



Schulich School of Law
Marine and Environmental Law Institute

Maritime Boundary Delimitation: Overview of Legal Principles

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China – ASEAN Academy – Nov. 11 2017



OUTLINE

- Selection of Issues Only
- Terminology
- Baseline Issues
- Delimitation Principles and Common Issues



Terminology

- **Delineation** of limits – eg. territorial sea, EEZ
- **Determination** of outer limits of continental shelf
- **Delimitation** – process of setting boundary or boundaries where overlap in claims between and among states
- **Opposite and Adjacent Coasts**
- **Entitlement vs Allocation**

Jurisdictional Zones

- Internal Waters

- Territorial Sea

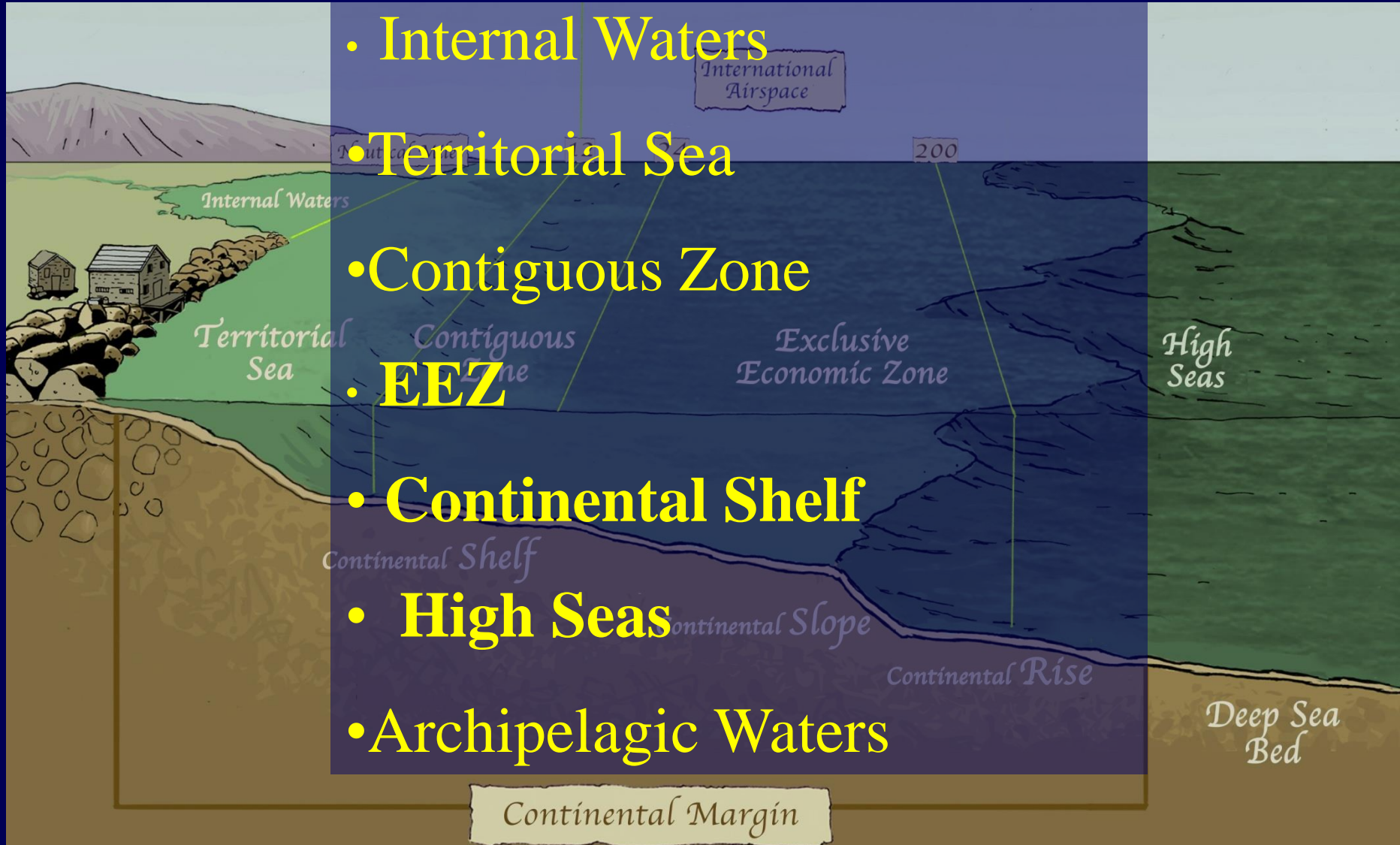
- Contiguous Zone

- EEZ

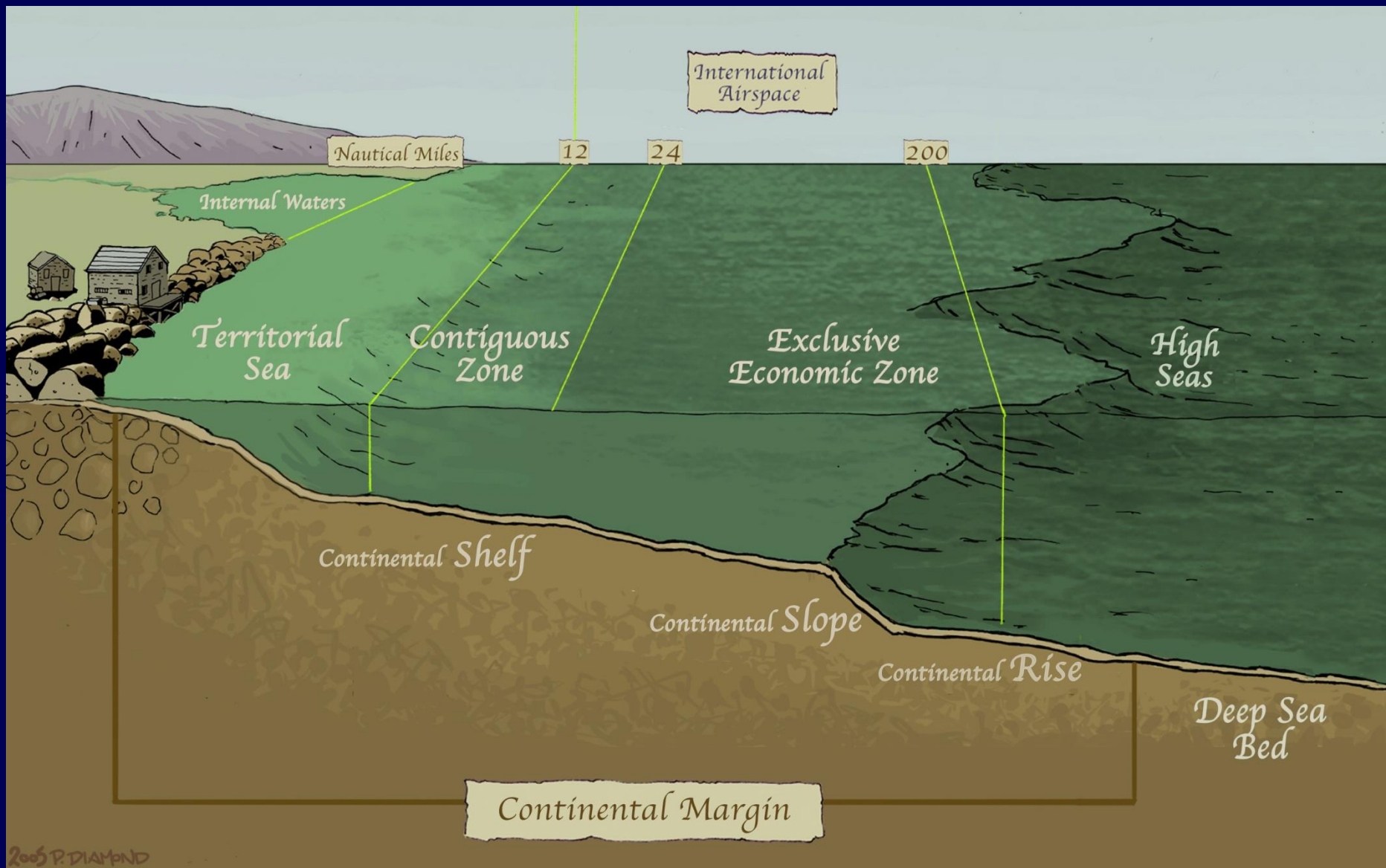
- Continental Shelf

- High Seas

- Archipelagic Waters



Jurisdictional Zones





Coastal Baselines

- Purpose – measure other zones from here
 - Inside – internal waters
 - **NOT** necessarily applied in delimitation
- LOS 1982 made real progress
 - Technical rules in Arts. 5-14: bays, rivers, harbour works etc
 - Default position is low water line on coast

- Common Problems
 - Small rocks, islets used as basepoint
 - Tendency to ignore, discount **in delimitation** even if valid basepoint (eg Libya/Malta, Qatar/Bahrain)
 - Straight baselines
 - LOS 1982 sets out some “rules”
 - Bays, harbours etc
 - Valid for Indented coastlines and fringing islands (Anglo/Norwegian Case)
 - Note archipelagic baselines special case



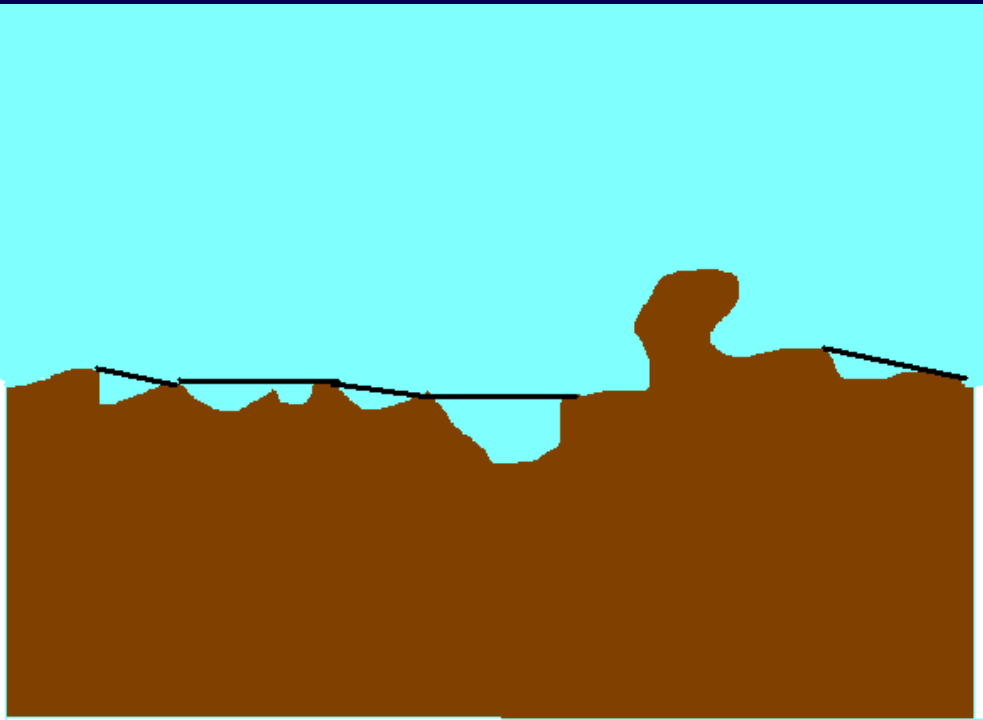
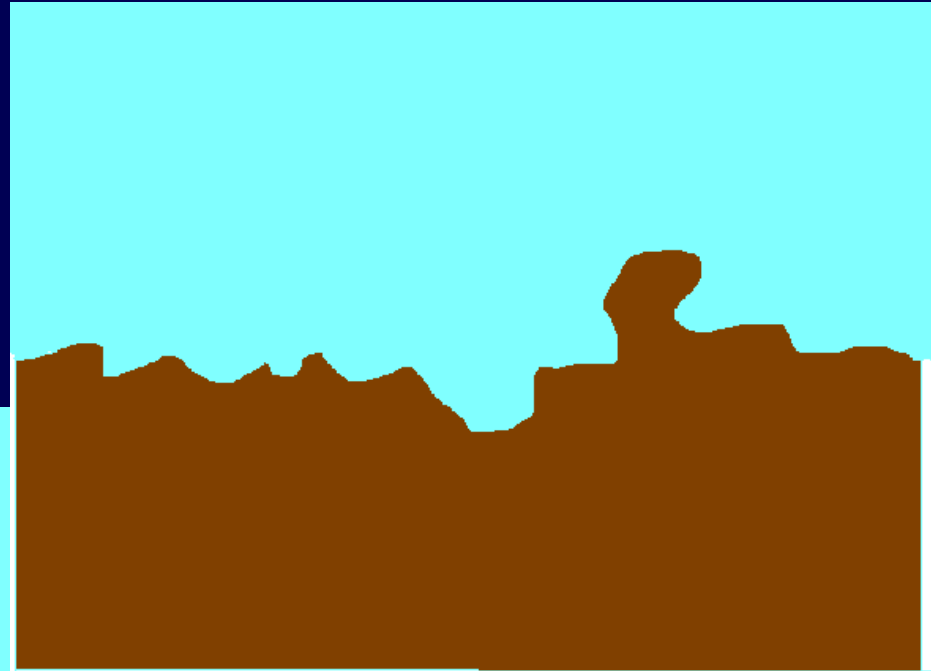
Illustrative Map Showing the Archipelagic Baseline for The Commonwealth Of The Bahamas



