

# PRINCIPLE OF CABOTAGE WITHIN AVIATION ACTIVITIES IN INDONESIA \*

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## *Abstract*

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*Liberalization their logging services makes the concept of cabotage which was known in the field of shipping, has now become part of the field of aviation. Such a situation when associated with the concept of state sovereignty in the air space, juridically has caused a serious intersection. In countries that do not accept the concept of air cabotage, often found smuggling air cabotage laws. Thus requiring the state government concerned to judicial action in order to protect its national airline company, including the Government of Indonesia.*

**Keywords:** *sovereignty, cabotage, flight liberalization.*

## *Intisari*

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Adanya Liberalisasi jasa penerbangan menjadikan konsep cabotage yang tadinya dikenal dalam bidang pelayaran, kini menjadi bagian dalam bidang penerbangan. Situasi demikian bila dikaitkan dengan konsep kedaulatan negara di ruang udara, secara yuridis telah menimbulkan persinggungan yang cukup serius. Pada negara yang belum menerima konsep cabotage udara, sering ditemukan penyelundupan hukum cabotage udara. Sehingga mengharuskan pemerintah negara yang bersangkutan melakukan tindakan yuridis dalam rangka melindungi perusahaan penerbangan nasionalnya, termasuk Pemerintah Indonesia.

**Kata Kunci:** kedaulatan, sabotase, liberalisasi penerbangan.

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## A. Background

National airspace of a State in addition to its defense area,<sup>1</sup> as well as a source of economic strength of the State, which in turn, indirectly acts as means of improving public welfare. Through airspace under its sovereignty, the State can manage its airspace for air traffic. Development of flight routes, both in a national and international scale, is indispensable in the era of trade liberalization, including trade in air transport services. Trade liberalization in air transport services has been intended to expand market access for foreign service providers and/or reduce discrimination against service providers. Currently, trade in services, particularly air transport services, is regulated in GATS (General Agreement on Trade in Services).

One of the most prominent issues in aviation activities concerns airspace traversed or entered by aircrafts. Aircrafts enjoy the freedom to fly in international airspace, whereas aircrafts in the territory of a Sovereign State shall be subject to the regulations or national laws of the State concerned. It should be noted that the principle of sovereignty plays an important role in flight activity. As stipulated in Article 1 of the 1944 Chicago Convention,<sup>2</sup> airspace is both complete and exclusive. Consequently, the State below it (under the country) has absolute rights over its airspace. Every State has the right to close its airspace above its territory from commercial activities by foreign countries in order to conduct a monopoly of air transport to and from its territory.<sup>3</sup> As found under Article 6 of the 1944 Chicago Convention,<sup>4</sup> every airspace activity shall obtain “special permission” of the State concerned. Providing “special permission” to aviation activities in the airspace is given to any scheduled commercial air activities conducted

bilaterally (bilateral agreements) between countries (Government to Government) exchanging “freedom of the air”. In order to realize the exchange of freedom of the air without prejudice to the existence of State sovereignty in airspace, the cabotage principle becomes highly significant.

Initially, the cabotage principle emerges in shipping activities, thus being a part of the law of the sea. Through the cabotage principle in the law of the sea, coastal States may prohibit foreign vessels to sail and trade along the coast of that coastal States’ territory. Under the principle of cabotage, the State has the prerogative right to prohibit the operation of foreign vessels between two or more sites in the territory of that State.<sup>5</sup>

Within aviation law, the principle of cabotage has initially been regulated in the 1919 Paris Convention, under Article 16. According to Article 16, each member State of the 1919 Paris Convention has the right to prohibit foreign aircrafts and allow reservations for the purposes of national aviation to carry passengers, cargo and mail from one place to another in one region. Moreover, the cabotage principle has been readjusted in Article 7 of the 1944 Chicago Convention. Later in development, the cabotage principle can be agreed between States. This is in accordance with the characteristic found in international air traffic which has always been preceded by the existence of bilateral agreements between States.

Until today, relating to the rise of trade liberalization including trade in air transport services, the principle of cabotage in the level of its implementation in the international community still raises pros and cons. Hence, the practice shows some States have accepted the principle of cabotage, while other countries have not yet accepted the cabotage

<sup>1</sup> As occurred on 25 February 2014, Pakistan carried out air strikes on the Taliban in order to maintain its integrity and uphold Pakistan.

