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THE LONDON INTERNATIONAL BOUNDARY CONFERENCE

**Exploring an Integrated Approach to the Resolution of
International Boundary and Territorial Disputes
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Future challenges from a maritime delimitation perspective:

IS EQUIDISTANCE DEAD?

Stephen Fietta

▶ **I. INTRODUCTORY REMARKS**



Maritime delimitation: a purportedly well settled three-stage methodology

- ▶ Construction of a provisional median/equidistance line
- ▶ Adjustment of the provisional median/equidistance line in light of special/relevant circumstances
- ▶ Proportionality (or disproportionality) test
- ▶ The ultimate goal: an “equitable solution”



Maritime delimitation: a purportedly well settled three-stage methodology

▶ ICJ:

“... it is appropriate to begin by taking provisionally the median line between the territorial sea baselines, and then enquiring whether “special circumstances” require “another boundary line”.... [re 1958 TSC]

Judicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have likewise regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result...” [citing *Libya/Malta*]...

It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle”

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), ICJ Reports 1993, paras. 49-50, 55.



Origins of the methodology

- ▶ Geneva Convention on the Continental Shelf, Article 6(1):

“Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. **In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.**”



Maritime delimitation: a purportedly well settled three-stage methodology

▶ ICJ:

“The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances...

For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.”

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), ICJ Reports 2001, paras. 176 (territorial sea), 230 (continental shelf/EEZ).



Maritime delimitation: a purportedly well settled three-stage methodology

- ▶ First stage – the objective element: construction of a provisional median/equidistance line
 - ▶ Median/equidistance line:
 - ▶ A geometric line drawn between the closest territorial sea base points
 - ▶ Not a line drawn between subjectively identified coasts or base points
 - ▶ “plotted on strictly geometrical criteria on the basis of objective data.”
(*Romania/Ukraine*, para. 118)



Maritime delimitation: a well settled three-stage methodology

- ▶ Second stage – the subjective element: special/relevant circumstances
 - ▶ circumstances necessary to reach an equitable result
 - ▶ to “modify the result produced by an unqualified application of the equidistance principle” (*Jan Mayen*)
 - ▶ e.g. modification of the equidistance line to give limited or zero effect to small islands (*Qatar/ Bahrain: Qit’ ad Jiradah* in TS, *Fasht al Jarim* in EEZ/CS)
- ▶ Overriding objective not to “refashion geography”



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- ▶ **II. The equidistance-based approach has been eroded by stealth in recent jurisprudence**
 - **The result: an illicit return to delimitation based on “equitable principles”?**



Recent jurisprudence has disregarded equidistance and objectivity at the first stage of the process

- ▶ ICJ, 2009:

- ▶ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*

- ▶ ITLOS, 2012:

- ▶ *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*

ICJ, 2013:

- ▶ *Nicaragua v. Columbia*



Subjectivity in the first stage of the delimitation

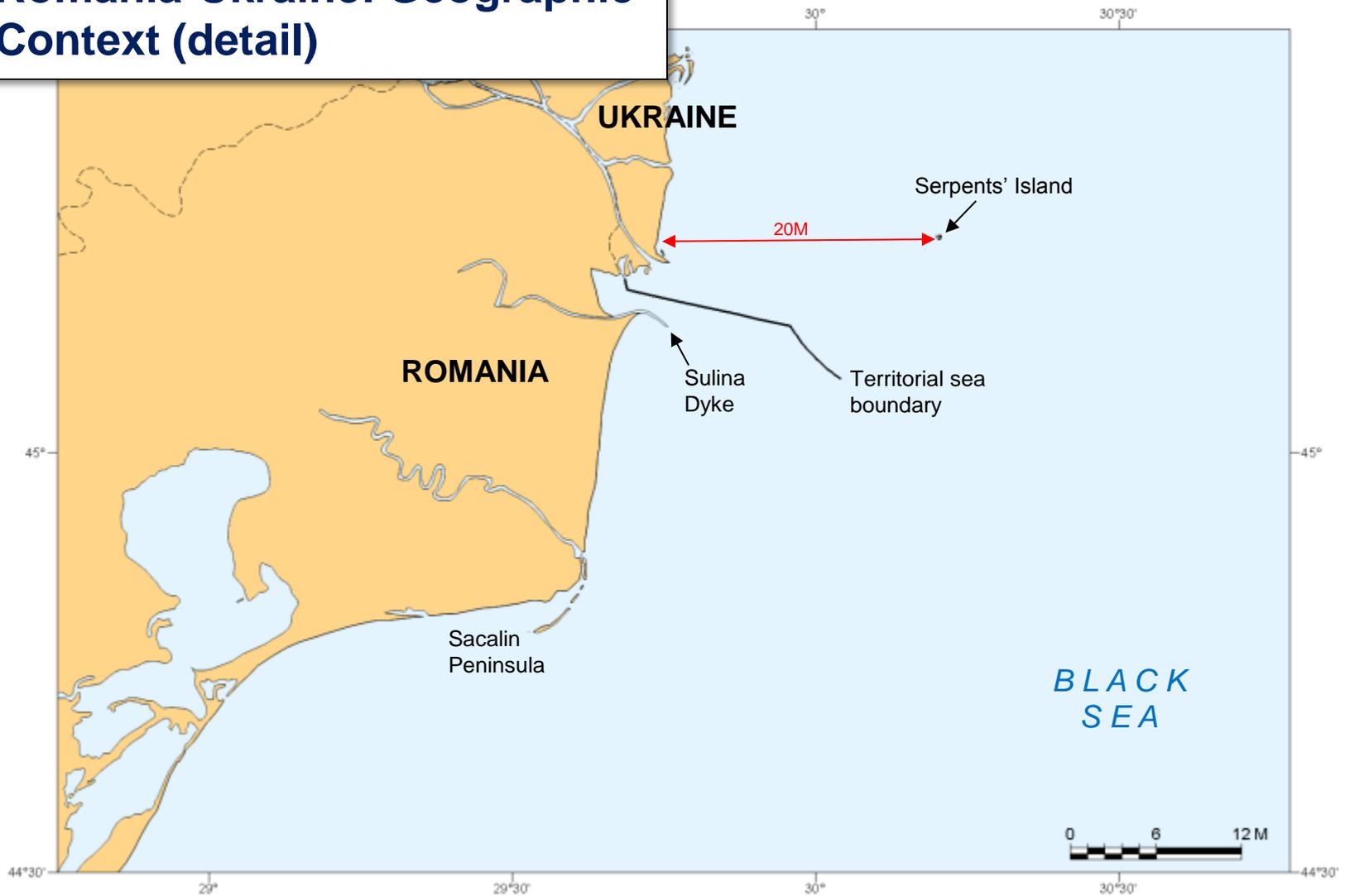
Romania v. Ukraine: the choice of base points



