

1-31-2021

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### Recommended Citation

Lestari, Maria Maya (2021) "WHAT IS THE RIGHT, ARCHIPELAGIC SEA LANES AND PASSAGE? (ACCORDING TO UNCLOS 1982 AND PRACTICE)," *Indonesian Journal of International Law*: Vol. 18 : No. 2 , Article 9.

DOI: 10.17304/ijil.vol18.2.809

Available at: <https://scholarhub.ui.ac.id/ijil/vol18/iss2/9>

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# WHAT IS THE RIGHT, ARCHIPELAGIC SEA LANES AND PASSAGE? (ACCORDING TO UNCLOS 1982 AND PRACTICE)

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## Abstract

*The Right, Archipelagic Sea Lanes, and Passage are a new concept in international law of the sea, which only exists and applies to archipelagic states. This concept was born as a result of world recognition of the existence of an archipelagic state. Indonesia is the only archipelagic state in the world to apply this concept. Therefore, using doctrinal research will be studied of definition, historical background, and law regarding the concept of the archipelagic sea lanes, which has been approved by the United Nations Convention of the Law of the Sea 1982 (UNCLOS 1982). This paper also describes all states' rights to cross the archipelagic sea, archipelagic sea lanes passage as a lane, passage as an activity to get through from one and another part of the high seas, or exclusive economic zone.*

**Keywords** :archipelagic, sea lanes, passage, UNCLOS

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Submitted : 29 July 2020 | Revised : 24 October 2020 | Accepted : 14 November 2020

## I. INTRODUCTION

Archipelagic sea lanes are international shipping routes recognized by the Law of the Sea Convention 1982 (UNCLOS 1982) as a track that crosses the archipelagic sea.<sup>1</sup> Archipelagic Sea itself is a sea that only exists and is owned by the archipelagic state, although several states in the world geographically have many islands<sup>2</sup> that are uncertain if their states are archipelagic states<sup>3</sup> and need an official statement from the state regarding the form of the state is an archipelagic state.<sup>4</sup>

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<sup>1</sup> United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833UNTS 397 (entered into force 16 November 1994) [hereafter UNCLOS], art. 53.

<sup>2</sup> UNCLOS 1982, Chapter IV, art. 46; Maria Maya Lestari, *Buku Ajar Hukum Laut Internasional (Konvensi Hukum Laut 1982 & Studi Kasus)* [Internasional Law Lecturer Materials (UNCLOS 1982 & Case Studies)], (Pekanbaru: Pusat Pengembangan Pendidikan Universitas Riau, 2009), 9-11.

<sup>3</sup> Etty R. Agoes, "Praktik Negara-Negara Atas Konsepsi Archipelagic State [States Practices on Archipelagic States Concession]," *Indonesian Journal of International Law* 1, no. 3, (2004): 444-455.

<sup>4</sup> *Ibid.*, there are states that are geographically shaped islands but not archipelagic state like

Every state that self-declared as an archipelagic state will draw the baseline with the archipelagic state's straight baseline.<sup>5</sup> The classification of sovereignty zones at sea will consist of inland water, archipelagic sea, and territorial sea.<sup>6</sup> The classification distinguishes the sovereignty of the archipelagic state from the coastal state, where the coastal state sovereignty zone consists only of inland water and territorial sea.<sup>7</sup>

The existence of the archipelagic sea is a special feature possessed by the archipelagic state, despite being on the side of the archipelagic baseline, this condition does not mean that the archipelagic state has the right to prohibit ships from crossing its archipelagic sea. International Law of the Sea has recognized and guaranteed the right of archipelagic sea lanes crossing for foreign vessels in the archipelagic sea. This is what still makes misunderstanding the meaning of the passage, lanes, and right crossing the archipelagic sea.

Archipelagic Sea position on the inside of the territorial sea is often misinterpreted as absolute sovereignty of the archipelagic state. That false interpretation creates some misunderstanding about the archipelagic state prohibiting or taking charge of foreign vessels while sailing at the archipelagic sea. This paper will discuss archipelagic sea lanes, starts from the archipelagic sea lanes history, passage, and routes, to foreign vessel rights implementation on archipelagic sea lanes.

## II. GENERAL DEFINITION OF THE RIGHT

Based on the Black's Law Dictionary, the term 'right' can be interpreted as a legally enforceable claim that another will do or not do a given act.<sup>8</sup> While Roscoe Pound gives the meaning of right as a noun as (1) frequently used in the sense of interest; subjectively perceived relation derived from necessity, between the person feeling the necessity and an object; (2) used to designate the main meaning which the law adopts in order to secure interests, namely, a recognition in persons, or a conferring upon persons, of certain capacities of influencing the action of others; (3) a capacity of creating, divesting, or alter-

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England, and there are potentially became archipelagic state but do not claim became archipelagic states like Maldives, Malta and Mauritius, etc.; see also in United Nations, office for Ocean Affairs and the Law of the Sea, *The Law of the Sea Practice of Archipelagic States*, (New York, United Nations, 1992).

