Background

Cambodia – Thailand dispute is an example of how a longstanding unresolved boundary dispute erupts into an open, deadly armed conflict between the two neighboring countries. Other example of boundary dispute is the overlapping claim between Indonesia and Malaysia in the Malacca Straits and Sulawesi Sea. It is a longstanding issue between the two countries, the remaining unresolved maritime boundaries after they signed the Continental Shelves delimitations in the South China Sea and the Straits of Malacca in 1969 and the Territorial Sea boundary in the Straits of Malacca in 1970. Fortunately both Indonesia and Malaysia could restrain themselves so that the diplomatic tension between them did not set off an armed conflict such as in Cambodia – Thailand case.

Boundary problems, especially maritime boundary, are lingering in Southeast Asia. It is a potential flashpoint that has to be managed carefully. It is unfortunate to note that 9 out of 10 ASEAN member countries have un-finished maritime boundary disputes among themselves as well as with their non-ASEAN countries neighbors. Each of those countries has to settle its overlapping claim of maritime zones. The only ASEAN country that has no maritime boundary problem is Laos, simply because it is a landlocked country.

All of ASEAN countries until now are successful in keeping the maritime boundary disputes low-profile, that they do not explode into an open armed conflict. Even in the most sensitive and delicate issue of South China Sea disputes the fellow ASEAN countries which happened to be the claimant states, and the non ASEAN claimant states managed to exercise self restraint. It does not mean, however, that they are able to solve the disputes. In fact, maritime boundary disputes in Southeast Asia are still far from being solved.

Maritime boundary is a delicate and sensitive matter. In the case of territorial sea, it is about territorial sovereignty, a matter of basic existence of a country. For other maritime zones, it is about sovereign rights over natural resources, including oil and natural gas. Securing maritime boundary means attaining natural resources. Moreover, safety and security could also be at stake for countries that need to secure their sealanes passage. Domestically, pride of a nation sometimes also comes into sight, which makes maritime boundary negotiation even more complicated.

Maritime boundary dispute among ASEAN member countries is a common problem for majority of ASEAN member countries. It is a bilateral dispute in nature, but once it breaks out into an open conflict, ASEAN unity and solidarity is at stake. ASEAN Charter and its other basic documents dictate its member countries to resolve such dispute peacefully in order to establish a peace, secure and stable region. Even though the degree of dispute is different from one case to another, still it is a challenge for ASEAN especially in its effort to establish ASEAN Political and Security Community.

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1 Myanmar has to settle its maritime boundary with a non-ASEAN member state, Bangladesh. Its maritime boundary with fellow ASEAN member Thailand in Andaman Sea was agreed in 1982.
Basic Principles of Maritime Boundary

The United Nations Convention on the Law of the Sea that was agreed during the concluding session held in Montego Bay, Jamaica in December 1982, and entered into force on 16 November 1994, a year after the 60th ratification done by Guyana, successfully resolved and codified international law of the sea, including international laws pertaining to various segments of waters in the world. UNCLOS 1982 superseded a series of convention such as Convention on the Territorial Sea and the Contiguous Zone, and Convention on the Continental Shelf. UNCLOS 1982 settled contentious issues such as the breadth of territorial sea and the rights of states to the deep seabed that could not be established by the previous conventions. Before the UNCLOS 1982 be applied, the breadth of territorial waters claimed by states varied, ranging from three miles (as claimed by Australia, Germany, Singapore), 12 miles (as claimed by Brunei, Colombia, Indonesia, Malaysia, Vietnam), to 200 miles (as claimed by Argentina, Brazil), and special claims (as done by Maldives, the Philippines).

The UNCLOS 1982 entitles states to claim Territorial Sea up to 12 nautical miles from baseline (Article 3), up to 24 miles Contiguous Zone (Article 33), up to 200 miles Exclusive Economic Zone (Article 57) and up to 200 miles (or to the outer edge of the continental margin) Continental Shelf (Article 76). For states facing high seas, they can exercise this claim without any obstruction. UNCLOS 1982 even provides them with the entitlement to claim a continental shelf beyond 200 miles. In this regards, baseline is one of the most important factors as the starting point to measure the breadth of each maritime zone.

It is important to note that states enjoy full sovereignty in their territorial waters, and sovereign rights over natural resources located within the exclusive economic zone and the continental shelf. Within their contiguous zone, states also enjoy rights to exercise control necessary to prevent infringement of their customs, fiscal, immigration and sanitary laws and regulations.

