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# THE LEGAL ANALYSIS OF “TEORI KEDAULATAN NUSANTARA” TOWARDS THE NEW CONCEPTION OF INDONESIA AIRSPACE SOVEREIGNTY

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## Abstract

*Art. 1 Chicago Convention of 1944 confirms that every state has a complete and exclusive sovereignty over the airspace above its territory. This arrangement gives the highest role of state in controlling air transportation based on state sovereignty principles. The concept of airspace sovereignty faced challenges with the introduction of international air transportation liberalization through deregulation provisions. Such liberalization policy is later known as ‘open sky policy’. Such open sky policy includes the establishment of single market such as Single European Sky dan ASEAN Single Aviation Market. The liberalization led to a situation where sovereignty concept has been regarded from a different perspective. It is widely argued that the smooth operation of new forms of international cooperation requires a more flexible perception of sovereignty. This study wants to analyze the concept of Indonesia airspace sovereignty. A theory of Indonesia airspace sovereignty that ever born is the “Teori Kedaulatan Nusantara” by Priyatna Abdurrazid in the 1970s. “Teori Kedaulatan Nusantara” based on two doctrines i.e. the doctrine of necessity and doctrine of right of self-preservation that is the core of military/security aspect. This paper argues that there is a continuing trend away from the absolute airspace sovereignty regime towards something less. It is submitted that preservation theory cannot be sustained in the Indonesia airspace sovereignty doctrine. This paper asserts that the new paradigm of international air transport drives Indonesia towards the release of some aspects of Indonesia’s airspace sovereignty doctrine.*

**Keywords:** legal analysis, ‘teori Kedaulatan Nusantara’, new conception, Indonesia airspace, sovereignty

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## I. INTRODUCTION

State sovereignty over its territorial airspace is the basic principle underlying the whole system on international air law.<sup>1</sup> Legal status of air space in international law develops very rapidly based on evolving states’ practice. One crucial example is the Roman principle “*cujus est solumn, ejus est usque ad coelum*”. The recognition of such airspace

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<sup>1</sup> Marek Zlicz, *International Air Transport Law*, Martinus Nijhoff Publishers, Dordecht/Boston/London: 1992, p. 58.

right has become part of international air law as envisaged in the Paris Convention of 1919 and re-emphasized in the Convention of The International Civil Aviation Organization. Since then, states continuously recognizing, regulating as well as protecting their air space.<sup>2</sup>

Art. 1 Chicago Convention 1944 states that “*The contracting states recognize that every state has complete and exclusive sovereignty over the air space above its territory.*” Priyatna Abdurrasyid argued that Article 1 of Chicago Convention 1944 is vague.<sup>3</sup> This is because this Article represented political conception which leads to crucial economic consequences that every state has the right to close airspace above their territory from any foreign commercial activities.<sup>4</sup> The provisions of Chicago Convention, which provides 1944 complete and exclusive sovereignty of states over their airspace, were considered as traditional and complex regulations.<sup>5</sup> This arrangement gives the highest role of state in controlling air transportation based on state sovereignty principles.

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<sup>2</sup> John C. Cooper in Herbert David Klein, *Cujus Est Solum Ejus Est ... Quousque Tandem*, Citation: 26 J. Air L. & Com. 237 1959, p. 238. A typical example of a state’s national sovereignty claim is found in Section 1108 (a) The Federal Aviation Act (72 Stat. 731) tahun 1958 yang berbunyi: “*The United States declare to possess and exercise complete and exclusive national sovereignty in the air space of The United States, including the air space above all inland waters and ... above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention The United States exercise national jurisdiction*”. It last codified of FAA of 1958. The U.S. had already asserted sovereignty over its airspace by means of the Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926).

<sup>3</sup> Priyatna Abdurrasyid, *Kedaulatan Negara di Ruang Udara*, Pusat Penelitian Hukum Angkasa, Jakarta: 1972, p. 97. See also Marek Zlicz, *op.cit.*, p. 61.

<sup>4</sup> Endang Saefullah Wiradipradja, “Penggunaan Ruang Udara Indonesia bagi Penerbangan Internasional Berjadwal dan Masalah Open Skies Policy” in Shinta Dewi (eds), *Perkembangan Hukum di Indonesia: Tinjauan Retrospektif dan Prospektif*, Remaja Rosdakarya, Bandung: 2012, p. 231. See also E. Saefullah Wiradipradja, *Tinjauan Singkat Atas Berbagai Perjanjian Internasional di Bidang Hukum Udara*, Lisan, Bandung: 1990, p. 21.

<sup>5</sup> Erwin von den Steinen, *National Interest and International Aviation*, The Netherlands: Kluwer Law International, 2006. See Hussein Kassim and Handley Stevens, *Air Transport and The European Union: Europeanization and its Limit*, Palgrave Macmillan-UK, 2010. See also Paul Stephen Dempsey and Andrew R. Goetz, *Airline deregulation and laissez-faire mythology*, Quorum Books, Westport, Connecticut-London: 1992.

Article 6 of Chicago Convention 1944 requires that every state who wish to schedule a flight above the state party territory to have a special authorization from the designated states. Thus, this article is clearly envisages the need for prior authorization or other permit by designated states.<sup>6</sup> Brian F. Havel who said that this Article 6 is a complete logic out of limitation provisions envisages in Article 1 also stated similar argument. Article 6 re-emphasizes article 1 which requires prior permission from designated states. Article 1 and 6 of Chicago Convention 1944 put the legal basis as a return to the freedom of the air principles.<sup>7</sup> It is argued that both articles lead to the recognition of main principles that is “sovereignty” and “special permission or other authorization. Those principles have placed “the freedom of the air” as well as bilateral agreement as the main part of Chicago Convention 1944.<sup>8</sup> From such provisions every scheduled international flight needs prior agreement either bilaterally or multilaterally.<sup>9</sup> Relating to this, Bin Cheng stated that: <sup>10</sup>

*“the now firmly established rule of international law that each state possesses complete and exclusive sovereignty over the airspace above its territory means that international civil aviation today rests on the tacit acquiescence or express agreement of states flown over”*

However, the traditional concept of airspace sovereignty faced challenges with the introduction of international transportation liberalization through deregulation provisions.<sup>11</sup> Such liberalization policy

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<sup>6</sup> See Bin Cheng, *The Law of International Air Transport*, London: The London Institute of the World Affairs, 1962, p. 314-326; also I.H.Ph. Diederiks Verschoor, *An Introduction to Air Law*, Six revised edition, Kluwer Law International, The Hague – London – Boston: , p. 23-24.

<sup>7</sup> Hussein Kassim and Handley Stevens, *Air Transport and The European Union: Europeanization and its Limit*, Palgrave Macmillan-UK, 2010, p. 25.

<sup>8</sup> Brian F. Havel, *op., cit.*, p. 103.

<sup>9</sup> See Endang Saefullah Wiradipradja in Shinta Dewi (eds), *op.cit.*, p. 237.

