

POSSIBLE DISPUTE SETTLEMENT FOR AMBALAT DISPUTE*

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Abstract

Ambalat dispute occurs in the area of Ambalat, located off the coast of the Indonesian province of East Kalimantan and southeast of the Malaysian State of Sabah. Many accidents have occurred in this area, and some of them involving navies from both of the state. Although this dispute has called for a need of serious settlement, none of this State has taken an effort to solve this long-term dispute that has become a problem to their harmony life as a neighboring State. Diplomatic protest, navy hot pursuit, and battle of natural resource exploitation are the dispute that be on the list of the effect of this Ambalat dispute, and if this dispute will not be solved in any time soon, the future generation of both state will still inherit and cannot use the natural resources contained in Ambalat area effectively. Seeing the urgency to solve this Ambalat dispute, the author would like to analyze the possible dispute settlement of this dispute, whether it is through ITLOS as it is provided in UNCLOS, or any other peaceful means. In writing this paper, the author is using the book research method.

Intisari

Sengketa kasus Ambalat terjadi di sekitar wilayah Ambalat, terletak di lepas pantai Indonesia bagian Kalimantan Timur dan sebelah tenggara dari Sabah, Malaysia. Banyak masalah yang terjadi di wilayah ini, dan sebagian besar melibatkan angkatan laut dari kedua negara. Walaupun sengketa ambalat harus diselesaikan dengan segera, kedua belah pihak tidak melakukan tindakan untuk mengakhirinya, yang menyebabkan terganggunya harmonisasi hubungan antara kedua negara bertangga tersebut. Protes secara diplomatis, pengejaran oleh angkatan laut, eksploitasi sumber daya alam adalah contoh dampak dari sengketa kasus Ambalat ini, apabila tidak diselesaikan dengan segera, maka generasi Indonesia mendatang tidak bisa mengakses sumber daya alam yang tersedia di pulau itu secara efektif. Melihat urgensi dari sengketa ini, penulis akan menganalisis metode penyelesaian sengketa yang efektif diaplikasikan dalam kasus ini. Baik melalui ITLOS, UNCLOS, dan mekanisme damai lainnya.

Keywords: Ambalat dispute, Dispute Settlement, UNCLOS, Maritime Delimitation.

Kata Kunci: Sengketa Ambalat, Penyelesaian Sengketa, UNCLOS, Batas Maritim.

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A. History of Ambalat Case

The history of Ambalat case was influenced by the the history of Indonesian-Malaysian border from the colonialism era. when Malaysia was still colonialized by the Great Britain and Indonesia was still colonialized by the Netherland, these two colonial States made a convention over Borneo Island, which was called the 1891 Convention. This convention divided the Island into two parts the northern part belonged to The Great Britain and the southern part was the Netherlands. (Andi Arsana, 2005) This 1891 Convention is still used by Malaysia as the successor of Great Britain and Indonesia as the successor of Netherland to define their boundary, especially land boundary.

Pursuant to article 2 of 1891 Convention between Great Britain and Netherland, the Indonesia-Malaysia maritime boundary continued as a straight line along the $4^{\circ} 10'$ North after it left the eastern land boundary terminus on the eastern shore of Sebatik Island. Therefor pursuant to this provision Ambalat is clearly in the area of Indonesia. Geographically, Ambalat is an area of sea block located off the coast of Indonesian Province of East Kalimantan and Southeast of Sabah which is the area of Malaysia.

