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NAVIGATIONAL RIGHTS IN ARCHIPELAGIC WATERS

Abstract: The United Nations Convention on the Law of the Sea of 1982, through the institutions of the right of innocent passage, the right of transit passage, and the right of archipelagic sea lanes passage, defines the rules for the navigation of foreign-flagged vessels, including warships, in territorial waters (internal waters, territorial sea, and archipelagic waters). The paper analyses the concept of archipelagic waters, the right of innocent passage within Archipelagic Waters, and the right of archipelagic sea lanes passage, respectively. How vital for the global economy and security are archipelagic waters with navigational rights and overflight on them exemplify waters of Indonesia, where nowadays shipping accounts for approximately 50% of total world trade (including Malacca and Singapore Strait, from the Indian Ocean to the Far East), and is rapidly growing.

Keywords: UNCLOS, archipelagic waters, innocent passage, archipelagic sea lanes passage, navigation

1. Introduction

One of the innovative aspects of the United Nations Convention on the Law of the Sea of 1982¹ (hereafter UNCLOS) was the recognition given

¹ The United Nations Convention on the Law of the Sea, drawn up in Montego Bay on 10 December 1982. Currently, it has been ratified by 168 states (1 March 2022). The states-parties to the convention include all archipelagic states in the following chronological order: Fiji as the first state to ratify UNCLOS (1982), Jamaica (1983), the Bahamas (1983), the Philippines (1984), Indonesia (1986), Trinidad and Tobago (1986), São Tomé and Príncipe (1987), Antigua and Barbuda (1989), Marshall Islands (1991), Seychelles (1991), Saint Vincent and the Grenadines (1993), Comoros (1994), Mauritius (1994), Grenada (1995), Tonga (1995), Palau (1996), Papua New Guinea (1997), Solomon Islands (1997), Vanuatu (1999), the Maldives (2000), the Tuvalu (2002), Kiribati

to “archipelagic state”, “archipelagic waters” and “archipelagic sea lanes passage” in international law. Nonetheless the idea of a specific regulation of the status of archipelagos was discussed for the first time even before the Hague Codification Conference by the International Law Association (1924)², the Institute of International Law (1928)³ and the American Institute of International Law (1929).⁴ During the 1930 Hague Conference, however, the idea was abandoned due to insufficient information on archipelagos.⁵ The need to take into account the presence of coastal archipelagos in the establishment of straight baselines was recognized by the ICJ in its judgment of 1951 (*Fisheries case*).⁶ The issue also appeared in the preparatory works and during the First Conference on the Law of the Sea in 1958. At that time, a distinction was made between coastal archipelagos, which, following the ICJ judgment of 1951, were to be taken into account in the establishment of straight baselines (Article 4 (1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone)⁷ and ocean archipelagos, regarding which no compromise was reached.⁸

The measures taken by some archipelagic states (mainly Indonesia, the Philippines, the Republic of Fiji and the Republic of Mauritius)⁹ during the Third United Nations Conference on the Law of the Sea 1973-1982 (hereafter UNCLOS III) to consider the waters between the archipelagic islands as internal waters or waters of a similar status, subject to the full

(2005), Cabo Verde (2008), and the Dominican Republic (2009). The United States of America has not ratified the Convention yet. Paradoxically, the United States became the main defender of the Convention (e.g. the Government’s *Freedom of Navigation Programme*) and a “beneficiary” of its regulations (especially the Navy). The USA recognises the significance of the Convention as an instrument for preserving order on the seas.

2 See *Report of 33rd Conference of the International Law Association 1924*, 262.

3 See Articles 4 and 5 of Resolution: *Projet de règlement relatif à la mer territoriale en temps de paix*, Institut de Droit International, Session de Stockholm – 1928.

4 Symonides, *The New Law of the Sea*, 71-72.

5 Nandan, Rosenne, (eds.). *United Nations Convention on the Law of the Sea 1982. A Commentary*, 399.

6 *Fisheries case (United Kingdom v. Norway)*, Judgment of 18 December 1951, ICJ Reports, 116.

7 Symonides, *ibidem*, 69.

8 Nandan, Rosenne (eds.), *ibidem*, 400.

9 Despite an active participation of the Republic of Mauritius in the development of the status of archipelagic waters, the state cannot benefit initially from this institution as it had difficulties meeting the criteria set out in UNCLOS for the establishment of straight archipelagic baselines. Mauritius was a member of the Group of Archipelagic States at the Third Conference on the Law of the Sea. Straburzyński. “Delimitacja wód archipelagowych”, 188-189; “Mauritius: Archipelagic and other Maritime Claims and Boundaries”.

sovereignty of the coastal state, were unacceptable from the point of view of maritime states, as such steps would undoubtedly have a negative impact on international communication and security. Only a “package” solution to the problem of claims by coastal states relating to the breadth of the territorial sea, while ensuring navigational rights, including the determination of the legal status of straits used for international navigation and archipelagic waters and the recognition of navigational rights within them, allowed a compromise to be reached.¹⁰ The result is the institution of international law called “archipelagic waters”, which, on the one hand, recognizes the sovereignty of archipelagic states and, on the other hand, guarantees high seas rights in those waters to other states,¹¹ which, apart from the regulations concerning navigation and overflight, do not affect the status of the waters and the sovereignty of the state over that area.¹² In accordance with Part IV of UNCLOS, the interests of the international community are ensured in these waters by:

- right of innocent passage (Article 52); and
- right of archipelagic sea lanes passage, the designation of which should be made possible by the archipelagic state through the designation of sea lanes and air routes (Article 53).

2. Archipelagic States and their Archipelagic Waters

In the geographical sense, the archipelago (Greek *arche* “origin” and *pelagos* “sea,” and *Archipelagos* as the name of the Byzantine province comprising the main islands of the Aegean Sea) means a group of islands situated close to each other, usually of common origin and of similar geological structure. The legal concepts of an archipelagic state and archipelagic waters were codified only with the adoption of UNCLOS (Part IV, Archipelagic states).

In legal terms, an archipelago is defined as a group of islands, together with parts of islands, the waters connecting them and other natural formations which are so closely interrelated that such islands, waters and other natural formations form an inseparable geographical, economic and political whole, or

10 Symonides, *ibidem*, 76-77; Agoes, “The Law of the Sea and Navigation: The Indonesian Archipelagic State Perspective”, 146.

11 Symonides, *ibidem*.

12 The success of archipelagic States is evidenced by the fact that the first state to ratify UNCLOS was in fact an archipelagic State: the Republic of Fiji (10 December 1982).

which have been regarded as such a whole historically (Article 46 of UNCLOS). An “archipelagic state”, on the other hand, is a state which consists entirely of one or more archipelagos and may also comprise other islands.

