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# Connecting Indonesia's Maritime Cabotage and the 1982 United Nations Convention on the Law of the Sea

Nilam Andalia Kurniasari<sup>1</sup>

*On 7 May 2008, Indonesia enacted Law 17/2008 on Shipping (Shipping Act) which substituted Law 20/1992 on Shipping. In the new Shipping Act, maritime cabotage is scheduled to take its full effects on 7 May 2011, exactly three years after its enactment. By the scheduled time, domestic seaborne transportation in Indonesian territorial waters shall be carried out by Indonesian shipping companies, using Indonesian-flagged vessels manned by Indonesian citizens. As a result, foreign-flagged vessels will be excluded from transporting goods and/or passengers between islands or ports within Indonesian territorial waters. Among the important reasons for the implementation of this principle are the sovereignty and protection of domestic shipping industry as well as Indonesia national security issues. This paper will argue that implementing maritime cabotage does not contradict any provisions in the 1982 UNCLOS. It will also show that maritime cabotage and the 1982 UNCLOS are closely related although this principle is not in the convention. The 1982 UNCLOS will advise Indonesia on the limit of its territorial waters, and thus where this largest archipelagic state in the world can exercise its maritime cabotage policy.*

**Keywords:** *maritime cabotage, sovereignty, domestic shipping industry, national security*

## I. Introduction

The word 'cabotage' may seem unfamiliar in English. One might think that probably there is a typo error, misspelling, or mispronunciation so that the correct word is actually 'sabotage'. To a certain degree this is understandable as this particular word was not originated from the English language. Moreover, it is mainly used only in maritime and aerial navigations. Therefore, there are not many people aware of its meaning or even its existence in English vocabulary.

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'Cabotage' was originally mentioned in French as 'capotage' and related to 'caboter', a verb which means 'to navigate from cape to cape, to navigate along the coast'.<sup>2</sup> 'Caboter' itself is derived from the Spanish word 'cabo' or cape.<sup>3</sup> In Spanish, 'cabotaje' means navigation near the coast without losing sight of it.<sup>4</sup>

In Maritime Law, cabotage is an exclusive right of a State to regulate its seaborne transportation of goods and passengers between two points in its territory. The essence of cabotage is the granting of privileges to national-flagged commercial vessels to carry cargos or passengers between points within the territory of the flag state. The privileges include the right to limit, or even prohibit, the service of foreign-flagged vessels serving the foresaid route. Maritime cabotage in the U.S. requires that the waterborne transport of goods or passengers between two ports in this country be carried on U.S.- owned, U.S.-built, and U.S.-manned vessels.<sup>5</sup>

Maritime cabotage is nothing new to Indonesia. This maritime law principle was first implemented in Indonesia in the Dutch colonial era through the 1936 Indische Scheepvaartwet.<sup>6</sup> This colonial shipping law had been enforced since then until 1992 based on the Transition Rules (Aturan Peralihan) of the 1945 Constitution of the Republic of Indonesia.<sup>7</sup> Indonesia enacted its own first Shipping Law on 17 September 1992.<sup>8</sup> During the implementation of maritime cabotage under the 1936 Indische Scheepvaartwet, from post-independence until the enactment of Law No. 21 of 1992 on Shipping, it was recorded that this policy was affected by some unfavorable government policies and regulations.

The first example of the government regulation which negatively affected the Indonesian maritime cabotage was Government Regulation No. 17 of 1988 on Sea Transport Provision and Management. This particular regulation enabled national shipping companies to operate foreign-flagged vessels through charter or lease to sail domestic routes without prior request

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<sup>2</sup> Pablo Mendes de Leon, *Cabotage in Air Transport Regulation* (1992) 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Maritime Cabotage Task Force, *About* (2006) <<http://www.mctf.com/about.shtml>> at 26 May 2009.

<sup>6</sup> 1936 Indonesische Scheepvaartwet [1936 Indonesian Shipping Law] (Dutch Colonial Law for Indonesia) 31 December 1936, *Sib*, 1936, 700.

<sup>7</sup> According to Article II of the Transition Rules of 1945 Constitution of the Republic of Indonesia, all State institutions, laws and regulations which existed in the colonial era shall remain exist, valid and fully enforced until they are replaced by the new ones according to the constitution.

<sup>8</sup> Undang-Undang No. 21 Tahun 1992 tentang Pelayaran [Law No. 21 of 1992 on Shipping] (Indonesia) 17 September 1992, *LNRI*, 1992, 98.

for a dispensation regarding national flag requirement (*dispensasi syarat bendera*) as required by the 1936 *Indische Scheepvaartwet*. The regulation was passed to address high sea transportation demand to transport cargos in interisland shipping. However, at the same time it widely opened up opportunity for foreign-flagged vessels to flood domestic shipping routes.

