

Critical Analysis Of The Regulation Regarding Traditional Fishermen In Grey-Area Of Indonesia-Malaysia

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Abstract—With the capture of Indonesian traditional fishermen by Malaysia without any clarity of violations as they operated in the grey area, Indonesia needs to act adequately and conduct legal protection. This is based on international agreement of UNCLOS 1982, which has been ratified by both Indonesia and Malaysia. This indicates that international law had been regulating maritime delimitation, and in case of unfinished arrangement, dispute resolution procedure as stated in Chapter XV of UNCLOS 1982 could be utilised, i.e. special regulation by temporary arrangement. Thus, during the final adjustment period, biological natural resources within the overlapping areas could still be utilised by traditional fishermen of both countries.

Keywords—Grey area, International agreement, Legal protection, Traditional fishermen

I. INTRODUCTION

A. Background

Indonesia, as an archipelagic state with international recognition, has distinct characteristics that no other country has. Indonesia is located between two continents: Asia and Australia, as well as two oceans: Indian and Pacific Oceans. Furthermore, Indonesia is an archipelagic state consisting of 17,508 islands, and marine region of 5.8 million km² consisting of Indonesia's archipelagic marine area and territorial sea of 3.1 million km², total area of EEZ of 2.7 million km², and 81290 km length of coastline. It should also be noted that 2/3 of Indonesia's area is water, and its potential such as marine fisheries, oil reserve, sea voyage and tourism.

These distinct characteristics should have been able to awaken the nation and rebuild its maritime culture. Indonesia have to realize that it is a nation whose identity, prosperity and future are determined by how its sea is managed.

In relation to the characteristics described above, what needs to be thoroughly observed is to maintain and manage marine resources with a focus on building sovereignty of sea food, through the development of marine fisheries industry by placing fishermen as the main pillar so that Indonesian maritime wealth can be utilised as much as possible for the prosperity of the people (as mandated by

the Constitution of the Republic of Indonesia 1945).

In order to achieve that goal, it is imperative to eliminate sources of conflict at the sea, such as maritime border area conflict. Indonesia itself has maritime boundaries with 10 countries: Malaysia, Singapore, Philippine, Palau, Papua New Guinea, East Timor, India, Thailand, Vietnam, and Australia; and therefore, prone to maritime border area conflict. To date, Indonesia has maritime border areas with three categories:

- Agreements have been reached
- Still in negotiation process
- Have not reached an agreement

More specifically is the maritime border area conflict between Indonesia and Malaysia, between West Kalimantan and Serawak. This particular area is considered as "Grey Area", and in this area both Indonesian and Malaysian government signed an MoU The Common Guidelines: Agree to Protect Fishermen, which was signed in Bali on the 27th of January, 2012.

The establishment of a maritime boundary is not a unilateral legal act of a country but a legal act between two or more countries as outlined in a border agreement that has been described in UNCLOS 1982. Regarding maritime delimitation, one could refer back to international regulation stated in Article 38 of International Court of Justice. If agreements have not been reached, then the relevant countries are required to refer to dispute settlement procedures specified in Chapter XV of UNCLOS 1982, in which it is suggested that during the final adjustment period, biological natural resources within the overlapping areas could still be utilised by temporary agreement.

B. Formulation of the Problem

Based on the background above, the formulation of the problem in this study is: how is the legal protection arrangements for traditional fishermen in the grey area of Indonesia-Malaysia?

II. RESEARCH METHODS

In this study, the approach used is a normative approach. Hence, the type of data used in this study is

secondary data in the form of regulations, and more specifically regulations in international law, in the form of international legal documents, books / articles related to the topics, dictionaries, mass media and the internet. However, if needed, primary data will be used as support to the secondary data used.

The approach of using international law and regulation is used, not only to analyse regulations related to law aspects, but also to analyse the consistency and suitability of the substance written in the rules and international law, and its philosophical foundation.

In normative legal research, the assessment of legal rules alone is not enough, so it needs further study on aspects of the legal system. The system can be defined as a complete order or unit consisting of parts or elements that are closely related to each other, namely the rules or statements about what should be, so that the legal system is a normative system [1].