<sup>2</sup> Article 1 Chicago Convention 1944 declares that the contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

<sup>3</sup> Saefullah Wiradipradja, 1990, *Tinjauan Singkat Atas Berbagai Perjanjian Internasional di Bidang Hukum Udara*, Lisan, Bandung, p. 21.

<sup>4</sup> Article 6 Chicago Convention 1944 declares that no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

<sup>5</sup> Mieke Komar Kantaatmadja, 1988, *Berbagai Masalah Hukum Udara dan Angkasa*, Remadja Karya, Bandung, pp. 3-4.

principle in its relation to trade of air transport services within its territory. Even Indonesia, until now, has yet to legally accept the principle of cabotage. Thus, air transport services in the country are still carried out by national airlines, even though national airlines often hold joint operations with foreign airlines. The existence of such practices generates a temporary assumption that Indonesia aims to accept the principle of cabotage in the field of aviation. Based on the description above, the formulated problems are as follows: **First**, how have States accepted the principle of cabotage in the aviation sector?; and **Second**, what is the tendency of the Government of Indonesia in responding to the cabotage principle in the aviation sector?

## B. Research Methods

### 1. Type of Research

Based on the opinion of F. Sugeng Istanto, the objective of the legal research can differentiate whether it is an exploratory legal research, descriptive legal research, explicative legal research, or prescriptive legal research.<sup>6</sup> This legal research constitutes as a prescriptive legal research, since this research will determine the actual legal fact on aviation activities in Indonesia. Threshold used to determine the legal fact is the provision of Article 7 of the 1944 Chicago Convention in conjunction to Article 85 of Law No. 1 Year 2009 relating to the cabotage principle in the field of aviation.

### 2. Type of Data

Within this legal research, the data sought is secondary data, either in the form of primary sources of law, secondary sources of law, or tertiary sources of law. Upon the secondary sources of law, it will be completed with information obtained through interviews with the competent resources.

### 3. Method to Search Data

In search of data, literature studies will be conducted in order to obtain secondary data, by reading books, related research results, as well as

journals. Search of secondary data is also conducted through the internet. In order to complete or support secondary data, such will be complemented by interviews with the competent resources.

## 4. Analysis of the Results

Once the data is collected, either in the form of secondary data or information, the latter will be initially redacted in order to minimize errors. After that, the data will be grouped according to their respective categories. Which data will be *das sollen* data and which will be *das Sein*. Then, the data will be separated according to the variables in the title of the study. Thus, it can be seen the data included in the cabotage variable in aviation law and data included in Indonesia's sovereignty variable in regulating cross-country flights in its territory. Then the data arranged will be explained and evaluated in accordance with the framework of the problems addressed. Based on the explanation and evaluation made a conclusion will be made in response to the problems that have been formulated.

In reviewing the provisions and principles of law, the author will use a method of induction and deduction, as well as conduct interpretation of the law, particularly with regards to Law No. 1 Year 2009 and the 1944 Chicago Convention.

## C. Research Results

### 1. State Sovereignty in Airspace and Principle of Cabotage

In the history of Roman law, there are two principles that apply to airspace. First, the airspace region acts as an international zone or *res communis* (collective right for all mankind). This theory was introduced by Grotius, which had analogized it to the sea at that time. Second, the principle that whoever owns land will also have everything above that land, up to the skies and all that is in the soil. This principle is known as *Cujus Solum est ejus est usque ad Coelum*.<sup>7</sup> Further, the opinion of Grotius has been applied to the issue of sovereignty in airspace

<sup>6</sup> F. Sugeng Istanto, 2007, *Penelitian Hukum*, Ganda, Yogyakarta, p. 48.

