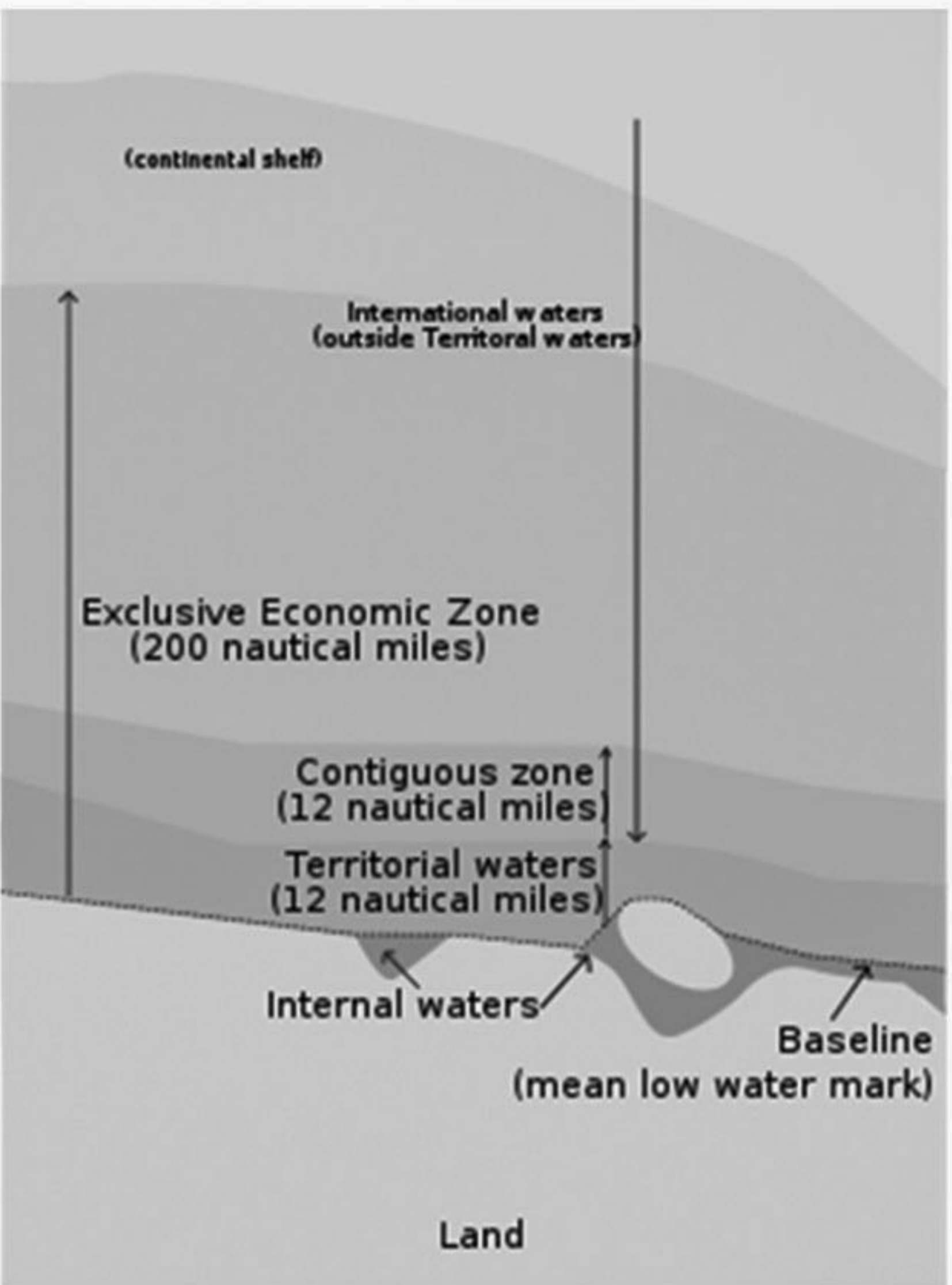


A 'Great Win' for Bangladesh

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The day I started writing this article Bangladesh achieved a great win by defeating its bigger neighbour, India, by five wickets in a cricket match at the Mirpur Cricket Stadium, Dhaka. However, two days earlier, on March 14, Bangladesh achieved a greater win in a courtroom in Hamburg, Germany against its other big neighbour, Myanmar. This article aims to explain the significance of the other great win, the judgment by the International Tribunal for the Law of the Sea (ITLOS), by which Bangladesh established its sovereign rights to a full 200 nautical mile exclusive economic zone in the Bay of Bengal, and to a substantial share of the "outer continental shelf" beyond 200 nautical miles. The judgment of March 14 sets an important precedent as this was the first time that ITLOS delimited a maritime area beyond 200 nautical miles, known as the "outer continental shelf."



