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Editorial Office: Faculty of Law, Sriwijaya University
Jalan Srijaya Negara, Palembang, South Sumatra 30139, Indonesia
Phone: +62711-580063 Fax: +62711-581179
E-mail: sriwijayalawreview@unsri.ac.id | sriwijayalawreview@gmail.com
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Legal Certainty of Cabotage Principle Regarding Sea Transportation in Indonesia

Annalisa Y^a, Murzal^{a*}, and Rizka Nurliyantika^a

^{a*} Faculty of Law, Universitas Sriwijaya, Indonesia. Corresponding author: murzalzaidan1960@gmail.com

Article	Abstract
<p>Keywords: Cabotage Principle; Legal Certainty; Passenger and Freight Transport; Sea Transportation.</p> <p>Article History Received: Nov 28, 2020; Reviewed: Jan 27, 2021; Accepted: Jan 29, 2021; Published: Jan 31, 2021.</p> <p>DOI: 10.28946/slrev.Vol5.Iss1.974.pp71-85</p>	<p>Shipping between domestic ports must be transported by ships with Indonesian flags and operated by national shipping companies, meaning the cabotage principle. The aim is to prevent and reduce dependence on foreign ships carrying out Indonesia's maritime territory. However, in regulating and implementing the cabotage principle, it is not sure that it can be applied absolutely, which can be interpreted as not reflecting legal certainty. This study aims to analyze the legal certainty of implementation of the cabotage principle in Indonesian territorial waters. This research is a normative study that uses legal, historical, interpretation and case approaches. The case and interpretation approaches are used to examine the cabotage principle concept in legislation and several relevant cases brought to Indonesian courts. The results shows that the regulation of the cabotage principle on sea transportation is found in the form of laws, presidential regulations, presidential instructions and ministerial regulations. However, in other various regulations, the cabotage principle does not apply absolutely (semi-protectionist) or inconsequently. On the one hand, this is because it prohibits foreign ships from operating in Indonesian territory to carry passengers and/or goods between islands or ports. On the other hand, foreign ships are allowed for other activities that do not include carrying passengers and/or goods with certain conditions and approval from the government. The application of the cabotage principle based on judges' considerations in cases submitted to the State Administrative, Supreme and the Constitutional Courts has fulfilled legal certainty according to the Shipping Law. However, the protection of national Shipping must be prioritized, and the use of foreign ships should be considerably tightened unless Indonesian-flagged vessels are not insufficiently available.</p>

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INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS 1982), which has been ratified through The 1985 Law No. 17, regulates the sea's legal regimes, including the legal regime Archipelagic State as a whole. The Archipelagic State's legal regime has a significant

meaning and role in strengthening Indonesia's position as an archipelagic state. Based on the 1982 UNCLOS, it is stated that the total of Indonesia's sea area is 5.9 million km², consisting of 3.2 million km² of territorial waters and 2.7 km² of Exclusive Economic Zone waters. This water area does not include the continental shelf. It makes Indonesia the biggest archipelago in the world.¹ Meanwhile, based on Indonesian maritime experts' calculations, it is estimated that around 90% of international trade is transported by sea and 40% of these international trade routes pass through Indonesian territorial waters.²

Indonesia has implemented the cabotage principle, which is the principle of granting exclusive rights to the transportation of goods and passengers in the country by national sea transportation companies using the Red and White flag and Indonesian nationality crew. Domestic sea transportation was previously dominated by foreign vessels and was not recorded in Indonesian vessels. It makes local transportation businesses underdeveloped and tends to stagnate.³ Thus, the implementation of the cabotage principle is not optimal. However, since the cabotage principle's implementation in 2005, the number of national merchant vessels has grown significantly.⁴ The national shipping industry's significant growth is the fruit of the cabotage principle where the national fleet (ships) in 2005 amounted to 16,142 fleets and in 2019 increased to 32,587 fleets.⁵ The development and procurement of national water transportation fleets are carried out to empower national water transportation and strengthen the national shipping industry into a vital vehicle that supports national unity and integrity.⁶

The principle of cabotage has been known from the start in Shipping and its development. This principle is also known in the world of aviation,⁷ but has the same concept, which is a form of state sovereignty. Under the principle of cabotage, the state has the prerogative right to prohibit foreign vessels' operation between two or more sites in the territory of the state.⁸ The cabotage principle is the exclusive right of a country to implement its laws and regulations in the fields of land, water and air within its territory. However, the cabotage principle regulation and its application need to be analyzed because the norms regulating the cabotage principle need to be proven whether there are regulations that cause a conflict of norms both vertically and horizontally which can lead to legal uncertainty. It is even necessary to have the right to test material related to the cabotage principle violations in the Supreme Court and the Constitutional Court.

¹ Ridwan Lasabuda, "Tinjauan Teoritis Pembangunan Wilayah Pesisir Dan Lautan Dalam Perspektif Negara Kepulauan Republik Indonesia," *Jurnal Ilmiah Platax* I, no. 2 (2013): 92–101.

