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Good agreements make good neighbours: Settlements on maritime boundary disputes in South East Asia

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ABSTRACT

Control over marine areas is instrumental for a country's economy, resources, and security. This vested interest of States in surrounding oceans leads to maritime boundary disputes, which are common in South East Asia. Maritime boundary disputes can be resolved through many methods, and it is often difficult for individual States to determine which option to pursue. Indonesia, as the largest archipelagic State in the world, has an extensive history dealing with maritime boundary disputes. This article examines landmark cases with which Indonesia was involved to examine the effectivity of various dispute settlement methods, both casuistically and from a broader policy perspective. Firstly, a theoretical study is presented of the different forms of dispute resolution available for maritime boundary issues, including their advantages and disadvantages. Then, specific cases are discussed: The South China Sea dispute, the development of the archipelagic principle in UNCLOS, and several experiences of disputes concerning Indonesia's maritime perimeter. Ultimately, the authors recommend exhausting all possibilities for negotiated settlements before considering other avenues such as arbitration, litigation, avoidance, and temporary alternatives. Negotiated settlements offer both short-term advantages (increased utility for both parties, mutual acceptability, flexibility, amicableness) as well as long-term gains (higher implementability, positive precedents for future ventures). Some weaknesses were also determined, namely time-intensiveness and the necessity to grant concessions. In general, States are encouraged to pursue negotiated settlements based on mutual interests, as these tend to endure. Specifically, Indonesia and geographically similar States should continue pursuing diplomatic solutions for unresolved segments, reinforcing its existing rights, and preventing misinformation spread to the public.

1. Introduction

The delimitation of maritime boundaries between States can give rise to significant tensions and conflict. Exclusive access to maritime areas is highly beneficial for States, providing control over trade routes and resource exploitation, and establishing additional layers of military security. This is especially true for island-States or States with large coastlines, whose economies may rely heavily upon maritime industries such as fisheries, offshore oil/gas, and shipping [1]. The delimitation of maritime boundaries is however complicated as sovereignty is not vested primarily in water, but on land (*la terre domine la mer*). From land territories, baselines are shaped from where maritime zones are projected. States can have different and even conflicting claims concerning these maritime boundaries, which can generate disputes.

The South East Asia (SEA) region – which houses the Malay and Philippine Archipelagos, ten ASEAN members and many neighbouring States – is a hotspot for maritime boundary disputes. SEA States have a serious interest in adjacent oceans due to the region's great maritime economic potential [1]. Overlapping claims over the many maritime zones have necessitated States to settle their disputes, either informally or formally. There are over twenty boundary agreements in force regulating SEA maritime zones, with many others being unresolved or under negotiation. Indonesia, with its extensive maritime area and coastlines, has been involved in approximately two-thirds of these agreements [2].

States involved in a maritime boundary dispute can resort to several options to settle their disagreement. The most extreme of these, the use of force, is generally avoided due to the international law principle to settle disputes peacefully, enshrined in the UN Charter (Arts. 2(3) and 33 (1)) and the Law of the Sea Convention ([58], Art. 279). ASEAN's own

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commitment to peaceful settlement can be found in the Treaty of Amity and Cooperation in Southeast Asia ([57]). ASEAN States have generally relied upon bilateral and multilateral talks, mediation, and international dispute settlement mechanisms to solve their issues, pursuant to TAC Arts. 2(d), 13, 15 and 17. However, the exact choice of approach has varied from conflict to conflict. States sometimes have turned to alternatives when popular support for a particular method diminished, or when States decided that the current avenue was too time-consuming.

International instruments generally suggest that States ought to follow a 'ladder' of increasingly expansive dispute settlement approaches, moving unto the next one when previous avenues did not yield a satisfactory result (UNCLOS, Arts. 279–285; TAC, Arts. 13–17), with international arbitration at its pinnacle. During the *Sipadan-Ligitan* dispute, for example, Indonesia and Malaysia abandoned negotiations in 1998 after years of discussion, and subsequently submitted the case to the ICJ. Similarly, the Philippines recently submitted their dispute on the South China Sea (SCS) to the Permanent Court of Arbitration (PCA) once talks with the PRC (China) turned sour. However, the aftermaths of these proceedings were decidedly mixed, and call into question the effectiveness of following the flowchart to its conclusion, in particular with regards to maritime boundary conflicts.

This article reviews the Indonesian practice of dealing with maritime boundary issues, both directly and indirectly, to provide an indication on which methods of dispute settlement have proven successful and which have been less so. From Indonesia's experiences, a strong indication is found that negotiated settlements are more effective, efficient and beneficial to States involved, both in the short and long term. Pursuant to this, this article proposes a different perspective for States, particularly those geographically similar to Indonesia, involved in maritime boundary disputes. Instead of the standard progressive approach to dispute settlement, the authors endorse the TAC's strong encouragement of "friendly negotiations" as the recommended method to solve disputes ([57], Art. 17 [3]; ¶268).

