

OBSERVATIONS ON THE IMPLEMENTATION OF ARCHIPELAGIC SEA LANES

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Summary

With the ratification of the Convention on the Law of the Sea we enter an implementing phase. This requires an interpretation of the meaning of various articles. As cases are examined on an individual base it is found that some of the rather general terms used in the Convention are insufficiently precise to make an unambiguous interpretation. This has found to be the case in archipelagic sea lanes, described in Article 53 of the Convention. A proposal by Indonesia to IMO has provided a first case to examine these matters in detail and it will probably provide a precedent for future interpretations. A key issue is whether an archipelagic sea lane is simply another routeing measure or whether it provides a completely new regime and should be treated quite independently.

INTRODUCTION

With the ratification of the Convention on the Law of the Sea many nations have moved into a phase of implementing the articles contained in this treaty. The United Nations Division of the Law of the Sea has been active in identifying those organizations that are stated, either explicitly or implicitly, of being competent international organizations, for the purpose of implementing the articles. The International Hydrographic Organization (IHO) has been explicitly identified in Article 3 of Annex II on the Commission on the Limits of the Continental Shelf but it has also been implicitly identified in several other places. In addition, in some places where the International Maritime Organization (IMO) is clearly the competent international organization and this has been recognized with respect to Article 53(9) concerning archipelagic sea lanes, it will in all probability have to turn to other specialist international organizations, such as the IHO, in carrying out this function.

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The entire regime of archipelagic states was an important issue of the Third Law of the Sea Conference and its detailed history will not be gone into in this paper. It is sufficient to recognize that the rights and obligations between the archipelagic states and the user states became an issue in the overriding concerns of some states during the conference concerning the freedom of navigation on the one hand and the sovereignty of coastal states on the other hand. The definition of an Archipelagic State and more significantly the rules for defining the baselines which 'fence it in' are to be found in Articles 46 and 47 of the Convention respectively. Essentially an archipelagic state, of which Indonesia is a prime example, may draw straight baselines around the outermost points of their land territory. Within the waters and air space, thus encapsulated a very specific legal status may be in place, according to Part IV of the Convention.

International trading nations and, in particular, world naval powers, which prior to the Third Law of the Sea Conference had enjoyed the relative freedom afforded by narrower territorial seas, were concerned that the establishment of such legal regimes as presented by the recognition of archipelagic states, over large parts of the oceans might impede the activities of their vessels. This could specifically be the base in critical choke areas, such as Indonesia, where it was felt that the establishment of an archipelagic state might impose a barrier to the free movement of ships between the Indian and Pacific Oceans. To overcome this problem it was decided to recognize the traditional freedom in providing a right of sea lanes passage for international shipping across the archipelagic state. Ships making use of these sea lanes could enjoy essentially unfettered passage as though they were passing through international waters. These rights are to be found in Article 53 Right of archipelagic sea lanes passage.

In this paper the author describes some of the difficulties that have been encountered in interpreting Article 53 in the first applications of sea lanes in the case of Indonesia. As hydrographers have already found in the implementation of Article 76 dealing with the continental shelf, although the persons who drafted the Law of the Sea Convention undoubtedly exercised considerable forethought and care, it is only when the legislation is considered on a case by case basis that some of the problems of interpretation are revealed.

PROPOSALS OF INDONESIA TO IMO

In 1996 the Indonesian Government submitted its Archipelagic Sea Lanes proposal to the competent international organization IMO, with its plans to designate archipelagic sea lanes. IMO recommended that it consult the IHO from a point of view of the hydrographic conditions along the planned lanes. Subsequently the proposals were submitted to IMO's Maritime Safety Committee. It was clear that before the subject had been brought to the IMO it had already been raised with several states, whose shipping would be affected by the implementation of the sea lanes. These countries included the USA, the UK and Australia. Undoubtedly there were others, which would certainly include Japan, but they do not seem to have been so active in the discussions.

The lanes were not only for ships but for aircraft as well and it was questioned whether the International Civil Aviation Authority (ICAO) should not be equally concerned. It appears to have been now decided that IMO should in fact be

the authority as civilian aircraft were under the authority of ICAO's own rules. However, ICAO would be kept informed. Another matter of relevance concerning the administration was how the matter should be considered by IMO. The Organization decided that initially it be considered by its Navigation Sub-committee and within the sub-committee that it should be addressed by the Working Group on Routeing. Thus in NAV 43 the Indonesian proposal was on the agenda plus several other papers by the USA and Australia. Much of the work was devoted to drafting an Annex to the General Provisions on Ship Routeing that would deal with the specific case of archipelagic sea lanes. In retrospect it may be questioned whether it was the correct action to relate archipelagic sea lanes to routeing measures because it has become increasingly clear that while the first deals with a political issue the other deals strictly with maritime safety.

