

# Responsibility

## *Articles on Responsibility of States for Internationally Wrongful Acts (2001)*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is **attributable to the State** under international law; and
- (b) **Constitutes a breach** of an international obligation of the State.

# Responsibility

## *Objective elements*

- *violation of the state's obligation*
- *material or moral damage*
- *no circumstances precluding wrongfulness*
- *not due to distress*
- *not due to necessity*

## *Subjective elements*

- *act by an official agent of the state*
- *act by a de facto agent of the state*



## Force majeure

*Rainbow Warrior* (France-New Zealand Arbitration Tribunal, 1990)

France... argued that even though its actions had not been in strict accordance with the letter of the First Agreement, its international responsibility was not engaged because the international law of State responsibility recognized notions of *force majeure* and distress which exonerated France....

*Force majeure* was cast in absolute terms and applied only where circumstances rendered compliance by a State with an international obligation impossible. It did not apply where, as here, circumstances merely made compliance more difficult or burdensome.



## Distress

### *Rainbow Warrior (cont.)*

What was involved in distress was a **choice between departure from an international obligation and a serious threat to the life or physical integrity of a State organ or of persons entrusted to its care....**

[I]t appeared that his initial evacuation, albeit that it was carried out without the consent of New Zealand, was not wrongful, since subsequent examinations showed that [Major Mafart] **required medical treatment** not available in Hao.... [T]here was, however, **a breach of France's obligations in the decision not to return Major Mafart** to Hao after 12 February 1988, when he was found to have recovered after his treatment.



## Responsibility for nonofficial acts

### *Teheran hostages* (ICJ 1980)

The [approval](#) given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the [decision to perpetuate them](#), translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, [had now become agents of the Iranian State for whose acts the State itself was internationally responsible](#).

### *Nicaragua* (ICJ 1986)

The Court has taken the view that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.... For this conduct to give rise to legal responsibility of the United States, it would in principle [have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed](#).

*Tadić* case (ICTY Appeals Chamber, 1999)

The Appeals Chamber, with respect, **does not hold the *Nicaragua* test to be persuasive....** **[C]ontrol by a State over subordinate armed forces or militias or paramilitary units may be of an overall character....** The control required by international law may be deemed to exist when a State... *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be **regarded as acts of *de facto* State organs** regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

*Application of the Genocide Convention* case (ICJ, 2008)

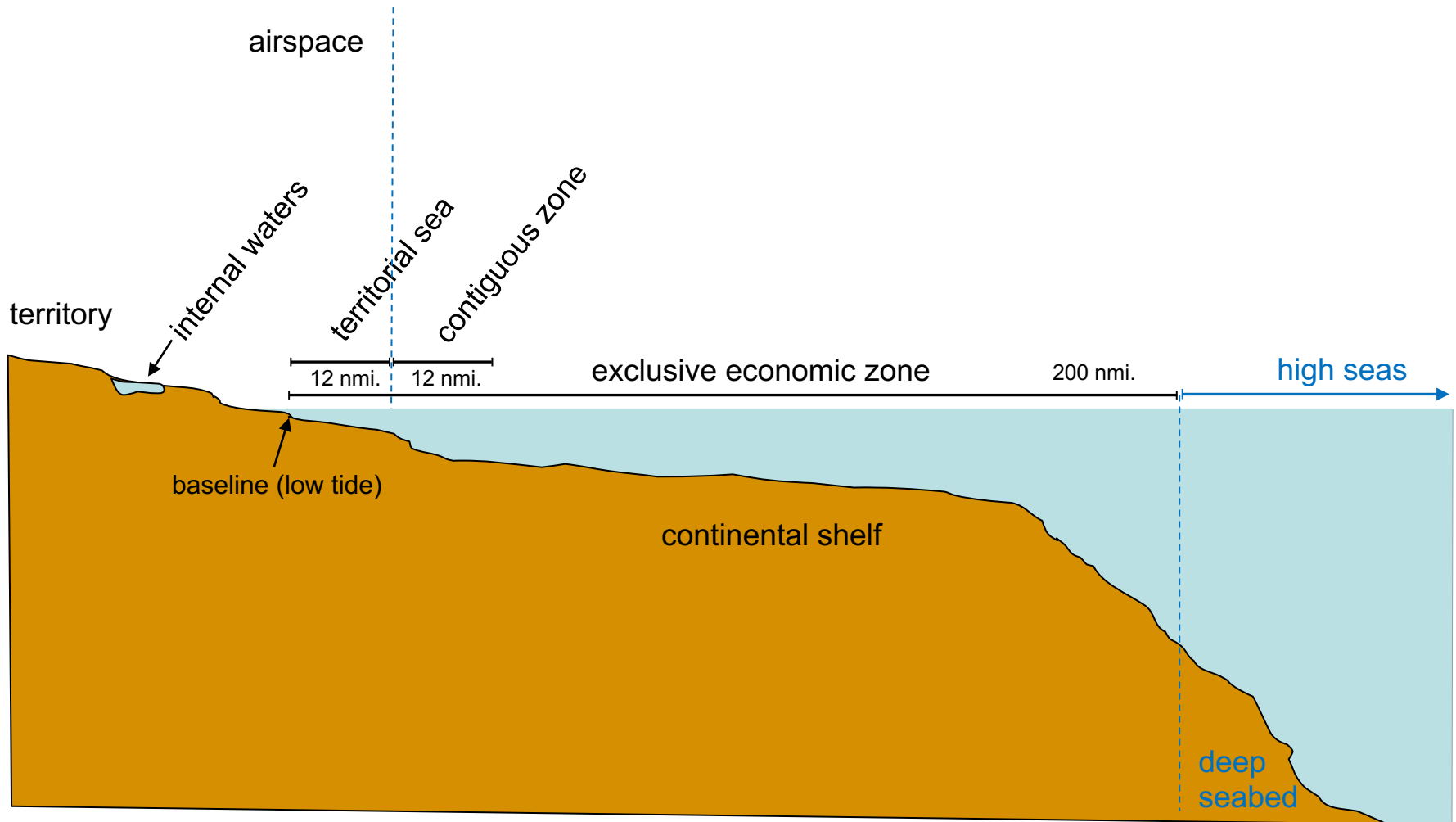
[A] State's responsibility can be incurred for acts committed by persons or groups of persons—neither State organs nor to be equated with such organs—only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law.... This is so where **an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed.** In this regard **the “overall control” test is unsuitable**, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