<sup>7</sup> Priyatna Abdurrasyid, 2003, *Kedaulatan Negara di Ruang Udara*, Riefka, Jakarta, p. 49.

by Paul Fauchille. According to him, airspace is free.<sup>8</sup> However, there were stern challenges from the opinions of English scholars and legal experts from other countries, which in principle states that “airspace is not free”. Thus, at the time, there were two groups on the ownership of airspace. The first group, those who opine that by nature, air is free. Its adherents can be grouped as followers of the free theory. The second group, those who argue that the State has sovereignty over air space above its territory.<sup>9</sup> In 1919, the international community successfully established an international convention which is the Convention Relating to the Regulation of Aerial Navigation, Signed at Paris, October 13, 1919, or better known as the 1919 Paris Convention. Within the Convention, Article 1 states that: The High Contracting Parties recognise that every power has complete and exclusive sovereignty over the airspace above its territory.

Within its development, the 1919 Paris Convention began to be abandoned, and the international community succeeded in forming a similar convention, namely the Chicago Convention on International Civil Aviation, Signed at Chicago, on 7 December 1944 or better known as the 1944 Chicago Convention. In the 1944 Chicago Convention, the issue of state sovereignty towards airspace has been regulated again in Article 1, stating that: The Contracting states recognize that every state has complete and exclusive. Through the 1944 Chicago Convention, it has been recognized that each State has sovereignty over its airspace. Hence, it is not limited only to apply

to member States of the Convention. However, in the aforementioned article, there still seems to be ambiguity over the meaning of complete, exclusive, territory and air space, thus giving rise to various interpretations.<sup>10</sup> Especially with regards to the “theory of sovereignty”, the airspace of a State has been subject to juridical provisions. Even Priyatna Abdurrasyid has said that: “specifically on state sovereignty towards airspace, States have agreed that this condition amounts to customary international law which has been confirmed in the convention”.<sup>11</sup>

Even though the 1944 Chicago Convention is the result of an agreement between member States of the international community, it still leaves certain issues, namely the absence of multilateral agreements related to the matter of freedom in the air that can be exchanged as a whole. States, through their national airlines, can practice freedom in the air towards or crossing other States which must be preceded by a “bilateral agreement” between the States based on the principle of reciprocity. The 1944 Chicago Convention only managed to formulate the kinds of freedom that can be exchanged between States, as set out in the International Air Services Transit Agreement<sup>12</sup> (transit rights), and the International Air Transport Agreement, which managed to agree upon “The Five Freedoms of the Air”. They are:<sup>13</sup>

- a. First freedom, the privilege to fly across the territory of state without landing.
- b. Second freedom, the privilege to land for non-traffic purposes (technical landing)

<sup>8</sup> Johnson, 1965, *Rights in Air Space*, Manchester University Press, Manchester, p. 21.

<sup>9</sup> *Ibid.*, pp. 54, 62-63.

<sup>10</sup> According to Wassenbergh, the meaning of Article 1, that the State’s sovereignty over its airspace covers the entire airspace over the country (without limit of height) and can not be divided. The application of Article 1 would be complete, as long as there are no restrictions, either through a special approval for it, as well as provisions in other conventions. Other experts have also made a similar interpretation, among other things: According to Shawcross and Beamont complete and exclusive means without limit of height. According to Lemoine, complete and exclusive by definition is meant as ‘full power of the state from its soil, at least theoretically, until infinite heights, and practically all the areas that can be controlled by man’. Meanwhile, according to Lapradelle, an airspace is without limits. See Wassenbergh, 1957, *Post-War International Civil Aviation Policy and the Law of the Air*, Martinus Nijhoff Publishers, Leiden, p. 100. See also E. Suherman, 1984, *Airspace and Regional Aerospace*, Alumni, Bandung, pp. 5-6.

<sup>11</sup> Priyatna Abdurrasyid, *Op.cit.*, p. 97. See also Wassenbergh, *Loc.cit.*

<sup>12</sup> Article 1, Section 1 International Air Services Transit Agreement declares that each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services: (1). the privilege to fly across the territory of state without landing, and (2). the privilege to land for non-traffic purposes (technical landing).

<sup>13</sup> Article 1 International Air Service Transit Agreement, Chicago, 7 December 1944. See Wassenbergh, *Op.cit.*, pp.15-16. See also Marek Zyllicz, 1992, *International Air Transport Law*, Martinus Nijhoff Publishers, Leiden, p. 80.

