

# Introduction to Maritime Boundary Delimitation

Dr. David S. Berry

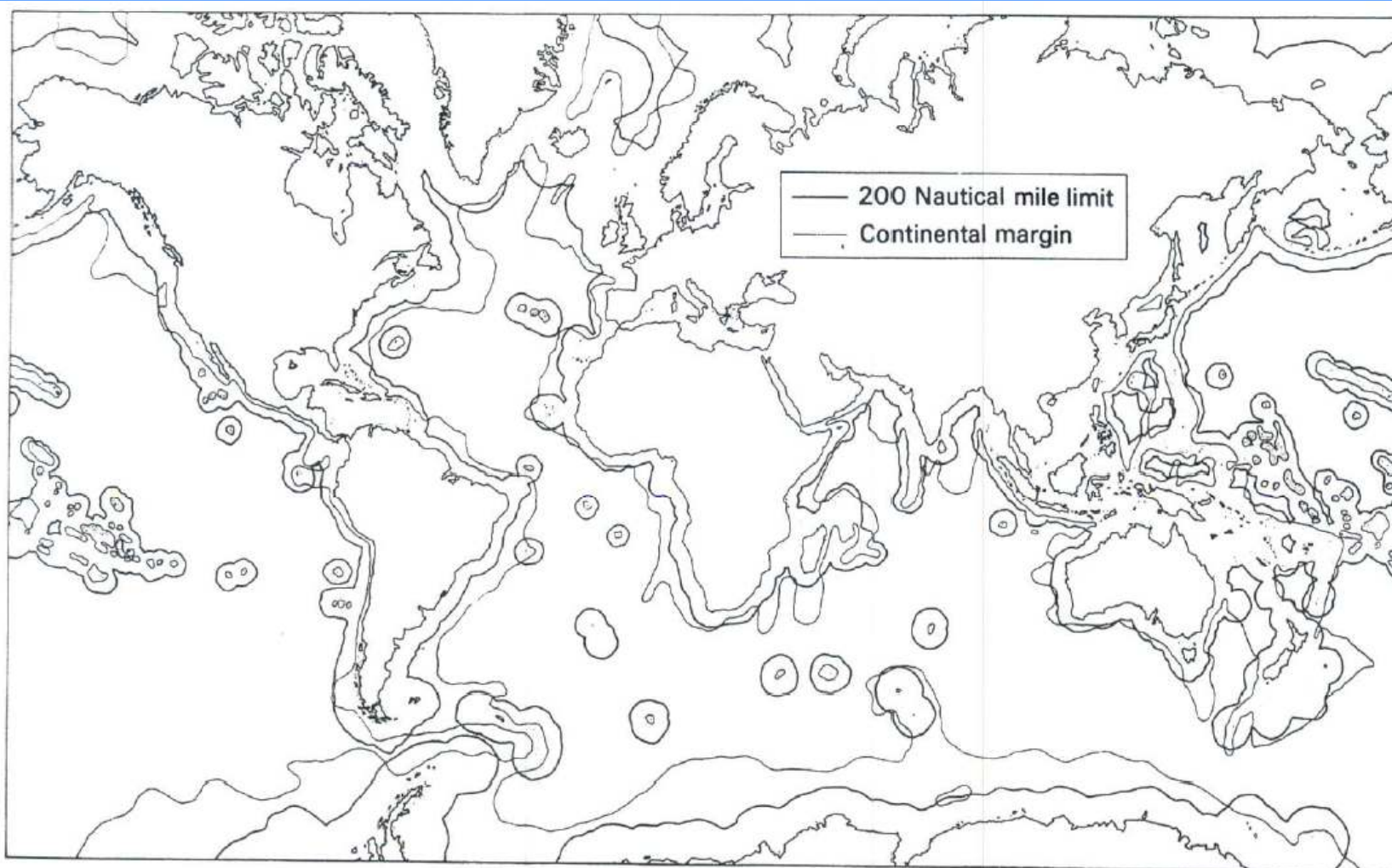
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# Delimitation Areas and Focus

- Examine three areas that require delimitation between opposite and adjacent states:
  - **Territorial sea**
  - **Exclusive economic zone**
  - **Continental shelf**
- Each area is governed by legally distinct rules, but shares several common features. I will focus on commonalities.
- Sequence of analysis:
  1. Applicable provisions of the 1982 *UN Convention on the Law of the Sea*
  2. Rules as established in the jurisprudence

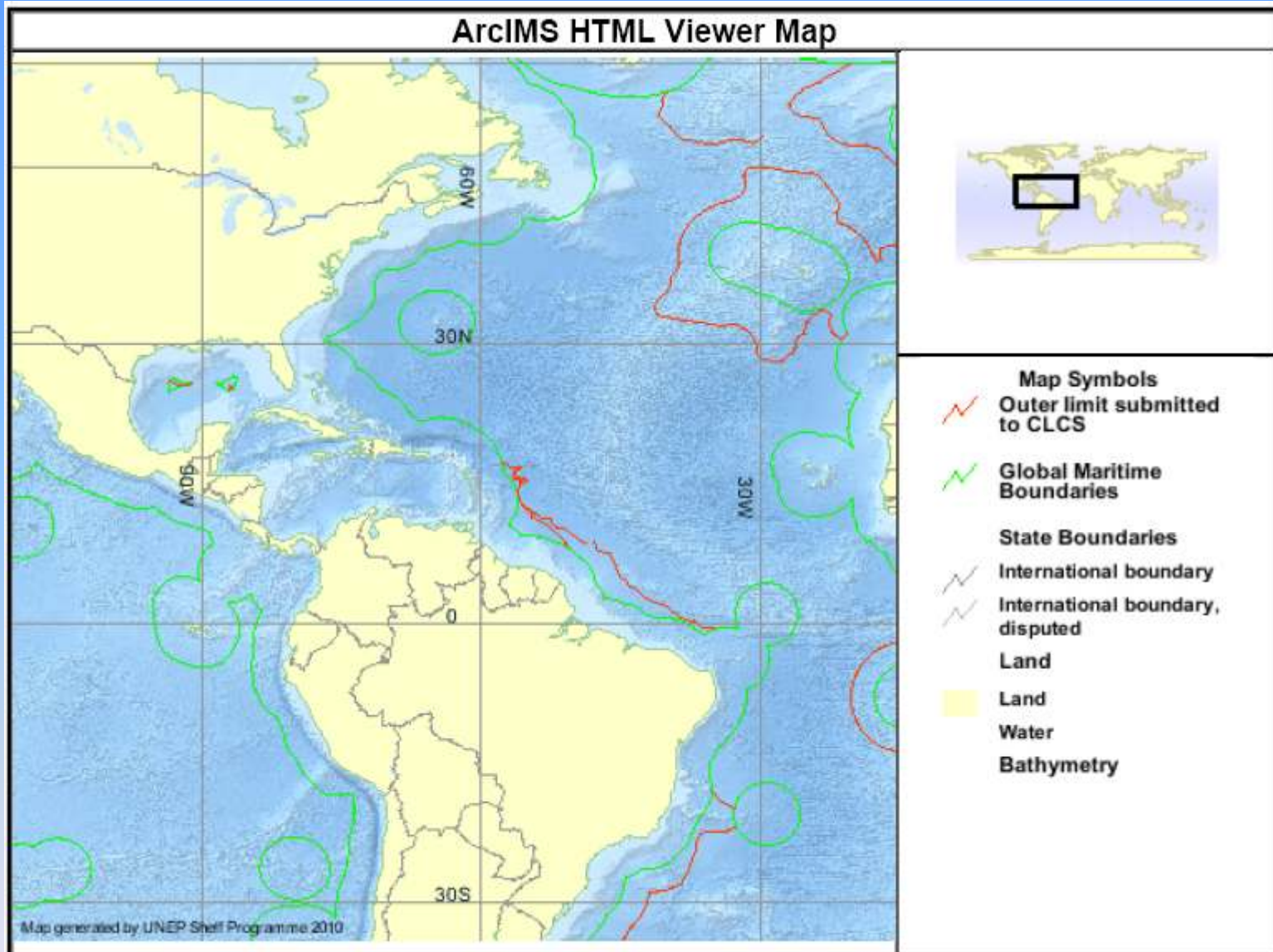
# Importance of Delimitation of Exclusive Economic Zone and Continental Shelf

