

ASIL Annual Conference 2013
5 April 2013

**ASEAN Approaches to Maritime
Boundary Disputes:
Wider Implications for ASEAN**

Tara Davenport
Research Fellow
Centre for International Law

Outline

- I. UNCLOS and Importance of Boundaries in Ocean Governance
- II. Geopolitics and Southeast Asia
- III. ASEAN Approaches to Maritime Boundaries
- IV. Wider Implications for ASEAN

PART I: UNCLOS & IMPORTANCE OF BOUNDARIES IN OCEAN GOVERNANCE

Importance of Ocean Boundaries

- 1982 UN Convention on the Law of the Sea (UNCLOS) allows coastal States to claim a territorial sea, EEZ and continental shelf
- Coastal States frequently make maritime claims to ocean space which maximize their maritime entitlements
- Overlapping claims to ocean space hinder effective resource management, protection of marine environment and 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” (Prescott and Schofield)

UNCLOS Provisions on Delimitation

Territorial Seas (Article 15)

Failing agreement between them to the contrary, States are not entitled to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines

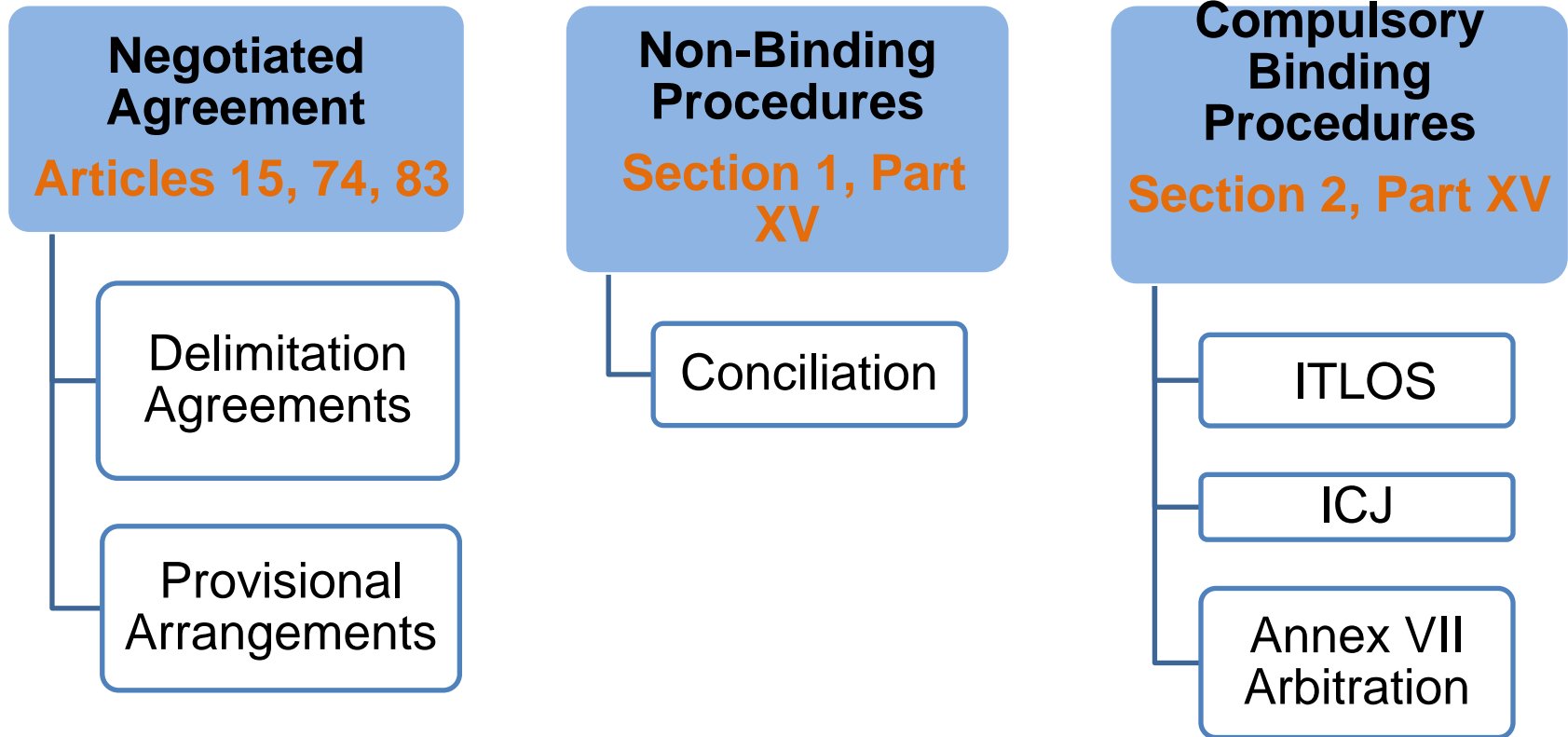
EEZ/Continental Shelf (Articles 74 and 83)