These states may draw straight archipelagic baselines joining the outermost points of the islands and drying reefs, provided that within such baselines are included the main islands and the ratio of the area of the water to the area of the land is between 1 to 1 and 9 to 1 (Article 47 of UNCLOS). Archipelagic baselines should be marked on maps of a scale or scales that is/are suitable for accurate marking of their run. The maps may be replaced with a list of geographical coordinates of points with demonstration of geodetic data. The archipelagic state shall present these maps or lists of coordinates to the public and each such a map or list shall be deposited at the address of Secretary-General of the United Nations. For the purpose of computing the ratio of water to land, land areas may include waters lying within the fringing reefs of islands and atolls, including the part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau. Despite the inclusion of the area of atolls to the land area, the waters within the atolls and reefs have the status of maritime waters (internal waters). Adoption of the limit values of the permissible ratios to such a large extent, i.e. from a level “land area” (calculated together with the waters of the atoll; see ex. of Tuvalu atolls) and sea to a nine-fold advantage of the maritime area, enables states (whose islands are scattered over large maritime areas) the establishment of such lines. The length of the archipelagic baselines may not exceed 100 nautical miles, except for up to 3% of the total number of lines covering a given archipelago, which may be longer but shall not exceed 125 nautical miles. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago and shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations, which are permanently above sea level, have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island. A system of archipelagic baselines shall not be applied by a state in such a manner as to cut off another state’s territorial sea from the high seas or the exclusive economic zone (paragraph 5). If a part of the archipelagic waters of an archipelagic state lies between two parts of an immediately adjacent neighbouring state, existing rights and all other legitimate interests which the latter state has traditionally exercised in such waters and all rights stipulated by agreement between those states shall continue and be respected (paragraph 6). A straight archipelagic line

is the basis from which the breadth of the territorial sea and other maritime zones of an archipelagic state (contiguous zone, exclusive economic zone and continental shelf) are determined.

Within its archipelagic waters, the archipelagic state may draw straight lines for the delimitation of internal waters, in accordance with Articles 9, 10 and 11 of UNCLOS. For example, if a juridical bay exists on an island that is enclosed by archipelagic baselines, a closing line may be drawn across the mouth of the bay, thus enclosing internal waters within archipelagic waters. Archipelagic states, for various reasons, generally do not make use of such a solution (including the largest ones: Indonesia,¹³ the Philippines and Papua New Guinea), although in many places the existing geographical conditions ensure its implementation, as in the case of the Manila Bay, which could be closed by a straight baseline forming the internal waters of the Philippines.¹⁴ It appears that only six of the archipelagic states (Antigua and Barbuda, Fiji, Grenada, Mauritius, Saint Vincent and the Grenadines, and Tuvalu) have delimited internal waters within their archipelagic waters.¹⁵

The territorial authority of an archipelagic state extends to the waters, bottom, subsoil and airspace within the straight archipelagic baselines. In archipelagic waters there are navigational rights which are exercised in accordance with the rules set out in UNCLOS and do not otherwise affect the status of the waters and the sovereignty of the state over the area. Under the convention, in these waters there are provided right of innocent passage (Article 52) and right of archipelagic sea lanes passage through the sea lanes and air-routes (Article 53).

Archipelagic sea lanes passage, as defined in Article 53 (3) of UNCLOS (“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”) was an entirely new solution to ensure that maritime and air navigation is maintained through waters that have been granted the status of territorial waters. The importance of the right of archipelagic sea lanes passage for international communication highlights the link between this right and the legal status of straits used for international

13 Djalal, “Challenges of Maritime Resource and Shipping Security that Face Archipelagic States”, 7, 97.

14 The Philippines considers all its waters “within” the archipelago to be “internal waters” without making a distinction between them [Author’s footnote].

15 Baumert, Melchior, “The Practice of Archipelagic States: A Study of Studies”, 71.

navigation. The uniformity of the provisions of the two regimes has been achieved by reference (Article 54 on duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic state and laws and regulations of the archipelagic state relating to archipelagic sea lanes passage), to Articles 39, 40, 42 and 44 concerning transit passage. In addition, the content of Article 53 (Right of archipelagic sea lanes passage), is the equivalent and “adaptation” of two other “transit” provisions (Articles 38 and 41). Therefore, the equivalence of the right of transit passage and the right of archipelagic sea lanes passage, intentionally adopted during UNCLOS III, is rightly emphasized in literature¹⁶ with the exception of minor differences concerning sea lanes and air routes.

According to the UN data (the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the United Nations, hereafter DOALOS),¹⁷ in 2022 twenty three states claimed the status of an archipelagic state as defined in UNCLOS, of which twenty established a system of straight archipelagic baselines: Antigua and Barbuda,¹⁸ the Bahamas,¹⁹ Cabo Verde (following the change of archipelagic baselines),²⁰ Comoros,²¹

16 Heintschel v. Heinegg, (eds.), *Kommandanten-Handbuch – Rechtsgrundlagen für den Einsatz von Seestreitkräften*, 76; Nandan, Rosenne (eds.) *ibidem*, 486-487; Symonides, *ibidem*, 84.

17 National legislation, sources of international law and other information on the law of the sea are published in the Law of the Sea Bulletin (LOS Bulletin) issued by the Division for Ocean Affairs and the Law of the Sea (Office of Legal Affairs of United Nations).

18 “Antigua and Barbuda: Archipelagic and other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, No. 133.

19 “The Archipelagic Waters and Maritime Jurisdiction (Archipelagic Baselines) Order, 8 December 2008.” Text of the Act in *LOS Bulletin* 2009, No. 69,74-77.

20 By means of the Delimitation of the Maritime Zones Act of 10 December 1992 (No. 60/IV/92), Cabo Verde amended the 1977 Decree establishing a new system of straight archipelagic baselines. It should be mentioned that the state has confirmed the right of innocent passage in the territorial sea and archipelagic waters, but does not mention the right of archipelagic sea lanes passage in the Act. Text of the Act of 10 December 1992 in: *LOS Bulletin* 1994, No. 26, 24-30; “Cabo Verde: Archipelagic and Other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, US DoS, No. 129.

21 “Comoros: Archipelagic and Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, No. 134.

the Dominican Republic,²² Grenada,²³ Indonesia,²⁴ Jamaica,²⁵ Kiribati,²⁶ the Maldives,²⁷ Marshall Islands,²⁸ Mauritius,²⁹ Palau,³⁰ Papua New Guinea,³¹ the Philippines,³² Saint Vincent and the Grenadines,³³ São Tomé and

22 The Dominican Republic has also established the coordinates of the archipelagic baselines but are not consistent with the UNCLOS. The US and the UK diplomatically protested this claim in 2007, 2010 and 2012 and Japan in 2008. “Dominican Republic: Archipelagic and other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, US DoS, No. 130.

23 “Grenada: Archipelagic and other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, US DoS, No. 135.

24 “Indonesia: Archipelagic and other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, US DoS, No. 141.

25 “Jamaica’s Maritime Claims and Boundaries.” In: *Limits in the Seas* 2004, US DoS, No. 125.

26 Republic of Kiribati Marine Zones (Declaration) Act 2011 (No. 4 of 2011), Baselines Around the Archipelagos of Kiribati Regulations 2014.

27 Constitution of the Maldives of 1964 determines a state’s borders providing two parallel and meridian lines forming a rectangle on the ocean. These lines have no connection to land, which is an unprecedented solution in practice, as well as completely contrary to the customary law of the sea and UNCLOS. This met with a diplomatic protest from the United States. The Maldives do not claim the status of an archipelagic state. Roach, J.A. Smith, R.W. “Straight Baselines: The Need for a Universally Applied Norm.” *Ocean Development and International Law* 2000, Vol. 31, 57-58.

28 *Declaration of Baselines & Maritime Zones Outer Limits* and its Schedule, dated 18 April 2016, adopted pursuant to the *Republic of the Marshall Islands Maritime Zones Declaration Act 2016* (Nitijela Bill No. 13) of 18 March 2016.

29 Mauritius was a member of the Group of Archipelagic States at the Third Conference on the Law of the Sea. Straburzyński, A. 188-189; “Mauritius: Archipelagic and other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, US DoS, No. 140.