Problem arises, however, when a state’s claim over a maritime zone overlaps with other state’s claim. This state may not be able to exercise its claim of a maritime zone into its maximum breadth if such claim encroaches other state’s rights. In this regards, UNCLOS 1982 dictates states with overlapping claim to negotiate the boundary of their claims. Article 15 UNCLOS 1982 clearly stipulates the need for such negotiation where the coast of two states is opposite or adjacent to each other, because neither of the two states is entitled to extend its territorial sea beyond the median line. Articles 74 and 83 UNCLOS 1982 also stipulate the need for two countries with opposite or adjacent coast to negotiate the delimitation of their exclusive economic zone and continental shelf respectively.

Article 15, 74 and 83 UNCLOS 1982 provide general guidelines for delimiting territorial sea, exclusive economic zone and continental shelf respectively. Firstly, the delimitation should be done by agreement. Moreover, for the territorial sea boundary as mandated by Article 15 UNCLOS, the delimitation should be based on the equidistant rule and special circumstances. Meanwhile Article 74 and 83 which are identical stipulate that the delimitation of the exclusive economic zone and the continental shelf should (1) be effected by agreement, (2) on the basis of international law as referred in Article 38 of the Statute of the International Court of Justice, and (3) to achieve an equitable solution.

UNCLOS 1982 provides basic and general rules of maritime boundary delimitation, and the application of these principles can be found among others in state practices or the decisions of the court on maritime boundary delimitation cases.
There are several major cases before the International Court of Justice to be referred to, such as the North Sea Continental Case 1969, the Tunisian-Libyan Arab Jamahiriya case 1982, and the Malta-Libya case 1985. On the equitable solution principles, for example, in those cases the Court took into account some factors such as geographic configuration of the coast and the presence of island, and rejected other factors such as local economic, security or political aspect as determining factor of an equitable solution.

Maritime Boundary Disputes in Southeast Asia

Nine Southeast Asian countries that are member of ASEAN, according to UNCLOS 1982, are entitled to claim territorial sea, contiguous zone, exclusive economic zone and continental shelf. They are Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Singapore entitles to claim territorial waters only, while Indonesia and the Philippines fulfill the requirements to be archipelagic states which are entitled to draw archipelagic baselines. Laos has no coastal line and has no entitlement to any maritime zone.

Some of the maritime zones claimed by ASEAN member countries have not been delimited yet. Those countries have to settle their differences with their fellow ASEAN member countries as well as their non ASEAN member neighbors. A brief of maritime boundary issues involving ASEAN countries are as follows:

Indonesia – Malaysia

Indonesia and Malaysia have yet to settle their maritime boundaries in the Strait of Malacca (exclusive economic zone, and territorial sea in the Southern part of the straits), South China Sea (exclusive economic zone), and Sulawesi Sea (territorial sea, exclusive economic zone and continental shelf). Tensions between them sometimes arise caused by the maritime boundary disputes, especially in the Strait of Malacca and the Sulawesi Sea (Ambalat) segments. The non existence of the exclusive economic zone boundary between the two countries in the Strait of Malacca have caused the arrest of Indonesian fishermen by Malaysia, and the counter arrest of Malaysian fishermen by Indonesia, as well as the arrest of Indonesian fisheries officers by Malaysia. The relations between the two countries were also heating up when both sides deployed their naval forces in Sulawesi Sea.

Indonesia – the Philippines

Indonesia and the Philippines have to delimit their maritime boundaries (exclusive economic zone and continental shelf) in Sulawesi Sea and the Pacific Ocean. The boundary line start from its western most point located in Sulawesi Sea, to its eastern most point located in the Pacific Ocean.

Indonesia – Singapore

After completing their maritime boundary delimitation in the middle and western segments of the Straits of Singapore, Indonesia and Singapore have to finish delimiting their maritime boundary line in the eastern segment, and around the Pedra Branca area.

\[^2\] Patricia Birnie, Delimitation of Maritime Boundaries: Emergent Legal Principles and Problems (Maritime Boundaries and Ocean Resources, p 33)

\[^3\] Three Indonesian maritime officers were arrested by Malaysian police in August 2010. See http://www.thejakartaglobe.com/home/malaysian-police-arrests-indonesian-maritime-officers-deny-shooting/391234
Indonesia – Vietnam
After around 25 years of negotiation, Indonesia and Vietnam eventually concluded their continental shelf boundary in the South China Sea in June 2003. Both countries have not come into negotiating table to discuss the exclusive economic zone, however. It is noted that sometimes Indonesian marine patrol arrested Vietnamese fishermen alleged for illegal fishing in the Indonesian waters.

Malaysia – the Philippines
Malaysia and the Philippines have to negotiate their maritime boundaries in South China Sea (territorial sea, exclusive economic zone and continental shelf boundaries of adjacent states), Sulu Sea (territorial waters), and Sulawesi Sea (territorial sea, exclusive economic zone and continental shelf boundaries). The maritime boundaries between these two countries in the South China Sea could be complicated by the overlapping claims of other states. Maritime boundary in the Sulu Sea is even more contentious because of Philippines’ claim of sovereignty over North Borneo (Sabah).