Moreover, due to the fact that utilization of marine fisheries resources in the EEZ is inseparable from the development of international law, and the fact that worldwide marine fisheries resource management are increasingly challenging, great attentions are needed for the regulation of marine fisheries resources utilization in EEZ. Therefore, in this study, the identification of facts, contained in legal materials such as regulations related to the use of fisheries resources, which includes other relevant regulations will be used as data source (including primary data). This means that identification of facts from secondary data is complemented by primary data. The process is intended to check and strengthen legal facts, to guarantee legal certainty, related to the object of this writing, namely the use of marine fishery resources in the EEZ. This is related to the grey area at the border of Indonesia and Malaysia, which is in the region of the "Indonesian EEZ", and consequently related to Indonesia's commitment that Indonesia's EEZ is intended for the welfare of the Indonesian people, as well as the existence of a clear law enforcement regulation against illegal fishing actions.

III. DISCUSSION

Indonesia is a country blessed with abundant natural resources from God Almighty, with marine fisheries as part of the wealth of resources available. Therefore, marine fisheries must be managed and utilized as adequately as possible to achieve the nation's objective of prosperity of the people. This is a nation's objective that needs to be the main orientation in regards to fisheries policies taken by the state.

According to the Minister of Home Affairs Regulation Number 18 of 2013 regarding the Government Administration Code and Regional Data, Indonesia's land area reaches 1.91 million km² while its territorial sea are

6.32 Million km², which in this case refers to the Geospatial Information Agency Letter No. b-3.4 / SESMA / IGD / 07/07/2014. The extent of Indonesia's territorial sea is a marker of how abundant its fishing resources are.

Indonesia's production rate of marine fisheries resources is another indicator in looking at Indonesia's marine wealth potential. According to documents released by the Ministry of Maritime Affairs and Fisheries, Indonesian fisheries production in 2014 reached 20.8 million tons compared to the previous year of 19.4 million tons, an increase of 7.35 percent compared to 2013. The trend of Indonesian fisheries production has increased since 2010, the average increase in 2010-2014 amounted to 15.80 percent with an average production of 16.2 million tons, with standard deviation of 3.8 million tons, and a 95% Confident Interval (CI) between 11.4 million-21.0 million tons, meaning that Indonesia's fisheries production has experienced a steady increase [2]. The contribution of capture fisheries to national fisheries' number in 2014 was 31.11 percent while the contribution of aquaculture was at 68.89 percent.

When discussing about fisheries, it is only natural to talk about the profession of a fishermen. Indonesian government must realize that, with the management of marine fisheries resources by placing fishermen as the main pillar, it is imperative to eliminate any possible conflict and the source of conflict in the sea. This is because Indonesia, as previously stated before, is neighboring 10 countries. This is the main reason why Indonesia is often associated with conflicts at the maritime border area.

An example of a border region that has not reached an agreement is the border between Indonesia and Malaysia, precisely between West Kalimantan and Sarawak, North Kalimantan and Sabah, there is a maritime border dispute (in this study, the focus is limited to the maritime border between Indonesia in West Kalimantan and Malaysia in Sarawak). Such areas can be categorized as grey areas. To provide legal protection for fishermen who hold fishing activities in the region, Indonesia and Malaysia have signed the MoU of The Common Guidelines: Agree to Protect Fishermen or commonly abbreviated as MoU of The Common Guidelines (signed in Bali, January 27, 2012)

The agreement for the MoU above is based on normative standards that are universally recognized. The determination of the maritime boundary line is not a unilateral legal action from a country but a legal action between two or more countries as outlined in a border agreement in UNCLOS 1982. The basis for determining maritime delimitation in accordance with international law is stated in Article 38 Statute of the International Court of Justice. If no agreement is reached, the relevant countries

are required to use dispute settlement procedures as specified in Chapter XV of UNCLOS 1982.

MoU The Common Guidelines mentioned above is a direct form of effort from the government to give legal protection for fishermen (including traditional fishermen). Legal protection for fishermen that conduct any fishing activity in the grey area of Indonesia and Malaysia is essential. Broadly speaking, these legal protections for traditional fishermen are based on several aspects:

A. Legal Framework (Sea) International and International Agreement

Marine fishery is closely related to the international sea law regime. Normatively there is a universally applicable foundation governing the management of marine waters. The internationally accepted foundation is the United Nations Convention on the Law of the Sea or what is known as UNCLOS. UNCLOS 1982 in Article 51 Paragraph (1) stipulates several important matters that need attention, namely:

- a. The recognition of the rights of traditional fisheries and other legitimate activities with neighboring countries directly side by side;
- b. The implementation of the rights of traditional fisheries and other actions is carried out by making prior agreements with neighboring countries which are then set forth in an agreement.

Traditional fishing rights thus receive protection through Article 51 Paragraph (1) of UNCLOS 1982. However, this right does not apply automatically, because there are several requirements that must be fulfilled, one of which is by further arrangement through bilateral agreements as it is necessary to regulate the fish resources that may be caught, the type of fishing equipment that may be used, where fishing activities must be carried out and some other provisions that must be obeyed.

