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# THE RESPONSIBILITIES BETWEEN PROVIDING ARCHIPELAGIC SEA LANES PASSAGE AND PROTECTING MARINE ENVIRONMENT : A CASE IN REPUBLIC OF INDONESIA

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## Abstract

*State responsibility in international law is only charged to an independent state. Such responsibility can be created due to the rules of international law regarding the state responsibility and numerous important agreement signatories. Part XII of LOSC 1982 clearly states that "States have the obligation to protect and preserve the marine environment". On the other hand, agreement might cause the issue of state responsibility, such as archipelagic sea-lanes in Indonesia. The obvious issue has raised serious problem, for instance, overlapping responsibility handled by the government of Indonesia under its implementation. On one side, Indonesia must preserve the marine environment by setting the marine protected areas (MPA). At the same time, Indonesia must ensure the existence of archipelagic sea lanes (ASLs), including its legality for international shipping. This makes Indonesia face a dilemma, since its territorial seas also lies within coral triangle. The recent solution undertaken by the government is prioritizing the existence of ASLs amongst with the rights of cross voyage, taking into account that ASLs have been set out prior to MPAs as well as the recognition of the sovereignty of archipelagic state created at the same time with the obligation of guaranteeing the right of crossing the ASLs. Thus, a plan for designating environmental protection area with ASLs, the assignment should not interfere with it. Therefore, to accommodate both interests, The Indonesian government must immediately deliver to the International Maritime Organization (IMO) regarding the condition of marine environment in which ASLP is closely confronted with MPAs to regulate special arrangements when the ships cross the area*

**Keywords:** *State Responsibility, Archipelagic Sea Lanes, Marine Protected Areas*

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## I. INTRODUCTION

In 1982, the concept of sovereignty of the archipelagic states has gained international recognition in the United Nations Convention on the Law of the Sea (LOSC) 1982, particularly in Chapter IV of the convention. Such recognition does not mean that the country was free from having responsibilities. Such principle is closely related in the

sovereign obligation that there is a duty not to misuse the sovereignty as well as the obligation of respecting the rights of other countries' territorial sovereignty in accordance with what has been regulated under LOSC.<sup>1</sup> Therefore, the sovereign state can be held accountable for actions abusing its sovereignty.<sup>2</sup>

The role of international law regarding state responsibility has been declared under authoritative basis that is limited to the responsibility of state for actions considered internationally wrongful or due to disobedience against the obligations imposed by the system of international law, and in turn, might cause harm to other nations.<sup>3</sup> For instance, the error or losses that could demonstrate an issue of state responsibility is when a country breaks the agreement reached together. The violation of such obligation shall be either an act of violating the obligations contained in the treaty or in form of negligence and disobedience of the implementation of the treaty which resulted in another country or citizens of other countries that suffer losses. In this case, the violator state can be held liable either in form of indemnity or obedience of the implementation of treaty. Under international law, all nations have the same responsibility for every action against the law which they break.<sup>4</sup>

Likewise with Indonesia, after signing and ratification of the LOSC of 1982 through the enactment of Law Number 17 of 1984 all rights and obligations of an archipelago in LOSC 1982 are mandated to be the rights and obligations for Indonesia. For example, Indonesia must ensure the right of innocent passage<sup>5</sup> and archipelagic sea lanes for all users<sup>6</sup>, as well as the obligation of the state users to comply with the conditions of Indonesia and articles in the LOSC.

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<sup>1</sup> R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 2<sup>nd</sup> ed. (Manchester: Manchester University Press, 1988), p. 77-74. See also *Ibid.*, p. 103.

<sup>2</sup> Huala Adolf, *Aspek-Aspek Negara Dalam Hukum Internasional*, Rev. ed. (Jakarta, Raja Grafindo Persada, 2002), p. 255.

<sup>3</sup> J.G. Starke, *Pengantar Hukum Internasional 1*, 9th ed. (Jakarta: Aksara Persada Indonesia, s.a.), p. 275

<sup>4</sup> *Ibid.*, p. 275. See also Rebecca M.M. Wallace, *International Law*, (London: Sweet & Maxwell, 1992), p. 166-167.

