Further regulation on Government Regulation</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Art 13(1)</td>
<td>Suspension</td>
<td>Art 25(3)</td>
</tr>
<tr>
<td>8</td>
<td>Art 13(2)</td>
<td>Publication of suspension</td>
<td>Art 25(3)</td>
</tr>
<tr>
<td>9</td>
<td>Art 13(3)</td>
<td>Further regulation on Government Regulation</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Art 14(1)</td>
<td>Sea lanes and traffic separation scheme</td>
<td>Art 22(1)</td>
</tr>
<tr>
<td>11</td>
<td>Art 14(2)</td>
<td>Further regulation on Government Regulation</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Art 15</td>
<td>Submarine and underwater vehicles</td>
<td>Art 20</td>
</tr>
<tr>
<td>13</td>
<td>Art 16</td>
<td>Nuclear power ships and ships carrying dangerous substances</td>
<td>Art 23</td>
</tr>
<tr>
<td>14</td>
<td>Art 17</td>
<td>Rules applicable to merchant ships, warships, and government ships operated for commercial and non commercial purposes will be regulated further in Government Regulation</td>
<td>Subsection C, Section 3, Part II of the LOSC</td>
</tr>
</tbody>
</table>

It is clear from Table 2 that Act Number 6 of 1996 has not yet implemented all provisions of the LOSC. It has several articles which could be considered to address the crucial issues in defining the right of innocent passage. The Act states that further detail on regulating innocent passage will be formulated in other government regulation. The Act also acknowledges that four government regulations are required to give full effect to the LOSC. These include: government regulation on non-innocent passage,\textsuperscript{154} temporary suspension,\textsuperscript{155} sea lanes and traffic separation scheme,\textsuperscript{156} and rights and obligations of merchant ships, warships, and government ships operated for...
commercial and non-commercial purposes. However, by 2009, there was only one government regulation enacted.

Ships of all States, whether coastal or land-locked, enjoy the right of innocent passage only in the territorial sea and archipelagic waters of Indonesia. It follows that there is no right of innocent passage in the internal waters of Indonesia. Indonesia does not use straight baselines to cover the archipelago in order to create internal waters in which the right of innocent passage could be exercised. However internal waters within archipelagic waters could be created not only by drawing straight baselines, but also by drawing closing lines under Articles 9, 10, and 11 of the LOSC. On the other hand, Article 11 (2) (b) of Act Number 6 of 1996 states that ships enjoy the right of innocent passage when proceeding to or from internal waters or a call at such roadstead or port facility of Indonesia. This will clearly be in the internal waters. Subsequently it seems that there is a contradiction between Article 11 (1) and Article 11 (2) (b) of the Act which creates confusion in implementing the right of innocent passage in the internal waters.

There are two instances when innocent passage occurs in Indonesian waters. The first relates to vessels traversing the archipelagic waters or territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters. The second situation relates to vessels proceeding to or from internal waters or call at such a roadstead or port facility. These provisions are similar to Article 18 (1)(a) and (b) of the LOSC. Indonesia has also restricted vessels anchoring and stopping while exercising the right of innocent passage because passage is considered

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157 Article 17, Act Number 6 of 1996.
158 Government Regulation Number 36 of 2002.
159 Article 11 (1), Act Number 6 of 1996.
160 Article 7, LOSC.
161 Article 50, LOSC.
162 Article 11 (2) (a), Act Number 6 of 1996.
163 Article 11 (2) (b), Act Number 6 of 1996.
as continuous and expeditious transit. Anchoring and stopping may only be allowed
where such are incidental to ordinary navigation or rendered necessary by force
majeure. There is no further explanation of what constitutes force majeure which
allows ships to anchor and stop their passage and what the meaning of continuous and
expeditious passage is.

Indonesia defines navigation as the delineated process of ship movement from
one point to another in safe, continuous and expeditious transit. Navigation may
include changing movements where the deviation is to avoid dangers and/or navigation
obstacles and to arrive on schedule. This formulation is based on Article 18 of the
LOSC and there is no further explanation as to what constitutes navigation from one
point to another. According to Sumardiman, navigation from one point to another is a
technical term which is usually used by masters of ships, so it is not legal term.

Act Number 6 of 1996 states that passage is innocent so long as it is not
prejudicial to the peace, good order or security of Indonesia and such passage takes
place in conformity with the LOSC and with other rules of international law. Act
Number 6 of 1996 states that passage is innocent so long as it is not
prejudicial to the peace, good order or security of Indonesia and such passage takes
place in conformity with the LOSC and with other rules of international law. Furthermore, passage of foreign ships shall be considered to be prejudicial to the
peace, good order or security of Indonesia if they, in the territorial sea or in
archipelagic waters, engage in any of the activities prohibited by the LOSC or other
rules of international law. Indonesia has not elaborated on the meaning of peace,
good order or security of Indonesia and other activities that might be considered as
non-innocent, but has left it to be interpreted in accordance with Article 19 of the
LOSC. The list of activities is identified in the Elucidation of Article 12 (2) of Act

164 Article 11 (3), LOSC.
165 Article 11 (3), Act Number 6 of 1996.
166 Elucidation of Article 11 (2), Act Number 6 of 1996.
167 Adi Sumardiman gave a general lecture in the seminar in the Indonesian Navy Headquarters, March
2005. Note on file with author who attended the seminar.
168 Article 12 (1), Act Number 6 of 1996.
169 Article 12 (2), Act Number 6 of 1996.
Number 6 of 1996. These activities are similar to those contained in Article 19 (2) of the LOSC. It follows that the Indonesian implementation is consistent with the LOSC.

Article 13(1) of Act Number 6 of 1996 stipulates that ‘the Indonesian Government may suspend temporarily in specified areas of the territorial seas and archipelagic waters the right of innocent passage of foreign ships if such suspension is essential to the protection of the security of Indonesia, including weapons exercises.’ The temporary suspension is carried out by the Indonesian Chief of Armed Forces.170 Furthermore, the suspension shall take effect only after being published by Department of Foreign Affairs using diplomatic channels and after being published in Notices to Mariners.171 Notification of suspension will include the affected areas and the time frame for suspension.172 Indonesia has considered that military exercises will be conducted in areas which are not subject to heavy traffic or economic activity.173 As mentioned earlier, suspension of innocent passage has taken lengthy debate.174 There is no clear meaning as to what constitutes the security of Indonesia. The Indonesian White Defence Paper defines the term ‘security’ broadly, for example regional security, internal security and maritime security.175 Additionally, there is no clear definition of ‘weapon exercise’. The unanswered questions are whether it would cover weapon exercises only or also cover all military exercises.
Indonesia has implemented suspension of innocent passage twice, in relation to the closure of the Straits of Sunda and Lombok,\textsuperscript{176} and the incident of \textit{Lusitania Expresso}.\textsuperscript{177} In September 1988, Indonesia suspended innocent passage in the Straits of Sunda and Lombok for the purpose of military exercises. In 1992, Indonesia also suspended innocent passage rights of the \textit{Lusitania Expresso}, a Portuguese-registered car ferry, which was carrying passengers from Australia to East Timor, on grounds of public order and internal security in Dili, East Timor.\textsuperscript{178}

Article 14(1) of Act Number 36 of 2002 stipulates that ‘where necessary, having regard to the safety of navigation, the Indonesian Government shall designate sea lanes and prescribe traffic separation schemes in the territorial seas and the archipelagic waters.’ The provision is intended to regulate navigation in order to make it safe and not to hamper passage. Indeed, to designate such sea lanes, Indonesia should consult with IMO with a view to their adoption.\textsuperscript{179}

Article 15 of Act Number 6 of 1996 provides that ‘in exercising the right of innocent passage in the territorial seas and the archipelagic waters, submarines and other underwater vehicles are required to navigate on the surface and to show their flag’. Any foreign submarines passing through Indonesian waters which do not comply with this regulation is to be considered as undertaking hostile passage and will be required to leave Indonesian waters immediately. This provision reproduces Article 20 of the LOSC, but it differs insofar as submarines will be considered to be exercising hostile passage instead of non-innocent passage as per the LOSC. It might be argued

\textsuperscript{177} Donald R Rothwell, ‘Coastal State Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso’ (1992) \textit{16(6) Marine Policy} 427, 427.
\textsuperscript{179} Article 53 (9), LOSC.
that this provision is intended to regulate submarine warships. If this is the case, the
drafters of the Act would appear not to have considered the possibility of existence of
commercial submarines which are under the general rules of innocent passage and not
under the provisions on warships and government ships operated for non-commercial
purposes.

Article 16 of Act Number 6 of 1996 regulates ‘foreign nuclear powered ships
and ships carrying nuclear materials or other inherently dangerous or noxious
substances. Ships in this category are required to, when exercising the right of
innocent passage, carry documents and observe special precautionary measures
established by international agreements.’ Furthermore, these ships have to confine
their passage to special sea lanes and routes which are designated for them.\textsuperscript{180} There
are also several articles in Act Number 17 of 2008 on Shipping which regulates the
protection of the marine environment,\textsuperscript{181} marine pollution control,\textsuperscript{182} management of
safety and protection of the marine environment.\textsuperscript{183} These articles are subject to
civil\textsuperscript{184} and criminal jurisdiction.\textsuperscript{185}

\textbf{4.5.2. Government Regulation Number 36 of 2002}

Indonesia promulgated Government Regulation Number 36 of 2002 on Rights
and Responsibilities of Foreign Ships on Exercising of Innocent Passage through
Indonesian Waters as a detailed implementation of Act Number 6 of 1996 on
Indonesian Waters. The original intention was to develop a number of government
regulations under the scope of Act Number 6 of 1996. In view of this, it may be argued

\textsuperscript{180} Article 11 (1), Government Regulation Number 36 of 2002.
\textsuperscript{181} Articles 123 and 226-243, Act Number 17 of 2008.
\textsuperscript{182} Article 134, Act Number 17 of 2008.
\textsuperscript{183} Article 169, Act Number 17 of 2008.
\textsuperscript{184} Article 243, Act Number 17 of 2008.
\textsuperscript{185} Articles 324-329, Act Number 17 of 2008.
that Indonesia needs further laws and regulations on innocent passage. However there
is opinion that such government regulation is not needed considering that Government
Regulation Number 36 of 2002 already covers all the relevant provisions of the
LOSC.\textsuperscript{186} To ascertain whether Government Regulation Number 36 of 2002 has
covered all issues on innocent passage, a detailed analysis of Government Regulation
Number 36 of 2002 will be provided.

It is clearly seen in Table 3 below that the Government Regulation refers to
provisions of the LOSC, but it appears that it does not cover all provisions on innocent
passage in the LOSC.\textsuperscript{187} There are many provisions omitted such as regulation on
criminal and civil jurisdiction in relation to foreign ships, regulation on warships and
government ships, and innocent passage in straits used for international navigation.
Government Regulation Number 36 of 2002 is intended to regulate in detail and cover
all aspects of innocent passage which includes operational, technical and legal aspects;
however, it appears that the Government Regulation is simply restating articles in Act
Number 6 of 1996 and provisions in the LOSC.\textsuperscript{188} An assumption can therefore be
made that there are other issues on innocent passage missing. There is no explanation
as to why Indonesia has not produced further regulations on innocent passage. It may
be argued that Indonesia intends to stick to the provisions of the LOSC, although there
are many provisions which are not clearly defined.

\textsuperscript{186} Adi Sumardiman argues that Indonesia does not need to pass other government regulations on
innocent passage because all issues have been covered by Government Regulation Number 36 of 2002.
Indonesia needs to promulgate an Act to cover all issues left especially how to enforce its laws against
ships which are not in compliance with its laws and regulations. Statement made during seminar in the
Indonesian Navy Headquarters, March 2005 (un-published). Notes on file with author who attended the
seminar.

\textsuperscript{187} For example, definitions in Article 1 of Government Regulation Number 36 of 2002 directly refer to
the definitions or articles in Act Number 6 of 1996 or articles in the LOSC.

\textsuperscript{188} As mentioned earlier, provisions in the LOSC and Act Number 6 of 1996 are general terms and some
of them are vague, and ambiguous.
In some aspects the Government Regulation regulates and uses a different formulation from the LOSC. For example, the Government Regulation stipulates normal routes rule in the innocent passage, ten per cent rule in the narrow strait and obligation to monitor coastal radio. These rules are not regulated in Part II, Section 3 on innocent passage of the LOSC, but may be found in other part of the LOSC. For example, the normal routes rule is located in the archipelagic sea lanes passage;\textsuperscript{189} the ten per cent rule is identical to the ten per cent rule in the archipelagic sea lanes;\textsuperscript{190} and the obligation to monitor coastal radio can be found in the transit passage and archipelagic sea lanes passage as part of safety navigation mechanism.\textsuperscript{191} So these rules which exist in the Government Regulation are not new rules, but refer to provisions in the LOSC. An argument could be made as to whether these rules hamper the legitimate exercise of the right of innocent passage. Taking into account the safety of navigation and protection of the marine environment, these rules do not hamper innocent passage because they do not have the practical effect of denying or impairing the right of innocent passage.

\textsuperscript{189} Article 53 (4), LOSC.
\textsuperscript{190} Article 53 (5), LOSC.
\textsuperscript{191} Article 39 (2) (a), LOSC.
Table 3. Relationship between Articles in Government Regulation Number 36 of 2002 and the LOSC

<table>
<thead>
<tr>
<th>No.</th>
<th>Articles GR 36/2002</th>
<th>Denotation</th>
<th>Articles LOSC</th>
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</thead>
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<tr>
<td>1</td>
<td>1</td>
<td>Meaning of passage, innocent passage, Indonesian waters, sea lanes. Refers to Act 6/1996</td>
<td>18, 19</td>
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<tr>
<td>2</td>
<td>2 (1)</td>
<td>Exercising of the right of innocent passage without entering internal waters or ports</td>
<td>18 (1) (a)</td>
</tr>
<tr>
<td>3</td>
<td>2 (2) 3 (1)</td>
<td>Use of normal routes</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>3 (2)</td>
<td>Exercising of the right of innocent passage in order to enter internal waters or ports</td>
<td>18 (1) (b)</td>
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<td>5</td>
<td>3(3)</td>
<td>Limitation of transit</td>
<td>18 (2)</td>
</tr>
<tr>
<td>6</td>
<td>3 (4), 4(1), 5</td>
<td>Non innocent passage activities</td>
<td>19 (2), 21</td>
</tr>
<tr>
<td>7</td>
<td>6</td>
<td>Ten per cent rules in narrow straits</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>7 (1)</td>
<td>Fishing vessels use special sea lanes</td>
<td>21 (1)</td>
</tr>
<tr>
<td>9</td>
<td>7 (2)</td>
<td>Stowage fishing gears</td>
<td>19(2)(i), 21(1)(e)</td>
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<tr>
<td>10</td>
<td>8 (1)</td>
<td>Research vessels use special sea lanes</td>
<td>21 (1)(g)</td>
</tr>
<tr>
<td>11</td>
<td>8 (2)</td>
<td>Stowage of research equipments</td>
<td>21 (1)(g)</td>
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<td>12</td>
<td>9</td>
<td>Obligation to monitor coastal radio</td>
<td></td>
</tr>
<tr>
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Indonesia has accorded several rights and duties to ships exercising the right of innocent passage in Government Regulation Number 36 of 2002. The rights and duties of vessels exercising the right of innocent passage are outlined in Articles 2 to 13 of the Government Regulation as seen in Table 3. These rights and duties emphasise the rights and duties stated in Act Number 6 of 1996 as mentioned above.\(^{193}\) Ships exercising the right of innocent passage shall use normal routes or routes normally

\(^{192}\) The Government Regulation was the implementation of Act Number 4 of 1960 on Indonesian Waters.

\(^{193}\) List of rights and duties of ships as mentioned in Table 3.
used for international navigation while passing through Indonesian waters and have to take precautionary measures to ensure safety of navigation.\textsuperscript{194} The normal routes are routes from place of origin to place of destination using normal speed, normal course and are continuous.\textsuperscript{195} Ships are not permitted to navigate back and forth, stopping, and anchoring, except otherwise in force majeure.\textsuperscript{196} Indonesia has not published a guidance of shipping which identifies routes for exercising the right of innocent passage.\textsuperscript{197} Ships are therefore free to design their course in order to maintain the closest and safest route. There is a requirement to use certain normal routes which is stated in Act Number 17 of 2008 on Shipping, particularly when passing certain areas which are environmentally dangerous or critical.\textsuperscript{198}

Articles 4 and 5 of the Government Regulation stipulate forms of activities which are not innocent. Those activities are the same as those mentioned in Article 19 (2) of the LOSC, likewise in the elucidation of these articles they refer directly to the provisions in the LOSC. Again, the Government Regulation does not provide further clarification on such terms which are unclear or vague. It would appear that interpretation is left to officers in the field to determine what constitutes non-innocent activities. For this reason the following terms are not legally defined, for example the term ‘any other activity not having a direct bearing on passage’,\textsuperscript{199} ‘any act of propaganda aimed at affecting the defence or security of the coastal State’.\textsuperscript{200}

There is no single article in Act Number 6 of 1996 and Government Regulation Number 36 of 2002 which addresses the situation where ships do not comply with

\begin{itemize}
\item \textsuperscript{194} Article 2 (2), Government Regulation Number 36 of 2002.
\item \textsuperscript{195} Article 3 (1), (2), (3), Government Regulation Number 36 of 2002.
\item \textsuperscript{196} Article 3 (4), Government Regulation Number 36 of 2002.
\item \textsuperscript{197} Indonesian Pilotage mentions routes normally used for navigation, but it is not merely dedicated for innocent passage. Indonesian Pilotage focuses on safety of navigation in Indonesian waters which include routes, navigational aids, weathers, ports, etc.
\item \textsuperscript{198} Article 190, Act Number 17 of 2008.
\item \textsuperscript{199} Article 4 (1) (g), Government Regulation Number 36 of 2002.
\item \textsuperscript{200} Article 4 (1) (d), Government Regulation Number 36 of 2002.
\end{itemize}
Indonesian laws and regulations. The Act and Government Regulation only refer to the provisions of the LOSC, so there is no clear definition of what constitutes innocent or non-innocent passage and whether it has to follow national or international standards. It is difficult to ascertain whether ships passing through Indonesian waters do so in an innocent way or not. Moreover, there is no method or procedure relating to enforcement for non-compliant activities. So if a non-compliant activity occurred, it would be difficult for Indonesian law enforcement to deal with it.

Indonesia acknowledges that where the strait is narrow, ships exercising the right of innocent passage shall not navigate closer to the coast than ten per cent of the width of the strait.\footnote{Article 6, Government Regulation Number 36 of 2002.} This latter provision is not reflective of international law. It might be assumed that the provision came from the restriction in the archipelagic sea lanes passage.\footnote{Article 53 (5), LOSC.} It is arguable whether this provision is in accordance with international law or not. But it may also be designed to ensure the safety of the island and surrounding environment. The Government Regulation does not elaborate further what constitute narrow straits,\footnote{‘Narrow strait’ could refer to geographical condition and the density of traffic.} how to define ten per cent rule, how to measure the rules, and why such rules must be applied and depicted. Thus, the rule is not clearly defined.

Article 10 of the Government Regulation states that foreign ships have the obligation to pay for services rendered to the ship while exercising innocent passage through archipelagic waters and the territorial sea. If a foreign ship refuses to pay, sanctions will be applied based on civil law. Government Regulation Number 36 of 2002 does not specify what constitutes general and specific services that should be provided to ships exercising the innocent passage right in order for such ships to take
some burden sharing. The Government Regulation only mentions that ships have to pay for such services.\footnote{204} But Article 176 (1) of Act Number 17 of 2008 on Shipping stipulates that ships passing through Indonesian waters must pay for services relating to the use of navigational aids. There is no further explanation on what services are included and how to pay for such services. Act Number 17 of 2008 only mentions that further government regulations will be made which have yet to be promulgated. Furthermore, there is an exception for State or government ships and warships.\footnote{205} It is clear that Indonesia needs to define the form of services that could be provided to the ships exercising innocent passage right. Then Indonesia could ask for a payment based on such services. Such list of services should be discussed or adopted by IMO in order to obtain wider acceptance from members and all user States are made aware of the services and payment that are levied.

Similar to Act Number 6 of 1996, Government Regulation Number 38 of 2002 does not clearly state the obligation of Indonesia on innocent passage. The obligation of Indonesia relates to the safety of navigation. However, the Government Regulation does not mention the obligation of Indonesia to provide information relating to the safety of navigation, although the LOSC gives authority to do so.\footnote{206} Under Act Number 17 of 2008 on Shipping, there are several articles that indicate the duties of the Indonesian Government to publish dangers to navigation, such as ship wreckage.\footnote{207} In practice, information related to safety of navigation is published in Indonesia Notices to Marines on a weekly basis.

\footnote{204} Article 10, Government Regulation Number 36 of 2002.
\footnote{205} Article 176 (2), Act 17 of 2008.
\footnote{206} Article 21 (1) (a, b), LOSC.
\footnote{207} Articles 183, 202 and 203, Act Number 17 of 2008. Those obligations include broadcasting the dangers to navigation, safety of navigation, and standard time, and also removing ship wreckage and erecting navigational aids.
4.5.3. Other Laws and Regulations

There are other Indonesian laws and regulations relevant to the analysis. These include President Decree on Authorities of Issuing Sailing Permit for Activities of Foreign Ships in Indonesian Waters\(^{208}\) and Decision of Minister of Defence and Security on Designation of Sea Lanes for Foreign Fishing Vessels.\(^{209}\) These laws and regulations are part of the implementation of Act Number 4 of 1960 on Indonesian Waters which has been superseded by Act Number 6 of 1996 on Indonesian Waters. However, there are differing opinions as to whether the Presidential Decree and other regulations still apply or not. Act Number 6 of 1996 is not very clear on the issue. Some commentators believe that laws and regulations are still in force if there are no laws or regulations which clearly revoke those laws and regulations. On the other hand, because Act Number 4 of 1960 on Indonesian Waters is no longer valid, all laws and regulations which are considered as the implementation of the Act are invalid as well. The situation is further complicated by the fact that the validity or invalidity of such laws and regulations apply differently. In order to gain a better understanding on these laws and regulations, it would be necessary to analyse these laws and regulations.

4.5.3.1. President Decree Number 16 of 1971

In 1971, the President of Indonesia enacted President Decree Number 16 of 1971 on Authority of Issuing Sailing Permit for Activities of Foreign Vessels in Indonesian Waters.\(^{210}\) The President Decree regulates all foreign ships which intend to

\(^{208}\) President Decree Number 16 of 1971.

\(^{209}\) Decision of Minister of Defence and Security Number Kep/17/IV/1975. Kep/17/IV/1975 is type of reference used by the Indonesian Armed Forces. Kep is type of the letter which means Decision, 17 is the number of the letter, IV is month of issued and 1975 is the year of issued.

\(^{210}\) The President Decree Number 16 of 1971 has been implemented into several technical regulations such as Note of Minister of Defence and Security Number SHK/521/VII/71 on Procedure of Aircraft (civil and military) while Passing through the Indonesian Restricted Areas, and Letter of Indonesian Armed Forces Number STR/632/1985 on Procedure on Issuing Security Clearance of Foreign Ships and
undertake activities or passing through Indonesian waters should get a sailing permit.\textsuperscript{211} The sailing permits consist of two types, sailing permit for civil vessels and security clearance for warships and government ships.\textsuperscript{212} The sailing permit is issued by the Minister of Transportation, whereas security clearance is issued by the Minister of Defence and Security.\textsuperscript{213} In the case of a civil vessel used for hydrographic survey activity or other activities which may affect the security of Indonesia, the vessel must get both a sailing permit and security clearance.\textsuperscript{214} It seems that a hydrographic survey which is part of marine scientific research is considered as activities that may relate to the security of Indonesia.

The requirements for ships to get prior notification and/or authorisation before passing through Indonesian waters, became the subject of a long debate as mentioned previously.\textsuperscript{215} Considering the absence of any requirement on notification and/or authorisation of foreign warships before passing through Indonesian waters in Act Number 6 of 1996, Government Regulation Number 36 of 2002, and other laws and regulations, the validity of the President Decree Number 16 of 1971 can be questioned. It could be argued that the President Decree and its implemented regulations are not valid. Thus it can be argued that, the requirement for notification before certain categories of vessels can exercise the right of innocent passage, although highly recommended and needed for the interest of Indonesia, is not supported by President Decree Number 16 of 1971.\textsuperscript{216}

\textsuperscript{211} Article 1 (1), President Decree Number 16 of 1971.
\textsuperscript{212} Article 1 (2), President Decree Number 16 of 1971.
\textsuperscript{213} Article 2, President Decree Number 16 of 1971.
\textsuperscript{214} Article 3, President Decree Number 16 of 1971.
\textsuperscript{215} See, description in section 4.4.2.1.
\textsuperscript{216} Seminar in the Indonesian Navy Headquarters, March 2005, personal experience of the author attended the seminar. According to Hasjim Djalal, warships and military aircraft exercising the right of
In practice, the security clearance and sailing permits are only required for ships who wish to make port calls or are calling at the ports of Indonesia. Maritime Domain Awareness initiatives in response to contemporary maritime security threats and concerns have also influenced the discussion on the need for notification and/or authorisation of foreign ships passing through Indonesian waters.

### 4.5.3.2. Decision of Minister of Defence and Security on Sea Lanes of Foreign Fishing Vessels

In 1975, there was a Decision by the Indonesian Minister of Defence and Security on Sea Lanes of Foreign Fishing Vessels under Kep/17/IV/1975.\(^{217}\) This Decision required that all foreign fishing vessels passing through Indonesian waters from the Indian Ocean to the Pacific Ocean or vice versa be required to pass through designated sea lanes. The special sea lanes which are in the Straits of Lombok and Makassar\(^ {218}\) are defined by a series of continuous axis lines from the entry points of passage routes to the exit points.\(^ {219}\) According to the Decision, foreign fishing vessels shall not deviate more than five nautical miles to either side of such axis lines during passage.\(^ {220}\)

Foreign fishing vessels passing through the special sea lanes are not to engage in any fishing activities,\(^ {221}\) including the stowage of fishing gear.\(^ {222}\) These obligations are the same as the obligation of ships while exercising the rights of innocent archipelagic sea lanes are advised to inform the Indonesian government. 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, 64.

\(^{217}\) Kep/17/IV/1975 is the reference method used by the Indonesian Armed Forces which means Decision Number 17, April 1975.

\(^{218}\) Article 1 (a), Decision of Minister of Defence and Security Number Kep/17/IV/1975.

\(^{219}\) The axis lines are in the Sulawesi Sea (05º 12' 00"N/127º 06' 00" E and 05º 05' 00"N/125º 35' 00"E), Makasar Strait (01º 00' 00"N/119º 42' 00"E; 02º 37' 30"S/118º 35' 00"E and 03º 25' 00"S/118º 34' 00" E), and Strait of Lombok (05º 29' 30"S/117º 03' 00" E; 07º 57' 00"S/115º 57' 00"E; 08º 18' 30"N/115º 48' 00"E; and 09º 07' 00"S / 115º 37' 00"E).

\(^{220}\) Article 1 (c), Decision of Minister of Defence and Security Number Kep/17/IV/1975.

\(^{221}\) Article 2 (c), Decision of Minister of Defence and Security Number Kep/17/IV/1975.

\(^{222}\) Article 2 (a, b), Decision of Minister of Defence and Security Number Kep/17/IV/1975.
passage, \(^{223}\) transit passage, \(^{224}\) and archipelagic sea lanes passage. \(^{225}\) Although the Decision does not refer to the LOSC, the provisions are similar to the provisions of the LOSC.

It could be argued that obligations under Article 1 of the Decision of Minister of Defence and Security Number Kep/17/IV/1975 could be considered contrary to international law, because under international law\(^{226}\) foreign fishing vessels are treated as ordinary ships which have innocent passage right through the waters of a foreign State. \(^{227}\) According to Sumardiman, the special sea lanes were intended to apply to Japanese fishing vessels. \(^{228}\) This was the reason why Japan gave assistance to Indonesia to enhance safety of navigation in the areas of the special sea lanes. \(^{229}\) Although the special sea lanes were created by a bilateral agreement, the Decision is applied to all foreign fishing vessels. Thus it might be considered as hampering the exercise of the right of innocent passage. On the other hand, designation of the special sea lanes can also be justified as a right of Indonesia to regulate passage of foreign ships in the shallow, narrow, and the density of traffic of straits, \(^{230}\) even though the designation of such sea lanes was not adopted or recognised by IMO. \(^{231}\)

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\(^{223}\) Article 19 (2) (i), LOSC.
\(^{224}\) Articles 39 (1) (d) and 42 (1) (c), LOSC.
\(^{225}\) Articles 54, 39 (1) (d) and 42 (1) (c), LOSC.
\(^{226}\) Article 17 of the LOSC stipulates that ships of all States enjoy the right of innocent passage. The phrase ‘ships of all States’ include fishing vessel.
\(^{227}\) Freedom of navigation was formerly proposed by Grotius and subsequently accept as customary international law. See, Francis Ngantcha, above n 2; Shekhar Ghosh, above n 2; C J Colombos, above n 2; C J Colombos, above n 2; Ruth Lapidoth, above n 2.
\(^{228}\) Seminar in the Indonesian Navy Headquarters, March 2005. Notes on file with the author who attended the seminar.
\(^{229}\) Japan gave financial and technical assistance to conduct hydrographic survey and publish the navigational charts. The Corridor could be seen in the Indonesian Navigation Chart Number 2 and other charts related to the area. Report on the hydrographic survey in Straits of Makassar and Lombok, in 1974 (unpublished). The author had the opportunity to read the report while posted in Dishidros TNI AL (Indonesian Navy Hydrographic Office).
\(^{230}\) Article 22 (1) of the LOSC stipulates that coastal States may require foreign ships exercising the right of innocent passage to use such sea lanes having regard to the safety of navigation.
\(^{231}\) Article 22 (3) (a), LOSC.
4.6. Conclusion

In recognition of the sovereignty of coastal States over their waters, it is also generally accepted that the right of innocent passage is restricted. There are restrictions on ships exercising the right of innocent passage: for instance, navigation should be on the surface, should be conducted for peaceful purposes and should be inoffensive. So the right of innocent passage is not as freedom of navigation as passage in the high seas. On the other hand, the sovereignty of coastal States is not full and complete because of the right of innocent passage. The exercise of sovereignty and the exercise of the right of innocent passage in Indonesian waters are a reciprocal bundle of rights and obligations, of opportunities and responsibilities.

Act Number 6 of 1996 on Indonesian Waters, Act Number 17 of 2008 on Shipping, and Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships in Exercising Innocent Passage through Indonesian Waters, do not regulate all activities of innocent passage mentioned in the LOSC. There are certain activities, relevant to Indonesia, which are regulated in the Acts and Government Regulations. The remainder of activities relating to the exercise of the right of innocent passage refer back to the provisions of the LOSC and international law. So there are still many activities that need further regulation.

Other laws and regulations further regulate innocent passage. These include President Decree Number 16 of 1971 on Authorities of Issuing Sailing Permit for Activities of Foreign Ships in Indonesia Waters and Decision of Minister of Defence Number Kep/17/IV/1975 on Sea Lanes for Foreign Fishing Vessels. These regulations implement Act Number 4 of 1960 on Indonesian Waters which has been repealed. Indonesia considers submarines as vessels exercising hostile passage instead of non-innocent passage since Indonesia regards submarines to be part of navies. Indonesian
State practice allows the suspension of the right of innocent passage if the voyage will jeopardise the security of Indonesia. However, the suspension must be announced publicly before it takes effect. While the right of innocent passage is clearly established in the LOSC and in international law, determining whether a passage is innocent or non-innocent is not easy given the ambiguity in the provisions of the LOSC. Indonesia would need to give further consideration to what constitutes innocent or non-innocent passage in its national laws and regulations.

The next chapter will examine archipelagic sea lanes passage in Indonesian waters, which will include the definition, meaning of archipelagic sea lane passage and special characteristics of archipelagic sea lane passage, how Indonesia designed the archipelagic sea lane passage rights, issues related to the application of the provisions of LOSC, and obligations of Indonesia, ships and aircraft exercising the right.
Chapter Five

Archipelagic Sea Lanes Passage in Indonesian Waters

5.1. Introduction

An archipelagic State can draw archipelagic baselines connecting the outermost points of the outermost islands and drying reefs\(^1\) and proclaim the waters landward of the baselines as archipelagic waters.\(^2\) Churchill and Lowe have characterised 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.’\(^3\) The archipelagic State has sovereignty over its archipelagic waters, including the super-adjacent airspace, seabed and subsoil, and the resources therein.\(^4\) This sovereignty is subject to a number of rights enjoyed by foreign States, such as allowing passages through the archipelagic waters,\(^5\) the obligation to respect existing agreements with other States, recognition of traditional fishing rights and other legitimate activities,\(^6\) and respect for existing submarine cables and permit maintenance and replacement of such cables.\(^7\)

During the Third United Nations Conference on the Law of the Sea, the right of passage of user States was one of the contentious issues in the negotiation of the LOSC provisions on archipelagic waters.\(^8\) The final text adopted was a compromise which

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\(^1\) Article 47, LOSC.

\(^2\) Article 49, LOSC.


\(^4\) Articles 2 and 49 (2), LOSC.

\(^5\) Articles 52 and 53, LOSC.

\(^6\) Articles 47 (6) and 51 (1), LOSC.

\(^7\) Article 51 (2), LOSC.

attempted to balance the interests of coastal States which includes archipelagic States
and user States.\textsuperscript{9} The regime of archipelagic sea lanes passage evolved as an attempt
to balance the territorial integrity and national security of the archipelagic States with
the right of transit through passageways which fall within the archipelagic waters. As
Wisnumurti notes: ‘… the regime of archipelagic sea lanes passage is a compromise
between the regime of innocent passage advocated by Indonesia (on the basis of the
1957 Djuanda Declaration and the 1960 Law No. 4) and the other archipelagic States,
…and the regime of freedom of navigation advocated by the maritime powers…’\textsuperscript{10}
This was a key issue because of the insistence by major naval powers in the
Conference on the necessity of an assured right of transit for all vessels and aircraft
through and over archipelagic waters.\textsuperscript{11}

The exercise of the right of archipelagic sea lanes passage was a new type of
passage introduced by the LOSC. Djalal points out that the exercise of archipelagic sea
lanes passage is in accordance with the rules of international law and is not just in
strict conformity with the LOSC since there has been no rule of international law in the
past on this matter.\textsuperscript{12}

The designation of archipelagic sea lanes itself poses some problems. The
determination and the designation of sea lanes would not be easy since it would
involve questions as to how many sea lanes should be designated, how to designate, as

\textsuperscript{9} LOSC was adopted as a ‘package deal’ whereby coastal and user States made mutual concessions to
arrive at a balanced outcome. 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 \textit{American
Journal of International Law} 871, 873-76; Barry Buzan, ‘Negotiating by Consensus: Developments in
Technique at the United Nations Conference on the Law of the Sea’ (1981) 75(2) \textit{American Journal of
International Law} 324, 331-33.