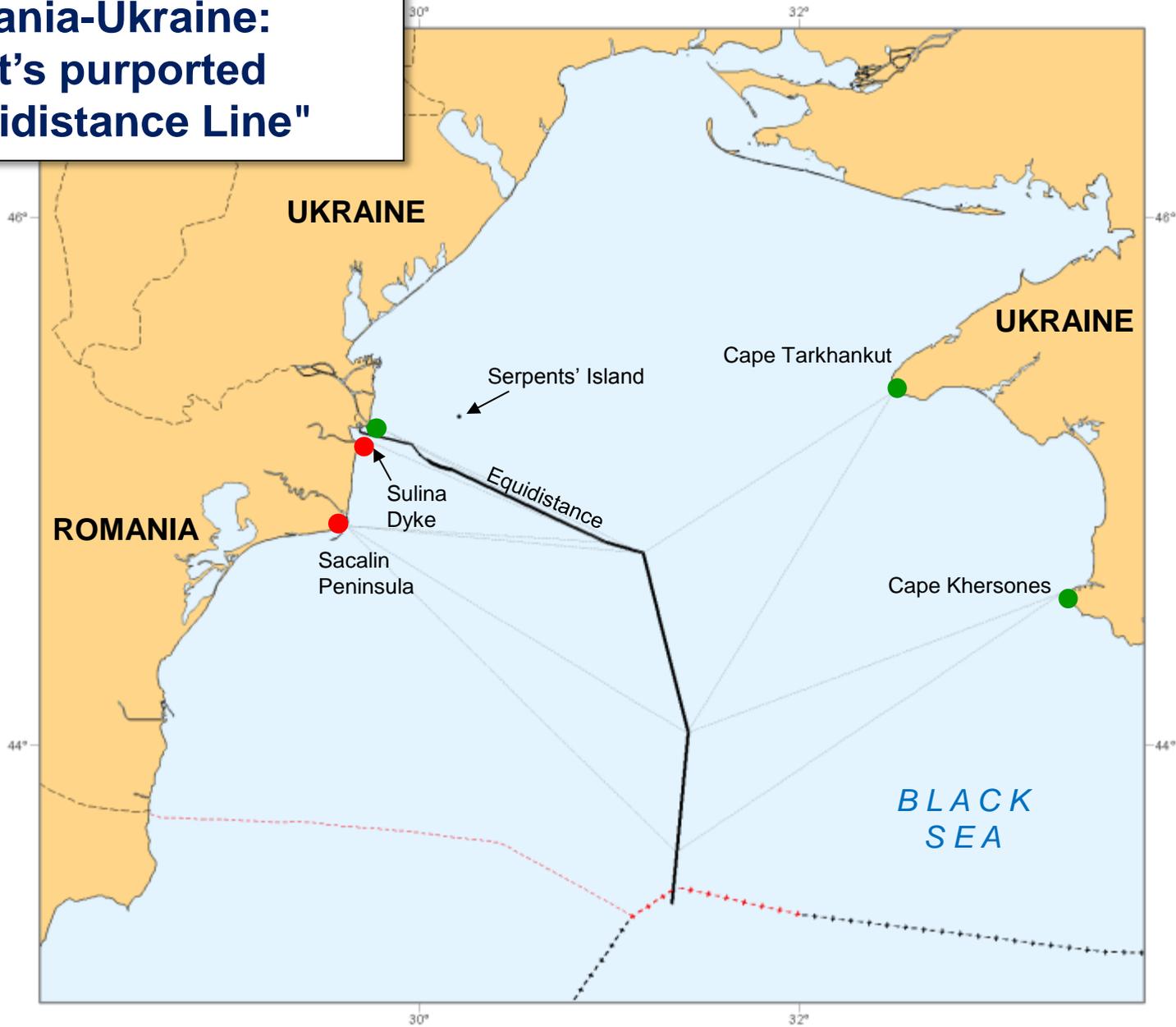
Romania-Ukraine: Geographical Context



Romania-Ukraine: Geographic Context (detail)



Romania-Ukraine: Court's purported "Equidistance Line"