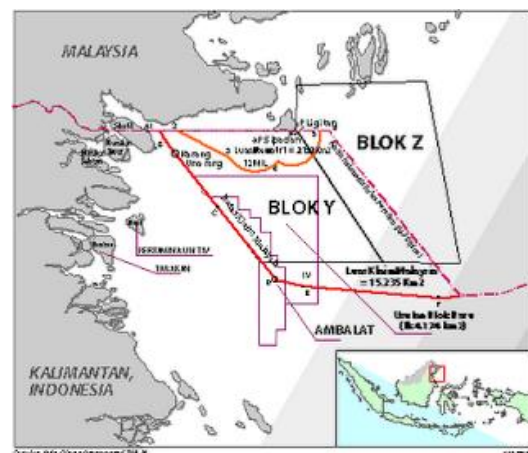
This area is believed to be one of the richest natural resources spot, containing 62,000,000 barrels (9,900,000 m³) of oil and 348 million cubic meters of natural gas. (Syarifuddin, 2009) The history of dispute between Indonesia and Malaysia over this area has begun in the 1979 when Malaysia published their map showing their territorial waters and continental shelf.

This publication of Malaysian National Map begun the territorial war between these two states, whereas Indonesia argued at that time that in *de jure* that Ambalat belonged to their territory, and they protested when Malaysia included

it in their territory in their national map. This map of Malaysia was not recognized by fellow ASEAN States, and also In addition, the 1979 Malaysian Map that they used to assert Ambalat has not been submitted to the UN Secretary General pursuant to Article 47(9) of LOSC. Hence, the 1979 Malaysia's map regarding their territorial water is not legitimate. (Schofield and Storey, 2007)

After Indonesia lost to Malaysia on their claim of Sipadan and Ligitan Island ownership in 2002, the Indonesian Government had to revised their maritime territory configuration, since they cannot use the Sipadan and Ligitan as their baseline anymore. In 2008, Indonesia redrew baselines from the eastern shore of Sebatik Island to *Karang Unarang* and three other points to the southeast. This results in the Ambalat Block no longer being entirely inside Indonesian internal waters.

Even though the ICJ made no decision on whether the features should be able to claim maritime zones, nor on maritime boundaries. But Malaysia then used these features as base points to make further claims to territorial sea, EEZ and continental shelf. (Mark and Khalid, 2013)



B. The Most Suitable Settlement for this Dispute

Ambalat dispute is different from the dispute of Sipadan and Ligitan Island, thus it requires different approach for settlement. The difference lays on the right that is being disputed between the disputing parties. In the case of Sipadan and Ligitan case, this is a dispute of ownership of an island which involves the question of full sovereignty, on the other hand, in case of Ambalat, it is merely the question of limited sovereign right which involves the right of exploration and exploitation in the sea area. (Villanueva, 2013)

Since, both Malaysia and Indonesia are the member states of the UN, and then in this case The UN Charter will be applicable to both states. Pursuant to article 2(3) UN Charter which states that:

“All member shall settle their international dispute by peaceful means in such a manner that international peace and security, and justice are not endangered”

Basically this provision demands that all member of UN settle their international dispute in a manner which does not endanger international peace and security, meaning that the means of dispute settlement shall not involve a provocation to the other disputing state or another state using of force that might end up as a war. (Shaw, 2008)

The Ambalat dispute fall under the category of marine delimitation dispute, since it involves an overlapping claim of a territory by 2 or more states, as it is regulated under UNCLOS article 83 concerning Delimitation of the Continental Shelf between State with Opposite or Adjacent Coasts. In order for UNCLOS to be applicable along with its dispute settlement mechanism, both of parties in dispute shall give their consent to be bound by that treaty

as what it has been regulated under Article 11 Vienna Convention on the Law of Treaty year 1969 which states. (Aust, 2002)

“The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”

Indonesia and Malaysia have fulfilled this requirement by ratifying the UNCLOS. Indonesia ratified UNCLOS under Law No. 17 Year 1985, (Kesumawardhani, 2008) on the other hand, Malaysia ratified on 14 October 1996 and came into force to Malaysia on 13 November 1966.

C. Maritime Delimitation Dispute

In this present case, Ambalat dispute is included as marine delimitation dispute. Marine Delimitation dispute is a dispute that arises when there is an overlapping claim of maritime zone from two or more States, and no agreement can be reach on the limit of each States maritime zone. (Alexander, 1986) Dispute of delimitation belongs to international dispute, where the parties are states and regulates by international law.

