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Thank you.



IBRU Workshop Resolving International Boundary Disputes

Preparing for Litigation

Dr. Derek C. Smith
Foley Hoag LLP
Washington, DC
November 15, 2022



OUTLINE OF PRESENTATION

- I. Establishing a Team**
- II. Determining Strategic Objectives**
- III. Gathering of Facts and Evidence**
- IV. Formulating a Claim**
- V. Developing Factual and Legal Arguments**
- VI. Filing the Application**

I. ESTABLISHING A TEAM

- A. The Agent
- B. The Internal Team
- C. International Legal Counsel
- D. Technical Experts

I. ESTABLISHING A TEAM

A. The Agent

- The Agent (typically an ambassador or the MFA) is the formal representative before the Court and the head of the legal team.
- The Agent instructs counsel and supervises the team.

A. The Agent (continued)

- The Agent's actions bind the State

“The Tribunal recalls that Ms. Drenik was Agent of Slovenia in the present proceedings. The conversations she had with Dr. Sekolec cannot, under any reasonable interpretation, be considered ‘private’ conversations from the perspective of attribution. Ms. Drenik was at the time acting in her capacity as Agent for her country; **the Tribunal is therefore satisfied that the breaches evidenced by the aforementioned conversations are attributable to Slovenia**” (*Croatia v. Slovenia*, Award, ¶ 210)

I. ESTABLISHING A TEAM

B. The Internal Team

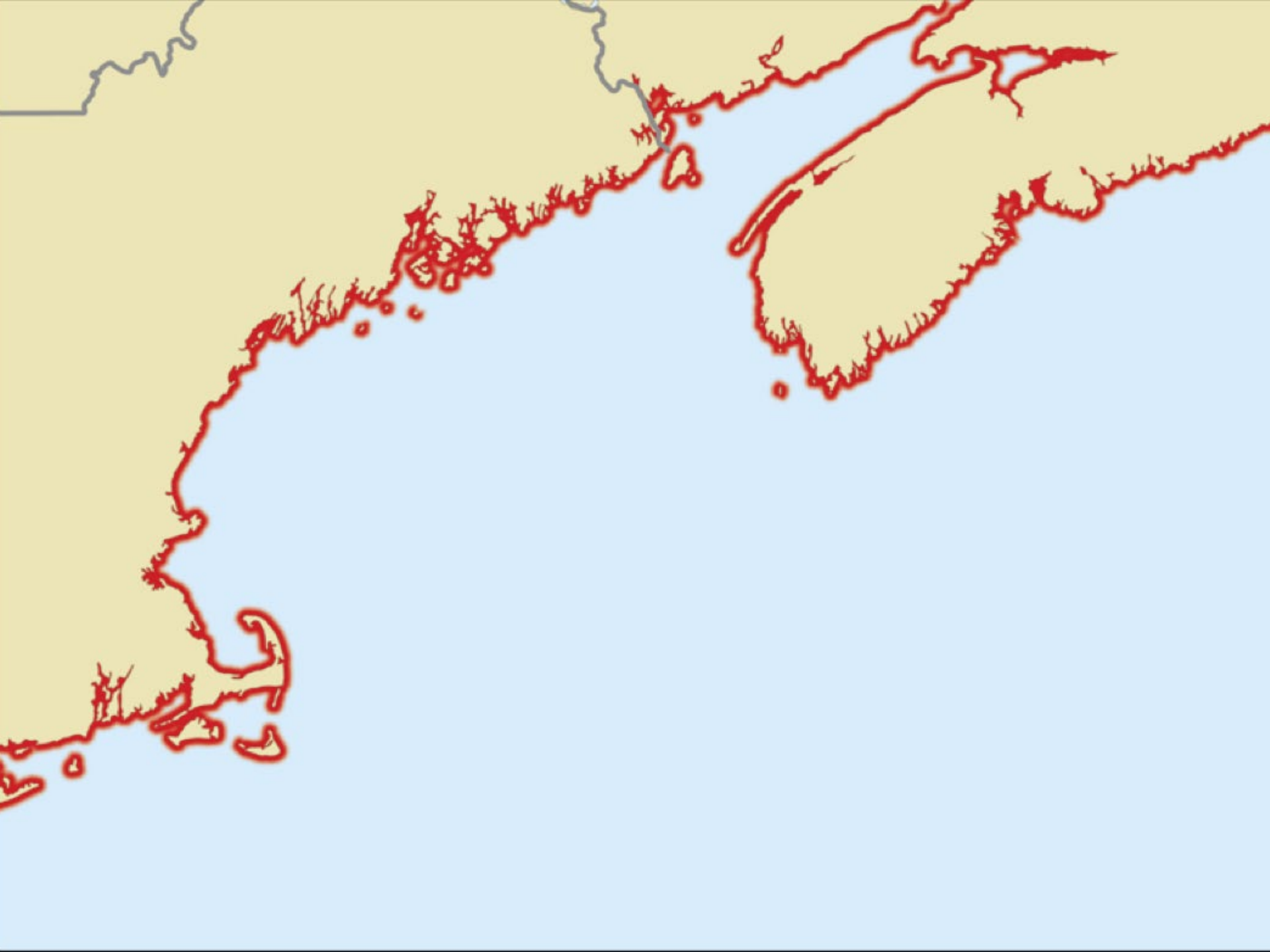
- The Internal Team should include representatives of all major government constituencies, such as the President or PM, Foreign Affairs, Legal Affairs, Natural Resources, and the Armed Forces.

