Whose Side is It On? – The Boundaries Dispute in the North Malacca Strait

Leonardo Bernard *

The waters in North Malacca Strait are one of a number of areas between Indonesia and Malaysia where no clear boundaries exist. Currently, there is an agreement on boundaries of the continental shelf between Indonesia and Malaysia in the area, but as yet there is no agreement on the boundaries for the Exclusive Economic Zone (EEZ). The lack of clear boundaries makes it difficult for either State to effectively exercise control over the body of water, not only with regard to fishing activities, but also with regard to environmental and security issues. This paper will discuss the history of the regime of the continental shelf, the Agreement on Continental Shelf Boundaries between Indonesia and Malaysia and the development of the international regimes for the EEZ and the continental shelf under the United Nations Convention on the Law of the Sea (UNCLOS). It will then discuss the importance for Indonesia and Malaysia of having clear EEZ boundaries in the North Malacca Strait.

Keywords: *boundaries dispute, North Malacca Strait, Indonesia, Malaysia, continental shelf. Exclusive Economic Zone, UNCLOS*

I. The History of Continental Shelf

The concept of the 'continental shelf' became important in the early 20th century. Even before coastal States had realised the potential of the continental shelf as a source of hydrocarbon resources, they had recognised the importance of the continental shelf for their fishing industries. At that time, it was already generally accepted that possession of territorial sea included rights over resources in the seabed and subsoil, and there was already a clear distinction between the bed of the territorial sea and the bed of the high seas, which is an area not subject to the jurisdiction of the coastal States.[1] In 1916, however, Spain's then Director-General of Fisheries was urged to extend Spain's territorial

* SH (Universitas Indonesia), LL.M (National University of Singapore). Research Associate, Centre for International Law, National University of Singapore. The author would like to thank CIL Director Professor Robert Beckman for his advice and influence in the conception process of this paper. The author would also like to thank Tara Davenport, Andi Arsana and Monique Page for their help and support in finalising this paper.

[1] RR Churchill and AV Lowe, The Law of the Sea, 3rd ed, Manchester University Press, 1999, p. 142.

sea to include the continental shelf, as most of the edible species of fish were found in the continental shelf area. Spain's claim, however, did not provide any definition of the term 'continental shelf'.[2] In 1926, a Committee of Experts formed by the League of Nations observed that at a certain distance from the coast, the bottom of the sea is marked by a sort of 'great step' that divides it into two distinct areas: the 'continental shelf', which extends from this step to the coastline and where most edible fish can be found; and a vast abysmal region that extends beyond this step.[3] Thus the Committee of Experts somewhat defined the regime of continental shelf, but still failed to clarify the legal limits of the continental shelf.[4]

A. The Truman Declaration 1945

Just prior to World War II, technology had advanced to the extent where it was possible to commercially exploit the hydrocarbon resources beyond the territorial sea. As there was no legal regime in place to regulate exploitation of these resources, some coastal States started to make unilateral claims to the continental shelf areas adjacent to their territorial seas.[5] In 1942, the United Kingdom, on behalf of Trinidad, and Venezuela succeeded in concluding one of the earliest agreements on the delimitation of the continental shelf, even before an international legal regime has been clearly established.[6] However, one of the most influential references to the regime of the continental shelf is probably the Truman Declaration of 1945,[7] in which the United States unilate-

---

[2] League of Nations Committee of Experts for the Progressive Codification of International Law, Questionnaire No 2: Territorial Waters (1926) 20:3 AJIL Supp 62, p. 125-126.

[3] Ibid, p. 126.

[4] Donald R Rothwell and Tim Stephens, The International Law of the Sea, Hart Publishing, 2010, p. 100.

[5] Ibid, p. 98.

[6] See Richard Young, Recent Development with Respect to the Continental Shelf (1948) 42:4 AJIL 849, p. 850; see also RR Churchill and AV Lowe, supra note 1, p. 143.

[7] 1945 US Presidential Proclamation No 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, (1945) 10 Fed Reg 12,305 [Truman Declaration], online: CIL <http://cil.nus.edu.sg/1945/1945-us-presidential-proclamation-no-2667-policy-of-the-united-states-with-respect-to-the-natural-resources-of-the-subsoil-and-sea-bed-of-the-continental-shelf/>.

rally declared its right to explore the natural resources in the continental shelf contiguous from its land territory.

The Truman Declaration was the first statement of its kind to assert a claim over the continental shelf and to clarify associated legal rights and entitlements.[8] It was no surprise that it prompted a spate of unilateral declarations by countries claiming 'entitlement' or 'sovereignty' over their continental shelf. The claims that followed the Truman Declaration were varied in nature, with some claiming only jurisdiction over the resources found in the continental shelf, others claiming sovereignty over the shelf and the column of water above it or even the air space above; some defining the limit of continental shelf to the depth of 100 fathoms or 200 metres,[9] and others defining the limit of the continental shelf to a distance of 200 nautical miles (nm) from their coast, regardless of the depth.[10] These claims differed from the Truman Declaration which only claimed jurisdiction and control over the natural resources found in the continental shelf beneath the high seas but contiguous to the coasts of the United States, but still recognised the freedom of the high seas of the water column above the shelf.[11] Furthermore, although the Truman Declaration did not define the limits of continental shelf, the accompanying press release described it as an area adjacent to the continent to a depth of 100 fathoms.[12]

The inconsistencies in relation to the nature and geographical extent of continental shelf claims following the Truman Declaration shows a lack of uniform state practice.[13] Nevertheless, these claims

---

[8] Although in 1944, Argentina made a claim to a 200nm territorial sea and all resources within it, which included the continental shelf. See Donald R Rothwell and Tim Stephens, supra note 4, at 100-101, see also Richard Young, supra note 6, at 852.

[9] Cuba, Mexico and Nicaragua set the boundary of the area claimed at the 200 meters depth line, see Richard Young, supra note 6, p. 851-852, 855.

[10] Chile, Peru and Costa Rica declared full sovereignty over the continental shelf, regardless of depth, to 200 nm off their coasts, see Richard Young, supra note 6, p. 853-854.

[11] Truman Declaration, supra note 7.

[12] Richard Young, supra note 6, at 851.

[13] See the award in the arbitration between Petroleum Development Ltd and the Sheikh of Abu Dhabi, where Lord Asquith concluded that by 1951, the doctrine of continental shelf was not yet admitted to the canon of international law, Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi (1952) 1 ICLQ 247, at 253, cited in Donald R Rothwell and Tim Stephens, supra note 4, p. 101.

were important to the development of the continental shelf regime. The United States' position of jurisdiction and control over the continental shelf without affecting the high seas freedom above it subsequently formed the basis of the continental shelf regime in the 1958 Convention on the Continental Shelf, and the position of the Latin American countries that claimed 200 nm jurisdiction, which was the pre-cursor for the Exclusive Economic Zone (EEZ) regime. These regimes will be discussed in Part 3 of this Paper.

