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IMPACT OF ACCESS TO OIL AND GAS RESOURCES ON INTER-STATE DISPUTE RESOLUTION

LL.M. THESIS

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Here I am, at the end of this journey and hopefully, at the beginning of a new one. I dedicate this work to those who never cease to be curious about the world.

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ABBREVIATIONS

AJIL **:** American Journal of International Law

ASIL : American Society of International Law

AÜSBF Yay. : Ankara Üniversitesi Sosyal Bilgiler Fakültesi Yayınları

As. Dis. Rev. : Asian Dispute Review

As. Y. Int'l Law: Asian Yearbook of International Law

BAU HF Der.: Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi

Berkeley J. Int'l Law: Berkeley Journal of International Law

BGR : Bundesanstalt für Geowissenschaften und Rohstoffe

CDC : Common Deposit Clause

CUP : Cambridge University Press

CLCS : Commission on the Limits of Continental Shelf

CFSP : European Union Common Foreign and Security Policy

EJIL : European Journal of International Law

EJIL: Talk : Blog of the European Journal of International Law

EU **:** European Union

EUL J Soc. Sci.: European University of Lefke Journal of Social Sciences

Fed. Reg. : US Federal Register

GAR : Global Arbitration Review

GMF : German Marshall Fund

HKIAC : Hong Kong International Arbitration Center

IBA : International Bar Association

ICJ : International Court of Justice

ICJ Statute : Statute of International Court of Justice

ILC : International Law Commission

Int'l J Mar. Coast. Law: The International Journal of Marine and Coastal Law

Int'l Com. Law Rev.: International Community Law Review

ITLOS **:** International Tribunal for the Law of the Sea

J Conf. Res. : Journal of Conflict Resolution

JDZ : Joint Development Zone

J En. & Nat. Res. Law: Journal of Energy & Natural Resources Law

J Nat. Gas. Geo.: Journal of Natural Gas Geoscience

J W. En. Law & Bus.: Journal of World Energy Law and Business

Leiden J Int'l Law: Leiden Journal of International Law

nm : Nautical Mile

MESP : Middle East Strategic Perspectives

MOGC : Major Oil and Gas Companies

OUP : Oxford University Press

PCA **:** Permanent Court of Arbitration

PCA Rules **:** Permanent Court of Arbitration Rules of 2012

PCIJ : Permanent Court of International Justice

PSA : Product Sharing Agreement

RSC : Risk Service Contract

Sep. Op. : Separate Opinion

UCL J Law & Jur.: UCL Journal of Law and Jurisprudence

UK : United Kingdom of Great Britain and Northern Ireland

UN **:** United Nations

UN Charter : Charter of the United Nations

UNGA **:** United Nations General Assembly

UNSC : United Nations Security Council

UN RIAA : United Nations Reports of International Arbitral Awards

UNCLOS : United Nations Convention on the Law of the Sea

UNCLOS : United Nations Convention on the Law of the Sea

UNTS : United Nations Treaty Series

U Miami Inter-Am. L. Rev.: University of Miami Inter-American Law Review

US : United States of America

USGS : US Geological Survey

USSR : Union of Soviet Socialist Republics

Y. B. Arb. & Mediation: Yearbook on Arbitration and Mediation

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International Court of Justice

[1] Cases have been categorized under the respective international court hearing or administering such case and aligned in reverse chronological order.

Permanent Court of Arbitration

International Tribunal for the Law of the Sea

ABSTRACT

This thesis aims to present an analysis on the impact of oil and gas (hydrocarbon) resources to the inter-state territorial dispute resolution taking the legal and political aspects into account and considering the perspective of investors and the role of state. Such an impact could be displayed by the states' willingness to resort to peaceful means of dispute resolution, such as an impetus for negotiations to conclude a boundary treaty in order to efficiently manage and develop the hydrocarbon resources in the disputed area at the same time providing legal clarity for the international investors that are willing to operate in such area. Existence of oil and gas resources in the disputed area as well as conduct of the disputing states with regards to these resources might also be considered relevant in the assessment of the international courts or the arbitral tribunals, however, international case-law demonstrates that this is not the case and the international judiciary is reluctant to give the arguments of the states concerning oil and gas resources legal relevance.

Oil and natural gas resources and how these resources are discovered and utilized are also a central issue for this thesis. Naturally, research concerning the locations of these resources are present and newly discovered locations these resources may potentially be found in commercially exploitable amounts were assessed. Geological survey assessments and reports of major oil and natural gas companies available online have been used in this thesis.

For the purpose of this thesis, first, the existing and potential oil and gas reserves in the world have been analysed. This section demonstrated that known onshore reserves were rapidly maturing while the demand for oil and gas was increasing. At the same time, the geological survey reports revealed that there were technically recoverable rich hydrocarbon reserves in the deep sea in various parts of the world. Following these facts, the links tying oil and gas resources to the territorial disputes were explained along with a brief history of the growing hydrocarbon business and the main actors therein. Then, the approach of major oil and gas companies in investing in the disputed territories was explained along with the types of agreements between states and investors used in the oil and gas industry.

Special attention was paid to the points of view potential and existing investors have with regards to operating in disputed waters. The dynamics of major international investments require legal clarity when they enter a new market. When this fact is combined with the lobbying power major oil and natural gas companies have, host states appear to be more willing in resolving their territorial disputes for a thriving investment environment to their favour.

In the course of this work, it became clear that the phenomenon of access to oil and natural gas resources was made subject to maritime delimitation disputes before international courts and arbitral tribunals. This is why, the third section of this thesis was reserved for the international law of the sea and the emergence and enclosure of maritime zones.

Relatively recent emergence of continental shelf and exclusive economic zone ("**EEZ**") concepts and the fact that emerging states following the decolonization had a voice during the third International Conference on the Law of the Sea held between 1973 and 1982 were the primary reasons for the maritime delimitation processes to be held and subsequent boundary treaties to be made. Continental shelf and the EEZ allow the coastal states to exercise sovereign rights concerning living and non-living natural resources in the seabed and subsoil thereof, which makes it economically important for the coastal states along with various historical and political reasons to claim jurisdiction in these zones. In many regions of the world, these circumstances may cause stalemates during the boundary negotiations and disputes may emerge due to overlapping claims of opposite or adjacent states in these undelimited maritime areas.

A brief history of the international law of the sea principles and the role of customary international law as reflected in various international treaties have been explained in this thesis. Special attention was paid to the United Nations Convention on the Law of the Sea of 1982 ("**UNCLOS**") and maritime zones defined in the UNCLOS were introduced under this section along with the rights these zones generate for the coastal states.

Under Section 4 of this thesis, peaceful dispute resolution methods were explained within the framework of the UN Charter and the non-binding, voluntary and

compulsory dispute settlement mechanisms set forth in the UNCLOS. Under this section, the author also provided a brief introduction of the international courts, tribunals and institutions administering international arbitrations competent to deal with inter-state disputes.

Principles governing maritime delimitation and the consideration of relevant circumstances as established by the international judiciary were explained under this section. Relevant circumstances include economic factors which have often been argued by the states in case-law. With the guidance of the relevant international case law, it was revealed that international courts and arbitral tribunals were cautious to consider the existence of oil and gas resources or the conduct of the parties with regards to these resources as relevant circumstance, justifying an adjustment of the provisional equidistance line in maritime delimitation. Nevertheless, the research also set forth that existence of oil and gas resources in undelimited maritime areas had direct impact on the location of the boundaries in the negotiations and subsequent agreements. In order to demonstrate this, various approaches followed in the inter-state negotiations to resolve the disputes arising out of overlapping claims in the hydrocarbon-rich areas were explained. Finally, peaceful resolution of maritime boundary disputes via conclusion of boundary treaties, joint action or international adjudication in the Arctic region was analysed within the framework of access to oil and gas resources.

In this thesis, the analysis was made in light of international law and the case-law created by the International Court of Justice, International Tribunal for the Law of the Sea, various arbitral tribunals tasked to deal with territorial dispute resolution under the scrutiny of Permanent Court of Arbitration. Therefore, in Section 5, background information concerning the disputes individually analysed herein was therefore provided with the aim of demonstrating the involvement of access to oil and natural gas resources in those disputes.

Arbitral tribunal in *Guyana v Suriname* examined the states' petroleum activities in the disputed area along with the involvement of oil and natural gas companies. Especially because Suriname interfered with the oil activities some oil companies that have been granted oil concessions by Guyana had been conducting, oil

concessions have been assessed as a relevant circumstance in the maritime delimitation. The tribunal cited the case-law of International Court of Justice to set forth under which circumstances states' petroleum activities would be considered relevant and decided that in this case, there were not enough evidence to suggest that states' petroleum activities to be considered relevant.

Access to offshore oil and gas resources provided an impetus for the Bay of Bengal states to resort to third party dispute settlement for the delimitation of their maritime boundaries. While the International Tribunal for the Law of the Sea ("**ITLOS**") did not give much consideration to hydrocarbon resources in *Bangladesh v Myanmar,* the parties were aware that as a result of the judgment, they would be entitled to some areas rich with natural gas deposits. In *Bangladesh v India,* the arbitral tribunal administered by the Permanent Court of Arbitration took the growing interests of the coastal states in the Bay of Bengal into consideration and clearly stated in the award the importance of stable and definitive maritime boundaries when the exploration and exploitation of hydrocarbon resources are at stake.[2] In the Tribunal's view, determination of sovereign rights of coastal states within the delimited maritime zones would allow development and investment.

In *Philippines v China* or *South China Sea* case, the arbitral tribunal delivered an award on the parties' sovereign rights pursuant to the United Nations Convention on the Law of the Sea in the absence of China's participation to the proceedings. Since these sovereign rights heavily involved parties' hydrocarbon activities in the South China Sea, the Tribunal's task in assessing the sovereign rights of these states in the disputed areas was crucial. China interfered with the operations of the oil companies under the concession Philippines granted on grounds of its historic rights claim within the so-called nine-dash-line. This appears to be one of the events compelling the Philippines to force China's hand via an international judicial decision with binding power. The Tribunal made a thorough assessment on the compatibility of China's historic rights claim with the Philippines' sovereign rights in the disputed area. The case of *Philippines v China* is considered politically very sensitive as the Tribunal's

[2] Maritime Boundary Arbitration between the Bangladesh and India ("*Bangladesh v India*"), PCA, Award, 7 July 2014, para. 218.

determinations in the award will trigger other coastal states' resort to international courts and arbitral tribunals to obtain similar decisions to force China's hand in the disputed areas in the South China Sea.

In *Ghana v Côte d'Ivoire,* assessment of the relevance of oil blocks licensed by Ghana and Côte d'Ivoire was made by the Special Chamber of International Tribunal for the Law of the Sea. However, the Special Chamber was not convinced that the mutual and long-standing oil activities were indicative of a maritime delimitation and did not consider the "*exceptional concentration of hydrocarbon resources in the disputed area*"[3] as relevant.

The thesis took a pending case into consideration as well. An *ad-hoc* arbitral tribunal administered by the Permanent Court of Arbitration is going to decide whether it has the jurisdiction to hear *Ukraine v Russia* in the next days. Ukraine lost access to the maritime zones of Crimea due to "*Crimea's effective change of sovereign*". These maritime zones in the Black Sea and the Sea of Azov has potentially rich oil and gas resources. Ukraine is claiming among other issues that Russia violated its rights to hydrocarbon resources in the Black Sea and the Sea of Azov. Russia raised preliminary objections and the Tribunal has not yet decided that it has the jurisdiction to hear the case.

Lastly, developments regarding the recent discovery of potentially rich natural gas reserves in the Eastern Mediterranean have been examined. Eastern Mediterranean is already a politically volatile region where the relationships between coastal states Greece Turkey, Lebanon, Syria, Palestine, Israel, Egypt, and Cyprus are strained, non-existent, on the edge of a dispute, or getting newly established for the necessity of utilizing the natural gas reserves. Region's complicated political dynamics were explained here as well as the importance of dispute resolution and subsequent determination of maritime boundaries for the energy politics between the coastal states of the Eastern Mediterranean. The Author here suggests that an interim solution here

[3] Case Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean ("*Ghana v. Côte d'Ivoire*"), ITLOS Case No. 23, Judgment, ITLOS Rep. 2017, p. 27, para. 439.

such as the establishment of joint development zones might provide useful and help ease tensions in the Eastern Mediterranean.

In light of above, this thesis reached the conclusion that oil and natural gas resources in fact have a two faceted impact on the inter-state territorial dispute resolution in the sense that they are among the triggering factors motivating states to resolve their disputes in the most effective way possible. This impact is less applicable during the maritime delimitation cases as the international courts and tribunals are cautious to take oil and natural gas resources into consideration as relevant circumstance.

The methodology of this work involved explaining the involvement of oil and natural gas resources and the role of major oil and gas companies in the inter-state territorial disputes in the first phase; acquainting the reader with specific concepts and principles of international law, particularly the law of the sea terminology and maritime delimitation in the second phase; detailing the history and importance of inter-state territorial dispute resolution mechanisms and venues in the third phase. In the fourth and last phase, analysis was provided on various international judgments and arbitral awards on territorial disputes involving oil and natural gas resources, some opinions were given on an interesting case pending before a PCA administered arbitral tribunal, and developments in the Eastern Mediterranean concerning the discovery of natural gas and the probability of the relevant states to resort to territorial dispute resolution has also been examined with suggestions of an interim solution.

Thorough research with the help and guidance of fundamental international law books of eminent scholars; analysis of primary sources of international law and the international case-law has been employed in the formation of this thesis. Various articles of international lawyers and social scientists as well as geologists on specific matters helped proving the major points of this thesis and stimulated further discussions. Finally, various internet resources, especially reports, news and articles available online were utilized heavily.

RESUMÉ

Cette thèse a pour objectif de présenter une analyse de l'impact des ressources pétrolières et gazières (hydrocarbures) sur le règlement des différends territoriaux entre États, en tenant compte des aspects juridiques et politiques, et en prenant en compte la perspective des investisseurs et le rôle de l'État. Cet impact pourrait être démontré par la volonté des États de recourir à des moyens pacifiques de résolution des litiges, tels qu'un élan pour les négociations en vue de conclure un traité frontalier afin de gérer et de développer efficacement les ressources en hydrocarbures de la zone litigieuse, tout en fournissant des garanties juridiques et de la clarté pour les investisseurs internationaux disposés à opérer dans de tels domaines. L'existence de ressources en pétrole et en gaz dans la zone litigieuse, ainsi que la conduite des États en conflit concernant ces ressources, pourraient également être considérées comme pertinentes pour l'appréciation par les tribunaux internationaux ou le tribunal arbitral. Toutefois, la jurisprudence internationale démontre que tel n'est pas le cas, et le pouvoir judiciaire international est réticent à donner de la pertinence juridique aux arguments des Etats concernant les ressources pétrolières et gazières.

Les ressources en pétrole et en gaz naturel et la manière dont ces ressources sont découvertes et utilisées sont également la problématique majeure de cette thèse. Nécessairement, des recherches sur la situation de ces ressources sont évoquées ainsi que des lieux récemment découverts où ces ressources pourraient potentiellement existées en quantités exploitables commercialement. Les évaluations géologiques et les rapports des principales sociétés pétrolières et gazières disponibles en ligne ont été également utilisés.

Dans le cadre de cette thèse, les réserves de pétrole et de gaz existantes et potentielles dans le monde ont été analysées dans un premier temps. La première section démontre que les réserves côtières arrivaient à maturation alors que la demande de pétrole et de gaz augmentait. Dans le même temps, les études géologiques ont révélé que de grandes réserves d'hydrocarbures, techniquement récupérables, se trouvaient

dans les eaux profondes de diverses régions du monde. Suite à cela, les liens entre les ressources pétrolières et gazières et les conflits territoriaux sont expliqués avec un bref historique de la croissance du secteur des hydrocarbures et de ses principaux acteurs. Ensuite, l'approche des principales sociétés pétrolières et gazières en matière d'investissement dans les territoires litigieux est expliquée, ainsi que les types d'accords entre États et investisseurs utilisés dans l'industrie du pétrole et du gaz.

Une attention particulière a été portée sur le point de vue des investisseurs potentiels et existants sur les opérations menées en eaux controversées. La dynamique des grands investissements internationaux exige une clarté juridique lorsqu'ils se font sur un nouveau marché. Lorsque cette donnée est combinée au pouvoir de lobbying des grandes sociétés pétrolières et gazières, on aperçoit que les États hôtes semblent être plus disposés à résoudre leurs différends territoriaux pour que les zones où ils investissent soient propices à leurs mises de fonds.

Au cours de ces travaux, il est apparu clairement que le phénomène de l'accès aux ressources pétrolières et gazières était soumis à des litiges de délimitation maritime devant des tribunaux internationaux et des tribunaux arbitraux. C'est pourquoi la troisième partie de cette thèse est réservée au droit international de la mer ainsi qu'à l'émergence et à l'espace de zones maritimes.

L'émergence relativement récente des concepts de plateau continental et de zone économique exclusive («**ZEE**») et le fait que les États émergents, suite à la décolonisation, aient pris la parole lors de la troisième Conférence internationale sur le droit de la mer, tenue entre 1973 et 1982, ont été les principales raisons pour que les processus de délimitation maritime soient organisés et que des traités ultérieurs sur les frontières soient conclus. Le plateau continental et la ZEE permettent aux États côtiers d'exercer des droits souverains sur les ressources naturelles vivantes et non-vivantes des fonds marins et de leur sous-sol, ce qui le rend économiquement important pour les États côtiers, et qui justifie, pour diverses raisons historiques et politiques, la demande de compétence dans ces zones. Dans de nombreuses régions du monde, ces

circonstances peuvent entraîner une impasse lors des négociations frontalières et des différends peuvent surgir en raison de chevauchement des revendications d'États opposés ou adjacents dans ces zones maritimes non délimitées.

Une brève histoire des principes du droit international de la mer et du rôle du droit international coutumier, tel qu'il est relaté dans divers traités internationaux, est rappelée dans cette thèse. Une attention particulière a été accordée à la Convention des Nations Unies sur le droit de la mer de 1982 (« UNCLOS ») et les zones maritimes définies dans l'UNCLOS ont été introduites dans cette section, ainsi que les droits que ces zones génèrent pour les États côtiers.

Dans la section 4 de cette thèse, les méthodes de résolution pacifique des conflits ont été expliquées dans le cadre de la Charte des Nations Unies et des mécanismes de règlement des conflits non contraignants, volontaires et obligatoires définis dans la Convention des Nations Unies sur le droit de la mer. Dans cette section, l'auteur a également présenté brièvement les juridictions internationales, les tribunaux et les institutions administrant des arbitrages internationaux compétents pour statuer sur des différends entre États.

Les principes régissant la délimitation maritime et la prise en compte des circonstances pertinentes établies par le pouvoir judiciaire international ont été expliqués dans la présente section. Les circonstances pertinentes comprennent des facteurs économiques qui ont souvent été discutés par les États dans la jurisprudence. En se fondant sur la jurisprudence internationale pertinente, il a été révélé que les juridictions internationales et les tribunaux arbitraux se gardaient bien d'examiner l'existence de ressources pétrolières et gazières ou le comportement des parties à l'égard de ces ressources comme des circonstances pertinentes justifiant un ajustement de la ligne d'équidistance provisoire en délimitation maritime. Néanmoins, les recherches ont également montré que l'existence de ressources pétrolières et gazières dans des zones maritimes non délimitées avait un impact direct sur l'emplacement des frontières dans les négociations et les accords ultérieurs. Afin de le démontrer, diverses

approches ont été suivies dans les négociations entre États pour résoudre les différends résultant de chevauchement de revendications dans les zones riches en hydrocarbures. Enfin, la résolution pacifique des conflits de frontières maritimes par la conclusion de traités sur les frontières, par des actions conjointes ou par des décisions internationales dans la région arctique, a été analysée dans le cadre de l'accès aux ressources pétrolières et gazières.

L'analyse conduite dans cette thèse a été faite à la lumière du droit international et de la jurisprudence créée par la Cour internationale de justice, par le Tribunal international du droit de la mer et divers tribunaux arbitraux chargés de régler les litiges territoriaux sous le contrôle de Cour permanente d'arbitrage. Par conséquent, dans la section 5, des informations de base concernant les différends analysés individuellement dans le présent document ont été fournies dans le but de démontrer l'implication de l'accès aux ressources pétrolières et gazières dans ces différends.

Dans l'affaire Guyana c. Suriname, un tribunal arbitral a examiné les activités pétrolières des États dans la zone litigieuse, ainsi que l'implication de sociétés pétrolières et gazières. Parce que le Suriname a gêné les activités pétrolières de certaines sociétés pétrolières à qui des concessions pétrolières ont été octroyées par la Guyane, les concessions pétrolières ont été considérées comme une circonstance pertinente dans la délimitation maritime. Le tribunal a cité la jurisprudence de la Cour internationale de Justice pour indiquer dans quelles circonstances les activités pétrolières des États seraient considérées comme pertinentes et a décidé qu'en l'espèce, il n'y avait pas suffisamment de preuves pour suggérer que les activités pétrolières des États soient considérées comme pertinentes.

L'accès aux ressources pétrolières et gazières en mer a incité les États de la baie du Bengale à recourir au règlement des litiges par des tiers pour délimiter leurs frontières maritimes. Alors que le Tribunal international du droit de la mer («**ITLOS**») n'accordait pas beaucoup d'attention aux ressources en hydrocarbures dans l'affaire Bangladesh c. Myanmar, les parties savaient qu'en raison du jugement, elles auraient

droit à certaines zones riches en ressources naturelles et en gisements de gaz. Dans l'affaire Bangladesh c. Inde, le tribunal arbitral administré par la Cour permanente d'arbitrage a pris en compte les intérêts croissants des États côtiers de la baie du Bengale et a clairement indiqué, dans la sentence, l'importance de frontières maritimes stables et définitives quand l'exploration et l'exploitation des ressources en hydrocarbures sont en jeu. Selon l'avis du tribunal, la détermination des droits souverains des États côtiers dans les zones maritimes délimitées permettrait un développement et des investissements.

Dans l'affaire Philippines c. Chine ou mer de Chine méridionale, le tribunal arbitral a statué sur les droits souverains des parties en vertu de la Convention des Nations Unies sur le droit de la mer, en l'absence de participation de la Chine à la procédure. Étant donné que ces droits souverains ont fortement impliqué les activités des parties en matière d'hydrocarbures en mer de Chine méridionale, la tâche du tribunal qui consistait à évaluer les droits souverains de ces États dans les zones en litige était cruciale. La Chine est intervenue dans les activités des sociétés pétrolières dans le cadre de la concession accordée par les Philippines sur la base de sa revendication de droits historiques dans le cadre de la ligne dite à neuf tirets. Cela semble être l'un des événements qui ont obligé les Philippines à forcer la Chine à prendre la direction d'une décision de justice internationale dotée d'un pouvoir contraignant. Le tribunal a procédé à une évaluation approfondie de la compatibilité de la revendication de droits historiques de la Chine avec les droits souverains des Philippines dans la zone litigieuse. L'affaire Philippines c. Chine est considérée comme politiquement très délicate car les décisions du tribunal dans la sentence inciteront d'autres États côtiers à recourir aux tribunaux internationaux et aux tribunaux arbitraux pour obtenir des décisions similaires contraignant la Chine dans les zones litigieuses de la mer de Chine méridionale.

Dans l'affaire Ghana c. Côte d'Ivoire, la Chambre spéciale du Tribunal international du droit de la mer a évalué la pertinence des blocs pétroliers concédés sous licence par le Ghana et la Côte d'Ivoire. Cependant, la Chambre spéciale n'était pas convaincue

que les activités pétrolières, mutuelles et de longue date, indiquaient une délimitation maritime et ne considérait pas la « concentration exceptionnelle de ressources en hydrocarbures dans la zone litigieuse » comme pertinente.

La thèse a également pris en compte une affaire en cours. Un tribunal arbitral ad hoc administré par la Cour permanente d'arbitrage va décider s'il est compétent pour entendre l'Ukraine contre la Russie dans les prochains jours. L'Ukraine a perdu l'accès aux zones maritimes de Crimée à cause du « changement de souverain effectif de la Crimée ». Ces zones maritimes de la mer Noire et de la mer d'Azov sont potentiellement riches en ressources pétrolières et gazières. L'Ukraine affirme notamment que la Russie a violé ses droits sur les ressources en hydrocarbures de la mer Noire et de la mer d'Azov. La Russie a soulevé des exceptions préliminaires et le tribunal n'a pas encore décidé s'il a compétence pour connaître de l'affaire.

Enfin, les développements concernant la découverte récente de réserves de gaz naturel potentiellement riches en Méditerranée orientale ont été examinés. La Méditerranée orientale est déjà une région politiquement instable où les relations entre les États côtiers (Grèce, Turquie, Liban, Syrie, Palestine, Israël, l'Égypte et Chypre) sont tendues, inexistantes, en quasi conflit ou en cours d'établissement pour la nécessité d'utiliser les réserves de gaz naturel. La dynamique politique complexe de la région a été expliquée, de même que l'importance du règlement des litiges et de la détermination ultérieure des frontières maritimes pour la politique énergétique entre États côtiers de la Méditerranée orientale. L'auteur suggère qu'une solution provisoire, telle que la création de zones de développement communes, pourrait être utile et contribuer à atténuer les tensions en Méditerranée orientale.

À la lumière de ce qui précède, cette thèse aboutit à la conclusion que les ressources en pétrole et en gaz naturel ont en réalité un impact à deux facettes sur le règlement des différends territoriaux entre États, en ce sens qu'elles sont l'un des facteurs déterminants qui poussent les États à résoudre leurs différends de la manière la plus efficace possible. Cet impact est moindre lors des affaires de délimitation

maritime parce que les cours et tribunaux internationaux se gardent bien de prendre en compte les ressources en pétrole et en gaz naturel en tant que circonstances pertinentes.

La méthodologie de ce travail a consisté à expliquer l'implication des ressources en pétrole et en gaz naturel et le rôle des principales entreprises pétrolières et gazières dans les conflits territoriaux entre États au cours de la première phase ; à familiariser le lecteur avec les concepts et principes spécifiques du droit international, en particulier la terminologie du droit de la mer et la délimitation maritime, au cours de la deuxième phase ; détailler l'histoire et l'importance des mécanismes et des lieux de règlement des différends territoriaux entre États au cours de la troisième phase. Au cours de la quatrième et dernière phase, différents jugements et sentences internationales portant sur des litiges territoriaux impliquant des ressources en pétrole et en gaz naturel ont été analysés, des opinions ont été rendues sur une affaire intéressante pendante devant un tribunal arbitral administré par la CPA et des développements en Méditerranée orientale concernant la découverte de gaz naturel et la probabilité pour les États concernés de recourir à la résolution des litiges territoriaux ont également été examinées avec des suggestions de solution provisoire.

Une recherche approfondie avec l'aide et les conseils d'ouvrages de droit international fondamental d'éminents spécialistes ainsi qu’une analyse des sources primaires du droit international et de la jurisprudence internationale ont été utilisées pour la rédaction de cette thèse. Divers articles de juristes internationaux et de spécialistes des sciences sociales, ainsi que de géologues sur des questions spécifiques, ont permis de démontrer les points principaux de cette thèse et de stimuler les discussions. Enfin, diverses ressources Internet, notamment des rapports, des nouvelles et des articles disponibles en ligne, ont été fortement utilisés.

ÖZET

Bu tez, petrol ve doğal gaz (hidrokarbon) kaynaklarının devletlerarası bölgesel uyuşmazlıkların çözümü üzerindeki etkisini, hukuki ve siyasi yönleri de ele alarak, yatırımcıların bakış açısını ve devletin rolünü de hesaba katarak analiz etmeyi amaçlamaktadır. Böyle bir etki, devletlerin barışçıl uyuşmazlık çözümü araçlarına başvurmasıyla ortaya konulabilir, örneğin tartışmalı bölgedeki hidrokarbon kaynakları etkin şekilde yönetilip geliştirilirken aynı zamanda böyle bir bölgede iş yapmak isteyen uluslararası yatırımcılara hukuksal konuların açıkça sunulması amacıyla, görüşmelerin bağlayıcı bir anlaşmayla sonuçlanması için bir irade gösterilmesi gibi. Tartışmalı bölgedeki petrol ve doğal gaz kaynaklarının varlığı ve uyuşmazlık yaşayan devletlerin bu kaynaklar hakkındaki tutumu da uluslararası mahkemelerin veya tahkim mahkemelerinin yapacağı değerlendirmede önem teşkil edebilir. Ancak, uluslararası içtihat durumun böyle olmadığını gösteriyor; uluslararası yargı organları, devletlerin petrol ve doğal gaz kaynakları konusundaki savlarını hukuksal anlamda önemli görmeye meyilli değildir.

Petrol ve doğal gaz kaynakları, bunların nasıl keşfedildikleri ve faydalı hale getirildikleri de bu tezin ana konuları arasındadır. Doğal olarak, bu kaynakların yerleri hakkında yapılan araştırmalar da tezde mevcuttur; bu kaynakların işletilebilir miktarlarda bulunması muhtemel, yeni keşfedilmiş yerlerden de bahsedilmiştir. Bu tezde başlıca petrol ve doğal gaz şirketlerinin internet üzerinden sundukları jeolojik ölçüm değerlendirmeleri ve raporları da kullanılmıştır.

Tezin yazımı için öncelikle tüm dünyadaki hem mevcut hem de potansiyel petrol ve doğal gaz rezervleri analiz edilmiştir. Bu bölüm, petrol ve doğal gaza talep artarken bilinen kıyı rezervlerinin hızla olgunlaştığını göstermiştir. Aynı zamanda, jeolojik ölçüm raporları dünyanın farklı yerlerinde, denizlerin derinliklerinde, çıkarılması teknik bakımdan mümkün olan zengin hidrokarbon rezervleri bulunduğunu ortaya çıkarmıştır. Bu veriler kullanılarak, petrol ve doğal gaz kaynaklarıyla bölgesel uyuşmazlıklar arasındaki bağlantılar, giderek büyüyen hidrokarbon sektörünün kısa bir tarihçesi ve bulundurduğu kilit aktörlerle birlikte açıklanmıştır. Akabinde, başlıca petrol ve doğal gaz şirketlerinin tartışmalı bölgelere

yatırım konusundaki yaklaşımları ve petrol ve doğal gaz endüstrisinde devletler ile yatırımcılar arasında yapılan anlaşmalar açıklanmıştır.

Hem potansiyel hem de halihazırdaki yatırımcıların tartışmalı sularda iş yapma konusundaki bakış açılarına özel olarak dikkat edilmiştir. Yeni bir pazara girdiklerinde, başlıca uluslararası yatırım dinamikleri hukuksal bakımdan açıklık gerektirir. Buna bir de başlıca petrol ve doğal gaz şirketlerinin lobicilik güçleri eklenince, rezervleri bulunduran ülkelerin gelişen bir yatırım ortamı oluşturma amacıyla bölgesel uyuşmazlıkları gidermeye daha gönüllü oldukları yönünde bir manzara vardır.

Bu çalışma sırasında, petrol ve doğal gaz kaynaklarına erişim konusunun uluslararası mahkemeler ve tahkim mahkemelerine ihtiyaç duyulacak şekilde deniz sınırı uyuşmazlıkları yarattığı açıkça görülmüştür. Bu sebeple de bu tezin üçüncü bölümü uluslararası deniz kanunlarına, deniz yetki alanlarının ortaya çıkışına ve kapsamlarına ayrılmıştır.

Yeni ortaya çıktıkları söylenebilecek kıta sahanlığı ve münhasır ekonomik bölge ("**MEB**") kavramları ve sömürgecilik sonrası ortaya çıkan devletlerin 1973-1982 yıllarında düzenlenen üçüncü Uluslararası Deniz Hukuku Konferansı'nda söz sahibi olmaları, deniz sınırlarının çekilmesi ve bunun sonucu olarak sınır anlaşmaları yapılmasının ana sebepleridir. Kıta sahanlığı ve MEB, denize kıyısı olan ülkelerin deniz yataklarında ve toprak altındaki canlı ve cansız doğal kaynaklar üzerinde egemenlik haklarına sahip olmalarını sağlamakta, bu da çeşitli tarihi ve siyasi nedenlerle birlikte denize kıyısı olan ülkelerin bu bölgelerde yetki talep etmesini ekonomik açıdan önemli kılmaktadır. Dünyanın birçok bölgesinde bu koşullar sınır görüşmelerinde tıkanmalara yol açabilmekte, karşı karşıya gelen veya komşu olan ülkelerin birbiriyle çakışan talepleri yüzünden tartışmalar çıkabilmektedir.

Bu tezde uluslararası deniz hukuku ilkelerinin kısa bir tarihçesi ve çeşitli uluslararası anlaşmalarda ortaya çıkan uluslararası teamüllerin rolü de açıklanmıştır. 1982 Birleşmiş Milletler Deniz Hukuku Sözleşmesi'ne ("**BMDHS**") özellikle dikkat çekilmiş ve BMDHS'de belirlenen deniz bölgeleri ile bu bölgelerin denize kıyısı olan ülkelere getirdiği haklar bu bölümde ele alınmıştır.

Bu tezin dördüncü bölümünde barışçıl uyuşmazlık çözümü yöntemleri hem BMDHS'de belirlenen, bağlayıcılığı olmayan, ihtiyari ve mecburi uyuşmazlık çözüm mekanizmaları hem de Birleşmiş Milletler Antlaşması kapsamında sunulmuştur. Yazar bu bölümde ayrıca devletlerarası uyuşmazlıkları çözebilecek kapasiteye sahip uluslararası mahkemeleri, hakem mahkemelerini ve uluslararası hakem mahkemelerinin idaresi ile görevli kurumları da kısaca tanıtmıştır.

Deniz sınırlarını belirleyen prensipler ve ilgili durumlara uluslararası hukukçular tarafından nasıl karar verildiği bu bölüde açıklanmıştır. İlgili durumlar arasında, devletlerin içtihatları işaret ederek öne sürdüğü ekonomik faktörler de bulunmaktadır. İlgili uluslararası içtihatların rehberliğinde ortaya çıkan şu olmuştur ki, uluslararası mahkemeler ve tahkim mahkemeleri petrol ve doğal gaz kaynaklarının varlığını veya tarafların bu kaynaklar hakkındaki tutumunu deniz sınırlandırmasındaki eş uzaklık hattında değişikliğe gidilmesini meşru kılacak şekilde ilgili durumlar olarak değerlendirmeden önce temkinli davranmaktadır. Bununla birlikte, araştırma aynı zamanda şunu da açığa çıkarmıştır ki sınır koyulmamış deniz bölgelerindeki petrol ve doğal gaz kaynaklarının varlığı, görüşmelerde ve takip eden anlaşmalarda sınırların nereye çekileceğine doğrudan etki etmektedir. Bunu göstermek üzere, hidrokarbon bakımından zengin alanlar üzerindeki çakışan talepler sebebiyle ortaya çıkan uyuşmazlıkların çözümü için yürütülen devletlerarası görüşmelerde ele alınan çeşitli yaklaşımlar açıklanmıştır. Son olarak, deniz sınırı uyuşmazlıklarının ortak hareket planlarıyla, Arktik bölgesindeki uluslararası hükümlerle veya sınır anlaşmalarının tamamlanmasıyla nasıl barışçıl bir çözüme ulaşabileceği de petrol ve doğal gaz kaynaklarına erişim kapsamında analiz edilmiştir.

Bu tezin analizi Uluslararası Adalet Divanı, Uluslararası Deniz Hukuku Mahkemesi ve Daimi Hakem Mahkemesi'nin denetimine tabi olan ve bölgesel uyuşmazlık çözümüyle görevlendirilen çeşitli tahkim mahkemeleri tarafından ortaya konulan uluslararası hukuk kuralları ve içtihatlar çerçevesinde yapılmıştır. Bu yüzden de beşinci bölümde ayrı ayrı analiz edilen uyuşmazlıklar hakkındaki perde arkası bilgiler, bu uyuşmazlıklarda petrol ve doğal gaz kaynaklarına erişimin ne kadar büyük pay sahibi olduğunu göstermek amacıyla sunulmuştur.

Guyana v Surinam davasındaki hakem mahkemesi, uyuşmazlığa konu bölgede bu devletlerin petrol faaliyetlerini ve petrol ve doğal gaz şirketlerinin işin içine dahil olmasını incelemiştir. Özellikle Surinam, Guyana tarafından petrol imtiyazı verilen bazı petrol şirketlerinin faaliyetlerine müdahale ettiği için, petrol imtiyazları deniz sınırlandırmasında ilgili durum olarak değerlendirilmiştir. Hakem mahkemesi, hangi durumlarda devletlerin petrol faaliyetlerinin ilgili durum olarak değerlendirileceğini belirten Uluslararası Adalet Divanı içtihadını referans göstererek bu davada devletlerin petrol faaliyetlerinin konuyla ilgili olarak değerlendirilmesi için yeterli kanıt bulunmadığına karar vermiştir.

Açık denizlerdeki petrol ve doğal gaz kaynaklarına erişim, Bengal Körfezi ülkelerinin deniz sınırlandırması için üçüncü tarafların uyuşmazlık çözümüne başvurmasında bir itici güç oldu. Uluslararası Deniz Hukuku Mahkemesi ("**UDHM**") *Bangladeş v Myanmar* davasında hidrokarbon kaynaklarının pek üzerinde durmamış olsa da taraflar hükmün bir sonucu olarak zengin doğal gaz yataklarına sahip bazı alanlara erişim kazanacaklarının farkındaydı. Daimi Hakem Mahkemesi'nin idari işlerini yürüttüğü *Bangladeş v Hindistan* davasında da hakem mahkemesi, Bengal Körfezi'ndeki kıyı devletlerinin giderek artan menfaatlerini dikkate almış, hidrokarbon kaynaklarının araştırılması ve çıkarılmasının söz konusu olduğu durumlarda sabit, belirli deniz sınırlarının önemini açıkça belirtmiştir.[4] Hakem mahkemesinin görüşüne göre, sınırlandırılmış deniz bölgelerinde kıyı devletlerinin egemen haklarının belirlenmesi, kalkınma ve yatırıma izin verecektir.

Çin'in yargılamaya katılmadığı *Filipinler v Çin* veya *Güney Çin Denizi* davasında, hakem mahkemesi, tarafların Birleşmiş Milletler Deniz Hukuku Sözleşmesi'nden kaynaklanan egemen haklarına ilişkin bir karar vermiştir. Bu egemen haklar, tarafların Güney Çin Denizi'ndeki hidrokarbon faaliyetlerini doğrudan ilgilendirdiği için, bu devletlerin uyuşmazlığa konu bölgelerdeki egemen haklarının değerlendirilmesi konusunda hakem mahkemesinin görevi büyük önem arz etmiştir. Çin, "dokuz çizgi hattı" içinde tarihi haklara sahip olduğu iddiasına dayanarak, Filipinler tarafından imtiyaz verilen petrol şirketlerinin bölgedeki operasyonlarına

[4] Maritime Boundary Arbitration between the Bangladesh and India ("*Bangladesh v India*"), PCA, Award, 7 Temmuz 2014, para. 218.

müdahale etmiştir. Bu da Filipinler'i bağlayıcı bir uluslararası yargı kararı alarak Çin'in elini zorlamaya iten olaylardan biri olarak görülmektedir. Hakem mahkemesi Çin'in tarihi haklar iddiasıyla Filipinler'in uyuşmazlığa konu alandaki egemen haklarının uyumluluğu konusunda kapsamlı bir değerlendirme yapmıştır. *Filipinler v Çin*, siyasi açıdan çok hassas bir dava olarak kabul edilmektedir, zira hakem mahkemesinin kararındaki tespitler, diğer kıyı devletlerini Güney Çin Denizi'nin uyuşmazlığa konu alanlarıyla ilgili Çin'in elini zorlayacak benzer kararlar almak üzere uluslararası mahkemelere ve hakem mahkemelerine başvurmaya sevk edecektir.

Gana v Fildişi Sahili davasında, Uluslararası Deniz Hukuku Mahkemesi'nin Özel Mahkemesi, Gana ve Fildişi Sahili tarafından lisans verilen petrol bloklarının ilgili durum olarak dikkate alınıp alınamayacağını değerlendirmiştir. Fakat uzun süredir karşılıklı devam eden petrol faaliyetlerinin, deniz alanlarının sınırlandırıldığının göstergesi olduğuna ikna olmayan Özel Mahkeme, "*hidrokarbon kaynaklarının uyuşmazlığa konu alandaki istisnai konsantrasyonu*"nu[5] ilgili durum olarak görmemiştir.

Bu tez beklemede olan bir davayı da hesaba katmıştır. Daimi Hakem Mahkemesi tarafından geçici olarak görevlendirilmiş bir tahkim mahkemesi, önümüzdeki günlerde *Ukrayna v Rusya* davasında yetkili olup olmadığına karar verecek. Ukrayna, "*Kırım'ın etkin egemeninin değişmesi*" nedeniyle Kırım'ın deniz bölgelerine erişimini kaybetmiştir. Karadeniz ile Azak Denizi'ndeki bu bölgeler zengin petrol ve gaz kaynaklarına sahip olma potansiyeli taşımaktadır. Ukrayna, Karadeniz ve Azak Denizi'ndeki hidrokarbon kaynaklarına ilişkin haklarını Rusya'nın ihlal ettiği iddiasındadır. Rusya da ilk itirazlarını sunmuştur ancak mahkeme bu davada yetkili olup olmadığına henüz karar vermemiştir.

