



DOI: <https://doi.org/10.38035/gijlss.v4i1>
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Delimitation Issues of Internal Waters in Indonesia: Asserting Historic Title Under International Law

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Abstract: Internal waters represent a vital maritime domain through which a State exercises sovereignty and ensures national security. However, their delimitation remains complex, particularly when intersecting with claims of historic title under international law. This study examines Indonesia's authority, as an archipelagic State under Article 50 of the United Nations Convention on the Law of the Sea 1982, to designate Tomini Bay as a historic bay. Employing a normative legal method with a comparative approach, the research analyzes the legal framework governing internal waters, historic title, and relevant State practice. It further explores the legal implications of reclassifying Tomini Bay from archipelagic waters to internal waters. The findings highlight that such a designation requires strict adherence to customary international law criteria and may significantly affect sovereignty claims, navigational rights, and international recognition.

Keywords: Internal Waters, Historic Bay, Tomini Bay.

INTRODUCTION

Indonesia is an archipelagic state as stipulated in its constitutional law.¹ Indonesia is the largest archipelagic state in the world and has the third largest exclusive economic zone in the world.² Indonesia currently has more than 17,000 islands with names and coordinates that can change every year due to geographical dynamics influenced by natural factors.³ These islands present both opportunities and challenges for Indonesia, particularly in determining maritime boundaries. However, the determination of maritime boundaries is not a simple process because the stages that must be passed are very complex through negotiations, where the interests of each party are the main factor, and the choice of methods used makes it difficult to achieve a quick resolution. In addition, cases such as the South China Sea dispute have made

¹ Indonesia Constitutional Law, Article 25A

² John G. Buthcer, *Becoming an Archipelagic State: The Juanda Declaration of 1957 and the 'Struggle' to Gain International Recognition of the Archipelagic Principle: Indonesia beyond the Water's Edge: Managing an Archipelagic State*, ISEAS Publishing, 2009 p. 30

³ Badan Informasi Geospasial, "Pulau Indonesia Bertambah Jadi 17.380, Mengapa Angkanya Berubah Setiap Tahun?", <https://sipulau.big.go.id/news/11> (accessed in 01 October 2025)

the countries involved aware of the importance of maintaining maritime sovereignty. Many cases of unilateral claims that result in overlapping claims against neighboring countries make this issue sensitive because it can have a direct effect on a country's national law, where the country's interest in resources in the fields of minerals, hydrocarbons, maritime affairs and fisheries, including shipping and aviation activities in the region, as well as various forms of utilization of marine resources for economic interests are disrupted.⁴

Indonesia has been trying year after year to align existing regulations with those stipulated in UNCLOS 1982. Harmonizing Indonesian regulations with UNCLOS 1982 indirectly demonstrates the strength of international maritime law as a constitution for the sea and the obligation of ratifying countries to comply with it. This can be seen from the provisions in the laws and regulations governing the Exclusive Economic Zone, continental shelf, and the Law on Indonesian Waters as an archipelagic state which are in accordance with the mandate of UNCLOS 1982. Although there are still many other provisions that need to be harmonized, including the delimitation of internal waters.

On the other hand, UNCLOS 1982 comprehensively regulates the rights and obligations of archipelagic states and also grants privileges to archipelagic states, such as determining their own internal waters.⁵ However, currently, Indonesia has not yet determined nor governed its internal waters specifically. Indonesia has long sought to resolve the issue of the concept of internal waters boundaries and is currently attempting to delimit its internal waters. The lack of designated Indonesian Archipelagic Sea Lane (ASLP) running from east to west and vice versa opens up the opportunity for several countries to exercise their own rights of passage based on their own navigation guidelines.⁶ This situation could pose problems for Indonesia if foreign vessels pass through or approach its internal waters. The government has not yet established clear regulations and has not closed all baselines. Although Law No. 6 of 1996 concerning Indonesian Waters stipulates that internal water boundaries are established by drawing closing lines at river mouths, estuaries, bays, inlets, and ports, in practice, not all areas that should be included in internal waters have been defined in detail.

Until now, there is still a lack of written regulations that clearly explain which areas fall into the internal waters category. The foregoing discussion aims to address the legal issue concerning the delimitation of internal waters. Indonesia relies on Government Regulations No. 38 of 2002 and Government Regulations No. 37 of 2008 for archipelagic baselines and Law Number 6 of 1996 for Indonesia's waters as a main law. Subsequently, in 2024, through Ministerial Decree No. 27 of 2024, Indonesia established an Interministerial Committee tasked with drafting Government Regulations on the Determination of Indonesia's Internal Waters.⁷ However, there have been no further updates regarding the draft as of the time this article was written.

