Dispute Settlement: Overview of UNCLOS PART XV

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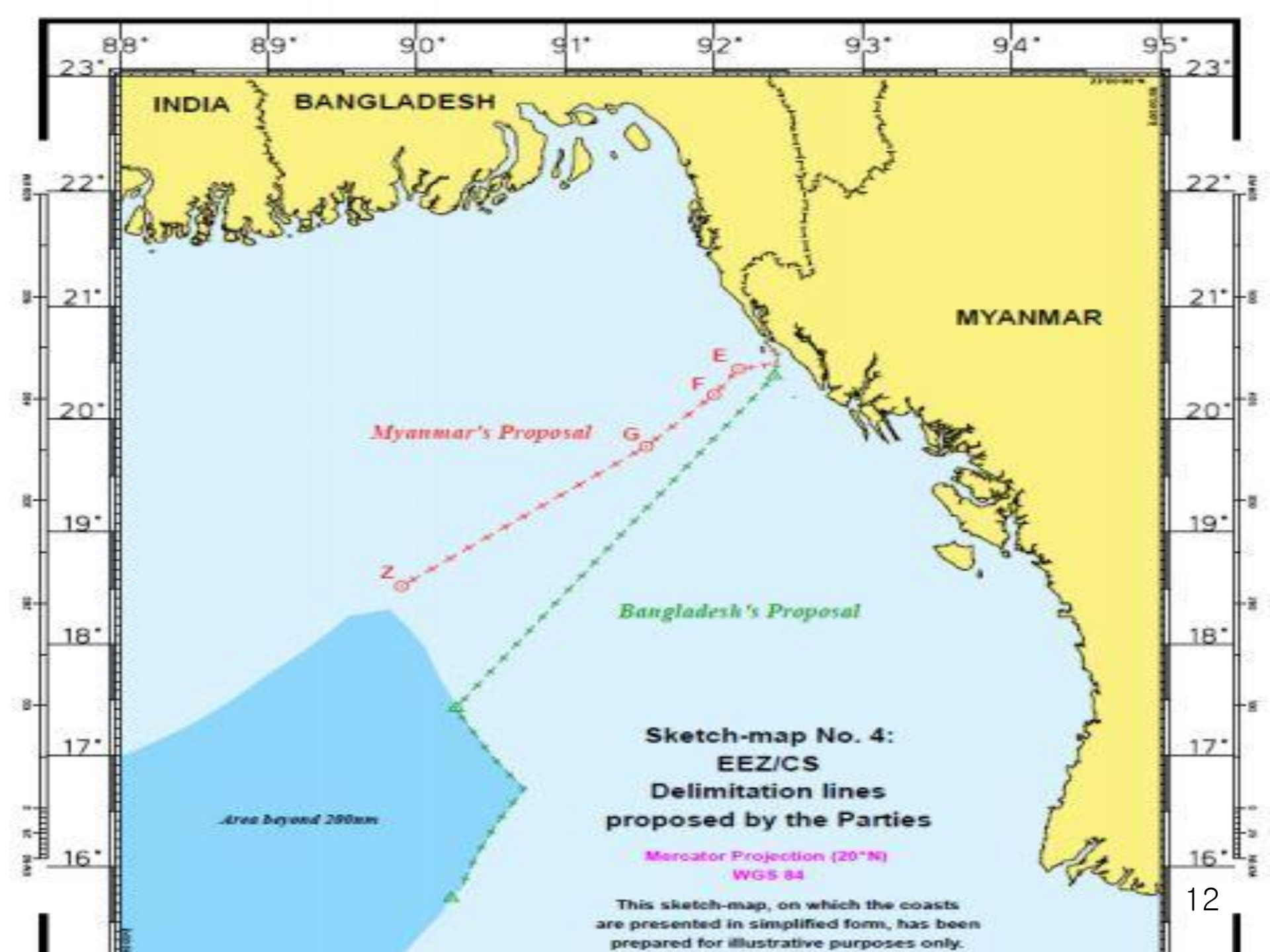