Delimitation shall be effected by agreement on the basis of international law, as referred to in Article 38 of the ICJ Statute in order to achieve an equitable solution

If no agreement can be reached within a reasonable period of time, States shall resort to the procedures provided for in Part XV

Pending agreement, States shall enter into provisional arrangements of a practical nature

Options for Resolving Maritime Boundary Disputes under UNCLOS



PART II

GEOPOLITICS AND SOUTHEAST ASIA

Development of ASEAN

- ASEAN created in 1967 with Indonesia, Malaysia, the Philippines and Thailand, accelerated by Cold War Politics
- Brunei (1984), Vietnam (1995), Laos (1997), Myanmar (2007), Cambodia (1999) all became ASEAN Members
- Timor Leste and Papua New Guinea have observer status at ASEAN
- For more than 40 years, ASEAN functioned without a formal constitution but in 2007, adopted the ASEAN Charter, an attempt to make it a more rules-based institution

Southeast Asia as a Maritime Region

- SEA is a distinctively maritime region
- 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 sits astride key access routes between the Indian and Pacific Ocean
- Economically and strategically important to the economies of Northeast Asia, the United States and other Western maritime powers

Major Shipping Routes





South China Sea

Gulf of Thailand

Gulf of Tonkin

Straits of Malacca
and Singapore

Celebes Sea

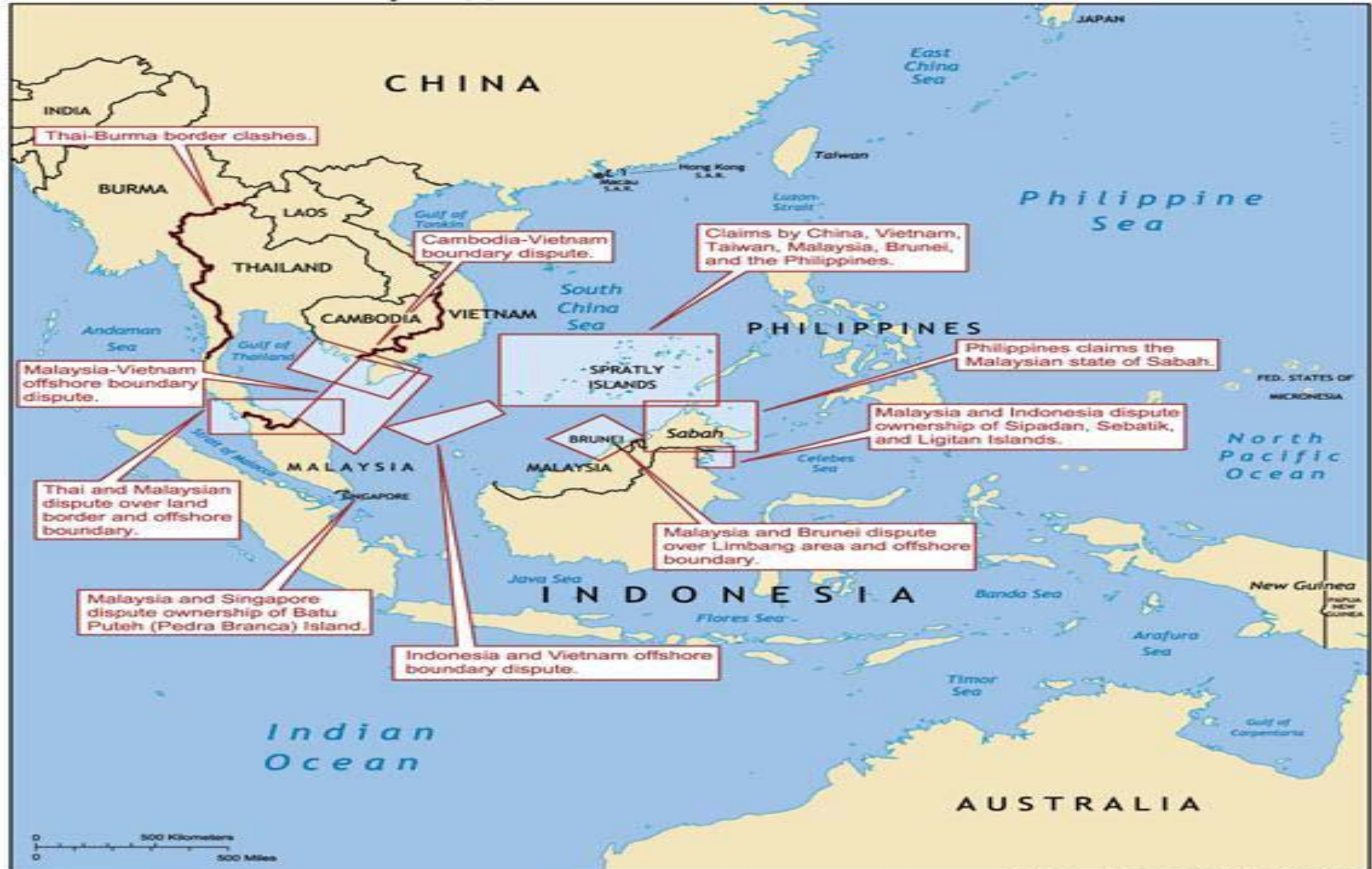
Sulu Sea

Arafura Sea

Complex Maritime Geography of Southeast Asia

- Virtually all Southeast Asian waters are enclosed as territorial seas, EEZs or archipelagic waters
- Resulting in overlaps between maritime claims of neighbouring States
- Maritime delimitation further complicated by
 - ⇒ Coastal configuration with gulfs that penetrate deeply into the mainland, many large and small islands and wide and narrow continental margins
 - ⇒ Island sovereignty disputes

Southeast Asia Territorial Disputes (U)



Unclassified

DI Cartography Center 753136A1 (R02106) 08-00

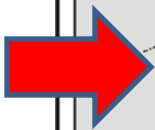
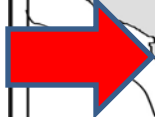
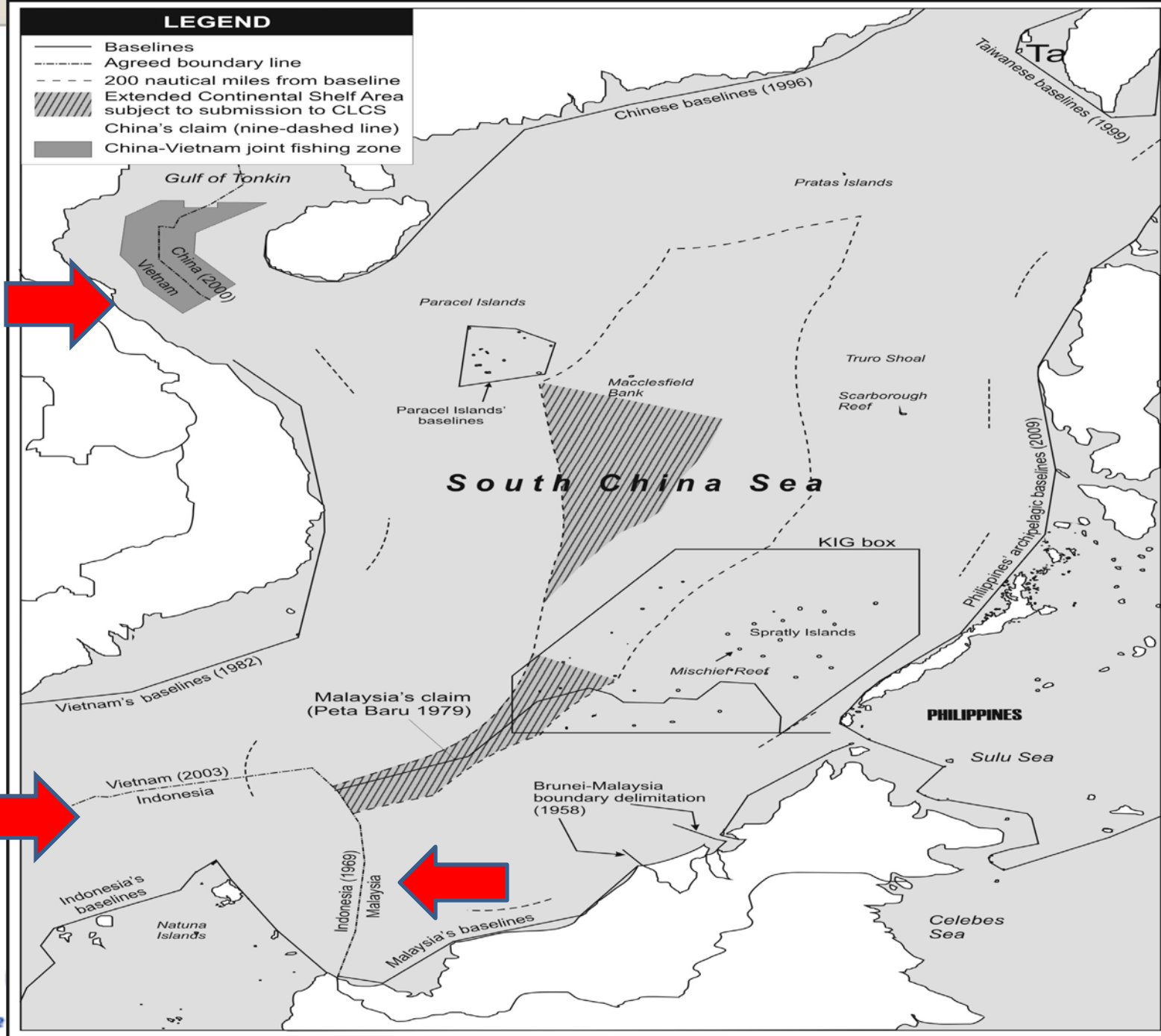
PART III: ASEAN APPROACHES TO MARITIME BOUNDARIES

