

Negotiated Maritime Boundary Agreement: A Malaysian Experience

Salma Yusof¹, Mazura Md Saman²

¹Department of International Relations, Security and Law,

²Faculty of Defence Studies and Management, National Defence University of Malaysia

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Abstract: Most of Malaysia's maritime boundary disputes with neighbouring countries have been settled through bilateral negotiation, resulting in a number of bilateral agreements. Despite the fact that some of the boundaries are already well-defined, others remain undelimited or only partially delimited. Among others in the North Strait of Malacca and Celebes Sea with Indonesia and in the Straits of Malacca with Singapore. This study attempts to examine 'agreement' as the basis for the settlement of maritime boundary dispute based on the International Law of the Sea Conventions. The research methodology used is mainly doctrinal, involving descriptive and historical analysis. With regards to outstanding maritime boundary issues, the submission to third-party settlement is very unlikely, at least in the near future. Having reviewed the past practice of Malaysia, it is reasonable to assume that Malaysia will continue with the bilateral negotiations until a definitive boundary agreement is reached.

Keywords: *Negotiated Agreement, Maritime Boundary Dispute, Maritime Agreement, Maritime Boundary Dispute Resolution*

1. Introduction

Most of the existing maritime boundaries are the result of agreements or treaties. The status of "agreement" as the primary method of maritime delimitation can be traced back to the historical development of the rules of delimitation. Articles 6 and 12 of the 1958 Conventions, as well as Articles 15, 74, and 83 of the 1982 Convention, were formulated in accordance with established state practise, namely, to effect the delimitation through mutual agreement between states. After the Conventions were adopted, most states recognised this practice of "delimitation by agreement" as the first and foremost fundamental method.

Maritime boundary agreement has a unique status among international legal sources. Article 38 (1) (a) of the Statute of the International Court of Justice identifies "international convention" as the Court's primary source of international law. The Court will initially determine if existing

agreements provide for the delimitation of the contested maritime territories. Other delimitation strategies can only be contemplated in the absence of an agreement. In accordance with Article 62 of the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on the Succession of States with Respect to Treaties, boundary agreements are accorded special protection. Treaties may be terminated or suspended in the event of a "compelling change of circumstances," except for boundary treaties.

Malaysia was already a state party to the 1958 Conventions before the advent of the 1982 Convention. Malaysia ratified the 1982 Convention on 14 October 1996. Being a state party to the 1982 Convention, few amendments have been made to the existing legislation to ensure compliance with this Convention.

This is primarily a qualitative and doctrinal study, that employs descriptive and historical analysis with the aim to

Corresponding Author: Mazura Md Saman, Centre for Military and International Humanitarian Law, NDUM, Malaysia. Email: mazura.mdsaman@upnm.edu.my

examine 'agreement' as a practicable method to resolve maritime boundary issues. Existing data or information on the study area obtained from the treaties, law reports, government documents and journal articles are utilised to examine and evaluate the development and the current practice adopted by the states. Since the study is purely legal, technical aspects such as, geomorphologic, and oceanographic studies and mapping issues will not be included or discussed. There may be limitations in respect of the availability and accessibility of data, particularly with regard to documents and materials from Government Ministries, most of which are restricted under the Official Secrets Act.

Malaysia and its neighbouring countries have concluded a number of maritime boundary agreements. Despite the fact that some of the boundaries are already well-defined, others remain undelimited or only partially delimited. For example, delimitation of the territorial sea in the Straits of Malacca with Singapore, delimitation of the territorial sea in the North Strait of Malacca, exclusive economic zone and continental shelf around Ambalat block or Celebes Sea with Indonesia.

2. Findings and Discussion

Most maritime boundaries are settled through agreements. An examination of the negotiating history reveals a consistent adoption of agreement as the first reference in maritime boundary disputes. In fact, the Final Convention adopted in 1982 demonstrated a clear "acceptance of agreement as an established method of maritime delimitation" (Articles 15, 74 and 83). Malaysia has adopted a similar approach of effecting its maritime delimitation with its neighbouring countries by agreement.

2.1 Malaysia-Indonesia Maritime Boundary

Malacca Strait, the South China Sea (SCS), and the Celebes Sea are the three primary areas where Malaysia and Indonesia share a maritime border.

