

Rethinking Nusantara Indonesia: Legal Approach

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Abstract

As one of the proponents of the archipelagic State concept, Indonesia considers the archipelagic State regime as Nusantara. Indonesia believes that the waters surrounding the islands considered an integral part of the island and part of its State territory. However, Indonesia seem to realize that Nusantara has to adopt the international community interest such as providing sea lanes of communication and addressing the challenges ensuing from conducting activities within its waters and surrounding. These balances of interest stipulated in the provision of the United Nations Convention on the Law of the Sea 1982 (LOSC). Indonesia seems very satisfied when the archipelagic state concept has been adopted in the LOSC, but there are many issues exist when discussing the implementation of the Nusantara. The purpose of this paper is to provide an overview of historical context of Nusantara within international law of the sea. Following the discussion it will also highlight a number of obligation as archipelagic State which may different from the concept of Nusantara from first place and balance needed between international community and Indonesia in difference interests.

Keywords : *Indonesia, Indonesian Waters, Wawasan Nusantara, Sovereignty, Law of the Sea*

I. INTRODUCTION

Discourse territory within traditional international law has only dealt with continental land masses or islands, not with groups of islands.¹ In traditional international law, territory is considered simply as land mass.² The traditional law of the sea, when applied to archipela-

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¹ Traditional international law, as used here, means international conventions and decisions of the Permanent Court of International Justice, before the 1930 Hague Conference on the Codification of International Law.

² D P O'Connell, 'The Juridical Nature of the Territorial Sea' (1971) 45 *British Year*

gos, encountered great difficulty and produced inadequate results.³ The sea was considered *res nullius* where coastal States could only exercise limited sovereignty.⁴ However, over the passage of time, the law of the sea has developed to accommodate archipelagic issues.

The outlook and opinions of archipelagic States such as Indonesia are also significant in the development of the archipelago concept. Indonesia believes that the waters surrounding the islands should be considered an integral part of the island and part of its total State territory.⁵ Thus, Indonesia considers the islands, waters, resources and people as part of a single entity.⁶ The relationship between people and territory is important. In certain parts of Indonesia, for example, the sea territory is regarded as more important than any nearby land masses.⁷ There is a strong link between human activity and sea territory.⁸ The relationship between the land, water and people inhabiting the islands of the archipelago was a justification for Indonesia proposing the archipelagic concept.⁹ In the development of the archipelagic concept, the interaction

Book of International Law, 304-05; Bernard H Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 *American Journal of International Law* 21, 830-31.

³ See, D P O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 *British Year Book of International Law* 1; Hiran W Jayewardene, *The Regime of Islands in International Law* (1990).

⁴ Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 15.

⁵ Munadjat Danusaputro, *Wawasan Nusantara: Dalam Ilmu Politik dan Hukum* (1978) (in Indonesian), 25-74; Mochtar Kusumaatmadja, 'The Concept of Indonesian Archipelago' (1982) 10 *Indonesian Quarterly* 12.

⁶ Lemhanas (Indonesian National Defence Council), *Pokok-pokok Pengertian dan Sejarah Pengembangan Wawasan Nusantara* (1982), (in Indonesian), 3; Nugroho Wisnumurti, 'Indonesia and the Law of the Sea' in Choon-ho Park and Jae Kyu Park (eds), *The Law of the sea : problems from the East Asian perspective* (1987), 392; Hasjim Djalal, *Indonesia and the Law of the Sea* (1995), 336.

⁷ Hope Sebastian, *Outcasts of the Islands: The Sea Gypsies of South East Asia* (2002).

⁸ There are many Bajo tribes or *Orang Suku Laut* (people of the sea) in Indonesia who lived floating at the sea. See, R H Djohani, 'The Bajo, Future Park Managers in Indonesia?' in M J Parnwell and R L Bryant (eds), *Environmental Change in South East Asia, People Politics and Sustainable Development* (1996); Cynthia Chou, *The Orang Suku Laut of Riau, Indonesia: The Inalienable Gift of Territory* (2009); Andi Hajramurni, 'Bajo People losing their Identity', *The Jakarta Post* (Jakarta), 12 September 2009, <<http://www.thejakartapost.com/news/2008/10/22/bajo-people-losing-their-identity.html>>, at 12 September 2009.

⁹ Mochtar Kusumaatmadja, 'The Legal Regime of Archipelagos and Supplementary

between Indonesia's geographical situation and its economy, history, culture and politics are important.¹⁰ Equally important is the archipelagic State concept enunciated in Article 46 (2) of the LOSC.¹¹

The United Nations Convention on the Law of the Sea (hereinafter referred to as the LOSC)¹² regulates, among other things, maritime marine resources, marine environment, science, technology, and dispute settlement relating to the law of the sea. One of the concepts introduced by the LOSC is the archipelagic State concept.¹³ Under this concept, a State may be considered as an archipelagic State if the State is constituted wholly or partly by one or more archipelagos, which may include other islands.¹⁴ Before the LOSC, lengthy discussions on archipelago issues took place at the 1930 Hague Conference on the Codification of International Law¹⁵ particularly regarding the geographical and ordinary understanding of the term 'archipelago'.¹⁶

From a geographical point of view, an archipelago is a group of islands which forms a single unit; from an ordinary point of view, an archipelago is a body of water interspersed with many islands.¹⁷ The

Remarks' in Lewis Alexander, M. (ed), *The Law of the Sea: Needs and Interests of Developing Countries* (1973) 116.

¹⁰ Hasjim Djalal above n 6, 342; Hiran W Jayewardene, above n 3, 103-90; Dale Andrew, 'Archipelagos and the Law of the Sea: Island Straits States or Island-Studded Sea Space?' (1978) 2(1) *Marine Policy* 46, 47.

¹¹ Article 46 (2) of the LOSC states that an "archipelago" means 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 features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."

¹² *United Nations Convention on the Law of the Sea*, opened for Signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (here in after *LOSC*).

¹³ Part IV, LOSC

¹⁴ Article 46 (a), LOSC.

¹⁵ League of Nations, Acts of the Conference for the Codification of International Law, held at the Hague from March 13th to April 12th, 1930.

¹⁶ See, D P O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 *British Year Book of International Law* 1; Hiran W Jayewardene, *The Regime of Islands in International Law* (1990); Hasjim Djalal, *Indonesia and the Law of the Sea* (1995), 293.

¹⁷ *Cambridge Advanced Learner's Dictionary* (2nd ed, 2005), 56; Mochtar Kusumaatmadja, 'The Legal Regime of Archipelagos and Supplementary Remarks' in Lewis M Alexander (ed), *The Law of the Sea: Needs and Interests of Developing*

LOSC 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 features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.”¹⁸

Indonesia was active in the negotiation of the archipelagic State concept.¹⁹ It was motivated by a desire to realise its aspirations for national unity, political stability, economic development, social justice, and national security.²⁰ These aspirations were expressed as “*nusantara*”, a concept which falls somewhere between the traditional notion of ‘islands’ and ‘archipelago’.²¹ The *nusantara* concept was further developed in the government’s maritime policy through “*Wawasan Nusantara*” or the “Archipelagic Outlook”, which advocated and stressed Indonesian unity.²² The adoption of the archipelagic State concept in the LOSC has given Indonesia the opportunity to address issues of national sovereignty and has granted Indonesia the jurisdiction over living and non living resources. The LOSC has provided Indonesia with the right to extend its sovereignty and jurisdiction over large ocean areas. Part IV of the LOSC, particularly Articles 47 to 52 deals with the extent of maritime jurisdiction, exploration, exploitation, conservation and utilisation

Countries (1973) 116; Dale Andrew, ‘Archipelagos and the Law of the Sea: Island Straits States or Island-Studded Sea Space?’ (1978) 2(1) *Marine Policy* 46; Jens Eversen, ‘Certain Legal Aspects concerning the Delimitation of the Territorial Waters of Archipelagos’ (Paper presented at the UN Conference on the Law of the Sea, Official Records, Geneva, 1958), 300, 302. Eversen pointed out that geographical features or geographical realities of the archipelago should be used in deciding whether a group of islands and the waters separating them could be treated as a single unit.

¹⁸ Article 46 (b), LOSC.

¹⁹ See, Mochtar Kusumaatmadja, *Indonesia dan Perkembangan Hukum Laut Dewasa ini* (1977) (in Indonesian); Munadjat Danusaputro, *Tata Lautan Nusantara: Dalam Hukum dan Sejarahnya* (1980) (in Indonesian); Hasjim Djalal, *Perjuangan Indonesia di Bidang Hukum Laut* (1979) (in Indonesia).

²⁰ Mochtar Kusumaatmadja, “*Wawasan Nusantara*”, *POLKAM: Pembangunan di Bidang Politik dan Keamanan* (1982) (in Indonesian), 5-17.

²¹ The concepts brought to the fore in 1957 when Prime Minister, Mr Djuanda, declared that Indonesia is an archipelagic State.

²² See, Mochtar Kusumaatmadja, above n 9; Munadjat Danusaputro, *Wawasan Nusantara: Dalam Ilmu Politik dan Hukum* (1978) (in Indonesia); Indonesian National Defence Council, *Pokok-pokok Pengertian dan Sejarah Pengembangan Wawasan Nusantara* (1982) (in Indonesian).

of marine resources within Indonesia's archipelagic waters. Indonesia, as an archipelagic State, has to fulfil certain obligations as stated in the LOSC, such as maintaining safety of navigation,²³ designating sea lanes for ships and aircraft traffic,²⁴ and preserving and protecting the marine environment.²⁵

The LOSC recognises the sovereignty of the archipelagic State in archipelagic waters.²⁶ However, this sovereignty is limited in Article 2(3) of the LOSC which states that this sovereignty is exercised subject to this Convention and to other rules of international law. There are similar limitations on State sovereignty in archipelagic waters such as the right of archipelagic sea lanes passage by foreign ships, overflight of foreign aircrafts, and other marine activities.

This paper focuses on the establishment of *nusantara* within international law. The paper provides an historical overview of the development of the concept of the archipelagic State. The paper also discusses the consequences of Indonesia being an archipelagic State within the framework of navigational rights and freedoms under international law. It also examines the responsibilities of archipelagic states/Indonesia with respect to accommodate the international community. Finally, the paper will demonstrate that while the LOSC has provided extended areas of sovereignty and sovereign rights of archipelagic State, it also has some disadvantages when in comes to implementation.

II. THE INDONESIAN ARCHIPELAGIC OUTLOOK

The Republic of Indonesia is the largest archipelagic State in the world, consisting of 17,504 islands.²⁷ Indonesia extends along the equator, straddles the continents of Asia and Australia, and is flanked by the

²³ Articles 21, 52, LOSC.

²⁴ Article 53, LOSC.

²⁵ Article 192 (Part XII), LOSC.

²⁶ Articles 2 (1) and 49, LOSC.

²⁷ Originally, Indonesia had 17,508 islands based on the publication of Dishidros TNI AL (Indonesian Hydro-Oceanographic Office) on Figures of Indonesian Territory, however, after the Republic of Timor Leste gained its independence in 1999, includes two islands (Arturo and Yako Islands) and the decision of the International Court of Justice (ICJ) on the sovereignty over Sipadan and Ligitan Islands in 2002, where both islands were transferred to Malaysia.