- c. Third freedom, the privilege to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses.
- d. Fourth freedom, the privilege to take on passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses.
- e. Fifth freedom, the privilege to take on passengers, mail and cargo destined for the territory of any other (third) state and the privilege to put down passengers, mail and cargo coming from any such territory.

Moreover, through the theory and practice of international air transport on the five freedoms mentioned above, such is equipped with new categories, namely:<sup>14</sup>

- a. Sixth freedom, the privilege of carrying passengers, mail and cargo between the territories of two foreign states via territory of the home state of the aircraft.
- b. Seventh freedom, the privilege of carrying passengers, mail and cargo between the territories of two foreign states without calling on the territory of the home state of the aircraft.
- c. Eighth freedom, the privilege of cabotage (ie carrying passengers, mail and cargo from one point in the territory of a foreign state to other point in the same territory).

The eight freedoms above emerged in relation to Article 7 of the Chicago Convention, known as the principle of cabotage.

In French, the term “cabotage” is derived from the word “*cabot*” or “*chabot*” which means small ship. While in Spanish, “cabotage” comes from the word “*cabe*” which means “cap” or promontory meaning the transport from one cape

to another in one coast.<sup>15</sup> For example, shipping from *Tanjung Emas* to *Tanjung Perak*. Within the *maritime encyclopedie* (publishing of C.de Boer, Bussum, The Netherlands), cabotage is the transport of people and goods by sea, air, land and inland waters between two sites located within the same country. The right to carry out cabotage is granted to citizens of the country concerned. When viewed from the linguistic aspect, the word “cabotage” is taken from the word *caboter* that means to sail along the coast. According to the American heritage dictionary of English language, 4th edition, cabotage is “Cabotage is trade or navigation in coastal waters, or, the exclusive right of a country to operate the air traffic within its territory”. According to the Black Law Dictionary, “Cabotage a term from Spanish, is navigation from cape to cape along the coast without going out into the open sea. In international law, cabotage is identified with coasting-trade so that it means navigating and trading along the coast between the ports thereof”.<sup>16</sup>

In relation to aviation law, the principle of cabotage obtains its stipulation from the 1919 Paris Convention, which in Article 16, states that “Each contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons, goods and mail between two points on its territory”.<sup>17</sup>

Furthermore, provision on the cabotage principle in the field of aviation has been stipulated again in Article 7 of the 1944 Chicago Convention, in which; each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Also, each contracting State undertakes not to enter into any arrangement which specifically grant any such

<sup>14</sup> Marek Zylicz, *Loc.cit*.

<sup>15</sup> K. Martono and Amad Sudiro, 2009, *Hukum Angkutan Udara Berdasarkan UU RI No. 1 Tahun 2009*, Rajawali Pers, Jakarta, p. 51.

<sup>16</sup> Henry Campbell Balck, 1979, *Black's Law Dictionary*, St. Paul Minn West Publishing Co., Minnesota, p. 183.

<sup>17</sup> Article 16 Paris Convention in K. Martono and Usman Malayu, 1996, *Perjanjian Angkutan Udara di Indonesia*, Mandar Maju, Bandung, p. 27.

privilege (cabotage) on an exclusive basis to my other State or an airline of any other State, and not to obtain any such exclusive privilege (cabotage) from any other State.<sup>18</sup>

Within the aviation sector, the initial implementation of the cabotage principle which in nature crosses borders occurred in countries that obtained colonies, such as the UK. During the existence of countries members to the British Commonwealth, flights between Darwin, Singapore, Kuala Lumpur, Hong Kong, and London constitute as domestic flights and included flights under the principle of cabotage rights for the UK. For countries that still retain the principle of cabotage, the issuance of operational permits for foreign airlines in a country's territory will be given under special considerations. Similarly, the United States had given cabotage rights to foreign airline companies during a massive strike by its pilots. Considering its national interests, eventually the United States had abandoned the cabotage principle.<sup>19</sup>

In line with the increasing needs of air transport services which in nature crosses borders, as well as the development in economy, particularly trade in services<sup>20</sup> in aviation, then the principle of cabotage becomes one of the objects of the air transport agreement. In the era of globalization, international trade has led to the emergence of trade liberalization policies, both in the regional and global/multilateral scale. At first, trade liberalization mostly involved goods, however, its development also concerns the service sector, including air transport services. Within its ideal form, the liberalization of trade in services is a condition in which every company and individual is free to sell services beyond the boundaries of the country. This includes the freedom to establish companies in

other countries and for individuals to work in other countries.

