

Legal Aspect on Use and Land Utilization of Outermost Small Islands in Indonesia for Foreign Investment Interests

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Abstract

The regulation of the use and utilization of the outermost small islands in Indonesia has not been well ordered. The development of outermost small islands of inhabitant has not been fully adapted to the island's characteristics, namely the ecological conditions and the island's resources. The outermost small islands which are generally controlled by customary law or traditional community from generation to generation as inhabitant require recognition and determination of land rights by the Government. The Minister of Agrarian Affairs and Spatial Planning has established regulations on Land Arrangement in Coastal Areas and Small Islands, based on customary law of the structure of autonomous community/traditional community which was appointed as the basis of approach in arranging the granting of land rights on small islands. Land rights may be granted under customary law on the Tenure and Ownership of Small Islands by customary law/Traditional community, in the form of Communal Right and/or confirmed as Hak ulayat. Land rights (Communal Right or Hak Ulayat) are the basis for the authority of autonomous community/traditional community and local community as islander to use and utilize the island's land and its surrounding waters. The land rights of outermost small islands can be undertaken as the basis for establishing a business that can be registered, and can be contracted with investors in the use and utilization of their land rights with due regard to the carrying capacity of the environment and the sustainability of its natural resources.

Keywords: characteristics, land rights of islanders, foreign investment.

I. Introduction

The Government of Indonesia in 5 years period (2012-2016) has been conducted a serious effort to treat island as a verifiable Indonesian archipelago with amount 14.572 islands. This amount is an addition from the amount set by the United Nations (UN) as many as 13,466 islands, with details of the addition is 537 islands in 2015 and 749 islands in 2016. From data prior to 2017 number of outermost islands were 92 islands, and in 2017 added a total of 19 islands. Thus, the number of outermost small islands of Indonesia currently amounts to 111 islands.¹ The standardization outermost islands are made to discipline and classify the characteristics and needs of the island, primarily on inhabited islands. For that purpose, the Government has stipulated a Presidential of the Republic of Indonesia Decree (Kepres) Number 6 Year 2017 on the Establishment of the Outermost Small Islands, which in its annex contains a list consisting of the name of the island, other names of islands, waters, outermost point coordinates, base dot, and province.

The island is an asset for Indonesia as an archipelagic state, therefore it takes strategic and appropriate policy for its management, because the available potential and richness as natural resources in each island is very diverse. Some can be utilized, some have not been utilized and some cannot be utilized, some are included in marine conservation areas, some are in the possession and/or ownership of the community, or some are managed by other parties / investments. Legal status in the form of control, ownership, management and utilization of outermost small islands needs to be established in the form of regulation in the form of land rights that can provide legal certainty, justice and benefits related to security defense function, economic function and ecological function.

Issues concerning island leasing, island ownership and even naming the outermost small islands by foreigners, emerged in early 2016. The facts of 16 islands that have been managed by foreigners with ownership status are contrary to the constitution (Articles 28 and 33 of the Indonesian Constitution 1945, as data disclosed by the People's Coalition for Fisheries Justice (KIARA).² The utilization of small islands and the utilization of its its surrounding waters in the context of foreign investment may be granted through a licensing mechanism by the Minister of Marine Affairs and Fisheries as set forth in Article 26 A paragraph 1 Law of the Republic of Indonesia Number 1 Year 2014 on Amendment to Law of the Republic of Indonesia Number 27 Year 2007 on the Management of Coastal Areas and Small Islands.

The management of small islands is also listed in the National Medium-Term Development Plan (RPJMN) 2015-2019, and has been listed around 100-300 potential islands will be offered to investors. Management of the outermost small islands is conducted at least carrying three missions, namely; (1) maintaining the integrity of the

¹ See www.mongabai.co.id/2017/01/12

² See www.mongabai.co.id/2015/10/09

Unitary State of the Republic of Indonesia, national security, national defense, and creating regional stability; (2) utilization of natural resources in the framework of sustainable development; (3) empowering the community in order to improve their welfare. Marine, coastal and small island management programs aimed at realizing the justice and welfare of the Indonesian people, therefore it is appropriate to realize legal certainty in the management of outermost small islands, mainly related to the problems of the aspects of agrarian law, among others: What are the characteristics and interests of the outermost small islands of inhabitants? To what extent are local government regulations and policies on the recognition and granting of land rights of outermost small islands to autonomous community/traditional community and local community? And How to provide Land Rights Management (HPL) on the outermost small islands for the benefit of foreign investment?

