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CHALLENGING THE FREEDOM OF THE OCEAN: THE U.S. FREEDOM OF NAVIGATION PROGRAM IN INDONESIAN ARCHIPELAGIC WATERS

INTRODUCTION. *In 2017, the US Department of Defense issued its Annual Freedom of Navigation Report. This is the first report released by the US government under the Trump administration. The report listed the geographic location of the US Freedom of Navigation (“FON”) Program all over the world. This document briefly describes an excessive maritime claims by coastal states’ activities in each case. Besides the South China Sea, the main US concern in Asia is Southeast Asia, which became one of the playing fields for the US FON Program, in particular the Java Sea in Indonesian archipelagic waters.*

MATERIALS AND METHODS. *This article examines the US DoD’s Annual Freedom of Navigation Report for Fiscal Year 2016 and the provisions of Indonesian national legislation. Further, the author analyses the applicable rules of international law, such as the relevant provisions of the UN Convention on the Law of the Sea (“UNCLOS”). In this research, the author relies on the existing doctrine on the legal issues underlying the topic of the article. The methodological basis consists of general scientific and special research methods, including analysis, synthesis, and systematization, as well as formal-legal, formal-logical and critical-legal methods.*

RESEARCH RESULTS. *This article argues that the US FON Program in Indonesia is not about the partial submission of archipelagic sea lane passage but rather the controversy created by Indonesian national legislation. In particular, when Indonesia’s government requires pre-notification and prohibits aircraft to come*

across the route normally used for international navigation. Therefore, this paper seeks to evaluate what are the different views between Indonesia and the US in terms of the regulatory framework in the Java Sea and what could be done in addressing these issues.

DISCUSSION AND CONCLUSIONS. *The root of the disagreement between the US and Indonesia is in diverging interpretations of Article 53(1) of the UNCLOS; more specifically, whether this Article creates an obligation for archipelagic States to establish archipelagic sea lanes passages. In the author’s opinion, this disagreement should be resolved through bilateral negotiations aimed at elaborating a common understanding. Furthermore, the exercise of freedom of navigation should not infringe upon the coastal State’s rights, including its sovereignty.*

KEYWORDS: *freedom of navigation, Indonesia, United States, archipelagic State, innocent passage, archipelagic sea lanes passage, the law of the sea, UN Convention on the Law of the Sea*

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БРОСАЯ ВЫЗОВ СВОБОДЕ ОКЕАНА: ПРОГРАММА США ПО СВОБОДЕ СУДОХОДСТВА В ИНДОНЕЗИЙСКИХ АРХИПЕЛАЖНЫХ ВОДАХ

ВВЕДЕНИЕ. В 2017 г. Министерство обороны США опубликовало ежегодный отчет о свободе судоходства. Это первый отчет, выпущенный правительством США при администрации президента Трампа. В отчете географический ареал реализации Программы США по обеспечению свободы судоходства («FON») обозначен как «весь мир». В данном документе несколько раз указывается на чрезмерные морские притязания прибрежных государств. Помимо Южно-Китайского моря, главные опасения США в азиатском регионе вызывает Юго-Восточная Азия, ставшая одной из площадок для реализации американской программы FON, в частности Яванское море в части архипелажных вод Индонезии.

МАТЕРИАЛЫ И МЕТОДЫ. В данной статье рассматривается ежегодный отчет Министерства обороны США о свободе мореплавания за 2016 финансовый год, а также положения национального законодательства Индонезии. Кроме того, автор анализирует применимые нормы международного права, такие как соответствующие положения Конвенции по морскому праву 1982 г. В своем исследовании автор опирается на существующую доктрину по правовым вопросам, лежащим в основе темы статьи. Методологическую основу составляют общенаучные и специальные методы исследования, включая анализ, синтез, систематизацию, а также формально-юридический, формально-логический и критико-правовой методы.

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. В настоящей статье утверждается, что положения программы FON США относительно Индонезии связаны не с архипелажным проходом по морским коридорам, а с противоречиями, проистекающими из национального законодательства Индонезии. В частности, речь идет о требованиях правительства Индонезии по предварительному уведомлению и запрете пролета воздушных судов над маршрутами, обычно используемыми для международного судоходства. Таким образом, в настоящей работе ставится задача оценить, в чем заключаются различия во взглядах Индонезии и США на регулирование судоходства в Яванском море и что может быть сделано для решения этих проблем.

ОБСУЖДЕНИЕ И ВЫВОДЫ. Корень разногласий между США и Индонезией лежит в различных интерпретациях статьи 53(1) Конвенции по морскому праву 1982 г., более конкретно, в том, создает ли эта статья обязательство для архипелажных государств устанавливать морские коридоры. По мнению автора, эти разногласия должны быть разрешены путем двусторонних переговоров, направленных на выработку общего толкования. Кроме того, осуществление свободы судоходства не должно ущемлять права прибрежного государства, включая его суверенитет.

КЛЮЧЕВЫЕ СЛОВА: свобода судоходства, Индонезия, США, архипелажное государство, право

мирного прохода, архипелажный проход по морским коридорам, морское право, Конвенция по морскому праву 1982 г

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ДЛЯ ЦИТИРОВАНИЯ: Дармаван А.Р. 2022. Бросая вызов свободе океана: программа США по свободе судоходства в индонезийских архипе-

Автор заявляет об отсутствии конфликта интересов.

I. Introduction

During the negotiations of the United Nations Convention on the Law of the Sea (UNCLOS)¹ between 1973 and 1982, navigational rights and freedoms were highly sensitive issues between coastal and maritime states [Clingan 1983:107-123; Moore 2008:459]. Coastal States were keen to expand their power at sea; however maritime states wanted to preserve their navigational rights and freedoms. [Moore 2008:459] Therefore, the negotiations on the UNCLOS tried to bridge the interests of both camps by creating new navigational regimes.

The UNCLOS recognized that coastal states are entitled to several maritime areas such as internal waters², the territorial sea³, the contiguous zone⁴, the exclusive economic zone (EEZ)⁵, and the continental shelf. Moreover, it also recognizes various navigational rights and freedoms, namely the right of innocent passage⁶, the right of transit passage⁷, the right of archipelagic sea lanes (ASLs) passage and the freedom of navigation. Even though the UNCLOS is regarded as one of the most successful

and important international agreements ever made, there are a lot of provisions that are the result of compromises and package deals and contain a considerable amount of ambiguity.

