

THE FACT IS: SOME CONTENTIOUS ISSUES STILL DO MATTER¹

Sobar SUTISNA, INDONESIA
National Coordinating Agency for Survey and Mapping (Bakosurtanal)
ssutisna@gmail.com

Sora LOKITA, INDONESIA
National Coordinating Agency for Survey and Mapping (Bakosurtanal)
soralokita@yahoo.com

Trismadi, INDONESIA
Indonesian Naval Hydrographic Office (DISHIDROS)
trismadi@lycos.com

The United Nations Convention on the Law of the Sea entered into force in 1994. Up to present, it has been ratified by 158 States and the European Union. This proves, arguably, the acceptance of the international community to the said convention.

However, the ratification of the LOSC does not necessarily guarantee the parties will share the same view on the implementation of the convention. In practice, it is not unusual the parties entered a long process of negotiation, which sometimes lead to a dispute, among themselves, in order to implement one or more provisions of the convention, such as the definition of straight and archipelagic baselines, the implementation of article 76, and management of bilateral maritime domains.

This paper briefly discusses several contentious issues in the LOSC which prove that “questions in implementation” still does matter and is another chapter to be solved in the future-record of the convention.

1. Introduction

The United Nations Convention on the Law of the Sea of 10 December 1982 (hereafter: LOSC)² entered into force on 16 November 1994. It was the culmination of a long process of codification of various maritime issues into a single package legally binding instrument for its parties. Furthermore, the LOSC has proven its unique role as to bridge the gap between centuries-old rights and obligations and the new awareness that

¹ Presented in the ABLOS International Conference on "Contentious Issues in UNCLOS - Surely Not? which Organized by ABLOS, at the International Hydrographic Bureau, Monaco, 25-27 October 2010.

² United Nations, *United Nations Conventions on the Law of the Sea*, available at <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>. This document was agreed at the third United Nations Conference on the Law of the Sea in 1982; sometimes referred to elsewhere as UNCLOS. In this paper the Convention from the Third Conference is referred to exclusively as LOSC. UNCLOS I, UNCLOS II and UNCLOS III refer to the three conferences, respectively.

the seas are not an inexhaustible resource for those whose geography or economic development facilitates maritime exploitation.³

It should be underlined that LOSC contains not only legal provisions concerning management of the ocean, however also contains the technical level that support the said management. In the technical level, several issues still dictate. The definition of straight baselines and the role of base points in maritime boundary delimitation still raise questions to many States. Furthermore, apart from some debatable technical terms, the requirements stipulated in the article 76 had force many States, especially those which lack of technology and funding resources, to pull out all of their resources in order to do a desktop study and field survey just to prepare a submission to the UN-CLCS. Further process is to deal with the UN-CLCS and its sub-commission.

In the context of maritime domain management, LOSC also still brings up some issues to be solved in the implementation stages. For example, how States which already claimed archipelagic status but have limited capability to fulfill provisions on archipelagic baselines treat and manage the waters surrounding and between their islands. This, of course, raises question to other States to deal with such waters.

Furthermore, managing resources in certain maritime zone also takes part in the list of complexities in implementing the LOSC, such as, how to treat the sedentary species on the continental shelf and preventing illegal fishing as well as complexities relating to traditional rights and States' interests.

2. Implementation of Articles 46 and 47 LOSC

In reference to Indonesian experiences in implementing provisions of LOSC, among others Articles 46 and 47 are in our concern and needing good understanding from technical point of view. Article 46 provides the definition of "archipelagic state" and "archipelago", so that readers and users of the LOSC can understand the differences between those two terms. A State that geographically formed as archipelago will not automatically be an archipelagic state, however an archipelagic state is contain by bearing geographical character as archipelago or archipelagos. Question is then, what and how to interpret the terms "... a State constituted wholly by one or more archipelagos and may include other islands". Should an island belong to a State which comply to the definition of Archipelagic State in the Article 47 (1), but its distance is very far away from the main archipelagos, so that can not comply to Article 47 (2)?