This article is structured as follows. First, the article discusses maritime boundary settlement options available for States, with emphasis on negotiation, its advantages and disadvantages, and what opportunity costs must be paid by States opting for more involved mechanisms. Several case studies of SEA disputes are subsequently discussed which provide enlightening reflections on the effectiveness of diplomacy and negotiation vis-à-vis other settlement methods. The article concludes with a summary of benefits and corollaries of pursuing negotiated settlements for maritime boundary disputes.

2. Maritime boundary settlement options

The spectrum of peaceful settlement mechanisms available under international law (negotiation, mediation, inquiry, conciliation, arbitration, litigation) can generally be categorised into one of two forms: negotiated or binding settlements. The former arises out of an agreed solution between the conflicting States, while the latter arises from resort to legal argumentation before an arbitrating party. Negotiated settlements, furthermore, can involve only the interested parties or the addition of a third supporting party. Thus, when faced with a maritime boundary dispute, States can choose out of a wide range of options to reach a conclusion. In fact, the modern international landscape demands it. Since the post-cold war era, international relations have been characterised by complex interdependence, wherein States must rely on negotiation and diplomacy instead of military competition and forceful confrontation [4,5]. This interdependent nature of existence means that States must take into account long-term effects when settling disputes, and consider consequences holistically: a 'win' in one dispute can yield a net negative when it compromises good relations and trust with the counterpart, jeopardising concurrent or future negotiations in different fields.

Much has been written about the advantages and disadvantages of different dispute settlement mechanisms [6–9]. Writers generally refrain from advocating certain approaches above others, as the optimal choice depends greatly on the circumstances of the dispute and the State's preferred outcome. States may opt for arbitration or litigation because they refuse to negotiate on principle, a decision needs to be reached swiftly, they simply prefer to relinquish the dispute to an established or specialised tribunal [6], or as a statutory duty (e.g. UNCLOS Art. 279 *juncto* Part XV). Authors have, however, also highlighted the negatives of referral to a third party for binding settlement. Demir argues that compared to negotiated settlements, there is fewer control and a greater chance of dissatisfaction with the losing party, possibly generating allegations that the arbitrating body was partial or influenced. Moreover, Demir warns of binding settlements providing a false sense of finality: while the problem itself may appear closed, it can displace the conflict until later or "open the door for bigger clashes and disputes". Merrills also writes that binding settlements can experience issues regarding legitimacy and enforcement: States may refuse to accept the body's jurisdiction, or rewards may simply not be implemented by the losing party.

With regards to negotiated settlements, States can choose to engage in bilateral talks or to invite third-party presence. Berkovitch & Jackson found that parties may prefer third-party intervention if there is bad blood between them, a power disparity, an impasse or antagonism, or if the mediator is trusted by both sides and can act as a guarantor. Wilkenfeld et al. found that mediation is sometimes relied upon because it is viewed as a 'quicker' solution as opposed to negotiation, or for more pragmatic reasons (it is beneficial for the State's interests, to protect the State's reputation, or because the mediator can be set up as a scapegoat if talks go awry).

Bilateral negotiation is more intimate. In fact, some States may see third-party involvement as an unwanted intrusion, and prefer a one-on-one discussion [7]. Arguably the most significant advantage of bilateral talks is its confidentiality. Bilateral talks ensure that information is retained between oneself and the negotiating partner only [10,11]. During bilateral talks, parties have the broadest form of control over the direction of negotiations and solutions, including special or political arrangements one may not wish to divulge openly until a final decision is made, due to political sensitivities. Speaking specifically for the ASEAN region, this is how many negotiations are conducted. The so-called 'ASEAN way' is characterised by an informal style of settlement, emphasising one-on-one negotiation, dialogue, consultation, and consensus [12]. [13] adds that in Asia in general, consensus is one of the primary goals of negotiations: it saves a party from losing face and prevents the acceleration of the conflict.

Taking into account the complex interdependent nature of modern politics, negotiated settlements of maritime borders have a distinct advantage over judicial settlement [14] define negotiations as the "deliberate interaction of (…) social units which are attempting to redefine the terms of their interdependence". Negotiations represent more than merely the dispute at hand, but define the nature of a continuous and dynamic relationship, as between States [5].

A significant advantage of negotiations is the possibility of 'integrative' problem solving, which in literature is often contrasted with 'distributive' or 'predatorial' solutions [15]. Distributive solutions amount to a zero-sum game: what one party gains, the other loses correspondingly. For example, sovereignty over an island may be ceded to one party over the other. These are most common in judicial settlements where States simply present their arguments before a body which then distributes awards, but can also occur in negotiated settlements, either by choice or because negotiators are not skilled enough to move beyond the distributive pie. Because of the inherent win-lose nature of distributive settlements, they are regarded by some critics as destructive [16]: a solution is reached, but not everyone walks away a winner.