Son olarak, Doğu Akdeniz'de potansiyel olarak zengin doğal gaz rezervlerinin keşfine ilişkin gelişmeler incelenmiştir. Doğu Akdeniz halihazırda kıyı ülkeleri Türkiye, Suriye, Lübnan, İsrail, Filistin, Mısır, Yunanistan ve Kıbrıs arasındaki ilişkilerin gergin olduğu, hiç olmadığı, uyuşmazlık çıkmasına müsait olduğu veya

[5] Case Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean ("*Ghana v. Côte d'Ivoire*"), ITLOS Case No. 23, Judgment, ITLOS Rep. 2017, s. 27, para. 439

doğal gaz kaynaklarından yararlanmasına ilişkin yeni ilişkilerin kurulmasına olanak verecek potansiyelde siyaseten değişken bir bölge teşkil etmektedir. Bölgenin karmaşık siyasi dinamikleri de uyuşmazlık çözümünün ve sonuç olarak Doğu Akdeniz kıyı ülkeleri arasındaki enerji politikaları için deniz sınırlarının belirlenmesinin önemiyle birlikte açıklanmıştır. Yazar burada ortak geliştirme bölgeleri benzeri geçici çözümlerin faydalı olabileceğini ve Doğu Akdeniz'deki gerilimi düşürebileceğini savunmuştur.

Yukarıdakilerin ışığında, bu tez, petrol ve doğal gaz kaynaklarının, devletlerarası bölgesel uyuşmazlık çözümünde, devletleri uyuşmazlıklarını en etkili biçimde çözmeye iten tetikleyici faktörler arasında yer alması anlamında iki yönlü bir etkiye sahip olduğu sonucuna varmıştır. Bu etki, uluslararası mahkeme ve hakem mahkemeleri deniz alanlarının sınırlandırılması hakkındaki davalarda petrol ve doğal gaz kaynaklarını ilgili durum olarak değerlendirme konusunda temkinli davrandıkları için daha az ve sınırlı olarak mevcuttur.

Bu çalışmanın metodolojisi, ilk aşamada petrol ve doğal gaz kaynakları ile başlıca petrol ve doğal gaz şirketlerinin devletlerarası bölgesel uyuşmazlıklarındaki rolünü; ikinci aşamada uluslararası hukukun kendine özgü kavram ve prensipleri tanıtılarak okuyucunun deniz hukuku terminolojisine aşina edilmesini; üçüncü aşamada devletlerarası bölgesel uyuşmazlık çözümü mekanizmaları ve kurumlarının ayrıntılı tarihçesini ve bunun önemini içerir. Dördüncü ve son aşamada ise petrol ve doğal gaz kaynaklarının dahil olduğu bölgesel uyuşmazlıklara ilişkin çeşitli uluslararası davaların analizleri sunulmuş, Daimi Hakem Mahkemesi'nin yetkilendirdiği bir hakem mahkemesinde görülmeyi bekleyen ilginç bir dava hakkında fikirler verilmiş ve Doğu Akdeniz'de doğal gaz keşfi ve konuyla ilgili devletlerin bölgesel uyuşmazlık çözümüne başvurma olasılıkları geçici bir çözüm önerisiyle birlikte incelenmiştir.

Bu tezin yazımında, tanınmış bilim insanlarının yazdığı temel uluslararası hukuk kitaplarının yardım ve rehberliği; öncül uluslararası hukuk ve uluslararası içtihat kaynaklarının analizine başvurulmuştur. Uluslararası hukukçuların, sosyal bilimcilerin ve jeologların çeşitli makaleleri de bu tezin ana noktalarının

kanıtlanmasına yardımcı olmuş, başka tartışmaların da önünü açmıştır. Son olarak, çeşitli internet kaynakları, özellikle çevrimiçi olarak erişilen raporlar, haberler ve makaleler bu tezde ağırlıklı olarak kullanılmışlardır.

1. INTRODUCTION

In the 21st century, sovereign control over a certain territory which is rich in natural resources[6] is amongst the few issues that has a potential to bring two (or more) states against each other and start a dispute. Such disputes may quickly escalate and give rise to inter-state conflicts and subsequently regional instability, if not resolved properly.[7] One of the reasons underlying such escalation appears to be the prospect of economic delevolment and prosperity for states.

This thesis focuses specifically on two kinds of natural resources: oil and natural gas (also referred to as "**hydrocarbons**"[8]). Hydrocarbons are geographically not equally distributed and are often contained in reserves underground in the desserts, mountains, frozen earth and deep ocean. Oil and gas do not only constitute sources of energy for our houses, vehicles, factories, but they are also used as major raw materials for products of petrochemical industry such as plastics, paints, rubber, textiles[9] and these facts make the states dependent on them. That is why, convenient access to these energy resources is deemed crucial for the economic independence and development of a state and social welfare of its people. With the help of the latest technological developments that allow people to search the seabed and discover the rich natural gas and petroleum[10], and enable them to efficiently extract these resources, foreign investors that have those means (know-how) and the funds for the abovementioned operations became important especially for the developing states.

States' interest for the hydrocarbon resources of the deep seabed grew due to the increasing demand to petroleum after the World War II ("**WWII**"), which resulted in more and more satates extending their jurisdiction and claiming sovereign rights over

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[6] A natural resource is "*any material from nature having potential economic value*" (…) such as minerals and oil (Source: Bryan A. Garner (Editor in Chief), **Black's Law Dictionary**, 8th Ed. St Paul, MN: Thomson/West, 2004, p. 1056).

[7] Beth A. Simmons, "Capacity, Commitment and Compliance: International Law and the Settlement of Territorial Disputes", **J Conf. Res.**, 2002;46 (6): 829-856, p. 829.

[8] "*Hydrocarbon is an organic compound containing only carbon and hydrogen and often occurring in petroleum, natural gas, coal, and bitumens*", (Source: Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/hydrocarbon?utm_campaign=sd&utm_medium=serp&utm_source=jsonld Accessed on 04.03.2019.)

[9] Michael Lauzon, "Petrochemical Industry" in **The Canadian Encyclopedia**, 1.07.2013 (Ed. 16.12.2013), https://www.thecanadianencyclopedia.ca/en/article/petrochemical-industry, Accessed on 2.06.2019)

[10] Selami Kuran, **Uluslararası Deniz Hukuku** (*International Law of the Sea*), 2. Baskı, Arıkan, 2007, p. 223.

the natural resources of the continental shelf[11].[12] From 1960s to 1980s, the law of the sea rapidly developed with the help of the international law of the sea conferences that brought states, including the newly emerging ones together, legally regulated the rules to be applied to newly emerging maritime zones such as the continental shelf and the exclusive economic zone ("**EEZ**"). These concepts were also made subject to the decisions of international courts and awards of international arbitral tribunals throughout these years due to the fact that delimitation of these maritime zones often gave rise to disputes between the adjacent and opposite coastal states in terms of the sovereign control therein.

These inevitable escalation of disagreements between coastal states and the emergence of territorial disputes presents an undesired risk for the potential foreign investor due to the possibility of being interrupted by the disputing state while conducting their operations, even worse, losing their investment in its entirety should the said state is entitled to the disputed area they operate in.

For better or for worse, the coastal state desiring to attract the investors and wishing to benefit from the natural resources of the disputed area must eradicate any doubt on its entitlement to such area. In the era of the United Nations ("**UN**") which prohibits the use of force in the Article 2(4) of its Charter and various resolutions of its Security Council ("**UNSC**") repeating and strengthening such prohibition[13], these disputes must be resolved peacefully, in a way that is: a) acceptable for the international legal community[14]; b) compatible with international law and c) binding

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[11] In various international law books, following descriptions for the geographical meaning of the continental shelf have been used: "*Geographically, the continental shelf consists (...)" of the tectonic terraces between continents, islands and the deep seabed. These terraces are generally conceived as a model of three different zones: the continental shelf itself, the continental slope"and the continental shelf*." (Source: Thomas Cottier, **Equitable Principles of Maritime Boundary Delimitation** – The Quest for Distributive Justice in International Law, Cambridge University Press, 2015, p. 70); "*In many parts of the world, the abyssial plain is separated from the coast of the land masses by a terrace or shelf which is geologically part of the continent itself overlain by the raletively shallow waters of the continental margin*." (Source: James R. Crawford, **Brownlie's Principles of Public International Law**, 8th Edition, Oxford University Press, 2012, p. 269-270); the continental shelf is "*a geological expression referring to the ledges that project from the continental landmass into the seas and which are covered with only a relatively shallow layer of ater and which eventually fall away into the ocean depths*" (Source: Malcolm N. Shaw, **International Law**, Sixth Edition, Cambridge University Press, 2008, p. 584).

[12] Yoshifumi Tanaka, **The International Law of the Sea**, Cambridge University Press, 2012, pgs. 132-133.

[13] Crawford, **Brownlie's Principles…,** p. 242-243.

[14] International legal community means the collective body of countries whose mutual legal relations are based on sovereign equality (Source: Garner, **Black's Law Dictionary…**, p. 835).

for the disputing states. This resolution may be in the form of an international judicial decision or an arbitral award as well as a bilateral or multilateral treaty providing clarity to the maritime boundaries of the disputing states.

In cases where peaceful settlement of inter-state disputes are resolved via negotiations and the subsequent conclusion of maritime boundary treaties, states often pay special attention to regulate the hydrocarbon resources that straddle the boundary lines, which may be deemed as a demonstration of the importance coastal states attribute to these resources. This thesis aims to find out whether oil and gas resources had an impact on the peaceful settlement of inter-state disputes.

The method of answering the research question will be gradual. First, the reader will be acquainted to the role of investors of oil and gas industry and coastal states in the boundary disputes and the link between access to oil and gas resources and territorial dispute resolution, then a background for the international law of the sea, maritime zones and the coastal states' rights in these zones will be introduced. Means of peaceful settlement of inter-state territorial disputes will be elaborated upon along with the maritime delimitation and consideration of relevant circumstances in these cases. This analysis will be further elaborated via a selection of relevant international case law as well as a pending matter before an international arbitral tribunal. Finally, the latest developments in the Eastern Mediterranean conserning the discovery of natural gas will be taken into consideration.

Particularly the case law of the International Court of Justice ("**ICJ**"), the International Tribunal for the Law of the Sea ("**ITLOS**") and the Permanent Court of Arbitration ("**PCA**") appointed tribunals will be analysed in this thesis to reveal whether access to oil and gas resources had any impact or at least played any role in the resolution of the disputes in these cases and to find out how these disputes were reconciled.

2. OIL AND GAS RESOURCES IN DISPUTED TERRITORIES AND INVOLVEMENT OF INVESTORS AND STATES

As explained in the introduction section, this thesis aims to present an analysis on the impact of hydrocarbon resources to the inter-state dispute resolution taking the legal and political aspects into account and considering the perspective of investors and the role of state. Under this section, first, after an analysis concerning the location and quantity of oil and gas resources in the world, then relevance of access to oil and gas resources in the issue of territorial dispute resolution will be explained. Oil and gas industry approach to overcome investment risks in the disputed territorias will also be explained. Finally, types of agreements between states and investors governing the oil and gas investment and the involvement of hydrocarbon investors to the boundary disputes will be explained.

2.1.Existing and potential oil and gas reserves in the world

Oil and gas reserves constitute valuable resources and commodities for the states, regardless of the wealth of such state. Since the raw material these reserves contain are used in various industries as well as, and perhaps most importantly, as a source for energy, discovery of new hydrocarbon resources inevitably attracts investors as it did for many decades ago.

Existing know-how about petroleum products and the relative cleanliness of natural gas might be among the reasons for the international companies to invest and for the states to give incentives and encourage the companies to make such investment within their jurisdiction. Certainly, these resources are utilized to produce energy and they are non-renewable, meaning they might run out one day which would make their price go even higher, making it a very lucrative investment for the accessing state and the investor MOGCs.

Explorers often find oil and natural gas resources together.[15] Oil is shipped via pipelines, by marine tankers, rail cars or tank trucks while natural gas can be moved via pipelines or by marine tankers in the LNG form.[16]

The following countries are known to be rich with proven oil reserves: Venezuela, Saudi Arabia, Canada (the North Sea), Iran (Persian Gulf), Iraq, Russian Federation,

[15] Samuel van Vactor, **Introduction to the Global Oil and Gas Business**, PennWell, 2010, p.117.
[16] **Ibid.**

Kuwait, UAE, Libya, USA, Nigeria and China; while the following are particularly rich in natural gas reserves: Russian Federation, Iran, Qatar, Turkmenistan, USA and Venezuela.[17] As the reader can see, proven oil and gas reserves are not equally distributed around the world as opposed to the demand for these energy resources.

With regards to total proven oil reserves, which include gas condensate and LNGs as well as crude oil, Venezuela takes the lead with 303.2 thousand million barrels while Saudi Arabia comes close with 266.2 thousand million barrels followed by Canada with 168.9 thousand million barrels, Iran with 157.2 and Iraq with 148.8 thousand million barrels, and finally Russia with 106.2 thousand million barrels. These giants are followed by Kuwait, UAE, Libya, USA, Nigeria and China with competitive oil reserves. Notably, China's total proven oil reserves appear to be quite low compared to its consumption with 25.7 thousand million barrels for the year 2018.[18]

Total proven natural gas reserves on the other hand is led by no other than Russian Federation with 1234.9 trillion cubic feet and closely followed by Iran with 1173.0 trillion cubic feet while the third place being Qatar's with 879.9 trillion cubic feet, Turkmenistan with 688.1 million cubic feet as notable natural gas reserves.[19]

This information reveals us that the majority of the countries mentioned above dominates the oil and gas market either on their own or via their influence on the countries possessing these resources.

As for the unexplored or potential oil and gas reserves, it has been a challenge due to the decline in new discoveries which was at its lowest by the end of 2017 since the early 1950s, able to meet only 10% of the demand as it gets harder to find large discoveries because the most prospective areas have already been explored.[20] Here it should be kept in mind that most of these unexplored reserves are located in the deep-water basins. Research indicates that there are 28 deep-water basins rich with oil and gas in the world.[21] Also, almost all of the existing and potential onshore oil and gas

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[17] **BP** Statistical Review of World Energy, 67th Edition, June 2018, pgs. 12, 26, https://www.bp.com/content/dam/bp/en/corporate/pdf/energy-economics/statistical-review/bp-stats-review-2018-full-report.pdf Accessed on 31.12.2018.

[18] **Ibid.** p. 12.

[19] **Ibid.**, p. 26.

[20] Giorgio Biscardini, Reid Morrison, David Branson, Adrian Del Maestro, "Oil and Gas Trends 2018-2019", **PwC**, https://www.strategyand.pwc.com/trend/2018-oil-gas Accessed on 31.12.2018.

[21] Hongjun Qu, Gongcheng Zhang, Shuo Chen, "Distribution pattern and main factors controlling hydrocarbon accumulation of global oil and gas-rich deep-water basins", **J Nat. Gas. Geo.,** 3, 2018, pp. 135-145.

reserves are under a certain state's jurisdiction, without being subject to a territorial claim of another state. This is not the same for offshore oil and gas reserves as there are overlapping claims to some of these offshore territories, subject to continental shelf regime, which are discovered to be potentially rich in hydrocarbons.

Furthermore, the known onshore reserves are rapidly maturing due to the endless need for energy and raw materials by countries such as China and India which have taken their place amongst the biggest economies in the world over the last decades. Seeing the decreased weather quality in its most crowded cities, China decided to decrease and eventually end the coal consumption in its industrial and domestic consumption, bringing know-how for the infrastructure at the same time making various deals to obtain oil and gas from diversified sources. Demand for oil and gas is not limited to growing economies. Not many countries are as blessed with the existence of rich hydrocarbons within their territories, so they become net importers of these resources.

In 2008, the US Geological Survey ("**USGS**") made a comprehensive study within which the scientists teamed up and assessed the undiscovered and technically recoverable (to be discovered, developed and produced using current technology) oil and gas resources within the Arctic circle.[22] Among this, one of the most remarkable ones was the undiscovered oil and gas potential of the West Greenland-East Canada Province which was estimated to hold a mean of 7.3 billion barrels of oil and a mean of 52 trillion cubic feet of undiscovered natural gas.[23]

In 2015, the USGS conveyed an assessment in the Dnieper-Donets Basin and North Carpathian Basin Provinces encompassing Ukraine, Romania, Moldova and Poland and estimated undiscovered and technically recoverable resources of 13 million barrels of oil and 2.643 billion cubic feet of natural gas in these provinces.[24]

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[22] Thomas E. Moore and Donald L. Gautier (Ed.), the 2008 Circum-Arctic Resource Appraisal, **USGS**, Professional Paper No. 1824, https://pubs.er.usgs.gov/publication/pp1824 Accessed on 11.01.2019.

[23] Schenk, C.J., Bird, K.J., Brown, P.J., Charpentier, R.R., Gautier, D.L., Houseknecht, D.W., Klett, T.R., Pawlewicz, M.J., Shah, A., and Tennyson, M.E., 2008, "Assessment of undiscovered oil and gas resources of the West Greenland–East Canada Province", **USGS**, Fact Sheet, 2008, https://pubs.usgs.gov/fs/2008/3014/pdf/FS08-3014_508.pdf Accessed on 05.01.2019.

[24] Klett, T.R., Schenk, C.J., Brownfield, M.E., Charpentier, R.R., Mercier, T.J., Leathers-Miller, H.M., and Tennyson, M.E., 2016, "Assessment of undiscovered continuous oil and gas resources in the Dnieper-Donets Basin and North Carpathian Basin Provinces, Ukraine, Romania, Moldova, and Poland", **USGS**, Fact Sheet, 2015 (ver. 1.1, December 2016), https://pubs.usgs.gov/fs/2016/3082/fs20163082.pdf Accessed on 05.01.2019.

In 2016, the USGS quantitatively assessed the potential for undiscovered and technically recoverable continuous oil and gas resources of 2.8 billion barrels of oil and 34 trillion cubic feet of gas in the Volga-Ural Region Province of Russia[25] while another USGS team assessed the continuous resources of an estimated 12 billion barrels of oil and 75 trillion cubic feet of gas in the West Siberian Basin Province of Russia.[26] The same year, the USGS also partnered with the Government of India and conducted expedition involving scientists from Japan Drilling Company and the Japan Agency for Marine-Earth Science and Technology and discovered that there were large accumulations of natural gas technically producible in the Bay of Bengal. [27]

In 2017, the USGS estimated that in the Gulf Coast region of the USA, there were undiscovered and technically recoverable approximately 100 million barrels of oil and 16.5 trillion cubic feet of gas[28] as well as 2 million barrels of oil and nearly 1.7 trillion cubic feet of gas in the Southern Alaska. [29] In 2018, the USGS assessed undiscovered and technically recoverable continuous resources of 46.3 billion barrels of oil and 281 trillion cubic feet of gas in the southeast New Mexico and west Texas.[30]

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[25] Klett, T.R., Brownfield, M.E., Finn, T.M., Gaswirth, S.B., Le, P.A., Leathers-Miller, H.M., Marra, K.R., Mercier, T.J., Pitman, J.K., Schenk, C.J., Tennyson, M.E., and Woodall, C.A., 2018, "Assessment of undiscovered continuous oil and gas resources in the Domanik-type formations of the Volga-Ural Region Province, Russia", **USGS**, Fact Sheet, 2017, https://pubs.usgs.gov/fs/2017/3085/fs20173085.pdf Accessed on 05.01.2019.

[26] Klett, T.R., Schenk, C.J., Brownfield, M.E., Leathers-Miller, H.M., Mercier, T.J., Pitman, J.K., and Tennyson, M.E., 2016, "Assessment of undiscovered continuous oil and shale-gas resources in the Bazhenov Formation of the West Siberian Basin Province, Russia", **USGS**, Fact Sheet, 2016, https://pubs.usgs.gov/fs/2016/3083/fs20163083.pdf Accessed on 05.01.2019.

[27] Large Deposits of Potentially Producible Gas Hydrate Found in Indian Ocean, 25.07.2016, **USGS**, News, https://www.usgs.gov/news/large-deposits-potentially-producible-gas-hydrate-found-indian-ocean Accessed on 16.03.2019.

[28] Buursink, M.L., Doolan, C.A., Enomoto, C.B., Craddock, W.H., Coleman, J.L., Jr., Brownfield, M.E., Gaswirth, S.B., Klett, T.R., Le, P.A., Leathers-Miller, H.M., Marra, K.R., Mercier, T.J., Pearson, O.N., Pitman, J.K., Schenk, C.J., Tennyson, M.E., Whidden, K.J., and Woodall, C.A., 2018, "Assessment of undiscovered conventional oil and gas resources in the downdip Paleogene formations, U.S. Gulf Coast", **USGS,** Fact Sheet, 2017, https://pubs.usgs.gov/fs/2018/3019/fs20183019.pdf Accessed on 05.01.2019.

[29] Stanley, R.G., Potter, C.J., Lewis, K.A., Lillis, P.G., Shah, A.K., Haeussler, P.J., Phillips, J.D., Valin, Z.C., Schenk, C.J., Klett, T.R., Brownfield, M.E., Drake, R.M., Finn, T.M., Haines, S., Higley, D.K., Houseknecht, D.W., Le, P.A., Marra, K.R., Mercier, T.J., Leathers-Miller, H.M., Paxton, S.T., Pearson, O.N., Tennyson, M.E., Woodall, C.A., and Zyrianova, M.V., 2018, "Assessment of undiscovered oil and gas resources of the Susitna Basin, southern Alaska", **USGS,** Fact Sheet, 2017 (ver. 1.1, May 11, 2018): U.S. Geological Survey Fact Sheet 2018–3017, https://pubs.usgs.gov/fs/2018/3017/fs20183017_v1.1.pdf Accessed on 05.01.2019.

[30] Gaswirth, S.B., French, K.L., Pitman, J.K., Marra, K.R., Mercier, T.J., Leathers-Miller, H.M., Schenk, C.J., Tennyson, M.E., Woodall, C.A., Brownfield, M.E., Finn, T.M., and Le, P.A., 2018, "Assessment of undiscovered continuous oil and gas resources in the Wolfcamp Shale and Bone Spring Formation of the Delaware Basin, Permian Basin Province, New Mexico and Texas", **USGS,** Fact Sheet, 2018, https://pubs.usgs.gov/fs/2018/3073/fs20183073.pdf Accessed on 05.01.2019.

The maturing sources are among the reasons why energy companies have a constant challenge to find new reserves and some of these reserves may not be in stable regions or in regions that are not disputed.[31] Therefore, apart from the difficulties and the advance need for know-how the energy companies need for the underground source, they also have to deal with an unfamiliar geology as well as legal and political risks associated with entering a new host state.[32] Nevertheless, the risks are priced and the companies are willing to take them because the benefits apparently exceed the risks.

2.2. The issue of access to oil and gas resources and its link to territorial disputes

As explained above, oil and gas resources were concentrated within the territory of few countries, but contrary to the supply, in the past, the demand for oil took place mainly in the industrialized countries of North America and Europe, which created a motive for these states to colonize the supply territories and control oil flows resulting in anxiety over oil supplies, leading to conflicts over access and pricing.[33] It has been revealed that during the WWII, the concern about the security of oil supplies was a motivating factor in Japan's attack to Pearl Harbor and Germany's decision to invade Russia.[34] The first Gulf War, where Iraq invaded Kuwait to get hold of its vast oil reserves was also the milestone for the upcoming conflicts related to the access to oil supplies.[35]

After WWII, and upon decolonization, countries called for new rules and principles of international law in order to ensure and regain control over the exploitation of non-renewable natural resources located within their territory.[36] UNGA Resolution No. 1515 recommended that the sovereign right of every state to dispose of its wealth and its natural resources to be respected in conformity with the rights and duties of states under international law.[37] The principle is now accepted as general

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[31] "Above-ground perspectives on energy investments", **GAR,** Vol. 11, Issue 1, p. 35.
[32] **Ibid.**
[33] Van Vactor, **Introduction to the Global…**, p.2, 23.
[34] **Ibid.** p.104.
[35] **Ibid.**
[36] Tonje Pareli Gromley, "Transparency and international energy", in Kim Talus (Ed.), **Research Handbook on International Energy Law**, Edward Elgar Publishing, 2014, p. 519.
[37] UNGA Resolution No. 1515 (XV) on Concerted action for economic development of less developed countries of 15 December 1969, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/89/IMG/NR015289.pdf?OpenElement Accessed on 05.01.2019.

principle of public international law.[38] Most countries today also establish ownership rights to natural resources situated within their territories as well as on their part of the continental shelf.[39]

In the second half of the 20th century following the discoveries of massive reserves in the Middle East, oil toppled the coal and became the dominant form of energy.[40] In fact, of the 24 largest oil fields in the world, 16 are located around the Persian Gulf, the largest being Saudi Arabia's Ghawar oilfield.[41] Although many super giant (over 5 billion barrels) reserves were discovered between 1948 and 1968, between 1980 and 2010, only three super-giant discoveries were made two of these being in Kazakhstan and one being offshore Brazil.[42] Between 1973 and 2007, giant (over 500 million barrels) oil field discoveries are made in deep water offshore East Africa, Brazil, the North Sea and North American Gulf Coast.[43]

Organization of the Petroleum Exporting Countries ("**OPEC**") founded in Baghdad, Iraq by Iran, Iraq, Kuwait, Saudi Arabia and Venezuela in September 1960 has to be mentioned here.[44] As per Article 2 of its status, the principal aim of OPEC is to coordinate and unify the petroleum policies of its member states, ensure the stabilization of prices in international oil markets to eliminate fluctuations and secure a steady income for the producing nations.[45] OPEC currently has 14 member states and as per Article 7 of its status, any country with a substantial net export of crude petroleum which has fundamentally similar interests to those of Member [States] may become a full member of the organization.[46] OPEC's 14 members control 35% of the global oil supplies and 82% of the proven reserves.[47]

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[38] Gromley, "Transparency and international…, in Talus (Ed.), **Research Handbook**…, p. 519.
[39] **Ibid.** p. 520.
[40] Van Vactor, **Introduction to the Global…**, p.1, 20.
[41] **Ibid**.
[42] **Ibid.** p.22.
[43] **Ibid.**
[44] **OPEC**, OPEC Member Countries, https://www.opec.org/opec_web/en/about_us/25.htm Accessed on 11.01.2019.
[45] **OPEC**, OPEC Statute of 2012, https://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC_Statute.pdf Accessed on 11.01.2019.
[46] **Ibid.**
[47] Ariel Cohen, "OPEC is Dead, Long Live OPEC+", 29.06.2018, **Forbes,** https://www.forbes.com/sites/arielcohen/2018/06/29/opec-is-dead-long-live-opec/#78521e0f2217 Accessed on 11.01.2019.

The Vienna Group comprises of non-OPEC countries notably Russia, Mexico and Kazakhstan.[48] Nevertheless, these states cooperate with OPEC when it comes to regulate the oil prices.[49] Among these countries, Russia is an example of success over control of oil and especially natural gas resources.

The inequality between the resources and supply end of the business versus the demand and consuming part was tested in 1973 when Arab OPEC members embargoed oil to the USA and the Netherlands followed by a production cut.[50] Europe experienced a natural gas supply crisis in 2006 and 2009 when Russia cut off the supply at the Ukraine border due to the disputes between Russia through its principal natural gas supplier Gazprom and Ukraine through its distribution company Naftogaz over the pricing.[51] Russia has been pursuing to build alternative routes for the distribution of its natural gas to Europe which would not go through Ukraine and/or other transit third countries. Notably Blue Stream[52], Turkstream[53], Nordstream I and II[54] are among those.[55] These two types of crisis related to the power games of the supply end of the chain should make the importance of security of a consistent and continuous supply clear for the countries in the consuming end.

Arctic region also has vast oil and gas resources potential making the disagreements on the area to heat up. Even China takes interest in the Arctic due to its value in terms of shorter and cheaper transportation routes. In Norway, exploitation of petroleum resources in the Arctic Ocean had a very positive effect since the beginning of the petroleum activities in the 1960s.[56] Norway has moved from being a post-occupancy state with an economy based on farming, shipping and fishery to a welfare

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[48] **Ibid.**
[49] **Ibid.**
[50] Van Vactor, **Introduction to the Global**…, p.107.
[51] **Ibid.**
[52] Bluestream pipeline is designed to deliver Russian natural gas to Turkey across the Black Sea bypassing third countries, supplementing the gas transmission corridor running from Russia to Turkey via Ukraine, Moldova, Romania and Bulgaria (Source: **Gazprom**, Bluestream, http://www.gazprom.com/projects/blue-stream/ Accessed on 12.01.2018).
[53] Turkstream is an ongoing project aimed at delivering Russian natural gas to Turkey as well as to southern and southeastern Europe via the Black Sea (Source: **Gazprom,** Turkstream, http://www.gazprom.com/projects/turk-stream/ Accessed on 12.01.2018).
[54] Nord Stream pipelines run from Russia to Europe across the Baltic Sea, bypassing transit third countries and delivering Russian natural gas to European consumers (Source: **Gazprom,** NordStream, http://www.gazprom.com/projects/nord-stream/ and http://www.gazprom.com/projects/nord-stream2/ Accessed on 12.01.2018).
[55] **Gazprom**, Projects, http://www.gazprom.com/projects/#pipeline Accessed on 12.01.2018.
[56] Gromley, "Transparency and international…, in Talus (Ed.), **Research Handbook…,** p. 517.

state with sound economic growth which is largely funded on revenues from petroleum exploitation.[57]

Drawing from Norwegian and Russian success over oil and gas exploitation, securing sovereignty of natural resources has historically been an important issue for host countries.[58] The issue is settled by the public international law principle of permanent sovereignty over natural resources developed in a series of UN resolutions as a reaction to and as a result of decolonization and a desire for sovereignty and development.[59]

Moving on from the natural gas giant Russia, the impact of China on the global energy market should be recognized. China is now a world superpower and as a consequence of its rapid growth, it is under constant pressure to find new energy resources.

After the discovery of Daqing oil field in late 1950, China climbed up in the world rankings as the sixth largest oil producer in the world by 1995.[60] Due to the development of its economy and the rise in the standards of living of its population, the demand for oil and has increased by large margins which caused Chinese policy makers to push state entities, Chinese National Petroleum Corporation ("**CNPC**") and China National Offshore Oil Company ("**CNOOC**") to invest for the exploration and development of overseas oil and gas reserves.[61] The oil consumption was on such a high scale, by the early 2000s, China became a net importer of energy, therefore, regional competition over oil between China and the neighbouring South East Asian states became inevitable.[62]

In the post-WWII years, China was trying to industrialize while Japan had all the technology it needed, and in exchange, Chinese raw materials, particularly oil and coal were in abundance for the Japanese demand.[63] In 2000s, China and Japan drifted apart due to China's high pricing of crude oil compared to international standards and the decreasing quality of Daqing oil.[64] Due to its own industrialization and rapid growth

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[57] **Ibid.** p. 518.
[58] **Ibid.**
[59] **Ibid.**
[60] Lim Tai-Wei, **Oil and Gas in China: The New Energy Superpower's Relations with Its Region**, World Scientific Publishing Co Pte Ltd, 2009, p.2.
[61] **Ibid.,** p.9.
[62] **Ibid.,** p.10-11.
[63] **Ibid.,** p.18.
[64] **Ibid.,** p.24.

as well as geopolitical concerns, China decided to diversify its oil import in order to reduce risks of interruption of its supply and shifted from Japan towards Russia as well as the Middle East to import oil from the 2000s forward.[65] China's energy deals are unprecedented as they involve arms supply to Kyrgyzstan and Iran in exchange of energy resources as well as provision of loans to Sudan, Nigeria, Gabon, Cameroon and Angola in exchange of oil commitments.[66] For oil-rich Association of Southeast Asian Nations ("**ASEAN**") states[67] such as Indonesia, Brunei and Malaysia, China is also a market to import their raw materials.[68]

In the South China Sea, China, the Philippines and Vietnam are competing for the continental shelf therefore have overlapping territorial claims.[69] China is claiming sovereign rights in a so-called historical nine-dash area in the South China Sea, but other South Asian states including Taiwan, Vietnam and the Philippines do not accept China's claims since the area is potentially very rich with oil and gas reserves. The continental shelf boundaries have also been a topic of dispute between China and Japan since China made its first official protest in December 1970 against the ongoing negotiations between Japan-Korea-Taiwan for a joint development of the potential oil and has in the East China Sea.[70] Over the time, various Southeast Asian states including Vietnam, Philippines, Indonesia and Malaysia had to take measures to prevent Chinese attempts to assert claims over maritime energy sovereignty.[71]

2.3.Perspective of oil and gas industry and tools to overcome risks in disputed territories

2.3.1. General

Investing in the exploration and exploitation of oil and gas requires a thorough risk analysis, and despite the associated high risks, such investment is a lucrative one. Nevertheless, known oil and gas resources have not been equally distributed around the world and a big portion of those resources are under the jurisdiction of very few

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[65] **Ibid.,** p.23-25.
[66] **Ibid**., p.97.
[67] Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam
[68] Tai-Wei, **Oil and Gas in China**…, p.40.
[69] Melissa H Loja, "Is the Rule of Capture Countenanced in the South China Sea? The Policy and Practice of China, the Philippines and Vietnam", **J En. & Nat. Res. Law**, Vol. 32, No. 4, 2014, p. 484-485.
[70] Miyoshi Masahiro, "The North Sea Continental Shelf Cases Revisited: Implications for the Boundaries in the Northeast Asian Seas", **As. Y. Int'l Law**, Vol. 15, Routledge, 2009, p. 206-207.
[71] Tai-Wei, **Oil and Gas in China**…, p.70.

countries which often has control on the policies surrounding the hydrocarbon exploration, exploitation and distribution business. Therefore, the prices and distribution routes of hydrocarbon resources are affected by the policies of these states and their national oil and gas companies. These companies are powerful actors having their voice heard in the hydrocarbon business.

Most of the globe has already been surveyed by geologists for the exploration of the potential oil and gas reserves and even though the geologists generally know the location of potential oil and gas structures, there are still issues of accessibility, suitable technology, financing and politics of the exploitation and production of these resources.[72] From the point of view of the investors, the question relates to the profitability of investing in such resource. For this reason, the following three questions should be answered affirmatively: (a) is it possible to obtain the exploration and development rights, (b) is there a reliable technology to produce such resource and (c) is the deposit of such resource sufficient to cover the capital and operating costs necessary to produce oil or gas.[73]

In the past, international energy industry had been dominated by seven transnational oil companies (the so-called "seven sisters" or the original "major oil companies") which were Anglo-Persian Oil Company, Gulf Oil, Standard Oil of California, Texaco, Royal Dutch Shell; Standard Oil of New Jersey, and Standard Oil Company of New York.[74] Today, the dominators in the industry (the so-called "true giants") are the national oil companies owned or controlled by the governments of oil-rich countries, managing approximately 90% of the world's oil reserves.[75] States participate in the energy industry through a national oil company, energy ministry or similar governmental entity and are principal players in the energy industry[76] due to their title to and control over the oil and gas resources. The ten biggest oil companies in the world are Saudi Aramco (Kingdom of Saudi Arabia, state-owned), Sinopec (China, state-owned), China National Petroleum Corporation (China, state-owned,

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[72] Van Vactor, **Introduction to the Global**…, p.120.
[73] **Ibid.**
[74] Doak Bishop, Eldy Quintanilla Roche and Sara McBrearty, "The Breadth and Complexity of the International Energy Industry" in J William Rowley QC, Doak Bishop and Gordon Kaiser (ed), **The Guide to Energy Arbitrations**, 2nd Edition, GAR, p. 1.
[75] "**National Oil Companies: Really Big Oil**", The Economist, 10.08.2006, https://www.economist.com/leaders/2006/08/10/really-big-oil Accessed on 04.02.2019.
[76] Bishop *et. al*., "The Breadth and Complexity…" in Rowley, Bishop and Kaiser (ed), **The Guide to Energy Arbitrations…,** p. 6.

"**CNPC**"), Exxon Mobil (the US), Royal Dutch Shell (the Netherlands-the UK), Kuwait Petroleum Corporation (Kuwait), BP (the UK), Total SA (France), Lukoil (Russia), ENI (Italy, formerly state-owned until 1995).[77] The same applies for the natural gas. The world's biggest producer of natural gas is Russia's Gazprom, followed by Exxon Mobil, CNPC, Royal Dutch Shell, BP, Chevron, Total, Statoil (Norway, largest shareholder is Norway), Conoco Philips (the US) and ENI.[78] For the purpose of this thesis, these companies, whether state-owned or privately held, will be generically referred to as Major Oil and Gas Companies ("**MOGC**").

2.3.2. Types of agreements between states and international investors used for handling oil and gas resources

Due to the strategic, security and/or geopolitical significance of the oil and gas resources, states, as the resource owners, are almost always in the key positions in the oil and gas industry, regulating the hydrocarbon industry through laws, regulations and policies as well as participating to the contracts through state entities or through a national oil and gas company.[79]

The main agreements used in the oil and gas industry which are briefly introduced here are the ones between the state that has the jurisdiction over the hydrocarbon resource at hand and the private investor wishing to operate on such resource. These are the concession agreements, production sharing agreements, (risk) service contracts and license agreements.

First agreement type used in oil and gas industry is the concession agreement. Concession is an arrangement between a concession granting authority and the grantee who is then allowed to undertake exploration development, production and trading of hydrocarbons extracted.[80] The grantor states did not posess the relevant technology, experience and control over oil operations prior to 1950s.[81] Historically, in the first half of the 20th century, many governments granted concessions to the MOGCs. Under

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[77] Benjamin Elisha Sawe, "Biggest Oil Companies in the World", 05.12.2018, **Worldatlas**, https://www.worldatlas.com/articles/biggest-oil-companies-in-the-world.html Accessed on 04.02.2019.

[78] J William Carpenter, "The world's top 10 natural gas companies", 9.02.2018, **Investopedia**, https://www.investopedia.com/articles/markets/030116/worlds-top-10-natural-gas-companies-xom-ogzpy.asp Accessed on 04.02.2019.

[79] Duncan Speller, Jonathan Lim and Justin Li, "Oil and Gas Arbitration in the Asia-Pacific Region", **GAR**, 25 May 2018.

[80] Mohd Naseem and Saman Naseem, "World Petroleum Regimes", in Kim Talus (Ed.), **Research Handbook on International Energy Law**, Edward Elgar Publishing, 2014, p. 151

[81] **Ibid.**

these earlier forms of concession agreements, states typically conceded their control over the energy resources to an international oil company, granted the title of the oil to such company, the concession covered vast areas, the duration was often 60 years or more, the international oil company controlled the schedule of the exploration and production operations, and the government received a percentage of royalty.[82] Within this context, oil companies directly negotiated with the government of the host state's for the drilling rights and royalty payments, did all the exploration, field development and marketing for the oil.[83]

However, over the time, these host states developed their own expertise and established state entities or national oil/gas companies tasked to do these works which paved the way for the states to seek a change in the type of agreements which would allow them to handle and develop their own resources.[84]

This shift in the dominating actors of the industry resulted in another type of agreement to emerge and that is called the Production Sharing Agreement ("**PSA**"). Under the concept of PSA, the host state retains the ownership and the right to exploit hydrocarbon resources whereas the international oil company performs the main tasks *vis-à-vis* a contractor, but share the production with the host state.[85] In these type of agreements, the financial and geological risk of finding commercially exploitable oil falls on these international oil companies which would typically have a certain number of years to explore for oil in a defined geographic area.[86]

Third type of agreement is the Risk Service Contract ("**RSC**") under which the oil and gas company usually provides funds required for exploring and developing hydrocarbon resources in question while the host state, retaining the ownership of these resources and the outcome of the production, pays the contractor a fee based on the percentage of the revenues for these services and also grants the contractor a certain percentage from the hydrocarbons to recover its initial costs (constituting its risk) once the project is successful.[87]

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[82] Bishop *et. al*., "The Breadth and Complexity…" in Rowley, Bishop and Kaiser (ed), **The Guide to Energy Arbitrations…,** p. 9.
[83] Van Vactor, **Introduction to the Global**…, p.121.
[84] **Ibid.**, p.120-121.
[85] Bishop *et. al*., "The Breadth and Complexity…" in Rowley, Bishop and Kaiser (ed), **The Guide to Energy Arbitrations…,** p. 9.
[86] **Ibid.** p. 10.
[87] **Ibid.**

The last type of agreement used in hydrocarbon business is the License Agreement where the investor is granted onshore or offshore licenses for exploration and/or production entitling such investor to operate in a specific geographical area in exchange for a royalty or fee.[88]

With respect to natural gas, which may be found in oil reservoirs (associated gas) or by itself (non-associated gas), methods of exploration are the same as it is for oil.[89] Historically, due to the nature and high volatility of natural gas, difficulty and costliness of its transportation, it has been domestically produced and marketed and only following the innovations in its extraction and technological advances in its cost-effective transportation, it has earned a place as a major and lucrative energy resource.[90] It can be transported through high-pressure pipelines as well as in special marine tankers in liquified natural gas ("**LNG**") form.

Naturally, these agreements and license terms and conditions are only applicable and operational when the host state's jurisdiction over the area is undisputed. Unfortunately, especially with regards to newly discovered deep-water resources, such certainty is not the case which complicates the entire equasion between the host state and the investors.

2.3.3. MOGCs link to boundary disputes

Oil and gas industry have a long history in dealing with international boundaries and the disputes arising from the extension of oil and gas resources over international borders.[91] Territorial and boundary disputes related to hydrocarbon resources tend to extend for long periods of time and develop when there is a real prospect of exploitation and production of these hydrocarbons and that usually leads to resolution of such disputes.[92]

One incentive for the states to get those disputes resolved as soon as possible is the prospect of long-term investment these resources might attract. Nevertheless, for the companies to be attracted to invest, they need certainty and clarity and they need to assess the risks to see if the investment is worth it. Most of the time, companies which

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[88] **Ibid.,** p. 10.
[89] **Ibid.,** p. 4.
[90] **Ibid.,** p. 4, 8.
[91] Tim Martin, "Energy and International Boundaries", in Talus (Ed.), **Research Handbook…,** p. 181;
[92] Kaj Hober, "Recent trend in energy disputes", in Kim Talus (Ed.), **Research Handbook on International Energy Law**, Edward Elgar Publishing, 2014, p. 227.

are able to invest in such a risky business are the transnational industry giants or the consortiums they may establish.