It is interesting to correlate the words "interconnecting waters" with the last words of the paragraph (b) which reads: [archipelagos should] "form an intrinsic geographical, economic and political entity, or which historically have been regarded as such". With the reference of the later words, one may argue that politically a State can claim archipelagic status without being entitled to claim archipelagic waters.⁴ For example, while Kiribati qualifies as an archipelagic State under that term; it however does not seem that Kiribati would be able to satisfy the technical aspects stipulated in the Article 47, namely the land-water ratio within the archipelagic baseline.⁵

In relation to the rights of States located in the vicinity of archipelagic States, LOSC stipulates that the archipelagic baselines must not be drawn in such a way as to

³ Eric LeGresley, *The Law of the Sea Convention*, Law and Government Division, Canadian Government, 1993, available at <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp322-e.htm>>

⁴ M. Tsamenyi et al, *Navigation Through Archipelagos: Current State Practice*, in Nordquist. Myron H, et.al. (ed), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*. (Leiden, Martinus Nijhoff Publishers, 2009), p.419

⁵ *Ibid*

cut off the territorial sea of another State from the high seas or its EEZ.⁶ What if the situation raise complexity such as when an island, part of a State claiming archipelagic status, situated closer to EEZ of another State rather than to its main archipelago. Is it possible the related island be given an enclave territory in its neighboring State's EEZ?

Another issue is related to the technical aspects of implementing the provision of Article 47 of the LOSC. Indonesia consisted of many archipelagos, namely *Kepulauan Sunda Besar*, *Kepulauan Sunda Kecil*, *Kepulauan Maluku* and West New Guinea. In 1985, Indonesia ratified the LOSC and followed by the enactment of Law No.6/1996 concerning Indonesian Waters, and in 2002 the Indonesian archipelagic baselines were announced, which then were revised in 2008 before submitted to the United Nations in 2009 for due publicity.

Why it took quite some time for Indonesia to establish its archipelagic baselines? The answer is the fact that there is a very demanding technical aspects required. The technical aspects that should be fulfilled is relatively high for such a developing country like Indonesia. The need of large scale and accurate chart is very demanding for the purpose of safety navigation, however, it is the case that not all area are already covered by large scale charts. The cost of producing large scale charts requires economic justification.

Therefore, for the purpose of defining basepoints of the baselines, would other techniques of mapping be alternatives? i.e, among others, remote sensing techniques. Some remote sensing techniques nowadays has shown very impressive development so that it can identify coastlines, small islands, and other coastline features very detail and sharp. The Possible use of remote sensing data will reduce the cost of survey and making charts. International Hydrographic Office (IHO) seems have already aware on this matter.

In addition to the context of archipelagic State, Article 53 also raise concerns. The Technical aspects of Article 53 requires the archipelagic states to put a very high efforts to provide "high way" for other States' vessels to passing by. First, the coastal states has to conduct a survey where the result will become the bases to designate the archipelagic sea lanes. Furthermore, the coastal State also still has to put efforts developing its capabilities in management of sea lanes, including the technology of surveillances.

Internal waters regime also raises a concern for archipelagic States. Where States qualify for constructing archipelagic straight baselines in accordance with Part IV, such baselines would mark the division between archipelagic waters and the territorial sea.⁷ With regard to determining the boundary between archipelagic waters and inland waters, LOSC stipulates that "within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with Articles 9, 10 and 11".⁸ The closing lines are permitted in this matter only relate to mouth of rivers, bays and ports. Article 7 on straight baseline is excluded. In other words, straight baselines cannot be drawn around component islands of such an archipelago even where the coast of such islands may be deeply indented or cut into or where there are fringe of islands. The rationale appears to have been the need to preserve the maximum possible area of interstitial waters as archipelagic waters in the interests of navigation.⁹ However, delimitation of internal waters for archipelagic state is not as easy as it seems. The

⁶ LOSC, Article 47 (5)

⁷ H.W. Jayewardene, , the Regime of Island, (Dordrecht, Martinus Nijhoff, 1990) , p 78

⁸ LOSC, Article 50

⁹ H.W. Jayewardene, *supra note 7*, p 78

archipelagic state should conduct a highly coast survey, desktop studies which include study on technical, social, political, and national security aspects.