In the review of Law and Policy Studies of Outermost Small Islands (Case Study of Nipa Island)¹ focused on border islands in the perspective of State endurance. Furthermore, in the writings of Land Tenure and Ownership of Small Islands (Strategy to Keep the Unity of NKRI)² is still in the form of idea on land control arrangement and ownership on small islands, before the enactment of Regulation of the Minister of Agrarian/Spatial of the Republic of Indonesia Number 17 Year 2016 on Land Arrangement in Coastal Zone and Small islands. The renewal of this paper is attributed to the characteristics, the status of land rights of outermost small islands with inhabitants, as well as the granting of Management Rights to investors to the outermost islands with inhabitants who have land rights in the form of Communal Right or Hak Ulayat.

II. Research Method

Normative Law Research deals with the truth of legal norms, through legal description, law formation, and law enforcement. This study aims to provide a complete picture by describing the qualitative data in a simple way. The simple data is analyzed in-depth through the knife of legal principles, norm hierarchy, consistency and synchronization of written legal norms through legislation or unwritten norms through living law in the community regarding the object and study of research on the management, utilization, and structuring of the outermost islands. Qualitative descriptive analysis is used to articulate between legal norms, legal reality and ideas related to the use and utilization of the outermost islands for foreign investment.

III. Result and Discussion

A. Characteristics and Interests of the Outlying Islands of the Outermost

A.1. The Terms of the Outermost Small Islands (PPKT)

The terms of the outermost islands are diverse if they relate to the characteristics of the location or existence of the islands, for example defines as the outermost islands, the foremost islands, remote islands, and isolated islands. The "outermost" means something very far from where we stand, while "front" means being in front of us. The term outermost islands refer to the translation of the "outermost island" of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, which in Indonesia shall be in accordance to the United Nations Convention on the Law of the Sea. According to Alex Retraubun, former Director of Small Island Empowerment, Ministry of Marine Affairs and Fisheries, the term "outermost islands" actually exists in the marine system of an archipelago country, including Indonesia. This term is an international standard term for an archipelagic state, including Indonesia which has recognized this law of the sea convention.

A.2. Characteristic of Outermost Small Island

The characteristic of outermost small islands is the conditions of natural resources, the economic condition of community, and the influence in the environment. Factual condition become important factors in determining the strategy/policy of management and utilization of coastal areas and outermost small islands together with marine resources. It is intended that the development of marine, coastal and outermost small islands directed to the welfare of the people is not only based on economic considerations that tend to ignore the potential carrying capacity and environmental sustainability.

The characteristics of small islands according to Griffith and Inmiss (1992) and Beller (1990) are:³

1. Separate from the main island habitats that are insular;
2. Have a limited supply of fresh water, including groundwater or surface water;
3. Vulnerable to external disturbances, whether natural or due to human activities;
4. Have endemic species that have high ecological functions;
5. Do not have hinterland area;

Then Sabarno⁴ mentioned that there were some juridical problems in potential utilization of the outermost

¹ Endang Adiyanto, Etty Eidman, Luky Adrianto. *Tinjauan Hukum dan Kebijakan Pengelolaan Pulau-Pulau Kecil Terluar (Studi Kasus Pulau Nipa)* Buletin Ekonomi Perikanan Volume VII No. 2 Year 2007

² Sutaryono. *Penataan Penguasaan dan Kepemilikan Tanah Pulau-Pulau Kecil (Strategi Menjaga Keutuhan NKRI)*, Seminar Nasional Peran Geospasial dalam Membingkai NKRI 2016, p. 119-125

³ Mustafa Abubakar. 2006. *Menata Pulau-Pulau Kecil Perbatasan*. Penerbit Buku Kompas, Jakarta. p.11

⁴ *Ibid.* p.19

small islands, which include:

1. The absence of law reference and regulation which are clear and comprehensive for the potential utilization of small islands of the border;
2. The settlement of current state border issues still depends on consideration of the advantages and disadvantages of the territory;
3. Determination of state border, still using survey references and mapping of the region that are partial, therefore its realization requires long and convoluted coordination; the settlement of border issues is still incidental situational.

