

The Contribution of ITLOS to the Development of International Law: From “a Ship as a Unit” to the Continental Shelf and Climate Change



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Introduction

**1. The right of the flag State to make claims
in respect of its vessels: *a ship as a unit***



2. Prompt release of vessels and crews upon the posting of a reasonable bond



3. Protection of the marine environment



4. Bunkering fishing vessels in the exclusive economic zone



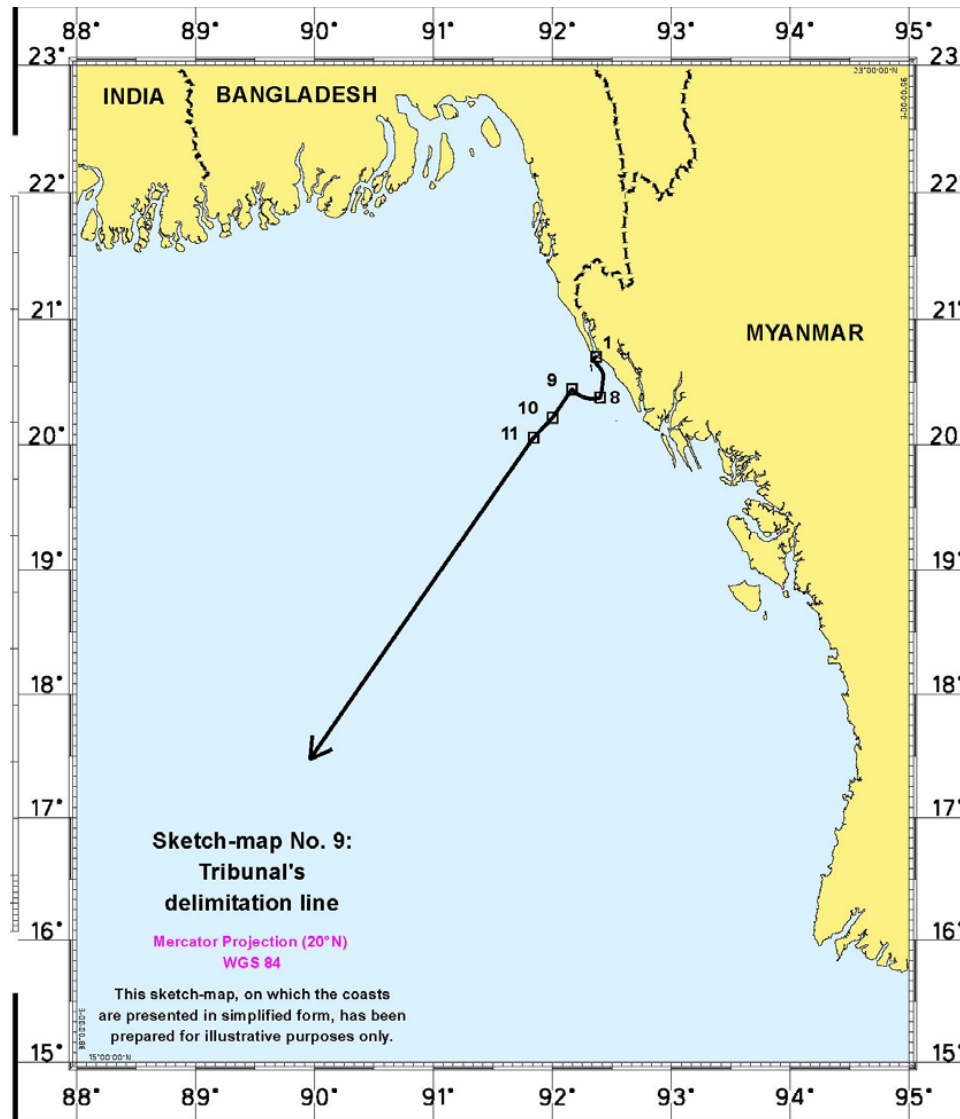
5. Freedom of navigation



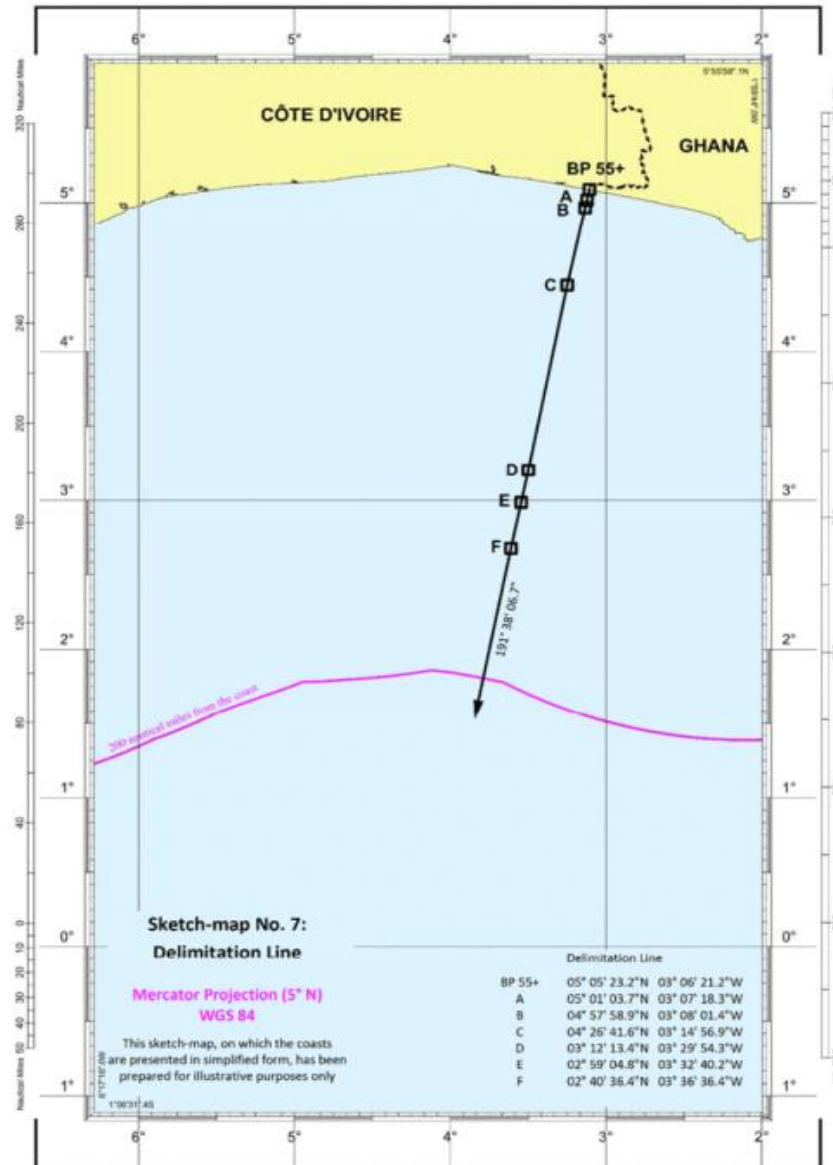
6. Delimitation of the continental shelf beyond 200 nautical miles