30 Palau in association with the United States gained independence in 1994 and has not yet claimed the archipelagic waters: www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/PLW.htm

31 “Papua New Guinea: Archipelagic and other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, US DoS, No. 138.

32 The Philippines was the first state that established a system of straight baselines “closing” the entire archipelago (1961). In the declaration made upon ratification of UNCLOS in 1984, the Philippines stated that those waters were excluded from the navigation of foreign ships. That met with protests from many states. Roach, Smith, *ibidem*, 53-56.

33 Archipelagic Closing Lines and Baselines of Saint Vincent and the Grenadines (Notice No. 60 of 1 April 2014).

Príncipe,³⁴ the Solomon Islands, Fiji,³⁵ Seychelles,³⁶ Trinidad and Tobago,³⁷ Tonga,³⁸ Tuvalu,³⁹ and Vanuatu.⁴⁰

An additional group of states situated on many islands but not meeting the criteria of an archipelagic state as defined in UNCLOS embraces Bahrain, East Timor, Japan,⁴¹ Malta,⁴² New Zealand, Republic of Ireland, Saint Lucia, Saint Kitts and Nevis, Samoa, Singapore, Sri Lanka, and the United Kingdom of Great Britain and Northern Ireland, can also be mentioned. In each of these above-mentioned states, at first sight, it is not possible to meet the criterion of water to land ratio because the land area closed by straight archipelagic lines is larger than the area of water within these lines. A good example is Malta, which, even after including in the system of baselines of the rocky

34 São Tomé and Príncipe established a system of 12 straight archipelagic baselines and a 12-mile territorial sea (Decree-Law No. 14/78) as early as June 1978. The waters closed by these lines were recognised as being under total national sovereignty; “freedom of navigation and overflight in straits and on lanes used for international navigation” were also confirmed. In November 2018 (Decree-Law No. 48/82), amendments were made to complement the system, which currently includes 14 lines. Their length ranges from 0.38 miles to 99.53 miles; 86 miles for lines connecting two main islands. In the current law status, the area of waters closed by lines is 3,886 km² and 964 km² on land. This gives a ratio of 4.03:1. Thus, the system of straight archipelagic baselines meets the proportions, line lengths and other UNCLOS criteria. “Archipelagic Straight Baselines: Sao Tome and Principe.” In: *Limits in the Seas* 1983, US DoS, No. 98, 2-9.

35 Francalanci, Scovazzi, (eds.), *Lines in the Sea*, 108.

36 “Maritime Zones (Baselines) Order, 2008 (S.I. 88 of 2008).” Text in: *LOS Bulletin* 2009, No. 70,16-25.

37 “Archipelagic Waters and Exclusive Economic Zone Act, 1986 (Act No. 24 of 1986).” The state has confirmed the right of innocent passage in the territorial sea and archipelagic waters, but does not mention the right of archipelagic sea lane passage in the Act. Text in: *LOS Bulletin* 1987, No. 9,6-17.

38 *A partial submission of data and information on the outer limits of the continental shelf of the Kingdom of Tonga in the western part of the Lau-Colville Ridge pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the Sea*, Part I, Submission to the Commission on the Limits of the Continental Shelf through the Secretary-General of the United Nations April 2014.

39 “Tuvalu: Archipelagic and other Maritime Claims and Boundaries.” in: *Limits in the Seas* 2014, US DoS, No. 139; Bugajski, “Klimatyczna deterytorializacja państwa na przykładzie Tuvalu.” 203-219.

40 “Vanuatu: Archipelagic and other Maritime Claims and Boundaries.” In: *Limits in the Seas* 2014, US DoS, No. 137.

41 Straburzyński, *ibidem*, 193.

42 Malta designated the system of straight baselines which was, according to the United States, illegal under the UNCLOS and was the subject of diplomatic protests by that country in 1981 and 1984. The system of those lines was also presented by Malta on a map submitted to ICJ in a dispute with Libya, which resulted in a ruling in 1985. *Maritime Claims Reference Manual*, Under Secretary of Defense for Policy 2005, DoD 2005.1-M, 381.

outcrop called Filfla (located south of the main island), it does not meet the proportionality criterion.⁴³

There is also a number of territories with different international legal status, which (together with independence) could gain the status of an archipelagic state⁴⁴ as they comply with the respective requirements of UNCLOS (e.g. the Åland Islands – autonomous region of Finland, Autonomous Region of Bougainville – Papua New Guinea, the Danish autonomous Faroe Islands, the French Department of Guadeloupe and autonomous New Caledonia, the Spanish autonomous Canary Islands, the Portuguese autonomous Azores as well as Madeira⁴⁵ with nearby islands and the British Overseas Territory Turks and Caicos, British Virgin Islands, United States Virgin Islands or State of Hawaii – formerly independent territory as the Hawaiian Kingdom etc.).

The comparison of the status of archipelagic waters, which (unlike other territorial waters) were a novelty formed during the work of the Third Conference on the Law of the Sea, with the status of internal waters and territorial sea leads to the conclusion that the limitation of sovereignty of an archipelagic state in these waters is even greater than in the territorial sea.⁴⁶ Pursuant to Article 51 of UNCLOS, in addition to navigational rights (innocent passage in the entire area of archipelagic waters and archipelagic sea lanes passage through maritime routes and air corridors connecting two areas of the high seas or the exclusive economic zone), the traditional rights of directly neighbouring countries to fishing and other legally justified activities in specific areas of archipelagic waters⁴⁷ and to maintain and replace laid (existing at the time of establishment of the archipelagic waters) submarine cables by other (also non-neighbouring) states have been preserved in archipelagic waters. Therefore, archipelagic waters, although (similarly to the territorial sea and internal waters) are a part of the territory of a state, should (in

43 Francalanci, Scovazzi (eds.) *ibidem*, 52.

44 *The Commander's Handbook on the Law of Naval Operations*, Department of the Navy (US), October 1995/ August 2017, 1-87.

45 A system of straight lines has been established around the Faroe Islands, the Azores and Madeira with nearby islands, even though they do not form a chain of islands along the coast, but “continental archipelagos.” The waters within these lines should be considered internal waters with a guaranteed right of innocent passage under Article 8(2) of UNCLOS. This solution is widely regarded as contrary to UNCLOS. Molenaar, “Navigational Rights and Freedoms in an European Regional Context.”, 24.

46 Symonides, *ibidem*, 82.

47 These rights cannot be transferred to third-party states or their nationals nor can they be exercised together.

terms of their extent of sovereignty) be classified between the territorial sea and the exclusive economic zone, even though they are territorially situated between internal waters and the territorial sea.⁴⁸

3. Right of Innocent Passage Through Archipelagic Waters

In addition to the right of archipelagic sea lanes passage, under Article 52, ships of all states shall enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, Section 3 of UNCLOS, without prejudice to Article 50 concerning the delimitation of internal waters by the archipelagic state and Article 53 governing archipelagic sea lanes passage. The right of innocent passage, except as provided for in Article 52 in connection with reference to Articles 50 and 53, shall be fully subject to the same rules as the right of innocent passage in the territorial sea governed by Part II, Section 3 of UNCLOS. It may therefore be legally suspended by the archipelagic state upon fulfillment of the following conditions:

- suspension without any discrimination in form or in fact against foreign ships;
- suspension is limited in time (it cannot be indefinite);
- suspension is limited to a specified area (it must not apply to archipelagic waters *in extenso*);
- suspension is essential for the protection of the security of the archipelagic state (ex. military exercises);
- suspension shall take effect only after having been duly published.

