

CHAPTER 1

INTRODUCTION

1.1 Background

The continental shelf can be defined as one of the very important aspects of surrounding seas when taking note of a country's natural resources in consideration of their regulated territory. These areas of land under the sea are defined under Article 76 of the UNCLOS paragraph 1 as follows:

“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, 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.”

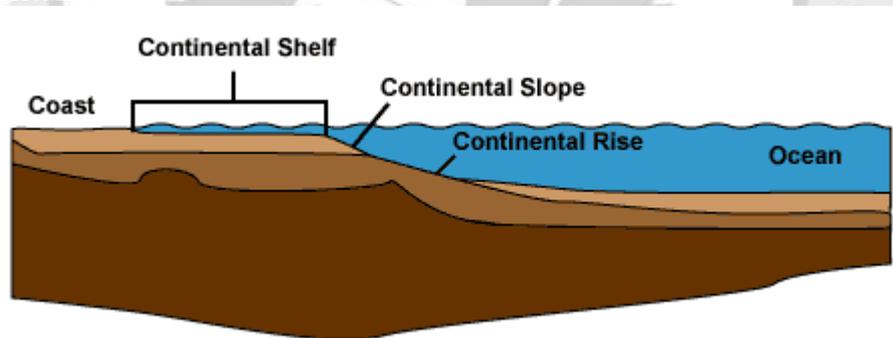


Image showing the natural prolongation of the continental shelf.¹

Because of how it is defined under Article 76 in the rule that it can be extended past a country's defined territorial waters, numerous disputes can arise in defining where a country's continental shelf ends and where another country's territorial waters begin. In practice, most neighbouring countries will have

¹ James Karuga, What is a Continental Shelf?, World Atlas, (2017), Accessed At:<<https://www.worldatlas.com/articles/what-is-a-continental-shelf.html>>

overlapping claims in their defined territorial waters because of their proximity each other. Hence, there will easily be overlapping claims in establishing their continental shelves on top of their defined territorial waters/exclusive economic zones, as follows that the case in question required the court's assistance in the judgement that followed in establishing these boundaries between the two countries.² Today, continental shelf rights are regarded to be highly prized due to hydrocarbon explorations and the oil reserves that can be found in them. Over the recent years, many countries have attempted to settle disputes over the continental shelf in order to delimit the overlapping areas and ensure that they can retain their rights to exploit it.

Based on Article 77, the rights of a coastal state over the continental shelf are described under paragraph 1 to "exploit its natural resources" which herein are referred to as "natural resources consisting of the mineral and other non-living resources" along with "living organisms belonging to sedentary species" in paragraph 4:

"1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."

"4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are

² ICJ, Maritime Delimitation in the Black Sea (Romania v. Ukraine): Judgement of 3 February 2009

unable to move except in constant physical contact with the seabed or the subsoil.”

As mentioned, the continental shelf is home to numerous resources, notably oil, which remains the contentious issue in this dispute owing to the granting of oil concessions. It is of no doubt that both Malaysia and Indonesia through history understand the importance of the Ambalat block’s resources. Indonesia had begun providing exploration concessions to various oil companies since 1961, and again in 1998 to ENI around the Sulawesi Sea. It was only in 2004 when Malaysia then made protests to Indonesia for offering another concession, providing evidence that there lies national interest at stake for the rights to oil mining in the Ambalat block for both parties.³

By securing key areas where a state does not hold concrete territorial rights over, there lies potential to boost their GDP while also procuring foreign interest in mining these continental shelves. Indonesia had recently made a Continental Shelf Submission in extending the outer limit of their existing continental shelf in the area beyond 200 nautical miles north of the Papua province, which is now held under consideration with the UN while talks are also going under way with other countries that have also made claims to the area or have potential to be in conflict with when creating these boundaries (e.g., Palau, the Federates States of Micronesia, Papua New Guinea).⁴ Prior to this claim,

³ Tulus Warsito, Ali Maksum, Surwandono, Ratih Herningtyas, Indonesia’s Foreign Policy Towards Malaysia In The Post Soeharto Era: A Case Study Of Ambalat Dispute, UNISCI Journal, (2020), p. 100-101

⁴ Dian Septiari, Indonesia seeks border extension in bid to bolster mineral reserves, The Jakarta Post, (2020), Accessed At:< <https://www.pwc.com/id/en/media-centre/pwc-in->

Indonesia had also submitted a claim in 2008 which was then recognized in 2011 in concern for the extended continental shelf near Aceh, which extended the area of North West Sumatra.⁵ In following inline with political will and recent claims, there is no reason why the Ambalat too should be tackled in resolving the dispute with Malaysia and relieving tensions between both countries.