Maritime Delimitation is a complex subject, as it involves several types of issues regarding the real situations throughout the world and the delimitation process. The delimitation process itself involves several types of issues: the authority, the principal method to carry out delimitation process, and technical questions regarding the determination of the actual lines in space. (Rosenne, 2007)

Currently, maritime delimitation is ruled through agreement between parties, , meaning that if there is an overlapping claim of marine zone from 2 or more parties, these claiming states shall come together and negotiate to set the limit of their marine zone in the disputing territory. (Vukas, 2004)

The need of Marine Delimitation is crucial in determining limit of a state's marine zone. Especially considering the breadth of every marine zone that is claimable by a state (territorial sea, contiguous zone, ZEE, and Continental Shelf) depends on the distance from that state to its neighboring state. An ideal condition for the marine zone division set up in UNCLOS would be if a coastal state does not have a neighboring state located in less than 400 M from that state. (Sobar, 2006) The coastal state will then have an ideal and undisputed territorial sea, additional zone, ZEE and Continental Shelf.

However, this condition is somewhat impossible in reality. For example, Indonesia as the largest archipelagic state which has wide coastline. Its outer island is directly adjacent to not less than 10 neighboring countries that are Singapore, Thailand, Malaysia, Vietnam, East Timor, Papua New Guinea, Australia, and Palau.

In terms of Ambalat dispute, pursuant to Article 47 of UNCLOS which states that,

“An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between one to one and nine to one”

Based on this provision, Indonesia as an archipelagic States has a right to draw a straight archipelagic baseline connecting the outermost points of outermost island of Indonesian territory, which also means that Ambalat region is located in Indonesian ZEE. (Agoes, 2006) However the overlapping claim occurs in Ambalat when Malaysia won the Sipadan and Ligitan Island from Indonesia, thus Indonesia can no longer use those Islands as their baseline, which resulted in not all part of Ambalat belongs

to Indonesia, and oil concession, navy hot pursuit and sea patrol incident regularly occurs ever since.

D. Dispute Settlement Provided by UNCLOS for Delimitation State Boundary Dispute

As both Indonesia and Malaysia are contracting States of UNCLOS, thus dispute settlement mechanism contained in UNCLOS are relevant in this matter. United Nation on the Law of the Sea or UNCLOS provides sets of dispute settlement procedures in the part XV from article 279 to 296.

To abide to United Nation charter article 2 (3) which requires all member state of UN to settle their international dispute in any manner that do not threat international peace, security and justice, or in other hand this charter requires an amicable and peaceful settlement first among their member state. This article is also inline with article 279 UNCLOS concerning the obligation of member state to settle dispute by peaceful means. This article 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”.

In choosing the method of amicable settlement or peaceful settlement, the UNCLOS does not impairs the right of any member states to agree at any time to settle a dispute between them by any peaceful means of their own choice. This right of every member state is guaranteed under Article 280 UNCLOS, which states that:

“Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or

application of this Convention by any peaceful means of their own choice.”

Here settlement for marine delimitation dispute is crucial because an undetermined boundary opens a possibility of clash and dispute between state, which can lead to threat to international peace, and security, and on the other hand delimitation enables neighboring States to properly exercise their rights, freedoms, jurisdiction and sovereignty in their respective zones. From the diplomatic standpoint, “good fences make good neighbors.” (Frost, Wall, and Connery, 1979)

There are two ways in solving the undetermined marine boundary according to UNCLOS. (Atmaja, 1997) The first is determining the boundary directly by states, which involves negotiation between those disputing states. The second way is by the involvement of a third party, either it is international tribunal or third state party. The first way is the most common way out for this kind of dispute, negotiations have been the most efficient, speedy and inexpensive way of establishing maritime frontiers between States just like any other dispute settlement in International Law dispute in general.