## Countermeasures

*Gabčíkovo-Nagymaros Project* case (ICJ, 1997)

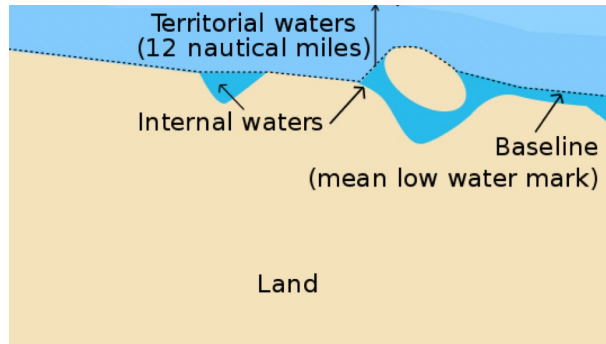
In the view of the Court, an important consideration is that **the effects of a counter-measure must be commensurate with the injury suffered**, taking account of the rights in question.... The Court thus considers that **the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate**. It is therefore not required to pass upon one other condition for the lawfulness of a counter-measure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.

# Law of the Sea





# Baselines make a difference



Bay



Historic bay



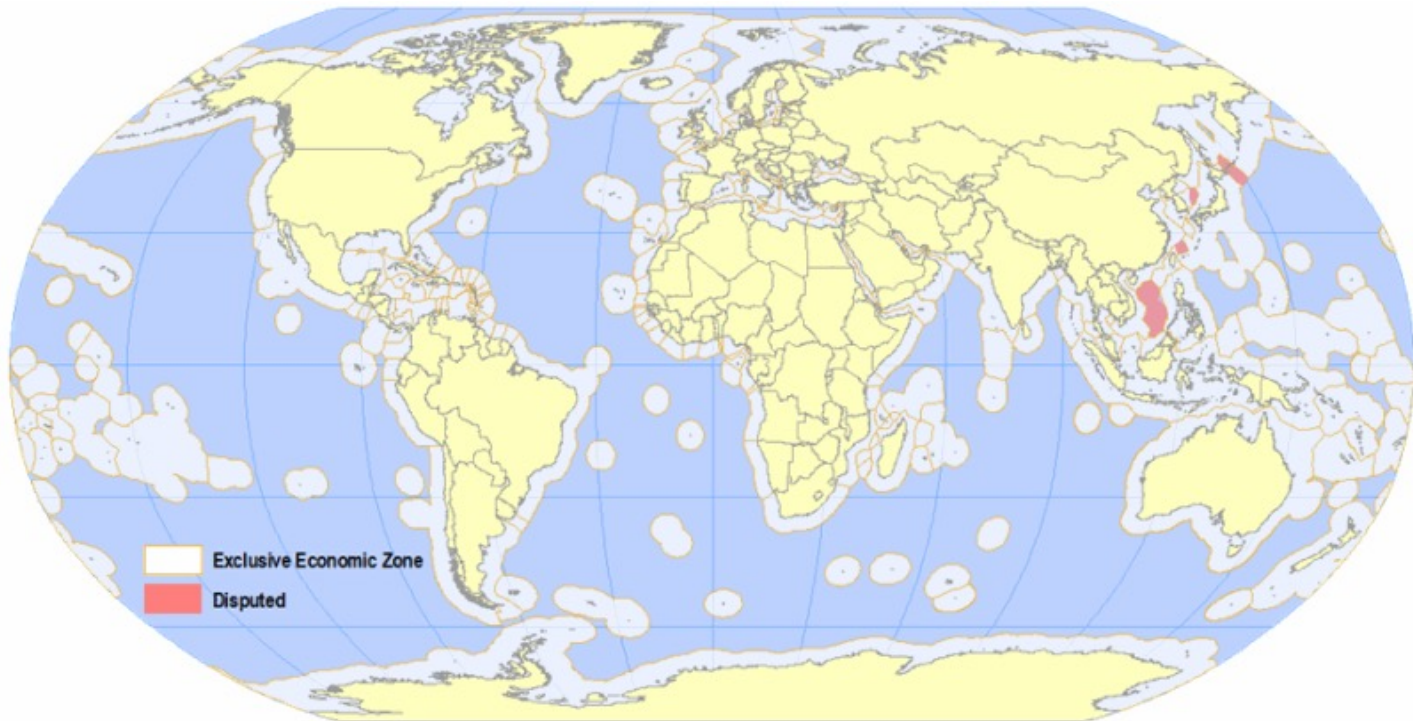
“Bay” of Sidra?



... not a bay



# Exclusive Economic Zones



# Islands make a difference

## Senkaku / Diaoyu Islands

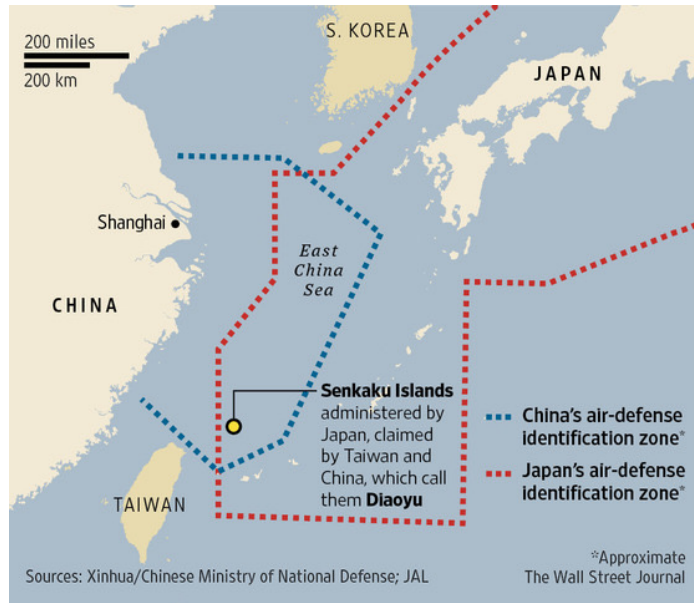
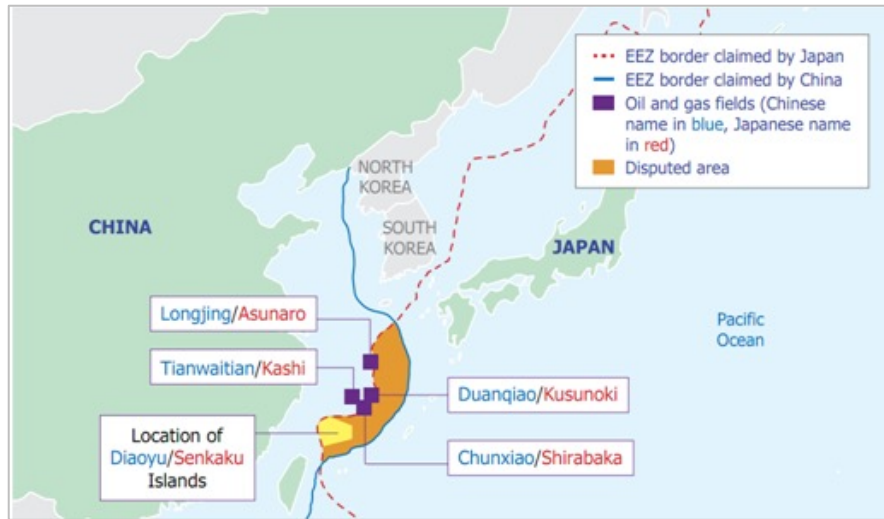


