MARITIME DELIMITATION: THE MALAYSIAN PRACTICE WITH SELECTED NEIGHBOURING COUNTRIES

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Abstract

Maritime delimitation is a complicated subject under the law of the sea. Until now, the applicable law in maritime delimitation is not clearly established. This paper attempts to analyse and examine the law governing maritime delimitation based on the International Law of the Sea Conventions, judicial decisions, and maritime delimitation treaties. The research methodology used is mainly doctrinal. Special reference is placed on Malaysia's delimitation practice with a few of its neighbours namely, Indonesia, Thailand and Brunei. It is submitted that the practicable adopted delimitation methodology is to be based on the "equidistance principle" to achieve an equitable result taking into account relevant circumstances. Malaysia, being a state party to the 1982 United Nations Convention on the Law of the Sea, has demonstrated a flexible and conciliatory approach toward maritime delimitation. To a certain extent, Malaysia has been successful in the conclusion of both maritime delimitation agreements and provisional arrangements pending final delimitation. The most significant characteristic of delimitation agreements between Malaysia and its neighbouring countries is the application of the "equidistance" method which is modified under relevant circumstances to arrive at an equitable result. With regard to outstanding maritime delimitation issues, it can reasonably be expected that Malaysia will continue with the adoption of the same method in its bilateral negotiations.

Keywords: Maritime Delimitation, Maritime Agreement, Maritime Boundary Dispute Resolution

Sub-theme: maritime delimitation in Southeast Asia

I. INTRODUCTION

The expansion of the existing maritime zones that fall under the sovereignty, sovereign rights, and jurisdiction of the coastal states has increased the importance of defining maritime boundaries between states, particularly those that have opposite or adjacent coasts and the states that share a coastline. In addition, for some states, the close geographical proximity of states with the neighbouring country, claiming the maximum maritime zones outlined in the 1982 United Nations Convention on the Law of the Sea (1982 Convention) is almost impossible. Hence, there will always be some overlap between maritime jurisdictions. In a situation where two or more states have overlapping claims, a line of separation must be drawn involving the division of maritime areas.

Due in large part to the multifaceted nature of the delimitation process, maritime delimitation is a complicated subject matter. It addressed issues but is not limited to, the source of authority, the primary methods of delimitation, and the technical questions involved in determining the actual lines in the sea. [1] As one of the primary sources on the subject, the Convention of 1982 establishes the fundamental rules for the delineation of maritime zones. The "median line" is given a prominent role in Article 15, which outlines the rules that govern the delimitation of the territorial sea between states that have opposite or adjacent coasts. Additionally, Articles 74 and 83, which deal with the delimitation of the exclusive economic zone (EEZ) and the continental shelf, respectively, between states that have opposite or adjacent coasts, emphasise the necessity of reaching an "equitable solution."

In order to arrive at a solution that is just and equitable, the delimitation is determined by several different factors. The first factor to consider is the proximity or opposition of the states along the coast that will be involved in the delimitation. Second, is the type of requested delimitation, whether a single maritime zone or an extensive maritime boundary. Third, any relevant or exceptional circumstances must be taken into account. There has been considerable confusion regarding the applicable laws and principles in maritime delimitation. This is primarily due to the somewhat disparate approaches taken by the conventions on the law of the sea, international court and tribunal decisions, and maritime delimitation treaties. The purpose of this study is to examine the rules governing maritime delimitation under the law of the sea conventions and the legal principle as it is currently established by judicial precedent. Special emphasis will be placed on Malaysia's maritime delimitation practises with its selected neighbours, namely Thailand, Indonesia and Brunei.

II. MARITIME DELIMITATION PRINCIPLES DEVELOPED BY THE LAW OF THE SEA CONVENTIONS

2.1 THE 1930 HAGUE CODIFICATION CONFERENCE

The law on maritime delimitation starts to "legally" crystallise during the 1930 Hague Conference. The Preparatory Committee for the 1930 Conference proposed that "when two states border on a strait which is not wider than twice the breadth of the territorial waters, the territorial waters of each state extend in principle up to a line running down the centre of the strait..."[2] However, the proposal is solely concerned with the demarcation of territorial waters

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[1] Lewis M. Alexander, "The Delimitation of Maritime Boundaries", *Political Geography Quarterly* 5 (1986): 1-2.

[2] Satya N. Nandan & Shabtai Rosenne. *United Nations Convention on the Law of the Sea 1982: A Commentary*, (Dordrecht: Martinus Nijhoff Publishers, 1993), vol. II, 134.

between states that have opposite coastlines. Due to inability to reach agreement on the crucial question on "the breadth of the territorial waters" the 1930 Conference consequently did not reach agreement on any delimitation article. Though no systematic rule on maritime delimitation is achieved from the Conference, the ideas and suggestions floating during that Conference laid down the basic foundation for the drafting of the present maritime delimitation law.

2.2 THE 1958 GENEVA CONVENTIONS

Many coastal states demanded the expansion of fishery jurisdiction over sea resources off the coast following the Truman Proclamation of 1945. This situation provided the motive for holding the First "United Nations Conference on the Law of the Sea" in Geneva. The International Law Commission (ILC) prepared Final Reports (1956 ILC's Final Report),[3] followed by an Experts Group, and worked on the preparations for the Conference.[4] The First Conference, which took place in 1958, resulted in the adoption of four conventions as the followings:

a. The Convention on the Territorial Sea and the Contiguous Zone 1958;
b. The Continental Shelf Convention 1958;
c. The High Sea Convention 1958, and
d. The Convention on Fishing and Conservation of the Living Resources of the High Sea 1958.

The principles laid down by those Conventions among others include the delimitation of the Territorial Sea and Continental Shelf.

With regards to the delimitation of the Territorial Sea,[5] the ILC's 1956 final report contains two articles on delimitating the territorial sea, that is, Article 12 which delimits the territorial sea with opposite coasts and Article 14 with adjacent coasts. Both articles shared a lot of similar ideas in their content. The Articles stipulated that "delimitation of the territorial sea shall be by agreement between the concerned states". If no agreement could be reached, the boundary would be drawn along the median line between states with opposite coasts, and the principle of equidistance would be applied between states with adjacent coasts. The provisions of Articles 12 and 14 of the ILC were combined as Article 12 (1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides for the triple rule of agreement-equidistance-special circumstances. If there was an overlapping claim between states, the main reference should first be made to the delimitation agreement between the states concerned failing which the equidistance principle applies. However, in cases where a deviation from equidistance is warranted due to historic title or other "exceptional circumstances", the equidistance principle will not apply. Nonetheless, the nature of the "other special circumstances" is not specified in the Article.

