

NEGOTIATING MARITIME BOUNDARIES

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ABSTRACT

This article considers the non-substantive aspect of maritime boundaries negotiation. Negotiation is a preferred method to delimit maritime boundaries as it has its own advantage compare to other peaceful method. Negotiators have to go through different stages throughout the negotiation process. Creative approach is required to avoid deadlock, and to push the negotiation forward. In the end, the success of the negotiation depends on good faith, and the readiness of each party to compromise and find agreed solution.

Keywords: Maritime Delimitation, Negotiation, United Nations Convention on the Law of the Sea.

INTRODUCTION

Particularly inside ASEAN, there has been no final agreement between several member states to determine the boundary of the sea territory, coupled with recent developments with tensions over the claim of control over the South China Sea between several ASEAN member countries and China (Samuels, 2013; Dutton, 2011; Rosyidin, 2017). This tension can be regarded as one of the greatest maritime tensions experienced by ASEAN countries with China since decades (Weissmann, 2010; Connelly, 2015; Yahya, 2013; Scott, 2012; Kaplan, 2014; Glaser, 2012; Buszynski, 2012; Fravel, 2011). As one of the largest countries in ASEAN, a member of the G20, the world's largest archipelagic country, and located in a very strategic position, Indonesia has a very important position to contribute actively to reduce maritime tensions in the region (Rüland, 2017). Indonesia's foreign policy is based on an independent and active principle (Djalal, 2012). Independent is that Indonesia's position and view in foreign policy is not subject to pressure. The active principle is that Indonesia has the position to continue to implement a respectful, harmonious foreign policy.

Negotiating maritime boundary is not an easy task. Advanced knowledge of the law, the technical aspects, as well as other relevant factors is required. This multi dimension, multi agencies, and multi discipline negotiation sometimes can take decades to complete. There is no agreement of maritime boundary negotiation. Different place have different characteristics. Different states also have different approaches in settling their maritime boundary negotiation. Although Indonesia declared its independence in 1945, this newly born state was not ready to negotiate maritime boundaries right away. At that time, the Government was not stable yet and internal revolution created further instability (Cribb, 2008; Reid, Bertrand & Laliberté, 2010). Indonesia was also facing military aggressions from the Netherlands. Indonesia has begun its maritime delimitation negotiation since 1960s, and has concluded one of the first maritime border agreement as early as 1969. Nowadays, Indonesia has concluded segments of maritime border agreements with India, Thailand, Malaysia, Singapore, Vietnam, Papua New Guinea,

Australia and the Philippines. Indonesia, however, has not entered into any maritime boundary agreement with Palau and Timor Leste.

As a country with a vast territory expanding between two oceans and two continents, negotiating maritime boundary is in Indonesia's blood. Indonesia always considered maritime boundary delimitation as one of its priority. It is believed as one of the cornerstone to support its border diplomacy. Certainty in maritime boundaries with its neighbouring countries is extremely important both from security and from resources management perspective (Rosenberg & Chung, 2008). It is also worth to notice that Indonesia began to negotiate its maritime boundary at the midst of fighting for acknowledgement of the archipelagic state principle after Djuanda Declaration of 1957 (Butcher, 2009). The first batch of Indonesia's maritime boundaries also has strategic value as acknowledgement of Indonesia's neighbours on the archipelagic state principle. With the acceptance of the archipelagic state regime in international law, Indonesia managed to triple its territory without firing a single bullet. After more than four decades negotiating its maritime boundaries, there are segments yet to be concluded. Most exclusive economic zone (EEZ) boundaries are not yet concluded, due to the fact that the EEZ regime is relatively new as it was created by the United Nations Convention on the Law of the Sea (UNCLOS) in 1982. Thus, Indonesia has concluded the continental shelf/ seabed boundary, but not the EEZ boundary in some segments such as the Strait of Malacca and the South China Sea. The process of maritime boundary delimitation will continue in the future. On the other hand, the diplomats who negotiate the boundary are constantly changes. Thus, institutional memory of the negotiating team is important to ensure continuity of the negotiating process. This article aimed to give the readers the story of Indonesian maritime delimitation experience. It will more focus on the negotiating aspect of maritime boundary delimitation, not on the legal or technical substance of the maritime delimitation. Other countries' negotiator might have similar experience, thus this article is designed for maritime delimitation negotiators in general.