Unlike trade in goods, trade of air transport services, especially concerning the right of passage, cannot take place without a bilateral agreement between the parties. In fact, air transport services trade obtains an exception to the application of the Most Favoured Nations principle as contained in GATT. In Europe, liberalization has already begun a few years ago. Initially, flights from Europe airport have limited service of routes in the United States and vice versa. Now, this barrier does not exist anymore. European airlines can fly to any destination in the United States from any airport in Europe. Thus, they are now allowed to offer air transport services not only in the member States of the European Union, but also to the United States.

## 2. Implication of the Air Cabotage Principle in Indonesia

### a. Juridical Basis

Cabotage in relation to transport is a term often used to refer to the transport of goods or passengers between two points in the same country by vessels registered in another country. Currently, cabotage also includes aviation, rail and road transport. In Indonesia, the cabotage principle is retained for air transport, land transport and railway.<sup>21</sup> At first, the abandonment of the cabotage principle in sea transport was to essentially meet the shortage of transport provided by shipping companies, including for the transportation of goods and cargo. Such is caused by, for one, geographical condition of Indonesia which consists of islands and each island is inhabited by Indonesian citizens and there are abundant natural resources.

<sup>18</sup> Article 7 Chicago Convention 1944 declares that "Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis, to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State". See Mieke Komar Kantaatmadja, *Loc.cit.*

<sup>19</sup> K. Martono, 2009, *Hukum Penerbangan Berdasarkan UURI No. 1 Tahun 2009*, Mandar Maju, Bandung, p. 11.

<sup>20</sup> Services in the negotiation establishing the World Trade Organization (WTO), within the Uruguay round in Marrakesh has accepted as one of the commodities object of trade, including air transport services.

<sup>21</sup> As stated in Presidential Decree No. 39 Year 2014, business fields for passenger transport by land either in a route or not in a route of transport between provinces or between regions, and cross-border transport, the State only gives permission for domestic capital of 100%.

Between one island to another, it is separated by a fairly wide territorial waters. Each island has been provided a cape or port, making it easier to dock ships transporting between islands. However, currently based on Article 8 of Law No. 17 Year 2008 in conjunction to Presidential Instruction No.5 Year 2005, Indonesia will maintain the principle of cabotage at sea.

Within the field of aviation, Indonesia, since the discussion of Law No. 15 Year 1992 on Aviation,<sup>22</sup> has retained the cabotage principle. During that time, there were two opposite opinions. The *first* opinion requires abandoning the principle of cabotage with the consideration that if Indonesia does not disclaim this principle, and if Europe becomes a Union, then Garuda Indonesia is unable to perform flights from Rome, Italy to Schiphol in the Netherlands, since such route is included in the domestic route of the European Union. The *second* opinion retains the cabotage principle with the following considerations:<sup>23</sup>

- a. To protect national airlines. If foreign airlines are allowed to operate in Indonesia, it is feared that the national airline would not be able to compete with foreign airline companies.
- b. Whereas, the concern of transportation in Europe becoming a Union is less likely to occur. This is because the Netherlands will not give traffic rights to the EU, since most of the national income in the Netherlands derives from the Air Transport sector. The Netherlands' air geographical position is very

strategic, because most of the transport from or to Europe goes through Schiphol.

- c. Consideration of national security. In accordance with the provisions of the 1944 Chicago Convention, every flight crossing a country must obtain permission from the concerned country.

Based on the considerations of the second opinion, eventually Law No. 15 Year 1992 still maintains the principle of air cabotage, as set out in Article 36 in conjunction to Article 39 in which activities of commercial air transport serving domestic transportation can only be managed by the Indonesian legal entities that have obtained a license. Hence, foreign airlines are prohibited from conducting commercial air transport in the country.<sup>24</sup> This is in line with Article 7 of the 1944 Chicago Convention on air cabotage. Only in the level of implementation has the Government of Indonesia been at fault, which is based on Presidential Decree No. 16 Year 1970 as the ratification of the agreement between Indonesia and Thailand with regard to the exchange of traffic rights for flights. Within this Presidential Decree, the Indonesian government issued a permit (cabotage rights) to Thailand allowing return flights from Jakarta - Medan - Singapore - Kuala Lumpur - Bangkok - Hong Kong - Tokyo. The Jakarta - Medan flight constitutes as cabotage.

