

Case study

The Importance of Internal Waters Delimitation to Secure State Sovereignty: A Case of Archipelagic State of Indonesia

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ABSTRACT

Internal water is a concept of maritime zone priority recognized at the early development of sovereign territories at sea. The concept of sovereignty in internal waters is similar to the concept of sovereignty on the land that archipelagic states have full sovereignty over their archipelagic waters. There are no other states' rights in such water zone. Unlike the case with other sovereignties, such as archipelagic waters (even though it is equally sovereign in these waters), other states have rights such as the right of innocent passage, the right to lay submarine cables, traditional fishing right and other noted rights. For such mandated reasons, it is essential for an archipelagic state such as Indonesia, which has 17,508 islands, to quickly assign internal waters delimitation in all islands to control of violation such as smuggling, trafficking, illegal fishing, so forth. Delimitation is important considering the position of internal waters within the archipelagic waters area, thus it requires the delimitation of internal waters to separate internal waters from archipelagic waters. This is important with regard to prevent overlapping and violation of the archipelagic state's full sovereignty in its inland waters.

Keywords: Delimitation, internal water, LOSC 1982, sea, sovereignty

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INTRODUCTION

As a result of the consensus, the United Nations Conference Law of the Sea / UNCLOS 1982 (Buzan, 1981) has formulated new concepts in international maritime law including the concept of territorial sovereignty at sea, the concept of the archipelagic state, and the sea dispute settlement mechanism. However, the most

important matter in The Law of The Sea Convention (LOSC) 1982 is the recognition of the concept of an archipelagic state as a new concept in the history of international maritime law. An archipelagic state has sovereignty over territorial sea, archipelagic waters, and internal waters covering seafloor, sea space, and the air above (LOSC 1982, Article 49). Meanwhile, the domain sovereignty of the archipelagic state consists of three maritime zones, as follows:

1. Internal waters: Waters on the land side of the territorial sea baseline are part of the inland waters of the State (LOSC, 1982, Article 8 (1)).
2. Archipelagic waters: Waters enclosed by the baseline of the archipelago, drawn in accordance with article 47, are referred to as archipelagic waters regardless of the depth or distance from shore (LOSC, 1982, Article 49(1)).
3. Territorial Sea: The territorial sea width to a limit not exceeding 12 nautical miles, measured from the baseline (LOSC, 1982, Article 3).

The determination of the three regimes of sovereignty zones is inseparable from the mechanism of drawing the baseline that has been set forth in article 47 of LOSC 1982 on the archipelagic straight line. This archipelagic straight line is illustrated by connecting the outermost points of the islands and the outermost dry reef of the archipelago, provided that within such baseline are included the main islands and a region where the ratio between the waters and the land area, including atolls, is

between one to one and nine to one (LOSC, 1982, Article 47 (1)). Therefore, through such formulated method, the archipelagic baseline will form a circle that connects each point in each outer island (see Figure 1).

The archipelagic baseline shall directly close the waters inward as the archipelagic waters and/or internal waters and outward as far as 12 miles as the territorial sea as stated in the LOSC, 1982, Article 3. This is where the privileges as states exist: with the determination of the archipelagic straight line, all territorial waters located among the islands shall be called archipelagic waters, and in its archipelagic waters, an archipelagic state is concerned to draw the closing lines for the purposes of determining the boundary of inland waters as stated in the LOSC, 1982, Article 50.

With regard to this issue, the current problem is that Indonesia has not established the delimitation of its internal waters in every existing island in the territorial waters of the Indonesian archipelago. However, Indonesia has legally regulated the inland waters in Law No. 6 of 1996 on Indonesian waters governing the determination of inland waters. This is particularly important given that the position of internal waters within Indonesian archipelagic waters is limited by the obligation to accommodate other states' right of innocent passage (Agoes, 2004), their right to lay submarine cables, traditional fishing rights, and other rights such as ships and air craft enjoy the right of archipelagic sea lane passage (LOSC 1982, art. 53(2)). This is not applicable in the inland waters, which is an integral part of the coastal state hence the coastal state allowed

