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Thank you.



Sovereignty and jurisdiction: relevant legal principles for resolving boundary disputes

IBRU Training Workshop, New York
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Freshfields Bruckhaus Deringer

Outline

1. Territorial delimitation

- Modes of acquisition of title to territory
- Acts of effective occupation and control
- Loss, abandonment or recognition of title
- Critical date
- Intertemporal law

2. Maritime delimitation

- United Nations Convention on the Law of the Sea (UNCLOS) 1982
- Title over the sea?
- Zones of maritime sovereignty and jurisdiction
- Continental shelf
- Overlapping maritime entitlements
- Maritime boundary delimitation – agreements, general approach and examples

3. Territorial and maritime delimitation – *Croatia v. Slovenia*



Territorial Delimitation

General Principles

Modes of acquisition of title to territory (1)

Terra nullius and (effective) occupation

- Notion of *terra nullius*
- Evidence of intention and will to act as sovereign
- Evidence of actual display of sovereign authority
- Effectiveness

Original or historic title

- Principle of immemorial possession
- Reliance upon evidence of general repute or opinion as to matters of historical fact
- Evidence of no competing claims of title

Modes of acquisition of title to territory (2)

The acquisition of title to territory: treaty

- Cession
 - 1867 US/Russia treaty for the cession of Alaska
 - Transferee cannot receive greater rights than those possessed by transferor
- Delimitation agreements
- Sanctity of boundary treaties
 - *Territorial Dispute (Libya v Chad)*, 1994

- ***Island of Palmas***: treaty of cession

“The title alleged by the United States as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Art III of said Treaty and therefore also those concerning the Island of Palmas. It is evident that Spain could not transfer more rights than she herself possessed.”

Modes of acquisition of title to territory (3)

Uti possidetis juris

- Presumption that the boundaries of a new State or entity follow administrative boundaries that existed under the previous (colonial) regime
- Reflects customary international law
- Evidence of administrative boundaries:
 - Administrative acts of the parties
 - Cadastral evidence
 - Maps

- **ICJ, *Frontier Dispute (Burkina Faso v. Mali)* (1986)**

“The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.”

Acts of effective occupation and control

'Effectivités' (1)

- Where there is no title of sovereignty over territory, or that title cannot be determined by other means, *effectivités* create title.

- ***Frontier Dispute (Burkina Faso v. Mali) (1986)***

“a distinction must be drawn among several eventualities. Where the act corresponds exactly to law, where effective administration is additional to the uti possidetis juris, the only role of effectivité is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the effectivité does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectivités can then play an essential role in showing how the title is interpreted in practice.”

Acts of effective occupation and control

'Effectivités' (2)

- No prior title – the role of *effectivités* in showing the better title
- Sources of evidence:
 - Official acts carried out *à titre de souverain*
 - Legislation relating to the disputed territory
 - Tax collection
 - Government authorisations and permits relating to the disputed territory (including resource management)
 - Official infrastructure projects
 - Policing and other administrative acts

Loss, abandonment or recognition of title

Abandonment

- State is held to have surrendered its title
- Conversion of territory to *res nullius*
- Another State establishes own title through lawful allocation or effective occupation
- No usurpation of sovereignty – no competing claims

Prescription

- Removal of defects in a putative title arising from usurpation of another State's sovereignty
- Requires display of State authority from usurping party and acquiescence by the other State
- Acquiescence may be by conduct or admission

The critical date

- Moment in time when the parties' claims must be legally assessed.
- Date when the dispute crystallised: when the parties formally opposed each others' claims.
- Exclusion of self-serving acts of parties after the dispute arises

- **ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002)**

“[The Court] cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.”

Intertemporal law

- ***Island of Palmas, 1898***

“As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case... a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of a right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”.