The UNCLOS, which was adopted in 1982, introduced several new maritime areas and associated regimes. One of these is archipelagic waters and the Archipelagic State. The UNCLOS stipulates that an 'archipelagic State' means "a State constituted wholly by one or more archipelagos and may include other islands"⁸. Only States that meet this definition qualify as archipelagic States⁹. Under Article 53 of the UNCLOS, an archipelagic State may designate ASLs in which vessels are entitled to exercise the right of ASLs passage. However, some scholars argue that the provisions relating to ASLs passage are vague and create ambiguity, which can lead to multiple interpretations¹⁰. At present, Indonesia and the United States have diverging interpretations of Article 53 of the UNCLOS. These came to the fore when Indonesia enacted a national regulation, which stipulated that, other than in designated ASLs, foreign ships passing through Indonesia's archipelagic waters are only entitled to exercise the right of in-

¹ United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter referred as "UNCLOS"). URL: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 10.03.2022).

² UNCLOS. Arts. 2 and 8.

³ Ibid. Arts. 2 and 3.

⁴ Ibid. Art. 33.

⁵ Ibid. Arts. 55-75.

⁶ Ibid. Art. 17.

⁷ Ibid. Arts. 37-44.

⁸ Ibid. Art. 46(a). Art 46 (b) defines an archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural resources form an intrinsic geographical, economic and political entity, or which historically have been regarded as such".

⁹ Article 51(1) UNCLOS mention that an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.

¹⁰ Cay V.J. E. Archipelagic sea lanes passage and maritime security in archipelagic Southeast Asia. World Maritime University Dissertations. 2010. P. 49. URL: https://commons.wmu.se/cgi/viewcontent.cgi?article=1442&context=all_dissertations (accessed 10.03.2022).

nocent passage¹¹. This led the United States to argue that, other than in designated ASLs, foreign vessels can also exercise the right of ASLs passage in routes normally used for international navigation. As a consequence, the US argued that the Indonesian national regulation amounts to an excessive maritime claim, as it is inconsistent with the UNCLOS. Employing its Freedom of Navigation Program (US FON Program), the US challenged Indonesia's practice by sending a diplomatic protest as well as by asserting their right to exercise ASLs passage in routes normally used for international navigation within Indonesia's archipelagic waters by sending a US warship through these routes in the normal mode associated with ASLs passage.

This article aims to analyze the different views of the United States and Indonesia concerning the application and implementation of ASLs passage, and the reasons for the US FON Program in Indonesian archipelagic waters. The article argues that continued US assertions in Indonesia's archipelagic waters in the context of the US FON program over a long period would be unproductive for the bilateral relations between the two countries, and damage the Indonesian public opinion about the US. Therefore, there should be something to do to solve the issues on a mutually acceptable basis.

The remainder of this article is divided into five sections. The second section will discuss the Archipelagic state regime under international law, the legal regime under UNCLOS and a comparison between ASLs passage and other passage regimes under UNCLOS. The third section will specifically analyze the implementation of the archipelagic state regime in Indonesia and how Indonesia has sought to comply with Part IV of UNCLOS. Section four will further examine the U.S. FON program, the history of the U.S. FON program, and its implementation in Indonesia. Finally, section six will explore possible solutions to the diverging positions between the two countries. And lastly, it will be closed by the conclusion.

II. The International Regime on Archipelagic States and Archipelagic Waters

The discourse for establishing a special legal regime for a state consisting of multiple islands started in the early twentieth century through a series of intergovernmental conferences [Tanaka 2015:111-120; Rothwell, Stephens 2015]. Two major conferences in the law of the sea – namely the first and second United Nations Conference on the Law of the Sea (UNCLOS I in 1958 and UNCLOS II in 1960) did not succeed in answering the question of how to establish a corresponding legal regime concerning archipelagic islands. Despite the failure of these two conferences in this regard, archipelagic states remained determined in promoting a new legal regime for archipelagos based on (i) political and security interests, (ii) historical factors, (iii) natural features, (iv) economic interests, (v) environmental protection and (vi) reasonableness [Jayewardene 1990:106-110; Churchill, Lowe 1999:119-120].

Their efforts were eventually rewarded during the Third United Nations Conference on the Law of the Sea (LOSC III) – convened between 1973 and 1982 – which finally recognized the regime of the archipelagic state under Part IV¹². The definition of an archipelago in article 46(b) of the UNCLOS itself is important to understand the concept of the archipelagic state [Herman 1985:172, 179, 185]. This definition reflects the aspiration during the archipelagic states' struggle for recognition of archipelagic status, as it not only focuses on land but also on the waters of the archipelago, and the 'close inter-related' criteria [Rothwell, Stephens 2015:180-202]. The definition not only takes into account the geographical elements but also the economic, political and historical claim of archipelagic states when declaring as an archipelagic state.

Unlike non-archipelagic states, archipelagic states are allowed to draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reef of the archipelago provided within such baselines, provided these comply with

¹¹ Indonesian Government Regulation No. 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*. 2002. No. 71. *Supplementary State Gazette*. No. 4210.

¹² Currently there are twenty-two States have formally claimed archipelagic status. Those are: Antigua and Barbuda, Bahamas, Cape Verde, Comoros, Dominican Republic, Fiji, Grenada, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius, Papua New Guinea, Philippines, Saint Vincent and the Grenadines, São Tomé e Príncipe, Seychelles, Solomon Islands, Trinidad and Tobago, Tuvalu and Vanuatu.

certain requirements¹³. These archipelagic baselines bring archipelagic states two distinct rights. First, the entitlement to use the archipelagic baselines for delineating the outer limits of the archipelagic State's territorial sea, contiguous zone, EEZ and continental shelf. Second, the right to exercise sovereignty over the archipelagic waters enclosed by these baselines, most of which had previously been high seas [Rothwell, Stephens 2015]. The sovereignty of archipelagic States over their archipelagic waters also extends to the airspace above and seabed and subsoil below [Molenaar 1998]¹⁴.

