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Non-Living Resources and Joint Development

Framework for the Joint Development of Hydrocarbon Resources

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Part 1

Legal Framework in UNCLOS

Art 74 EEZ & Art 83 CS

- 1. The delimitation of the EEZ [or continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
- 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

Articles 74 and 83

3. Pending agreement as provided for in paragraph 1,
the States concerned,
in a spirit of understanding and cooperation,
shall make every effort
to enter into provisional arrangements of a practical nature
and, during this transitional period,
not to jeopardize or hamper the reaching of the final agreement.

Such arrangements shall be without prejudice to the final delimitation.

Joint Development & Provisional Arrangements

- An arrangement to jointly develop hydrocarbon resources in the area of overlapping claims is a type of provisional arrangement
- An arrangement to undertake a joint seismic survey would also be an interim arrangement
- Articles 74 and 83 do not impose a legal obligation on States to enter into negotiations to establish joint development arrangements
- Such arrangements are “without prejudice” to sovereignty claims and final delimitation of maritime boundaries

Part 2

Necessary Conditions for JDAs

Overlapping Sovereignty & Maritime Claims

- JDAs must be considered in the Context of the overlapping sovereignty and maritime claims
- Geography and history of the claims must be understood by all the parties
- Must understand overlapping claims before you can agree on “areas for joint development”
- Difficult to agree on areas for joint development if parties do not agree on that the claims of the parties are legitimate under international law

“Setting Aside the Disputes”

- The principle promoted by the late Deng Xiaping of China must be accepted by all the Parties to the JDA:
 1. Each claimant continues to maintain it has sovereignty
 2. Dispute on the sovereignty and boundary issues are “set aside” for a set period or indefinitely
 3. The JDAs are “without prejudice” to the sovereignty claims and final maritime boundaries

Political Will

- It is not possible to negotiate JDAs unless all the parties to the arrangement have the necessary **“political will”**
- Negotiation of JDAs require parties to develop **trust & confidence**
- Negotiation of JDAs require all parties to make **compromises**
- Negotiation of JDAs are require **time** and **resources**
- Negotiation of JDAs require parties to treat the JDAs as means to achieve a **win-win solution** – not as a “surrender of sovereignty “ or as a “sharing of our resources”

Domestic Political Opinion

- Governments must be prepared to educate their media and public opinion, including opposition politicians and netizens
- In some countries any discussion of JDAs triggers comments that the Government is surrendering sovereignty or sovereign rights
- Governments should not play the “domestic political card” and attack the legitimacy of the other States claims
- Level of “transparency” of the negotiations of the JDAs must be agreed upon by the parties
- Governments must also consider how to “sell” the final agreement to their media and to their people

Interests of Stakeholders

- The relevant stakeholders in each State must be identified and dealt with
- Existence of oil concessions in the “area for JD” will complicate negotiations
- Existence of national oil company in one of the parties must be taken into account
- Third party interests in the JD arrangements should also be taken into account

Information on Hydrocarbon Resources

- State of knowledge about the potential for resources in the areas being considered for JDAs must be considered – nature, extent and location
- Needs of each party for the resources must be considered
- There will be a lack of trust if one party believes the other has more knowledge about the resources
- Joint seismic surveys might be considered as an interim step

Involvement of Experts

- If one or more of the parties lacks the requisite expertise, it may be useful to involve outside neutral experts as “advisors” in the negotiations
- Experts might be able to advise on the areas for joint development
- Recommendations of experts might enable the parties to move away from a historic position

Part 3

Joint Development Arrangements

Joint Development Models

1. **Single State Model** – one State manages, but revenues shared with others
2. **Joint Venture Model** – the States or their nominated concessionaires form a joint venture to exploit the resources
3. **Joint Authority Model** – the States set up a new institutional framework, including a Joint Authority to manage and develop the resources