The next example is Law No. 21 of 1992 on Shipping it self. Through its first own Shipping Law, the government continued to implement maritime cabotage. It was stated in Article 73 Paragraph (1) that domestic shipping should be carried out by Indonesian-flagged vessels.<sup>9</sup> However, the next paragraph stated that foreign-flagged vessels might sailed domestic shipping routes as long as they were operated by national shipping companies.<sup>10</sup> This made the cabotage statement in the first paragraph became almost null. Foreign-flagged vessels were still easily roaming Indonesian domestic shipping routes.

These laws and regulations had weakened maritime cabotage grip of Indonesian waters. This condition persisted until the passing of Presidential Instruction No. 5 of 2005 on the Empowerment of National Shipping Industry which re-regulated maritime cabotage in Indonesia.<sup>11</sup> The President of the Republic of Indonesia instructed thirteen related Ministers, all Governors, Mayors and Bupati to empower the national maritime industry through the implementation of cabotage principle. Each of them shall consequently implement this Maritime Law principle and make necessary steps and policy according to their duty and functions. Since then, the Presidential Instruction has shown its effectiveness. The number of foreign flagged vessels serving domestic shipping decreased dramatically from 2,494 units in 2004 to 1,955 units in 2005.<sup>12</sup> It continued to reach 1,154 units of foreign-flagged vessels in 2007.<sup>13</sup>

To ensure that maritime cabotage can take its full effect in empowering and developing the national shipping industry, the government then re-stated the implementation of this maritime law principle on the higher hierarchy of Indonesian laws. The government enacted Law No. 17 of

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<sup>9</sup> Law No. 21 of 1992 on Shipping (Indonesia) Article 73 Paragraph (1).

<sup>10</sup> Ibid Article 73 Paragraph (2).

<sup>11</sup> Instruksi Presiden No. 5 Tahun 2005 tentang Pemberdayaan Industri Pelayaran Nasional [Presidential Instruction No. 5 of 2005 on the Empowerment of National Shipping Industry] (Indonesia) 28 March 2005.

<sup>12</sup> Ministry of Transportation, Republic of Indonesia, *Informasi Transportasi Departemen Perhubungan 2007* (2008) 39.

<sup>13</sup> Ibid.

2008 on Shipping (Shipping Law) which was dated on 7 May 2008.<sup>14</sup> Since then, the Indonesian shipping industry has received a greater amount of protection from the Government against foreign competition. It is stated on Article 8 Paragraph (1) and (2) of the Shipping Law that all domestic sea transportation activities are required to be carried out by national shipping companies using Indonesian-flagged vessels which are manned by Indonesian citizens.<sup>15</sup> Moreover, in three years time after the enactment of this new Shipping Law, as required by the Article 341, all foreign flagged vessels are completely excluded from carrying passengers and/or cargos between ports or between islands on Indonesian waters.<sup>16</sup>

Through such a great amount of protection in domestic shipping route, the Indonesian government has tried to empower Indonesian shipping industry by offering its domestic route which was previously shared with foreign-flagged vessels operated by national shipping companies, solely to national-flagged vessels operated by national shipping companies and crewed by its nationals. Furthermore, this 'empowering national shipping industry' spirit is articulated clearly on the Elucidation of the Shipping Law which is embedded in the Annex of the State Gazette of the Republic of Indonesia No. 4849.<sup>17</sup> However, the effect of implementing cabotage can reach beyond this point. Chuyang Liu identified that cabotage is also important 'to preserve the domestic transport capability, to maintain essential maritime skills that may be required in time of conflict, to create employment in the shipping and ship-building industries and to strengthen balance of payments by preventing an outflow of foreign ship-owners providing domestic shipping services.'<sup>18</sup>

Some of these may be true, but in Indonesia's case, 'preserving domestic transport capability' certainly is not the main idea behind the application of maritime cabotage policy. As the biggest archipelagic State in the world, Indonesia comprises 17,508 islands,<sup>19</sup> with only 7,661 national-flagged vessels serving domestic shipping route in 2008.<sup>20</sup> It is no doubt

14 Undang-Undang No.17 Tahun 2008 tentang Pelayaran [Law No. 17 of 2008 on Shipping] (Indonesia) 7 May 2008, LNRI, 2008, 64.

15 Law No. 17 of 2008 on Shipping (Indonesia) Article 8 Paragraph (1).

16 Ibid Article 8 Paragraph (2).

17 Elucidation of a Law in Indonesia is the authentic interpretation of the particular Law. This can be found in Annex of the State Gazette.

18 Chuyang Liu, *Maritime Transport Services in the Law of the Sea and the World Trade Organization*, *Studies in Global Economic Law* (1999-) 165.