<sup>5</sup> UNCLOS, art. 47.

<sup>6</sup> UNCLOS, art. 2 (1).

<sup>7</sup> UNCLOS, art. 2 (1).

<sup>8</sup> Bryan A. Garner, ed., *Black's Law Dictionary Tenth Edition*, (USA: Thomson Reuters, 2014), 1517.

ing ‘right’ in the second sense, and creating or altering duties; (4) to signify a condition of legal immunity from liability for what otherwise would be a breach of duty; (5) right is also used in a purely ethical sense of that, even in legal speech, we do not infrequently say one has ‘a right’ to this or that, because, without any factual claim, we feel that on a balance of equities we should like to see him have it.<sup>9</sup>

When referring to the opinion of an international legal expert, Von Glahn, the rights of a state can be interpreted as fundamental rights, including a right of equality, of existence, of external independence, of self-defense, of territorial supremacy (sovereignty), of intercourse, and respect.<sup>10</sup>

### III. ARCHIPELAGIC SEA LANES (ASL)

As a terminology, sea lanes can be interpreted as a designated course or regularly used route for oceangoing ships, especially in restricted waters such as harbor and straits. Although sea lanes have obvious safety advantages, they were long resisted by sea captains, who saw them as a threat to their freedom of navigation.<sup>11</sup>

#### A. WHAT IS ASL IN UNCLOS 1982?

Based on UNCLOS 1982 Article 53, archipelagic states can create two forms of routes, the first is a shipping route, and the second is a flight route. Especially for routes at sea, the archipelagic state can create one shipping route or can create separate traffic schemes for separate routes (TSS).<sup>12</sup>

In addition to the archipelagic sea lanes in the form of a single axis that connects the entry route to the exit route, the archipelagic state can also create Traffic Separation Schemes (TSS) the archipelagic sea lanes.<sup>13</sup> Of course, to establish TSS in ASL, it needs approval from the authorized organization (IMO).<sup>14</sup> As for the flight route, it follows the shipping route below it.<sup>15</sup>

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<sup>9</sup> Roscoe Pound, “Legal Right,” *International Journal of Ethics* 26, no. 1 (1915): 92-101.

<sup>10</sup> Gerhard von Glahn, *Law Among Nations An Introduction to Public International Law 3<sup>rd</sup> Edition*, (New York: MacMillan Publishing, 1976), 123.

<sup>11</sup> Bryan A. Garner, ed., *Black’s Law Dictionary Tenth Edition*, 1551.

<sup>12</sup> UNCLOS, art. 53.

<sup>13</sup> UNCLOS, art. 53 (8).

<sup>14</sup> UNCLOS, art. 53 (9).

<sup>15</sup> Kresno Buntoro, *Alur Laut Kepulauan Indonesia (ALKI) Prospek dan Kendala [Indonesia Archipelagic Sea Lanes: Prospect and Challenges]* (Jakarta: Sekolah Staf dan Komando TNI AL / SESKOAL, 2012), 51.

Archipelagic sea lanes are imaginary lines<sup>16</sup> to cross the adjacent archipelagic sea and territorial sea and all normal cross routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, ships with normal navigational channels, provided that duplication of routes has similarities between the same entry and exit points shall not be necessary.<sup>17</sup>

This flow must be determined as a series of continuous axes starting from the exit cross route entrance. Ships and aircraft crossing through archipelagic sea lanes must not deviate more than 25 nautical miles from the axis line. The ships may not sail, and aircraft may not fly close to shore less than 10% of the distance between points the closest point to the islands bordering the sea channel.<sup>18</sup>

## B. SEA LANES AND AIR ROUTES

Archipelagic sea lanes are shipping routes for the ship and aircraft. There are two forms of understanding of lanes in Article 53 (2) UNCLOS 1982, namely the sea lane and the air routes for air traffic routes.<sup>19</sup> At present, sea lane arrangements for routes at sea will be returned to international organizations. In this case, the International Maritime Organization (IMO) has claimed the mandate of the UNCLOS 1982 as a competent agency for the appointment of ASL.<sup>20</sup> There is no problem regarding shipping (ships) at sea, this route is a cross-line connecting one EEZ to another or from one high sea to another.

Based on Article 53 (4) UNCLOS 1982, the archipelagic state will comply with the sea lanes below the air space to define the air routes in the air space above it.<sup>21</sup> Archipelagic air route is determined by the International Civil Aviation Organization/ICAO's provisions and exceptions as an international organization governing flight civil.<sup>22</sup> However, it will be difficult and dangerous for the aircraft if it is obliged to follow the ASL route in practice. Therefore, currently, civil aviation routes still comply with the route determined by

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<sup>16</sup> Munadjat Danusaputro, *Wawasan Nusantara dalam Konvensi Hukum Laut PBB Tahun 1982 Buku VIII*, (Bandung : Alumni, 1983), 308.

<sup>17</sup> UNCLOS, art. 53 (4).

<sup>18</sup> UNCLOS, art. 53 (4).