Hasjim Djalal stated that traditional fishing rights are defined as fishing rights that arise because in practice they have been fishing in certain areas, often for generations and lasts a long time [3]. Thus the regulative provisions concerning traditional fishing rights show legal protection for traditional fishermen who have inherited and exercised these rights for quite a long time.

Following up on Article 51 Paragraph (1) of UNCLOS 1982, the Indonesian Government negotiated with Malaysia and resulted in a Memorandum of Understanding, which regulates the "Treatment of Fishermen by Maritime Law Enforcement Agencies of Malaysia and Republic of Indonesia". The agreement was agreed on January 27, 2012 located in Bali.

In general, The Common Guidelines MoU is a form of good cooperation between the Government of Indonesia and the Government of Malaysia to ensure the safety and security of regional marine environment and the protection of the marine environment as a shared responsibility. In Article 1 of the MoU, The Common Guidelines have even affirmed the goals or objectives to be addressed by the

various clauses in the Common Guidelines MoU, namely: to establish guidance for agreed activities in fisheries issues between parties on ensuring the wellbeing of the fishermen of the parties.

The Common Guidelines MoU must be regarded as a guideline, benchmark or minimum standard for handling fisheries problems that occur and all parties must ensure that the welfare of Indonesian and Malaysian fishermen is prosperous and secure. Various fisheries issues, including the problem of traditional fishermen who catch fish in the grey also become an important part to be overcome by adhering to the MoU of The Common Guidelines.

As a regulative standard in solving fisheries issues, MoU of the Common Guidelines also established basic principles that must be referred to in order to solve any marine fisheries conflicts / issue that may arise between Indonesia and Malaysia. These basic principles are, in general, have the same stature as law principles or principles of law. Satjipto Rahardjo stated that once discussion starts to reach principles of law, it is imperative to seek important aspects and essence of related legal framework and regulations. Thus, it can be said that principles of law is the 'heart' of legal framework and regulations [4].

Basic principles from the MoU of the Common Guidelines, as stated in Article 2, are an important aspect and the essence of the agreement. This is due to the fact that these principles are the reason why the MoU The Common Guidelines are made in the first place. Therefore, it is imperative that these basic principles are referred to and act as the guidelines for all parties seeking to solve maritime fisheries issues that may arise. Moreover, as previously stated, these basic principles act as the heart of the MoU of the Common Guidelines, and thus without them the regulation would cease to exist. This is in line with Paton regarding the existence of principles as stated:

.... as a means to make the law live, grow and develop. law is not just a collection of rules. If it is said, that with the principle of law, the law is not just a collection of rules, it is because the principle contains ethical values and demands. If you read a rule of law, we might not find ethical considerations there. But the principle of law shows that there are ethical demands and aspects, or at the very least we can sense those values and demands

Sudikno Mertokusumo defined principles of law as not a regulation, basic, general thoughts or abstract, or background of the regulation within a system in the form of laws and judge's verdict, which is a positive law that can be achieved by analyzing the basic characteristics of the regulation itself [5].

Basic Principles within the MoU of the Common Guidelines act as a way to ratify and have a normative and binding effect on parties who have agreed to the clauses contained in the agreement.

From the Principles of the Common Guidelines, it can be seen that first, in principle all actions that will be taken in overcoming marine fisheries issues, including the issue of legal protection of fishermen in the grey area, must be conducted in an effort to maintain good relations, close cooperation and mutual understanding between the Indonesian Government with the Malaysian Government. This is regarded as the highest priority that must be considered by both countries.

Secondly, there is a principle of prohibition of law enforcement authorities to use violence in regards to handling and solving maritime issue. It is important to avoid the use of violence and force as much as possible. Traditional fishermen from both Indonesia and Malaysia who conduct fishing activities in the grey area receive legal protection in the form of prohibition of acts of violence in handling the fishing activities they carry out.

The third, important principle, is that the states that binds themselves to the MoU of The Common Guideline is prohibited from discriminating against fishermen, or in other words fishermen from each country must be treated equally or impartially. This is to provide protection for fundamental human rights which are also owned by the fishermen.

The fundamental rights owned by fishermen have lately been highlighted. This was stated by Anthony Charles in his article entitled "Human Rights and Fishery Rights in Small-Scale Fisheries Management" [6].