B. Convention on the Continental Shelf 1958

As discussed above, by the time the First Convention on the Law of the Sea was concluded in 1958, the regime of continental shelf had gained wide-spread, albeit not uniform, support through state practice, and was officially recognised in the signing of the 1958 Convention on the Continental Shelf (Continental Shelf Convention).[14] The Continental Shelf Convention reaffirmed the doctrine introduced in the Truman Declaration, that coastal States have exclusive sovereign rights to explore and exploit their continental shelf,[15] as well as confirming that the body of water above the continental shelf remains as high seas.[16]

The Continental Shelf Convention also tried to tackle the elusive issue of how to determine the outer limit of the continental shelf. In the period leading up to the Continental Shelf Convention, the limit of the continental shelf declared by coastal States varied from the depth requirement (200 metres) to the distance requirement (200 nm). In preparation for the 1958 Convention, the International Law Commission (ILC) crafted a draft definition that limited the continental shelf "to a depth of 200 metres, or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas".[17] Despite failing to provide a definitive outer limit of the continental shelf,[18] the definition provided by the ILC was fully adopted

[14] Convention on the Continental Shelf, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964) [Continental Shelf Convention], online: CIL <http://cil.nus.edu.sg/1958/1958-convention-on-the-continental-shelf/>.

[15] Art. 2 (1), ibid.

[16] Art. 3, Continental Shelf Convention, supra note 14.

[17] United Nations, Yearbook of the International Law Commission, vol I, 1956, p. 131.

[18] Friedman stated that Article 1 of the Continental Shelf Convention was 'one of the most disastrous clauses ever inserted in a treaty of vital importance to mankind',

by the Continental Shelf Convention without any changes,[19] which reflected a desire to have certainty as to the extent of the continental shelf while leaving open the (outer limit?) of the continental shelf for further exploration as technology developed.[20]

Another feature of the Continental Shelf Convention highly relevant to this Paper is the use of median line and the principle of equidistance in delimiting continental shelf between two or more opposing coastal states.[21] During the negotiation of the Continental Shelf Convention, the negotiating States preferred the use of the median line based on the principle of equidistance from the respective coastlines. The negotiating States also agreed with the ILC as to the existence of special circumstances as exceptions to the median line / equidistance rule.[22] This principle was 'updated' somewhat by the International Court of Justice (ICJ) in its seminal 1969 judgment of the North Sea Continental Shelf Cases.

C. The North Sea Continental Shelf Cases 1969

The decision of the ICJ in the 1969 North Sea Continental Shelf Cases had a huge impact on the development of the doctrine of the continental shelf, especially with respect to delimitation methods.[23] In its judgment, although the ICJ was of the opinion that the Continental Shelf Convention did not "embody or crystallize any pre-existing or emergent rule of customary law",[24] the court recognised the inherent sovereign rights of coastal States to explore and exploit the natural resour-

---

which left the limits of national jurisdiction open; see Wolfgang Friedman, "Selden Redivjvus – Towards a Partition of the Seas?", The American Journal of International Law, vol. 65, no. 5, 1971, p. 759.

[19] Art. 1, Continental Shelf Convention, supra note 14.

[20] Stuart Kaye, "State Practice and Maritime Claims: Assessing the Normative Impact of the Law of the Sea Convention" in Aldo Chircop, Ted L. McDorman and Susan J. Rolston, eds, The Future of Ocean Regime-Building, Martinus Nijhoff Publishers, 2009, p. 140.

[21] Art. 6, Continental Shelf Convention, supra note 14.

[22] United Nations, Yearbook of the International Law Commission, vol II, 1952, p. 216.

[23] North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands) (1969) ICJ Rep 3 [North Sea Continental Shelf Cases].

[24] Ibid, at para 69.

ces in the area of continental shelf that constitute a natural prolongation of their land territories into and under the sea.[25] However, since one of the parties to the case, Germany, was not a signatory to the Continental Shelf Convention, the ICJ had to spell out the criteria of delimitation for States not bound by the Continental Shelf Convention.

In its judgment, the ICJ rejected the use of the median line principle contained in the Continental Shelf Convention,[26] stating that the median line principle was not a customary rule since it was not used in the Truman Declaration (which used the equitable principle), and that its inclusion into the Continental Shelf Convention was subject to reservations.[27] The ICJ also stated that the use of the median line / equidistance principle in certain circumstances (in this case Germany's concave coastline) can lead to an unnatural or unreasonable result.[28] The ICJ, thus, came up with new criteria, and stated that the delimitation of the continental shelf between adjacent states should be equitable[29] and take into account the relevant circumstances, such as the configuration of the coast.[30]

II. The Continental Shelf Boundary Between Indonesia and Malaysia

On 27 October 1969, just a few months after the ICJ issued its judgment on the North Sea Continental Shelf Cases, Indonesia and Malaysia concluded a treaty which delimited the continental shelf boundary in the Malacca Strait (the 'Continental Shelf Agreement').[31] The Agreement claimed to be based on the equidistance principle between Indonesia's and Malaysia's baselines.[32] A look at the actual boundary on

[25] North Sea Continental Shelf Cases, supra note 23, at para 19.

[26] Para. 23, North Sea Continental Shelf Cases, supra note 23.

[27] Wolfgang Friedman, "The North Sea Continental Shelf Cases – A Critique", The American Journal of International Law, vol. 64, no. 2, 1970, p. 233.

[28] Para. 24, North Sea Continental Shelf Cases, supra note 23.

[29] Para. 55, North Sea Continental Shelf Cases, supra note 23.

[30] Para. 91, North Sea Continental Shelf Cases, supra note 23.

[31] Agreement between the Government of Malaysia and the Government of the Republic of Indonesia on the Delimitation of the Continental Shelf between the Two Countries, 27 October 1969 (entered into force 7 November 1969), US Department of State, 'International Boundary Study, Series A, Limits in the Seas', No 1, 21 January 1970 [Continental Shelf Agreement].

[32] Ibid, at 7.

the map, however, suggests that the boundary is actually closer to the Indonesian coast than to the Malaysian coast.

States with sovereignty over land territory are permitted to claim maritime zones from such land territory. During the negotiation of the Continental Shelf Agreement, both States accepted that like all maritime zones, the boundary between them should be measured from their respective baselines. Under the 1958 Convention on the Territorial Sea and the Contiguous Zone, the normal baseline for measuring maritime zones is the low-water mark along the coast.[33] It was generally recognised that straight baselines may be employed if a coast is deeply indented or has a fringe of islands, provided that the baseline does not depart to an appreciable extent from the general direction of the coast.[34] If a State employs straight baselines, the waters landward of the baseline are considered to be internal waters. However, if the use of straight baselines has the effect of enclosing as internal waters areas which were not previously considered as such, the right of innocent passage applies in such waters.[35]

Prior to the signing of the Agreement, Indonesia had been promoting the regime of 'Archipelagic Waters'; and during the 1958 Law of the Sea Convention, Indonesia had unsuccessfully argued the use of 'archipelagic baselines' to enclose mid-ocean archipelagos (which are States which consist entirely of island archipelagos, such as Indonesia and the Philippines). Indonesia argued that archipelagic States should be permitted to draw straight baselines connecting the outermost points of the outermost islands in their archipelago. When Indonesia came to negotiate the Agreement with Malaysia it was proposing the use of this archipelagic baseline as the base points to measure the boundary from their land territory.

Malaysia countered Indonesia's use of archipelagic baselines by applying the straight baselines system to enclose all of its islands off the coast of western Malay Peninsula. This was Malaysia's way of achieving an equal footing in the division of the continental shelf

[33] Art. 3, Convention on the Territorial Sea and the Contiguous Zone, opened for signature 29 April 1958, 15 UST 1606; 516 UNTS 205 (entered into force 10 September 1964) [Territorial Sea Convention], Article 3, online: CIL <http://cil.nus.edu.sg/1958/1958-convention-on-the-territorial-sea-and-the-contiguous-zone/>.

