

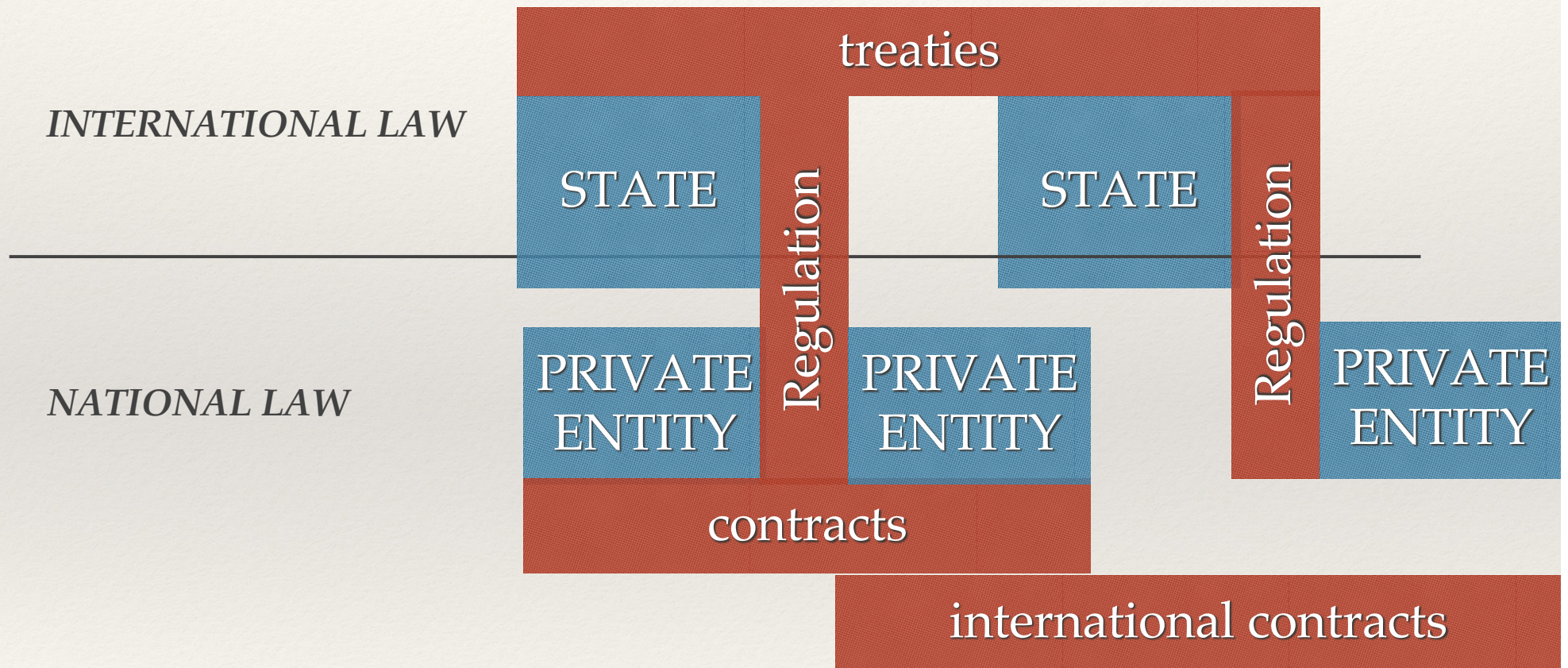


*International Arbitration in the Energy Sector
online, 12 April 2021*

*State – State Arbitration:
Maritime delimitation, islands and offshore
drilling
&
Commercial Arbitration*

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Stakeholders



*Maritime delimitation:
The role of an international arbitration*

Maritime Delimitation

1) Territorial "onshore" disputes

2) Maritime delimitation

- There was no practical need to draw a line of delimitation of the maritime boundary between two or more states.
- Energy companies have faced significant technical challenges associated with offshore exploration and development.

Maritime regimes

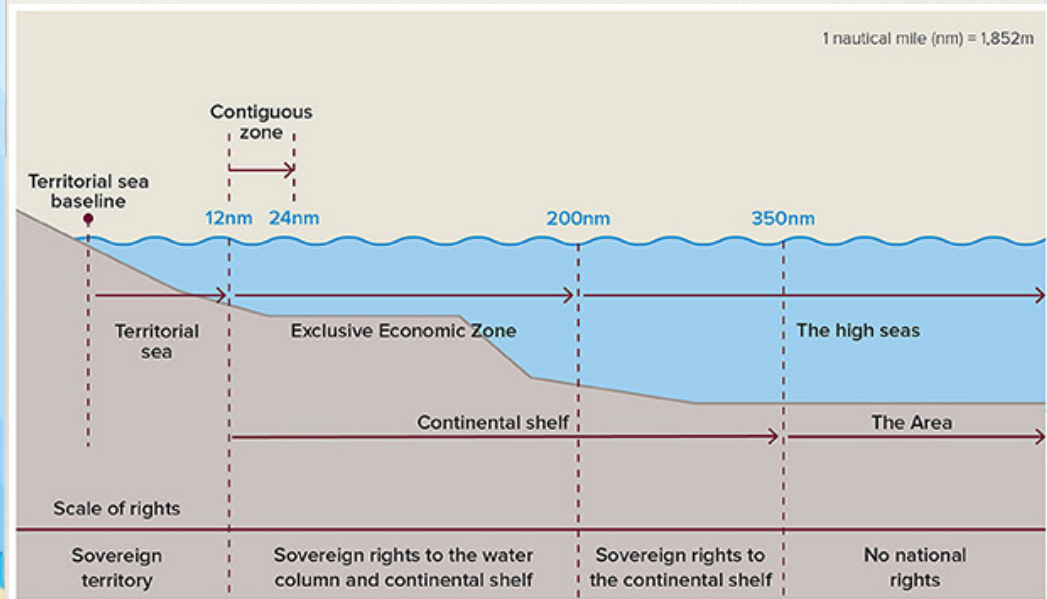
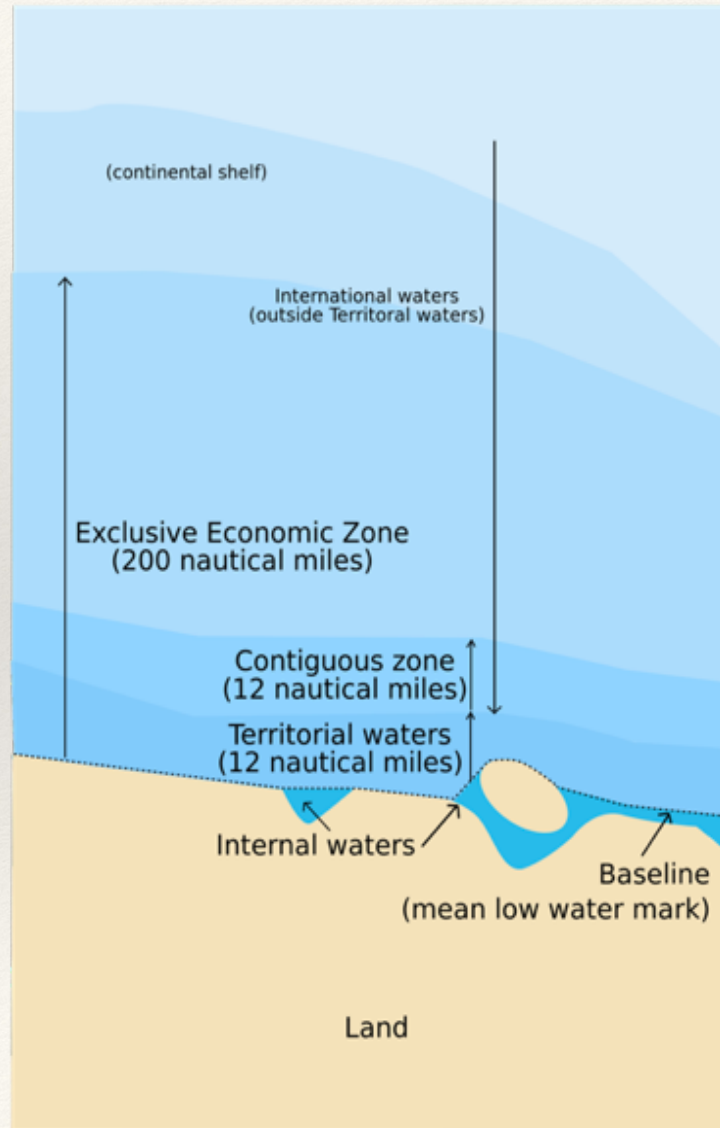
United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) is an international treaty adopted and signed in 1982. It replaced the four Geneva Conventions of 1958, which respectively concerned the territorial sea and the contiguous zone, the continental shelf, the high seas, fishing and conservation of living resources on the high seas.

