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Australia-Indonesia Maritime Delimitation

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AUSTRALIA-INDONESIA MARITIME DELIMITATION

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I. Introduction

Unclear maritime boundaries may cause a variety of problems as seen in incidents which occurred in the relationship between Indonesia and Malaysia some years ago. Maritime boundary delimitations should generally be executed without expecting any land boundary completeness. Negotiation should be taking place to determine, besides dispute settlement mechanisms, fundamental conditions such as appropriate juridical foundation and available methods aimed at achieving equitable solution and/or equitable result.[1]

The first maritime boundary agreement between Australia and Indonesia was signed on 18th of May 1971 and delimited a small portion of their overlapping maritime entitlements.[2] Quoting the agreement between the government of the commonwealth of Australia and the Government of The Republic of Indonesia establishing certain seabed boundaries, it is said that this treaty was *desiring particularly to cooperate in delimiting by agreement the boundaries of certain areas of seabed in which the two countries respectively exercise sovereign rights for the exploration and exploitation of the natural resources*.

In 1972, initial continental shelf boundary was extended to the west, remaining an amount of maritime space to be delimited. To add on to that, in the year 1976 Australia's government claimed Sand Island as their property, regardless of this island being included in Indonesia's territory. This claim was a trigger to a prolonged polemic over the ownership of the island. Nonetheless, on the 14th of March 1997, Maritime boundary between Australia and Indonesia was fully established through a bilateral agreement, specifically establishing an exclusive economic zone boundary and certain seabed boundaries. It should be emphasised that agreements between both Australia and Indonesia is subject to ratification in accordance with the constitutional requirements of each country, and shall enter into force on the day on which the Instruments of Ratification are exchanged. In this case, the 1997 agreement hasn't been

[1] Marcel Hendrapati, 'Maritime Expansion and Delimitation after the Timor Gap Treaty' (2015), V Indonesia Law Review. [82]
[2] "Australia-Indonesia Maritime Boundary" (Sovereign Limits January 16, 2023) <https://sovereignlimits.com/boundaries/australia-indonesia-maritime> accessed April 12, 2023.

ratified by Indonesia, thus agreement is not a full treaty and hence its revisit is possible.[3]

This essay hence outlines as follows to explain: 1) causes of maritime boundary disputes between Australia and Indonesia; and 2) other alternative solutions in settling the maritime boundary disputes.

As a whole, this essay is based in accordance to article 15 of the United Nation Convention on the Law of the Sea about delimitation of the territorial sea between States with opposite or adjacent coasts has stated that where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitles, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith. Furthermore, other forms of legal basis of this essay are articles in relation to the delimitation of maritime boundary in UNCLOS which are article 15, 16, 50, 60 (8), 74, 75, 76, 259, and 298 as well as treaties and/or agreements between Indonesia and Australia such as Agreement between the Government of the Republic of Indonesia and the Government of the Commonwealth of Australia establishing certain seabed boundaries, signed on May 18, 1971, with ratifications exchanged on November 8, 1973; and Agreement between Indonesia and Australia concerning certain boundaries between Indonesia and Papua New Guinea, signed on February 12, 1973 with ratification exchanged on November 26, 1974.

II. Content

1.1 Territory of Australia-Indonesia which are contested and claimed

It is states authority to own its territory, there is no other power that is higher than it. According to National Geographics encyclopaedic entry, broadly explaining for purposes of international law, territory is a geographical area subject to the sovereignty, control, or jurisdiction of a state or other entity. In addition to land, territory includes adjacent waters and associated airspace.[4] In the case of maritime boundaries, there are several

[3] Arisan DIMA and others, "Renegotiating the Indonesia-Australia Maritime Boundary Agreement? – AILA" (Australian Institute of International Affairs April 24, 2018) <https://www.internationalaffairs.org.au/australianoutlook/renegotiating-the-indonesia-australia-maritime-boundary-agreement/> accessed April 11, 2023.