Archipelagic Baselines of The Bahamas

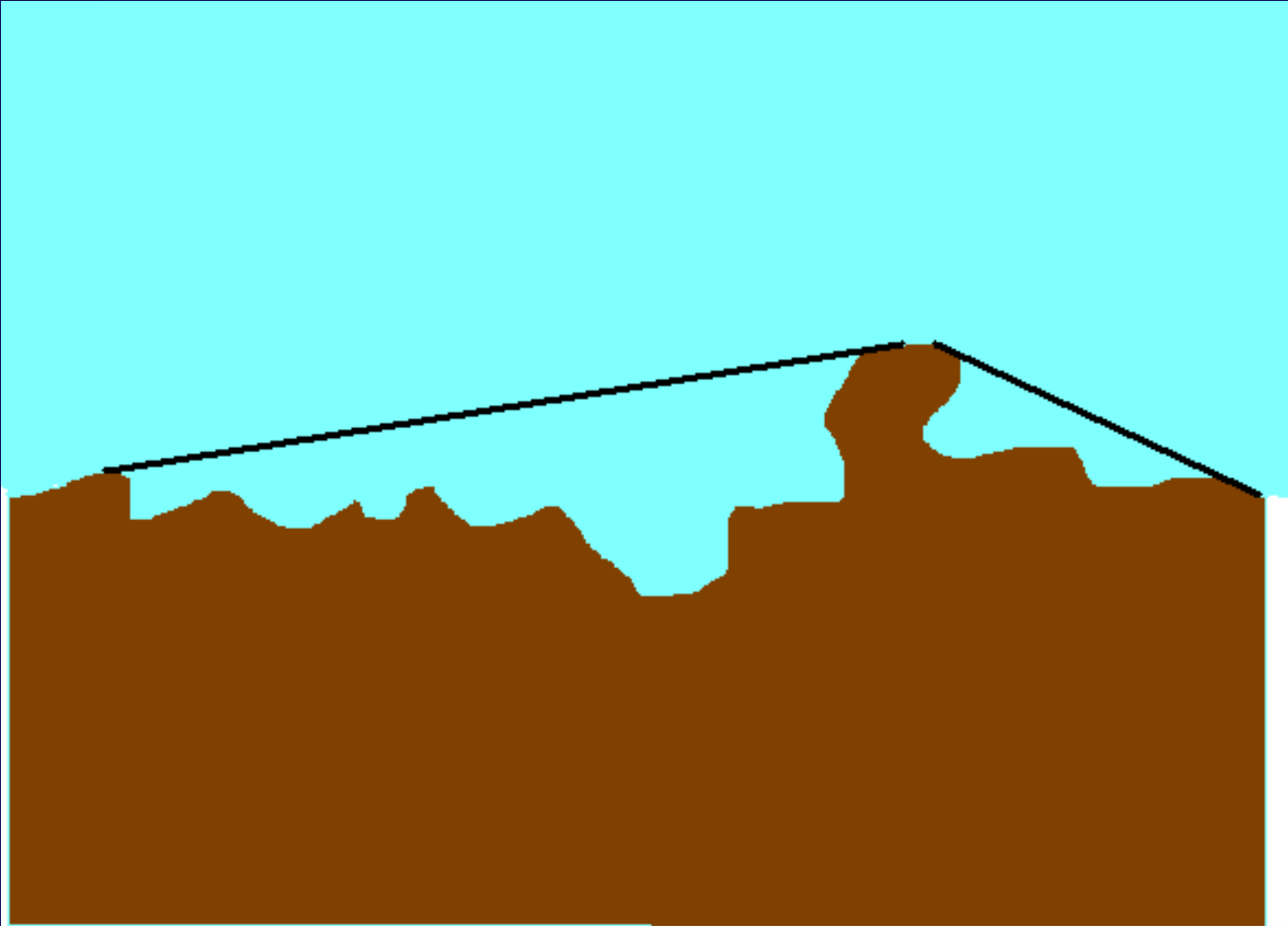


Baseline Problems 1



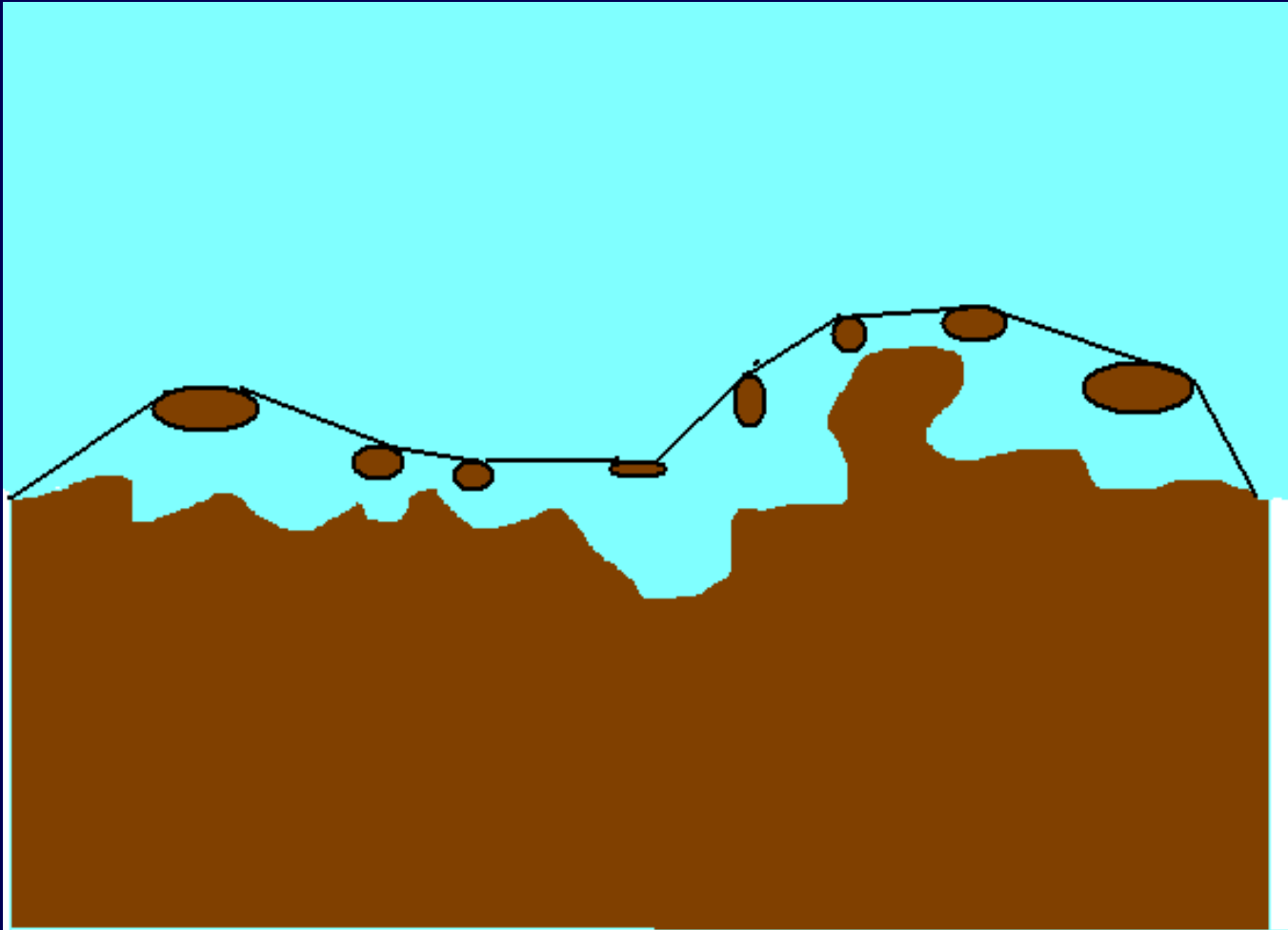


Baseline Problems 2



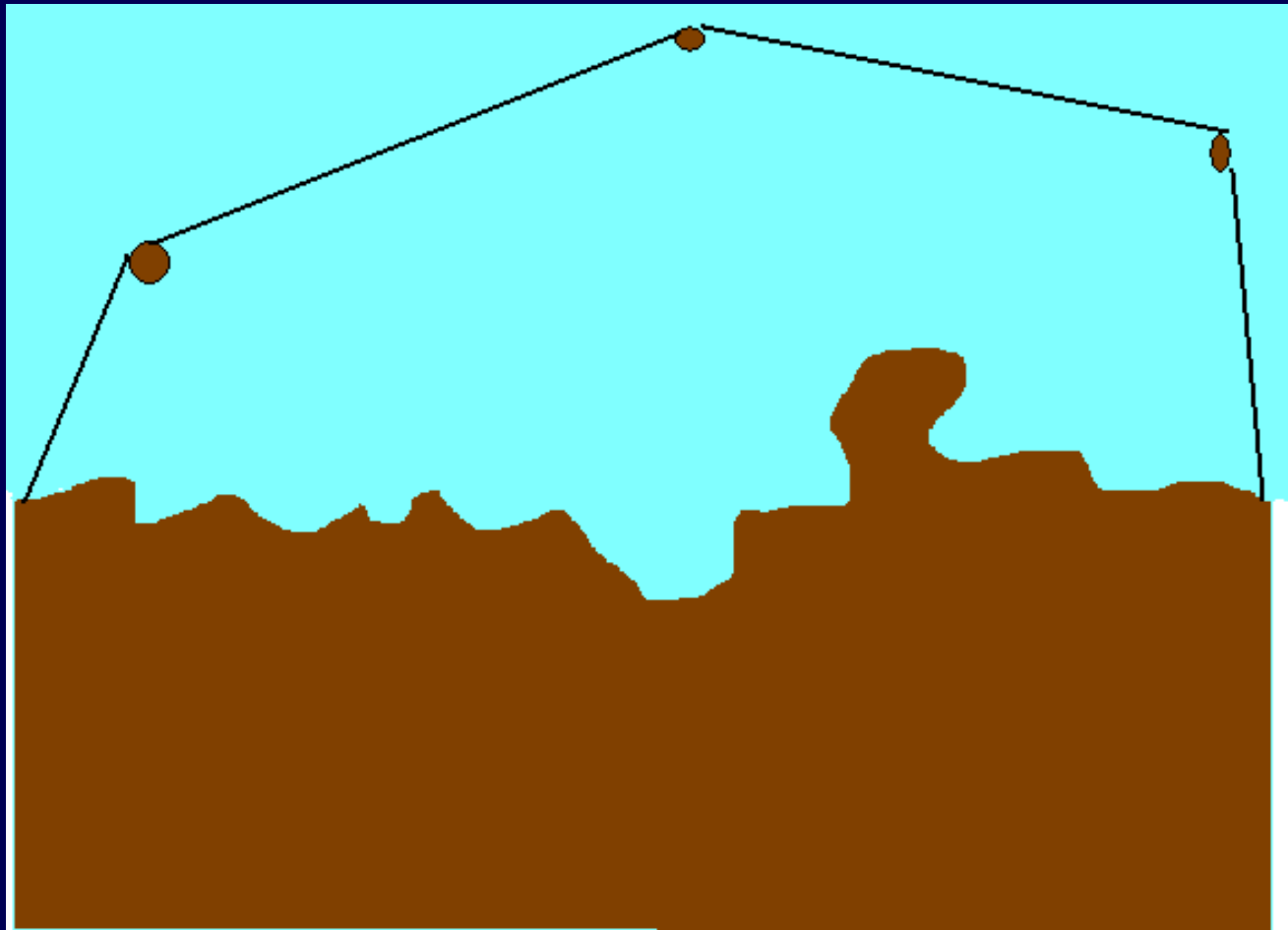


Baseline Problems 3



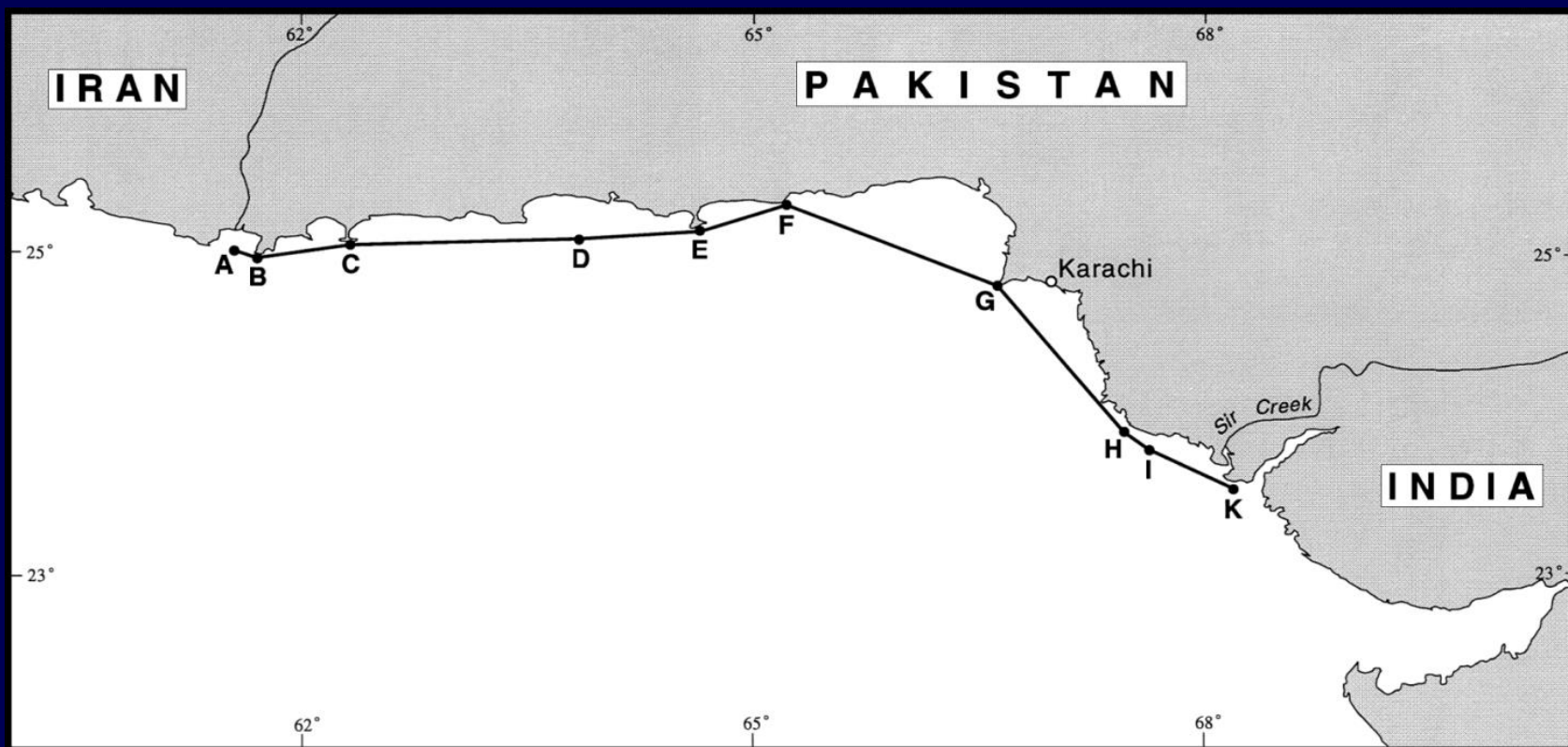


Baseline Problems 4





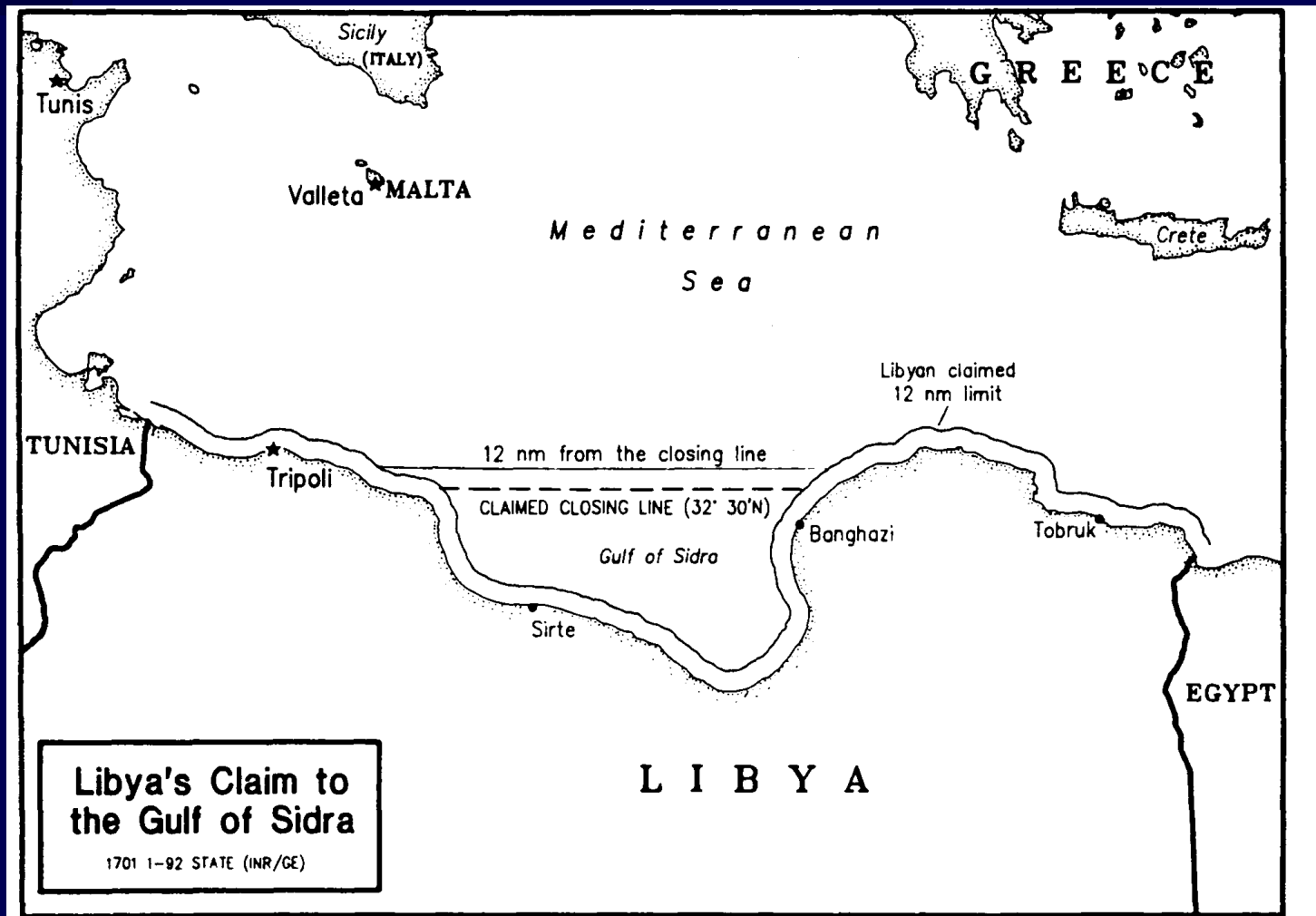
Pakistan Baseline



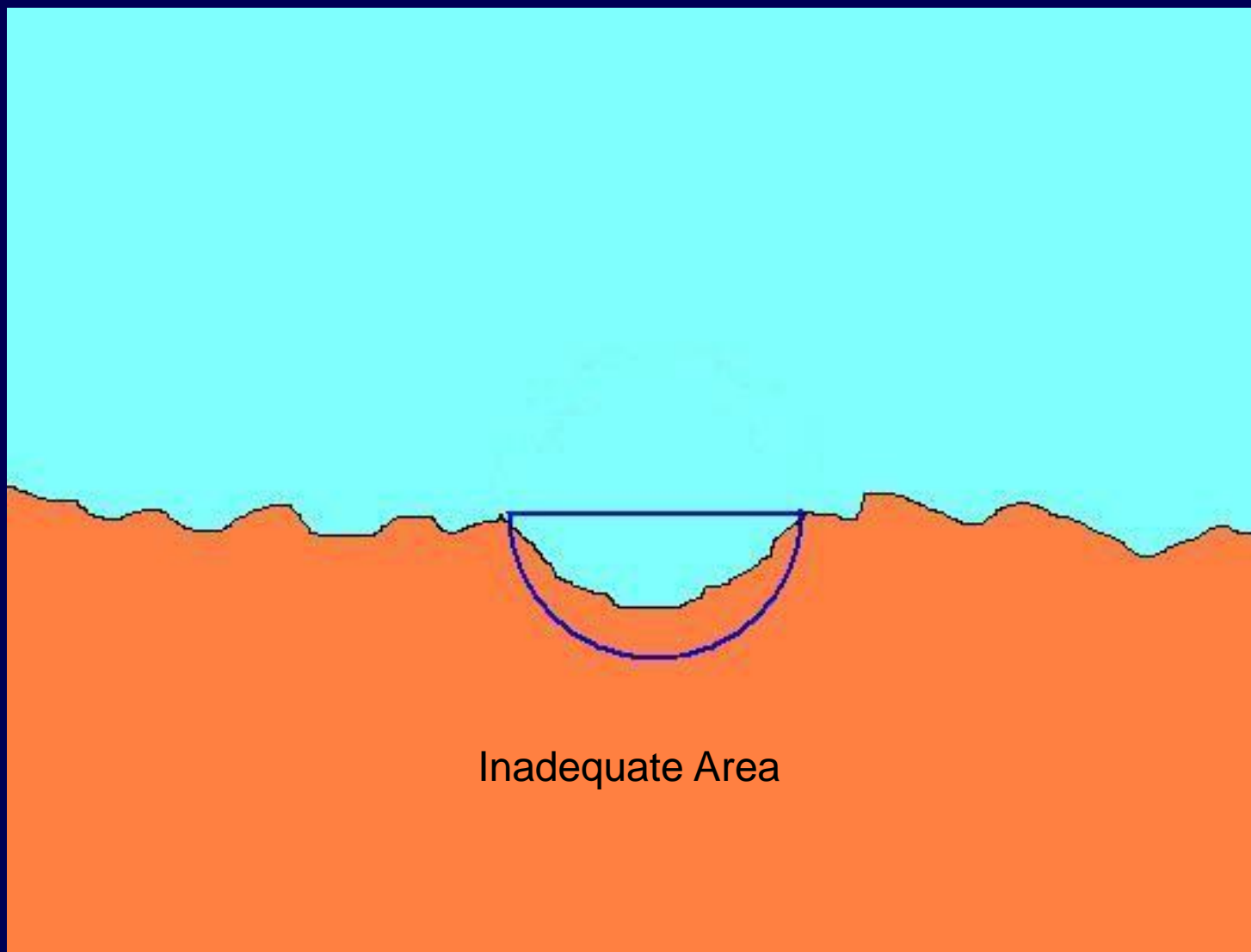


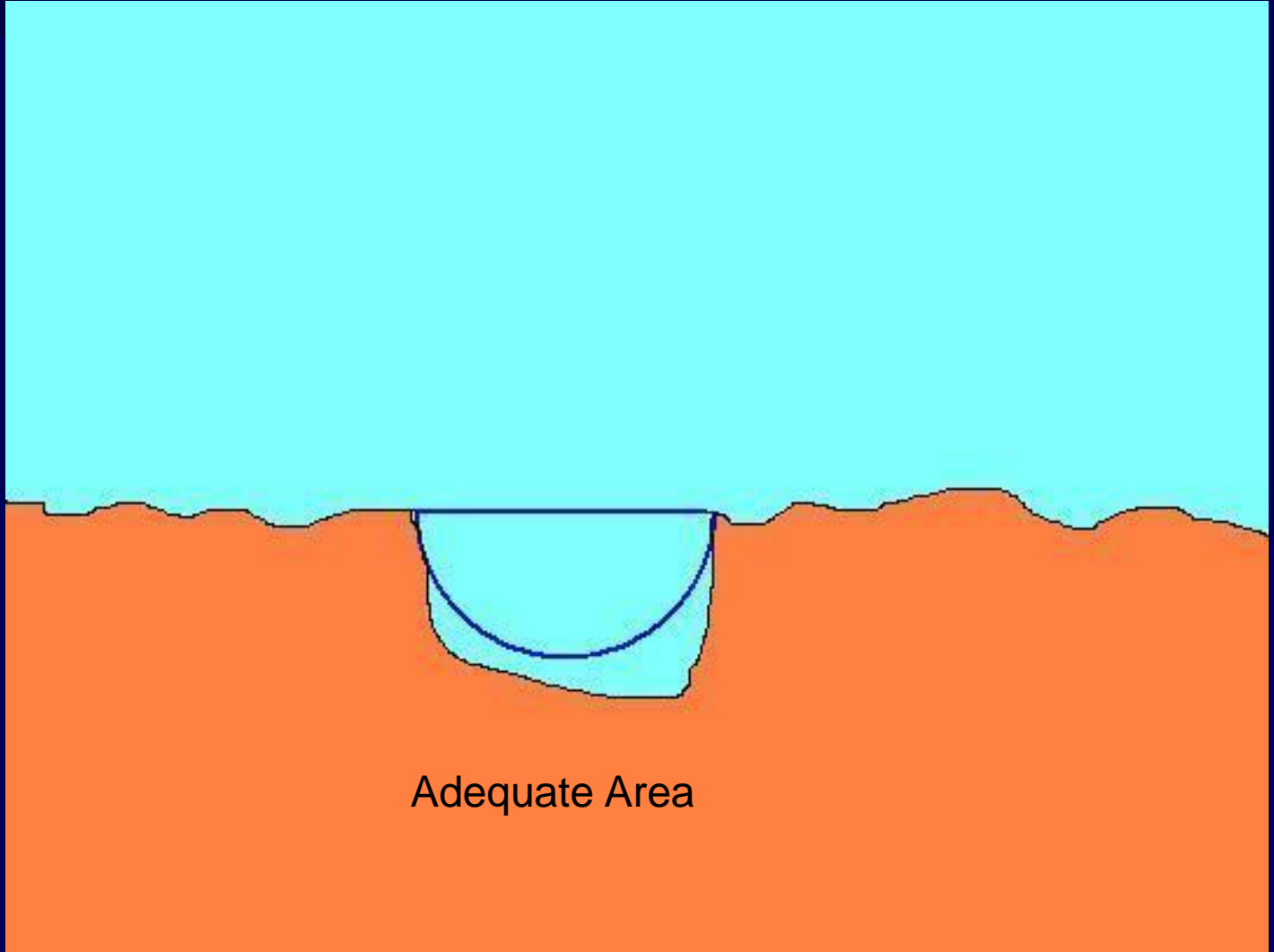
Particular Rules

- Bays – Article 10
 - “Well-marked” indentations in coast – not “mere curvature”
- Gulf of Sidra example
- Non-Compliant *Unless* Accepted As “Historic” Bay