These actors in the oil and gas industry are known to assume exclusive rights to extract the resources of an area where major site-specific investments -such as oil platforms - are to be made.[93] It is not practical for these companies if the area is disputed or in case there are no legal certainty so as to which coastal state has the jurisdiction over such area. Without such legal certainty is ensured by the relevant coastal state's government, the oil and gas investors would be reluctant to invest as there would always be a risk of losing their investments. From the perspective of legal certainty, predictability and the rule of law, it is important for the companies to know which rule is applicable and must be followed, in other words, which government has the jurisdiction in the location of such resource. Therefore, companies directly get involved when they are granted concessions crossing the disputed boundary lines.[94] The relevant boundary disputes display an increase as the industry discovered hydrocarbon resources in the deep waters and further offshore.[95]

When initiating an investment plan to pretty much any area in the world really, an investor (as said, typically a MOGC) establishes a team to assess the risks and conduct the necessary study and also to assess/determine how to overcome these risks or how much of these risks are worth taking. This "risk analysis" is conducted regardless of the existence of any boundary disputes or any other risks open to public knowledge, it is just a way of doing business. When an investor is faced with a boundary challenge, this would normally be something out of its control. Loss of access to a resource due to the host state's loss of title as a sovereign to an area is not an acceptable risk for most of the investor companies, so they need to include the boundary risk to their due diligence process and should structure this into their contract with the host state.[96] The companies need the boundary lines to be definitive to assess how these boundaries impact their concession area even if there is no boundary dispute and the boundaries may be defined precisely with a list of turning-point coordinates (geodetic datum), including the information concerning the nature of the lines between those turning points which appear not to be specified in almost 50% of the world's boundary

[93] Oxman, "International Maritime Boundaries…", **U Miami Inter-Am. L. Rev.,** p. 247.
[94] Tim Martin, "Energy and International Boundaries", in Talus (Ed.), **Research Handbook…,** p. 181.
[95] **Ibid.**
[96] **Ibid.,** p. 193.

agreements.[97] It can be said that there is a gap in the technical aspect in the defined international boundaries and this would be a risk *per se* for the investors especially if their concession areas are close to these "boundaries" with the adjacent country of their host country. Even if the concession sets forth that the concession aligns with the actual boundary, the companies should request the host state to provide the geodetic datum to confirm that the boundary line is where it is supposed to be, meaning that the contract area actually belongs to the host state or whether there exists a prolonged dispute and continued uncertainty.[98]

The companies assessing the risks do usually have a solid budget for the legal costs or the study of the existing data, may consider seismic acquisition and hesitate at exploration drilling and do not usually proceed with development and production until the boundary uncertainty has definitively removed.[99]

Investor MOGCs usually possess financial resources and lobbying powers which they use to their advantage. They cannot settle the boundaries or participate in the dispute directly as they do not have any legal standing in a territorial dispute.[100] Nevertheless, these MOGCs can manage the boundary risks and limit their exposure to such risks by: (1) negotiating the provisions of their contract in terms of indemnity clauses, limitation of liability clauses with regards to the boundary risk and a force majeure clause which includes non-host government claims interfering with their investments; (2) carrying out limited operations on their concession area; (3) assisting the host government which lacks the necessary funds or legal expertise to deal with an international boundary dispute -usually acceptable for the developing nations with little financial resources- and providing funding and expertise as well as information and advice on boundary experts and legal counsel and can also provide existing and future data covering the disputed area; and finally, (4) bringing the both governments together to have them accept a single investor on both sides of the disputed boundary issuing matching concessions and then work towards settling the dispute .[101]

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[97] **Ibid.**
[98] **Ibid.** pgs. 193-194.
[99] **Ibid.**
[100] **Ibid.**
[101] Martin "Energy and International Boundaries" in Talus (Ed.), **Research Handbook…,** p. 194-195.

3. Role of public international law in inter-state territorial disputes involving oil and gas resources

Expectation of a shortage of oil and gas led to the increased interest in the exploration and exploitation of these energy resources. Following two severe oil crises and wars impacting the oil and gas industry, significant development took place in the international energy sector due to the liberalization of the former state monopolies following private investment in the energy sector and consequent increase of the trans-border trade.[102]

The world observed the emergence and rise of energy law ever since. Basically, energy law deals with the allocation of rights and duties concerning the exploitation of energy resources between individuals and governments and between states, entailing all sources of energy, their exploitation, production, transport, distribution and legal relationships between actors behind all these processes.[103] Energy law is a transnational legal field where domestic and international law plays a role in governing the trans-border relations, especially in terms of cross-border oil or gas pipelines where exploration takes place in one location and the product is distributed and sold worldwide.[104]

International energy law concerns the rules and regulations within public and private international law, international investment law, international trade law, international environmental law, law of the seas etc.[105] Onshore and offshore oil and gas exploration and exploitation; rules on liability and compensation for oil pollution and damage; rules on energy trade, transfer and transit through networks and pipelines; rules on investment protection are all covered by public international law.[106] Public international law regulates the claims for territorial sovereignty for the exercise of jurisdiction among different states which is crucial for international energy markets as it provides legal clarity on which state has the jurisdiction and legitimate authority to redistribute ownership or exploration and exploitation rights over oil and gas resources under the principle of sovereignty over natural resources.[107] Public international law

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[102] Stephan W. Schill, "The Interface between national and international energy law", in Talus (Ed.), **Research Handbook…,** , p. 47.
[103] **Ibid.,** p. 44.
[104] **Ibid**.
[105] **Ibid.**, p. 50.
[106] **Ibid.**
[107] **Ibid.**, p. 59.

also provides the institutional infrastructure and legal instruments necessary for inter-state cooperation in energy related issues, among others, such as international treaties and international courts and tribunals.[108]

We have previously explained that how majority of onshore oil resources were rapidly maturing and that unexplored oil and gas reserves were located in the deep-water basins. This fact brings us under the realm of international law of the seas within public international law.

Access to oil and gas resources appears to have triggered many territorial disputes but also gave rise to their peaceful resolution via inter-state negotiations, binding third-party dispute settlement and subsequent conclusion of boundary treaties. Majority of these disputes concern maritime delimitation and interpretation of sovereign rights of the states with regards to maritime zones. Underlying reason for emergence of such disputes is the fact that debut of maritime zones, along with some other developments, created opportunities for states to legitimately extend their jurisdiction to these zones therefore have access to various natural resources (including non-living natural resources, *e.g.* oil and gas) contained therein. This is why, in the next section, the author will "dive deep" into the international law of the seas and examine various principles established by the international adjudication for maritime delimitation as well as interpretation of sovereign rights of the states in maritime zones.

4. INTERNATIONAL LAW OF THE SEA AND MARITIME ZONES

In this section, the concept of territorial sovereignty of states, the enclosure of the seas[109] and the emergence of maritime zones and states' rights concerning these zones will be explained within the context of principles of international law of the seas and various treaties codifying the rules of the law of the seas.

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[108] **Ibid.,** p. 60.

[109] *See:* Thomas Cottier, **Equitable Principles of Maritime Boundary Delimitation** – The Quest for Distributive Justice in International Law, Cambridge University Press, 2015, pgs. 45-129

4.1.Territorial sovereignty of a state

One of the characteristics of modern statehood is the sovereign control over a definitive territory[110], as without any territory, a legal person cannot be a state.[111] Sovereignty of a state over its land territory extends to its territorial sea, its seabed and subsoil and islands, islets, rocks as well as the air space above its land territory and territorial sea, while high seas and outer space are *res communis* and cannot be placed under the sovereignty of any state.[112]

Sovereignty in international law refers to the use of a state's dominion on its own authority and exclusively[113] and sovereign rights refer to various types of rights conferred to that state, such as the coastal state's sovereign rights with regards to natural resources in the seabed of the continental shelf.[114]

Natural resources of the sea consist of two main categories: living resources and non-living resources (hydrocarbons and other minerals).[115] Characteristics of these natural resources as well as the existence and extent of the states' jurisdiction in the maritime zones that contain these resources bear utmost importance for those who wishes to benefit from these resources.[116]

For the legal clarity and predictability, ascertaining that the state which has the jurisdiction and legal authority to convey certain rights over these offshore resources would be one of the priorities for an international investor to be able to commit its capital to a major project involving oil and gas resources in the territory in question. Most maritime boundaries are determined by way of agreements and recorded in treaties, many remain undelimited among which a significant number are disputed.[117] Nevertheless, benefits of mutually accepted boundaries would encourage states towards the settlement of their overlapping claims giving rise to territorial disputes

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[110] Territory refers to "a geographical area within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control" (Source: Garner, Black's Law Dictionary…, p. 1512.)

[111] Shaw, **International Law**…, p. 487; Simmons, "Capacity, commitment …" **J Conf. Res…,** p. 829.

[112] Crawford, **Brownlie's Principles…,** p. 203; also see: Article 1 of the Chicago Convention on International Civil Aviation, 7.12.1944, 15 UNTS 295 reads as: "*The contracting States recognize that every State has complete and exclusive sovereignty over the air-space above its territory*."

[113] Hüseyin Pazarcı, **Uluslararası Hukuk** (*International Law*), 8th Edition, (2009) Turhan Kitabevi, p. 148-149.

[114] Crawford, **Brownlie's Principles**…, p. 204-205.

[115] Pazarcı, **Uluslararası Hukuk**…, p. 248.

[116] **Ibid.**

[117] Crawford, **Brownlie's Principles…**, p. 281.

with their neighbours. Economic opportunities such as a boost in trade volume and joint development of a difficult-to-reach resource are among these benefits.[118] At this point, it becomes necessary to familiarize the reader with the history and main characteristics of international law of the seas before moving on to inter-state territorial disputes and the impact of hydrocarbon resources in these proceedings, if any.

4.2.Emergence of Maritime Zones

In the course of the research conducted for this thesis, it has been revealed that oil and gas come into the picture almost primarily when the disputed territory subject to overlapping claims of opposite or adjacent states is a maritime zone and the disputing states desire such zone to be delimited between them. It has further been revealed that the focus of this thesis, namely the impact of access to oil and gas resources on the settlement of territorial disputes, concern the delimitation of the maritime zones, especially the continental shelf and the states' sovereign rights therein for the majority of the time. That is why, this section will briefly explain emergence of the concept of continental shelf as well as other maritime zones and important principles that has shaped the law of the sea.

Law of the sea was among the many things that has changed after the World War II, all the more so with regards to claims of states over the natural resources of the sea and seabed.[119]

The concept and development of the continental shelf regime began with the exploration for oil and natural gas in the submarine areas in the 1930s[120] In 1935, geological survey reports revealed that there were vast and potentially commercially exploitable oil reserves in the submarine areas of Gulf of Paria between Trinidad and Venezuela.[121] This revelation was swiftly followed by the commencement of negotiations between the two governments to regularize the legal regime regarding the rights over the submarine areas of the Gulf of Praia in 1936 where the parties agreed to delimit the submarine areas -which was the first in its kind- and concluded the Gulf

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[118] Simmons, "Capacity, commitment …" **J Conf. Res…,** p. 832.
[119] Thomas Cottier, **Equitable Principles of Maritime Boundary Delimitation** – The Quest for Distributive Justice in International Law, Cambridge University Press, 2015, p. 45.
[120] Anthony Lucky, "The Issues Concerning the Continental Shelf: Reflections", **Int'l Com. Law Rev.** 17, No. 1, January 2015, p. 95.
[121] **Ibid.** p. 96.

of Praia Treaty which defined the submarine areas and the principles to govern such area, later years to become the "continental shelf".[122]

Since the WWII, the growing demand for oil and gas which has been discovered to be abundant in the offshore reserves, as well as technological advances enabling the extraction of these resources eventually resulted in the creation of continental shelf.[123]

On 28 September 1945, the US President Harry Truman issued a Proclamation and Order ("**Truman Proclamation**") to extend the US jurisdiction over the submerged lands and subsoil of the Outer Continental shelf.[124] The Truman Proclamation stated that "*the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just (...) since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it*".[125] Truman continued and stated that *"[the US] regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the US, subject to jurisdiction and control*."[126] were subject to the control and jurisdiction of the US.[127] President Truman aimed to establish that the US would exercise "jurisdiction and control" over the natural resources within its continental shelf for international recognition.[128]

Truman Proclamation set the ground for the exploitation of hydrocarbon resources, therefore was attractive to many states which followed suit in 1950s and 1960s, leading the concept of continental shelf through becoming a customary law rule.[129] As a result, the continental shelf appeared as a legal concept in the 1950s which would entitle the coastal states to exploit the oil and gas resources found in the seabed of its shallow waters.[130]

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[122] **Ibid.**
[123] Yoshifumi Tanaka, **The International Law of the Sea**, Cambridge University Press, 2012, p. 132.
[124] Proclamation No.2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf ("Truman Proclamation"), 28 September 1945, 10 **Fed. Reg.** 12303 (1945), https://www.gc.noaa.gov/documents/gcil_proc_2667.pdf Accessed on 01.02.2019.
[125] **Ibid.***; see also*: Gündüz, **Milletlerarası Hukuk…,** p. 460.
[126] Truman Proclamation.
[127] Truman Proclamation, para. 6.
[128] Lucky, "The Issues Concerning…", **Int'l Com. Law Rev.,** p. 101.
[129] Cottier, Equitable Principles of Maritime Boundary Delimitation …, p. 73; Crawford, **Brownlie's Principles…**, p. 270.
[130] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 47.

Evolution of the law of the sea in the direction of enclosure of the seas by the developing coastal states was motivated by their desire to protect relevant national interests on the natural resources in the sea and the seabed, such as preserving offshore oil and gas resources and the proceeds within the continental shelf or preventing over-exploitation of fish resources by foreign vessels in the EEZ.[131] This change in the law of the sea for the achievement of global distributive justice led to the law making endeavours by the UN International Law Commission ("**ILC**") and the subsequent treaties during this period.[132]

The ILC initiated the first International Conference on the Law of the Sea in 1958 in Geneva ("**1958 Geneva Conference**") with the participation of 86 states which resulted in the adoption of (i) the Convention on the Territorial Sea and the Contiguous Zone[133], (ii) the Convention on the High Seas[134], (iii) the Convention on Fishing and Conservation of the Living Resources of the High Seas[135], (iv) the Convention on the Continental Shelf[136] ("**1958 Geneva Conventions**").[137]

1958 Geneva Conventions confirmed the division of the oceans into the categories of internal waters, territorial sea and the high seas.[138] The Convention on the Territorial Sea and the Contiguous Zone stipulated that "*the sovereignty of a state extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea*".[139] The Convention on the High Seas defined the high seas as "*all parts of the sea that are not included in the territorial sea or in the internal waters of a state*."[140] The Convention on the Continental Shelf provided an initial definition of the continental shelf as follows: "*continental shelf is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that*

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[131] **Ibid.**
[132] **Ibid.**, p. 49.
[133] **ILC**, Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, in force 10 September 1964, UNTS, vol. 516, p.205.
[134] **ILC**, Convention on the High Seas, Geneva, 29 April 1958, in force 30 September 1962, UNTS, vol. 450, p.82.
[135] **ILC**, Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958, in force 20 March 1966, UNTS, vol. 599, p.285.
[136] **ILC**, Convention on the Continental Shelf, Geneva, 29 April 1958, in force 10 June 1964, UNTS, vol. 499, p.311.
[137] Tanaka, **The International Law of the Sea**…, p. 22.
[138] **Ibid.**, p. 23.
[139] Article 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.
[140] Article 1 of the 1958 Convention on the High Seas.

limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."[141] In 1969 in the *North Sea Continental Shelf*, the ICJ defined the continental shelf as the natural offshore extension of the land territory over which the coastal state had sovereign rights: "*the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources*."[142]

Breadth of territorial sea and limits on fisheries remained open in the 1958 Geneva Conference as well as in the second UN conference on the law of the sea in 1960.[143] Issue of control over living and non-living offshore natural resources to meet the growing demand as well as the actual possibility to reach and exploit deep seabed resources due to technological advances necessaitated further management of these resources.[144] It is also important to note that independence of the majority of former colonies could only take place in the 1960s which meant that these newly emerging states could barely have a voice in the drafting of 1958 Geneva Conventions.[145]

In 1947, three Andean states with no continental shelves, Chile, Peru and Ecuador, had claimed to exercise full sovereignty within 200nm from their coast in order to be able to reach currents rich in fish and the deposit of guano birds, an important fertilizer, located up to 187nm because of the fish larvae that these birds fed on.[146] On 8 May 1970, governments of Argentina, Brazil, Chile, Ecuador, Panama, Nicaragua, El Salvador, Uruguay and Peru signed the Declaration of Montevideo on the Law of the Sea[147] where they claimed rights to explore, conserve and exploit the natural resources of the sea adjacent to their territories including its soil and subsoil.[148] In order to find a conciliation between the 200nm claims of the developing coastal

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[141] Article 1 of the 1958 Geneva Convention on the Continental Shelf.
[142] *North Sea Continental Shelf*, p. 22, para 19.
[143] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 49-50; Tanaka, **The International Law of the Sea**…, p. 23-24.
[144] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 50; Tanaka, **The International Law of the Sea**…, p. 25.
[145] **Ibid.**
[146] Tanaka, **The International Law of the Sea**…, p. 124.
[147] Montevideo Declaration on the Law of the Sea ("***Declaration of Montevideo***"), 08.05.1970, https://iea.uoregon.edu/treaty-text/1970-montevideodeclarationlawofseaentxt Accessed on 17.03.2019.
[148] Article 3, 4 and 5 of the Declaration of Montevideo.

states and maritime powers perceiving this as an obstacle to their economic and military interests, Kenya submitted a proposal for a 200nm EEZ to the Seabed Committee of the UN in 1972 which would be placed under the jurisdiction of the coastal state and would guarantee freedom of navigation at the same time.[149]

During the 1960s, the possibility of exploitation of the mineral resources of the deep seabed and ocean floor became a hot topic.[150] Legal status of deep seabed and ocean floor was discussed internationally for the first time upon the speech of Malta's delegation Arvid Pardo in the United Nations General Assembly ("**UNGA**") of 1967.[151] On 18 December 1967, the UNGA decided to establish an *ad hoc* committee to study the peaceful uses of the sea bed and the ocean floor beyond the limits ofnational jurisdiction ("**Seabed Committee**") for the purpose of peaceful use of the deep seabed.[152] This was followed by the Declarations of Principles Governing the Deep Seabed on 17 December 1970[153] and the subsequent adoption of the UNGA resolution declaring that the deep seabed and its resources were outside any national jurisdiction and to be treated as the common heritage of mankind.[154] The principles declared would form the fundamentals of the codification of the Area[155] and the real prospect to explore deep seabed resources would result the concept of the Area to emerge as a third category of maritime zone in the 1980s.[156] Same day, the UNGA also

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[149] Tanaka, **The International Law of the Sea**…, p. 124; Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 109.

[150] Crawford, **Brownlie's Principles…**, p. 327; Selami Kuran, **Uluslararası Deniz Hukuku** (*International Law of the Sea*), 2. Baskı, Arıkan, 2007, p. 256.

[151] Tanaka, **The International Law of the Sea**…, p. 25; Kuran, **Uluslararası Deniz**…, p. 257.

[152] Tanaka, **The International Law of the Sea…**, p. 25; UNGA Resolution No. 2340 XXII of 18.12.1967 on Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor and the Subsoil thereof, Underlying the High Seas beyond the limits of Present National Jurisdiction and the use of their resources in the interests of mankind, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/236/75/IMG/NR023675.pdf?OpenElement Accessed on 4.05.2019.

[153] UNGA Resolution No. 2749 XXV of 17 December 1970 on Declaration of Princples Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/350/14/IMG/NR035014.pdf?OpenElement, Accessed on 4.05.2019; Tanaka, **The International Law of the Sea…**, p. 14.

[154] UNGA Resolution No. 2750A XXV of 17 December 1970 on Reservation exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor and the Subsoil thereof, Underlying the High Seas beyond the limits of Present National Jurisdiction and the use of their resources in the interests of mankind and convening of a conference on the law of the sea, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/350/15/IMG/NR035015.pdf?OpenElement Accessed on 4.05.2019; Kuran, **Uluslararası Deniz…,** p. 257.

[155] Tanaka, **The International Law of the Sea**…, p. 14.

[156] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 48.

decided to "*convene in 1973 (…) a conference on the law of the sea which would deal with the establishment of an equitable international regime (…) a precise definition of the area and a broad range of related isses including those concerning the regimes of the high seas, the continental shelf, the territorial sea (…) and contiguous zone, fishing and conservation of the living resources of the high seas (…)*".[157]

The third International Conference on the Law of the Sea first convened in December 1973 and continued for a decade with a total of eleven sessions until 1982[158] and was acknowledged as the most comprehensive and meaningful conference on the law of the seas ("**Conference**").[159] The Conference tasked three committees to deal with the (i) legal regime of the deep seabed beyond the limit of national jurisdiction; (ii) territorial sea, contiguous zone, the EEZ, continental shelf, international straits, archipelagic waters, high seas and land-locked and geographically disadvantaged states; (iii) marine environment, scientific research and technology.[160] Intensive work and several revisions of the text finally led to the adoption of the United Nations Convetion on the Law of the Sea ("**UNCLOS**")[161] on 30 April 1982 by 130 votes in favour, 18 abstentions and 4 votes against (USA, Israel, Turkey and Venezuela) and its entry into force on 16 November 1994.[162] Currently, 168 states have ratified UNCLOS, Azerbaijan being the last one on 16 June 2016.[163]

The UNCLOS is acknowledged to constitute the codification[164] of the rules of the law of the seas developed through centuries of state practice and *opinio juris*.[165]

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[157] UNGA Resolution No. 2750C XXV of 17 December 1970 on Reservation exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor and the Subsoil thereof, Underlying the High Seas beyond the limits of Present National Jurisdiction and the use of their resources in the interests of mankind and convening of a conference on the law of the sea, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/350/15/IMG/NR035015.pdf?OpenElement Accessed on 4.05.2019; Tanaka, **The International Law of the Sea…**, p. 26.

[158] Tanaka, **The International Law of the Sea**…, p. 26.

[159] Öktem, **Uluslararası Teamül Hukuku**…, p. 386-387; Cottier, Equitable Principles of Maritime Boundary Delimitation …, p. 50-51.

[160] Tanaka, **The International Law of the Sea**…, p. 26.

[161] United Nations Convention on the Law of the Sea, 10.12.1982, UNTS: 1833.

[162] Tanaka, **The International Law of the Sea…**, p. 29; Cottier, Equitable Principles of Maritime Boundary Delimitation …, p. 52.

[163] **Oceans & the Law of the Sea United Nations**, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm and http://www.un.org/depts/los/convention_agreements/convention_declarations.htm Accessed on 05.08.2018

[164] International codification primarily refers to the practice of transforming the unwritten law (*jus non scriptum)* which is established through the centuries of state practice and *opinio juris* into written law (*jus scriptum*). (Source: Öktem, **Uluslararası Teamül Hukuku…,** p. 366).

[165] 1958 Geneva Conventions on the 1) Continental Shelf, 2) High Seas, Territorial Sea and Contiguous Zone; Fishing and Conservation of the Living Resources of the High Sea were the first attempt on the

Customary law rules reflected in the UNCLOS appear to be very comprehensive and detailed than any other customary law rules in international law.[166] The UNCLOS provided an international framework for the determination of maritime boundaries and resolution of maritime boundary disputes and its provisions are widely accepted as the *digest* of customary international law on the law of the seas[167]. Finally, the author would like to note that the UNCLOS prevails between the state parties over the 1958 Geneva Conventions.[168] In the next section, a brief analysis of the division of maritime zones in the UNCLOS and rights of the states with regards to these maritime zones will be provided.

4.3.Maritime Zones and States' Rights concerning these Zones in the UNCLOS

The UNCLOS defines six major maritime zones: the territorial sea[169]; the contiguous zone[170]; the EEZ[171]; the Continental Shelf[172]; the High Seas[173]; and the Area[174]. The scope of these zones under the jurisdiction of a particular coastal state are measured on the basis of their distance from the coast and that line is called the baseline.[175]

The UNCLOS mentions normal baselines, straight baselines, closing lines around river mouths and bays and archipelagic baselines.[176] A normal baseline is defined as "*the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state*".[177] In case of islands situated on atolls or islands having fringed reefs, the baseline is the seaward low water line.[178] The UNCLOS also establishes the straight baselines method in case "*the coastline is deeply*

codification of the rules of the international law of the seas, nevertheless, due to the dramatic changes observed concerning the very subjects these treaties govern, a new regulation was deemed ecessary by the international community and the UNCLOS was born as an outome of the third United Nations conference of the Law of the Sea. *Source:* Aslan Gündüz, **Milletlerarası Hukuk Temel Belgeler-Örnek Kararlar** (*International Law Primary Documents- Case Law*) 5. Baskı, Beta, 2009, p. 331.

[166] Öktem, **Uluslararası Teamül Hukuku**…, p. 387.

[167] *Nicaragua v. Colombia*, para. 114.

[168] Article 311 of the UNCLOS; Tanaka, **The International Law of the Sea**…, p. 191.

[169] Article 2(1) of the UNCLOS

[170] Article 33 of the UNCLOS.

[171] Article 55 of the UNCLOS.

[172] Article 76(1) of the UNCLOS.

[173] Article 86 of the UNCLOS.

[174] Article 1(3) of the UNCLOS.

[175] Tanaka, **The International Law of the Sea**…, p. 43.

[176] Tanaka, **The International Law of the Sea**…, p. 44.

[177] Article 5 of the UNCLOS.

[178] Article 6 of the UNCLOS.

indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity".[179] In this method, straight baselines are drawn by joining appropriate points of the farthermost seaward extent of the low water line. If the "*presence of a delta or other natural conditions of the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line*".[180]

4.3.1. Territorial Sea

The territorial sea is a marine space under the territorial sovereignty of the coastal state, along with internal waters, international straits and archipelagic waters, and is measured from a baseline, related to the low-water mark and enclosing internal waters lying on its landward side.[181] Pursuant to UNCLOS, length of the territorial sea can be established up to a limit not exceeding 12nm measured from the baselines.[182] Sovereignty of the coastal state extends to the air space over the territorial sea, its seabed and subsoil, and as a result, to the natural resources therein.[183] Within its territorial sea, the coastal state may reserve fisheries exclusively for national use and bar foreign ships from navigation and trade along the coast (cabotage), however has to allow ships of all other states innocent passage through its territorial sea.[184]

As a rule, and in the absence of an agreement to the contrary, territorial sea between states with opposite or adjacent coasts cannot be extended "*beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured*."[185] Exception of delimitation via application of the median line (equidistance principle) comes into frame when adjustment is necessary due to a historic title claim or the existence of other special circumstances.[186]

4.3.2. Contiguous Zone

Contiguous zone gives jurisdiction to the coastal state beyond its territorial sea for special purposes.[187] This is the zone contiguous/adjacent to the territorial sea of the

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[179] Article 7 of the UNCLOS.
[180] **Ibid.**
[181] Tanaka, **The International Law of the Sea**…, p. 76, 83; Crawford, **Brownlie's Principles…**, p. 255; Article 2(1) of the UNCLOS.
[182] Article 3 of the UNCLOS.
[183] Article 2(2) of the UNCLOS.
[184] Crawford, **Brownlie's Principles…,** p. 264-265; Article 17 of the UNCLOS.
[185] Article 15 of the UNCLOS.
[186] **Ibid.**
[187] Crawford, **Brownlie's Principles…**, p. 265; Pazarcı, **Uluslararası Hukuk**…, p. 275.

coastal state where it has the authority to prevent any breach of its immigration, customs, financial or health laws and regulations within its territory or territorial sea and impose sanctions in case the relevant laws and regulations are infringed within its territory or territorial sea.[188] While territorial sea is a part of the state's seas; the contiguous zone is the part of high seas and while the state has the full sovereignty over the territorial sea, it can only exert limited jurisdiction within the contiguous zone.[189] The contiguous zone may not extend beyond 24nm from the baselines.[190] The contiguous zone overlaps with the EEZ and does not have any affect when it comes to boundary disputes or accessing natural resources in maritime zones.[191]

The next two maritime zones where the coastal states have sovereign rights are the continental shelf and the EEZ, both historically originated from the states' desire to control, preserve and manage the offshore natural resources within these zones.[192]

4.3.3. Continental Shelf

Continental shelf is gepgraphically described as terraces between continents, islands and the deep seabed.[193] UNCLOS consolidated all the law and practice on the continental shelf and defines the continental shelf as the area comprising "*the seabed and subsoil of the submarine areas that extend beyond the coastal state's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200nm from the baselines from which the length of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance*".[194] The continental margin comprises the submerged prolongation of the coastal state's land and consists of the seabed and subsoil of such shelf, which does not include the deep ocean floor and its subsoil.[195] The continental shelf of a coastal state may also extend its continental shelf beyond 200nm determined pursuant to the methods described in Article 76(4)(a)(i) and (ii), but such extension is limited to 350nm from the baselines from which the length of the territorial sea is measured or to 100nm from the 2,500m isobath.[196]

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[188] Tanaka, **The International Law of the Sea**…, p. 120; Article 33 of the UNCLOS.
[189] Kuran, **Uluslararası Deniz**…, p. 194.
[190] Article 33(2) of the UNCLOS.
[191] Tim Martin, "Energy and International Boundaries", in Talus (Ed.), **Research Handbook…,** p. 184
[192] Tanaka, **The International Law of the Sea**…, p. 120.
[193] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 70.
[194] Article 76(1) of the UNCLOS.
[195] Article 76(3) of the UNCLOS.
[196] Tanaka, **The International Law of the Sea**…, p. 135; Article 76(5) of the UNCLOS.

Outer limits of the continental shelf of the coastal states must be delimited from where it extends beyond 200nm from the baselines by straight lines limited to 60nm in length, connecting fixed points, defined by coordinates of latitude and longitude and submit such information to the UN Commission on the Limits of the Continental Shelf ("**CLCS**") and also deposit charts and relevant information, including geodetic data permanently describing the outer limits of its continental shelf with the Secretary General of the UN.[197] The coastal states can establish continental shelf in accordance with Article 76 of the UNCLOS by submitting particulars of such limits to the CLCS with the scientific and technical data within 10 years of the entry into force of UNCLOS for that state.[198]

A coastal state may exercise sovereign rights to explore and exploit the natural resources within its continental shelf.[199] These rights over the continental shelf are inherent rights and exist *ipso facto* and *ab initio* and do not depend on occupation or any express proclamation.[200] In addition to that, these rights may be used exclusively by that specific coastal state and if it choses not to explore its continental shelf or exploit its resources, no other state may perform these activities absent any explicit consent of the coastal state.[201] The coastal state may authorize and regulate drilling for all purposes in its continental shelf.[202] Naturally, the power to authorize any private company in these areas are also vested in the coastal state who has the jurisdiction over the relevant continental shelf. The exploitability of the offshore oil and gas resources resulted in overlapping territorial claims by neighbouring coastal states.[203] Here, it should be noted that if the coastal state does not claim an EEZ, the superjacent waters above the continental shelf are high seas; if the coastal state establishes an EEZ, the superjacent waters above the continental shelf beyond 200nm are always high seas.[204]

As an impartial and objective intermediary with neutral scientific principles, the CLSC may make final recommendations regarding territorial disputes, encouraging the disputing states to reach a settlement, however has no authority or

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[197] Article 76(7), (8) and (9) of the UNCLOS.
[198] Article 76(8) of the UNCLOS and Article 4 of Annex II (Commission on the Limits of the Continental Shelf) of the UNCLOS.
[199] Article 77(1) of the UNCLOS.
[200] Tanaka, **The International Law of the Sea**…, p. 142.
[201] Article 77(2) of the UNCLOS; Article 2(2) of the Geneva Convention on the Continental Shelf.
[202] Article 81 of the UNCLOS.
[203] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 71.
[204] Article 78 of the UNCLOS; Tanaka, **The International Law of the Sea**…, p. 145.

jurisdiction to make any binding decision on any such dispute.[205] States started to submit their proposals for the outer-continental shelf limits to the CLCS to extend their continental shelf in the Arctic because of the significant opportunities to access potentially rich deep-water oil and gas reserves.[206] In terms of overlapping territorial claims in the Arctic, the CLCS has an important task as the exploration and exploitation of the oil and gas reserves increased[207] and any extended continental shelf areas have the potential to keep the oil and gas industry very busy for the upcoming years.[208] This is also apparent from the enthusiasm major oil and gas companies display when it comes to bid for the offshore oil and gas block exploration tenders and licenses.

As the coastal state assumes the exclusive rights of exploring and exploiting oil and gas from the subsoil, economic potential of the continental shelf could be significant for a developing coastal state.[209] Therefore, the coastal state would be inclined to exploit and use the potential hydrocarbon resources in the subsoil within its continental shelf. It is inherent therefore that the coastal state would need an undisputed continental shelf to do so.

The coastal state may construct and maintain artificial installations necessary for exploration and exploitation of oil and gas on its continental shelf and has the authority to create safety zones around such installations and all ships are obliged to respect these safety zones and comply with international standards while navigating around them.[210]

The UNCLOS also regulate the obligations for the coastal state concerning the exploration and exploitation of the subsoil of its continental shelf. In respect of the exploitation of the oil and gas resources of the continental shelf beyond 200nm, the coastal state is obliged to make payments or contributions in kind through the International Seabed Authority ("**Authority**") to be equally distributed to the state

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[205] Paul Michael Blyschak, "Offshore oil and gas projects amid maritime border disputes: applicable law", **J W. En. Law & Bus.**, Vol. 6, No. 3, 2013, p. 214.
[206] Clive Schofield, "Securing the Resources of the Deep: Dividing and Governing the Extended Continental Shelf", **Berkeley J. Int'l Law**, Vol.33, 1, 2015:291, p. 275-276, http://scholarship.law.berkeley.edu/bjil/vol33/iss1/7/ Accessed on 02.03.2019.
[207] Blyschak, "Offshore oil and gas…", **J W. En. Law & Bus.**, p. 215.
[208] Schofield, "Securing the Resources…", **Berkeley J. Int'l Law**, p. 275-276.
[209] **BGR**, UNCLOS and Article 76, https://www.bgr.bund.de/EN/Themen/Zusammenarbeit/TechnZusammenarb/UNCLOS/UNCLOS_Article76/UNCLOS_Article76_node_en.html Accessed on 05.08.2018.
[210] Article 60&80 of the UNCLOS.

parties to UNCLOS.[211] Nevertheless, this is not applicable to every state. The UNCLOS makes an exception for developing states which are net importers of a resource produced from its continental shelf.[212]

4.3.4. Exclusive Economic Zone

The EEZ as well as the rights, jurisdiction and duties of the coastal state within such zone are governed by Articles 56-58 of the UNCLOS. The coastal state has sovereign rights to explore and exploit, conserve and manage the living (fish, sea creatures) or non-living (oil and gas) natural resources within the seabed and subsoil of the EEZ, and to perform other economic activities such as the production of energy from the water, currents and winds.[213] The EEZ extends from outer limit of the territorial sea to a maximum distance of 200nm from the baseline.[214] In other words, the sovereign rights the coastal states have on the natural resources in the EEZ includes its sovereign rights concerning the (non-extended) continental shelf and within the water column in addition to the continental shelf.[215]

The continental shelf and the EEZ overlaps within 200nm but the continental shelf may be extended further and may contain oil and gas reserves underneath.[216] Unlike the continental shelf, the EEZ is not based on natural concepts and is a man-made zone from the beginning.[217] Another difference between continental shelf and the EEZ is that for the establishment of an EEZ, the state must proclaim such zone.[218] This means that the creation of an EEZ is optional and its existence depends upon a claim by the coastal state[219] Majority of the EEZ and continental shelf boundaries naturally overlap, rendering the distinction between the two zones to minimum.[220] Primary reason of this is the fact that foundations and justifications for the creation of the EEZ and the continental shelf is closely related to coastal state's access to offshore natural resources.[221]

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[211] Article 82(1) and (4) of the UNCLOS.
[212] Article 82(3) of the UNCLOS.
[213] Article 56(1)(a) of the UNCLOS,
[214] Article 57 of the UNCLOS
[215] Pazarcı, **Uluslararası Hukuk**…, p. 283.
[216] Crawford, **Brownlie's Principles…**, p. 269-270.
[217] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 112.
[218] Tanaka, **The International Law of the Sea**…, p. 125; Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 112.
[219] Crawford, **Brownlie's Principles…**, p. 277
[220] Tim Martin, "Energy and International Boundaries", in Talus (Ed.), **Research Handbook…,** p. 183-184.
[221] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 112.

Finally, maritime zones that have been regulated by the UNCLOS which are beyond any national jurisdiction, namely the high seas and the Area[222] will be briefly explained below.

4.3.5. High Seas

High seas comprise all parts of the sea that are not included in the internal waters of a state, territorial sea, EEZ, archipelagic waters.[223] Part VII of the UNCLOS is dedicated to high seas which are open to all states whether coastal or land-locked and no state may validly claim sovereignty over the high seas.[224] Freedom of high seas comprises the "*(a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; and (f) freedom of scientific research, subject to Parts VI and XIII*".[225]

4.3.6. The Area

The Area as set forth in the UNCLOS means the deep seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.[226] Resources mean all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules.[227] The Area and its resources are the common heritage of the mankind, which means no state can claim or exercise sovereignty or sovereign rights over any part of the Area.[228]

The regime UNCLOS provides for the Area has the following key elements: 1) no state could claim sovereignty or sovereign parts over any part of the Area or its resources[229], 2) activities in the Area would be controlled by the Authority and carried out for the benefit of mankind as a whole[230]; 3) exploration and exploitation of the Area

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[222] Tanaka, **The International Law of the Sea**…, p. 149.
[223] Article 86 of the UNCLOS.
[224] Articles 87-88 of the UNCLOS
[225] Article 87 of the UNCLOS.
[226] Article 1(3) of the UNCLOS.
[227] Article 133 of the UNCLOS.
[228] Articles 136 – 137 of the UNCLOS; *also see*: Tanaka, **The International Law of the Sea**…, p. 172-173.
[229] Article 137(1)), 2 of the UNCLOS.
[230] Article 153 of the UNCLOS.

would involve parallel activities by the Authority[231]; and 4) the Authority would provide for the equitable sharing of the economic benefits of activities in the Area.[232]

In order to organize and control the activities in the Area, particularly with a view to administering the resources of the Area,[233] the UNCLOS established the Authority to which all its state parties are *ipso facto* members.[234]

One of the changes observed after the UNCLOS became effective was the rapid economic and political changes with regards to the commercial prospects of the deep seabed mining regime regulated in the UNCLOS.[235] These circumstances required a special agreement to be made in order to implement Part XI of the UNCLOS concerning "the Area" in 1994.[236]

Relevant maritime zones and jurisdictions of the states as per UNCLOS are demonstrated for the convenience of the reader below. Among the maritime zones explained above, EEZ and continental shelf stand out as coastal states have sovereign rights over some crucial issues such as access, exploration and exploitation of natural resources which also include building infrastructure to develop those resources within these maritime zones.

[231] UNCLOS Article 140(2), 160(2)(f)(i)
[232] Crawford, **Brownlie's Principles…**, p. 327-328.
[233] Article 157(1) of the UNCLOS
[234] Article 156(2) of the UNCLOS
[235] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Overview on Informal Consultations, http://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm Accessed on 01.01.2019.
[236] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994, https://treaties.un.org/doc/Treaties/1994/11/19941116%2006-01%20AM/Ch_XXI_06a_p.pdf Accessed on 01.01.2019.

Image No. 1: Maritime Zones and Jurisdictions as per UNCLOS

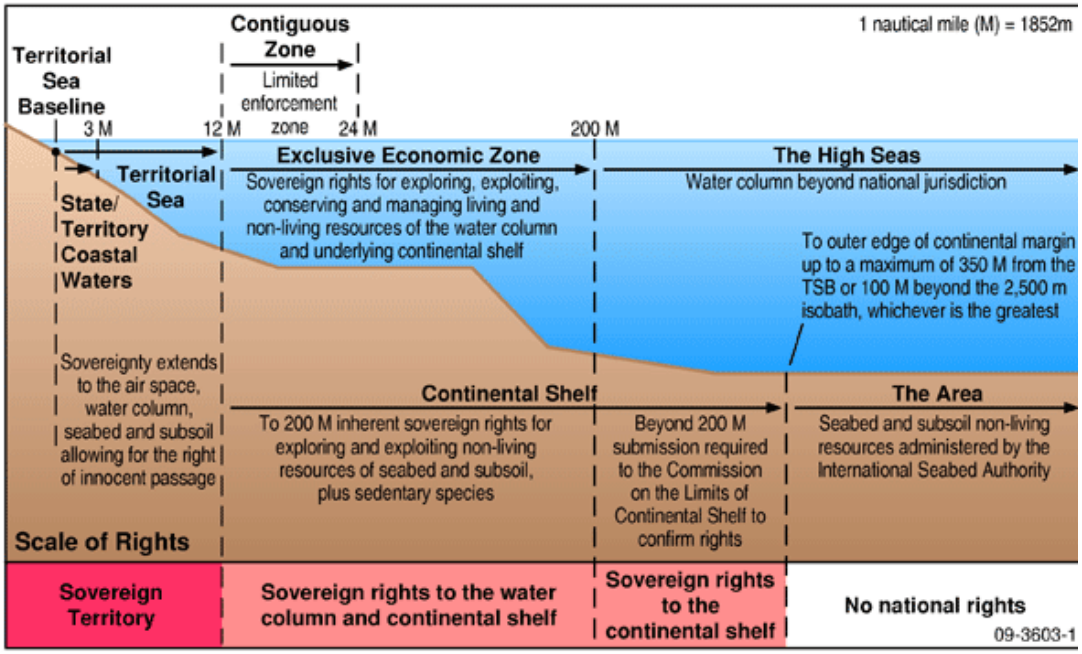

Image Source: Philip Symonds, Mark Alcock and Colin French, Setting Australia's limits, AusGeo News, March 2009, Issue No. 93, http://www.ga.gov.au/ausgeonews/ausgeonews200903/limits.jsp

In addition to such zones described in the UNCLOS, some other zones have been announced by some states over the areas of the seas such as Canada's 100nm wide "pollution-free zone" along her Arctic coastline.[237]

Now that the newly emerging maritime zones are explained, it should be kept in mind that due to many reasons -geographical, political or historical- not all of these zones are under the clear jurisdiction of one state and there are overlapping claims of states over these zones. That is why, absent any prospect of settlement via negotiations between the states, international law often has to deal with territorial disputes concerning the precise determination of their boundaries through international proceedings where the state submits its claim before a competent international judicial body.[238]

In the next section, a brief introduction will be made with regards to the concept of inter-state territorial disputes; international courts, tribunals and institutions administering international arbitrations competent to deal with such disputes. Then the

[237] Shaw, **International Law**…, p. 583.
[238] Crawford, **Brownlie's Principles**… p. 215.

international law principles governing territorial dispute settlement between states, particularly maritime delimitation will be dealt with.

