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Note from the Director

Institutional and governance issues in tackling climate change and natural resources have become more complicated than before, when there existed less information and capacity to address them. In other words, the conventional system, which relies on sovereign states, has begun to face challenges and reveal its limitations, especially in addressing environmental problems while ensuring sustainable growth.

For example, there has been an increased understanding on the importance of cities in curbing GHG emissions, which seem to represent a large portion, possibly 70 percent, of the total GHG emissions of the world. Cities are not necessarily under the full control of their central governments, and they may have the capability for developing and implementing policy measures to control emissions, based on the low emission development scenario. In a way, they could serve a complementary role to the already existing ones that are governed by central governments. In this sense, the first article of this volume well discusses how a decentralized climate change architecture can contribute both to addressing climate change as well as to pursuing a low emission development.

Furthermore, a low carbon development path requires innovation. R&D, and deployment and market developments of new green technologies are all required to realize a low emission development. However, in a situation where conventional energy sources such as coal are still available at a cheaper price, introducing new green technologies to a society can be of a challenge. A study on the Carbon Capture and Storage technology in the U.K. demonstrates such complex issue.

On the other hand, when it comes to the issue of resources, competition for sovereign claims seem to be more apparent, as they are discussed more in the context of sovereign state's resource ownership. Due to the pressure of securing necessary resources combined with developments in new technologies, states have explored more possibilities in exploiting natural resources in those

areas where the exertion of state sovereignty used to be neither apparent nor important. In this sense, it is noteworthy that both cases on the Arctic region and the maritime dispute in Southeast Asia demonstrate a new governance architecture based on soft and cooperative principles that may be a more feasible solution instead of the conventional Westphalian system.

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Sidestepping Maritime Border Delimitation: Potential Joint Development of Deep Sea Hydrocarbons in the Ambalat Block

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Abstract

Maritime boundary disputes with neighboring states, driven by potentially large hydrocarbon deposits lying in overlapping continental shelves and territorial sea borders, has become an all too familiar situation for coastal states in Southeast Asia. In the past decade, the Ambalat Block has become a major hotbed of conflict between Malaysia and Indonesia, as each country respectively stakes legal claims over the prospectively hydrocarbon rich, deep sea block. Currently, the states remain in the initial stages of negotiation with little progress being made toward delimitation, while all hydrocarbon extraction and exploration operations remain frozen. Consulting international law, particularly the UNCLOS, this study attempts to prove the legal vindication of cooperation between claimants in maritime boundary disputes. In this study, the concept of joint development is introduced as a mechanism to effectively deviate the complex issue of boundary delimitation and support the legally mandated cooperation between two claimant states. Using an established set of joint development principles, this study will evaluate the Ambalat Block case in order to assess the viability of the establishment of such a joint development scheme in the region and reveal whether boundary delimitation between Malaysia and Indonesia could be successfully sidestepped in favor of mutual cooperation.

Keywords: maritime boundary dispute, deep sea hydrocarbons, Malaysia, Indonesia, Ambalat Block

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1. Introduction

This study will focus on a maritime boundary dispute that has arisen between Malaysia and Indonesia in an area where the two claimants have overlapping continental shelves and territorial sea borders, located in the Celebes Sea known as the Ambalat Block. The Ambalat Block is rich in hydrocarbons with an estimated 62 million barrels of extractable oil and 384 million cubic meters of natural gas lying in the seabed.¹⁾ The deep-sea block is located off the coast of the island of Borneo, of which Malaysia and Indonesia share a land border. This land border has been in place since the two major colonial powers separated it in a treaty in 1891. However, the treaty failed to discern the ownership of the small outlining islands, Ligitan and Sipadan. These islands are important because they can be used as points for states to draw their baselines for both continental shelves and territorial sea borders as defined by traditional international law in the United Nations Convention on the Law of the Sea (UNCLOS). The ownership of these islands remained unclear until 2002 when the disputing states took the case to the ICJ and the court handed down a decision in favor of Malaysian sovereignty. "However, although the Court decided sovereignty over Sipadan and Ligitan to Malaysia, no maritime boundary was defined".²⁾ Thus the overlapping border in the Celebes Sea still remains in question.

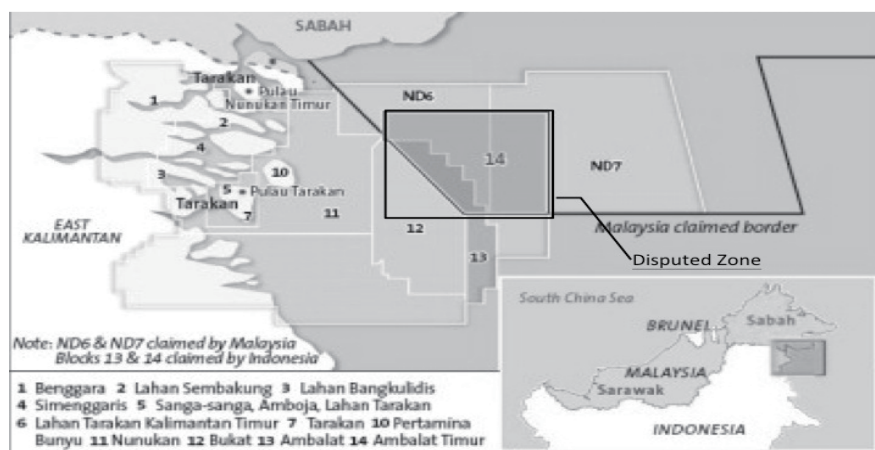
The current Ambalat Block dispute was ignited by the simultaneous authorization of exploration licenses in overlapping deep-water concession blocks to several different national and international oil companies by both countries. As shown in Fig. 1, Indonesia was the first to initially give exploration licenses in two blocks known as Ambalat Timor (13) and Ambalat Timor (14), within its claimed territory. Malaysia followed suit and issued exploration licenses in two overlapping blocks within its own claim area, ND6 and ND7. Following the exploration licensing of the Ambalat Block, there became increasing levels of military activity in the area, including the violation of the territorial sea borders of the two states. Subsequent, the two states' military officials