19 Central Intelligence Agency, United States of America, *The World Factbook 2010* (1st ed, 1981-)

20 Ministry of Transportation, Republic of Indonesia, *Informasi Transportasi Departemen Per-*  
*Volume 8 Number 4 July 2011*

that Indonesia needs to build a bigger and stronger national fleet rather than to 'preserve' what it already has. Even with the growing number of Indonesian-flagged ships as a result of cabotage policy, which in March 2010 reach 9,309 ships, this number still could not meet all the domestic shipping demands.<sup>21</sup>

Moreover, its unique geographical environment has made water-borne transportation become an essential transportation mode. This mode of transportation for many years has been known as the cheapest way to transport people and bulk cargos across the waters. Without an adequate national fleet, it is almost impossible to turn *wawasan nusantara* into reality.<sup>22</sup> Although Indonesians acknowledge waters as something which bond their islands, without sufficient number of vessels available acting as bridges between these islands there will be no actual physical connection from one island to another. No doubt without efficient sea transportation it would be difficult for people to travel between islands in this vast archipelago. Furthermore, the national economy will experience negative impact as the result of this condition as the distribution chain will not run properly. Therefore, in this sense, maritime cabotage policy plays an important role to create a conducive environment for the development of a strong national fleet and maritime industry.

From Indonesia's national security perspective, the existence of a strong and adequate national merchant fleet as an auxiliary to its naval fleet is very important in time of emergency. Distributing logistic to the emergency-affected areas, evacuating people to safer places, search and rescue activities on Indonesian waters, are some of the examples of how this merchant fleet can be very useful in an unlikely event. This has added another reason for maritime cabotage implementation in this archipelagic State.

With all the benefits which could be gained by having this maritime law principle enforced, it is essential for Indonesia to ensure that this principle can take its full effect by not passing laws and regulations which may

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hubungan Tahun 2008 (2009) 39.

<sup>21</sup> Pusat Komunikasi Publik, Direktorat Jenderal Perhubungan Laut Kementerian Perhubungan Republik Indonesia, 'Penerapan Azas Cabotage Memberikan Hasil Signifikan' (2010) <<http://www.dephub.go.id/read/berita/direktorat-jenderal-perhubungan-laut/2178>> at 24 August 2010

<sup>22</sup> *Wawasan nusantara* is a doctrine on Indonesians' perspective and attitude towards their archipelagic environment with emphasis on the unity and integrity of the whole territory. According to this doctrine, Indonesian waters is seen as medium to connect one island to another in order to form a wholly archipelagic state. It is seen as something which glued them together rather than to separate. For further reading about *wawasan nusantara* read Dewi Fortuna Anwar, *Indonesia's Strategic Culture: Ketahanan Nasional, Wawasan Nusantara, and Hankamrata* (1996).

decrease its power in domestic shipping as has happened in the past. Moreover, although Indonesia's national interests play the biggest proportion in the idea of re-regulating this principle, it is essential as well for Indonesia to adhere to the international law which governs this particular matter.

Accordingly, the second section of this paper will discuss about how the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as a convention which created the law of the sea regime, sees the Indonesian maritime cabotage from its perspective. The discussions will show that maritime cabotage and the 1982 UNCLOS share a common element, which is navigation. Then it will demonstrate that there are some lack of legislations in Indonesian maritime cabotage provisions under the Shipping Law and how the convention can be a solution to this problem.

With regard to navigation, the third section of this paper will show that although they share navigation as a common element, the navigation under maritime cabotage is completely different from the one under the convention. Despite the differences, navigation under the maritime cabotage principle does not deny the rights of navigation on the maritime zone where this principle is being exercised.

## **II. Maritime Cabotage from the 1982 UNCLOS' Perspective**

Nowhere in the 1982 UNCLOS can we find maritime cabotage principle. The principle which governs access to domestic shipping of its implementing country is not stated in any of the 1982 UNCLOS provisions. The rationale behind this is that shipping and other maritime transport services, such as the use of port facilities are governed by both domestic and international laws.<sup>23</sup> However, this does not mean that there is an overlap in the governing law of a particular matter. For example, anti-monopoly issues in the shipping industry of a country is only governed by its domestic law, not international law.

Furthermore, according to a report prepared by OECD, regulations on shipping industry can be classified into two categories. The first category is the 'regulations related to the rights and obligations of states and to safety

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<sup>23</sup> Division of Transport, 'Regulatory Issues in International Maritime Transport' (Organisation for Economic Co-operation and Development, Directorate for Science, Technology, and Industry, 1999) 26.

and the protection of the environment' and the second one is the 'regulations related to commercial operations and practices'.<sup>24</sup>

