

Application of the Passive National Principle to Excise Crimes that Occur in the Outside Port Limits Area on the Border of Indonesia and Singapore

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Abstract. Excise duty is an essential source of income for a country, including Indonesia. Therefore, through law enforcement officials, the State strives so that state revenue from excise taxes can enter with certainty. Unfortunately, many goods that should be excisable enter the territory of Indonesia without being prevented. One of the obstacles to law enforcement is related to the enactment of UNCLOS, which determines the existence of an area outside port limits that are used to enter goods without excise duty. By normative juridical methods, this paper concluded that the implementation of UNCLOS can be ignored by applying the principle of protection or passive national because the entry of goods without Excise is detrimental to Indonesia's national and economic interests.

Keywords: Excise; outside port limits; passive national principle

1 Introduction

Indonesia is an archipelagic country that God graces with abundant marine wealth. Indonesia has the 4th largest population in the world. The fishing potential in the marine sector is as much as 6.4 million tons per year, so Indonesia's competitors in the ASEAN region also have competitors in fisheries and marine affairs, which are profitable commodities in the sea[1]. In addition, Indonesia, with the broadest coastline, facilitates the entry of various trading commodities from other countries.

Since time immemorial, traditional royal states have had the right to collect goods entering the territory of their countries. The profit of the levy rights is one of the sources of income for the kingdoms that control the sea trade routes and ports. In the modern era, levies on such goods are known as excise duties. Goods that have specific characteristics are subject to the enactment of the Excise Law, such as tobacco products, ethyl alcohol containment drinks, and goods that contain ethyl alcohol or ethanol as contained in Article 2 of the Law of the Republic of Indonesia Number 39 of 2007 concerning Amendments to Law Number 11 of 1995 concerning Excise which explains that certain goods that have properties or the characteristics of excisable goods are certain goods whose consumption needs to be controlled, certain goods whose circulation needs to be monitored, certain goods whose use can hurt society or the environment and their use needs to be imposed by state levies for the sake of justice and balance [2].

One state apparatus assigned to supervise excisable goods is the PPNS Customs and Excise Investigator. By Indonesian criminal Law, the working area or jurisdiction of law enforcement is limited to the territorial scope of the State as regulated in Article 2 of the Criminal Code,

commonly known as the territorial principle. The territorial principle, which is also known as the territorial principle, is a principle that states that criminal law laws apply to all criminal acts (criminal acts) that occur within the territory of the State, whether carried out by its citizens or by foreigners. What is essential for this territorial principle, namely that the criminal act occurs within the territory of the State, in this case, the part of the Republic of Indonesia, or the criminal act is committed in Indonesia. This means that Indonesian law enforcement officials are not authorized to try a case that occurs outside the territory of the Indonesian State [3].

In addition to being subject to criminal law and criminal procedural law, law enforcement arrangements in the sea area are also subject to the provisions of international Law, namely the United Nations Convention on the Law of Sea (UNCLOS) of 1982, which has agreed, Indonesia has three boundaries of sea areas, namely the Territorial Sea Boundary, the Continental Shelf Boundary and the Exclusive Economic Zone (EEZ). One of the areas in question is the Singapore Strait, the boundary of Indonesia's territory with Singapore. In addition, it is also known as the Outside Port Limits (OPL) area or what is commonly called the Ship to Ship (STS) area, traffic separation scheme (TSS).

In 2018 the Directorate General of Customs and Excise (DJBC) of Capri cracked down on 349 vessels, and as of September 2019, 311 ships have been cracked down on used clothing smuggling. DJBC Kepri also thwarted the smuggling of mobile phones totalling 3,304 units of various brands such as iPhone, Samsung, Google Pixel, and other brands with a total value of IDR. 12 billion, potentially causing state losses of up to IDR 2.5 billion and thwarting the smuggling of 95,750 baby lobsters with a total value of IDR 12 M [4]. Even though actions like those taken above, the DGT Kepri can take more significant actions and save the country's economy with a more substantial number. But unfortunately, some normative and empirical obstacles still hinder the efforts of customs officials to enforce the Law in the Indonesian border area of Singapore.