The conditions and problems mentioned above are the main reasons for the Directorate General of Marine, Coastal and Small Islands of the Ministry of Marine Affairs and Fisheries in accordance with its function to gradually undertake efforts to manage the law on management of marine resources, coastal and small islands. Starting with the enactment of Law of the Republic of Indonesia Number 27 Year 2007 on the Management of Coastal Areas and Small Islands, Law of the Republic of Indonesia Number 26 Year 2007 on Spatial Planning, Law of the Republic of Indonesia Number 9 Year 2015 on the Second Amendment to Law of the Republic of Indonesia Number 23 Year 2014 on the Regional Government, Law of the Republic of Indonesia Number 43 Year 2008 on State Territory, to the stipulation of several implementing regulations, namely: Presidential of the Republic of Indonesia Regulation Number 78 Year 2005 on Management of Outermost small Islands, Government of the Republic of Indonesia Regulation Number 62 Year 2010 on Utilization of Outermost Small Island, Regulation of the Minister of Marine Affairs and Fisheries of the Republic of Indonesia Number PER.20/MEN/2008 on Utilization of Small Islands and Nearby Waters. Regulation of the Minister of Agrarian Affairs/Spatial of the Republic of Indonesia Number 17 Year 2016 on the Arrangement of Land in Coastal Areas and Small Islands, and Presidential of the Republic of Indonesia Decree Number 6 Year 2017 on the Establishment of the Outermost Small Islands.

A.3. The interest of the Outermost Small Islands is Linked to the Welfare of the Inhabitants

The interest of the outermost small islands is what the most important things needed for the survival of community in the outermost islands. In Presidential of the Republic of Indonesia Regulation Number 78 Year 2005 on the Management of Outermost Small Islands, the intended meaning of management is an integrated series of activities to utilize and develop the natural resources potential of the outermost small islands, as contained in article 2 on development of outermost small islands is conducted with purposes:

- a. To guard the territorial integrity of the Unitary State of the Republic of Indonesia, national security, defense of the State and the nation as well to create regional stability;
- b. To utilize natural resources for sustainable development;
- c. To empower community in the context of improving welfare.

Based on the Presidential Regulation (PR) mentioned above, the government has made a change of approach from sovereignty and security orientation (sovereignty and security approach), shifted to the prosperity approach, in the form of improving people's welfare in the border area. This welfare-oriented approach can ultimately strengthen the sense of nationalism identity of the small island community as part of the Unitary State of the Republic of Indonesia.¹ Developing the outermost small islands with a prosperity approach in accordance to mentioned PR is also exercised by building synergy between various departments and non-departmental institutions, in addition to the establishment of several sustainable development programs proclaimed in the Outermost Small Islands (PPKT), namely:

- a) for inhabited PPKT can be created in the form of tourism development, exploration of fishery resources, increased trade activity, infrastructure development, and institutional strengthening;
- b) for uninhabited islands is more directed towards development conservation and marine national parks, nature laboratories, marine tourism, and making the island as a transit area.

The community empowerment program that lives in small islands in improving their welfare, among others, is performed with the provision of production facilities in the form of aid ships, nets to catch fish.

To be able to improve the welfare of the inhabitants of the outermost small islands, the Department of Marine Affairs and Fisheries conducted field observations to see the condition of the outermost small islands, the results formulated in the form of what matters potential to be problems, both internal and external appropriate with the condition and characteristics of the island, to further establish the management strategy of the outermost small islands in improving the welfare of the community/its inhabitants. Some of the strategies set include:

- a. Opening nodes of border area access as an international gateway. For example, Pulau Berhala in the Malacca Strait to be opened as access to international trade;
- b. Improving the mobility of people/inhabitants in the outermost islands by opening transportation routes of PT. Pelni's boat section;

¹ Muh. Ali Nugroho. 2011. *Pemberdayaan Pulau-Pulau Terluar tidak Berpendhuni di sekitar Selat Malaka dalam Meningkatkan Ketahanan Negara*. Tesis Pasca Sarjana Universitas Indonesia; Jakarta. p. 15

- c. Inviting private sector participation in investments for the development of outermost small islands, especially border islands. For example, the development of Pulau Bidadari and Pulau Seribu as a tourism area;
- d. Developing growth centers of border islands in accordance with the potential and carrying capacity of the environment by enabling international cooperation in various sectors for marine development.

