
Nexus between Biodiversity beyond National Jurisdiction and Extended Continental Shelf: The Need for Sui Generis Status in Overlapping Jurisdiction*

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The legal status of Biodiversity Beyond National Jurisdiction (BBNJ) has been regulated through the High Seas Treaty as a common heritage of humankind. However, there still exist problems related to overlapping areas above the Extended Continental Shelf (ECS). In such areas, a significant continental shelf would fall within national

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jurisdiction, whereas the water column would be under the regime of the high seas, and BBNJ would be the common heritage of humankind. We argue that, in order to address the overlapping of areas within the superjacent waters in the ECS, a given sui generis status is required, so that the coastal state has a sovereign right to conserve the BBNJ in these areas. This study concludes that the sui generis arrangement should be implemented in the context of an overlapping ECS and its water column. The efforts of the Indonesian government to extend the continental shelf beyond 200 nautical miles constitute an important step in preserving natural resources for future generations.

Keywords

BBNJ, Extended Continental Shelf, Sui Generis, UNCLOS, Indonesia, High Seas Treaty

1. Introduction

The conservation and sustainable use of marine biodiversity in Areas Beyond National Jurisdiction (ABNJ)¹ is gaining global recognition, given the growing awareness about the richness and fragility of marine biodiversity.² In 2015, the United Nations General Assembly decided to develop an international, legally-binding instrument under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), dealing with the conservation and sustainable use of marine biodiversity in ABNJ.³ After more than a decade of negotiations, the international community successfully adopted a new treaty known as the High Seas Treaty or the BBNJ Agreement on June 19, 2023.⁴

Activities in the ABNJ will directly impact areas in countries bordering the high seas. Conservation and management of living resources and dealing with pollution are areas of particular concern, because the marine environment ecosystem will affect them, regardless of the legal boundaries established by UNCLOS. Indonesia is one of the largest archipelagic states in Asia. The waters of this archipelagic state lie right upon the intersection of the communication lines between the Pacific and Indian Oceans as well as the Asian and Australian continents. These communication lines connect the interests of large, developed countries in the West and in the East, in the

¹ BBNJ Agreement art. 1(4).

² Western Central Atlantic Fishery Commission [WECAFC], Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) Treaty and Its Potential Implications for the Fisheries Sector, at 1, <https://www.Fao.Org/3/Cc7149en/Cc7149en.Pdf>.

³ U.N. Doc. A/RES/69/292.

⁴ See *Beyond Borders: Why New 'High Seas' Treaty is Critical for the World*, UN NEWS (June 19, 2023), <https://news.un.org/en/story/2023/06/1137857>.

North and in the South.⁵ Indonesia is thus impacted by activities in the ABNJ.

On the other hand, states have been increasingly extending their continental shelves beyond 200 nautical miles (nm). As of today, 93 submissions for an ECS, including that of Indonesia, have been received by the Commission on the Limits of the Continental Shelf (CLCS).⁶ A continental shelf is crucial for a coastal state, because it has significant mineral deposits, including silver, diamonds, copper, cobalt, and nickel.⁷ Indonesia's continental shelf has a very rich potential, containing among others, nickel, cobalt, oil, and gas.⁸ The continental shelf regime and the circumstances of its extension have given rise to specific area considerations. Accordingly, there exists a need to articulate the powers exercised in the area under national jurisdiction, the outer continental shelf, and the overlying area where there is freedom of the high seas, while considering that these spaces are necessarily interconnected.

Article 78 of the UNCLOS provides that the exercise of the coastal state's rights over the continental shelf shall not affect the free regime that exists in the water column (nor in the overlying air space). However, the coastal State is also entitled to protect its own space and resources. In this regard, a question may arise on how to strike a balance, which is not always clear, between the interests of the coastal state and those of the states that are beneficiaries of the freedom of the seas.⁹

Indonesia is an archipelagic state with the potential to apply for an ECS.¹⁰ It has thus delineated a continental shelf beyond 200 nm to the CLCS, in the Northwest of Sumatra, in 2008.¹¹ Based on the recommendations adopted by the CLCS on March 28, 2011, the Indonesian continental shelf was extended by 4209 square kilometers.

⁵ Arif Oegroseno, *Managing High Seas Through a Sui Generis*, in MARINE BIODIVERSITY OF AREAS BEYOND NATIONAL JURISDICTION 18 (Myron Nordquist & Ronán Long eds., 2020).

⁶ UN Oceans and Law of the Sea, 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 Dec. 1982, https://www.un.org/depts/los/clcs_new/commission_submissions.htm.

⁷ Gérard Grignon, *Extension of the Continental Shelf beyond 200 Nautical Miles: An Asset for France*, DELEG. OVERSEAS TERRIT. 19 (2013), https://www.lecese.fr/sites/default/files/travaux_multilingue/F122_plateau_continental_imp.pdf.

⁸ Bramley Murton, *A Global Review of Non-living Resources on the Extended Continental Shelf*, 18(3) REV. BRAS. GEOP. 281 (2000).

⁹ Joanna Mossop, *The Relationship between the Continental Shelf Regime and a New International Instrument for Protecting Marine Biodiversity in Areas Beyond National Jurisdiction*, 75(1) ICES J. MAR. SCI. 444 (2018).