2.1.1 Malacca Strait and the SCS

The Agreement on the Delimitation of the Continental Shelves between Malaysia and Indonesia in the central and southern parts of the Strait of Malacca and areas to the west and east of the Natuna Islands in the SCS was signed on 27 October 1969 and came into effect on 7 November 1969. Another agreement between the two countries pertaining to "the determination of boundary lines of territorial waters at the Strait of Malacca" which entered into force on March 10, 1971. The 1971 Agreement almost coincides with the 1969 Agreement. In relation to that area, Malaysia, Indonesia and Thailand, reach an agreement to establish a common tripoint for their respective maritime boundaries on 21

December 1971. The resulting delimitation line continued the "Indonesia-Malaysia continental shelf boundary to the common tripoint"; "extended the Malaysia-Thailand maritime boundary to the common point" and "partially delimited an Indonesia-Thailand maritime boundary." It has been contended that the "common point" agreed upon by the parties was a "negotiated settlement" between them.

According to Hamzah (2023), these earlier maritime treaties were concluded in a very quick time for three reasons; there was good chemistry between the military junta leaders in Indonesia and the political leaders in Malaysia under the late Tun Razak, it was a top-down approach and by agreeing to demarcate their continental shelf treaties in 1969, Malaysia was doing Indonesia a favor to become an archipelagic state.

At that time, the EEZ regime was not yet established, so the delimitation of the EEZ in the area remains a problem. Indonesia argues that the EEZ boundary should be negotiated since the 1969 Agreement only covers the exploitation of the seabed and its resources and does not extend to the body of water above it. Consequently, a distinct delimitation boundary is required. Malaysia on the other hand asserts that the 1969 Agreement should be the applicable EEZ boundary.

Upon its ratification of the 1982 Convention Malaysia made a declaration that "if the maritime area is less than 200 nautical miles from baselines, the boundary for the EEZ zone shall be the same line with the boundary of the continental shelf". Considering the geographical distance of both coastal states in the area is less than 200 nautical miles, a new delimitation line is not necessary. As of today, the negotiations on the delimitation of the EEZ in the Strait is still ongoing. Given the current circumstances and the significance of the EEZ, which is abundant in natural resources, it seems unlikely that Indonesia will concede to Malaysia's demand (Yuniar, 2022). According to Bernard (2011) although it is possible to have separate and distinct boundaries, the implementation can be quite challenging due to geographical factor. Hence, a provisional agreement to jointly develop the shared resources in the overlap zone is another option. This approach is consistent with Article 74 paragraph 3 of the 1982 Convention.

Both countries have prior experience instituting a "Joint Development Area (JDA)" and to some extents have demonstrated success. Malaysia had signed JDA Agreements with Thailand and Vietnam" while Indonesia had a similar experience in establishing a "Joint Development Zone with Australia in Timor Gap Area" (Ong, 1990). The idea of a provisional arrangement may prevent unnecessary delays caused by negotiations impasse. As has been demonstrated by state practice, the negotiations typically require a considerable amount of time before a final agreement is reached. Moreover, to some extent,

“provisional arrangement” has been proven to be “flexible in terms of area, duration and resource or function applied to” (Schofield and Storey, 2005).

2.1.2 Celebes Sea

The dispute over the area emerged in 1969 when both countries were in an initial stage of offshore petroleum exploration and had begun to negotiate their continental shelf boundaries. The inclusion of both islands as part of Malaysia's territory in the 1979 *Peta Baru* was contested by Indonesia for the reason that their sovereignty issue was not addressed during the negotiation of the 1969 Agreement on the Continental Shelf. It is contended that the 1969 Agreement generally resolved the “continental shelves” problem between Malaysia and Indonesia, particularly in the “Strait of Malacca, the Strait of Singapore and in the SCS” but not the “Celebes Sea” (Asri et al., 2009; Butcher, 2013).

Notably, the question before the court in Pulau Sipadan and Pulau Ligitan pertained only to sovereignty over the disputed islands, and not to the delimitation issue. Thus, the effect of these islands on the “undelimited maritime boundary” between Indonesia and Malaysia in that area remains. Of particular importance is disputed claim over the ND6 and ND7 Blocks (Ambalat blocks). This prolonged dispute over the area was an “uncomfortable distraction to Malaysian and Indonesian diplomacy. Although there were no significant “military conflagrations”, it has seen its share of “emotional flare-ups” (Hamzah, 2023).