The governing rule for the delimitation of the continental shelf is provided for in Article 6 of the 1958 Convention on the Continental Shelf: Article 6 (2) deals with the delimitation of the

[3] An independent body of experts in international law set up by the General Assembly of the United Nations.
[4] Tommy T. B. Koh & Shanmugam Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea", in *United Nations Conference on the Law pf the Sea: A Commentary*, ed. Myron H. Nordquist, (Dordrecht: Martinus Nijhoff Publishers, 1985,) vol. I, 29.
[5] Article 2 of the 1958 Convention on the Territorial Sea and the Contiguous Zone refers territorial sea as "an area of water adjacent to the coast over which the coastal state has sovereignty, subject to the right of passage allowed under the international law."

states with adjacent coasts and Article 6 (1) governs the delimitation of the states with opposing coasts. Except for using the words "the median line" for opposite coasts and "the principle of equidistance" for adjacent coasts, both paragraphs contain the same triple rule as in Article 12, namely, "agreement-equidistance (median line)-special circumstance".[6] However, there is no mention of a historic title as a special circumstance. The concept of the continental shelf becomes evident following the 1945 Truman Proclamation, which asserts a claim over the continental shelf and clarifies any associated legal rights and entitlements.[7]

2.3 THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1982 Convention)

The Third "United Nations Conference on the Law of the Sea" started in 1973 and lasted until 1982 when it was finally wrapped up with the adoption of the 1982 UNCLOS. Nevertheless, it only came into force on 16 November 1994 and is currently ratified by 168 states.

Article 15 of the 1982 Convention which governs overlapping territorial sea claims, in essence, accepts the principle of the median line between opposite and adjacent coastal states, unless "modified by agreement between the parties concerned and in the absence of historic title or other special circumstances".[8] No clarification is made on the historic title and special circumstance. Notably, the territorial sea is the only maritime zone concerning which the rule on delimitation remained unchanged from the one outlined in Article 12 of the 1958 Territorial Sea Convention.

Article 74 of the 1982 Convention addresses the delimitation of the EEZ,[9] while Article 83 addresses the delimitation of the continental shelf. Both Articles are essentially identical in terms of content. Articles 74 (1) and 83 (1) as adopted in the 1982 Convention provide:

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

Contrary to Article15, no method of delimitation is favoured in Articles 74 and 83 and the provision is 'flexible' in its approach. The notion that the conclusion of a maritime delimitation must be "equitable" for all involved parties continues to serve as the overarching guiding principle. As a result, it can be affected by many different aspects of geography, including politics, strategic and historical considerations, economics, and features like "islands, rocks, reefs, low-tide elevation", and proportionality.

The "equidistance principle" as outlined in Article 15 for overlapping territorial sea and the "equitable principle" as outlined in Articles 74 and 83 for overlapping EEZ and continental shelf appear to be the two main principles under the 1982 Convention that guide the

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[6] Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing, 2006), 40; Jonathan I Charney, "Progress in International Maritime Boundary Delimitation Law", *American Journal of International Law* 88, (April 1994): 244.

[7] 1945 US Presidential Proclamation No. 2667, Policy of the United States with Respect to the Natural resources of the Subsoil and Seabed of the Continental Shelf, (1945) 10 Fed Reg 12, 305.

[8] Andreas J. Jacovides, "Three aspects of the Law of the Sea: Islands, Delimitation and Dispute Settlement", *Marine Policy* (October 1979): 286; Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law", American *Journal of International Law* 88 (1994): 227.

[9] Since the concept of EEZ is a new one, no equivalent reference to it is found in the 1958 Convention.

determination of maritime delimitation. Both Conventions shared common wisdom that maritime boundary delimitation between states should primarily be determined by agreement.

2.4 ESTABLISHED LEGAL PRINCIPLE OF MARITIME DELIMITATION BY INTERNATIONAL COURTS AND TRIBUNALS

The decisions of international courts and tribunals have special weight, particularly in the interpretation and application of maritime delimitation rules and principles. Since the ***North Sea Continental Shelf*** case[10], there were conflicting views on the applicable methods in determining maritime delimitation. In its early development, it is observed that the international courts and tribunals had held that the "equidistance principle" as enshrined under the 1958 Convention was not a mandatory rule of international law. The international courts and tribunals tend to emphasise the customary rule of "equitable principles" when resolving maritime delimitation disputes. In ***Tunisia v. Libya*** case[11] the Court interpreted equity in the process of maritime delimitation as requiring first and foremost an equitable result. The ***Libya v. Malta*** case[12] marked an important turning point in the development of maritime delimitation law when the "equidistance line" was recognised as "a primary delimitation step in the delimitation process to be adjusted if justified by relevant circumstances". Gradually, the use of the equidistance-based approach became more common in law, and this continued after the 1982 Convention went into effect., as in the case of ***Nicaragua v. Honduras***,[13] ***Barbados v. Trinidad and Tobago***,[14] and ***Guyana v. Suriname.***[15]

This equidistance-based approach utilised by courts and tribunals combines "equidistance" and "equitable" principles. Both principles complement each other in yielding an equitable result.[16] The courts and tribunals have attempted to articulate what is meant by "equitable solutions" as embodied under Articles 74 and 83 of the 1982 Convention. It appears that to generate an equitable result the delimitation must be carried out following equitable principles while taking into account all relevant circumstances. The process of weighing all of these factors will, more often than not, generate an equitable outcome. Delimitation should be carried out with the goal of equity in mind rather than as a method.

Drawing a provisional equidistance line as the initial step in maritime boundary delimitation is the accepted practice based on recent judicial decisions. Given the existence of relevant circumstances, the line is either maintained or adjusted. In the final stage proportionality test is used to verify the line to ascertain the equitableness of the result. This equidistance-relevant circumstances-proportionality test method has come to be known as a three-stage approach. It seems to be a 'standard' methodology adopted in the case of the ***Black Sea***,[17] the ***Bay of***

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[10] (1969) ICJ Rep 3.
[11] (1982) ICJ Rep 18.
[12] (1985) ICJ Rep 13.
[13] Judgment of the International Court of Justice of October 8, 2007.
[14] Award of Arbitral Tribunal of April 11, 2006.
[15] Award of Arbitral Tribunal of September 2007.
[16] Abdul Ghafur Hamid @hin Maung Sein, "Refining the Maritime Boundary Delimitation Methodology: The Search for Predictability and Certainty", *IIUMLJ* 27 no.1 (2019): 49.
[17] Judgment of the International Court of Justice of February 3, 2009.

