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Thank you.





THE LAW  
OF THE SEA



United Nations



# Legal principles in maritime boundary negotiations

Negotiating Maritime Boundaries  
6-8 June 2022, The Hague

This presentation contains personal views.

# **Outline**

- 1. What is international law? (“Sources”)**
- 2. Relevant United Nations Charter obligations**
- 3. 1982 UN Convention on the Law of the Sea (“UNCLOS”)**
- 4. International law in maritime boundary negotiations**
- 5. Uncertain/disputed sovereignty over land territory?**



**Maritime boundary negotiation**

**Law of the Sea Convention  
delimitation rules and  
dispute settlement system**

**UN Charter obligation  
to settle disputes peacefully**

**Sources of international law**



# **1. / International law**





**International law governs relations between States.**

Photo credit: UN Photo / Jean-Marc Ferré





**How do we know what international law is?**

→ Doctrine: “sources of international law”.

Photo credit: International Court of Justice

### Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- 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. subject to the provisions of Article 59, 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.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

### Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

### Article 38

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2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

### CHAPTER III PROCEDURE

### Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the



# **Sources of international law**

**1. Treaties**

**2. Customary international law**

**3. General principles of law** – must be widely accepted

**4. Subsidiary means**

- Judicial decisions

- Selected scholarly writings

# Sources of international law

1. **Treaties** ————— **example** —————→ **UNCLOS**

2. **Customary international law**

incl. Articles 15, 74, 83

3. **General principles of law** – must be widely accepted

4. **Subsidiary means**

- Judicial decisions
- Selected scholarly writings

# **Sources of international law relevant to maritime boundary negotiation**

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## **1. Treaties**

- UNCLOS
- Other relevant treaty — e.g. existing boundary treaty

## **2. Customary international law**

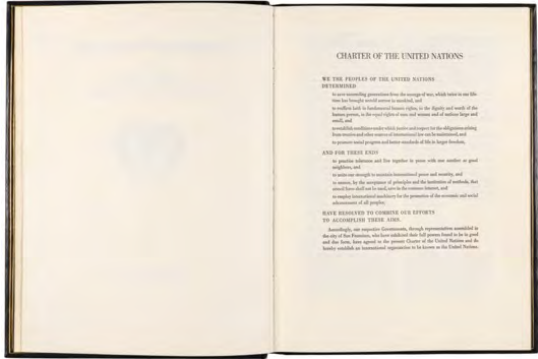
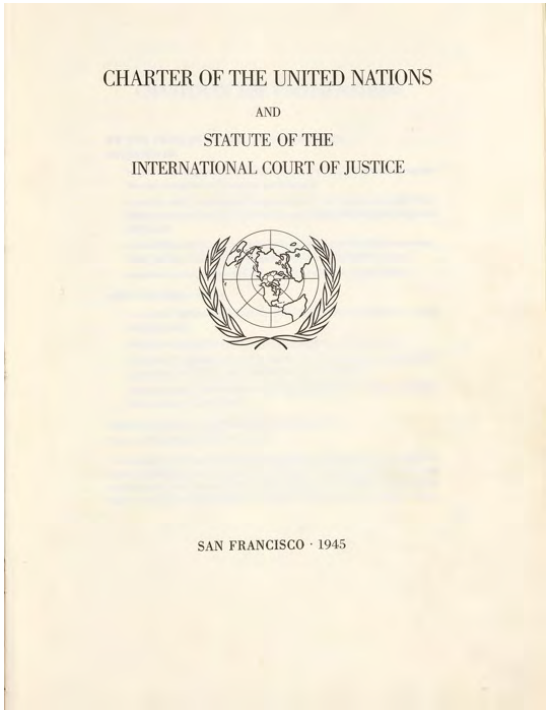
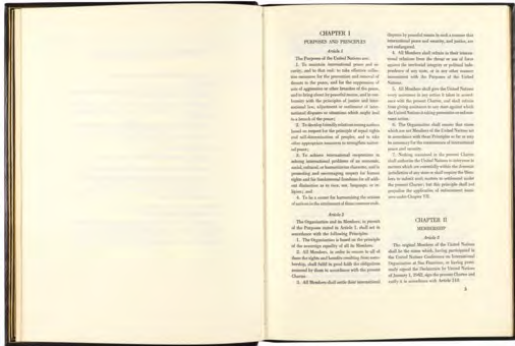
## **3. Judicial decisions – with qualification**



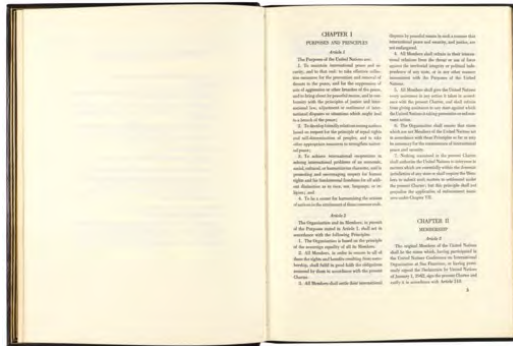
## **2./ The UN Charter**



Stage setting in the interior of the War Memorial Opera House, San Francisco. Photo credit: UN Photo







## WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

## AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbors, and

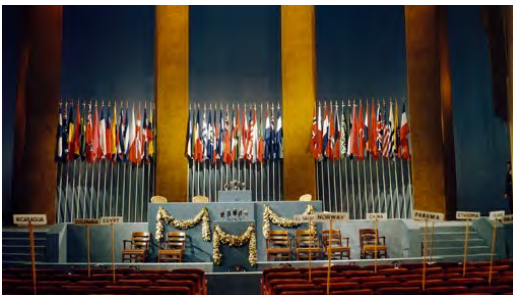
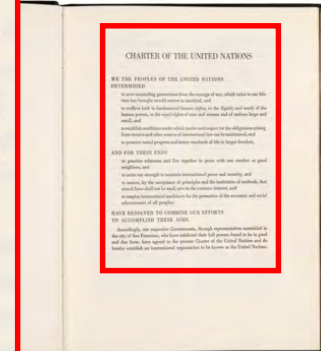
to unite our strength to maintain international peace and security, and

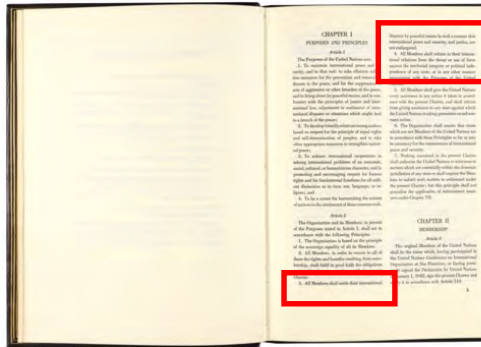
to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

## HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.





3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.