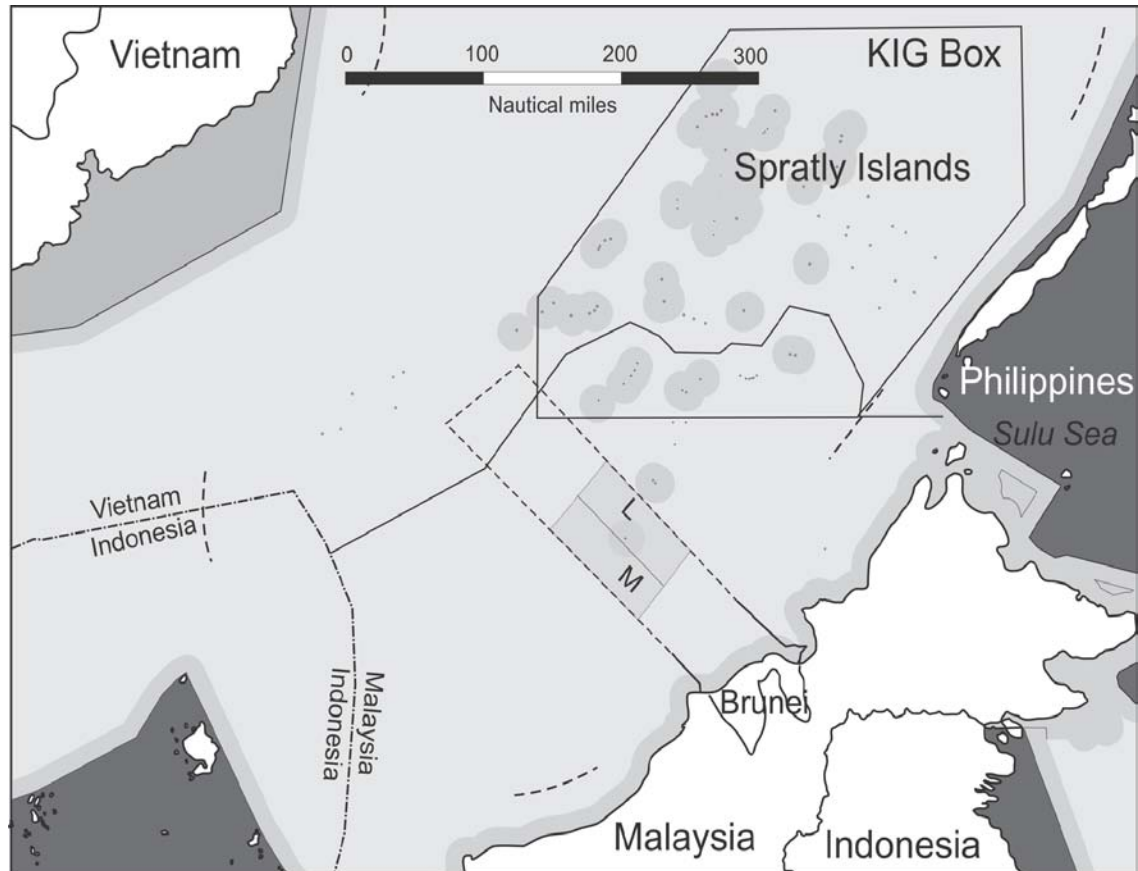
Single State Model

- One State manages the development of the deposits located in a disputed area on behalf of both States
- The other State shares in the revenues arising from the resource exploitation, once the costs incurred by the first State have been subtracted
- **Problem: unacceptable loss of autonomy on the part of the State that allows its sovereign rights to be administered by another State**

Single State Model - Example

- **The 2009 Brunei-Malaysia Exchange of Letters**
 - Malaysia agreed to withdraw her claim over the seabed area directly fronting Brunei's coastline off the north-western part of Borneo island
 - Both countries agreed for Petronas to be the designated operator over the two adjacent concession blocks that were previously disputed

