

EXTENDED CONTINENTAL SHELF REGIME IN INTERNATIONAL LAW: ITS APPLICATION IN INDONESIA

Nikki Krisadtyo*

Abstract

Indeed, every state intends to explore and exploit its mineral resources. One of the ways to increase the area on which states can explore and exploit its mineral resources is by applying the Extended Continental Shelf ("ECS") regime. This research explains the development and regulation of the ECS regime which include its requirements, sovereign rights over it, the role of the Commission on the Limits of the Continental Shelf, et cetera. This research then analyzes the ECS regime in Indonesia. This research uses a legal normative research method—which is of an explanatory and descriptive-analytical character—and uses primary, secondary, and tertiary data. This research shows that Indonesia does not have a strong legal basis to apply the ECS regime nor a utilization plan for its ECS. This regime can be applied in north-west of Sumatera, south of Nusa Tenggara, and north of Papua. Indonesia has made a submission for the ECS in North-West Sumatera which has been accepted. The writer offers some advice: Indonesia should have further legal basis to apply the ECS regime and a utilization plan for its ECS.

Keywords: *extended continental shelf; natural prolongation; sovereign rights.*

I. INTRODUCTION

The Continental Shelf is indeed very important for a coastal state. The bigger the better, they say. Having this mindset is very understandable as 90% of the Continental Shelf's output is oil and gas. In addition, the Continental Shelf also contains rich minerals such as silver, diamonds, copper.¹ The appeal of the Continental Shelf does not only lie in the resources discovered by man, but also other resources which are yet to be discovered in the future. This is why coastal states around the world race to have their Continental Shelves limits as seaward as possible. The eagerness of coastal states can be seen by the number

*Author is Associate at Hadiputranto, Hadinoto & Partners, a member firm of Baker & McKenzie International, a Swiss Verein. He obtained his Bachelor of Law (S.H.) from the University of Indonesia (2014). He can be reached at nikki_krisadtyo@yahoo.com.

¹ R. R. Churchill, A. V. Lowe, *The Law of the Sea*, ed. 3, Manchester University Press, 1999, pp. 141-142.

of submissions made to the Commission on the Limits of the Continental Shelf (“CLCS”). Until 2014, a total number of more than four dozen states have made a submission.²

This article will address a number of issues in general. First, it will address the development of the Extended Continental Shelf (“ECS”) regime since its inception until recent developments in practice. Second, it will address the ECS regime from a legal standpoint, i.e., its provisions in the United Nations Convention on the Law of the Sea 1982 (1982 Law of the Sea Convention/“LOSC”). Third, it will address the application of the ECS regime in Indonesia in its legislation and in practice in numerous areas. Last, this paper will provide concluding remarks in which the author will give a brief conclusion and offer a number of suggestions with respect to the application of the ECS regime in Indonesia.

II. THE DEVELOPMENT OF THE EXTENDED CONTINENTAL SHELF REGIME

The Continental Shelf regime has been recognized for a long time; states have exercised their jurisdiction over their seabed and subsoil well beyond their territorial seas. As time progressed, so did the Continental Shelf regime, especially with the development of technology, which made states realize the potentials and possibilities lying beneath the waters. At the outset, the Continental Shelf was only recognized by a handful of states in their respective national laws. Today, the Continental Shelf is recognized world-wide. It is not only recognized through national laws, but also through customary international law and one of the most successful international conventions—the very LOSC with its sophisticated and highly technical provisions, a few among which concern the ECS. Between the two extremes in time lies a time period of the development of the Continental Shelf regime. This first part of this article will address that time period.

² Commission on the Limits of the Continental Shelf, “Submissions through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982,” available at: http://www.un.org/Depts/los/cles_new/commission_submissions.htm, accessed on 17 February 2014.

A. THE CONTINENTAL SHELF BEFORE THE REGIME OF THE EXTENDED CONTINENTAL SHELF

Prior to 1945, the Continental Shelf was only recognized nationally through states' national laws. These states exercised their jurisdiction well beyond their territorial seas. At that time the concept of territorial waters was already recognized from the school of thought of *mare clausum* (closed sea), which was an exception to Hugo Grotius' *mare liberum* (free sea).³ Prior to 1945, most states determined their territorial waters to be at a distance of three nautical miles from the baseline, as is known as the "cannon-shot rule."⁴ However, the distance claimed for the Continental Shelf differed from state to state to some degree. For instance, Tunisia made a claim for 17 miles, whereas Panama made a claim for 120 miles.⁵ The reasons underlying the claims were primarily for commercial reasons, such as for tunneling and exploitation of sedentary fish, which can be found at the seabed.⁶

A big moment in the Continental Shelf's life came in 1945 when the President of the United States of America ("USA") made a proclamation to claim the Continental Shelf—the "Harry S. Truman Proclamation."⁷ This proclamation is the beginning of the modern concept of the Continental Shelf as the international community knows it now. This proclamation is significant for a number of reasons. It mentioned the seabed and subsoil as a "natural prolongation" of the land

³ Bryan A. Garner, *Black's Law Dictionary*, ed. 9, Thomas Reuters, 2009, p. 1052; Gabriel Adeleye, Kofi Acquah-Dadzie, *World Dictionary of Foreign Expressions: A Resource for Readers and Writers*, Bolchazy-Carducci Publishers, 1999, p. 240; Garry R. Russa, Dirk C. Zellerb, "From Mare Liberum to Mare Reservarum," *Marine Policy*, vol. 27, 2003, p. 76; Bo Johnson Theutenberg, "Mare Clausum et Mare Liberum," *Arctic*, vol. 37, no. 3, 1984, p. 491; Knud Haakonssen, *The Free Sea*, Liberty Fund, Inc., 2004, p. Xviii.

⁴ Robert Jay Wilder, "The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism," *Virginia Journal of International Law*, vol. 32:681 1991-1992, pp. 703-705.

⁵ Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Springer, 2008, pp. 21, 22.

⁶ *Ibid*; Marhaeni Ria Siombo, *Hukum Perikanan Nasional and Internasional*, PT Gramedia Pustaka Utama, 2010, p. 14.

