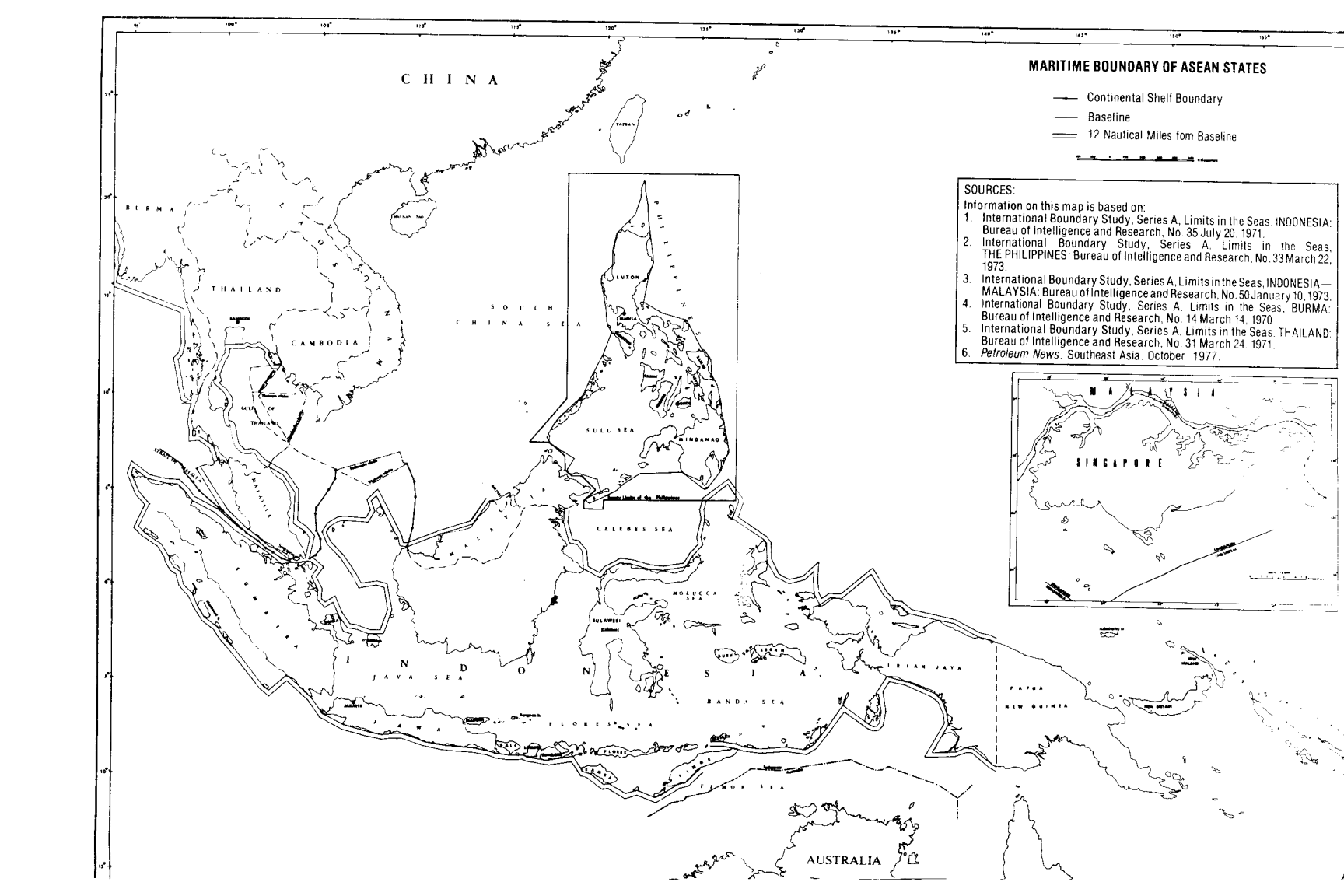
ASEAN and the Law of the Sea


MARITIME BOUNDARY OF ASEAN STATES
Continental Shelf Boundary
Baseline
12 Nautical Miles fom Baseline
SOURCES:
Information on this map is based on:
1. International Boundary Study, Series A, Limits in the Seas, INDONESIA: Bureau of Intelligence and Research, No. 35 July 20, 1971.
2. International Boundary Study, Series A. Limits in the Seas, THE PHILIPPINES: Bureau of Intelligence and Research, No. 33 March 22, 1973.
3. International Boundary Study, Series A, Limits in the Seas, INDONESIA—MALAYSIA: Bureau of Intelligence and Research, No. 50 January 10, 1973.
4. International Boundary Study, Series A. Limits in the Seas, BURMA: Bureau of Intelligence and Research, No. 14 March 14, 1970.
5. International Boundary Study, Series A, Limits in the Seas, THAILAND: Bureau of Intelligence and Research, No. 31 March 24, 1971.
6. Petroleum News, Southeast Asia, October 1977.
CHINA
TAIWAN
BURMA
THAILAND
CAMBODIA
SOUTH CHINA SEA
PHILIPPINES
LUZON
MANILA
SULU SEA
MINDANAO
CELEBES SEA
MOLUCCA SEA
SULAWESI
INDONESIA
JAVA SEA
BANDA SEA
FLORES SEA
TIMOR SEA
IRIAN JAYA
PAPUA NEW GUINEA
AUSTRALIA
MALAYSIA
SINGAPORE

ASEAN and the Law of the Sea

Phiphat Tangsubkul

INSTITUTE OF SOUTHEAST ASIAN STUDIES

The **Institute of Southeast Asian Studies** was established as an autonomous organization in May 1968. It is a regional research centre for scholars and other specialists concerned with modern Southeast Asia. The Institute's research interest is focused on the many-faceted problems of development and modernization, and political and social change in Southeast Asia.

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FOREWORD

The Institute of Southeast Asian Studies is an autonomous regional research centre for scholars and other specialists concerned with modern Southeast Asia, particularly the multifaceted problems of development and modernization, and political and social change. The Institute is supported by annual grants from Singapore and other governments, as well as donations from international and private organizations and individuals. It has neither students nor teaching functions, being purely a research body. In addition to support staff, the Institute has 20 to 25 academics and other specialists working at the Institute at any one time. About half of these are Southeast Asians, including Burmese, Indonesians, Malaysians, Filipinos, Singaporeans, Thais, and Vietnamese, and others come from as far afield as Europe, Japan, and North America.