\textsuperscript{10} Nugroho Wisnumurti, 'Indonesia and the Law of the Sea ' in Choon-ho Park and Jae Kyu Park (eds),

\textsuperscript{11} William T Burke, 'Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea

\textsuperscript{12} Hasjim Djalal, 'The Law of the Sea Convention and Navigational Freedoms' in Donald R Rothwell and
35, 1, 1, 5.
Indonesia has had to designate sea lanes through its archipelagic waters in which foreign vessels and aircraft are able to exercise the right of archipelagic sea lane passage. The designation of archipelagic sea lanes is the right of the archipelagic State but consultation with the user States and international organisations would be well advised so as to accommodate the general interests of user States. Furthermore, the environmental aspect which requires marine scientific research, knowledge and technology also has to be taken into consideration while designating archipelagic sea lanes.

Indonesia has recognised that ships and aircraft exercise their rights of archipelagic sea lanes passage through and over the Indonesian archipelago. In order to accommodate such passage, Indonesia enacted Act Number 6 of 1996 and Government Regulation Number 37 of 2002 on Rights and Responsibilities of Foreign Ships and Aircraft on Exercising Archipelagic Sea Lanes Passage Right through and over Designated Archipelagic Sea Lane.

This Chapter will analyse issues pertaining to the right of archipelagic sea lane passage in Indonesian waters. It will explore the definition and meaning of archipelagic sea lanes passage and identify its special characteristics. It will then

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13 Involvement of members of the Indonesian Parliament (DPR) in certain circumstances creates further problems considering most of them are political appointees and most of them do not have sufficient understanding of the issues.


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


18 Article 20, Act Number 6 of 1996.
examine how Indonesia has designated its archipelagic sea lanes. It will examine the rights and duties of Indonesia as a coastal State in implementing the rights of archipelagic sea lane passage and also examine the rights and duties of ships and aircraft which pass through Indonesian waters exercising the right of archipelagic sea lane passage. It will analyse the Indonesian laws and regulations on archipelagic sea lanes passage and also issues arising from archipelagic sea lanes passage.

5.2. Definition, Function, and Differences of the Regimes

The main concern of the international community with respect to the archipelagic concept is the issue of navigation. Archipelagic sea lanes passage is considered an important component of navigational rights granted to user States in archipelagic waters and territorial seas. The provisions of the LOSC provide for the sovereignty of the archipelagic State over waters, interconnecting islands and other natural features; while maritime/user States get a non-suspendible form of passage for ships and/or aircraft known as innocent passage and archipelagic sea lanes passage.

Innocent passage which refers only to the passage of ships has been examined in the previous chapter.

The regime of archipelagic sea lanes passage is based on the concept of passage for both ships and aircraft through and over archipelagic waters and the adjacent territorial sea from entry to exit points. In addition, the right of archipelagic sea lanes passage is identical to the right of transit passage through straits used for international

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19 As Prescott argues, once a State has declared archipelagic State status it places upon itself greatest responsibilities to the international community is archipelagic sea lanes passage in its archipelagic waters and territorial sea. Moreover Djalal notes, for Indonesia, achieving acceptance of the archipelagic concept as an international legal principle involved a trade off, in that it had to recognise a right of passage which went beyond the normal right of innocent passage. See, Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (2005), 178-79; Hasjim Djalal, above n 15, 62.

20 Article 52(1), LOSC.

21 Article 53, LOSC.

22 Article 53(1 and 4), LOSC.
navigation which is provided for under Article 54 of the LOSC. There are still many issues involved in the implementation of the provisions of the LOSC on archipelagic sea lanes passage.

5.2.1. Definition and Function of the Archipelagic Sea Lanes Passage Right

The right of archipelagic sea lanes passage is defined in Article 53 (3) of the LOSC as ‘...the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone’. Thus, archipelagic sea lanes passage, like other forms of passage (innocent passage and transit passage), is the right of foreign ships and aircraft to traverse in their normal mode, continuously, expeditiously and unobstructed from one part of the high seas or an EEZ to another part of the high seas or an EEZ. According to Djalal, the term ‘unobstructed’ means the physical obstruction that could hamper navigation, for example, where the archipelagic State’s ship has an intention to hamper the passage of a foreign ship by blocking the course of the foreign ship.

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, namely: the right of an archipelagic State to designate; no air routes can exist without sea lanes thereunder; sea lanes should be suitable for passage;

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23 Some articles under transit passage such as Articles 39, 40, 42, and 44 of the LOSC apply mutatis mutandis to archipelagic sea lanes passage.

24 The term normal mode will be discussed in Section 5.5.3.6.

25 Notes by Hasjim Djalal, during internal meeting on designation of Indonesian archipelagic sea lanes passage, in Indonesia Foreign Affairs, Jakarta, March 1997. Note on file with author who participated the meeting. Notes are not publicly available.
passage should be continuous and expeditious; and 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 or not.26

Under Article 53 (1) of the LOSC, it seems that the archipelagic State has to designate the sea lanes first and then identify routes above the sea lane as routes for aircraft to exercise the right of archipelagic sea lanes passage.27 The word ‘thereabove’ clearly means that the air route is above the designated sea lanes. It is evident that sea lanes were originally restricted to be used by ships and not aircraft.28 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 way. There is no clear meaning on ‘suitable’, but it can be assumed that ‘suitable’ means the sea lanes must be safe and free of navigational obstructions.29 So this provision requires archipelagic States to conduct marine research include hydrographic surveys before designing the sea lanes. In addition, the passage should be continuous and expeditious. Continuous means the passage must be from one part of the high seas or EEZ to another part of the high seas or EEZ. 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.30 There are no rules on the maximum or minimum speed a ship or aircraft must travel, so it will

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26 Hasjim Djalal, above n 15, 62.
27 According to Djalal, the air routes should be concomitant with the sea lanes, so archipelagic States should designate the sea lanes first, then air routes thereabove. Hasjim Djalal, above n 12, 4.
28 The oldest right of ships pass through foreign waters is innocent passage. The innocent passage right is the right for ships only. See, Phillip P Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 120.
29 Djalal notes that there is no stipulation that the archipelagic sea lanes must be ‘safe’. Hasjim Djalal, above n 12, 5.
30 During an informal meeting between Indonesia the United States and Australia, the term ‘expeditious’ was discussed, but there was no clear meaning concluded. Hasjim Djalal notes that the term ‘expeditious’ also means no back and forth movement as stated in the 19 rules. Hasjim Djalal, above n 15, 65.
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depend on the capability of the ships or aircraft themselves, geographical conditions and also weather conditions.\footnote{Personal experience of the author who attended an internal discussion in the Indonesian Navy, March 2003. There was an opinion on how to determine whether a ship’s transit is expeditious. There was an understanding that speed limits of the ships could not be determined because it depended on capability of the ships, geographical and weather conditions. The report of the internal discussion was not published. Note on file with author.} Finally, sea lanes may be used by all ships and aircraft.\footnote{The terms ‘ships and aircraft’ could also be found in Articles 53 (2) (5) of the LOSC.} This could include all categories of ships or aircraft regardless of type, cargo, means of propulsion, whether commercial or not, whether or not they are entitled to sovereign immunity;\footnote{Elaboration on ships can find in Haijiang Yang, \textit{Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea}, Hamburg Studies on Maritime Affairs (2006), 7-12.} 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.\footnote{Article 53 (5), LOSC.} 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.\footnote{Article 53 (5), LOSC.} 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.\footnote{Article 53 (12), LOSC. It is argued what constitute routes normally used for international navigation, is dependent on the amount of vessel traffic and the length of time that the routes have been used by flags States to be considered as ‘international navigation’.}

The LOSC emphasises that all ships and aircraft enjoy the right of archipelagic sea lane passage.\footnote{Article 53 (2), LOSC.} Considering that the archipelagic sea lanes passage is for ships and aircraft which is important for the movement of military forces, it could be argued that the archipelagic sea lanes passage was formerly for the accommodation of the needs of
military forces. Although there is no clear evidence that archipelagic sea lanes are dedicated to accommodate the movement of military forces, Djalal argues that the right of archipelagic sea lanes passage was formerly proposed for the navigation of warships, including submarines, and the free navigation of aircraft. 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. Alexander also argues that the right accommodates the specific passage interest of the United States and maritime user States for the movement of their military forces, which usually consists of many ships and aircraft for the protection of vessels which move in formation.

It is interesting to note that the LOSC requires archipelagic States to designate air routes above the sea lanes. Since non-military aircraft would normally use routes designated by the International Civil Aviation Organization (ICAO), 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 analysis appears to confirm that the main purpose of attaching air routes to sea lanes is to accommodate military vessels and aircraft.

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38 Notes by Hasjim Djalal, during internal meeting on designation of Indonesian archipelagic sea lanes passage, in Indonesia Foreign Affairs, Jakarta, March 1997. Personal experience of the author who attended the meeting. Notes are not publicly available.


40 Lewis M Alexander, Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States (1986), 162.

41 Article 53 (1), LOSC.
5.2.2. The Differences between Archipelagic Sea Lanes Passage and other Passage Regimes

The LOSC recognises the navigational rights of innocent passage, archipelagic sea lanes passage and transit passage. It is essential to understand the significance of and the differences between these three rights of passages. The significant differences between archipelagic sea lanes passage and transit passage will be discussed in the following chapter.

The right of innocent passage is guaranteed in archipelagic waters, even where archipelagic States have already designated archipelagic sea lanes. The right of innocent passage is exercised in the normal passage routes used for international navigation. Having considered that archipelagic sea lanes passage is designated for ‘normal passage routes’, it could be argued that the right of innocent passage can be exercised in archipelagic sea lanes and in the other normal passage routes. While discussing the exercise of both rights, it is very difficult to distinguish whether the vessels are exercising the right of innocent passage or the right of archipelagic sea lanes passage. Therefore, it is essential to differentiate both rights. Djalal suggests the following differentiation:

a) In innocent passage ‘submarines and other underwater vehicles are required to navigate on the surface and to show their flag’, while in archipelagic sea

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42 Part II, Section 3 and Article 52, LOSC.
43 Articles 53 and 54, LOSC.
44 Part III, Section 2, LOSC.
45 Article 52 (1), LOSC.
46 There are no specific provisions in the LOSC on which sea lanes could be used for exercising the right of innocent passage. The LOSC only describes specific sea lanes while the coastal States want to designate traffic separation schemes for the purpose of safety of navigation stated in Article 22 of the LOSC.
47 For example, merchant ships which do not operate aircraft.
49 Notes by Hasjim Djalal, during internal meeting on designation of Indonesian archipelagic sea lane passage, in Indonesia Foreign Affairs, Jakarta, March 1997. Personal experience of the author who attended the meeting. Notes are not publicly available. Hasjim Djalal, above n 15, 61.
lanes they are allowed to navigate in ‘normal mode’, thus there is the possibility for underwater passage;
b) In innocent passage there is no right of over-flight while in archipelagic sea lanes such right of overflight is permitted over the sea lanes;
c) The right of innocent passage can be ‘suspended’ while the right of archipelagic sea lanes cannot be suspended although the sea lanes can be ‘substituted’;
d) In innocent passage an archipelagic State has more powers to regulate and to exercise control while in archipelagic sea lanes passage this right is more limited;
e) There are no precise rules of international law with regard to the requirement of prior notification or prior authorisation for warships navigating in innocent passage in the territorial sea. Some countries require prior notification, some require prior authorisation and some strongly oppose these requirements. In archipelagic sea lanes, there is no requirement for prior notification or prior authorisation for the passage of warships or military aircraft.

These differences are reflected in the provisions of the LOSC, but the question remains unresolved. For example ships passing through the archipelagic sea lanes could be exercising the right of innocent passage or the right of archipelagic sea lanes passage. These uncertainties can create difficulties for law enforcement should something happen to a ship. Because of this, some commentators argue that archipelagic States should have the right to obtain information as to whether ships are exercising the right of innocent passage or the right of archipelagic sea lanes passage.

5.3. Designation of Archipelagic Sea Lane Passage in Indonesian Waters

Indonesia has designated three major archipelagic sea lanes. These sea lanes are (1) in the western part of the Indonesian archipelago Indonesian Archipelagic Sea Lanes I together with its ‘spurs’ for the navigation between the South China Sea and the Indian Ocean; (2) in the central part of the Indonesian archipelago, Indonesian Archipelagic Sea Lanes II for the navigation between the Sulawesi Sea and the Indian Ocean; and (3) in the eastern part of the Indonesian archipelago, Indonesian Archipelagic Sea Lanes III.

50 Articles 20 and 53 (3); 17 and 53 (2); 19 and 53 (3), LOSC.
51 Personal experience of the author who attended the internal discussion in the Indonesian Navy, March 2003, where the issue was raised.
52 After the adoption of IMO, Indonesia enacted Government Regulation Number 37 of 2002.
Archipelagic Sea Lanes III for the navigation between the Timor Sea and the Arafura Sea to the Pacific Ocean, together with its spurs.

The process of designating Indonesian Archipelagic Sea Lanes was made in several different stages over a period of time frame. The process involved surveys, national coordinating meetings, consultations with relevant neighbouring and other interested States, (particularly Australia and the United States) relevant international organisations (such as the International Maritime Organization (IMO), the International Hydrographic Organization (IHO) and the International Civil Aviation Organization (ICAO)), and culminating in the acknowledgment and adoption by IMO.

The process of designation of Indonesian archipelagic sea lanes can be divided into four stages, namely preparation for designation, informal consultation, IMO meeting, and post–adoption of the Indonesia archipelagic sea lanes.

5.3.1. Preparation for Designation

The designation of the Indonesian archipelagic sea lanes passage was initiated by the Indonesian Navy. In 1991, the Indonesian Navy held seminars in a strategic forum in order to accommodate the passage of warships in Indonesian waters.\(^{53}\) The seminar found that Indonesia should provide three sea lanes, north-south access, dedicated only for warships passing through the archipelago.\(^{54}\) The Minister of Politics and Security believed that this proposal of access for warships could be used as a preliminary proposal for designation of archipelagic sea lanes which needed to be

\(^{53}\) The Indonesian Naval Command and Staff College has carried out a Forum Strategic Seminar every year in order to discuss and solve strategic and operational issues.

\(^{54}\) There were no spurs in the north-south sea lanes for warships transiting Indonesian waters concluded in the Indonesian Naval Forum Strategic Seminar. Personal experience of the author who attended internal seminar in the Indonesian Navy Headquarters, March 2003. Note on file with author.
declared as soon as possible.\(^{55}\) The Department of Foreign Affairs initiated a national meeting to discuss the designation of Indonesia’s archipelagic sea lanes. On 17-19 January 1995, a national seminar was attended by representatives from various departments, agencies, non-governmental organisations (NGOs), universities, and the armed forces.\(^{56}\) The agenda of the national seminar consisted of the designation of sea lanes, rules applicable in sea lanes and time frames for designating archipelagic sea lanes. The national seminar concluded with the proposed archipelagic sea lanes shown in Figure 5 below\(^{57}\) and with the 19 rules applicable while ships and aircraft exercise passage in those sea lanes.\(^{58}\)

According to Djalal, there were nine considerations in the designation of the axis of the sea lanes.\(^{59}\) These are:

1. the need of international transportation and aviation in transiting Indonesian waters;
2. the hydrography, oceanography and natural marine conditions in and near the relevant axis lines;
3. the intensity of coastal and inter-island navigation and overflight;
4. the intensity of fishing activities, particularly of local artisanal fisherman;
5. the existence of oil and gas exploration and exploitation;
6. the presence of maritime installations and structures, as well as underwater cables and pipe lines;
7. the need to protect marine environments and marine parks as well as marine ecosystems;
8. the development of coastal and marine tourism; and
9. the peace, stability and security in Indonesia, particularly in the heavily populated coastal zones.

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\(^{55}\) Letter of Minister of Politics and Security to Minister of Foreign Affairs, Number B/153/Menko/Polcam/12/1994 dated 7 December 1994 (in Indonesian).

\(^{56}\) The meeting was known as Cisarua Meeting which is the first time Indonesia ran such an extensive meeting on the LOSC.

\(^{57}\) It could be seen on the illustrative map that formerly, the proposed Indonesian archipelagic sea lanes did not have many spurs (only in sea lanes III) compared with the adopted archipelagic sea lanes. The sea lane I was closed to Kalimantan Island, because there was an enclave in the Natuna Sea. The Sea Lane II was closed to Sulawesi Island, because the axis lane was placed in the deep waters.

\(^{58}\) These rules were known as 19 rules of archipelagic sea lanes passage. According to Djalal, the idea behind the set up of the 19 rules was that there is no clear provision on what constitutes the rights and duties of ships and aircraft while exercising the right of archipelagic sea lanes passage in the LOSC. Hasjim Djalal, above n 15, 63.

\(^{59}\) Ibid, 63.
The seminar also stated that a working group should be established in order to make preparations, set up consultations and attend meetings for the designation of the sea lanes. Furthermore, the seminar noted that the working group should consult with user States, neighbouring States, and appropriate international organisations.

5.3.2. Informal Consultations

In 1996, Indonesia began consultations with interested user States, such as Australia, Japan, the United States and the United Kingdom on the designation of archipelagic sea lanes, including the rules that would be applicable in those sea lanes. Such consultations produced general understanding on the 19 rules that would be applicable in the archipelagic sea lanes. In addition, Indonesia consulted with

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61 The 19 Rules are in fact embodied in the provisions of the LOSC and in international law.
international organisations (IMO, IHO, ICAO) and neighbouring States such as Malaysia, Thailand and Singapore.62

Informal meetings between Indonesia and the United States took place on numerous occasions.63 The agenda revolved around a review of Indonesia’s interests over its archipelagic waters, a review of the United States’ interests, discussion of archipelagic sea lanes and the LOSC, the role of IMO, the United States proposal on the designation and approval of archipelagic sea lanes, east-west route, and the rules to be applied in the archipelagic sea lanes. The United States suggested that Indonesia should revise the archipelagic baselines in the Natuna Sea and close the enclave. If Indonesia did not close the enclave, Indonesia would not be able to designate the Archipelagic Sea Lanes I which passed through the Natuna Sea.64 This was because the sea lanes would not pass through the Indonesia archipelagic water or territorial sea.65 During the consultations, the United States proposed normal routes that should be designated as archipelagic sea lane passage shown in Figure 6.

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62 Hasjim Djalal, above n 15, 62-63.
64 In order to close the ‘Natuna Enclave’ (see description in Chapter 3 of this thesis), Indonesia enacted Government Regulation Number 61 of 1998 on List of Geographical Coordinates of the Base Points of the Archipelagic Baselines of Indonesia in Natuna Sea (State Gazette Year 1998 No. 100, Supplementary State Gazette No. 3768).
65 Article 53 (4) of the LOSC stipulates that the archipelagic sea lanes and air route shall traverse the archipelagic waters and the adjacent territorial sea.
Several informal meetings between Indonesia and Australia were held in 1996 and 1997. The agenda focused on the designation of three archipelagic sea lanes, the 19 rules and the east-west route. Australia proposed archipelagic sea lanes passage based on normal routes as shown in Figure 7.

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Figure 6. Archipelagic Sea Lanes Passage Proposed by the United States in Bandung Meeting, March 1996

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Figure 7. Archipelagic Sea Lanes Passage Proposed by Australia in Jakarta Meeting, April 1996

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Informal meetings between Indonesia and the United Kingdom were held in 15 February 1996 in London. Indonesia explained that Indonesia would designate archipelagic sea lanes passage and Indonesia proposed three north-south archipelagic sea lanes and some spurs. The United Kingdom representative appreciated Indonesia’s position and supported the Indonesian proposal. Indonesia also consulted with Japan. The main concern of Japan was to ensure freedom of navigation for tankers in Indonesian waters.

On 14 February 1996, Indonesia consulted with the IMO representatives and outlined its proposal for designation of archipelagic sea lanes and also sought clarification on the role of IMO in the process. IMO noted that, based on introductory notes from United Nations Office of Legal Affairs Division for Ocean Affairs and the Law of the Sea as stated under Article 53(9) of the LOSC, the international organisation referred to pertains to IMO. IMO suggested that Indonesia should consult with IHO regarding hydrography considerations, such as safety of navigation and the environment. Furthermore, IMO suggested that Indonesia should send a letter to the IMO Secretary-General proposing the archipelagic sea lanes.

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67 Indonesian Navy Working Group, above n 63, 18.
71 There is relevant instrument of IMO related to reference that IMO as ‘competent international organization’, such as SOLAS V/8 (renumbered as V/10 in 2000 amendments), COLREG (rules 1 (d) and 10), Res. A.572 (14), Res. A.858 (20), MSC.72 (69).
72 Indonesian Navy Working Group, above n 63, 43.
73 Indonesian Navy Hydrographic Office, above n 60, 5.
On 23 August 1996, Indonesia consulted with IHO and explained that Indonesia would propose three archipelagic sea lanes. Indonesia informed IHO that the axis lines had been depicted on 21 Indonesian navigational charts. The President of IHO stated that the proposal was good in terms of the hydrography aspect and suggested the proposal could have been sent to IHO earlier. Furthermore, IHO proposed symbology that would be applied in the archipelagic sea lanes passage navigation charts.74

In June 1997, Indonesia had meetings with Singapore,75 Thailand76 and Malaysia.77 Indonesia explained the proposed archipelagic sea lanes and modification of baselines in the Natuna Sea and the Karimata Strait. Singapore noted that Indonesia and Singapore had an agreement on the territorial sea, so the modification would not affect the existing agreement. Thailand did not think the modification of baselines would affect Thai interests; whilst Malaysia stressed that as long as Malaysia’s interest in the Natuna Sea was still in existence, the modification of baselines would be acceptable.78

5.3.3. IMO Meetings

The designation of Indonesia’s archipelagic sea lanes was discussed in two meetings of the Maritime Safety Committee of IMO (MSC 67 and 69), two meetings of the Safety of Navigation Sub-Committee of IMO (NAV 43 and 44) and in the 20th General Assembly of IMO in December 1997.

74 Letter from Dr PG Cox, Chairman of Chart Standardization Committee, IHO, on Archipelagic Sea Lanes – Notes on Symbology Proposed, 15 September 1997. On file with author.
75 Consultation with Singapore on 16 June 1996 in Singapore.
76 Consultation with Thailand on 18 June 1996 in Bangkok, Thailand.
77 Consultation with Malaysia on 20 June 1996 in Kuala Lumpur, Malaysia.
78 Indonesia Delegation was lead by Hasjim Djalal. See, Indonesian Navy Hydrographic Office, above n 60, 18.
Indonesia’s submission compelled IMO to develop a procedure for assessing archipelagic sea lanes designation proposals. The document known as the ‘General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes’ reflects some practical compromises necessary to implement the archipelagic sea lanes concept envisaged in the LOSC. The General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes appears to achieve an appropriate balance between the interests of archipelagic States and user States and was also of interest to IMO member States because it was an opportunity to set criteria which would apply to all future proposals. The criterion eventually developed were designed to supplement the relevant Articles in the LOSC to the extent necessary to facilitate IMO decision processes. The General Provisions also contained the concept of partial designation which was originally raised by the United States Delegation at the 67th session of the Maritime Safety Committee (MSC).


80 The General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes was adopted by the 69th Meeting of the Maritime Safety Committee (MSC) in May 1998 and form Part H of IMO Ships Routeing System Publication. SN/Cir.199.

81 Australia and the United States played a vital role in the adoption of the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Se Lanes. It is because Australia conscious of its strategic and economic dependence on passage routes through Indonesian waters. While the United States conscious merely of its naval mobility as well as economic factor.

82 The Philippine delegate intervened on a number of occasions during the MSC 69 and NAV meetings to indicate that General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes and the handling of the Indonesia archipelagic sea lanes designation proposal should not represent a precedent for future archipelagic sea lanes designation. According to Jay L Batongbacal, since the issues were settled in inter-sessional meetings between Indonesia and user States, rather than in IMO process, the Philippines could not agree to be bound by such discussions. Jay L Batongbacal, 'Barely Skimming the Surface: Archipelagic Sea Lanes Navigation and the IMO' in A G Oude Elferink and Donald R Rothwell (eds), Oceans Management in the 21st Century: Institutional Framework and Responses (2004) 49, 59.

83 MSC, Report of Maritime Safety Committee on its Sixty-Seventh Session, MSC 67/22, 19 December 1996. Paragraph 7.33. The United States delegation believed that the Indonesian submission should be viewed as a 'proposal for partial designation only, and that IMO continue to have jurisdiction over the archipelagic sea lanes designation process until complete plan is adopted by IMO'.
air routes must include all normal passage routes used as routes for international navigation or overflight. The concept of partial designation is reflective somewhat of the excessive jurisdiction of IMO. Some Indonesians believed that there was no single provision in the LOSC that gave jurisdiction to IMO to adopt partial designation proposals submitted by archipelagic States. Furthermore, if such jurisdiction exists, it seems that IMO has jurisdiction whether the designation of sea lanes proposed by IMO is already a full designation or not. There are no parameters to justify what kind of designation constitutes full designation in terms of what kind of normal passage routes the archipelagic should be designated.

Indonesia commenced its submissions on the designation of the archipelagic sea lanes to IMO in 1996. The IMO Assembly decided to delegate its power in respect of archipelagic sea lanes to its Maritime Safety Committee (MSC). In relation to the Indonesian proposal, MSC undertook its duties with the assistance of its Subcommittee on Safety of Navigation (Sub-NAV). Indonesia formally submitted the proposal at the 67th Meeting of Maritime Safety Committee of IMO (MSC-IMO) which began deliberation on the Indonesian archipelagic sea lanes designation. Before that, the 67th session of the Marine Safety Committee requested Sub-NAV to consider the need for procedures regarding the adoption of archipelagic sea lanes proposal, specifically the terms of reference and reviewing the General Provisions on Ships’ Routeing. At its 43rd session in July 1997, Sub-NAV agreed on new draft procedures for the submission of archipelagic sea lanes proposals and also discussed

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84 This opinion was raised in several meetings in Indonesia attended by author. Some commentators in Indonesia believed that Indonesia agreed to propose a partial designation to get wider acceptance in the IMO Meetings.
85 Indonesia expressed an intention to submit the proposal at the MSC 66th session, MSC 66/24, Paragraph 7.30.
86 Proposal of Indonesia has been pending because IMO needed to set up guidelines on the adoption of such sea lanes first. Government of Indonesia, Safety of Navigation: Designation of Certain Sea Lanes and Air Routes there above through Indonesian Archipelagic Waters: Note by Indonesia, MSC 67/7/2, of 30 August 1996.
the Indonesian proposal. Certain technical deficiencies were raised in relation to the Indonesian proposal with the Sub-Committee Navigation 43 advising that further work was needed to develop an acceptable format for description of the sea lanes.

In May 1998, the 69th session of the MSC adopted the General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes which was published in Part H of IMO Publication on Ships Routeing. At the 67th Meeting of the MSC, IMO also adopted the ‘partial’ designation of Indonesian archipelagic sea lanes passage routes as shown in Figure 8.

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89 Sub-NAV Meeting revised the Adoption of Amendment to the General Provisions on Ships’ Routeing (Res. A.572(14) as Amended). The amendment of General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes has major innovations such as: creation of a concept of partial designation; reinforcement of the obligation upon archipelagic State to include all international navigation routes (Art. 53 (4)); more onerous pre proposal procedures; formal role for foreign States in relation to the preparation and determination of a proposal.

90 Res. MSC 72 (69) Adopted 19 May 1998. SN/Cir.200.
Figure 8. The Indonesian Archipelagic Sea Lane, Adopted by IMO MSC 72 (69)

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 has 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 from the Indian Ocean through the Sunda Strait and Natuna Sea 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 as well as 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.

The archipelagic sea lanes adopted by IMO were to come into effect on a date promulgated by Indonesian national legislation. That date shall not be earlier than six months after the date of designation of the sea lane.\textsuperscript{92}

5.3.4. Post-IMO adoption

IMO has already adopted the Indonesian archipelagic sea lanes which was a partial designation. Because of this there are a number of obligations that Indonesia is therefore required to implement. For example, Indonesia is required to propose for adoption further archipelagic sea lanes including all normal passage routes and navigational channels.\textsuperscript{93} Indonesia must periodically inform IMO of its plans, including the general location of the additional sea lanes and time frames for further submissions.\textsuperscript{94} IMO will retain continuing jurisdiction over the process of adoption of sea lanes in the Indonesian archipelago until the adoption includes all normal passage routes.\textsuperscript{95} It seems that these obligations have not been fulfilled by Indonesia, considering that there is no further report from IMO on Indonesian archipelagic sea lanes.

According to Djalal, Indonesia is still not ready to designate the other normal passage routes. This is because Indonesia has to prepare hydrographic and oceanographic data, charts, and navigational aids.\textsuperscript{96} These data and information require surveys which will be costly.

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\textsuperscript{92} General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes, Paragraph 3.13.
\textsuperscript{93} General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes, Paragraph 3.12.
\textsuperscript{94} General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes, Paragraph 3.12.
\textsuperscript{95} General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes, Paragraph 3.5.
\textsuperscript{96} Hasjim Djalal, above n 15, 68.
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 had enacted national legislation on archipelagic sea lanes passage as stated in the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes Paragraph 3.13 and that the legislation would enter into force in December 2002.97 There was a conflicting interpretation on the question of entry into force, with the national legislation based on the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes Paragraph 3.13. A majority of the IMO’s members believed that the provisions require six months time for entry into force and that this should be calculated from the time Indonesia informed IMO. On the other hand, Indonesia believed that the six months should be calculated from the date of promulgation of the national legislation. This issue was brought to the Sub-NAV, which finally concluded in a meeting to amend the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes Paragraph 1.13.98 Based on the amendment, Government Regulation Number 37 of 2002 would enter into force six month after Indonesia informed IMO.99

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97 SN/Circ.200/Add.1 published on 3 July 2003.
98 Amendment SN/Cir. 199, Paragraph 3.13 became two paragraphs, 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.

99 Six months after the decision of the Sub NAV MSC (July 2003), Government Regulation Number 37 of 2002 entered into force in December 2003.
5.4. Rights and Duties of Archipelagic State, Ships and Aircraft on Archipelagic Sea Lanes Passage

There are only six articles of the LOSC which clearly regulate rights and duties of archipelagic States, ships and aircraft on archipelagic sea lanes passage. It could be argued that those rights and obligations mentioned in these articles are not sufficient to provide a basis for the implementation of the archipelagic sea lanes passage provisions. Further guidance and State practice on this issue may be necessary.

5.4.1. Rights and Duties of Ships and Aircraft

Ships and aircraft exercising the right of archipelagic sea lanes passage should respect and observe the laws and regulations of the archipelagic States as well as international law.

The rights and duties of ships and aircraft while exercising their right of archipelagic sea lanes passage is mentioned in Articles 53 and 54 of the LOSC. Article 54 of the LOSC refers to Articles 39 and 40 of the LOSC, which deal with transit passage through straits used for international navigation and has applied these articles mutatis mutandis to archipelagic sea lanes passage. Therefore the regulation for ships and aircraft exercising the right of transit passage also appear to apply in archipelagic sea lanes passage. This means that the right of archipelagic sea lanes passage is in fact identical to the right of transit passage.

Article 53 of the LOSC stipulates rights and obligation of ships and aircraft while exercising the right of archipelagic sea lanes passage. This article is considered as an assurance article of exercising the right of archipelagic sea lanes passage. On the other hand, Article 53 (11) stipulates that ships in archipelagic sea lanes passage must

\footnote{Article 54 of the LOSC also refers to Articles 42 and 44 of the LOSC. But those articles relate to rights and obligation of archipelagic States and user States.}
respect applicable sea lanes and traffic separation schemes. The formulations of these provisions vary slightly; Article 53 (2) mentions ships and aircraft while Article 53 (11) mentions only ships. It could be argued that there is no obligation for aircraft to respect air routes or there is no such traffic separation scheme in the air routes.

Article 54 of the LOSC stipulates the duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic State and laws and regulations of archipelagic State relating to archipelagic sea lanes passage; this article also refers to four articles relating to transit passage. Thus, in order to understand these obligations, Article 54 has to be read together with Articles 39, 40, 42, and 44 of the LOSC.

Ships and aircraft, while exercising the right of archipelagic sea lanes passage are required to:

a) proceed without delay through or over the archipelagic sea lane;
b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the archipelagic State, or in any other manner in violations of the principles of international law embodied in the Charter of the United Nations;
c) refrain from any activities other than that incidental to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;
d) comply with other relevant provisions of part III of the LOSC relating to straits used for international navigation. 101

Furthermore, ships exercising the right of archipelagic sea lanes passage are required to:

a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships. 102

101 Article 39 (1), LOSC.
102 Article 39 (2), LOSC.
These restrictions seem almost identical to these provisions in Article 19 of the LOSC which regulates the right of innocent passage, although the provisions use different wording and formulae. Moreover, aircraft while exercising the right of archipelagic sea lanes passage are required to:

a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.\(^{103}\)

Article 40 of the LOSC states that while exercising rights of archipelagic sea lanes passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorisation of the archipelagic State. Foreign ships exercising the right of archipelagic sea lanes passage shall comply with the archipelagic State’s laws and regulations\(^{104}\) on the safety of navigation and the regulation of maritime traffic; the prevention, reduction and control of pollution; with respect to fishing vessels, the prevention of fishing; the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of archipelagic States.\(^{105}\) Article 42 (5) of the LOSC states that the flag State of a ship or the State of registry of an aircraft shall bear international responsibility for any loss or damage which results to archipelagic States.

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\(^{103}\) Article 39 (3), LOSC.
\(^{104}\) Article 42 (4), LOSC.
\(^{105}\) Article 42 (1), LOSC.
5.4.2. Rights and Duties of the Archipelagic State

Part IV of the LOSC refers to the rights of navigation and overflight,\textsuperscript{106} while Part III of the LOSC confers a freedom of navigation and overflight.\textsuperscript{107} This implies that the right of archipelagic sea lanes passage is a grant by the archipelagic State and therefore, the modalities of exercising such rights are subject to the exclusive competence of the archipelagic State, so long as the minimum conditions of non-impairment of passage are maintained.\textsuperscript{108} Freedom of navigation is not the foundation for determining the extent of rights and duties of foreign vessels within archipelagic waters, but rather the sovereignty of the archipelagic State, which is obliged under international law only to permit continuous, expeditious and unobstructed passage;\textsuperscript{109} anything seems more remains subject to the discretion of the archipelagic State.