Normatively, law enforcement is constrained by the territorial principle provisions and provisions of the 1982 *United Nations Convention on the Law of Sea (UNCLOS)* concerning *Outside Port Limits (OPL)* areas or commonly called *Ship to Ship (STS) areas*, *Traffic Separation Scheme (TSS)*. Such a free territory caused the smugglers to get a loophole in placing their ships over the region. From the ship, goods that should have been excisable were unloaded to small vessels that quickly entered Indonesian waters. These small ships are equipped with seven engines to beat the speed of boats owned by law enforcement officials ranging from Customs, Navy, or Polair, usually only equipped with four engines.

Overcoming the weaknesses of law enforcement, questions arise about how to address these weaknesses to optimize law enforcement against lawless practices at sea. Another principle can be applied in criminal Law, namely the principle of protection or the passive national code, which determines that the criminal provisions of a State apply to acts committed outside the territory but harming the national interest (State). The focus of passive nationality is contained in Article 4 of the Criminal Code, which determines that Indonesian criminal Law can be applied to any person abroad if committing an act that, according to Indonesian criminal Law, is a punishable act that interferes with Indonesia's sovereignty and economy.

2 Research Method

This research uses a normative juridical approach method. According to [5], normative legal research is research that utilizes secondary data as research material. Normative juridical research is legal research examining Pustaka material or secondary data. The specifications in

this study are analytical descriptive research. The data used is secondary data in the form of primary and secondary legal materials. Data collection techniques in this study were carried out with literature studies.

3 Result and Discussion

Article 4 of the Criminal Code specifies that criminal provisions in Indonesian Law are applied to everyone who commits outside Indonesia:

- One of the offences under Articles 104, 106, 107, 108, and 131.
- a crime regarding the seal issued and the brand used by the Government of Indonesia.
- Forgery of debt securities or certificate debt on dependents of Indonesia, on the dependents of a region or part of the territory of Indonesia, including the copy of talons, dividend marks or interest marks, which follow the letter or certificate, and marks issued instead of such letters, or use the notes above, which are forged or forged, as if they were genuine and not forged;
- One of the offences referred to in articles 438, 444, to 446 on sea piracy, article 447 on the surrender of watercraft to the power of pirates and article 479 letter j on unlawful possession of aircraft, article 479 letters I, m, n, and o on crimes threatening the safety of civil aviation.

According to [6], the core of the principle of protection is the focus of defence against the national interest, meaning that the criminal law legislation of a country applies to all people outside the territory of their country when committing crimes related to the security and integrity or economic interests of their country.

Referring to the provisions of article 4 of the Criminal Code, four things want to be protected from this article 4, namely firstly, the security of the country, the second currency issued by the State or bank, including against the circulation of counterfeit money as well as stamps given and brands used by the third Indonesian government related to debt securities or debt certificates for Indonesian dependents on the dependents of an area or the fourth part of Indonesia's territory related to shipping. The rationale of the passive national principle is that every sovereign State is generally entitled to protect its legal interests, even if it is legal. Thus, Indonesian Criminal Law can be required against anyone, both citizens and non-citizens, who violate the legal interests of the Indonesian State anywhere and especially abroad—for example, committing major crimes against the security of the State and the head of the Indonesian State [7]. This Passive National Principle is based on the principle of *Interest reipublicae quod homines conservator*, which means a state's interest, so its citizens are protected. Regarding the direction of passive nationality, Van Hamel stated : “... *Voorts het passieve (Realprincipe, schutzprincipe, beschermingsbeginsel) terbescherming van nationale rechtsbelangen, algemeene of bijzondere, zit het dan, in verband met het vorige, tegenover, nationale ruimer dan tegenover vreemdelingen, mee onmisbaar.* (... for the principle of passive nationality (real principle, real principle, principle of protection) to protect the national interest, both general and special, although with respect to the previous principle is also necessary, but against citizens the State is more protected than foreign nationals [7].

