



Regulating and Managing Energy Resource Across International Borders JDAs and JDZs

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History

- Freedom of the Seas
 - 17th Century
 - Canon Shot
 - Three nautical miles
 - International Waters
 - Free to all nations, but property of none
 - Fishing and navigation

Natural Resources

- Oil and Gas
- The “easy” oil and gas has been found
- Disputed areas
 - Fallow
- Only one-third of the world’s maritime boundaries have been delimited
 - Alberto Szekely et al., *Transboundary Hydrocarbon Resources: The Puerto Vallarta Draft Treaty*, 31 Nat. Resources J., 609, 613 (1991)

Delimitation of International Maritime Boundaries

○ International Law

- Compulsory jurisdiction of international courts and tribunals is subject to the consent of the States
- International conventions
- International customs
- General principles of law
- Judicial decisions
- Thinking of experts

○ Stare Decisis

- Decisions of International Court of Justice (ICJ) are binding only as to the parties of a particular case and in connection with such case
- Persuasive authority, not a binding precedent

Delimitation of International Maritime Boundaries *(cont'd.)*

- Sovereignty – jurisdiction
 - Non-intervention in the area under jurisdiction of other States
 - Compliance with international laws and treaties subject to State's consent
- Territorial sovereignty does not extend beyond borders
- Sovereign rights over mineral resources located in the soil and subsoil of land territory and territorial sea to an unlimited depth
- States have exclusive sovereign rights rather than full territorial sovereignty over mineral resources located on the continental shelf

Delimitation of International Maritime Boundaries *(cont'd.)*

Delimitation of the Continental Shelf

- Three mile territorial sea limit
- Truman Proclamation (1945)
 - Natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coast of the United States are subject to United States' jurisdiction and control
 - Delimitation of boundary by mutual agreement and based on equitable principles

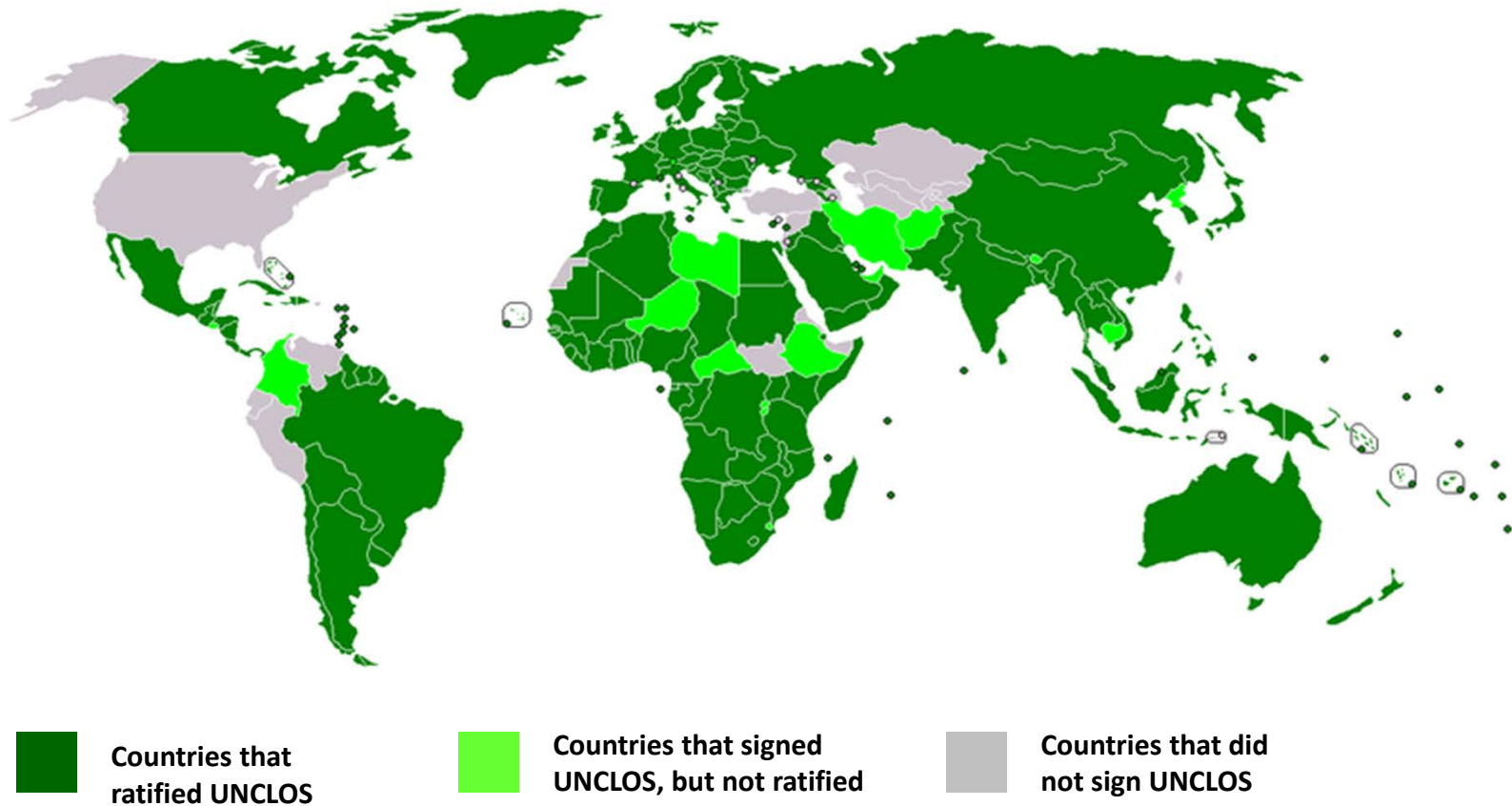
Delimitation of International Maritime Boundaries *(cont'd.)*

- Geneva Convention on the Continental Shelf (1958)
 - Principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured
 - ...unless justified by special circumstances
- ...to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.”

