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**SOUTHEAST ASIAN APPROACHES TO MARITIME
DELIMITATION**

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SOUTHEAST ASIAN APPROACHES TO DELIMITATION OF MARITIME BOUNDARIES

By Tara Davenport

Delimitation of maritime boundaries is necessary either when a coastal State's claims to maritime space abut or overlap either an opposite coastal State's maritime area or an adjacent coastal State's maritime area.¹ Prior to the mid-20th Century, coastal State jurisdiction over maritime space rarely extended more than three nautical miles (nm) offshore. Delimitation of maritime boundaries between States was limited to a narrow section of inshore waters and was therefore "generally an infrequent and uncontroversial process."² However, post-World War II, expanding claims to maritime space by coastal States,³ driven by the need for ocean resources, resulted in maritime delimitation becoming increasingly complex and critical. International law on maritime delimitation has developed so as to provide States with both rules and principles on how delimitation should be carried out, as well as an array of dispute settlement mechanisms to resolve maritime boundary disputes.

The delimitation of maritime boundaries in Southeast Asia is a particularly critical process. Southeast Asia is a distinctly maritime region and the majority of States are either coastal States or archipelagic States. Driven by the possibility (proven or suspected) of vast untapped resources in the seabed, Southeast Asian States began to make expansive claims to seabed and superjacent waters from the 1960s to the 1980s. However, the complex geography of Southeast Asia has meant that all Southeast Asian waters are enclosed either as territorial seas, exclusive economic zones, or archipelagic waters.⁴ This has resulted in a multitude of overlapping claims, some of which have caused tensions in bilateral relations and undermined peace and stability in the region. Notwithstanding this, Southeast Asia has often been described as the "scene of very active and innovative ocean boundary diplomacy."⁵ Indeed, Southeast Asian States have made considerable progress since 1969 in resolving maritime boundary disputes despite significant obstacles to boundary-making, including historical claims to waters and territorial disputes.

This Paper will examine the ways in which Southeast Asian States have dealt with their overlapping claims to maritime space. The ultimate objective of the Paper is to determine whether there is a distinct "Southeast Asian" approach to maritime boundary disputes, and

¹ Victor PRESCOTT and Clive SCHOFIELD, *The Maritime Political Boundaries of the World*, 2nd ed. (The Netherlands: Martinus Nijhoff Publishers, 2005) at 1.

² *Ibid.*

³ This began with the 1945 Truman Declaration by President Truman of the USA 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. (United Kingdom: Manchester University Press, 1999) at 143–144.

⁴ Sam BATEMAN, Joshua HO and Jane CHAN, "Good Order at Sea in Southeast Asia", RSIS Policy Paper, April 2009 at 8.

⁵ Douglas M. JOHNSTON and Mark VALENCIA, *Pacific Ocean Boundary Problems: Status and Solutions* (The Netherlands: Martinus Nijhoff Publishers, 1991) at 66; Ted L. MCDORMAN, "Central Pacific and East Asian Maritime Boundaries" in Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries, Volume V* (The Netherlands: Martinus Nijhoff Publishers, 2005) at 3442.

whether there are any lessons to be learned from such approaches, which may then be applied to existing unresolved boundaries.

Part I will describe the applicable international law rules and principles relevant to maritime delimitation. Part II will explain the status of maritime boundary making in Southeast Asia, including setting out the geographical ambit of Southeast Asian waters. Parts III to VI will examine the different means used by Southeast Asian States to resolve overlapping maritime claims, namely delimitation agreements (Part III), provisional arrangements (Part IV), binding dispute settlement mechanisms (Part V) and conflict management (Part VI). Part VII will provide a final analysis on Southeast Asian approaches to maritime delimitation and whether there are any lessons to be learned which could be applied to existing unresolved maritime boundary disputes.

DELIMITATION OF MARITIME BOUNDARIES UNDER INTERNATIONAL LAW

The Importance of Maritime Delimitation

Before explaining the applicable international law governing maritime delimitation, it is essential to understand the importance of maritime delimitation. The 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁶ which is generally considered to have established a “constitution”⁷ for the oceans, demarcates zones of juridical competence where different rights and obligations are extended to coastal States and other users of the sea.

Under UNCLOS, coastal States can claim a territorial sea up to 12 nm, and archipelagic States⁸ can claim archipelagic waters. Coastal States and archipelagic States are afforded sovereignty over all activities that take place in these zones, subject to certain exceptions,⁹ as well as sovereignty over the resources found in the seabed and superjacent waters.¹⁰

UNCLOS also allows coastal States to claim an exclusive economic zone (EEZ) up to 200 nm where they have sovereign rights (as opposed to sovereignty) over living and non-living resources in the seabed and subsoil as well as the superjacent waters.¹¹ Further, the EEZ regime also provides coastal States with “opportunities and obligations in the sphere of ocean management”, including conservation of living resources, marine environmental protection and marine scientific research.¹²

⁶ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 (entered into force 16 November 1994) [UNCLOS].

⁷ “A Constitution for the Oceans”, Remarks by Tommy KOH of Singapore, President of the Third UN Conference of the Law.

⁸ UNCLOS, *supra* note 6, art. 46 (a).

⁹ These include the rights afforded to foreign vessels under the regime of innocent passage in the territorial sea (see *ibid.*, arts. 18 and 19), transit passage in straits used for international navigation (see *ibid.*, art. 38), and archipelagic sea lanes passage in archipelagic waters (see *ibid.*, art. 53).

¹⁰ See generally *ibid.*, arts. 2 and 49.

¹¹ See generally *ibid.*, Part V as well as art. 56.

¹² Prescott and Schofield, *supra* note 1 at 9.

Under UNCLOS, a coastal State is also allowed to claim a continental shelf up to 200 nm,¹³ or if certain criteria are met, it can claim what is known as an extended continental shelf.¹⁴ The coastal State has sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources,¹⁵ which include “mineral and other non-living resources of the seabed and subsoil.” The EEZ regime and continental shelf regime within 200 nm will usually apply concurrently to the same geographical area.¹⁶

UNCLOS also allows States to claim a territorial sea, EEZ and continental shelf from offshore features which qualify as “islands” under Article 121, i.e. they must be naturally formed areas of land above water at high tide and capable of sustaining human habitation or an economic life of their own. Islands that are not capable of sustaining human habitation or an economic life of their own are considered “rocks”, which are only capable of generating a territorial sea.¹⁷

In view of these numerous benefits to coastal States, particularly in terms of control over fisheries and hydrocarbon resources in the waters and seabed, it is unsurprising that coastal States frequently make maritime claims to ocean space that maximize their maritime entitlements, resulting in a multitude of overlapping claims. It has been estimated that if all coastal States were to assert their maximum possible claims (excluding extended continental shelf claims), around 44.5% of the world would fall under some form of national jurisdiction.¹⁸

Such overlapping claims can potentially hinder effective resource exploration and exploitation, the conservation of living resources, the protection of the marine environment as well as enforcement against illegal activities. More importantly, competing claims to rights and jurisdiction can be a constant irritant in bilateral relations, undermining peace and stability in the region, especially when one State carries out unilateral activities in the disputed area. Accordingly, maritime delimitation can “arguably be viewed as an essential precursor to the full resource potential of national maritime zones and the peaceful management of the oceans.”¹⁹

Principles of Maritime Delimitation under International Law

¹³ UNCLOS, *supra* note 6, art. 76 (1).

¹⁴ *Ibid.*, arts. 76 (1) and (4).

¹⁵ *Ibid.*, art. 77.

¹⁶ The EEZ has a breadth of 200 nm and the minimum breadth of the continental shelf is 200 nm. It is said “had it not been for a strong desire on the part of many coastal States, now reflected in the provisions of [UNCLOS], to include within the legal continental shelf those parts of the continental margin extending beyond 200 miles, the legal regime of the continental shelf could have been subsumed within the EEZ (emphasis added).” See Churchill and Lowe, *supra* note 3 at 166.

¹⁷ UNCLOS, *supra* note 6, art. 121 (3).

¹⁸ Prescott and Schofield, *supra* note 1 at 9.

¹⁹ *Ibid.*, at 217.

International law has attempted to provide some guidance on the applicable principles governing maritime delimitation. These principles have been shaped by the competing objectives of developing certainty in maritime delimitation, while at the same time, ensuring that there is sufficient flexibility to take into account the particular circumstances of each case.²⁰ For delimitation of the territorial sea, Article 15 of UNCLOS provides:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.

There is a clear presumption in favour of equidistance for delimitation of the territorial seas, although it has been recognized under customary international law that this presumption does not apply where historic title or “special circumstances” exist.²¹

Such clarity is not repeated in the UNCLOS provisions on the delimitation of the EEZ and continental shelf, which are identical:

The delimitation of the [continental shelf/EEZ] between States with opposite or adjacent coasts shall 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.²²

This imprecise terminology has been attributed to the difficulty in obtaining the agreement of States on the applicable principles for delimitation during the negotiations of UNCLOS.²³ 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.²⁴ Articles 74 and 83 contained language which gave precedence to neither argument.²⁵ The emphasis is on an “equitable solution”, which appears to be a rather vague and intangible concept.

However, over the years, the decisions of international courts and tribunals have attempted to articulate what is meant by “equitable solution”. An “equitable solution” does not require maritime boundaries to be delimited in accordance with any particular method and only requires that maritime boundaries be delimited in accordance with equitable principles, taking into account all the relevant circumstances of the case so as to produce an equitable result.²⁶

²⁰ *Gulf of Maine Case* [1984] I.C.J. Rep. 246 at paragraph 157.

²¹ Prescott and Schofield, *supra* note 1 at 219.

²² UNCLOS, *supra* note 6, art. 73 (1) and 84(1).

²³ Churchill and Lowe, *supra* note 3 at 191.

²⁴ *Ibid.*, at 191.

²⁵ Arguably, an “equitable solution” mentioned in Articles 73 and 84 is not the same as “equitable principles” as a method of delimitation.

²⁶ Jonathan CHARNEY, “The Delimitation of Ocean Boundaries” (1987) 18 (5) *Ocean Development and International Law* 497–531 at 507; *Tunisia/Libya Continental Shelf* [1982] I.C.J. Rep. 18 at 72.

Indeed, both academics and international courts have described the method provided for in Articles 73 and 84 as the “equitable principles-relevant circumstances method.”²⁷ In the *2009 Black Sea Case*, the ICJ set out a three-stage test on the method of delimitation that should be employed. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in a particular case. So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. 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. 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.²⁸

It should be borne in mind that in a negotiation of a maritime boundary, States are not bound by the rules and principles articulated by international courts and tribunals. As noted by Prescott and Schofield, “states 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.”²⁹ However, international law will inevitably play a role in such negotiations and provide the context in which negotiations take place.³⁰

The legal uncertainty surrounding the principles and rules governing maritime delimitation inevitably results in disputes on how a boundary should be delimited. Beyond the territorial seas, coastal States are only obliged to achieve an “equitable solution” and no preferred method of delimitation or relevant circumstances are set out. While international case law has attempted to give some clear principles on what is meant by “an equitable solution” as well as what is meant by “relevant circumstances”, there is much room “for radically differing interpretations as to which factors and methods of delimitation are appropriate to a particular case and therefore potential for dispute and deadlock in delimitation negotiations.”³¹ Accordingly, international law has also developed a comprehensive dispute settlement mechanism to resolve maritime boundary disputes, which has been significantly enhanced by the dispute settlement mechanisms in Part XV of UNCLOS. This will be dealt

²⁷ See, for example, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening) [2002] I.C.J. Rep. 303 at paragraph 288; Prescott and Schofield, *supra* note 1 at 221.

