The Settlement of Maritime Boundary Disputes in Southeast Asia and Oceania: A Synthesis in Light of Indonesian Practice

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Structured Abstract

Article Type: Research Paper

Purpose—This study reviews the sophisticated diversity of recent approaches to the resolution of delimitational and related maritime disputes among Indonesia's neighboring States, and presents potential approaches to unresolved disputes in Southeast Asia and beyond the region.

Design, Methodology, Approach—The study highlights Indonesia's experiences due to the range of approaches it has employed and issues which have arisen in the settlement or non-settlement of boundary disputes with its 10 maritime neighbors. The study first offers a taxonomy of these approaches: zero-sum negotiated solutions (e.g., treaty-based maritime delimitation); mutual-benefit negotiated solutions (e.g., joint development of the continental shelf); amicable third-party resolution (e.g., boundary conciliation); and adversarial third-party resolution (e.g., arbitration).

Findings—The study identifies and compares modalities that are found to varying degrees within each of these general approaches, and offers conclusions as to whether their utility or non-utility in prior practice can be effectively extended to unresolved disputes in the region. Such modalities include: strategic considerations (e.g., incremental approaches to dispute settlement); procedural difficulties (e.g.,

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post-negotiation ratification); potential third-party involvement (e.g., intervention of third States); and durability issues (e.g., perceptions of legitimacy).

Practical Implications—By systematizing common benefits and drawbacks across a range of approaches to maritime boundary disputes, the study provides and assesses tools for governments regarding the resolution of outstanding conflicts, including vulnerabilities to unilateral settlement pursuant to existing dispute settlement treaty provisions.

Originality, Value—The study differs from existing commentary due to its identification of strategic and other modalities in boundary practice which may be of interest to scholars and the governments of coastal states. It is also unique in its illustrative but comprehensive exploration of one government's myriad maritime boundary concerns.

Keywords: delimitation, dispute settlement, joint development, maritime boundaries, Southeast Asia

Introduction

The present study reviews the sophisticated diversity of approaches to the resolution of delimitational and related maritime disputes among States in Southeast Asia and Oceania, and on this basis systematizes potential approaches to unresolved disputes within and beyond the region.[1] The coordination and identification of nomenclature for the varied dimensions of this practice—particularly as concerns Indonesia, the world's largest archipelagic State, which possesses delimited or undelimited maritime boundaries with 10 other States—holds potential value for not only governmental and intergovernmental stakeholders in the region, but also policymakers across a geographically broader spectrum. A comprehensive perspective on these approaches may not only maximize the efficient utilization of economic and natural resources, but also reduce the likelihood of boundary issues giving rise to military conflict.[2]

With a predominant focus on Indonesia's prolific experience in maritime boundary practice,[3] *Part II* of this article offers a taxonomy of these general approaches. By grouping these approaches within specific categories, the article permits closer examination of the relevant differences between such examples of boundary practice. These categories consist of: zero-sum negotiated solutions, which aim to draw definitive boundaries in treaty form; mutual-benefit negotiated solutions, which prioritize the economic gains of two States over the clarification of their respective sovereignty claims (such as seen in joint development agreements); amicable third-party dispute settlements, which introduce an external actor into a boundary dispute, but which depend upon the post hoc conclusion of a zero-sum treaty or mutual-benefit arrangement in order to give effect to a third party's recommendations (such as seen in boundary conciliation); and adversarial dispute settlement, through which two States consent in advance to comply with a third party's final and binding resolution of a boundary dispute (such as seen in arbitration).

In discussing practical examples from each of these four categories, *Part II* takes an inclusive approach to case law, exploring synergies between boundary conflicts and regional disputes that may not directly concern delimitation, such as cases regarding sovereignty or entitlements. *Part III* of this article identifies and compares certain modalities that are found to varying degrees within each of the four categories of dispute resolution, and considers how their utility or nonutility in prior practice may be effectively extended to unresolved boundary disputes by governments in Southeast Asia and beyond. *Part IV* concludes with brief remarks regarding the application of tactics in prospective maritime boundary practice.

Taxonomy of the Approaches

Zero-Sum Treaty Negotiation

The negotiation of maritime boundaries is a task that varies according to the political and geographic dynamics between neighboring States, but it does not exist in a normative vacuum. Unlike boundaries between provinces and other intra-State jurisdictions, the negotiation of international boundaries has been informed by a body of norms developed through adjudicative bodies such as the International Court of Justice ("ICJ") and codified in multilateral treaties, most notably the UN Convention on the Law of the Sea ("UNCLOS"), to which all Southeast Asian States other than Cambodia are currently Contracting Parties.

UNCLOS Article 15 provides that the territorial seas of opposite or adjacent States shall be delimited according to a median line using equidistant base points, unless variance is justified by historic title or other special circumstances, or else the parties agree to a different delimitation. In the absence of credible evidence of historic title,[4] it would appear that the most likely means for a State to achieve a negotiated territorial sea delimitation that does not rely upon equidistance methodology is to expand the scope of the negotiation and, in so doing, offer a *quid pro quo* concession that incentivizes its neighboring State's consent to depart from Article 15's default approach. In contrast, the delimitation of the exclusive economic zone ("EEZ") offers no default methodology in the absence of agreement. UNCLOS Article 74(1) requires only an "equitable solution" based on the means stated in ICJ Statute Article 38, which are as vague and permissive as the "equitable solution" they are intended to serve in this context. Indeed, this implied reference to the primary source cited in Article 38(1)(a) ("international conventions, whether general or particular, establishing rules expressly recognized by the contesting states") establishes an arguably circular logic, insofar as the conclusion of a boundary treaty informs, and thus ensures accordance with, the recognized sources of international law. The same language is incorporated in UNCLOS Article 83(1) concerning continental shelf delimitation. States thus have far greater flexibility in negotiating boundary treaties under the EEZ and continental shelf regimes than they do in the territorial sea.

This is not to say that international courts and tribunals have not provided

guidance to negotiators in the interpretation of Articles 74(1) and 83(1). Indeed, the ICJ has recognized and applied a three-step version of the corrective equity approach advanced by earlier arbitral tribunals in continental shelf boundary disputes, consisting of drawing a provisional equidistance line, adjusting for relevant circumstances, and reviewing for proportionality.[5] Yet the distinction between a mere adjustment based on relevant circumstances and a full "change" from the primacy of equidistance may be difficult to discern in practice, as noted by several Judges of the International Tribunal for the Law of the Sea ("ITLOS") when adopting this approach in *Bangladesh v. Myanmar*.[6]

Among its 10 opposite or adjacent neighboring States, Indonesia has negotiated maritime boundary agreements in whole or in part with all except Palau and Timor-Leste. In terms of EEZ delimitation, its experience with India reflects a notable approach. The two States had agreed upon a boundary between their continental shelves in the 1970s.[7] As opposed to Indonesia's practice with Malaysia—which includes a 1970 agreement formally imposing a territorial sea delimitation upon a previously agreed continental shelf delimitation[8]—the subsequent practice of these two States reflects a *mutatis mutandis* application of this boundary to the EEZ, without necessitating the conclusion of a separate treaty.[9]

This practice merits two reflections. First, it should be borne in mind that while the continental shelf regime traces its roots to post–World War II unilateral declarations and multilateral conventions, the EEZ is a regime that in principle did not emerge until the adoption of UNCLOS in 1982. The effect of this development was to remove large swaths of maritime space from the high seas, and place it under the economic control of coastal States. Thus, in the instance of States with opposing coasts less than 400 nautical miles apart, a new regime emerged without necessitating the governance of bilateral delimitation treaties.

Second, while continental shelf jurisdiction in the absence of opposite coastal States or extended continental shelf claims extends, like the maximum length of the EEZ, 200 nautical miles from the coast, it should be noted that these regimes are not necessarily coterminous. Given the separate treatment of these regimes in UNCLOS—and considering the above said flexibility in their delimitation, under Articles 74(1) and 83(1)—States remain at liberty to agree to separate arrangements as to these areas.