In general, navigational rights are not subject to temporal suspension, except as explicitly provided for in UNCLOS (as above). Even in the event of war, the full extent of these rights may continue to be enjoyed by the vessels and warships of belligerents in the territorial waters (territorial sea and archipelagic waters) of neutral states, including straits used for international navigation, and in archipelagic waters, which may be of strategic importance in an ongoing armed conflict. Also the scope of innocent passage during war remains unchanged, as a warship cannot pass through the territorial sea or archipelagic waters, but also enter the port of a neutral state. In the latter

⁴⁸ Janusz Symonides shares that view (see Symonides, *ibidem*, 85), however, Janusz Gilas has a different opinion (see Łopuski (ed.), "Prawo morskie", Part II by J. Gilas, Bydgoszcz 1996, 361).

case, the Law of the Sea is supplemented by contractual and customary norms of the Law of War (in principle, the limitation of the time of stay in the port to 24 hours).⁴⁹ In the 1907 Hague Convention (XIII) on Neutral Powers in Naval War, which was a codification of the then customary law, belligerent warships were already allowed to moor in ports or on the roadsteads of neutral states. The main restrictions on mooring in a neutral port and in neutral waters concern time (not longer than 24 hours unless a warship is damaged or the weather prevents further voyage) and the number of warships of one belligerent, which may not be more than three.⁵⁰ In accordance with the *San Remo Manual*⁵¹ (paragraph 20), a neutral state respecting the principle of impartiality, without prejudice to its neutrality, may authorise the following activities by warships and auxiliary ships of the belligerents in its territorial waters:

- passage through the territorial sea and archipelagic waters, including the use of services of a pilot from a neutral state;
- replenishing food, water and fuel supplies in an amount sufficient to the navigation to the port of a flag state;
- repair to the extent necessary to restore seaworthiness, but not to restore or enhance combat capabilities.

Although there is one article referring to the right of innocent passage in the “Archipelagic States Part” of UNCLOS, this does not avoid discrepancies with the “Innocent Passage Part”, which are difficult to justify. At the end of the first sentence of Article 52 Section 2, after the word “security”, the phrase “including weapons exercises”, which comes at the end the first sentence of Article 25 (3) of UNCLOS, has not been added. This difference was noticed at UNCLOS III, but presented at the 11th session in 1982 by Papua New Guinea. The proposal to add the missing phrase was not accepted.⁵² This does not mean that an archipelagic state cannot suspend the right

49 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, International Institute of Humanitarian Law, Cambridge 1995, 99-101 (paragraph 20 and 21).

50 For example, the Polish submarine ORP “Orzeł” took advantage of the right to shelter in a neutral port on 15 September 1939 by entering the Estonian port of Tallinn. The next day, at the insistence of the Germans and Russians, Estonian military authorities boarded the ship, interned the crew, confiscated all the navigation aids and maps, and commenced dismantling all the armaments. On 17 September, ORP “Orzeł” escaped and continued to patrol the Baltic Sea. They took the decision to join the United Kingdom where they arrived on 14 October, 43 days after leaving Gdynia. See Bugajski, *The Polish Naval Academy. In the Centenary of Regaining Access to the Baltic Sea*, 30 and 33.

51 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, *ibidem*.

52 Nandan, Rosenne, (eds.), *ibidem*, 461.

of innocent passage in archipelagic waters for the purpose of conducting military exercises, as the phrase used in Article 25 (3) is only indicative and suspension is therefore possible in both areas (territorial sea and archipelagic waters) also for other reasons, provided that they are justified by the need to protect national security.

Pursuant to Article 51 of UNCLOS, in addition to the explicitly stated navigational rights (right of innocent passage in the entire area of archipelagic waters and right of archipelagic sea lanes passage), traditional fishing rights and other legitimate activities of the immediately adjacent neighboring states in certain areas falling within archipelagic waters shall be recognized. The phrase: “traditional (...) rights and other legitimate activities of the immediately adjacent neighboring states” includes, inter alia, ensuring communication between archipelagic waters of another state separated by parts of a territory, by prohibiting the suspension of the right of innocent passage within a specified area of archipelagic waters.⁵³ Therefore, this is an exception to the principle that the right of innocent passage in archipelagic waters may be temporarily suspended if such suspension is essential for the protection of the security of the archipelagic state (Article 52 (2)).

An example of a strait in archipelagic waters, where the right of innocent passage is not suspended, is the Serasan Strait (South China Sea), located parallelly between the Natuna Islands and Borneo (precisely between the Serasan Island and the Api Island). These waters are enclosed by Indonesia with two straight archipelagic baselines with a total length of almost 78 nautical miles from Serasan to Borneo.⁵⁴ The strait is separated by islets and shallows into three smaller passages (from the north Koti Passage, Serasan Passage and Api Passage) and is the shortest way from mainland Malaysia to the Malaysian Port of Kuching in Sarawak. The nearby 1st ASL of Indonesia runs in this area from the south-west to the north-east, passing north of the Serasan Strait between the Great Natuna Island and the Subi Island.

The terms and conditions for the exercise of rights and activities referred to in Article 51, including the nature, the extent and the areas to which they apply, shall, at the request of any of the states concerned,

53 Symonides, *ibidem*, 83.

54 The 27.67-mile straight archipelagic baseline connects Cape Datu (02°05'10" N, 109°38'43" E) on Borneo (Kalimantan) with Kepala (02°38'43" N, 109°10'04"E) and hence, another 44.1 nautical mile line connects the Cape on the Subi Island (03°01'51" N, 108°54'52" E). *Maritime Claims ...*, 286.

be regulated by bilateral agreements between them. An example of such an agreement is the treaty concluded between Malaysia and Indonesia in 1982.⁵⁵ Although the rights listed in Article 51 of UNCLOS may not be transferred to or exercised with third states or their nationals, the prohibition of the suspension of innocent passage in a specified part of the archipelagic waters, established in the interest of the neighboring state, whose territory has been divided by such waters, in fact, serves the navigation of ships of all states (ex. the southern part of the South China Sea called the Natuna Sea).

In addition to the differences indicated, the right of innocent passage in archipelagic waters takes the same shape as in the territorial sea and therefore, the list contained in Article 19 of UNCLOS, requiring warships to show their flag and submarines and other underwater vehicles to navigate on the surface etc., is fully applicable. Moreover, there is no right of overflight of aircraft in the airspace over the archipelagic waters, except in the air routes above the archipelagic sea lanes.

It is worth noting that after fishing, the rights of neighbouring states include “other, legally justified activities (interests) in specific areas of archipelagic waters.” This concept includes ensuring communication between the separated archipelagic waters of another state’s parts of the territory, by maintaining the right of innocent passage (not subject to suspension) in a defined area.⁵⁶ Therefore, this is an exception to the principle that the right of innocent passage in defined areas of archipelagic waters may be temporarily suspended to ensure the security of the archipelagic state (Article 52(2)).⁵⁷

Of the areas of archipelagic waters to which the prohibition of the suspension of innocent passage through the archipelagic state applies, the most typical and the most significant aspect for the purposes of navigation is the area of the South China Sea, south of the Indonesian geographical archipelagos of Anambas and Natuna (waters called the Natuna Sea), which Indonesia connected by a system of straight archipelagic baselines to the main

55 “The 1982 Treaty between the Republic of Indonesia and Malaysia relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia.” In *LOS Bulletin* 1998, No. 38, 45.