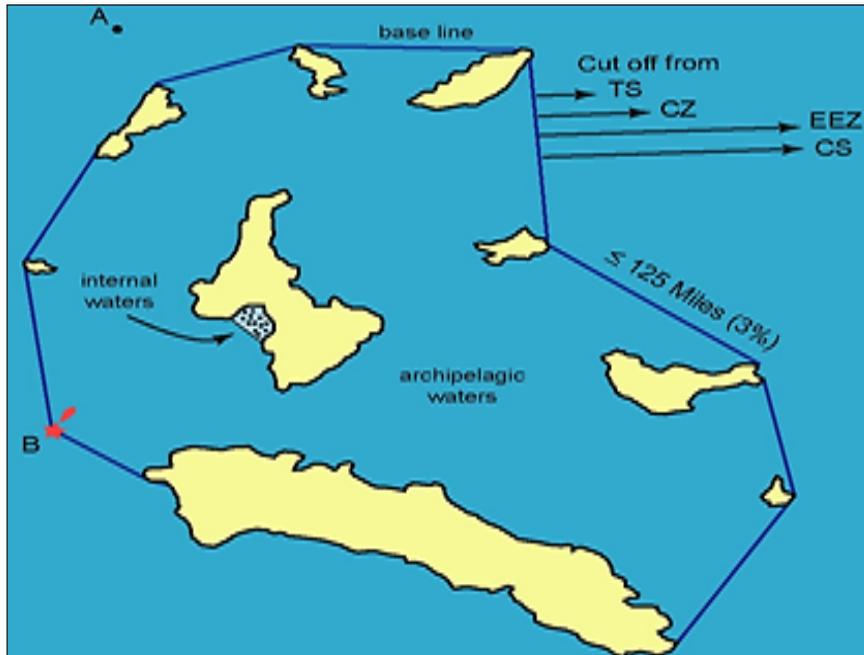


Figure 1. Archipelagic baseline (Advisory Board on Law of the Sea, 2006)

to enjoy full and absolute sovereignty (Buntoro, 2012; Churchill & Lowe, 1988; Hillier, 1998).

As an archipelago, Indonesia has many island and sea routes that can be visited by ships, thus it can open a gap for violation. Based on data's of National Anti-Narcotics Agency (2018) [Badan Narkotika Nasional (BNN)] 90% of narcotics smuggling comes from the sea. In general, based on data from Indonesia Customs, there are 400 ports that are prone to smuggling (Hasyim, 2017). In 2017-2018, Ministry of Marine and Fisheries has captured 633 of illegal fishing vessels. (Ministry of Marine and Fisheries, 2018).

From such observations, the current paper draws attention to address the importance of determining the internal delimitation in Indonesia to prevent

other states' abuse of rights, especially when conducting the right of innocent passage and traditional fishing rights along the archipelagic waters that have been recognized by LOSC 1982. The current study is also concerned to limit the internal waters concept of water after LOSC 1982.

The objective of this study is to examine the importance of inland waters delimitation in safeguarding the sovereignty of Indonesia's marine territory from abuse and violation of the right of state users while in the archipelagic waters.

MATERIALS AND METHODS

This research examined data from secondary resources specifically books, journals and legislation documents to understand the concept and the importance of internal waters for archipelagic state.

RESULTS AND DISCUSSIONS

Delimitation in International Law

According to the Oxford English Dictionary, the word delimitation is derived from the Latin “delimitate,” where “de” means down, completely and “limiter” (derived from “limes”: limit or boundary). Furthermore in the mid-19th century in French language, it is known as “delimitier,” and in English, “delimit” is defined as the limits or boundaries. Maritime boundary determination is aimed at determining the boundaries of two opposite or contiguous states (Churchill & Lowe, 1998). However, in the further development of maritime law, delimitation is not only employed to determine maritime zones (which are under state jurisdiction) but also to determine the rights and interests of the coastal state to fisheries, natural resources, minerals, hydrocarbons, navigation, and others (Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs [DOALOS], 2001).

Although in principle the concept of delimitation is the division of maritime zones associated with the boundaries of two states or interests with ZEE and the continental shelf (Dundua, 2007), this does not indicate that the limits/delimitations are not applicable to internal waters zones. Article 50 of LOSC 1982 states that within its archipelagic waters, the archipelagic state shall draw the closing lines for the purposes of determining the internal waters boundaries, in accordance with the provisions of articles 9, 10, and 11 of the LOSC 1982.

Internal water is all waters on the land side of the territorial sea baseline if use normal base line, but another ways internal water can also established when a river flows directly into the sea, the baseline is a straight line across the mouth of the river between the points on the low water line of both riversides (Article 9 of LOSC 1982), the bays the coasts of which belong to a single state (Article 10 of LOSC 1982), and the installation of the outermost permanent port which is an integral part of the port system shall be regarded as a part of the coast (Article 10 of LOSC 1982).