Archipelagic sea lanes passage, being a ‘right of navigation,’ implies a more limited freedom for foreign ships and aircraft than they would otherwise have under ‘freedom of navigation.’\textsuperscript{110} Thus, the right of navigation is subject to more restrictive laws and regulations of archipelagic State than the freedoms of navigation mentioned in transit passage. Article 54 of the LOSC also provides the rights and duties of archipelagic States on enacting laws and regulations as referred to in Articles 39, 40, 42, and 44 of the LOSC.

The word ‘may’ in Article 53 (1) of the LOSC indicates that archipelagic sea lanes passage is a right of archipelagic State.\textsuperscript{111} Thus, it is not obligation of archipelagic State to designate the archipelagic sea lanes. If an archipelagic State is not

\textsuperscript{106} Article 53 (3), LOSC.
\textsuperscript{107} Article 38 (2), LOSC.
\textsuperscript{108} Barbara Kwiatkowska and Etty R Agoes, \textit{Archipelagic State Regime in the Light of the 1982 UNCLOS and State Practice} (1991), 46-47.
\textsuperscript{109} Article 53 (3), LOSC.
\textsuperscript{111} Hasjim Djalal, above n 15, 62.
designated the archipelagic sea lanes, the right of archipelagic sea lane passage may be exercised on routes normally used for international navigation.\textsuperscript{112} As archipelagic State designated the archipelagic sea lanes, there are obligations to define the archipelagic sea lanes passage which consist of a series of continuous axis lines from the entry points of passage routes to the exit points crossing the archipelagic waters and the adjacent territorial sea.\textsuperscript{113} These axis lines must be clearly depicted on nautical charts as part of publication.\textsuperscript{114} According to Halliwell, charting of the archipelagic sea lanes could create technical problems such as symbology, correcting the navigational charts and application the 10 per cent rule.\textsuperscript{115} Moreover, archipelagic States have the right to prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes and may substitute such traffic separation schemes and also the sea lanes as appropriate.\textsuperscript{116}

One of the rights of the archipelagic States is to adopt laws and regulations relating to archipelagic sea lanes passage in respect of:

a) the safety of navigation and the regulation of maritime traffic;
b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.\textsuperscript{117}

Foreign ships and aircraft exercising the right of archipelagic sea lanes passage are required to comply with the laws and regulations of archipelagic States. However,
archipelagic States cannot hamper archipelagic sea lanes passage and must give appropriate publicity to any danger to navigation or overflight within or over archipelagic sea lanes of which they are aware.\textsuperscript{118} Furthermore, archipelagic States are not able to suspend archipelagic sea lane passage unlike in the case of innocent passage.\textsuperscript{119}

5.5. Legal Analysis of Indonesian Laws and Regulations on Archipelagic Sea Lanes Passage

Indonesia has designated archipelagic sea lanes passage. The designation has been regulated further in Indonesian laws and regulations. These include Act Number 6 of 1996 on Indonesian Waters, Act Number 17 of 2008 on Shipping, Government Regulation Number 37 of 2002 on Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes and Letter of Decision of Indonesian Chief of Armed Forces on Securing the Archipelagic Sea Lanes.

To ascertain whether Indonesian laws and regulations are consistent with the provisions of the LOSC and other rules of international law, a detailed analysis of the laws and regulations is required. This analysis will compare the Indonesian laws and regulations which relate to archipelagic sea lanes passage with relevant rules of international law. It is also necessary to examine the process, development, challenges and issues faced by Indonesia in enacting and promulgating the laws and regulations in order to gain a better perspective of the implementation of archipelagic sea lanes passage.

\textsuperscript{118} Article 42 (4), LOSC; Part XV, Act Number 17 of 2008 provides shipping information systems which regulate how the Indonesia Government publish all information on shipping including dangers to navigation.

\textsuperscript{119} Article 44, LOSC.
5.5.1. Rights and Duties of Indonesia, Ships, and Aircraft

Rights and duties of Indonesia on archipelagic sea lanes passage are regulated in Indonesian laws and regulations. Act Number 6 of 1996 and Government Regulation Number 37 of 2002 do not mention clearly what the rights and duties of Indonesia are in relation to archipelagic sea lanes passage. These laws and regulations simply state that the axis lines and connecting points of the archipelagic sea lanes are depicted on nautical charts or tables which list the geographical coordinates of the axis lines. Indonesia uses two methods to publish the archipelagic sea lanes; they are depicted in the Indonesian nautical charts and the list of geographical coordinates of axis lines and connecting or turning points are stated in the tables.

Indonesia has published 35 navigation charts which contain the depiction of its archipelagic sea lanes on scales 1: 100,000 and 1: 4,000,000. Indonesia also published Notices to Marines Number 08/2003, encouraging all ships to follow the archipelagic sea lanes. Furthermore, Indonesia through the Chief of Indonesian Armed Forces, has declared that Indonesia would take several steps to secure its archipelagic sea lanes. Those steps consisted of patrolling the sea lanes, deployment of the Indonesian Navy in certain areas along the sea lanes and development of coastal radars along the sea lanes. The Indonesian Air Force also patrols along the archipelagic sea lanes using maritime patrol aircraft.

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Act Number 6 of 1996 and Government Regulation Number 37 of 2002 regulated further rights and duties of ships and aircraft exercising the right of archipelagic sea lanes passage.

5.5.1.1. **Act Number 6 of 1996**

Articles 18 and 19 of the Indonesian Act Number 6 of 1996 regulate the right of archipelagic sea lanes passage in Indonesian waters. Article 18 of the Act states that archipelagic sea lanes is the implementation of rights of navigation and overflight, as stated in the LOSC, in the normal mode solely for the purpose of continuous, expeditious and unobstructed passage. All ships and aircraft enjoy the right of archipelagic sea lanes passage in Indonesian waters, transit between one part of the high seas or an EEZ to another part of the high seas or an EEZ.

Article 19 (1) of the Act specifies that Indonesia would designate sea lanes for exercising the rights of archipelagic sea lanes passage. The designation of sea lanes may also prescribe traffic separation schemes for the safe passage of ships. 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, traverse the archipelagic waters and the adjacent territorial sea. Article 19 (3) states that where circumstances are required Indonesia may designate, after giving due publicity thereto, substitute sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by it. In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, Indonesia will refer proposals to the competent

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124 Article 18 (1), Act Number 6 of 1996.  
125 Article 18 (2), Act Number 6 of 1996.  
126 Article 19 (1), Act Number 6 of 1996.  
127 Article 19 (2), Act Number 6 of 1996.
international organization with a view to their adoption.\textsuperscript{128} Indonesia indicates the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity will be given.\textsuperscript{129} Ships in archipelagic sea lanes passage shall respect applicable sea lanes and traffic separation schemes.\textsuperscript{130}

5.5.1.2. Government Regulation Number 37 of 2002

Government Regulation Number 37 of 2002 states that foreign vessels and aircraft can exercise the right of archipelagic sea lanes passage through certain parts of the Indonesian territorial seas and archipelagic waters.\textsuperscript{131} Archipelagic sea lanes passage rights are to be exercised through specific archipelagic sea lanes passage routes and air routes identified.\textsuperscript{132} As well as exercising the right of archipelagic sea lanes passage, all foreign vessels have the right of ‘innocent passage’ through Indonesian territorial seas and archipelagic waters, without entering internal waters, for the purpose of transiting the seas from one part of the EEZ or high seas to and from another part of another EEZ or high seas.\textsuperscript{133} Furthermore, the exercise of the archipelagic sea lanes passage in other parts of Indonesian waters can be undertaken after their designation.\textsuperscript{134} This provision was to become rather controversial.\textsuperscript{135} This controversy will be discussed further in the next sections.

Archipelagic sea lanes passage must be undertaken quickly in the ‘normal mode’ solely for the purpose of continuous, direct, expeditious passages and

\textsuperscript{128} Article 19 (4), Act Number 6 of 1996.
\textsuperscript{129} Article 19 (5), Act Number 6 of 1996.
\textsuperscript{130} Article 19 (6), Act Number 6 of 1996.
\textsuperscript{131} Article 2, Government Regulation Number 37 of 2002.
\textsuperscript{132} Articles 3 and 11, Government Regulation Number 37 of 2002.
\textsuperscript{133} Article 13, Government Regulation Number 37 of 2002.
\textsuperscript{134} Article 3 (2), Government Regulation Number 37 of 2002.
unobstructed transit. Ships and aircraft exercising the right of archipelagic sea lanes passage may not:

a) deviate more than 25 nautical miles from either side of the axis of the archipelagic sea lanes, provided that those ships and aircraft may not navigate or fly closer to the coast/land territory than 10 per cent of the distance between the nearest points on the islands bordering on the archipelagic sea lanes passage, and aircraft may not land in the Indonesian territory, except in force majeure or in case of accident;

b) threaten or use force against the sovereignty, territorial integrity or political independence of Indonesia or in any other manner that violates the principles of International Law as embodied in the United Nations Charter,

c) carry out war exercises or exercises using any weapon with ammunition.

d) engage in unauthorized broadcasting or causing disturbances to the telecommunication systems and may not carry out direct communication with unauthorized people or group of people in Indonesian territory.

e) carry out maritime research activities or hydrographic surveys, either by using detecting devices or other examples taking, except has been permitted to do so.

Stopping, anchoring, and moving back and forth (zigzagging) are prohibited while exercising the right of archipelagic sea lanes passage, except in the case of force majeure or danger, or in giving assistance to people and ships in danger. Foreign vessels, including foreign fishing vessels, in archipelagic sea lanes passage may not carry out fishing activities and must keep their fishing equipment in storage. Foreign vessels and aircraft in archipelagic sea lanes passage may not embark or disembark people, goods, or currency in contravention of the customs, immigration, fiscal, and sanitary control laws, except in force majeure or in distress. It is a further requirement that foreign vessels in archipelagic sea lanes passage must follow

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136 Article 4 (1), Government Regulation Number 37 of 2002. There is no further explanation what constitutes as quick or speedy.
137 Article 4 (2), Government Regulation Number 37 of 2002.
139 Article 4 (3), Government Regulation Number 37 of 2002.
140 Article 4 (4), Government Regulation Number 37 of 2002.
141 Article 4 (7), Government Regulation Number 37 of 2002.
142 Article 5, Government Regulation Number 37 of 2002.
143 Article 4 (6), Government Regulation Number 37 of 2002.
144 Article 6, Government Regulation Number 37 of 2002.
145 Article 6 (3), Government Regulation Number 37 of 2002.
international rules, procedures, and practices with regard to the safety of navigation which have been generally accepted, including rules on avoiding collision at sea\textsuperscript{146} and must follow the traffic separation scheme for the purpose of safe navigation.\textsuperscript{147}

Foreign vessels in archipelagic sea lanes passage may not cause damage or disruption to navigation aids or facilities or underwater cables and pipelines in Indonesian waters.\textsuperscript{148} Where there are installations for exploration or exploitation of living or non-living resources, foreign vessels in archipelagic sea lanes passage may not navigate closer than 500 meters around the installations.\textsuperscript{149}

Foreign aircraft in archipelagic sea lanes passage must follow ICAO rules (for civil aircraft) and always monitor radio frequency indicated by the competent authority or relevant international emergency radio frequency and must respect regulations on safety of aviation of ICAO.\textsuperscript{150}

Foreign vessels exercising the right of archipelagic sea lanes passage are prohibited from discharging oil, oily wastes, and other pollutants into the marine environment, or carrying out activities contrary to international regulations and standards to prevent, reduce or control marine pollution from ships and are also prohibited from dumping in Indonesian waters.\textsuperscript{151} There are certain requirements for foreign nuclear ships or ships carrying nuclear materials or other dangerous or hazardous materials in exercising the right archipelagic sea lanes passage. The requirements include carrying documents and following special preventive measures

\textsuperscript{146} Article 7 (1), Government Regulation Number 37 of 2002.
\textsuperscript{147} Article 7 (2), Government Regulation Number 37 of 2002.
\textsuperscript{148} Article 7 (3), Government Regulation Number 37 of 2002.
\textsuperscript{149} Article 7 (4), Government Regulation Number 37 of 2002. This provision is related to Articles 60 (5) and 80 of the LOSC. On the other hand, Act Number 1 of 1973 on Indonesian Continental Shelf (State Gazette Year 1973 No. 1, Supplementary State Gazette No. 2994) defines a restricted zone is 1250 meters and a prohibited zone is 500 meters around offshore installation.
\textsuperscript{150} Article 8, Government Regulation Number 37 of 2002.
\textsuperscript{151} Article 9 (1 and 2), Government Regulation Number 37 of 2002.
prescribed by international agreement for such vessels. Unfortunately, Indonesia does not have specific laws and regulations on safety of navigation and the regulation of maritime traffic; prevention, reduction and control of pollution as the implementation of Article 42 (1) of the LOSC. There are articles in Act Number 17 of 2008 on Shipping which regulates preservation of marine environment and the archipelagic sea lanes passage. But these articles do not clearly define what constitute protection and preservation of marine environment and what steps should be taken in order to avoid incidents at sea.

5.5.2. Consequences of the Independence of Timor Leste on Archipelagic Sea Lanes Passage

In 1999, Timor Leste became independent. The Indonesian Archipelagic Sea Lane Passage III A and B pass through Timor Leste Waters, consequently issues arose as to whether Indonesia had to go back to IMO to substitute the sea lanes or whether Indonesia only had to indicate that the right of archipelagic sea lanes passage does not prevail in such waters. During that time, Indonesia prepared government regulation on the designation of Indonesian archipelagic sea lanes passage. This government regulation would affect the status of waters within the archipelagic sea lanes as seen in Figure 9.

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152 Article 9 (3), Government Regulation Number 37 of 2002.
154 Further detail laws and regulations are required in order to preserve, protect the marine environment and to avoid incidents at sea.
155 Indonesia has not concluded maritime delimitation with Timor Leste. Havas Arif Oegroseno, 'Indonesia's Maritime Boundaries' in Robert B Cribb and Michelle Ford (eds), Indonesian beyond the Water's Edge (2009), 10.
Indonesia established a Working Group in preparation for the designation of Indonesian archipelagic sea lanes. The Working Group proposed many ideas to address the issue of archipelagic sea lanes passage through Timor Leste’s waters. These included Indonesia resubmitting revised sea lanes to IMO for adoption; Indonesia proposing the substitution of Archipelagic Sea Lanes Passage III A and B; Indonesia making a declaration indicating that the Indonesian archipelagic sea lanes III A and B did not come into effect; and Indonesia declaring that the right of archipelagic sea lane passage does not prevail in the disputed waters between Indonesia and Timor Leste.

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156 Source of Map in Annex SN/Cir. 200, Res. MSC 72 (69) Adopted 19 May 1998 with modification by author.
The Working Group decided that Indonesia should declare that the right of archipelagic sea lane passage would not be effective in the Strait of Leti and some parts of Ombai Strait which has not yet been concluded with Timor Leste. Before arriving at that conclusion, the Working Group had discussed numerous alternatives such as Indonesia substituting, skipping or removing the Archipelagic Sea Lanes Passage III A and B in the areas. These alternatives indicated that Indonesia had to propose the changed sea lanes back to IMO.

5.5.3. Non-Compliance Rules

Government Regulation Number 37 of 2002 provides that anyone responsible for the operation of commercial vessels or aircraft is liable and responsible for any loss or damage suffered by Indonesia as the result of non-compliance with the rules of Indonesian archipelagic sea lanes passage. Additionally, the flag State of the vessel or the registry of the aircraft shall bear responsibility for any loss or damage suffered by Indonesia as the result of non-compliance with these rules by their ships or aircraft in archipelagic sea lanes passage. Despite these provisions, Government Regulation Number 37 of 2002 is silent on what Indonesia would do if any foreign ship or aircraft does not comply with its laws and regulations. This lack of clarity in the regulation creates problems for maritime law and enforcement. It is therefore important that this situation be corrected through enactment of legislation providing clear enforcement powers.

157 Article 14, Government Regulation Number 37 of 2002.
158 Article 53 (9) of the LOSC stipulates that designation or substitution of archipelagic sea lanes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption.
159 Article 10 (1), Government Regulation Number 37 of 2002.
160 Article 10 (2), Government Regulation Number 37 of 2002 refer to non-compliance of Articles 7, 8, and 9, Government Regulation Number 37 of 2002. This kind of regulation also stated in Article 42 (5) of the LOSC.
Another possible case that might arise is where a vessel or aircraft is known or suspected to have engaged in illegal activity outside archipelagic waters and whether it may exercise a right of archipelagic sea lanes passage as a means to cover its escape. Again, there is no provision in the regulation on what Indonesia should do in such a case or whether Indonesia has a right to take action based on information provided by other States. Another problem is whether a pursuing foreign vessel would be permitted to pursue or just to shadow the suspected vessel through the archipelagic sea lanes. Article 53(2) of the LOSC provides that archipelagic sea lanes passage may be exercised by all ships and aircraft without discrimination; and Article 42 of the LOSC, which applies *mutatis mutandis* to the archipelagic sea lanes, still does not provide a clear guidance how to tackle such cases. The archipelagic State may argue that the passage of a vessel is contrary to its peace, good order and security; and therefore the vessel does not enjoy the right of archipelagic sea lanes. But there is no clear regulation on what action can be taken, such as arresting the ships or requiring the ships to leave the archipelagic waters immediately.\(^{161}\) Moreover, the pursuing foreign vessels cannot perform law enforcement activities within the archipelagic waters, although it is only shadowing the suspected vessel. This argument may be part of the exercise of the right of hot pursuit which should stop when the suspected ship enters the territory of another State.\(^{162}\)

5.5.4. Issues Arising from 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

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161 There is provision in innocent passage for non compliance ‘warships’ with the coastal States’ laws and regulations. Article 30, LOSC.
162 Article 111 (3), LOSC.
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.

Some of these issues relating to the interpretation of Articles 53 and 54 of the LOSC came up during informal meetings between Indonesia, the United States and Australia. The issues which arose included how to define all normal passage routes, the ten per cent rule, the absence of designation of sea lanes, the East/West route and normal mode.

5.5.4.1. What constitutes ‘all normal passage routes used as routes for international navigation or overflight’

Article 53(4) of the LOSC requires the designation of sea lanes through 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.\(^{163}\)

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’,\(^{164}\) ‘all normal navigational channels’\(^{165}\) and ‘routes normally used for international navigation’.\(^{166}\)

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\(^{163}\) 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.

\(^{164}\) Article 53 (4), LOSC.

\(^{165}\) Article 53 (4), LOSC.
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.167

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 passage168 and accordingly, this provision is contrary to the provisions of the LOSC,169 the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes of IMO,170 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.171 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.172

166 Article 53 (12), LOSC.
167 Article 22 (3) (b) of the LOSC on innocent passage uses a different term as well, such as ‘channel customarily used for international navigation.’
168 Semaphore, above n 135, 1.
169 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.
170 Paragraph 6.6 of Res. MSC 71 (69) IMO.
172 Hasjim Djalal, above n 12, 8.
During informal meetings on the designation of Indonesian archipelagic sea lanes passage, 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 10, the United States Chart is shown in Figure 11 and the Australian Chart is shown in Figure 12.

173 Informal meetings between Indonesia and user States such as the United States and Australia. See, Indonesian Navy Working Group, above n 63, 3.

174 Map used during informal discussion on archipelagic sea lanes passage. Map shows a compilation of navigation routes (normal routes) in Indonesian waters.
Figure 12. Normal Routes Proposed by Australia

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 geopolitical 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’ of archipelagic sea lanes.

Indonesia agreed that most of the sea lanes in the maps are routes that have been used for international navigation. But the issue here is whether those sea lanes could be justified as ‘normal passage routes’, any channels customarily used for

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175 Map used during informal meeting. The Map was presented in several seminars on archipelagic sea lanes passage in Indonesia.
176 Map used during informal meeting between Indonesia and user States. The Map was presented in several seminars on archipelagic sea lanes passage, in Indonesia.
177 This term came up during informal meetings between Indonesia and the United States, Australia and United Kingdom which indicated that there were so many routes (overlapping) that should be designated as axis lines of archipelagic sea lanes.
178 Personal experience of the author who attended the internal discussion in the Indonesian Navy Headquarters, March 2003. All participants agreed that those routes commonly used by merchant ships and contained in the Indonesian sailing directions. Report of the discussion is not published. Note on file with author.
179 Article 53 (4), LOSC.
international navigation" or ‘routes normally used for international navigation’. Thus, it would appear impossible for Indonesia to designate all those sea lanes for archipelagic sea lanes passage as required by Article 53(4) of the 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. 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.

5.5.4.2. The Application of Ten Per cent Rule

Article 53(5) of the LOSC provides at least three important points. 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 may 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.

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180 Article 22 (3) (b), LOSC.
181 Article 53 (12), LOSC.
182 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 10 per cent of the distance between the nearest points on islands bordering the sea lane.’ Emphasis added.
During meetings between Indonesia and the United States, 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.

The application of the ten per cent rule is relatively easy if there is plain water on either 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 which 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.

There are many opinions on how to define and apply 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. Another view is that the ten per cent rule has to be measured from adjacent coast to the axis lines. The complexities in implementing the ten per cent rule under different geographical situations are shown in Figure 13, Figure 14, and Figure 15.

183 Meeting held in Jakarta, on 23-27 October 1997.
185 This opinion based on interpretation Article 53 (5) of the LOSC which states ‘…between the nearest points on islands bordering the sea lane.’ Emphasis added. So the ten per cent rule is measured from the distance of islands across the axis lines.
186 Andrian J Halliwell, above n 115, 3.
IMO provides guidance for ships transiting archipelagic waters using archipelagic sea lanes. The guidance includes an explanation and diagrammatic

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187 Diagram was presented by Adi Sumardiman during Internal discussion in Indonesian Navy Headquarters, March 2003.
188 Diagram was presented by Adi Sumardiman during Internal discussion in Indonesian Navy Headquarters, March 2003.
189 Diagram was presented by Adi Sumardiman during Internal discussion in Indonesian Navy Headquarters, March 2003.
representation of the ten per cent rule.\footnote{IMO’s SN/Circ.206, issued in January 1999.} 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 the archipelagic sea lanes or where there is only one island within the sea lane. There is no further guidance on how to work out the ten per cent rule if these bordering islands are not directly opposite each other or where there are water areas inboard the midstream island bordering the archipelagic sea lane.\footnote{These issues came up during informal meetings between Indonesia and the United States and Australia. The existence of the island/s will affect the width of the sea lanes as part of application of the ten per cent rule.}

Indonesia, Australia and the United States\footnote{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.} have different interpretations on the geographical situations depicted in the three figures. 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 16.\footnote{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.} On the other hand, the United States maintains 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 16.\footnote{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 the United States-Indonesia Consultations on Archipelagic Sea Lanes, Jakarta October 23-27, 1997 (un-published). Author has a copy of this summary.} It seems that the United States view was to 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 17. 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.195

![Diagram of Indonesia and the United States Interpretation of Islands Bordering an Archipelagic Sea Lanes](image)

**Figure 16. Indonesia and the United States Interpretation of Islands Bordering an Archipelagic Sea Lanes**

195 Robin Warner, above n 171, 179 and 182.
196 Source of the diagram: in Robin Warner, above n 171, 181 with modification by author.
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.¹⁹⁸

The IMO Guidance SN/Circ 206,¹⁹⁹ 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 18) to the circular, 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. 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

¹⁹⁷ Source of the diagram: in Robin Warner, above n 171, 182 with modification by author.
¹⁹⁸ Robin Warner, above n 171, 184.
will create difficulties in determining the buffer zones, although it may give greater safety margins further from the axis lines.

![Figure 18. Composition of an Archipelagic Sea Lanes and Application of the Ten Per cent Rule](image)

Based on Indonesian navigation charts depicting the areas of the ten per cent,\(^{201}\) 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 19, AB is the distance between axis lines and island, AC is the area of ten per cent rule is applied, and BC as valid sea lanes. This interpretation seems consistent with the guidance of IMO SN/Circ.206.\(^{202}\)

\(^{200}\) Sources of Diagram in the Annex to the SN/Circ.206.
\(^{201}\) 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.
\(^{202}\) IMO’s SN/Circ.206, issued in January 1999.
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.\textsuperscript{204} Based on the depiction of the axis lines in the Indonesian navigational charts as shown in Figure 20, 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 20 which shows that ships and aircraft can exercise the right represented with ‘A arrow (magenta)’ and ships and aircraft cannot navigate through additional water inboard of the midstream island (Pulau Panaitan)\textsuperscript{205} as depicted by the ‘B arrow (black)’. This 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

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure19}
\caption{Application of the Ten Per cent Rule\textsuperscript{203}}
\end{figure}

\textsuperscript{203} Source of the diagram: in Andrian J Halliwell, above n 115, 6 with modification by author.
\textsuperscript{204} IMO’s SN/Circ.206 does not regulate this issue.
\textsuperscript{205} Pulau means island.
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 20). This Indonesian interpretation is contrary to the United States and Australia views.\textsuperscript{206}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{map.png}
\caption{Figure 20. Exercising the Right of Archipelagic Sea Lane Passage in the Sunda Strait}\textsuperscript{207}
\end{figure}

5.5.4.3. Axis Lines and its Depiction

There are two articles in the LOSC concerning axis lines and the depiction of axis lines. Article 53(5) of the LOSC provides 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…’ and Article 53(10) provides that ‘… the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts …’.

\footnotetext[206]{According to Halliwell, the Indonesian position will close the area which is usually used for navigation. Andrian J Halliwell, above n 115, 6-8.}

\footnotetext[207]{Source of the map: in Andrian J Halliwell, above n 115, 7 with modification by author.}
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.  

Several methods have been used for positioning the axis lines of archipelagic sea lanes, as the LOSC does not provide much guidance on how to draw the axis lines. 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 complicated to position 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. It has been argued that the axis lines should represent the routes normally used for

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208 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.

209 Robin Warner, above n 171, 177-78.

210 Based on informal meeting between Indonesia and Australia, the axis lines should coincide with the deep water routes for safe passage, in order to facilitate commercial shipping.
international navigation\textsuperscript{211} and should comply with safety requirements for maritime navigation and preservation of marine environment, as regulated by IMO.\textsuperscript{212}

Contrary to the positions held by Australia and Indonesia, the United States supports the view that axis lines should 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.\textsuperscript{213}

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 views of Indonesia, Australia and the United States; for example, the axis lines based on the United States view can be placed in shallow waters, whereas the Indonesian and Australian views it is placed in deep waters. The axis lines based on the United States view can be easily discerned because it tends to take distance from the island; whereas the Indonesian and Australian views, the axis lines tend to be close to the island.

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, but based on the United States preferences, the axis line has been moved to the middle of the Strait. As shown in Figure 21 the axis lines are on the sand banks and shallow waters. The United States

\textsuperscript{211} Robin Warner, above n 171, 178-79. Indonesia designation proposal submitted to MSC 69, IMO Doc MSC/69/5/2, 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.’

\textsuperscript{212} The adoption of Indonesian axis lines by IMO appears not to have been verified with respect to navigational safety, although Indonesia consulted and brought the depiction of the axis lines on the Indonesian navigational charts to IMO and IHO prior to its adoption.

\textsuperscript{213} Robin Warner, above n 171, 178.
also argued that the provisions of the LOSC do not require that axis lines should be determined based on the depth of waters or navigable channel.\textsuperscript{214}

Figure 21. Position of the Axis Line in the Makassar Strait\textsuperscript{215}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure21}
\caption{Position of the Axis Line in the Makassar Strait\textsuperscript{215}}
\end{figure}

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. 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.\textsuperscript{216}

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 Adoption,

\textsuperscript{214} Indonesian Navy Hydrographic Office, above n 60, 35. 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.
\textsuperscript{215} Source of the map: in Andrian J Halliwell, above n 115, 13 with modification by author.
\textsuperscript{216} Robin Warner, above n 171, 178.
Designation and Substitution of Archipelagic Sea Lanes\textsuperscript{217} does not include any
guidelines in relation to the positioning of axis lines. The absence of guidance in the
positioning of axis lines will leave it open for an archipelagic State in 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 Adoption, 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.\textsuperscript{218} 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.\textsuperscript{219} There is no clear definition
what constitute as ‘suitable’, but it appears that the archipelagic State is obliged to
guarantee the navigational safety of archipelagic sea lanes before proposing the
archipelagic sea lanes to IMO for consideration and adoption.\textsuperscript{220}

Article 53 (10) of the LOSC stipulates 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.’ 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

\textsuperscript{217} The Document was adopted by the 69\textsuperscript{th} Meeting of the Maritime Safety Committee (MSC) in May
\textsuperscript{218} Paragraph 7.1 of the General Provisions for the Adoptions, Designation and Substitution of
Archipelagic Sea Lanes.
\textsuperscript{219} The Australian delegation prompted the need of navigational safety to the NAV 43 and MSC 69.
\textsuperscript{220} Robin Warner, above n 171, 179; Paragraph 4.2 of the General Provisions for the Adoption,
Designation and Substitution of Archipelagic Sea Lanes.
Figure 22. It is interesting to note that the sea space and the air space for exercising the right of archipelagic sea lane passage do not coincide.

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) mean different things. This would mean 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.

5.5.4.4. Non-Designation of Archipelagic Sea Lanes

The designation of Indonesian Archipelagic Sea Lanes Passage is a partial designation.\(^{222}\) This means that Indonesia still has to designate additional sea lanes. Article 53(12) of the LOSC provides that ‘If an archipelagic State does not designate

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\(^{221}\) Source of the map: in Andrian J Halliwell, above n 115, 14 with modification by author.

\(^{222}\) Resolution MSC 72 (69) IMO.
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 interpretations\textsuperscript{223} of Article 53(12) of the LOSC. 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 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).

Additionally, it appears that if the 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 than the archipelagic State itself, which it is contrary to Article 53(1) of the LOSC.

Indonesia did not want all normal routes usually used for navigation to be used for exercising the right of archipelagic sea lanes passage. 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. There are many conditions that have to be satisfied 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 organisations and depict the axis lines on the proper navigational charts. These requirements mean the right of archipelagic sea lane passage is not automatically exercisable, although the right still exists.

Furthermore, if the archipelagic State has designated the archipelagic sea lane partially and it 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, the designation of archipelagic sea lanes by an archipelagic State can be problematic. It seems IMO has the power to determine whether the archipelagic State has made a full or partial

224 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.
225 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 a member of the Working Group.
226 See discussion in Section 5.3.1.
designation of archipelagic sea lanes. Again, the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes gives IMO the power to do this.

In addition, if user States do not agree that the sea lanes that have been designated by the archipelagic State and adopted by IMO is a partial designation, the 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 States can use other sea routes and pretend or declare that they enjoy the rights of archipelagic sea lanes passage in such routes. 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.’

5.5.4.5. East–West Issue

One of the routes that many States urge Indonesia to designate is an east-west route. East-west routes were proposed by Australia and the United States during

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227 IMO retains jurisdiction if there is partial designation of archipelagic sea lanes. Paragraph 3.5, General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes, Resolution A 572 (14), MSC 71 (69) IMO.
228 Paragraph 3.2. of the General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes, Res. MSC 71 (69), adopted 19 May 1998.
informal meetings with Indonesia on the preparation of designation of the Indonesian archipelagic sea lanes. The normal routes proposed by the United States and Australian show east-west routes in different sea lanes or routes.\(^{230}\)

Indonesia has not yet designated the east-west route because hydrography data, environmental assessments and navigational charts of the area have not been completed.\(^{231}\) There were many arguments during the informal meeting with Australia, the United Kingdom, the United States and the IMO’s formal meetings concerning Indonesia and its failure to complete the full designation. Those arguments could be grouped into legal, technical and policy arguments.

The legal argument was based on differing interpretations, such as what the east-west route was, which east-west route and what to consider as a full designation. Technical arguments focused on which routes should be chosen and what technical considerations should be taken into account. Policy arguments revolved around security matters, the survival of Indonesia and operational difficulties in monitoring ships and aircraft.

Most prominent Indonesian jurists believe that there are normal passage route in the Java Sea.\(^{232}\) The Java Sea is a navigation route used for international trade dating back to the Indonesia Kingdoms. Indonesia also believes that there are normal routes which are normally used for international navigation in the Java Sea. However, the routes themselves usually run close to Java Island and Kalimantan Island (Northern and Southern Bawean Island), so there are technical considerations regarding which

\(^{229}\) This route was discussed during informal meetings between Indonesian and the United States, Australia, Japan, the United Kingdom on the designation of archipelagic sea lanes.

\(^{230}\) See, illustrative maps in section 5.5.3.1.

\(^{231}\) These arguments came up during informal meeting on preparation of designation of the Indonesian archipelagic sea lanes among Indonesia and user States; Report of the Maritime Safety Committee on its Seventy-seventh Session, MSC 77/26 dated 10 June 2003, Paragraph 28.40.

\(^{232}\) Statement was made by Nugroho Wismu Murti, Hasjim Djalal, Adi Sumardiman, and Etty R Agoes, during meeting in Foreign Affairs, in 1997. Minutes of Meeting is not available publicly. They noted that Indonesia should consider designating archipelagic sea lanes passage in Java Sea.
routes should be chosen for designating archipelagic sea lanes. In addition, if an east-west route were to exist in the Java Sea, the east-west route should connect one part of the high seas or EEZ to another part of high sea or EEZ. There is the issue of whether east-west routes should connect the Indonesia Archipelagic Sea Lanes I and II or whether they must connect the Indonesia Archipelagic Sea Lanes I, II, III and its spurs as well. Indonesia has to undertake further study to determine whether east-west routes exist in the Indonesian Archipelagic Sea Lanes III which has three spurs (as shown in Figure 23). Furthermore, Indonesia has to undertake hydrography surveys, environment and fisheries assessments, consider natural resources and prepare the charts on such areas.