Ordinarily, the delimitation of internal waters in archipelagic waters has been difficult because each body of water is a different arena for its determination. However, in the situation of a maritime zone indicated to be historic waters, this may bring another level of issue in delimiting its internal waters. That is what Indonesia is currently facing. Indonesia faces considerable challenges in determining its internal maritime boundaries, especially in several maritime areas, particularly in areas such as Tomini Bay. An area such as Tomini Bay presents

⁴ Muhamad Widodo, Testing the Suitability of the Indonesia and Vietnamese Baselines Under UNCLOS, *Padjadjaran Journal of International Law*, Vol. 8, Number 1, January 2024, p. 24

⁵ United Nation Convention on the Law of the Sea 1982 ("UNCLOS 1982"), Article 50.

⁶ Maria Maya Lestari; Melda Kamil Ariadno, The Importance of Internal Waters Delimitation to Secure State Sovereignty: A Case of Archipelagic State of Indonesia, *Pertanika J. Soc. Sci. & Hum.* 27 (3): 2055 - 2065 (2019), p. 2063.

⁷ <https://jdih.kkp.go.id/Homedev/DetailPeraturan/6588>

significant difficulties in determining its internal waters, as the bay's size exceeds the limits governed by UNCLOS 1982, which is more than 24nm.⁸



Official Map of Indonesia⁹

As previously outlined, although the reclassification of Tomini Bay from archipelagic waters to internal waters presents legal and practical challenges, this does not preclude the possibility under the framework of the 1982 United Nations Convention on the Law of the Sea. Rather, such a possibility remains open, provided that it is supported by a sound legal basis and consistent State practice. The strategic significance of Tomini Bay lies not only in its proximity to the Indonesian Archipelagic Sea Lanes (ASLP), but also in its rich and diverse marine ecosystems, including mangroves, seagrass beds, coral reefs, coastal biota, and various oceanographic elements. These characteristics underscore the necessity for a more robust legal status that enables enhanced protection and governance.¹⁰

At the regional level, coastal administrations have already implemented various resource management initiatives, reflecting the socio-economic importance of the area. Tomini Bay supports marine tourism, coastal livelihoods, and aquaculture development, all of which contribute significantly to local economic resilience. Nevertheless, increasing economic utilization must be balanced with ecological sustainability, as marine biodiversity particularly coral reefs and endemic species remains highly vulnerable to degradation and overexploitation. Given its dual function as both an ecological hotspot and a strategic maritime corridor in the Sulawesi region, Tomini Bay requires a governance framework capable of integrating security, environmental protection, and sustainable economic use. In this context, the consideration to elevate its legal status into internal waters reflects a broader effort to consolidate maritime sovereignty while ensuring long-term ecological preservation.¹¹

METHOD

This study analyzes the delimitation of internal waters in Indonesia as archipelagic state. This paper uses normative legal methods with comparative law by comparing several state practices.¹² Due to this unclear concept of delimiting internal waters, indicating historic waters,

⁸ Rachma, TRN; Rizka Winidastuti, "Spatial Study of Indonesia's Historic Bay: A Case Study in Tomini Bay", IOP Publishing, (2020), doi:10.1088/1755-1315/618/1/012038, p. 2.

⁹ Badan Informasi Geospasial, <https://www.big.go.id/content/layanan/unduh-peta-nkri>

¹⁰ Towadi, M., & Mandjo, J. T. (2021). Tomini Gulf Maritime Axis in International Law Review. JILS (Journal of Indonesian Legal Studies), 6(2), 389-410. <https://doi.org/10.15294/jils.v6i2.49667>, p. 399.

¹¹ Rachma, *ibid*, p. 9.

¹² Amiruddin; Zainal Asikin, "Pengantar Metode Penelitian Hukum", Jakarta: Raja Grafindo Persada 2004, pp. 130-131.

the study focuses on two key issues. First, whether Indonesia can designate Tomini Bay as a historic bay, and to what extent does it have the authority to do so? Second, what are the legal implications if such a designation is implemented? This article examines three discussions, beginning with a discussion of the concept of internal waters in archipelagic states regime. Second, the study examines the delimitation in the internal waters regime. Third, it discusses the possibility of delimiting internal waters in Tomini Bay, which would change its status from archipelagic to internal waters and its legal implications. The analysis aims to bring a new perspective in strengthening maritime security in Indonesia.

Discussion

The Concept of Internal Waters in Archipelagic States

The discussion regarding internal waters in archipelagic state is an important basis in understanding the regime of archipelagic state regulated by UNCLOS 1982. This regime is built through the drawing of archipelagic baselines, so that the determination of internal waters in Indonesia cannot be separated from this structure. A clear understanding of the characteristics and legal implications of archipelagic waters serves as a useful basis for examining how Indonesia's maritime jurisdiction is structured as a whole.