In any event: legal bay must have area equal to or greater than semi-circle drawn with mouth of bay as diameter (Art. 10(2))

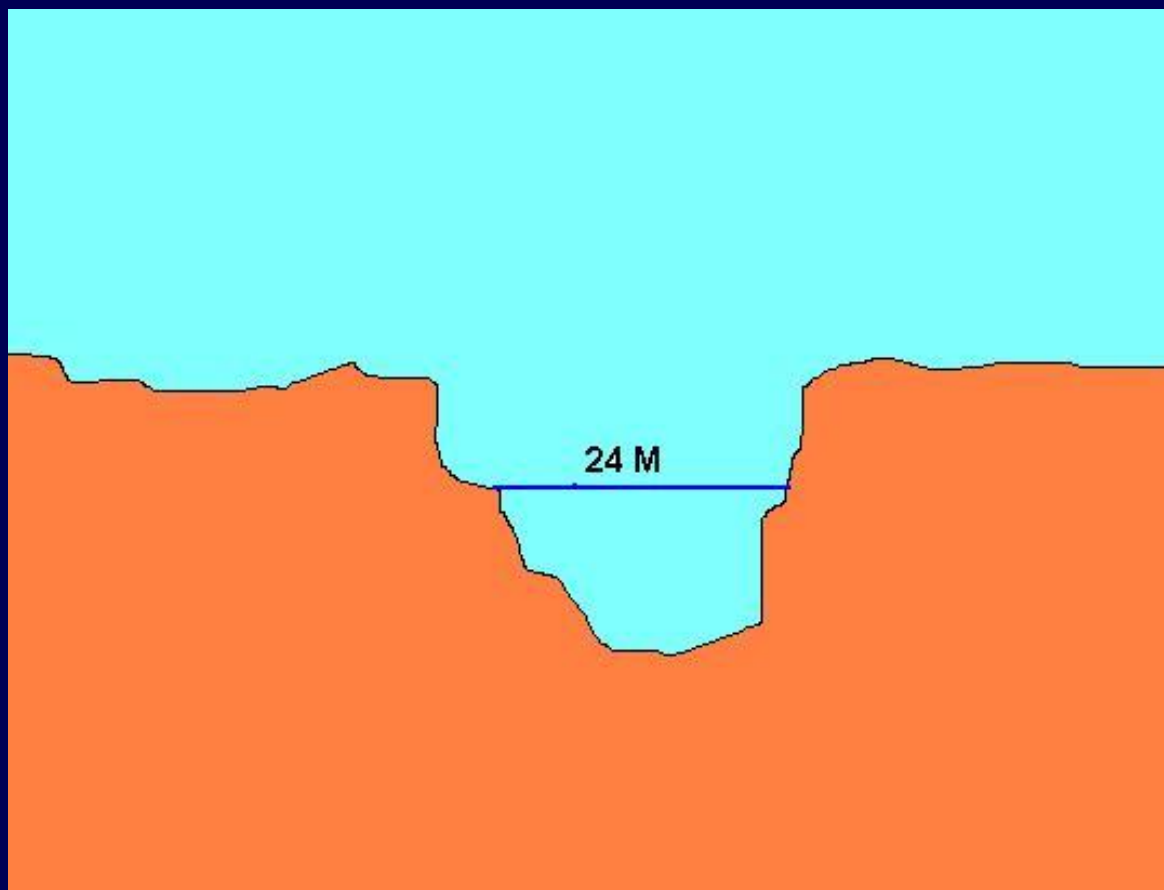






Bays cont'd

- Where mouth of bay is less than 24 M (minus any islands in mouth), draw closing line at first points where it meets this limit





Bays cont'd

- These restrictions do not apply to “so-called ‘historic’ bays” (Art. 10(6))
 - Rely on long practice, acceptance by international community
 - Eg – St. Peter the Great Bay, Hudson Bay
- Also – general rules on straight baselines may still permit bay closure

Maritime Boundary Delimitation: Treaty Law

1958 Geneva Convention on Continental Shelf: Article 6

- First: obligation to settle **by agreement**.
- If not:
 - “In the absence of agreement, and **unless another boundary line is justified by special circumstances**, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines...”
- Shelf boundaries only

- So-called “Equidistance-Special Circumstances” Rule
 - **Seemed** to give primacy to equidistance (i.e. equidistance “unless justified by special circumstances”)
 - BUT Subsequent cases tended to discount this as rule of custom – or even treaty
 - Beginning with *North Sea Cases* (1969) and *Anglo-French Arbitration* (1977)

LOS 1982

EEZ Article 74

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be **effected by agreement on the basis of international law**, as referred to in Article 38 of the Statute of the International Court of Justice, **in order to achieve an equitable solution.**

Shelf – Article 83 – same wording

Territorial Sea – repeats 1958 – **median line dominates**

- Shelf & EEZ: Not much guidance – equity of **result** is key
- BUT: That is not all. To be effected on “basis of international law” – which includes *customary law*



Jurisprudence

- Widely litigated issue
 - Numerous tribunals: International Court of Justice and *ad hoc* tribunals
 - Note: important to remember that difficult cases tend to be litigated – otherwise negotiated: may skew the principles

Litigated Boundaries

North Sea Cases	Cont. Shelf	I.C.J.1969
Anglo -French	Cont. Shelf	Arbitration 1977
Tunisia-Libya	Cont. Shelf	I.C.J. 1982
Canada- US (<i>Gulf of Maine</i>)	Single Maritime Boundary (SMB)	I.C.J. Chamber 1984
Guinea – Guinea Bissau	Cont. Shelf and TS	Arbitration 1985
El Salvador-Honduras (Nicaragua Intervening)	Land Boundary, Islands, “Status of Waters”	I.C.J. 1992
Libya-Malta	Cont. Shelf.	I.C.J. 1986
Canada-France (<i>St. Pierre and Miguelon</i>)	“Single” Maritime Boundary	Arbitration 1992

Denmark-Norway (<i>Jan Mayen</i>)	SMB	I.C.J. 1993
Qatar-Bahrain	SMB – in sectors Sovereignty	I.C.J. 2001
Cameroon-Nigeria	Land and SMB	I.C.J. 2002
Eritrea-Yemen	Islands and SMB	Arbitration 1998, 1999
Barbados-Trinidad & Tobago	SMB	LOS Annex VII Arbitration 2006
Guyana-Suriname	SMB	LOS Annex VII 2006
Nicaragua – Colombia	Territory & SMB	I.C.J. 2007
Romania v Ukraine	SMB	I.C.J. 2009
Bangladesh v Myanmar	SMB (outer shelf)	ITLOS 2012
Nicaragua v Honduras	SMB (outer shelf?)	I.C.J. 2012



Croatia/Slovenia	SMB and land	Arbitration, pending (Withdrawal of Croatia
Bay of Bengal (India/Bangladesh)	SMB	Annex VII 2014
Delimitation in Indian Ocean, Kenya/Somalia	SMB	I.C.J. Pending
Nicaragua/Colombia	Cont. Shelf beyond 200	I.C.J. Pending
Costa Rica/Nicaragua	SMB plus land boundary	I.C.J. Pending
Ghana/Cote D'Ivoire	SMB, Preliminary Measures	Annex VII to ITLOS Chamber – Oct 2



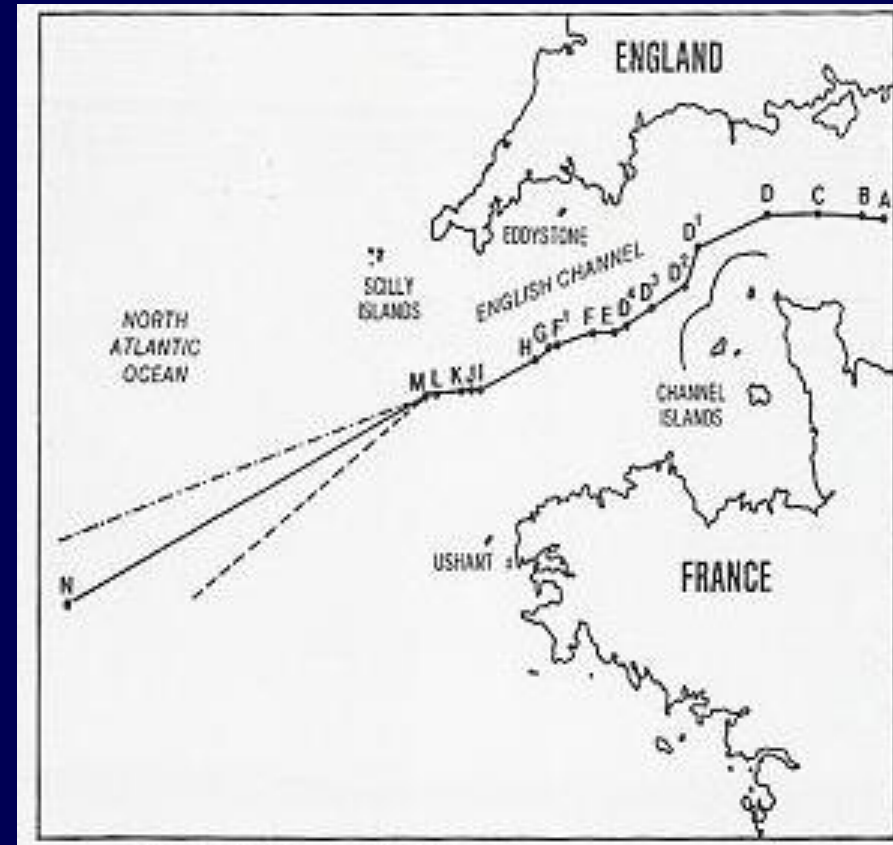
- **North Seas Cases (1969)**
- Fundamental approach: delimit **in accordance with equitable principles and taking account of relevant circumstances** to leave each party as much of **natural prolongation** as possible (was shelf boundary)
- 1958 Convention not applied





- **Anglo-French Arbitration 1978**

- Merger of equidistance-special circles and equitable principles/relevant circles.
- 1958 applicable
- Equity of result dominates (formally)



Gulf of Maine: 1984

- First litigated “**Single**” boundary (seabed, water)
- Stressed process:
 - **Define relevant area** and coasts
 - Determine **equitable principles** (eg. no “cut-off, zone blocking, proportionality)
 - Set **equitable criteria** (eg. equal division of maritime area)
 - Choose **practical method**
 - Check equity of result

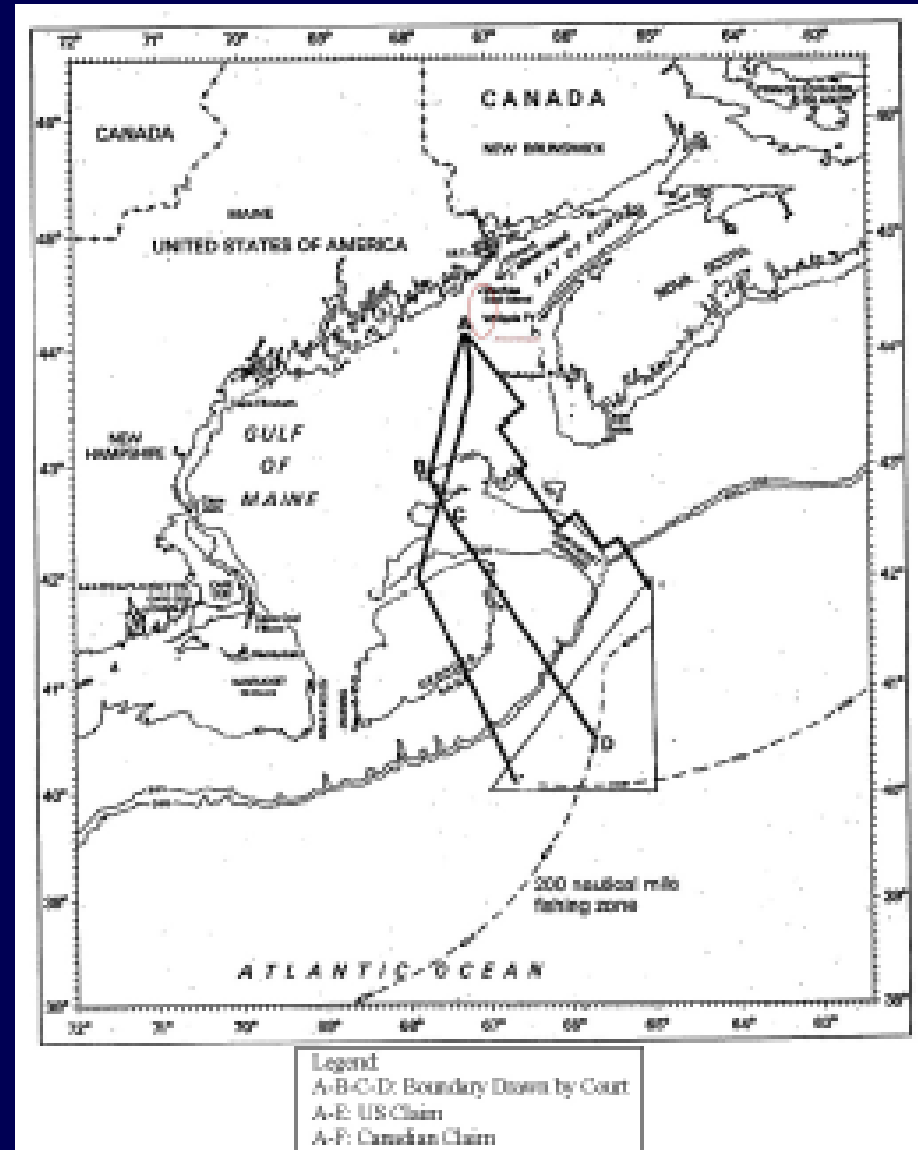
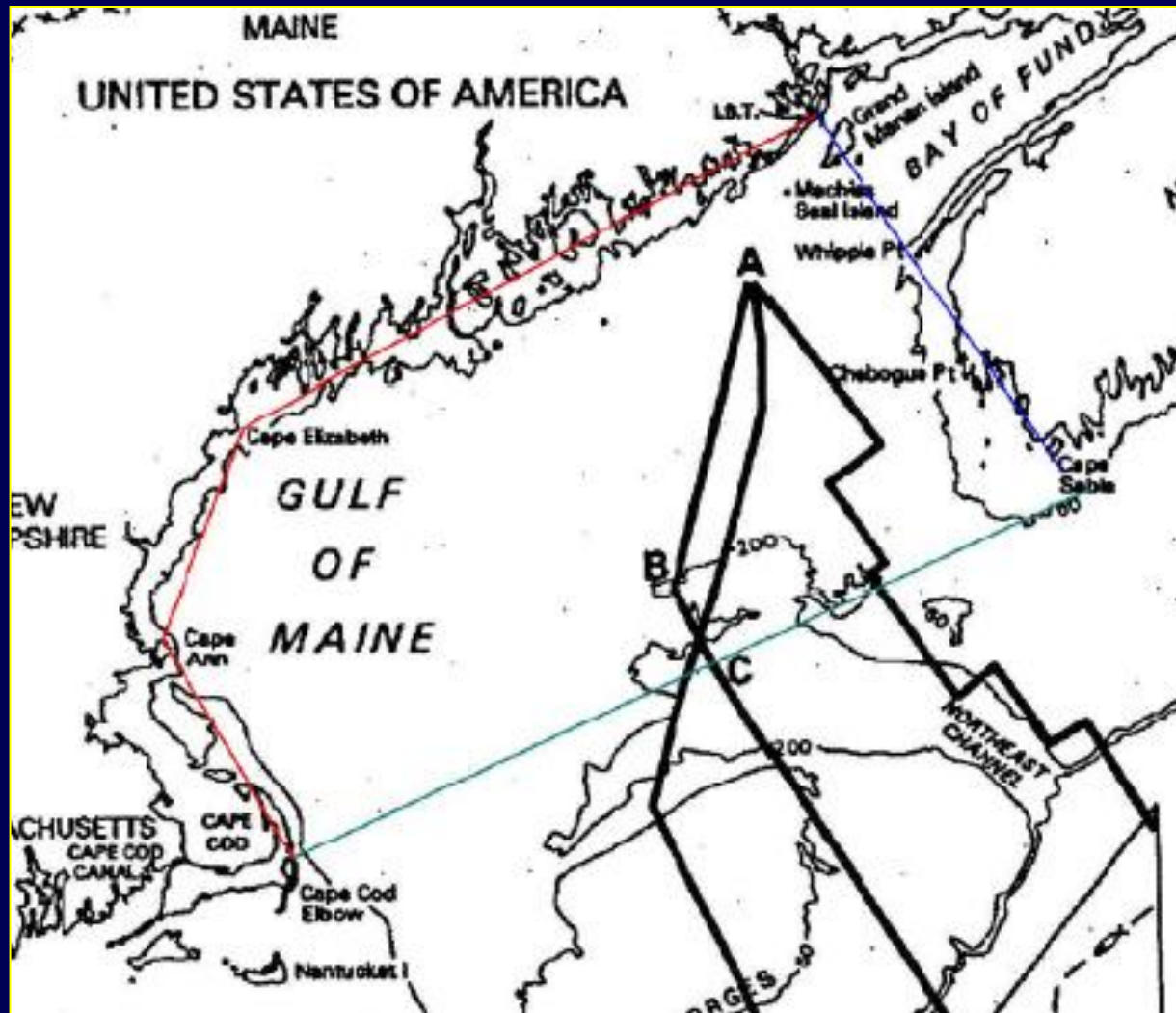
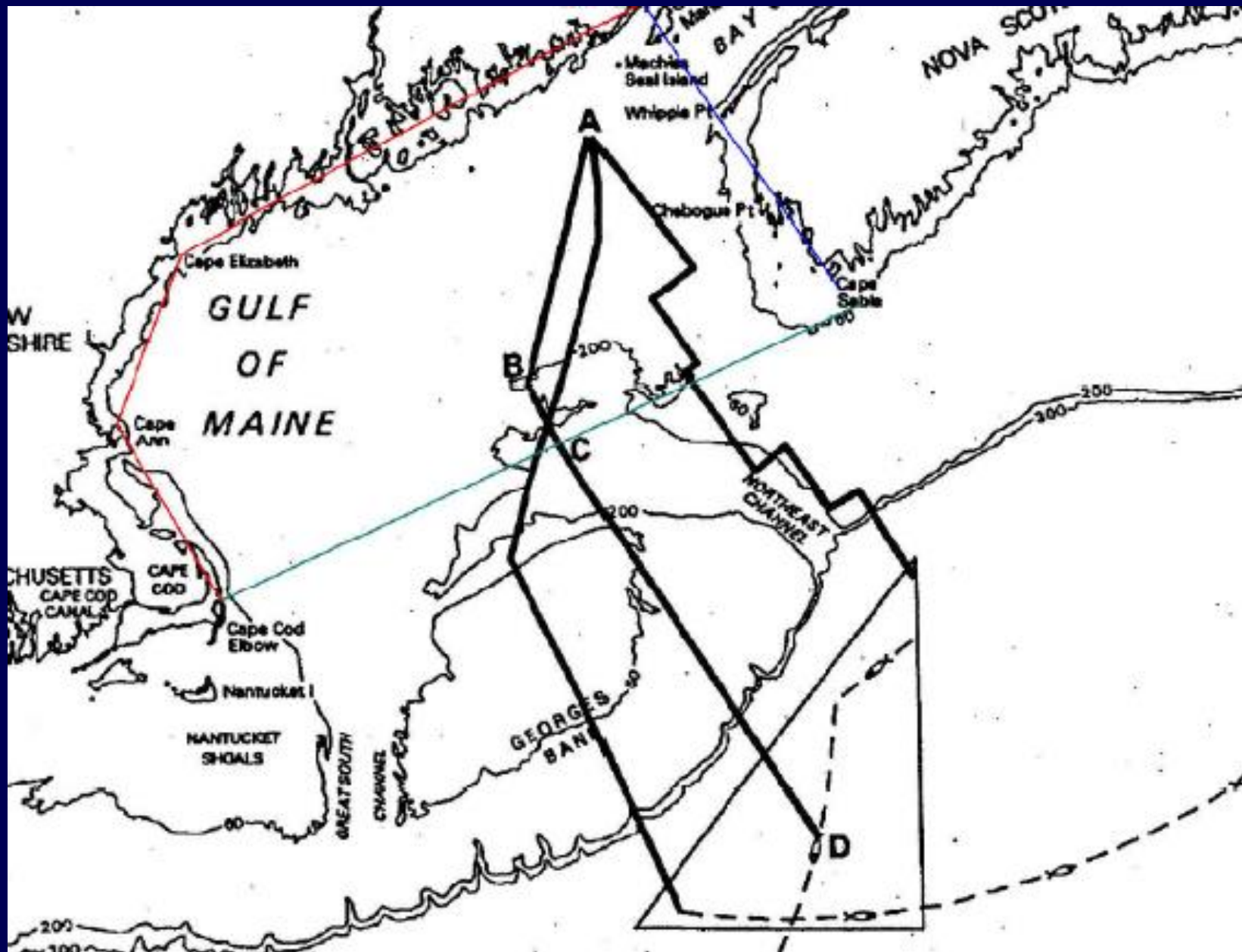