UNCLOS established rules governing all uses of the oceans and their resources.

The convention has been ratified by 168 parties.

Maritime regimes



Territorial Waters

Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

SECTION 2. LIMITS OF THE TERRITORIAL SEA

Article 3

Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Continental Shelf

CONTINENTAL SHELF

Article 76 Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

- (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
- (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural

Continental shelf is a natural prolongation of the state's territory.

CS does not address superjacent waters.
CS covers only the seabed and subsoil of the submarine areas.

Continental Shelf

Article 77

Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Continental Shelf

Where the Continental Shelf extends 200 nm, UNCLOS envisages a system of global solidarity.

States having an extended shelf shall contribute to a system of sharing the revenue derived from the exploitation of mineral resources beyond 200 miles. These payments or contributions are to be equitably distributed among States parties to the Convention through the International Seabed Authority.

Article 82

Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles

1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Production does not include resources used in connection with exploitation.

3. A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource.

4. The payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis

of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.

Exclusive Economic Zone

EXCLUSIVE ECONOMIC ZONE

Article 55 *Specific legal regime of the exclusive economic zone*

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 57 *Breadth of the exclusive economic zone*

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 56 *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

High Seas

Article 89

Invalidity of claims of sovereignty over the high seas

No State may validly purport to subject any part of the high seas to its sovereignty.

The Area

Article 136 Common heritage of mankind

The Area and its resources are the common heritage of mankind.

Article 137 Legal status of the Area and its resources

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Article 140 Benefit of mankind

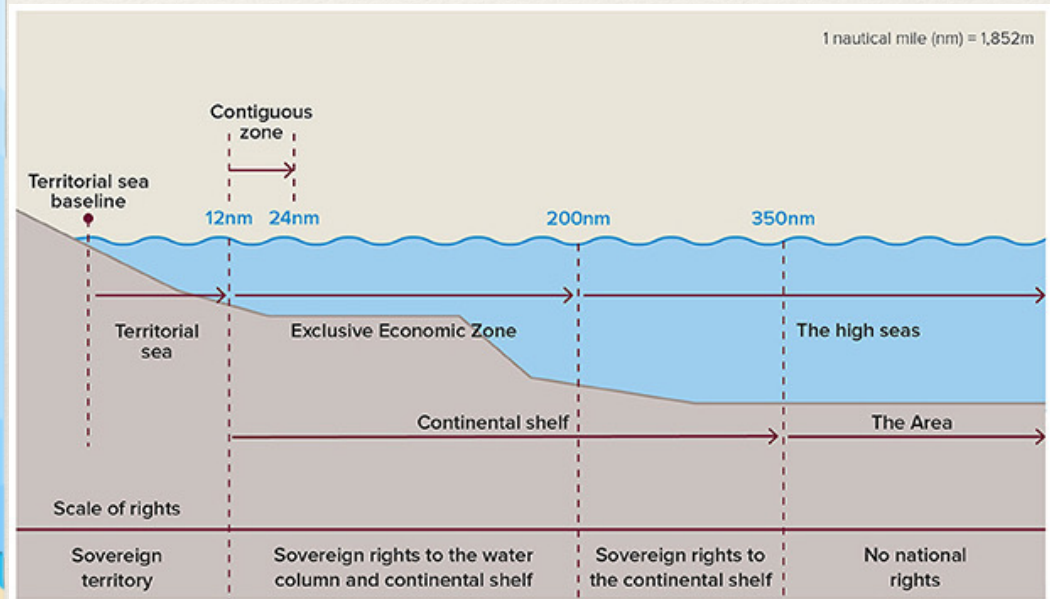
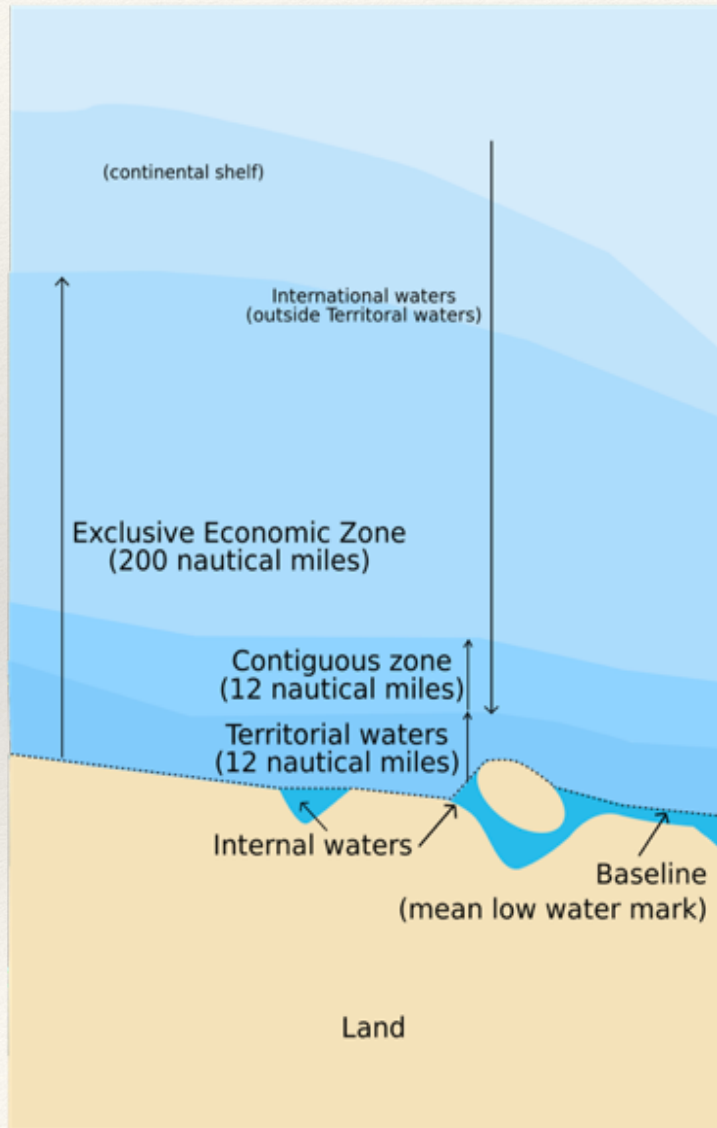
1. Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions.

