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TO : DEPARTMENT OF STATE

INFO : SINGAPORE, SAIGON, BANGKOK, CANBERRA, MANILA, MEDAN, SURABAYA

Pol 33-4 Malaysia-Indon

Indonesia / Territorial Waters

FROM : Amembassy DJAKARTA DATE: April 11, 1969

SUBJECT : An Indonesian View of the Offshore Boundary Question

REF : Djakarta 2110

Attached is an Embassy translation of portions of a speech by Professor MOCHTAR Kusumaatmadja at the Faculty of Law of Padjadjaran Univeristy, Bandung, on March 1, 1969. Dr. Mochtar, who holds a Master of Laws degree from Yale University, is Indonesia's foremost international law authority. His speech is of particular interest because he is head of the Indonesian delegation which is conducting informal talks with Malaysia on the offshore-boundary question.

In this speech, Mochtar explains his views on the issues of territorial waters, offshore boundaries for exploitation of subsoil resources, and related matters. He accepts the principle of total sovereignty over territorial waters and the sea bed below them. He also adheres to the principle that a nation has a right to the resources of the continental shelf, though he holds that the water above the shelf, beyond the territorial seas, is a part of the high seas. Mochtar rejects the thesis held by some countries that nations have the right to resources of the sea bottom beyond the limits of the shelf (i.e., beyond a sea depth of 200 meters). He points out that Indonesia has chosen the "median-line" principle to determine national rights when more than one country shares a particular shelf. Thus Indonesia draws the offshore boundary at the halfway point between the outermost limits of the national territories of Indonesia and her neighbors. He recognizes, however, that other methods of resolving this question may be legitimate. He recommends that Indonesia and her neighbors should get together as soon as possible to negotiate agreed offshore boundaries.

LYE

Enclosures: As stated.

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Drafted by: ECON:TETaylor:jb 4/9/69
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EXCAVATION OF SEABED AND SUBSOIL NATURAL WEALTH AND INTERNATIONAL LAW

(excerpts from a speech by Mochtar Kusumaatmadja at the Faculty of Law of Padjadjaran University, March 1, 1969)

What is the legal foundation for granting exploration and exploitation permits for off-shore areas?

As far as they are within the limits of Indonesian waters as stipulated in Law No. 4, 1960, the permits are granted on the basis of the right of the state to all natural wealth in Indonesian soil, including its territorial waters and the seabed. Beyond the territorial limits, the right to the natural wealth of the seabed is based on the concept of the continental shelf.

This new concept in maritime law was formulated in a Proclamation of President Truman of the United States dated September 28, 1945, which stated among other things:

"Having concern for the urgency of conserving and prudently utilizing its natural resources, the government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control . . . The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected".

From the explanation issued together with the above Proclamation of the President of the United States, it can be concluded that the proclamation was prompted by the need for mineral reserves, and especially petroleum, for the sake of America's interest and in order to regulate exploitation in the best way possible. This action concerned an area of 760,000 square miles beneath the sea and was taken after it had been ascertained that the continental shelf bordering on the United States contained reserves of petroleum and other minerals and after off-shore drilling techniques had reached a stage which permitted exploitation of these natural resources. Control over the continental shelf does not affect the fact that the waters above it are a part of the high seas, and thus open to unimpeded navigation.

In subsequent years, the Truman proclamation concerning the continental shelf was followed by dozens of countries throughout the world, so that at the Maritime Law Conference held in Geneva in 1958, the continental shelf became a new institution of international law through the process of common law.*

*Dr. Mochtar refers to general acceptance of the proclamation, not "common law" in the Anglo-American legal sense.

Despite one or two extreme claims such as the decree of the Argentine President in 1946 which proclaimed Argentina's full sovereignty over the continental shelf and the waters above it, the principle that a country has exclusive rights to the natural resources of the continental shelf contiguous to its coasts has in general been accepted. Generally, the continental shelf is considered to be all land under waters up to a depth limit of 200 meters. For this reason, the countries participating in the Maritime Law Conference in Geneva in 1958 had little trouble in formulating legal provisions to regulate the rights of coastal countries to control the continental shelf. These principles were later cast in a Convention on the continental shelf.

Article 1 of the Convention stated:

"For the purpose of these articles, the term continental shelf is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands".

Though the origin is still obvious, yet the above quotation of article 1 clearly shows that the definition of the continental shelf as a legal concept is different from the continental shelf as a mere geologic concept.