The considerations of the adjustments of the continental shelf rights are according to Article 78(2) of the 1982 UNCLOS, which states as follows:

2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.

When laying claim to these continental shelves, such claims must be settled through bilateral agreements with other States in the event such claims result in infringing boundaries. Most notably in the present dispute, there was a sequence of events following the *Sipadan-Ligitan* ruling that exasperated diplomatic relations between both countries, with both States enforcing their claims over the overlapping area which resulted in deployment of patrols from both parties.⁶

Article 83 also further denotes that:

[news/2020/english/indonesia-seeks-border-extension-in-bid-to-bolster-mineral-reser.html](https://www.thejakartapost.com/news/2020/english/indonesia-seeks-border-extension-in-bid-to-bolster-mineral-reser.html)> on 21/02/2021

⁵ Government of the Republic of Indonesia, Partial Submission in respect of the area of North West of Sumatra, (2008)

⁶ Clive Schofield, Ian Storey, Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes, Asian Quarterly, (2005), Accessed At: <<https://web.archive.org/web/20080513024233/http://www.asiaquarterly.com/content/view/160/>>

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

Considering it is nearing 19 years since *Sipadan-Ligitan* ruling with no clear signs of a delineation of the dispute area nor intent to bring the case before a third party, perhaps it may be due time for the dispute to be settled by the various means provided and stated in the UNCLOS, namely that in Article 287 which states:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration,

one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Another issue lies in the source behind Malaysia's overlapping claim over the Ambalat block, stemming from their own unilateral declaration and issuance of a sea map known as the 1979 Malaysia Map. The sea map, as well as the Ambalat block remain contested by Indonesia, with the former also being met with criticism across various countries in Asia. Despite the "hostile" nature of the 1979 Map in its declaration of seizing territory from other countries in Asia, Malaysia has since continued to assert the map to be a valid official document.⁷ On the other hand, Indonesia has determined ownership of the Ambalat block historically as part of their internationally recognized Djuanda Declaration and usage of the Ambalat block for oil exploration since 1961.⁸

⁷ Tulus Warsito, Ali Maksum, Surwandono, Ratih Herningtyas, Indonesia's Foreign Policy Towards Malaysia In The Post Soeharto Era: A Case Study Of Ambalat Dispute, *Unisci Journal*, (2020), p. 98

⁸ Tulus Warsito, Ali Maksum, Surwandono, Ratih Herningtyas, (2020), p. 98-99

In the event bilateral negotiations do not work, a choice of Tribunal/Court can be made when both States choose a third party as a means of dispute settlement. The usage of a third party in dispute resolution can be deemed important in providing expert opinion concerning International Laws as well as comparisons of scientific evidence. As a result of animosity between states in claiming the other as flawed or illegitimate and designated as an adversary, there will need to be a proper decision with proper reasoning to support it.⁹ The compliance of a state to a ruling mandated by a court/tribunal then also brings upon social impacts in concern to the domestic groups of the states, as it then creates a need for them to accept the legitimacy of these decisions/consideration,¹⁰ and thus legally bind them to their obligations in accordance with Article 296 of the UNCLOS.

When considering the choices of institutions for dispute settlement, the most fitting could arguably be the ITLOS (International Tribunal for the Law of The Sea) out of consideration that it is in fact made for the sole purpose of adjudicating over issues regarding the UNCLOS; The ITLOS exists to focus on prompt release and provisional measures stemming from its jurisdictional role while also being more frequently used to settle boundary cases in recent times.¹¹ Such can be observed in the Bangladesh v. Myanmar case settled by the Tribunal

⁹ Ana Cristina Rodriguez Pineda, 'Recourse to International Dispute Settlement Mechanisms, Including Recent International Court of Justice Decisions', *ILSA Journal of International & Comparative Law*, (2015), pg. 385–395. Available at: <https://search-ebscohost-com.ezproxy.taylors.edu.my/login.aspx?direct=true&db=a9h&AN=102478272&site=ehost-live&scope=site> (Accessed: 6 December 2020).

¹⁰ Todd L. Allee, Paul K. Ruth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*. *The American Political Science Review*, (2006), pg. 219-234.