An exclusive economic zone is a sea-zone over which a coastal state has sovereign rights for the use and exploration of marine resources, including oil and gas. This zone generally stretches from the seaward edge of the state's 12 nautical mile territorial sea out to 200 nautical miles from its coast. Beyond the exclusive economic zone, a state may lay claim to an "outer continental shelf" extending more than 350 nautical miles from its coastline if it can demonstrate the existence of certain geological conditions. Outer continental shelf areas can contain natural resources like oil and gas. With the advent of technology it has now become possible for states to explore the outer continental shelf areas beyond 200 nautical miles, which is why rights over this area are important.

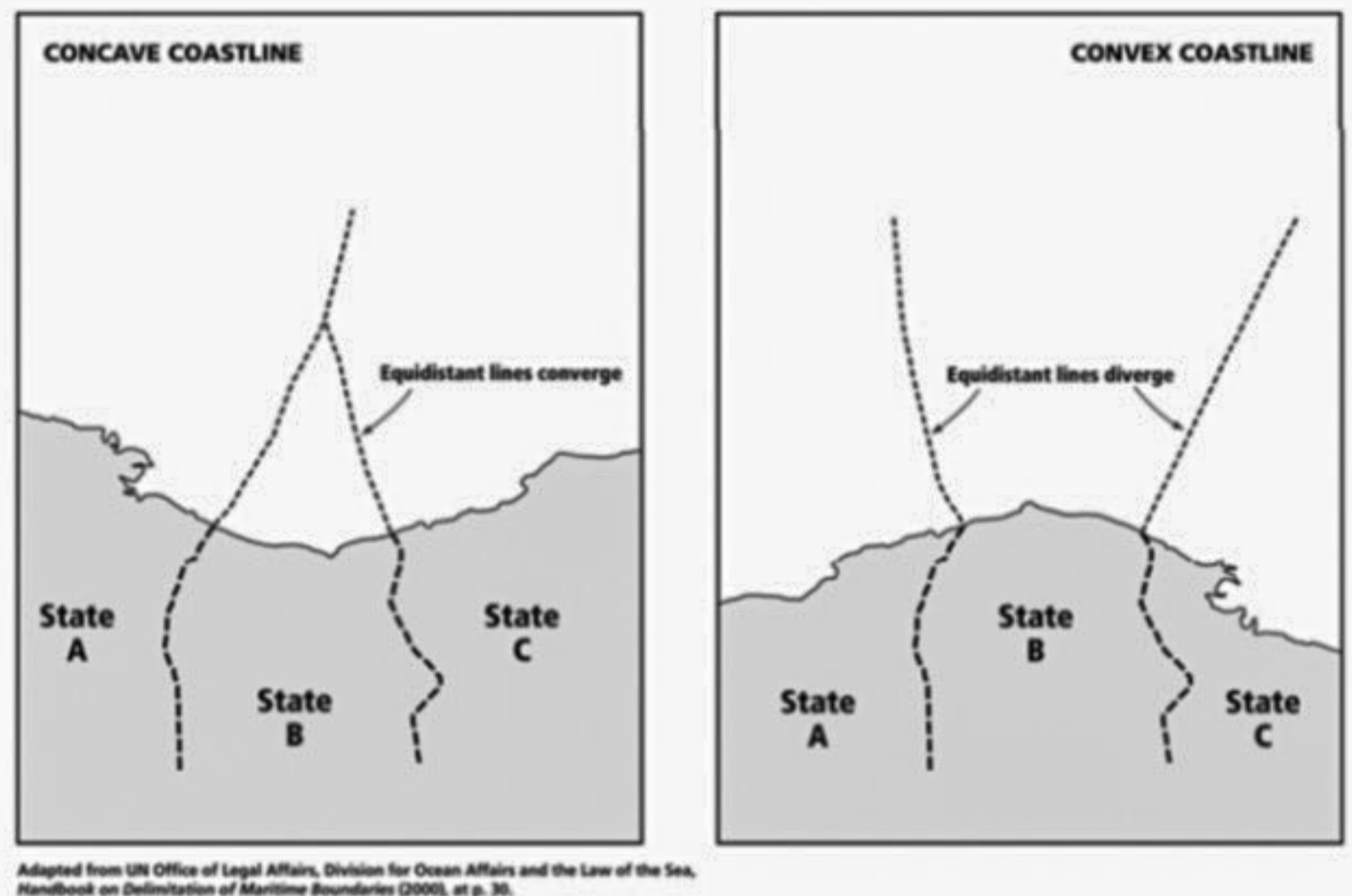
History of the dispute:
Following negotiations between Bangladesh and Myanmar, in 1974, the two countries reached an understanding regarding the delimitation of their respective territorial seas to a distance of 12 nautical miles from their coastlines. As per the terms of the 1974 Agreed Minutes, signed by delegations of the two countries, Bangladesh permitted Myanmar's vessels free and unimpeded navigation through Bangladesh's waters around St. Martin's Island to and from the Naaf River.
However, despite extensive negotiations for over three decades, since 1974, the two neighbours had been unable to agree on the delimitation of the boundary in the exclusive economic zone and the continental shelf.
Upon assuming office in early 2008 the Awami League government engaged in further negotiations with the government of Myanmar. However, from 2008 onwards, Myanmar started denying the existence of any formal agreement between the parties regarding maritime delimitation.
Having failed to resolve the issues bilaterally the Bangladesh government took the bold decision on December 13, 2009, to initiate arbitration pursuant to the United Nations Convention on the Law of the Sea (UNCLOS) to secure the full and satisfactory delimitation of Bangladesh's maritime boundaries with Myanmar in the territorial sea, the exclusive economic zone and the continental shelf in accordance with international law.

