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ENFORCEMENT OF CABOTAGE PRINCIPLE ON TERRITORIAL SEA
WITHIN THE INDONESIAN SOVEREIGNTY PERSPECTIVE

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Abstract

The many foreign vessels that only transverse without making any stop have made the activities of the national shipping industry sluggish. Additionally, most transport of goods to foreign countries has depended upon importers' vessels. This has prevented numerous cargo and logistics shipping companies from conducting shipping activities. The operating vessels suffer from loss due to lack of goods being transported. The collection of data regarding the condition of domestic shipping business was carried out by employing the normative legal methods. The enforcement of Cabotage Principle is set forth under the Law Number 17 of 2008 on Shipping. This principle aims at protecting the state sovereignty over territorial sea in the security-defence, economic and sociocultural aspects. The national shipping has considerable potential to maintain the state sovereignty. Cabotage Principle significantly impacts on the national shipping industry. Modes of sea transport, particularly vessels, have an important role for Indonesia, an archipelagic state. Modes of sea transport are required for transporting goods and passengers or for conducting offshore activities in Indonesian waters. In order to provide domestic shipping companies with a protection and to promote shipping business, it is deemed necessary to strictly enforce the Cabotage Principle to maintain the Indonesian sovereignty.

INTRODUCTION

Cabotage is the transport of passengers and goods by shipping, aviation, road transport, and internal waters between two places within a country. Rights to apply cabotage are granted to relevant citizens with the purpose of protecting them against foreign competition (Umar, 2015).

In the shipping sector, Cabotage Principle is a privilege for merchant vessels under the flag of relevant states to conduct transport of passengers and goods from and to the ports of the states in relation to their national legal provisions. The vessels must be owned and operated by the citizens or legal entities of the states (Umar, 2015).

Over the years, the domestic shipping industry has been dominated and controlled by foreign states. The shipyard industry apparently does not demonstrate any development in Indonesia, which is the largest archipelagic state in the world with breadth of seas of 5.4 million square km and length of coastline of 95,181 km. For tens of years, the Indonesian nation only carries the name of a maritime state, but has yet been able to exploit the maritime potential for the greatest benefits of its people.¹

The national sea transport business has slumped and started to be awakened after the enforcement of the Presidential Instruction No. 5 of 2005 on the Empowerment of the National Shipping Industry, which also articulated the enforcement of Cabotage Principle. This principle asserts that rights to manage domestic shipping entirely belong to the coastal state. This means that the coastal state reserves the rights to prohibit foreign vessels from sailing or trading in the state's waters. The application of Cabotage Principle is supported by the International Law of the Sea, which is related to the sovereignty and jurisdiction of a coastal state over its seas (Sodik, 2016).

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) (Puspitawati, 2017: 4) is a convention that has been ratified by Indonesia through the Law Number 17 of 1985 on the Ratification of the United Nations Convention on the Law of the Sea. The 1982 Convention on the Law of the Sea recognizes the rights of nations to claim various kinds of maritime zones which are under different statuses, starting from the full sovereignty of a state including internal waters, territorial seas, and straits, which are used for international shipping (Tunggal, 2014).

The state has the authority to restrict foreign vessels from entering into its seas. Foreign vessels are prohibited from entering the internal waters of a coastal state without permission and clear reason except for the route of aid ships and with permission and clear reason without disturbing the security stability and good order of the state. Meanwhile, for territorial seas and straits, a coastal state should grant innocent passage and transit passage guarantee for international shipping (Article 8 of UNCLOS 1982).

Classical legal principles in the sovereignty of seas were introduced by Hugo de Grotius. Grotius stated that sea is *res gentium*, to which all states across the world have equal rights to their seas (Starke, 1992).

In Indonesia, Cabotage Principle is governed under the Law Number 17 of 2008 on Shipping. The implementation of this principle gives rights to domestic shipping companies to exclusively conduct commercial operations.