Regulations which fall under the first category are generally those which bear international community's interests. These regulations are based on international conventions under an international organization's authority such as the UN or the International Maritime Organisation (IMO).<sup>25</sup> Certainly, the 1982 UNCLOS falls under this category. This convention, which consists of 320 articles and 9 annexes, entered into force on 16 November 1994. With regard to shipping, it regulates the rights and obligations of both flag states and coastal states. The OECD also identifies other kinds of regulations which fall under this category, such as international safety and environments regulations, national environmental and safety regulations, flag state and port state inspections, as well as international labour regulations.<sup>26</sup>

While the emphasis of regulations under the first category is the benefits for the international community, regulations which fall under the second category are heavily influenced by national interests. Thus, the OECD categorizes the following regulations under this category: shipping specific economic policy regulations, ship registration conditions, cargo sharing/cargo sharing reservations, cargo liability regimes, national security measures, competition legislation, and cabotage laws.<sup>27</sup>

Although maritime cabotage and the 1982 UNCLOS are in two different categories and bearing different interests, both of them are closely connected. Both of them are sharing the same important element, namely navigation. This element is the most fundamental element of maritime activity. Approximately one third of the 1982 UNCLOS addresses issues on navigation and shipping.<sup>28</sup> Some of them are contained in Part II on Territorial Sea and Contiguous Zone, Part III on Straits Used for International Navigation, Part IV on Archipelagic States, Part V on Exclusive Economic Zone, Part VII on High Seas, and Part XII on Protection and Preservation of the Marine Environment.<sup>29</sup> A discussion on how maritime cabotage and the 1982 UNCLOS regulate the shared element will be delivered in the next sub-section followed by another one on how maritime cabotage route and coverage determined by the convention.

<sup>24</sup> *Ibid.*

<sup>25</sup> Liu, above n 17, 13.

<sup>26</sup> Division of Transport, above n 23.

<sup>27</sup> *Ibid.*

<sup>28</sup> Liu, above n 24, 29.

<sup>29</sup> 1982 United Nations Conventions on the Law of the Sea.



### A. Navigation Element in Maritime Cabotage

Navigation is inseparable from maritime cabotage. As discussed earlier, cabotage is not an original English word. However, since its first usage in French and Spanish until its acceptance in English vocabulary, cabotage always refers to navigation. In French Dictionary, it refers to 'coastal navigation'.<sup>30</sup> In Spanish, cabotage which pronounced as *cabotaje*, means *[[n]avegación o tráfico que hacen los buques entre los puertos de su nación sin perder de vista la costa, o sea siguiendo derrota de cabo a cabo]* or, in English, the navigation of sea vessels along the coast between ports in a particular country without losing sight of the shore.<sup>31</sup> Furthermore, cabotage in English literally refers to 'trade or navigation in coastal waters'.<sup>32</sup> Here we can see that cabotage in all three languages possesses the navigation element. It is only later in English language that cabotage may contain trade element.

Specific dictionary also recognized the navigation element within cabotage. For example in a marine affairs dictionary, cabotage is described as the '[c]arriage of goods or passengers between two points within the same country'.<sup>33</sup> Here, although 'navigation' is not explicitly mentioned in this definition, the carrying process which takes a route from one point to another in a particular country has already constituted a navigation. Moreover, in a law dictionary, cabotage which is acknowledged to be synonymous with coasting trade,<sup>34</sup> is described as 'the carrying on of trade along a country's coast'.<sup>35</sup> Accordingly, it is clear that there is a navigation element in it. Furthermore, the navigation route has to be 'from one port or place to another in the same country'.<sup>36</sup>

In summary, navigation is an important element which constitutes maritime cabotage. However, it needs further explanation with regards to its route. 'Along a country's coast',<sup>37</sup> 'between two points within the same

30 Beryl T. Atkins et al, *Collins-Robert French-English English-French Dictionary* (3rd ed ed, 1996) 57.

31 Real Academia Española., *Diccionario de la Lengua Española* (22a ed, 2001) 379.

32 Susan Butler (ed), *The Macquarie Dictionary* (5th ed, 2009); Susan Butler (ed), *The Macquarie Dictionary* (5th ed, 2009) accessed online <<http://0-www.macquariedictionary.com.au.alpha2.latrobe.edu.au/131.172.0.0.16@929FF872245939f-/fp/thes/5ed.html>> at 1 September 2010.

33 Niels West, *Marine Affairs Dictionary: Terms, Concepts, Laws, Court Cases, and International Conventions and Agreements* (1st ed, 2004) 157.

34 L. Oppenheim, 'The Meaning of Coasting-Trade in Commercial Treaties' (1908) 24(3) *Law Quarterly Review*, 329.

35 Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary* (8th ed, 2004) 215.

36 *Ibid.*

37 *Ibid.*

country',<sup>38</sup> 'in coastal waters',<sup>39</sup> or 'between ports in a particular country without losing sight of the shore' does not seem adequate to address issue on how far this maritime law principle can be exercised in a country's waters. Thus, this is the point where maritime cabotage interacts with the 1982 UNCLOS which regulates navigation issues in shipping.