² Dominica Mutiara Mega, Wulfram I Ervianto, and Green Port, "Pengembangan Indikator Hijau Pada Pelabuhan Laut," in *Prosiding Konferensi Nasional Pascasarjana Teknik Sipil (KNPTS) 2018 Inovasi, Inovasi Dan Riset Keselamatan Dan Kesehatan Kerja Untuk Pembangunan Infrastruktur Berkelanjutan* (yogyakarta, 2018), 1–10.

³ Indonesian National Shipowner's Association, "Asas Cabotage Harus Dipertahankan," <https://insa.or.id/asas-cabotage-harus-dipertahankan/>, 2019.

⁴ INSA, "Workshop Menuju 15 Tahun Implementasi Asas Cabotage" (Jakarta, 2019).

⁵ Kementerian Perhubungan, *Transportation Statistic 2019, Buku I* (Jakarta: Kementerian Perhubungan, Pusat Teknologi Informasi Dan Komunikasi, 2019).

⁶ Yanuar Putra, "Rekonstruksi Hukum Transportasi Perairan Terhadap Keselamatan Dan Keamanan Penumpang Dan Barang," *Lex Librum : Jurnal Ilmu Hukum* 4, no. 2 (2018): 693–700, <https://doi.org/10.5281/zenodo.1286116>.

⁷ Harry Purwanto, "Principle of Cabotage Within Aviation Activities in Indonesia," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 28, no. 1 (2016): 138–48, <https://doi.org/10.22146/jmh.15870>.

⁸ Mieke Komar Kantaatmadja, *Berbagai Masalah Hukum Udara Dan Angkasa* (Bandung: Remadja Karya, 1988).

RESEARCH METHODS

In the perspective of legal research, solving a legal issue requires approaches as a basis for preparing appropriate, logical and accurate legal arguments.⁹ This research is a normative study that studies the law's objectives, justice values, the validity of legal rules, legal concepts, and legal norms. Normative legal research can also be a process to find legal rules, principles, and doctrines to answer legal issues at hand. It can also be said that legal research is carried out to produce arguments, theories, or concepts as prescriptions or answers to the problems at hand.¹⁰

The approaches used in this research are the statute approach, historical approach, interpretation approach,¹¹ and case approach¹² by analyzing 3 (three) Court decisions related to the application of the cabotage principle, namely the Court Decision. No. 43/G/2020/PTUN.JKT; Court Decision No. 7 P/HUM/2017; and Court Decision No. 64/PUU-XIII/2015. Furthermore, the collected data such as primary, secondary and tertiary legal materials were analyzed qualitatively.¹³

ANALYSIS AND DISCUSSION

Regulation of Cabotage Principle on Sea Transportation in Indonesian Legislation

Regulation of Cabotage Principle on Sea Transportation in Indonesian Legislation from an economic point of view is implementing the cabotage principle and improves the Indonesian people's economy by providing the broadest possible business opportunity for national and local sea transportation companies.¹⁴ It is believed that this regulation can increase the production and productivity of domestic vessels because all ships sailing in Indonesian waters must have the Indonesian flag. Besides, the cabotage principle is functioned to protect the state's sovereignty, particularly in the maritime industry.¹⁵

The maritime cabotage law assessment reveals the establishing concept of maritime cabotage and legal uncertainty. It is observed that sovereignty, economic development and national security are the basis for adopting a maritime cabotage law in many countries. It is acknowledged that an international framework of maritime cabotage law is fraught with several challenges. It is because many nations refuse to accept that the concept of maritime cabotage is more than a domestic policy agenda. For instance, Japan, USA and China have been reluctant to consider any reform that may challenge their domestic maritime cabotage regime. It is further argued that the trend on matters such as world economics, commerce and national security indicates that an inclusive approach is now a strength rather than a weakness. One of the

⁹ Irwansyah, *Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel*, ed. Ahsan Yunus, 1st ed. (Yogyakarta: Mitra Buana Media, 2020).

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2010).

¹¹ Anwarul Yaqin, *Legal Research and Writing*, ed. Venny Shu Nyet Moi (Selangor Darul Ehsan: Malayan Law Journal SDN BHD, 2007).

¹² Charles Chatterjee, *Methods of Research in Law*, 2nd ed. (London: Old Bailey Press, 2000).

¹³ Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1986).

¹⁴ Graciella Eunike Sumenda, "Keberadaan Asas Cabotage Terhadap Perusahaan Angkutan Laut Dalam Undang-Undang No.17 Tahun 2008 Tentang Pelayaran," *Lex et Societatis* 5, no. 7 (2017): 157–64.