5. INTER-STATE TERRITORIAL DISPUTE RESOLUTION AND MARITIME DELIMITATION

Disputes are basically disagreements between two (or more) parties which would need to be resolved for such parties to move forward. A disagreement/dispute may arise between private law subjects such as companies or real persons as well as public law subjects such as a state entity or the state itself. In the narrow sense, the term international dispute refers to conflicts between international law persons, particularly between states.[239]

Traditional methods of dispute settlement may be non-judicial (negotiations, good offices, mediation, conciliation, fact finding or inquiry) or judicial settlement (international arbitration and adjudication) between states.[240] International practice always included negotiation between the parties, as well as mediation as an informal method of settling a dispute.[241] Negotiation or diplomatic negotiation means examination and discussion of a request, a dispute, an attitude or an initiative to be taken or a treaty to be made between two or more parties.[242] Conciliation is a semi-judicial procedure where a third-party commissioned by the parties to see the dispute are empowered to make investigation and elucidate the facts, may hear the parties and must make suggestions for a settlement which is normally non-binding.[243] Fact-finding or inquiry method in international relations is used to investigate and reveal the material data for the following purposes: (a) providing necessary information to take decisions in international organizations; (b) determining the proper implementation of a treaty or fulfilment of the treaty obligations of the states; (c) revealing material data for the settlement of a dispute.[244]

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[239] Pazarcı, **Uluslararası Hukuk**…, p. 446.
[240] Pazarcı, **Uluslararası Hukuk…,** pgs. 447-490.
[241] **Ibid.** p. 719.
[242] Pazarcı, **Uluslararası Hukuk**…, p. 447.
[243] Crawford, **Brownlie's Principles…**, p. 719; Shaw, **International Law**…, p. 1022.
[244] Pazarcı, **Uluslararası Hukuk**…, p. 453.

Peaceful settlement does not always equal to legal settlement as vast majority of disputes are settled by negotiation and without the assistance of a third party.[245] Even so, all the peaceful settlement methods boil down to the production of a legal document where the parties clearly set forth their rights and obligations, which is often not easy to agree upon, especially if one state party is less willing than the other and/or considers itself to have more to lose out of a political deal. So, the state parties may prefer to settle their disputes via international arbitration or judicial settlement before international courts where they can prevent the involvement of political and other non-legal elements and obtain a binding award or judgment.[246]

International arbitration is amongst the methods used to settle inter-state disputes, majority of which concerning territorial or quasi-territorial disputes[247], where arbitral tribunal or the "umpire" has the binding decision-making power. The parties to an inter-state dispute may resort to institutional arbitration where an expert institution administers and manages the procedure via handling official notifications, secretarial work, presenting parties with a list of arbitrators with expertise and an excellent reputation, appointment of arbitrators in lieu of the parties when they cannot agree upon an arbitrator; or an *ad hoc* arbitration which is administered by the parties in every aspect and dissolves *functus officio* after the proceedings.[248]

Not only there are no significant distinctions between arbitration and judicial settlement, but also the permanent courts/tribunals developed their practice from arbitral practice.[249] International courts and tribunals, tasked by the states to resolve disputes by applying general legal principles instead of institutionalized bargaining, are the key for legalization of the international dispute resolution.[250]

As a general principle of international law, adjudication involving states can only be made through their consent to the jurisdiction/competence of the international court or arbitral tribunal they would appear before. Whether or not a judgment or an

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[245] Robert McCorquodale and Martin Dixon, **Cases and Materials on International Law**, Fourth Editon (2003), OUP, p. 574.
[246] **Ibid.**
[247] Crawford, **Brownlie's Principles…**, p. 720.
[248] Özturanlı, **Devletlerarası Tahkim**…, p. 47-48.
[249] **Ibid.**
[250] Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational", in Beth A. Simmons and Richard H. Steinberg (Ed.), **International Law and International Relations**, CUP, 2006, p. 131.

award can be imposed upon them depends on their acceptance of jurisdiction of the court or the tribunal as well as their willingness to comply with an adverse ruling.[251]

When the territorial dispute involves access to oil and gas reserves, states involved may be interested in determining their boundaries by way of negotiation and an agreement/treaty that follows such negotiation or resorting to international arbitration or adjudication in resolving their disputes for the sake of the opportunities settled boundaries would create.

International arbitration or adjudication proves especially useful in cases where the government values settlement but is prevented to pursue it because of the domestic opposition which may reject a negotiated deal but would agree on a settlement by a neutral third party, hoping for a more favourable outcome than the outcome of any negotiation through diplomacy.[252] Moreover, if the states fail in their efforts to solve the territorial dispute diplomatically, they tend to commit to letting a third party to determine the borders of such disputed territory by international arbitration or adjudication.[253] International adjudication is advantageous as it presents a clear roadmap for when and how the states can make their case and attain a final and binding resolution.[254] Furthermore, if the case goes in the wrong direction for the states and the decision of the international court or the tribunal ends up not being favourable to them, they can avoid taking responsibility of such an outcome before their voters.[255]

International adjudication and arbitration may help governments to avoid domestic political costs, but they also entail a loss of control and may prevent non-legal factors to be taken into account, which may not always be considered advantageous by the governments.[256] This is why, while states may consent to international adjudication or arbitration that has the outcome of a legally binding award or ruling, they may not always comply with the outcome of such award or ruling.[257] Nevertheless, the existence of a legally binding rule changes the dynamics because the costs of disregarding such decision can be higher than displaying similar behaviour in

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[251] **Ibid.**
[252] Simmons, "Capacity, commitment …" **J Conf. Res…**, p. 834.
[253] **Ibid.,** p. 840.
[254] Tim Martin, "Energy and International Boundaries", in Talus (Ed.), **Research Handbook…,** p. 191.
[255] Ibid.
[256] Michael Byers and James Baker, **International Law and the Arctic**, 2013 Cambridge University Press, 122.
[257] Simmons, "Capacity, commitment …" **J Conf. Res…**, p. 834.

the absence of a legally binding decision, among them is the reputational costs of non-compliance.[258]

States' willingness to commit to a treaty which has a compulsory dispute resolution clause would prevent any domestic political blockage in case the dispute escalates in that direction.[259] In terms of compliance with the outcome of such commitment, the importance of oil and gas resources in the disputed territory poses a great cost for the losing party to pay, therefore losing state would be less willing and less likely to comply with such decision.[260]

This thesis posits that so far as inter-state territorial dispute resolution is concerned, one of the main reasons for the states to opt for international arbitration or adjudication as well as one of the reasons some of them fail to comply with the outcome of such proceeding is the presence/involvement of [potentially] rich hydrocarbon reserves in the disputed territory. In order to be able to demonstrate this, peaceful settlement/resolution methods of inter-state disputes, major international courts and tribunals will be explained in detail.

Since the inter-state disputes that this thesis is interested in primarily concerns the international law of the seas, the section will move on to handle maritime delimitation along with the principles established by the international courts and arbitral tribunals.

5.1. International Courts and Tribunals for the Peaceful Resolution of the Disputes and the Sources of International Law

In the late 18th and early 19th centuries, *ad hoc* dispute resolution bodies have been created to assess claims and decide on the compensations in the disputes between states whereas the adjudication would involve a neutral state or an impartial umpire.[261] Jay Treaty of 1794 represents the first example, in other words, origins of modern international adjudication where a mixed commission was established by the UK and the US to decide claims of each other's nationals for the resolution of boundary disputes by an impartial umpire.[262] However, it was not until 1899 that the PCA has

[258] **Ibid.**, p. 835, 844.
[259] **Ibid.** p. 842.
[260] **Ibid.** p. 843.
[261] Crawford, **Brownlie's Principles…**, p. 733-734.
[262] **Ibid.,** p. 734; Chester Brown, **A Common Law of International Adjudication**, OUP, 2007, p. 17.

been founded as a permanent institution for the settlement of international disputes.[263] Beginning of 20th century marked the emergence of the idea of founding a standing court to resolve inter-state disputes or facilitate their resolution through arbitration which resulted in the establishment of prominent international courts.[264]

It is observed throughout the international legal history that primary methods of peaceful resolution of the disputes included good offices, negotiation and mediation whereas conciliation was provided by the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and its revision in 1907 ("**1907 Convention**")[265], where peaceful means of settlement has been dealt with in their entirety the first time.[266] The 1907 Convention aimed at providing the contracting states with a peaceful dispute settlement mechanism "*with a view to obviating as far as possible recourse to force in the relations between the States*".[267] One of the mechanisms referred to in the 1907 Convention is the international arbitration in its Part IV recognizing that "*recourse to arbitration implies an engagement to submit in good faith to the Award*".[268] Inter-state arbitration was practiced as a sophisticated procedure similar to judicial settlement and a suitable mechanism to settle territorial disputes due to the flexibility it provides to the parties and due to its efficiency as designated experts forming a tribunal specifically to deal with a certain dispute.[269]

The Hague Convention for the Pacific Settlement of International Disputes of 1899 and the 1907 Convention therefore established the Permanent Court of Arbitration ("**PCA**") as a permanent arbitration institution which provides dispute resolution services (constitution of *ad hoc* arbitral tribunals and administering the proceedings) involving intergovernmental organizations, states, state entities, and private parties.[270] The PCA is not a court and does not itself arbitrate but it is the first

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[263] Brown, **A Common Law**…, p. 17.
[264] **Ibid.**, p. 17-18.
[265] 1907 Convention for the Pacific Settlement of International Disputes, ("**1907 Convention**") https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf, Accessed on 10.06.2018.
[266] Crawford, **Brownlie's Principles…,** p. 719; Özturanlı, **Devletlerarası Tahkim**…, p. 30.
[267] Article 1 of the 1907 Convention.
[268] Article 37 of the 1907 Convention.
[269] Crawford, **Brownlie's Principles…**, p. 719-720.
[270] **Ibid.**; **Permanent Court of Arbitration**, History, https://pca-cpa.org/en/about/introduction/history/, Accessed on 10.06.2018.

permanent intergovernmental organization for the international disputes resolution by way of arbitration and other peaceful means.[271]

The PCA is responsible for settling disputes between the contracting states about the questions of a legal nature and especially in the interpretation or application of international conventions via arbitration as "*the most equitable means of settling disputes which diplomacy has failed to settle*".[272] The PCA is competent for all arbitration cases unless the parties agree to institute a special tribunal.[273] The award of a PCA Tribunal is binding for the parties of the dispute[274] and in the absence of any agreement between the parties, definitively settles the dispute without any possibility to appeal[275], although they can reserve a right to request the revision of the award in the *Compromis*.[276]

The Hague Conference of 1907 aimed at creating a permanent court, but the participating states could not agree on the selection of the judges.[277] The League of Nations, tasked the Council with the establishment of a Permanent Court of International Justice via its Covenant.[278] Permanent Court of International Justice ("**PCIJ**") was therefore established by the League of Nations and began to function in 1922, having its permanent seat at the Peace Palace in the Hague, Netherlands.[279]

PCIJ was a success story due to its contributions to the international legal history as it was established as a permanent body having its own statute for governance and its own rules of procedure which were binding on the parties; had a registry for the proper and timely communication between governments and international bodies as well as providing guidance for the parties and judges hearing the case as a secretariat; kept verbatim records of the hearings, submissions, evidence etc.[280] Upon

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[271] Özturanlı, **Devletlerarası Tahkim**…, p. 47.
[272] Article 38 of the 1907 Convention.
[273] Article 42 of the 1907 Convention.
[274] Article 84 of the 1907 Convention.
[275] Article 82 of the 1907 Convention.
[276] Article 83 of the 1907 Convention.
[277] Remy Jorritsma, National Groups: Permanent Court of Arbitration (PCA), in **Max Planck Encyclopedia of International Procedural Law Online (MPEiPro)**, Max Planck Institute Luxembourg Department of International Law and Dispute Resolution, (January 2018), https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/3158_National_Groups_-_Permanent_Court_of_Arbitration__PCA_.pdf, p. 6.
[278] **Ibid.,** p. 7; *See:* **League of Nations**, *Covenant of the League of Nations*, 28 April 1919, https://avalon.law.yale.edu/20th_century/leagcov.asp, Accessed on 18.01.2019.
[279] **International Court of Justice**, History, https://www.icj-cij.org/en/history, Accessed on 18.01.2019.
[280] **Ibid.**

the referral of the League of Nations Council or Assembly or any dispute or question, the PCIJ also rendered advisory opinions which contributed immensely to the development of international law as it represented the international community more than any previous international tribunal.[281] The PCIJ was conferred jurisdiction upon in various categories of disputes in hundreds of conventions, treaties and declarations and dealt with 29 inter-state cases and issued 27 advisory opinions between 1922 and 1940 which demonstrated that a permanent international judicial body was a necessity and could function.[282]

The Second World War ("**WWII**") put a break to the activities of the PCIJ and resulted in its relocation to Geneva and evidently dissolution in October 1945 to leave its place to the newly established ICJ.[283] After the war, states like the USA, the UK, China and USSR recognized the necessity of establishing an international organisation for the maintenance of the peace and based on the equality of all nations, open to every state in favour of peace and security including an international court of justice which led to the preparation of the Charter of the United Nations ("**UN Charter**")[284] a draft ICJ Statute based on the statute of PCIJ in 1945.[285]

In its Article 2(3), the UN Charter obliges its member states to settle their international disputes by peaceful means and in the following paragraph also obliges all its member states to refrain from the threat or use of force against the territorial integrity or political independence of any states inconsistent with the purposes of the UN Charter. Requirement of a peaceful settlement of disputes between states have been regulated in Article 33(1) of the UN Charter which reads as "*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*"

In order to ensure a standard for the peaceful means of inter-state dispute resolution, the UN Charter established the ICJ, and specified in the preamble of the

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[281] **Ibid.**
[282] **Ibid.**
[283] **Ibid.**
[284] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.unwebsite.com/charter.
[285] **International Court of Justice**, History, https://www.icj-cij.org/en/history, Accessed on 18.01.2019.

UN Charter that the Statute of the ICJ ("**ICJ Statute**") is the built-in part of the UN Charter and the ICJ is the principal judicial organ of the UN.[286] The ICJ, as the successor of the PCIJ,[287] is tasked to hear cases that arise out of legal disputes between consenting states and has the power to render a binding decision.[288]

All 193 UN member states[289] are *ipso facto* parties to the ICJ Statute[290] and accept to comply with the ICJ's decision[291]. Solely states may be parties of the cases referred to the ICJ[292] and its jurisdiction is based on consent of the states and any dispute concerning jurisdiction shall also be settled by the ICJ[293]. There are some ways to confer jurisdiction to the ICJ. States might give their consent for the ICJ's jurisdiction: (a) *ad hoc*, in the form of a special agreement (*compromis*) or separate act of consent by the respondent state following the unilateral application by the applicant state; (b) in advance via the dispute resolution clauses of treaties and conventions or via declarations under the optional clause of the ICJ Statute; (c) *post hoc* or by virtue of the principle of *forum prorogatum*, via a unilateral or joint application concerning the entirety of the dispute or some of its aspects after the initiation of the proceedings as a result of an express or tacit agreement, *e.g.* declaration of acceptance of the ICJ's jurisdiction in the state's response; providing arguments and responses concerning the merits of the case at hand.[294]

If the jurisdiction granted by consent of the parties is given in advance of any dispute, it is called "compulsory jurisdiction" of the ICJ, typically encountered in the dispute resolution clauses of multilateral and bilateral treaties granting jurisdiction over disputes arising out of the interpretation or the application of said treaty at hand.[295] ICJ's jurisdiction may be accepted in advance via unilateral declarations by the states, the declaring state being bound to accept jurisdiction *vis-à-vis* any other declaring state insofar as their declaration is reciprocal[296] which prevents the ICJ from having any

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[286] Articles 7 and 92 of the UN Charter.
[287] **International Court of Justice**, History, https://www.icj-cij.org/en/history, Accessed on 18.01.2019.
[288] Ian Hurd, **International Organizations, Politics, Law, Practice**, CUP, 2011, p. 187-188.
[289] **United Nations**, UN Member States, http://www.un.org/en/member-states/index.html Accessed on 19.01.2019.
[290] Article 93 of the UN Charter.
[291] Article 94 of the UN Charter.
[292] Article 34 of the ICJ Statute.
[293] Article 36(1) and (4) of the ICJ Statute; Crawford, **Brownlie's Principles…**, p. 723.
[294] Crawford, **Brownlie's Principles…**, p. 725-728; Pazarcı, **Uluslararası Hukuk**…, p. 474-475.
[295] Crawford, **Brownlie's Principles…**, p. 726; Hurd, International Organizations…, p. 193.
[296] **Ibid.**, p. 727.

automatic and compulsory jurisdiction in the cases referred thereto. Such advance consent via declaration is the result of a compromise between a system of compulsory jurisdiction based on unilateral applications by claimants and independent treaty-based jurisdiction.[297] Currently, due to the lack of confidence to international adjudication or tactical advantages of staying out of the system, many states opted for making arbitrary and ambiguous reservations and declarations, and only one third of the state parties to the ICJ Statute have given their consent to the compulsory jurisdiction of the ICJ.[298]

The ICJ has jurisdiction in all matters specifically provided in the UN Charter or in treaties and conventions in force[299]. There are two cumulative conditions for the jurisdiction of the ICJ: the treaty or convention must be in force between the litigating states to the case; and all parties to the dispute must be parties to the ICJ Statute.[300] The parties to the ICJ Statute may declare that they recognize the compulsory *ipso facto* jurisdiction of the ICJ unconditionally or on condition of reciprocity regarding the legal disputes concerning *"(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation"*.[301]

The ICJ applies the following sources of international law in the resolution of the disputes: *"(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) (...) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."*[302] The ICJ also has the authority to decide *ex aequo et*

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[297] **Ibid.**
[298] **Ibid.** p. 727-728.
[299] Article 36(1) of the ICJ Statute; Crawford, **Brownlie's Principles…**, p. 725.
[300] Crawford, **Brownlie's Principles…**, p. 726.
[301] Article 36(2) and (3) of the ICJ Statute, also called the "optional clause" which is the result of a compromise between a compulsory jurisdiction based on unilateral applications by states and treaty-based jurisdiction (Source: Crawford, **Brownlie's Principles…**, p. 726-727).
[302] Article 38 of the ICJ Statute.

bono if the parties expressly agree thereto[303] which has never been exercised as of today.[304]

International conventions/treaties impose obligations upon states, therefore can be regarded as the primary source of international law. International law is a system founded on customary law.[305] Customary law arises from the repetitions of past practices and it is near impossible to determine the outcome *a priori*, it can only be characterized with *a posteriori* reasoning as the action/practice prevails the legal characterization.[306] Sources of many rules which are considered fundamental principles of international law are customary law rules and contrary to domestic law, the customary law has a far more important place in international law.[307] Treaty law, for example, has been built on *pacta sunt servanda*[308], a customary law norm.[309] Nevertheless, customary law is far more powerful then any treaty, because while a treaty confers rights and imposes obligations to its parties, customary law would be binding on non-parties to any such treaty and to the parties of such treaty when it ceases to be valid.[310]

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[303] Article 38(2) of the ICJ Statute. To decide *ex aequo et bono* means to reach a fair/just conclusion in a case at hand which may entail the application of non-legal rules (Source: Pazarcı, **Uluslararası Hukuk**…, p. 115; Ayşe Nur Tütüncü, Enver Arıkolu, Verda Neslihan Akün, Elif Başkaracaoğlu (Ed.), **Toluner Milletlerarası Hukuk (Giriş, Kaynaklar) Prof. Dr. Sevin Toluner'in Ders Notlarından** (*Toluner International Law (Introduction, Sources) Compiled from the Lectures of Prof. Sevin Toluner*), Beta Yayınevi, Istanbul 2017, p. 59; Beyza Özturanlı, **Devletlerarası Tahkim** (*Inter-State Arbitration*), Seçkin, 2016, p. 282).

[304] Emre Öktem, **Uluslararası Teamül Hukuku** (*International Customary Law*), Beta, İstanbul 2013, p. 62; Pazarcı**, Uluslararası Hukuk**…, p. 477.

[305] Öktem, **Ul**uslararası Teamül Hukuku**…**, p. 4.

[306] **Ibid.**, p. 57, 308.

[307] Tütüncü *et al.,* Toluner Milletlerarası Hukuk…, p. 36.

[308] *Pacta sunt servanda* (*lat*.) is directly understood as "agreements must be met" which is the "*rule that agreements and stipulations, especially those contained in treaties must be observed*" (Source: Garner, **Black's Law Dictionary…,** p. 1140).

[309] Tütüncü *et al.,* **Toluner Milletlerarası Hukuk**…, p. 36.

[310] **Ibid.** p. 37.

For a practice to be considered a customary law rule, a) it needs to be implemented in a uniform, general[311] and consistant manner[312] (material element) and b) there needs to exist an *opinio juris sive necessitatis* (psychologic element).[313]

State practices forming the material element of a customary international law rule are considered both declaratory and constitutive.[314] Substantial uniformity of the practice is required to fulfil the first requirement although no particular duration is needed for the rule to be a customary rule and complete consistency is not required when it comes to fulfil the requirement for the generality of practice.[315] Lastly, the ICJ would often infer the existence of *opinio iuris sive necessitatis* from a general practice, from scholarly consensus or from the decisions of the previous determinations (whether itself or other tribunals).[316] The ICJ ruled in the *North Sea Continental Shelf*[317] case that in order to form a new customary rule, not only a performance must amount to a settled practice but such performance must also be accompanied by the *opinio iuris sive necessitatis: "(...) in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be sucli, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of Iaw requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. (...)"*[318]

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[311] Exception to the generality of the practice of international custom are the regional and local customs and sometimes local customs might evolve into universal customs. For example, the *uti possidetis* principle which stipulates taking former colonies' borders into account when determining the new borders of the newly emerging states, has first came into existence as a local custom at the end of the dissolution of Spanish Empire, Öktem, **Uluslararası Teamül Hukuku…**, p. 65-66, 76.

[312] Tütüncü *et al.,* **Toluner Milletlerarası Hukuk**…, p. 38; Pazarcı, **Uluslararası Hukuk…,** p. 104-105.

[313] Tütüncü *et al.,* **Toluner Milletlerarası Hukuk…,** p. 39; Pazarcı, **Uluslararası Hukuk…,** p. 106. *Opinio juris sive necessitatis* or *opinio juris* (an opinion of law or necessity) is the belief that a practice was carried out because it was a legal obligation to do so. *Opinio juris* is "*the principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice*" (Source: Garner, **Black's Law Dictionary…,** p. 1125) In its Advisory Opinion on the "Legality of the Treat or use of Nuclear Weapons" (1996), the ICJ, by observing the continuing difference of views of the states concerning nuclear weapons' legal status, concluded that an opinio juris did not exist on the subject matter and the fact that such weapons were not used since 1945 was the non-existence of the circumstances justifying their use (Source: Öktem, **Uluslararası Teamül Hukuku…,** p. 60.)

[314] Öktem, **Uluslararası Teamül Hukuku**…, p. 58.

[315] Öktem, **Uluslararası Teamül Hukuku**…, p. 61; Crawford, **Brownlie's Principles…**, p. 24-25.

[316] Öktem, **Uluslararası Teamül Hukuku**…, p. 316; Crawford, **Brownlie's Principles…**, p.26.

[317] Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands ("*North Sea Continental Shelf*") Judgment, ICJ Reports 1969, p. 3.

[318] *North Sea Continental Shelf*, para. 77.

If a general practice is accepted as a customary international law rule, all states are bound by such rule and only exception to this is if a state explicitly, consistently and incessantly objects to the implementation of such practice (*persistent objector*).[319] The exact timing of formation of *opinio juris sive necessitatis* may not be determined from the outset, therefore if a state wishes to object to a customary law rule to be formed (therefore become binding and applicable to itself), it shall immediately react to it and continue such reaction in an explicit, consistent and incessant manner, otherwise it cannot be exempt from the application of such rule.[320]

Apart from the sources of international law stipulated by the ICJ Statute, *jus cogens* norms[321], unilateral declarations of states, the most favourite nation clause in the inter-state agreements and soft law[322] may also be used as the sources of international law.[323]

5.2.Dispute Resolution Mechanisms in the UNCLOS

The UNCLOS sets forth a detailed mechanism for the dispute settlement in its Part XV with respect to disputes arising out of its interpretation and application[324]. UNCLOS dispute settlement mechanism combines voluntary and compulsory dispute settlement procedures.[325]

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[319] Tütüncü *et al.*, **Toluner Milletlerarası Hukuk…,** p. 44. Despite having worked vigorously in the 3rd UN Conference on the Law of the Sea of 1958 in an effort to affect the rules o be applied to territorial sea and the acceptance and implementation of any special circumstances in the determination of the length of the territorial seas, Turkey could not prevent the 12nm breadth of the territorial sea entitlement the UNCLOS conferred upon the state parties in its Article 3. Article 309 of the UNCLOS forbade states to make any exceptions or reservations when signing the convention unless explicitly allowed by the UNCLOS itself (such as the optional exception to the applicability of section II with respect to dispute resolution as provided by Article 289 of the UNCLOS), so Turkey was compelled to object to the UNCLOS and refused to sign it. As long as Turkey is persistent in its objection, the 12nm breadth of the territorial sea set forth by Article 3 of the UNCLOS cannot be applied to Turkey, even though it may be accepted as a customary international law rule.

[320] Öktem, **Uluslararası Teamül Hukuku**…, p. 480.

[321] Article 53 of the Vienna Convention on the Law of the Treaties ("**VCLT**") define a *jus cogens* (peremptory) norm of general international law is *"(...) a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general in ternational law having the same character*." Article 71 of the VCLT provides the consequences of the invalidity of a treaty which conflicts with a *jus cogens* norm of general international law.

[322] The term soft law connotes "*rules that neither strictly binding nor completely lacking legal significance*" (Source: Garner, **Black's Law Dictionary…,** p. 1426). Soft law can be in the form of declarations, final acts etc. of non-binding nature.

[323] Rona Aybay, **Kamusal Uluslararası Hukuk** (*Public International Law*), Seçkin Yayıncılık, 2011, pgs 135-140.

[324] Article 279 of the UNCLOS.

[325] Tanaka, **The International Law of the Sea**…, p. 390.

The state parties are first obliged to peacefully settle their disputes concerning the interpretation of application of the UNCLOS in accordance with the means stipulated in Article 2(3) of the UN Charter.[326] The state parties can also resolve such disputes by any peaceful means of their own choice.[327] If the parties fail to reach a peaceful settlement on their dispute, then the dispute may be submitted to a nominated tribunal having the power to render binding decisions.[328] The state parties have a conventional duty to resort to dispute resolution procedures stated in general, regional or bilateral agreements between them if they have agreed on specific dispute resolution methods entailing a binding decision.[329]

5.2.1. Non-binding and Voluntary Dispute Settlement Methods

Referring to the non-binding dispute resolution methods prescribed in the UN Charter, the first of these methods that could be used by state parties to UNCLOS is negotiation. The disputing states need to exchange views concerning the settlement of such dispute by negotiating or resorting to other peaceful methods.[330] However, resolving territorial disputes by negotiation is difficult and may take years for any meaningful deal to be closed. Also, in the boundary negotiations, one state would often have the upper hand in the negotiations and would try to keep the factors affecting the negotiation as discreet as possible. Boundary negotiations are seldom made available to public via media channels and this avoidance of providing information often extends to the international oil companies which have been granted a concession within the disputed territory.[331] Nevertheless, the outcome of these negotiations, namely the boundary agreements and/or treaties themselves are mostly available.

Mediation is another dispute settlement method to be used when states can not reach an agreement by means of negotiation. Mediation apparently have provided

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[326] Article 279 of the UNCLOS; Article 33(1) of the UN Charter provides for non-binding and binding peaceful means of dispute settlement: "*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*."

[327] Article 280 of the UNCLOS.

[328] Article 281(1) of the UNCLOS.

[329] Article 282 of the UNCLOS.

[330] Article 283 of the UNCLOS.

[331] Tim Martin, "Energy and International Boundaries", in Kim Talus (Ed.), **Research Handbook on International Energy Law**, Edward Elgar Publishing, 2014, p. 191.

successful settlement to several boundary disputes.[332] Since it requires a degree of cooperation between the parties, and its outcome lacks a binding order that needs to be obeyed by the parties, mediation does not immediately appear as a preferred method to resolve inter-state disputes. Nowadays, mediation is becoming an increasingly popular method to resolve some categories of domestic legal disputes. Interestingly, it appears that utilizing mediation is also very useful to resolve violent inter-state conflicts in lieu of international arbitration and adjudication.[333]

Mediation was used to resolve the conflict between Egypt and Israel which resulted in the Camp David Accords in 17 September 1978[334] where the US president Jimmy Carter acted as a mediator between Israel and Egypt and guaranteed them US funding for their military bases.[335] Following the Camp David Accords, Israel and Egypt signed the Treaty of Peace on 26 March 1979[336], meaning that the mediation process was successful. However, not all the mediation efforts are successful. In the Kashmir region dispute between India and Pakistan, the mediation efforts of the 1948 UN Commission for India and Pakistan ("**UNCIP**") failed.[337] UNCIP, which existed from June 1948 to March 1950 was tasked to investigate and mediate the dispute between India and Pakistan concerning the fate of the state of Jammu and Kashmir and managed to achieve Karachi Agreement of 27 July 27 1949 for ceasefire, but Pakistan refused to evacuate his troops.[338] The mediation efforts apparently failed as Kashmir dispute and the conflict in the region is still ongoing.[339]

The third non-binding solution is the conciliation as referred to in Article 284 of the UNCLOS and provided for under Annex V Section 1 of the UNCLOS. Conciliation is carried out by a commission of independent and impartial conciliators

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[332] **Ibid.**
[333] Scott Sigmund Gartner, "Third Party Mediation of Interstate Conflicts: Actors, Strategies, Selection and Bias", Vol. 6, **Y. B. Arb. & Mediation** 269, 2014, p. 270.
[334] Jimmy Carter, "Camp David Accords**"**, **Encyclopedia Brittanica**, https://www.britannica.com/event/Camp-David-Accords Accessed on 12.03.2019.
[335] Gartner, "Third Party…", **Y. B. Arb. & Mediation,** p. 270, 289.
[336] Treaty of Peace between Egypt and Israel, UN Treaty Series, No. 17813, https://www.mfa.gov.eg/Lists/Treaties/Attachments/2278/Peace%20Treaty_en.pdf Accessed on 12.03.2019.
[337] Gartner, "Third Party…", **Y. B. Arb. & Mediation,** p. 270.
[338] Fonds United Nations Commission for India and Pakistan – AG-046, https://search.archives.un.org/united-nations-commission-for-india-and-pakistan-uncip-1948-1950, Accessed on 12.03.2019.
[339] Kashmir profile – Timeline, 21 July 2017, **BBC News**, https://www.bbc.com/news/world-south-asia-16069078 Accessed on 12.03.2019.

and is essentially a diplomatic mean of dispute settlement.[340] Main duties of the conciliation commission are hearing the parties, examining their claims and objections, and make proposals for the parties so that they can reach an amicable settlement.[341] The conciliation may be terminated when a settlement has been reached, the parties have accepted or one party has rejected the conciliation commission's recommendation, or a three months' period has expired from the notification of the conciliation commission's report to the parties.[342] In this case, as the dispute would remain unsettled, it would be taken to the compulsory dispute settlement procedures under the UNCLOS.[343]

5.2.2. Compulsory Dispute Settlement Methods

The UNCLOS includes a section titled "Compulsory Procedures Entailing Binding Decisions", entailing arbitration and adjudication.[344] Subject to the limitations and exceptions[345], Article 286 of the UNCLOS sets forth that where the parties are not able to reach any settlement through Section 1 of the UNCLOS, any one of them shall submit any such dispute concerning the interpretation or application of the UNCLOS to the competent international court or arbitral tribunal as stipulated by Article 288 of the UNCLOS. In the next sections, this thesis will briefly examine some cases where compulsory dispute resolution mechanism of UNCLOS was triggered.

The UNCLOS provides for four alternative means of binding dispute resolution a state is free to choose for the interpretation or application of the UNCLOS: (a) the International Tribunal for the Law of the Sea ("**ITLOS**"); (b) the ICJ; (c) an *ad-hoc* arbitral tribunal constituted in accordance with Annex VII to the UNCLOS; or (d) a special arbitral tribunal constituted specifically for the resolution of the disputes concerning certain subjects as per Article 1 of Annex VIII of UNCLOS.[346] If no declaration is made, a state party is deemed to have accepted arbitration in accordance with Annex VII of the UNCLOS.[347]

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[340] Tanaka, **The International Law of the Sea**…, p. 397.
[341] Articles 3 and 6 of the Section 1 of the Annex V of the UNCLOS.
[342] Article 8 of the Section 1 of the Annex V of the UNCLOS.
[343] Tanaka, **The International Law of the Sea**…, p. 398.
[344] Section 2 of the Part XV of the UNCLOS.
[345] Section 3 of the Part XV of the UNCLOS.
[346] Article 287(1) of the UNCLOS.
[347] Article 287(3) of the UNCLOS.

ITLOS is a permanent and independent international tribunal established in accordance with Article 287, Part XV and Annex VI ("**Statute of ITLOS**") of the UNCLOS and largely modelled on the ICJ.[348] However, while the ITLOS is not an organ of the UN, therefore its expenses are borne by state parties and the Authority.[349] As mentioned above, ITLOS is one of the four alternative means of settling disputes concerning the interpretation and application of the UNCLOS. ITLOS is based in Hamburg and open to state parties as well as entities other than state parties in certain cases specified in Article 20 of the Status of ITLOS.[350] Decisions of ITLOS are rendered in the form of a judgement which is final and shall be complied by the parties to the dispute.[351]

ITLOS has jurisdiction over any dispute concerning the interpretation or application of the UNCLOS as well as over any matters specifically provided for in any other agreement conferring jurisdiction to ITLOS.[352] As per the UNCLOS, jurisdiction of ITLOS is limited with the subject-matter of the dispute which can only concern the application and interpretation of UNCLOS (jurisdiction *ratione materiae*).[353] ITLOS also has a compulsory jurisdiction regarding the matters involving prompt release of detained vessels and crews.[354] Moreover, ITLOS has a specialized division called the Seabed Disputes Chamber[355] which has the exclusive jurisdiction over disputes arising out of the exploration and exploitation of the Area[356].[357] As for jurisdiction *ratione personae*, state parties and, provided that it is specifically prescribed in the UNCLOS, other entities may refer their disputes to ITLOS.[358]

If the parties to a dispute do not agree on the same dispute resolution procedure, arbitration in accordance with Annex VII applies, unless the parties otherwise agree.[359] This means that while it is better that the governments agree on resolution of their

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[348] Tanaka, **The International Law of the Sea**…, p. 391.
[349] **Ibid.**, p. 404.
[350] Statute of the International Tribunal for the Law of the Sea ("**ITLOS Statute**"), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf Accessed on 02.01.2019.
[351] Tanaka, **The International Law of the Sea**…, p. 410, 414.
[352] Article 21 of the ITLOS Statute and Part XV of the UNCLOS.
[353] Article 288 of the UNCLOS; Tanaka, **The International Law of the Sea**…, p. 409.
[354] Article 292(1) of the UNCLOS.
[355] Established by Part XI, Section 5 of the UNCLOS and Article 14 of the Statute of ITLOS
[356] As per Article 1(3) of the UNCLOS, the Area means "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".
[357] Articles 187 and 287(2) of the UNCLOS; Tanaka, **The International Law of the Sea**…, p. 399.
[358] Tanaka, **The International Law of the Sea**…, p. 409; Article 291 of the UNCLOS.
[359] Article 287(5) of the UNCLOS.

disputes, in case such attempt fails or the process gives no outcome, it may still be possible for a state-party to UNCLOS to act unilaterally to compel another state-party into binding dispute resolution (subject to exceptions).[360]

There are limitations on the applicability of compulsory dispute resolution provided under Part XV - Section 2 of the UNCLOS. Only on limited occasions disputes arising out of the application or interpretation of the UNCLOS concerning the coastal states' exercise of sovereign rights or jurisdiction as subscribed by the UNCLOS are subject to the compulsory dispute resolution procedures.[361]

There are also optional exceptions to the compulsory dispute resolution under the UNCLOS.[362] State parties to UNCLOS can make a written declaration and exclude disputes concerning the application or interpretation of the UNCLOS provided for under Section 2 with respect to: "*a) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations*[363]*, or those involving historic bays or titles, provided that a State having made such a declaration (...) and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission; (...)*"[364] This means that state parties to UNCLOS may exclude delimitation of territorial sea, the EEZ and continental shelf between opposite or adjacent states from the scope of compulsory dispute resolution.[365] If a state party excludes delimitation disputes from the compulsory jurisdiction, it is still obliged to submit the matter to conciliation at the request of the other party and the parties ar further obliged to negotiate an agreement based on the recommendation of the conciliation commission and if they fail to agree, they shall submit their dispute to binding procedure by mutual consent.[366]

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[360] Tim Martin, "Energy and International Boundaries", in Talus (Ed.), **Research Handbook…,** p. 192.
[361] Article 297 of the Section 3 of the Part XV of the UNCLOS.
[362] Tullio Treves, "What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?" in Rainer Lagoni and Daniel Vignes, (Ed.), **Maritime Delimitation**, Martinus Nijhoff Publishers, 2006, pp. 63-78, p. 73.
[363] Delimitation of the territorial sea between States with opposite or adjacent coasts (Article 15 of the UNCLOS), delimitation of the exclusive economic zone between States with opposite or adjacent coasts (Article 74 of the UNCLOS), and delimitation of the continental shelf between States with opposite or adjacent coasts (Article 83 of the UNCLOS).
[364] Article 298 of the Section 3 of the Part XV of the UNCLOS.
[365] Treves, "*What have the United Nations Convention…*" in Lagoni and Vignes, (Ed.), **Maritime Delimitation…**, p. 73.
[366] Article 298(1)(a)(i)&(ii) of the UNCLOS; Treves, "*What have the United Nations Convention…*" in Lagoni and Vignes, (Ed.), **Maritime Delimitation…**, p. 75-76.

As of today, 25 cases have been referred to the ITLOS.[367] In this thesis, the cases brought before ITLOS where the parties arguments included access to oil and gas resources offshore or the prior concessions granted to the energy companies will be analyzed.

5.3.Maritime Delimitation and Determination of Sovereign Rights

Human actitvities in the ocean are regulated by the states having jurisdiction in those maritime zones, and if more than one state claims jurisdiction over a particular marine space, neither state can efficiently and legally benefit from the use of such space.[368]

Most of the time the states are determined to negotiate in good faith and resolve their territorial disputes through negotiation, but often, due to many different dynamics, it may be difficult for the governments to agree on such a crucial matter such as delimitation of the boundaries and they may end up referring their dispute to an international court or an arbitral tribunal through the international institutions assigned to coordinate the dispute resolution as determined in various international treaties (the UN Charter and the UNCLOS being the primary of those in our analysis). Enclosure of marine spaces and creation of maritime zones by the states resulted in cases concerning the allocation of maritime jurisdiction to become a prominent area of international dispute settlement.[369] The law of maritime boundary delimitation, which is generally complex and difficult, has evolved through cases before the international courts (especially the ICJ) and arbitral tribunals.[370]

Under the 1958 Geneva Conventions and the UNCLOS, the maritime zones to be delimited are the territorial sea, contiguous zone, continental shelf and the EEZ.[371]

Delimitation of the territorial sea between states with opposite or adjacent coasts are formulated identically, both of which first requires an agreement between these states, failing an agreement, drawing a median line every point of which is equidistant from the nearest points on the baselines from which the breadth of territorial seas of each of the two states is measured (equidistance method) and adjusting this line in the

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[367] **ITLOS**, Cases, https://www.itlos.org/en/the-tribunal/ Accessed on 01.01.2019.
[368] Tanaka, **The International Law of the Sea**…, p. 186.
[369] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 61.
[370] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 271; Masahiro, "The North Sea Continental Shelf Cases Revisited…", **As. Y. Int'l Law**…, p. 192.
[371] Tanaka, **The International Law of the Sea**…, p. 188.

existence of any historic title or other special circumstances.[372] Rationae behind the application of special circumstances is to avoid any inequitable result from the application of equidistance method.[373]

Delimitation of the contiguous zone was based on equidistance method as per Article 24(3) of the Convention on the Territorial Sea and the Contiguous Zone, however the UNCLOS does not govern delimitation of the contiguous zone.[374]

Convention on the Continental Shelf prescribed separate but almost identical delimitation methods for the delimitation of continental shelf between states with opposite coast and states with adjacent coasts, and applied the requirement of an agreement, failure of which the combination of equidistance method and application of special circumstances to delimitation.[375] The UNCLOS lifted the difference between states with opposite or adjacent coasts for the delimitation of the continental shelf and prescribed identical rules for the continental shelf and the EEZ as follows: "*The delimitation of the exclusive economic zone [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 International Court of Justice, in order to reach an equitable result*."[376]

If no agreement can be reached within a reasonable period of time, the coastal states must resort to the dispute settlement procedures in Part XV of the UNCLOS.[377] During such time, pending a final delimitation, the parties are required to make every effort to enter into provisional agreements of practical nature and they must avoid any acts which would jeopardize or hamper reaching a final agreement.[378]

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[372] Article 12(1) of the Convention on the Territorial Sea and the Contiguous Zone; Artcle 15 of the UNCLOS.
[373] Tanaka, **The International Law of the Sea**…, p. 189.
[374] **Ibid.**, p. 190.
[375] Article 6 of the Convention on the Continental Shelf; Tanaka, **The International Law of the Sea**…, p. 189-190.
[376] *See:* Article 74(1) of the UNCLOS for the delimitation of the EEZ and Article 83(1) of the UNCLOS for the delimitation of the continental shelf; Tanaka, **The International Law of the Sea**…, p. 190.
[377] Article 74(2) of the UNCLOS & Article 83(2) of the UNCLOS.
[378] Article 74(3) of the UNCLOS & Article 83(3) of the UNCLOS reads as: "*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*."

