THE IMPLEMENTATION OF INDONESIA’S RIGHTS AS ARCHIPELAGIC STATE UNDER UNCLOS REGIME IN THE CASE OF CHINA’S CLAIM OVER TRADITIONAL FISHING RIGHTS AT WATERS OF NATUNA ISLAND

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ABSTRACT

This paper is aimed to understand and analyze the implementation of Indonesia’s rights as an archipelagic state in the case of China’s claim over traditional fishing rights at waters of Natuna Island. It is a normative research by using secondary data.

Indonesia as archipelagic state has several rights including to exclude other states, especially China to claim over traditional fishing rights at Exclusive Economic Zone of Natuna Island. Based on the aforementioned analysis, the conclusions were that the fulfillment of elements stipulated by Article 51 of UNCLOS is required, such as having bilateral agreement with Indonesia, the recognition of existing traditional fishing rights and its status as neighboring states. As China does not fulfill the aforementioned elements, it is thus invalid to claim traditional fishing rights at waters of Natuna Island and Indonesia as an archipelagic state as well as coastal state has the sovereignty to exercise its rights.

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A. INTRODUCTION

Indonesia as a country which consists of more than 17,000 islands, deserve the title as Archipelagic State under The United Nations Convention on the Law of the Sea (UNCLOS) Regime. As an archipelagic State, Indonesia possesses the rights that are stipulated by UNCLOS. UNCLOS itself has become customary international law, in which even if a state is not a party to the convention, it would still bind the state anyway. Speaking of rights of archipelagic state, it is clearly stipulated on Article 47, in which Indonesia, has the right to draw archipelagic baselines, with some mechanisms written in the convention.

Natuna Island as part of Indonesia’s islands under the same administrative of Riau Island Province has become the center of attention since its potential dispute with China, in which it falls within China’s nine-dash line. China used the Nine-Dashed Line (NDL) to mark areas at Natuna Island sea, in which thirty percent of Natuna Islands is a potentially disputed zone.

The main interest would be the natural resources from Natuna Island, such as fish. Illegal fishing within Indonesia’s Exclusive Economic Zone has happened several times, for instance, on May 2016, Gui Bei Yu Ship 27088 from China was caught fishing illegally in Indonesia’s Exclusive Economic Zone at Natuna Island sea. China claimed that it was their traditional fishing right and the sea area was included in the “nine-dashed line”, which is not recognized by Indonesia.

Therefore, in this paper, we would analyze further related to the rights of archipelagic state possessed by Indonesia and the current issue related to the traditional fishing right claimed by China and how the implementation of UNCLOS in this matter can solve the potential dispute between the two countries.

B. METHODOLOGY

This journal would be a normative research by using secondary data, secondary data is data which can be obtained through any kind of text books, articles, and any other literatures.

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3 Ibid.

There would be no field observation to obtain the data and information. The data would be obtained through primary and secondary source of data such as the international law, customary international law, treaties, court judgment, thesis, or other literature sources that might be useful for this journal. The collection of data would be a documentary study or literature study. Therefore, this legal research would depend on the data available on the text.

In this research, the obtained data would be analyzed by using qualitative data analysis. Qualitative data analysis is a method to draw a conclusion using several qualitative data having different perspective, thinking, argument, or opinion which has been collected. The qualitative data analysis would not involve any statistical technique, rather the process would result a conclusion from the interpretation of various qualitative data.

C. Indonesia’s Rights as Archipelagic State under UNCLOS Regime

Indonesia is recognized as an archipelagic state based on point (a) of Article 46 of UNCLOS, which defines archipelagic State as a state constituted wholly by one or more archipelagos and may include other islands. Meanwhile, archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.\(^5\)

A state which qualifies as an archipelagic State under Article 46 of UNCLOS may exercise the right to draw archipelagic baselines in accordance with Article 47 of UNCLOS. In addition to the qualifications as an archipelagic State, there are three elements, which are first, there must be a group of islands which may include parts of islands, interconnecting waters, and other natural features; second, these features must be closely interrelated, in a way that they form an entity; third, the entity must be one with three types of characteristic, namely an intrinsic geographical entity, an intrinsic economic entity, and an intrinsic political entity.\(^6\)

Worth noting is that continental States, though they may possess archipelagos defined by

\(^5\) Point (b) Article 46 of UNCLOS

\(^6\) L. L. Herman, The Modern Concept of the Off-lying Archipelago in International Law, Canadian Yearbook of International Law, Vol. 23, 1985, p. 178.
Article 46(b), do not qualify the status of “archipelagic States”. As a result, they do not enjoy the corresponding rights and obligations as archipelagic States, e. g. drawing archipelagic baseline.

