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Southeast Asian Approaches to Maritime Boundaries

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Abstract
From both a geographical and geopolitical perspective, Southeast Asia is a particularly interesting case-study for maritime delimitation. Despite the existence of significant obstacles to maritime boundary-making, including a complex coastal geography and a multitude of territorial and jurisdictional disputes, Southeast Asia has been described as the "scene of very active and innovative ocean boundary diplomacy". The objective of this paper is to examine Southeast Asian approaches to maritime boundaries. First, it seeks to identify whether there are common trends and practices in Southeast Asian practice which have contributed to the high number of maritime boundaries concluded by Southeast Asian states. Second, the paper will explore the extent to which Southeast Asian practice has contributed to the normative development of international law on maritime delimitation. Third, the paper will discuss whether there are any lessons to be learned from Southeast Asian practice that can be used to settle unresolved maritime boundary issues in the region.

Maritime delimitation is a process that consists of "establishing lines separating from each other the maritime areas in which coastal States exercise [sovereignty or] jurisdiction"[1] or, in other words, establishing maritime boundaries. After World War II, expanding claims to maritime space by coastal states,[2] driven by the need for ocean resources and sanctioned by developments in law of the sea, resulted in a multitude of overlapping claims that made maritime delimitation an increasingly complex yet critical exercise. Competing claims to rights and jurisdiction in the same marine area not only posed an irritant to bilateral relations but also hindered the effective exploration, exploitation, and conservation of resources, the protection of the marine environment, and enforcement against illegal activities. It is therefore

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1. Lucius CAFLISCH, "Maritime Boundaries, Delimitation" (1997) 3 Encyclopaedia of Public International Law 300 at 301.

2. This began with the 1945 Truman Declaration, by President Truman of the US, that the "natural resources of the subsoil and seabed of the continental shelf beneath the high seas … as appertaining to the United States", which was followed by similar claims by other states: see R.R. CHURCHILL and A.V. LOWE, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999) at 143–4.

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unsurprising that maritime delimitation has been described as an "an essential precursor to the full resource potential of national maritime zones and the peaceful management of the oceans".[3]

The international law on maritime delimitation, a subset of international law of the sea, is a body of rules and principles that have developed over the years that aim to provide some normative standards for states in their delimitation with other states. These principles have been shaped by the competing objectives of developing certainty and predictability in maritime delimitation, while at the same time ensuring that there is sufficient flexibility to take into account the particular circumstances of each case.[4] The underlying objective of these principles has been to achieve an equitable outcome.[5] The sources of the law on maritime delimitation can be found in three multilateral conventions,[6] the decisions of international courts and tribunals, and, last, in state practice, as reflected in boundary agreements that have been concluded between states.

With regard to the latter, state practice on how states have delimited their maritime boundaries both substantively (i.e. the international law principles used in their bilateral agreements with other states) and procedurally (i.e. the dispute settlement mechanism used to settle the maritime boundary dispute) have always formed an important aspect of the law and practice on maritime delimitation.[7] Scholarly examination of such state practice has usually revolved around regional perspectives.[8] This is a reflection of the fact that maritime delimitation does not occur in a vacuum but is inherently shaped by political, strategic, historical, economic, and geographical considerations that are often shared within a specific region.

In this connection, this paper will examine the approach of Southeast Asian states towards their maritime boundaries. From both a geographical and geopolitical perspective, Southeast Asia is a particularly interesting case-study for maritime

3. Victor PRESCOTT and Clive SCHOFIELD, *The Maritime Political Boundaries of the World*, 2nd ed. (Leiden: Martinus Nijhoff Publishers, 2005) at 217.

4. *Gulf of Maine Case*, [1984] I.C.J. Rep. 246 at para. 157.

5. See generally the discussion in Nuno Marques ANTUNES, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Leiden/Boston: Martinus Nijhoff Publishers, 2003) at 214–39.

6. These are the *1958 Convention on the Territorial Sea and Contiguous Zone*, adopted 19 April 1958, 516 U.N.T.S 205 (entered into force 10 September 1964); the *1958 Convention on the Continental Shelf*, adopted 29 April 1958, 499 U.N.T.S 311 (entered into force 10 June 1964); the *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, U.N.T.S 1833 (entered into force 16 November 1994) [*UNCLOS*].

7. State practice, of course, is one of the essential components of customary international law (along with *opinio juris*), and bilateral and multilateral agreements are one form of state practice. *Opinio juris* can also be derived from such bilateral and multilateral boundary agreements (see Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries*, Vol. I (Leiden: Martinus Nijhoff Publishers, 1993) at xliii), although the fact that maritime boundary agreements may be shaped by legally irrelevant considerations "complicates the quest for customary rules of maritime delimitation enshrined in State practice": see Antunes, *supra* note 5 at 180, citing Hugh THIRLWAY, "The Law and the Procedure of the International Court of Justice (Part Five)" (1993) 64 British Yearbook of International Law 1–54 at 40.

8. See, for example, the six volume series on *International Maritime Boundaries* produced by the American Society of International Law; Prescott and Schofield, *supra* note 3; and Douglas M. JOHNSTON and Mark VALENCIA, *Pacific Ocean Boundary Problems: Status and Solutions* (Leiden: Martinus Nijhoff Publishers, 1991).

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delimitation.[9] Driven by the need for ocean resources (and the accompanying economic security that such resources bring), newly independent Southeast Asian states began to make claims to territorial seas, archipelagic waters, exclusive economic zones (EEZs), and continental shelves from the 1960s onwards. However, congested coastal geography meant that nearly all Southeast Asian waters were enclosed in overlapping claims of territorial seas, exclusive economic zones, and/or continental shelves.[10] Maritime delimitation of these overlapping claims has been hampered by several factors. These include, *inter alia,* the complex coastal geography that exists in Southeast Asia characterized by deeply indented gulfs and the presence of small offshore features littered along the coast of several Southeast Asian states, and the existence of historical claims to waters as well as territorial sovereignty disputes. Added to this already complex mix are the historically tenuous relations between Southeast Asian states, coupled with an increasing trend towards regionalism as reflected in the formation and development of the Association of Southeast Asian Nations (ASEAN). Given these issues, some of which have posed obstacles to maritime boundary-making, some may find it surprising that Southeast Asia has often been described as the "scene of very active and innovative ocean boundary diplomacy".[11]

To this end, the objective of the examination of Southeast Asian practice is threefold. First, it seeks to identify whether there are common trends and practices in Southeast Asian practice which have contributed to the high number of maritime boundaries concluded by Southeast Asian states. Second, the paper will explore the extent to which Southeast Asian practice has contributed to the normative development of international law on maritime delimitation. Third, the paper will discuss whether there are any lessons to be learned from Southeast Asian practice that can be used to settle unresolved maritime boundary issues in the region.

Part I will give an overview of Southeast Asia as a region, setting out the relevant historical, geopolitical, and geographical considerations that play an important role in boundary-making. Part II will give an overview of the various dispute settlement mechanisms used by Southeast Asian states to resolve their maritime boundary disputes with each other and with extra-regional states. Parts III to V will then examine in more detail each mechanism used by Southeast Asian states to resolve overlapping maritime claims, namely delimitation agreements, provisional arrangements, and binding dispute settlement mechanisms. Part VI will provide a final analysis on Southeast Asian approaches to maritime boundaries and analyze: (a) common trends and practices; (b) the contribution of Southeast Asian practice to the development of international law; and (c) whether there are any lessons to be learned which could be applied to existing unresolved maritime boundary disputes.

9. This will be dealt with in further detail in Part I.

10. Sam BATEMAN *et al.*, "Good Order at Sea in Southeast Asia", RSIS Policy Paper, April 2009 at 8.

11. Johnston and Valencia, *supra* note 8 at 66; Ted L. MCDORMAN, "Central Pacific and East Asian Maritime Boundaries" in David A. COLSON and Robert W. SMITH, eds., *International Maritime Boundaries,* Vol. V (Leiden: Martinus Nijhoff Publishers, 2005) at 3442.

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I. GEOPOLITICS AND GEOGRAPHY IN SOUTHEAST ASIA

It has been said that only in the last three decades has the ambiguity over the territorial expanse of "Southeast Asia" been resolved.[12] Historically, Southeast Asia has been characterized by the absence of any unifying hegemonic power caused by different colonial regimes administering different parts of Southeast Asia.[13] After World War II, and amidst the prevalent trend of self-determination and independence for colonies, Southeast Asian states achieved independence, beginning with Indonesia in 1945. With the exit of colonial powers from the region, relations between the new governments of Southeast Asia were initially characterized by tension and discord. It was observed that these eight newly independent nations (Singapore was yet to be separated from Malaysia) and Thailand were "drifting into the grip of petty nationalisms and jealousies, complete with border disputes and rivalries among their leaders".[14] Regional relationships were further complicated by the continued dependence of regional countries on extra-regional powers and the superpower Cold War rivalry between the US and the USSR.[15]

Ultimately, the unification of Southeast Asia and the ten states of Brunei, Cambodia, Indonesia, Malaysia, Myanmar, Laos, the Philippines, Singapore, Thailand, and Vietnam was accelerated by Cold War politics.[16] The creation of the Association of Southeast Asian Nations in 1967[17] by Indonesia, Malaysia, the Philippines, Singapore, and Thailand[18] "reflected the desire of some of the nations in the region to institutionalize relations among the region's anti-communist states and to provide a forum to address anxieties about the actions of outside powers".[19] Since then, ASEAN has expanded its membership to ten, including Brunei, Vietnam, Laos, Myanmar, and Cambodia.[20] Timor Leste,[21] independent from Indonesia since 2002, and Papua New Guinea,[22] have observer status at ASEAN, and both have expressed a desire to join ASEAN as full members.

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12. It has been suggested that the designation of Southeast Asia was first applied in 1943 to a region that included parts of modern-day South Asia (Sri Lanka and northeast India) and which excluded the former Netherlands Indies and the Philippines: see CHIA Lin Sien, ed., *Southeast Asia Transformed: A Geography of Change* (Singapore: ISEAS, 2003) at 1.
13. *Ibid*. The British ruled the former territories of Burma, Malaya, Singapore, and Northern Borneo; the Dutch in Indonesia; the Portugese in East Timor; the Spanish and Americans in the Philippines; and the French in Laos, Cambodia, and Vietnam. Only Thailand escaped colonial occupation.
14. Amitav ACHARYA, *The Making of Southeast Asia: International Relations of a Region* (Singapore: ISEAS, 2012) at 150, citing the statement of American scholar Albert Ravenholt.
15. *Ibid*.
16. Diane A. DESIERTO, "Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia" (2008) 36 International Journal of Legal Information 388 at 418–19.
17. ASEAN was formed through constitutive instruments such as the *1967 ASEAN Bangkok Declaration, Bangkok, Thailand*, 8 August 1967 and the *1976 Treaty of Amity and Cooperation in Southeast Asia, Indonesia*, 24 February 1976.
18. Singapore, Indonesia, Malaysia, the Philippines, and Thailand became members of ASEAN on 8 August 1967.
19. Chia, *supra* note 12 at 1.
20. Brunei became a member of ASEAN on 8 January 1984, Vietnam on 28 July 1995, Laos and Myanmar on 23 July 1997, and Cambodia on 30 April 1999.
21. "Indonesia supports East Timor ASEAN Membership bid" *Jakarta Globe* (3 March 2011). Online: 〈http://www.thejakartaglobe.com/archive/indonesia-supports-east-timor-asean-membership-bid/〉.
22. Luke HUNT, "Papua New Guinea Eyes ASEAN" *The Diplomat* (9 November 2011), online: The Diplomat 〈http://the-diplomat.com/asean-beat/2011/11/09/papua-new-guinea-eyes-asean/〉.

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Against this geopolitical backdrop, it is important to bear in mind that Southeast Asia has always been a distinctively maritime region.[23] Indeed, the maritime character of the region has been described as the "first and primary unifying factor of Southeast Asia".[24] Nine out of the ten Southeast Asian states (Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Thailand, Vietnam, and Singapore) are coastal states, and two of these states (the Philippines and Indonesia) are the world's largest archipelagic states. Consequently, most of these states have extensive maritime interests. Further, due to the fact that the region sits astride key access routes between the Indian and Pacific Oceans, the region is also economically and strategically important to the economies of Northeast Asia, the US, and other Western maritime powers.[25] All ASEAN states, with the exception of Cambodia, are parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[26] Both Papua New Guinea and Timor Leste are also parties.[27]

There are several definitions of "Southeast Asian waters". For example, Johnston and Valencia have stated that the "core" of Southeast Asian waters consists of the waters of eight of the ten ASEAN states (excluding Myanmar and Laos), and that the "periphery" of Southeast Asian waters could be defined to include the offshore areas of southern China (the People's Republic of China, Hong Kong, and Taiwan), Myanmar on the eastern side of the Andaman Sea and Papua New Guinea at the southern extremity of the West Pacific.[28] The American Society of International Law, in its seminal six volume series on *International Maritime Boundaries* has described Southeast Asia as one of the three subregions of the Asia-Pacific, the other two being Northeast Asia (comprising the Sea of Japan, the Yellow Sea, and the East China Sea) and the Southwest Pacific.[29] Prescott and Schofield consider Southeast Asian waters to be part of the Asian Rim in the Pacific Ocean.[30]

For present purposes, this paper takes a broad definition of Southeast Asian waters to include the eastern part of the Andaman Sea, the South China Sea, the Gulf of Thailand, the Gulf of Tonkin, the Straits of Malacca and Singapore, the Celebes Sea, the Sulu Sea, the Arafura Sea, the Timor Sea, and the Torres Strait. This is on the

23. As noted by Bateman *et al.*, *supra* note 10 at 4.

24. Chia, *supra* note 12 at 5.

25. Bateman *et al.*, *supra* note 10 at 11. There are numerous straits used for international navigation in the region, including the Straits of Malacca and Singapore, the Lombok/Makassar Straits / Sunda Straits / Philippines Straits. There are also major ports such as Singapore, Port Klang, and Tanjung Pelapas in Malaysia, and Tanjong Priok in Indonesia.

26. *UNCLOS*, *supra* note 6. Cambodia signed UNCLOS on 1 July 1983 but has not ratified it. Brunei ratified UNCLOS on 5 November 1996, Indonesia on 3 February 1986, Laos on 5 June 1998, Malaysia on 14 October 1996, Myanmar on 21 May 1996, the Philippines on 8 May 1984, Singapore on 17 November 1994, Thailand on 15 May 2011, and Vietnam on 25 July 1994.

27. Papua New Guinea ratified UNCLOS on 14 January 1997 and Timor Leste acceded to UNCLOS on 8 January 2013.

28. Johnston and Valencia, *supra* note 8 at 50.

29. Choon Ho PARK, "Central Pacific and East Asian Maritime Boundaries" in Charney and Alexander, *supra* note 7 at 297.

30. See generally Victor PRESCOTT and Clive SCHOFIELD, "Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean" in Shelagh FURNESS, ed., *Maritime Briefing*, Vol. 3 (Durham: International Boundaries Research Unit, 2001) at 1.

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basis that at least one of the ten ASEAN Member States or the two ASEAN observer states (Timor Leste and Papua New Guinea) have a potential maritime claim in these waters, either vis-à-vis each other or vis-à-vis extra-regional states.

II. SOUTHEAST ASIAN APPROACHES TO THE SETTLEMENT OF MARITIME BOUNDARY DISPUTES

Generally, a dispute arises when there is a "dispute on a point of law or fact, a conflict of legal views or of interests between two persons".[31] Not all overlapping maritime claims will necessarily result in a dispute between parties. However, because there is much room "for radically differing interpretations as to which factors and methods of delimitation are appropriate to a particular case"[32] and states often make claims which maximize their maritime entitlement, maritime boundary disputes very often do arise.

This was certainly the case in Southeast Asia. From the 1960s, Southeast Asian states, recently free of their colonial heritage and eager to have control over their ocean resources, began to make maritime claims to a territorial sea, continental shelf, and an exclusive fishery/economic zone.[33] However, the geographical congestion in the region resulted in "overlaps between the jurisdictional claims of neighbouring states, generating disputes, and even conflicts, that would not have arisen in a diffuse region such as the Southwest and Central Pacific Ocean".[34]

There have been several obstacles to maritime delimitation in Southeast Asian waters.[35] First, Southeast Asia has a complex maritime geography characterized by the presence of "gulfs that penetrate deeply into the mainland, a multitude of large and small islands and wide and narrow [continental] margins".[36] Second, many maritime boundary disputes are intermingled with territorial sovereignty disputes over small islands,[37] the disputes over the Spratly Islands and the Paracel Islands in the South China Sea being examples par excellence, and this has posed serious challenges to the conclusion of maritime boundaries. Third, there have also been a plethora of historic claims to waters, which have made it difficult to negotiate a boundary.[38] Fourth, the presence of hydrocarbon resources, or the belief in the

31. *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgement of 30 August 1924, 1924 PCIJ (Ser. A) No. 2 at 11.

32. *Ibid.*, at 246.

33. See Table 2 on "Relevant Maritime Jurisdictional Zones Declared by the Southeast Asian Coastal States" in Kriangsak KITTICHAISAREE, *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press, 1987) at 11.

