

NAVIGATING LEGAL AMBIGUITY: FOREIGN MILITARY ACTIVITIES AND THE RIGHTS OF ADJACENT STATES UNDER ARTICLE 51(1) UNCLOS 1982

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Abstract

Article 51(1) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 exists within the framework of the archipelagic state regime. It provides a legal basis for immediately adjacent neighbouring states to continue exercising existing rights in specific areas that were previously considered international waters but have since come under the jurisdiction of an archipelagic state. The provision refers to these as “other legitimate activities” without offering a clear definition or scope. As a result, the ambiguity of this term undermines legal certainty. A notable example of this issue is the historical disagreement between Indonesia and Singapore over whether military exercises fall within the scope of “other legitimate activities” within Indonesia’s archipelagic waters. This article argues that the term should be jointly defined by the states concerned, as scholars suggest that Article 51(1) constitutes a pactum de contrahendo, thereby necessitating subsequent agreements. By exploring the historical context and scholarly interpretations, this paper seeks to clarify the ambiguous meaning of “other legitimate activities” under Article 51(1) of UNCLOS 1982.

Keywords:

archipelagic state; foreign military exercises; pactum de contrahendo; UNCLOS 1982

Abstrak

Pasal 51 (1) dari Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut (UNCLOS 1982) muncul karena adanya rezim negara kepulauan. Adapun Pasal 51(1) berusaha mengakomodasi hak (kegiatan) negara tetangga berdampingan yang telah dilakukan di wilayah yang sebelumnya merupakan laut bebas namun kemudian masuk sebagai wilayah maritim suatu negara kepulauan. Pasal 51(1) menggunakan istilah “*other legitimate activities*” untuk mengelompokkan kegiatan-kegiatan yang dimaksud tanpa definisi dan batasan yang jelas hingga saat ini. Dengan demikian, istilah yang digunakan sangat dapat ditafsirkan secara luas sehingga bermasalah pada kepastian hukum. Indonesia dan Singapura pernah memiliki masalah interpretasi berkenaan dengan istilah “*other legitimate activities*”, khususnya dalam menentukan apakah hak latihan militer Singapura termasuk sebagai hak negara tetangga berdampingan yang dapat dilakukan di dalam wilayah kepulauan Indonesia. Penulis berpendapat bahwa “*other legitimate activities*” harus disepakati oleh kedua belah pihak, mengingat Pasal 51(1) adalah *pactum de contrahendo* dan membutuhkan perjanjian tambahan sebagaimana diusulkan oleh para ahli. Dengan melihat pada rekam sejarah dan pandangan dari para ahli, penelitian ini bertujuan untuk memberi kejelasan terhadap istilah “*other legitimate activities*” dalam Pasal 51(1) UNCLOS.

Kata Kunci:

latihan militer negara asing; negara kepulauan; *pactum de contrahendo*; UNCLOS 1982

Introduction

Indonesia and Singapore are longtime neighbours in the Singapore Strait with Riau Islands being the closest Indonesian territory to the Lion City. Since the Dutch East Indies colonial government and the upcoming years after Indonesia declared its independence, the Indonesian waters bordering Singapore were very limited in distance. The *Teritoriale Zee en Maritieme Kringen Ordonantie 1939* or TZMKO 1939 implemented by the Dutch East Indies colonial government was the existing national legislation limiting maritime claims to no more than 3 nautical miles/NM.¹ After gaining independence in 1945, Indonesia's post-colonial government adopted and kept the TZMKO 1939 in effect for over a decade.² It was not until the then Prime Minister of Indonesia declared the Djuanda Declaration in 1957 which spearheaded the idea for an archipelagic state.³ Indonesia's unprecedented declaration before the international community proposed the waters in between and connecting the foremost part of the archipelago as a single part of Indonesian sovereignty.⁴

Consequently, the waters that were once international waters fell within Indonesian control since the Declaration surpassed the aforementioned 3 NM limit. Hence, under no circumstances Singapore or any foreign states were allowed to freely exercise their existing rights as if it was in international waters. The problem was that prior to the archipelagic state regime, the Singapore Armed Forces had been conducting military exercises in the now Indonesian controlled waters.⁵ Discussions between the two states were intense, mainly to negotiate military exercises by the immediately adjacent neighbouring state as existing rights that should be respected in the archipelagic state regime. Indonesian diplomats and their Singaporean counterparts mostly argued over Article 51 (1) United Nations Convention on the Law of the Sea (UNCLOS) 1982, with both countries debating the

¹ Indonesian Law Number 32 of the Year 2014 concerning The Sea, Explanation Section (hereinafter Bagian Penjelasan).

² Id.

³ Hasjim Djalal, *Indonesia and the Law of the Sea* 439 (Centre for Strategic and International Studies, Jakarta, 1995).

⁴ Id.

⁵ News Release by the Ministry of Defence of the Republic of Singapore on January 17 2008, available on <https://www.nas.gov.sg/archivesonline/data/pdfdoc/20080117995.htm>.

term “other legitimate activities” to define foreign military exercises as one of the existing rights that needs to be respected.

Although no concrete definition was yet to be determined, both countries engaged in several bilateral agreements including Military Training Area (MTA) Agreement 1995 and Defence Cooperation Agreement (DCA) 2007 in the following years after the archipelagic state regime was recognized.⁶ Unfortunately these two bilateral agreements have had its vicissitudes.⁷ In 2003, MTA 1995 was terminated by Indonesia who then accused Singapore for breaching its provisions. It was then got replaced by the DCA 2007, but the interpretation debacle remained, not to mention its prolonged ratification process. Nonetheless, the issues surrounding DCA 2007 and its predecessor, the MTA Agreement 1995 always put “other legitimate activities” under legal spotlight.⁸ Since the early days of negotiating Article 51 (1), Singapore had deep concern for the ‘potential loss’ of their military training grounds that were once in international waters but now falls within Indonesian controlled waters.⁹

In retrospect, Indonesia reluctantly ratified DCA 2007 until 2022, over a decade after its signature at Istana Tampak Siring.¹⁰ The Indonesian Parliament insisted that foreign military exercises were risky and sensitive by its nature.¹¹ As the political tug of war unfolded at the Senayan Parliament Complex in Jakarta, Singapore persisted by arguing “other legitimate activities” should not exempt its right to conduct military exercises. Be that as it may, UNCLOS does not provide any clear scope regarding what “other legitimate activities” may be, let alone defining it. Article 51 (1) fails to provide legal certainty when contradicting interpretation rises between Indonesia and Singapore.¹² A military exercise is rather self-explanatory,

⁶ Dedy Putra Brahmata, Anak Agung Bayu Perwita, and Hikmat Zaky Almubaroq, Pengaruh Defence Cooperation Indonesia dan Singapura Terhadap Lingkungan Strategis di Asia Tenggara dalam Perspektif Manajemen Pertahanan, Vol 10 NUSANTARA: Jurnal Ilmu Pengetahuan Sosial. 3585, 3586 (2023).