Prior to Papua New Guinea's independence in 1975, Australia on its behalf had concluded with Indonesia three 1971 continental shelf delimitation agreements in the Timor and Arafura Seas.[10] In 1980, Indonesia and Papua New Guinea concluded a new agreement that incorporated and extended, by means of equidistance, the 1971 boundary northward 200 nautical miles from the two States' baselines.[11]

This extension of seabed delimitation included as well as a provision concerning the superjacent water column. Given the extent of intermixing between Indonesian archipelagic waters and the Timor and Arafura seawaters, such clauses may be viewed as particularly salient for archipelagic States, as the potential for marine pollution to spread through these mixwaters underscores the value of clearly defined environmental enforcement and EEZ boundaries.[12] While the agreement envisages in

undefined form the cooperative management and coordination of policies concerning marine living resources in these areas, it provides a much firmer normative framework concerning subsistence fishing, preserving "[t]he right of nationals of either Party who have, customarily and by traditional methods, fished in the waters of the other Party […]."[13]

Indonesia's treaty practice with Singapore is particularly notable as regards baselines, insofar as it gives no effect to artificial means that would otherwise extend baselines seaward. The two States' 2009 and 2014 boundary agreements extend by short distances the border that had been affected by earlier agreement.[14] Given Singapore's land reclamation activities in the intervening period, it is worth noting that neither of the more recent agreements took such activities into account when extending the boundary line.[15] Also noteworthy is the 2009 treaty's use of archipelagic baselines to Indonesia's marginal benefit in the delimitation.

Indonesia would leverage this practice to greater benefit in its far more extensive delimitation with the Philippines in 2014. The Philippines is the State with which Indonesia (or indeed, any other State) has most recently begun to delimit maritime spaces, with two decades of negotiation culminating in a boundary agreement in the Sulawesi Sea. Aside from the breadth and complexity of this agreement, which includes eight turning or terminal points and extends for over 600 nautical miles, its most notable aspect is that it delimits the EEZ without prejudice to continental shelf delimitation.[16] This may reflect the application of equidistance delimitation being modified to an extent in favor of Indonesia, due to its longer archipelagic baselines in relation to the delimitation area.[17]

Indonesia's delimitation practice with Thailand reveals a flexible approach to equidistance methodology, and a preference for relegating to separate treaty negotiations two delimitations that diverge on this basis. The two States' 1971 boundary treaty delimits an expanse of continental shelf with fairly uniform morphological characteristics. By contrast, their 1975 agreement abandons this approach when addressing an expanse of continental shelf with divergent morphology in relation to their coastlines. The negotiation of this delimitation was undoubtedly complicated further by the promising nature of petrol exploration in this particular area. As such, the treaty's requirement of cooperation "[i]f any single geological petroleum or natural gas structure extends across the boundary line" may be seen to reduce the risk of delimitation for either delegation to this negotiation.[18]

The 2003 continental shelf boundary agreement between Indonesia and Vietnam also partly abandons equidistance methodology, though this would appear to be due principally to conditions above sea level.[19] These include a high level of disparity in the two States' coastlines vis-à-vis this maritime area, as well as discrepancies in the distance between each State and its relevant islands. In those areas where equidistance was maintained, Indonesia again benefits from a favorable trajectory arising from its use of archipelagic baselines. The agreement only expressly covers the continental shelf boundary and—consistent with a general trend in latter-day Indonesian boundary practice—in respect of those areas where equidistance was not maintained Indonesia has confirmed that the agreement does not prejudice

any divergent claims as to the EEZ. Indeed, the inherent difficulties of regulating enforcement jurisdiction when seafloor and water column boundaries follow different trajectories underscore how much value Indonesia has placed in the liberty to negotiate, as a general practice, each of these regimes separately.

The series of Indonesia's bilateral delimitation negotiations demonstrating the single greatest source of innovation in zero-sum boundary practice has been with Australia. Since the 1970s, the two States have crafted agreements that cover approximately 1,300 nautical miles of seabed and aquatic territory, on the basis of various principles of natural prolongation, equidistance, and modified effect for insular features.[20] In some instances these agreements have framed and influenced each other in innovative ways, such as the parties' agreement to a provisional fisheries boundary on the basis that a prior agreement be preserved regarding Indonesian nationals' traditional fishing activities in Australian waters.[21]

The aforementioned 1971 agreements between Australia and Indonesia established seabed boundaries on the basis of roughly equivalent coastal geographies, requiring few turning points to affect an equidistance delimitation. Further simplifying these negotiations was a relative lack of available geological data concerning the parties' continental margins. The two neighbors followed this with a 1972 seabed boundary agreement spanning the Arafura and Timor Seas, which have taken on economic and environmental significance for both States. The 1972 agreement left a gap between two delimitations due to Portugal's control of the East Timor region and refusal to participate in trilateral negotiations. This agreement also benefited Australia's claims to an area north of the equidistance line between its coast and that of Indonesia, due to the area's morphological characteristics and the ICJ's espousal of natural prolongation in its 1969 *North Sea* Judgment (on which basis the parties to that landmark case—three neighboring States along a concave coast—negotiated boundaries which enlarged West Germany's maritime entitlement vis-à-vis those of Denmark and the Netherlands).[22]

State practice and delimitational case law since the 1982 adoption of UNCLOS have tended to depart from the ICJ's early embrace of the equidistance approach, instead favoring median line boundaries when delimiting between States with opposing coastlines less than 400 nautical miles apart.[23] In 1972, however, Indonesia readily accepted Australia's proposed application of natural prolongation principles, resulting in a seabed boundary quite closer to the island of Timor than to the Australian coast.[24] Indonesia would come to publicly regret accepting this position during the 1972 negotiations.[25]

Following the two States' 1973 arrangements concerning area which would ultimately rest with Papua New Guinea upon its independence, Australia and Indonesia returned to negotiations after Australia declared in 1979 an EEZ defined by strict equidistance. Indonesia's opposition to this methodology in the area concerned arose from the presence of Ashmore and Cartier Islands, which Indonesia argued would result in disproportionate delimitation if these features were given full EEZ effect. Under the terms of the parties' 1981 agreement,[26] these features were treated as *de facto* "rocks" in the parlance of Article 121 of the following year's final UNCLOS

text, resulting in radii of 12 nautical miles. Indonesia's achievement of favorable terms in this regard was likely helped by the absence of major fishing activities in the disputed area and the expressly provisional nature of the agreement.[27]

The parties' 1997 agreement extended delimitations drawn provisionally in 1981, modifying this arrangement only by adjusting the radii of the two insular features from 12 to 24 nautical miles.[28] This is a relatively minor adjustment as compared to the full effect of a 200 nautical mile EEZ, and one that reasonably accommodates the contiguous zones provided for in UNCLOS Article 33. The agreement provided Australia with significant seabed territory subjacent to Indonesian EEZ waters in the region of the 1981 arrangement, while effecting new delimitations north of Christmas Island and south of Java that provided Indonesia with approximately two-thirds of the parties' overlapping maritime and seabed claims.

However, the remarkable achievement of the 1997 agreement—which has been credited in part to the ability of delegations to negotiate in locations other than Jakarta and Canberra[29]—has also been overshadowed by forces beyond the negotiators' direct control. A shift in legal representation of the region of East Timor from Indonesia to the UN Transitional Administration in East Timor in 1999 raised a significant technical issue for the 1997 agreement, as it referred to now-defunct treaties and obligations concerning the region of East Timor vis-à-vis Indonesia. As a result, the 1997 agreement is not in force and negotiations on its fate remain pending.