As stipulated clearly on Part IV of UNCLOS, that specifically governs regarding Archipelagic States, on Article 47, it clearly stipulates regarding how an archipelagic state could draw their archipelagic baselines based on the regulations stipulated in section 1, 2, 3 and 4 of the Article, which are:

1) An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2) The length of such baselines shall not exceed 100 nautical miles, except that up to three per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3) The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4) Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

And with the emphasis on the section five of Article 47 which states that the system of such baselines shall not be applied by an archipelagic state as to cut off from high seas or the exclusive economic zone the territorial sea of another state. Additionally, section six stipulates

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8 Ibid.
that If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

Considering the conditions mentioned by two aforementioned sections, Indonesia is evident that it does not violate the two sections and in the very first place, Indonesia has never had agreement with China in regards to the existing rights that they claimed as traditional fishing rights at Natuna Island. As a matter of fact, China, which is located 2,265 Nautical Miles\(^9\) while Malaysia which is considered as one of Indonesia’s neighbor located only 776 Nautical Miles\(^10\) and so China cannot be classified into category of neighboring state that Indonesia can possibly cut off its exclusive economic zone the territorial sea. Thus, Indonesia as an archipelagic state has exercised its rights and done its obligations as stipulated above.

Further, it is explained by Article 49 regarding the legal status of archipelagic waters that based on section one that the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with Article 47, described as archipelagic waters, regardless of their depth or distance from the coast, in which it indicates that Indonesia, as the archipelagic state has a full sovereignty over its archipelagic water based on its archipelagic baseline without regarding the depth or distance from the coast. the full sovereignty here means that Indonesia has the right to exclude any states that enter into their archipelagic waters, even exclude any states to exploit the natural resources contained in the said archipelagic waters.

Indonesia has several rights regarding the archipelagic sea lane passage under the UNCLOS regime, *inter alia*:

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


2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes;

3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.\textsuperscript{11} (...) 

Indonesia as an archipelagic state has the sovereignty over its archipelagic water, Indonesia has a power to control the sea lane passage over its archipelagic water and even the air route above it, it means that Indonesia can determine which route is suitable for any foreign ships/aircraft to pass Indonesia’s archipelagic water. All ships/aircrafts have the right to enjoy the archipelagic sea lane passage or air route over Indonesia’s archipelagic water, however they still need to comply the designated sea lanes and air routes over Indonesia’s archipelagic water which have been designated by Indonesia. The ships or aircrafts that may enjoy the right of passage over archipelagic water have to be in a continuous, expeditious, and unobstructed transit.

In response to the case of China’s claim, Indonesia may argue that they have the right and power to designate the sea lane passage over their archipelagic water, and thus, they may execute any foreign ship that violate their sovereignty over their archipelagic water and territorial water.

\textbf{D. The Legal Status of Natuna as an Island and its Consequences}

The first question that emerges before explaining regarding the China’s claim over waters at Natuna Island, is the legal status of Natuna Island itself, whether Natuna is an island recognized by International Law of The Sea under UNCLOS Regime. Moreover, the consequences of its legal status of an island.

According to the Foreign Minister, Indonesia’s ownership on Natuna Islands was already registered at the United Nations (UN) and all parties, including China, never raised an objection.\textsuperscript{12}

\textsuperscript{11} UNCLOS Art. 53

\textsuperscript{12} <http://setkab.go.id/en/no-claim-from-china-over-natuna-islands/> accessed March 21, 2017
1. Minister of Foreign Affairs of Indonesia, Retno Marsudi admitted that there was overlap in continental boundaries between Indonesia and Malaysia related Natuna Islands. However, she added, the problem had been resolved and registered at the UN.

2. Meanwhile, related to the overlapping in Exclusive Economic Zone (EEZ) with Malaysia at the West and Vietnam at the North, according to the Minister, it is still under negotiation.

Further, it is supported by List of Geographical Coordinates of Points of the Indonesian Archipelagic Baselines based on the Government Regulation of the Republic Indonesia no. 38 of 2002 as amended by the Government Regulation of the Republic of Indonesia no. 37 of 2008 and UNCLOS annexes; Government Regulation No. 61 of 1998 on the list of geographical coordinates of the base points of the archipelagic baselines of Indonesia in the Natuna Sea.