²⁸ *Maritime Delimitation in the Black Sea* (Romania v. Ukraine) (Judgment) [2009] I.C.J. Rep. 61 at paragraphs 115–122.

²⁹ Prescott and Schofield, *supra* note 1 at 218.

³⁰ *Ibid.*, at 218.

³¹ *Ibid.*, at 246.

with in the next section.

Dispute Settlement Options for Resolving Maritime Boundary Disputes

Article 279 of UNCLOS provides that:

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and to end, shall seek a solution indicated in Article 33 (1) of the Charter.

Article 33 (1) of the UN Charter requires parties to a dispute to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice. For purposes of this paper, the dispute settlement options available for maritime boundary disputes are categorized into (a) bilateral negotiations; (b) non-binding procedures and (c) binding procedures.

Bilateral Negotiations

Article 283 (1) of UNCLOS obliges parties to a dispute concerning the interpretation or application of UNCLOS to “proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.” Articles 73 and 84 envisage two types of agreements relating to maritime boundaries that can be achieved by negotiations.

First, Articles 74 (1) and 83 (1) provide that generally, parties should come to an agreement on delimitation, usually in the form of a binding agreement or treaty on the boundary.

Second, in recognition of the fact that coming to an agreement on delimitation is a time consuming process, Articles 74 (3) and 83 (3) provide that pending agreement on maritime delimitation, States are also obliged “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 a final agreement. Such arrangements shall be without prejudice to the final delimitation.”³² “Provisional arrangements” are designed to “promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation” and “constitute an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area.”³³

Bilateral negotiations are by far the primary and favoured method of handling maritime delimitation disputes between States. From the period of 1940 to 2008, there have been approximately 230 bilateral maritime boundary settlements achieved.³⁴

³² UNCLOS, *supra* note 6, arts. 74 (3) and 83 (3).

³³ *Guyana v. Suriname* (Sept. 17, 2007) UN Law of the Sea Annex VII Arb. Trib. at para 60, online: Permanent Court of Arbitration <<http://www.pca-cpa.org>>.

³⁴ This is based on a review by the Author of Volumes I to VI of the series on *International Maritime Boundaries* produced by the American Society of International Law.

Non-Binding Procedures

When parties to a maritime boundary dispute are unable to resolve such a dispute by negotiations, the “intervention of a third party is a possible means of breaking the impasse and producing an acceptable solution.”³⁵ Such intervention can take the form of mediation,³⁶ conciliation (expressly referred to in Article 284 and Annex V of UNCLOS)³⁷ or inquiry,³⁸ not all of which are expressly mentioned in UNCLOS but which exist under international law.

Compulsory Binding Dispute Settlement Procedures

Once State Parties to UNCLOS have exhausted all possibilities to settle a maritime boundary dispute through bilateral negotiations or non-binding procedures, then settlement by binding third party procedures remains the only option (apart from maintaining the status quo). The compulsory dispute settlement regime in UNCLOS is the most complex system ever included in any international convention.³⁹ It entails the principle that all disputes concerning the interpretation or application of any provision in UNCLOS will be subject to compulsory dispute settlement.⁴⁰ This includes disputes concerning the interpretation or application of Articles 15, 74 and 83 on maritime delimitation.

The applicable rules for compulsory dispute settlement are set out in Section 2 of Part XV of UNCLOS. State Parties can elect the type of binding settlement forum they prefer, either at the time of ratifying UNCLOS or any time thereafter.⁴¹ For maritime boundary disputes, three out of the four choices of forum are made available to States, namely the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and an Arbitral Tribunal constituted under Annex VII of UNCLOS.⁴² In the event that parties to a dispute

³⁵ J.G. MERRILLS, *International Dispute Settlement*, 5th ed. (United Kingdom: Cambridge, 2011) at 26.

³⁶ 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 1 at 258.

³⁷ 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 35 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 1 at 258.

³⁸ 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 1 at 258.

³⁹ On the UNCLOS dispute settlement generally, see Natalie KLEIN, *Dispute Settlement in the UN Convention on the Law of the Sea* (United Kingdom: Cambridge University Press, 2005).

⁴⁰ UNCLOS, *supra* note 6, Article 286.

⁴¹ *Ibid.*, art. 287 (1).

⁴² *Ibid.* The special arbitral tribunal constituted in accordance with Annex VIII is only for special categories of disputes.

have not made a declaration as to which procedure they choose, or if the parties have chosen different procedures, the default procedure is arbitration under Annex VII of UNCLOS.⁴³

UNCLOS also provides exceptions to the principle of compulsory settlement of disputes. Article 298 (1) provides that on ratifying UNCLOS or any time thereafter, a State may 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.”⁴⁴

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 a dispute has arisen after UNCLOS has come into force (i.e. after 1994) and where no agreement is reached in negotiations between the parties within a reasonable period of time, *at the request of any party to the dispute*, the dispute can be submitted to compulsory conciliation under Annex V, Section 2 of UNCLOS, provided that the dispute does not involve the consideration of any unsettled dispute on sovereignty or other rights over continental or insular land territory.⁴⁵

After the Conciliation Commission has issued its report, the parties are under an obligation to negotiate an agreement on the basis of the Conciliation Commission’s Report. If these negotiations do not result in an agreement, the parties shall, *by mutual consent*, submit the question to one of the procedures provided for in Section 2 unless the parties otherwise agree. To date, no State Party has used compulsory conciliation.

STATUS OF MARITIME BOUNDARIES IN SOUTHEAST ASIA

Geopolitics in Southeast Asia: Setting the Stage for Maritime Boundary Making

Before addressing the status of maritime boundaries in Southeast Asia, it is necessary to understand the geopolitical considerations which have influenced Southeast Asia as a region. It has been said that only in the last three decades has the ambiguity over the territorial expanse of “Southeast Asia” been resolved.⁴⁶ Historically, Southeast Asia has been characterized by the absence of any unifying hegemonic power caused by different colonial

⁴³ *Ibid.*, arts. 287 (3) and 287 (5).

⁴⁴ *Ibid.*, art. 298 (1) (a) (i). Other categories of dispute for which States can opt out of are disputes concerning military activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. These categories of disputes were subject to the “opt out” because they reflect traditional sensitivities, i.e. territorial sovereignty and military activities. Without these exceptions, the adoption of machinery for the binding settlement of disputes as an integral part of the Convention would not have been generally accepted: See Merrills, *supra* note 35 at 173–174.

⁴⁵ UNCLOS, *supra* note 6, art. 298 (1) (i) (a).

⁴⁶ 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.

regimes administering different parts of Southeast Asia.⁴⁷ 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. 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.⁴⁸ The creation of the Association of Southeast Asian Nations (ASEAN) in 1967⁴⁹ by Indonesia, Malaysia, the Philippines, Singapore and Thailand⁵⁰ “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.”⁵¹ Since then, ASEAN has expanded its membership to ten, including Brunei,⁵² Vietnam,⁵³ Laos,⁵⁴ Myanmar⁵⁵ and Cambodia. East Timor,⁵⁶ independent from Indonesia since 2002, and Papua New Guinea⁵⁷ have observer status at ASEAN, and both have expressed a desire to join ASEAN as full members.

Southeast Asia is a distinctively maritime region⁵⁸ and the maritime character of the region has been described as the “first and primary unifying factor of Southeast Asia.”⁵⁹ 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 Ocean, the region is also economically and strategically important to the economies of Northeast Asia, the United States and other Western maritime powers.⁶⁰ All ASEAN States, with the exception of

⁴⁷ *Ibid.* The British ruled the former territories of Burma, Malaya, Singapore and Northern Borneo, the Dutch in Indonesia, the Portuguese in East Timor, the Spaniards and Americans in the Philippines and the French in Laos, Cambodia and Vietnam. Only Thailand escaped colonial occupation.

⁴⁸ Diane A. DESIERTO, “Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia” (2008) 36 *International Journal of Legal Information* 388 at 418–419.

⁴⁹ 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.

⁵⁰ Singapore, Indonesia, Malaysia, the Philippines and Thailand became members of ASEAN on 8 August 1967.

⁵¹ Chia, *supra* note 46 at 1.

⁵² Brunei became a member of ASEAN on 8 January 1984.

⁵³ Vietnam became an ASEAN member on 28 July 1995.

⁵⁴ Myanmar became an ASEAN Member on 23 July 1997.

⁵⁵ Cambodia became an ASEAN Member on 30 April 1999.

⁵⁶ “Indonesia supports East Timor ASEAN Membership bid” *Jakarta Globe* (3 March 2011).

⁵⁷ Luke HUNT, “Papua New Guinea Eyes ASEAN” *The Diplomat* (9 November 2011), online: <http://the-diplomat.com/asean-beat/2011/11/09/papua-new-guinea-eyes-asean/>.

⁵⁸ As noted by Bateman, Ho and Chan, *supra* note 4.

⁵⁹ Chia, *supra* note 46, at 5.

⁶⁰ Bateman, Ho and Chan, *supra* note 4 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 Tanjung Priok and in Indonesia.

Cambodia, are parties to UNCLOS.⁶¹ Papua New Guinea is also a party, although East Timor is not.

Southeast Asia has a complex maritime geography. Virtually all Southeast Asian waters are enclosed as territorial seas, EEZs or archipelagic waters.⁶² This “geographical congestion has produced 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.”⁶³ Further, coastal configurations are also “complicated with gulfs that penetrate deeply into the mainland, a multitude of large and small islands and wide and narrow [continental] margins.”⁶⁴ All these factors have posed challenges to maritime boundary making.

Ambit of Southeast Asian Waters

As this Paper focuses on maritime boundary arrangements in Southeast Asian waters, it is necessary to define the ambit of Southeast Asian waters. 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 PRC, 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.⁶⁵ For purposes of this Paper, however, Southeast Asian waters refers to 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 basis that at least one of the 10 ASEAN Member States or the two ASEAN observer States (East Timor and Papua New Guinea) has a potential maritime claim in these waters, either vis-à-vis other ASEAN Member or Observer States or vis-à-vis extra-regional States.