Mutual-Benefit Treaty Negotiation

A failure to resolve overlapping claims through delimitation agreements may lead to a reluctance among petrochemical companies and foreign investors to pursue operations in a given continental shelf area. For example, in the South China Sea, disputes concerning sovereignty and delimitation between neighboring States have left neighboring States unable to demonstrate clear title to mineral deposits and therefore attract large-scale investment.[30] The consequences of unresolved overlapping claims are not limited to the continental shelf regime, as the absence of an agreed system of legal governance may also problematize fisheries management.[31] While an agreed delimitation may be particularly difficult to obtain when overlapping claims arise in narrow waters such as the Timor Sea and the Torres Strait, such conflicts may be partly resolved by creating neutral areas in which claimant States share rights to seabed or aquatic resources.[32]

The rationale behind joint development zones—to exploit disputed resources in a manner that is efficient, fair, and mutually beneficial—is evident in multiple bilateral arrangements in Southeast Asia, such as a 1992 arrangement between Malaysia and Vietnam.[33] One of the most notable examples of such efforts is the 1989 Timor Gap Treaty between Indonesia and Australia,[34] which was at the time the most comprehensive joint development agreement in existence.[35] This agreement addressed the Timor Gap, which had been omitted from the delimitation in the parties' 1972 agreement due to Portugal's control of East Timor and refusal to participate in trilateral negotiations. In revisiting this area, Australia and Indonesia temporarily

resolved a negotiation deadlock and attempted to ensure efficient exploration and exploitation activities by creating a zone of cooperation consisting of three regions. In the regions closest to either party's coastal baselines, that State would hold the right to grant exploration and exploitation contracts, provided that 10 percent of resulting revenue is remitted to the other State. In the middle region, a body composed of both States' agents was established to supervise activities and jointly grant licenses. The Timor Gap Treaty took a maximalist approach to the facilitation of investment in this area, including extensive annexes such as a model Production Sharing Contract and codes regarding mining and taxation.

While the agreement provided that it would serve for 40 years, with the possibility of endless renewals at 20-year intervals, it also stipulated that Indonesia and Australia would continue to seek a mutually agreeable permanent boundary in this region.[36] Indeed, the preamble to the agreement specifically refers to UNCLOS Article 83, which stipulates that, pending a permanent delimitation agreement, States shall "make every effort to enter into provisional arrangements of a practical nature" and shall not "jeopardize or hamper the reaching of the final solution," providing that such provisional arrangements "shall be without prejudice to the final delimitation." However, the independence of Timor-Leste and its repudiation of territorial agreements concluded by Indonesia on its behalf have mooted this objective.

The utility of the establishment of a joint development zone in the 1989 Timor Gap Treaty may be viewed in contrast to the establishment of overlaid EEZ and continental shelf jurisdictions in the parties' 1997 agreement. Unlike the voluminous text and annexes of the 1989 agreement, the 1997 agreement did not attempt to comprehensively address the regulation of the geographic area concerned, omitting reference to marine scientific research, environmental protection, and the construction of installations. Observers have noted that UNCLOS does not adequately address such situations, as several of its provisions refer to "the" coastal State (thus leaving rights and duties difficult to discern in overlaid regimes).[37]

On the date of Timor-Leste's independence in 2002, it concluded the Timor Sea Treaty with Australia, establishing a Joint Petroleum Development Area ("JPDA") in the area formerly occupied by the joint control zone in the Timor Gap Treaty.[38] Whereas under the 1989 agreement the States shared revenue equally, 90 percent of such funds were to be disbursed to Timor-Leste under this new agreement. In other respects, however, the Timor Sea Treaty retained fundamental provisions of the Timor Gap Treaty, including its provisional status.[39]

Nevertheless, political difficulties arose concerning a region of seabed exploration fields known as the Greater Sunrise area, nearly 80 percent of which lay on what Australia considered to be within its claimed territory, beyond the geographic scope of the JPDA.[40] The parties eventually resolved this impasse through a 2006 interim resource sharing protocol.[41] While this agreement vests Timor-Leste with jurisdiction over the water column above the JPDA, it defers the parties' respective claims in the Timor Sea for up to 50 years, subject to expiration if the parties could not agree upon a development plan for the Greater Sunrise area within six years or begin production operations within 10 years of adoption. Despite its innovation of

such detailed moratorium provisions and establishment of a joint Maritime Commission possessing a broad mandate regarding the JPDA,[42] circumstances arising from the negotiation of the 2006 agreement which subsequently came to light have resulted in a series of judicial and quasi-judicial proceedings which, *inter alia*, resulted in the treaty's joint termination in January 2017.[43]

Another regional example of joint zonal management, a 1979 agreement between Malaysia and Thailand, reflects a tension-reducing incentive to pursue joint arrangements in regions where exploitable resources are likely to be found.[44] As in the Timor Gap Treaty, the importance of this incentive is emphasized in preamble text. In this sense, the establishment of joint management arrangements fulfils the obligation that UNCLOS Articles 74(3) and 83(3) imposes on Member States with opposite coasts and overlapping claims to endeavor to conclude "provisional arrangements of a practical nature which do not jeopardize or hamper the reaching of final agreement."[45] The arrangement between Malaysia and Thailand established broad principles concerning the joint development of petroleum and other non-living natural resources in a defined continental shelf area. This 50-year agreement provides for equitable cost-sharing in their joint activities and the peaceful resolution of disputes, and was supplemented by a protocol concerning more complex matters concerning regulatory implementation, which was not signed until 1990.[46]

Amicable Third-Party Resolution

Treaty negotiations may subjugate legal norms to political considerations.[47] In the context of boundary disputes, this reflects to some extent the normatively ambiguous nature of the express terms of the delimitation provisions found in UNCLOS, and the resulting inefficiency of negotiation on the basis of purely legal considerations.[48] Such negotiations do not exist in a vacuum, and may involve a broader *quid pro quo* or demonstrate value placed upon good neighborly relations. For example, benefits disproportionately conferred upon Australia in the Timor Gap Treaty were widely considered to have constituted a political reward for Australia's recognition of Indonesia's annexation of East Timor.[49]

Yet negotiation is only one of the methods for the peaceful settlement of disputes, as stated in UN Charter Article 33. These methods include as well equally amicable procedures that utilize the involvement of a neutral third party. Methods such as mediation may facilitate amicable settlement by providing a third party's objective input on legal interests addressed in this non-legal context.

As regards maritime boundary disputes, the most important form of amicable third-party dispute settlement in practice has been conciliation. Under UNCLOS Art. 298(1)(a), traditionally ad hoc boundary conciliations have taken an innovative new shape. While either party remains free to reject the conciliation commission's report,[50] UNCLOS nevertheless requires an obligation of conduct: any UNCLOS Member State may unilaterally require another Member State to participate in good faith in compulsory conciliation procedures regarding a boundary dispute.[51]

The first and thus far only instance of UNCLOS Part XV boundary conciliation

is a case initiated in 2016 by Timor-Leste against Australia. While Timor-Leste could not initiate a boundary adjudication against Australia due to the latter's recent adoption of reservations to compulsory jurisdiction over boundary disputes through both UNCLOS and Article 36(2) of the ICJ Statute, it had in recent years initiated two arbitrations and an ICJ case on a range of related matters, on the basis of jurisdictional instruments other than UNCLOS.[52]

Adversarial Third-Party Resolution

As an adversarial process, judicial resolution offers two key distinctions from amicable third-party resolution. First, dispute settlement mechanisms such as adjudication and arbitration delegate to the neutral third party the power to issue a decision that binds the parties without any further agreement on their part. Second, this decision is based on applicable law, and in principle eschews the broader political considerations that may inform the approaches discussed above. The interpretation and judicial development of these legal norms may follow evolutions and reasoning unforeseen by the parties upon submitting the case, leading to unpredictable results. As such, judicial resolution entails significant risks for States.[53]

While ITLOS has made important contributions to the settlement of maritime disputes in Southeast Asia (i.e., through its delimitation beyond 200 nautical miles in *Bangladesh/Myanmar*,[54] and its provisional measures Order in the *Straits of Johor* land reclamation dispute between Malaysia and Singapore),[55] the ICJ remains the judicial forum with the greatest depth of experience in boundary disputes. Yet its Judgments in maritime disputes in Southeast Asia have focused primarily on principles of sovereignty over islands.[56] This was the case in Indonesia's only appearance before the Court, in the *Pulau Ligitan and Pulau Sipadan* dispute submitted jointly by special agreement with Malaysia. Faced with insufficient evidence of legal title, the Court in that case awarded sovereignty of the namesake maritime features to Malaysia on the basis of the parties' competing *effectivités*[57] and the absence of reference to these features as base points or turning points in Indonesia's maps of its archipelagic baselines.[58] By illustrating the potential use of government-published baseline maps for evidentiary purposes in subsequent sovereignty disputes, this latter rationale for the Court's decision demonstrates the elusive but extraordinary value of foresight and inclusiveness when publishing such maps.