Figure 2. Gulf of Maine Boundary: Chamber of the ICJ (1984)

Relevance: Geographical Relationship





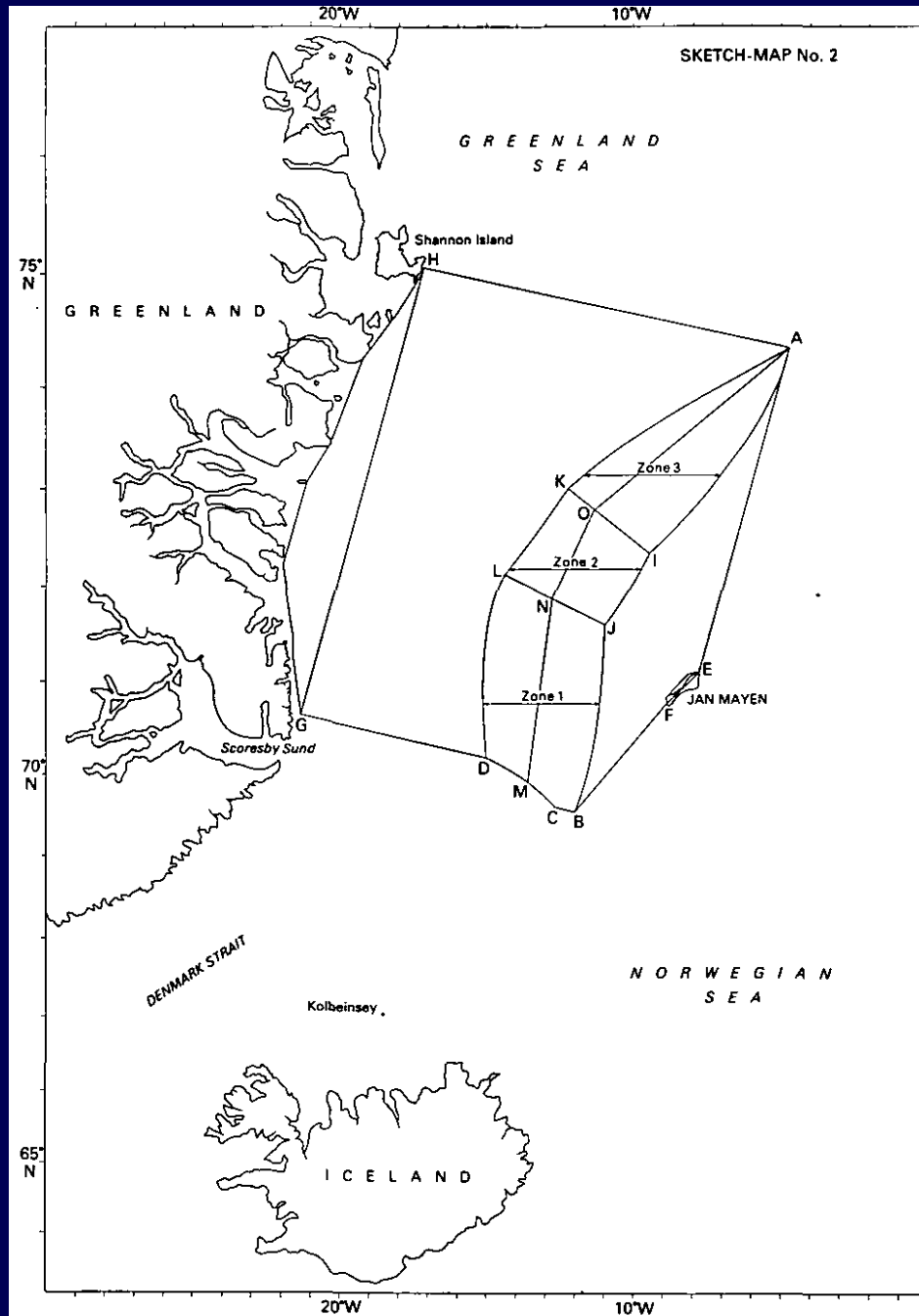
Outside Gulf – No real coastal relationship

Summary of Impact Up to 1990s

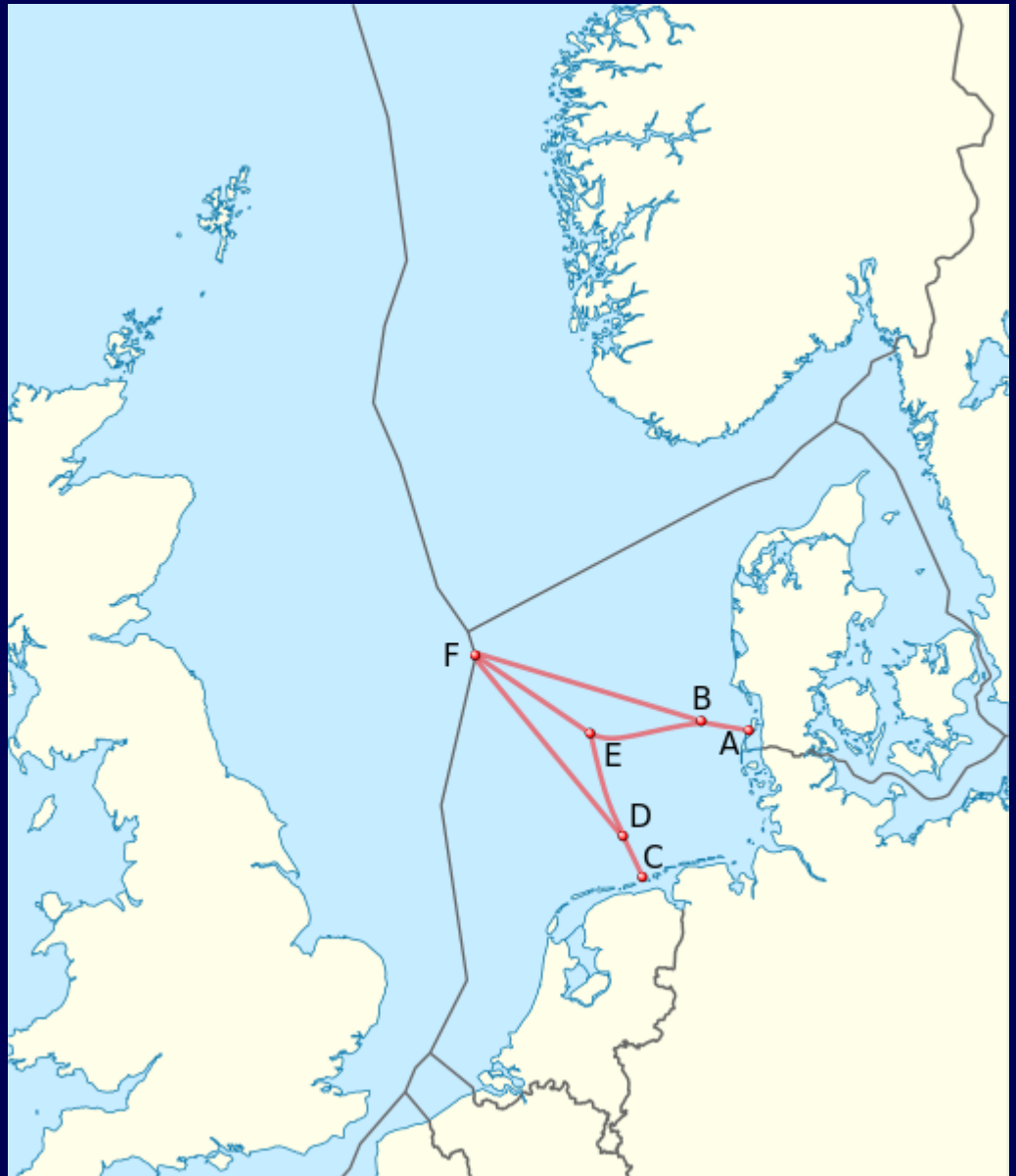
Definition of equitable principles (determined with “relevant circumstances”):

- Highly dependent upon **geography (subjective)**
 - **Proportionality** of coasts to maritime area (but – sometimes principle, sometimes “check”. Not necessarily mathematical exercise)
 - “Cut-Off”
 - **Zone blocking** – eg.
 - Relationship of coasts to each other is central circumstance – especially where **other boundaries**
- Mostly rejected factors such as land-mass, fisheries, population, economic impact etc.

Jan Mayen Case – Proportionality of Coastlines to maritime Area



North Sea – Classic
Case of Zone Blocking

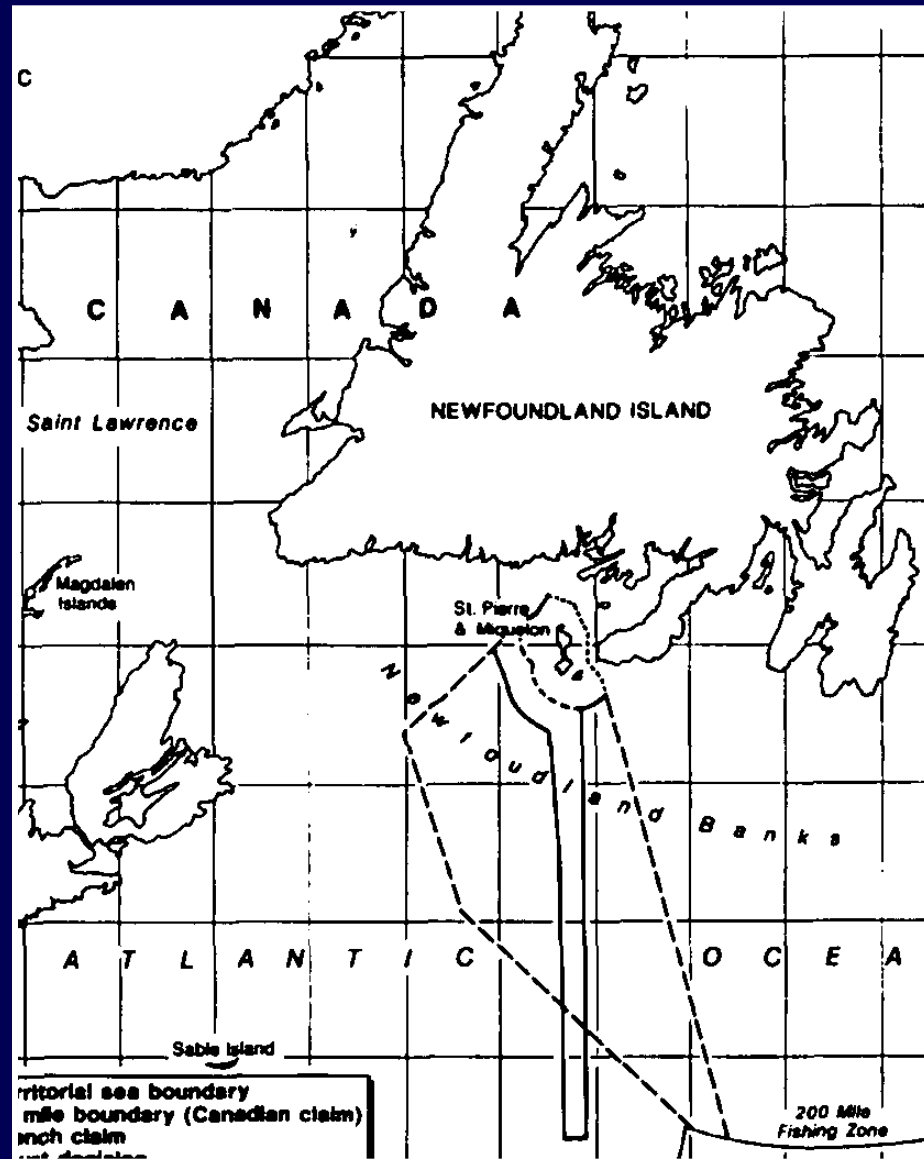


- List of relevant circumstances, equitable criteria not closed – cases are unique
- **Corollary** to this approach:
 - No one “**practical method**” of delimitation given any priority
 - Main contender for this status was equidistance or median line
 - BUT other methods commonly applied:
 - Perpendiculars to direction of coast
 - Azimuth or directional lines



- Problems with “pure” equitable approach
 - Highly **subjective** in treatment of geography and “relevant” coastlines and maritime areas
 - Can be extremely **unpredictable**
 - In state practice - forms of equidistance much more common than in litigation
 - Litigation **has the “hard” cases** where diplomacy failed?

Canada – France – 1992: High point of Unpredictability



More Recent Cases

Eg. Jan Mayen, Qatar/Bahrain, Cameroon/Nigeria, Barbados/Trinidad and Tobago, Romania v Ukraine etc

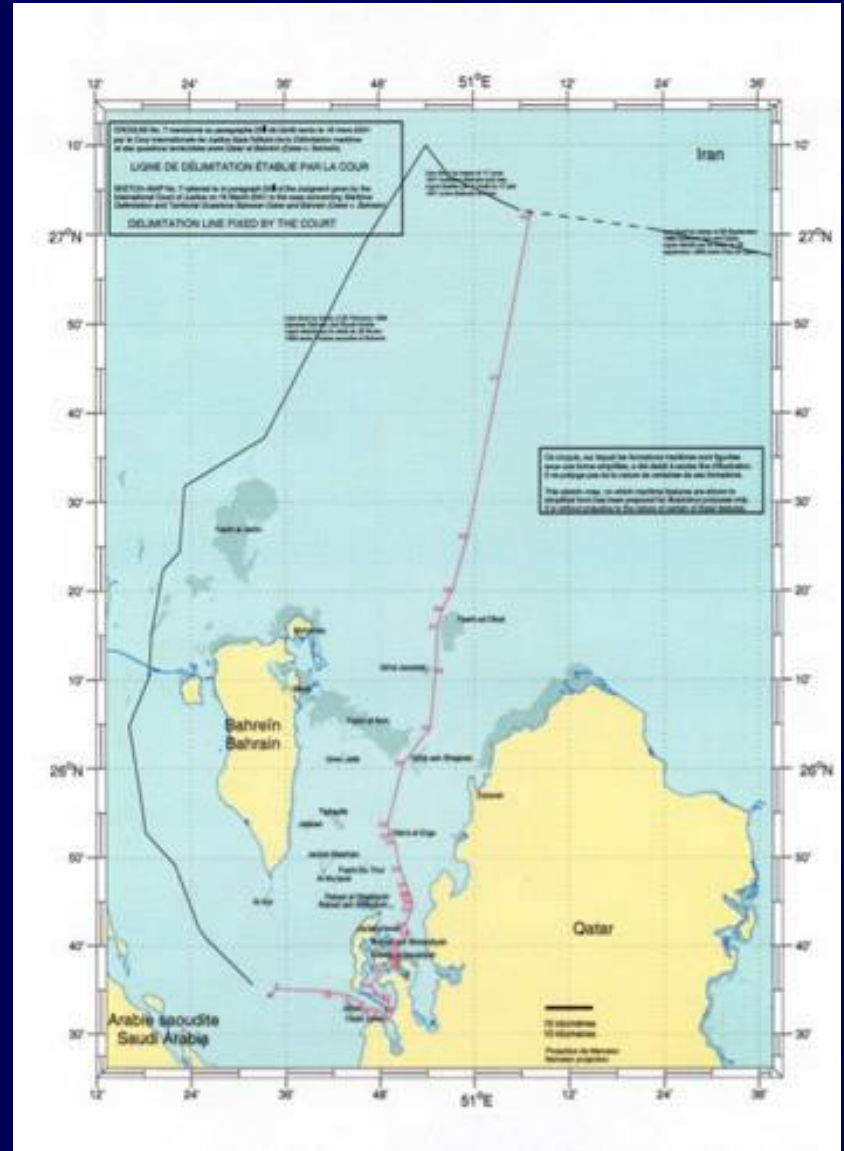
- Increasing relevance of equidistance as **starting point**
 - Always true of “opposite” boundaries
- i.e. **presumption for equidistance** – in absence of special or relevant circumstances that would justify adjustment
- **HIGHLY** relevant in negotiation preparations

Qatar/Bahrain – ICJ (2001)



“The most logical and widely practised approach is first to draw **provisionally** an equidistance line and then to consider whether that line must be **adjusted in the light of the existence of special circumstances.**”

Mainly territorial sea – but later applied to EEZ





Barbados – 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 specific peculiarities of each specific case.”

Similar approach in *Cameroon - Nigeria*



Summary

- Equitable principles **not** put aside
- BUT – in most cases – **starting point** will be equidistance or median line
- More predictable, as an initial consideration
- **Burden of proof** issues – Practically, need to find some way to justify moving away from equidistance

What is Unchanged

- Primary obligation of states is to delimit by agreement (arts. 74, 83, 15 of UNCLOS) on the basis of international law in order to achieve an equitable solution.

“No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States.”

ICJ, *Gulf of Maine Case* [Canada/United States] (1984)
(para.112)

Current Delimitation Process

It is now accepted that the correct approach to maritime delimitation involves a **3 stage process** (see, eg.: *Cameroon v Nigeria* [ICJ 2002]; *Barbados v Trinidad & Tobago* 2006; *Romania v Ukraine (Black Sea Case)* [ICJ 2009]; *Bangladesh v Myanmar*, [ITLOS 2012], *Nicaragua v Colombia* [ICJ 2012])

1. Drawing of **provisional equidistance line**
2. Identification of **relevant (special) circumstances** which **may** require shifting or adjustment of provisional line to produce equitable result
3. **Assessment of line** to ensure no inequitable result by **disproportion** between ratio of coastal lengths and relevant maritime areas.