¹⁰ I Arsana, *The Delineation of Indonesia's Outer Limits of its Extended Continental Shelf and Preparation For its Submission: Status and Problems* 110 (The United Nations-Nippon Foundation Fellowship Programme 2007-2008, 2007).

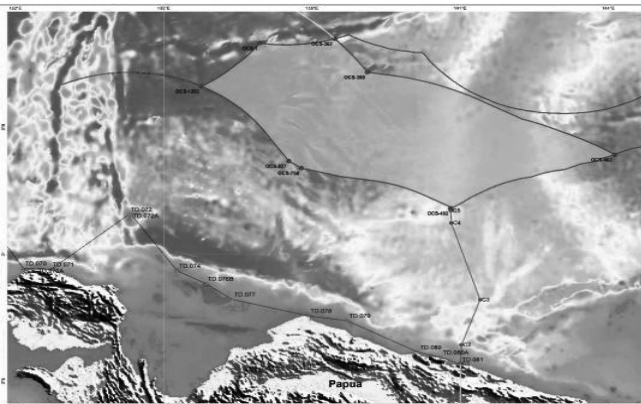
¹¹ Nikki Krisadtyo, *Extended Continental Shelf Regime in International Law: Its Application in Indonesia*, 12(3) INDON. J. INT'L L. 141 (2015).

Figure 1: ECS in Northwest of Sumatra based on CLCS recommendation, adopted on March 28, 2011¹²



Indonesia has also submitted an ECS request to the CLCS, for the northern areas of Papua and the south of Nusa Tenggara, in 2020.¹³ In these areas, a significant portion of the continental shelf is expected to fall within Indonesia's national jurisdiction, whereas the water column would be under the regime of the high seas.

Figure 2: Partial submission ECS in northern of Papua¹⁴

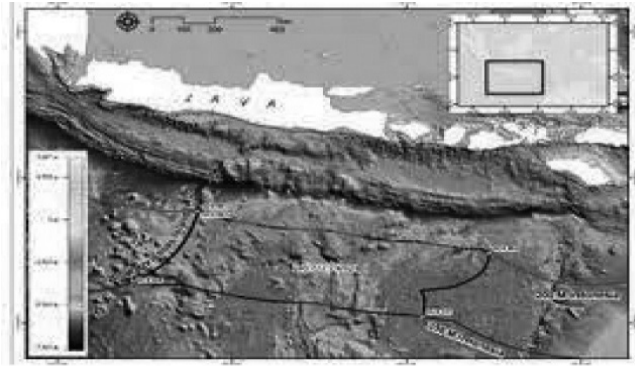


¹² CLCS, Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Indonesia in Respect of the Area North West of Sumatra on 16 June 2008, https://www.un.org/depts/los/clcs_new/submissions_files/idn08/Summary%20Recommendations%20for%20Indonesia.pdf.

¹³ Indonesian National Oceanographic Data Center, The Indonesian Government Claims a Continental Shelf as Wide as Two Times the Island of Java in Southwest Sumatra, <https://nodc.id/berita/17/pemerintah-indonesia-klaim-landas-kontinen-seluas-dua-kali-pulau-jawa-di-barat-daya-sumatera?PageSpeed=noscri>.

¹⁴ Government of the Republic of Indonesia, Continental Shelf Submission of the Republic of Indonesia: Partial Submission with respect to the Area of North of Papua, https://www.un.org/Depts/los/clcs_new/submissions_files/idn1_83_19/2019-02-01_IDN-Executive_Summary.pdf.

Figure 3: Partial Submission ECS in southern area of the island of Java to Nusa Tenggara¹⁵



In such a situation, there must be clarity regarding whether the life cycle of the biodiversity or genetic resources in the water column begins from the subsoil and seabed or is vice versa. Further, there must be clarity whether an uninterrupted and well-connected biological linkage exists between the seabed and the water column, in areas where the ECS and BBNJ overlap. In this context, Indonesia enjoys authority over the areas where the seabed and the land beneath it are under Indonesian jurisdiction, but the water column has been accorded the status of international waters.

Activity in the ABNJ will directly affect the areas under state control. Since the maritime environment is an ecosystem, such activity will impact living resources and pollution management, regardless of the legal borders in line with UNCLOS. In these regions, a sizeable portion of the continental shelf is expected to fall under Indonesia's national jurisdiction, whereas the water column would be governed by the high seas.¹⁶ This particular issue needs to be resolved, because it raises serious concerns about the legal status of genetic resources and biodiversity in interlinked areas under these two distinct regimes.

Several scholars has examined the status and protection of the BBNJ. Wang opined that the Marine Genetic Resources (MGRs) in the ABNJ possess the legal attribute of being the Common Heritage of Mankind (CHM).¹⁷ In addition, Joanna Mossop concluded that the main challenge lies in the fact that the notion of sedentary

¹⁵ The Indonesian government claims a continental shelf as wide as two times the island of Java in southwest Sumatra, <https://nodc.id/berita/17/pemerintah-indonesia-klaim-landas-kontinen-seluas-dua-kali-pulau-jawa-di-barat-daya-sumatera>.

¹⁶ Oegroseno, *supra* note 5.