Delimitation of International Maritime Boundaries *(cont'd.)*

- United Nations Convention on the Law of the Sea (UNCLOS) (1982)
 - Adopted in December 1982, into force in November 1994
 - 163 countries joined UNCLOS (including the EU)
 - http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm
 - U.S. has not signed UNCLOS
 - Colombia, Israel and Venezuela

Delimitation of International Maritime Boundaries *(cont'd.)*



http://en.wikipedia.org/wiki/United_Nations_Convention_on_the_Law_of_the_Sea#cite_note-1

Delimitation of International Maritime Boundaries *(cont'd.)*

- UNCLOS - Territorial Sea
 - Corresponding to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the UNCLOS
- UNCLOS - Continental Shelf
 - Corresponding to the natural prolongation of the land territory to the continental margin's outer edge, 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

Delimitation of International Maritime Boundaries *(cont'd.)*

UNCLOS - Exclusive Economic Zones (EEZ)

- Natural prolongation of its land territory to the outer edge of the continental margin
 - Not to exceed 350 nautical miles or 100 nautical miles beyond the 2,500 meter isobath
- 200 nautical miles from the baseline of the territorial sea
 - Sovereign rights over exploration and exploitation of natural resources

UNCLOS – Article 76

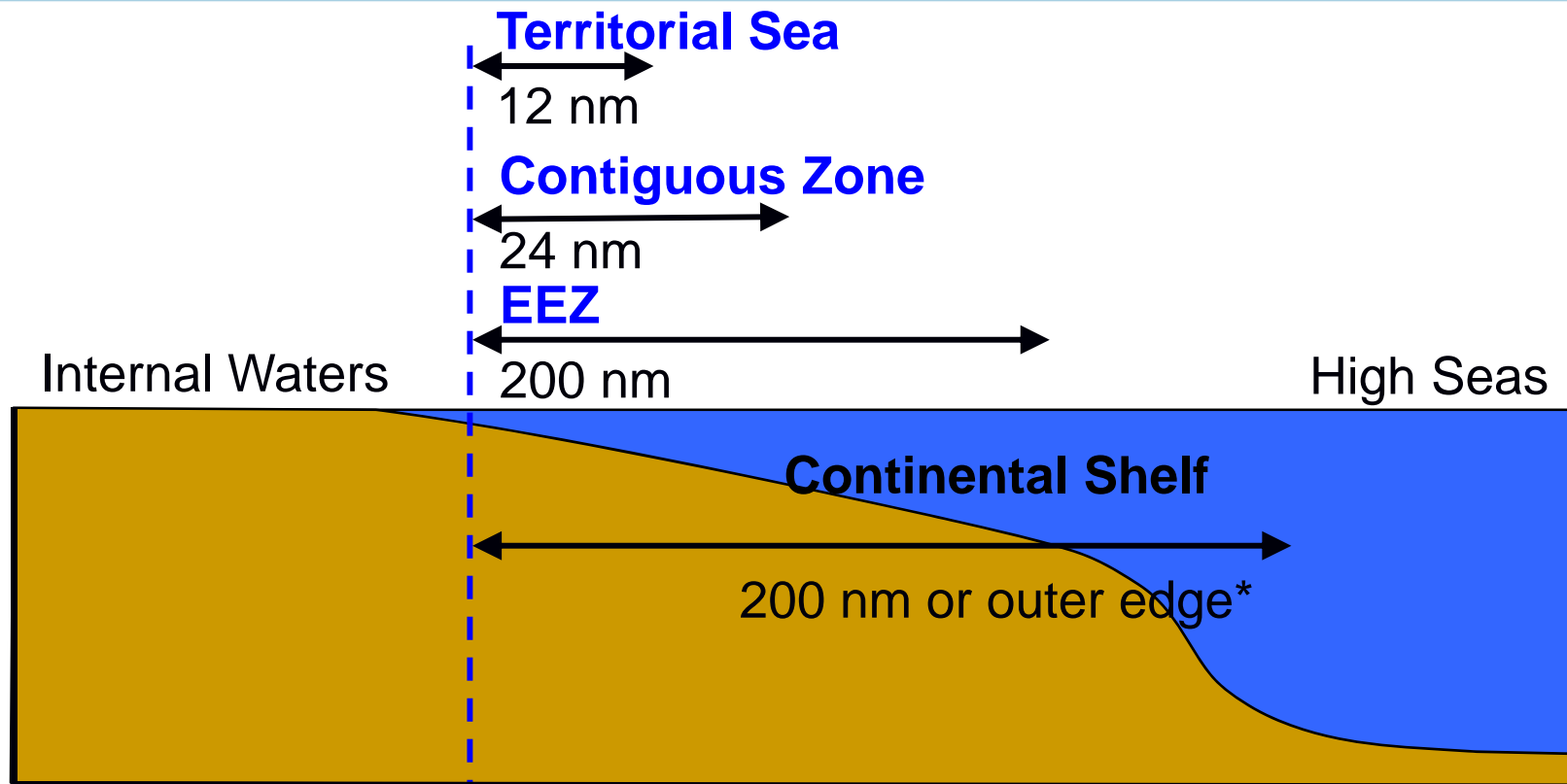
Definition of the continental shelf

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.