<sup>10</sup> Bin Cheng, *op., cit.*, p. 3.

<sup>11</sup> *Liberalization is define as “the reduction of constraints imposed upon the existing actors in the marketplace, the incumbent national airlines. See Report of conferences, 12 Air L. 303, 306 (1987). Deregulation, by comparison, is defined as “the abolition” of all restrictions dominating the air traffic marketplace, thus prociding free access to international air transport. See Seth M. Warner, Liberalize Open Sky: Foreign Investment And Cabotage Restrictions Keep Noncitizens in Second Class. Citation: 43 Am.*

is later known as *open sky policy*. Verschoor defines *open sky policy* as follows:<sup>12</sup>

*“The term Open Skies indicates a shift from the traditional exchange of traffic rights toward a system under which regulation of competition forms the core elements. As freedom is inherent to such a system, it would seem more appropriate to list what should not be allowed under such a regime instead of the present situation of a non-exhaustive list what is allowed”*

*Open sky policy* is an international policy which aims to put liberalization in international aviation industries, especially commercial aviation. Such liberalization includes the establishment of single market such as Single European Sky dan ASEAN Single Aviation Market. Such air transport integration can be defined as the form of various national interest combinations into wider international interests.<sup>13</sup> In specific, this regional and global economic development can be seen as the form of economic positioning re-evaluation of states within state’s national economic system. This condition prevents state to treat aviation as isolated activities anymore.<sup>14</sup> The development of cooperations shows that state conception should have absolute control over external policy and free from external authority structure has transformed. State sovereignty transformation can be noticed through the integration of legal system, which is manifested in the form of *rules* and *regulations* by the determination of ‘*common standards*’ and ‘*procedures*’ for all state parties.

By virtue of its interdependent character and highly economic and technical aspects, civil aviation has been an outstanding field of activity affected by the transformation in sovereignty.<sup>15</sup> The economic and political globalization led to a situation where sovereignty concept has been regarded from a different perspective. It is widely argued that the smooth operation of new forms of international cooperation requires a

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U. I. Rev. 277 1993-1994, P. 279.

<sup>12</sup> Verschoor, *An Introduction to Air Law*, ninth revised edition, Walters Kluwer, 2012, p. 66.

<sup>13</sup> Jason R. Robin, *Regionalism in International Civil Aviation: A Reevaluation of The Economic Regulation of International Air Transport in The Context of Economic Integration*, Singapore Year Book of International Law and Contributors, 2010, p. 114.

<sup>14</sup> *Ibid*, p. 122.

<sup>15</sup> Gul Sarigul, *The Evolving Concept of Sovereignty in Air Law*, tesis Faculty of Law Institute of Air and Space Law Monreal, August 2004, p. 1

more flexible perception of sovereignty. Consequently, there has been an increasing trend towards proposing to abandon the normative concept of sovereignty and establish a new regime, which would accommodate the realities of today's international affairs.<sup>16</sup> In the discourse and sophisticated practice, the concept of state sovereignty has been changed so that the absolute sovereignty of the State cannot be sustained any longer.<sup>17</sup> Sigit Riyanto, argues that there has been a change in the nature of state sovereignty.<sup>18</sup> Pamberton state that it is, of course, true that the meaning of the word 'sovereign' has shifted in the past.<sup>19</sup>

Based on the shifting meanings of the state sovereignty, as reflected in the previous paragraph, this study wants to analyze the concept of Indonesia airspace sovereignty. A theory of Indonesia airspace sovereignty that ever born is the "Teori Kedaulatan Nusantara" by Priyatna Abdurasyid in the 1970s. This theory based on the two doctrines, i.e. doctrine of necessity dan doctrine of right of self-preservation. The basics of these doctrines is militarily/security aspect, and in terms of the specific forms of Indonesia achipelago. The legal question that arises in this study is whether the "Teori Kedaulatan Nusantara" is still relevant to accommodate the national interests in the international aviation service liberalization that demands a transformation of the form of the state airspace sovereignty. To aswer the legal problem of this study, author use normative research oriented *Law Reform Research*, as intended by William Hulburt as "*the alteration of the law in some respect with a view to its improvement.*"<sup>20</sup> Author is interested in examining the roots and history of the evolution of international air law. The context of the origin and the causes of evolution help illustrate the social and cultural framework. It also helps to

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<sup>16</sup> *Ibid.*

<sup>17</sup> Struet in Sigid Riyanto, *Re-Interpretasi Negara dalam Hukum Internasional*, paper presented in the inauguration of Law Faculty of Gadjah Mada University, Yogyakarta, 26/06/2014, p. 3.

<sup>18</sup> *Ibid.*

<sup>19</sup> Jo-Anne Pambert'on, Jo-Ane Pamberton, *Sovereignty Interpretation*, Palgrave Macmillan, England: 2009, p.1. Pamberton explains that in medieval France, for example, the word *souverain* could stand for any authority 'which had no other authority above itself' and thus, France's 'highest courts' in that period were designated '*Cours Souverains*'.

<sup>20</sup> Terry Hutchinson, *Researching and Writing in Law*, Lawbook Co., Pymont NSW 2009, Australia: 2002, p. 55.

understand and interpret the law.

## II. THE EVOLUTION CONCEPT OF AIRSPACE SOVEREIGNTY

The author agree with Ruwantissa Abeyratne, in a modern treatise of air law these issues hardly deserve more than a brief comment.<sup>21</sup> Common sense dictates that air law — i.e., law governing the aeronautical uses of the air space — could not have existed before mankind learned the art of aerial navigation and before the practice of that art created social- relations and possible social conflicts of interests that required legal regulation.<sup>22</sup> If we assume that law does not govern the technology but only the social relations created by the technology, we will agree that air law cannot have a long history.<sup>23</sup> Like as Abeyratne, Bambang Widiarto argues that aviation history is very related to the history of international air law. The principle of airspace sovereignty over the state’s territories as a legal principle of law that is internationally accepted at the beginning of the 20th century, after the emergence of aviation technology.<sup>24</sup>

The author divides the evolution of state sovereignty over airspace into seven periods of time, i.e. periode early doctrine of airspace sovereignty, Paris Conference 1910, The Treaty of Versailles 1918, Paris Conference 1919, Madrid Convention 1926, Havana Convention 1928, dan Chicago Convention 1944.

### 1. Early Doctrine

The “defined territory” of each state is “tri-demensial”. It consists of each state’s surface (land and, if a coastal state, a portion of the sea), sub-surface (*usque ad feros*), and a column of air to an as yet undetermined altitude coinciding with the state’s land and sea boundaries”.<sup>25</sup> Although the economic and military use of airspace date back merely

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<sup>21</sup> Ruwantissa Abeyratne, *Essential Air and Space Law*, Eleven International Publishing, Utrech: 2008, p. 5.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> T. Bambang Widiarto, *Tinjauan Hukum Udara sebagai Pengantar: Dalam Perspektif Hukum Internasional dan Nasional*, Pusat Studi Hukum Militer, Jakarta: 2015, p. 11.