⁷ In the meantime, UNCLOS 1982 does not provide definitions regarding “other legitimate activities” in Article 51 (1).
⁸ Legal certainty remains as the primary concern.

⁹ Aristyo Rizka Darmawan, Catatan Hukum Terkait Implementasi Pasal 51 (1) UNCLOS Dalam Kaitannya Dengan Hak Tradisional Latihan Militer Di Perairan Kepulauan Indonesia, Vol 25 Jurnal Opini Yuris Direktorat Jenderal Hukum Dan Perjanjian Internasional Kementerian Luar Negeri Republik Indonesia. 20, 27 (2019)

¹⁰ Dedy Putra Brahmata, Anak Agung Bayu Perwita, and Hikmat Zaky Almubaroq, supra note 6, p. 3589.

¹¹ Aristyo Rizka Darmawan, Resolving Indonesia and Singapore’s UNCLOS Dispute, available on East Asia Forum, <https://eastasiaforum.org/2021/04/07/resolving-indonesia-and-singapores-unclos-dispute/>, accessed on January 25, 2024.

¹² Aristyo Rizka Darmawan, supra note 9.

there will be manoeuvres and firing exercises. But the central question remains, does these aforementioned activities constitute “other legitimate activities” based on Article 51 (1) UNCLOS?

This paper taps into the legal discipline to inquire a normative-based interpretation of “other legitimate activities.” The writer employs normative legal research by examining the broad spectrum of international laws concerning the sea and treaty interpretation as the focal point. Document-based data serves as the main data collection method for primary and secondary legal sources.¹³ For the former, the writer makes use of the binding international norms obtained predominantly from the UNCLOS 1982 and the Vienna Convention on the Law of Treaties (VCLT) 1969. As for the latter, the writer factors the plethora of related legal principles proposed by prominent law scholars. These data are then qualitatively examined in a normative framework to seek its coherency with the legal discipline. The normative legal research also allows the writer to garner interdisciplinary analysis comprising of non-legal resources to further support the legal reasonings.¹⁴ Related disciplines such as international relations, linguistics, and the chronicles of the law of the sea prove indispensable for this research as they bear significant importance to lay a strong root cause to assist in interpreting “other legitimate activities.”

Analysis

The Sea as a Contentious Legal Space and Archipelagic State Regime

Since the early days of maritime voyages, the dominations over the contentious sea were prominent issues among scholars particularly in the 15th and 16th century.¹⁵ John Selden once proposed the “closed sea” doctrine or *mare clausum*.¹⁶ The English jurist stipulated that the sea belonged only to those who dominated or admitted private dominion in the vast blue ocean.¹⁷ However, the seizure of Portuguese merchant ship Santa Catarina by Dutch authorities in 1603

¹³ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* 15 (Raja Grafindo, Jakarta, 1995).

¹⁴ Muhaimin, *Metode Penelitian Hukum* 60 (Mataram University Press, Mataram, 2020).

¹⁵ R. P. Anand, *Origin and Development of The Law of The Sea* 105 (Brill, Netherlands, 2022).

¹⁶ Obugheni William Arugu and Benibo Fredrick Anabraba, *The History And Development Of The Law Of The Sea*, Vol 2 *The Journal of Law and Policy*. 20, 22-23 (2022).

¹⁷ R. P. Anand, *supra* note 15.

shed a new notion of *mare liberum* or the freedom of the seas postulated by the Dutch jurist, Hugo Grotius.¹⁸ As a critic of Selden's *mare clausum*, Grotius's *mare liberum* would prevail and later receive the support of the international community. However, Grotius's triumph over the so-called "war of the books" did not mark the end of battling ideas about the sea as a contentious legal space.

In 1702, Cornelius van Bynkershoek, another Dutchman wrote *de dominio maris* (1702) and introduced the "cannon shot rule".¹⁹ The seas were subject to occupation in his view, thus signifying military nuances through the effect of deterrence highlighted by the word "cannon" in his idea. Moreover, the cannon shot rule was later linked with the three mile limit (measured in NM) that was formally brought by the US in 1793.²⁰ The two ideas were conveniently intertwined as both saw the use of cannons for coastal authority.²¹ Over the 19th century, the British were key in promoting the three mile limit as it became attached to the idea of ownership of maritime resources.²² The then Dutch East Indies colonial government in Indonesia also adopted the same measures and put it into effect by TZMKO 1939, limiting its territorial waters to no more than 3 NM.²³

It was not until the Third Law of The Sea Conference that the previously adopted 3 NM maritime claim became much of a debate. The Third Law of The Sea Conference, which spanned from 1973-1982 successfully addressed and further regulated several key maritime issues such as internal waters, territorial sea, archipelagic waters, contiguous zone, Exclusive Economic Zone (EEZ), and continental shelf.²⁴ Notably, the archipelagic state regime was introduced around the same time together with the discussions of archipelagic waters, which later redacted the 3 NM maritime claim exclusively for archipelagic states. Advocated by the 1957 Djuanda Declaration and brought to the Third Law of The Sea Conference,

¹⁸ Obugheni William Arugu and Benibo Fredrick Anabraba, *supra* note 16, p. 23.

¹⁹ Gilbert T. Davis, *Maritime Jurisdiction over Fishery Resources* *Maritime Jurisdiction over Fishery Resources*, Vol 4 *Vanderbilt Journal of Transnational Law* *Vanderbilt Journal of Transnational Law*. 109, 109 (1971). Moreover, Davis quoting Bynkershoek as follows, "Wherefore on the whole it seems a better rule that the control of the land [over the sea] extends as far as cannon will carry, as that is as far as we seem to have both command and possession."

²⁰ Robert J. Wilder, *Listening To The Sea* 15 (University of Pittsburgh Press, Pittsburgh 1998).

²¹ *Id.*, p. 16.

²² *Id.*, p. 20

²³ Indonesian Law Number 32 of the Year 2014 concerning The Sea, *supra* note 1.

²⁴ Institute for Maritime and Ocean Affairs, *About the UNCLOS*, available on <https://www.imoa.ph/treaties/unclos/unclos-history/>, accessed on September 29, 2024.

the archipelagic state regime would later begin its early journey through the table of discussions and debates between Indonesia and Singapore.