The cabotage principle under Law No. 15 Year 1992 is retained by Law No. 1 Year 2009 as set out in Article 85 paragraph (1), in which scheduled domestic commercial air transport can only be managed by national air

<sup>22</sup> This Law has been replaced by Law No. 1 of 2009 on Aviation.

<sup>23</sup> K. Martono and Amad Sudiro, *Op.cit.*, p. 52.

<sup>24</sup> See Article 36 in conjunction to Article 39 Law No. 1 of 2009 on Aviation.

transport business entities that have received work permit for scheduled commercial air transport business. Through Article 85 paragraph (1), only national airlines can operate in the territory of Indonesia. Even the existence of Article 85 paragraph (1) is reinforced by Article 108 (2) and (3), which states that:

- a. National airline commercial business entities are wholly or in partial of its capital must be owned by an Indonesian legal entity or a citizen of Indonesia.
- b. In terms of the capital of national airline commercial business entities owned by Indonesian legal entities or citizens of Indonesia, is divided into numerous capital owners, one of them requires national investors to obtain a greater share than the overall foreign investors (single majority).

Pursuant to Article 108, it is intended that in the event capital ownership must be divided between the national investors and foreign investors, with the single majority provision, the airline is still in control of national investors or national legal entities. The provision in Article 108 is strengthened by the invocation of Presidential Decree No. 39 Year 2014 dated 21 April 2014 on the List of Business Fields Closed and Business Sectors Opened with Reservation in the Investment Sector. Within this presidential decree, particularly in the field of air transport, it is emphasized that in commercial air transport, the government has permitted foreign capital of up to 49%, meeting the specific requirements, and the national investors should be greater than the overall foreign investors, which in this case is 51%.

**b. Breaching Air cabotage principle in Indonesia**

Within the stage of airline company identification, one of the implementation of State sovereignty in the exclusivity of airspace over the airspace of a country is defined by the nationality of an airline company, in which nationality of the airline company can be marked of its ownership and control. However, each State determines different standards for it. The United States, for example, stipulates that a country's airline company must be at least 75% owned by a citizen of the United States, European States have determined that ownership of share must be at least 51% owned by its citizens, while Indonesia designates a 51% share ownership.

The magnitude of the State's influence and provisions on nationality of an airline within regulations concerning flight activities forces airline companies to search for business models in order to continue to business activities which crosses countries by not being in contrary to international law which gives exclusivity of airspace to the State. Some of the business models implemented is through business alliances or code share with a domestic airline company for all domestic purposes. Alliance or code share with domestic airline companies provide benefits for both parties, where for international airlines, they can sell tickets for international flights to final destination points which can only be provided by domestic flights. As for domestic airlines, this alliance can directly increase fulfilling aircraft seats with its domestic destination.

The cooperation model beneficial to both parties is in its development, mainly airline companies with a strong capital has developed into an expanded business by buying shares of airlines which are business' alliances. Optimizing profits by buying shares



of airline companies from other countries has become the main purpose of corporate action. Airline companies are also private companies, however, under both applicable international and national provisions, generally, ownership and control of national legal entities of an airline company must be the majority. As mentioned above, under Indonesian national law, relating to ownership set out in Article 108 paragraph (3) in conjunction to Law No. 1 Year 2009 in conjunction to Presidential Decree No. 39 Year 2014, which essentially states that national capital ownership should be greater than foreign capital ownership (single majority) with a percentage of at least 51% for the national share ownership. As for the term “control”, the national legislation has yet to set out provisions on this matter.