<sup>19</sup> UNCLOS, art. 53 (2).

<sup>20</sup> Chris Forward, "Archipelagic Sea-Lanes in Indonesia – Their Legality in International Law," *Maritime Law Journal* 23, no. 2 (2009): 143.

<sup>21</sup> *Ibid.*

<sup>22</sup> Annex 1: 19 Rules Agreed by the US, Australia and Indonesia on the exercise on archipelagic sea lanes passage (19 Rules), see in Dhiana Puspitawati, "The East/West Archipelagic Sea Lanes Passage Through the Indonesian Archipelago," *Maritime Studies* 140, 2005: 9.

ICAO.<sup>23</sup>

Air routes will bow (directly proportional to the top) following sea lanes set by the archipelagic state for military aircraft.<sup>24</sup> So, the purpose of having a coincide with air routes over the sea route in UNCLOS 1982 is on the base of accommodating the interests of military ships and aircraft considering that military aircraft are not subject to civilian flight routes regulated by ICAO.<sup>25</sup>

### C. TRAFFIC SEPARATION SCHEME (TSS) IN INDONESIA ASL (IASL)

For shipping safety and environmental reasons, Indonesia has submitted a TSS application to IMO. Starting 1 July 2019, IMO has approved TSS implementation in ASL Sunda Strait and Lombok Strait based on SN.1-Circ.337 and COLREG.2 / Circ.74. The TSS ratification by IMO made Indonesia become the first and the only archipelagic state in the world that has TSS in archipelagic sea lanes.

The submission of TSS for the Sunda Strait by the Indonesian government was based on why the Sunda Strait was the busiest and narrowest strait. To maintain shipping safety, it was necessary to separate the routes for ships exit and entry.<sup>26</sup> Meanwhile, the reason for submitting the TSS Lombok Strait is that it is narrow and close to a marine conservation area. For environmental and shipping safety reasons, the separation of shipping lanes in the Lombok Strait must be carried out.<sup>27</sup>

TSS Lombok Strait's consequence is that every ship passing using the right of archipelagic sea lane passage or the right of peaceful passage in the Sunda and the Straits must follow this route as explained in the previous paragraph. By defining TSS on Indonesian Archipelagic Sea Lanes (IALS) routes, every ship passing by using the right of archipelagic sea lane passage will be subject to the implementation of Article 53 (11) UNCLOS 1982.

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<sup>23</sup> Kresno Buntoro, *Alur Laut Kepulauan Indonesia (ALKI): Prospek dan Kendala Kendala [Indonesia Archipelagic Sea Lanes: Prospect and Challenges]*, 56.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 56-57.

<sup>26</sup>

See also NCSR 5/INF.24

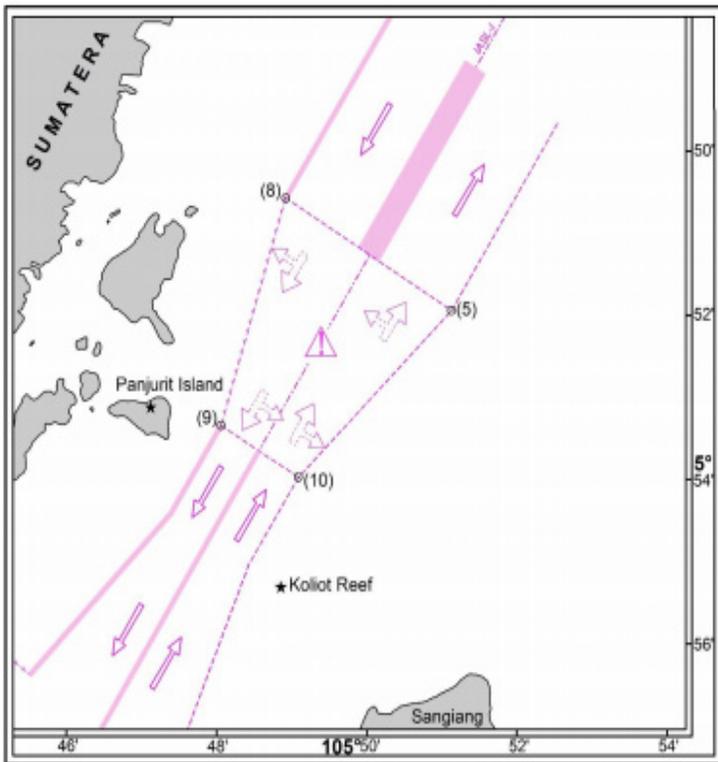
<sup>27</sup> The Sub-Committee on Navigation, Communication and Security (NCSR) Doc 5 / INF 23, 15 December 2017. and see also Proposal Indonesia to IMO, MEPC 73/INF.18 about Particularly Sensitive Sea Areas. Especially for the Lombok Strait, submitting Indonesia's proposal to IMO is not only about TSS but also based on reasons for saving the environment. Considering that the Lombok Strait is adjacent to marine conservation areas so that this Strait, Indonesia has also applied for the designation of Particularly Sensitive Sea Areas (PSSA).