Through this principle, the Government obliges domestic shipping companies to have Indonesia-flagged vessels and to employ Indonesian citizens as crew members. The Government implements the Cabotage Principle to make Indonesia-flagged vessels the kings of their own territorial sea (Aprilianto, 2014).

Based on this background, the following problems are formulated:

1. How is the Cabotage Principle arranged in some other states?
2. How is the Cabotage Principle enforced in the perspective of the sovereignty of Indonesia?

¹ ([https://maritimeneews.id/08/L\\$zzzz\\$x/Bymaritimeneews](https://maritimeneews.id/08/L$zzzz$x/Bymaritimeneews) – August 12, 2015 : Retrieved on March 15, 2018).

3. What is the positive impact enforcement of Cabotage Principle on Indonesian's sea freight logistics services?

LITERATURE REVIEW

Literature review in a research serves as a conceptual framework. A concept is defined as a word that collates generalized abstractions from specific matters called operational definition (Suryabrata, 1998). A concept determines the variables to be investigated and the existence of empirical relationship (Koentjaraningrat, 1997).

As a fundamental concept, the following terms are defined:

1. Cabotage Principle is a domestic sea transport activity conducted by a national sea transport company using Indonesian-flagged ships and manned by Indonesian citizenship crew (Article 8 of Act Number 17 Year 2008). Based on Article 8, it can be concluded that : The activities of domestic sea transport are carried out by national sea transport companies using Indonesian-flagged vessels and manned by Indonesian Vessel ships and foreign ships are prohibited from transporting passengers and/or inter-island or interpassage goods in the territorial sea of Indonesia .
2. Cabotage Principle means a principle stating that shipping activities within the waters of a state are only allowed for the vessels of the state concerned. Cabotage principle has been recognized in the law and practice of shipping worldwide and is the manifestation of the sovereignty of a state in controlling its own seas. This principle serves as a protection for domestic shipping companies against unreasonable conditions due to unfair business competition (Kusumaatmadja, 1997).
3. State sovereignty means the highest supremacy of a state. Sovereignty is solitary, authentic, and undividable in nature. Solitary means there is only one highest authority. Authentic means that the supremacy comes from or not a derivative of other authority. Meanwhile, permanent means that the state authority is sustainable and continuous (Dahlan, 1999).
4. Beyond cabotage means a follow-up measure in the implementation of a Cabotage Principle which has been in force and has been in line with the activity of the Minister of Trade in relation to the promotion of the national maritime tradition in an international trade.²
5. National Sea Transport Company is a sea transport company incorporated in Indonesia and conducting sea transport activities within Indonesian waters and/or from and to overseas ports (Article 1 point 29 of the Government Regulation Number 20 of 2010 on Water Transportation).
6. A vessel is carrying out a direct call in the shipping business if it carries cargo from one place to the place of destination of the cargo directly without transiting at any other port.³

MATERIALS AND METHODS

² http://m.mediaindonesia.com/index.php/read/2012/10/10/354751/4/2/Bentuk_Task_Force_untuk_Pelaksanaan_Program_Beyond_Cabotage. Lapangan Realita Asas Cabotage dan Implementasinya” : Retrieved on July 6, 2017.

³ Hasibuan, 2016, <http://www.emaritim.com/2016/11/antara-direct-call-dan-strategi-bisnis.html?m=1> : Retrieved on July 6, 2017.

The nature of this research is a normative legal research. The data employed in this research were secondary data, which were comprised of:

- a. primary legal materials in the forms of laws and regulations,
- b. secondary legal materials in the forms of writings, be it books, journals, or articles which contained commentaries and analyses relating to the problems,
- c. tertiary legal materials in the form of a dictionary.

The data were collected through a library research, and were entirely processed through data and document analysis employing qualitative approaches based on deductive logic.

RESULTS AND DISCUSSIONS

Cabotage Principle in Other States

Differences in opinions about sovereignty over territorial sea lead to differences in the practice of Cabotage Principle enforcement in some states across the world.