Myanmar's position had always been that the delimitation of the territorial sea on the one hand and the exclusive economic zone and continental shelf on the other hand, had to be settled together. There were also conflicting and overlapping claims to the outer continental shelf beyond 200 nautical miles, with each state claiming that the outer shelf is the natural prolongation of its own landmass, and the other state has no rights to the outer continental shelf.

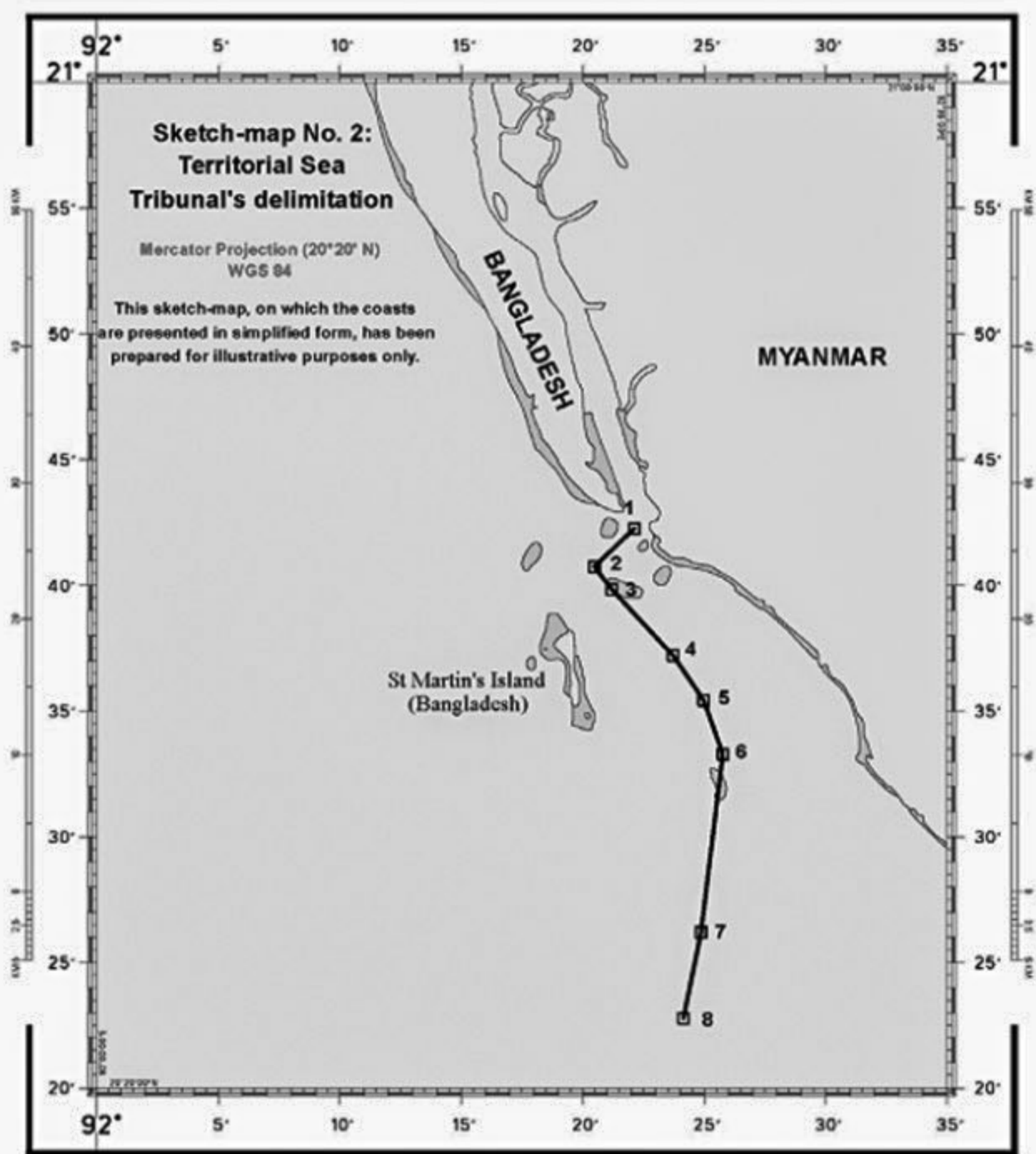
Myanmar had insisted that the maritime boundary should be delimited on the basis of "equidistance." Bangladesh had always wanted a solution to the issue based on "equitable principles/relevant circumstances rule." If the "equidistance principle" was used to draw the maritime boundary this would have resulted in the drawing of a median line equidistant from the shores of Bangladesh and Myanmar. However, given the unique concavity of the Bangladesh coastline an equidistant line would have deprived Bangladesh a substantial portion of the seas. Thus, Bangladesh wanted the maritime boundary to be drawn using the "equitable principles" rule under which a provisionally drawn equidistance line is adjusted (or abandoned) in consideration of the "special" or "relevant" circumstances. The unique concavity of the Bangladesh coastline would be one of these "special" or "relevant" circumstances.