## **B. Indonesian Maritime Cabotage Route and Coverage**

The main reference for determining Indonesian maritime cabotage route is the provision of Article 8 Paragraph (2) of the Shipping Law which states that foreign ships shall not transport passengers and/or goods between islands or ports in Indonesian waters.<sup>40</sup> Accordingly, it seems to be clear that Indonesian maritime cabotage route takes place between Indonesian islands or ports and that maritime cabotage can be exercised within Indonesian waters. However, referring only to this provision is certainly not enough since it still leaves some open questions to be answered.

What can be constituted as an Indonesian island, an Indonesian port, and Indonesian waters are three issues which should be addressed in order to be able to identify maritime cabotage route precisely. Failure to answer these questions will create a big loophole in the Shipping Law, particularly its maritime cabotage provisions. This will enable foreign ships to continue transporting goods and passengers on what are supposed to be cabotage routes. Connecting Indonesian maritime cabotage with the 1982 UNCLOS is a method to cover this loophole other than amending the law.

### **1. Indonesian Island**

Nowadays, an island is not only 'a [nature-made] tract of land completely surrounded by water, [which is] ... not large enough to be called a continent.'<sup>41</sup> Humans, with their science, knowledge, and skills have been able to create artificial islands. With regards, to Article 8 Paragraph (2) of the Shipping Law,<sup>42</sup> it is unclear whether 'islands' under this provision also covers man-made islands located within Indonesian waters. Moreover, none of the Shipping Law's 355 articles can properly address this issue.<sup>43</sup>

There have not been as yet any cases arising from the artificial islands issue with regard to maritime cabotage. In fact, at present, there are not

<sup>38</sup> West, above n 32.

<sup>39</sup> Butler, above n 31.

<sup>40</sup> Law No. 17 of 2008 on Shipping (Indonesia) Article 8 Paragraph (2).

<sup>41</sup> Butler, above n 38.

<sup>42</sup> Law No. 17 of 2008 on Shipping (Indonesia) Article 8 Paragraph (2).

<sup>43</sup> Ibid.

any artificial islands yet in Indonesia. However, with the country's positive economic growth, increasing number of investments, acquirement of high technology and science, it is not something impossible that in the near future Indonesia will built its first artificial island.

With its current maritime cabotage provisions, should currently Indonesia have an artificial island, certainly foreign-flagged vessels would legally be able to transporting goods and passengers from this island to another Indonesian island or port. Therefore, to anticipate the establishment and construction of these islands in Indonesia and to secure the country's maritime cabotage, it is essential for Indonesia to cover this loophole. At least there are three methods which can be employed to address this issue.

First is by amending maritime cabotage provisions in the Shipping Law to extend its coverage to artificial islands. This method provides the strongest legal certainty as the wordings of the provisions will explicitly resolve the problem. However, amending a law may take considerable time.

Meanwhile, before the amendment is made, it is proposed that 'islands' in Article 8 Paragraph (2) of the Shipping Law should be contextually interpreted as both natural islands and artificial islands.<sup>44</sup> This is the second method which can be applied to resolve the problem. Without contextual interpretation, artificial islands will be excluded from being the starting and finishing points in cabotage route. Furthermore, as a result to this, the purposes of implementing maritime cabotage in Indonesia as explained earlier in this paper can not be fully achieved.

Another method to include an artificial island as a place of departure and/or destination of Indonesian maritime cabotage in Article 8 Paragraph (2) of the Shipping Law is to refer it to the 1982 UNCLOS provisions as the *lex generalis* of the shipping law.<sup>45</sup> In this convention, the sea is categorized into several zones such as territorial sea, contiguous zone, archipelagic waters, internal waters, Exclusive Economic Zone (EEZ), and high seas.<sup>46</sup> Indonesia can exercise its maritime cabotage only within its territorial sea.<sup>47</sup> The only provision in the 1982 UNCLOS which specifically addresses artificial islands issue located in territorial water is the Article 11 with 'Ports' as its title.<sup>48</sup> It states that:

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<sup>44</sup> *Ibid* Article 8 Paragraph (2).

<sup>45</sup> *Ibid*.

<sup>46</sup> 1982 United Nations Conventions on the Law of the Sea.

<sup>47</sup> This will be discussed next.

<sup>48</sup> 1982 United Nations Conventions on the Law of the Sea, Article 11.