Integrative negotiations, in contrast, try to expand the metaphorical pie by seeking out methods of increasing utility and maximising joint outcomes for both parties [59]. Skilled negotiators can find solutions that address the need of both parties without resorting to distributive

bargaining. States can, for example, desire control over a maritime zone for different reasons: one may seek economic benefit, while for the other it is valuable as a military buffer. Through integrative talks, States can come to realise this and work towards a solution that addresses both needs, e.g. exploitation rights for one party, but strict demilitarisation of the zone. Wertheim emphasises that such problem-solving is very important for on-going relationships, such as in the SEA region, because all parties will feel victorious in their own way. It is also beneficial for implementation, because parties who feel they had 'lost' generally have a lower commitment to the agreement, may not cooperate with its enforcement, or even retaliate in the future.

In the following sections, several maritime delimitation issues in the SEA region are highlighted to analyse how the choice of settlement can have a great impact on the diplomatic process, the eventual solution, and not less importantly, its implementation and enforcement. In particular, the authors wish to draw a distinction between negotiated and judicial settlements and the benefits (and corollaries) each approach brings.

3. The South China SEA dispute

Most readers are likely familiar with the attempts of many States to secure control over the much-coveted area of sea between the Asiatic Archipelagos and China, often referred to as the SCS. Recently, the Philippines' decision to appeal its dispute with China to the PCA sparked particular international attention. The details of this case have been well-recorded by authors [13,17–19], and will not be repeated here. Instead, this article will highlight aspects of the SCS issue that deserve some further analysis from the comparative perspective of dispute settlement options.

At the outset, should be established that although the PCA delivered a technically binding reward in the case of *Philippines v. PRC*, the procedure was inconsequential in practice and failed to advance the Philippines' interests in any way. The tribunal ruled in favour of the Philippines and rejected China's claims with respect to the SCS [20]; ¶271). Theoretically, the UNCLOS establishes that awards of arbitral procedures must be complied with by States (Art. 11 Annex VII). However, China simply maintained its position that the PCA had no jurisdiction; it sent no agent as a representative at The Hague and continued with its construction of artificial islands in the disputed area as a *fait accompli* [20]; ¶1128–29, ¶1177 and ¶1400).

States have since accepted that the PCA's award has been practically meaningless, as China consistently refused to accept and implement its result. Incriminatingly, during the 2016 presidential campaign, Duterte again spoke of resuming "bilateral talks" with China on the matter [21]. The Philippine-PRC dispute remains open as if the juridical appeal had never happened. This result is an unfortunate, but unsurprising, corollary of juridical settlements. International law, it must be restated, has no inherent enforcement mechanisms. The Philippines initiated PCA proceedings without China's approval, and even though the Philippines had cited exhaustion of diplomatic avenues as a justification [22,23], it was to be expected that China would never willingly implement a decision harmful to their interests, to which it never consented. Ultimately, the Philippines had scored a pyrrhic legal victory, but lost more in the process. It lost energy and resources during litigation – valuable time which China instead spent to solidify its foothold in the region – and goodwill between the two parties to negotiate.

One may point out in support of the Philippines that it had no other viable option left to address its disagreement with China. There is some validity to this argument. The Philippines and China had been negotiating for many years before 2013, described by the PCA as "numerous unsuccessful diplomatic exchanges, negotiations and consultations" [3]; ¶209). Since 1970, both States have attempted bilateral consultation, information sharing, and joint development [24]. The Philippines also pursued multilateral talks by pushing for a united ASEAN front against China [25]. In defence of the Philippines, it is well-documented that China has always maintained a strict position that bilateral negotiations were its only accepted form of settlement [3]; ¶196 and ¶337–341), and always rejected all institutionalised approaches [17,19,21].

Some analysists have understandably pointed out that from the Philippine perspective, it would appear self-defeating to submit to China's demands for bilateralism. Cynics believe that China's stance is so purely so it can leverage its power imbalance with individual ASEAN States [19], so it can "bully others into submission" [26]. Indeed, from the Chinese perspective, its military, political and economic hard power would best be put to use in a bilateral setting [13,27], and it would be naïve to expect China not to take advantage of this whenever it can. However, in such a situation, it is doubly naïve to expect China to comply with an arbitral decision that it rejects by principle.

Contrary to intuition, imposing an agreement upon the 'weaker' ASEAN States would not strictly be in China's best interest, as the inverse of the PCA decision would occur [5] explains that agreements that are one-sided cannot endure indefinitely, and that parties coerced into accepting arrangements contrary to their interest will "invariably resent those agreements and the parties that imposed them". If a party's interest is fundamentally compromised, the agreement is likely to be violated. There is every incentive to avoid, not implement, or cheat out of the arrangement. Economically and politically, the ASEAN bloc is an important partner for China [28]. China would prefer to maintain good relations with its neighbours, if only for diplomatic purposes.

