



## **THE SINKING OF FOREIGN FISHING VESSELS THAT COMMIT ILLEGAL FISHING IN INDONESIAN SEA TERRITORY IN REVIEW OF THE 2012 MEMORANDUM OF UNDERSTANDING**

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### **Abstract**

Indonesia has a vast territory, most of which consists of the sea. Indonesia's strength lies in its natural resources, particularly the abundant marine resources, especially in incredibly diverse fisheries. With the many benefits received by the Indonesian nation, it also brings issues such as limited surveillance capabilities at sea and Indonesia's strategically located territory that can provide opportunities for the exploitation of marine resources by irresponsible parties, particularly the most frequent criminal activity, which is illegal fishing by foreign parties, resulting in significant losses for the country. The problem statement encompasses two aspects for examination: firstly, whether Indonesia's act of sinking Malaysian-flagged vessels can be justified based on the 2012 Memorandum of Understanding between Indonesia and Malaysia; secondly, the legal efforts Indonesia must undertake to defend its territorial sovereignty from illegal fishing activities by foreign fishing vessels. The research method used was normative legal research, examining from the perspective of positive law. The research findings reveal discrepancies in Indonesia's actions of sinking Malaysian-flagged vessels based on the 2012 Memorandum of Understanding. Consequently, Indonesia has fulfilled its obligations as stipulated in the Fisheries Law. However, this fulfillment of obligations occurred without prior investigation into the previously agreed bilateral agreements.

**Keywords** : Illegal Fishing; Memorandum of Understanding; Exclusive Economic Zone.

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DOI : 10.31604/jips.v11i4.2024. 1321-1330

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## INTRODUCTION

Indonesia in the eyes of the world is famous for its nickname as a maritime country or world maritime axis as stated in Article 1 point 2 of Presidential Regulation Number 16 of 2017 concerning Indonesian Maritime Policy. This is because most of its territory is sea. Indonesia has more than 17 thousand large and small islands, which have an area of approximately 9 million km<sup>2</sup>, divided into 3 million km<sup>2</sup> of land islands, 3 million km<sup>2</sup> of sovereign sea waters between and around the islands, and 3 million km<sup>2</sup> of sea waters surrounding the sovereign sea as a 200 nautical mile wide belt with sovereign rights (S.K., 2009), so it has the right to explore and exploit its natural resources both above and below the surface of the sea and in the lower layers of the seabed.

Article 33 paragraph (3) of the 1945 Constitution states that "The land and water and the natural resources contained therein shall be controlled by the state and utilised for the greatest prosperity of the people". However, the reality reflects that Indonesia's natural resources are mostly controlled by foreigners, causing losses to the common people. The mandate in Article 33 of the 1945 Constitution must continue to be reviewed so that this country can remain in the international sphere without the need to abandon the spirit of popular sovereignty contained in its highest law.

Over time, the number of fishing cases in Indonesia's marine territory has increased. From this, it explains that illegal fishing is an act of taking fish illegally, and the act of taking fish that there is no regulation from the applicable provisions, and the activity of taking fish is not notified to the government authority in the field of fisheries. Illegal fishing is also an act of malpractice in utilising fisheries resources and this is included in illegal acts. Illegal fishing activities have been carried out by

Malaysian nationals, on 9 December 2014, Indonesia conducted an operation coded Sri Gunting and it turned out that there was one unit of ships from Malaysian nationals stealing fish in the waters of the Malacca Strait, Indonesia and on 8 January 2015 a ship sinking was carried out in the waters of Belawan, North Sumatra. In addition, there is evidence of 150 kilograms of stolen fish and has been auctioned. The sinking was carried out by blowing up the ship. The activity was carried out by the Ministry of Maritime Affairs and Fisheries (KKP) with the cooperation of the Indonesian National Navy (TNI AL) after obtaining permission from the court.

What has been done by Indonesia regarding the sinking of illegal fishing vessels owned by Malaysian citizens is something that is contrary to the bilateral agreement between the two countries in the form of "*Memorandum of Understanding (MoU) Between the Government of the Republic of Indonesia and the Government of Malaysia in Respect of the Common Guidelines Concerning Treatment of Fishermen by Maritime Law Enforcement Agencies of Malaysia and the Republic of Indonesia*" which was agreed on 27 January 2012 in Bali, Indonesia.