[34] Art. 4, ibid.

[35] Art. 5, Territorial Sea Convention, supra note 33.

with Indonesia, the latter having drawn straight baselines around its archipelago.[36] Malaysia drew straight baselines to join its coast with two of its outer most islands in the north Malacca Strait, these being Pulau Perak and Pulau Jarak. Pulau Perak is approximately 55 nm from the nearest point of Malaysian land (the island of Pulau Singa Besar), while Pulau Jarak lies approximately 25 nm from the nearest land at Pulau Butuh.[37]

Indonesia agreed to Malaysia's use of straight baselines to delimit the continental shelf boundary between the two countries. The distance between Pulau Perak and Indonesia's nearest territory is 84 nm and the distance between Pulau Jarak and Indonesia's nearest 'archipelagic baseline' is 30 nm.[38] The two countries then agreed to delimit the continental shelf boundary by drawing a median line equal distance from the straight baselines of both countries, which was an approach that was in line with the approach set out in the Continental Shelf Convention.[39]

If baselines were ignored and equidistance is measured from the coast of both countries, Indonesia should have gained more continental shelf than what was agreed in the Agreement.[40] Indonesia's acceptance of Malaysia's use of 'straight-baselines' as the basis for the Continental Shelf Agreement between the two states was seen as 'a gift' from Indonesia to Malaysia for the latter's support in pushing the regime of Archipelagic Waters during negotiations for the Third United Nations Law of the Sea Conference.[41] Hence, Malaysia secured a larger continental shelf area in the north Malacca Strait than Indonesia. This,

[36] Continental Shelf Agreement, supra note 31, p. 4.

[37] Maxx Herriman and Raja Petra Mohamed, 'A Malacca Straits EEZ Boundary: Factors for Consideration', in M Shariff, et al, eds, Towards Sustainable Management of the Straits of Malacca, Malacca Straits Research and Development Centre, 2000, p. 758 – 759.

[38] Continental Shelf Agreement, supra note 31, p. 5.

[39] Art. 6, Continental Shelf Convention, supra note 14.

[40] Prescott claimed that if a strict line of equidistance was drawn in this sector, Indonesia would gain about 1,000nm^2 of continental shelf; see Victor Prescott, Indonesia's Maritime Claims and Outstanding Delimitation Problems, in IBRU Boundary and Security Bulletin, Winter 1995 – 1996, p. 94-95.

[41] United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1883 UNTS 3 (entered into force 16 November 16 1994), [UNCLOS] online: United Nations <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

however, posed a problem after the establishment of the EEZ regime following the conclusion of the third Convention of the Law of the Sea in 1982 (UNCLOS), as discussed in Part 3 below.

III. UNCLOS 1982

The Third United Nations Conference of the Law of the Sea began in 1973 and lasted for nine years. The Conference was initially set up to address the deep sea-bed regime and the two issues outstanding from the first two United Nations conferences on the law of the sea (these being the breadth of the territorial sea and limits of the fishing zone).[42] However, its objectives were revised and it endeavoured to draft a new convention governing all uses of the oceans which would be universally acceptable. Aside from establishing new regimes such as the EEZ and Archipelagic Waters, UNCLOS also made provision for the deep seabed area beyond the limits of national jurisdiction as the common heritage of mankind.[43] No State may claim or exercise sovereignty or sovereign rights over any part of this area or its resources. All rights in the resources in the area are vested in mankind as a whole. UNCLOS provided for the establishment of the International Sea Bed Authority (ISBA) which is authorised to act on behalf of mankind as a whole in order to regulate the exploration and exploitation of the natural resources of the deep sea bed.[44]

The text of the UNCLOS was finally adopted in Jamaica on 10 December 1982 and entered into force in 16 November 1994. As of June 2012, 162 countries and the European Community are parties to UNCLOS.[45]

A. The Continental Shelf Regime under UNCLOS

Not unlike its predecessor the Continental Shelf Convention, UNC-

[42] See the Introduction to the UNCLOS, ibid.

[43] Art. 135, UNCLOS, supra note 41.

[44] Art. 156, UNCLOS, supra note 41.

[45] Thailand was the latest country to ratified UNCLOS on 11 May 2011; see Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 03 June 2011, online: United Nations <http://www.un.org/depts/los/reference_files/chronological_lists_of_rati fications.htm#The United Nations Convention on the Law of the Sea>.

LOS recognises that coastal States have sovereign rights to explore and exploit the natural resources of the seabed and subsoil on their continental shelf.[46] However, unlike the Continental Shelf Convention, UNCLOS adopted an equitable solution approach in delimitation of continental shelf rather than following the approach of the Continental Shelf Convention which favoured the use of median line,[47] which was clearly a reflection of the effect of the North Sea Continental Shelf Cases decision. The extent of a coastal State's continental shelf was one of the most debated topics during the negotiations for the third Convention. The Conference finally agreed to a 200 nm limit from the coastline.[48] States with a broad continental shelf off their coasts, however, through a complex assessment mechanism may claim sovereign rights to the resources of their continental shelf up to 350 nm from their coastline or to the outer edge of the continental margin.[49] These claims to extend continental shelf beyond 200 nm (referred to as 'outer continental shelf'), however, must be submitted to and accepted by the Commission of the Limits of the Continental Shelf (CLCS).[50]

B. The Development of Archipelagic Waters

UNCLOS finally recognized special baseline rules that apply to archipelagic States, a concept ardently pushed by Indonesia and the Philippines. Archipelagic States are permitted to draw straight baselines connecting the outermost points of the outermost islands in their archipelago, known as archipelagic baselines.[51] The waters inside the archipelagic baselines are called archipelagic waters.[52] If a continental State has sovereignty over offshore island archipelagos, the normal baselines rules apply to such archipelagos because continental States do

---

[46] Art. 77, UNCLOS, supra note 41.

[47] Art. 83, UNCLOS, supra note 41.

[48] Art. 76(1), UNCLOS, supra note 41.

[49] Art. 76(5), UNCLOS, supra note 41.

[50] Art. 76(8), UNCLOS, supra note 41; as of October 2011, 57 countries have put in their submissions to the CLCS, and the CLCS has issued 14 recommendations, see Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, online: United Nations <http://www.un.org/depts/los/clcs_new/commission_submissions.htm>.

[51] Art. 47, UNCLOS, supra note 41.

[52] Art. 49, UNCLOS, supra note 41.

not fall within the definition of 'archipelagic States' under UNCLOS. For example, the United States must apply the normal baseline rules to the Hawaiian Islands even though they are island archipelagos because the United States itself is not an archipelagic State.