UNCLOS – Article 76

Definition of the continental shelf

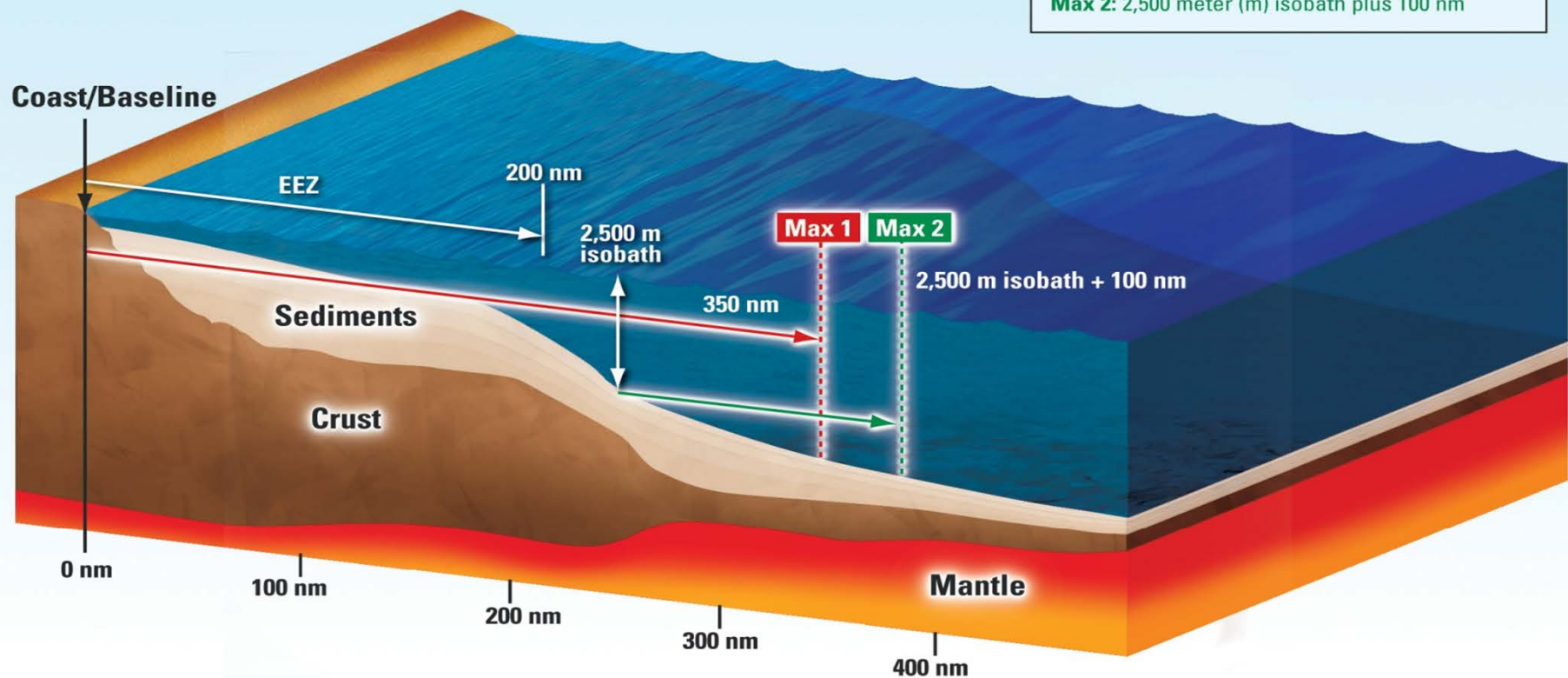
5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical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



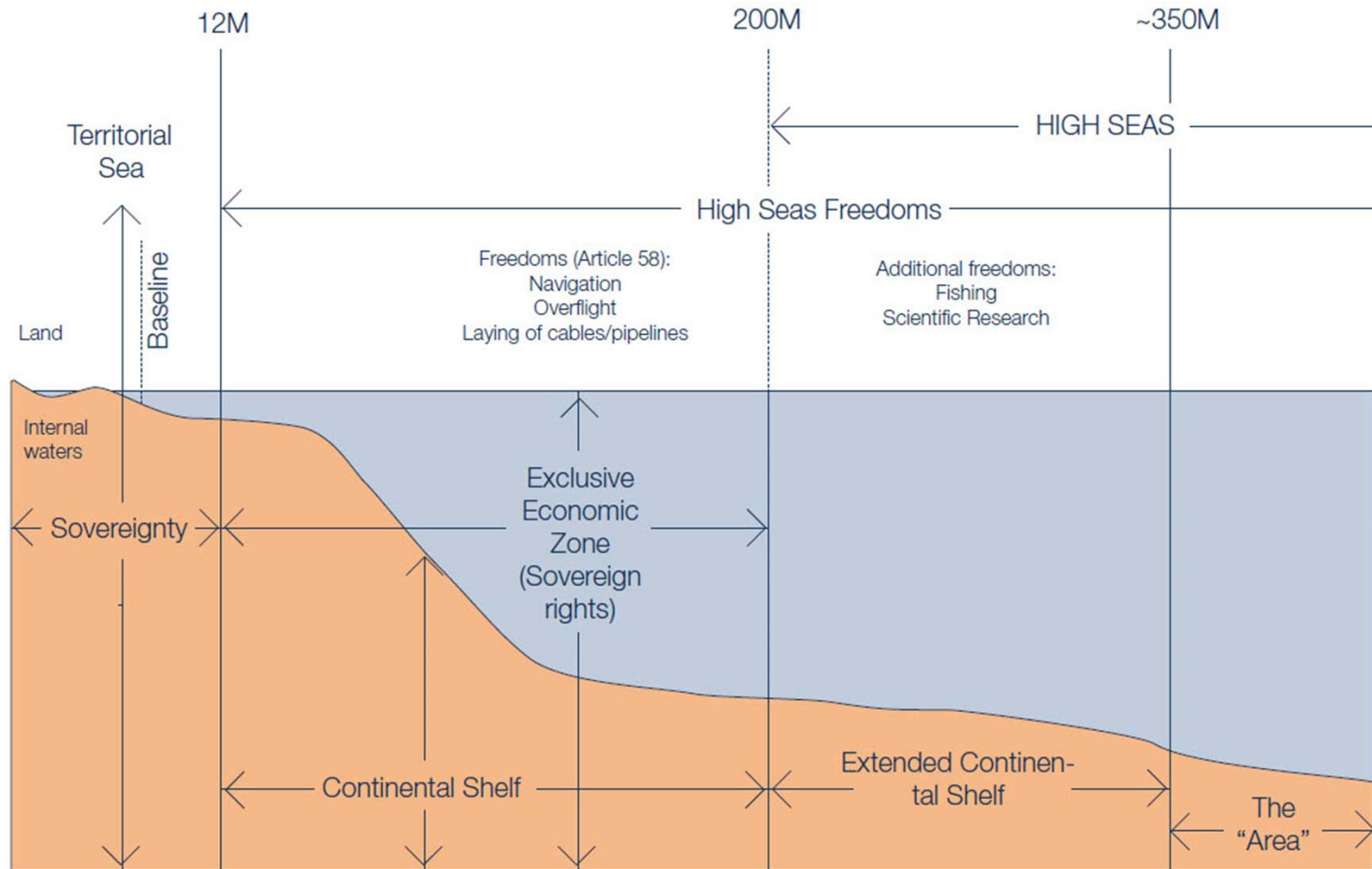
*Not more than 350 nm or 100 nm beyond 2500m isobath