Indian and Pacific Oceans. The territory of the Republic of Indonesia stretches from Pulau Rondo off the northern tip of Sumatra in the west longitude 94° 58' East to Merauke, Papua in the east longitude 141° East and from Pulau Miangas in the north to Pulau Dana in the south. With an overall distance of more than 1,900 kilometres from east to west, Indonesia covers an area as vast as Europe; however, nearly 80 per cent of the area between the abovementioned geographical extremities is made of seas.

History of Nusantara can be traced back from the first century AD, there has been continuous trade among people on the Indonesian archipelago, India and China.²⁸ Trade created close relations in many areas such as religion, arts, and government.²⁹ The fact that Indonesia is located halfway between India and China has been an important factor in the formation of Indonesian culture.³⁰ Indian and Chinese traders made stop-overs to replenish their supplies of fresh water and food and Indonesians visited India and brought back Hinduism. In port cities in particular, Chinese and Indian traders influenced the local Indonesian culture.³¹ Evidence of Indian and Chinese cultures and religions can still be found in certain parts of Indonesia, for example, in Indonesian drama, architecture, literature, textile design, as well as in elements of religion.³²

According to Caldwell,³³ Indonesia has a unique ability to synthesise different ingredients, accepting the new without discarding the old, absorbing and blending rather than substituting. At the same time the sea barrier between the islands has resulted in the fact that each island developed uniquely, shaping and moulding its own cultures. The variety of Indonesian cultures can be found in many places and spread across the entire archipelago, for example traditional music instruments

²⁸ Rosemary Brissenden, 'Pattern of Trade and Maritime Society before the Coming of the Europeans' in Elaine McKay (ed), *Studies in Indonesian History* (1976), 65-71.

²⁹ Donald Wilhelm, *Emerging Indonesia* (1980), 10.

³⁰ R P Hardjowardojo, 'Basic Cultural Influences' in Elaine McKay (ed), *Studies in Indonesian History* (1976), 3

³¹ V J H Houben, 'Trade and State Formation in Central Java 17th-19th Century' in G J Schutte (ed), *State and Trade in the Indonesian Archipelago* (1994)

³² Donald Wilhelm, above n 29, 10.

³³ Malcolm Caldwell, *Indonesia* (1968), 33.

can be found in many islands, batik can be found almost in all islands and ethnics.

With regard to Indonesia's political evolution, many kingdoms and states rose and fell in various parts of the archipelago during the centuries preceding western colonialism.³⁴ Although most of these states had localised jurisdiction, there were two great kingdoms which stood out namely Majapahit and Sriwijaya. The Sriwijaya Empire, located in Sumatra, reigned from the 7th to the 13th century. The empire encompassed most of present-day Indonesia and included some parts of the Asian mainland.³⁵ The empire became a great maritime and trading power as well as a centre for Buddhist learning.³⁶ The Majapahit Empire, based in Java and founded in 1292, succeeded in uniting much of the archipelago. The latter empire was bigger than Sriwijaya and had a great maritime fleet which played a large role in uniting all the islands.³⁷ The Majapahit Empire lasted until the 16th century.³⁸ Well before that time, it seems that Indonesia was being affected by two new forces, Islam and the Europeans.

Islam was introduced by Arab traders soon after the birth of Islam in the 7th century.³⁹ In the early 15th century, Malacca became a major Islamic trading centre and Islam spread more quickly to the whole archipelago.⁴⁰ Although Islam spread rapidly, it took on new forms which were infusions, combinations and blends with old traditions and cultures which already existed, such as Hinduism, Buddhism and animistic practices.⁴¹

Europeans came to the archipelago in 1292, with the arrival of Marco

³⁴ Ann Kumar, 'Development in Four Societies over the Sixteenth to Eighteenth Centuries' in Harry Aveling (ed), *The Development of Indonesian Society* (1979), 30-37.

³⁵ G Moeldjanto, *Indonesia Abad ke-20: Dari Kebangkitan Nasional sampai Linggarjati*, Sejarah Indonesia (2nd ed, 1989), (in Indonesia), 15-24.

³⁶ Rosemary Brissenden, above n 28, 74. See- O W Wolters, *Early Indonesian Commerce* (1967).

³⁷ G Moeljanto, above n 35, 15.

³⁸ Merle Calvin Ricklefs, *A History of Modern Indonesia since c. 1200* (4th ed, 2008), 17-23; Rosemary Brissenden, above n 28, 79.

³⁹ *Ibid*, 3-16.

⁴⁰ Merle Calvin Ricklefs, above n 28, 3-16.

⁴¹ Donald Wilhelm, above n 29, 10.

Polo, followed by Portuguese and Spanish explorers.⁴² The Portuguese and Spanish captured various trading centres and occupied some Indonesian territory. The English and Dutch challenged the Portuguese and Spanish hold, which were gradually expelled from the archipelago.⁴³ The English stayed on the Malacca peninsula while the Dutch occupied and controlled most of Java and others islands. The archipelago became known as the Dutch East Indies. Although it was for only five years, the British took over the archipelago from the Dutch, with Thomas Stamford Raffles as the British chief administrator in the archipelago.⁴⁴ The Dutch resumed control of the archipelago and continued to convert land into plantation in order to produce export commodities. Java became a vast Dutch government plantation. Serious famine occurred in Java because the Dutch neglected to plant food crops and the people were forced to become labourers or slaves.

The independence movement began long before its final success. In 1629, Sultan Agung, the King of Mataram, sent troops to attack the Dutch in Batavia.⁴⁵ There were several revolts and uprisings which took place in Aceh, Bali, Java and many other parts of the archipelago. The movements failed because the Dutch used a “*divide et impera*” system whereby the Dutch chose local rulers and used them to control areas. The system was economical and proved successful in the suppression of popular movements. During that time, the Dutch allowed some young Indonesians, who had studied in Netherlands, to handle administrative jobs. But the students had also studied political movements and they proceeded to establish a political party.⁴⁶ The Youth Pledge of 1928 expressed the ideals of one nation, one language, and one motherland or

⁴² Ibid, 11.

⁴³ Ibid, 9.

⁴⁴ Peter B R Carey, ‘Aspect of Javanese History in the Nineteenth Century’ in Harry Aveling (ed), *The Development of Indonesian Society* (1979) 120, 57-59.

⁴⁵ Ibid, 18; Donald Wilhelm, above n 29, 15.

⁴⁶ There were many political parties and student organisations established by young professionals and students of Indonesia, such as Indische Party, Budi Utomo, Sarekat Islam, Partai Komunis Indonesia, Indonesian Alliance of Students, Jong , Jong Jawa, Jong Ambon, *Indonesia, Early Political Movements*. Library of Congress Country Studies; “The Growth of National Consciousness”. Federal Research Division of the Library of Congress < <http://countrystudies.us/indonesia/14.htm>.> at 15 August 2008.

Tanah air.⁴⁷ It was the first political manifestation of the concept of national unity and was inspired by a nationalist movement which aimed to lead the national struggle for independence.

In 1942, the Japanese came to the archipelago and took over all systems of government. They set up some steps for independence such as allowing the use of the Indonesian flag, the national anthem and Bahasa Indonesia as the national language. But, overall, the Japanese treated the native population worse than the Dutch.⁴⁸ People were starving and there was famine everywhere. The Japanese established Indonesian officer armies and created quasi-military youth organisations which later formed the core of the Indonesian armed forces.⁴⁹

Indonesia declared its independence on 17 August 1945, two days after Japan surrendered to the Allies.⁵⁰ The victorious powers, however, allowed the Dutch to return and reclaim its former colony, Indonesia, which had been occupied by Japan since 1942. In order to defend its independence, the Indonesian people had to fight better armed and trained Dutch soldiers in a war for its independence. The poorly armed and trained Indonesian people were able to overcome the professional Dutch military forces because the Indonesian forces were fully supported by the native population throughout the lengthy guerrilla war.⁵¹ This experience made the country realise that Indonesia's defence must rely on the unity between its armed forces and civilian population.⁵² The

⁴⁷ "*Tanah Air*" means "Motherland" in Bahasa Indonesia. See, Indonesian National Defence Council, *Pokok-pokok Pengertian dan Sejarah Pengembangan Wawasan Nusantara* (1982) (in Indonesian).

⁴⁸ Robert van Neil, 'From Netherlands East Indies to Republic of Indonesia 1940-1945' in Harry Aveling (ed), *The Development of Indonesian Society* (1979) 106, 162-63.

⁴⁹ Harold Crouch, 'The Trend to Authoritarianism: The Post 1945 period' in Harry Aveling (ed), *The Development of Indonesian Society* (1979) 165, 168; Rosihan Anwar, *Musim Berganti: Sekilas Sejarah Indonesia, 1925-1950* (1985), (in Indonesia), 124-129.

⁵⁰ Japan surrendered to the Allied on 15 August 1945, with the surrender documents finally signed aboard the deck of the American battleship USS Missouri on September 2, 1945. See, Mark Donnelly, *Britain in the Second World War* (1st ed, 1999).

⁵¹ Nugroho Notosusanto, *The National Struggle and Armed Forces in Indonesia* (Second ed, 1980), (in Indonesia), 6; G Moeljanto, above n 35, 96-189.

⁵² The defence system which focused on the unity of armed forces and the people is called *Hankamrata* (Total People's Defence). The armed forces would act as a core to

revolutionary experience gave the nation a strong sense of self-confidence in its ability to defend the country against a hostile foreign power. In addition, the experience shaped Indonesia's defence and security outlook, focusing it on the unity of the nation. The notion of national unity, known as "*Wawasan Nusantara*" or the 'Archipelagic Outlook or Principle' unites the Indonesian archipelago into an indivisible "*Tanah Air*", or "Place of Land and Water for all Indonesians."⁵³ The archipelagic outlook clearly envisages the islands and the surrounding seas as a single unit.

The *Wawasan Nusantara* doctrine was reflected in Indonesia's geopolitical concern for its maritime territory. There were three catalysts for this doctrine.⁵⁴ First, the Indonesian elite started to realise that Indonesia needed a new doctrine to integrate the maritime territory into its land territory as a single entity. Second, the location of Indonesia at the cross-roads of world trade puts Indonesia in both an advantageous and vulnerable position. Third, there was heightened concern surrounding foreign maritime passages within the archipelago. The last concern related specifically to the activities of the Dutch warships while Indonesia campaigned for the transfer of Papua (Irian Jaya)⁵⁵ from Dutch to Indonesian rule from 1950 to 1962.⁵⁶

Having considered the location of Indonesia, the *Wawasan Nusantara* doctrine developed along with understanding of Indonesia's archipelagic outlook. Its geographical setting came to be considered with other aspects, such as demography, natural resources, ideology, politics, economics, social and cultural aspects, and defence and security. Those aspects were known as "*asta gatra*" which means 'eight

mobilise the entire population against the enemy.