1) Raudin Anwar, "Joint Development Zone: An Alternative Solution in Solving the Ambalat Case Between Indonesia and Malaysia," *DIPLOMASI*, 1, no. 2 (2009), p.7

2) ResistensiaKesumawardhani, "Dispute between Indonesia – Malaysia over Ambalat Block," *YURIDIKA*, 23, no. 3 (2008), p.10

met to negotiate joint military patrols of the areas to ease military tensions and decrease border infractions. According to the Jakarta Post, the two countries have agreed to open a diplomatic discussion to settle the dispute and agreed to reactivate a joint commission comprised of work groups in several fields including politics, which had previously been adjourned.³⁾ Presently there has been no exploitation or development of any of the 15 thousand square kilometer territory, as all operations remain frozen and no border delimitation or any other agreement has yet been reached.

Figure 1. Map of conflicting claims



Source: Adamrah, 2010

Due to the strong legitimate claims of both states and the ambiguity of international law in concern to continental shelves and territorial seas, it seems unlikely that a delimitation agreement between Malaysia and Indonesia can be easily achieved through traditional bilateral negotiations. A possible alternative to the complete delimitation of the Ambalat Block at the present time could be for the two states to seek joint exploration and establish a Joint Development Zone, hereafter referred to as a JDZ. The establishment of a JDZ between Malaysia and Indonesia in the Ambalat Block has

3) Adamrah, Mustaqim. "RI, Malaysia to avoid force in Ambalat row." *The Jakarta Post*, June 23, 2010.

the potential to ease tensions in the region while allowing the two states to utilize the rich seabed hydrocarbon reserves to improve their energy security and achieve mutual economic benefits.

2. Traditional international law applied to joint development

2.1. Legal basis for joint development in conventional international law

Several scholars who have written about the legal basis of joint development vested in conventional international law; namely Ong, Schofield and Gao hold the similar view that international agreements like the UNCLOS are the primary sources of the concept of maritime joint development. According to Schofield, when deadlock in maritime boundary delimitation negotiation transpires, Article 74(3) and Article 83(3) of UNCLOS clearly dictate that states should cooperate.⁴⁾ Both articles similarly state that “Pending agreement as provided for in paragraph 1, the states concerned, in a spirit of understanding and cooperation shall make every effort to enter into provisional arrangements of a practical nature and during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation”.⁵⁾ When Gao discusses these two articles he acknowledges the wording ‘provisional arrangement of a practical nature’ as somewhat ambiguous, however he then later suggests that joint development has become the most commonly used provisional measure in such deadlock maritime boundary cases.⁶⁾ So in short, both writers seem to hold that at the very least, Articles 74(3) and 83(3) provide some basic legal justification for the establishment of a joint development

4) Clive H. Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 29, no. 2 (2007), p.289

5) Article 74 of the UNCLOS

6) Zhiguo Gao, "The legal concept and aspects of joint development in international law," *Ocean Yearbook*, 13 (1998), p.110

scheme.

However, it is not only in these two articles where joint development and the wider encompassing concept of obligatory cooperation between two states appear. Ong cites UNCLOS Article 123, which stipulates that “States bordering an enclosed or semi enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties”.⁷⁾ According to Ong this article applies to all states whose maritime interests may conflict with one another, by mandating the principle of cooperation. This principle is associated with a numerous joint development agreements cases reached between two claimant states (ex. Malaysia-Thailand, Malaysia-Vietnam, and Indonesia-Australia).⁸⁾

Lagoni says “the obligation to cooperate has been interpreted as requiring states with interests in a common resource to negotiate in good faith with a view to concluding an agreement”.⁹⁾ This obligation to cooperate introduced in Article 123 of UNCLOS and dictated in Articles 74(3) and 83(3) are further supported by the good faith principle mentioned by Lagoni, which is illustrated in Article 300 of UNCLOS. According to Article 300, “States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”.¹⁰⁾ Ong suggests this article precludes any states involved in a maritime boundary dispute from delaying delimitation without forming any provisional arrangement as dictated in Articles 74(3) and 83(3) or prolonging the negotiation process unnecessarily.¹¹⁾

7) Article 123 of the UNCLOS

8) David Ong, "1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-Operation in Common Offshore Petroleum Deposits," *The International Journal of Marine and Coastal Law*, 14, no. 2 (1999), p.782

9) Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements," *The American Journal of International Law*, 78 (1984), p.367.