<sup>25</sup> Gul Sarigul, *op.*, cit., p.28.

to the 20th Century, assertions of sovereignty in airspace date back to Roman times.<sup>26</sup> The development of airspace sovereignty concepts as related to airspace supra-adjacent to state territory involved three distinct ideas: airspace as private property, airspace as *res communes* or *res nullius*, and airspace as state property.

The Romans, in attempting to protect the private rights of its citizens, developed the maxim *cujus est solum, ejus est usque ad coelum*.<sup>27</sup> John Cobb Cooper, in his study on Roman Law and the Maxim “*cujus est solum*” in International Air Law, elaborates on the findings of Roman Law authorities and states that:<sup>28</sup>

*All of these authorities thus emphasized the territorial status of Roman Airspace and the continuing sovereign control by the Roman State above the surface of the earth. The landowner was held to be protected by the State at least to the extent of the use of so much of the airspace as might from time to time be needed in connection with the enjoyment of the sur-*

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<sup>26</sup> Ruwantissa Abeyratne states that it appears misguided to comb the legal history and claim that the ‘Roman law’ concept *cuius est solum eius est usque ad coelum et ad inferos* was a nascent principle of air law. In the first place, the principle *cuius est solum* cannot be found in the classical (royal, republican and early imperial) Roman law. It cannot be found even in the Byzantine 6th century A.D. Justinian’s codification in *Digesta seu Pandectae* (525 A.D.) much later named *Corpus Iuris Civilis*. The concept was apparently used for the first time only in the 13th century by the Bologna Professor Accursius as a ‘glossa’ or comment on the ancient Roman texts. Whatever the true origins of this term, it had nothing to do with the aeronautical uses of the air space and it only more closely defined the property rights of the owner of the land against any incursions (protruding construction or tree branches, etc.) from the owner of the neighbouring land; originally it probably meant protection of the public roads against any incursions above them. A real historical curiosity is the doctoral thesis of a certain Johannes Stephan Dancko presented in 1687 to University Viadrina (Frankfurt/Oder). The author of the thesis admits the *res omnium communis* quality of the air (the air belongs to everyone) but preserves for the ruler (Duke) special *patrimonium* prohibiting the general population to hunt birds or to use wind for windmills without authorization or even to display fireworks in the air. It would be a daring conclusion to state that the *patrimonium* of the ruler (special inherent right) in the air is a precursor of the concept of territorial sovereignty. See Ruwantissa, *essential Air and Space Law*, op., cit., p. 5.

<sup>27</sup> The meaning of this axiom is *for whomsoever owns the soil, it is theirs up to the sky and down to the depths*. See Brian F. Havel, *Beyond Open Skies, A New Regime for International Aviation*, Kluwer International Law, Netherland: 2009, p. 99.

<sup>28</sup> John Cobb Cooper in Gul Sarigul, op., cit., p. 28.



*face property below.*

Roman law probably viewed air in three ways: first, airspace over public lands had the same legal status as the surface, which was state control; second, air was common to all to sustain life and thus, common to all men; and third, airspace over private lands was the property of the landowner to an indefinite height subject only to building restrictions.<sup>29</sup> Hence, the “*air*” and the “*space*” were viewed in two different ways—the air itself as *res communes* and the actual space as private property. The Roman rule was subsequently adapted under English common law to mean that no state acquired any domain in what was known as navigable airspace until it was needed to protect subjacent territory.<sup>30</sup> In the 19th Century, the public interest in the use of the atmosphere increased and the right of ownership was restricted to the airspace directly adjacent to the ground.<sup>31</sup>

## 2. Paris Conference 1910

The need for regulation of the airspace for navigation safety and security purpose was born.<sup>32</sup> However, it was not until the beginning of the 20th century that the features of the modern principle of state sovereignty in airspace were shaped. National sovereignty over the airspace above a state’s territory was a recognized legal principle well before the outbreak of World War. The First World War was a turning point for the evolution of airspace sovereignty.

The first multilateral effort at lawmaking in international aviation was the Paris Conference of 1910. The conferees met from May 10 until June 29, 1910.<sup>33</sup> The 1910 Paris conference produced the international agreement that usable airspace above the land and water of a state is part of its territory. Although the Paris Conference of 1910 concluded without having signed a convention, it laid down the general international agreement that the usable airspace of a State was

<sup>29</sup> Stephen M. Shrewsbury, *September 11th And The Single European Sky: Developing Concepts of Airspace Sovereignty*, Journal of Air Law and Commerce, 68 J. Air L. & Com. 115, 2003, p. 122.

<sup>30</sup> *Ibid.*

<sup>31</sup> The civil codes adopted in the nineteenth century in many states, including France, Austria, Germany and Italy, and in the province of Quebec (Canada), together with judicial decisions in Great Britain and the United States, defining landowners’ space rights, are clear evidences of the continued assertion of territorial sovereignty in space above national lands and water.

<sup>32</sup> In 1822, the first reported case of navigation tort decided in the common law occurred in the United States.

<sup>33</sup> Paul Stephen Demhsey, *Air Law*, McGill University, Montreal: 2008, p. 13.

an integral part of its territory where sovereignty is exercised. It should be noted that the Paris Conference recognized airspace sovereignty not only for the Contracting States, but for all States. This was an important step toward transformation of the sovereignty principle from a conventional rule to a customary international rule.<sup>34</sup> Although of relatively recent origin, these principles are now among the least disputed in international law. These principles of air sovereignty insured that national governments would play a dominant role in the development of international civil aviation.<sup>35</sup>

### **3. The Treaty of Versailles**

International civil aviation enjoyed rapid growth after the end of World War I. One of the treaty that ended World War I was the Versailles Treaty of 1918. This treaty created an Inter-Allied Aeronautical Commission that was to consider the limits on commercial aviation to be allowed to the defeated Germany. Moreover, the Commission was invited to prepare a Convention on international aerial navigation in the time of peace — recognition that aviation had become a growing technology requiring specific international legal regulation “*to prevent controversy*” and “*to encourage the peaceful intercourse of nations by means of aerial communications.*” The Commission agreed airspace sovereignty arrangements that’s still empty in Paris Conference 1910 with used international customary law which is derived from the provisions of the United Kingdom, the Aerial Navigation Act 1911. That’s mean international customary law is the airspace state sovereignty provision that later became article 1 the Paris Convention 1919.

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<sup>34</sup> The legal and diplomatic framework within which international air transport has since developed is based upon three simple, yet fundamental, principles: (1) each State has sovereignty and jurisdiction over the air space directly above its territory (including territorial waters); (2) each State has complete discretion as to the admission or non-admission of any aircraft to the air space under its sovereignty; and (3) air space over the high seas, and over other parts of the earth’s surface not subject to any State’s jurisdiction, is free to tie aircraft of all States.