Extended Continental Shelf Constraint Lines

Max 1: 350 nautical miles (nm) from baselines OR
Max 2: 2,500 meter (m) isobath plus 100 nm



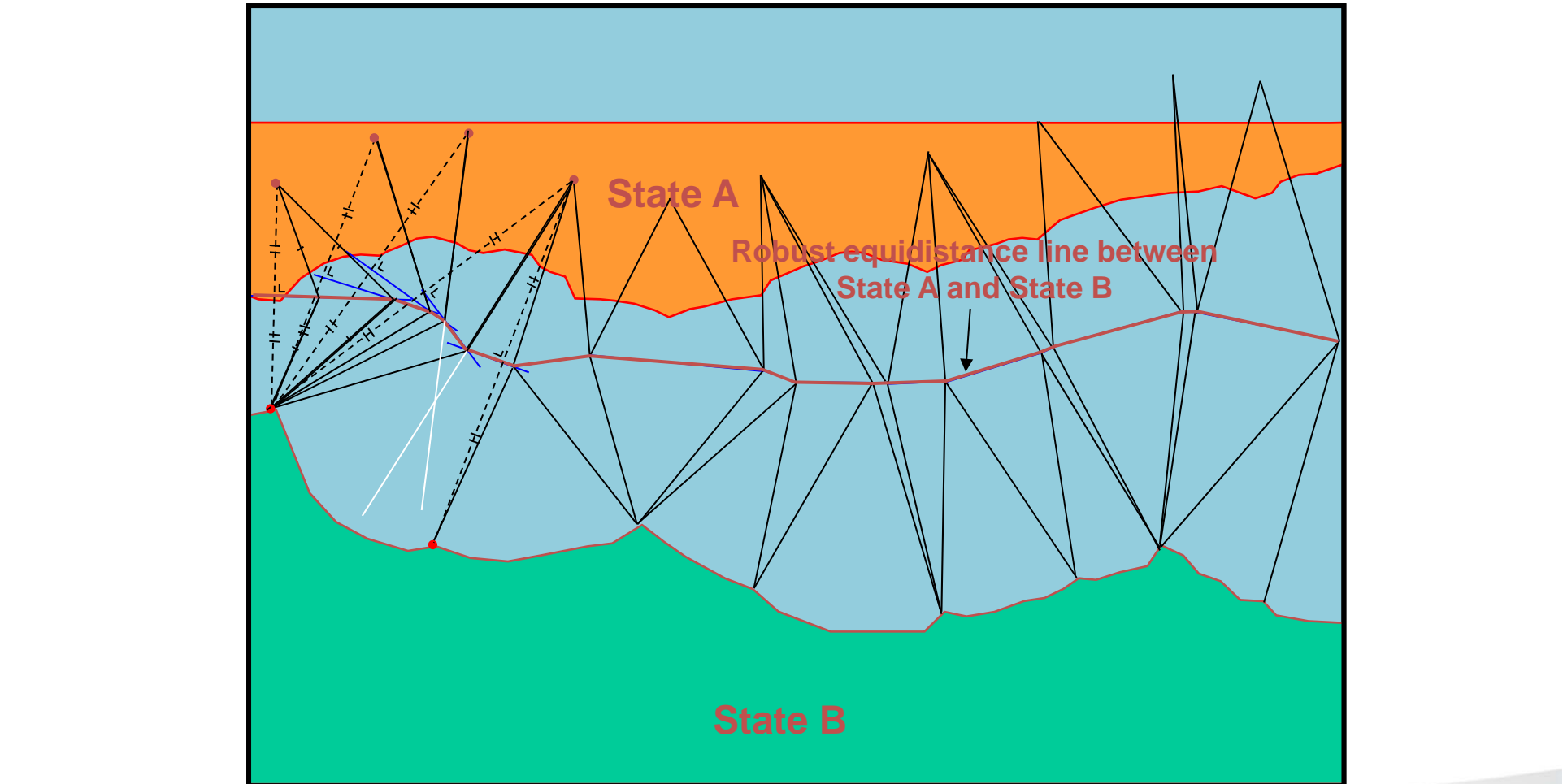
Zones Established Under UNCLOS



Delimitation of International Maritime Boundaries *(cont'd.)*

- UNCLOS – Islands
 - Naturally formed area of land, surrounded by water, which is above water at high tide
 - Territorial sea, contiguous zone, EEZ and continental shelf: same provisions of UNCLOS applicable to other land territory