International precedent[379] suggests that in their quest to reach an equitable result, international courts and tribunals took special/relevant circumstances into account and developed case law on maritime delimitation particularly in terms of EEZ and continental shelf delimitation. As will be seen in the following paragraphs, the ICJ presided the establishment of the maritime delimitation method that is applied today with a certain degree of predictability as well as flexibility for adopting to special circumstances of each case.[380]

In 1969 *North Sea Continental Shelf*, the ICJ rejected the effect of equidistant principle as being a rule of law on any *a priori* basis and concluded that equidistance method was not obligatory for the delimitation of continental shelf areas in the case.[381] The ICJ developed model of equity and equitable principles as introduced by the Truman Proclamation and established following criteria to be considered in the negotiation of the parties: configuration of the coasts, physical and geological structure and unity of any deposits of natural resources of the shelf and a reasonable degree of proportionality between the continental shelf areas appertaining to the relevant coastal state.[382] This case brought equitable principles as customary law to the center of the martime delimitation law and the goal to achieve equitable results allowed the international courts and arbitral tribunals to be flexible.[383]

This approach took a turn in the 1993 *Jan Mayen*[384] case concerning maritime delimitation between the continental shelf and the EEZ/fisheries zone, when the ICJ first draw a provisional median line between the territorial sea baselines and then enquired whether any special circumstances required an adjustment of the boundary

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[379] The author uses the term "international precedent" with caution here. Contrary to the domestic legal systems like common law sytem, the *stare decisis* principle is not applicable in international law. *Stare decisis* principle stipulates that the previous judgments shall be followed and similar cases shall be concluded/decided in a similar manner. Article 59 of the ICJ Statute explicitly sets forth that its decisions are binding only *inter-partes* and in respect of that particular case. No matter what, the importance of precedent consisting of previous cases decided by international judiciary cannot be denied in international dispute resolution. The fact that sovereignty [and sovereign rights] can be the subject-matter in international cases demonstrates the power of international case law and international judiciary (Source: Öktem, **Uluslararası Teamül Hukuku…,** p. 269, 253).

[380] Yoshifumi Tanaka, **Predictability and Flexibility in the Law of Maritime Delimitation**, Hart Publishing, 2006, p. 352.

[381] *North Sea Continental Shelf*, p. 46, para. 82; Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 274.

[382] *North Sea Continental Shelf*, p. 51-53, para. 93-98; Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 275.

[383] Tanaka, **The International Law of the Sea**…, p. 192.

[384] Maritime Delimitation in the Area between Greenland and Jan Mayen ("*Jan Mayen***"),** Judgment, ICJ Rep. 1993.

line.[385] This was the first time the ICJ applied the "corrective-equity approach" as customary law and placed the equidistance method in customary law.[386]

Until *Qatar v Bahrain*[387], equidistance method was applied in case of opposite coasts but in this case, where the coastlines of these two states were adjacent, the ICJ applied the equidistance method and accepted the corrective-equity approach which was considered an important step towards unification of approach towards equitable principles.[388]

The ICJ applied the corrective-equity method to the delimitation of a single maritime boundary with regards to continental shelf and the EEZ in *Romania v Ukraine*[389] in three steps: first, it drew the provisional equidistance line between the adjacent coasts of Romania and Ukraine and continued as a median line between their opposite coasts, then secondly, examined whether there were any relevant circumstances requiring the adjustment or shifting of this provisional equidistance line in order to achieve an exuitable result, then finally verified whether the result was proportionate in terms of ratios of coastal lengths.[390]

Consequently, with regards to the delimitation of the continental shelf, the practice and case-law established the following three stages of delimitation: 1) provisional delimitation by drawing an equidistance line in case of two adjacent coasts or opposite coasts; 2) consideration of relevant circumstances requiring the adjustment or shifting of the provisional equidistance line to achieve an equitable result; and 3) consideration of the proportionality between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each state.[391] By first applying the equidistance method, then correcting the provisional equidistance line in the second stage by taking relevant circumstances into account [and verifying the proportionality of the result], the ICJ ensured the balance of predictability and flexibility needed in the maritime delimitation cases.[392]

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[385] **Ibid.**, p. 59, para. 49; Tanaka, **The International Law of the Sea**…, p. 195.
[386] Tanaka, **The International Law of the Sea**…, p. 195.
[387] Maritime Delimitation and Territorial Questions between Qatar and Bahrain ("*Qatar v Bahrain*"), Judgment, ICJ Rep. 2007, p. 745.
[388] Tanaka, **Predictability and Flexibility…,** p. 350.
[389] Maritime Delimitation in the Black Sea ("*Romania v Ukraine*"), Judgment, ICJ Rep. 2009, p. 61, para. 198.
[390] *Romania v Ukraine*, para. 119-122; Tanaka, **The International Law of the Sea**…, p. 196-197.
[391] Crawford, **Brownlie's Principles…**, p. 287.
[392] Tanaka, **Predictability and Flexibility…,** p. 352.

As a next stage, understanding the approach of international courts and arbitral tribunals towards relevant circumstances is important since the existence of oil and gas reserves as well as concessions of the states granted to MOGCs in the disputed waters were often argued as relevant by the disputing states.

5.3.1. Consideration of Relevant Circumstances in Maritime Delimitation

In the application of equitable principles, there are a number of relevant circumstances to be taken into account such as geographical factors, such as adjacent or opposite position of the states, existence of coastal configurations of the parties such as concavity or convexity of the coastline, direction of the coast, relation between coastal lengths and the maritime areas attributed to the disputing states are considered as relevant circumstances and are used in adjusting the provisional equidistance line.[393]

Presence of any islands in the disputed area may also constitute a relevant circumstance in adjusting the provisional equidistance line to reach an equitable outcome.[394] Islands have a critical position for coastal states when it comes to determining the maritime zones. Islands are naturally formed areas of land, surrounded by water, which are above water at high tide, have territorial sea, contiguous zone, the EEZ, and continental shelf[395]. Pursuant to UNCLOS, an island has to sustain human habitation or economic life of its own, otherwise it is considered a rock, not an island and would have no EEZ or continental shelf.[396] Depending on the circumstances of each case, in the maritime delimitations, islands may be granted full effect as in *Qatar v Bahrain*; partial effect as in *Tunisia v Libya*[397]; or no effect as in *Romania v Ukraine*, in terms of generating maritime zones.[398] In *Romania v Ukraine*, due to its potentially rich offshore oil and gas reserves, maritime zone generation of the Serpents Island have been relied on by Ukraine.[399] Assessing its characteristics and location, the ICJ disregarded the Serpents Island while drawing the provisional equidistance line between the two countries by stating that if Serpents Island would have been

[393] Tanaka, **The International Law of the Sea**…, p. 198-202.
[394] **Ibid.,** p. 204.
[395] Article 121(1) and (2) of the UNCLOS.
[396] Article 121(3) of the UNCLOS.
[397] Continental Shelf (Tunisia/Libyan Arab Jamahiriya) ("*Tunisia v Libya*"), ICJ Rep. 1982 p. 18.
[398] Tanaka, **The International Law of the Sea**…, p. 204-205.
[399] Nilüfer Oral, "Current Legal Developments International Court of Justice", **Int'l J Mar. Coast. Law,** 25, 2010, pp. 115-141, p. 117.

considered to form a part of the Ukrainian coast, "*the consequence would be judicial refashioning of geography"* which was not authorized by the law or the practice of maritime delimitation.[400]

Relevant circumstances also include non-geographical factors, such as economic factors *e.g.*, unity of any reserves[401], conduct of the parties, historic rights[402], security interests, navigational and environmental factors.[403] Among these circumstances, dependency on living and/or non-living natural resources appear to be the most relied on by the states in international adjudication.[404] We can fairly say that ever since oil and gas reserves have been found in the continental shelf and deep-sea exploration became feasible, maritime delimitation is used to divide the potential spoils of the seabed.[405] Primary motivation of the states in initiating maritime boundary delimitation cases is to obtain permanent sovereignty and control over these resources by the legal allocation of jurisdiction in the disputed maritime spaces.[406] When the areas of EEZ to be delimited, the interests to be considered would be on account of fisheries rather than oil and gas in the continental shelf.[407]

In the *North Sea Continental Shelf*, the main issue with regards to delimitation of maritime boundaries was not the boundaries between the states but the seaward limit of the area where the coastal state could claim exclusive rights of exploitation and before the question of exploitation of oil and gas resources of the subsoil arose, most states did not attempt to regulate their side maritime boundaries with adjacent states, therefore the practice was rare.[408]

According to Judge Philip J. Jessup, the real issue in the *North Sea Continental Shelf* case was the allocation of valuable oil and gas reserves, however the parties did not build their cases on this fact: "*(...) the Parties in this case chose to deal obliquely in their pleadings with the actuality of their basic interests in the continental shelf of*

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[400] *Romania v. Ukraine*, para. 149.
[401] *North Sea Continental Shelf*, p. 51-52, para 94.
[402] The concept of historic title entails the principle of immemorial possession over traditional boundaries which has an eloquent role in the territorial dispute resolution in Asia where the tribunals recognize the concept of an ancient title to the extent that there exists appropriate evidence (*Source*: Crawford, **Brownlie's Principles…**, p. 221).
[403] *See:* Tanaka, **The International Law of the Sea**…, p. 208-213; Crawford, **Brownlie's Principles…**, p. 288-289.
[404] Tanaka, **The International Law of the Sea**…, p. 208.
[405] Jan Klabbers, **International Law**, Cambridge University Press, Cambridge 2013, p. 255.
[406] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 559.
[407] Crawford, **Brownlie's Principles…**, p. 293.
[408] *North Sea Continental Shelf*, para 48.

the North Sea, it is of course obvious that the reason why they are particularly concerned with the delimitation of their respective portions is the known or probable existence of deposits of oil and gas in that seabed. (…)"[409]

"*In addition to the Parties in this case, Great Britain and Norway are also actively interested in the exploitation of North Sea oil and gas, but the petroleum industry has not evinced any interest in the area of the continental shelf appertaining to Belgium or to France*."[410]

"*It is apparent from the above extracts that the problem of the exploitation of the oil and gas resources of the continental shelf of the North Sea was in the front of the minds of the Parties but that none of them was prepared to base its case squarely on consideration of this factor, preferring to argue on other legal principles which are sometimes advanced with almost academic detachment from realities*."[411]

In *Tunisia v Libya*[412], the ICJ had the opportunity to consider the oil resources as relevant circumstances while delimiting the continental shelf areas of Tunisia and Libya in a strict sense, *i.e.* oil and gas deposts.[413] On 10 June 1977, Tunisia and Libya notified their special agreement (for the dispute resolution) to the ICJ for the delimitation of their respective continental shelf areas by considering the equitable principles and the relevant circumstances which characterize the area, as well as the recent trends admitted at the Conference and notified it to the ICJ on 25 November 1978.[414]

Libya predominantly advanced its claim within the context of its legislation relating to hydrocarbons, *e.g.* its Petroleum Law No. 25 of 1955 and Petroleum Regulation No. 1 of 15 June 1955.[415] Libya's Petroleum Law of 1955 divided Libya's territory into four petroleum zones and extended to the seabed and subsoil beneath the territorial waters and the high seas contiguous thereto, purporting to claim sovereign rights over the shelf resources.[416] Tunisia also invoked economic considerations remarking its relative powerty in terms of natural resources *vis-à-vis* Libya, especially

[409] *North Sea Continental Shelf* (sep op. Jessup J.), p. 67.
[410] *North Sea Continental Shelf* (sep op. Jessup J.), p. 67.
[411] *North Sea Continental Shelf* (sep op. Jessup J.), p. 72.
[412] Continental Shelf (Tunisia/Libyan Arab Jamahiriya) ("*Tunisia v Libya*"), ICJ Rep. 1982 p. 18.
[413] Tanaka, **Predictability and Flexibility**…, p. 268.
[414] *Tunisia v Libya*, para. 1-2.
[415] *Tunisia v Libya*, para. 91.
[416] *Tunisia v Libya*, para. 91-92.

oil and gas while Libya dismissed these arguments due to their irrelevancy to the maritime delimitation as a factor.[417]

The ICJ did not take these economic considerations into account for the delimitation of the continental shelf areas appertaining to each party but did consider the presence of oil wells themselves in the delimitation by stating that: *"[these factors] are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource. As to the presence of oil-wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing al1 relevant factors to achieve an equitable result*."[418]

In *Jan Mayen*, the ICJ assessed whether access to the resources of the area of overlapping claims constituted a factor relevant to the delimitation and concluded that: *"(...) So far as sea-bed resources are concerned, the Court would recall what was said in the Continental Shelf (Libyan Arab Jamahiriya/Malta) case: "The natural resources of the continental shelf under delimitation 'so far as known or readily ascertainable' might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation, as the Court stated in the North Sea Continental Shelf cases (I.C.J. Reports 1969, p. 54, para. 101 (D) (2)). Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them." (I.C.J. Reports 1985, p. 41, para. 50.)".*[419] Here the ICJ emphasized that for the natural resources to be considered as relevant in drawing the continental shelf boundary, the parties needed to rely on sufficient information about these natural resources.[420]

Conduct of the parties may also affect the maritime delimitation if the parites can prove existence of a *de facto* line arising from a tacit agreement or a *modus vivendi.*[421] In *Tunisia v Libya*, the ICJ took note of the *de facto* line which was the result of the parties' initial grant of concessions for offshore exploration and exploitation of oil and

[417] *Tunisia v Libya*, para. 106.
[418] *Tunisia v Libya*, para. 107.
[419] *Jan Mayen*, para. 72.
[420] Tanaka, **Predictability and Flexibility**…, p. 269.
[421] Tanaka, **The International Law of the Sea**…, p. 211.

gas and was tacitly respected for a number of years.[422] Conduct of the parties include respect for frontiers inherited from colonization (*uti possidetis iuris),* claims of *effectivités* where both states claim sovereignty based on exercise of authority over the area in question and proportionality. Nevertheless, Tanaka notes that the idea of *effectivités* would not be compatible with the fundamental character of continental shelf rights of the state which are *ipso facto* and *ab initio*.[423]

The ICJ clarified this approach in *Cameroon v Nigeria*[424] and stated that "*although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.*"[425] Since the ICJ could not find any agreement between the parties with regards to oil concessions, oil practice of the parties was not considered as a relevant factor in delimitation of maritime boundaries.[426]

In many of the cases analysed in the further sections, the parties relied on their conduct within the disputed area (especially in terms of hydrocarbon resource exploration and exploitation activities and oil and gas concessions) as well as the other party's inaction or acquiescence of such conduct in the hope to establish a valid tacit agreement favouring their claims. Existence of a tacit agreement between the parties was analysed in detail by ITLOS in *Ghana v. Côte d'Ivoire*[427]. Ghana argued that for more than five decades, Ghana and Côte d'Ivoire respected an equidistance line which reflected a tacit agreement as to the existence of a maritime boundary whereas Côte d'Ivoire insisted that there is no formal or tacit agreement on delimitation of the maritime boundary between the parties and that Côte d'Ivoire systematically refused to recognize the western limit of Ghanaian oil concessions.[428]

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[422] *Tunisia v Libya*, para. 92, 96.
[423] Tanaka, **The International Law of the Sea**…, p. 211.
[424] Land and Maritime Boundury hetween Cameroon and Nigeria Equatorial Guinea intervening ("*Cameroon v. Nigeria*"), Judgment, ICJ Rep. 2002, p. 303.
[425] *Cameroon v Nigeria*, para. 304.
[426] **Ibid**.; Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 562.
[427] Case Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean ("*Ghana v. Côte d'Ivoire*"), ITLOS Case No. 23, Judgment, ITLOS Rep. 2017, p. 27.
[428] *Ghana v. Côte d'Ivoire*, para. 102-103.

In this case, the ITLOS Special Chamber has analysed the oil activities in the form of oil concessions and their locations, seismic surveys, drilling activities and the question of protest as well as other maritime activities, the parties' legislation, parties' representation to international institutions (especially in terms of their submissions to the CLCS where Côte d'Ivoire clearly stated that it has overlapping maritime claims with adjacent states and has not signed any delimitation agreements) and negotiationsand concluded that there is no tacit agreement between the parties to delimit their territorial sea, EEZ and continental shelf within and beyond 200nm.[429] In terms of oil practice of the parties, ITLOS Special Chamber considered that "*the oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary. Mutual, consistent and long-standing oil practice and the adjoining oil concession limits might reflect the existence of a maritime boundary, or might be explained by other reasons. (…)*"[430]

In the PCA administered *Barbados v Trinidad and Tobago*[431] arbitration, there were potentially significant oil and gas resources in the disputed maritime area between the parties. Nevertheless, the Tribunal did not find Barbados' conduct in the disputed area, *e.g.* performing seismic surveys for oil, grant of oil concessions, representations to oil companies with respect to four submarine areas for petroleum exploration and production and patrolling[432] as posing a determinative legal significance in the area claimed by Trinidad and Tobago north of the equidistance line.[433] With regards to the equitable access to natural resources, the ICJ ruled that *"[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance"*[434]

In *Romania v Ukraine*[435], the ICJ examined the conduct of the parties (oil and gas concessions granted by the parties in the area) as a relevant circumstance for the adjustment of the provisional equidistance line but referring to *Barbados v Trinidad*

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[429] *Ghana v. Côte d'Ivoire*, para. 211-228.
[430] *Ghana v. Côte d'Ivoire*, para. 215.
[431] Arbitration between Barbados and the Republic of Trinidad and Tobago ("*Barbados v Trinidad and Tobago*"), Arbitral Award of 11 April 2006.
[432] *Barbados v Trinidad and Tobago*, para. 11, 106, 363.
[433] *Barbados v Trinidad and Tobago*, para. 363.
[434] *Barbados v Trinidad and Tobago*, para. 241.
[435] Maritime Delimitation in the Black Sea ("*Romania v. Ukraine*"), Judgment, I.C.J. Reports 2009, p. 61.

and Tobago, ruled that these state activities did not play any particular role in the maritime delimitation in this case.[436]

Access to oil resources was the triggering point in *Nicaragua v Colombia.* The dispute between the parties crystallized on 4 June 1969 via Colombia's Note of protest, right after Nicaragua granted oil exploration concessions in the area of Quitasueño in 1967-1968.[437] Nicaragua took its dispute with Colombia concerning title to territory and maritime delimitation to the ICJ on 6 December 2001.[438] Apart from the main plea where it sought sovereignty over several maritime features off of its coasts and appropriate form of delimitation, Nicaragua requested the ICJ to adjudge and declare that Colombia was in breach of its international law obligations by halting or hindering Nicaragua from accessing and using its natural resources to the east of the 82º W meridian.[439] Following this, and taking the factual and legal issues into account, the ICJ referred to *Romania v Ukraine* and *Barbados v Trinidad and Tobago* and concluded in its consideration that there did not exist any issues of access to natural resources so exceptional as to treating them as a relevant circumstance in delimitation of the maritime boundaries between Nicaragua and Colombia.[440]

Significant hydrocarbon reserves were amongst the main issues of dispute between Bangladesh and Myanmar, preventing them from benefiting from these resources. Bangladesh and Myanmar decided to resort to arbitration under the UNCLOS. The ITLOS judgment of *Bangladesh v. Myanmar*[441] on 14 March 2012 was well-received by the parties and resulted in finalization of their maritime boundaries. In a case like this where the parties are pleased with the outcome, this would cause, among others, two things: 1) these states could open their -now determined- areas to investments, and 2) satisfaction with the outcome of the case could encourage other states to resort to peaceful resolution of their territorial disputes.

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[436] *Romania v Ukraine*, para. 198.
[437] *Nicaragua v Colombia*, para. 69
[438] *Nicaragua v Colombia*, para. 1.
[439] *Nicaragua v Colombia*, para. 5.
[440] *Nicaragua v Colombia*, para. 223; *Barbados v Trinidad and Tobago*, para. 241; *Romania v Ukraine*, para. 198.
[441] Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal ("*Bangladesh v Myanmar*"), ITLOS Case No 16, Judgment, ITLOS Rep. 2012, p. 448.

Similarly, in *Eritrea v Yemen*[442], the parties relied heavily on their petroleum activities for oil exploration, development, producton and sale by way of granting of offshore oil concessions and contracts in the Red Sea and disputed islands.[443] While examining the legal implications of these petroleum activities, the ICJ assessed the *effectivités* arising out of or associated with these contratcs and concessions submitted by Yemen and Eritrea, however found that they could not establish or substantially strengthen the claims of either party to sovereignty over the disputed islands.[444]

Existence/incidence of natural resources in the disputed area as well as conduct of the parties with regards to oil and gas practices such as the production of a *de facto* line due to the grants of petroleum concessions premised on a tacit or an express agreement between the parties in the disputed area are considered relevant but are not as well accepted as, say, coastal configuration of the parties in the delimitation of the area.[445] This reveals that even though existence of hydrocarbon resources provide a strong motivation for the states for delimitation negotiations, their direct impact on the location of the boundaries remain modest.[446] Location of resources are scarcely capable of establishing a natural boundary as delimitation of these boundaries is fundamentally a political and legal process.[447] This does not change the fact that existence of oil and gas resources in undelimited maritime areas had direct impact on the location of the boundaries in the negotiations and subsequent agreements.[448]

As seen above, international courts and tribunals treat the resource related criteria more cautiously and may not consider the existence of natural resources as a relevant circumstance in the maritime delimitation.

In the following subsection, different approaches used by the states in order to settle their territorial disputes via agreements and useful mechanisms will be analyzed.

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[442] Award of the Tribunal in the First Stage - Territorial Sovereignty and Scope of the Dispute ("*Eritrea v Yemen*"), PCA, Award, 9 October 1998.
[443] *Eritrea v Yemen,* para. 389, 390.
[444] *Eritrea v Yemen,* para. 391, 437. The ICJ examined Yemen's concessions and agreements between paragraphs 393-422, and Ethiopia and Eritrea's concessions and agreements between paragraphs 424-430. The author notes that State of Eritrea became legally independent from the State of Ethiopia in 1993, therefore previous concessions and contracts pertaining areas currently under Eritrean control have also been assessed by the ICJ.
[445] Crawford, **Brownlie's Principles…**, p. 289.
[446] Tanaka, **Predictability and Flexibility**…, p. 276.
[447] Cottier, **Equitable Principles of Maritime Boundary Delimitation** …, p. 560.
[448] **Ibid.**

5.4. Access to Hydrocarbon Resources in the Boundary Agreements: Common/Resource Deposit Clauses and Joint Development Zones

Considering the fact that many coastal states in the world have yet to establish full set of maritime boundaries via treaties, and there are considerable number of overlapping claims over some of the maritime areas in these non-delimited marine spaces, settlement of territorial disputes and boundary making becomes a necessity for coastal states.[449] The need for maritime boundary delimitation is deemed especially crucial for the states when the potentially rich oil and gas areas are involved. In an undelimited maritime area potentially rich in hydrocarbon resources, the states may (i) attempt to enforce their jurisdiction on the persons or licensees therein, giving rise to the escalation of the dispute which might negatively impact meaningful economic activity, result in political hostilities and environmental damage[450]; or (ii) refrain from authorizing oil and gas activities in the disputed area and instead, try making these areas the subject of a future boundary agreement in their endeavour to refrain from provoking the counter-party.[451]

It cannot be denied that there is an enormous economic potential in resolving the disputes in such area, considering the fact that prospective investors would be more interested in directing their valuable resources to an area where the state jurisdiction is clear. Reflecting above, it can be argued that states would be more willing to resolve such disputes in a peaceful manner.

Oil and gas industry aim to assume exclusive legal rights to extract hydrocarbon resources of the area in question, which means that any dispute between neighbouring states over such area puts those rights that investors need at risk.[452] That is why invesors in the oil and gas industry expect to deal with precise locations in order to be able to further their operations. Exploration and exploitation of seabed hydrocarbons are relatively recent developments and require delimitation of the maritime areas for the

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[449] David Anderson, "Negotiating Maritime Boundary Agreements: A Personal View" in Rainer Lagoni and Daniel Vignes, (Ed.), **Maritime Delimitation**, Martinus Nijhoff Publishers, 2006, pp. 121-141, p. 122.
[450] Bernard H. Oxman, "Political, Strategic and Historical Considerations", in Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 3-5.
[451] Ibid.
[452] Oxman, "Political, Strategic…", in Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 5.

MOGCs to be able to operate offshore without any risks or more correctly, with relatively less risk of overlapping jurisdiction claims by the neighbouring state precluding their operations. They need the legal certainty in obtaining and maintaining the necessary permits and licenses for their offshore operations.[453] Such legal certainty is also important for the legal accountability and liability of the actors involved in offshore exploration and exploitation of oil and gas considering their potential to harm the fragile marine environment.

Unexplored and unexploited potentially hydrocarbon-rich areas in the world heavily affects the political approach of the states concerning these areas.[454] It is beneficial for the states to have clear jurisdiction over the extended offshore zones with rich hydrocarbon resources and make them available for commercial exploitation, therefore boost their investment environment and economy. States may consider agreeing on their maritime boundaries 1) when substantial activities subject to coastal state jurisdiction are being conducted or there is a possibility of such activities being conducted in an area of actual or potential dispute, 2) and/or one or both disputing states are on the same page in their wish to use the area in question.[455]

Maritime boundaries may be established via international agreements/treaties or decision of an international court or award of an arbitral tribunal.[456] Both negotiation and international adjudication and arbitration have their advantages and disadvantages. Under this section, boundary negotiations and subsequent treaties between states will be highlighted as a mean of settlement of inter-state territorial disputes.

In order to delimit their maritime boundaries, the states may choose to negotiate to determine a boundary; propose a particular boundary; grant concessions with a view of reaching an agreement on the boundary; and agree on a particular boundary.[457] International law of the sea on the maritime boundaries requires the parties to have

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[453] Anderson, "Negotiating Maritime Boundary Agreements…", in Lagoni and Vignes, **Maritime Delimitation**…, p. 122.
[454] Bernard H. Oxman, "International Maritime Boundaries: Political, Strategic and Historical Considerations", **U Miami Inter-Am. L. Rev.**, Vol. 26, No. 2 (Winter, 1994/1995), pp. 243-295, p. 247.
[455] Bernard H. Oxman, "Political, Strategic and Historical Considerations", in Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 3.
[456] Anderson, "Negotiating Maritime Boundary Agreements…", in Lagoni and Vignes, **Maritime Delimitation**…, p. 122.
[457] Oxman, "International Maritime Boundaries…", **U Miami Inter-Am. L. Rev.,** p. 255.

meaningful negotiations in the process of negotiations.[458] Let us remember that the UNCLOS requires state parties to negotiate and conclude agreements to delimit the continental shelf and EEZ before resorting to dispute resolution.[459] During their good-faith negotiation, states may be guided by economic factors as well as legal and political factors.[460]

In the negotiation and conclusion of maritime boundaries, economic considerations, specifically access to oil and gas resources, seems to have constituted an important impetus for the states.[461] It appears that for the majority of the time, oil and gas resources do not have a direct impact on the location of the boundaries in the boundary treaties, nevertheless, in a few treaties, existence of hydrocarbon resources directly influenced the outcome of those negotiations.[462]

In the course of maritime boundary negotiations, states came up with creative and flexible solutions for the allocation of hydrocarbon resources. Establishment of a joint development zone ("**JDZ**") or formulating a "common deposit clause" or "resource deposit clause" ("**CDC**") in the boundary treaty prove to be useful for the successful conclusion of these treaties and the management of hydrocarbon resources therein.[463]

In cases where the oil and gas reserves straddle the boundary or the concession limit of one state and flows to the other side, the states may consider adding a CDC provision in boundary agreements to unitize such reserve/deposit exceeding the boundary line.[464] Concept of unitization requires the cooperation of the parties for the exploration and exploitation of the transboundary hydrocarbon reserves.[465] Within this concept, the hydrocarbon reserve in question is unitized and each state is entitled to

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[458] *North Sea Continental Shelf*, p. 47, para 85; Anderson, "Negotiating Maritime Boundary Agreements…", in Lagoni and Vignes, **Maritime Delimitation**…, p. 129.
[459] Articles 74(1) and 83(1) of the UNCLOS.
[460] Oxman, "International Maritime Boundaries…", **U Miami Inter-Am. L. Rev.,** p. 256.
[461] Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations", in Jonathan I. Charney and Lewis M. Alexander (ed.), **International Maritime Boundaries Volume I**, Martinus Nijhoff Publishers, p. 75.
[462] Tanaka, **The International Law of the Sea**…, p. 209; Tanaka, Predictability and Flexibility…, p. 276.
[463] Tanaka, **The International Law of the Sea**…, pgs. 209-210; Tanaka, **Predictability and Flexibility…,** pgs. 279-287; Thomas A. Mensah, "Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation" in Rainer Lagoni and Daniel Vignes, (Ed.), **Maritime Delimitation**, Martinus Nijhoff Publishers, 2006, pp. 143-151, pgs. 146-151.
[464] Tanaka, **The International Law of the Sea**…, p. 209; Tanaka, **Predictability and Flexibility…,** p. 279; Anderson, "Negotiating Maritime Boundary Agreements…", in Lagoni and Vignes, **Maritime Delimitation**…, p. 137; Kwiatkowska, "Economic and Environmental…", Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 89.
[465] Tanaka, Predictability and Flexibility…, p. 279.

resources that lie in their side of the line.[466] Continental shelf agreements negotiated in the late 1960s and early 1970s reflected the practical interest in the offshore oil and gas exploitation activities and almost exclusively included these type of provisions.[467]

A typical example of CDC was contained in 1965 Continental Shelf Delimitation Agreement between Norway and the UK as follows: "If any single geological petroleum structure or petroleum field, (…), extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned."[468]

The Continental Shelf Boundary Agreement signed between the Shaykhdom of Bahrain and the Kingdom of Saudi Arabia sets forth the agreement between these two governments to equally share the income from the exploitation of petroleum resources in the Fasht bu Saafa Hexagon (in Persian Gulf), which is located in Saudi Arabian waters and under the Saudi Arabian jurisdiction.[469] In this agreement, the parties agreed that the oil resources of the abovementioned area would be developed as the Saudi Arabians see fit, but revenues received from the exploitation of the petroleum would be evenly divided between the two countries: "*The Fashtu bu Saafa Hexagon is an area under Saudi Arabian jurisdiction. However, Saudi Arabia and Bahrain have agreed that the oil resources of this area shall be developed as the Saudi Arabians see fit, but revenues received from the exploitation of the petroleum will be evenly divided between the two countries*."[470]

Article 2 of the Continental Shelf Boundary Agreement of 1970 between Iran and Qatar reads as follows: "*If a single petroleum geological structure, a single petroleum*

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[466] Anderson, "Negotiating Maritime Boundary Agreements…", in Lagoni and Vignes, **Maritime Delimitation**…, p. 137.
[467] Colson, "The Legal Regime…" Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 55.
[468] Article 4 of the UK and Norway Agreement Relating to the Delimitation of the Continental Shelf Between the two Countries, 10 March 1965, UNTS No. 8043, https://treaties.un.org/doc/Publication/UNTS/Volume%20551/volume-551-I-8043-English.pdf, Accessed on 24.02.2019; Tanaka, **Predictability and Flexibility…,** p. 279.
[469] Limits in the Seas No. 12, Continental Shelf Boundary: Bahrain-Saudi Arabia, 10.03.1970, State Bureau of Intelligence and Research Issued, https://2009-2017.state.gov/documents/organization/62003.pdf, Accessed on 24.02.2019, p. 2.
[470] **Ibid.**, p. 6.

field, or any single geological structure or single field of other minerals extends to the other side of the demarcation line (…) and if the part of the structure or field which is located on one side of the demarcation line is such that it could be exploited by oblique drillings from the other side, then in this case: A) In no areas located on both sides of the demarcation line (…) can wells whose exploitation area is at least 125 meters from the said demarcation line be drilled, except on agreement of the parties concerned; B) The two parties will make efforts to come to an agreement on ways to standardize operations or for unifying them on both sides of the demarcation line."[471]

Another example of the CDC is the Article IV of the Memorandum of Understanding of 1979 on the Malaysia-Thailand Continental Shelf Delimitation which reads as follows: "*If any single geological petroleum or natural gas structure or field, or any mineral deposit of whatever character, extends across the boundary lines (…) the two Governments shall communicate to each other all information in this regard and shall seek to reach agreement as to the manner in which the structure, field or deposit will be most effectively exploited; and all expenses incurred and benefits derived therefrom shall be equitably shared*."[472]

The resource deposit clauses like the above require states to cooperate when a single resource extends across the boundary and part of such deposit is exploitable from the other side of the boundary.[473] This was achieved via joint development agreements between states for the exploration and exploitation of oil and gas resources extending across a boundary or located in an area of overlapping claims.[474]

The concept of joint development requires an agreement between two states to cooperate and jointly develop and share offshore oil and gas resources in agreed proportions in a designated zone of the continental shelf.[475] Joint development between states may be provisional or permanent and may relate to the areas where maritime

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[471] Limits in the Seas No. 25, Continental Shelf Boundary: Iran-Qatar, 09.07.1970, State Bureau of Intelligence and Research Issued, https://2009-2017.state.gov/documents/organization/61564.pdf, Accessed on 24.02.2019.

[472] Thailand and Malaysia - Memorandum of Understanding on the delimitation of the continental shelf boundary between the two countries in the Gulf of Thailand No. 21271, signed at Kuala Lumpur on 24.10.1979, https://treaties.un.org/doc/Publication/UNTS/Volume%201291/volume-1291-I-21271-English.pdf Accessed on 24.02.2019.

[473] Kwiatkowska, "Economic and Environmental…", Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 86.

[474] **Ibid.;** Blyschak, "Offshore oil and gas…", **J W. En. Law & Bus.,** p. 217.

[475] Tanaka, **The International Law of the Sea**…, p. 209; Tanaka, **Predictability and Flexibility…,** p. 281; Mensah, "Joint Development Zones…" in Lagoni and Vignes, **Maritime Delimitation**, p. 147.

boundaries are being established or where maritime delimitation was not or could not be established for various reasons.[476] Usually, JDZs are established where parties find it difficult or impossible to agree on a single boundary between them or because it is not feasible for only one state to exploit hydrocarbon reserve which exceeds the agreed boundary.[477] In a typical joint development regime, governments establish a Joint Commission, consisting of members from each state, to manage joint development of hydrocarbon resources and issue permits for international tenders in the area.[478]

On 1 January 1970, Korean government enacted the "Law for Development of Submarine Mineral Resources" and leased certain seabed areas in the East China Sea to some major international oil companies and some of these areas overlapped some parts of the seabed areas leased to Japanese oil exploration companies prior to that date.[479] In order to encourage exploration and exploitation in the area, the Parties established that within the JDZ, they needed to identify a concessionaire each which would agree on an operator subject to the approval of Japan and Korea.[480] 1974 Joint Development Agreement between Japan and Republic of Korea[481] delimited the northern part of the East China Sea with a median line boundary between Japan and South Korea and created a JDZ in the southern part of the East China Sea[482], without prejudice to the eventual determination of the boundary. Unfortunately, the existence of a boundary delimitation agreement did not prevent a dispute arising between the two states when the subject-matter was access to oil reserves in the East China Sea.[483]

In 1981, the Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen (Norway) recommended a joint development agreement within the area prospectively rich with hydrocarbons based on the Iceland's dependence on

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[476] Tanaka, **The International Law of the Sea**…, pgs. 209-210; Tanaka, **Predictability and Flexibility…,** pgs. 281-282, 284.
[477] Mensah, "Joint Development Zones…" in Lagoni and Vignes, **Maritime Delimitation**, p. 147.
[478] Anderson, "Negotiating Maritime Boundary Agreements…", in Lagoni and Vignes, **Maritime Delimitation**…, p. 138.
[479] Masahiro, "The North Sea Continental Shelf Cases Revisited…", **As. Y. Int'l Law…,** p. 204-205.
[480] David Colson, "The Legal Regime of Maritime Boundary Agreements" in Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 59.
[481] Japan and Republic of Korea Agreement concerning joint development of the southern part of the continental shelf adjacent to the two countries, 30.01.1974, http://www.marineregions.org/documents/volume-1225-I-19778-English.pdf Accessed on 16.03.3019.
[482] Masahiro, "The North Sea Continental Shelf Cases Revisited…", **As. Y. Int'l Law…,** p. 204.
[483] Tanaka, **The International Law of the Sea**…, p. 210; Tanaka, **Predictability and Flexibility…,** pgs. 284.

the hydrocarbon imports and Norway's status as a significant exporter of oil and gas.[484] This report was considered as an attempt to finding a practical solution to what was essentially and economic dispute about access to potential hydrocarbon resources.[485]

Due to the interconnecting nature of Chunxiao oil and gas reserves in the East China Sea, China and Japan reached a compromise over the joint development of Chunxiao in 2008.[486] The two states also agreed to jointly develop natural gas fields in the East China Sea where Japanese companies would invest in a Chinese-managed project to exploit underwater natural gas deposits and an unexplored and undeveloped gas block in Longjing/Asunaro.[487]

JDZs appear to have facilitated the management of oil and gas resources for the disputing states in the territories where they have overlapping claims and made efficient and economic exploitation of hydrocarbon resources possible, and improved the possibility of attracting investor MOGCs.[488]

In most of the territorial dispute cases examined in this thesis, there were prior and unilateral state authorizations for exploration or exploitation of the seabed to private companies and most of the time these companies would be operational in the disputed area. In its attempt to resolve its territorial dispute by delimiting the maritime boundaries, the state may be responding to political pressure from its licensees or fear of liability arising out of the license agreements.[489] There are various examples where the prior authorizations in the disputed area were taken into consideration in the agreement of the states or affecting the relevant court's/tribunal's decision in delimiting the area in question. Denmark and [Federal Republic of] Germany implemented the ICJ's *North Sea Continental Shelf* judgment to permit some existing Danish licensees to remain on the Danish continental shelf; United Arab Emirates (Abu Dhabi) and Qatar agreed to share ownership and revenues from a disputed oil field under the existing concession granted by Abu Dhabi.[490] Another example is the

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[484] Kwiatkowska, "Economic and Environmental…", Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 80; Tanaka, **Predictability and Flexibility…,** pgs. 282.
[485] Kwiatkowska, "Economic and Environmental…", Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 80.
[486] Tai-Wei, **Oil and Gas in China**…, p.63-64.
[487] Tai-Wei, **Oil and Gas in China**…, p.71.
[488] Mensah, "Joint Development Zones…" in Lagoni and Vignes, **Maritime Delimitation**, p. 149.
[489] **Ibid.,** p. 38.
[490] **Ibid.**

Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of marine and submarine areas of 18 April 1990[491] where three of four sectors of the boundary line were drawn to preserve the integrity of the existing oil fields and concessions.[492]

Apart from the obvious economic benefits, states sometimes assert that the access and control over hydrocarbon resources of the seabed are also within their security interests influencing their decision to resolve their territorial dispute by way of delimitation.[493] Establishment of agreed boundaries are a stabilizing factor that would facilitate the conduct of the existing and future offshore oil and gas activities within the continental shelf.[494]

5.5.Negotiation and Establishment of Maritime Boundaries in the Arctic Region

Under this subsection, maritime boundary disputes in the Arctic region and their peaceful resolution via agreements, joint action or international adjudication will be examined to establish the role of access to oil and gas resources in the peaceful resolution of territorial disputes between the states in the Arctic region.

Arctic circle around the North Pole covers more than a sixth of the Earth's total land mass and unlike Antarctica[495], Arctic circle is populated by people and borders the following coastal states: the US via Alaska; Canada; Kingdom of Denmark[496] via Greenland; Kingdom of Norway; and finally, Russian Federation.

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[491] Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of marine and submarine areas, 18 April 1990, Article 8, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TTO-VEN1990SA.PDF Accessed on 23.02.2019.

[492] Kwiatkowska, "Economic and Environmental…", Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 92.

[493] Oxman, "International Maritime Boundaries…", **U Miami Inter-Am. L. Rev.,** p. 270-271.

[494] Kwiatkowska, "Economic and Environmental…", Charney and Alexander (ed.), **International Maritime Boundaries Volume I**, p. 75.

[495] Kingdom of Denmark Strategy for the Arctic 2011-2020, p. 9 http://library.arcticportal.org/1890/1/DENMARK.pdf Accessed on 05.01.2019.