6.1. Exercise of jurisdiction: question of entitlement

Bangladesh/Myanmar case, 2012



Ghana/Côte d'Ivoire case, 2017



Mauritius/Maldives case, 28 April 2023



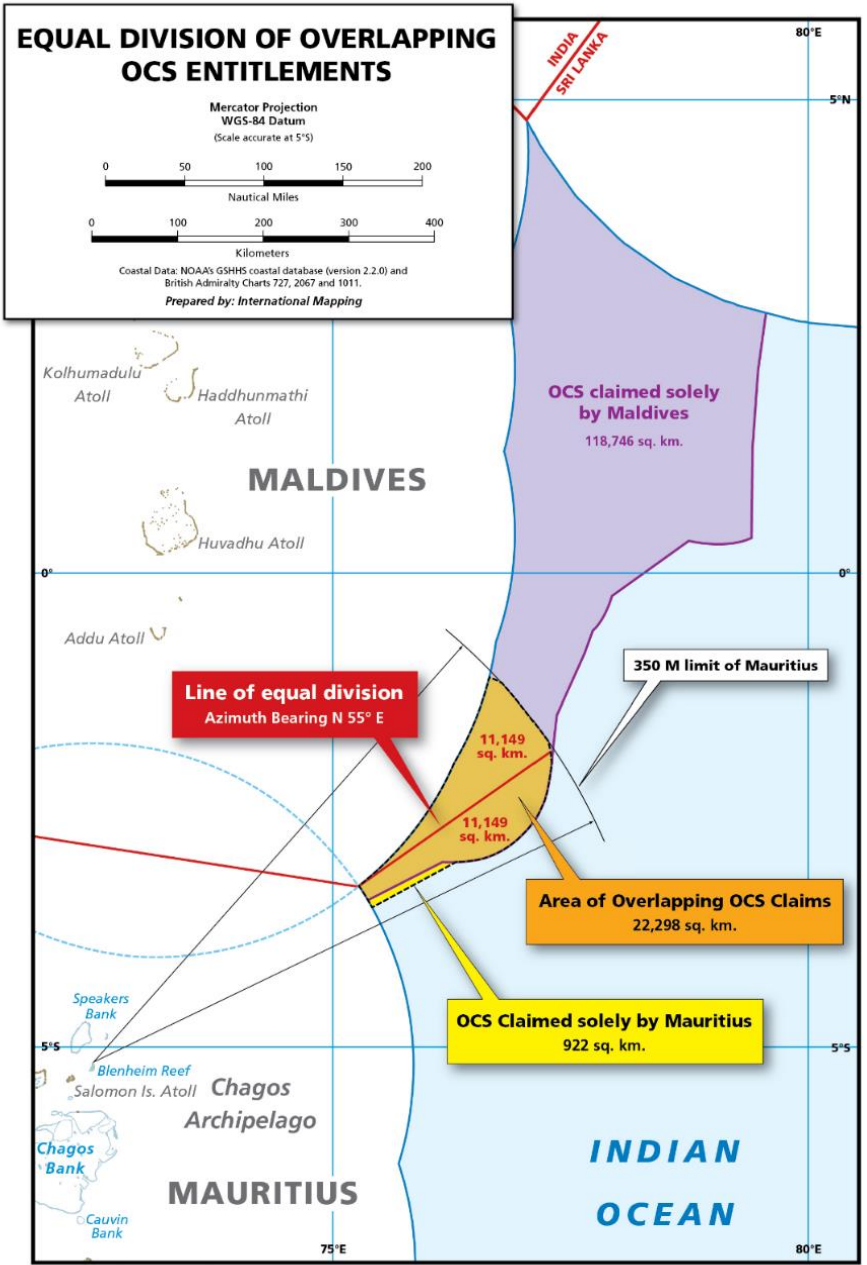


Figure 4.11

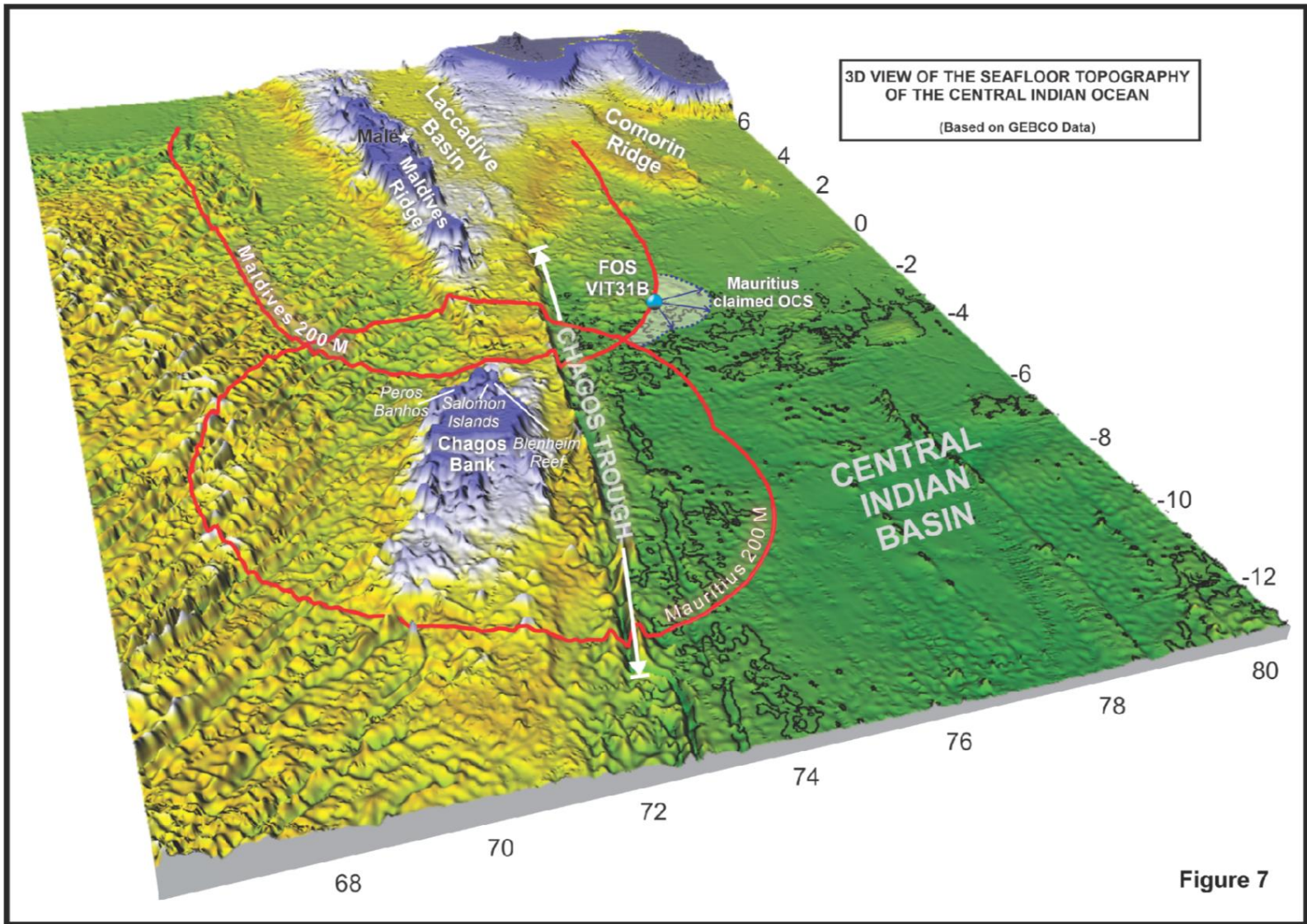


Figure 7

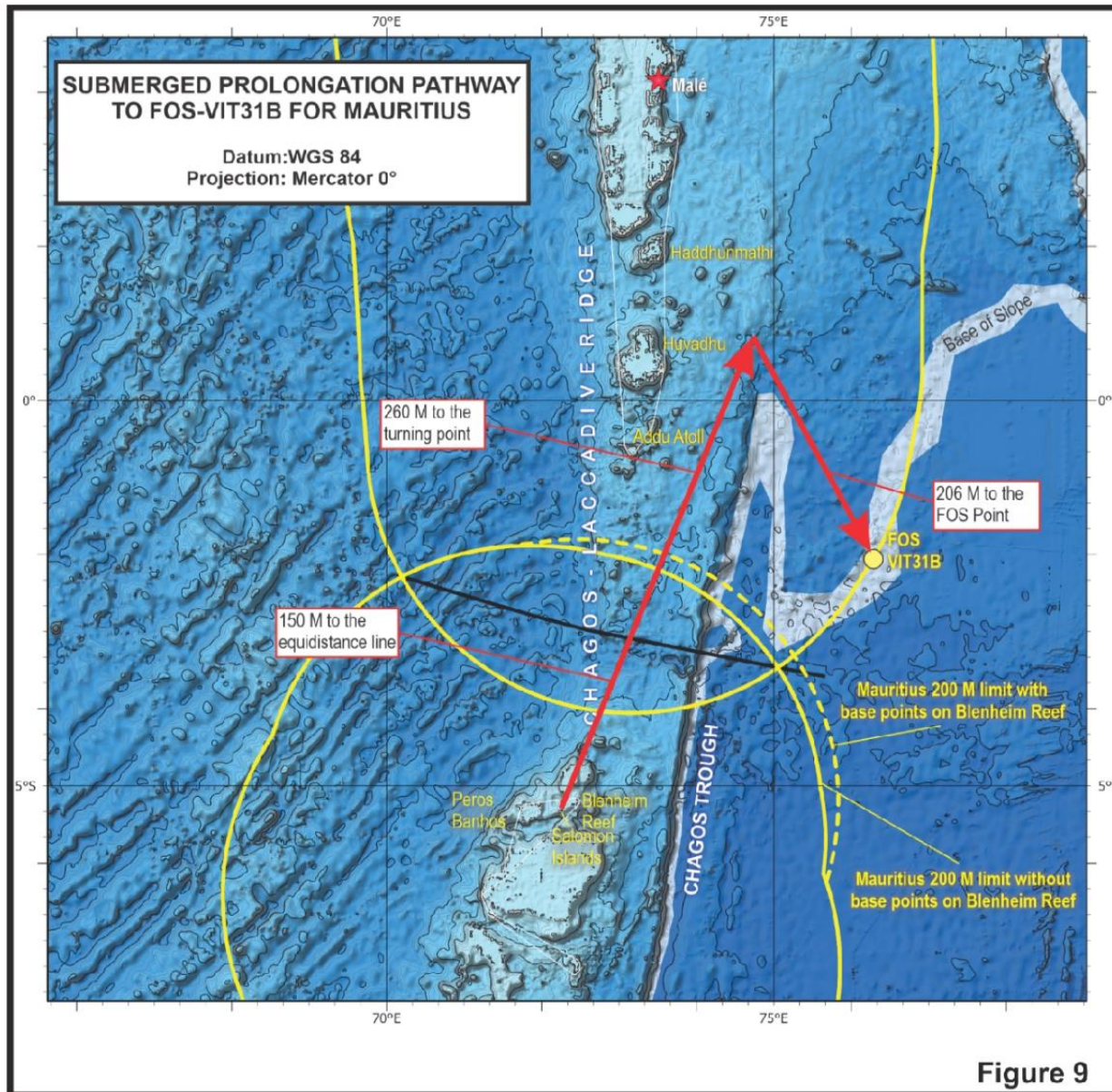
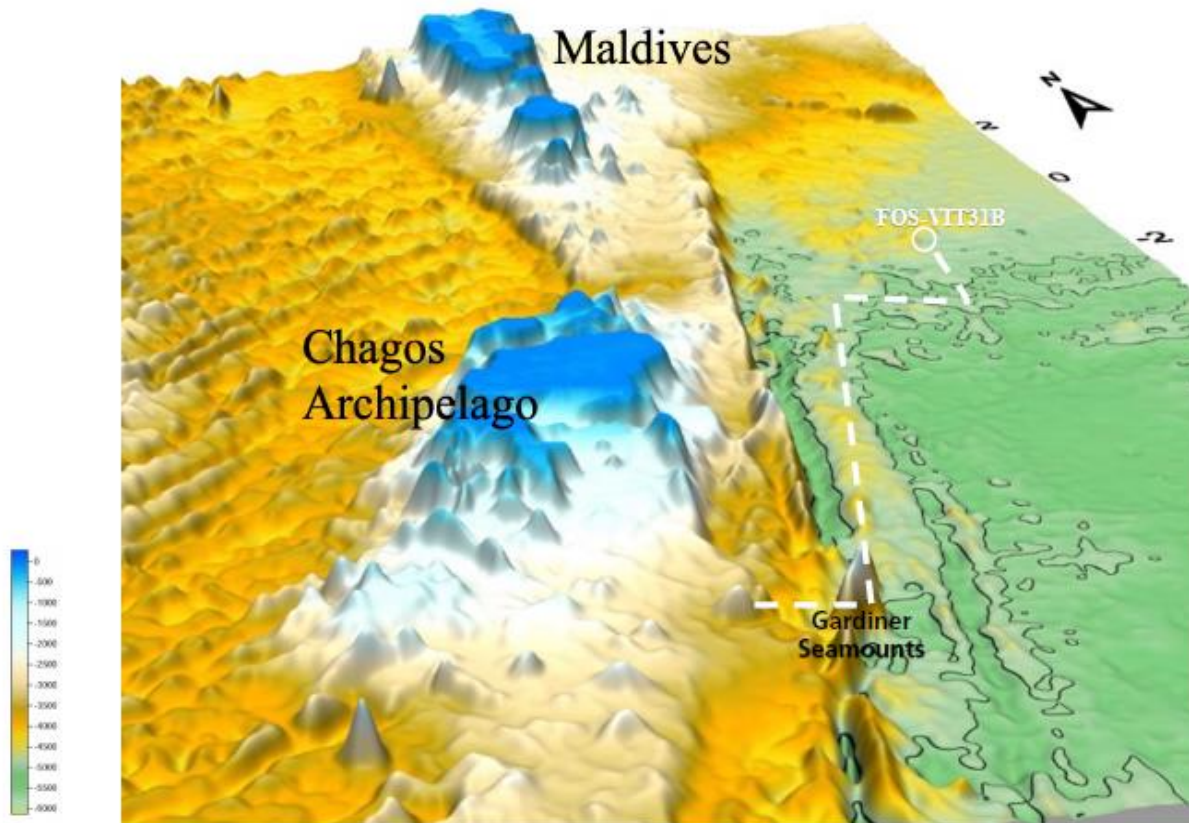


