

UNIT 5. STATES' POWERS OVER TERRITORY

1. The territorial sovereignty of the State.
2. Competence of States over marine areas.
3. Competence of States over airspace.



TERRITORIAL JURISDICTION

- A. Concept, characters, and classes
- B. Territorial acquisition titles
 - B.1. Original titles
 - B.2. The derivative titles
- C. Borders and neighborhood relations
- D. Special territorial arrangements
 - D.1. The condominium
 - D.2. Warlike occupation
 - D.3. Foreign military bases
 - D.4. International administration

A.- CONCEPT, CHARACTERS, AND CLASSES

- Territory: one of the essential elements of state and cannot be conceived without it.
- **Definition:** the spatial sphere in which the state exercises its powers, i.e., as the material or physical support of state sovereignty. For international law, the territory of the state comprises not only the terrestrial space (land, rivers, lakes, and inland marine waters) but also those other spaces over which the state exercises its sovereignty.
- **Characteristics:**
 - must be delimited by the delimitation of borders.
 - must present a certain geographical continuity (relativized).
 - implies the exercise of state functions in an exclusive and complete manner.
 - Entitles a series of duties and rights:
 - Rights (*examples*):
 - ❖ sovereignty over natural wealth and resources.
 - ❖ to exploit those resources according to its own national policies.
 - ❖ to preserve the inviolability of its territory and its territorial integrity (Article 2.4 of the UN Charter and GA Resolution 2625 (XXV) of 24 October 1970). Structural principle of IL.
 - Duties (*examples*):
 - ❖ Non-detrimental use: ICJ The Corfu Channel Case 1949.
 - ❖ ILC Prevention of transboundary harm from hazardous activities

- How is the territory acquired? **TITLE** by virtue of which the state is entitled to exercise sovereignty. Legal and documentary title.
- **Classification** of titles of acquisition:
 - Classical: original (*terra nullius*) / derivative titles (transfer state to state). Problems with current situation and current international law. BUT: still used in solving disputes as many derive from this classification.
 - Contemporary approach: de facto situations (occupation/terra nullius) and legal title (cession).

B. TERRITORIAL ACQUISITION TITLES

B.1. Original titles of acquisition

➤ Different modes throughout history:

- **Historical title:** Most common title.
- **Formation of the state on the territory.** Possibility of disputes, especially in relation to peripheral areas (enclaves, coastal islands, etc.).
- **Occupation of territories:** Most important title.
 - Concurrence of several conditions required by international jurisprudence consistently:
 - ❖ the occupied territory be effectively a territory without owner (terra nullius). What is terra nullius for international law? [ICJ Advisory Opinion on West Sahara 1975](#).
 - ❖ an effective occupation of territory (effectiveness of the occupation) interpreted as effective and continuous exercise of the functions of the state over the whole of the territory under occupation (administrative, legislative, policing). Possibility of attenuation (nature of territory and existence of population).
 - ❖ Supported by the unequivocal intention to acquire sovereignty over it (*animus occupandi*).
 - Actual conception: an intentional display of power and authority over the territory, through the exercise of state jurisdiction and functions in a continuous and peaceful manner.

- **Territorial accession:** new land masses come to be incorporated into the territory of a state either naturally or artificially (less common).
 - natural geological processes: no need for formal declaration (the accessory follows the principal).
 - artificially: problems regarding transboundary harm.
- What about PROXIMITY, is it a title? Based on theories of "continuity" (natural prolongation of the territory) or "contiguity" (geographical adjacency). Diplomatic arguments not accepted in IL.

B.2. Derivative titles of acquisition

- Those that transfer title to a territory from one state to another.
- Some of these titles are still valid today (voluntary cession, acquisitive prescription, *uti possidetis iuris*) while others are invalid in the light of contemporary IL (conquest).
 - **Voluntary cession:** relinquishment of sovereignty over a territory by a state in favor of another state that accepts it. Different examples (peace treaties, succession treaties, or cession agreements with or without monetary compensation). Some still in force.
 - Concurrence of several conditions required for perfecting the title:
 - ❖ formal agreement between the parties.
 - ❖ that the ceding state possessed sovereignty over the territory.

- ❖ the said state relinquishes completely the administration of the ceded territory.
- ❖ ceding state effectively exercises the functions of government therein.
- **Acquisitive prescription (*usucapio*):** acquisition of sovereignty through the effective exercise of state functions for a certain period over a territory previously belonging to another state which no longer exercises its powers over it.
 - Rare and problematic: how much time is needed?
 - ❖ Theoretically: conditions needed would be:
 - the effectiveness in the exercise of the functions of government over the territory by the state that intends to acquire it.
 - announcement.
 - lack of protest or acquiescence on the part of the previous sovereign state.
 - a lapse of a sufficient period.
- ***Utī possidetis iuris*:** Consolidated in decolonization process: territories belonging to the colonizing state automatically and *ab initio* pass into the new emancipated state, with the same territorial boundaries as they had before. Some difficulties: ICJ case concerning the frontier dispute (Burkina Faso v. Republic of Mali) 1986, showed various possibilities:
 - title & effectiveness: confirmed sovereignty.
 - legal title missing or unclear: effectiveness would be taken into consideration.
 - legal and clear title: effectiveness would not prevail.