With the Memorandum of Understanding between Indonesia and Malaysia regarding the handling of fishermen by marine authorities, as stated in the agreement Indonesia is required to expel vessels originating from Malaysia, but in reality Indonesia is sinking illegal fishing vessels, especially Malaysian-flagged vessels. The Ministry of Maritime Affairs and Fisheries (KKP) carries out the sinking of illegal fishing vessels based on the Law of the Republic of Indonesia Number 45 of 2009 on the Amendment to Law Number 31 of 2004 on Fisheries. The consequences based on the 2012 Memorandum of Understanding (MoU) between Indonesia and Malaysia states that in the

event of acts or omissions committed by the parties, it does not reduce bilateral agreements contained in maritime boundaries, bilateral negotiations, sovereignty issues, and the application of international law. In addition, it also contradicts the 1969 Vienna Convention on the Law of Treaties related to Article 26 regarding the principle of *pacta sunt servanda*.

Based on the description above, the author puts forward the formulation of the problem as follows whether Indonesia's actions to sink Malaysian-flagged vessels that commit illegal fishing can be justified based on the 2012 Memorandum of Understanding between Indonesia and Malaysia, as well as legal efforts that can be made by Indonesia to maintain its sovereign territory. The purpose of this paper is to know, understand, and analyze the sinking of vessels owned by foreign nationals, especially Malaysians, who commit illegal fishing based on the 2012 Memorandum of Understanding between Malaysia and Indonesia.

## **RESEARCH METHODS**

The preparation in this research uses normative juridical research type. The meaning of the normative juridical research type is research that is focused on law through written norms that have been made and promulgated by authorised institutions and officials and have relevance to the problem. In addition, the framework is related to the problem approach through statute approach and conceptual approach. The statute approach is used to find out, identify, and discuss the laws and regulations that apply and are linked to the problems to be examined. In addition, the conceptual approach is used to study the understanding of scholars' opinions contained in various kinds of literature as a basic foundation in solving this problem.

## **DISCUSS AND RESULT**

### **Indonesia's Legal Position Towards the Sinking of Vessels Owned by Malaysian Citizens Who Commit Illegal Fishing**

Along with the development of technology in the marine sector in Indonesia's maritime sector, it has led countries to submit ownership claims over their sea areas. In particular, claims to sea areas submitted by archipelagic countries such as Indonesia, which are based on the unity of its islands. In addition, there are problems that are of particular concern, not only to Indonesia but also to countries around the world that have high potential for marine natural resources, namely illegal fishing. Illegal fishing has a negative impact on the country and will threaten the standard of living of fishermen.

On 9 December 2014, a Malaysian-flagged fishing vessel caught fish in waters entering WPP 571, around Pandang Island. Then, on 8 January 2015, the decision was mandated that the Malaysian-flagged vessel must be sunk. Based on UNCLOS international law of the sea regulated by the United Nations on sovereign rights related to fishing which is only allowed if it has obtained permission to fish in the area with both countries must have a bilateral agreement.

Bilateral agreements are closely related to international instruments. The context of international law is different from national law, as the two legal systems are completely separate and have no relationship of superiority or subordination. Indonesia adheres to dualism, which means that it prioritises national law over international law. Meanwhile, monism has an interrelated part between international law and national law.

According to Wisnu Aryo Dewanto (2016), a special feature of a

dualist state is the primacy of national law, therefore the country's constitution does not explicitly regulate the relationship between international law and national law. Therefore, Malaysia sees that Indonesia's decision can be categorised as dualism when Indonesia uses national law in carrying out vessel sinking actions mandated in Article 69 paragraph (4) of Law Number 45 of 2009, which states that "the investigator and/or fisheries inspector may, in performing function as referred to in section (1), take any special act in terms of burning and/or sinking of fishery vessel flying foreign flag based on adequate preliminary evidence". This shows that Indonesia has the right to sink Malaysian-flagged vessels that commit illegal fishing in Indonesian territory and are accompanied by concrete evidence, such as still using prohibited fishing gear to fish in Indonesian waters.