Concavity of Bangladesh coastline:
The land territory of Bangladesh is located at the northern limit of the Bay of Bengal in a broad and deep concavity between Myanmar in the east and India in the west. Because Bangladesh is tucked between Myanmar and India in the concavity described by the Bay of Bengal's north coast, Myanmar's proposed equidistance line would have converged a short distance in front of the Bangladesh coast with the equidistance line India had claimed as its maritime boundary with Bangladesh. Together, these two lines would have created a "cut-off" effect that would have deprived Bangladesh of the overwhelming majority of its maritime entitlement. The

combined effect of the equidistance lines claimed by Myanmar and India was that the two lines quickly met and truncated Bangladesh's maritime entitlement at a distance of just 137 nautical miles from the Bangladesh coast, leaving it with a narrow wedge of maritime space.
Notwithstanding Bangladesh's substantial 421 km coastline, the equidistance lines claimed by its neighbours would have prevented it from reaching even its 200 nautical mile limit, much less its natural prolongation in the outer continental shelf beyond 200 nautical miles.



Delimitation of the territorial sea:
Article 15 of UNCLOS, which deals with the delimitation of the territorial sea, states that where the coasts of two states are opposite or adjacent to each other (as is the case of Bangladesh and Myanmar), neither of the two states is entitled to extend its territorial sea beyond the equidistant median line (i.e. in compliance with the equidistance principle). The equidistance principle 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 that abandons the equidistance principle.