CHARTER OF THE UNITED NATIONS

AND  
STATUTE  
OF THE  
INTERNATIONAL COURT  
OF JUSTICE



SAN FRANCISCO

*Article 30*

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

*Article 31*

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

*Article 32*

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI  
PACIFIC SETTLEMENT OF DISPUTES

*Article 33*

1. 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.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

*Article 34*

The Security Council may investigate any dispute, or any situation which might lead to inter-

## CHAPTER VI PACIFIC SETTLEMENT OF DISPUTES

### *Article 33*

1. 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.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.



# **UN Charter obligations relevant to maritime boundary negotiation**

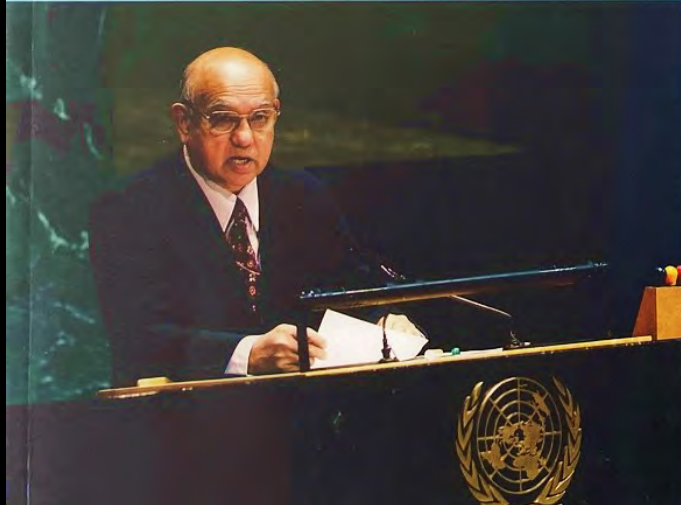
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- 1. No threat or use of force against another State.**  
Article 2(4) – prohibition.
- 2. Settle inter-State disputes by peaceful means.**  
Article 2(3) – obligation.  
Article 33(1) – means, including negotiation.

## **3./ The 1982 Convention**

**Reflections** on the  
**Making** of the **Modern**  
**Law** of the **Sea**

SATYA N. NANDAN  
WITH KRISTINE E. DALAKER



**Building** a  
**New Legal Order**  
for the **Oceans**

TOMMY KOH







## A Constitution for the Oceans: Comments and Suggestions Regarding Part XI of the Informal Composite Negotiating Text

ELISABETH MANN BORGESE\*

*In this Article, Mrs. Borgeese critically examines the provisions of Part XI of the Informal Composite Negotiating Text and continues the trend she began last year\*\* by indicating the relationship between the law of the sea and efforts of the developing nations to restructure the world political and economic system. She continues with an acute critique of the present draft of the negotiating text and makes provocative suggestions for reforming the draft to accommodate the quest of developing nations for a new world economic order.*

(1978) San Diego Law Review 39

# “Constitution”

“The [Informal Composite Negotiating Text] is a unique document the likes of which the international community has never dealt with before. Whatever its weaknesses and imperfections...it is a landmark on the long road ahead.”

—Elisabeth Mann Borgese, writing in 1978

# “Constitution”

“Let no nation put asunder this landmark achievement of the international community.”

—Ambassador Tommy TB Koh of Singapore,  
closing the Third UN Conference on the Law of the Sea in 1982





“The Convention that we celebrate today arose out of the failure of the 1958 treaties on the law of the sea. *Its adoption established a ‘legal order of the seas’ which replaced a situation that could have been described as the ‘legal chaos of the seas’...*

Today’s problems can appear daunting; the differences among States may seem impossible to bridge. But we cannot succumb to cynicism or fatalism. Instead, we must recall, as demonstrated by the United Nations Convention on the Law of the Sea, that international law and international institutions offer *tools that we can use* to solve seemingly intractable problems, to reduce conflict and to move, with diligence and foresight, towards the ideals that inspired the Charter of the United Nations.”

— H.E. Judge Joan Donoghue, President of the International Court of Justice, addressing the UN General Assembly to mark the 40<sup>th</sup> anniversary of the adoption of UNCLOS, 29 April 2022