In essence, a country's jurisdiction has full sovereignty over its territory, whether by land, sea or air, which means that it will apply national law if there is a dispute in its jurisdiction. Basically, the concept of sovereignty is the first priority owned by a state regarding its jurisdiction. Therefore, the territory of the state becomes the main pillar regarding the supreme power entitled to its territory in accordance with the provisions of international law.

According to the Minister of Marine Affairs and Fisheries Regulation Number 18/2015, "Indonesia's marine waters are categorised into 11 Fisheries Management Areas (WPP), of which the marine waters of the Malacca Strait and Andaman Sea are classified as WPP 571, covering the marine waters of the provinces of Aceh, North Sumatra and Riau". The EEZ region has a sui generis (unique or different) legal status in relation to the exercise of rights and obligations. The sovereign rights are limited to exploration and exploitation of marine resources. The 1982 UNCLOS

outlines that the rights and jurisdiction of coastal states in the EEZ include "exploration and exploitation of marine resources; enacting laws and regulations relating to the exploration and exploitation of marine resources; construction of artificial islands and other permanent installations; and conducting marine scientific research and protection of the marine environment".

Meanwhile, the obligation of the coastal state of the EEZ is to respect the existence of the rights and obligations of other countries over the EEZ area. Article 27 paragraph 1 of UNCLOS 1982 explains that "*the extent of the coastal state's authority to enforce its laws against foreign vessels that violate the law in the territorial sea, inland waters or archipelagic waters is a manifestation of a state's jurisdiction*". Therefore, when a Malaysian-flagged vessel commits fish theft in Indonesian waters, it is only natural for Indonesia to sink the Malaysian-flagged vessel based on Law Number 45 of 2009.

In particular, Article 4 of Law Number 5 of 1983 on Indonesia's Exclusive Economic Zone states that "In the EEZ, Indonesia has sovereign rights, other rights, jurisdiction and obligations over the resources in the EEZ". Indonesia's authority over offences in the EEZ is limited to fisheries. It is this difference in authority that limits coastal states from fully exercising their sovereignty.

In the MoU, Indonesia agreed to the agreement with Malaysia. However, Indonesia did something that contradicts the MoU Article 3 letter b stipulates that "*action to be taken upon encroachment incidents/cases*", the first element is "*inspection and request to leave the area shall be conducted promptly towards all fishing boats, except for those using illegal fishing gears, such as explosives, electrical and chemical fishing gears*". This explains that there is an inspection and request to

leave the area, except for those using illegal fishing gears, such as explosives, electrical or chemical fishing gears. In the case discussed by the author, it implies that the Malaysian side feels unfair about the decision to sink the Malaysian-flagged vessel unilaterally.

According to Thomas Hobbes, the theory of justice is that an action can be considered fair if it is based on a mutually agreed agreement (Yamin & et al, 2023). This means that justice will be achieved with an agreement made in the agreement by both parties in order to create an interest of each party. However, in fact, it is not in accordance with the MoU, but Indonesia not only examines the Malaysian-flagged vessel, but the case is submitted to the North Sumatra District Court and the verdict is the implementation of vessel sinking. This is already not in accordance with the rules that apply to the MoU between Indonesia and Malaysia, Article 10 which states that "in the event of a dispute between the parties regarding interpretation and/or implementation and/or application, it will be resolved amicably through mutual consultation and/or negotiation between the parties through diplomatic channels, without reference to a third party or international court".

Indonesia sinks Malaysian-flagged vessels that have been proven to commit illegal fishing, which should be handled by Indonesia as Malaysian-flagged vessels are only carried out for express expulsion or notification to the Malaysian authorities. However, such action contradicts Article 26 of the 1969 Vienna Convention, explaining that states must comply with international agreements that have been in force with the principle of good faith. The international agreement agreed by Indonesia and Malaysia is a Memorandum of Understanding, which means that there are provisions in

written form that describe the initial description of the substance to be agreed between the parties, and has a certain period of time. According to Erhmann, the legal system applicable in Indonesia, namely Codified Roman Law, means that the highest position in the form of international agreements is a written legal agreement (Dewanto, 2013). So, an agreement must be implemented with the principle of *pacta sunt servanda* by the parties as the agreement contained in the MoU in practice is based on the principle of good faith and responsibility.

