

LAW ENFORCEMENT TO ERADICATE ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING IN INDONESIAN EXCLUSIVE ECONOMIC ZONES

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ABSTRACT

The practice of Illegal, unreported, unregulated fishing (IUU Fishing) in the Indonesian Exclusive Economic Zones still frequently take place. The loss suffered the state resulting from illegal fishing done by foreign falgged ships is increasing and this line with the number of cases related to illegal fishing. IUU fishing does not only threat the state, but also fishermen and fish cultivators, the industry, and fisheries business on a national scale. This issue must be resolved in a thorough manner, which means law enforcement in fisheries sector becomes an important and strategic part of supporting the development of the sector in a controlled and sustainable fashion. To prevention every criminal every criminal offense, especially illegal fishing in the Indonesian Exclusive Economic zone, Indonesia ha legal products which are in the form of rules and regulations.

Keywords: Illegal Fishing, Law enforcement, IUU Fishing, IEEZ.

Introduction

As an archipelagic state, the Republic of Indonesia has both regional sovereignty as well as sovereign rights over areas beyond its sovereignty to be managed and utilized as much as possible for the welfare of Indonesian people, as mandated by the Preamble to the 1945 Constitution of the Republic of Indonesia.

Within the frame of international law, Indonesia's conception as an archipelagic state has been determined since the Declaration of Juanda in 1957 and set forth in Law No. 4/Prp. 1960—later superseded by Law No. 6/1996 on Indonesian Waters—and internationally recognized through the United Nation Convention on the Law of the Sea 1982 (UNCLOS 1982) later ratified with Law No. 17/1985. This recognition has brought a jurisdictional consequence, defining Indonesian waters to be a whole region of which maritime boundaries are

marked from the outermost point of its outermost island.

Defining a country's sovereign area and sovereign rights over natural resources is closely related to the importance of setting a baseline to determine the boundaries of the country's low tide elevation. Once the coast low tide elevation line is known, the baseline can be set. Low tide elevation is a naturally formed land area surrounded by and above water at low tide, but submerged at high tide. In the event that a low tide elevation is fully or partially situated at a distance less than the breadth of territorial waters of a mainland or an island, the low tide line at such elevation can be used as the baseline to measure the breadth of territorial waters.²

Indonesia has the most expansive territorial waters in the world, as two-thirds of its area is waters. Geographically, Indonesia is a maritime country with a 5.8 million km² of oceans,

¹ See Article 47 paragraph (1) of UNCLOS 1982.

² *Ibid.*

consisting of 0.8 million km² of territorial waters, 2.3 million km² of archipelagic waters, and 2.7 million km² of Exclusive Economic Zones. Moreover, it also has 17,480 islands and a 95,181 km coastline.³

As a maritime country with extremely vast oceanic area, Indonesia is blessed with rich marine resources. According to the data of the Ministry of Marine Affairs and Fisheries, Indonesia's potential marine fisheries resources reach up to 6.4 million tons per year. Marine fisheries production has reached 4.7 million tons per year, out of the maximum limit allowed of 5.2 million tons per year set by Ministry of Marine Affairs and Fisheries, which means that only 0.5 tons per year remains. Meanwhile, the Gross Domestic Income (GDI) of fisheries sector in the Third Quarter of 2014 has reached IDR86.88 billion. The GDI contributed by this sector is the biggest compared to those of other sub-sectors such as agriculture, farming, and forestry.⁴

Indonesia's remarkable strategic geographical position also exposes the country to numerous security concerns, such as theft and illegal exploitation of marine resources, or known internationally as Illegal, Unreported and Unregulated Fishing (IUU Fishing). IUU fishing could take form as any kind of fisheries activity and occur in any national or international jurisdictional zone such as high sea⁵, regardless of location, target species, fishing tools used, and exploitation intensity. Illegal, unregulated, and unreported fishing is any kind of fishing that takes place in another country's jurisdiction by using prohibited or environmentally destructive

fishing tools and whose haul is unreported.

According to the FAO's data, current practices of IUU in Indonesian territory has resulted in IDR30 billion loss every year, while according to Minister of Marine Affairs Susi Pudjiastuti, the state has suffered US\$20 billion or IDR240 trillion loss due to illegal logging.⁶ Those losses significantly harm the country and threaten the conservation of marine and fisheries resources.⁷

According to the Ministry of Marine Affairs and Fisheries, there are numerous causes of high frequency IUU Fishing in Indonesia, such as:

- a) the extent of control and the vast supervised area cannot be covered by the current surveillance capability;
- b) the limited capability of surveillance fleet and facilities at sea;
- c) the vulnerable state of Indonesian fishermen and the high number of exploiting entrepreneurs or brokers;
- d) poor law enforcement;
- e) poor coordination and commitment among law enforcing apparatus.

The frequent problem of IUU in Indonesian waters is a threat that can disrupt the stability of national security, particularly its oceanic security. Considering Indonesia is a country with high potential fisheries resources, illegal fishing has become an important issue to be reviewed. This writing seeks to answer the questions of how law enforcement can eradicate IUU in Indonesian EEZ and what factors hinder such attempt. This is in line with the international principle on the importance of responsible fisheries management

³ Policy Evaluation In Order to Implement the United Nations Convention of the Law of the Sea UNCLOS 1982) in Jakarta, Indonesia, Indonesian Marine Agency; 2008, page 11.

⁴ Main database book, the Ministry of Marine Affairs.

⁵ General Directorate of Marine Affairs and Fisheries Surveillance and Control, 2006. Surveillance Policy in Combating Illegal, Unreported, and Unregulated (IUU) Fishing, Library Archives of Ministry of Marine Affairs and Fisheries, page 7.