Status of Maritime Boundaries in Southeast Asia

As mentioned above, Southeast Asia has been an arena for active and innovative boundary diplomacy. Table 1 shows the existing maritime boundary arrangements by Southeast Asian States with other Southeast Asian States as well as extra-regional States. Since the end of the colonial period,⁶⁶ thirty-seven maritime boundary arrangements have been concluded in

⁶¹ 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, Philippines on 8 May 1984, Singapore on 17 November 1994, Thailand on 15 May 2011 and Vietnam on 25 July 1994.

⁶² Bateman, Chan and Ho, *supra* note 4 at 8.

⁶³ Johnston and Valencia, *supra* note 5 at 50.

⁶⁴ Prescott and Schofield, *supra* note 1 at 429.

⁶⁵ Johnston and Valencia, *supra* note 5 at 50.

⁶⁶ 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 one hand and Brunei on the other is apparently the basis of Brunei’s claim to the South China Sea: See Jonathan CHARNEY and Lewis

Southeast Asia from the year 1969 to 2009. These maritime boundary arrangements can be categorized into two categories, either a (1) Delimitation Agreements whereby a boundary is agreed upon⁶⁷ or a (2) 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.⁶⁸ There are twenty-nine (29) Delimitation Arrangements and eight (8) Provisional Arrangements.

Despite the considerable progress made in resolving overlapping claims to maritime space, unresolved boundaries still remain in pockets of Southeast Asia. Cambodia still has to resolve its boundaries with both Vietnam and Thailand in the Gulf of Thailand.⁶⁹ While there are Provisional Arrangements between Cambodia and Vietnam⁷⁰ and one between Cambodia and Thailand⁷¹ in the Gulf of Thailand, such arrangements envisage that further negotiations on delimitation will continue regarding the disputed area.

Indonesia has potential maritime boundaries with ten neighbouring countries, i.e. Australia, East Timor, Papua New Guinea, Palau, the Philippines, Vietnam, Thailand, Malaysia, Singapore and India. Indonesia has been particularly active in maritime boundary making and has partially concluded boundaries with seven of these ten States (Australia, Papua New Guinea, Vietnam, Thailand, Malaysia, Singapore and India).⁷² The majority of Indonesia's concluded boundaries are continental shelf boundaries, and thus Indonesia has to conclude EEZ boundaries with Malaysia in the Northern 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

ALEXANDER, eds., *International Maritime Boundaries, Volume I* (The Netherlands: Martinus Nijhoff Publishers, 1987) 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.

⁶⁷ Pursuant to UNCLOS, *supra* note 6, arts. 15, 74 (1) and 83 (1).

⁶⁸ Pursuant to UNCLOS, *supra* note 6, arts. 74 (3) and 83 (3).

⁶⁹ See Jonathan CHARNEY and Robert SMITH, eds., *International Maritime Boundaries, Volume IV* (The Netherlands: Martinus Nijhoff Publishers, 2002) at 2689.

⁷⁰ 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 has never agreed to such a boundary. See Charney and Smith, eds., Volume IV, *supra* note 69 at 2685.

⁷¹ The 2001 Cambodia-Thailand Provisional Arrangement (Gulf of Thailand) (No. 36 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 Clive SCHOFIELD, "Unlocking the Seabed Resources of the Gulf of Thailand" (2007) 29 (2) Contemporary Southeast Asia 286 at 302.

⁷² See Table 1, Maritime Boundary Arrangement Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 18, 19, 24, 28, and 32.

boundary with Malaysia in the Northern Malacca Strait, where an overlap in the EEZ claims between both States has resulted in several arrests by Indonesian authorities of Malaysian fishermen.⁷³

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.⁷⁴ 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 Rocks⁷⁵ has paved the way for delimitation.⁷⁶ Indonesia also has no boundaries at all with Palau, East Timor in the Timor Sea and the Philippines in the Celebes Sea.⁷⁷

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.⁷⁸ The conclusion of boundaries between Malaysia and the Philippines has been complicated by the Philippines' historical claim to waters within treaty limits established by colonial powers,⁷⁹ and the Philippines' dormant claim to Sabah, which is also claimed and administered by Malaysia.⁸⁰

Perhaps the most complex and contentious delimitation issues exist in the northwest and 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, historical claims to waters, as well as a complex geography characterized

⁷³ Indonesia and Malaysia are facing challenges in negotiating their EEZ boundary. Indonesia is arguing that a new EEZ boundary should be negotiated which lies north of the 1969 Malaysia-Indonesia Continental Shelf Delimitation (Straits of Malacca and South China Sea) (No. 1 of Table 1). Malaysia, on the other hand, has argued that the 1969 Indonesia-Malaysia Continental Shelf Delimitation (Straits of Malacca and South China Sea) should be the applicable EEZ boundary. The fishing activities of Malaysian fishermen in the area of overlapping claim have caused tension between both States: For an overview of the Malaysia-Indonesia dispute, see Leo BERNARD, "Whose side is it on? – The Boundaries Dispute in the North Malacca Strait", paper presented at the 2nd CILS International Conference 2011, *ASEAN's Role In Sustainable Development*, Faculty of Law, Gadjah Mada University, Indonesia, 21–22 November 2011.

⁷⁴ *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan* (Indonesia/Malaysia) (Judgment) [2002] I.C.J. Rep. 625.

⁷⁵ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore) (Judgment) [2008] I.C.J. Rep. 12.

⁷⁶ 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 (1) *Ocean Development and International Law*, 1–35.

⁷⁷ Prescott and Schofield, *supra* note 1 at 450.

⁷⁸ *Ibid.*, at 452.

⁷⁹ Philippines claims that the limits established in three treaties (1898 *Treaty between Spain and the United States*, 1900 *Treaty between Spain and the United States for the Cession of Outlying Islands for the Philippines* and 1930 *Convention between the United States and Great Britain Delimiting the Philippines Archipelago and the State of Borneo*) which form a rectangle around the main archipelago of the Philippines provide the territorial borders of Philippines, and all waters from the baselines to the international treaty limits are considered the territorial sea of Philippines.

⁸⁰ Prescott and Schofield, *supra* note 1 at 433–434.

by a myriad of predominantly small islands, islets, rocks, cays, shoals and drying reefs.⁸¹ The Paracel Islands are claimed by China, Taiwan and Vietnam, whereas the Spratly Islands are claimed in its entirety by China, Taiwan and Vietnam and are partly claimed by Brunei, Malaysia 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 continental shelf from these features).⁸²

While some of the unresolved boundaries described above may be relatively simple to resolve and will not result in protracted negotiations, others are complex in varying degrees, particularly those involving more than two States. The next four sections will elaborate on the mechanisms that have been used by Southeast Asian States to resolve their boundaries with each other and extra-regional States, and will then examine whether there are any lessons to be learned that can be applied to unresolved boundaries.

MARITIME DELIMITATION AGREEMENTS

As mentioned above, Southeast Asian States have concluded twenty-nine (29) Delimitation Agreements. This section will examine four aspects of Southeast Asian approaches to Delimitation Agreements: (1) the factors driving these Delimitation Agreements; (2) the Type of Maritime Delimitation Agreements; (3) the Principles of Maritime Delimitation and (4) Co-operative Arrangements in Delimitation Agreements.

Factors Driving Delimitation Agreements in Southeast Asia

There are a variety of factors which provide impetus to the conclusion of Delimitation Agreements by Southeast Asian States, and the weight each factor has will depend on the circumstances surrounding the delimitation.

Economic Factors

Generally speaking, the need for maritime boundaries has been resource-induced,⁸³ and Southeast Asia is no different, with economic factors playing an important role in providing the impetus for Delimitation Agreements.⁸⁴ For example, the need for hydrocarbon resources, coupled with the belief in the existence of hydrocarbon resources, played a considerable role

⁸¹ 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* (United Kingdom: Routledge, 2009).

⁸² See generally, Robert W. SMITH, “Maritime Delimitation in the South China Sea: Potentiality and Challenges” (2010) 41 *Ocean Development & International Law*, 214–236.

⁸³ Prescott and Schofield, *supra* note 1 at 217.

⁸⁴ Barbara KWIATKOWSKA, “Economic and Environmental Considerations in Maritime Boundary Delimitation” in Charney and Alexander, eds., Volume I, *supra* note 66 at 91.

in pushing parties to the Delimitation Agreements in the Gulf of Thailand⁸⁵ and the Andaman Sea,⁸⁶ the 2000 China-Vietnam Delimitation in the Gulf of Tonkin⁸⁷, the 2003 Indonesia-Vietnam Continental Shelf Delimitation in the South China Sea around the Natuna Islands,⁸⁸ as well as the 2009 Brunei-Malaysia Delimitation off Borneo.⁸⁹ 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 fewer number of agreements delimiting the EEZ), such resources significantly influenced Australia and Indonesia in concluding their 1981 and 1997 Delimitation Agreements,⁹⁰ and also pushed China and Vietnam to agree to the boundary in the Gulf of Tonkin.⁹¹

Another notable factor inducing Indonesia, Malaysia, Singapore and Thailand to agree to Delimitation Agreements⁹² in the Straits of Malacca and Singapore is the need to ensure the

⁸⁵ These are the 1979 Malaysia-Thailand Territorial Sea Delimitation (Gulf of Thailand) (No. 15 in Table 1), the 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand) (No. 16 in Table 1), the 1997 Thailand-Vietnam Delimitation Agreement (Gulf of Thailand) (No. 25 in Table 1). Also see Ted MCDORMAN, “Central Pacific and East Asian Maritime Boundaries” in Charney and Alexander, eds., Volume V, *supra* note 5 at 3440.

⁸⁶ 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) (No. 20 in Table 1). See also Kwiatkowska in Charney and Alexander, eds., Volume I, *supra* note 66 at 92.

⁸⁷ 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 Keyuan, “The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin” (2005) 36 *Ocean Development and International Law* 13–24 at 17–18.

⁸⁸ The potential for oil and gas north of the Natuna Islands was an important factor in the reaching of 2003 Indonesia-Vietnam Continental Shelf Delimitation and the seabed areas around the Natunas have proven to hold substantial reserves of commercially recoverable hydrocarbons.

⁸⁹ Both Malaysia and Brunei had awarded concessions over these blocks to foreign oil companies in 2002–2003. 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, Sazlan ISKANDAR, “Maritime Claims and Energy Cooperation in the South China Sea” (1 April 2007) 29 (1) *Contemporary South East Asia*; Johan SARAVANAMUTTU, “Malaysia’s Lucrative Approach to Joint Development in Troubled Seas” *Opinion Asia* (16 May 2010).

⁹⁰ The 1981 Indonesia-Australia Fisheries Delimitation (Timor Sea and Arafura 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 seven days of negotiations was because it had already been agreed in 1974 between Australia and Indonesia allowing traditional fishermen from Indonesia to fish in Australia’s EEZ: See generally, Report No. 6 – 2 (4) in Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries, Volume II* (The Netherlands: Martinus Nijhoff Publishers, 1993) at 1229–1236.

⁹¹ 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 between 700,000 and 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 87 at 16–18.