About Article 3 on the territorial principle, Hieariej said that in the case of a foreign sea vessel, if it is in Indonesian waters, Indonesian criminal Law applies. When it is on the high seas, free sea, or in this case, the area referred to as *Outside Port Limits (OPL)* or what is commonly called *the Ship to Ship (STS) area, the Traffic Separation Scheme (TSS)*, then the Criminal Law of the country where the ship is registered or refers to the flag used by the boat. Regardless of whether the vessel is on the high seas or in the sea of its territory, the most

significant area does not belong to the Indonesian criminal jurisdiction, referring to the territorial principle in criminal Law or the provisions of UNCLOS.

However, suppose it refers to the principle that wants to be protected based on the principle of protection, namely the protection of the national interest. In that case, it means that the criminal Law of a country applies to all people outside the territory of their country if they commit crimes related to the security and integrity or economic interests of their country, then to foreign ships that are on the high seas or in the *Outside Port Limits* area (OPL) can be enforced by Indonesian criminal Law, considering that Indonesia's economic interests are significantly harmed by the activity of entering non-excite goods in Indonesian territory.

Moreover, this is related to Indonesia's strategic location in the Southeast Asian region. Southeast Asia's maritime location is prone to various crimes, such as piracy and maritime terrorism. The Strait of Malacca is also the most vulnerable in the world to potential political conflicts and environmental disasters. The strait is one of the most important shipping lanes in the world, accounting for a third of world trade and half of its oil shipments include 80 per cent of the oil and gas imports of Japan, Taiwan, South Korea, and China. The strait is also one of the most dangerous maritime regions in the world for possible transnational crimes [8].

Today's application of the national principle does not stop at the four types of crimes referred to in Article 4 of the Criminal Code. Still, it has also extended to other crimes, including trafficking. In its development, Indonesia as a sovereign country considers that the Crime of trafficking is severe and threatens the legal interests of the Indonesian State. Therefore, this principle of passive nationality is enforced in its arrangements, especially in the criminal code [9].

Article 568 of the Criminal Code reads : "Any person outside the territory of the Republic of Indonesia who provides assistance, convenience, means or information for the occurrence of trafficking crimes shall be punished with the same Crime as a maker as referred to in Article 555.

In practice, the interpretation of the passive national principle is not limited to the interests of a national and public interest but also claims of a personal nature. Alternative changes in the theory of international Law practice have given birth to various new and actual interpretations [10]. Two examples of the application of the national principle are the case of the murder of his older half-brother, Kim Jong Un, and the Leader of North Korea, Kim Jong Nam. North Korea demanded that the settlement of the murders that occurred in Malaysia be carried out in North Korea using passive national principles.

North Korea uses *the Passive Nationality Principle (the Passive Personality Principle)* to try to take over the case of a quo and prosecute the perpetrators. This principle allows a country to make claims and declare its jurisdiction over a criminal act that occurs abroad because the perpetrator is a foreigner. Still, the victim is a citizen of his country. Foreigners who commit an illegal act abroad and inflict harm on their citizens, including countries whose citizens are victims, can file claims and assert their jurisdiction to carry out legal proceedings. This principle is justified based on the protection of very vital state interests [11].

In the case of the assassination of Kim Jong Nam it is a threat to the security and stability of the country because one of the potential successors of the leader of the country was killed. Another thing to remember is that Malaysia is not the most disadvantaged party because the government is only a place (*locus*) and time (*Tempus*). So the government has no harm, both material and immaterial, for the murder of Kim Jong Nam [11]. Likewise, the case of Time magazine's humiliation of the family of former Indonesian President Soeharto. Suharto's outgoing lawyers made a report against Time Magazine to the police. But in its development, his criminal case was not processed. A civil suit that was later heard in Indonesia. In the case of

the hijacking of the Singapore-flagged Kota Budi Ship in Nigerian waters, there are several possibilities for the use of jurisdiction.