![Figure 23. Illustrative East West Route (in red line)](image)

There were arguments and lengthy discussions in Indonesia with respect to the east-west routes, especially the strategic aspect. There are many possible scenarios:

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233 Sources of the map: in Annex SN/Cir. 200 with modification by author.
234 There were many internal discussions in the Indonesian Navy Headquarters, the Indonesian Armed Forces Headquarters and internal working groups on evaluation of east-west routes. The author was a participant in these internal discussions. Indonesian Navy Working Group, above n 63, 4.
for example, all ships and aircraft, including warship and military aircraft, will enjoy
the right of archipelagic sea lane passage in the normal mode. Considering that there is
no obligation regarding notification and/or authorisation before exercising such a right,
it is crucial for Indonesia to monitor or control such passage. Furthermore, an east-west
route will pass though areas which have much economic activity; many protected
marine areas and some shallow waters. So if an incident took place, such as a high risk
vessel sinking in the Java Sea, most of the economy of Java, Sumatra and Kalimantan
Islands would collapse and the whole nation would be in crisis. On the other hand,
Indonesia believes that by designating an east-west route it will be easy to monitor all
movement of ships and aircraft passing through Indonesian waters. Moreover,
Indonesia could enforce the laws and regulations against all ships and aircraft.235

The discussion on the possibility of designating the east-west archipelagic sea
lane is still developing. The main reason for this thinking is that currently there are
different versions of ‘routes used for international navigation’ in the east-west axis
through the Java Sea, which vary from one user to another. Thorough deliberation is
needed because it may not be conducive to the safety of navigation and protection of
environment, nor to the security of Indonesia

5.5.4.6. Normal Mode

The LOSC states that ‘Archipelagic sea lanes passage means the exercise … of
the rights of navigation and overflight in the normal mode solely for the purpose of
continuous, expeditious and unobstructed transit…’236 During informal meetings
between Indonesia and user States, the interpretation of normal mode provided in
Article 53(3) of the LOSC was raised. Most of the user States argued that normal mode

235 Semaphore, above n 135, 2.
236 Article 53 (3), LOSC. Emphasis added.
should be related to activities that are usually undertaken by ships, such as replenishment at sea, man over board exercises, sea boat drills, officer of the watch manoeuvres, helicopter and aircraft operations, war gaming, electronic war exercise, etc. Indonesia did not support such a broad interpretation.

During informal meetings on 23-24 April 1997 in Jakarta, the Australian delegation proposed that the term ‘normal mode’ should include flying operations, replacing of equipment, manoeuvring, stopping and delaying of navigation, loading and recovering, submerged transit, damage control, and continuity of navigation. The differences between Indonesia and user States on interpretation of ‘normal mode’ have still not been resolved. By contrast, the Philippine view on this issue may provide some guidance. According to Batongbacal, the Philippines views normal mode restrictively by qualifying that permissible activities should only be those related to actual navigation, since Article 53(3) of the LOSC defines archipelagic sea lanes passage as a right of navigation and overflight in normal mode solely for the purpose of continuous, expeditious and unobstructed transit. Furthermore, he argues that normal mode navigation will have to comply fairly closely with standards for innocent passage. This is because it would not be acceptable for vessels transiting the very heartland of an archipelagic State to be able to undertake activities more liberally than vessels transiting up to twelve nautical miles away from the coast of a continental coastal State.

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237 The list of activities came up in the informal meeting between Indonesia and Australia. Indonesian Navy Working Group, above n 63, 38.
238 Indonesian opinion in response to the proposed list of activities as conclusion of the Indonesian Armed Forces internal meeting, June 1996. This response is not available publicly. Indonesian Navy Working Group, above n 63, 40.
239 Ibid, 38.
240 Jay L. Batongbacal, above n 82, 62.
5.5.5. Case Study on Archipelagic Sea Lane Passage

Practical issues associated with the conflicting interpretation and application of the normal passage routes and the exercise of archipelagic sea lanes passage is illustrated by the Bawean241 or Hornet incident.242 On 3 July 2003 news services reported that there were five United States F-18 Hornets passing through the Java Sea over the Bawean Island northern Java Island.243 Those aircraft were reported by the Bouraq244 Pilot to the Air Traffic Control in Surabaya and Jakarta. The Indonesian Air Force dispatched F-16 jet fighters to intercept the American warplanes. The Indonesian Air Force pilot said that he saw the F-18 fighters run into attack mode and had their missiles locked on his plane before communication was established.245 The F-18 Hornets were also detected on Air Force radar manoeuvring over Bawean Island in East Java and performing strange manoeuvres for more than two hours above Bawean Island in the Java Sea. In addition, the United States military aircraft were part of the task force coming from Singapore to Australia. The task force consisted of USS Carl Vinson, two frigates, and one tanker.

There were varied responses in Indonesia among the Members of Parliament, the Chief of Armed Forces, the Minister of Defence, and Indonesian scholars. Most of their commentary was that the United States actions were threatening to Indonesian sovereignty and were provocative.246 Some Indonesian experts in international law

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241 The incident named Bawean case, because the case/incident took place around the Bawean Island.
242 Hornet case because the case/incident involved the F 18 Hornet.
243 Media Indonesia Editorial, 'Territorial Sovereignty', Antara (Jakarta), 9 July 2003, 1; '5 F 18 Hornet Maneuver in Bawean (in Indonesian)', Kompas (Jakarta), 4 July 2003, 1.
244 Bouraq is an Indonesian commercial airline.
245 'The US Maneuvers Threat Indonesian Civil Aviation (in Indonesian)', Kompas (Jakarta), 5 July 2003, 1.
246 Antara, 'RI to protest if US Jet-Fighters Violate the Rules, Mil Chief Says', Antara 7 July 2003, 1; Antara, 'F-18 Maneuvers, a Form of US Pressure, Says MP', Antara (Jakarta), 8 July 2003, 1; Antara, 'Indonesia has not issued statement on US Intruders, Minister says', Antara (Jakarta), 5 July 2003, 1.
said that the United States violated international law and urged Indonesia to lodge a protest over the intrusion, saying it could jeopardise Indonesian commercial routes.\textsuperscript{247}

On the other hand, the United States Embassy spokesman Stanley Harsha argued that the United States jet fighters did not violate Indonesia's airspace or international law and the aircraft manoeuvre is a normal procedure and indeed it is in accordance with international law.\textsuperscript{248}

Finally, the Indonesian government summoned the United States Ambassador to Indonesia, Ralph L. Boyce, to clarify the allegedly unauthorised intrusion of five American jet fighters into Indonesian airspace. Speaking after the meeting with Boyce, the Indonesian Coordinating Minister for Political and Security Affairs said Indonesia officially noted its deep concern that the United States Navy F-18 Hornets might have violated the Indonesian airspace. Moreover, the Minister said that the United States Ambassador told him that the United States had notified Indonesian Military authorities before the overflight of the American jet fighters. But regretfully, the Indonesian Armed Forces Headquarters did not receive the notification in time. In addition, the Minister said that the United States Government was very seriously responding to Jakarta's concern over the incident and he had received a commitment of the United States that its jet fighters will not fly over Indonesian airspace unless Indonesia gives permission and the United States has also assured Indonesia that its warplanes would abide by the LOSC which has been ratified by Indonesia and acknowledged by the United States as customary international law.\textsuperscript{249}

\textsuperscript{247} 'The Manuevres of the F 18 Hornet Violated International Law (in Indonesian)', \textit{Kompas} (Jakarta), 8 July 2003, 1.
\textsuperscript{248} Tiarma Siboro, 'Investigation continues into US Jets Intrusion', \textit{The Jakarta Post} (Jakarta), 07 July 2003, 1; Media Indonesia Editorial, 'Territorial Sovereignty', \textit{Antara} (Jakarta), 9 July 2003, 1.
\textsuperscript{249} 'The US will not Overflight the Indonesian Territory (in Indonesian)', \textit{Kompas} (Jakarta), 11 July 2003, 1; 'The US will not Overflight the Indonesian Territory (in Indonesian)', \textit{Kompas} (Jakarta), 11 July 2003, 1; Tiarma Siboro, 'Minister Summons US envoy over Hornet Intrusion', \textit{The Jakarta Post}
Issues emerged as to whether the United States aircraft carrier USS Carl Vinson and the manoeuvres and overflight of five of its fighter aircrafts did indeed violate international law, whether they had a right to traverse the Java Sea or if they had to get prior notification or authorisation before passage. These issues will be discussed in the following paragraphs.

Although the United States has not ratified the LOSC, it is arguable that the United States had a right to pass through the Java Sea using the right of archipelagic sea lanes passage. The LOSC states that the right of archipelagic sea lanes passage can be exercised by all ships and aircraft.250 It does not say that warships or aircraft carriers or military aircraft cannot enjoy the right. Furthermore, the LOSC does not qualify that ships and aircraft must belong to States which are parties to the LOSC.251 Thus, the United States warships and aircraft had the right of archipelagic sea lanes passage. However, United States has to respect and abide by the laws and regulations of Indonesia and international law generally.252

Another issue is whether the right of archipelagic sea lanes passage could be exercised in the Java Sea. As mentioned earlier, Indonesia only designated north-south archipelagic sea lanes. There is a conflicting interpretation between Indonesia and user States. Based on 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 is no right of archipelagic sea lane passage in the Java Sea.253 The Indonesian Government has not yet designated the normal passage routes in the area. However, it seems that the

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250 Article 53 (2), LOSC.
251 Article 53 (2) of the LOSC provides that: ‘All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.’
252 Article 39, LOSC.
253 Articles 3 (2) and 15, Government Regulation Number 37 of 2002.
Indonesian Government recognised the normal passage route in the area, but the right of archipelagic sea lane passage cannot be exercised automatically.\textsuperscript{254} There are some procedures that must be fulfilled first.\textsuperscript{255}

The position of user States\textsuperscript{256} which is shared by Djalal is that the United States’ warships and military aircraft have a right to passage through the Java Sea using the right of archipelagic sea lane passage. Moreover, Djalal said that the Indonesian Government did not designate all normal passage routes as archipelagic sea lanes passage, so the user States still have the right of archipelagic sea lanes passage in those routes as based on Article 53(12) of the LOSC.\textsuperscript{257} Djalal pointed out that according to international law of the sea, the South China Sea, as well as the Karimata Sea, the Java Sea, the Sunda Sea and the Indian Ocean, were international routes that lead to the eastern zone, and since Indonesia had yet to confirm its eastern and western sea lanes, foreign planes and vessels were free to use this sea lane. The Java Sea is on the route connecting the eastern and western zones. Accordingly, Djalal argued that the United States had not violated international law. Djalal urged Indonesia to immediately determine its sea lanes so as to avoid such confusion in the future.\textsuperscript{258}

Indonesia argued that the manoeuvres of the F 18 Hornets were contrary to international law, based on the radar image showing the Hornets had flown over the Bawean Island.\textsuperscript{259} International law and the LOSC recognised that States have full

\textsuperscript{254} See description in Section 5.5.3.5.
\textsuperscript{255} See description in Section 5.3.1.; Hasjim Djalal, above n 15, 63.
\textsuperscript{256} The United States’ and Australia’s position in the IMO Meetings was that the right of archipelagic sea lanes passage would be exercised in all normal passage routes. See Johnson Constance, 'The IMO Consideration of the Indonesia Archipelagic Sea-Lanes Submission' (2000) 15(3) The International Journal of Marine and Coastal Law 15; Robin Warner, above n 171, 176.
\textsuperscript{257} Statement by Hasjim Djalal in an interview, see in Tiarma Siboro, 'Investigation continues into US Jets Intrusion', The Jakarta Post (Jakarta), 07 July 2003, 1.
\textsuperscript{258} Tiarma Siboro, 'Investigation continues into US Jets Intrusion', The Jakarta Post (Jakarta), 07 July 2003, 1; Hasjim Djalal, above n 15, 68.
\textsuperscript{259} Air Marshal Wresniwiro cited in 'The US Manuevres Threat Indonesian Civil Aviation (in Indonesian)', Kompas (Jakarta), 5 July 2003, 1.
sovereignty over their land territory. Thus, the United States military aircraft could be considered as violating international law and the LOSC. In addition, the manoeuvres themselves jeopardised civil aviation, as the pilot of Bouraq was concerned with the manoeuvres. Although the United States has not ratified the LOSC, the United States has obligations to respect the laws and regulations of coastal States and international laws which include customary international law. As shown in Figure 24, the ‘red track’ indicated the track of the United States F 18 Hornet, while the ‘blue track’ indicated the Indonesian F16 Falcon. The red and blue tracks also crossed the Bawean Island which meant both aircraft flew over the Island.

During the Informal Meeting, the United States Delegate said that the United States aircraft are not permitted by international law to overfly islands, and as an operational matter, it is highly unlikely that the United States military aircraft would get close to any Indonesia Islands. Summary of the United States-Indonesia Consultation on Archipelagic Sea Lanes, Jakarta, October 23-27, 1997. A copy of the summary is on file with author.

The US Manoeuvers Threat Indonesian Civil Aviation (in Indonesian)', Kompas (Jakarta), 5 July 2003, 1.

Convention on International Civil Aviation 1944, 15 UNTS, opened for signature 7 December 1944 (entered into force 4 April 1947) (The Chicago Convention). Indonesia and the United States are party to the Chicago Convention. Based on Article 3 (c) mentioned that ‘no state aircraft of a contracting State shall fly over the territory of another State or land thereon…’ Emphasis added.

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Indonesia argued that the USS Carl Vinson and the F 18 Hornet did not have the authorisation nor was notice given to the Indonesian Government to pass through Indonesian territory. The United States Ambassador said that they had lodged the notification, but the Indonesian authorities indicated that they had not received the notification. The issue was whether the notification was necessary or not to exercise the archipelagic sea lanes passage. Based on the LOSC, there are no provisions requiring military vessels or aircraft to give prior notification. So if the United States did really send the notification, it could be assumed that the United States interprets the provision of the LOSC, international law, and Indonesian laws and regulation faithfully. Furthermore, it could be used as good State practice in the implementation of the LOSC.

263 Map was taken from presentation of Air Marshal Erris Heryanto, Commanding Officer of National Aerial Defence Command, during Seminar on Sovereignty over Indonesia Territory, Jakarta, 12-13 April 2006.
Indonesia obliges all aircraft passing through Indonesian air territory to obtain clearance or give notification.\textsuperscript{264} The aircraft has to obtain clearance from the Indonesian Armed Forces Headquarters, the Department of Foreign Affairs and the Department of Transportation.\textsuperscript{265} According to Poerwoko,\textsuperscript{266} Indonesia has a flight detection system which relates to issuing the clearance. Indonesia has already implemented the flight clearance on-line to make it easier for aircraft to get clearance before passing through Indonesian air space and to make it easier for Indonesian authorities to monitor the Indonesian air space.\textsuperscript{267} Therefore, there should be no time delay in order to get such clearance.

5.6. Conclusion

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

IMO has adopted the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes in order to give guidance to archipelagic States who wish to propose archipelagic sea lanes. There is opinion that the jurisdiction of IMO in defining the rights and obligations stated in the guidance is excessive. The

\textsuperscript{264} Article 7, Act Number 1 of 2009 on Air Navigation (State Gazette Year 2008 No. 1, Supplementary State Gazette No. 4956).
\textsuperscript{266} Djoko Poerwoko, 'There is still violation on the National Air Space (in Indonesian)', \textit{Kompas} (Jakarta), 23 June 2006, 2.
\textsuperscript{267} Ibid, 2.
reasons for this view are that the guidance includes concepts of partial designation which is not regulated in the LOSC and that IMO has jurisdiction to decide whether a designation is partial or full. The General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes still leaves the interpretation of the LOSC provisions to the archipelagic State. Moreover, the General Provisions for the Adoptions, Designation and Substitution of Archipelagic Sea Lanes still requires technical invention on applying the relevant articles of the LOSC.

The adoption of the partial designation of Indonesian archipelagic sea lanes passage in IMO was a long process of consultation and negotiation between Indonesia and user States which has enriched the interpretation of the LOSC provisions on archipelagic regimes. The positioning of the axis lines in the final package reflected an accommodation and compromise between Indonesia and user States. It indicated the axis line was not the navigable track for ships and further 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 that 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. Furthermore, government regulations do not specify in detail the rights and obligations of ships and aircraft and the enforcement process on ships and aircraft which are not compliant with Indonesian laws and regulations.
The next chapter will describe transit passage in Indonesian waters, including the definition and meaning of transit passage; the identification of straits within Indonesian waters; how transit passage exists in Indonesian waters, and issues on traverse in the Indonesian straits.
Chapter Six

Transit Passage Rights in Indonesian Waters

6.1. Introduction

The extension of the territorial sea to a maximum of 12 nautical miles from the baseline under the LOSC resulted in most of the straits used for international navigation previously subject to the high seas freedom of navigation to fall within the territorial seas of one or more coastal States.\(^1\) This resulted in these straits coming under the sovereignty of coastal States\(^2\) and consequently governed by the restrictive innocent passage rules of navigation as analysed in Chapter 4. However, in straits used for international navigation, the maritime powers and user States wanted to secure their navigational rights which were not sufficiently safeguarded under the right of innocent passage.\(^3\)

In order to balance the competing interests of the international community in ensuring freedom of navigation and the flow of international commerce against those of the coastal States bordering these straits in protecting their sovereignty and national security, the LOSC fashioned the concept of transit passage as one of the fundamental navigational rights.

Straits which are considered as narrow waterways for international navigation are often referred to as ‘choke points’. In certain choke points, States bordering the

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choke points are permitted to restrict passage. There are at least six straits used for international navigation which commonly referred to as 'choke points' in Indonesian waters, namely the Malacca Strait, Singapore Strait, Sunda Strait, Lombok Strait, Makassar Strait, and Ombai-Wetar Straits. These straits play a dominant role in global trade which makes them of global strategic importance.

This chapter analyses the right of transit passage in Indonesian waters. It will explore the definition of the right of transit passage and identify rights and obligations of ships and aircraft exercising the right of transit passage. It will also examine how Indonesia implements this navigational freedom and identify the relevant issues for Indonesia.

6.2. Straits Used for International Navigation

A study conducted by the United States Department of State shows that if a standard 12 nautical miles limit is adopted, the waters of over 116 major straits of the world would no longer be high seas areas. This situation will affect the interests of user States or maritime powers as they would need to comply with innocent passage rights under the territorial sea regime. Richardson summarises these concerns clearly:

More than one hundred straits around the world are more than six but less than twenty four nautical miles. So long as the territorial sea on each side of strait is confined to three nautical miles, a high seas route remains in which full freedom of navigation and overflight will continue to exist. But extension of the territorial sea on both sides 12 nautical miles would eliminate these high seas corridors and the bordering States would be able to contend that the straits remain subject to the right of innocent passage. The result could seriously

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4 Restriction may include traffic separation scheme; and use of pilotage.
impair the flexibility of the United States conventional forces, ballistic missile submarines which depend on complete mobility in the oceans and unimpeded passage through international straits. The United States economic well being is continually more dependent on overseas trade and more vulnerable to distant political developments. The combined result is to compel increased reliance on the strength, mobility and versatility of the armed forces. To fulfill deterrence and protective mission of these forces is through global mobility. The erosion of the traditional rules and the trend towards expanding claims of coastal State jurisdiction has progressively increased the risk of challenge by their States along the way.8

In contrast to the concerns of the maritime powers, States bordering these straits were worried about the proximity and density of ship traffic in the straits and the possible negative effects on their interests.9 These States were fearful that pollution caused by accidents in adjacent straits would endanger the lives of their citizens, damage property and destroy marine resources.10 Moreover, dense traffic in a strait may make it difficult or impossible for the straits States to fully utilise their fisheries and seabed resources. States bordering the straits were also concerned that traffic may jeopardise their national security interests.11

To address the kinds of concerns Richardson was alluding to, the LOSC created a new legal regime for ‘straits used for international navigation’ in Part III and granted the right of transit passage through such straits. However, the LOSC fails to define which straits fall into the category of ‘straits used for international navigation’ and the criteria for recognising such straits. Similarly, the 1958 Convention on the Territorial Sea and the Contiguous Zone do not contain any specific provision concerning the

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10 The Indonesian point of view is that if there is marine pollution takes place in the Java Sea, it will jeopardise the security of the environment of the whole Indonesia. Kresno Buntoro, above n 5, 124.
During the Third United Nations Conference on the Law of the Sea (UNCLOS III) the need for a specific definition of transit passage was discussed, but it was very difficult to agree on a definition that is satisfactory to all the parties. Academic commentators have identified three elements in the definition of a strait. These include geographical, legal and functional elements.

Moore, proceeding from a geographical point of view, defines a strait as ‘a narrow stretch of sea connecting the extensive areas of the sea.’ This is similar to Baxter’s definition of a strait as ‘a narrow passage connecting two sections of the high sea.’ Bruel suggests that a strait may be defined as a contraction of the sea between two territories, being of a certain limited width and connecting two seas otherwise separated, at least in that particular place, by the territories in question. Bruel points out the following components in his definition. One, the strait must be a part of the sea which is not artificially created by human effort. Two, it must be a contraction of the sea and it should be of a certain limited width. Three, it must separate two areas of land, whether continents islands. Four, it must connect two areas of the sea, which more otherwise separated by the territories between which the strait runs.

From a legal point of view, an international strait is a geographical strait in which freedom of navigation does not exist, because it is covered by the territorial seas.

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12 Article 16 (4) of the United Nations Convention on the Territorial Sea and Contiguous Zone, 516 UNTS 205 (The 1958 TSC), dealing with the right of innocent passage stipulated that ‘…there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation…’


17 Ibid, 19.
of States bordering the straits. Straits wider than the territorial sea would be mere geographical straits in which all ships and aircraft enjoy freedom of navigation and overflight as stipulated in the LOSC.

The functional aspect of what constitutes a ‘strait’ was discussed by the International Court of Justice (ICJ) in the Corfu Channel Case which pointed out that the criterion for defining an international strait was that it is used for international navigation. O’Connell notes that the test of defining a strait is a functional matter and not so much a geographical consideration as it is with the determination of bays. There are subjective and objective criteria to test what constitutes a strait.

Some scholars have categorised straits into several types based on the provisions of the LOSC. Paik claims there are four types of straits based on the LOSC; Froman maintains that there are only three types of straits in the LOSC; and Yturriaga argues that the types of straits depend on the combination elements considered in their categorisation. According to George, a combination of geographical and legal criteria would create six different categories of straits under the provisions of the LOSC, as follows:

a) Category one: High seas or exclusive economic zone runs through the

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18 Richard Baxter, above n 15, 9.
19 Description of these geographical straits is straits which are not entirely covered by the territorial sea of the bordering States and within them have high seas corridors. An example is the Strait of Malacca which have territorial sea and EEZ.
20 Corfu Channel (United Kingdom v. Albania), (Merit) Judgment of 9 April 1949, ICJ Reports 1949, 28.
22 Eric Bruel, above n 16, 42.
25 For example, Yturriaga argues that if one considers the geographical and legal elements of categorising straits, there will only be three types of straits. However, if one combines the geographical and functional factors of strait classification, there will be four types of straits. See, Jose Atonio de Yturriaga, Straits Used for International Navigation: A Spanish Perspective (1991), 12.
middle. Article 36 of the LOSC recognises straits used for international navigation where there exists through the strait high seas or an exclusive economic zone route of similar convenience with respect to navigational or hydrographical characteristics. An example of such a strait is the Bass Strait, Australia.

b) Category two: Formed by high seas or exclusive economic zone. Article 37 of the LOSC recognises straits covered by territorial sea situated between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

c) Category three: Straits situated between part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. This category is an application of Article 45 (1) (b) of the LOSC, which refers to straits used for international navigation located between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. An example of such a strait is the Strait of Juan de Fuca between the United States and Canada and Strait of Leti between Indonesia and Timor Leste.

d) Category four: Formed by an island of a straits State and its mainland. Article 38 (1) of the LOSC refers to a strait covered by a territorial sea which is formed by an island of a strait bordering the strait and its mainland, and seaward of the island there exists high seas or an exclusive economic zone. An example of such a strait is the Strait of Messina between Italy and Sicily.

e) Category five: Long-standing convention. Article 35 (6) of the LOSC recognises straits which are regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. An example of such arrangement is the 1937 Montreux Convention regulating the Turkish Straits.

f) Category six: Straits that were previously territorial sea. This category is an application of Article 35 (a) and also relates to Article 8 (2) of the LOSC. It includes straits used for international navigation where waters of the strait were previously territorial sea but since the establishment of straight baselines in accordance with the method set forth in Article 7 of the LOSC are now considered as internal waters.

Despite the lack of consensus among commentators on what constitutes straits used for international navigation and which elements are to be used for determining a strait, it can be safely asserted that a strait does not need to be a primary route of navigation meet any specific vessel volume traffic requirement to be considered as ‘strait used for international navigation’. It is sufficient for the strait to simply be a
useful route, or a route that is safe for navigation, for it to be classified as a ‘strait used for international navigation’.  

6.3. Regime of Transit Passage

The regime of transit passage applies to straits which are used for international navigation between one part of the high seas or an EEZ to another part of the high seas or an EEZ. There is an exception for straits formed by an island of a State bordering the strait and its mainland. In such straits, transit passage cannot apply if there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. Article 38(2) of the LOSC refers to ‘transit passage as the exercise … of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit between one part of the high seas or an EEZ and another part of the high seas or an EEZ.’ The exercise of the right of transit passage must be in accordance with Part III of the LOSC and subject to the other applicable provisions of the LOSC.

6.3.1. Rights and Duties of Ships and Aircraft Exercising Transit Passage

Article 38(1) of the LOSC provides that ‘all ships and aircraft enjoy the right of transit passage, which shall not be impeded.’ Ships and aircraft are given the freedom or right to enter, leave or return from a strait State and the right to continuous and expeditious navigation and overflight. The right may be exercised by all ships and aircraft, which include merchant ships and government ships such as warships and

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27 Corfu Channel (United Kingdom v. Albania), (Merit) Judgment of 9 April 1949, ICJ Reports 1949; Jose Atonio de Yturriaga, above n 25, 11.
28 Article 37, LOSC.
29 Article 38(1), LOSC.
30 Emphasis added.
31 Article 38 (3), LOSC.
submarines, and references to aircraft include overflight of State aircraft and scheduled and non-scheduled airlines. 32

With regard to navigation, it could be argued that the transit passage regime implies that the strait is no longer to be considered as part of the territorial sea of the bordering State and that coastal State powers in the strait are different from those which can be exercised in the territorial sea. However, Article 34 of the LOSC provides that the regime of passage through straits used for international navigation shall not affect the legal status of the waters forming such straits. This article confirms that even though the regime applicable to navigation through certain straits is more extensive than innocent passage, it is without prejudice to coastal State sovereignty and jurisdiction.

6.3.2. Elements of Transit Passage

Foreign ships exercising transit passage have a duty to refrain from any activities other than those incidentals to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or distress. 33 In addition, ships and aircraft should traverse without delay through or over the straits, 34 must not use or threaten the use of force, 35 nor may they conduct unauthorised research or survey activities. 36 Unlike in the territorial sea, submarines and underwater vehicles exercising transit passage are not required to navigate on the surface and show their flags. Based on common practice, submarines and underwater vehicles may

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32 This is a gap between regulation in the LOSC and the 1944 Convention on International Civil Aviation with regard to the legal principle of air space above maritime zones (straits, internal waters, archipelagic waters, and territorial sea) and their sovereignty over these maritime zones which extend to the air space.
33 Article 39 (1) (c), LOSC.
34 Article 39 (1) (a), LOSC.
35 Article 39 (1) (b), LOSC.
36 Article 40, LOSC.
transit in their normal mode.

6.3.3. **Relationship between Transit Passage and Innocent Passage**

The unimpeded, unimpaired, or unhampered right of transit passage of all ships, submarines, and aircraft of all States in straits used for international navigation are the principal differences in content between transit passage and other passage regimes. Part III of the LOSC regulates two types of passage namely, transit passage under section 2 and innocent passage under section 3. Article 45 of the LOSC provides that the innocent passage regime applies in straits used for international navigation with exceptions on the application of the regime of transit passage under Article 38 (1) and/or passage between a part of the high seas or an EEZ and the territorial sea of a foreign State. Nandan and Anderson point out that innocent passage may be suspended in certain circumstances. However, it is not available to aircraft which does not have right of innocent passage and submarines are required to pass on the surface. On the other hand, transit passage is available to aircraft and submarines may navigate submerged.37

6.3.4. **Relationship between Transit Passage and Archipelagic Sea Lanes Passage**

Transit passage and archipelagic sea lanes passage are considerably new navigational regimes.38 The right of transit passage in archipelagic waters and archipelagic sea lanes, are more extensive than innocent passage rights. Archipelagic sea lanes passage is essentially the same as transit passage through straits which are

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38 Both navigational regimes are regulated in the LOSC for the first time.
used for international navigation. However, some legal scholars, such as Djalal, have noted a number of differences between transit passage and archipelagic sea lanes passage. Article 38(2) of the LOSC relating to transit passage through straits used for international navigation refers to ‘freedom of navigation’ through straits, while Article 53 concerning archipelagic sea lanes passage refers to ‘rights of passage’. In archipelagic sea lanes, the right of navigation is qualified with the words, ‘normal mode of navigation’, which is not the case with respect to transit passage, where there is no qualification of how vessels would transit. Article 53(3) of the LOSC refers to ‘unobstructed’ passage through archipelagic sea lanes, while Article 38(1) of the LOSC relating to transit passage states that passage through straits used for international navigation should not ‘impeded’. Finally, archipelagic sea lanes are to be defined by a series of continuous axis lines, with restrictions for ships and aircraft not to deviate more than 25 nautical miles to either side of such axis lines during passage and not to navigate closer to the coast than ten per cent of the width of the waterways. Such restriction does not exist in the transit passage regime.

Kwiatkowska and Agoes also highlight that while archipelagic States in designating or substituting archipelagic sea lanes are obliged to refer their proposals to the competent international organisation, States bordering straits have an obligation to do so ‘before’ designating or substituting sea lanes in the straits used for international navigation.

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41 Article 53 (5), LOSC.
6.3.5. Straits Used for International Navigation in Indonesian Waters

As mentioned earlier in the chapter, there are at least six straits used for international navigation, called ‘choke points’ which are important for international navigation in Indonesian waters. These are the Malacca, Singapore, Sunda, Lombok, Makassar, and Ombai-Wetar straits. These straits are illustrated in Figure 25 and discussed in detailed below.

![Figure 25. Straits for International Seaborne Trade within Indonesian Waters](image)

6.3.5.1. The Straits of Malacca and Singapore

The Straits of Malacca and Singapore have long been known as international seaborne trade routes, and since the 1960s have been considered as straits used for

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43 Lewis M Alexander, above n 5, 289-98; Michael Leifer, above n 5, 76-85; Kresno Buntoro, above n 5, 123-25.
44 Source of the map: Indonesian Navigational Charts Numbers 2 and 3, modification by author’s.
international navigation.\textsuperscript{46} The Straits of Malacca and Singapore extend for approximately 600 nautical miles. The Malacca Strait is located between the east coast of Sumatra, Indonesia and the west coast of peninsular Malaysia. The Strait of Singapore is located south of Singapore and the south-eastern tip of peninsular Malaysia, and north of the Riau Islands of Indonesia. The straits provide the shortest sea route between the Indian Ocean (via the Andaman Sea) and the Pacific Ocean (via the South China Sea).

The Straits of Malacca and Singapore have become of vital importance after the economic rise of East Asian countries, such as Japan, China, Taiwan, and South Korea. The demand for oil, gas and raw material increased as did the number of large vessels passing through these straits. The straits also carry considerable amounts of general cargo, raw materials and manufactured goods in both directions, such as the flow of primary products to Europe including vegetable oil, copper, rubber and tin which are re-exported through the ports of Singapore, as well as manufactured products from South Korea, Hong Kong and Japan. The Straits of Malacca and Singapore transport more than 30 per cent of the world’s traded goods.\textsuperscript{47}

The western entrance of the Strait of Malacca is wide and separates Indonesia and Malaysia by about 200 nautical miles. However, the strait begins to narrow as vessels proceed through it in a south-easterly direction. In the southern part of the strait, the territorial waters of Indonesia and Malaysia begin to overlap.\textsuperscript{48} After that, vessels enter the Strait of Singapore and then into the South China Sea at its eastern

\textsuperscript{46} Preamble of Government Regulation Number 8 of 1962 on Rights and Duties of Foreign Ships in Indonesian Waters.
\textsuperscript{48} There is a Treaty between the Republic of Indonesia and Malaysia relating to the Delimitation of the Territorial Seas of the Two Countries in the Straits of Malacca, ratified by the Indonesian Act Number 2 of 1971. See, Adi Sumardiman, \textit{Kumpulan Perjanjian-perjanjian International tentang Batas-batas Territorial dan Sumber Alam Indonesia} (2007) (in Indonesian), 38-41.
entrance. The territorial seas of Indonesia and Singapore overlap in the Strait of Singapore.\(^{49}\) The narrowest breadth of the Strait of Malacca is 8.4 nautical miles, while the narrowest breadth of the Strait of Singapore is 3.2 nautical miles.\(^{50}\)

The problems of navigation in the Straits of Malacca and Singapore may be classified into three categories: danger of collisions, congestion, and the possibility of running aground.\(^{51}\) The danger of collision of vessel arises because of an increase in the number and size of vessels in the strait.\(^{52}\) Congestion in certain areas result because of the narrow nature of the straits, the presence of many small islands, large numbers of vessels passing through,\(^{53}\) and unpredictable weather.\(^{54}\) The grounding issue arises because of the shallow water depth nature of the straits,\(^{55}\) large tidal ranges,\(^{56}\) and the uncertainty of the topography of seabed influenced by ocean currents.\(^{57}\) These factors affect the safety of navigation in the Straits of Malacca and Singapore. Although there have been vast improvements, such as navigational aids, updated charts, electronic navigational charts and marine electronic highways, the basic problem of depth in the Straits of Malacca and Singapore remains. Thus, it will affect vessels which have deep draught. There have in fact been many incidents of tankers running aground during

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\(^{49}\) There is a Treaty between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Seas of the Two Countries in the Straits of Singapore, ratified by Indonesian through Act Number 7 of 1973. See, Adi Sumardiman, supra n 48, 64-66.


\(^{52}\) The number of vessels transiting the Straits at different times because of fluctuating economic growth of countries which usually use the Straits for seaborne trade. For example, IMO released news that at least 50,000 ships sail through these Straits every year.

\(^{53}\) International and local traffic in the Straits of Malacca and Singapore consist of vessels varying in number, types and size: International traffic includes destinations beyond the peninsula and Straits areas while local traffic include destination inter peninsula and Sumatra Island or around Straits areas.

\(^{54}\) During tropical monsoon, the visibility may drop sharply so the vessels have to slow down, cause’s heavy traffic in the Straits. See, Mochtar Kusumaatmadja, 'Sovereign Rights over Indonesia Natural Resources: An Archipelagic Concept of Rational and Sustainable Resources Management' (1991) 15(6) Marine Policy, 385.

\(^{55}\) The depth is less than 20 meters in certain areas.

\(^{56}\) The tidal range is varies from three to four meters.

\(^{57}\) Indonesian territory is considered as the bridge between two Oceans (India and Pacific). The current passing through the Indonesian Straits include the Straits of Malacca and Singapore.
passage in the straits, such as the Shell tanker *Myrtea* of 210,000 DWT in 1972; the Japanese oil tanker *Showa Maru* of 244,000 DWT on 6 January 1975; the Japanese crude carrier *Isuzugawa Maru*, 122,000 DWT in 1975; and the Liberian tanker *Silver Palace* 30,000 DWT in 1975.