J. Kearney, as quoted by Anthony Charles, written down 'fishing rights' owned by fisheries or fishermen communities, namely the right to fish for food; the right to fish for livelihood; the right to healthy households, communities and cultures; the right to live and work in a healthy ecosystem that will support future generations of fishermen; and the right to participate in decisions affecting fishing activity. Traditional fishermen thus have at least these rights. These rights are inherent; thus, the government holds the responsibility to respect, protect and fulfill these rights (state responsibility).

It should also be noticed that this human-rights based approach is adopted to embody or identify the rights of fishermen. This is what was explicitly noticed by Anthony Charles by saying that "The adoption of this human rights-based approach in fisheries has been advocated by two major international fisheries organizations, the World Forum of Fisher People (WFFP) and the International Collective in Support of Fishworkers (ICSF). Regarding the fundamental reasons for the acceptance of the human rights-based approach, the FAO Committee on Fisheries in 2009 stated [7]:

... recognizes that development efforts in fisheries should contribute to securing the freedom, well-being and dignity of all fisher people everywhere. Given the international consensus on achieving human rights, committed action to realizing the human rights of fishing communities, as indeed of all vital, yet marginalized groups and

communities, is an obligation

Fisheries are universally recognized as a sub-sector of life that must be managed properly so that it can contribute in creating prosperity for all humanity. The existence of an international consensus to achieve human rights implies that the commitment to recognize, respect and fulfill human rights that are owned by all members of the community including those owned by certain community groups, such as traditional fishermen. The importance of protecting fishermen's rights is actually based on a global view that recognizes that the ocean is a place to work (Oceans as a workplace). The principle was introduced in Resolution 67/69 issued by the United Nations on December 11, 2012 [8].

The global view recognizes that the sea has become a workplace for millions of people to make a living by harvesting fisheries resources. Fish is a valuable food and nutrition source and is one of the most traded food commodities. The community universally recognizes the rights of traditional fishermen to fulfill their needs through fishing activities carried out at sea. Therefore, the right to earn a living must be protected by the state.

Other content material within the MoU of The Common Guidelines in the scope of activities agreed to be carried out in order to overcome fisheries issues in the maritime boundary area between Indonesia and Malaysia is Article 3. The clause regulated in Article 3 of the MoU of The Common Guidelines entitled "Scope of Activities".

The Scope of Activities indicate the existence of an integral principle in using prevention policies and countermeasures policies. The existence of preventive policies or preventive measures is carried out by disseminating information to fishermen, industry stakeholders and other stakeholders, as well as conducting coordinated patrols. Therefore, it should be noted that to overcome the problem of rampant traditional fishermen who catch fish in the grey area, these traditional fishermen should have sufficient information in the first place, not to conduct fishing activities in the area. Therefore, all existing rules must be socialized first.

Countermeasure policies can be identified by the emergence of Article 3 section B of MoU of The Common Guidelines. Actions that can be taken by law enforcement officers in the form of inspections and ordering them to leave the area immediately for all fishing vessels, except those that use prohibited fishing equipment such as explosives, electric and chemical fishing equipment. In addition, notification of inspections and orders must be reported to "focal points" and direct communication between Indonesian and Malaysian law enforcement authorities immediately.

IV. CONCLUSION

The 2012 MOU needs to be reviewed, because the impact directly affects certain fishermen and certain

villages, so that legal protection is needed for the fishermen. Both land and sea areas in a country are inseparable from the problems of natural resources, such as marine fisheries resources, which are the necessities of human life, especially the utilization of these natural resources for the welfare and prosperity of the people.

The utilization of natural resources, especially marine areas of a neighboring countries, often sees conflicts of interests, such as Indonesia and Malaysia. These two countries have ratified the 1982 UNCLOS which states that each country has the right to the sea, and the allocation of the sea should be conducted in accordance to related stipulated rules. The process of allocating or dividing the sea is called the process of delimitation of maritime boundaries. It will cause various types of boundaries and widths which caused overlapping / grey area between exclusive economic zones and continental bases. Looking at the borders of the State of Indonesia, as stipulated in Article 1 Part 2 of Indonesia's Law No. 43 of 2008 on Indonesian territory states "State Borders are the boundary lines which constitute a separation of a country's sovereignty based on international law".

Lack of clarity about maritime boundaries and restrictions between Indonesia and Malaysia in some parts of the region, especially the waters of Kalimantan-Malacca Strait, agreements have yet to be reached by both parties. This lack of clarity on maritime boundaries often affects directly at the sea between Indonesian fishermen and the Malaysian counterpart. For example, there is a unilateral claim from the Malaysian side stating that the position of traditional Indonesian fishing vessels has violated the boundary, and vice versa with Malaysian fishermen.