¹⁷ Chuanliang Wang, *On the Legal Status of Marine Genetic Resources in Areas Beyond National Jurisdiction*, 13(14) SUSTAINABILITY 1-13 (2021).

species, which forms the basis of coastal state concern for shelf biodiversity, was originally intended for a purpose that differed significantly from the preservation of biodiversity. Applying legal frameworks to genetic resources within the setting of oceanic non-sedentary organisms above the shelf presents significant challenges.¹⁸ Gulardi Nur Bintoro and Haryo Budi Nugroho examined the debated status of MGRs, as to whether they were related to the freedom of the seas or CHM. They also noted that, though an overlapping jurisdiction exists vis-à-vis Indonesia's ECS and the superjacent waters, no solution has been offered for managing these areas.¹⁹

This research aims to examine the relationship between the BBNJ and the ECS from an Indonesian perspective. The authors will address the management of overlapping areas in the water column superjacent of the ECS. This specific concern must be addressed, because it raises a fundamental question about the legal status of biodiversity and genetic resources in the areas governed by two distinct administrations. We argue that addressing an overlapping area in the water column superjacent of the ECS can be managed through a *sui generis* status that gives states the authority to exercise sovereign right. In addition, an ECS is important for a state to preserve the resources for future generations. This article consists of five parts, including Introduction and Conclusion. Part two examines the BBNJ and the emergence of the High Seas Treaty. Part three discusses the problem of interconnection between the BBNJ and the ECS, and proposes solutions for the same. Part four discusses Indonesian laws and policies related to the High Seas Treaty.

2. The BBNJ Issue and Evolution of the High Seas Treaty of 2023

In recent years, BBNJ has increasingly attracted the attention of the international community. Its potential economic value has created a need to establish new regimes of international law. The question of whether BBNJ is to be included under freedom of the seas or CHM has been answered. BBNJ falls under CHM.²⁰ Also, BBNJ in the ABNJ is related to that in the ECS. According to the UNCLOS, the coastal states

¹⁸ Mossop, *supra* note 9.

¹⁹ Gulardi Nurbintoro & Haryo Nugroho, *Biodiversity Beyond National Jurisdiction: Current Debate and Indonesia's Interest*, 6(3) *INDON. L. REV.* 283 (2016).

²⁰ Nguyen Thanh Trung, *The BBNJ Agreement: Links between the New and Existing Laws on Protecting Marine Biodiversity*, Center for International Law (Apr. 17, 2023), <https://cil.nus.edu.sg/blogs/the-bbnj-agreement-links-between-the-new-and-existing-laws-on-protecting-marine-biodiversity>.

enjoy sovereign rights over biological resources in EEZ²¹ and continental shelf.²² In exercising these sovereign rights, States have obligation to protect and preserve the marine environment, provided by Article 192 and more generally Part XII of the UNCLOS, which is dedicated to the protection and preservation of the marine environment in the whole ocean.²³

The primary objective of the BBNJ negotiations is to promote the preservation and responsible utilisation of marine biological diversity. BBNJ deals with two international conventions: the UNCLOS and the Convention on Biological Diversity (CBD). Another fundamental term related to BBNJ is “marine biological diversity” which is not defined in the UNCLOS, but is defined in the CBD. According to the CBD, biological diversity is defined as “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”²⁴

Based on CBD’s definition of biological diversity, it may be concluded that the BBNJ falls under the specific regime of “the Area” and the regime of “the High Seas” of the UNCLOS. BBNJ is closely related to the CHM regime, since Article 136 of the UNCLOS states that “the Area and its resources are the Common Heritage of the Mankind.”²⁵ While the CBD does refer to “areas beyond the limits of national jurisdiction,” it does not provide any additional clarification or details regarding this concept. In order to establish a solid foundation, it is necessary to make references to the appropriate sections of the UNCLOS. These provisions delineate the various maritime zones that exist within the ocean, thereby regulating the authority of states.

The coastal state has the sovereign right to the Exclusive Economic Zone (EEZ) and the continental shelf up to 200 nm under international law.²⁶ In addition, it has the inherent right to a continental shelf extending up to 350 nm, so long as it can provide scientific evidence that the seabed beyond the 200-nautical-mile limit is a natural extension.²⁷ It should be noted that the sovereign rights of the coastal state in

²¹ UNCLOS art. 56(1).

²² *Id.* art. 77.

²³ Pascale Ricard, *Sovereignty and Challenges of the Future International Legally Binding Instrument on Marine Biodiversity Beyond National Jurisdiction: How to Reconcile the Individual Interest of States at Sea and the ‘Common Interest of Mankind’?* 209-15 (ESIL 2019 Athens Conference Proc., 2019).

²⁴ CBD art. 2.

²⁵ Dirhamsyah, *Biodiversity beyond National Jurisdiction (BBNJ): Indonesian Perspective as an Archipelagic State*, 789 IOP CONF. SER. EARTH ENVTL. SCI. 3 (2021).

²⁶ UNCLOS arts. 56 & 76 (1).