6.3.5.2. The Sunda, Lombok, Makassar, Ombai, and Wetar Straits

The Sunda Strait, which is approximately 50 nautical miles in length, connects the Indian Ocean with the Java Sea. Its narrowest passage is 13.8 nautical miles, which is further restricted by Sangian Island which creates two channels: the western channel being 2.4 nautical miles wide and the eastern channel which is 3.7 nautical miles wide. The strait separates Java and Sumatra Islands including the famous volcanic island of Krakatau. The depth of the Strait varies. It is not more than 100 meters at its western end but as it narrows to the east around 20 meters.\(^5\)\(^8\) The Sunda Strait is not as important as the Malacca and Singapore Straits, but it has long served as an important passage for commercial traffic.\(^5\)\(^9\) It carries containers, oil and iron traffic from Europe via the Cape route and from ports of Australia and also serves as a major sea link from the Indian Ocean and Australia to the Java Sea and South China Sea. About 2,300 ships transit the Sunda Strait annually and the total tonnage carried by the Sunda Strait is 111 million metric tonnes.\(^6\)\(^0\)

The Lombok Strait is located between the islands of Bali and Lombok.\(^6\)\(^1\) It connects the Indian Ocean to the Makassar Strait and Sulawesi Sea. The Strait is

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\(^{59}\) The Sunda Strait has been an important shipping route for centuries, especially during the period when the Dutch East India Company used it as the gateway to the Spice Islands of Indonesia (1602-1799). Merle Calvin Ricklefs, *A History of Modern Indonesia since c. 1200* (4th ed, 2008), 33.

\(^{60}\) Japan Maritime Research Institute, *Study on Passage through the Straits of Malacca and Singapore in 2001* (2002), 16-18.

\(^{61}\) Ibid, 76.
around 11.5 nautical miles wide and 35 nautical miles long. The Strait has depths exceeding 150 meters with only a few small islands within the Strait, making navigation through the Strait easy. The Lombok Strait has become an alternative route for tankers which cannot pass through the Straits of Malacca and Singapore, because of depth constraints. In particular, the Lombok/Makassar route is used for very large crude carriers (VLCCs) when fully laden. Hence, a significant tonnage of oil passes through this strait even if the number of vessels is far less than for the Straits of Malacca/Singapore. The Lombok Strait is considered an important strategic and commercial shipping route in Southeast Asia together with the Straits of Malacca and Singapore due to its ease of navigability and the access it provides from the Indian Ocean. About 418 ships transit the Lombok and Makassar Straits annually, which carry 36 million metric tonnes of cargo.

The Makassar Strait is located between the islands of Kalimantan to the west and Sulawesi to the east. It connects the Makassar Sea in the north and the Java Sea in the south. The Strait is around 11 to 280 nautical miles in width and around 600 nautical miles in length, with the deep water channel at certain parts around 11 nautical miles in width. There are many islands, coral sands and sand banks within the Strait. The Indonesian Government has designated many marine parks in the Makassar Strait. The deepest waters are on the Sulawesi side of the Strait which offers a navigable channel of 22.5 nautical miles. The Makassar Strait is considered an

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64 For example, tankers with draughts exceeding 19.8 meters have to divert through this Strait.
65 Japan Maritime Research Institute, above n 60, 19-21.
66 Example are Taka Bonerate and Sangalaki marine parks.
extension of the Lombok Strait. So the Straits of Makassar and Lombok are important and strategic sea lanes connecting the Indian and Pacific Oceans.

Wetar Strait separates the eastern part of the island of Timor from the island of Wetar. It lies between Indonesia to the north and Timor Leste to the south. To the west is Atauro Island (Timor Leste) and beyond it the Ombai Strait, while to the east is the southern part of the Banda Sea and the southernmost of the Maluku Islands (Indonesia). The narrowest point of the strait is around 23 nautical miles.

Ombai Strait is located between the islands of Alor and Timor. The strait connects the Banda Sea in the north to the Sawu Sea to the southwest. Its narrowest navigable channel is 16 nautical miles in width. The Strait is around 1000 meters deep and easy to navigate through. The Ombai and Wetar Straits link waterways between Australia, Timor Leste and Java Sea to Banda Sea, Sulawesi Sea and the Pacific Ocean.

6.3.5.3. Legal Status of the Straits of Sunda, Lombok, Makassar, Ombai, and Wetar

The Straits of Sunda, Lombok, Makassar, Ombai and Wetar connect the high seas or EEZ to another high sea or EEZ, and used for international seaborne trade. Thus these straits are, in terms of functional and geographical aspects, qualify as straits used for international navigation. However, the position of Indonesia is that the Straits of Sunda, Lombok, Makassar, Ombai, Wetar are not considered straits used for international navigation under Part III of the LOSC.68 Indonesia considers these straits

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68 Since the Third UNCLOS, the only straits that Indonesia recognises as straits used for international navigation in Indonesian waters are in Straits of Malacca and Singapore. Statement made by Mochtar Kusumaatmadja during UNCLOS III, Caracas 15 July 1974 cited in Mochtar Kusumaatmadja, *Konsepsi Hukum Negara Nusantara: Pada Konferensi Hukum Laut III* (2003), 32-33.
as ordinary straits inside the archipelagic waters of Indonesia.\textsuperscript{69} Accordingly, Indonesia holds the view that there is no right of transit passage in these straits. Although it is arguable that these straits easily fall under the functional criterion of being straits used for international navigation, there are arguments using the geographical criterion which would make it difficult to justify a similar conclusion.\textsuperscript{70} According to Article 37 of the LOSC, the right of transit passage could be exercised in straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ. The Straits of Sunda and Lombok do not necessarily fit this criteria and the word ‘between’ can be interpreted in a different light.\textsuperscript{71}

Indonesia considers that the Straits of Sunda and Lombok are straits that do not immediately connect the high seas (Indian Ocean) or EEZ to other part of the high seas or EEZ. Rather, in geographical sense, those straits are connecting the Indian Ocean or Indonesian EEZ to Indonesian archipelagic waters, other Indonesian straits and to the South China Sea or Sulawesi Sea. Thus, Indonesia believes that the Straits of Sunda and Lombok are not immediately connecting high seas or EEZ, because once a ship enters or exits from these Straits, the ships enters into Indonesian archipelagic waters or another Indonesian strait.

If the wider view of ‘between’ is taken, so as to look at the whole voyage through all the straits of the archipelago, a different result is reached. For example, in the case of ships from the Indian Ocean passing through the Indonesian archipelago to Sulawesi Sea or the South China Sea. The Indonesian archipelago is considered as a

\textsuperscript{69} Indonesian has drawn baselines to enclosure archipelagoes since 1960 which can be considered reflecting the implementation of Article 47 of the LOSC, hence all waters landward of the baselines considered as Indonesian archipelagic waters.

\textsuperscript{70} Article 37, LOSC.

\textsuperscript{71} Donald R Rothwell, ‘The Indonesia Strait Incident: Transit or Archipelagic Sea Lanes Passage’ (1990) 14(6) Marine Policy 491, 500.
large strait which consists of many small straits. This is obvious in the case of ships merely using the Indonesian waters for the purpose of navigating to destinations further south or north passage in this case would in effect be through a series of straits from one end of the archipelago to the other. The wider view has been challenged by Koh who argues that straits within archipelagos should be seen as part of a network of geographical straits through which international shipping passes in order to navigate through the archipelago. He therefore states that, ‘… if straits ultimately link part of the high seas or an economic zone, the fact that the immediate geographical connection consists of two bodies of archipelagic waters becomes irrelevant. If this is accepted then some archipelagic sea lanes could well be classified as straits used for international navigation.’

Considering that the Straits of Sunda, Lombok, Makassar, Ombai, and Wetar have been designated as archipelagic sea lanes where the right of archipelagic sea lanes passage exists, the issue of the status of these straits with respect to navigational rights seems irrelevant. It is also unfeasible to change the status of these straits to become straits used for international navigation, as the right of archipelagic sea lanes passage already exists in these straits.

Finally, straits within Indonesian waters are not considered as straits used for international navigation under Part III of the LOSC, except the Straits of Malacca and Singapore. It is because, from a geographical perspective, the Straits of Malacca and Singapore are considered connecting the high seas or EEZ to another part of the high seas or EEZ, as recognised in Articles 37 and 38 of the LOSC. For reasons stated

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73 Mary George, above n 26, 190.
above, the Straits of Sunda, Karimata, Lombok, Makassar, Ombai, and Wetar\textsuperscript{74} do not satisfy this requirement.

6.3.5. **Issue on Passage through Straits within Indonesian Waters**

The significant increase in the amount of energy (oil, gas, and coal) and goods being transported through Indonesian straits or ‘choke points’ has brought greater pressure on Indonesia to invest in sophisticated and expensive navigational aids in order to ensure the safety and security of passing ships. The dangers associated with the high volume of maritime traffic include the transport of dangerous and hazardous cargoes. The issue is whether Indonesia has to bear this burden on her own or should user States share this burden. On the basis of equity as well as sound economics, since States derive significant benefits from their use of the straits, it seems fair that user States or ships which benefit from the use of these straits should share in the costs of enhancing the safety of these straits. On the contrary, user States and ship owners believe that freedom of passage should be guaranteed in all straits to maintain growing economic activity in international seaborne trade. Their interest is to ensure safe and secure passage at no additional economic cost to sea transportation\textsuperscript{75}.

There is no specific provision in the LOSC which specifies that the ships or user States have the obligation to assist coastal States such as Indonesia in order to enhance the safety and security of these straits. Article 43 of the LOSC clearly prescribes that user States and States bordering a strait should by agreement cooperate in the establishment and maintenance of necessary navigational and safety aids or

\textsuperscript{74} Description of these straits could be found in Kresno Buntoro, above n 5, 7-9; Michael Leifer, above n 5, 12-56.

other improvements in aid of international navigation for the prevention, reduction and
control of pollution from ships. Therefore, the common areas for cooperation based on
this article are navigational safety and marine environment management. These areas
have been continuously articulated in the media and in international meetings especially at the IMO.\(^76\)

Article 43 of the LOSC further provides the requirements for user States to contribute to the cost of safety and environmental protection of a strait. However, there is a problem with respect to developing mechanisms for cost recovery. The basic question is whether the contribution should come from governments or ship owners. Moreover, many argue that any burden of a fee for transit, either direct or indirect, would be contrary to the principle of freedom of transit through a strait used for international navigation.\(^77\)

The issue of burden sharing, for Indonesia, is also complicated. As emphasised in the previous section, the only straits that are used for international navigation recognised by Indonesia are the Malacca and Singapore Straits.\(^78\) The question is whether Indonesia should apply Article 43 of the LOSC in order to impose burden sharing in Sunda, Lombok, Makassar, Ombai, and Wetar straits. Moreover, it seems that the issue of burden sharing under Article 43 of LOSC is not well-developed considering that at present no such agreement has been concluded.

\(^{76}\) Introduction to IMO, available at IMO website at <http://www.imo.org/> at 15 April 2009. Many meetings took place in order to set up the cooperative mechanism in the Straits of Malacca and Singapore, such as Meeting in Penang, Malaysia on 16-17 April 2008 and Meeting in Kuching, Malaysia on 28-29 October 2008. One of issues in the meetings was an aid navigation fund program. It should be noted that in this context Japan has been the major supporter of the program for at least the last 30 years. See, Havas Arif Oegroseno, ‘Threat to Maritime Security and Response thereto: A Focus on Armed Robbery against Ships at Sea in the Straits of Malacca and Singapore: The Indonesian Experience ’ (Paper presented at the Ninth Meeting United Nations Informal Consultative Process on Oceans and the Law of the Sea, New York, 23-27 June 2008).

\(^{77}\) These issues were highlighted in the Jakarta Statement on Enhancement of Safety, Security and Environment Protection in the Straits of Malacca and Singapore in September 2005. Another basis of the argument is Article 38 (2) of the LOSC which stipulates that transit passage means the exercise of freedom of navigation and overflight.

\(^{78}\) Elucidation of Article 20(2) of Act Number 6 of 1996.
In the case of the Straits of Malacca and Singapore, littoral States have sought the assistance of the Japanese Government to enhance the safety of navigation since the early 1970s. In 2004, a number of international organisations have been involved in improving the safety of navigation and protecting the environment of the Straits, such as the World Bank, IMO, IHO, the International Association of Independent Tanker Owners (INTERTANKO) and the International Chamber of Shipping which worked on a project called Marine Electronic Highways in the Straits of Malacca and Singapore. The costs of ensuring the safety and security of the Straits of Malacca and Singapore is still on a voluntary basis, and it is not under the agreement which Article 43 of the LOSC prescribes, although this initiative could be considered as a breakthrough cooperative mechanism concluded under the LOSC.

There is a potential mechanism in Article 43 of the LOSC and State practice in the Straits of Malacca and Singapore which can be adopted in straits within Indonesian waters in order to promote the concept of burden-sharing. Such mechanisms might be established through bilateral or multilateral agreements which could enhance the safety and security of these straits.

Further, the focus of cooperation should be the importance of the straits for international trade and not the question of the legal status of the choke points. States should take into consideration that these straits are designated archipelagic sea lanes which serve the interests of user States and the international community. In this case, the IMO could initiate cooperation mechanisms between Indonesia and user States in order to promote a safe, secure and clean sea in these straits.

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80 This initiative known as the IMO’s Protection of Vital Shipping Lanes Initiative. IMO Council Meeting 93rd Session, 15-19 November 2004.
The language of Articles 28, 29, and 40 of the LOSC, 81 support the conclusion that ships and aircraft are the holder of the right of transit passage. This is in contrast with the basic notion in international law which recognises States as its primary subject. 82 This may create some ambiguity and uncertainty 83 since under international law, rights and obligations are granted and imposed upon States. 84 In most cases, ships and aircraft are not in a position to face the corresponding obligations and responsibilities from the right of transit passage. 85 Traditionally, States ascribe nationality to ships by flying its flag, 86 in the same way that they would ascribe nationality to citizens. This is due to a recognition that ships and aircraft may need the protection and jurisdiction of flag States. 87

6.4. Legal Analysis of Transit Passage in Indonesia

Act Number 6 of 1996 on Indonesian Waters is the only Act in Indonesia which regulates the right of transit passage. Although only one law mentions transit passage, it is useful to examine it in order to see whether the Act is in accordance with the LOSC.

6.4.1. Rights of Indonesia on Transit Passage

Based on the provisions of the LOSC, the rights of States bordering straits may

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81 These articles refer to all ships and aircraft, or foreign ships and aircraft.
82 Montevideo Convention on Rights and Duties of States, 165 LNTS 19.
83 Harris notes that in any legal system there must be liability for failure to observe obligations imposed by its rules. This liability is known as responsibility. David John Harris, Cases and Materials on International Law (6th ed, 2004), 484.
84 Ibid, 486.
86 ‘... (T)he ship, everything on it, and every person involved or interested in its operation are treated as an entity linked to the flag State.’ Paragraph 106 of the Judgment of Saiga Case, Case No. 2, Saint Vincent and the Grenadines v. Guinea, ITLOS, <http://www.itlos.org/start2_en.html> at 15 November 2008; R R Churchill and A V Lowe, above n 39, 179; D P O'Connell, above n 21, 752,865; Haijiang Yang, above n 85, 16-18, 26-29.
87 R R Churchill and A V Lowe, above n 39, 262.
be divided into two aspects: the power of States to regulate transit passage and the power to enforce State laws and regulations. Indonesia has not enacted any government regulation concerning transit passage in Indonesian waters or in straits used for international navigation despite the mandate in Act Number 6 of 1996 on Indonesian Waters to enact government regulation.\footnote{Article 21 (2), Act Number 6 of 1996.} One possible explanation why Indonesia has not enacted detailed government regulation regulating the Straits of Malacca and Singapore is that the Straits do not belong exclusively to Indonesia, but to Malaysia and Singapore as well. Therefore the regulations formulated should be made jointly by the respective States. Secondly, there are international community interests in the Straits of Malacca and Singapore which are difficult for Indonesia to regulate on the basis solely of Indonesia interests.

Article 20 of Act Number 6 of 1996 states that ‘all foreign vessels and aircraft are free to navigate or overfly merely for the purpose of continuous transit, directly and as quickly as possible through Indonesian territorial sea, in a strait between one part of the high seas or the Indonesian EEZ to another part of high sea or the Indonesian EEZ. The right of transit passage should be conducted in accordance with the provisions of the LOSC, international law and other laws and regulations.\footnote{Article 20 (1), Act Number 6 of 1996.} The legislative history of Article 20 of Act Number 6 of 1996 reveals that the right of transit passage in Indonesian waters was based on Article 39 of the LOSC.

Article 21 of Act Number 6 of 1996 also states that ‘due to the safety of navigation, Indonesia can stipulate sea lanes and traffic separation scheme for exercising the right of transit passage’. Article 21 (2) of the Act also provides that further regulations on the exercise of transit passage should be established in government regulation. This provision reflects Article 42(1) of the LOSC which
provides that States bordering the straits may adopt laws and regulations relating to safety of navigation and regulation of maritime traffic; prevention, reduction and control of pollution; prevention of fishing activities; and loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws, and regulations of States bordering straits.

Strait States have the right to adopt laws and regulations which serves to limit the exercise of the right of transit passage. The limitations on transit passage seem more restrictive than innocent passage.⁹⁰ According to Malaysia, Morocco and Spain, the competence of States bordering straits should be broader or at least have the same restrictive factors as in innocent passage.⁹¹ However, the listing of the regulatory powers of the coastal State seems to be a comprehensive.⁹² Indonesia implemented this provision into several laws and regulations such as safety of navigation and prevention and preservation of marine environment regulated in Act Number 17 of 2008 on Shipping,⁹³ fishing vessels and prevention of fishing regulated in Act Number 31 of 2004 on Fisheries,⁹⁴ loading or unloading of any commodity, currency or person regulated in Act Number 10 of 1995 on Customs,⁹⁵ amended by Act Number 17 of 2006,⁹⁶ Act Number 11 of 1995 on Fiscal Matters⁹⁷ amended by Act Number 39 of

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⁹⁰ The right of coastal States to adopt laws and regulations stated in Article 21 (1) of the LOSC.
⁹¹ Explanatory Comment to Article 40 (1) of Malaysia’s Amendment to the RSNT/Part II, 8 March 1977.
⁹² John Norton Moore, above n 3, 114.
⁹³ Act Number 17 of 2008 on Shipping (State Gazette Year 2008 No. 64, Supplementary State Gazette No. 4849).
⁹⁴ Act Number 31 of 2004 on Fisheries (State Gazette Year 1996 No. 118, Supplementary State Gazette No. 4433).
⁹⁵ Act Number 10 of 1995 on Customs (State Gazette Year 1996 No. 75, Supplementary State Gazette No. 3612).
⁹⁶ Act Number 17 of 2006 on Amendment of Act Number 10 of 1995 on Customs (State Gazette Year 2008 No. 93, Supplementary State Gazette No. 4661). Amendment of the Act relates to ratification of agreement on establishing the World Trade Organization.
⁹⁷ Act Number 11 of 1995 on Fiscal (State Gazette Year 1996 No. 76, Supplementary State Gazette No. 3613).
Indonesia regulates safety of navigation of ships passing through Indonesian waters in Act Number 17 of 2008 on Shipping. Article 190 of the Act stipulates that the government designates systems of routes for safety and security of navigation in certain areas. System of routes consists of traffic separation scheme, deep water routes, restricted areas, areas to be avoided, dual routes, and recommended track. Indonesia has to establish aids of navigation and telecommunication of navigation, and declare prohibited and restricted areas on an activity affects to safety of navigation. This is in keeping with Article 41 of the LOSC, which allows States to adopt laws and regulations on the safety of navigation by designating sea lanes and adopting traffic separation schemes in straits used for international navigation provided that certain conditions are satisfied. Article 42(1) (b) of the LOSC provides that States bordering the straits may adopt laws and regulations relating to transit passage through straits in respect of prevention, reduction, and control of pollution, by giving effect to applicable international regulations regarding the discharges of oil, oil waste and other noxious substances in the straits. It seems that States bordering straits may not adopt

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98 Act Number 39 of 2007 on Amendment of Act Number 11 of 1995 on Fiscal (State Gazette Year 2008 No. 105, Supplementary State Gazette No. 4755). Amendment of the Act focuses on sanctions, law enforcements, and criminalisation on certain activities.
99 Act Number 9 of 1992 on Immigration (State Gazette Year 1996 No. 33, Supplementary State Gazette No. 3474).
100 Act Number 17 of 2008 on Shipping (State Gazette Year 2008 No. 64, Supplementary State Gazette No. 4849).
101 Article 190 (1), Act Number 17 of 2008.
102 Article 192, Act Number 17 of 2008.
103 Article 195, Act Number 17 of 2008.
104 These conditions include: (1) the sea lanes and traffic separation schemes necessary to promote the safe passage of ships through straits; (2) such sea lanes and traffic separation schemes conform to generally accepted international regulations; (3) the proposals to designate sea lanes or prescribe traffic separation scheme (or to substitute either of them) have to be referred to IMO, with a view to their adoption. IMO may not adopt such proposals unless they are agreed upon by the States bordering the straits. On the other hand, the States bordering the straits concerned may not designate or prescribe such sea lanes or traffic separation scheme until they have been adopted by IMO. See Article 41, LOSC; International Maritime Organization, Implications of the United Nations Convention on the Law of the Sea for International Maritime Organization (2008).
regulations concerning the prevention, reduction and control pollution resulting from causes other than discharges, which excludes pollution caused by dumping or resulting from maritime casualties. Article 42 (1) (b) of the LOSC seems to be more restrictive that the parallel innocent passage provisions which outlines the regulatory power of the coastal State in its territorial sea within the broader context of the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.\(^{105}\) Indonesian regulations on the prevention of marine pollution and the preservation of the marine environment are not based on the passage regimes, but on the activities of ships. Prevention and preservation of the marine environment are regulated in Act Number 23 of 1997 on Environmental Management\(^{106}\) and Act Number 17 of 2008 on Shipping. Act Number 23 of 1997 grants Indonesia control over activities which have a social impact on the general public.\(^{107}\) The Act requires Indonesia to develop a fund to address the costs of environmental protection.\(^{108}\) The Act only focuses on environmental management and does not elaborate on what activities will have a detrimental effect on the environment.\(^{109}\) Act Number 17 of 2008 on Shipping regulates prevention and preservation of marine environment including conservation of the marine environment,\(^{110}\) prevention of pollution from ship activities,\(^{111}\) prevention of pollution from port activities,\(^{112}\) and dumping.\(^{113}\) However, these articles merely regulate the activities at seas which threaten the marine environment but do not address the navigational rights exercised by ships.

\(^{105}\) Article 21(1) (f), LOSC.

\(^{106}\) Act Number 23 of 1997 on Environmental Management (State Gazette Year 1997 No. 68, Supplementary State Gazette No. 3699).

\(^{107}\) Article 8 (2) (d), Act Number 23 of 1997.

\(^{108}\) Article 8 (2) (e), Act Number 23 of 1997.

\(^{109}\) Act Number 23 of 1997 is assumed to use a holistic approach based on the concept of the essential unity of the living space and the Indonesian people.

\(^{110}\) Article 226, Act Number 17 of 2009.

\(^{111}\) Articles 227-237, Act Number 17 of 2009.

\(^{112}\) Articles 234-238, Act Number 17 of 2009.

\(^{113}\) Articles 239 and 240, Act Number 17 of 2008.
The LOSC also allows the coastal States of a strait to adopt laws and regulations with respect to fishing vessels and the prevention of fishing, including the stowage of fishing gear. The formulation of Article 42(1) (c) of the LOSC is different from Article 21(1) (e) of the LOSC on the right of a coastal State to adopt fisheries laws and regulations that apply to ships that exercise the right of innocent passage through its territorial sea. The formulation of Article 42 of the LOSC is more restrictive than that of Article 21, since the regime of passage through straits should not affect the legal status of the water forming such straits or the exercise by the State bordering the straits of their sovereignty or jurisdiction over such waters. Furthermore, there is no explanation why Article 42(1) (c) of the LOSC uses the phrase ‘with respect to fishing vessel’ because it could be interpreted as meaning that non-fishing vessels could fish in the straits. The argument does not seem adequate however, as all ships, while exercising the right of transit passage, must refrain from any activities other than just passage in a continuous and expeditious transit. Indonesia implements these articles into Act Number 31 of 2004 on Fisheries. The Fisheries Act prohibits the use of illegal fishing methods and equipments that pollute and degrade the fisheries and their ecosystems. These activities can be categorised as a crime. Indonesia defines ‘fishing vessel’ broadly which covers vessels for catching, transporting, exploring, processing, training, and supporting fishing activity.

Article 42(1) (d) of the LOSC provides that States bordering the straits may adopt laws and regulations relating to transit passage in respect of ‘the loading or unloading of any commodity, currency or person in contravention of the customs,'
fiscal, immigration or sanitary laws and regulations of States bordering straits.’ The right of a coastal State is only limited on the loading or unloading of any commodity, currency or person. It is not the same as the innocent passage provision which includes the regulation on sanitary matters.\(^{120}\) It is even more limited compared with the right of coastal States in the contiguous zone in which coastal States could adopt laws and regulations on fiscal, custom, immigration and sanitation.\(^{121}\) Indonesia implements this article into several acts such as Act Number 10 of 1995 on Customs as amended by Act Number 17 of 2006, Act Number 11 of 1995 on Fiscal, Act Number 16 of 1992 on Quarantine of Agriculture, Cattle and Fish (Quarantine Act), and Act Number 9 of 1992 on Immigration. These Acts covers all activities both inland and at sea.

Indonesia has not enacted any regulation with respect to how submarine and other underwater vehicles should pass through Indonesian waters. While submarines and other underwater vehicles are free to exercise right of transit passage, it could be argued that these vehicles have to adhere to other regulations. It is not clear whether the innocent passage regime requirement for submarine and other underwater vehicles to navigate on the surface and to show their flag applies to transit passage.\(^{122}\)

Part III of the LOSC does not contain provisions similar to the enforcement rights of the coastal State over its territorial sea. The rights of strait States to take enforcement action against ships whose passage is not innocent in straits used for international navigation are limited. There are clear provisions in the LOSC that coastal States should not impair, hamper, deny or suspend the right of transit passage.\(^{123}\) Similarly, Article 233 of the LOSC provides for limited enforcement powers to bordering States in respect of violations of laws and regulations on safety

\(^{120}\) Article 21(1)(h), LOSC.
\(^{121}\) Article 33(1), LOSC.
\(^{122}\) Article 20, LOSC.
\(^{123}\) Articles 38, 42 (2), 44, LOSC.
navigation, maritime traffic, and prevention, reduction and control pollution covered in Article 42 paragraph (1) (a) and (b). So, Article 233 of the LOSC contains various conditions which allow States bordering the straits to exercise enforcement powers.\textsuperscript{124} Thus, the provision confirms that States bordering the strait have very limited powers of enforcement within straits.

Indonesia has not specifically regulated enforcement in straits used for international navigation. Because of the absence of specific laws and regulations,\textsuperscript{125} in the event of non-compliance by ships or aircraft, Indonesia may apply the Code of Criminal Procedural\textsuperscript{126} as a general mechanism on law enforcement, and the colonial ordinance on maritime domain.\textsuperscript{127} According to Sumardiman, there is a draft law on marine enforcement mechanism. The draft is part of the implementation of the LOSC, but there are many arguments on the procedural difficulties of implementing this draft. It can be assumed that this draft should be enacted soon because law enforcement at sea still uses the old Dutch Ordinance.

6.4.2. Duties of Indonesia

There is no Indonesian law regulating the duties of Indonesia with respect to transit passage. However, the obligations of Indonesia under the LOSC are clear.

\textsuperscript{124} These include: passing ships must commit a violation of the laws and regulations of coastal States in respect of the safety of the navigation and the regulation of maritime traffic. The passing ship should not be entitled to sovereign immunity because such ships come under special treatment in the LOSC. Discharges of oil, oily wastes and other noxious substances must cause or threaten major damage to the environment of the strait. Furthermore, there are many terms in Article 233 of the LOSC which have no clear definitions. For example, it is unclear as to what constitutes ‘appropriate enforcement measure’ where a foreign ship causes or threatens major damage to the marine environment of the straits or what constitutes ‘major damage’.

\textsuperscript{125} The draft is in Department of Law and Human Rights. The author is member of the interdepartmental working group on implementation of the LOSC.

\textsuperscript{126} Act Number 8 of 1981 on Criminal Procedure (State Gazette Year 1983 No. 76, Supplementary State Gazette No. 3209).

Article 44 of the LOSC stipulates that coastal States or States bordering the strait shall not hamper transit passage of ships and aircraft through their straits. Thus, States have to respect the right of transit passage, considered as the main obligation of coastal States while exercising their sovereignty over the straits. Article 38 of the LOSC also mentions that ‘… all ships and aircraft enjoy the right of transit passage, which shall not be impeded …’ The language used in the two articles are different, but it seems the purpose of these articles are the same, namely that the coastal States should not suspend the right of transit passage. There are many provisions in the LOSC which indicate that coastal States shall not suspend the right of transit passage using different terms, such as ‘hamper’, ‘deny’, ‘impair’, ‘impede’, and ‘suspension’. These provisions restate the affirmative obligation of States bordering straits to respect the right of transit passage. It is also clear that Indonesia has to provide and guarantee the safety of navigation and the protection and preservation of the marine environment around its straits.

The LOSC in Article 42(2) imposes the duty upon the coastal State not to discriminate in form or in fact among foreign ships which will have the practical effect of denying, hampering or impairing the right of transit passage. The obligation of coastal States give due or appropriate publicity applies to laws and regulations relating to transit passage; to the charts in where all sea lanes and traffic separation schemes are designated; and to any danger to navigation or overflight within or over the strait.

128 Article 42(2), LOSC.
129 Article 38, LOSC.
130 Article 44, LOSC.
131 There are many provisions in the LOSC which have similar restrictions such as in Part II and XII of the LOSC. According to Article 24 (1) (b), in the application of the LOSC, coastal States shall not discriminate in form or in fact against the ships of any States or against ships carrying cargoes to, from or on behalf of any State. Similar provisions are provided in Article 227 of the LOSC.
132 Article 42(3), LOSC.
133 Article 42(6), LOSC.
of which they have knowledge.\textsuperscript{134} Indonesia has discharged its duties with respect to
the safety of navigation in Indonesian waters by updating navigational charts, publishing notices to mariners, publicising the Indonesian pilotage.\textsuperscript{135} These activities are not based on requirements under the transit passage regime, but it is based on Act Number 17 of 2008 on Shipping and on the obligations of Indonesia as a member of IMO, IHO, ICAO, and other international bodies which relate to the safety of navigation and overflight through and over Indonesian waters.

6.5. Conclusion

The right of transit passage through straits used for international navigation is an important compromise in the LOSC that safeguards the interests of coastal States and the navigational rights of user States and the international community over these important sea routes. This Chapter discussed the regime of transit passage by providing its definition, elements, as well as its relationship with the rights of innocent passage and archipelagic sea lanes passage. The Chapter identified and discussed the legal status of six straits in Indonesian waters used for international navigation. Finally, it proceeded with a legal analysis of the implementation of the transit passage regime in Indonesia by examining relevant domestic legislation and their conformity with the LOSC.

In summary, there are three main points raised in this Chapter. First, despite the ambiguity and lack of a clear definition of what constitutes straits in the LOSC, there are geographical, legal and functional criteria which can be used to determine straits used for international navigation. Secondly, there are straits within Indonesian waters

\textsuperscript{134} Article 44, LOSC.
used for international navigation. However, it is the position of Indonesia that these straits, with the exception of the Straits of Malacca and Singapore, do not fall into the LOSC category of straits used for international navigation. These other straits have been designated by Indonesia as archipelagic sea lanes where the right of archipelagic sea lanes passage exists. Thirdly, the Chapter raised the issue of possible cooperative mechanisms that promote cost-sharing through an agreement whereby the financial burden of ensuring the safety and security of the straits are not borne solely by Indonesia but shared by user States and ships and aircraft which derive economic benefits from their passage through these waters.

The next chapter will analyse Access and Communication passage in Indonesian waters, including the background and definition of Access and Communication passage, difference with other navigational regimes, its operational aspects, and obligations of Indonesia and ships and aircraft exercising the right access and communication passage.
Chapter Seven

Access and Communication Passage in Indonesian Waters

7.1. Introduction

Prior to the emergence of the archipelagic State concept, discussion on archipelagos was more focused on the issues of the drawing of straight baselines and the definition of archipelago, rather than the character of the enclosed waters.¹ During the Preparatory Committee of the 1930 Hague Codification Conference, Germany raised the issue of possible infringement of navigational rights which might arise from the enclosure of an island group within a single baseline system; but the issue was not responded to by States members of the Conference.² As O'Connell notes, ‘the Conference did not exhibit more awareness of the fundamental issue … and the authors did not pay more attention to this aspect of the matter.’³

In the early 1950s, the International Law Commission (ILC) started to consider the issue of the archipelago and the potential conflict of an archipelagic regime with rights of navigation. The claims of archipelagic States during the following years highlighted the crucial question of whether even innocent passage could still be exercised in their enclosed sea areas. Consequently, during the negotiations at UNCLOS III, States tried to balance the concerns of the archipelagic States with the interests of other States in archipelagic waters.

Besides navigational rights and freedoms in archipelagic waters, another contentious issue relating to the regime of archipelagic waters is the possible effect of

³ D P O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 British Year Book of International Law 1, 11.
the application of the archipelagic principles on the interest of adjacent neighbouring States. Neighbouring States were concerned that their traditional rights such as local access, control over resources, and the laying and maintenance of submarine cable and pipelines may be restricted. Malaysia in particular was concerned about the impact of Indonesia’s claims on Indonesian national unity which it will affect to the Malaysia’s traditional rights and the unity of Malaysia.\(^4\)

To address Malaysia’s concerns, Indonesian signed bilateral treaty on 25 February 1982 which defines and regulates the legal regime of the archipelagic State and the legitimate interests of Malaysia in the territorial sea and the archipelagic waters of Indonesia lying between East and West Malaysia. The Treaty is an important development in the implementation of Article 47 (6) and Article 51 (1) of the LOSC concerning the existing rights of neighbouring States in archipelagic waters.