<sup>35</sup> Stephen Dempsey, *log., cit.* After the Paris conference of 1910, the United Kingdom enacted the Aerial Navigation Acts, which decreed prohibited zones along British coasts. In 1912, Russia decreed an absolute prohibition against flying over its western borders. As World War I began, in 1914, the United States forbade flights over the Panama Canal, and Switzerland became the first state to prohibit all foreign aircraft from its skies, with Sweden following suit in 1916.

#### 4. The Paris Convention of 1919

The Convention is the historically first multilateral instrument of international law relating to air navigation. It helped to formulate also the principles of the domestic law of contracting states, many of whom by 1919 did not have any laws governing aviation. Article 1 of the Convention puts an end to almost two decades of academic discussions whether the air space is ‘free’ like the high seas or whether it forms a part of the sovereign territory of the subjacent state. This article states that “*The High contracting parties recognize that every power has complete and exclusive sovereignty over the airspace above its territory*”. It is noteworthy that the Convention does not create the principle of air sovereignty but recognizes<sup>36</sup> it; moreover, it recognizes it not only for the Parties of the Convention among themselves but for every power as a rule that is generally applicable for all states. The articles of Paris Convention of 1919 was not expressly stated the limits of the definition and scope of “*territory*”. According to the Convention, which referred to the territory is the state’s national territory both of the mother country and of the colonies and the territorial waters adjacent thereto.<sup>37</sup>

#### 5. The Madrid Convention of 1926

Articles 1 and 2 of the Madrid Convention repeated verbatim the first two articles of the Paris Convention. John Cobb Cooper state that:<sup>38</sup>

*“a universally accepted rule of international law that the airspace above national lands, waters, and territorial waters is part of the territory of the subjacent state, and that each sovereign state has the same right to control all movement in its national airspace as it had on national lands and waters, and that the traditional rights of innocent passage enjoyed by surface vessels through territorial waters did not exist for the benefit of foreign aircraft above such territorial waters”*

The Convention was not a success and was eventually ratified only by Argentina, Costa Rica, Dominican Republic, El Salvador, Mexico

<sup>36</sup> The term of “*recognize*” suggests that prevailing customary international law at the time embraced the fundamental principle of State sovereignty over air space.

<sup>37</sup> Article 1 paragraf (2): “*For the purpose of the present Convention, territory of a state shall be understood as including the national territory, both of the mother country and of the colonies and the territorial waters adjacent thereto*”.

<sup>38</sup> Stephen Dempsey, op., cit., p. 18.

and Spain. Argentina and Spain renounced the Convention by 1933 and joined the ICAN and the Madrid Convention never came into force.<sup>39</sup> It did not bring about any innovations in legal terms and practically repeated verbatim the text of the 1919 Paris Convention, while omitting all references to the League of Nations and the Permanent Court of International Justice. It was no more than the result of political posturing of Spain trying to assert leadership in Latin America.

## **6. The Havana Convention of 1928**

In 1928, the Convention between the United State of America and other American Republics, widely known as Havana Convention, was signed by 21 Western Hemisphere States.<sup>40</sup> The first article of Havana Conventin of 1928 the Havana Convention repeated the first two articles of the Paris Convention in substance. Havana Convention states that “*every states has complete and exclusive sovereignty over the airspace above its teritory and teritorial waters*”. The Convention is no longer applicable but its liberal handling of the frame rights still inspires partisans of the ‘*open skies*’ and free competition of air transport services in a borderless world. The convention recognized the right of each state to set the routes to be flown over its territory, as well as the right of innocent passage of aircraft. Additionally, it formulated the rules of international air navigation between and among the contracting parties relating to aircraft identification, landing facilities, and standards for pilots.

The Havana Convention dealt in a most liberal manner with the traffic rights and provided that aircraft of a contracting state are to be permitted to discharge passengers and cargo at any airport — authorized as a port of entry — in any other contracting state, and to take on passengers and cargo destined to any other contracting state.<sup>41</sup> The practical impact of this provision would amount to multilateral granting of the ‘five freedoms of the air’, a concept to be addressed later.

## **7. The Chicago Convention of 1944**

As the final word of the long-lasting debate summarized above,

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<sup>39</sup> Ruwantissa Abeyratne, *Essential Air and Space Law*, op., cit., p. 12.

<sup>40</sup> Gul Sarigul, op., cit., p. 35.

<sup>41</sup> Ruwantissa Abeyratne, *Essential Air and Space Law*, op., cit., p. 13.

Article 1 of the Chicago Convention provides that “*The contracting states recognize that every state has complete and exclusive sovereignty over the air space above its territory.*” The fact that the term, ‘*recognize*’ was used by the drafters of the Chicago Convention suggests that sovereignty over airspace was a pre-existing right. Like the Paris Convention did, Article 1 repeats the sovereignty principle for every state’s airspace, whether it is a contracting party or not. The *complete* and *exclusive* rights of subjacent state, is necessary to prevent the occurrence of violations of the airspace of a State, where a state’s civil aircraft or military entered the airspace of another country without permission or special authorization.<sup>42</sup>

Although not exhaustive, the 1944 Chicago Convention specifies the attributes of sovereignty more clearly i.e. *scheduled air service, cabotage, pilotless aircraft, restrict or prohibit overflight, complete jurisdiction of state, dan the rule of the air*. However, air sovereignty, although “*complete and exclusive*”, can not be considered absolute or free of any legal constraints (*legibus soluta*) under international law. Its exercise is actually subject not only to treaty obligations, but also to some generally accepted rules of customary law.<sup>43</sup> Marek Zylicz identifies the legal consequences of air sovereignty as the main rights of states:<sup>44</sup>

- 1) *authorize or refuse authorization of any international flights into and above its territory;*
- 2) *im pose such regulations, conditions and limitations for the exercise of such flights as it may deem appropriate; and*
- 3) *establish and where practicable, enforce its jurisdiction and territorial application of its laws with respect to both national and foreign aircraft while within its territory, as well as to the persons and goods on board such aircraft, and to the offences, torts and other acts committed on board-wherever territorial links are applicable according to its law.*

The Paris and Chicago Conventions established the principle that each state has absolute sovereignty over the airspace above its terri-

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<sup>42</sup> T. May Rudy, *Hukum Internasional 2*, PT Refika Aditama, Bandung: 2002, p. 32.

<sup>43</sup> Marek Zylicz. Op. Cit, p. 59.

<sup>44</sup> *Ibid.* p. 61.

tory. The principle led to the development of national air carriers, which have been protected from foreign competition by their governments. Initially, government owned, controlled, or subsidies air carriers and negotiated bilateral with other government to exchange travel right. The government that controlled the largest or most influential air transport markets, were able to controll international air transport policy.

