

# FREEDOM OF NAVIGATION AND ARCHIPELAGIC STATE: INDONESIAN CASE

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*Keberadaan Indonesia sebagai negara kepulauan yang lahir dari Konvensi Hukum Laut PBB telah menimbulkan konflik kepentingan dengan negara besar yang pada umumnya menganut doktrin "freedom of navigation". Konflik kepentingan tersebut telah menimbulkan berbagai masalah menyangkut pelaksanaan hak yang dinikmati kapal asing di dalam perairan teritorial negara kepulauan. Karangan ini mencoba membahas pangkal perselisihan antara "freedom of navigation" pada satu sisi dan "archipelagic state" pada sisi lain dan bagaimana hukum laut internasional mengkaji masalah tersebut.*



## Case Background

In September 1988, just three years after Indonesia ratified the 1982 United Nations Convention on the Law of the Sea (The LOS Convention) on 31 December 1985, the Government of Indonesia temporarily closed the Sunda and Lombok Straits for naval practice reason, without giving any notification and designating any alternative sea lanes before it took place<sup>1</sup>. Among countries that have been influenced by that action is the United States which has formally recognized Indonesian status as an archipelagic state in an the exchange of letters in May 1986 which is signed in July 1988

<sup>1</sup> William T. Burke, *International Law of the Sea*, Sup. I-1 (Lupus Publication, Detroit 1992).  
Lombok Strait is located between the islands of Bali and Lombok and having regard at "the most important passage for vessel proceeding between Makasar Strait (the Pacific Ocean) and the Indian Ocean, mainly on account of its width and the ease with which it can be navigated".

and attached to Indonesia-US Income Tax Treaty<sup>2</sup>.

This case has raised much more questions regarding the archipelagic state regime in International Law of the Sea, indeed there have been very tough negotiations regarding it in the Third United Nations Conference on the Law of the Sea (1982 Conference) that adopted The LOS Convention and the compromises that have been reached seemed unsatisfactory for archipelagic state perspectives<sup>3</sup>. This paper will discuss about the conflicting point between freedom of navigation on the one side and archipelagic state on the other side and how is the above case be seen from international law of the sea point of view.

## Freedom of Navigation V. Archipelagic State Regime

### A. The Compromise

The regime of archipelagic state did not legally exist in international law of the sea until The LOS Convention was adopted in 1982. It is clearly understood that the freedom of navigation has been developed for centuries and still has a significant role until recent development, whereas the first important legal issue regarding archipelago just raised not many years ago, with the International Court of Justice decision in the Anglo-Norwegian Fisheries Case in 1951 when the Court verified the usage of the straight baselines method in measuring coastal archipelagos water territory. Since then a preliminary attention has been given also to mid-ocean archipelagos and there were some literal actions taken by the states claiming themselves as archipelagic states regarding their jurisdictions on the sea surrounding their territories.

The LOS Convention came into force on November 16, 1994, after struggling more than two decades in having ratified by the countries are signatory to it. One of the basic changes that can be found in that convention

<sup>2</sup> For further discussion, see Barbara Kwiatkowska, "The Archipelagic Regime in Practice in the Philippine and Indonesia - Making or Breaking International Law", (1991) 6 *International Journal of Estuarine and Coastal Law*, 18-19. The United States argue that Strait of Lombok is subject to both the right of transit passage and the right of archipelagic sea lanes passage which cannot be suspended. See Burke, *supra* n.1, at Sup. 1-1 - 2.