Maritime delimitation

General Principles

United Nations Convention on the Law of the Sea (UNCLOS) 1982

**Entered into force
16 November 1994**

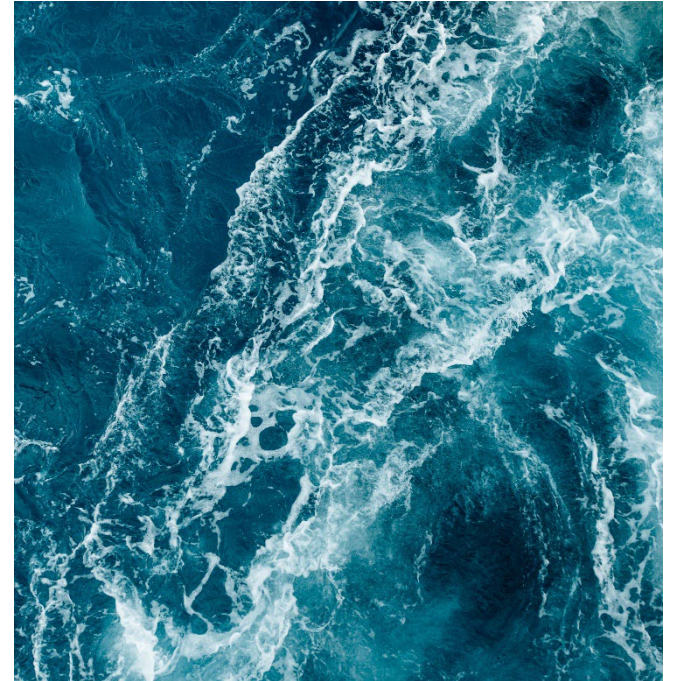
**Ratified by
168 States**

**Provisions on delimitation reflect
customary international law**

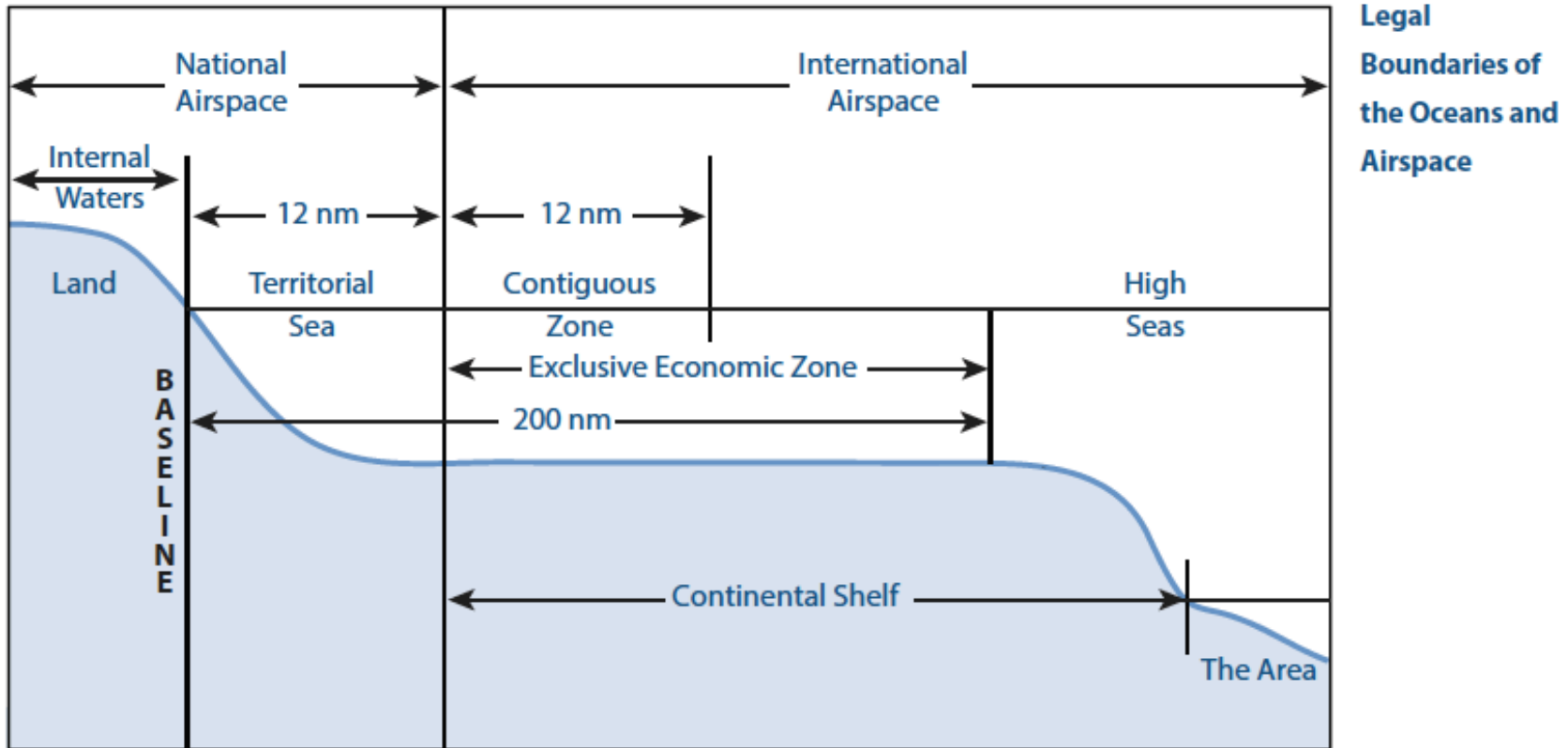
Title over the sea?

- **ICJ, *North Sea Continental Shelf Cases* (1969):**

“[T]he principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coast-lines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored, for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions.”



Zones of maritime sovereignty and jurisdiction



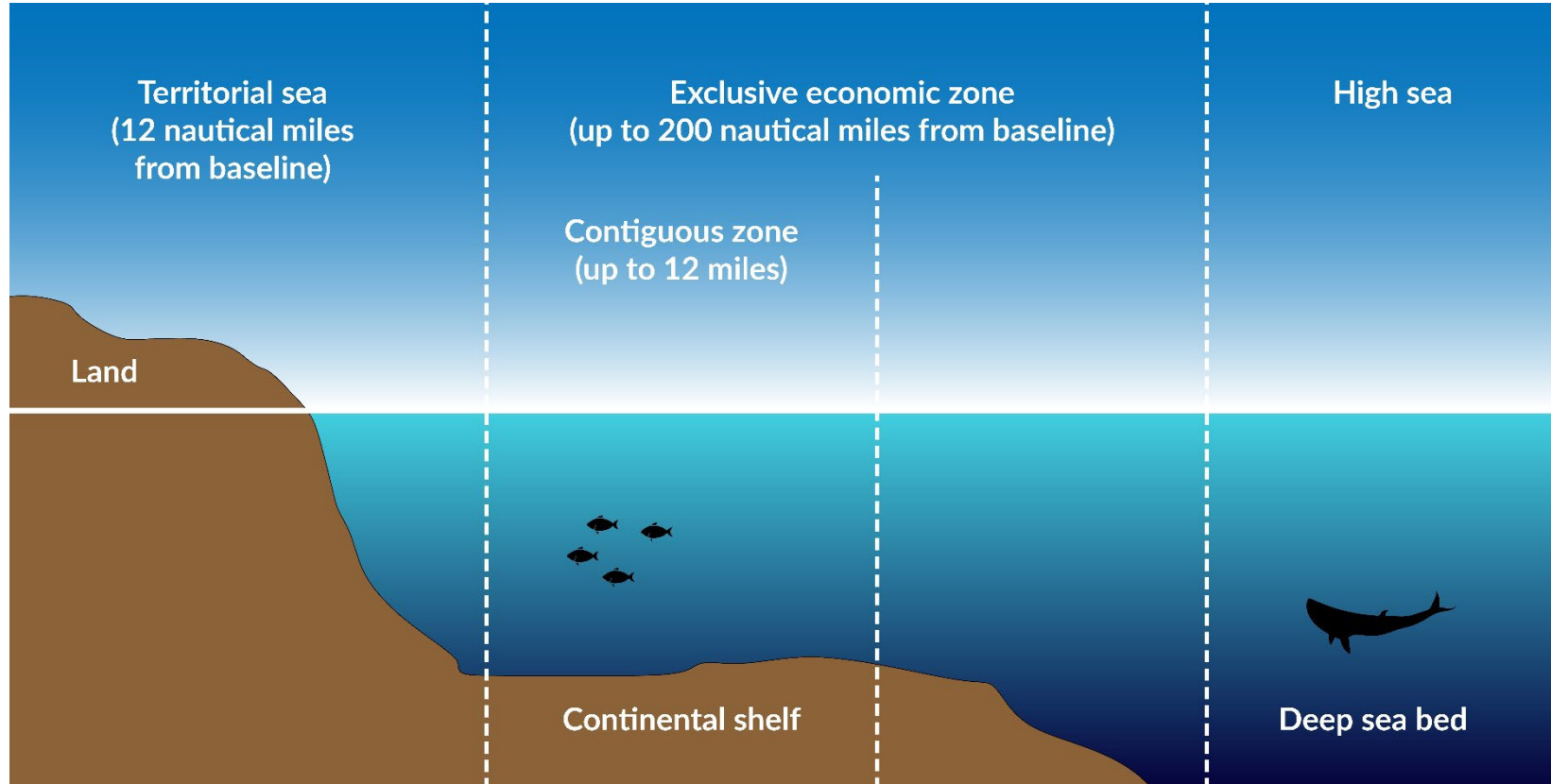
nm – nautical mile

Continental shelf (1)