[496] Kingdom of Denmark is centrally located in the Arctic and consists of three parts: Denmark, Greenland and Faroe Islands. (Source: **Ibid.**)

Image No. 2: Map of the Arctic Region

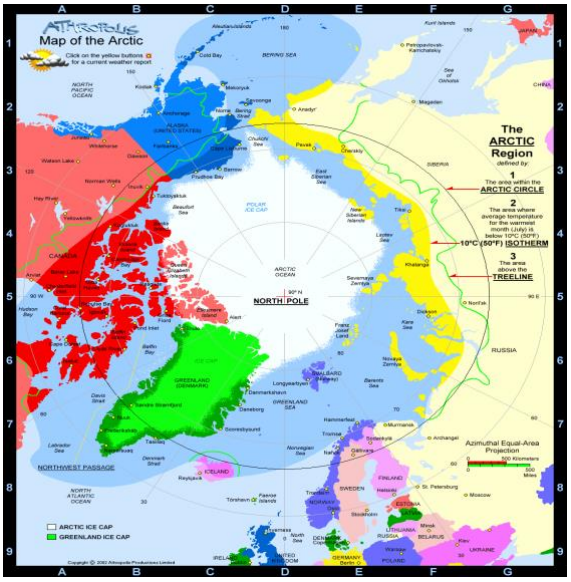

Image Source: http://www.athropolis.com/map2.htm

It is reckoned that the Arctic region hold 30% of the world's undiscovered gas reserves and about 10% of undiscovered oil reserves in the world.[497] The USGS revealed that the unproven oil and gas resources in the Arctic may be vast, similar to the previously major discoveries of natural gas in Russia and oil in Alaska.[498]

Considering the increased need to access to the exploitation of oil and gas, the Arctic states have incredible economical potential. The rising global demand for oil and gas has fuelled the international interest in the Arctic which alarmed its coastal states to seek to ensure their rights regarding the unexplored Arctic subsoil.[499] Arctic has a different position among other territories around the world as it is one of the most fragile places when it comes to the climate change along with oil-spill related environmental issues. Resorting to international legal framework for peaceful cooperation and the management of the resources and protection of environment is an absolute necessity.

When it comes to the impact of the energy resources on the territorial disputes, Arctic region needs to receive proper credit because that issue was one of the central points of discussion during the negotiations for boundary delimitations. In 2008, Denmark/Greenland, Canada, Norway, Russia and the US confirmed their responsibility to cooperate to manage the development of the Arctic Ocean pursuant to the international law via the Ilulissat Declaration[500] and committed to resolve disputes and overlapping claims through negotiation.[501]

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[497] **Ibid.,** p. 9, 24.
[498] Moore and Gautier (Ed.), "The 2008 Circum-Arctic…", **USGS**.
[499] Kingdom of Denmark Strategy for the Arctic…, p. 13.
[500] Ilullisat Declaration, Ilulissat, Greenland on 28 May 2008.
[501] Kingdom of Denmark Strategy for the Arctic…, p. 14.

Territories in the Arctic became subjects of disputes among the coastal states of Arctic from time to time. Most of the time, these disputes were resolved through negotiations and concluding treaties.

One of such territory is the Archipelago of Spitsbergen. Due to the prospect of oil and gas exploitation in its extended continental shelf (beyond 200nm of the Archipelago of Spitsbergen), the area has the potential to be a subject to a dispute. Norway's sovereign rights on the area has been set out by the Svalbard Treaty[502] Norway gradually modified its claims around the Archipelago of Spitsbergen and adopted a 12nm territorial sea asserting that the limits on its sovereign rights on the area set out by the Svalbard Treaty should be applied restrictively.[503] It appears that Iceland and Russia initially posited that under the provisions of the Svalbard Treaty which limited Norway's sovereignty in substance and in geographical scope, consequently leaving Norway without any EEZ or continental shelf; while the UK argued that the Svalbard Treaty must be interpreted in accordance with the Vienna Convention on the Law of the Treaties and stated that the intent of the parties was to extend non-discriminatory rights[504] to the full geographic extent of Norway's sovereignty to include the EEZ and continental shelf when Norwegian sovereignty was extended to those new zones.[505] Which means that Norway could be able to regulate the conditions on exploitation of oil and gas in the Archipelago of Spitsbergen including completely banning these activities.[506]

When Greenland became an integral part of Denmark in 1953 and then became autonomous on its judicial affairs, policing and natural resources in 2008 with a referendum, another issue with regards to oil and gas development in offshore Greenland was raised.[507] Sea floor around Greenland holds one of the world's largest

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[502] Article 2 of the Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920 ("**Svalbard Treaty**"), http://library.arcticportal.org/1909/1/The_Svalbard_Treaty_9ssFy.pdf Accessed on 29.09.2018.
[503] Byers and Baker, International Law and the Arctic…, p.19.
[504] *E.g.* Article 3 of the Svalbard Treaty reads as: "*The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.*"
[505] Byers and Baker, **International Law and the Arctic**…, p.20.
[506] **Ibid.,** p.21.
[507] **Ibid.,** p.23.

remaining undiscovered oil fields.[508] Greenland, being the new dearest of the global oil industry, became the centre of attention for major oil and natural gas companies including Royal Dutch Shell, Cairn Energy, ExxonMobil, Chevron and Husky Energy.[509] Government of Greenland sees large oil and gas resources of the island as a way to achieve Greenland's economic independence and eventually "to become independent from former colonial powers".[510]

The 1973 Canada Denmark Boundary Treaty[511] establishes the dividing line for the purpose of each party's exploration and exploitation of the oil and gas reserves within their part of the continental shelf in accordance with the international law.[512] The 1973 Canada Denmark Boundary Treaty also prohibits each party from issuing licenses for exploitation of resources in areas near the division line without prior agreement of the other party regarding the exact determination of the geographic coordinates of such area.[513] Lastly, the 1973 Canada Denmark Boundary Treaty establishes that in case any exploitable petroleum field or structure is discovered, situated on the side of the dividing line or extends across such line, the parties are obliged to seek to reach an agreement regarding the exploitation of such structure or field.[514]

Jan Mayen Island, located 250nm east of Greenland, 360nm northeast of Iceland and 600nm from Norway, was formally integrated into the Kingdom of Norway in 1930.[515] Due to its location, Jan Mayen Island became the subject of several disputes regarding the sovereign rights of its neighbouring states. One of such disputes was referred to the ICJ by Denmark in 1993 where the ICJ delimited the maritime boundaries.[516] In 1981, Norway and Iceland concluded the Agreement on the

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[508] Schenk *et. al.*, "Assessment of undiscovered oil…", **USGS…,** p. https://pubs.usgs.gov/fs/2008/3014/pdf/FS08-3014_508.pdf Accessed on 05.01.2019.
[509] Sylvia Pfeiffer and Christopher Thompson, "The Struggle for Greenland's Oil", **Financial Times**, 26.08.2011, https://www.ft.com/content/1440b166-cea1-11e0-a22c-00144feabdc0 Accessed on 28.01.2019.
[510] **Ibid.**
[511] No. 13550 Denmark and Canada, Agreement relating to the delimitation of the continental shelf between Greenland and Canada ("1973 Canada Denmark Boundary Treaty"), signed at Ottawa on 17.12.1973, https://treaties.un.org/doc/Publication/UNTS/Volume%20950/volume-950-I-13550-English.pdf Accessed on 28.01.2019.
[512] Article 1 and Article 2 of the 1973 Canada Denmark Boundary Treaty.
[513] Article 3 of the 1973 Canada Denmark Boundary Treaty.
[514] Article 5 of the 1973 Canada Denmark Boundary Treaty.
[515] *Jan Mayen*, para. 13.
[516] *Jan Mayen*, para.91-92.

Continental Shelf between Iceland and Jan Mayen[517] ("**Norway-Iceland Treaty**") where they regulated their participation in the oil and gas exploration on a portion of each other's continental shelves. Article 4 of the Norway-Iceland Treaty stipulates that any exclusive exploration and production licenses in respect of the special fields in the area specified in Article 2 would be based on joint venture contracts (unless agreed otherwise) where governmental or non-governmental petroleum companies can participate in such contracts. As per Article 5 and 6 of the Norway-Iceland Treaty, Iceland and Norway would be entitled to participate with a share of 25% in the petroleum activities and these shares would be considered when negotiating with outside governmental or non-governmental petroleum companies.

The Barents Sea lies between Norway and Russia and its entire seabed constitutes continental shelf. Russia's Shtokman gas field, operated by Gazprom, was discovered in 1988 and is located in the middle of the Russian sector of the Barents Sea, around 600 kilometers northeast of Murmansk.[518] Russia's Shtokman gas field has an estimated 3.8 trillion cubic meters of gas and 53.4 million tons of gas condensate.[519] In the Barents Sea, Norway's Statoil operates the Snøhvit, Albatross and Askeladd natural gas fields containing more than 193 billion cubic metres of natural gas.[520] Norway's Goliat oil field, discovered in 2000 and operated by Vår Energi AS (65%) and Equinor Energy AS (35%) is also located in the Barents Sea, 50 km southeast of the Snøhvit field.[521] Norway and the Soviet Union (now Russian Federation) were involved in a maritime boundary dispute concerning the Arctic Sea and Barents Sea which has over 50.000 sq nm of seabed rich with oil and gas.[522]

Stateoil was producing gas from Snøhvit field for some time located in an undisputed part of the Barents Sea. Gazprom has been developing the huge Shtokman field in Russian waters. The disputed area lies between Shtokman field and two oil and

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[517] Agreement on the Continental Shelf between Iceland and Jan Mayen, 22.10.1981, (entry into force: 2 June 1982; No: 37026; Date: 08.11.2000, available at www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/ISL-NOR1981CS.PDF, Accessed on 27.04.2019.

[518] **Gazprom,** Shtokmanovskoye Field, http://www.gazprom.com/projects/shtokmanovskoye/ Accessed on 27.04.2019.

[519] **Ibid.**

[520] Snohvit Gas Field, Offshore Technology, https://www.offshore-technology.com/projects/snohvit-field/ Accessed on 27.04.2019.

[521] **Norwegian Ministry of Petroleum and Energy**, Goliat, https://www.norskpetroleum.no/en/facts/field/goliat/ Accessed on 27.04.2019.

[522] Byers and Baker, **International Law and the Arctic**…, p.5.

gas fields in which Statoil has shares.[523] Norway and Russia (the Soviet Union at the time) postponed their oil and gas activities in the disputed zone concerning the sovereign offshore rights of the two states in the Barents Sea and delimited a) their territorial sea boundary within the Varangerfjord in 1957; b) 20nm of a maritime boundary beyond their territorial sea in 2007 and c) the rest of the maritime boundary in 2011.[524] As the two countries envisaged the hydrocarbon reserves to be a subject to dispute between them, they eventually agreed to co-manage the hydrocarbon deposits on the continental shelf.[525] Negotiations continued for many years until the parties agreed to split the area in half allowing Barents Sea to get ahead with petroleum development. Barents Sea dispute between Norway and Russia has only been resolved in 2010 via the Treaty Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean ("**Barents Sea Treaty**").[526]

This is a good example of a peaceful settlement of the dispute between two states: through negotiations and concluding agreements/treaties. The Barents Sea Treaty agreement was undoubtedly facilitated by the hopes and plans at the time to develop the Shtokman field.[527] This is a direct impact of access to oil and gas reserves in the states' desire to settle the territorial dispute between them.

Another territory in the Arctic region rich in hydrocarbon resources is the Beaufort Sea. Beaufort Sea lies north of Alaska and Canada's Yukon Territory. The US and Canada cooperated to complete their respective surveys on the seabed to determine the geographical extent of their sovereign rights to an extended continental shelf more than 200nm more.[528] In 1970s, seismic surveys established that seabed of Beaufort Sea contained hydrocarbons.[529] Canada started issuing oil and gas concessions while the US protested Canada's actions and a dispute arose regarding the

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[523] Hober, "Recent trend in energy disputes", in Talus (Ed.), **Research Handbook…,** p. 228.
[524] Byers and Baker, **International Law and the Arctic…**, p. 42; "Joint Statement on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean," Oslo, April 27, 2010, available at www.regjeringen.no/upload/UD/ Vedlegg/Folkerett/030427_english_4.pdf
[525] Byers and Baker, **International Law and the Arctic**…, p. 44.
[526] 2010 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, English translation available at https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf, Accessed on 27.04.2019.
[527] Hober, "Recent trend in energy disputes", in Talus (Ed.), **Research Handbook…,** p. 228.
[528] Byers and Baker, **International Law and the Arctic**…, p 57.
[529] **Ibid.**

location of maritime boundary between two countries in the Beaufort Sea in 1976 onwards.[530]

Upon the discovery of 240 million barrels of oil in 2006, Imperial Oil and ExxonMobil Canada committed 585 million USD in return for exploration rights over a nearby area of seabed.[531] BP followed in 2008 committing 1.2 billion dollars in exploring an area adjacent to these areas and finally in 2010, these three made a joint venture to search for oil and gas in two offshore parcels.[532] On the US side of the maritime boundary, the cost of exploratory drilling which was postponed to take place in 2013 costed billions of dollars to Shell.[533] In 2016, the US Bureau of Ocean Energy Management issued a proposal for new leases off the Alaska coast and some of the area within this proposal included 21.000sq km section offshore territory disputed by Canada which is planned to be operational in 2020.[534] This action brought the international boundary dispute back on the table for these two states to negotiate.

As these major oil companies need prior knowledge regarding which state has the authority to grant them necessary exploration and drilling permits for the particular areas, the disputed Beaufort Sea boundary between the US and Canada needs to be managed and resolved peacefully in accordance with international law.[535]

Various treaties mentioned above have the effect of providing the predictability and legal clarity MOGCs required. In the Arctic region, cooperation between states and negotiations to delimit the boundaries appear to achieve beneficial results. It is also apparent that the great potential and existence of rich oil and gas reserves in the Arctic region in terms work in favour of the cooperative approach by the states towards peaceful resolution of territorial disputes, mainly concerning continental shelf and the oil and gas reserves contained within.

In concluding Section 4, it is important to note that, international precedent demonstrates that apart from exceptional circumstances, mere incidence of

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[530] **Ibid.,** p. 58.
[531] Byers and Baker, **International Law and the Arctic**…, p. 57.
[532] **Ibid.,** p. 57-58.
[533] **Financial Times**, "Shell resurrects Alaska drilling plans"; Sylvia Pfeiffer and Christopher Thompson, "The Struggle for Greenland's Oil", **Financial Times**, 26.08.2011, https://www.ft.com/content/1440b166-cea1-11e0-a22c-00144feabdc0 Accessed on 28.01.2019.
[534] "Proposed US Beaufort Sea drilling leases infringe on Canada's sovereignty, says Yukon", **CBC News**, 20.03.2016, https://www.cbc.ca/news/canada/north/proposed-beaufort-licences-infringe-arctic-sovereignty-1.3498469 Accessed on 28.01.2018.
[535] Byers and Baker, **International Law and the Arctic**…, p. 58.

hydrocarbon resources as well as states' conduct with regards to hydrocarbon activities in the disputed maritime area are cautiously considered relevant by the international courts and arbitral tribunals. The preferred way for the coastal states to settle their territorial disputes arising out of overlapping claims in a maritime zone is via inter-state negotiations and subsequent boundary delimitation treaties. In these treaties, they may opt for inserting a CDC in case any hydrocarbon deposits straddle the boundary lines. They may also create JDZs for the joint management and development of the area potentially rich in hydrocarbons.

JDZs may be established temporarily or permanently and in the course of boundary delimitation or in case of an ongoing dispute as a temporary solution. Under this section, various examples demonstrated that hydrocarbon reserves were the main motivators behind the states' initiation of settlement of their disputes, even if the location of these resurces or the state conduct with regards to these resources seldom had an impact on the judgment/award itself, they were considered as relevant circumstances during the proceedings. In terms of settlement of these disputes via negotiations, the economic potential of hydrocarbon resources did make an impact and pushed states to opt for flexible soutions to handle these resources. Settlement of boundaries with the impetus of oil and gas resources via mostly negotiations was heavily observed in the Arctic region.

In the next section, the author will analyse some recent cases where oil and gas resources were argued by the states and were taken into consideration by the international courts and tribunals and whether they had an impact. This will include analysis of pending cases in terms of access to oil and gas resources and Eastern Mediterranean where the states' disagreements on the jurisdiction over maritime zones potentially rich in natural gas and small number of maritime delimitation agreements as a hot topic.

6. IMPACT OF ACCESS TO OIL AND GAS RESOURCES ON THE SETTLEMENT OF TERRITORIAL DISPUTES

As we have previously established, the discovery of unexplored and potentially rich reserves of oil and gas as well as rapid development of new methods and technology to extract them from the deep seabed combined with enclosure of the seas

resulted in more territory, specifically marine spaces for the states to exert jurisdiction. Especially in the early years of this enclosure, many developing states would welcome the investment of MOGCs which constitutes a beneficial relationship for both parties. It is important for the states that their jurisdiction is clear in the designated areas so that they can control the hydrocarbon resources contained therein and regulate the hydrocarbon related activities. Likewise, it is important for the MOGCs for the host state to have proper jurisdiction in the areas where the exploration and/or exploitation of oil and gas would take place so that they can legally obtain access to explore and exploit the relevant hydrocarbon deposits and not interrupted during their operations.

States' primary motivation to resolve any territorial dispute and delimit their maritime zones appears to be the existence of potentially rich oil and gas resources in the disputed area. Therefore, bound by the international law principle of peaceful settlement of disputes, they resort to boundary negotiations with their neighbours and regulate the main principles concerning oil and gas reserves in the subsequent boundary treaties. However, due to a variety of reasons, negotiations may fail and states may be obliged to and/or opt for third party dispute settlement. In the previous sections, the principles established by international judiciary with regards to the economic considerations as well as state conduct over the oil and gas related operations in maritime delimitation disputes were explained and it was revealed that international judiciary was reluctant to give resource related criteria any operational effect in the delimitation of maritime boundaries.

Under this section, first, a selection of recent case-law and the approach of the international courts and arbitral tribunals with regards to oil and gas resources will be analysed in order to determine whether the existence of oil and gas resources or the conduct of the disputing states with regard to these resources had any impact in the resolution of these disputes. Secondly, the author will examine the states' arguments with regards to hydrocarbon resources in the disputed area in a pending case. Finally, impact of hydroarbons affecting the relations between coastal states of Eastern Mediterranean will be analysed and possible solutions for potential disputes regarding access to natural gas resources and maritime delimitation will be suggested.

7. INTERNATIONAL JUDGMENTS AND ARBITRAL AWARDS

7.1.1. Guyana v Suriname (PCA administered arbitration)

7.1.1.1.Background

Guyana and Suriname are located on the northeast coast of the South America and are separated by the Corentyne River flowing to the Atlantic Ocean as was first agreed by the colonial powers (The UK for Guyana and the Netherlands for Suriname) in 1799 and was later determined with precision by a Mixed Boundary Commission in 1934.[536] The UK drafted a treaty delimiting the territorial sea of the two states in 1939 but it was never ratified due to the interruption of WWII.[537]

Image No. 3: Guyana and Suriname Boundary as per PCA Award

Image Source: https://sovereignlimits.com/boundaries/guyana-suriname Accessed on 11.02.2019.

Absent a proper agreement delimiting their maritime areas, both Guyana and Suriname started to grant concessions for offshore exploration rights to various oil companies Both states had overlapping claims in the disputed maritime territory. The dispute arose when the grantees of oil concessions by Guyana in the area claimed by both states started their activities and two patrol boats from the Surinamese navy ordered an oil rig and drill ship (CGX's C.E. Thornton) to leave on 3 June 2000. [538]

Staatsolie, the national petroleum company of Suriname held exclusive right to obtain concessions to all of Suriname's open offshore area limited to its west by the 10º Line and between 1980 to the present date, Staatsolie also granted concessions in the area in dispute between the parties.[539] The heads of state of the parties discussed the maritime boundary between Guyana and Suriname in 1989 and agreed that they

[536] Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, ("*Guyana v Suriname*"), PCA, 17 September 2007, para. 127, 137.
[537] *Guyana v Suriname*, para. 139.
[538] *Guyana v Suriname*, para. 151.
[539] *Guyana v Suriname*, para. 147.

should jointly utilize the border area pending settlement of the border and that concessions that had already been granted therein should remain in force.[540] The parties signed a Memorandum of Understanding in 1991 governing the rights and obligations pertaining to the offshore area between Guyana and Suriname concerning a concession agreement of Guyana with the LASMO/BHP Consortium but it was never implemented by Suriname.[541]

Between 1958-2000, Guyana[542] granted exploration rights to several oil companies like California Oil Company, Guyana Shell Limited (a subsidiary of Royal Dutch Shell), BHP Petroleum and allowed operations in the disputed area.[543] Suriname has also granted oil exploration concessions in its territorial sea and continental shelf, including the disputed area.[544]

One of the companies Guyana issued concession for oil exploration was the Canadian CGX Resources in 1998 comprising the disputed maritime area.[545] On 11 and 31 May 2000, through diplomatic channels, Suriname demanded Guyana to cease oil exploration activities in the disputed area and on 31 May 2000, ordered CGX Resources to cease activities beyond the 10° Line.[546] Guyana posited that the maritime boundary between itself and Suriname laid along an equidistance line.[547] Suriname continued its approach via its navy ordering the oil rig and drill ship of CGX Resources C.E. Thornton to detach the oil rig from the sea floor and withdraw from the conceisson area, so the ship followed through this order and departed from the concession area.[548]

From the point of view of the foreign oil company, this is a very vivid example of an inter-state territorial dispute directly affecting the investment, resulting the company's resources to be unoperational and eventually abandonment of the investment. MOGCs usually use various lobbying methods with the host government and they usually build a mutually beneficial relationship with the government contacts and politicians. This means that a major company to be forced out of its concession

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[540] *Guyana v Suriname*, para. 148.
[541] *Guyana v Suriname*, para. 148.
[542] By "Guyana", the author also refers to British Guiana before its independence from the UK.
[543] *Guyana v Suriname*, para. 140.
[544] *Guyana v Suriname*, para. 141.
[545] *Guyana v Suriname*, para. 150.
[546] **Ibid.**
[547] **Ibid.**
[548] *Guyana v Suriname*, para. 151.

area would not be a positive enforcement for the host government concerning other foreign investors. Guyana granted licenses to other oil companies such as Maxus Guyana Ltd. and Esso Exploration and Production Company, however, on 8 June and 18 August 2000 they also received notifications that they were operating in Surinamese waters without a licence which was unacceptable to Suriname.[549] Maxus Guyana Ltd. invoked the *force majeure* clause under its licence agreement and Esso Exploration and Production Company ceased its activities invoking this incident.[550]

7.1.1.2.Proceedings and the Tribunal's Award

In order to settle this dispute, Guyana and Suriname conducted diplomatic negotiations, however no progress was made, which resulted in Guyana's initiation of the dispute settlement proceedings before the PCA on 24 February 2004 pursuant to Articles 286 and 287 of the UNCLOS.[551]

By citing the 1957–1958 delimitation of the UK, which was made to enable an oil concession to be granted to the California Oil Company in 1958[552]; the non-objection of the Netherlands to such delimitation made in accordance with the equidistance principle as well as the Dutch charts demonstrating a median line from 1959[553]; and also the oil concessions granted by the parties in the continental shelf areas, Guyana stated that a boundary situated along an azimuth of N34°E was generally respected.[554] Guyana contended that until May 2000, " *when anti-Guyana rhetoric in the run-up to Surinamese parliamentary elections placed political pressure on its government*", Suriname did not express any concern whatsoever to Guyana's concessions and the presence of GCX Resources in the disputed maritime area.[555]

Suriname rejected Guyana's arguments with regards to maritime boundary delimitation and maintained that Guyana's practice regarding the eastern limit of its continental shelf was inconsistent considering the differing eastern borders of its oil concessions.[556] When Guyana pointed out the practice of the international tribunals in

[549] *Guyana v Suriname*, para. 152.
[550] **Ibid.**
[551] *Guyana v Suriname*, para. 156.
[552] *Guyana v Suriname*, para. 189.
[553] *Guyana v Suriname*, para. 190.
[554] *Guyana v Suriname*, para. 197.
[555] *Guyana v Suriname*, para. 201.
[556] *Guyana v Suriname*, para. 206.

taking the grant of oil and gas concessions of the parties into consideration in boundary delimitation[557], Suriname contended that such practice would not be of legal relevance unless it demonstrated express or tacit agreement as to the location of a boundary.[558]

With regards to the relevance of oil practice in the maritime boundary delimitation dispute, the Tribunal stated that it was true that in *Tunisia v Libya*, the ICJ acknowledged parties' conducts with regard to oil concessions may determine the delimitation line,[559] but it also noted, citing the *Gulf of Maine*[560], that such conduct was not automatically applicable to the delimitation of the boundaries, as in *Tunisia v Libya*, the ICJ took special account of the conduct of France and Italy, once responsible for the external affairs of Tunisia and Libya respectively, which amounted to a *modus vivendi,* respected by Tunisia and Libya after they became independent.[561]

The Tribunal also cited ICJ's *Cameroon v Nigeria* judgment where Nigeria asserted that state conduct with respect to oil concessions was a decisive factor in the establishment of maritime boundaries but redistribution of oil concessions was not ICJ's business while Cameroon opined that the existence of oil concessions was never accorded particular importance in maritime delimitation and the ICJ concluded that the oil concessions and oil wells would not be taken into account unless they were based on expres or tacit agreement between the parties and that in the present case, there existed no such agreement.[562] The Tribunal further cited *Barbados v Trinidad and Tobago* arbitration where the tribunal applied the dictum of oil wells not being considered as relevant circumstances themselves unless there is a tacit or express agreement between the parties and did not consider the activities of either party or their response to the acts of other states to comprise a relevant factor that must be taken into account in the delimitation.[563]

The Tribunal, determined in the present case that there was no evidence of any agreement between the parties regarding their oil practices, therefore such conduct

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[557] *Guyana v Suriname*, para. 216.
[558] *Guyana v Suriname*, para. 218.
[559] *Tunisia v Libya*, para. 118; *Guyana v Suriname*, para. 381.
[560] Delimitation of the Maritime Boundary in the Gulf of Maine Area ("*Gulf of Maine*"), Judgment, ICJ Rep. 1984, p. 246.
[561] *Tunisia v Libya*, para. 119; *Gulf of Maine*, para. 150; *Guyana v Suriname*, para. 383.
[562] *Cameroon v Nigeria*, para. 303-304; *Guyana v Suriname*, para. 385-386.
[563] *Barbados v Trinidad and Tobago*, para. 364 – 366; *Guyana v Suriname*, para. 389.

could not be considered in the delimitation of the maritime boundary in the *Guyana v Suriname*.[564] At the end, the Tribunal cocncluded that there were no relevant circumstances in the EEZ and continental shelf requiring the adjustment of the provisional equidistance line.[565]

Suriname further argued that CGX Resources deviated from its original concession program and deliberately started exploratory drilling in the disputed area which was an invasive exercise of Suriname's sovereign rights over natural resources in the disputed area and constituted Guyana's breach of the 1989 *modus vivendi* and 1991 Memorandum of Understanding between Suriname and Guyana.[566]

The Tribunal referred to the state parties' obligation not to hamper or jeopardise the reaching of a final agreement and set forth that following two types of hydrocarbon exploration and exploitation activities were permissible in disputed waters: (i) activities undertaken by the parties pursuant to provisional arrangements of a practical nature and (ii) unilateral activities which would not have effect of jeopardising or hampering the reaching of a final agreement on the delimitation of the maritime boundary, *e.g.* seismic exploration.[567] The Tribunal referred to *Aegean Sea*[568] case between Greece and Turkey where Greece requested the ICJ to order Turkey to cease its seismic exploration in disputed Aegean Sea and the ICJ declined to give such interim measures for the following reasons: (i) seismic exploration did not involve any physical damage to seabed or subsoil; (ii) Turkey's activities were transitiory and did not involve any installations in the area; and (iii) Turkey did not operate to appropriate or use any natural resources therein.[569]

After analysing the circumstances of the case, the Tribunal discovered that Guyana had been preparing exploratory drilling in the disputed area and had authorised the CGX Resources one year before the incident and did not informed Suriname of its plans, therfore concluded that Guyana violated its obligation to make every effort to enter into provisional arrangements by allowing exploratory drilling in the disputed area which led to the CGX Thornton incident.[570]

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[564] *Guyana v Suriname*, para. 390.
[565] *Guyana v Suriname*, para. 392.
[566] *Guyana v Suriname*, para. 272.
[567] *Guyana v Suriname*, para. 465-467.
[568] Aegean Sea Continental Shelf ("*Greece v Turkey*"), Interim Protection, Order, ICJ 1976, p. 3.
[569] *Greece v Turkey*, para. 30; *Guyana v Suriname*, para. 468.
[570] *Guyana v Suriname*, para. 477.

Guyana v Suriname award also cited the statements of the fact witnesses Mr. Netterville, a high-level executive of the CGX Resources, having extensive experience in the oil industry and offshore oil rigs and Mr. Graham Barber, who served as Reading & Bates Area Manager for the project.[571] In his testimony, Mr. Netterville claimed not to have experienced, nor heard of, any similar occasion where a rig has been evicted from its worksite by the threat of armed force in his extensive experience in the marine and oil industry.[572] Involvement of employees of the CGX Resources in the case demonsrated that the investors played an active role during the dispute resolution proceedings.

As an outcome of the proceedings, the Tribunal delimited the territorial sea, continental shelf and EEZ of between Guyana and Suriname in the disputed area.[573]

7.1.2. Bay of Bengal Cases

Following the discovery of great hydrocarbon potential in the Bay of Bengal[574] and the developments in drilling technology, the area became a hot spot for oil and gas exploration for its coastal states Bangladesh, Myanmar, India and China as the demand for energy resources in these countries is growing rapidly.[575] This fact appears to have provided a motive for the coastal states of Bay of Bengal to settle their territorial disputes via third party territorial dispute settlement.

Coastal states of Bay of Bengal, Bangladesh and Mayanmar are adjacent states coastal to the Bay of Bengal, having deep interests in the oil and gas resources in the subsoil.[576] However, neither of them was able to make full use of such potential due to the lack of any precisely defined maritime boundaries until they attempted to peacefully settle their dispute before ITLOS.[577] In order to enable foreign investors and energy companies to bring any capital to either country for exploring and exploiting

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[571] *Guyana v Suriname*, para. 434-435.
[572] *Guyana v Suriname*, para. 434.
[573] *Guyana v Suriname*, para. 400, 488.
[574] "Large Deposits of…", **USGS** News…
[575] Jared Bissinger, "The Maritime Boundary Dispute between Bangladesh and Myanmar: Motivations, Potential Solutions, and Implications," **Asia Policy**, No 10, 2010, pp: 103-142. *See:* pages 105 and 111-117.
[576] *Bangladesh v Myanmar*, Dissenting Opinion of Judge Lucky at p. 236.
[577] **Ibid.**

potentially vast[578] natural gas fields, Bangladesh and Myanmar were willing to make an agreement on delimitation of their maritime boundaries.[579] Of course in this case, both states were aware that as a result of the judgment, they would be entitled to some areas rich with natural gas deposits, so the result would be a win-win anyways, which might be the reason why they were willing to resort to dispute settlement.[580]

Prior to the proceedings, the two states tried to achieve an agreement that would facilitate oil exploration and exploitation in waters over the continental shelf in the Bay of Bengal from 1974 to 2008[581] but no treaty governing the subject matter has been signed afterwards. In 2008, Daewoo, a South Korean energy company began natural gas exploration in the waters claimed by Bangladesh under the license from Myanmar and a few weeks later, Bangladesh submitted its continental shelf claim to CLCS and both countries mobilized naval forces in the disputed area.[582]

On 08 October 2009, Bangladesh initiated the proceedings against Myanmar before ITLOS pursuant to Part XV of the UNCLOS concerning the delimitation of the maritime boundaries between them in the territorial sea, the EEZ and the continental shelf in the Bay of Bengal and Myanmar promptly agreed by way of a declaration accepting ITLOS jurisdiction on 12 December 2009. [583] ITLOS' judgment of 14 March 2012 delimiting the territorial sea, the continental shelf and the EEZ of Bangladesh and Myanmar[584] was welcomed by both parties as the decision enabled them to make licensing agreements with oil and gas companies. Myanmar managed to successfully conclude auctions for the oil and gas blocks under its jurisdiction and bring foreign investment from the US, Japan and Norway.[585]

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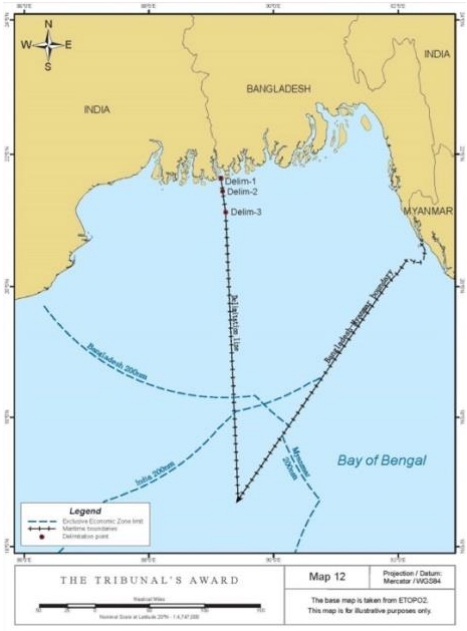
[578] "Large Deposits of…", **USGS** News…
[579] Sarah Watson, "The Bangladesh/Myanmar maritime Dispute: Lessons for Peaceful Resolution", **Asia Maritime Transparency Initiative**, 19.10.2015, https://amti.csis.org/the-bangladeshmyanmar-maritime-dispute-lessons-for-peaceful-resolution/ Accessed on:20.01.2019.
[580] **Ibid.**
[581] *Bangladesh v Myanmar*, p. 21, para. 36.
[582] Watson, "The Bangladesh/Myanmar maritime Dispute…" **Asia Maritime Transparency Initiative…**
[583] *Bangladesh v Myanmar*, Dissenting Opinion of Judge Lucky at p. 237.
[584] *Bangladesh v Myanmar*, p. 130-131, para. 506(1)-(6).
[585] Mark E. Rosen and Douglas Jackson, "Bangladesh v India: A Positive Step Forward in Public Order of the Seas", September 2017, **CNA**, https://www.cna.org/cna_files/pdf/DOP-2017-U-016081-Final.pdf Accessed on 23 February 2019, p. 33.

7.1.2.1.Bangladesh v India (PCA administered arbitration)

The Bay of Bengal is situated in the north-eastern Indian Ocean bordered by India, Bangladesh, Myanmar and Sri Lanka. The boundary dispute between the parties dates back to the partition of India in 1947 when the Bengal Boundary Commission first established the border between India and [then East Pakistan] Bangladesh which was operational until a low tide elevation (an island) emerged in the mouth of the New Moore/South Talpatty River resulting in competing territorial claims by the two parties in the early 1970s.[586]

As have been emphasized many times in this thesis, international energy companies would be inclined to invest in the exploration over the areas where the legal title is clear.[587] The undefined maritime boundaries in the Bay of Bengal had a negative impact on the investment to oil and gas exploration and exploitation in the region, affecting the coastal states. The growing interests of the coastal states in the Bay of Bengal with regard to access to oil and especially natural gas resources in the region was so compelling for the development of their economies, they resorted to third party dispute resolution in tandem, pioneer of this being Bangladesh.

Image No. 4: PCA Tribunal's Delimitation of Maritime Boundary between Bangladesh and India



In 2006, India included over 15.000 sqkm of ocean territory, comprising oil and gas blocks claimed by Bangladesh in its bid which stirred up the dispute.[588] In November 2008, two ships from Myanmar's navy accompanied four survey ships from Korean company Daewoo into disputed waters and in December 2008 an Indian survey ship accompanied by two ships from Indian navy entered the disputed waters, resulting Bangladesh to take matters under its

[586] **Ibid.,** p. 5.
[587] **Ibid.,** p. 33.
[588] **Ibid.** p. 5.

control and initiate third party dispute settlement against both countries in 2009.[589]

Image Source: *Bagladesh v India*, Map No. 12, p. 163.

India awarded two oil and gas blocks near the maritime boundary between India and Bangladesh to Australian Santos Energy in 2007, which, after investing $60 million in the project halted its exploration activities invoking force majeure clause in its license after Bangladesh initiated arbitration against India and ultimately pulled out of its lease in 2013.[590]

In 2016, there were a series of discoveries concerning the natural gas reserves under the Bay of Bengal. In January 2016, Australian Woodside Energy discovered natural gas offshore Myanmar in the blocks shared with Myanmar Petroleum Resources and French Total and a month later, made another discovery in a block oprated by Korean Daewoo International.[591] In June 2016, Indian government, Japanese government and the USGS conducted a joint survey and discovered large, highly enriched accumulations of natural gas hydrate in the Bay of Bengal.[592]

Bangladesh initiated arbitral proceedings against India on 8 October 2009 pursuant to Article 287 of UNCLOS for the delimitation of their territorial sea, EEZ and the continental shelf within and beyond 200nm in the Bay of Bengal.[593]

On the issue of base points, with regards to the arguments of Bangladesh alleging that provisional equidistance line and relevant circumstances method would not be applicable due to the instability of the coastline and potential effect of climate change, the Tribunal dismissed these arguments as irrelevant and stated that its concern was "*the physical reality at the time of the delimitation*"[594] and noted that boundaries must be stable and definitive to ensure a peaceful relationship between the parties in the long term.[595] Within this perspective, the PCA Tribunal stated that "*The importance of stable and definitive maritime boundaries is all the more essential when the*

[589] **Ibid.**
[590] **Ibid.,** p. 34.
[591] **Ibid.,** p. 35.
[592] "Large Deposits of…", **USGS** News…
[593] Maritime Boundary Arbitration between the Bangladesh and India ("*Bangladesh v India*"), PCA, Award, 7 July 2014, para. 1, 56.
[594] *Romania v Ukraine*, para. 131.
[595] *Bangladesh v India*, para. 213-216.

exploration and exploitation of the resources of the continental shelf are at stake. Such ventures call for important investments and the construction of off-shore installations, (…) Bangladesh rightly points out the importance of such resources to a heavily populated State with limited natural resources. In the view of the Tribunal, the sovereign rights of coastal States, and therefore the maritime boundaries between them, must be determined with precision to allow for development and investment. (…)."[596]

On 7 July 2014, the PCA Tribunal rendered its award, determining the terminus of the land boundary and delimiting the maritime boundary between Bangladesh and India and leaving the appropriate measures concerning the grey area[597] to the further agreements of the parties.[598]

The *Bangladesh v India* award is politically and commercially significant just like the *Bangladesh v Myanmar* judgment as it finally delimited the maritime boundaries between the two states and enabled them to offer oil and gas exploration licences to foreign investors previously reluctant to make investment due to the uncertainty of sovereign rights of the two states in the Bay of Bengal.[599] As a result of the PCA Tribunal's award, India surrendered 10 oil and gas blocks to Bangladesh[600] which meant that international oil and gas companies would be interested as Bangladesh's jurisdiction in these areas were definite. It appears that previously in 2012, PetroBangla, national oil gas and mineral company of Bangladesh, had received no bids in its 2012 offshore licensing tender.[601] After two successful dispute settlement proceedings and the subsequent determination of maritime boundaries, in 2016, PetroBangla announced a tender for international companies to carry out exploration survey activities in some of the deep-water blocks of the Bay of Bengal and Norway-US consortium TGS-NOPEC and Schlumberger, Chinese company BGP, Russian

[596] *Bangladesh v India*, para. 218.
[597] In *Bangladesh v India*, the PCA Tribunal, while delimiting the maritime zones of the parties, created a grey area where the entitlements of the parties overlap. The Tribunal also referred to a similar situation in *Bangladesh v Myanmar* award (*Bangladesh v India*, para. 498-499). In order to avoid any unnecessary complications and for the purpose of staying within the context of the topic of this thesis, the author omited any examination on the grey area as well as the technical details of the delimitation process.
[598] *Bangladesh v India*, para. 508-509.
[599] Marcin Kałdunski, "A Commentary on Maritime Boundary Arbitration between Bangladesh and India Concerning the Bay of Bengal", **Leiden J Int'l Law**, 2015, 28, pp. 799–848, p. 847-848.
[600] Rosen and Jackson, "Bangladesh v India: A Positive Step…", **CNA**…, p. 35.
[601] Kałdunski, "A Commentary on Maritime Boundary…", **Leiden J Int'l Law**, p. 847-848

Dalmorneftegeophysica (DMNG) and Marine Arctic Geological Expedition (MAGE), and UK-based Spec Partners Ltd. expressed their interest.[602] In 2017, Posco Daewoo announced that it would invest a capital of 112 million USD to explore a deep-water block with PetroBangla.[603]

7.1.3. Philippines v China (PCA administered arbitration)

7.1.3.1.Background

PCA Tribunal's *Philippines v China* award was an intriguing case with regards to the impact of Philippines' access (or lack thereof) to rich seabed hydrocarbon resources on its endeavour to resolve its territorial dispute with China in the South China Sea. First and foremost, the Author must emphasize that *Philippines v China* is not a maritime delimitation case and the award did not result in any determination of maritime boundaries in the South China Sea. Nevertheless, the award is significant in many aspects as the Tribunal had a chance to examine and interpret: its jurisdiction with regards to determination of "sovereign rights" of the states pursuant to the UNCLOS in the non-participation of one of the parties (China) to the proeedings; the extent of historic right claims and their relevance to the sovereign rights of the states acknowledged in the UNCLOS; legality of China's land reclamation and construction activities at some reefs in detriment of the marine environment as well as sovereign rights of Philippines; maritime zone entitlements of some islands and shoals in accordance with the UNCLOS; and finally, as a result of the interpretation of the UNCLOS with regards to maritime entitlements of the parties, Philippines' sovereign rights on certain offshore petroleum blocks in the South China Sea.

China did not formally participate to the proceedings but was very vocal about its position in the South China Sea in its diplomatic notes to Philippines and position papers and statements for the attention of the Tribunal.[604]

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[602] **Gazprom**, "Petrobangla calls tender for exploration in Bay of Bengal", 03.02.2016, Gazprom International, http://www.gazprom-international.com/en/news-media/articles/petrobangla-calls-tender-exploration-bay-bengal Accessed on 16.03.2019.
[603] Rosen and Jackson, "Bangladesh v India: A Positive Step…", **CNA**…, p. 36.
[604] *Philippines v China*, Award on Merits…, p.12, 14, 20-21, para.29, 37, 61.