The archipelagic state regime is a legal concept recognized in Part IV of UNCLOS that doubles Indonesia's sovereign maritime claim by constituting the waters in between and connecting the foremost parts of the archipelago as a whole part of its sovereignty.²⁵ In great detail, all waters around, between and connecting islands within Indonesia, regardless of their width, depth, or size, are pertinent parts of Indonesian territory.²⁶ This political milestone marked one of Indonesia's major landmarks in its foreign diplomacy, after proclaiming independence and claiming sovereignty in 1945. The Indonesian government later enacted Law 4/1960 as its early legal maritime claim basis.²⁷ As for its criteria, an archipelagic state's baseline system must enclose an area of sea at least as large as the area of enclosed land (1 to 1 ratio), but not more than nine times that land area (9 to 1 ratio).²⁸ Altogether there are 21 archipelagic states spanned across the continent with Indonesia being the largest.²⁹ But what does this legal breakthrough in the history of the law of the sea have to do with Indonesia's foreign diplomacy?

On December 13th 1957, the then head of the parliamentary government of Indonesia, Prime Minister Djuanda Kartawidjaja proclaimed Djuanda Declaration (hereinafter in Bahasa: Deklarasi Djuanda).³⁰ In hindsight, the Prime Minister declared all waters in between and connecting the foremost parts of Indonesia's islands as pertinent part of Indonesia's sovereignty.³¹ The Indonesian government felt the urgent need to secure the archipelago since the TZMKO 1939 and its 3NM limit adopted from the Dutch East Indies era posed risks to the national defence as it segregated the islands with international waters.³² Eventually the declaration was

²⁵ Hasjim Djalal, Regime of Archipelagic States, available on <https://aseanregionalforum.asean.org/wp-content/uploads/2019/10/Annex-K-Prof-Hasjim-Djalal-Regime-of-Arch-States.pdf>, accessed February 23, 2025.

²⁶ Id.

²⁷ Hasjim Djalal, *supra* note 3.

²⁸ Kevin Baumert and Brian Melchior, The Practice of Archipelagic States: A Study of Studies, Vol 46 (1) Ocean Development & International Law. 60, 62 (2015).

²⁹ Raul Pedrozo, Archipelagic States, Vol 97 International Law Studies US Naval War College. 12, 13 (2021). As Pedrozo mentioned, these states are Antigua & Barbuda, Bahamas, Cape Verde, Comoros, Dominican Republic, Fiji, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands, Papua New Guinea, Filipina, Saint Vincent & the Grenadines, Sao Tome & Principe, Seychelles, Kepulauan Solomon, Trinidad & Tobago, Tuvalu, dan Vanuatu.

³⁰ Hasjim Djalal, *supra* note 25.

³¹ Id.

³² Indonesian Law Number 32 of the Year 2014 concerning The Sea, *supra* note 1.

regarded as enunciating a unity for the newly independent country.³³ Albeit what the Prime Minister proclaimed was merely a declaration that prompted no legal rights and obligations, it marked Indonesia's first footstep specifically in maritime diplomacy. Nonetheless, the archipelagic state regime eventually doubled Indonesia's maritime claim as it surpassed its 3 NM limit and overlapped with Singapore's training grounds in the once international waters.

For the most part, archipelagic states must respect the rights of other countries who had existed prior to the regime's recognition by UNCLOS.³⁴ In other words, one might see the exchange of rights and obligations on both sides. This could mean accommodating spaces within its territory to respect other state's existing rights. Clear examples of the aforementioned practice are the so called "other legitimate activities" and the Archipelagic Sea Lanes (hereinafter in *Alur Laut Kepulauan Indonesia* or ALKI in Bahasa Indonesia) which likewise are *quid pro quo* that is thoroughly discussed in the next section. Currently, Indonesia has three ALKI that travel Southbound through the archipelago.³⁵ Ships and aircrafts travelling through ALKI must abide UNCLOS's provisions on innocent passage.³⁶ As the name suggests, innocent passage must be carried out continuously when travelling through ALKI without instigating or posing a threat to the archipelagic state.³⁷

Even though Indonesia has provided three ALKI as *quid pro quo*, at some point its doubled maritime claim by the archipelagic state regime made some of Indonesia's neighbours uneasy. Neighbouring states may not be pleased with the overwhelming maritime claims of Indonesia and instead suggested equal distance as opposed to the archipelagic state regime when it comes to maritime delimitation.³⁸ As improbable as it may seem, it took 25 years from 1978 until 2003 to conclude the Indo-Vietnam Continental Shelf Delimitation bilateral agreement.³⁹

³³ John G. Butcher and Robert Edward Elson, *Sovereignty And The Sea: How Indonesia Became An Archipelagic State* 421 (NUS Press, Singapore, 2017).

³⁴ United Nations Convention on The Law of The Sea, December 10, 1982, 1183 U.N.T.S. 3, Article 51 (1).

³⁵ Once there were suggestions to establish Eastbound passages. The reasoning was fairly simple which was to complement the current Southbound passages. Up to this point, the Indonesian government decides it is best to carefully reconsider such an idea by factoring the risks and benefits towards national interests.

³⁶ United Nations Convention on The Law of The Sea, *supra* note 34, Article 18-19.

³⁷ *Id.*

³⁸ Minister of Foreign Affairs of the Republic of Indonesia Decree Number 01/B/R0/IV/2015/01 concerning the Strategic Plan of the Ministry of Foreign Affairs for the period of 2015-2019, Chapter I (Introduction), p. 20.

³⁹ *Id.*

Nevertheless, the expansion of Indonesia's maritime claim tested Jakarta's diplomacy and bargaining skill into new levels. The Indonesian government was morally obliged to respect and seek legal certainty for neighbouring states to exercise their existing rights within the now Indonesian controlled territory while at the same time upholding its sovereignty.

***Quid Pro Quo* and "Other Legitimate Activities"**

Scholars define *quid pro quo* as one of the basic modes of giving and receiving benefits.⁴⁰ It is a kind of reciprocity that returns kindness with kindness.⁴¹ One might notice *quid pro quo* straight away from UNCLOS's provisions governing the archipelagic state regime because of the mutual respect nature it has. The ALKI as mentioned previously, is a great example of modern-day *quid pro quo* as it also highlights the seas as a legal space. Upon becoming an archipelagic state, Indonesia opened three passages so that foreign ships and aircrafts could legally travel through the sovereign waters in between the archipelagos that were once international waters.⁴² Aside from being a *quid pro quo*, the archipelagic sea lanes were opened to ensure the continuity of maritime navigation (international transportation) by accommodating Indonesia's sovereignty interest and the international community as a whole.⁴³ Therefore, it is mandatory for Indonesia to establish security and safety throughout all three ALKI as these waters fall within Jakarta's watch.⁴⁴

Now that we understand what a *quid pro quo* is, let us dive deeper into how the term "other legitimate activities" is likewise a *quid pro quo*. The provision of Article 51 (1) dictates the following,

⁴⁰ Jed Lewinsohn, Paid on Both Sides: Quid pro quo Exchange and the Doctrine of Consideration, Vol 129 The Yale Law Journal. 690, 695 (2020).