The program plan in the framework of management of the outermost small islands refers to the Spatial of the Territory Plan. The policy of economic development and the acceleration of the growth of the populist-based border island economy is a priority. The presence of investors in order to encourage economic acceleration in the outermost islands is needed to assist in mobilizing the islanders to improve their socio-economic welfare. According to Mustafa Abubakar¹ one of the efforts that can be undertaken if few population are inhabiting the small islands, the area can be undertaken with fishermen relocation by: 1) in-depth assessment of characteristics of small islands border and supporting growth factors; 2) to emphasize development on the aspect of equity, growth, and improving the welfare of local community; 3) emphasis on economic development that accessing local natural resource potentials with increased support for basic service sectors such as education and health and transportation facilities and infrastructure; 4) community participation in the planning, implementation and monitoring of economic empowerment programs.

B. Status of Land Rights on the Outermost Small Islands (PPKT)

B.1. The Inhabitants of the Outermost Small Islands

Some of the rules governing the outermost small islands set the inhabitants of the outermost islands consisting of: autonomous community, local community and traditional community. In the Regulation of the Minister of Marine Affairs and Fisheries of the Republic of Indonesia Number 20/MEN/2008 on Utilization of Small Islands and Its Surrounding Waters in Article 2 paragraph (2) letter g mentioning autonomous community, local community and traditional community. In Government Regulation Number 62 Year 2010 on the Utilization of Outermost Small Islands in the general provision mentioned Local Community, but mentioned the participation of the community in carrying out the utilization of PPKT based on customary law which is not contradictory to the national law. Subsequently, based on Article 4 paragraph (1) letter (d) in the Regulation of the Minister of Agrarian Affairs and Spatial/Head of the National Land Agency of the Republic of Indonesia Number 17 Year 2017 on Land Arrangement in Coastal Areas and Small Islands is granted the land rights on coastal for autonomous community or community that has been lived hereditarily in the place.

According to Law of the Republic of Indonesia Number 1 Year 2014 on Amendment to Law of the Republic of Indonesia Number 27 Year 2007 on the Management of Coastal Areas and Small Islands defines: Autonomous Community is a group of people that hereditarily lived in a certain geographical area in the Unitary State of the Republic of Indonesia due to a bond on the origin of the ancestors; strong relationship with land; territory; natural resources; have customary government institutions, and customary law arrangements in their customary territory in accordance with the provisions of laws and regulations; Local Community is a group of people who practice daily life according to customs that have been accepted as common values, but do not rely entirely on coastal resources and small islands; Traditional community is a traditional fishery community that is still recognized on their traditional rights in conducting fishing activities or other legitimate activities in certain areas that are in archipelagic waters in accordance with the rules of international maritime law.

The autonomous community referred to by some of the rules above according to Ter Haar² is a group of people who are well-regulated, settled in a certain area, have their own power, and have their own wealth in the form of objects that is seen or unseen, where the member of each unity is encountering a life in community as natural matter according to the power of nature and no one among the members has the thought or tendency to dissolve the growing bond or leave it in the sense of disengaged from that bond forever.

The Indonesian Constitution uses several terms to designate the unity of autonomous community, such as autonomous community, indigenous people, and traditional community, so that these terms can be used simultaneously or alternately. The Constitution of the Republic of Indonesia Year 1945 does not provide the definition of autonomous community directly. However, there are articles that recognize the existence of autonomous community. This has arisen since the second amendment of the 1945 Constitution of the Republic of Indonesia Year 2000, namely the addition to Article 18 and the appearance of a special chapter on Human Rights. The regulation concerning the existence of autonomous community can be found in Article 18B paragraph (2) and Article 28I paragraph (3). Article 18B paragraph (2) is in the Chapter of Regional Government, while Article 28I paragraph (3) is in the Chapter of Human Rights.