⁹² See 1969 Indonesia-Malaysia Continental Shelf Delimitation (No. 1 in Table 1), 1970 Indonesia-Malaysia Territorial Sea Delimitation (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), 2009 Indonesia-Singapore Territorial Sea Delimitation (Singapore Strait) (No. 28 in Table 1).

safety of navigation and the protection of the marine environment in this intensely used narrow sea lane.⁹³

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,⁹⁴ 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.”⁹⁵ For example, the ever-improving relations between Thailand and Vietnam, bolstered by Vietnam’s entrance into ASEAN in 1995, facilitated the conclusion of the 1997 Thailand-Vietnam Delimitation Agreement in the Gulf of Thailand.⁹⁶ 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.⁹⁷

Strategic Reasons

There are also other strategic reasons why States such as Indonesia agreed to a relatively high number of boundaries than 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.”⁹⁸ 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.”⁹⁹ This increased its ocean space by approximately 875,000 square kilometres (sq km). Accordingly, one of the reasons why Indonesia so readily agreed to maritime delimitation agreements that did not always give it the most advantage was to gain recognition of this method of drawing straight baselines.¹⁰⁰

Type of Maritime Boundaries

⁹³ Charney and Alexander, eds., Volume I, *supra* note 66 at 1020 and 1050.

⁹⁴ McDorman, *supra* note 5 at 3442.

⁹⁵ Johnston and Valencia, *supra* note 5 at 50.

⁹⁶ Charney and Smith, eds., Volume IV, *supra* note 69 at 2684–2685.

⁹⁷ It was only after the normalization of relations in 1991 that negotiations between the two parties became fruitful: See generally, Zou, *supra* note 87.

⁹⁸ Charney and Alexander, eds., Volume II, *supra* note 90 at 1196.

⁹⁹ Djuanda Declaration 1957.

¹⁰⁰ Indonesia concluded 10 bilateral and trilateral agreements between 1969 and 1975. See R. HALLER-TROST, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, International Boundary Studies Series (London: Kluwer Law International, 1998) at 24.

To date, Southeast Asian States have demonstrated 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 29 Delimitation Arrangements listed in Table 1, five (5) are territorial sea delimitations¹⁰¹ and fourteen (14) are continental shelf boundaries.¹⁰² 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 multi-purpose 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 as compared with the single purpose boundaries above. Of the 29 Delimitation Agreements, five (5) are single maritime boundaries.¹⁰³ This is consistent with international state practice as well as judicial preference

¹⁰¹ These are:

1. 1970 Indonesia-Malaysia Territorial Sea Delimitation (Straits of Malacca) (No. 2 in Table 1)
2. 1973 Indonesia-Singapore Territorial Sea Delimitation (Straits of Malacca) (No. 3 in Table 1)
3. 1979 Malaysia-Thailand Territorial Sea Delimitation (Straits of Malacca and the Gulf of Thailand) (No. 15 in Table 1);
4. 1995 Malaysia (Johor)-Singapore Territorial Waters Agreement (Johor Straits) (No. 23 in Table 1);
5. 2009 Indonesia-Singapore Territorial Sea Delimitation (Singapore Strait) (No. 28 in Table 1)

¹⁰² These are:

1. 1969 Indonesia-Malaysia Continental Shelf Delimitation in the Straits of Malacca and the South China Sea (No. 1 of Table 1);
2. 1971 Indonesia-Australia (on behalf of Papua New Guinea) Continental Shelf Delimitation in the North Coast of New Guinea and the in the Arafura Sea (No. 3 of Table 1);
3. 1971 Indonesia-Thailand Continental Shelf Delimitation (Straits of Malacca and the Andaman Sea) (No. 4 in Table 1);
4. 1971 Indonesia-Malaysia-Thailand Continental Shelf Delimitation (Straits of Malacca) (No. 5 in Table 1);
5. 1972 Indonesia-Australia Continental Shelf Delimitation (Timor Sea and Arafura Sea) (No. 6 in Table 1);
6. 1974 Indonesia-India Continental Shelf Delimitation (Andaman Sea) (No. 9 in Table 1);
7. 1975 Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 10 in Table 1);
8. 1977 Indonesia-India Continental Shelf Delimitation (Andaman Sea) (No. 11 in Table 1);
9. 1978 India-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 12 in Table 1);
10. 1978 Indonesia-India-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 14 in Table 1);
11. 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand) (No. 16 in Table 1);
12. 1993 India-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 21 in Table 1);
13. 1993 India-Myanmar-Thailand Continental Shelf Delimitation (Andaman Sea) (No. 22);
14. 2003 Indonesia-Vietnam Continental Shelf Delimitation (South China Sea) (No. 27 in Table 1).

¹⁰³ These are:

1. 1973 Indonesia-Australia (on behalf of Papua New Guinea) Continental Shelf Delimitation in the South of New Guinea in the Arafura Sea (No. 7 in Table 1);
2. 1980 Myanmar-Thailand Delimitation of Territorial Sea, EEZ and Continental Shelf in the Andaman Sea (No. 17 in Table 1);
3. 1980 Indonesia-Papua New Guinea Delimitation (Pacific Ocean) (No. 18 in Table 1);

for a single maritime boundary delimiting both the EEZ and continental shelf.¹⁰⁴ States are generally reluctant to adopt two separate boundaries for the same area as “the co-existence of two or more separate boundaries for functionally distinct purposes in the same ocean area may create confusion in the minds of ocean users and complexities in the work of ocean administrators.”¹⁰⁵

Despite the perceived advantages of single maritime boundaries, Southeast Asia is unique in that it is the only region in the world which has adopted two (2) separate boundaries for the EEZ and continental shelf for the same area. The first example is the 1978 Australia-Papua New Guinea Delimitation (Torres Strait) establishes two separate boundaries¹⁰⁶ 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,¹⁰⁷ 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.”¹⁰⁸

The second example of two separate boundaries is in the Timor Sea where separate boundaries were established between Australia and Indonesia through three (3) consecutive agreements. First, in 1972, Australia and Indonesia established their seabed boundaries in the Timor Sea and Arafura Seas. 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.¹⁰⁹ The third agreement¹¹⁰ converted

4. 1997 Thailand-Vietnam Delimitation (Gulf of Thailand) (No. 25 in Table 1);

5. 2000 China-Vietnam Delimitation (Gulf of Tonkin) (No. 26 in Table 1).

¹⁰⁴ See Donald ROTHWELL and Tim STEPHENS, *The International Law of the Sea* (United Kingdom: Hart Publishing, 2010) at 407–408.

¹⁰⁵ Johnston and Valencia, *supra* note 5 at 19.

¹⁰⁶ There is also a Protected Zone enclosure which straddles the seabed jurisdiction line and surrounds several islands of 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), Article 10.

¹⁰⁷ *Ibid.*, Article 4(1).

¹⁰⁸ *Ibid.*, Article 4(2) and 1(1)(b).

¹⁰⁹ Charney and Alexander, eds., Volume II, *supra* note 90 at 1229.

¹¹⁰ 1997 Australia-Indonesia Delimitation (Timor Sea) (No. 24 in Table 1). 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.

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

Maritime Delimitation Methodology

Equidistance as a method of delimitation, particularly in cases where relevant coastlines are of similar length and there are no exceptional features, such as islands, will usually result in an equal division of maritime space and thus an equitable delimitation.¹¹¹ Fifteen (15) of the Delimitation Agreements in Southeast Asia appear to have adopted equidistance as the applicable method for delimitation.¹¹² 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.¹¹³ 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. This has not always resulted in an equal division of maritime space.¹¹⁴ Southeast Asian States have demonstrated a willingness to adopt a flexible approach towards delimitation principles and in many occasions have not pushed their maximum legal

¹¹¹ Prescott and Schofield, *supra* note 1 at 225–226.

¹¹² 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 of Table 1); 1980 Indonesia-Papua New Guinea Delimitation (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. No. 22 in Table 1); 1995 Malaysia (Johor)-Singapore Territorial Waters Delimitation (Johor Straits) (No. 21 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).

¹¹³ Choon Ho PARK, “Central Pacific and East Asian Maritime Boundaries” in Charney and Alexander, eds., Volume I, *supra* note 66 at 301.

¹¹⁴ At least twelve (12) 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 Seas) (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) (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).

claims in order to get agreement on their maritime boundaries. This will be illustrated with several examples below.

Baselines

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.¹¹⁵ 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.¹¹⁶ As the drawing of a straight baseline can significantly extend a State's maritime claim, many Southeast Asian States have adopted straight baselines even when they do not meet the required conditions in Article 7 of UNCLOS.¹¹⁷ Examples of Southeast Asian States which have drawn straight baselines contrary to the requirements in UNCLOS are Cambodia,¹¹⁸ Malaysia,¹¹⁹ Myanmar,¹²⁰ the Philippines,¹²¹ Thailand,¹²² and Vietnam.¹²³

¹¹⁵ UNCLOS, *supra* note 6, art. 5.

¹¹⁶ *Ibid.*, art. 7.

¹¹⁷ J. Ashley ROACH and Robert W. SMITH, *United States Responses to Excessive Maritime Claims*, 2nd ed. (The Netherlands: Kluwer Law International, 1996) at 17.

¹¹⁸ Council of the State Decree, 31 July 1982.

¹¹⁹ 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) in Monaco, 16–17 October 2008, online: University of New South Wales <<http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session7-Paper1-Bateman.pdf>>.

¹²⁰ Myanmar claimed a system of straight baselines on 15 November 1968. Burma'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 Article 7 (3) of UNCLOS. Myanmar's claim has been the subject of international protest: See Bateman and Schofield, *supra* note 119.

¹²¹ The Philippines established baselines through Republic Act No. 3046 of 17 June 1961 and 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 1000 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 Philippines' straight baselines: See Bateman and Schofield, *supra* note 119. However, the Philippines have now amended its baselines law by Republic Act No. 9522 in 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>>.

¹²² Thailand claimed straight baselines in relation to three sectors in the Gulf of Thailand and Andaman Sea in 1970 and in one sector in the Gulf of Thailand in 1992. While the straight baselines declared by Thailand in 1970 has 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 119.

When concluding Delimitation Agreements, Southeast Asian States appear to have not insisted on baselines being in strict compliance with the requirements in UNCLOS for various reasons. 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 in three areas, the Straits of Malacca, the western side of the South China Sea and the eastern side of the South China Sea. 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.¹²⁴ Malaysia had not specified its baselines by geographic co-ordinates at the time of signing.¹²⁵ 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."¹²⁶ 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.¹²⁷ If a strict equidistant line using Malaysia's normal baselines had been used, Indonesia would have gained about 1000 square nautical miles (sq nm) of continental shelf.¹²⁸ 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.¹²⁹ 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.¹³⁰

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)**.¹³¹ It has been suggested that a small

¹²³ Vietnam claimed straight baselines in 1977 which has been described as particularly radical and far from the requirements established in Article 7 of UNCLOS. Vietnam's claims have been subject to both US and Thai protests: See Bateman and Schofield, *supra* note 119.