<sup>5</sup> LOSC, art. 52

<sup>6</sup> LOSC, art. 53

Aside from having the obligation to ensure the rights of other states confronting the innocent passage and archipelagic sea lanes, Indonesia also has the right designate the archipelagic sea lanes. Indonesia shall choose to designate 3 archipelagic sea lanes (ASL) by submitting proposals to the IMO and gain the approval of IMO after conducting numerous long discussions with users such as the United States of America and Australia.<sup>7</sup> In 1998, this kind of assignment had been through an agreement with the state users and got the approval of International Maritime Organization (IMO) in Annex 9 resolution MSC.72 (69), adopted on 19 May 1998 regarding Adoption, Designation and Substitution of Archipelagic Sea Lanes.<sup>8</sup> In this respect, the designation of Archipelagic Sea Lanes in Indonesia has been signed by the users such as America and Australia and both have the great interests of cruise in the sea of Indonesia, Whereas the arrangements regarding procedures undertaking the path in the Archipelagic Sea Lanes in Indonesia have been enshrined in the 19 Rules of ASLP in Indonesia.<sup>9</sup> Article 53 of 1982 LOSC regarding the right of innocent passage stated that:

*“An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.”*

Basically, the responsibility of archipelago not only include a guarantee over the rights of other countries to do the cruise in waters of territorial seas. However, in chapter XII LOSC of 1982 article 192 states that “States have the obligation to protect and preserve the marine environment.” Therefore, the responsibility of protecting the marine environment from pollution and destruction of the marine

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<sup>7</sup> Dhiana Puspitawati, “The East/West Archipelagic Sea Lanes Passage Through the Indonesian Archipelago,” *Maritime Studies* (January-February 2005), p. 6. See also Kresno Buntoro, “Legal and Technical Issues on Designating Archipelagic Sea Lanes Passage: Indonesia Experience,” *Indonesian Journal of International Law* 8:2 (2011), p. 244-245.

<sup>8</sup> Annex 9 resolution MSC.72 (69), adopted on 19 May 1998 tentang Adoption, Designation and Substitution of Archipelagic Sea Lanes

<sup>9</sup> Dhiana Puspitawati, “The East/West Archipelagic Sea Lanes Passage Through the Indonesian Archipelago,” p. 6.

environment is the obligation of all States. There are various means of the marine environmental protection, one of them is by establishing the marine conservation area. The protection of the marine environment through the conservation has been carried out in Indonesia prior to its independence, furthermore since Netherlands-Indies period, marine environmental protection had performed at the the lowest since 1916.<sup>10</sup> However, 2009 has served as the peak of marine protection confronted by the government, in which Indonesia began to initiate the protection of marine environment not only within the territorial jurisdiction of Indonesia but also at the regional level.

Most importantly, Indonesia has attempted to initiate a deal and the signing of the marine environment protection with some surrounding countries by having territorial establishment of the Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security (CTI-FF). The establishment of such cooperation was initiated by the President of Indonesia, Yudhoyono, with the critical backgrounds such as protecting the marine and coastal resources, and focusing on food security through the management of natural resources sustainable with the sea, taking into account the impact of climate change.<sup>11</sup> Together with 5 other countries (Malaysia, Papua New Guinea, Philippines, Solomon Islands and Timor-Leste (the 'CT6'), Indonesia has signed the CTI-FF Regional Plan of Action (CTI RPOA), its goal was to protect biological resources in sea and coastal territory. RPOA has five major goals, namely:<sup>12</sup>

1. strengthening the management of seascapes;
2. promoting an ecosystem approach to fisheries management;
3. establishing and improving effective management of marine protected areas;
4. improving coastal community resilience to climate change; and
5. protecting threatened species

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<sup>10</sup> The Ordinance for Pearl and Coral Harvesting, *Ordonansi Perikanan Mutiara dan Bunga Karang (Algemene Regelen voor het Visschen naar Parelschelpen, Parelmoerschelpen, Teripang en sponsen binnen de afstand van neet meer dan drie engelschezeenijlen van de kusten van Nederlandsch Indie)*, quoted in bahasa Indonesia Stbl. 1916 – 157.