¹¹ Sara McLaughlin Mitchell, *Clashes at Sea: Explaining the Onset, Militarization, and Resolution of Diplomatic Maritime Claims*, *Security Studies*, (2020).

which was considered to have strictly relied upon the law on maritime delimitation, as opposed to progressively developing the law and elaborating thoroughly on the various aspects of the delimitation process.¹² Through strict interpretation and application of the UNCLOS it can be observed that the Tribunal does not deviate from international case law on the subject, hence conducting fulfilment of its function in creating equitable solutions based on the principles of UNCLOS; The ITLOS arguably is proven to be a competent forum in the settlement of maritime delimitation disputes in that regard.¹³ Furthermore, the existence of a permanent tribunal then provides a constant reminder to states of the availability of litigation as a means of peaceful settlement.¹⁴

Another potential forum to be considered is the ICJ, or International Court of Justice. The relative newness of the ITLOS in comparison to the ICJ (the Tribunal being established in 1996 while the ICJ in 1945) gives concern that it may not have enough experience in handling dispute resolutions. Unlike the ITLOS, the ICJ can be considered to have more jurisprudence in its existing dispute resolutions/delimitations, such as in Latin America observed through the *Peru v. Chile* case of 2014 in which the Court assisted in the delimitation and creation of a maritime boundary, which was followed with an agreement from both States two months after the court judgement.¹⁵ Furthermore, the ICJ is equipped with a trust fund from the UN used to assist states in the settlement of

¹² Marcin Kaldunski, Taduesz Wasilewski, *The International Tribunal for the Law of the Sea on Maritime Delimitation: The Bangladesh v. Myanmar Case*, *Ocean Development & International Law*, (2014), pg. 123-170, DOI: 10.1080/00908320.2014.898920

¹³ *ibid*

¹⁴ *Ibid*

¹⁵ Ana Cristina Rodriguez Pineda, (2015), pg. 385–395.

disputes, thus providing another layer of assurance.¹⁶ Although the ITLOS acts as a standing tribunal for the settlement of maritime disputes, the ICJ will continue to stand as one of the only courts that hold general competence to any aspect of international law.¹⁷ Because of a standing nature that courts have a better system in place that acknowledges facts and research that can be developed through the course of a trial, it would therefore stand the ICJ could be preferred in circumstances where both parties desire an outcome that is fair and justified. Such was a determining factor when the ICJ was requested to conduct marine delimitation in the *Nicaragua v. Costa Rica* case.¹⁸

Arbitration is considered as a means when both parties agree to seeking neutral and knowledgeable arbitrators to provide an award that is final and without appeal. Special arbitral tribunals are then used for adjudication over UNCLOS related issues concerning; fisheries; protection and preservation of the marine environment; marine scientific research; and navigation, including pollution from vessels and by dumping.¹⁹ Arbitration can be raised when there is no room for discussion, particularly if diplomacy is unable to be established between the parties.²⁰ Ultimately the decision in choice of forum depends on the level of goodwill or animosity between Indonesia and Malaysia.

¹⁶ *ibid*

¹⁷ Merrills J. G., *International Dispute Settlement*, Cambridge University Press, Cambridge, (2011).

¹⁸ *ibid*

¹⁹ Ana Cristina Rodriquez Pineda, (2015), pg. 385–395.

²⁰ Chao Wang, ‘International Arbitration of Maritime Delimitation: An Alternative for East Asia?’, *Journal of East Asia & International Law*, 7(2), pp. 427–441. doi: 10.14330/jeail.2014.7.2.06., (2014)

The ICJ's ruling in the *North Sea Continental Shelf* cases established that the rights of the coastal states in the continental shelf 'exist ipso facto and ab initio, by virtue of its sovereignty over land'.²¹ Another key issue that was raised in the *Bangladesh/Myanmar* case on the Bay of Bengal was the consideration of jurisdiction. Arguably, the CLCS (Commission on the Limits of the Continental Shelf) holds the role in determining entitlements to an outer continental shelf, which was raised as an objection by Myanmar.²² However, this provides the implication that a coastal State's entitlement to an outer continental shelf depended on the establishment of the outer limits of the shelf. An important consideration by the ITLOS was the drawing of a clear distinction between the notions of 'entitlement to the continental shelf beyond 200 nm' and 'the outer limits of the continental shelf', whereby the ITLOS was adamant that the entitlement of a coastal does not depend on the establishment of the outer limits of the continental shelf.²³ Herein, a coastal State does not need to have established its outer limits in order to prove that it then holds entitlement to a continental shelf, that itself lies in another set of considerations in establishing the outer limits itself through the CLCS in the conduct set out by Article 76(4-7).