Equidistance Line Construction



Boundary Disputes – Pragmatic Approaches

Cooperative Agreements in State Practice (*cont'd.*)

- Contractual Management

- Agreement establishing a system of compulsory joint ventures between States and their national oil companies in designated joint development zones
- 1974 Agreement between Japan and South Korea
 - Exploration and exploitation in defined joint development areas
 - Subdivided zones by entities nominated by both States
 - Joint Operating Agreements approved by both States

Boundary Disputes – Pragmatic Approaches

Cooperative Agreements in State Practice (*cont'd.*)

- Creation of Legal Authority – (ZOC or JDZ)
 - More complicated
 - Institutionalized option
 - Reduced national autonomy
 - States establish an international joint authority or commission with legal personality, licensing and regulatory powers

Boundary Disputes – Pragmatic Approaches

Cooperative Agreements in State Practice (*cont'd.*)

- Creation of Legal Authority (*cont'd.*)
 - Malaysia-Thailand Joint Development Agreements (1979-1990)
 - Established the Malaysia-Thailand Joint Authority
 - Timor Gap Zone of Cooperation Treaty between Indonesia and Australia (1989)
 - Established a Ministerial Council and Joint Authority
 - Area A – controlled one of cooperation
 - Zone B – controlled by Australia
 - Zone C – controlled by Indonesia

JOINT DEVELOPMENT AGREEMENTS

- Cooperative practice to preserve the unity of the reservoir while respecting sovereign rights of the interested States
- Arrangement between States to develop and share in agreed proportions the oil found within a geographic area whose sovereignty is disputed
 - Boundaries not defined or more than one State is entitled to that area under international law
- Temporary solution without prejudice to subsequent delimitation of maritime boundaries
- Pragmatic development of oil and gas resources that straddle state borders as one unit

JOINT DEVELOPMENT AGREEMENTS (*cont'd.*)

- Reasons for executing a JDA
 - Exploitation of the resources as soon as possible
 - Delay in delimitation process could result in negative impact on bilateral relations
 - Solution already adopted in different situations
 - Reduce costs and conserve natural resources
 - Maximize economic benefits
- Binding agreement with legal obligations between contracting States – “pacta sunt servanda” – Vienna Convention on the Law of Treaties
- International treaties need to be ratified by the States and incorporated into national law

DEVELOPMENT OF COMMON DEPOSITS

- Specific rules in view of fluid, migratory nature of oil and gas
 - Rule of Capture
 - Competitive drilling and physical waste of resources
 - Containership Theory
 - Rule of sovereignty over the subsoil
 - Cooperation Rule
 - Obligation not to cause material damage
 - Exchange information

OBLIGATION TO COOPERATE UNDER CUSTOMARY INTERNATIONAL LAW

- General principle of cooperation between States sharing natural resources
- Optimum use of resources without causing damage to legitimate interest of adjacent States
- No specific and legally enforceable obligation
- Reasons to cooperate
 - Prevent neighboring States from unilaterally extracting oil from the common reservoir
 - Lower costs
 - Maximize production rates and economic benefit
 - Protection of sovereign rights

ICJ DECISIONS

- Adoption of three different approaches
 1. Equidistance Line Rule
 - Gulf of Maine case between United States and Canada
 2. Result-Oriented Equity Rule
 - 1969 North Sea Continental Shelf
 - 1985 Libya / Malta decisions
 3. Equidistance-Special Circumstances / Corrective-Equity Rule
 - 2001 Qatar / Bahrain
 - 2002 Nigerian / Cameroon

GENERAL STRUCTURE OF AGREEMENTS

- Joint Development Agreements are treaties and governed by the Vienna Convention of the Law of Treaties
- Treaty is to be incorporated into internal laws
- Joint Development Zone
 - Considers the concerns of both States
 - Allocates control, taxes (benefits) equitably

GENERAL STRUCTURE OF AGREEMENTS

(cont'd.)

- Defining the JDZ
 - Without prejudice to individual claims of sovereignty
 - One or more zones
- Allocation of taxes (benefits)
 - Equal sharing, but variations exist
 - Senegal - Guinea-Bissau agreement of 1993 (85:15 split in favor of Senegal)
 - Nigeria - São Tomé e Príncipe JDZ of 2001 (60:40 split in favor of Nigeria)
 - Australia - Indonesia original Timor Gap Agreement (50:50 / 90:10 / 10:90)

GENERAL STRUCTURE OF AGREEMENTS

(cont'd.)

- Management – protection of the rights of both States
- Single state structure
 - Bahrain - Saudi Arabia agreement of 1958
- Two states joint venture structure
 - Japan - South Korea JDZ
- Joint Authority structure (may contain more than one level of authority)
 - Thailand - Malaysia Agreement (1979/1990)
 - Australia - Indonesia Timor Gap Treaty (1989)
 - Nigeria - São Tomé e Príncipe JDZ (2001)
 - Australia - East Timor Sea Treaty (2002)

GENERAL STRUCTURE OF AGREEMENTS

(cont'd.)

- Governing Law
 - Treaty vs. the Law of a State
 - Oil tax and licensing regime, civil, criminal and labor law
 - Regulations governing health, safety and environmental issues
- Agreement with operator / contractors
 - Production Sharing Agreement
 - Concession (Royalty / Tax)
 - Service Contract

GENERAL STRUCTURE OF AGREEMENTS

(cont'd.)

- Sharing resources
 - How should the oil and gas be allocated?
- Operational authority and approval
 - How much authority is delegated to operator?
 - How does the approval process function?

GENERAL STRUCTURE OF AGREEMENTS

(cont'd.)