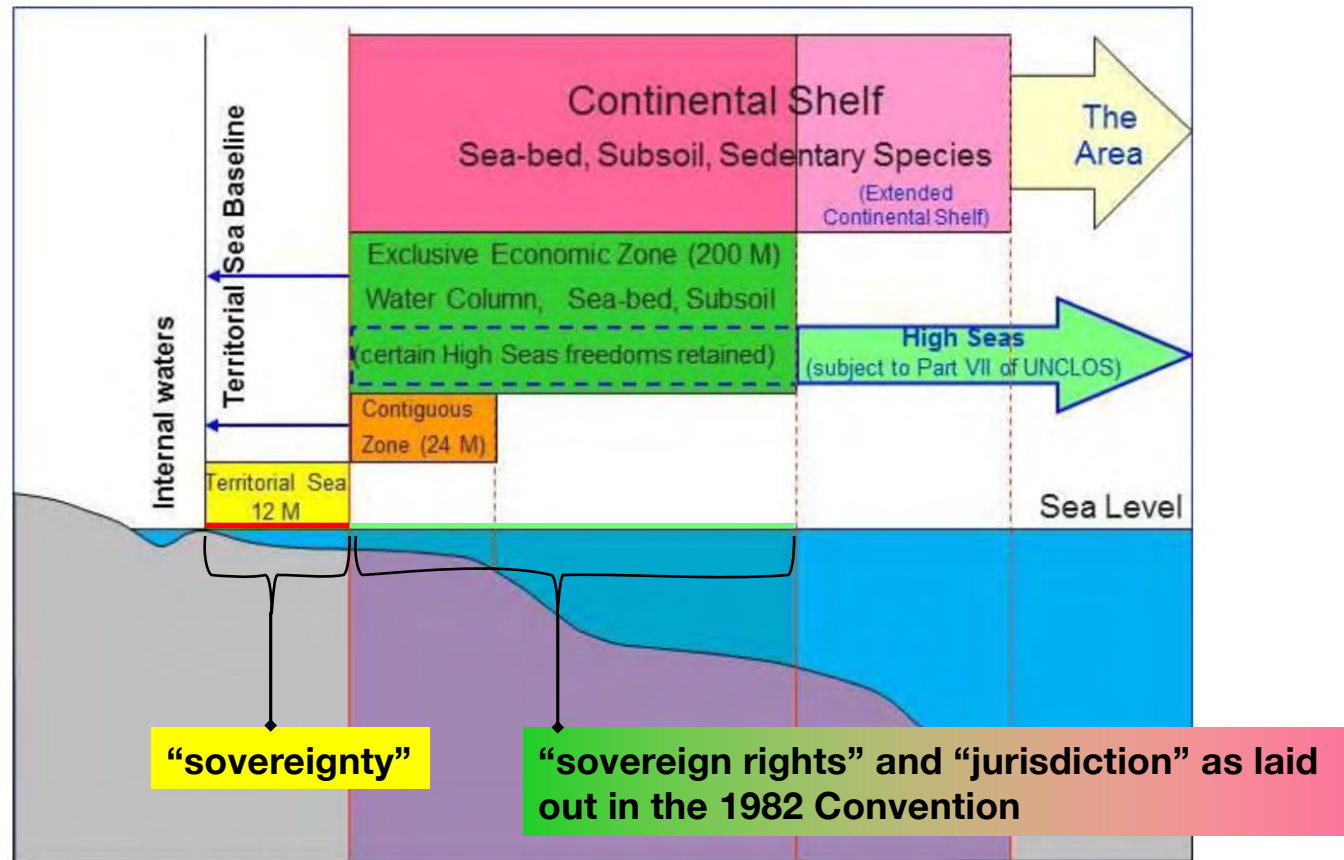
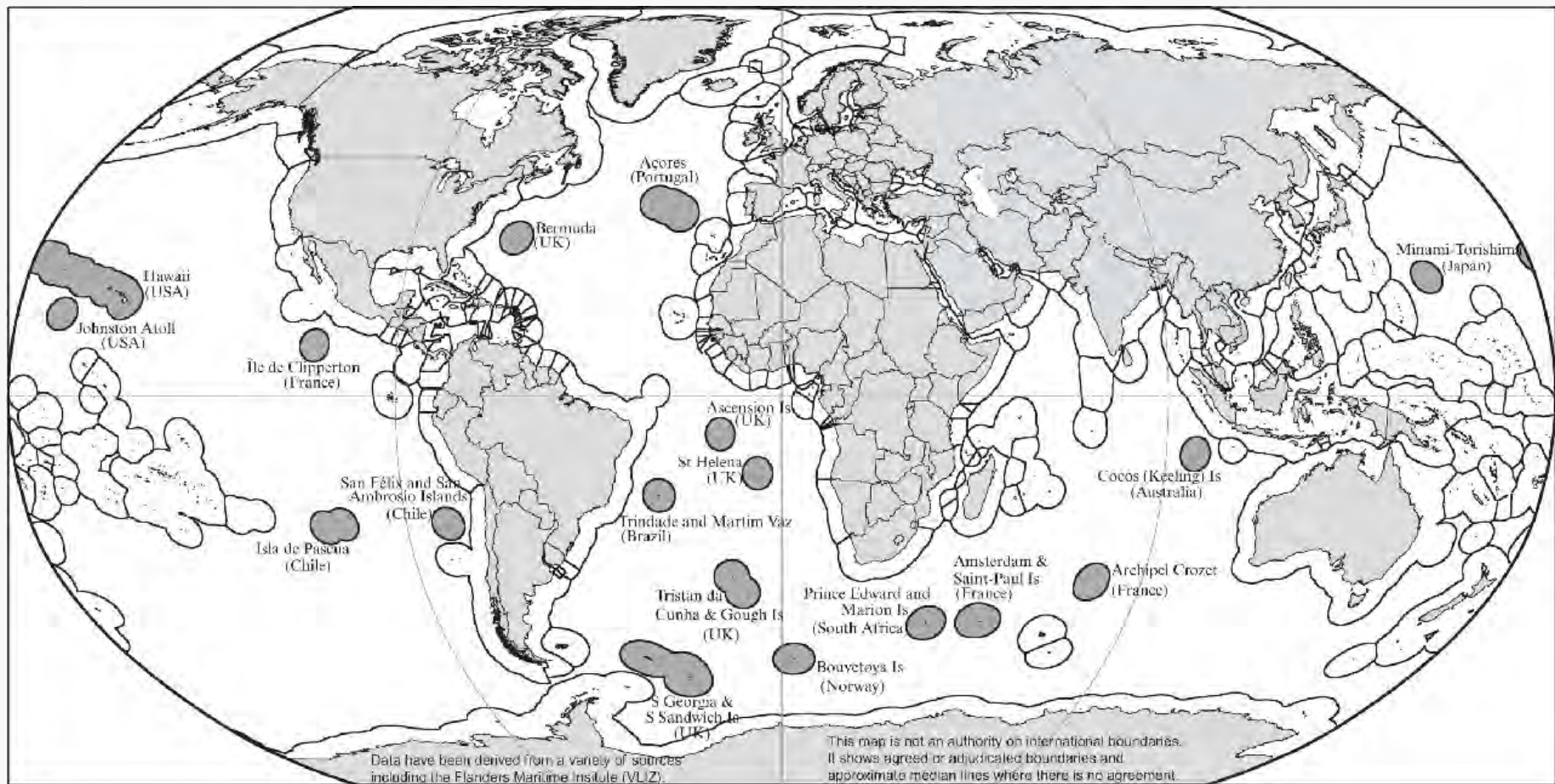


Figure 5.1 – Diagram to illustrate maritime jurisdictional zones of a coastal State.

Source: IHO Doc C-51 TALOS Manual (6<sup>th</sup> ed.)



Map showing 200-mile maritime zones and associated boundaries.  
 Highlighted areas are those islands without overlapping zones; all of which are dependencies.