34. Johnston and Valencia, *supra* note 8 at 50.

35. For a more detailed description of these obstacles to boundary-making, see Johnston and Valencia, *ibid.*, at 50–8.

36. Prescott and Schofield, *supra* note 3 at 429.

37. Johnson and Valencia, *supra* note 8 at 51–2.

38. The Philippines, for example, has previously asserted that the limits around the Philippines archipelago established by three treaties concluded by its former colonial master the US was its "international treaty limits" (see the *Treaty of Paris between Spain and the United States*, 10 December 1898, TS No. 343; *Treaty Between Spain and the United States for the Cession of Outlying Islands for the*

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presence of hydrocarbon resources, in the seabed underlying Southeast Asian waters has added an additional complexity to maritime boundary negotiations, with states inevitably advancing their maximum entitlement and reluctant to give up their claims.[39]

Southeast Asian states, consistent with states around the world,[40] have demonstrated a preference for negotiations as a dispute settlement mechanism. Since the end of the colonial period,[41] from 1969 to 2009, thirty-nine maritime boundary arrangements have been concluded in Southeast Asia. These maritime boundary arrangements can be categorized into two groups, either a (i) Delimitation Agreement whereby a boundary is agreed upon[42] or (ii) a Provisional Arrangement whereby no boundary is agreed upon, and where states have agreed to some form of joint exercise of jurisdiction and management of resources.[43] There are twenty-nine Delimitation Arrangements and ten Provisional Arrangements that have been concluded so far, although not all of them are presently in force. Indonesia has been especially productive, and is or has been party to seventeen out of the twenty-nine Delimitation Agreements. In contrast, the Philippines are party to none. As is clear from Table 1 (at the end of this paper), the majority of these Agreements are in the Andaman Sea, in the Straits of Malacca and Singapore, and in the Gulf of Thailand.

In comparison, Southeast Asian states have only rarely used third-party binding dispute settlement to resolve maritime boundary disputes.[44] There has only been one instance of a dispute involving a Southeast Asian state being heard by an international court, namely the recent case concerning delimitation of the maritime

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Philippines, 7 November 1900, TS No. 345, and the *Convention Between the United States and Great Britain Delimiting the Philippines Archipelago and the State of Borneo*, 2 January 1930, TS No. 856). However, with the enactment of its *Archipelagic Baselines Law* in 2009, the Philippines appears to have retracted from this claim. Similarly, Cambodia and Vietnam also jointly claimed historic waters in 1982 (see *Agreement on Historic Waters of Vietnam and Kampuchea*, adopted on 7 July 1982), and China has also claimed some form of historic rights in the South China Sea.

39. Johnston and Valencia, *supra* note 8 at 57.

40. See Antunes, *supra* note 5 at 177. Indeed, based on a review by this author of Vols. I to VI of the series on *International Maritime Boundaries* produced by the American Society of International Law, from the period 1940 to 2008, there have been approximately 230 bilateral maritime boundary settlements achieved.

41. During the colonial period, the colonial powers also concluded boundary arrangements on behalf of their colonies which may still have relevance today. For example, the boundaries established by the *United Kingdom Orders in Council* of 11 September 1958 between Sarawak and North Borneo on the one hand and Brunei on the other is apparently the basis of Brunei's claim to the South China Sea: see Charney and Alexander, *supra* note 7 at 915. However, Table 1 focuses on boundary arrangements made by independent Southeast Asian states. While Boundary Arrangement No. 32 was made by a Southeast Asian state, i.e. Indonesia, with Australia on behalf of East Timor after East Timor was annexed by Indonesia, technically speaking, Indonesia is not considered a "traditional" colonial power.

42. Pursuant to *UNCLOS*, *supra* note 6, arts. 15, 74(1), 83(1).

43. Pursuant to *UNCLOS*, *supra* note 6, arts. 74(3), 83(3).

44. However, it should be noted that while this is the only maritime boundary dispute submitted to binding dispute settlement mechanisms, both Indonesia and Malaysia, as well as Singapore and Malaysia, have submitted their respective sovereignty disputes over Sipadan and Ligitan, as well as over Pedra Branca, to the International Court of Justice. Malaysia has also initiated arbitration proceedings against Singapore and requested provisional measures from the International Tribunal for the Law of the Sea to curtail Singapore's land reclamation activities. The Philippines has also recently initiated arbitral proceedings against China over certain disputes in the South China Sea.

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boundary between Bangladesh and Myanmar in the Bay of Bengal,[45] and this dispute was unilaterally referred to dispute settlement by Bangladesh. The next three Parts of this paper will examine the approaches of Southeast Asian states to maritime delimitation agreements, provisional arrangements, and third-party dispute settlement in greater detail.

III. SOUTHEAST ASIAN APPROACHES TO THE NEGOTIATIONS OF MARITIME DELIMITATION AGREEMENTS

Amongst the dispute settlement mechanisms recognized by international law for maritime boundary disputes, maritime delimitation agreements have a high priority under UNCLOS. Article 15 of UNCLOS requires states to determine their territorial sea boundary by agreement, and in the absence of agreement the median line should be employed as the boundary unless historic title or other special circumstances warrant otherwise. With regard to overlapping EEZ/continental shelf claims, Articles 74(1) and 83(1) require delimitation of the EEZ/continental shelf to be effected by agreement on the basis of international law in order to achieve an equitable solution.

Unsurprisingly, maritime delimitation agreements are the most frequent form of dispute settlement employed by states. Southeast Asian states are no exception and, as mentioned above, Southeast Asian states had concluded twenty-nine Delimitation Agreements between 1969 and 2009. Compared to some other regions in the Asia-Pacific, Southeast Asia has been particularly prolific in its conclusion of Delimitation Agreements. For example, in Northeast Asia (Sea of Japan, Yellow Sea, and the East China Sea),[46] there are currently only four maritime delimitation agreements in force,[47] with sovereignty disputes over islands continuing to be a challenge to maritime boundary-making.

Despite the requirement in Articles 74(1) and 83(1) that maritime delimitation agreements be concluded on the basis of international law, states are not bound to take into consideration the rules and principles governing maritime delimitation under international law. They "are free to agree to any boundary they want provided that the rights and interests of third states or of the international community are not prejudiced".[48]

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45. See *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Case No. 16, Judgment dated 14 March 2012, International Tribunal for the Law of the Sea (ITLOS), online ITLOS: 〈http://www.itlos.org/index.php?id=108&L=1%2F〉.

46. See McDorman, *supra* note 11 at 3349.

47. These are: (i) *Agreement Between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries*, 30 January 1974, Limits in the Seas No. 75 (1979), (entered into force 22 June 1978); (ii) *Agreement Between the Union of the Soviet Socialist Republics and the Democratic People's Republic of Korea on the Delimitation of the Soviet-Korean National Border*, 17 April 1985 (exact date of entry into force unknown); (iii) *Agreement of the Economic and Continental Shelf Boundary Between the Union of the Soviet Socialist Republics and the Democratic People's Republic of Korea*, 2 January 1986 (exact date of entry into force unknown); (iv) *Agreement Between the Government of the Union of Soviet Socialist Republics and the Government of the Democratic People's Republic of Korea Concerning the Regime of the Soviet-Korean State Frontier*, 3 September 1990 (exact date of entry into force unknown).

48. Prescott and Schofield, *supra* note 3 at 218.

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Notwithstanding this, international law will inevitably play a role in negotiations. As noted by Antunes, "[c]laims advanced by States are virtually always marked by the expression of an understanding of international law. While not necessarily determined by normative standards, agreements often incorporate a compromise between opposing views on normativity."[49]

In this regard, Southeast Asian states have demonstrated a remarkably innovative, flexible, and conciliatory approach towards the use of international law in their Delimitation Agreements. The following sections will demonstrate this by examining (A) Types of Maritime Delimitation Agreements, (B) Baselines in Maritime Delimitation Agreements, (C) Legal Principles Adopted in Maritime Delimitation Agreements, (D) Co-operative Arrangements in Delimitation Agreements, and (E) Factors Driving Maritime Delimitation Agreements in Southeast Asia.

A. *Types of Maritime Delimitation Agreements*

To date, Southeast Asian states have shown a distinct preference for simple linear settlements, i.e. the drawing of a line, which represents a single-purpose maritime boundary, either of the territorial sea, or the EEZ, or the continental shelf. Of the twenty-nine Delimitation Arrangements listed in Table 1, five are territorial sea delimitations and fourteen are continental shelf boundaries. Arguably, there is one example of a single-purpose EEZ boundary in Southeast Asia, the 1997 Australia-Indonesia EEZ Boundary (which converted the boundary provisionally established in the 1981 Provisional Fisheries Surveillance and Enforcement Arrangement into an EEZ boundary), but this also continued the seabed boundary established in 1972 between Australia and Indonesia. Accordingly, the 1997 Australia-Indonesia EEZ Boundary is more accurately described as a multiple line delimitation (separate boundaries for the EEZ and continental shelf), which will be dealt with below.

States in Southeast Asia have also adopted single multipurpose boundaries, i.e. one boundary which delimits both the EEZ and continental shelf (hereinafter referred to as the "single maritime boundary"), although they are in the minority compared with the single-purpose boundaries above. Of the twenty-nine Delimitation Agreements, five are single maritime boundaries (see Table 1). This is consistent with international state practice as well as judicial preference for a single maritime boundary delimiting both the EEZ and the continental shelf.[50] Judicial and state support for a single maritime boundary appears to be motivated by considerations of simplicity, certainty, and convenience.[51] As noted by Judge Oda in *Tunisia/Libya*:

> It is congruous or conceivable that the same marine/submarine column should be placed under different national jurisdictions for the same purpose of resource exploitation, however different the resources may be and that the same area of ocean be consequently

49. Antunes, *supra* note 5 at 180.

50. See Donald ROTHWELL and Tim STEPHENS, *The International Law of the Sea* (Oxford: Hart Publishing, 2010) at 407–8.

51. Stuart KAYE, "The Use of Multiple Boundaries in Maritime Boundary Delimitation and Practice" (1998) 19 Australian Yearbook of International Law 49 at 58.

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> policed by two different States. One is entitled to enquire whether superimposition of two different boundaries is tolerable as a matter of international *ordre public*.[52]

Despite the perceived advantages of single maritime boundaries, there is no legal impediment to having two separate boundaries. UNCLOS "does not indicate that the boundaries delimiting the continental shelf and the EEZ ought to be combined in a single line".[53] Indeed, Southeast Asia is unique in that it is the only region in the world which has adopted two separate boundaries for the EEZ and continental shelf for the same area, departing from judicial preference and state practice. The first example is the 1978 Australia-Papua New Guinea Delimitation (Torres Strait) which establishes two separate boundaries[54] between Australia and Papua New Guinea in the Torres Strait, namely a "seabed jurisdiction line", which delimits the sovereign rights of each state over the continental shelf,[55] and a fisheries jurisdiction line, which delimits the sovereign rights of each state "for the purpose of exploring and exploiting, conserving and managing fisheries resources other than sedentary species".[56]

The second example of two separate boundaries is in the Timor Sea, where separate boundaries were established between Australia and Indonesia through three consecutive agreements. First, in 1972, Australia and Indonesia established their seabed boundaries in the Timor Sea and Arafura Sea (Arrangement No. 6 in Table 1). Indonesia had argued that equidistance should be the applicable delimitation principle, whereas Australia (arguably bolstered by the *1969 North Sea Continental Shelf* cases, which had given support to the idea that the continental shelf was the "natural prolongation" of one's territory) argued that the Timor Trough was the "natural boundary" between Indonesia and Australia. Neither country was able to secure its maximum claim, and a line was drawn between the line of equidistance to the south and the axis of the Timor Trough to the north. The boundary favoured Australia as it gave Australia a greater portion of the seabed. The second agreement in this area came in 1981 in the form of the Provisional Fisheries Surveillance and Enforcement Arrangement, where Australia and Indonesia agreed on a provisional fisheries line which diverged from the seabed boundary and was closer to the equidistance line favoured by Indonesia (see Arrangement No. 19 in Table 1).[57] The third agreement in 1997 (see Arrangement No. 24 in Table 1)[58] converted the

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52. *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, (1982) I.C.J Reports 18 at para. 232.

53. Kaye, *supra* note 51 at 58.

54. There is also a Protected Zone enclosure which straddles the seabed jurisdiction line and surrounds several islands off Australia and Papua New Guinea which is established to protect the "traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement", and also to protect and preserve the marine environment: *1978 Australia-Papua New Guinea Delimitation (Torres Strait)* (No. 13 in Table 1), art. 10.

55. *Ibid*., art. 4(1).

56. *Ibid*., arts. 4(2), 1(1)(b).

57. Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries,* Vol. II (Leiden: Martinus Nijhoff Publishers, 1993) at 1229.

58. The agreement is not in force yet, reportedly because it contains references to the *1989 Timor Gap Treaty* which has now been replaced by the *2002 Timor Sea Treaty* between Australia and East Timor.

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provisional fisheries line to an EEZ boundary (based on equidistance) and also extended the 1972 seabed boundary westwards.

B. *Baselines in Maritime Delimitation Agreements*

A state's maritime zones are drawn from its baselines. Under UNCLOS, a state can draw a normal baseline which follows the low-water line along the coast.[59] However, in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in the immediate vicinity of the coast, a state can use straight baselines.[60] States which meet the definition of "archipelagic States" under Article 46 can also draw straight archipelagic baselines.[61]

Most maritime delimitations take as their starting point the baseline of the territorial sea. Baselines or, more specifically, base points along baselines, are critical in constructing a provisional delimitation line based on equidistance.[62] However, with regard to general state practice, maritime boundary agreements often do not mention the type or co-ordinate of baselines used.[63] Likewise, it is also often not clear when straight baselines have been used in the construction of a maritime boundary and there are only a few cases in which it is "clear that there is a link between these two sets of lines".[64] However, in a survey of the world's maritime boundaries carried out in 1993, it was reported that there were some twenty cases in which straight baselines were specifically taken into account, and in some fifty cases they were disregarded either in whole or in part.[65] However, it is not clear how many of these were cases of straight baselines that were adopted contrary to UNCLOS.

In international case-law, the International Court of Justice (ICJ) has found that the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the EEZ, and the issue of identifying base points for the drawing of an equidistance line for the purpose of delimiting the continental shelf and the EEZ, are two different issues.[66] The Court is not bound by the base points in baselines determined by the parties.[67] Further, the ICJ has also held that "the method of straight baselines, which is an exception to the normal rules for the determination of baselines … must be applied restrictively".[68]

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59. *UNCLOS*, *supra* note 6, art. 5.
60. *Ibid.*, art. 7.
61. *UNCLOS*, *supra* note 6, art. 47.
62. Clive SCHOFIELD, "Departures from the Coast: Trends in the Application of Territorial Sea Baselines under the Law of the Sea Convention" (2012) 27 International Journal of Marine and Coastal Law 723 at 729.
63. Louis B. SOHN, "Baseline Considerations" in Charney and Alexander, *supra* note 7 at 154–5.
64. This is because such a determination would require charts of a scale and accuracy adequate to ascertain the exact relationship of the boundary to the parties' straight baselines: *ibid.*, at 156–7.
65. *Ibid.*, at 157.
66. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] I.C.J Rep. 61 at para. 137.
67. *Ibid.*
68. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] I.C.J Rep. 40 at para. 212.

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In contrast to the position taken by the ICJ, a significant number of Southeast Asian states have adopted straight baselines even when they do not meet the required conditions in Article 7 of UNCLOS.[69] Examples of Southeast Asian states which have drawn straight baselines contrary to the requirements in UNCLOS are Cambodia,[70] Malaysia,[71] Myanmar,[72] the Philippines,[73] Thailand,[74] and Vietnam.[75]

When concluding Delimitation Agreements, some Southeast Asian states have demonstrated a flexible approach to the use of baselines. There are examples of one party accepting the use of straight baselines by another party even though those straight baselines were not in strict compliance with UNCLOS. A prime example of this is the 1969 Indonesia-Malaysia Continental Shelf Delimitation (Straits of Malacca and the South China Sea). The 1969 Agreement divided the continental shelves of Malaysia and Indonesia into three areas: the Straits of Malacca, the western side of the South China Sea, and the eastern side of the South China Sea.

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69. J. Ashley ROACH and Robert W. SMITH, *United States Responses to Excessive Maritime Claims*, 2nd ed. (Dordrecht: Kluwer Law International, 1996) at 17.

70. Council of the State Decree, 31 July 1982.

71. While Malaysia has not formally claimed straight baselines, Malaysia issued a map in 1979 (New Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia 1979) which suggests that it has employed a system of straight baselines arguably inconsistent with Article 7 of UNCLOS. While this has not been subject to objections from other states, "it appears that this has more to do with the fact that they have not been officially announced and publicized rather than because they necessarily meet the criteria set out in UNCLOS Article 7". See Sam BATEMAN and Clive SCHOFIELD, "State Practice Regarding Straight Baselines in East Asia - Legal, Technical and Political Issues in a Changing Environment", Paper Presented at *Difficulties in Implementing the Provisions of UNCLOS*, organized by the Advisory Board on the Law of the Sea (ABLOS), Monaco, 16–17 October 2008, online: University of New South Wales 〈http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session7-Paper1-Bateman.pdf〉.

72. Myanmar claimed a system of straight baselines on 15 November 1968. Myanmar's straight baselines do not meet the conditions in Article 7 in that they depart from the general direction of the coast to an appreciable extent and islands are used as turning points that are not in the immediate vicinity of the coast. The claim is also objectionable because it uses a single straight baseline segment across the Gulf of Martaban, which brings into question whether the waters so enclosed are "sufficiently linked to the land domain to be subject to the regime of internal waters" as required in art. 7(3) of UNCLOS. Myanmar's claim has been the subject of international protest: see Bateman and Schofield, *supra* note 71.

73. The Philippines established baselines through *Republic Act No. 3046* of 17 June 1961, and was subsequently amended through *Republic Act No. 5446* of 18 September 1968. Bateman and Schofield note that while this system of baselines appears to be archipelagic in character, enclosing approximately 1,000 islands that constitute the Philippines, the Philippines legislation refers to "straight baselines". Further, the Philippines did not recognize the right of innocent passage or archipelagic sea lanes passage through the waters enclosed by its declared straight baselines. The US and other countries have protested the Philippines' straight baselines: see Bateman and Schofield, *supra* note 71. However, the Philippines have now amended its baselines law by *Republic Act No. 9522* of February 2009 in order to bring its baselines in conformity with the archipelagic baselines regime: see Robert BECKMAN and Tara DAVENPORT, "CLCS Submissions and Claims in the South China Sea", Paper Presented at the *2nd International Workshop on the South China Sea: Co-operation for Regional Security and Development*, organized by the Diplomatic Academy of Vietnam at Ho Chi Minh City, 10–12 November 2010, online: Centre for International Law 〈http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/Beckman-Davenport-CLCS-HCMC-10-12Nov2010-1.pdf〉.