Delimitation through diplomacy and negotiation is far more advantageous than adjudication, because there are no limits to the considerations, which States may take into account for the purpose of making sure that they apply equitable procedures. (North Sea Case, 1969) Furthermore, there is no legal rule, which guides negotiations on delimitation. (Oda, 2003) States are unrestrictedly free to choose any circumstances (political, geographical, strategic, environmental, defense, juridical, economic, etc.), irrespective of their legal relevance, which would not always be possible in international adjudication.

In fact since the entry of force of the UNCLOS, there has been at least approximately 71 maritime delimitation treaties have been negotiated by States and only six boundaries have been brought to international court.

The examination of the agreements concluded in the period under review demonstrates that the most preferred method of delimitation has been the drawing of a single maritime boundary, a solution created exclusively by State practice. (Qatar vs. Bahrain, 2001) Single maritime boundaries are not mentioned in the Convention, but they have broadly been used both by States and by the international courts.

Even though government to government diplomacy or negotiation is the most common way to solve a delimitation boundary dispute, but however this method only work if both of the disputing states have at least good relation to each other and can leave their ego behind which is rarely happened in the practice. (Rothwell and Stephens, 2010) Most of marine delimitation boundary dispute caused by the eagerness of states to fight over the natural resources contained in that area. (Oda, 1995)

If the all matter of amicable dispute settlement effort fails, Article 281(1) of UNCLOS will be applicable, which states that:

“If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure”.

Article 287 of UNCLOS has provide several procedure and international tribunal that can be chosen by member states to solve their dispute, which are: 1) ITLOS, 2) ICJ, 3) Arbitral Tribunals and 4) Special Arbitral Tribunals.

Member state can choose one of those listed international tribunal to solve their dispute in writing declaration when they are ratifying, acceding or at any time when they need. (Boyle, 2007) This third party involvement is considered as a deterrent or unilateral interpretation of the terms of the Convention that would lose the compromise achieved during negotiations. (Klein, 2004)

E. Indonesia and Malaysia Current Effort to Settle Ambalat Dispute

Indonesia and Malaysia has once discussed about their marine delimitation dispute and tried to figure out the solution. As a result, a treaty was even concluded to regulate the delimitation boundary between Indonesia and Malaysia, this treaty came into force in 1964. (Forbes, 2001)

However, the boundaries have not been fully accomplished until today. It is noted that there are three locations of maritime boundaries between Indonesia and Malaysia: Malacca Strait, South China Sea, and Celebes Sea, where Ambalat lays. (Prescot, 2004) Even though this negotiation resulted a convention that was aimed as a dispute settlement for marine delimitation boundary, it is still not useful since the fact that this dispute cannot solve the problem it was intended to solve. Due to this failure of negotiation, there are other efforts taken by Indonesian and Malaysian government to solve this dispute such as diplomatic way.

Indonesian government through the Ministry of Foreign Affairs has sent more than 36 Diplomatic notes protesting the action by Malaysian government. Not only in form of note, but also diplomatic spy war in the media though television or

newspaper. (Bernard, 2011) It was improperly conducted and condemned as Malaysia ignored 36 diplomatic notes from the government of Indonesia. It shows that Malaysia has not good faith to settle this dispute in an amicable way by diplomatic means.

However, we cannot just look from Indonesian perspective, as maybe the government of Indonesia procrastinating this dispute. A big and emergency case like this cannot be just solved by sending diplomatic notes containing protest.