First, it is stated that "For the purpose of these articles, the term continental shelf is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea . . ." Secondly, in addition to a depth limit of 200 meters, article 1 stipulates: ". . . or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas".

Thirdly, the provision in paragraph (b) which expands the concept of a continental shelf to cover ". . . the seabed and subsoil of similar submarine areas adjacent to the coasts of islands".

The limitation as stated by the words ". . . but outside the area of the territorial sea" is a logical limitation. The seabed and subsoil beneath the area of the territorial sea are already within the sovereignty of coastal countries since the territorial sea constitutes an integral part of these countries' territories. The enlargement of the concept of continental shelf to include the seabed and subsoil surrounding an island or archipelago which do not constitute a continental shelf in the genuine geological sense, is a very encouraging development.

On the other hand, the enlargement of the concept of a continental shelf with the additional provision that ". . . or beyond that limit (namely 200 meters), to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" has of late evoked many

new problems. I will talk about this when discussing the boundaries of submarine areas controlled by coastal countries.

It is clear that the geological concept of the continental shelf as first used in Truman's Proclamation in 1945 has been expanded into a legal concept, of the same name but of different contents, albeit the basis of a country's right to a submarine area adjacent to its coast remains the same, namely contiguity.

To discriminate between two concepts of different contents, we will in Indonesia use the term dataran kontinen for the concept of continental shelf in the geological sense of the word, and landas (base) kontinen for the resulting legal concept.

We will now discuss the character of the claim of a coastal State over the continental shelf.

Article 2 of the Geneva Convention of 1958 concerning the legal concept of the continental shelf states that (paragraph 1) "a coastal State has a sovereign right to undertake explorations on the continental shelf and to exploit its natural resources". This definition is a compromise between those desiring full recognition of the coastal State's sovereignty over the continental shelf, and those who only wish to recognize more limited rights.

That "sovereign rights to explore and exploit" are not tantamount to full sovereign rights of a coastal State will be obvious if we link article 2, paragraph (1) to article 3 which definitely stipulates that "The rights of a coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters". Thus the concept of "sovereignty to explore and exploit" does not go so far as the concept of sovereignty as practiced by several South American countries, including Argentina, which actually have made the continental shelf a part of the State's territory.

Except for the limitation contained in the aforesaid article 3, the rights of coastal states over the continental shelf are extensive and clearly exclusive in nature in the sense that if a coastal state refrains from exerting its rights on the basis of paragraph (1) of article 2 to explore the continental shelf and exploit the natural resources in it, no one can undertake these activities or claim the continental shelf without the express consent of the coastal state.

In connection with the discussion of the rights of a coastal state over natural resources of the seabed and subsoil of the continental shelf, it is interesting to note the provisions of article 2, paragraph 4 concerning natural resources, which reads as follows:

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

This provision is a compromise between those parties desiring to limit the concept of natural resources to mineral resources only, and those who wish to include bottomfish and crustacea in it. Included in "sedentary species of living organisms" are sea grass and other sea plants, sponges, coral, echinoderms and molluscs, while bottomfish are excluded. There is disagreement on whether all crustacean species are excluded from the above definition.

Concerning these/live natural resources, it could be added that even though article 2, paragraph 4 of the Geneva Convention of 1958 on the continental shelf recognized the exclusive rights of coastal States, they may not ignore the historic rights of other parties. The Royal Pronouncement of Saudi Arabia concerning the "Subsoil and seabed of Areas in the Persian Gulf contiguous to the coasts of the Kingdom of Saudi Arabia", dated May 29, 1949, emphatically said that ". . . the traditional freedom of pearling by the peoples of the Gulf, is in no way affected".

Let us now discuss the second problem: Where are the boundaries of sovereignty of the coastal State over the continental shelf?

The sovereignty of a State over the continental shelf adjacent to its coast is determined by the definition of the continental shelf itself as contained in article 1, and by the existence or non-existence of neighbor countries with coasts adjacent to the same continental shelf.

As is known, the difference between the concept of the continental shelf according to article 1 of the Convention and the then existing concept as adhered to in practice by the States, is the additional provision that ". . . or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the said areas" in addition to the depth limit of 200 meters which had been generally accepted.

The progress achieved in the technique of sea exploitation during the past 10 years and the interpretation of the aforesaid provision which only emphasizes "technical exploitability", evoked an interpretation which says that coastal states reserve the right to explore and exploit submarine areas to a depth which could possibly be achieved by submarine exploitation techniques. With the advance in deep ocean floor excavation

techniques, this means that the sovereignty of a state facing the ocean could cover the deep ocean floor thousands of miles off the coast.