The principles of UNCLOS 1982 affirm that archipelagic states have a distinct legal standing from coastal states in general. This regulation grants archipelagic states the right to establish archipelagic baselines by connecting the outermost points of their outermost islands, recognizes the existence of archipelagic waters, and allows archipelagic states to determine their own internal waters.¹³ This authority is the primary foundation that distinguishes archipelagic states from other forms of statehood. Thus, the concept of an archipelagic state is not simply understood as "a group of islands," but also reflects "sea interspersed with many islands," demonstrating that the elements of the sea and islands are equally important in forming the territorial unity of an archipelagic state.¹⁴ This understanding emphasizes that maritime space does not merely separate islands but rather plays a role in uniting the entire region as a single geographical and legal entity.

Archipelagic states grant certain rights to foreign vessels, including the right of innocent passage and the ASLP. The right of innocent passage is regulated by the general provisions of UNCLOS 1982 concerning territorial seas, while the ASLP is a distinctive feature that distinguishes the regime of archipelagic states from other states. Furthermore, archipelagic states have the authority to determine these routes. Archipelagic states may determine ASLP and air routes thereon to ensure the smooth and safe passage of international shipping and aviation, and when the channel is determined, all foreign ships and aircraft have the right to navigate and overflight in normal mode continuously, expeditiously, and unhindered through the channel, with the obligation to follow the determined route and the applicable traffic separation scheme and if the archipelagic state does not determine ASLP, the right of passage can still be exercised through routes generally used for international navigation.¹⁵ On the other hand, the archipelagic waters regime still allows other countries to enjoy traditional fishing rights recognized under international law, as well as the right to lay submarine cables.¹⁶ This provision often results in waters near coastal states becoming traditional fishing grounds for some countries. This situation ultimately present archipelagic states with greater challenges in preventing illegal fishing and smuggling, especially when these activities are carried out using access permitted under the archipelagic waters regime.¹⁷

¹³ UNCLOS 1982, Part IV.

¹⁴ Puspitawati, Dhiana (2021) "Indonesia's Archipelagic State Status: Current Development," *Indonesian Journal of International Law*: Vol. 8: No. 4, Article 6. DOI: 10.17304/ijil.vol8.4.329, pp. 695-696.

¹⁵ UNCLOS 1982, Article 53.

¹⁶ UNCLOS 1982, Article 51.

¹⁷ Maria Maya Lestari, *ibid*, p. 2063.

Having discussed the rights applicable within the archipelagic state regime, it is important to emphasize that internal waters, even within the same natural resource framework, can have different legal consequences. These differences depend primarily on the method of delimitation adopted by the state, as each delimitation method can result in varying rights and responsibilities and can affect the scope of the state's authority over activities within it. This difference is particularly evident between internal waters established based on customary rules and those established through the straight baseline method. Delimitation based on customary rules places the area entirely under the sovereignty of the coastal state, preventing other states from acquiring navigation rights such as the right of innocent passage. In this situation, the coastal state has full authority to determine the types of rights and conditions under which foreign vessels can access them. Conversely, internal waters established through straight baselines still allow foreign vessels to enjoy the right of innocent passage, so the legal consequences are not as absolute as those of internal waters established based on customary practices.

At the time Indonesia declared its independence, its status as an archipelagic state was not yet recognized. This recognition was only unilaterally declared through the Djuanda Declaration in 1957, at a time when the concept of an archipelagic state was still in its development stage.¹⁸ The provision that Indonesia is an archipelagic state was then officially adopted into the Indonesian Constitution through the second amendment to the 1945 Constitution. It confirms Indonesia's position as an archipelagic state at the national legal level and strengthens its position in building a maritime regime that is in line with the principles of international maritime law.

However, Indonesia still faces a number of challenges related to the implementation of the principles of an archipelagic state in accordance with international law, such as the implementation of ASLP which is not yet fully in line with UNCLOS 1982, maritime delimitation issues with neighboring countries, delimitations of internal waters, and a draft maritime law that has not yet been ratified, thus emphasizing the importance of commitment and harmonization of national policies with UNCLOS 1982 provisions to strengthen the management and sovereignty of maritime areas.¹⁹

The concept of internal waters as applied to archipelagic states is essentially the same as territorial waters that applied to other types of states. Although the archipelagic state regime has unique characteristics, the legal definitions and principles governing internal waters remain within the same general framework, ensuring that their legal status and consequences are consistent without any substantive distinction between the two. In general, internal waters are the waters on the landward side of the baseline of the territorial sea.²⁰ The concept of internal waters is generally governed in Article 8 of UNCLOS 1982. The definition of internal waters is "except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State."²¹ Internal waters can be described as maritime zones that are not independent or give the impression of having a subsidiary character, the regulation of which depends on two conditions, namely their connection with the territorial sea zone and the shape of the land area.²² However, these conditions apply in cases where straight baselines are used.

Internal waters regime is governed by customary international law.²³ Under customary international law, the status of internal waters depends on the land area, so its establishment is

¹⁸ Puspitawati, *ibid.*, pp. 696-697.

¹⁹ Puspitawati, *ibid.*, pp. 713-714.

²⁰ UNCLOS 1982, Article 8(1).