<sup>3</sup> The regime of archipelagic state is formed by compromising between the freedom of navigation and the right of the mid-ocean archipelagic state. *Archipelagic States, Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (United Nations Office for Ocean Affairs and the Law of the Sea, 1990). See also Charlotte Ke, "The Archipelagic State, Convention and Practice", 1991 *Yale Law Journal*, 101-120.

is the regime of archipelagic state, whereas the status of the area, under which the traditional high seas freedom of navigation and overflight applied between the mid-ocean archipelagos, has been transformed to archipelagic water. Thus there are five different regimes relating to the right of navigation stand in archipelagic state, which are:

1. Internal Water; subjects to absolute sovereignty of archipelagic state, in case otherwise that internal water is previously used for international navigation before the usage of the straight baseline, then the right of innocent passage would apply (article 8 The LOS Convention);
2. Archipelagic Water; subjects to sovereignty of archipelagic state with respect to the right of archipelagic sea lanes passage or the right of innocent passage that is enjoyed by foreign vessel, whereas the first one will apply through the routes normally used for international navigation and the latter will apply through the other rest of archipelagic water (article 53 The LOS Convention), as will be discussed afterwards;
3. Territorial Sea; subjects to sovereign right of archipelagic state with exclusion of the right of innocent passage (article 17 The LOS Convention);
4. Exclusive Economic Zone; subjects to sovereign right of archipelagic state under which the high seas freedom of navigation will apply (article 58 The LOS Convention);
5. Strait used for international navigation; three different rights that can be applied here are the right of transit passage, the right of nonsuspendable innocent passage and the right of archipelagic sea lanes passage, as will be reviewed hereinafter (articles 38, 45 and 53 The LOS Convention).

## B. The Regimes of Archipelagic Water and Strait Used for International Navigation

### I. The Regime of Archipelagic Water

The legal development of the archipelagic water regime can be based on two hypotheses<sup>4</sup>. First, that is a direct result of the development of the doctrine of the territorial sea and the straight baselines principle or second, that is a sui generis regime established in this recent century as a compromise between the traditional concept of freedom of navigation and the

<sup>4</sup> Philost Tenggubul, *The Southeast Asian Archipelagic States: Concept, Evolution, and Current*

movement of the newly independent mid-ocean archipelagos. Consequently, there are some guarantees that have to be given by the archipelagic states to ensure the freedom of navigation still can be enjoyed. The result of that bargaining are the right of nonsuspendable archipelagic sea lanes passage and the right of innocent passage.

The archipelagic state may designate sea lanes suitable for the safe, continuous and expeditious passage of foreign vessel through its archipelagic water [article 53 (1) The LOS Convention]. This provision tends not to be mandatory rule, so there seems no obligation of archipelagic state to provide the sea lanes, where the right of archipelagic sea lanes passage will apply<sup>5</sup>. However, that right still may be enjoyed by the foreign ship even though such sea lanes are not designed, by using the routes normally used for international navigation. The right of archipelagic sea lanes passage is extremely important for international navigation, especially through Indonesian and Philippine archipelagic waters, since they both have been used as convenience international routes by foreign vessel since a long time ago.

In the archipelagic water which is not used for international navigation (there is no sea lanes on it) will apply the right of innocent passage, which can be suspended temporarily by archipelagic state for the protection of its security [article 51 (2) The LOS Convention]. This suspension shall not discriminate in form and in fact among foreign ships and has to be duly published, so the foreign vessel will be well informed before such suspension takes place.

## II. *The Strait used for International Navigation*

A general extension of territorial seas from three to twelve miles will have effect of enclosing some 116 international straits within territorial waters<sup>6</sup>. This could create problems of navigation, especially for the major maritime power such as United States and Japan, affecting their trade and security. However The LOS Convention have attempted to resolve these problem accordingly. Actually, there are six categories of international

<sup>5</sup> Morris F. Maduro, "Passage Through International Straits: The Prospects Emerging from the Third United Nations Conference on the Law of the Sea", (1980). *12. Journal of Maritime Law and Commerce*, 88.