⁴¹ Id.

⁴² To top it all, Indonesia's right to expand its maritime claim within the archipelagic state regime and the obligation prompted to ensure a safe and secure archipelagic sea lane passage within its archipelago is a *quid pro quo*.

⁴³ Lilian del Castillo (Ed) and Hugo Caminos, Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea : Liber Amicorum Judge Hugo Caminos 314, (Brill Nijhoff, Netherlands, 2015).

⁴⁴ Siti Merida Hutagalung, Penetapan Alur Laut Kepulauan Indonesia (ALKI): Manfaatnya Dan Ancaman Bagi Keamanan Pelayaran Di Wilayah Perairan Indonesia, Vol 1 Jurnal Asia Pacific Studies. 75, 84 (2017). Hutagalung further explains that Indonesian authorities are responsible for the safety and security of the three ALKI while also maintaining law and order against foreign and domestic threats.

“Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.”⁴⁵

Apparently, Article 51 (1) aims to respect existing rights in areas that now fall within the sovereignty of an archipelagic state. While fishing rights by default are fairly innocent activities, that does not seem to be the case when it comes to foreign military exercises. The problem is that Singapore has always demanded the right of conducting military exercise to be embedded in Article 51 (1), while Indonesia constantly stood firm and labelled such demand as “sensitive”.⁴⁶ The short story that had been told here was about Singapore’s hope that Indonesia would lend some of their now doubled territory for foreign military exercise.⁴⁷ No agreement was made over this issue and both countries just ended up with the term “other legitimate activities” as seen in Article 51 (1). Unfortunately, up to this point there are no concrete binding international legal instruments (subsequent agreements) explicitly stating that the term “other legitimate activities” does not exclude the right to conduct military exercises for the immediately adjacent neighbouring state. The definition of “other legitimate activities” remains on the fence while contradicting interpretation continues to be inevitable.

Owing to the fact that legal interpretation requires language as its object, it is sensible to say that to a certain degree, a legal instrument is also a linguistic product. Language and law professor Karen McAuliffe once put it, “Law and language does recognise that “law is language” because it relies on language for its use.”⁴⁸ Language plays significant importance in law, bridging human cognitive ability to understand written rules and eventually implement it on every day basis.

⁴⁵ United Nations Convention on The Law of The Sea, supra note 34, Article 51 (1).

⁴⁶ Aristyo Rizka Darmawan, supra note 11.

⁴⁷ What the writer meant by “lending” is an act of respecting existing rights as mentioned in Article 51 (1) UNCLOS and not to be misunderstood as transfer of sovereignty.

⁴⁸ Karen McAuliffe, *Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ 200* (Oxford University Press, Oxford, 2012).

But likewise, the fast developing and dynamic laws where it is written, languages may not retain their original meaning.⁴⁹ Meanings can change from time to time, it is now up to the interpreter to find out the real intention of the previous lawmakers. It can be a challenge however when interpreting words that are so common. Renowned linguists Jennifer Smolka and Benedict Pirker define these words as “generic terms.”⁵⁰ As the name suggests, with no distinction that stands out like sophisticated terms that are usually purposed for something in particular, these “generic terms” are in for a long ride to be decoded. Nonetheless, a good example for one is “other legitimate activities”.

Defence Cooperation Agreement 2007

Although not explicitly mentioned in the paragraphs, DCA 2007 is arguably a bilateral agreement motivated by Article 51 (1) that practically applies *quid pro quo*. It is apparent that Singapore’s lack of training grounds fails to support its military training capabilities since dropping ordinances within the vicinity of a metropolitan area will not tactically be in any officer’s favour. Both parties admit Singapore’s geographical disadvantage and acknowledge Indonesia’s extended maritime claims due the archipelagic state regime.⁵¹ Therefore, telltale signs of *quid pro quo* are evident from those reasons. The sole purpose of the DCA was to acquire training grounds for the Singapore Armed Forces by respecting Singapore’s existing rights within Indonesia’s archipelago that was practiced before the regime’s emergence.⁵² Indonesia and Singapore officially agreed to sign the DCA in 2007, after over two decades of joint military exercise that dates back to 1970.⁵³

As mentioned before in the previous sections, Indonesia and Singapore already had several agreements about military exercises from the early 1970 until the late 1980,⁵⁴ but it was until 1995 that both countries engaged in more serious

⁴⁹ Jennifer Smolka dan Benedikt Pirker, *International Law and Pragmatics - An Account of Interpretation in International Law*, Vol 5 *International Journal of Language & Law*. 1, 3 (2016).

⁵⁰ Id.

⁵¹ Agreement between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on Defence Cooperation, Indonesia-Singapore, Preamble, April 27, 2007.

⁵² Aristyo Rizka Darmawan, *supra* note 9, p. 21.

⁵³ Lab 45, *Diplomasi Pertahanan Indonesia dan Singapura*, available on <https://www.lab45.id/detail/170/diplomasi-pertahanan-indonesia-dan-singapura>, accessed on January 27, 2024.

⁵⁴ Dedy Putra Brahmata, Anak Agung Bayu Perwita, and Hikmat Zaky Almubaroq, *supra* note 6, p. 3586.

and strategic talks to address this particular matter. Before DCA 2007, Indonesia and Singapore had previously signed the MTA Agreement in 1995 that aimed for a similar purpose. The MTA Agreement 1995 designated coordinates within MTA 1 (Tanjung Pinang) and MTA 2 (South China Sea) which were parts of Indonesia's sovereignty for Singapore's military exercises.⁵⁵ Indonesia showed its consent by putting into effect Presidential Decree No. 8 / 1996, not long after.⁵⁶ In hindsight, the execution of MTA Agreement was convincing in the upcoming years, it was evident by major establishments that followed afterwards such as Air Weapon Range (AWR), Air Combat Manoeuvring Range (ACMR), and Overland Flying Training Area (OFTA) which benefited both countries.⁵⁷ Due to the mutual respect nature of the MTA Agreement, both countries opted the word "Indopura" (which derived from two words: Indonesia and Singapura) for their military exercises.⁵⁸ These were Elang-Indopura for the Air Force,⁵⁹ Eagle-Indopura for the Navy,⁶⁰ and Safkar-Indopura for the Army, to name a few.⁶¹ Regrettably, in 2003 Singapore contravened their obligations by conducting joint exercise with the US and Australia without Indonesia's consent.⁶² In response to this, Jakarta terminated the MTA Agreement and thus ended the aforementioned eight years period of bilateral agreement between both countries.⁶³

Four years after the end of the MTA Agreement, Singapore defence officials met with their Indonesian counterparts in Bali. Nonetheless, this diplomatic effort was yet again aiming for another bilateral agreement that could replace the previously terminated MTA Agreement. Eventually on April 27, 2007 the DCA was signed by Indonesia's Minister of Defence Juwono Sudarsono and Singapore's Defence Minister Theo Chee Hean at Istana Tampak Siring in Bali.⁶⁴ The signing of DCA 2007 outlined Singapore's urgent need to acquire its military training grounds

⁵⁵ Id., p. 3589.