¹²⁴ Archipelagic baselines and archipelagic waters were accepted in Part V of UNCLOS, *supra* note 6.

¹²⁵ Even its 1979 Map produced by the Directorate of National Mapping of Territorial Waters and Continental Shelf Boundaries do not specify baselines, and most scholars view the straight baselines as inferred or constructed baselines: Charney and Alexander, eds., Volume II, *supra* note 90 at 1022.

¹²⁶ "Limits in the Seas No. 1, Continental Shelf Boundary: Indonesia and Malaysia" *US Geographer* (21 January 1970).

¹²⁷ Under Article 4 of the 1958 Territorial Seas Convention, only States which have a "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.

¹²⁸ Victor PRESCOTT, "Indonesia's Maritime Claims and Outstanding Delimitation Problems" (Winter 1995–1996) *IBRU Boundary and Security Bulletin* at 94–95.

¹²⁹ Bernard, *supra* note 73 at 6. While countries such as Australia, Japan, the Netherlands, New Zealand and the UK and the US protested against the Indonesian baseline system of 1957, Malaysia, together with the USSR and PRC, was 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 Haller-Trost, *supra* note 100 at 36.

¹³⁰ See generally Bernard, *supra* note 73.

¹³¹ Charney and Alexander, eds., Volume V, *supra* note 5 at 3750.

segment of the agreed boundary appears to have been influenced by straight baselines drawn by China for Hainan Island.¹³²

Geological and Geomorphologic Circumstances

Under international law, geological and geomorphologic circumstances (i.e. the composition and shape of the seabed) can constitute relevant circumstances which would require an adjustment of the equidistance line,¹³³ although the relevance of geological and geomorphologic circumstances has been rendered irrelevant in areas less than 400 nm after the *Libya/Malta Continental Shelf Case*.¹³⁴

Geological and geomorphologic circumstances have played a role in adjusting the equidistance line in Delimitation Agreements in Southeast Asia. Indonesia, in particular, has agreed to an adjustment in the equidistant 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 Seas)** 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 (3 points) and a negotiated variation of the equidistance principle (3 points). Two of the three on the 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,¹³⁵ which means that a "small patch of Singapore's territorial seas" cuts into Indonesia's internal waters.¹³⁶ 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 sea bed for pragmatic reasons in a way which favoured Singapore.¹³⁷

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

¹³² Zou, *supra* note 87 at 14.

¹³³ This was recognized in the *North Sea Continental Shelf Cases* [1969] I.C.J. Rep. 3.

¹³⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] I.C.J. Rep. 13.

¹³⁵ Charney and Alexander, eds., Volume I, *supra* note 66 at 1049.

¹³⁶ *Ibid.*, at 1051.

¹³⁷ *Ibid.*, at 1051.

and favoured Thailand.¹³⁸ 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.¹³⁹ Further, a spur of shallower seabed extends from the Thai margin North of Dreadnought Bank.¹⁴⁰ It appears that Indonesia recognized the equity of giving Thailand areas of the adjacent margin beyond the strict line of equidistance.¹⁴¹

Similarly, in the **1978 India-Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea)**, the parties agreed to a tri-junction point which resulted in India securing full equidistant entitlement, with Thailand securing more than its full equidistant entitlement and Indonesia obtaining less than its full equidistant entitlement.¹⁴² The concession made to Thailand compared with the equidistant 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.¹⁴³

Offshore Features

As mentioned in Part I, 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 and economic life of its own, is entitled to a territorial sea, EEZ and continental shelf of its own. 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.¹⁴⁴

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.¹⁴⁵ 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

¹³⁸ Charney and Alexander, eds., Volume II, *supra* note 90 at 1465.

¹³⁹ *Ibid.*, at 1468.

¹⁴⁰ *Ibid.*, at 1377.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, at 1383.

¹⁴³ *Ibid.*, at 1379.

¹⁴⁴ There has been no authoritative interpretation by international courts and tribunals of what is meant by “sustaining human habitation and economic life of its own”.

¹⁴⁵ Prescott and Schofield, *supra* note 1 at 248–249.

when delimiting the maritime boundary.¹⁴⁶ In negotiations, it will be up to the parties to decide what effect is given to islands in delimitation.

Southeast Asian States have shown an admirably flexible 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 Sarawak¹⁴⁷ 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 basepoints of the parties. The Indonesian Islands situated Northwest of Tanjong Datu were not given full effect on Malaysia’s insistence.¹⁴⁸

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.¹⁴⁹

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 kilometres (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.¹⁵⁰

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

¹⁴⁶ Rothwell and Stephens, *supra* note 104 at 405.

¹⁴⁷ Charney and Alexander, eds., Volume I, *supra* note 66 at 1019.

¹⁴⁸ Indonesia is believed to have conceded to Malaysian claims to enlist Malaysian support for its archipelagic claims: *Ibid.*, at 1022.

¹⁴⁹ 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 basepoints, it is possible that Thailand may have changed its baselines by moving them seaward to surround all coastal islands: See Charney and Alexander, eds., Volume II, *supra* note 90 at 1457.

¹⁵⁰ *Ibid.*

equidistant boundary as well as a negotiated variance of the equidistant boundary.¹⁵¹ This was a particularly difficult boundary to draw, and negotiations took 11 years.¹⁵² One of the major obstacles to the conclusion of the boundary was firstly the fact that Myanmar and India claimed sovereignty over Narcondam Islands, east of Andaman Islands. Secondly, Myanmar disputed India's right to claim extended maritime zones from Narcondam Islands. Using Narcondam Islands as a basepoint for an equidistant 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 equidistant points on the boundary.¹⁵³ However, both States compromised in order to reach an agreement on delimitation. Myanmar gave up its claim to Narcondam Island and also did not insist on the closing line across the Gulf of Martaban being used to fix the boundary.¹⁵⁴ In exchange, part of the boundary either completely discounts India's claim from both the Barren and Narcondam Islands or gives them half-effect.¹⁵⁵ The net result is that Myanmar gained about 6225 sq nm above its entitlement according to a strict application of the equidistance principles.¹⁵⁶

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 Losin¹⁵⁷ or 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.¹⁵⁸ However, both Parties retracted from their absolute positions and agreed to give due weight to both Ko Losin and the Tho Chu archipelago.¹⁵⁹ 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."¹⁶⁰

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."¹⁶¹ Both parties considerably retracted from their initial hard-line 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

¹⁵¹ *Ibid.*, at 1134.

¹⁵² *Ibid.*, at 1335.

¹⁵³ *Ibid.*, at 1329.

¹⁵⁴ *Ibid.*, at 1332.

¹⁵⁵ *Ibid.*, at 1330.

¹⁵⁶ *Ibid.*, at 1030.

¹⁵⁷ Although it had given effect to Ko Losin in its claims vis-à-vis Malaysia in the Gulf of Thailand: See Schofield, *supra* note 71.

¹⁵⁸ Charney and Smith, eds., Volume IV, *supra* note 69 at 2687.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, at 2689.

¹⁶¹ *Ibid.*, at 3743.

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 metres (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 25% 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.¹⁶² 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.¹⁶³

Lastly, 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 positions of the parties.”¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ Charney and Alexander 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.¹⁶⁸

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

¹⁶² *Ibid.*, at 3749–3750.

¹⁶³ *Ibid.*, at 3753.

¹⁶⁴ Jonathan CHARNEY and Robert SMITH, eds., *International Maritime Boundaries, Volume VI* (The Netherlands: Martinus Nijhoff Publishers, 2011) at 4308.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*, at 4310.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

boundary, there is a duty to negotiate and reach an agreement on the development of straddling resources.¹⁶⁹ 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.¹⁷⁰

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.¹⁷¹

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.¹⁷² 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.¹⁷³

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 coordinate their policies on the protection of the marine environment.¹⁷⁴

PROVISIONAL ARRANGEMENTS

¹⁶⁹ See, for example, Article IV of the 1969 Indonesia-Malaysia Delimitation (Straits of Malacca and South China Sea); Article III of the 1974 Indonesia-India Continental Shelf Delimitation (Andaman Sea); Article II of the 1975 Indonesia-Thailand Continental Shelf Delimitation (Andaman Sea); Article 7 of the 2000 China-Vietnam Delimitation (Gulf of Tonkin) and Article 4 of the 2003 Indonesia-Vietnam Continental Shelf (South China Sea).

¹⁷⁰ Article IV, 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand).

¹⁷¹ Zou, *supra* note 87 at 16.

¹⁷² Johan SARAVANAMUTTU, “Malaysia’s Lucrative Approach to Joint Development in Troubled Seas” *Opinion Asia* (16 May 2010).

¹⁷³ *Ibid.*

¹⁷⁴ Article 3, 2003 Indonesia-Vietnam Continental Shelf Delimitation (South China Sea).

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.”¹⁷⁵

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 allocation of criminal and civil jurisdiction. One of the more common types of “provisional arrangements of a practical nature”, however, appears to be the joint development of hydrocarbon resources, which has been defined as:

The co-operation between states with regard to the exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims.¹⁷⁶

States in Asia have frequently employed the joint development of hydrocarbon resources as a “provisional arrangement of a practical nature” pending delimitation of overlapping maritime claims. Seven Southeast Asian States¹⁷⁷ have been party to either a joint marine seismic undertaking (usually the precursor to joint development) or at least one joint development arrangement, ranging from comprehensive frameworks for jointly managing resources¹⁷⁸ to “in principle” understandings to jointly develop resources (i.e. the framework has yet to be implemented).¹⁷⁹

Overview of Provisional Arrangements in Southeast Asia

The **1979/1990 Malaysia-Thailand Provisional Arrangement** covers the overlapping claims of Malaysia and Thailand in the Gulf of Thailand where they were unable to agree on a boundary. In 1979, Malaysia and Thailand signed a Memorandum of Understanding, which signaled their intention to establish a Joint Authority for the management of seabed resources. However, it “did not provide a detailed petroleum exploitation framework for the [Joint Development Area] with sufficient information to enable prospective licensees to enter into

¹⁷⁵ UNCLOS, *supra* note 6, arts. 74 (3) and 83 (3).

¹⁷⁶ Chidinma Bernadine OKAFOR, “Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?” (2006) 21 (4) *International Journal of Marine and Coastal Law* 489 at 495.

¹⁷⁷ The Philippines, Malaysia, Thailand, Cambodia, Vietnam, Indonesia and East Timor.

¹⁷⁸ See for example, the 1979/1990 Malaysia-Thailand JDA, the 1989 Indonesia-Australia JDA, the 1992 Malaysia-Vietnam JDA, and the 2002 Australia-East Timor JDA.