<sup>11</sup> CTI-FF, History of CTI-FF, available at CTI-FF official website <http://www.coral-triangleinitiative.org/history-cti-ff>, last access 14/07/2017

<sup>12</sup> Ibid, CTI-FF.

Indonesia's compliance against the obligations laid upon the International communities has been proven and confronted by the government of Indonesia. By establishing a conservation area, Indonesia has fulfilled its mandate under chapter XII LOSC to protect the marine environment, and even then, Indonesia has simultaneously accommodate the interests of archipelagic sea lanes of other countries at the territorial sea in Indonesia by establishing the archipelagic sea lanes. It also has been in accordance with article 52, article 53 and 19 rules agreement amongst Indonesia and the users.

Returning briefly, this is where the problems start to appear. There are two international obligations imposed to Indonesia, which also corresponds to the same location of Indonesian sea. Thus, Indonesia currently has an obligation to guarantee both the existence and security of the ASLs and MPAs simultaneously. And therefore, when one of them attempts to show less or ignore, Indonesia will be internationally responsible to any harm or infringement of all the obligations that have been exchanged. For that reason, the recent paper shall examine on how Indonesia confronts and overcomes obstacles under the implementation of both obligations.

## II. STATE RESPONSIBILITY

State Responsibility is a fundamental principle under international law. It was created naturally from the system of international law and the doctrine of sovereign and the equality amongst states. When a country conducts an action against the law to other countries then it would turn the attention of an international responsibility. With regard to this issue, a breach of an international obligation might cause an obligation to perform recovery.<sup>13</sup>

According to Black's Law Dictionary, responsibility is defined as the obligation (a legal duty, by which a person is bound to do or not to do a certain thing) to answer for an act done, and to repair any injury it may have caused.<sup>14</sup> However, according to Linguistic deficiency in English,

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<sup>13</sup> Malcolm N. Shaw, *International Law*, 5<sup>th</sup> ed. (Cambridge:Cambridge University Press, 2003), p. 694.

<sup>14</sup> Black's Law Dictionary Deluxe, 10th edition, "Responsibility" by. Brian A. Garner

the lack of proper grammatical differences between “responsibility” and “liability” shall create further difficulty in distinguishing between State Responsibility and the State’s International Liability.<sup>15</sup>

According to Brownlie, the nature of the state responsibility is not based on the premise of national law but it is concerned on international responsibility towards violations of the treaty and other legal violations.<sup>16</sup> In contrary, Huber as a distinguished judge, under the case of Spanish zone of Morocco Claims, has defined responsibility as “the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.”<sup>17</sup>

In traditional international law, the responsibility of state is a classic way to deal with the violation of international law,<sup>18</sup> which is a country shall be able to be requested for the international responsibility towards the harmful impacts of activities under its control or within its jurisdiction. The control or exercise of jurisdiction by a particular state might incur responsibility, regardless of whether international law or the state law gives permit or prohibition on the activity involved.<sup>19</sup>

Currently, the definition of state responsibility is referred to the ILC which is defined as the international responsibility where every internationally wrongful act of state entails the international responsibility of that State.<sup>20</sup> Therefore, responsibility is closely related to liability of a nation for any offence committed.

### **III. THE RESPONSIBILITY TO PROVIDE ARCHIPELAGIC SEA LANES PASSAGE**

The rights and obligations of the archipelago have been regulated

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<sup>15</sup> Melda Kamil Ariadno, ‘Haze Pollution in Indonesia’, *Journal of Sustainable Development Law and Policy*, vol. 2 Iss. 1, 2013, p. 8

<sup>16</sup> Ian Brownlie, *Principle of Public International Law* (Oxford: Clarendon Press, 1966), p. 355.

