

Maritime Security in Southeast Asia: Maritime Governance

Session 3

Provisional Arrangements of a Practical Nature: Problems and Prospects in Southeast Asia

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Outline

- I. Importance of Boundaries in Ocean Governance**
- II. Provisional Arrangements of a Practical Nature**
- III. Status of Maritime Boundaries in Southeast Asia**
- IV. Case Study for Joint Development: Gulf of Thailand**
- V. Sub-regions in Southeast Asia: Need for Provisional Arrangements?**

PART I:

IMPORTANCE OF BOUNDARIES IN OCEAN GOVERNANCE

Importance of Boundaries in Oceans Governance

- 1982 UN Convention on the Law of the Sea (UNCLOS) allows coastal States to claim a territorial sea, EEZ and continental shelf
- EEZ/Continental Shelf regime gives coastal States:
 - ⇒ Sovereign rights to explore and exploit living and non-living resources
 - ⇒ Opportunities and obligations in ocean management such as conservation of living resources, marine environmental protection and marine scientific research
- Coastal States frequently make maritime claims to ocean space which maximize their maritime entitlements

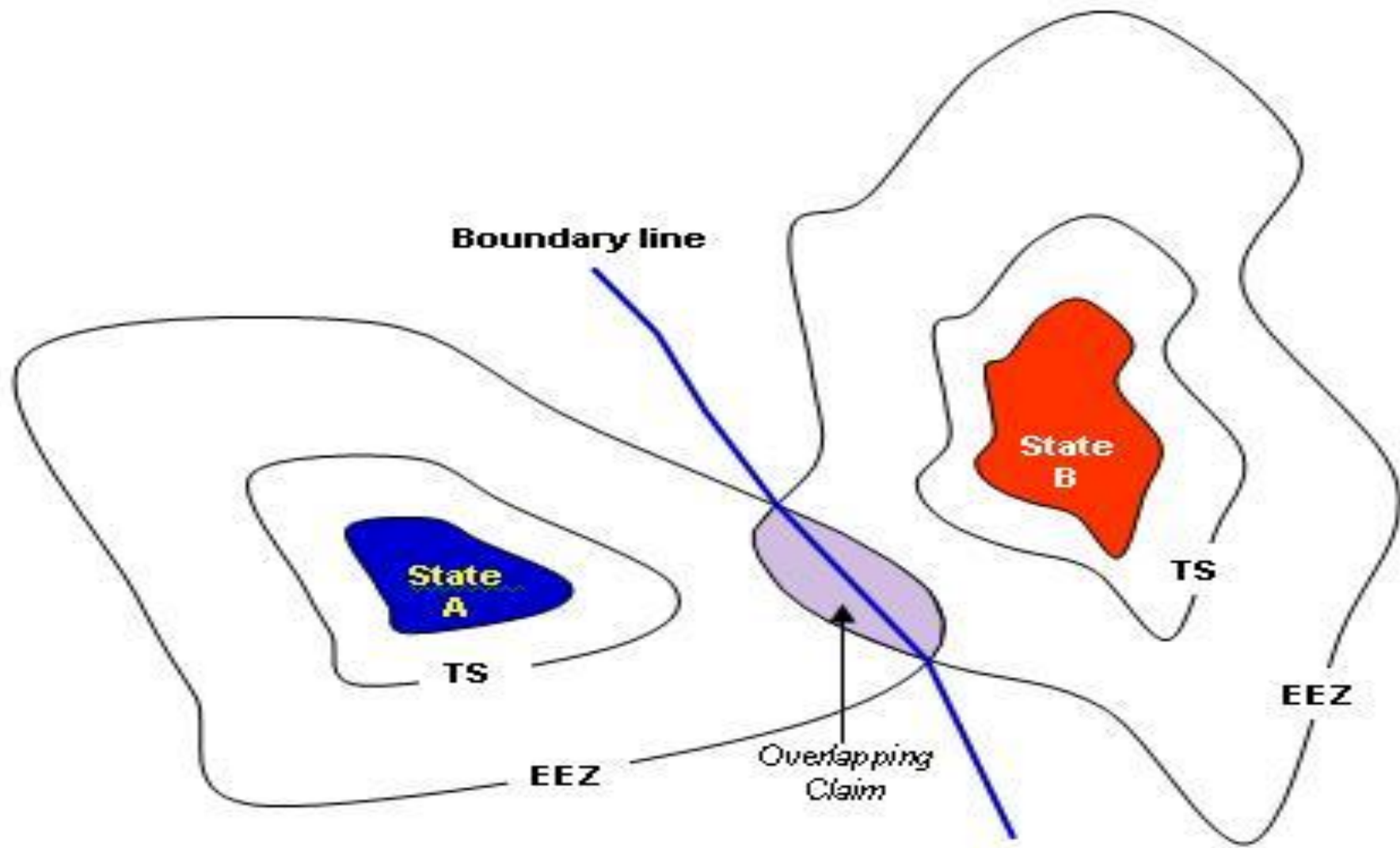


Figure 2 Overlapping Claim requires boundary line delimitation

Importance of Boundaries in Oceans Governance

- Overlapping claims to ocean space hinder:
 - Effective resource exploration and exploitation
 - Effective conservation of living resources
 - Protection of the marine environment
 - Enforcement against illegal activities
- Also pose a constant irritant in bilateral relations and undermine peace and stability
- Maritime delimitation “can be viewed as an essential precursor to the full resource potential of national maritime zones and peaceful management of oceans.”
- **GOOD FENCES MAKE GOOD NEIGHBOURS**

PART II: PROVISIONAL ARRANGEMENTS OF A PRACTICAL NATURE

Dispute Settlement Options under UNCLOS

Must be by Peaceful Means

Negotiations
(Articles 15, 74,
83)