Figure 9

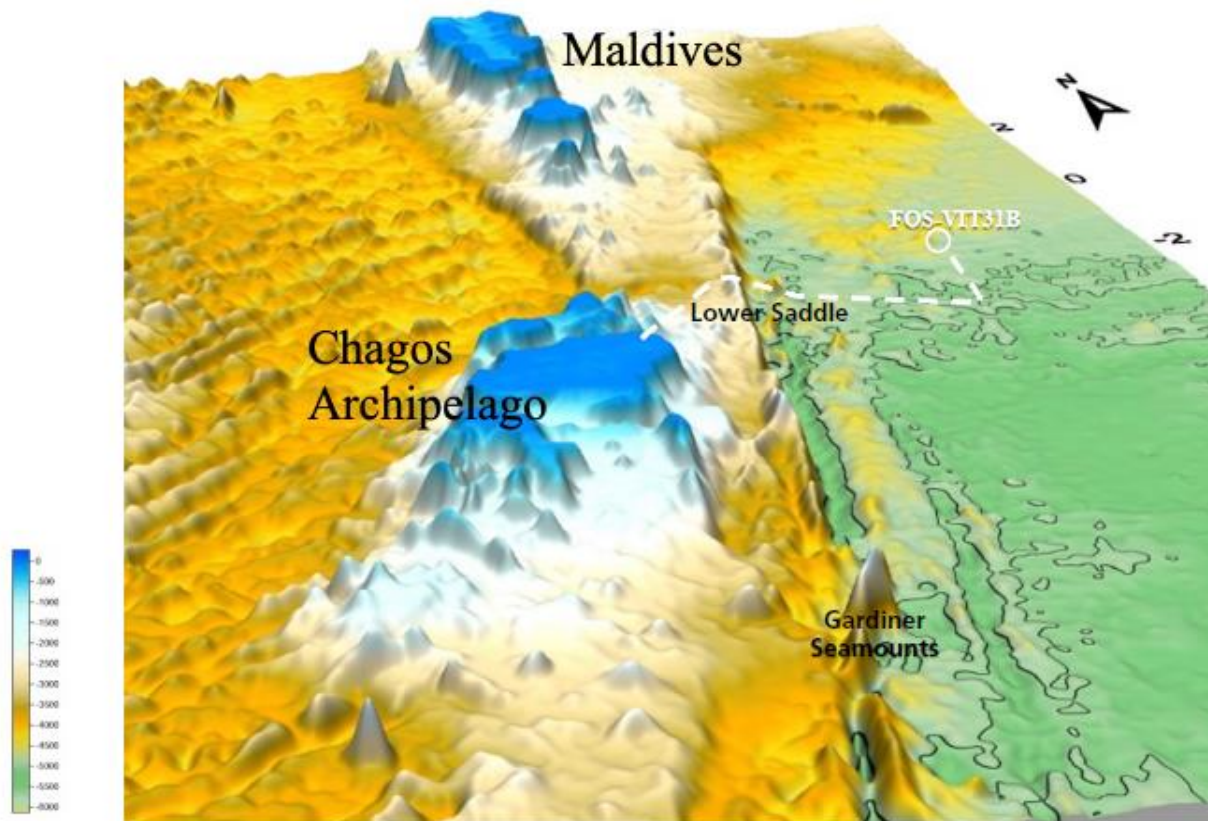
Critical Foot of Slope Point: FOS-VIT31B



Source: Mauritius Memorial, Figure 2.12

(Badal-1) Figure 9

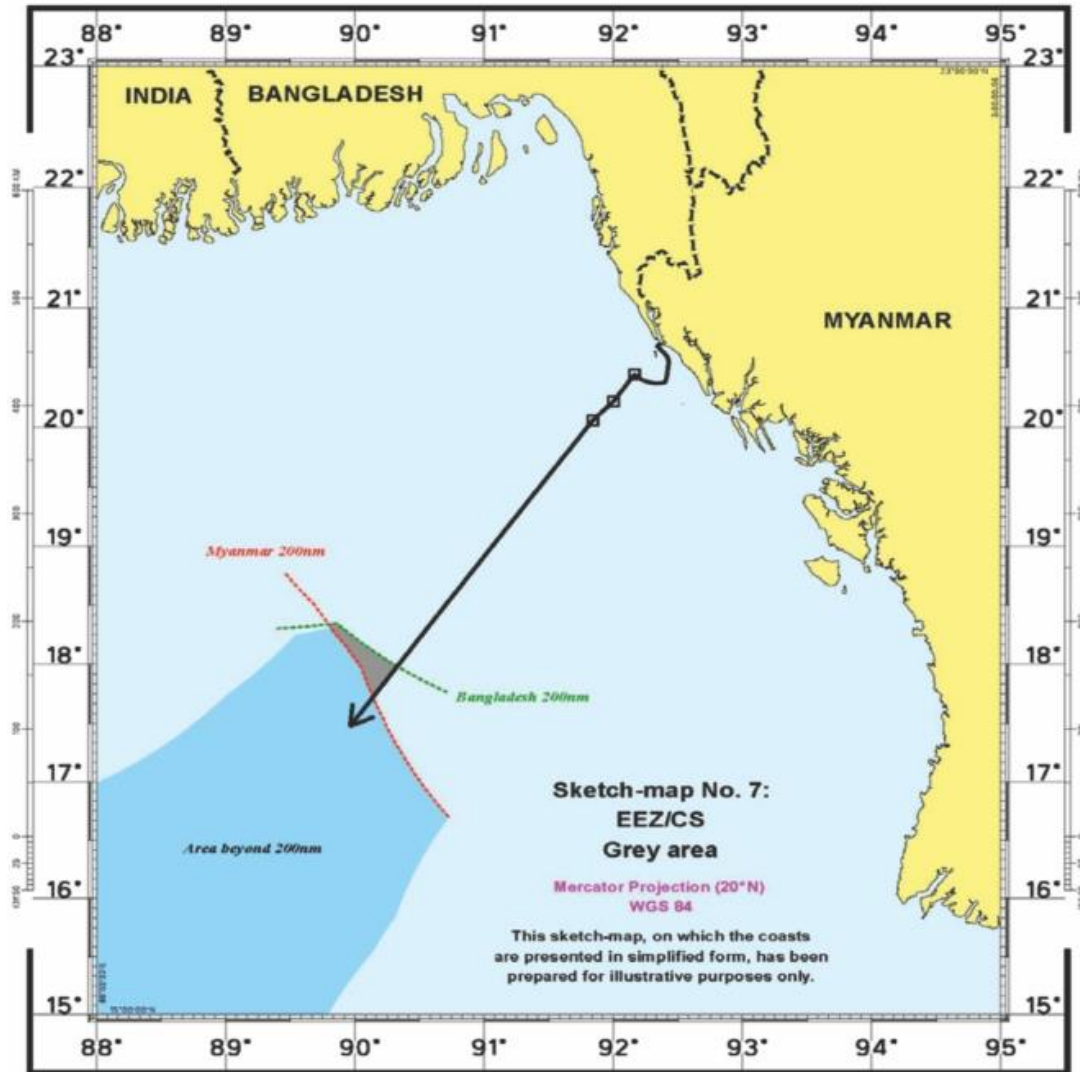
Critical Foot of Slope Point: FOS-VIT31B