- As a result of the expansion of state jurisdiction under the *Law of the Sea Convention*, states now have the potential to control/utilize:
  - EEZ – 90% of world's fish stocks (Milton Haughton)
  - Continental shelf – very high percentage of world's continental margin (up to 200 n.m.)
- Result: greater need for maritime boundaries, between both adjacent and opposite states (Churchill & Lowe, p. 181)
- Key: unresolved boundaries can result in no exploration or exploitation (CS), conflicts (EEZ)
- Alternative (interim) solution: cooperative (joint management) regimes (see Churchill & Lowe, 198-200)
  - E.g., zone created under Columbia-Jamaica Maritime Delimitation Treaty (1993)



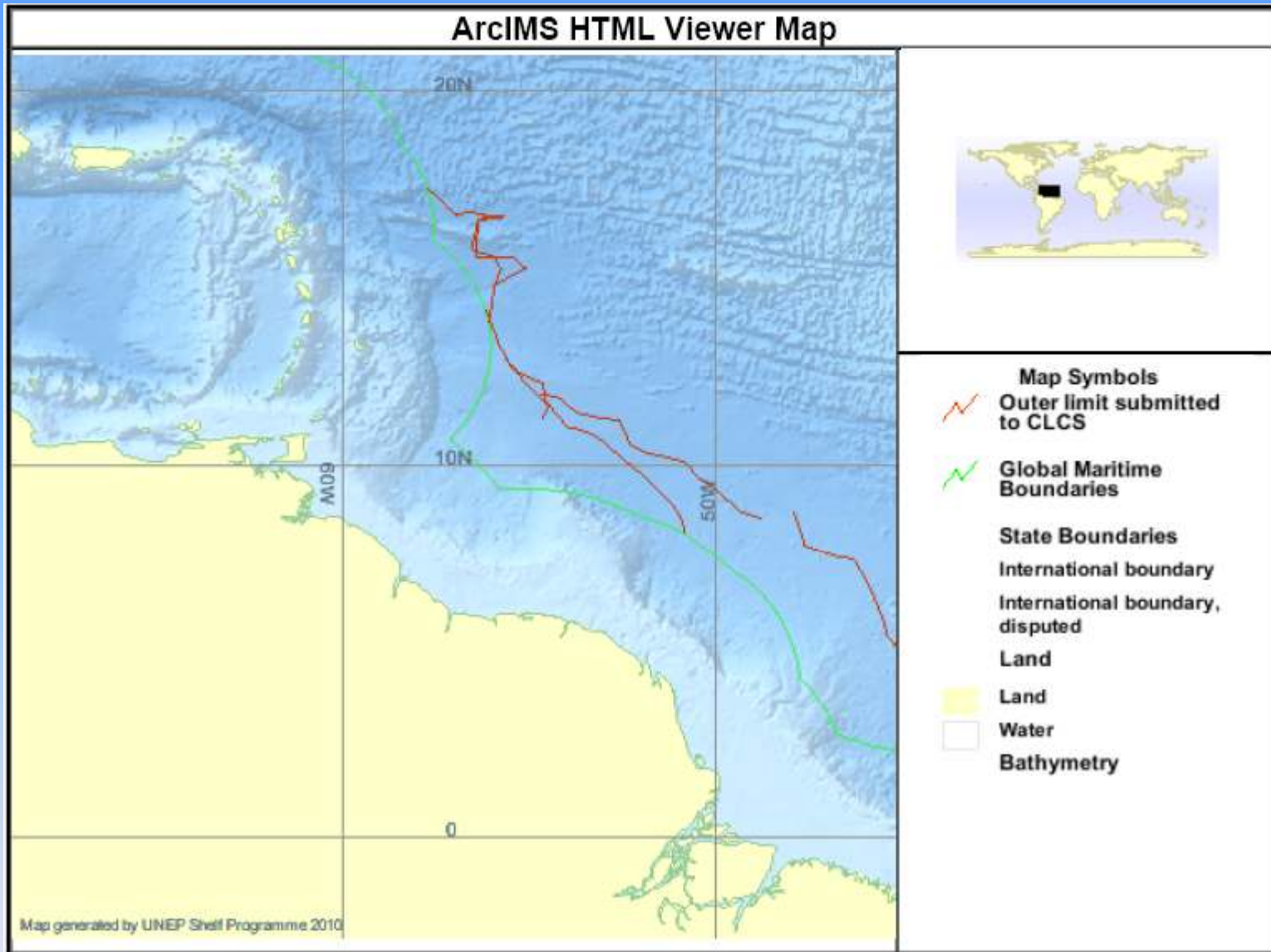
*The 200-mile limit and continental margin*

RR Churchill and AV Lowe, *The Law of the Sea*, 3<sup>rd</sup> ed (Manchester: Manchester University Press, 1999), p. 159.



UNEP Shelf Programme (<http://maps.continentalshef.org/viewer.htm>)

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# Territorial Sea

## UNCLOS Governing Provision

- **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.

# Territorial Sea

## Impact of Art. 15:

- Opposing or adjacent states are limited to drawing boundary at median line, unless another boundary line is necessary as a result of
  - historic title or
  - other special circumstances
- Key term: “special circumstances”

# Exclusive Economic Zone

## UNCLOS Governing Provision

- **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 [settlement of disputes]. ...