This process **provides guidance for delimitation negotiations**

The Use of Proportionality

- Disproportion in ratio of coastal lengths and maritime area is *not* a method of delimitation

“If such use of proportionality were right, it is difficult to see what room would be left for any other consideration ... the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views or in the jurisprudence.” *Libya v. Malta* [ICJ 1993], (para. 45)

Proportionality serves to *“check the line of delimitation that might have been arrived at in consideration of other factors, so as to ensure that the end result is equitable...”* [*Barbados/Trinidad Award*, para. 240]

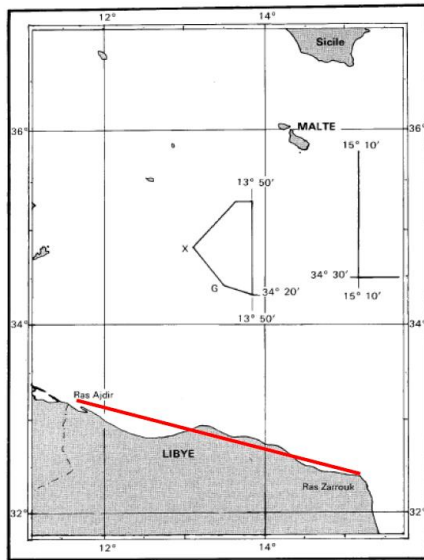
Relevant Circumstances: Disproportion

- Proportionality can only be considered as a “relevant circumstance” (rather than a “check”) where the disproportion is extreme:

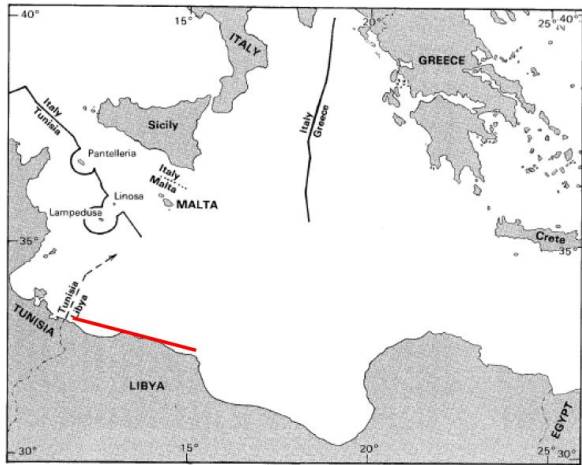
*“Where disparities in the lengths of coasts are **particularly marked**, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.” Black Sea Case, para 164*

- Applied only in cases of very significant coastal disparities :
 - *Libya/Malta*: 1 : 8
 - *Jan Mayen*: 1 : 9
 - *Barbados/Trinidad*: 1 : 8.2

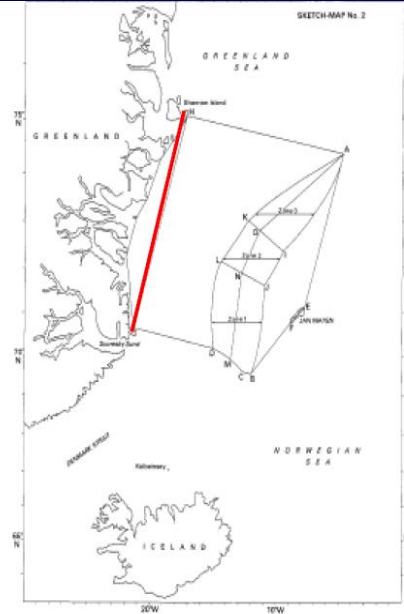
A. Relevant Coast of Libya – Per ICJ



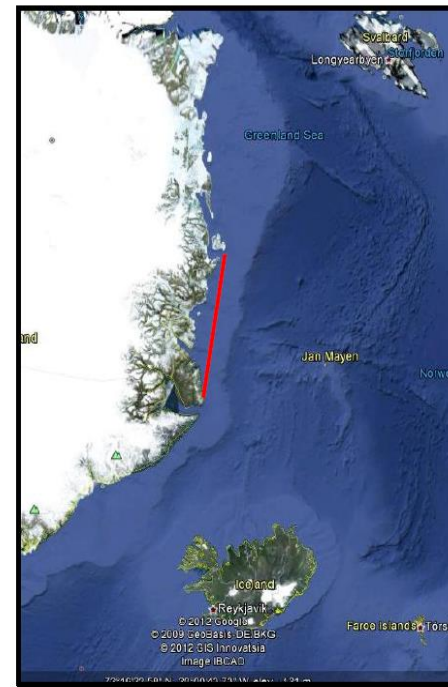
B. Relevant Coast in Regional Context



Libya/Malta
356 km



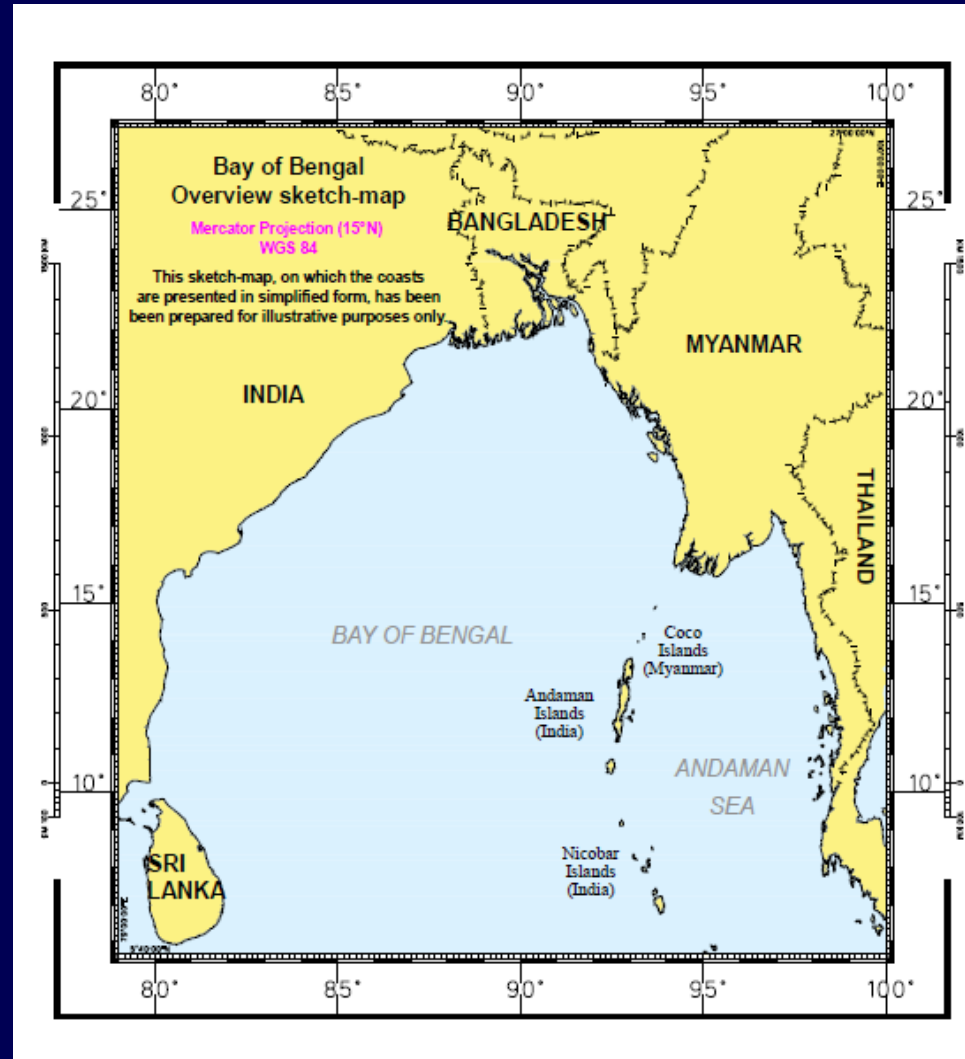
46



Jan Mayen:
504 km

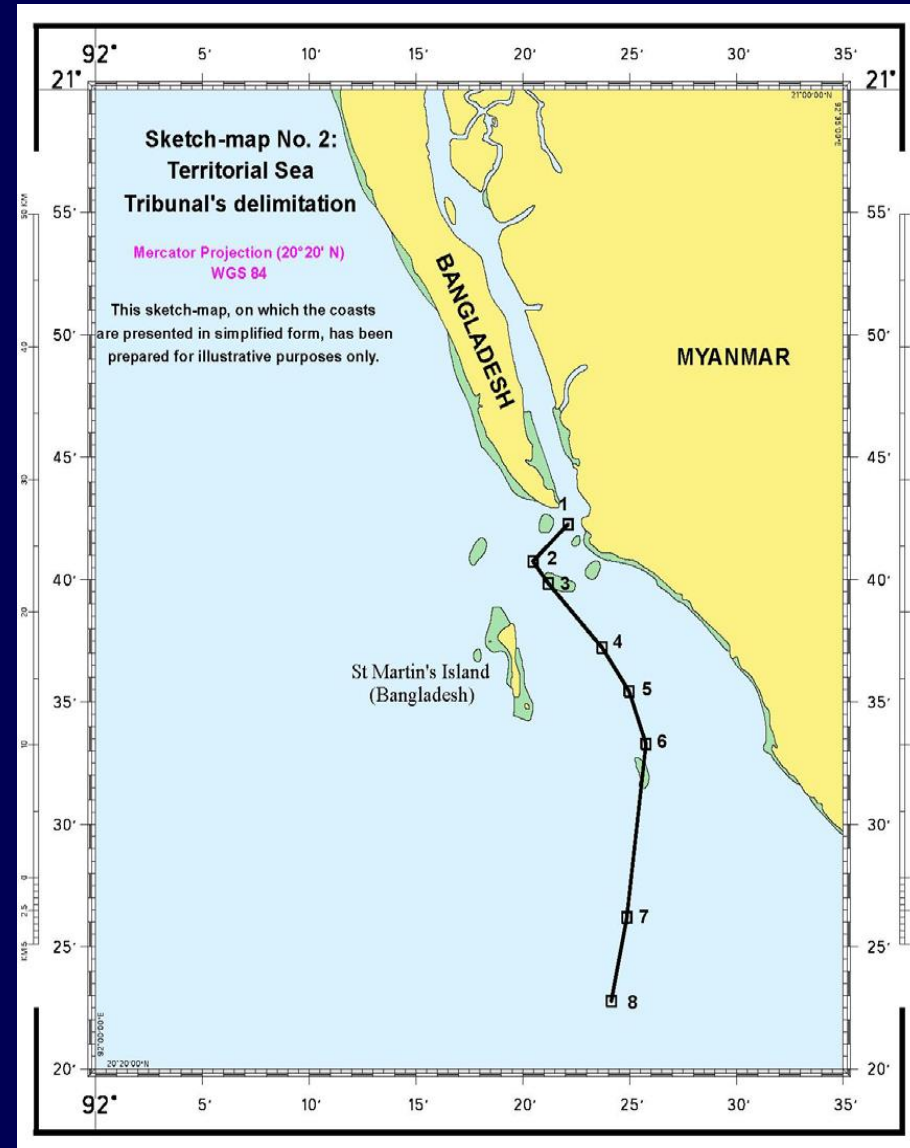
Application of Approach in *Bangladesh v Myanmar* ITLOS 2012

- Single Maritime Boundary
- Including outer shelf
- First ITLOS boundary decision
- Impact on India



Territorial Sea

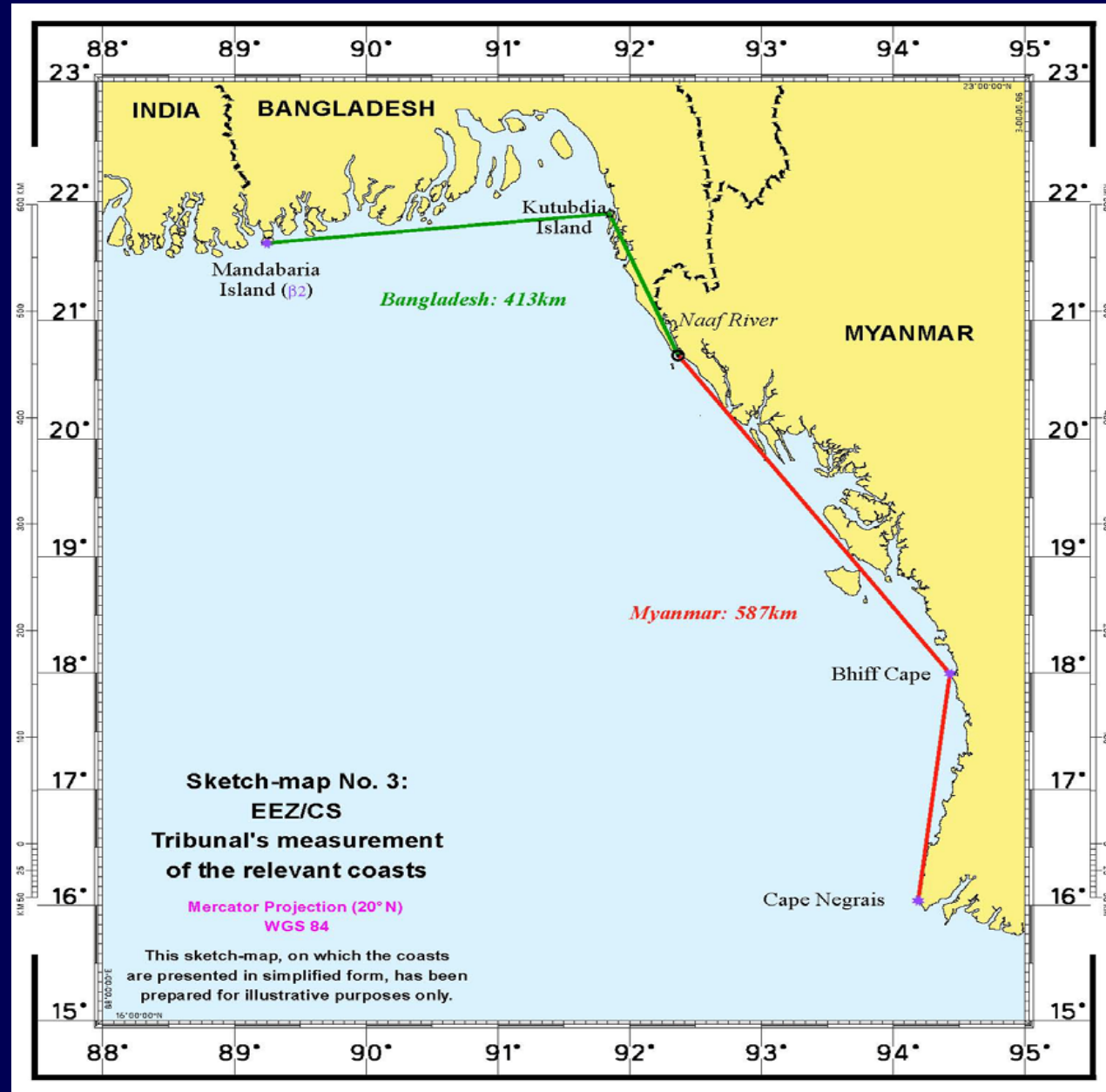
- Prior agreement and estoppel rejected
- UNCLOS Art 15 applied
- St. Martin's **not** special circumstance (as claimed by Myanmar)
- Equidistance line out to end of 12 nm overlap



Exclusive Economic Zone/Shelf to 200

- Applicable law: Arts. 74 & 83
 - “achieve an equitable solution”
 - But take into account customary law developments (i.e. equidistance/relevant circles)
- Definition of relevant coasts: essentially full coastal front of Bangladesh, Myanmar south to Cape Negrais