The existing rights and other legitimate interests which Malaysia traditionally had in the territorial sea and archipelagic waters of Indonesia lying between East and West Malaysia and the airspace above, include the rights of access of communication of ships and aircraft, traditional fishing rights, the right of maintenance of submarine cables and pipelines, the right to undertake search and rescue, the right to promote and maintain law and order, and the right to conduct marine scientific research.\(^5\) This

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\(^4\) During Caracas Meeting, Tan Sri Abdul Kadir Yusof (Malaysia Attorney-General) made a statement that ‘...based on geographical point of view, two groups of islands that belong to Indonesia lie directly between West and East Malaysia and consequently the Indonesian archipelago boundary as claimed, would divide Malaysia. While we support the Indonesian claim to unity, we find ourselves disunited and disconnected. We would also find Malaysia separated by foreign territory’, cited in Michael Leifer, *International Straits of the World: Malacca, Singapore and Indonesia*, International Straits of the World (1978), 135.

\(^5\) Article 2 (2) of the Treaty between the Republic of Indonesia and Malaysia relating to the Legal Regime of the 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 (hereafter Access and Communication Treaty or Treaty).
chapter will focus only on the rights of access and communication of Malaysian ships and aircraft as part of the navigational regime in Indonesian waters.

7.2. Regime of Access and Communication Passage

The geographical configuration of the Indonesian archipelago is unique. It consists of thousands of islands spread over the seas in the equatorial region, with its sea territory being larger than its land territory. Indonesia has to draw baselines which can encompass all the islands and enclose all seas surrounding the islands. The Natuna Sea divides the territory of Malaysia into two parts: West Malaysia (or the Malaysian Peninsula) and East Malaysia in Kalimantan Island (see Figure 26).

![Figure 26. Natuna Sea](image)

One of the significant aspects of the archipelagic regime is the obligation to recognise existing agreements with other States. Article 51 of the LOSC stipulates that

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6 Indonesia as an archipelagic State has drawn the archipelagic baselines of Indonesia in accordance with Article 47 of the LOSC.

‘an archipelagic State shall respect existing agreements with other States and shall recognise traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.’ Such rights could, at the request of any of the States concerned, be further regulated by bilateral agreements between them. Furthermore Article 47(6) of the LOSC reaffirms that the agreement between an archipelagic State and an immediately adjacent neighbouring State on existing rights and all other legitimate interests shall continue and be respected.

7.2.1. Historical Background of Access and Communication Passage

After a confrontation between Indonesia and Malaysia,8 States in South East Asia demanded a regional organisation known as the Association of South East Asian Nations (ASEAN)9 be established with the aim of building a peaceful environment in the region. In order to support regional stability, Indonesia made several agreements on maritime boundaries10 and a memorandum of understanding on particular issues. In 1974 Indonesia and Malaysia signed an important document entitled ‘Memorandum of Understanding’ (MOU) which provided the basis for more extensive bilateral discussions on the archipelagic doctrine.

After the 1974 MOU, a series of discussions were held between Malaysia and Indonesia on how to resolve problems relating to the Indonesian proposal on the archipelagic concept. At least two main issues were discussed. Firstly, at a national

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8 Indonesia and Malaysia confrontation took place in 1963-1965.
10 During the period 1969-1975, Indonesia concluded maritime boundary agreements with its neighbouring countries.
level, it was agreed that there would be an exchange of letters followed by a bilateral treaty which provided special treatment for Malaysia in Indonesian waters. Second, at an international level, Malaysia and Indonesia agreed to search for balanced provisions to be included in the LOSC which would safeguard the legitimate interests of Malaysia in the area.\(^\text{11}\)

### 7.2.1.1. Prior to UNCLOS III

Indonesia recognises that it had a long cultural and social relationship with Malaysia.\(^\text{12}\) Indonesia also understood that Malaysia had traditional rights that existed in the Indonesian waters between East and West Malaysia. Therefore, Indonesia had to provide certain privileges in order to accommodate the legitimate rights of Malaysia in Indonesian waters, such as rights of access and traditional fishing rights.

Prior to UNCLOS III, Indonesia undertook to provide a special corridor for passage between West Malaysia and East Malaysia to recognise the legitimate rights of Malaysia in the Natuna Sea. Indonesia realised that the issues in the Natuna Sea could jeopardise the archipelagic State concept during UNCLOS III if Indonesia did not settle it beforehand. On the other hand, Malaysia would support the concept of archipelagic States if Malaysian traditional rights in the area were guaranteed. With these issues in mind, Indonesia and Malaysia had several meetings to accommodate their respective interests.

Indonesia and Malaysia developed various draft articles concerning the archipelagic State concept, including the recognition of traditional rights in

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\(^\text{12}\) Indonesia and Malaysia are part of Melayu race and known to have the same root of ancestor, Malaysia used to be part of Sriwijaya Kingdom. See, G Moeldjanto, *Indonesia Abad ke-20: Dari Kebangkitan Nasional sampai Linggarjati*, Sejarah Indonesia (2nd ed, 1989), (in Indonesian), 15-23.
archipelagic waters. However, in the draft articles, no mentioned were made on what constituted legitimate rights in archipelagic waters. At this stage, Indonesia only recognised the legitimate interests of Malaysia in Indonesian waters as limited to traditional fishing rights and access between East and West Malaysia.\(^\text{13}\)

7.2.1.2. UNCLOS III

During the Caracas Meeting (20 June - 29 August 1974) at UNCLOS III, Malaysia supported the Indonesian concept of the archipelagic State and proposed the inclusion of rights of adjacent neighbouring States in archipelagic waters. The Malaysian delegate stated that if the drawing of such baselines enclosed part of the sea which had traditionally been used by an immediately adjacent neighbouring State for direct communication,\(^\text{14}\) the continuous right of communication would be recognised and guaranteed by the archipelagic State.\(^\text{15}\)

At the Geneva Meeting, Malaysia submitted another draft proposal to include all rights such as the freedom of navigation, overflight, fishing and the laying of submarines cables and pipelines. Malaysia also sought the preservation of naval and aerial manoeuvres as well as other legitimate interests.\(^\text{16}\) Indonesia was not content with this proposal. Hasjim Djalal notes that Malaysia attempted to negate or diminish the archipelagic principles.\(^\text{17}\) Although Malaysia did not oppose the archipelagic concept, it is obvious that Indonesia did not recognise the list of activities mentioned in

\(^{13}\) Hasjim Djalal, *Perjuangan Indonesia di Bidang Hukum Laut* (1979), 120; Adi Sumardiman, above n 11, 95.

\(^{14}\) The interests include the laying of submarines cables and pipelines, the continued right of national territory to another part of such territory.

\(^{15}\) UN Doc. A/CONF.62/C.2/L.49.


\(^{17}\) Hasjim Djalal, above n 13, 122-32.
the proposal as legitimate interests of Malaysia in its archipelagic waters.18

During the meeting in Jakarta on 26-27 July 1976, both delegations agreed to sign another MOU for a joint position on the archipelagic State concept and Malaysia again reaffirmed its support to the concept. Indonesia also stated that it would continue to respect the legitimate and existing rights traditionally exercised by Malaysia in Indonesian archipelagic waters between East and West Malaysia, especially the right of access and communication through those waters whether by sea or air, and whether it be for civil or military vessels.19 Furthermore, the MOU agreed on six points; namely: Malaysian recognition and support of the Indonesian archipelagic State regime; Indonesian recognition of the right of access and communication through Indonesian territorial waters and archipelagic waters between East and West Malaysia by sea or air for civil or military purposes including naval and aerial manoeuvres, excluding third parties; the continuation of traditional fishing rights in existing areas before the application of the archipelagic regime; protection of existing cables and pipelines between East and West Malaysia; protection of other legitimate interests; and the conclusion of a bilateral treaty before the final adoption of an international convention.

The MOU also agreed that those general provisions on existing rights in archipelagic waters would be included in the provisions of the LOSC. These provision are reflected in Article 119 (7) of the Revised Single Negotiating Text reads as follows:

If a certain part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, all existing rights and

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18 The Malaysian position in supporting the Indonesian concept on archipelagic States was reaffirmed by Malaysia during a meeting of the President of Indonesia and the Prime Minister of Malaysia in November 1975.
19 Memorandum of Understanding between Indonesia and Malaysia signed in Jakarta, 27 July 1976. Both MOU are confidential and unpublished.
all other legitimate interest which the latter state has traditionally exercised in such waters and all rights stipulated under agreements between these two States shall continue and be respected.\footnote{UN Doc.A/CONF.62/WP.8/Rev.1/Part II.}

### 7.2.1.3. Bilateral Treaty

Following the 1976 MOU, Indonesia proposed to conclude a bilateral treaty with Malaysia on the application of the archipelagic State concept in 1981. A series of meetings\footnote{By December 1981 four meetings had taken place.} between Indonesia and Malaysia held in Jakarta and Kuala Lumpur formulated the draft treaty.

On 25 February 1982, the Treaty between the Republic of Indonesia and Malaysia relating to the Legal Regime of the 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 (hereafter Access and Communication Treaty) was signed by the respective Ministers of Foreign Affairs in Jakarta. Indonesia has implemented the Access and Communication Treaty in Act Number 1 of 1983. Another document, called a Record of Discussion, was signed by the respective leaders of the negotiating team and defined the terms of the treaty. Unlike the Access and Communication Treaty, the Record of Discussion is confidential and unpublished.

The Access and Communication Treaty tries to balance the interests of both parties in terms of protecting the rights and legitimate interests of Malaysia without rendering the Indonesian archipelagic concept meaningless. The Treaty states that Malaysia shall recognise and respect the legal regime of the archipelagic State applied by the Republic of Indonesia in accordance with the laws and regulations of the
Republic of Indonesia and in conformity with international law, under which Indonesia has sovereignty over the territorial sea, archipelagic waters and the seabed and subsoil thereof and the resources contained therein as well as the airspace above them.\textsuperscript{22} Article 2 (2) of the Access and Communication Treaty stipulates that Indonesia shall continue to respect existing rights and other legitimate interests that Malaysia has traditionally exercised in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of Indonesia lying between East and West Malaysia. The existing rights and legitimate interests of Malaysia referred to in the treaty\textsuperscript{23} include the following:

- Right of access and communication of Malaysian ships and aircraft;\textsuperscript{24}
- The traditional fishing rights of Malaysian fishermen in the designated areas;\textsuperscript{25}
- The legitimate interests relating to the existence, protection, inspection, maintenance, repair and replacement of submarine cables and pipelines;\textsuperscript{26}
- The legitimate interests in the promotion and maintenance of law and order;\textsuperscript{27}
- The legitimate interest to undertake search and rescue operations;\textsuperscript{28} and
- The legitimate interest to cooperate with the appropriate authorities of the Government of the Republic of Indonesia in the conduct of marine scientific research.\textsuperscript{29}

Although the content of the Access and Communication Treaty is identical with the 1976 Memorandum of Understanding, the Treaty provides details as to the rights and obligations of Malaysia in Indonesian waters. It seems that Indonesia and Malaysia had finally agreed on what constituted the legitimate interest of neighbouring adjacent States.

\begin{footnotes}
\item[22] Article 2 (1) of the Treaty.
\item[23] Article 2 (2) of the Treaty.
\item[24] Part II and III of the Treaty.
\item[25] Part V of the Treaty.
\item[26] Part VI of the Treaty.
\item[27] Part VII of the Treaty.
\item[28] Part VIII of the Treaty.
\item[29] Part IX of the Treaty.
\end{footnotes}
One of the more interesting points in the Access and Communication Treaty is that Indonesia recognised the legitimate interest of Malaysia in the territory of Indonesia lying between East and West Malaysia. There is no explanation as to what the ‘territory of Indonesia’ signifies. Having considered Article 8 (1) and 9 (1) of the Treaty, it can be argued that the ‘territory of Indonesia’ refers to islands in the Natuna Sea. It is interesting to note that Indonesia agreed to such provisions, because based on international law, land is subject to the full sovereignty of States, and that Indonesia has recognised its land and superjacent airspace as territory of Indonesia, over which it has sovereignty.

The right of access and the communication passage regime is a new regime which is not found in the LOSC, international law or other State practice. The right is a special right that may only be exercised by Malaysia in Indonesian waters and is a compromise between the freedom of navigation proposed by Malaysia and the restricted passage proposed by Indonesia. Access and communication passage lies between freedom of navigation and innocent passage. The next section will elaborate the right of access and communication.

7.2.2. Elements of the Access and Communication Passage

Article 2 of the Access and Communication Treaty provides a definition of transit passage which consists of three elements, namely that, access and communication passage is the exercise of navigation and overflight; the passage should be solely for the purpose of continuous, expeditious and unobstructed transit; and its

30 Article 3 (c) of the Convention on International Civil Aviation 1944, 15 UNTS, opened for signature 7 December 1944 (entered into force 4 April 1947) (The Chicago Convention) mentioned that ‘No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorisation by special agreement or otherwise, and in accordance with the terms thereof’.

exercise should be in accordance with the provisions of the Treaty.

Access and communication passage must be exercised in accordance with the provisions of the Treaty which relate to the legitimate interests which Malaysia has traditionally exercised in the territorial sea and archipelagic waters as well as in the airspace above the waters referred to in the Treaty. The purpose of the limitation is to respect the sovereignty and jurisdiction of Indonesia. Thus, the regime of access and communication passage does not modify the legal status of the waters within the corridors. Accordingly any activities which are not directly related to the passage are contrary to the Treaty. The right of continuous, expeditious and unobstructed access and communication provided for in the Treaty shall not include any other activity not having a direct bearing on such access and communication.32 Interestingly, there are no such limitations for State aircraft in exercising the right of access and communication passage.

7.2.3. Corridors for Access and Communications Passage

Article 2 (2) (a) of the Access and Communication Treaty stipulates that the right of access and communication of government ships through the designated corridors are defined by a series of continuous axis lines in the map attached to the Treaty. However, the Treaty does not specify the details of the axis lines such as turning points and directions. Furthermore, the Treaty does not specify where the axis lines start or finish. The geographical coordinates of the turning point and the nautical charts that were used as official maps of the negotiation for drawing axis lines may be found in the ‘Record of Discussion’. Thus, it is difficult at times to find the position of the corridors if the map and Record of Discussion are unavailable. There is no

32 Articles 4 (4), 5 (4), and 9 (2) of the Treaty.
explanation given as to why such geographical coordinates are not mentioned in the Treaty. It could be argued that the drafters of the Treaty considered that the corridors would be substituted, changed or added at a later stage. Thus, not placing them in the Treaty it would make it easier to change the axis lines of the corridors. An illustrative map of the corridors is shown in Figure 27.

![Illustrative Map Corridors in Natuna Sea](image)

**Figure 27. Illustrative Map Corridors in Natuna Sea**

Corridor I or Axis I known as ‘Corridor Midai’ connects passage routes from the Malaysian Peninsula to the South China Sea or vice versa. Turning point I (a) passage route to or from Malaysia Peninsula has a direction of 270 degrees and turning point I (c) passage route to or from the South China Sea has a direction of 106 degrees. The Midai corridor passes along the recommended routes for international navigation between Pulau Repong and Pulau Penghibu and between Natuna Besar and Natuna Selatan.

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33 Source of the map in Adi Sumardiman, above n 11, 115.
Corridor I may be used for exercising the right of access and communication for Malaysian government ships (including naval ships); merchant ships (including foreign merchant ships) that are engaged in trading with East and West Malaysia; and fishing vessels (including foreign fishing vessels) which cooperate with the Government of Malaysia. In this corridor, Malaysian naval ships may conduct naval manoeuvres (including tactical exercises) without firing of weapons, while proceeding through the corridor.

Corridor II or Axis II known as ‘Corridor Muri’ connects a passage route from Singapore to Sarawak. Turning Point II (a) is a passage route to Singapore and has a direction of 252 degrees and turning point II (b) passage route to Sarawak has a direction of 60 degrees. The Muri corridor also passes between Pulau Repong and Pulau Penghibu but its other end is further south, between the Api passage and north of Tanjung Datu.

Unlike in the Midai corridor, Malaysian ships may exercise the right of access and communication passage through this corridor in the eastern part of Muri Island. However, they are required to take precautionary measures in order to respect the traditional fishing activities in this area.34

7.3. Rights and Duties of Indonesia on Access and Communication Passage

There are many similarities regarding navigational rights between the provisions of the Access and Communication Treaty and the LOSC concerning the rights and duties of Indonesia as a coastal State. As mentioned earlier, since the provisions in the Treaty sometimes use the same language as in the LOSC, it may be argued that they have the same meaning. Thus, it is useful to examine the provisions of

34 Records of Discussion during the negotiation. The Document is not available publicly.
the Treaty to ascertain the rights and duties of Indonesia regarding access and communication passage and, in certain cases, to compare the rights and duties of Indonesia as a coastal State with different regimes of passage.

7.3.1. Rights of Indonesia based on the Treaty

Unlike in the LOSC, the Treaty does not specify the right of Indonesia regarding access and communication passage. Article 2 of the Treaty only specifies that Indonesia may apply laws and regulations relevant to safety of navigation and overflight. Furthermore, both parties agreed to develop further arrangements on the application and implementation of the Treaty, such as naval manoeuvres, overflight and aerial manoeuvres, safety of navigation, the promotion and maintenance of law and order, the coordination of search and rescue and marine scientific research.

Although there are no specific provisions in the Treaty which define the rights of Indonesia, the application and implementation of the right of access and communication passage and the rights of Indonesia can be divided into two aspects: the power to regulate access and communication passage and the power to enforce the exercise of the right of access and communication passage.

7.3.1.1. Regulatory Power

Article 12 of the Treaty provides that ships and aircraft should observe regulations, procedures and practices. This implies that Indonesia must enact laws on safety of navigation and overflight. The Treaty stipulates that such laws and regulations should be in accordance with generally accepted international regulations, procedures and practices. It is imperative that Indonesia look into the provisions of the LOSC concerning such rights. Article 42 of the LOSC is analogous to the rights relating to the safety of navigation in accordance with Article 12 of the Treaty. Article
42 of the LOSC provides that States bordering the straits may adopt laws and regulations relating to transit passage through straits.

Article 12 (1) (b) of the Access and Communication Treaty stipulates that ‘ships exercising the right of continuous, expeditious and unobstructed access and communication in accordance with the provisions of the Treaty shall comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships’. This article is in accordance with the LOSC which provides that States bordering the straits may adopt laws and regulations relating to transit passage through straits in respect of the prevention, reduction and control of pollution. However, the regulatory power of coastal States in their territorial sea are still broader than that provide in the Treaty.

The Access and Communication Treaty recognises the traditional fishing rights of Malaysia in certain designated fishing areas. Furthermore, fishing vessels, including foreign fishing vessels, may exercise the right of continuous, expeditious and unobstructed access and communication through the corridors solely for the purpose of direct passage between East and West Malaysia. In addition the Treaty grants innocent passage rights to Malaysian fishing vessels from base stations to the fishing areas. In contrast, the Treaty does not specify the rights of Indonesia in these instances. However, there are applicable provisions in the LOSC which regulate the powers of coastal States over foreign fishing vessels while they are passing through their waters. According to the LOSC, coastal States may adopt laws and regulations with respect to fishing vessels, and the prevention of fishing, including the stowage of

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35 Article 42 (1) (b), LOSC.
36 Article 5 (3) of the Treaty.
37 Article 13 (1) (b) of the Treaty.
38 Article 21 (1) (e) and Article 42 (1) (c), LOSC.
fishing gear.39

The Access and Communication Treaty does not specify the right of Indonesia to implement laws and regulations relating to customs, fiscal, immigration or sanitary matters. Having considered that the right of access and communication is a right of passage through corridors connecting East and West Malaysia, other activities which are not directly related to the passage should be prohibited. Therefore, Indonesia has a right to adopt laws and regulations in respect of the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of Indonesia.40

7.3.2.2. Enforcement Powers

Article 18 of the Access and Communication Treaty states that ‘the Contracting Parties shall, through bilateral arrangements to be agreed upon, cooperate in the promotion and maintenance of law and order in the territorial sea and archipelagic waters of the Republic of Indonesia’. The provision should be read together with Article 3 (1) (c) of the Treaty which states that Malaysia should comply with the laws and regulations of Indonesia. However, the previous provision requires further bilateral arrangements to regulate the enforcement of law and order.

The bilateral arrangement seems to regulate only procedural matters and does not regulate the enforcement power itself. In other words, Indonesia has sovereignty or jurisdiction over the body of water forming the corridors, and therefore Indonesia has enforcement power to uphold its laws. However, there is no provision in the Treaty

39 Articles 19 (2) (i), 21 (1) (d), 42 (1) (d), LOSC.
40 Article 19 (2) (g), LOSC. Indonesia has enacted several laws on customs, fiscal, and immigration, such as Act Number 17 of 2006 on Amendment of Act Number 10 of 1995 on Customs (State Gazette Year 2008 No. 93, Supplementary State Gazette No. 4661); Act Number 39 of 2007 on Amendment of Act Number 11 of 1995 on Fiscal (State Gazette Year 2008 No. 105, Supplementary State Gazette No. 4755); Act Number 9 of 1992 on Immigration (State Gazette Year 1996 No. 33, Supplementary State Gazette No. 3474).
explicitly defining the nature of the waters forming the corridors. Article 2 (1) of the Treaty states that Malaysia shall recognise and respect the legal regime of the archipelagic State applied by Indonesia in accordance with Indonesian laws and regulations and in conformity with international law. Indonesia has sovereignty over the territorial sea and archipelagic waters and the seabed and subsoil thereof and the resources contained therein as well as the airspace above them.\(^{41}\) This clearly indicates that the waters forming the corridor are still subject to the sovereignty of Indonesia.

In order to maintain law and order in the corridors, Indonesia may take the necessary steps in its waters to prevent passage which is not in accordance with the provisions of the Treaty. The Treaty does not specify what constitutes passage other than provided in the Treaty or any other activity not having a direct bearing on such access and communication. It seems that these kinds of activities should be elaborated further in bilateral arrangements. However, until now, there has been no bilateral arrangement on cooperation in the promotion and maintenance of law and order in the corridors, which creates some uncertainties for Indonesia in term of enforcement.

### 7.3.2. Obligations of Indonesia based on the LOSC and the Treaty

Article 3 (2) of the Access and Communication Treaty states that Indonesia shall not suspend or hamper the right of access and communication exercisable by Malaysia under this Treaty. Although there is no specific provision in the Treaty, it can be argued by analogy based on the LOSC that Indonesia has obligations not to enact laws and regulations which have the practical effect of denying, hampering or impairing the right of access and communication passage in their application.\(^{42}\)

The Treaty stipulates that the right of access and communication is the right of

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\(^{41}\) Articles 2 (1, 2) and 49 (1, 2), LOSC; Article 2 (1) of the Treaty.

\(^{42}\) Article 24 (1), LOSC.
continuous, expeditious and unobstructed navigation and overflight through the corridors and the territory of Indonesia. It means that the Treaty imposes various duties on coastal States regarding publicity.\textsuperscript{43} Indonesia is obliged to give due or appropriate publicity to their laws and regulations relating to access and communication passage, to the charts in which all axis lines and traffic separation schemes might be designated or prescribed by coastal States, and to any danger to navigation or overflight within or over the corridors of which they have knowledge.

Furthermore, Indonesia has an obligation to provide air traffic and communication services not only for Malaysian aircraft, but for any State in the airspace above the territorial sea, archipelagic waters and the territory of Indonesia. The air traffic and communication services should be in accordance with the relevant legal instruments of the International Civil Aviation Organization (ICAO).\textsuperscript{44} The provision stressed that these kinds of services are not merely for Malaysian aircrafts which enjoy the right of access and communication passage but are obligations of Indonesia based on the provisions in the Chicago Convention\textsuperscript{45} and as a member of ICAO.\textsuperscript{46}

ICAO has divided the air space in the world into different Flight Information Regions (FIR).\textsuperscript{47} The Natuna Area is under the FIR of Singapore as shown in Figure 28.\textsuperscript{48} It follows that all aircraft must report and be controlled by the Singapore FIR.

\textsuperscript{43} Articles 11 and 12 (4) of the Treaty.
\textsuperscript{44} Article 11 of the Treaty.
\textsuperscript{45} \textit{Convention on International Civil Aviation 1944}, 15 UNTS, opened for signature 7 December 1944 (entered into force 4 April 1947) (\textit{The Chicago Convention}).
\textsuperscript{47} During the Third Asia/Pacific Regional Air Navigation Meeting held in 19 April-7 May 1993, ICAO decided the Flight Information Regions over the South China Sea Oceanic Airspace, Asia/PAC/3-WP/137, 19/4/93.
\textsuperscript{48} In 1995, there was an agreement between the Government of Indonesia and the Government of Singapore on the Realignment of the Boundary between the Singapore Flight Information Region and the Jakarta Flight Information Region, ratified by Indonesian Presidential Decree Number 7 of 1996.
Issues may arise as to whether aircraft exercising the right of access and communication should also report to the Singapore FIR. The Treaty does not regulate the obligation of aircraft to report to certain authorities, but the Treaty stresses that the aircraft must comply with international regulations. Thus, Malaysian aircraft enjoying the right of access and communication must report to the Singapore FIR as well.

![Map of Flight Information Region in the South China Sea (Natuna Sea)](image)

7.3.3. Rights and Obligations of Indonesia based on Indonesian Laws and Regulations

Unlike the other navigational regimes which are stipulated further in government regulations, Indonesia has not enacted special laws or regulations concerning access and communication passage in Indonesian waters. There is only Act Number 6 of 1996 on Indonesian Waters which mentions the right of access and communication passage in Indonesian waters. Article 22 of the Act states that, ‘If a part of the waters of the Indonesian Archipelago is located between two territorial parts of a neighbouring State which are directly adjacent, Indonesia shall respect the existing rights and other legal interests conducted traditionally by the country concerned in said

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49 Source of the Map is in the Annex of Presidential Decree Number 7 of 1996.
waters through a bilateral agreement’. There is no other provision on the right of access and communication passage in the Act. Thus, it is very difficult to examine the rights and duties of Indonesia based on Indonesian laws and regulations.

7.4. Rights and Duties of Malaysian Ships and Aircraft on Access and Communication Passage

Malaysian ships and aircraft may exercise the right of access and communication through designated corridors in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of Indonesia lying between East and West Malaysia. Under Article 3 Paragraph 1 of the Treaty, ‘in exercising the rights and promoting the legitimate interests in accordance with the provisions of this Treaty, Malaysia shall:

a) refrain from any threat or use of force against the sovereignty, territorial integrity, political independence and the security of the Republic of Indonesia, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

b) take the necessary measures to prevent, reduce and control pollution of the marine environment from any source;

c) comply with the laws and regulations of the Republic of Indonesia not inconsistent with the provisions of this Treaty.

The provisions provide the rights may be exercised by Malaysian ships and aircraft, while stipulating the obligations borne by the Malaysian Government to make sure that all Malaysian ships would not act contrary to the Treaty. This creates some ambiguity and uncertainty because there is an interconnection between rights and obligations. It is interesting to note the Judgment of the Saiga (No.2) case where the Tribunal stated that, ‘the ship, everything on it, and every person involved or interested

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50 Article 2 (2) of the Treaty.
in its operation are treated as an entity linked to the flag State’.\footnote{Saiga Case, Case No. 2, Saint Vincent and the Grenadines v. Guinea, ITLOS, <http://www.itlos.org/start2_en.html>, at 10 October 2009.} States are the primary subjects of international law and they are normally the ones to which rights are granted and obligations are imposed.\footnote{See, Ian Brownlie, Principles of Public International Law (7th ed, 2008), 508-09; David John Harris, Cases and Materials on International Law (6th ed, 2004), 484.} By granting the right of access and communication passage to ships and aircraft, in most cases, ships and aircraft are not in a position to discharge obligations and responsibilities which derive from the rights granted to them.\footnote{Philipp Wendel, State Responsibility for Interferences with the Freedom of Navigation in Public International Law (2007), 111-12.}

According to Article 3 (1) of the Treaty, the Malaysian Government has three obligations: the general obligation during passage; environmental protection; and respect for the laws and regulations of Indonesia. The obligations mentioned in the provisions of the Treaty seem to follow the language used in the provision of the LOSC on innocent passage rights,\footnote{Part II, LOSC.} transit passage rights\footnote{Part III, LOSC.} and archipelagic sea lane passages.\footnote{Article 54, LOSC.} It is understandable that these obligations should be applied to Malaysian ships and aircraft. The following section will examine the rights and duties of Malaysian ships and aircraft in specific provisions of the Treaty.

7.4.1. Right of Ships to Access and Communication Passage

The Access and Communication Treaty formulates rights of access and communication based on general rules which apply to all ships and depend on the type of ships, such as government ships or merchant ships. Based on the general rules, the Treaty provides that ships may stop and anchor while exercising the right of access and communication, but only so far as the same are incidental to ordinary navigation or are...
rendered necessary by force majeure or distress. Ships may also stop or anchor in case of rendering assistance to persons, ships or aircraft in danger or distress. These provisions are similar to the LOSC provisions on innocent passage.

7.4.1.1. Rights of Government Ships

The Treaty divides the government ships into two categories: naval ships and government ships. The term ‘government ships’ means vessels owned or used by the Government of Malaysia, including naval ships that are operated for official and non-commercial purposes. Rather than using the term ‘warships’ which is used in international law and the LOSC, the Treaty uses the term ‘naval ships’. It is not clear whether the term ‘naval ships’ is broader than ‘warships’ or why the Treaty has used the term.

The right of naval ships to access and communication is the right of continuous, expeditious and unobstructed navigation through the corridors. Whilst proceeding through the corridors, naval ships may conduct naval manoeuvres, including tactical exercises. In the course of tactical exercises no firing of weapons is permitted. There is no specific provision in the Treaty which defines ‘manoeuvres of naval ships’. The Treaty only stipulates that Indonesia and Malaysia should hold consultations with a view to concluding arrangements as may be appropriate regarding

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57 Article 6 of the Treaty.
58 Article 18 (2), LOSC.
59 Article 1 (3) of the Treaty.
60 Indonesia uses the both terms ‘warships’ and ‘naval ships’. Warships and naval ships have the same elements such as manned by a crew which is under regular armed forces discipline, ship belonging to the armed forces of a State, bearing the external marks, registration, call sign, etc. The differences are usually based on the size of the platform. Naval ships tend to be smaller and are not armed heavily armed.
61 Article 4 (1) (a) of the Treaty.
62 Article 4 (1) (b) of the Treaty.
naval manoeuvres.63 In addition, government ships which are not used for commercial purposes may exercise the right of access and communication in continuous, expeditious and unobstructed navigation through the corridors.64

7.4.1.2. Rights of Merchant ships

The Treaty divides merchant ships into merchant ships and fishing vessels. Merchant ships means vessels registered or licensed in accordance with the laws and regulations in force in Malaysia that are operated for commercial purposes, including foreign merchant vessels. The right of access and communication is not mainly for Malaysian ships, but covers foreign ships which engage in trading in or with Malaysia. Furthermore, the Treaty uses the phrase ‘ships and vessels’, but there is no explanation as to their distinction. This is probably a drafting error as ‘ship’ and ‘vessel’ are often used interchangeably in international IMO instruments.65

The right of access and communication exercisable by merchant ships shall, in connection with such access and communication, refer to the right of continuous, expeditious and unobstructed navigation through the corridors for the purpose of proceeding to the destined ports in Malaysia or to the high seas.66 In addition, foreign merchant ships that are engaged in trading with East and West Malaysia, may exercise the right of continuous, expeditious and unobstructed access and communication through the corridors solely for the purpose of direct passage between East and West

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63 Although Indonesia and Malaysia continuously run several naval training and joint operations, there is no single arrangement on defining naval manoeuvres.
64 Article 4 (3) of the Treaty.
65 International law observes the different and functional definition of ship or vessel related to maritime navigation, for example in MARPOL 73/78 and in the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969. The term ‘ships’ and ‘vessel’ are used interchangeably, <http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660.>, at 3 November 2009.
66 Article 5 (1) of the Treaty.
Malaysia.67

Although there is an exceptional passage right in the Natuna Sea, in practice it is very difficult to distinguish whether merchant ships use the right of access and communication or the right of innocent passage. For the purpose of passage it is arguable that merchant ships prefer to use the right of innocent passage over the right of access and communication. This is because if merchant ships use the right of innocent passage they do not necessarily have to follow the corridors, providing them a shorter route.

Furthermore, fishing vessels (including foreign fishing vessels) may exercise the right of continuous, expeditious and unobstructed access and communication through the corridors solely for the purpose of direct passage between East and West Malaysia.68 The Treaty defines what constitutes a fishing vessel69 and a foreign fishing vessel.70 Unlike in the LOSC which prescribe that fishing vessels should not fish while they pass through maritime zones under the sovereignty of the coastal States and in certain cases must stow their fishing gear, the Access and Communication Treaty does not impose such a prohibition. However this is implied in the Access and Communication Treaty when it recognised the sovereignty of Indonesia over such waters71.

The Access and Communication Treaty also provides that Indonesia should grant the right of innocent passage for traditional fishing boats72 of Malaysia in the

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67 Article 5 (2) of the Treaty.
68 Article 5 (3) of the Treaty.
69 Article 1 (10) of the Treaty defines fishing vessels as ‘any vessel, other than traditional fishing boat, owned and used by Malaysian fishermen’.
70 Article 1 (11) of the Treaty mentions the meaning of foreign fishing vessels as ‘any foreign fishing vessel on joint venture with Malaysian nationals or under any other arrangements with the Government of Malaysia’.
71 Article 2 (1) of the Treaty.
72 According to Article 1 (9) of the Treaty, ‘traditional fishing boat means any boat owned and used by Malaysian traditional fisherman for traditional fishing in the designated fishing area’.
territorial sea and archipelagic waters of Indonesia lying between East and West Malaysia, including such right of innocent passage from base stations to the Fishing Area illustrated in Figure 29.\textsuperscript{73} Given that the designated fishing area and the corridors overlap,\textsuperscript{74} it may be difficult to determine whether a traditional fishing boat is exercising the right of innocent passage or the right of access and communication. In other words, as well as enjoying the right of access and communication, the traditional fishing boat could also enjoy the right of innocent passage as defined in the LOSC.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure29.png}
\caption{The Designated Fishing Area based on the Treaty\textsuperscript{75}}
\end{figure}

7.4.2. Obligations of Ships Exercising Access and Communication Passage

Article 3 of the Access and Communication Treaty stipulates the general obligations of ships and aircraft while exercising the right of access and communication. As stated earlier, the general obligations include the obligation not to threaten the sovereignty, territorial integrity, political independence and security of Indonesia; protection of the marine environment; and compliance with laws and

\textsuperscript{73} Article 13 (1) (b) of the Treaty.
\textsuperscript{74} Corridor I crosses the designated fishing area.
\textsuperscript{75} Source of the Map in Adi Sumardiman, above n 11, 116.
regulations of Indonesia. The Treaty also stipulates other obligations that must be 
complied with by Malaysian ships and aircraft, including safety of navigation and 
protection of the marine environment.