Malaysia – Brunei Darussalam
On 16 March 2009 Brunei Darussalam and Malaysia issued a Joint Statement announcing among others the signing of Exchange of Letter between the Prime Minister of Malaysia and Sultan of Brunei that ends a longstanding boundary disputes between the two states. Legally this agreement should end the maritime boundary disputes that caused tension between these two states, even reportedly they were near an armed conflict in the past. However controversy exists over this agreement, mostly caused by domestic discontent over the agreement.

Malaysia – Singapore
The unsettled maritime boundary disputes between the two countries is in the vicinity of Pedra Branca, after the International Court of Justice decided that the sovereignty of this island belongs to Singapore, and Middle Rock belongs to Malaysia. The existence of South Ledge (a low tide elevation), the third maritime feature contested by the two countries before the ICJ could make the negotiation to settle the maritime boundary even more complicated.

Cambodia – Thailand
Cambodia and Thailand have an overlapping claim offshore, a 27,000 sq km located in the Gulf of Thailand that estimated to contain 11 trillion cubic feet of natural gas and undetermined condensate oil. Cambodia asserted its continental shelf claim in 1972, which overlapped with Thailand’s continental shelf claimed in 1973. Both sides signed an MOU in 2001 to jointly develop the overlapping claim area, but this MOU was revoked by Thailand in November 2009. Thai Navy admitted that before they came into agreement in 2001, they applied strict law enforcement of its claim which sometimes created tension especially with a weak Cambodian Marine Police. The unilateral cancelation of the 2001 MOU by Thailand and the deadly armed conflict on Preah Vihear temple case may affect the maritime boundary settlement between the two countries.

South China Sea Disputes
South China Sea issue is the most contentious problem in the region. There are six claimants parties (four of them are ASEAN countries), namely Brunei Darussalam, China, Malaysia, the Philippines, Taiwan and Vietnam that claim wholly or partly of around 170

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6 http://www.investincambodia.com/oil&gas.htm
maritime features collectively called Spratly Islands, scattered in an area around 240,000 km². Most of these features are submerged banks, reefs and low tide elevations and only 36 are known to rise above high tide. The biggest of them is Itu Aba Island (1.4 km long and 400 m wide). 5 claimant states affirm their claims with their military presence, leaving Brunei the only claimant state that does not have military presence there.8

One may argue, however, that the Spratly Islands dispute is not a matter of maritime boundary delimitation dispute but a dispute over title of islands. In this regards, the International Court of Justice in its judgment on the Nicaragua v. Honduras case (see para 114 of the judgment) clearly stated that delimitation and sovereignty issues are interrelated. In the case of Spratly Islands dispute, therefore, those countries have to firstly determine over the title of the islands and subsequently delimiting the boundaries among them. Special attention must be given to the low tide elevations and other submerged features. As stated by the Court in the Qatar v. Bahrain case and reconfirmed in the Malaysia v. Singapore case, states could not acquire by appropriation over low tide elevation, and other submerge features.9

It should be noted that the Spratly Island disputes is not only a dispute over sovereignty of insignificant rocks in the middle of the ocean. More importantly it is a dispute over the sovereign rights to explore the natural resources contained in the seabed and subsoil thereof. No single claimant state recognizes other claimant state’s claim in the South China Sea. They also try to enforce their claims by deploying their military to occupy the claimed island or islands. There is an imminent potential arms conflict that makes the negotiation over this issue is becoming more and more difficult.

It must be noted that maritime boundary dispute is a unique one. It is a legal dispute which requires states to employ international laws to win their case, as shown in the ICJ judgments. In this regards, UNCLOS 1982 provides guidelines for settlement of disputes mechanism as contain in Part XV, which apply also to the maritime boundary disputes. There are options for resolving maritime boundary dispute, such as negotiation, agreement on provisional arrangement of practical nature such as joint development (pending final solution for the delimitation), or submission to a third party resolutions. Those third party resolutions could be mediation, submission to the International Court of Justice or to other court such as International Tribunal for the Law of the Sea, or resort to an ad hoc arbitration. Each of those options has its own strengths and weaknesses, and also prerequisite conditions. Agreement on provisional arrangement, for example, can only be done when both sides have a good bilateral relations, while for the mediation or arbitration there is a need for a clear agreement on the procedural aspects on how such mediation or arbitration should be carried out.