Source: Mauritius Memorial, Figure 2.12

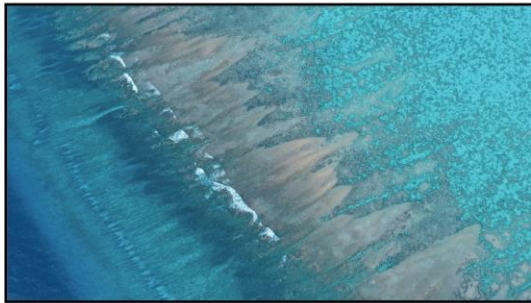
(Badal-1) Figure 14.1

6.2. Legal status of the “grey area”



7. Relevance of low-tide elevations in maritime delimitation

**DRYING SANDS AND CORAL BLOCKS
ALONG BLENHEIM REEF'S PERIMETER**



**DRYING REEFS OBSERVED DURING
SITE SURVEY OF BLENHEIM REEF**

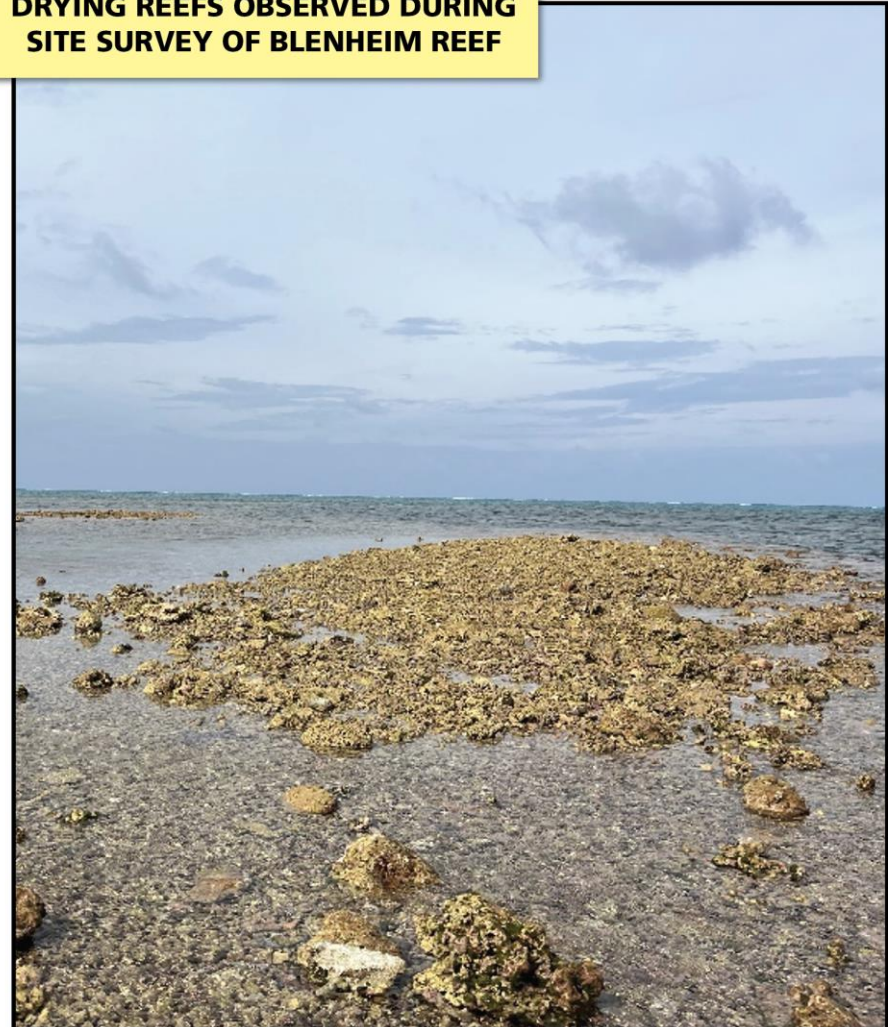


Figure R2.2

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BA CHART 727

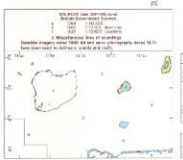


INDIAN OCEAN
 BRITISH INDIAN OCEAN TERRITORY
 CHAGOS ARCHIPELAGO
PEROS BANHOS
 TO
BLENHEIM REEF
 INCLUDING
NELSON'S ISLAND
 DEPTHS IN METRES
 SCALE 1:80,000 at lat 7°20'

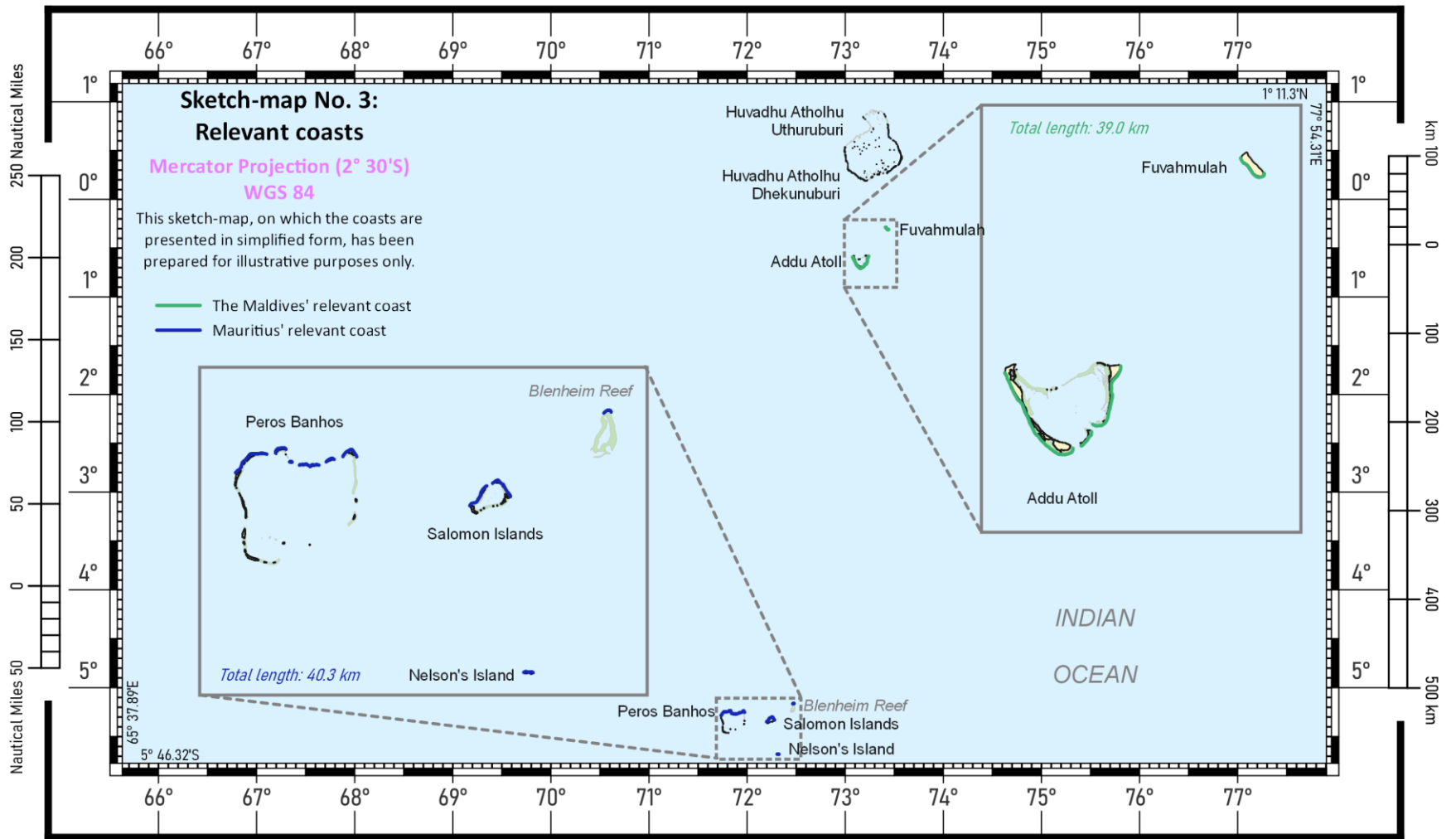
DEPTHS are shown and are measured at Chart Datum, which is the mean low water of all tides. The soundings are in metres. The datum is the mean low water of all tides. The datum is the mean low water of all tides. The datum is the mean low water of all tides.