⁷ Harry S. Truman Proclamation (Proclamation of the United States of America no. 2667), Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, September 28, 1945.

territory of the USA. Taking off from this premise, the USA claimed that any natural resources contained on the seabed and beneath the subsoil can be claimed by the USA. It also separates the regime of the water column and the seabed and subsoil. At that time, the USA recognized their territorial waters to be until the distance of three nautical miles. But the proclamation did not limit the distance of the Continental Shelf. It shall be noted, however, in a separated document issued by the White House at the same time the proclamation was made—the USA considers its natural prolongation until the distance where the depth of the water is 100 fathom lines (600 feet). The concept of water depth (isobaths) to determine the limit of the Continental Shelf remains relevant until this day. Lastly, the proclamation emphasized on the commerciality of the Continental Shelf, i.e. the Continental Shelf is important for the sake of exploitation of gas and mineral resources. The Harry S. Truman Proclamation sparked a number of other proclamations from other states, but most importantly it made the international community realize the importance of an international legal regime for the Continental Shelf.

In 1947, the United Nations issued Resolution 174 to form the International Law Commission who among other things concerned about the Continental Shelf regime. In 1957, the International Law Commission handed over its work to the United Nations General Assembly. The latter then issued a resolution requesting the United Nations Secretary General to form a law of the sea conference, and the United Nations Conference on the Law of the Sea I (“UNCLOS I”) was formed.⁸ In 1958, UNCLOS I adopted four conventions on the law of the sea: Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas, and Convention on the Continental Shelf (“Continental Shelf Convention”).

The Continental Shelf Convention gives two limits of the Continental Shelf: depth of the water column of 200 meters and depth where exploitation can be conducted. The Continental Shelf Convention also stipulates about rights over the Continental Shelf. The rights over

⁸ U.N.G.A. Resolution 1105 (XI), General Assembly of the United Nations Convening the Conference, 658th Plenary Meeting, 21 February 1957.

the Continental Shelf are sovereign rights for the purposes of exploration and exploitation.⁹ Another provision of significance is the provision which stipulates rights over the Continental Shelf do not depend on occupation or proclamation; it is deemed that the rights are inherent to the coastal state.¹⁰ The Continental Shelf Convention was fairly successful with 58 state parties. It is the first international instrument on the Continental Shelf. Despite this, the Continental Shelf Convention was problematic because of the limit based on “exploitability.” The concept of exploitability is very vague especially considering the different technological abilities which vary from place to place and time to time. Nevertheless, the Continental Shelf Convention is of great significance as it is the first international instrument governing the Continental Shelf regime.

B. THE EXTENDED CONTINENTAL SHELF REGIME

Until 1982, the ECS regime was not known to the international community, or at least was never put into a binding instrument. 1982 was the year the LOSC was made. The LOSC was made by United Nations Conference on the Law of the Sea III (“UNCLOS III”), which started in 1974. UNCLOS III was negotiated on a consensus approach and package-deal approach. The latter was significant in the forming of the ECS in the LOSC. On the seventh UNCLOS III, the ECS was one of the topics, where the Soviet Union and Ireland were the first two states to offer formulae and constraints for the outer limits of the ECS.¹¹ Their suggestions were adopted and were put into the LOSC which will be further addressed in the second part of this article.

In the eighth session, a number of key discussions were held. First, was a discussion which resulted in the term “recommendation” being used for CLCS’s decisions with respect to submissions submitted to it.¹² Second, was a discussion which resulted in the obligation

⁹ The Continental Shelf Convention, Article 2(1).

¹⁰ The Continental Shelf Convention, Article 2(3).

¹¹ Suarez (2008), *op.cit.*, p. 61.

¹² Ted L. McDorman, “The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World,” *The International Journal of Marine and Coastal Law*, vol. 17, no 3, 2002, p. 302; Vladimir Jares, “The Continental

to make payments to the International Seabed Authority (“ISA”) for exploitation on the ECS. The provision was as a result of the package deal between coastal states—which were eager to have as big a Continental Shelf as possible—and landlocked and geographically disadvantaged states—which wished to gain advantage of the exploitation of the ECS as well.¹³ The details of these provisions will be addressed in the second part of this article. As of 2013, there are 166 state parties to the LOSC.¹⁴ Coupled with the fact that it has 320 Articles and nine annexes, the LOSC is considered one of the most successful international conventions and is indeed the most comprehensive codification on the law of the sea to date.

In recent times, coastal states are very enthusiastic about the ECS; in total there are 75 submissions made to the CLCS for the ECS. Out of the total 75 submissions, only 18 recommendations have been given by the CLCS.¹⁵ This big gap between the number of submissions and recommendations is not always necessarily because the submissions were in conformity with the LOSC. The main reason this is happening is simply because the CLCS has too much on its plate. In 2009, where at the time there were only 51 submissions, it was estimated that CLCS could only go through all the submissions by 2030.¹⁶

The Continental Shelf indeed went through a lot of phases. It has come from a regime recognized only by a handful of states to a regime recognized worldwide. It has come from a simple distance-

Shelf Beyond 200 Nautical Miles: The Work of the Commission on the Limits of the Continental Shelf and the Arctic,” *Vanderbilt Journal of Transnational Law*, vol. 42:1265, 2009, pp. 1276, 1277.

¹³ *Ibid.* p. 63.

¹⁴ The United Nations, “Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013”, available at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm, accessed on 26 March 2014.

¹⁵ Commission on the Limits of the Continental Shelf, “Submissions through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982,” available at: http://www.un.org/Depts/los/clcs_new/commission_submissions.htm, accessed on 19 October 2014.

¹⁶ Suzette V. Suarez, “Commission on the Limits of the Continental Shelf,” *Max Planck UNYB*, 2010, p. 138.

based regime, to a highly technical and complicated regime. The next part will address this technical aspect of the Continental Shelf, specifically the ECS—which is regulated in the LOSC.

III. THE EXTENDED CONTINENTAL SHELF IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The LOSC is the hard-law basis of the ECS. The Continental Shelf is governed in Part VI of the LOSC, titled—appropriately, of course—“CONTINENTAL SHELF.” This part will address the ECS from the perspective of the living provisions of the LOSC, from the rights and obligations of coastal states, the limits of the ECS, until the provisions regarding CLCS in Annex II of the LOSC. But before that, back to basics: the definition of the Continental Shelf itself.

A. CONTINENTAL SHELF DEFINITION

Article 76(1) of the LOSC provides that the Continental Shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin,¹⁷ or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. Article 76(3) of the LOSC stipulates that the continental margin comprises the submerged prolongation of the land mass of the coastal state, and consists of the seabed and subsoil of the shelf, the slope¹⁸ and the rise.¹⁹ It does

¹⁷ International Oceanographic Commission, International Hydrographic Organization, International Association Of Geodesy, *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982*, ed. 4, International Hydrographic Bureau, 2006 p. Appendix 1-9: “As defined in Art. 76.3 as follows: “The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof”.