[4] "Territory" (National Geographic May 19, 2022) <https://education.nationalgeographic.org/resource/territory/> accessed April 20, 2023

measurements of waters that are grouped into several categories of which illustrates its purpose and functions. 0 – 12 mil from the baseline is said to be territorial sea, 12 – 24 mil from the baseline is additional zone, 24 – 200 mil from the baseline is said to be the exclusive economic zone. It should be understood that sovereignty does not exist within the exclusive economic zone, oppositely what it possesses is sovereign rights. Sovereign rights of EEZ are in the purpose of exploring, exploiting, conserving, and managing natural resource of the seabed, subsoil, and waters above it. Outside of the EEZ territory, 200mil+ from the baseline, it is categorised high seas in which part of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a state.

Australia and Indonesia have always had various number of negotiations as well as discussion concerning the establishment of permanent maritime boundary, in which Indonesia has reportedly shown that they have lost a considerably immense amount of area of the sea containing natural resources. Indonesia's issue is illustrated through Australia's and Indonesia's agreement of maritime boundary in the year 1971 and 1972. The difference in continental shelf stated on the agreement in 1971 and 1972 is immense and quite alarmingly disadvantageous for Indonesia, adding to it, the existing of Timor Trough in between Australia's coastline and the boundary with Timor Island. In this case, Australia assumes that the axis of Timor Trough is the boundaries of the continental shelves of the two countries. On the other hand, Indonesia views that there was only one continental shelf and the Timor Trough should not be taken into account as it is just a depression within the continental base. At this era, Indonesia and Australia viewed to establish a permanent maritime boundary as a form of worry of Portugal's existence in Timor Timur as well as to avoid conflict, primarily due to foreign concession areas that have been given permission by one of the parties, and because of the presence of a third country, namely Portugal. This conflict has passed for years in which both Indonesia and Australia still have not made an agreement concerning the seabed boundary to close the Timor gap, therefore the issue of overlapping maritime territorial claims arises between the two. [5]

Where there are overlapping claims, states must establish and boundary. [6] The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by an agreement on the basis of international law, as

[5] Aquiles Sarmento Varela, 'Masalah Hukum di Celah Timor Antara Timor-Leste dengan Australia Telaah Dari Aspek Perlindungan Kepentingan Hukum' (2013), Magister Ilmu Hukum Program Pascasarjana Universitas Kristen Satya Wacana.

[6] UNCLOS, supra note 2, art. 74(1)

referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution (article 74/83, paragraph 1).[7] All in all both countries wants an assurance on areas of in which they have sovereign rights: assuring their maritime areas are protected from illegal fishing, preventing environmental maritime pollution, assuring application of maritime risk management, as well as sustainable management in their natural resources.

1.2 Alternative solution in settling the maritime boundary disputes

1.2.1 Effectivity of agreements and treaty

Australia has ratified UNCLOS 1982 on 5th of October 1994 and Indonesia ratified UNCLOS 1982 in the year 1985 through "Undang-Undang No.17 Tahun 1985 tentang Pengesahan UNCLOS". This action expresses that both Australia and Indonesia have given consent to be bound by a convention and apply in good faith its provisions.[8] With this being said, execution of emplacement of boundaries must act in accordance of what has been regulated on the convention. Commonly, resolutions of delimitation issues between neighbouring states are accomplished by complying to the procedures written in UNCLOS 1982, where boundaries are to be drawn using the equidistance principle aimed for clarity in boundary delimitation rather than an equitable division in resources.