# Continental Shelf

## UNCLOS Governing Provision

- **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.

# Exclusive Economic Zone & Continental Shelf

## Impact of Arts 74 & 83:

- EEZ and continental shelf boundaries are both to be delimited
  - By agreement
  - On the basis of international law (as referred to in Art. 38 of the *Statute of the International Court of Justice*)
  - In order to achieve an equitable solution
- Key concept: “international law”
  - *Barbados-Trinidad* [222]: “This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.”
- “Equitable solution” refers to equity within the law (*infra legem*), not outside of the law; equity ≠ equality (cannot refashion nature)
  - *North Sea* [88-90, 91]; *Barbados-Trinidad* [230]

# Current Tendency in Delimitation: Single Maritime Boundary

- Trend towards single maritime boundary (EEZ/continental shelf), even though the two regimes remain conceptually distinct: *Libya/Malta*; *Barbados-Trinidad* [226-7, 234]
- State practice discussed in *Barbados-Trinidad* [235]:
  - “it is evident that State practice with very few exceptions (most notably, with respect to the Torres Strait) has overwhelmingly resorted to the establishment of single maritime boundary lines and that courts and tribunals have endorsed this practice either by means of the determination of a single boundary line (*Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Guinea/Guinea-Bissau*, 77 I.L.R. p. 635; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40) or by the determination of lines that are theoretically separate but in fact coincident (*Jan Mayen*, I.C.J. Reports 1993, p. 38).”
- Q: Any benefits/drawbacks in separate boundaries?

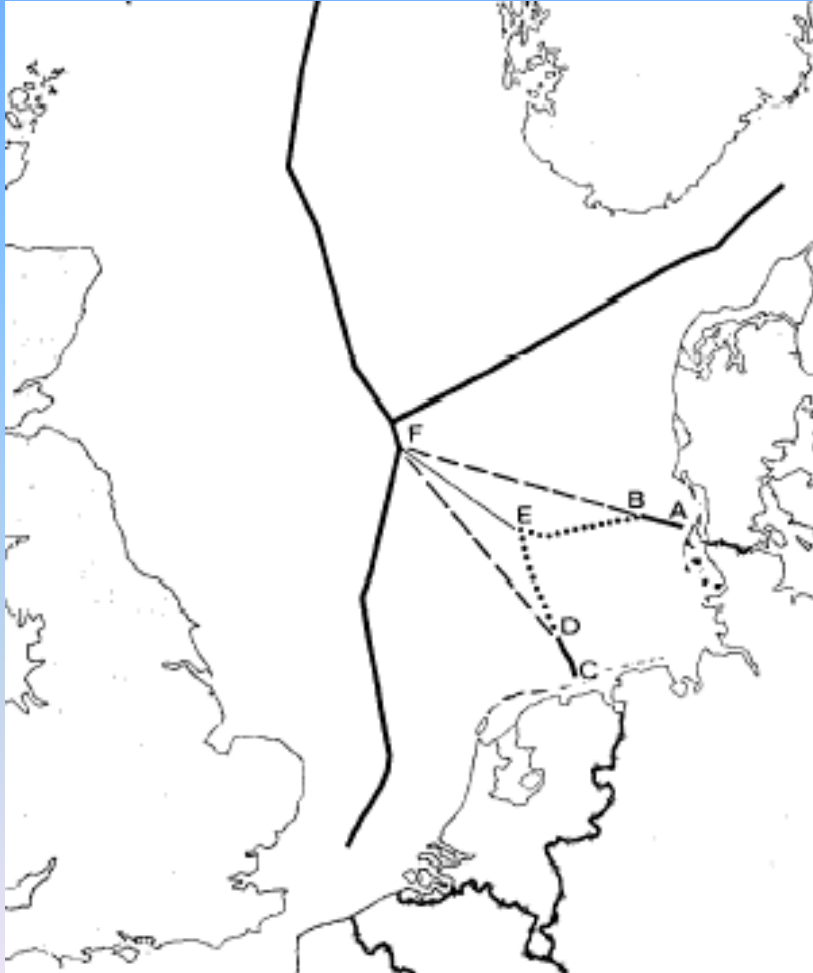
# Jurisprudential Developments

- Cases have taken *vastly* divergent positions on delimitation questions. ICJ stated in *North Sea* [93]:
  - “... there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.”
- But contradictions can lead to instability, unpredictability. Hence helpful that potential consensus may be emerging that law requires a “two-step approach” (*Barbados-Trinidad* [242]):
  1. **‘Start in the middle’** (provisional median line, equidistance line)
  2. **Vary** as required by ‘special’ or ‘relevant’ circumstances
- Termed “equidistance/relevant circumstances principle” (*Barbados-Trinidad* [242]). Likely origin: 1958 *Geneva Convention on Continental Shelf* and customary international law...

# Step 1: 'Start in the Middle'

1. Territorial sea: median line
2. EEZ and continental shelf: equidistance
  - Q: How can equidistance arise from Arts 74 and 83? Not expressly included...
  - A: Equidistance is itself an equitable principle, which falls under rubric of international law and which can lead to an 'equitable result'
  - **But there is a clear exception**, where equidistance is not suitable - when it produces an inequitable result: *North Sea* [89, 91]

# Illustration: *North Sea Continental Shelf Cases* (Map 3, cropped)



**Inequitable result  
(from equidistance)**

Agreed boundaries:  
C-D and A-B

Denmark: B-E

Germany: D-F and B-F

Netherlands: D-E

# North Sea Continental Shelf Today



- Map source: Norwegian Ministry of the Environment's "Fifth International Conference on the Protection of the North Sea" web site (as available at <http://www.dep.no/md/nsc/map/index-b-n-a.html>).

# Step 2: Special or Relevant Circumstances

1. Territorial sea – Art. 15 specifically allows deviation because of historic title or special circumstances
2. EEZ & continental shelf – Arts 74 and 83 silent on relevant circumstances. How arise?
  - Similar to equidistance – developed in jurisprudence; founded upon sources of international law (including custom) and need for equitable result.
  - ‘Special’ vs. ‘relevant’ - originally
    - Special - coastal configurations, islands, navigable channels (TS)
    - Relevant - broader scope of factors (EEZ)
    - Today often terms used interchangeably

# Examples of Special and Relevant Circumstances

1. Equidistance (discussed earlier)
2. Proportionality of relevant coasts and continental shelf areas (coastal configuration and length)
3. Natural prolongation (continental shelf) – now checked by ‘distance approach’ of EEZ
4. Navigational and security considerations
5. Regional considerations
6. Natural resources (more controversial)