This interpretation of the provision in Article 1 is unacceptable because it favors coastal states with a certain geographic location and especially countries with a high level of technological development. An interpretation which separates the criterion of technical exploitability from the principle of contiguity, which constitutes the basis of the rights of coastal states on submarine areas adjacent to the coast, deviates from the basic concept of the continental shelf.

Though the concept of the continental shelf in the 1958 Convention is said to differ from the original concept, so that in Indonesian we use the term of landas kontinen (continental substratum), the principle of contiguity with the continent (or an analogous continent) cannot be completely abandoned, if we still wish to give meaning to the concept of the continental shelf in maritime law. So, beyond a certain limit, the sovereignty of a coastal state must end and a beginning made for a deep ocean floor area which is detached from the principle of contiguity.

The time has come to reconsider the provision of technical exploitability and to replace it with another standard, namely a proper depth limit. We'll not discuss what standard or depth limit to adopt, since this is beyond the scope of this discussion. Various concepts and theories can, and have been put forward, but this matter should be settled by an international convention, which according to Article 13 of the Convention can be held at any time five years after the Convention went into effect.

In my opinion, there is no urgent reason for Indonesia to adopt the interpretation which is based on the extreme of technical exploitability. Both on the Sunda shelf and the Sahul shelf, the depth does not exceed 200 meters. In addition to that, there are other countries adjacent to the two continental shelves. Thus, such an interpretation will have no impact on the area of the Sunda shelf and the Sahul shelf which will come under Indonesia's control.

Article 6, paragraph 1 of the Convention which regulates the division of the continental substratum between two neighboring countries which are opposite each other, reads as follows:

> "1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundaries of the continental shelf appertaining to such States shall be determined by agreement between them.
>
> In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured."

The division of the continental substratum adjacent to the coasts of two adjacent states is regulated in paragraph 2 which reads as follows:

> "2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the territorial sea of each state is measured."

It is obvious from these provisions that, though the principles of the median line and equidistance constitute important principles in the division of the continental substratum between neighbor countries, they are not the only decisive way toward solution. This means that neighboring States may, on the basis of other considerations, determine by agreement a boundary in accordance with their need, situation and the problem they face.

*In practice, the median line principle is actually used in matters involving the boundary of the continental shelf, like for instance in the agreement of October 6, 1966, between Britain and the Netherlands on the boundary of the continental shelf of the North Sea between these two States. But there is also an agreement on the determination of the boundary of the continental shelf which deviates from the median line, like for instance the agreement between Italy and Yugoslavia (Adriatic Sea) dated January 8, 1966.

The matter of the boundary of the continental shelf between our country and neighboring countries of the Sunda shelf (Malaysia, Thailand, Cambodia and Viet-Nam) and the Sahul shelf (Australia) should be settled speedily, so that we may know which part of the shelf is Indonesia's. The settlement of the boundary of the continental shelf will not only eliminate a source of conflict between neighboring countries, but will also eliminate all uncertainties which might surround exploration and exploitation, and especially off-shore operations, adjacent to neighboring states. . .

I will conclude with the following:

Indonesia reserves exclusive rights to explore and exploit natural resources on the continental shelf adjacent to its coast. This right is based on international common law, which has grown and developed based on practice of States in connection with the continental shelf and which has been affirmed by the 1958 Continental Shelf Convention, which can be considered as a codification of the existing law in this field.

The fact that the United Nations did not accept Indonesia's ratification of the Continental Shelf Convention (and the Fisheries and Protection of Biologic Life Convention) by Law No. 19, 1961 on the three Geneva Conventions of 1958 on Maritime Law, does not diminish Indonesia's rights to the continental shelf and the principle of contiguity, which have become an institution and an unassailable principle of international law.

In order to be certain about the submarine areas which Indonesia may claim as its right, the boundary of the continental shelf had better be determined through negotiations with our neighbor countries on the basis of the existing principles of law and justice, and in a climate of friendship while mindful of common interests.

Until this imperative step to safeguard our interests on the continental shelf adjacent to Indonesia's coasts are taken, and considering that permits have already been issued for exploration of the continental shelf, we should present a firm statement expounding the position and policies of the Republic of Indonesia on this matter and the steps to be taken.

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*This paragraph appeared in the prepared text of the speech, but was not actually delivered.