"Indonesia as a legal state law should be understood as an integrated system consisting of elements of institutional (institutional), point rules (instrumental) and the behaviour of the subjects of law (subjective and cultural elements)" (Marwiyah, et al. 2015). This means that Indonesia is a state of law that should be understood as an integrated system, consisting of institutions, legal rules, and the behaviour of the subjects of law. According to the preamble of the 1945 Constitution and its body affirms that Indonesia is a Unitary State of territorial integrity (Mahawijaya, 2015), meaning that it prioritises the principle of territoriality and the principle of sovereignty in order to maintain territorial integrity and law in Indonesia adheres to dualism.

Changes to international treaties must be ratified through domestic regulations (Aprianto, 2022). This means that a country that has made a treaty and has ratified it, then it must go through the transformation stage into national law so that it can be enforced. The transformation process is that international legal regulations follow the form or change form into national laws and the substance of the international legal regulations must be in accordance with the national legal policies of the

country concerned (Widagdo & et al, 2019).

There are two fundamental principles in the scope of national law and international law, namely national law which requires complying with the rules of state law, while international law emphasises the agreement on the principle of *pacta sunt servanda*. According to Charles G. Fenwick, states that international treaties have the binding force of international law to the state formed by the state's agreement to accept the principles and rules contained therein based on the theory of *pacta sunt servanda* (Kurnia, 2017). Under the *pacta sunt servanda* theory, once an agreement is made, as long as it is not contrary to applicable law, the agreement is binding on the parties (Fuady, 2013). However, Indonesia in carrying out the sinking of foreign fishing boats adheres to dualism so that national law has more perfect integrity than international law (Darusman, 2022).

According to Jean Bodin, the theory of sovereignty states that sovereignty is absolute and undivided (Koesrianti & et al, 2021). This means that the supreme and absolute power in a country cannot be divided in order to determine the law in the country. Jean Bodin's doctrine has had a major influence on the theory of sovereignty. However, until now there is still no certainty regarding the meaning of the theory of sovereignty. In its development, according to Tunkin, the character of sovereignty is supremacy within its territorial limits, so that the limit of the exercise of power is only within the territory of the country (Koesrianti & et al, 2021).

“Sovereignty in a State is closely associated with the region and Territory of a State is a place of refuge for the people as well as a place for the Government for organising and conducting its reign as the territory of a country consists of land, sea, and air”

(Cornelis, et al. 2014). This means that the Indonesian government has full sovereign rights over its territory, including land, sea and air. Despite having full sovereign rights, Indonesia still has an obligation to grant other countries the right of Peaceful Passage to cross a country's territorial sea. The meaning of crossing is when travelling in the territorial sea of a country with or without the intention of entering those waters, except for force majeure reasons (Anwar, 1989).

### **Indonesia's Efforts to Defend Sovereignty from Illegal Fishing Activities**

Vessels sinking actions carried out by Indonesian authorities are coordinated by the Indonesian Navy, Bakorkamla, and the Ministry of Maritime Affairs and Fisheries. The organisational structure of Bakorkamla, starting from "the Chairman, namely the Coordinating Minister for Political, Legal and Security Affairs; its members, namely the Minister of Foreign Affairs, the Minister of Home Affairs, the Minister of Defence, the Minister of Law and Human Rights, the Minister of Finance, the Minister of Transportation, the Minister of Maritime Affairs and Fisheries, the Attorney General of the Republic of Indonesia, the Commander of the Indonesian National Army, the Chief of the Indonesian National Police, the Chief of the National Intelligence Agency, and the Chief of Staff of the Indonesian National Army Navy" as stated in Article 5 of Presidential Regulation Number 81 of 2005 concerning the Marine Security Coordinating Agency. Also, the existence of the Water and Air Police (Polairud) is a unit within the Indonesian National Police that supports police tasks through water such as rivers or sea and air. From this, it implies that there are many agencies that have the authority to conduct surveillance in Indonesian seas.