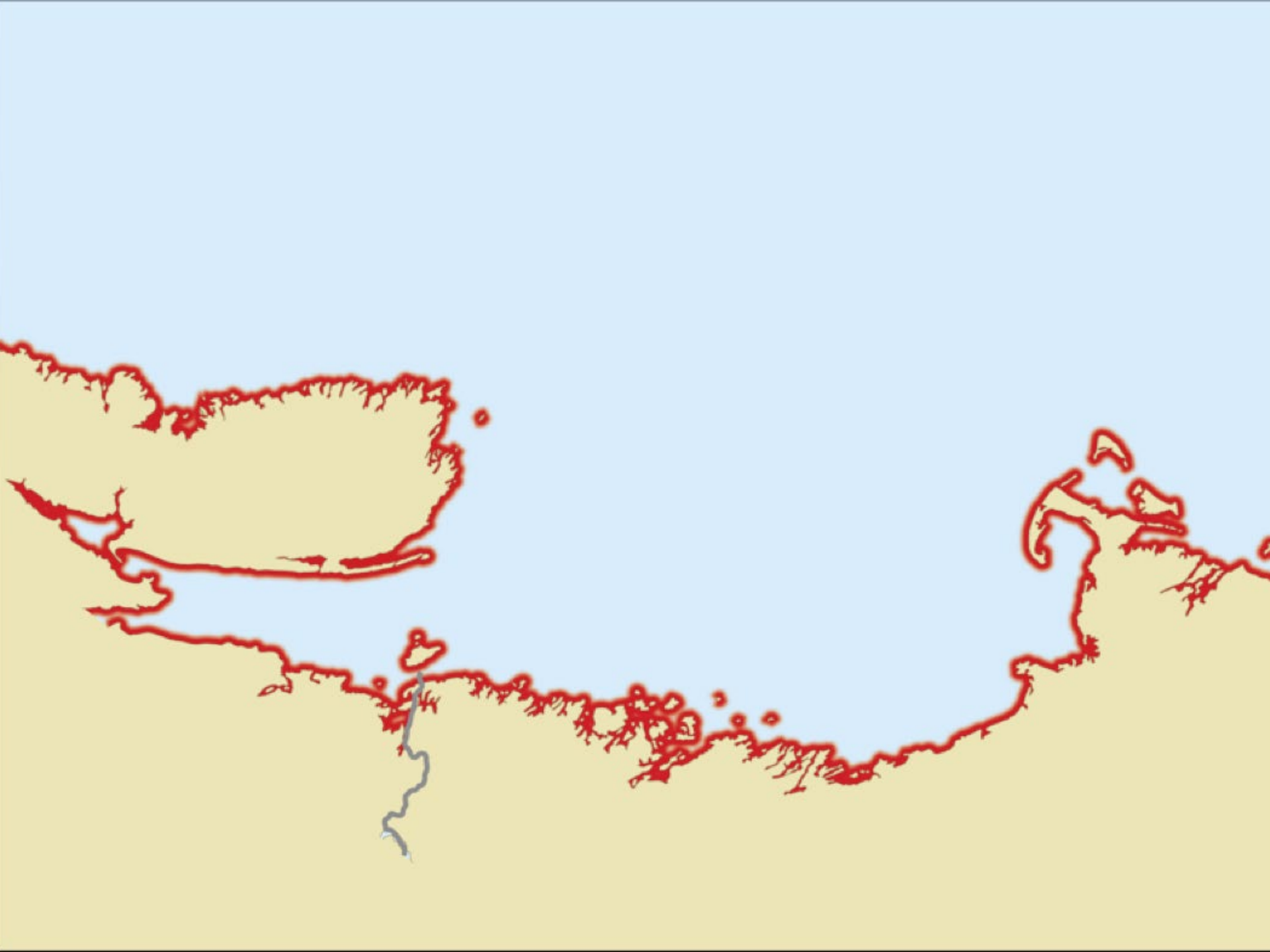
C. International Legal Counsel

- International legal counsel bring the benefit of their prior experience in litigating and arguing maritime delimitation cases before international courts and tribunals.

D. Technical Experts

- Relevant technical experts include hydrographers, cartographers, geologists, and marine biologists.
- Technical experts may be members of the internal team or foreign nationals.
- Experts with prior litigation experience are an asset.







CONFIGURATION OF THE RELEVANT COASTLINES

Mercator Projection
Scale: 1:1,911,880
units at 1°

0 25 50 75 100
Nautical Miles

0 25 50 75 100
Kilometers

Map Note: Coastal information has been compiled from NOAA Nautical Charts 2020, 2040, 2050, 2055, 2070, 2080, 2090, 2440, 2445, 2450, 2460, and 2465.
Map prepared by International Mapping Associates.

200 N Exclusive Economic Zone (EEZ)

12 N Territorial Sea

III. GATHERING FACTS AND EVIDENCE

As with negotiation, mediation and conciliation, the first and most important step in preparing for litigation is learning the facts and gathering evidence. All legal decisions depend on effective fact gathering.

A. Maritime Boundary Claims