56 Symonides, *ibidem*.

57 It should be noted that it is difficult to justify the difference between Article 25(3) and Article 52(2) of UNCLOS, consisting in the absence of the phrase ending the first sentence in the latter case: “including exercises with weapons.”

islands (Borneo and Sumatra).⁵⁸ These waters also form the shortest parallel sea route between two parts of Malaysia, located on the Malay Peninsula and Borneo. Another example concerns cabotage navigation between the western and eastern ports of the Malaysian province of Sabah, which is forced to pass through the archipelagic waters of the Philippines due to its proximity to the coast of foreign islands.⁵⁹ Between Turtle islands included in the system of straight archipelagic baselines of the Philippines and the Sabah coast (port of Sandakan) which is approximately 10 miles away from these islands, navigational conditions are difficult and thus navigation can take place from outside. It may be pointed out that, despite different legal bases, there is a certain analogy in the latter case as to the solution of the problem of navigation in the (“island”) straits between an island and a mainland, where the non-suspendable right of innocent passage, as provided for in Article 38(1) sentence 2 of UNCLOS (e.g. the Strait of Messina), applies.⁶⁰

4. Archipelagic Sea Lines Passage

4.1. Rights of Archipelagic States

The regime of archipelagic sea lanes passage established in line with Part IV of UNCLOS shall not in other respects affect the status of archipelagic waters, including sea lanes, or the exercise by the archipelagic state of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein Article (49 (4) of UNCLOS).

The extensive Article 53 of UNCLOS, which corresponds to Article 41 of the Part on transit passage, sets out the rules for the designation and use of archipelagic sea lanes. In accordance with Section 1 of this Article, [a]n 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. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal *passage routes* used as routes for international navigation or overflight through or over

58 “Act No. 6 of 8 August 1996 regarding Indonesian Waters.” In: *LOS Bulletin* 1998, No. 38, 32-51.

59 See Francalanci, Scovazzi (eds.) *ibidem*, 100.

60 See Caffio, *Glossario di Diritto del Mare*.

archipelagic waters and, within such routes, so far as ships are concerned, all normal *navigational channels*, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary. Such sea lanes and air routes shall be defined *by a series of continuous axis lines* from the entry points of passage routes to the exit points in the territorial sea. An archipelagic state may also prescribe *traffic separation schemes* for the safe passage of ships through narrow channels in such sea lanes, which shall conform to generally accepted international regulations.⁶¹ An archipelagic state may, when circumstances require, after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by it. In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic state shall refer proposals to the competent international organization (IMO)⁶² with a view to their adoption. However, the competence of the organization is limited to the approval or rejection of the proposal of the archipelagic state, with no possibility of suggesting another solution.⁶³ Although Article 53 (9) of UNCLOS does not consider the approval of air routes by the ICAO, it is assumed to be the only competent organization in this respect, in the same way and to the same extent that IMO is the only competent organization for the approval of sea lanes and traffic separation schemes.⁶⁴ It should also be noted that the air routes within the meaning of Article 53 have nothing to do with the air routes designated by ICAO for civil aviation, since the Convention routes essentially serve the navigation of non-civilian aircraft to which the organization's rules do not apply.⁶⁵ The archipelagic state shall clearly indicate the axis lines of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given.

61 Traffic separation schemes shall be prescribed on the basis of general principles set out in Rule 10 of the COLREG'72.

62 "*Competent or relevant international organizations*" under the *United Nations Convention on Law of the Sea*, Text in: *LOS Bulletin* 1996, No. 31, 81.

63 Lotilla, "Navigational Rights in Archipelagic Waters: A Commentary from the Philippines", 155.

64 Warner, "Implementing the Archipelagic Regime in the International Maritime Organization", 185.

65 *Convention on International Civil Aviation, adopted in Chicago on 7 December 1944* (Journal of Laws 1970, No. 4, item 25).

The designation of sea lanes and air routes thereabove, is certainly not an obligation of the archipelagic state.⁶⁶ If an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation (Section 12). The latter provision, read in conjunction with Section 4, which prescribes that the designated sea lanes and air routes “shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic water”, indicates that the jurisdiction of the archipelagic state in this regard is limited to determining the detailed course of the sea lane and air route, and the traffic separation system, taking into account the local navigational and safety conditions best-known to the archipelagic state, and ensuring its own security. However, this does not imply the right of an archipelagic state to designate sea lanes which are separate from the existing “system” of sea lanes normally used for international navigation, or “only” to limit their number, for example by designating a single sea lane.⁶⁷ Therefore, an archipelagic state may designate sea lanes and air routes, only within the existing passage routes normally used for international navigation.

In accordance with a document adopted by the Maritime Safety Committee (MSC) containing IMO procedures for adopting archipelagic sea lanes, the following requirements shall be met, concerning:

- continuous, expeditious and unobstructed passage in the normal mode;
- designation of all normal passage routes;
- designation of all normal navigation channels;
- a requirement that ships and aircraft shall not deviate more than 25 miles to either side of axis lines and shall not navigate closer to the coast than 10% of the distance between the nearest points on islands bordering the sea lane.⁶⁸

To sum up, it should be noted that the obligation to designate all normal passage routes, including all navigation channels, leads to the conclusion that the right of archipelagic sea lanes passage can be exercised on both designated and undesignated routes if the state concerned has not designated all routes which are normally used for international navigation

66 Djalal, “The Law of the Sea Convention and Navigational Freedom”, 4.

67 An example is Indonesia, which has designated three such sea lanes, despite the fact that user states (Australia, USA) have indicated a larger number.

68 IMO Doc MSC 67/7/3 of 5 September 1996.

through or over archipelagic waters (ex. the archipelagic waters of Galleon's Passage between Trinidad and Tobago). Both in the case of designated and undesignated passage routes, the archipelagic state shall not impede or suspend the exercise of archipelagic sea lanes passage, even for reasons of state security.⁶⁹ Finally, there are questions about practical solutions, which have yet to be resolved. These include, among other things, the difficult problem of identifying "all passage routes which are normally used for international navigation through or over archipelagic waters". Moreover, the question remains as to which entity would decide on these matters, the archipelagic state, the main user states of the archipelagic sea lane, or the competent international organization.⁷⁰ Based on past practice, it may be considered that the best solution would be to conclude an "implementing" agreement on the basis of the provisions of UNCLOS between the archipelagic state and user states in agreement and with the approval of the IMO.⁷¹

4.2. Scope of the Right of Archipelagic Sea Lanes Passage

Section 2 Article 53 of UNCLOS has highlighted the scope of the right of archipelagic sea lanes passage and overflight in air routes over such sea lanes, which applies to all ships and aircraft. As stated in the definition (Article 53 Section 3) 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. Comparing the definition of transit passage (first sentence of Article 38 Section 2) with the definition of archipelagic sea lanes passage, two differences may be observed, which include the addition, in the latter case, of the term *in the normal mode* to the right of navigation and overflight, and the addition of the purpose of transit, since, apart from being continuous and expeditious, archipelagic sea lanes passage shall also be *unobstructed*. However, in the first sentence of Article 38 (1), it was specified that transit passage *shall not be impeded*. Although the negation of the word "impeded" and the word "unobstructed", in its fundamental sense, can be understood as "not hindered", the use of different words would, in accordance with

69 *Kommandanten-Handbuch* ...,77.