⁵³ Munadjat Danusaputro, above n 5, 31.

⁵⁴ Lemhanas (Indonesian National Defence Council), above n 6, 4-15.

⁵⁵ Papua is the current official name of the territory known successively as Netherlands New Guinea, West New Guinea, West Irian and Irian Jaya. The Name of Papua will be used throughout for consistency, except for the name of Treaty.

⁵⁶ In spite of the fact that the Dutch Government did not recognise the independence of Indonesia, the Dutch still ruled in West Papua (Irian Jaya) until 1962. In that time, Dutch Navy always passed through the Java Sea and waters surround the Indonesian islands.

aspects',⁵⁷ which the first *gatra* (aspect) is geographical setting.⁵⁸

The *Wawasan Nusantara* doctrine promoted both an inward and outward looking perspectives.⁵⁹ At a national level (that is, the inward-looking perspective), it emphasizes the notion of Indonesia as one political, economic and security entity. Internationally, (that is from an outward-looking perspective), the promotion of *Wawasan Nusantara* is designed to advance the security of Indonesian territorial waters.⁶⁰ The *Wawasan Nusantara* doctrine would go on to provide substance to Indonesia's perceptions and interests in maritime matters in subsequent years, regarding maritime boundaries, navigational regimes and managing natural resources. In these maritime zones, Indonesia has sovereignty, which is the same as the sovereignty over land and air space.

III.1. DEVELOPMENT OF INDONESIA'S MARITIME POLICY

The arrival of the European powers, with their ambitions for the expansion of their overseas colonial empires, brought with them the concept of *mare clausum*. However, the Dutch interest in the East Indies, supported by the legal doctrine of *mare liberum* developed by Grotius and others, necessitated advocacy of the principle of freedom of the high seas, in contradiction to the Portuguese and Spanish views on the matter. According to Alexandrowicz the Portuguese attempted to limit the access of competitors to the high seas in the East Indies.⁶¹ With the gradual achievement of supremacy by the Dutch in the East Indies during the 18th and 19th centuries, the original customary law position came to be restored in the form of Dutch practice.⁶²

⁵⁷ "Astra gatra"/aspect is divided into two categories namely three "gatra"/aspects and five "gatra"/aspects. The three aspects known as tangible aspects consist of Indonesia's geographical position, natural resources, and population. The five "gatra" known which are the intangible aspects consist of ideology, politic, economic, socio-cultural, defence and security.

⁵⁸ Indonesian National Defence Council, above n 6, .5-16; Munadjat Danusaputro, above n 5, 10-27.

⁵⁹ Lemhanas (Indonesian National Defence Council), above n 6, 7.

⁶⁰ Ibid, 9.

⁶¹ C H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967), 64-65.

⁶² Ibid, 65. He hypothesized that Grotius apparently derived support for his treaties

The Dutch Government applied regulations which conformed to the general practices of the law of the sea at that time to regulate the territorial sea in the Dutch East Indies. These regulations were based on the development of the law of the sea; for example, in 1893 there was Ordinance Number 261 regulating pearl fishery in the territorial sea of the Netherlands Indies.⁶³ Second, in 1902, there was Ordinance Number 4 regulating pearl fishery within the distance of no more than three nautical miles off the coasts of the Netherlands Indies.⁶⁴ Third, in 1905, the Government of Dutch East Indies declared Ordinance Number 436, amending the Ordinance Number 4 of 1902 defines the territory to include rocks, reefs and banks exposed at the low water line.⁶⁵

During the colonial era, the territorial waters of Indonesia inherited from the Dutch East Indies were fixed generally at three nautical miles from the coast, as stated in Article 1(1) of the *Territoriale Zee en Maritieme Kringen Ordonatie* of 1939.⁶⁶ Consequently, Indonesia consisted of so many units of islands, each being separated from the others by so-called high seas as shown in Figure 2-Illustrative Maps of the Indonesian Territory Based on the TZMKO 1939. The colonial regulation still applied after the independence of Indonesia based on the text of the Proclamation of 17 August 1945 and the 1945 Constitution of Indonesia which stated that “*all existing regulations and administrative ordinance in as much as they are not incompatible with the transfer of sovereignty remain in force*”.⁶⁷

from the original Asian practice.

⁶³ John G. Butcher, ‘Becoming an Archipelagic State: The Juanda Declaration of 1957 and the “Struggle” to Gain International Recognition of the Archipelagic Principle’ in Robert B Cribb and Michelle Ford (eds), *Indonesia Beyond the Water’s Edge: Managing an Archipelagic State* (2009) , 30.

⁶⁴ Ibid, 31.

⁶⁵ Ibid,32.

⁶⁶ Ordinance of 18 April 1939 on the Territorial Sea and the Maritime Domain, 1939 Staatsblad 442 (Netherlands Indies), in Indonesia Naval Headquarters, *Himpunan Peraturan di Bidang Maritim* (1997) (in Indonesian).

⁶⁷ The text of the Indonesian Proclamation of Independence 1945 and Article II of Additional Regulation of The Constitution of Indonesia 1945, UUD 1945 (*the 1945 Constitution*) provides that colonial law still applies unless specifically repealed under the 1945 Constitution. So this “transitional Article’ was made a ground for validity in subsequent regulations.



Figure 2. Illustrative Maps of the Indonesian Territory Based on the TZMKO 1939⁶⁸

Since some of Indonesia's islands or groups of islands lay more than six miles apart, the three nautical miles territorial sea could not enclose the archipelago within a single jurisdiction. Consequently, each island had their own respective territorial waters and there was a gap between islands which consisted of high seas. As a result, the major part of Java, Banda, Maluku, and Natuna Seas which form the heart of the Indonesian archipelago, were considered high seas.⁶⁹

The colonial territorial arrangement did not favour Indonesia's interests. The three nautical miles regulation was a long way from the objective of the independence movement, which was to unite Indonesia. This made it very difficult for the government to execute various

⁶⁸ Department of Foreign Affairs, *Indonesia 1963: Looking Back over the Years* (1963). The map could be found in Bakosurtanal, *Menata Ruang Laut terpadu* (2002), (in Indonesian). This map has been presented by Deputy 1, Coordinating Ministry of Maritime Affairs during his presentation on history of archipelagic state concept, Yogyakarta 29 November 2016.

⁶⁹ Jack Draper, 'The Indonesia Archipelagic State Doctrine and Law of the Sea: "Territorial Grab" or Justifiable Necessity?' (1977) 11(1) *International Lawyer* 20, 145.

functions of the government, such as defence and security, law enforcement, administration, and economic development.⁷⁰ Along with that, the three nautical miles regulation placed Indonesia in a fragile situation in terms of territorial integrity, since the presence of pockets of open sea gave opportunity to hostile external elements which used the cover of the high seas to support local political unrest on the islands.⁷¹

Economically, the three nautical miles territorial sea limit meant Indonesia was vulnerable insofar as economic and fishing activities were concerned. Foreign fishing vessels invoking the right of fishing in the “high seas” (seas between Indonesia’s islands) were coming close to the coast of islands within three nautical miles of the coast or even closer.⁷² The presence of foreign fishing vessels with modern equipment adversely affected the local fishermen due to their old-fashioned and traditional methods of fishing. The local fishermen were left unprotected from this foreign competition. Due to these reasons, the Indonesian government had to protect the fishermen and did not tolerate the activities of foreign fishing vessels. As stated by Mauna, “foreign States, which were much more advanced in their technology, could easily deplete our fisheries resources on our neaPolitically, after independence, Indonesia needed to strengthen national unity, political stability and national security. There were several separatist and regional political movements which wished to secede from Indonesia. Domestic dissent was mostly caused by island sentimentality for the colonial regime, as the result of the colonial policy in the past which had favoured certain islands over others.⁷³

The struggle to liberate Papua (West Irian/Irian Jaya) was also a prominent issue which supported the notion of the Indonesian archipelagic State concept. The pockets of sea known as “high seas” between the Indonesian islands meant the Dutch Navy could pass through

⁷⁰ Munadjat Danusaputro, above n 5, 53. See, Hasjim Djalal, *Perjuangan Indonesia di Bidang Hukum Laut* (1979), (in Indonesian), 61

⁷¹ During the period 1950-1960 there were much political unrest as many islands wanted to become independent because the central government did not have enough power to control all the islands. See Boer Mauna, *Hukum Internasional* (1987), (in Indonesian), 411.

⁷² Hasjim Djalal, above n 6, 298, 337.

⁷³ Dewi Fortuna Anwar, ‘Indonesia: Ketahanan Nasional, Wawasan Nusantara, Han-kamrata’ in Ken Booth and Russel Trood (eds), *Strategic Culture in the Asia-Pacific Region* (1999) 199, 199-246.

such areas very easily and it was considered by Indonesia as provocation. The Dutch naval presence in Indonesian waters was well aware of this, as the Dutch strategy was maintaining sovereignty in Papua and also keeping logistic communication between Papua and Holland. The Dutch Navy was always operating on the Java Sea and the inland seas on the eastern part of the Indonesia territory by flying its flag and traversing between Papua and Holland.⁷⁴ As stated by the Indonesian Foreign Ministry: “The presence of pockets of open seas, due to its freedom of navigation, all states could conduct all kinds of activities there, even war.”⁷⁵ This illustrated the vulnerability of the Indonesian maritime territory for the purpose of defence.

III.2. DEVELOPMENT OF THE ARCHIPELAGIC STATE CONCEPT OF INDONESIA

Between 1953 and 1957 there were many elements which combined to highlight the need for uniting the territory of Indonesia. These elements included growing unrest in regions outside Java, army commanders in a number of regions declaring martial law, Sukarno declaring martial law over the whole country, Sukarno setting up a “business cabinet” headed by Djuanda Kartawidjaja, labour unions taking over Dutch enterprises, and tensions between Indonesia and the Netherlands over West New Guinea escalating.⁷⁶ In addition, in 1955 the Philippines submitted a *note verbale* to the United Nations which stated that “all waters around, between and connecting different islands belonging to the Philippines Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines”.⁷⁷ The Philippine position thus supported the

⁷⁴ James Cable, *Gunboat Diplomacy, 1919-1979* (1981), 234.

⁷⁵ Boer Mauna, above n 71, 410.

⁷⁶ Dino Patti Djalal, *The Geopolitics of Indonesia's Maritime Territorial Policy* (1996), 84-88.

⁷⁷ Jens Eversen, ‘Certain Legal Aspects concerning the Delimitation of the Territorial Waters of Archipelagos’ (Paper presented at the UN Conference on the Law of the Sea, Official Records, Geneva, 1958), Vol. 1; Barbara Kwiatkowska, ‘The Archipelagic Regime in Practice in the Philippines and Indonesia-Making or Breaking International Law?’ (1991) 6(1) *International Journal of Estuarine and Coastal Law* 1, 4-5.

Indonesian position.