As a compromise for the incorporation of the new archipelagic state regime in the UNCLOS, Article 53 contains the regime of ASLs passage. It stipulates that an archipelagic state "may" designate ASLs through its archipelagic waters to make

sure the right of ASLs passage¹⁵. To understand the regime of ASLs passage under the UNCLOS, one should understand the differences between ASLs passage and the other passage regimes. There are four main passage regimes under UNCLOS which are: First, innocent passage, which applies in the territorial sea, and also in archipelagic waters outside ASLs and, where no ASLs have been designated, outside all routes normally used for international navigation. Second, ASLs passage which applies to ASLs and, where no ASLs have been designated, in all routes normally used for international navigation¹⁶. Third, transit passage in straits is used for international navigation.¹⁷ Finally, freedom of navigation in the high seas and the EEZ¹⁸. The differences between the first three passage rights are summarized in Table 1 below.

TABLE 1.

Passage Regime under UNCLOS¹⁹

	Archipelagic Sea Lanes Passage	Innocent Passage	Transit Passage
Legal Basis	Article 53	Articles 17 - 26	Article 38
Definition	Archipelagic sea-lanes passage means the exercise under this Convention of the rights of navigation and overflight in the normal mode solely for 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.	The passage is innocent as 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 ²⁰ . Innocent passage means navigation through the territorial sea ²¹ : (a) Traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) Proceeding to or from internal waters or a call at such roadstead or port facility.	Transit passage means the exercise by this Part of the freedom of navigation and overflight solely for continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.
Geographical location	Within archipelagic waters in designated ASLs and, where ASLs are not designated - routes normally used for international navigation ²² .	In all areas of the Territorial Sea of a coastal state as long as the passage shall be continuous and expeditious, Except for those areas where transit passage applies and Archipelagic waters ²³ .	Within straits used for International navigation, and between one part of the high seas and EEZ and another part of the high seas and EEZ ²⁴ .
Applicable to	Both ships and aircraft ²⁵ .	Only ships ²⁶ .	Both ships and aircraft.

¹³ UNCLOS. Art. 47 (1).

¹⁴ UNCLOS. Art. 49(2).

¹⁵ UNCLOS. Art. 53 (1).

¹⁶ UNCLOS. Arts. 53 and 54.

¹⁷ Ibid. Part III, Section 2.

¹⁸ Ibid. Arts. 58(1) and 87(a).

¹⁹ Under UNCLOS there are three main passages: innocent passage, transit passage, and archipelagic sea-lanes passage. However, in the development, some authors also add communication sea-lanes passage.

²⁰ UNCLOS. Art. 19 (1).

²¹ Ibid. Art. 18 (1).

²² Ibid. Art. 53(12).

²³ Ibid. Art 18 (1), also see Art. 8 (2).

²⁴ Ibid. Art 38 (1).

²⁵ Under article 53, right of aircraft does not mention in the archipelagic sea lanes passage,

²⁶ LOSC. Art 17.

As is reflected in Table 1 above, there are significant differences between innocent passage and ASLs passage. The regime of innocent passage is tending to be more limitative and protective in comparison with ASLs passage. The innocent passage is only available for vessels and not for aircraft. Moreover, when a submarine exercises the right of innocent passage, it is not allowed to do so in its 'normal mode' – meaning submerged – but is required to navigate on the surface and show its flag.²⁷ On the other hand, the regulations of ASLs are not as strict as innocent passage. ASLs passage is not only applied to vessels but also to aircraft. And when a submarine uses the ASLs passage, they can still navigate under the water and don't have to navigate on the surface and show a flag or also known as "normal mode". However, UNCLOS does not give sufficient on what to consider as "normal mode". Presumably "normal mode" can be understood as ships operating in their "own normal mode". For instance, "normal mode" for a submarine would be navigating under the surface, while aircraft belonging to aircraft carriers would normally fly above the carrier [Djalal 1995].

It is therefore, the United States argue that if Indonesia stipulated in regulation that other than designated ASLs in Indonesian archipelagic waters, foreign vessels should use the innocent passage regime instead of ASLs which normally used for international navigation, it will affect their navigation interest because it means that there could be no rights for aircraft above and the submarine has to navigate above the surface and showing flag [Krasaka, Pedrozo 2013:270-273].

Furthermore, UNCLOS stipulates, "If an archipelagic States does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation"²⁸. This provision can be seen as ambiguous and allowing multiple interpretations because there is no further explanation on what constitutes a route "normally" used for international navigation. In regards to the ambiguity, Indonesia argues that there are no legal documents

that define what constitutes 'all normal passage routes used as routes for international navigation or over flight' [Djalal 1995]²⁹. On the other hand, some states such as the United States and Australia argue that an archipelagic state should designate all routes normally used for international navigation as ASLs, therefore Indonesia is still required to propose for the adoption of further ASLs (east-west)³⁰.

III. Indonesia's Practice as an Archipelagic State

Throughout the history of the Indonesian archipelago, the ocean has always been a very important source of power, trade, and security [Lieberman 2010:529-539; Studies in Indonesian history...1976:65-71]. The earliest kingdoms of Majapahit [Studies in Indonesian history1976:65-71] and Sriwijaya³¹ utilized the ocean as their central source of power to spread their influence in Asia [Lieberman 2010:529-539]. Indonesia's strategic location between China and the India Trade route has contributed significantly to shaping Indonesian maritime culture and identity [Studies in Indonesian history...1976:3]. Therefore, it also has shaped the archipelago as a strong maritime kingdom. Only when the Dutch colonial government came, did they prohibit the people in the archipelago to develop their maritime connectivity, and forcibly turned it from an archipelagic nation to an agricultural-based nation [Taylor 2003].

After Indonesia gained its independence in 1945, significant unrest existed throughout the islands in the archipelago; one of the factors is because of the geographical separation [Doeppers 1972:183-195]. The legacy in the past inspired Prime Minister Djuanda to declare Indonesia as an archipelagic state in 1957 [Butcher, Elson 2017]. The Djuanda Declaration reiterated that the surrounding waters, 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. Therefore, the internal or national waters between islands are under the exclusive sovereignty of the Indonesian State³². The declara-

²⁷ Ibid. Art 20.

²⁸ UNCLOS. Art. 53(12).

²⁹ To know the exact Indonesian government position.

³⁰ Cay V.J. E. Op. cit. P. 49.

³¹ Srivijaya empire, a maritime and commercial kingdom that flourished between the 7th and the 13th centuries, largely in what is now Indonesia. The kingdom originated in Palembang on the island of Sumatra and soon extended its influence and controlled the Strait of Malacca. Srivijaya's power was based on its control of international sea trade.