70 See Bugajski, *Międzynarodowe organizacje morskie*, 169-194.

71 See Gilas, „Uprawnienia normotwórcze Międzynarodowej Organizacji Morskiej”, 93-104.

the principles of a rational legislator, imply their different meaning. However, a review of doctrine and case law does not provide an answer to the question of a difference between these terms. On the contrary, their “factual identity” is indicated in Article 53 (3) and Article 38 (2).⁷²

Ships shall respect sea lanes and traffic separation schemes established in accordance with Article 53. Additionally, ships and aircraft in archipelagic sea lanes passage shall not:

- deviate more than 25 nautical miles to either side of such axis lines during passage,
- navigate closer to the coasts than 10% of the distance (10 per cent rule) between the nearest points on islands bordering the sea lane.

Where a sea lane is bordered by islands, of these two requirements, the 10 per cent rule shall take precedence, which means narrowing the available shipping and overflight lane from 50 miles to less than the distance between the coasts of the islands lying on both sides of the sea lane. While the obligation for a ship and an aircraft, exercising its rights in connection with archipelagic sea lanes passage, to remain within the limits of the archipelagic sea lane during navigation is not disputed, the interpretation of the 10 per cent rule raises doubts. Several possible interpretations are proposed.⁷³ According to one of the opinions expressed in the commentary of S.N. Nandan and S. Rosenne, the 10% value refers to the distance between neighboring islands on both sides of the archipelagic sea lane.⁷⁴ According to this interpretation, if the distance between the islands is 60 miles, a ship and an aircraft may pass no closer than five miles from the coast of the island (from the 25-mile axis of the sea lane), but the 10 per cent rule of the whole 60-mile-broad sea lane means that a ship cannot pass closer than six miles from the coast of the island, which means that the sea lane is in fact only 48 miles in breadth.⁷⁵ However, the problem is that there is no obligation to designate the axis of the archipelagic sea lane along the median line, i.e. at equal distance from the islands. Also, the hydrographic conditions themselves may make it impossible, for instance,

72 Nandan, Rosenne (eds.) *ibidem*, 476.

73 The Australian Department of International Law at the Ministry of Justice has presented as many as five possible methods of interpretation based on the analysis of the Indonesian proposal for the designation of an archipelagic sea lane and Article 53 Section 5 of UNCLOS. R. Warner, *ibidem*, 184.

74 Nandan, Rosenne, (eds.) *ibidem*, 478.

75 *Ibidem*, 478.

by means of a varied distribution of navigable depths, including submarine navigation in the underwater position, to designate the axis of the sea lane along the median line between the islands, as is the case in the Makassar Strait, where the median line of the sea lane runs off the coast of Sulawesi (Celebes) and far from the coast of Borneo (Kalimantan). Moreover, the provision of Section 5 refers to bordering, rather than neighboring islands. Finally, the *ratio legis* of designating an archipelagic sea lanes passage is not to increase the security of the archipelagic state by maximizing the distance of the sea lane from the islands, but to ensure the conditions for the “continuous and expeditious passage of foreign ships and aircraft”.

There is also a lack of sufficient practice by states in applying the 10 per cent rule, since out of the twelve states that have established simple archipelagic baselines, only Indonesia has designated archipelagic sea lanes in accordance with the Convention’s procedure and, in addition, the adopted provisions relating to this matter repeat the wording of the second sentence of Section 5, without providing any guidance on interpretation.⁷⁶ This issue was also discussed in negotiations between Indonesia and the main users of archipelagic sea lanes in its waters (Australia and the United States), but remained unresolved. There are also no grounds for recognizing the competence of IMO in this area. Finally, there is also a lack of case law or advisory opinions from international courts, of which the ICJ in particular has jurisdiction in this matter.⁷⁷

Acceptance of the position of S.N Nandan and S. Rosenne would mean, in extreme cases, preventing larger ships from passing through the archipelagic sea lane. These problems are best reconciled by the recognition that the 10% value refers to the distance between the axis of the sea lane and the coastal points of the islands bordering the sea lane. This is the simplest solution to apply in practice, but it is not possible to achieve by means of a linguistic interpretation of Article 53 (5).⁷⁸ With such an interpretation, in the presented example of a 60-mile broad strait, the available archipelagic sea lane will amount to 50 nautical miles.

76 “Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes 28 June 2002.” Text in: *LOS Bulletin* 2003, No. 52, 20-25; IMO Circular SN/Circ.200/Add.1 of 3 July 2003.

77 The advisory competence of the second international court – the International Tribunal for the Law of the Sea – is limited to matters relating to the exploitation of the seabed beyond the limits of national jurisdiction (the Seabed Disputes Chamber).

78 Warner, *ibidem*, 184.

In conclusion, it should be noted that the spatial scope of the right of archipelagic sea lanes passage includes sea lanes and air routes (designated and undesignated) within archipelagic waters and territorial sea as measured from the archipelagic baselines, but only where the archipelagic sea lane and air route is connected with the high seas through a strip of territorial sea (Article 53 (1)).

As regards warships, UNCLOS does not distinguish them, in any way, from other ships. It can therefore be assumed, for instance, that it does not limit the number of warships passing through the archipelagic sea lane at the same time. This means that there is a right of archipelagic sea lanes passage, in practice even of large groups of warships, which may include aircraft carriers and submarines. It is generally accepted that the right to navigate in “the normal mode solely for the purpose of continuous, expeditious and unobstructed transit” (Article 53 (3)) in the case of submarines and other submersible vehicles with respect to transit passage, includes underwater navigation, which is the normal mode of passage for this group of ships.⁷⁹ The normal mode of navigation of all warships, in addition to normal navigation requirements (communication, technical observation, etc.), also includes, for instance, changing the order of the group of warships, or the take-off and landing of aircraft,⁸⁰ which should comply with the rules of overflight in the air route, including the 10 per cent rule. In addition, unlike in the case of innocent passage, UNCLOS does not provide sufficiently precise guidance to establish a detailed scope of rights of a warship or groups of warships during archipelagic sea lanes passage.

4.3. Navigation under the Right of Archipelagic Sea Lanes Passage in Practice of Indonesia

To the present day, Indonesia is the only archipelagic state to have designated both archipelagic baselines and archipelagic sea lanes. Indonesia made the first archipelagic baselines claim in 1960 afterward replaced by Act No.6 of 8 August 1996.⁸¹ The latter act deals with the definition of archipelagic baselines in general terms. Supplementary regulations of 1998 and

79 Mandsager, “The U.S. Freedom of Navigation Program: Policy, Procedure, and Future”, 124; *Kommandanten-Handbuch...*, *ibidem*, 76; *San Remo Manual...*, Sections 23, 26, 28 and 30 (pp. 103-107); Symonides, *ibidem*, 58.

80 *Kommandanten-Handbuch...*, *ibidem*; Djalal, *ibidem*, 6.

81 See www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1996_Act.pdf.

2002 provided for the specific designation of Indonesia's archipelagic baselines.⁸² Interestingly, neither the 1960 or 2002 Indonesian archipelagic baselines designations provide for a system of baselines wholly enclosing the Indonesian archipelago. For instance, in the 1960 designation, a gap was left north of Timor Island in the vicinity of the Ombai and Wetar Straits.⁸³

Among the twenty states that have established archipelagic baselines, only Indonesia has designated, in accordance with the procedure provided for in UNCLOS and the special document adopted in 1998 by the IMO, entitled *General Provisions for the Selection, Designation and Replacement of ASLs*,⁸⁴ broadly oriented north-south the three archipelagic sea lanes (hereafter ASL), and they duly entered into force on 28 December 2002.⁸⁵ Indonesia has enacted regulations in respect of both the right of innocent passage, and the right of archipelagic sea lanes passage.⁸⁶

Therefore, there is no sufficiently representative practice of states to establish customs "developing" the Convention provisions concerning archipelagic sea lanes passage. Nevertheless, the solutions adopted by Indonesia, which is the largest and most important state of all archipelagic states in terms of international communication, are expected to influence the development of international practice in this respect. It is also relevant that the procedure for the establishment of archipelagic sea lanes by the government in Jakarta included, in addition to the presentation

82 *Government Regulation No. 61 of 1998 on the List of Geographical Coordinates of the Base Points of the Archipelagic Baselines of Indonesia in the Natuna Sea*, at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1998_Regulation61.pdf. *Government Regulation No. 38 of June 2002* www.dtic.mil/whs/directives/corres/20051m_062305/indonesia.doc.