⁵⁶ John G. Butcher and Robert Edward Elson, *supra* note 33.

⁵⁷ Dedy Putra Brahmata, Anak Agung Bayu Perwita, and Hikmat Zaky Almubaroq, *supra* note 6, p. 3590.

⁵⁸ News Release by the Ministry of Defence of the Republic of Singapore on January 17 2008, *supra* note 5.

⁵⁹ Dedy Putra Brahmata, Anak Agung Bayu Perwita, and Hikmat Zaky Almubaroq, *supra* note 6, p. 3588.

⁶⁰ Id.

⁶¹ Id.

⁶² Id., p. 3589.

⁶³ Aristyo Rizka Darmawan, *supra* note 9, p. 28.

⁶⁴ Agreement between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on Defence Cooperation, Indonesia-Singapore, *supra* note 51, Signatories.

after jeopardizing the previous agreement in 2003. Unlike the MTA Agreement which was quickly put into effect by Jakarta, DCA 2007 was grinded to a halt in the Indonesian Parliament.⁶⁵ Reasons for this stagnancy varied from political motives to defence related. But most members of the Parliament deemed the use of the Indonesian archipelago for foreign military exercises as “sensitive”.⁶⁶ Ultimately after lengthy political debates and political bargaining, DCA 2007 was ratified.⁶⁷ In 2022, over a decade after the signing in Bali, Indonesian Parliament ratified the only bilateral agreement motivated by Article 51 (1) through Law No. 3 / 2023.⁶⁸

Negotiating “*Other Legitimate Activities*”

Since the very beginning, the negotiation process to determine or at least define “other legitimate activities” was indeed demanding. It was apparent that conflicting views on *quid pro quo* and interests both from Indonesia and Singapore perplex any possible way to reach common grounds. Upon UNCLOS’s recognition of Indonesia as an archipelagic state, its neighbours swiftly proposed “traditional rights-related agreements” to secure their existing rights that once had been practiced long before the archipelagic state regime existed. It was Thailand who first came up with a proposal in 1974, persuading archipelagic states to respect existing rights concerning the exploitation of living resources through bilateral agreement.⁶⁹ Although Thailand did not concern foreign military exercises as Singapore did, one may note Thailand’s statement on “equal footing” in its proposal.⁷⁰ This suggests that the term “other legitimate activities” in Article 51 (1) should be regarded as a legal construction that acknowledges the archipelagic state and its adjacent state’s rights and obligation on the basis of mutual respect. In other words, albeit Indonesia legally claimed the waters between its island as sovereign archipelagic waters under

⁶⁵ Id., p. 3589.

⁶⁶ Aristyo Rizka Darmawan, supra note 11.

⁶⁷ Dedy Putra Brahmata, Anak Agung Bayu Perwita, and Hikmat Zaky Almubaroq, supra note 6, p. 3589.

⁶⁸ The writer believes the DCA 2007 as the sole bilateral agreement motivated by Article 51 (1) UNCLOS given the special yet unique geographical characteristics between Indonesia and Singapore that overlap between them. This “other legitimate activities” issue, up to this point, is an isolated legal issue that happens just between Indonesia and Singapore.

⁶⁹ Aristyo Rizka Darmawan, supra note 9, p. 22, quoting the first draft article, Second Committee UNCLOS III, Thailand: Draft Article on Archipelagos, UN Coc. A/CONF.62/C.2/L.63(1974), OR III, 233.

⁷⁰ Id.

UNCLOS, immediately adjacent neighbouring states would remain with their existing rights that was once practiced in international waters. Unfortunately, this pioneer proposal failed to satisfy Indonesia, Jakarta further argued that the interest and needs from neighbouring states were still vague, whether traditional, legitimate, or reasonable.⁷¹

Noticeably, in UNCLOS's 1976 fourth session that the term "other legitimate activities" was brought to the table. This ambiguous term was nevertheless brought by two states with the most conflicting views to what "other legitimate activities" may be. Indonesia and Singapore came with a proposal that was not much different from their Thailand counterpart, except with the new addition of the term "other legitimate activities" in it. Part of the proposal read as follows, "without prejudice to archipelagic states sovereign rights over its archipelagic waters".⁷² During the same time, Singapore's Ministry of Foreign Affairs expressed its concern and fear of 'potentially' losing their existing rights to conduct military exercises in Indonesia's archipelagic waters through a cable to the US Embassy in their capital.⁷³ Singapore requested their US counterpart for support, hoping that Washington's geopolitical leverage will secure their existing rights.⁷⁴ This was not the first time Singapore effortfully tried to secure its maritime interest, in 1973 Singapore was also actively engaged in rounds of high level talks like in the Maritime Boundary Agreement with Indonesia. All these efforts show that it was deemed necessary for Singapore to pursue legal certainty amidst the "expansion" of Indonesia's sovereign archipelagic waters.

That being the case, Singapore consistently remained firm, viewing foreign military exercises by the immediately adjacent neighbouring state as *quid pro quo* arising from archipelagic state regime. Nevertheless, Indonesia also remained firm with its stance, citing foreign military exercises for the basis of *quid pro quo* as "sensitive" and decided not to easily accept Singapore's idea. Nonetheless,

⁷¹ Id., quoting the statement of Mr. Nugroho Wisnumoerti (Indonesia): Second Committee UNCLOS III, 45th Meeting, UN Doc. A/CONF.62.C.2/SR.45 (1974), OR II, 298 (para. 3.)

⁷² Id., quoting the Second Committee UNCLOS III, Informal Proposal Indonesia and Singapore: Article 122 (ISNT II) (1976, mimeo.), in Renate Platzöder (ed), Third United Nations Conference on the Law of the Sea: Documents, vol IV (1983), 339.

⁷³ John G. Butcher and Robert Edward Elson, *supra* note 33.

⁷⁴ Id.