Malaysian government and merchant ships are required, while enjoying the 
right of continuous, expeditious and unobstructed access and communication, to avoid 
any activities which do not have a direct bearing on such access and communication. 
There is no explanation as to the kinds of activities that have a direct bearing on such 
rights.\textsuperscript{76} Indonesia and Malaysia could interpret this in different ways and this may 
result in conflict at sea; although this has not yet occurred.

Furthermore, ships exercising the right of continuous, expeditious and 
unobstructed access and communication shall comply with generally accepted 
international regulations, procedures and practices for safety at sea, including the 
International Regulation for Preventing Collisions at Sea.\textsuperscript{77} In addition, ships shall 
comply with generally accepted international regulations, procedures and practices for 
the prevention, reduction and control of pollution from ships.\textsuperscript{78} The latter relates to the 
general obligations stated in Article 3 (1) (b) of the Treaty.\textsuperscript{79} Thus, both Malaysian 
ships and Malaysia, as a flag and coastal State must take precautionary measures to 
prevent, reduce and control pollution of the marine environment from any source. 
Again, these provisions are similar to the provisions of the LOSC on transit passage.\textsuperscript{80}

The language of the Treaty is broad and refers to international laws and 
regulations. It is not clear what these international laws and regulations are. Unless 
Indonesia ratifies the relevant international agreements they will not be part of

\textsuperscript{76} Article 4 (4) and Article 5 (4) of the Treaty.
\textsuperscript{77} Article 12 (1) (a) of the Treaty.
\textsuperscript{78} Article 12 (1) (b) of the Treaty.
\textsuperscript{79} The provision stated that Malaysia shall take necessary measures to prevent, reduce and control 
pollution of the marine environment from any source.
\textsuperscript{80} Article 39 (2), LOSC.
Indonesian laws and regulation. Although the Treaty uses a different language and formulae compared with the provisions in the LOSC, the essence of the provisions are the same -- that the ships, while passing through the marine space, must take precautionary measures to ensure the protection of the marine environment.

7.4.3. Rights and Obligations of Aircraft Exercising Access and Communication Passage

The Treaty divides aircraft into two categories: State and civil aircraft. State aircraft means aircraft owned or used by the Government of Malaysia, including aircraft used in military, customs and police services and other aircraft used for official or non-commercial purposes. Civil aircraft covers all aircraft, other than State aircraft, which are registered or licensed in accordance with the laws and regulations in force in Malaysia.

7.4.3.1. Rights of Aircraft Regarding Access and Communication Passage

State aircraft, as stated in Article 8 of the Treaty, have a right of continuous, expeditious and unobstructed overflight through the airspace above the territorial sea, archipelagic waters and the territory of Indonesia lying between East and West Malaysia. Military aircraft may conduct aerial manoeuvres, including tactical exercises, through the airspace above the said maritime zones and territory of Indonesia, but they cannot conduct weapons firing in the course of tactical exercise. What constitutes ‘tactical exercises’ is not defined in the Treaty. It is not clear whether it refers just to tactical manoeuvres and formations or whether it includes refuelling in

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81 Indonesia tends to follow dualism in accepting international laws (treaties). It means that Indonesia needs to ratify the international laws (treaties) in order to become positive laws of Indonesia. See Act Number 24 of 2000 on International Treaties.
82 Article 1 (5) of the Treaty.
83 Article 1 (6) of the Treaty.
84 Article 8 (1) (b) of the Treaty.
the air. The Treaty only stipulates that Indonesia and Malaysia should hold consultations with a view to concluding such arrangements as may be appropriate regarding overflight and aerial manoeuvres.\(^5\) To date, there is no such arrangement regarding overflight and aerial manoeuvres.

Malaysian aircrafts have the right to use existing established air routes, through the airspace above the territorial sea, archipelagic waters and the territory of Indonesia lying between East and West Malaysia. According to the Record of Discussion of the Treaty, the air route above the territory of Indonesia surrounding the Natuna Sea consists of three segments, namely, Kuching to Pekan/Kuantan, Kuching to Singapore, and Pekan/Kuantan to Kinabalu. The air routes stated in the Record of Discussion could be considered as limiting the right of access and communication by aircraft. But given the background and purpose of the Treaty to accommodate and recognise legitimate interests,\(^6\) air routes considered as appropriate routes and embodying the traditional air route that already exist would likely be allowed. The issue is whether the aircraft may use the corridors for overflight or whether they must follow the air routes. If they can use air space over the corridors, it seems that they may deviate ten nautical miles on each side of the axis lines, but if they have to follow the air routes, they may not deviate while conducting overflight.

It is arguable that aircraft may not use the corridors. The Treaty regulates the ships and aircraft in different provisions\(^7\) and the corridors may only be used by ships in order to exercise the right of access and communication passage. Moreover, the Treaty regulates aircraft together with their air routes. Thus, the air routes and corridors are different concepts, although they may overlap. Additionally, aircraft are

\(^{5}\) Article 8 (2) of the Treaty.

\(^{6}\) Preamble of the Treaty.

\(^{7}\) Ships are regulated in Part II of the Treaty and Aircraft is regulated in Part III of the Treaty.
not included in the definition of ‘ships’. A further complication relates to the issue of whether aircrafts which are part of ships may conduct overflight during passage in the corridors. The Treaty is silent on this crucial issue which is relevant for military vessels and aircraft.

Furthermore, it is arguable that Malaysian civil aircraft may use air routes designated by Indonesia and approved by ICAO as depicted in Figure 30. According to ICAO regulations, civil aircraft may conduct overflight in the territory of another State.\(^{88}\) Air routes which have been approved by ICAO are more varied than the air routes stated in the Record of Discussion; thus, giving Malaysian civil aircraft more flexibility than the strict application of the Access and Communication Treaty.

![Figure 30. Air Routes in Indonesia Territory\(^{89}\)](image)

7.4.3.2. Obligations of Aircraft Exercising Access and Communication Passage

Aircraft exercising the right of continuous, expeditious and unobstructed access and communication passage must observe the general obligations mentioned in Article

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\(^{88}\) Article 5, the Chicago Convention 1944.

3 (1) of the Treaty. These include: a) refraining from any threat or use of force against the sovereignty, territorial integrity, political independence and the security of Indonesia or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; b) taking necessary measures to prevent, reduce and control pollution of the marine environment from any source; and c) complying with the laws and regulations of Indonesia consistent with the provisions of the Treaty.

Additionally, civil aircraft exercising the right of continuous, expeditious and unobstructed access and communication shall comply with the laws and regulations of Indonesia in conformity with generally accepted international rules and regulations, which usually apply to civil aircraft.\(^{90}\) Civil aircraft shall maintain radio communication with the appropriate air traffic control authority at all times.\(^ {91}\) State aircraft exercising the right of access and communication passage will at all times operate with due regard for the safety of air navigation.\(^ {92}\)

### 7.4.4. Submarines and Other Underwater Vehicles

There is no provision in the Access and Communication Treaty which regulates underwater vehicles or submarines. Thus, unlike in innocent passage, transit passage or archipelagic sea lanes passage, it is not clear in the Treaty what submarines should do while exercising the right of access and communication passage. The issue is whether Malaysian submarines or underwater vehicles should traverse submerged or on the surface.

Given that the right of access and communication passage is specific and based

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\(^{90}\) Article 12 (2) (a) of the Treaty.

\(^{91}\) Article 12 (3) of the Treaty.

\(^{92}\) Article 12 (2) (b) of the Treaty.
on the Treaty, it makes sense that, if the Treaty does not make provision for submarines, they must abide by provisions of the LOSC. Under the provisions of the LOSC on innocent passage rights, submarines and underwater vehicles must navigate on the surface and show their flag while passing through Indonesian territorial sea.93 However, as seen in the discussion on the right of archipelagic sea lanes passage, there is a strong view that submarines may traverse the Indonesian archipelagic waters in the normal mode.94 Moreover, it could be argued that Malaysian submarines and underwater vehicles do not need to use the stipulated corridors, but the normal routes which exist between East and West Malaysia. To avoid conflict in the future, Indonesia and Malaysia would need to clarify the application of the Access and Communication Treaty to submarines and other underwater vehicles.

7.5. Relationships between Archipelagic Sea Lanes Passage and Access and Communication Passage

The existence of access and communication rights and archipelagic sea lanes passage rights at the same time can result in overlap and confusion. Both access and communication passage and archipelagic sea lanes passage use axis lines to define where the right of passage could be exercised. The axis lines used for the right of access and communication passage can only be used by ships, whereas aircraft use different routes. In contrast, the right of archipelagic sea lanes passage uses same axis lines for both ships and aircraft to exercise such rights.

Although there has been no detailed study on axis lines in access and communication passage, it could be considered that the axis lines are normal passage routes which are traditionally used by Malaysian ships connecting East-West Malaysia.

93 Article 20, LOSC.
94 Article 53 (3), LOSC.
The designation of the axis lines are based on the Agreement between Indonesia and Malaysia. In contrast, the axis lines of archipelagic sea lanes passage is designated by archipelagic States.\textsuperscript{95}

There are cases of overlaps between axis lines of access and communication passage and axis lines of archipelagic sea lanes passage as shown in Figure 31. Although there are many precautions that ships and aircraft have to take, there is still the possibility of navigation accidents. There is no provision in the LOSC, the Treaty or in Indonesian laws or regulations on how to prevent an accident between ships and aircraft which use different navigational regimes. It may be argued that the archipelagic sea lanes passage should prevail over access and communication rights because such axis lines have been approved by IMO using international standards, compared to access and communication passage which is only based on a bilateral agreement. However, there is no guidance on how to resolve such issues.

\textbf{Figure 31. Overlapping Axis Lines between Indonesia Archipelagic Sea Lanes Passage and the Corridors}\textsuperscript{96}

\textsuperscript{95} Article 53 (1), LOSC; Article 53 (9) of the LOSC states that the archipelagic State has to propose its designation of archipelagic sea lanes to international organisation for its adoption.

\textsuperscript{96} Source of the Map is in the Indonesian Navigational Charts Number 38 with modification by author.
The designation of archipelagic sea lanes passage came after the Access and Communication Treaty entered into force. There is not enough information to determine whether prior to the designation of the archipelagic sea lanes passage there had been an examination of the effect of such designation on the rights of Malaysia that were already recognised in the Treaty. In 1998, during the bilateral consultations between Indonesia and Malaysia on the proposal for archipelagic sea lanes passage, Malaysia stressed the recognition of existing traditional and legitimate interests of Malaysia in the Natuna Sea. However, detailed rights which might affect the designation of the archipelagic sea lanes passage have not been discussed. It may be argued that designation of archipelagic sea lanes passage could be considered as denying the rights of Malaysia in the Natuna Sea. For example in exercising the right of laying and maintaining submarine cables and pipelines, Malaysian ships and aircraft cannot pass freely but would always defer to other rights which co-exist over these waters. On the other hand, if Malaysia uses its right to the maintenance of submarine cables and this activity takes several days, it could be argued that such activities have the effect of suspending or hampering the right of archipelagic sea lanes passage.

Finally, the overlapping axis lines between the right of access and communication passage and archipelagic sea lanes passage could have the potential for navigation accidents in the future. Exercising navigational passage rights under archipelagic sea lanes passage and access and communication passage could give rise to debates on the denial or suspension of certain rights.

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7.6. Conclusion

Indonesia and Malaysia agreed that the later would support the concept of the archipelagic State proposed by the former during UNCLOS III. In return, Indonesia agreed to provide a special navigational regime as part of respecting the legitimate interests and existing rights which traditionally exist in archipelagic waters and the territorial sea of Indonesia. The recognition and granting of such rights are part of the implementation of Article 51 of the LOSC. Indonesia is obliged to provide the right of access and communication passage for ships and aircraft of Malaysia. Although Indonesia must concede such rights to Malaysia, Indonesia has succeeded in unifying the Indonesian territory.

The exercise of the right of access and communication passage is different from the right of innocent passage, transit passage and archipelagic sea lanes passage. There are many similarities among them, such as the rights exercised by ships and aircraft; the use of axis lines; and the requirement that no suspension of passage allowed. But there are also many differences, such as the axis lines are only used for navigation of ships while aircraft use different air routes. The Treaty also allows military vehicles to exercise tactical manoeuvres. Although the Treaty describes the rights and obligations of ships and aircraft, it seems that the Treaty still defers to the provisions of the LOSC and international law for further explanation of such rights and obligations relating to access and communication passage.

The next chapter is the conclusion of this thesis and has two overriding purposes. First, it summarises the findings of each of the chapters. Second, it provides prospects and recommendations for the establishment of legal and policy frameworks in Indonesia for reforming laws and regulation which inconsistent with the LOSC and international law.
Chapter Eight

Conclusions

8.1. Introduction

This thesis has examined Indonesia’s implementation of each of the navigational regimes under the LOSC, namely: innocent passage, archipelagic sea lanes passage, and transit passage. It has also examined access and communication passage. This thesis has analysed the implementation of each of these navigational regimes in the context of Indonesia’s interests and interpretation of the LOSC. As shown by the experience of Indonesia in dealing with States whose vessel traverse its waters, conflicting interpretations between State parties to the LOSC arise because of two key reasons. First, States parties interpret the provisions on the basis of their interests, and second, because of the ambiguity in the language of the provisions of the LOSC.

Indonesia has already enacted several laws and regulations on navigational rights and freedoms in order to implement the LOSC and to accommodate the interests of the international community.¹ However, it is evident that there are still issues which persist with respect to the full compliance of Indonesia with international law.² Indonesia believes it has implemented and fulfilled its obligations in international law. Indeed, in the preambles of domestic laws and regulations on navigational regimes, reference is always made to the fact that the laws and regulations adhere to the LOSC.

¹ There are hundreds of laws and regulation on maritime affairs in the form of such as acts, government regulations, presidential decrees, minister regulations, regional/district regulations, etc.
This concluding chapter has three purposes. First, it provides a summary of each of the previous chapters to clearly identify answers to the research questions posed in Chapter One and to emphasise the contribution which this thesis has made to the scholarly literature. Second, it identifies the legal, institutional and policy reforms needed in the implementation of the various navigational regimes in Indonesia. Lastly, this chapter suggests a way forward for Indonesia through intervention at the legal, policy and institutional levels which might influence the current and future situation.

8.2. Summary of Findings

Indonesia is an archipelagic State according to the provisions of the LOSC and domestic legislation. As an archipelagic State, Indonesia has rights and obligations based on international law and the LOSC. In order to implement the LOSC and international law, Indonesia has enacted a number of laws and regulations which form part of an extensive and complex regulatory framework. In fact, those laws and regulations are not only designed to implement the LOSC and international law, but also to accommodate the national interests of Indonesia, to promote the development of its people and security of its environment. Although the national interest of Indonesia may not be explicitly stated in its laws and regulations, the 1945 Constitution provides national aims which could be considered as part of national interest, such as the aim to protect all the people of Indonesia and their entire native land, to improve the public welfare, to advance the intellectual life of the people and to contribute to the establishment of a world order based on freedom, abiding peace and social justice.

This thesis has argued that Indonesia has implemented the LOSC and accommodated the interests of the international community on navigational regimes. In
the examination of the laws and regulations on navigational regimes, Indonesia has sought to balance competing interests between Indonesia and user States. The case study approach used in the thesis revealed that the provisions of the LOSC could lead to different interpretations in their implementation and could lead to conflict between States parties.

Despite having an extensive legal framework based on the LOSC and international law, not all of the interests of the international community have been accommodated in Indonesian laws and regulations. However, those interests have been significantly considered and balanced with the national interest of Indonesia as an archipelagic and coastal State in accordance with the provisions of the LOSC. There are three main conclusions for the difficulties experienced by Indonesia to fully implement the provisions of the LOSC on navigational regimes.

First, the vagueness and ambiguity of the provisions of the LOSC and the absence of further guidance on how to interpret and implement the provisions on navigational regimes are the primary source of conflicting claims between Indonesia and the user States. Second, the way of thinking of the Indonesian people in looking at their territory and water has influenced Indonesian maritime policy. This is what is known as Wawasan Nusantara or the ‘Indonesian archipelagic outlook’. Based on the Indonesian legal system, Indonesian maritime policy must be implemented through Indonesian laws and regulations. Especially with regard to navigational regimes, the Wawasan Nusantara doctrine considers Indonesian waters as an integral part of the territory of Indonesia over which it has full sovereignty. This has affected the way that Indonesia implements the navigational regimes under the LOSC. As a party to the LOSC, Indonesia would need to implement the LOSC, including its obligations to provide sea lanes of communication for foreign ships and aircraft. Third, the
competence of the parliament of Indonesia in formulating the laws and regulations on navigational regimes has hampered its implementation of the LOSC. Given that members of the Indonesian parliament are political appointees, some of them may not fully understand the nature of the navigational regimes and may put significant emphasis on the interest of those who have appointed them in their positions rather than real issues such as the rights of user States.

Chapters Two and Three showed how Indonesian marine policy has evolved alongside the development of international law of the sea. This thesis traced the evolution of the maritime policy of Indonesia from the time of the Dutch colonists when the territorial sea limit was three nautical miles, to the independence of Indonesia, and the creation of the archipelagic State concept or Wawasan Nusantara. Indonesia’s struggle for independence created a mind-set that the country has full and absolute sovereignty over the whole of the Indonesian territory and that all Indonesian people must protect and defend it at all costs. These opinions influenced the development of Indonesian marine laws and regulations, especially on navigational regimes. This posed some difficulties for Indonesia to accommodate sea lane passage in Indonesia waters. From a historical perspective, it is understandable why the Indonesian people adhere to their perception of their territory and waters. This perception is then reflected in Indonesian maritime policy and maritime laws and regulations.

This thesis describes four navigational regimes in Indonesian waters, namely, innocent passage, archipelagic sea lanes passage, transit passage, and access and communication passage. Those navigational regimes are supported by national legislation as part of the implementation of the provisions of the LOSC and international law. Each law and regulation on navigational regimes discussed in this
thesis is unique in some respect -- whether in terms of its interpretation of the provisions of the LOSC, political background, legal process, characteristics, nature, significance, problems or impact. A number of other significant features of the legal process, at both the national and international level, were examined including an analysis of relevant cases studies.

Chapters Four through Seven examined the above four navigational regimes which are implemented in Indonesian waters by applying both a legal and operational approach. The four navigational regimes indicate that Indonesia has implemented all navigational regimes stated in the LOSC. Each chapter explained some of the issues that the international community had regarding certain provisions in Indonesian laws and regulations on navigation. This thesis has concluded that those provisions are also based on the provisions of the LOSC, which themselves are sometimes vague or ambiguous.

Innocent passage: The exercise of sovereignty and the exercise of the right of innocent passage in Indonesian waters are a reciprocal bundle of rights and obligations, risks and responsibilities. Indonesian laws and regulations on navigation regimes which provide for innocent passage in Indonesian waters do not regulate all the activities associated with innocent passage mentioned in the LOSC. Those laws and regulations always refer back to the LOSC and international law in the absence of a clearly applicable provision. Thus, there are still many activities related to innocent passage that need to be further elaborated. For example, Indonesia states that submarines that do not comply with Indonesian laws and regulations will be considered as conducting hostile passage instead of non-innocent passage. However there is no detailed explanation as to what constitutes non-innocent passage. Although the right of innocent passage is clearly established under the LOSC and international
law, defining whether passage is innocent or non-innocent is not easy. The provisions of the LOSC are not clear enough in this regard.

**Archipelagic sea lanes passage:** The archipelagic sea lanes passage is a new navigational regime introduced in the LOSC. Currently, only Indonesia as an archipelagic State has designated archipelagic sea lanes. There are still many unresolved issues on the designation sea lanes where States need additional guidance. For example, 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 of sea lanes? How are we to deal with the non-designation of archipelagic sea lanes? How can the ten per cent rule be interpreted? IMO has already adopted the General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes in order to give guidance to archipelagic States who want to propose and designate archipelagic sea lanes. The guidance contains the concept of partial designation. However, the guidance still leaves open many windows for archipelagic States to interpret the provision in the LOSC in different ways. More technical guidance is needed on applying the relevant articles of the LOSC to the designation of archipelagic sea lanes.

The adoption of the Indonesian proposal on partial designation of Indonesian archipelagic sea lanes in IMO was a long process of consultation and negotiation between Indonesia, international organisations and user States which clarified some aspects of the LOSC provisions on the archipelagic regime. The positioning of the axis lines in the final convention package was reflective of accommodated and compromised interests between Indonesia and some user States, and an indication that 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 in order to regulate archipelagic sea lanes passage. There were many objections to this Government Regulation. For example, some States argue that Indonesia is not complying with the LOSC by introducing provisions where the right of archipelagic sea lanes passage may only be exercised in the designated sea lanes. Indonesia does not indicate that the designation of the archipelagic sea lane as a partial one and that it must substitute or change the sea lanes in the Ombai and Leti Straits. Furthermore, the Government Regulation does not mention in detail the rights and obligations of ships and aircraft and the enforcement process to which ships and aircraft are subject.

**Transit passage:** The LOSC provides the right of transit passage of ships and aircraft through straits used for international navigation. Although there is no clear definition as to what constitutes straits in which the transit passage right could be exercised, there is a common understanding that straits can be looked at using geographical, legal and functional criteria. Based on these criteria and provisions in the LOSC, straits may be classified into many types.

The exercise of the right of transit passage is different from the right of innocent passage and archipelagic sea lanes passage. It is obvious that all provisions of the LOSC must be read together in order to understand the right of transit passage and not merely Part III of the LOSC in isolation. Indonesia has not yet enacted the government regulation on transit passage rights and there are only two articles in Act Number 6 of 1996 on Indonesian Waters which regulate the right of transit passage. Thus, there is no detailed explanation as to what constitutes the rights and obligations of ships and aircraft exercising the right of transit passage in Indonesia or even the rights and obligation of Indonesia with regard to transit passage. The Act provides that the right of transit passage could only be exercised in the Straits of Malacca and
Singapore. Thus, these straits constitute straits used for international navigation. There is no explanation in the Act as to why Indonesia only declared the Straits of Malacca and Singapore as straits used for international navigation.

**Access and Communication Passage:** Indonesia and Malaysia have agreed that Indonesia must provide a special navigational regime respecting the legitimate interests and existing rights which traditionally existed in its archipelagic waters and territorial sea. The recognition and granting of such rights are part of the implementation Articles 47 (6) and 51 of the LOSC. Accordingly, Indonesia has to provide the right of access and communication for Malaysian ships and aircraft in Indonesian waters. This right would not have been granted if the archipelagic State concept did not exist. Although Indonesia has to grant this right to Malaysia, Indonesia has nonetheless succeeded in unifying or integrating the Indonesia’s territories, especially in the Natuna area. On the other hand, Malaysia must still observe the Indonesian laws and regulations when they pass through or over the Natuna Sea.

The exercise of the right of access and communication passage is different from the right of innocent passage, transit passage, and archipelagic sea lanes passage. There are many similarities among them, such as all passage rights may be exercised by both ships and aircraft; the use of axis lines; prohibition on suspension of passage; and other technical aspects. But there are also many differences, such as the axis lines being only used for the navigation of ships, while aircraft use different air routes; the maximum width of axis lines; and the right of military vehicles to conduct tactical manoeuvres in sea lanes. Although the Treaty has described the rights and obligations of ships and aircraft, it still refers to the provisions of the LOSC and international law for further explanation of rights and obligations relating to the exercise access and communication passage. This is because there are still many unclear provisions in the
Finally, as will be further discussed in this chapter, the Indonesian legal system and legal process has a number of weaknesses which can reduce the effectiveness of achieving national development goals. Those weaknesses are based on the internal interests involved in the parliament or DPR and government institutions. There are many laws and regulations which are not well integrated with each other, leading to overlapping mandates and jurisdictions of government departments. The effectiveness of the legal framework is related to effective institutional mechanisms. Having many government institutions involved in marine affairs could be beneficial for managing an area which is vast and complex. However, it could also create problems because of a lack of coordination, overlapping functions and technical and financial problems.

8.3. Reforms Needed Within National Legal, Policy and Institutional Frameworks

Taking all relevant laws and regulations and legal, policy and institutional frameworks together, two observations can be made. First, a legal framework, *per se*, does not currently exist for navigation regimes as part of a larger marine legal framework. Requirements, prohibitions, policies and guidelines must be pieced together from various existing laws and regulations and their implementation. Although there are national laws and regulations on specific navigation regimes, some of them merely reproduce the provisions of the LOSC and do not provide specific guidelines on certain matters. A mentioned in the previous Chapter four and five the provisions of the LOSC form part of package deal; thus, there are many articles which are not well defined. Indonesian laws and regulation merely repeat its provisions and put them into domestic law.
Second, regarding institutional frameworks, there are many laws and regulations which provide sanctions and also establish agencies to enforce them. On the contrary, there are also many laws and regulations which do not provide sanctions or establishment of agencies and merely refer to other laws and regulations. Such sanctions may not always fit the appropriate punishment for navigation related offences. Establishment of agencies usually relates to functional and law enforcement aspects of the law. The functional aspect has to do with how to implement the laws and regulations in order to achieve the mandate, while law enforcement aspects relate to how to uphold such laws and regulations.

These frameworks could in many instances lead to contradictions, redundancies, gaps and inefficiencies. The problems arising from the disconnect between laws affects the legal framework in general and prevents the laws and regulations from achieving the aims that they were designed for. The institutional framework based on those laws and regulations have significant impacts as well, for example, the system of law enforcement. The next section will describe the reforms that Indonesia may need to consider to establish a robust navigation regime.

8.3.1. Reforms Needed to Legal and Policy Frameworks

The 1945 Constitution has provided a legal and policy framework on maritime affairs. The problem lies in the application of those provisions into laws and regulations which has resulted in the fragmentation between laws, and jurisdictional overlaps and duplication of functions among government agencies.

8.3.1.1. Inconsistencies among Acts

This section will provide examples of disconnects among acts on maritime affairs. An example is Article 25 A of the 1945 Constitution which mentions that the
State territory will be further regulated by an Act. This article could be interpreted in two ways. First, it will be in a specific Act on State territory, and second, it could be argued that there is no need to create such Act, because there are already many Acts and Presidential Decrees in place including the ratification of maritime boundary treaties between Indonesia and neighbouring countries.

Indonesia has already enacted Act Number 43 of 2008 on State Territory, so Indonesia chose to have a specific Act in this case. The problem is that there are many disconnects between this Act and other laws and regulations. As mentioned earlier, Act Number 43 of 2008 refers to the LOSC and Act Number 6 of 1996, but the terms that Act Number 43 of 2008 use are different from those used in Act Number 6 of 1996. With respect to definitions, both Acts use different language and formulations. Act Number 6 of 2006 takes a much more rigorous approach in referring to the provisions of the LOSC.

There are four navigation regimes in Indonesia mentioned in Act Number 6 of 1996, but Act Number 17 of 2008 on Shipping only mentions archipelagic sea lanes passage which creates a mismatch. Furthermore, Act Number 17 of 2008 regulates marine environment protection which is more specific compared with Act Number 6 of 1996. In addition, Act Number 17 of 2008 provides detailed provisions on marine environmental protection that are specific only to activities of ships, while Indonesia

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3 Act Number 43 of 2008 on *State Territory* (State Gazette Year 2008 No. 177, Supplementary State Gazette No. 4925).
4 Part XII of Act number 17 of 2008 on *Shipping* (State Gazette Year 2008 No. 64, Supplementary State Gazette No. 4849) stipulates reduction and prevention of pollution from ships’ operations that relate to other laws and regulation that address ship sourced pollution requirement arising from international laws.
5 Article 23 of Act Number 6 of 1996 on *Indonesian Waters* (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647) provides for the utilisation, management, protection and preservation of marine ecosystems.
also enacted Act Number 23 of 1997 on Environmental Management.\textsuperscript{6} Act Number 23 of 1997 and Act 17 of 2008 state that dumping in designated areas is allowed. Problems arise if pollution takes place in a maritime area as to which Act should be implemented. There are many possible applications, such as whether an individual Act or both Acts should be implemented. Those possibilities could create problems and issues regarding justice and law enforcement mechanisms.

There are several examples of disconnects in spatial categorisation. Act 6 of 1996 only divides Indonesian waters based on the provisions of the LOSC namely, internal waters, archipelagic waters and territorial sea.\textsuperscript{7} Those maritime zones further have been classified in several other zones or zoning systems in order to preserve and conserve ecosystems. Currently there are at least 12 different types of protected areas, defined in five different Acts, many with vaguely similar goals and standards.\textsuperscript{8} Articles 12 and 13 of Act Number 5 of 1990 on the Conservation of Biological Resources and their Ecosystems authorises the Minister of Forestry to establish sanctuary reserves, including nature reserves and wildlife sanctuaries, and nature conservation areas such as national parks, recreation parks and grand forest parks. These areas can be marine or terrestrial. Act Number 41 of 1999 on Forestry\textsuperscript{9} reiterates these classifications and includes a few more. On the other hand, the Ministry of Marine Affairs and Fisheries claimed that its duties and functions under President Decree Number 12 of 2001 were to determine marine protected areas such as marine parks and wildlife sanctuaries.

\textsuperscript{6} This Act is a comprehensive law on environmental management which covers land, sea, air space under Indonesia sovereignty as essential unity of the living space of Indonesian people. Article 20 and 21 of the Act covers pollution.
\textsuperscript{7} Act 43 of 2008 uses the term ‘water territory’ (wilayah perairan) instead of ‘internal waters’ or ‘archipelagic waters’.
\textsuperscript{9} Act Number 41 of 1999 on \textit{Forestry} (State Gazette Year 1996 No. 167, Supplementary State Gazette No. 3888) amended with Act Number 19 of 2004 on \textit{Forestry}. 
Act Number 32 of 2004 on Regional Government\textsuperscript{10} gave authority to regional governments to manage their own resources. Provincial governments have jurisdiction extending up to 12 nautical miles from the coastline, while district or city governments have four nautical miles.\textsuperscript{11} Jurisdictions of regional government include the exploration, exploitation, conservation and management of coastal resources. Except for some functions that are retained by the central government,\textsuperscript{12} the regional governments have full power to regulate their regions. To some extent regional governments could impact on the regulation of the rights of other States or the international community on navigation which is guaranteed by Act Number 6 of 1996 and other laws and regulations. Although the jurisdiction of the regional government applies mainly to resources, the utilisation of those resources could be hampered by international navigation, if those regional governments do not take precautionary measures to prevent such conflicts. There is no provision on such matters in this Act or an obligation on the central government to detail how to address such issues.

8.3.1.2. Inconsistencies among Government Regulations

Government regulations are enacted by the President and intended to implement an Act.\textsuperscript{13} Thus, government regulations should be clear, detailed and specific. An examination of government regulations on navigation would reveal that these regulations are ambiguous and cross reference other laws and regulations which are sometimes difficult to comprehend. There are also disconnected between these provisions and also with other government regulations.

\textsuperscript{10} Act Number 32 of 2004 on Regional Government (State Gazette Year 2004 No. 125, Supplementary State Gazette No. 4427).

\textsuperscript{11} Article 18 (4), Act Number 32 of 2004.

\textsuperscript{12} These functions include foreign affairs, security, defence, judicial, national fiscal and monetary, and religion. Article 10 (3), Act Number 32 of 2004.

\textsuperscript{13} Articles 1 (5) and 10, Act Number 10 of 2004.
Government Regulation Number 36 of 2002\textsuperscript{14} stipulates that the Indonesian Government can designate sea lanes and traffic separation schemes for ships in Indonesian waters.\textsuperscript{15} However, there is no requirement that such sea lanes and traffic separation schemes have to be discussed with or adopted by IMO. Hence further regulation on this matter is required. Moreover, Article 6 of this Government Regulation provides that ships shall not navigate closer than ten per cent to the islands in the narrow strait. This provision reproduces the provision in the LOSC on the archipelagic sea lanes passage, but there are no further provisions in domestic regulations on how this is implemented, how to measure width, and how the ten per cent rule depicted. The buffer zone which is required by both innocent passage and archipelagic sea lane passage might conflict, given that in narrow straits it would be possible to designate archipelagic sea lanes passage and innocent passage as well. The issue is whether buffer zones will have the same width or not. It might also be difficult to justify this because Indonesia has not implemented the ten per cent rules for innocent passage. These are some of the legal and technical issues that need to be clarified in government regulations.

Designation of archipelagic sea lanes has to be adopted by IMO. Based on the Indonesian experience, the process of adoption is not easy and it is a long process. As IMO adopted the proposal for archipelagic sea lanes passage, all ships and aircraft can exercise this passage right through designated axis lines. Those axis lines are depicted on the edge of territorial sea as entry and exit points. Those entry and exit points are based on the territorial sea and baselines that the archipelagic States employed. If there is significant change in baselines, it would also alter the entry and exit points.

\textsuperscript{14} Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships on Exercising of Innocent Passage through Indonesian Waters (State Gazette Year 2002 No. 70, Supplementary State Gazette No. 4209).

\textsuperscript{15} Articles 11–13, Government Regulation Number 36 of 2002.
Government Regulation Number 37 of 2002\textsuperscript{16} states that the base points and baselines in fields will be used if there are changes due to natural causes or a judicial decision.\textsuperscript{17} This provision is also mentioned in Government Regulation Number 38 of 2002.\textsuperscript{18} The issue is that there are no provisions in Government Regulation Number 37 of 2002 which provide that such changes must go to IMO as well; therefore it could be considered as part of a substitution of the sea lanes which is required under Article 53 (9) of the LOSC.

Two government regulations under Act Number 23 of 1997\textsuperscript{19} have been adopted, namely, Government Regulation Number 7 of 1999 on the Preservation and Conservation of Plants and Animals and Government Regulation Number 19 of 1999 on the Standardisation of Water Quality. Article 9 of Government Regulation Number 19 of 1999 prohibits activities by person or legal entities that will cause marine pollution or destruction of the environment. These offences are punishable by the reimbursement of all costs associated with pollution prevention and recovery from the damages caused to the marine environment.\textsuperscript{20} In addition, Indonesian laws and regulations\textsuperscript{21} on navigation regimes also provide that ships have to take precautionary measures in order to protect and preserve the marine environment while passing through Indonesian waters. However there is no single provision in those Government Regulations as to what constitutes an offence and what sanctions are to be imposed.