2. The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160, paragraph 2(f)(i).

Though it is perpetually cold, generally dark, and subject to extreme pressures, the *deep sea contains a wealth of mineral resources, some of them in unique or highly enriched concentrations.*

The three main seabed mineral resources of interest are *cobalt-rich crusts, manganese nodules and seafloor massive sulfides.*

UNCLOS



Maritime Delimitation

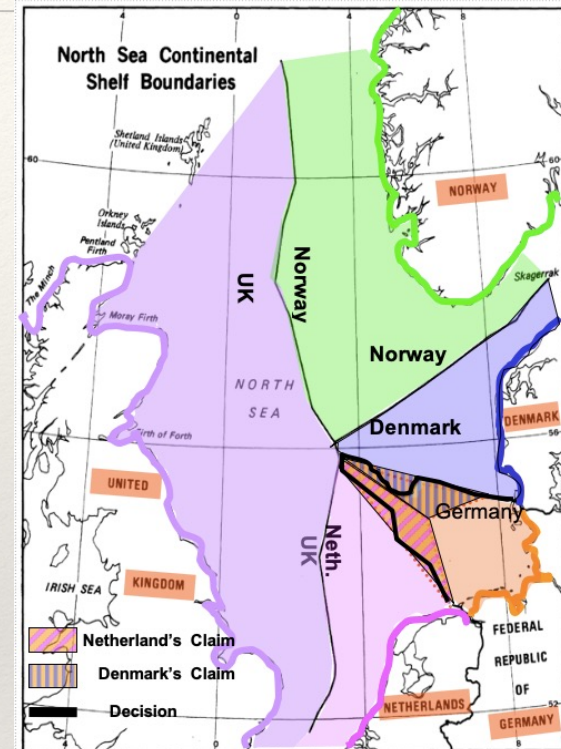
Maritime Delimitation

EEZs and CSs overlap - seas between states are often too narrow to grant coastal states full 200 nm.

UNCLOS

- ❖ Part XV of UNCLOS sets forth rules for the resolution of disputes between State Parties arising out of the interpretation or application of UNCLOS. Pursuant to Article 287(1) of UNCLOS, when signing, ratifying, or acceding to UNCLOS, a State may make a declaration choosing one or more of the following means for settling such disputes:
 - ❖ *the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany;*
 - ❖ *the International Court of Justice in The Hague, The Netherlands;*
 - ❖ *ad hoc arbitration (in accordance with Annex VII of UNCLOS); or*
 - ❖ *a “special arbitral tribunal” constituted for certain categories of disputes (established under Annex VIII of UNCLOS).*

Since UNCLOS came into force in 1994, the PCA has served as registry for 14 arbitrations under Annex VII of UNCLOS.



Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

1. The delimitation of the exclusive economic zone 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.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Maritime Delimitation

Overlapping claims for EEZs and CSs -> the delimitation.

Article 74

Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

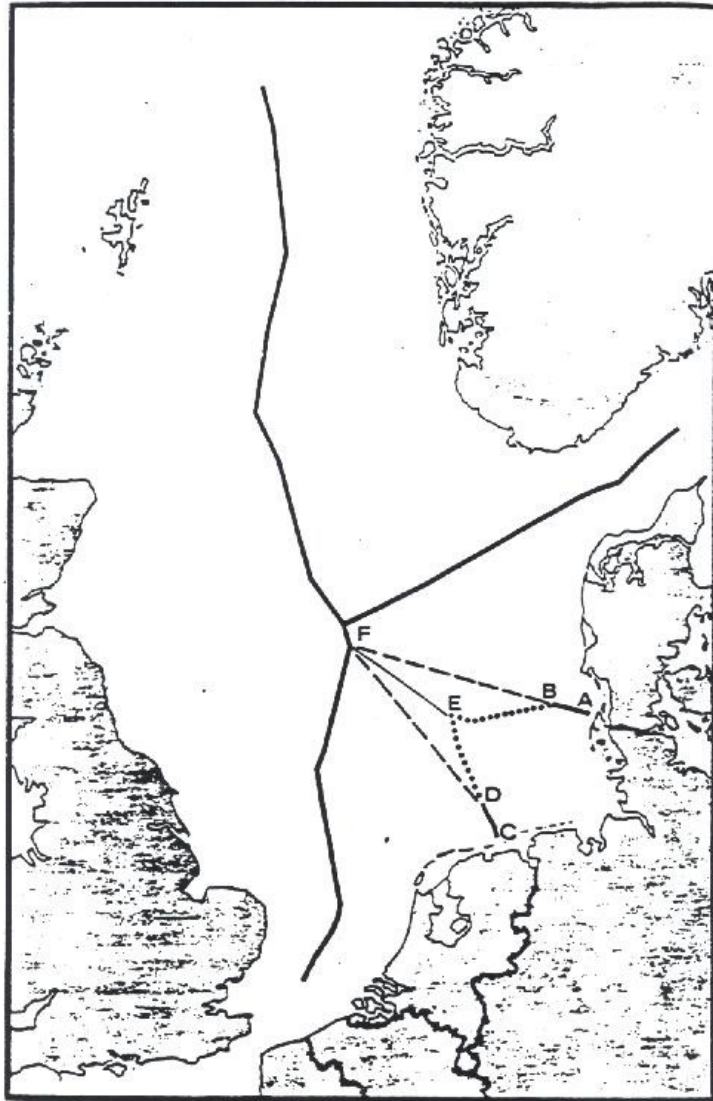
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Article 83