## Japan's EEZ

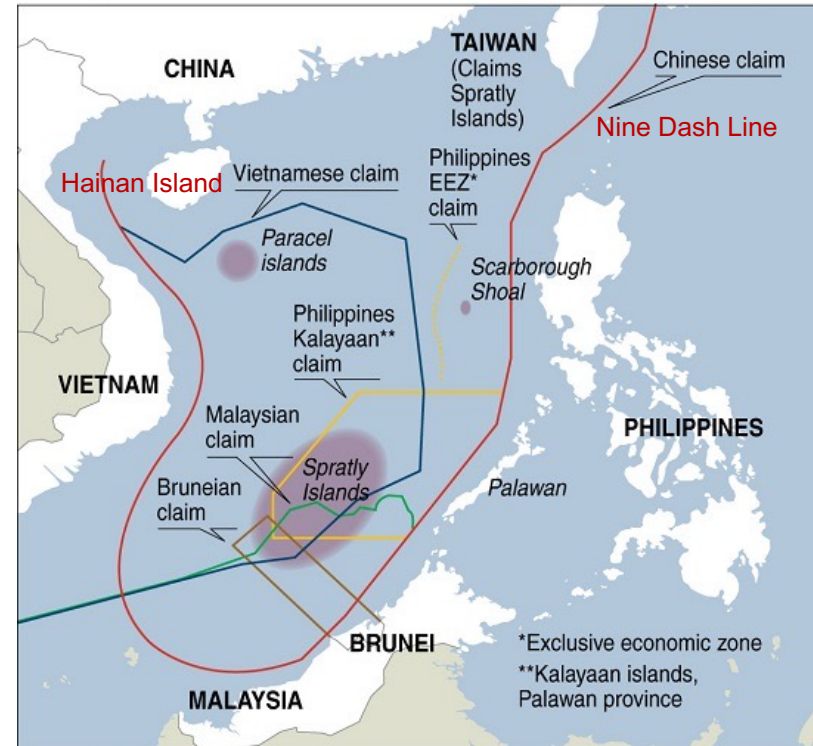


# Disputed EEZs

## East China Sea



## South China Sea



... and ADIZs

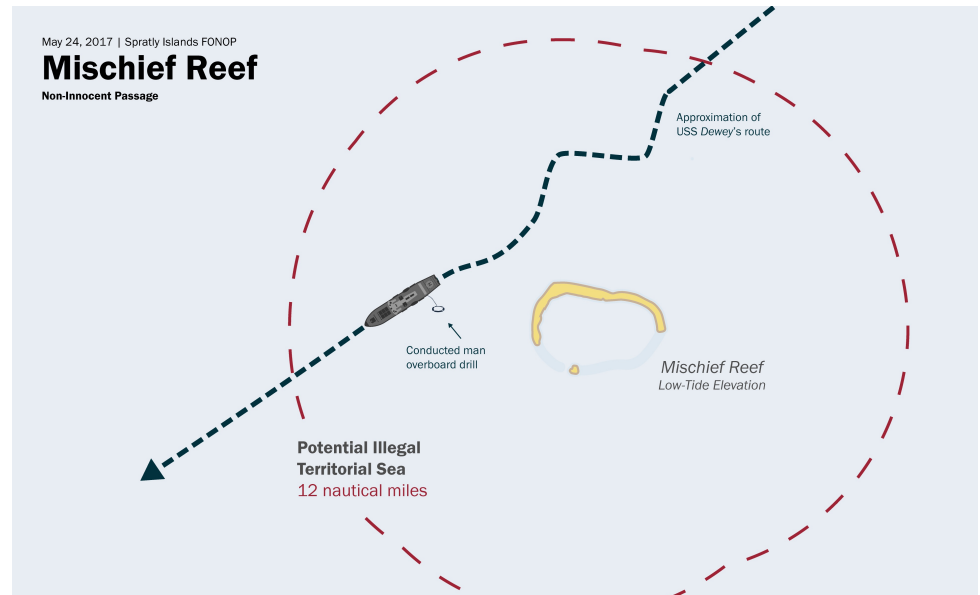


# China's Artificial Islands

## Mischief Reef Reclamation



## U.S. FONOP



# U.S. Continental Shelf