Indigenous and tribal peoples are associated with land tenure regulated in Law Number 5 Year 1960 on Basic Agrarian Law (BAL) which strongly holds the concept that the owner of customary rights is autonomous

¹ Mustafa Abubakar. *Op.Cit.* p. 129

² Ter Haar. 1985. *Asas-Asas dan Susunan Hukum Adat*. Cetakan ke -8. Penerbit Sumur; Bandung. p. 28.

community. This is seen in Article 3 of BAL which regulates:

"In recalling the provisions of Articles 1 and 2 of the implementation of the Hak ulayat and similar rights of autonomous community, insofar as they still exist, shall be in accordance with national and state interests, based on national unity and should not be contrary to the laws and other higher regulations".

BAL at the same time has acknowledged the existence of autonomous community as a subject that has hak ulayat (object). Hak ulayat as objects cannot exist without the existence of autonomous community as the subject. Maria Sumardjono (1999)¹ stated that the defining criteria for the existence of hak ulayat related to the existence of hak ulayat are:

- a. The existence of indigenous and tribal peoples that fulfill certain characteristics as subjects of hak ulayat,
- b. The existence of land/territory with certain limits as lebensraum (living space) which is the object of hak ulayat;
- c. The existence of the authority of indigenous and tribal peoples to perform certain actions relating to land, other natural resources and legal acts.

B.2. Structuring on Tenure, Communal and Land Rights of Small Islands

In Article 2 of the Regulation of the Minister of Agrarian Affairs and Spatial/Head of the National Land Agency (RM AAS) of the Republic of Indonesia Number 17 Year 2016 concerning Land Arrangement in Coastal Areas and Small Islands, which means the Land Arrangement in Coastal Areas and Small Islands is to provide direction and limitations of tenure, ownership, use and utilization of land in the Coastal Zone and Small Islands for the granting of rights. The purpose of the land arrangement (Article 2 paragraph (2)) is to provide certainty of tenure, ownership, use and utilization of land in Coastal Zone and Small Islands.

The aforementioned RM AAS is based on the consideration that in coastal areas and small islands there are variety of tenure, ownership, use and utilization of growing lands based on local customs and wisdom, as well as development necessity that needs to be organized. Consideration based on local customs and wisdom in this ministerial regulation reveals that customary law based on autonomous community/traditional community structure is appointed to be the basis of the equation in arranging the granting of land rights on small islands. Customary law that applies as local customs and wisdom is understood according to the present time describes the dynamic nature of customary law values that are capable of adapting to present momentum. The recognition and granting of land rights on the coast and in coastal waters have accommodated the rights of autonomous community inhabiting or living in the waters as set forth in article 5 and article 6 of RM AAS.

Recognition and Granting of Land Rights under Government of the Republic of Indonesia Regulation Number 24 Year 1997 on Land Registration, there are two forms of rights issuance, namely: 1. The proven rights of the land title are obtained from the customary land received recognition on land rights by the Government; 2. Unidentified rights in the land records are obtained from customary rights but from state land therefore is granted land rights by the Government. In this case the Government has accommodated the rights to customary land through the procedure rather than granting rights but recognizing existing rights. The status of customary land can be distinguished on:²

- 1) Land of hak ulayat (land belongs to all autonomous community together). With respect to the land of hak ulayat, in principle, it is not permissible for outsiders to exploit on ulayat land with all the plants, the animals in it;
- 2) Individual Owned Land: if individual communal rights are reinforced then hak ulayat will be depleted, on the contrary if individuals are thinned (abandoned) then the land becomes a land of hak ulayat.

The definition of Hak ulayat under Article 3 of BAL stated:

"In recalling the provisions of Articles 1 and 2 of the implementation of the Hak ulayat and similar rights of autonomous community, insofar as they still exist, shall be in accordance with national and state interests, based on national unity and should not be contrary to the laws and other higher regulations".

In the Regulation of the Minister of Agrarian Affairs and Spatial/Head of the National Land Agency of the Republic of Indonesia Number 10 Year 2016 on Procedures for Determination of Communal Rights on Autonomous Community's Land and Community in Specified Regions, Article 2 Paragraph (1) states that the Autonomous community that has fulfilled the requirements can be confirmed to land rights, while the requirements that must be fulfilled further stipulated in Article 4 include:

- a) the community is still in the form of a Paguyuban;
- b) there is an institution in its customary ruling device;

¹ Ade Saptono. 2010. *Hukum dan Kearifan Lokal (Revitalisasi Hukum Adat Nusantara)*. Penerbit PT. Grasindo, Jakarta. p. 15

² Rosnidar Sembiring. 2017. *Hukum Pertanahan Adat*. Penerbit PT. Raja Grafindo Persada; Depok. p.93

- c) there is a clear customary law area;
- d) there are institutions and legal instruments, which are still adhered to.