Bengal,[18] ***Nicaragua v Columbia,***[19] ***Peru v Chile,***[20] ***Costa Rica v Nicaragua***[21] and the recent case of ***Somalia v Kenya.***[22] This method of using the "provisional equidistance line" as a delimitation starting point will help resolve overlapping maritime boundaries. Adjusted equidistance seems to be well established in the court's as well as the tribunal's jurisprudence as the preferred method of delimitation.

As far as special or relevant circumstances is concerned, it functions as a basis for the adjustment of the "equidistance line" when it leads to an inequitable result. As previously stated, the law of the sea conventions does not specify the criteria for special or relevant circumstances. The international courts and tribunals, therefore, seem to have wide discretion as to which of these criteria are selected and how they are weighted. Basically, there is no clear-cut criteria have been established given that each case has its very specific characteristics. However, analysis of the case law implies that the primacy is accorded to geographical factors rather than non-geographical factors. Coastal state configuration, presence of islands, historic title, low-tide elevation, and conduct of the parties have been argued as capable of being relevant factors. As far as proportionality is concerned, the case law suggests that only a disproportion of significant orders of magnitude will affect a provisional median line. The Court in ***Somalia v Kenya*** highlighted that "relevant circumstances are factors which are mostly geographical in nature but there is no closed list of relevant circumstances." This opens the door to allowing for non-geographic factors as relevant considerations. In the ***Gulf of Maine***, the court has given a paramount role to coastal geography as a relevant factor. The physical and ecological characteristics of the seabed and overlying waters however were not considered relevant factors.[23] In ***Libya v Malta*** relevancy of natural maritime boundaries such as "geology, geomorphology, economics, population and other social science data were dismissed".[24] In ***Greenland/Jan Mayen*** case[25] The court found that the coastline length disparity was relevant and observed that it would be "inequitable" based on other relevant considerations "to permit Greenland its full 200-nautical-mile entitlement and left Jan Mayen with the remaining 50-nautical miles between them". ***Qatar v Bahrain*** case is the first precedent in international case law to give effect to low-tide elevation albeit partially.

III. DELIMITATION BY AGREEMENT AS AN ESTABLISHED STATE PRACTICE

Most of the existing maritime delimitation boundaries are the result of agreements or treaties. Some of these agreements only set certain parts of the whole border or zone lines. The status of "agreement" as the primary method of maritime delimitation can be traced back to the historical development of the rules of delimitation in the 1958 Conventions. Articles 6 and 12 of the 1958 Conventions as well as Articles 15, 74 and 83 of the 1982 Convention respectively were drafted based on established state practice to affect the delimitation through mutual agreement between states. In addition, Article 38 (1) (a) of the Statute of the International Court

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[18] (2012) ITLOS Rep 4.
[19] (2012) ICJ Rep 624.
[20] (2014) ICJ Rep 3.
[21] (2018) ICJ Rep 139.
[22] Judgment of the International Court of Justice of October 12, 2021.
[23] L. H. Legault and Blair Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *American Journal of International Law* 79 (October 1985): 990.
[24] David A. Colson, "The Delimitation of the Outer Continental Shelf Between Neighbouring States", *American Journal of International Law* 97 (January 2003): 91.
[25] (1993) ICJ Rep 38.

of Justice refers to the "international convention" as the first source of international law to be applied by the International Court of Justice. In light of this, the Court will first need to ascertain whether existing agreements provide for the delimitation of the maritime territories in question. Other methods of delimitation can only be considered in the absence of the agreement.

Most maritime delimitation agreements are the product of bilateral negotiations. Indeed, conducting a bilateral negotiation between states which expectedly to have different views and interests is not an easy task. There are lots of factors that need to be considered before a final delimitation agreement, which is "equitable" for both parties, can be reached. A successful maritime delimitation negotiation very much depends on the commitment and dedication of the negotiating teams; be it political, economic or technical, as well as the expertise and facilities available to the state concerned. Given that each maritime boundary delimitation situation is unique the methods and strategies adopted also play an important role in the negotiation. What is important the negotiation process should be carried out in the spirit of "neighbourhood to maintain peace and friendly relationship between states" having regard to the rules under international law.

As far as the method of delimitation is concerned, the use of the equidistance-based principle remains popular practice among the states. The method has been expressly stated in several delimitation agreements. Based on the claims submitted to international courts and tribunals, state practice seems to show that the adoption of a single maritime boundary delimiting both the EEZ and the continental shelf has increased since the 1982 Convention. For practical reasons and convenience, many delimitation agreements were concluded based on a single maritime boundary.

IV. MALAYSIA'S MARITIME DELIMITATION WITH SELECTED NEIGHBOURING COUNTRIES

Before the birth of the 1982 Convention Malaysia has already a state party to the 1958 Conventions.[26] Malaysia ratified the 1982 Convention on 14 October 1996.[27] At present, Malaysia's claimed maritime zone consists of "12 nautical miles for the territorial sea, 200 nautical miles for the EEZ"[28] and "200 nautical miles or to the extent of the continental margin for the continental shelf". The maritime delimitation legal framework in Malaysia is composed of various domestic legislations such as the Baselines of Maritime Zone Act 2006, Territorial Sea Act 2012, the EEZ Act 1984 and the Continental Shelf Act 1966. Being a state party to the 1982 Convention, few amendments have been made to the existing legislation to ensure compliance with this Convention.

4.1 MARITIME DELIMITATION BETWEEN MALAYSIA AND INDONESIA

Malacca Strait, the South China Sea (SCS), and the Celebes Sea are the three primary areas where Malaysia and Indonesia share a maritime border.[29] Although some parts of them have

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[26] Malaysia became party to these Conventions by accession on 21 December 1960.

[27] Chronological lists of ratifications of accessions and successions to the Convention and Related Agreements hhttp://www.un.org/Depts/los/.

[28] Section 3 (1) of the Exclusive Economic Zone 1984.

[29] Mark J. Valencia, *Malaysia and the law of the sea, the Foreign Policy Issues, the Options and their Implications*, (Kuala Lumpur: Institute of Strategic and International Studies (ISIS, 1991), 46-48, 80-84, 135.

been delimited, there are areas in which maritime delimitation has not been fully accomplished or remains unresolved. There are few maritime delimitation treaties or agreements which have been concluded between Malaysia and Indonesia.