Maritime boundary claims are less fact dependent, but evidence is still important

✧ Diplomatic history

A. Maritime Boundary Claims (continued)

- ✧ Economic Activities
 - Oil and gas, fishing seabed activities
- ✧ Security and maritime activities
 - Search and rescue, research, environmental protection

B. Land Boundary and Sovereignty Claims

Land boundary and sovereignty proceedings are very fact dependent and require broad, deep and thorough research

- ✧ Diplomatic history
 - Agreements
 - Protest notes
 - Evidence of acquiescence

B. Land Boundary and Sovereignty Claims (continued)

- ✧ Effective sovereign control (effectivités)
 - Laws, administrative structure, public records, land grants, police activities, etc.
- ✧ Maps
- ✧ Pre-independence boundaries (*uti possidetis juris*)
 - Records of colonial State

IV. FORMULATING A CLAIM

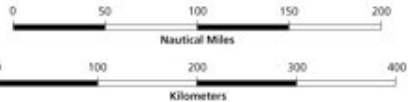
- A. Relationship between Strategic Objectives, Legal Position and the Claim**
- B. Maritime Boundary: decide on the Most Suitable Delimitation Methodology**
- C. Land Boundary: analyze proof in light of strategic goals**
- D. Alternative Litigation strategy: determine what strategic goals can be achieved**