F. Most Suitable Dispute Settlement for Ambalat Dispute

The first suitable dispute settlement that author would like to suggest is the establishment of Joint Development Agreement. The delimitation of the maritime boundary is not necessarily a panacea for the dispute over offshore resources (a panacea for Disputes over offshore resources). Both demands on oil reserves and fish or marine mammals must respect national boundaries. Even success the limit may still require close cooperation level if countries are opposite or adjacent (opposite or adjacent states) is rationally to exploit the cross-border resources. Therefore, necessary arrangements through joint development. (Low and Churchill, 2012)

As it is known that the joint development agreement (the joint development agreement) covered in a particular segment of the UNCLOS, which concluded after or in agreement on the maritime boundary and is not intended by Article 74 (3) and 83 (3) of UNCLOS, 1982. In other words, the agreement negotiated in recognition of the resources are located between the two countries, and the need to avoid unilateralism in international resource development and management in general. Countries will also prove that the joint development can be negotiated without

force (compelling) factors that limit disputed or overlapping maritime boundary claims (disputed boundary or overlapping maritime boundary claims). Demands of coastal states over maritime areas adjacent to it along the continental shelf region, not only involves the region delimitation issues, but also issues concerning resource exploitation of natural resource such as mineral and hydrocarbon reserves. Also, delimitation of borders is a politically sensitive process. It has a direct effect not only on the rights and interests of those countries with respect to fisheries and marine resources, but also oil, gas and hydrocarbon resources, navigation and other uses over the sea. Therefore, the question of delimitation of the area is so complex, involving a variety of interests that helped determine the delimitation. (United Nations, 2008)

Second most suitable settlement is on the basis of equity principle. Equity principle is one of the principles of maritime boundary delimitation determination. Ideas or thoughts on a fair principle are at the heart of the delimitation of the Continental Shelf, which is based on the 1945 Truman Proclamation. Dundua mentions the following:

“The notion of equity is at the heart of the delimitation of the CS and entered into the delimitation process with the 1945 proclamation of US President Truman, concerning the delimitation of the CS between the United States and adjacent States. President Truman proclaimed that: The United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another

States, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles.”

There are many cases of claims on the continental shelf in the future is decided based on the principle of a fair (equity / equitable), as decided by the ICJ. Aasen elaborate as follows: "In the Cameroon / Nigeria case it was held that there was no presumption for any one method to be used under Articles 74 (1) and 83 (1), putting, in theory, all thinkable methods of maritime delimitation on an equal footing.

Yet, in the Barbados/Trinidad and Tobago Award, it was held that the determination of the line of delimitation normally follows that of the corrective/equity approach. In the Nicaragua/ Honduras case it was held that the use of another method than that of the corrective/equity approach would require a well-founded justification (as indeed was the situation in this case). In the Guyana/Surinam Award it was held that there is presumption for the corrective/equity approach in situations with opposite as well as adjacent coasts. And finally in the Romania/Ukraine case it was held that there is presumption for the corrective/equity approach could be better unless compelling make this unfeasible in the particular case.

According to the ICJ, the rights of the coastal State with respect to the area of the continental shelf is the natural prolongation of the land territory into and under the sea exist ipso jure and ab initio based on its sovereignty over the land and the expansion of its sovereign rights for the purpose of exploring the seabed and the exploitation of resources nature.

ICJ decided that the continental shelf to be restricted in accordance with "the principles of fair, and considering all the

relevant circumstances (equitable principles and taking into account all the relevant circumstances) to rule out as much as possible from each party, all the parts of the continental shelf which is a natural extension to the mainland territory, in, and under the sea, without breaking a natural extension of the land territory of the other country (without encroaching on the natural prolongation of the land territory of the other). Based on these considerations as well, the continental shelf Ambalat can be settled.

G. Conclusion

Ambalat is a very crucial issue for both Indonesia and Malaysia. This is not a new dispute between these two neighboring

states, as it has been started even before the independence of Indonesia and Malaysia. Ambalat is rich with natural resources, mostly natural gas and crude oil.

Many incidents and territorial disputes occur in this area since 2005, especially when Malaysian navy ships shot Indonesian navy ships and refused to leave the Indonesian territory.

There are dispute settlements that are available under UNCLOS to solve this dispute, but none of them is taken by both disputing states. Only negotiation, which has failed, and diplomatic ways have been taken by the government of Indonesia and it is not enough to solve this dispute.

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