The archipelagic waters development had a huge impact on the Continental Shelf Agreement between Indonesia and Malaysia. The recognition of archipelagic waters under UNCLOS legitimised the use of straight baselines by Indonesia to enclose its outermost points of its outermost islands, which was used as the basis of the continental shelf boundary delimitation between Indonesia and Malaysia. The same could not be said about Malaysia's use of straight baselines. Malaysia does not qualify as an archipelagic State under UNCLOS. Therefore, Malaysia can only draw straight baselines under strict conditions, such as it having a coast that is deeply indented or having a fringe of islands, and provided that the baselines do not depart to an appreciable extent from the general direction of the coast.[53]

C. The Development of the EEZ Regime

Although the concept of Exclusive Fishing Zone was already recognised prior to the third Law of the Sea Convention in 1973, it was not until 1974 that the concept of the EEZ was introduced and quickly gained wide support from most of the coastal States. This regime 'overlapped' with the continental shelf regime and granted sovereign rights over the natural resources in the body of water and subsoil up to 200 nm from the shore in spite of the lack of natural prolongation of the land territory.[54] The EEZ is neither under the sovereignty of the coastal State nor part of the high seas. It is a specific legal regime, in which coastal States have rights and jurisdiction as set out in UNCLOS, and other States also have rights and freedoms as set out in UNCLOS.

Coastal States have the sovereign right to explore and exploit the natural resources of the sea and of the seabed and subsoil in their EEZ. In other words, they have the exclusive right to the fisheries and other living resources of the sea and to the oil and gas resources of the seabed and subsoil. They also have such jurisdiction as is necessary for them to exercise their sovereign rights, including limited jurisdiction over

[53] Art. 7, UNCLOS, supra note 41.
[54] Art. 56-57, UNCLOS, supra note 41.

marine scientific research and protection and preservation of the marine environment. Coastal States have no 'residual' jurisdiction in the EEZ. They only have such jurisdiction as is provided for in UNCLOS. Other States have the right to exercise high seas freedoms in the EEZ of any State, including the freedoms of navigation and over flight. With respect to jurisdiction over matters outside of economic activities, the principles of jurisdiction governing the high seas apply in the EEZ. In other words, outside of economic activities, ships in the EEZ are subject to the flag State principle (whereby they are subject to the exclusive jurisdiction of the State with whom they are registered), and the warships of any State may seize pirates in the EEZ.

Even though the EEZ and the continental shelf regimes usually apply concurrently to the same geographical area, this is not always the case, and at times they remain as two separate regimes.[55] The breadth of EEZ is fixed at 200 nm, and even though UNCLOS has established the legal limit of continental shelf at 200 nm (which coincides with the extent of EEZ), the extent of the actual or 'physical' continental shelf may be greater than 200 nm. Moreover, while a continental shelf is an 'inherent right' of a coastal State and need not be claimed, an EEZ should always be claimed. This was made expressly clear by the ICJ in its judgment on the Libya/Malta Continental Shelf case, where the ICJ stated that there can be a continental shelf without an EEZ but there cannot be an EEZ without a continental shelf.[56] The regime of the EEZ therefore overlaps with the regime of continental shelf, which gives rise to new complications when delimitating maritime boThis is especially so in the case in the north Malacca Strait. Prior to UNCLOS, the area beyond the territorial seas of Indonesia and Malaysia in the north Malacca Strait was considered to be high seas, an area in which both states could freely exploit the fishing resources. The Continental Shelf Agreement which exists between the two countries did not affect the freedom of fishing in this area, as the Agreement only concerns the exploitation of the seabed and its resources, not the water column. The introduction of the EEZ regime, however, turned this area of water as EEZ claimable by both Indonesia and Malaysia. This raised problems in the north Malacca Strait, because the Continental Shelf Agreement

[55] R. R. Churchill and A. V. Lowe, supra note 1, at 145

[56] Continental Shelf (Libyan Arab Jamahiriya/Malta) (1985) ICJ Rep. 13 [Libya/ Malta], at 33.

only covers the continental shelf, and not the body of water above it.

IV. EEZ Boundary Delimitation in the North Malacca Strait

In 1996 Malaysia unilaterally declared that it considers the continental shelf boundaries in the north Malacca Strait concluded between Indonesia and Malaysia to represent the boundary for the EEZ as well.[57] The fact remains, however, that the Continental Shelf Agreement signed in 1969 does not extend to the body of water above it; and it is unlikely that Indonesia will concede to Malaysia's claim.

A. Malaysia's Straight Baselines

Although Indonesia has accepted Malaysia's use of straight baselines which enclosed Pulau Perak and Pulau Jarak as a basis for the delimitation of the continental shelf in the north Malacca Strait, Indonesia does not recognise the use of these straight baselines to delimit the EEZ in the area. Indonesia has also objected the use of straight baselines to delimit Malaysia's territorial sea in the north Malacca Strait.[58]

As discussed in Part 3.2 above, Indonesia's use of straight baselines to enclose its archipelago has been recognised under Article 47 of UNCLOS as archipelagic baselines. It is difficult, however, to justify Malaysia's use of straight baselines that enclosed the whole body of water between its mainland coast and Pulau Perak and Pulau Jarak as its internal waters. The coast of Malaysia facing the north Malacca Strait is not deeply indented and cut into, one of the requirements to justify the use of straight baselines under UNLCOS.[59] Furthermore, although there is a fringe of islands in the immediate vicinity of the coast, Pulau Perak and Pulau Jarak are not located in the immediate vicinity of the coast, as Pulau Perak lies 56 nm from the coast while Pulau Jarak lies 25 nm

[57] Upon its ratification of UNLCOS, Malaysia declared that if the maritime area is less than 200 nm from baselines, the boundary for the EEZ shall be the same line with the boundary of continental shelf; see Malaysian Declaration Upon Ratification of the Convention of the Law of the Sea 1982, 14 October 1996, online: United Nations <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Malaysia%20Upon%20ratification>.

[58] Robert Smith, in personal communication to Jon van Dyke, 10 February 2003, cited in Mark J. Valencia, 'Validity of Malaysia's Baselines and Territorial Sea Claim in the Northern Malacca Strait', Marine Policy, vol. 27, no. 5, 2003, at 372.

[59] Art. 7, UNCLOS, supra note 41.

from the nearest fringing coastal island.[60] The ICJ in *Qatar/Bahrain* also stated that straight baselines can only be used in the strict and very limited situations as provided in Article 7 UNCLOS, and on the fact pattern before them decided to eliminate the disproportionate effect of small islands.[61] Hence, there would be little support for Malaysia's use of straight baselines in delimiting the EEZ in the north Malacca Strait.

B. Multiple Maritime Boundaries

UNCLOS establishes a legal framework for all activities in the oceans.[62] It does not, however, contain any provisions on how to decide between competing sovereignty claims over territory and features. UNCLOS assumes that it is known which State has sovereignty over land territory and off-shore features. It then sets out the maritime zones which can be claimed from such territory and / or features.

The UNCLOS provisions on the delimitation of boundaries in overlapping maritime zones in the EEZ and continental shelf are set out in Articles 74 and 83. The general principle is that boundaries are to be delimited by agreement on the basis on international law in order to reach an equitable solution.[63] This regime, however, has further developed since the conclusion of UNCLOS in 1982. In the same year that UNCLOS was concluded, the ICJ issued its decisions in the Libya/ Malta Continental Shelf Case, which stepped back a bit from its earlier judgment of the North Sea Continental Shelf cases in 1969. In the Libya/Malta decision, the ICJ explained that the equidistance principle may be applied if it leads to an equitable solution.[64] The ICJ went further in the Qatar/Bahrain decision, stating that for the delimitation of maritime zones beyond 12 nm, it would first draw the provisional

[60] Mark J. Valencia, supra note 58, p. 370.