⁶ www.financedetik.com

⁷ Marlina and Faisal Riza, *Aspek Hukum Peran Masyarakat Untuk Mencegah Tindak Pidana Perikanan*, (Jakarta: PT Sofmedia, 2013), pg. 1.

(Code of Conduct for Responsible Fisheries from the FAO, 1995). Surveillance and law enforcement in fisheries resources exploitation are one of the measures of responsible fisheries resources management, in addition to monitoring and controlling measures. Surveillance and law enforcement shall be conducted over people exploiting fisheries resources, whether for fisheries and/or shipping activities, or other activities related to fisheries. Surveillance and law enforcement with regard to fisheries resources management are a relatively recent concept, which means that the comprehension level on the importance of these measures is still considerably lacking.

IUU fishing does not only threaten the state, but also fishermen and fish cultivators, the industry climate, and fisheries business on a national scale. This issue must be resolved in a thorough manner, which means law enforcement in fisheries sector becomes an important and strategic part of supporting the development of the sector in a controlled and sustainable fashion. Legal certainty is an essential condition to enable criminal counter measures in the fisheries sector.

Definition of IUU Fishing

According to the documents of International Plan of Action-Food and Agriculture Organization of the United Nations (IPOA-FAO), illegal fishing is classified into the following categories:⁸

- 1) Activities conducted by national or foreign vessels under the jurisdiction of a state, without the permission of that state, or in contravention of its laws and regulations;
- 2) Activities conducted by vessels flying the flag of member states of a regional fisheries organization but operating in

contravention of the conservation and management measures adopted by that organization and by which the member states are bound, or the relevant provisions of the applicable international law;

- 3) Activities in violation of national laws or international obligations, including those undertaken by states cooperating with a regional fisheries management organization.

The above is followed by the objective of IPOA as well as the principles and implementation of measures to prevent, deter, and eliminate IUU fishing. These measures focus on all state responsibilities, flag state responsibilities, coastal state measures, port state measures, and internationally agreed market-related measures, research and regional fisheries management organization. Special requirements for developing countries are then taken into consideration, followed by reporting requirements and the FAO's roles. IUU Fishing itself is classified into three types:

1. Illegal

Fishing activities conducted by a national or foreign person/vessel in Indonesian waters without authorization or in contravention of existing laws and regulations.

2. Unreported

Fishing activities never reported or not being reported appropriately to the competent authorities, in a manner inconsistent with national laws and regulations.

3. Unregulated

Fishing activities in the areas or of fish stocks in Indonesian waters to which there is no applicable conservation or management measures, and conducted in a manner inconsistent with the state responsibilities for the

⁸ "International Plan Of Action To Prevent, Deter And Eliminate Illegal, Unreported And Unregulated Fishing", <http://www.fao.org/docrep/003/y1224e/y1224e00.HTM>, also see the abstract of IPOA-FAO as an independent instrument that applies for all the countries, their entities, and their fishermen.

conservation and management of fish resources under international law.

The most prominent practice in IUU Fishing is basically poaching, or fishing in another state without the authorization of that state, or in other words, illegal fishing by a foreign party.

National Laws and Regulations on Law Enforcement to Eliminate IUU Fishing

1) Law No.5/1983 on Exclusive Economic Zones (EEZ)

The law explains that an Exclusive Economic Zone (EEZ) is defined as an outer strip bordering the Indonesia territorial sea, as determined by the law applicable to Indonesian waters, covering the seabed, the sub-soil under it, and the water above it, with an outermost limit of 200 nautical miles, measured from the baseline of the Indonesian territorial sea.⁹

Law No.5/1983 has a legal blind spot that could be taken advantage of by illegal fishers to avoid legal repercussions, seeing that there is no firm penalty being set. This could be seen in the provisions of Article 4 (3) and Article 5 (3) of Law No.5/1983 on EEZ.

Article 4 (3) states that within the Indonesian exclusive economic zones, the freedom of international navigation and overflight, as well as the freedom of laying cables and pipelines, shall be recognized in accordance with the principles of the international law of the sea.¹⁰ Meanwhile, Article 5 (3) states that, without prejudice to the provision of Article 4, the exploration and exploitation of natural resources in certain areas within the Indonesian Exclusive Economic Zones, conducted by any person or legal entity or

government of a foreign state are allowed, provided that the species caught in fishing are permitted by the government of the Republic of Indonesia as their quantity exceeds Indonesia's capacity to harvest such species.

2) Law No.6/1996 on Indonesian Waters

According to the provisions of Law No. 6/1996 on Indonesian Waters, what constitutes Indonesian waters is Indonesian territorial sea along with the archipelagic waters and interior waters.

Therefore, every foreign vessel passing through Indonesian waters is subject to and must comply with the applicable regulations in Indonesia.

3) Law No. 17/2008 on Shipping

Law No.17/2008 is issued based on the following considerations: (a) that the Unitary State of the Republic of Indonesia is an archipelago characterized by many islands united by extremely vast waters of which boundaries, rights, and sovereignty are stipulated by the Law; (b) that to realize the archipelago concept and consolidate national resilience, a national transportation system is required to support economic growth, regional development, and strengthen the state's sovereignty; (c) that the potentials and roles of shipping consisting of water transportation, harbor affairs, and shipping safety and security must be developed to achieve an effective and efficient transportation system, and to help create a consolidated and dynamic national distribution system; and (d) that shipping safety and security must be made a priority for the sake of national interest. The Law on Shipping comprises four main parts; water transportation, harbor

⁹ See Article 2 of Law No.5/1983 on Exclusive Economic Zones.

¹⁰ Article 2 of Law No.5/1983 on Exclusive Economic Zones.

affairs, shipping safety and security, and marine environmental protection.