**Non-Binding
Procedures**
(Articles 283, 284)

**Compulsory Binding
Dispute Settlement**
(Part XV, Section 2)

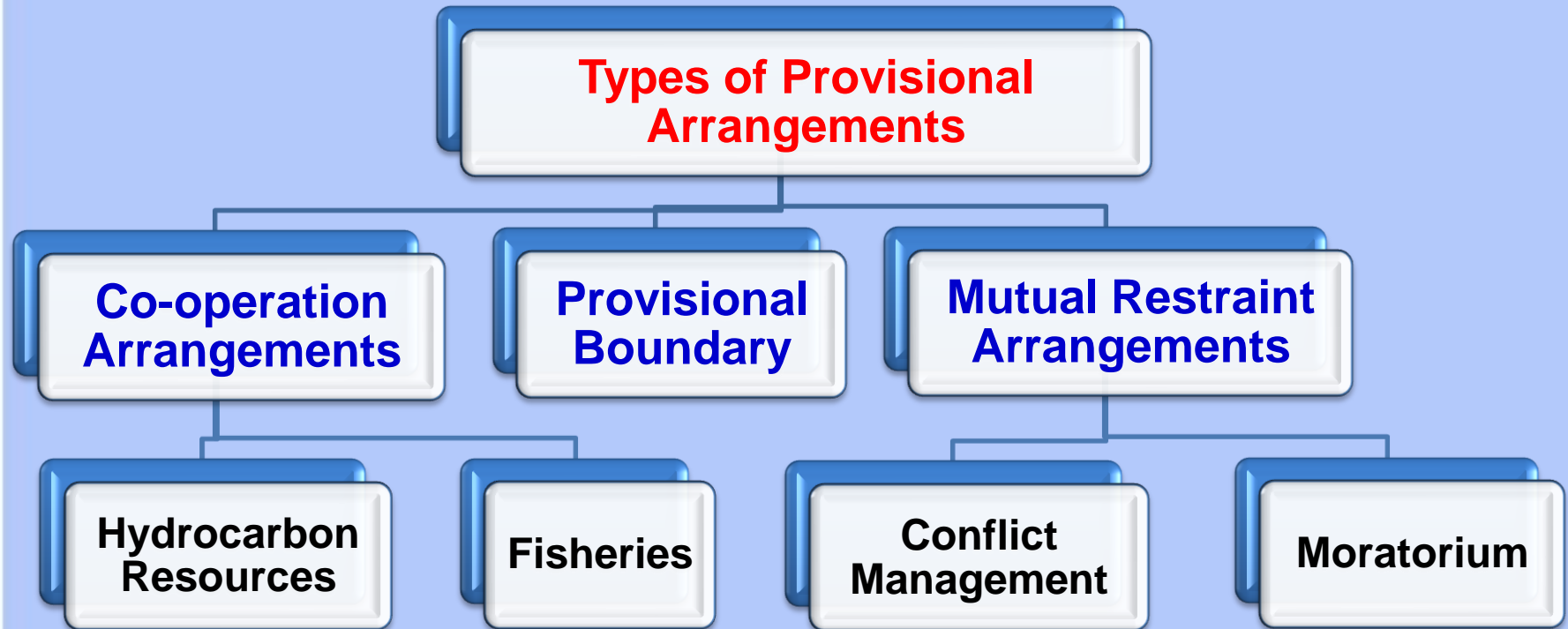
**Delimitation
Agreements**

**Provisional
Arrangements**

Article 74 and 83 of UNCLOS (EEZ/Continental Shelf)

1. The delimitation of the EEZ/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.
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.

Provisional Arrangements of a Practical Nature



Guyana vs. Suriname (2007)

Duty to Make Every Effort to Enter into Provisional Arrangements

- “Every Effort” imposes a *duty to negotiate in good faith*
- Requires Parties to take a conciliatory approach
- Entails duties of co-operation, consultation and notification when undertaking unilateral activities in disputed areas

Duty Not to Hamper or Jeopardize the Reaching of a Final Agreement

- Obligation not intended to preclude ALL activities in disputed areas
- Activities which would have a permanent physical impact on marine environment prohibited whereas other activities which do not are permissible

Provisional Arrangements as a Tool of Ocean Governance

- Flexible enough to encompass a wide array of arrangements suitable to each case
- Reflects a more **broad-based functional approach** to ocean management as opposed to more traditional legalistic approaches focusing on a dividing line
- Is **without prejudice** to final resolution of dispute i.e. nothing in the provisional arrangement can be interpreted to effect the claims made by parties or be considered a renunciation or compromise of such claims

PART III:

**MARITIME BOUNDARIES AND
PROVISIONAL ARRANGEMENTS IN
SOUTHEAST ASIA**

Southeast Asia as a Maritime Region

- SEA is a distinctively maritime region
- Association of Southeast Asian Nations (ASEAN) created in 1967
- Presently 10 ASEAN Member States
- 9 out of 10 ASEAN States are coastal States and 2 of these States are the world's largest archipelagic States (Indonesia and Philippines)
- SEA waters economically and strategically important to the economies of Northeast Asia, US and Europe