Source: Dr Robin Cleverly, Marbdy Consulting Ltd, reproduced as Fig. 12.1 in James Crawford, ed., *Brownlie's Principles of Public International Law*, 9<sup>th</sup> ed. (OUP 2019)

# UNCLOS maritime delimitation rules

## Process

Seek to agree

Interwoven with Part XV  
dispute settlement tools

## Substance

Territorial sea: Article 15

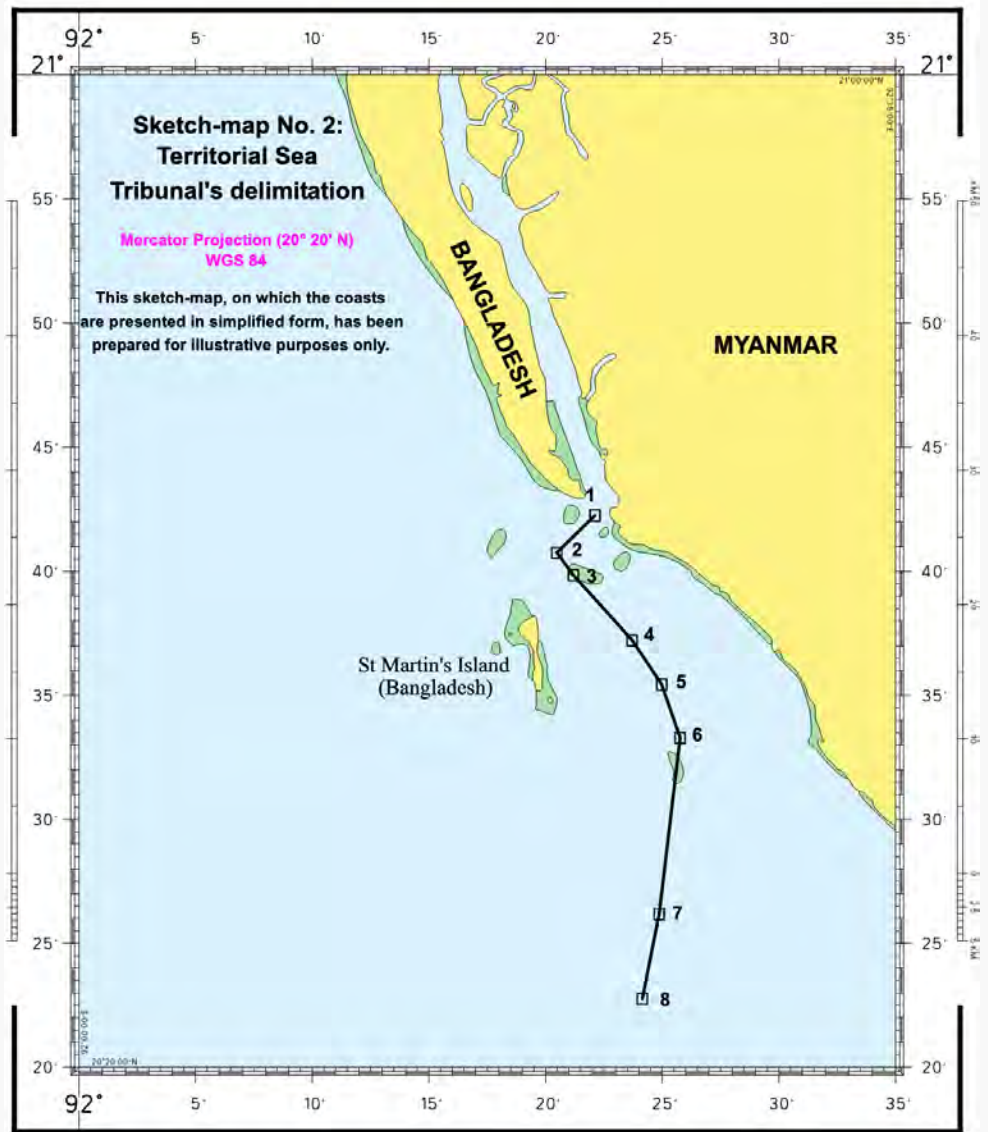
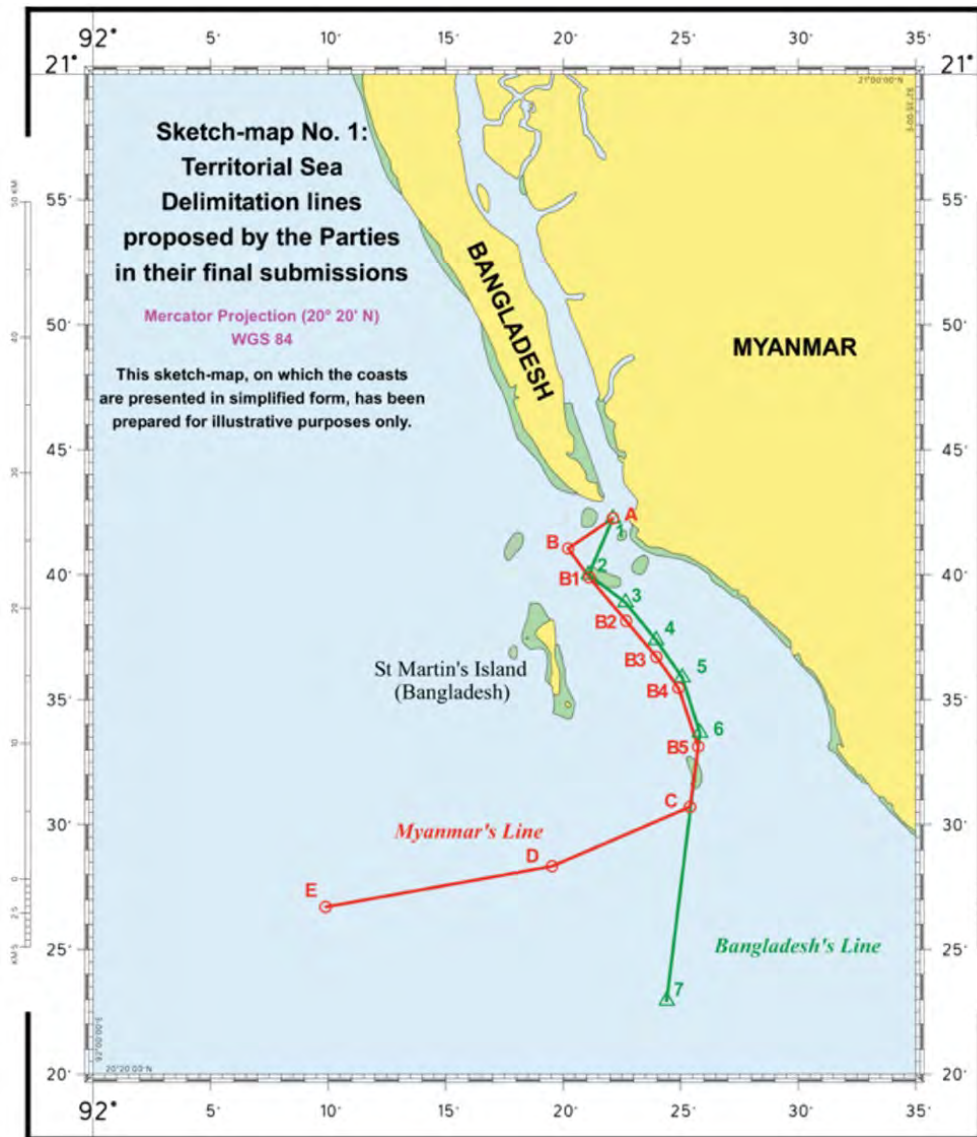
Exclusive economic  
zone and continental  
shelf: Articles 74 & 83