²⁷ UN Oceans & Law of the Sea, Scientific and Technical Guidelines, https://www.un.org/depts/los/clcs_new/commission_guidelines.htm.

its EEZ and continental shelf are primarily limited to its natural resources, whereas other states have the right to freedom of navigation.²⁸ It may be thus concluded that an area beyond national jurisdiction refers to a territory over which no single state has total sovereignty or sovereign rights, with regard to both the waters and the subsoil.

Claims to maritime jurisdiction are frequently assessed in terms of resource access. Article 77(1) of the UNCLOS stipulates that coastal states have sovereign rights over the continental shelf, including areas of the outer continental shelf, “for the purpose of exploring and exploiting its natural resources.” Are outer continental shelf resource claims likely to be profitable then? This query is extremely difficult to answer because very little is known about the resources of the continental margin beyond the EEZ.²⁹

On June 19, 2023, the UN adopted the Biodiversity Beyond National Jurisdiction Agreement (BBNJ Agreement or High Seas Treaty) to address marine biodiversity in the high seas. This BBNJ Agreement promotes accessibility to MGRs collected as part of the ABNJ.³⁰ MGRs have been defined as “any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value.”³¹ The High Seas Treaty has 75 provisions aimed at preserving the intrinsic value of marine biological variety, safeguarding the integrity of ocean ecosystems, and ensuring the responsible use of the marine environment.

There are four important components within the BBNJ agreement. The first component (Articles 5(c)) is the sustainable use of MGRs as well as the fair and equitable distribution of benefits arising from such use. The second (Articles 14-21) is Area-Based Management Tools (ABMT). The third (Articles 24-41) is Environmental Impacts Assessment (EIA). The fourth (Articles 42-47) is Capacity Building and Transfer of Marine Technology (CBTMT).²² Another important aspect of the BBNJ Agreement is that the BBNJ has been accorded the CHM status. This principle emphasises that the conservation and utilisation of biodiversity, including MGRs, constitute the preservation of a common heritage for the benefit of humanity. However, this new Agreement still leaves regulatory gaps related to the high seas areas located above the ECS. There is no specific regulation vis-a-vis the status of sedentary species in the BBNJ, under the CHM and sovereign rights regime.

²⁸ UNCLOS arts. 56 (1) & 77 (1).

²⁹ Clive Schofield & I Arsana, *Beyond the Limits?: Outer Continental Shelf Opportunities and Challenges in East and Southeast Asia*, 31(1) CONTEMP. SE. ASIA 28 (2009).

³⁰ The Biodiversity Beyond National Jurisdiction Agreement (High Seas Treaty), <https://sgp.fas.org/crs/misc/IF12283.pdf>.

³¹ BBNJ Agreement art. I(11).

3. The Problem of Interconnection between BBNJ and ECS: The Need for Sui Generis Status

These natural resources basically consist of the mineral and other non-living resources in the seabed and subsoil. However, as an exception, sedentary species are also included as part of natural resources on the continental shelf. Sedentary species are defined as animals that, at the harvestable stage, are either immobile on or beneath the seabed or are unable to move other than in persistent physical contact with the seabed or the subsoil.³² With regard to sedentary species, the UNCLOS has also addressed the distinction between the regimes of the continental shelf and its adjacent waters. In accordance with the provisions of Part VI of the UNCLOS, a coastal state has sovereign rights over these sedentary species that fall under the continental shelf regime.

According to Article 76(6) of the UNCLOS, a coastal state is entitled to a continental shelf not exceeding 200 nm, or not exceeding 350 nm, if it is proved to be a natural prolongation from the mainland of the coastal state. The coastal state is required to delineate the outer limits of this ECS and submit it to the CLCS through the UN Secretary-General. ECS claims have become increasingly important to coastal states due to emerging technology and a changing climate that has opened up fresh possibilities for resource extraction.³³ Currently, there are 93 ECS submissions to the CLCS. Following the ECS submission, the Commission will then move forward with a recommendation to determine the shelf's outer limit. The delineation of the outer limits based on this recommendation is then considered final and binding.³⁴

Meanwhile, genetic resources might be discovered at any stage of an organism's life cycle. In this regard, if Indonesia's continental shelf extends beyond 200 nm, it will be difficult to determine whether the MGRs belong to the seafloor or the high seas. This area has been specifically excluded from the EEZ regime. It suggests that sedentary species do not belong to any regime regulating the ocean's water column. However, one might ask whether such provisions could be attributed to organisms residing in the deep seabed. In addition, MGRs might be discovered at any stage of an organism's life cycle.

In addition, genetic resources could be discovered at any time during an

³² UNCLOS art. 77(4).

³³ Alex Marsh, *More to Maritime Boundaries: The Extended Continental Shelf, Sovereign Limits* (Feb. 4, 2022), <https://sovereignlimits.com/blog/more-to-maritime-boundaries-the-extended-continental-shelf>.

³⁴ UNCLOS art. 76(8).

organism's life cycle. It would be challenging to determine where to draw the line between MGRs from the seabed or the land in this case, because Indonesia has a continental shelf that extends beyond 200 nm. Under these conditions, there will be an overlap between Indonesia's designated continental shelf extending beyond 200 nm and the high-seas-governed waters adjacent to it.³⁵ The UNCLOS provides that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters which, in the case of a continental shelf extending beyond 200 nm, are the high seas.

