Discussion on the Application of Dispute Settlement Mechanism of the 1982 United Nations Convention on the Law of the Sea to the Thai-Myanmar Maritime Dispute

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Abstract—: This qualitative research study aims to examine the Thai-Myanmar maritime dispute, applying the dispute settlement mechanism of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The research methodology includes documentary research and in-depth interview. After analyzing data collected, it is found that the dispute settlement mechanism of the UNCLOS comprises voluntary and compulsory procedures. As both Thailand and Myanmar are parties to the UNCLOS and their dispute involves an area in the Andaman Sea, those procedures may be applied. The compulsory procedure may be applied with some issues, but not the territorial dispute and the boundary delimitation dispute. Therefore, there are few benefits to gain from the procedure. The voluntary procedure especially negotiation, on the other hand, should be the most appropriate method considering history of both parties.

Keywords : The United Nations Convention on the Law of the Sea, Thai-Myanmar maritime dispute, Dispute Settlement Mechanism.

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Introduction

Thailand and Myanmar have been in maritime boundary disputes over the area at about 90 kilometers from the mouth of the Pakchan River to Surin Island (Thanom. 2007, 128). The key issue that prevents the two countries from reaching an agreement on boundary delimitation is the territorial dispute over the Lam, Khan, and Khi Nok Islands.

The area of the Lam Island (Ginga Island in Myanmar) is approximately 150 rai (60,000 sq.m.), it is about 1.24 kilometers from Sin Hai Island of Thailand and 2.659 kilometers from Victoria Island of Myanmar. The area of the Khan Island is approximately 4 rai (1,600 sq.m.) and is about 347 meters from Tha Krut Island of Thailand and 434 meters from Myanmar's Victoria Island. The area of the Khi Nok Island is about 3 rai (1,200 sq.m.) and is about 775 meters from Victoria Island of Myanmar and 1.299 kilometers of Thailand's Tha Krut Island (Jaturon. 2003, 112). Geographically the three Islands are located between Ranong province of Thailand and the Tennasserim division or Tanintharyi region of Myanmar.

The dispute between the two states was first initiated in 1965 when the Myanmar authorities verbally prohibited Thai fishermen who were fishing around the Lam Island, reasoning that the Island was governed by Myanmar, and Thai fishermen were not allowed to fish there (Vasin, 1977). In 1993, Matichon Daily Newspaper reported on November 17 that the Thai Border Surveillance Operations stationed on Trakut Island found Myanmar soldiers building a Pagoda of a Myanmar style on the Lham Island (Jaturon. 2003, 112). These events led to international confrontation. Myanmar and Thailand started negotiating for maritime boundary delimitation in 1977 at Yangon. The discussion was divided into two parts. The first was delimitation of the maritime area from the mouth of Pakchan river to the Surin-Christie Islands and the second was delimitation of the maritime area from the Surin-Christie Islands to the maritime boundary trijunction between Thailand, Myanmar and India. Nevertheless, due to concern about the sovereignty over the Lham, Khan, and Khi Nok Islands, the maritime boundary line in the first area could not be delimited while the maritime boundary line in the second area was delimited by the Agreement on

the delimitation of the maritime boundary between the two countries in the Andaman Sea in 1980. (Thanom. 2007, 147).

Apart from this, there was no other formal negotiation among the two states. In December 1998, a Thai patrol boat received a report that a Thai fishing vessel was threatened by a non-nationality vessel. The event led to the meeting of the Thai-Myanmar Joint Commission in 1999. The objective of this meeting was to propose a guideline for cooperation in joint naval patrol, not maritime delimitation (Thai Cabinet Resolution on 28th September 1999).