In general, based on the above explanation, broadly, the concept of delimitation is not only limited to the “limit” between states, but it can also be defined as the closing line as applicable for the mouth of rivers, bays, and ports that may separate the inland waters and the archipelagic waters (Agoes, 2004). Each zone of this water has its own legal regime. In this case, it is lawful if Indonesia establishes internal waters delimitation to reinforce the boundary among the archipelagic waters.

As a territorial water area on the land side or inner side of a baseline (LOSC, 1982, Article 8), internal waters are the waters among the grounds from the baseline where the territorial sea is measured. For the states with an archipelagic geographical form, the withdrawal of the closing line of internal waters can be conducted within the archipelagic waters area. This is because the baseline used by the archipelagic state is the archipelagic straight line, thus all marine areas within the baseline shall be regarded

as archipelagic waters and internal waters are bound by archipelagic waters (Tanaka, 2012). By law, these internal waters do not only include rivers downstream, bays and ports as described above but also all inner waters closed by the straight line.

Legal Basis for Determination of Internal Waters

In general, the legal basis allowing an archipelagic state (such as Indonesia) to establish internal waters is stipulated in article 50 LOSC 1982. Recognition the international law to distinguish bodies of water properly classified as internal waters from adjacent territorial, gained momentum following the anglo-Norwegian Fisheries case (Rothwell & Stephen, 2010). Meanwhile, according to national law, Indonesia has regulated internal waters in Law No. 6 of 1996 on Indonesian Waters in Article 7 which states:

(1) In archipelagic waters, for the purpose of the determination of internal waters boundary, the Government of Indonesia shall draw closing lines at the mouth of any river, estuary, bay, seafarer, and port.

(2) Internal waters consist of:

*a. Internal seas (laut pedalaman);
and*

b. Internal waters (perairan darat).

(3) Internal seas as referred to in paragraph (2) letter a is a part of sea located on the land side of the closing line, on the sea side of the low water line.

(4) Internal water as referred to in paragraph (2) letter b is all waters located on the land side of a low water line, except at the mouth of rivers. Internal waters are all waters located on the land side of the river mouth closing line.

Furthermore, the regulation shall be regulated in Government Regulation No. 38 of 2002 on Geographic Coordinates List of the Points of Indonesian Archipelagic Baseline (Government Regulation No. 38 of 2002), namely in article 6:

(1) On a bay-shaped shore indentation, the baseline for measuring the width of the territorial sea is the Bay Closing Line.

(2) The Bay Closing Line as referred to in paragraph (1) as a straight line drawn between the outermost points of the most prominent Low Water Line and across the mouth of bay.

(3) The Bay Closing Line as referred to in paragraph (1) shall only be withdrawn if the bay area is as large as or larger than that of semi-circle whose diameter is a closing line drawn across the mouth of the bay.

(4) If there are islands at the bay that make up more than one bay mouth, then the maximum total length of the Bay Closing Line from the bay mouths is 24 (twenty four) nautical miles.

(5) The waters located on the inner side of Bay Closing Line as referred to in paragraph (1) are the Territorial Sea.

Article 7 Government Regulation No. 38 of 2002, states:

(1) In the Estuary of a river or canal, the baseline for measuring the width of the Territorial Sea is the Straight Line as the closing of the river mouth or the canal.

(2) The straight line as referred to in paragraph (1) shall be drawn between the outermost points of the prominent and opposite Low Water Line.

(3) In the case of the straight line referred to in paragraph (1) is not applicable because of the existence of the estuary at the river mouth. As the Estuary closing line, straight lines are used to connect between points of the estuary with the outermost points on the Low Water Line of the edge or river mouth.

(4) Waters located on the inner side of the closing line as referred to in paragraphs (1) and (3) are Internal Waters, and waters located on the outer side of the closing line are the Territorial Sea.

And article 8 Government Regulation No. 38 of 2002, states:

(1) In the port area, the baseline for measuring the width of the Territorial Sea are straight lines as the closing of port area, which include the outermost permanent building which is an integral part of the port system as part of the coast.

(2) The straight line referred to in paragraph (1) shall be drawn between

the outermost points on the coastal Low Water Line and the outermost points of the outermost permanent building which is an integral part of the port system.

(3) Waters located on the inner side of the closing lines of the port area as referred to in paragraph (1) are the Inland Waters, and waters located on the outer side of the closing line are the Territorial Sea.

These two provisions of national legislation have also been regulated in Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs (DOALOS) thus the international world be made aware towards the practice of Indonesian national law regarding the determination of internal waters.