It should be noted that the concept of sedentary species, as described in Part VI of the UNCLOS, might be incompatible with the emphasis on the preservation of biodiversity in Part XII of the UNCLOS, in the CBD and in the High Seas Treaty. The primary issue is that the concept of biodiversity is radically distinct from the right of resource allocation under the UNCLOS.³⁶ Article 2 of the CBD defines biodiversity as "the variability among living organisms from all sources, including terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species, diversity between species, and diversity of eco-systems." Consequently, the concept of biodiversity is primarily associated with ecosystems, as opposed to individual species. The transition from a single species model of environmental management has strengthened the biodiversity concept because it reflects the interdependence of organisms and ecosystems.

A distinction between the continental shelf regime and its superjacent waters has also been addressed by the UNCLOS, with regard to sedentary species. The UNCLOS has defined sedentary species as organisms which, at the harvestable stage, are either immobile on or under the sea-bed or are unable to move except in constant physical contact with the seabed or the subsoil.³⁷ A coastal state has sovereign rights over the sedentary species, which fall under the continental shelf regime, pursuant to the provisions of Part VI of the UNCLOS. These species have been explicitly excluded from the EEZ regime. This implies that sedentary species do not belong to any regime governing the water column of the oceans. In order to address the overlap of the legal status of the MGR in waters superjacent to the ECS, the High Seas Treaty can stipulate that the superjacent water column is *sui generis*.³⁸

According to the UNCLOS, a *sui generis* regime has been applied for the EEZ. The EEZ combines the features of high seas and territorial waters, but cannot be assimilated

³⁵ Nurbintoro & Nugroho, *supra* note 19.

³⁶ UNCLOS art. 194(5).

³⁷ *Id.* art. 77 (4).

³⁸ Oegroseno, *supra* note 5.

with these. The EEZ is actually a unique region with unique rules. In contrast to the territorial waters, it is not a region where coastal states should automatically and fully exercise their sovereignty; unlike the high seas, it is not a place where foreign states should be granted unrestrained freedoms.³⁹ The coastal states have not only sovereign rights over economic resources in this multipurpose region, but also the legal authority to exercise those rights in connection with other matters, such as environmental protection. In addition, the UNCLOS provides, when a coastal state has established its ECS and the continental shelf physically extends beyond the outer boundary of the EEZ, the coastal state is allowed to extend its inherent sovereign rights to explore and exploit the natural resources on or under the ocean floor, beyond the 200 nm EEZ limit.⁴⁰ Nevertheless, in the event that the coastal state engages in the utilisation of the non-living resources of its ECS, it is obliged to provide financial compensation to the International Seabed Authority (ISA). Subsequently, the ISA will allocate these payments fairly among the parties to the UNCLOS.⁴¹ If the waters above the ECS are given *sui generis* status, coastal states with an ECS will have sovereign rights over their natural resources, so that there is no overlap. The state will have an obligation to protect and prevent pollution in the area.

4. Indonesia's Problems and Challenges in managing BBNJ

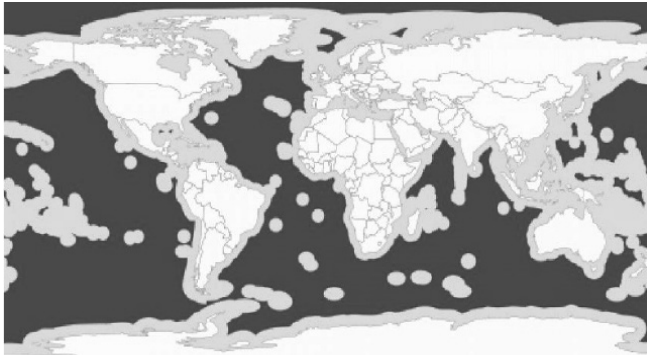
Indonesia is an archipelagic state bordered by the Indian Ocean to the west, the Pacific Ocean and the South China Sea to the north. The EEZ and the Indonesian Continental Shelf directly border the high seas and the international seabed, which form the geographical scope of the ABNJ.

³⁹ Adascalitei Oana, *Exclusive Economic Zone – The Concept of Suis Generis Area and Its Implications for the Legal Order of the Seas* *Constanta Maritime University Annals*, 20(2) CONSTANTIA MAR. UNIV. ANN. 187 (2014).

⁴⁰ UNCLOS arts. 1(2) & 82; *See also* Ocean Foundation, TOF White Paper - Section re Extended Continental Shelf, <https://oceanfdn.org/wp-content/uploads/2019/08/EXTENDED-CONTINENTAL-SHELF.pdf>.

⁴¹ *Id.*

Figure 4: The dark blue areas of the map represent areas beyond national jurisdiction⁴²



The management of the BBNJ will directly influence the biodiversity and marine environment of Indonesia.⁴³ The management of MGRs in the high seas is a complex and challenging issue that involves international law, environmental conservation, and equitable sharing of benefits. Indonesia, as a country with vast maritime territory, plays a significant role in these discussions, due to its rich biodiversity and potential for marine bioprospecting. Similarly, the BBNJ issue in Indonesia will raise the same concerns. The ocean communities found on the edges of Indonesia's jurisdiction will most likely continue to exist in the ABNJ. The management regime for this type of biodiversity will require a special arrangement, as there is a possibility that certain organisms will live partially within and beyond Indonesia's jurisdiction.