³² Djuanda Declaration in [Leifer 1978].

tion signified the concept of *Wawasan Nusantara* (meaning Archipelagic Outlook)³³ which aims for the unification of the land, water and people of Indonesia, with the belief that all of the Indonesian islands, and the waters around them and interconnecting those islands are one entity. The nationhood of Indonesia is built based on unity between the Indonesian islands and its interconnecting waters, which are regarded as a unifying, rather than a separating element [The Law of the Sea...1987:392].

However, the Djuanda Declaration was followed by number of diplomatic protests from Australia, France, Japan, the Netherlands, New Zealand, the United Kingdom³⁴, and the United States³⁵. They argued that the declaration could affect the freedom of navigation [Rothwell, Stephens 2015:186]. However, despite the stern protests, Indonesia still implemented the declaration internally under Act No. 4 of 18 February 1960³⁶, which stipulated that 'Indonesian internal waters and territorial sea are measured from archipelagic baselines. Under the Act, Indonesia did permit innocent passage by foreign vessels through these 'internal' waters³⁷, in order to show Indonesia's intent to create a new maritime area within an archipelago which would be a hybrid of internal waters and territorial sea [Rothwell, Stephens 2015:186]. However, Indonesia also clarified that the regulation had distinguished innocent passage through the territorial sea and innocent passage within 'interior waters'. Innocent passage by foreign ships in internal waters or archipelagic waters constituted a certain benefit granted intentionally and unilaterally by Indonesia, while the innocent passage in the territorial sea was a right recognized by international law. At that time, Indonesia argued that innocent passage was a "benefit" rather than a right which comes with implications, even more, Indonesia might forbid passage through

the enclosed seas when they think it would give a threat to national security [O'Connell 1971].

Indonesia also regulated innocent passage in 1962 by enacting the Government Regulation concerning 'Innocent Passage by Foreign Water Vehicles within Indonesian Waters' [Rothwell 1990:491, 496-497]. It stipulates that innocent passage of foreign vessels was guaranteed within Indonesian waters. It substantially implemented the innocent passage regime of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone³⁸.

The failure of LOSC I and II in recognizing the archipelagic state regime made Indonesia press for the concept even more at LOSC III [Djalal 1995]. The Indonesian government sought to further its goals by setting up a special task force known as the Coordinating Committee for National Territory (*Panitia Koordinasi Wilayah Nasional/PANKOR-WILNAS*), which was established by Presidential Decree Number 36 of 1971 to coordinate and prepare the Indonesian position for LOSC III³⁹. Throughout the long process of the negotiation of the UNCLOS, Indonesia pursued a very careful approach and tended to avoid any high-profile campaign in promoting the archipelagic concept⁴⁰. Indonesia more often used bilateral consultations means with the Group of 77 or with multilateral organizations such as the Asian-African Legal Consultative Committee (AALCC), the Islamic Conference, and the Organization of African Unity (OAU).

The archipelagic state regime was finally recognized under Part IV of the UNCLOS [Koh 1983-1984; Beesley 1983:183-194; Buzan 1981:324-348]. After UNCLOS entered into force in 1994, Indonesia enacted Act No. 6 of 1996 on Indonesian Waters to implement the new regime under UNCLOS. It stipulates that Indonesian Waters consist of internal

³³ *Wawasan Nusantara* is terminology introduced by Prime Minister Djuanda, *Wawasan* means outlook and *Nusantara* means Archipelagic. In the early 1970 *Wawasan Nusantara* become one of the main principles introduced by the government.

³⁴ The United Kingdom argued that the 'archipelago' can't apply to Indonesia, it applies only to a small, compact group of islands, while the straight baseline principle applies only to sharply indented coasts and fringes of islands.

³⁵ The verbatim statement by the United States Delegation can be found in United Nations Conferences on the Law of the Sea: Official Records. First Conference, 1958. 2nd ed. New York: William S. Hein & Co 1980.

³⁶ Act concerning Indonesian Waters. (Act No. 4 of 18 February 1960. Art 1 (1). URL: <https://faolex.fao.org/docs/pdf/ins1650.pdf> (accessed 18.03.2022).

³⁷ Ibid. Art 1(3).

³⁸ Article 1 of the Government Regulation concerning 'Innocent Passage by Foreign Water Vehicles within Indonesian Waters 1962.

³⁹ Buntoro K. An Analysis of Legal Issues Relating to Navigational Rights and Freedoms Through and Over Indonesian Waters. Dissertation. University of Wollongong Thesis Collection. 2010. URL: <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4091&context=theses> (accessed 10.03.2022).

⁴⁰ Ibidem.

waters, archipelagic waters and the territorial sea of Indonesia. For further implementation, Indonesia has also enacted several implementing regulations⁴¹. Within these regulations, Indonesia will respect and honour existing agreements with other countries over its archipelagic waters⁴². Consistent with Article 51 of the UNCLOS, Indonesia will also recognize the traditional fishing rights of Malaysia's traditional fishermen in certain parts of the Natuna Sea⁴³ and of Papua New Guinea's traditional fishermen in the Northern Part of Papua Island⁴⁴.

Indonesia's practices in the designation of ASLs have not been an easy one. It has involved numer-

ous questions, such as how many ALs should be designated, how to designate and how to monitor and regulate them in national legislation⁴⁵. Many factors should be considered in designating ASLs. Even though it is the right of the archipelagic state, it should still consult with user States and relevant international organizations⁴⁶. Ultimately, under the Indonesian Act No. 6 of 1996⁴⁷ and Government Regulation No. 37 of 2002⁴⁸ Indonesia allowed foreign ships and aircraft to exercise ASLs passage through and over the designated ASLs.