74. Thailand claimed straight baselines in relation to three sectors in the Gulf of Thailand and the Andaman Sea in 1970 and in one sector in the Gulf of Thailand in 1992. While the straight baselines declared by Thailand in 1970 have been described as conservative, the straight baseline it claimed in 1992 has been described as an excessive maritime claim: see Bateman and Schofield, *supra* note 71.

75. Vietnam claimed straight baselines in 1977, which has been described as particularly radical and far from the requirements established in art. 7 of UNCLOS. Vietnam's claims have been subject to both US and Thai protests: *ibid*.

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In the Straits of Malacca, a median line was used to divide the continental shelf equally. However, this ostensibly equal division was based on straight baselines being adopted by *both* Indonesia and Malaysia. Indonesia, of course, argued for the regime of archipelagic waters, which employed straight baselines.[76] Malaysia had not specified its baselines by geographic co-ordinates at the time of signing.[77] However, Malaysia's straight baselines "were apparently intended to put Malaysia on an equal footing in the division of the continental shelf with Indonesia which had previously drawn straight baselines".[78] Under international law applicable at the time, Malaysia would not qualify as a state entitled to draw straight baselines, which, as mentioned above, is only reserved for states which meet certain geographic conditions.[79] If a strict equidistant line using Malaysia's normal baselines had been used, Indonesia would have gained about 1,000 square nautical miles (sq nm) of continental shelf.[80] Indonesia's acceptance of Malaysia's use of straight baselines was seen as a "gift" from Indonesia to Malaysia for the latter's support of the regime of archipelagic waters during negotiations of the Third UN Convention on the Law of the Sea.[81] Indonesia also accepted the questionable use of Malaysia's straight baselines in the 1970 Indonesia-Malaysia Territorial Sea Delimitation (Straits of Malacca). However, it should be noted that the acceptance of Malaysia's straight baselines in these agreements has caused issues in the negotiations of an EEZ boundary with Malaysia in the Straits of Malacca.[82]

There have also been cases where two parties have declared straight baselines in contravention of UNCLOS but have disregarded them for purposes of maritime boundary delimitation, retracting from their extreme claims. For example, while both China and Vietnam proclaimed straight baselines around certain areas of their coast, including straight baselines around China's Hainan Island, they did not do so in the 2000 China-Vietnam Delimitation (Gulf of Tonkin)[83] (although it has been suggested that a small segment of the agreed boundary appears to have been

76. Archipelagic baselines and archipelagic waters were accepted in Part V of *UNCLOS*, *supra* note 6.

77. Even its 1979 map produced by the Directorate of National Mapping of Territorial Waters and Continental Shelf Boundaries does not specify baselines, and most scholars view the straight baselines as inferred or constructed baselines: Charney and Alexander, *supra* note 57 at 1022.

78. "Limits in the Seas No. 1, Continental Shelf Boundary: Indonesia and Malaysia" *US Geographer* (21 January 1970). Online: 〈http://www.law.fsu.edu/library/collection/limitsinseas/ls001.pdf〉.

79. Under art. 4 of the 1958 *Territorial Seas Convention*, only states whose "coastline is deeply indented and cut into" or which have "a fringe of islands along the coast in its immediate vicinity" can draw straight baselines. Malaysia had acceded to the *Territorial Seas Convention* on 21 December 1960.

80. Victor PRESCOTT, "Indonesia's Maritime Claims and Outstanding Delimitation Problems" (Winter 1995–1996) IBRU Boundary and Security Bulletin at 94–5.

81. Leonardo BERNARD, "Whose Side Is It On? The Boundaries Dispute in the North Malacca Strait" (2012) 9 Indonesian Journal of International Law 381 at 388. While countries such as Australia, Japan, the Netherlands, New Zealand, the UK, and the US protested against the Indonesian baseline system of 1957, Malaysia, together with the USSR and the PRC, were among the first countries to acquiesce to them, although such a concept impeded Malaysia's rights of access between its two parts on the peninsula and Borneo: see R. HALLER-TROST, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective* (London: Kluwer Law International, 1998) at 36.

82. See generally Bernard, *supra* note 81.

83. Colson and Smith, *supra* note 11 at 3750.

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influenced by straight baselines drawn by China for Hainan Island).[84] Similarly, in the 1997 Thailand-Vietnam Delimitation (Gulf of Thailand), both countries also disregarded their straight baselines for purposes of delimitation of the territorial sea, EEZ, and continental shelf boundary.[85]

C. *Legal Principles Adopted in Maritime Delimitation Agreements*

As mentioned above, both Articles 15 and Articles 74/83 set out the principles relevant for the delimitation of the territorial sea and EEZ/continental shelf respectively. Article 15 endorses equidistance for delimitation of the territorial sea unless special circumstances warrant an adjustment (known as the "equidistance-special circumstances" rule). Articles 74 and 83 merely state that delimitation of the EEZ/continental shelf "should be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". The vagueness of this formulation is attributable to the difficulties in obtaining agreement of the states negotiating UNCLOS on the applicable principles for delimitation.[86] Some states preferred the equidistance principle, taking into account "special circumstances" when necessary, as the main principle of delimitation, whereas others wanted to emphasize equitable principles.[87] Articles 74 and 83 contained language which gave precedence to neither argument. However, over the years, the decisions of international courts and tribunals have attempted to articulate what is meant by "equitable solution" and such jurisprudence is recognized to be relevant to the interpretation of Articles 74 and 83.[88]

There are two distinct phases in international jurisprudence. The first phase from 1969 to 1992[89] has been characterized as the "equitable principles-relevant circumstances" phase.[90] Delimitation was to

> be effected in accordance with equitable principles or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result. The underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method.[91]

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84. ZOU Keyuan, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin" (2005) 36 Ocean Development and International Law 13 at 14.
85. Johan Henrik NOSSUM, "What Vietnam Could Gain from Redrawing its Baselines" (Winter 2001–2002) IBRU Boundary and Security Bulletin at 103.
86. Churchill and Lowe, *supra* note 2 at 191.
87. *Ibid.*
88. *Bangladesh/Myanmar Dispute, supra* note 45 at para. 184.
89. *North Sea Continental Shelf Cases*, [1969] I.C.J Rep. 3; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, [1984] I.C.J Rep. 246; *Tunisia/Libya Case, supra* note 52; *Continental Shelf (Libya v. Malta)*, [1985] I.C.J Rep. 13; *Guinea/Guinea-Bissau Maritime Delimitation Case*, Decision of 14 February 1985, 25 I.L.M 252 (1986); *St Pierre and Miquelon Case*, 31 I.L.M (1992).
90. See, for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, [2002] I.C.J Rep. 303 at para. 288; Prescott and Schofield, *supra* note 3 at 221.
91. *St Pierre and Miquelon Case, supra* note 89 at para. 38.

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Under this approach, equitable principles gave no primacy to equidistance as a method of delimitation.[92] Instead, the goal of achievement of equitable results was the most important in delimitation (as opposed to the method of delimitation).[93]

However, this approach was modified in the later cases from 1993 onwards which found that the "equitable principles-relevant circumstances" rule as it had been adopted since 1958 is "closely interrelated"[94] or "very similar"[95] to the "*equidistance*/special circumstances" method applicable to the delimitation of the territorial sea.[96] This has been described as the "corrective-equity" approach[97] or the "equidistance/relevant circumstances" approach.[98] While the need for an equitable solution is still the defining goal, the courts have now set out a definite methodology in order to achieve such an equitable solution. Initially, this methodology consisted of two steps whereby the courts first drew a provisional equidistance line and will then consider whether there are factors calling for the adjustment of that line in order to achieve an equitable result.[99] Most recently, this has been modified to three steps in the 2009 *Black Sea* case:[100]

1. First, the Court will establish a provisional equidistance or median line unless there are compelling reasons that make this unfeasible in a particular case.

2. At the second stage, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. During this stage the Court will consider factors such as the configuration of the coasts concerned and the presence of islands.

3. Finally, at the third stage, the Court will verify that the line does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each state by reference to the delimitation line. This final check for an equitable outcome entails a confirmation that no great disproportionality of the delimited maritime areas can be evident by comparison to the ratio of coastal lengths.

In this regard, Southeast Asian states have certainly employed international law principles in their negotiations, utilizing the more recognized "equidistance/relevant circumstances" methodology. Fifteen of the Delimitation Agreements in Southeast

92. *Tunisia/Libya Case, supra* note 52 at para. 110.
93. Yoshifumi TANAKA, "Reflections on Maritime Delimitation in the Nicaragua/Honduras Case", Paper Presented at the International Law Association British Branch, 5 March 2008, online: 〈http://www.zaoerv.de/68_2008/68_2008_4_a_903_938.pdf〉.
94. *Qatar/Bahrain*, *supra* note 68 at para. 231.
95. *Cameroon/Nigeria*, *supra* note 90 at para. 228.
96. *UNCLOS*, *supra* note 6, art. 15 (emphasis added).
97. See Tanaka, *supra* note 93 at para. 229.
98. *Bangladesh/Myanmar*, *supra* note 45 at para. 229.
99. See, for example, *Arbitration between Barbados and Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them (Barbados/Trinidad and Tobago)*, Award, (2006) 45 I.L.M. 798 at para. 242.
100. *Romania/Ukraine*, *supra* note 66 at para. 115–22.

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Asia appear to have adopted equidistance as the applicable method for delimitation.[101] That said, the relatively high use of equidistance cannot be said to reflect a particular circumstance of the region and merely reflects that equidistance is generally applied as a point of departure in maritime boundary negotiations worldwide.[102] Indeed, as mentioned above, the equidistant line has been recognized as having a primary place in delimitation methodology by the ICJ, as reflected by the use of a provisional equidistance line in the first stage of delimitation.

Despite the prevalence of equidistance as a method of delimitation, there are nearly an equal number of Delimitation Agreements in which Southeast Asian states have negotiated variations of equidistance, adjusting the equidistance line to take into account special circumstances. This has not always resulted in an equal division of maritime space.[103] Southeast Asian states have demonstrated a willingness to adopt a flexible approach towards "relevant circumstances", and on many occasions have not pushed their maximum legal claims in order to get agreement on their maritime boundaries. This will be illustrated with several examples below.

1. *Geological and geomorphologic circumstances*

Under international law, geological and geomorphologic factors (i.e. the composition and shape of the seabed) can constitute relevant circumstances which would require an adjustment of the equidistance line.[104] Geological and geomorphologic circumstances have played a role in adjusting the equidistance line in Delimitation Agreements in Southeast Asia, although they were concluded before the 1985 *Libya/*

101. These are the 1971 Indonesia-Australia (on behalf of Papua New Guinea) Continental Shelf Delimitation (Arafura Sea) (No. 3 in Table 1); 1971 Indonesia-Thailand Continental Shelf Delimitation (Straits of Malacca and Andaman Sea) (No. 4 in Table 1); 1973 Indonesia-Australia (on behalf of Papua New Guinea) Delimitation (Arafura Sea) (No. 7 in Table 1); 1974 Indonesia-India Continental Shelf Delimitation (Andaman Sea) (No. 9 in Table 1); 1977 Indonesia-India Continental Shelf Delimitation (Andaman Sea) (No. 11 in Table 1); 1978 India-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 12 in Table 1); 1979 Malaysia-Thailand Territorial Sea Delimitation (Straits of Malacca and Gulf of Thailand) (No. 15 in Table 1); 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand) (No. 16 in Table 1); 1980 Myanmar-Thailand Delimitation (Andaman Sea) (No. 17 in Table 1); 1980 Indonesia-Papua New Guinea Delimitation (Pacific Ocean) (No. 18 in Table 1); 1993 India-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 21 in Table 1); 1993 India-Myanmar-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 22 in Table 1); 1995 Malaysia (Johor)-Singapore Territorial Waters Delimitation (Johor Straits) (No. 23 in Table 1); 1997 Australia-Indonesia Delimitation (Timor Sea) (No. 24 in Table 1); 1997 Thailand-Vietnam Delimitation (Gulf of Thailand) (No. 25 in Table 1).

102. Park, *supra* note 29 at 301.

103. At least twelve Delimitation Agreements do not use a strict equidistance line. These are the 1969 Indonesia-Malaysia Continental Shelf Delimitation (Straits of Malacca and South China Sea) (No. 1 in Table 1); 1970 Indonesia-Malaysia Territorial Sea Delimitation (Straits of Malacca) (No. 2 in Table 1); 1971 Indonesia-Malaysia-Thailand Continental Shelf Delimitation (Straits of Malacca) (No. 5 in Table 1); 1972 Indonesia-Australia Continental Shelf Delimitation (Timor Sea and Arafura Sea) (No. 6 in Table 1); 1973 Indonesia-Singapore Territorial Sea Delimitation (Straits of Malacca) (No. 8 in Table 1); 1975 Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 10 in Table 1); 1978 Australia-Papua New Guinea Delimitation (Torres Strait) (No. 13 in Table 1); 1978 Indonesia-India-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 14 in Table 1); 1981 Indonesia-Australia Provisional Fisheries Delimitation (Timor Sea) (No. 19 in Table 1); 1986 Myanmar-India Delimitation (Andaman Sea, Coco Channel, and Bay of Bengal) (No. 20 in Table 1); 2000 China-Vietnam Delimitation (Gulf of Tonkin) (No. 26 in Table 1); 2003 Indonesia-Vietnam Continental Shelf Delimitation (South China Sea) (No. 27 in Table 1).

104. This was recognized in the *North Sea Continental Shelf Cases*, *supra* note 89.

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Malta Continental Shelf case[105] which marked the beginning of the decline of geological and geomorphologic circumstances in maritime delimitation.[106]

Indonesia, in particular, has agreed to an adjustment in the equidistance line to take into consideration characteristics of the seabed, hence affording the other party a greater share of the seabed. For example, the 1972 Indonesia-Australia Continental Shelf Delimitation (Timor Sea and Arafura Sea) referred to above was not an equidistant one despite Indonesia's preference for one. The boundary was drawn between the line of equidistance to the south and the axis of the Timor Trough to the north, favouring Australia and its arguments that the Timor Trough was a geomorphologic circumstance which interrupted the unity of the seabed. Similarly, the continental shelf boundary established in the 1997 Indonesia-Australia Delimitation (Timor Sea) again favoured Australia's arguments on geomorphologic circumstances, although it established an equidistance line for the EEZ.

The 1973 Indonesia-Singapore Territorial Sea Delimitation (Straits of Malacca) uses both the equidistance principle (three points) and a negotiated variation of the equidistance principle (three points). Two of the three negotiated points on the west are slightly closer to Indonesia and hence favour Singapore. Interestingly, one of the points lies within Indonesia's internal/archipelagic waters,[107] which means that a "small patch of Singapore's territorial seas" cuts into Indonesia's internal waters.[108] This was a pragmatic consideration so as to accommodate the deep-draft tanker route that lies close to the boundary. Indonesia took into account the geomorphologic considerations of the seabed for pragmatic reasons, in a way which favoured Singapore.[109]

Another example is the boundary in the 1975 Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea), which lay on the Indonesian side of a strict line of equidistance and favoured Thailand.[110] Charney and Alexander suggest that one possible reason for the concession by Indonesia could be the geomorphologic conditions of the seabed. The continental shelf adjacent to Thailand is wider than that adjoining Indonesia, and there is a broad depression between them, i.e. the seabed shelves much more steeply off the Indonesian coast than off the Thai coast.[111] Further, a spur of shallower seabed extends from the Thai margin north of Dreadnought Bank.[112] It appears that Indonesia recognized the equity of giving Thailand areas of the adjacent margin beyond the strict line of equidistance.[113]

Similarly, in the 1978 India-Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea), the parties agreed to a tri-junction point which resulted in India

105. *Libya/Malta*, *supra* note 89.
106. Keith HIGHET, "The Use of Geophysical Factors in the Delimitation of Maritime Boundaries" in Charney and Alexander, *supra* note 7, 167.
107. Charney and Alexander, *supra* note 7 at 1049.
108. *Ibid*., at 1051.
109. *Ibid*.
110. Charney and Alexander, *supra* note 57 at 1465.
111. *Ibid*., at 1468.
112. *Ibid*., at 1377.
113. *Ibid*.

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securing full equidistance entitlement, with Thailand securing more than its full equidistance entitlement and Indonesia obtaining less than its full equidistance entitlement.[114] The concession made to Thailand compared with the equidistance line was borne entirely by Indonesia and has to do with the same considerations that resulted in the 1975 Indonesia-Thailand Continental Shelf Boundary discussed above being not equidistant.[115]

2. *Offshore features*

Under Article 121 of UNCLOS, a feature which qualifies as an "island", i.e. a naturally formed feature above water at high tide, and which is capable of sustaining human habitation or an economic life of its own, is entitled to a territorial sea, EEZ, and continental shelf of its own.[116] If it is not capable of sustaining human habitation or an economic life of its own, it is considered a "rock", only entitled to a territorial sea.[117] The meaning of "sustaining human habitation and economic life of its own" was left deliberately vague in UNCLOS and has been subject to several different interpretations.[118]

The issue of whether a particular feature qualifies as an "island" capable of generating extended maritime zones and its resultant effect on delimitation has also been a frequent bugbear in maritime delimitation negotiations and adjudications.[119] Generally, under international case-law, if there are overlapping claims between a maritime zone measured from a small remote island and a maritime zone from the mainland or from an archipelagic state, the practice of courts and tribunals is to give a significantly reduced effect to the island when delimiting the maritime boundary.[120] In negotiations, it will be up to the parties to decide what effect is given to islands in delimitation.

Southeast Asian states have shown a conciliatory approach in their treatment of offshore features in Delimitation Agreements. Many states have allowed their own offshore features which could reasonably qualify as "islands" to have a reduced effect in delimitation, or have agreed that offshore features belonging to other states can have full effect.