Indonesia fully supports the adoption of the BBNJ Agreement, which will accelerate marine environmental conservation and restoration for the future of humanity.⁴⁴ As a party to the UNCLOS, Indonesia has full sovereignty over its waters, as well as to the seabed and its subsoil, the air space superjacent to the waters, and all of the resources within those waters. Such sovereignty is to be used in a positive and sustainable manner for the welfare of the Indonesian people and in accordance with Indonesia's

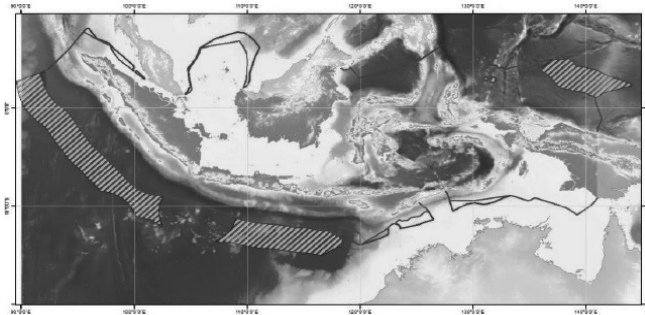
⁴² IUCN, Governing Areas Beyond National Jurisdiction, <https://www.iucn.org/resources/issues-brief/governing-areas-beyond-national-jurisdiction>.

⁴³ David Ardyantara, *The Harmonization of Maritime Law (UU No. 32 of 2014) for Indonesia's Sovereignty in Marine Resource Management Facing UN Policy about Area beyond National Jurisdiction*, 363 *ADVANCES SOC. SCI. EDUC. & HUM. RES.* 209 (2009).

⁴⁴ Indonesian Ministry of Foreign Affairs, Through BBNJ Agreement, Indonesia Pushes to Accelerate Global Ocean Protection and Utilisation, <https://kemlu.go.id/portal/en/read/4872/view/through-bbnj-agreement-indonesia-pushes-to-accelerate-global-ocean-protection-and-utilisation>.

national interests.⁴⁵ Indonesia's geographical conditions give it the potential to apply for ECS in the following areas: the north-west of Sumatra, the north of Papua, the south-west of Sumatra Island, and in the south of Java, Bali, and Nusa Tenggara. A map of Indonesia indicating the area potency for ECS submission is shown below.

Figure 5: The area potency for Indonesia's ECS⁴⁶



Currently, Indonesia has made four ECS submissions to the CLCS. In the first instance, the Government of Indonesia made a partial submission vis-a-vis the continental shelf beyond 200 nm to the CLCS on June 16, 2008.⁴⁷ Next, the recommendations submitted on August 17, 2010 stated that Indonesia's submissions regarding the continental shelf beyond 200 nm in the northwestern region of Sumatra should officially become the Indonesian continental shelf, covering an area of 4209 square meters, wider than the previously proposed area of \pm 3500 square meters. The submission was adopted at the 27th session of the CLCS on March 28, 2011.⁴⁸

Second, in March 2019, Indonesia made a partial submission regarding the ECS in the North of Papua. If the negotiations go smoothly, the territorial waters of Indonesia will increase to an area of 195,568.5 square meters or equivalent to the size of the United Kingdom. Meanwhile, in the North of Papua, the continental shelf survey shows that the thickness of the sediment in the area around the foot of the slope is approximately 2000 meters and, based on seismic measurements, the sediment

⁴⁵ Coordinating Ministry for Maritime Affairs Republic of Indonesia, Indonesian Ocean Policy, https://maritim.go.id/konten/unggahahan/2017/07/offset_lengkap_KKI_eng-vers.pdf.

⁴⁶ *Supra* note 11.

⁴⁷ CLCS, Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Republic of Indonesia, https://www.un.org/depts/los/clcs_new/submissions_files/submission_idn.htm.

⁴⁸ *Id.*

thickness ranges from 500–700 meters. In some places, there are basins not too wide, with a sediment thickness of around 1500 meters.⁴⁹

Third, the Indonesian government has officially submitted to the CLCS its claim for an ECS southwest of the Sumatra island on December 28, 2020.⁵⁰ Specifically, the Indonesian submission covers an area of 211,397.7 square meters in Farcture Zone Investigator and Wharton Fossil Region.⁵¹ The submission to the CLCS proved that, despite the pandemic conditions during 2020, the national team continued to work optimally and successfully completed a desktop study, bathymetry survey, and complete preparation of all documents for the submission vis-a-vis the southwest segment of Sumatra.⁵²

Fourth, the Indonesian government has submitted a document claiming expansion of the continental shelf in the southern area of Java Island to Nusa Tenggara on August 11, 2022. The presentation of proof in the submission for the extension of the Indonesian continental shelf is based on the expertise of Indonesian human resources in processing marine data.⁵³ According to the submission's claim, Indonesia has the potential to expand its continental shelf area of 245,711 square meters.⁵⁴ Furthermore, this submission is the largest of the four submissions that have been made by the Government of Indonesia.