Malaysia and Indonesia have yet to reach an agreement regarding their overlapping territorial sea, EEZ, and continental shelf claims in this region. Since 2005, Malaysia and Indonesia have attempted to demarcate the area in a series of negotiation, but have had little success (Hamzah, 2018). In the latest development, Malaysia and Indonesia have reportedly signed agreement over Celebes maritime border dispute (Tarrence and Sheridan, 2023). The detailed of the agreement, however, was not made public. The agreement was considered as a breakthrough after 18 years of negotiation. Albeit the latest development, joint economic initiatives (Druce and Baikoeni, 2016) or a provisional arrangement in the form of a joint development agreement (JDA) or a joint development zone (JDZ) may be a viable option (Supancana, 2018) pending the conclusion of the final agreement.

2.2. Malaysia-Thailand Maritime Boundary

In general, Malaysia's maritime boundaries with Thailand lie in the area of “The Straits of Malacca” and the “Gulf of Thailand - SCS”.

2.2.1 Malacca Strait

As stated above, Malaysia, Indonesia, and Thailand signed

the 1971 Agreement to establish a “common tripoint” for their respective “continental shelf maritime boundaries in the Malacca Strait.” This Agreement, which entered into force on 16 July 1973, provides, among other things, for the “extension of the maritime boundary between Malaysia and Thailand to the common point.”

Another Treaty signed on 24 October 1979 related to the territorial seas’ boundary of Malaysia and Thailand in that part of the “Strait of Malacca”. Under the 1979 Treaty, territorial sea delimitation boundary in that part of “Strait of Malacca between the islands known as the ‘Butang Group’ and ‘Pulau Langkawi’ shall be formed by straight lines”. The precise location of the delimitation line, however, “shall be determined by a method mutually agreed upon by both parties.” According to the provision, it can be concluded that the final actual delimitation line is subjected to negotiation between both parties.

2.2.2 Gulf of Thailand-SCS

The “1979 Memorandum of Understanding Between Thailand and Malaysia” addresses the overlapping claims of continental shelf area in the “Gulf of Thailand.” The memorandum was signed following the disagreement on the “Ko Losin” issue. The exact location of the boundary however was not specified, but bilateral negotiations should continue until the completion of the boundary delimitation. In the same year, Malaysia and Thailand agreed to sign a “Memorandum of Understanding” to establish a “Joint Authority for the management of seabed resources in the defined area of the continental shelf in the Gulf of Thailand (Kriangsak, 1987).

However, the Memorandum cannot be implemented successfully due to its failure in providing details on the “petroleum exploitation framework for the Joint Development Authority” to allow prospective licensees to enter into operations there (Hazel Fox et al., 1989). Hence, the parties engaged in bilateral negotiations from 1979 to 1990. Finally, on 30 May 1990, both countries signed an “Agreement on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority”. It took almost 11 years to finalise the details and ensure the successful implementation of the “Joint Authority” in the area.

It was believed that the awarding of exploration concessions to oil companies sped up negotiations on the “Joint Authority” (Ong, 1990). “Malaysia-Thailand Joint Authority” was regarded as a “provisional arrangement” to manage the overlapping claims of the continental shelf between the two countries pending a final delimitation. In practice, the creation of a “Joint Authority” constitutes an effective provisional arrangement permitting states to overcome the problem in particular maritime delimitation disputes and facilitate the exploitation of natural resources.

In other words, it is an agreeable measure pending a final delimitation. At present, maritime delimitation issues between Malaysia and Thailand appear to be “not the primary concern” because they have been settled through treaties or are being managed through a provisional arrangement.

2.3. Malaysia-Brunei Maritime Boundary

Malaysia’s maritime border with Brunei was originally established by the "Order in Council 1958," which was implemented after the British government exercised its authority under the "Colonial Boundaries Act of 1958". The “1958 Orders in Council” is said “to delimit only the territorial sea and continental shelf” within a defined area and do not extend far into the SCS. (Haller Trost, 1998).

After attaining independence, both Malaysia and Brunei agreed to the then-existing boundaries. Neither country has revoked the “relevant legislation enacted by the British in 1958,” and both have adhered to the “Order in Council” which are following Article 7 (4) of the 1982 Convention. In 1987, Brunei’s Surveyor General published three maps depicting its maritime zones: "1987 Map Showing Territorial Waters, 1988 Maps Showing Continental Shelf, and 1988 Maps Showing Fishery Limits."