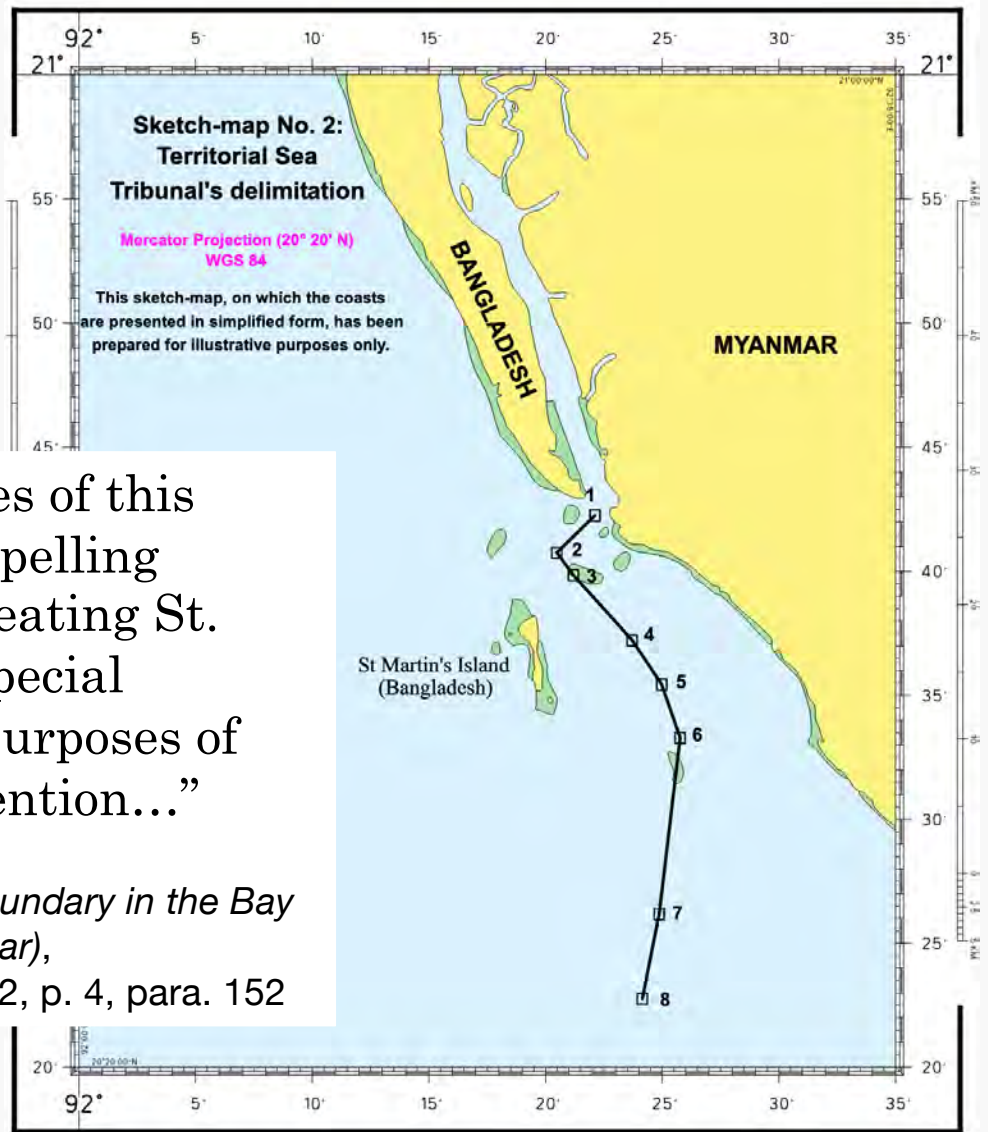
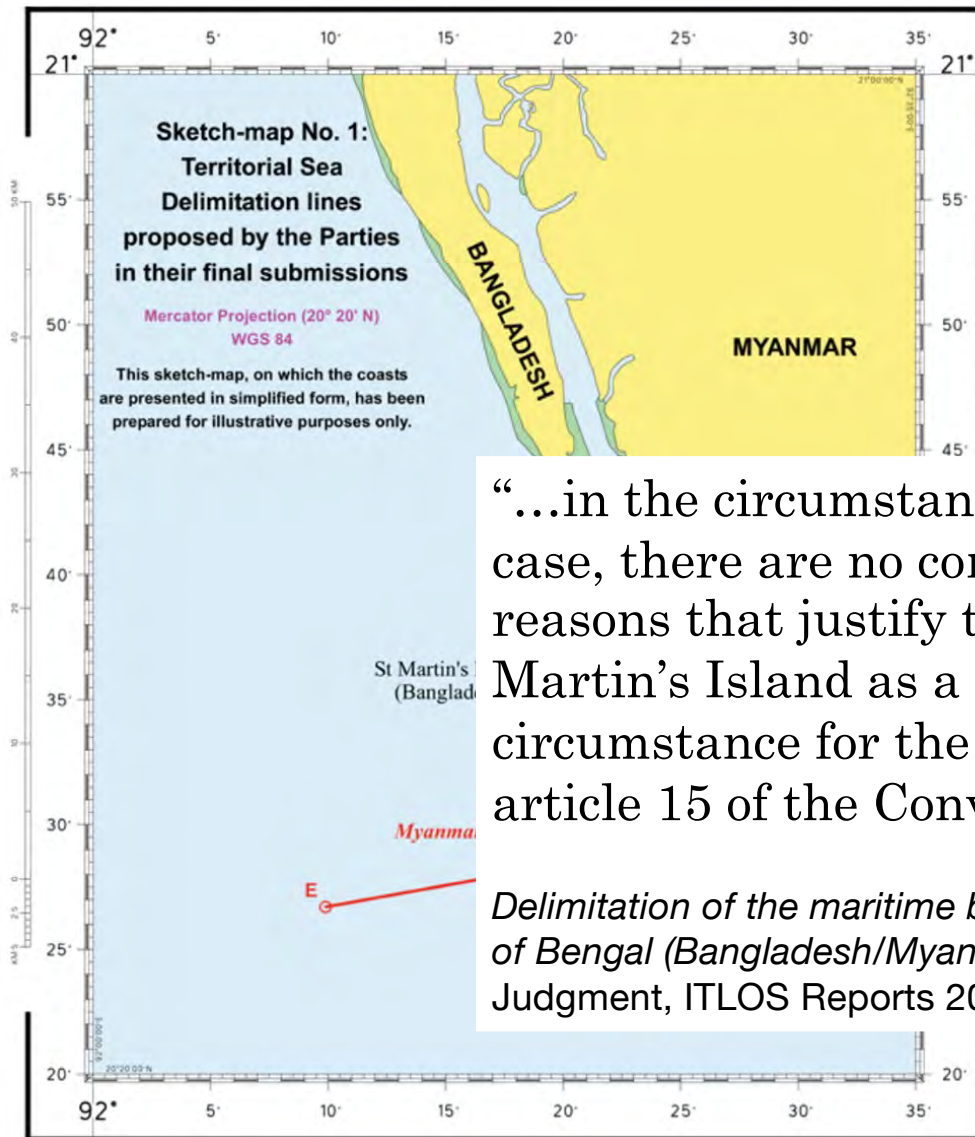