The term Bakorkamla, which was contained in Presidential Regulation Number 81/2005 on Bakorkamla, has been changed to the Marine Security Agency (Bakamla). Bakamla always conducts security patrols in Indonesian waters. Bakamla's authority, among others, includes "conducting instant pursuit; stopping, examining, arresting, bringing, and handing over vessels to the relevant authorities to carry out further legal processes; and integrating security and safety information systems in Indonesian waters and Indonesian jurisdiction" as stated in Article 4 of Presidential Regulation Number 178 of 2014 concerning the Marine Security Agency. This explains that the authority must be exercised in an integrated and unified manner within the command and control of the Head of Bakamla.

The Indonesian government added regulations for security in marine areas related to vessel sinking contained in Law Number 45 of 2009 concerning Amendments to Law Number 31 of 2004 concerning Fisheries. In the scope of international law, Indonesia should pay attention to its agreements that have been made with Malaysia regarding if there are Malaysian fishing boats that commit illegal fishing in Indonesian territory, then the marine authorities only carry out expulsions, and vice versa, if Indonesian vessels commit fishing theft in Malaysian territory, then the Malaysian authorities only expel Indonesian vessels. This is due to the bilateral agreement that has been agreed between Indonesia and Malaysia based on the provisions of the 1969 Vienna Convention.

According to Article 1 point 5 of Law Number 45 of 2009 concerning Fisheries, explains that "fishing means an activity to catch fish at waters area which is not beaing cultured, by using any tools or by method, including activitie by ship for loading, transporting, storing,

handling, processing, and/or preserving fish". This means that people who commit illegal fishing use dangerous fishing gear or in any way can damage marine biota and this crime has provided a warning not to do so, because there are sanctions that will be given if they violate these provisions.

Factors that cause illegal fishing include the increasing demand for fish; insufficient supply of fish in other countries to fulfil their needs; and weak supervision in Indonesia's marine territory; as well as weak law enforcement in Indonesia (Maryani & Nasution, 2019). These factors have led to an increase in illegal fishing practices in Indonesian waters. The Ministry of Marine Affairs and Fisheries provides strict action in the form of sanctions in the form of vessel sinking to perpetrators who are proven to steal fish in Indonesian territory. This explains that the implementation of the sinking of fishing vessels of illegal fishing offenders is a form of State authority in securing and preserving fisheries resources at sea (Tobing & Setiawan, 2019).

The Indonesian government's efforts to tackle illegal fishing with the issuance of the Fisheries Law provide a legal basis for perpetrators who violate Indonesia's sovereign territory. Foreign fishermen who repeatedly enter Indonesian waters come from Malaysia, Thailand, Vietnam and the Philippines. This shows that there is no deterrent effect and illegal fishing activities will continue to be sustainable and structured. Indonesia's efforts to overcome illegal fishing activities are not easy and not enough to be done by the Government of Indonesia alone, there must be a lot of state participation involved, such as neighbouring countries that often commit illegal fishing in Indonesian territory (Muhamad, 2012).

The agreement agreed in 2012, regarding "*The Common Guidelines*

*Concerning Treatment of Fishermen by Maritime Law Enforcement Agencies of Malaysia and the Republic of Indonesia*", is expected to reduce the number of illegal fishing violations. In fact, foreign fishing boats, especially Malaysian-flagged ones, are still often found committing illegal fishing in Indonesian sea territory. On 22 October 2023, the Hunting Ship (KP) Hiu 16 as a ship patrolling the Indonesian sea territory, found a Malaysian-flagged foreign ship and when a hot pursuit was to be carried out, the Malaysian fishermen tried to escape by cutting the fishing net and moving to the grey area (overlapping claim) so that the Indonesian side could not catch the ship (KKP, 2023). Moreover, Malaysian-flagged vessels commit fish theft using trawls which are clearly prohibited from use as stated in Ministerial Regulation Number 2 of 2015 concerning Prohibition of the Use of Trawls and Seine Nets in the Fisheries Management Area of the Republic of Indonesia.