Malaysia-Brunei

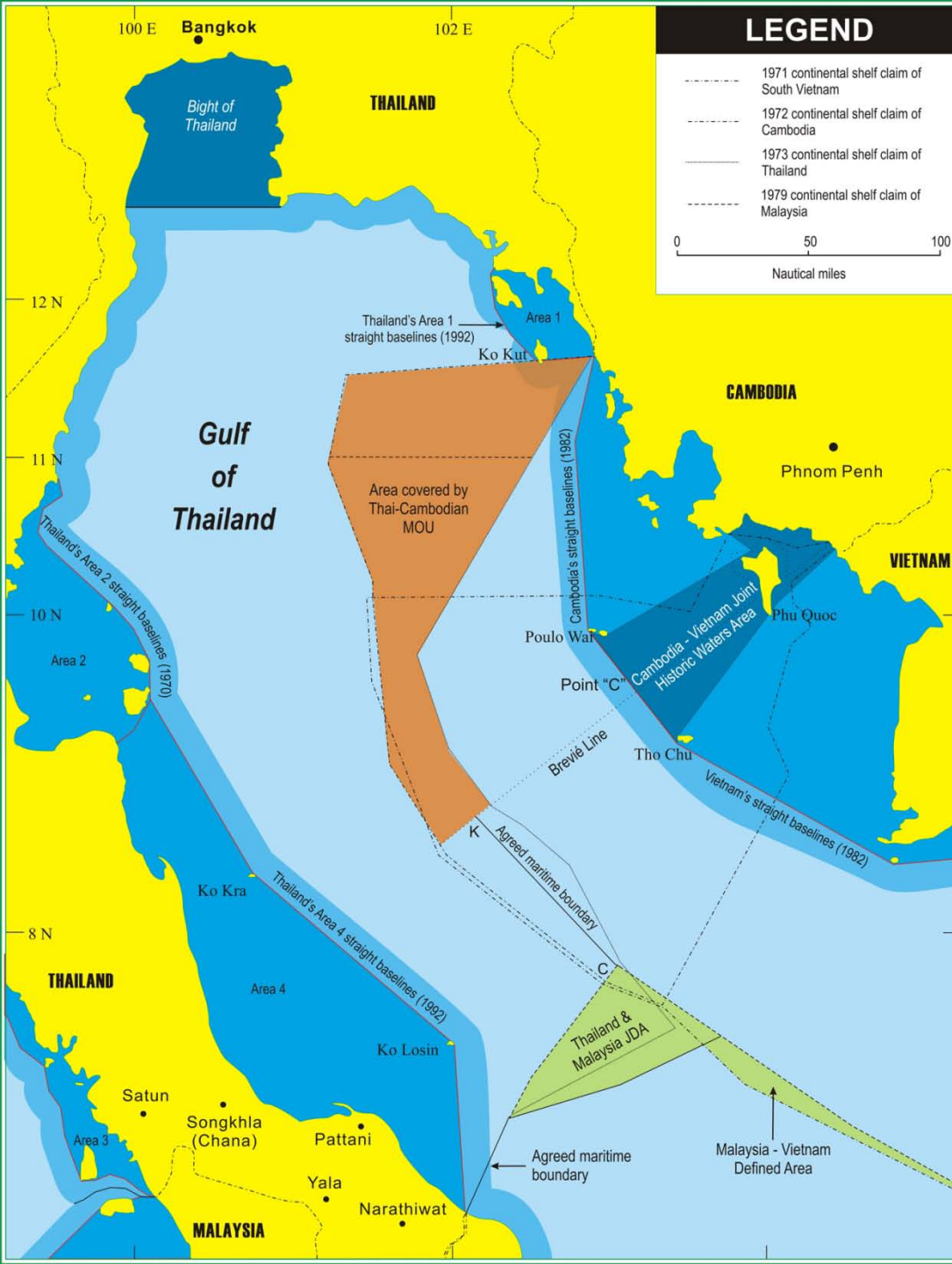


Joint Venture Model

- Requires the Parties to establish compulsory joint ventures between their national or other nominated oil companies in designated joint development zones
- Or, provides for the compulsory unitization of transboundary deposits and the nomination of a single operator to exploit the unitized deposit on behalf of all the interested operators.
- Or, a combination of several of these features