Singapore's proposal was eventually rejected.⁷⁵ This ambiguous term put both states in a battle of wills for decades. Be that as it may, in the light of this the Indonesian delegation promised that Jakarta would welcome the possibility of further bilateral agreement in the future to address this particular issue.⁷⁶ Unfortunately, instead of explicitly stating Singapore's demand in Article 51 (1), the long discussions of Article 51 (1) did not fully accommodate the interests of both countries.

Interpreting "Other Legitimate Activities"

Efforts to interpret "other legitimate activities", which linguistic experts refer to as "generic terms" come from various points of views. The renowned maritime law expert, Nordquist complements his interpretation with a strong freedom of the sea approach influenced by US foreign policy. Contrariwise, Alexander Proelss, E.D. Brown, and Aristyo Darmawan suggest a more accommodative soft approach by putting forward consensus between states through international legal instruments. Before taking a closer look to what these experts have in mind, one must agree that the "other legitimate activities" and military activities remain vague up to this point. As Alexander Proelss points out, apparently the right to conduct military exercises is still yet to be determined as "other legitimate activities."⁷⁷

To start with, Nordquist postulates that the right to conduct military exercises in Article 51 (1) should not be exempted from defining "other legitimate activities" within the archipelagic state regime.⁷⁸ Through his words, Nordquist further mentions the following, "legitimate activities include 'military uses, such as training, as they had been legitimately exercised before the archipelagic regime [...] was established."⁷⁹ His idea tells us that the right to conduct military exercises by the immediately adjacent neighbouring state is an inherent right and part of every country's interest, thus an international agreement does not play a pivotal role

⁷⁵ Aristyo Rizka Darmawan, *supra* note 9, p. 22.

⁷⁶ John G. Butcher and Robert Edward Elson, *supra* note 33.

⁷⁷ Alexander Proelss et al., *United Nations Convention on the Law of the Sea: A Commentary* 387 (C.H. Beck, München, 2017).

⁷⁸ Satya N. Nandan, Myron H. Nordquist, and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Nijhoff, Dordrecht, 1985).

⁷⁹ *Id.*

unlike how Proelss and Darmawan tend to view it.⁸⁰ Furthermore, Nordquist's approach would suit better for nations with the Blue Water Navy that are capable of conducting long range operations.⁸¹ On top of that, his view strongly underscores and encourages the freedom of the seas since UNCLOS is supposedly meant to negotiate law of the sea convention and not an arms control agreement as observed by Parker S. Carlisle, another law of the sea expert in his maritime legal discourse.⁸² On the flip side, Proelss criticizes Nordquist, arguing that existing rights such as those mentioned in Jakarta Treaty 1982 between Indonesia and Malaysia are merely interests and not inherent rights until subsequently accepted through an international agreement between the respective states.⁸³ In the light of the Jakarta Treaty 1982, Proelss's proceeds as follows, "In practice such activities will be limited because, as in the case of traditional fishing rights, the nature and scope of such activities will depend upon bilateral agreements."⁸⁴ For that reason, contrary to Norquist, an international agreement whether bilateral or multilateral is necessary since exercising existing rights are dependent on legal instruments from Proelss's understanding. Apparently, Article 51 (1) itself has implicitly and imperatively urged the need for a legal instrument through the words "shall, at the request of any of the States concerned, be regulated by bilateral agreements between them." Moreover, the use of "shall" suggests a mandatory nature. Legal dictionary defines the word "shall" as an imperative command.⁸⁵ Thus, a further agreement is needed that will prompt and bind state parties regarding their rights and obligations.

In essence, there may be a follow up international legal instrument from Article 51 (1) to further define "other legitimate activities" as one might add. That

⁸⁰ However, there is an opinion among academics that view 'activities' as concrete actions (visible) while 'interests' remain solely as motivation (invisible). Hence, without any concrete implementation, military exercises and marine scientific research are just merely interests of a state. A "legitimate activity" therefore needs a legal instrument that prompts rights and obligations to its parties, that one can lawfully exercise its interests.

⁸¹ Patricia Patricia dan Putu Agung Nara I.P. Satya, Questioning China's Peaceful Development: A Mahanian Sea Power Analysis of Blue Water Navy Accumulation, Vol 24 Global: Jurnal Politik Internasional. 252, 253 (2022).

⁸² Parker S. Carlisle, Military Activity in the Exclusive Economic Zone: Preventing Creeping Sovereignty, Vol 67 Naval Law Review. 247, 253 (2021).

⁸³ Proelss et al., supra note 77, p. 388. He further explains, "According to the treaty, Malaysia also has interests in promoting and maintaining law and order, undertaking search and rescue operations, and conducting marine scientific research. However, these activities are defined as 'interests' rather than rights and can only be undertaken in cooperation with Indonesia."

⁸⁴ Id., p. 387.

⁸⁵ Legal Information Institute, Shall, available on Wex Legal Dictionary and Encyclopedia <https://www.law.cornell.edu/wex/shall#:~:text=Shall%20is%20an%20imperative%20command,implying%20so%20degree%20of%20discretion>.

opinion is not merely hypothetical though, as E.D. Brown introduces the idea of a *pactum de contrahendo* or in short, an agreement to further regulate issues between state parties.⁸⁶ The Oxford Public International Law further defines *pactum de contrahendo* or *pactum de negotiando* as a binding international law instrument by which contracting parties assume legal obligations to conclude or negotiate future agreements.”⁸⁷ Hereby, the DCA 2007 as the only bilateral agreement motivated by Article 51 (1) may by its nature, a *pactum de contrahendo*. Brown’s commentary on Article 51 (1) also enlightens us with the importance of communications and good faith between state parties as he puts it,

“So far as this paragraph refers to ‘traditional fishing rights and other legitimate activities’, it is little more than a *pactum de contrahendo*, an agreement to try in good faith to reach agreement at the request of the neighbouring State concerned.”⁸⁸

Supporting Brown’s view are experts like Fitzmaurice and Aristyo Rizka Darmawan that suggest a soft and accommodative approach to Article 51 (1). In terms of addressing foreign military exercise as traditional rights being argued by Singapore, both experts come to the conclusion that traditional rights are existing rights which had been practiced long before the archipelagic state regime.⁸⁹ Furthermore, due to the vague nature of the term itself, Darmawan describes it as “constructive ambiguity.”⁹⁰ For that reason, Darmawan postulates that respective states should determine the so-called ambiguous traditional rights to ensure legal certainty regarding its terms and conditions and moreover accommodate both interests regarding this sensitive matter.⁹¹ As its predecessor to DCA 2007, Jakarta Treaty 1982 exemplifies how Indonesia and Malaysia formulate the terms and conditions for Malayan fishermen to exercise their traditional fishing rights within

⁸⁶ E. D. Brown, Archipelagos, in *The International Law of The Sea* 117 (Dartmouth Publishing Company Limited, England, 1994).