<sup>17</sup> *Ibid.*, p. 355.

<sup>18</sup> Sompong Sucharitkul, “State Responsibility And International Liability Under International Law”, *Loyola of Los Angeles Int’l. & Comp* 1:18 (1996), p. 823.

<sup>19</sup> *Ibid.*, p. 834.

<sup>20</sup> Responsibility of a State for its internationally wrongful acts, 2001, art. 1

in Part IV of LOSC. One of them concerns the coastal states' right to designate the archipelagic sea lanes.<sup>21</sup> Indonesia has been exercising its right by designating the 3 strands of archipelagic sea lanes. By designating the archipelagic sea lanes, it caused obligation for Indonesia to secure the cruise and flight of crossing rights of archipelagic sea lanes, in normal ways, continuous, direct and as quickly as possible without any form of hindrance (unobstructed).<sup>22</sup>

The use of designating archipelagic sea lanes not only poses obligation to guarantee shipping and ways for merely foreign ships, but also obliges Indonesia to guarantee conditions and safety of archipelagic sea lanes from various forms of pollution and destruction of the environment that may harm sea lanes conditions. Indonesia has an obligation to ensure ships traversing the archipelagic sea lanes not causing pollution while doing traversing.<sup>23</sup> The function of such supervision was the responsibility of Indonesia government considering there have been 19 rules regarding the procedures for traversing archipelagic sea lanes that have been mutually agreed amongst Indonesia, Australia and the United States regarding the procedures of traversing the archipelagic sea lanes.

The agreement regarding the procedures for traversing the archipelagic sea lanes is a form of agreement that must be obeyed by all parties including Indonesia as a country that designates the archipelagic sea lanes. Indonesia has the obligation of surveillance considering disposition of the archipelagic sea lanes in its sovereignty. Thus, if there is a disruption to navigation of traversing ship including if a case of pollution occurs when crossing the archipelagic sea lanes, this shall turn the considerable attention to an obligation for Indonesia to do the restoration and even Indonesia can also be held accountable for compensation due to an absence of supervision to the impacts of the cruise in the archipelagic sea lanes in Indonesia.

As already suggested, when there is no supervision towards the ships using their rights of traversing from the government of Indonesia, Indonesia shall be held accountable to such obvious case. It can be

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<sup>21</sup> LOSC, art. 53 (1)

<sup>22</sup> *Ibid.*, art. 53 (2) dan (3)

<sup>23</sup> List of the Indonesian Archipelagic Sea Lanes Rules Agreed By Indonesia, Australia and the United States (19 Rules, no. 11)

seen from the example of Corfu Channel case where Albania can be requested for any liabilities to the loss of United Kingdom affected by mines while conducting peaceful cross-territorial sea in Albania.

**Table 1.**  
**The Rights and Obligations after Determining ASLs**

Art.	Indonesia's rights to designate ASLs	Indonesia's obligations
53	(1) <b>An archipelagic State may designate</b> sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.	<ol style="list-style-type: none"> <li>1. The route and sea lanes are secured in safe condition especially when traversing the sea lanes.</li> <li>2. The implementation of the IMO rules are secured regarding the requirements of suitable sea lanes for traversing</li> <li>3. The condition of ASL environment is secured to be free from any impacts of pollution and/or destruction regardless with the implementation of IMO rules.</li> </ol>
	Foreign rights in ASLs	Foreign obligations
	(2) <b>All ships and aircraft enjoy the right</b> of archipelagic sea lanes passage in such sea lanes and air routes.	<ol style="list-style-type: none"> <li>1. The regulation under 19 rules and IMO must be obeyed when confronting the passage</li> <li>2. The passage shall be confronted in a directly quick way and not disturb the sovereignty of archipelagic country.</li> <li>3. The acts do not create pollution and environmental destruction.</li> <li>4. All the requirements of IMO must be obeyed regarding the procedures and the cruise order.</li> </ol>

In 1998, there had been an agreement in IMO regarding three archipelagic sea lanes in Indonesia. Such agreement between International world and Indonesia was built as a form of consensus. Hence, it must be respected by all parties including Indonesia, considering the demand of three archipelagic sea lanes were from Indonesia thus Indonesia was obligated to confront the surveillance so that the agreement reached could run smoothly. It is therefore argued that another deal in the 19 Rules constituted the agreement between Indonesia with United States of America and Australia, which currently

it must be followed not only by the three signatories' countries but also it applied to all ships traversing.