¹⁵ The United Nations, "The United Nations Convention on the Law of the Sea" (1982).

advantages of an international framework is economy of scale, with rules and standards tailored to fit the different maritime cabotage nations' agenda.¹⁶

Based on the statutory approach, various cabotage principles are found in various laws and regulations in Indonesia as follows:

1. The 1992 Law No. 21 on Shipping

Indonesia has implemented the cabotage principle, which is the principle of granting exclusive rights to the transportation of goods and passengers in the country by national sea transportation companies using the Red and White flag and Indonesian nationality crew. Cabotage can be interpreted as "Restriction of the operation of the sea, air, or other transport services within or into a particular country to that country 's own transport services".¹⁷

The cabotage principle was first recognized in the 1992 Law No. 21 on Shipping. It states that "only ships with the Indonesian flag are allowed to conduct domestic voyages." It is evidence of the cabotage principle's existence. It is just that this law has not provided strict sanctions for violations of the cabotage principle. So that at that time there were still many foreign ships operating in Indonesian waters. However, after the enactment of The 2008 Law No. 17 on Shipping, The 1992 Law No. 21, declared revoked and no longer valid.

The 2005 Presidential Instruction No. 5 on Empowerment of the National Shipping Industry. The cabotage principle regulated in The 1992 Law No. 21 on Shipping, was reaffirmed through The 2005 Presidential Instruction No. 5 on Empowerment of the National Shipping Industry. The Presidential Instruction substance is related to national transportation while still paying attention to the implementation of the cabotage principle.

The issuance of The Presidential Instruction No. 5 is to optimize the implementation of the national shipping industry empowerment policy where national transportation still observes the implementation of the cabotage principle. Indeed, the cabotage principle's application is supported by International Maritime Law provisions relating to coastal states' sovereignty and jurisdiction over their territorial sea areas.¹⁸ UNCLOS 1982 states that countries' right and responsibility to use the world's oceans and establish guidelines for business, the environment, and marine natural resources management. As a follow-up to the UNCLOS ratification, since 2014 Indonesia has had a legal umbrella that emphasizes Indonesia's maritime territory as regulated in The 2014 Law No. 32 on Maritime Affairs.

In order to optimize the implementation of the national shipping industry empowerment policy, The 2005 Presidential Instruction No. 5, among others, instructs the Minister of Marine Affairs and Fisheries to apply the cabotage principle consequently and formulate policies and take the necessary steps under the duties, functions and authorities of each. Furthermore, in the Trade Sector, domestic inter-port shipping cargoes must be transported by Indonesian flagged vessels and operated by national shipping companies. Moreover, in the Sea Transportation Sector, it is also stated that the implementation of national (domestic) sea transportation is entirely served by ships with Indonesian flags. In Dewi Rina Cahyani's

¹⁶ Aniekan Akpan, *Maritime Cabotage Law*, 1st ed. (New York, USA: Routledge, 2019).

¹⁷ Henry Campbell Black, *Black's Law Dictionary* (St. Paul Minn: West Publishing Co, Minnesota, 1979).

¹⁸ Graciella Eunike Sumenda, *Note*: 1–14.

research, the cabotage principle regulated in The 2005 Presidential Instruction No. 5, currently, all country's shipping market shares are controlled by total national companies.¹⁹

2. The 2008 Law No. 17 on Shipping

Indonesia is an archipelagic state with huge territorial water within the boundaries, rights and sovereignty stipulated by law. A national marine transportation system's existence is to support economic growth, regional development, and strengthen the country's sovereignty.

The 2008 Law No. 17 on Shipping expressly states that "Foreign ships are prohibited from carrying passengers and/or goods between islands or between ports in Indonesian territorial waters."²⁰ In this context, it is very clear about the existence of the Cabotage Principle. Then it is confirmed more in the Elucidation of the Shipping Law that four elements of Cabotage Principle, namely transportation in waters, ports, shipping safety and security. Also, the protection of the maritime environment further requires adjustment to the needs and developments of the times and science and technology so that the world of Shipping can play a role in the international world. Regulations for the transportation sector in waters contain the principle of implementing the cabotage principle by empowering national sea transportation which provides a conducive climate for advancing the sea transportation industry.

The cabotage principle stipulated in the 2008 Shipping Law is found in several articles, namely Article 8 paragraph (1) states that "domestic sea transportation activities are carried out by national sea transportation companies using Indonesian-flagged vessels and manned by Indonesian crews. Elucidation of Article 8 paragraph (1) states that "The use of Indonesian-flagged ships by national sea transportation companies is intended for the implementation of the cabotage principle in order to protect the state's sovereignty and support the realization of the archipelagic concept and provide the widest possible business opportunity for national sea transportation companies in the gain share of the payload." Furthermore, the affirmation of the cabotage principle in Article 8 paragraph (2) states that "Foreign ships are prohibited from carrying passengers and/or goods between islands or between ports in Indonesian territorial waters.

About the joint venture in the shared ownership of sea transportation companies as stated in Article 29 paragraph (1) states that "an Indonesian citizen or business entity can cooperate with a foreign sea transportation company or foreign legal entity or a foreign citizen". This regulation still considers applying the cabotage principle in which Indonesian citizens own the majority of shares, as stated in Article 158 paragraph (2) c of the 2008 Shipping Law. This regulation aims to advance the shipping industry in Indonesia. This law was enacted simultaneously. It tolerated foreign ships that were still serving domestic sea transportation activities to continue their activities no later than 3 (three) years since this law came into effect. The provisions of Article 29 Paragraph (1) in conjunction with Article 158 paragraph (2) c of the Shipping Law 2008, constitute proof that the cabotage principle cannot be implemented absolutely or consequently.