\textsuperscript{16} Government Regulation Number 37 of 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).
\textsuperscript{17} Article 12 (4), Government Regulation Number 37 of 2002.
\textsuperscript{18} Articles 10 and 11 (2, 3), Government Regulation number 38 of 2002 on List of Geographical Coordinates of Indonesian Archipelagic Baselines (State Gazette Year 2002 No. 72, Supplementary State Gazette No. 4211).
\textsuperscript{19} Act Number 23 of 1997 on Environmental Management (State Gazette Year 1997 No. 68, Supplementary State Gazette No. 3699).
\textsuperscript{20} Articles 23 and 24, Government Regulation Number 19 of 1999.
\textsuperscript{21} These laws and regulations include Acts and Government Regulations which regulate navigation regimes.
The issue is whether those ships have to abide by the Environmental Management Act or the individual Act or individual government regulation. These laws and regulations cross reference each other on such matters without definitive provisions.

8.3.1.3. Inconsistencies among Enforcement Provisions

 Disconnects also exist in enforcement provisions, particularly in provisions relating to violations and standards of liability, sanctions and fines in laws and regulations. Different Acts have different sanctions and liability\(^\text{22}\) for similar offences. Sanctions differ broadly, such as criminal versus administrative and civil penalties. Different Acts also have different standards of liability, such as negligence, specific intent or strict liability for almost identical violations. Different Acts also have complicated enforcement and prosecution mechanisms. Take for example the different Acts regulating marine pollution: Article 11 (1) of Act Number 5 of 1983\(^\text{23}\) on the EEZ provides that any intentional pollution within the EEZ shall be punished under applicable law; Article 35 of Act Number 23 of 1997 on Environmental Management provides strict liability for dumping of hazardous or toxic materials including the marine environment; Article 8 of Act Number 31 of 2004 on Fisheries prohibits\(^\text{24}\) the destruction of fisheries habitat; and Article 229 (1) of Act 17 of 2008 on Shipping prohibits ships from polluting Indonesian waters. The standard for liability under Act Number 5 of 1983 requires an ‘intent’ to commit a violation, meaning the defendant has to deliberately pollute the marine environment. The standard for liability under Act Number 23 of 1997 is ‘strict’, meaning that the defendant only has to have engaged in

\(^{22}\) The term liability and responsibility, generally and for the sake of this study, have the same meaning and are sometimes used interchangeably.

\(^{23}\) Act Number 5 of 1983 on Indonesian Exclusive Economic Zone (State Gazette Year 1983 No. 44, Supplementary State Gazette No. 3260).

\(^{24}\) Act Number 31 of 2004 on Fisheries (State Gazette Year 1996 No. 118, Supplementary State Gazette No. 4433).
the activity, without any particular state of mind. The standard under Act Number 31 of 2004 and Act 17 of 2008 are not explicitly stated, but would generally be interpreted as one of ‘knowledge’ standard, meaning that the defendant had knowledge of his actions. These three standards are vastly different and are difficult to implement. There are also questions as to which standard should apply to navigation related offences.

Sanctions and fines are also based on the individual Acts. Several Acts regulate sanctions and fines on marine pollution: destruction of fisheries habitat based on Act 31 of 2004 is imprisonment up to six years and a fine of up to IDR. 1.2 billion. Dumping of hazardous or toxic materials in marine environment based on Act 23 of 1997 has similar penalties but a fine of up to IDR. 300 million. Pollution in the EEZ based on Act Number 5 of 1983 has penalties of up to IDR. 225 million. Destruction of the environment based on Act Number 17 of 2008 carries the penalty of imprisonment of up to ten years and a fine of up to IDR. 500 million. Thus there are many sanctions for various violations, all relate to the destruction of the marine environment.

8.3.2. Reforms Needed to Institutional Frameworks in Indonesia

Article 2 (1) of Act Number 32 of 2004 states that the governmental system of Indonesia is divided into three main levels, namely, national or central level; provincial level; and district or city level. Provinces and districts or cities are considered autonomous with their own head of regional governments and local houses of representatives whose members are elected by direct ballot. Every level of government

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25 IDR means Indonesian Rupiahs.
26 Article 84 (1), Act Number 31 of 2004.
27 Article 43 (1), Act Number 23 of 1997.
28 Article 16, Act Number 5 of 1983.
29 Article 325 (2), Act Number 17 of 2008.
has a right to set up institutional bureaucracies as they wish in order to run the administration. Thus regional governments can also set up bodies or agencies in order to run their administrations.

This creates further challenges to the effective management of marine affairs which include navigational regimes. These major challenges include the fragmentation of marine management responsibilities, lack of clear jurisdiction over marine management functions, lack of effective coordination, and lack of technical and financial resources. Given the complexity of the bureaucratic system, the next section will only discuss some of challenges confronting government institutions in applying the navigational regime at the national level.

8.3.2.1. Fragmentation of Management Functions

The Indonesian government system has three forms of ministries, namely, (i) ministries or line departments, (ii) coordinating agencies, which are divided into two types, coordinating ministries and state ministries, and (iii) non-departmental government agencies. There are at least nine line departments, two state ministries, two coordinating ministries, five non-departmental government agencies and one inter-ministerial council involved at the national level which are responsible for marine affairs. The complexities of institutional arrangements on navigation regimes can be seen in Table 4.
<table>
<thead>
<tr>
<th>No</th>
<th>Government Agencies</th>
<th>Major Duties and Functions relating to Marine and Navigation Regimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Ministry of Marine and Fisheries</td>
<td>Responsible for overall coastal and marine resources management</td>
</tr>
<tr>
<td>2</td>
<td>Ministry of Energy and Mineral Resources</td>
<td>Responsible for regulating mining exploitation activities in Indonesian territory</td>
</tr>
<tr>
<td>3</td>
<td>Ministry of Home Affairs</td>
<td>Responsible for coordinating national and regional policies and programs, including spatial planning</td>
</tr>
<tr>
<td>4</td>
<td>Ministry of Communication</td>
<td>Responsible for regulating shipping activities</td>
</tr>
<tr>
<td>5</td>
<td>Ministry of Defence</td>
<td>Responsible for regulating and planning of Indonesia territory for defence purposes</td>
</tr>
<tr>
<td>6</td>
<td>Ministry of Trade</td>
<td>Responsible for administering trade activities include export and import trade</td>
</tr>
<tr>
<td>7</td>
<td>Ministry of Foreign Affairs</td>
<td>Responsible for implementing international conventions which has been ratified by Indonesia</td>
</tr>
<tr>
<td>8</td>
<td>Ministry of Legal and Human Right</td>
<td>Responsible for regulating laws and regulations including immigration</td>
</tr>
<tr>
<td>9</td>
<td>Ministry of Finance</td>
<td>Responsible for financing and also regulating fiscal and custom</td>
</tr>
</tbody>
</table>

**Coordinating Ministries and Agencies**

<table>
<thead>
<tr>
<th>No</th>
<th>Coordinating Ministry</th>
<th>Coordinating Ministry Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Politics, Security and Terr</td>
<td>To coordinate and synchronise policy and programs on politics, security, defence and territory</td>
</tr>
<tr>
<td>2</td>
<td>Economic Affairs</td>
<td>To coordinate and synchronise economic policy</td>
</tr>
<tr>
<td>3</td>
<td>Environment</td>
<td>Responsible for developing national policy on the environment including conservation and preservation</td>
</tr>
<tr>
<td>4</td>
<td>Attorney General</td>
<td>Responsible for prosecuting criminal offences including maritime offences</td>
</tr>
</tbody>
</table>

**Non-Departmental Government Agencies**

<table>
<thead>
<tr>
<th>No</th>
<th>Agency</th>
<th>Functions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>National Development Planning Agencies</td>
<td>Responsible for planning and budgeting on national development programs</td>
</tr>
<tr>
<td>2</td>
<td>National Coordinating for Survey and Mapping</td>
<td>Responsible for establishing guidelines for survey and mapping</td>
</tr>
<tr>
<td>3</td>
<td>Indonesian Institute of Sciences</td>
<td>Responsible for establishing guidelines for scientific studies</td>
</tr>
<tr>
<td>4</td>
<td>Indonesian Armed Forces</td>
<td>Responsible for defending the territory. Indonesian Navy has authority to investigate offences at sea</td>
</tr>
<tr>
<td>5</td>
<td>Indonesian Policy</td>
<td>Responsible for investigating all offences</td>
</tr>
</tbody>
</table>

**Permanent Inter-Ministerial Council**

<table>
<thead>
<tr>
<th>No</th>
<th>Council</th>
<th>Functions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Indonesia Maritime Council³⁴</td>
<td>Responsible for establishing national policy on maritime sector</td>
</tr>
</tbody>
</table>

The table shows that there are already many government institutions which deal with navigation regimes. Apart from that, there are other institutions which need to be established based on individual Acts such as the sea and coast guard based on Act 17

³⁴ President Decree Number 35 of 2000.
of 2008,\textsuperscript{35} National Board for the Management of Separate Territories,\textsuperscript{36} and the Indonesian Maritime Security Coordinating Board.\textsuperscript{37} Thus, it might be argued that there are overlapping jurisdictions, unclear mandates, internal power rivalries, and insufficient institutional mechanisms having a negative impact on managing marine affairs, including navigation regimes.

Indonesia already established a Coordinating Ministry for Politics, Security and Territory which is responsible for coordinating bodies that respond to a particular problem falling within the mandate of several agencies. However, this coordinating body is not fully effective when dealing with navigation issues. This is because there are so many issues being discussed by this coordinating body. Some issues are prioritised and carry more weight than navigational issues.

Navigation in Indonesian waters is the main concern for several departments and agencies, such as Ministry of Foreign Affairs, Ministry of Defence, Ministry of Transportation, Ministry of Marine and Fisheries, and the Indonesian Armed Forces. These departments usually discuss and identify preliminary options in cases of navigation issues. These departments also take an active part in designating the Indonesian archipelagic sea lanes. However, there are instances when some of the relevant government departments and agencies do not take part in resolving navigational issues because of lack of awareness or other priorities.

\textbf{8.3.2.2. Lack of Clear Jurisdictions and Functions over Navigation Regimes}

The evident multiplicity of agencies and departments has the corollary effect of diffusion in responsibility and oversight in the assignment of function which cause

\textsuperscript{35} Article 276, Act Number 17 of 2008.
\textsuperscript{36} Article 14 (1), Act Number 43 of 2008. There is no formal institutional name adopted for this Board yet.
\textsuperscript{37} President Regulation Number 81 of 2005.
either an overlapping of or gaps in responsibilities. Alternatively, it could be argued that the multiplicity of agencies should overcome a lack of technical and/or financial capacity when addressing issues. Given that the Indonesian waters is enormous and issues therein are complex, it seems impossible that issues arising could be handled by a single or only a few agencies.

Jurisdictions and management of activities at sea are already divided into departments and agencies. These departments and agencies have had their functions and jurisdiction delineated in order to avoid overlap and in theory these institutional arrangements should work well. In reality however, there are many overlapping jurisdictions and gaps in responsibilities which cause issues and problems in the field. For examples, if there is a marine pollution incident arising from an operation of a ship, it would be difficult to determine whether the Ministry of Transportation or the Ministry of Environment would be in charge or even if other ministries need to take the lead if the pollution affected other marine sectors or caused trans-boundary pollution.

The lack of coordination in the policies, plans, programs and activities of government institutions occurs among agencies with shared functions. The breakdown in the implementation of registration, licensing systems and sailing permits to ships signifies weak coordination between the Ministry of Transportation and the Ministry of Marine and Fisheries, although the latter is only authorised to regulate fishing vessels. These authorities should be combined or their functions coordinated because they address similar issues.

There may also be a lack of coordination among existing government agencies both vertically and horizontally across all levels of government. Horizontal integration commonly called inter-sectoral integration of several agencies at the same government
level has not yet been achieved. Vertical integration of agencies at different levels of
government to coordinate programs has also been unsuccessful. Most government
agencies remain focused on their sectoral, temporal and constricted mandates. This has
led to weak governance, lack of consultation with stakeholders and has been a negative
factor in the implementation of navigational regimes in Indonesia.

8.3.2.3. Lack of Technical and Financial Capacity

Insufficient technical and financial capacity has consistently been identified as
a major obstacle to the general implementation of marine policies and regulations and
in effectively fulfilling the responsibilities of navigation-related institutions. The lack
of technical capacity leads to navigation institutions which do not perform effectively
and efficiently. There are two issues on technical capacity namely, asset adequacy and
human capacity. Asset adequacy relates to the financial capacity of government to
provide the assets and technical support needed. Human capacity relates to human
resources to handle the technical assets. Increasing the human resources is usually
undertaken by enrolling staff in certain technical courses in order to enhance their
capacities. The problem is that there are only a few courses relating to their capacity
and if they exist, the courses are too expensive.

There are many problems involved regarding law enforcement at sea, such as
the lack of adequate assets and the multiplicity of law enforcement institutions
involved. These problems prevent the implementation of navigation regimes,
particularly with respect to monitoring, control, surveillance and enforcement.38 The
government institutions which have authority to perform law enforcement are made up
of nine institutions, including the Indonesian Navy, Indonesian Police, Ministry of

38 Press Release of the function of Indonesian Maritime Security Coordinating Board,
Marine Affairs and Fisheries, Ministry of Forestry, Ministry of Justice and Human Rights, Ministry of National Education, State Ministry of Environment, Ministry of Finance and Ministry of Communication. Of these government institutions, there are only a few which have ships and related assets to perform their enforcement tasks such as the Indonesian Navy, Indonesian Police, Ministry of Marine Affairs and Fisheries, Ministry of Transportation and Ministry of Finance (see Table 5). Thus, the rest of the government institutions have mandates but they are not able to fulfil their functions. Their assets are also limited and may be deemed inadequate to perform law enforcement tasks and cover Indonesian waters. This leads to a prevalence of offences at sea.

Table 5. Maritime Enforcement Agencies based on Indonesian Acts

<table>
<thead>
<tr>
<th>Officer from Acts</th>
<th>Navy</th>
<th>Police</th>
<th>Custom</th>
<th>Sea Comm</th>
<th>Fisheries</th>
<th>Immigration</th>
<th>Environment</th>
<th>Forestry</th>
<th>Cultural</th>
</tr>
</thead>
<tbody>
<tr>
<td>TZMKO 1939</td>
<td>✓</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>5/1983 EEZ</td>
<td>✓</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>31/2004 Fisheries</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>5/1992 Cultural heritage</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
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</tr>
<tr>
<td>9/1992 Immigration</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>17/2008 Shipping</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5/1990 Natural conservation</td>
<td>✓</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10/1995 Custom</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6/1996 Indonesian waters</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>23/1997 Environment</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>41/1999 Forestry</td>
<td>✓</td>
<td></td>
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</table>

The lack of financial resources is also a challenge for agencies involved in law enforcement. The availability of government funding is limited and is spread across all law enforcement agencies. Thus, the finances are usually insufficient for conducting law enforcement operations. In addition, those law enforcement institutions tend to
perform their tasks based on their mandate. These law enforcement operations could be
done in the same areas, but it is performed by different institutions resulting in a lack
of coordination between them. In this regard, since December 2005, the Indonesian
Government has set up a Maritime Security Coordinating Board which has the
authority to formulate and determine general policy on sea security and coordinate law
enforcement activities.39

8.4. Alternative Solutions to Legal and Institutional Reforms

The establishment of effective legal and institutional frameworks is one of the
requirements for achieving the national development goal of Indonesia. Their
establishment could also be used to balance the interests of Indonesia and the
international community in order to implement international law. There are many steps
that could be taken to achieve this objective. This section will provide alternative
solutions to legal and institutional reforms in order to balance both interests.

8.4.1. Legal Reform

As mentioned earlier, there is both a great vertical as well as horizontal
disconnect among laws and regulations. There are several reasons why these
disconnects are prevalent and why they are difficult to resolve. Laws interact through
a body of doctrines40 that govern legal interpretation and construction as tools used to
interpret the meaning of an Act and to determine the relationship of one Act to another.
First, Indonesian laws and regulations are often written in vague and broad terms,
without specific details for application. Commonly its detail is intended to be

39 Djoko Sumaryono, 'The Indonesian Maritime Security Coordinating Board' in Robert B Cribb and
Michelle Ford (eds), Indonesia beyond the Water's Edge: Managing an Archipelagic State (2009), 134-45.
40 For examples, Pancasila and Wawasan Nusantara.
developed with lower levels of regulations and decrees. One law may offer two or more broad goals or principles that may conflict when applied in specific circumstances. The Indonesian system of law recognises a means to resolve potential or actual conflicts that arise within one act or regulation.41

Second, Indonesia recognises the basic doctrine of legal construction for resolving differences among Acts. There are three that are most commonly used: (1) laws of a higher level take priority over laws of a lower level; (2) laws enacted later in time take priority over laws enacted earlier in time; and (3) laws that are more specific take priority over more general laws. However, these rules of legal interpretation are not codified, so there is a lack of consistent application.

Third, legal construction is difficult to understand because of the common use of implied revocation of previous acts. If a new law is replacing or superseding a prior act on a particular matter, it can do so either explicitly or implicitly. If done in explicit manner, the terms are clear. The new Act will directly state that it replaces the relevant previous acts. If implied, however, there is no specific reference to prior acts that are replaced. The language that is typically used is to state that all existing acts remain in force and effect unless otherwise contradicted by the new act. This makes legal interpretation exceedingly difficult, as there is no good guidance as to what is contradictory and what is not. Such acts and regulations would need to be reviewed carefully, on a case-by-case basis, against the provisions of Act. Even then, such reviews may be quite subjective, creating numerous disputes.

The analysis of inconsistencies of laws and regulations in Indonesia include laws and regulations on navigation regimes. Therefore in order to be effective,

41 The Constitutional Court is set up to settle disputes arising from the application and consistency of laws and regulations, Article 24 (2) of the 1945 Constitution and Act Number 24 of 2003 on Constitutional Court (State Gazette Year 2003, No. 98, Additional State Gazette No. 4316).
Indonesia should modify these laws and regulations and try to minimise conflicts among them.

Furthermore, implementation of international laws through national legislation has to go to the Indonesian Parliament (DPR). Thus, there is always a political process element to it. Considering that the LOSC was adopted as a package deal, there are many provisions which might not coincide with the Indonesian national interest. Incorporation of the LOSC into national legislation led to the adoption of some provisions of the national legislation which have been challenged by the international community because they think those provisions are not in accordance with the provisions of the LOSC.\textsuperscript{42} Thus, there are conflicting perspectives of this matter. Indonesia believes that conflicting provisions arise because the provisions of the LOSC are not clearly defined. On the other hand, the international community believes that those interpretations have to accommodate its interests.

In order to avoid disputes arising because of conflicting interests, there are two steps which could be taken. First, Indonesia has to modify its laws and regulations. Second, Indonesia has to give sufficient explanation on its interpretation of certain provisions to the international community that such provisions are consistent with the LOSC and international law. Modifying those laws and regulations might not be easy; however the Government has to approach the DPR and explain to them the positive and negative implications of Indonesia not modifying those laws and regulations on navigation. Sometimes this effort becomes problematic because certain views emerge which can be exemplified by statements such as ‘the government does not protect Indonesia’s interests’ or that ‘the government is lenient with foreign interests’. In the case of designation of archipelagic sea lanes, many are of the opinions that those

\textsuperscript{42} See description in Chapters Four and Five.
sea lanes will cut Indonesian territory into many pieces, so resulting in difficulties to reach agreement at the national level. In addition the view exists that archipelagic sea lanes is contrary to Wawasan Nusantara. Those holding these views will not accept that archipelagic sea lanes passage is a consequence of the archipelagic State concept.

Giving explanations to the international community could be achieved through bilateral and multilateral meetings with user States. Sometimes, user States are not well-informed with regard to the position of Indonesia. Diplomatic means may be useful to settle this kind of issue, although in certain circumstances when national interests are discussed, it will be difficult to reach common ground. Alternatively, Indonesia or the international community could ask the International Tribunal for the Law of the Sea to provide a clearer and authoritative interpretation of the provisions of the LOSC.43

8.4.2. Institutional Reforms

As mentioned earlier, the issues of marine affairs are complex and diverse, including economic, social, cultural, security, defence and political concerns. In order to address these issues, Indonesia need to establish an adequate institutional mechanism. The Indonesian institutional mechanism on marine affairs is distributed amongst many departments, government agencies and regional governments. Those institutions are authorised to perform their tasks based on their mandates. In certain cases their mandates are clearly stated in laws and regulations. For example, the mandates of the Minister of Marine and Fisheries are stated in Act Number 31 of 200444 while those of the Minister of Communication are stated in Act Number 17 of

43 Article 288, LOSC.
44 Article 1 (24), Act Number 31 of 2004.
In other cases, such as with members of cabinet, the government institutional tasks are also stated in presidential decrees.

Marine affairs cover many issues which are handled by many institutions with different mandates. Those mandates and functions in the same arena could lead to some conflicting interests, overlaps and gaps between those institutions, as well as duplication of functions and activities. This example could be considered as ineffective management and shows that there is no proper coordination among government agencies.

The institutional problem in Indonesia is that there is a lack of coordination, overlapping jurisdictions as well as technical and financial problems. One solution to institutional issues is to develop a more effective administrative structure for marine activities. Several options are available to Indonesia to resolve these issues.

First is by improving coordinating mechanisms by empowering the Coordinating Ministries. Given the mandates and functions as stated in the Presidential decree, the Coordinating Ministry for Politics, Security and Territory would be a good choice to perform this task. The Coordinating Ministry may be task to control all activities, budget and other sources into a program of actions. If necessary, the organisation and its function may be changed to adapt to this new task. This solution could minimise conflicting and overlapping jurisdictions, but it would also create another problem – it may make the bureaucracy larger and more complicated.

Second is by reviewing the mandates. Having examined several laws and regulations, the mandates of certain government institutions are based on acts, not only on presidential decrees. Thus, where the jurisdiction is based on both an act and on a presidential decree, there will be conflicting jurisdictions and it will be difficult for

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45 Article 1 (64), Act Number 17 of 2008.
46 The establishment of Sea and Coast Guard is a mandate stated in Act Number 17 of 2008.
those government institutions to perform those mandates. In order to solve this problem, a review of the mandates of these entities is required. The mandates of the government institutions should only be based on Presidential Decrees. This is because those ministries are part of the cabinet and those ministers should be responsible to the President. Therefore all mandates which are stated in the Acts should be reviewed and adjusted in order to minimise conflicting jurisdictions among government institutions. Even with the establishment of new agencies such as the Sea and Coast Guard, Separate Territories Board, and other new agencies, it would be better that an evaluation is first performed in order to avoid conflicting jurisdictions. Creating new agencies in order to handle certain issues would not be beneficial and necessary if the jurisdiction and mandate of the new agencies overlaps with the jurisdiction and mandate of existing institutions. This solution might not be easy because it has to involve the DPR, which may have the review of mandates in its agenda.

8.4.3. Some Final Remarks

The Indonesian legal system and legal process have a number of weaknesses which reduce the effectiveness of achieving national development. Those weaknesses are based on several factors, including the internal interests in the parliament or DPR and government institutions. There are many laws and regulations which are often not related to each other, creating overlap of mandates and jurisdictions. These problems also take place in laws and regulations on navigation. Some provisions on national legislation concerning navigational regimes have been challenged by the international community because their interests are not perceived to be accommodated. There are at

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47 Based on Act 17 of 2008.
48 Based on Act 43 Year 2008.
49 Since 2000, the DPR is involved in a number of government affairs by having hearings with respected Ministries.
least two steps that could be taken in order to resolve the conflicting interests between Indonesia and user States. Indonesia may to modify is laws and regulations or approach the international community to inform them on the compliances of Indonesia on the LOSC provisions on navigational regime. Given that the cause of competing interests is a result of conflicting interpretations of the provisions of the LOSC, Indonesia and the international community could ask the International Tribunal for the Law of the Sea to give a clearer interpretation of such provisions. Those steps are not easy and could give rise to other issues, but they could be the first step towards a solution.

The effectiveness of the legal framework is related to institutional mechanisms. Having many government institutions involved in marine affairs could be useful for managing a vast and complex field. But it could also create problems because of a lack of coordination, overlapping functions as well as technical and financial problems. Those problems could be minimised if there is an effective control from institutions which have the power to coordinate and clearly established mandates. Empowering existing agencies is preferable than establishing new agencies.

8.5. Reflections

The LOSC was concluded based on the notion of a ‘package deal’, by which State Parties were to ‘take it or leave it.’ The LOSC was a compromise of many interests. This led to its provisions being general and vague in terms of language and formulation. This creates the potential for conflict between States which usually interpret instruments based on their national interests or between States and the international community and organisations. Although Article 300 of the LOSC provides that State Parties shall fulfil their obligations in good faith with regard to
interpreting the provisions of the LOSC, the fact remains that there is always a national interest which precedes it.

The provisions of the LOSC on navigational regimes are not well defined and unclear. In addition, Indonesian laws and regulations only restate those provisions in the LOSC. Thus, similar to the provisions of the LOSC, Indonesian laws and regulations on navigation are not well defined either. Moreover, Indonesian laws and regulations also advance the national interests which may sometimes be viewed as contrary to the interests of the international community and those of other States. Indonesia has to review its national laws and regulations in order to strike a realistic balance of interests between Indonesia and user States to avoid conflicts.

There are some provisions in Indonesian national legislation concerning navigational regimes that have been challenged by the international community. There are at least two steps that could be taken to resolve the conflicting interests. Indonesia can either modify the laws and regulations or approach the international community and user States and ensure they understand the point of view of the country. Alternatively, Indonesia, user States or the international community could ask the International Tribunal for the Law of the Sea to give clearer explanations of such provisions. A competent international organisation may also be requested to give guidance on certain issues. These steps are not easy and could create other issues, but it would be a possible way to find a solution.

At the national level, the Indonesian parliament and government have to take into consideration international rights which arise from the LOSC and international law. Attending seminars, discussions and meetings at a national and international level could enhance the understanding of the members of the Indonesian parliament and also the Indonesian government itself. An appreciation of the intricacies of the navigational
regimes in Indonesia can lead to the parliament and government to establish laws and regulations which better consider the right and obligation of other States. If there is a law or regulation which is contrary to international law, there should be an effort to review or revise it.

Furthermore, the effectiveness of the legal framework is always closely related to the institutional framework. The institutional framework has a number of overlaps and fragmentation among the agencies and the law enforcement bodies that need to be addressed. In order to minimise the issues that might arise on maritime affairs, there must be effective control from institutions which have the power to coordinate various government department and agencies. Furthermore, a law enforcement body is essential to uphold the laws and regulations on marine affairs. Having many law enforcement institutions would be beneficial only if there is effective coordination between their activities. In addition, empowering existing agencies would be preferable than establishing new agencies in order to avoid establishing new infrastructure and system.
Bibliography

'5 F 18 Hornet Maneuvre in Bawean (in Indonesian)', Kompas (Jakarta), 4 July 2003, 1


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


Andrew, Dale, 'Archipelagos and the Law of the Sea: Island Straits States or Island-Studded Sea Space?' (1978) 2(1) Marine Policy 46

Anonymous, 'Singapore Protest', The Times (London), 16 December 1957, 8


Antara, 'F-18 Maneuvers, a Form of US Pressure, Says MP', Antara (Jakarta), 8 July 2003, 1

Antara, 'Indonesia Has not Issued Statement on US Intruders, Minister says', Antara (Jakarta), 5 July 2003, 1

Antara, 'RI to Protest if US Jet-Fighters Violate the Rules, Mil Chief Says', Antara 7 July 2003, 1

Anwar, Dewi Fortuna, 'Indonesia: Ketahanan Nasional, Wawasan Nusantara, Hankamrata' in Ken Booth and Russel Trood (eds), Strategic Culture in the Asia-Pacific Region (1999) 199

Anwar, Rosihan, Musim Berganti: Sekilas Sejarah Indonesia, 1925-1950 (1985)

Bakosurtanal, Menata Ruang Laut terpadu (2002)

Baldwin, Christopher, Seaborne Trade Flows in the Asia Pacific Present and Future Trends (2001)


293

Baxter, Richard, The Law of International Waterways, with Particular regard to Interoceanic Canals (1964)

Bondansky, Daniel, 'Protecting the Marine Environment from Vessel-Sources Pollution: UNCLOS III and Beyond' (1991) 18 Ecology Law Quarterly

Boyle, Alan E, 'Marine Pollution under the Law of the Sea Convention' (1985) 79 American Journal of International Law

Brissenden, Rosemary, 'Pattern of Trade and Maritime Society before the Coming of the Europeans' in Elaine McKay (ed), Studies in Indonesian History (1976)

Brownlie, Ian, Principles of Public International Law (7th ed, 2008)


Butler, W E, Basic Documents on the Soviet Legal System (1983)


Cable, James, Gunboat Diplomacy, 1919-1979 (1981)

Caldwell, Malcolm Indonesia (1968)

Cambridge Advanced Learner's Dictionary (2nd ed, 2005)


Carey, Peter B R, 'Aspect of Javanese History in the Nineteenth Century' in Harry Aveling (ed), The Development of Indonesian Society (1979) 120


Deddish, M, 'The Right of Passage by Warships Through International Straits' (1979) 24 *JAG Journal* 81


Department of Foreign Affairs, *Indonesia 1963: Looking Back over the Years* (1963)

Department of Legal and Human Rights, 'Report of Inter Department Working Group on Indonesian Baselines' (Department of Legal and Human Rights, 2001)


Djalal, Hasjim, '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

Djalal, Hasjim, *Perjuangan Indonesia di Bidang Hukum Laut* (1979)


Djohani, R H, 'The Bajo, Future Park Managers in Indonesia?' in M J Parnwell and R L Bryant (eds), *Environmental Change in South East Asia, People Politics and Sustainable Development* (1996)


Editorial, Media Indonesia, 'Territorial Sovereignty', *Antara* (Jakarta), 9 July 2003, 1


George, Mary, 'Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention' (2002) 33(2) *Ocean Development and International Law* 189


Hajramurni, Andi, 'Bajo People Losing their Identity', *The Jakarta Post* (Jakarta), 12 September 2009,


Indonesian Navy Hydrographic Office, 'Figures of Indonesian Territory' (Indonesian Navy Hydrographic Office, 2003)


Indonesian Navy Hydrographic Office, 'Report on Consultation with IMO and IHO, and IMO's Meetings on Designation of Archipelagic Sea Lanes' (Indonesian Navy, 1997)

Indonesian Navy Working Group, 'Evaluation on Designation of the Indonesian Archipelagic Sea Lanes Passage' (Indonesian Navy, 1996)


Japan Maritime Research Institute, *Study on Passage through the Straits of Malacca and Singapore in 2001* (2002)

Jayakumar, Shunmugam, 'UNCLOS-Two Decades On' (2005) 9 *Singapore Year Book of International Law 1*


297


Kumar, Ann, 'Development in Four Societies over the Sixteenth to Eighteenth Centuries' in Harry Aveling (ed), *The Development of Indonesian Society* (1979)


Kusumaatmadja, Mochtar, *Indonesia dan Perkembangan Hukum Laut Dewasa ini* (1977)

Kusumaatmadja, Mochtar, 'Sovereign Rights over Indonesia Natural Resources: An Archipelagic Concept of Rational and Sustainable Resources Management' (1991) 15(6) *Marine Policy*

Kusumaatmadja, Mochtar, 'The Concept of Indonesian Archipelago' (1982) 10 *Indonesian Quarterly* 12


Lawrence, Keith D, 'Military-Legal Consideration in the Extension of Territorial Sea' (1965) 29 *Military Law Review* 47

Leifer, Michael *International Straits of the World: Malacca, Singapore and Indonesia* (1978)


Lowe, A V, 'The Right of entry into Maritime Ports in International Law' (1976-77) 14(3) San Diego Law Review 597


Mauna, Boer, Hukum Internasional (1987)


McNees, Richard B, 'Freedom of Transit through International Straits' (1974-75) 6(2) Journal of Maritime Law and Commerce 175


Morgan, J R and Fryer, D W, 'The Marine Geography of Southeast Asia ' in G. Kent and M.J. Valencia (eds), Marine Policy in Southeast Asia (1985)


National Committee for Maritime Technology and Industrial Development, National Maritime Profile (2nd ed, 1996)
Neil, Robert van, 'From Netherlands East Indies to Republic of Indonesia 1940-1945' in Harry Aveling (ed), The Development of Indonesian Society (1979) 106


Notosusanto, Nugroho The National Struggle and Armed Forces in Indonesia (Second ed, 1980)


O'Connell, D P, 'Mid-Ocean Archipelagos in International Law' (1971) 45 British Year Book of International Law 1

O'Connell, D P, 'The Juridical Nature of the Territorial Sea' (1971) 45 British Year Book of International Law


Oegroseno, Havas Arif, 'Indonesia's Maritime Boundaries' in Robert B Cribb and Michelle Ford (eds), Indonesian beyond the Water's Edge (2009) 10


Peele, Reynolds B 'The Importance of Maritime Chokepoints' (1997) 27(2) Parameters 14

Poerwoko, Djoko, 'There is Still Violation on the National Air Space (in Indonesian)', Kompas (Jakarta), 23 June 2006, 2


Richardson, Elliot L, 'Power, Mobility and the Law of the Sea' (1980) 58(004) *Foreign Affairs* (pre-1986) 17


Rothwell, Donald R, 'The Indonesia Strait Incident: Transit or Archipelagic Sea Lanes Passage' (1990) 14(6) *Marine Policy* 491


Semaphore, 'Indonesian Archipelagic Sea Lanes' (2005) 6(6) *Semaphore, Newsletter of the Sea Power Centre-Australia*

Siboro, Tiarma, 'Investigation Continues into US Jets Intrusion', *The Jakarta Post* (Jakarta), 07 July 2003, 1

Siboro, Tiarma, 'Minister Summons US Envoy over Hornet Intrusion', *The Jakarta Post* (Jakarta), 11 July 2003, 1


Soebroto, Sahono, Sunardi and Wahyono, 'Konvensi PBB tentang Hukum Laut', *Sinar Harapan* (Jakarta), 1983, vi

Sokolsky, Richard, Rabasa, Angel and Neu, Richard C *The Role of Southeast Asia in U.S. Strategy Toward China* (2001)


Susanto, Dwi R., Mitnik, Leonid and Zheng, Quanan, 'Ocean Internal Waves Observed in the Lombok Strait' (2005) 18(4) *Oceanography*


'The Manuevres of the F 18 Hornet Violated International Law (in Indonesian)', *Kompas* (Jakarta), 8 July 2003, 1

'The US Manuevres Threat Indonesian Civil Aviation (in Indonesian)', *Kompas* (Jakarta), 5 July 2003, 1

'The US Will not Overfligth the Indonesian Territory (in Indonesian)', *Kompas* (Jakarta), 11 July 2003, 1


Whiteman, M, *Digest of International Law* (1965)


Wolters, O W, *Early Indonesian Commerce* (1967)