<sup>6</sup> *Ibid* 69. This Regime is part of an indivisible package that 12 mile territorial sea was acceptable only if there would be a freedom of navigation through international straits. See Horace B. Robertson,

straits provided in The LOS Convention, which are<sup>7</sup>:

1. The normal international strait connecting one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone (article 37 The LOS Convention), where the right of transit passage shall apply;
2. The strait in which a route through the high seas or exclusive economic zone of similar convenience with respect to navigational and hydrographic characteristic exist (article 36 The LOS Convention), it depends on whether the straits state want to extend their territorial sea out to 12 miles that results in territorial sea overlap and the continued existence of a high seas corridor.
3. The strait that called "Messina Exception Strait" [article 38 (1) The LOS Convention], the regime of nonsuspendable innocent passage shall apply in this kind of strait;
4. The strait that called dead-end straits exception strait [article 45 (1)(b)], The LOS Convention also provided that the regime of nonsuspendable innocent passage shall apply in this particular strait.
5. The international strait that occur within archipelagic waters (article 46-54 The LOS Convention), the right of archipelagic sea lanes passage shall apply in this strait as well as in the other archipelagic water that used for international navigation, and
6. The strait which passage is regulated by long standing international convention in force [article 35 (c) The LOS Convention], this strait is governed by such particular convention.

In this regards, we can conclude that there are three different rights of foreign vessel that can be applied in the strait used for international navigation, which are (1) the right of transit passage; (2) the right of nonsuspendable innocent passage and (3) the right of archipelagic sea lanes passage. Sometimes these different rights could be applied in the same region, for instance in the Indonesian water, where the Strait of Malacca and the Strait of Lombok are located. In the Malacca Strait, the foreign ships can enjoy the right of transit passage as well as the right of nonsuspendable innocent passage, depending on the designation of their passage, whereas in the Lombok Strait they enjoy the right of archipelagic sea lanes passage.

## The Case of Lombok Strait

### A. Indonesian Position

As addressed above, in 1988 Indonesian government temporarily closed the Lombok Strait from international navigation. United States has made their complaint and deemed that action as violating of international law of the sea, in this respect the right of archipelagic sea lanes passage that is adopted in The LOS Convention. However, Indonesia has justified the action based on its "sovereign right to close the straits", and the right that applied in that strait is the right of innocent passage that can be impeded by the archipelagic state<sup>8</sup>.

This opinion seems to be based on the situation that there are no archipelagic sea lanes passage that have been proposed by Indonesia, so the rule that could apply here is the article 53 (12) The LOS Convention which has ambiguity on it. The routes normally used for international navigation tend to be unclear, and remain to the recognition of the archipelagic state on such routes. The other reason that was given by Indonesia was The LOS Convention was not yet in force, so there was no obligation of Indonesia to guarantee the rights addressed in The LOS Convention to be applied in its territory. This issue will be more uncertain in regard to the non party state, such as United States, so Indonesia could find the basis to ignore the protest that is given by the state not signatory to the convention.

In addition to that, Indonesia still has not revoked its regulations regarding its water territory, as enacted in Act No. 4 concerning Indonesian Waters, 18 February 1960<sup>9</sup>, which stated that all waters lying within the baselines are internal waters of Indonesia, that subject to Indonesian sovereignty<sup>10</sup>.

### B. The United States Position

Even though the United States is not a party to The LOS Convention, it has argued since the very beginning that both the right of transit passage and archipelagic sea lanes passage have already existed in customary international law, therefore they shall be enjoyed by all states in the world,

<sup>8</sup> See Ku, *supra* n. 3, at 479. Also see Mark J. Valencia and James Barney Marsh, "Access to Straits and Sea Lanes in Southeast Asian Seas: Legal, Economic, and Strategic Considerations", (1985) 16 *Journal of Maritime Law and Commerce*, 525.

<sup>9</sup> See UN, *supra* n.3, at appendix.

with or without joining the convention. This position is taken by United States while refusing to sign The LOS Convention and has been rejected by many other states, especially developing states, including Indonesia.