Though from different disciplinary and national backgrounds, all these scholars share a common concern, that is, an interest in the problems of Southeast Asia. They function as a community of scholars and interact among themselves and with the public at large through a series of seminars and professional meetings. Their research findings are published through various outlets of the Institute and distributed all over the world. In other words, the Institute is not the proverbial ivory tower. Its involvement in the region's affairs is both direct and contemporary. It seeks to be not only a research organization devoted to nurturing a scholarly environment conducive to maximum intellectual creativity, but also one that is keenly alive to public issues and needs. In this light it was quite natural that we should get involved in an effort to understand the implications of the emerging Law of the Sea on the ASEAN countries. In this, we have benefited greatly from the study conducted by Dr. Phiphat Tangsubkul during his fellowship at the Institute of Southeast Asian Studies, culminating in this publication.

Dr. Phiphat's close involvement with the problems of the Law of the Sea and resource development in Southeast Asia, both as an observer at the Third United Nations Conference of the Law of the Sea, and otherwise, has enabled him to acquire an intimate knowledge of the ebb and flow in the negotiations for the formulation of an international Law of the Sea. His analysis of the implications of the important issues facing the ASEAN countries and the parts these countries have played in the negotiations, as well as their future roles, provides an understanding of the realities and problems of the region. This understanding is vitally important if the question of maritime jurisdiction among the ASEAN countries is to be resolved favourably. The publication of *ASEAN and the Law of the Sea* is thus timely and welcome and should prove useful and interesting to many.

Finally, as is customary with the Institute's publications in wishing the author

and his work all the best, it is clearly understood that the responsibility for facts and opinions expressed in this publication rests exclusively with Dr. Phiphat, and his interpretations do not necessarily reflect the views or the policy of the Institute or its supporters.