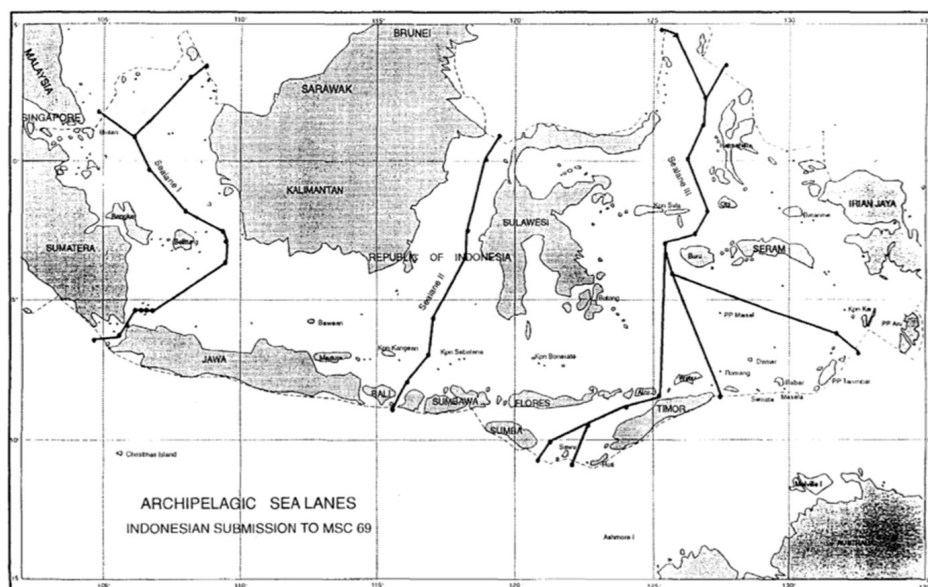


Figure 1. Archipelagic Sea lanes Indonesian Submission to MSC 69⁴⁹

⁴¹ 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*. 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*. 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 Baseline. – *State Gazette*. 2008. No. 77. *Supplementary State Gazette*. No. 4854.

⁴² Art. 9 of the Indonesian Act No. 6 of 1996 on Indonesian Water.

⁴³ Agreement between Indonesia and Malaysia on the Legal Regime of the 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.

⁴⁴ Agreement between the Government of the Republic of Indonesia and the Government of Papua New Guinea concerning Maritime Boundaries between the Republic of Indonesia and Papua New Guinea and Co-operation on Related Matters, in 1980.

⁴⁵ Buntoro K. Op. cit.

⁴⁶ United Nations Office for Ocean Affairs and Law of the Sea, *Law of the Sea Bulletin*. Part III. Competence of Relevant International Organizations under the UN Convention on the Law of the Sea. 1996. No. 31. P. 79-95.

⁴⁷ Act No. 6 of 1996 on Indonesian Waters. – *State Gazette*. 1996. No. 73. *Supplementary State Gazette*. No. 3647).

⁴⁸ 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*. 2002. No. 71. *Supplementary State Gazette*. No. 4210.

⁴⁹ Groves St. The Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms. – *The Heritage Foundation*. org. August 24, 2011. URL: <https://www.heritage.org/defense/report/accession-the-un-convention-the-law-the-sea-unnecessary-secure-us-navigational> (accessed 10.03.2022).

To designate its ASLs, Indonesia conducted a series of consultations with neighbouring and interested States⁵⁰, and international organizations,⁵¹ as well as hydrographic surveys to make sure that the designated ASLs are safe and free from navigational obstructions for ships and aircraft.⁵²

During the designation process, Indonesia consulted in particular with the United States⁵³. These consultations aimed to balance the interests of Indonesia and those of the United States as one of the major maritime nations. During some of the consultations, the United States suggested that Indonesia should revise the archipelagic baselines in the Natuna Sea and close the enclave. The United States argued that if Indonesia did not close the enclave, Indonesia would not be able to designate ASL I (from the South China Sea to the strait of Sunda) to pass through the Indonesian archipelagic water or territorial sea.

Other than the United States, Indonesia also consulted with the United Kingdom, on 15 February 1996 in London. Indonesia proposed three north-south ASLs and some spurs and the UK supported the Indonesian proposal⁵⁴.

After all these consultations with related institutions and interested states, Indonesia decided to propose three ASLs in a north-south direction across the archipelago. These are (1) ASL I in the western part of the Indonesian archipelago for navigation between the South China Sea and the Indian Ocean; (2) ASL II in the central part of the archipelago, for navigation between the Sulawesi Sea and the Indian Ocean; and (3) ASL III, in the eastern part for navigation between the Timor Sea and the Arafura Sea to the Pacific Ocean, together with its spurs⁵⁵.

Indonesia's submission to International Maritime Organization ("IMO") regarding the proposed ASLs lanes is a form of procedural obligation. Even though the UNCLOS does not explain the 'competent international organization' to submit the proposal, in 1994 the UN Division of Ocean Affairs and Law of the Sea published a list of UN expert bodies in particular areas. In the report, the IMO and the International Civil Aviation Organization (ICAO) was acknowledged as the relevant competent organization for Article 53 of the UNCLOS [Puspitawati 2005].

Kresno Buntoro argues that the right of innocent passage is also guaranteed in archipelagic waters⁵⁶ even when archipelagic States have already designated ASLs. He also argues under article 52(1) of UNCLOS that the right of innocent passage regime is also applied in the archipelagic waters, including the normal passage routes used for international navigation. Therefore, while passing through Indonesian waters and have to take precautionary measures to ensure the safety of navigation⁵⁷. He further contends that there are no specific provisions in the UNCLOS on which sea lanes could be used for exercising the right of innocent passage. The UNCLOS only describes specific sea lanes while the coastal States want to designate traffic separation schemes for the safety of navigation stated in Article 22 of the UNCLOS.

If we compare the designation of ASLs concerning the two main archipelagic states, Indonesia and the Philippines⁵⁸, we can see that up to date, the Philippines has not designated specific legislation on ASLs passage [Palma 2009]. It has only enacted legislation on marine environmental protection⁵⁹. In contrast with Indonesia, which has already followed

⁵⁰ Interested States such as the United States of America and Australia

⁵¹ Relevant International Organizations, such as the International Maritime Organization (IMO), the International Hydrographic Organization (IHO), and the International Civil Aviation Organization (ICAO).

⁵² The terms 'ships and aircraft' can be found in Articles 53 (2) (5) of the LOSC.

⁵³ Buntoro K. Op. cit.

⁵⁴ Indonesian Navy Working Group, cited in Kresno Buntoro, an analysis of legal issues relating to navigational rights and freedoms through and over Indonesian waters.

⁵⁵ International Maritime Organization: Resolution MSC.72(69) "Adoption, Designation and Substitution of Archipelagic Sea Lanes". Adopted on 19 May 1998. URL: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.72\(69\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.72(69).pdf) (accessed 10.03.2022).