- Financial Provisions
 - One or both of the States
 - Joint Authority
- Dispute Resolution
 - Consultation
 - Negotiation
 - Conciliation
 - Arbitration

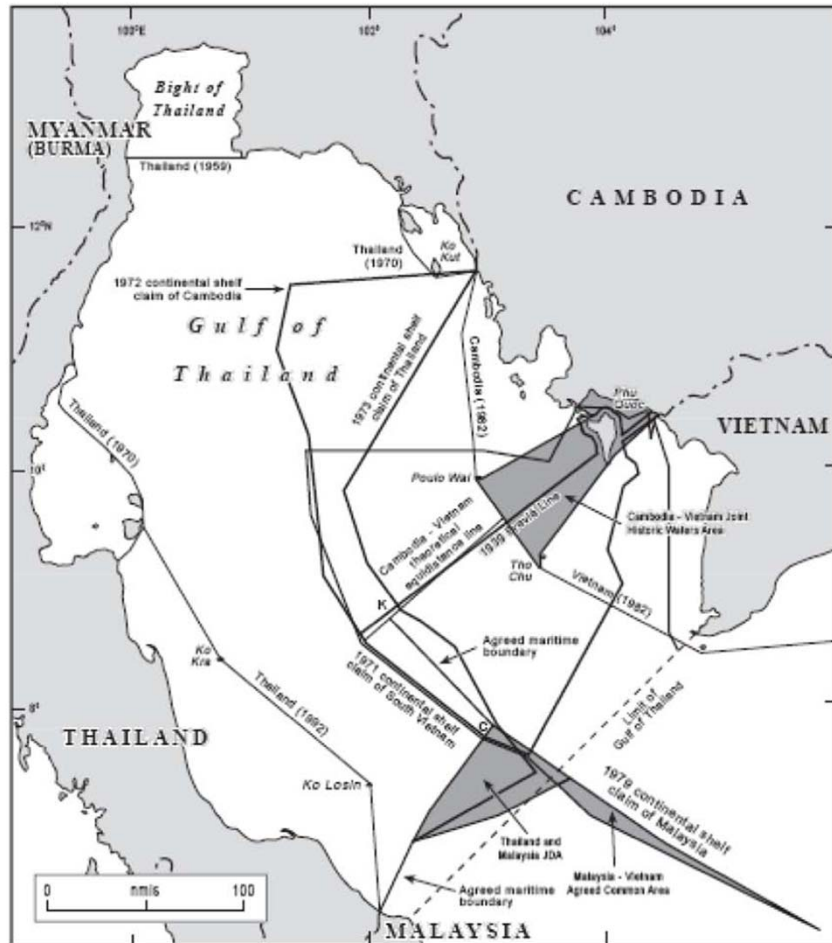
Pragmatic Examples

Provided as a teaching tool and not to further any position as to borders, boundaries or government positions



VIETNAM - MALAYSIA JDA

- 1992: MOU for joint development in the Gulf of Thailand by and between Vietnam and Malaysia
- Coordination Committee formed by eight members (nominated by PetroVietnam and Petronas)
 - Guidelines for the management of operations



VIETNAM - MALAYSIA JDA (*cont'd.*)

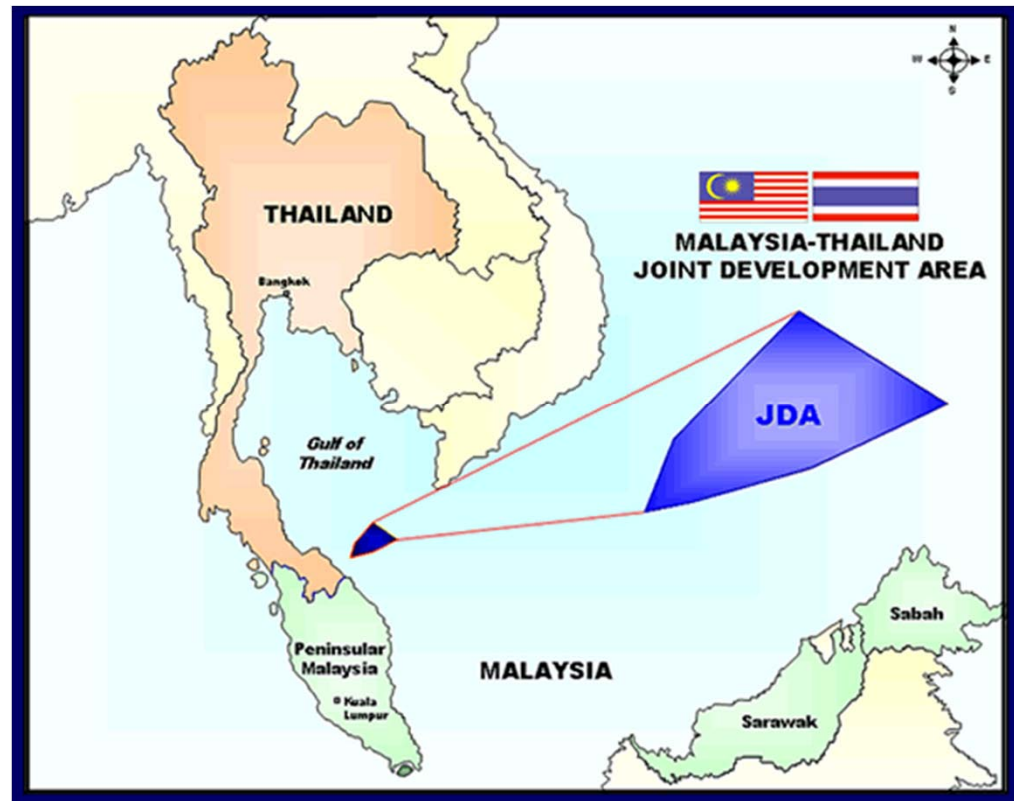
- Invitation of contractors by Petronas on behalf of the Committee
- Governing law of the Assignment Agreement (Production Sharing Agreement): Law of Malaysia
- Allocation of interests/costs - 50:50
- Result: Economic benefit for both countries