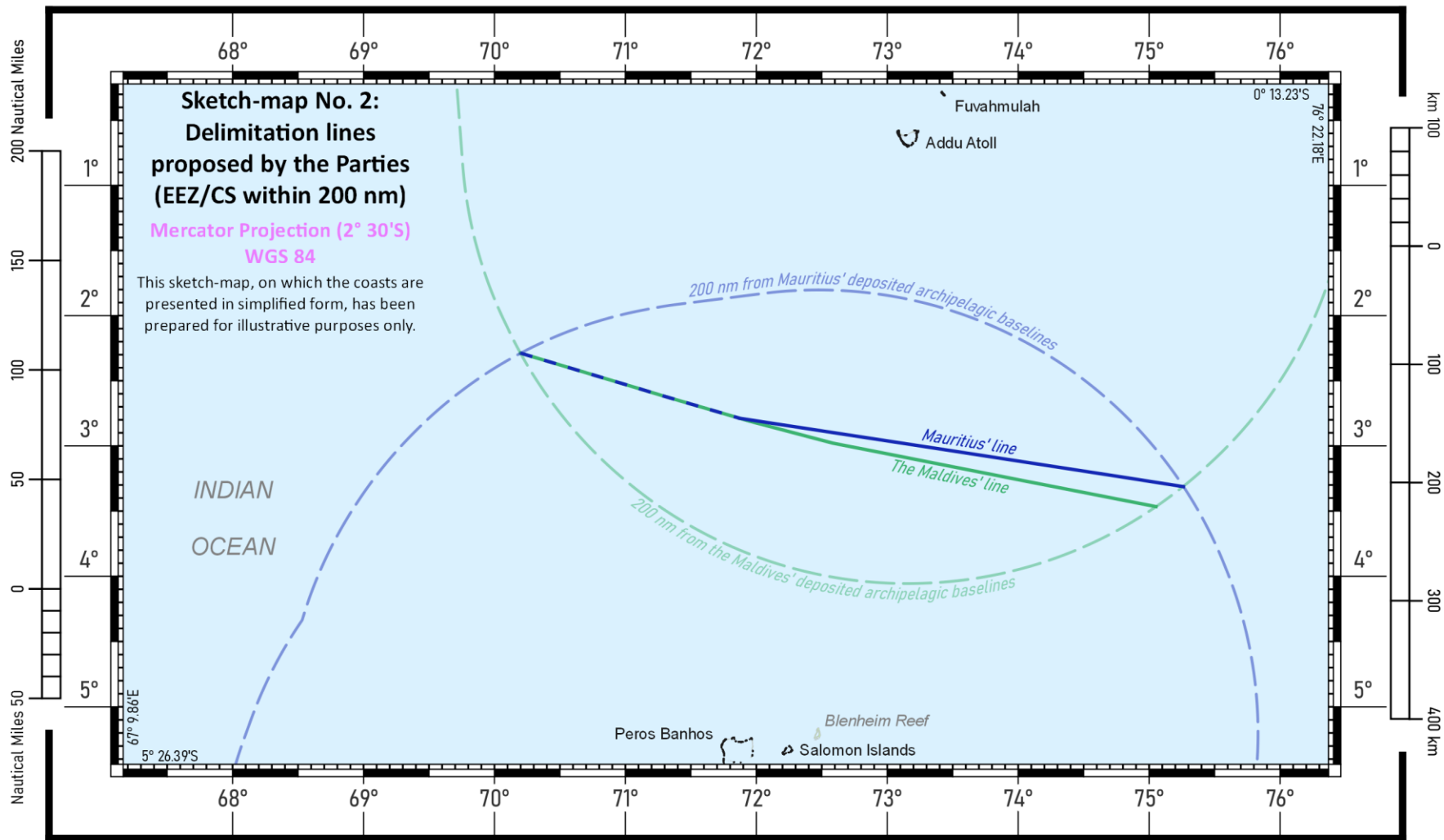
COAST is shown and is measured at Chart Datum, which is the mean low water of all tides. The soundings are in metres. The datum is the mean low water of all tides. The datum is the mean low water of all tides.

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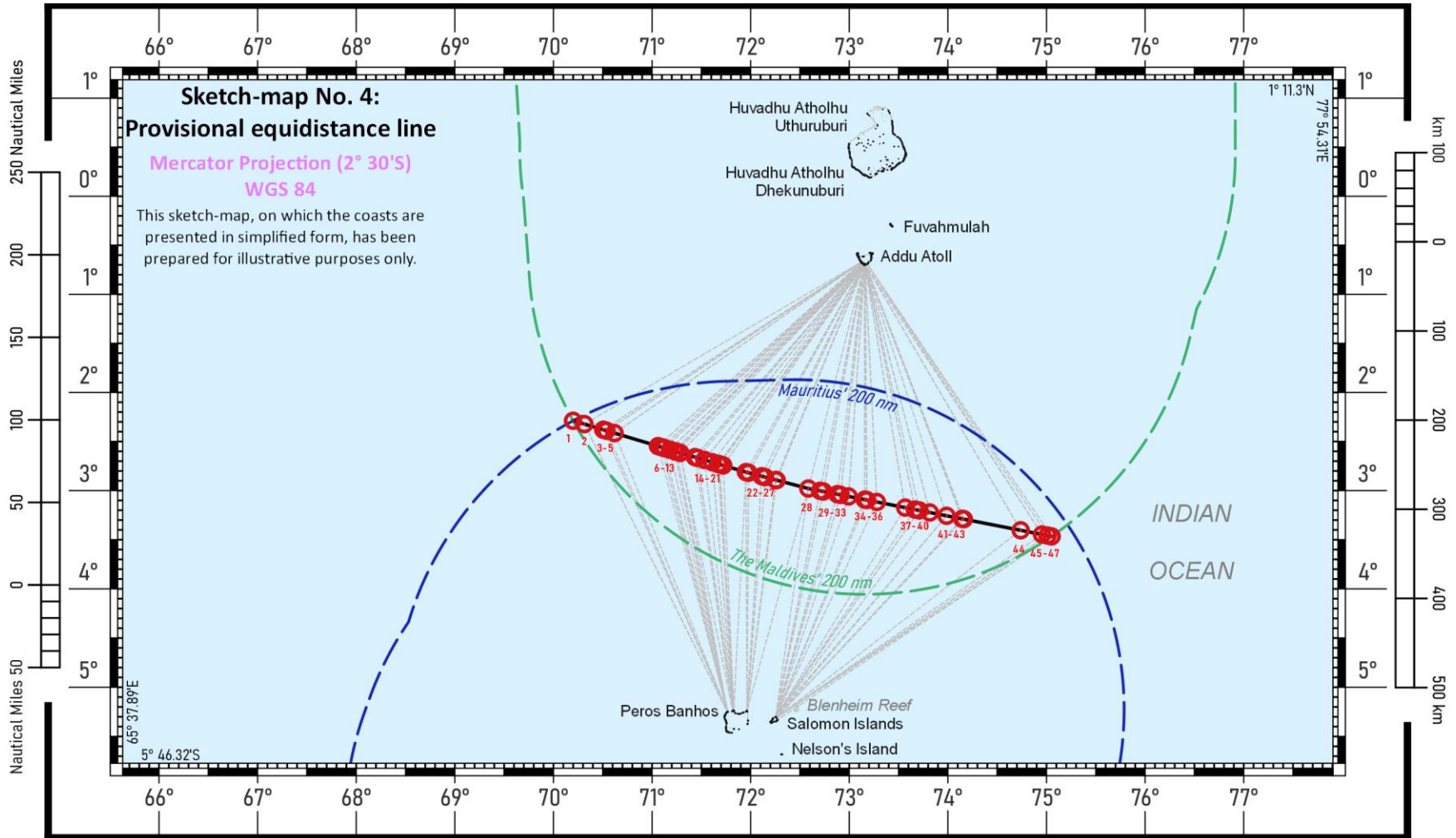


DEPTH	HEIGHT	DEPTH	HEIGHT
10	10	10	10
20	20	20	20
30	30	30	30
40	40	40	40
50	50	50	50
60	60	60	60
70	70	70	70
80	80	80	80
90	90	90	90
100	100	100	100

