

Encyclopedia of Public International Law in Asia

VOLUME 2 *Southeast Asia*

EDITED BY SEOKWOO LEE

BRILL | NIJHOFF



Encyclopedia of Public International Law in Asia

General Editor

Seokwoo Lee
Inha University Law School

Managing Editor

Hee Eun Lee
Handong International Law School

State Volume Editors

Volume I
Northeast Asia

China
Jiangyu Wang
City University of Hong Kong
School of Law

Japan
Atsuko Kanehara
Sophia University

Korea
Seokwoo Lee
Inha University Law School

Mongolia
Battogtokh Javzandolgor
National University of Mongolia

Taiwan
Dustin Kuan-Hsiung Wang
National Taiwan Normal University

Blake C.Y. Wang
National Taipei University

Volume II
Southeast Asia

Indonesia
Juwana Hikmahanto & Arie Afriansyah
Universitas Indonesia

Malaysia
Mary George & Usharani Balasingam
University of Malaya

Philippines
Rommel J. Casis
University of the Philippines

Singapore
Kevin YL Tan
National University of Singapore

Thailand
Kitti Jayangakula
Thammasat University

Viet Nam
Hai Yen Trinh
Diplomatic Academy of Vietnam

Volume III
Central & South Asia

Bangladesh
Muhammad Ekramul Haque
University of Dhaka

Central Asia
Sergey Sayapin
KIMEP University

India
Rajesh Babu Ravindran
Indian Institute of Management

Iran
Jamal Seifi
Iran-United States Claims Tribunal

Sri Lanka
Wasantha Seneviratne
University of Colombo

The Library of Congress Cataloging-in-Publication Data is available online at <http://catalog.loc.gov>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISBN 978-90-04-38877-2 (set)

ISBN 978-90-04-46473-5 (volume 1, hardback)

ISBN 978-90-04-46474-2 (volume 2, hardback)

ISBN 978-90-04-46475-9 (volume 3, hardback)

Copyright 2021 by Koninklijke Brill nv, The Netherlands.

Koninklijke Brill nv incorporates the imprints Brill, Brill Nijhoff, Brill Hotei, Brill Schöningh, Brill Fink, Brill mentis, Vandenhoeck & Ruprecht, Böhlau Verlag and V&R Unipress.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher. Requests for re-use and/or translations must be addressed to Koninklijke Brill nv via brill.com or copyright.com.

This book is printed on acid-free paper and produced in a sustainable manner.

Contents

| | |
|--------------------------------|-------|
| Introduction | XXVII |
| Acknowledgements | XXX |
| State Volume Contents Overview | XXXI |

Indonesia

Volume Editors: Hikmahanto Juwana & Arie Afriansyah, *Universitas Indonesia*

| | |
|----------------------|---|
| List of Contributors | 3 |
|----------------------|---|

| | |
|------------------|---|
| Country Snapshot | 5 |
|------------------|---|

| | |
|-----------------------|---|
| State Report Overview | 6 |
|-----------------------|---|

A. *The State in International Law*

| | | |
|-------|---|----|
| 1 | History & Theoretical Approach of Indonesia in International Law | 11 |
| 1.1 | Indonesia's Approach to 'Law' and 'International Law' | 11 |
| 1.1.1 | <i>The ICCPR, UNCAC, and Anti-Terrorism Resolutions in Practice</i> | 11 |
| 1.1.2 | <i>The Prevalent Interest of Sovereignty over Indonesia's Territories</i> | 12 |
| 1.1.3 | <i>The Government of Indonesia's Inconsistent Position on International Law in Practice</i> | 12 |
| 1.2 | Sources of International Law | 13 |
| 2 | Statehood & Sovereignty | 17 |
| 2.1 | Evolution and Creation of the State | 17 |
| 2.1.1 | <i>Different Point View on a State</i> | 17 |
| 2.1.2 | <i>Theories on Origins of State</i> | 18 |
| 2.1.3 | <i>International Law and its Contribution</i> | 19 |
| 2.1.4 | <i>Indonesia Evolution under International Law</i> | 20 |
| 2.1.5 | <i>Islam's Contribution to the Evolution of Indonesia</i> | 20 |
| 2.1.6 | <i>Western Contributions in the Evolution of Indonesia</i> | 21 |
| 2.1.7 | <i>Conclusion</i> | 21 |
| 2.2 | State Succession – Territory (Indonesian Territorial Case Post-Colonial) | 21 |

- 3 Territory & Jurisdiction 25
 - 3.1 Authority and Sovereignty over Territory 25
 - 3.2 Acquisition or Disposition of Territory – Indonesia's Claim of Timor Leste 28
 - 3.3 International Cooperation in Adjudication and Enforcement (MLA Agreement) 31