Joint Venture Model - Examples

- **The 1992 Malaysia-Viet Nam MOU**
 - Petronas & PetroVietnam entered a joint operating agreement for the exploration and exploitation of petroleum in a Defined Area of overlapping continental shelf
- **The 2003 Australia-Timor Leste International Unitization Agreement**
 - The administration of the JPDA is controlled by the Designated Authority, which is a Timor-Leste governmental body
 - The Designated Authority is overseen by the Joint Commission, membership of which is divided equally between Australia and Timor-Leste
 - The entire structure is overseen by a Ministerial Council which is drawn from both States, with each contributing at least one minister



Cambodia – Vietnam
joint 'historical waters' area

Malaysia – Thailand
joint development area

Malaysia – Vietnam
joint development area

Cambodia – Thailand
revoked MoU?

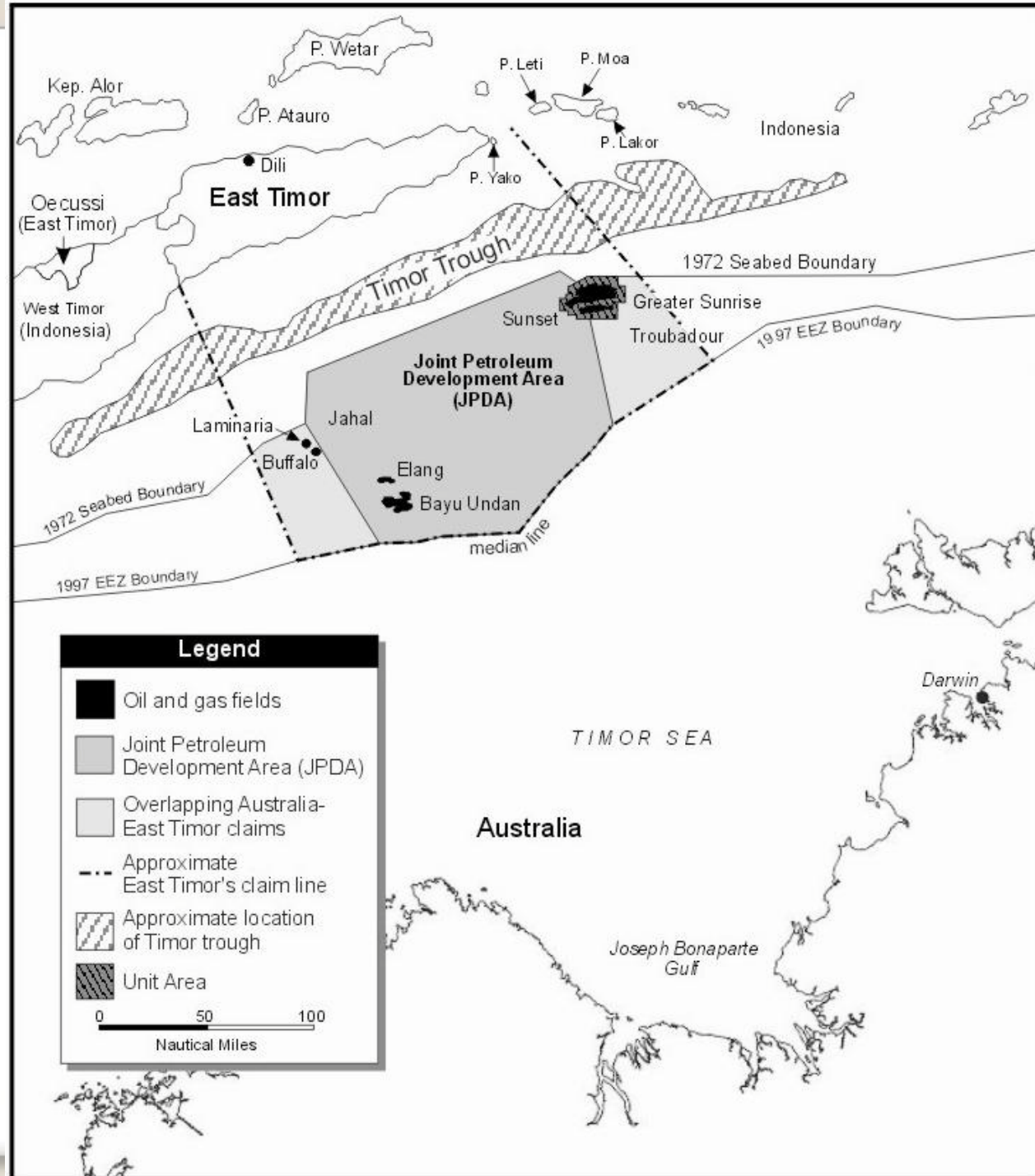
Source: National Bureau of
Asian Research, 2011