- What about CONQUEST? Historically, very important. Contemporary international law: repudiated. GA Resolution 2625(XXV).
- Territorial disputes: critical date to take account of the law applicable/de facto circumstances. Distinction between:
 - attribution conflicts (disputes over the title conferring sovereignty).
 - delimitation conflicts (determination and delimitation of borders).Territorial disputes awards or sentences are just DECLARATORY in nature (do not constitute a title of acquisition).

C. BORDERS AND NEIGHBORLY RELATIONS.

- Delimitation of spaces: delimitation of borders.
 - Border: delimitation of portion of the territory in which each state exercises its own authority and may require other states to refrain from penetrating or acting therein. But there are different components in a territory (land, sea, airspace..).
- Ways of delimitation of frontiers:
 - Most common: boundary treaty - lasts longer than the treaty itself.
 - Different ways depending on the type of component.
 - States usually prefer natural boundaries (mountain range; equidistant point in case of rivers, etc.).
 - Technical or ideal criteria (geometric lines - airspace and marine spaces).
- Two distinct moments: delimitation and demarcation:
 - Delimitation: cartographic delimitation often carried out by boundary commissions (powers to act drawn in the boundary treaty).
 - Material demarcation: material signs by technical experts (demarcation commission).
- NEIGHBORING RELATIONS: closely related to the notion of frontier where the borders of two states meet (frontier zone instead of frontier line). Special reciprocal relations originating in the spaces and populations located on both sides of the border.

- Definition: set of conventional or customary rules govern mutual relations between neighboring states in the bordering portions of their territories.
 - Community of interests implies a duty of international cooperation between the bordering states for the achievement of certain common interests and objectives: cooperation agreements.
 - Areas: land communications, the use of border rivers and lakes, the use of natural resources shared between bordering states and, more recently, neighborliness in environmental protection.

D. SPECIAL TERRITORIAL ARRANGEMENTS

D.1. Condominium

- Exercise of concurrent or joint state powers over a specific spatial area, breaking the general characteristic of exclusivity. Not the same as co-sovereignty.
- **Definition:** "status of a territory in respect of which the enjoyment and exercise of the powers recognized to states by the law of nations belong to a partial international community characterized by the juridical and functional equality of the states that compose it, exercising their powers through particular international organs, mediate or immediate.

D.2. War occupation

- Occasionally, because of an armed conflict, situations of military occupation of the territory of one state by armed forces of one or more other states occur. This occurs when it is de facto placed under the authority of a foreign army, the authority of the legal power having passed into the hands the occupying state and not by the mere declaration as such by the foreign armed forces (differs from invasion for the purpose of combat).

- In principle, occupation in contravention of the UN Charter is unlawful (GA Res. 2625 (XXV) BUT it is a de facto situation that has consequences under IL:
 - it cannot give rise to the acquisition of the occupied territory by the occupying state or of altering in any way the status of the territory permanently.
 - it gives rise to the international responsibility of the occupying state in respect of all violations of international law committed in the occupied territory during the duration of the occupation.
 - ICJ 1971 Advisory opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).
 - the occupying state must respect both the rules of international humanitarian law applicable to armed conflict and the rules relating to the protection of human rights of the population in the occupied territory:
 - ICJ 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: The international covenants are applicable in cases where a contracting party exercises extraterritorial jurisdiction because of the military occupation of the territory of another state.

D.3. Foreign military bases

- They do not involve territorial cession, only the granting of permission for the use of certain parts of the territory by armed forces.
 - Generally, temporal in nature, but there are cases of perpetuity cession (Guantanamo).
 - American military bases in Spain?
 - Three different regimes: leasing, joint use, and authorization of use.
- No foreign bases in Spanish territory but Spanish bases which the US is authorized to use.

D.4. International administration

- Refers to the temporary exercise by an IO of the prerogatives of power over a territory for the purpose of:
 - protecting the population
 - contributing to the protection of the population
 - contributing to the development of the territory of another state
 - to the protection of the territory/population of another state.
 - to contribute to the maintenance of peace and security
- Recent example: United Nations Security Council in Resolution 1292 (1999) of 25 October 1999, process of transition to the independence of the territory of East Timor. United Nations Transitional Administration in East Timor (UNTAET) exercised overall responsibility for the administration of East Timor.