One of the earlier goals of the international traders and maritime powers was to see that all routes normally used for navigation should be included in any archipelagic sea lanes designation. Indonesia had initially only submitted three north south lanes but the USA, the UK and Australia appear to have been anxious to see at least an east west route through the Java Sea included in this initial set and eventually to have all routes covered. Indonesia politely rejected this on the grounds that while they may have had an eventual obligation there was no requirement in the Convention to propose all the sea lanes at once. At NAV 43, this position seems to have been accepted provided that in the new Annex it was made explicit that the eventual goal was to have sea lanes established along all routes normally used for international navigation. At NAV 43, the USA and Australia both presented papers outlining where they considered that these routes existed. However, such routes are defined in several publications, including the UK Hydrographic Office's publication 'Ocean Passages of the World'.

Although considerable progress was made at NAV 43 in drafting Annex 2 to the General Provisions for Ships' Routeing, the time to actually review Indonesia's proposals was limited. It was therefore agreed that it should be brought up again at the next Maritime Safety Committee meeting.

EXAMINING INDONESIA'S PROPOSAL

It appears that while initially it was the international shipping interests that were anxious to have the Indonesian submission adopted, it is now the Indonesians themselves who would like to see the submission adopted expeditiously. Having drafted out an Appendix to the Routeing Guides, the shipping interests now seem content to be able to thoroughly examine the actual submission.

It is difficult to know what features should be examined in the sea routes proposed without having first a firm understanding whether the sea lanes are a political or a maritime safety measure. Certainly the interpretation of Article 53 itself must be considered and this introduces the first difficulties. These mainly relate to paragraph 5 of the article, which is quoted below:

'Such sea lanes and air routes shall be defined as a series of continuous axis lines from the entry points of the passage routes to the exit points. Ships and aircraft in archipelagic sea 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.'

Although the actual identification of the axis requires little interpretation and can be a reasonably arbitrary choice provided that it reflects a route normally used for international navigation, the 'ten percent rule' may prove to be a source of difficulty. The original reason for this measure is not known but it is assumed that it was intended either to keep ships from running aground or simply to keep them at reasonable distance offshore for strategic interests of the archipelagic state. If it was for the former it does not serve well, as it does not take into consideration a safety margin off the dry land itself. If it is for some strategic reasons, it may only be noted that the 'ten percent rule' really provides a very small distance offshore. It lacks specificity also in terms of whether it means the high water or low water coastline of the islands, a matter which is considered in detail in other parts of the Convention, such as Article 5 defining the normal baselines as the low-water line. Finally, what does the term 'islands bordering the sea lane' mean? Does it include only those islands outside the sea lane on each side, or islands touching the sea lane, or does it mean islands within the sea lane but bordering its axis? This matter is very critical because there are many islands within the proposed sea lanes and there are many grey cases concerning the general size and disposition of islands. It is felt that if the original intention was to give some safety or security margin around dry land islands then it would be meaningless to exclude 'the islands in the stream'. That is, the interpretation should be islands bordering the axis of the sea lanes that fall within or touching the sea lane itself.

The application of the term '10 percent of the distance between the nearest points on islands bordering the sea lane' results in two methods of interpretation. Does one measure the distance between the islands on each side of the axis and then take 10 percent of that or do you take the distance between the islands and the axis of the sea lane? Both interpretations cause difficulties. The first method is ambiguous because there may be many islands or points of islands on each side of the axis and the matter is which to choose. The latter is not difficult to apply from the side of an island facing the axis but what happens in measuring the distance from the axis to the far side of the island? To explore these situations one needs to examine particular cases.

A particularly interesting situation exists in the Sunda Straits which are proposed as part of the sea lane that will go from the Sunda Straits of Karimata towards Singapore (see Fig. 1). Sunda Straits provide a deep but relatively narrow passage from the Indian Ocean into the Indonesian Archipelago. Also it may be noted that the area north of the Straits themselves are rather shallow, with depths of around 20 metres and many hazards. The total width, from the main island of Sumatra to Java is 14 miles but in the middle of the Strait is Pulau Sangiang, an island over two miles in length. In addition there are several smaller islands and shoals constricting the waterway. In the existing Indonesian proposal the axis of the sea lane is proposed to pass to the north west of Pulau Sangiang but given that a sea lane may extend 25 nautical miles on each side of the axis, the entire Strait may be used, with the exception of parts covered by the 10 per cent rule. This really

brings into question whether Pulau Sangiang is a bordering island and if it is, then how will the rule be applied. It may be possible for the 10 per cent rule to be applied in such a way that one of the channels passing to the south and east of the above island be closed as part of the sea lane. Would such a move be internationally supported?