du.sg

Australia- East Timor JDA

Source:
Clive Schofield

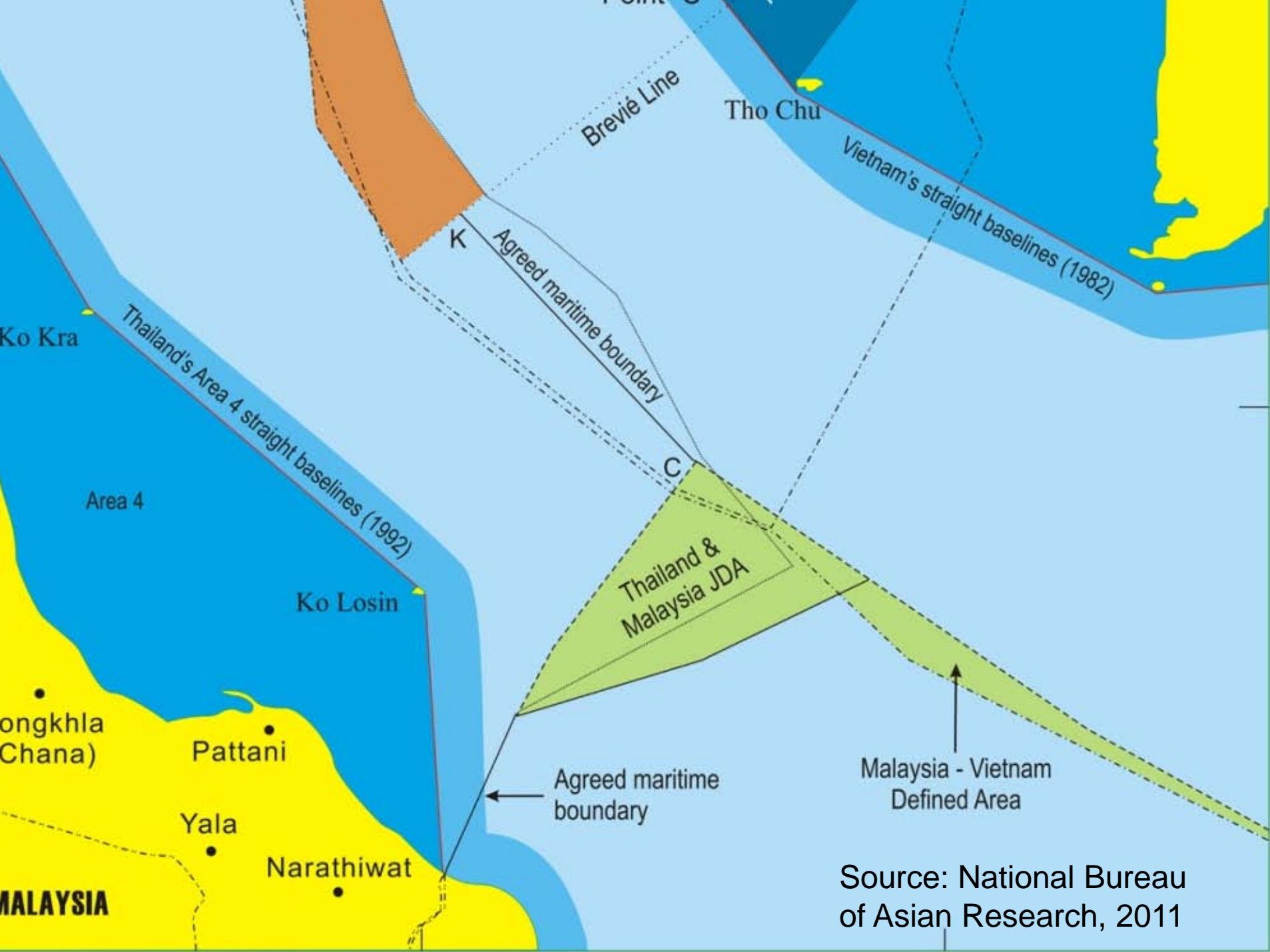


Joint Authority Model

- Establishing an international joint authority or commission with legal personality, licensing and regulatory powers, and a comprehensive mandate to manage the development of the designated zone
- These joint authorities have been described as ‘strong’ institutions, with extensive supervisory and decision-making powers and wide-ranging functions

Joint Authority Model - Example

- **The 1979 and 1990 Malaysian-Thailand agreements**
 - The Joint Authority has rights to explore and exploit the resources of the sea-bed in the JD Area for 50 years
 - All costs incurred and benefits derived by the Joint Authority from activities in the JD Area are equally borne and shared by both Parties
 - Divided the criminal jurisdiction of both Parties within the JD Area by a straight line that corresponds to the equidistance line from the two Parties' adjacent coastlines
 - The rights (including powers of enforcement) exercised by the parties over fishing, navigation, marine scientific research and marine pollution shall extend to the JD Area



Source: National Bureau of Asian Research, 2011

Factors influencing Model of JDA

1. Level of trust and confidence among the parties
2. Extent of experience in oil and gas regulation and exploitation
3. Extent of necessary capital and expertise
4. Size of Joint Development Area
5. Knowledge about location and amount of Resources in JDA