²¹ UNCLOS 1982, Article 8 (1).

²² Hanna Kureemun. The Appurtenance of Internal Waters to the Land Domain: a proposal to resolve the ambiguity of Article 7(3) of the UN Convention on the Law of the Sea. *Neptunus*, 2023, 29 (3), pp.18. hal-04586219, pp. 5-6.

²³ Bangert Kaare, "Internal Waters", *Oxford Public International Law*, 2018, p. 3, para. 2

not solely determined by legal aspects. Various non-legal considerations, such as protection and security, economic interests, social conditions, political factors, and historical background, are also considered important influencing factors.²⁴ Thus, the historical element plays an important role in strengthening a country's claim to maritime areas located on the landward side of the baseline, because this historical status provides additional legitimacy based on long-standing practices recognized by customary international law. Both internal waters and the partially overlapping regime of historical waters constitute the only regimes within the law of the sea that are regulated exclusively by general customary law.²⁵ Consequently, the status of a bay will affect the fishing rights, the freedom of innocent passage had traditionally been enjoyed, and also the implications of security over the area.

As an integral part of its sovereign territory, internal waters grant coastal states full authority to establish regulations (prescriptive jurisdiction) and enforce laws (enforcement jurisdiction). This authority remains subject to the limits established by international law.²⁶ Based on this characteristic, coastal states have extensive capacity to regulate the use, supervision, and management of internal waters, including aspects of security, the environment, and the economic activities taking place within them.

In some cases, states interpret the internal waters regime as a basis for including provisions in bilateral agreements governing the division of maritime territory with neighboring states, or as a basis for constitutional instruments asserting specific rights over those waters.²⁷ This interpretation demonstrates that the status of internal waters is not solely dependent on UNCLOS rules but is also influenced by state practices and geopolitical needs in the region. In such contexts, internal waters can acquire additional legal character when the states concerned agree on specific claims, access rights, or management mechanisms through treaties or constitutional arrangements. Coastal states are authorized to establish and enforce regulations regarding the conservation of marine living resources and the prevention of fisheries violations.²⁸ This authority is relevant because the state has full control over the management and protection of resources in the area. Therefore, the designation of Tomini Bay as internal waters also relates to efforts to ensure clearer and more effective management and protection of natural resources in the area.

The Delimitation of Internal Waters Under the Framework of International Law

As a regime with full sovereignty, internal waters constitute an area over which a state holds ultimate authority. This makes delimitation a crucial issue, particularly for archipelagic states that cannot automatically claim all waters within their baselines. Delimitation of internal waters in regards of archipelagic state lies in Article 50 UNCLOS 1982, where it stipulates that “*Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11.*”

As mentioned earlier, an archipelagic state has the right to define its internal waters. This provision is specific and applies only to archipelagic states. Delimitation of internal waters must comply with provisions governing river mouths, bays, and ports, thus reflecting compliance with the principles of international maritime law. However, UNCLOS 1982 does not stipulate a specific method for drawing internal water boundaries, allowing states flexibility in determining their delimitation methods. This right gives archipelagic state the authority to adjust internal water boundaries to suit geographic conditions and national sovereignty

²⁴ Hanna Kureemun, *ibid*, p. 10-11.

²⁵ Bangert Kaare, *Internal Waters*, Oxford Public International Law, 2018, p. 3.

²⁶ Rothwell D, Stephens T, *ibid*, p. 53.

²⁷ *Ibid*.

²⁸ *Ibid*, p. 352.

interests, while still considering international navigational interests and applicable maritime law.

Even if there is no specific method for delimiting internal waters, it does not necessarily mean that an archipelagic state can determine all the waters within their sovereignty as internal waters. The delimitation of internal waters must be carried out with respect for the rights of third parties that arise as set out under UNCLOS 1982. This is due to the existence of other rights in different parts of the sea, including archipelagic waters and exclusive economic zones, which essentially do not overlap. Other countries are granted the right by UNCLOS 1982 to be innocent passage, conduct international navigation, and transit passage that are not included in the internal waters regime or different treatment will apply based on their legal status. Accordingly, complying with existing provisions regarding mouths of rivers, bays, and ports is essential to protect the rights of other countries. However, this article will not discuss the river and port regimes, as these provisions are not relevant to Tomini Bay, which is a bay. The discussion will focus on the possibility of changing Tomini Bay's status to internal waters.

In the regime of bays, Article 10(1) of UNCLOS 1982 defines 'bay' as a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast.²⁹ This definition forms the basis for determining the status of a bay, which can then influence whether a country gains full sovereignty over the bay. The term "bay" or "gulf" should not be differentiated since it would not be material to the subject.