⁸⁷ Oxford Public International Law, *Pactum de Contrahendo, Pactum de Negotiando*, available on <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1451?rskey=4Q4sky&result=1&prd=OPIL>

⁸⁸ E. D. Brown, *supra* note 86.

⁸⁹ Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* in Aristyo Rizka Darmawan, *Catatan Hukum Terkait Implementasi Pasal 51 (1) UNCLOS Dalam Kaitannya Dengan Hak Tradisional Latihan Militer Di Perairan Kepulauan Indonesia*, Vol 25 *Jurnal Opinio Yuris Direktorat Jenderal Hukum Dan Perjanjian Internasional Kementerian Luar Negeri Republik Indonesia*. 20, 24 (2019)

⁹⁰ Aristyo Rizka Darmawan, *supra* note 9, p. 25.

⁹¹ *Id.*, p. 26.

the now controlled Indonesian waters. Subsequently, Indonesia and Singapore should consider it necessary to formulate the terms and conditions about military exercises as traditional rights. These terms and conditions (or *pactum de contrahendo* in Brown's view) may range from the types of exercises, weapons, and training sites to name a few.⁹² Darmawan further suggests that Indonesia as the archipelagic state should act proactively by showing its willingness to be the requesting state and pioneer an agreement with Singapore.⁹³ This underscores the legal obligation prompted to the archipelagic state to respect existing rights as highlighted in Article 51 (1) with the following statement, "archipelagic state shall respect existing agreements..." Darmawan adds.⁹⁴ The provision provided above once again reiterates *quid pro quo* for Indonesia to respect the immediately adjacent neighbouring state's existing rights under UNCLOS's archipelagic state regime. Just as importantly, a soft and accommodative approach will better suit Indonesia's foreign policy.

Aside from experts' opinions and commentaries, scholars also refer to the VCLT 1969. As the leading convention on treaties, the VCLT 1969 provides enlightening methods to decode treaty related problems. Although Indonesia never ratified VCLT 1969, its provisions still bind subjects of international law like states.⁹⁵ This is because VCLT 1969 are sets of codified customary law that needs to be respected regardless of its ratification status as acknowledged by many legal discourses and the ICJ.⁹⁶ To start with, let us examine how a binding legal instrument prompts rights and obligations to its state parties according to VCLT 1969. Article 11 of the VCLT 1969 dictates that these rights and obligations arise after state parties show their consent to be bound to the agreed provisions. Furthermore, a consent to be bound can be a signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so

⁹² Id.

⁹³ Id., p. 26.

⁹⁴ Id., p. 23.

⁹⁵ Jean Elvardi, Firman Hasan, and Arya Putra Pratama, *The Use of Language in International Agreements According to the 1969 Vienna Convention and Its Implementation in Indonesian National Law*, Vol 37 *Yuridika*. Vol 37, 515, 520 (2022).

⁹⁶ Karl Zemanek, *Vienna Convention On The Law Of Treaties*, United Nations Audiovisual Library of International Law. 1, 2 (2009).

agreed.⁹⁷ Evidently, the Indonesian government and their Singaporean counterpart were at Istana Tampak Siring in Bali for the signing of DCA in 2007 and in 2023, Jakarta finally ratified the aforementioned bilateral agreement through Law No. 3/2023.⁹⁸ Moving onwards, let us examine Article 31 until Article 33 of the VCLT 1969 with the primary focus on the general rules of interpretation. It is also worth noting that the provisions (methods or general rules of interpretation) in VCLT 1969 are not subordinates but equally elements of the general rule.⁹⁹ Therefore, should one method cannot be perceived, the other methods will fill the gap. Also, in the upcoming section, the term treaty and agreement will be used interchangeably to refer to an international legal instrument such as the DCA 2007.

Let us dive from the simplest of the three articles, which is Article 33 about the choice of language to interpret a treaty. Article 33 dictates that any languages are equally authoritative, but should the parties agree, then a specific text in a specific language shall be used as the basis for interpretation. In the case of Article 51 (1) UNCLOS 1982, Article 320 of the convention equally recognizes any of the six languages¹⁰⁰ that UNCLOS are derived from.¹⁰¹ Therefore, this paper will examine and interpret Article 51 (1) by looking at its English meaning since it is much easier to understand universally both by native English speakers and non-natives. Hence, the writer believes that the term “other legitimate activities” itself can simply be defined as lawful actions carried out by states that are yet to be defined.

Next, Article 31 VCLT 1969 brings good faith, object, and purpose to the general rules of interpretation.¹⁰² This encourages state parties to refrain from interpretations with the intent of weaselling out of the rights and obligations that had been prompted and agreed upon by the state parties.¹⁰³ For that reason, Article

⁹⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Article 11.

⁹⁸ Indonesian Law Number 3 of the Year 2023 concerning the Ratification Between The Government of The Republic of Indonesia and The Government of The Republic of Singapore on the Agreement between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on Defence Cooperation.

⁹⁹ Richard Gardiner, Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, Its Terms, and Their Ordinary Meaning, in *Treaty Interpretation* 45 (2nd Edition, Oxford University Press, Oxford, 2017).

¹⁰⁰ The six languages are Arabic, Chinese, English, French, Russian and Spanish.

¹⁰¹ United Nations Convention on The Law of The Sea, *supra* note 34, Article 320.

¹⁰² Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in The 1969 Vienna Convention On The Law of Treaties* 204 (Springer, Dordrecht, 2007).

¹⁰³ Andrew D. Mitchell, M. Sornarajah, and Tania Voon, *Good Faith and International Economic Law* 11-12 (Oxford University Press, Oxford, 2015).

51 (1) and its *quid pro quo* nature shall be interpreted by upholding mutual respect to accommodate certain rights and obligations arising from the archipelagic state regime. In addition to that, one might have to factor the context of the treaty and its follow up agreements or subsequent agreements as mentioned in Article 31 (2) and Article 31 (3a) VCLT 1969.¹⁰⁴ As for the objects and purpose or contexts of the treaty, one needs to look at the reason why the treaty exists – also referred to as *ratio legis*.¹⁰⁵ Evidently debates surrounding foreign military exercises as existing rights that need to be respected by Article 51 (1) was the reason why “other legitimate activities” existed.