JURISDICTION OF STATES OVER MARINE AREAS

- A. General considerations
- B. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)
 - B.1. Spaces under the jurisdiction of the coastal state
 - i. Inland waters
 - ii. Territorial sea
 - iii. Contiguous zone
 - iv. Archipelagic waters
 - v. Exclusive Economic Zone
 - vi. Continental shelf
 - B.2. Spaces located outside the limits of national jurisdiction.
 - i. High seas
 - ii. International seabed and ocean floor area

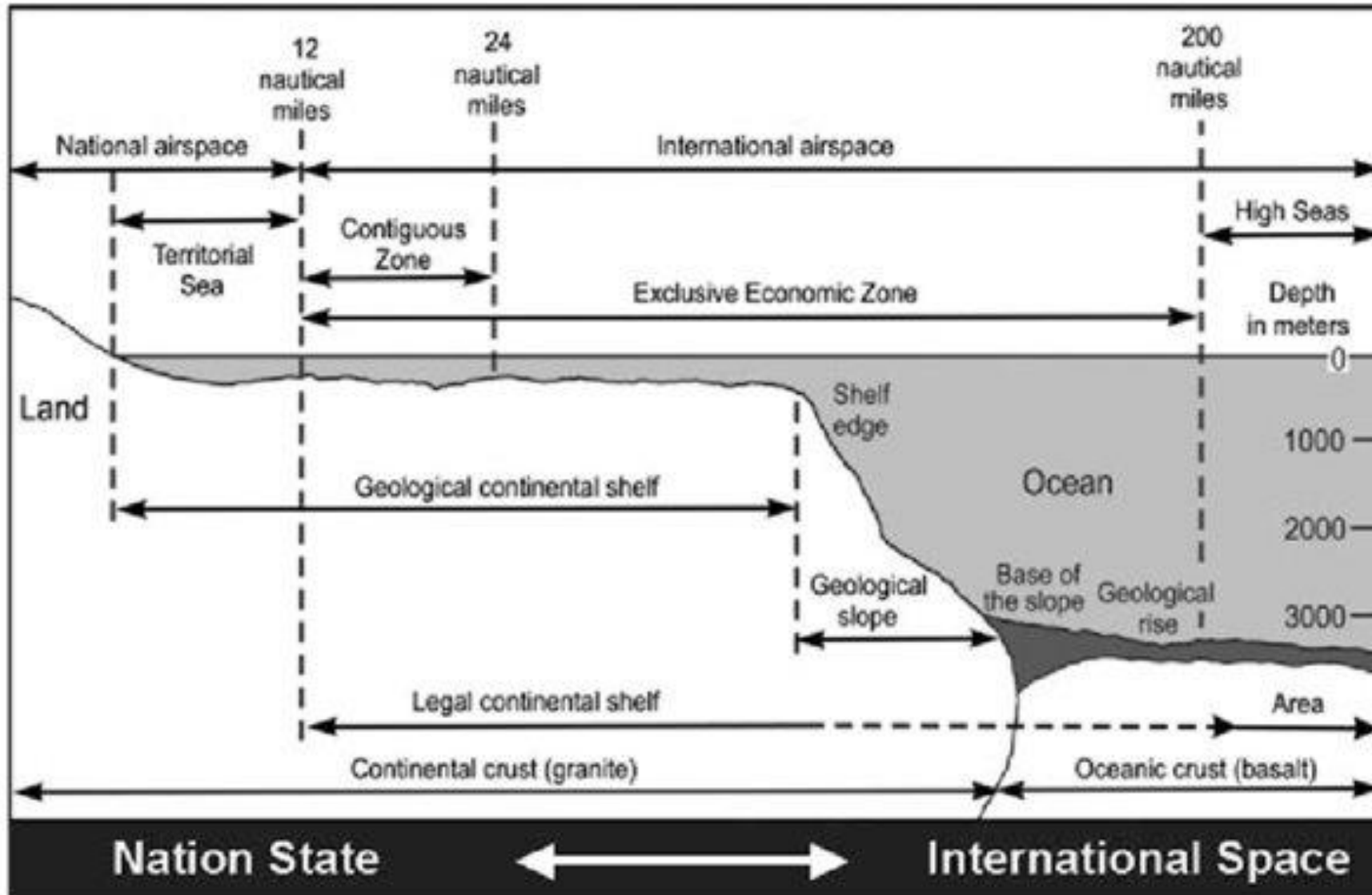
A. GENERAL CONSIDERATIONS

- The exercise of jurisdiction over marine spaces stems from the principle that the land dominates the sea and thus the projection of the state into the sea from the mainland.
- Expansive or rampant jurisdiction: greater extension and more spaces.
- Historical evolution of the Law of the Sea:
 - International customary law: Spanish School (freedom of navigation) and John Selden (*The Prince is sovereign in the seas close to land*). High sea (HS) and territorial sea (TS) appear as concepts.
 - League of Nations attempted to codify the "statute of the territorial sea" (The Hague-1930) but failed because of differences regarding proposed limits.
 - First UN Conference on the Law of the Sea (Geneva 1958): Although it was not possible to achieve a single convention and the problem of the outer limit of the TS was not solved, it was possible to conclude IV Conventions on the Law of the Sea & Optional Protocol:
 - Convention on the Territorial Sea (TS) and the Contiguous Zone (CZ)
 - Convention on the High Seas (HS)
 - Convention on Fishing and Conservation of the Living Resources of the High Seas
 - Convention on the Continental Shelf
 - Optional Protocol of Signature concerning the Compulsory Settlement of Disputes

- Second UN Conference on the Law of the Sea (Geneva 1960): Failure (the formula of 6 nm TS and 6 nm CZ was not supported by one vote).
- Third UN Conference on the Law of the Sea (1973-1982) ends with the adoption of the UN Convention on the Law of the Sea of Montego Bay (UNCLOS), 10/12/1982, which was negotiated by consensus and adopted by vote and whose entry into force required the adoption of an agreement relating to the implementation of Part XI of UNCLOS (1994).

B. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)

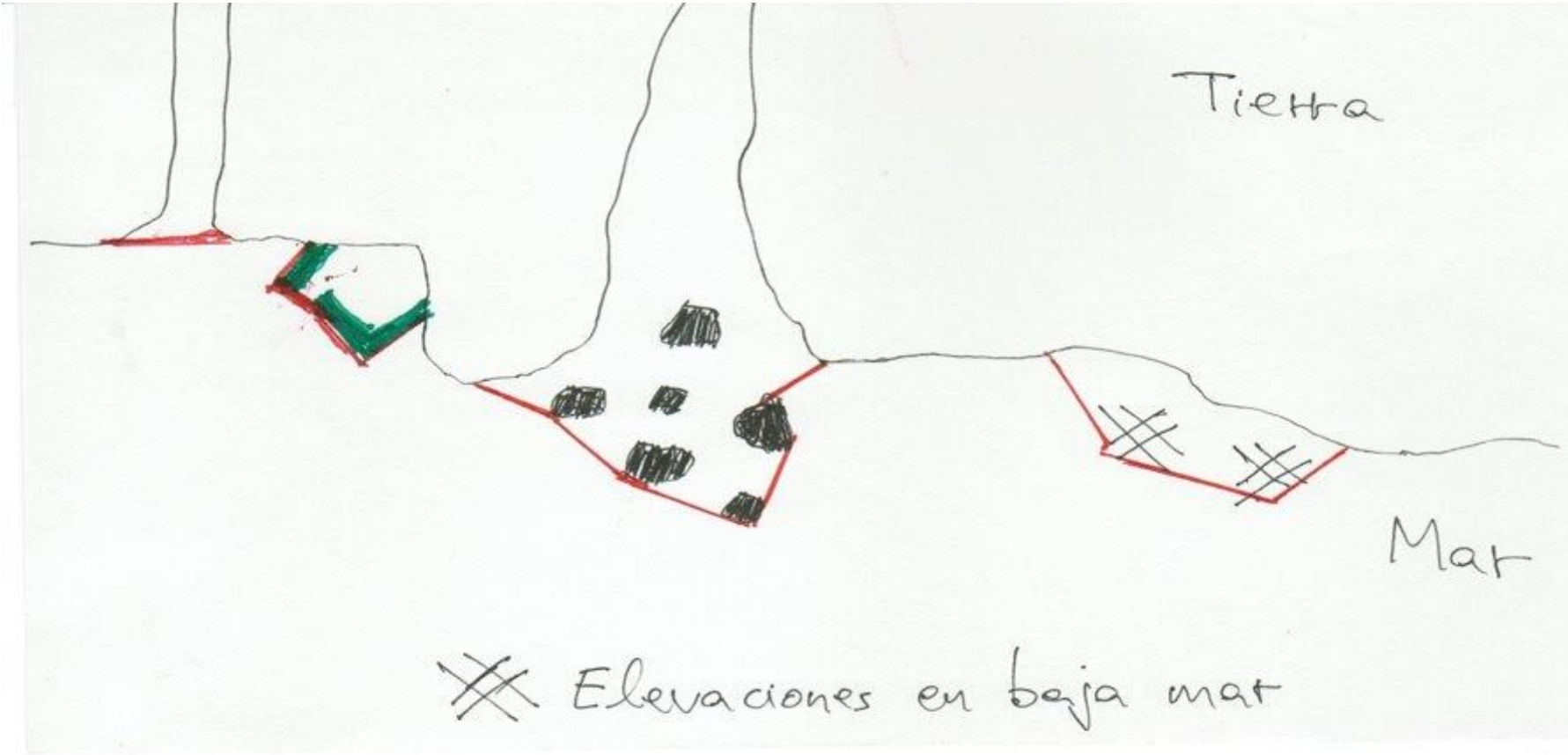
- **UNCLOS** creates a spatial division of the seas and oceans, distinguishing marine spaces under the sovereignty or jurisdiction of the coastal state/marine spaces beyond the limits of national jurisdiction.
 - Spaces under sovereignty or jurisdiction: baselines; internal waters; archipelagic waters; territorial sea; contiguous zone; exclusive economic zone; and the continental shelf.
 - Spaces outside sovereignty: high seas and the area.



Zones of Marine Spaces from National Coastal Boundaries to International Spaces [Paul Arthur Berkman, Environmental Security in the Arctic Ocean: Promoting Co-Operation and Preventing Conflict, Whitehall paper 75, 2010, 91.]