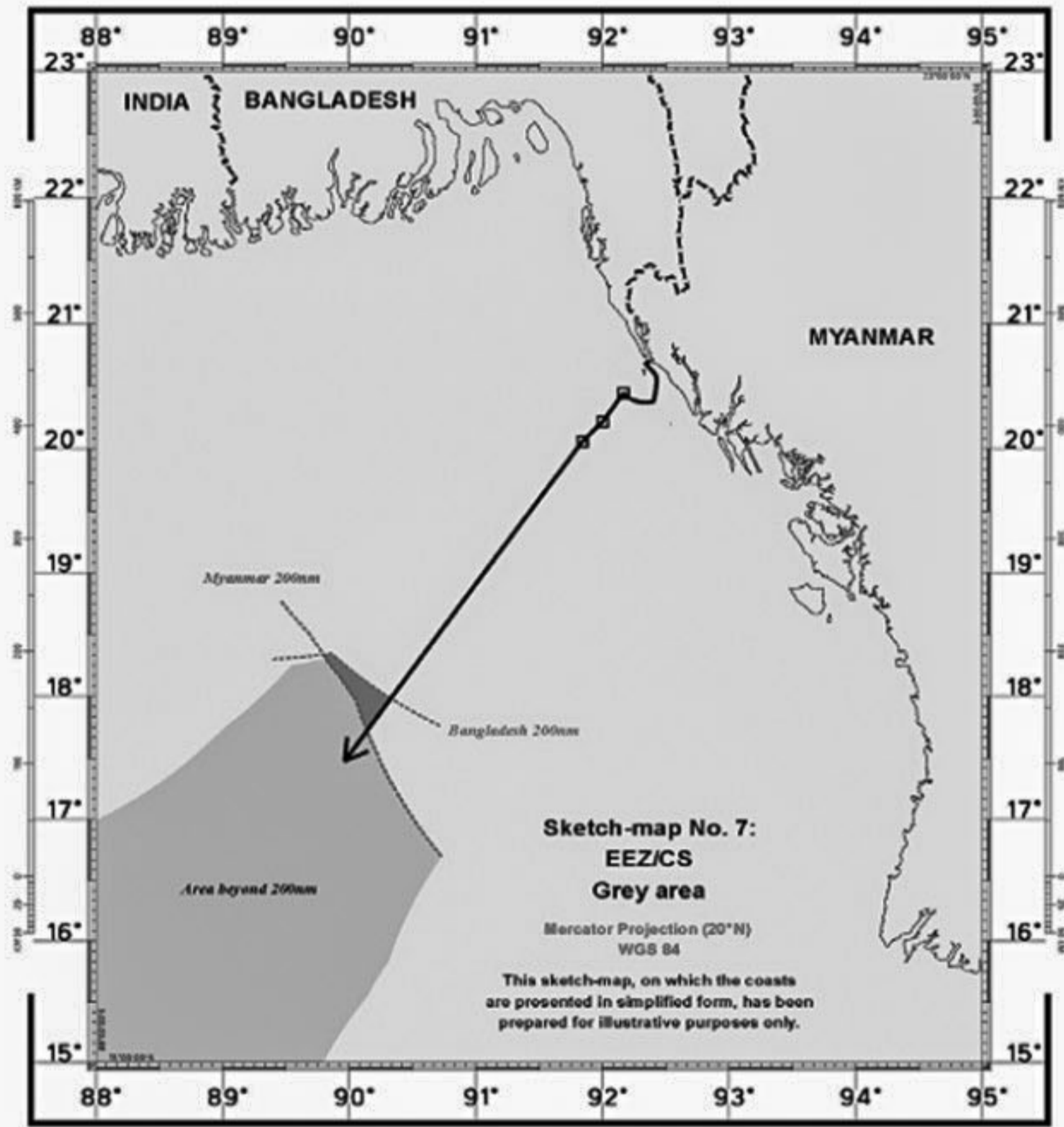


Whether St. Martin's Island constitutes a special circumstance?
Myanmar argued the St. Martin's Island was a "special circumstance" which should not be given full effect for the territorial sea delimitation since this would lead to distortion of the general configuration of the coastline of the two states. Thus, Myanmar wanted St. Martin's Island to generate a territorial sea of just 6 nautical miles, rather than the 12 nautical miles to which Bangladesh is entitled under Article 15 of UNCLOS. It also argued that the island could not be described as a "coastal island" because it lay in front of the coast of Myanmar, and not that of Bangladesh, to which it belongs.
Bangladesh argued that St. Martin's Island should be given full effect because international law demanded it. In prior cases, international tribunals had awarded islands a territorial sea of less than 12 nautical miles only when they were barren and uninhabitable. By contrast, Bangladesh stressed that St. Martin's Island, in addition to being an important base for naval operations of Bangladesh Navy, had an area of eight square kilometres and a permanent population of about 7,000 people.
The Tribunal agreed with Bangladesh's claims and gave full effect to St. Martin's Island in delimiting the territorial sea. It noted that while St. Martin's Island lay in front of Myanmar's mainland coast, it was located almost as close to Bangladesh's mainland coast as to the coast of Myanmar and it is situated within the 12 nautical mile territorial sea limit from Bangladesh's mainland coast.
The Tribunal recognised that Bangladesh had the right to a 12 nautical mile territorial sea around St. Martin's Island in the area where such territorial sea no longer overlaps with Myanmar's territorial sea. It noted that a conclusion to the contrary would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea.

Delimitation within 200 nautical miles:
The tribunal first noted that in drawing the maritime delimitation the goal of achieving an equitable result was of the paramount consideration. It thus adopted the "equidistance/relevant circumstances" method preferred by Bangladesh. The tribunal observed that the coast of Bangladesh was manifestly concave and since the equidistance line produces a "cut-off" effect on the maritime entitlement of Bangladesh an adjustment of the provisional equidistance line was necessary to reach an equitable result. It adjusted the provisional equidistance line to reach an equitable solution taking into account the relevant circumstances, notably the concavity of the Bangladesh coastline.

Delimitation of the outer continental shelf beyond 200 nautical miles:
Regarding the outer continental shelf areas, states can potentially lay claim to areas more than 200 nautical miles from their coastlines if they can prove that the seafloor in that area possesses one of two characteristics