Regarding sovereignty over the three islands, the grounds of Thailand and Myanmar are different. Myanmar refers to the British navigational map no. 3052 which stated that those three islands were in Myanmar's territory, and the 1868 Convention between the King of Siam and the Governor-General of India, which defined the Boundary on the Mainland between the Kingdom of Siam and the British Province of Tenasserim (hereinafter referred to as "the 1868 Convention") and was supportive (Vasin. 1977, 109). Thailand claims that the Royal Thai Survey Department published a map no. 4740 IV and 4640 I that included the three Islands in Thai territory. Besides, all administrative evidence since 1929 shows that Thailand registers the three islands under her sovereignty (Vasin. 1977, 110). It is to say that the two countries refer to contradictory references and the sovereignty over the three islands is still one-sidedly registered.

Considering the grounds of dispute, the sovereignty over these three islands should be discussed and determined so that the maritime boundary can be delimited. There are several methods under Article 33 of the charter of the United Nations that can be applied. The dispute settlement mechanism of the UNCLOS to which Thailand and Myanmar are parties is also applicable, but there are some issues to consider. Therefore, this article aims at exploring the application of the dispute settlement mechanism of the UNCLOS, both voluntary and compulsory procedures, to the Thai-Myanmar maritime dispute and analyzes the possibility and the advantage of each method.

The Dispute Settlement Mechanism of the 1982 United Nations Convention on the Law of the Sea

The disputes settlement under the traditional law of the sea was divided into two types. The first was between states and the second was between state and individual. For disputes between states, there were several methods to be used, such as negotiations, fact-finding and conciliation commissions, arbitration, and the International Court of Justice (hereafter referred to as "ICJ") (Churchill R. R. and Lowe A. V. 1988, 330-335). That is to say, the settlement of maritime affairs was similar to other international disputes.

Nevertheless, the dispute settlement under the law of the sea was improved by the first United Nations Conference on the Law of the Sea (hereafter referred to as "UNCLOS I") in 1958. This conference succeeded in adopting four conventions: the Convention on the Territorial Sea and the Contiguous Zone (Territorial Sea Convention), the Convention on the High Seas (High Sea Convention), the Convention on the Continental Shelf (Continental Shelf Convention), and the Convention on Fishing and Conservation on the Living Resources of the High Seas (Fishing and Conservation Convention).

Among the four Conventions, only the Fishing and Conservation Convention has its own dispute settlement mechanism, stating that any dispute concerning fishing in the high seas shall be submitted to a special commission of five members under Article 9 and the decision of the special commission shall be binding on the States concerned by virtue of Article 11.

On the other hand, the disputes concerning interpretation and application of the first three Conventions shall refer to the compulsory jurisdiction of the ICJ following Article 1 of the 1958: Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (hereafter referred to as "The Optional Protocol"). The compulsory procedure was excluded from the three Conventions because it was not widely accepted at that time and states still maintained their traditional stance on consent-based, non-compulsory methods. Therefore, many states would not ratify this protocol and it has not been effective. (Natalie K. 2005, 17).

Due to the ineffectiveness of the Optional Protocol, the issue of settlement mechanism was raised again in the third United Nations Conference on the Law of the Sea in 1982 (hereafter referred to as "UNCLOS III"). Four fundamental bases were considered for dispute settlement: equality, uniformity, exception, and integrity (Natalie K. 2005, 21). Among issues discussed in this conference, there were three to consider in our study: to which organization should jurisdiction to justify cases pertain? Should the provisions on dispute resolution be contained in the UNCLOS or in other protocols? Should consent-based or compulsory procedures be applied? In the conference, Wiliam Riphagen's proposal that allowed states to select the organization determining their cases was accepted. The provisions on dispute settlement were contained in the UNCLOS for the effectiveness of law enforcement. Both consent-based and compulsory procedures would be applied as the compulsory procedure was then recognized worldwide, and was supported by both developing and developed countries. (UN Doc. A/CONF.62/WP.9 (21 July 1975)).

Finally, the UNCLOS created a unique and innovative mechanism, reconciling the principle of free choice of means with compulsory procedures (Yoshifumi T. 2019, 494). The dispute settlement mechanism was concluded in Part XV of the UNCLOS as three sections. Section 1 contains general provisions that involve voluntary dispute settlement procedures. Section 2 provides compulsory procedures for dispute settlement, and the Section 3 sets out limitations and optional exceptions to the compulsory procedures (Yoshifumi T. 2019, 494). This is binding to all state parties without exception according to the concept of a deal package that prohibits a state party to make a reservation (The UNCLOS, Article 309).