Romania-Ukraine: Effect of Serpents' Island on Equidistance

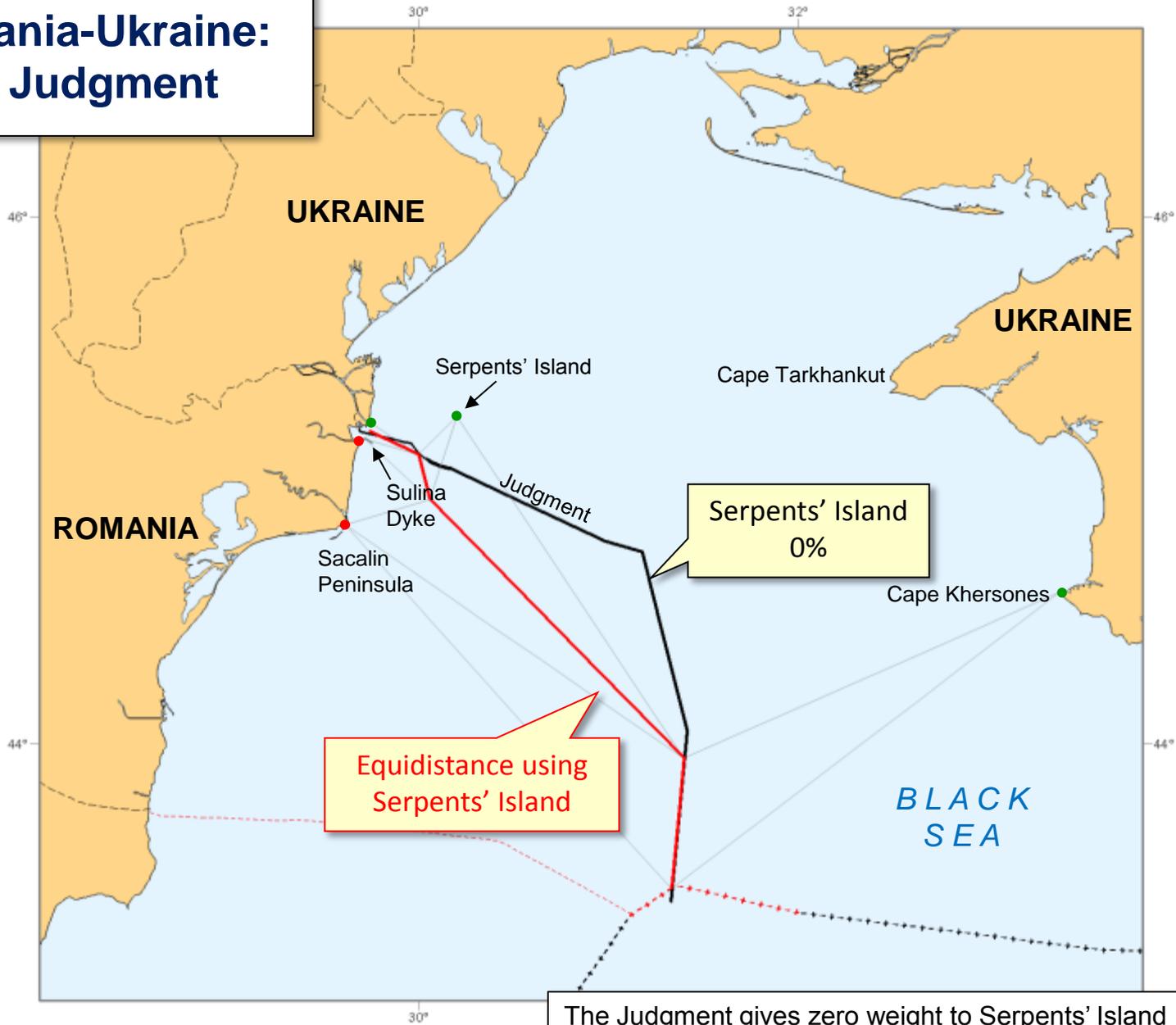


The Judgment gives zero weight to Serpents' Island

Romania-Ukraine: Weightings for Serpents' Island



Romania-Ukraine: Final Judgment