In the context of recent developments, this paper is considered very important. This paper details some practical cases in diplomacy. Some specific cases are discussed in detail in order to give examples of how to position Indonesia in negotiations with other countries based on the mutual and equal orientation. This paper, as a reflection of maritime negotiations, takes an inherent position of Indonesian foreign policy adopted by Indonesia (Rosyidin, 2013; Willis, 2016), and does not fret in writing that discourages parties involved in disputes (Nguntragool, 2012). This politic orientation, however, has proved successful in negotiating the sovereignty of each parties and avoiding the conflict, as a basic character of Southeast Asian societies and ASEAN organization. Although this paper does not reflect any degree of formal view of the Indonesian government in the resolution of bilateral and regional tensions, which may be mentioned on a case by case basis in this study, with my extensive experience and in-depth observation as diplomat, high-ranking foreign ministry official, ambassador, and the president's special envoy in maritime negotiations, this paper is expected to provide practical guidance and peace-oriented discourse in negotiating in the effort to resolve conflicts and tensions especially in the field of maritime boundary. This will be useful in negotiating maritime boundaries experienced by Indonesia, ASEAN members, and intra-regional relations such as between ASEAN and South Pacific countries and between ASEAN and China. By looking at the originality, this paper is expected to provide insights on the settlement of borderline maritime boundaries through dignified diplomacy.

WHY NEGOTIATE MARITIME BOUNDARY?

Simply put, it is mandated under international law. The United Nations Charter, in Article 2 paragraph 3 and Article 33 paragraph 1 stipulated that disputes should be settled in peaceful means, which includes negotiation, enquiry, mediation, conciliation, arbitration, or judicial settlement. United Nations Convention on the Law of the Sea (UNCLOS) reaffirmed this provision; particularly Article 279 paragraph 1, which makes direct reference to the UN Charter.¹ Generally, negotiation is being mentioned as the first mean for peaceful dispute settlement, including delimiting maritime boundaries. Besides negotiation the simplest mechanism, that is only include the States concerned, negotiations also have its unique benefit thus preferable compare to other mechanisms. Negotiations allow neighbouring States to have full control over the boundary that will be drawn. States have various interests to be secured when delimiting boundaries. Sometimes these interests cannot per se accommodated solely by applying the international law in a strict fashion. When it comes to these minute details, negotiations allow States to make special arrangement and adjustment to accommodate their interest in finding agreed boundary delimitation. The second advantage of negotiation over other mechanisms is confidentiality. Arguably, arbitration, mediation, or conciliation can be done behind closed doors as well. However, it is inevitable to have the arbiters, mediators, conciliators, as well as the secretariat/administering body to have access to information related to the delimitation. When it comes to high profile confidential national interests, one should be considered to keep the delimitation process among the neighbouring states.

GETTING READY TO NEGOTIATE

Negotiating maritime boundary does not start on the negotiating table. Before meeting the counterpart to negotiate, State should have a solid national position. Maritime boundary delimitation is a complex, multi-dimension, and multi factored processed. In most cases, like in Indonesia, maritime domain is not handled by a single agency. Rather, it handled in a sectorial approach in various departments. In Indonesia, to name a few, it involves the Ministry of Transportation, Ministry of Marine Affairs and Fisheries, and Ministry of Mineral Resources, as well as other relevant agencies. State needs to have a national position, not a sectorial or departmental position, reflecting all of its interest in a particular segment of maritime borders. Coordinating a national position seems to be a challenge, taking into account the bureaucratic system of Indonesia that comprises of various ministries and agencies that deals with maritime issues. Furthermore, because negotiating maritime boundary can be a long process, State must have a clear and sustained policy in handling maritime boundaries delimitation. Negotiation processes in most cases are longer than the age of a cabinet. Thus, it is certain that a change of government, restructuring of ministry might be happened during the negotiation process. It is crucial to maintain a clear policy as well as national position on the negotiating table. Additionally, the leading sector or coordinator of the negotiating team should also be clear. This is then followed by obtaining the necessary mandate to negotiate. Failing to do so will result in resetting the negotiation, which then delayed the conclusion of the maritime boundary. Indonesia's experience in negotiating maritime boundary is no exception to these principles. In the past, Indonesia's main interest in maritime delimitation is the oil and gas resources. To ensure that this interest is well taken care, the negotiating team was the Delimitation of