Article 53 (11) UNCLOS 1982 states, “ships in archipelagic sea lanes passage shall respect applicable sea lanes and traffic separation schemes established following this article.” As a state proposing TSS, Indonesia is obliged to make announcements, socialize and determine new route maps to the flag states whose ships regularly use the archipelagic sea lanes.

This is by Article 53 (10) UNCLOS 1982:

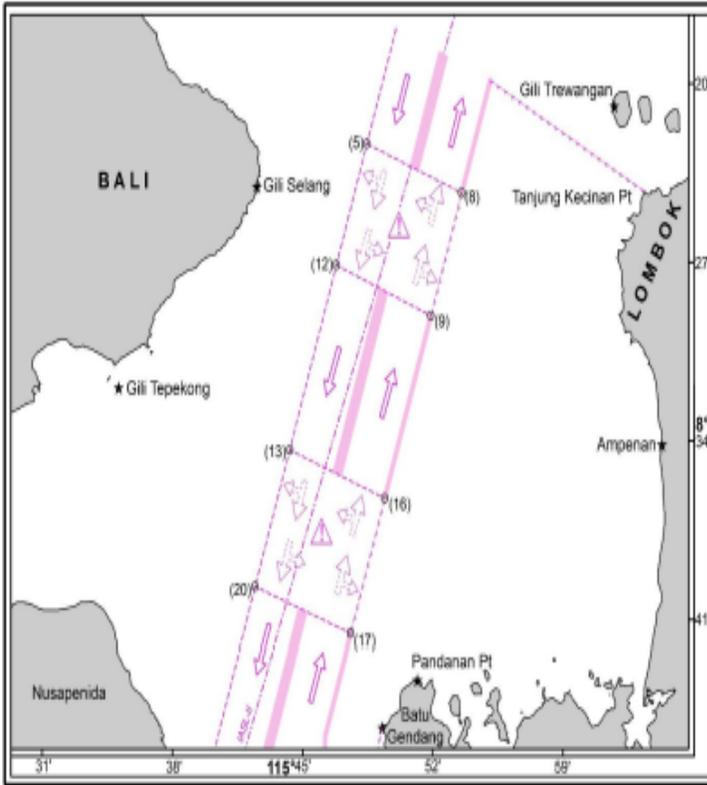
*“The archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given.”*

**Picture 1. TSS in Sunda Strait**



Sources: SN.1-Circ.337

Picture 2. TSS at Lombok Strait



Sources: SN.1-Circ.337

#### D. ARCHIPELAGIC SEA LANES PASSAGE (ASLP)

Based on the Oxford dictionary, the term ‘passage’ is defined as a journey from one place to another by ship.<sup>28</sup> The subject in ASLP is the ship. As mentioned in the previous sub-section, the ship consists of two types: the ship (vessel/commercial ship and military ships)<sup>29</sup> and the aircraft (civil aircraft and state aircraft).<sup>30</sup>

<sup>28</sup> “Oxford Dictionary Online,” available at <https://www.oxfordlearnersdictionaries.com/definition/english/passage?q=passage>, accessed on 2 June 2020.

<sup>29</sup> John Birkler et.al, *Difference Between Military and Commercial Shipbuilding Implication for the United Kingdom Ministry of Defence* (United Kingdom: Rand, 2005), xv-xvi.

<sup>30</sup> Convention on International Civil Aviation, Doc. 7300/9, ninth edition, 2006, Art. 3 (b), state aircraft in this article means aircraft used in military, customs and police services.

Based on article 53 (2) UNCLOS 1982, “All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes”.<sup>31</sup> This means that international maritime law has guaranteed every state’s right to carry out track activities along the archipelagic state’s ASL routes. In other words, even though the archipelagic state did not set ALS routes, the right of ASLP still exists.<sup>32</sup>

UNCLOS 1982, article 53 (3) defines Archipelagic Sea Lanes Passage as:

*“The exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”*

Based on this definition, Yoshifumi Tanaka concludes that there are three important elements regarding this right:<sup>33</sup>

- 1) As with the right of transit passage, the right of archipelagic passage applies between one part of the high seas or an EEZ and another part of the high seas or an EEZ,
- 2) All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes under Art. 53(2). The right of archipelagic sea lanes passage contains the right of overflight by aircraft. In common with the right of transit passage, a foreign warship and military aircraft have archipelagic sea lanes passage right.
- 3) Like the right transit passage, archipelagic sea lanes passage must be the exercise of navigation rights and overflight solely for the purpose of continuous, expeditious, and unobstructed transit.

Procedures for passing, which are characteristic of the cross by using the right of passage archipelagic sea lanes are:<sup>34</sup>

- 1) May sail in normal mode (for example, a submarine can sail while still diving without having to surface);
- 2) Crossing activities must transit continuously, directly, and as quickly as possible.
- 3) Unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive eco-

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<sup>31</sup> UNCLOS, art. 53 (2).

<sup>32</sup> UNCLOS, art. 53 (12).