Article 76 UNCLOS

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
[...]
3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

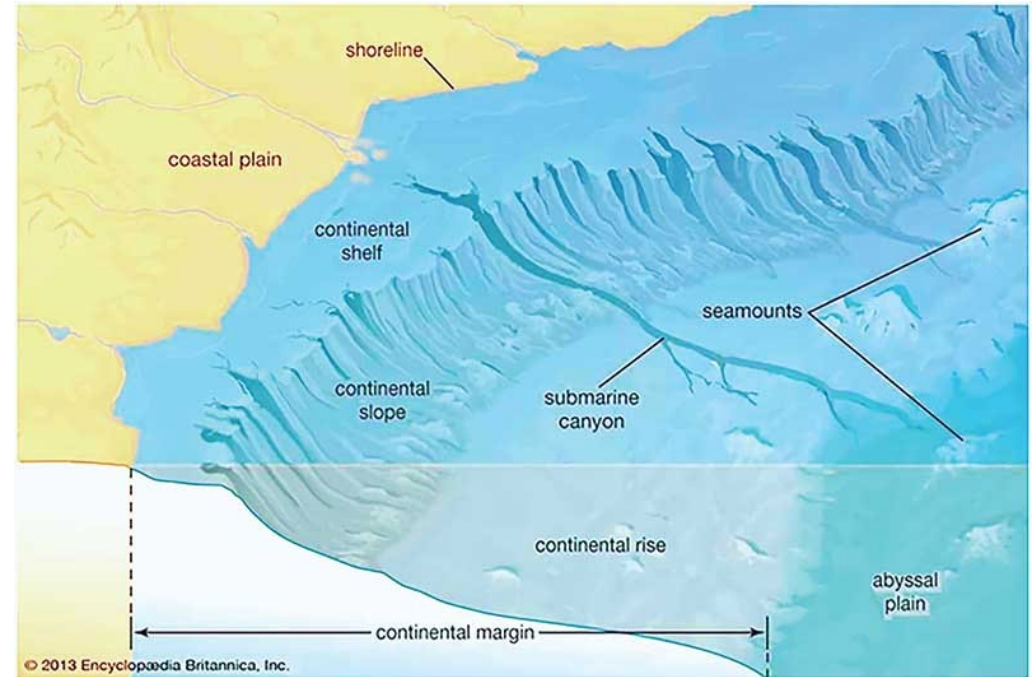
Continental shelf (2)



Continental shelf (3)

ITLOS, Bangladesh/Myanmar (2012)

“[t]he reference to natural prolongation in article 76, paragraph 1, of the Convention, should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin. Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4”



Continental shelf (4) – The CLCS

Article 76 UNCLOS

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

- The “Test of Appurtenance”
 - If either the line delineated at a distance of 60 nautical miles from the foot of the continental slope, or the line delineated at a distance where the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the slope, or both, extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, then a coastal State is entitled to delineate the outer limits of the continental shelf as prescribed by the provisions contained in article 76, paragraphs 4 to 10 of UNCLOS.

Overlapping maritime entitlements

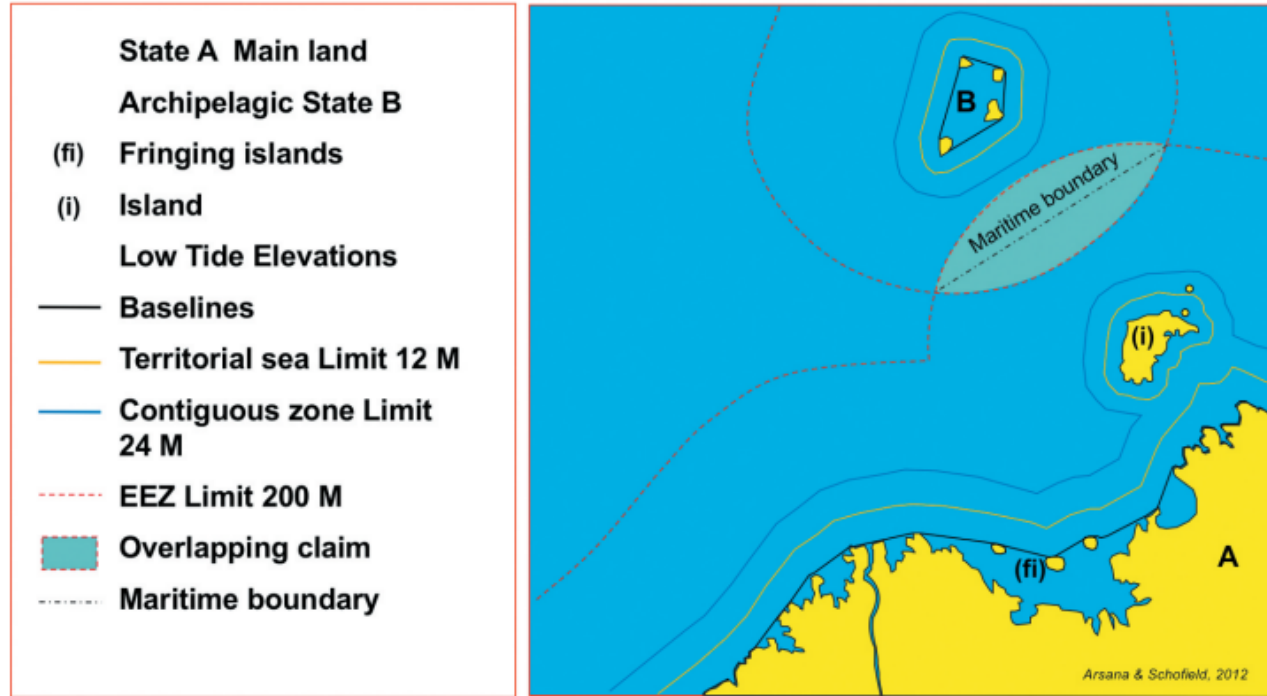


FIG. 7—Schematic illustrating the key elements in the construction of a representative bilateral maritime boundary between coastal States with coastlines opposite to one another. Clive Schofield and I Made Andi Arsana (IHO [International Hydrographic Organization] 2014).