Image No. 5: Conflicting Territorial Claims in the South China Sea

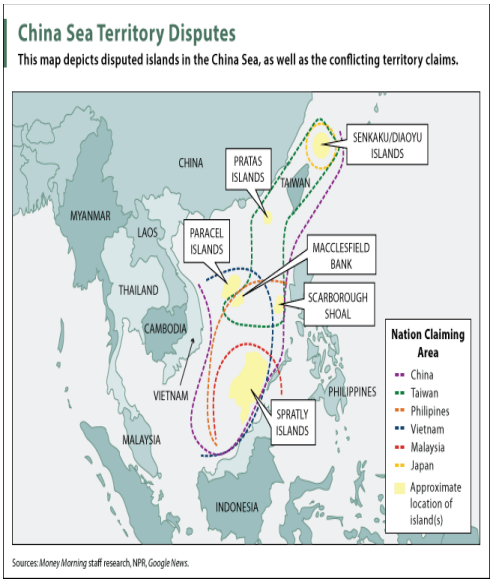

Image Source: http://www.eastbysoutheast.com/wp-content/uploads/2013/05/0912ChinaSeaTerritory2.png Accessed on 03.01.2019.

South China Sea is a semi-enclosed sea in the western Pacific Ocean, believed to hold substantial oil and gas resources, abutting seven states, six of which having competing claims to its waters.[605] The South China Sea lies to the south of China and the islands of Hainan and Taiwan; to the west of the Philippines; to the east of Vietnam; and to the north of Malaysia, Brunei, Singapore, and Indonesia.[606]

China, Taiwan and Vietnam have overlapping territorial claims on the entirety of Spratly/Nansha Islands while the Philippines, Malaysia and Brunei have territorial claims over some parts of Spratly/Nansha islands, and not only China, but also Vietnam, Malaysia and Taiwan had land reclamation endeavours by way of constructing facilities and structures at these islands.[607] Determination of the legal status of these terrestrial formations bears importance as it is directly relevant to the existence of maritime zones of these terrestrial formations and sovereign rights these states may or may not have over them.[608]

China's claim of nine-dash-line, which refers to a vaguely located demarcation line in the South China Sea, was drawn in 1947 by the (then) Chinese Nationalist Government and was first published in February 1948 which was adopted by Communist Party in Mainland China in 1949 and was officially used by China for the

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[605] *Philippines v China*, Award on Jurisdiction and Admissibility…, para. 3.
[606] Ibid.
[607] Bleda R. Kurtdarcan, "Güney Çin Denizi'nde Kriz: Çin Halk Cumhuriyeti'nin Ada İnşa/Arazi Genişletme Çalışmaları ve bu Çalışmaların Doğurduğu Bazı Uluslararası Hukuk Sorunlarına Kısa Bir Bakış (*Crisis in the South China Sea: People's Republic of China's Land Reclamation and Island Building Activities and a Short Survey of Some International Law Problems that They Bring About*)", **BAU HF Der.**, 2015, Vol. 10, Sayı: 131-132, pp: 53-82, p. 65.
[608] **Ibid.**, p. 71.

first time in its response to the Malaysia and Vietnam's submissions made to the CLCS in 2009.[609] China did not give any explanation on the meaning or coordinates of these vague nine-dash-lines.[610] One particular reason is thought to be China's intention to transform the terrestrial formations to artificial islands to support its sovereign rights and jurisdiction claims within the nine-dash-line and create a *de facto status quo* in its favour in the South China Sea.[611]

China's nine-dash-line claims created a lot of tension throughout the years among the countries of the South China Sea as well as for Japan and the USA. China simply treated a big portion of the South China Sea as its own territorial waters based on a so-called historic claim, impeding with other states' sovereign rights in the area. As a result of a series of events fueling the tension between them, including China's actions within the disputed waters towards Philippines' oil concessions, Philippines decided to take the matter before an arbitral tribunal. The award, among other things, examined whether China's actions in the South China Sea prevented Philippines' hydrocarbon exploration within its continental shelf and the EEZ.

7.1.3.2.Jurisdiction and Admissibility

On 22 January 2013, Philippines commenced the arbitration proceedings against China[612] pursuant to Part XV Annex VII of the Convention.[613]

The *South China Sea Case* concerns the dispute between China and the Philippines regarding: (a) the legal basis of maritime rights and entitlements in the South China Sea, specifically setting forth that China's rights and entitlements in the South China Sea Case is based on the UNCLOS and not any historic nine-dash-line marked on Chinese maps[614]; (b) the status of certain geographic features in the South China Sea and whether they generate an entitlement to an EEZ or to a Continental Shelf[615]; (c) lawfulness of certain actions taken by China in that territory, specifically China's interference with the exercise of the Philippines' right under UNCLOS with respect to oil exploration, among others. [616]

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[609] Leonardo Bernard and Michael Ewing-Chow, "A Rising Tide: Law of the Sea Disputes in Asia and Arbitration", **As. Dis. Rev.**, HKIAC 2014, Vol. 2014, Issue 3, pp: 114-118, p 114.
[610] **Ibid.**, p 114; Kurtdarcan, "Güney Çin Denizi'nde Kriz…", BAU HF Der., p. 74.
[611] Kurtdarcan, "Güney Çin Denizi'nde Kriz…", **BAU HF Der.**, p. 75.
[612] Both Philippines and China are parties to the UNCLOS.
[613] *Philippines v China*, Award on Merits…, p.1-2, para.5-6.
[614] *Philippines v China*, Award on Merits…, p.1, 2, para.2, 7.
[615] *Philippines v China*, Award on Merits…, p.1, 2 para.2, 8.
[616] *Philippines v China*, Award on Merits…, p.1, 3, para.2, 9.

China's position in this case was neither accepting nor participating in these proceedings. Nevertheless, as provided in Article 9 of Annex VII of the UNCLOS, the absence of a party or failure of a party to defend its case does not prevent the proceedings from continuing and as per Article 296(1) of the UNCLOS as well as Article 11 of Annex VII of the UNCLOS, China would be bound by any award the Tribunal issues.[617]

On 7 December 2014, China published a Position Paper on the Jurisdiction of the Tribunal in the South China Sea Case and argued that the Tribunal lacked jurisdiction due to the essence of the subject-matter of the arbitration being the territorial sovereignty over the relevant maritime features in the South China Sea and further claimed that the Philippines and China agreed to resolve these disputes through negotiations.[618] The Tribunal regarded these statements as a jurisdiction objection by China and ruled in its Award on Jurisdiction, among other things, thet China's non-appearance in the proceedings did not deprive the Tribunal of jurisdiction.[619]

On 30 October 2015, China issued another statement declaring that the South China Sea arbitration award would be null and void, and would have no binding effect on China.[620] In this statement, China highlighted, among others, that the essence of the arbitration at hand was the territorial sovereignty and maritime delimitation which meant the Philippines and the PCA Tribunal abused the compulsory dispute resolution procedures by evading and disregarding China's Declaration of 2006 under Article 298 of the UNCLOS excluding maritime delimitation disputes from its compulsory dispute settlement procedures along with disputes over historic bays or titles or military and law enforcement activities therefore violated China's rights under the UNCLOS.[621]

Due to China's declaration excluding maritime boundary delimitation from the compulsory dispute settlement under the UNCLOS, the PCA Tribunal's award would

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[617] *Philippines v China*, Award on Merits…, , p.3, para. 12; Article 296 of the UNCLOS reads as: "Any decision rendered by a court or tribunal having jurisdiction under this section [Section 2 - Compulsory Procedures Entailing Binding Decisions] shall be final and shall be complied with by all the parties to the dispute".

[618] *Philippines v China*, Award on Merits…, p.4, para. 13.

[619] *Philippines v China*, Award on Jurisdiction and Admissibility…, para. 119.

[620] "Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on October 30, 2015", **Ministry of Foreign Affairs of the People's Republic of China**, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1310709.shtml Accessed on 01.02.2019.

[621] **Ibid.**

not resolve sovereignty question over the disputed islands and neither would it delimit maritime boundaries between China and the Philippines.[622]

Proceedings of this arbitration case was highly publicized since there were many interests at stake. China was not participating in the case and was rejecting the Tribunal's jurisdiction constantly, arguing that the real dispute concealed under Philippines' claims was over territorial sovereignty in the South China Sea.[623] Unfortunately for China, the Tribunal upheld its jurisdiction by ruling that the Philippines' claim concerned the application of UNCLOS to the rights asserted by China over the South China Sea.[624] The Tribunal concluded that the Philippines' submission reflected a dispute concerning the source of maritime entitlements in the South China Sea and the role of UNCLOS.[625] Tribunal ruled that this was not a dispute concerning sovereignty or maritime boundary delimitation, it concerned interpretation and application of the UNCLOS.[626]

7.1.3.3.Merits and the Tribunal's Award

There are several territorial disputes in the South China Sea over the Spartly islands (claimed partially or wholly by Brunei Darussalam, China, Taiwan, Malaysia, the Philippines and Vietnam), the Paracel Islands (claimed by China, Taiwan and Vietnam), and the Scarborough Shoal (claimed by China, Taiwan and the Philippines), most of which are complicated by different historical narratives and sensitive domestic politics making negotiations to resolve these sovereignty disputes very difficult.[627]

At the time a potential award favouring the Philippines was thought to present a legal ground to rule out China's historic rights claim and to set a precedent for similar overlapping entitlements the other states have in South China Sea, which would be significant on its own. This is why, representatives from Australia, the Republic of Indonesia, Japan, Malaysia, Singapore, Thailand and Vietnam attended the hearing on the merits as observers.[628] On 5 December 2014, Vietnam issued a statement with regards to its position and reserved its right to intervene.[629]

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[622] *Philippines v China*, Award on Merits…, p.1-2, para.5-6.
[623] "South China Sea tribunal favours Philippines", **GAR**, Vol. 11, Issue 4, p. 10.
[624] *Philippines v China*, Award on Jurisdiction and Admissibility…, para. 398.
[625] **Ibid.**
[626] **Ibid.**
[627] Bernard & Ewing-Chow, "A Rising Tide…", **As. Dis. Rev.**, p 114.
[628] Arbitration between the Republic of the Philippines and the People's Republic of China, **PCA** Press Release, 30 November 2015, https://pcacases.com/web/sendAttach/1524 Accessed on 11.02.2019.
[629] *Philippines v China*, Award on Merits…, p.13, para. 36.

The focus of this thesis with regards to the South China Sea case will only concern Philippines' claims on China's interference with the Philippines' sovereign rights over oil and gas resources in the South China Sea. Philippines's arguments with regards to the status of certain geographic features in the South China Sea were also relevant to its interests in "Area 3" and "Area 4", designated as Philippine oil blocks.[630]

Philippines argued that China's statements with respect to jurisdiction in the disputed territory made a distinction between assertion of sovereignty over the islands of the South China Sea and their territorial seas and adjacent waters; and a claim of sovereign rights and jurisdiction, short of sovereignty, in the waters that lie between the territorial seas claimed by China and the nine-dash line.[631] Philippines opined that the nature of China's claim with regards to the sovereign rights and jurisdiction could be confirmed by China's conduct in the relevant areas, one of two being "*interfering with the Philippines' petroleum exploration activities; and offering concessions to oil blocks in areas within the 'nine-dash line' but beyond the possible limits of China's entitlements under the [UNCLOS].*"[632]

In June 2012, China National Offshore Oil Corporation ("**CNOOC**") issued a tender notification for the open blocks for petroleum exploration adjacent to the western edge of the 'nine-dash line' where Block BS16, one of these open blocks, was located beyond 200nm from any feature in the South China Sea claimed by China and beyond any possible extended continental shelf.[633] This fact assisted the Tribunal in understanding the nature of China's claims within the 'nine-dash line' and led to the conclusion that even assuming the maximum possible claim to entitlements that China could make under the UNCLOS, China's authority to issue tenders regarding the petroleum blocks in question could not have been based upon entitlements derived from the UNCLOS.[634]

It was revealed that China interfered with Philippines' activities or concessions in the South China Sea through objecting the Philippines' conduct of survey and exploration contracts on grounds of its "*indisputable sovereignty over the Spratly Islands and its adjacent waters since ancient times*", also claiming they were located

[630] *Philippines v China*, Award on Merits…, p.51, para. 132.
[631] *Philippines v China*, Award on Merits…, p.79, para. 189.
[632] *Philippines v China*, Award on Merits…, p.79, para. 190.
[633] *Philippines v China*, Award on Merits…, p.87, para. 208.
[634] *Philippines v China*, Award on Merits…, p.87, para. 208.

"*deep within China's 9-dash line*". [635] China also objected to the Philippines' Area 3 and Area 4 petroleum blocks, which were amongst the 15 petroleum blocks offered by the Department of Energy of the Philippines to local and international companies for exploration and development, claiming that they were "*situated in the in the waters of which China has historic titles including sovereign rights and jurisdiction*"[636]

The Tribunal concluded that China's objections indicated that China considered that its rights with regards to the petroleum resources were based on its assertion of historic rights[637], which ultimately meant that China claimed rights to petroleum resources within the nine-dash line on the basis of its historic rights existing independently of the UNCLOS[638] and apart from the territorial sea generated by any islands, China did not consider the waters within the nine-dash line to form part of its territorial sea or internal waters.[639]

The notion of sovereign rights over the non-living resources within the coastal state's EEZ are generally incompatible with another state's claims of historic rights to the same resources, especially if those historic rights are considered exclusive which appears to be the case with regards to China.[640] The coastal state's sovereign rights over the non-living resources within its continental shelf are also "*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".*[641] The coastal state also has exclusive right to authorize and regulate drilling on the continental shelf for all purposes.[642]

Thus, the Tribunal opined that upon China's accession to the UNCLOS and its entry into force, the UNCLOS superseded earlier rights and agreements to the extent of their incompatibility with the limits of the maritime zones provided for by the UNCLOS, in other words, insofar as China's historic rights to the (living and) non-living resources within the nine-dash line comprised the EEZ or continental shelf of

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[635] *Philippines v China,* Award on Merits…, p.87, para. 209. China's conduct interfering with Philippines' exploration and exploitation of the oil and gas resources in the relevant areas of the South China Sea and its grant of petroleum concessions in the area are detailed in the following paragraphs of the Award on Merits: 465, 650-654, 657, 661-667.
[636] *Philippines v China,* Award on Merits…, p.87, para. 209.
[637] *Philippines v China,* Award on Merits…, p.87, para. 209.
[638] *Philippines v China,* Award on Merits…, p.88, para. 211.
[639] *Philippines v China,* Award on Merits…, p.91, para. 214.
[640] *Philippines v China,* Award on Merits…, , p.102, para. 243.
[641] *Philippines v China,* Award on Merits…, p.102, para. 244; Article 77(2) of the UNCLOS.
[642] Article 81 of the UNCLOS.

the Philippines, China's claims to historic rights were incompatible with these provisions of the UNCLOS.[643] The Tribunal concluded that China's claim to historic rights to the living and non-living resources within the 'nine-dash line' was incompatible with the UNCLOS to the extent that it exceeded the geographic and substantive limits of China's maritime entitlements under the UNCLOS.[644]

The Tribunal set forth that "*in order to establish the exclusive historic right to living and non-living resources within the nine-dash line China appeared to claim, it would be necessary to show that China had historically sought to prohibit or restrict the exploitation of such resources by the nationals of other States and that those States had acquiesced in such restrictions.*"[645] With regards to non-living resources, considering that the idea of seabed mining was very recent when the Seabed Committee began the negotiations that led to the UNCLOS and the idea of offshore oil extraction was in the early stages and only recently became possible in deep water areas, and also CNOOC was only founded in 1982, the Tribunal considered that no basis for any historic right existed with respect to exploitation of non-living resources.[646]

China claimed sovereignty, sovereign rights and jurisdiction in the areas in question and therefore considered the Philippines' service contracts and tenders as part of the Philippines' petroleum exploration activities as violations of its sovereignty, sovereign rights and jurisdiction in such areas where China claimed to have historic rights.[647] What the Tribunal found was that there was no legal basis for any entitlement by China to maritime zones in the GSEC101 block, Area 3, Area 4, or the SC58 block which were all located where only the Philippines possesses possible entitlements to maritime zones (EEZ and continental shelf) under the UNCLOS, therefore only

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[643] *Philippines v China,* Award on Merits…, p.103, 111, para. 246, 247, 262.
[644] *Philippines v China,* Award on Merits…, p.111, 117, para. 261,278. In the para. 1203 B(2) of the Award on Merits, the Tribunal declared that "(…) as between Philippines and China, China's claims to historic rights or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the "nine-dash-line" are contrary to the UNCLOS and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the UNCLOS (…) the UNCLOS superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein."
[645] *Philippines v China,* Award on Merits…, p.114, para. 270.
[646] **Ibid.**
[647] *Philippines v China,* Award on Merits…, p.268, para. 668.

Philippines and not China possessed sovereign rights with respect to the resources in these areas.[648]

Not surprisingly, Ministry of Foreign Affairs of China declared the award to be null and void with no binding force and effect and further declared that it would not accept or recognize such award.[649] China reasserted its position that the issue at hand was a territorial issue which was not subject to UNCLOS pursuant to China's declaration of 2006 excluding maritime delimitation disputes from its compulsory dispute settlement procedures along with disputes over historic bays or titles.[650]

South China Sea case was amongst one of the most politically sensitive international arbitrations where the PCA Tribunal upheld the position of the Philippines and found that China's historic rights claims to the majority of the South China Sea were without lawful effect because of its ratification of the UNCLOS in 1996 to the extent that they were incompatible with the rights granted therein.[651] After the decision was announced, the US, Australia, Japan, France and the EU supported the ruling and urged China to comply with it.[652] As of 2019, China rapidly continues its rise as the second biggest economy in the world with the gross domestic product of 14.22 billion USD[653], expanding its economic and political power with overseas investments and its military power with the world's fastest-growing navy among major powers.[654] It does not appear easy to convince China to give up its access to potentially rich hydrocarbon reserves in the South China Sea.

South China Sea award demonstrated that access to oil and gas resources are amongst the main reasons for determining the rights of states in the South China Sea. The Tribunal set forth the compatibility of various claims with the UNCLOS in the South China Sea which would guide the coastal states to enter into maritime

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[648] *Philippines v China*, Award on Merits…, p.278, para. 692-694, 697, 1203A.
[649] "South China Sea tribunal favours Philippines", **GAR…**, p. 13.
[650] **Ibid.**
[651] **Ibid.** p. 10.
[652] Mark E. Rosen, "Elements of a South China Sea Deal: Saving Face and Making Money," **IPP Review** (Singapore), 21 October 2016, http://www.ippreview.com/index.php/Home/Blog/single/id/260.html Accessed on 28.04.2019.
[653] **IMF**, GDP Current Prices, World Economic Outlook (April 2019), https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD/AFQ/APQ Accessed on 27.04.2019.
[654] Stephen Mulrenan, "Belt and Road: China's Global Expansion", **IBA Global Insight**, October/November 2017, p.19.

delimitation treaties within the framework the PCA Tribunal has established in this case.

7.1.4. Ghana v. Côte d'Ivoire (ITLOS)[655]

7.1.4.1.Background

Ghana and Côte d'Ivoire are adjacent states bordering Gulf of Guinea in the West Africa and the maritime area they request to be delimited lies in the Atlantic Ocean.[656] Both countries awarded concessions for offshore oil exploration and exploitation activities since 1950s[657] but they lacked a formally concluded delimitation agreement and disagree on the existence of an agreed maritime boundary between them.[658]

Image No. 6: Map of Ghana and Côte d'Ivoire Coastline

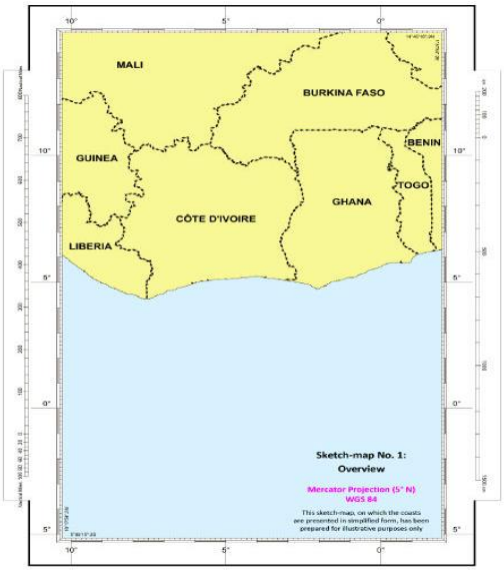

Image Source: *Ghana v. Côte d'Ivoire*, p. 27.

Following the discovery of significant hydrocarbon offshore reserves, first in 2007, the discovery of major Jubilee oil field 32nm offshore to Ghana, the oil potential of which attracked the foreign investors[659], then the area of Deepwater Tano Block containing Twebeboa, Enyenra and Ntomme fields ("TEN") 3nm east of Jubilee in 2009, Ghana took the opportunity of maritime delimitation negotiations.[660]

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[655] Case Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean ("*Ghana v. Côte d'Ivoire*"), ITLOS Case No. 23, Judgment, ITLOS Rep. 2017, p. 27.
[656] *Ghana v. Côte d'Ivoire*, para. 64.
[657] *Ghana v. Côte d'Ivoire*, para. 115.
[658] *Ghana v. Côte d'Ivoire*, para. 101.
[659] Constantinos Yiallourides and Elizabeth Rose Donnely, "Part I: Analysis of Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire", **EJIL: Talk!**, 19.10.2017, https://www.ejiltalk.org/part-i-analysis-of-dispute-concerning-delimitation-of-the-maritime-boundary-between-ghana-and-cote-divoire-in-the-atlantic-ocean/ Accessed on 18.02.2019.
[660] **Ibid.**

Ghana and Cote d'Ivoire could not resolve their dispute via negotiation and agreed to submit their dispute to ITLOS under the UNCLOS on 3 December 2014.[661]

Ghana claimed that there was a tacit agreement regarding the existence and location of a "customary equidistance boundary" between the parties due to their consistent oil practices by way of oil concessions, seismic surveys, exploration and drilling activities.[662] Côte d'Ivoire argued, in addition to insisting that the oil practice says nothing about any of the sovereign right, jurisdiction and duties of the coastal state in the EEZ and on the continental shelf, that it has regularly objected to the oil practice of Ghana interfering with a potential agreement on the maritime boundary by way of negotiation.[663]

7.1.4.2.Proceedings and the Award

Ghana notified ITLOS on 21 November 2014 and initiated the arbitration proceedings against Côte d'Ivoire.[664] By Order of 12 January 2015, the ITLOS has formed a Special Chamber to deal with the dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean.[665] On 25 April 2015, the Special Chamber delivered an Order deciding, among others, that the parties to take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area and that Ghana shall take necessary steps to prevent information resulting from past, ongoing or future exploration activities undertaken by Ghana in the disputed area that is not already in public domain from being used to the detriment of Côte d'Ivoire and that the Parties to refrain from any unilateral action that might aggravate the dispute.[666] The Special Chamber delivered its judgment on 23 September 2017.

In this case, Ghana primarily sought from the Special Chamber to declare the existence of a maritime boundary, meaning its territorial sea, EEZ and continental shelf with Côte d'Ivoire in the Atlantic Ocean including the continental shelf beyond 200nm.[667] Côte d'Ivoire maintained that no maritime boundary between the Parties

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[661] **Ibid.**
[662] *Ghana v. Côte d'Ivoire*, para. 113.
[663] *Ghana v. Côte d'Ivoire*, para. 103, 114.
[664] *Ghana v. Côte d'Ivoire*, para. 1.
[665] *Ghana v. Côte d'Ivoire*, ITLOS Press Release No. 222, 12 January 2015, https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_222_EN.pdf
[666] Ghana v. Côte d'Ivoire, para. 16.
[667] *Ghana v. Côte d'Ivoire*, para. 2.

existed and such boundary is still to be delimited.[668] Côte d'Ivoire in its counter memorial filed on 4 April 2016, among other things, requested the Special Chamber to declare and adjudge that the activities undertaken unilaterally by Ghana in the Ivorian maritime area constitute a violation of the exclusive sovereign rights of Côte d'Ivoire over its continental shelf as well as the obligations conferred upon Ghana via UNCLOS Article 83(1) and (3) and the Special Chamber's Order of 25 April 2015.[669] Côte d'Ivoire further requested from the Special Chamber that Ghana to send all the data concerning its oil exploration and exploitation activities in the Ivorian maritime area, including the oil refinement and transportation operations.[670]

It appeared that Côte d'Ivoire had been consistently including a caveat to its concession contracts stating that the coordinates for oil blocks were indicative and could not be regarded as the limits of the national jurisdiction of Côte d'Ivoire.[671] Ghana claimed to have drilled over 20 wells in the area without any protest from Côte d'Ivoire and only after Ghana discovered significant oil deposits just east of the agreed boundary in 2009 that Côte d'Ivoire abandoned its longstanding position and protested.[672] Côte d'Ivoire asserted that Ghana's drilling operations in the disputed area before 2009, namely in 1989, 1999, 2002 and 2008 in the Tano West field took place under suspicious circumstances and that it did object to Ghana's invasive activities between 1988-2009 and further alleged that between 1992-2007, it suffered from internal conflicts, which shifted its attention from the maritime boundary issue, and that Ghana was aware of this situation because it played an active role in the resolution of the crisis in Côte d'Ivoire.[673] Following the discovery of Jubilee field in 2007 and then the TEN field in March 2009, Ghana carried out at least 34 drilling operations between 2009-2014 and Côte d'Ivoire claims to have protested against these developments within the Ivoiro-Ghanaian Joint Commission, and by writing directly to the oil companies operating under Ghana's control.[674]

ITLOS Special Chamber noted that the oil concession blocks licensed by the parties aligned with a line which Ghana claimed as an equidistance line and that oil

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[668] *Ghana v. Côte d'Ivoire*, para. 103.
[669] *Ghana v. Côte d'Ivoire*, para. 61.
[670] **Ibid.**
[671] *Ghana v. Côte d'Ivoire*, para. 122.
[672] *Ghana v. Côte d'Ivoire*, para.130-131.
[673] *Ghana v. Côte d'Ivoire*, para. 133.
[674] *Ghana v. Côte d'Ivoire*, para. 134.

activities carried out have been confined to the area lying on the respective sides of the parties, but the Special Chamber was not convinced that the mutual, consistent and long-standing oil activities of the parties were indicative of a common understanding between them regarding the maritime delimitation and that the proof of the existence of a maritime boundary required more than the demonstration of longstanding oil practice or adjoining oil concession limits.[675] The Special Chamber stated that: "*It is not unusual for States to align their concession blocks with those of their neighbouring States so that no areas of overlap arise. To equate oil concession limits with a maritime boundary would be equivalent to penalizing a State for exercising such caution and prudence.*"[676]

The Special Chamber assessed the location and distribution of hydrocarbon resources (or as the Côte d'Ivoire puts it: "*the exceptional concentration of hydrocarbon resources in the disputed area*"[677]) in the delimitation of the EEZ, continental shelf and continental shelf beyond 200nm and concluded based on its assessment that they could not be considered as a relevant circumstance in this case.[678]

Côte d'Ivoire set forth that its goal was to obtain a fair share from the rich hydrocarbon resources in the disputed area between the parties and claims that if the hydrocarbons are not to be taken into account, the repercussions of such delimitation could be catastrophic for Côte d'Ivoire by further arguing that "*it is as a result of [Ghana's] (...) hegemonic policy of controlling the disputed area (...) that Côte d'Ivoire is deprived of access to the hydrocarbon resources contained in the area and cannot therefore demonstrate any economic dependence*".[679] Ghana disagreed with Côte d'Ivoire in the sense that the concentration of hydrocarbons were not exceptional enough to constitute a relevant circumstance and that Côte d'Ivoire was producing up to 70 times as much oil per day as Ghana prior to 2009.[680] Ghana further argued that access to hydrocarbons could not have been considered a relevant circumstance as there would be no catastrophic repercussions due to the lack of prior access to these resources and thus no deprivation of them.[681]

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[675] *Ghana v. Côte d'Ivoire*, para. 146-147, 215.
[676] *Ghana v. Côte d'Ivoire*, para. 225.
[677] *Ghana v. Côte d'Ivoire*, para. 437-439.
[678] *Ghana v. Côte d'Ivoire*, para. 228, 458.
[679] *Ghana v. Côte d'Ivoire*, para. 440-442.
[680] *Ghana v. Côte d'Ivoire*, para. 443.
[681] *Ghana v. Côte d'Ivoire*, para. 448-449.

The Special Chamber considered these arguments in its assessment along with the international jurisprudence which has been reluctant to consider oil concessions and petroleum exploration and exploitation activities as relevant circumstances justifying the adjustment of the provisional delimitation line, except for the extreme situations when an objective determination based on the geographic configuration of the relevant coasts would "*likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned*" [682] and did not find Côte d'Ivoire to be in this situation.[683]

The Special Chamber then examined the responsibility of Ghana for authorizing oil and gas activities within the disputed area and noting that Ghana, when carrying out these activities, was or should have been informed about the existence of a delimitation dispute and Côte d'Ivoire's opposition to its increased unilateral oil exploration activities' being carried out in the disputed area, still found that Ghana did not violate the sovereign rights of Côte d'Ivoire since they had taken place on Ghana's side of the designated maritime boundary.[684]

It appears that the Special Chamber's judgment may have practical implications for states' future conduct of unilateral oil and gas activities in disputed areas, as well as for the rights and obligatons of the relevant states.[685]

The Special Chamber delimited the maritime areas between Ghana and Côte d'Ivoire based on objective geomorphological conditions and such a result would require adjustment of all existing hydrocarbon blocks licensed by the parties along the adjudicated boundary since the Special Chamber's line does not coincide with the parties' claimed lines.[686] *Ghana v. Côte d'Ivoire* ruling of ITLOS directly impacts oil companies holding licenses on the offshore oil and gas blocks in the disputed area and would have further impacts on the future licencees as a great percentage of Africa's lakes and ocean boundaries, which hold potentially rich hydrocarbon reserves, remain to be delimited.[687]

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[682] *Gulf of Maine*, para. 237.
[683] *Ghana v. Côte d'Ivoire*, para. 452-455, 476.
[684] *Ghana v. Côte d'Ivoire*, para. 568-569, 587-588, 594.
[685] Yiallourides and Donnely, "Part I: Analysis of Dispute Concerning…", **EJIL: Talk!...**
[686] Pieter Bekker & Robert van de Poll, "Ghana and Côte d'Ivoire Receive a Strict Equidistance Boundary", **ASIL**, Vol. 21, Issue 11, 13 October 2017, https://www.asil.org/insights/volume/21/issue/11/ghana-and-cote-divoire-receive-strict-equidistance-boundary Accessed on 15.02.2019.
[687] **Ibid.**

8. PENDING CASE

8.1.1. Ukraine v. the Russian Federation (PCA administered arbitration)

8.1.1.1. Background

When the topic is the impact of oil and gas resources on inter-state dispute settlement, one cannot rule out the Russian Federation and its use of vast amount of oil and natural gas resources in its power politics in the regional and international sphere. Therefore, along with the historical and strategic reasons, access to potentially rich oil and gas resources in the Black Sea and Sea of Azov might have been one of the reasons behind the annexation of Crimea by Russian Federation in 2014.

Image No. 7: Map of Crimea and Sea of Azov

Image Source: http://theglobalstate.com/popular/why-is-russia-so-interested-in-ukraine/

Crimea peninsula is located on the northern coast of the Black Sea, surrounded by the Sea of Azov and the Black Sea, between Ukraine and Russia. As of 18 March 2014, following a controversial referendum and a treaty, Russia acquired effective control of Crimea and annexed the peninsula to its country.[688]

For the purposes of this thesis, only a brief historical background with the major points will be provided to the reader before moving on to the case. After the Russian Empire collapsed upon the October Revolution in 1917, Crimea became a sovereign state for a couple of years, only to become a part of the Soviet Union ("**USSR**") in 1921 as the Crimean Autonomous Soviet Socialist Republic and remained autonomous until 1945 when it became the Crimean Oblast, an

[688] "Russia marks five years since annexation of Ukraine's Crimea", **Al Jazeera News**, https://www.aljazeera.com/news/2019/03/russia-marks-years-annexation-ukraine-crimea-190318072208651.html Accessed on 29.04.2019.

administrative region of Russia.[689] In 1954, as a "goodwill gesture to mark the 300th anniversary of Ukraine's merger with tsarist Russia"[690], Premier Nikita Khrushchev transferred the Crimean Oblast to the Ukrainian Soviet Socialist Republic.[691] After the USSR's collapse in 1991, Ukraine held a referendum in December 1991 and with the lowest majority (only 54% of voters), Crimea agreed to remain a part of Ukraine albeit with significant autonomy.[692]

Ukraine's independence pushed the Russian borders and limited its access to the Black Sea. Nevertheless, NATO was extending its reach and coming closer to Russia at the time, so Russia had to compromise and recognize Ukraine's independence. At the end, Ukraine and Russia signed a Treaty on Friendship, Cooperation and Partnership on 31 May 1997.[693] As per Article 29 of the said Treaty, the Parties agreed on developing comprehensive cooperation in order to, among other things, utilize the recreational potential and natural resources of the Azov and Black Sea. It can be concluded that Russia has had an albeit limited opportunity to "utilize" the hydrocarbon resources in cooperation with Ukraine via the Treaty of 1997.

Since its independence, Ukraine's dilemma with regards to its economic integration and foreign policy direction in the sense that leaning to and partnering with Russia, Eastern European states or the EU were all amongst its options, caused heavy political instability internally.[694] Ukraine's unique location makes it crucial for the efficient transit of natural gas through pipelines from Russia to European countries, so both Russia and western states have interests in Ukraine.[695]

Ukraine's political climate took a turning point with the Orange Revolution in 2005 when Victor Yuschenko, aiming the EU and NATO membership for Ukraine

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[689] Adam Taylor, "To Understand Crimea, Take a Look Back at Its Complicated History", 27 February 2014, **The Washington Post**, https://www.washingtonpost.com/news/worldviews/wp/2014/02/27/to-understand-crimea-take-a-look-back-at-its-complicated-history/?noredirect=on&utm_term=.dfc4cb525519 Accessed on 29.12.2018; G. S. Derman and Y. Ongarova, "Ukrayna'da Siyasi Kriz (*Political Crisis in Ukraine*)", **Karadeniz Araştırmaları**, Yaz 2014, Vol. 42, pp 11-23, p. 13.

[690] Joshua Keating, Khrushchev's Gift, 25 February 2014, **Slate,** https://slate.com/news-and-politics/2014/02/separatism-in-ukraine-blame-nikita-khrushchev-for-ukraine-s-newest-crisis.html Accessed on 29.12.2018.)

[691] Taylor, "To Understand Crimea…", **The Washington Post**…

[692] Ibid.

[693] Andrew D. Sorokowski, "Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation" in Ukraine in the World: Studies in the International Relations and Security Structure of a Newly Independent State (1996), **Harvard Ukrainian Studies**, Vol. 20, pp. 319-329.

[694] Derman and Ongarova, "Ukrayna'da Siyasi Kriz", **Karadeniz Araştırmaları…,** p. 14.

[695] **Ibid.,** p. 15.

became the head of state but towards the end of his pro-Russian successor Victor Yanukovych's term, Ukraine's political climate became instable again when the government rejected to sign the EU Association Agreement on 21 November 2013.[696]

Ukraine's attempt to associate with the EU resulted in failure because Russia used its power over the vast reserves of natural gas supply as a leverage against Ukraine which stirred up the political crisis and resulted in protests and the fall of the government.[697] Crimea had been a separate administrative entity within Ukraine since 1954 as well as the headquarters of Russia's Black Sea Fleet since the 1997 Agreement between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory ("**1997 Black Sea Fleet Agreement**")[698]. At the very beginning of Yanukovych's term, on 21 April 2010, the 1997 Black Sea Fleet Agreement which was due to expire in 2017 was extended until 2042 in exchange of Russia's offer of 30% discount on the Ukraine's natural gas purchase price which was perceived as a clear demonstration of Russian influence on Ukraine.[699] Yanukovich's sudden decision of withdrawal from the EU Association Agreement was apparently the final straw for the pro-EU Ukrainians as hundreds of thousands took to the streets (primarily the "Euromaidan") to protest which soon transformed into violent chashes between the protesters and the police lasting for months, also affecting the Eastern Ukraine (especially Donetsk and Luhansk).[700]

The instability in Ukraine eventually led to the infamous referendum of 16 March 2014 being held in Sevastopol where local election officials recorded that 83%

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[696] **Ibid.,** p. 14, 18, 20. The Ukraine- EU Association Agreement was eventually signed on 21 March 2014 by the Ukraine's interim government and became effective as of 1 September 2017 (Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Council of the European Union, https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013005, Accessed on 21.05.2019)

[697] Harun Semercioğlu, "Ukrayna Krizi Bağlamında AB-Rusya İlişkilerinin Ekonomi Politiği (*Political Economy of EU-Russia Relations in Context of Ukrainian Crisis*), **EUL J Soc. Sci.,** 2016, VII(II): 188-202, p. 190.

[698] Eric Posner, "The 1997 Black Sea Fleet Agreement between Russia and Ukraine", 5 March 2014, http://ericposner.com/the-1997-black-sea-fleet-agreement-between-russia-and-ukraine/ Accessed on 29.12.2018.

[699] Luke Harding, "Ukraine extends lease for Russia's Black Sea Fleet", 21.04.2010, **the Guardian**, https://www.theguardian.com/world/2010/apr/21/ukraine-black-sea-fleet-russia, Accessed on 21.05.2019.

[700] Richard Balmforth, "Kiev protesters gather, EU dangles aid promise", **Thomson Reuters**, World News, 12 December 2013, https://www.reuters.com/article/us-ukraine/kiev-protesters-gather-eu-dangles-aid-promise-idUSBRE9BA04420131212 Accessed on 21.05.2019; "Ukrainian Crisis: Timeline", **BBC News**, 13 November 2014, https://www.bbc.com/news/world-middle-east-26248275 Accessed on 21.05.2019.

of the population has voted in favour of joining Russia.[701] This incident is neutrally referred to as Crimea's "change of effective sovereign".[702] On 4 April 2014, Russia has annulled the 1997 Black Sea Fleet Agreement via a diplomatic Note.[703] It was followed by the Minsk Agreement[704] on 12 February 2015 and subsequent sanctions were imposed on Russia by the EU as well as a wide range of states including the US, Canada, Australia, Japan, Norway and Switzerland.[705]

Article 2(4) of the UN Charter forbids states from using threat or force against the territorial integrity or political independence of any state, which means that acquisition of territory of another state resulting from the threat or use of force constitutes a breach of international law and is not acceptable by international community. At the same time, principle of self-determination co-exists with the prohibition of territorial acquisition via threat or use of force. Article 1(2) of the UN Charter recognizes the respect to self-determination of peoples among the purposes of the UN.

A post-colonial or a severely oppressed population has the right to freely determine its future status in the international community (the principle of self-determination) and independence of Timor-Leste in 2002, Kosovo in 2008 and South Sudan in 2011 are the examples for the use of this right.[706] The principle of self-

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[701] "Ukraine Briefing by Deputy Secretary-General and Assistant Secretary-General for Human Rights", 19 March 2014, **What's in Blue,** https://www.whatsinblue.org/2014/03/ukraine-briefing-by-deputy-secretary-general-and-assistant-secretary-general-for-human-rights.php, Accessed on 29.12.2018.

[702] G. Matteo Vaccaro-Incisa, "Crimea Investment Disputes: are jurisdictional hurdles being overcome too easily?", 9.05.2018, **EJIL: Talk!**, https://www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/ Accessed on 04.02.2019.

[703] "Note by the Russian Ministry of Foreign Affairs on the Black Sea Fleet", **The Ministry of Foreign Affairs of the Russian Federation**, http://archive.mid.ru//brp_4.nsf/0/77663CE0A757909E44257CB000525E1A Accessed on 29.12.2018.

[704] "Briefing by the Secretary-General on Ukraine", 27 March 2014, **What's in Blue**, http://www.whatsinblue.org/2014/03/briefing-by-the-secretary-general-on-ukraine.php Accessed on 31.12.2018. *See also*: Minsk Agreement (English), **Unian**, http://www.unian.info/politics/1043394-minsk-agreement-full-text-in-english.html Accessed on 29.12.2018.

[705] "Factsheet: Ukraine-Related Sanctions", Office of the Press Secretary, **White House**, 17 March 2014, https://www.whitehouse.gov/the-press-office/2014/03/17/fact-sheet-ukraine-related-sanctions,; "Switzerland confirms latest EU sanctions against Russia", **Reuters**, 13 November 2014, https://www.rt.com/business/205059-switzerland-joins-sanctions-russia/ Accessed on 29.12.2018; Council Decision concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, No. 2014/145/CFSP of 17 March 2014 OJ L 78/16; Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78/6, 17.03.2014.