The question arises whether the United States can rely on customary international law to guarantee its enjoyment of the navigational right of foreign vessel in water territory of other state, in this regards in archipelagic water, which is adopted in The LOS Convention. Many experts in International Law argue that United States has indirectly threatened its position in international navigation<sup>11</sup>, since The LOS Convention is meant to be a "package deal" convention, where there is no country can pick up and choose whatever they want and leave what they do not want. On the contrary, some scholars affirmed that those rights have become customary international law, therefore they can be enjoyed by all states without any exception. Moreover the archipelagic states have to pay the status they got by assuring the exercise of the right previously enjoyed in such area<sup>12</sup>. Another view addressed to this matter is the acceptance of those navigational rights of foreign vessel in The LOS Convention after many years negotiation is evidence of the provisions' emerging status as customary law<sup>13</sup>.

### Conclusion

BHAKTI - DHARMA - WASPAKA

The conflict of interest between the freedom of navigation which is held by big maritime states on the one hand and the archipelagic states on the other hand, indeed has turn out the various problems regarding the implementation of the right enjoying by foreign vessel through the water territories of archipelagic state.

Indeed, Indonesia as a party to The LOS Convention should comply

<sup>11</sup> David A. Larson, "Innocent, Transit, and Archipelagic Sea Lanes Passage", (1987) 18 *Ocean Development and International Law*, 426-428, See also George V. Galdoris and James G. Stavridis, "United Nations Conference on the Law of the Sea: Time for A. U.S. Reevaluation?", (1992) 40 *Naval Law Review*, And see David Lawrence Treat, "The United States' Claims of Customary Legal Rights under the Law of the Sea Convention", (1984) 41 *Washington and Lee Law Review*.

<sup>12</sup> David A. Larson, "Innocent, Transit, and Archipelagic Sea Lanes Passage", (1987) 18 *Ocean Development and International Law*, 421-423, See also Said Mahmoudi, "Customary International Law and Transit Passage", (1989) 20 *Ocean Development and International Law*, 167-168. Also Richard J. Grunawalt, "United States Policy on International Straits", (1987) 18 *Ocean Development and International Law*, 457-458. And Luke T. Lee, "The Law of the Sea Convention and Third States", (1983), 77 *American Journal of International Law*.

<sup>13</sup> John King Gamble, Jr. and Maria Emekoye, "The 1982 Convention Law of the Sea

with regulations stipulated in it. All the rules pursuant to The LOS Convention have to be exerted by Indonesia, not only by enacting the national implementing regulations, such as the designation of sea lanes and traffic separation schemes<sup>14</sup>, but also by revoking the national laws conflicting with it. After all, this consideration has to be taken into account much seriously, since The LOS Convention has already come into force, which is meant has bound the contracting parties.

On the other hand, United States similarly cannot on its current position, since it is anomalous and ambiguous. Furthermore its assertion that innocent, transit and archipelagic sea lanes passage are customary international law has remained questionable, therefore the certainty on this matter would only be reached by accessing or ratifying The LOS Convention<sup>15</sup>, so it has a strong legal basis in protecting its interest instead only setting forth its influential power as a super power country.

Empat faktor yang menyebabkan seorang layak menjadi pemimpin, yakni: adabnya, kejujurannya, harga dirinya dan amanahnya.

<sup>14</sup> P.J. Slot, "The International Legal Regime for Navigation", (1985) 15 *Ocean Development and International Law*, 98.

<sup>15</sup> For further comments see Kwiatkowska, *supra* n.2., at 28-30. According to David L. Larson, the other approach that can be taken by the United States by issuing a formal declaration that it accept all of the 1982 Convention except Part XI on deep seabed mining as evidence of or the codification of customary international law. Even though this approach would not be as strong as accession or ratification, but under international law an executive declaration can bind just as a treaty or executive agreement. Larson, *supra* n.11, at 428. Further discussion can be found at John R. Stevenson and Bernard H. Oxman, "The Future of Submarine Mineral Resources", *Journal of Energy & Development*, 1982, p. 10.