⁵⁶ Article 52 (1), LOSC stipulated that ships of all "States enjoy the right of innocent passage through archipelagic waters."

⁵⁷ Buntoro K. Op. cit.

⁵⁸ The Philippines is regarded as an archipelago, it is composed of more than 7,100 islands with a total coastline length of around 18,000 kilometers. The total land to water is 1:7, with a land area of approximately 300,000 square kilometers and a total water area of 2.2 million square.

⁵⁹ Presidential Decree No 979, amending Presidential Decree No. 600, Marine Pollution Decree of 1974. August 18, 1976. Sec. 4.

the relevant procedures with IMO and ICAO that have led to a partial ASLs designation, the Philippines has not yet started such procedures. However, the practice of the Philippines has not raised any objection because it allows vessels to transit through its archipelagic waters using ASLs passage [Amer 1998].

The Philippines in this matter has therefore taken a different path than Indonesia. Since it proclaimed itself as an archipelagic state, there have been various proposals for the designation of ASLs by the Philippines. The latest of such proposals was filed by Senator Antonio Trillanes IV during the 17th Congress in 2016. In the House of Representatives, a similar bill was filed in March 2015 by Representatives Al Francis C. Bichara, Francisco Ashley L. Acedillo, Rodolfo G. Biazon, Jose F. Zubiri III and Rufus B. Rodriguez⁶⁰. At the same time, the Philippine Navy also urged the designation of ASLs⁶¹. The latest proposal for designating the Philippines ASLs as proposed by the Philippines Senate is shown in the figure below⁶²;

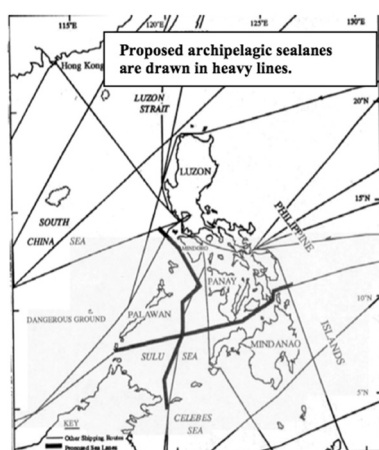


Figure 2. Philippine proposed ASLs
[Designation...1997:11]

However, the Philippine discussion on ASLs has not progressed since the proposal was rejected

by Congress. The debate on whether or not the Philippines should designate ASLs focused on such issues as the number of ASLs that the government can operate effectively; measures for safe, expeditious and continuous passage; the interests of security, inter-island shipping, fisheries and other affected users; protection of the marine environment; and possible connection with the Indonesian ASLs [Designation... 1997].

Based on the ongoing discourse, there might be two conclusions regarding the comparison between Indonesia and the Philippines on why the US FON Program focuses on Indonesia and not on the Philippines. First, the Philippines is not located on the major route of International trade; therefore, the political exposure for a maritime state is not as high as Indonesia. Second, even though the Philippines does not designate the archipelagic sea lanes passage, they let the route normally used for international navigation, under the archipelagic state regime, therefore aircraft and ships can pass through their archipelagic waters under ASLs passage [Batongbacal 2003]. So, it will not impact the other neighbours and maritime states.

So far, Indonesia has been the only archipelagic state to use the procedure for the designation of ASLs laid down in Article 53 of the UNCLOS, as subsequently implemented by the IMO⁶³. However, Indonesia did not submit a comprehensive proposal for ASLs, as it only proposed north-south ASLs and not east-west ASLs. There is still an ongoing internal discourse between Indonesian scholars, policymakers, and stakeholders on whether Indonesia should propose the designation of additional east-west ASLs. To ensure legal certainty before Indonesia decides on this issue, Indonesia enacted a Government Regulation in 2002, which stipulated that other than in designated ASLs, foreign vessels navigating in Indonesian archipelagic waters can do so under the innocent passage regime. The regulation then resulted in a

⁶⁰ Tordesillas E.T. Why the Archipelagic Sea Lanes Passage bill should be passed. – *ABS-CBN News*. August 23, 2019. URL: <https://news.abs-cbn.com/blogs/opinions/08/23/19/opinion-why-the-archipelagic-sea-lanes-passage-bill-should-be-passed>. (accessed 10.03.2022).

⁶¹ For the historical proposal of the Philippines' archipelagic sea lanes, See, Varona, Eriberto. "Designation of Archipelagic Sea Lanes: The Philippine Navy Perspective." *Ocean L. & Poly Series* 1 (1997): 18.

⁶² An Act To Establish The Archipelagic Sea Lanes In The Philippine Archipelagic Waters, Prescribing The Rights And Obligations Of Foreign Ships And Aircraft Exercising The Right Of Archipelagic Sea Lanes Passage Through The Established Archipelagic Sea Lanes And Providing For The Associated Protected Measures Therein. Introduced by Senator Antonio "Sonny" Trillanes IV at The Seventeenth Congress Of The Republic Of The Philippines First Regular Session.

⁶³ International Maritime Organization: Resolution MSC.72(69) "Adoption, Designation and Substitution of Archipelagic Sea Lanes". Adopted on 19 May 1998. URL: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.72\(69\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.72(69).pdf) (accessed 10.03.2022).

strong protest from the United States through its FON Program.

IV. The US FON Program and Indonesia's Archipelagic Waters

Even though the US FON program in Asia mainly focuses on China and the South China Sea, in fact, nine other Asian countries have been targeted as well⁶⁴. One of which is Indonesia concerning its archipelagic waters, which have always been a US concern. The issue of navigational rights and freedoms in Indonesian maritime zones is related mainly to the regime of archipelagic waters and different interpretations of its application and implementation. However, it should be emphasized that the US does not question or challenge Indonesia's status as an archipelagic State or its sovereignty over its archipelagic waters. The concerns of the US are only aimed at ensuring that foreign vessels are entitled to exercise the navigational rights to which they are entitled under the UNCLOS.

The United States under the Trump Administration has released two Freedom of Navigation reports by the Department of defense in 2017 and 2018. In both reports, Indonesia was listed as one of the countries that had an excessive maritime claim, therefore had to be challenged. Even though both of the reports listed Indonesia, it has two different reasons for the excessive maritime claims. The 2017 report only mentions the limits on ASLs passage through normal routes used for international navigation in the Java Sea⁶⁵. The 2018 report, however, only mentions the limits on ASLs passage through normal routes used for international navigation [Government Regulation No.