Kernial S. Sandhu
Director
Institute of Southeast Asian Studies

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A number of people from ASEAN countries have given me valuable advice and views to assist me complete this study. They include: Professor Mochtar Kusumaatmadja, Dr. Hasjim Djalal, Dr. M. Dimyati Hortono, S.H., Mr. Noegroho Wisnoemoerti, Dean and Staff of Fakultat-Hukum, Universitas Airlangga, Indonesia (Indonesia); Mr. S.A.L. Mohammad Hashim, Mr. Mohamed Haji Said (Malaysia); Mr. Arturo M. Tolentino, Mr. Vicente Abad Santos, Mr. Estelito P. Mendoza, Mr. Inocencio A. Ronguillo, Mr. Francisco A. Comsti, Mr. Mario C. Manansala, Dr. Virginia L. Aprieto, Dr. Corazon M. Siddayao (Philippines); Professor S. Jayakumar, Mr. Chao Hick Tin, Mr. Michael P.C. Cheok (Singapore); Dr. M.L. Birabhongse Kasemsri, Commander Swarng Charernphol, RTN, Dr. Prajit Rojanaphruk, Captain Thanom Charoenlaph, RTN, Mr. Charu-Udom Ruangsuvan (Thailand); and Mr. M.A. Warga Dalen (ASCOPE).

Dr. Choon Ho-Park kindly gave some general comments, while Professor Douglas M. Johnston advised me concerning legal aspects.

The map was prepared and drawn with great skill by Promuk Kaeniam of the Geographer, Environmental and Ecological Research Department, Applied Scientific Research Corporation of Thailand, and the various tables were prepared with the assistance of Dr. Virginia L. Aprieto of the University of the Philipines' College of Fisheries.

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staff members of the Faculty of Political Science, Ramkhamhaeng University, Dr. Michel Bruneau, and last but not least my wife and my family.

Although I am indebted to all these kind people for their various contributions, needless to say the responsibility for the facts and opinions expressed in this study is solely mine. It should also be pointed out that as the bulk of this work was carried out in 1978, every effort has been made to update statistics; however, this has not been possible in all cases due invariably to the lack of published information.

December 1981 Phiphat Tangsubkul

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INTRODUCTION

The world has already had a foretaste of various kinds of trouble which will occur more frequently unless international rule concerning the oceans can be agreed upon. Basically, instability has manifested itself in various unilateral claims by coastal states to exclusive sovereignty over vast areas of adjacent ocean space, including seas within Southeast Asia.

In an effort to inject some rationality into the development of the Law of the Sea, two conferences were convened under the auspices of the United Nations in Geneva in 1958 and 1960. The four Conventions which emerged codified much existing customary law but failed to resolve two issues of fundamental importance to the majority of coastal states. These relate to the breadth of the territorial seas and fisheries. The absence of agreement on these issues was followed by an increasing incidence of extended claims in the establishment of jurisdiction in adjacent sea areas in several parts of the world, including Southeast Asia (see frontispiece map).

During the past decade, there has been increasing concern about regional interests with regard to new developments in the Law of the Sea. As a result, several regions have organized seminars and conferences on the issues of the Law of the Sea. Many have finally achieved their mutual standpoint or even a regional legal binding, for example, the Santo Domingo Declaration of 1972; Yaounde's Conference of 1972; the Organization of African Unity (OAU) Declaration of 1973; the Ministerial Conference of the Socialist Countries' "Declaration of 1972 on Principles of Rational Exploitation of the Living Resources of the Seas and Oceans in the Common Interests of All Peoples of the World"; a common fisheries policy adopted by the European Economic Community (EEC) in 1970; and so forth.

However, within the Southeast Asian region, countries have been rather more concerned with their internal problems, which have consequently retarded their regional economic development as well as their contributions to the regional development of the Law of the Sea. Although a regional organization, the Association of Southeast Asian Nations (ASEAN), founded on 8 August 1967 with five member states (Indonesia, Malaysia, the Philippines, Singapore, and Thailand), has so far not made any substantial contributions to the development of community activity in respect of the sea when compared with contributions to developments in other fields.

A new regime for the oceans is now being drafted under the auspices of the United Nations in the Third Conference which has held sessions since 1973.

However, to date (1981), the substantive negotiations on the Law of the Sea that began at the session held in Caracas in 1974 have not been concluded. Whatever the outcome of the new regime of Sea Law, it is certain that the real needs and interests of each region of the globe, including Southeast Asia, might not always be catered for. It is thus necessary for countries in Southeast Asia to work out and agree upon a regional package deal in order firstly to understand what could create transnational problems; secondly, to solve and/or prevent the problems from becoming Sea Law issues; and thirdly, to promote an atmosphere of confidence and co-operation within the Southeast Asian region.