- 4 Sovereign/State Immunity 34
 - 4.1 Immunity of States from Jurisdiction 34

- 5 State Responsibility 36
 - 5.1 Conditions for International Responsibility 36
 - 5.2 Acts of State – Attribution, Responsibility & Defenses 37
 - 5.2.1 State Responsibility and Attribution in Indonesia 38
 - 5.2.2 Defense for the Internationally Wrongful Act in Indonesia 40

- 6 Relationship between International & Domestic Law 42
 - 6.1 Theories of International & Domestic Law – Monism, Dualism 42
 - 6.1.1 The Theory of the Relation between Domestic Law and International Law 43
 - 6.1.2 Indonesia's Position within the Theories 45

- B. Institutional Relations

- 8 Diplomatic & Consular Relations 51
 - 8.1 Diplomatic & Consular Personnel and Immunity 51

- 12 Settlement of Disputes 53
 - 12.1 Enforcement of International & Foreign Awards 53

- C. Particular International Law Subjects

- 13 International Economic Law 57
 - 13.1 International and Regional Trade Treaties and Bodies 57
 - 13.2 Foreign (Direct) Investment Law 59
 - 13.2.1 Scope of Application 60
 - 13.2.2 Investment Institution 60
 - 13.2.3 Entry and Approval of New Investments 60
 - 13.2.4 Relationship to Other Laws 61
 - 13.2.5 Investment Incentives 62
 - 13.2.6 Investor Rights 63
 - 13.2.7 Dispute Settlement 63
 - 13.2.8 Status of Investment Treaties and Involvement in Investor-States Dispute Settlement (ISDS) 64
 - 13.2.9 Unique Features 65

Territory & Jurisdiction

3.1 Authority and Sovereignty over Territory

The concept of state sovereignty is the highest power of a country. Nevertheless, state sovereignty only applies to people, objects, and events within the territorial boundaries of the countries concerned. In other words, sovereignty is limited to another country's territorial boundaries. This means that a country only has the authority to carry out its government in the areas that have become part of its power.

The concept of state sovereignty for Indonesia is regulated in Law No. 43 of 2008 concerning State Territories. Article 3 of Law No. 43 of 2008 aims to:

1. guarantee the territorial integrity of the country, the sovereignty of the country, and order in the border region, in the interests of the welfare of the whole nation;
2. uphold sovereignty and sovereign rights; and
3. regulate management and use of national territory and border areas, including monitoring of boundaries.

Article 4 of Law No. 43 of 2008 further stipulates that the sovereignty of the state of Indonesia covering land, waters, seabed, and the land underneath, as well as the air space above it, including all sources of wealth contained therein. The urgency of Indonesia's sovereignty has subsequently been affirmed in Law No. 3 of 2002 concerning National Defense. Article 4 of Law No. 3/2002 stipulates that national defense aims to safeguard and protect national sovereignty, the territorial integrity of the Unitary State of the Republic of Indonesia, and the safety of all nations from all forms of threats

In the context of land sovereignty, Indonesia is bordered by the territory of Malaysia, Papua New Guinea (PNG), and Timor Leste. This can be seen in Article 6 paragraph (1) of Law No. 43 of 2008. Paragraph (2) further states that the State Territory Boundaries as referred to in paragraph (1),

including the coordinates, are determined based on bilateral and/or trilateral agreements.

The border between Indonesia and Malaysia is generally set based on the Dutch-British Agreement of 1891, which is located on the island of Kalimantan/Sebatik. The 1891 Agreement generally explicitly uses the parameters of geographical coordinates in addition to using natural boundaries. Even though the Agreement has been using geographical coordinates, the exact position of the boundaries of the field remains very difficult to determine because of the geographical situation that makes it extremely difficult and impossible to do a determination in the field. Article V of the 1891 Agreement stated that the exact position of the boundary line would be determined through a further agreement. The survey effort and border enforcement as a follow-up to the 1891 Agreement had been carried out by the Dutch and British since 1912 which finally succeeded in formulating the 1915 Agreement and the 1928 Agreement which emphasized in more detail the limits referred to by the Treaty of 1891. Therefore, in 1973, through a Memorandum of Understanding 1972, the Governments of Indonesia and Malaysia formed a Joint Boundary Committee which specifically served to emphasize border as referred to by these Agreements. The Joint Committee has conducted survey and mapping activities in the field of unclear boundaries and has produced a kind of agreement on the location of the boundary pillars.

As for PNG and Timor Leste, Indonesia already has an agreement with PNG concerning the territorial borders and disputes that were signed on December 13, 1980. It has also bilateral agreements with Timor Leste regarding territorial borders and disputes. The Provisional Agreement (PA) between the two countries was agreed to in 2005. Only 3% of the territory had not been agreed upon in terms of the assertion of boundaries between

the two countries. Timor Leste wants to settle this dispute with the Treaty 1904, but Indonesia wants to resolve it by using the PA, especially article 6, whose contents call for the affirmation of the boundaries taking into account the conditions of local communities living around the border. Those people who live on the border still use Rupiah, an Indonesian language, and have close social and cultural relations with Indonesian people who specifically live on the border.