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

The Government declares that all waters surrounding, between and connecting the islands constituting the Indonesian State, regardless of their extension or breadth, are integral parts of the territory of the Indonesian State and therefore, parts of the internal or national waters which are under the exclusive sovereignty of the Indonesian State. [...] The delimitation of the territorial sea (the breadth of which is 12 nautical miles) is measured from baselines connecting the outermost points of the islands of Indonesia.⁷⁸

The Djuanda Declaration stated that Article 1(1) of the colonial maritime ordinance, concerning territorial and maritime boundaries, was no longer in accord with the needs of an independent Indonesia. The Declaration itself did not have the force of law under the then constitution.⁷⁹ Nonetheless, it clearly stated the policy of the Republic in relation to its territorial integrity and protection of natural wealth. Although not carrying the force of a formal repeal, this statement of policy might be considered sufficient evidence of conflict with principles embodied in the Indonesian Constitution such that the colonial law on the limits of national jurisdiction in Indonesia waters would have been held void by the Indonesian courts.⁸⁰

The Declaration itself was a political statement and revoked certain provisions of the 1939 Territorial Sea and Maritime Areas Ordinance, so the Indonesian government had to create a legal basis for its new maritime assertion. The Indonesian government embodied the new territorial concept in national legislation Act Number 4 of 1960 on Indone-

⁷⁸ Djuanda Declaration in Michael Leifer, *International Straits of the World: Malacca, Singapore and Indonesia* (1978). See also English version in M Whiteman, *Digest of International Law* (1965), 281.

⁷⁹ Articles 140-142, The Provisional Constitution of Indonesia, UUDS 1950.

⁸⁰ Article 142, The Provisional Constitution of Indonesia, UUDS 1950.

sian Waters.⁸¹ The new law provided more details on the nature and extent of Indonesian waters compared to the Djuanda Declaration. Article 1 of the Act provided that the territorial sea extends 12 nautical miles outward from the baselines drawn around the outermost islands of the Indonesian archipelago. All waters enclosed by the baselines declared in Article 2 were regarded as internal waters. These internal waters and territorial sea were regarded as Indonesian waters within the meaning of the regulation. The law also provided that straits of less than 24 nautical miles width, which belonged to one or more foreign States, shall be divided at the mid-point. Article 3 provided that the government may regulate the innocent passage by means of executive regulation. Finally, Article 4 stated that the new law repealed the contradictory provisions of the Dutch colonial ordinance.

Having considered the interest of user States in navigational matters, the Government of Indonesia also took into account the innocent passage of foreign vessels in Indonesian waters by permitting such passage so long as it was not prejudicial to the security of Indonesia. The innocent passage regime was further implemented through Government Regulation Number 8 of 1962 on Innocent Passage of Foreign Vessels in Indonesian Waters. The regulation clarified the conditions under which Indonesia would allow innocent passage. However, it seemed to contain some significant deviations from the innocent passage recognised by the international community. Article 1 of this Government Regulation guaranteed innocent passage, although the definition which had been used in subsequent articles narrowed the definition. Innocent passage was defined as “navigation with a peaceful purpose which travels through the territorial sea and internal waters of Indonesia from high seas to high seas”. This means that passage from the high seas to the territorial sea of foreign States was not considered innocent passage. Article 4 purported to grant the President power to temporarily suspend innocent passage in Indonesian waters, including straits used for international navigation. Finally, Articles 5, 6 and 7 placed restrictions on fishing, research and naval vessels of foreign States. These restrictions included permit requirements for research vessels and prior notice by naval and other vessels of foreign States.

⁸¹ This Act latter has been amended with Act Number 6 of 1996 on *Indonesian Waters* (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647).

The Indonesian archipelagic State concept elicited strong opposition from maritime powers⁸² such as the United States,⁸³ France, Netherlands, the United Kingdom⁸⁴ and Australia.⁸⁵ These States believed that the new territorial limit was invalid and would jeopardise world seaborne trade.⁸⁶ On the other hand, the Soviet Union and China supported the archipelagic concept. According to Hasjim Djalal, their endorsement was because Moscow and Beijing dedicated their naval forces for coastal defence, so they had no compelling strategic stake in the use of Indonesia's seas.⁸⁷

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

The archipelagic State concept was raised in the First United Nations Conference on the Law of the Sea (UNCLOS) in 1958 but it was not recognised. The joint proposal submitted by the Philippines and Yugoslavia concerning archipelagos was defeated.⁸⁸ In UNCLOS II in

⁸² D P O'Connell, above n 16, 39.

⁸³ The verbatim statement by the US Delegation could be found in: *United Nations Conferences on the Law of the Sea: Official Records, First Conference, 1958 2-3*, William S. Hein & Co 2nd edition, New York, 1980.

⁸⁴ The United Kingdom stated that the term "archipelago" applies only to a small, compact group of islands, while the straight baseline principle applies only to sharply indented coasts and fringes of islands. NAA: A 1838,696/2/5 Part I.

⁸⁵ Sahono Soebroto, Sunardi and Wahyono, 'Konvensi PBB tentang Hukum Laut', *Sinar Harapan* (Jakarta), 1983, vi, (in Indonesian). France submitted a formal protest on 8 January 1958; Netherlands on 7 January 1958; On 3 January 1958, Britain notified that the new territorial limit was invalid and thus not applicable to its citizens, ships, and airplanes. Australia followed suit on 3 January 1958.

⁸⁶ Anonymous, 'The New Piracy', *The Times* (London), 18 December 1957, 9; Anonymous, 'Singapore protest', *The Times* (London), 16 December 1957, 8.

⁸⁷ Hasjim Djalal, above n 70, 63.

⁸⁸ Mohamed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995), 81-82.

1960,⁸⁹ held a few months after Indonesia's made a unilateral action to enact the Act Number 4 of 1960 on Indonesian waters, the question of the precise limits of the territorial sea and the special problem of archipelagos and island groups was also left unsettled. In late 1961, the Indonesian Government passed legislation ratifying the Geneva Conventions on the high seas,⁹⁰ continental shelf⁹¹ and fishing,⁹² without mention of the Convention on the Territorial Sea and the Contiguous Zone.⁹³ However, the Secretary-General of the United Nations refused to accept the ratification of Indonesia because the Geneva Conventions on the high seas, continental shelf and fishing did not allow States to make a reservation when ratifying.⁹⁴

A further Indonesian statement on the archipelagic State doctrine appeared in the form of a Presidential Decree Number 103 of 1963 on Declaration of Indonesian Waters to be the Maritime Domain. The Decree was meant to overcome the discrepancy between the colonial ordinances and those which had revoked the decrees of the colonial Governor-General concerning the Maritime Domain. Act Number 4 of 1960 revoked portions of Article 1 of the Dutch East Indies colonial ordinance on the maritime domain, but the main body of law was left intact.⁹⁵ Thus, under Indonesian law, most of the sea space formerly regulated by the colonial ordinances had become internal waters, but colonial law governing them was meant to apply to the high seas.

The other element of Indonesian positive law was enacted in 1971 and related to the archipelagic State doctrine and affected innocent passage rights of foreign ships. Presidential Decree Number 16 of 1971 provided further explanation of the requirements of foreign vessels' transiting through Indonesian Waters. The Decree created two types of

⁸⁹ The Second United Nations Conference on the Law of the Sea, 1960.

⁹⁰ *United Nations Convention on the High Seas*, 450 UNTS 11.

⁹¹ *United Nations Convention on the Continental Shelf*, 449 UNTS 331.

⁹² *United Nations Convention on Fishing and Conservation of the Living Resources of the High Seas*, 559 UNTS 285.

⁹³ Act Number 19 of 1961 on *Ratification of Three 1958 Geneva Conventions on the Law of the Sea* (State Gazette Year 1961 No. 276).

⁹⁴ The letter of Secretary General No.LE 139 (1-2) dated 12 September 1961.

⁹⁵ The rest of the Articles of the TZMKO 1939 concerning law enforcement at the sea which still valid until now, especially on Procedural Criminal Code.

permits: “sailing permits” and “security permits”.⁹⁶ The sailing permits applied to all non-military foreign vessels, except non-military vessels engaged in activities which may affect Indonesian security, such as hydrographic surveys or which require operation in “closed or restricted areas.”⁹⁷ Non-military vessels engaged in such activities and all foreign military vessels were required to obtain a “security clearance”, from the Minister of Defence and Security.⁹⁸ Non-military vessels engaged in sensitive activities required both a sailing permit and a security clearance.

Until now, there are many laws and regulation on the implementation of LOSC, but it seems only maritime space issues that satisfied with Indonesian interest. When it deliberations on the utilization of the marine resources and also the interest of Indonesia on maritime safety and security, there are many issues that have to be regulated further.

IV. THE IMPORTANCE OF INDONESIAN WATERS

Indonesia, as the world’s largest archipelagic State, consists of 17,504 islands,⁹⁹ with an approximate 7.73 million km² of sea territory made up of substantial living and non living natural resources. Indonesia and the international community have opposing interests.¹⁰⁰ The international community as user States argue that Indonesia has to leave open all routes normally used for international navigation and guaran-

⁹⁶ Article 1, Presidential Decree Number 6 of 1971.

⁹⁷ Article 3, Presidential Decree Number 6 of 1971.

⁹⁸ Article 2, Presidential Decree Number 6 of 1971.

⁹⁹ Originally, Indonesia had 17,508 islands based on the publication of Indonesian Hydro-Oceanographic Office on Figures of Indonesian Territory; however, after the Republic of Timor Leste (hereinafter referred to as East Timor) gained its independence, two islands (Arturo and Yako Islands) were ceded to East Timor. Further to this, the International Court of Justice in 2002 decided that Sipadan and Ligitan Islands should become part of Malaysia. Indonesian Navy Hydrographic Office, ‘Figures of Indonesian Territory’ (Indonesian Navy Hydrographic Office, 2003); Biro Pusat Statistik (Bureau of Central Statistic/BPS) of Indonesia <https://www.bps.go.id/website/pdf_publicasi/Statistik-Indonesia-2016--_rev.pdf, Statistical Yearbook of Indonesia 2016.

¹⁰⁰ Mohamed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995), 8.

tee no interference with such passage.¹⁰¹ On the other hand, Indonesia wishes to secure its national interests. In this respect, the preservation of the island group's unity is of key importance, along with jurisdiction over intervening waters and seabed areas. Thus, in certain cases, these interests overlap and often create conflict between Indonesia and the international community. Since Indonesian waters have many sea lanes of communication, and are therefore vital to world trade¹⁰² and military movement, Indonesia's maritime policy regarding navigation will always be of interest to the international community.¹⁰³

Indonesian waters contain critical sea lanes of communication for sea-borne trade, naval movement, and other maritime interests.¹⁰⁴ In Indonesian waters, there are at least six choke points, comprising the Malacca Strait, Singapore Strait, Sunda Strait, Lombok Strait, Ombai and Wetar Straits; all of which are used for international navigation.¹⁰⁵ While Indonesia has strategic interests in commerce, peace, stability and security in the region, it must also address potentially negative effects associated with international navigation, such as marine pollution, degradation of marine resources and maritime criminal activities.¹⁰⁶

Although there is no exact statistic depicting the sea and air traffic passing through Indonesian waters,¹⁰⁷ it is believed that Indonesian wa-

¹⁰¹ Interference to the passage will lead to time delay and extra costs for maritime transport. See, Kazumine Akimoto, 'Re-routing Options and Consequences' in Andrew Forbes (ed), *The Strategic Importance of Seaborne Trade and Shipping: A Common Interest of Asia Pacific*, Australian Maritime Affairs (2002) vol 10, 113.