Continental shelf beyond 200nm

Issue: Can a court or tribunal delimit a maritime boundary beyond 200nm before the Commission on the Limits of the Continental Shelf has delineated the outer limit of the continental margin?

ICJ, Nicaragua v Colombia (2016)

“The procedure before the CLCS relates to the delineation of the outer limits of the continental shelf, and hence to the determination of the extent of the sea-bed under national jurisdiction. It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of UNCLOS and effected by agreement between the States concerned, or by recourse to dispute resolution procedures.”

[...]

“[S]ince the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation.”

Maritime delimitation

Territorial sea

- **Article 15, UNCLOS:**
 - Absent an agreement, the delimitation is the median line every point of which is equidistant from the nearest points on the baselines from which the territorial seas of the States is measured.
 - The median line rule does not apply if justified by historic title or specific circumstances.

EEZ/Continental shelf

- **Article 74 and 83, UNCLOS:**
 - *“The delimitation of the 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 the International Court of Justice, in order to achieve an equitable solution”.*

Maritime boundary delimitation agreements

- Express agreements
- Tacit agreements

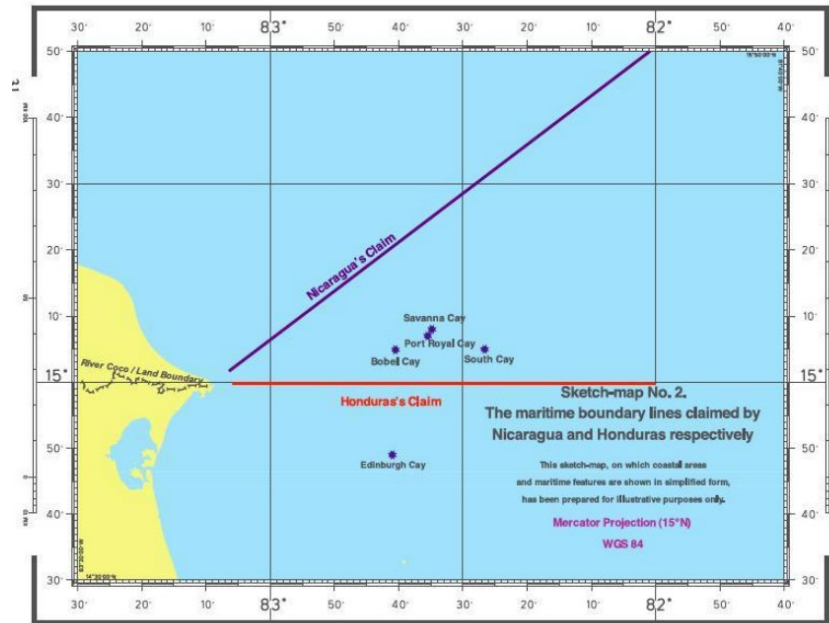
ICJ, *Nicaragua v. Honduras* (2007)

“Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily presumed.”

“A de facto line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary”.

Maritime boundary delimitation – tacit agreements (1)

Case concerning territorial and maritime dispute between Nicaragua and Honduras
(*Nicaragua v. Honduras*), 2007



Maritime boundary delimitation – tacit agreements (2)

- ***Peru v. Chile (2014)***

“The 1954 Special Maritime Frontier Zone Agreement does not indicate when and by what means that boundary was agreed upon. The Parties’ express acknowledgment of its existence can only reflect a tacit agreement which they had reached earlier [...] In this case, the Court has before it an Agreement which makes clear that the maritime boundary along a parallel already existed between the Parties. The 1954 Agreement is decisive in this respect. That Agreement cements the tacit agreement.”

- ***Ghana v. Ivory Coast (2017)***

– *“[E]vidence relating solely to the specific purpose of oil activities in the seabed and subsoil is of limited value in proving the existence of an all-purpose boundary which delimits not only the seabed and subsoil but also superjacent water columns [...] The conduct of the Parties with respect to matters other than oil concessions and operations seems to confirm the uncertainty as to the maritime boundary, and add little, if anything, to the proof of the existence of a tacit agreement.”*

General approach to maritime boundary delimitation (1)

- ***Barbados v. Trinidad and Tobago (2006)***

“The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result [...] This approach is usually referred to as the ‘equidistance/relevant circumstances’ principle ...”

General approach to maritime boundary delimitation (2)