What solution is there, then, for States engaged in a dispute with China on SCS zones? On the one hand, China systematically blocks all avenues except bilateral negotiation, but on the other, China may simply be demanding more than the ASEAN States are willing to give up. In such a situation, where there is a 'mutually hurting stalemate', one can fall back upon integrative bargaining. States should focus less on pursuing the maximum maritime zone possible, but discuss each other's needs and how these can be addressed together [16]; [59].

The SCS is strategic for many different reasons: Gas and oil, fisheries, trade, and military security, amongst others. Some interests may weigh greater for one party compared to another. For example [19], theorised that one of China's main objectives in the SCS is security. China has throughout history always created 'rings' of control around itself (e.g. in Manchuria, Mongolia, and Tibet) to protect its civilisation cores. In doing so, it created an umbrella of territorial control to enhance its security. After the 1840 Opium War and WWII, it realised these rings should also extend to the maritime flank (east and south). If this is true, it can be utilised during integrative bargaining [17] warned that an overemphasis on the SCS's current resource and strategic potential may force the dispute to be seen in zero-sum terms, which reverts the situation to a stalemate. However, when it is revealed through negotiations that one State emphasises fisheries and another military security, a mutually beneficial agreement can be reached that addresses both parties' needs, enlarging the 'pie'.

The approach taken by Vietnam to address tensions in the SCS shows that the bilateral paradigm preferred by China is not inherently doomed for failure [25] records that Vietnam has established an extensive communication network with China which is highly structured and allows for swift consultation between top levels of government. It hosted high-level talks on the SCS, defence and security, and has mechanisms ready to manage tensions that may arise between the States. Despite some incidents persisting and Vietnam's explicit rejection of the Nine-Dash Line [29], Li cites a clear progression throughout the rounds of talks, including more detailed arrangements and a commitment by both parties to friendly consultations (e.g. Ref. [30]. This is much in contrast with the Philippines, which did not maintain the previously-established forms of dialogues after the 1990s and early 2000s.

When faced with a difficult situation such as the SCS dispute with China, States should accept the political compromise of opting for bilateral negotiations despite its status as China's preferred avenue, because insisting on other options preclude a solution at all: One cannot

enforce a settlement with a party that rejects it outright. Even if a settlement takes years of intensive negotiations, this is preferable to silence or, even worse, outright hostility. To add to this, the bilateral track is not by definition disadvantageous for ASEAN States. Bilateral negotiations are adaptive and can involve informals. If both parties approach the discussion with goodwill, integrative bargaining can be employed and a political win-win can be arranged [17]. Bilaterals are confidential and no high expectations are attached to meetings. Concrete decisions or positive resolutions do not have to be made under the discerning eye of media.

Informals are effective because of their flexibility [13] found that in the 1990s, informals were much more successful in SCS negotiations because they did not formalise the conflict and avoided addressing nationalist sentiments. States can work together for a solution and postpone an official settlement until a political compromise is made. Informals also reinforce formal negotiations when the latter lose momentum. States should encourage forums and opportunities for discussions and talks, such as through conferences and seminars. If these are held by apolitical entities such as universities, speakers will be able to express their perspectives more liberally. Ideas emerging from such brainstorming sessions can then be adapted by diplomats and politicians as a potential solution to the problem. Indonesia, as a minor actor in the SCS dispute, can facilitate these activities as a neutral party.

4. The archipelagic principle

In 1982, the international community was introduced to a new tenet of the law of the sea called the archipelagic principle. Through the codification of the archipelagic principle in UNCLOS, its two main proponents – Indonesia and the Philippines – gained control over a significant maritime area in an unconventional way. This result was the culmination of intensive efforts by both parties to achieve international recognition for the principle [31]. Indonesia was its greatest beneficiary, securing 3,081,756 km^2 of enclosed archipelagic waters, effectively tripling its maritime territory without firing a single bullet [10,32]. In this section, the authors wish to briefly highlight some important aspects of the development of the archipelagic principle, and demonstrate that even though archipelagic States have gained much through the principle's recognition, it entailed years of careful diplomacy, negotiation, and political and legal compromise.

Before 1982, States generally adhered to a territorial sea regime of 3 nautical miles (NM), with but a few deviations. With the adoption of UNCLOS, the international community reached a consensus to broaden the breadth to 12 NM. This standard, however, remained too narrow for expansive archipelagic States such as Indonesia and the Philippines, whose sovereign territories would be "chopped into pieces" by pockets of high seas [31]. Beyond the economic, logistical, and practical disadvantages, Indonesia and the Philippines also had political and ideological reasons for pursuing the archipelagic principle [33,34]. The young States needed to reinforce national cohesion and stability, and their peoples had to be shown that their nation was one [35,36].