MALAYSIA-THAILAND JDA

- Malaysia - Thailand JDA (1979-1990)
 - Established the Malaysia - Thailand Joint Authority
 - Held all rights and responsibilities for the exploration and exploitation of natural resources in the JDZ
- Criminal jurisdiction
 - JDZ divided into north (jurisdiction of Thailand) and south (jurisdiction of Malaysia)
 - Dividing line not to be construed as indicating the border

MALAYSIA - THAILAND JDA (*cont'd.*)

- Royalty of 10% of gross production payable to Joint Authority (50:50)
- Production Sharing Contract



Source: <http://www.mtja.org/GIF/a1.gif>

OTHER SOUTH CHINA SEA EXAMPLES

- Joint Development Trends:
 - 2000: China – Vietnam Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin
 - 2002: Petronas (Malaysia) – Pertamina (Indonesia) – PVN (Vietnam) formed Con Son Joint Operating Company (“JOC”) at Nam Con Son Basin
 - 2003: Petronas (Malaysia) – Pertamina (Indonesia) – PVN (Vietnam) entered into Tripartite Cooperation Agreement for Block SK305 offshore Sarawak and formed PCPP JOC

OTHER SOUTH CHINA SEA EXAMPLE

(cont'd.)

- 2003: Petronas (Malaysia) – PVN (Vietnam) formed Lam Son JOC at Cuu Long Basin offshore Vietnam
- 2005: PVN (Vietnam) – PNOC (Philippines) – CNOOC (China) joint seismic survey in the South China Sea



Management and Cooperation Agreement between Senegal and Guinea Bissau (1995)

- Resources – Senegal 85% / Guinea Bissau 15%
 - Fishery - Senegal 50% / Guinea Bissau 50%
- Establish an International Agency for the exploitation
 - Agency shall “succeed Guinea Bissau and Senegal with regard to rights and obligations....”
- “Pool the exercise of the respective rights, without prejudice to legal titles....”

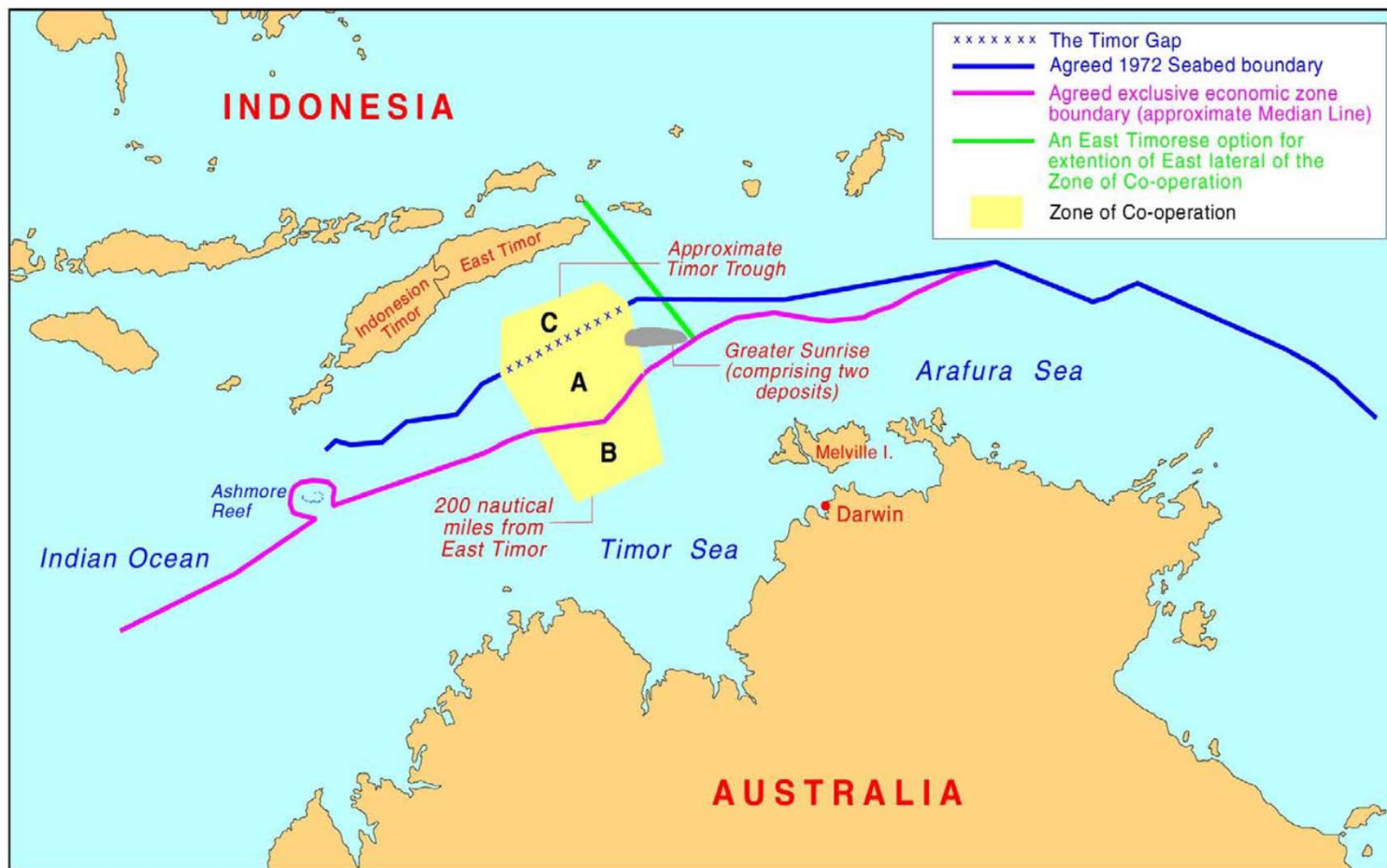
Management and Cooperation Agreement between Senegal and Guinea Bissau (1995)