10) Article 300 of the UNCLOS

11) David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?," *The American Journal of International Law*, 93, no. 4 (1999), p.784

2.2. Legal basis for joint development in customary international law

According to Gao, the principle of joint development is not only rooted in conventional contemporary international law, but also equally justified by customary international law.¹²⁾ The scholars who discuss about how joint development has become a rule of customary law focus on the precedents of joint development in international adjudication and its increased use in bilateral state practice. One of the most outspoken supporters of joint development as a rule of customary law is Onorato, who says “State practice and international legal precedent have evolved a coherent body of emerging customary international law that prevents a State interested in a common international petroleum deposit from exploiting it unilaterally over the seasonable objection of another...thus, whatever the circumstances that give rise to the claim of a common interest between States in a single petroleum reserve, the legal rules for its appointment remain consistent. Joint development is mandated”.¹³⁾

Ong believes that joint development has become a customary rule of international law largely based upon the trending number of favorable international judicial decisions. One of the main examples he gives is that of the North Sea case in the ICJ, where it was stated that joint exploration agreements are “particularly appropriate when it is a question of preserving the unity of the deposit in overlapping, but equally justifiable claims”.¹⁴⁾ Miyoshi argues that the North Sea case doesn’t provide enough foundational precedent to justify that joint development has become an emerging customary rule of law, because the previous quote doesn’t represent the view of the court, but the separate opinion of the preceding Judge Jessup.¹⁵⁾ Ong concedes to

12) ZhiguoGao, "The legal concept and aspects of joint development in international law," *Ocean Yearbook*, 13 (1998), p.109

13) William Onorato, "A Case Study in Joint Development: The Saudi Arabia-Kuwait Partitioned Neutral Zone," *Energy*, 10, no. 3 (1985), p.53

14) David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?," *The American Journal of International Law*, 93, no. 4 (1999), p.785

15) Masahiro, Miyoshi . "The Basic Concepts of Joint Development of Hydrocarbon Resources on the Continental Shelf." *International Journal of Estuarine and Coastal Law*. 3. no. 1 (1988), p.9.

Miyoshi's argument but believe that "pronouncements like these serve to aid the identification of rules created by States for such a relatively new legal concept as joint development, and thus contribute to establishing the general principles of law recognized by civilized nations".¹⁶⁾ Another ICJ case that Ong says has provided further support for the justification of joint development being established in customary international law is the 1982 Continental Shelf case between Tunisia and Libya. According to Ong, Judge Evensen suggested a system of joint exploration of hydrocarbon resources, based on the opinion that joint development represented an alternative solution to maritime boundary disputes, which was later implemented by the two states involved. Ong makes the conclusion that "these judicial pronouncements indicate that cooperation with a view toward some form of exploitation is increasingly being contemplated as a legally viable alternative to the delimitation".

According to Onorato, "it is generally agreed that State practice to date has clearly established the obligation to negotiate in good faith about the exploitation and appointment of international common petroleum deposits as a rule of customary international law".¹⁷⁾ Even if all states or in similar scenario do not act in the same way, for example establishing joint development zones in a disputed maritime boundary area; if similar practices are widespread enough, this constitutes as customary law. Ong and Gao both point to a number of such recent maritime boundary dispute cases where in the absence of delimitation, joint development agreements were reached. Gao noted over fourteen cases where states made bilateral agreements to seek exploration and development of shared maritime hydrocarbon resources.¹⁸⁾ Ong gives further support to the notion that bilateral state practice of joint development has become more wide spread, by citing the increasing number of regions throughout the world where such agreements have been established and claiming that, "their geographical diversity

16) David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?," *The American Journal of International Law*, 93, no. 4 (1999), p.787.

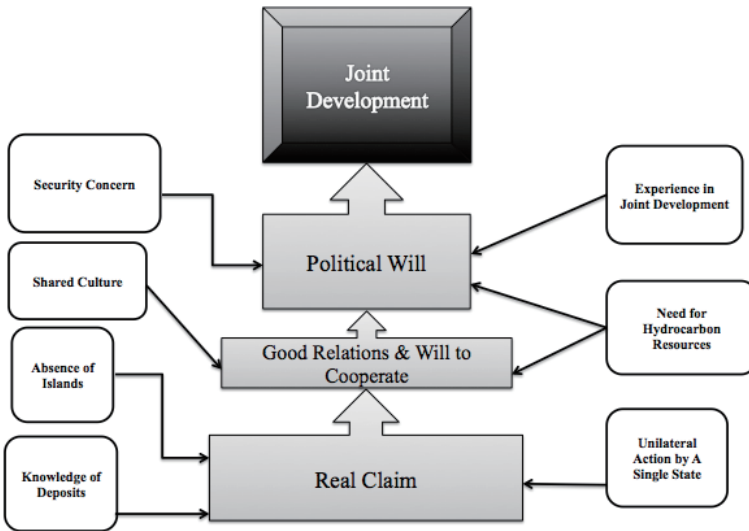
17) William Onorato, "Joint Development of Seabed Hydrocarbon Resources: An Overview of Precedents in the North Sea," *Energy*, 6, no. 11 (1981), p.1312.