A. Maritime Boundaries

1. Coastal Geography
2. Maritime Features
3. Special / Relevant Circumstances

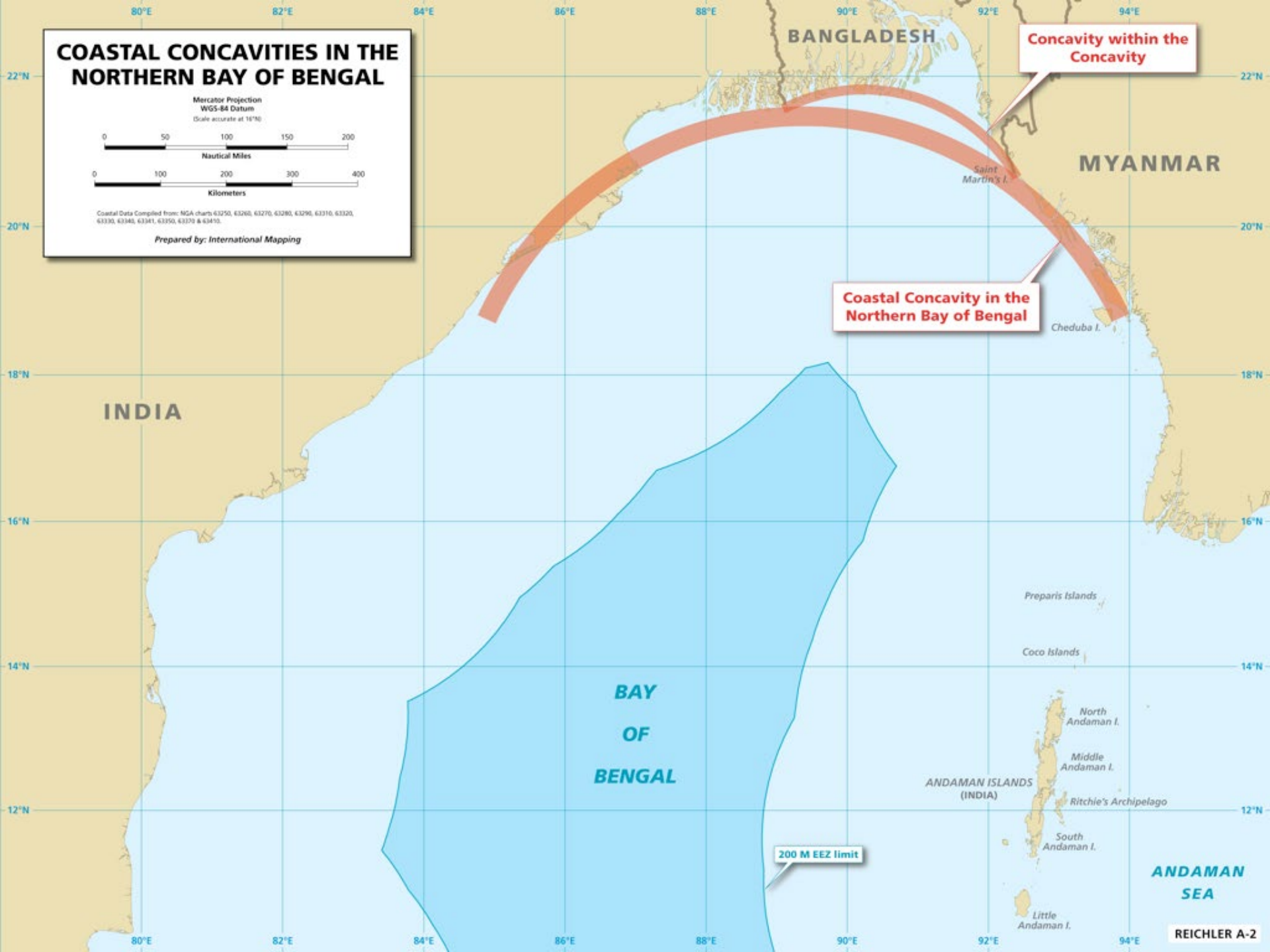
COASTAL CONCAVITIES IN THE NORTHERN BAY OF BENGAL

Mercator Projection
WGS-84 Datum
(Scale accurate at 16°N)



Coastal Data Compiled from: NGA charts 63250, 63260, 63270, 63280, 63290, 63310, 63320, 63330, 63340, 63351, 63350, 63370 & 63410.