¹⁸ International Oceanographic Commission, International Hydrographic Organization, International Association Of Geodesy, *op. cit.*, p. Appendix 1-10: “That part of the continental margin that lies between the shelf and the rise. Simply called the slope in Art. 76.3.”

¹⁹ *Ibid.*: “A submarine feature which is that part of the continental margin lying

not include the deep ocean floor with its oceanic ridges or the subsoil thereof. From these provisions, it can be seen that the LOSC uses two definitions for the Continental Shelf: first, using geology and, second, using distance.²⁰

B. COASTAL STATES' RIGHTS AND OBLIGATIONS OVER THE CONTINENTAL SHELF

In order for coastal states to be able to explore and exploit their Continental Shelves, they must have the legal right to do that. With rights come the obligations, and this sub-part will address the coastal states' rights and obligations over the Continental Shelf. The rights and obligations over the Continental Shelf within and beyond 200 nautical miles are slightly different. The difference comes from the different regime governing the water column above the Continental Shelf within and beyond (the ECS) 200 nautical miles. Another difference comes from the compromise that was made during UNCLOS III for the Continental Shelf beyond 200 nautical miles.

1. Coastal States' Rights and Obligations within 200 Nautical Miles

Under Article 77(1) of the LOSC, coastal states exercise over the Continental Shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. "Sovereign rights" are exercise of control smaller than "full sovereignty," but bigger than "jurisdiction."²¹ According to the International Law Commission, sovereign rights are rights needed for and related to exploitation of the Continental Shelf including jurisdiction with respect to preventions of and punishments for violation of the coastal state's national law.²²

Sovereign rights over the Continental Shelf are exclusive, in

between the continental slope and the deep ocean floor; simply called the Rise in the Convention."

²⁰ Sharveen Persand, *A Practical Overview of Article 76 of the United Nations Convention on the Law of the Sea*, The United Nations - The Nippon Foundation of Japan Fellowship Programme, 2005, p. 5

²¹ Charlotte Breide, Phillip Saunders, *Challenges to the UNCLOS Regime: National Legislation Which is Incompatible with International Law*, International Hydrographic Organization, 2008, p. 1.

²² International Law Commission, *Yearbook of the International Law Commission 1956*, Volume II, p. 297.

that other states cannot conduct exploitation of the natural resources without permission from the coastal state.²³ Sovereign rights over the Continental Shelf are not dependent upon occupation or proclamation; therefore, sovereign rights over the Continental Shelf are inherent.²⁴ Sovereign rights have their limits. Article 78(2) of the LOSC stipulates that in exercising sovereign rights, coastal states must not infringe navigation and other rights provided in the LOSC.

2. Coastal States' Rights and Obligations outside 200 Nautical Miles

In essence, the rights and obligations of coastal states on the Continental Shelf beyond 200 nautical miles are the same as the rights and obligations within 200 nautical miles. The differences lie on the water column above the continental shelf and the compromise that UNCLOS III took for the ECS. With respect to the first difference, given that the seas within 200 nautical miles are the territorial sea, contiguous zone, and exclusive economic zone, coastal states can exercise their rights on the water column within 200 nautical miles. However the sea beyond 200 nautical miles is the high seas, in which coastal states have no special rights. This difference has an effect on fisheries. Coastal states do not have sovereign rights over the fish beyond 200 nautical miles; coastal states only have sovereign rights over the fish within 200 nautical miles. Fish beyond 200 nautical miles which fall within the rights of the coastal state are only sedentary fish, as they are considered to be part of the continental shelf.²⁵

With respect to the second difference, coastal states have an obligation to make payments to the ISA for the exploitation of the ECS, pursuant to Article 82 of the LOSC. This is because of the compromise taken between coastal states and landlocked and geographically disadvantaged states. The consideration is because the ECS regime cuts down the area of the continental shelf which is free from the jurisdiction of states.²⁶ The rationale is because the deep sea of the ocean

²³ International Law Commission, *loc.cit.*; The LOSC, Article 77 (2).

²⁴ Clive Schofield, I Made Andi Arsana, "Beyond the Limits?: Outer Continental Shelf Opportunities and Challenges in East and Southeast Asia", *Contemporary Southeast Asia*, vol. 31, no. 1 2009, p. 31

²⁵ Churchill, *op.cit.*, p. 156.

²⁶ International Seabed Authority, "Implementation of Article 82 of the United Nations Convention on the Law of the Sea", *ISA Technical Study*, no. 12, International

(“Area”) is a common heritage of mankind.²⁷ The ISA is formed by the LOSC to organize and control activities on the Area, especially concerning the exploration and exploitation of the resources.²⁸ Therefore, as the Area is within the jurisdiction of the ISA, coastal states with an ECS—which shrinks the ISA’s jurisdiction—must make payments to the ISA for the exploitation of the ECS.

C. THE LIMIT OF THE CONTINENTAL SHELF

The outer limits of the continental shelf are determined using a combination of formulae and constraints. The formulae concern the actual natural prolongation of the coastal state’s land mass, whereas the constraints serve as a limit to the formulae. In essence, coastal states can have an ECS for as long the natural prolongation is, but irrespective of how long the natural prolongation is, it is still subject to the constraints.

1. Natural Prolongation Formulae

If a coastal state’s continental margin extends beyond 200 nautical miles, it can use two formulae to determine the natural prolongation: the Gardiner Formula/Irish Formula and the Hedberg Formula. These two formulae can be used alternatively and together, at the discretion of the coastal state, whichever provides the farthest limits.²⁹

a. Gardiner Formula/Irish Formula

The Gardiner Formula/Irish Formula is the name used for the formula stipulated in Article 76(4)(a)(i) of the LOSC. That Article stipulates that the outer limits of the continental margin are at the points where the thickness of the sedimentary rocks is at least 1% of the shortest distance from such points to the foot of the continental slope. So for instance, if the thickness of the sedimentary rocks is one nautical mile, then the outer limit is located at a distance of 100 nautical miles from the continental slope.³⁰ This formula is considered to be complicated given that it is heavily dependent on in-

Seabed Authority, 2013, p. 2.

²⁷ Marta Chantal Ribeiro, *What is the Area and the International Seabed Authority?*, l’Institut Océanographique, 2013, pp. 1-3

²⁸ The LOSC, Article 157(1).