The first example of this is the 1969 Indonesia-Malaysia Continental Shelf Delimitation (Straits of Malacca and the South China Sea). The boundary drawn on the eastern side of the South China Sea off the coast of Sarawak[121] originates from Tanjong Datu, the northern terminus of the land boundary between Indonesia's Kalimantan and Malaysia's Sarawak. It is not based on equidistance and is slightly on the Indonesian side of what would be the median line from the base points of the

114. *Ibid.*, at 1383.
115. *Ibid.*, at 1379.
116. *UNCLOS*, *supra* note 6, arts. 121(1), 121(2).
117. *Ibid.*, art. 121(3).
118. There has been no authoritative interpretation by international courts and tribunals of what is meant by "sustaining human habitation and an economic life of its own".
119. Prescott and Schofield, *supra* note 3 at 248–9.
120. Rothwell and Stephens, *supra* note 50 at 405.
121. Charney and Alexander, *supra* note 7 at 1019.

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parties. The Indonesian Islands situated northwest of Tanjong Datu were not given full effect on Malaysia's insistence.[122]

In the 1971 Indonesia-Thailand Continental Shelf Delimitation (Straits of Malacca and Andaman Sea), an equidistance line was used. However, Indonesia did not object to Thailand using small islands 30 nm from the mainland as base points, i.e. they were given full effect.[123]

Similarly, in the 1980 Indonesia-Papua New Guinea Delimitation (Pacific Ocean), Indonesia concluded a continental shelf boundary with Papua New Guinea based on an equidistant line between Indonesia's cape north of Djajapura and from Papua New Guinea's Wuvulu Island. Indonesia clearly allowed Wuvulu Island to be given full effect, even though Wuvulu lies more than 230 km from Papua New Guinea. If Wuvulu had not been given full effect, one of the points of the maritime boundary would have been located further east in favour of Indonesia.[124]

The 1986 Myanmar-India Delimitation (Andaman Sea, Coco Channel, and in the Bay of Bengal) is also an interesting example of flexible and conciliatory treatment of offshore features between a Southeast Asian state and a South Asian state. This boundary is approximately 600 nm in length and separates India's maritime claims measured from the Andaman and Nicobar Islands from Myanmar's maritime claims. The countries used both an equidistant boundary as well as a negotiated variance of the equidistant boundary.[125] This was a particularly difficult boundary to draw, and negotiations took eleven years.[126] One of the major obstacles to the conclusion of the boundary was, first, the fact that Myanmar and India claimed sovereignty over the Narcondam Islands, east of the Andaman Islands. Second, Myanmar disputed India's right to claim extended maritime zones from the Narcondam Islands. Using the Narcondam Islands as a base point for an equidistance line would have given India a marked advantage. On India's part, India objected to the correctness of Myanmar's baseline across the Gulf of Martaban and was opposed to that baseline being used in generating equidistance points on the boundary.[127] However, both states compromised in order to reach an agreement on delimitation. Myanmar gave up its claim to the the Narcondam Islands and also did not insist on the closing line across the Gulf of Martaban being used to fix the boundary.[128] In exchange, part of the boundary either completely discounts India's claim from both the Barren and Narcondam Islands or gives them half-effect.[129] The net result is that Myanmar

122. Indonesia is believed to have conceded to Malaysian claims to enlist Malaysian support for its archipelagic claims: *ibid.*, at 1022.

123. Charney and Alexander suggest that there are several reasons for doing so. Indonesia had been generous in earlier boundary agreements with Malaysia when a seabed boundary had been drawn on the Indonesian side of the strict line of equidistance. Second, if Indonesia had questioned Thailand's full use of small islands as base points, it is possible that Thailand may have changed its baselines by moving them seaward to surround all coastal islands: see Charney and Alexander, *supra* note 57 at 1457.

124. *Ibid.*

125. *Ibid.*, at 1334.

126. *Ibid.*, at 1335.

127. *Ibid.*, at 1329.

128. *Ibid.*, at 1332.

129. *Ibid.*, at 1330.

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gained about 6,225 sq nm above its entitlement according to a strict application of the equidistance principles.[130]

Another notable example is the 1997 Thailand-Vietnam Delimitation (Gulf of Thailand), which was Vietnam's first delimitation agreement. When Thailand made its continental shelf claim vis-à-vis Vietnam in 1973, it had given no effect either to the Thai offshore feature Ko Losin[131] or to Vietnamese features in the Tho Chu archipelago. Similarly, Vietnam's claim to the continental shelf in 1971 gave full effect to the features in the Tho Chu archipelago but no effect to Ko Losin.[132] However, both parties retracted from their absolute positions and agreed to give due weight to both Ko Losin and the Tho Chu archipelago.[133] This resulted in Thailand getting two-thirds of the disputed area and Vietnam getting one-third of the disputed area, although Charney and Smith note that "this inequity is more apparent than real" as the "maximum claims of both States exaggerate the area that was truly in dispute and subject to negotiation".[134]

The 2000 China-Vietnam Delimitation (Gulf of Tonkin), China's first maritime boundary agreement, has also been described as a "product of obvious compromise, creativity and the result of pragmatic considerations".[135] Both parties considerably retracted from their initial hardline positions. During negotiations in the 1990s, Vietnam abandoned its claim of historic waters in the Gulf of Tonkin, and China also abandoned its proposal of a neutral zone in the shape of a rectangle in the middle of the gulf, within which no exploration or exploitation should take place. Vietnam also agreed not to give one of its islands, Bach Long Vi, which is 2.5 sq km, 62 m above sea level, and approximately 50 nm from Vietnam, full effect in constructing the boundary. It is estimated that the difference between an equidistance line using Bach Long Vi as a base point and one ignoring the island completely is approximately 1,700 sq km. Bach Long Vi was given a twenty-five percent effect on the delimitation line. The Vietnamese islet of Con Co was given half-effect in the southern areas of the Gulf of Tonkin. Other Vietnamese Islands, such as Chin Lan Xan and Cu Xu, were given some but not full effect in the inner reaches of the Gulf.[136] Further, both Vietnam and China agreed upon a common fishing zone, which made it easier for China to agree to a boundary line in the middle of the Gulf.[137]

Last, the 2003 Indonesia-Vietnam Continental Shelf Delimitation (South China Sea) resolved a long-standing maritime boundary dispute between Indonesia and Vietnam around the Natuna Islands and "represents a compromise between the

130. *Ibid.*

131. Although it had given effect to Ko Losin in its claims vis-à-vis Malaysia in the Gulf of Thailand: see Clive SCHOFIELD, "Unlocking the Seabed Resources of the Gulf of Thailand" (2007) 29 Contemporary Southeast Asia 286 at 302.

132. Jonathan CHARNEY and Robert SMITH, eds., *International Maritime Boundaries*, Vol. IV (Leiden: Martinus Nijhoff Publishers, 2002) at 2687.

133. *Ibid.*

134. *Ibid.*, at 2689.

135. Colson and Smith, *supra* note 11 at 3743.

136. *Ibid.*, at 3749–50.

137. *Ibid.*, at 3753.

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positions of the parties".[138] The boundary consists of equidistant and non-equidistant sections. The western part of the boundary is equidistant between the Indonesian islands of Natuna and Vietnam's island of Hon Khoai.[139] It is clear that Indonesia got full effect for its islands in this part of the boundary and retained its control over hydrocarbon resources in the seabed around the Natunas.[140] However, as the boundary progresses, it veers south of the equidistance line in favour of Vietnam, which implies that Indonesia's islands were given only partial weight in the construction of this section of the line.[141] Colson and Smith suggest several reasons for this: the disparity in the relevant coastal fronts (Indonesia's concave coastline and small islands as against Vietnam's mainland coast and associated islands) and the fact that Indonesia's relevant island groups (the Natunas and Anambas) are considerably further offshore than Vietnam's islands.[142]

D. *Co-operative Arrangements in Delimitation Agreements*

Another notable trend in Delimitation Agreements in Southeast Asia is the increasing use of co-operative arrangements in addition to the establishment of a boundary, ranging from loose agreements to co-operate in certain areas to concrete legal arrangements on co-operation with respect to resources.

Approximately half of the Delimitation Agreements contain a provision dealing with "unity of deposits", i.e. where hydrocarbon resources straddle a boundary. These provisions most frequently simply establish the principle that if there is a common deposit lying across the boundary, there is a duty to negotiate and reach an agreement on the development of straddling resources.[143] However, Delimitation Agreements such as the 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand) establish more specific rules in cases where there is a "unity of deposits":

> If any single geological petroleum or natural gas structure or field, or any mineral deposit of whatever character, extends across the boundary lines referred to in Article I, the two governments shall communicate to each other all information in this regard and shall seek to reach agreement as to the manner in which the structure, field or deposit will be most effectively exploited; and all expenses incurred and benefits derived therefrom shall be equitably shared.[144]

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138. David COLSON and Robert SMITH, eds., *International Maritime Boundaries,* Vol. VI (Leiden: Martinus Nijhoff Publishers, 2011) at 4308.

139. *Ibid.*

140. *Ibid.*, at 4310.

141. *Ibid.*

142. *Ibid.*

143. See, for example, art. IV of the 1969 Indonesia-Malaysia Delimitation (Straits of Malacca and South China Sea) (No. 1 in Table 1); art. III of the 1974 Indonesia-India Continental Shelf Delimitation (Andaman Sea) (No. 9 in Table 1); art. II of the 1975 Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 10 in Table 1); art. 7 of the 2000 China-Vietnam Delimitation (Gulf of Tonkin) (No. 26 in Table 1); and art. 4 of the 2003 Indonesia-Vietnam Continental Shelf (South China Sea) (No. 27 in Table 1).

144. Art. IV, 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand) (No. 16 in Table 1).

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There are also examples of more detailed co-operative arrangements on resources which were essential to the conclusion of the boundary. For example, and as mentioned above, the 2000 China-Vietnam Delimitation Agreement (Gulf of Tonkin) was concluded together with the 2000 Agreement on Fishery Co-operation in the Gulf of Tonkin, which established a common fishery zone, a buffer zone for small fishing boats, and a zone for transitional arrangements.[145]

A more interesting example can be seen in the 2009 Brunei-Malaysia Delimitation, which has yet to be published. From available reports, it appears that on 16 March 2009, Malaysia and Brunei agreed to an Exchange of Letters which established the final delimitation of the territorial sea, continental shelf, and EEZ of both states off Borneo.[146] This area had been subject to a long-standing overlapping claim dispute between Brunei and Malaysia, particularly over Blocks L and M, which had been the subject of competing concessions by Malaysia and Brunei. However, along with the Delimitation Agreement, it was also announced that Blocks L and M would be situated on Brunei's continental shelf, but that Malaysia was given "unsuspendable" rights of access for the exploration and exploitation of Blocks L and M in exchange for giving up its claims over these Blocks.[147]

There are rarely any provisions on co-operation on the maritime environment, although notably, for the first time in Southeast Asia, the 2003 Indonesia-Vietnam Continental Shelf Delimitation (South China Sea) required the two states to consult with each other in order to co-ordinate their policies on the protection of the marine environment.[148]

E. *Factors Driving Delimitation Agreements in Southeast Asia*

1. *Economic factors*

Generally speaking, the need for maritime boundaries has been resource-induced,[149] and Southeast Asia is no different, with economic factors providing a major impetus for Delimitation Agreements.[150] For example, the need for hydrocarbon resources, coupled with a belief in the existence of hydrocarbon resources, played a considerable role in pushing parties to the Delimitation Agreements in the Gulf of Thailand[151] and the Andaman Sea,[152] the 2000 China-Vietnam Delimitation in the Gulf of Tonkin[153], and the

145. Zou, *supra* note 84 at 16.

146. Johan SARAVANAMUTTU, "Malaysia's Lucrative Approach to Joint Development in Troubled Seas" *Opinion Asia* (16 May 2010).

147. *Ibid*.

148. Art. 3, 2003 Indonesia-Vietnam Continental Shelf Delimitation (South China Sea) (No. 27 in Table 1).

149. Prescott and Schofield, *supra* note 3 at 217.

150. Barbara KWIATKOWSKA, "Economic and Environmental Considerations in Maritime Boundary Delimitation" in Charney and Alexander, *supra* note 7 at 91.

151. These are the 1979 Malaysia-Thailand Territorial Sea Delimitation (Straits of Malacca and Gulf of Thailand) (No. 15 in Table 1); the 1979 Malaysia-Thailand Continental Shelf Delimitation (Straits of Malacca and Gulf of Thailand) (No. 16 in Table 1); and the 1997 Thailand-Vietnam Delimitation Agreement (Gulf of Thailand) (No. 25 in Table 1). Also see McDorman, *supra* note 11 at 3440.

152. The 1975 Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 10 in Table 1); the 1978 India-Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 14 in Table 1); and the 1986 Myanmar-India Delimitation (Andaman Sea, Coco Channel, and Bay of Bengal) (No. 20 in Table 1). See also Kwiatkowska, *supra* note 150 at 92.

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2003 Indonesia-Vietnam Continental Shelf Delimitation in the South China Sea around the Natuna Islands[154], as well as the 2009 Brunei-Malaysia Delimitation off Borneo.[155] While the need to exploit fishery resources appears to have played a less significant role in Delimitation Agreements in Southeast Asia (as evidenced by the smaller number of agreements delimiting the EEZ), such resources significantly influenced Australia and Indonesia in concluding their 1981 and 1997 Delimitation Agreements,[156] and also pushed China and Vietnam to agree to a boundary in the Gulf of Tonkin.[157]

Another notable factor inducing Indonesia, Malaysia, Singapore, and Thailand to agree to Delimitation Agreements[158] in the Straits of Malacca and Singapore is the need to ensure the safety of navigation and the protection of the marine environment in this intensely used narrow sea lane.[159]

2. *Political factors*

One of the major reasons why Southeast Asia has been such an active arena for maritime boundary-making is the existence of good relations between Southeast Asian states,[160] particularly as ASEAN has matured as an organization. It has been noted that ASEAN Member States in particular "are both familiar and comfortable with one another and are careful to avoid unnecessary conflicts and provocations".[161] For example, the ever-improving relations between Thailand and Vietnam, bolstered

153. The Gulf of Tonkin is supposedly rich in oil and gas resources and competing claims over such resources by Vietnam and China initially triggered negotiations in the 1970s: see Zou, *supra* note 84 at 17–18.

154. The potential for oil and gas north of the Natuna Islands was an important factor in the reaching of the 2003 Indonesia-Vietnam Continental Shelf Delimitation, and the seabed areas around the Natunas have proven to hold substantial reserves of commercially recoverable hydrocarbons.

155. Both Malaysia and Brunei had awarded concessions over these blocks to foreign oil companies in 2002–03. These foreign oil companies had on several occasions been forced to leave the area by both Bruneian and Malaysian patrol boats, prompting some foreign companies to cease all operations in the area and highlighting the need for agreement on boundaries: see Leszek BUSZYNSKI and Sazlan ISKANDAR, "Maritime Claims and Energy Cooperation in the South China Sea" (1 April 2007) 29 Contemporary South East Asia 143–71 at 163; Saravanamuttu, *supra* note 146.

156. The 1981 Indonesia-Australia Provisional Fisheries Delimitation (Timor Sea) (No. 19 in Table 1) established a provisional fisheries boundary which allocated jurisdiction over fisheries surveillance and enforcement to Australia and Indonesia on either side of the line. One of the reasons why this agreement was concluded after only seven days of negotiations was because it had already been agreed in 1974 between Australia and Indonesia to allow traditional fishermen from Indonesia to fish in Australia's EEZ: see, generally, Report No. 6 – 2(4) in Charney and Alexander, *supra* note 57 at 1229–36.

157. Access to fishery resources and fisheries management was the key issue in the negotiation of the 2000 China-Vietnam Delimitation (Gulf of Tonkin) (No. 26 in Table 1), and there are approximately 700,000 to 800,000 Chinese fishermen who depend on the fishery resources in the Gulf of Tonkin. One of the major reasons for the signing of the Delimitation Agreement is the accompanying Agreement on Fishery Co-operation in the Beibu Gulf: see Zou, *supra* note 84 at 16–18.

158. See 1969 Indonesia-Malaysia Continental Shelf Delimitation (Straits of Malacca and the South China Sea) (No. 1 in Table 1); 1970 Indonesia-Malaysia Territorial Sea Delimitation (Straits of Malacca) (No. 2 in Table 1); 1971 Indonesia-Thailand Continental Shelf Delimitation (Straits of Malacca and Andaman Sea) (No. 4 in Table 1); 1971 Indonesia-Malaysia-Thailand Continental Shelf Delimitation (Straits of Malacca) (No. 5 in Table 1); 1973 Indonesia-Singapore Territorial Sea Delimitation (Straits of Malacca) (No. 8 in Table 1); 1979 Malaysia-Thailand Territorial Sea Delimitation (Straits of Malacca and Gulf of Thailand) (No. 15 in Table 1); and 2009 Indonesia-Singapore Territorial Sea Delimitation (Singapore Strait) (No. 28 in Table 1).

159. Charney and Alexander, *supra* note 7 at 1020, 1050.

160. McDorman, *supra* note 11 at 3442.

161. Johnston and Valencia, *supra* note 8 at 50.

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by Vietnam's entrance into ASEAN in 1995, facilitated the conclusion of the 1997 Thailand-Vietnam Delimitation Agreement in the Gulf of Thailand.[162] Further, the existence of good relations between Southeast Asian states and extra-regional states such as China and Vietnam was also instrumental in the 2000 China-Vietnam Delimitation in the Gulf of Tonkin.[163]

3. *Strategic reasons*

There are also other strategic reasons why states such as Indonesia agreed to a relatively high number of boundaries compared with other Southeast Asian states. As noted by Charney and Alexander, Indonesia has been "diligent in negotiating maritime limits with its neighbours. It was much more active than its neighbours and it is generally true that Indonesia did not push hard for maximum claims but demonstrated a spirit of conciliation and willingness to compromise."[164] This conciliatory compromise was in part a calculated compromise in order to secure support for Indonesian claims to archipelagic waters around the Indonesian archipelago. In 1957, Indonesia had declared straight baselines by "connecting the outermost points of the low-water mark of the outmost islands or part of such islands comprising Indonesian territory".[165] This increased its ocean space by approximately 875,000 sq km. Accordingly, one of the reasons why Indonesia so readily agreed to maritime delimitation agreements that did not always give it the biggest advantage was to gain recognition of this method of drawing straight baselines.[166]

IV. PROVISIONAL ARRANGEMENTS

As mentioned above, UNCLOS recognizes that the delimitation of a boundary may not always be possible. It requires states, pending agreement on maritime delimitation, and in a spirit of understanding and conciliation, "to make every effort to enter into *provisional arrangements of a practical nature* and during the transitional period, not to jeopardize or hamper the reaching of final agreement. Such arrangements shall be without prejudice to the final delimitation."[167] This provision is designed to "promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation" and "constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area".[168] As noted by

162. Charney and Smith, *supra* note 132 at 2684–5.

163. It was only after the normalization of relations in 1991 that negotiations between the two parties became fruitful: see, generally, Zou, *supra* note 84.