Prepared by: International Mapping



Concavity within the Concavity

Coastal Concavity in the Northern Bay of Bengal

200 M EEZ limit

ANDAMAN SEA

COTE D'IVOIRE

2011-2014

GHANA

5°N

IVCO-19
IVCO-23
Ibex-1

Assinie 1-X

Tano-1

Tweneboa-1
Western Tano 1X/2X

Mahogany-1

200m

Dzata-1

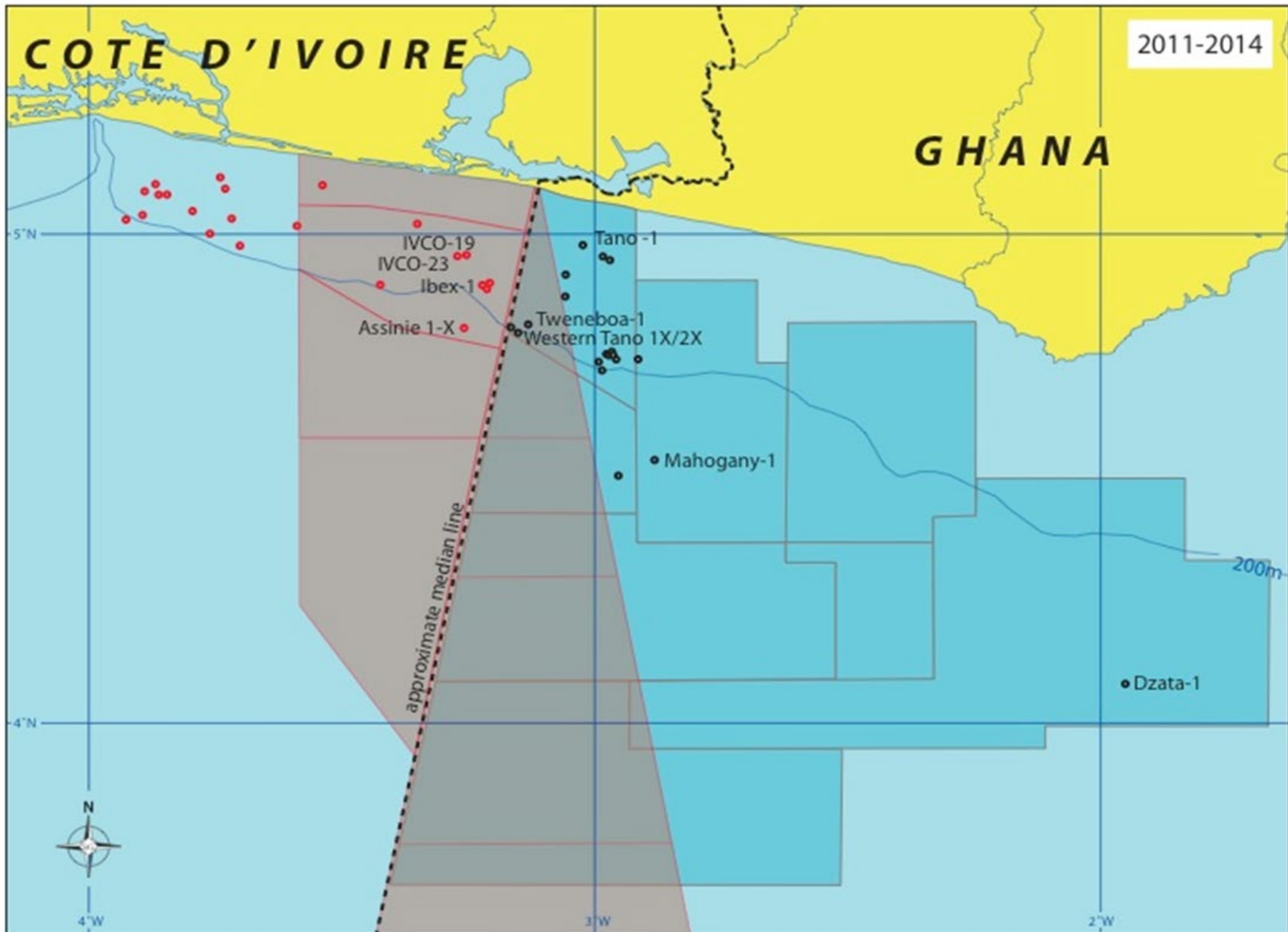
approximate median line



4°W

3°W

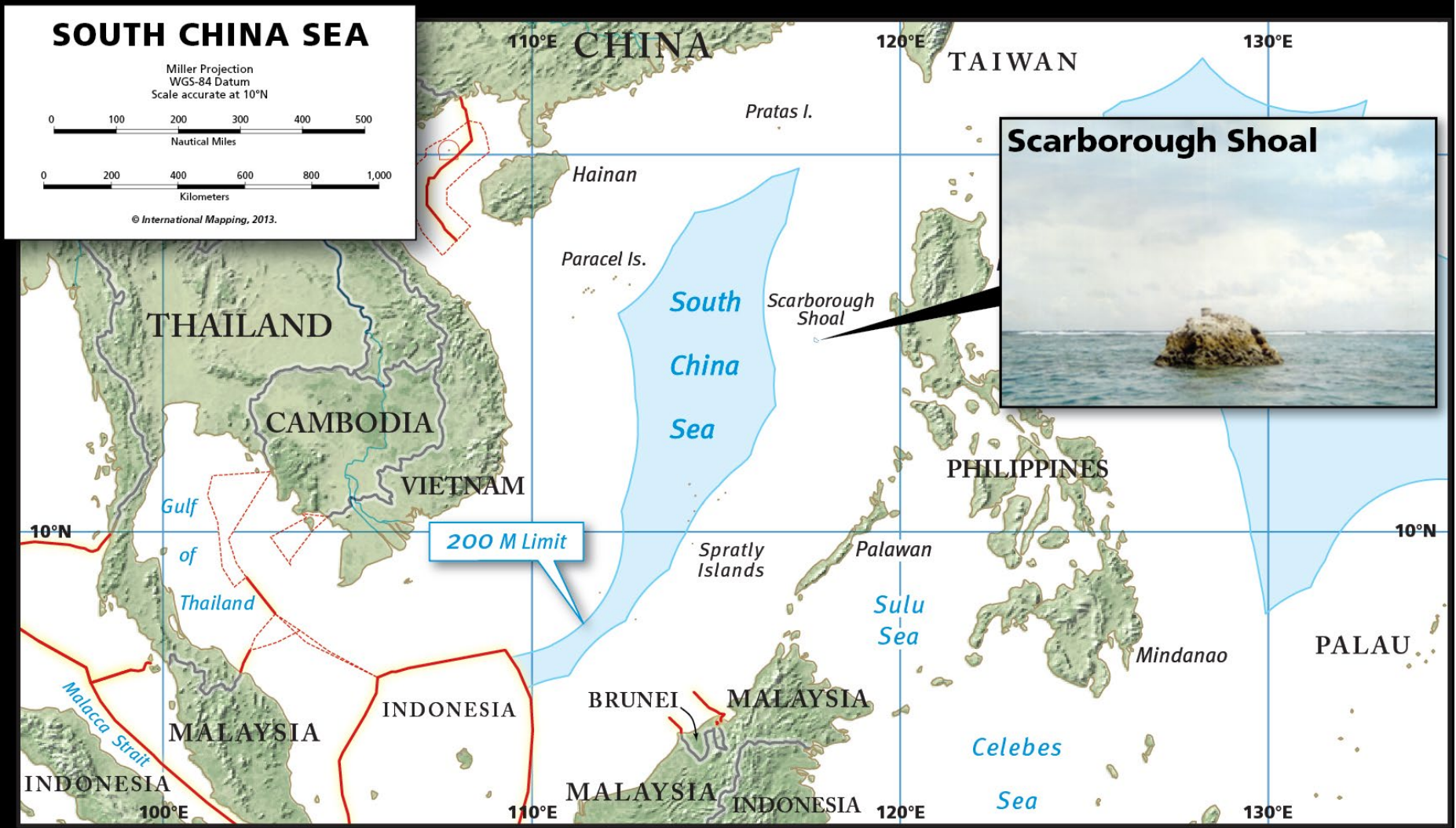
2°W



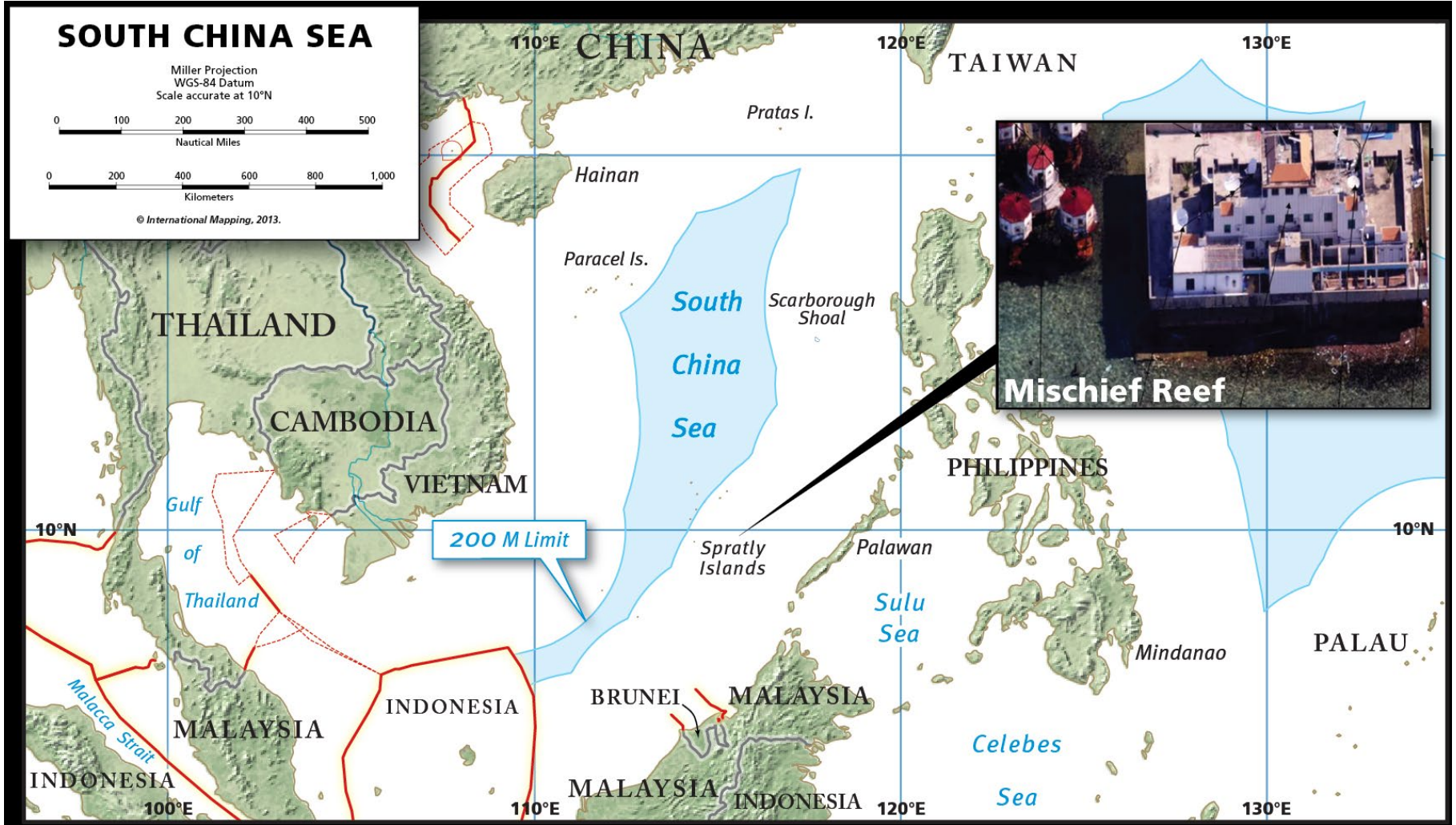
A. Maritime Boundaries

1. Coastal Geography
2. **Maritime Features**