In order to prevent illegal fishing, the Law has set out the following duties for the Sea and Coast Guard:

- (a) to control shipping safety and security;
- (b) to observe, prevent, and tackle pollution at sea;
- (c) to control and put in order ship activities and traffics;
- (d) to observe and put in order salvage activities, underwater works, exploration, and exploitation of sea resources;
- (e) to secure Shipping Navigational Aid; and
- (f) to support the performance of search and rescue at sea.¹¹

In executing their functions, the sea and coast guard shall coordinate to:

- (a) formulate and stipulate general policies for law enforcement at sea;
- (b) compile integrated policies and standard operating procedures for law enforcement at sea;
- (c) guard, control, prevent, and take actions on law violations, and secure shipping and public and government activities within the Indonesian territorial waters; and
- (d) provide integrated administration technology support in law enforcement at sea.

4) Law No. 31/2004 as amended by Law No. 45/2009 on Fisheries

This Law has become a legal umbrella in the attempt to eradicate illegal fishing, as it substantially regulates every subject in relation to fisheries.

Fisheries management shall be performed based on the principles of benefit, fairness, togetherness,

partnership, self-reliance, equal distribution, transparency, efficiency, and sustainable conservation.¹²

Moreover, fisheries management shall be executed with the following objectives:

- a) to improve the living standards of small-scale fishermen and small-scale fish cultivators,
- b) to increase the state's foreign exchange reserves,
- c) to encourage expansion and employment opportunities,
- d) to increase the availability and consumption of fish as a protein source,
- e) to optimize the management of fish resources,
- f) to improve productivity, quality, value added, and competitiveness,
- g) to increase raw material availability for fish processing industry,
- h) to optimize utilization of fish resources, fish cultivation lands, and environment of fish resources, and
- i) to ensure the sustainability of fish resources, fish cultivation lands, and spatial layouts.

Law No. 45/2009 is the amendment to Law No. 31/2004. The amendment covers, among others:

- a) Law enforcement and surveillance, particularly with regard to an inter-investigating-body coordinating mechanism in the investigation of criminal offenses in fisheries sector, imposition of sanctions (criminal sanctions or fines), procedural laws (especially with regard to determining the time limit for a case investigation), and facilities of law enforcement in fisheries sector, including the possible legal action of sinking foreign vessels operating within the

¹¹ See Article 276 of Law No. 17/2008 on Shipping

¹² See Article 4(3) of Law No. 45/2009 on Fisheries

- fisheries management zone of the Republic of Indonesia.
- b) Fisheries management issues such as fisheries port affairs, conservation, licensing, and harbor master affairs.
 - c) Extension of fisheries court jurisdiction, so as to cover the entire fisheries management zone within the Republic of Indonesia.
 - d) This law amendment also at favoring small-scale fishermen and small-scale fish cultivators, among others, in terms of licensing, obligation to provide ship monitoring system, fisheries charges, and imposition of criminal sanctions.

5) Law No. 27/2007 on the Management of Coastal Areas and Small Islands.

This law is made to serve as a basis for developing a law-level regulation on the Management of Coastal Areas and Small Islands, particularly related to their planning, utilization, rights and community access, settlement of conflicts, conservation, disaster mitigation, coast, coastal area rehabilitation, and elaboration of related international conventions; building up the synergy between and consolidating central and local government institutions in the management of coastal areas, so there will be harmonious cooperation between institutions as well as preventing and mitigating conflicts of utilization and authorization between activities in coastal areas and small islands; and providing legal certainty and protection as well as improving the welfare of the people in coastal areas and small islands by developing regulations that can ensure their access and rights as well as those of other interested parties, including entrepreneurs.

This law applies to Coastal Areas and Small Islands, where lands and seas meet. At land, they cover sub-

district administrative regions, and at sea, they cover areas of 12 (twelve) nautical miles from coast lines to high seas and/or to archipelagic waters. The scope of this Law is generally classified into three phases: planning, management, and surveillance and control.

Coastal Areas and Small Islands are highly prone to illegal fishing, due to their abundant biological resources, such as fish and corals, having high economic value. Illegal fishers usually harvest marine resources using prohibited methods and cause ecosystem destruction.

Provisions of International Law

1. United Nations Convention on the Law of the Sea (UNCLOS 1982)

The United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) is a codification of existing international regulations. Since the convention regulates in a comprehensive manner and covers nearly all activities at sea, UNCLOS 1982 is deemed as a constitution for the ocean.

As a constitution for the ocean, UNCLOS comprehensively regulates fisheries activities in order to achieve sustainable fisheries management, whether within or beyond the jurisdiction of a coastal state. These regulations are set out in Chapter V on Exclusive Economic Zones (EEZ) and Chapter VII on High Seas.

Basically, UNCLOS 1982 does not regulate IUU Fishing. It only regulates the law enforcement in territorial waters or EEZ of a country in a general sense.

In broad terms, UNCLOS 1982 classifies territorial waters into two types of area where a country can enforce its law on IUU Fishing: territorial waters under sovereignty and territorial waters within the country's jurisdiction. Territorial

waters that are subject to the sovereignty of a coastal/archipelagic state refer to internal waters and territorial seas, or archipelagic waters and territorial seas. Meanwhile, territorial waters over which a coastal/archipelagic state has sovereign rights and jurisdiction are EEZ and Continental Shelves.¹³ The EEZ have a legal status that is *sui generis* (unique/distinguished) in nature, particularly with regard to the rights and obligations of a coastal state and other states over the EEZ. In contrast to territorial sea, over which a coastal state has sovereignty, a coastal state only has sovereign rights over the EEZ. These sovereign rights are limited to exploration and exploitation of marine resources, whether biological or non-biological.