83 Prescott, "The Question of East Timor's Maritime Boundaries", 72-81. See also, Schofield, Arsana, "The Delimitation of Maritime Boundaries: A Matter of 'Life and Death' for East Timor?", 67-85.

84 The document entitled "The General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes" (GPASL) was adopted in: *Resolution MSC.71(69)* (adopted on 19 May 1998), *Adoption of Amendments to the General Provisions on Ships' Routing (Resolution A.572(14) as amended)* and incorporated as Part H to the *IMO Ships Routing Publication*.

85 See International Maritime Organisation, *Adoption, Designation and Substitution of Archipelagic Sea Lanes*, T2-NAVSEC/2.7.1, SN/Circ.200/Add.1 (3 July 2003) at www.imo.org/includes/blastDataOnly.asp/data_id%03D7620/200-add.1.pdf.

86 Act No. 6 of 8 August 1996 regarding Indonesian Waters, at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1996_Act.pdf and Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, 28 June 2002, at www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin52e.pdf.

of the Indonesian proposals to the IMO,⁸⁷ consultations and the exchange of diplomatic correspondence with the user states of the sea lanes (mainly Australia and the United States) and, to a lesser extent, the participation of ICAO, DOALOS and International Hydrographic Organization, and the views expressed in the literature.⁸⁸

The direct trigger for resolving doubts regarding the rules of navigation through Indonesian archipelagic waters was the temporary closure of the international straits of Sunda and Lombok for the purpose of carrying out military exercises with weapons in September 1988.⁸⁹ The situation was repeated in 1992 when an Indonesian submarine contested the right of an Australian submarine to pass through the Sunda Strait.⁹⁰ These events took place after Indonesia's active participation in the work of UNCLOS III and almost immediately after ratification of UNCLOS (3 February 1986), as indicated in the protests raised by the user states.⁹¹

In the Regulation on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes,⁹² adopted on 22 June 2002, covering 16 articles, Indonesia designated three almost longitudinal ASLs, which were marked by Roman numerals and their branches by capital letters of the Latin alphabet. From the west, the 1st ASL of Indonesia leads from the Serasan Strait (located between the islands of Natuna and Borneo) to the south-west, where it connects with branch IA leading south-east from the Singapore Strait through the Karimata Strait and again south-west through the Sunda Strait to the Indian Ocean. Connecting the South China Sea and the Singapore Strait with the Indian Ocean, this sea lane comprises 14 sections and one section of the "Singapore branch". The 2nd ASL of Indonesia is the shortest sea lane (approximately 640 miles in the archipelagic waters and the territorial sea), with no branches, almost straight and leads from the Celebes Sea and

87 A proposal by Indonesia to designate three longitudinal archipelagic sea lanes was adopted in May 1998 at the 69th session of the Maritime Safety Committee (MSC).

88 Warner, *ibidem*, 171.

89 Bateman, 108 and 164.

90 Johnson, "A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission", 330.

91 Apart from the United States, protests were also lodged in 1988 by Australia, Japan, Spain (on behalf of the European Community) and in 1989 by the Federal Republic of Germany. Roach, Smith, *ibidem*, 218-219.

92 "Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, 28 June 2002." Text in: *LOS Bulletin* 2003, No. 52, 20-25.

the region of the Philippines along the shortest route through the Makassar and Sunda Straits to the Indian Ocean (it comprises 7 straight sections). The 3rd ASL of Indonesia leads directly from the Pacific Ocean, between Celebes and the Maluku Islands and further along the four branches to the east and west of Timor and towards the Torres Strait (it comprises 12 sections of the main IA sea lane and 7 branches).

In the Indonesian Regulation (Article 3 (2)), it was indicated that the right of archipelagic sea lanes passage in the rest of its waters may be exercised subject to the designation of archipelagic sea lanes, and therefore the spatial scope of that right was limited to the aforementioned three lanes with their branches. This is contrary to the provision of Article 53 (4) of UNCLOS, which expressly states that this right shall apply to all routes used for international navigation or overflight through or over archipelagic waters. User states (Australia and the United States) also pointed to the “incompleteness” of Indonesia’s proposal and suggested to complement the longitudinal system of the three ASLs with several branches, and to recognize an additional parallel ASL running from Singapore, through the Java Sea towards New Guinea and the Torres Strait, thus connecting the three ASLs established by Indonesia.⁹³ The problem should be resolved by means of a memorandum of understanding between the archipelagic state and the user states of the archipelagic sea lanes, which would then be adopted by IMO and ICAO respectively.⁹⁴ The practice followed in the designation of the first archipelagic sea lanes, i.e. direct negotiations between the states concerned outside IMO regarding the coordinates of the ASL axis, confirms the validity of this solution.⁹⁵

Another important issue that has not been addressed in the inter-state negotiations, by IMO or by the Indonesian Regulation, is the application of the 10 per cent rule. In the case of all three Indonesian ASLs, there are large numbers of small islands, rocks and reefs located in the 25-mile belt on both sides of the sea lane axis, which constitute navigational obstacles but also, in practice, limit the available breadth of the sea lane and air route. Despite attempts by Australia and the United States to convince Indonesia of the need to mark, in addition to the sea lane axis and the air route axis, their lateral boundaries on maps, which would solve the problem

93 See more Lestari, “What is the Right is the Right, Archipelagic Sea Lanes and Passage? (According to UNCLOS 1982 and Practice)”, 209-228; Johnson, *ibidem*, 327-328.

94 On the role of the ICAO in the process of establishing ASLs: Warner, *ibidem*, 185.

95 *Ibidem*, 175.

of interpretation of the 10 per cent rule by users, the 2002 Regulation merely reiterates the imprecise provisions of UNCLOS in this respect.

With regard to warships and military aircraft, Indonesia prohibits the conduct of “war exercises or exercises using any kind of weapons with ammunition” during archipelagic sea lanes passage (Article 4 (4)). Any direct communication with unauthorized persons or groups within the territory of Indonesia is also not allowed. It is also important, in view of the fairly widespread restriction of navigational rights of nuclear-powered ships or ships carrying nuclear or other inherently dangerous materials, that Indonesia does not deny this category of ships the right to pass through its archipelagic waters and, in the 2002 Regulation, provides for the obligation for these vessels to bring documents and observe special precautionary measures as determined by international agreements for such vessels (Article 9 (3)).

One of the consequences of the declaration of independence by East Timor in 2002 (previously occupied by Indonesia, which closed the waters around this island with its own system of archipelagic baselines⁹⁶) was a change in the course of straight archipelagic baselines in this area and a change in navigation rules in the Ombai Strait (north of Timor) and the Leti Strait (east of Timor). In addition to the confirmation of the above (Article 14), the Indonesian Regulation does not indicate an appropriate navigational right which could replace the right of archipelagic sea lanes passage in these waters. The assessment of the situation is hindered by the absence of a bilateral agreement between the two states bordering straits on the delimitation of sea areas and the issue of navigation.