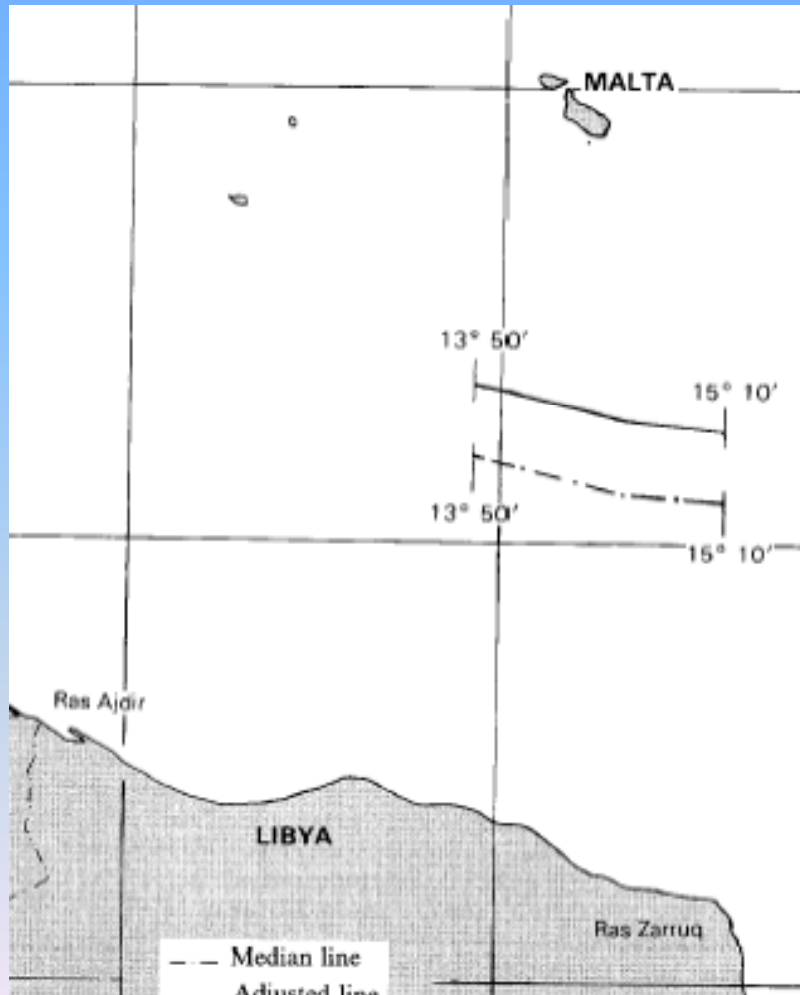
# Proportionality of Coasts

- Need to ensure a reasonable degree of proportionality between the length of fronting coastlines and the area of continental shelf awarded – i.e., if two states have roughly same length of coastline, then any peculiarities in the shape of the coast should not give one state a disproportionately larger continental shelf: *North Sea* [98]
- Proportionality does not require a mathematical ratio between the relevant coast and area of continental shelf: *Libya/Malta* [95]; *Barbados-Trinidad* [236-7, 328]
- Clarification: proportionality as a relevant circumstance serves as a final check on the equitableness of a tribunal's tentative decision: *Barbados-Trinidad* [232, 238-40]
  - “...the Tribunal concludes that proportionality is a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation, but not in any way to require the application of ratios or mathematical determinations in the attribution of maritime areas. The role of proportionality, as noted, is to examine the final outcome of the delimitation effected, as the final test to ensure that equitableness is not contradicted by a disproportionate result.”[337]

# Proportionality of Coasts (cont.)

- What constitutes the relevant coastal frontage? Award in *Barbados-Trinidad*:
  - “...if coastal frontages are viewed in the broader context referred to above, what matters is whether they abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation, not whether they contribute basepoints to the drawing of an equidistance line.”[331]
  - “...the orientation of coastlines is determined by the coasts and not by baselines, which are only a method to facilitate the determination of the outer limit of the maritime zones in areas where the particular geographical features justify the resort to straight baselines, archipelagic or otherwise. “[334]
- There are several cases where proportionality has changed the outcome: *North Sea, Jan Mayen* [68], *Libya/Malta, Barbados-Trinidad*

# Illustration: *Continental Shelf* (*Libya/Malta*)



Proportionality does not require an arithmetical ratio in the relationship between the relevant coasts and the relevant areas of continental shelf (para. 95)

However the final award shifted the delimitation line to the north (solid line).

# Natural Prolongation

- The continental shelf as the natural prolongation of the land territory...
  - Truman Proclamation; *North Sea* [19, 43-44, 101(C)(1)]
- Natural prolongation principle is now checked by the ‘distance approach’ of the EEZ (when within 200 n.m.)
  - *Libya/Malta; Barbados-Trinidad* [224]
- Lingers in recent claims? I.e., *Barbados-Trinidad* [232]:
  - the need to avoid the encroachment by one party on the natural prolongation of the other or its equivalent in respect of the EEZ
  - the avoidance to the extent possible of the interruption of the maritime projection of the relevant coastlines

# Navigational and Security Considerations

- *Guyana-Suriname*: “Navigational interests have been found to constitute ... special circumstances.” [304, citing *Beagle Channel Award*]
- Also linked to maritime security by arbitral tribunal...

# Regional Considerations

- An equitable delimitation cannot ignore other delimitations already made or still to be made in the region
  - *Guinea/Guinea-Bissau* [104]
- Note that this approach may be traceable to the discussion of the consequences of convex and concave coasts in the *North Sea Continental Shelf Cases* [8] – comparison of fairness of potential delimitation for several states
- Query:
  - Is it fair to take into account potential regional delimitation scheme (re which tribunal neither assigned or empowered) when delimiting boundaries of two states (assigned task)?
  - E.g., Venezuela-Trinidad treaty?

# Natural Resources

- **Fisheries**

- *Jan Mayen* – a ground for varying the equidistance line
- *Gulf of Maine* – refined the test by imposing the requirement for catastrophic consequences [237]
- *Barbados-Trinidad* [224, 241]:
  - “Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case (I.C.J. Reports 1993, p. 38). That is insufficient to establish a rule of international law.” [269]

# Natural Resources

- **Oil**

- *Guyana-Suriname:*

- “The cases reveal a marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line. In the words of the Court in the *Cameroon/Nigeria* case, “oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account”.<sup>453</sup> The Tribunal is guided by this jurisprudence. ....” [390]