UNCLOS 1982 states that in exclusive economic zones, a coastal state has sovereign rights for exploring and exploiting, conserving and protecting natural resources, whether biological or non-biological, in waters superjacent to the seabed and the seabed and its subsoil, and in relation to other activities for economic exploration and exploitation of the zones such as production of energy using water, currents, and wind; the jurisdiction relates to:

- (i) establishment and use of artificial islands, installations, and structures;
- (ii) marine scientific research;
- (iii) protection and conservation of marine environment.

In exercising its rights and performing its obligations in exclusive economic zones, a Coastal State shall have due regard to the rights and obligations of other States and act in compliance with the provisions of this Convention.¹⁴

Several provisions in UNCLOS 1982 with regard to fish resources surveillance are:

Article 61 paragraph (2)

The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of biological resources in the exclusive economic zones is not endangered by over-exploitation. As appropriate, the coastal State and the competent sub-regional, regional or global international organizations shall cooperate to this end.

Article 62 paragraph (2)

The coastal State shall determine its capacity to harvest biological resources in the exclusive economic zones. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph (4), give other States access to the surplus of the allowable catch, by complying with the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

Article 62 paragraph (4)

Nationals of other States fishing in the exclusive economic zones shall comply with the conservation measures and other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following:

- (a) licenses for fishermen, fishing vessels and equipment, including payment of fees and other forms of

¹³ Article 77 of UNCLOS.

¹⁴ Article 56 of UNCLOS.

remuneration, which, in the case of a developing coastal State, may consist of adequate compensation in the forms of financing, equipment and technology relating to fishing industry;

- (b) determination of species allowed to be caught, and setting quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;
- (c) regulation on the seasons and areas of fishing, types, sizes and number of gears and fishing vessels allowed to be used;
- (d) determination of the ages and sizes of fish and other species allowed to be caught;
- (e) details on the information required from fishing vessels, including catch and fishing effort statistics and vessel position reports;
- (f) requirement, under the commission and control of the coastal State, to conduct specific fisheries research programs and regulation on the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;
- (g) placement of observers or trainees on board on such vessels by the coastal State;
- (h) landing of all or any parts of the catch by such vessels in the ports of the coastal State;
- (i) terms and conditions relating to joint ventures or other cooperative arrangements;
- (j) requirements for personnel training and transfer of fisheries technology, including improving the coastal State's fisheries research capability;
- (k) enforcement procedures.

Article 63 paragraph (2) mandates that in the event that the same stock or stocks of associated species occur both within the exclusive economic zones and in areas beyond and adjacent to the zones, the coastal State and the States fishing for such stocks in the adjacent areas shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent areas.

Article 64 paragraph (1) determines that the coastal State and other States whose nationals fish in the region for highly migratory species shall cooperate directly or through appropriate international organizations, with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zones.

Article 73 paragraph (1) states that the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage biological resources in the exclusive economic zones, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

Article 94 paragraph (1) states that every State shall effectively exercise its jurisdiction and control in the administrative, technical and social matters over ships flying its flag.

In Article 117, all States are mandated to take, or to cooperate with other States in taking measures against their respective nationals as may be necessary for the conservation of biological resources in the high seas. Meanwhile, the obligations

of States in high sea fisheries are regulated in Article 118. It is stated there that all States have a duty to take actions or cooperate with other States in conserving biological resources at high seas. The importance of cooperation between States at high seas in conservation and biological resources management is highlighted further in Article 119, which states that in determining the allowable catch and establishing other conservation measures for biological resources in high seas, planning must be made based on best scientific evidence available and for the purpose of maintaining the population of harvested species at a sustainable level. In addition, the availability of scientific evidence, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be shared and exchanged on a regular basis through the competent sub-regional, regional, or global international organizations.

2. FAO Compliance Agreement, 1993

The agreement applies to flag states and spurred by the decline of fisheries resources and the frequent occurrence of flag of convenience (FOC) vessels operating at high seas, which have weakened conservation effectiveness and fisheries management at high seas. This agreement is a legally binding instrument of international law.

3. UN Fish Stock Agreement, 1995

This agreement applies to coastal states and flag states. This agreement is spurred by the decline of straddling migratory fish stocks and highly migratory fish stocks at high seas and exclusive economic zones

of coastal states. This agreement is a legally binding instrument of international law. Indonesia has ratified this agreement through Law No. 21/2009 on the Validation of Agreement for The Implementation of The Provisions of The United Nations Convention on The Law of The Sea of 10 December 1982 Relating to The Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Chapter III of this Agreement states that, "...mechanism for international cooperation in the management of straddling migratory fish and highly migratory fish, whether directly or indirectly, through agreements or regional and sub-regional fisheries management organizations. One of the objectives of the cooperation is for the States to agree on conservation and management measures in order to avoid overfishing.

Under this Agreement, obligations and rights have been granted for Indonesia as the state party. In the exercise Indonesia's sovereign rights, Indonesia must apply *mutatis mutandis* the general principles under Article 5¹⁵, where it must take measures to prevent or eliminate overfishing and excess fishing capacity and ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources¹⁶. Moreover, in the cases when violations occur, Indonesia is able to conduct an investigation and judicial proceeding, and impose a sanction in respect of the violation have been complied.¹⁷

4. FAO Code of Conduct for Responsible Fisheries, 1995

¹⁵ Article 3 (2) of the UN Fish Stocks Agreement.

¹⁶ Article 5 (h) of the UN Fish Stocks Agreement.

¹⁷ Article 19 (1) of the UN Fish Stocks Agreement.

FAO Convention on CCRF 1995 is executed by FAO in October 1995 following the acceptance of UN Fish Stock Agreement in High Sea Fisheries by the United Nations in August 1985. The objective of this agreement is to set out the principles of responsible fisheries management. This convention must be implemented in compliance with the related provisions of international laws, such as UNCLOS 1982 and UN Fish Agreement.