4.1.1 Delimitation in Malacca Strait and the SCS

The Agreement on the Delimitation of the Continental Shelves between the Two Countries 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 concluded on 27 October 1969 and came into effect on 7 November 1969. Article 1 of the Agreement sets out that the "boundaries of Malaysia and Indonesia continental shelves in those areas are the straight lines". The first section of the seabed boundary in the Malacca Strait is "equidistant between Indonesia's archipelagic baselines in which Pulau Perak and Pulau Jarak were given full effect", perhaps as "circumstances relevance" in the drawing of the delimitation lines as portrayed in the *1979 Peta Baru*.[30]

The EEZ regime was not yet established at that time. Hence, the delimitation of the EEZ in the area remains a problem. Indonesia argues that the EEZ boundary should be negotiated since the 1969 Agreement is concerned with the exploitation of the seabed and its resources and does not extend to the body of water above it. Therefore, a separate delimitation boundary is required. Malaysia on the other hand argues that the 1969 Agreement should be the applicable EEZ boundary.[31] 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".[32] Accordingly, having considered the geographical distance of both coastal states in the area is less than 200 nautical miles, a new delimitation line is not required. It appears doubtful that Indonesia will give in to Malaysia's demand given the circumstances at hand and the significance of the EEZ.

Though it is possible to have separate and distinct boundaries, the implementation can be quite challenging[33] and complex considering the close geographical proximity of both states in this area. Another option is to make a provisional agreement to develop the shared resources in the overlap zone together. This is in line with the approach provides under Article 74 (3) of the 1982 Convention:

> "Pending agreement…the states concerned, in a spirit of understanding and cooperation shall make every effort to enter into provisional arrangements of practical nature and during this transitional period not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation".

Both countries have prior experience instituting a "Joint Development Area (JDA)" and to some extent have demonstrated success. Malaysia had established JDA Agreements with Thailand and Vietnam" while Indonesia had a similar experience in establishing a "Joint

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[30] The accuracy of the *1979 Peta Baru* which "illustrated the Territorial Waters and Continental Boundaries of Malaysia is contested by many.

[31] Leo Bernard, "Whose Side Is It On? – The Boundaries Dispute in the North Malacca Strait", paper presented at the 2nd CILS International Conference 2011, *ASEAN's Role in Sustainable Development*, Indonesia, 21-22 November 2011: 10

[32] Paragraph 7 of Malaysia's declaration upon ratification of the 1982 Convention.

[33] Leo Bernard, "Whose Side Is It On? – The Boundaries Dispute in the North Malacca Strait":13

Development Zone with Australia in Timor Gap Area". The idea of a provisional arrangement may avoid undue delays due to deadlock in negotiations. As has been demonstrated by state practice, the negotiation process normally takes a long time before a final agreement.[34] Moreover, to some extent, "provisional arrangement" has been proven to be "flexible in terms of area, duration and resource or function applied to".[35]

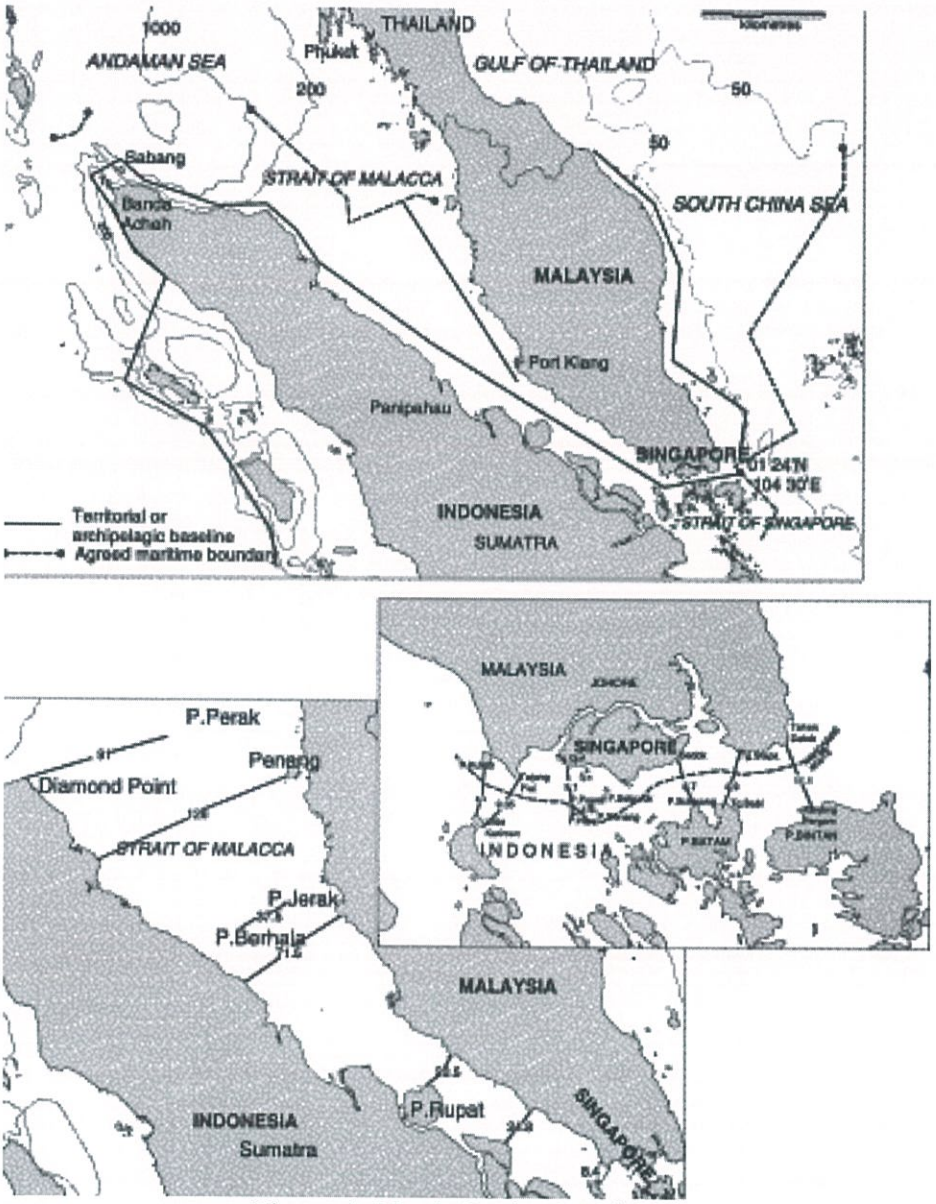

Figure 1: North Strait of Malacca
(Source: ars.els-cdn.com/)

[34] For example, in the Black Sea case "24 rounds of negotiations were held between these two states from 1998 until 2004 before it was finally referred to the International Court of Justice for adjudication."
[35] Clive Schofield and Ian Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes", *Harvard Asia Quarterly* 9, no. 4 (2005).