South China Sea

Gulf of Thailand

Gulf of Tonkin

**Straits of Malacca and
Singapore**

Celebes Sea

Sulu Sea

Arafura Sea

Eastern Andaman Sea

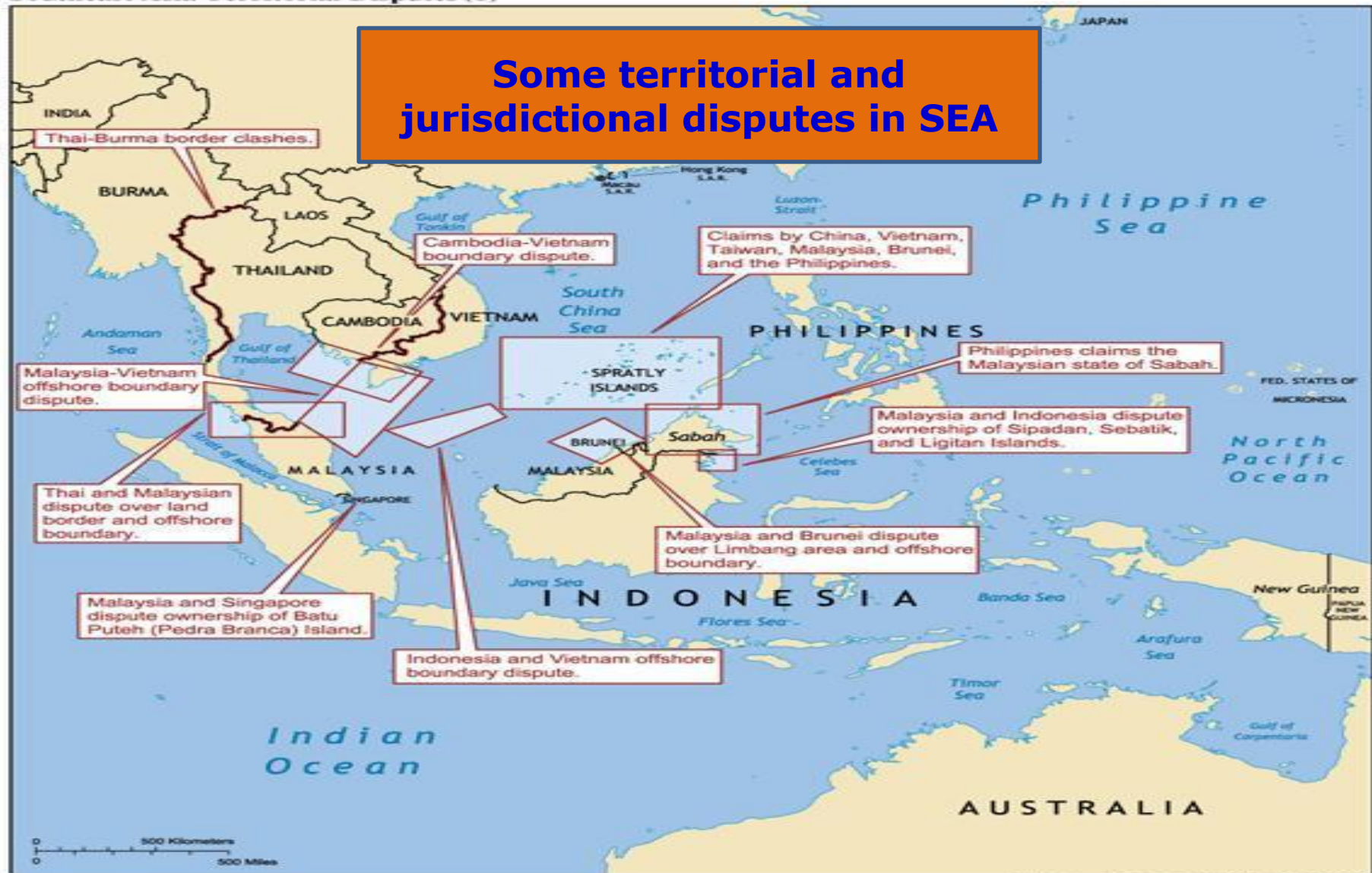
Timor Sea

[Torres Strait]

Overlapping Claims in Southeast Asia

- SEA has a complex maritime geography
 - ⇒ Virtually all SEA waters enclosed as territorial seas, EEZs or archipelagic waters
 - ⇒ Coastal configurations complicated with gulfs that penetrate deeply in the mainland
 - ⇒ Multitude of large and small islands, some of which are subject to sovereignty disputes
- Many overlapping maritime claims between ASEAN States
- Complex maritime geography has posed challenges to boundary-making