Convention on IUU Fishing is an agreement made between the member states of FAO during a meeting in Rome in March 2001 as an attempt to prevent illegal, unregulated, and unreported fishing activities against the states or interested regional bodies in compliance with regional and international regulations.

5. FAO IPOA-IUU Fishing, 2001

IUU Fishing is illegal, unreported, and unregulated fishing activities at high seas or jurisdictional waters of a coastal state. All states must support the eradication of IUU Fishing. FAO IPOA-IUU Fishing, 2001 is a voluntary instrument of international law that regulates the responsibilities of various countries for IUU Fishing eradication.

6. FAO Model Scheme on Port State Measures, 2005

FAO Model Scheme on Port State Measures, 2005 applies to port states and spurred by abundant fish landing from IUU activities in the port of convenience of several port states. FAO has observed that port states have enormous potential to eradicate IUU Fishing effectively and efficiently since fishing vessels typically unload their catch from IUU Fishing in these

ports. FAO Model Scheme on Port State Measures, 2005 itself is a voluntary instrument of international law. Indonesia has adopted the model scheme of these port state measures through the Decision of Director General of Marine Fisheries, the Ministry of Marine Affairs and Fisheries No. 18/DJ-PT/2009 on the Designation of Fisheries Ports as the Site for Implementing the Provisions of Port State Measures.

7. FAO Agreement on Port State Measures, 2009

IUU fishing is an ongoing problem that brings harm to fish stocks, marine ecosystems, and lawful livelihoods of fishermen, as well as to increased need for food security among global citizens. Considering this, FAO has fine-tuned FAO Model Scheme on Port State Measures 2005 into FAO Agreement on Port State Measures 2009, a legally binding instrument by referring to FAO IPOA-IUU Fishing 2001 and FAO Model Scheme on Port State Measures 2005. Indonesia is in the process of ratifying this agreement. The provisions in this agreement are identical with the ones in FAO Model Scheme on Port State Measures 2005, although they are set out in articles format in the vein of legally binding instrument of international law.

Law Enforcement against IUU Fishing in Indonesia

Law enforcement is an attempt or activity by a state based on the state sovereignty or the applicable laws and regulations, whether national laws of the state itself or international laws, which may be ignored by individuals and legal entities, or even other countries in order to defend their own interest, without damaging the interest of another party.¹⁸

¹⁸ Indonesian Marines Army Staff and Command School, "Wawasan Nusantara." Instructional Package, Jakarta, 2002, pg. 83.

In judicial term, law enforcement is interpreted as a legal proceeding that consists of preliminary investigation, advanced investigation, prosecution, examination in the court of law, and execution of court verdict. This measure is meant to maintain legal certainty and compliance. In a judicial context, law enforcement at sea is a process to resolve a case that arises due to a violation at sea against the applicable provisions of national or international law.¹⁹

Law enforcement may be interpreted as under the legal jurisdiction of a State, and the jurisdiction can be classified into the following:

- a) Jurisdiction of legislation or jurisdiction to prescribe (authority to make legal provisions in order to regulate various matters).
- b) Jurisdiction to enforce the law (authority to enforce the applicable provisions of law). The jurisdiction to enforce the law is based on:
 - a. Sovereignty. Sovereignty of State is a fundamental activity of a State with regard to individuals, objects, and territories of the State and other matters for the purpose of the State's growth. Sovereignty is the highest form of authority within a State.
 - b. Provisions of International Law. Conventional Law/Treaty is an international legal convention or general legal principle, which also serves as recognition toward a civilized State that has become an international legal subject.

Law enforcement attempts against IUU Fishing in the Indonesian Exclusive Economic Zones of Fisheries Management Zones of the Republic of Indonesia much depend on the provisions of law and law enforcement institutions; the former takes form as laws and

regulations, while the latter takes form as the enforcer institutions, such as the Ministry of Marine Affairs and Fisheries, Indonesian Navy (TNI-AL), Indonesian National Police (Polri), Court, and Correctional Facilities. Law enforcer is an essential part of law upholding, while law upholding itself is an integral component of national development.

In accordance with the international guidance on the importance of responsible fisheries management (Code of Conduct for Responsible Fisheries from FAO, 1995), law enforcement and surveillance over fish resources utilization is one of the activities aiming to achieve responsible fish resources management, in addition to monitoring and control. Law enforcement and surveillance is applied to those who utilize fish resources, whether through fishing and/or transporting fish, or other activities related to fish resources.

UNCLOS 1982 does not specifically regulate IUU Fishing, but it does impose an obligation to develop a provision of law with regard to preventing and controlling pollution from any sources, whether from lands, activities under state jurisdiction, water vehicles, dumping, or air/atmosphere. This provision is set out in Article 207-212.

The development of provision of law regarding marine environmental protection and conservation as mandated by UNCLOS 1982 must be complemented with law enforcement. This law must be enforced by flag states, port states, and coastal states.

Law enforcement by port states, flag states, and coastal states must also be followed up with safeguard measures in compliance with Article 223-233 of UNCLOS 1982. This safeguard serves as facilitation to prosecution.

¹⁹ Adi Susanto, "Hubungan Antara Penegakan Hukum di Laut dan Ketahanan Nasional, Legal Forum, Volume 4, Number 4, 2007, pg. 6.