Continental Shelf Team, led by the Directorate General for Oil and Natural Gas of the Ministry of Energy and Mineral Resources. With the growing interest in maritime domain, which include navigation, fisheries, as well as legal and security affairs, the posture of the negotiating team were required to adjust to this changes. In 2004, the Ministry of Foreign Affairs of Indonesia issued the Ministry for Foreign Affairs Decree to establish the Technical Maritime Boundaries Team (Technical Team) consists of relevant stakeholder with various expertise which includes legal, hydrography, geology, fisheries and navigation. This Team supersede inactive the Delimitation of Continental Shelf Team coordinate by Director General for Oil and Natural Gas, the Ministry of Energy and Natural Resources. Up until today, the Technical Team, led by the Ministry of Foreign Affairs is the spears for Indonesian maritime boundary negotiation. It has the mandate to negotiate boundaries based on legal as well as other relevant technical aspects. On a more personal level, State should also ensure that the negotiating team can be from both well equipped with the necessary knowledge or expertise, and with the overall national position. It is expected that the negotiating team personnel will constantly change, and this is something that need to be anticipated for the States to groom future negotiators. A common perception in handling maritime boundaries issues is very important. This can be handled by organizing workshops or seminars of maritime delimitation for junior officials from relevant agencies. Indonesia has been sending their officials to learn about the legal and technical aspect of maritime delimitation to various international institutions. Besides promote a better understanding about the entire delimitation process, this will equipped officials with the up to date expertise when it comes to the maritime boundary delimitation. Additionally, in order to maintain consistency and preserve institutional memory of the negotiating team, Indonesian Technical Team is always advised by a group of former (retired) negotiators.

STARTING THE NEGOTIATION PROCESS

Before the two negotiating team meet, usually it is preceded by high level political arrangement. In the case of Indonesia, the Minister of Foreign Affairs will have a prelude discussion with the counterpart about the proposal to start the negotiation. This is one of the options to know the readiness of the counterpart. Furthermore, through this, it will be decided the levelling of the negotiating team (Director General or Director level) as well as the lead agency who will negotiate on behalf of the respective country. The negotiating team will then meet as a follow up of the political arrangement. However, normally the first meeting is dedicated as an ice breaking session for the negotiating team to get to know their counterpart. Establishing a good communication with counterpart is necessary and should not be taken lightly. The first couple meetings usually the substance was not discussed yet. Both negotiating teams need to set up the expectation and the playing field together.

Some of the technicalities are need to be agreed upon before moving into the substances, normally are written down in a Terms of Reference which may include:

1. The format, size, and frequency of the meetings.
2. Format of the notes/records of discussion to keep track of progress of each meeting.
3. Reference chart that will be use.
4. Legal and technical basis for negotiation

Challenges can come as early as this phase. When a state is not ready to negotiate, either because they have not yet have a national position or the domestic political condition is not conducive, it is difficult even to start the negotiation. For example, Indonesia experienced this when it was focusing on the ownership dispute over the Islands of Ligitan and Sipadan with Malaysia in The International Court of Justice (ICJ).² Maritime delimitations are departed from the land that serves as the baseline from where the maritime zone is projected. State should settle the land territory first before maritime boundary can be delimited. The negotiation in the Sulawesi Sea, where the two islands were located, commenced after the ICJ rendered the decision back in 2002. Similarly, in the Straits of Singapore Segment, the dispute over Pedra Branca and relevant features between Malaysia and Singapore delayed the discussion of a tri-junction between Indonesia, Malaysia and Singapore. Likewise, the delimitation of maritime boundary between Indonesia and Timor-Leste will commence once the terminus of land boundaries is agreed. Additionally, Indonesia also has possibility to delimit continental shelf beyond 200 nautical miles (NM) boundary with Micronesia. This will be the case if the Commission on the Limits of the Continental Shelf (CLCS) issued a recommendation that there is exist a continental shelf beyond 200 NM from both Indonesia and Micronesia in the Euripic Rise (3°48'2" N 141°29'0" E). In some cases, even budget can become a problem. Although boundary negotiation involves neighbouring states, but getting the officials into one place require extensive travel plan that can increase the cost. For example, Indonesia and Australia had a quite a narrow boundary in the Arafura Sea between Papua of Indonesia and Australia's Northern Territory. However, the negotiation teams are based in Jakarta and Canberra, which are very far away.