¹⁰² The world shipping market is broadly divided into two categories, namely: bulk shipping and container shipping. A bulk carrier is a ship used to transport crude oil, iron ore and other bulk cargoes in large volumes. Cargoes are divided into two categories which are dry cargo and liquid cargo.

¹⁰³ Reynolds B Peele, 'The Importance of Maritime Chokepoints' (1997) 27(2) *Parameters* 14, 70.

¹⁰⁴ Indonesian Navy Doctrine in Markas Besar TNI AL (Indonesian Navy Headquarters), *Eka Sasana Jaya* (1st ed, 2004) (in Indonesian), 3.

¹⁰⁵ *Ibid*, 9; Lewis M Alexander, *Navigational Restrictions within the new LOS context: Geographical Implications for the United States* (1986), pp. 289-297; Michael Leifer, *International Straits of the World: Malacca, Singapore and Indonesia*, *International Straits of the World* (1978), 6-11.

¹⁰⁶ Markas Besar TNI AL (Indonesian Navy Headquarters), above n 105, 2-15.

¹⁰⁷ It is difficult to find exact figures on the number of ships and aircraft which transverse Indonesian waters from the Department of Communication and Department

ters are highly strategic because of their geographical locations.¹⁰⁸ Indonesian waters connects States in two continents: Asia¹⁰⁹ and Australia;¹¹⁰ and two oceans: the Indian and Pacific Oceans. Every year, many ships pass through Indonesian waters using various straits¹¹¹ carrying cargo ranging from crude oil to finished products, coming from ports all over the world.¹¹² These Indonesian straits are known as the arteries of the world economy.¹¹³ Indonesian waters are also used for movement of military auxiliaries between the Indian Ocean and the Pacific Ocean.¹¹⁴

Indonesian waters have become the focus of strategic consideration by user States due to a number of factors, including economic, military and oil considerations. These factors are interrelated and exert distinct dynamic impacts and outcomes for all concerned States, including economic, socio-cultural, political and military considerations. In certain

of Marine and Fisheries of Indonesia. The Balance Sheet of Indonesian Trade indicates that the export and import are increased significantly up to 137.020,4 (export) and 129.197,3 (import) valued Million US\$ in 2008, sources National Portal of Republic of Indonesia <<http://www.indonesia.go.id>> at 5 January 2009. Those export and import are related to Indonesian seaborne trade because a major mode of transport for Indonesia's export and import is by sea.

¹⁰⁸ Geography and Strategy setting could be read further in John H Noer and Gregory David, *Chokepoints: Maritime Economic Concerns in Southeast Asia* (1996); James E Toth, *Military Strategy Note: Strategic Geography* (1995).

¹⁰⁹ Examples of emerging industry countries in Asia are China, Japan, India, Taiwan, and South Korea.

¹¹⁰ Australia is known as an exporter of coal and ore to industries' countries in Asia <http://www.dfat.gov.au/facts/trade_fast_facts.html>, at 7 January 2009.

¹¹¹ The straits of Malacca, Singapore, Lombok, and Makasar are the most important straits for international seaborne trade and also known as choke points within Indonesian waters.

¹¹² Statistic of seaborne trade flow in the Asia-Pacific which also pass through Indonesia could be seen in Christopher Baldwin, *Seaborne Trade Flows in the Asia Pacific Present and Future Trends* (2001).

¹¹³ See, the importance of straits regimes in John Norton Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 *American Journal of International Law* 43, 79-80; Jin-Hyun Paik, 'Maritime Security in East Asia: Major Issues and Regional Responses' (2005) 12(2) *Journal of International and Area Studies* 15, 15.

¹¹⁴ See, U S Department of Defense, *National Security and the Convention on the Law of the Sea* (2nd ed, 1996), pp.5-6, 11; Donald Rumsfeld, 'Strategic Imperative in East Asia' (1998) Lecture 605 *Heritage Lecture* <<http://www.heritage.org/Research/AsiaandthePacific/HL605.cfm>> at 27 December 2008.

cases, Indonesian waters turn out to be where all such interests converge. For instance, sea lanes of communication in Indonesian waters give Indonesian waters a certain strategic value. The following section will explore the extent to which Indonesian waters have significant strategic implications from economic (particularly with regard to oil and gas), and military perspectives.

A. ECONOMIC IMPLICATIONS

David Ricardo has pointed out that States would benefit if they could use comparative advantages in the production and export of certain goods and if the transport costs of such exports do not exceed the margin.¹¹⁵ There is no doubt that current global commodity trade continues to grow and, in certain aspects, has attained real strategic significance, particularly in the trade of oil, gas and minerals. Seaborne trade represents the most important mode of transport as it shortens the usually long distances between areas of the world where production costs differ significantly while also offering efficiency through the low cost of such transport. This is the reason that seaborne trade has become centrally important to the international economic system and a source of wealth. For example, in 2015, according to the United Nations Conference on Trade and Development (UNCTAD), the world economy embarked on a slow mowing recovery led by uneven growth in developed economies and a slowdown in developing countries and economies in transition. In 2014, the world gross domestic product (GDP) increased marginally by 2.5 per cent, up from 2.4 per cent in 2013. Meanwhile, world merchandise trade increased by 2.3 per cent; this is down from 2.6 per cent in 2013 and below the pre crisis levels.¹¹⁶

According to Baldwin, the key seaborne trade trends for the Asia-Pacific over the next 10 to 20 years will be based on energy fuels and mineral exports, value-added manufactures, and agricultural produce, including grains and meat.¹¹⁷ These commodities will be transported to

¹¹⁵ David Ricardo, *On the Principles of Political Economy and Taxation* (3rd ed, 1817), 89-91, cited by Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (2007), 13.

¹¹⁶ UNCTAD Secretariat, *United Nations Conference on Trade and Development, Review of Maritime Transport, 2015* (2015), 2-5.

¹¹⁷ Christopher Baldwin, *Seaborne Trade Flows in the Asia Pacific Present and*

other countries by sea and most of them will pass through Indonesian waters. Thus, Indonesian waters have a strategic impact on the economy of not only the region, but also the entire world, especially on seaborne trade, as can be seen in.

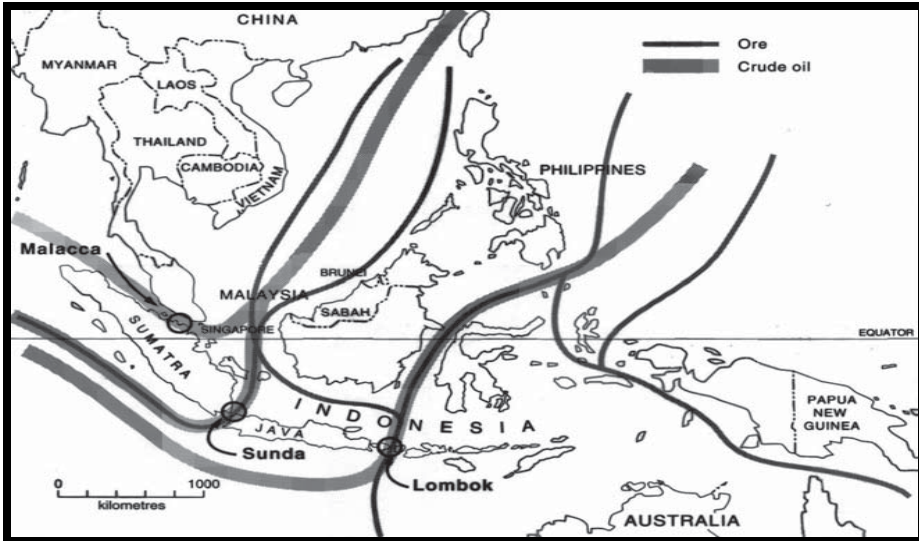


Figure 2. Routes of Iron and Ore Carrier and Tankers in the Asia-Pacific¹¹⁸

According to an UNCTAD report, energy is one of the most important drivers of economic development and is a key determinant for the quality of people's daily lives.¹¹⁹ In the International Energy Outlook 2008 projections, total world consumption of marketed energy is projected to increase by 50 percent from 2005 to 2030.¹²⁰ The rapid eco-

Future Trends (2001), 28-29.

¹¹⁸ Source of map: Peter J Rimmer, 'Commercial Shipping Patterns in the Asia Pacific Region, 1990-2000: the Rise and Rise of China' in Andrew Forbes (ed), *The Strategic Importance of Seaborne Trade and Shipping: A Common Interest of Asia Pacific*, Australian Maritime Affairs (2002) vol 10, 35, 39.

¹¹⁹ Note by the UNCTAD Secretariat, TD/B/C.I/MEM.2/8, 12 January 2010. <http://unctad.org/en/Docs/cimem2d8_en.pdf>

¹²⁰ Energy Information Administration, <<http://www.eia.doe.gov/oiaf/ieo/world.html>>, at 28 December 2008.

conomic development of Asian countries comes with a heavy price: a high dependence on the import of raw materials, especially oil. For example, since 1993 China has had to import large volumes of crude oil to satisfy economic demands, particularly demand from its own industries. At least 32 per cent of China's oil is imported from the Middle East.¹²¹ It is obvious that the bulk of the Middle Eastern oil to Northeast Asian economies such as China, Japan, Taiwan, and South Korea, will pass through Indonesian waters, such as the Straits of Malacca, Lombok, or Sunda. The uninterrupted flow of imported energy must be secured so as not to jeopardise economic growth.

Moreover, in addition to oil, these countries also need coal and gas, including liquid natural gas. Australia is one of the world's biggest exporters of coal and iron ore.¹²² Ships carrying coal and iron ore from Australia will pass through Indonesian waters.¹²³ Like Australia, Indonesia too is an exporter of mineral resources to countries such as China, India, Japan and South Korea.

B. NAVAL MOVEMENT

There is no doubt that securing energy flow usually parallels a need to secure the movement of naval auxiliaries so that they may guarantee the security of energy supplies.¹²⁴ In addition, regional stability also requires the presence of naval forces. Thus, in certain circumstances, States tend to build up their naval forces in order to secure their inter-

¹²¹ Kevin X Li and Jin Cheng, 'Maritime Law and Policy for Energy Security in Asia: a China Perspective' (2006) 37(4) *Journal of Maritime Law and Commerce* 567.

¹²² In 2007, Australia's largest individual merchandise export items were coal (\$21 billion), iron ore (\$16 billion) and non-monetary gold (\$11 billion), <http://www.dfat.gov.au/facts/trade_fast_facts.html>, at 7 January 2009; See, eg, Ken Matthew, 'Trade and Shipping: A Common Interest of the Asia Pacific' in Andrew Forbes (ed), *The Strategic Importance of Seaborne Trade and Shipping: A Common Interest of Asia Pacific*, Australian Maritime Affairs (2002) vol 10, 53.