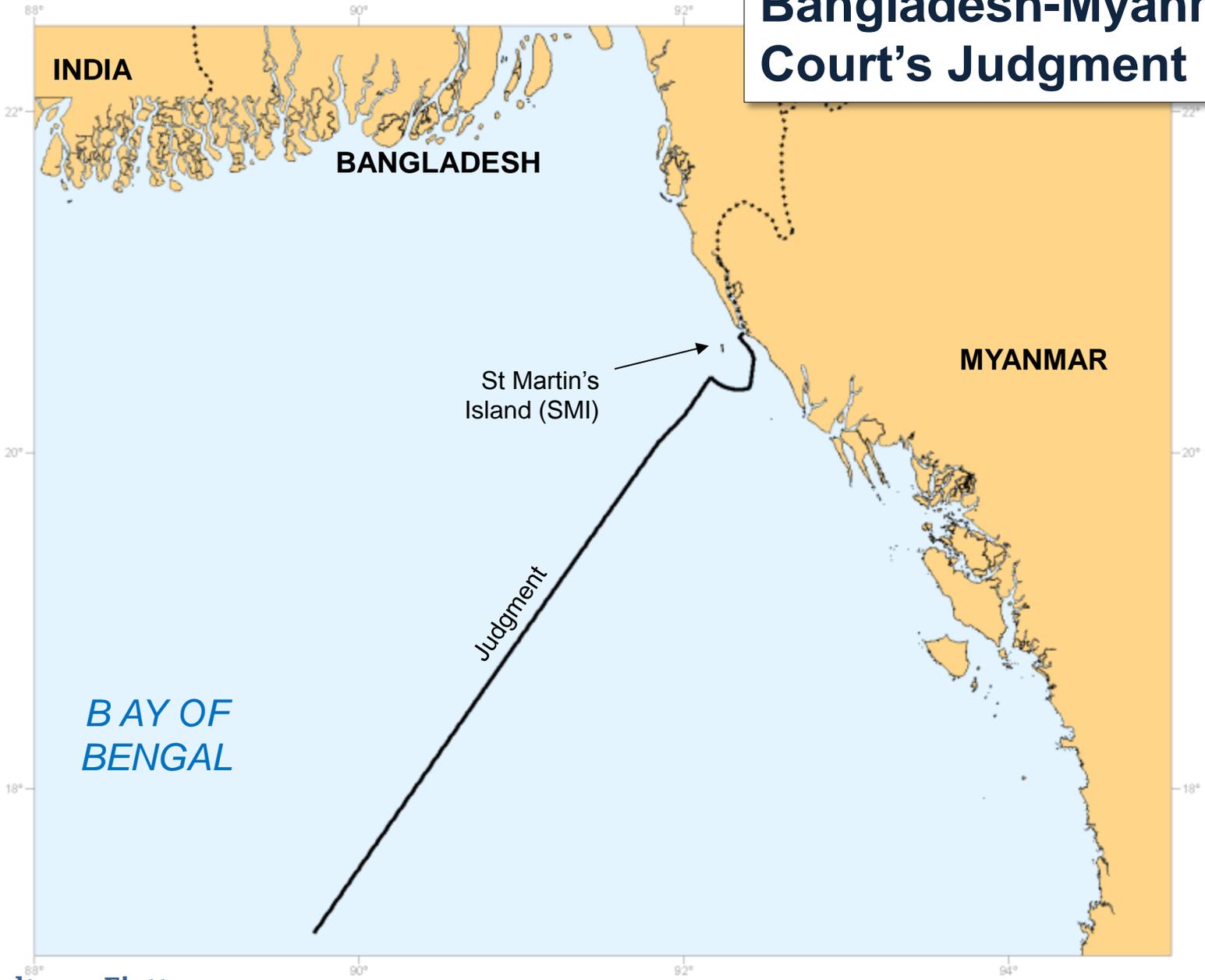


Subjectivity in the first stage of the delimitation

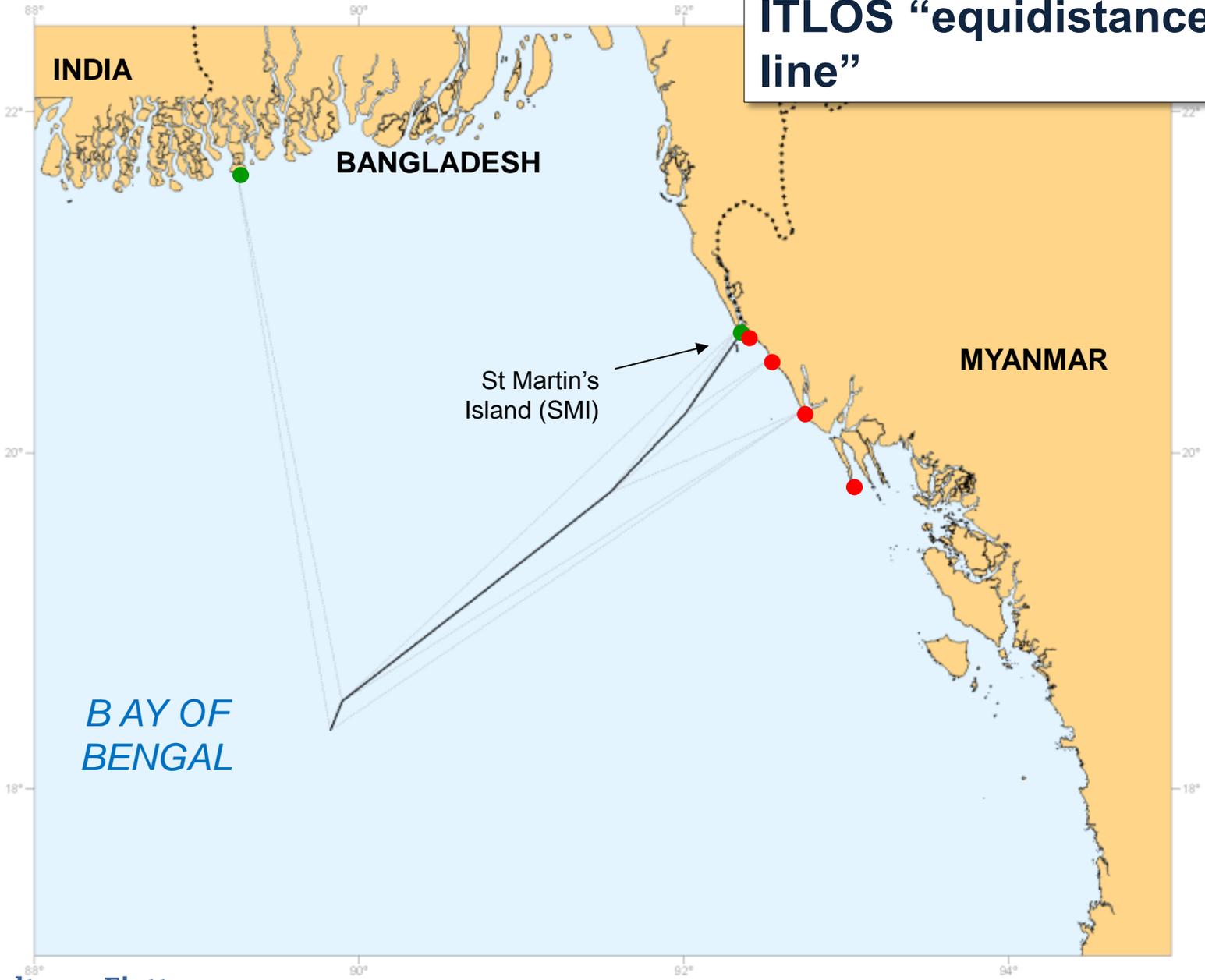
Bangladesh/Myanmar: the Tribunal ignores an island with a population of 7,000 people in its selection of base points