Some territorial and jurisdictional disputes in SEA



Unclassified

DI Cartography Center 753136A1 (R02106) 08-00

Status of Boundaries in SEA Waters

40 Maritime Boundary Arrangements (1969 to 2012)

**29 Delimitation
Agreements**

**11 Provisional
Arrangements**

6 Joint
Development
Arrangements of
Hydrocarbons

1 Joint Seismic
Undertaking

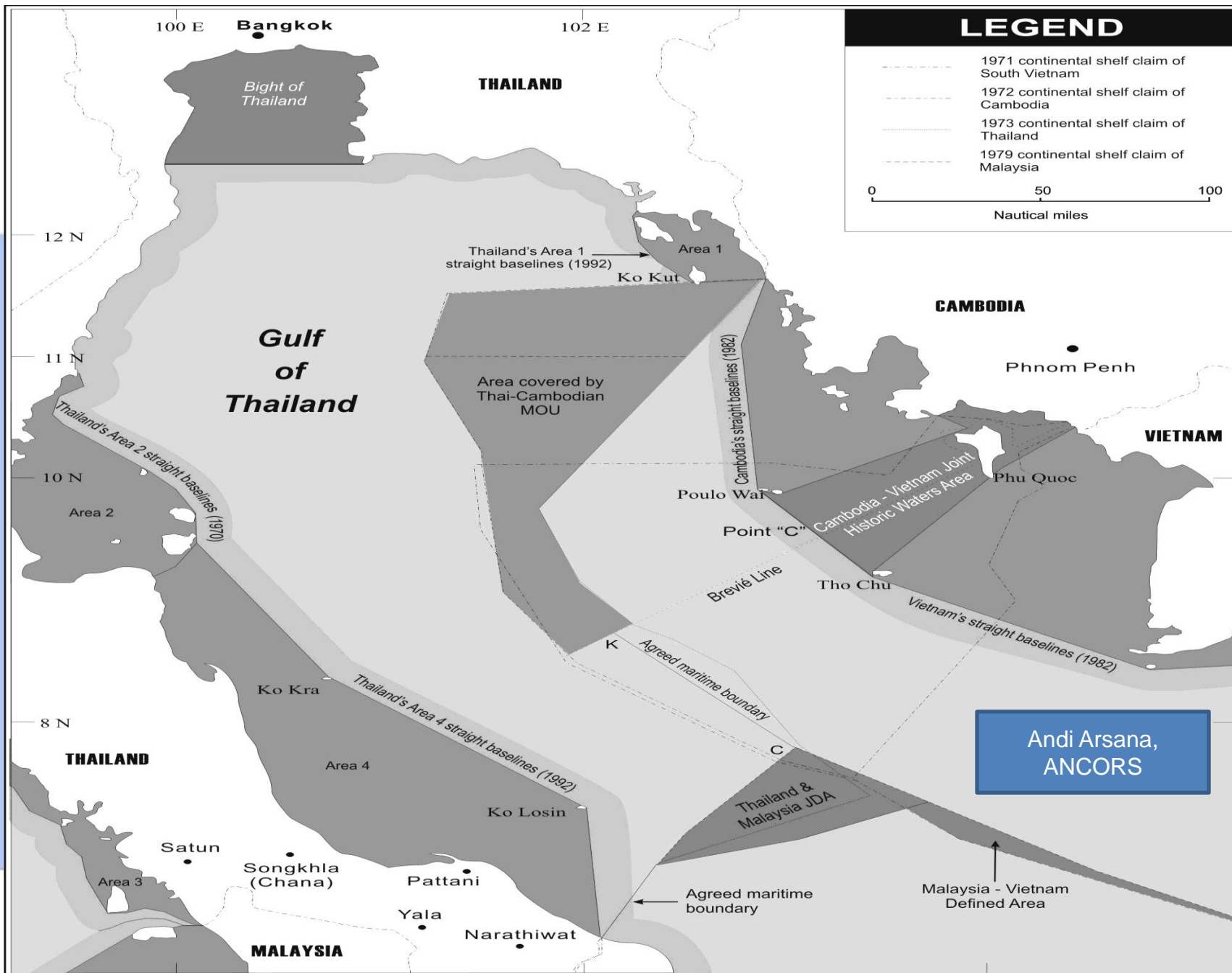
1 Joint
Exploitation
Zone

3 Conflict
Management
Arrangements

	Year	Parties	Subject-matter	Area	Remarks
1.	1979 1990	Malaysia Thailand	Joint Development (Seabed Resources)	Gulf of Thailand	
2.	1982	Cambodia Vietnam	Joint Historic Waters (Fisheries and Seabed)	Gulf of Thailand	Not implemented
3.	1989	Australia Indonesia	Joint Development (Seabed Resources)	Timor Sea	No longer in force
4.	1992	Malaysia Vietnam	Joint Development (Seabed Resources)	Gulf of Thailand	
5.	1999	Malaysia Thailand Vietnam	Joint Development (Seabed Resources)	Gulf of Thailand	Not implemented
6.	2001	Cambodia Thailand	Joint Development (Seabed Resources)	Gulf of Thailand	Not implemented
7.	2002	Australia East Timor	Joint Development (Seabed Resources)	Timor Sea	
8.	2002	China ASEAN	Declaration on the Code of Conduct in the SCS	South China Sea	
9.	2005	Philippines Vietnam China	Joint Seismic Undertaking	South China Sea	No longer in force
10.	2012	China Vietnam	Basic Principles Guiding Settlement of Sea Issues		
11.	2012	Malaysia Indonesia	Co-operation on Law Enforcement for Fisheries	Straits of Malacca	