ASEAN Approaches to Maritime Boundaries (1969 – 2012)

<u>No. of Delimitation Agreements</u>	<u>29</u>
Between ASEAN Members	14
Between ASEAN Members and Non-ASEAN Members	15
<u>No. of Provisional Arrangements</u>	<u>10</u>
Between ASEAN Members	6
Between ASEAN Members and non-ASEAN Members	4
<u>No. of Disputes Submitted before Court or Tribunal</u>	<u>1</u>

LEGEND

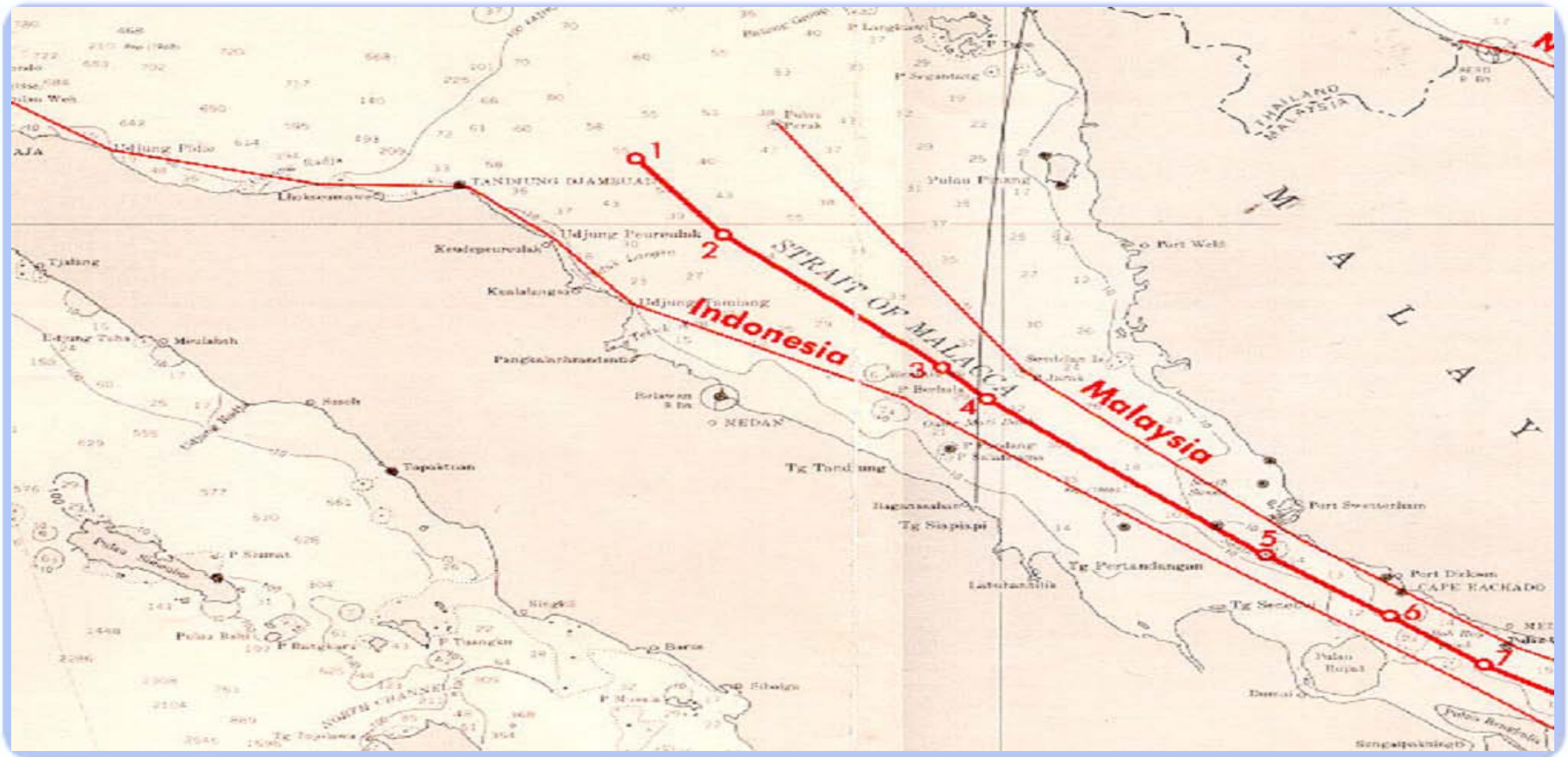
- Baselines
- - - - - Agreed boundary line
- · - · - 200 nautical miles from baseline
- ▨ Extended Continental Shelf Area subject to submission to CLCS
- - - - - China's claim (nine-dashed line)
- China-Vietnam joint fishing zone