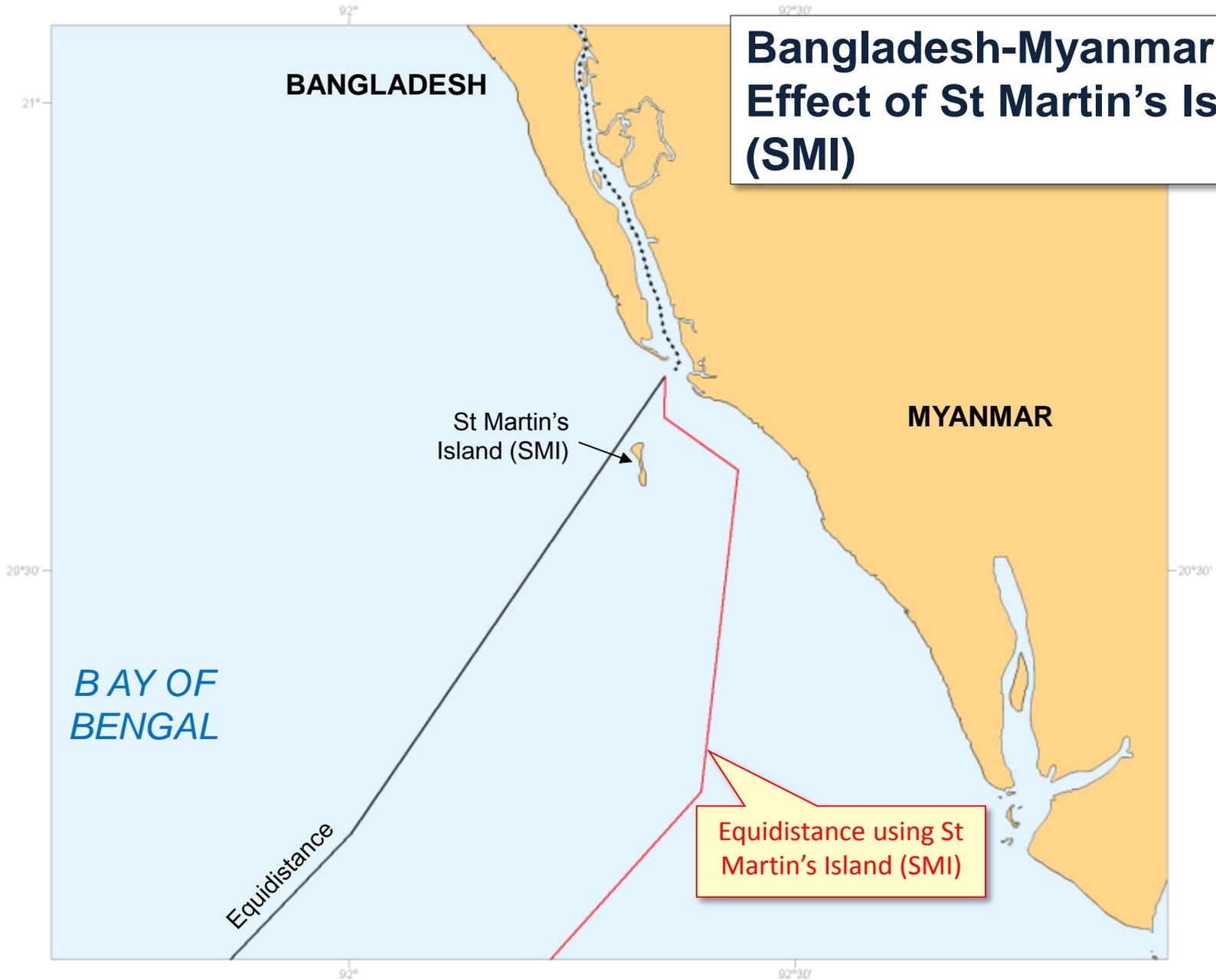
Bangladesh-Myanmar: Court's Judgment



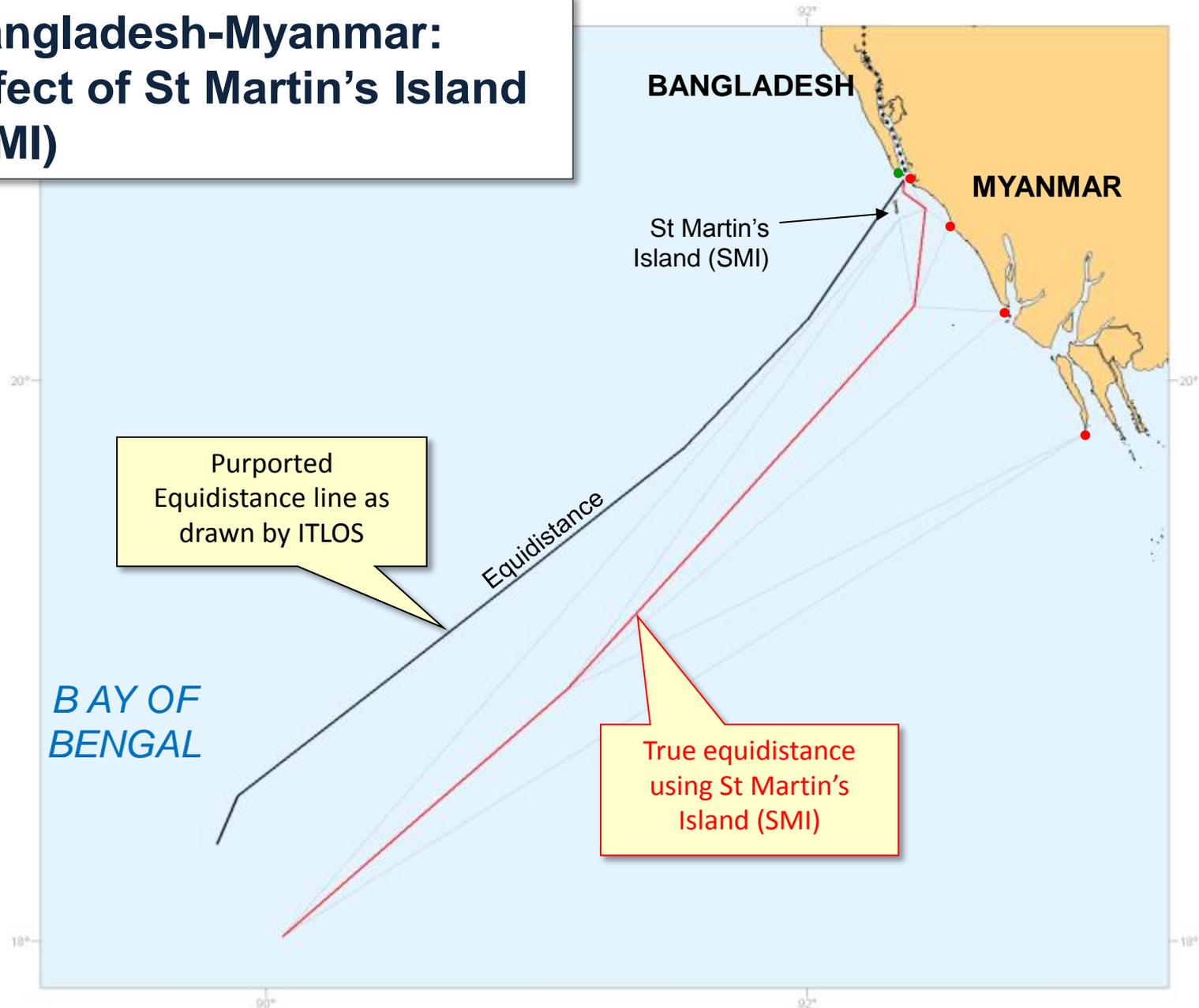
Bangladesh-Myanmar: ITLOS “equidistance line”



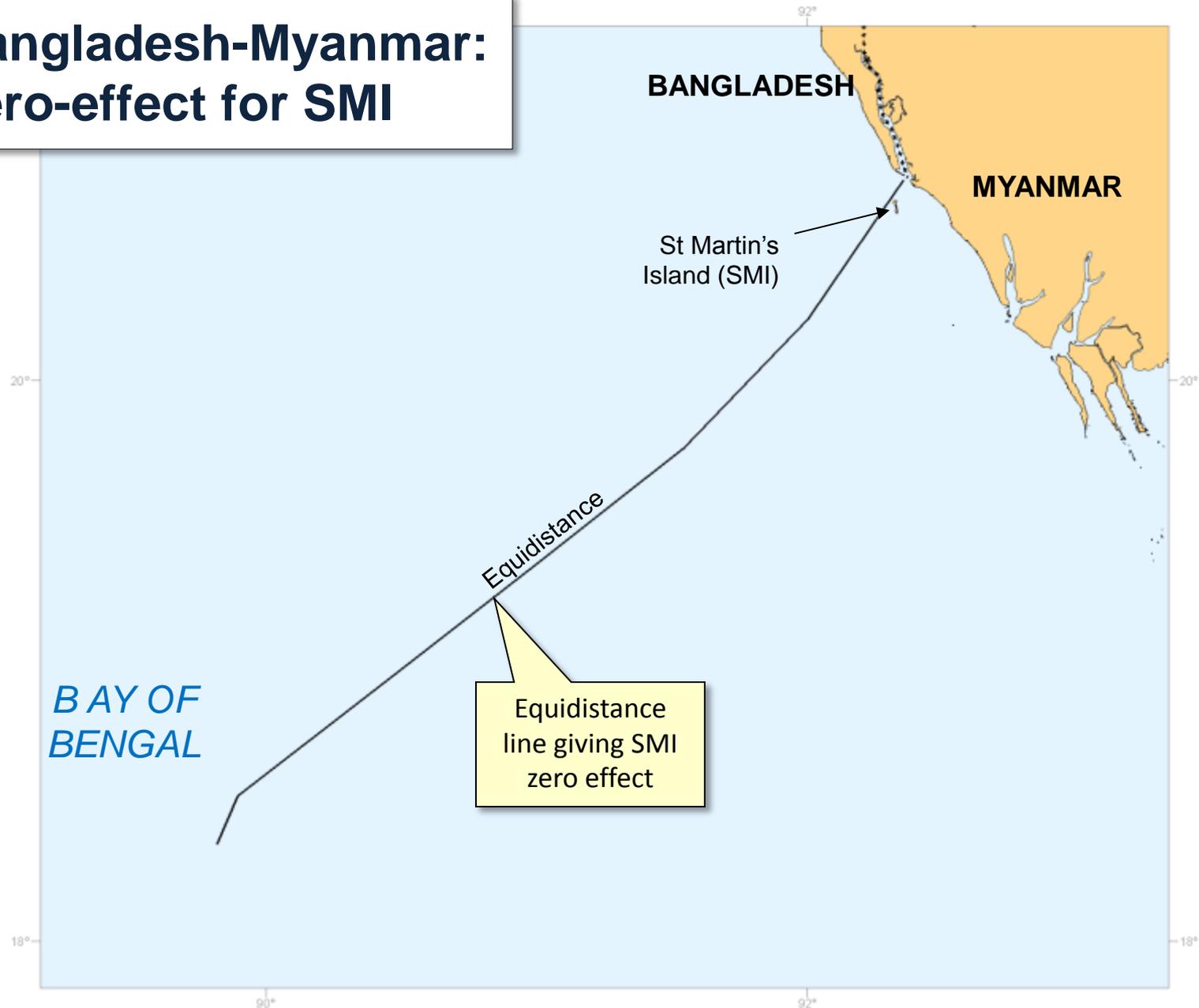
Bangladesh-Myanmar: Effect of St Martin's Island (SMI)



Bangladesh-Myanmar: Effect of St Martin's Island (SMI)