*Article 15*  
*Delimitation of the territorial sea between States*  
*with opposite or adjacent coasts*

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea 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. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.







“...in the circumstances of this case, there are no compelling reasons that justify treating St. Martin’s Island as a special circumstance for the purposes of article 15 of the Convention...”

*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 4, para. 152*

# Other examples

“historic title”	“other special circumstances”
Not yet considered by an international court or tribunal.	✓ Coastal configuration producing “boxing-in” or “cut-off” ( <i>Croatia/Slovenia</i> )
	✓ Navigational interests ( <i>Beagle Channel; Guyana/Suriname</i> )
	✗ Concavity of Bangladesh’s coastline not producing significant “cut-off” effect ( <i>Bangladesh/India</i> )
	✗ Difference in length of Parties’ coastal fronts ( <i>Croatia/Slovenia</i> )

*Article 74*  
*Delimitation of the exclusive economic zone*  
*between States with opposite or adjacent coasts*

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.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. 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.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

*Article 83*  
*Delimitation of the continental shelf*  
*between States with opposite or adjacent coasts*

1. 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.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

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4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.



*Article 74*  
*Delimitation of the exclusive economic zone*  
*between States with opposite or adjacent coasts*

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# Why Articles 15 and 74/83 are different


1945	<b>Truman Proclamation</b> on the Continental Shelf: “In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with <b>equitable principles</b> .”
1958	<b>UN Continental Shelf Convention</b> adopted “ <b>equidistance</b> ” / “ <b>special circumstances</b> ” approach
1969	<ul style="list-style-type: none"><li>• <b>North Sea Continental Shelf Cases – International Court of Justice</b> asked to delimit continental shelf boundaries in the North Sea (FRG/Netherlands; FRG/Denmark). FRG never ratified 1958 Continental Shelf Convention.</li><li>• ICJ said that the Continental Shelf Convention delimitation rule was not customary international law. Used “<b>equitable principles</b>” approach.</li></ul>
1982	<ul style="list-style-type: none"><li>• EEZ/CS delimitation highly contentious issue during UNCLOS III.</li><li>• Outcome: general compromise text seen in Articles 74/83.</li></ul> <p style="text-align: right;">In (judicial) practice...</p>

# ***Black Sea* “three-stage” methodology for EEZ/CS delimitation**


**Preliminary.** Identify coasts that generate overlapping radial projections seaward – “relevant coasts”.



**1./ Equidistance.** Construct simplified equidistance line. This is the provisional boundary.

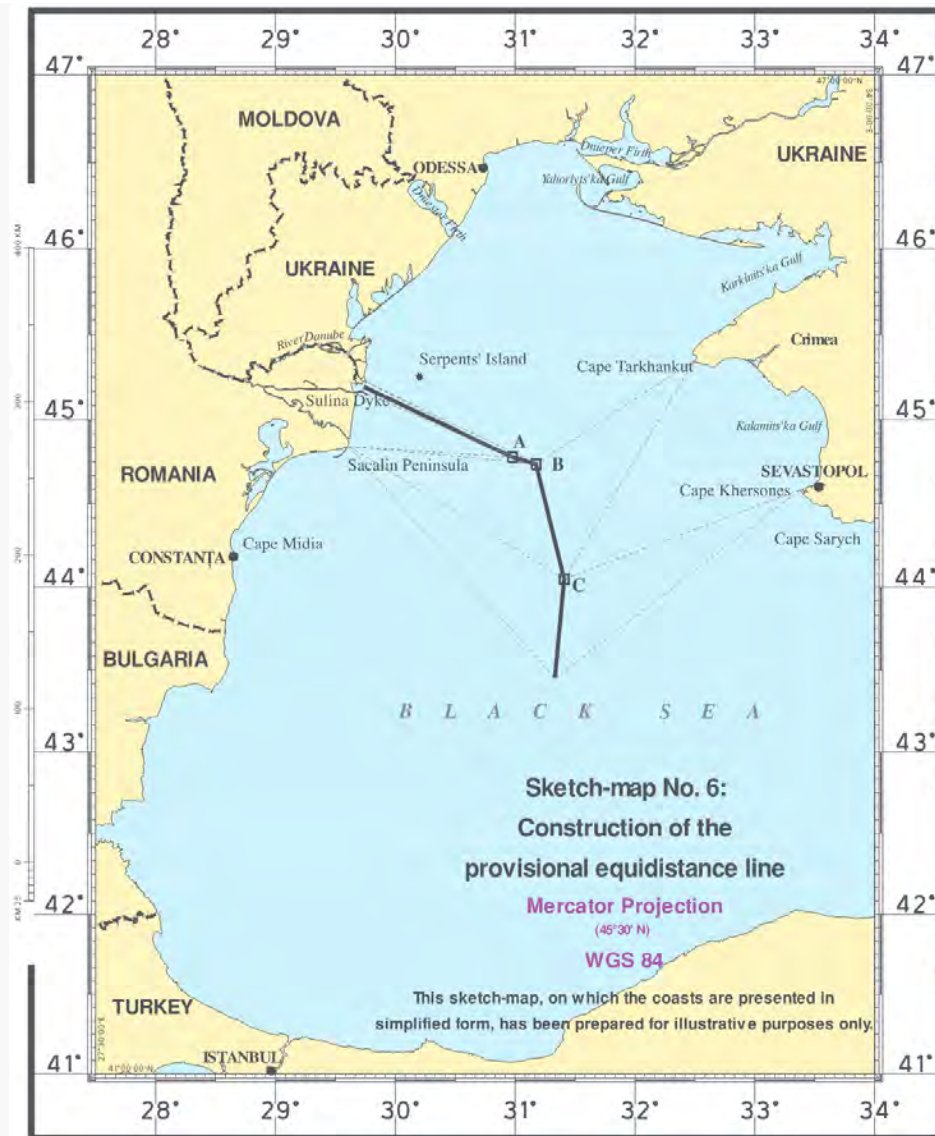


**2./ Relevant circumstances.** Consider if there are any relevant circumstances that require the equidistance line to be adjusted in order to reach an equitable result. If so, consider what adjustments they entail.