Before 1979, there do not appear to be any significant disputes between Malaysia and Brunei. However, in August 1980, Britain; on behalf of Brunei, sent a protest to the Malaysian Government concerning the deep-sea section of the SCS which Malaysia claimed as within its continental shelf area in the 1979 *Peta Baru*. A similar objection was made in May of 1981 (Haller Trost, 1998). Malaysia contended that “Brunei’s maritime jurisdiction was limited to the 100-fathom line off the coast of Borneo” which was based on the 1958 Order (Smith, 2010). In response to the objection, the Malaysian government also stated, “the government will negotiate with all of its neighbours whose claims might overlap with those of Malaysia”. In 1981, it was proposed that “the delimitation of the continental shelf between the two states in that area should be effected through an outward prolongation of the established lateral lines defined by the two 1958 Orders in Council”. Since no agreement can be reached to settle the issue, several bilateral meetings took place resulting in the decision to form a “Joint Commission”. However, the details of the Commission's activities were not disclosed to the public.

In 2003, the two states were further found to be in uptight conflict. This was caused by Malaysia and Brunei awarded production sharing contracts of overlapping “seabed exploration block in the SCS”. Malaysia awarded its two blocks; referred to as “Block L and M”, which Brunei claimed to be theirs, to an American oil company while Brunei awarded the same blocks to a French oil firm. This has triggered a dispute between the two states. In the

years that followed, the two states held a total of 39 negotiation sessions before reaching a definitive agreement in March 2009.

2.3.1 South China Sea

Basically, maritime boundary issues between Malaysia and Brunei in the SCS are due to “overlapping claims to the continental shelf and EEZ” (Forbes, 1995). As previously stated, no maritime delimitation agreement exists between independent Malaysia and Brunei with the exception of those agreements inherited from the British. Accordingly, some maritime areas were not clearly defined resulting in the misunderstanding between both parties.

In March 2009, Brunei and Malaysia has finally reached an agreement on the “contentious matter of their maritime boundaries seaward of the 100-fathom isobath”. Following six years of negotiations and decades of unresolved land and boundary disputes between the two countries, the agreement was deemed a success. The 2009 maritime delimitation treaty signed between Malaysia and Brunei took the form of an “Exchange of Letters.” From available reports, it appears that the governments of the two countries disclosed in general terms that “final delimitation of the territorial sea, continental shelf and EEZ of both states off Borneo had been established”. The "Letter" also acknowledged two Malaysian oil concession blocks, "Block L and M", which coincided with Brunei's blocks. It was stated that “Blocks L and M would be situated on Brunei’s continental shelf,” but that “Malaysia was given ‘unsuspendable’ rights of access for the exploration and exploitation” of Blocks L and M “in exchange for giving up its claims over these Blocks” (Hafizah, 2009). Indirectly, this ensured “Malaysia’s participation in any commercialisation of oil and gas” from the area, thereby “guaranteeing Malaysia’s share in the resources of the area” (Khairun Syazwan et al., 2021).

As far as the “Exchange of Letter” is concerned, very few specific details have been made public. Due to the confidentiality and sensitivity of the issues involved, it was put under "low key" between the parties. Brunei and Malaysia appear to have agreed, at least in principle, on mechanisms to resolve their maritime boundary disputes. In this regard, a “Joint Committee” is to determine the final maritime border between the two countries.

4. Malaysia-Singapore Maritime Boundary

The 1927 Agreement which was signed between British; as the “colonial ruler of the Straits Settlement of which Singapore is part” and the Sultanate of Johor to “determine the border between the island of Singapore and Johor along the Straits of Johor” has been the basis for the 1995 “Agreement between Malaysia and Singapore to Delimit Precisely the Territorial Waters Boundary.” It was

contended that the Agreement was not really establishing a “boundary between Malaysia and Singapore in the Singapore Straits.” Rather it was more on defining and establishing “base points both to the east and west of Singapore where the Johor Straits is presumed to meet the Singapore Straits”. In light of this, “the center of the deep-water channel in the Johor Straits” was considered a means of dividing the territorial seas between Malaysia and Singapore (Charney & Alexander, 1998). Beyond the defined boundary, there is still no formal agreement to delimit their overlapping claims, some part of which even intersect with the Singapore and Indonesia boundary. In its 2008 decision, the Court ruled that Batu Puteh belonged to Singapore while the Middle Rocks belonged to Malaysia. As for the South Ledge the court only declared that it belongs to the state territorial water of which it is located. Batu Puteh is located beyond the “three nautical mile zone” claimed by Singapore but within the “twelve nautical-mile zone” claimed by Malaysia. Singapore has indicated that the “Indonesia-Singapore and Malaysia-Singapore borders in this area would not run continuously from the waters adjacent to the main Singapore island to the Batu Puteh area.” Here, a stretch of the border between Malaysia and Indonesia would lie in between (Beckman and Schofield, 2009). The awarding of “Middle Rocks” to Malaysia appears to further “complicate the delimitation process”. Middle Rocks can be used as a new basepoint for Malaysia, the same would apply to Singapore in which it can use Batu Puteh as its new basepoint. Hence, resulting from the judgment, the question that follows is how the delimitation of the territorial sea between the two states shall be accomplished (Abdul Ghafur, 2011).