According to the concept of territorial jurisdiction, Nigeria is the one who has the authority to exercise its territorial jurisdiction in handling the Kota Budi ship hijacking case because the place where the ship hijacking incident occurred was in the Nigerian sea waters. Suppose it relies on the concept of personal jurisdiction, which is principled in passive nationality. In that case, the party that can exercise the jurisdiction of his country based on the jurisdiction of tolerant race is China. The Budi City hijacking case caused Chinese citizens to become kidnapping victims. So based on this principle, China has jurisdiction to take care of the case of the hijacking of the Kota Budi ship, punish the pirates who have kidnapped five Chinese citizen sailors, and provide diplomatic protection to the five citizens. Extraterritorial jurisdictions can also be enforced. In this case, China and Singapore have the power to exercise their jurisdiction because, according to the concept of extraoral jurisdiction, a state in international Law can exercise its jurisdiction in territories that do not include its environment. In the case of the Hijacking of the Kota Budi Ship, Singapore became the country that owned the ship and was authorized to prosecute the losses of the hijacking of his craft that occurred outside the territory of his control.

Meanwhile, China is also harmed and victimized by this ship hijacking problem because five of its nationals were kidnapped, so China could also impose its exterritorial jurisdiction in prosecuting, investigating the case, and protecting its five abducted nationals outside its territory [12].

According to the author, in the case of the Kota Budi Ship, China and Singapore do not need to use the extraterritorial principle but use the code of protection or the direction of passive nationality where in that case, Chinese nationals and ships belonging to Singapore are victims of the Crime. The principle of protection in UNCLOS is recognized as relating to the goodwill of foreign vessels to take advantage of and respect the common right to the sea as a means of shipping for the common interests of the international community, not to undermine the economy of a country, in this case, Indonesia. Criminal Law exists to punish those who deliberately cause harm to the other party.

Article 73 paragraph (1) of UNCLOS 1982 explains that if a foreign vessel does not comply with the fisheries laws and regulations of the coastal State in the EEZ, then the coastal State may board, inspect, arrest and carry out judicial proceedings against the foreign vessel, as necessary to ensure the observance of the laws and regulations established by the provisions in UNCLOS 1982 [13]. More certainly, in the Criminal Code Bill, the national principle of passive is described in more detail in Article 5, namely:

The criminal provisions in the Law apply to any person outside the territory of the Unitary State of the Republic of Indonesia who commits a criminal act against the interests of the Unitary State of the Republic of Indonesia related to:

- state security or constitutional life processes;
- the dignity of the President, Vice President, and Indonesian Officials abroad;
- currency, seals, state stamps, seals, or securities issued by the Government of Indonesia, or credit cards issued by Indonesian banks;
- Indonesia's economy, trade, and banking;
- safety or security of shipping and aviation;
- safety or security of Indonesian national or State buildings, equipment, and assets;
- safety or security of electronic communication systems;
- Indonesia's national interest as stipulated in the Law; or

- Indonesian citizens based on international agreements with the country where the Crime Occurred

The practical problem between Indonesia and Singapore is about which countries have the authority to crack down on criminal acts on ships on the high seas. Based on the provisions of Article 5 letter d of the Criminal Code Bill above, it is clear that Indonesia's jurisdiction to enter foreign-flagged vessels suspected of smuggling goods can be carried out, especially if the Criminal Code Bill has been passed. Goods are supposed to be excisable but not related to Indonesia's economic interests, so they are worthy of being enforced by passive national principles by law enforcement officials. With the enactment of Article 5 of the Criminal Code Bill later, the provisions of UNCLOS on the jurisdiction of flagged ships can be ignored.

4 Conclusion

Based on the discussion, it can be concluded that in the event of smuggling of goods without excise duty by ships on the high seas with the help of small vessels to enter Indonesian waters, Indonesian law enforcement officials can enter, board, and take legal action according to Indonesian Law against foreign-flagged ships that are above outside port limits. The provisions of UNCLOS are intended for the common security and comfort of the sea as a legacy of humanity, not to be used to commit crimes. Thus, if the provisions of UNCLOS are used in bad faith, they can be ignored using the national principle of passive according to the applicable criminal Law.

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