¹²³ Australia's largest merchandise trading countries are China, Japan, the United States and the Republic of Korea, <http://www.dfat.gov.au/facts/trade_fast_facts.html>, at 7 January 2009. Data of export and import of Australia <http://www.dfat.gov.au/publications/stats-pubs/dme/direction_exports_0708.pdf>, at 7 January 2013.

¹²⁴ According to Sir Walter Raleigh, "Whosoever commands the sea commands the trade; whosoever commands the trade of the world commands the riches of the world, and consequently the world itself," cited in James E Toth, *Military Strategy Note: Strategic Geography* (1995), 94.

ests.¹²⁵ While the presence of naval forces is necessary in certain circumstances, it sometimes may however create tension if such a presence is considered to threaten the sovereignty or interests of a coastal State. According to Bateman,¹²⁶ the maritime security scene in the Asia-Pacific region is currently volatile. This is due to threats of maritime terrorism,¹²⁷ bilateral tensions that occasionally re-surface,¹²⁸ and the ongoing problem of law and order at sea. Security concerns which interfere with navigation are very broad, but they can be limited to several activities such as piracy, terrorism, undocumented migration, trafficking of narcotic drugs and psychotropic substances, illegal fishing, and pollution.¹²⁹ These concerns sometimes require the involvement of military presence to be dealt with effectively.

The United States naval bases in the Asia-Pacific region are in Hawaii, Guam and Japan.¹³⁰ Furthermore, there are the United States naval bases in the Indian Ocean, such as in Diego Garcia¹³¹ which typically concerns itself with transferring warships and their auxiliaries to the other United States naval bases for deterrence purposes.¹³² Moreover,

¹²⁵ Regional countries spend a combined US\$ 14 billion on new naval ships, Defence expert say on Naval ship spending to increase in Asia Pacific, the China Post (11 November 2003) <<http://www.chinapost.com.tw/news/2003/11/11/43042/Naval-ship.htm>>, at 2 January 2014; Jin-Hyun Paik, 'Maritime Security in East Asia: Major Issues and Regional Responses' (2005) 12(2) *Journal of International and Area Studies* 15, 18-19.

¹²⁶ Sam Bateman, 'The Growing Significance of Coast Guards in the Asia Pacific: A Quiet Development in Regional Maritime Security' in Aldo Chircop, Scott Coffen-Smout and Moira McConnell (eds), *Ocean Yearbook 20* (2006) 505, 505.

¹²⁷ This threat includes weapon of mass destruction (WMD).

¹²⁸ It is due to disputed claims to sovereignty over islands (Spratley, Paracel, Takeshima/Tokdo islands) or offshore areas (off Sipadan and Ligitan Islands).

¹²⁹ Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (2007), pp. 16-48; Kazumine Akimoto, above n 102, 119.

¹³⁰ Seventh Fleet homepage <<http://www.c7f.navy.mil/command-support.htm>>, at 10 September 2009.

¹³¹ Rahul Roy-Chaudhury, 'US Naval Policy in the Indian Ocean' (1998) 22(9) *Strategic Analysis* 17, 1319-21.

¹³² This is part of the United States military strategy as stated in U S Department of Defense, *National Security and the Convention on the Law of the Sea* (2nd ed, 1996) and the 1994 White Paper of the United States Navy and the United States Marine Corps; George Galdorisi, 'An Operational Perspective on the Law of the Sea' (1998)

the United States warships travelling to their allied countries such as Australia and Singapore usually pass through Indonesian waters.¹³³ The policy of ‘places not bases’ developed by the United States Forces in the Pacific for Southeast Asia is intended to enhance the United States strategic interests in maintaining regional stability and a credible power projection capability in the region and beyond.¹³⁴ This policy is also used to retain the United States influence in Asia on economic, capital and military access through the domination of sea lanes of communication. The Freedom of Navigation (FON) Program initiated by the Carter administration in 1979 and continued under Presidents Reagan, Bush, and Clinton, combines diplomatic action and the operational assertion of navigational rights.¹³⁵ This program emphasizes the use of naval exercises to discourage State claims inconsistent with customary international law, as reflected in the LOSC, and to demonstrate the United States resolve to protect navigational freedoms proclaimed in the LOSC.¹³⁶ The United States has always expounded the freedom of navigation as an important right for American military vessels while denying that same freedom to the former Soviet Union and China.¹³⁷ Moreover, the growing naval power of developing nations with regional ambitions, such as China and India, are rapidly building open ocean, ‘blue water’ naval capability which increases the requirements for the United States naval mobility.¹³⁸ According to Valencia, the United States’ flexibility regarding South Asia’s sea lanes of communica-

29(1) *Ocean Development and International Law* 43.

¹³³ The Changi Naval Base in Singapore has been newly expanded to accommodate Nimitz-class aircraft carriers and other large ships of the United States Seventh Fleet that are transiting from the Indian Ocean to the Pacific Ocean, <<http://www.globalsecurity.org/military/facility/singapore.htm>>, at 26 July 2011.

¹³⁴ U S Department of Defense, *The United States Security Strategy for East Asia Pacific Region* (1998).

¹³⁵ George Galdorisi, ‘The United States Freedom of Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea?’ (1996) 27(4) *Ocean Development and International Law* 399.

¹³⁶ U S Department of State, *Limit in the Seas: United States responses to Excessive Maritime Claims 2-4* (1992).

¹³⁷ Richard Sokolsky, Angel Rabasa and Richard C Neu, *The Role of Southeast Asia in U.S. Strategy Toward China* (2001), 11.

¹³⁸ George Galdorisi, ‘The United Nations Convention on the Law of the Sea: A National Security Perspective’ (1995) 89 *American Journal of International Law* , 209.

tion during the Cold War was designed to create options for the United States Navy to navigate its warships and submarines from east to west and vice versa.¹³⁹ Navies in the Asia-Pacific region travel from and to parts of the region in order to patrol, or to perform courtesy or joint exercises.¹⁴⁰ These activities occur sometimes in Indonesian waters or adjacent to Indonesian's EEZ, so those participants' ships must first pass through Indonesian waters.

V. THE LAW OF THE SEA CONVENTION AND INDONESIA

Indonesia is an archipelagic State according to the provisions of the LOSC and domestic legislation. As an archipelagic State, Indonesia has rights and obligations based on international law and the LOSC. In order to implement the LOSC and international law, Indonesia has enacted a number of laws and regulations which form part of an extensive and complex regulatory framework such as Act Number 6 of 1996 on Indonesian Waters, Act Number 17 of 2008 on Shipping, Act Number 43 of 2008 on State Territory,¹⁴¹ Act Number 23 of 1997 on Environmental Management,¹⁴² Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships Exercising Innocent Passage through Indonesian Waters¹⁴³, Government Regulation Number

¹³⁹ Mark J Valencia and James Barney Marsh, 'Access to Straits and Sealanes in Southeast Asian Seas: Legal, Economic, and Strategic Considerations' (1985) 16(4) *Journal of Maritime Law and Commerce* 513, 543-45.

¹⁴⁰ Indonesia conducts bilateral and multilateral joint exercises with Malaysia, Singapore, Indonesia, Australia, the United States, etc. Departemen of Defense of the Republic of Indonesia (Departemen Pertahanan Republik Indonesia), *Buku Putih Pertahanan Indonesia 2008* (2008) (in Indonesian), < http://www2.dephan.go.id/buku_putih/bukuputih.pdf>, at 17 August 2009. Indonesia now, has published a new defence white paper, the paper almost the same only some aspects have changes especially paradigm and threats.

¹⁴¹ Act Number 43 of 2008 on *State Territory* (State Gazette Year 2008 no. 177, Supplementary State Gazette no. 4925).

¹⁴² This Act is a comprehensive law on environmental management which covers land, sea, air space under Indonesia sovereignty as essential unity of the living space of Indonesian people. Article 20 and 21 of the Act covers pollution.

¹⁴³ Government Regulation Number 36 Year 2002 on *Rights and Responsibilities of Foreign Ships on Exercising of Innocent Passage through Indonesian Waters* (State gazette Year 2002 no. 70, Supplementary State Gazette no. 4209).

37 of 2002 on Rights and Responsibilities of Foreign Ships and Aircraft on Exercising Archipelagic Sea Lane Passage Right through and over Designated Archipelagic Sea Lane.¹⁴⁴

After considerable debate in UNCLOS III,¹⁴⁵ the archipelagic State concept was finally endorsed and became a new concept recognised under international law. Part IV of the LOSC incorporates the essential elements of the legal framework for archipelagic State. Although some of the provisions of Part IV are different from the Indonesian concept in the 1950s and 1960s, endorsement of the concept was a major diplomatic achievement for Indonesia and vindication of the Djuanda Declaration in 1957.

There are at least three differences between the provisions of the LOSC and the Indonesian concept in the 1950s and 1960s. The Indonesian concept only recognized internal waters and territorial sea as maritime zones under the sovereignty of Indonesia; whilst the LOSC provides internal waters, archipelagic waters, and territorial sea as maritime zones under sovereignty of archipelagic state. Basically, baselines in the 1950s and 1960s' Indonesian concept, was straight baselines which used to encompass all Indonesian archipelagos; the LOSC provides that many baselines such as normal baselines, straight baselines, archipelagic baselines can be used to enclose territory of archipelagic state. In terms of navigation, the Indonesian concept only recognized the right of innocent passage of foreign vessels in Indonesian waters; whilst the LOSC provides at least three navigational regimes namely innocent passage, transit passage, and archipelagic sea lanes passage that can be exercised in the maritime zones under sovereignty of the archipelagic State.

¹⁴⁴ Government Regulation Number 37 of 2002 on *Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes* (State Gazette Year 2002 no. 71, Supplementary State Gazette no. 4210), here in after Government Regulation Number 37 of 2002 <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin52e.pdf> at 126 November 2009.

¹⁴⁵ Further reading on the UNCLOS III, See, C F Amerasinghe, 'The Problem of Archipelagos in the International Law of the Sea' (1974) 23 *International and Comparative Law Quarterly*; Tommy T B Koh, 'Negotiating a New World Order for the Sea' (1983-1984) 24(4) *Virginia Journal of International Law* 24; Jose Antonio de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (1991), chapter 2 and 3.

One of the basic principles of the archipelagic State regime as incorporated in the LOSC is to allow archipelagic States, like Indonesia, to draw straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago,¹⁴⁶ thus creating archipelagic waters landward of the baselines. From the baseline, an archipelagic State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, its contiguous zone up to 24 nautical miles, its EEZ up to 200 nautical miles, and its continental shelf to the outer edge of the continental margin (which is measured seaward from the archipelagic baselines from which the territorial sea is measured). The archipelagic State has territorial sovereignty over the archipelagic waters enclosed by such baselines and over the 12 nautical miles territorial sea around the archipelago; it has sovereign rights over the natural resources of the EEZ and the continental shelf all the way to the outer edge of continental margin.