### **III. THE DEVELOPING CONCEPT OF AIRSPACE SOVEREIGNTY: THE IMPACT OF AIR TRANSPORTATION IN THE DE-REGULATION ERA**

International law had changed since the peace treaty of Westphalia 1648. In international law and international relation, “*sovereignty*” does not enjoy a longstanding and straightforward definition. The meaning of “*sovereignty*” has changed throughout its history. Along with the development of international law, the principle of state sovereignty that developed at that time get many challenges, including the challenges of globalization. Kofi Annan states that:<sup>45</sup>

*“state sovereignty is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be servant of its people, not vice versa. At the same time, individual sovereignty – the human rights and fundamental freedoms of each and every individual as enshrined in our charter – has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny”.*

International air transport has always been one of the most regulated of industries of globalaization. Therefore, airspace sovereignty no escape from the challenges of globalization. Traditionally, it has been regulated on the basis of the Chicago Convention, which most countries in the world have ratified. Chicago Convention of 1944 was based on international bilateral air service agreement, by which nations could trade the freedom of the skies among, themselves.<sup>46</sup> This regulatory system has been changing recently because of worldwide initiative that have paved

<sup>45</sup> Joseph Camilleri, *Sovereignty Discourse and Practice Past and Future*, in Trudy Jacobsen (eds.), *Re-envisioning Sovereignty*, Ashgate, England: 2008, p. 44.

<sup>46</sup> Francesco Gaspari, *The EU Air Transport Liberalization and Re-Regulatin*, *International and Comparative Law Review*, Vol.11. No.2, 2011, p. 6.

the way for enhancing air transport liberalization. This is why numerous models have been hypothesized for a new (multilateral) aviation order to supersede bilateralism, which still remains the primary vehicle for liberalizing international air transport service for most states.<sup>47</sup> Those models have to take into account the globalization process of the airline industry that is already under way. In light of this process, government intrusion should be restricted to competition law discipline, and government intervention should be limited (only) ensure, on the basis of objective criteria, public service obligation concerning links with isolated destinations.<sup>48</sup> In such situation and condition, Stephen M. Shrewsbury argues that it is evident that economics more than any factors is the dichotomous force that, at once, drives some states away from the absolute airspace sovereignty model and others towards it. Laissez faire proponents will continue advocating freedom of the air and unrestricted competition. Proponents of economic control will advocate either absolute airspace sovereignty or, the pooling of sovereignty, as a tool to ensure survival of their national flagship airlines and their ability to compete in the global air transportation market.<sup>49</sup> Furthermore, Lowenfeld argues that international aviation is thus not just another problem in a changing economic system, though it is that; international civil aviation is a serious problem in international relations, affecting the way government view one another, the way individual citizens view their own and foreign countries, and in a variety of direct and indirect connections the security arrangements by which we live.<sup>50</sup>

Yet one approach that has gained a broad following is that suggested by Keohane and Nye, in which four conceivable models of increasing complexity are tested, focusing in turn on economic processes, overall power structure, issue structure and : *international organization*.<sup>51</sup> Nico Schrijver offered seven indicators to an understanding of sovereignty. These indicators contribute to providing an examining the evolution of

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Stephen M. Shrewsbury menyatakan bahwa masih banyak negara-negara di dunia yang berpegang teguh pada kedaulatan absolut wilayah (ruang). Menurutnya, globalisasi dan kedaulatan wilayah (udara) adalah sebuah dikotomi.

<sup>50</sup> A. F. Lowenfeld, in Crister Jonsson, *Sphere of Flying: The Politics of International Aviation*, International Organization, Vol. 35, No. 2, 1981, p. 274.

<sup>51</sup> Keohane dan Nye in Crister Jonsson, *Ibid.*, p. 293.

the concept of sovereignty, do the challenges of airspace sovereignty go further and compel a change of paradigm? These indicators are actors, definition of sovereignty, scope of sovereignty, influence of universal values, duties of states, role of international institutions, and procedures for settlement of disputes.<sup>52</sup> Author use them to analyze the recent air-space sovereignty applied in the international aviation liberalization era.

### **1. The actors**

Civil aviation is moving from a sovereignty-based framework towards an increasingly supranational basis in an industry that is guided by the principles of a free market. Herein, international air transport and even air traffic management will operate under multinational corporatized structures with public/private stakeholder governance.<sup>53</sup> Historically, since Westphalia Peace Treaty, sovereign state is an exclusive actor of international relation and law. In the modern era, after World War II, the tipe of actors of international relation and law had significant development, i.e. international organization, *business representative*, *scientific experts*, and *non-governmental organization*.<sup>54</sup> By adhering to an instrument of international law that, among others, establishes an international organization such as ICAO, the WTO, the EU, the ASEAN, and etc, the state is exercising its sovereign powers to the effect that the functions which are allocated to the international organization will hencefort be performed not by the state but by the organization. These may be executive task or even legislative and related judicial tasks.<sup>55</sup>

Public aviation encompasses States, international or regional organizations but also those stakeholders that perform specific state functions and services through delegation or other forms of outsourcing. Public aviation encompasses States, international or regional organizations but also those stakeholders that perform specific state functions and services through delegation or other forms of outsourcing. The following is an example interest coalition actors for European Airline Liberalization:

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<sup>52</sup> Nico Schrijver, *The Changing Nature of State Sovereignty*, op., cit., hlm. 78.

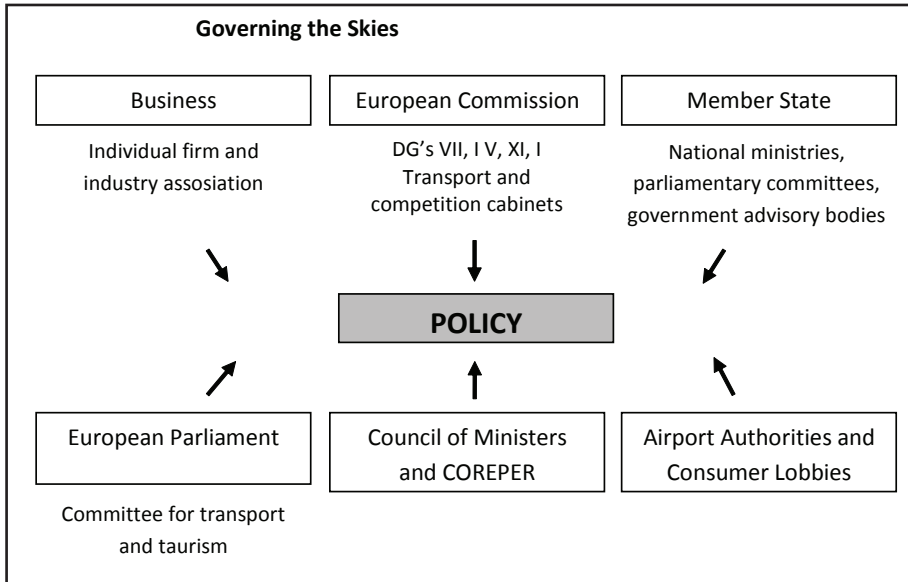
<sup>53</sup> Roderick van Dam, *The Long and Winding Road: Air Traffic Management Reform in Europe*, *Air and Space Law* 40, no. 1, 2005, p. 45.