[61] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (2001), Merits, Judgment, ICJ Rep 40 [Qatar/Bahrain] at paras 21, 179 & 214.

[62] UNCLOS sets out a legal order for the seas and oceans to facilitate international communication and promote peaceful uses of the seas and oceans, equitable and efficient utilization of their resources, conservation of their living resources and study, protection and preservation of the marine environment; see the Preamble of UNCLOS, supra note 41.

[63] See Libya/Malta, supra note 54, at 51; Eritrea v Yemen (1999) Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) at 116; Maritime Delimitation in the Black Sea (Romania v Ukraine) (2009) ICJ Rep 61, at 120.

64 Libya/Malta, supra note 56, p. 109.

equidistance line before considering whether there are circumstances that lead to an adjustment of that line.[65] More recently, in the 2009 Black Sea Case between Romania and Ukraine, the ICJ introduced a three-stage approach to maritime delimitation: (i) establish provisional equidistance line; (ii) consider whether there any factors which call for an adjustment of the equidistance line to reach an equitable result; and (iii) verify that that line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coast lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line.[66]

The ICJ has thus clarified the preferred method for delimitation of maritime zones, including the continental shelf and the EEZ. However, it is not clear what effect should be given to islands in any maritime boundary delimitation. As discussed in Part 4.1 above, international courts and tribunals have consistently held that small islands should not be given full effect in delimiting maritime boundaries against the mainland of a large State.[67] Therefore, there is an argument to be made that Pulau Perak and Pulau Jarak should not be given full effect in delimiting the EEZ boundary between Malaysia and Indonesia in the north Malacca Strait.

Negotiations to delimit the EEZ boundaries in the north Malacca Strait may lead to the establishment of a line that differs from the 1969 continental shelf boundaries. UNCLOS does not contain any provisions requiring the delimitation of a single maritime boundary for both the EEZ and the continental shelf in the case of opposing states less than 400 nm from each other. UNCLOS provides that rights with respect to the seabed and subsoil under the EEZ regime shall be exercised in a manner consistent with the continental shelf regime.[68] Despite suggesting some superiority of the continental shelf regime over that of the EEZ, this provision does nothing to resolve the difficulty of delimitation between coastal States having jurisdiction over both continental shelf and EEZ

---

[65] Qatar/Bahrain, supra note 61, p. 217.

[66] Maritime Delimitation in the Black Sea, supra note 63, p. 116.

[67] See Anglo-French Continental Shelf Arbitration (1979) 18 ILM 397, p. 251; Libya/ Malta, supra note 56, p. 129; Eritrea v Yemen, supra note 63, p. 147; Maritime Delimitation in the Black Sea, supra note 63, p. 187-188.

[68] Art. 56(3), UNCLOS, supra note 41.

in the same area.[69] Although the ICJ has been asked to delimit a single maritime boundary in the past,[70] this approach will not always be ideal or even possible.[71] Due to the different nature of the EEZ and continental shelf regimes, the relevant circumstances to be considered when reaching an equitable delimitation will vary between the regimes. While geomorphology will be relevant to continental shelf boundary delimitation, it would not affect the delimitation of the EEZ boundary;[72] on the other hand the existence of traditional fishing rights will affect the EEZ delimitation, but not continental shelf delimitation.[73]

While it is possible to have separate and distinct boundaries for the continental shelf and the EEZ, the implementation of multiple boundaries could be challenging. There are two potential options for resolving this issue. The first is to agree on separate boundaries for different purposes. The second is to agree to a provisional arrangement to jointly develop the resources in the overlapping area. The latter will be discussed in the next part of this Paper. A good example of an area in which multiple boundaries operate is with respect to the separate boundaries of the EEZ and continental shelf agreed between Australia and Indonesia. The countries had successfully concluded two continental shelf boundaries in 1971[74] and 1972,[75] which placed much of the Browse Basin under Australian jurisdiction.[76] The boundaries for the water column between the two countries were concluded in a treaty

---

[69] Stuart Kaye, 'The Use of Multiple Boundaries in Maritime Boundary Delimitation law and Practice', Australian Yearbook of International Law, vol, 19, 1998, p. 51.

[70] See Barbados v Trinidad and Tobago (2006) 45 ILM 798, p. 243.

[71] Donald R Rothwell and Tim Stephens, supra note 4, p. 408.

[72] See for example Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay Of Bengal (2012) Judgment, ITLOS Case No 16 [Bangladesh/Myanmar] at para. 322, online: ITLOS <http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.140-E.pdf>.

[73] Stuart Kaye, supra note 69, p. 57.

[74] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries, signed 18 May 1971, 974 UNTS 307 (entered into force 8 November 1973).

[75] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, signed 9 October 1972, 974 UNTS 319 (entered into force 8 November 1973),.

[76] Stuart Kaye, Australia's Maritime Boundaries, CMP, 2001, p. 53-58.

signed in 1997,[77] which provided for a water column boundary that was based on an equidistance line in all areas except between Christmas Island and Java, which substantially favoured Indonesia, and reflected the relative size of the islands.[78] Thus, there are quite substantial areas of Australian continental shelf overlapping with the Indonesian EEZ.[79] The 1977 Agreement provided that Indonesia's EEZ sovereign rights and jurisdiction are limited to the water column, and that Australia's continental shelf sovereign rights and jurisdiction are applicable to the seabed.[80] The 1977 Agreement also aims to allow both States to exercise their jurisdiction independently of the other, while up-holding the 'due regard' principle, which means that notice is required before either party undertakes any activities in the sea or seabed that could potentially interfere with the jurisdiction and/or enjoyment of the other.[81]

C. Provisional Arrangements of a Practical Nature

Until the fundamental and intractable disagreements on maritime delimitation between Indonesia and Malaysia can be resolved, UNCLOS purports to provide a temporary solution to this situation in paragraph 3 of Articles 74 and 83. It provides that if delimitation cannot be effected by agreement, the States in dispute shall make every effort to enter into provisional arrangements of a practical nature, and not jeopardize or hamper the reaching of a final agreement. Such arrangements will be without prejudice to the final delimitation.[82] This means that nothing in

[77] Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, signed 14 March 1997, ATNIF 4 [Treaty Between Australia and Indonesia].

[78] Stuart Kaye, 'Joint Development in the Timor Sea', Paper presented at the CIL Conference on Joint Development and the South China Sea, 16-17 June 2011, (unpublished).

[79] See generally, Stuart Kaye, "Australia and Indonesia Tie the Maritime Knot", Australian Law Journal, vol. 71, no.12, 1997.

[80] Art. 7, Treaty Between Australia and Indonesia, supra note 77.

[81] For example, the construction of any installation or structure that is not an artificial island must be preceded by 'due notice'; Art. 7(e), Treaty Between Australia and Indonesia, supra note 77.