In the context of sovereignty at sea, Indonesia has a very important contribution to the development of maritime law. Sovereignty in the sea begins with the Declaration of Djuanda, 1957 which defines Territory Indonesian waters as "All the waters around, between and connecting the islands or parts of islands including mainland of Indonesia state irrespective of area or width are parts reasonable than the mainland area of Indonesia and as such is part of national waters which are under absolute sovereignty of the Indonesian state". Article 1 paragraph 1 of the Law No. 6 of 1996 regarding Indonesian Waters states that "an archipelagic state is a country composed entirely of one or more islands and may include other islands". Indonesia's status as an archipelagic state is stated either in the 1957 Djuanda Declaration, the Law No. 6 of 1996, or UNCLOS. This was further solidified by Indonesia by putting out the Islands State Conception in the 2nd amendment to the 1945 Constitution Chapter IXA on the territory of the country. Article 25E states that "Unitary State of the Republic of Indonesia is an archipelagic state characterized by the archipelago with territories whose boundaries and rights are determined by law".

Regarding the concept of the archipelagic state, Indonesia further issued Government Regulation No. 38 of 2002 on the Geographic Coordinates Dots Indonesian archipelagic baselines, as amended by the Government Regulation No. 37 of 2008 concerning the Geographic Coordinate List of the baselines of the Indonesian archipelago. Article 2 Paragraph (1) of this regulation states that the government draws baselines to determine the width

of the territorial sea. Whereas the withdrawal of archipelagic baselines is carried out using archipelagic straight baselines, ordinary baselines, straight baselines, bay cover lines, river mouth lines, canals, and closing lines at the port.

In the context of Indonesia's ownership of small islands, especially the outermost islands which border directly with neighboring countries, Indonesia still faces problems. The case of the islands of Sipadan and Ligitan with Malaysia has given lessons to Indonesia internationally. The Indonesian government issued the Presidential Decree No. 78 of 2005 concerning the Management of the Outer Small islands. The Decree aims to:

1. Maintain the integrity of the Unitary Republic of Indonesia, national security, national defense, and creating regional stability;
 2. Utilize natural resources in the framework of sustainable development; and
 3. Empower the community to improve welfare.
- Economic Exclusive Zone (EEZ) is also part of the authority of one state to explore and exploit it. The EEZ of Indonesia covers the sovereignty, jurisdiction, rights, and duties of Indonesia over the sea as wide as 200 miles from the baseline around the Indonesian archipelago. It is applicable under the Government Announcement dated March 21, 1980, which was then entered into in Law Number 5 of 1983 concerning Indonesian EEZ. In this Exclusive Economic Zone, Indonesia is one of the coastal countries that has and implements:
1. The sovereign rights to explore and exploit, manage and conserve biological and non-biological natural resources from the seabed and the underlying land and water on it and other activities for the exploration and economic exploitation of the zone, such as hydropower, and wind.
 2. The jurisdiction related to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.
 3. Other rights and duties under the Convention of Law applicable sea.

The sovereign rights of Indonesia as a coastal state referred to above are not the same or cannot be equated with full sovereignty which is owned and exercised by Indonesia over the territorial sea, the archipelago waters, and the inland waters of Indonesia. Based on the foregoing, sanctions threatened at EEZ of Indonesia differ from sanctions threatened at the waters that are under the sovereignty of Indonesia. Other rights under international law are the right of Indonesia to carry out law enforcement and hot pursuit of foreign vessels that violate the provisions of the Indonesian laws and regulations concerning EEZ. Indeed, Indonesia has to respect the rights of other countries, such as shipping and flight obligations (freedom of navigation and overflight) and freedom of the laying of submarine cables and pipelines. Regarding the seabed and the subsoil, the sovereign rights, jurisdiction, rights and obligations of Indonesia are set out according to the laws of the continental shelf of Indonesia, as well as agreements between Indonesia and neighboring countries, and the provisions of applicable international law. At Indonesia's EEZ, freedom of shipping and international aviation, as well as the freedom to install undersea cables and pipes, are also recognized by the applicable principles of the International Sea Law.

Besides the land and sea sovereignty, Indonesia also has the authority and sovereignty over Indonesia air space that is referred to in article 5 of Law No. 1 of 2009 concerning Aviation, which states that Indonesia is fully and exclusively sovereign of Indonesian airspace. The air space has a very important meaning for Indonesia, including aspects of regional integrity and national security, which must be utilized as well as possible. Indonesia considers that the air space has a strategic function as a valuable national asset, especially for defense and security interests.