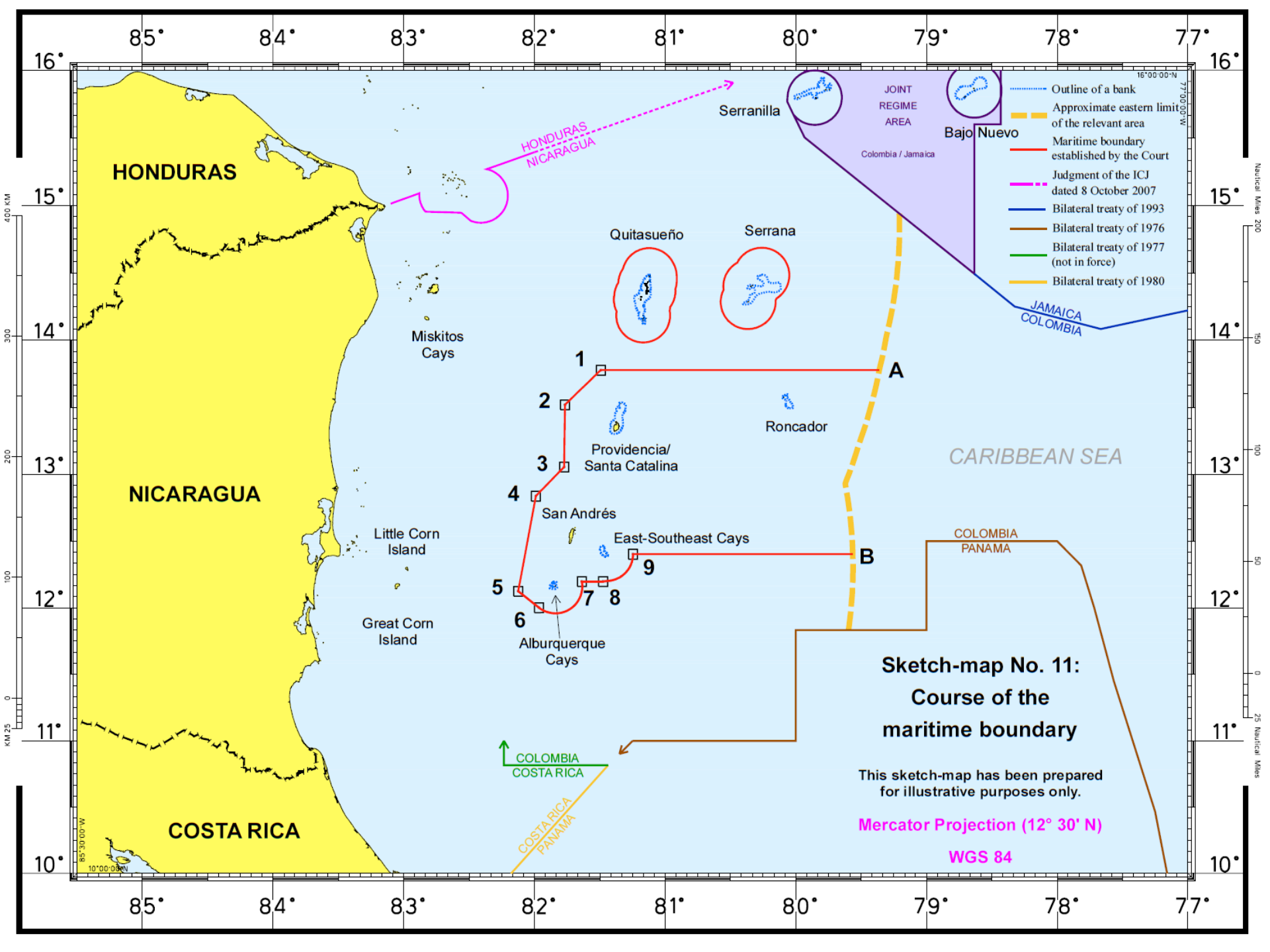
REVIEW:
Maritime Boundary Delimitation: Recent Jurisprudence