Bangladesh-Myanmar: Zero-effect for SMI

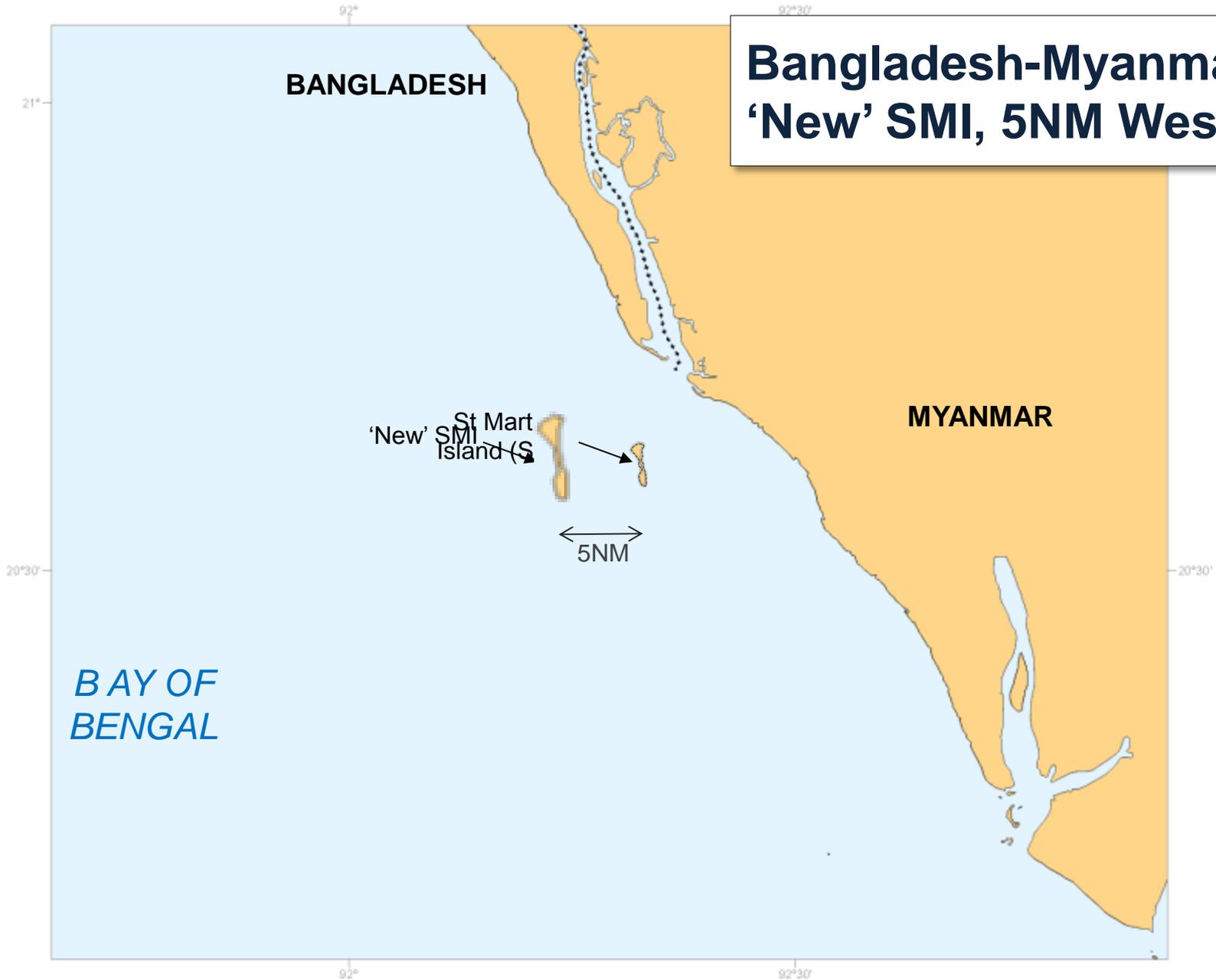


Bangladesh/Myanmar: alternative scenario

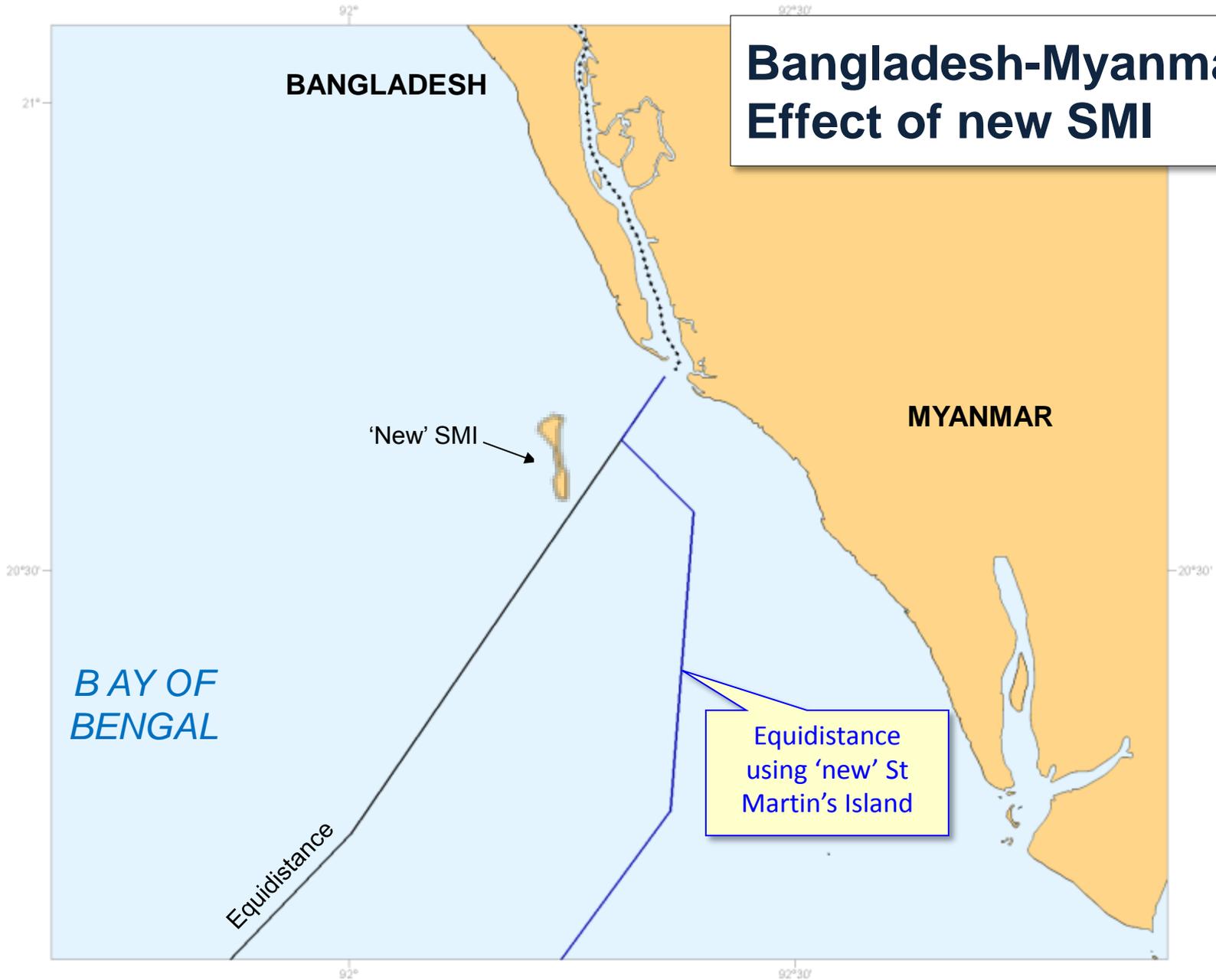
“New St. Martin’s Island”: twice the size of the real St. Martin’s Island – being moved 5 nm west of where it is