Some of the writers believe that the possession of South Ledge can only be determined based on the “final result of negotiation in terms of defining territorial waters claims between both parties”. The issue of South Ledge’s sovereignty remains unresolved despite series of discussion between the parties (Wan Syahrina Ramlah, 2018). The absence of the territorial sea delimitation in that area would make it complicated for the countries to exercise their sovereignty or sovereign rights (Mohd Rosli et al., 2014). Such a situation could result in “tension or unwelcome incidents.” For instance, “Tanjung Berakit case” in 2010 involving “Indonesian officials of Ministry of Fisheries and Malaysian Marine Police and Fishermen”. It is crucial that both parties expedite the negotiation process and finalise maritime boundary delimitation in area surrounding Batu Puteh.

As discussed, most of maritime boundaries established by agreements are the product of bilateral negotiations. In this respect, bilateral negotiation is the “preferred and effective method” of settling disputes (Prescott & Schofield, 2005). By virtue of the delimitation provisions under the 1958 Conventions and the 1982 Convention, the coastal states

embroiled in delimitation disputes are encouraged to first engage in negotiations to reach an agreement. However, it should be kept in mind that it is not in every case that maritime boundary will be successfully delimited. If parties can agree to peacefully delimit their boundaries without much contention that would be of a great relief. Typically, many delimitation negotiations reach an impasse. This is significantly more difficult when valuable natural resources have been discovered or are suspected to exist.

Where there appears to be no prospect of agreement on maritime boundary delimitation, interim or provisional arrangement seems to offer an ideal option. Malaysia has showed its willingness to accept a “provisional arrangement”. “Joint Authority”, a form of “provisional arrangement” as established between Malaysia and Thailand in the Gulf of Thailand is one of the examples on how Malaysia deal with unresolved maritime dispute due to the deadlock in bilateral negotiation. Interim arrangements are encouraged under the 1982 Convention whereby the “inherent relationship between delimitation and interim measures” is acknowledged in Article 15 of the 1982 Convention”. Similar provision can be found in paragraph 3 to Articles 74 and 83. These Articles do not specify the type of provisional arrangements that countries may engage. It is up to the discretion of the parties concerned to determine in the negotiation, so long as a consensus is reached (Klein, 2006). Hence, provisional arrangements can include a variety of arrangements.

These Articles imposes on the parties the “duty to negotiate in good faith” and “a conciliatory approach to negotiations in which they are willing to make concessions in the pursuit of a provisional arrangement”. Provisional measures pending delimitation are in essence “incentive and preventive obligations of a conventional nature”. At least something can be done before the final agreement can be reached. This is also consistent with a general obligation of coastal states to facilitate optimum ocean management.

3. Conclusion

Most of Malaysia’s maritime boundary disputes with neighbouring countries have been settled through bilateral negotiation, resulting in a number of bilateral agreements. Malaysia’s approach reflects its adherence to the delimitation provisions of international sea conventions.

Bilateral negotiation is the main principal to reach agreement. A successful maritime boundary negotiation very much depends on the commitment and dedication of the negotiating teams. Undoubtedly, settling maritime dispute is not an easy task. Maritime boundary issues are not always at the “top of the list”. Accordingly, it is difficult to predict how long “bilateral negotiations” will take to be completed. In addition, numerous factors need to be

considered before a final agreement can be reached.

Several maritime boundary issues between Malaysia and its neighbours remain unresolved. The submission to third-party settlement is improbable, at least in the near future. It can reasonably be expected that Malaysia will continue with bilateral negotiations or opt for a “provisional arrangement” pending a final agreement. What is important the negotiation process should be carried out in the spirit of “neighbourhood to maintain peace and friendly relationship between states” having regards to the rules under the international law of the sea.

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