²⁹ Schofield, *op.cit.*, p. 32.

³⁰ *Ibid.*

formation directly obtained from the continental shelf.³¹

b. Hedberg Formula

An alternative to the Gardiner Formula/Irish Formula is provided in Article 76(4)(a)(i) of the LOSC—called the Hedberg Formula. Based on the Hedberg Formula, the limit of the continental margin is at a line which connects points which are at a distance of 60 nautical miles from the foot of the continental slope. The Hedberg Formula was made by Hollis D. Hedberg who opined that the Gardiner Formula/Irish Formula is too complicated to be implemented and is very much in favor of developed states as its implementation is costly and time consuming. The Hedberg Formula is much simpler given that to determine the relevant points, coastal states must only determine the foot of the continental slope. After it is determined, it is only a matter of determining the 60-nautical-mile distance.³²

2. The Extended Continental Shelf Constraints

After a coastal state has used the abovementioned formulae, it must apply the constraints given by the LOSC. There are two constraints given by the LOSC, the first which takes into account the distance from the baseline, and the second which takes into account the depth of the water above the ECS. It shall be noted that these two formulae can also be used alternatively and together, whichever is most advantageous for the coastal state.

a. 350 Nautical Miles from the Baseline

The first constraint takes into account the distance from the baseline. This constraint is provided in Article 76(5) of the LOSC which stipulates that the constraint of the ECS is set at a distance of 350 nautical miles from the baseline. This method is very simple as no survey is needed. So long as points of the baseline are gathered—which are readily available—coastal states must only draw a line 350 nautical miles away from it.

³¹ David A. Colson, “The Delimitation of the Outer Continental Shelf between Neighboring States,” *The American Journal of International Law*, Vol. 97, No. 1 (Jan., 2003), p. 93.

³² McDorman, *loc.cit.*

b. 2500 isobath + 100 Nautical Miles

The second constraint takes into account the depth of the water above the ECS. This constraint is also provided in Article 76(5) of the LOSC which stipulates that the constraint of the ECS is set at a distance of 100 nautical miles from the 2,500 meter isobaths, which is a line connecting the depth of 2,500 meters. This constrain requires a little more data as coastal states must first determine the 2,500-meter depths of the water column above their ECS. It should be noted that this constraint is used more in practice as more often than not, the ultimate distance is more seaward than 350 nautical miles.³³

D. ANNEX II. COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

Annex II of the LOSC is the primary legal basis of the CLCS. The CLCS consists of 21 members who are experts in geology, geophysics, or hydrography, who are chosen by the LOSC member states taking into account a fair geographic representation.³⁴ The CLCS has two roles: first is to make recommendations for coastal states which have made submissions, and second, is to provide technical and scientific input if asked for by coastal states which intend to make a submission.³⁵

It must be noted that the CLCS is not a legal body to resolve disputes; the CLCS does not adjudicate or make binding decisions as a court or arbitral body would. The CLCS is a technical body whose capacity is to evaluate whether or not the technical provisions on the ECS have been met by a coastal state which intends to delineate its ECS.³⁶ This fact directly corresponds with the term used to describe the output of the CLCS, i.e., “recommendation,” not “decision” or “award.” The LOSC provides that the CLCS makes recommendations to coastal states which have made a submission to it. This recommendation only serves as a basis for the delineation. But only with the recommendation can delineation by a coastal state become binding.³⁷

³³ Persand, *op.cit.*, p. 9; R. W. Smith, G. Taft, *Legal Aspects of the Continental Shelf*, in Peter Cook and Chris Carleton, *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford University Press, 2000, p. 17-19.

³⁴ Annex II, Article 2(1).

³⁵ McDorman, *op.cit.*, p. 302; Annex II, Article 3(1).

³⁶ Schofield, *op.cit.*, p. 33.

³⁷ The LOSC, Article 76(8).

As a concluding remark for this part, it is safe to say that the ECS is a heavily regulated regime now. UNCLOS III has done a tremendous job in providing the basis for this regime, from the technical aspects to the legal aspects. While the ECS is made sure to be in the hands of coastal states (by providing the right for coastal states to delineate the ECS themselves, if they desire), its application is also made sure to be consistent, which is why the CLCS was formed.

IV. ANALYSIS OF THE APPLICATION OF THE EXTENDED CONTINENTAL SHELF REGIME IN INDONESIA

In this part, the writer will explain about the application of the ECS in Indonesia in its legislation and practice. This part will address existing laws and draft laws, as well as submissions to the CLCS which have been made and future submissions.

A. THE EXTENDED CONTINENTAL SHELF UNDER INDONESIAN LAW

Currently, Indonesia does not have a specific law regarding the ECS. However, it is at a process of enacting a new law on the continental shelf, which will have provisions on the ECS regime. At this time, the basis for the application of the ECS in Indonesia is the LOSC itself, or rather the law which ratifies the LOSC.

1. Existing Laws

Indonesia currently has a number of laws which refer to the continental shelf. However, none specifically regulate the ECS in Indonesia. Indonesian laws that are of interest are: Law No. 1 of 1973 on the Indonesian Continental Shelf (“Continental Shelf Law”), Law No 22 of 2001 on Oil and Gas (“Oil and Gas Law”), Law No. 43 of 2008 on State Territory (“State Territory Law”), and Law No. 17 of 1985 on the Ratification of the United Nations Convention on the Law of the Sea (“LOSC Ratification Law”).

The Continental Shelf Law is the one Indonesian law which specifically regulates about the continental shelf in Indonesia. However, as the year would suggest, it was made before the LOSC—by some distance, too. The Continental Shelf Law was made in accordance with

the Continental Shelf Convention, to which Indonesia was a state party. The Continental Shelf Law has the same provision regarding the limits of the continental shelf as the Continental Shelf Convention, i.e., to a depth of 200 meters or, to the extent where exploitation is possible. It shall be noted that the Continental Shelf Law is not yet been revoked.

The Oil and Gas Law has one Article which touches upon the continental shelf. Article 1(15) stipulates that the Indonesian mining area includes the land mass, waters, and continental shelf of Indonesia. Indonesian mining area is defined as an area where exploration and exploitation is possible. While the Oil and Gas Law declares Indonesia has the right to explore and exploit its continental shelf, it does not further define the continental shelf or refer to a law that defines it.

The State Territory Law gives a definition of the continental shelf. Article 1(9) stipulates that the continental shelf:

“comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea, throughout the natural prolongation of the land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance, until the furthest 350 nautical miles until 100 nautical miles from the line connecting the depth of 2,500 meters.”