Natuna is factually considered as an island referring to the PCA award between Philippines and China, that in Tribunal Consideration for Article 121 (3) of UNCLOS ‘‘Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf’’ points out several important elements, as follows:

- ‘‘Cannot’’ — means that the capacity of a fitur laut to have an ability to sustain human habitation or economic life objectively, this ability can be seen from its current feature and whether in the future could have the competency to sustain human habitation or economic life.

In order to define an island as being able to ‘‘sustain human habitation or economic life’’?

There are three aspects in the word ‘‘sustain’’, as follows:

1. Ability to provide;

2. Temporal qualification: supplies is not temporary and in a ‘‘sufficient period of time’’ and;

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3. Qualitative Standard: the existing supplies fulfill the minimum standard for habitation.\textsuperscript{16}

In the word "human habitation" itself, tribunal also has their criteria such as that "sea feature" must be conducive for humans to inhabit, not to merely survive, such as:

- The number of humans are not small and do not stay temporarily;
- The sea feature must have a conducive environment to maintain its live, not only to survive but also to fulfill the daily needs for people in a long-term period.\textsuperscript{17}

"On their own" means that independent in supporting and supplying the needs without transfusion in importing stuff from outside the island and "Economic Life" is defined as their capacity to produce, distribute and conduct a transaction to support the local population.\textsuperscript{18}

Thus, as considering the aforementioned elements mentioned by the PCA Award, it is evident that Natuna can be classified as an island and indeed it has been registered as it is. Therefore, Natuna Island shall have Continental Shelf or Exclusive Economic Zone on their own, as they do not satisfy the qualifications as a rock under section three of Article 121 of UNCLOS.

**Exclusive Economic Zone at Natuna Island**

The exclusive economic zone (EEZ) is a 200 nautical mile zone extending from a coastal State's baseline in which the coastal State has priority of access to living resources and exclusive right of access to non-living resources.\textsuperscript{19} Indonesia as the coastal State of EEZ nearby the Natuna Island has rights and jurisdiction according to the provision of UNCLOS. Nevertheless, a third State also has a freedom over the EEZ of a coastal State, it can be seen on the Article 55 of the UNCLOS which provides that:

*Specific Legal Regime of the Exclusive Economic Zone. The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the*

\textsuperscript{16}South China Sea Arbitration (Philippines v China) Awards, PCA 2013, p. 486-487.

\textsuperscript{17}South China Sea Arbitration (Philippines v China) Awards, PCA 2013, p. 492.

\textsuperscript{18}South China Sea Arbitration (Philippines v China) Awards, PCA 2013, p. 416.

rights and freedoms of other States are governed by the relevant provisions of this Convention.20

The rights of a coastal State are regulated in the Article 56 of the UNCLOS, which provides that the coastal State has “sovereign rights” to explore and exploit the natural resources in the EEZ as well as other “activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds.21 The EEZ regime gives coastal States sovereign rights over three main resources, (1) non-living resources on the seabed, subsoil and superjacent waters, (2) living resources of the seabed, subsoil and superjacent waters and (3) other economic activities related to the economic exploitation and exploration of the zone.22 With regard to living resources, the coastal State has sovereign rights to explore and exploit them but it also has certain obligations with respect to the management of conservation of the living resources in its EEZ.23 Article 62 (1) of the UNCLOS provides that the coastal State shall promote the objective of optimum utilization of the living sources, it might be considered as one of the obligation of coastal State in the EEZ. Article 61 (1) and Article 62 (2) of the UNCLOS impose an obligation on the coastal State to determine the allowable catch of the living resources in its EEZ and its own capacity to harvest the living resources.24 Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, and especially developing countries.25 Nevertheless, if the coastal State is very dependent on the exploitation of the living resources of its EEZ, the obligation to give an access to other States may be discarded.26

21 See Article 56 (1), Ibid
23 Ibid, p.8
24 Ibid.
The other rights and duties of other States are regulated in the Article 58 of the UNCLOS, *inter alia*, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. In exercising their rights and performing their duties in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State.27 Therefore the coastal State may determine the laws and regulations in regards to the other States conduct in exercising their rights in the EEZ of a coastal State in accordance to the UNCLOS provision.

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.28 Thus, despite of the sovereign rights that has been mentioned before, a coastal State is also obliged to respect the rights and duties of the other States.