The United States of America is extremely protective towards its sea transport industries, which is reflected in strict enforcement of Cabotage Principle. The Cabotage Principle set forth in the Jones Act specifies that the national sea transport of the United States of America must be conducted using the vessels having the United States flag (US Registered), made in the United States (US Built) and owned by American citizens (US Owned). Additionally, the vessels must be operated by companies managed by American citizens (US Controlled Companies) and operated by American citizens (US Crew). This Cabotage Principle is applied to sea, inland (railway and trucking), and air transport.⁴

The Cabotage Principle over the maritime area of the State of Canada has been enforced since the establishment of British Columbia to date. Hence, shipping plays a vital role in Canada's economic activities. The enforcement of cabotage in Canada is principally aimed at protecting domestic shipping activities against foreign-flagged vessels (Hidayanto, 2011).

The Cabotage Principle applied in Canada is set forth under Chapter 98 of the Customs Tarrif and Customs Act. Law makers in Canada restrict the navigation area of foreign vessels through the Cabotage Principle by establishing that only designated areas are open for foreign vessels to sail through (Hidayanto, 2011).

Two specific types of implementation of Cabotage Principle allow include repositioning move, which is the transportation conducted within domestic waters by foreign vessels for transporting goods in exportation and importation, and equipment switching at sufferance warehouse station, which is equipment switching for any purposes. In international shipping, goods may be transfered from one ship to another. Besides, there is no time limit for the transfer of domestic goods to foreign container vessels, provided that each of the container vessels complies with the Cabotage Principle set forth under the Customs Act (Hidayanto, 2011).

The enforcement of Cabotage Principle is also exercised in Malaysia. The Cabotage Principle in Malaysia specifies that foreign vessels may be given a temporary permit from the Domestic Shipping Licensing Board (DSL) to

⁴ <http://www.mappel.org/kajian-ilmiah-untuk-inpres-ii> : Retrieved on March 3, 2017.

transport goods in a domestic trade, under condition that principally, there is no Malaysia-flagged vessel that has the capacity and meet the criteria to conduct shipping transport for the goods to be transported. The statement of incapacity of Malaysia-owned vessels to conduct shipping is made officially and in writing by the Malaysian Shipowners Association (MASA) (Hidayanto, 2011).

Despite historical differences in the legal systems of states applying civil law and those applying common law, both law systems have the same legal principles in the enforcement of the Cabotage Principle. The two legal systems share similarities in the legal solutions aimed at protecting the sovereignty over the states' territories and well-being of the states' citizens (de Cruz, 2017).

The similarity in legal principles for seeking and finding legal solutions in the legal systems of civil law and common law for the purpose of achieving a legal certainty and justice as well as a protection for a state's sovereignty over its territory and individual citizen's rights is called Natural Convergence in every legal system (de Cruz, 2017). However, fundamental differences remain present in the juridical features, the philosophy and the substance, the court structure and the legal source.

Given these facts, it is only reasonable if Indonesia enforces the Cabotage Principle over its seas as well in order to protect the business of its domestic shipping companies.

Enforcement of Cabotage Principle in the Perspective of the Sovereignty of Indonesia

The principle of state sovereignty (*staats-sovereiniteit*) as expressed by Jean Bodin and George Jellinek establishes that the highest supremacy is in the hand of the state and the state governs the lives of its community members. A sovereign state protects its community members, especially those who are disadvantaged. One of the elements or conditions that must be fulfilled to establish a state is sovereign government or sovereignty (Dahlan, 1999).

With regards to the fundamental principle of state sovereignty, a sovereign state applies its jurisdiction and authority within its territory. This is in line with the opinion of Oppenheim-Lauterpacht, "As all persons and things within the territory of a state full under its territorial supremacy, each state has jurisdiction over them" (Lauterpacht, 1966).

For this reason, it is said that sovereignty and jurisdiction are closely related. Sovereignty is the highest supremacy of a state, which means that sovereignty is not surpassed by any other power (Kusumaatmadja, 1997). The sovereignty of a state shows that the state is independent or is not under the control of any other state (Anwar, 2011).