37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, June 28, 2002] in the Lombok Strait⁶⁶.

One year after the enactment of the Indonesian Government Regulation, in August 2003, the United States officially sent a diplomatic note protesting the regulation. The protest note stated that the Indonesian submission to the IMO was only a "partial designation" so that "the right of the ships and aircraft of all states to exercise archipelagic sea lanes passage continues on all normal routes used for international navigation through other parts of the Indonesian archipelago, as provided in Article 53(12) of UNCLOS"⁶⁷. Along with the diplomatic note, the US reiterated its protest with operational assertions.

In July 2003, the *USS Carl Vinson* and five F-18s conducted maneuvers near Bawean Island in the Java Sea, outside of designated ASLs⁶⁸. The US F-18 Hornet planes went into attack mode and locked their missiles onto the two Indonesian F-16 fighters. The Indonesian authority observed that the US planes were guarding an aircraft carrier, two frigates and a tanker. After noticing there are US military coming into Indonesian sovereign territory, two Indonesian F-16 fighter jets intercepted the U.S. planes and warned them that they were in Indonesian territory⁶⁹. After long communication between the two forces, the incident was resolved and the US F-18 agreed to leave Indonesian territory⁷⁰. The Bawean Island incident has left a huge impact on the Indonesian public audience. The public discourse is not really about why the US naval come to Indonesian water but more about how Indonesia deals with and responds to it.

⁶⁴ See: Department of Defense Report to Congress. Annual Freedom of Navigation Report. Fiscal Year 2017. URL: <https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053> (accessed 10.03.2022); Panda M.A. US Freedom of Navigation Operations Targeted 10 Asian Countries - Not Just China. – *The Diplomat*. January 25, 2018. URL: <https://thediplomat.com/2018/01/in-2017-us-freedom-of-navigation-operations-targeted-10-asian-countries-not-just-china/> (accessed 10.03.2022).

⁶⁵ Department of Defense Report to Congress. Annual Freedom of Navigation Report. Fiscal Year 2017. URL: <https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053> (accessed 10.03.2022).

⁶⁶ Department of Defense Report to Congress. Annual Freedom of Navigation Report. Fiscal Year 2018. URL: [https://policy.defense.gov/Portals/11/Documents/FY18%20DoD%20Annual%20FON%20Report%20\(final\).pdf?ver=2019-03-19-103517-010](https://policy.defense.gov/Portals/11/Documents/FY18%20DoD%20Annual%20FON%20Report%20(final).pdf?ver=2019-03-19-103517-010) (accessed 10.03.2022).

⁶⁷ Groves St. Op. cit.

⁶⁸ Cay V.J. E. Op. cit. P.

⁶⁹ Indonesia Protest US Jet Incursion. – *The Sydney Morning Herald*. July 13, 2003. URL: <https://www.smh.com.au/national/indonesia-protest-us-jet-incursion-20030711-gdh2vh.html> (accessed 10.03.2022).

⁷⁰ Indonesian Jets Face Off Near Java. – *Los Angeles Times*. July 5, 2003. URL: <http://articles.latimes.com/2003/jul/05/world/fg-indo5> (accessed 10.03.2022).

The Bawean incident, however, is not the last incident where the US Navy challenged Indonesia's so-called excessive maritime claim. Based on the Department of Defense Annual report, navy vessels and aircraft crossed Indonesian archipelagic waters on 73 occasions in the fiscal year 1997⁷¹, 20 occasions in the fiscal year 1998, and 22 occasions in the fiscal year 1999⁷². Moreover, in 2005-2010, the US Navy issued several diplomatic notes relating to Indonesia's archipelagic waters, including protests against Indonesia's claim that its partial designation of ASL was a "full designation".⁷³ In fiscal year

(FY) 1994-1999, the Department of Defense released a list US Navy's operational assertions under FON Program. The list of annual assertions for FY 2000 – FY 2010 was posted on the website of the Office of the Deputy Assistant Secretary of Defense for Countering Weapons of Mass Destruction. In the FY 2000 – 2003, the Department of Defense did not specifically indicate the fiscal year in which each assertion was conducted. Table 2 below summarizes US the FON operational assertions in Indonesian waters from 2000-2010⁷⁴.

Table 2

Year	Reason for Operational Action by the United States Navy ⁷⁵
2000 – 2003:	Prior notification for a warship to enter territorial sea
2004:	Archipelagic sea lanes passage
2005:	Archipelagic sea lanes passage
2006:	Conduct of ASLP through normal passage routes used as routes for international navigation through or overflight over archipelagic waters
2007:	Partial designation of archipelagic sea lanes
2008:	Partial designation of archipelagic sea lanes
2009:	Partial designation of archipelagic sea lanes
2010:	Partial designation of archipelagic sea lanes

Based on the number of assertions by the US navy, the possible factors motivating the US insist to conduct assertions in Indonesian archipelagic waters. First, it is obvious that the US aims to safeguard navigational rights in response to the Indonesian government regulation No 37. The US believe that under article 53 of the UNCLOS if a state has not yet designated ASLs, foreign ships can use the route normally used for international navigation under the regime of ASLs passage. It means that all ships including warships can come to use all routes normally used for international navigation

in the archipelagic water in "normal mode"⁷⁶, as well as aircraft can come above the route. However, as Indonesia argues that there is ambiguity on the issue of routes normally used for international navigation this also means that there is a lack of clarity as to what a foreign ship can and cannot do under the regime. Against that backdrop, to make sure legal certainty, Indonesia argues that it would be better for foreign ships who want to come to Indonesian archipelagic waters other than the designated ASLs, they should use the innocent passage regime⁷⁷.

⁷¹ The United States Government released the data based on fiscal years instead of maritime operations. Each Fiscal year consisted of several maritime operations in that year.

⁷² U.S. Department of Defense. Annual Report to the President and the Congress. 1997. Appendix I. URL: https://history.defense.gov/Portals/70/Documents/annual_reports/1997_DoD_AR.pdf?ver=2014-06-24-153256-173 (accessed 10.03.2022); Annual Report to the President and the Congress. 1998. Appendix I. URL: https://history.defense.gov/Portals/70/Documents/annual_reports/1998_DoD_AR.pdf?ver=2014-06-24-153404-623 (accessed 10.03.2022); Annual Report to the President and the Congress. 1999. Appendix H. URL: https://history.defense.gov/Portals/70/Documents/annual_reports/1999_DoD_AR.pdf?ver=2014-08-22-095354-640 (accessed 10.03.2022).