<sup>33</sup> Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2012), 114.

<sup>34</sup> UNCLOS, art. 53 (2), (4), (5), (6), (9) and (12).

onomic zone.

- 4) Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during the passage,
- 5) Ships and aircraft shall not navigate closer to the coasts than 10 percent of the distance between the nearest points on islands bordering the sea lane.
- 6) If the archipelagic state has designed archipelagic sea lanes, the ships must be passing in the designated routes. However, if there are no designated sea lanes or air routes, archipelagic sea lanes passage right may be exercised through the routes normally used for international navigation.
- 7) Suppose the archipelagic state has established a traffic separation scheme (TSS) for ship passage and approved by IMO. In that case, all passing ships (civil and military ships) must follow the separation scheme's route.

#### IV. RIGHT OF ARCHIPELAGIC SEA LANES PASSAGE

##### A. RIGHT OF ARCHIPELAGIC SEA LANES IN UNCLOS 1982

That archipelagic sea lane had not existed in the International Law of the Sea before. This concept was created as a result of the claims of an archipelagic state, in this case, pioneered by Indonesia and the Philippines regarding a form of state called the archipelagic state.<sup>35</sup> The claim being filed is based on geographical and historical forms consisting of thousands of islands and a single unit.

International recognition for this concept of the archipelagic state took a long time and tough negotiations. As one of the pioneers, Indonesia convinced the international community that it needed a special baseline drawing (currently known as straight archipelagic baseline). The impact will cover all the island waters, which will later be referred to as the archipelagic sea.<sup>36</sup> Churchill and Lowe explained that the archipelagic sea is a new regime in the International Law of the Sea which is not like inland water but is also not like a territorial sea<sup>37</sup> because of its geographical position between those two

<sup>35</sup> J. Ashley Roach and Robert W. Smith, "Excessive Maritime Claim," *International Law Studies* 66, (1994): 235.

<sup>36</sup> UNCLOS, art. 49 (1).

<sup>37</sup> RR. Churchill dan A.V. Lowe, *The Law of the Sea, 3<sup>rd</sup> Edition* (Manchester: Manchester

regimes.

This, of course, got defiance from powerful maritime states such as United States, United Kingdom, and Australia.<sup>38</sup> Given that the withdrawal of straight archipelagic baselines will automatically close all the island is outside water into a territorial sea. Thus, it is worried will close international navigation routes that existed long before the state was existed by international law.

The closure of these straight archipelagic baselines' inner waters, of course, becomes a concern for a large maritime state that always crosses that water before. Nevertheless, Indonesia, Fiji, Mauritius, and the Philippines, as pioneers of the concept of an archipelagic state, were trying to convince the international community in every meeting held by the United Nations. Even more, this archipelagic state expressly guarantees and respects international shipping that has long existed. In a sense, that the right of international navigation that has existed for a long time can still traverse in that waters.<sup>39</sup>

This long negotiation finally resulted in the recognition of the concept of the archipelagic state as set out in Chapter IV, UNCLOS 1982, about the archipelagic state.

Definition of archipelagic state, Article 46, UNCLOS 1982:

*For the purposes of this Convention:*

(a) "Archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;

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

This international recognition was followed by recognizing a new concept, namely the archipelagic sea lanes rights. The concept of the Right of passage archipelagic sea lanes has never been known in the International Law of the Sea rules before. The previous international law of the sea only recog-

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University Press, 1999), 125.

<sup>38</sup> Kresno Buntoro, Legal and Technical Issues on Designating Archipelagic Sea Lanes Passage: Indonesia Experience, *Indonesian Journal of International Law* 8, no. 2 (2011): 223; Leonard C. Bastian, Ristian Atriandi S. and I Made Andi A., "Indonesia and the law of the Sea: Beyond archipelagic outlook," *National Security College Issue Brief*, no. 9 (May 2014): 70.

<sup>39</sup> United Nation General Assembly, Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Sub Committee II, Archipelagic Principles as Proposed by the Delegations of Fiji, Indonesia, Mauritius and the Philippines, A/AC.138/SC.II/L.15, 14 March 1973, 581-582.

nized the right of innocent passage and right of transit passage. However, with the recognition archipelagic state concept in UNCLOS 1982 (Chapter IV), the right of archipelagic sea lanes passage was recognized.

UNCLOS 1982, as a consensus, proves that, in fact, international law has accommodated the interests of every state,<sup>40</sup> in this case, the interests of the archipelagic state and maritime state. When the 1982 UNCLOS recognized the archipelagic state concept, straight archipelagic baselines can be used as the basis for drawing baselines and determine archipelagic state sovereignty over the sea between the islands.<sup>41</sup> On the other hand, UNCLOS 1982 also guarantees the existence of international navigation for user countries to cross the archipelago by recognizing a new right, namely the right of archipelagic sea lanes passage.<sup>42</sup>

The right of archipelagic sea lanes passage resulted from freedom navigation in international law, which has existed since time immemorial, which is the basis of international navigation.<sup>43</sup> The concept of the right of archipelagic sea lanes passage is unique because every ship is free to cross without any interference.<sup>44</sup> However, this crossing activity must still respect the sovereignty of the archipelagic state.