- Ratified 1995 and “...in force for a period of twenty years and shall be automatically renewable.”
- Disputes
 - Direct negotiations
 - Six months
- International Court of Justice

AUSTRALIA / INDONESIA JDA EXAMPLE

- Timor Gap Zone of Cooperation Treaty between Indonesia and Australia (1989)
 - Established a Ministerial Council and Joint Authority
 - Area A of the zone of cooperation (50:50 later 90:10)
 - Zone B controlled by Australia (10:90 later 90:10)
 - Zone C controlled by Indonesia (90:10)
- Production Sharing Contracts

AUSTRALIA / INDONESIA JDA EXAMPLE



AUSTRALIA / EAST TIMOR TIMOR SEA TREATY

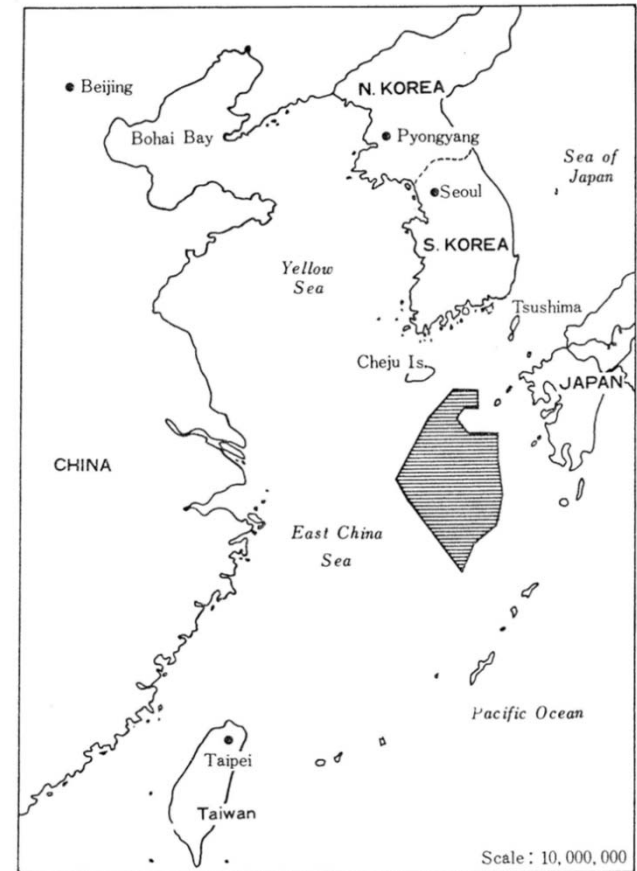
- 2002: Australia and East Timor entered into a Joint Petroleum Development Agreement
 - Bayu-Undan Field – ratified by both countries
- 2003: Australia and East Timor entered into an International Unitization Agreement
- Zone A – 90:10 allocation in favor of East Timor
- Three-tiered management structure
 - Ministerial Council / Joint Commission / Designated Authority

AUSTRALIA - EAST TIMOR TIMOR SEA TREATY *(cont'd.)*

- East Timor's claim:
 - Dispute to be settled in accordance with United Nations Convention on the Law of the Sea (UNCLOS)
- Australia's claim
 - Prior Timor Gap Treaty with Indonesia
- Maritime borders / negotiation / resort to agreed arbitration
- Joint Development Zone - without prejudice to the eventual boundary delimitation

JAPAN-SOUTH KOREA JOA

- Agreement between Japan and South Korea (1974)
- Exploration and exploitation in the defined joint development area
- Subdivided zones by entities nominated by both States
- Joint Operating Agreement, approved by both States
- Single entity with exclusive operational control over the relevant sub-zone



Map 4.2 The Joint Development Zone

JAPAN-SOUTH KOREA JOA *(cont'd.)*

- Expenses incurred in the exploration and exploitation phases were shared equally (50:50)
- Concessionaire was responsible only to its State with respect to any taxes and burdens

IGERIA – SÃO TOMÉ E PRÍNCIPE JDZ

- 2001: JDZ in overlapping EEZs
- 60:40 allocation in favor of Nigeria
- “Without prejudice” clause
- Joint Authority and Joint Ministerial Council
- 2003 licensing round: Nine blocks on offer received 33 bids from 23 companies



SUDAN – SAUDI ARABIA COMMON ZONE

- Sudan and Saudi Arabia (1974)
 - Common zone in the central part of the Red Sea that lies between both States
- Exclusive sovereign rights
 - Water depth was less than 1000 meters
- Common Zone
 - Water depth greater than 1000 meters
 - Equal and exclusive sovereign rights by both States
- Joint Commission granted licenses and concessions for exploration and exploitation of natural resources

TUNISIA – LIBYA JDZ

- Three agreements in relation to disputed borders
- Delimitation agreement - ICJ judgment (1982)
- JDZ in the Gulf of Gabes area
 - Result of delimitation of continental shelf boundary
- Libya - Tunisia agreement over production in Libya

TUNISIA – LIBYA *JDZ* (cont'd.)

- Libyan - Tunisian exploration company
 - Special status of an offshore enterprise to explore the gas field in the northwestern part of the JDZ
- Tunisia granted 10% of production in the southeast part of the joint zone on the Libyan continental shelf



Boundary Disputes: Pragmatic Solutions to Sharing Oil and Gas



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