While the intention to include this article may be well—when read in isolation, it becomes misleading. This is as the Article makes it seem as though the limits of the continental shelf are the constraints only, without taking into account the Hedberg and Gardiner/Irish Formulae. The State Territory Law provides that Indonesia has sovereign rights over the continental shelf. An interesting point is that the State Territory Law makes reference to international law; Article 7 stipulates that the exercise of sovereign rights must be done in accordance with, among others, international law. Another point of interest in the State Territory Law is Article 8(3) which stipulates that Indonesia, when not at the border with another state, shall unilaterally determine its territorial limits (including continental shelf). This provision seems to disregard the existence of the CLCS. With respect to the continental shelf and the ECS, the State Territory Law, while more advanced than other laws, still very much lacks the necessary provisions.

Lastly, the LOSC Ratification Law is *the* basis for the application of the ECS in Indonesia. However, usually Indonesian ratification or accession laws only have two articles: the first stipulating which convention Indonesia ratifies or accedes to, and second stipulating when the law becomes effective; the LOSC Ratification Law is no exception. Hence, the LOSC Ratification Law in no way regulates the ECS in Indonesia; it merely serves as a basis for the application of it.

As a conclusion, as of now, Indonesia does not have a law which regulates the ECS in Indonesia, from the submission mechanism, division of authority and tasks, Indonesia's exercise of its rights and obligation, etc.

2. Draft Law

As the current Continental Shelf Law is no longer in line with the LOSC, Indonesia is at a process of making a new Continental Shelf Law. The National Law Development Agency of the Ministry of Law and Human Rights ("NLDA") has prepared an academic paper for the new Continental Shelf Law. In total NLDA has made two academic papers for the new Continental Shelf Law, made in 2011 and 2012. These academic papers are the basis for the draft law. With respect to the ECS, these academic papers have addressed it appropriately; they emphasized the potential of the ECS in Indonesia given the broad natural prolongation Indonesia has in numerous areas. At this time, Indonesia has not passed the new law on the Continental Shelf. However, the steps which have been taken so far looks promising for Indonesia to have a strong legal basis for the application of the ECS regime.

B. INDONESIA'S SUBMISSION FOR THE EXTENDED CONTINENTAL SHELF

In this part, the author will address the application of the ECS in practice in Indonesia in its numerous areas. Indonesia has made one submission to the CLCS and duly obtained the recommendation. It is now also at a process of preparing other submissions to the CLCS for other areas.

Since approximately a decade ago, Indonesia has started to initiate moves to make a submission to the CLCS. The first step Indonesia

took was making a desktop study which was followed by a continental shelf survey. The data gathering period was done by the Geospatial Information Agency (“GIA”). For the desktop study, the GIA relied on readily available data which was obtained without a direct survey, such as: (1) bathymetric data; (2) seafloor topography data; (3) sedimentary rock thickness data; (4) Government Regulation No. 38 of 2002 on the List of Indonesian Baselines; (5) the coastline; (6) exclusive economic zone maps, etc. After all the data was gathered, the Ministry of Foreign Affairs led the way to make the submission in front of the CLCS in New York.³⁸

1. Submission: The Extended Continental Shelf in North-West Sumatera

On 16 June 2008, Indonesia made a submission to the CLCS for the ECS in North-West Sumatera. On 24 March 2009, Arif Havas Oegroseno made a presentation before the CLCS.³⁹ Finally, on 28 March 2011, the CLCS adopted the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Indonesia in respect of the area North West of Sumatra on 16 June 2008. The recommendation was then given to the Indonesian government and the United Nations Secretary General.

a. Limits

For its submission, Indonesia used the Gardiner/Irish Formula; the Hedberg Formula was not used at all by Indonesia. As can be seen in Picture 4-1, the foot of the continental slope is very close to the baseline. Therefore, if Indonesia were to use the Hedberg Formula, it would not gain any ECS at all, as the limit would fall within 200 nautical miles.⁴⁰

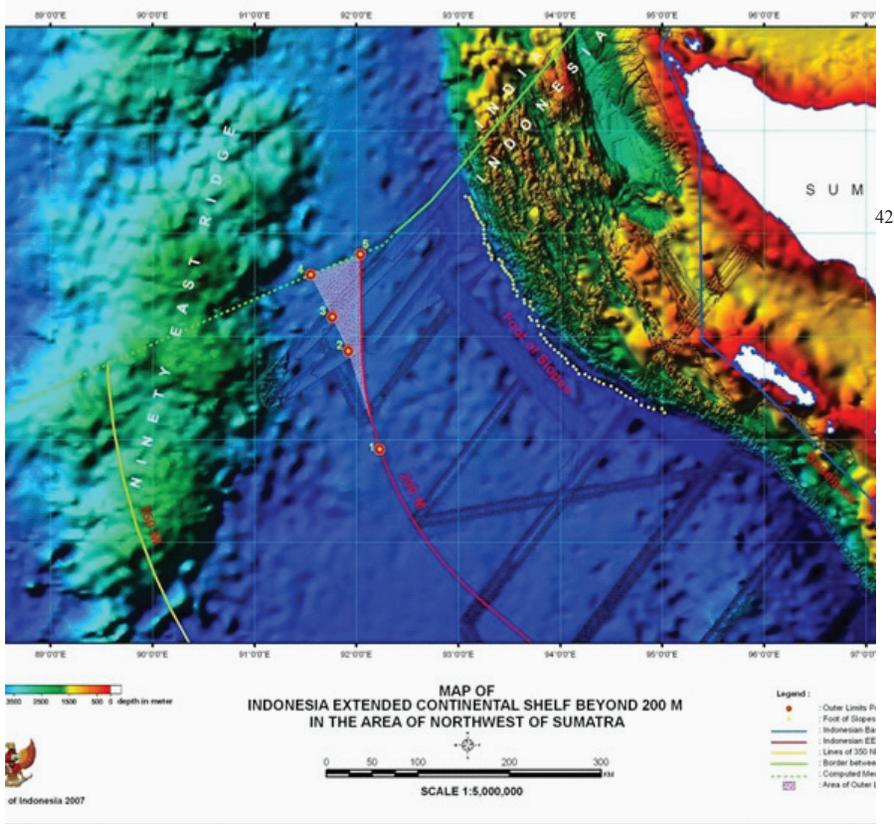
³⁸ Author’s interview with Arif Havas Oegroseno, head of the Indonesian delegate for the submission before the CLCS; Author’s interview with Tri Patmasari, Head of GIA’s Sea Mapping; Sobar Sutisna, Tri Patmasari, and Khafid, *Indonesian Searching for Its Continental Shelf Outer Limits*, (Bogor: National Coordinating Agency for Surveys and Mappings, 2005), p. 3.