(i) a certain thickness of sedimentary rocks, or (ii) the existence of certain morphological/topographic features. If a coastal state can demonstrate the existence of one of these two characteristics, it must make a submission to the Commission on the Limits of the Continental Shelf (CLCS), which is charged with determining the outer limits of the area the state can claim according to a complex technical formula. Thus, given the complexity of determining the outer limits of the continental shelves, some extending to beyond 200 nautical miles, UNCLOS established CLCS to make recommendations to coastal states to establish the outer limited of continental shelves beyond 200 nautical miles. UNCLOS also established ITLOS to adjudicate disputes between States concerning issues covered UNCLOS, including the delimitation of maritime boundaries.
Myanmar argued that since neither it nor Bangladesh had established the outer limit of the continental shelf based on recommendations from the CLCS, delimitation of that area by the Tribunal would be nothing more than a hypothetical exercise, as it did not know what the outer limits would be. It also argued that it would not be appropriate for ITLOS to exercise jurisdiction over the outer continental shelf since this would prejudice the rights of a third party, implying India, which also has claims in the outer continental shelf areas.
Bangladesh stressed the point that UNCLOS does not prevent the tribunal from exercising jurisdiction over areas beyond 200 nautical miles. Bangladesh also argued that potential claims of third party states cannot deprive ITLOS of its jurisdiction since third parties are not bound by the judgment of ITLOS and its rights are thus unaffected by the judgment. Bangladesh pointed out that there was no conflict between the roles of ITLOS and CLCS. It argued that their roles are complementary because the CLCS's rules prevent it from issuing recommendations on the outer limits of the continental shelf when there is a dispute concerning delimitation. Thus, the recommendations of the CLCS were not a prerequisite to the jurisdiction of ITLOS, as was being argued by Myanmar.



The tribunal agreed with Bangladesh and found it had jurisdiction to delimit the continental shelf in its entirety. It noted that its exercise of its jurisdiction to delimit the outer shelf did not encroach on the functions of the CLCS. The tribunal determined the direction of the maritime boundary without indication a precise terminus, specifying instead that the maritime boundary line continued until the rights of a third party are affected. After reaching the end of the exclusive economic zone the line continues at the same bearing into the outer continental shelf beyond 200 nautical miles. However, a precise end point was not determined in consideration of India's pending claim. The exercise of jurisdiction by ITLOS to delimit the continental shelf beyond 200 nautical miles is the most significant legal aspect of the judgment. This was for the first time that a tribunal exercised jurisdiction to delimit a maritime boundary in the outer continental shelf.

Significant gains for Bangladesh in the maritime boundary dispute with Myanmar
Shortly after the judgment the Foreign Minister of Bangladesh, Dipu Moni, hailed the gains achieved by Bangladesh through the resolution of the long-standing maritime dispute between Bangladesh and Myanmar. She stated that all of our strategic objectives were achieved. The foreign minister continued: "Bangladesh's full access to the high seas out to 200 nautical miles and beyond is now recognised and guaranteed, as are our undisputed rights to the fish in our waters and the natural resources beneath our seabed. Bangladesh claimed 107,000 square kilometers while it got 111,000 square kilometers area in the Bay of Bengal."

Much credit goes to the government of Bangladesh for handling this case with due diligence and giving it the focused attention it deserved. The foreign minister herself led the Bangladesh team from the front opening the submissions for Bangladesh. She was assisted by the equally capable and knowledgeable Rear Admiral (Retd) Md. Khurshed Alam. Bangladesh was ably represented by a "dream team" of international lawyers including Paul Reichler and Lawrence Martin of Foley Hoag LLP; Professor James Crawford of Cambridge University; Professor Philippe Sands of the University College London; Professor Alan Boyle of the University of Edinburgh; and Professor Payam Akhavan of McGill University.

The immediate impact of the judgment of March 14 is that Bangladesh will be able to carry out exploration for oil and gas in several offshore blocks that show enormous potential. In addition, the judgment is likely to set an important precedent for the pending dispute concerning delimitation of the maritime boundary between Bangladesh and India. Because of this judgment Bangladesh is now more likely to obtain a positive outcome in that case as well.

To sum up, the ITLOS judgment can be described as a total victory for Bangladesh. To make a cricket analogy, as a counsel for Bangladesh did for me, "all in all, I'd say Bangladesh defeated Myanmar by 200 runs, and scored a couple of centuries on the way!"

The writer is currently a Hubert H. Humphrey Fellow at the American University and, as part of the Fulbright exchange programme, is undertaking a professional affiliation at Foley Hoag LLP, which represented Bangladesh in ITLOS Case No. 16, the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar case). The source materials for this article are primarily the submissions made by the parties and the judgment in the Bangladesh/Myanmar case.