In 1951, the ICJ delivered a verdict supporting a straight baseline system for the archipelagic Eastern Finnmark coastline in the *Fisheries* case [37]; ¶128–129). In the interest of securing internal archipelagic waters, the Philippines introduced a midocean archipelagic version of the system through a *note verbale* in 1955, and reinforced their position in 1956 through ILC replies [38]. Indonesia followed shortly after with the 1957 Djuanda Declaration and its 1960 codification in law, which proclaimed Indonesia as one single maritime entity [2]. These unilateral declarations were not uncontroversial: many States felt their interests compromised, such as France, the US, the UK and Japan, and reacted indignantly to the promulgation of the Djuanda Declaration [39]. Nevertheless, Indonesia and the Philippines continued to vocally advocate for the principle in international forums, in particular during the crucial UNCLOS Conferences [2].

In 1972, the archipelagic principle was successfully placed on the agenda of UNCLOS III. In 1974, Indonesia, the Philippines, Fiji and Mauritius advanced draft articles specifically on the archipelagic principle. According to these articles, archipelagic waters would be measured using straight baselines, declared subject to national sovereignty, and regarded as forming an intrinsic geographical, economic, and political union with the land territories [40]; Arts. 1(3), 2(1)). These, and the right of archipelagic States to designate sea lanes and air routes over their waters, were eventually adapted into the UNCLOS (Arts. 46–53).

The principle's recognition in the UNCLOS was a capstone for the archipelagic States' efforts and granted them sovereign control over all waters in their jurisdiction. Its monumental achievement cannot be understated, as before 1951, the Grotian concept of freedom of the high seas remained the dominant doctrine in international law [31]. The Asiatic Archipelagos had always been kept 'free' by Dutch and US colonial powers to facilitate trade and transport, and there had been no precedent for the archipelagic principle in history [41]. However, as is necessarily the case in honest diplomacy, the archipelagic States' gains needed to be offset by compromises. Such concessions were necessary in order to attain political consensus and moral support during the UNCLOS Conferences, in particular from the major maritime powers.

The most disputed aspect of the regime during the discussions concerned the rights of passage for foreign ships. During UNCLOS I, the archipelagic States negotiated in favour of the recognition of their waters as internal. Ships would be allowed to pass using innocent passage, subject to national legislation. It quickly became clear that major maritime powers would not support this regime, and so major compromises had to be made [41]. Under the final regime, three forms of passage are recognised: innocent passage, transit passage, and sea lanes passage (UNCLOS, Arts. 52–53). Specific concessions were made, such as in regard to the phrasing "normal mode" in Art. 53(3), enabling submarines to pass while submerged. The final Convention denies the archipelagic States' rights to suspend sea lanes passage, in contrast to innocent passage (Art. 54). Other compromises the archipelagic States were forced to accept were respect for traditional fishing rights in Art. 51 (1), and respect for "existing rights" of neighbouring States (Art. 47(6)).

To achieve recognition of the principle, the archipelagic States had to surrender to interests of stakeholders, in particular those of maritime powers (Singapore, Malaysia, Thailand and Japan) [31] refers to these compromises as the "archipelago package". It quickly became clear that larger maritime States were willing to accept the concept only if it met criteria which would not impede their interests of navigation and overflight. While the subdued sovereignty under transit and sea lanes passage is detrimental to the archipelagic States' own interests in a vacuum, it should be considered as part of the overall deal [32]. agree that the final UNCLOS formulation represents a successful balance between interests.

The development of the archipelagic principle is significant when one considers that the principle's beneficiaries have gotten away with what one could frankly call an expansive appropriation of high seas. Pursued through force, it would have resulted in bloody conflict, perhaps even military decimation. Pursued through purely juridical means, it would have been difficult to argue for what was in essence legal fiction. However, pursued through years of intensive diplomacy, a new legal doctrine was formed instead. One must nevertheless not forget the corollary of negotiation. The concessions found in the UNCLOS reflected what the archipelagic States had to pay for the benefits they wrought. Ultimately, the archipelagic concept became one that was no longer controversial, because it was the result of discussions, mutual compromise and respect for their individual interests [41]. A sustainable result.

5. Indonesian experiences: Malaysia boundary disputes

As the most expansive State in the SEA region, it was necessary for Indonesia to invest heavily in negotiations and agreements with

neighbouring States concerning its many adjacent maritime segments. Over the years, Indonesia has formed agreements with Malaysia, Vietnam, Singapore, Australia, Thailand, New Guinea and India, on the many different forms of maritime jurisdiction (territorial sea, continental shelf, EEZ). For converging zones, Indonesia and its counterparts established tri-junction agreements, such as between Indonesia, Malaysia, and Thailand [2]. Despite the sheer volume of boundary agreements already in force, many segments remain contested and are still on Indonesia's agenda for future negotiation, such as the Ambalat, Palau, and East Timor blocks.