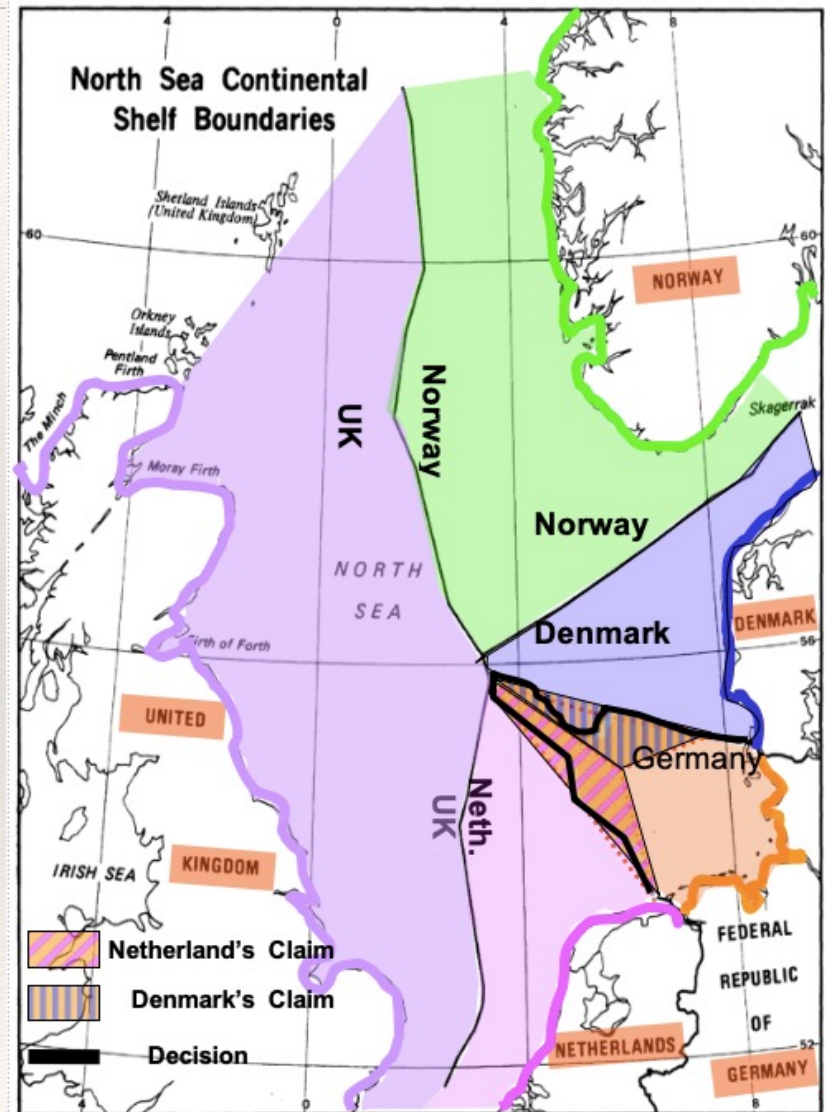
Delimitation of the continental shelf between States with opposite or adjacent coasts

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4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

Nord Sea Continental Shelf, 1969



Concaved
Germany's
costline.



Maritime Delimitation

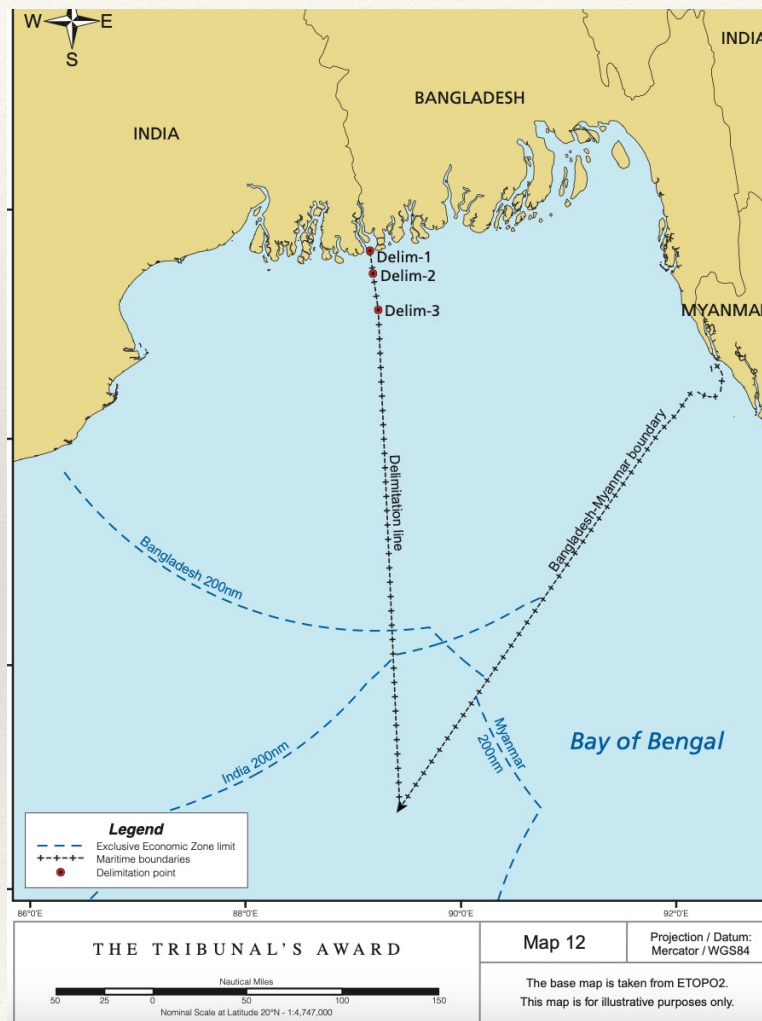
Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India

On October 8, 2009, the People's Republic of Bangladesh instituted arbitral proceedings concerning the delimitation of the maritime boundary between Bangladesh and the Republic of India pursuant to Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea (UNCLOS). The Permanent Court of Arbitration acted as Registry in this arbitration.