SOME APPROACHES TO AVOID DEADLOCK

Maritime boundaries are not concluded in a single meeting, it will require sequences of meetings. It is even common to find that negotiation is stagnant even after a series of sessions. If the reason is the counterpart which is not ready to negotiate, probably, the best solution is to wait other than forcing a non-fruitful discussion. However, there are a number of approaches that can be taken in order to make the negotiation continues. If the problem is on the mandate of the negotiating team, the respective team may have the option to present the current negotiating stage to their respective higher authority in order to obtain further mandate. In most cases, the negotiating teams are limited by the mandate that they are entrusted by their respective government. The limitation of mandate may be very. It can be limitation of the segments that can be negotiated, or the minimum result of the boundary line from their national perspective. If the problem is on identifying the counterpart's interest in why they want the boundary is drawn to accommodate their interest, the negotiating team may want to have off-the-record or informal meeting. The formalities of the negotiation sometimes created restriction for the negotiating team to be candid in expressing their interest. The sensitivity or the confidentiality of the interest makes it difficult to be explained in the negotiation forum.

Usually the head of the negotiating teams will have a private one on one meeting off the record. The more exclusive nature of a one on one meeting may enable both sides to express the underlying interest why the counterpart cannot accept a particular delimitation line. If a deal can be reached, usually in a quid pro quo situation, both negotiating teams will proceed to obtain

approval from their respective country in order to be formalized the line that was drawn. Indonesia also experienced in involve in two tracks of negotiation for maritime boundary. In negotiating maritime boundaries with Malaysia, in addition to the Technical Team Track, both countries agreed to create the Special Envoy Mechanism. The President of Indonesia and the Prime Minister of Malaysia agreed back in 2015 that each country will designate a special envoy to expedite the on-going delimitation process. The special envoys were given mandate broader than the mandate of the Technical Team. While the Technical Team negotiates boundaries from legal and technical aspects of maritime delimitation, the special envoys are given the mandate to take into account political, economic, defence, as well as security aspects of the maritime boundary. These solutions are by no means an exhaustive list. At the end of the day, negotiators have to be creative in finding alternative approach as well as alternative solution that can be mutually agreed by both sides.

READINESS TO COMPROMISE

Although the main objective of maritime boundary delimitation is simple that is to draw an agreed line, it is difficult to fulfil. Certainty, both sides will be guided by the principles of international law, especially those that are enshrined in the UNCLOS. However, the law can be interpreted differently, particularly in maritime delimitation, in order for states to have a maximum claim. UNCLOS provides the general rule for maritime delimitation. For territorial sea, unless otherwise agreed by the parties, the guiding principle in the UNCLOS is the median line between the baselines. For EEZ and continental shelf, UNCLOS stipulates that the boundary is aimed to achieve an equitable solution. Not surprisingly, different method of drawing the baseline, selection of base points in finding the median line, as well as interpreting what considered as “equitable”. Thus, it is impossible for one side to gain its maximum claim. Against this background, States must aware that there are bigger purposes in maritime delimitations that are the certainty of boundary that can affect various factors. One of the most important things is to maintain security and stability. Unlimited areas, particularly the territorial sea, are often used for illegal activities. Smuggling, trafficking, and even terrorism have the chance to operate while law enforcers are arguing who have the authority to enforce the law. Finalization of a boundary line is very much depends on the readiness and political willingness of the States concerned. Good faith in negotiation along with offering alternative solution that can be accepted for all is also very important. States can argue for decades defending their maximum claim based on the legal and technical aspect, but at some point States have to be ready to compromise.

CONCLUSION

The results of this study can be summarized in three key points. First, it is important to have a comprehensive, solid, and long lasting national policy on maritime delimitation. Government or cabinet may change, negotiators may change, but the national position should endure the long delimitation process. Second, it is also urgent to continuously explore creative ideas, both in terms of format of the negotiation as well as in terms of the delimitation line. The advantage of negotiation to have states concerned full control over the process and the results should be utilize in order to find an agreed solution. Last but not least, be ready to compromise.

It is impossible for state to have its maximum claim. Political will to accept a win-win situation is important in concluding maritime boundaries.

ENDNOTE

1. Article 279 of UNCLOS (Obligation to settle disputes by peaceful means) states that States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter. Moreover, Article 2 paragraph 3 of the Charter of the United Nations on The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the principle: All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Article 33 paragraph 1 states that The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The content of Article 279 of UNCLOS was retrieved from http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, while the Article 2 paragraph 3 of the Charter of the United Nations were retrieved from <http://www.un.org/en/sc/repertoire/principles.shtml>, and <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>
2. As stated in Article 2 Subject of the Litigation, it is stated that The Court is requested to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia. Retrieved from <http://www.icj-cij.org/files/case-related/102/102-20021217-JUD-01-00-EN.pdf>.

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