In respect of the continental shelf boundary in the SCS, the seabed boundary is mainly an "equidistant line" from Peninsular Malaysia and Indonesia's Kepulauan Anambas and Kepulauan Natuna.[36] The border follows the "equidistant line between the baselines of Indonesia and Malaysia." 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".[37]

Another treaty between the two countries concerned with "the determination of boundary lines of territorial waters at the Strait of Malacca" which came into force on March 10, 1971. Article 1 of the Treaty provides that "boundary lines of territorial waters of Indonesia and Malaysia at the Strait of Malacca in areas shall be the line at the center drawn from baselines of the respective parties in the areas." In a way, the Treaty almost coincides with the 1969 Continental Shelf Delimitation Agreement.

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."[38] It has been argued that the "common point" agreed by the parties has "not been determined based on equidistance", more exactly it was a "negotiated settlement" based on "equitable principle having regards to the geographical locations and the baselines used in the area".

Both the "1969 Continental Shelf Boundary" and the "1971 Territorial Sea Boundary" generally follow the "equidistant line" between the baselines of the two countries. The boundaries are generally "one and the same line" except for one turning point of the territorial sea boundary known as "Turning Point 6" resulting in the formation of a "small triangle of the sea in the southern part of the Straits of Malacca which forms part of the Indonesian continental shelf but not part of its territorial sea."[39]

4.1.2 Delimitation in the Celebes Sea

While the sovereignty dispute between Malaysia and Indonesia over Pulau Ligitan and Pulau Sipadan was resolved in favour of Malaysia, the maritime delimitation between the two countries in the Celebes Sea remains a problem.[40] The dispute emerged in 1969 when both countries were in an initial stage of offshore petroleum exploration in the area 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.[41] One important point to note is that the question before the court pertained only to sovereignty over the disputed islands, and not to the delimitation issue. Thus, the effect

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[36] Victor Prescott, "Indonesia's maritime claims and outstanding delimitation problems", *International Boundary Research Unit, Boundary and Security Bulletin* (1995-1996), 95.
[37] Asri Salleh et al., "Malaysia's Policy towards its 1963-2008 territorial disputes", *Journal of Law and Conflict Resolution* 1, no. 5 (2009): 107-116.
[38] The agreement went into effect on 16 July 1973.
[39] Charney &. Alexander (eds.), *International Maritime Boundaries*, vol. I & II, (London: Martinus Nijhoff Publishers, 1993/1998), 1443-1454.
[40] *Sovereignty over Pulau Ligitan and Pulau Sipadan* 2002 ICJ Rep 625.
[41] Asri Salleh et al., "Malaysia's Policy towards its 1963-2008 territorial disputes": 107-116.

of these islands on the "undelimited maritime boundary" between Indonesia and Malaysia in that area remains.

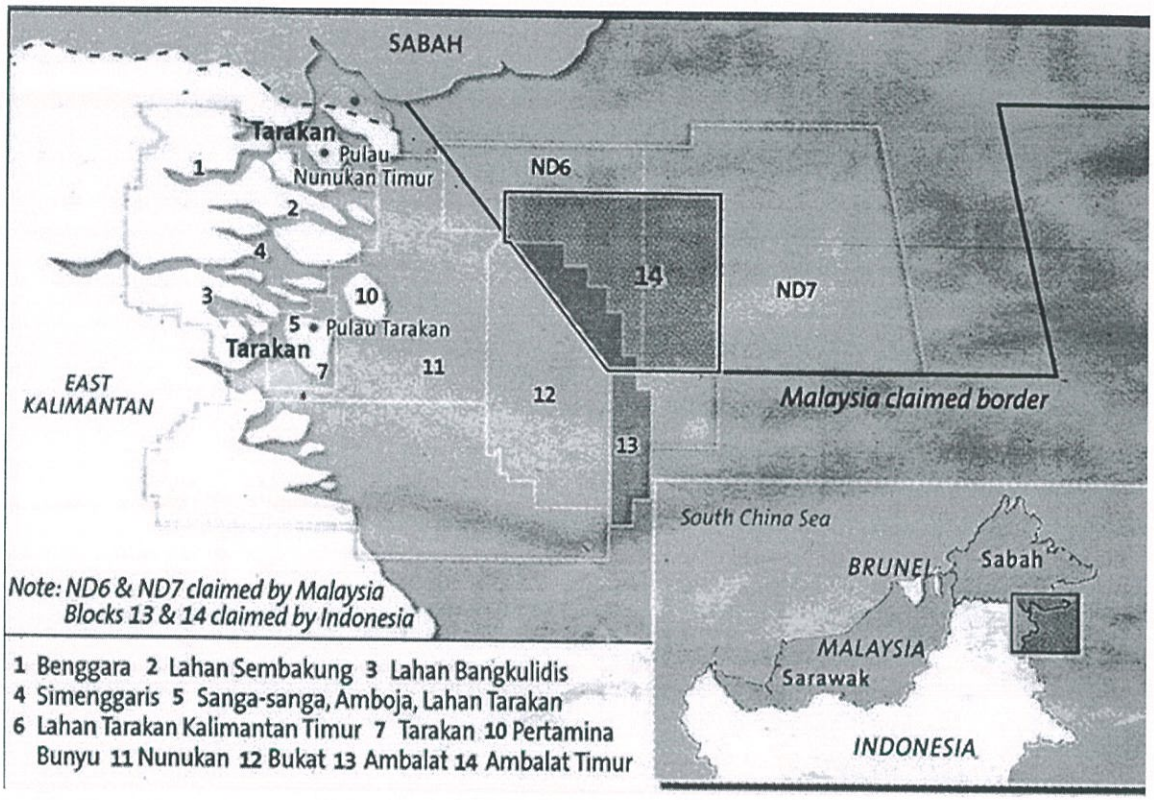

Figure 2: ND6-ND7/Ambalat dispute
(Source: The Star, 2009)

This prolonged dispute over the area was an "uncomfortable distraction to the diplomacies" between Malaysia and Indonesia. Though not resulting in any significant "military conflagrations", it has seen its share of "emotional flare-ups". Malaysia's claim on ND6 and ND7 Blocks (Ambalat blocks) is based on two grounds. Firstly, the area is within Malaysia's territory as illustrated in the *1979 Peta Baru*. Secondly, the 2002 decision of the International Court of Justice in which the sovereignty of Pulau Sipadan and Pulau Ligitan was awarded to Malaysia. Indonesia, on the other hand, claims the Ambalat block based on the 1891 Convention between Great Britain and the Netherlands. Indonesia also contested the use of straight baselines is not in accordance with Article 7 of the 1982 Convention.[42] As of today, no agreement has been reached between Malaysia and Indonesia on overlapping claims of the territorial sea, EEZ and continental shelf around that area.