1

Establish a provisional equidistance line

2

Consider factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result

3

Verify that the line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line

Baselines

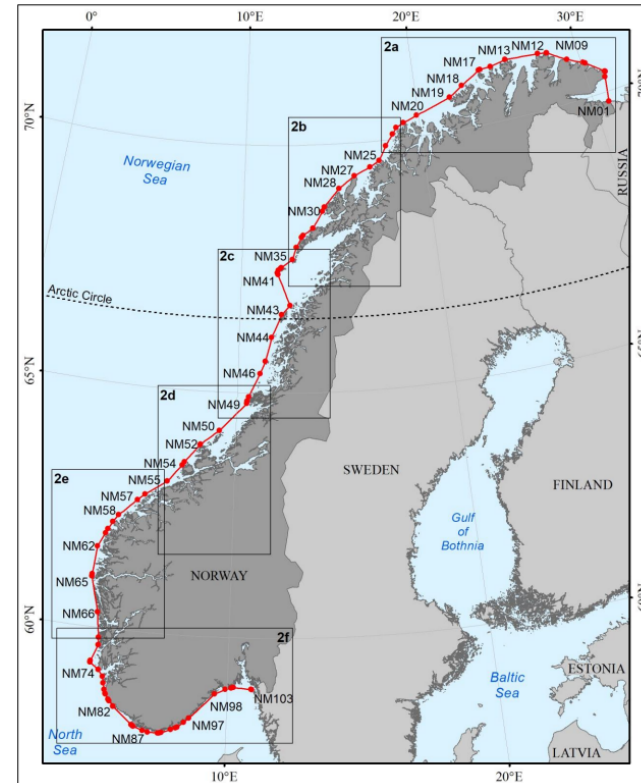
Normal baselines

- Low-water line: intersection of the plan of low water with the shore

Straight baselines

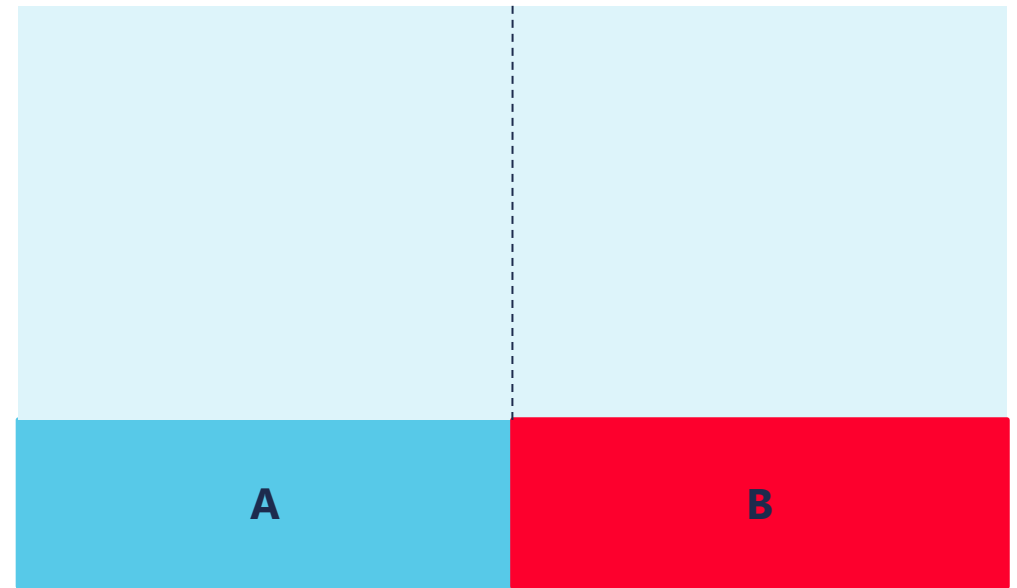
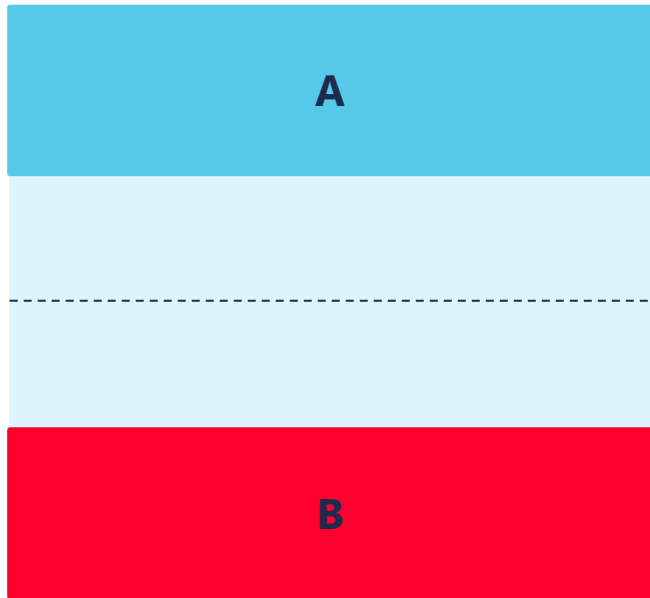
- Allowed when:
 - The coastline is deeply indented and cut into; or
 - If there is a fringe of islands along the coast in its immediate vicinity.
- Conditions:
 - Must not depart from the general direction of the coast;
 - Sea areas lying within the line must be sufficiently closely linked to the land domain to be subject to the regime of internal waters; and
 - Shall not be drawn to and from low-tide elevations and they shall not cut off the territorial sea of another State from the high seas or an EEZ.

Straight baselines in Norway

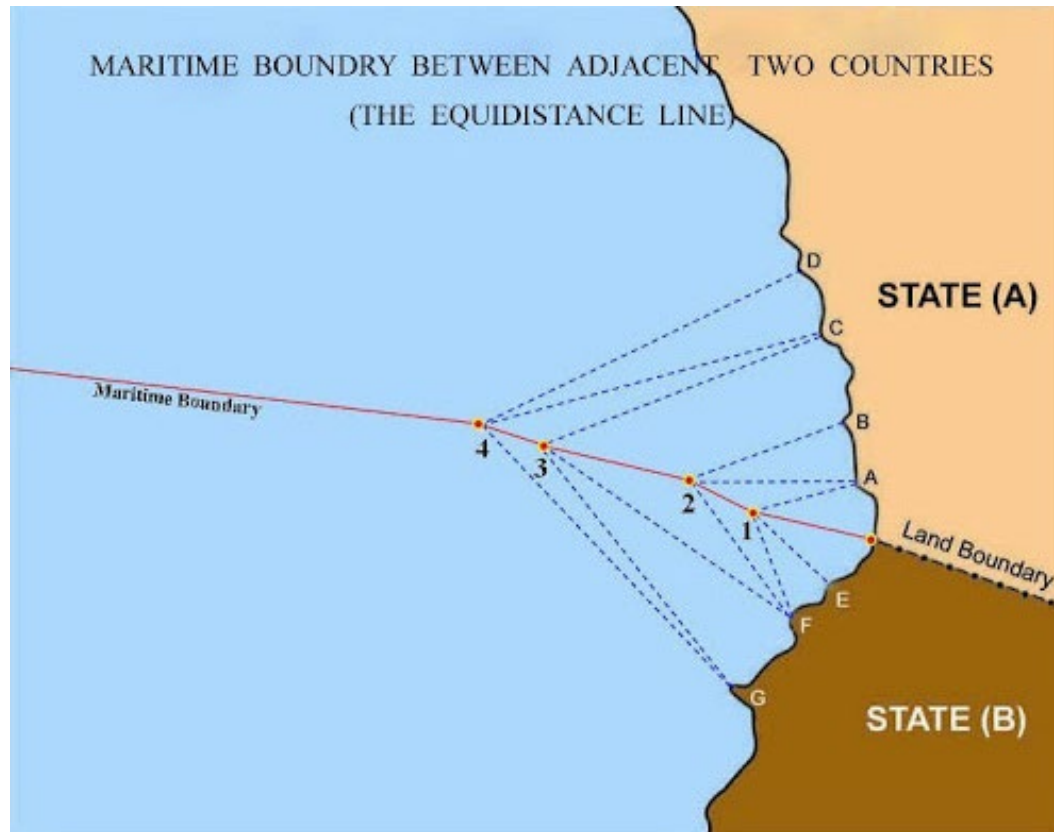


Equidistance/median lines (1)