¹⁷⁹ See for example, the 1982 Cambodia Vietnam Provisional Arrangement, the 1999 Malaysia-Vietnam-Thailand Provisional Arrangement and the 2001 Cambodia-Thailand Provisional Arrangement.

operations there.”¹⁸⁰ Negotiations continued from 1979 to 1990, and in 1990, the two governments finally signed an agreement “on the Constitution and other matters relating to the establishment of the Malaysia-Thailand Joint Authority (MTJA).” Since 1994, there have been a total of sixty-three exploration wells and one hundred and fourteen development wells drilled.¹⁸¹

The **1982 Cambodia-Vietnam Provisional Arrangement** defines a specified zone which encompasses an area of 4000 sq nm in the Gulf of Thailand and which is jointly claimed as historic waters.¹⁸² It provides that pending settlement of the maritime boundaries, both countries will undertake certain co-operative activities, including joint patrols and surveillance and exploitation of natural resources by common agreement.¹⁸³ To date, the degree of joint exploitation in the area and the extent of negotiations on this issue are still unclear, and government upheaval in Cambodia has led to the non-implementation of many of the co-operative aspects of the agreement.¹⁸⁴ Bilateral negotiations on delimitation between Cambodia and Vietnam within the Historic Waters were to be done through negotiations at a suitable time, but thus far no delimitation agreement has been reached.¹⁸⁵ However, it is interesting to note that the effect of the 1982 Arrangement was that Cambodia effectively gave up its claim over Phu Quoc Island, which had previously been claimed by both Cambodia and Vietnam, although it was arguably endorsing a situation that had been prevalent for some time.¹⁸⁶

The **1989 Australia-Indonesia Provisional Arrangement** covers an area between Australia and East Timor, which prior to 1975 had been under the colonial administration of Portugal, but was invaded and annexed by Indonesia in 1975. While Australia and Indonesia had an existing 1972 sea boundary, Indonesia refused to use this boundary as the boundary between Australia and East Timor. As mentioned above, this was because the 1972 boundary favoured Australia’s natural prolongation arguments up to the axis of the Timor Trough rather than

¹⁸⁰ Hazel FOX, Paul MCDADE, Derek Rankin REID, Anastasia STRATI, Peter HUEY, *Joint development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary* (Great Britain: British Institute of International and Comparative Law, 1989) at 147. It has been observed that even though the 1979 MOU had all the characteristics one might expect of a binding bilateral treaty, the nomenclature used to describe it, i.e. memorandum of understanding rather than an agreement “is instructive and indicates less than whole-hearted commitment to the agreement on the part of the governments concerned”: See Schofield, *supra* note 71 at 292.

¹⁸¹ Malaysia-Thailand Joint Authority Website, online: MTJA < <http://www.mtja.org/>>.

¹⁸² Article 1, *Historic Waters Agreement*. Cambodia and Vietnam’s claim to historic waters is generally considered to be legally untenable under customary international law and UNCLOS. For a more detailed discussion of this issue, please see Schofield, *supra* note 71 at 294–295.

¹⁸³ Article 3, *Historic Waters Agreement*.

¹⁸⁴ Charney and Alexander, eds., Volume II, *supra* note 90 at 2361.

¹⁸⁵ In the 1997 Thailand-Vietnam Delimitation Agreement (Gulf of Thailand), 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, *supra* note 70 at 77. However, Cambodia officially objected to this reference noting that Cambodia has never agreed to such a boundary. See Charney and Smith, eds., Volume IV, *supra* note 69 at 2685.

¹⁸⁶ Schofield, *supra* note 71 at 295.

Indonesia's equidistance line approach.¹⁸⁷ The increasing irrelevance of the natural prolongation method of continental shelf delimitation and its perceived unfairness to Indonesia¹⁸⁸ stalled maritime delimitation negotiations, and joint development of the hydrocarbon resources was agreed to as a solution to this stalemate. The Treaty had been successful in that "numerous production sharing contracts have been approved, oil wells have been drilled, seismic surveys have been conducted and several major oil discoveries made."¹⁸⁹ However, the Treaty is no longer in force, having been replaced by the 2002 Australia-East Timor Provisional Arrangement after East Timor's independence.

The **1992 Malaysia-Vietnam Provisional Arrangement**, established after two years of negotiations, establishes a long narrow "Defined Area" representing their overlapping claims in the Southeastern part of the Gulf of Thailand for the exploration and exploitation of seabed petroleum deposits.¹⁹⁰ The Arrangement provides for both Malaysia's and Vietnam's national oil companies, PETRONAS and PETROVIETNAM, to undertake exploration and exploitation of petroleum in the defined area.¹⁹¹ Four years after the conclusion of the commercial arrangement, petroleum was extracted, and hence the arrangement "can be viewed as a great success and vindication of the Malaysian-Vietnamese model of joint development in the Gulf."¹⁹²

The **1999 Malaysia-Thailand-Vietnam Provisional Arrangement** covers an area of approximately 256 sq nm of the Malaysia-Thailand Joint Development Zone established under the 1979/1990 Malaysia-Thailand Provisional Arrangement described above. The possibility of such an agreement was first raised in the 1997 Thailand-Vietnam Delimitation (Gulf of Thailand), which stated that Thailand and Vietnam, together with Malaysia, "shall enter into negotiations ... in order to settle the tripartite overlapping continental shelf claim area."¹⁹³ In 1999, Vietnam, Thailand and Malaysia apparently agreed in principle on joint development for a small overlapping area¹⁹⁴ although there have been no reports of progress. The potential claim of Vietnam in the "Tripartite Overlapping Claim Area" in the Malaysia-Thailand Joint Development Zone has meant that no exploration or exploitation has taken place there.¹⁹⁵

¹⁸⁷ Clive SCHOFIELD, "Minding the Gap: The Australian-East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)" (2007) 22 *International Journal of Marine and Coastal Law* 189 at 190–198.

¹⁸⁸ *Ibid.*

¹⁸⁹ Lian A. MITO, "The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands" (1997-1998) 13 *American University International Law Review* 727 at 758.

¹⁹⁰ Article 1, 1992 Malaysia-Vietnam Provisional Arrangement.

¹⁹¹ Article 3, 1992 Malaysia-Vietnam Provisional Arrangement.

¹⁹² NGUYEN Hong Thao, "Joint Development in the Gulf of Thailand" (1992) *IBRU Boundary and Security Bulletin* Autumn at 83.

¹⁹³ Schofield, *supra* note 187 at 16–17.

¹⁹⁴ Nguyen, *supra* note 192 at 79.

¹⁹⁵ MTJA website, *supra* note 181.

The **2001 Cambodia-Thailand Provisional Arrangement** covers an overlapping claim area of approximately 7500 sq nm,¹⁹⁶ which is the largest disputed area in the Gulf of Thailand.¹⁹⁷ The overlapping area was divided into two areas, along the 11 degree north parallel.¹⁹⁸ In Area I, north of the boundary, parties agreed to attempt to define the maritime boundary through further negotiations, whereas south of the boundary, there would be further negotiations for joint development of this area.¹⁹⁹ The Arrangement was reportedly revoked in 2009 despite advanced negotiations on the development of resources due to thorny relations between the two States, but talks of reviving the Arrangement have recently been reported.²⁰⁰

The **2002 Australia-East Timor Provisional Arrangement**, which came into being when East Timor gained independence from Indonesia, consists of a series of agreements²⁰¹ which purports to continue the arrangement between Australia and Indonesia in the Timor Gap. However, issues with both the unitization of the Greater Sunrise Field, which straddles the joint development zone, and the location of downstream activities have continued to hinder proper implementation of the Arrangement.²⁰²

The **2005 China-Vietnam-Philippines Provisional Arrangement**²⁰³ was an undertaking between the national oil companies of these States to carry out seismic surveys and research in an area over a 143,000 sq km in the South China Sea, near the disputed Spratly Islands.²⁰⁴ It was framed as a “pre-exploration study solely to collect, process and analyze seismic data and no drilling and development involved”. However, the text of the agreement was not made public.²⁰⁵ The Arrangement faced controversy particularly in the Philippines. The Philippines had not consulted its foreign ministry and ASEAN on this matter, and the Arrangement was also perceived to be contrary to the general policy of a united ASEAN front vis-à-vis China.²⁰⁶ Further, it was purportedly inconsistent with the Philippines constitution.²⁰⁷ In addition, the disputed area where the seismic survey was to take place, was also shrouded in secrecy and turned out to be an area off Palawan, which was said to implicitly recognize Chinese

¹⁹⁶ Schofield, *supra* note 71 at 301.

¹⁹⁷ Daniel J DZUREK, “Maritime Agreements and Oil Exploration in the Gulf of Thailand” in Gerald BLAKE, Martin PRATT, Clive SCHOFIELD and Janet Allison BROWN, eds., *Boundaries and Energy: Problems and Prospects* (United Kingdom: Kluwer Law International, 1998) at 122.

¹⁹⁸ Schofield, *supra* note 71 at 302.

¹⁹⁹ *Ibid.*

²⁰⁰ “Thailand to revive revoked MoU with Cambodia” *MCOT.NET* (30 December 2011), online: MCOT.NET <http://www.mcot.net/cfcustom/cache_page/312373.html>.

²⁰¹ See generally, Schofield, *supra* note 187.

²⁰² *Ibid.*

²⁰³ The Agreement was originally between China and Philippines, but Vietnam protested and was eventually included: See Barry WAIN, “ASEAN: Manila’s Bungle in the South China Sea” *Far Eastern Economic Review* (18 Jan 2008).

²⁰⁴ Abigail HO, “RP, China, Vietnam Pursue Spratlys Project” *Philippines Daily Inquirer* (2 Nov 2007).

²⁰⁵ “Philippines, China to map potential oil in Spratlys, Vietnam invited” *Agence France Presse* (2 Sept 2004).

²⁰⁶ Mario B CASURUYAN, “Pangilinan seeks thorough Senate probe on so-called Spratly deal” *Manila Bulletin* (8 March 2008).

²⁰⁷ The Philippines constitution which provides that the Philippines government should have full control of activities related to the exploration, exploitation and utilization of natural resources in the Philippine territory. See *Agence France Presse*, *supra* note 205.

sovereignty claims.²⁰⁸ Lastly, the entire affair was also tainted with a corruption scandal due to claims that the Arrangement was inked in exchange for Chinese loans for infrastructure projects.²⁰⁹ For obvious reasons, when the JMSU lapsed in 2008, it was not renewed.

Rationale for Provisional Arrangements in Southeast Asia

There are several reasons why Southeast Asian States have chosen provisional arrangements 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 1972.²¹⁰ 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.²¹¹ 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.²¹² 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 degree north parallel.²¹³ In Area I, north of the boundary, parties agreed to attempt to define the maritime boundary through further negotiations, whereas south of the boundary, there would be further negotiations for joint development of this area.²¹⁴ 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.²¹⁵

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 Thailand²¹⁶ and the Timor Sea²¹⁷ are reportedly rich in hydrocarbon

²⁰⁸ Wain, *supra* note 203.

²⁰⁹ Carina RONCESVALLES, "Santiago wants RP to set aside territorial claim over Spratlys" *BusinessWorld* (4 March 2005).

²¹⁰ See 1979 Malaysia-Thailand Continental Shelf Delimitation (Gulf of Thailand).

²¹¹ Schofield, *supra* note 71 at 290.