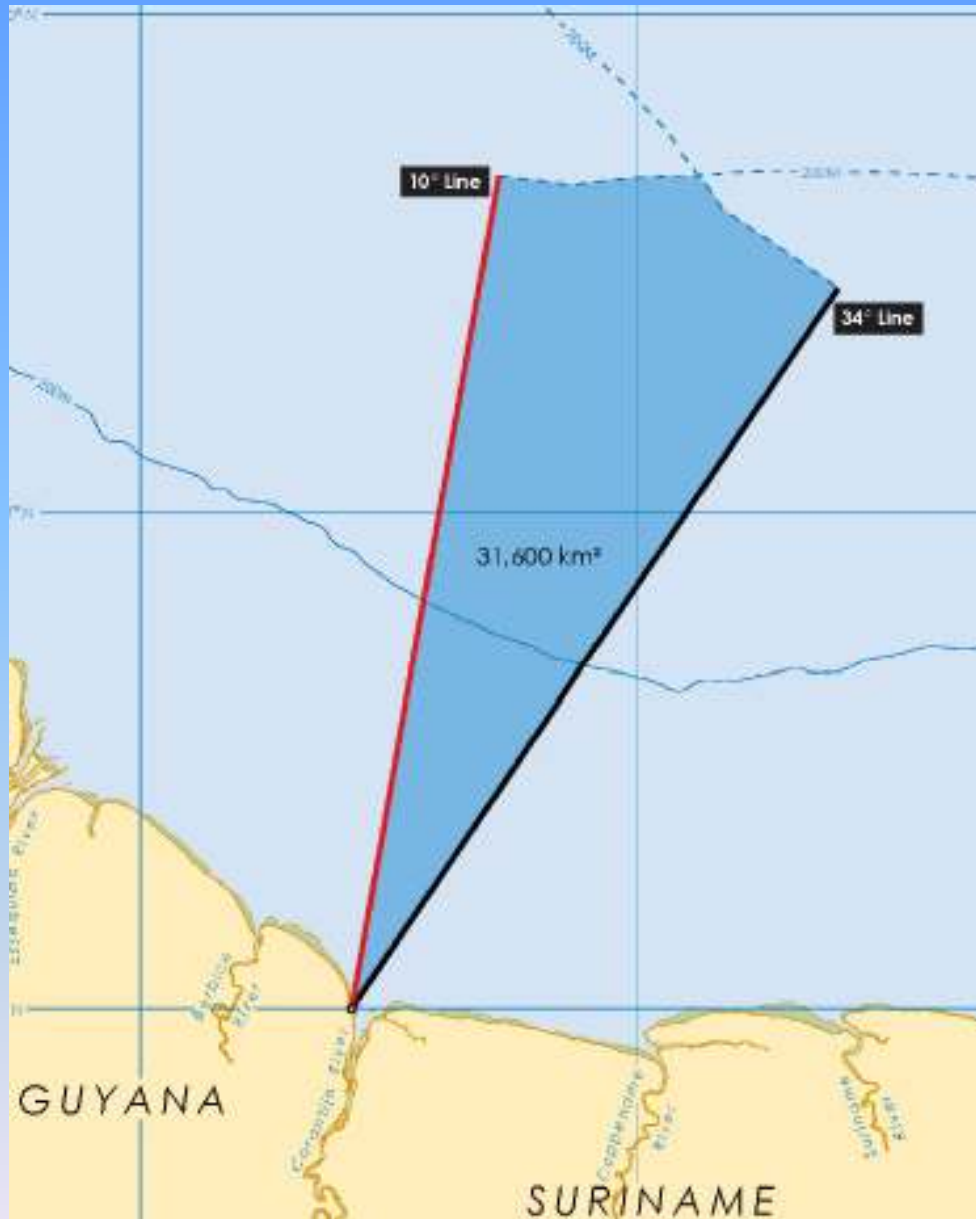
- **Note:** two resource categories relevant to different areas (EEZ vs. CS)

# Focal Studies: Caribbean Arbitrations

1. *Guyana-Suriname Maritime Boundary Arbitration*
  - Helpful on territorial sea delimitation
2. *Barbados-Trinidad Maritime Boundary Arbitration*
  - Helpful on EEZ and continental shelf delimitation

# Guyana-Suriname Arbitration

- **Areas to be Delimited**
  - **Territorial sea**
    - General rule (Art. 15): median line, adjust for historic title or special circumstance
    - Claim on basis of navigational considerations around river mouth at border
  - **Exclusive Economic Zone**
  - **Continental Shelf**
    - General rule (Arts 74 & 83)
      - Provisional equidistance line
      - Vary as required by relevant circumstances



## Opposing Claims of Parties (to 200 n.m.)

Suriname = 10° line  
Guyana = 34° line

# Guyana-Suriname Arbitration

- **Navigational interests as special circumstance**
- Tribunal accepts claim:
  - “The Tribunal concludes that special circumstances of navigation may justify deviation from the median line, and that the record amply supports the conclusion that the predecessors of the Parties agreed upon a N10°E delimitation line for the reason that all of the Corentyne River was to be Suriname’s territory and that the 10° Line provided appropriate access through Suriname’s territorial sea to the western channel of the Corentyne River. Contrary to Guyana’s assessment above, Suriname has presented evidence of navigation in the western channel, albeit of small local craft, rather than large ocean-going vessels. The fact is that there is an “established practice of navigation”<sup>354</sup> in the western channel, not only a hypothetical one. Furthermore, the Tribunal must take account of Guyana’s own admissions that there was recognition of a N10°E line for 3 nm....” [306]