For the granting of land rights to community on small islands regulated in the Regulation of the Minister of Agrarian Affairs and Spatial/Head of the National Land Agency of the Republic of Indonesia Number 17 Year 2016 on Land Arrangement in Coastal Areas and Small Islands regulates that small islands can be granted the Land Rights, including communal rights, however, the granting of land rights on small islands should take account of the following:

- a. The control of small islands at most of 70% (seventy percent) of the island's width, or in accordance with the provincial/district/city spatial plan and/or zonation plan of the small island;
- b. The remaining 30% (thirty percent) of the existing small island area is directly controlled by the state and used and utilized for protected areas, public areas or public interest; and
- c. Must allocate 30% (thirty percent) of the island's width for protected areas;

Further regulated in Article 4 of Regulation of the Minister of Marine Affairs and Fisheries of the Republic of Indonesia Number 20/MEN/2008 on Utilization of Small Islands and Its Surrounding Waters that the utilization of small islands and its surrounding waters can be given to:

- 1) Individuals of Indonesian citizens;
- 2) Legal entities established under Indonesian law;
- 3) Indigenous people.

With the requirement that the ownership of the land on small islands should not close public access. Public access is:

- a. Individuals or groups of people access to seek refuge, shelter, save themselves, seek help in the voyage;
- b. Individuals or groups of people access with official permission to carry out activities related to education, research, conservation and preservation.

B.3. Community Welfare on Inhabitants of Outermost Small Islands

One of the criteria of the outermost small islands is located far from big islands or big cities hence the islands do not have the basic infrastructure to sustain the lives of people living on small islands. People who live in these small islands are community of autonomous community hereditarily and may also be migrant community from nearby islands.

The people who are the inhabitants of the outermost small islands are people who have expertise as fishermen and farmers, if they do not have the expertise then rely more on marine life that can be utilized for everyday basis. Poverty depiction is coloring the life of the people of small islands due to the shortage of fresh water, far from health and education facilities therefore economically has not meet the criteria of prosperity. This certainly requires a serious handling from the government.

In order to realize a prosperous, fair, and wealthy community, it is necessary to have laws governing it. Legal development must aim at the welfare of community, and therefore the development of the law must be a universal policy based on the integrity of community itself.¹ One of the targets of poverty reduction is the effort to guarantee and protect the individual and communal rights to the land, which is carried out by:²

- a. increasing the participation of poor and customary institutions in the planning, and implementation of spatial planning;
- b. improving the knowledge of the poor on the legal aspects of land and customary land;
- c. increasing legal certainty of land rights for poor people without gender discrimination;
- d. developing mechanisms for the protection of land rights for vulnerable groups;
- e. developing a land redistribution effectively.

Related to the welfare of the outermost small islands community, as regulated in Article 7 of Government Regulation Number 62 Year 2010 on Utilization of the Outermost Small Islands, are: a) marine and fishery business; b) marine ecotourism; c) education and research; d) agriculture subsystem; e) placement of social economic facilities and infrastructure; f) the maritime service industry.

C. Management and Utilization of Minor Outlying Islands for Investment

C.1. Small Island Profile for Investment Activities

Discussion in the previous sub-chapter has been set forth on several regulations governing Small Islands and Outermost Small Islands, namely: 1) Law of the Republic of Indonesia Number 27 Year 2007 on Management of Coastal Areas and Small Islands; 2) Law of the Republic of Indonesia Number 43 Year 2008 on State Borders; 3) Government of the Republic of Indonesia Regulation Number 62 Year 2010 on Utilization of the Outermost Small Islands; 4) Presidential of the Republic of Indonesia Regulation Number 78 Year 2005 on Management of Outermost Small Islands; 5) Presidential of the Republic of Indonesia Regulation Number 12 Year 2010 on