A large number of islands closed by Indonesian straight archipelagic baselines form a complex maze of “internal” seas and straits, many of which are located on the routes usually used for international navigation, which form archipelagic sea lanes. Alongside the Strait of Malacca, through which most of the freight transport heading to and from the dynamically developing Far East passes, the straits of Indonesian archipelagic waters, generally forming longitudinal connections between the waters of the Pacific Ocean and the waters of the Indian Ocean, are of great significance for navigation. Particularly important is the Makassar-Lombok Straits Sea Lane (the 2nd ASL of Indonesia), which due to hydrographic conditions (the navigational breadth in the Lombok Strait is 11 miles and in the narrowest point

96 List of coordinates of Indonesian archipelagic baselines in accordance with the Regulation of June 2002 No. 38 [in:] *Maritime Claims ...*, 281-296.

of the Makassar Strait, 22.5 miles) is accessible to the largest tankers and provides a safe passage for aircraft carrier assemblies and, in particular, the covert movement of submarines with nuclear weapons on board in both directions.⁹⁷ For the passage of submarines from the Guam Island base, the United States have also used the 3rd ASL of Indonesia, both during the Cold War and today, which is longer and less convenient for navigation, but much less used by merchant navigation.⁹⁸

5. Conclusion

Among the three navigational rights, the right of innocent passage (Part II of UNCLOS), the right of transit passage (Part III of UNCLOS) and the right of archipelagic sea lanes passage (Part IV of UNCLOS), there is not only a “conceptual link” intended by the authors of the Convention, visible in the use of terms such as “traffic separation scheme”, “sea lane”, but also a *de facto* link between the three institutions which serve, from a military point of view, to ensure international security and conditions for the peaceful use of the sea for commercial and communication purposes.

Of the navigational rights, while historically the oldest right of innocent passage has been designed to serve all navigation regardless of the type and purpose of the ship, the right of transit passage and the right of archipelagic sea lanes passage have undoubtedly been adopted primarily with a view to ensure the free movement of naval forces in terms of navigation on the surface, submerged navigation, and air navigation. After all, even if the right of transit passage and the right of archipelagic sea lanes passage were not established within the archipelagic waters and straits used for international navigation, the right of innocent passage, which fully permits merchant navigation for the purposes of global trade, would be preserved.

Taking into account the geographical location of the territorial waters, which constitute the space for the exercise of navigational rights, the following are situated from the coast: internal waters, archipelagic waters and the territorial sea.⁹⁹ However, given the scope of navigational rights and

97 Leifer, *Malacca Singapore and Indonesia*, 79.

98 *Ibidem*, 85.

99 Taking into account the legal status of maritime waters, two groups can be distinguished in principle. The former is territorial waters which include internal and archipelagic waters as well as the territorial sea. The latter group comprises international waters which include international

thus the degree of limitation of the sovereignty of the coastal state, the order of territorial waters will be different, as in this case, the most extensive navigational rights are defined in relation to archipelagic waters (the right of innocent passage and the right of archipelagic sea lanes passage), the territorial sea (the right of innocent passage) and in relation to internal waters, the scope of navigational rights is the smallest (the right of innocent passage as an exception).

The poor practice of applying the principles of the right of archipelagic sea lanes passage prevents the adoption of proposals for this navigational right. So far, three archipelagic sea lanes have been designated by Indonesia alone. Under the Indonesian Regulation, foreign ships and aircraft may exercise the right of archipelagic sea lanes passage only through determined archipelagic sea lanes. Foreign vessels that navigate through non-designated sea lanes may do so in innocent passage mode. In this case, some issues related to archipelagic sea lanes passage have remained unresolved (for instance, the interpretation of the 10 per cent rule). Even in the case of issues about which there are rather clear provisions in UNCLOS, such as the obligation to designate sea lanes and air routes for international navigation through or over archipelagic waters, there is a dispute between the archipelagic state (Indonesia) and the main user states (Australia and the United States).

UNCLOS explicitly provides the right of innocent passage, the right of transit passage¹⁰⁰ through sea straits used for international navigation as well as the right of archipelagic sea lanes passage in neutral waters for the forces of the belligerents.¹⁰¹ It should be added that the right of innocent passage in neutral territorial waters can be exercised by warships of the belligerents to the full extent.¹⁰² Such a solution is provided not only by UNCLOS, but above all the Law of War.¹⁰³

waters and areas with specific rights of the coastal state (maritime contiguous zone, exclusive economic zone, continental shelf, fishing zone) and those without specific rights of the coastal state, which are treated as *res communis* (high seas beyond the limits of the exclusive economic zones and the Area). Nandan, Rosenne (eds.) *ibidem*, 56.

100 See Mayama, "The Influence of the Straits Transit Regime on the Law of Neutrality At Sea", 1-30.

101 *Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War*, The Hague, 18 October 1907, Article 10: *The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.*

102 Schachte, "The Value of the 1982 UN Convention on the Law of the Sea: Preserving Our Freedoms and Protecting the Environment", 57.

103 *San Remo Manual...*, 99-101 (paragraph 20 and 21).

In summary, navigational rights are designed in the interest of the entire international community and due to that, among other reasons, these rights cannot be suspended “only” on the ground that two or even several states are at war with each other. Therefore, these rights are fully applicable not only in peacetime but also in time of armed conflict at sea, ensuring the free movement of navies (right of innocent passage, right of transit passage and right of archipelagic sea lanes passage) as well as of air forces (right of transit passage and archipelagic sea lanes passage) of belligerents within the borders of neutral states (in territorial waters and airspace above these waters).¹⁰⁴

From both navigational and legal points of view there is a category of straits used for international navigation consisting of straits lying within archipelagic waters (Part IV of UNCLOS), through which navigation may take place in accordance with the principles of archipelagic sea lanes passage, and outside of sea lanes, in accordance with the principles of innocent passage. Examples of archipelagic sea lane straits include Karimata and Sunda Straits (the 1st ASL of Indonesia), Makassar and Lombok Straits (the 2nd ASL of Indonesia), Ombai Strait (the 3rd ASL of Indonesia) and other straits when an archipelagic state does not designate sea lanes or air routes through the routes normally used for international navigation: Alas Strait (between Lombok and Sumbawa Islands, Indonesia), Antigua Passage (Antigua and Barbuda), Erromango Island Gap (Vanuatu), Indispensable Strait (Solomon Islands), Mindoro Strait (Philippines), passage between Saint Thomas Island and Prince Island (Gulf of Guinea), Northwest and Northeast Providence Channels (Bahamas), Sibutu Passage (Philippines), Sumba Strait (between Sumbawa and Sumba Islands, Indonesia), St. Georges Channel (between New Britain and New Ireland, Papua New Guinea,), Surigao Strait (Philippines), the Galleon’s Passage (between Trinidad and Tobago), Vatu-i-Ra Passage (Fiji), and Vitiaz Strait (Papua New Guinea) etc. In the remaining part of archipelagic waters outside the archipelagic sea lanes, including the straits outside the archipelagic sea lanes, the right of innocent passage applies which, with exceptions (such as Serasan Strait, South China Sea), can be suspended.

104 Cf. Łukaszuk, *Współpraca i spory międzynarodowe na morzach. Wybrane zagadnienia prawa, polityki morskiej i ochrony środowiska*, 231.

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