¹⁹ Dewi Rina Cahyani, "INSA: Jumlah Kapal Di Indonesia Naik Dua Kali Lipat Dalam 5 Tahun," *TEMPO.COM* (Jakarta, 2020).

²⁰ Minister of Justice and Human Rights Republic of Indonesia, "Law Number 17 of 2008 concerning Shipping, Article 8 (1) and (2)" (2008).

If there is a violation as regulated in Article 8 paragraph (2) of the Shipping Law, Article 284 can be implemented. It is stipulated that "Every person operating a foreign ship to transport passengers and / or goods between islands or between ports in Indonesian territorial waters as referred to in Article 8 paragraph (2) shall be punished with imprisonment of 5 (five) years and a maximum fine of Rp. 600,000,000.00 (six hundred million rupiahs)." The criminal sanctions and fines stipulated in this law characterize that the cabotage principle is enforced more strictly and strictly.²¹

3. The 2016 Presidential Regulation No. 44 on List of Business Fields Closed and Business Fields Opened with Requirements in the Field of Investment (the 2016 Presidential Regulation)

Drafting of the 2016 Presidential Regulation is based on The 2008 Law No. 17 on Shipping and international agreements such as The ASEAN Framework Agreement on Service (AFAS). This International Agreement is under the provisions of Article 6 paragraph (2) of The 2007 Law No. 25 on Investment, states that "the Government provides equal treatment to all investors who come from any country who carry out investment activities in Indonesia under the provisions of the laws and regulations." However, this treatment does not apply to investors from a country who obtain special rights based on Indonesia's agreement, such as the AFAS agreement. In the agreement, foreign share ownership for the foreign sea transportation business sector has maximum foreign share ownership of 49%, and specifically for investors from ASEAN countries, it is adjusted to the Government's Commitment, such as AFAS, a maximum of 70% for investors from ASEAN countries. Thus the 2016 Presidential Regulation continues to protect the domestic mode transportation business sector under the provisions of Article 158 paragraph (2) of The 2008 Law No. 17. It is stated that "the ship belongs to an Indonesian legal entity which is a joint venture whose majority of shares are owned by Indonesian citizens." This provision shows that the cabotage principle is still being observed. Furthermore, the agreement must be rational and should be implemented in good faith as provided in the Article 1338 paragraph (3) the Indonesian Civil Code.²²

Philosophically, the 2016 Presidential Regulation is to increase investment activities both from within and outside the country. Also, to accelerate development while increasing protection for micro, small and medium enterprises and cooperatives and various national strategic sectors as well as increasing economic competitiveness in the face of the ASEAN Economic Community (AEC) and the dynamics of economic globalization. Overseas Sea Mode Transportation for Passengers and Goods' business field, in order to compete in ASEAN countries with the same capital ownership, namely 70%.

The 2016 Presidential Regulation is an implementing regulation of Law No. 25 of 2007 concerning Investment. The maximum capital ownership limit is 70% for investors from

²¹ Marselin Yuniarti Hardani, "Eksistensi Penerapan Asas Cabotage Di Perairan Indonesia Dalam Menghadapi Pemberlakuan Masyarakat Ekonomi Asean," *Fakultas Hukum, Universitas Atma Jaya Yogyakarta* 1, no. No 2 (2016): 229–46.

²² Annalisa Yahanan, Febrian Febrian, and Rohani Abdul Rahim, "The Protection of Consumer Rights For Aviation Safety And Security In Indonesia and Malaysia," *Sriwijaya Law Review* 1, no. 1 (2017): 27–43, <https://doi.org/10.28946/slrev.vol1.iss1.7.pp027-043>.

ASEAN countries based on the ASEAN Framework Agreement on Service (AFAS) agreement. The AFAS Agreement is a commitment of 10 (ten) ASEAN countries that have been ratified as regulated in Law No. 38 of 2008 concerning Ratification of the Charter of the Association of Southeast Asian Nation (Charter of the Association of Southeast Asian Nations).

The 2019 Regulation of the Minister of Transportation of the Republic of Indonesia No. PM 46 on the Regulation of the Minister of Transportation concerning Amendments to the 2018 Regulation of the Minister of Transportation Number PM 92 on the Procedures and Requirements for Granting Approval of the Use of Foreign Vessels for Other Activities which do not include Activities to Transport Passengers and/or Goods in Domestic Sea Transportation Activities.

The 2019 Regulation of the Minister of Transportation of the Republic of Indonesia No. PM 46 is related to the procedures and requirements for granting approval for foreign ships' use but for other activities and not for activities of transporting passengers and/or goods. Thus, the cabotage principle regulates the prohibition of the transportation of passengers and goods and foreign ships carrying out other activities in Indonesian waters, with the condition that Indonesian ships are not yet available.