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.<sup>49</sup>

*Accordingly, by employing argumentum e contrario, it can be concluded that other than 'for the purpose of delimiting the territorial sea, ... artificial islands shall ... be considered as permanent harbor works.'<sup>50</sup> Furthermore, referring to the article's title, it can be concluded that 'permanent harbor works' is equal to 'ports'.<sup>51</sup> Thus, according to the 1982 UNCLOS an artificial island located within a country's territorial waters is legally treated as a port.<sup>52</sup> In a brief summary, by referring to Article 11 of the 1982 UNCLOS, an artificial island will automatically be included in Indonesian maritime cabotage route – not as an 'island' but as a 'port'.<sup>53</sup>*

## 2. Indonesian Waters

According to Article 8 paragraph (2), this is the area where Indonesia can exercise its maritime cabotage.<sup>54</sup> Furthermore, it is stated in Article 1 Number 2 of the Shipping Law that Indonesian waters consist of by Indonesian territorial sea including its archipelagic waters and internal waters.<sup>55</sup> The reason why Indonesia can exercise its maritime cabotage only within the breadth of its territorial sea is that only within this sea area Indonesia has its sovereignty. It is stated in the 1982 UNCLOS that:

*The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.<sup>56</sup>*

This territorial sovereignty in international law is recognized as 'the fullest rights over territory known to the law'.<sup>57</sup> Therefore, territorial sov-

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49 Ibid.

50 Ibid.

51 Ibid.

52 Ibid.

53 Ibid.

54 Law No. 17 of 2008 on Shipping (Indonesia) Article 8 Paragraph (2).

55 Ibid Article 1 Number 1.

56 1982 United Nations Conventions on the Law of the Sea, Article 2 Paragraph 1.

57 J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed, 1963) 162.

ereignty gives a State the freedom to legislate and enforce that legislation within its territory'.<sup>58</sup> To Indonesia, it has given this State a discretion to implement maritime cabotage within its waters.

Although the Shipping Law provision itself has addressed the issue on what constitutes Indonesian waters,<sup>59</sup> but it appears that it does not provide further details on these sea zonings, such as the breadth of territorial sea where Indonesia exercise its cabotage within it. Therefore, again, this *lex specialis* provision should be read together along with its *lex generalis* – the 1982 UNCLOS.

**a. Indonesia's Territorial Sea**

Generally, the breadth of territorial sea of a State is set-out in Article 3 of the 1982 UNCLOS, which states:

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.<sup>60</sup>

Normally, baseline used to measure the breadth of territorial sea is the low-water line along the coast based on the official large-scale charts of the coastal State.<sup>61</sup> However, Indonesia's baseline is different. As a result to its unique geographical features, this State may draw straight archipelagic baselines. This is pursuant to Article 47 Paragraph 1 of the 1982 UNCLOS, which reads as follows.

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.<sup>62</sup>

This enable Indonesia to enclose its thousands islands and archipelagic waters into one single entity. The following map describes how archipelagic baselines helps Indonesia to unite its lands and waters territory into a united territory. Measured from this baselines stretched up to maximum 12 miles is where Indonesia can exercise its maritime cabotage.

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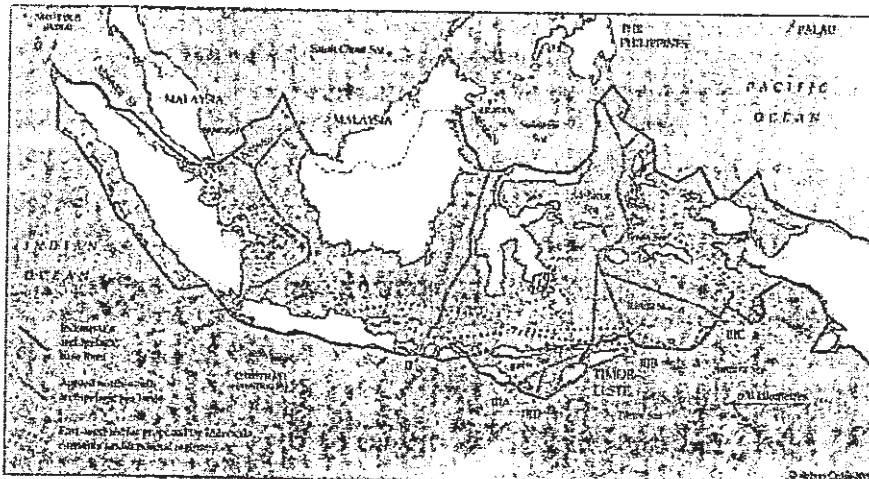
58 Anthony Aust, *Handbook of International Law* (2nd ed, 2010) 43.

59 Law No. 17 of 2008 on Shipping (Indonesia) Article 1 Number 2.

60 1982 United Nations Conventions on the Law of the Sea, Article 3.

61 *Ibid* Article 5.

62 *Ibid* Article 47 Paragraph 1.



Map 1 Indonesia's Archipelagic Baselines and Sea Lane Passage.<sup>63</sup>

**b. Indonesia's Archipelagic Waters**

To put it simple, it is the waters enclosed by the archipelagic baselines as shown on Map 1.<sup>64</sup> Within this area, Indonesia own its sovereignty. Therefore, this State is free to implement its legislation, including maritime cabotage, in its archipelagic waters.