B.0. Baselines and determination of internal waters

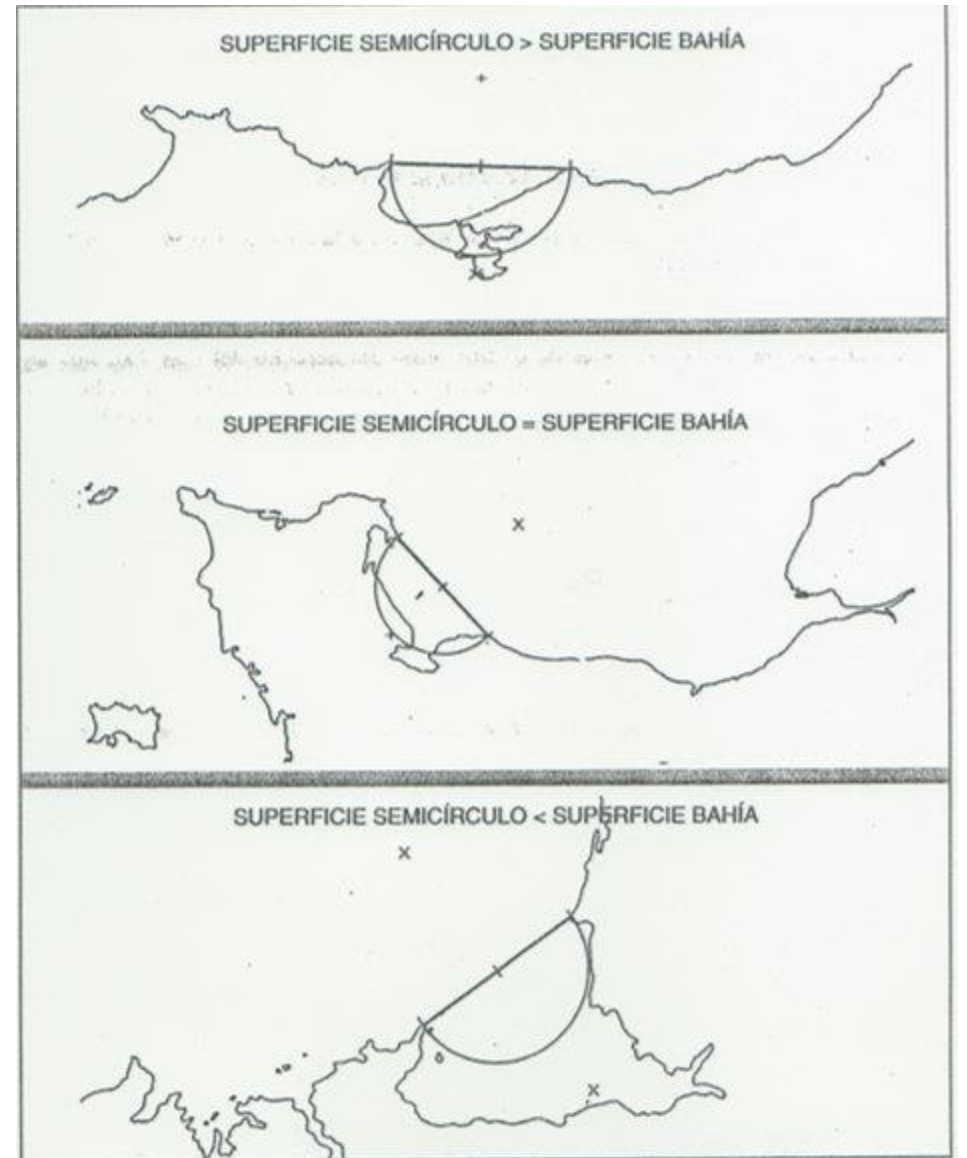
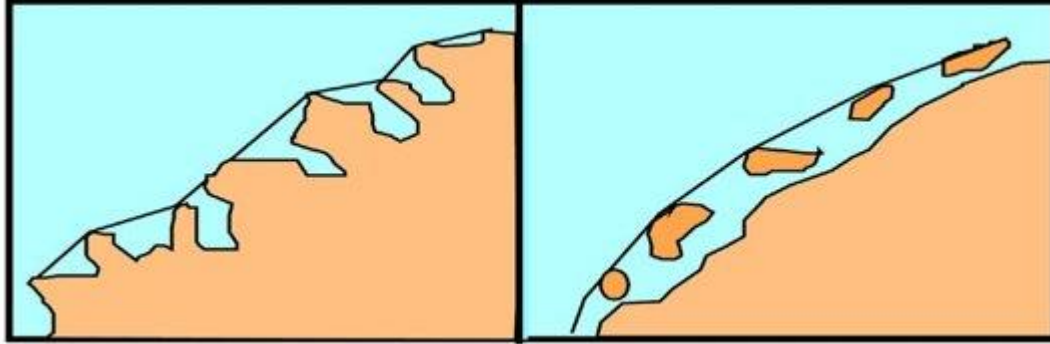
- Drawing baselines is the first operation for establishing the different sea areas.
- As a general rule: normal baseline is the low tide line along the coast.
- **Exceptions:**
 - Traditional baselines (drawing in next slide)
 - Rivers (estuaries): if it flows directly into the sea, the baseline will be a straight line drawn across the mouth between the points of the low tide line of its banks.
 - Rivers (deltas)
 - Ports: permanent harbor constructions farthest from the coast that form an integral part of the port system are considered part of it.
 - Bays: if the distance between the low-water lines of the natural points of entry does not exceed 24 mm, a demarcation line may be drawn between the two low-water lines and the enclosed waters are considered inland waters.
 - Elevations in low water.