3. Special / Relevant Circumstances

Scarborough Shoal



Mischief Reef

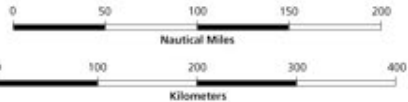


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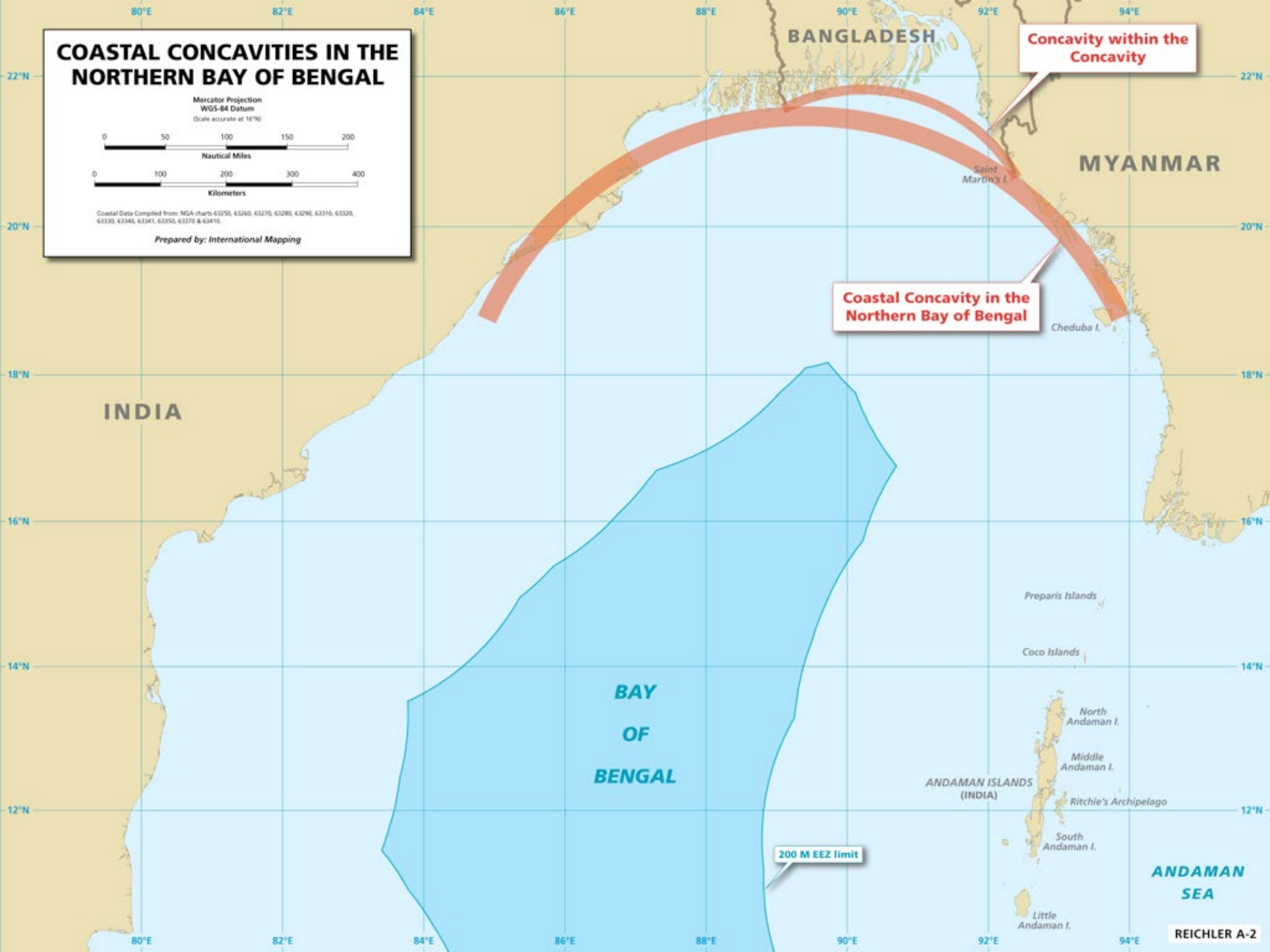
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Concavity within the Concavity

Coastal Concavity in the Northern Bay of Bengal

200 M EEZ limit

ANDAMAN SEA

B. Land Boundaries, Maritime Boundaries and Sovereignty Disputes

1. **Historical Factors and *Effectivités***
2. **Legal and Diplomatic History**
3. **Jurisprudence, Case Law, Commentaries, Custom**
4. **Anticipation (and Pre-emption) of Counter-Arguments**



The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations.

Cameroon v. Nigeria

- Cameroon relied on colonial era treaties and history
 - Anglo-German Agreement of 11 March 1913
 - 1884 Treaty of Protection between Great Britain and Kings and Chiefs of Old Calabar
 - British mandate over territory of Cameroons and British Order in Council of 1923
- Nigeria relied on effective occupation and historical consolidation of title

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2. Legal and Diplomatic History
3. Jurisprudence, Case Law, Commentaries, Custom
4. **Anticipation (and Pre-emption) of Counter-Arguments**

VI. PRESENTATION OF THE APPLICATION

- Must be fully prepared for case before filing
- First opportunity to present claim and frame the facts and legal arguments
- Should be consistent with later written and oral pleadings



Thank you

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