Upon the single majority provision, practice in the field has shown indications that weaken national investors. Such is because the amount of national capital which is 51% has been split into multiple shareholders or investors, thus, the ownership is not of a single majority. Meanwhile, value for foreign investors is still 49%. Based on this composition, shareholders meeting will be dominated by foreign investors, hence the company’s policy will be under foreign airlines. Such example can be seen in the local shareholders in PT Indonesia Air Asia (IAA), Tiger Airways Airlines and Silk Air Airlines. PT IAA is controlled by four parties, 51% of shares ownership is by national investors, namely, 21% by the Sandjaja Wilaya family, 20% by the Pin Paris family, PT Fersindo Nusaperkasa as much as 10%, whereas the remaining 49% is held by Air Asia Group (Malaysia).<sup>25</sup> Likewise with Tiger Airways, ownership of local shares is 51%, but it is divided into 11% owned by Temasek Group

Pte, Ltd., 16% owned by Ireland’s Investment Pte, Ltd., and 24% belong to Indogo Partners Coop., while 49% which is the majority share is owned by Singapore Airlines Group.

Based on the example of the two cases mentioned above, particularly regarding the ownership of shares has been in accordance with national legislations, though, when studied more in depth, then in terms of share ownership, it still controlled by foreign investors. That being so, it is quite possible that Temasek Group Pte, Ltd., and Ireland Investment Pte, Ltd., are foreign subsidiaries operating in Indonesia; also ownership of national capital amounting to 51% is not owned by one national investor. As a result, if the national investors do not have an integrated decision within the general meeting of shareholders, they would be outvoted. It can be seen in PT IAA with its airline fleet known as Air Asia, has conducted flights between from and to one airport to other airports in Indonesia. Likewise, Tiger Airways with its airline fleet known as Tiger Mandala has served flight routes for more than 20 cities in Indonesia. Such as Ambon, Medan, Kendari, Makassar, Gorontalo, Banjarmasin, and so forth.

Slightly different from the practice of Silk Air, as stated by Marvin, Chief Executive Officer (CEO) of Silk Air, which offers a different flight experience with other airlines. Among them is a service to take care of “boarding pass” for passengers who intend to continue their journey from Singapore to any other international routes. This service is not only for passengers who want to use the services of the airline, but also to passengers who intend to continue their journey with planes owned by Singapore Airlines. “We are part of Singapore Airlines”, said Marvin.

<sup>25</sup> Erlangga Djujmena, “Investor Lokal Air Asia Sepakat Buat Holding”, <http://edukasi.kompas.com/read/2011/06/16/12025843/Investor.Lokal.AirAsia.Sepakat.Buat.Holding>, accessed on 8 October 2014.

With this facility, the Bandung – Singapore route could be an option for international passengers who plan to continue their flight to another country, which all this time has been utilizing Soekarno Hatta Airport. Interestingly, Silk Air Flights from and to Singapore including Bandung has already flied to nine cities in Indonesia, and Singapore Airlines has already flied to 11 cities in Indonesia. Hence, as explained by the CEO of Silk Air above, if from Bandung and after arriving in Singapore plans to fly to Manado, Pekanbaru, Medan or Balikpapan, it would be an international flight with the ongoing “boarding pass” service. Whereas, for example, flights from Bandung to Manado are inter-city domestic flights, and should be serviced by national airlines, if not then it would be in violation with the Law on Aviation for violating the principle of cabotage. But this is easily debated that such situation would not be cabotage since it passes Singapore, becoming an international flight. The same goes for if the flight crossed Kuala Lumpur, for example with Air Asia. Therefore, Singapore and Kuala Lumpur will be the “hub” of air transportation in Indonesia. Even if the flights continued from Singapore to cities abroad, Singapore and Kuala Lumpur are not just “hubs” but potential Indonesian gateways. The difficulty of flying from Bandung to Manado with National Airlines requires going through Jakarta instead. Thus, passengers have to go to Jakarta first by road, thus, it will be easier to go through Singapore or Kuala Lumpur.

These practices are found within domestic flights, although under formal juridical such does not violate aviation law, but in fact there has been covert practice over the violation of the principle of cabotage.

This is because of the weak supervision (either directly or indirectly) on investment in the field of air transport, thus opening opportunities for the possibility of the *smuggling* of investment law, which in turn the national capital market is controlled by foreign parties through national legal entities and national laws which in this case is in the form of covert cabotage, in order to declare that commercial air transport services in Indonesia has not violated the principle of cabotage.