State sovereignty consists of internal and external aspects. Internal aspect takes the form of the highest supremacy a state has in order to govern any matters that exist or arise within the boundaries of its territory. Meanwhile, external aspect refers to the highest supremacy a state has in order to establish relationship with international community members or to govern any matters arising outside of its territory but has relevance with its interest.⁵

⁵ <http://scholar.unand.ac.id/32301/2/BAB%20I%20PENDAHULUAN.pdf> : Retrived on April 18, 2018.

From the sovereignty, a state's rights and power or authority to govern internal and external affairs are derived. From sovereignty, a state's jurisdiction is derived. With rights, power or authority, and jurisdiction, a state governs in a more detailed and clear manner every matters it faces for the achievement of its goals. Therefore, it can be concluded that only sovereign states are entitled to have jurisdiction according to the international law (Parthiana, 1990).

Through sovereignty, a state has a goal to realize its community's well-being (Adolf, 2002). This will refer to the economic system to be implemented in the state governance. A state's sovereignty to determine economic activities within its jurisdiction has long been accepted by the international law (Siregar, 2008).

The implementation of this permanent sovereignty is guaranteed in the United Nations General Assembly Resolution No. 3281 (XXIX) dated December 12, 1974 on Charter of Economic Rights and Duties of State. Article 2 (1) of this resolution mentions, "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."

The extension of this right covers the state's sovereignty right to independently govern economic activities within its territory. Therefore, this resolution serves as a justification for a host state to restrict the economic activities of foreign citizens or foreign companies within their jurisdiction, which includes seas, land, and air.

The classical legal principle about sovereignty territory of the sea was first introduced by Hugo de Grotius. Grotius said that the sea is "*Res Gentium*", where all countries in the world have equal rights over the sea area. This principle is known as the "*Mare Liberum*" or the open sea principle (Puspitawati, 2017). Contrary to this principle, Selden points out the closed sea principle of "*Mare Clausum*", in which a country may exercise exclusive jurisdiction over the sea territory around and around its land area (Puspitawati, 2017).

The principle difference of sovereignty over marine territory leads to two opinions among the user countries. Major maritime nations (archipelagos) and non-coastal countries adhere to the principle of *Mare Liberum*. Because it strongly supports the interests of the state in the utilization of the sea, the interests of shipping and fisheries. In contrast, many coastal states adhere to the principle of *Mare Clausum* by claiming a certain marine territory included in its sovereignty (Caminos, 2001).

Differences in the principle of sovereignty over a country's marine territory create a conflict of interest over the sea. Thus the appear of a international convention that is global about the sovereignty and utilization territory of the sea of each country's.

United Nations Convention on the Law of the Sea (UNCLOS) 1982, is a universal legal framework on the use territory of the sea and recognizes the "equity relationship" between nations on ocean utilization and the allocation of natural resources in the oceans (Puspitawati, 2017).

Indonesia as a sovereign state obtained its sovereignty since the Proclamation of Independence on August 17, 1945. Sovereignty is obtained

in a *de facto* and *de jure* manner. *De facto* sovereignty means solid sovereignty to be complied with, which is based on the concrete implementation of supremacy. Meanwhile, *de jure* sovereignty means the sovereignty recognized by law and constitution. In other words, the state is declared sovereign legally.

As an independent state, Indonesia is sovereign internally and externally. Internal sovereignty is '*staatsrechtelijk*' in nature, which enables a state to govern the state organization, establishment of law, judicial administration, and governmental system on its own will and consciousness. This internal sovereignty is the highest supremacy of a state over its people and other residents, and any forms of their associations within its jurisdiction and over other internal affairs management.

External sovereignty is '*volkenrechtelijk*' in nature, and enables a state to build diplomatic relationships and agreement between nations and to fight in a war to defense itself against potential assaults from enemies. External sovereignty is usually called "independence".⁶

The sovereignty of the Unitary State of the Republic of Indonesia comes from independence, which was achieved due to the blessings of God Almighty, which is called the *Prime Cause* (Juliardi, 2015). This provision is set forth under the Third Paragraph of the Preamble of the 1945 Constitution, in the first *Sila* (principle) of *Pancasila* "*Ketuhanan Yang Maha Esa*" (Belief in One and Only God), and the third *Sila* "*Persatuan Indonesia*" (Unified Indonesia). This is implemented in the Article 33 of the 1945 Constitution "The land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people".