## B. MEANING RIGHT OF ASLP

According to article 53(3) of the UNCLOS defines the archipelagic sea lanes passage as:

*“Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”*

<sup>40</sup> Suren Movsisyan, “Decision Making by Consensus in International Organizations as a Form of Negotiation,” *21<sup>st</sup> Century I*, no. 3 (2008): 80-81; David L. Larson, “Innocent, Transit, and Archipelagic Sea Lanes Passage,” *Ocean Development and International Law* 18, no. 4 (1987): 412.

<sup>41</sup> UNCLOS, art. 47 (1).

<sup>42</sup> Arief Havas Oegroseno, “Archipelagic Sea Lanes Passage Designation: The Indonesian Experience” in *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Myron H. Nordquist, Tommy T.B.Koh and John Norton Moore, eds. (Leiden: Martinus Nijhoff, 2009), 387.

<sup>43</sup> Masitha Tismananda Kumala and Dina Sunyowati, “Designation of Archipelagic Sea Lanes According to the United Nations Convention on the Law of the Sea 1982 (Indonesia Archipelagic Sea Lanes Case),” *International Journal of Business, Economic and Law* 10, no. 4 (2016): 49.

<sup>44</sup> UNCLOS, art. 53 (3)

The Right of passage intended in this discussion is the right to get through in ASL<sup>45</sup> with or without an international shipping route determined by the archipelagic state.<sup>46</sup> This Right of passage only exists and applies when a ship or aircraft crosses the archipelagic sea area. Regarding Article 53 UNCLOS 1982, archipelagic waters are waters under archipelagic states sovereignty, which has officially declared themselves an archipelagic state.<sup>47</sup>

According to Churchill, there are four things regarding the rights and obligations of the coastal state and user states in archipelagic sea lane passage, such as:<sup>48</sup>

First, an archipelagic state must respect right enjoyed by third states deriving from existing agreements.<sup>49</sup>

Second, an archipelagic state must recognize traditional fishing rights and neighboring states' legitimate activities in certain areas in archipelagic waters. The terms and conditions to exercise such rights and activities, including nature and the areas to which they apply, shall be regulated by bilateral agreements between them at the request of any of the states concerned. Such rights shall not be transferred to or shared with third states.<sup>50</sup>

Third Obligation on archipelagic state respects the submarine cables installed by other States and passes through its waters without making a landfall. An archipelagic State shall permit to maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.<sup>51</sup>

Last, there are the navigational rights of other states.<sup>52</sup>

### C. 19 RULES ON INDONESIA'S ARCHIPELAGIC SEA LANES PASSAGE

Indonesia, United States, and Australia have an agreement on passing Indonesia ASLP. These rules today are used by all states passing in Indonesia ASLP. Here the 19 Rules passing in Indonesia ASL:<sup>53</sup>

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<sup>45</sup> UNCLOS, art. 53.

<sup>46</sup> UNCLOS, art. 12.

<sup>47</sup> *Ibid.*, Etty R. Agoes, 444-455.

<sup>48</sup> *Ibid.*, Churchill, 103-104.

<sup>49</sup> UNCLOS, art. 51 (1).

<sup>50</sup> UNCLOS, art. 51 (1).

<sup>51</sup> UNCLOS, art. 51 (2).

<sup>52</sup> UNCLOS, art. 53.

<sup>53</sup> Dhiana Puspitawati, "The East/West Archipelagic Sea Lanes Passage Through the Indonesian Archipelago," 9-10.

- 1) Ships in sea lanes will not disturb or threaten Indonesia's sovereignty, territorial integrity, independence, and national unity. They will not carry out any action that would contravene international law principles as embodied in the United Nations Charter.
- 2) Except for situations involving force majeure or distress, aircraft in archipelagic sea lanes passage shall not land in Indonesian territory, including the sea lane's territory. They shall not deviate more than 25 nautical miles to either side of the axis lines during the passage, provided that such aircraft shall not deviate closer to the coast than 10 percent of the distance between the nearest points on islands bordering the sea lanes.
- 3) Foreign civil aircraft passing through the sea lanes must comply with civil aviation's international rules as established by the ICAO.
- 4) While exercising sea lanes passage, foreign warships and foreign military aircraft are not allowed to conduct war or use live ammunition or conduct military training. They pass without delay through or over the sea lanes in the normal mode solely for continuous, expeditious, and unobstructed transit.
- 5) Foreign warships and ships using nuclear energy, passing through sea lanes, are recommended to inform the Indonesian Government (namely the Commander of the Indonesian Armed Forces) in advance for the purpose of navigation and taking the preparatory actions should something untoward happen.
- 6) Subject to Rule 18, ships carrying nuclear materials, except warships and other government ships, operated for non-commercial purposes, are required to notify the Commander of the Indonesian Armed Forces in advance in accordance with the *Convention on the Physical Protection of Nuclear Materials*; are requested to comply with the code for the safe carriage of irradiated nuclear fuel, plutonium and high-level radioactive waste in flasks on board ships (INF code); and are required to comply with other international conventions dealing with transportation or carriage of dangerous goods, hazardous materials and noxious substances, including the IMDG codes and HNS codes.
- 7) Foreign military aircraft flying above the sea lanes must observe civil aviation safety and monitor emergency frequencies and are requested to maintain contact with the authorized air traffic controllers within controlled air space.
- 8) Foreign transit ships should move with caution in sea lanes enlivened with economic activities (either fisheries or mining), limited naviga-