<sup>54</sup> Mieke Komar Kantaatmadja, *Hukum Angkasa dan Hukum Tata Ruang*, Bandung: Mandar Maju, 1994, p. 8.

<sup>55</sup> Roderick van Dam, log., cit.



Pic. Interest Coalition Actors for European Airline Liberalization



Source : Thomas C. Lawton, 1999.

## 2. The definition of sovereignty

An interesting issue is the way sovereignty is defined and what qualifications have been added in the cases under review. In the public international law, Stephen Ratner has observed that conventional sovereignty is based on two principles, i.e international legal sovereignty and Westphalian sovereignty.<sup>56</sup> Specially in the international air law, with the development of aerospace technologies, a catalyst formed that speeded the development of modern concepts of airspace sovereignty. These developments coincided with general changes in conceptions of sovereignty-changes that are accelerating as the global environment rapidly develops. The present global economy has sparked a debate about the evolution of airspace sovereignty and continues to place great pressure on leading states to develop new ideas about sovereignty over

<sup>56</sup> Stephen Ratner in C. Raj Kumar, Corruption and Transparency in Governance and Development: Reinventing Sovereignty for Promoting Good Government, in Trudy Jacobsen (eds.), op., cit., p. 255.

airspace in order to keep pace with the world's economic growth.<sup>57</sup> The development of global economy, such as international air transport, i.e. the air transport and air travel, seem somehow exemplary for the purposes of this discussion representing the sovereign as both attenuated and powerful but also conjuring into existence space that seem to challenge the whole notion or traditional sovereignty. Gerry Simpson might begin then by interpolating these three sovereignties: degraded sovereignty, resurgent sovereignty, and decomposed/recomposed sovereignty.<sup>58</sup> There is a continuing trend away from the absolute airspace sovereignty regime toward something less.

There is no positive conclusions for international aviation navigation and trade that was actually derived from basic principles of *fundamental principles, rights and freedom* of the 'complete' dan 'exclusive' of airspace sovereignty. This conception is maintained in theory, but is rejected by international practice. In line with it, Boutros Ghali states that:<sup>59</sup>

*"The foundation stone of this work is and must remain the state. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality."*

### **3. The scope of sovereignty**

This section examines the definition of sovereignty in reference to territory. Is the extent of the exercise of sovereignty confined to territory within the national boundaries? Extra territorial jurisdiction is exercised when a State (or in this case a community of States) seeks to apply its laws outside its territory in such a manner as may cause conflicts with other States. It can be justified by the invocation of the effects doctrine or the "effects theory" which goes beyond the principles of sovereignty.

First example is although the Chicago Convention does not mention

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<sup>57</sup> Stephen M. Shrewsbury, op., cit., p. 115-116.

<sup>58</sup> See Gerry Simpson, *The Guises of Sovereignty*, in Trudy Jacobsen (eds.), op., cit., p. 53.

<sup>59</sup> Nico Schrijver, op., cit., p. 78.

aviation and environmental protection (which was not a subject of concern at all in 1944) the Convention has been dragged into a spat that has developed with the enforcement by the European Union of its extension to aviation of the European Emissions Trading Scheme. Many States who have opposed this scheme do so on the basis that it erodes the protection afforded to sovereign States by Article 1. This would mean that the Scheme would be applicable, for example, to an American carrier's flight from New York to London all the way, covering inter alia emissions released over American airspace right through the flight over other territorial airspace before entering European airspace. Detractors of Union's Emissions Trading Scheme (EU ETS)<sup>60</sup> claim that this is extra territorial application of European law.

The other example of extra territorial application is applied in the United States particularly in the field of antitrust legislation. In several instances, the United States has controlled or influenced activities occurring outside its borders which are calculated to harm the environment. The United States has also used trade and investment measures to influence the conduct of other States. For example, during the 1990s, Congress drew a link between the human rights record of China with most-favoured nations treatment of the World Trade Organization. In every instance of extra territorial jurisdiction, there are two issues to be considered: the first is whether the State or group of States has the authority to exercise extra territorial jurisdiction; and the second is, whether the exercise of that authority reasonable (taking into consideration the law concerned and the potential foreign policy conflicts).

In the other hand, as to the scope of sovereignty, open skies agreements, illustrate how new international law rules can lead to third parties intervening in the territory and/or jurisdiction of a state. Hence, a new open skies policy shows that the unintended result can be that the sovereignty of a state can be significantly affected by international arrangements. A new "Open Skies" policy had provisions designed to ease restrictions on commercial aviation. In the United State, for freedom of the air purposes, the relevant provisions included open entry on all routes to and from the United States, unrestricted capacity and frequency on all routes, and no restrictions as to intermediate stops. The

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<sup>60</sup> The European Union, by Directive 2003/87/EC.

United States signed the first Open Skies agreement with the Netherlands in September 1992. As of 2000, eight members of the European Union (EU) had entered into Open Skies agreements with the United States. In addition to the opening up of national airspaces through the use of air traffic agreements such as Open Skies, other realities are forcing changes in the way states view absolute control over their national airspaces. The booming growth in civil Aviation over the last several decades has led to innovative attempts by states to solve their airspace capacity problems. In several ways, these ideas will directly impact the ability of states to control their national airspaces.<sup>61</sup>

#### **4. The influence of universal values**

This part of the exercise assesses the reason given for subjecting sovereignty to international law examines the influence in this regard of universal values such as peace and security, preservation of the basic living standards. Traditionally, universal values of international air transport can found on the Preamble of Chicago Convention as bellow:<sup>62</sup>

WHEREAS the future development of international civil aviation can really help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil Aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

The traditional civil aviation should never be consider as something apart from the pressing problems of world political and economic strife

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<sup>61</sup> In June 2001, the Federal Aviation Administration released a ten-year Operational Evolution Plan (OEP) to dramatically change the way the United States controls its national airspace.

<sup>62</sup> The Preamble of Convention on International civil Aviation, Chicago, 1944.

or cooperation.<sup>63</sup> Author agree with Erwin von den Steinen, the Preamble did not fully address: the ideas of competition and consumer benefit that have become the central feature of more recent policy debat. In the other hand, today's globalization emphasizes competition rather than the monopolies or the exclusive franchising that the imperialists practiced.<sup>64</sup>

The traditional concept of sovereignty, the power of states to regulate their internal affairs without foreign interference, has been evolving for centuries. The present global economy has sparked a debate about the evolution of airspace sovereignty and continues to place great pressure on leading states to develop new ideas about sovereignty over airspace in order to keep pace with the world's economic growth. The development of international air law, especially air transport policy, is being increasingly shaped not only by considerations of the peace of the world depends, but also by other universal values such as free trade, competition and consumer benefit.