Delimitation Agreements

- 16 of 29 Delimitation Agreements were agreed in late 1960/s 1970s
- ASEAN States have (so far) expressed a preference for single purpose boundaries either of the continental shelf or territorial sea
- Majority of agreements are simple allocation of rights and jurisdiction along a boundary
- Dispute settlement in majority of agreements is by recourse to “negotiations and consultations” rather than third party dispute settlement
- Serious disputes rarely arise after Delimitation Agreements in SEA are concluded (with exceptions)

Straits of Malacca and Singapore

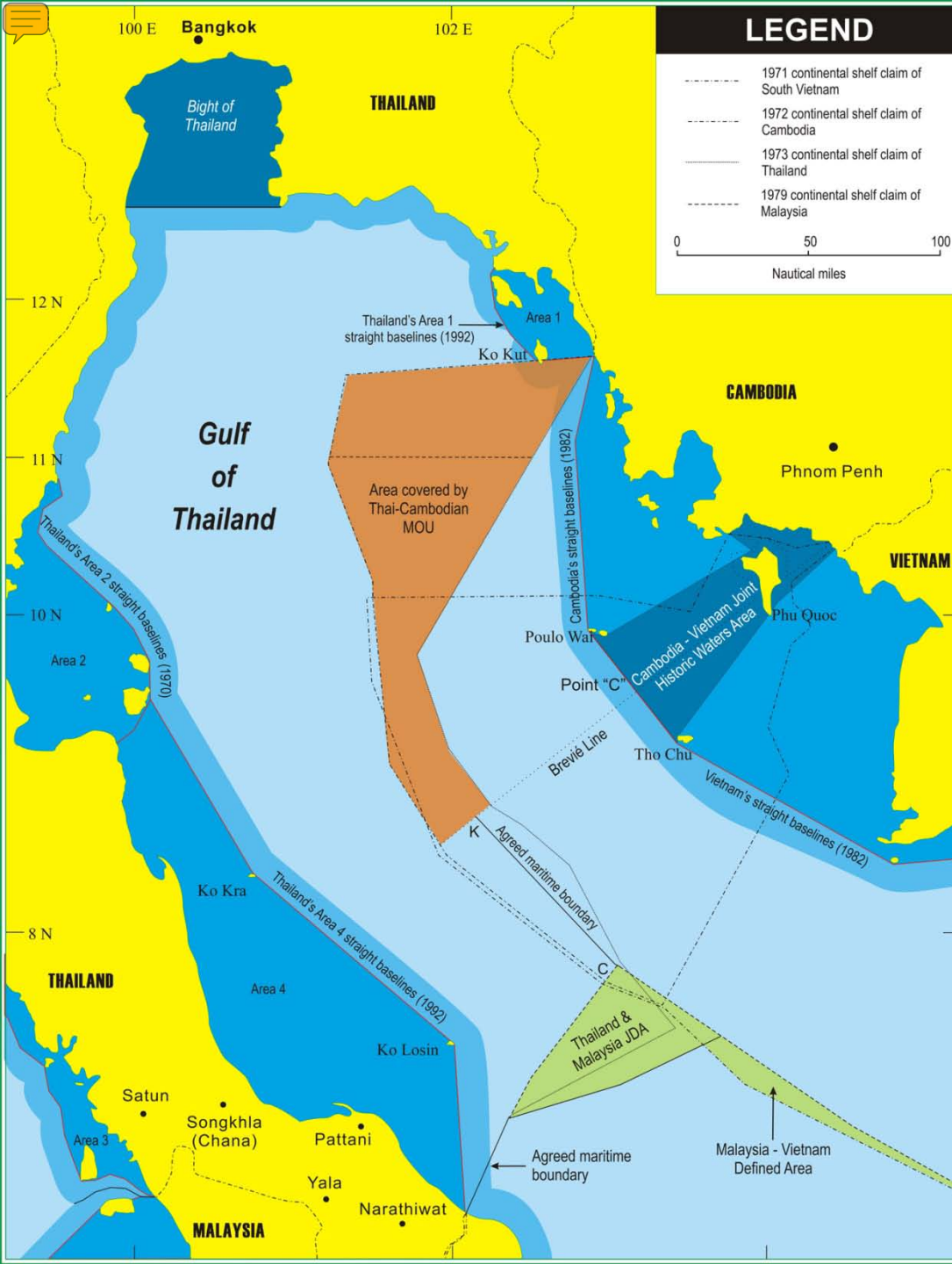


Source: US Department of State
www.cil.nus.edu.sg



Provisional Arrangements

Year	Parties	Area	Type
1979 1990	Malaysia Thailand	Gulf of Thailand	Joint Development (Seabed Resources)
1982	Cambodia Vietnam	Gulf of Thailand	Historic Waters
1989	Australia Indonesia	Timor Sea	Joint Development (Seabed Resources)
1992	Malaysia Vietnam	Gulf of Thailand	Joint Development (Seabed Resources)
1999	Malaysia Thailand Vietnam	Gulf of Thailand	Joint Development (Seabed Resources)
2001	Cambodia Thailand	Gulf of Thailand	Joint Development (Seabed Resources)
2002	ASEAN China	South China Sea	Conflict Management
2002	Australia Timor Leste	Timor Sea	Joint Development (Seabed Resources)
2005	China Philippines Vietnam	South China Sea	Joint Marine Seismic Undertaking
2012	Malaysia Indonesia	Straits of Malacca	Conflict Management