Indonesia applies its sovereignty over its jurisdiction, which include land, seas, and air space. Sovereignty has conferred full power to a state to govern and exploit its own seas and to be independent from interventions from foreign states and certain parties. A state's sovereignty over territorial sea is embodied in the enforcement of Cabotage Principle as a form of control and exploitation of Indonesia's territorial sea.

The Positive Impact Enforcement of Cabotage Principle on Indonesian's sea Freight Logistics Services

Indonesia's sea transport sector ever reached its golden era in 1960s after the nationalization of a Dutch shipping company, NV. *Koninklijk Paketvaart Maatschappij* (KPM), through Government Regulation Number 34 Year 1960 date 24 September 1960. Sadly, it slowly faded away after the issuance of the Ministry Regulation Number 57 Year 1984 through which government bans the operation of more than twenty-five-year-old ships. Due to the lack of ships, businessmen are forced to use foreign ships and this continues until 2005.⁷

In response to this situation, the Government of Indonesia issued Presidential Instruction Number 5 Year 2005 on the Empowerment of the National Shipping Industry. It regulates the implementation of the cabotage

⁶ <https://dokumen.tips/law/teori-kedaulatan-558b1fa625d6d.html> : retrieved on April 15, 2018.

⁷ Novy Rahmat, *Mengingat (Lagi) Asas Cabotage*, Marine Claim Manager at PT. KBRU Insurance Broker, Published on June 18, 2015, <https://id.linkedin.com/pulse/mengingat-lagi-asas-cabotage-novy-rachmat>, diakses 07 April 2018.

principle in the Indonesia's marine territory. Then, the cabotage principle is regulated in Law Number 17 Year 2008 on Shipping.⁸

The enforcement of the cabotage principle has evidently brought improvement to the national shipping industry and has a major impact on the national economy. The Department of Transportation has confirmed that the number of Indonesian-flagged ship owners in February 2014 was 13,244 units, while in May 2005 the number was only 6,041 units. This shows a significant increase of 7203 units or up about 119%. This also brought a positive impact on the number of red-white-flagged ships that reached 19.2 million Gross Tonnage or grew 238% compared to 2005 which was recorded only 5.67 million Gross Tonnage.⁹

The provisions of the cabotage principle are furtherly stipulated in Government Regulation No. 20 of 2010 concerning on Sea Transportation, this regulation technically regulates that any domestic sea transport activities shall be carried out by national sea transportation companies using Indonesian-flagged ships and Indonesian crew. Foreign ships are prohibited to transport passengers or products both inter-island and inter-port within the territorial waters of Indonesia.

Based on Ministerial Decree No. 48 of 2011 concerning on application of Cabotage principle upstream Oil and Gas, the government provides dispensations for the operation of foreign vessels for offshore and underwater activities until the end of 2011. It also says that the dispensation of foreign vessels for oil and gas survey activities ends in December 2015.

Many foreign ships pass through Indonesian waters. According to ports data, the number of foreign ships which berth or transit in Indonesia are only about 10,000 ships. This means that there are tens of thousands of other foreign vessels that just pass by in Indonesian waters, without ever stopping or transiting in Indonesian ports.¹⁰

To facilitate the sea transport business, the Government undertakes sea toll road development which is one of the efforts to provide the sea transport network regularly and continuously through the implementation of sea transport service with subsidized pattern and supported by the improvement of port facility. The sea toll road can facilitate connectivity and ease the logistics costs so as to obtain great economic benefits.¹¹

The support to the sea toll road program is realized by the government with the development of marine transportation infrastructure such as sea freight, port, safety and security of shipping. The Government issued Presidential Regulation No. 71 of 2015 on Types of Cargo that can be transported by the fleet of sea toll road.¹²

⁸ See Article 8 of Law No. 17 of 2008 on Shipping. The purpose of enforcement of the cabotage principle so that the activities of domestic shipping are carried out by national sea transport companies using Indonesian-flagged vessels and operated by Indonesian citizenship crews.