Either explicitly or implicitly, UNCLOS 1982 recognizes five types of bays.³⁰ First, UNCLOS recognizes historical bays, which are not governed by the straight-line system under Article 7 or, more generally, by Article 10. Second, bays that have been designated as internal waters through the use of the straight-line system under Article 7. Third, bays that are the subject of competing claims by several states, which fall outside the scope of Article 10. Fourth, bays that meet the criteria for legal bays with a natural entrance of less than 24 nautical miles. Fifth, legal bays with a natural entrance of more than 24 nautical miles.

Although the term "historical" is expressly mentioned in Article 10, paragraph (6), UNCLOS 1982, this does not mean that historical bays are fully regulated by UNCLOS 1982, but rather are subject to a special regime.³¹ UNCLOS 1982 also allows for interpretation of the term "historic bay." As stated in Article 10, paragraph (6), the general provisions regarding bays do not apply to bays designated as "historical" or to cases where the straight-line system under Article 7 applies. This means that the definition of a bay, including bays with entrances exceeding 24 nautical miles, is excluded.

Thus, internal waters can be classified into two group categories, namely:³² areas of sea delimited by customary rules and areas of sea delimited by conventional rules of straight baselines.

1. Areas of sea delimited by conventional rules of straight baselines

In the first group, internal waters that are limited using straight baselines can be said to be conventional internal waters. Straight baseline is also known as one of the methods for determining the baseline based on specific geographical conditions. Straight baselines methods refer to Article 7 of the UNCLOS 1982.³³ This article explains the use of straight baselines by coastal states to determine their territorial sea boundaries. This method can be

²⁹ UNCLOS 1982, Article 10 (1)

³⁰ Rothwell D, Stephens T, *ibid*, p. 44.

³¹ Yoshifumi Tanaka, "The International Law of the Sea". 3rd ed. (Cambridge: Cambridge University Press, 2019) p. 65.

³² Kaare Bangert, Internal waters: Customary Rules of the Extension of Internal Waters, *Nordic Journal of International Law* 61/62: 43-60, 1994, Kluwer Academic Publisher, ("Internal Waters: Customary Rules") p. 44.

³³ UNCLOS 1982, Article 8(2) "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

used when the coastline is geographically irregular, such as when the coast is highly indented, has many small bays, or contains a series of small islands along the coastline.³⁴ In such situations, straight baselines allow coastal states to draw lines from specific points along the coast or between islands, thus reflecting the general shape of the coastal area more accurately than conventional baselines that follow the low-water

Furthermore, it stipulates that if a region's coastline is unstable due to natural factors, such as the presence of deltas or sedimentation that cause coastal changes, coastal states may establish baselines at the most seaward parts of the coast. These baselines remain in effect even if natural changes cause the coastline to recede, until the state in question formally changes them in accordance with the provisions of UNCLOS 1982.

However, the drawing of straight baselines must not deviate too far from the general direction of the coast, and the sea within the baseline must be closely connected to the mainland, both geographically and functionally, to be considered internal waters. Straight baselines should also not be drawn from land that is only visible at low tide, unless there are permanent structures on it or this has been internationally recognized. In determining these baselines, coastal states may consider their distinctive and long-standing economic interests in the area. However, this method should not be applied in a manner that prevents other states from accessing the high seas or their exclusive economic zones (EEZs).

Notwithstanding that the method seems available and there are general provisions regarding delimitation using straight baselines, the absence of maximum limits is common in internal waters regimes.³⁵ The delimitation of internal waters is largely left to the sovereignty of coastal states without any practically significant legal restrictions.³⁶

However, in the situation such Tomini Bay, the extent of its territorial waters far exceeds the maximum limit permitted for drawing a straight baseline. Therefore, if Indonesia continues to use the straight baseline method to enclose the mouth of Tomini Bay, it can only draw a line 24 nautical miles long, thus enclosing only a small portion of the bay.

Consequently, this method fails to transform the entire Tomini Bay area into internal waters. Only the portion enclosed by the 24 nautical mile line can be classified as internal waters, while the remaining area remains legally outside the internal waters regime. This means that Indonesia cannot obtain full recognition of its supreme sovereignty over the entire bay through the straight baseline method, making this approach less feasible for achieving the goal of establishing a comprehensive legal status for Tomini Bay and the objective of providing more optimal protection for marine biota that require special handling was also not achieved.

2. Areas of sea delimited by customary rules

In the first group, as mentioned above, the lack of definition regarding the term 'historical' is emphasized in customary international law. This issue of internal waters in relation to the status of historical waters is nothing new in international law. This concept developed due to the uncertainty and ambiguity at that time regarding the maximum width of the territorial sea and the rules regarding the closure of bays.³⁷ Unfortunately, although the concept of historical waters is recognized in international law, UNCLOS 1982 does not provide a specific definition or concept for historical waters, making this a frequent source

³⁴ Muhamad Widodo, Testing the Suitability of the Indonesia and Vietnamese Baselines Under UNCLOS, *Padjadjaran Journal of International Law*, Vol. 8, Number 1, January 2024, p. 22.