²¹² 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.

²¹³ Schofield, *supra* note 71 at 302.

²¹⁴ *Ibid.*

²¹⁵ *Ibid* at 303.

²¹⁶ See Dzurek, *supra* note 197 at 117.

resources. In the majority of the Provisional Arrangements under discussion, there was a 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.²¹⁸ In the **1989 Australia-Indonesia Provisional Arrangement**, the discovery of exploitable hydrocarbons in an area called Kelp in the Timor Gap, coupled with the declining production in of Australia's oil fields, also highlighted the importance of joint development.²¹⁹ In the **1992 Malaysia-Vietnam Provisional Arrangement**, Malaysia had commenced hydrocarbon exploration activities from the 1980s onwards and signed three petroleum enterprises with foreign enterprises.²²⁰ 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.²²¹

A third related factor which motivated States in Southeast Asia to agree to joint development was the disparity between the capacity of some States to develop their petroleum and natural gas resources.²²² For example, in the **1992 Malaysian-Vietnam JDA**, 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 petroleum legislation.²²³ Similarly, the fledgling State of East Timor benefited from Australia's experience in hydrocarbon development.²²⁴

Lastly, as with Delimitation Arrangements, 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 Arrangements** took eleven years to implement, arguably because disputes over fishing rights unrelated to continental shelf delimitation had a detrimental effect on bilateral relations.²²⁵ It has been suggested that Vietnam was beginning the process of entry into ASEAN at the time of the **1992 Malaysia-Vietnam Provisional Arrangements**, and co-operation with Malaysia, a key ASEAN State,

²¹⁷ Swee Guan LEE, "Petroleum Development Area Timor Sea", online: GEOExpro <<http://www.geoexpro.com/exploration/timor-sea/>>.

²¹⁸ 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 (2) *International Journal of Marine and Coastal Law* 207 at 225.

²¹⁹ Anthony BERGIN, "The Australian-Indonesia Timor Gap Maritime Boundary Agreement" (1990) 5 (4) *International Journal of Estuarine and Coastal Law* 383 at 384.

²²⁰ Nguyen, *supra* note 192 at 81.

²²¹ *Ibid.*

²²² Thomas MENSAH, "Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation" in Ranier LAGONI and Daniel VIGNES, eds., *Maritime Delimitation* (The Netherlands: Martinus Nijhoff Publishers, 2006) 143 at 149.

²²³ Nguyen, *supra* note 192 at 82.

²²⁴ For example, the 2002 Australia-East Timor JDA, Article 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.

²²⁵ Schofield, *supra* note 71 at 293.

was critical.²²⁶ Similarly, despite advanced negotiations and agreement on the framework for joint development, the **2001 Cambodia-Thailand Provisional Arrangements** has not been implemented because of the thorny bilateral relationship between the two countries. In 2009, the Thai Government reportedly revoked the MOU unilaterally on the basis that it was negotiated by former Prime Minister Thaksin, whom Cambodia had apparently appointed as its economic adviser.²²⁷

Important Features of Provisional Arrangements in Southeast Asia

As with Delimitation Agreements, Southeast Asian States have also demonstrated innovative and wide-ranging approaches to provisional arrangements of a practical nature.

First, the Provisional Arrangements in Southeast Asia range from “in principle” understandings on co-operation²²⁸ to comprehensive joint management regimes for resource exploration and exploitation.²²⁹ 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” JDA, but both Malaysia and Thailand were committed to the spirit of cooperation embodied there and finally signed the 1990 Agreement implementing the 1979 MOU.

Second, while most of the Provisional Arrangements are bilateral, there are examples of trilateral Provisional Arrangements, which are unique to the region. Admittedly, both the **1999 Malaysia-Thailand-Vietnam Provisional Arrangement** and the **2005 China-Philippines-Vietnam Provisional Arrangement** have faced issues in their implementation, with the latter arguably increasing tensions. However, given the difficulties in agreeing on co-operation between two parties, it is a considerable feat to get agreement between three parties. If such arrangements work, it would provide a very useful precedent for other disputes in the region, such as those in the South China Sea, which involve several claimants.

²²⁶ Jonathan CHARNEY and Lewis ALEXANDER, eds., *International Maritime Boundaries, Volume III* (The Netherlands: Martinus Nijhoff Publishers, 1998) at 2336.

²²⁷ Boonsong KOSITCHOETETHANA, “Tearing up MoU on JDA is so wrong” *Bangkok Post* (20 November 2009).

²²⁸ See, for example, the 1982 Cambodia-Vietnam Provisional Arrangement, the 1999 Malaysia-Vietnam-Thailand Provisional Arrangement, the 2001 Cambodia-Thailand Provisional Arrangement, and the 2005 China-Vietnam and Philippines Provisional Arrangement.

²²⁹ The 1979/1990 Malaysia-Thailand Provisional Arrangement, the 1989 Australia-Indonesia Provisional Arrangement, the 1992 Malaysia-Vietnam Provisional Arrangement, and the 2002 Australia-East Timor Provisional Arrangement.

Third, 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,²³⁰ 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.²³¹

²³⁰ See, for example, the 1979/1990 Malaysia-Thailand Provisional Arrangement and the 1992 Malaysia-Vietnam Provisional Arrangement.

²³¹ Schofield, *supra* note 71 at 303.

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.²³² The ZOC is divided into three areas and 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 10% of the petroleum tax revenue generated in the area. Similarly, jurisdiction in Area C is under Australia, but it has agreed to account for 16% of the tax revenue generated from petroleum.²³³ The area in between Area 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."²³⁴ Area A is under the joint control of Indonesia and Australia. A Joint Ministerial Council and Joint Authority carries out management of the resources.²³⁵

The fourth 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 degree of legal integration or 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.²³⁶ 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.

²³² 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.

²³³ *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 Sea.

²³⁴ 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.

²³⁵ *Ibid.*

²³⁶ Ong, *supra* note 218 at 230.

BINDING DISPUTE SETTLEMENT MECHANISMS

States in Southeast Asia have not used binding dispute settlement mechanisms to settle their maritime boundary disputes often. To date, there has been only one submission by a Southeast Asian State to the binding dispute settlement mechanisms under UNCLOS, namely the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.²³⁷ Both parties accepted the jurisdiction of ITLOS to hear their dispute.

Arguably, this is not surprising considering the opposition of Southeast Asian States to the compulsory binding dispute settlement during the negotiations of UNCLOS. 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 so as to negate the concept of compulsory jurisdiction.²³⁸ 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 where it was expressly agreed upon.²³⁹ Cambodia and Vietnam held the same position as Indonesia and felt that all disputes relating to maritime boundaries should be resolved through negotiations.²⁴⁰ This is also consistent with the general perception of States in Asia as having a "dislike of confrontational/adversarial litigation of disputes, particularly, third party dispute resolution before a court or tribunal"²⁴¹ and a preference for consultation and consensus-decision making.²⁴²

An examination of the reasons why Bangladesh and Myanmar chose to use binding dispute settlement mechanisms is instructive. A combination of factors appears to have pushed these countries in the direction of adjudication. First, neither party was willing to compromise on their positions on boundary delimitation, although negotiations were arguably sporadic.²⁴³ Second, the discovery of large reserves of natural gas in the Bay of Bengal, coupled with

²³⁷ See ITLOS Website <<http://www.itlos.org/index.php?id=108&L=1%2F>>. 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 ICJ. Malaysia has also initiated arbitration proceedings against Singapore and requested for provisional measures from ITLOS to curtail Singapore's land reclamation activities.

²³⁸ Kriangsak KITTICHAISAREE, *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press, 1987) at 103.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*, at 104.

²⁴¹ Gillian TRIGGS, "Confucius and Consensus: International Law in the Asian Pacific" (1997) 21 Melbourne University Law Review 650 at 675.

²⁴² *Ibid.*

²⁴³ 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 on 1986. Negotiations began again in 2007 but to date 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 Jared BISSINGER, "The Maritime Boundary Dispute between Bangladesh and Myanmar: Motivations, Potential Solutions, and Implications," (July 2010) Asia Policy, No. 10, 103–142 at 107.

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.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶

Incidentally, this was the first maritime boundary dispute to be decided by ITLOS since its inception.²⁴⁷ Bangladesh had initially initiated arbitration 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.²⁴⁸ It has been described as "remarkable" that Bangladesh chose ITLOS instead of the Annex VII arbitral tribunal 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 reduction of disputes over arbitrators which can delay proceedings.²⁴⁹

CONFLICT MANAGEMENT

Apart from the above means used to resolve disputes over overlapping claims, Southeast Asian States have also demonstrated a unique willingness to utilize non-traditional forms of dispute settlement. These include preventive diplomacy, confidence-building measures, conflict management regimes as well as Track II diplomacy, all of which are interrelated concepts.²⁵⁰ These are not directly targeted at resolving the cause of the dispute, but at preventing existing disputes from escalating and fostering an environment of trust and confidence so as to facilitate the resolution of disputes. Such an approach has been described as:

²⁴⁴ *Ibid.*, at 113–117.

²⁴⁵ *Ibid.*, at 129.

²⁴⁶ *Ibid.*, at 107.

²⁴⁷ "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>.

²⁴⁸ *Ibid.*

²⁴⁹ Bissinger, *supra* note 243 at 130.

²⁵⁰ 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* (USA: University of Michigan, 2009).

[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.²⁵¹

The use of these non-traditional dispute settlement mechanisms has been widely utilized in the South China Sea disputes. For example, there are several bilateral declarations on codes of conduct in the South China Sea,²⁵² as well as the 1992 ASEAN Declaration on the South China Sea and the 2002 ASEAN-China Declaration on the Code of Conduct in the South China Sea. These “codes of conduct” are non-binding in that there is no mechanism for enforcement through dispute settlement or otherwise. These include provisions on information exchange, increased communications and transparency particularly relating to military matters, confidence-building measures, measures of self-restraint as well as co-operative activities.

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.²⁵³ The Workshop discussed both ways to manage conflict and to ascertain areas of co-operation and is considered a prime example of Track II diplomacy.

SOUTHEAST ASIAN APPROACHES TO MARITIME DELIMITATION: LESSONS LEARNED

Southeast Asian Approaches to Maritime Delimitation

The underlying premise of this Paper is that there is a distinct Southeast Asian approach to the delimitation of maritime boundaries. While generalizations can be difficult to make and may often be misleading,²⁵⁴ and indeed may not be accurate without an equivalent comparator, the above analysis does demonstrate a distinct “Southeast Asian” approach to delimitation. This Southeast Asian approach is characterized by pragmatism, flexibility and compromise which favours consensus and co-operation over conflict, as evidenced by the following:

1. Southeast Asian States have demonstrated a distinct preference to resolve disputes over maritime boundaries through negotiated agreements (either delimitation agreements or provisional arrangements) rather than compulsory binding dispute settlement mechanisms (there has been only one submission of a maritime boundary dispute to binding dispute settlement to date).