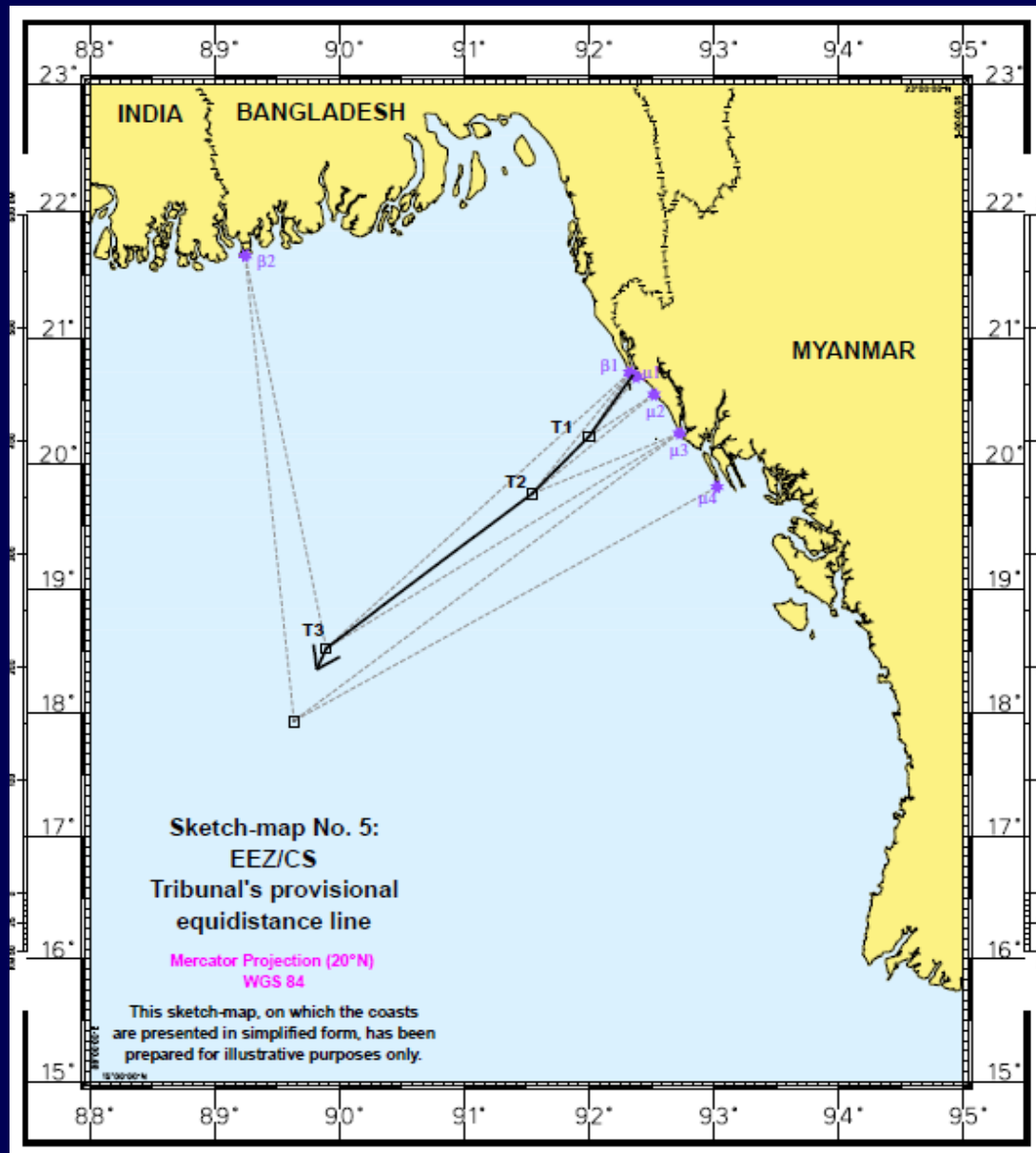
Myanmar: 587 km
Bangaldadesh: 413 km



Approach to delimitation

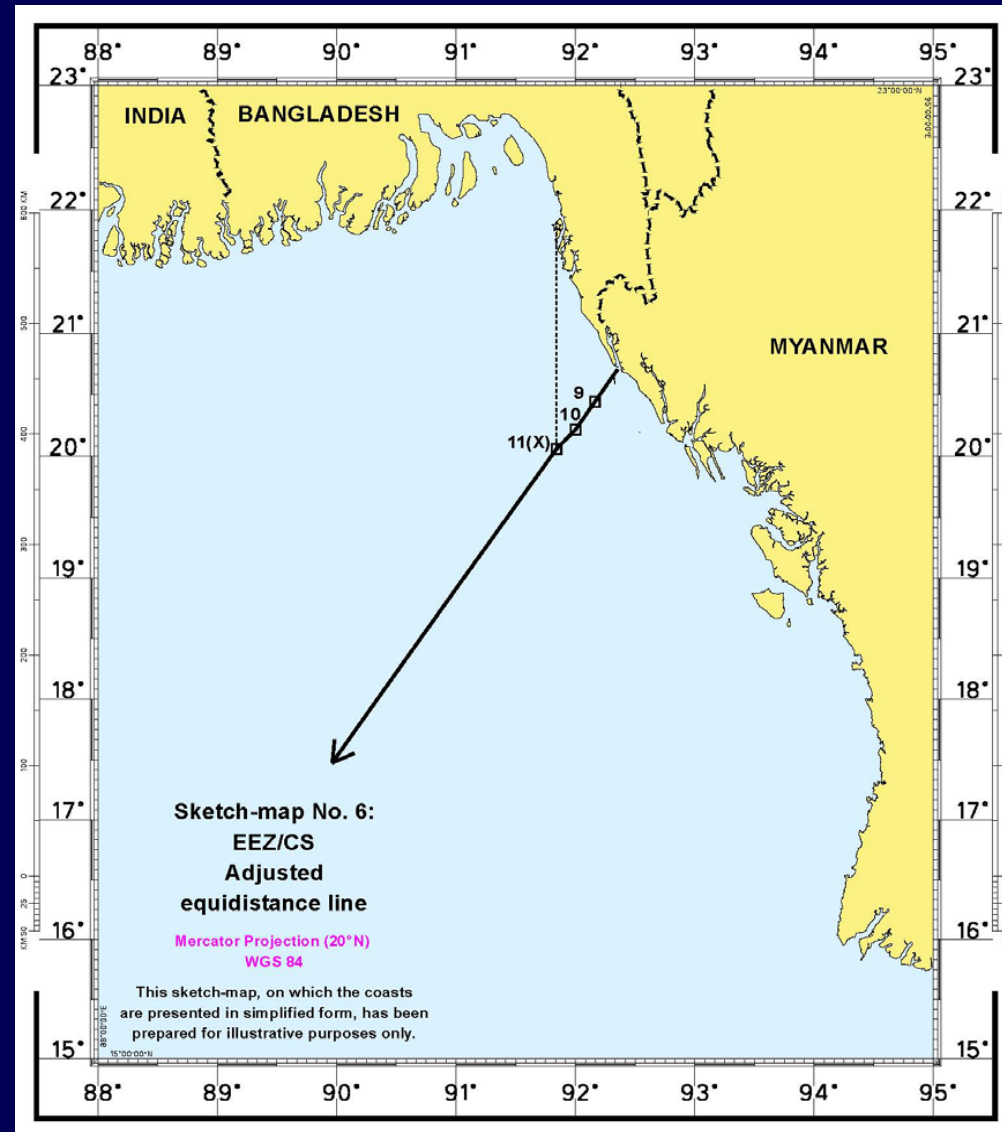
- Adopted equidistance/relevant circles
- Following *Romania v Ukraine*, *Barbados v Trinidad & Tobago* etc
- Provisional equidist. line, adjust for relevant circles.

Provisional Equidistance Line



Relevant Circs. And Adjustment

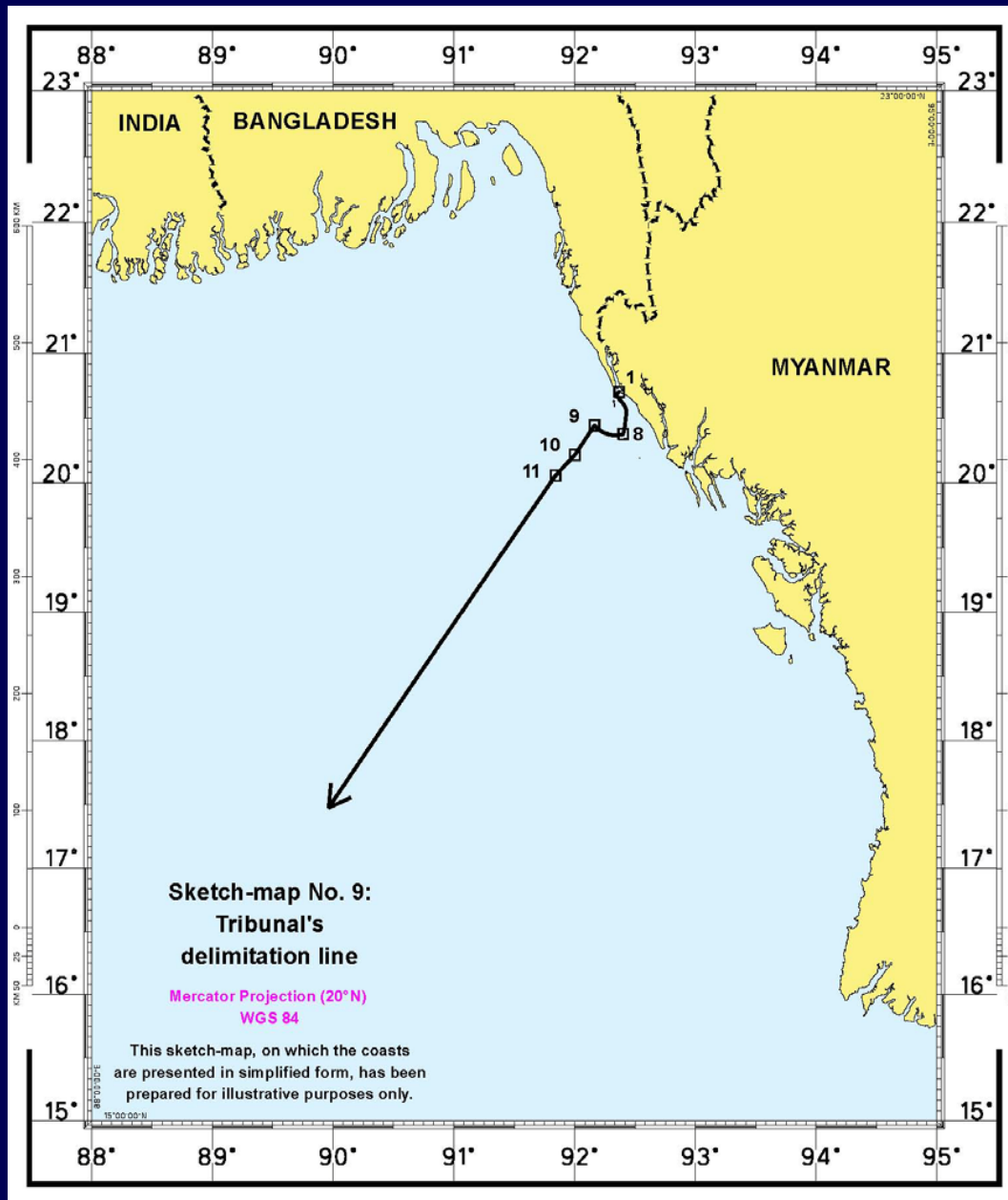
- Bangladesh: Bengal depositional system; St. Martin's, concavity and cutoff
- Tribunal: concavity, “pronounced “cut-off: effect
- Deflection of line to 215° from point x (where effect is marked)



Shelf Beyond 200 nm

Summary:

- Tribunal had jurisdiction to delimit and, if needed, rule on entitlement (was an issue)
- Both parties had entitlements throughout area
- Applied same approach as in EEZ: and found concavity & cut-off still had impact
- Continued 215 °line until areas where third party rights affected
- Contra ICJ approach??



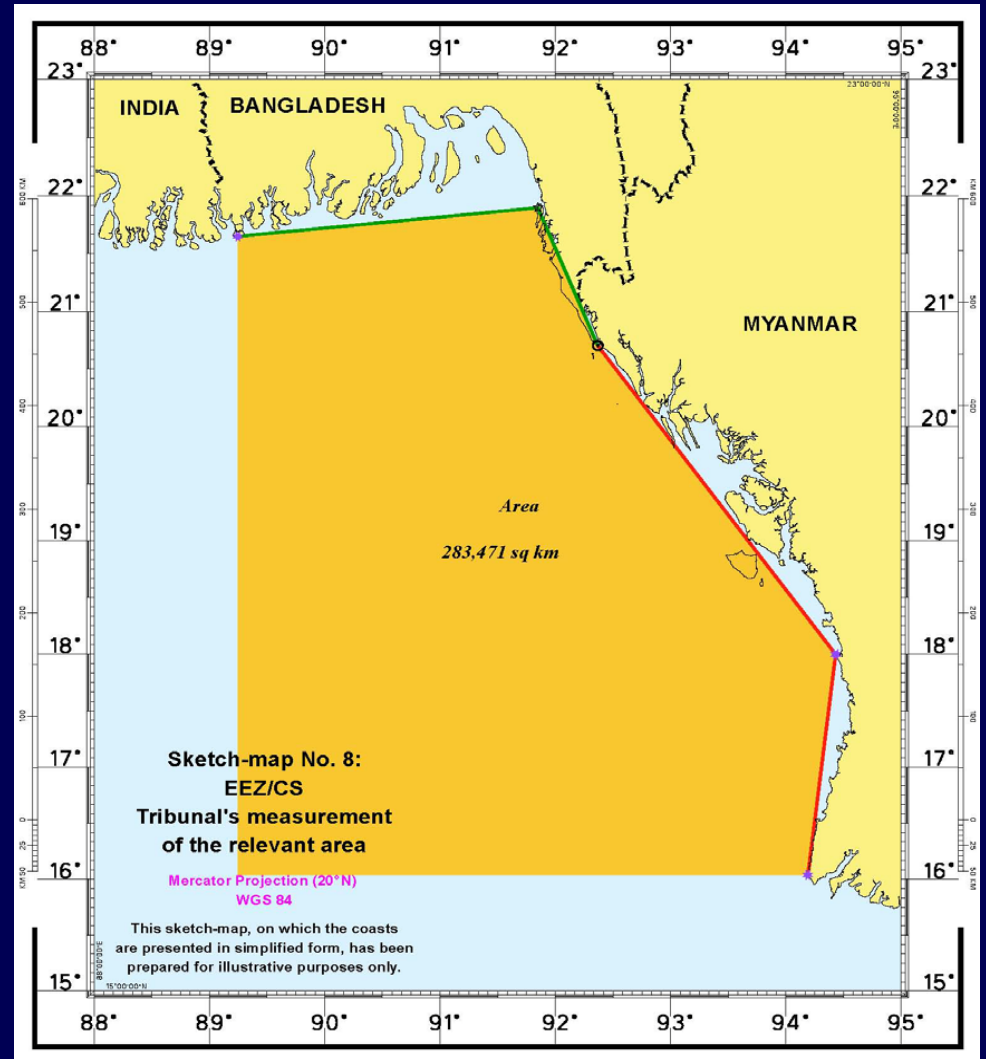
Test of Disproportionality

Coasts

1 : 1.42 favour of Myanmar

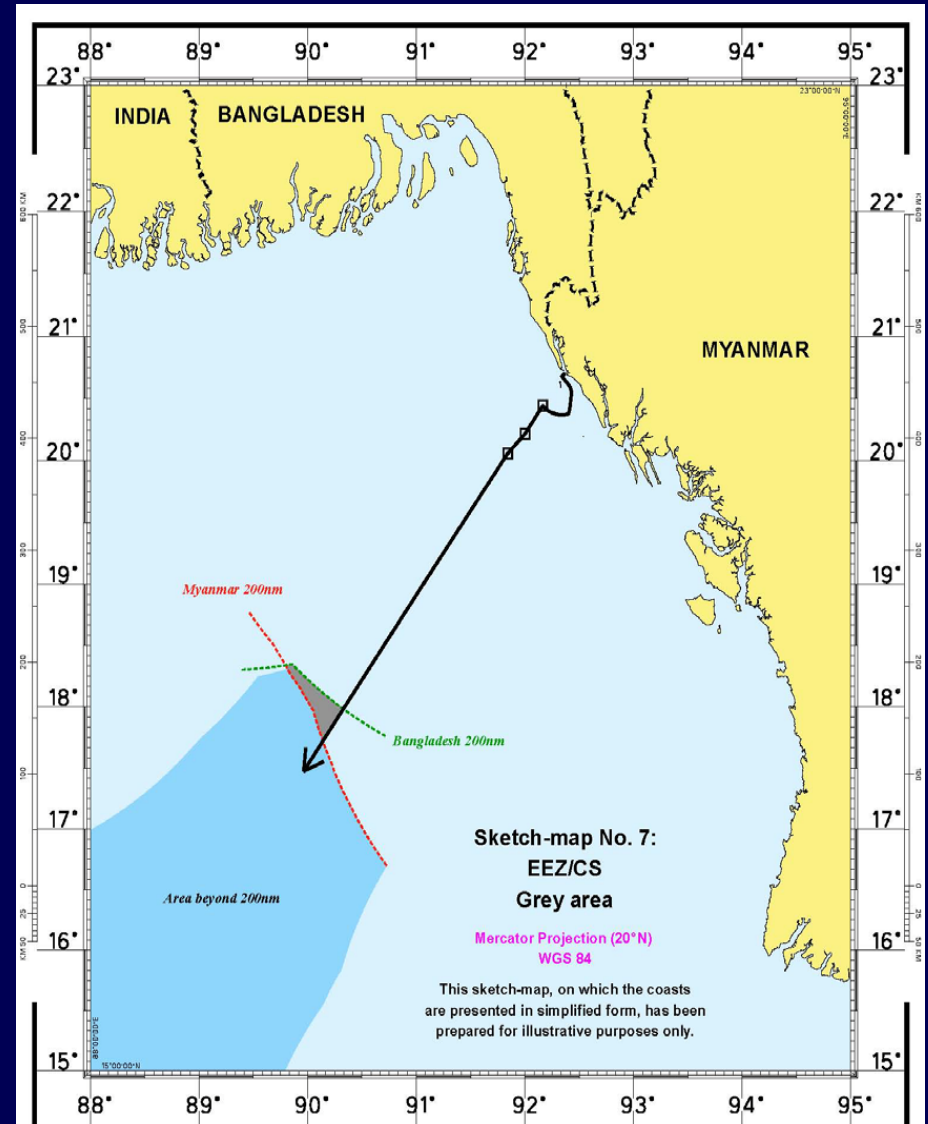
Area:

1 : 1.54 for Myanmar



Entitlement Issues: Grey Area

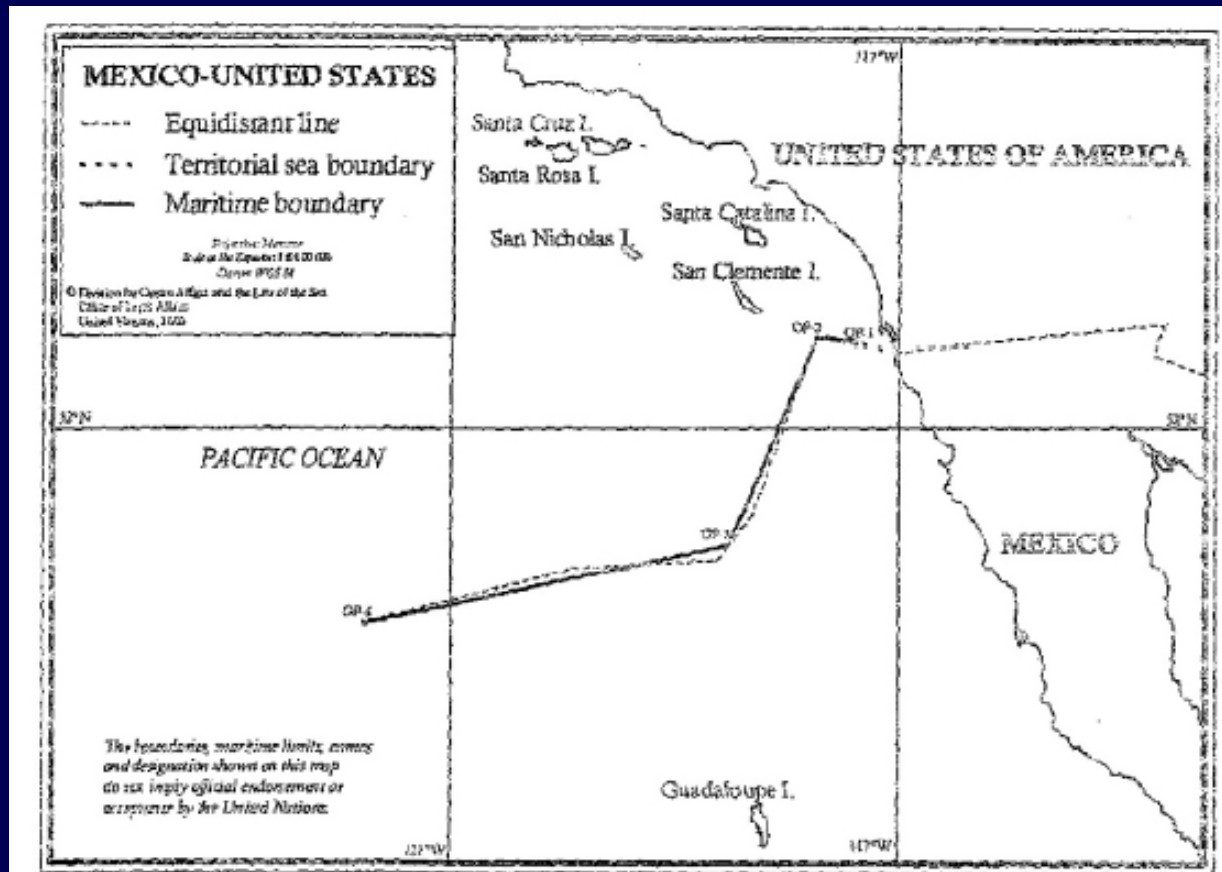
- Grey Area created outside Bangladesh 200
- Neither zone “trumps” the other
- Consequence of delimitation
- Does not remove Myanmar’s entitlement to **water column**
- For parties to deal with difficulties – cooperative measures
- Does **not** delimit both: EEZ would be unilateral (due regard)