Given the above situation, there will be an overlap between Indonesia's defined continental shelf and the superjacent waters governed by the high seas regime. In such a context of the UNCLOS, the coastal state's rights over the continental shelf have no bearing upon the legal status of the superjacent waters on the high seas in the case of the continental shelf extending beyond 200 nm. The question about who has the right to exploit the biodiversity existing in the high seas but above Indonesia's continental shelf beyond 200 nm is likely to spark a discussion.

⁴⁹ See *Indonesia Submits Claim of Extended Continental Shelf which is the Same Area as England in Northern Papua* [Indonesia Ajukan Klaim Landas Kontinen Ekstensi Seluas Negara Inggris di Utara Papua], *JURNAL MARITIM* (Apr. 30, 2019), <https://jurnalmaritim.com/ri-ajukan-klaim-ekstensi-landas-kontinen-seluas-negara-inggris-di-utara-papua>.

⁵⁰ Ismira Tisnadibrata, *Indonesia Seeks Expansion of Rights over Continental Shelf Rich in Mineral Resources*, *ARAB NEWS* (June 11, 2020), <https://www.arabnews.com/node/1687906/world>.

⁵¹ NODC, *The Indonesian Government Claims a Continental Shelf as Wide as Two Times the Island of Java in Southwest Sumatra*, <https://nodc.id/berita/17/pemerintah-indonesia-klaim-landas-kontinen-seluas-dua-kali-pulau-jawa-di-barat-daya-sumatera?PageSpeed=noscript>.

⁵² *Supra* note 51.

⁵³ Coordinating Ministry for Maritime Affairs Republic of Indonesia, *Affirm Sovereign Rights, Indonesian Government Claims Continental Shelf of 245,000km² in South Java-Nusa Tenggara to the UN* [Teguhkan Hak Berdaulat, Pemri Klaim Landas Kontinen 245.000km² di Selatan Jawa-Nusa Tenggara ke PBB], <https://maritim.go.id/detail/teguhkan-hak-berdaulat-pemri-klaim-landas-kontinen-245000km-di-selatan-jawa-nusa-tenggara-ke-pbb>.

⁵⁴ *Continental Shelf Submission of the Republik of Indonesia*, https://www.un.org/depts/los/clcs_new/submissions_files/idn3_93/es.pdf.

Management of marine natural resources on the continental shelf and the ECS is in line with Indonesia's vision as a global maritime fulcrum, which has been described in the Presidential Regulation Number 16 of 2017 concerning Indonesian Ocean Policy (IOP).⁵⁵ Management of marine resources in the ECS is being carried out in an effort to exercise sovereign rights and protect Indonesia's natural wealth. One of the strategies in the IOP is to accelerate the expansion of the continental shelf under international law. Indonesia's efforts should be thus supported by the UNCLOS.⁵⁶

All efforts towards submitting the ECS claim contain at least two important and basic meanings. First, the expansion of the seabed area that has been and will be carried out by Indonesia is a strategic and visionary step. Indonesia is able to take advantage of the leniency of conditions provided by the UNCLOS, one of which is making a preliminary submission before completing all the required data. Second, Indonesia desires to show its dominance in the maritime world, by actively seeking to map the potential and depths of its waters as an integral part of the long-term national development projection in the maritime sector.⁵⁷

The legal basis for submission of the Indonesian ECS claim has been strengthened by Article 3 of Law No. 16 of 2023 in conjunction with Article 6 of Law No. 16 of 2023 concerning the continental shelf. This provision confirms that the Indonesia can determine the boundaries of the continental shelf beyond 200 nm and has the sovereign right to explore and/or exploit its natural resources.

Article 3 of the High Seas Treaty accepts the CHM principle which highlights the conservation and use of biodiversity, including MGR, as a common heritage for the benefit of humanity. This acceptance is a victory for developing countries, as this UNCLOS principle was initially known only for the use of the deep seafloor. With the adoption of this principle, the utilisation of biodiversity expands, which is advantageous for Indonesia and other developing countries. The legal basis for the utilisation of the continental shelf is Article 33, paragraph (3) of the Constitution of Indonesia 1945, which states: "the earth and water and the natural resources contained therein controlled by the state and utilised for the greatest prosperity of the people."⁵⁸ In addition, during the reign of President Joko Widodo, beginning in

⁵⁵ Ade Suherman et al., *Indonesian Ocean Policy: Paradigm Shift in Strengthening Ocean Governance*, 13(2) J. E. ASIA & INT'L L. 359 (2020).

⁵⁶ Dian Septiari, *Indonesia Seeks Border Extension in Bid to Bolster Mineral Reserves*, JAKARTA POST (Mar. 2, 2020).

⁵⁷ Hasan Sadeli, *Territorial Expansion Through the Continental Shelf Bill* [Perluasan Wilayah Melalui RUU Landas Kontinen], KOMPAS (July 2, 2021), <https://nasional.kompas.com/read/2021/10/02/22083641/hasrat-perluasan-wilayah-melalui-ruu-landas-kontinen>.

⁵⁸ F. Arsil & Q. Ayuni, *Understanding Natural Resources Clause in Indonesia Constitution*, 940 IOP CONF. SERIES: EARTH & ENVTL. SCI. 1 (2021).