The cabotage principle regulation related to the availability of national ships as stated in Article 11 states "to consistently apply the cabotage principle, the Director-General conducts an evaluation to find out that ships with the Indonesian flag are not yet available or not yet available. The evaluation is carried out periodically every 6 (six) months by involving related agencies and service provider associations and service user associations. Based on Article 11, foreign ships may carry out activities provided that there are not enough ships with Indonesian flags available, as in case No. 43/G/2020/PTUN.JKT.

The principle of cabotage is a principle that is recognized in Shipping's law and practice throughout the world and is an embodiment of a country's sovereignty to manage itself, in this case, domestic transportation (land, sea and air). Thus, it cannot simply be considered improper protection or preferential treatment for domestic companies, leading to unfair competition.²³ The cabotage principle's implementation objectives are to prevent and reduce dependence on foreign ships, smoothen the flow of goods or services, and people throughout the archipelago besides providing job opportunities for citizens and support the National Defense and Security Systems.

From several regulations on the cabotage principle in Indonesian legislation as previously mentioned, both in the form of Laws, Presidential Regulations, Ministerial Regulations and Presidential Instruction, it can be interpreted that the cabotage principle is enforced firmly and strictly and subject to sanctions for violators. However, on the one hand, the cabotage principle can be violated by certain conditions or because of previous binding international agreements. Thus, the cabotage principle is difficult to maintain. In other words, it cannot be enforced absolutely (semi-protectionist).

Why does this cabotage principle need to be applied in Indonesia?. It is because Indonesia is an archipelagic country that needs to develop and advance national Shipping in order to compete with foreign ships. Therefore, the majority shareholder is still owned by Indonesian citizens if

²³ Trisnowati Rahayu, "Pengaruh Penerapan Asas Cabotage Di Bidang Offshore Pada PT . Orela Bahari" 7, no. 14 (2019): 1–20.

the shipping company is a joint venture company. The cabotage principle regulated in various laws and regulations provides a sense of justice and legal certainty also provides benefits to national Shipping in Indonesia.

The Cabotage principle is substantively at the level of legislation, namely in The 2008 Law No. 17 on Shipping. It means that the law becomes the basis or guideline for lower legislation below it, either in Government Regulations or Presidential Regulations and Ministerial Regulations below. Hans Kelsen called it in stages where lower rules must be guided by rules or legal rules that are even higher so that it looks like a pyramid arrangement (Stufenbau Theory).²⁴

Implementation of Cabotage Principle in Indonesian Legislation

The cabotage principle regulation in Indonesian legislation reflects the shipping industry's progress in Indonesia, especially shipping companies, where Indonesian citizens own the majority of shares. However, the regulations discussed previously do not provide legal certainty for certain parties, so there have been several cases that have arisen submitted to the State Administrative Court, namely Decision No. 43/G/2020/PTUN.JKT,²⁵ Decision No. 7 P/HUM/201726 in Case of Judicial Rights to the Supreme Court to review The 2016 Presidential Regulation No. 44 (legislation under Laws against higher level statutory regulation, namely the Shipping Law and Decision No. 64/PUU-XIII/2015,²⁷ as well as the review of The 2008 Law No. 17 on Shipping against The 1945 Constitution of the Republic of Indonesia).

The study of the application of the cabotage principle in this paper is reviewed from 3 (three) Court Decisions with the following analysis:

1. The decision of the State Administrative Court No. 43/G/2020/PTUN.JKT, dated February 27 2020

In this case, the Plaintiff filed a lawsuit at the Jakarta State Administrative Court on February 27, 2020, with case register No. 43/G/2020/PTUN.JKT and has been corrected on March 16, 2020. The Plaintiff is the United Federation of State-Owned Enterprises Workers Against the Minister of Transportation and PT. Bahari Eka Nusantara related to the use of foreign ships in Indonesian territorial waters.

The Reasons for the Plaintiff to file a lawsuit against the Minister of Transportation of the Republic of Indonesia and the PT Bahari Eka Nusantara with the Object of the Dispute, which is related to granting permits to use foreign ships with the Panama flag. The license is given because there was a Decree of the Minister of Transportation No. KP 198 of 2020 dated January 14, 2020, regarding approval to PT. Bahari Eka Nusantara uses foreign "Fu Hai" Cable Ship for other activities that do not include carrying passengers and/or goods in domestic transportation activities. According to the Plaintiff, the issuance of the lawsuit's object causes the absorption of Indonesian workers to decrease and loss of job opportunities. The permit has violated the cabotage principle as stated in Article 8 paragraph (1) of The

²⁴ Sudirman, "Implementation of the Cabotage Principle on Good Governance As The World Maritime Axis," *Hang Tuah Law Journal* 3, no. 1 (2019): 138–45.

²⁵ Direktori Putusan Mahkamah Agung Republik Indonesia, Putusan Nomor 43/G/2020/PTUN.JKT (2020).