6. Extent to which the sharing of resources is a sensitive domestic issue
7. Extent to which exploitation is a matter of urgency

Common Provisions in JDAs

1. Identification of the Joint Development Area
2. Basis for Sharing Costs
3. Basis for Sharing Revenues
4. Scope of Activities to which the JDA applies
5. Applicable Law within the JDA
6. Duration of the Agreement and provisions its termination
7. Mechanism to resolve disputes which arise on the JDA
8. “Without prejudice” clause

Other issues in JDAs

1. Oil and gas licensing scheme
2. Terms of involvement of national oil companies
3. Environmental, health and safety issues
4. Applicable tax regime
5. Customs and Immigration
6. Jurisdiction over persons & property in the JDA
7. Rights of Third Parties / Jurisdiction over Third Parties
8. Regulation of Fisheries in the JDA

Conclusions

- JDAs are consistent with UNCLOS and international law
- JDAs are not “magic bullets” that will solve all problems
- JDAs are practical interim solutions which enable parties to put intractable disputes aside and jointly share resources
- Parties must understand the economic and political issues before they can enter into a JDA
- Political Will of the parties is critically important
- Trust and Confidence among the parties is critically important

Thanks for Your Attention

For more information on Joint Development,
see the CIL web site :
Research Project on the South China Sea

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