2014, the idea of the Global Maritime Fulcrum (GMF) emerged. The idea of the GMF also constitutes an approach to maritime strategy, based on the fact that Indonesia is geographically referred to as a country on the cross-borders: occupying a position between two continents and two oceans. This idea is stated in the IOP.⁵⁹

The Indonesian government's programme to expand the continental shelf has been listed as one of the programmes in the First Plan of Action for the period of 2016–2019 and in the second Plan of Action for the period of 2021–2025. Presidential Regulation No. 34 of 2022 serves as a legal basis for the second National Action Plan of 2021–2025.⁶⁰ The strategy on “Accelerated Submission Determination of the Extended Continental Shelf in accordance with International Law” is included in the Maritime Boundary, Sea Space, and Maritime Diplomacy Programmes. Considering the emergence of Indonesia's national policy and the government's efforts to extend the continental shelf beyond 200 nm, Law No. 1 of 1973 has been replaced with Law No. 16 of 2023.

In an era of competing maritime interests, Indonesia has been setting aside resources to consolidate its territorial integrity in accordance with President Joko Widodo's vision of the GMF. The GMF represents Indonesia's vision of becoming sovereign, advanced, and independent maritime nation able to contribute to peace and security in the region as well as in the world, in accordance with its national interests.⁶¹ Indonesia is committed to preserving natural resources for the future.

The submission process for the expansion of the Indonesian continental shelf served as one way of proving the quality and capability of Indonesia's human resources. For every stage, Indonesia did not receive any assistance from foreign experts or equipment. The preparation of submission documents requires a variety of deep-sea floor data and complex interpretation from technical as well as legal sides. Most developing countries and even developed countries are assisted by from international experts or experts provided by the UN Commission on Continental Shelf Boundaries when they make submissions. However, Indonesia was able to do everything independently, using personnel from various scientific backgrounds and nationally-owned equipment. This submission is proof that Indonesia is ready to realise its aspirations to be a GMF.⁶²

Expanding the continental shelf is important for each state firstly because of the

⁵⁹ Shafiah Muhibat, *Indonesia's New Ocean Policy: Analysing the External Dimension*, 13(2) MAR. AFF. 50-61 (2017).

⁶⁰ Government Issued Presidential Decree on Indonesian Maritime Policy Action Plan 2021-2025 [Pemerintah Terbitkan Perpres Rencana Aksi Kebijakan Kelautan Indonesia 2021-2025], <https://setkab.go.id/pemerintah-terbitkan-perpres-rencana-aksi-kebijakan-kelautan-indonesia-2021-2025>.

⁶¹ Suherman et al., *supra* note 55, at 361.

⁶² Coordinating Ministry for Maritime Affairs Republic of Indonesia, *supra* note 45.

economic potential of the continental shelf. Ever since the US's Truman Proclamation in 1945, countries have been aware of the economic potential of the oil and gas exploration in the continental shelf. If natural resources in the strategic continental shelf can be explored or exploited, Indonesia will at least gain more revenue for economic recovery. Indonesia's ECS area might offer a potential for long-term exploitation, if Indonesia can prove that there is a natural prolongation of the continental shelf.

Secondly, as the Indo-Pacific region gains global significance, it is strategically important for Indonesia to have a stronger presence in the region. This will make Indonesia not only an object of the geopolitical competition to utilise resources in the region, but also a player in exploiting the economic potential of the region. Further, President Joko Widodo's GMF agenda is still relevant.⁶³ Indonesia borders ABNJ in four regions of the Indian Ocean: to the west of Sumatra Island, to the south of Java Island, to the south of NTB and NTT, and in the Pacific Ocean to the north of Papua. Indonesia has also ensured that its position as an archipelagic state bordering the high seas should not be excluded from consultation processes on the activities in the high seas. Indonesia is highly responsible and consultative in the activities on the high seas with an affirmative policy representing island and archipelagic countries under the BBNJ Agreement, including the Scientific and Technical Body. As a party to the UNCLOS, it is in Indonesia's interest to have a clear regulation concerning the BBNJ. Indonesia can urge for the *sui generis* concept with countries that have overlapping areas above the ECS in international forums, such as the concept of archipelagic State

5. Conclusion and Way Forward

The legal status of the BBNJ has been regulated by the High Seas Treaty 2023 as CHM. However, a question may arise on the practice of expanding the continental shelf. States have sovereign rights in the ECS, including over sedentary species, but the High Seas Treaty stipulates that sedentary species are to be included as CHM. To address this question, a *sui generis* status in the waters superjacent to the ECS can be considered. If this area gets *sui generis* status, the coastal state will have sovereign rights over it, as in the EEZ. Considering the numerous advantages of the High Seas Treaty, Indonesia should promptly consider initiating coordination and exploration

⁶³ Aristyo Darmawan & Arie Afriansyah, *Indonesia Submit Extended Continental Shelf Proposal Amidst Pandemic: Why Now is Important?*, MOD. DIPLOMACY (Jan. 9, 2021), <https://moderndiplomacy.eu/2021/01/09/indonesia-submit-extended-continental-shelf-proposal-amidst-pandemic-why-now-is-important>.

processes for its ratification. Also, if the High Seas Treaty is to be implemented as a national law, a study must be conducted on national legislation that is compatible with the Treaty or requires an adjustment procedure.

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