**c. Indonesia's Internal Waters**

Apart from lakes, rivers, and other waters enclosed by land, '... waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State'.<sup>65</sup> Internal waters includes mouth of rivers, bays, and ports. As an archipelagic States, within its archipelagic waters, Indonesia may draw closing lines for the delimitation of internal waters'.<sup>66</sup> Although demarcating internal waters is important as different

<sup>63</sup> John G Butcher, 'Becoming an Archipelagic State: The Juanda Declaration of 1957 and the 'Struggle' to Gain International Recognition of the Archipelagic Principle' in Robert Cribb and Michele Ford (eds), *Indonesia beyond the Water's Edge*, Indonesia Update Series (1<sup>st</sup> ed, 1988-) vol 20, 28, 29.

<sup>64</sup> Archipelagic waters and its legal status is stated on Article 49 Paragraph 1 of the 1982 UNCLOS which read: 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.

<sup>65</sup> 1982 United Nations Conventions on the Law of the Sea, Article 8 Paragraph 1.

<sup>66</sup> *Ibid* Article 50.

legal regime applies within this maritime zone, unfortunately this task has not been completed by Indonesia.<sup>67</sup>

In summary, only within Indonesian waters that this State can implement its maritime cabotage as it has full sovereignty over it. This zone includes Indonesian territorial sea, archipelagic waters as a result to its geographical condition, and internal waters. The 1982 UNCLOS plays a significant role in determining this State's maritime cabotage coverage as it explains the limits of these maritime zones where this maritime law principle can be exercised.

### **III. Navigation: Commonly Shared But Different**

As has been discussed earlier in the previous section, maritime cabotage and the 1982 UNCLOS are sharing a common element, namely navigation. It was shown how the convention filling-up the gaps in Indonesian maritime cabotage legislation with regards to navigation, particularly to the determination of the maritime cabotage route and the maritime zone where Indonesia may implement this principle. However, navigation under the 1982 UNCLOS is different from the one under the maritime cabotage. The difference is affected by the fact that the 1982 UNCLOS and the maritime cabotage law are in two different legal classifications as was discussed in the previous section of this paper. The convention is classified under legislations which '[bear] the rights and obligation of states, and the safety and protection of the environment.'<sup>68</sup> On the other hand maritime cabotage, is in the group of legislations which 'focuses on commercial activities on international shipping'.<sup>69</sup> Legislations under the first group 'reflect the opinions of the international community and put emphasis on public interest and social benefits.'<sup>70</sup> While the second one consists of legislations which reflect national interests, including national security and economic objectives.

The difference in the classification influenced the purpose of navigation legislation under both laws, the 1982 UNCLOS and the maritime cabotage. Navigation is legislated in the convention to ensure that all ships flying any flags can navigate any seas in the world. Although in order to protect

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<sup>67</sup> Butcher, above n 62, 51.

<sup>68</sup> Liu, above n 27, 13.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

national interests of the coastal State, different navigation rights and obligations apply in different maritime zones. On the other hand, navigation in maritime cabotage is legislated to ensure that foreign-flagged ships can not navigate and trade along the cabotage route. This may seem contradict each other. However, the following discussion will show that maritime cabotage does not deny navigation rights applicable to the territorial sea.

As it was discussed in the previous section of this paper, Indonesia can only enforce its maritime cabotage policy in its waters, which comprises of Indonesian territorial sea, archipelagic waters, and internal waters. This means that within these zones, foreign-flagged vessels are not permitted to transport goods and passengers between points along the cabotage routes as were specified by Article 8 Paragraph (2) of the Shipping Law. Here, the navigation shall take place only along the cabotage routes. On the other hand, within these maritime zones, there are navigation rights which were bestowed by the 1982 UNCLOS upon foreign-flagged ships so that they can navigate within these zones, the right of innocence passage and its extension, which is the right of archipelagic sea lanes passage.

The right of innocence passage is prescribed in Article 17 of the 1982 UNCLOS, which states that:

*Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.<sup>71</sup>*

The application of this right is extended to the archipelagic waters of archipelagic States. The right of innocence passage through archipelagic waters is known as the right or archipelagic sea lanes passage. It is the right bestowed by the 1982 UNCLOS upon all ships and aircraft to navigate through a coastal States' archipelagic waters in an innocence passage along designated sea lanes and air routes thereabove.<sup>72</sup> Article 53 Paragraph 3 of the 1982 UNCLOS describes the right as follows.

*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 eco-*

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<sup>71</sup> 1982 United Nations Conventions on the Law of the Sea, Article 17.

<sup>72</sup> Ibid Article 52 Paragraph 1, 53 Paragraph 1 – 2.