³⁹ Arif Havas Oegroseno, whom the author met and interviewed for this article, was the Director General of Legal Affairs and International Treaties and head of the Indonesian delegate for the submission before the CLCS; Commission on the Limits of the Continental Shelf CLCS/70, Twenty-seventh session, p. 3.

⁴⁰ Commission on the Limits of the Continental Shelf, Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Indonesia in Respect of The Area North West of Sumatra on 16 June 2008, p. 12.

With respect to the constraints, Indonesia opted for the 350-nautical-mile limit. As can be seen in Pictures 4-1 and 4-3, the 350-nautical-mile limit is located far more seaward than the outer limits of the ECS. Indonesia's coordinates were subsequently accepted by the CLCS, with minor differences⁴¹. The difference can be seen in Pictures 4-1 and 4-2.

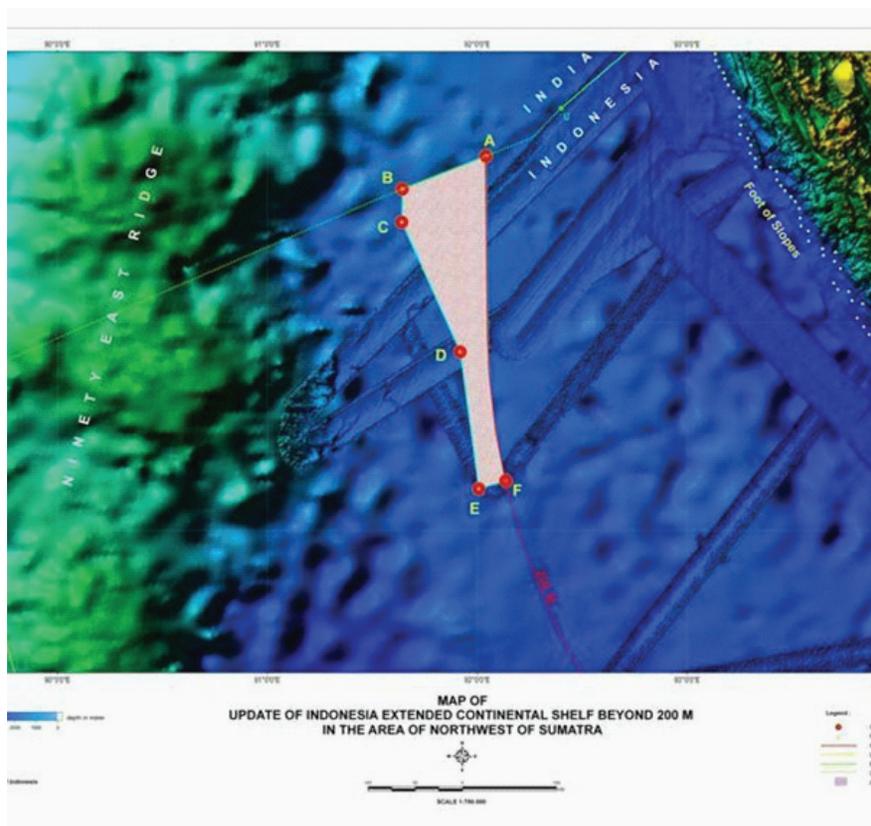
Picture 4-1



⁴¹ *Ibid.*, p. 17.

⁴² Picture 4-1, Continental Shelf Submission of Indonesia, Partial Submission in respect of the area of North-West of Sumatra, Executive Summary, p. 7.

Picture 4-2



b. Disputes and Possible Disputes

In its submission, Indonesia noted that there are no disputes in the North-West Sumatera area.⁴⁴ Interestingly, India sent a *note verbale* to the CLCS, reminding the latter of Article 83 of the LOSC which stipulates that delineation of the continental shelf between bordering states must be made through an agreement; the *note verbale* emphasized that the submission cannot have any prejudice to India.⁴⁵ Indonesia replied to the *note verbale* with a *note verbale* of its own. It stated that it

⁴³ Picture 4-2, NLDA Naskah Akademis Rancangan Undang-Undang Tentang Landas Kontinen, NLDA, 2011, p. 31

⁴⁴ Continental Shelf Submission of Indonesia, Partial Submission in respect of the area of North-West of Sumatra, Executive Summary, p. 6.

⁴⁵ *Note Verbale* India, No.NY/PM/443/1/2009, 25 March 2009.

agrees with India regarding Article 83 of the LOSC, after which Indonesia reminded India and CLCS that Indonesia and India in fact *have* made an agreement—two, in fact—regarding the borders of the continental shelf between the two states.⁴⁶

The two agreements were made in 1974 and 1977.⁴⁷ These two agreements comprehensively set out the coordinates of the borders of the continental shelf between Indonesia and India. Therefore, the submission made by Indonesia for the ECS in North-West Sumatera is free from any dispute with neighboring states.

c. Exploration and Exploitation

Indeed, the intention of Indonesia to make the submission is to explore and exploit its resources. However, based on the author's interview with Arif Havas Oegroseno and Tri Patmasari, Indonesia has not started exploration, let alone exploitation, on the ECS. This is because of a number of reasons.

Firstly, the issue is with respect to costs. In essence the farther away the area, the more pricey the exploration and exploitation cost will be. Two hundred nautical miles is a long way from the shore, and it shall be noted that not even all of the continental shelf within 200 nautical miles have been explored and exploited. Hence, Indonesia will focus on the continental shelf within 200 nautical miles first.

Secondly, according to Arif Havas Oegroseno, the major issue—as the author explored in the previous part—is the lack of legal framework for exploration and exploitation. The new law on the Continental Shelf itself has not yet been made. And usually, laws need to be further implemented by Government Regulations and Minister Regulations. According to him, Indonesia is in a unique position where externally,

⁴⁶ *Note Verbale* Indonesia, No. 471/Pol-SG/V/09, 30 April 2009.

⁴⁷ Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India relating to the Delimitation of the Continental Shelf Boundary between the Two Countries, opened for signature 8 August 1974 (entered into force 17 December 1994); Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India on the Extension of the 1974 Continental Shelf Boundary between the Two Countries in the Andaman Sea and the Indian Ocean, opened for signature 14 January 1977 (entered into force 22 December 1980).