18) Zhiguo Gao, "The legal concept and aspects of joint development in international law," *Ocean Yearbook*, 13 (1998), p.116.

refutes any attempt to dismiss their repeated occurrence as merely coincidental.”¹⁹⁾

3. Alternative approach: JDZ solution

Figure 2. 10 assessment points for joint development



3.1. Analytical framework

This study takes a qualitative approach to answering the question of whether the Ambalat Block is suitable for the establishment of a joint development regime. With reference to several case studies and academic literature, a modified model of common factors required for joint development has been created. In this model, the 10 factors have been organized into primary and secondary or supporting factors and placed into a sequential structure.²⁰⁾ All primary factors should be present if a joint development

19) David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?," *The American Journal of International Law*, 93, no. 4 (1999), p.788.

20) See Figure 2.

regime is to be established. The presence of the secondary factors is not critical, however the more factors present, the more likely joint development will be achieved.

The real claim is the first primary and base factor. Three factors that influence real claim are the absence of islands, unilateral action by a single state, and the degree of knowledge about the deposit. Unilateral action by a single party can be critical because it will compel the observing party, which has not already stated its claim to do so in order to ensure they would be getting their fair share of the deposit in question. The knowledge of deposits can have great influence on how large a stake each claimant will make. The presence or absence of an island in the disputed zone can heavily impact the real claim as it can bring in new aspects of international law, further complicating the dispute by making the area harder to define. Once a real claim has been established it is necessary for two states to have good relations and the will to cooperate, which is influenced and supported by shared culture and mutual needs for hydrocarbon resources by both states. In theory, if both states require hydrocarbon resources, they will be more likely to seek cooperation in order to fulfill their needs to exploit those hydrocarbons as soon as possible. The shared culture factor will also help to facilitate good relations and cooperation between the two claimants, based on the logic that similarities harbor understand and goodwill. Following the establishment of good relations and the will to cooperate is the primary factor and if not the most critical, political will. Political will is the link that connects all the other factors to the establishment of joint development. The conclusion can be made that without political will, joint development cannot be achieved. Security concerns, experience in joint development and the need for hydrocarbon resources are all factors which can provide support for the political will to create a joint development regime in a disputed maritime boundary area. In the case of the factor of experience in joint development, former precedent of JDZ creation with other states in the region may give confidence to politicians and aid in establishing political will. As far as security concerns go, if a threat existed that endangers the states national security this would provide ample political will for politicians to push forward a joint development scheme as a solution. As in the good relations and will to cooperate factor, need for hydrocarbons to meet economic demands could be a powerful incentive for providing the necessary political

will for joint development regime creation.

3.2. 10 common factors required for joint development

A number of scholars, who have written about the establishment of joint development of maritime hydrocarbon resources between two disputing states, share a popular consensus of which factors need to be present. In total there are ten common factors that are generally accepted by writers as the points that are most favorable for establishing a maritime hydrocarbon joint development regime between states. In this study the 10 factors have been organized into primary and secondary or factors and placed into a sequential structure.²¹⁾

3.2.1. Real claim

It has been proposed that if all claims to the disputed maritime areas have a real basis in international law, there will be an incentive to move along the process of joint development without litigation or delay. However if one states' claim is believed to be illegitimate there might be less inclined to pursue a settlement establishing a joint development regime. The Timor Gap case is a positive example of how a JDZ can swiftly be established if real claims are present. In this case both Indonesia and Australia had a really claim justified by International Law and further more recognized each other's legitimate claims over the area, thus a JDZ was easier to achieve.

3.2.2. Good relations and the will to cooperate

In order to establish a joint development regime between two states, generally good relations and a spirit of trust and cooperation are essential. Having good relations allows for the two states to not only approach the negotiation table but provides incentive for them to seek a solution which both could mutually benefit from. The Thailand-Malaysia case was more easily able to establish a joint development zone

21) See Figure 2.

because of the spirit of cooperation, previously existent between the two countries, as members of ASEAN.²²⁾ The ladder of this example is the Nigerian-Cameroon case, where there wasn't a willingness to cooperate and both states choose to pursue only their own self-interests. This proved to slow any solution for reaching any joint development solution scheme, with the case being taken to the ICJ for litigation.²³⁾

3.2.3. Political will

Of the 10 common factors, scholars seem to be at consensus that political will is the most critical aspect influencing joint development. Establishment of bilateral agreements that are focused towards cooperation between states in the exploitation of their common hydrocarbon deposits cannot be expected to provide concrete results without political will from all governments involved.²⁴⁾ Often politicians of the respective states' government fear risking their political futures and also internal instability can be an influencing factor on political will as well. Political will was a major factor in the Thailand-Malaysia case that was intermittently inconsistent, resulting in an 11 year delay in the full implementation of the provisions of the joint development settlement reached by the two states.²⁵⁾

3.2.4. Absence of islands

The presence of islands in a disputed maritime boundary area can adversely affect the ability to doctor the situation with the establishment of a joint development scheme, because it raises the issue of sovereignty over land. The presence of islands in the

22) Yang RazaliKassim, "ASEAN Cohesion: Making Sense of Indonesia Reactions to Bilateral Disputes," *IDSS COMMENTARIES* (2005), p.2.

23) Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?," *The International Journal of Maine and Coastal Law*, 21, no. 4 (2006), p.512.

24) Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?," *The International Journal of Maine and Coastal Law*, 21, no. 4 (2006), p.510.

25) Clive H. Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 29, no. 2 (2007), p.298.