## Tribunal's territorial sea delimitation

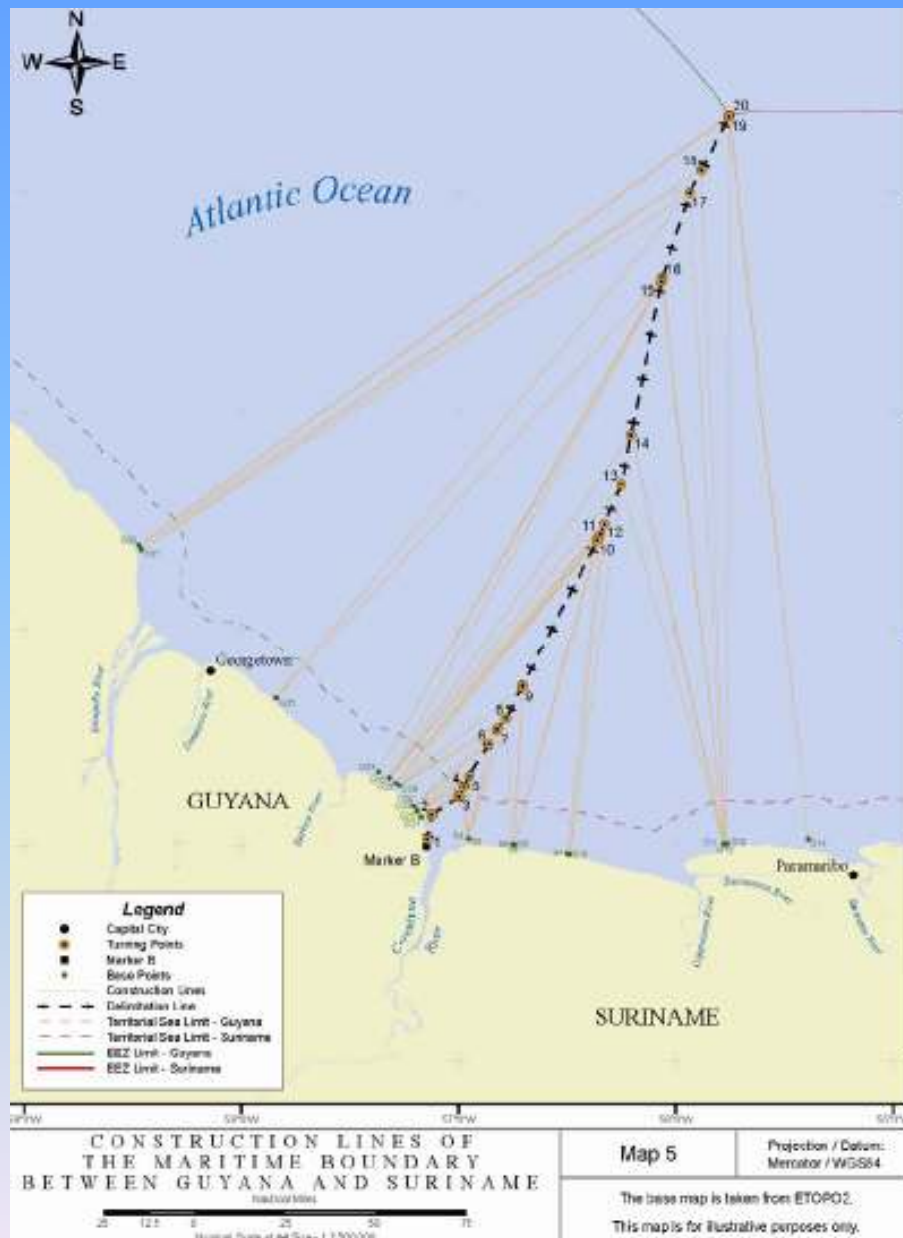
A. Depart from median line for first 3 miles (points 1-2), to satisfy navigational needs of Suriname along Corentyne (Corantijn) River.

B. Remainder (points 2-3) drawn to connect to base of EEZ/continental shelf boundary line.

# Guyana-Suriname Arbitration

## Note on 3-12 mile 'connecting line' in territorial sea

- Tribunal admits that novel situation, which it describes as “special circumstance”
- Balances need for navigational interests, avoiding cut off and wrap around, and otherwise equitable interests.
  - “The Tribunal considers that, in determining a delimitation line dividing the Parties’ territorial seas from the point at which the N10°E line ends at 3 nm to the 12 nm limit, a special circumstance is constituted by the very need to determine such a line from a point at sea fixed by historical arrangements of an unusual nature. Bearing this special circumstance in mind, the Tribunal arrives at a line continuing from the seaward terminus of the N10°E line at 3 nm, and drawn diagonally by the shortest distance to meet the line adopted later in this Award to delimit the Parties’ continental shelf and exclusive economic zone.” [323]
- Unusual result: three stage delimitation (a) 0-3 n.m., (b) 12-200 n.m., then (c) 3-12 n.m



## Tribunal's EEZ and continental shelf delimitation

No relevant circumstances.  
(Very similar coastal frontage  
lengths: Guyana 223 n.m.,  
Suriname 191 n.m.) [132]

Result: boundary drawn  
along equidistance line

# Guyana-Suriname Arbitration

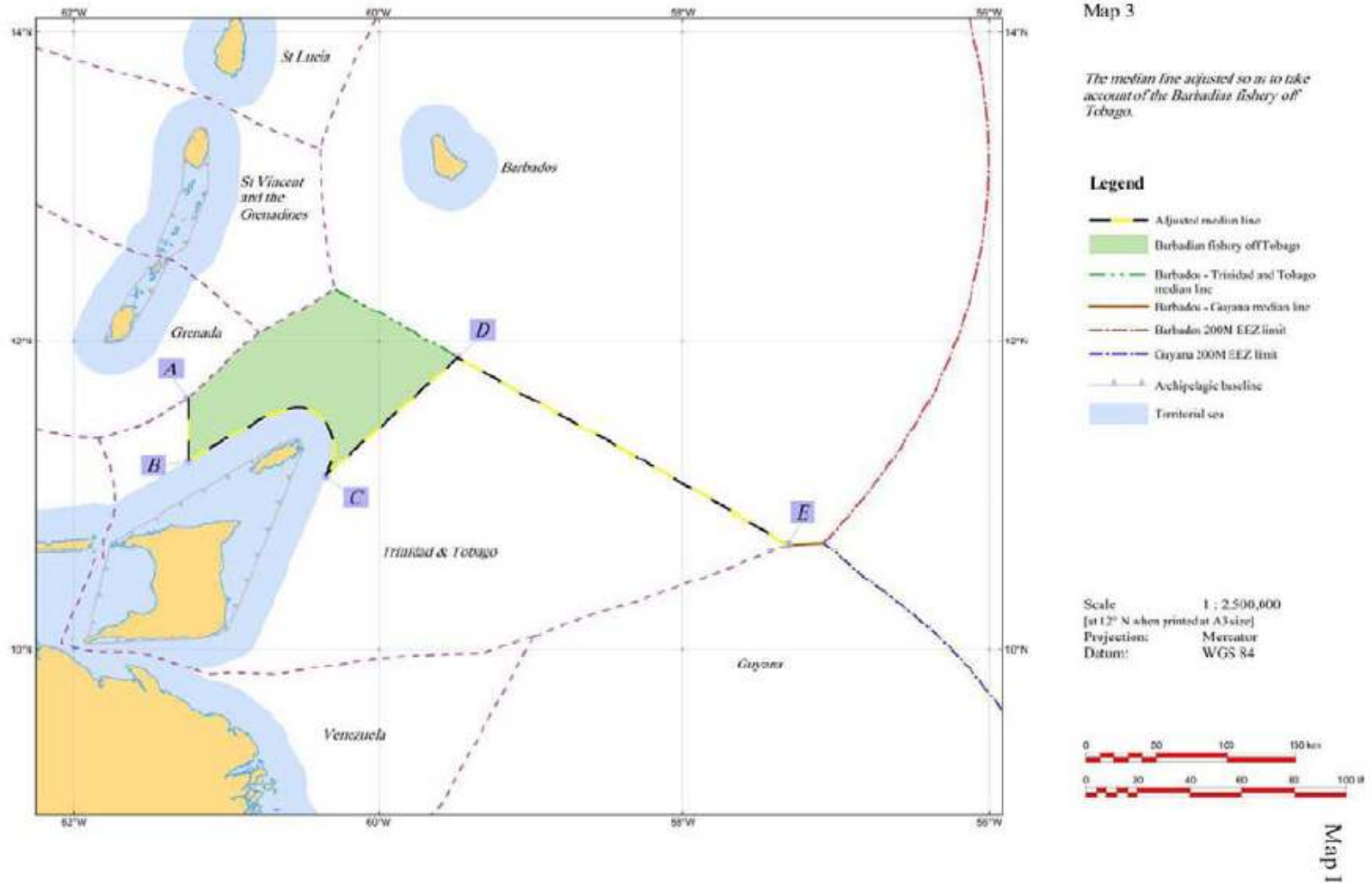
- **Note on the CGX Incident**

- Guyana's claim here was for reparations (i.e., compensation) for damages caused by the Suriname Navy's actions in ordering the removal of the *Thornton* drilling rig
- Not a claim for variation of the boundary
- Tribunal decided that Suriname's action amounted to unlawful threat of force, which could not qualify as countermeasure [446]
- However since damages were not proved, compensation was not awarded [452]