PART IV:

**JOINT DEVELOPMENT OF
HYDROCARBON RESOURCES: CASE
STUDY IN THE GULF OF THAILAND**



Rationale for Joint Development Agreements

- Insurmountable impasse on national positions in negotiations of maritime boundaries
- **Economic Rationale:**
 - Need for Hydrocarbon Resources
 - Need for Technical and Capacity Assistance
 - Need for Secure Investment Framework
- **Political Rationale:** Need for Good Relations and Conflict Prevention

Factors Conducive to JDAs in Gulf of Thailand

- Defined Claim Areas with a Clear Legal Basis
- Knowledge of Hydrocarbon Resources
- Public Perceptions of JDAs
- Absence of Sovereignty Disputes over Islands
- Absence of Claims of Third Party States
- Good Bilateral Relations
- Political will

PART V:

**SUB-REGIONS IN SOUTHEAST ASIA:
NEED FOR PROVISIONAL
ARRANGEMENTS?**

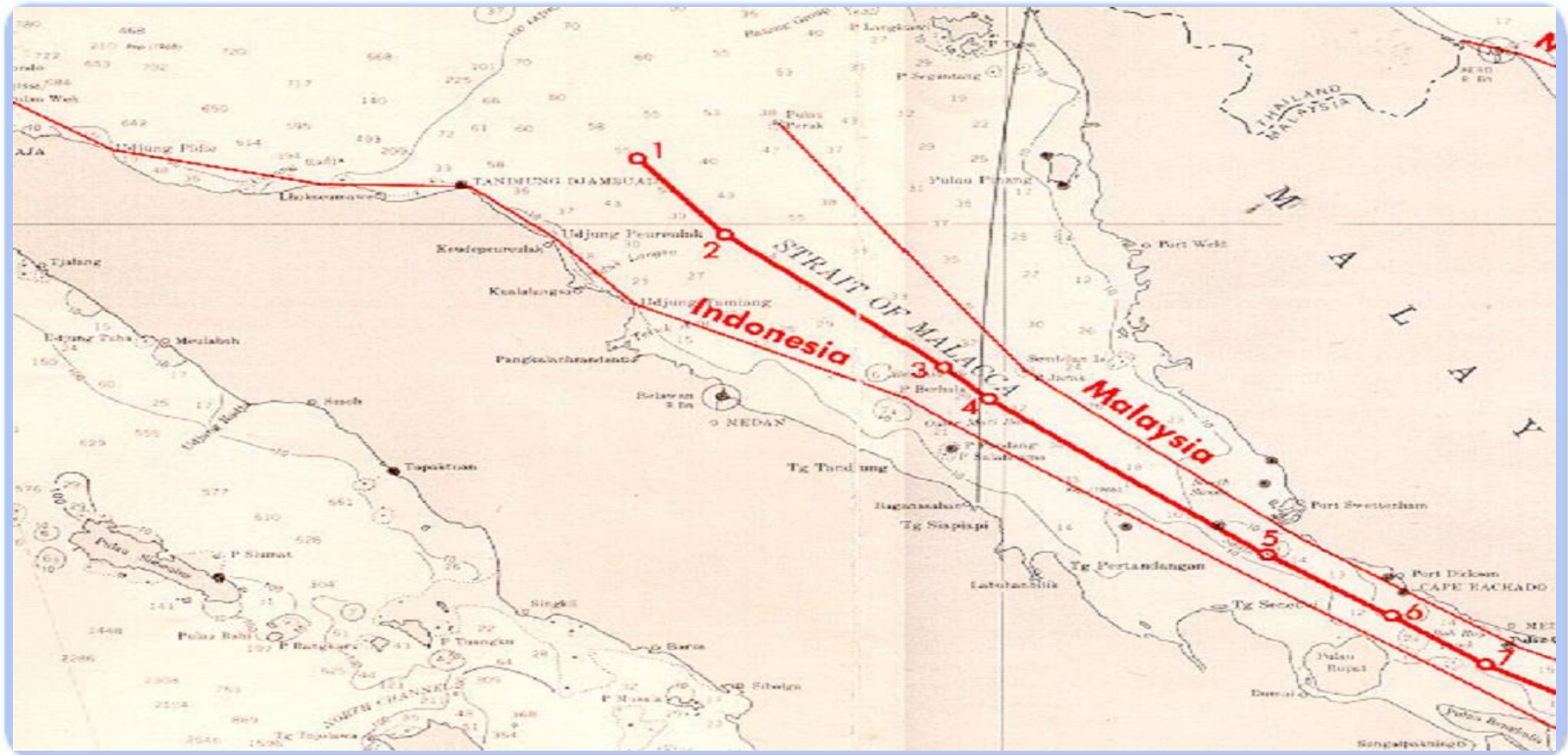
Straits of Malacca and Singapore

- 7 Delimitation Agreements in Straits of Malacca and Singapore
 - ⇒ 1969 Indonesia-Malaysia Continental Shelf Agreement
 - ⇒ 1970 Indonesia-Malaysia Territorial Sea Agreement
 - ⇒ 1971 Indonesia-Thailand Continental Shelf Agreement
 - ⇒ 1971 Indonesia-Malaysia-Thailand Continental Shelf Agreement
 - ⇒ 1973 Indonesia-Singapore Territorial Sea Agreement
 - ⇒ 1979 Malaysia-Thailand Territorial Sea Agreement
 - ⇒ 2009 Indonesia-Singapore Territorial Sea (Singapore Strait)

Straits of Malacca and Singapore

- Despite considerable progress, still remain some unresolved boundaries
- Indonesia and Malaysia still have to negotiate an EEZ boundary in the Northern Part of the Malacca Strait
 - ⇒ Overlapping EEZ claims have resulted in Indonesian authorities arresting Malaysian fishermen in disputed area
 - ⇒ In Jan 2012, Malaysia and Indonesia concluded Common Guidelines concerning Treatment of Fishermen by Maritime Law Enforcement Agencies
- Indonesia, Malaysia and Singapore must also negotiate a boundary in the eastern Straits of Malacca resulting from Pedra Branca decision

Straits of Malacca and Singapore



Source: US Department of State

Centre for International Law

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Sulu Sea/Celebes Sea

- No Delimitation Agreements or Provisional Arrangements between Malaysia, Philippines and Indonesia in the Sulu Sea or Celebes Sea
