Summary Report of Workshop on
"Law and Best Practices for Maritime Boundary Delimitations"
Jakarta, Indonesia
August 2 – 4, 2015

Introduction:

The number and significance of maritime boundaries in current international relations has increased with the expansion of national limits of maritime jurisdiction reflected in the 1982 UN Convention on the Law of the Sea (UNCLOS). Therefore, boundary-making is now a major task for coastal states and most coastal states do not have a full set of agreed maritime boundaries. To help address this issue, with support from the U.S. Department of State, The Asia Foundation and the Centre for Strategic and International Studies (CSIS)/Jakarta co-sponsored a workshop that examined "Law and Best Practices for Maritime Boundary Delimitations" held in Indonesia on August 3 and 4, 2015. A major objective of this workshop was for participants to discuss their nations' practical experiences over the past three decades implementing international law as reflected in UNCLOS, with particular emphasis on Articles 74 and 83 on the delimitation of the exclusive economic zone (EEZ) and the continental shelf between states with opposite and adjacent coasts.

This report presents a summary by The Asia Foundation of the workshop and some of the key conclusions, findings, and recommendations that can be drawn from it.

The workshop brought together 51 participants and observers from ASEAN member states and other countries that comprise the Expanded ASEAN Maritime Forum (EAMF) – Australia, China, Japan, New Zealand, and the United States. In addition, there were four observers from Timor Leste. The workshop was fortunate to have some of the world's leading international maritime lawyers and specialists present at the workshop, including Mr. Gilberto Asuque, Philippine Deputy Chief of Mission to Japan; Dr. Arif Havas Oegroseno, Indonesia's Deputy Coordinating Minister for Maritime Affairs; Professor Robert Beckman, Director of the Centre for International Law at National University of Singapore; Mr. Larry Martin, Partner at Foley Hoag, LLP; U.S. Navy Captain (retired) Ashley Roach; Dr. Clive Schofield, Director of Research at the Australian Centre for Ocean Resources and Security at the University of Wollongong; Professor Xue Guifang, Chair of the Ko Guan School of Law, Shanghai Jiao Tong University, among others. These individuals and other presenters and participants provided legal, technical, and policy insight, including through practical examples and case studies, to illustrate the means and methods of how delimitation under UNCLOS can be used in practice to resolve overlapping claims of maritime boundaries. Attached is the workshop agenda and list of participants and observers.

Summary of Conclusions, Findings, and Recommendations:

Where coastal states' entitlements to territorial seas, exclusive economic zones, or the continental shelf overlap, the value of establishing maritime boundaries consistent with international law is self-evident. Successful maritime delimitation, whether by adjudication, conciliation, or diplomatic negotiation, lends clarity and certainty for all, reduces the probability of inter-state conflict, and works to promote sustainable management and governance of oceans. In essence, "good fences make good neighbors." Unresolved boundaries can have adverse economic consequences that can stall or disrupt the

exploration of resources, fishing, and maritime conservation efforts, impede shipping, as well as trigger disputes. Pending delimitation, the effective management of unresolved maritime boundaries generally requires appropriate self-restraint and can be enhanced through provisional arrangements of a practical nature.

Key findings and recommendations that can be drawn from the workshop include the following:

(1) All maritime boundary delimitation happens in the context of international legal rules. Most participants agreed that the law under UNCLOS regarding maritime boundary delimitation is clear, though some noted that it lacks specificity. For delimiting the EEZ and continental shelf, the key is to reach an agreement on the basis of international law in order to achieve an "equitable solution."

(2) What constitutes an "equitable solution," and what methodology is used to reach it, is largely up to the countries involved in negotiating a maritime boundary agreement, but there is a growing body of case law and state practice to refer to. Some contexts are relatively simple, and some are more complex. When international courts and tribunals adjudicate maritime boundaries, they have coalesced around applying a "three-step method" that first involves drawing a provisional equidistance line between the relevant coasts, then determines whether there are any relevant circumstances that justify deviation of the line, and then checks its result with a test for disproportionality. The most important of the "relevant circumstances" is coastal geography, including issues like relative length and shape of coastlines and the effect of small islands.