International law provides the state with the authority to legislate, regulate the use of its inland waters, and decide who may cross and out as well as things that can be carried out when entering the internal waters (Chen, 2000). Based on its early history, the state's full power in its internal waters is due to the geographical conditions of the internal waters adjacent to the territorial waters of a state's land (Tanaka, 2012).

Legal Status of Internal Waters

Each state can enjoy its full sovereignty throughout the internal waters. In Article 2 (1) of LOSC explains that the sovereignty of coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to the adjacent belt of sea, described

as the Territorial Sea. (Tanaka, 2012). Unlike the territorial sea, the right of innocent passage does not apply in internal waters. The exception to such cited rule is that when the internal waters are closed on the basis of the latest rule on the determination of the straight line, the right of innocent passage still exists in the internal waters in accordance with article 5 (2) of the Geneva Convention on the Territorial Sea and the Countinuous Zone/TSC and article 8 of LOSC (Tanaka, 2012). The law regime of internal waters has not much discussed in the LOSC, the basic concept of sovereignty of inland waters is just as the same as the concept of sovereignty on land. This is because the inland waters are those strongly affected by the geographical condition of the land.

Coastal State Jurisdiction on Foreign Ships in Internal Waters

In modern legal practice, user states have the right to access ports located in inland waters or to enter inland waters due to certain conditions that permit ships and their voyages. When a foreign ship enters the port and internal waters of a coastal state, the sovereignty of the coastal state over its internal waters is correspondingly qualified (Sohn, 2014).

Any vessels entering the port and internal waters are subject to the sovereignty of the coastal state (Churchill & Lowe, 1988). The law applicable in inland waters has the same legal regime as the land (with regard to the jurisdiction of the national law of an archipelagic state may apply),

and every vessel entering the inland waters shall comply with the national law of coastal states (Churchill & Lowe, 1988). The subjects of law enforcement in these internal waters or ports may be criminal acts, civility and other rules established by the port state. For minor criminal offenses relating to disciplinary issues on ships, the coastal state may not seek to apply its criminal laws. However, if a criminal act on a vessel affects the interests of the coastal state, then the law will be enforced (Rothwell & Stephen, 2010).

Matters relating to civility and administration are dealt with depending on the type of violation committed. If the case relates to the perpetrator on the ship, the “internal economy” problem of the ship, and the people above it, then the laws of the flag states or the laws of the ship captain or the local consul in the area may apply. When the assistance of the coastal state is requested, the coastal state is limited to providing assistance and not to enforce the law, and law enforcement shall be returned to the flag state of the ship (Churchill & Lowe, 1988).

One particular limitation is the enforcement of provisions on foreign ships that passing from the territorial sea to internal waters, such as ships in port. The difficulty is the application of laws that are relevant to the coastal state itself, such as matters relating to design, construction, crew, and foreign ship equipment problems. It would be better if the coastal state has adopted such standards, which will include IMO instrument, such as SOLAS. This instrument can prevent and regulate in both waters, namely in the territorial sea

and waters, which leads to more stringent application of provisions to ships in inland waters. Particular requirement is important for the prevention, reduction, and control of marine environment pollution as a condition for the entry of foreign ships into ports or inland waters as well as to provide appropriate notice in accordance with the terms and conditions of IMO (Rothwell & Stephen, 2010).

Right of Access to a Port. Although there is no right of innocent passage granted to foreign vessels in internal water territories, and foreign vessels are not allowed to enjoy a general right to ports in all states, customary international law regulates a special regime known as the right of access to a states' ports (Chen, 2000). As in the 1986 case of Nicaragua, International Court of Justice (ICJ) also referred to certain rights relating to the freedom of communications and trade, where the ICJ has decided to recognize the foreign vessels to enjoy "right of access" to the ports (Rothwell & Stephens, 2010; Sohn, 2014). Based on the case of Saudi – Aramco discussed above, this has drawn broad attention that although there is a right of ports access to foreign vessels, international law guarantees the sovereignty and rights of the coastal states to close the access to its port area, whether it is for vital interests, security, or for any other specific reasons (Sohn, 2014).

Ships under Difficult Conditions and Needing Help. Under conditions that endanger the safety of ships and sea

voyages, ships may enter the inland waters. According to Lord Stowell in as cited in Tanaka's (2012) book, based on the Eleanor case, there are four conditions for ships under difficult conditions or in need of help may enter the inland waters:

1. Distress shall be urgent and something of grave necessity.
2. There must be at least a moral necessity.
3. It must not be a distress which he has created himself.
4. The distress must be proven by the claimant in a clear and satisfactory manner.