**Dispute Settlement Mechanism in ASEAN**

It is clearly the interest of ASEAN to live in a region of lasting peace, security and stability, as stipulated in its Charter and other ASEAN documents such as the Treaty of Amity and Cooperation in Southeast Asia (1976), Zone of Peace, Freedom and Neutrality Declaration (1971), and Declaration of ASEAN Concord (1976). Article 1 (1) of the Charter states the purpose of ASEAN to maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region. The Treaty of Amity and Cooperation (TAC) signed in 1976 provides a bold guidelines for ASEAN member countries to develop and strengthen good neighborliness and cooperation, prevent disputes from arising, or once they involve in

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a dispute, refrain the threat or use of force and at all times settle such disputes through peaceful negotiations.

Article 14 of the TAC provides ASEAN to solve disputes through regional processes by constituting a High Council comprises a representative at ministerial level from each of ASEAN member country. Settling the bilateral disputes through direct negotiations is always the most preferable approach. But if such negotiations fail, High Council shall recommend the parties to take other means such as good offices, mediation, inquiry, and conciliation, or the High Council itself be the one who conducts the good offices, mediation, inquiry or conciliation.

ASEAN Charter re-emphasizes direct dialogue, consultation or negotiation between the parties of a dispute as a matter of general principle. The other means to settle disputes as mention in the Charter are good offices, conciliation and mediation. These good offices, conciliation and mediation could be done by the Chairman of ASEAN or Secretary General of ASEAN. The Charter does not mention about High Council in this regard. However, the Charter specifies in Article 24 (2) that the TAC still be available to be used by member countries to resolve disputes.

Pursuant to the provisions contained in Articles 22 (2) and 25, ASEAN has established the “2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanism”, adopted in Hanoi on 8 April 2010. The ASEAN Protocol on Dispute Settlement Mechanism (DSM) is meant for the disputes concerning the application and interpretation of ASEAN Charter, however Article 2 (2) opens the possibility for other dispute to use it if the parties to such dispute mutually agree that the Protocol shall apply.

The ASEAN Protocol on DSM stipulates that the parties to the dispute may agree to settle the dispute through good offices, mediation or conciliation. If a dispute is referred to the ASEAN Coordinating Council, the Council may also direct the parties to such dispute to resolve their dispute through good offices, mediation or conciliation. The Protocol also states that parties to the dispute may mutually agree, or the Council may direct the parties, to arbitration. The award of this arbitration shall be final and binding, and be complied with by the parties.

It is worth noting that ASEAN countries have agreed to develop an ASEAN Political-Security Community (APSC) to promote peace, security and stability in the region as an important factor to establish an ASEAN Community by 2020. The APSC, together with the ASEAN Economic Community and the ASEAN Socio-Cultural Community constitute as the pillars of ASEAN Community. The APSC re-emphasizes the principles contained in the TAC, and provides detailed actions for member countries in achieving peace, security and stability of the regions.

ASEAN response to maritime boundary disputes among its member

ASEAN Charter and other documents already provide avenues for ASEAN to be a problem solver. There are mechanisms for ASEAN to help its member countries settling their disputes. Yet, there is no precedent of ASEAN functions as a conflict resolution forum. ASEAN remains silence of its member countries disputes, especially on maritime boundary disputes. The High Council that is available by the TAC since 1976 is never been activated by any single ASEAN member country either. Does the fact that nine out of ten ASEAN member countries facing the problems of maritime boundary disputes concern ASEAN?

There is a fact that ASEAN remains silence over its member countries’ maritime boundary disputes, which is bilateral in nature. There is also a fact that by being silence to its members’ disputes, ASEAN could maintain its unity and solidarity until
today. The very existence of ASEAN is guaranteed because relatively there is no quarrel, no finger pointing, and no tension during ASEAN meetings. The tendency of ASEAN is to avoid discussion on contentious issues especially the political one, but urges its member to solve disputes quietly between the parties concerned. If bilateral negotiation failed, third party resolution such as ICJ is even more preferable rather than invoking regional mechanism.

Definitely, there is a need to solve maritime boundary disputes to enhance peace, security and stability of the region. Until today, however, ASEAN practice to maintain peace, security and stability in the region does not necessarily mean for ASEAN to solve maritime boundary disputes by itself. When it comes to maritime boundary disputes, ASEAN countries have yet to benefit from the dispute settlement mechanism it developed.

It has to be mentioned that Indonesia, the biggest archipelagic state in the world, the proponent of the UNCLOS 1982, a country with the longest maritime boundary in Southeast Asia, currently the Chairman of ASEAN, somehow has to start educating fellow member of ASEAN on the importance of speeding up solving maritime boundary problems. It is worth noting the success story of Indonesian diplomacy to bring its neighbor to the negotiating table, and eventually to sign agreements on maritime boundaries in the 60s and 70s that paved the way to the recognition of Indonesia’s archipelagic state.