(3) Many participants noted advantages of negotiation between claimants, as opposed to resorting to adjudication before a court or tribunal. In negotiation, for example, the countries have more control over the result and can generate creative options. Adjudication, however, also can have advantages, including a relatively predictable methodology, timely resolution of difficult issues, and an international imprimatur with binding effect that can help justify compromises to domestic stakeholders. Conciliation and other third-party procedures are also potentially useful options.

(4) In all the case studies, whether involving negotiation, adjudication, or other processes, the importance of making reasonable claims, grounded in international law, was emphasized. Positions that would be perceived internationally as unreasonable or without apparent legal basis are counterproductive and detrimental to national interests. Trust and credibility are critical to the successful resolution of maritime boundaries. It is also important to manage the expectation of domestic stakeholders with regard the range of feasible and legally plausible outcomes.

(5) International law also provides rules governing states' activity pending delimitation of a maritime boundary, as reflected in UNCLOS articles 15, 74(3), and 83(3). With respect to the EEZ and continental shelf, for example, states are obligated to make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of the final delimitation agreement. Provisional arrangements of a practical nature, while not a panacea, can take a variety of forms and cover a range of issues, and many useful examples of such arrangements exist.

(6) For complex government-to-government negotiations, national teams need multi-disciplinary perspectives – with input from lawyers, hydrologists, geologists, geographers, diplomats, regulators, etc. Team leaders should be well-versed in the legal and technical issues involved (including the determination of the outer limit of their nation's maritime claim under the international law of the sea), and can be groomed through ongoing training. There is great value in countries' providing or acquiring training to build a negotiating team and senior experts. Establishing a strong team of experts will greatly benefit a country's interests and improve the chances of successfully concluding a maritime boundary agreement.

(7) Because of the multiplicity of skills required to successfully determine and negotiate a maritime boundary, increased capacity building, particularly in smaller, less developed nations is needed.

(8) There should be greater transparency in sharing information between countries. Such information sharing could help to bridge disagreements among countries in the region.

(9) More discussion is needed. If future workshops were to be held, there was a general sense from the participants that it would be very useful to have additional case studies of successful delimitations (both negotiated and adjudicated), and the views of participants in those delimitations. Simulations of how the "three-step approach" has been used could benefit future negotiators and lend insight on how different equitable solutions can result using the same legal framework. Countries may also wish to look at existing training mechanisms to see if further use of these mechanisms might be made available for training and capacity building.

(10) If other workshops of this kind were to be held, it could also be beneficial to address additional case studies in joint development agreements and other provisional arrangements of a practical nature, so as to learn to co-manage maritime resources, and to examine in more detail the jurisprudence of the International Court of Justice (ICJ), the International Tribunal on the Law of the Sea (ITLOS), and other tribunals.

While the role of politics and nationalism loom large when looking at maritime boundary disputes in the region, participants recognized that their governments must remain committed to cooperation, diplomacy, and a peaceful means to settling their maritime boundaries.

The remainder of this report provides narrative detail on these themes and the presentations and discussions that came out of the workshop.

Themes, Presentations, and Discussions in the Workshop:

Perhaps the most common theme mentioned throughout the two day workshop was that "good fences make good neighbors." But this requires states to cooperate and negotiate in good faith and to settle disputes peacefully in order to bring clarity and finality to the delimitation of maritime boundaries between and among coastal states with opposite and/or adjacent maritime entitlements. Inherent in such negotiation is trust. The peaceful settlement of disputes over territory and over unresolved maritime boundaries is fundamental for the prevention of inter-state conflict. Disputed territorial sovereignty and contested maritime boundaries can impair maritime security, hinder effective inter-state cooperation, hamper the flow of goods and resources, and compromise the sustainable use of natural resources. Whether countries with maritime boundary disputes achieve resolution by negotiation or adjudication, the result is always to have "an equitable solution." An "equitable solution"

is largely in the discretion of the states involved, and need not be a zero-sum game with winners or losers. What is needed is a fair and balanced boundary result. In most cases, states have relied on diplomatic agreements as opposed to adjudication. Because there is no certainty with adjudication, there is no guarantee that any side in a dispute will get the area it wants. Of the roughly 200 maritime boundaries that have been settled in whole or in part, there have been fewer than 20 adjudications.

Another topic that was addressed in-depth at the workshop was that when claimant states are unable to come to any agreement, they should consider submitting their territorial and maritime disputes to any of the various dispute resolution mechanisms available under international law; in particular, the provisions of UNCLOS. Considerable discussion was spent on the dominant "three-step method" for maritime delimitation used by courts and tribunals, such as in the International Court of Justice's (IJC's) decision on the 2009 Maritime Delimitation of the Black Sea case between Romania and the Ukraine. The "three-steps" have evolved to become, roughly:

(1) Identifying a provisional equidistance line between the relevant coasts;
(2) Considering any relevant circumstances that justify deviation of the line; and
(3) Adjusting to avoid a disproportionate result, if necessary (though it has not been necessary in cases to date, suggesting that disproportionality is a high bar here).

Equidistance is a methodology, not a principle of what is necessary to make an equitable solution, but it has the significant advantage of being largely an objective, geometric exercise. An equidistance line is a line every point of which is the same distance from each country's nearest coast. In this regard the coastal baselines determined in accordance with Part II of UNCLOS are typically relevant. These baselines normally run along the low-water line of the coast, but in some cases as provided in UNCLOS article 7 straight baselines may be drawn between appropriate points on the coast, and a state consisting entirely of islands or parts of islands may draw archipelagic baselines meeting the technical criteria in article 47. Islands, rocks, and even near-shore low-tide elevations can be relevant to baselines and equidistance, and their location can be a very important factor, where isolated features far from a mainland often get less weight. There are still debates in some cases as to whether certain coastal features such as small islands should be taken into account at the equidistance stage, given that even a small feature can have a significant effect on the course of an equidistance line, or whether instead the weight they are given should be considered as a "relevant circumstance" in step 2. Small islands generally get less weight than a mainland coast opposite, such that the maritime boundary would be closer to the small island than an equidistance line would. Courts and tribunals also seek to avoid cutting off a state from too much of its maritime entitlements, as in the case of a foreign island close to a mainland shore, or adjacent states along a concave coastline. A two-hour session presented these technical and legal foundations, which continued to be discussed throughout, including how the three-step method was applied in the case of Nicaragua v. Columbia in 2013. Mr. Lawrence Martin, Partner in Foley Hoag, LPP, in Washington, D.C., who represented Nicaragua at the International Court of Justice, provided rich detail in how the IJC applied the three-step method in that case. One participant noted that equidistance may be popular in practice, but it is not mandatory, and that historical claims need to be taken into consideration.

A session on "Interpreting and Implementing UNCLOS's Articles 74(3) and 83(3)" went into detail about the obligations in these articles "to make every effort to enter into provisional arrangements of a practical nature and . . . not to jeopardize or hamper the reaching of the final agreement" on delimitation. Special attention was paid to the *Guyana v. Suriname* case, which addressed these two "every effort" obligations in detail. On the obligation not to jeopardize or hamper the reaching of a final

agreement, it was emphasized that this obligation does not prevent all economic activity in disputed areas, the relevance of permanent changes to the physical environment was noted as an important factor likely to have jeopardized a final agreement in that case. Useful examples of provisional arrangements were also noted, including bilateral fisheries agreements between Japan and China and between Japan and Korea. The presenters noted that provisional arrangements of a practical nature can take a variety of forms (legally binding agreements, nonbinding instruments, even cooperative modi vivendi) and can cover a range of issues (fisheries, hydrocarbons, governance structures, etc.). Many useful examples of such arrangements exist. At the same time, such provisional arrangements by definition do not resolve all of the issues, and in some cases face complications of their own, including for example in defining their geographic scope or in maintaining implementing or governance institutions.