# Barbados-Trinidad Maritime Boundary Arbitration

- **Areas to be Delimited**
  - **Exclusive Economic Zone and**
  - **Continental Shelf**
    - General rule (Arts 74 & 83)
      - Provisional equidistance line
      - Vary as required by relevant circumstances

## [Map of Barbados Claim]



# Barbados-Trinidad Maritime Boundary Arbitration

- **General Pattern of Barbados' Claim**

- Equidistance in the East; variation in the West. The western variation is justified for protection of fisheries. Two arguments:

- 1. 'traditionally fished for flyingfish off Tobago for centuries' (historic)

- 2. 'the results of past or continuing lack of access by Barbados fisherfolk to the waters in issue will be catastrophic'

- Tribunal denies claim: Barbados' historic claim is unsubstantiated; further, 'injury does not equate with catastrophe'

- However the tribunal does **recognize a fisheries-related right**:

- "[Trinidad and Tobago] is obliged to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad and Tobago, subject to the limitations and conditions spelled out in that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources within its jurisdiction." [292]

# [Map of Trinidad Claim]

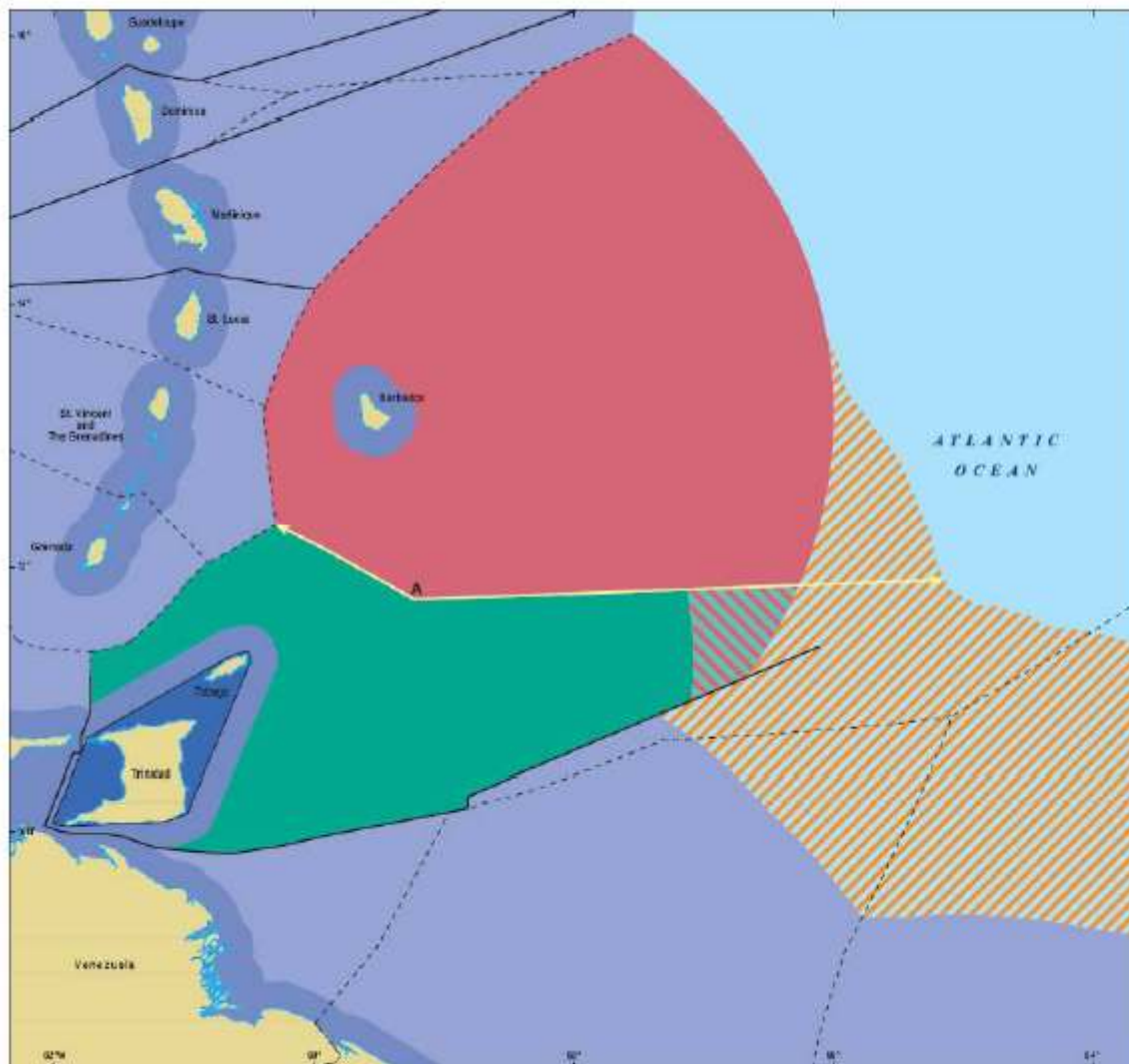


Figure 7.5  
Trinidad and Tobago's claim line



Map II

# Barbados-Trinidad Maritime Boundary Arbitration

## General Pattern of Trinidad's Claim

- Equidistance in the west; variation in the eastern sector. Justified on three grounds:
- **Ground 1: the projection of the relevant coasts** and the avoidance of any cut-off effect or encroachment
  - Tribunal accepts: "...the Tribunal must also conclude that broad coastal frontages of the island of Trinidad and of the island of Tobago as well as the resulting disparity in coastal lengths between the Parties, are relevant circumstances to be taken into account in effecting the delimitation as these frontages are clearly abutting upon the disputed area of overlapping claims." [334]
- **Ground 2: the proportionality of relevant coastal lengths**
  - Tribunal accepts: "The role of proportionality, as noted, is to examine the final outcome of the delimitation effected, as the final test to ensure that equitableness is not contradicted by a disproportionate result." [337]