THE QUESTION OF SAFETY

The matter of whether archipelagic sea lanes are a safety measure or a political measure has already been raised in this paper. If they are only the latter then this is clearly not the business of the IHO and one might question whether it is even the business of IMO. However, we are guided by Article 54, which states that articles 39, 40, 42 and 44 apply *'mutatis mutandis'* to archipelagic sea lanes passage and Article 44 states:

"States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage".

Normal routeing measures, examined and approved by IMO with the assistance of the IHO, are examined from a point of view of whether the entire area defined is safe for the passage of those ships proposed to use the measures. A country proposing a traffic separation system or other form of routeing is expected to have consulted all those agencies providing navigation services to ensure that they are adequate for safe navigation. This includes the Hydrographic Offices to ensure that the area has been adequately surveyed and that all obstructions identified and marked if necessary. Also, that the published charts and other publications are adequate. The IHO is generally asked by IMO to review all proposals to ensure that 'nothing has dropped between the cracks' and that the hydrography is indeed satisfactory.

It was presumably with the above process in mind that IMO originally proposed to Indonesia that it consult the IHO. That organization's Bureau has examined the proposal carefully and besides noting the various difficulties of interpretation mentioned earlier in this paper, has identified some areas on the charts where the hydrography may be brought into question. This, it should be stressed, does not question the competence of the Indonesian hydrographic authorities but given the information available on the published charts raises questions of understanding the state of the basic data. It is only within the Hydrographic Office itself that the basic data is available, because the published charts are the result of a major digestion and reduction of the data.

Some problems of understanding may be noted. Several of the charts presented were only in the national language and therefore it is difficult for an international authority to review the chart. For instance, small, apparently isolated dangers may be annotated with a word which could mean 'reported' or 'examined'. These have vastly different meanings. This leads to the recommendation that on charts proposing sea lanes it is necessary that they either be bilingual or they have some encoding system. It may be noted that the IHO at its recent XVth International Hydrographic Conference agreed on a resolution that all charts in a language other

than English be in bilingual form with English. However, this measure will take many years to implement.

As the original data from which a chart is compiled is neither available to an international reviewer or, in fact, to the navigator, it is most desirable that it include what is termed as a 'source diagram'. This diagram normally shows in an inset the dates and possibly the ships or agencies which collected the data in different areas of the chart. The date alone of the chart or some other feature such as the regular or irregular distribution of the soundings, can only be considered as clues in evaluating the reliability of the chart. Some years ago the IHO approved a resolution requiring the inclusion of source diagrams. In looking at the Indonesian charts it was found that all the more recent charts had this useful feature but some of the older charts did not include it and consequently were more difficult to assess.

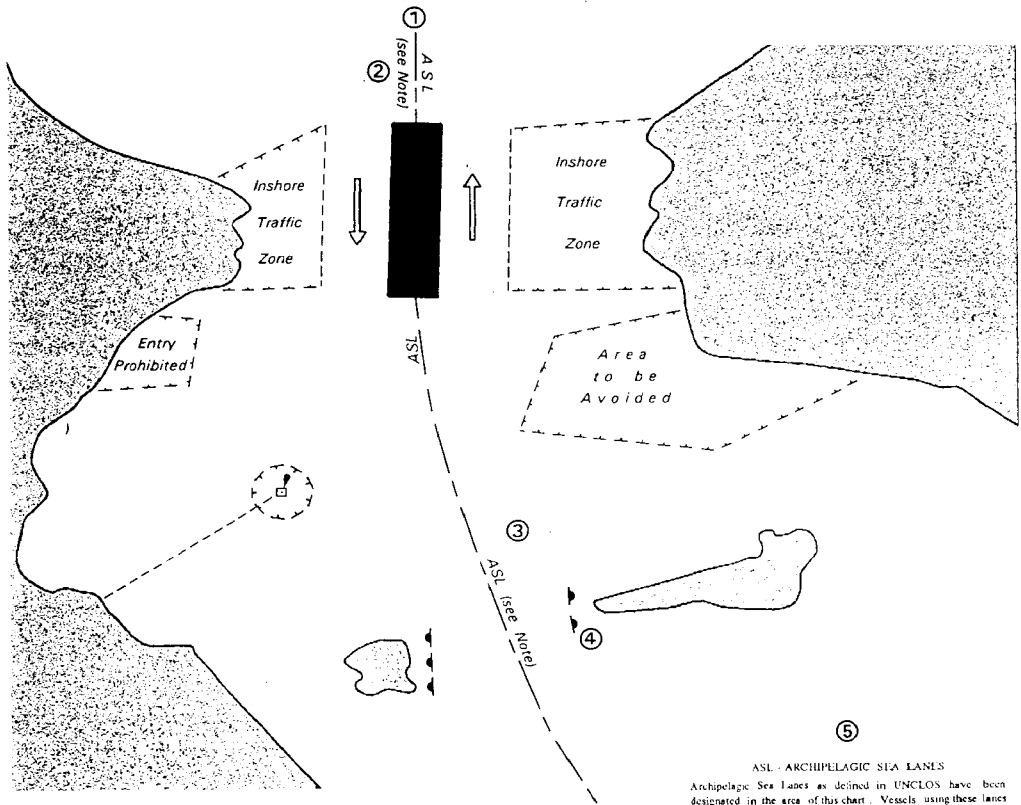
Other features having a bearing on the completeness or use of the chart include a statement of the datums, both horizontal and vertical. This requirement has assumed great importance in recent years with the increased use of satellite positioning systems and has been discussed by various authors. Once again on the charts of Indonesia language proved a difficulty although in fact the differences between the recommended World Geodetic System of 1984 (WGS 84) and the local datums did not appear to be highly significant in the review process. However, at a later stage when the turning points of the sea lane axes are submitted for reference the consistent use of WGS 84 will be necessary.