³⁵ Internal waters: Customary Rules

³⁶ Internal waters: Customary Rules

³⁷ Raul Pete Pedrozo, Reflecting on UNCLOS Forty Years Later: What Worked, What Failed, 99 *INT'L L. STUD.* 874 (2022), p. 912

of conflict.³⁸ Consequently, any claim to a historical bay must be carefully examined, taking into account state practice, historical evidence, and international consensus, to avoid protracted legal disputes

Many countries chose to claim maritime areas near their coastlines as sovereign territories, deemed essential for protecting national security and supporting economic prosperity.³⁹ With the development of international maritime law, the width of the territorial sea was definitively set at twelve nautical miles, the exclusive economic zone was expanded to two hundred nautical miles, and the rules regarding the closure line for legal bays were more clearly defined. Therefore, the justification for maintaining claims to historical waters on security or economic grounds became less relevant.⁴⁰

Nevertheless, UNCLOS 1982 continues to recognize the concept of historical waters, particularly within the bay regime. Therefore, historical waters retain a certain place in international maritime law, particularly when states wish to assert that a bay possesses historical characteristics or value that provide additional basis for determining its legal status and may affect the delimitation between countries.⁴¹ The term “historical” is mentioned in UNCLOS 1982, but is not defined, so this gap will be filled by customary international law. However, until now there has been no validly established standard as a basis for a country to claim a bay as a historic bay.⁴²

For emphasis, in 1962, the United Nations established the *UN Juridical Regime for historical waters, including historical bays (UN Juridical Regime for historic waters and bay)*, which serves as an important reference for understanding the concept of historical waters.⁴³ The UN Regime of Historic Waters sets out elements of title to historic waters. The claims to historic title or water are linked to claims to sovereignty over both land and water areas.⁴⁴ In historic waters regime, it also explicitly states that “historic rights” can be asserted not only over bays, but also in other maritime zones, including the waters within archipelagos and those situated between an archipelago and the adjacent mainland.⁴⁵ However, this article solely focuses on the discussion of the bay.

Moreover, the concept of historic waters has developed through the years. Thus, to define, historic waters are waters in which the coastal State, in deviation from generally accepted rules of international law, has exercised sovereign rights in a clear, effective, continuous manner over a significant period, with the tacit acceptance of the global community.⁴⁶ Indonesia can use the Historic Waters Status as a basis for delimiting waters outside the provisions of UNCLOS 1982. This concept offers an alternative to the bay regime, which limits its territorial waters to only 24 nautical miles. Considering that Tomini Bay extends beyond this limit, the use of the Historic Waters Status can provide a legal basis for Indonesia to change the status of its waters from archipelagic waters to internal waters.

In the UN Juridical Regime for historic waters and bay, the criteria set out for establishing historic waters can be divided into three elements. The elements consist of the exercise of authority over the area by the State claiming the historic right; the continuity of this exercise of authority; and the attitude of foreign States.

³⁸ Yoshifumi Tanaka, “The International Law of the Sea”. 3rd ed. (Cambridge: Cambridge University Press, 2019) p. 58.

³⁹ Raul Pete Pedrozo, *Ibid*, p. 912.

⁴⁰ *Ibid*.

⁴¹ UNCLOS 1982, Article 15.

⁴² Raul Pete Pedrozo, *ibid*, p. 913

⁴³ Hereinafter, “the UN Regime of Historic Waters”

⁴⁴ UN Secretariat, ‘Judicial Régime of Historic Waters’, p. 23, para. 164.

⁴⁵ Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea*. at. 78.

⁴⁶ L.J. Bouchez, *The Regime of Bays in International Law* in Clive R. Symmons, (2008) *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*, Martinus Nijhoff Publishers, p. 1.

First, the exercise of authority by the state claiming a historic bay is a fundamental element that must be fulfilled for the claim to be valid. This exercise of authority must be demonstrated through concrete actions on the ground, not merely through unilateral declarations or proclamations without evidence of action.⁴⁷ Although the state is not required to enact this authority in the form of enforceable laws or regulations, it must demonstrate that it truly exercises control over the area.⁴⁸ This control can be reflected in various activities or actions that demonstrate the state's presence and intervention, thus proving that the area falls within its effective and sustainable authority.⁴⁹

Second, a state seeking to make a claim must demonstrate that its activities in utilizing the area have been continuous and ongoing. This means that the state's actions in exercising its authority or sovereignty in the area must occur over a period of time long enough or considerable time to demonstrate a real commitment.⁵⁰ However, this principle does not require a formally established minimum period for a region to be recognized as having historic title.⁵¹ Essentially, what is assessed is the continuity and continuity of the state's actions, not a specific number of years required.