In the event of a violation of sovereignty from a foreign aircraft that enters the Indonesian airspace, Law No. 1 of 2009 does not use the term

"violation of sovereignty for foreign aircraft entering into Indonesian airspace without permission." The term used is a violation of sovereign territory, and it also does not specify who can violate the sovereignty of Indonesia. Therefore, in the absence of special arrangements for who can violate Indonesian sovereignty, it can be concluded that all types of aircraft, both military and civilian, can be the perpetrators of violations of Indonesian sovereignty territory.

Indonesia, in making regulations for its airspace, has established Air Defense Identification Zone (ADIZ), as stipulated in the Government Regulation No. 4 of 2018 concerning Safeguarding the Airspace of Indonesia. In Chapter II, Article 6 paragraph (2), concerning the determination of the status of airspace and airspace it is explained that in addition to the determination of the airspace, the government can establish an ADIZ (Air Defense Identification Zone). In addition to Article 9 paragraphs (1) and (2), it is explained that ADIZ is certain airspace above the land and/or waters specified for identification purposes aircraft for the benefit of national defense and security. The application of ADIZ on Java Island including Madura and Bali as a whole has not yet accommodated the interests of defense and security of Indonesia as a sovereign state over its territorial territories. The problem of implementing ADIZ in Indonesia is a complicated matter. It means that Air Traffic Control (ATC) must function to identify foreign aircraft that will enter the national air sovereignty area of a country. Air defense radar is also always on standby for 24 hours to identify all movements that enter national airspace.

Besides air space, Indonesia also is concerned regarding outer space as the consequence of the ratification of the 1967 Space Treaty by Indonesia. Indonesia finds that its geographical position is always unprofitable. For example, the use of Geo Stationary Orbit (GSO) at the top of the equator is only beneficial to the developed countries because of limited space. Even if a straight line is

drawn vertically upwards, the GSO position is in the upper region of Indonesia, but Indonesia has no power to prohibit the operation of various foreign satellites to operate.

Maskun

3.2 Acquisition or Disposition of Territory – Indonesia's Claim of Timor Leste

East Timor experienced three historical phases in its path, from the colonial era, the period of integration with Indonesia, and the period of its independence from Indonesia. All three phases are passed by Timor Leste with full control of international law. In this connection, this heading will describe how the status of the territory of East Timor was obtained and determined through public international law, and the decision of the International Arbitration Court.

Historically, the status of the territory of Timor Leste as a sovereign territory began from the recognition of the area by the international communities, especially by the nations of Europe, China, and India. The appeal of East Timor as a fraction of the Big Island called East Nusa Tenggara, which was called West Timor in the colonial era in the west, was due to the exoticism of sandalwood products. The charm of East Timor sandalwood invited the foreign nations to establish trade with the East Timorese people through a barter mechanism. For example, around the 6th century, a Chinese trader named Hsing Cha Seng came to East Nusa Tenggara carrying ceramics and silk to be bartered with sandalwood. Likewise, the Indians with the same purpose brought horses from Arabia. The center of sandalwood international trade took place in the 17th and 18th centuries located in the *Wehale Coast* region.

It was also the sandalwood charm that later provoked the European attraction to come to East Timor at that time. In historical records,

the Portuguese were the first Europeans who came to East Timor for commercial and missionary purposes. There are two versions of the historical record that mention exactly when the Portuguese landed in East Timor. First 1511, when the Portuguese explorer Alfonso de Abreu Karsama, and a cartographer Francisco Rodriquez, toured the island of East Timor to make a map of the sandalwood-producing island. The second version of history that mentions the first arrival of the Portuguese to East Timor was in 1519 when a Portuguese explorer named Ferdinand Magellan set his first foot on the island aboard a Spanish-flagged expedition. Regarding this historical difference, historians only agreed on one thing that the Portuguese's main purpose for East Timor was not initially intended to carry out territorial colonization, but rather to carry out missionary missions. This is proven by historical data that in 1589, the Portuguese sent priests from the Dominican Friars to the Santa Cruz area as they called it to East Timor to build a missionary center in Kupang.

The change of the Portuguese mission to East Timor from missionary to territorial colonization occurred in 1641 which was marked by the East Timorese rebellion against the Portuguese. At that time several local authorities, especially those living in the international trade area in *Wehale*, controlled part of the coast of Timor. However, finally, in 1642 the Portuguese were able to control the situation after their troops won the war in the *Atapupu* area, which is an area on the North Coast of Timor that is now part of the Belu Regency of East Nusa Tenggara.

The contact of the East Timorese with the Dutch began with their arrival on the island in 1643 with the main objective of participating in the trade of sandalwood by establishing several trade agreements with the local authorities. In 1947, the Dutch moved the VOC headquarters from Solor to Kupang. In 1749, the Dutch authorities managed to control the Kupang area to strengthen its