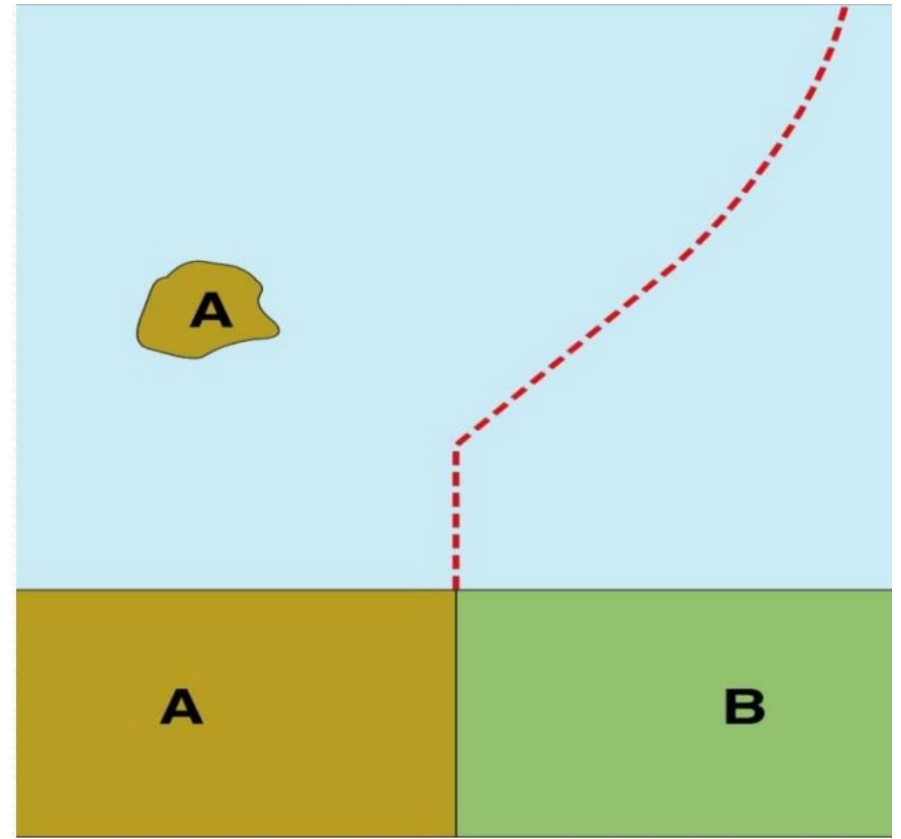
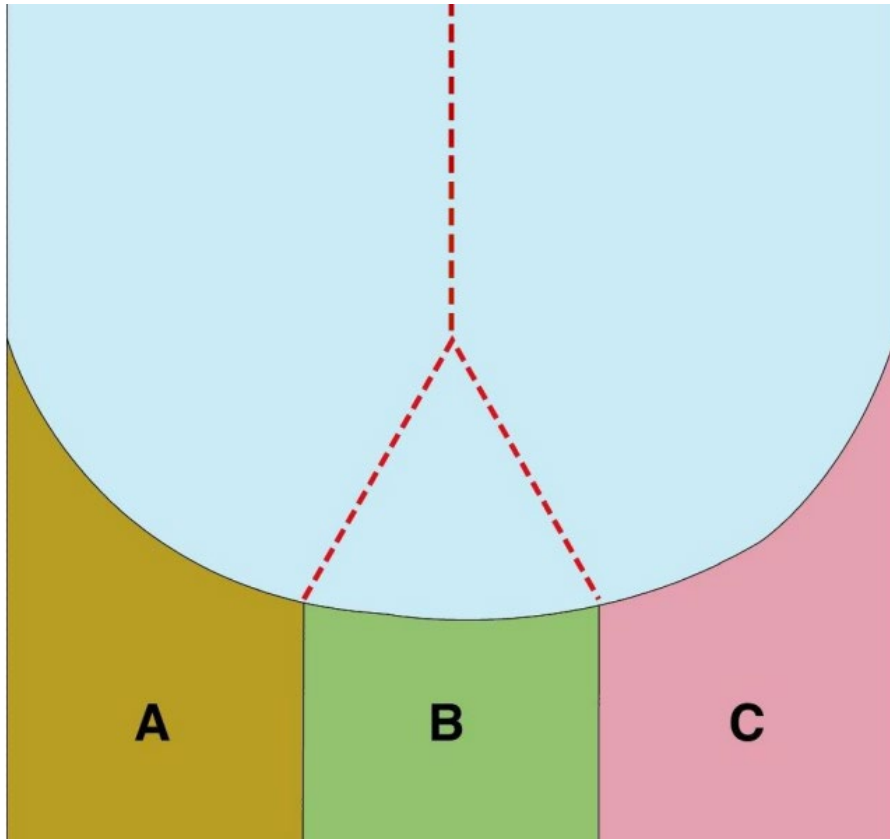
The median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured



Equidistance/median lines (2)



'Inequitable' equidistance?



North Sea Continental Shelf (1969)

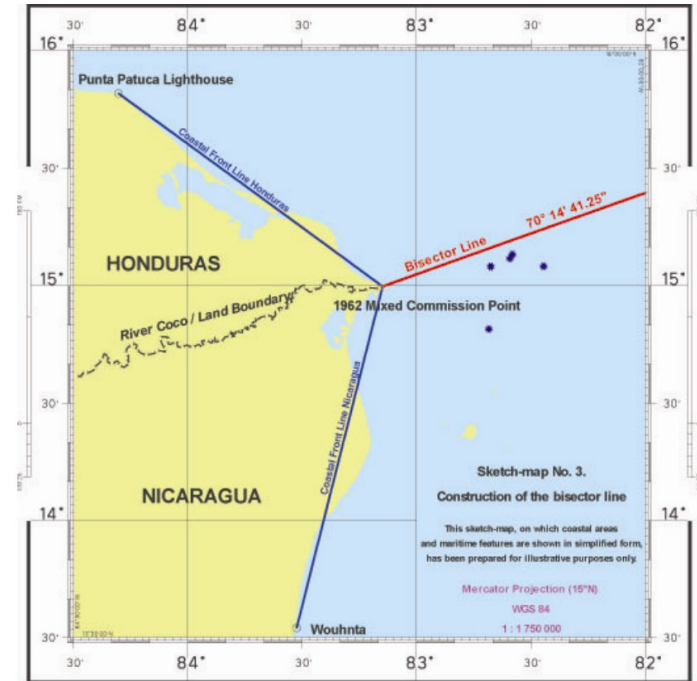


Alternative to the equidistance method (1)

The bisector line

Case concerning territorial and maritime dispute between Nicaragua and Honduras

- *Nicaragua v. Honduras (2007)*
 - Impossible to identify base points
 - Bisector of the angle created by lines representing the relevant mainland coasts
 - “Viable substitute method in certain circumstances where equidistance is not possible or appropriate”.