3. Questions on the Role of Baselines in Maritime Boundary Delimitation

When an archipelagic State has designated its archipelagic baselines, then it has rights to determine its maritime zones outside the baselines. The challenge occurs when its outer limit of maritime zones are overlapping with other states, which requires maritime delimitation through negotiations and/or other format of solutions including resorting the solution to a third party.

It is the question of archipelagic state that when it is facing continental states in maritime delimitation, their archipelagic baselines seems to be disregarded. Even though during the construction of the baselines, the coastal state had followed and fulfilled the requirements stipulated in the article 47 of the LOSC.

With regard to that matter, it is the case that international Courts and Tribunals have in the past had cause to consider the use of straight baselines and have generally tended not to use them in the delimitation of a maritime boundary. For example, in the recent *Black Sea Case*, the Court noted that:

the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues.¹⁰

The Court went on to state that in the first of these scenarios, it was up to the coastal State to determine the relevant base points, in conformity with the provisions of LOSC, including Article 7.¹¹ In the context of maritime boundary delimitation between two or more States, however, the Court asserted that ‘it should not base itself solely on the choice of base points made by one of those parties’ and should, instead, “select base points by reference to the physical geography of the relevant coasts”.¹²

However, it is a distinction which can be drawn between archipelagic baselines, which must conform to the fairly rigorous provisions of Article 47 of LOSC, and the straight baselines, which merely need to comply with the ambiguous language of Article 7 of LOSC. Consequently, while many straight baselines can be characterised as “excessive”, the same cannot be said of archipelagic baselines.¹³ Arguably, therefore, there is greater justification for the application of archipelagic baselines in the delimitation of maritime boundaries than there is for many straight baselines based on a liberal interpretation of Article 7 of LOSC.

4. Articles 76 and Its Implementation

Indonesian experiences in dealing with Article 76 are really quite something. It was started in 2003 when Indonesia had just completed survey and mapping of its EEZ. Indonesian experiences conclude that it had succeeded with the submission by its own

¹⁰ International Court of Justice, *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)* Judgment 3 February 2009 (hereafter: Black Sea Case), Available at: <<http://www.icj-cij.org/docket/files/132/14987.pdf>>, para.137.

¹¹ *Ibid.* The provisions of LOSC that the Court noted that States should determine base points in conformity with were Articles 7, 9, 10, 12 and 15.

¹² *Ibid.*

¹³ Roach, J.A. and Smith, R.W., *United States Responses to Excessive Maritime Claims* (The Hague: Martinus Nijhoff Publishers, 1996), pp.57-161.

capacity. Indonesian geoscientist has shown its caliber in fulfilling provisions and requirements relating to the submission in accordance to UN-CLCS technical and procedural guidelines.

Lesson learned from the success of the Indonesian partial submission are as follow:

1. The decision of United Nations to extend the period of submission, through the establishment of SPLOS 183, which giving a chance to coastal states to have partial submission and also preliminary information of submission, is wise and appropriate considering the differences level of technology and human resources having by States.
2. To have a submission, a State requires a lot of investment in terms of man powers, technology and infrastructures. Technically, arguably, it seems the developing countries facing difficulties and the developed countries have more opportunities for success. Indeed, the United Nations provides funding and technical assistance for developing countries; however, still it is not the real answer of the problem facing by developing countries due to limited sources provided by the UN through that scheme.
3. In relation to that, Indonesia is of the view that ABLOS can be a bridge to provide assistance and facilitation to develop methodology for submissions so that can lessen the burden of submission especially to the developing countries.

5. Concluding Remarks

Implementation of LOSC for developing countries requires a lot of investment related to technical aspects. This due to in the past they were less intention in governing the sea. Even thought with very limited resources, Indonesia has succeeded in implementing the LOSC, such as in areas as follow:

- Completion of the provisions of archipelagic state definition, rights and obligation.
- Depositing the list of geographical coordinates of points of its archipelagic baselines.
- Partial submission of its extended continental shelf.
- Hosting the 16th ABLOS business meeting and an International Seminar on the Technical Aspects on the Law of the Sea in 2009.

With those experiences, Indonesia is more than ready to take part in and contribute more in the development of TALOS.

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