Since 2005, Malaysia and Indonesia have met to try to delineate the area, but with little success.[43] As demonstrated through state practice, negotiation involving two states may take a long time. The frequency and length of bilateral negotiation depend on a variety of factors including the perceived importance of the issues at stake, which in turn is determined by political, economic and broader security perspectives. Perhaps, a possibly good option, for

[42] Ida B. R Supancana, "Maritime Boundary Disputes between Indonesia and Malaysia in the area of Ambalat Block: Some Optional Scenarios for Peaceful Settlement," *JEAIL* 1 (2015): 197.
[43] B A Hamzah, "Maritime Boundary Issues: Time for closure", *News Straits Times*, July 31, 2018.

now, is the idea of a provisional arrangement in the form of a JDA. Although it does not resolve the maritime delimitation problem in the area, based on the state practice such arrangements are favourable pending the conclusion of the disputes. A provisional arrangement is considered an effective measure pending a final delimitation.

4.2 MARITIME DELIMITATION BETWEEN MALAYSIA AND THAILAND

In general, Malaysia's maritime boundaries with Thailand lie in the area of "The Straits of Malacca" and the "Gulf of Thailand - SCS". According to the "1990 Anglo-Siamese Treaty" as far as the western terminus of the land boundary at the "Straits of Malacca" is concerned, the maritime boundary:

> "With regard to the islands close to the west coast, those lying to the north of the parallel of latitude where the most seaward point of the north bank of the estuary of the Perlis River (the western terminus of the Malaysia-Thailand land boundary) touches the sea shall remain to Siam, and those lying to the south of the parallel shall become British."
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> The island known as Pule Langkawi, together with all the islets south of the mid-channel between Terutau and Langkawi, and all the islands south of Langkawi shall become British. Terutau and the islets to the north of mid-channel shall remain to Siam".

In the "Gulf of Thailand - SCS" area, the same Treaty provides that the maritime boundary between the two countries as follows:

> "All islands adjacent to the eastern States of Kelantan and Tringganu, south of the parallel of latitude drawn from the point where the Sungei Golok reaches the coast at a place called Kuala Tabar, shall be transferred to Great Britain, and all islands to the north of that parallel shall remain to Siam."

Being the successor of the British, Malaysia, therefore, succeeds in all those areas mentioned in the Treaty.

4.2.1 Malacca Strait

There were a few maritime delimitation treaties concluded between Malaysia and Thailand. On 21 December 1971, an Agreement was signed involving three states; Malaysia, Indonesia and Thailand, to establish a "common tripoint" for their respective "continental shelf maritime boundaries in the Malacca Strait". This Agreement that came into force on 16 July 1973, among others provides for the "extension of the Malaysia-Thailand maritime boundary to the common point". It has been argued that the "common point" has not been determined based on the "equidistance principle", the predominant practice in maritime delimitation. Having considered the "geographical locations and the baselines" in the area the resulting "delimitation line" was considered "equitable" for the parties involved.[44]

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[44] Vivian L. Forbes, *Indonesia's Maritime Boundaries*, A Malaysian Institute of Maritime Affairs Monograph (Kuala Lumpur: Malaysia Institute of Maritime Affairs, 1995), 18 - 44.

In the following year, Malaysia and Thailand succeeded in delimiting their overlapping territorial sea and continental shelf out to a "point 29 miles offshore". However, there was disagreement on how much weight to be accorded to the "islet of Ko Losin"; "uninhabited maritime feature, standing 1.5 meters high above the sea level, which has no economic life of its own". According to Malaysia, this "islet should not affect the delimitation." Thailand, however, insists that the feature is a valid "basepoint."

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".[45] However, the actual location of the delimitation line "shall be determined by the method to be mutually agreed by both parties".[46] Looking at the provision, it can be concluded that the final actual delimitation line is subjected to negotiation between both parties.

4.1.2 Gulf of Thailand – SCS

The "1979 Memorandum of Understanding Between Thailand and Malaysia" covers the overlapping claims of continental shelf area in the "Gulf of Thailand." [47] The memorandum was concluded following the disagreement on the "Ko Losin" issue. It is provided in Article 1 of the Memorandum that the "boundary of the continental shelf in the Gulf of Thailand between the two states shall consist of straight lines." The exact location of the boundary however was not specified, but it is stipulated that bilateral "negotiations should continue the completion of the boundary delimitation".[48] 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.[49] That agreement provides that:

> "The Joint Authority shall assume all rights and responsibilities on behalf of both parties for the exploration and exploitation of the non-living resources of the sea-bed and subsoil in the overlapping area".

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 enable prospective licensees to enter into operations there.[50] Hence, bilateral negotiations took place between the parties from 1979 to 1990. Finally, on 30 May 1990, both countries concluded an "Agreement on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority" on establishing a JDA. It took almost 11 years after the signing of the "1979 Memorandum of Understanding" to finalise the details and ensure the successful implementation of the "Joint Authority" in the area.

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[45] Article 1 of the 1979 Treaty; see also Kriangsak Kittichaisaree, *The Law of the sea Convention and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press, 1987), 1091-1098.
[46] Article 3 of the 1979 Treaty.
[47] Memorandum of Understanding Between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, 24 October 1979.
[48] Article 3 of the 1979 Memorandum of Understanding.
[48] Kriangsak Kittichaisaree, *The Law of the sea Convention and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press, 1987), 100-103, 189-194.
[50] Hazel Fox et al., *Joint Development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary* (Great Britain: British Institute of International and Comparative Law, 1989), 147.

It was believed that the unilateral award of exploration concessions to oil companies by both states sped up negotiations on the JDA.[51] Both agreements however do not resolve the maritime delimitation issue in that area. "Malaysia-Thailand JDA" was regarded as a "provisional arrangement" to deal with the overlapping claims of the continental shelf between the two countries pending a final delimitation. Practically, the creation of a JDA constitutes an effective provisional arrangement permitting states to overcome the problem in particular maritime delimitation disputes and facilitate the exploitation of natural resources during a transitional period. In other words, it is an agreeable measure pending a final delimitation. At present, it seems that maritime delimitation issues between Malaysia and Thailand are "not the major preoccupation" since they have been settled through treaties or are managed through the provisional arrangement. Both parties appear to be satisfied with the current situation.

4.3 MARITIME DELIMITATION BETWEEN MALAYSIA AND BRUNEI

Brunei's maritime border with Malaysia 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". All these territories; Brunei, Sabah and Sarawak, were previously under British rule. 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. According to the "1958 Order", the delimitation is based on "equidistance" and a "perpendicular to the general direction of the coast".[52]

After the independence era, both states; 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, three maps indicating Brunei's maritime zones; namely "1987 Map Showing Territorial Waters, 1988 Maps Showing Continental Shelf and 1988 Maps Showing Fishery Limits" was published by its Surveyor General.