Spratly Island case has created a complicated dilemma, allowing for states to physically occupy the islands with military forces to maintain their claims, for example, the Vietnamese and Philippines have military bases on several islands in the Spratlys.²⁶⁾

3.2.5. Knowledge of deposits

Where the assumption might be made that it's best to know the full extent of a deposit before establishing a JDZ between two states, to the contrary the less known the better. This is because when states possess a substantial knowledge of what resources are lying beneath the seabed, this could provide more incentive for them to make a more extensive claim. In the Iceland Norway Jan Mayen Ridge case there wasn't a very high hydrocarbon potential projected in the disputed area so this lessened the pressure and allowed for joint development to be more simply achieved.²⁷⁾ However, in the South China Sea many disputed areas like the Spratly islands are deadlocked due to the high projected hydrocarbon potential and sizable discoveries made in the region.

3.2.6. Unilateral action by a single state

Unilateral action for example, exploration of a deposit taken by one state in a maritime boundary dispute may at first seem contradictory to the idea of joint cooperation between two states in a maritime dispute, it actually is quite the opposite. Such action calls attention to the area in question and can provide needed motivation for the other parties to get involved, seeking to create a joint development regime in which both can equally benefit.

3.2.7. Shared culture

Sharing a common ethnicity or culture can play a role in influencing the ability of the

26) Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?," *The International Journal of Marine and Coastal Law*, 21, no. 4 (2006), p.512.

27) Elliot L. Richardson, "Jan Mayen in Perspective," *The American Society of International Law American Journal of International Law*, 82, no. 443 (1988), p.455

two states to negotiate a joint development scheme. For example in the case of Saudi Arabia-Kuwait the two countries carried out a relatively smooth and successful joint development agreement because of good relations and practical attitudes. These good relations and attitudes might be explained by pan-Arabism and the shared belief in the Islamic concept of ‘mushaa’ (equal shares in joint and undivided property).²⁸⁾

3.2.8. Need for hydrocarbon resources

The states need for new exploitable hydrocarbon deposits can be a huge influence on the establishment of joint development. It has the ability to both harbor will for states to cooperate as well as the potential to have an overriding influence on political will. In the case of Malaysia-Thailand, prior to making the joint development agreement, one of Malaysia’s major gas fields experiences a significant decrease in production. This sudden need to meet a new demand helped press forward the joint development scheme.²⁹⁾

3.2.9. Previous experience in other joint development schemes

Several scholars have suggested that states with past experience in establishing joint development schemes in the region are more likely to be motivated to enter into new schemes. For example the relative success experienced by Malaysia in the establishment of a JDZ with Thailand in 1979, provided some incentive to later establish a JDZ with Vietnam in 1992.³⁰⁾ The more similar the circumstances to past experiences, the more probable it is that a state will undertake another joint development scheme in the same region.

28) Mark J. Valencia, "Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas," *San Diego Law Review*, 23, no. 3 (1986), p.676.

29) Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?," *The International Journal of Marine and Coastal Law*, 21, no. 4 (2006), p.512.

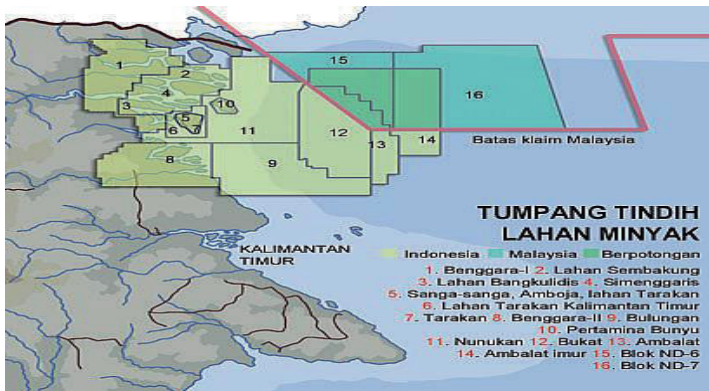
30) Clive H. Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 29, no. 2 (2007), p.298.

3.2.10. Security concerns

As has been observed in several other cases, security concerns can be a scale tilting factor when the establishment of joint development is being discussed. In the case where military aggression due to the pending boundary dispute might be high, a joint development regime could be used as a mechanism to dissolve some of the tensions, or protect states interests. One example of a JDZ being established partially out of security concerns is one created in 1978, between South Korea and Japan. For fear that North Korea would stake a claim in the seabed off of the South Sea of Korea, the South Korean government was quick to begin unilateral exploration, which in turn sparked Japan, the other claimant state, to enter into negotiations to establish a joint development regime.³¹⁾

3.3. Factors for joint development present in the Ambalat Block

Figure 3. Malaysian map of claims of two states



Source: Okafor, 2003

31) Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?," *The International Journal of Marine and Coastal Law*, 21, no. 4 (2006), p.512.