[82] Art. 74(3) and 83 (3), UNCLOS, supra note 41; Guyana/Suriname Arbitration, UN Law of the Sea Annex VII Arb Trib, award on 17 September 2007, at para. 461, online: Permanent Court of Arbitration <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>; see also Rainer Lagoni, 'Interim Measures Pending Mari-

the arrangement can be deemed as a renunciation of the claim of any party to sovereignty over the features or sovereign rights in the surrounding waters. Also, the provisional arrangement does not constitute an explicit or implicit acknowledgement of the legitimacy of the claim of any other party.[83]

Provisional arrangements under UNCLOS share a common goal with the provisional measures powers of the Security Council, this being to prevent an aggravation of the situation in dispute.[84] There are two aspects to the obligation under Articles 74(3) and 83(3) of UNCLOS. First, States should make every effort to enter into provisional arrangements of a practical nature. This imposes on parties a 'duty to negotiate in good faith'[85] and to take 'a conciliatory approach to negotiations in which they would be prepared to make concessions in the pursuit of a provisional arrangement'.[86] Second, during this transitional period before there is final agreement on the boundaries, States are obliged not to jeopardize or hamper the reaching of a final agreement on delimitation. International courts and tribunals have found that any activity which represents an irreparable prejudice to the final delimitation agreement is a breach of this obligation.[87]

The dispute in the north Malacca Strait has always been a sensitive issue for both Indonesia and Malaysia, especially with regard to fishing activities in these waters. The capture and treatment of fishermen who are nationals of one country by the authorities of the other has created many issues and been the source of much tension between the two States. While Indonesia and Malaysia are at the negotiation table prior

---

time Delimitation Agreements', The American Journal of International Law, vol. 78, no. 2, 1984, p. 358.

[83] See for example art. 2(3), Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, signed 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991) [Timor Gap Treaty]; generally, see also Gao Zhiguo, 'Legal Aspects of Joint Development in International Law,' in M. Kusuma-Atmadja, T. A. Mensah, B. H. Oxman, eds, Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21, Law of the Sea Institute, 1997, p. 639.

84 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 40, online: <http://www.unhcr.org/refworld/docid/3ae6b3930.html>.

[85] Guyana/Suriname Arbitration, supra note 82.

[86] Guyana/Suriname Arbitration, supra note 82, p. 471-478.

[87] Guyana/Suriname Arbitration, supra note 82, p. 480.

to a final settlement, the States are both under an obligation pursuant to UNCLOS to reach a provisional arrangement to prevent any tensions that can aggravate the situation further.

Articles 74(3) and 83(3) do not mandate the type of provisional arrangements States can enter into, but leave it to the discretion of the States concerned.[88] Provisional arrangements can include a wide variety of arrangements such as mutually agreed moratoriums on all activities in overlapping areas,[89] joint development or cooperation on fisheries,[90] joint development of hydrocarbon resources,[91] agreements on environmental cooperation[92] and agreements on allocation of criminal and civil jurisdiction.[93] The term 'arrangements' implies that the arrangement can include both informal documents such as Notes Verbale, Exchange of Notes, Agreed Minutes, or Memorandum of Understanding (MoU); as well as more formal agreements, such as treaties.[94]

---

[88] Natalie Klein, "Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes", The International Journal of Marine and Coastal Law, vol. 21, no. 4, 2006, p. 444; see also Sun Pyo Kim, Maritime Delimitation and Interim Arrangements in North East Asia, Martinus Nijhoff Publishers, 2004, p. 94.

[89] Art. 3, Maritime Delimitation Treaty between Jamaica and the Republic of Colombia, signed 12 November 1993, (entered into force 14 March 1994), online: UN <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDF_FILES/TREATIES/JAM-COL1993MD.PDF>.

[90] Agreement on Fisheries between the Republic of Korea and the People's Republic of China, signed 3 August 2000 (entered into force 30 June 2001), reprinted in Sun Pyo Kim, supra note 88, p. 347.

[91] Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources in the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, signed 21 February 1979 (entered into force 24 October 1979), reprinted in David M. Ong, 'Thailand/Malaysia: The Joint Development Agreement 1990", International Journal of Marine and Coastal Law, vol. 6, no. 1, 1990, p. 61.

[92] Art. 5, Agreement between the Government of Jamaica and the Government of the Republic of Cuba on the Delimitation of the Maritime Boundary Between the Two States, signed 18 February 1994, reprinted in 34 Law of the Sea Bulletin, Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, p. 64.

[93] Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority, 30 May 1990.

[94] Sun Pyo Kim, supra note 88, p. 47. Kim notes that 'some States may prefer MOUs to formal agreements for provisional arrangements because these have some advan-

In compliance with their obligation under UNCLOS, Indonesia and Malaysia signed a MoU early in 2012 on the treatment of fishermen by each State's agency.[95] The MoU provides guidance for agreed activities in dealing with fisheries issues between the neighbouring States and to ensure the wellbeing of the fishermen of each of the State Parties. In the MoU, each State agrees to treat the fishermen of the other State in accordance with their fundamental human rights and that every action or manoeuvre undertaken by maritime law enforcement agencies of both States should avoid any violence and be carried out without use of force. Both States, in accordance with the characteristics of the provisional arrangements under UNCLOS, also stress that the MoU is without prejudice to the ongoing bilateral negotiations on delimitation of maritime boundaries between the two countries.

D. UNCLOS Dispute Settlement Mechanisms

If Indonesia and Malaysia fail to reach any agreement or settlement to the dispute, UNCLOS provides an alternative settlement mechanism through third parties. The dispute settlement regime in UNCLOS is arguably one of the most complex systems ever included in a global convention,[96] and was part of the 'package deal' agreed to at the start of the nine year negotiations that led to the adoption of UNCLOS in 1982.[97] Under the package deal, States agreed to accept the Convention in its entirety, with no right to make reservations, and that, as a general principle, all disputes concerning the interpretation or application of any provision in the Convention would be subject to compulsory bind-

tages in several aspects: no need to publish them as these are not treaties; no need for elaborate final clauses or the formalities surrounding treaty-making; easy amendment; and no need to be submitted for an approval of the parliament'; see also Ranier Lagoni, supra note 82.

[95] Memorandum of Understanding Between The Government of The Republic of Indonesia and the Government of Malaysia in Respect of the Common Guidelines Concerning Treatment Of Fishermen By Maritime Law Enforcement Agencies Of The Republic Of Indonesia And Malaysia, signed on 27 January 2012.

[96] On the UNCLOS dispute settlement system generally, see Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea, Cambridge University Press, 2005.

[97] Tommy T.B. Koh, 'A Constitution for the Oceans' (Statements by President Koh at the final session of the Conference at Montego Bay, 6 and 11 December 1982), reprinted in United Nations, The Law of the Sea: United Nations Convention on the Law of the Sea (1983) E.83.V.5.

ing dispute settlement.[98] In other words, once States become parties to UNCLOS, they have given their consent in advance to the system of compulsory binding dispute settlement.

The 'default' rule in UNCLOS is that if there is a dispute between two States concerning the interpretation or application of any provision in UNCLOS, it is subject to the system of compulsory binding dispute settlement contained in Section 2 of Part XV of the Convention. When States fail to resolve the dispute by following the procedures set out in Section 1 of Part XV,[99] the dispute can be unilaterally submitted at the request of one party to the dispute to a court or tribunal having jurisdiction under this section.[100] This means that if either Indonesia or Malaysia felt that negotiations would not result in any fruitful agreement, either State could invoke the compulsory dispute settlement mechanism under UNCLOS, effectively forcing the other State to appear before a court or tribunal, subject to some exceptions expounded upon below.