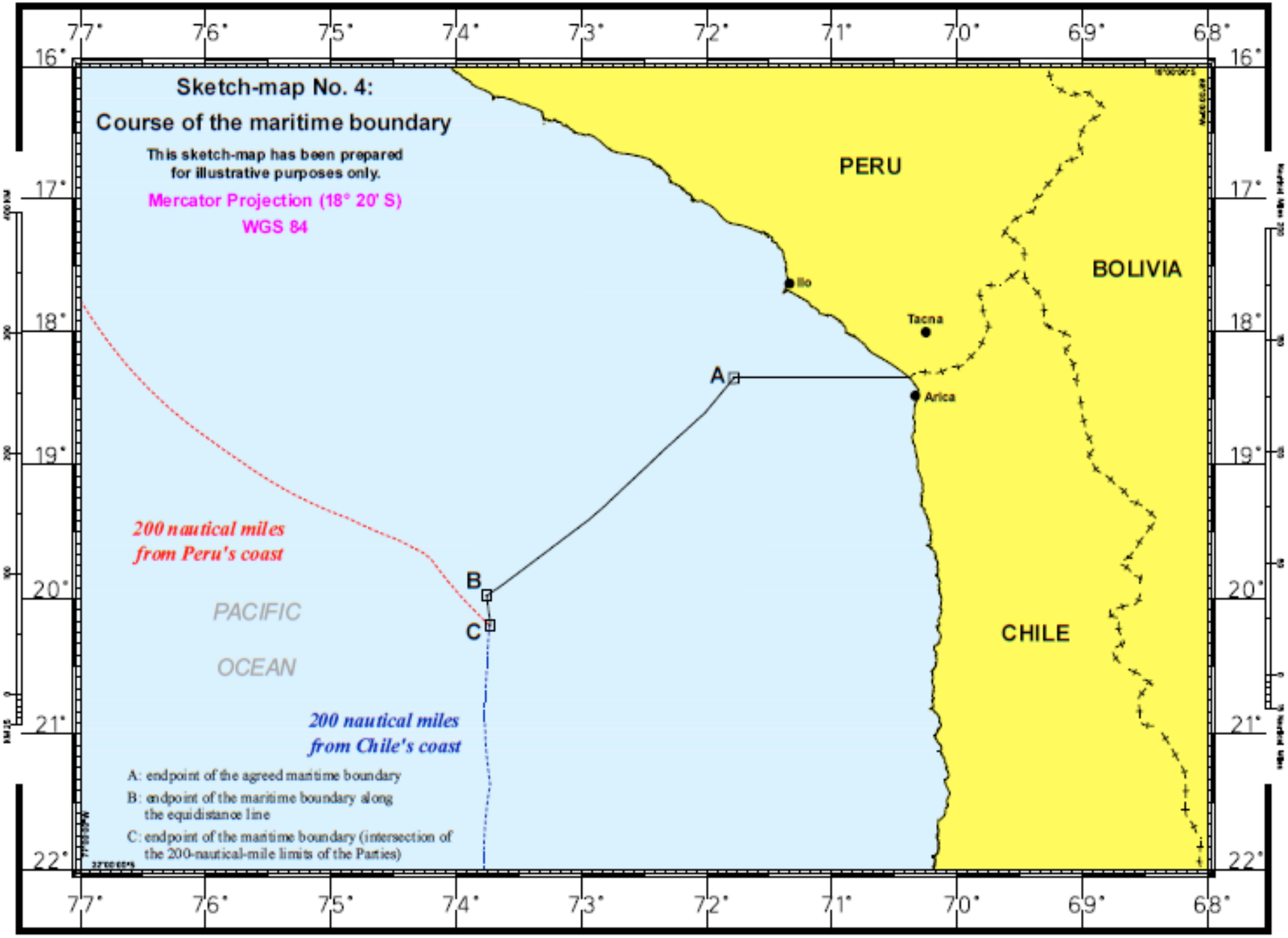
A Three-stage Approach

: The Black Sea Case

- The Court outlined a clear approach to delimitation:
- First – establish a provisional delimitation line
  - "[A]n equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case…"
  - The strongest statement yet in favour of equidistance as a starting point for maritime delimitation
- Second – consider factors calling for an adjustment to the provisional line in order to achieve an equitable result
- Third – verify the line by applying a "disproportionality" test


88°
89°
90°
91°
92°
93°
94°
95°
23°
22°
21°
20°
19°
18°
17°
16°
INDIA
BANGLADESH
MYANMAR
E
F
G
Z
Myanmar's Proposal
Bangladesh's Proposal
Area beyond 200nm
Sketch-map No. 4:
EEZ/CS
Delimitation lines
proposed by the Parties
Mercator Projection (20°N)
WGS 84
This sketch-map, on which the coasts
are presented in simplified form, has been
prepared for illustrative purposes only.