Sand Island is an area generally used as a transit point by Indonesian fisherman during sails to the southern part of Indonesia. Despite of this activity, a Memorandum of Understanding has been signed in 1974 between Indonesia and Australia where Australia claimed Sand Island as theirs in which beforehand was included in Indonesia's territory. According to officials reports, statement, and witnesses, a number of people of the Nusa Tenggara Timur population still have access to the sea around the island. In this case, based on data from the Nusa Tenggara Timur Police, from year 2004 to 2006 around three thousand Nusa Tenggara Timur fishermen were arrested while entering the area. It is also reported recently that in 2021, several fishermen were arrested and boats were sunk by Australian border police as the activities of Nusa Tenggara Timur people

[7] R.R Churchill and A.V Lowe, The Law of the Sea (Machester University Press, 1983).
[8] Definition by International Labour Organization

are considered to have violated national boundaries and caught fish in Sand Island waters.[9] However, according to the agreements made, Indonesian fisherman are supposed to be allowed to fish in the area but oil and gas extracted from the seabed are only for Australia.

The zone of Cooperation Treaty between Indonesia and Australia in the Timor Gap was signed on 11 December 1989. This treaty was between the Government of Republic of Indonesia and the Government of Australia establishing an Exclusive Economic Zone boundary and certain seabed boundaries completed at Perth on 14th of March 1997. However, as Indonesia has never ratified the Perth Treaty, hence it cannot enter into force as it stands now as it, inter alia, covers area that now belongs to Timor Leste. EEZ extends 200 miles from the baselines from which the territorial seas are measured and over which Indonesia acquire sovereign rights over all the natural resources contained therein and jurisdiction over installations, artificial islands and structures, regulation of marine scientific research and proception and conservation of the marine environment in accordance with the provision of UNCLOS 1982. According to former news, Jakarta was reportedly struggling to comply upon the Timor agreement as it affects the jurisdiction of energy reserves worth billions of dollars in the gas industry, in which will nullify the 1997 agreement demarcating the exclusive economic zones of Indonesia and Australia.[10]

Part XV UNCLOS 1982 governs the settlement of disputes in which parties are obligated to settle any disputes by peaceful means of their choosing.[11] Generally, when each party cannot reach a settlement upon such means, one party can submit the request to a court or tribunal with jurisdiction, which includes the International Tribunal on the Law of the Sea (ITLOS), the ICJ, or an arbitral tribunal. Articles 17, 74, and 83 are the only three articles which provide actual delimitation criteria, in which those articles do not, however, address the impact such as shifting coastal geography or any correspondent

[9] "Indonesia's efforts to reclaim its right over Sand Island Cluster" (Antara News October 14, 2022) <https://en.antaranews.com/news/254921/indonesias-efforts-to-reclaim-its-right-over-sand-island-cluster> accessed April 20, 2023

[10] Alan Bloyd, "Australia-Indonesia border tensions resurface" (Asia Times, March 13, 2018) <https://asiatimes.com/2018/03/australia-indonesia-border-tensions-resurface/> accessed April 20, 2023

[11] UNCLOS supra note 2 art 279 and article 282 (1)(a)(i)

change in equities. For that reason, despite of whether baselines are ambulatory or fixed under UNCLOS, states like Australia and Indonesia may build an agreement by treaty to ignore the implications of shifting coastlines, subject to the rights of third states.[12]

1.2.2 Resolution in management and/or enforcement of settling maritime boundary disputes

The equitable solution is a principle to arrange the maritime delimitation in the exclusive economic zone/continental shelf. The emergence of this principle during the third conference on the law of the sea was brought about by disagreements and debates between the group of states supporting 'the Equidistance-Special Circumstances rule' and the group of states supporting the 'Equitable principle'. As a result, that no consensus was reached between the two groups, the president of the conference had no option ice but to propose a new formula which did not refer to the two terms, 'equidistance' and 'equitable principles' with regard to the delimitation of the continental shelf and the exclusive economic zone. The formula only established the 'final aim' of maritime delimitation, which it termed the achievement of an 'equitable solution (equitable result)'. Some states do not accept 'the equidistance-special circumstances' rule because the equidistance method might produce an inequitable result in certain cases. In contrast, other states argue that this rule can guarantee 'predictability' concerning maritime delimitation.[13]

Indonesia and Australia have agreed in functioning a maritime cooperation which involves nine important contribution points that is agreed based on the Memorandum of Understanding in which the core values are development of the economy, maritime connectivity and blue economy.[14] A United Nation representative defined that Blue Economy is an economy that comprises a range of economic sectors and related policies that together determine whether the use of ocean resources is sustainable.