Joint Development Arrangements in the Gulf of Thailand

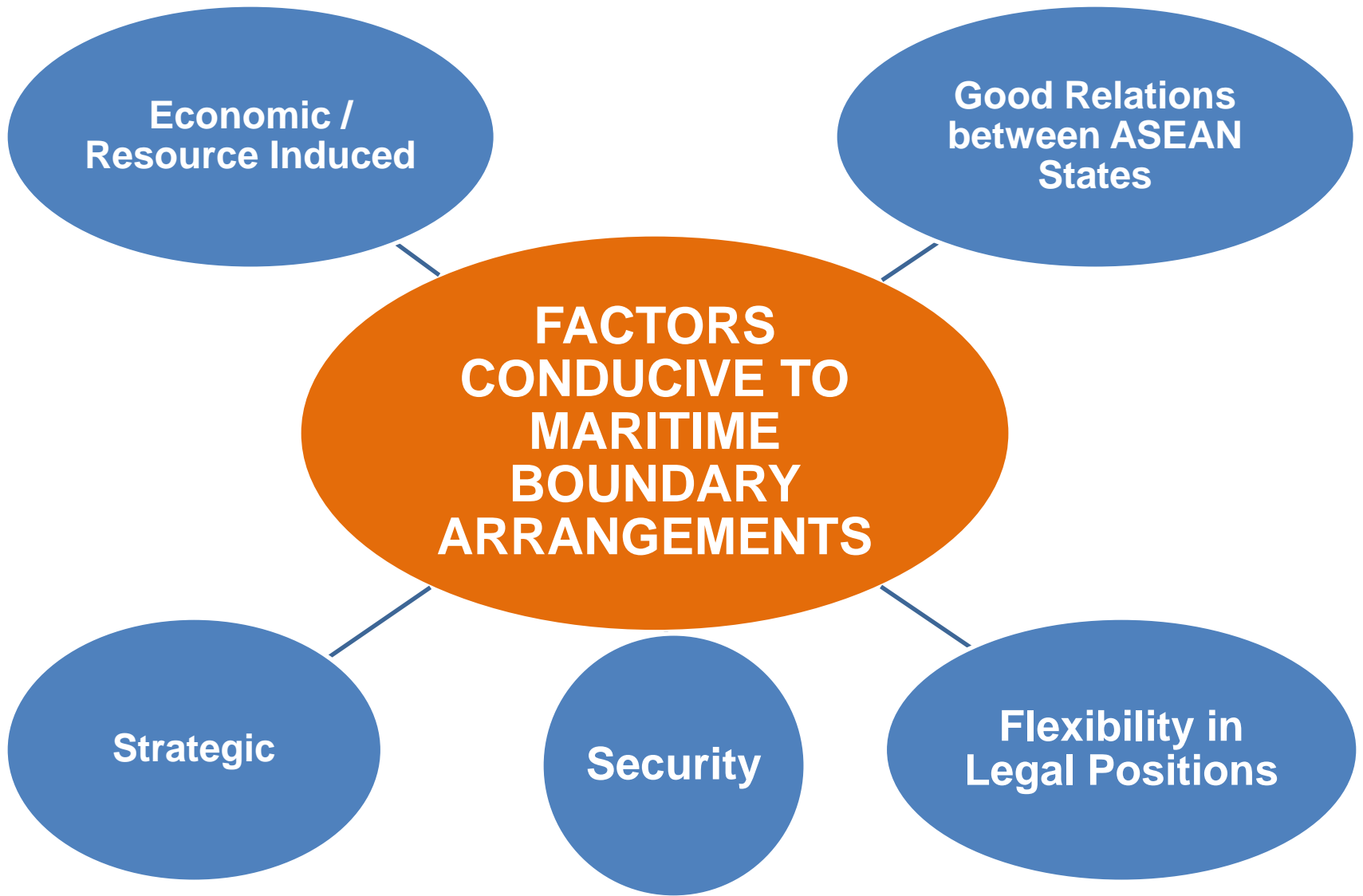
Cambodia – Vietnam
joint 'historical waters' area