LOSC is the most comprehensive international treaty dealing with maritime affairs.¹⁴⁷ Although there are many gaps in LOSC,¹⁴⁸ but it covers almost the entire spectrum of ocean issues, including the designation of baselines, the establishment of the archipelagic State regime, the breadth of the territorial sea, the creation of 200 nautical miles exclusive economic zones (EEZs), definition of the outer limits of the continental shelf, seabed mining beyond areas of national jurisdiction, rules for navigation through straits, prevention of marine pollution, conduct of marine scientific research, fisheries management, and dispute settlement. Despite its wide-ranging provisions, there are still many issues which arise in the implementation of LOSC. These include controversial issues raised during its negotiation, such as issues relating to archipelagic states, passage rights, and deep seabed exploration.¹⁴⁹ In order to be accepted broadly and to accommodate the interests of all states, LOSC was adopted as a 'package deal' whereby coastal and user states

¹⁴⁶ Article 47, LOSC.

¹⁴⁷ The preamble of LOSC states that it covers all issues relating to maritime affairs.

¹⁴⁸ For example, there is a gap between LOSC and the 1944 Convention on International Civil Aviation (the Chicago Convention) with regard to the legal principle of airspace above archipelagic waters.

¹⁴⁹ See, Tommy T B Koh, 'Negotiating a New World Order for the Sea' (1983-1984) 24 *Virginia Journal of International Law* 24; Shunmugam Jayakumar, 'UNCLOS: Two Decades On' (2005) 9 *Singapore Year Book of International Law* 1, 2.

made mutual concessions to arrive at a balanced outcome.¹⁵⁰

The balancing of interests in LOSC seeks to benefit and accommodate both the interests of archipelagic states as well as other, non-archipelagic, coastal states.¹⁵¹ However, in terms of areas under territorial sovereignty, archipelagic states seem to benefit more than non-archipelagic states. However, the benefits of archipelagic status enjoyed by archipelagic states are offset by certain obligations under LOSC that they need to fulfil.¹⁵² For example, an archipelagic state is required to provide sea lanes of communication, specifically archipelagic sea lanes, through and over archipelagic waters and guarantee the safety and security of such sea lanes.¹⁵³ An archipelagic state also has the obligation to address threats from marine pollution, criminal activities at sea, degradation of marine resources, and accommodate the interests of other states.

LOSC provides a delicate balance between the rights and duties of coastal states and foreign ships with respect to navigation rights through the waters of coastal states.¹⁵⁴ This balance of interests is achieved through the implementation of the sovereignty and sovereign rights of coastal states and the navigational rights of maritime states.¹⁵⁵

¹⁵⁰ Hugo Caminos and Michael R Molitor, 'Perspective on the New Law of the Sea: Progressive Development of International Law and the Package Deal' (1985) 79 *American Journal of International Law* 871, 874-878. See also, Barry Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' (1981) 75 *American Journal of International Law* 324.

¹⁵¹ LOSC does not recognize the term non-archipelagic state, this paper use this term to underline the differences between archipelagic and non archipelagic states. Archipelagic state is a coastal state as well, but not every coastal state entitled as an archipelagic state. To become archipelagic state, a coastal state has to fulfil criteria in articles 46 and 47 of LOSC.

¹⁵² LOSC art 49 mentions that an archipelagic state has to rely on the provisions of LOSC while exercising its sovereignty.

¹⁵³ The concepts of maritime safety and maritime security became inextricably linked following 9/11. These concepts were reflected in the International Maritime Organization (IMO) changing its motto from 'safer ships, cleaner oceans' to 'safe, secure and efficient shipping on clean oceans.'

¹⁵⁴ Jon M Van Dyke, 'Balancing Navigational Freedom with Environmental and Security Concerns' (2004) 15 *Colorado Journal of International Environmental Law and Policy* 27.

¹⁵⁵ Karin M Burke and Deborah A DeLeo, 'Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea' (1982-1983) 9 *Yale Journal of*

Maritime states usually focus on the freedom of navigation in order to guarantee the movement of goods, peoples, and naval auxiliaries.¹⁵⁶ In contrast, coastal states are concerned with the proximity and density of vessel traffic and the possible negative impacts of shipping in their waters such as vessel-sourced pollution and maritime accidents which endanger the lives of their citizens and damage their properties and resources.¹⁵⁷ Moreover, dense traffic in certain straits may render it difficult or impossible for a coastal state to fully utilise its fisheries and seabed resources.

There are some obligations of archipelagic state which are to accommodate the rights of user states and ships, for example, by ensuring safe passage through and over its archipelagic waters, notably through innocent passage and archipelagic sea lane passage. Like other coastal states, archipelagic states need to allow innocent passage for ships in their territorial seas,¹⁵⁸ but they also need to facilitate innocent passage in archipelagic waters.¹⁵⁹ Further, coastal and archipelagic states need to allow transit passage for ships and aircraft passing through straits used for international navigation.¹⁶⁰

There are at least thirty obligations relating to the Indonesian waters as stipulated by the provisions of the LOSC (Parts II, III, and IV), which Indonesia must fulfil.¹⁶¹ The right granted to other States in Indonesian waters generally satisfy the specific interests of neighbouring States, for example, the fishing rights, maintenance of existing submarine cable, and the rights of Singaporeans to conduct sea trials for ships in the

World Public Order 390.

¹⁵⁶ W Michael Reisman, 'The Regimes of Straits and National Security: An Appraisal of International Lawmaking' (1980) 74 *American Journal of International Law* 30, 67.

¹⁵⁷ Karin M Burke and Deborah A DeLeo, above n 156, 401.

¹⁵⁸ LOSC art 17.

¹⁵⁹ LOSC art 52.

¹⁶⁰ LOSC art 38.

¹⁶¹ Part II, Articles 2 (3), 17, 21, 22 (3), 24, 26 (1), 27, and 28; in Part III, Article 54 insofar as it applies to Articles 39 and 34 (2), Article 54 insofar as it applies Articles 42 (1, 2, and 3), and Article 54 insofar as it applies Article 44; in Part IV, Article 47 insofar as it relates to Articles 48, 3, 4, 5, 6, 7, 9, 10 and 11; Article 48 insofar as it relates to Articles 3 - 15, 33 (2), 50, 57, 76; and Article 49 insofar as it relates to Article 2 (3); Articles 51 - 53.

Natuna Sea. Furthermore, Indonesia must accord certain rights to the international community regarding navigation; for example, by the designation of archipelagic sea lanes, and allowing innocent passage and transit passage through Indonesian waters. The rights granted to other States within archipelagic waters are based on pre-existing State practice in such waters.

A. RIGHTS OF INNOCENT PASSAGE

The freedom of navigation¹⁶² is a universally-recognised rule of international law. In addition to freedom of navigation applying to shipping on the high seas, rights of access to and from the high seas and between different maritime zones¹⁶³ have also been recognised. For this reason, ships of all nations enjoy certain rights of navigation in some maritime zones which are subject to the sovereignty of coastal States.

As mentioned earlier, the maritime zones under the sovereignty of States consist of internal waters, archipelagic waters and territorial seas. However, in exercising its sovereignty, an archipelagic State is required to conform to the provisions in the LOSC and other rules of international law.¹⁶⁴ Both the LOSC and other established rules of customary international law attempt to reconcile the opposing interests of archipelagic States and the international community in specific maritime zones.¹⁶⁵ Limitations on the exercise of sovereignty in the LOSC and international law are effected through the granting of navigational and over flight rights through waters/area under sovereignty of coastal States.

¹⁶² The freedom of navigation has always been attributed to the great works of Hugo Grotius which were later questioned by John Selden. There are many authors who wrote about freedom of navigation. Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (2007); Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990) pp 38-43; Shekhar Ghosh, 'The Legal Regime of Innocent Passage Through the Territorial Sea' in Hugo Caminos (ed), *Law of the Sea* (2001) 37; C J Colombos, *International Law of the Sea* (6th ed, 1967); Ruth Lapidot, 'Freedom of Navigation- Its Legal History and Its Normative Basis' (1974-75) 6(2) *Journal of Maritime Law and Commerce* 265.

¹⁶³ The LOSC recognised maritime zones consist of internal waters, archipelagic waters, territorial sea, exclusive economic zone, and high seas.

¹⁶⁴ Articles 2 (3) and 49 (3), LOSC.

¹⁶⁵ Shekhar Ghosh, above n 163, 39.

The exercise of sovereignty and the duty to provide innocent passage to foreign ships results in two sets of competing interests, namely; the interests of coastal or archipelagic States and user States. On the one hand, coastal or archipelagic States wish to control their maritime zones in order to protect their national interests such as their economic well-being, the marine environment and security.¹⁶⁶ On the other hand, user States or flag States want free and unimpeded use of the same maritime zones which will ensure maximum freedom of access to the ocean for transportation, communication, and the production and exchange of raw material and goods.¹⁶⁷ This conflict of interest hinges on the issue of sovereignty and navigational rights.¹⁶⁸ The LOSC and international law try to balance these competing interests by providing rules and guidance.

In order to accommodate the interest of user States on innocent passage¹⁶⁹, Indonesia has promulgated Act Number 6 of 1996 on Indonesian Waters¹⁷⁰ and Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships Exercising Innocent Passage through Indonesian Waters.¹⁷¹ Indonesia believes that these laws and regulations which deal with the rights and responsibilities of ships exercising the right of innocent passage are based on the LOSC. It could

¹⁶⁶ Myres S McDougal and William T Burke, 'Crisis in the Law of the Sea: Community Perspective versus National Egoism' (1958) 67(4) *The Yale Law Journal*, 542.

¹⁶⁷ Based on the United States Department of State, Pub No. 112. The United States has a Freedom of Navigation (FON) Program. The rationale behind the FON Program, is as follows::

Operations by the United States naval and air forces designed to emphasize internationally recognised navigational rights and freedoms complement the United States Diplomatic efforts. These assertions of rights and freedoms tangibly exhibit US determination not to acquiesce in excessive claims to maritime jurisdiction by other states.

¹⁶⁸ Karin M Burke and Deborah A DeLeo, above n 156, 403

¹⁶⁹ Article 17, LOSC

¹⁷⁰ Act Number 6 Year 1996 on *Indonesian Waters* (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647), hereinafter referred to as Act Number 6 of 1996 on Indonesian Waters or Act Number 6 of 1996.

¹⁷¹ Government Regulation Number 36 Year 2002 on *Rights and Responsibilities of Foreign Ships on Exercising of Innocent Passage through Indonesian Waters* (State gazette Year 2002 no. 70, Supplementary State Gazette no. 4209), hereinafter referred to as Government Regulation Number 36 of 2002 or GR 36/2002.

be seen that all provisions on those laws and regulations¹⁷² on innocent passage always refer to provisions in the LOSC.¹⁷³ However, it is debatable whether Indonesia has indeed implemented the LOSC faithfully or whether there are any loopholes in its implementation which will create disputes in the future.