²⁶ Direktori Putusan Mahkamah Agung Republik Indonesia, Putusan Nomor 7 P/HUM/2017 (2017).

²⁷ Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 64/PUU-XIII/2015 (2015).

2008 Law No. 17 on Shipping which states that "Domestic sea transportation activities are carried out by national sea transportation companies using Indonesian flagged vessels, and are manned by Indonesian crews. Furthermore, Article 8 paragraph (2) states "Foreign ships are prohibited from carrying passengers and/or goods between islands or between ports in Indonesian territorial waters".

Also, the permit to issue the use of the "Fu Hai" cable ship which was issued by the Defendant violated Article 7 jo Article 2 of the 2019 Minister Transportation Regulation No PM 46 on Amendments to The 2018 Regulation of the Minister of Transportation No. PM 92 on the Procedures and Granting of Approval for the Use of Foreign Vessels for other activities that do not carry passengers and/or goods in Domestic Sea Transportation activities. It states that foreign ships can carry out activities other activities that do not include the activity of carrying passengers and/or goods in domestic sea transportation activities in Indonesian territorial waters as long as ships with Indonesian flags are not yet available or not sufficiently available (Article 2) Apart from these conditions, there are other conditions, namely approval from the Minister of Transportation (Article 7). Meanwhile, the types of vessels such as the Fu Hai cable ship are available domestically and are owned by 4 (four) companies in Indonesia, namely; PT. Limin Marine & Offshore, PT. Pelayaran Lintas Optik, PT. Bina Nusantara Perkasa, and PT. Jala Nusantara Merdeka.

The Defendant's actions violated Article 11 of The 2019 Regulation of the Minister of Transportation of the Republic of Indonesia No. PM 46, which reads "in order to apply the cabotage principle; consequently, the Director-General evaluates to find out whether the Indonesian flagged vessels are not yet available or not." The evaluation is carried out periodically every 6 (six) months by involving related agencies and service provider associations and service user associations. Thus, the Defendant could not issue the Foreign Ship Operating Permit for the Fu Hai Cable Ship. One of the inhibiting factors in implementing the cabotage principle is that domestic shipping companies have not provided certain types of vessels to support offshore exploration and exploitation activities.²⁸

The State Administrative Decision which is the object of the State Administration dispute, in this case, violates the prevailing laws and regulations, so according to the Plaintiff, the Decree contains legal flaws. It must be declared null and void and revoke the license for Domestic Sea Transportation Activities.

In the Decision of the State Administrative Court, the Plaintiff's claim is not accepted or rejected. It is because the object of the dispute has expired and has no legal force. The dispute's object is valid for 39 days (from January 21, 2020, to February 28 2020). This means that the approval for the use of foreign vessels is up to February 28, 2020. Meanwhile, the lawsuit is registered on February 27, 2020 (one day before the approval letter ends). Thus the object of dispute in question has not existed since February 28, 2020, so that in any case, the Defendant cannot carry out the decision in the case. The Plaintiff's claim is vague and unclear

²⁸ Rizky Aprilianto, Abdul Hakim, and Ainul Hayat, "Implementasi Asas Cabotage Dalam Kebijakan Pelayaran Di Indonesia (Studi Di Direktorat Jendral Perhubungan Kementerian Perhubungan Dan Indonesian National Ship Owners Association)," *Jurnal Administrasi Publik Mahasiswa Universitas Brawijaya (JAP)* 2, no. 4 (2014): 758–64, <https://www.neliti.com/publications/79182/implementasi-asas-cabotage-dalam-kebijakan-pelayaran-di-indonesia-studi-di-direk>.

because it demands the cancellation or revocation of a disputed object that has expired. For that reason, it is fitting that the lawsuit cannot be accepted.

It can be concluded that the criteria violate the cabotage principle if foreign ships not only carry passengers and/or goods in the Indonesian waters, but also foreign ships that carry out other domestic activities in the Indonesian maritime area without the approval of the Ministry of Transportation. In this case, there was no violation of the cabotage principle in other activities in Indonesian territorial waters and stated that the Plaintiff's claim was unacceptable.

2. Decision No.7 P/HUM/201, dated January 19, 2017. In this case, the Petitioner's name is Ucok Samuel B. Hutapea against the Respondent, the President of the Republic of Indonesia. The Petitioner filed an objection to exercise the right to a judicial review to assess statutory regulations' content under the law against higher level statutory regulations. In this case, the Petitioners requested that the Supreme Court conduct a review of The 2016 Presidential Regulation No. 44 on List of Closed Business Fields and Opened Business Fields with Requirements in the Field of Investment under the 2008 Law No. 17 on Shipping.