A majority of Indonesia's borders with neighbouring States stem from negotiated agreements. These entailed often very lengthy negotiation periods – sometimes longer than a decade – and, not uncommonly, concessions. Indonesia's earliest boundary agreement with Malaysia concerning the continental shelf was concluded on November 27, 1969 and covered both the Malacca Strait and East SCS. All segments were drawn based on equidistance, and distant offshore islands in the Malacca Strait and east of the Malay Peninsula were given full recognition. However, Indonesia offered concessions to Malaysia with respect to islands north of Tanjung Datu. Choon-Ho [42] notes that these concessions were given as part of a broader diplomatic strategy to gain Malaysia's support for the archipelagic principle Indonesia was pursuing internationally at the time. This flexibility is one of the advantages of negotiated settlements, as Indonesia offered concessions not for the dispute being discussed, but to pursue a greater (long-term) purpose. Its successful payoff has been demonstrated in the previous section.

While the SEA preference seems to rest with negotiated settlements [2], a recent foray to the ICJ in the *Sipadan-Ligitan* case against Malaysia shows that judicial settlements remain an attractive alternative. To a certain extent, the case's background mirrors the SCS arbitration, as the decision to litigate was made after years of failed talks. After the 1969 Continental Shelf talks concluded, the islands were subject to years of negotiation and working groups without result. In 1998, perhaps because both States foresaw a deadlock or because the ICJ was viewed as an easy and quick solution to their dispute, the case was sent to The Hague [43]; ¶31 [44]; – although in contrast to the SCS dispute, this referral was the result of a joint decision.

The *Sipadan-Ligitan* Judgement rendered by the ICJ presented an unwelcome surprise to Indonesia when the Court awarded the islands to Malaysia by virtue of *effectivités* [43]; ¶149). What was a defeat for Indonesia became a great victory for Malaysia, which gained a significant area of sea to the east of Kalimantan, as baselines were to be drawn from the newly acquired islands. Politically, the judgment was received very poorly in Indonesia. The choice of litigation was criticised heavily. A narrative spread that Sipadan and Ligitan were 'stolen by' Malaysia, some blaming incompetent government counsels and even the ICJ itself. Of course, this is manifestly untrue; Indonesia never lost, but had simply failed to gain, sovereignty over those islands in the first place [44]. In contrast, we do agree with the opinion that the ICJ was not the optimal choice, but not due to hindsight. Rather, the circumstances of the case seemed to indicate that a negotiated settlement would have produced greater utility overall.

The Court's logic in the Judgment followed a three-step approach. It only turned to *effectivités* after it had ruled that: (1) The 1891 Convention between the Netherlands and Great Britain did not apply to the offshore islands of Sipadan and Ligitan, and (2) There was no uninterrupted series of title transfers between the islands' original administrator, the Sultan of Sulu, and Great Britain (ICJ, ¶92, ¶124). Neither State had a convincing case to present concerning *effectivités*, but the Court ultimately placed more weight on Malaysia's establishment of light houses and turtle shell regulation compared to Indonesia's claims of naval and air patrolling and piracy-control. However, by the Court's own admission, the evidence in Malaysia's favour was "modest in number" [43]; ¶148), while dissenting judge *ad hoc* Franck found the argumentation "not very convincing" (Franck Dissent, ¶17). Essentially, the *effectivités* test could have gone either way, and combined with the weak position of both States with regards to points (1) and (2) above, neither State had a superior case. The result of such a case being litigated, then, is that the Court has to declare a winner regardless of how indecisive either party's arguments are. It is a 'fast' solution, but also an unpredictable and volatile one. Its win-lose nature may be detrimental for future talks and arbitration makes it much harder to propose alternative solutions.

What could have been done better? According to Ref. [45]; joint and voluntary decisions tend to carry greater advantages and fewer risks. Had Indonesia and Malaysia continued negotiating instead, it is feasible that the two States could have realised the weakness of their own position and considered a mutual compromise. The islands, for example, could have been split, or a political settlement could be reached concerning the baselines in the spirit of cooperation instead of competition. Compromises could also be granted as part of a political 'package deal' or a broader programme of amity and cooperation, as what occurred during the continental shelf negotiations in 1969. The same advantages apply for Malaysia, as it would not have had to commit to a win-lose result, and could have advanced its own interests vis-à-vis Indonesia.

Moving forward, Indonesia is still undergoing negotiations with Malaysia with regards to the Ambalat block. The authors recommend that the parties opt for a negotiated solution, as it gives the States full control over the solution and results are easier to predict. To prevent a negotiation fallout, both States should strive to accommodate each other's interests, as the strength of a negotiation is proportional to the goodwill of the parties [8,16]. The Special Envoy Track attempted for Ambalat can be a productive avenue to achieve this [46].

One possible alternative for the Ambalat block problem is the establishment of a joint development area (JDA) [47] describes JDAs as zones where resources are managed using a shared regime rather than a unilateral one. In the past decades, JDAs have gained popularity, in particular where overlapping claims exist and negotiations have reached a deadlock. JDAs are provided for in UNCLOS under Arts. 74(3) and 83 (3) as "provisional arrangements of a practical nature". Schofield adds that JDAs can be advantageous as they allow for the exploitation of resources, foreign investment, and shared enrichment without having to wait for political negotiations to conclude. It is also pragmatic: JDAs shift the emphasis to the fair division of resources at stake, instead of the drawing of an artificial line [48]. For the Ambalat block, JDAs have already been proposed as a possible solution to the dispute [49].