HONDURAS
NICARAGUA
COSTA RICA
CARIBBEAN SEA
Serranilla
Bajo Nuevo
JOINT REGIME AREA
Colombia / Jamaica
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
Miskitos Cays
San Andrés
East-Southeast Cays
Little Corn Island
Great Corn Island
Alburquerque Cays
1
2
3
4
5
6
7
8
9
A
B
HONDURAS NICARAGUA
JAMAICA COLOMBIA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Outline of a bank
Approximate eastern limit of the relevant area
Maritime boundary established by the Court
Judgment of the ICJ dated 8 October 2007
Bilateral treaty of 1993
Bilateral treaty of 1976
Bilateral treaty of 1977 (not in force)
Bilateral treaty of 1980
Sketch-map No. 11:
Course of the maritime boundary
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84


Sketch-map No. 4:
Course of the maritime boundary
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (18° 20' S)
WGS 84
PERU
BOLIVIA
CHILE
Ilo
Tacna
Arica
A
B
C
200 nautical miles from Peru's coast
200 nautical miles from Chile's coast
PACIFIC
OCEAN
A: endpoint of the agreed maritime boundary
B: endpoint of the maritime boundary along the equidistance line
C: endpoint of the maritime boundary (intersection of the 200-nautical-mile limits of the Parties)
77°
76°
75°
74°
73°
72°
71°
70°
69°
68°
16°
17°
18°
19°
20°
21°
22°

Dispute Settlement:
Overview of UNCLOS PART XV

1. Overview

- Part XV: “One of the most innovative features of the Convention”

- Sec. 1: General provisions (Arts. 279-285)
- Sec. 2: Compulsory procedures (Arts. 286-296)
- Sec. 3: Limitation and exceptions to applicability of Sec. 2 (Arts. 297-299)

2. General Provisions

- Obligations to settle disputes by peaceful means (Art. 279)
- Peaceful means of parties' own choice prevail over Part XV (Art. 280)
- Obligation to exchange views (Art. 283)
  - *Pactum de negotiando*: an obligation to negotiate in good faith with a view to concluding an agreement
  - Cf. *Pactum de contrahendo:* an obligation to reach an actual permanent agreement

3. Compulsory Procedure

- Only where consensual settlement is not possible (Art. 286)

Forums for compulsory dispute settlement (Art. 287)

- Disputants given considerable freedom in choosing the specific forums
- Four main choices: ITLOS, ICJ, Annex VII Arbitral Tribunal, and Annex VIII Special Arbitral Tribunal
- If the parties have chosen the same forum, the dispute goes to that forum; If not, the dispute goes to the Annex VII Arbitral Tribunal
- State Party that has not selected is deemed to have accepted the Annex VII AT
- Thus, Annex VII Arbitral Tribunal is a default forum

4. Exceptions

- Exclusion of certain categories of disputes that touch upon discretionary power or vital interest of State (sovereignty, boundary, security, etc)
- Balance between the need for safeguards against an abuse of power (thus, an effective dispute settlement system) and the need for safeguards against an abuse of legal process

(1) Limitations on the applicability of compulsory procedures (Art. 297)

- Disputes concerning the exercise of a right or discretion by coastal State regarding marine scientific research (Art. 246) or a decision to suspend or terminate a research project (Art. 253)
- Disputes concerning the exercise of sovereign rights (discretionary powers) with respect to living resources in the EEZ

(2) Optional exceptions (opting-out) to applicability of compulsory procedure (Art. 298)

- Disputes concerning sea boundary delimitation or those involving historic bays or titles
- Disputes concerning military activities and law enforcement activities in regard to the exercise of sovereign rights/jurisdiction related to Art. 297 (2) or (3)
- Disputes in respect of which the UNSC is exercising its functions