¹ Bambang Daru Nugroho. 2013. *Hukum Adat, Hak Menguasai Negara atas Sumber Daya Alam Kehutanan dan Perlindungan terhadap Masyarakat Hukum Adat*. PT. Refika Aditama, Bandung. p. 21

² *Ibid.* p. 23

National Border Management Agency (BNPP); 6) Regulation of the Minister of Marine Affairs and Fisheries of the Republic of Indonesia Number 20/MEN/2008 on the Utilization of Small Islands and Its Surrounding Waters. "Management of coastal areas and small islands is a process of planning, utilizing, supervising and controlling coastal resources and small islands between sectors, between the central government and local government, between land and marine ecosystems, and between science and management to improve people's welfare.

Picture 1. Outermost Small Islands Management Approach



The outermost islands management approach to the scheme above is done by establishing the baseline arrangement of the outermost small island, which is started from the profile of small islands, then identifying and mapping the small islands, before establishing the use and utilization of the small islands. Identification and mapping activity of small island resource potential is based on Regulation of Directorate General Number Per.07/KP3K/2011. The data generated from the identification result are the physical condition of the island in the form of: topography, land/geomorphology, island genesis, land use, land cover, slope, coastal morphology and geology. It includes coastal biological resource data, non-biological coastal resources, and water quality data, etc.

The results of identification in the form of reporting and preparation of island profiles, consisting of:

- i. General Description
- ii. Population, Socio-Cultural, Economic and Institutional
- iii. Ecosystems and Coastal Resources
- iv. Non-Coastal Resources
- v. Resource Management Activities
- vi. Environment
- vii. Facility and Infrastructure
- viii. Investment Opportunity
- ix. Potential and Direction Development
- x. Constraints of Development

C.2. Utilization of Small Islands for Investment Activities

Small islands in Indonesia are an area that have the potential of natural resources that can be managed for various development activities. The diversity of sea biota has high economic value, in addition to environmental services such as beautiful sandy beaches, dive area and waves which are the potential of tourism. However, the condition of outermost small islands in general due to their remote location, the facilities and infrastructure are still limited, such as clean water, electricity, transportation and other infrastructure, leading to the need for small island islands based on the strength of local resources and the welfare of the islanders to be a priority.

The policy on spatial use of small islands is conducted in a sustainable and community-based manner, based on the following approaches:¹ 1) Ecosystems; 2) Space; 3) Right to land and water; 4) Local wisdom. These four approaches are conducted by considering the condition/profile of each island.

Specifically, the right to land and water approach for investment activities in small islands still respects customary rights/rights of origin to the control of land and territorial waters of small islands. Implementation of ulayat/customary rights/rights of origin over land tenure and the territorial waters of small islands as long as they are in fact still exist, shall in accordance with the national interest and shall not be contrary to the prevailing laws and regulations.

Several matters to note in the use of land rights:

1. For small islands in which territorial waters are controlled/owned/cultivated by indigenous and tribal peoples, their management activities shall be carried out by considering the existence of local customary law;
2. Any management of small islands by investors using customary law areas, shall be preceded by treaty and or agreements between investors and indigenous people that is mutually beneficial by observing environmental carrying capacity and resource sustainability;

¹ Decree of the Minister of Marine Affairs and Fisheries of the Republic of Indonesia Number: KEP.39/MEN/2004 on General Guidelines for Investment on Small Islands

3. Procedures for obtaining land and/or water rights shall be in accordance with prevailing laws and regulations.

The use of land for investment in small islands should:

- a. Paying attention to the area of protection and public interest, at least 30% of the area of the island is reserved for protected areas and other public interests;
- b. Giving people access to the areas of public interest, such as: freshwater, coastal, and other sources;
- c. Locals and even third parties who have used the land may be granted a right to land as long as it meets certain requirements, in accordance with the nature and purpose of granting the rights;
- d. Land utilization for investment in small islands shall refer to Regional Spatial Plans (RTRW), Buildings/Houses that are built must face to the coast, which must first have a roadside facility;
- e. Land that is utilized for investment prior to the establishment of RTRW remains respected. If the use and utilization is not in accordance with the function of the area, then gradually must be rearranged or adjusted both the type of rights and land use.