Indonesia is ready, but internally, it is not yet supported by the necessary laws and regulations.

Thirdly, according to Tri Patmasari, until now, Indonesia has not made a benefit analysis for the ECS. This sort of analysis is usually conducted prior to Indonesia signing a certain agreement. It has also not yet made a utilization plan for the ECS. Hence, Indonesia made the submission without knowing how to make use of the ECS and even after the recommendation has been given, it still does not know how to make use of it.

As a conclusion, even though Indonesia has obtained the recommendation from the CLCS, it is still far from exploring and exploiting the ECS. The ECS, for now, is a long-term investment for future generations which will have the capacity to explore and exploit the ECS.

2. Future Submissions

In its submission for the ECS in North-West Sumatera, Indonesia explicitly mentioned that it is a partial submission; Indonesia intends to make other submissions for South Nusa Tenggara and North Papua.⁴⁸ Indonesia has started to explore the possibilities for these two areas at the same time it started to explore the possibilities of North-West Sumatera. The NLDA has acknowledged these potential in its academic paper, in which it included a map for Indonesia's ECS potentials, as can be seen in Picture 4-3.⁴⁹

⁴⁸ Commission on the Limits of the Continental Shelf, Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Indonesia in Respect of The Area North West of Sumatra on 16 June 2008, p. 1.

⁴⁹ Picture 4-3, NLDA, Naskah Akademis Rancangan Undang-Undang Tentang Landas Kontinen, NLDA, 2011, p. 29.

Picture 4-3



a. The Extended Continental Shelf in South Nusa Tenggara

The potential of the ECS in South Nusa Tenggara was first seen in the desktop study, explained above. In addition to the desktop study, the GIA has also conducted a survey in 2008. This survey is the same survey which was done in North-West Sumatera in 2006 and 2010, which proved to be very important for the CLCS's approval. According to Tri Patmasari, the ECS in South Nusa Tenggara is not ready to be submitted as additional surveys are needed. The potential of the ECS in South Nusa Tenggara can be seen in Picture 4-3 marked "OCS-2."

b. The Extended Continental Shelf in North Papua

Other than the desktop study Indonesia has conducted a number of surveys here in 2008, 2013, and—most recently—2014. According to Tri Patmasari, the surveys revolve especially around the Eauripik Rise. Indonesia has also made diplomatic moves for the ECS in North

Papua with neighboring states. These states are Papua New Guinea and Micronesia. Both are at the border of Indonesia. In 2012, Indonesia, Papua New Guinea, and Micronesia have made a trilateral meeting to discuss the ECS in the area around North Sumatera. Indonesia is open for the possibility of a joint submission with these neighbors.⁵⁰

From the facts, the ECS submission preparation for North Papua is better prepared. It was estimated that Indonesia would launch its submission by the end of 2014. However, until this article was written, no submission was made. The potential of the ECS in North Papua can be seen in Picture 4-3 marked “OCS-32.”

V. CONCLUSION

A. ANALYSIS AND CONCLUDING REMARKS

In this section the author will analyze the problems of the Indonesian ECS. The main issue for the implementation of the ECS regime in Indonesia is the lack of a strong legal basis. The Continental Shelf Law is now essentially obsolete, although it still has not yet been revoked. The Continental Shelf Law was made long before LOSC and still uses the understanding of the Continental Shelf Convention that is no longer applicable to Indonesia since 1985. Other laws governing the continental shelf are also insufficient. The Oil and Gas Law does not recognize the regime of the ECS and only touches upon the continental shelf in general. The State Territory Law is a more applicable to the ECS regime because in the definition of the continental shelf, it mentions the possibility of extending the continental shelf up to 350 nautical miles from the baselines or 100 nautical miles from a line connecting the depth of 2500 meters. However, the State Territory Law is also problematic. When the State Territory Law is read in isolation, it is as if Indonesia can extend its continental shelf to the maximum extent without any formulae. This is made worse by the provisions of the State Territory Law which states that the delimitation of the continental shelf can be done unilaterally. This is not in line with the LOSC, which requires a process through the CLCS. The applicability

⁵⁰ Commission on the Limits of the Continental Shelf, CLCS/62, Twenty-third session, p 9.

of the ECS is solely relying on the LOSC Ratification Law. However, like other ratification laws, the LOSC Ratification Law only consists of two articles; it does not provide any further detailed provisions.

The absence of a strong legal basis for the adoption of the ECS regime in Indonesia results in several outcomes. The first is the lack of clarity of the rights and obligations of Indonesia over the ECS based on national law. Second, the absence of a strong legal basis means that Indonesia does not have a legal mandate to carry out exploration and exploitation over the ECS. This is viewed by Arif Havas Oegroseno as one of the main reasons—other than the high costs—why Indonesia has not started exploration and exploitation over the ECS.

In addition to a lack of a strong legal basis for the application of the ECS regime, a problem lies in the benefit analysis, which was never done by Indonesia. This means that Indonesia made its submission without knowing what benefits will be obtained when the submissions are approved by CLCS though its recommendation. This also means Indonesia does not have utilization plan for the ECS. Arif Havas Oegroseno opined that Indonesia has not carried out exploration and exploitation because there is no legal basis and because of the high cost. Although it is true, in the opinion of Tri Patmasari, Indonesia has not carried out exploration and exploitation because there is no plan to do it to begin with.

B. SUGGESTIONS

Looking at the application of the ECS regime in Indonesia, the authors offer two suggestions. First, there is the need for a strong national legal basis for the application of the ECS regime in Indonesia. The new Continental Shelf Law should contain provisions regarding the ECS in accordance with the LOSC. In addition to the new Continental Shelf Law, there should be implementing regulations for the exploration and exploitation over the ECS. Second, Indonesia needs to conduct a study or analysis for the benefit of obtaining the ECS. This should be done both for the ECS in North-West Sumatera as well as for the future ECS in South Nusa Tenggara and North Papua, so that when the CLCS give its recommendations, Indonesia is ready with its well-tailored utilization plan.