5. International Tribunal for the Law of the Sea (ITLOS)

(1) Relationship between Part XV and the ITLOS

- ITLOS is one among the four means of dispute settlement under the Convention (not the "default procedure")
- Jurisdiction of the ITLOS goes beyond the settlement of disputes arising under the Convention

(2) Jurisdiction

A. Contentious jurisdiction

The Tribunal has jurisdiction over:

- All disputes and all applications submitted to it accordance with the Convention (Art. 21, Statute); and
- All matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Art. 21, Statute)
- Any dispute concerning the interpretation or application of treaty already in force and concerning the subject matter covered by the Convention, if all parties to such a treaty so agree (Art. 22, Statute)

B. Advisory jurisdiction

- The Seabed Dispute Chamber may give an advisory opinion on legal questions arising within the scope of the activities of the Assembly or Council of the ISA (Art. 191)
- The Tribunal may give an advisory opinion on a legal question if this is provided for in an international agreement related to the purposes of the Convention (Art. 138, Rules)
    - A major innovation
    - Statutory basis: Art. 21, ITLOS Statute
    - Who may submit a request?: whatever "body" authorized in the respective agreement

(3) Access

The Tribunal is open to:

- States Parties to the Convention (Art. 20 (1), Statute); and
- Entities other than States Parties in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case (Art. 20 (2), Statute)

The Seabed Dispute Chamber is open to:

- States Parties, the Authorities and the other entities referred to in Part XI, section 5 (Art. 37, Statute)

(4) Urgent Proceedings

A. Provisional measures pending the constitution of an Annex VII arbitral tribunal (Art. 290(5))

- An innovation in international adjudication
- ITLOS becomes a default forum for provisional measures:
  - where a dispute on the merit has been submitted to the arbitration tribunal
  - if it is not constituted or parties fail to agree on any other court or tribunal within two weeks from the request
- Measures to protect the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision
- Normally, it takes four weeks to prescribe provisional measures after the request

B. Prompt release of vessels and crews (Art. 292)

- Tribunal becomes a default forum over the prompt release from detention in the following cases:

◦ (a) When the authorities of a St Party have detained a vessel of another St Party

(b) It is alleged that the detaining St has not complied with the provisions of the Convention for the prompt release upon the positing a reasonable bond or other security (Art. 73 (2) on the alleged violation of fisheries legislation; or Arts. 220 and 226(1)(b) on marine pollution or environmental damage)

(c) The parties have not agreed upon the application of release to any court or tribunal within 10 days from the time of detention

- Application by or on behalf of the flag St: a private person authorized by the flag St may institute this proceedings

(5) Advantages of the Tribunal

- Specialized court with competence over the law of the sea disputes
- Access, though limited, to non-State entities
- Advisory jurisdiction
- Urgent proceedings
- Speedy trial
- Legal aid: ITLOS trust fund