Third, acquiescence from other states is a crucial element in assessing the validity of a historical claim.⁵² The term acquiescence does not necessarily require the claimant state to explicitly request approval, but rather refers to the absence of opposition from other states to the action or claim.⁵³ In the practice of international relations, this situation makes claiming historical territory even more complex, as relying on the absence of acquiescence from other states is not easily obtained or controlled by the claimant state. Acquiescence from other states of the claimant, particularly regarding historical elements and their continued implementation over a long period, can also strengthen the claim. In fact, the absence of acquiescence over a period of time is often considered a form of acquiescence, so that, in a simple sense, silence constitutes acquiescence. However, the United States holds a different view regarding the principle that silence constitutes acquiescence.⁵⁴ According to the United States, acquiescence must be demonstrated through concrete actions by other states, not merely by the absence of acquiescence.⁵⁵ As a result of these differences in interpretation, the United States subsequently rejected 17 of the 19 claims to the historic bay submitted by various countries, because they considered that these claims did not meet the provisions of international law that could be used as a basis for determining the status of historic waters.⁵⁶

The understanding of historic bays in international law is also heavily influenced by how countries implement their practices. Furthermore, the developments over claims to the historic bay are also influenced by the other factors to justify the claim, rather than those three elements, are based on economic necessity, national security, vital interest, or a similar ground.⁵⁷ Where this vital interest element is still being debated, especially by the United States.⁵⁸ Therefore, the discussion below highlight some examples of state practices that demonstrate how historical elements have been applied in attempts to characterize

⁴⁷ Raul Pete Pedrozo, p. 913.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p. 914.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Juridical regime of historic waters, including historic bays, at. 13. Para. 81.

⁵⁸ Stuart Kaye, "The South Australian Historic Bays: An Assessment", (1995) 17 Adel LR, p. 276

certain bays as historic bay. This discussion is limited to a general overview of these existing practices without undertaking a detailed analysis.

In 1973, the Libyan Government presented its claim to the Gulf of Sirte to the United Nations through a *note verbale*, which was submitted after the country published an official announcement in the Official Gazette on October 15.⁵⁹ These actions demonstrate that states generally view notification through diplomatic channels, particularly to the most interested states, as an essential part of the process of asserting claims to historical waters, even though such a step is not expressly required by international law. In line with this, the state is also striving to fulfill the provisions in the first element of the UN Juridical Regime of Historic Waters. Moreover, it is generally believed that most countries tend to avoid formally delimiting their historical waters unless circumstances truly require it. However, this view is often considered to oversimplify reality and does not fully reflect evolving state practices, particularly in the 20th century, when states demonstrated a more diverse and complex approach to establishing and maintaining claims to historical waters.⁶⁰ For instance, when Italy declared the Gulf of Taranto as a historic bay in 1977, it openly notified the international community by issuing a decree accompanied by a map, indicating that states may actively advance historic claims even without external pressure or extraordinary circumstances. Following by the case of South China Sea, The South China Sea dispute starts with a unilateral claim made by China. China claims called the ‘nine-dash line’, and it has been revealed on their map since 1947.⁶¹ In the case of the South China Sea where China’s claims are solely based on the historic rights called the ‘nine-dash line’. Further, this case was brought to the Permanent Court of Arbitration (“PCA”) in July 2016 by Philippine. However, in this matter, China appears to have taken a very bold step and demonstrated its bargaining position through its economic power and broad and significant strategic interests, while simultaneously ignoring the arbitral award, thus confirming that UNCLOS 1982 is ineffective in implementing the award.⁶²

As a comparison, seems there are no similar cases that can serve as direct references for the case under review, including in the current issue. The various examples available demonstrate that historical water status generally arises from unilateral claims made by a country directly bordering another country, making the process of determination and resolution much more complex because it is related to the potential overlapping rights and interests of other countries.

However, there is one particularly interesting case study. When reviewing Australia's claims to Anxious Bay, Encounter Bay, Lace Pedee Bay, and Rivoli Bay, it appears that all four bays were designated as historic bays despite the absence of any other disputing parties or any other country actively pursuing a competing claim. Australia first proclaimed this claim in 1987, then reaffirmed it in 2006 and 2016. This consistency demonstrates Australia's commitment to maintaining historic bay status for these bays.

Despite the lack of direct protection from other countries, this claim nevertheless sparked a protest from the United States in 1991. In a diplomatic note, the United States stated that, in its view, no interests were being harmed and that any interests sought to be protected could be achieved through other mechanisms without establishing the bays as historic bays.

In response to the protest, Australia issued a statement essentially deeming the United States' approval merely a formality. Australia also emphasized that if they followed the

⁵⁹ Clive R, *Ibid*, p. 147.

⁶⁰ Clive R, p. 147.

⁶¹ Eric Pomes, Jean M. C, “The Emotional Backdrop of Legal Discourses in South China Sea Disputes”, *Hasanuddin Journal of Social and Political Science*, Vol. 1 No. 1 (2021), p. 3.