With regard to law enforcement of coastal states in the EEZ, Article 73 of UNCLOS 1982 regulates that:

1. A coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage biological resources in the exclusive economic zones, take such measures, including boarding vessels, inspecting, arresting and taking on judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zones shall not include imprisonment, in the absence of an agreement to the contrary by the relevant States, or any other forms of corporal punishment.
4. In cases of arrest or detention of foreign vessels, the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Therefore, according to Article 73 of UNCLOS 1982, if a foreign vessel does not comply with a coastal state's fisheries laws and regulations in the EEZ, the coastal state may board, inspect, arrest, and take on judicial proceedings over the vessel and inform the flag state of the vessel. However, the arrested vessel and crews shall be promptly released upon the posting of reasonable bonds to the coastal state. Penalties for the foreign vessel shall not take form as corporal punishment or imprisonment. Therefore, the form of sanctions for a vessel and its crews applies differently when it occurs in the parts of sea under sovereignty, compared to within the EEZ. The authority of the coastal state over a violation in the EEZ is limited to law enforcement related

to fisheries. This difference is due to the fact that in the EEZ, a coastal state only has sovereign rights instead of sovereignty, which limits it on matters related to a coastal or an archipelagic state's sovereign rights. According to the provision of Article 73 (2), a coastal state must promptly release the arrested vessel and its crews once a reasonable bond or other security is posted. Prompt release is regulated in Article 292. The procedure for promptly releasing an arrested vessel and its crews is an innovation in international law of sea. However, although Article 292 (1) stipulates that the bond or other security shall be "reasonable", UNCLOS 1982 does not provide any detail on such security.

In order to maintain order in Indonesian EEZ, the law enforcement apparatuses must take all preventive measures possible against any violations, including illegal fishing, as well as security measures. These formal measures should take into account and comply with the national and international laws.

The legal bases for law enforcement against illegal fishing are as follows:

- 1) Law No. 5/1983 on Exclusive Economic Zones. This law is made to address problems arising in Indonesian EEZ and aims to provide early prevention for these problems. It proves Indonesia's vigilance against any possible adversity and danger to marine conservation.
- 2) Law No. 17/1985 on the Ratification of the UN Convention on the Law of the Sea 1982. This law signifies Indonesia's approval to be bound to the Convention on the International Law of the Sea.
- 3) Law No. 6/1996 on Indonesian Waters.
- 4) Law No. 27/2007 on the Management of Coastal Areas and Small Islands.
- 5) Law No. 31/2004 as amended by Law No. 45/2009 on Fisheries. This law further clarifies and provides legal certainty on law enforcement against

criminal offenses in fisheries sector, which consists of investigation, prosecution, and examination in the court of law. However, there need to be more specific regulations on the authority of investigators, public prosecutors, and judges presiding over fisheries offenses.

- 6) Law No. 17/2008 on Shipping.
- 7) International laws.

The law enforcement in fisheries sector against illegal fishing aims to push down illegal activities to a minimum, in order to achieve orderly and responsible fisheries management, as well as to improve law administration and enforcement in a systematic, consistent, and firm manner. To enforce law in Indonesian EEZ, especially against illegal fishing, the right strategy is needed. It should include²⁰ licensing administration, improved operational monitoring, imposing severe and proper sanctions in legal proceedings, and giving incentives to law enforcers who successfully act on violations and fisheries offenses.

Law enforcement in fisheries sector has become a very important and strategic part of supporting the fisheries industry in a controlled manner and in compliance with the principle of fisheries management that focuses on sustainable development. Therefore, legal certainty is essential. Law No. 31/2004 in conjunction with Law No. 45/2009 on Fisheries have clarified and provided legal certainty on law enforcement over criminal offenses in fisheries sector, which consists of investigation, prosecution, and examination in the court of law. However, there need to be more specific regulations on the authority of investigators, public

prosecutors, and judges presiding over fisheries offenses.²¹

The points being regulated in Law No. 45/2009 on Fisheries Criminal Offenses are, among others:

1. With regard to law enforcement and surveillance:
 - Inter-investigating-body coordinating mechanism with regard to fisheries offense investigation (Indonesian Maritime Security Coordinating Board/ Bakorkamla);
 - Imposition of sanctions (corporal punishment or fine);
 - Criminal Procedure Law (time limit on resolution of case);
 - Possibility of sinking foreign flag vessel.
2. With regard to fisheries management, such as:
 - Fisheries port affairs;
 - Conservation;
 - Licensing;
 - Harbor master affairs.
3. With regard to extension of Fisheries Court Jurisdiction.

According to Law No. 45/2009, criminal sanctions mean imposing sanctions whether in the form of administrative sanctions (revoke of permit), imprisonment (jail), or fines. In investigating fisheries offenses, including perpetrators of IUU Fishing, the Government has authorized a Fisheries Civil Servant Investigator, Indonesian Navy Investigator, and/or Republic of Indonesia National Police Investigator.²²

Sinking vessels perpetrating IUU Fishing is also one method to enforce law in Indonesian waters. The act to sink

²⁰ Wignyo Handoko, 2004, *Kebijakan Pengawasan Sumber Daya Kelautan Dan Perikanan*, Jurnal Hukum Internasional, Lembaga Pengkajian Hukum Internasional – Fakultas Hukum Universitas Indonesia, Jakarta, pg. 117.

²¹ Sukardi, *Penyidikan Tindak Pidana Tertentu (Beberapa Ketentuan Pidana di luar KUHP)*, Restu Agung, Jakarta, 2009, pg. 274-275

²² See Article 73 of Law No.45/2009 on Fisheries.

a vessel without official document or in contravention with the laws and regulations of Republic of Indonesia is set out in the provisions of Article 69 paragraphs (1) and (4) of Law No. 45/2009 on the Amendment to Law No. 31/2004 on Fisheries (Law of Fisheries). Article 69 paragraph (1) of Law of Fisheries determines that fisheries surveillance ship shall function as a law enforcement and surveillance mechanism on fisheries within the fisheries management zones of the Republic of Indonesia. Meanwhile, Article 69 paragraph (4) states that in performing the functions referred to in paragraph (1), the fisheries investigator and/or controller is entitled to take special actions in the form of burning or sinking any fishing ship flying a foreign flag on the basis of sufficient initial proof. Next, the act of destruction is regulated in Article 76A of the Law of Fisheries, which states that any objects and/or tools used in or produced by fisheries criminal offenses may be confiscated or destroyed after receiving the court's approval.