While one of the perceived benefits of judicial resolution is legal certainty, another regional dispute concerning island sovereignty—the *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* case between Malaysia and Singapore before the ICJ—recently called such permanence into question. In its 2008 judgment, the Court awarded sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore and sovereignty over Middle Rocks to Malaysia, allocating sovereignty over South Ledge to the State in the territorial waters of which it is located.[59] In 2017, Malaysia instituted two new cases arising from each dispositive finding that had not favored Malaysia in 2008, requesting both interpretation of the Court's earlier holdings

regarding sovereignty over insular features and revision thereof in light of "new facts" uncovered through archival research.[60]

These interpretation and revision mechanisms—found in the governing texts of both the ICJ and ITLOS—might raise the question as to whether judicial resolution in an institutional forum truly provides greater certainty than other modes of boundary dispute settlement. It should nevertheless be borne in mind that both institutions prescribe a very high threshold for requests to revise Judgments, which no State has yet satisfied.[61] Ad hoc arbitration, the default mechanism for cases initiated unilaterally under UNCLOS,[62] may guarantee against even this remote prospect of uncertainty since these tribunals do not resolve disputes pursuant to an institutional statute, and thus do not generally possess tools of substantive revision or obligations of interpretation for indefinite periods of time.[63] Relevant examples in recent arbitral practice include the maritime delimitation between Bangladesh and India,[64] and the determination of entitlements in the *South China Sea* arbitration.[65] Yet as controversy concerning the latter case suggests, legal certainty may be seen to entail more than just *de jure* permanence, and may in the arbitral context also entail *de facto* considerations of perceived legitimacy.

Assessment of the Approaches

Strategic Themes

In terms of zero-sum and mutual-benefit negotiation, two key dynamics may be observed in the treaty practice discussed above. The first dynamic concerns to what extent the treaty-making strategy employs what may be called "incrementalism": the conclusion of an agreement addressing a subset of the dispute, with the expectation of the future settlement (using any of the four approaches identified above) of the remainder of the dispute.

At first glance, incrementalism may be seen as a conservative tactic for resolving the underlying dispute through the practicable management of offshore rights.[66] Practice between Indonesia and Papua New Guinea would seem to support this conclusion. As discussed above, Australia (in respect of Papua New Guinea's territory) and Indonesia concluded in 1971 three continental shelf delimitation treaties in the Arafura and Timor Seas. Following Papua New Guinea's independence from Australia, Indonesia and Papua New Guinea in 1980 concluded an agreement incorporating the boundary established in the earlier treaties and extending it northward by means of equidistance. This agreement also reveals incrementalism insofar as it establishes relatively firm rules for subsistence fishing by traditional methods while envisaging, but not clearly defining, subsequent cooperation regarding other uses of fisheries.

Yet the principal weakness of incrementalism in treaty practice is the risk of miscalculating the possibility and consequences of political shifts and emerging disputes following the conclusion of an initial agreement, thus complicating bilateral

relations and making negotiation more difficult.[67] This risk is evident in practice between Malaysia and Thailand. As discussed above, the two States concluded in 1979 an agreement establishing broad principles governing the joint development of non-living resources in a defined area of overlap within their respectively claimed continental shelf entitlements. Malaysia and Thailand pursued an incremental strategy in this dispute by relegating complex matters regarding regulatory implementation to a separate protocol. The fact that this protocol was not signed until 1990 may suggest the relative undesirability of States binding themselves to framework agreements that are then subject to disputes and implementation difficulties. As such, while regional practice suggests the benefits of bifurcating negotiation phases, States must weigh this incremental strategy against the legal uncertainties and bilateral tensions that may arise in treaty relations when the fine print is delayed by changes in government administrations and by commercial and fishing disputes.

The second dynamic evident in treaty practice concerns to what extent the treaty-making strategy relies upon what may be called "boilerplatism": the use of textual devices of general application that have been incorporated in prior agreements. Reliance upon certain clauses that have proven useful in past practice is not per se problematic. As discussed above, Indonesia has utilized this tactic to quite successful ends. For example, the use of a "without prejudice" clause in its 2014 EEZ delimitation treaty with the Philippines would seem to protect the parties' preferred incremental approach (i.e., forestalling the conclusion of a continental shelf boundary). In the absence of such a clause, the complexity of the agreement's turning points over the course of 600 nautical miles might otherwise suggest a more comprehensive intent. Similarly, the use of an "expressly provisional" clause in its 1981 EEZ delimitation treaty with Australia arguably helped Indonesia to achieve favorable terms therein. The further value of this approach as a framing device for setting the terms of a permanent delimitation is evident in the two States' 1997 treaty, in which they agreed to permanently affirm this boundary, making slight adjustments regarding insular features but retaining the delimitation methodology used in the provisional terms of the 1981 agreement.

In other respects, however, the 1997 treaty suggests the critical risks of utilizing boilerplatism in boundary treaty practice. Unlike the tome that the parties authored in 1989, this treaty opted for a dangerous degree of simplicity, relying by default on some of the more ambiguous provisions of UNCLOS, rather than establishing a *lex specialis* to comprehensively regulate these issues. This preference for reliance on previously agreed rules may accelerate the treaty negotiation process by removing the need to negotiate new terms, but the weakness of this strategy is most readily apparent in the 1997 treaty's inclusion of provisions that incorporate by reference the rules established in the 1989 agreement concerning joint development in the Timor Sea. As discussed above, the subsequent independence of Timor-Leste has led to the nullification of the 1989 agreement, and thus negotiators' preference for boilerplate cross-references in the text of the 1997 treaty has given rise to major hurdles concerning its amendment and ratification.

Recurring Limitations

The approaches identified in regional practice cannot be understood as overly prescriptive, and cannot be strategically applied to a boundary dispute if viewed in isolation from the specific dynamics of the dispute. Nevertheless, certain case-specific limitations arise frequently in the application of each of these approaches, and may thus be valuable to consider for illustrative purposes.

In treaty negotiation, such limitations may possess a factual or political character. In terms of the zero-sum approach, uncertainties concerning factual issues such as geodetic datum can clearly stall the progress of negotiations.[68] Political shifts may also impede the ratification of negotiated agreements, as discussed above in respect of mutual-benefit practice between Australia and Indonesia and between Malaysia and Thailand. The mutual-benefit approach may raise related limitations concerning the effectiveness of an established authority in managing a joint development zone, based on whether the underlying agreement attempts to ensure its members' independence from political winds in either State party to the agreement.