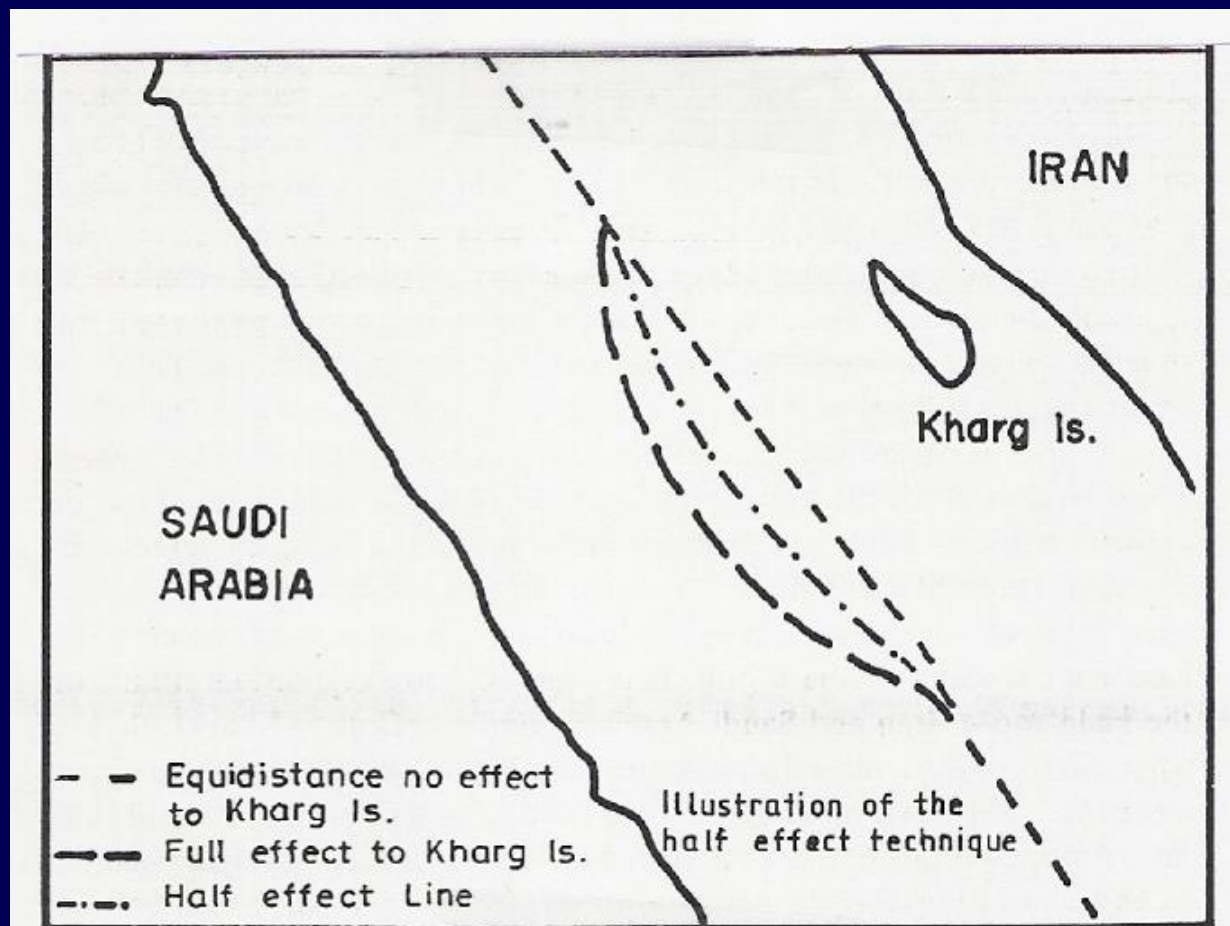


Sample of Issues Arising: Methods

- **Simplified Equidistance: US-Mexico**



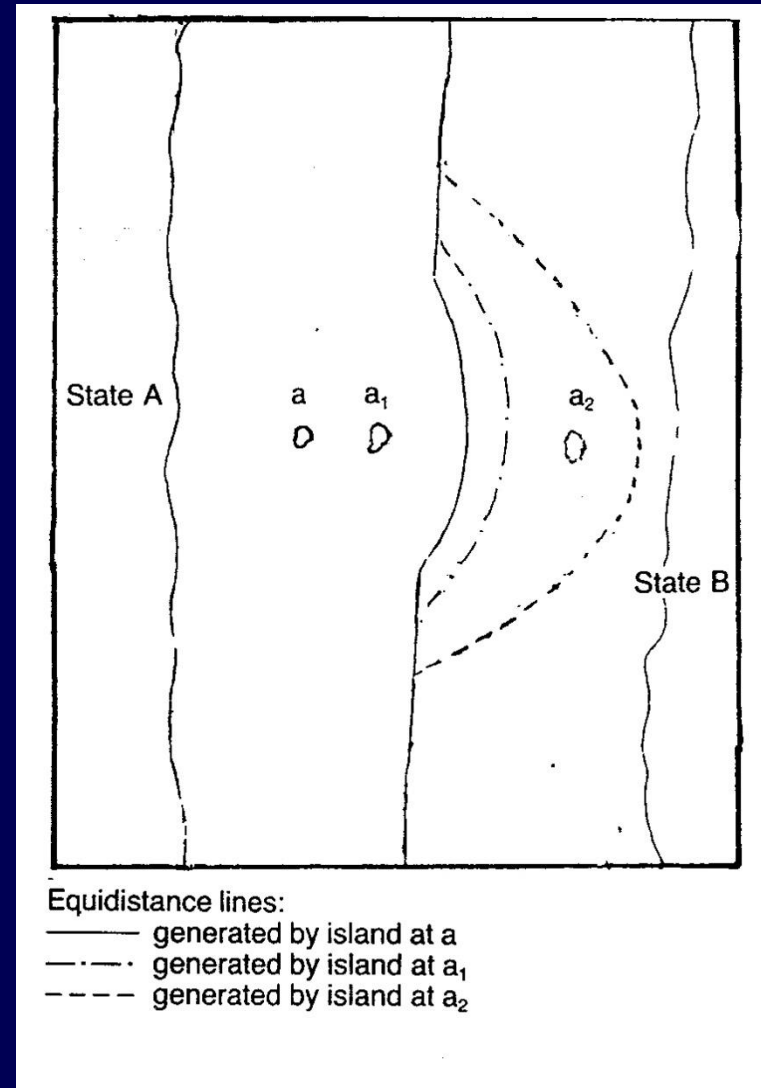
- **Modified Equidistance** – Saudi Arabia - Iran



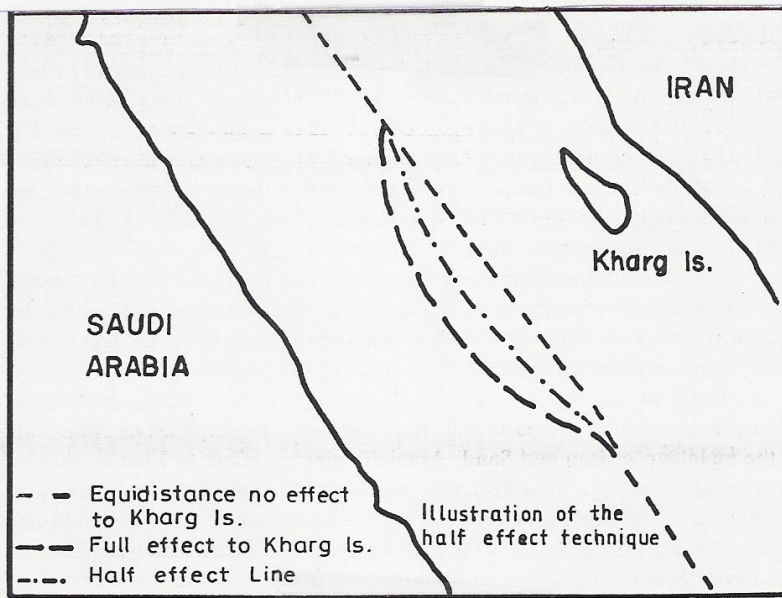


Common Special Circumstances

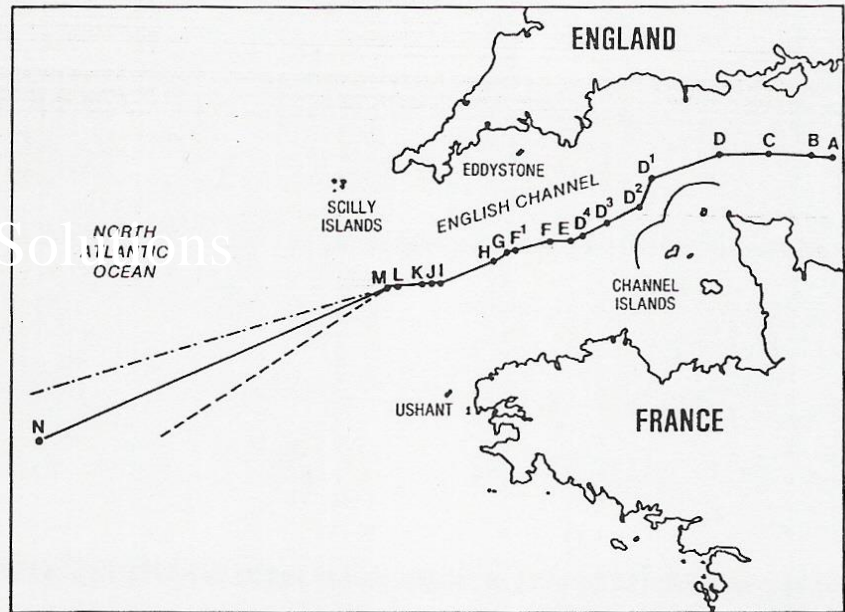
- Islands on “wrong” side of median line
- Distorting effect on boundary out of proportion with size, significance
- Same for peninsulas



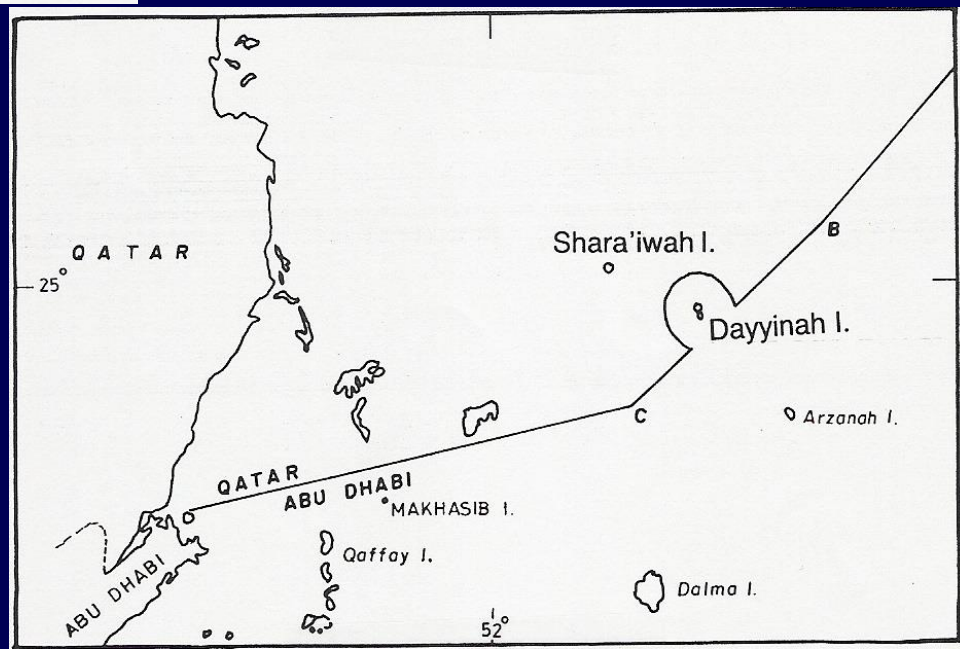
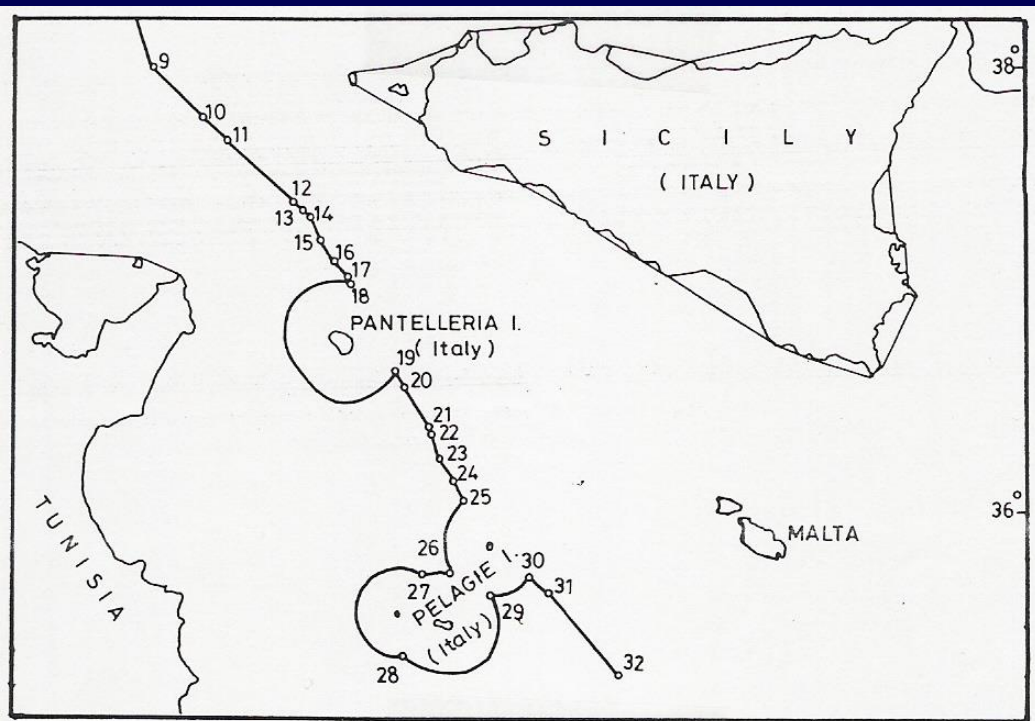
Possible Solutions



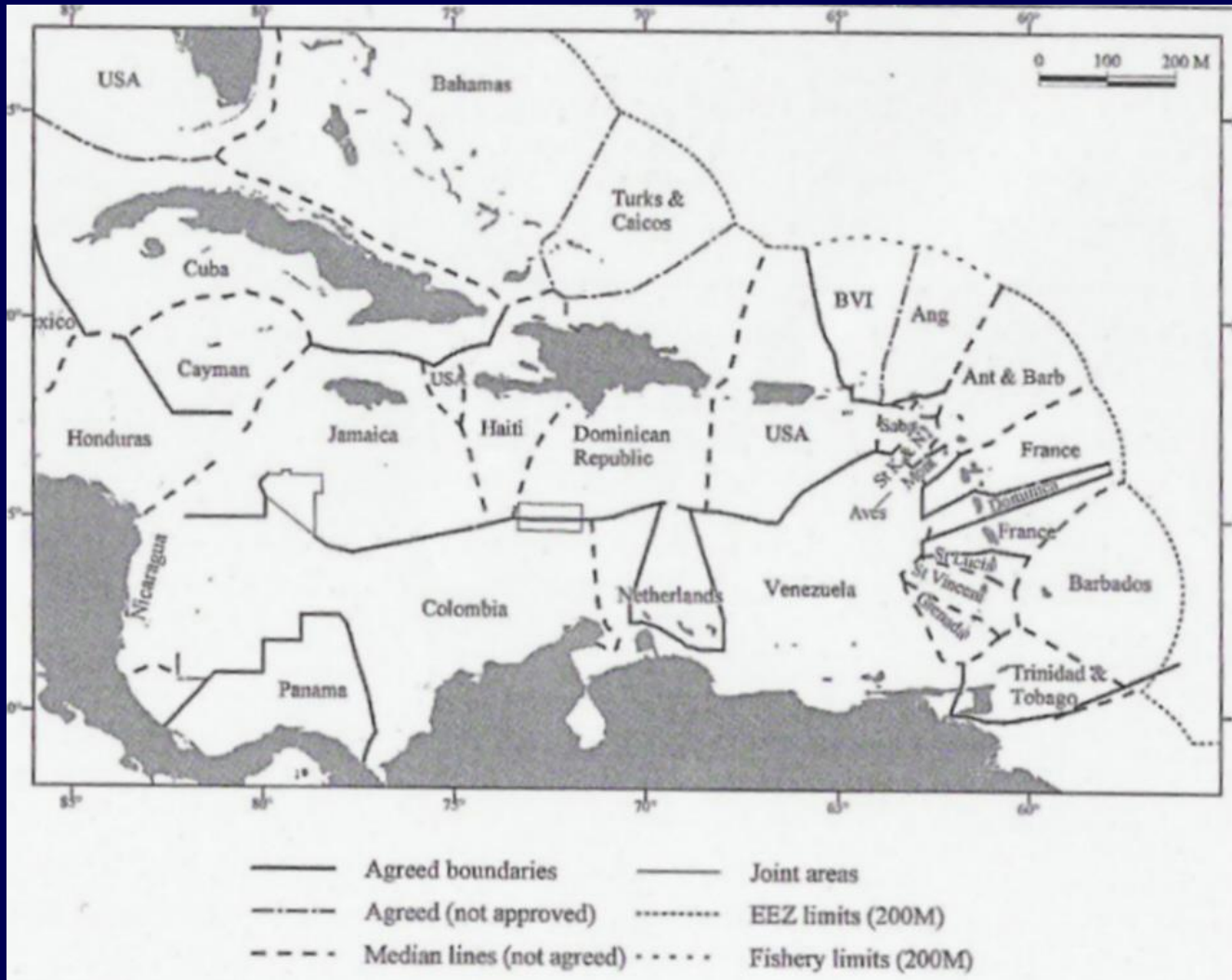
Possible Solutions



- .-.- French claim in the Atlantic Region.
- UK claim in the Atlantic Region.
- Boundary segments drawn by the Court of Arbitration, 1977.
- 12-nautical mile territorial sea enclaves for the Channel Islands established by the Court of Arbitration, 1977.



Geographic Disadvantage: Effect of Congested Areas and Semi-Enclosed Seas





Islands - Entitlement

- As discussed earlier – islands are common example of “special” or “relevant” circumstances justifying departure from strict equidistance
- Key issue: does location of Island result in inequity: is the *impact* that matters

BUT – there are further issues re –
entitlement of “islands” to zones

Article 121: Regime of Islands

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

- First – is the relevant feature an “island” under para. 1 of Art. 121

“An island is a naturally formed area of land, surrounded by water, which is above water at high tide.”

- Is it really a low-tide elevation – not above water at high tide?
- Is it “naturally formed”?

- If it is an “island” – is it also within the category of a “rock” (121(3)):
 - “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”
- If it is a “rock” – only a territorial sea.
- But – how to define this? Habitation? Govt only? What resources?