#### IV. THE RESPONSIBILITY TO PROTECT MARINE ENVIRONMENT

The protection of marine environment is the obligation of every country without any exception.<sup>24</sup> Every country is obliged to preserve its territories either within the territorial region or outside of its territorial sea. One form of protection of marine environment that can be done is by way of designating Marine Protected Areas.<sup>25</sup> Indonesia pays serious concern regarding MPAs formation considering the territorial sea of Indonesia is an area rich in its numerous marine biodiversity.<sup>26</sup>

Such special obligation was also strengthened after signing the 6 countries treaty to keep in the establishment of CTI-FF even for the Sustainable Development Goals (SDGs) which was initiated by the United Nations regarding the state obligation to designate 20% of its sea as conservation areas. Indonesia has been bound by such international treaty, and in turn, Indonesia is also responsible for confronting any obligations.

Currently, Indonesia has started implementing its obligations by establishing conservation areas in some remarkable territories. However, the obstacles existed within some contiguous areas and cross-areas with the archipelagic sea lanes. As for the legal basis, LOSC obligates every country to perform actions for protecting the ecosystem which attempts to begin rare and nearly extinct through the MPA approach,<sup>27</sup> which can be based on Article 194(5):

*“The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of*

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<sup>24</sup> LOSC, art. 192

<sup>25</sup> Another way to protect the marine environment is to prohibit pollution, disposal, garbage disposal, illegal fishing ban, fishing ban by trawl or poison etc.

<sup>26</sup> Laurretta Burke et.al., *Reef at Risk Revisited in the Coral Triangle*, World Resources Institute, Washington, 2012, p. 6-8

<sup>27</sup> Yoshifumi Tanaka, *The International Law*, Cambridge University Press, Cambridge, 2012, p. 316

*marine life.*”

According to Tanaka, there are two types of MPAs regulated in international law, firstly it regards to the intention to protect the marine environment, as declared in ;<sup>28</sup>

1. ‘clearly defined area’ in art. 211(6) of the LOSC
2. ‘ice-covered areas’ in art. 234 of the LOSC
3. ‘particularly sensitive sea areas’ (PSSA) in IMO Guideline, and
4. ‘specially protected areas’ in the 1985 Montreal Guidelines.

Furthermore, the second category is directly related with the various biological conservations. Such category is divided into;<sup>29</sup>

1. Directly related with a species-specific MPA, such as special protection for sea mammals, certain sea animals, etc. The fundamental law regarding this rule is as follows;
  - a. The 1990 Agreement on the conservation of Seals in the Wadden Sea
  - b. The 1993 *Déclaration conjointe pour la création d’un Sanctuaire méditerranéen pour les Mammifères Marins* (Joint declaration for the creation of a Mediterranean Sanctuary for Marine Mammals)
  - c. The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS)
  - d. The 1999 Agreement Establishing a Sanctuary for Marine Mammals
  - e. The Inter-American Convention for the Protection and Conservation of Sea Turtles.
2. Directly related to the protection of rare animals or the condition of ecosystem and natural habitats, endangered species and marine life in certain territories. In particular, some examples of the rules of law which includes the Asia are as follows:
  - a. ASEAN Agreement on the Conservation of Nature and Natural Resources 1985, under Article 3(3)(a)
  - b. The newest deal regarding this term is the agreement conducted

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<sup>28</sup> Ibid, p. 325

<sup>29</sup> Ibid, Yoshifumi Tanaka, p. 326-327

together with 6 other countries regarding the *Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security (CTI-CFF)* as an area for protecting marine environment carried out together under one policy that later on shall be executed under Regional Plan of Action (RPOA).