The arbitral tribunal delimited the territorial sea, the exclusive economic zone, and the continental shelf between the Parties within and beyond 200 nautical miles in the areas where the claims of the Parties overlap.

Jurisdiction: both Bangladesh and India are parties to the UNCLOS. Having analysed the relevant provisions of the Convention, the Tribunal found that Bangladesh had complied with the requirements for submission of the dispute to arbitration under Annex VII. The Tribunal also noted the agreement between the Parties that the Tribunal had jurisdiction to identify the location of the land boundary terminus and to delimit the continental shelf beyond 200 nautical miles.

Maritime Delimitation



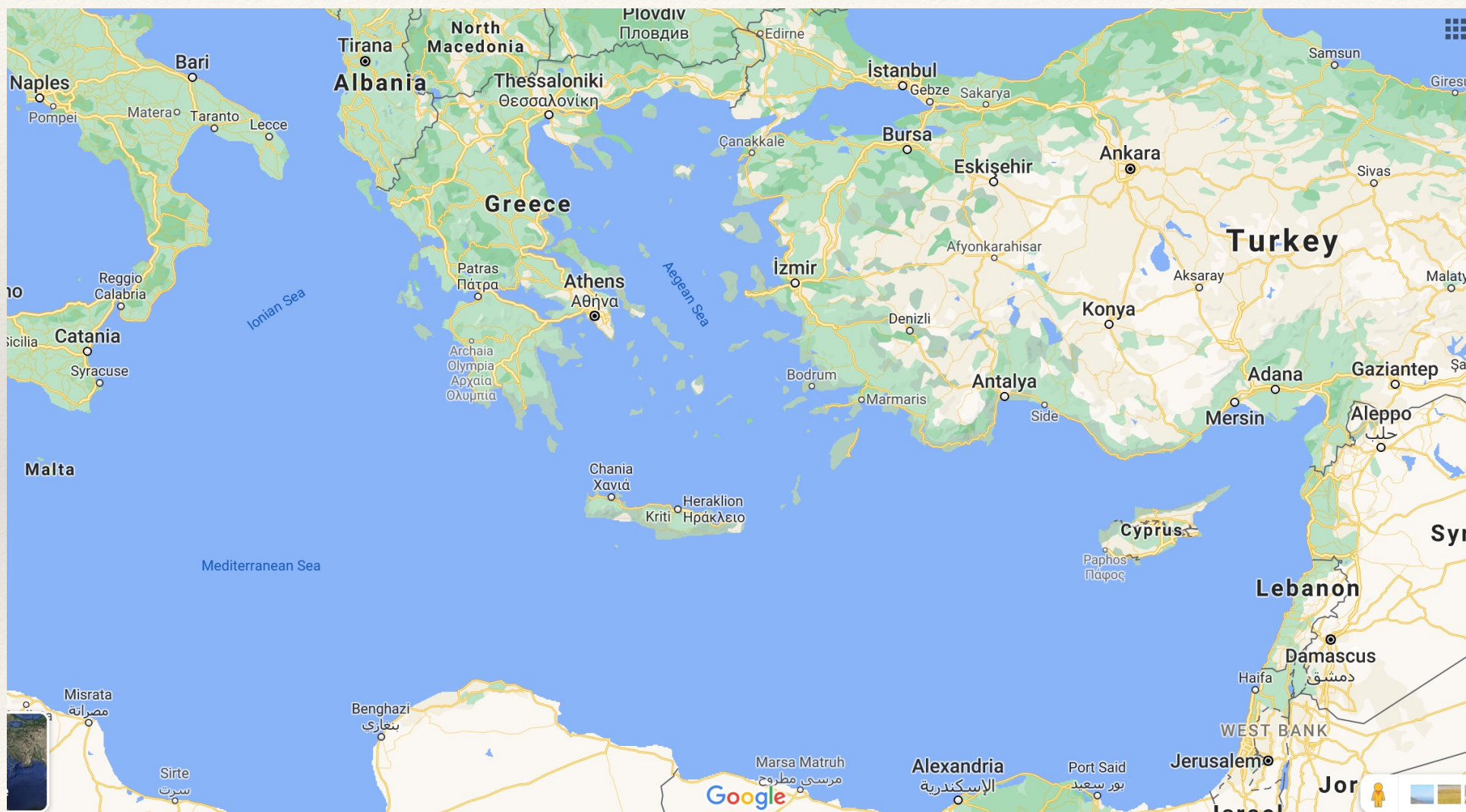
Regime of islands

Islands

Article 121 *Regime of islands*

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Energy resources in the Mediterranean Sea



Distance between Cyprus and Libanon is 142 nautical miles

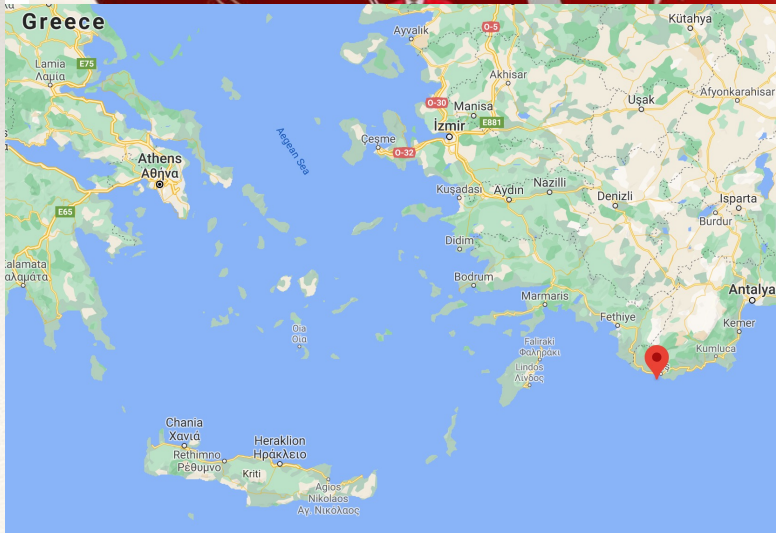
Greek islands off Turkey's Aegean coast

2 billion barrels of oil and 4 trillion of cubic meters of gas lie in the seabed of Eastern Mediterranean.

Energy resources in the Mediterranean Sea

Greece and Turkey closer to armed conflict, say experts

Turkey is threatening to send a drilling ship to waters claimed – and defended – by Greece.



Greece claims EEZ of its islands off Turkey's Aegean coast.