164. Charney and Alexander, *supra* note 57 at 1196.

165. Djuanda Declaration, 13 December 1957.

166. Indonesia concluded ten bilateral and trilateral agreements between 1969 and 1975; see Haller-Trost, *supra* note 81 at 24.

167. *UNCLOS*, *supra* note 6, arts. 74(3), 83(3) (emphasis added).

168. *Guyana/Suriname Arbitration*, UN Law of the Sea Annex VII Arbitral Tribunal, Award of 17 September 2007, at para. 460, online: Permanent Court of Arbitration 〈http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf〉.

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Prescott and Schofield, such co-operative arrangements are "evidence of the emergence of a more broad-based, functionalist and comprehensive approach to ocean management as opposed to more traditional legalistic and thus confrontational approaches focusing on the delimitation of a particular dividing line".[169]

UNCLOS leaves it to the discretion of the state as to the type of "provisional arrangements of a practical nature" they may enter into. They include a wide variety of arrangements such as mutually agreed moratoriums on all activities in overlapping areas, joint development or co-operation on fisheries, agreements on environmental co-operation, and agreements on the allocation of criminal and civil jurisdiction.

States have increasingly utilized provisional arrangements of a practical nature when there is an impasse in maritime delimitation negotiations and agreement on a boundary cannot be reached. A survey of state practice indicates that there are approximately thirty-two provisional arrangements adopted by states worldwide.[170] As reflected in Table 1, Southeast Asian states have concluded ten provisional arrangements in lieu of maritime delimitation. This is a relatively high number—the only other region with a higher number appears to be the Atlantic Ocean and Caribbean region.[171]

The following paragraphs examine the two most common types of provisional arrangements adopted in Southeast Asia, namely joint development arrangements and conflict management arrangements.

A. *Joint Development of Hydrocarbon Resources*

Generally, joint development arrangements are one of the most common types of "provisional arrangements of a practical nature" under Articles 74(3) and 83(3) of UNCLOS. Joint development is usually used as a "generic term"[172] and extends from unitization of a single resource straddling an international boundary to joint development of a shared resource where boundary delimitation is shelved because it is not feasible or possible to reach an agreed boundary at the time[173] (this present paper is concerned with the latter type of joint development arrangement). International courts and tribunals have endorsed joint development agreements as an alternative to maritime delimitation.[174] For example, in the *North Sea Continental Shelf* cases, the ICJ held that joint exploration agreements were "particularly appropriate when it is a question of preserving the unity of a deposit" in areas of

169. *Ibid.*

170. See, generally, ss. 3.3–3.7 of Ben MILLIGAN, *Legal and Policy Options for the Provisional Joint Management of Maritime Spaces Subject to Overlapping Jurisdictional Claims*, Unpublished PhD thesis, University of Woollongong.

171. *Ibid.*

172. Hazel FOX, ed., *Joint Development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary* (London: British Institute of International and Comparative Law, 1989) at 43.

173. Chidinma Bernadine OKAFOR, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?" (2006) 21 International Journal of Marine and Coastal Law 489 at 495.

174. *Guyana v. Suriname*, *supra* note 168 at 463.

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overlapping claims.[175] In his Dissenting Opinion in the 1982 continental shelf delimitation case between Tunisia and Libya, Judge ad hoc Evensen proposed a system of joint exploration of petroleum resources based on his view that joint development represented an alternative equitable solution to the maritime boundary dispute, which was eventually adopted by the parties.[176] In the Eritrea/Yemen arbitration, the Arbitral Tribunal stated that the parties should give every consideration to the shared or joint or unitized exploitation of any such resources.[177]

In line with state practice and the endorsement of international courts and tribunals, states in Southeast Asia have frequently employed the joint development of hydrocarbon resources as a "provisional arrangement of a practical nature", pending delimitation of overlapping maritime claims. Out of the ten provisional arrangements referred to in Table 1, eight concern co-operation on hydrocarbon resources.

1. *Factors driving joint development arrangements in Southeast Asia*

There are several reasons why Southeast Asian states have chosen joint development in lieu of a maritime delimitation agreement. First, agreement on such arrangements is usually preceded by an insurmountable impasse on national positions in negotiations of a maritime boundary. For example, with regard to the 1979/1990 Malaysia-Thailand Provisional Arrangement, the states were able to agree on a continental shelf boundary up to 29 nm in the Gulf of Thailand in 1972.[178] However, negotiations stalled because of a disagreement over the use of Ko Losin, a feature located approximately 39 nm offshore and 1.5 m above water at high tide with a light beacon on it.[179] Thailand insisted that Ko Losin was to be treated as a base point in measuring the continental shelf boundary at the expense of Malaysia, whereas Malaysia insisted that Ko Losin should not be used as a base point to extend Thailand's continental shelf.[180] Similarly, with respect to the 1989 Australia-Indonesia Provisional Arrangement, the disparity between the two states on the applicable rules of delimitation for the continental shelf in the Timor Sea (natural prolongation versus equidistance) meant that it was too difficult to come to an agreement about a boundary.

In the 2001 Cambodia-Thailand Provisional Arrangement, which covered the largest overlapping area in the Gulf of Thailand, the applicable Memorandum of Understanding divided the overlapping area into two areas, along the 11° north parallel.[181] In Area I, north of the boundary, parties agreed to attempt to define the

175. *North Sea Continental Shelf Sea Cases*, *supra* note 89 at para. 99.

176. David ONG, "Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?" (1999) 93 American Journal of International Law 771 at 787.

177. *The Government of the State of Eritrea v. The Government of the Republic of Yemen* (1999), 119 I.L.R. at 417, (1999), Award Of The Arbitral Tribunal In The Second Stage Of The Proceedings (Maritime Delimitation), online: PCA-CPA 〈http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF〉.

178. See 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand) (No. 16 in Table 1).

179. Schofield, *supra* note 131 at 290.

180. It should be borne in mind that negotiations of UNCLOS were going on at this point in time and the exact effect of islands in generating maritime zones or their effect in maritime delimitation was not clear.

181. Schofield, *supra* note 131 at 302.

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maritime boundary through further negotiations, whereas south of the boundary there would be further negotiations for joint development of this area.[182] There was no way that Thailand would have accepted joint development in the north of the overlapping area, which would risk legitimizing Cambodia's arguably dubious claim in that area, so the division of the area was a practical way to address this issue.[183]

The second major impetus was the belief that these areas contained hydrocarbon resources, and joint development was the only way to exploit such resources in an area of overlapping claims. Both the Gulf of Thailand[184] and the Timor Sea[185] are reportedly rich in hydrocarbon resources. In the majority of the Provisional Arrangements under discussion, there was the discovery of hydrocarbons coupled with the unilateral award of concessions in the area. For example, in the 1979/1990 Malaysia-Thailand Provisional Arrangement, it was believed that there was natural gas potential in the area of overlapping claim, and the unilateral award of exploration concessions to oil companies by both countries sped up negotiations on joint development.[186] In the 1989 Australia-Indonesia Provisional Arrangement, the discovery of exploitable hydrocarbons in an area called Kelp in the Timor Gap, coupled with declining production in Australia's oilfields, also highlighted the importance of joint development.[187] In the 1992 Malaysia-Vietnam Provisional Arrangement, Malaysia had commenced hydrocarbon exploration activities from the 1980s onwards and signed three petroleum agreements with foreign enterprises.[188] When one of these enterprises announced that there were gas reserves in the overlapping area in 1991, Vietnam protested, and thereafter both countries expressed a willingness to negotiate.[189]

A third related factor which motivated states in Southeast Asia to agree to joint development was the disparity between the capacities of some states to develop their petroleum and natural gas resources.[190] For example, in the 1992 Malaysia-Vietnam Provisional Arrangement, Malaysia's national oil company PETRONAS carried out exploration and exploitation on behalf of PETROVIETNAM, Vietnam's national oil company, as the latter lacked the necessary expertise as well as

182. *Ibid.*

183. *Ibid.*, at 303.

184. Daniel J. DZUREK, "Maritime Agreements and Oil Exploration in the Gulf of Thailand" in Gerald BAKE *et al.*, eds., *Boundaries and Energy: Problems and Prospects* (London: Kluwer Law International, 1998) at 177.

185. Swee Guan LEE, "Petroleum Development Area Timor Sea", online: GEOExpro 〈http://www.geoexpro.com/exploration/timor-sea/〉.

186. David M. ONG, "The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?" (1999) 14 International Journal of Marine and Coastal Law 207 at 225.

187. Anthony BERGIN, "The Australian-Indonesia Timor Gap Maritime Boundary Agreement" (1990) 5 International Journal of Estuarine and Coastal Law 383 at 384.

188. NGUYEN Hong Thao, "Joint Development in the Gulf of Thailand" (1992) IBRU Boundary and Security Bulletin (Autumn) at 81.

189. *Ibid.*

190. Thomas MENSAH, "Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation" in Ranier LAGONI and Daniel VIGNES, eds., *Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2006) 143 at 149.

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petroleum legislation.[191] Similarly, the fledgling state of East Timor benefited from Australia's experience in hydrocarbon development.[192]

Last, as with Delimitation Agreements, arguably the most important factor for Provisional Arrangements is that they tend to be concluded during a period of good relations between states. The 1979/1990 Malaysia-Thailand Provisional Arrangement took eleven years to implement, arguably because disputes over fishing rights unrelated to continental shelf delimitation had a detrimental effect on bilateral relations.[193] It has been suggested that Vietnam was beginning the process of entry into ASEAN at the time of the 1992 Malaysia-Vietnam Provisional Arrangement, and co-operation with Malaysia, a key ASEAN state, was critical.[194] Similarly, despite advanced negotiations and agreement on the framework for joint development, the 2001 Cambodia-Thailand Provisional Arrangement has not been implemented because of the thorny bilateral relationship between the two countries. In 2009, the Thai government reportedly unilaterally revoked the Memorandum of Understanding (MOU) on the basis that it was negotiated by former Prime Minister Thaksin, whom Cambodia had apparently appointed as its economic adviser.[195]

2. *Important features of joint development in Southeast Asia*

As with Delimitation Agreements, Southeast Asian states have also demonstrated innovative and wide-ranging approaches to joint development arrangements.

First, the Provisional Arrangements in Southeast Asia range from "in principle" understandings on co-operation[196] to comprehensive joint management regimes for resource exploration and exploitation.[197] Even though they are only the first step in resolving overlapping claims, the importance of "in principle" agreements should not be underestimated. They reflect the compromise that could be achieved at that point in time and form a starting point for negotiations. They also have the potential to frame future conduct. Parties will find it difficult to backtrack from joint development once they have committed to it in principle. A good example is the 1979/1990 Malaysia-Thailand Provisional Arrangement. The 1979 Agreement was essentially an "in principle" Joint Development Arrangement (JDA), but both

191. Nguyen, *supra* note 188 at 82.

192. For example, the 2002 Australia-East Timor Provisional Arrangement, art. 11 of the 2002 Timor Sea Treaty, provides that Australia shall facilitate as a matter of priority training and employment opportunities for East Timorese nationals and permanent representatives.

193. Schofield, *supra* note 131 at 293.

194. Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries,* Vol. III (Leiden: Martinus Nijhoff Publishers, 1998) at 2336.

195. Boonsong KOSITCHOETETHANA, "Tearing up MoU on JDA is so Wrong" *Bangkok Post* (20 November 2009).

196. See, for example, the 1982 Cambodia-Vietnam Provisional Arrangement (No. 31 in Table 1); the 1999 Malaysia-Vietnam-Thailand Provisional Arrangement (Gulf of Thailand) (No. 34 in Table 1); the 2001 Cambodia-Thailand Provisional Arrangement (No. 37 in Table 1); and the 2005 China-Vietnam-Philippines Provisional Arrangement (No. 38 in Table 1).

197. The 1979/1990 Malaysia-Thailand Provisional Arrangement (No. 30 in Table 1); the 1989 Australia-Indonesia Provisional Arrangement (No. 32 in Table 1); the 1992 Malaysia-Vietnam Provisional Arrangement (No. 33 in Table 1); and the 2002 Australia-East Timor Provisional Arrangement (No. 35 in Table 1).

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Malaysia and Thailand were committed to the spirit of co-operation embodied there and finally signed the 1990 Agreement implementing the 1979 MOU.

Second, in defining the area that is to be subject to a provisional arrangement, Southeast Asian states have also taken a progressive approach. While most of the Provisional Arrangements represent the whole area of overlapping claims between the states,[198] some Provisional Arrangements use a different approach. For example, in the 2001 Cambodia-Thailand Provisional Arrangement, only part of the overlapping claims between Thailand and Cambodia were subject to joint development. The other part was subject to an agreement to continue negotiations on maritime delimitation, as Thailand's claims in this area of overlapping claim were legally untenable.[199]

Another example is the 1989 Australia-Indonesia Provisional Arrangement. The Arrangement establishes a Zone of Co-operation (ZOC), reflecting the maximum possible extent of the countries' claims.[200] The ZOC is divided into three areas with different joint development regimes with varying levels of co-operation established in each area. Jurisdiction in Area B is under the control of Indonesia, but it is required to account for ten percent of the petroleum tax revenue generated in the area. Similarly, jurisdiction in Area C is under Australia, but it has agreed to account for sixteen percent of the tax revenue generated from petroleum.[201] The area in between Areas B and C, Area A, "lies between the lines most strongly pressed by both Australia and Indonesia, and is the area where a compromise boundary between the two States proved impossible to draw".[202] Area A is under the joint control of Indonesia and Australia. A Joint Ministerial Council and Joint Authority carries out management of those resources.[203]

The third observation that can be made concerns the institutional arrangements adopted by states in Provisional Arrangements. States in Asia have adopted a diverse range of institutional arrangements for managing the exploration and exploitation of resources, varying from complex joint authorities or commissions necessitating representation of officials from both states to more flexible arrangements between national oil companies. Both have their advantages and disadvantages and will depend on the circumstances and needs of the states at that time. The more complex institutional arrangements usually require a high degree of legal integration or

198. See, for example, the 1979/1990 Malaysia-Thailand Provisional Arrangement (No. 30 in Table 1); and the 1992 Malaysia-Vietnam Provisional Arrangement (No. 33 in Table 1).

199. Schofield, *supra* note 131 at 30.

200. The northern extremity of the ZOC represents the maximum claim that Australia could make based on the natural prolongation principle, and the southern boundary represents the maximum claim by Indonesia using the equidistance principle: see Stuart KAYE, "The Timor Gap Treaty: Creative Solutions and International Conflict" (1994) 16 Sydney Law Review 72 at 79.

201. *Ibid*., at 80. Kaye suggests that the reason for the disparity in the tax revenues in Indonesia's favour is due to several reasons. First, the fact that Indonesia had a stronger position on maritime delimitation and needed a greater incentive for participation played a role in Indonesia having to allocate a lower share of its revenue in Area C. Second was the fact that Area B under Australia's control was larger than Area C under Indonesia's control and thus, while Australia would be surrendering a greater share of its tax revenue, the size of that revenue would be far larger than Indonesia's tax return from Area C.

202. The north boundary of Area A reflects Australia's position with regard to where it believes a permanent boundary should be established, and the south boundary of Area A indicates Indonesia's view of the seabed boundary, based on an approximate median line between Australia and Indonesia: *ibid*., at 81.

203. *Ibid*.

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harmonization, especially if the states wish to establish a joint authority. The establishment of the Malaysia-Thailand Joint Authority took eleven years because of the fundamental differences between the legal and licensing systems in Malaysia and Thailand.[204] Given the diverse cultural and legal traditions of Southeast Asian states, employing a more flexible approach, like that in the 1992 Malaysia-Vietnam Provisional Arrangement, which allowed national oil companies to manage the resources under development, may be more appropriate.

B. *Conflict Management Arrangements*

Southeast Asian states have also demonstrated a unique willingness to utilize non-traditional forms of dispute settlement. These include preventive diplomacy, confidence-building measures, and conflict management regimes, as well as Track II diplomacy, all of which are interrelated concepts and which have been used relatively extensively in the South China Sea.[205] These are not directly targeted at resolving the cause of the dispute, but at preventing existing disputes from escalating, and at fostering an environment of trust and confidence so as to facilitate the resolution of disputes. Such an approach has been described as:

> [M]anaging potential conflicts by promoting co-operation among the states or authorities in the region in as many sectors as possible. The objective is to promote confidence and cohesion so that any problems arising from them can be solved peacefully and amicably before they degenerate into armed conflict.[206]

For example, there is the 2002 ASEAN-China Declaration on the Code of Conduct in the South China Sea (see No. 36 in Table 1). While the Declaration is non-binding in that there is no mechanism for enforcement through dispute settlement or otherwise, it would certainly constitute a provisional arrangement as envisaged under Articles 74 and 83. The Declaration includes provisions on information exchange, increased communications and transparency, particularly relating to military matters, confidence-building measures, and measures of self-restraint, as well as co-operative activities.[207]

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204. Ong, *supra* note 186 at 230.