Drawing a comparison therein with the established precedence above and the Ambalat conflict, as follows that the Ambalat Block is a natural continuation of East Kalimantan because its basic rocks are part of the continental plates

²¹ Lan Ngoc Nguyen, *Unclos Tribunals And The Development Of The Outer Continental Shelf Regime*, British Institute of International and Comparative Law, Cambridge University Press, (2017); *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment)* [1969]

²² *ibid*

²³ *ibid*

forming Kalimantan.²⁴ The Ambalat Block is hence clearly included in the Indonesian territory, drawn from the boundary between East Kalimantan and Sabah then drawn from the Sebatik islands based upon the archipelagic baseline.²⁵ In those veins then is it clear that the matter in dispute is not whether Indonesia has the right to claim or whether they are entitled, but rather delimitation and exploitation rights. This should also be held under the legitimacy of Malaysia's claims, namely the legality of the unilateral enforcement of national law as well as the Sipadan and Ligitan ruling. Such a parallel can be drawn too in comparison to the *Bangladesh/Myanmar* and *Bangladesh/India* case where all three states made submissions to the CLCS in respect to their claims beyond 200 nm which the UNCLOS tribunals then acknowledged to entitlement and thus proceeded with delimitation.²⁶ The key issue remains in that what should Malaysia and Indonesia should consider going forward in order to settle the dispute, what laws must be considered, and what forums or choices of dispute settlement are available to them or mandated for them to follow.

The importance of this research intends to assist in the solution of this conflict because of International Legal basis that is required in understanding the nuances of Continental Shelf Rights in the context of disputed claims by neighbouring states. Simply applying national legislation is not sufficient as sovereign rights only stretch as far as other states are willing to respect, and in this

²⁴ Pulung Widhi Hananto, Anggita Doramia Lumbanraja, Rahandy Rizki Prananda, Aisyah Ayu Musyafah, Legal scenario towards the policy of marine natural resources on the continental shelf: Ambalat case study, IOP Conference Series: Earth and Environmental Science, (2020), pg. 7

²⁵ *ibid*

²⁶ Lan Ngoc Nguyen, *Unclos Tribunals And The Development Of The Outer Continental Shelf Regime*, British Institute of International and Comparative Law, Cambridge University Press, (2017)

case the situation has evolved into the clashing of borders. In that aspect the legality of the situation is very clear by utilizing the Articles of the UNCLOS 1982 to formulate the basis of a solution. However, it should also be kept in mind that due to the political and diplomatic situation between both countries being strained because of various events leading up to the issue, it is not as simple as one may initially perceive.

1.2 Formulation of Issues

Based upon the research backgrounds abovementioned, this research endeavours to analyse rigorously the following research statements:

1. What are the relevant provisions under UNCLOS 1982 that must be examined in the establishment of Continental Shelf boundaries in relation to the Ambalat dispute between Malaysia and Indonesia; and
2. What avenues would International Law prescribe in the settlement of dispute under UNCLOS 1982 in delineating the continental shelf boundary in the Ambalat between Malaysia and Indonesia?

1.3 Research Purposes

The purposes of writing this paper will be determined by the author in the following issues:

1. Understand the legal basis of the UNCLOS and its implementation to clearly define the rights and obligations of Indonesia.

2. Observe past judgements and agreements in courts/tribunals and between states, respectively, to create a framework of the precedence that can be expected when laying claim to disputed seas.
3. Finalize a proposed plan of action that can provide the best possible outcome to Indonesia and Malaysia.

1.4 Research Benefits

1.4.1 Theoretical Benefits

Arguably, Indonesia's focus on its own National Civil Law system blindsides a lot of lawyers and government institutions to have little to no consideration of how important legal precedence is in the establishment of decisions in the International Law field. What this paper hence aims to explore is a clear definition of what the legal precedence of continental shelves are and provide advice in new proposals in the future over the Ambalat issue.

1.4.2 Practical Benefits

By creating a clear way forward, this research can potentially aid in solving the ongoing dispute and creating a plan of action for future disputes or providing advice as to what areas should be claimed as soon as possible.

Through research this paper aims to prove useful not only to the Indonesian legal field but also other international entities including countries or firms that are interested in understanding the UNCLOS regime.

1.5 Framework of Writing

The paper/thesis will be divided into the following chapters:

Chapter I: Introduction

Providing an outline of the issues and the various laws that will be interacted with in this paper. Furthermore, establishing a clear outline of the current status quo and what needs to be solved to improve it.

Chapter II: Literature Review

Under the literature review chapter two main sets of research will be made. The first is the laws of the UNCLOS and a clear background on its formulation and how Indonesia came to ratify the convention with various historical agreements/contributions. The second will be identifying various landmark cases from Tribunals and Courts and determining their legal precedence.

Chapter III: Research Methods

This chapter will highlight the various research methods utilized in this paper

Chapter IV: Findings

Breaking apart what has been written in Chapter 2 as well as observing additional information in then formulating the solutions to the Ambalat issue. Furthermore, the subject of methods utilized by various Continental Shelf dispute cases will also be scrutinized.

Chapter V: Conclusion

Finalizing the closure of issues and creating a narrative on the state of international response to claims of the continental shelf and the current status quo of diplomacy in this field.

