



INDONESIA
OCEAN JUSTICE
INITIATIVE

INDONESIA AND DEEP SEABED MINING



“At the 7th meeting of the plenary, the Assembly elected by acclamation Mr. Hasjim Djalal (Indonesia) as President of its first session and also adopted its agenda.”

I. Introduction

The quotation above is taken from a meeting record that captures the initial work of the International Seabed Authority (ISA) in 1995.¹ Mr. Hasjim Djalal, a prominent legal scholar from Indonesia was elected as the first President of the ISA. It was a proud moment for the country after the lengthy deliberation of UNCLOS where Indonesia² together with Fiji and the Philippines strived for the incorporation of “archipelagic state” to the convention which was finally concluded on 1982.

From 1995 forward, Indonesia has been gradually disappearing from the leadership seat of international organizations and the development of international law, including but not limited to the deep seabed mining in the Area. Mr. Damos argued that this phenomenon was due to major political reform back in 1998 that dealt with domestic issues rather than international issues.³ Mr. Damos further argued that the “ignorant attitude” of the country, that is unfortunately apparent until present time, is founded upon a notion that international law is a thing that is “hardly present in the daily lives of the general public,” and the “teaching of international law is still basic and far from the levels attained in developed countries.”⁴

Indonesia’s appearance before the international community must change from the past where the purpose was to rebuild reputation after 1998 multidimensional crisis.⁵ Merely being compliant to the ratified international treaties is not enough. With the current state of development and challenges it faces, Indonesia must push itself to be a participant that is worth to be heard in the development of international law. This is surely a challenging task and according to Mr. Pandjaitan⁶, Mr. Trenggono⁷ and Mr. Nurbintoro⁸ regeneration of international legal scholar in Indonesia shall be the first step to move forward.

¹ International Seabed Authority Assembly Meeting. ISBA/A/L.1/Rev.1. 22 March 1995. <https://isa.org.jm/files/files/documents/isba-a-l1-rev1.pdf>

² Mr. Hasjim Djalal was part of the Indonesian delegation to the Third UN Law of the Sea Conference (1973 - 1982) led by Mr. Mochtar Kusumaatmadja.

³ Damos Dumoli Agusman. The Dynamic Development on Indonesia’s Attitude Toward International Law. *Jurnal Hukum Internasional* Volume 13 Number 1. October 2015.

⁴ *Ibid.*

⁵ *Id.* at 21.

⁶ Mr. Luhut Binsar Pandjaitan is the Coordinating Ministry for Maritime Affairs and Investment. <https://www.timesindonesia.co.id/read/news/160514/menko-kemaritiman-ahli-hukum-laut-sangat-dibutuhkan>

⁷ Mr. Sakti Wahyu Trenggono is the Minister of Marine Affairs and Fisheries. <https://www.unpad.ac.id/2021/07/regenerasi-ahli-hukum-laut-diperlukan/>

⁸ <https://kumparan.com/gulardi-nurbintoro/dicari-hakim-indonesia-di-mahkamah-internasional-1qin4Xpx7oI>

In terms of deep seabed mineral mining within and beyond national jurisdiction, until present time, Indonesia is absent. While many suggest that this is due to the lack of capacity, Karim and Yudha argued that such absence is due to a conscious decision made by government elites to avoid excessive political cost, drop in public support and decreasing trust towards the figure of Mr. Joko Widodo.⁹ According to Karim and Yudha, Indonesian government is consciously avoiding the execution of deep seabed mining project because a single project requires at least IDR 175 Trillion (equal to USD 12.1 billion).¹⁰ With the increase of government's debt, pursuing deep seabed mining project will hurt Joko Widodo's political reputation.¹¹ From Karim and Yudha's perspective, financial constraints outweigh the administration's written political desire to work on deep seabed mining as reflected in President's "Global Maritime Fulcrum" jargon, the Law Number 32 Year 2014 on Ocean Affairs, the Presidential Regulation Number 16 Year 2017 on National Ocean Policy and the Presidential Regulation Number 34 Year 2022 on National Ocean Policy Plan of Action 2021 - 2025.



II. Regulatory Landscape of Deep Seabed Mining

A line of distinction must be drawn between deep seabed mining within national jurisdiction and beyond national jurisdiction. UNCLOS stipulates that, within its national jurisdiction: continental shelf, the coastal State has the sovereign rights¹² to explore and exploit the living and non-living natural resources on the seabed and subsoil. The non-living resources in this context includes min-

⁹ Moch Faisal Karim and Willy Dwira Yudha. *Poliheuristic Theory and Indonesia's Absence in Deep Seabed Mining (DSM)*. *Journal of Current Southeast Asian Affairs*. Vol. 40(3), 2021. p 463. <https://journals.sagepub.com/doi/pdf/10.1177/18681034211036711>

¹⁰ *Id.* at 472.