⁶² Lan Anh Nguyen Dang, ‘Joint development and China's bargaining strategies in the East and South China Seas’ (*The Japan Institute of International Affairs*, 2024), pp. 5-6.

protest, it could actually have consequences for their other root canals. Furthermore, Australia argued that designating the four bays as historic would not negatively impact the interests of any foreign country. Moreover, over time, the claim has increasingly gained historical basis and weight, strengthening its position within the international law.

Delimitation of Internal Waters in Tomini Bay and Its Legal Implications

As an archipelagic state, Indonesia does have the authority to delimit internal waters; however, this authority remains limited by applicable regulations regarding rivers, bays, and ports. Therefore, not all waters can be designated as internal waters.⁶³ As above criteria mentioned, there are two methods that can be used to determine the status of an area as internal waters. However, in the context of Tomini Bay, only one method can be applied. Given that Tomini Bay's width exceeds 24 nautical miles, this area cannot be qualified as a conventional bay where a closing line can be drawn based on the general provisions of Article 7 UNCLOS 1982, namely using a straight baseline that cannot be used. Therefore, the only relevant and still possible approach is through customary international law.

Existing practice shows that historical waters typically arise from unilateral claims between countries, making their determination complex. This pattern is not entirely relevant to Tomini Bay because the area is entirely under Indonesian sovereignty and does not raise cross-border issues, thus eliminating the need for proof of control. It is widely known that a new claim of historic bay cannot automatically create such a title, since it needs a history of continuous practice.⁶⁴ Therefore, unless the claim is clearly intended to apply to the past, its legal effect will usually only apply in the future.⁶⁵ However, the situation in Tomini Bay needs to be understood as a situation that differs from other general cases. An archipelagic state is considered an “intrinsic geographical, economic, and political entity, or which historically has been regarded as such”.⁶⁶ Based on this basis, unilateral claims made by archipelagic states remain permissible as long as they are within the limits of delimitation authority and do not conflict with the rights of third countries. Nevertheless, Australia's practice confirms that elements of the UN Juridical Regime of Historic Waters remain important as objective standards for assessing the legitimacy of claims, particularly since UNCLOS 1982 only allows the closure of bays beyond 24 nautical miles through the designation of historical waters. Therefore, the framework of this regime remains necessary to assess the historical basis and consistency of Indonesia's practice.

In the current issue, Tomini Bay is not within the ASLP, and other countries' rights in archipelagic waters are limited to innocent passage and the installation of submarine cables. If Tomini Bay were designated as internal waters, neither of these rights could be exercised without Indonesia's permission. This change in status would also not disrupt international navigation, as global routes are already routed through the ASLP, which lies outside Tomini Bay. Establishing Tomini Bay as internal waters through customary law not only affirms Indonesia's sovereignty but also provides optimal protection for the region's natural resources. Consequently, Indonesia not only sets regulations but also enforces them through executive or adjudicative means against foreign vessels, crew, passengers, and cargo on board. Foreign vessels are required to comply with the provisions of the coastal state, particularly regarding customs, safety, health, navigation, and port administration in ports and other parts of internal waters.⁶⁷ The implication is that the loss of the right of innocent passage reduces the potential

⁶³ UNCLOS 1982, Article 50.

⁶⁴ Cliver R. p. 109.

⁶⁵ Cliver R. p. 109.

⁶⁶ UNCLOS 1982, Article

⁶⁷ Nugroho, S. (2019). “IMPLEMENTASI KETENTUAN PASAL 50 UNCLOS DI WILAYAH NEGARA KEPULAUAN” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 8(2), 293. doi:<http://dx.doi.org/10.33331/rechtsvinding.v8i2.314>, p. 300.

for environmental pressures, while the expansion of state authority allows for more sustainable management. The change in status to internal waters also aligns with international legal principles in state practice and supports efforts to prevent future environmental degradation.⁶⁸ Thus, if Indonesia can demonstrate a strong national interest that aligns with the provisions of UNCLOS 1982, then in principle, the status of Tomini Bay can be transferred to internal waters through a unilateral determination that is valid under international law.

CONCLUSION

This study concludes that Indonesia has the authority to determine the delimitation of its internal waters under the archipelagic State regime, subject to the limits of international law. The possible change of Tomini Bay's status from archipelagic waters to internal waters therefore falls within Indonesia's jurisdiction, provided that the requirements of customary international law on historic waters are met. Among the existing approaches to delimiting internal waters, the customary law approach is the most relevant to the characteristics of Tomini Bay, as it allows the closure of the bay while supporting its potential classification as a historic bay.

Such a change in legal status would result in the exercise of full Indonesian sovereignty over Tomini Bay, including the exclusion of the right of innocent passage and restrictions on the installation of submarine cables by other States. It would also provide greater legal space for sustainable environmental management. More broadly, this reclassification would strengthen Indonesia's maritime defense strategy by enhancing sovereignty, maritime security, and ecosystem protection in the Tomini Bay area.

⁶⁸ Towadi, *ibid*, p. 403.

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