In third-party resolution, such limitations may be considerably more varied, depending on the mechanisms of the specific forum in question. In terms of the amicable approach, the paucity of practice under UNCLOS conciliation—which leaves intact the traditional freedom of parties to reject the report of the conciliation commission but innovates an obligation of conduct to engage in the process leading to this report—leaves open questions as to the minimum threshold for good-faith participatory efforts. As discussed above, the sole conciliation initiated thus far under UNCLOS Article 298, between Australia and Timor-Leste, raised no apparent concerns in this respect. The adversarial approach, on the other hand, raises foundational considerations of jurisdiction. Australia has over the years adopted a conservative tactic in this respect, filing a reservation against the arbitration of maritime boundaries pursuant to UNCLOS Article 298 and amending its declaration recognizing the compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute to include a reservation against the adjudication of such disputes. Beyond this foundational assessment of the relative vulnerability or opportunity seen in arbitration or adjudication, the adversarial approach raises procedural considerations, such as a theoretically problematic interaction between a court or tribunal's issuance of provisional measures and the parties' obligations to pursue cooperative arrangements pursuant to UNCLOS Articles 74(3) and 83(3) or *lex specialis* agreements.[69]

Trilateral Contexts

The examples from practice discussed above have focused on the settlement of boundary disputes between two governments. Yet the consideration of boundary dynamics in Southeast Asia suggests the varied questions that can often arise as regards the interests of third States. In both treaty negotiation and third-party res-

olution, the principal variable is whether the third State chooses to participate in the process.

Regional treaty practice has provided potential guidance for the establishment of boundary tripoints among three negotiating parties, such as the 1971 agreement among Indonesia, Malaysia, and Thailand, and the 1978 agreement among India, Indonesia, and Thailand.[70] As the complexity of boundary negotiations may be significantly heightened in a trilateral context, however, existing practice in relation to non-participating third States provides perhaps more practicable guidance. Notable in this regard are bilaterally negotiated tripoints based on the claims of Indonesia, Malaysia, and Singapore, as well as those of Malaysia, Thailand, and Vietnam.[71]

Regional practice before international courts and tribunals has provided a significant body of jurisprudence on the interests of third States in the settlement of disputes that involve questions relating to maritime boundaries. Often these have included disputes that do not directly concern boundaries, but indirectly raise such questions insofar as they relate to disputes concerning sovereignty or entitlements. In terms of third States that seek to participate in this process, reference points include the Philippines' failed intervention request in the *Pulau Ligitan and Pulau Sipadan* case submitted to the ICJ by Indonesia and Malaysia, and the participation of several neighboring States as authorized observers in the *South China Sea* UNCLOS arbitration between the Philippines and China. In terms of third States which abstain from this process, contemporaneous ICJ disputes (and divergent Judgments) between Australia and Portugal in *East Timor* and between Australia and Nauru in *Phosphates in Nauru* have proven instrumental in attempting to clarify the doctrine of absent third parties in international dispute settlement.[72] Whereas in the former case the Court found that proceeding to the merits of the case in the absence of Indonesia would impermissibly require it to adjudicate the validity of the Timor Gap Treaty,[73] in the latter case it concluded that it could proceed to the merits because a Judgment on the existence or content of Australia's responsibility toward Nauru (pursuant to a trusteeship agreement to which New Zealand and the United Kingdom were also parties) did not require it to make findings as to those third States' responsibilities.[74]

Notably, viewing maritime boundary disputes through a trilateral lens further reveals the possible involvement of third entities beyond States. These entities may include intergovernmental organizations, such as the role of ASEAN in attempting to manage tensions associated with overlapping claims in the South China Sea (though without direct, multilateral involvement in the determination of these boundaries). Regional entities may indeed take a more pronounced role in facilitating and endorsing attempts to resolve bilateral boundary disputes through the approaches discussed above.[75] Such entities may also include global treaty bodies, such as the Commission on the Limits of the Continental Shelf ("CLCS") established under UNCLOS. While a body such as the CLCS could in theory play an informal role in facilitating the settlement of disputes concerning overlapping extended continental shelf entitlements,[76] its work in practice has tended to be impeded by the formal protest of one State in response to another State's submission of claimed

entitlements, such as with Timor-Leste's protest to Indonesia's submission. Nevertheless, this protest power may play an important role as a bargaining chip in resolving boundary disputes. In this regard, a State may offer during negotiations to remove its protest (thus allowing the CLCS's affirmation of entitlements to proceed) in exchange for concessions regarding a broader delimitation dispute.

Non-Aggravation and Durability

The ultimate value of any of the approaches identified above depends upon the extent to which they do not exacerbate disputes, as well as the legal certainty of the resolutions to which they lead. In terms of negotiated approaches, the durability of agreements may for democratic States broadly entail the perceived legitimacy of achieved solutions and underlying processes. More specifically, objectives of legal certainty have been primarily safeguarded through the use of specific treaty language. For example, in the 1975 treaty between Indonesia and Thailand concerning an area of the continental shelf where there was significant petrol exploitation potential, the parties included text requiring cooperation "if any single geological petroleum or natural gas structure extends across the boundary line." In this manner, the use of "prospective text" foreseeing later mutual-benefit negotiation reduced the political and economic risks of negotiating an otherwise zero-sum delimitation agreement.

In the absence of specific treaty language, regional practice demonstrates the possibility of "*mutatis mutandis*" extension of boundaries from one maritime regime to another, such as in the 1970s negotiation of continental shelf delimitations between India and Indonesia.[77] The parties deemed that their practice would constitute a *mutatis mutandis* application of the continental shelf boundary to the EEZ, without necessitating a separate treaty defining the boundaries of that zone. At least in this particular instance, the approach may be seen to serve the two States' interests in efficiently clarifying the legal status of this regime and avoiding potential disputes regarding their respective economic rights therein.[78]

Compared to the prospect of prolonging a dispute while maintaining a negotiating position that may never prevail, the establishment of conciliation commissions has proven "swift, cheap and successful" by removing some of the political burdens inherent in bilateral boundary negotiations between States with democratically elected governments.[79] The limited practice of UNCLOS conciliation in this respect demonstrates a "concentrative function" that may improve the manageability of a range of disputes between two States without prejudicing their ultimate resolution. This is evident in Timor-Leste's decision to terminate each of its previously initiated arbitrations against Australia (and a related ICJ case) during the course of the parties' conciliation. Indeed, this concentrative function bore fruit in the parties' jointly authorized October 2017 announcement that "[h]aving reached agreement on maritime boundaries, engagement with the Greater Sunrise Joint Venture and the development of Greater Sunrise will now become the principal focus of the Parties." The conciliation commission noted therein that "this has been done in a bilateral setting, without the need for intervention by the Commission."[80] The parties

formalized their Maritime Boundary Treaty in March 2018 at UN Headquarters in New York, and the commission deposited its report and recommendations with the UN Secretary-General in May 2018.[81]

As such, these two States have successfully demonstrated the utility of the UNCLOS conciliation process in avoiding the further stagnation or escalation of boundary-specific and related economic disputes in an area of overlapping maritime claims. Moreover, in proceeding through the facilitation of the commission, the parties appear to have been mindful to remedy certain shortcomings in the prior arrangements. For example, whereas one of the recent arbitrations instituted (and terminated) by Timor-Leste against Australia concerned ambiguity in the JPDA as to the exclusivity of either State's jurisdiction over pipelines stemming from their joint development area, the 2018 Maritime Boundary Treaty clearly sets out to clarify this question for the purposes of the parties' new jointly operated special regime in the Greater Sunrise Fields.[82] Failing that, the parties have moreover agreed to a mechanism providing for either party's unilateral submission of resulting disputes to arbitration.[83]

Having thus logically transitioned to a reflection on adversarial proceedings, the principal question raised by regional practice in this respect is arguably one of legal certainty. This may seem counterintuitive, in light of the fundamental character of *res judicata* decisions rendered by international courts and tribunals. Nevertheless, certain caveats to this principle may arise. For example, the multiplicity of dispute settlement fora concerning the spectrum of issues relating to boundary disputes—as seen in the aforementioned proceedings between Australia and Timor-Leste, as well as other parallel inter-State proceedings beyond this region[84]—may raise significant burdens on governments, requiring greater case management capacity.[85] Such multiplicity may further raise the specter of conflicting decisions and cross-institutional interference.[86] The possibility of such caveats is further evident in the aforementioned 2017 requests for revision and interpretation initiated by Malaysia before the ICJ in respect of the Court's 2008 Judgment in *Pedra Branca, Pulau Batu Pateh, and Middle Rocks*.