Therefore, due to humanitarian and security reasons, foreign vessels under difficult conditions and need assistance, according to customary international law, they have the right to enter inland waters or transit at the nearest port (Tanaka, 2012). However, coastal states may also reject or take certain actions such as legal action, prohibition of entry, or keeping troubled ships away from the inland waters and the surrounding waters if it turns out that the conditions endangering the ships may cause pollution and environmental destruction in which its effects may harm the subjected coastal state. Recalling Chapter XII of LOSC on the protection and preservation of the marine environment, the precautionary and prudential principle is the main matter that shall be carried out to prevent pollution and destruction due to human activities at sea.

Indonesia's Internal Waters

Indonesian internal waters are currently within the territory of archipelagic waters, arising from the withdrawal of the archipelagic straight line. Although Indonesia already has written rules on internal waters, the implementation in the field regarding boundaries/delimitation of archipelagic waters has not been performed. In fact, not all local governments are aware of the delimitation of internal waters on the coast or every island in the region. Particularly for Indonesia, the determination of archipelagic waters delimitation is very important considering that territories of these waters are intertwined with archipelagic waters that in fact they are the same as the territorial sea and that there are rights of other states as well as international rights for certain accesses, such as:

1. Traditional fishing rights and the right to lay submarine cables (LOSC, article 51)
2. The right of innocent passage (LOSC, Article 52)
3. The right of Archipelagic Sea Lane Passage (LOSC, Article 53)
4. And other rights under bilateral agreements such as the 1982 agreement between Indonesia and Malaysia.

The concept of traditional fishing rights recognized by international law makes the territorial waters of Indonesian archipelago a place for traditional fishermen from several countries to fish. However, the concern is that the-fishing activity should

not enter the territorial waters of Indonesia. If the Indonesian government does not establish the delimitation of the internal waters area for 17,508 islands (Law No. 6 of 1996), then the legal force to prevent illegal fishing, smuggling, and so forth as long as it is near the coastal areas of Indonesia will be difficult to obtain. Sometimes, the absence of regulation and the determination of boundaries/delimitation can be excuses for violators to harm Indonesia. Similar with submarine cables, the existence of internal waters delimitation improves the Indonesian government's law enforcement in the internal waters.

Currently, Indonesia has established three archipelagic sea lanes (Maritime Safety Committee (MSC) 69, Annex 9) connecting the oceans in Northern Indonesia and Southern Indonesia, and as a result, the number of passing vessels will be higher and the potential for violations of internal waters zone will be greater. In addition, the effect of the absence of the establishment of the East-West sea lanes and vice versa has allowed some states to use the right of archipelagic sea lane passage based on their voyage manuals (Puspitawati, 2004) which could trouble Indonesia if there are foreign ships passing and approaching the internal waters while the government has not provided rules and closed every baseline of its waters.

The legal rules of internal waters in Indonesia still have a special practice in that the government only discusses the inland waters entering the port and customs domains. In fact, the inland waters include

the bay and the mouth of river. With Indonesia's large number of islands, the closing of inland waters to all islands is a must. This must be conducted as efforts to prevent various cases of crimes in the sea such as smuggling, illegal trade, or illegal fishing include marine pollution cause of right archipelagic sea lane passage or the impact of installing submarine cabling to marine ecology.

The large number of islands in Indonesia makes it very difficult to maintain and secure all of its waters. To prevent violations, all islands, especially islands located around international and border shipping lines, must immediately limit land waters. This is important to prevent violations of the law around the island's sea route in the future. After Indonesia sets inland waterways, violations committed in secrecy by state users will be punished more easily by the law.

CONCLUSION

There is now considerable evidence that Chapter IV of LOSC has recognized the sovereignty of the archipelagic state, Indonesia in this regard can draw attention the archipelagic straight line. Through such baseline, the Indonesian sea will consist of several zones of waters, archipelagic waters, the territorial sea, and internal waters.

Sovereignty in the sea does not mean that the archipelagic state has full rights to its marine territory but there are international rights. In the archipelagic and territorial waters zones, the archipelagic state has an obligation to guarantee international rights

for voyage, traditional fishing, or submarine cabling. It is only in the internal waters that the archipelagic state has full sovereignty over the sea. Since inland waters are within the archipelagic waters area, the possibility of violations committed by state user is becoming greater, such as secretly entering the inland waters in secrecy, smuggling, fish theft, trafficking and the like. Therefore, by way of conclusion, the Indonesian government should conduct internal waters delimitation and communicate the obstacles to all local governments and communities in order to prevent the violations of maritime law in Indonesia's inland waters.

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