For the voluntary procedures, states shall settle their disputes that involve the interpretation or application of the UNCLOS by peaceful means such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements (The UNCLOS, Article 279) not in danger by their own choices at any time (The UNCLOS, Article 280). Only after the voluntary procedure is exhausted, the compulsory procedure will be applied under the 3 conditions provided in Article 286 as follows:

1) State parties have agreed to seek a settlement, but none has been reached by such means and the agreement does not prohibit state parties to apply any further procedure (The UNCLOS, Article 281),

2) State parties have never agreed through a general, regional or bilateral agreement or otherwise that entails a binding decision (The UNCLOS, Article 282), and

3) State parties have exchanged views regarding its settlement (The UNCLOS, Article 283).

The compulsory procedure will not be applied to any state that has declared exception for the disputes concerning sea boundary delimitations, historic bays or titles, and military activities pursuant to Article 298. Anyhow, such state shall accept the compulsory conciliation under Annex V.

Applying the Voluntary Procedure to the Thai-Myanmar Maritime Dispute

The two countries have never applied any peaceful means for this dispute other than negotiation. Historically they only negotiated once in 1977. The negotiation scope was divided into two parts. The first was the maritime boundary dispute from the mouth of the Pakchan River to Surin-Christie Island and the second was the maritime boundary dispute from the Surin-Christie Island to the middle of the Andaman Sea. The delegates of the two countries could not reach an agreement on the first part because of their concern about sovereignty over the Lam, Khan, and Khi Nok Islands. While an agreement on maritime boundary delimitation in the second part was reached in 1980 and was ratified in 1982 (Thanom. 2007, 147).

The adjudicative method consists of two types of procedures: arbitration and judicial settlement involving the dispute determination between the states through a legal decision. Considering the past inter-state cases, Thailand and Myanmar might not favor the judicial settlement. All the cases that Thailand and Myanmar have been involved in ended up with unsatisfying results e.g. the Preah Vihear

case between Cambodia and Thailand (Case concerning the Temple of Preah Vihear, 1962, 32-33.), the dispute on the maritime boundary delimitation in the Bay of Bengal between Bangladesh (Dispute concerning Delimitation of the Maritime Boundary in the Bay of Bengal, 2011, para. 293.) and the Rohingya case between Gambia and Myanmar (Application of the Convention on the Prevention and Punishment for the Crime of Genocide, 2020, para. 86.).

For the settlement by international organizations, there are two organizations to which both Thailand and Myanmar are members. One is the United Nations (UN) at the global level. The other is the Association of Southeast Asian Nations (ASEAN) at the regional level.

The UN takes very important part in settling international disputes. Its Charter states that the UN must bring about adjustment or settlement to any international dispute or situation that might lead to a breach of the peace by peaceful means and in conformity with the principles of justice and international law (The UN Charter, Article 1 (1)). If the parties involved fail to settle any dispute that might endanger the maintenance of international peace and security (The UN Charter, Article 34), the Security Council may call upon the parties to settle their dispute by peaceful means provided in Article 33. Then it may recommend appropriate procedures or methods of adjustment (The UN Charter, Article 36 (1)) and terms of the settlement, as it may consider appropriate (The UN Charter, Article 37 (2)). In addition, the General Assembly may discuss and make recommendations for procedures or methods of adjustment, or the terms of the settlement concerning any dispute or situation brought before it (The UN Charter, Article 11, 12, and 14). Nevertheless, the maritime dispute between Thailand and Myanmar might not be considered endangerment to the maintenance of international peace and security. Therefore, it is less likely to bring this issue before the Security Council or the General Assembly of the United Nations.