In light of the relative ineffectuality of Article 94 of the UN Charter, which provides the Security Council with authority to take action concerning non-compliance with ICJ Judgments, the lack of a comparable central enforcement mechanism concerning inter-State arbitral awards arguably does not play an outsize role in the durability of such awards. However, given the lack of an intergovernmental organization's imprimatur of authority over the issuance of inter-State awards (by contrast to the ICJ as the principal judicial organ of the UN), legal certainty may also be seen to entail perceptions of legitimacy. UNCLOS arbitration has demonstrated recent problems in this respect, notably in the phenomenon of powerful respondents denigrating the authority of Annex VII tribunals and refusing to participate in cases such as *South China Sea*.[87] While this does not necessarily cast doubt on the use of arbitral tribunals to resolve maritime boundary disputes, it does raise questions in some instances as to the enforcement of awards rendered in arbitrations instituted through compulsory, treaty-based mechanisms.

The question may thus reasonably arise as to whether such judgments and awards provide as much certainty as to resolution of boundary disputes as do treaty-based approaches. It may be seen, however, that treaties do not necessarily provide substantially more guarantees of legal permanence than adjudication and arbitration. In this respect, one may consider the termination of territorial treaty obligations in the Timor Gap Treaty following the independence of Timor-Leste. Beyond the creation of new States, caveats to the certainty of treaty-based approaches are also evident in the spying scandal concerning the negotiation of the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea between Australia and Timor-Leste, the revelation of which gave rise to arbitration concerning Timor-Leste's obligations under said treaty. Looking beyond the scope of the present article, it may be worth reflecting on the utility or necessity of extending the norms governing invalidity, termination, and suspension of operation of treaties—as found in Part V of the Vienna Convention on the Law of Treaties—to the durability of inter-State awards and judgments in instances of fraud, material breach, or fundamental change of circumstances.

Conclusion

While Indonesia's practice suggests a clear preference for negotiations,[88] the present article has highlighted some of the values that may be considered in selecting from among the four general approaches to maritime boundary disputes, and has identified in regional practice certain norms in each of these respects. In terms of strategic themes, incrementalism in treaty practice may be complicated when the initial treaty is a broad framework agreement (rather than a clear boundary segment). Additionally, boilerplatism may prove problematic insofar as a treaty cross-references a prior provisional agreement (rather than adapting its terms). While some procedural aspects of third-party resolution may be difficult to predict, jurisdictional considerations regarding adversarial proceedings can be effectively formulated in advance as part of a State's comprehensive boundary strategy. Both amicable and adversarial mechanisms enable States to circumvent the recurring factual and political limitations that may forestall agreements to utilize resources.

Trilateral interests may arise in each of the principal approaches, and the key variable as to how the parties may effectively address third-State interests is whether that State seeks to assert its interest in the negotiations or proceedings. Third-party institutions may affect negotiations in a similarly binary fashion, by either facilitating bilateral consultations (such as through regional integration organizations) or indirectly broadening their dynamics (such as through the availability of quasi-judicial treaty bodies). Finally, the Southeast Asian experience has innovated several tactics that may concern the non-aggravation and durability of solutions reached through each of the four approaches. These include the beneficial use of prospective text in treaty language, the *mutatis mutandis* application of treaty terms through subsequent practice, and the concentrative function of conciliation proceedings. By contrast,

multiplicity in adversarial proceedings may raise questions as to the legal certainty of the results achieved therein.

Notes

1. An earlier version of this article was presented at the 8th International Conference on Boundary Affairs in Pontianak, Indonesia in October 2017, upon the gracious invitation of the Center for International Law Studies and the Faculty of Law Universitas Indonesia. The author is indebted to valuable feedback received from Indonesian negotiators and boundary experts who organized or attended the event.

2. See S.A. Kocs, "Territorial Disputes and Interstate War," *Journal of Politics*, vol. 57(1) (1995), pp. 173–174.

3. See generally V.L. Forbes, *Indonesia's Delimited Maritime Boundaries* (Springer 2014).

4. Reliance upon "other special circumstances" is omitted here due to the ambiguity of the term in the context of bilateral negotiations. Scholars have referred to this clause by: noting that what will meet this threshold will depend upon conditions unique to each area (see N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* [Cambridge University Press 2004], p. 278); emphasizing "historic title" as the more dominant exception in UNCLOS Article 15 (see Z. Keyuan, *Law of the Sea in East Asia: Issues and Prospects* [Routledge 2005], p. 70); and hypothesizing that the phrase could include "acquired rights to non-exclusive uses within those waters" (see W.M. Reisman & M.H. Arsanjani, "Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation," in T.M. Ndiaye & R. Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007), p. 647).

5. See *Maritime Delimitation in the Black Sea*, Judgment, ICJ Reports 2009, p. 61, paras 120–121, 155. See further B. McGarry, "The Development of Custom in Territorial Dispute Settlement," *Journal of International Dispute Settlement*, vol. 8(2) (2017), pp. 352–355.

6. See *Delimitation of the Maritime Boundary in the Bay of Bengal*, Judgment, ITLOS Reports 2012, p. 4, para 183. See further Joint Declaration of Judges Nelson, Chandrasekhara Rao, and Cot; Separate Opinion of Judge Cot; Separate Opinion of Judge Gao.

7. Agreement between India and Indonesia of 8 August 1974; Agreement between India and Indonesia of 14 January 1977.

8. Treaty between Indonesia and Malaysia of 17 March 1970.

9. See J.R.V. Prescott, "Agreement Between the Government of the Republic of India and the Government of the Republic of Indonesia," *International Maritime Boundaries*, rpt. 6–6(1) (1993), p. 1364; S.P. Jagota, *Maritime Boundary* (Martinus Nijhoff 1985), p. 82.

10. Agreement between Australia and Indonesia of 18 May 1971; Agreement between Australia and Indonesia of 9 October 1972; Agreements between Australia and Indonesia of 12 February 1973.

11. Agreement between Indonesia and Papua New Guinea of 13 December 1980.

12. See R.J. Morrison & J.R. Delaney, "Marine Pollution in the Arafura and Timor Seas," *Marine Pollution Bulletin*, vol. 32(4) (1996), p. 329, https://doi.org/10.1016/0025-326X(96)00004-5

13. Art. 5. Cf. arts. 6, 7.

14. Agreement between Indonesia and Singapore of 25 May 1973.

15. Treaty between Indonesia and Singapore of 10 March 2009; Treaty between Singapore and Indonesia of 3 September 2014.

16. Agreement between the Philippines and Indonesia of 23 May 2014, art. I(3).

17. See C.H. Schofield & I.M. Andi Arsana, "Agreement Between the Government of the Republic of the Philippines and the Republic of Indonesia Concerning the Delimitation of the Exclusive Economic Zone Boundary," *International Maritime Boundaries*, rpt. 5–41 (2016), p. 4956.

18. Agreement between Indonesia and Thailand of 11 December 1975, art. 2.

19. Agreement between Vietnam and Indonesia of 26 June 2003.

20. For a history of Indonesia's objectives and efforts negotiating continental shelf boundary agreements in the years between the *North Sea* Judgment and the adoption of UNCLOS, see gen-

erally J.G. Butcher & R.E. Elson, *Sovereignty and the Sea: How Indonesia Became an Archipelagic State* (NUS Press 2017).