While some authors have advocated for the advantages of JDAs in providing a temporary solution for deadlocked disputes [47,50], it is in our opinion in the best interest of both States not to resort to JDAs too quickly. In the past, Indonesia had established a JDA with Australia to resolve the Timor Gap, a marine zone south of what was then Indonesia's province of East Timor. Previously, in 1971, Indonesia and Australia adopted a seabed agreement through negotiation, albeit with some difficulties: Australia, with its extensive continental margin, wished to maximise rights over those areas up to the Timor Through, while Indonesia proposed using an equidistant line instead [50]. Eventually, Australia conceded part of its continental slope in exchange for its claimed area of the continental shelf [51]. The eventual delimitation line was positioned closer to Indonesia, inducing some cynicism in Indonesia that Australia had taken it "to the cleaners" (The Age, 2018), despite the fact that Indonesia had entered into the agreement willingly.

The Timor Gap was not covered by the 1971 agreement, as East Timor was still a Portuguese colony at the time. Because Portugal never negotiated its maritime border with Australia, the two States were driven back to the negotiating table once again after Indonesia assumed control over East Timor in 1975. Much was at stake, as significant oil and gas reserves were reported to be present in the area [52]. As before, Australia maintained that its rights extended to the Timor Through, while Indonesia claimed that the seabed was continuous and that a median line should be drawn instead. Neither party seemed prepared to compromise [50]. Eventually, the Timor Gap Treaty (TGT) was agreed upon on 1988 and signed on December 11, 1989, which constituted "a diplomatic agreement to disagree on where the boundary lay" [53]. The

TGT featured a complex formula and a three-zone regime which determined how benefits were to be shared between the States Parties (Art. 2 (1)). It is described by Refs. [47] as one of the most "sophisticated and comprehensive" JDAs in the world. The contents of the agreement still favoured Australia, but nevertheless the TGT resolved a potential deadlock between the States.

Some authors have referred to the TGT as a "triumph of compromise" and an "imaginative approach to breaking the deadlock in boundary negotiations" [52,54]. However, Mito also touches upon how the TGT may have been *too* successful. The TGT would remain in force for forty years or until the States "concluded an agreement on a permanent continental shelf delimitation" (Art. 33). JDAs should not come at the cost of a genuine resolution of the boundary dispute. This philosophy of a JDA, as a temporary measure only, can also be found in the UNCLOS, which describes JDAs as "provisional" and a "transitional period" which should not jeopardise or hamper the reaching of a final agreement (Arts. 74(3) and 83(3)).

Unfortunately, all too often JDAs become agreements *in lieu*, instead of *in addition*, to a boundary line. Mito regarded it unlikely that a boundary agreement would be reached in the near future, and as such, that the Indonesia-Australia boundary would ever be completed. It is feasible to imagine that without East Timor's secession, the discontinuity in the two States' fences would remain, possibly indefinitely, creating uncertainty about the area's economic future. When East Timor seceded from Indonesia, it announced an intent to renegotiate what it regarded as a disadvantageous arrangement, leading to the 2006 CMATS agreement. This agreement split revenue from the lucrative Greater Sunrise Field 50-50, a better deal than the TGT. However, it also contained a clause deferring claims over the actual boundary for 50 years (Art. 12) and a stringent moratorium on claims while the treaty was in force (Art. 4), effectively delaying negotiations over a permanent boundary line for half a century [55]. This forecast never came to pass as in 2017, the CMATS was repealed as a result of an espionage scandal and subsequently replaced with the 2018 Maritime Boundaries Treaty, which was much more favourable for East Timor [53,56]. The risk, however, remains apparent that JDAs, when formulated as an avoidance tactic, can unduly and unnecessarily defer actual boundary negotiations. The same trend can be found in regard to the Malaysia-Brunei and Malaysia-Thailand agreements, neither of which have developed past the JDA stage since the late twentieth century [47].

6. Conclusion

Control over maritime areas has become an increasingly important objective for coastal States. In the current climate of increasing globalisation and mutual interdependence, however, States pursuing this agenda must navigate a difficult international landscape, advancing their own interests while simultaneously maintaining amicable long-term relations vis-à-vis other States. Proper borders provide political (inter-State) stability, while favourable arrangements concerning said borders can greatly benefit the State economically, diplomatically, and militarily. In this modern era of *ius contra bellum*, most overlapping interests can be resolved through agreements and diplomacy. However, recent history has shown that States often resort to alternatives which either impose a solution (conciliation, arbitration) or postpone it (avoidance, JDAs). It may be necessary to re-examine this paradigm.