REFERENCE

Agreements

- Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India on the Extension of the 1974 Continental Shelf Boundary between the Two Countries in the Andaman Sea and the Indian Ocean.* (opened for signature 14 January 1977, entered into force 22 December 1980).
- Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India relating to the Delimitation of the Continental Shelf Boundary between the Two Countries.* (opened for signature 8 August 1974, entered into force 17 December 1994).
- Geneva Convention on the Continental Shelf.* (opened for signature 29 April 1958, entered into force 10 June 1964).
- Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.* (opened for signature 29 April 1958, entered into force 20 March 1966).
- Geneva Convention on the High Seas.* (opened for signature 29 April 1958, entered into force 30 September 1962).
- Geneva Convention on the Territorial Sea and the Contiguous Zone.* (opened for signature 29 April 1958, entered into force 10 September 1964).
- Timor Sea Treaty between the Government of East Timor and the Government of Australia.* (open for signature 20 May 2002, entered into force 2 April 2003).

Regulations

- Indonesia. Undang-Undang Nomor 1 Tahun 1973 tentang Landas Kontinen Indonesia. LN. 1973-2994.
- Indonesia. Undang-Undang Nomor 17 Tahun 1985 tentang Pengesahan *United Nations Convention on the Law of the Sea* (Konvensi United Nations Tentang Hukum Laut). LN. 1985-76.
- Indonesia. Undang-Undang Nomor 22 Tahun 2001 tentang Minyak and Gas Bumi. LN. 2001-136.
- Indonesia. Undang-Undang Nomor 43 Tahun 2008 tentang Wilayah Negara. LN. 2008-177.
- United States of America. Harry S. Truman Proclamation. (US Proclamation no. 2667). Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. 1945.

Books

- Adeleye, Gabriel and Kofi Acquah-Dadzie. *World Dictionary of Foreign Expressions: A Resource for Readers and Writers.* Bolchazy-Carducci Publishers. 1999.
- Churchill, R. R. and A. V. Lowe. *The Law of the Sea.* Ed. 3. Manchester University Press. 1999.
- Garner, Bryan A. *Black's Law Dictionary,* ed. 9. Thomas Reuters. 2009.
- Haakonssen, Knud. *The Free Sea.* Liberty Fund, Inc. 2004.
- International Oceanographic Commission, International Hydrographic Organization and International Association Of Geodesy. *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982,* ed. 4. International Hydrographic Bureau. 2006.

- Persand, Sharveen. *A Practical Overview of Article 76 of the United Nations Convention on the Law of the Sea*. The United Nations - The Nippon Foundation of Japan Fellowship Programme. 2005.
- Prescott, Victor. *Resources of the Continental Margin and International Law*. Oxford University Press. 2000.
- Siombo, Marhaeni Ria. *Hukum Perikanan Nasional and Internasional*. PT Gramedia Pustaka Utama. 2010.
- Smith, R. W. An G. Taft. *Legal Aspects of the Continental Shelf*. Oxford University Press. 2000.
- Suarez, Suzette V. *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*. Springer. 2008.

Journals

- Breide, Charlotte and Phillip Saunders. "Challenges to the UNCLOS Regime: National Legislation Which is Incompatible with International Law". *International Hydrographic Organization*. 2008.
- Colson, David A. "The Delimitation of the Outer Continental Shelf between Neighboring States". *The American Journal of International Law*. Vol. 97. No. 1. 2003.
- International Law Commission. "Yearbook of the International Law Commission 1956". *ILC Volume II*. 1956.
- International Seabed Authority. "Implementation of Article 82 of the United Nations Convention on the Law of the Sea". *ISA Technical Study: No.12*. 2013.
- Jares, Vladimir. "The Continental Shelf Beyond 200 Nautical Miles: The Work of the Commission on the Limits of the Continental Shelf and the Arctic". *Vanderbilt Journal of Transnational Law* Vol. 42:1265. 2009.
- McDorman, Ted L. "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World". *The International Journal of Marine and Coastal Law*. Vol 17. No 3. 2002.
- United Nations. "The Law of the Sea: Training Manual for Delineation of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles and for Preparation of Submissions to the Commission on the Limits of the Continental Shelf". *United Nations*. 2006.
- Ribeiro, Marta Chantal. "What is the Area and the International Seabed Authority?". *l'Institut Océanographique*. 2013.
- Russa, Garry R. and Dirk C. Zellerb. "From Mare Liberum to Mare Reservarum". *Marine Policy*. Vol. 27. 2003.
- Schofield, Clive and I Made Andi Arsana. "Beyond the Limits?: Outer Continental Shelf Opportunities and Challenges in East and Southeast Asia". *Contemporary Southeast Asia*. Vol. 31. No. 1. 2009.
- Suarez, Suzette V. "Commission on the Limits of the Continental Shelf". *Max Planck UNYB*. 2010.
- Sutisna, Sobar, Tri Patmasar and Khafid. "Indonesian Seaching for Its Continental Shelf Outer Limits". *National Coordinating Agency for Surveys and Mappings*. 2005.
- Theutenberg, Bo Johnson. "Mare Clausum et Mare Liberum". *Arctic*. Vol. 37. No. 3. 1984.

Wilder, Robert Jay. "The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism". *Virginia Journal of International Law*. Vol. 32:681. 1992.

Documents

NLDA. Naskah Akademis Rancangan Undang-Undang Tentang Landas Kontinen. 2011.

NLDA. Naskah Akademis Rancangan Undang-Undang Tentang Landas Kontinen (Lanjutan). 2012.

Commission on the Limits of the Continental Shelf. CLCS/62. Twenty-third session. Commission on the Limits of the Continental Shelf. CLCS/70. Twenty-seventh session.

Commission on the Limits of the Continental Shelf. Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Indonesia in Respect of The Area North West of Sumatra on 16 June 2008.

Continental Shelf Submission of Indonesia. Partial Submission in respect of the area of North- West of Sumatra, Executive Summary.

Note Verbale India. No.NY/PM/443/1/2009. 25 March 2009.

Note Verbale Indonesia. No. 471/Pol-SG/V/0. 30 April 2009.

United Nations. Resolution 1105 (XI), General Assembly of the United Nations Convening the Conference. 658th Plenary Meeting. 21 February 1957.

Internet

Commission on the Limits of the Continental Shelf. "Submissions through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982." Available at: http://www.un.org/Depts/los/clcs_new/commission_submissions.htm. Accessed on 17 February 2014.

United Nations. "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013." Available at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm. Accessed on 26 March 2014.

United Nations. "Treaty Collections, Chapter XXI (Law of the Sea), Subchapter 6 (United Nations Convention on the Law of the Sea. Montego Bay, 10 December 1982)." Available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en. Accessed on 17 February 2014.