¹¹ *Ibid.*

¹² Article 77 paragraph 2 of UNCLOS: Sovereign right means no one is allowed, without an express consent from the coastal State, to explore and exploit such resources in case the coastal State does not explore or exploit it yet.

eral and living resources for the purpose of continental shelf is limited to organisms that fall under the category of sedentary species.¹³

On the other side of coastal States' continental shelf lies "the Area", a part of world's seabed that is free from sovereignty or sovereign rights claim. This area is a common heritage of mankind¹⁴ so that any activities within "the Area" shall be carried out for the benefit of mankind as a whole.¹⁵ In this regard, an authority named the International Seabed Authority, is responsible to ensure every single exploitation activity in the Area is followed by equitable sharing of financial and other economic benefits.¹⁶

Different from the continental shelf, the meaning of resources in the context of "the Area" is limited to solid, liquid or gaseous mineral.¹⁷ Living resources is not included.



III. Brief Note on the Prevailing Indonesian Laws Pertaining Deep Seabed Mining Within and Beyond National Jurisdiction

In Indonesia, presumably like in any other State, the UNCLOS serves as the legal foundation for deep seabed mining within and beyond national jurisdiction. The more detailed arrangement of this matter is governed under several Laws.

Mining of mineral and coal is subject to Law Number 4 Year 2009 that has been amended by Law Number 3 Year 2020 and Law Number 11 Year 2020 (these laws altogether will be referred as "Mineral and Coal Mining Law"), whereas mining of oil and natural gas is governed by Law Number 22

¹³ Article 77 paragraph 4 of UNCLOS.

¹⁴ Article 136 of UNCLOS.

¹⁵ Article 140 paragraph 1 of UNCLOS.

¹⁶ Article 140 paragraph 2 of UNCLOS.

¹⁷ Article 133 point (a) of UNCLOS.

Year 2001 that has been amended by Law Number 11 Year 2020 (these laws together will be referred as “Oil and Natural Gas Mining Law”). The scope of these Laws are limited to Indonesian continental shelf.

In addition, Indonesia has also enacted the Law Number 32 Year 2014 on Ocean Affairs which has been amended by Law Number 11 Year 2020, the Presidential Regulation Number 16 Year 2017 on National Ocean Policy and the Presidential Regulation Number 34 Year 2022 on National Ocean Policy Plan of Action 2021 - 2025. These laws speak about deep seabed mining within and beyond national jurisdiction in general.

All of the Laws mentioned above, particularly the one related to the deep seabed mining within national jurisdiction, will be supplemented by the new upcoming Law on Continental Shelf.¹⁸ On the other side, a specific and detailed Law/Regulation concerning deep seabed mining beyond national jurisdiction is still needed to guide the implementation of UNCLOS, Law on Ocean Affairs and the National Ocean Policy (including its plan of action).

Both Mineral and Coal Mining Law and Oil and Natural Gas Mining Law had opened the door for seabed mining activities since early 2000 by regulating three different levels of licensing authority for offshore mining.¹⁹ The most recent amendment, Law Number 11 Year 2020, transfers the licensing authority to the central government. At the moment, while there are 634 offshore oil and gas platform on the continental shelf of Indonesia (534 active, 100 non- active)²⁰, there is no offshore mineral or coal mining yet.

In line with both of the mining Laws, the Law Number 32 Year 2014 on Ocean Affairs and the Government Regulation Number 16 Year 2017 on National Ocean Policy had also opened the door for Indonesia to enter the seabed mining. These Laws on Ocean speak about mining in “the Area” aside from mining in the continental shelf of Indonesia.

Article 12 of the Law Number 32 Year 2014 grants the government an authority to enter into agreement with the international agency responsible for “the Area” (in this case the International Seabed Authority) according to the UNCLOS. In addition, the National Ocean Policy underlines the urgency of developing capacity to explore “the Area” for future interest.

¹⁸ Indonesian Law on Continental Shelf was enacted on 1973, before the final text of UNCLOS adopted in 1982. The parliament and the government agree to amend this Law (Law Number 1 Year 1973 on Continental Shelf) and the bill is currently in the drafting process.

¹⁹ Offshore mining within the span of 0 to 4 nautical miles from the low water line should obtain permit from the municipality government, whereas offshore mining within 4 to 12 nautical miles and beyond 12 nautical miles from the low water line should have permit from provincial government and central government respectively.