Concerning the rights possessed by Indonesia as a coastal state in regards to China’s claim over traditional fishing rights at exclusive economic zone of Natuna Island, Indonesia is legally allowed to exclude other states to gain benefits from the natural resources contained therein, particularly fish. In addition to that, Indonesia also has the obligation to respect the neighboring states’ traditional fishing rights at waters of Natuna Island. However, whether China is one of those neighboring states who could claim such right, would be elaborated in the next chapter.

E. China’s Claim over Traditional Fishing Rights at Waters of Natuna Island

Traditional fishing rights are fishing rights granted to certain groups of fishermen of a particular State who have habitually fished in certain areas over a long period, these rights must be based on habitual practice for long time and inherited from the previous generation.29 Thus, referring to the aforementioned definition, China’s claim on traditional fishing rights at

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Natuna Island must be proven by the existing practice of such right at Natuna Island by China and it must be proven that it derived or given by the previous generation in a long time.

However, referring to UNCLOS as the legal basis for the dispute pertaining international law of the sea, traditional fishing right itself is not clearly defined in UNCLOS. Therefore, pertaining China’s claim over traditional fishing rights based on international law, it is vague in that regard. Yet, it is only mentioned in section one of Article 51, which states that without prejudice to Article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. For example, Malaysia that has traditional fishing rights recognized by Indonesia over the Indonesian water, the agreement between them is basically regarding which species that can be taken or that have to be protected.30

Considering the article, it is apparent that Indonesia, in the very first place, has to be in an agreement with China, if China indeed has traditional fishing rights at Natuna Island. As a matter of fact, China and Indonesia do not have such agreement governing China’s traditional fishing rights around Natuna Island. And another element would be, that Indonesia shall recognize traditional fishing rights of neighboring states in certain areas falling within archipelagic waters, in which this condition is not met in the particular case.

For instance, Indonesia-Australia has an agreement about traditional fishing rights among these neighbouring states. Both states already signed the agreement since 1972.31 However, it is known that Australia no longer admits Indonesia’s Traditional Fishing Right in several areas like Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet.32

Moreover, it is further stipulated that the terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them.

30 MOU 74, Record of Discussion 76, Treaty 1982


Yet, there is no such bilateral agreements between the two states, that would mean the article cannot be applied to the case of Indonesia and China.

The requirements that must be satisfied in order to successfully establish historic rights are, *inter alia*, long-established activities, and the continuous exercise of these activities that are recognized by other States.\(^{33}\) From this requirements, it can be concluded that China must have a long-established activities of fisheries at Natuna Island, and China must obtain a recognition of such rights from the other States, especially Indonesia, since Natuna Island is part of Indonesian territory, however in fact there is no such long-established activities or any historic fishing activities conducted by China at Natuna Island. Indonesia is also denying that China has traditional fishing rights, by saying that Indonesia only has a bilateral agreement on traditional fishing rights with Malaysia.\(^{34}\)

Considering the aforementioned factors that can be classified as the requirements to recognize China’s traditional fishing rights, which are having bilateral agreement with Indonesia related to the existing traditional fishing right and long-established activities that are recognized by other States, are fairly not fulfilled since there is no such agreements and Indonesia does not recognize China’s traditional fishing right at waters of Natuna Island.

**F. CONCLUSION**

As a matter of fact, Indonesia does not recognize China’s traditional fishing right and pertaining traditional fishing right itself, it is not regulated clearly in UNCLOS. China’s claim in this matter is invalid since referring to Article 51 of UNCLOS that Indonesia shall respect existing agreement and recognize traditional fishing rights and other legitimate activities of the neighboring states in certain areas falling within archipelagic waters, in which China does not meet any of the aforementioned elements in the article.

Further, in order to successfully establish historic rights are, *inter alia*, long-established activities, and the continuous exercise of these activities that are recognized by other States, in which it is evident that China failed to establish such rights since Indonesia does not recognize China’s traditional fishing rights. In short, Indonesia as an archipelagic state as well

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\(^{33}\) Tunisia/Libya, supra note 7, at paras 98-99; Fisheries Jurisdiction (United Kingdom v Iceland), Merits, Judgment, (1974) ICJ Reports 3, at paras 63-65.

\(^{34}\) Estu Suryowati, ‘*Susi: Klaim China Ihwal Perairan Natuna Sebagai “Traditional Fishing Ground” Tidak Berdasar*’ Kompas (Jakarta, 2016)
as a coastal state that has exclusive rights over Exclusive Economic Zone at waters of Natuna Island to exclude other states, including China to claim the rights, particularly traditional fishing right over the natural resources contained therein.

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