Both Indonesia and Malaysia cannot claim that the maritime delimitation area is entirely owned by each country, due to the fact that the boundaries of the two countries are very close. Thus, they cannot be claimed as full rights for one of the countries, both Indonesia and Malaysia.

Neighboring countries often border their territories with land areas, and some are also bordering at the sea. Bordering area at the sea can differ in size, from vast sea area to a narrow one. In terms of claiming sea areas, a country can claim its EEZ zone to 200 miles from land. Thus, for a large body of water more than 2 X 200 miles there is certainly no problem. However, border issue may arise for a narrow sea area less than 400 miles or even less than 200 miles, as it is possible to have an overlap of the EEZ regions.

In case of such conditions, the way to resolve this maritime border issue of a country that will make a claim has been regulated in UNCLOS 1982, and it has provided rules on how to resolve it. For Indonesia, related to this matter, the regulation in its implementation has been stated

in Article 3 Paragraph (1) and Paragraph (2) of Indonesia's Law No. 5 of 1983 which states:

1. If the Indonesian EEZ overlaps with the EEZs of other countries whose shores face each other or situated side by side with Indonesia, the EEZ boundary between Indonesia and the country is stipulated by an agreement between the Republic of Indonesia and the country concerned.
2. As long as the agreement referred to in paragraph (1) does not yet exist and there are no special circumstances that need to be considered, the EEZ boundary between Indonesia and the country is the middle line or the same line of distance between the bases of the Indonesian territory or the outermost point of Indonesia, except if the country has reached an agreement on temporary arrangements related to the Indonesian EEZ boundary.

As there is no clear boundary and authority over the boundary line between the two countries in the delimitation area, it cannot be said that there are allegations of violations of territorial boundaries or sovereignty limits carried out by traditional fishing vessels at sea.

Article 15 of UNCLOS 1982 states that if there are two countries that must establish a territorial sea boundary, meaning that they are less than 24 nautical miles from each other, then the outermost boundaries of each country must not exceed the median line, in which each point is within the same distance from the closest point on the baseline of the two countries. Therefore, UNCLOS 1982 indicates that in establishing the territorial sea boundary, the method used was the midline between the two countries. However, this provision may not apply if the two countries agree on other matters based on historical title.

Although there are indications of the use of the median line by UNCLOS 1982, still a boundary line is the product of an agreement. If there is no agreement, then there is no definite and binding boundary line. In the absence of an agreement, it must be understood that each country generally has an interest in the sea area. These interests can be economically motivated, with the utilisation of marine resources (fish, oil, gas, etc.). Furthermore, in general each country will have a unilateral claim line before the maritime boundary agreement is reached. It can be assumed that this claim line must be different from each other. As a result, there will be one marine area which is an overlapping claim. Indonesia and Malaysia have yet to agree on a median line and there will still be a review of the 2012 MOU in the future in maritime boundary negotiations, so that legal certainty / legal basis is agreed upon between the two countries to determine whether or not an act is a violation.

Both Indonesia and Malaysia must be able to achieve

an agreement on the midline or maritime boundary, to be accepted and agreed upon by both parties of Indonesia and Malaysia, so that there will be clarity on the sovereign rights of the two countries to carry out exploration and exploitation, management, utilization and conservation of living natural resources and the non-living material contained in it can be utilised. The principles of "freedom of the high seas" include the principles of freedom of fishing which are stated in Article 87 of UNCLOS 1982.

Based on these two principles, the role of UNCLOS 1982 is very important in order to regulate and maintain relations within the international community, and it requires law to ensure the element of certainty needed in this relationship. In addition, it also resolves issues related to the law of the sea in order to maintain peace and the progress of the entire world community.

The achievement of an agreement between the two countries also reflects the understanding of the national regulations of each country that are fulfilled together. Mochtar Kusumaatmadja stated "The non-material binding factor is the similarity of legal principles between nations in the world, however different forms of positive law apply in each country without the existence of a legal community of nations. The principles of general law recognized by civilized nations are embodiments of natural law (*naturrecht*). There is a natural law that requires the nations of the world to coexist naturally. "

Agreement between Indonesia and Malaysia will create

law enforcement of sea border area for both countries and law enforcement will function automatically. Law enforcement is a process to realize legal desires into reality. What is meant by legal desires here is none other than the thoughts of the legislative institution which are formulated in the legal regulations, so it cannot be separated just between law enforcement and law maker.

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