205. For a general discussion on these non-traditional dispute settlement mechanisms, see Chapters 7 and 10 of Jacob BERCOVITCH and Richard JACKSON, *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches* (Ann Arbor, MI: University of Michigan, 2009). The Informal Workshops on Managing Potential Conflicts in the South China Sea, initially organized by Indonesia and Canada, brought academics, diplomats, government officials, and other relevant stakeholders to discuss the various issues on an informal and non-binding basis. The Workshop discussed ways both to manage conflict and to ascertain areas of co-operation and is considered a prime example of Track II diplomacy: see Hasjim DJALAL and Ian TOWNSEND-GAULT, "Preventive Diplomacy: Managing Potential Conflicts in the South China Sea" in Chester A. CROCKER *et al.*, eds., *Herding Cats: Multiparty Mediation in a Complex World* (Washington, DC: US Institute of Peace Press, 1999), 107–33 for a description of the Workshop process.

206. Djalal and Townsend-Gault, *supra* note 205 at 107.

207. ASEAN and China are now attempting to negotiate a code of conduct in the South China Sea: see "ASEAN Welcomes Start of South China Sea Code of Conduct Talks" *Channel NewsAsia* (30 June 2013), online: Channel NewsAsia 〈http://www.channelnewsasia.com/news/asiapacific/asean-welcomes-start-of/729504.html〉.

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A further example of conflict management is the 2012 MOU between Indonesia and Malaysia in respect of common guidelines concerning the treatment of fishermen by the maritime law enforcement agencies of the two countries.[208] This stems from the arrest of fishermen in the overlapping EEZ claims of Malaysia and Indonesia in the Northern Malacca Strait, where they have a continental shelf boundary but no EEZ boundary.[209] The Parties agreed, *inter alia*, to co-operate to conduct preventive measures, and instead of arresting the fishermen in disputed waters, both parties agreed that their law enforcement agencies would ask the fishermen to leave the area and return to their home country.[210]

V. SOUTHEAST ASIA AND THIRD-PARTY BINDING DISPUTE SETTLEMENT

Once states have exhausted all possibilities to settle a maritime boundary dispute through bilateral negotiations, then settlement by binding third-party procedures remains the only option (apart from maintaining the status quo). States can mutually consent to their maritime boundary disputes being referred to arbitration or adjudication,[211] or can utilize the compulsory dispute settlement mechanisms in Section 2 of Part XV of UNCLOS to unilaterally refer a dispute. UNCLOS provides that, subject to certain exceptions, all disputes concerning the interpretation or application of any provision in UNCLOS will be subject to compulsory dispute settlement.[212] This includes disputes concerning the interpretation or application of Articles 15, 74, and 83 on maritime delimitation. UNCLOS also allows states to opt out of the compulsory dispute settlement procedures for certain categories of dispute, including "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles".[213] However, even if a state makes a declaration under Article 298 to exclude disputes relating to maritime boundary delimitation and historic bays and titles from compulsory dispute settlement, it may still be subject to the compulsory conciliation procedures in Annex 5 of UNCLOS if certain conditions are met.[214]

During the negotiations of UNCLOS, Southeast Asian states demonstrated ambivalence towards third-party dispute settlement. Indonesia preferred "consultation" only as a means to resolve disputes and did not favour the compulsory jurisdiction of the ICJ or any other compulsory arbitral procedure, except in certain specific cases

208. *Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Malaysia in Respect of the Common Guidelines Concerning Treatment of Fishermen by Maritime Law Enforcement Agencies of the Republic of Indonesia and Malaysia*, 27 January 2012.

209. I Made Andi ARSANA, "Indonesia-Malaysia Deal Is Good News for Fishermen" *Jakarta Post*, 30 April 2012. Online: 〈http://www.thejakartapost.com/news/2012/04/30/indonesia-malaysia-deal-good-news-fishermen.html〉.

210. *Ibid.*

211. For example, states can come to a special agreement to refer their disputes to an arbitral tribunal or to the ICJ (art. 36(1), ICJ Statute).

212. *UNCLOS*, *supra* note 6, art. 286.

213. *Ibid.*, art. 298(1).

214. *Ibid.*

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where it was expressly agreed upon.[215] Cambodia and Vietnam held the same position as Indonesia, and felt that all disputes relating to maritime boundaries should be resolved through negotiations.[216] Only Singapore and the Philippines were in favour of compulsory third-party adjudication for disputes, although the Philippines recognized the need for exceptions to safeguard a state's vital interests, provided that they were not so broad as to negate the concept of compulsory jurisdiction.[217] Interestingly, despite their ostensible preference for non-binding dispute resolution, the majority of Southeast Asian states have not exercised their option to exclude certain categories of disputes under Article 298, including disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations, or those involving historic bays or titles. Thailand is the only Southeast Asian country that has excluded these categories of disputes from compulsory dispute settlement.[218]

Notwithstanding this, states in Southeast Asia have not voluntarily used binding dispute settlement mechanisms to settle their maritime boundary disputes. To date, out of the twenty-two maritime boundary disputes referred to binding dispute settlement (either arbitration or adjudication),[219] only one Southeast Asian state has had its maritime delimitation dispute heard by an international court, and that was not by choice. Bangladesh had initially initiated arbitration against Myanmar under Annex VII of UNCLOS in October 2009, but in November 2009 Myanmar replied to the arbitration notice by submitting the dispute to ITLOS, which Bangladesh ultimately agreed to. Both parties accepted the jurisdiction of ITLOS to hear their dispute. This was the first maritime boundary dispute to be decided by ITLOS since its inception.[220] A combination of factors appears to have pushed these countries in

215. Kriangsak KITTICHAISAREE, *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press, 1987) at 103.

216. *Ibid*., at 104.

217. *Ibid*., at 103.

218. See statement by Thailand dated 15 May 2011 on the Ratification of UNCLOS, online: 〈http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Thailand%20Upon%20ratificatio〉.

219. *Grisbadarna (Norway v. Sweden)*, (1910) A.J.I.L. 226; *North Sea Continental Shelf Cases* (1969), *supra* note 89; *Anglo-French Continental Shelf Arbitration (France v. United Kingdom)* (1977), 18 I.L.M. (1979) at 397–494; *Aegean Sea Continental Shelf Case*, [1978] I.C.J. Rep. 3; *Tunisia/Libya Continental Shelf* Case (1982), *supra* note 52; *Gulf of Maine Case* (1984), *supra* note 4; *Libya/Malta Continental Shelf Cases* (1985), *supra* note 89; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, [1992] I.C.J. Rep. 351; *St Pierre and Miquelon Case* (1992), *supra* note 89; *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 38; *Guinea-Bissau/Senegal Case* (1985), *supra* note 89; *Eritrea/Yemen Arbitral Award* (1999), *supra* note 177; *Qatar/Bahrain Case* (2001), *supra* note 68; *Cameroon/Nigeria Case* (2002), *supra* note 90; *Barbados v. Trinidad and Tobago* (2006) 45 I.L.M. 798; *Guyana/Suriname* (2007), *supra* note 168; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Rep. 2007 at 659; *Bangladesh/Myanmar* (2012), *supra* note 45; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012. There are also several pending maritime delimitation cases: *Maritime Dispute (Peru v. Chile)* (Peru initiated proceedings in the ICJ against Chile in 2008 but Judgment has not been issued); *Croatia/Slovenia* (On 4 November 2009, Croatia and Slovenia agreed to submit their territorial and maritime dispute to arbitration); *Bangladesh/India* (Bangladesh initiated arbitral proceedings under Annex VII of UNCLOS).

220. "Bangladesh and Myanmar Give ITLOS its First Maritime Boundary Case" *IBRU News* (21 December 2009), online: Durham University 〈http://www.dur.ac.uk/ibru/news/ibru_news/?itemno=9202〉. It has been described as "remarkable" that Bangladesh chose ITLOS instead of the Annex VII Arbitral Tribunal

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the direction of adjudication. First, neither party was willing to compromise on their positions on boundary delimitation, although negotiations were arguably sporadic.[221] Second, the discovery of large reserves of natural gas in the Bay of Bengal, coupled with demand from both countries (both are heavily reliant on natural gas and the development of offshore technology which allows greater depths to be drilled), played a significant role.[222] Third, Myanmar's filing of preliminary information for its extended continental shelf claim in December 2008, followed by an update in 2009, also pushed Bangladesh to issue the notice for arbitration.[223] Myanmar claimed a large continental shelf which overlapped with Bangladesh's claim and this drew protests from Bangladesh and India. A fourth reason was the escalation of tension between parties caused by incidents at sea. In October 2008, seismic survey vessels escorted by the Myanmar navy began surveys, and also drilled an exploration well in an area also claimed by Bangladesh in the Bay of Bengal. This prompted Bangladesh to also send its navy to the area, which resulted in a week-long stand-off until the survey vessels withdrew.[224]

VI. SOUTHEAST ASIAN APPROACHES TO MARITIME BOUNDARIES

It has never been the purpose of this paper to demonstrate that Southeast Asian states have a distinct or different approach to maritime boundaries compared to other regions. However, as mentioned previously, there are common trends and practices in the approach of Southeast Asian states towards maritime boundaries that may explain why the region has been described as an active scene for boundary diplomacy. An analysis of these common trends and practices also facilitates an examination of: (i) the extent to which Southeast Asian approaches have contributed to the development of international law; and (ii) whether there are any lessons to be learned that could help resolve existing and future maritime boundary disputes.

A. *Trends in Southeast Asian Approaches to Maritime Boundaries*

Based on the discussions in Parts III, IV, and V, there are several discernible trends prevalent in Southeast Asian approaches towards maritime boundaries,

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or the ICJ, both of which have experience in maritime delimitation disputes. It is said that the consensus between Myanmar and Bangladesh is due to the "tribunal's emphasis on and ability to provide expedience", which is partly attributable to the reduction of disputes over arbitrators, which can delay proceedings: see Jared BISSINGER, "The Maritime Boundary Dispute between Bangladesh and Myanmar: Motivations, Potential Solutions, and Implications" (July 2010) 10 Asia Policy 103–42 at 130.

221. The Bay of Bengal is concave and creates overlapping claims between Bangladesh, Myanmar, and India. Negotiations between Myanmar and Bangladesh on delimitation began in 1974 and, with no real incentive, talks occurred sporadically until they ceased in 1986. Negotiations began again in 2007 but have been unsuccessful as neither side was willing to give in on the applicable maritime delimitation principles, with Bangladesh arguing equitable principles and Myanmar using equidistance: see Bissinger, *supra* note 220 at 107.

222. *Ibid.*, at 113–17.

223. *Ibid.*, at 129.

224. *Ibid.*, at 107.

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which have contributed to the high level of maritime boundary arrangements in the region.

First, arguably, Southeast Asian states have a cultural inclination to resolve disputes through consultations and negotiations, coupled with "a dislike of confrontational/adversarial litigation of disputes, particularly third party resolution before a court or tribunal".[225] A paradigm example of this preference is ASEAN, which is a regional organization known for its reliance on consultations and negotiations as a way to settle disputes or conflicts.[226] This is commonly referred to as "the ASEAN way", which has been described as "the principle of seeking agreement and harmony, the principle of sensitivity, politeness, non-confrontation and agreeability, the principle of quiet, private and elitist diplomacy versus public washing of dirty linen, and the principle of being non-Cartesian, non-legalistic".[227] Adversarial third-party dispute settlement processes to resolve disputes, including maritime boundary disputes, are perceived to be the antithesis to such an approach. Possible reasons for this aversion to third-party dispute settlement have been articulated by some scholars, and they include the perception that international law and the jurisprudence of the ICJ reflect a dominant Western philosophy which fails to recognize other cultural traditions,[228] a lack of participation by Southeast Asian judges in international courts, and the belief that many disputes in the region "are not amenable to strictly legal resolution because they involve sensitive questions of sovereignty and domestic policies".[229] Regardless of the validity of this assumption, this aversion to binding dispute settlement may explain why Southeast Asian states have been so willing to enter into negotiated agreements rather than risk dispositive binding dispute settlement. Southeast Asian states may feel that given the fluidity of international maritime delimitation law, the outcome of third-party dispute settlement is unclear, that there is too much to lose, and they would rather take their chances with negotiations.

Second, Southeast Asian states have taken an admirably flexible and conciliatory approach towards their Delimitation Agreements, fulfilling their obligation to negotiate in good faith,[230] which has made it easier for the relevant parties to come to

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225. Gillian TRIGGS, "Confucius and Consensus: International Law in the Asian Pacific" (1997) 21 Melbourne University Law Review 650 at 675.

226. See generally Walter WOON, "Dispute Settlement in ASEAN" (17 October 2011), online: Centre for International Law 〈http://cil.nus.edu.sg/wp/wp-content/uploads/2010/08/DISPUTE-SETTLEMENT-IN-ASEAN-KSIL-ProfWalterWoon.pdf〉.

227. Gillian GOH, "The ASEAN Way: Non-Intervention and ASEAN's Role in Conflict Management" (2003) 3 Stanford Journal of East Asian Affairs 113 at 114.

228. Manohar SARIN, "The Asian-African States and the Development of International Law" in Frederick SNYDER and Surakiart SATHIRATHAI, eds., *Third World Attitudes Toward International Law* (Leiden: Martinus Nijhoff Publishers, 1987), 33–51 at 33.

229. Triggs, *supra* note 225 at 659.

230. This obligation to negotiate in good faith was succinctly put by the ICJ in the *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3, para. 86 (a):

> …the parties are under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are

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an agreement. While they have employed international law in these Delimitation Agreements, they have not pushed their maximum claims under international law or strictly insisted on their legal rights. This is shown *inter alia* by:

1. a readiness to agree to an adjustment of the equidistance line in Delimitation Agreements to take into consideration other circumstances, which may not always result in a division of maritime space in their favour;

2. a willingness to relinquish claims to both territorial and maritime space in order to obtain agreement with the other state. This can be seen in the 1986 Myanmar-India Continental Shelf Delimitation (Andaman Sea, Coco Channel, and in the Bay of Bengal), where Myanmar gave up its claim to Narcondam Islands to India; in the 1982 Cambodia-Vietnam Provisional Arrangement, where Cambodia gave up its claim to Phu Quoc Island; in the 2000 China-Vietnam Delimitation Agreement (Gulf of Tonkin), where Vietnam gave up its claim to historic waters in the Gulf of Tonkin; and in the 2009 Brunei-Malaysia Delimitation (off Borneo), where Malaysia gave up its claim to Blocks L and M in exchange for non-suspendable rights of access to the resources there;

3. the non-insistence on strict legal rights and ability to accept less than maximum legal claims. For example, Indonesia did not object to Malaysia's use of "inferred" baselines,[231] and Vietnam did not object to China's use of straight baselines around Hainan Island.[232] Other examples include the way in which Southeast Asian states and external states have agreed to give reduced effect to some of its offshore features in Delimitation Agreements, even though they were arguably entitled to full maritime zones under Article 121 of UNCLOS.

Third, the relatively high number of Provisional Arrangements entered into by Southeast Asian states in lieu of boundaries reflects a preference for solutions which aim to maintain peace and good relations between parties rather than resolve the underlying cause of the dispute. Because provisional arrangements allow Southeast Asian states to "shelve" contentious issues and focus on co-operative action, they have proved particularly useful in this region. For example, as noted by one scholar, joint development may be "a device of particular interest and appeal to Asian societies" due to their cultural predisposition to "consensus-building as well as in cooperative behaviour governed by rules that emphasize the collectivity rather than the individual".[233] There is no doubt that the conclusion and implementation of

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meaningful, which will not be the case when one of them insists upon its own position without contemplating any modification of it.

231. Although this was arguably because Indonesia wanted Malaysia's support for its newly proposed concept of archipelagic waters. It has also now caused issues in the negotiation of EEZ boundaries with Malaysia.

232. This could be because the effect of China's baselines on the boundary is mitigated by the fact that the delimitation divides the whole of the Gulf of Tonkin and not just the overlapping claims between China and Vietnam in the Gulf of Tonkin: see Zou, *supra* note 84 at 14.

233. YU Hui, "Joint Development of Mineral Resources - An Asian Solution?" (1992) 2 Asian Yearbook of International Law 87 at 112.

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provisional arrangements generally entail a large degree of co-operation and collaboration between states, and require significant political commitment from all parties, as opposed to a dividing line which allocates jurisdiction separately.[234]

Fourth, one of the major reasons that Southeast Asian states have been willing to enter into some form of maritime boundary arrangements has been because of their need to explore and exploit resources, particularly hydrocarbon resources, in overlapping claim areas. In their quest for economic independence, Southeast Asian states have been well aware of the transformative potential of hydrocarbon resources to developing economies and have been eager to unlock the potential of such resources.

Fifth, there is no doubt that good relations between ASEAN Member States have also played a role in facilitating the conclusion of maritime boundary arrangements. As noted above, the steady march towards regional integration has most certainly provided a environment conducive to the conclusion of maritime boundary arrangements.

B. *Contribution Towards the Development of International Law*

The fact that states are free to shape maritime delimitation agreements without any recourse to international law principles has tended to undermine the normative contribution that state practice can make to the law of maritime delimitation. It has been observed that "courts have been reluctant to find any evidence of generally acceptable norms in state practice, and they have been unimpressed by statistical surveys demonstrating the preponderance of any particular method".[235] However, as mentioned above, because states will inevitably use international law to frame their negotiations, and because it is assumed that states would not agree to a maritime boundary arrangement which they felt was inequitable, state practice on boundaries still has some relevance to the development of international law principles on delimitation. As noted by Antunes:

> [W]hen an objective trend is found in the type of solutions devised in treaties, it ought to be taken as a matter of reference for discerning the normative standards applied to engender equitable solutions … if recourse is had to a certain type-solution by a significant majority of states, it becomes difficult to deny that there is some, prima facie normative content in such a "type-solution".[236]

Arguably, it is not possible to say with any degree of certainty that Southeast Asian state practice has *contributed* to the development of the international law of maritime delimitation. The reliance on the "equidistance/relevant circumstances" methodology used in Delimitation Agreements concluded by Southeast Asian states

234. Prescott and Schofield, *supra* note 3 at 263.

235. Alan L. WILLIS, "Delimitation in State Practice Generally," in Donat PHARAND and Umberto LEANZA, eds., *The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime* (Dordrecht/Boston/London:, Martinus Nijhoff Publishers, 1993), 65–79 at 65.