The authority of the Supreme Court to examine the content of The 2016 Presidential Regulation No. 44 (Transportation sector Number 250 and 251) against Article 158 paragraph (2) of The 2008 Law No. 17 on Shipping. In this connection, each applicant must have a legal standing, whose rights are impaired by either individuals or customary community units and public or private legal entities (Article 31A paragraph (2) of the Supreme Court Law). The Petitioner feels that his rights have been impaired by enacting the 2016 Presidential Regulation No. 44 and its attachments. The loss of the applicant is the regulation of the transportation sector as attached to The 2106 Presidential Regulation No. 44 which states that "Overseas Sea Capital Transportation for Passengers and Goods is not included in the cabotage principle so that foreign ownership of these types of companies is a maximum of 70% as long as the foreign investors come from ASEAN countries". According to the Petitioner, 70% of foreign majority domination in the maritime world will hinder the national maritime industry's development, including companies established by the applicant. The petition for a review of The 2016 Presidential Regulation No. 44 with Article 8 of the Shipping Law states that "domestic sea transportation activities are carried out by national sea transportation companies and use Indonesian-flagged ships and are manned by Indonesian crews.

The cabotage principle's implementation is not only done by the State of Indonesia; many countries have also done the same to support its maritime industry. It can be said that cabotage is a restriction on foreign penetration in a country's maritime industry.²⁹ The cabotage principle is applied to support and protect the domestic shipping industry, which is the "heart" of the Shipping Law. Indonesian citizens and/or Indonesian legal entities can play an active role in developing the national shipping industry.

The Shipping Law does not further elaborate on what is meant by national transportation companies, however, the Shipping Law, in essence, does not prohibit foreign ownership of shares in national sea transportation, as stated in Article 29 paragraph (2) of the Shipping

²⁹ Direktori Putusan Mahkamah Agung Republik Indonesia, Putusan Nomor 7 P/HUM/2017.

Law. This article does not specify the required amount of foreign ownership in a national transportation company. However, implicitly Article 158 paragraph (2) letter c of The 2008 Law No. 17 states that Indonesian citizens must own the majority of national transportation companies. According to the Petitioner's opinion, in the national maritime transportation joint venture, the maximum number of shares owned by foreigners is 49%. So that Appendix III letter J (Transportation sector Number 250 and 251) The 2016 Presidential Regulation No. 44 is contrary to Article 8 and Article 158 paragraph (2) of The 2008 Law No. 17.

In this case, the Respondent rejected all of the arguments/reasons for the Petitioner's petition. The Petitioner did not have the legal standing to apply for a judicial review of the 2016 Presidential Regulation No. 44. It is because the applicant is unable to prove a causal relationship between direct losses suffered by the Petitioner as stated by the Petitioner due to the enactment of The 2016 Presidential Regulation No. 44 and its attachments. Therefore, the Petitioner does not meet the requirements to apply for the right to judicial review.

Actually, the maximum capital ownership limit value of 70% for investors from ASEAN countries is based on the agreement of The ASEAN Framework Agreement on Service (AFAS). The AFAS Agreement is a commitment of 10 (ten) ASEAN countries that have been ratified as stipulated in The 2008 Law No. 38 on Ratification of the Charter of the Association of Southeast Asian Nation (Charter of the Association of Southeast Asian Nations). In this connection, based on the Supreme Court's considerations, Attachment III letter J of The 2016 Presidential Regulation No. 44 does not conflict with the cabotage principle. In fact, it encourages national business actors to develop Investment in the ASEAN Region. Attachment III letter J (Transportation sector Number 250 and 251) The 2016 Presidential Regulation No. 44 does not contradict Article 8 and Article 158 paragraph (2) of Law No. 17 of 2008. Likewise, Attachment III letter J of The 2016 Presidential Regulation No. 44 does not conflict with Article 6 and 7 paragraph (2) of Law No. 12 of 2011 which states that it contains norms contrary to higher laws and regulations.

Drafting of The 2016 Presidential Regulation No. 44 has referred to the applicable laws and regulations, especially for the Transportation sector, referring to The 2008 Law Number 17 and international agreements, such as AFAS. Based on the above considerations, the Supreme Court rejected the objection to the judicial review right. The 2016 Presidential Regulation No. 44 is an implementing regulation of The 2007 Law No. 25 on Investment. The verdict's contents rejected the objection to the petition for judicial review rights submitted by the Petitioner to the Supreme Court because according to law, it is groundless. The exception to the cabotage principle requires a maximum of 70% as in Attachment III Letter J (Transportation Sector No. 250 and 251) in The 2016 Presidential Regulation No. 44 does not necessarily make this policy contrary to the cabotage principle as regulated in The 2008 Law No. 17.