⁹ Novy Rahmat., *Loc.Cit.*

¹⁰ [https://maritimeneews.id/08/L\\$xzzzz\\$x/Bymaritimeneews](https://maritimeneews.id/08/L$xzzzz$x/Bymaritimeneews) - August 12, 2015, 10.00 wib, visited on March 15, 2018.

¹¹ Tri Achmadi, Rasionalisasi Program Tol Laut, *Supply Chain, Indonesia Artikel Kepelabuhan*, Published on Thursday 15 Juni 2017, <http://supplychainindonesia.com/new/rasionalisasi-program-tol-laut/>, diakses 23 Juli 2018.

¹² *Ibid.*

The government now wants the maritime sector to be a priority program in the current development to make Indonesia a maritime axis of the world. Sea toll road aims for equitable development, efficiency of trade routes. The sea toll road can facilitate connectivity and ease the logistics costs so as to obtain great economic benefits.¹³

The implementation of the cabotage principle has proven to be an exciting part of the national shipping industry and has a major impact on the national economy.

Another positive impact, according to Nova A. Mugijanto, Chairman of INSA Offshore Support Operations, within 8 years, is that the growth of Red-white flagged AHT (Anchor Handling Tug) shot up to 1,400% to 45 units as of June 2013 compared to 2005 which was only 3 units. AHT ships are the fleets which are used to tow barges or rigs and even offshore platforms in Indonesia. Furthermore, the value of AHT vessel investment in order to support the cabotage principle from 2005 to June 2013 reached 252 million US Dollars or 2.82 trillion Rupiahs, while investment for AHTS (Anchor Handling Tug & Supply) ship reached US \$ 1,001 billion or about Rp. 11.2 trillion.¹⁴

The enforcement of the cabotage principle should be done seriously to protect domestic shipping companies and even enforcement can be done beyond cabotage.¹⁵

The enforcement of the cabotage principle beyond cabotage aims to build a national shipping industry and increase the potential of Indonesian maritime territory.

CONCLUSIONS

The enforcement of Cabotage Principle in the United States of America, Canada and Malaysia is exercised in accordance with the national legal provision of each state, adhering to the principle of state sovereignty over territorial sea. There has been no fundamental difference in the enforcement of Cabotage Principle in states applying the legal systems of Civil Law and and states applying the legal systems of Common Law.

The enforcement of Cabotage Principle within the Indonesian sovereignty perspective is derived from the independence of the Republic of Indonesia on August 17, 1945, which is embodied in *Pancasila* and Article 33 of the 1945 Constitution. The application of Cabotage Principle over Indonesia's territorial sea is part of the sovereignty of Indonesia to independently govern its economic activities with the purpose of realizing efficient and effective sea transport systems and reinforcing the state sovereignty.

Enforcement of the cabotage principle in the national shipping industry and have a major impact on the national economy. After the cabotage principle, there was an increase in the number of Indonesian-flagged ship owners by 119% from 2005 to 2014. Another positive impact, there was an

¹³ <http://presidenri.go.id/program-prioritas-2/pembangunan-tol-laut-groupg-sea-as-liaison-not-separator-island.html>, visited on April 18, 2018.

¹⁴ Novy Rahmat., *Loc.Cit.*

¹⁵ <http://m.mediaindonesia.com/index.php/read/2012/10/10/354751/4/2/> Bentuk_Task_Force_untuk_Pelaksanaan_Program_Beyond_Cabotage_Field_of_Realities_Cabotage_Principles_and_Implementation", visited on July 6, 2017.

increase in technology in the shipping industry and the development of Indonesian sea tolls in an effort to re-establish national shipping business activities.

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