3.3.1. Real claim in the Ambalat Block

The United Nations Convention on the Law of the Sea of 1982 (UNCLOS) outlines how states may define their exclusive economic zones (EEZ), continental shelf boundaries, and from where they may draw baselines. According to Article 47 of UNCLOS, when dealing with the continental shelf boundary “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”.³²⁾ As an archipelagic state, Indonesia is entitled to draw its baseline from its outer most island, which in this case would be a low tide lying elevation known as Karang Unarang, located off of the Sebatik Islands (under both Malaysian and Indonesia sovereignty). Indonesia’s right to draw the baseline from Karang Unarang is further supported by Article 13 of UNCLOS, which states that “where a low-tide elevation is situated wholly or partially at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea”.³³⁾ Based on Article 13 and 47 of UNCLOS, the Ambalat Block falls under the legal sovereignty of Indonesia. Malaysia’s claim is largely based on the Territorial Waters and Continental Shelf Boundaries of Malaysia Map, drawn unilaterally in 1979 and further supported by its victory in the 2002 ICJ case, which awarded the state sovereignty of Sipadan and Ligitan. Malaysia draws both a straight baseline from the Sebatik Islands and an archipelagic baseline, which uses the islands of Sipadan and Ligitan as base points. Based on the map and according to Article 47 of UNCLOS, the Ambalat Block falls under the Malaysian continental shelf boundary in the Celebes Sea. Indonesia challenges the claim because Malaysia’s maritime boundaries outlined in the map were drawn unilaterally and are contrary to the existing principles of international law. Furthermore, Indonesia brings Malaysia’s legal claim into question, concerning the issue of whether Malaysia classifies as an archipelagic state. Article 46

32) Article 47 of the UNCLOS

33) Article 13 of the UNCLOS

of UNCLOS defines an archipelago as “a group of islands, including parts of islands, interconnecting waters and other natural features, which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such”.³⁴⁾ Based on this definition, the status of Malaysia as an archipelago remains unclear. According to one Indonesia scholar, “pursuant to article 46 and article 47 of the UNCLOS concerning the Archipelagic State, Malaysia is not an archipelagic state. Therefore, they are not entitled to draw straight archipelagic baseline from Sebatik, Sipadan and Ligitan islands”.³⁵⁾ However if in fact, Malaysia by definition of Article 46 of UNCLOS is an archipelagic state, it presents a real claim is equally as strong as Indonesia’s over the Ambalat Block and whatever exploitable resources may lie in its seabed.

3.3.2. Absences of islands in the Ambalat Block

The previous section discusses the drawing of baselines from Sebatik, Sipadan and Ligitan islands to justify the real claim of each claimant respectively, although these islands exist within the vicinity of the Ambalat block, they do not extend into the disputed area. Upon examination of Figure. 3, it can be seen that in sector 14 (Ambalat Timor) and sectors 15 and 16 (ND6, ND7), no island bodies are present in these areas. Thus, the logical conclusion can be made from the observation of this map, that there are no island bodies present in the Ambalat Block.

3.3.3. Knowledge of deposits in the Ambalat Block

Although there have been a number of different estimates of the amounts of hydrocarbons in the Ambalat, given the nature of the boundary dispute between the two states, no clear consensus has been made. An average estimate of the hydrocarbon deposits that lay within the Ambalat Block, is approximately 62 million barrels of extractable oil and 384 million cubic meters of natural gas. However, much higher

34) Article 46 of the UNCLOS

35) ResistensiaKesumawardhani, "Dispute between Indonesia – Malaysia over Ambalat Block," *YURIDIKA*, 23, no. 3 (2008)

estimates have been made in the range of 764,000,000 barrels of oil and 1.4 trillion cubic feet of gas.³⁶⁾ The most recent seismic survey conducted by ENI, who holds drilling rights given by Indonesia over the Ambalat Block, has reported finding a reserve capable of producing 30,000 to 40,000 barrels of oil a day.³⁷⁾ Although these estimates seem very promising, from the present data available, there doesn't seem to be enough information to draw a full conclusion about the total amount of hydrocarbons, which actually exist within the Ambalat Block.

3.3.4. Good relations and the will to cooperate in the Ambalat Block

The two states of Malaysia and Indonesia have strong economic ties and participate in bilateral cooperation in a wide span of issues, including joint military exercises. The Joint Commission for Bilateral Cooperation, a committee established to negotiate bilateral issues between the two states, meets regularly, and the respective heads of government meet annually for consultations.³⁸⁾ Both Malaysia and Indonesia have a history of cooperation, especially in international institutions such as ASEAN, D-8 and APEC. The spirit of cooperation between these two countries that can particularly be observed in their participation in ASEAN, creates a strong case for future joint undertakings, despite some diplomatic ruts.³⁹⁾ As previously mentioned, the two countries have taken the incentive to carry out joint military exercises such as the joint naval patrols. These military patrols serve as a precedent for cooperation in the Ambalat Block. Considering this and the two states previous record of willingness to cooperate in international organization, as an economic partner, and on various other bilateral issues, it can be concluded that there is a foundation of good relations between the two states.

36) OilVoice, "Ambalat ." Last modified April 1, 2013

37) EBR Staff Writer, "Eni Finds Oil Reserve In Ambalat Area Near Indonesia's Border With Malaysia." *Energy Business Review*, April 17, 2009.

38) Malaysia Insider. "KL-Jakarta tensions rekindled at Ambalat." *The Strait Times*, , sec. C10, May 30, 2009.