236. Antunes, *supra* note 5 at 181.

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can, at most, be said to reinforce current trends in maritime delimitation law. The reliance of Southeast Asian states on joint development as a solution to their maritime boundary disputes has been widespread, and has also contributed to our understanding on joint development regimes.[237] However, it still does not meet the requirements of customary international law[238] in that it is not constant or uniform (Southeast Asian states use a variety of models of joint development) and there is no *opinio juris* in that there is no evidence that Southeast Asian states believe that joint development (or some other form of provisional arrangement) is binding on them.[239]

C. *Moving Forward on Unresolved Maritime Boundaries*

Despite the laudable progress made with maritime boundary arrangements, unresolved boundaries still remain in Southeast Asian waters, and some of them, particularly those in the South China Sea, have the potential to threaten peace and stability in the region.

For example, Cambodia still has to resolve its boundaries with both Vietnam and Thailand in the Gulf of Thailand.[240] While there are Provisional Arrangements between Cambodia and Vietnam[241] and one between Cambodia and Thailand[242] in the Gulf of Thailand, such arrangements envisage that further negotiations on delimitation will continue regarding the disputed area.

While Indonesia has been particularly active in maritime boundary-making,[243] the majority of Indonesia's concluded boundaries are continental shelf boundaries. Indonesia still has to conclude EEZ boundaries with Malaysia in the Northern

237. See generally David ONG, "Implications of Recent Southeast Asian Practice for the International Law on Offshore Joint Development," in Robert BECKMAN *et al*., eds., *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Cheltenham: Edward Elgar, 2013), 181–217.

238. As set out in the seminal *North Sea Continental Shelf Cases*, *supra* note 89.

239. Ian TOWNSEND-GAULT and William STORMONT, "Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?" in Gerald Blake *et al*, eds., *The Peaceful Management of Transboundary Resources* (London: Graham & Trotman Ltd and Kluwer Publishers Group, 1995) at 53.

240. Charney and Smith, *supra* note 132 at 2689.

241. In the 1982 Cambodia-Vietnam Provisional Arrangement (Gulf of Thailand) (No. 31 in Table 1), both Cambodia and Vietnam agreed that there would be further negotiations on delimitation of a boundary within the historic waters. In the 1997 Thailand-Vietnam Delimitation Agreement (Gulf of Thailand) (No. 25 in Table 1), there was a reference to a point in the boundary between Thailand and Vietnam which was stated to be situated on the maritime boundary between Vietnam and Cambodia. According to the Vietnamese, this maritime boundary between "Cambodia and Vietnam" refers to a working agreement in the area covering the historic waters agreed in 1991: see NGUYEN Hong Thao, "Vietnam's First Maritime Boundary Agreement" (1997) 5 IBRU Boundary and Security Bulletin 74 at 77. However, Cambodia officially objected to this reference, noting that Cambodia had never agreed to such a boundary. See Charney and Smith, *supra* note 132 at 2685.

242. The 2001 Cambodia-Thailand Provisional Arrangement (Gulf of Thailand) (No. 37 in Table 1) divides the overlapping claim area into two parts. In Area I, north of the boundary, parties agreed to attempt through further negotiations to define the maritime boundary, whereas south of the boundary there would be further negotiations for joint development of this area: see Schofield, *supra* note 131 at 302.

243. See Table 1, Maritime Boundary Arrangements Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 18, 19, 24, 28, and 32.

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Malacca Strait, with Vietnam in the South China Sea, with Papua New Guinea, with India in the Andaman Sea, and with Thailand in the Straits of Malacca and in the Andaman Sea. The negotiation of EEZ boundaries with these states may not be a pressing priority for Indonesia, perhaps with the exception of its EEZ boundary with Malaysia in the Northern Malacca Strait. In this area, there exists an overlap in the EEZ claims between the two states which has resulted in several arrests by Indonesian authorities of Malaysian fishermen,[244] although the recent MOU between these two states may alleviate this issue.

Indonesia also has no boundaries with Malaysia in the Celebes Sea, although the sovereignty dispute between Indonesia and Malaysia over Sipidan and Ligitan has been resolved in favour of Malaysia.[245] Disputes continue today over access to the hydrocarbon-rich Ambalat Block. Similarly, Indonesia must also negotiate a boundary with Singapore and Malaysia in the eastern Straits of Malacca, where the ICJ decision on sovereignty over Pedra Branca and Middle Rocks[246] has paved the way for delimitation.[247] Indonesia also has no boundaries at all with Palau, East Timor in the Timor Sea, and the Philippines in the Celebes Sea.[248]

As mentioned above, Malaysia has to resolve maritime boundary disputes with Indonesia in the Celebes Sea, with Singapore in the Straits of Malacca, and with the Philippines in the Celebes Sea, the Sulu Sea, and South China Sea.[249] The conclusion of boundaries between Malaysia and the Philippines has been complicated by the Philippines' historical claim to waters within treaty limits established by the colonial powers,[250] and the Philippines' dormant claim to Sabah, which is also claimed and administered by Malaysia.[251]

Perhaps the most complex and contentious delimitation issues exist in the northwest and the central south part of the South China Sea, surrounding the Paracel Islands and the Spratly Islands, respectively. This area is characterized by sovereignty disputes over islands and other offshore features, and historical claims to waters, as well as a complex geography characterized by a myriad of predominantly small islands, islets, rocks, cays, shoals, and drying reefs.[252] The Paracel Islands are claimed by China, Taiwan, and Vietnam, whereas the Spratly Islands are claimed in their entirety by China, Taiwan, and Vietnam, and are partly claimed by Brunei, Malaysia,

244. See generally Bernard, *supra* note 81.

245. *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)*, Judgment, [2002] I.C.J. Rep. 625.

246. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, [2008] I.C.J. Rep. 12.

247. See generally Robert BECKMAN and Clive SCHOFIELD, "Moving Beyond Disputes over Island Sovereignty: ICJ Sets Stage for Maritime Boundary Delimitation in the Singapore Strait" (2009) 40 Ocean Development and International Law 1–35.

248. Prescott and Schofield, *supra* note 3 at 450.

249. *Ibid*., at 452.

250. See *supra* note 38.

251. Prescott and Schofield, *supra* note 3 at 433–4.

252. See generally Clive SCHOFIELD, "Dangerous Ground: A Geopolitical Overview of the South China Sea" in Sam BATEMAN and Ralf EMMERS, eds., *Security and International Politics in the South China Sea* (London: Routledge, 2009), 7–24.

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and the Philippines. Delimitation around the Spratly Islands will not be possible until (a) the sovereignty disputes over the offshore features are resolved and (b) claims are made from these offshore features pursuant to Article 121 of UNCLOS (i.e. whether states which have sovereignty over these features will be claiming an EEZ and/or a continental shelf from these features).[253]

There is no doubt that current Southeast Asian approaches to maritime boundaries, with their emphasis on consensus, compromise, and consultation, are largely responsible for the relatively high number of maritime boundary arrangements in the region. It stands to reason that State Parties to the existing maritime boundary disputes described above should take the same approach that they have adopted in the maritime boundary arrangements already concluded, i.e. an approach driven by the need for consensus, compromise, and consultation, non-insistence on strict legal positions, and a willingness to modify positions or retreat from extreme positions or claims. Apart from the approach taken towards negotiations, the type of boundary arrangement employed by Southeast Asian states to date should also be explored to determine whether such arrangements can be used for existing disputes. For example, Indonesia and Malaysia may wish to explore the feasibility of using two separate boundaries for their EEZ and continental shelf in the Northern Malacca Strait. Similarly, joint development of hydrocarbon resources may be the appropriate solution in the Celebes Sea. Southeast Asian state practice has provided a multitude of examples of effective solutions to boundary disputes and each should be carefully considered by the relevant states.

However, at the same time, there are inherent limitations in relying on negotiations as the only means of resolving maritime boundary disputes. Not only can negotiations be protracted, and in some cases span several decades, there is no guarantee of a final resolution. Further, negotiations are always problematic when each party has differing bargaining power. A state "with a completely unjustified claim may well be able to secure a favourable negotiated settlement by bringing superior power to bear".[254]

Arguably, a good illustration of the limitations of negotiations is the South China Sea disputes. The first factor militating against any negotiated resolution in the South China Sea is the fact that the underlying dispute is over sovereignty to features in the South China Sea. Sensitive issues relating to sovereignty are rarely resolved by negotiations, and this is especially true in the South China Sea in view of how both the Spratly Islands and the Paracel Islands have become potent symbols of nationalistic rhetoric to the populations of many of the claimants. Any negotiated agreement relating to sovereignty is likely to be perceived negatively by national populations. Second, the fact that there are six parties to the dispute (China, Taiwan, Malaysia, Brunei, the Philippines, and Vietnam) poses a huge challenge to a negotiated resolution. While some of the features are claimed by only China and

253. See generally Robert W. SMITH, "Maritime Delimitation in the South China Sea: Potentiality and Challenges" (2010) 41 Ocean Development & International Law 214–36.

254. J.G. MERRILLS, *International Dispute Settlement*, 5th ed. (Cambridge: Cambridge University Press, 2011) at 23.

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Vietnam, many of the features are claimed by at least three parties, and in some cases by five parties. If negotiations were to produce a meaningful resolution to the disputes, it would need to take into account the interests and positions of all parties concerned, which may prove to be impossible. Third, agreement on maritime delimitation can only take place when the sovereignty disputes are settled. In lieu of maritime delimitation, the only option for a negotiated settlement would be to set aside the sovereignty disputes and adopt "provisional arrangements of a practical nature". Again, there are certain obstacles that would need to be overcome. None of the claimants have definitively confirmed what maritime zones they are claiming from the disputed Spratly or Paracel Islands. Because of this, it is infinitely more difficult to determine the ambit of overlapping claim areas that could be subject to "provisional arrangements". The lack of clarity in the maritime claims, coupled with the lack of trust and confidence between the claimants, presents a major hindrance to the negotiation of provisional arrangements. Fourth, there is unequal bargaining power between China and the rest of the ASEAN claimants. China's economic and growing military might means that it will always be in a stronger position vis-à-vis its ASEAN neighbours, and this of course explains its steadfast insistence on negotiations as being its preferred mechanism for resolving the disputes. Indeed, China has chosen not to participate in the recent arbitral proceedings brought by the Philippines over certain disputes in the South China Sea (not related to either sovereignty or maritime delimitation, although China may think otherwise).

The limitations illustrated underscore the fact that negotiations cannot and should not be the only option for dispute resolution with respect to maritime boundaries. Southeast Asian states should explore other dispute settlement options available to them under international law. One such option is the use of non-binding dispute settlement mechanisms such as mediation,[255] conciliation,[256] and inquiry,[257] which "offer the benefit of a third party opinion with no commitment to accept the result".[258] Again, this can greatly aid in a negotiated settlement and incorporates

255. Mediation can range from simply serving a "good offices" function and facilitating communication between parties to offering informal proposals and to interpret and/or transmit each party's proposals to the other. See *ibid*., at 26. Mediation has been used in maritime boundary disputes. For example, France mediated the dispute between Eritrea and Yemen to facilitate an agreement on arbitration procedure, and the Holy See mediated the dispute between Chile and Argentina over the Beagle Channel Award: see Prescott and Schofield, *supra* note 3 at 258.

256. Conciliation refers to a more formal type of mediation which involves the establishment of a commission by the parties, either on a permanent or ad hoc basis, and which "proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties with a view to its settlement, such aid as they may have required": see Merrills, *supra* note 254 at 58. Non-binding conciliation has been used on occasion to resolve maritime boundary disputes. Iceland and Norway appointed a Conciliation Commission in August 1980 to make unanimous recommendations on the question of the continental shelf boundary between Iceland and the Norwegian island of Jan Mayen. The parties accepted the recommendations of the Commission and entered into an agreement on the boundary, which established a joint development zone in 1981: see Prescott and Schofield, *supra* note 3 at 258.

257. Inquiry consists of "an impartial, frequently third-party conducted, fact-finding and investigation procedure, usually applied where a dispute exists over points of fact": see Prescott and Schofield, *supra* note 3 at 258. Also, see generally N. BAR-YAACOV, *The Handling of International Disputes by Means of Inquiry* (Oxford: Oxford University Press, 1974).

258. Merrills, *supra* note 254 at 285.

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elements which are compatible with the Southeast Asian preference for consultation and consensus without binding them to a decision which may not be in their favour. For example, the "good offices" of the ASEAN Chair, which was Indonesia at the time, was successfully used in the recent rise in tensions between Cambodia and Thailand over Preah Vihear.[259] Mediation, conciliation, and inquiry, as well as fact-finding over certain issues which need an impartial finding of fact, can be very useful ways to move disputes such as those over the Spratly Islands towards some sort of resolution.

Another option for Southeast Asian states, following the example of Bangladesh and Myanmar (and countless other countries around the world) is to seriously consider utilizing binding dispute settlement mechanisms to resolve both maritime boundary disputes *and* underlying disputes to such maritime boundary disputes such as disputes over territory. As explained above, there appears to be some reluctance on the part of Southeast Asian states to use binding dispute settlement mechanisms, and this needs to undergo a paradigm shift. Such dispute settlement mechanisms should not be perceived as contrary to "the ASEAN way" of consensus and consultation, but as a peaceful and effective means to settle disputes and ultimately to maintain peace and stability in the region. In order to facilitate this paradigm shift, it is important to understand the advantages of such binding and non-binding dispute settlement mechanisms.

First, because the decisions of courts and tribunals are binding, "litigation is a good way of disposing a troublesome issue when the resolution of a dispute is considered to be more important than the result".[260] This is particularly true of maritime boundary disputes which do not involve sensitive questions of sovereignty. Second, even for maritime boundary disputes which do involve sensitive questions of sovereignty, because decisions are given by judges who are perceived as impartial, and which are based on recognized principles, such decisions are considered "rational, orderly and authoritative".[261] Such decisions may therefore be perceived as fair or neutral by states as well as their national electorates. Third, because it takes decision-making out of the hands of governments, it allows governments to avoid one of the pitfalls of negotiations, namely, the perception of national electorates that governments have given up too much—at the very least, there is an external third party which can be "blamed" for a decision which is not favourable to it.

Fourth, resorting to binding dispute settlement mechanisms can facilitate negotiations towards an agreed settlement. As put by one writer:

> Where complex and difficult factual and technical questions are involved—as may be the case, for example, in land or maritime boundary disputes—the adjudicative process may facilitate a more orderly and thorough examination of the issues than might otherwise be the case. Adjudication also typically requires at least some contact and co-operation between the parties. At the least, this may lead to a more thorough examination of the issues by each party and a fairer disposition of the controversy. Conceivably, it may lead

259. Woon, *supra* note 226.
260. Merrills, *supra* note 254 at 291.
261. *Ibid*., at 293.

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> to a better understanding by the parties themselves of the respective merits of each other's positions concerning the issue in dispute, and to their own negotiation of a settlement.[262]

This is well illustrated in the Bangladesh-Myanmar dispute. After years of frustrated negotiations, Bangladesh decided to submit the case to binding dispute settlement. After it did so, and after both states had accepted the jurisdiction of ITLOS in 2009, it was reported that they had reached a breakthrough in negotiations and decided to demarcate the boundary using both equity and equidistance principles.[263] The pending case before ITLOS is acknowledged to have served as a catalyst for the breakthrough in negotiations.[264] This shows that negotiations under the "shadow" or "threat" of binding dispute settlement can be much more effective.

There are positive indications that Southeast Asian states will resort to binding dispute settlement mechanisms more frequently. Singapore and Malaysia, as well as Malaysia and Indonesia, have submitted their respective territorial disputes over islands and other offshore features to the ICJ. The Philippines has initiated arbitral proceedings against China, although it is not clear how China's lack of participation will impact the effectiveness of any award rendered by the arbitral tribunal. Additionally, after the adoption of the ASEAN Charter in 2007, ASEAN moved towards being a more "rules based" and legal organization as opposed to the informal structure it had previously been.[265]

VII. CONCLUSION

Southeast Asian states have demonstrated a flexible and conciliatory approach towards maritime delimitation characterized by consensus and co-operation. As compared to regions such as Northeast Asia, Southeast Asia has been particularly successful in the conclusion of both maritime boundaries and provisional arrangements pending maritime boundaries. Southeast Asian states should continue to use the same approach for existing unresolved boundaries, both amongst each other and with extra-regional states. However, the effectiveness of such an approach will be considerably enhanced if done under the "shadow" of binding and non-binding dispute settlement mechanisms. Southeast Asian states need to change perceptions about such mechanisms as being contrary to or undermining traditional preferences for resolving disputes by negotiations and consultations, and truly understand the benefits that such mechanisms can bring to disputes which appear to be intractable.

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262. R. B. BILDER, "International Dispute Settlement and the Role of adjudication" in L.F. DAMROSCH, ed., *The International Court of Justice at Crossroads* (New York: Transnational Publishers, 1987) at 165.

263. Bissinger, *supra* note 220 at 110.

264. *Ibid*., at 131.

265. *Ibid*.