- Dispute between Indonesia and Malaysia in Celebes Sea is particular source of contention
 - ⇒ While sovereignty over Sipidan/Ligatan was resolved in favour of Malaysia in 2002, dispute over oil-rich Ambalat block remains
 - ⇒ Many incidents at sea between Indonesian and Malaysian maritime authorities
 - ⇒ May be an area in which joint development of oil and gas resources may be suitable especially if negotiations on a boundary prove too difficult



South China Sea

- Disputes over sovereignty over Spratly Islands and Paracel Islands and accompanying disputes over maritime claims serious flashpoint for conflict and tension in the region
- Presently, 2 Delimitation Agreements in South China Sea (excluding Gulf of Tonkin and Gulf of Thailand)
 - ⇒ 1969 Indonesia-Malaysia Continental Shelf Agreement (West and East South China Sea)
 - ⇒ 2003 Indonesia-Vietnam Continental Shelf Agreement
- Provisional Arrangements adopted in SCS have been more focused on conflict management

South China Sea

- Adopting “Provisional Arrangements of a Practical Nature” relating to resources is hindered by the existence of sovereignty claims, the lack of certainty and clarity in the maritime claims and the number of Claimants
- However, may remain the only feasible long-term solution for the South China Sea disputes
- Claimants should start with bilateral arrangements in disputed areas where there are only two parties and focus on narrow scope of co-operation (for example, joint seismic surveys)
- Claimants should also bear in mind their duty to negotiate provisional arrangements in good faith and refrain from activities which would cause irreparable harm to the marine environment

Conclusions

- **Provisional Arrangements of a Practical Nature are an extremely important tool of oceans governance in areas of overlapping maritime claims**
- **Enables a myriad of activities to occur without the need for a boundary and is “without prejudice” to final resolution of dispute**
- **However, “provisional arrangements” are not a panacea to all problems associated with overlapping claims**
- **Suitability will depend on the particular factors/circumstances of each case**
- **Most important factor is the political will of States in the conclusion and implementation of provisional arrangements**