39) Yang RazaliKassim, "ASEAN Cohesion: Making Sense of Indonesia Reactions to Bilateral Disputes," *IDSS COMMENTARIES* (2005): p.1

3.3.5. Shared culture in the Ambalat Block

There are many cultural commonalities between both Malaysia and Indonesia who share the same religion and speak a similar language. Firstly, as Islamic states both countries are familiar with the Muslim concept of distributing an equal share in joint and undivided property, known as ‘mushaa’.⁴⁰⁾ This Muslim concept was very helpful in facilitating good relations and cooperation in the Kuwait-Saudi Arabia case and has the same potential to be equal helpful in the Ambalat Block case. Secondly, although Bahasa Indonesian and Bahasa Malaysian are not identical languages, they are as similar as British English to American English.⁴¹⁾ Thus, when the two states enter negotiations, language will not serve as a barrier or net in which dialogue can become halted or tangled in. So, in conclusion, the shared culture of Malaysia and Indonesia provides incentive for cooperation and tightens the relationship between the states invariably.

3.3.6. Need for hydrocarbon resources in the Ambalat Block

Upon review of the most recent energy profiles of both Malaysia and Indonesia, several similar patterns can be traced. The most significant observation that can be made is that the domestic consumption of both gas and oil is growing faster than the two states can increase production. Malaysian oil production has been experiencing a gradual decrease due to maturing reserves while the domestic demand increase has been consuming the majority of its production.⁴²⁾ Indonesia, in particular, has failed to keep up with growing domestic demand in recent years, being hit hard by maturing oil fields and aging infrastructure.⁴³⁾ Continued state subsidies for fuel in both countries may be one of the root causes of the recently drastic increase in domestic demand for

40) Mark J. Valencia, "Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas," *San Diego Law Review*, 23, no. 3 (1986), p.677

41) Raudin Anwar, "Joint Development Zone: An Alternative Solution in Solving the Ambalant Case Between Indonesia and Malaysia," *DIPLOMASI*, 1, no. 2 (2009), p.99

42) Energy Information Administration, "Country Analysis Briefs: Malaysia." Last modified December 14, 2011.

43) Energy Information Administration, "Country Analysis Briefs: Indonesia." Last modified January 9, 2013.

hydrocarbons as the two states economies and populations grow in tandem. In order to compensate for the rising demand, the Malaysian government has been focused on encouraging investments and developing in deep-water blocks near Sarawak and Sabah.⁴⁴⁾ Similarly, Indonesia has also been shifting away from traditionally important sources of oil and gas into new parts of the country like the blocks in the Arafura Sea and Sulawesi Sea (Celebes Sea).⁴⁵⁾ The Ambalat Block and the hydrocarbon rich area that surrounds it, has a vast potential to supply both Malaysia and Indonesia with much needed gas and oil to meet their domestic demands.

3.3.7. Political will in the Ambalat Block

One of the biggest tasks in analyzing the feasibility of creating a joint development zone in the Ambalat Block is determining whether or not there is an ample political will at present to do so. When assessing the level of political will in the Ambalat Block case, there are several points that need to be examined. Firstly, toward the beginning of the dispute, with the election of President Yudhoyono in Indonesia, there was a lot of internal political pressure for the new government to take a hardline position against Malaysia and for the new leader to show off his statesmanship and resolve in the face of the sensitive question of national sovereignty.⁴⁶⁾ Up until the peak of the conflict in 2009, continued posturing between the two states served a domestic political end, with the dispute being used by politicians especially in Indonesian as a distraction from other pressing domestic issue like fuel price hikes in March of 2005.⁴⁷⁾ Up until 2009, it seems that there was almost a greater political will to keep the conflict going to fuel a domestic political agenda, then to settle the dispute.

44) Energy Information Administration, "Country Analysis Briefs: Malaysia." Last modified December 14, 2011.

45) Energy Information Administration, "Country Analysis Briefs: Indonesia." Last modified January 9, 2013

46) Clive Schofield, and Ian Storey, "Energy security and Southeast Asia: the impact on maritime boundary and territorial disputes," *Harvard Asia Quarterly*, IX, no. 4 (2005), p.38

47) Clive Schofield, and Ian Storey, "Energy security and Southeast Asia: the impact on maritime boundary and territorial disputes," *Harvard Asia Quarterly*, IX, no. 4 (2005), p.41

Following escalated military tensions in 2009 the two states agreed that they would seek to resolve overlapping claim through peaceful means by utilizing diplomatic channels. In June of 2010 a joint committee, comprised of four different work groups, which involved respective ministries of both states was established. Meetings were held for the different work groups, which included representatives from the Defense Ministry, the Foreign Ministry and National Mapping Coordination Agency and others.⁴⁸⁾ The idea of transforming the Ambalat Block from a zone of hostility into a zone of functional cooperation, through which joint development could be achieved, was one concept that emerged throughout these meetings.

Now that the two states have managed to generate enough political will to reach the negotiation table, perhaps one of the strongest points which may provide political will for the establishment of a joint development zone is the general opposition by both states of taking the case before the ICJ. For Indonesia, the loss in the 2002 Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan is still strong in the memory of the Indonesian people and any possible repeated loss could be very damaging to the political future of any politician who tries to champion the Ambalat case. Similarly on the side of Malaysia, although victorious in the previous ICJ 2002 case, with such potentially valuable hydrocarbons deposits at risk, there is little existing government support or initiative to take the case before the ICJ. Thus, there is political will for some sort of cooperation or joint development, especially as an alternative solution to the traditional international law approach of solving a border delimitation issue by taking it before an international adjudicator.