Pursuant to the convention, if an archipelagic coastal State does not designate the sea lanes suitable for the continuous and expeditious passage through or over its archipelagic waters, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.<sup>74</sup>

To examine whether implementing maritime cabotage may nullify these rights, should be started with a full understanding that navigation is not as simple as a matter of sailing from one point to another point. In maritime cabotage, the navigation should be performed together with the transportation of goods and passengers activity. On the other hand, the navigation element in the right of innocence passage through the territorial sea of a coastal State should fall within the description of 'passage' as prescribed by Article 18 of the 1982 UNCLOS which states that:

1. *Passage means navigation through the territorial sea for the purpose of:*
  - (a) *traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or*
  - (b) *proceeding to or from internal waters or a call at such roadstead or port facility.*
2. *Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.*<sup>75</sup>

Here it is clear that there is no overlap between maritime cabotage's navigation and the navigation under the right of innocence passage. A merchant ship flying Panama's flag departing from a port in Singapore enjoys the right of innocence passage and the right of archipelagic sea lanes passage passing through Indonesian territorial water and archipelagic waters to go to Darwin, Australia. The ship may navigate on Indonesian Archipelagic Sea Lane I as shown on Map 1. What this ship can not do is sailing from Singapore to Jakarta, while it is in Jakarta it loads some containers,

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<sup>73</sup> Ibid Article 53 Paragraph 3.

<sup>74</sup> Ibid Article Article 53 Paragraph 12.

<sup>75</sup> Ibid, Article 18.

then it continues to sail to Kupang and unloaded the goods there before going out from Indonesia's archipelagic waters through the second sea lane to continue its journey to Darwin. The first illustration does not constitute cabotage, however the second illustration is maritime cabotage. Since the Panamas ship is violating Indonesian maritime cabotage restriction as stipulated in Article 8 Paragraph (2) of the Shipping Law, the operator of the ship can be held responsible for the violation and the sanction is imprisonment for maximum of 5 years as well as fine for up to 600 million rupiahs.<sup>76</sup>

In summary, the navigation under maritime cabotage and the right of innocence passage, including the right of archipelagic sea lanes passage as its extension is different. Therefore, by implementing maritime cabotage, a States is not denying these rights. Indonesian maritime cabotage policy is in accordance with the law of the sea.

#### **IV. Conclusion**

Maritime cabotage is an important policy to Indonesia. Theoretically, it promises a solution to develop Indonesian maritime industry, particularly the domestic one, by excluding foreign flagged-vessels to engaged in cabotage trade. At the end the policy is expected to contribute to the increase of the Indonesian economic growth level. Therefore, it is suggested that the Government should create a conducive atmosphere to support the implementation of this maritime law policy in Indonesia.

Unfortunately, the current Indonesian legislation of maritime cabotage contains some defects. They have got loopholes which enable foreign-flagged ships to transport goods and passengers in maritime cabotage route should these gaps are left opened. One of the gaps is the lack of legislation on the definition of 'islands'. According to Article 8 Paragraph (2) of the Shipping Law, apart from a port, an island is regarded as one of the forming parts of a maritime cabotage route. The lack of legislation leaving 'artificial islands' being excluded from becoming parts of cabotage routes. By connecting Indonesian maritime cabotage provisions with the 1982 UNCLOS, the gap has properly been closed. By employing *argumentum e contrario* in interpreting Article 11 of the convention, it can be concluded that a man-made island is categorized as a port. Therefore, according to

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<sup>76</sup> Law No. 17 of 2008 on Shipping (Indonesia) Article 284.

Article 8 Paragraph (2) of the Shipping Law is a part of cabotage route. Although the 1982 UNCLOS has filled-in the lack of legislation in maritime cabotage provision contained in the Shipping Law, it is strongly suggested to amend the cabotage provision itself. By amending the law, the government will provide stronger legal certainty in its maritime cabotage policy.

The 1982 UNCLOS also provides details on the limit of where Indonesia can exercise its maritime cabotage. The Shipping Law only provides that Indonesia can enforce its maritime cabotage policy within its waters, which consist of Indonesian territorial sea, archipelagic waters, and internal waters. The convention specifies the limits of these water zones including the navigation rights which can be enjoyed by ships within these zones. These rights are the right of innocence passage and the right of archipelagic sea lanes passage.

Although maritime cabotage and the 1982 UNCLOS share navigation as a common element, navigation in maritime cabotage is completely different from the one in the right of innocence passage and the right of archipelagic sea lanes passage. Navigation in maritime cabotage should be performed together with the act of transporting goods and/or passengers between the cabotage route, while navigation under the navigation rights foresaid above is generally the passing of a foreign-flagged vessels through the territorial sea and archipelagic waters of a coastal State. Thus, by implementing maritime cabotage, the right of innocence passage and the right of archipelagic sea lanes passage of foreign flagged ships are not denied.

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