## **5. Duties of states**

The doctrine of national airspace sovereignty, sanctified in the Chicago Convention as the juridical predicate for government control of the world airline industry for over 60 years. International aviation deregulation signs of a perceptible transition, which has recently gathered pace, from a state-dominate system toward future private governance of the international airline industry.<sup>65</sup> Despite the enduring 'specificity' of the Chicago system<sup>66</sup>, initiatives such as US airline deregulation, the open skies program, and the EC single aviation market, have begun a

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<sup>63</sup> John C. Cooper, The Proposed Multilateral Agreement on Commercial Right in International Civil Air Transport, *The Journal of Air Law and Commerce*, Volume 14, Number 2, 1947, p. 125.

<sup>64</sup> Erwin von den Steinen, *National Interest and International Aviation*, Kluwer Law International, The Netherlands: 2006, p. 34.

<sup>65</sup> Brian F. Havel, p. 98.

<sup>66</sup> Michael G. Folliot in Brian F. Havel uses the term 'specificity' and 'universality' to describe two opposing principles at work in the international air transport system; expressions of supranational tendencies apply the principles of 'universality' (the European Community's liberalization policy being the prototypical instance), while expressions of national tendencies (the zero-sum strategies of the bilateral system) apply the principle of 'specificity'. See Michael G. Folliot, *La Communauté Economique Européenne et Le Transport Aérien*, 32 R. FR. D. Aérien 137, 140, 1978.

gradual displacement of the state's primary role in the international airline industry in favor of independent management and the market system. As airlines receive greater autonomy to define their market through freedom to price, to determine capacity, and to enter specific city-pair routes, these governments are seeking to replace a priori state control with the supervision of the market a posteriori through competition policy, and (in the EU) by rolling back traditional ownership stakes in so-called 'flag' carriers.<sup>67</sup>

## **6. The role of international institutions**

This section examines the question of the role of international institutions in implementation and supervision of rules of international law. Recently, many international organizations interfere in the domestic affairs of developing countries. For example, Ross P. Buckley states that developing countries in financial difficulties routinely enter into arrangements with the International Monetary Fund.<sup>68</sup> Such arrangements reduce the economic sovereignty of the developing country markedly.

Especially in the international air law, much has been written about the extent to which integration has produced a cumulative and irreversible transfer of policy competencies from nation states to the international organization, like the European Union. Europeanisation may, for instance, mean the convergence of national policy styles and European policy processes.<sup>69</sup> Europeanisation may also be interpreted as the transfer of power from national governments to supranational institutions.<sup>70</sup> The term "supranational" derives from the seminal work of Hass (1958) and refers to a body whose laws are above those of the nation state in the area of its competence.<sup>71</sup>

Chicago, December 2000, the delegates to a new global air transport conference have crafted a proposed multilateral 'open skies' agreement that would supersede the mercantilist Chicago Convention, originally

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<sup>67</sup> Brian F. Havel, *log.*, cit.

<sup>68</sup> Ross P. Buckley, *op.*, cit., p. 267.

<sup>69</sup> Wessel in Thoman C. Lawton, *Governing the Skies: Condition for the Europeanisation of Airline Policy*, *Journal Public Policy*, Vol. 19, No.1 (Jan – Apr., 1999), p. 93.

<sup>70</sup> *Ibid.*, p. 94.

<sup>71</sup> *Ibid.*, See E. B. Hass, *The Writing of Europe: Political, Social, and Economic Forces, 1950 – 1957*, London: Stevens & Sons, 1958.

signed 1944. The new dispensation would transform commercial access to the world's airspace, eliminate the government domination of routes, prices, and market access that has limited the network expansion of the world's airlines for more than 50 years. As part of the effort, the delegates have proposed establishing two 'supranational' institutions to monitor international airline competition, on Open Skies Commission and on International Court of Air Transportation. The Commission and Court, applying a new code of international competition law, would exercise exclusive supervision over the legal relations between private citizens, between citizens and sovereign states, and between sovereign states, in connection with the operation of international air transport routes. Accordingly, for example, a United State airline seeking to merge with a European Union airline could find the proposed deal blocked by the Open Skies Commission as anticompetitive, but would have a right of appeal to the international court of air transportation. Decisions of the Commission and Court would have the status of domestic law within each contracting party's jurisdiction and no further domestic appeals or challenges would be allowed. To facilitate this regime, private citizens would be granted standing before the Commission and the Court, The United States delegation has demurred; in its view, the United States Constitution precludes the assignment of obligatory adjudicative powers over private party relationships – and possibly even over the sovereign actions of the United States itself – to supranational tribunals and judges.

## **7. Procedures for settlement of Disputes**

Supranationalizing disputes settlement in the plurilateral, in particular, is likely to generate a sustainable body of case law and norm creation. Moreover, it is virtually axiomatic that a respected international tribunal, steadfast in its jurisprudence, can gain legitimacy through its processes of adjudication or appellate review. Such has been the recent experience of the European Court of Justice and of the Appellate Body of the WTO, two examples of supranational radicalism that have settled into uncontested roles as powerful non-state adjudicators. The WTO applies more pressure on state than past incarnations of supranational adjudication through appellate review and also by creating a reserve consensus rule that upholds arbitral or appellate decisions unless the

membership votes by consensus (unanimity) to reject them. Generally speaking, rules made ‘within the institutional framework of an organized community’ are more likely to bind, and to contribute to rule coherency and legitimacy, than rules that merely ‘ad hoc agreements between parties’ made outside that community – the latter reflecting the preferred dispute settlement mechanism adopted under Chicago system bilateral air services agreements.

According to Stephen M. Shrewsbury, open sky efforts demonstrates that factors beyond state interests in maintaining complete sovereignty over national airspace are slowly drawing states away from the Chicago Convention’s absolute sovereignty formula. In the past these forces were primarily economic and will continue to be driving force for change. Nonetheless, given the growth in air traffic, an underlying-need for efficiency and air safety have added to the momentum towards change – a change resulting in the continuing erosion in the absolute airspace sovereignty doctrine.<sup>72</sup> Single sky or single aviation market is proff of that.

#### **IV. “TEORI KEDAULATAN NUSANTARA” AND THE APPLICATION OF INDONESIA SOVEREIGNTY OVER AIRSPACE**

Indonesian Act No. 4/prp/ 1960 on Indonesian waters clearly declared that Indonesian include three dimension, which is land, water and air. Through this provision, Indonesia consider itself as having sovereignty over its land, water as well as air territory.<sup>73</sup> It follows from the above that Indonesia declared the unity of its land and waters through the principle of archipelagic state. In its dissertation, Priyatna submitted that the delimitation of air territory following the delimitation of waters territory below is acceptable. The determination of territorial sea waterways around every island resulted in disintegration of air sovereignty according to certain configuration dictated by the amount of islands. In such cases, it will be very difficult or almost impossible to determine which one is Indonesian air sovereignty and which one is free air territory. This circumstances further resulted in the disturbance of the integ-

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<sup>72</sup> Stephen M. Shrewsbury, op., cit., p. 150.