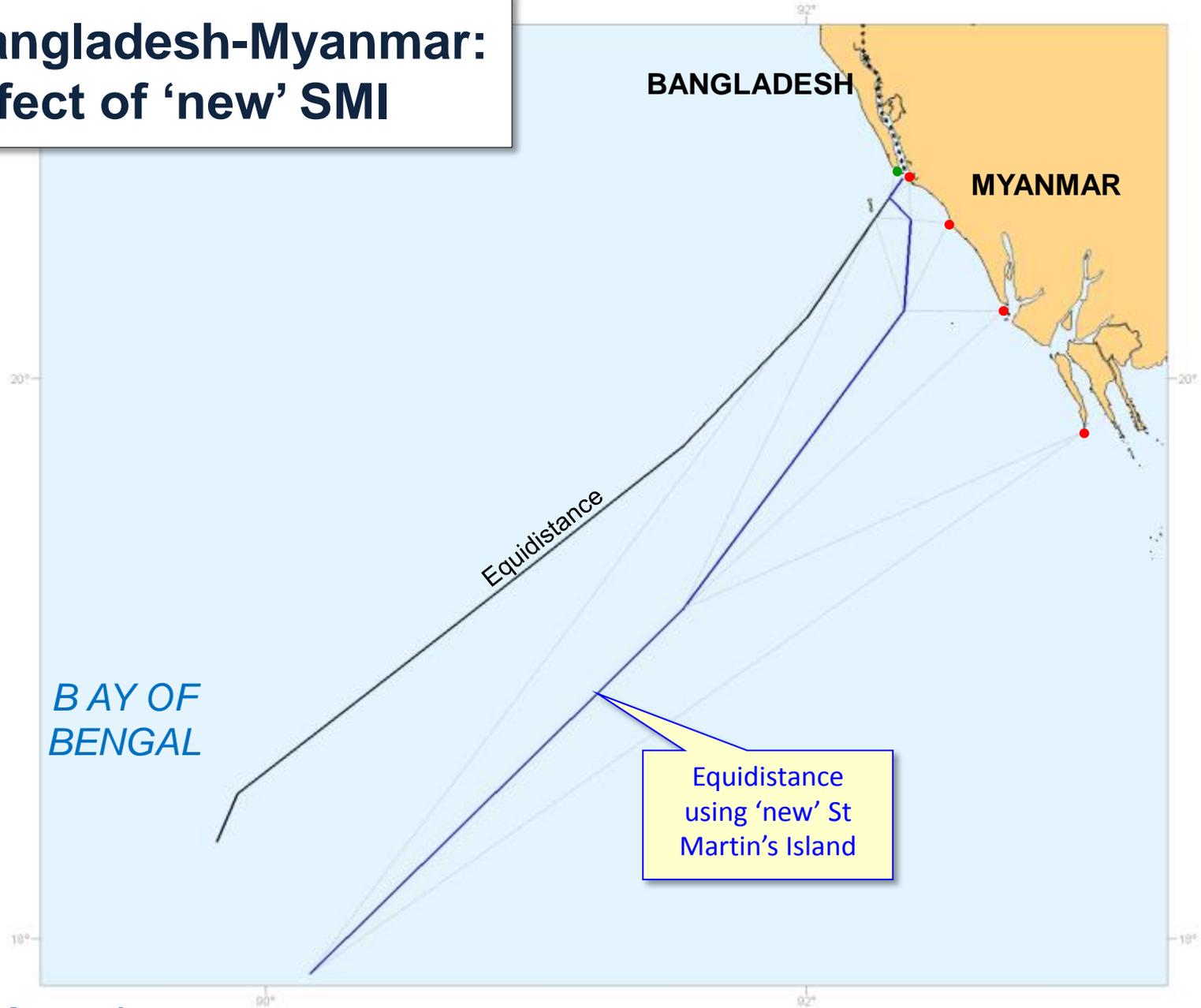
Bangladesh-Myanmar: 'New' SMI, 5NM West



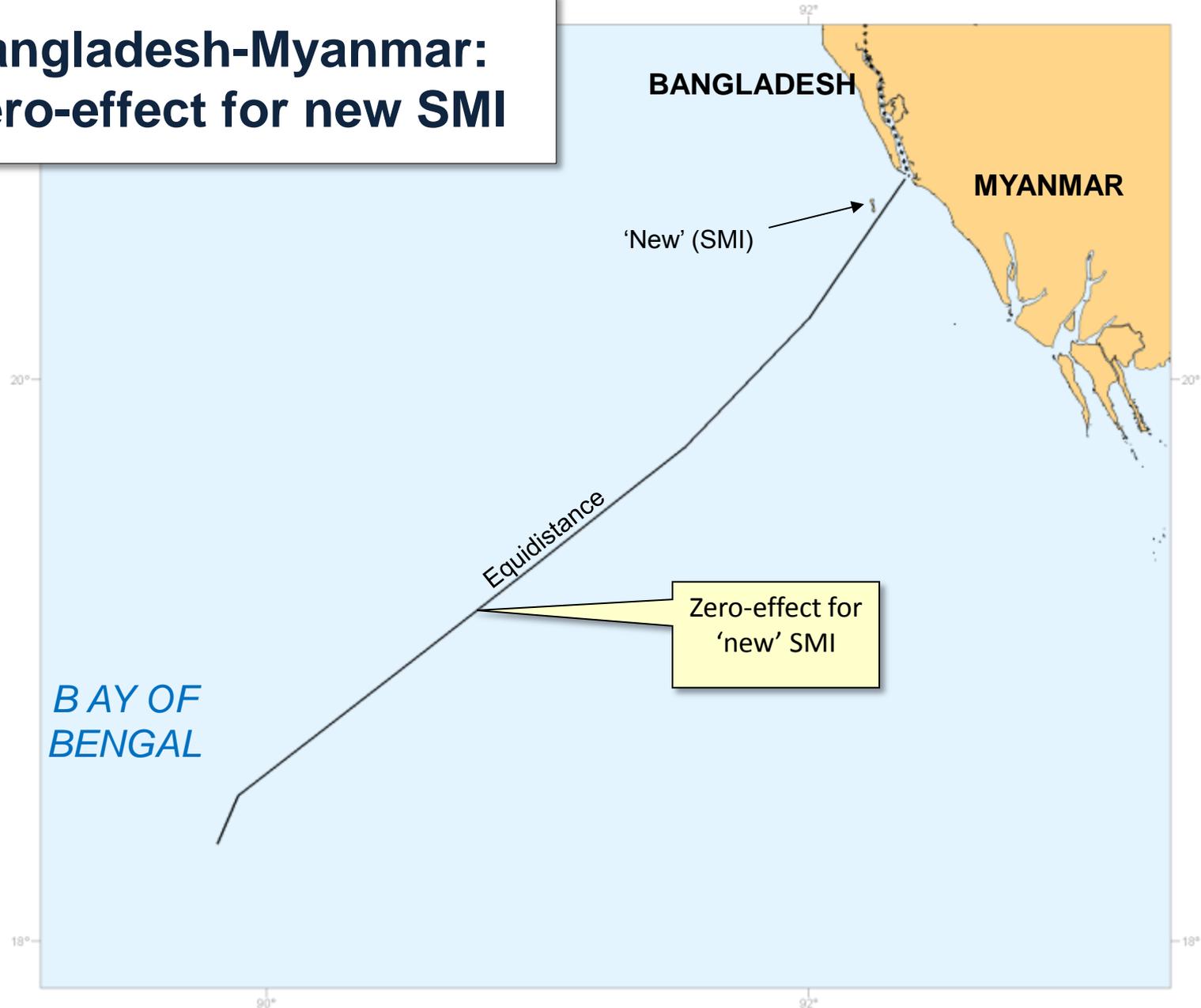
Bangladesh-Myanmar: Effect of new SMI



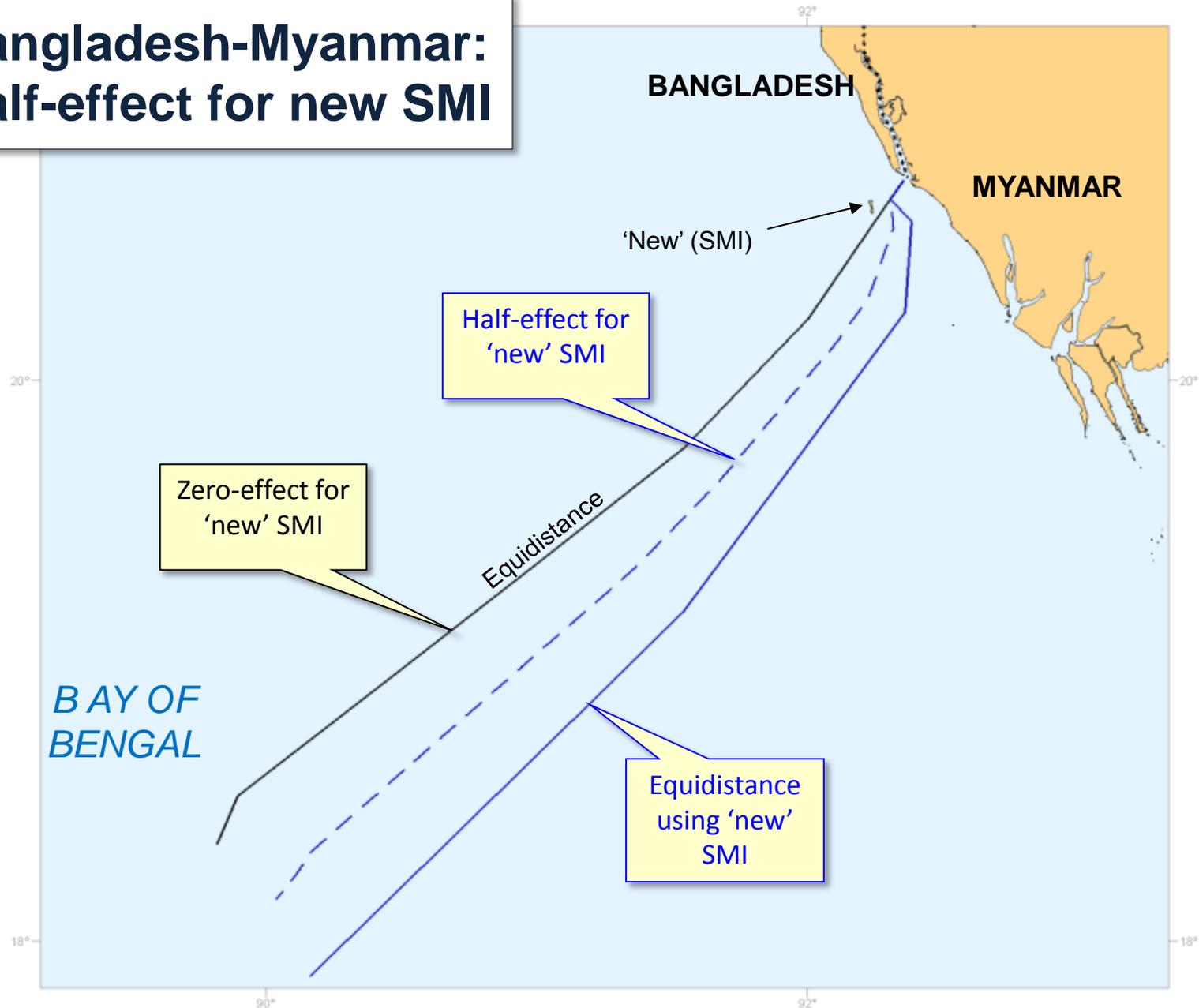
Bangladesh-Myanmar: Effect of 'new' SMI



Bangladesh-Myanmar: Zero-effect for new SMI



Bangladesh-Myanmar: Half-effect for new SMI



▶ **III. The future challenge: can equidistance be saved from judicial meddling?**



Objectivity v. Subjectivity

Law v. “Equitable principles”

- ▶ ICJ and ITLOS gave lipservice to, but failed to apply, the three-stage methodology:
 - ▶ First stage: strict equidistance line taking into account all potential base points
 - ▶ “plotted on strictly geometrical criteria on the basis of objective data”
 - ▶ Second stage: adjustment of the provisional line in light of relevant circumstances in order to “modify the results produced by an unqualified application of the equidistance principle” (*Jan Mayen*)



First stage of the delimitation methodology: *Objectivity v. Subjectivity*

- ▶ Subjective selection of base points in the first stage threatens to undermine the essential objective element as the first stage of the “three stage approach”
- ▶ As a result, the certainty and predictability of law is being eroded by subjectivity at every stage
- ▶ The result: a return to the “equitable principles”-based delimitation methodology that the “three stage approach” was intended to avoid
- ▶ What can be done to protect the objective and technical aspects of maritime delimitation from further judicial erosion?
 - ▶ Parties having their technical experts agree on basepoints and the provisional median line (*Barbados/TT*)
 - ▶ A court-appointed technical expert to construct the provisional median line as a first stage, using objective and technical criteria, so that the court's subjective “correction” role is limited to the second and third elements of the process



First stage of the delimitation methodology: *Objectivity v. Subjectivity*

“Equitable considerations *per se* are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process. Some early attempts by international courts and tribunals to define the role of equity resulted in distancing the outcome from the role of law and thus led to a state of confusion in the matter. **The search for predictable, objectively determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases, emphasized that the role of equity lies within and not beyond the law.”**

Barbados v. Trinidad and Tobago, para. 230.