There are two methods of sinking a foreign fishing vessel that may be used by the Government of the Republic of Indonesia through the competent authorities:

1. Vessel sinking through court order
 - a) Authority who arrests the foreign fishing vessel bring the vessel and its crew to the land
 - b) A legal proceeding in fisheries court is conducted on the land
 - c) Once it is tried and found guilty under a permanent legal binding ruling, the vessel will be confiscated
 - d) Once the vessel is confiscated, it is up to the executing prosecutor to determine what they want to do with the vessel
 - e) The vessel could either be auctioned or destroyed

- f) If the vessel is decided to be destroyed, then it could either be blown or sunk.
2. Caught red-handed by the authority
 - a) The second method is based on Article 69 of Law of Fisheries No. 45/2009.
 - (1) A fishing surveillance ship has a function of exerting controlling and law enforcement in fisheries sector within the fisheries management of zones of the Republic of Indonesia.
 - (2) The fishing surveillance ship referred to in paragraph (1) may be equipped with fire arms.
 - (3) The fishing surveillance ship is entitled to stop, investigate, and detain a ship suspected or worth to be suspected of having committed a violation within the fisheries management zones of the Republic of Indonesia and to force it to the nearest port for further proceedings.
 - (4) In the performance of the function referred to in paragraph (1), the fisheries investigator and/or controller is entitled to take special actions in the form of burning and/or sinking any fishing ship flying a foreign flag on the basis of sufficient initial proof.

There are several conditions that must be met before the above special actions can be taken: the ship flies a foreign flag with all of its crews being foreigners, the event is located within the fisheries management zones of Indonesia, and the ship does not have documentation issued by the Government of Indonesia. The other conditions are based on factual letter, the ship is old or does not have a high economic value, it is not possible to bring the ship to the dock because of its vulnerable or hazardous nature, and the ship performs

a dangerous maneuver or the captain or the crews retaliate with violence. Before performing special actions, the officer should first evacuate the crews, make an inventory of all equipment and tools of the ship, secure documentation, secure fish as a proof, and make a report.

Severe and proper sanctions in legal proceedings are imposed to deter perpetrators of illegal fishing. Provisions for Indonesian EEZ law enforcement regulate the following:

- 1) Any vessels and/or persons suspected of committing a violation in Indonesian EEZ shall be seized and/or arrested, which includes a process of stopping up to handing the vessels or persons over to a port for further case proceedings.
- 2) The vessels or persons must be handed over immediately no later than 7 days following their seizure or arrest, except in the event of force majeure.
- 3) The law enforcer for investigation in Indonesian EEZ shall be a TNI-AL Officer.
- 4) The public prosecutor shall be a prosecutor of the relevant District Court.
- 5) The District Court having the competence to adjudicate the violation to Indonesian EEZ law shall be a District Court the jurisdiction of which covers the port where the vessels or persons seized or arrested.
- 6) A request to release the seized vessels or arrested persons may be applied at any time prior to a decision from the competent court, by posting bail set by the competent District Court.

In Law No. 45/2009 on the amendment to Law No. 31/2004 on Fisheries, investigation of fisheries criminal offenses is regulated by Article 73 paragraph (1). Meanwhile, paragraph (2) of Article 73 of Law No. 45/2009 explains the exclusive authority of the Indonesian National Armed Forces (TNI). Such authority is also regulated in Article

282 paragraph (1) of Law No. 17/2008 on Fisheries. However, this authority does not fully match with Article 34 of the Law of Fisheries, which grants exclusive authority to the Indonesian Navy (TNI-AL) to perform investigative duties on criminal offenses that happen within the Indonesian EEZ.

The provision on the authority bestowed to TNI Officer to perform investigation on criminal offense occurring within Indonesian EEZ is regulated in Article 14 Law No. 5/1983. The provisions on authorities of TNI-AL to perform investigation on criminal offenses occurring within the Indonesian waters is strengthened by the issuance of Law No. 6/1996 on Indonesian waters, as well as the result of international conventions such as UNCLOS 1982.

In Article 24 Law No. 6/1996 on Indonesian waters, the process of law enforcement against criminal offenses in the Indonesian waters is stated firmly. Meanwhile, the authority of TNI-AL is stated in Article 111 paragraph 5 of UNCLOS 1982, later ratified by the government of Indonesia with Law No. 17/1985. In accordance with the provisions of Article 111 paragraph (5) of UNCLOS 1982, TNI-AL has the authority to enforce the state sovereignty as well as the law in accordance to the state jurisdiction and its territorial seas.

Law enforcement at sea covers customs, immigration, shipping, quarantine, fisheries, environment, police, and national defense. However, what has become an issue in reality is that multiple institutions handle law enforcement at sea. Many regulations have mandated and authorized various government institutions to enforce law. The law has granted various authorities to government and law enforcement apparatuses on matters such as: customs, immigration, ship safety, and navigation. Law enforcement apparatuses at sea perform their duties according to their respective sector, causing legal clashes

to arise. For instance, the overlapping authorities that result in disputes between several law enforcement institutions.