It is true that the different geographical positions of countries in the region are the main factor for the unique position of each of the ASEAN member states at the Third United Nations Conference on the Law of the Sea (UNCLOS III). Nevertheless, this does not imply that, eventually, countries in the region especially ASEAN members could not adopt a harmonious policy to protect and promote their national interests pertaining to the exploitation of the resources of the sea.

Until now, there have been no major disputes or vital conflicts in relation to problems of maritime jurisdiction among ASEAN countries. However, draft proposals and official statements submitted to the Third Conference by ASEAN members reflect their different perspectives on several issues. Moreover, different viewpoints could also easily result from varied interpretations and implementation of the Law of the Sea text when it is drawn up in the near future.

Nevertheless, whether or not the notion of regionalism *vis-à-vis* appropriation of the marine environment is accepted by the ASEAN countries, the issue will certainly lead to greater consciousness of maritime interdependence amongst the member states. An awareness of the controversial issues which could jeopardize the emerging trend of co-operation within ASEAN is therefore essential: the time has come to construct a basic framework for the implementation of resolutions. The framework could include various aspects of maritime issues, such as

(1) prevention of marine pollution in the region;

(2) how to prevent Law of the Sea problems from becoming transnational conflicts;

(3) agreement within ASEAN on how to interpret and implement the provisions of the ICNT[1];

(4) the safety and security of the ASEAN states *vis-à-vis* potential threats by extraregional powers;

(5) co-operation concerning, or joint exploitation of, natural resources among littoral states in the region;

(6) how to prevent extraregional powers from trying to impose or continuing to impose their will over Southeast Asian countries or ASEAN members.

It goes without saying that, in drawing up such a framework, there should be no attempt to dictate solutions that are contrary to the national aspirations, sovereign rights, and sovereignty of the countries in the region.

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1 Informal Composite Negotiating Text, (U.N.Doc.A/CONF.62/L.78) often referred to as the Draft Convention on the Law of the Sea.

Up to 1945, the Law of the Sea dealt only with two dimensions, namely, surface longitude and latitude. After World War II, however, advancements in technology enabled the hitherto unreachable depths of the sea floor to be explored and exploited. This in turn led to the discovery of new wealth in the form of living and non-living resources on and within the sea-bed. The availability of these resources created new problems in the existing Law of the Sea by adding yet another dimension to its scope, that of depth.

The present Law of the Sea Conference, the first session of which was convened in New York in December 1973, is the third conference of its kind convened by the United Nations and commonly referred to as UNCLOS III. It is UNCLOS III that is trying to deal with the problems of the three dimensions.

The types of jurisdiction claimed by states attending UNCLOS III can be broadly divided into two categories;

(1) *Complete jurisdiction.* This is where the coastal state has control over the resources of the sea and sea-bed as well as navigation and overflight with regard to a particular stretch of water. This stretch of water is usually known as the territorial sea and lies immediately adjacent to the coastal state.

(2) *Partial jurisdiction.* Here, only the resources of the sea come under the sovereignty of the coastal state. This type of jurisdiction can be further divided into two subgroups:

(a) Resources of the ocean both within the water and on and within the sea-bed;

(b) Resources within and on the sea-bed only.

Type (a) is presently being claimed at UNCLOS III and is called the Exclusive Economic Zone. This zone will be 200 nautical miles in width, measured from the same baselines from which the territorial sea is measured.

Type (b) is also being claimed at UNCLOS III by countries having continental shelves exceeding the continental margin.

Part I of this book will deal with Category (1) while Part II will deal with Category (2) under the heading of living and non-living resources. Obviously this study concentrates only on the position of ASEAN member states.

The research work for this book was conducted not without some difficulties. Firstly, there is a lack of source documents; the ASEAN states do not appear to have any collections of legislations in relation to maritime jurisdiction. Secondly, there is the problem of language; besides laws in Thai, the author's mother tongue, there are several laws published in Malay, Indonesian, and even in Dutch (some Dutch legislation is still enforced in Indonesia) that presented difficulties with regard to interpretation. Thirdly, owing to the time limitation for research, it was impossible to provide a complete analysis that would cover every aspect of the Law of the Sea. However, this book is an attempt to provide at least a synthesis that covers the important issues in the Law of the Sea that ASEAN countries are facing.

Although, on completion of the field work for this research I became more optimistic regarding the question of co-operation within ASEAN, I would say that the ASEAN states need to put in much more effort to promote an atmosphere of confidence and to support scientific research work in matters pertaining to the Law of the Sea.