²⁰ <https://money.kompas.com/read/2021/03/23/140746126/skk-migas-sebut-ada-100-anjungan-migas-lepas-pantai- yang-sudah-tak-beroperasi>

The National Ocean Policy consists of three parts: the “main body” and two annexes. The “main body” governs shortly about the structure of the document and which Ministry responsible for reporting. The two most important parts of the Presidential Regulation Number 16 Year 2017 are the Annex I and Annex II. Annex I is the “meat” of this document. The narrative of “what, why, and how” of the National Ocean Policy is written here. Subsequently, Annex II speaks about the plan of action from 2016 - 2021. Under Annex II we can find the details of what Annex I has described in the form of table that contains list of activities with specific output, timeframe, responsible ministry and source of funding. With this structure, consequently, the substance of Annex II should not depart from what is written under the Annex I.

Point number 8 and 10 of Chapter III of Annex I of the National Ocean Policy says that “8. ...until present time, there has not been, yet, utilization of deep seabed mining mineral within Indonesia’s continental shelf. ... utilization of non-living resources from the deep seabed shall be a priority for the future development of the nation ... 10. ... another challenge for Indonesia is to explore “the Area” situated beyond national jurisdiction. Collective effort to improve the quality of human resources, funding and technology must be carried out to enable this nation in managing deep seabed resources from “the Area”.”

Unfortunately, even with such a strong statement, the Annex II (plan of action 2016 - 2021) speaks nothing about deep seabed mining within and beyond national jurisdiction. The activities listed under the context of energy and mineral from the ocean in the Annex II are mostly about increasing the production of oil and gas, tidal based power generation and coal transportation.²¹ The recently issued Presidential Regulation Number 34 Year 2022 concerning the National Ocean Policy Plan of Action 2021 - 2025²² is also silent about deep seabed mining. Only two activities with questionable relevance listed under the context of energy and mineral from the ocean: first, feasibility study on nuclear based electricity generation facility and research on mineral concentration in fisheries product using neutron activation analysis.²³

²¹ Annex II of the Presidential Regulation Number 16 Year 2017 point C.2., page 80-84.

²² The Presidential Regulation Number 34 Year 2022 governs only about the plan of action 2021 - 2025. It replaces the expired Annex II of the Presidential Regulation Number 16 Year 2017. The Annex I of the Presidential Regulation Number 16 Year 2017 remains in force.

²³ Annex of the Presidential Regulation Number 34 Year 2022, point 1.4., page 48-49

IV. Other Perspective



According to the 2020 - 2024 Strategic Plan of the Ministry of Energy and Mineral Resources²⁴ the highest priority on mineral sector is to increase the construction of smelter. Since there is no concern of mineral scarcity, there is no single section in the strategic plan that speaks about increasing the mineral production from the existing land-based facilities or exploring mineral resources on the continental shelf or “the Area”.

Nonetheless, in a webinar on deep seabed mining²⁵, the Head of Technology Research and Development Agency mentioned about the need to start the exploration of ocean-based mineral as the trend of electric vehicle is increasing globally. Massive production of electric vehicle will create an unprecedented demand of seabed minerals. If the government is slow in responding this economic opportunity, it predictably will miss the momentum to accrue monetary benefit from it. The second argument to support the idea of deep seabed mining raised by the speakers was the importance of finding mineral stock for future generation as the mineral deposits on the land above the water are gradually diminishing.

V. Recent Actions by the Government of Indonesia with regard to Deep Seabed Mining in the Area

Speakers in the deep seabed mining webinar mentioned above have one common understanding that Indonesia is left behind in terms of exploration of deep seabed minerals in “the Area”. Other countries, for instance UK, Belgium, Poland, China, Japan, Nauru, Tonga, etc, have been exploring mineral resources on the seabed in areas approved by the ISA since years ago.²⁶

²⁴ Minister of Energy and Mineral Resources Regulation Number 16 Year 2020 on Ministry of Energy and Mineral Resources Strategic Plan 2020 - 2024.

²⁵ https://www.youtube.com/watch?v=VIK9bs6_h8U; https://www.youtube.com/watch?v=Z_u-_JmSEIU; <https://www.youtube.com/watch?v=sVnwuJ3abjM>.

²⁶ Complete list of exploration contracts under the International Seabed Authority can be found in <https://www.isa.org.jm/exploration-contracts>

However, it should be firstly understood that participation in seabed mining in “the Area” is a complex issue and demands multidimensional commitments. It is not merely assigning people to a vessel and sail into the middle of the ocean. To be prepared for exploration of minerals in “the Area”, the government of Indonesia must work on at least three issues namely improvement of human resources and technology development, preparation of legal arrangements, and allocation of appropriate funding.