Malaysia – Thailand
joint development area

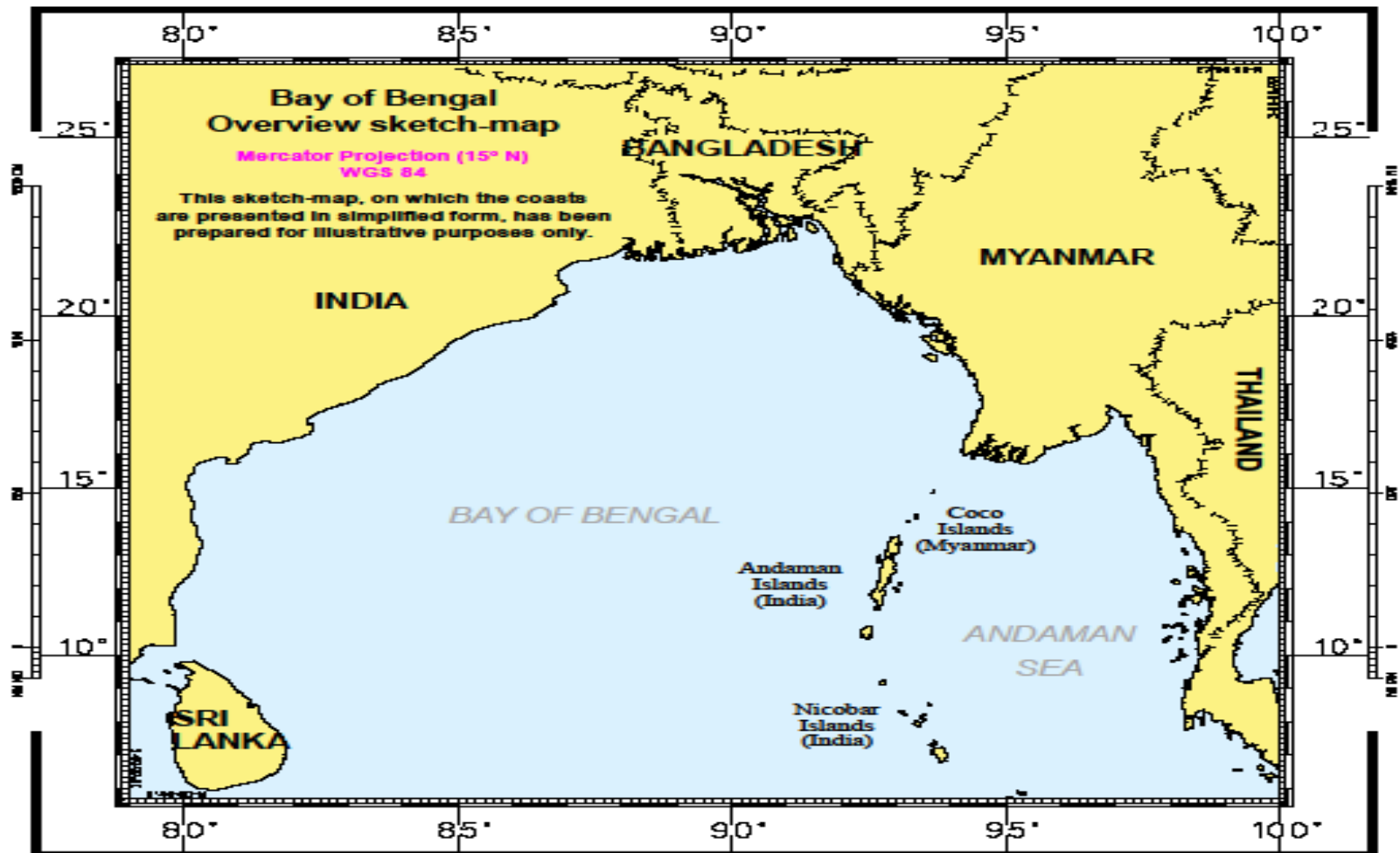
Malaysia – Vietnam
joint development area