The great majority of workshop participants agreed that the most interesting and valuable session of the two-day workshop was the session titled "Best Practices and Reality in Implementing Boundary Disputes: Case Study – Indonesia and the Philippines." The two panel speakers were Dr. Arif Havas Oegroseno, Indonesia's Deputy Coordinating Minister for Maritime Affairs, and Mr. Gilberto Asuque, the Philippine Deputy Chief of Mission in Tokyo. Both Dr. Oegroseno and Mr. Asuque were intimately involved the diplomatic negotiation that successfully delimited the Indonesia and the Philippines EEZ boundary in the Celebes Sea. This was a 20-year negotiation. As ASEAN member states, relations between both nations are strong, which was helpful in dealing with the intricacy and complexities of the negotiation. It was also helpful that as archipelagic states they shared certain traits and interests.

Despite several obstacles, including the hardship of having to restart a dormant negotiation, the parties entered negotiation with the mindset of "we attack the problem, but we do not attack each other." This created a spirit of good faith and, despite difficulties, both sides remained patient, were steadfast in continuing the dialogue, and were committed to achieving an equitable solution. Both countries created a Joint Permanent Working Group on Maritime and Ocean Concerns (JPWG-MOC). This group was tasked to discuss hydrographical and technical matters including submission of proposed delimitation lines. A seminar on maritime boundary delimitation was organized by both countries for mutual benefit. But most importantly, legal certainty in accordance with UNCLOS was needed. Initially, the Philippines was looking at its claims as outlined in the 1898 Treaty of Paris, under which Spain ceded its territorial claims over the Philippines to the United States at the end of the Spanish-American War. Indonesia objected to a treaty more than 100 years old or historical claims as a point of reference for interpreting maritime claims as being inconsistent with UNCLOS in a maritime boundary negotiation. Once the Philippines was able to convince domestic stakeholders that this was the correct view and that it was necessary to comply with the approach set out in UNCLOS, the two sides were able to generate creative solutions to the maritime boundary in light of the complicated coastal geography and other factors. Sometimes discussions are most productive in a less political environment of discussions among lawyers, while at the same time it was clear that political will on each side at the highest levels was essential to success. This maritime boundary delimitation is a good example of how to resolve longstanding disagreements without the use of force, predicated by rule of law, in a peaceful, equitable manner benefitting both sides.

The workshop discussion also lent perspectives on when it is appropriate to negotiate, litigate, or develop provisional arrangements of a practical nature. The presentations cited a plethora of factors involved in deciding which course to take. They include, for example, (1) identifying overlapping national interests; (2) historical factors (e.g., colonial boundary arrangements); (3) any prior agreements between if the parties; (4) position of parties in prior negotiations; (5) provisions in constitutions and

laws; (7) official positions of past governments. All of these factors are important in understanding where each party is coming from as all of these factors can affect the resolutions on maritime boundary delimitations.

But other circumstances are also relevant, depending on the particular circumstances. These include: (a) strategic considerations (e.g., a state might be concerned about the proximity of particular naval facilities); (b) economic factors (states may have interests in traditional fishing grounds, oil and gas resources, location of major shipping lanes, etc.); (c) interests of stakeholders (press, NGOs, industries, legislatures, political parties, past positions of prior leaders, etc.); (d) relations between negotiating states (level of trust, respect for leaders, possible past tensions, general bilateral relations, whether both sides can envisage agreements as "win-win," etc.); and (e) legal issues (such as disputes on the legality of baselines or other maritime claims, or on the status of off-shore features). There are other complicating factors as well, including disputes on jurisdiction over foreign ships in areas of overlapping claims; disputes on fishing or oil exploration of overlapping claims; sovereignty disputes over off-shore islands, among others. Not resolving maritime boundaries comes at a cost, particularly when it creates uncertainty for maritime activities, oil and gas contracts, and the like.