Two recent actions by the Indonesian government fit into the second box: legal arrangement. On October 26th of 2021, President Joko Widodo assigned Ambassador Arrmanatha Christiawan Nasir as the Head of Indonesian Permanent Mission to the United Nations and the International Seabed Authority. Prior to this assignment the office was not covering matters related to the International Seabed Authority. Ambassador Nasir is the first Indonesian permanent representative to the International Seabed Authority. The Ministry of Foreign Affairs in this regard stated that this assignment is a manifestation of Indonesia’s strong commitment to participate actively in the work of the International Seabed Authority particularly on the draft of “mining code” (Regulation on Exploitation).²⁷

Secondly, the Coordinating Ministry of Maritime Affairs and Investment has been pushing the development of a Presidential Regulation that will, expectedly, facilitate mineral exploration by Indonesia in “the Area”. At the moment, the exact title and content of the Presidential Regulation is unclear. A government official unwilling to be disclosed said that the draft will be published once the “cleaner” version is available. The draft, predictably, will not go far from the provisions of Part XI, XII, XIII, Annex III and IV of UNCLOS. Specific provisions on the role of Indonesia as a sponsoring State or as a part of sponsoring States are also supposed to be included in the draft.



²⁷ <https://kemlu.go.id/portal/id/read/3082/berita/indonesia-angkat-wakil-tetap-pertama-untuk-otoritas-dasar-laut-internasional>

That being said, there are still rooms for the government to work on especially related to the development of human resources and technology as well as allocation of appropriate funding.

In addition, at the ongoing 27th Session of the International Seabed Authority the Indonesian delegation headed by Ambassador Mohammad K. Koba reiterated the importance of the principle of common heritage of mankind, adequate protection of the marine environment, respect of the rights and legitimate interests of adjacent coastal State and the special requirements/circumstances of developing countries for the development of the ISA's mining code.²⁸ Bear in mind the clear potential impact of activities in the Area towards the environment and socio-economic aspects of coastal States whose jurisdiction are adjacent to the mining location, Ambassador Koba proposed a notification and consultation mechanism in the process of approving mining application (Part II of the Draft of Mining Code) and also in the emergency response and contingency plan (Regulation 53 on the Draft of Mining Code).²⁹

VI. Transparency and the “BRIN”



Exploration of minerals in “the Area” is not all about competition. As a country with jurisdictional waters adjacent to “the Area”, the interest of Indonesia encompasses also marine protection, transfer of technology, and matters related to damage and liability. In this regard, feasibility study prior to the exploration and due diligence during the exploration to minimize the risk of failure are extremely crucial and must be covered by the Presidential Regulation.

The Ministry of Energy and Mineral Resources carries a big responsibility to ensure that important matters, including the three mentioned above, are included in the draft so that the interest of Indo-

²⁸ Intervention by Indonesian Delegation, 21 March 2022. https://isa.org.jm/files/files/documents/Indonesia_Statement.pdf

²⁹ *Ibid.*

nesia and the interest of the humankind as a whole can be balanced. With no prior experience of regulating activity in “the Area” the Ministry will benefit the most from inputs by the experts.

The Constitutional Court, in its decision on judicial review of Law Number 11 Year 2020, expressed their views on how important “convenient access to the draft” is in law making process.³⁰ Such access is needed to allow the flow constructive inputs from the experts to the Ministry for the purpose of improving the quality of the law/regulation as well as its accountability. More importantly transparency is a mandate from the Statute Making Act³¹ that must be satisfied by the law maker. Failure to meet this requirement is a clear violation to the Statute Making Act.

Secondly, the government has just established a single national research body called BRIN (Badan Riset dan Inovasi Nasional/National Agency for Research and Innovation). This new research agency is a “melting pot” of research units administered by numerous Ministries beforehand. Government’s decision to fuse numerous research units is in line with the multidisciplinary nature of deep seabed mining. Under the BRIN, collaboration between scientists with different expertise is more likely to happen. Additionally, centralized research authority will also ease the utilization of marine research infrastructure and tools as they are now administered under a simplified bureaucracy.

The birth of BRIN offers a new hope to ocean-based research in Indonesia, including but not limited to deep seabed mining within and beyond national jurisdiction, that has been overlooked for years.

³⁰ Indonesian Constitutional Court Decision Number 91/PUU-XVIII/2020 page 412.

³⁰ Law Number 12 Tahun 2011 on Statute Making that has been amended by Law Number 15 Year 2019.

About



INDONESIA OCEAN JUSTICE INITIATIVE

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