21. See D. Colson, "The Legal Regime of Maritime Boundary Agreements," *International Maritime Boundaries*, vol. 1 (1993), p. 58. See further B. Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations," *International Maritime Boundaries*, vol. 1 (1993), p. 81*n*31.

22. *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3.

23. See further D. Nicholson & T. Clarke, "Asia-Pacific: Unfinished Business in the Timor Sea," *Alternative Law Journal*, vol. 38(2) (2013), pp. 122–123. https://doi.org/10.1177/1037969X1303800213

24. See S. Kaye, *Australia's Maritime Boundaries* (Centre for Maritime Policy 2001), pp. 49–50.

25. See S. Stepan, "Credibility Gap: Australia and the Timor Gap Treaty," Australian Council for Overseas Aid (1990), p. 3, http://vuir.vu.edu.au/26190/1/STEPAN_compressed.pdf.

26. Memorandum of Understanding between Indonesia and Australia of 29 October 1981.

27. See R.R. Churchill, "Fisheries Issues in Maritime Boundary Delimitation," *Marine Policy*, vol. 17(1) (1993), p. 49. But see J.R.V. Prescott, "The Problems of Completing Maritime Boundary Delimitation Between Australia and Indonesia," *International Journal of Marine and Coastal Law*, vol. 10 (1995), p. 396, https://doi.org/10.1163/157180895X00141

28. Treaty Between Australia and Indonesia of 14 March 1997.

29. See J.R.V. Prescott, "The Completion of Marine Boundary Delimitation Between Australia and Indonesia," *Geopolitics and International Boundaries*, vol. 2(2) (1997), pp. 132–133, https://doi.org/10.1080/13629379708407593

30. See C.W. Dundas, "The Impact of Maritime Boundary Delimitation on the Development of Offshore Mineral Deposits," *Resources Policy*, vol. 20(4) (1994), p. 277. https://doi.org/10.1016/0301–4207(94)90007–8

31. See P. Hallwood, "An Economic Analysis of Drawing Lines in the Sea," University of Connecticut (2007), p. 406, http://digitalcommons.uconn.edu/econ_wpapers/200721.

32. See A. Melamid, "The Division of Narrow Seas," *Political Geography Quarterly*, vol. 5(1) (1986), p. 39, https://doi.org/10.1016/0260–9827(86)90009–1

33. Memorandum of Understanding between Malaysia and Vietnam of 5 June 1992. See further T.A. Mensah, "Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation," in R. Lagoni & D. Vignes (eds), *Maritime Delimitation* (Brill 2006), p. 147.

34. Treaty between Australia and Indonesia of 11 December 1989.

35. See C.H. Schofield, "Blurring the Lines? Maritime Joint Development and the Cooperative Management of Ocean Resources," University of Wollongong (2009), pp. 14–15, http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1373&context=lawpapers.

36. See further D. Mercer, "Closing the Gap: Australian-Indonesian Relations, the "Perilous Moment' and the Maritime Boundary Zone," *Journal of Economic and Social Geography*, vol. 90(1) (1999), pp. 70–71, https://doi.org/10.1111/1467-9663.00050

37. See M. Herriman & M. Tsamenyi, "The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?," *Ocean Development and International Law*, vol. 29(4) (1998), pp. 378–379, https://doi.org/10.1080/00908329809546132

38. Exchange of Notes Constituting an Agreement between East Timor and Australia of 20 May 2002.

39. See further S. Derrington & M. White, "Australian Maritime Law Update: 2002," *Journal of Maritime Law and Commerce*, vol. 34 (2003), p. 367.

40. See generally C.H. Schofield, "Dividing the Resources of the Timor Sea: A Matter of Life and Death for East Timor," *Contemporary Southeast Asia*, vol. 27(2) (2005), p. 255. https://doi.org/10.1355/CS27–2E

41. Treaty between Australia and East Timor of 12 January 2006.

42. See further C.H. Schofield, "Minding the Gap: The Australia—East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)," *International Journal of Marine and Coastal Law*, Vol. 22(2) (2007), pp. 218–219.

43. See *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Press Release, 9 August 2017, https://pcacases.com/web/sendAttach/2226.

44. Memorandum of Understanding between Thailand and Malaysia of 24 October 1979. See also *ibid.*, Annex I.

45. See further A. Bergin, "The Australian-Indonesian Timor Gap Maritime Boundary Agreement," *International Journal of Estuarine and Coastal Law*, vol. 5(4) (1990), pp. 390–91, https://doi.org/10.1163/157180890X00353; British Institute of International and Comparative Law, Report on Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas (2016), p. 94, https://www.biicl.org/documents/1192_report_on_the_obligations_of_states_under_articles_743_and_833_of_unclos_in_respect_of_undelimited_maritime_areas.pdf?showdocument=1.

46. Agreement between Malaysia and Thailand of 13 May 1990.

47. See C. Cook, "Filling the Gap—Delimiting the Australia-Indonesia Maritime Boundary," *Australian Year Book of International Law*, vol. 10 (1983), p. 175.

48. See I.A. Shearer, "International Legal Aspects of Australia's Maritime Environment," *Australia's Maritime Horizons in the 1980s* (Australian Centre for Maritime Studies 1982), p. 8.

49. See N. Bugalski, "Beneath the Sea: Determining a Maritime Boundary Between Australia and East Timor," *Alternative Law Journal*, vol. 29(6) (2004), p. 289. https://doi.org/10.1177/1037969X0402900606

50. See further R. Beckman, "UNCLOS Part XV and the South China Sea," in S. Jayakumar, et al. (eds), *The South China Sea Disputes and Law of the Sea* (Edward Elgar 2014), p. 246.

51. See further UNCLOS, art. 300; *M/V "Louisa" Case*, ITLOS Judgment of 28 May 2013, para 137.

52. *Arbitration under the Timor Sea Treaty*, PCA Case 2013–16; *Arbitration Under the Timor Sea Treaty*, PCA Case 2015–42; *Questions Relating to the Seizure and Detention of Certain Documents and Data*, Order of 11 June 2015, ICJ Reports 2015, p. 572. The case before the ICJ concerned Australia's treatment of evidence relevant to the first of the Timor Sea Treaty arbitrations.

53. See Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, Dissenting Opinion of Judge Gros, ICJ Reports 1984, pp. 246, 360, para 2; T.L. McDorman, et al., "The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?," *Marine Policy*, vol. 9(2), p. 107, https://doi.org/10.1016/0308–597X(85)90001–6

54. *Delimitation of the Maritime Boundary in the Bay of Bengal*, Judgment, ITLOS Reports 2012, p. 4. In particular, ITLOS in this case rejected natural prolongation as irrelevant to both entitlement and delimitation in the outer continental shelf. See *ibid.*, paras 435, 455, 460.

55. *Land Reclamation in and Around the Straits of Johor*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10. This case concerned whether a land reclamation project by Singapore constituted a threat of serious harm to the marine environment and, if so, whether Singapore was required *inter alia* to conduct an environmental impact assessment and to notify and consult with Malaysia. At the provisional measures stage, ITLOS clarified one aspect of the relationship between diplomatic and judicial means of dispute settlement in finding that a party is "not obliged to continue with an exchange of views when it [has] concluded that this exchange could not yield a positive result." *Ibid.*, para 48.

56. See C.H. Schofield, "The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation," in S. Hong & J. Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009), p. 22, https://doi.org/10.1163/ej.9789004173439.i-308.13. See further J.R.V. Prescott & C.H. Schofield, *Maritime Political Boundaries of the World* (Martinus Nijhoff 2005), pp. 265–84.