3. Decision No. 64/PUU-XIII/2015, dated April 27, 2015

The decision on Case Number 64/PUU-XIII/2015 is a case for reviewing The 2008 Law No. 17 on Shipping against the 1945 Constitution of the Republic of Indonesia to the Constitutional Court. This case was filed by an individual petitioner who is a citizen of the Republic of Indonesia (Ucok Samuel Bonaparte Hutapea). The basis for filing a request that the Constitutional Court conducts a review includes Article 158 paragraph (2) letter c and

Article 341 of Law No. 17 of 2008 regarding Article 28D paragraph (1) of the 1945 Constitution which states that "Everyone has the right to recognition, guarantees, protection, and legal certainty that is just and equal treatment before the law". The Petitioner considers that his constitutional rights and/or authorities have been impaired by the enactment of Article 158 paragraph (2) letter c and Article 341 of Law No. 17 of 2008, with the following reasons:

- a. Article 158 paragraph (2) letter c states that "the ship belongs to an Indonesian legal entity which is a joint venture whose majority of shares are owned by Indonesian citizens". The provisions of Article 158 paragraph (2) letter c have created legal uncertainty and their implementation is contrary to the spirit of the cabotage principle in the Shipping Law. This legal uncertainty has the potential to violate the applicant's constitutional rights in his professional practice. Besides, article 158 paragraph 2 c creates legal uncertainty because it states that Indonesian citizens can only own the majority of shares in national sea transportation companies. However, in fact, Indonesian legal entities also have shares in national sea transportation companies.
- b. Article 341 states that "Foreign ships currently still serving domestic sea transportation activities can continue to carry out their activities no later than 3 (three) years after this Law comes into effect". This article creates legal uncertainty because it does not imply that the same term is also required for national shipowning companies whose majority shares are foreign-owned. Thus causing the foreign shareholders to feel they are not obliged to divest. It has the potential to harm the Petitioner planning to establish a Shipping Company, as well as the Petitioner to compete with shipping companies that have a strong and large capital.

Further regulations regarding the cabotage principle contained in The 2008 Law No. 17, the Constitutional Court believes that the Shipping Law has provided apparent legal certainty and regulations for shipping businesses in Indonesia. Likewise, with Article 158 paragraph (2) letter c and Article 341, which the Petitioner examined, these articles provide clear signs for national shipping business actors and foreign shipping business actors. The Court did not find any loss of constitutional rights caused by the enactment of the Shipping Law's norms petitioned for review by the Petitioner. In fact, the Petitioners' interests are better protected by the Shipping Law.

If refers to article 8 and 341 of The 2008 Law No. 17 on Shipping, the provisions on the use of foreign-flagged ships are no longer valid because foreign-flagged ships still operating within the country can still perform their activities within a maximum period of 3 (three) years since the enactment of this regulation so that after May 7 2011, the use of foreign ships is not allowed anymore. Whereas, article 11 paragraph (1) of The 2008 Law No. 17 on Shipping indicates that sea transport activities from and to abroad are conducted by national and foreign transport companies by using Indonesian and/or foreign-flagged ships.³⁰

In this case, the applicant's petition cannot be accepted, because the applicant does not have legal standing to submit the petition. Thus the Court no longer considers the principal of the Petitioner's petition.

³⁰ Aulia Rifai et al., "Cabotage Principle as the Realization of National Freight Protection in Free Trade," *Journal of Law* 64 (2017): 8–12.

The results of the analysis of the three decisions above, it can be said that the application of the cabotage principle related to sea transportation in Indonesia has fulfilled legal certainty and does not harm one's constitutional rights.

The urgency of implementing the Cabotage Principle on sea transportation in Indonesia is based on the premise that domestic marine transportation has a strategic and significant role in national development. Besides, the implementation of the cabotage principle is to improve the economy of the Indonesian people by providing the broadest possible business opportunity for national and local sea transportation companies.

Maritime cabotage is a vital policy to Indonesia. Theoretically, it promises a solution to develop the Indonesian maritime industry, particularly the domestic one, by excluding foreign-flagged vessel to engage in cabotage trade. In the end, the policy is expected to contribute to the increase of the Indonesian economic growth level. Therefore, it is suggested that the government should create a conducive atmosphere to support the implementation of this maritime law policy in Indonesia.³¹

CONCLUSION

Cabotage Principle regulation in Indonesia is found in various laws and regulations, such as Laws, Presidential Regulations, and Ministerial Regulations to Presidential Instruction. Based on the law, the cabotage principle does not apply absolutely (semi-protectionist) and is subject to sanctions for violators. However, in the regulation, it was found that the cabotage principle could have deviated with certain conditions, and there was approval from the government if you wanted to use foreign ships.

The implementation of the cabotage principle in Indonesian legislation in 3 (three) cases studied, based on Judges' considerations at the State Administrative Court, the Supreme Court and the Constitutional Court have provided legal certainty. In that case, the judicial review rights to the Supreme Court and the Constitutional Court did not have constitutional rights that were violated due to the Shipping Law's enactment. There is also no contradiction between the Ministerial Regulation against the Shipping Law and the contradiction between the Shipping Law and the 1945 Constitution. However, in the future, using foreign ships for other activities in Indonesian territorial waters will still consider the availability of Indonesian ships.

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³¹ Nilam Andalia Kurniasari, "Connecting Indonesia's Maritime Cabotage and the 1982 United Nations Convention on the Law of the Sea," *Indonesian Journal of International Law* 8, no. 4 (2011): 716–33.

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