There seem to be no major disputes between Malaysia and Brunei before 1979. However, in August 1980, Britain; on behalf of Brunei, sent an objection 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.[53] 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.[54] However, in response to the objection, the Malaysian government also said, "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

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[51] David M. Ong, "The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?" *International Journal of Estuarine and Coastal Law* 5, no.4 (1990): 384.

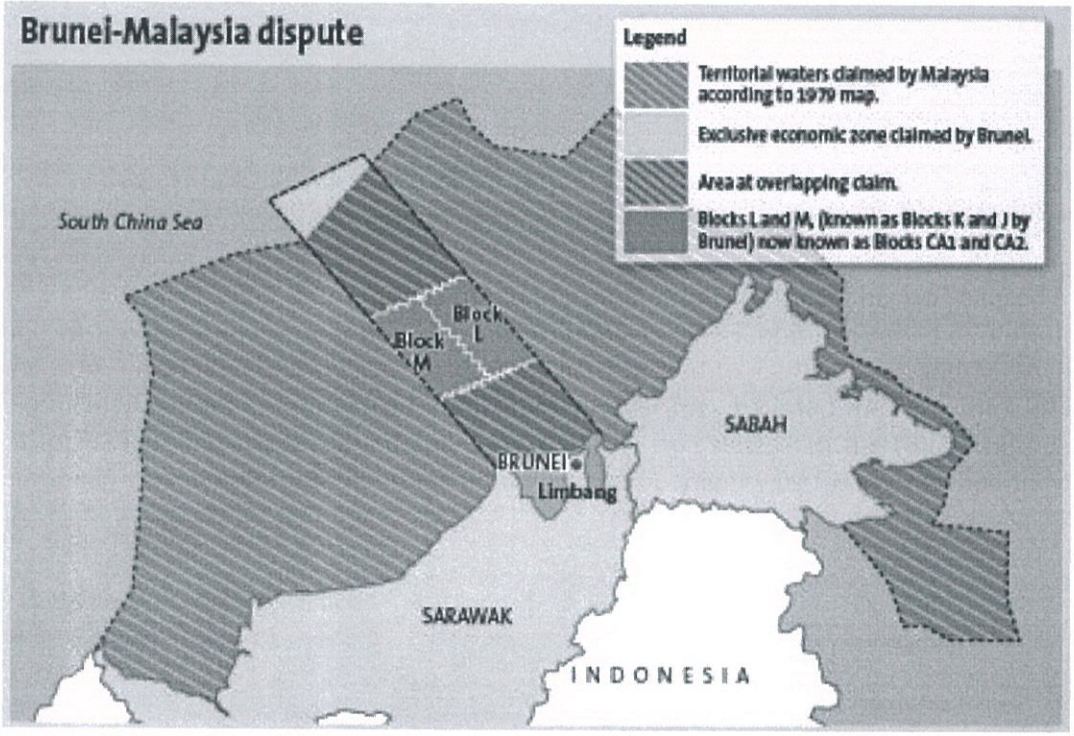
[52] For detailed discussion on the historical claim of maritime dispute between Malaysia and Brunei see R. Haller-Trost, The Brunei-Malaysia Dispute over Territorial and Maritime Claim in International Law, *Maritime Briefing*, vol, 1 (3), (Durham: International Boundaries Research Unit).

[53] R. Haller-Trost, 46-48.

[54] Jeffrey J. Smith, "Brunei and Malaysia Resolve Outstanding Maritime Boundary Issues", *LOS Reports* 1 (2010): 1.

took place resulting in the decision to form a "Joint Commission".[55] The details of the work done by the Commission however 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."[56] Malaysia awarded its two blocks; referred to as "Block L and M", which Brunei claimed to be theirs, to a US oil company while Brunei awarded the same blocks to a French oil firm. This has triggered a dispute between the two states. In the following years, the two states held 39 negotiation meetings until a final agreement was finally reached in March 2009.



(Source: thestar.com.my, 9 May 2010.)

4.3.1 The SCS

Basically, maritime boundary issues between Malaysia and Brunei in the SCS are due to "overlapping claims to the continental shelf and EEZ".[57] As stated earlier, no maritime delimitation agreement exists between independent Malaysia and Brunei except those inherited from the British. Accordingly, some maritime areas were not clearly defined resulting in the misunderstanding between both parties.

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[55] R. Haller-Trost, 50.

[56] John C. Wu, "The Mineral Industry of Brunei", *U.S Geological Survey Minerals Yearbook*, United States Department of the Interior (2001), 6.1.

[57] Vivian L. Forbes, *Indonesia's Maritime Boundaries*. A Malaysian Institute of Maritime Affairs Monograph (Kuala Lumpur: Malaysia Institute of Maritime Affair, 1995), 227-228; Valencia, Mark J., *Malaysia and the Law of the Sea*, The Foreign Policy Issues, the Options and their Implications (Kuala Lumpur: Institute of Strategic and International Studies (ISIS), 1991), 48-54.

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."[58] The agreement was considered a successful achievement following six years of negotiations and decades of unresolved land and boundary questions between the two states. The 2009 maritime delimitation treaty concluded between Malaysia and Brunei took the form of an "Exchange of Letters."[59] It was signed by Sultan Hassanal Bolkiah of Brunei and Malaysia's Prime Minister Datuk Seri Abdullah Ahmad Badawi at their meeting on 16 March 2009. From available reports, it appears that the governments of the two states 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 recognised two Malaysian oil concession blocks; "Block L and M", 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."[60] 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".

As far as the "Exchange of Letter" is concerned, very few specific details in them have been disclosed publicly or to the international legal community. Rather, it was put under "low keynote" between the parties due to the confidentiality and sensitivity of the issues involved. Although details are still not very clear, it appears that Brunei and Malaysia 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.

V. CONCLUSION

Maritime delimitation should be effected by an agreement that forms the basis for delimitation of overlapping maritime boundaries as enshrined under Articles 6 and 12 of the 1958 Conventions as well as Articles 15, 74 and 83 of the 1982 Convention. Overall, the delimitation provisions as stipulated in the law of the sea conventions have provided a workable basis for the maritime boundaries delimitation. Based on the current practice, the 'standard' methodology adopted by the international courts and tribunals for maritime boundaries determination, is the three-stage principle grounded on an equidistance line as a starting point.