B. RIGHTS OF ARCHIPELAGIC SEA LANE PASSAGE

The archipelagic State has sovereignty over its archipelagic waters, including the super-adjacent airspace, seabed and subsoil, and the resources therein.¹⁷⁴ This sovereignty is subject to a number of rights enjoyed by foreign States, such as allowing passages through the archipelagic waters,¹⁷⁵ the obligation to respect existing agreements with other States, recognition of traditional fishing rights and other legitimate activities,¹⁷⁶ and respect for existing submarine cables and permit maintenance and replacement of such cables.¹⁷⁷

The right of passage of user States was one of the contentious issues in the negotiation of the LOSC provisions on the archipelagic waters.¹⁷⁸ The final text adopted was a compromise which attempted to balance the interests of coastal States includes archipelagic States and user States.¹⁷⁹ The regime of archipelagic sea lane passage evolved as

¹⁷² Acts, government regulation, president decree, president regulation, regulation issued by minister are known as laws and regulations.

¹⁷³ Reference on the articles of the LOSC is mentioned in the preambles and elucidation of the laws and regulations on innocent passage.

¹⁷⁴ Articles 2 and 49 (2), LOSC.

¹⁷⁵ Articles 52 and 53, LOSC.

¹⁷⁶ Articles 47 (6) and 51 (1), LOSC.

¹⁷⁷ Article 51 (2), LOSC.

¹⁷⁸ See, Tommy T B Koh, 'Negotiating a New World Order for the Sea' (1983-1984) 24(4) *Virginia Journal of International Law* 24; Shunmugam Jayakumar, 'UNCLOS-Two Decades On' (2005) 9 *Singapore Year Book of International Law* 1; Mohamed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995), 163.

¹⁷⁹ LOSC was adopted as a 'package deal' whereby coastal and user States made mutual concessions to arrive at a balanced outcome. See, Hugo Caminos and Michael R Molitor, 'Perspective on the New Law of the Sea: Progressive Development of International Law and the Package Deal' (1985) 79 *American Journal of International Law* 871; Barry Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' (1981) 75(2) *American Journal of International Law* 324.

an attempt to balance the territorial integrity and national security of the archipelagic States with the right of transit through passageways which fall within the archipelagic waters. As Wisnumurti notes: ‘... the regime of archipelagic sea lanes passage is a compromise between the regime of innocent passage advocated by Indonesia (on the basis of the 1957 Djuanda Declaration and the 1960 Law No. 4) and the other archipelagic States, ...and the regime of freedom of navigation advocated by the maritime powers...’¹⁸⁰ This was a key issue because of the insistence by major naval powers in the Conference on the necessity of an assured right of transit for all vessels and aircraft through and over archipelagic waters.¹⁸¹

The exercise of the right of archipelagic sea lanes passage was a new type of passage introduced by the LOSC. Djalal points out that the exercise of the archipelagic sea lane passage is in accordance with the rules of international law and is not in strict conformity with the LOSC since there has been no rule of international law in the past on this matter.¹⁸² The designation of archipelagic sea lane passage itself poses some problems. The determination and the designation of sea lanes would not be easy since it would involve questions as to how many sea lanes should be designated, how to designate, and how to monitor and to regulate them in national legislation.¹⁸³ Indonesia would have to designate sea lanes through its archipelagic waters in which foreign vessels and aircraft are able to exercise the right of archipelagic sea lane passage. The designation of archipelagic sea lanes is the right of the archipelagic State but consultation with the user States and international organisations¹⁸⁴ would be well advised so as to accommodate the

¹⁸⁰ Nugroho Wisnumurti, ‘Indonesia and the Law of the Sea’ in Choon-ho Park and Jae Kyu Park (eds), *The Law of the sea : Problems from the East Asian Perspective* (1987), 395-96.

¹⁸¹ William T Burke, ‘Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text’ (1977) 52 *Washington Law Review* 34, 193-200.

¹⁸² Hasjim Djalal, ‘The Law of the Sea Convention and Navigational Freedoms’ in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms, and the New Law of the Sea*, (2000) vol 35, 1, 1, 5.

¹⁸³ Involvement of members of the Indonesian Parliament (DPR) in certain circumstances creates further problems having considered most of them are political appointees and most of them have not sufficient understand the issues.

¹⁸⁴ United Nations Office for Ocean Affairs and Law of the Sea, *Law of the Sea Bulletin No. 31* (1996), Part III, Competence of Relevant International Organizations

general interests of user States. Furthermore, the environmental aspect which requires marine scientific research, knowledge and technology also has to be taken into consideration while designating archipelagic sea lanes.¹⁸⁵

Indonesia has recognised that ships and aircraft exercise their rights of archipelagic sea lanes passage through and over the Indonesian archipelago. In order to accommodate such passage, Indonesia enacted Act Number 6 of 1996¹⁸⁶ and Government Regulation Number 37 of 2002¹⁸⁷ on Rights and Responsibilities of Foreign Ships and Aircraft on Exercising Archipelagic Sea Lane Passage Right through and over Designated Archipelagic Sea Lane.¹⁸⁸

C. RIGHTS OF TRANSIT PASSAGE

The extension of the territorial sea to a maximum of 12 nautical miles from the baseline under the LOSC resulted in most of the straits used for international navigation previously subject to the high seas freedom of navigation to fall within the territorial seas of one or more coastal States.¹⁸⁹ This resulted in these straits coming under the sover-

under the UN Convention on the Law of the Sea, 79-95. See also, International Maritime Organization, *Implications of the United Nations Convention on the Law of the Sea for International Maritime Organization* (2008), LEG/MISC.6, 10 September 2008; Satya N Nandan and Shabtai Roseanne, *United Nations Convention on the Law of the Sea 1982: A Commentary* (1993), 465.

¹⁸⁵ Hasjim Djalal, 'Indonesia's Archipelagic Sea Lanes' in Robert B Cribb and Michelle Ford (eds), *Indonesia Beyond the Water's Edge: Managing an Archipelagic State* (2009) 59, 63.

¹⁸⁶ Act Number 6 of 1996 on *Indonesian Waters* (State Gazette Year 1996 No. 73, Supplementary State Gazette No. 3647), here in after Act Number 6 of 1996 on Indonesian Waters.

¹⁸⁷ Government Regulation Number 37 of 2002 on *Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes* (State Gazette Year 2002 no. 71, Supplementary State Gazette no. 4210), here in after Government Regulation Number 37 of 2002 <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin52e.pdf> at 126 November 2009.

¹⁸⁸ Article 20, Act Number 6 of 1996.

¹⁸⁹ W Michael Reisman W Michael Reisman, 'The Regimes of Straits and National Security: An Appraisal of International Lawmaking' (1980) 74(48) *American Journal of International Law* 30, 67; W George Grandison and Virginia J Meyer, 'International Straits, Global Communications, and the Evolving of the Sea' (1974-75) 8 *Vanderbilt*

eignty of coastal States¹⁹⁰ and consequently governed by the restrictive innocent passage rules of navigation. However, in straits used for international navigation, the maritime powers and user States wanted to secure their navigational rights which were not sufficiently safeguarded under the right of innocent passage.¹⁹¹

Straits which are considered as narrow waterways for international navigation are often referred to as “choke points”. In certain choke points, States bordering the choke points are permitted to restrict passage.¹⁹² There are at least six straits used for international navigation which commonly referred to as “choke points” in Indonesian waters, namely the Malacca Strait, Singapore Strait, Sunda Strait, Lombok Strait, Makassar Strait, and Ombai-Wetar Straits.¹⁹³ These straits play a dominant role in global trade which makes them of global strategic importance.¹⁹⁴

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

Journal of Transnational Law 393, 393-94.

¹⁹⁰ Myres S McDougal and William T Burke, ‘The Community Interest in a Narrow Territorial Sea: Inclusive versus Exclusive Competence over the Oceans’ (1960) 45 *Cornell Law Quarterly* 171, 165-66.

¹⁹¹ The right of innocent passage could be suspended by coastal States, if passage endangers sea communication. See, John Norton Moore, ‘The Regime of Straits and the Third United Nations Conference on the Law of the Sea’ (1980) 74 *American Journal of International Law* 43, 86.

¹⁹² Restriction may include traffic separation scheme; and use of pilotage.

¹⁹³ Lewis M Alexander, *Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States* (1986), 289-98; Michael Leifer, *International Straits of the World: Malacca, Singapore and Indonesia*, International Straits of the World (1978), 76-85; Kresno Buntoro, ‘Burden Sharing: An Alternative Solution in order to Secure Choke Points within Indonesian Waters’ (2009) 1(4) *Australian Journal of Maritime and Ocean Affairs* 13, 123-25.

¹⁹⁴ Markas Besar TNI AL (Indonesian Navy Headquarters), above n 105, 4.

VI. CONCLUSION

This paper has provided the historical context of the development of Indonesia's archipelagic State doctrine and shown development of the archipelagic State doctrine of Indonesia is based on its geographical setting, economic interest and national security. The maritime policy of Indonesia can be traced back to the Dutch colonial period which stated that the territorial limit was three nautical miles and defined the way those baselines were drawn. After the independence of Indonesia, the colonial concept of maritime territory was not favoured by Indonesia. Later, the struggle for Indonesian independence affected the way Indonesia looked upon its own territory.

The archipelagic State doctrine is a new legal concept for ocean regimes around the world. The Indonesian archipelagic concept, as a maritime policy known *Wawasan Nusantara*, began in 1957 through what is recognized as the *Djuanda Declaration*. This Declaration stated that the islands of Indonesia and the seas between the islands formed one integral unit. This political declaration was transformed into a legal concept through Act Number 4 of 1960 on Indonesian Waters. It could be said that the *Djuanda Declaration* and Act Number 4 of 1960, influenced the adoption of the archipelagic State concept in the LOSC. Furthermore, Indonesia has enacted many laws and regulation in order to conform the provision in LOSC, such as Act Number 6 of 1996 on Indonesian Waters, Act Number 17 of 2008 on Shipping, Act Number 43 of 2008 on State Territory, Act Number 23 of 1997 on Environmental Management, Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships Exercising Innocent Passage through Indonesian Waters, and Government Regulation Number 37 of 2002 on Rights and Responsibilities of Foreign Ships and Aircraft on Exercising Archipelagic Sea Lane Passage Right through and over Designated Archipelagic Sea Lane. These laws and regulations created extensive and complex regulatory framework on maritime issues.

The provisions of the LOSC and other rules of international law have guaranteed sovereignty over the Indonesian's internal water, archipelagic waters, and territorial sea. Nevertheless, while exercising its sovereignty, Indonesia has to consider provisions in the LOSC and in international law in order to balance and secure Indonesia's interests,

the interests of its adjacent neighbouring States, as well as the interests of the international community.

Unlike sovereignty in the land territory, sovereignty of Indonesia in the maritime area has to be conformed and exercised under provisions in LOSC. It can be said that, there is no full sovereignty of Indonesia in the maritime area. It also shown that the interest of International community to Nusantara is navigation/communication and Indonesia has to accommodate the interest. Again, it might be different from the notion of *Nusantara* from first place, but Indonesia seems to take it. Finally, Indonesia needs to look again the Nusantara Concept for the sake of Indonesia interest within the nowadays-global maritime interest.

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