TRADITIONAL BASELINES

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- Straight baseline: coasts with deep openings and islands along the coastline in the immediate vicinity.



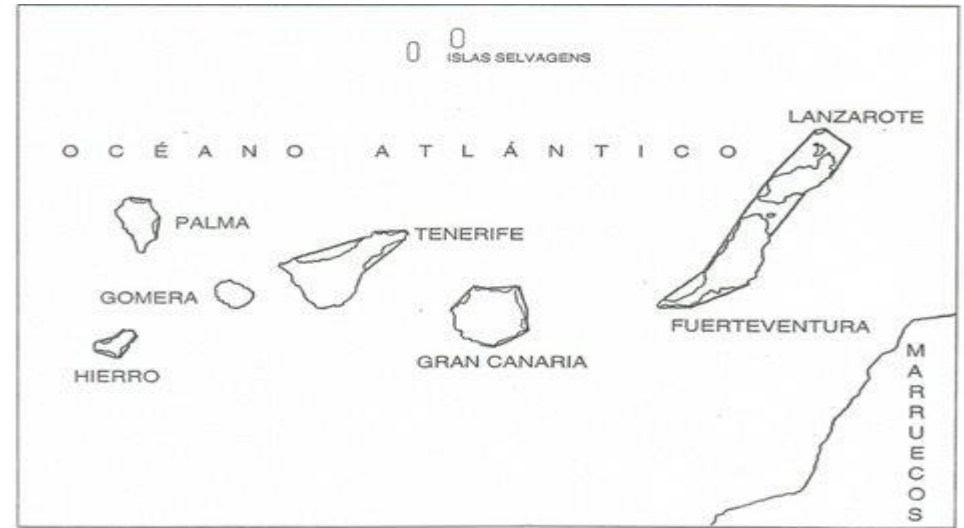
- Straight archipelagic baselines:



- Once the baseline has been determined:
 - INLAND WATERS: waters located inside the baseline of the TS and subject to the sovereignty of the state with a limit: right of innocent passage through inland waters that have been created by the drawing of straight baselines.
 - ARCHIPELAGIC WATERS: these are the waters enclosed by archipelagic baselines and include bed and subsoil. It should be considered that there may also be inland waters because of traditional closures. In any case, they are subject to the sovereignty of the archipelagic state with two limits: right of innocent passage with the possibility of temporary suspension in all archipelagic waters and right of passage (maritime and aerial) through archipelagic sea lanes.



- Spain's baselines:



B.1. REGIME OF THE SPACES UNDER JURISDICTION OF THE COASTAL STATE

(i) Territorial Sea (TS)

- Definition: It is the strip of sea adjacent to the land territory of a state. It includes soil and subsoil and has two limits (interior: baseline/interior: up to 12 nm).
- For the delimitation of the TS between states with adjacent or opposite coasts, the rule of equidistance will be applied.
 - **General regime:** Sovereignty limited by right of innocent passage with possibility of temporary suspension.
 - Spain: Act 10/1977 on Spanish TS: 12 nm and delimitation by equidistance.
 - **Strait's regime:** The UNCLOS modifies the previous customary law that established the right of innocent passage without the possibility of suspension. Different regimes are established:
 - Straits communicating a part of the HS or of an EEZ: transit passage.
 - Innocent passage without the possibility of suspension for straits formed by the island of a coastal state and its continental territory (Messina) and those located between a part of the high seas or EEZ and the TS of another state.
 - Large straits: straits that have been regulated by an international agreement in force. In those cases, particular agreements apply.
 - False straits.

Straits with innocent passage regimes: Tiran and Messina



Large straits: Dardanelles, Sea of Marmara, and Bosphorus



False straits:



(ii) Contiguous Zone (CZ)

- Definition: the next area is referred to as the CZ and has two boundaries (inner: outer boundary of the TS / outer: up to 24 nautical miles (nm) MEASURED from the closing line).
- Regime: limited jurisdiction of the coastal state.