Malaysia has demonstrated a preference to resolve maritime disputes with other neighbouring countries through negotiated agreements. Several delimitation agreements; including "provisional arrangement" have been concluded most of which between 1969 to 1979. The most significant characteristic of delimitation agreements between Malaysia and its neighbouring countries is the application of the equidistance method, which is modified following the circumstances to arrive at an equitable result. The approach reflects the adherence not only to the delimitation provisions under the sea conventions but also to the development of the maritime delimitation law as demonstrated by the decisions of the international courts and tribunals. Most of the maritime boundary treaties signed between Malaysia and its neighbouring countries happen after the confrontation between Malaysia and Indonesia.

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[58] Jeffrey J. Smith, "Brunei and Malaysia Resolve Outstanding Maritime Boundary Issues", *LOS Reports* 1 (2010): 1.

[59] Joint Press Statement by Leaders on the Occasion of the Working Visit of Yab Dato' Seri Abdullah Haji Ahmad Badawi, Prime Minister of Malaysia to Brunei Darussalam on 15-16 March 2009.

[60] Hafizah Kamaruddin, 'Brunei Drops Territorial Claim over Limbang", *Bernama*, 17 March, 2009; Leong Shen Li, 'Brunei Drops Claim over Limbang District, says Abdullah', *The Star*, 17 March 2009.

Perhaps, looking from another perspective the 'lenient' approach taken by the states related to the aim of maintaining and persevering the spirit of the neighbourhood.

Upon its ratification of the 1982 Convention, Malaysia has made a Declaration, which among others highlights the importance of using the "equidistance line" to determine its maritime borders. It seems to imply that the "equidistance principles" is to be generally adopted in its bilateral negotiations of maritime boundaries, at least on Malaysia's part. Several maritime delimitation issues between Malaysia and its neighbours remain unresolved. The submission to third-party settlement is very unlikely, at least in the near future. Having reviewed the past practice of Malaysia it can reasonably be expected that Malaysia will continue with the bilateral negotiation or opt for a "provisional arrangement" pending a final delimitation agreement.

REFERENCE

Abdul Ghafur Hamid @hin Maung Sein. "Refining the Maritime Boundary Delimitation Methodology: The Search for Predictability and Certainty," *IIUMLJ* 27, no. 1 (2019): 35 – 61.

Andreas J. Jacovides. "Three aspects of the Law of the Sea: Islands, Delimitation and Dispute Settlement", *Marine Policy* (October 1979): 286.

Asri Salleh. "Dispute Resolution Through Third Party Mediation: Malaysia and Indonesia," *Intellectual Discourse* 15, no. 2 (2007): 147-165.

Asri Salleh, Che Hamdan Che Mohd Razali & Kamaruzaman Jusoff. "Malaysia's policy towards its 1963-2008 territorial disputes," *Journal of Law and Conflict Resolution* 1 no.5 (2009):107-116.

Bernard, Leonardo. "Whose side is it on? – The boundaries dispute in the North Malacca Strait." Paper presented at the 2nd CILS International Conference 2011 – The ASEAN's role in sustainable development. Yogyakarta: Indonesia.

B A Hamzah. "Maritime Boundary Issues: Time for closure", *News Straits Times*, July 31, 2018.

Clive Schofield and Ian Storey. "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes", *Harvard Asia Quarterly* 9, no. 4 (2005).

David A. Colson. "The Delimitation of the Outer Continental Shelf Between Neighbouring States," *American Journal of International Law* 97 (January 2003): 91.

David M. Ong. "The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?" *International Journal of Estuarine and Coastal Law* 5, no.4 (1990): 384.

Hafizah Kamaruddin. "Brunei drops territorial claim over Limbang," *Bernama*, March 17, 2009.

Haller-Trost, R. *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective* (International Boundary Studies Series. London: Kluwer Law International, 1998).

Hazel Fox et al. *Joint Development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary*. Great Britain: British Institute of International and Comparative Law, 1989.

Ida B. R Supancana. "Maritime Boundary Disputes between Indonesia and Malaysia in the area of Ambalat Block: Some Optional Scenarios for Peaceful Settlement," *JEAIL* 1 (2015): 197.

John C. Wu. "The Mineral Industry of Brunei", *U.S Geological Survey Minerals Yearbook*, United States Department of the Interior (2001), 6.1.

Jonathan I Charney. "Progress in International Maritime Boundary Delimitation Law", *American Journal of International Law* 88, (April 1994): 227 - 244.

Kriangsak Kittichaisaree. *The Law of the sea Convention and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press,1987):100-103, 189-194.

Lewis M. Alexander. "The Delimitation of Maritime Boundaries", *Political Geography Quarterly* 5 (1986): 1-2.

Li, Leong Shen. "Brunei drops claim over Limbang district, says Abdullah." *The Star*, March 17, 2009.

L. H. Legault and Blair Hankey. "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case," *American Journal of International Law* 79 (October 1985): 990.

Mark J. Valencia. *Malaysia and the law of the sea, the Foreign Policy Issues, the Options and their Implications*, (Kuala Lumpur: Institute of Strategic and International Studies, 1991).

Saravanamuttu, Johan. "Malaysia's Lucrative Approach to Joint Development in Troubled Seas." *Opinion Asia*, May 16, 2010.

Satya N. Nandan & Shabtai Rosenne. *United Nations Convention on the Law of the Sea 1982: A Commentary*, (Dordrecht: Martinus Nijhoff Publishers, 1993), vol. II, 134.

Smith, Jeffrey J. "Brunei and Malaysia resolve outstanding maritime boundary issues." *LOS Reports*, vol. I (Law of the Sea Interest Group, American Society of International Law, 2010).

Tommy Koh & Jayakumar, Shanmugam. "The negotiating process of the third united nations conference on the law of the sea." In *United Nations Conference on the Law of the Sea: A Commentary*. vol. I, edited by Myron H. Nordquist, 29. Dordrecht: Martinus Nijhoff Publishers, 1985.

Valencia, Mark J. "Validity of Malaysia's Baselines and Territorial Sea Claim in the Northern Malacca Strait," *Marine Policy* 27, (2003): 367-373.

Valencia, Mark J. *Malaysia and the law of the sea. The Foreign Policy Issues, the Options and their Implications*. (Kuala Lumpur: Institute of Strategic and International Studies, 1991).

Victor Prescott, "Indonesia's maritime claims and outstanding delimitation problems", *International Boundary Research Unit, Boundary and Security Bulletin* (1995-1996): 95.

Vivian L. Forbes, *Indonesia's Maritime Boundaries*, A Malaysian Institute of Maritime Affairs Monograph. Kuala Lumpur: Malaysia Institute of Maritime Affairs, 1995.

Yoshifumi Tanaka. *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing, 2006.