Meanwhile, subsequent agreements must demonstrate the parties contemporaneous understanding of its meaning by the time they conclude the treaty.¹⁰⁶ Unfortunately, as this paper repeatedly concerns, no subsequent agreements explicitly interpreting “other legitimate activities” were promulgated after the conclusion of UNCLOS. Finally, the last section of VCLT 1969’s Article 31 that will be examined is sub article (3b). This particular section observes the activities or subsequent practice into account. The article states the following, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. One might find subsequent practice by looking back at historical records like the 2022 transcripts of ministerial meetings between Singapore and Indonesia published by the Prime Minister Office of The Republic of Singapore. In those documents, Singapore stated that their military had been exercising in the waters of South China Sea Danger Area (SCSDA) since 1960.¹⁰⁷ That South China Sea Danger Area is the modern day “other legitimate activities” training areas within Indonesia’s archipelago. Furthermore, before the MTA Agreement 1995 Indonesia and Singapore have had several “Indopura” exercises.¹⁰⁸

¹⁰⁴ Steven R. Ratner, *International Law Rules on Treaty Interpretation in The Law and Practice of the Northern Ireland Protocol* edited by Christopher McCrudden 86 (Cambridge University Press, Cambridge, 2022).

¹⁰⁵ Ulf Linderfalk, *supra* note 102.

¹⁰⁶ Steven R. Ratner, *supra* note 104.

¹⁰⁷ Ministry of Foreign Affairs Singapore, Transcript of Ministerial Statement by Senior Minister and Coordinating Minister for National Security Teo Chee Hean on the Agreements under the Expanded Framework between Singapore and Indonesia at the Parliament Sitting on 14 February 2022, available on <https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/02/20220214-SM-Teo-Ministerial-Statement>.

¹⁰⁸ Steven R. Ratner, *supra* note 104. Furthermore Ratner adds that subsequent practices may include executive, legislative, and or judicative actions. In the case of “other legitimate activities, both Indonesia and Singapore once had

It is evident that subsequent practices to this matter do exist and may be considerably valuable to be factored as legal interpretation basis in the general rules of interpretation.

Moreover, Article 32 of the VCLT 1969 explores preparatory works and historical backgrounds. In the previous sections the writer has thoroughly described what the negotiation process looks like beginning from Thailand's proposal up to Indonesia and Singapore's decision to opt for the term "other legitimate activities." The thing is that foreign military exercises as a legal right clearly shows a strong nexus with the term "other legitimate activities" and the state of Singapore as the immediately adjacent neighbouring state. Even most of the discussions concerning "other legitimate activities" were strongly motivated by the idea of foreign military exercises as existing rights that need to be respected in Article 51 (1). Nonetheless, historical background and preparatory works proved that this ambiguous term was the elephant in the room throughout the discussions.

Last but not least, military exercises are likewise yet to be clearly defined by UNCLOS. As Joanna Siekiera observes, the lack of clear and codified international legal instruments defining military exercises (foreign military exercise) could potentially spark hybrid threats such as "lawfare".¹⁰⁹ This term, as its name suggests, might put conflicting states battling for their own interpretation while also tactically manoeuvring combat elements to support their claims. Although lawfare does not see states engage in all out conflict (yet), the uncertainty of the status quo may put them on thin ice. Most of the time, the only legal instrument for foreign military exercises such as its terms and conditions are provided in the national legislations promulgated by national lawmakers.¹¹⁰

That means, as domestic laws may vary between states, different interpretations on how foreign military exercises should be carried out may as well vary.¹¹¹ For instance one state may see foreign military exercises as an inherent

the 1995 MTA Agreement that went through executive and legislative actions like signature and implementing it by law.

¹⁰⁹ Joanna Siekiera, International Legal Framework Regulating Military Exercises Lawfare Potentially Associated with Military Exercises as a Hybrid Threat, Vol I *Kwartalnik Prawa Międzynarodowego*. 107, 111 (2023).

¹¹⁰ Id., p. 112-113.

¹¹¹ Id.

right embedded in the freedom of the sea, thus a bilateral agreement is not necessary. But other states may see bilateral agreements as an important part for foreign military exercises given that states still have sovereign rights up until the EEZ. As it may be uncertain for foreign military exercises to be widely accepted as inherent right without bilateral agreements, but it remains paramount for states to be mindful of peaceful relations envisaged in Article 1 of the UN Charter as Joanna adds.¹¹² For academics, honouring the rights of other states by both the foreign and archipelagic states (or coastal states in some UNCLOS provisions) remains the focal point for peacetime military activities.¹¹³

Expert opinions might at least suggest two options to opt for states. The first option urges states to adopt foreign military exercises as inherent rights that can be lawfully exercised with or without bilateral agreement with the other states concerned. Consequently, the absence of consent between states may lead to a lawfare debacle with growing political tensions lurking in the background. Other experts prefer putting forward communications and discussions between states to reach a bilateral agreement under Article 51 (1) for the ultimate consensus.¹¹⁴ Unfortunately, discussions like negotiating “other legitimate activities” might last for quite some time. Although resolvable, debates and interpretation clashes in the negotiation process might perplex possible agreements in the near future. As in the case for interpreting “other legitimate activities,” both Indonesia and Singapore decided on resolving it the traditional Asian way through the good old-fashioned discussions (hereinafter *musyawarah* in both Bahasa Indonesia and Malay).

Conclusion

The writer concludes that “other legitimate activities” as a *quid pro quo* to the archipelagic state regime does not exempt the right of the immediately adjacent neighbouring state to conduct military exercises in archipelagic states with the supposition of both state’s consent. Furthermore, experts postulate that Article 51

¹¹² Id., p. 118.

¹¹³ Adrianus Adityo Vito Ramon. The Legality of Foreign Peacetime Military Activities In The Economic Exclusive Zone Of Another State, Vol 3 Veritas et Justitia. 327, 346 (2017).

¹¹⁴ Lilian del Castillo (Ed) and Hugo Caminos, supra note 43, p. 308.

(1) which contains the ambiguous term is a *pactum de contrahendo*. For that reason, Article 51 (1) requires subsequent international legal instruments to address the terms and conditions and eventually seek legal certainty for these yet to be defined “other legitimate activities.” In retrospect, one might note that lawmakers already had the intention to do so by the words “be regulated by bilateral agreements between them” in the provisions of Article 51 (1). Unfortunately, no international legal instruments clearly defining “other legitimate activities” were ever made.

Frankly, scholars with the assistance of VCLT 1969 could agree that by looking at how Indonesia showed its consent to be bound and the general rules of interpretation, both aspects collectively support the legal interpretation of “other legitimate activities” as foreign military exercises. In the meantime, DCA 2007 happens to be the only bilateral agreement motivated by Article 51 (1), specifically underscoring the right to conduct military exercises for the immediately adjacent neighbouring state as existing rights that need to be respected by the archipelagic state. Another key point is that Indonesia as the archipelagic state should show its willingness and proactively engage in the discussions since Article 51 (1) is exclusively formulated for archipelagic states. This highlights not only the importance of discussions in a bilateral relation, but the softer and more accommodative approach suits better with Indonesia’s posture and foreign policy.

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