There are a variety of approaches states might take in dealing with maritime boundaries, including:

- leave the boundary issue unresolved, provided that each side acts in accordance with international law with respect to the disputed area;
- attempt to negotiate a boundary agreement;
- attempt to negotiate provisional arrangements of a practical nature pending a boundary agreement (see UNCLOS articles 74(3) and 83(3));
- request the other party to agree to mediation by a third party;
- pursue conciliation under UNCLOS, part XV (articles 284 and 298);
- refer the issue to a court or tribunal, such as the ICJ, the International Tribunal on the Law of the Sea, or an arbitral tribunal, consistent with Part XV of UNCLOS, if the countries have consented to that either on an ad hoc basis or by virtue of being party to UNCLOS (to the extent the country has not opted out of such disputes under UNCLOS article 298(1)(a)(i)).

Especially challenging are circumstances involving both a maritime boundary dispute and a sovereignty dispute. In such circumstances, participants noted that the best course of action would often be provisional arrangements of a practical nature and that negotiations to resolve the territorial dispute may have a lower chance of success. If a party was acting unreasonably or without a legal basis, then appealing to a tribunal or court was a particularly plausible option, if legally available.

There are an enormous number of stakeholders and a range of expertise needed when trying to resolve a maritime boundary dispute. Fifty years ago, for example, even in major maritime states there were often only a handful of knowledgeable people involved in trying to resolve maritime boundary disputes, and such delimitations were often ad-hoc. Participants also cited cases where different teams within the same government would be competing or duplicating work in parallel. The last session of the workshop addressed the importance of applying a "whole-of-government approach" to ongoing maritime boundary issues. Having a strong team leader is imperative, with an excellent understanding of the legal and technical issues, and may be more important than the size of the team so long as it has the necessary expertise. Team members must trust each other and share their knowledge and expertise in order to handle maritime boundary issues effectively. Egos have to be set aside in order to work in a

cooperative fashion to achieve a common goal. Some maritime boundary negotiations are relatively simple and straightforward, but more complicated negotiations can take many years to complete. As a result, patience is needed, and it is important to cultivate and train future generations of people in maritime affairs, including people with legal and technical knowledge of maritime boundary issues. Training is critical in being able to put together a negotiating team. Governments need to invest in the effectiveness of institutions within government and academia, and not just in the skills of a certain group of people. Capacity-building, whether internally or with international help, is key.

However, as a number of countries lack the legal and technical capacity to do this, how can they find the legal and technical expertise to properly represent their interests? Unless a government is well organized, they are often going to fail, whether in litigation or negotiations. One option is to hire foreign legal expertise. At times foreign legal counsel is appropriate and can apply an abundance of expertise, including as appropriate to give their clients a "reality check" to ensure a country's arguments will be perceived internationally as reasonable and in good faith. Ultimately, there is no substitute for the government's understanding and deciding on its position and making decisions accordingly.

Government officials, too, need to "truth test" their own case. Positions can be presented positively and with confidence, but cannot be unreasonable or overly aggressive. It is critically important to ensure reasonableness, and not let national expectations exceed what is credible and feasible to achieve given international law and practice. This may require real leadership in explaining to domestic audiences what is a legally viable position, mindful that the other party to a boundary negotiation will never accept an outcome that is harmful to its interests which does not have a credible basis in international law and practice.

Participants expressed their hope that further work could be conducted on this topic, perhaps under the auspices of the Expanded ASEAN Maritime Forum, and that government policymakers might consider further workshops and capacity building measures to enhance the ability of countries to successfully negotiate and resolve their outstanding maritime boundaries.