There are at least 8 (eight) government institutions having authority over the seas under various regulations: Indonesian Navy (TNI-AL), Indonesian National Police (Polri), Civil Servant Investigator of the Ministry of Marine Affairs and Fisheries (PPNS KKP), Civil Servant Investigator of the Ministry of Transportation (PPNS Kemenhub), Civil Servant Investigator of the Customs Office (PPNS Bea Cukai), Civil Servant Investigator of the Immigration Office (PPNS Imigrasi), Civil Servant Investigator of the Ministry of Environment (PPNS LH), and Civil Servant Investigator of the Ministry of Forestry (PPNS Kemenhut). Remarkably, if we refer to Law No. 6/1996 on Indonesian Waters, these eight institutions all have law enforcing authority over the seas. Law No. 5/1983 on Indonesian Exclusive Economic Zones grants the authority to TNI-AL.

According to Law No. 5/1990 on the Conservation of Biological Resources and Ecosystems, the law enforcers at sea are TNI-AL, Polri, and PPNS Kemenhut. Law No. 9/1992 on Immigration bestows authority to Polri and PPNS Imigrasi. In Law No. 6/1996 on Indonesian Waters, besides to PPNS LH, the authority is granted to TNI-AL and Polri. Meanwhile, in Law No. 45/2009 on Fisheries, the authority is bestowed upon PPNS KKP in addition to TNI-AL and Polri. PPNS Bea Cukai and Polri are mandated to enforce law at sea under Law No. 17/2006 on Customs. Law No. 17/2007 on the Management of Coastal Areas and Small Islands appoints Polri and PPNS KKP as law enforcement apparatuses at sea. Whereas, Law No. 17/2008 on Shipping states TNI-AL, Polri, and PPNS Kemenhub as the law enforcers at sea. Besides the foregoing, according to Law No. 34/2004 on

Indonesian National Army, TNI-AL has the following duties: enforcing law and maintaining security in any parts of the seas within the national jurisdiction in accordance with the provisions of national laws and international laws that have been ratified (Article 9B of Law No. 34/2004). In combating non-military entities and threats, the countermeasure shall be coordinated between the institutional leaders of the relevant sector (Article 19 of Law No. 3/2002 on National Defense).

Conclusion

Law enforcement to eradicate IUU Fishing in the waters within the Exclusive Economic Zones of Indonesia could be strengthened by observing the provisions of international or national laws, such as UNCLOS 1982, Law No. 17/2008 on Shipping, Law No. 31/2004 as amended by Law No. 45/2009 on Fisheries, Law No. 27/2007 on the Management of Coastal Areas and Small Islands, or other related laws and regulations.

The poor coordination between law enforcement institutions could result in overlapping authorities and policies, which makes them very prone to conflict of interest. Uncoordinated law enforcement is one of the obstacles in combating the crime of IUU Fishing.

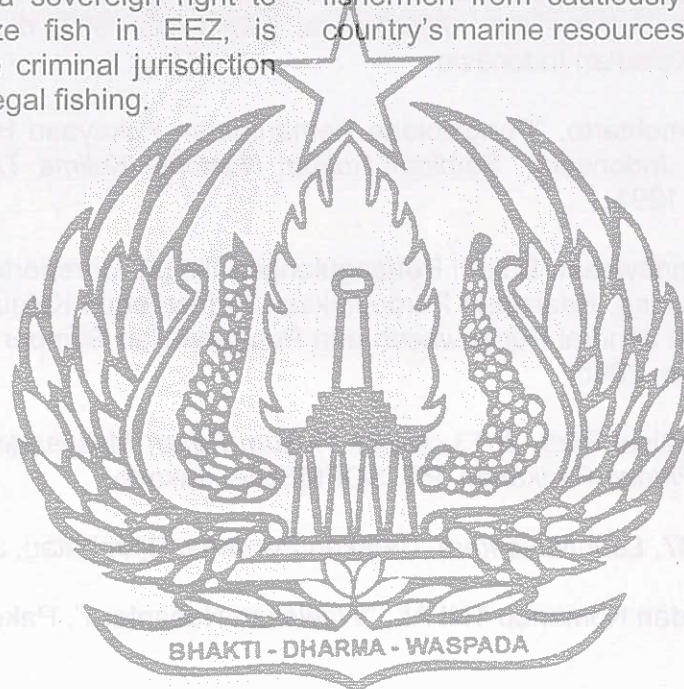
The coordination between various institutions would be a huge deciding factor in ensuring the success of criminal law enforcement over IUU Fishing, which has grown into an organized crime with an extremely vast network extending from illegal fishing, transshipment of fish in the middle of the ocean, and illegal export of fish.

If a foreign vessel entering Indonesian EEZ is suspected of committing or commits illegal fishing, the government of Indonesia has the authority through its apparatuses to stop or seize the foreign vessel and its entire crew, and escort them to the nearest

port. According to Article 56 paragraph (1) point (a) of UNCLOS 1982, a coastal state has a sovereign right over the utilization (exploration and exploitation) of natural resources in EEZ. Here, we can conclude that whoever has a right over an object, as a logical consequence of such ownership, has a right to defend it. If we apply this premise to the right of a coastal state to utilize natural resources (fish, in particular) in EEZ, the logical consequence is the natural resources itself. One manifestation of the right to defend is by exercising criminal jurisdiction. Therefore, Indonesia, as a coastal state with a sovereign right to manage and utilize fish in EEZ, is considered to have criminal jurisdiction over the crime of illegal fishing.

The lack of institutional harmony between the law enforcement apparatuses at sea can also be resolved by codifying all of the regulations into a single master regulation, whether by forming an institution to head all of the existing law enforcers under a single chain of command or by merging all of the law enforcer apparatuses into a completely new institution with multiple authorities over multiple fields/sectors.

Hopefully, law enforcement attempts in Indonesian waters and seas will be able to transform itself into a sustainable practice in order to deter foreign fishermen from cautiously stealing this country's marine resources.



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