1. Disputes subject to compulsory binding dispute settlement

Except for the limited categories of disputes which are excluded, all other disputes between States Parties to UNCLOS on the interpretation or application of a provision in UNCLOS are subject to the compulsory binding dispute settlement system. With respect to provisions discussed in this Paper, disputes on whether a State's straight baselines along its coast are in conformity with Article 7 of UNCLOS would be subject to dispute settlement by an international court or tribunal. Disputes concerning delimitation of the EEZ can also be subject to dispute settlement by an international court or tribunal,[101] unless expressly excluded as discussed below.

2. Limitations and exceptions to compulsory binding dispute settlement

Section 3 of Part XV provides for exceptions and limitations to the

---

[98] Tommy TB Koh and S Jayakumar, 'Negotiating Process of the Third United Nations Conference on the Law of the Sea', in Myron H Nordquist, ed., United Nations Convention on the Law of the Sea 1982: A Commentary, vol 1, Martinus Nijhoff Publisher, 1985, at para. 29-134.

[99] Art. 238, UNCLOS, supra note 41.

[100] Art. 286, UNCLOS, supra note 41.

[101] Art. 74, UNCLOS, supra note 41.

system of compulsory binding dispute settlement in Section 2. Specifically, Article 297 excludes two types of disputes from the compulsory binding dispute settlement system in Section 2 of Part XV: (a) disputes with respect to discretionary decisions on fisheries in the EEZ; and (b) disputes with respect to discretionary decisions on permits for marine scientific research in the EEZ. Section 3 of Part XV also gives States the right to 'opt out' of the compulsory binding dispute settlement system in Section 2 for certain categories of disputes. Article 298 provides that States Parties have the option to formally declare to the UN Secretary-General that they do not accept the compulsory binding dispute settlement under Section 2 for the following categories of disputes: [102]

a. disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles;
b. disputes concerning military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3; and
c. disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

Several States in Asia, including China, Korea and Thailand, have exercised their right to exclude these categories of disputes from the system of compulsory binding dispute settlement in Section 2 of Part XV.[103] However, Indonesia and Malaysia have not made any declaration to exclude these disputes from the system of compulsory binding dispute settlement, notably disputes concerning the application of article 74 on the delimitation of the EEZ. Thus, either Indonesia or Malaysia could bring the other to compulsory binding dispute settlement in Section 2 of Part XV.

3. Choice of procedure for compulsory binding dispute settlement

Identifying which court or tribunal has jurisdiction to hear a dispute

[102] Art. 298 (1), UNCLOS, supra note 41.

[103] For the up-to date official texts of declarations and statements which contain optional exceptions to the applicability of Part XV, Section 2, under Article 298 of UNCLOS, see online: UN Division for Ocean Affairs and the Law of the Sea <http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm>.

depends on whether the parties in question have exercised their right to select a procedure for resolving disputes to which they are a party.[104] Under Article 287 of UNCLOS, a State is free to choose one or more of four procedures for the settlement of disputes concerning the interpretation or application of the Convention. The choices are: adjudication before the International Court of Justice (ICJ); adjudication before the International Tribunal on the Law of the Sea (ITLOS); arbitration under Annex VII of UNCLOS; or special arbitration under Annex VIII of UNCLOS. The choice of procedure may be made when signing, ratifying or acceding to UNCLOS, or at any time thereafter.[105]

If two States parties to a dispute have elected the same procedure, the dispute will be referred to that procedure. If the States parties to the dispute have not elected the same procedure, or if one of them has not made a choice of procedure, the dispute by default will be referred for arbitration under Annex VII, unless the parties agree otherwise.[106] This procedure has been invoked in the past, for example by Malaysia against Singapore in the Land Reclamation Case;[107] and more recently, by Bangladesh against both India and Myanmar with regard to UNCLOS provisions on maritime boundary delimitation.[108] Bangladesh, India, and Myanmar had not made a choice of procedure under Article 287 of UNCLOS. Therefore, the dispute between Bangladesh and India as well as the dispute between Bangladesh and Myanmar would normally have been referred for arbitration under Annex VII. However, Bangladesh and Myanmar subsequently agreed to take their dispute to ITLOS rather than to arbitration.[109] Consequently, Bangladesh's dispute

---

[104] Art. 288, UNCLOS, supra note 41.

[105] Art. 287, UNCLOS, supra note 41.

[106] Art. 287 (5), UNCLOS, supra note 41.

[107] Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore), (2003) Provisional Measures, ITLOS Case No 12, online: ITLOS <http://www.itlos.org/index.php?id=104>.

[108] On October 8, 2009, the People's Republic of Bangladesh instituted arbitral proceedings concerning the delimitation of the maritime boundary between Bangladesh and the Republic of India pursuant to Article 287 and Annex VII, Article 1 of UNCLOS. The Permanent Court of Arbitration acts as a Registry in this arbitration, online: Permanent Court of Arbitration <www.pca-cpa.org/showpage.asp?pag_id=1376>.

[109] Bangladesh/Myanmar, supra note 72. The dispute had initially been submitted to an arbitral tribunal to be constituted under Annex VII UNCLOS through a notification dated 8 October 2009, made by the People's Republic of Bangladesh to the Union

with India is currently being heard in arbitration under Annex VII; and Bangladesh's dispute with Myanmar had been settled through ITLOS by its judgment on 14 March 2012.[110]

Neither Indonesia nor Malaysia has made an election under Article 287.[111] Therefore, if the compulsory binding dispute settlement system in Section 2 of Part XV were invoked in a dispute between the two States relating to the EEZ boundaries in the north Malacca Strait, the case would automatically go to arbitration under Annex VII of UNCLOS.[112]

When resolving a dispute regarding the interpretation or application of a provision in UNCLOS, a court or tribunal is not limited in its jurisdiction to applying only the provisions of UNCLOS. Article 293 of UNCLOS provides that a court or tribunal having jurisdiction shall apply the Convention as well as other rules of international law not incompatible with the Convention.[113] Thus, in resolving disputes on maritime delimitation, for example, the court or tribunal can consider existing customary international law and precedence in previous cases of maritime delimitation. Whether the dispute is referred for adjudication or arbitration, the decision rendered by the court or tribunal with jurisdiction is final and must be complied by all the parties to the di

4. Request for provisional measures

A State party to a dispute which is referred to dispute settlement under Section 2 of Part XV may also make a request for provisional measures from ITLOS to either preserve the respective rights of the parties or to prevent serious harm to the marine environment.[114] Even if a dispute is being referred to an arbitration tribunal, a State party may

---

of Myanmar. However, on 14 December 2009, proceedings were instituted before ITLOS after both States submitted declarations to ITLOS accepting its jurisdiction to hear the case. See ITLOS, Press Release, 140, 'Proceedings Instituted in the Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal' (16 November 2009).

[110] Bangladesh/Myanmar, supra note 72.

[111] For the up-to date official texts of declarations and statements which contain the choice of procedure under Article 287 of the UNCLOS, see online: UN Division for Ocean Affairs and the Law of the Sea, supra note 103.

[112] Art. 287 (5), UNCLOS, supra note 41.

[113] See Natalie Klein, supra note 88, at 58.

[114] Art. 290 (1), UNCLOS, supra note 41.

request provisional measures from ITLOS pending the establishment of the arbitral tribunal.[115] The only prerequisite is that ITLOS must first determine that, *prima facie*, the arbitral tribunal to be constituted would have jurisdiction to hear the case.