The ASEAN was established to strengthen cooperation in politics, economy, and society, and to maintain peace and stability of the region (The Bangkok Declaration made in 1967 in Bangkok, Thailand) (ASEAN. 2019). According to the ASEAN charter, for any dispute the member states shall act based on peaceful settlement (The ASEAN

Charter, Article 2 para 2 (d)) and shall resolve all disputes promptly and peacefully through dialogue, consultation, and negotiation. The ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation (The ASEAN Charter, Article 22)

The Thai-Myanmar maritime dispute may be settled through the dispute settlement mechanisms under the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC), adopted by the Foreign Ministers at the 1st ASEAN Ministerial Meeting in Bangkok in 1976 and its rules of procedure (The ASEAN Charter, Article 24 (2)). TAC's objective is to promote perpetual peace, everlasting amity and co-operation in Southeast Asia for regional strength, solidarity, and closer relationship (Forty-seventh session of the General Assembly A/C.1/47/L.24 30 October 1992).

In chapter IV of the TAC, the High Contracting Parties shall prevent any dispute with determination and good faith, avoiding threat or use of force, and shall settle any dispute with amiable negotiations (The 1976 TAC, Article 13). In the case that direct negotiation does not end in any solution, the High Contracting Parties shall constitute a High Council to recognize any dispute or situation which might agitate the regional peace and harmony. The High Council shall also recommend the parties in dispute appropriate ways of settlement i.e. good offices, mediation, inquiry or conciliation (The 1976 TAC, Article 14-15). Anyhow this mechanism is applicable only when the disputing parties agree (The 1976 TAC. Article 16).

The member states of the ASEAN shall hold on to peaceful resolution in a timely manner through dialogue, consultation, and negotiation (The ASEAN Charter, Article 22) They may agree with the good offices, conciliation, or mediation arranged so that the dispute is resolved in the time limit agreed (The ASEAN Charter, Article 23 (1)), also they may request that the Chairman or the Secretary-General of ASEAN provide good offices, conciliation or mediation for them (The ASEAN Charter, Article 23 (2)) Appropriate dispute settlement mechanisms including arbitration shall be established for the disputes concerning the interpretation or application of the ASEAN Charter (The ASEAN Charter, Article 25). Nevertheless, the arbitration shall be established only by the mutual consent of the disputing parties or

by direction of the ASEAN Coordinating Council (The 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, Article 10). In case that, after the above mentioned methods, any dispute is still unsettled, it shall be referred to the ASEAN Summit for the decision (The ASEAN Charter, Article 26). So the approaches provided in the ASEAN Charter and the TAC are diplomatic ones except for the arbitration. As the jurisdiction of the arbitrator depends on the consent of the parties, it is not easy for Thailand and Myanmar to settle the dispute by institutional methods.

Finally, in terms of voluntary procedure, negotiation is still the most appropriate for the Thai-Myanmar maritime dispute. The adjudicative method is not favourable for both countries and the organizational methods are not easy to apply. Also both countries have successfully settled various disputes by negotiations e.g. the 1868 Convention, the 1931 Exchange of Notes regarding the Boundary between Burma (Kengtung) and Siam, the 1934 Exchange of Notes regarding the Boundary between Burma (Tanasserim) and Siam, and the 1940 Exchange of Notes regarding the Boundary between Burma and Thailand (Department of State. 1966). Both parties also have set up negotiation mechanisms at three levels: Joint Boundary Committee, Regional Border Committee, and Township Boundary Committee.

Applying the Compulsory Procedure to the Thai-Myanmar Maritime Dispute

According to Articles 281 to 283, in order to apply the compulsory procedure, there are three conditions mentioned above. There is a question whether the two countries have agreed on the dispute settlement method in conformity with Article 281 and 282. Historically, the two countries have no direct agreement to settle the Thai-Myanmar maritime dispute. Thus, some international instruments such as the TAC, the 1992 Convention on Biological Diversity (CBD), the 2002 ASEAN Declaration on the South China Sea (DOC), and the ASEAN Charter might be considered as an agreement under Article 281 and 282.