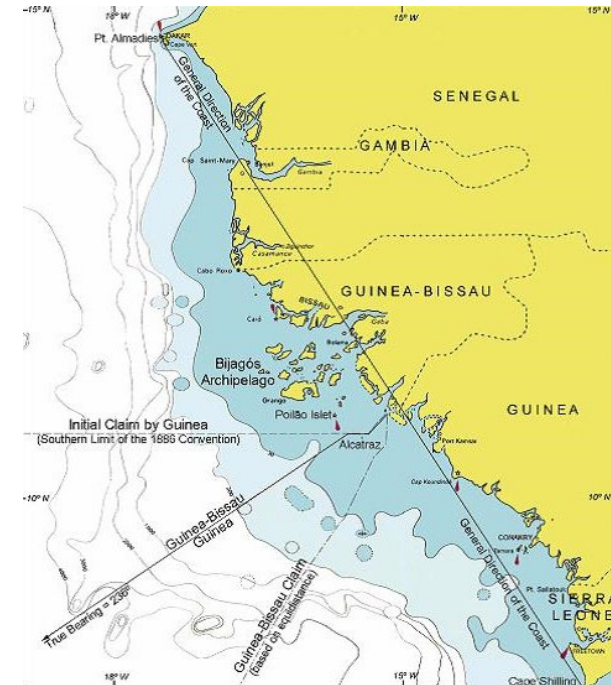


Alternative to the equidistance method (2)

Perpendicular

Delimitation of the maritime boundary between Guinea and Guinea-Bissau, 1985

- Perpendicular to the 'general configuration of the coast'
- Tribunal considered that the perpendicular reduced the risk of cut-off



Relevant circumstances in determining an equitable solution



Geographic factors

- Configuration of the coast
 - Length of the coast
 - Enclosed nature of the area
(*Ukraine v. Romania*, 2009)
- Islands



Historic rights



Geology and geomorphology



The previous conduct of the parties



Security concerns

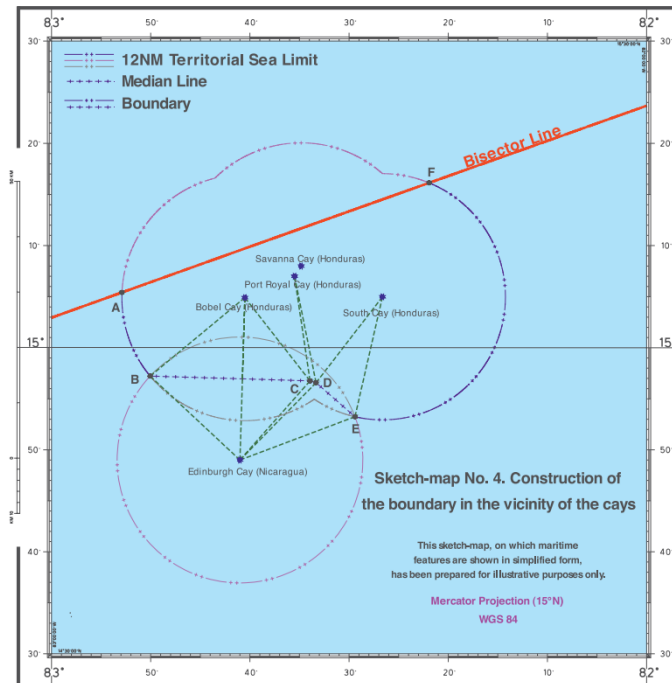


Economic factors

- Hydrocarbon resources
- Fisheries

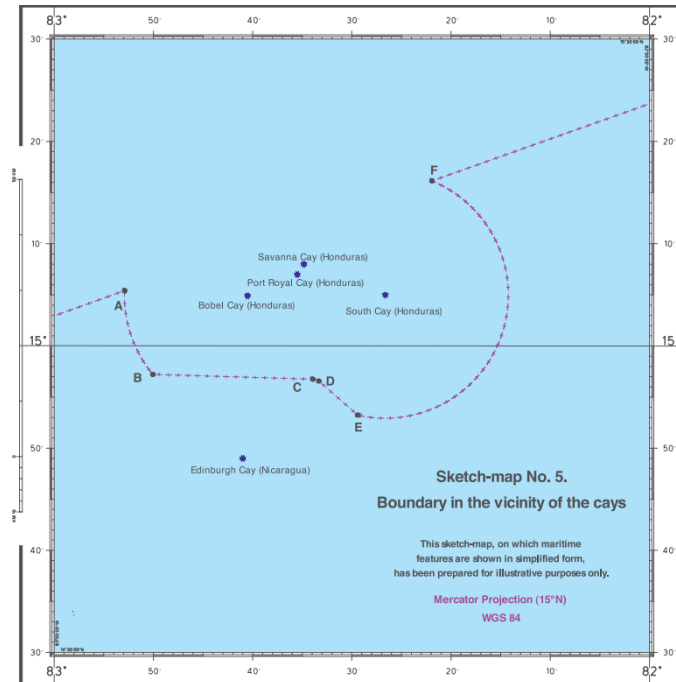
Maritime boundary delimitation (1)

*Case concerning territorial and maritime dispute between Nicaragua and Honduras
(Nicaragua v Honduras), 2007*



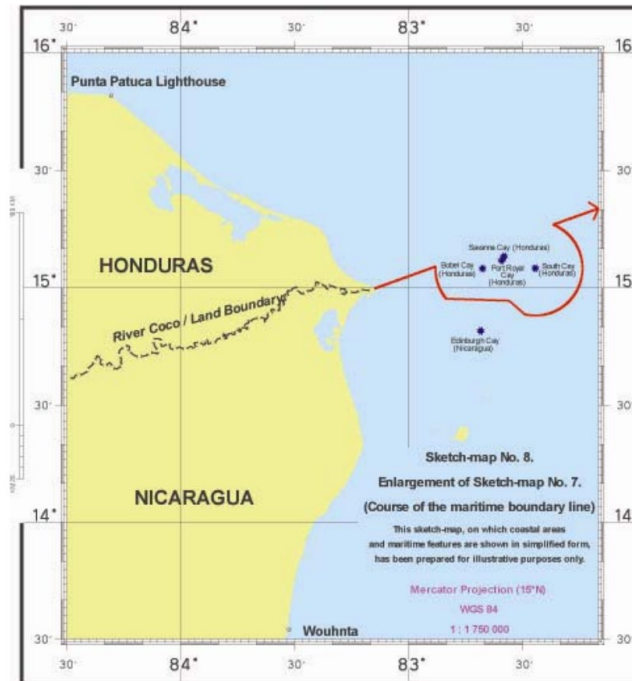
Maritime boundary delimitation (2)