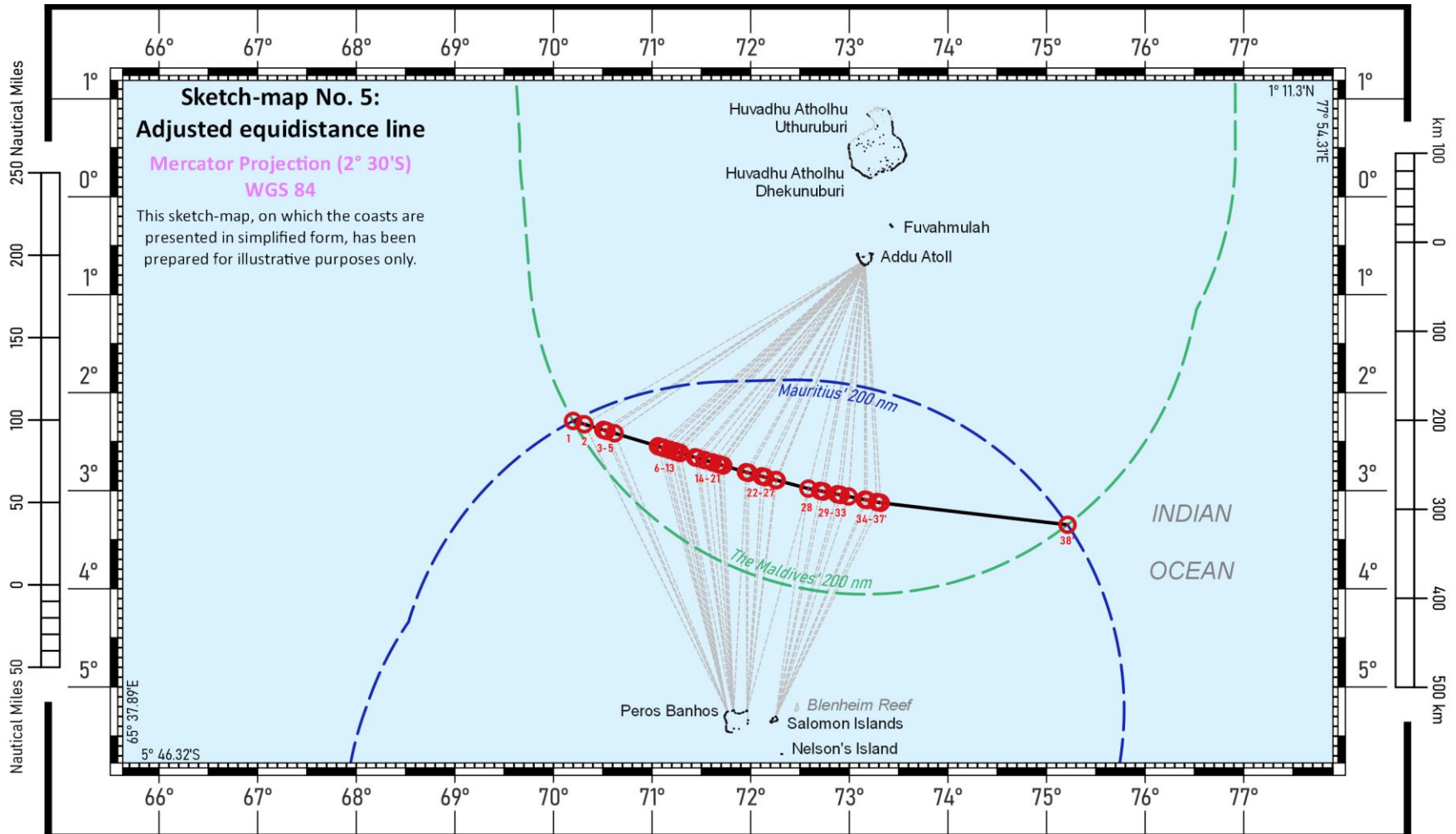


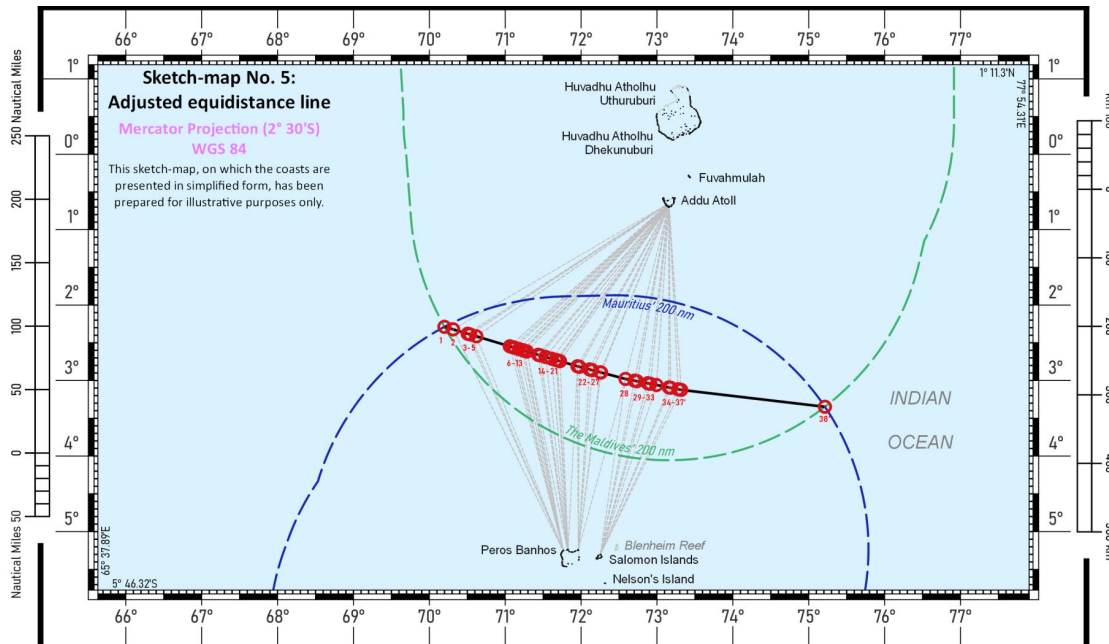
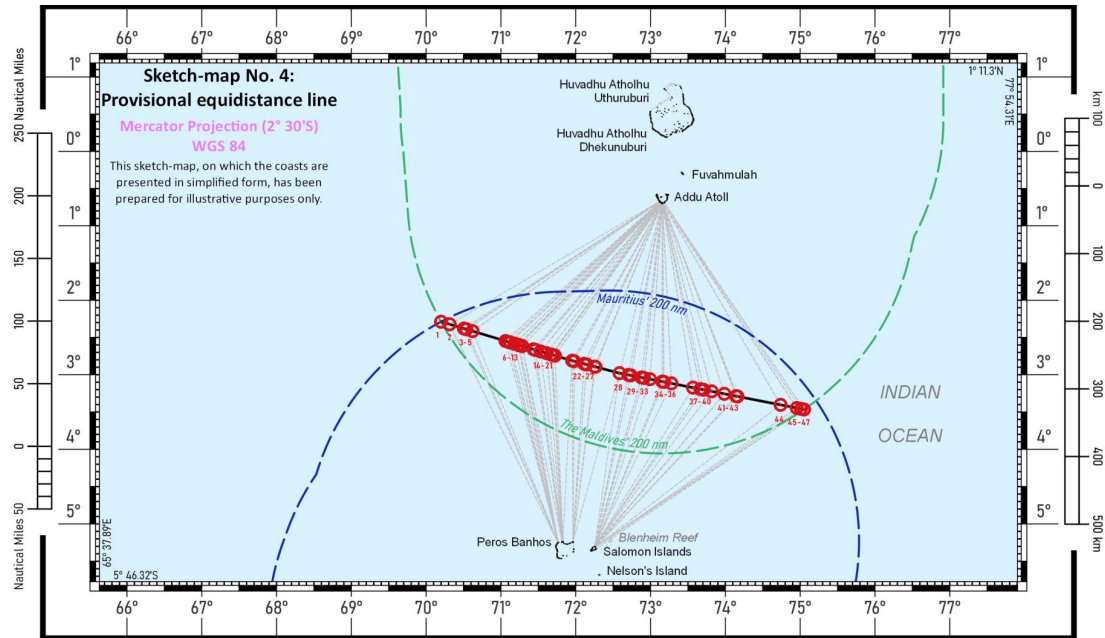