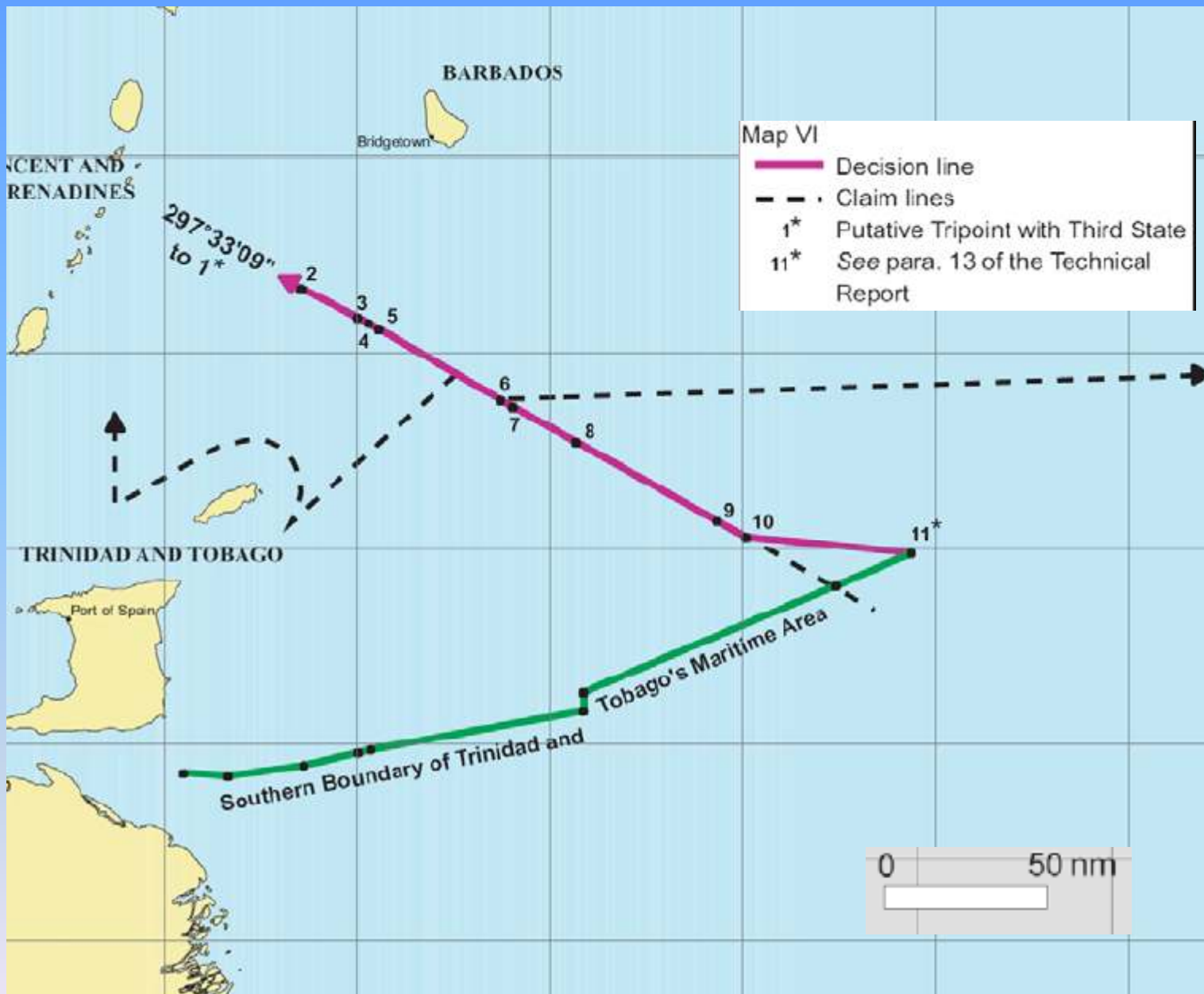
# Barbados-Trinidad Maritime Boundary Arbitration

## General Pattern of Trinidad's Claim

- **Ground 3**: the **regional implications** of the delimitation
- Trinidad argued that the regional context must be considered. Stated that one purpose of the 1990 *Trinidad-Venezuela Agreement* was to allow Venezuela access to the Atlantic ("*salida al Atlántico*")
  - Tribunal mainly denies claim: "The Tribunal is not concerned with the political considerations that might have led the Parties to conclude the 1990 Trinidad-Venezuela Agreement, and certainly Barbados cannot be required to "compensate" Trinidad and Tobago for the agreements it has made by shifting Barbados' maritime boundary in favour of Trinidad and Tobago. By its very terms, the treaty does not affect the rights of third parties." [346]
  - "[But] ... the maximum extent of overlapping areas between the Parties is determined in part by the treaty between Trinidad and Tobago and Venezuela, in so far as Trinidad and Tobago's claim is concerned. This the Tribunal will take into account in determining the delimitation line." [348]
- **Result**: only relevant for proportionality assessment

# Barbados-Trinidad Maritime Boundary Arbitration

- Resulting Delimitation
  - Equidistance line in Western sector
  - Equidistance line in Eastern sector until point 10
  - Variation to the North from points 10-11 to reflect significant differences between coastal frontages [372]
- Other points:
  - Duty to negotiate EEZ fishing rights for Barbadian fishermen [385(3)]
  - No need to examine claim for outer continental shelf



# Barbados-Trinidad Maritime Boundary Arbitration

## Outer Continental Shelf Claim

- “Trinidad and Tobago argues that its continental shelf extends to an area beyond 200 nm from its own baselines that lies within, and beyond, Barbados’ 200 nm EEZ so as to follow on uninterruptedly to the outer limit of the continental margin. Trinidad and Tobago asserts that its rights to the continental shelf cannot be trumped by Barbados’ EEZ.” [367]
- Tribunal’s analysis:
  - “The Tribunal has concluded above that it has jurisdiction to decide upon the delimitation of a maritime boundary in relation to that part of the continental shelf extending beyond 200 nm. As will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. The problems posed by the relationship in that maritime area of CS and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the problem posed by the argument advanced by Trinidad and Tobago.” [368]

# Conclusions

- We have examined and analyzed both the rules and competing factors which may be assessed for a maritime boundary delimitation
- I have suggested that there is a (or an emerging) general consensus about the methodology for maritime boundary delimitations:
  - The starting point is a provisional median line or equidistance line
  - Which then may be varied only if clearly justified by a special or relevant circumstance
- Case law adds nuances and complexities to rules of UNCLOS. Problem? Would argue that these nuances should be welcomed and utilized in negotiations and third party dispute settlements...
- Crucial to remember: boundaries between sovereign states, once delimited, are permanent. Without agreement between the two states it is almost impossible to vary them...