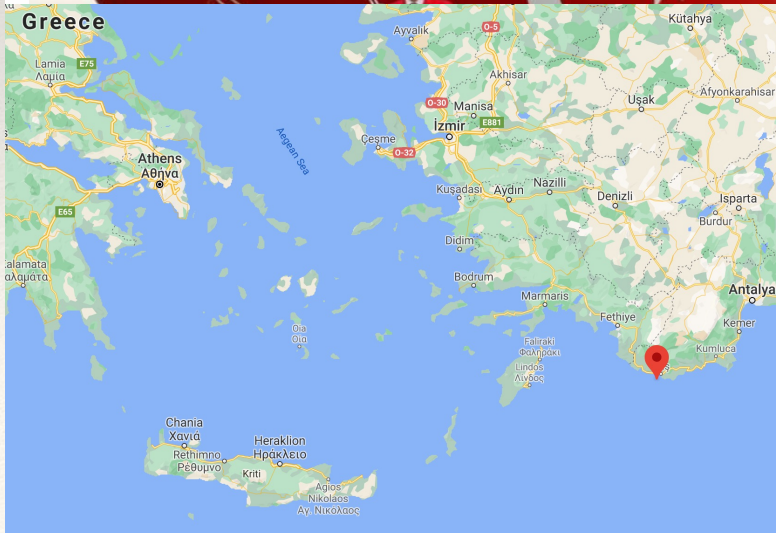
Turkey: Many Greek islands off Turkey's Aegean coast should be entitled only to a significantly reduced Exclusive Economic Zone (EEZ), if any.

According to Turkey's Foreign Minister Mevlut Cavusoglu, it was unacceptable that the small island of *Kastellorizo*, which lies just off the Turkish mainland and is more than 500 kilometres (311 miles) from Athens, has a maritime jurisdiction of 200 nautical miles in every direction.

Energy resources in the Mediterranean Sea

Greece and Turkey closer to armed conflict, say experts

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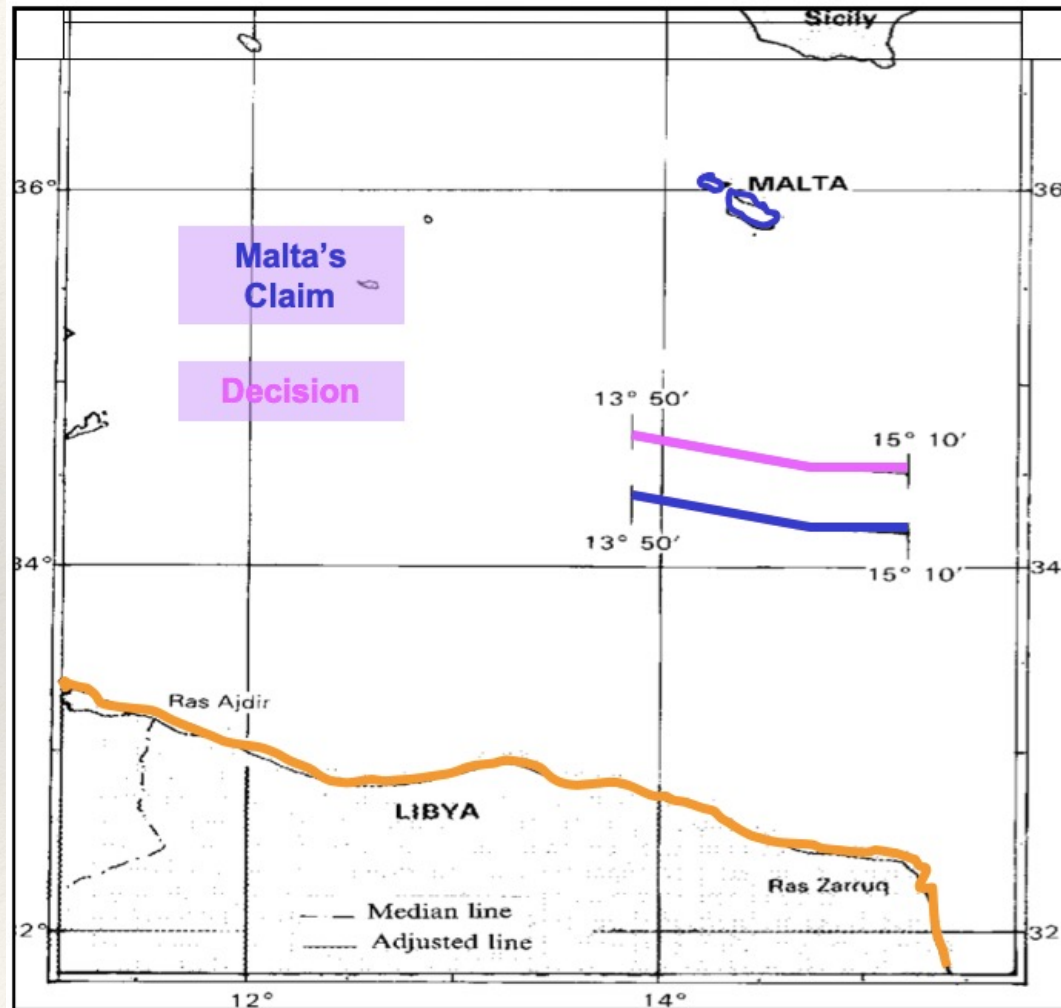
By virtue of article 121(2) UNCLOS, islands generate maritime zones. Article 121 UNCLOS reflects customary law and, accordingly, applies to non-states parties as well (Turkey did not ratify UNCLOS).

Maritime space an island can claim may be diminished depending on the circumstances (See, e.g., [Anglo-French Arbitration 1977](#), [Tunisia v Libya 1982](#), [Black Sea Case 2009](#), [Bangladesh/Myanmar 2012](#)).

Article 74 Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

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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.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

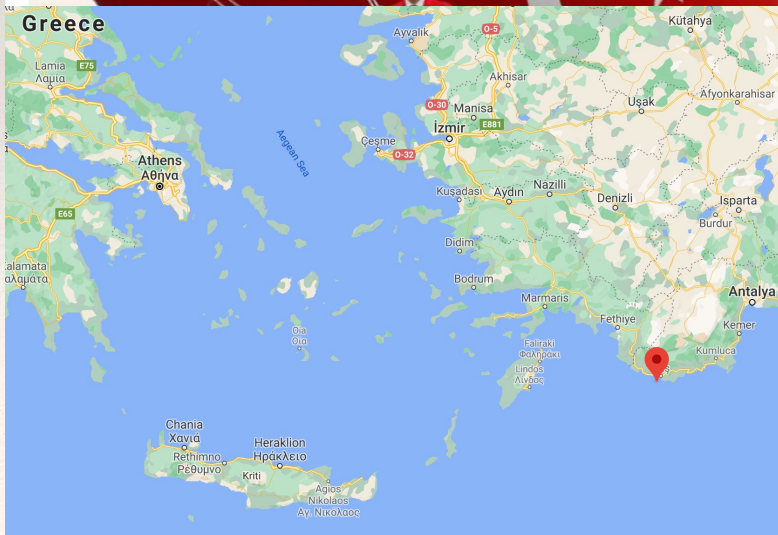
Delimitation of the areas of continental shelf: Malta Libya (ICJ)



Islands - EEZ - CS

Greece and Turkey closer to armed conflict, say experts

Turkey is threatening to send a drilling ship to waters claimed – and defended – by Greece.