In this respect, the conservation area designation for Indonesia is an obvious form of Indonesia's liability based on the agreement and provisions defined by the international environmental law. In particular, if Indonesia did not implement the content of the agreement or conducted omission over the implementation of the agreement of waters conservation area designation, the government of Indonesia may incur liability (responsibility).

## **V. WHAT HAS BEEN CONDUCTED BY INDONESIA?**

In general, the ocean is an archipelagic cruise lanes that connects amongst the continent and islands with other territorial parts of the world,<sup>30</sup> including Indonesia sea linking the Pacific and Indian oceans. The voyage by taking the traversing passes through the sea of Indonesia has been a crucial fact of history existed since a long time ago, which give a solid foundation for the modern law of the sea that give the sovereignty of coastal states over its territories. Even this term becomes the fundamental basis of LOSC that provides the rights of archipelagic sea lanes towards every ship that shall traverse in waters of archipelagic country.

Indonesia has fulfilled the responsibility of providing and assigning the archipelagic sea lanes for international interests. Even currently, Indonesia also has met the obligations of the international community by protecting its environment through the approach of Marine Protected Areas. However, the problem is that both areas are located within the same territories, thus there has been overlapping responsibilities.

The government of Indonesia has made a remarkably good policy, by way of removing the coordinates of MPAs. Thus, for some territories proven to cross the archipelagic sea lanes, the determination of the

<sup>30</sup> Lewis M. Alexander, 'The Role of Choke Points in the Ocean Context', *GeoJournal*, Vol. 26, No. 4, April 1992, p. 503

MPAs coordinates should not interfere with the archipelagic sea lanes. Based on the findings of the recent project, the researcher disclosed that the actions conducted by the government of Indonesia has been considerably correct. Given the historical point of view that the recognition of the sovereign archipelago is a political deal where at that time the international world shall recognise the concept of archipelagic nation when Indonesia gave the archipelagic sea lanes.

Regarding this issue, it is further narrowed when Indonesia has chosen to assign the archipelagic sea lanes thus the ships would utilize the archipelagic sea lanes can only traverse lanes established by the government of Indonesia, they have no right to traverse on its outside. While from the time point of view, it is particularly clear regarding the agreement on the sea lanes and the archipelagic sea lanes assignment is priorly compared to the establishment of MPAs that are repeatedly conducted within last few years.

Under IMO Rules and 19 Rules, it is particularly clear that international world has mainly obtained the safety standards and cruise safety thus the possibility for the occurrence of pollution and destruction of the marine environment around the MPAs can be minimised. Nowadays, the problem is whether the government of Indonesia has conducted constant and tight supervision on the law enforcement of marine environment, especially against foreign ships passing the wayward against the rules agreed. Thus it could be possible that the waters traffic activity might lead into the pollution and destruction of the marine environment primarily MPAs.

At the time of the coordinates determination, MPAs should not interfere ASLs coordinates established by the government of Indonesia, thus the further actions to be conducted is the determination of area proven to cross-sea such as Sawu sea. Therefore, what needs to be done immediately is to establish PSSA and report it to IMO. Basically, IMO has had clear rules, firm and tight on the voyage when it crosses the PSSA.

## **VI. CONCLUSION**

This report presented the findings of research that Indonesia has already carried out all international responsibilities charged. In the case of overlapping archipelagic sea lanes with waters conservation area, the coordinates MPA's existed outside ASLs was notably made, and in turn, it was previously determined and established since 1998 and it had obtained an international world agreement. With regard to this issue, the findings disclosed that under the implementation of conservation areas and the ASLs, it shall be either adjacent or enclosed in conservation areas.

However, the remarkable need to get consideration is that the government of Indonesia must immediately design the proposal to the IMO regarding the territories considered to be sensitive areas. By way of conclusion, IMO has a right to determine such territories as the PSSA, thus the cruise etiquette shall adjust to the rules of navigation in the PSSA.

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