Anyhow, the legal status of the TAC, CBD, and DOC has been determined by the Arbitral Tribunal constituted in accordance with Annex VII of the UNCLOS (the Arbitral Tribunal) in the South China Sea case between the Philippines and China. The Arbitral Tribunal ruled that the TAC, CBD, and DOC are not regarded as the agreement in Article 281 and 282. The TAC is a legal binding agreement including several dispute settlement methods, but it does not prohibit applying other settlement methods (Award on Jurisdiction and Admissibility. 2015, para 268) pursuant to Article 17 and does not entail a binding decision. Neither does the CBD enforce the parties to apply the compulsory procedure of the UNCLOS in accordance with Article 27 of the CBD (Award on Jurisdiction and Admissibility. 2015, paras -300 301). Even though the dispute settlement of the CBD entails a legally binding decision, it does not require the parties to submit all disputes to the settlement mechanism (Award on Jurisdiction and Admissibility. 2015, paras 321-317). The DOC is an aspirational political document. Therefore, it is not regarded as an agreement provided in Article 281 and 282 (Award on Jurisdiction and Admissibility. 2015, paras 248-241).

According to the ASEAN Charter, the dispute concerning its interpretation and application will be settled under the dispute settlement mechanism, while other disputes will rely on the TAC. Therefore, the ASEAN Charter is not regarded as the agreement under Article 281 and 282. Consequently, it can be concluded that so far there is no agreement between Thailand and Myanmar that impedes the application of the compulsory procedure.

Another issue to consider is whether or not Thailand and Myanmar have exchanged their views in terms of the Thai-Myanmar maritime dispute. Though there is ambiguity in definition of "exchange of views", there are some judgements or awards from the international courts and tribunals that have interpreted the word, which should be studied.

In the Chagos Marine Protected Area Case, the arbitral tribunal ruled that the exchange of views differs from the negotiation. The objective of the exchange of views is to inform

the other about the application of the compulsory procedure while the objective of negotiation is to settle a dispute (Chagos Marine Protected Area Arbitration. 2015, para 382). The exchange of views has no strict format. States are not required to exchange their views in an official manner. The substance of resolution does not need to be mentioned in their views (Chagos Marine Protected Area Arbitration. 2015, para 385). Only the method of settlement is sufficient as this provision is a procedural matter, not substance (Chagos Marine Protected Area Arbitration. 2015, para 378). In addition, there is no time limit for the exchange of views.

In the South China Sea case, the Arbitral Tribunal ruled that the Philippines and China exchange their views. At the Scarborough Shoal in 2012, the Philippines sent China the Note Verbale calling on China to respect its sovereignty. If China would not agree, the dispute should be settled before an appropriate third-party adjudication body under international law, specifically ITLOS. China refused the Philippine Note Verbale and insisted on its sovereignty over the Scarborough Shoal. In addition, China preferred to settle the dispute only by bilateral talks (Award on Jurisdiction and Admissibility. 2015, para 342). This case reflects that the process of exchange of views is not practically and strictly interpreted. Therefore, the negotiation between Thailand and Myanmar at Yangon in 1977 may be considered as the exchange of views according to Article 283 of the UNCLOS.

To apply the compulsory procedure, there is another question as to which forum the two countries will submit their dispute. According to Article 287, there are four institutions with the compulsory procedure; the International Tribunal on the Law of the Sea (ITLOS), the International Court of Justice (ICJ), the Arbitral Tribunal Constituted under Annex VII of the UNCLOS, and the Arbitral Tribunal Constituted under Annex VIII of the UNCLOS. According to Article 287, once the disputing States select the same institution with a formal declaration, the dispute will be submitted to that institution. On the other hand, if the disputing parties select different forums or do not select any, the dispute will be submitted only to arbitration in accordance with

Annex VII (The UNCLOS, Article 287, paras 5 ,3).