As provided in Part C above, Indonesia and Malaysia already have a MoU that can be considered as a provisional arrangement under UNCLOS. If, however, either State feels that the existing MoU is not sufficient to protect the marine environment in the north Malacca Strait or if it does not provide protection for any other rights of either State, then the concerned party can apply for provisional measures from ITLOS. Such provisional measures will be legally binding on both parties pending the final decision of the arbitral tribunal.[116]

V. Conclusion

It is possible for Indonesia and Malaysia to reach an agreement on the EEZ boundaries in the north Malacca Strait that differs from the continental shelf boundaries. The preamble to UNCLOS affirms that matters not regulated by the Convention continue to be governed by the rules and principles of general international law. It can be argued that Articles 74 and 83 of UNCLOS on the delimitation of EEZ and continental shelf boundaries in effect incorporate the rules and principles of customary international law. This is because they provide that delimitation is to 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."

The effect of this provision is that when negotiating boundary delimitation agreements, negotiators must be aware of not only the jurisprudence of international courts and tribunals in boundary delimitation cases, but also of state practice with respect to multiple maritime boundaries. Indonesia and Malaysia can negotiate to reach a final EEZ boundary between them, or alternatively they can enter into an agreement to cooperate and establish a joint development area to share resources in the overlapping area.

Finally, given that neither Indonesia nor Malaysia have made

[115] Art. 290 (5), UNCLOS, supra note 41.
[116] Art. 290 (1), UNCLOS, supra note 41.

any declaration under Article 298, certain disputes relating to the interpretation or application of provisions of UNCLOS could be referred to the system of compulsory binding dispute settlement provided for in Section 2, Part XV of UNCLOS. For example, if Indonesia interfered with Malaysia's fishing activities in the disputed area, Malaysia may be able to invoke the dispute settlement system in Part XV by asserting that Indonesia has violated its rights under Article 56 and ask a court or tribunal to decide on the EEZ boundaries between the two countries. On the other hand, Indonesia could also invoke the dispute settlement system in Part XV by claiming that Malaysia's straight baselines along its coast are not in conformity with Article 7 of UNCLOS.

This, however, is not the preferred option for either country, and it is unlikely that we will see Indonesia or Malaysia invoking the compulsory binding dispute settlement procedure under UNCLOS in order to settle the matter. Agreement by negotiation is still the approach preferred by the two States, and the negotiation process is on-going. The important thing to do while awaiting the result of this negotiation is to prevent any conflict in the north Malacca Strait that could escalate tensions between the two neighbours. The MoU on treatment of fishermen is a good step in the right direction. However, if the negotiation process drags on, Indonesia and Malaysia should be open and ready to agree to more provisional arrangements in other areas as well, such as the sharing of resources, security and navigational issues.

Bibliography

Books

Churchill, R. R. and A. V. Lowe. The Law of the Sea. 3rd ed. Manchester University Press. 1999.

Herriman, Maxx and Raja Petra Mohamed. "A Malacca Straits EEZ Boundary: Factors for Consideration". in M. Shariff, et al, eds. Towards Sustainable Management of the Straits of Malacca. Malacca Straits Research and Development Centre. 2000.

Kaye, Stuart. Australia's Maritime Boundaries. CMP. 2001.

_____. "State Practice and Maritime Claims: Assessing the Normative Impact of the Law of the Sea Convention". in Aldo Chircop, Ted L. McDorman and Susan J. Rolston, eds. The Future of Ocean Regime-Building. Martinus Nijhoff Publishers. 2009.

Kim, Sun Pyo. Maritime Delimitation and Interim Arrangements in North East Asia. Martinus Nijhoff Publishers. 2004.

Klein, Natalie. Dispute Settlement in the UN Convention on the Law of the Sea. Cambridge

University Press. 2005.

Koh, Tommy T. B. and S. Jayakumar. "Negotiating Process of the Third United Nations Conference on the Law of the Sea". in Myron H. Nordquist, ed. United Nations Convention on the Law of the Sea 1982: A Commentary. Vol. 1. Martinus Nijhoff Publisher. 1985.

Rothwell, Donald R. and Tim Stephens. The International Law of the Sea. Hart Publishing. 2010.

United Nations. Yearbook of the International Law Commission. Vol I. 1956.

_____. Yearbook of the International Law Commission. Vol II. 1952.

Zhiguo, Gao. "Legal Aspects of Joint Development in International Law". in M. Kusuma-Atmadja, T. A. Mensah and B. H. Oxman, eds. Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21. Law of the Sea Institute. 1997.

Journal Articles

Friedman, Wolfgang. "The North Sea Continental Shelf Cases – A Critique". The American Journal of International Law. Vol. 64. No. 2. 1970.

_____. "Selden Redivjvus – Towards a Partition of the Seas?". The American Journal of International Law. Vol. 65. No. 5. 1971.

Ong, David M. "Thailand/Malaysia: The Joint Development Agreement 1990". International Journal of Marine and Coastal Law. Vol. 6. No. 1. 1990.

Kaye, Stuart. "Australia and Indonesia Tie the Maritime Knot". Australian Law Journal. Vol. 71. No. 12. 1997.

_____. "The Use of Multiple Boundaries in Maritime Boundary Delimitation Law and Practice". Australian Yearbook of International Law. Vol. 19. 1998.

Klein, Natalie. "Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes". The International Journal of Marine and Coastal Law. Vol. 21. No. 4. 2006.

Lagoni, Rainer. "Interim Measures Pending Maritime Delimitation Agreements". The American Journal of International Law. Vol. 78. No. 2. 1984.

Valencia, Mark J. "Validity of Malaysia's Baselines and Territorial Sea Claim in the Northern Malacca Strait". Marine Policy. Vol. 27. No. 5. 2003.

Conference Paper

Kaye, Stuart. "Joint Development in the Timor Sea". Paper presented at the CIL Conference on Joint Development and the South China Sea, 16-17 June 2011.

Internet References

United Nations. "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 03 June 2011". http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea.

_____. "Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982". http://www.un.org/depts/los/clcs_new/ commission_submissions.htm

Treaties

Agreement between the Government of Jamaica and the Government of the Republic of Cuba on the Delimitation of the Maritime Boundary Between the Two States (signed 18 February 1994).

Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries. 974 UNTS 307 (signed 18 May 1971, entered into force 8 November 1973).

Agreement between the Government of the Commonwealth of Australia and the

Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971. 974 UNTS 319 (signed 9 October 1972, entered into force 8 November 1973).

Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority (signed 30 May 1990).

Agreement on Fisheries between the Republic of Korea and the People's Republic of China (signed 3 August 2000, entered into force 30 June 2001).

Convention on the Continental Shelf. 499 UNTS 311 (opened for signature 29 April 1958, entered into force 10 June 1964).

Convention on the Territorial Sea and the Contiguous Zone. 15 UST 1606. 516 UNTS 205 (opened for signature 29 April 1958, entered into force 10 September 1964).

Maritime Delimitation Treaty between Jamaica and the Republic of Colombia. (signed 12 November 1993, entered into force 14 March 1994).

Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources in the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand (signed 21 February 1979, entered into force 24 October 1979).

Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Malaysia in Respect of the Common Guidelines Concerning Treatment of Fishermen by Maritime Law Enforcement Agencies of the Republic of Indonesia and Malaysia (signed on 27 January 2012).

Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia. [1991] ATS 9 (signed 11 December 1989, entered into force 9 February 1991).

Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries. ATNIF 4 (signed 14 March 1997).