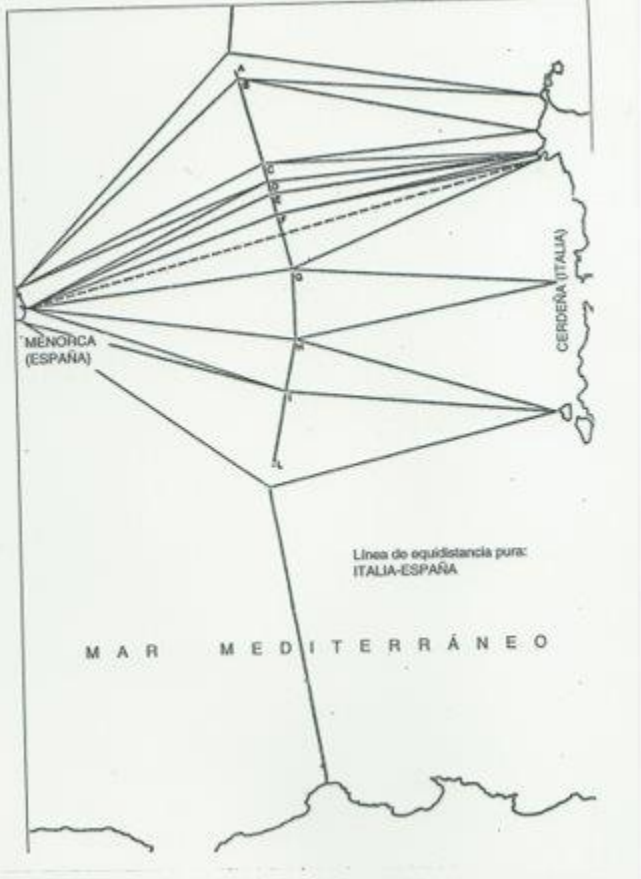
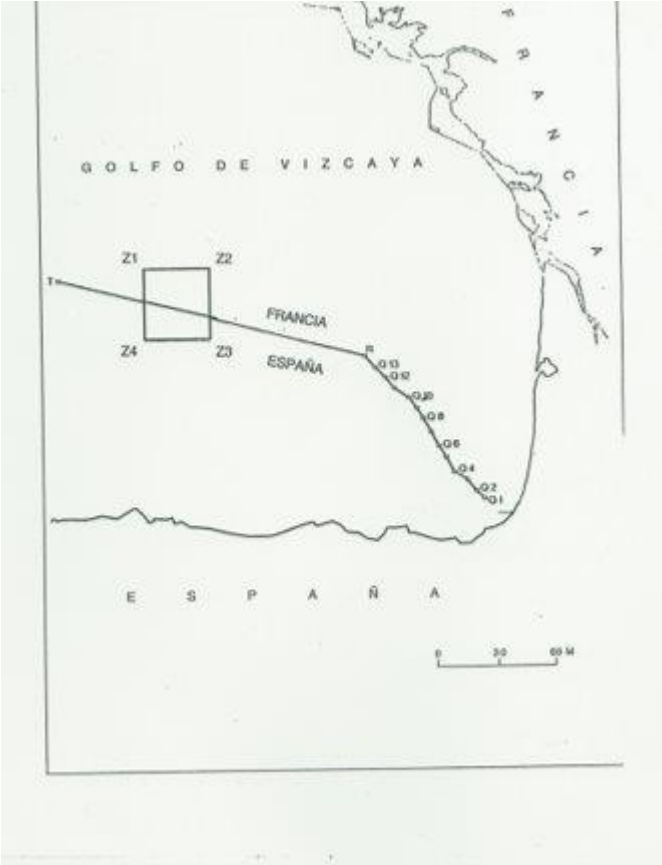
(iii) Exclusive Economic Zone (EEZ)

- Definition: area beyond and adjacent to the TS and has two boundaries (inner: outer boundary of the TS / outer: up to 200 nm MEASURED from the baseline).
- It covers the water column and the seabed and subsoil, but we must consider the continental shelf regime.
- It is established by an act of express proclamation of the state
 - Spain: Atlantic Ocean only.
- Rights, jurisdiction, and duties of the coastal state:
 - economic "sovereignty rights" (fishing regime) and jurisdiction over islands and artificial structures, marine scientific research, protection, and preservation of the environment.
 - Other UNCLOS rights.
- Rights and duties of other states. Residual clause.
- Delimitation of the EEZ between states with adjacent or conflicting coasts: equitable solution.

(iv) Continental shelf (CS)

- Definition: the bed and subsoil of the submarine areas that extend beyond the TS with two boundaries: inner: outer boundary of the TS; outer: with two options:
 - UP to 200 nm counted from the baselines
 - UP to the outer edge of the continental margin (Art. 76.3: includes shelf + slope + continental emersion) with two alternative limits (Art. 76.5):
 - UP to 350 nm from the baselines.
 - UP to 100 nm from the 2500 meters isobath.
- Rights, jurisdiction, and duties of the coastal state independent of: (i) its real or fictitious occupation (= *ab initio*) and (ii) of any express declaration (*ipso facto*).
 - economic "sovereignty rights".
 - They are exclusive rights: there is no surplus even if the coastal state does not exercise them.
- Questions regarding the CS:
 - Determination of the concept "natural resource": mineral resources; other non-living resources (includes gas and hydrocarbons); sedentary species (immobile in bed or subsoil in period of exploitation; can only move in physical contact with bed or subsoil).
 - Delimitation: equidistance/special equity circumstances.