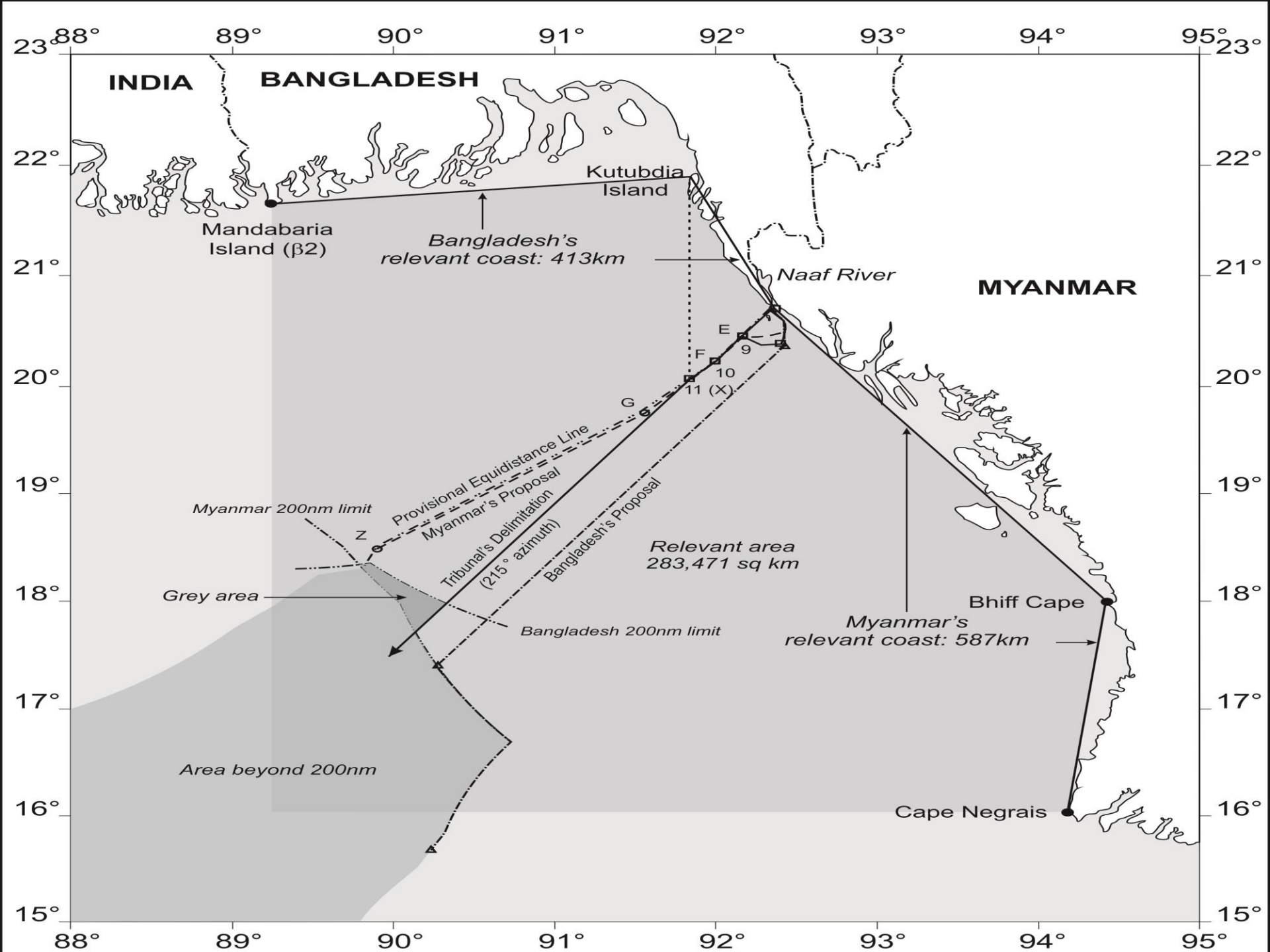
(6) Cases submitted before the Tribunal

- Subject matters
  - Disputes about fishing, pollution and marine environmental protection, detention of vessels, maritime boundary delimitation, development of deep seabed, damages to vessels
- Assessment
  - Tribunal has received more cases than any other forums under Art. 287
  - The pace of building its docket thus far is comparable to that of other judicial bodies in their early years
  - As more activities take place in the Area, more disputes are likely to be submitted to its Seabed Dispute Chamber
  - Needs to make State Parties more familiar with Part XV and the procedures of the Tribunal

Delimitation of Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal

The *Bay of Bengal Case:* A number of Firsts

- **Significance:**
  - **First delimitation case for the Tribunal**
  - **First Asian maritime delimitation to be settled by international adjudication**
  - **First delimitation of the extended shelf through international adjudication**


INDIA
BANGLADESH
MYANMAR
Kutubdia Island
Mandabaria Island (β2)
Bangladesh's relevant coast: 413km
Naaf River
E
9
F
10
11 (X)
G
Provisional Equidistance Line
Myanmar's Proposal
Tribunal's Delimitation
(215° azimuth)
Bangladesh's Proposal
Myanmar 200nm limit
Z
Grey area
Bangladesh 200nm limit
Relevant area
283,471 sq km
Bhiff Cape
Myanmar's relevant coast: 587km
Area beyond 200nm
Cape Negrais
88°
89°
90°
91°
92°
93°
94°
95°
23°
22°
21°
20°
19°
18°
17°
16°
15°