The criteria of investment activities in small islands are:

- Using renewable energy
- Efficient in water use
- Utilizing local potential
- Involve the local community
- Develop environmentally friendly technologies
- Developing high value-added commodities

Utilization of small islands for investment activities requires the participation of the community and also requires the investor to implement the community development program. The investment development model is implemented in the form of cooperation or direct investment of small island management, namely in the form of Joint Venture, Joint Operation, Build Operate Transfer (BOT), and Direct Investment. By referring to the Decree of the Minister of Marine Affairs and Fisheries of the Republic of Indonesia Number: KEP.39/MEN/2004 on General Guidelines for Investment on Small Islands, it can provide guidance for the Government, Provincial Government, Regency/City Government, on small islands in a sustainable and community-based way, can also increase investor interest, and can provide certainty of business guarantee for investors.

Table 1

Comparison of Regulations Governing the Use of Outermost Small Islands

No.	Ministerial Regulation Number 20 Year 2008	Government Regulation Number 62 Year 2010
1.	Utilization of small islands and its surrounding waters	Utilization of outermost small islands
2.	Business license may be granted to: a. Individual Indonesian citizen b. Legal Entity that is domiciled in Indonesia c. Foreigner/foreign capital investment 20%:	Business license may be granted to: a. Individual Indonesian citizen b. Legal Entity is domiciled in Indonesia
3.	Granting rights to autonomous community or traditional community by: a. Deliberation = agreement b. Registration to the Regent	Not mentioning the Rights of Autonomous community and so on only mention community participation
4.	Foreigners need permission from the Minister through consideration of Governor/Regent	Not mentioning foreigners, just mention investment activities.

More details can be seen in the provisions of the Regulations of the Minister of Maritime Affairs and Fisheries of the Republic of Indonesia Number PER.20/MEN/2008 on the Utilization of Small Islands and Its Surrounding Waters, regulated in Article 7, Autonomous community in utilizing small islands and its surrounding waters shall register to the regent/mayor by enclosing: a. business type plan; b. expanse of land use; and the extent of water to be utilized.

For foreigners (Article 8) who will utilize small islands and its surrounding waters shall apply petition to the Minister by enclosing: (a). the statement of ability to use foreign capital investment facilities (PMA) of at least 20% of its capital comes from within the country commencing from the first year of establishment of the company: (a). business type plan; (b). expanse of land use; (c). the extent of the waters to be utilized; (d). recommendation from the Governor or Regent/Mayor in accordance with their authority; and (e). approval from the agency related to the field of business to be undertaken.

In order to optimize the management of coastal areas and small islands, the state is responsible for the management of coastal areas and small islands and through licensing mechanisms that can be provided to individuals or legal entities / investors, definitely. Licensing to individual or legal entities/investors it does not undermine the authority of the state to make a policy (*beleid*), regulate (*regelendaad*), administer (*bestuursdaad*),

administer (*beheersdaad*), and supervise (*toezichthoudensdaad*). Ultimately, the outermost small islands are suitable for investment activities meaning that the island has adequate economic, ecological and infrastructural potential, and the portion entitled to management to investors is an island that already has a clear spatial and designation.

IV. Conclusion and Recommendation

Characteristics and conditions of each island are different, then before set as a potential island for investment is undertaken identification and mapping first. The island profile as the basis for the management and utilization of the island shall be determined through the Regional Spatial Plan (RTRW) firstly, to be granted the utilization permit. Tenure and Utilization of Land on Small Islands, based on customary law can be stipulated Hak ulayat of Autonomous community, and can be granted Land Communal rights for Indonesian citizens. Management and Utilization of Outermost Small Islands for investment interests is divided into two, namely for the islands of inhabited and uninhabited islands and forms of cooperation can be Joint Venture, Joint Operation, Build Operate Transfer (BOT), and Direct Investment.

It is necessary to increase identification and mapping of the characteristics and needs of the outermost small islands inhabited in Indonesia. It is necessary to accelerate regulation of implementation of recognition and empowerment of Autonomous community/Traditional Community/Local Community related to Hak ulayat and Communal Rights may be granted to the tenure, ownership and utilization of land and natural resources as well as outermost small islands. Legal certainty is required and legal protection for the community of the outermost small islands that are eligible to work in investment for the welfare of the islanders.

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