The last question to consider is the scope of the compulsory procedure application; what submission can be submitted to the Arbitral Tribunal. From a comparative study with the South China Sea case, the Thai-Myanmar maritime dispute shares some issues i.e. territorial and delimitation dispute. Notably, the Philippines submitted 15 submissions which were divided into five categories; the legality of the Chinese nine-dashed line, the status of maritime features located in the Spratly Islands, Chinese violations against the UNCLOS, the extended severity of the dispute, and the future practice for both parties. However, the nature and situations of the Thai-Myanmar maritime dispute are different. Some submissions are not among the Thai-Myanmar maritime dispute such as marine environment or historic rights. Only three submissions are concerned in the Thai-Myanmar maritime dispute; the status of the Lam-Khan-Khi Nok Island, traditional fishing rights, and the prevention of the collision of the vessels. Similar to the South China Sea case, Myanmar cannot submit the submission on the maritime boundary delimitation to the Arbitral Tribunal as Thailand has made a declaration on exception of the dispute concerning the maritime boundary in accordance with Article 298 of the UNCLOS. On the contrary, Thailand may submit this submission to the Arbitral Tribunal because Myanmar has never made such a declaration on exception. Nevertheless, it is unlikely that Thailand waives its rights which have been declared previously. Moreover, the Thai-Myanmar maritime dispute includes sovereignty and delimitation disputes, so the Arbitral Tribunal could not delimit the boundary line before indicating sovereignty over the three Islands.

However, despite Thailand's declaration, there is the compulsory conciliation according to Article 297 of the UNCLOS provided that in the dispute concerning maritime boundary that a party had made a declaration of exception, will be submitted to the conciliation commission instituted by the parties. The commission shall hear the disputing parties, examine their claims and objections, and make proposals to them. Though the proposal

is not legally binding and any of the parties has the right to obey or deny.

Conclusion

The Thai-Myanmar maritime dispute includes a territorial dispute over the Lam, Khan, Khi Nok Islands and maritime boundary dispute from the mouth of the Pakchan River to the middle of the Andaman Sea. The cause of the dispute is that both countries have not agreed on who has the sovereignty over the three islands. Moreover, the 1868 Convention that Myanmar referred to does not include any identification of ownership over the three Islands. The unclear sovereignty over the three Islands has lead to an inability of delimitation in the overlapping zone.

While Thailand and Myanmar are both parties to the UNCLOS, the voluntary and compulsory procedures can be applied but with the different outcomes. The voluntary procedure does not only apply to the dispute concerning interpretation and application of the UNCLOS but also to all international disputes. Therefore, the scope of application covers all issues in the Thai-Myanmar maritime dispute. For other peaceful settlements, both countries are not acquainted with the adjudicative method. The intuitional settlement is not easy to apply for the case.

As of compulsory procedure, both countries have never selected a forum for dispute settlement, the Arbitral Tribunal constituted in accordance with Annex VII of the UNCLOS will be the arena for this case. For the scope of application, there are some submissions that may be submitted such as the status of the Lam, Khan, and Khi Nok Islands, the infringement of traditional fishing rights, and the ignorance of preventing the collision of ships. While other issues such as the territorial or delimitation disputes cannot be submitted to the Arbitral Tribunal because the territorial dispute is beyond the scope of interpretation or application of the UNCLOS, and the delimitation dispute has been declared an exception by Thailand that it is not easy for

the Arbitral tribunal to delimit maritime boundary lines before indicating sovereignty over the three Islands. Hence, there is a few benefits to gain from those three submissions.

From the study above, to settle the Thai-Myanmar maritime dispute, negotiation is the most appropriate method which both countries are familiar with and share many experiences. However, the process and substance of negotiation are key elements. The two countries are concerned with sovereignty over the three islands. Therefore, no one has initiated the negotiation and that the method and substance of negotiation have not been discussed.

In the author's opinion, sovereignty is a very sensitive issue in terms of politics and law. Thus, to settle the Thai-Myanmar maritime dispute, the sovereignty issue should be opted out from negotiation, and should be be discussed on another occasion. Also, both countries should negotiate and conclude a provisional arrangement to establish a joint development area which will avoid confrontation and reduce tension among the parties. Another reasonable method that the author would like to suggest is the compulsory conciliation. Because the conciliation commission's proposals will be helpful for negotiation.

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