tional areas. Foreign transit ships are prohibited from passing in 500-1250 meter safety zones around oil gas installations, and beware of underwater cables and pipelines.

- 9) Foreign fishing vessels must keep their fishing gear stowed during transit and are prohibited from carrying out fishing activities while in transit.
- 10) Transiting ships through sea lanes have to follow generally accepted international navigational rules for navigation safety and be careful due to local fishermen's local shipping and activities.
- 11) Ships in sea lanes passage must comply with all generally accepted international standards regulating pollution of the marine environment from vessels. Following such standards, they shall not discharge poisonous or dangerous materials while in Indonesian waters. Ships using sea lanes shall not dump wastes or other matter while in Indonesian waters.
- 12) All ships are prohibited from either cleaning tanks and discharging waste overboard or polluting Indonesian waters while in transit.
- 13) All passing ships are not allowed to stop or anchor or to move back and forth while passing without any legitimate reason, except in case of *force majeure* or in distress. Transiting ships shall solely navigate the normal mode for the purpose of continuous, expeditious, and unobstructed transit.
- 14) Transiting ships are not allowed to disembark persons or goods and transfer them to other ships or embark persons/ goods from other ships in contravention of customs, fiscal, immigration, or sanitary rules of Indonesia, or other activities in contravention of those rules.
- 15) Ships and transiting aircraft are not allowed to carry out survey works or marine scientific research, including taking water samples for investigation during the passage. They should not interfere with a survey, or marine scientific research activities carried out by Indonesia in the sea lanes or there above.
- 16) Transiting ships and aircraft are prohibited from carrying out unauthorized broadcasting or emitting electronic signals to interfere with national telecommunications systems and establish direct communications with unauthorized persons or groups in Indonesia's territory.
- 17) Transiting ships shall always meet the generally accepted international requirements for the safety of navigation.
- 18) Regarding international agreements, shippers, cargo owners, and ship

owners are liable individually or collectively for the damage caused by them and shall be insured as required by those agreements. Shippers, cargo owners, and ship owners are liable individually or collectively for the damage caused by them, including to pay compensation to Indonesia as agreed on the agreement, and shall be insured as required accordingly. The ship's flag state entitled to sovereign immunity shall bear international responsibility for damages caused to Indonesia by the non-compliance of the ship with international law.

- 19) For the safety of navigation and Indonesia security, foreign tankers, vessels using nuclear energy, foreign vessels carrying nuclear substances and other dangerous goods, foreign fishing vessels as well as foreign warships passing through Indonesian waters from one part of the exclusive economic zone or high seas to another part of exclusive economic zones or high seas are recommended to pass through sea lanes.

The designation of archipelagic sea lanes in certain archipelagic waters does not affect the exercise of the right of innocent passage outside the sea lanes in the relevant archipelagic waters under Article 52, paragraph 1 of the UNCLOS. Before other sea lanes through other parts of the Indonesian archipelagic waters being decided, archipelagic sea lanes passage right might be exercised in accordance with Law of the Sea Convention 1982.

These Rules were incorporated into Indonesia Regulation No. 37 of 2002, and these rules have been applied for all user state when used their right of archipelagic sea lanes passage in Indonesia.<sup>54</sup> However, this route is still debatable because Indonesia has not yet designed the East/West route.<sup>55</sup>

## **V. THE IMPACT OF THE ROUTE FOR RIGHT OF ASLP ESTABLISHMENT**

### **A. THE IMPACT OF ESTABLISHING ASLP**

If the archipelagic state determines the ASLP route, then all ships and aircraft that will pass using the right of archipelagic sea lanes passage will only make the path on the designated route. The provisions concerning the archipelagic state right to determine the ASLP route are regulated in Article

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<sup>54</sup> Regulation No. 37 of 2002.

<sup>55</sup> Annex 9, Resolution MSC 72(69), Adoption, Designation and Substitution of Archipelagic Sea Lanes, this resolution explains that the shipping routes that have been determined by Indonesia are currently still partial because they have only regulated the north-south route or vice versa, have not regulated east-west.