**3./ Check for “disproportionality”.** Compare parties’ respective shares of the relevant maritime area : lengths of the relevant coasts.

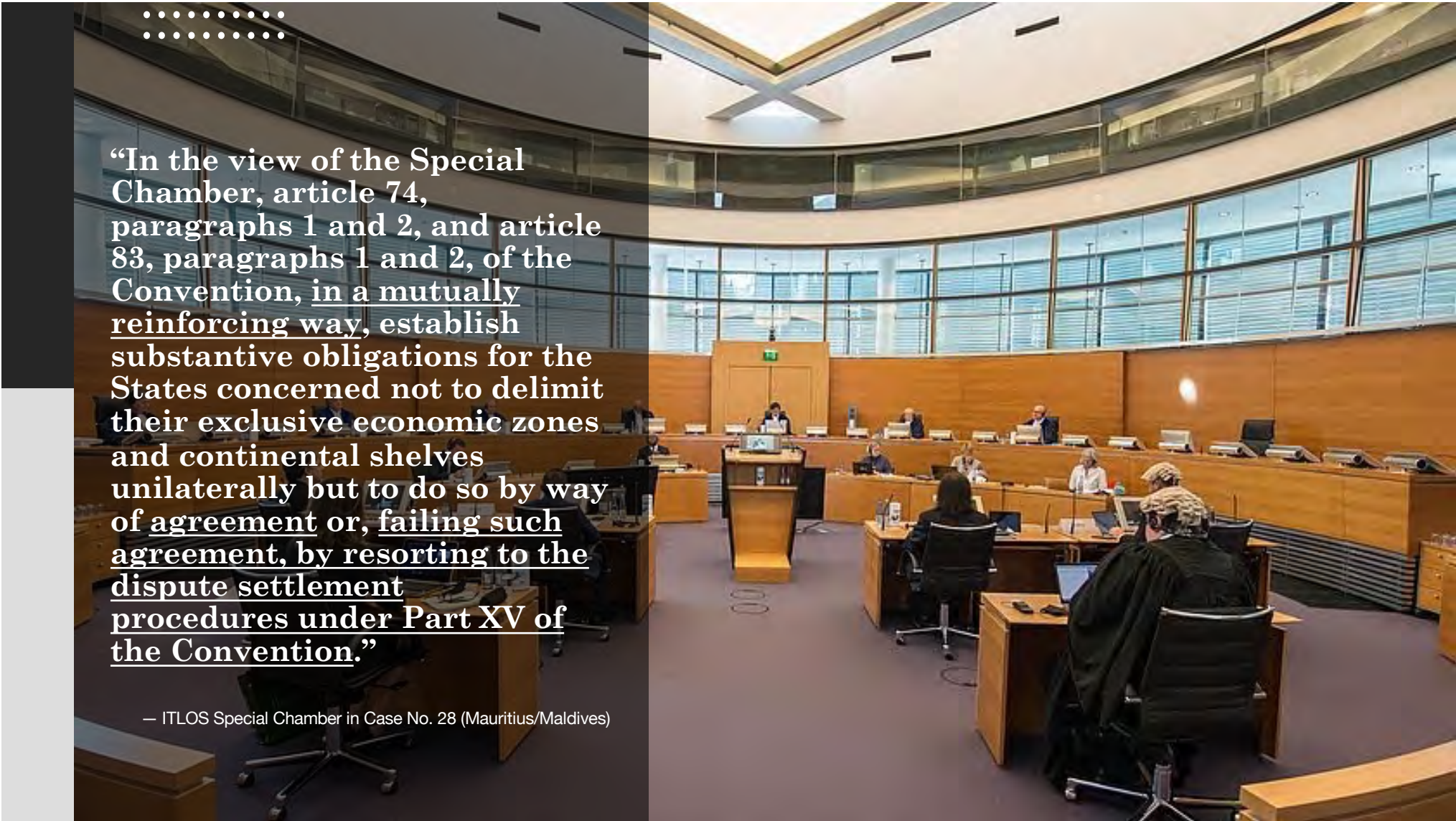




# Other examples

## “relevant circumstances”

- ✓ Islands (*Qatar/Bahrain*; *Costa Rica/Nicaragua*)
- ✓ Cut-off due to shape of coastline (*North Sea Continental Shelf*; *Bangladesh v. India*; *Bangladesh/Myanmar*; *Nicaragua v. Colombia*)
- ✓ Marked disparity in lengths of parties’ relevant coasts (*Nicaragua v. Colombia*)
- ✗ Location of resources
- ✗ Conduct of the parties – except if amounting to tacit agreement



“In the view of the Special Chamber, article 74, paragraphs 1 and 2, and article 83, paragraphs 1 and 2, of the Convention, in a mutually reinforcing way, establish substantive obligations for the States concerned not to delimit their exclusive economic zones and continental shelves unilaterally but to do so by way of agreement or, failing such agreement, by resorting to the dispute settlement procedures under Part XV of the Convention.”