⁷³ Ibid. Appendix 1.

⁷⁴ Groves St. Op. cit.

⁷⁵ Ibid, indicates that multiple operational challenges to the same excessive claim were conducted during a single fiscal year.

⁷⁶ In UNCLOS there is no strict definition of what to consider as 'Normal Mode'. However, it could be understood that the phrase is taken to mean that a submarine may remain submerged, whereas in the innocent passage it must navigate on the surface and show its flag.

⁷⁷ Based on the interview with First Admiral Kresno Buntoro the Head of the Legal Office of the Indonesian Navy.

Despite the legal and political debate regarding the interpretation of the route used for international navigation, there are more important practical problems when it comes to daily law enforcement. It is obvious that the most important goal of the U.S. is to assure their navigation rights and freedoms, including in the Indonesian archipelagic waters, on the other side Indonesia wants to maintain its national security by having legal certainty for all navigational passage in the Indonesian maritime territory⁷⁸.

V. Possible Solutions to the Diverging Positions of Indonesia and the United States

At the level of a national institution for instance, how does the Indonesian navy respond if a US warship or fleet is crossing Indonesia's archipelagic waters, or how does diplomacy take a role in mitigating the possible escalation of tension? Based on the information from First Admiral Kresno Buntoro, the Head of the Legal Office of the Indonesian Navy, Indonesia believes that Indonesia has finished designating all ASLs, therefore Indonesia will not accept it if there are foreign warships or military aircraft which come across Indonesian water without following the Indonesian national law mechanism⁷⁹. In responding to the Bawean incident in 2003, as an example, Indonesia also did a two-track response.

First, the Indonesian military at that time immediately sent F-16s to escort and open communication with the US warship and F-18s, asserting that they were in Indonesian waters illegally and therefore urging them to leave immediately. Second, right after the incident, through the Ministry of Foreign Affairs, Indonesia sent a diplomatic protest to the US, and the Indonesian Minister of Foreign Affairs summoned the US ambassador to clarify that matter. After a series of communications and clarifications, both states finally settled the problem, and the US warship and aircraft agreed to leave the Indonesian archipelagic waters.

Based on the US Department of Defense report mentioned earlier in this section, there are a lot of incidents happening where US warships come across the Indonesian sovereign territory under the FONOPs. This surely has made no productive con-

tribution to the relationship between Indonesia and the US. Therefore, this article argues that something must be done to ensure that no incident will happen again. It is also obvious how Indonesia's attitude towards the program will affect how the problem could be resolved.

This article argues that one of the best ways to avoid any tension between both countries is there should be more diplomatic negotiation or an agreement on what can and cannot be done when passing through the Indonesian archipelagic waters. This should be started by diplomatic communications regarding this issue. Although Indonesia has a firmly different view about the ASLs passage, there might be some alternatives, for instance as what kind of notification is needed to enter archipelagic waters. Referencing the Joint Statement between the Russian Federation and the Kingdom of the Netherlands on Scientific Cooperation in The Russian Arctic Region and The Settlement of a Dispute, Indonesia and the United States could also explore the possibility to create such a statement to show a common understanding. What is important from such a joint statement is that both countries acknowledge the common perspective such as respecting the rights of archipelagic states and flag states, and also can agree upon the limitation and practical matters for US vessels to come across the archipelagic waters.

There are at least two elements necessary for Indonesia and the United States to be agreed upon to assure peaceful navigation. First, both countries should uphold friendly cooperation with the spirit of the United Nations Convention on the Law of the sea. Second, in exercising the navigation in the archipelagic sea lanes, a flag State shall have due regard to the rights and duties of a coastal State, including its sovereignty over its archipelagic waters concerning right of passage.

VI. Conclusion

Navigational rights and freedoms are one of the very important pillars of international trade, security and military exercise. Under article 53 (1) of UNCLOS, however, there is no obligation for the archipelagic state to designate ASLs. The legal norms, which come up from the article more to the

⁷⁸ Indonesia Protest US Jet Incursion. – *The Sydney Morning Herald*. July 13, 2003. URL: <https://www.smh.com.au/national/indonesia-protest-us-jet-incursion-20030711-gdh2vh.html>(accessed 10.03.2022).

⁷⁹ Interview with Adm. Kresno Buntoro via e-mail.

archipelagic state to make sure that there is a right for passage through the archipelagic waters.

The very core debate on the US Freedom of Navigation program in the Java Sea between the United States and Indonesia is mainly regarding the interpretation of Article 53 (1) UNCLOS. It was unclear how the limitations of the obligations for an archipelagic state under the UNCLOS to designate or not designate the ASLs. In Article 53 (4) some argue that the archipelagic state should designate all normal passage routes used for international navigation as ASLs. And until an archipelagic state has completely designated its ASLs, vessels can exercise ASLs passage through all routes normally used for international navigation. After all, ASLs have been designated, vessels are restricted from exercising the right of ASLs passage and only conduct innocent passage through remaining archipelagic waters. However, on the other side, Indonesia believes that UNCLOS give no strong obligation for archipelagic states to designate the archipelagic sea lanes. Therefore, Indonesia has a right to set its national legislation for enacting navigation. In Government Regulation Number 37 of 2002, Indonesia decides that other than the designated ASLs, foreign vessels

can use the route normally used for international navigation under the innocent passage mode. Until recently, based on the US Freedom of Navigation Report, the United States still occasionally send the FON assertion to the Indonesia archipelagic waters

This regulation then triggered the protest by the United States and asserts the applicability of navigational rights in Indonesia's archipelagic waters. Indonesia's position is arguably based on its national interest in maintaining safety and security in the archipelagic waters and its long-standing belief in non-military innocent passage.

This article concluded that to assure peace and avoid tension escalation between the United States and Indonesia relating to the diverging positions and practices, both countries should negotiate a common understanding which reiterated three main principles which are, uphold friendly cooperation with the spirit of the United Nations Convention on the Law of the sea. Second, in exercising the navigation in the archipelagic sea lanes, a flag State shall have due regard to the rights and duties of a coastal State, including its sovereignty over its archipelagic waters concerning right of passage.

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