The case described previously is the last illegal fishing case as of 2023, in which the sanctions will be adjusted to the provisions in Law Number 45/2009 on fisheries. The rule of law is included in the principle of *lex specialis derogat legi generali*, meaning that special laws override general laws so that the special regulation that takes precedence is the Fisheries Law (Mahmudah, 2015). Indonesia has been right to take action against drowning based on the Fisheries Law, because the perpetrators of illegal fishing clearly violate state sovereignty and steal fisheries resources without regard to the jurisdiction of a country.

The decision to sink foreign fishing boats will not affect Indonesia's international relations with other countries. According to Professor of International Law at the University of Indonesia, Hikmanto Juwana stated that "there are five reasons the policy is worth supporting and will not worsen

relations between countries, namely no country in the world justifies its citizens who commit crimes in other countries, especially illegal fishing; the sinking action is carried out in Indonesia's sovereign territory and sovereign rights (EEZ); the sinking action is carried out on the basis of legal provisions as stated in Article 69 paragraph (4) of the Fisheries Law; other countries must understand that Indonesia is the aggrieved party of the criminal act; and the sinking process has taken into account the safety of the crew" (Efritadewi & Jefrizal, 2017).

Not only is the illegal fishing policy strengthened, but also in terms of fisheries development, there needs to be more attention from the government, the community, and other related parties (stakeholders), regarding the symptoms of fishing theft, overfishing, and other illegal actions that have a negative effect on the country and destroy the income of fishermen (Tribawono, 2013). It is hoped that the entire community, government, and related parties can resolve these issues in order to support the standard of living of the community, especially fishermen and also increase security officers to patrol the Indonesian sea area in a controlled and sustainable manner.

## **CONCLUSION AND RECOMMENDATION**

Based on the results of the previous discussion, Indonesia's action to sink Malaysian-flagged vessels that are proven to have committed illegal fishing in Indonesian waters is in accordance with legal provisions as stated in Article 69 paragraph (4) of Law Number 45 of 2009 concerning Fisheries. On the other hand, the action is not justified according to the 2012 MoU between Indonesia and Malaysia, because the MoU is a preliminary agreement which means that the agreement is only known by the parties to the agreement, unless the MoU is to be ratified into national law, then the



legal relationship in the MoU becomes more valid.

The efforts of the Indonesian government by enacting Article 69 paragraph (4) of Law Number 45 of 2009 concerning Fisheries, does not deter the perpetrators of illegal fishing, which is increasing every year for this criminal act. All efforts have been made by Indonesia, one of which is the existence of marine agencies, namely Bakamla in coordination with Polairud, which has the authority to protect Indonesian waters, especially areas that are very vulnerable to illegal fishing such as in the area of eleven Indonesian Fisheries Management Areas.

The relationship between national law and international law is an interlocking legal system. The two do have different components and bases of enforcement, but with many state practices that result in the two laws being one-sided. For example, one of the substances in the Fisheries Law is not in accordance with the MoU, but the reality is that the MoU is a memorandum of understanding containing initial agreements that must be better understood between the parties. It is hoped that there will be new rules that in detail discuss the position of the MoU so that there will be harmonization between national law and international law, especially in international agreements, and the state can comply in carrying out its obligations according to what has been agreed between each country.

Optimization in dealing with illegal fishing can be done with changes to the Fisheries Law and Marine Law. For example, the Fisheries Law has the substance of sanctions or fines carried out by foreign vessels that conduct "fishing in the Indonesian WPP with a sentenced to imprisonment for a maximum of six years and fined for a maximum of two billion rupiah" as stated

in Article 93 of Law Number 45 of 2009 concerning Fisheries. Meanwhile, the Marine Law has the substance of sanctions or fines, "every person utilizing of Marine space permanently without a location permit, it will be sentenced with imprisonment for maximum of six years and fined for a maximum of twenty billion rupiah" as stated in Article 49 of Law Number 32 of 2014 concerning Marine Affairs. It is hoped that in the future, sanctions and fines can be doubled and there is a threat of additional sanctions in the form of not being allowed to enter Indonesian territory in the next few years for perpetrators of illegal fishing.

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