In the Nicaragua v. Colombia case (2012), the ICJ put an end to the argument that one state's islands cannot have their own continental shelf because they are located on another state's continental shelf:

"The Court does not believe that any weight should be given to Nicaragua's contention that the Colombian islands are located on "Nicaragua's continental shelf". It has repeatedly made clear that geological and geomorphological considerations are not relevant to the delimitation of overlapping entitlements within 200 nautical miles of the coasts of States."

The 1969 Continental Shelf case stipulates *that all relevant factors should be considered in order to reach an equitable result*; however, the Court gave no further guidance as to how such an equitable result would be reached.

In principle islands are not deprived of the rights bestowed on them by article 121 UNCLOS, *they may not always be granted full effect in maritime boundary delimitations.*

South China Sea Arbitration

The South China Sea holds an estimated 190 trillion cubic feet of natural gas and 11 billion barrels of oil in proved and probable reserves, with much more potentially undiscovered.

SCS

The South China Sea Arbitration (The Republic of The Philippines v. The People's Republic of China)

In 2013, the Republic of the Philippines instituted arbitral proceedings against the People's Republic of China under Annex VII to the United Nations Convention on the Law of the Sea.

- 1) Historic rights and the source of maritime entitlements in the South China Sea claimed by China (so-called "nine-dash line").
- 2) *The status of certain maritime features in the South China Sea.*
- 3) The lawfulness of certain actions by China in the South China Sea.

SCS



SCS

China's artificial islands.



SCS

China's artificial islands.



SCS

The Tribunal undertook a technical evaluation as to whether certain coral reefs claimed by China are or not above water at high tide.

Article 13 Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, **it has no territorial sea of its own.**

Article 121 Regime of islands

1. An island is a naturally formed area of land, surrounded by water, *which is above water at high tide.*
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. *Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*

SCS

Features that are submerged at high tide generate no entitlement to maritime zones.

Tribunal: Many of the reefs in the SCS have been heavily modified by land reclamation and construction and recalled that UNCLOS classifies features on the basis of their natural condition. Thus, the Tribunal used historical surveys and archival materials in evaluating these features. Number of features were classified as submerged at high tide in their natural condition.

Pursuant to Article 121 (3) UNCLOS rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or CS.

According to the Tribunal, it was intended to prevent insignificant features from generating large entitlements to maritime zones that would infringe on the entitlements of inhabited territory or on the high seas and the area of the seabed reserved for the common heritage of mankind.

Conditions to be met:

the objective capacity of a feature, in its natural condition, to sustain a stable community of people or economic activity that is not dependent on outside resources or is not purely extractive in nature.

SCS

Spratly Islands – constructed installations and maintained personnel.

According to the tribunal, this modern presence is dependent on outside resources and support. Many features have been modified to improve their habitability.

The current presence of official personnel of many of the features does not establish their capacity, in their natural condition, to sustain a stable community of people and historic evidence of habitation or economic life was more relevant to the objective capacity of the features.

All of the high-tide features in the Spratly Islands are legally rocks that do not generate an EEZ or CS.

SCS

*Article 60
Artificial islands, installations and structures
in the exclusive economic zone*

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

- (a) artificial islands;
- (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
- (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

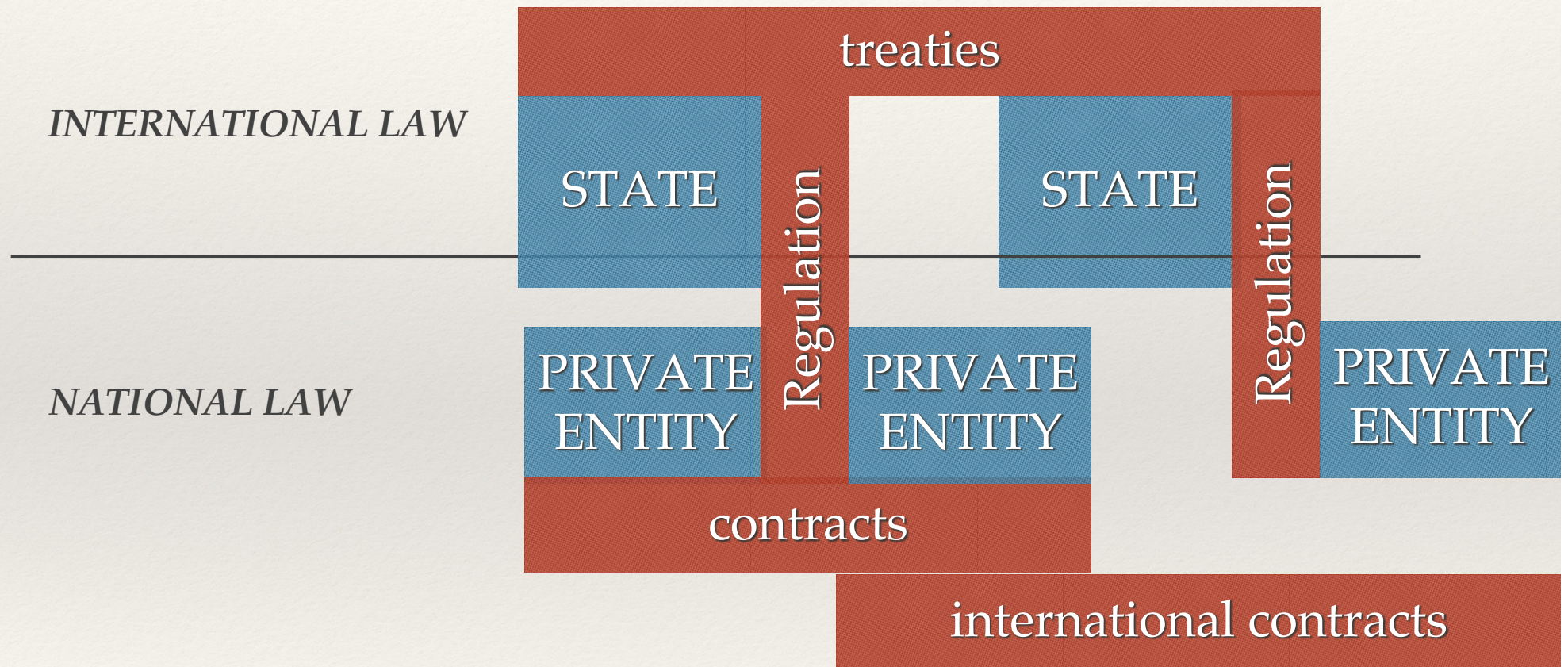
8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

Mischief Reef is located in the Exclusive economic zone of the Philippines.