Provisional equidistance line

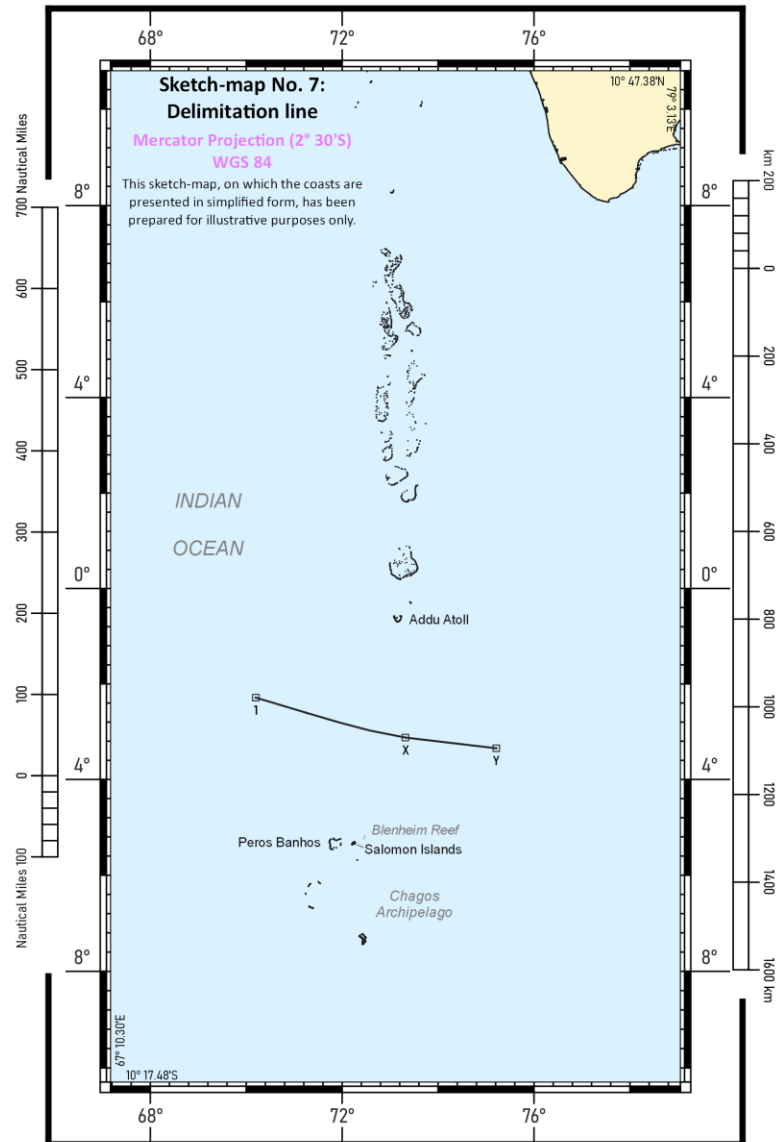


Adjusted equidistance line





Delimitation line



8. Legal effect of advisory opinions



9. Application of UNCLOS to anthropogenic GHG emissions into the atmosphere (climate change)



“A landmark ruling”

- The Tribunal concluded that anthropogenic greenhouse gas (GHG) emissions into the atmosphere constitute “pollution of the marine environment” within the meaning of article 1(1)(4) of the Convention
- Thus, although the term is not to be found in the Convention, climate change has been brought into the realm of the Convention, in particular Part XII on the protection and preservation of the marine environment

Two questions:

What are the specific obligations of State[s] Parties to the [Convention], including under Part XII:

- (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?*
- (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?*

Three points



1. Relevance of science

- Given that the phenomenon of climate change was central to the questions submitted and necessarily involved scientific aspects, the Tribunal decided to devote an entire section of the Advisory Opinion to the scientific background of the case
- The Tribunal made references to the reports of the Intergovernmental Panel on Climate Change (IPCC)
 - Most participants in the proceedings recognized these reports “as authoritative assessments of the scientific knowledge on climate change”
 - The Tribunal stated that “[w]ith regard to climate change and ocean acidification, the best available science is found in the works of the IPCC which reflect the scientific consensus”

2. Continued relevance of UNCLOS in the face of contemporary challenges to the law of the sea

- Although terms such as “climate change”, “GHG emissions” and “ocean acidification” do not appear in the Convention, the Advisory Opinion makes clear that this does not place such phenomena beyond the scope of the Convention
- Can be demonstrated by referring to the Tribunal’s interpretation of the notion of “pollution of the marine environment” and its application to anthropogenic GHSs

Definition of “pollution of the marine environment” in article 1(1)(4) of UNCLOS

*For the purposes of this Convention ... “pollution of the marine environment” means the **introduction by man**, directly or indirectly, of **substances or energy** into the marine environment, including estuaries, which results or is likely to result in such **deleterious effects** as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.*

- Following thorough examination, the Tribunal found that 1) anthropogenic GHGs are substances, that 2) their emissions are produced “by man” and that, 3) by introducing carbon dioxide and heat (energy) into the marine environment, they cause climate change and ocean acidification resulting in “deleterious effects”

- On this basis, having determined that all three criteria of the definition were satisfied, the Tribunal concluded that anthropogenic GHG emissions into the atmosphere constitute “pollution of the marine environment” within the meaning of article 1(1)(4) of UNCLOS

3. Interpretation of UNCLOS and the relationship between UNCLOS and external rules

- The Tribunal explicitly acknowledged the significance of coordination and harmonization between the Convention and other relevant rules of international law (external rules)
- Achieving this objective is important “to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument”
- The relationship between the provisions of Part XII of the Convention and external rules was found to be of particular relevance in this case
- In the present case, relevant external rules may be found, in particular, in the extensive treaty regime addressing climate change, including the UNFCCC and the Paris Agreement – an entire section of the Advisory Opinion was devoted to the climate change treaty regime as background of the case

- The Tribunal categorized three distinct mechanisms through which a relationship between the provisions of Part XII of UNCLOS and external rules is formed
 1. Rules of reference contained in Part XII of UNCLOS
 2. Article 237 of UNCLOS
 3. The method of interpretation, as reflected in article 31(3)(c) of the Vienna Convention on the Law of Treaties, requiring that account be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties
- According to the Tribunal, article 237 of UNCLOS, which clarifies the relationship of Part XII of UNCLOS with other treaties relating to the protection and preservation of the marine environment, reflects the need for consistency and mutual supportiveness between the applicable rules

- The rules of reference contained in Part XII and article 237 of UNCLOS demonstrate the openness of Part XII of UNCLOS to other treaty regimes
- A primary example of how the relationship between the Convention and external rules operates is the Tribunal's assessment of the obligation to take necessary measures under article 194(1) of UNCLOS

Article 194(1) of UNCLOS

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for that purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection

- Assessment of necessary measures
 - The science, in particular IPCC reports
 - International rules and standards, in particular the Paris Agreement
 - Other factors

- It was contended by some participants in the proceedings that the UNFCCC and the Paris Agreement are *lex specialis* in respect of the obligations of States Parties under the more general provisions of the Convention
- In the same vein, several participants took the view that, as concerns obligations regarding the effect of climate change, the Convention does not by itself impose more stringent commitments than those laid down in the UNFCCC and the Paris Agreement
- The Tribunal reached different conclusions on these matters

“The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.” (para. 223 of the Advisory Opinion)

Conclusion

Thank you for your attention!