[706] William W. Burke-White, "Crimea and the International Legal Order", **Faculty Scholarship at Penn Law,** 2014, Vol. 56 (4), pp: 65-80, p. 67.

determination may provoke a plebiscite which may be used and is deemed acceptable for the transfer of territory.[707] In the case of Crimea, Russia embraced the international law and exploited the tension between the prohibition of acquisition of territory through use of force and the fundamental right of self-determination to annex Crimea.[708]

8.1.1.2.Proceedings before the Tribunal

As a result of all the above, various disputes emerged between Ukraine and the Russian Federation one of which concerns the coastal state rights in the Black Sea, Sea of Azov and Kerch Strait and Ukraine initiated an arbitration before the PCA on 16 September 2016.[709]

Ukraine filed its memorial on 19 February 2018 claiming that the Russian Federation has violated "(*i) Ukraine's rights to hydrocarbon resources in the Black Sea and Sea of Azov, (ii) Ukraine's rights to living resources in the Black Sea, Sea of Azov, and Kerch Strait, (iii) Ukraine's rights by embarking on a campaign of illegal construction in the Kerch Strait that threatens navigation and the marine environment, (iv) its duty to cooperate with Ukraine to address pollution at sea, and (v) Ukraine's UNCLOS rights and [its] own duties in relation to underwater cultural heritage*."[710]

In accordance with Article 10(2) of the Rules of Procedure, Russia has submitted its preliminary objections to the Arbitral Tribunal's jurisdiction on 19 May 2018 on following grounds: (i) the dispute in reality concerned Ukraine's claim to sovereignty over Crimea instead of interpretation or application of the Convention as required by Article 288(1) of the UNCLOS; (ii) the portion of the Ukraine's claims pertaining to the Sea of Azov and the Kerch Strait constitute internal waters and UNCLOS does not regulate internal waters, also Kerch Strait is not a strait regulated by UNCLOS; (iii) Ukraine's claims relate to categories listed in Article 298(1)(a)(i) and (b) of the UNCLOS which are excluded from the Arbitral Tribunal's jurisdiction as a result of the Parties' declarations made under Article 298(1); (iv) the dispute concerning living resources within the EEZ are excluded from the Arbitral Tribunal's

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[707] Crawford, **Brownlie's Principles…**, p. 243.
[708] Burke-White, "Crimea and the International…", **Faculty Scholarship at Penn Law…,** p. 67.
[709] Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (*Ukraine v Russia*), pending before the Arbitral Tribunal (PCA), https://pca-cpa.org/en/cases/149/ Accessed on 22.12.2018.
[710] **PCA** Press Release of 31 August 2018, https://pcacases.com/web/sendAttach/2447, Accessed on 22.12.2018.

jurisdiction as per Article 297(3)(a); (v) parties' declarations excluding jurisdiction of the Arbitral Tribunal over Ukraine's claims relating to fisheries, protection and conservation of the marine environment and navigation; and (vi) the provisions on dispute settlement contained in the State Border Treaty and the Azov/Kerch Cooperation Treaty exclude the Arbitral Tribunal's jurisdiction over Ukraine's claims related to the Sea of Azov, the Kerch Strait and other adjacent sea areas.[711]

The Tribunal set the timetable for the parties' written pleadings on jurisdiction[712] and scheduled a hearing on the matter to take place between 10 June to 15 June 2019.[713] According to the latest update, Russia will deliver its opening statement on 10 June 2019 at the hearing concerning its preliminary objections.[714] If the Tribunal decides that it has jurisdiction to hear the case, the proceedings as well as the outcome of this case are likely to be historical in many aspects. Among other issues, Ukraine appears to have been motivated by the access to hydrocarbon reserves in the Black Sea and Sea of Azov in the initiation of this case, which is why the Tribunal will likely include this aspect in its interpretation.

8.2.Hot Topic: Developments in the East Mediterranean Concerning Discovery of Natural Gas

New developments are taking place in the Eastern Mediterranean upon the discovery of potentially rich natural gas resources in its seabed. Eastern Mediterranean is surrounded by the coasts of Turkey, Syria, Lebanon, Israel, Palestine (through Gaza), Egypt and Greece; and includes Island of Cyprus and constitutes an intersection between Europe, Asia and Africa.

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[711] **PCA** Procedural Order No: 3 "Regarding Bifurcation of the Proceedings" of 20 August 2018, p. 2, https://pcacases.com/web/sendAttach/2446 Accessed on 22.12.18.
[712] **PCA** Procedural Order No: 4, "Regarding the Timetable for the Parties' Written Pleadings on Jurisdiction" of 27 August 2018, https://pcacases.com/web/sendAttach/2449 Accessed on 22.12.18.
[713] **PCA** Procedural Order No: 5 "Regarding the Schedule fort he Hearing on Jurisdiction" of 8 April 2019, https://pcacases.com/web/sendAttach/2580 Accessed on 22.12.18.
[714] **PCA** Press Release, 7.06.2019, https://pcacases.com/web/sendAttach/2615 Accessed on 07.06.2019.

Image No. 8: Natural Gas Fields in the Eastern Mediterranean Sea

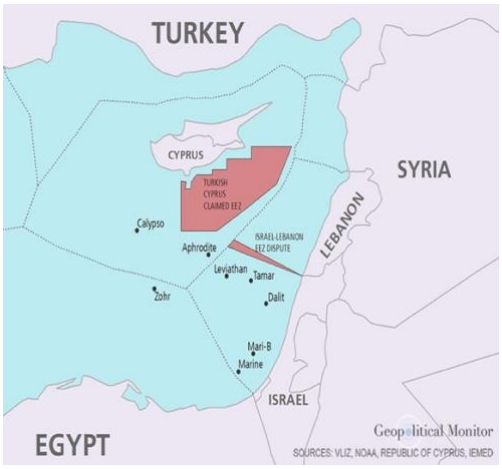

Image Source: Alessandro Gagaridis, Rising Tensions in the Eastern Mediterranean: Another South China Sea?, 20.03.2018, Situation Reports, Geopolitical Monitor, https://www.geopoliticalmonitor.com/rising-tensions-in-the-eastern-mediterranean-another-south-china-sea/ Accessed on 16.03.2019.

The USGS made an assessment and estimated approximately 1.7 billion barrels of recoverable oil and approximately 122 trillion cubic feet of recoverable gas in the Levant Basin in 2010.[715] Existence of rich hydrocarbon reserves, particularly natural gas reserves offshore Eastern Mediterranean was welcomed by the coastal states, especially Turkey, Egypt, Lebanon, Cyprus[716] and Israel.

[715] Schenk, C.J., Kirschbaum, M.A., Charpentier, R.R., Klett, T.R., Brownfield, M.E., Pitman, J.K., Cook, T.A., and Tennyson, M.E., "Assessment of undiscovered oil and gas resources of the Levant Basin Province, Eastern Mediterranean", **USGS** Fact Sheet, 2010. https://pubs.usgs.gov/fs/2010/3014/pdf/FS10-3014.pdf Accessed on 16.03.2019.

[716] **Cyprus** refers to the Greek-Cypriot part of the Island of Cyprus which has internationally been recognized as the sole legitimate representative of the Republic of Cyprus by the EU and the UN states except Turkey. Republic of Cyprus was established on 16 August 1960 by the Treaty Concerning the Establishment of the Republic of Cyprus (Source: Treaty Concerning the Establishment of the Republic of Cyprus between Greece, Turkey and the UK dated 16.08.1960, Treaty No. 5476, https://peacemaker.un.org/sites/peacemaker.un.org/files/CY_600816_TreatyNicosia.pdf Accessed on 23.05.2019.). Upon increasing disturbances between Turkish and Greek Cypriots, Turkey relied upon the provisions of Annex B - Treaty of Guarantee between the Republic of Cyprus, Greece, the UK and Turkey in its 1974 peace operation and the island's division as north and south took place (See: Tütüncü *et al.*, **Toluner Milletlerarası Hukuk…,** p. 195-198 for the compatibility of Turkey's peace operation with international law and the UN Charter). On 15 November 1983, National Assembly of Turkish Federated State of Cyprus declared the establishment of Turkish Republic of Northern Cyprus ("**TRNC**") (Source: Melek Fırat, Yunanistan'la İlişkiler (*Relations with Greece*) in Baskın Oran (Ed.), **Türk Dış Politikası** (*Turkish Foreign Policy*), Cilt II: 1980-2001, Vol. II: 1980-2001, 14. Baskı, İletişim, 2013, p. 107.). On 18 November 1983, UN Security Council ("**UNSC**") assembled and considered the declaration of TRNC invalid and called for its withdrawal, also calling upon all the states not to recognize any Cypriot state other than the Republic of Cyprus in its Resolution No.541 (1983) (Sources: Fırat, "Yunanistan'la İlişkiler", in Oran, **Türk Dış Politikası…,** p. 108; UNSC Resolution No. 541 of 18 November 1983, http://unscr.com/en/resolutions/doc/541 Accessed on 23.05.2019.). Turkey declared that it did not recognize UNSC Resolution No. 541 and today, legal status of the TRNC is recognized only by Turkey (Source: Fırat, "Yunanistan'la İlişkiler", in Oran, **Türk Dış Politikası…,** p. 108.).

The beginning of international attention in the Eastern Mediterranean in terms of hydrocarbons started with the EU Project "Anaximander" where sediment samples and sysmic profiles revealed that the existence of gas hydrates in the Eastern Mediterranean were potentially richer than once estimated.[717] Assessment of the USGS confirmed the findings in the years that followed Anaximander.

Discovery of potentially rich natural gas reserves entails a row of current and future disputes over these gas reserves. Due to the region's complicated political structure, coastal states of the Eastern Mediterranean do not have any consensus on their EEZ including any such consensus on the validity of the limited number of EEZ delimitation agreements made in the region. This makes the determination of jurisdiction over the blocks/sea areas which have been or to be subjected to international tenders for hydrocarbon reserve development very difficult or simply not possible.

The UNCLOS prescribes an international agreement to be made for the delimitation of the EEZ between the states with opposite or adjacent coasts within the meaning of Article 38 of the Statute of the ICJ in order to achieve an equitable solution.[718] Even though not all the states in the Eastern Mediterranean are parties to the UNCLOS, they may still resort to Article 33(1) of the UN Charter for the peaceful settlement of their disputes through various means including negotiations and conclude treaties to delimit their maritime areas. Upon mutual consent, they also have the option to take their disagreement before an international court or an arbitral tribunal.

8.2.1. Coastal States of Eastern Mediterranean and their relations

In the North Africa, the richest hydrocarbon reserves are located primarily in Libya's Sirte basin and Algeria's Trias/Ghadames which appear to be amongst the largest hydrocarbon reserves in the region.[719] The third largest reserve is located in the

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[717] İsmail Hakkı Demirel, "Doğu Akdeniz Havzası Hidrokarbon (Petrol-Gaz) Potansiyeli (*Eastern Meditrerranean Basin Hydrocarbon (Oil and Gas) Potential*), in Sertaç Hami Başeren (Ed.), **Doğu Akdeniz Yetki Alanlarında Hukuk ve Siyaset** (*Law and Politics in the Area of Jurisdiction of the Eastern Mediterranean*), AÜSBF Yay., No. 608, Ankara (2013), p. 61; **European Commission**, Exploration and evaluation of the eastern mediterranean sea gas hydrates and the associated deep biosphere, https://cordis.europa.eu/project/rcn/64938/factsheet/en, Accessed on 15 May 2019.

[718] Article 74(1) of the UNCLOS.

[719] Demirel, "Doğu Akdeniz Havzası…" in Başeren (Ed.), **Doğu Akdeniz Yetki Alanlarında Hukuk ve Siyaset…,** p. 12-14.

Gulf of Suez, Egypt with its unusual aerial production.[720] In the Eastern Mediterranean, the recent discovery of Zohr field off its northern coast in 2015 increased Egypt's existing reserves massively, almost 40% with 850bn m^3 gas, enough to meet domestic needs and maintain Egypt's status as the region's net importer.[721]

In terms of Lebanon, Cyprus and Israel, which were priorly known to be poor in energy resources, these major discoveries in the Eastern Mediterranean came as a pleasant surprise and created an opportunity for not only meeting their domestic demand but also importing this newly found treasure to Europen countries as an alternative supply channel to Russia, provided that they navigate through region's complicated political structure.[722] Israel's combined reserves from its Tamar and Leviathan fields discovered in 2009 and 2010 were estimated to produce 930bn m^3 gas and Cyprus' Aphrodite field discovered in 2011 was estimated to hold 100bn m^3 gas as of 2015.[723]

Lebanon's EEZ is part of the Levant Basin which is estimated to contain vast amount of recoverable gas and oil which could help Lebanon dramatically reduce its energy dependence if it can develop these hydrocarbon reserves.[724]

Currently, Lebanon and Israel have a dispute concerning the limits of their EEZ as well as Lebanon's claim regarding the Tamar field. The two countries still do not have any agreements on their respective EEZs. While Lebanon claims Tamar field is located in a part of its own EEZ, Israel claims that Lebanon has no entitlement in that maritime area.[725] Lebanon signed an EEZ delimitation agreement with Cyprus on 17 January 2007 but Lebanese Parliament never ratified it due to its disagreement with Israel concerning said disputed area and due to the pressure from Turkey which

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[720] **Ibid.**, p. 14.
[721] "Gas Sector Challenges and opportunities for Israel", 01.12.2015, **The Economist** Intelligence Unit, http://country.eiu.com/article.aspx?articleid=633727847 Accessed on 09.03.2019.
[722] "Israel has a Gas Conundrum- Egypt could help Israel get rid of its excess gas", 19.08.2017, **The Economist**, https://www.economist.com/middle-east-and-africa/2017/08/19/israel-has-a-gas-conundrum Accessed on 09.03.2019.
[723] "Gas Sector Challenges…", **The Economist…**
[724] Bassam Fattouh & Laura El-Katiri, "Lebanon: The Next Eastern Mediterranean Gas Producer?", **GMF** Policy Paper, 12.02.2015, http://www.gmfus.org/publications/lebanon-next-eastern-mediterranean-gas-producer Accessed on 15 May 2019.
[725] "Disputes hinder hydrocarbons development", 28.07.2015, **The Economist** Intelligence Unit, http://country.eiu.com/article.aspx?articleid=663384450 Accessed on 16.03.2019.

denounces all maritime border agreements of Cyprus.[726] In the meanwhile, Lebanon defined the geographical coordinates of points defining the Western, Northern and Southern limits of its EEZ and deposited these coordinates to the UN in November 2011.[727] On 17 December 2010, Cyprus also concluded an EEZ delimitation agreement with Israel.[728] As the Cyprus-Israel EEZ delimitation agreement included the coordinates unilaterally notified by Lebanon to the UN prior to the date of such agreement, Lebanon sent a letter objecting to the EEZ delimitation agreement between Cyprus and Israel.[729] As a result, 870sq km of maritime area between Lebanon and Israel is currently being disputed between them.[730]

While Lebanon is a party to the UNCLOS since January 1995, Israel is not a party to the UNCLOS, which means that Israel is not conventionally obliged to follow the legal framework set forth by Artice 74 of the UNCLOS on the delimitation of EEZ between states with adjacent coasts. However, it should also be set forth that the rules of the law of the seas codified by UNCLOS are generally considered customary international law to be respected and obeyed by the states. Lebanon and Israel must have been aware that maritime delimitation is crucial in determining which state has the control and jurisdiction over the disputed area, as such determination would allow the competent state to explore and exploit the rich gas reserves in the seabed. Nevertheless, Israel made considerable progress in development and production of hydrocarbons in the Eastern Mediterranean and Tamar field has been operational since 2013.[731] On the other hand, in 2013, Lebanon had also announced an international

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[726] "The maritime border dispute between Lebanon and Israel explained", 5.03.2018, **MESP**, https://www.mesp.me/2018/03/05/maritime-border-dispute-lebanon-israel-explained/, Accessed on 25.05.2019.

[727] Deposit of a chart and lists of geographical coordinates of points defining the Western, Northern and Southern limits of Lebanon's exclusive economic zone, accompanied by Decree No. 6433 - Delineation of the boundaries of the exclusive economic zone of Lebanon, 1 October 2011, M.Z.N.85.2011.LOS (Maritime Zone Notification) of 14 November 2011, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn85ef.pdf Accessed on 25.05.2019.

[728] Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, signed in Nicosia on 17 December 2010, **UNTS** Vol. 2740, https://treaties.un.org/pages/showDetails.aspx?objid=08000002802d12b7 Accessed on 25.05.2019.

[729] Emin Erol, "Doğu Akdeniz'de Hidrokarbon Kaynaklar ve Bölgesel Barış (*Hydrocarbon Resources and Regional Peace in the Eastern Mediterranean*) in Başeren (Ed.), **Doğu Akdeniz Yetki Alanlarında Hukuk ve Siyaset…,** p. 206.

[730] "Disputes hinder hydrocarbons development", 28.07.2015, **The Economist** Intelligence Unit, http://country.eiu.com/article.aspx?articleid=663384450 Accessed on 16.03.2019.

[731] **Ibid.**

tender of five blocks for the exploration of hydrocarbon resources in the EEZ that it declared some of which overlapping with Israel's claimed EEZ therefore confusing and discouraging some of the companies that had initially been interested in the tender.[732]

In 2015, the US government intervened and proposed a settlement for the dispute between Lebanon and Israel over their shared Darish field, giving Lebanon the 2/3 of the field's reserves and Israel the 1/3 which was rejected by Lebanon.[733] However, the rejection appears to be causing the country a chance to develop its hydrocarbon reserves, therefore Lebanon is now prioritizing to have the disputed territorial waters to be defined with the help of the UN which had in the past also brokered a deal between the two countries on their land border.[734]

In 2018, Lebanon signed two exploration and production agreements with the Total-ENI-Novatek Consortium for Blocks 4 and 9 (which includes some portion of the disputed border with Israel)[735]

As explained in the previous sections, the ICJ established in *Qatar v Bahrain* and reiterated in *Nicaragua v Colombia* that the principles of maritime delimitation enshrined in Articles 74 and 83 reflect customary international law.[736] Even though Turkey is not a state-party to the UNCLOS, it adopts the law of the sea practices with regards to continental shelf and the EEZ as customary international law. Turkey posits is that any delimitation of the continental shelf or EEZ should be made by agreements based on equitable principles considering all the special circumstances in the area and protecting the rights and interests of all the parties involved.[737]

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[732] "Lebanon Launches Pre-Qualification Phase for 1st Offshore Licensing Round", 15.02.2013, **OffshoreEnergyToday**, https://www.offshoreenergytoday.com/lebanon-launches-pre-qualification-phase-for-1st-offshore-licensing-round/; "Lebanon's second licensing round Lessons learned and the case for stability", 12.092018, MESP, https://www.mesp.me/2018/09/12/lebanons-second-licensing-round-lessons-learned-and-the-case-for-stability/ Last Access 25.05.2019.

[733] "Lebanon's speaker calls for UN to delineate maritime border", 24.03.3016, **The Economist** Intelligence Unit, http://www.eiu.com/industry/article/514061835/lebanons-speaker-calls-for-un-to-delineate-maritime-border/2016-03-28 Accessed on 16.03.2019.

[734] **Ibid.**

[735] "Oil&Gas in East Med: 2018 roundup and what to expect in 2019", 18.12.2018, **MESP**, https://www.mesp.me/2018/12/18/oil-gas-in-east-med-2018-roundup-and-what-to-expect-in-2019/ Accessed on 25 May 2019.

[736] *Qatar v Bahrain*, para. 167 *et seq*., *Nicaragua v Colombia*, para. 139.

[737] Sertaç Hami Başeren, "Doğu Akdeniz Deniz Yetki Alanları Sınırlandırması Sorunu (*the Problem of Maritime Zone Delimitation in the Eastern Mediterranean*) in Başeren (Ed.), **Doğu Akdeniz Yetki Alanlarında Hukuk ve Siyaset…,** p. 262.

On 5 December 1986, Turkey declared and deposited an EEZ in the length of 200nm in the Black Sea.[738], but still does not have any such declaration in the Aegean Sea and the Mediterranean Sea.[739] Nevertheless, Turkey have already established straight baselines in the Aegean and Mediterranean Seas and made continental shelf delimitation agreements with Russia, Georgia, Ukraine and Bulgaria in the Black Sea.[740] Following the discovery of rich natural gas resources in the Eastern Mediterranean and the subsequent endeavours of Cyprus to exploit these resources, Turkey concluded a continental shelf delimitation agreement with the TRNC on 21 September 2011 in New York which entered into force on 12 July 2012.[741] Exploration and exploitation of natural resources within the continental shelf in the Mediterranean were amongst the main purposes of the Continental Shelf Agreement between Turkey and the TRNC[742] which also included a CDC in its Article 3 as follows: "*If it is determined that the natural resource reserve contained in the seabed or subsoil of the continental shelf is above the limit set our in Article 1 of this Agreement and is located in the continental shelf of both parties, then the Contracting States shall negotiate to jointly determine the most efficient way to operate such reserve*."[743]

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[738] Published in the Official Gazette No. 19314 dated 17 December 1986, http://www.resmigazete.gov.tr/arsiv/19314.pdf; Agreement between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics concerning the Delimitation of the Continental Shelf Between the Republic of Turkey and the Union of Soviet Socialist Republics in the Black Sea 23 June 1978, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TUR-RUS1978CS.PDF Accessed on 23.05.2019.

[739] Kuran, **Uluslararası Deniz…,** p. 234; Turkey Summary of Claims at **US Navy Judge Advocate General's Corps**, https://www.jag.navy.mil/organization/code_10_mcrm.htm Accessed on 23.05.2019.

[740] Turkey Summary of Claims at US Navy Judge Advocate General's Corps, https://www.jag.navy.mil/organization/code_10_mcrm.htm Accessed on 23.05.2019.

[741] Türkiye Cumhuriyeti ile Kuzey Kıbrıs Türk Cumhuriyeti ArasındaAkdeniz'de Kıta Sahanlığı Sınırlandırması Hakkında Anlaşma (*Continental Shelf Agreement between Turkey and the TRNC*), https://www2.tbmm.gov.tr/d24/1/1-0471.pdf; published in the Official Gazette No. 28351 dated 12.07.2012, Accessed on 24.05.2019.

[742] **Ibid.**, third paragraph of the preamble of the Continental Shelf Agreement between Turkey and the TRNC stipulates as follows: "Tarafların kıta sahanlığının doğal kaynakları araştırmak ve işletmek amacıyla egemen haklarını kullandıkları Akdeniz'de kıta sahanlığının ilgili bölgelerinin sınırının saptanmasını sağlamak" (*To ensure that the boundaries of respective areas of the continental shelf where the parties use their sovereign rights to explore and operate the natural resources thereof is determined*.)

[743] **Ibid.**, Original text of Article 3 of the Continental Shelf Agreement between Turkey and the TRNC reads as follows: "Kıta sahalığının deniz yatağında veya toprak altında doğal kaynak rezervinin işbu anlaşmanın 1. Maddesinde belirlenen sınırın üzerinde, her iki tarafın da kıta sahanlığı alanına girecek şekilde bulunduğunun belirlenmesi durumunda, Akit Taraflar Kıbrıs bu rezervin en verimli şekilde nasıl işletileceği konusunu müştereken saptamak üzere görüşmeler yapacaklardır."

Turkey is determined to be included in the natural gas exploitation underneath the Eastern Mediterranean as it undertook its own research for finding commercially exploitable natural gas reserves.[744] Naturally, as a coastal state with significant coastal length to the Eastern Mediterranean, Turkey's stance on the hydrocarbon reserves in the region appears to be quite strong, especially with regards to the question of jurisdiction in the maritime zones.

Turkey posits that Cyprus' exploration and exploitation of hydrocarbon resources activities prior to a peace deal between Turkish and Greek Cypriots as an explicit violation of the rights of Turkish Cypriots and states that both communities had rights on the natural resources of the island.[745]

In December 2011, US Noble Energy discovered natural gas laying south and southeast offshore Cyprus in the amount of 141 billion to 226 billion m^3.[746] As a result of an international tender, on 24 January 2013, Cyprus signed Exploration and Production Sharing Contracts for Blocks 2, 3 and 9 located in the Cypriot deep offshore portion of the Levantine basin with the ENI-KOGAS Consortium.[747]

On 22 September 2011, right after signing the Continental Shelf Agreement between Turkey and the TRNC, the TRNC Cabinet granted hydrocarbon exploration license to Turkish Petroleum Corporation ("**TPAO"**).[748] However, some blocks granted by the TRNC and Cyprus to MOGCs overlap in the south and southeast of the island.[749]

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[744] Stelyo Berberakis, "Doğu Akdeniz'de doğal gaz gerilimi (*Natural Gas tension in the Eastern Maditerranean*), **DW**, 28.02.2019, https://www.dw.com/tr/do%C4%9Fu-akdenizde-do%C4%9Fal-gaz-gerilimi/a-47718844 Accessed on 16.03.2019.

[745] "Doğu Akdeniz - Kıbrıs'taki doğalgaz gerginliği hakkında bilinmesi gerekenler (*Need-to-know about the natural gas tension in Eastern Mediterranean – Cyprus*)", 15.02.2018, **BBC**, https://www.bbc.com/turkce/haberler-turkiye-43061162, Accessed on 23.05.2019.

[746] "Cyprus issues two licenses for offshore gas exploration", 25.01.2013, **Euractiv**, https://www.euractiv.com/section/energy/news/cyprus-issues-two-licences-for-offshore-gas-exploration/ Accessed on 23.05.2019.

[747] "Eni awarded three offshore exploration blocks in the Republic of Cyprus", 24.01.2013, **Europetrole**, https://www.euro-petrole.com/eni-awarded-three-offshore-exploration-blocks-in-the-republic-of-cyprus-n-i-7051 Accessed on 23.05.2019.

[748] "KKTC'den TPAO'ya arama ruhsatı (*Exploration license from TRNC to TPAO*)", 23.09.2011, **Hürriyet News**, http://www.hurriyet.com.tr/gundem/kktc-den-tpao-ya-arama-ruhsati-18805687 Accessed on 24.05.2019.

[749] Emin Erel, Doğu Akdeniz'de Hidrokarbon Kaynaklar ve Bölgesel Bakış, (Hydrocarbon Resources in the Eastern Mediterranean and the Regional Perspective) in Başeren (Ed.), **Doğu Akdeniz Yetki Alanlarında Hukuk ve Siyaset…,** p. 202-203.

On 22 November 2013, Turkey issued a NAVTEX[750] reserving maritime areas near the southern coasts of Karpas Peninsula and the Famagusta Gulf to conduct seismic survey by the Turkish survey vessel Barbaros Hayrettin Pasa between 20 October – 20 December 2013.[751]

On 11 February 2014, Greek and Turkish Cypriots had their first meeting under the auspices of the UN Secretary General's Good Offices mission and jointly declared that they will negotiate to conclude a settlement with the prospect of a common future in a united Cyprus within the EU based on a bi-communal and bi-zonal federation with political equality with a single international legal personality.[752]

In the meanwhile, on 25 September 2014, ENI-KOGAS Consortium's drillship Saipem commenced its exploratory drilling in the Block 9 which was followed by Turkey's issuance of another NAVTEX on 4 October 2014 for the seismic survey to be conducted from 20 October- 30 December 2014.[753] Greek Cypriot president suspended the peace talks with the Turkish Cypriot leader on 7 October 2014.[754] On 13 November 2014, the EU Parliament adopted a resolution stating that the areas reserved for seismic surveying affected the blocks allocated by Cyprus to ENI-KOGAS Consortium for the exploration of hydrocarbon reserves and urged Turkey to revoke its NAVTEX immediately meanwhile stressing that Cyprus had the full and sovereign right to explore the natural resources with its EEZ and that the Turkish maritime surveys were illegal and provocative.[755]

Considering their complex political relationships and decades old disputes, the Eastern Meditarrenean states may unavoidably focus to create a balance by forming alliances with each other with the support of other states such as US, Russia, China

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[750] **NAVTEX** is a navigational telex used to notify seafarers of navigational and meteorological warnings and forecast, operations as well as urgent maritime safety information to ships: http://www.navtex.lv/navtex/MainTable

[751] Sohbet Karbuz, "Natural Gas and Politics: An Exlosive Mixture in the Eastern Mediterranean", 01.12.2014, **Eppen**, http://www.eppen.org/en/index.php?sayfa=Yorumlar&link=&makale=152 Accessed on 24.05.2019.

[752] "11 February 2014 Joint Declaration on Cyprus", **UN Cyprus Talks News**, http://www.uncyprustalks.org/11-february-2014-joint-declaration-on-cyprus/ Accessed on 24.05.2019.

[753] Karbuz, "Natural Gas and Politics…", **Eppen**…

[754] **Ibid.**

[755] European Parliament Resolution of 13 November 2014 on Turkish actions creating tensions in the EEZ of Cyprus (2014/2921(RSP)), http://www.europarl.europa.eu/doceo/document/TA-8-2014-0052_EN.html?redirect Accessed on 24.05.2019.

and the EU that deem Eastern Mediterranean as strategically very important and have their own agendas in the region.[756]

Taking the European states' energy dependency to Russia into account, Eastern Mediterranean hydrocarbon reserves appear to constitute a balancing alternative and this fact may encourage these states to form alliances to develop the hydrocarbon resources in the Eastern Mediterranean or to build infrastructures and execute pipeline projects in line with the interests of the powerful international actors mentioned above.[757] Israel and Cyprus alliance may be an example of this approach.

Due to the emergence of an alignment between Greece, Cyprus and Israel through energy and defense partnership and a pipeline project with Egypt hoping to be a part of this deal through its Zohr field, Turkey is currently being isolated in the Eastern Mediterranean, and its position is compared to China's position in the South China Sea.[758]

Noting the considerable opportunity for economic development for the Eastern Mediterranean countries arising out of the great potential of their natural gas reserves, and taking complex and long-lasting regional disagreements into account, especially on the EEZ, it appears that an interesting dispute resolution process between Israel and Lebanon is underway.

On another note, as crucial as delimitation of maritime areas in the Aegean Sea and Mediterranean is for Turkey, the Aegean Sea[759] disputes complicate a smooth

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[756] Eyyub Kandemir, "Doğu Akdeniz'deki Gelişmeler: Postmodern Dönemde Realizmin Yeni Bir Tezahürü (mü?) (*Developments in the Eastern Mediterranean: A New Manifestation of Realism in the Postmodern Era (?)*) in Başeren (Ed.), **Doğu Akdeniz Yetki Alanlarında Hukuk ve Siyaset…,** p. 133.

[757] **Ibid.,** p. 134.

[758] Alessandro Gagaridis, "Rising Tensions in the Eastern Mediterranean: Another South China Sea?", 20.03.2018, Situation Reports, **Geopolitical Monitor**, https://www.geopoliticalmonitor.com/rising-tensions-in-the-eastern-mediterranean-another-south-china-sea/ Accessed on 16.03.2019.

[759] The Aegean Sea Dispute is a legal dispute concerning the determination and delimitation of the maritime zones between Turkey and Greece which primarily comprises two issues: i) the method to be used in the determination of the baselines for the territorial sea and the length of territorial sea; delimitation of the continental shelf and the EEZ of the parties in the Aegean Sea (See: Toluner, **Milletlerarası Hukuk Açısından…** p. 5.).
According to Hüseyin Pazarcı's analysis on the *South China Sea* award, the *South China Sea* Tribunal's judgment on the difference between sovereignty of the state and sovereign rights of the state as well as the difference between maritime zone delimitation and the interpretation of UNCLOS concerning the legal basis on the sovereignty over geographical formations indicate that a careful use of terms in a potential delimitation in the Aegean Sea is necessary. Also, if Turkey acceeds to the UNCLOS, avoiding the compulsory jurisdiction mechanism of the UNCLOS would not be possible with the South China Sea Tribunal's determination of its jurisdiction in the absence of one party (See: Hüseyin Pazarcı, Güney Çin Denizi Davasının Ege Sorununa Olası Etkileri (*Potential Effects of the South China Sea Case to the Aegean Sea Problem*), **Yeni Deniz Mecmuası**, Vol:13, March 2019, p. 33-34).

settlement. Furthermore, the complex Cyprus issue and its relationship with Israel, Egypt and the EU creates major obstacles for the maritime delimitation in the Eastern Maditerranean. The fact that Turkey does not recognize Cyprus and no country other than Turkey recognizes TRNC leads the matter to a stalemate. As explained under Section 4, in disputes where the parties find it difficult or impossible to agree on a boundary between them, they may establish a JDZ to exploit resources which have been identified in the disputed area.[760] Within the framework of the Cyprus issue, the parties may prefer creating JDZs in the disputed area in the Eastern Mediterranean waters and opt for the joint management and development of the area potentially rich in hydrocarbons. Absent any agreement between the parties and any real prospect for settlement of the disputes, creation of a JDZ may help ease the tensions. The JDZ wouold only be a temporary solution, as the dispute involves other elements, however, it could be a start and a demonstration of good will for all the parties. If the parties are able to seek a preliminary arrangement such as the estalbishment of a JDZ to manage and develop the natural gas resources in the disputed area and the practical cooperation of administering such JDZ, it may help reduce the tensions between the parties in other areas as well as the specific dispute concerning hydrocarbons.

Eastern Mediterranean is an unexpected and interesting example of how the dynamics of energy politics controls this ancient area with the use of technological advances. Region's complicated political issues make it impossible to sail smoothly in these waters. As a result, even though a legal solution every party can accept would be the best for the peace and stability of the region, it appears a political solution constantly faces a stalemate. Initiating any compulsory third-party dispute settlement with regards to maritime delimitation pursuant to UNCLOS appears not to be possible in the Eastern Mediterranean since not all the states involved are parties to the UNCLOS, specifically considering Turkey and Israel. Without a maritime delimitation process clearly determining the maritime boundaries of each coastal state in the Eastern Mediterranean, providing legal clarity to international investors willing to invest in the area to extract the potentially rich natural gas is very difficult. One mechanism which could prove successful in providing an interim solution to the

[760] Mensah, "Joint Development Zones…" in Lagoni and Vignes, **Maritime Delimitation**, p. 147.

problem created by the overlapping claims would be the establishment of JDZs in the disputed areas in the Eastern Mediterranean.

9. CONCLUSION

Jules Gabriel Verne said in the Twenty Thousand leagues Under the Sea, "*The sea does not belong to tyrants. On its surface, they can still exercise their iniquitous claims, battle each other, devour each other, haul every earthly horror. But thirty feet below sea level, their dominion ceases, their influence fades, their power vanishes!*"[761] Since the time of the famous French novelist, thirty feet below sea level came closer than ever within the reach of men.

Several recent geological surveys revealed that many offshore areas were potentially rich with hydrocarbon (and rare mineral) resources and some of them were technically recoverable. Humanity is used to exploiting the vast resources of the planet with little consideration to environment and sustainability of those resources. Therefore, it is not surprising that the states would want to access to, control, and benefit from the potentially rich oil and gas resources via deep-sea drilling. Nevertheless, it is also an undeniable fact that these resources are capable of providing an economic boost for the developing states, therefore wealth to their people. Oil and gas are amongst the main non-renewable energy resources of our century. Oil also provides the raw material for many other products in the petroleum industry. These two resources are not abundantly found and not equally distributed around the world which put states that conrol these resources in an advantageous position compared to others by giving them additional economic and political power in the international trade.

Enclosure of the seas resulted in the emergence of new maritime zones and the subsequent extension of jurisdiction of the coastal states to these zones which provided legal access to and control of oil and gas reserves in the deep seabed for these coastal states. Coastal state's *ipso facto* and *ab initio* entitlement to continental shelf and exclusive right to explore and exploit natural resources within its continental shelf are crucial elements for the access to these resources. This gives the coastal state the power to regulate the exploration and exploitation in the area and authorize private and/or

[761] Jules Verne, **Twenty Thousand Leagues Under the Sea**, EBD Publications, p. 76.

state-owned oil and gas companies with the extraction of these resources. International investment is necessary for the developing states which has access to the hydrocarbon reserves but little to no know-how and/or funds to explore and develop the oil and gas contained therein. For the states to attract meaningful investments that would be beneficial for the investor as well as the state, they should be capable of providing a healthy investment environment with minimum risks for the investor. Providing legal certainty and the clarity in terms of jurisdiction over the specific area the investors seek to obtain concessions, licenses etc., appears to be necessary for such attraction. This might be difficult if those reserves are located in an area two states have overlapping claims.

Apart from the historical, political and geological reasons, exploitability of these resources is among the reasons that adjacent or opposite coastal states have overlapping claims over certain marine spaces. Allocation and management of oil and gas resources in the maritime areas which have not yet been delimited were made subject to boundary negotiations and were given special attention in the subsequent maritime boundary treaties. Under these treaties, CDCs for handling a single resource straddling the maritime boundary line or the concession limit of one state or JDZs for the joint development and allotment of offshore oil and gas resources were acknowledged as the flexible solutions states have prompted. In case of boundary disputes states find impossible or very difficult to settle, JDZ mechanism appear to be a useful tool to ease tensions between disputing states and provide temporary solutions to the management and development of natural resources in the disputing areas.

In this thesis, the importance and the means of peaceful settlement of disputes have been explained. Along with negotiations and other non-binding methods of peaceful dispute settlement, the disputing states may also resort to international adjudication or arbitration. In terms of the maritime zones acknowledged by the international legal community, certain rules and obligations exist according to the international law regardless of their source being international customary law or treaty obligations. This means that any state claiming its entitlement over these maritime zones, is obliged to justify its entitlement. A treaty reflecting the sovereign will of the contracting states as well as a binding judgment or an arbitral award that has been rendered by an international court or an arbitral tribunal recognized and respected by the international community, have the potential to provide such justification. Various maritime

delimitation cases resolved by the ICJ, ITLOS or the arbitral tribunals administered by the PCA provided the approach of international judiciary to the existence of oil and gas resources and the state conduct for the handling of these resources and their place as relevant circumstances to be considered in the adjustment of the provisional boundary line in the maritime delimitation disputes. Even though access to oil and gas resources appears to motivate the coastal states to resort to third party dispute resolution, international case-law demonstrates that the international judiciary is reluctant to give resource related criteria any operational effect in the delimitation of maritime boundaries.

Impact of oil and gas resources in the maritime boundary negotiations and the peaceful resolution of related disputes were examined with various examples of maritime boundary agreements. Within this context, commitment of Arctic states to settle their disputes and overlapping claims through negotiations was provided to the readers as successful examples of dispute settlement through negotiations. In this thesis, the author also attempted to find out to what extent access to oil and gas resources were argued by the states and were handled by the international judiciary in some (mostly) recent international case law. To this end, several (mostly) recent cases concerning maritime delimitation or the rights and entitlements of the states in accordance with the UNCLOS before the ICJ or ITLOS or *ad-hoc* arbitral tribunals administered by the PCA were selected and assessed in terms of states' arguments concerning access to hydrocarbon resources such as oil concessions, surveying activities, drilling activities, construction of offshore oil platforms, conclusion of various types of resource-related contracts with private entities. The approach and evaluation of international judiciary of these aguments in the concluded cases were also assessed. The pending *Ukraine v Russia* case was also given a place since Ukraine alleged that Russia has violated its access to hydrocarbon resources in the Black Sea and the Sea of Azov. Moreover, the author also examined the developments in the Eastern Mediterranean concerning the recent discovery of natural gas reserves and the conduct of coastal states concerning these reserves within the context of the region's complex politics.

Consequently, findings of this thesis suggest that potentially rich and technically recoverable oil and gas resources motivate the states to exert their claims over the maritime areas where these resources are present. In order to convey

international investment and benefit from the capital that these investors would bring as well as the resources themselves, the coastal states may resort to various types of non-binding and binding peaceful dispute settlement methods to delimit their maritime areas or manage the natural resources in the disputed area. Hydrocarbon reserve management related clauses and various arrangements contained in the martime boundary treaties as the outcome of negotiations were assessed in this thesis. It appears that various flexible mechanisms were able to provide temporary or permanent solutions to the resource related disputes. International case law examples where the states argued the existence of oil and gas resources and/or their conduct with regards to these resources were also examined in this thesis. However, it was revealed that international courts and tribunals were hesitant to take oil and gas related activities into account in the final determination of maritime boundaries. The impact of access to oil and gas resources on inter-state territorial dispute resolution was therefore understood to be limited.

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Author of this thesis has graduated from Ankara University Faculty of Law in 2013 and by obtaining the Jean Monnet Scholarship, started the European Law LL.M. Programme in Leiden University in the Netherlands the same year. She graduated from Leiden Univsersity in 2014 by obtaining her LL.M. degree with her thesis titled "*How can Turkey Achieve a Visa-Free Regime with the EU*" where she researched how Turkey could achieve a visa-free regime with the EU within the framework of the EU law and CJEU decisions as well as the terms of the Readmission Agreement between Turkey and the EU. The author, who started the Public Law LL.M. programme in Galatasaray University in 2015, has been working as an associate in a private law firm specializing in international arbitration since becoming an attorney registered at Istanbul Bar Association in 2016. Apart from the international reports the author has contributed, she has published an article titled "*Investment Treaty Arbitration between Libya and Turkish Contractors: Temporal Validity of Turkey-Libya Bilateral Investment Treaty*". The author is a native in Turkish, has full professional proficiency in English and has limited proficiency in German.

ÖZGEÇMİŞ

Tezin yazarı 2013 yılında Ankara Üniversitesi Hukuk Fakültesi'nden mezun olmuş, aynı yıl Jean Monnet Bursunu kazanarak Hollanda'da Leiden Üniversitesi'nde "*European Law LL.M.*" programında yüksek lisans eğitimine başlamış, "*Türkiye, Avrupa Birliği ile Vizesiz Rejimi Nasıl Elde Edebilir*" başlıklı, AB hukuku ve yargı kararları ile Geri Kabul Anlaşması altında Türkiye'nin AB ile vizesiz seyahat rejimini nasıl elde edebileceğini araştıran tezini tamamlayarak 2014 yılında mezun olmuştur. 2015 yılında Galatasaray Üniversitesi Kamu Hukuku Tezli Yüksek Lisans programına başlayan yazar, 2016 yılından beri, İstanbul Barosuna kayıtlı avukat olarak, uluslararası tahkim alanında uzmanlaşan bir hukuk bürosunda çalışmaktadır. Yazarın katkıda bulunduğu uluslararası raporların yanısıra "*Investment Treaty Arbitration between Libya and Turkish Contractors: Temporal Validity of Turkey-Libya Bilateral Investment Treaty*" adlı bir makalesi de bulunmaktadır. Yazarın anadili Türkçe olup, yazar, profesyonel yetkinlik seviyesinde İngilizce, orta seviyede ise Almanca dillerini bilmektedir.

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