Delimitation of CS between Spain and France; and between Spain and Italy:



B.2. REGIME OF THE SPACES BEYOND JURISDICTION OF THE COASTAL STATE

(i) High sea (HS)

- Residual space that is defined by exclusion (Art. 86 UNCLOS), so it will depend on the outer limits of the marine spaces of the coastal states (it is necessary to send a copy of scale charts or coordinate lists to UN Secretary General).
- Legal regime:
 - regime of freedom (Art. 87). Navigation (regulated in detail in UNCLOS); overflight; laying submarine cables and pipelines; construction of artificial islands and installations permitted in DI; fishing (not absolute, ensure conservation and state cooperation); scientific research.
 - Peaceful use/illegitimacy of sovereignty claims.
 - Freedom of navigation: regulation of exceptions for the exclusive jurisdiction of the flag state over merchant vessels on the high seas by warships or military or duly authorized and identifiable military aircraft:
 - Right to board and seize pirate (or pirate-held) vessel or aircraft and detain persons and seize property: warships or military aircraft or other state vessels/aircraft, duly authorized, and identifiable as vessels in the service of a government.

- Right to board and seize vessels making unauthorized radio/television transmissions to the general public in violation of international regulations, and to seize persons and confiscate equipment: warships or military aircraft or other state vessels/aircraft, duly authorized, and identifiable as vessels in the service of a government of any state in which they may be received, or of those whose services are interfered with.
- Right of hot pursuit and seizure on the high seas of a foreign vessel when the coastal state has reasonable grounds to believe that it is committing violations of state laws and regulations or violating rights for the protection of which the area where the violation occurs, or violation of the laws of the marine space where it is located.
 - ❖ Must begin in internal waters, territorial sea, etc. (waters within sovereignty) and continue outside marine space without interruption: warships or military aircraft or other state vessels/aircraft, duly authorized, and identifiable as vessels in the service of a government of the coastal state ONLY.
- Right to visit foreign vessels on reasonable suspicion of: (i) slave trading; (ii) no nationality; (iii) same nationality as warship but flying foreign flag is denied; warships or military aircraft or other state vessels/aircraft, duly licensed, and identifiable as vessels in the service of a government of any state.

- Repression of narcotic/psychotropic drug trafficking: this is no exception to the general rule, except in exceptional cases expressly provided for in international treaties. Thus, a flag state may request cooperation from other states: 1989 UN Vienna Convention against Trafficking in Narcotic Drugs and Psychotropic Substances: cooperative measures for surveillance and law enforcement.
 - Spain-Italy: 1990 treaty on mutual recognition right to intervene beyond territorial sea. Duty of assistance on the high seas.

(ii) The Area (A)

- Definition: seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction; precise determination of the extent of the outer limit of the continental shelf of the coastal states.
- UNCLOS: common heritage of mankind without recognition of sovereignty claims or appropriations; activities for the benefit of mankind, with special consideration for the benefit of developing states; and peaceful purposes.
- International Seabed Authority (states parties to UNCLOS are automatically members): IOA organizes and controls exploration and exploitation of resources in the Area.
 - Part XI: Complex, innovative, and equitable regime of utilization, but no developed states joined. Therefore, agreement relating to the implementation of Part XI of UNCLOS 1982 (UNGA resolution 48/263) - in force 1996.
 - Amendment of Part XI regarding exploration and exploitation system to be interpreted jointly - and in case of collision - with preference for the agreement.

JURISDICTION OF STATES OVER AIRSPACE

- A. General considerations
- B. National airspace
- C. International airspace

A. GENERAL CONSIDERATIONS

- Atmospheric space above the Earth.
 - Upper boundary: outer space, although the precise boundary is not known.
 - Located in spaces subject to the sovereignty of a state: territory, waters, etc.
 - Lateral limits: vertical projection of the terrestrial borders and territorial sea limits (archipelagic waters).
 - Located in spaces not subject to sovereignty: ZC, EEZ, AM, and Antarctica.
- Initially: conflict between supporters of absolute freedom/conciliation of overflight state protection rights. Finally: pragmatic solution establishing a differentiated regime for national/international airspace.

B. NATIONAL AIRSPACE REGIME

- It is the airspace above the spaces subject to sovereignty.
- Convention on International Civil Aviation - Chicago 1944 (applicable only to civil aircraft):
"*The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory*". Consequences of "*complete and exclusive sovereignty*".
- Overflight and landing: with state consent.
- Legal regime distinction between scheduled/non-scheduled international air services:
 - Non-scheduled: the "five freedoms of the air": Art. 5.
 - Scheduled: do not benefit from commercial freedoms of the air: Art. 6: special permission to operate (U.S.-U.K. model bilateral air traffic agreements of 1946) but enjoy freedom of overflight and technical stopover.
 - Can an aircraft be shot down if overflying without authorization? Amendment 1984: Require landing and give necessary guidance to stop the violation but must refrain from using weapons against civil aircraft and avoid endangering lives of aircraft occupants (Art. 3bis).
- Establishment International Civil Aviation Organization (ICAO).

C. INTERNATIONAL AIRSPACE REGIME

- Airspace overlying spaces not subject to state sovereignty.
- Legal regime: freedom of overflight in a *sensu contrario* interpretation of the provisions of the national airspace legal regime and UNCLOS articles.



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