— ITLOS Special Chamber in Case No. 28 (Mauritius/Maldives)



# UNCLOS dispute settlement system

- Operationalises UN Charter obligations seen earlier
- Established in Part XV of UNCLOS
- Key plank of overall UNCLOS “package deal”
- Optional and compulsory parts
- Compulsory parts also apply to maritime boundary disputes – exact shape for each Party depends on its choice from the menu



*Article 279*  
*Obligation to settle disputes by peaceful means*

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

*Article 280*  
*Settlement of disputes by any peaceful means chosen by the parties*

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

*Article 283*  
*Obligation to exchange views*

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

# Article 283: “a provision particular to the Convention”

“Article 283 requires the Parties to ‘proceed expeditiously to an exchange of views regarding [the] settlement [of the dispute] by negotiation or other peaceful means.’ Article 283 thus requires the Parties to exchange views *regarding the means* for resolving their dispute; it does not require the Parties to in fact engage in negotiations or other forms of peaceful dispute resolution. As a matter of textual construction, the Tribunal considers that *Article 283 cannot be understood as an obligation to negotiate the substance of the dispute... Article 283 is thus a provision particular to the Convention* and distinct from a requirement that parties engage in negotiations prior to resorting to arbitration.”

— Annex VII Arbitral Tribunal in PCA Case No. 2011-03 *Chagos Marine Protected Area Arbitration*, Award, para. 378

# Article 283: example of compliance

Article 283 ... concerns an exchange of views on the means to settle the dispute, whether by negotiation or other peaceful means. In the Tribunal's view, the most unequivocal example of compliance with this provision is that offered by Australia and New Zealand in the *Southern Bluefin Tuna* arbitration. In identical Notes Verbales dated 15 September 1999, Australia and New Zealand each set out a history of diplomatic communications recording the termination of negotiations, the possible submission of the dispute to mediation, Japan's preference for arbitration under the 1993 Convention for the Conservation of Southern Bluefin Tuna, and Australia and New Zealand's rejection of this option and intent to submit that dispute to arbitration under the Convention..."

— Annex VII Arbitral Tribunal in PCA Case No. 2011-03 *Chagos Marine Protected Area Arbitration*, Award, para. 378



## International Tribunal for the Law of the Sea

Permanent international tribunal established by UNCLOS

21 members (+ 2 ad hoc if applicable)

Seated in Hamburg and can sit in Singapore

Outcome binding on the parties

## International Court of Justice

Principal judicial organ of the UN

15 members (+ 2 ad hoc if applicable)

Seated in The Hague

Outcome binding on the parties

## Arbitral Tribunal under Annex VII

Ad hoc arbitration; in practice all but one administered by the Permanent Court of Arbitration

5 members

Parties and Arbitral Tribunal can decide on venue

Outcome binding on the parties

## Conciliation Commission under Annex V

Compulsory where a Party has opted out of adjudication or arbitration of sea boundary delimitations

5 members

More flexible procedure than adjudication or arbitration

Outcome not binding on the parties

## Special Arbitral Tribunal under Annex VIII

Fisheries, marine environment, MSR, navigation

5 members

## International Tribunal for the Law of the Sea

Permanent international tribunal established by UNCLOS

21 members (+ 2 ad hoc if applicable)

Seated in Hamburg and can sit in Singapore

Outcome binding on the parties

## International Court of Justice

Principal judicial organ of the UN

15 members (+ 2 ad hoc if applicable)

Seated in The Hague

Outcome binding on the parties

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Ad hoc arbitration; in practice all but one administered by the Permanent Court of Arbitration

5 members

Parties and Arbitral Tribunal can decide on venue(s)

Outcome binding on the parties

## Conciliation Commission under Annex V

Compulsory where a Party has opted out of adjudication or arbitration of sea boundary delimitations

5 members

More flexible procedure than adjudication or arbitration; Parties and Commission can decide on venue(s)

Outcome not binding on the parties

## Example of Annex V conciliation commission



The Conciliation Commission (top to bottom row, left to right): Professor Donald McRae, Judge Rüdiger Wölfrum, Judge Abdul G Koroma, HE Ambassador Peter Taksø-Jensen (Chairman) and Dr Rosalie Balkin  
(Photo: The Government of Timor-Leste)

## International Tribunal for the Law of the Sea



## International Court of Justice



## Example of Annex VII arbitral tribunal



# 1982 UN Convention on the Law of the Sea



- Impact of the Convention – before/after
- Substantive law on maritime boundary delimitation – Article 15; Articles 74 & 83
- Role of the dispute settlement system – Part XV



## **4./ Int'l law in negotiations**



“Boundary-making involves conducting what are often complex, structured and face-to-face negotiations against a predominantly legal background...

International law is the yardstick against which to measure an offer in talks, as well as the worth overall of a proposed boundary.”

—Former ITLOS Judge and  
UK government lawyer David H. Anderson,  
2008

# The role of international law in maritime boundary negotiations

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1. Common language for negotiations
  - Substantive basis for presenting proposals
  - In (institutional, systemic) context of UNCLOS Part XV dispute settlement procedures
2. When Parties get to “yes”: role of treaty law

## **5./ Territorial sovereignty?**





**“...the land dominates the sea...”**

“...the land is the legal source of the power which a State may exercise over territorial extensions to seaward...”

—International Court of Justice in *North Sea Continental Shelf*, 1969

## What if territorial sovereignty over a relevant geographical feature is uncertain or disputed?

- UNCLOS Part XV procedures – apply only to “interpretation or application” of UNCLOS
  - ✗ Territorial sovereignty dispute
- UN Charter obligations to settle dispute peacefully apply – but beyond that, no set approach
- Depends on various factors – e.g. complexity of dispute; Parties’ overall relationship



# Some possibilities

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- 1 **(Sequential) direct negotiation or assisted negotiation (i.e., mediation, conciliation) of all open issues**, potentially as overall package
- 2 **Refer both** territorial sovereignty and maritime delimitation disputes for (sequential) decision in adjudication or arbitration  
*Example: Eritrea/Yemen (1999), Qatar/Bahrain (2001), Cameroon/Nigeria (2002), Nicaragua/Colombia (2012), Guatemala/Belize (pending before the ICJ)*
- 3 **Refer only territorial sovereignty dispute** to adjudication or arbitration; follow up later with direct negotiation on maritime boundary  
*Example: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (decided by the International Court of Justice in 2008; Parties' Special Agreement did not ask the Court to delimit the maritime boundary)*

# Selected resources

1. Churchill, Lowe and Sander, The law of the sea, 4<sup>th</sup> ed. (Manchester University Press, 2022) (maritime delimitation and dispute settlement chapters) [\[overview\]](#)
2. Koh & Jayakumar, “The Negotiating Process of the Third United Nations Conference on the Law of the Sea” in Nordquist *et al*, eds., United Nations Convention on the Law of the Sea: A Commentary (Brill) 106 [\[UNCLOS III\]](#)
3. Fietta & Cleverly, A Practitioner’s Guide to Maritime Boundary Delimitation (Oxford University Press, 2016) [\[cases\]](#)