In terms of policy, the Government of Indonesia gives too much freedom in domestic flight routes, airlines coming to Indonesia generally only belongs to low cost carrier (LCC), instead of flying premium class. As a consequence, economically, Indonesian passengers prefer services of low-cost foreign airlines, including foreign airlines in cooperation with national employers for national commercial airline services.<sup>26</sup> As a further result, national airlines fail to compete with airlines from code share, which in some ways although its capital ownership does not violate the principle of single majority, but the fact is that it is divided to several capital owners. Even one or two of them are foreign subsidiaries operating in Indonesia. Moreover, the foreign parent company is from the same country of the 41% foreign investor.

#### D. Conclusion

Based on the description above, it can be concluded as follows, that: **First**, state’s acceptance of the principle of air cabotage until today still includes groups that still maintain the cabotage principle in order to protect its national airlines and for security of the State. However, practice leads to the *smuggling* of air cabotage. Other State’s group,

<sup>26</sup> Adi Kusumaningrum, 2012, *Prinsip Cabotage dalam Industri Penerbangan Indonesia di Era Asia Single Aviation Market 2015*, Arena Hukum, p. 3.

has abandoned the cabotage principle, which is in line with the development of trade liberalization in air transport services.

**Second**, the Government of Indonesia, in a juridical manner, still maintains the principle of cabotage for air transport, although in practice there are instances of covert cabotage in some foreign airlines allowing to operate in Indonesia.

If the government wants to provide protection against airlines in the country, it should supervise of investment in the field of air transport should be enhanced, thus the practice of covert cabotage can end immediately. Increased surveillance is also in line with the law enforcement of the cabotage principle which is still within the government of Indonesia's commitment.

## BIBLIOGRAPHY

### A. Books

- Abdurrasyid, Priyatna, 2003, *Kedaulatan Negara di Ruang Udara*, Riefka, Jakarta.
- Balck, Henry Campbell, 1979, *Black's Law Dictionary*, St. Paul Minn West Publising Co, Minnesota.
- Istanto, F. Sugeng, 2007, *Penelitian Hukum*, Ganda, Yogyakarta.
- Johnson, 1965, *Rights in Air Space*, Manchester University Press, Manchester.
- Kantaatmadja, Mieke Komar, 1988, *Berbagai Masalah Hukum Udara dan Angkasa*, Remadja Karya, Bandung.
- Kusumaningrum, Adi, 2012, *Prinsip Cabotage dalam Industri Penerbangan Indonesia di Era Asia Single Aviation Market 2015*, Arena Hukum, Malang.
- Martono, K. and Usman Malayu, 1996, *Perjanjian Angkutan Udara di Indonesia*, Mandar Maju, Bandung.
- Martono, K. and Sudiro, Amad, 2009, *Hukum Angkutan Udara; Berdasarkan UURI No. 1 Tahun 2009*, Rajawali Pers, Jakarta.
- Martono, K., 2009, *Hukum Penerbangan Berdasarkan UURI No. 1 Tahun 2009*, Mandar Maju, Bandung.

- Suherman, E., 1984, *Airspace and Regional Aerospace*, Alumni, Bandung.
- Wassenbergh, 1957, *Post-War International Civil Aviation Policy and the Law of the Air*, Martinus Nijhoff Publishers, Leiden.
- Wiradipradja, Saefullah, 1990, *Tinjauan Singkat Atas Berbagai Perjanjian Internasional di Bidang Hukum Udara*, Lisan, Bandung.
- Zylicz, Marek, 1992, *International Air Transport Law*, Martinus Nijhoff Publishers, Leiden.

### B. Laws and Regulations

- Chicago Convention 1944.
- Article 39 Law Number 1 of 2009 on Aviation.
- Paris Convention.
- International Air Services Transit Agreement.

### D. Internet

- Djujmena, Erlangga, "Investor Lokal Air Asia Sepakat Buat Holding", <http://edukasi.kompas.com/read/2011/06/16/12025843/Investor.Lokal.AirAsia.Sepakat.Buat.Holding>, accessed on 8 October 2014.