Reaching negotiated settlements are challenging and often diplomatically intensive, but carry many advantages that are difficult to achieve through other alternatives. Most importantly, when successful, a mutually acceptable solution is reached, which ideally will have expanded the total utility gained by both States through integrative deliberations. Beyond this, the mutually acceptable result produces additional benefits which are just as valuable as the settlement itself. Firstly, positive relations are maintained and fostered between the States, which are often geographical neighbours that have extensive diplomatic, economic, and political ties, that ideally should not be compromised. Secondly, there is a low risk of non-conformity: neither State has walked away a 'loser', and there is a lower probability that agreed arrangements will be ignored out of spite, disappointment or lack of political support, or even that the solution is rejected outright with impunity. States can also opt to keep their discussions confidential, which is often impossible if third parties, especially arbitrators, are involved.

Simultaneously, practice has identified caveats that must be recognised with regard to negotiated settlements. First, they can be very time-consuming, occasionally taking decades of talks before a conclusion is reached. To commit to a negotiated settlement, both States should accept this reality and exercise due patience and diligence. Even if formal negotiations slow or come to a relative standstill, States can still employ informals or, at the very least, maintain friendly contact. For extensive negotiation periods, it is important that mandates to negotiators should remain consistent, despite changes in political leadership or policy over time.

Second, negotiations are founded on the willingness of both parties to make concessions and reciprocate. To achieve the greater good, States must be prepared to concede certain points to appease their negotiating partner. Unavoidably, some national interests are sacrificed in exchange for guarantees of implementation, beneficial future ventures, and a firm, undisputed legal boundary. Negotiated settlements are, however, flexible, and diplomats can involve the greater national agenda during talks. It was a worthwhile trade, for example, to offer concessions to Malaysia in the form of a reduced baseline, in exchange for the entirety of Indonesia's current archipelagic waters. When performed effectively, concessions are not sacrifices, but investments.

In contrast, one major pitfall to avoid is the premature suspension of talks out of laxness. Third-party involvement reduces or removes State agency and flexibility, which is key for maritime boundary disputes. Arbitration involves an open confrontation between States with no guarantee of success, which even if won, provides no guarantee of implementation by the losing party. Even more concerningly, it can generate hostility between States, leading to economic, political, or even military consequences. The amicable alternative, the JDA, is acceptable as long as it does not lull the States into postponing the actual boundary talks indefinitely.

On the other hand, it is inevitable that in some circumstances, owing to the attitudes, national policies and interests of the parties in a dispute, no other recourse is available other than to refer the case to a third party. The main point to remember is that if a State decides to pursue this route, it should only do this if negotiations have truly reached a deadlock, and not in lieu of them. Ultimately, irrespective of the avenue chosen, the optimal result is not one which provides a fast moral victory, but one that is grounded, effective and implementable. To do this, diplomats must engage with the counterpart to ensure that the choice of forum and subsequent result will be acceptable to both parties, both at the government and popular levels.

Experience in Indonesia has shown the great value of prioritising negotiated settlements. Particularly for States with similar geographical and political characteristics such as archipelagic States, this recommendation can also be valuable for their own current and future challenges. Moving forward, Indonesia will continue its attempts to establish boundary delimitations throughout its marine perimeter, as well as to take an active part in solving regional disputes, such as that of the SCS. Indonesia's approach to maritime boundary disputes has always been centred on bilateral negotiation and settlement, which in the authors' opinion is often the best approach to take. This trend is unlikely to change in the future, in particular after the disenchanting experience at the ICJ. Drawing from both the Indonesian and regional experiences discussed in this article, the authors suggest the following for future Indonesian delegates.

Firstly, Indonesia should pursue a negotiated solution with Malaysia concerning the Ambalat block. Malaysia is likely more willing to reciprocate this offer after the conclusion of its own dispute on Pedra

Branca. Settling for a JDA should be discouraged, as this carries the risk of drawing resources away from, or even supplanting, the proper negotiations. Secondly, Indonesia should be consistent in reinforcing its archipelagic rights found in UNCLOS. It represents one of Indonesia's greatest diplomatic achievements, but only has value as long as rights derived from it are enforced. Thirdly, better information control is required. Misinformation spread to the public, such as claims that Malaysia robbed Indonesia of Sipadan and Ligitan, is damaging to international relations and may jeopardise internal political support toward a diplomatic solution.

States should not be hesitant toward flexibility when pursuing its interests through diplomacy. In dealing with disputed segments, or even challenges against its baseline systems, States should consider alternatives and not shy away from giving and taking. For example, States may agree to a political boundary (instead of an UNCLOS-prescribed one) if it is beneficial in the long term or if it represents an equitable division of resources that both parties can agree on. When a settlement is finally made, both parties must feel that the outcome "was the best they could achieve and that it is worth accepting and supporting" [59], because ultimately, agreements based on mutual interests tend to endure.

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Appendix A. Supplementary data

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