57. *Sovereignty Over Pulau Ligitan and Pulau Sipadan*, Judgment, ICJ Reports 2002, p. 625, paras. 58, 72, 80, 92, 94, 96, 114, 124, 132, 148; J.M. Van Dyke, "Disputes Over Islands and Maritime Boundaries in East Asia," in S. Hong & J. Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009), pp. 47–49, https://doi.org/10.1163/ej.9789004173439.i-308.18. On considerations of *effectivités* and historical records in island sovereignty disputes, see M.J. Valencia, et al, *Sharing the Resources of the South China Sea* (University of Hawaii Press 1997), pp. 17–19.

58. *Sovereignty Over Pulau Ligitan and Pulau Sipadan*, Judgment, ICJ Reports 2002, p. 625, para 137.

59. *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Judgment, ICJ Reports 2008, p. 12.

60. See ICJ Press Release, 30 June 2017, http://www.icj-cij.org/files/case-related/170/170–20170630-PRE-01–00-EN.pdf; ICJ Press Release, 3 February 2017, http://www.icj-cij.org/files/case-related/167/19344.pdf. The parties agreed to discontinue both cases shortly after a new administration assumed office in Malaysia. See ICJ Press Release, 1 June 2018, http://www.icj-cij.org/files/case-related/170/170-20180601-PRE-01-00-EN.pdf; ICF Press Release, 1 June 2018, http://www.icg-cij.org/files/case-related/167/167-20180601-PRE-01-00-EN.pdf.

61. See, e.g., ICJ Statute, Art. 61. Notably, although the UNCLOS negotiators who drafted the ITLOS Statute omitted any provision concerning the revision of Judgments, the Judges themselves, when adopting their procedural rules, largely incorporated the terms of Article 61 of the ICJ Statute. See ITLOS Rules of Court, Art. 127.

62. See further R. Beckman & C.H. Schofield, "Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait," *Ocean Development and International Law*, vol. 40(1) (2009), pp. 24–25, https://doi.org/10.1080/00908320802631551. See generally P. Gautier, "The Settlement of Disputes," in D.J. Attard (ed), *IMLI Manual on International Maritime Law* (OUP 2014), p. 553; B.H. Oxman, "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals," in D.R. Rothwell (ed), *Oxford Handbook of Law of the Sea* (OUP 2015), p. 394.

63. Cf. Decision of the Commission (15 Dec. 1933), Mixed Claims Commission: United States and Germany: Decisions and Opinions from January 1, 1933 to October 30, 1939 (Excepting Decisions in the Sabotage Claims of June 15, and October 30, 1939), pp. 1115, 1127–1128 (1940).

64. *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA Case 2010–16, Award, 7 July 2014.

65. *South China Sea Arbitration*, PCA Case 2013–19, Award, 12 July 2016; *Arctic Sunrise Arbitration*, PCA Case 2014–02, Award on the Merits, 14 August 2015.

66. See C.H. Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia*, vol. 29(2) (2007), pp. 292–293, https://doi.org/10.1355/CS29–2D.

67. See C.H. Schofield & M. Tan-Mullins, "Maritime Claims, Conflicts and Cooperation in the Gulf of Thailand," *Ocean Yearbook*, vol. 22 (2008), pp. 108–111. https://doi.org/10.5670/oceanog.2008.08.

68. See H.Z. Abidin, et al, "Geodetic Datum of Indonesian Maritime Boundaries: Status and Problems," *Marine Geodesy*, vol. 28(4) (2005), p. 303, https://doi.org/10.1080/01490410500411745.

69. See N. Klein, "Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes," *International Journal of Marine and Coastal Law*, vol. 21(4) (2006), p. 460, https://doi.org/10.1163/157180806779441129. But see M. Miyoshi, "The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf," *International Journal of Estuarine Law*, vol. 3(1) (1988), p. 14, https://doi.org/10.1163/187529988X00012. See further D.M. Ong, "Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?," *American Journal of International Law*, vol. 93 (1999), p. 801, https://doi.org/10.2307/2555344.

70. Agreement between Indonesia, Malaysia and Thailand of 21 December 1971; Agreement between India, Indonesia and Thailand of 22 June 1978.

71. See D. Anderson, "Negotiating Maritime Boundary Agreements: A Personal View," in R. Lagoni & D. Vignes (eds), *Maritime Delimitation* (Brill 2006), pp. 136–137, n. 42; A.G. Oude Elferink, "Third States in Maritime Delimitation Cases: Too Big a Role, Too Small a Role, or Both?," in A. Chircop, et al. (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Martinus Nijhoff 2009), p. 609, https://doi.org/10.1163/ej.9789004172678.i-786.152. See further Agreement between Thailand and Vietnam of 11 August 1997.

72. *East Timor*, Judgment, ICJ Reports 1995, p. 90; *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240. See generally B. McGarry, "Third Parties and Insular Features After the *South China Sea* Arbitration," *Chinese (Taiwan) Yearbook of International Law and Affairs*, vol. 35 (2018).

73. *East Timor*, Judgment, ICJ Reports 1995, p. 90, para 34.

74. *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240, para 55.

75. See, e.g., the role of the EU in endorsing the underlying agreement in the *Arbitration between Croatia and Slovenia*, and the role of the Organization of American States regarding the

potential shift from mediation to adjudication in the long-running boundary dispute between Belize and Guatemala.

76. See M. Finnemore & S.J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics," *International Organization*, vol. 55(3) (2001), pp. 747–748. https://doi.org/10.1162/00208180152507614.

77. See J.R.V. Prescott, "Agreement Between the Government of the Republic of India and the Government of the Republic of Indonesia," *International Maritime Boundaries*, rpt. 6–6(1) (1993), p. 1364; J.R.V. Prescott, "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," rpt. 6–6(2) (1993), p. 1372.

78. See I. Papanicolopulu, "Some Thoughts on the Extension of Existing Boundaries for the Delimitation of New Maritime Zones," in R. Lagoni & D. Vignes (eds), *Maritime Delimitation* (Brill 2006), p. 223.

79. See R.R. Churchill, "Maritime Delimitation in the Jan Mayen Area," *Marine Policy*, vol. 9 (1985), p. 25 (citing the *Jan Mayen* conciliation between Iceland and Norway). https://doi.org/10.1016/0308–597X(85)90077–6.

80. *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Press Release, 15 October 2017, http://www.pcacases.com/web/sendAttach/2240.

81. *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Press Release, 9 May 2018, https://www.pcacases.com/web/sendAttach/2358.

82. See, e.g., *ibid.*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018, para 47; Treaty between the Democratic Republic of Timor-Leste and Australia Establishing their Maritime Boundaries in the Timor Sea signed 6 March 2018, Art. 10.

83. Treaty between the Democratic Republic of Timor-Leste and Australia Establishing their Maritime Boundaries in the Timor Sea signed 6 March 2018, Annex E, Art. 1.

84. These include the *"MOX" Plant* dispute between the UK and Ireland, the *Swordfish* dispute between Chile and the EU, and the *Atlanto-Scandian Herring* dispute between the Faroe Islands and the EU.

85. See generally B. McGarry, "Cost Efficiency in Inter-State Dispute Settlement," in P. Butler, et al. (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018).

86. See generally "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, http://legal.un.org/docs/?symbol=A/CN.4/L.682.

87. See B. McGarry, "Enforcing an Unenforceable Ruling in the South China Sea," The Diplomat, 16 July 2016, https://thediplomat.com/2016/07/enforcing-an-unenforceable-ruling-in-the-south-china-sea/.

88. See H. Chiu, "Political Geography in the Western Pacific after the Adoption of the 1982 United Nations Convention on the Law of the Sea," *Political Geography Quarterly*, vol. 5(1) (1986), pp. 28–29, https://doi.org/10.1016/0260–9827(86)90007–8; I.M. Andi Arsana, "Mending the Imaginary Wall Between Indonesia and Malaysia," *Wacana*, vol. 13(1) (2011), p. 31.

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