3.3.8. Previous experience in other joint development schemes

If a joint development zone was to be established in the Ambalat Block, this would not be the first joint development scheme in which both state has participated and also not the first of such schemes to be established in the general region. Malaysia has established a JDZ in two separate cases with Thailand and Vietnam. The JDZ created between Thailand and Malaysia in the Gulf of Thailand precedes the Malaysia-
48) Adamrah, Mustaqim. "RI, Malaysia to avoid force in Ambalat row." *The Jakarta Post*, June 23, 2010

Vietnam JDZ, which was established in 1992. The Malaysia-Thailand JDZ, largely in part to the lack of political will, faced an 11-year delay. In contrast however, the Malaysia-Vietnam JDZ took a very streamline approach to joint development that was sharply focused on facilitating hydrocarbon exploration and exploitation at the earliest opportunity with minimal government intervention.⁴⁹⁾ This approach can be viewed as a reaction to the long delays experienced in the Malaysia-Thailand JDZ establishment and further serve as a testament to the knowledge and ability gained by the Malaysian government in negotiating a joint development scheme.⁵⁰⁾ If the Malaysia-Vietnam case is any indicator of a pattern of advancement in Malaysia's ability to negotiate and establish joint development schemes, then this presents higher prospects for success in the creation of JDZ in the Ambalat Block.

Indonesia also has experience with establishing a JDZ in the Timor Gap with Australia in 1989. Through hydrocarbon exploration, Australia discovered large deposits in the Timor Gap, so instead of trying to lay sole claim to the deposit, Australia along with Indonesia sought to shelve the issue of boundary delimitation in favor of a practical agreement to exploit the newly discovered resources. At that time, Indonesia lacked some of the technical knowhow, resources, and investments that Australia possessed; thus the two states pursued a single state joint development model, in which Australia lead the actual exploration and exploitation of the deposits. The technology transfer from Australia and negotiating experience that Indonesia gained from the establishment of this JDZ could be adequately applied in the case of the Ambalat Block.

3.3.9. Unilateral action by a single state in the Ambalat Block

For business reasons, Royal Dutch Shell who had been formerly been awarded concessions over the Ambalat Block by the Indonesia government gave up its

49) Clive H. Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 29, no. 2 (2007), p.288

50) Clive H. Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 29, no. 2 (2007), p.299

concessions to the Italian oil company ENI. After obtaining the concessions, ENI proceeded to begin exploration in the Ambalat Block, which yields large discoveries of oil and gas reserves. Exploration in the block continued in 2006, by the American energy company Unocal, revealing even higher estimates of hydrocarbons in the deposits.⁵¹⁾ By this time, the unilateral exploration of the Ambalat Block by Indonesia sparked the attention of Malaysia who quickly awarded concessions in the same area to former Indonesian concession holder Royal Dutch Shell.⁵²⁾ The unilateral exploration taken by Indonesia and its concessionaries and the reaction of Malaysia spurred the boundary dispute in the Ambalat Block. However, in this case unilateral action has created mutual awareness of the hydrocarbon resources in the Ambalat Block, thus generating an opportunity for equal sharing and joint development.

3.3.10. Security concerns in the Ambalat Block

Since the break out of the boundary dispute in the Ambalat Block, both states have strategically deployed a number of naval armaments to ensure the security of their sovereignty in the area. In one of the worst incidences of the time of the dispute, an Indonesian naval vessel came dangerously close to firing on a Malaysian naval vessel which had penetrated around 12 nautical miles into Indonesia's territorial waters. The seriousness of the conflict strained the bilateral relations of the two countries as the security of their national sovereignty was and still presently drawn into question. As previously mentioned in this paper, since the violation of maritime boundaries, the two states have established joint military patrols of the Ambalat Block to defuse some of the increasing tensions. However, despite these joint patrols, the threat of conflict breaking out in the Ambalat Block if one state were to attempt to unilaterally restart exploration or development of any deposits remains a persistent concern. In conclusion, ahead of a total delimitation agreement, joint development would help to ease the security concerns in the region and prevent any further military escalations.

51) Adamrah, Mustaqim. "East Ambalat row started as 'corporate dispute'." *The Jakarta Post*, March 10, 2005.

52) Adamrah, Mustaqim. "East Ambalat row started as 'corporate dispute'." *The Jakarta Post*, March 10, 2005.

4. Conclusion

This study attempted to answer the following two questions about the case of the Ambalat Block maritime boundary dispute: In the case of a maritime boundary dispute involving continental shelves and/or territorial seas, where border delimitation cannot be reached, does international law dictate the joint development of seabed hydrocarbon resources? Secondly, does the case of the Ambalat block meet all of the preconditions needed to establish a joint development zone? According to the various pieces of literature reviewed in the course of this study, it can be concluded that a legal basis for joint development does exist in international law. This legal basis is justified in both conventional international law (the articles of UNCLOS) and customary international law (precedent in international adjudication, increased bilateral state practice). Along with proving a legal basis for joint development in maritime boundary disputes, this study also developed 10 preconditions for joint development, based on previous research in other boundary dispute cases. After applying these preconditions to the Ambalat Block case, the findings suggest that the right environment exists for establishment of a JDZ in the Ambalat Block. In conclusion, this study reveals the potential of joint development to serve as a viable short-term solution to the maritime boundary dispute in the Ambalat Block between Malaysia and Indonesia.

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