<sup>73</sup> Priyatna Abdurrasyid, op. cit., p. 154.



rity of air territory with all of its consequences. Based on these reasons, Priyatna Abdurrasyid introduced *Teori Nusantara* for Indonesia's airspace, as the unifying theory of land and waters territory of Indonesia.<sup>74</sup>

Priyatna conducted research based on existing international law doctrine as well as customary international law on the matter, which include *doctrine of necessity* and *doctrine of right of self-preservation*. The relation of customary international law and international law principles draws what was provided within Article 1 of the Chicago Convention 1944. Similar to Schubert, it seems that Priyatna Abdurrasyid was re-emphasises that state powers with regard to security and national defense are "the core elements of sovereignty".

The core relationship between the *doctrine of necessity* and *doctrine of right of self-preservation* can be found in the military aspect and special aspect of archipelagic state principles. According to Priyatna, the importance of the doctrine is that it preserve state sovereignty towards territorial sovereignty and *national security*. These doctrine was put as main basis of the theory of kedaulatan Nusantara. *Doctrine of necessity* and *doctrine of right of self-preservation* were used to justified to preserve certain condition to eliminate possibility of threats.<sup>75</sup> The recognition of Indonesia air space through the doctrine of kedaulatan Nusantara was underpinned by philosophical considerations between the theory of Kerukunan and Haley theory. Those considerations in fact can be accepted by the recognition of airspace within specialized national Act, Indonesian act No. 5 Year 1992 on Aviation.<sup>76</sup>

Thus, this paper argues that there is a continuing trend away from the absolute airspace sovereignty regime towards something less. The recent airspace sovereignty applied in liberalization era in aviation services. It is submitted that preservation theory cannot be sustained in air space sovereignty doctrine. This paper asserts that the new paradigm<sup>77</sup>

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<sup>74</sup> *Ibid.* p. 139.

<sup>75</sup> This doctrine is different from the "*self defence*" doctrine that provided in the Article 51 UN Charter.

<sup>76</sup> Airspace sovereignty has not been regulated in the previous aviation act.

<sup>77</sup> The changes of paradigm of international air transport was written by many experts. See Daniel M. Kasper, *Deregulation and Globalization: Liberalizing International Trade in Service*, Massachusetts: Balinger Publishing Company, 1988, p., 2. Also Ruwantissa Abeyratne, *Liberalization of Trade in Air Transport Services*, The Journal of

of international air transport drives Indonesia towards the release of some aspects of Indonesia's airspace sovereignty doctrine.

## **V. THE NEW CONCEPTION OF INDONESIA AIRSPACE SOVEREIGNTY**

What has become clear in the last few decades is that the economic aspects of airspace sovereignty have dominated change, or the lack thereof, in the international air sovereignty regime. Such is the case with Indonesia airspace sovereignty, that at the end of 2015 implemented ASEAN Single Aviation Market (ASAM) together with the other ASEAN Member States. Indonesia has been signed the three agreements of the cornerstones of ASAM, i.e. *ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services* (ASEAN MAFLAFS) dengan 6 protocol; *ASEAN Multilateral Agreement on Air Services* (ASEAN MAAS) dengan 6 protocol; and *ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Service* (ASEAN MAFLPAS) dengan 2 protocol. ASAM will involve implementation of changes in airspace structures and control procedures, especially in ASEAN region. Related to this, author agreed with Peter Haanappel argues that transformation of sovereignty in the air is not really occurring, what seems to be happening is an evolution in the role of national sovereignty.<sup>78</sup>

The evolution of national airspace sovereignty implementation needs the new conception for better integration of security aspects in air traffic management through better integration and harmonization of procedures and technologies and better coordination between all stakeholders, including military ones. therefore, the author considers that the conception of Indonesia airspace sovereignty that were solely based on *doctrine of necessity* and *doctrine of right of self-preservation*, as Priyatna Abdurrasyid, less relevant today. The author argues that Indonesia should arranges the new conception of maintaining airspace sovereignty that afford protection of the national interest both of the

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World Investment, p. 658.

<sup>78</sup> Peter Haanappel, *The Transformation of Sovereignty in the Air*, 20 *Air & Space Law*, 1995, p. 311 & 317.

security and economic advantages. The new conception of Indonesia airspace sovereignty not only based on doctrine of necessity and doctrine of right of self-preservation, but also needs to be based on the conception of Indonesian economy, that is regulated in Article 33 of the Constitution of Indonesia. Based on this provision, the ‘domination of state’ over the natural resources of Indonesia should be based on the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.<sup>79</sup> Jimly Asshididjie states that in the globalization era required constitutional market economy system, that is build following the logic of economy market, but is limited by Constitution. This system offers a middle way i.e. (1) a requirement-oriented to a market with emphasis on efficiency and competition with (2) necessity of the existence of the supreme system as control and driving equitable economic progress and encourage the development of cooperation orientation.<sup>80</sup>

As a follow of re-conception of Indonesia airspace sovereignty, author agrees the need for reconstruction of international air law of Indonesia. Author agreed with Chia Jui Cheng, Chairman of The Asian Institute of International Air and Space Law, the content of ‘international air law’ as ‘a vastly more complex system of law i.e. international public law, private international law, and rules emanating from municipal law. Public law norms regulate the airspace, as well as air navigation, air traffic, aviation security, the International Civil Aviation Organization, and international air transport services. Private law rules govern the liability regime of the international air carrier, product liability in aviation, surface damage and collisions, insurance assistance, and salvage. And aspects of municipal constitutional law, administrative law, civil law, procedure, commercial law, and criminal law filter through these public and private regime of law. Related to the this dicipline of law, author states the need for re-arrangement public, private and municipal law of international air law of Indonesia. International air law of

<sup>79</sup> Author asserts that the 1945 Constitution of State of The Republic of Indonesia has not been regulated airspace sovereignty explicitly. The recognition of the airspace sovereignty explicitly needs to be done in the future amendments of the 1945 Constitution of State of The Republic of Indonesia.

<sup>80</sup> Jimly Asshiddiqie, *Konstitusi Ekonomi*, Kompas, Jakarta:2010, p. 393.

Indonesia still happens to overlap the rules and rechtsvacuum. Indonesian Act No. 1 Year 2009 on Aviation regulated many aspects of public, private and municipal constitutional law.

## **VI. CONCLUSION**

Globalization and liberalization of international air transport are causing a great number of challenges for the conception of airspace sovereignty. Even so, transformation of sovereignty in the air is not really occurring, what seems to be happening is an evolution in the role of national sovereignty. The substance of airspace sovereignty in the international air law today differs from that of the early birth conception. The airspace sovereignty has a new perception and is more qualified, but this does not constitute a new paradigm. In these respects, Indonesia should arrange the new conception of maintaining airspace sovereignty that afford protection of the national interest both of the security and economic advantages. The amendment of the 1945 Constitution of State of The Republic of Indonesia that recognize the airspace sovereignty explicitly needs to be done in the future.

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