²⁵¹ Hasjim DJALAL and Ian TOWNSEND-GAULT, “Preventive Diplomacy: Managing Potential Conflicts in the South China Sea,” in Chester A. CROCKER, Fen Osler HAMPSON and Pamela AALL, eds., *Herding Cats: Multiparty Mediation in a Complex World* (USA: US Institute of Peace Press, 1999), 107–133 at 107.

²⁵² See for example, Joint Statement of the Republic of Philippines and the People’s Republic of China on the South China Sea and on other Areas of Cooperation, 9–10 August 1995, and Joint Statement on the Fourth Annual Bilateral Consultation between the Socialist Republic of Vietnam and the Republic of Philippines, issued on 7 November 1995 in Hanoi, Vietnam reproduced in NGUYEN Hong Thao, “Vietnam and the Code of Conduct for the South China Sea” (2002) 32 *Ocean Development and International Law* 105 at 125–127.

²⁵³ See generally Djalal and Townsend-Gault, *supra* note 248, for a description of the Workshop Progress.

²⁵⁴ Triggs, *supra* note 241 at 655.

2. Southeast Asian States have primarily concluded maritime boundary arrangements for pragmatic reasons such as the need to exploit hydrocarbon resources, the need to protect the safety of navigation as well as the need for good relations between States with overlapping claims, particularly if they are part of ASEAN.
3. Southeast Asian States have admirably taken a flexible and conciliatory approach to Delimitation Agreements, fulfilling their obligation to negotiate in good faith.²⁵⁵ They have not pushed their maximum claims or strictly insisted on their legal rights. This is shown by:
 - a. 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;
 - b. A willingness to relinquish claims to both territory 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; the **2000 China-Vietnam Delimitation Agreement (Gulf of Tonkin)**, where Vietnam gave up its claim to historic waters in the Gulf of Tonkin; and 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;
 - c. 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" baselines²⁵⁶ and Vietnam did not object to China's use of straight baselines around Hainan Island.²⁵⁷ 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.

²⁵⁵ 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, paragraph 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 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 meaningful, which will not be the case when one of them insists upon its own position without contemplating any modification of it.

²⁵⁶ 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.

²⁵⁷ 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 87 at 14.

4. The number of Provisional Arrangements entered into by Southeast Asian States in lieu of boundaries, particularly the relatively high number of joint development arrangements, also reflects a preference for solutions which require compromise and consensus. 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.”²⁵⁸ There is no doubt that joint development arrangements require considerable co-operation and collaboration between States and consequently involve significant political commitment from all parties as opposed to a dividing line which allocates jurisdiction separately.²⁵⁹

5. Arguably, the increasing number of co-operative arrangements in Delimitation Agreements, as well as the co-operative arrangements inherent in Provisional Arrangements, reflect a more functional approach to maritime boundary making. As noted by 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.”²⁶⁰

6. A preference for non-traditional dispute settlement mechanisms such as conflict management regimes also reflects a cultural predisposition towards solutions which aim to maintain peace and good relations between parties, but which do not necessarily resolve the underlying cause of the dispute.

Southeast Asian approaches to maritime delimitation as described above are arguably part of a wider cultural inclination to resolve disputes through consensus and consultation and a cultural aversion to binding dispute settlement mechanisms.²⁶¹ This is aptly illustrated by the formation of ASEAN, which was initially formed by a series of “informal and ad hoc arrangements.”²⁶² Indeed, the “ASEAN Way” is often used as nomenclature to describe a set of procedural norms upon which ASEAN States conduct relations with each other. As noted by one scholar:

This includes 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.²⁶³

²⁵⁸ YU Hui, “Joint Development of Mineral Resources – An Asian Solution?” (1992) 2 *Asian Yearbook of International Law* 87 at 112.

²⁵⁹ Prescott and Schofield, *supra* note 1 at 263.

²⁶⁰ *Ibid.*

²⁶¹ Triggs, *supra* note 241 at 675.

²⁶² 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>>.

²⁶³ Gillian GOH, “The ASEAN Way: Non-Intervention and ASEAN’s Role in Conflict Management” (2003) 3 (1) *Stanford Journal of East Asian Affairs* 113 at 114.

As mentioned above, this preference for consensus and consultation is coupled with “a dislike of confrontational/adversarial litigation of disputes, particularly third party resolution before a court or tribunal.”²⁶⁴ Possible reasons for this reluctance 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,²⁶⁵ 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.”²⁶⁶

The next question that must be answered is whether current Southeast Asian approaches to maritime delimitation are sufficient to resolve existing unresolved boundaries, or if more must be done.

Moving Forward on Unresolved Maritime Boundaries

As mentioned in Part II, despite the laudable progress made with maritime boundary arrangements, unresolved boundaries still remain, and some of them, particularly those in the South China Sea, have the potential to threaten peace and stability in the region.

There is no doubt that current Southeast Asian approaches to maritime delimitation, 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 existing maritime boundary disputes 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.

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 they be protracted and in some cases, span several decades, there is no guarantee of a final resolution. Further, using negotiations to resolve certain disputes may not be feasible for a variety of reasons.

The dispute in the South China Sea is a prime example of such a dispute that may not be resolved through negotiations. 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

²⁶⁴ Triggs, *supra* note 241 at 675.

²⁶⁵ 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* (The Netherlands: Martinus Nijhoff Publishers, 1987).

²⁶⁶ Triggs, *supra* note 241 at 659.

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 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.

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, following the example of Bangladesh and Myanmar (and countless of other countries around the world) should 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.”²⁶⁷ 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”.²⁶⁸ 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

²⁶⁷ Merrills, *supra* note 35 at 291.

²⁶⁸ *Ibid.*, at 293.

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 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.²⁶⁹

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.²⁷⁰ The pending case before ITLOS is acknowledged to have served as a catalyst for the breakthrough in negotiations.²⁷¹ This shows that negotiations under the “shadow” or “threat” of binding dispute settlement can be much more effective.

Another option that Southeast Asian States should consider is the use of non-binding dispute settlement mechanisms such as mediation, conciliation and inquiry, which “offer the benefit of a third party opinion with no commitment to accept the result.”²⁷² Again, this can greatly aid in a negotiated settlement and incorporates 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.²⁷³ 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.

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. Additionally, after the adoption of the ASEAN Charter in 2007, ASEAN

²⁶⁹ R. B BILDER, “International Dispute Settlement and the Role of adjudication” in LF DAMROSCH, ed., *The International Court of Justice at Crossroads* (New York: Transnational Publishers, 1987) at 165.

²⁷⁰ Bissinger, *supra* note 243, at 110.

²⁷¹ *Ibid.*, at 131.

²⁷² Merrills, *supra* note 35 at 285.

²⁷³ Woon, *supra* note 262.

moved towards being a more “rules based” and legal organization as opposed to the informal structure it had previously been.²⁷⁴

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 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 the 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.

²⁷⁴ *Ibid.*

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 March 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	Strait of Malacca Andaman Sea	17 Dec 1971 16 July 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 Strait of Malacca	21 Dec 1971 16 July 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)	<u>Single Multi-Purpose Territorial Sea, Continental Shelf Fishery Boundary</u>	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 Nicobar Islands and Sumatra of Indonesia	8 Aug 1974 17 Dec 1974	1974 Indonesia-India Continental Shelf Delimitation (Andaman Sea)⁹

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 June 1978 15 Dec 1978	1978 India-Thailand Continental Shelf Delimitation (Andaman Sea)¹²
13.	1978	Australia Papua New Guinea	Multiple Boundaries Continental Shelf Fisheries	Torres Strait		1978 Australia – Papua New Guinea Delimitation (Torres Strait)¹³
14.	1978	Indonesia India Thailand	Continental Shelf	Andaman Sea	22 June 1978 2 March 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 July 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 Oct 1982	1979 Malaysia- Thailand Continental Shelf Delimitation (Gulf of Thailand)¹⁶
17.	1980	Myanmar Thailand	Single Multi-Purpose Territorial Sea, Continental Shelf Fishery Boundary	Andaman Sea	25 July 1980 12 April 1982	1980 Myanmar –Thailand Delimitation (Andaman Sea)¹⁷
18.	1980	Indonesia Papua New Guinea	Single Multi-Purpose Continental Shelf EEZ	Pacific Ocean	13 Dec 1980 10 July 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 Fishery Delimitation (Timor Sea)¹⁹

20.	1986	Myanmar India	Single Multi-Purpose Territorial Sea, Continental Shelf Fishery Boundary	Andaman Sea Coco Channel Bay of Bengal	23 Dec 1986 14 Sept 1987	1986 Myanmar-India Delimitation (Andaman Sea, Coco Channel and Bay of Bengal)²⁰
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 Strait)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 Multi-Purpose 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 Multi-Purpose Territorial Sea Continental Shelf EEZ	Gulf of Tonkin	25 Dec 2000 30 June 2004	2000 China-Vietnam Delimitation (Gulf of Tonkin)²⁶
27.	2003	Indonesia Vietnam	Continental Shelf	South China Sea	26 June 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 Multi-Purpose Territorial Sea Continental Shelf EEZ	Off Borneo	Unknown*	2009 Brunei-Malaysia Delimitation (off Borneo)

PROVISIONAL ARRANGEMENTS

30.	1979 1990	Malaysia Thailand	Joint Development (Seabed Resources)	Gulf of Thailand	24 Oct 1979 15 July 1982	1979/1990 Malaysia-Thailand Provisional Arrangement (Gulf of Thailand)²⁸
31.	1982	Cambodia Vietnam	Joint Historic Waters	Gulf of Thailand	7 July 1982 7 July 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 June 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.	2001	Cambodia Thailand	Joint Development (Seabed Resources)	Gulf of Thailand	18 June 2001 Not yet in force	2001 Cambodia-Thailand Provisional Arrangement (Gulf of Thailand)³³
37.	2005	China Philippines Vietnam	Joint Marine Seismic Surveys	South China Sea	14 March 2005 (No longer in force)	2005 China-Vietnam-Philippines Provisional Arrangement (South China Sea)

* 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 Strait 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 Governments 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 Strait*, 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 *Agreements 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)

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, Jonathan Charney and Lewis

Alexander, *International Maritime Boundaries* (American Society of International Law: The Netherlands, 1993) at 1238 – 1243 (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, Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* (American Society of International Law: The Netherlands, 1998) at 2380 – 2382 (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, Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* (American Society of International Law: The Netherlands, 1998) at 2351 – 2353 (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 Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* (American Society of International Law: The Netherlands, 1998) at 3755 – 3758 (entered into force 30 June 2004)

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) *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, Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* (American Society of International Law: The Netherlands, 1998) at 2364 – 2365 (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, Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* (American Society of International Law: The Netherlands, 1998) at 2341 – 2344 (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 East Timor*, 12 January 2006, Australian Treaty Series [2007] ATS 12 (entered into force 23 February 2007)

³³ *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, Jonathan Charney and Robert Smith, *International Maritime Boundaries* (American Society of International Law: The Netherlands, 2005) at 3743 – 3744