*Case concerning territorial and maritime dispute between Nicaragua and Honduras
(Nicaragua v. Honduras), 2007*



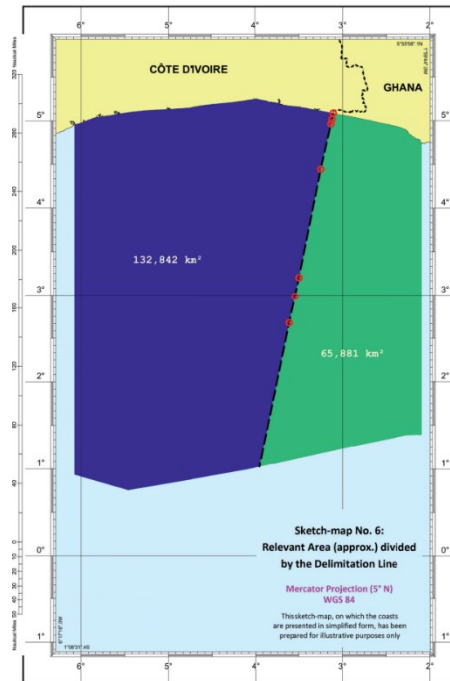
Maritime boundary delimitation (3)

*Case concerning territorial and maritime dispute between Nicaragua and Honduras
(Nicaragua v. Honduras), 2007*



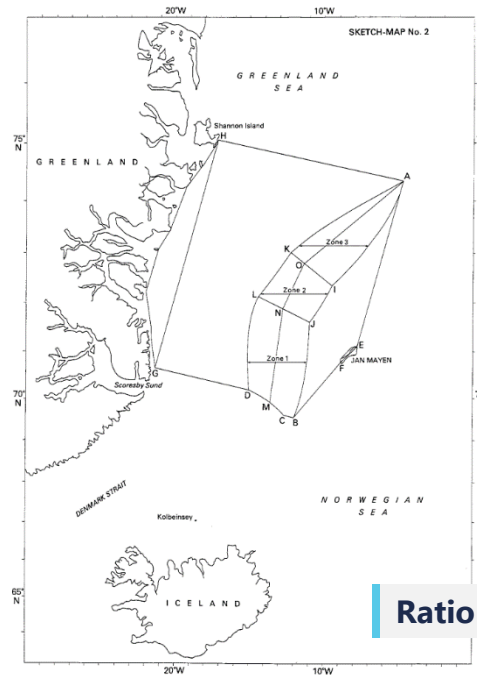
Absence of disproportion (1)

Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), 2017



Absence of disproportion (2)

Case concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway), 1993



Ratio of coastal lengths: 1 to 9.1



Territorial and maritime delimitation

Case study: Croatia v. Slovenia

Croatia v. Slovenia

Facts of the case

- Croatia and Slovenia gained their independence on 25 June 1991 after the dissolution of the Socialist Federal Republic of Yugoslavia
- **Territorial boundaries dispute:**
 - States agreed on the application of the *uti possidetis* principle;
 - However, conflicts in some land-registry books led to a territorial dispute over villages which both states claim sovereignty after the dissolution of Yugoslavia.
- **Maritime boundaries dispute:**
 - Sovereignty/delimitation over the Bay of Piran;
 - Delimitation of territorial sea; and
 - Junction to the High Seas.

Croatia v. Slovenia

Course of the land boundary

Arbitration agreement

- Arbitration agreement mandated Arbitral Tribunal to decide in accordance with international law
- Arbitral Tribunal: only legal rules applicable – rejection of historical, political, sociological arguments

Uti possidetis

- Arbitral Tribunal recognises *uti possidetis* as a general principle
- Application of *uti possidetis* not limited to decolonisation (Badinter Commission)
- Application further endorsed by Parties

- Borders between the former Republics of the SFRY are decisive and to be determined
- Significant date: date of independence of both Parties (25 June 1991)
- Evidence: laws of the SFRY, cadastres and maps

Effective control

- *Effectivité* as subsidiary principle
- Effective control may support rather than constitute title
- Evidence for effective control: wide range of acts (legislative, executive, judicial)

Croatia v. Slovenia

Course of the maritime boundary (1)

The Bay of Piran

- The bay had the status of internal waters prior to the dissolution of the SFRY (closed bay)
- The bay retained that status via State succession
- Delimitation of internal waters are to be made on the same principles as applicable to the delimitation of land territories (*uti possidetis*)
- Tribunal considered the *effectivités* of both Parties at the date of independence



Croatia v. Slovenia

Course of the maritime boundary (2)

Delimitation of the territorial sea

- Provisional equidistance line
- Adjusted the line because the configuration/concavity of the coast so as not to leave Slovenia disproportionately 'boxed-in'

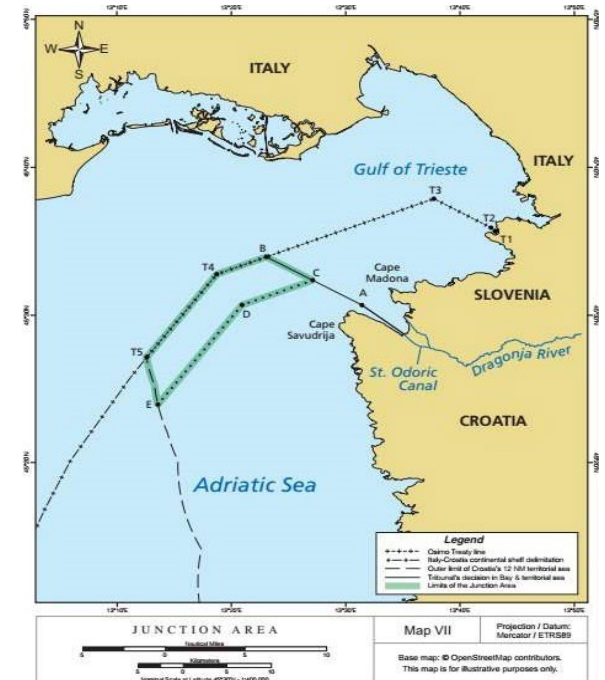


Croatia v. Slovenia

Course of the maritime boundary (3)

Junction to the High Seas

- Specific mandate of the Arbitral Tribunal under the Arbitration Agreement
- Applicable law international law, equity, good neighbourly relations
- Special area in which freedoms of communication between the high seas and the territorial sea of Slovenia (freedom of navigation, freedom of overflight, etc)





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