In summarizing these matters concerning the navigational safety of the chart we must return to the basic issue whether or not we should be concerned for the archipelagic sea lane as an instrument of marine safety or one of political expedition. If it is the former then every feature within the sea lanes should be examined from a point of view of their accuracy and reliability. Anywhere that such a feature appears on a chart it should be questioned as to whether it is thoroughly surveyed and accurately portrayed. This is based on the view that if you have built a road then you have a responsibility to ensure that it has no potholes. On the other hand, if a sea lane is only to satisfy the political requirement for unhindered passage of ships through a foreign territory then it is only up to the navigators to see that they exercise normal navigation care and steer clear of all apparent dangers, as they would do for any area of the high seas. The importance of dealing with this decision at an early stage can be seen in the Straits of Makasar, where the original Indonesian proposal had the sea lane axis towards the east side of the strait where the water was the deepest and the sea lane stayed clear of some shallow areas in the centre of the strait. However, it was reported that the USA preferred an axis further to the west so that even though this incorporated the shallow water within the sea lane, a broader expanse of sea lane was available, giving aircraft following the sea lane, a wider expanse to manoeuvre.

PRESENTATION ON CHARTS

Paragraph 10 of Article 53 states:

'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.'



ASL - ARCHIPELAGIC SEA LANES


Archipelagic Sea Lanes as defined in UNCLOS have been designated in the area of this chart. Vessels using these lanes should not deviate more than 2.5 miles from the charted axis line and should not navigate while in archipelagic sea lanes passage within the areas indicated thus . Where ASL coincide with routing measures, rules for the use of the routing measures apply. It should be noted that the axis of the ASL does not necessarily represent the deep water channel.

FIG. 2.- The diagram of symbols proposed by the Chairman of the IHO Chart Standardization Committee (CSC).

The task of how this may be achieved has been referred to the IHO. It was initially thought that these sea lanes are simply another routeing measure and that symbols used for depicting routes could be adapted. However, as it has become clearer that the sea lane is in reality quite different from other routeing, the matter has had to be reconsidered.

It may be noted that the requirement is only to draw the axis but discussions at IMO have included whether there is a need to portray the limits of the entire sea lane. In normal cases this will be lines 25 miles distant on each side of the axis but the Indonesian representatives have pointed out that this is politically undesirable as it stresses a division of the country. Furthermore, they argue that the Convention includes no requirement for this. However, it has been agreed that it is desirable to show those areas where the 10 percent lines is in force as this may require interpretation by the user. The depiction of the ten percent line on the chart will make it clear to the navigator whether or not his ship is within the sea lane and able to enjoy the unhindered passage of sea lane navigation or whether he is outside this limit and enjoys only the right of innocent passage.

The choice of symbolization, including colours to be used, has yet to be formally decided but it is clear that a distinction must be made between the particular case of archipelagic sea lanes and routeing systems in the general sense. Some preliminary ideas (see Fig. 2) are that the axis of the sea lane be shown by long pecked lines with ASL written alongside them. Traffic flow on either side of the axis line might be shown by double head arrows in pecked lines. This would distinguish the navigation from routeing in which traffic must go only in one direction on each side of the central line. For the 10% areas to be shown by a special new symbol that will clearly distinguish these areas from 'Inshore Traffic Zones' and from 'Areas to be avoided'. As with most other chart features, it is desirable to limit additional clutter on the charts and to limit the use of written words in favour of abbreviations. Colour, in accordance with all features of this type, will almost certainly be magenta.