Thus, PCA determined that China was in violation of its UNCLOS obligations specifically because China was operating Mischief Reef as an artificial island without the consent given by the Philippines.

Commercial Arbitration

Stakeholders



Gas Supply Transactions and Disputes

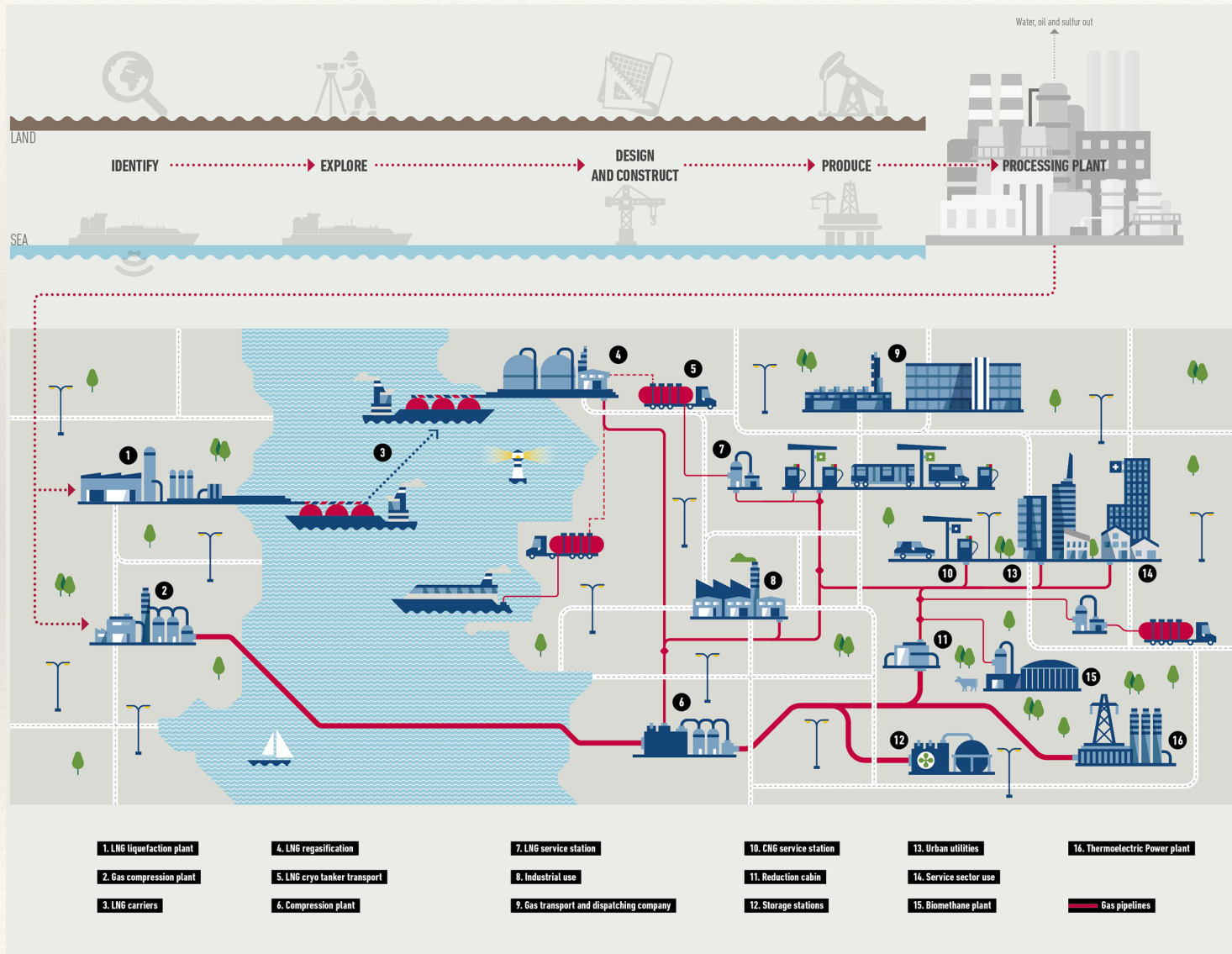
Natural gas is produced from the anaerobic decomposition of organic materials. It is found in nature in its fossil state on its own or together with oil and other hydrocarbons.

The main component of natural gas is methane (CH₄).

Natural gas is used to produce electricity, heat buildings, cook food and serves as a feedstock for chemicals.

Getting energy products to the place where there are consumed is a very challenging process.

Gas Supply Transactions and Disputes



Gas Supply Transactions and Disputes

STAGE I: Production and processing contracts

Natural gas is most commonly extracted by drilling vertically from the Earth's surface.

It is a common practice for the producer to enter into *a contract with an oilfield service contractor to drill wells*.

Contractor is paid a day rate based on the number of days necessary until the well is drilled to a target depth, or a certain amount for every foot that is drilled, or a lump sum to drill the well.

<https://www.youtube.com/watch?v=Do9dz6ypD7w>

Once the gas has been extracted, the next step is to *process it*.

Raw gas consists of a variety of hydrocarbons and contains impurities (such as sulphur). Processing facility for the gas is, thus, needed and producers enter into *gas processing contracts*.



Commercial Arbitration: Gas Supply Transactions and Disputes

STAGE II: Sales from producers to wholesalers (midstream)

There are 2 primary ways to transport natural gas over long distances to end markets.

A) *Pipelines*

B) *LNG* (involves cooling of the gas in a liquification facility to $-161\text{ }^{\circ}\text{C}$)

Pipeline:

Is there a pipeline?

Should it be built by the producer / joint venture between buyer and seller / third party?

Contractual relationship between the shipper and the owner or operator of the pipeline.

- Supplying gas by pipeline is extremely capital intensive.
- Thus, **producers** need *guaranteed purchases* of sufficient quantities of gas over a long period of time.
- **Wholesalers** aim to secure supply over an extended period of time since they have usually significant downstream supply obligations.



LONG TERM GAS CONTRACTS (Gas Sales and Purchase Agreements)

- Terms between 10 and 30 years.