Settling disputes is attainable and could easily be resolved, if the parties

[12] Julia Lisztwan, 'Stability of Maritime Boundary Agreements' (2011), XXXVII The Yale Journal of International Law.

[13] Marcel Hendrapati, 'Maritime Expansion and Delimitation after The Timor Gap reaty' (2015), V Indonesia Law Review, [80].

[14] Rahmania Kamarudin, 'Kerjasama Indonesia-Australia Bidang Maritim (Maritime Cooperation) Tahun 2017-2018' (2019), Undergraduate thesis, University of Muhammadiyah Malang.

involved work and discuss upon a goal in wanting to complete and clear the incompatibility of territory. Availability of International Law Institutions exists to aid nor assist parties' desires to resolve existing disagreements. However, parties like Australia and Indonesia should take into account in which international law does not have coercive powers like national institutions. Settling boundaries in which both states would have to agree do have a general rule of thumb in which are usually performed through qualitative delimitation-is the determination of the outer limit based on existing appearance-and the quantitative delimitation in which is the determination of the outer limit using the number parameter. However, if reconciliation between states is not met there are other ways in which disputes can be settled some of which are:

1. International Tribunal for the Law of the Sea: formed according to Annex VI. Settling disputes through ITLOS are submitted through a written request or petition, in which based on the application, an inspection is processed and resolving the case is done in court. Verdict is decided upon the most votes of members of the court present, provided that the chairman's of court can vote determinant, by mentioning the reasons for the decision.
2. International Court of justice: in which a settlement is done according to the procedures of general international court
3. Arbitration or Special Arbitration Procedure arranged in annex VII and annex VII of convention
4. Conciliation according to has been arranged in annex V[15]
5. Other provisional arrangement of a practical nature: moratorium with regard to all uses of the area where claims overlap, joint licensing of a consortium to explore the area, unitisation of specific oil and gas field within the disputed area.[16]

III. Closing

Treaty on the Zone of Cooperation is an area between the Indonesian province of East Timor and Northern Australia, generally known as the Timor Gap Treaty, all in all is not a

[15] Veriena J. B Rehatta, 'Penyelesaian Sengketan Perikanan di Laut Lepas menurut Hukum Internasional' (2014), XX Jurnal Sasi, [64].
[16] United Nation (Maritime Boundary Delimitation 2020) <https://www.un.org/Depts/los/nippon/Presentation_MaritimeDelimitation.pdf> accessed April 21, 2023.

treaty on continental shelf boundary between Indonesia and Australia, but a joint development treaty applied in Timor Sea in which embraces three joint zones. However, as Indonesia has not ratified the agreement, the state has rights to not comply or be bound to its arrangements. Treaties between Indonesia and Australia has been made as a result of assuring each state: maritime areas are protected from illegal fishing, preventing environmental maritime pollution, assuring application of maritime risk management, minimising economic losses through unequal territory, as well as sustainable management in their natural resources. These triggers of disputes are those viewed by the government to have risk the states economy, security, equality and other factors in which could impact on the state as a whole as well as the citizen and their wellbeing.

Maritime boundary disputes between Australia and Indonesia have generally been settled through agreements and treaties, in which from the chapters above can be understood that those agreements are not effective. In that case other options in which can settle the maritime boundary disputes between The Common wealth of Australia and the Republic on Indonesia are through International Tribunal for the Law of Sea, International Court of Justice, Arbitration or Special Arbitration Procedure, Conciliation, and other provisional arrangement of a practical nature such as moratorium with regard to all uses of the area where claims overlap, joint licensing of a consortium to explore the area, unitisation of specific oil and gas field within the disputed area.

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