Effect on Delimitation

- Assume for argument that islands “entitled” to generate zones – this is *entitlement*
- Does not mean that they will be given full, or any, effect in a *delimitation*
- Recall that some larger islands – eg. Filfla, Sable, have been given no effect or partial effect in delimitations – even though they are entitled to generate zones



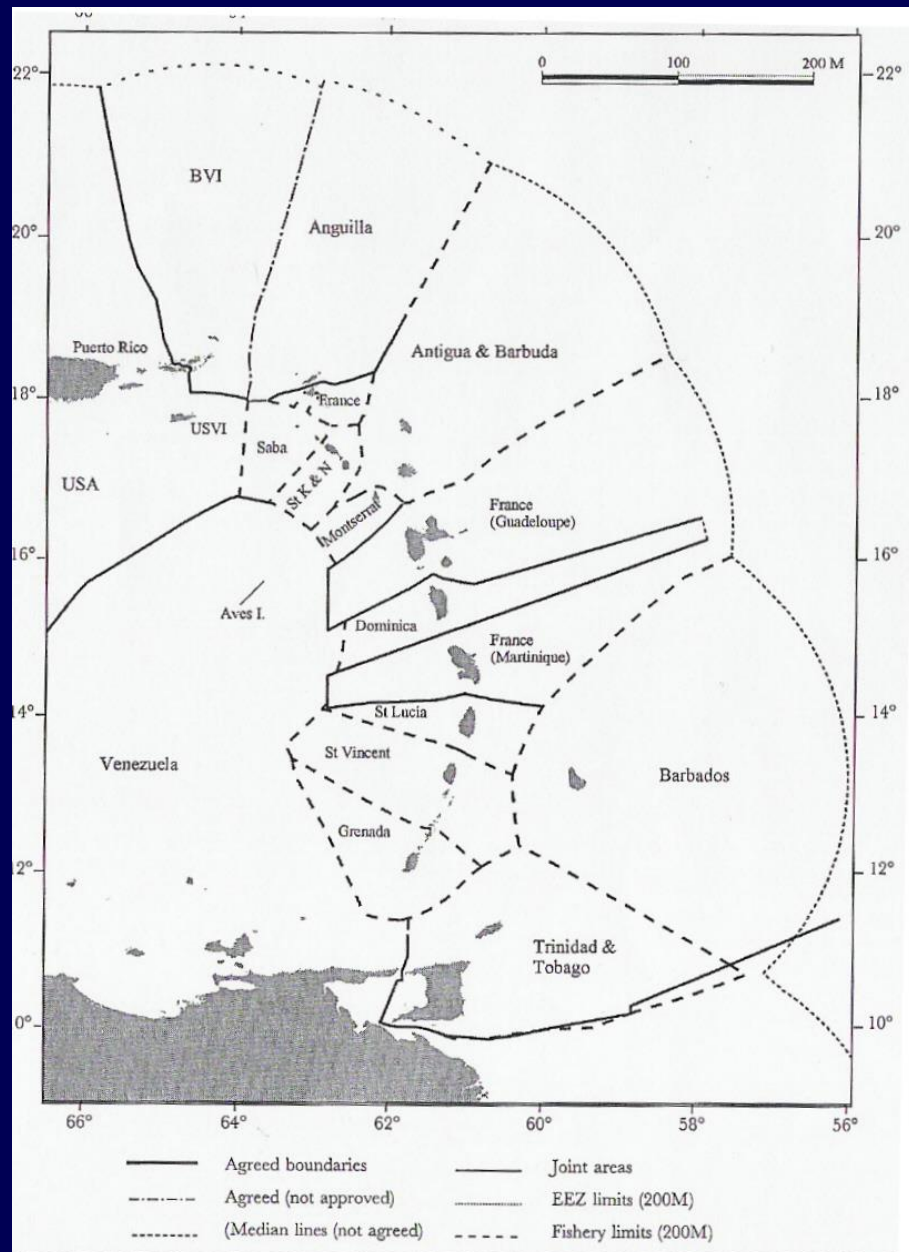




Aves Island / Bird Rock - Venezuela

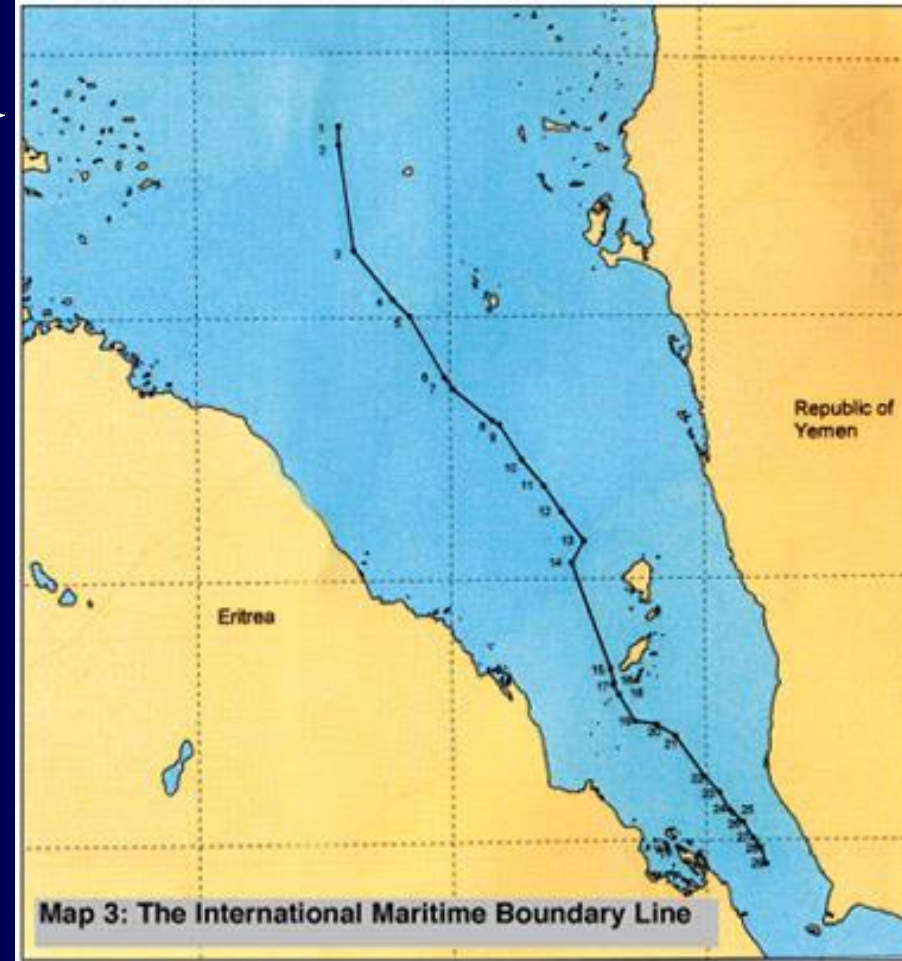




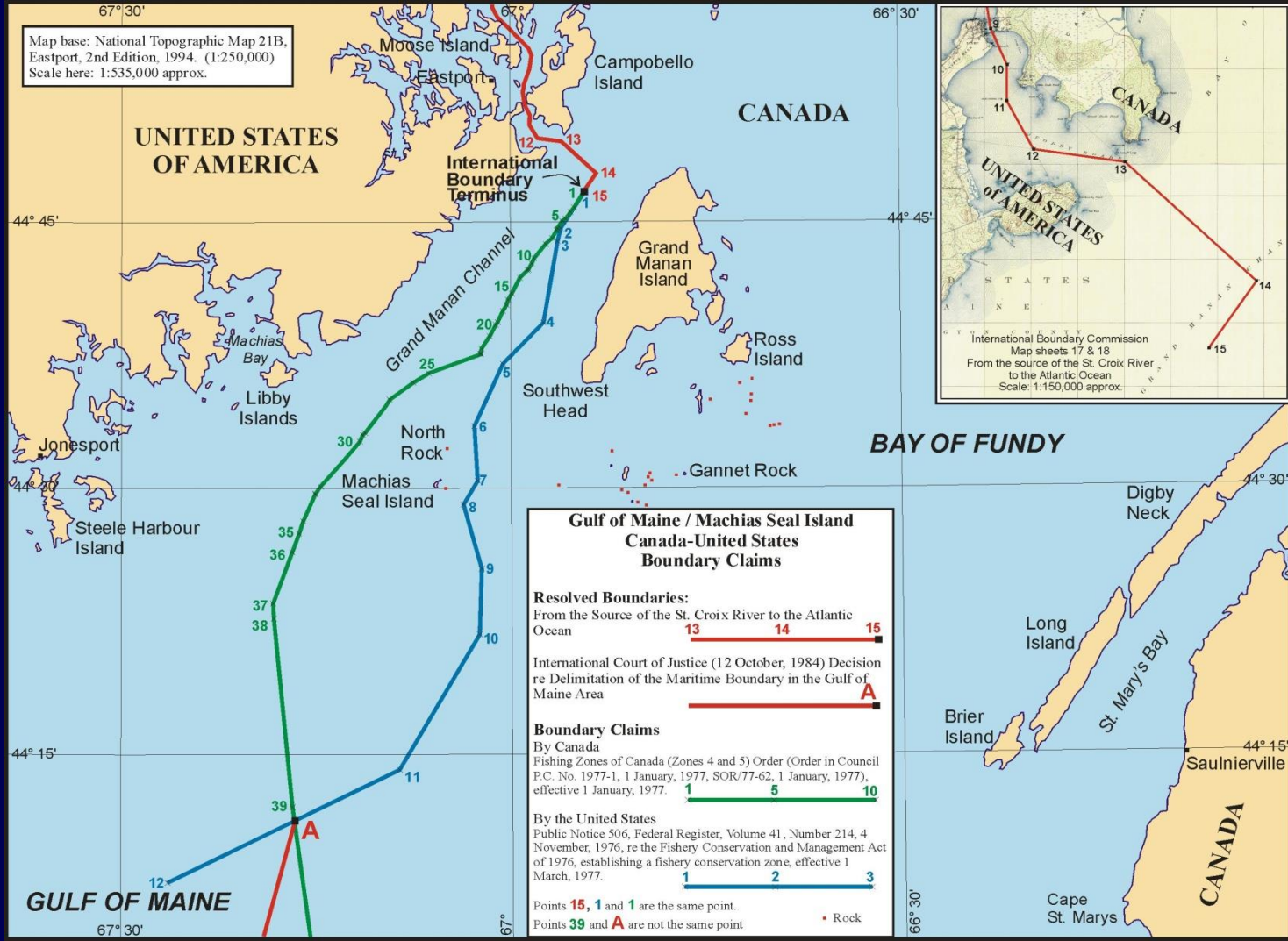


Residual Sovereignty Disputes

- How to put aside dispute over status of Island, land mass – and still proceed on boundary?
- Possible solutions: two stage arbitration (Eritrea-Yemen)
- “Set aside” Canada-US, Denmark



Machias Seal Island – Canada - US





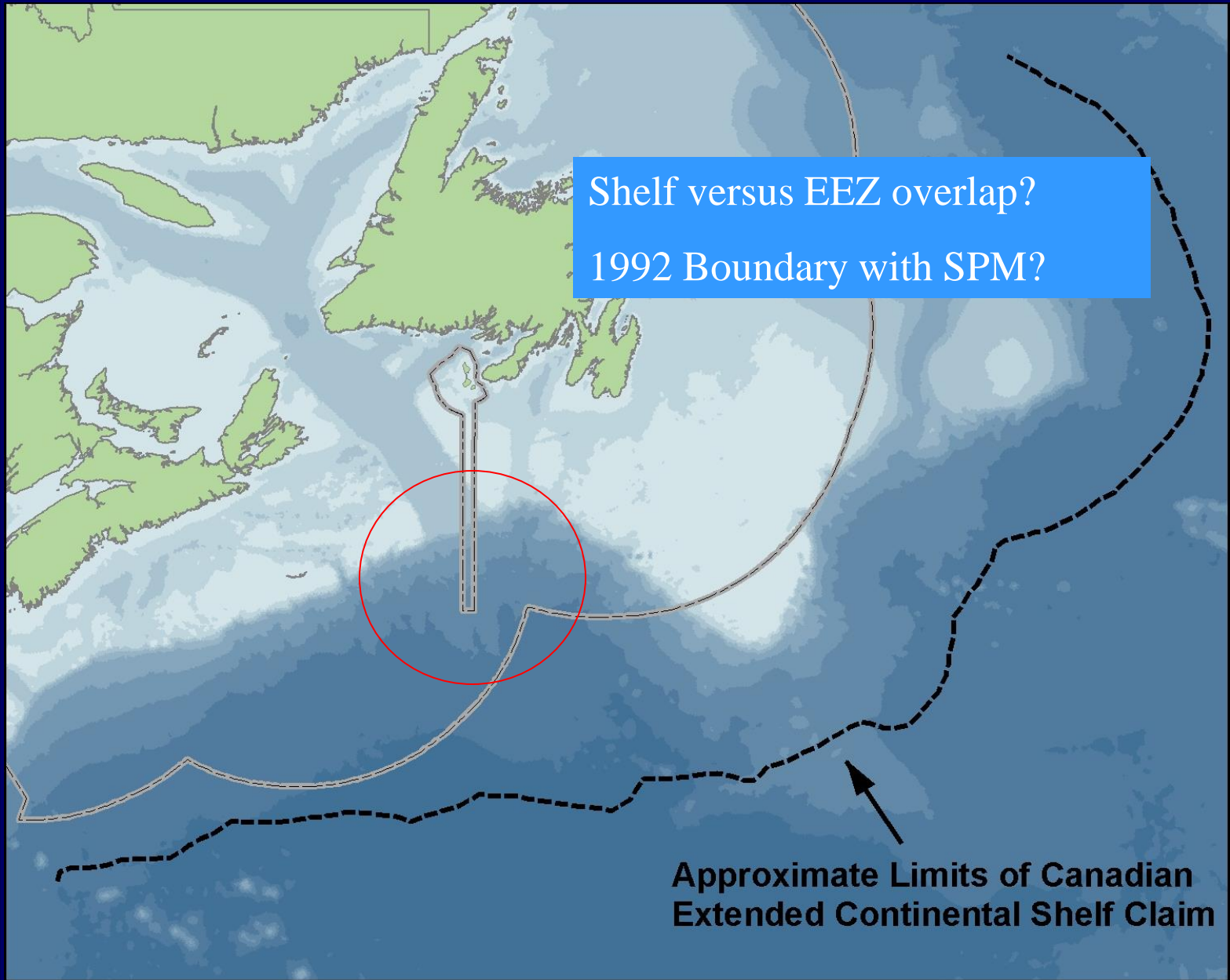
Hans Island



Remaining Issues?



- Delimitation of outer continental shelf – beyond 200: ICJ vs ITLOS
- Do different principles apply?
- Will natural prolongation re-emerge as a significant factor? (Probably no)
- No need to wait for Commission on Limits of Cont. Shelf



Shelf versus EEZ overlap?
1992 Boundary with SPM?

Approximate Limits of Canadian
Extended Continental Shelf Claim

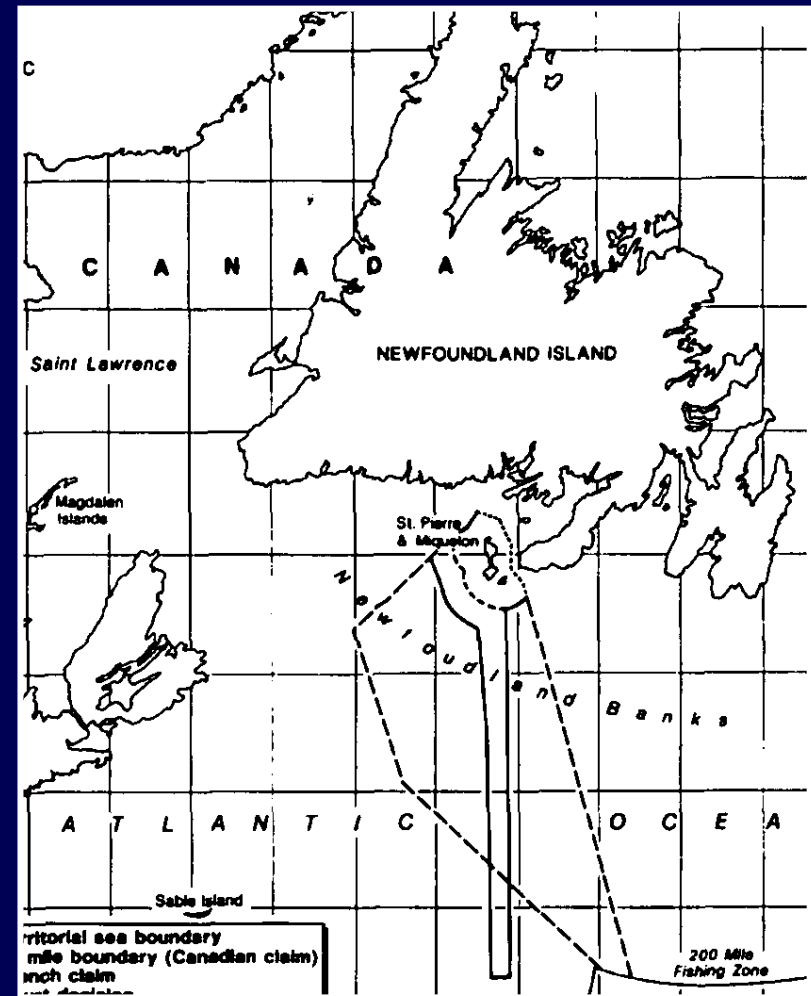
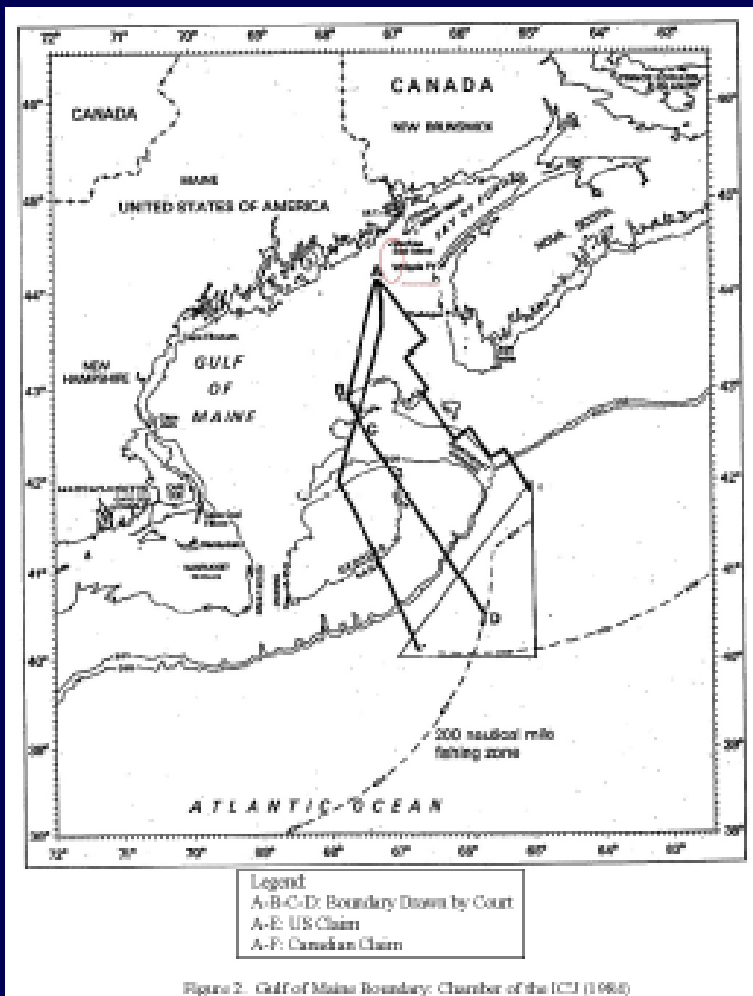
Options In Negotiation: Boundary/Resource Disputes

- Agreement to disagree
- Agreement to Designate Area in Dispute
- Agreement on limited cooperation in area of dispute
- Agreement on access for specified purposes
- Preliminary joint undertakings
- Agreement on joint development contemplating production
- Agreement to share specified state services
- Agreement for uni-sectoral joint management
- Agreement for integrated joint ocean management

Adjudication ≠ Dispute “Settlement”

...At least – not necessarily

- Especially in the context of marine jurisdictional disputes
- Transboundary uses, resources and **relationships** must continue to be managed: after the boundary
- Negotiations both **precede** and **follow** typical boundary adjudication



Gulf of Maine and SPM
 Both followed by extensive negotiations to Manage
 the Underlying Resource and Use Conflicts



- Adjudication – “Binary” results
 - Courts cannot negotiate
 - Cannot develop compromises
 - Cannot be creative with solutions
- All of this is possible in negotiations