53 (1) UNCLOS 1982:

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

Kresno Buntoro gives the meaning that Article 53 (1) UNCLOS 1982 has five meanings: (1) the right of archipelagic states to determine whether or not archipelagic sea lanes exist, (2) no air routes without sea routes underneath, (3) sea lanes must be suitable for passage, (4) passage must be continuous and direct, (5) passage for foreign ships and aircraft.<sup>56</sup>

Another impact of the ASLP route for the user state is that it will eliminate the maps and normal shipping routes they have because the archipelagic state's shipping route has received IMO approval as an official international agency regulating shipping and navigation at sea.<sup>57</sup>

The process of setting an IMO route is quite time-consuming. It started from submitting proposals, discussion, endorsement until the announcement of a map/ new shipping route to all user countries. ASLP route will be beneficial for the archipelagic state because the ASLP route will be able to cover the possibility of violating the state's sovereignty due to the use of archipelagic sea lanes right of passage, closing the use of many international shipping map routes owned by each state, and making it easier for the archipelagic state to supervise foreign ships crossing the sea area.

The ASPL route, determined by IMO, also applies to the airspace above it.<sup>58</sup> However, its application (by taking the example of Indonesia) as the only state that has set ASLP globally, implementing ASLP routes in the air is followed by other rules. For cross-flight routes for military aircraft in practice, ASL in Indonesia is subject to 19 Rules.<sup>59</sup>

For civil aircraft, there is a slight difference. Although ASL as a sea route has been established by an archipelagic state, in its implementation, civil aviation routes still follow the rules of the International Civil Aviation Organization / ICAO as the official international organization governing civil aviation.

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<sup>56</sup> *Ibid.*, Kresno Buntoro, 51.

<sup>57</sup> UNCLOS, art. 12; Interview with Prof. Hasjim Djalal, an Indonesia expertice in law of the Seas, Jakarta, 2017.; Constance Johnson, “A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission,” *International Journal of Marine and Coastal Law* 15, no. 3 (2000): 320-322.

<sup>58</sup> UNCLOS, art. 4 dan art. 5.

<sup>59</sup> *Ibid.*, see 19 Rule.

According to the personal analysis of researchers and the ASL set by the archipelagic state based on UNCLOS 1982, other routes still follow ICAO rules.

For the passage right, the impact of determining the sea lane will require that every ship (both ship and aircraft) that cross on ASL is only allowed to cross the designated route, whether by ships or aircraft, are subject to ASL stipulations. Ships only cross in the specified ASL, not the outside.

Nevertheless, in practice, the activity of passing by aircraft still needs attention. As explained earlier, military aircraft will use the right of passage and pass only on the specific ASL route at sea. However, unlike civil aircraft, when sailing with ASL's passage right, is automatically subject to ASL's passage right rules, but the reality in the field, civilian aircraft crossing activities must also consider flight rules and procedures that have been regulated and established by ICAO.

Of course, carried out by ships in the sense of civilian and military ships and civilian and military aircraft. For civil ships, cross-regulation is subject to IMO rules as one of the international institutions established by the United Nations in the field of sea safety and security at sea.<sup>60</sup>

## B. IMPACT OF NOT ESTABLISHING ASLP

If ASLP were not established, it would impact the archipelagic state. This unestablishment will make every user state ship sail through the international navigation route.<sup>61</sup> In other words, all passing ships will use their respective maps and shipping routes. This will affect the archipelagic state in safeguarding the sovereignty of the state from passing ship activities.

For passage right, whether or not the coastal state determines the ASL route will not eliminate the ASL passage right for foreign ships. So, with the presence or absence of determining routes of ships and aircraft, it is still possible to carry out the trajectory at any time by using the route commonly used by international shipping.<sup>62</sup> However, the difference is that they only cross the specified ASL route.

## VI. CONCLUSION

That every ship and aircraft have the right of archipelagic sea lanes passage with or without ASLP routes being determined by the archipelagic state.

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<sup>60</sup> Ilke Basaran, "The Evolution of the International Maritime Organization's Role in Shipping," *Journal of Maritime Law & Commerce* 47, no. 1 (2016): 101-102.

<sup>61</sup> UNCLOS, art. 53 (12).

<sup>62</sup> UNCLOS, art. 53 (12).

ASL itself is a shipping route that includes shipping routes at sea and in the air. In contrast, ASLP is a shipping activity on ASL that required direct and continuous passing activities by ships or aircraft in a normal and unobstructed manner, starting from one part of the high seas or exclusive economic zones to the high seas or other exclusive economic zones.

In author's view, Indonesia should established East-West ASL as soon as possible. In this case, when referring to the establishment of archipelagic sea lanes in Indonesia which has determined three archipelagic sea lanes that connect the North and the South, vice versa, the consequences will arise for users who are no longer allowed to use routes normally but are obligate to sail "only" on the archipelagic sea lanes has been established. As for the East-West route of Indonesia, which until the time of this writing this has not determined, the greater consequences arising are not on the user state but for the Indonesian government. This is because the right to pass the ASLs is not loss or ceased for these users when the ASLs are yet to determined. The users keep crossing the archipelagic waters but using "the normal route" as they used to. Therefore, the Indonesian government should start to consider about the establishment of East-West ASL to control ship passing by using archipelagic sea lanes passage rights.

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