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Table 1. Maritime boundary arrangements in Southeast Asia

No.	Year	Parties	Type of Delimitation/ Provisional Arrangement	Area	Signed/entered into force	Reference in paper (with endnote to full title of Agreement)
				Delimitation arrangements		
1.	1969	Indonesia Malaysia	Continental shelf	Straits of Malacca West South China Sea East South China Sea	27 Oct 1969 7 Nov 1969	**1969 Indonesia-Malaysia Continental Shelf Delimitation (Straits of Malacca and the South China Sea)**[1]
2.	1970	Indonesia Malaysia	Territorial sea	Straits of Malacca	17 Mar 1970 8 Oct 1971	**1970 Indonesia-Malaysia Territorial Sea Delimitation (Straits of Malacca)**[2]
3.	1971	Indonesia Australia (PNG)	Continental shelf	New Guinea Arafura Sea	18 May 1971 8 Nov 1973	**1971 Indonesia-Australia (Papua New Guinea) Continental Shelf Delimitation (New Guinea and Arafura Sea)**[3]
4.	1971	Indonesia Thailand	Continental shelf	Straits of Malacca Andaman Sea	17 Dec 1971 16 Jul 1973	**1971 Indonesia-Thailand Continental Shelf Delimitation (Straits of Malacca and Andaman Sea)**[4]
5.	1971	Indonesia Malaysia Thailand	Continental shelf	Northern part of the Straits of Malacca	21 Dec 1971 16 Jul 1973	**1971 Indonesia-Malaysia-Thailand Continental Shelf Delimitation (Straits of Malacca)**[5]
6.	1972	Indonesia Australia	Continental shelf	Timor Sea Arafura Sea	9 Oct 1972 8 Nov 1973	**1972 Indonesia-Australia Continental Shelf Delimitation (Timor Sea and Arafura Sea)**[6]
7.	1973	Indonesia Australia (PNG)	Single multipurpose territorial sea, continental shelf fishery boundary	South of New Guinea in the Arafura Sea	12 Feb 1973 26 Nov 1974	**1973 Indonesia-Australia (Papua New Guinea) Delimitation (Arafura Sea)**[7]
8.	1973	Indonesia Singapore	Territorial sea	Straits of Malacca	25 May 1973 29 Aug 1974	**1973 Indonesia-Singapore Territorial Sea Delimitation (Straits of Malacca)**[8]
9.	1974	Indonesia India	Continental shelf	Andaman Sea dividing the shelf between the Nicobar Islands and Sumatra of Indonesia	8 Aug 1974 17 Dec 1974	**1974 Indonesia-India Continental Shelf Delimitation (Andaman Sea)**[9]

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Table 1. *(Continued)*

No.	Year	Parties	Type of Delimitation/ Provisional Arrangement	Area	Signed/entered into force	Reference in paper (with endnote to full title of Agreement)
10.	1975	Indonesia Thailand	Continental shelf	Andaman Sea	11 Dec 1975 18 Feb 1978	**1975 Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea)**[10]
11.	1977	Indonesia India	Continental shelf	Andaman Sea	14 Jan 1977 15 Aug 1977	**1977 Indonesia-India Continental Shelf Delimitation (Andaman Sea)**[11]
12.	1978	India Thailand	Continental shelf	Andaman Sea	22 Jun 1978 15 Dec 1978	**1978 India-Thailand Continental Shelf Delimitation (Andaman Sea)**[12]
13.	1978	Australia Papua New Guinea	Multiple noundaries continental shelf, fisheries	Torres Strait	18 Dec 1978 15 Feb 1985	**1978 Australia-Papua New Guinea Delimitation (Torres Strait)**[13]
14.	1978	Indonesia India Thailand	Continental shelf	Andaman Sea	22 Jun 1978 2 Mar 1979	**1978 Indonesia-India-Thailand Continental Shelf Delimitation (Andaman Sea)**[14]
15.	1979	Malaysia Thailand	Territorial sea	Straits of Malacca Gulf of Thailand	24 Oct 1979 15 Jul 1982	**1979 Malaysia-Thailand Territorial Sea Delimitation (Straits of Malacca and Gulf of Thailand)**[15]
16.	1979	Malaysia Thailand	Continental shelf	Gulf of Thailand	24 Oct 1979 15 Jul 1982	**1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand)**[16]
17.	1980	Myanmar Thailand	Single multipurpose territorial sea, continental shelf fishery boundary	Andaman Sea	25 Jul 1980 12 Apr 1982	**1980 Myanmar-Thailand Delimitation (Andaman Sea)**[17]
18.	1980	Indonesia Papua New Guinea	Single multipurpose continental shelf EEZ	Pacific Ocean	13 Dec 1980/ 10 Jul 1982	**1980 Indonesia-Papua New Guinea Delimitation (Pacific Ocean)**[18]
19.	1981	Indonesia Australia	Provisional fishery line	Timor Sea	29 Oct 1981 1 Feb 1982	**1981 Indonesia-Australia Provisional Fisheries Delimitation(Timor Sea)**[19]
20.	1986	Myanmar India	Single multipurpose territorial sea, continental shelf fishery boundary	Andaman Sea Coco Channel Bay of Bengal	23 Dec 1986 14 Sep 1987	**1986 Myanmar-India Delimitation (Andaman Sea, Coco Channel, and Bay of Bengal)**[20]

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Table 1. *(Continued)*

No.	Year	Parties	Type of Delimitation/ Provisional Arrangement	Area	Signed/entered into force	Reference in paper (with endnote to full title of Agreement)
21.	1993	India Thailand	Continental shelf	Andaman Sea	27 Oct 1993	**1993 India-Thailand Continental Shelf Delimitation (Andaman Sea)**[21]
22.	1993	India Myanmar Thailand	Continental shelf	Andaman Sea	27 Oct 1993 24 May 1995	**1993 India-Myanmar-Thailand Continental Shelf Delimitation (Andaman Sea)**[22]
23.	1995	Malaysia (Johor) Singapore	Territorial waters	Johor Straits	07 Aug 1995 07 Aug 1995	**1995 Malaysia-Singapore Territorial Waters Delimitation (Johor Straits)**[23]
24.	1997	Australia Indonesia	Multiple boundaries continental shelf, EEZ	Timor Sea	14 Mar 1997 Not yet in force	**1997 Australia-Indonesia Delimitation (Timor Sea)**[24]
25.	1997	Thailand Vietnam	Single multipurpose Continental shelf, EEZ	Gulf of Thailand	9 Aug 1997 27 Dec 1997	**1997 Thailand-Vietnam Delimitation (Gulf of Thailand)**[25]
26.	2000	China Vietnam	Single multipurpose territorial sea, continental shelf, EEZ	Gulf of Tonkin	25 Dec 2000 30 Jun 2004	**2000 China-Vietnam Delimitation (Gulf of Tonkin)**[26]
27.	2003	Indonesia Vietnam	Continental shelf	South China Sea	26 Jun 2003 29 May 2007	**2003 Indonesia-Vietnam Continental Shelf Delimitation (South China Sea)**[27]
28.	2009	Indonesia Singapore	Territorial sea	Singapore Strait (Western)	Unknown*	**2009 Indonesia-Singapore Territorial Sea Delimitation (Singapore Strait)**
29.	2009	Brunei Malaysia	Single multipurpose territorial sea, continental shelf EEZ	Off Borneo	Unknown*	**2009 Brunei-Malaysia Delimitation (off Borneo)**

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Table 1. *(Continued)*

No.	Year	Parties	Type of Delimitation/ Provisional Arrangement	Area	Signed/entered into force	Reference in paper (with endnote to full title of Agreement)
			Provisional arrangements			
30.	1979 1990	Malaysia Thailand	Joint development (seabed resources)	Gulf of Thailand	24 Oct 1979 15 Jul 1982/ 13 May 1990	**1979/1990 Malaysia-Thailand Provisional Arrangement (Gulf of Thailand)**[28]
31.	1982	Cambodia Vietnam	Joint historic waters	Gulf of Thailand	7 Jul 1982 7 Jul 1982	**1982 Cambodia-Vietnam Provisional Arrangement (Gulf of Thailand)**[29]
32.	1989	Australia Indonesia	Joint development (seabed resources)	Timor Sea	11 Dec 1989 9 Feb 1991 (no longer in force)	**1989 Australia-Indonesia Provisional Arrangement (Timor Sea)**[30]
33.	1992	Malaysia Vietnam	Joint development (seabed resources)	Gulf of Thailand	5 Jun 1992 5 May 1992	**1992 Malaysia-Vietnam Provisional Arrangement (Gulf of Thailand)**[31]
34.	1999	Malaysia Thailand Vietnam	Joint development (seabed resources)	Gulf of Thailand	Not in force	**1999 Malaysia-Thailand-Vietnam Provisional Arrangement (Gulf of Thailand)**
35.	2000 2002 2003 2006	Australia East Timor	Joint development (seabed resources)	Timor Sea	See endnote	**2002 Australia-East Timor Provisional Arrangement (Timor Sea)**[32]
36.	1992 2002	ASEAN China	Conflict management	South China Sea	See endnote	**ASEAN-China Declaration on the Conduct of Parties in the South China Sea**[33]
37.	2001	Cambodia Thailand	Joint development (seabed resources)	Gulf of Thailand	18 Jun 2001 Not yet in force	**2001 Cambodia-Thailand Provisional Arrangement (Gulf of Thailand)**[34]
38.	2005	China Vietnam Philippines	Joint marine seismic surveys	South China Sea	14 March 2005 (no longer in force)	**2005 China-Vietnam-Philippines Provisional Arrangement (South China Sea)**

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Table 1. *(Continued)*

No.	Year	Parties	Type of Delimitation/ Provisional Arrangement	Area	Signed/entered into force	Reference in paper (with endnote to full title of Agreement)
39.	2012	Malaysia Indonesia	Conflict management	South China Sea	See endnote	**2012 Malaysia-Indonesia ProvisionalArrangement**[35]

*This Agreement is not publicly available.

[1] *Agreement Between the Government of the Republic of Indonesia and the Government of Malaysia Relating to the Delimitation of the Continental Shelf Between the Two Countries*, 27 October 1969, 9 ILM 1173 (1970) (entered into force 7 November 1969).

[2] *Treaty Between the Republic of Indonesia and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries in the Straits of Malacca*, 17 March 1970, Limits in the Seas No. 50 (1973) (entered into force 8 October 1971).

[3] *Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries*, 18 May 1971, 974 UNTS 307 (1975) (entered into force 8 November 1973).

[4] *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand Relating to the Delimitation of a Continental Shelf Boundary Between the Two Countries in the Northern Part of the Malacca Straits and the in the Andaman Sea*, 17 December 1971, Limits in the Seas No. 81 (1978) (entered into force 16 July 1973).

[5] *Agreement Between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Malacca Straits*, 21 December 1971, Limits in the Seas No. 81 (1978) (entered into force 16 July 1973).

[6] *Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971*, 9 October 1972, Limits in the Seas No. 87 (1979) (entered into force 8 November 1973).

[7] *Agreement Between Australia and Indonesia Concerning Certain Boundaries Between Papua New Guinea and Indonesia*, 12 February 1973, 975 UNTS 4 (1975) (entered into force 26 November 1974).

[8] *Agreement Stipulating the Territorial Sea Boundary Lines Between Indonesia and the Republic of Singapore in the Strait of Singapore*, 25 May 1973, Limits in the Seas No. 60 (1974) (entered into force 29 August 1974).

[9] *Agreement Between the Government of the Republic of India and the Government of the Republic of Indonesia*, 8 August 1974, Limits in the Seas No. 62 (1975) (entered into force 17 December 1974).

[10] *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Seabed Boundary Between the Two Countries in the Andaman Sea*, 11 December 1975, Limits in the Seas No. 93 (1981) (entered into force 18 February 1978).

[11] *Agreement Between the Government of the Republic of India and the Government of the Republic of Indonesia on the Extension of the 1974 Continental Shelf Boundary Between the Two Countries in the Andaman Sea and the Indian Ocean*, 14 January 1977, Limits in the Seas No. 93 (1981) (entered into force 15 August 1977).

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[12] *Agreement Between the Government of the Republic of India and the Government of the Kingdom of Thailand on the Delimitation of Seabed Boundary Between the Two Countries in the Andaman Sea*, 22 June 1978, Limits in the Seas No. 93 (1981) (entered into force 15 December 1978).

[13] *Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters*, 18 December 1978, 118 ILM 291 (1979) (entered into force 15 February 1985).

[14] *Agreement Between the Government of the Republic of India, the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand Concerning the Determination of the Trijunction Point and the Delimitation of the Related Boundaries of the Three Countries in the Andaman Sea*, 22 June 1978, Limits in the Seas No. 93 (1981) (entered into force 2 March 1979).

[15] *Treaty Between the Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries*, 24 October 1979, Maritime Boundary Agreements (1970–1984) 212 (1987) (entered into force 15 July 1982).

[16] *Memorandum of Understanding Between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary Between the Two Countries in the Gulf of Thailand*, 24 October 1979, 1 Canadian Annex 607 (1983) (entered into force 15 July 1982).

[17] *Agreement Between the Government of the Socialist Republic of the Union of Burma (Myanmar) and the Government of the Kingdom of Thailand on the Delimitation of the Maritime Boundary Between the Countries in the Andaman Sea*, 25 July 1980, Limits in the Seas No. 102 (1985) (entered into force 12 April 1982).

[18] *Agreement Between the Government of the Republic of Indonesia and the Government of Papua New Guinea Concerning the Maritime Boundary Between the Republic of Indonesia and Papua New Guinea and Cooperation on Related Matters*, 13 December 1980, Canadian Annex 661, 10 July 1982.

[19] *Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Australia Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement*, 29 October 1981, reproduced in Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries*, Vol. II (Leiden: Martinus Nijhoff Publishers, 1993) at 1229–43 (entered into force 1 February 1982).

[20] *Agreement Between Socialist Republic of the Union of Burma (Myanmar) and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal*, 23 December 1986, 27 ILM 1144 (1988) (entered into force 14 September 1987).

[21] *Agreement Between the Government of the Republic of India and the Government of the Kingdom of Thailand on the Maritime Boundary Between the Two Countries in the Andaman Sea from Point 7 to the Tri-Junction Point (Point T) Between India, Thailand, Myanmar*, 27 October 1993, reproduced in Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries*, Vol. III (Leiden: Martinus Nijhoff Publishers, 1998) at 2380–2 (unknown entry into force).

[22] *Agreement Between the Government of the Union of Myanmar, the Government of the Republic of India and the Government of the Kingdom of Thailand on the Determination of the Trijunction Point Between the Three Countries in the Andaman Sea*, 27 October 1993, 30 LOS Bulletin 66 (entered into force 24 May 1995).

[23] *Agreement Between the Government of Malaysia and the Government of the Republic of Singapore to Delimit Precisely the Territorial Waters Boundary in Accordance with the Straits Settlements and Johore Territorial Waters Agreement 1927*, 7 August 1995, reproduced in Charney and Alexander, *supra* note 21 at 2351–3 (entered into force 7 August 1995).

[24] *Treaty Between the Government of Australia and the Government of Indonesia Establishing an Exclusive Economic Boundary and Certain Seabed Boundaries*, 14 March 1997, 36 ILM 1053 (1997) (not yet entered into force).

[25] *Agreement Between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on the Delimitation of the Maritime Boundary Between the Two Countries in the Gulf of Thailand*, 9 August 1997, LOS Bulletin 23 (2000) (entered into force 27 December 1997).

[26] *Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf (Gulf of Tonkin) Between the People's Republic of China and the Socialist Republic of Vietnam*, 25 December 2000, reproduced in David COLSON and Robert SMITH, eds., *International Maritime Boundaries*, Vol. V (Leiden: Martinus Nijhoff Publishers, 2005) at 3755–8 (entered into force 30 June 2004).

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[27] *Agreement Between the Government of the Socialist Republic of Vietnam and the Republic of Indonesia Concerning the Delimitation of the Continental Shelf Boundary*, 26 June 2003, 67 LOS Bulletin, 39 (entered into force 29 May 2007).

[28] The 1979/1990 Malaysia-Thailand Provisional Arrangement (Gulf of Thailand) consists of the following agreements:

a) *Memorandum of Understanding Between the Kingdom of Thailand and Malaysia on the Delimitation of the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand*, 24 October 1979, 1 Canadian Annex 607 (1983) (entered into force on 15 July 1982).

b) *Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority*, 13 May 1990.

[29] *Agreement on Historic Waters of Vietnam and Kampuchea*, 7 July 1982, reproduced in Charney and Alexander, *supra* note 21 at 2364–5 (entered into force 7 July 1982).

[30] *Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989, 29 ILM 469 (1990) (entered into force 9 February 1991).

[31] *Memorandum of Understanding Between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries*, 5 June 1992, reproduced in Charney and Alexander, *supra* note 21 at 2341–4 (entered into force 5 June 1992).

[32] The 2002 Australia-East Timor Provisional Arrangement (Timor Sea) is established under the following documents:

a) *Memorandum of Understanding Between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Acting on Behalf of East Timor on Arrangements Relating to the Timor Gap Treaty*, 10 February 2000, Australia Treaty Series 2000, No. 9 (entered into force 10 February 2000, with effect from 25 October 1999).

b) *Timor Sea Treaty Between the Government of East Timor and the Government of Australia*, 20 May 2002 (2002) Australian Treaty Series 13 (entered into force 2 April 2003).

c) *Agreement Between the Government of Australia and the Government of the Democratic Republic of East Timor Relating to the Unitization of the Sunrise and Troubadour Fields*, 6 March 2003, 2183 UNTS 3 (No. I-44576) (entered into force 23 February 2007).

d) *Treaty Between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, 12 January 2006, Australian Treaty Series [2007] ATS 12 (entered into force 23 February 2007).

[33] 1992 ASEAN Declaration on the South China Sea, adopted by the Foreign Ministers of ASEAN at the 25th ASEAN Ministerial Meeting in Manila, Philippines on 22 July 1992; 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea, adopted by the Foreign Ministers of ASEAN and the People's Republic of China at the 8th ASEAN Summit in Phnom Penh, Cambodia on 4 November 2002.

[34] *Memorandum of Understanding Between the Royal Government of Cambodia and the Royal Thai Government Regarding the Area of Their Overlapping Maritime Claims to the Continental Shelf*, 18 June 2001, reproduced in Colson and Smith, *supra* note 26 at 3743–4.

[35] *Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Malaysia in Respect of the Common Guidelines Concerning Treatment of Fishermen by Maritime Law Enforcement Agencies of the Republic of Indonesia and Malaysia*, 27 January 2012.