Cambodia – Thailand
revoked MoU?

Source: National Bureau of
Asian Research, 2011



ITLOS - Bangladesh/Myanmar



Source: ITLOS Decision

ITLOS - Bangladesh/Myanmar

- Dispute between Bangladesh and Myanmar over maritime delimitation in Bay of Bengal
- Negotiations occurred sporadically from 1974 – 1986
- Factors which led to submission of dispute to ITLOS in 2009:
 - Neither Party willing to Budge on Delimitation Principles
 - Discovery of large reserves in Bay of Bengal + demand from both countries + development of offshore drilling technology
 - Unilateral Exploration and Drilling in Bay of Bengal by Myanmar in 2008
 - 2008/2009 Submission of Continental Shelf Claim (Preliminary Information)

ITLOS - Bangladesh/Myanmar

- Bangladesh submitted dispute to Annex VII Arbitration in 2009 but Myanmar requested that the dispute be referred to ITLOS
- ITLOS rendered a decision in record time (Approximately 2years)
- Decision perceived as fair to both Bangladesh and Myanmar
- Bangladesh already reported to have issued blocks for oil exploration after the decision

PART IV: IMPLICATIONS FOR ASEAN

The ASEAN Way

- Clear that ASEAN States have a preference for negotiated agreements (be it a delimitation agreement or a provisional arrangement) as opposed to third party dispute settlement for maritime boundary disputes
- ASEAN approaches to maritime boundaries arguably consistent with wider cultural inclination to resolve disputes through consensus and consultation and a cultural aversion to judicial settlement
- So-called ASEAN Way characterized the first 30 years of ASEAN Agreement
 - ⇒ Includes the principle of seeking agreement and harmony, non-confrontation, quiet diplomacy versus public washing of dirty laundry and legalistic solutions
 - ⇒ members largely rely on patient consensus-building to arrive at informal understandings or loose agreements.

Maritime Boundaries as an Exception to the ASEAN Way?

- ASEAN Member States have demonstrated that when it comes to issues which affect their economic resources and security interests, ASEAN States have always preferred formal/legal structures or rule-based conduct:
 - ⇒ Negotiations of Boundaries take place in formalized processes
 - ⇒ Use international law principles to frame their negotiations
 - ⇒ Delimitation Agreements and Provisional Arrangements are Legal Solutions endorsed by UNCLOS and which clearly set down rules of conduct between States in maritime spaces

Negotiations versus Judicial Settlement

- **Implicit criticism of Asian States (including ASEAN States) for not using binding dispute settlement to resolve disputes**
- **But the question must be asked: is binding dispute settlement always appropriate?**
- **The value of third party dispute settlement mechanisms will depend on a wide variety of factors**
- **Negotiated Agreements are particularly useful for ASEAN States who have a predisposition towards compromise and flexibility vis-à-vis each other**