



Maritime Safety and Security Law Journal

2016

Issue 2

The Arbitral Award in the Bangladesh-India Maritime Delimitation in the Bay of Bengal and its Contribution to International Maritime Boundary Law: A Case Commentary

Suzette V. SUAREZ¹

Abstract

The Arbitral Tribunal rendered its Award in the maritime delimitation dispute between Bangladesh and India in the Bay of Bengal on 7 July 2014. It delimited the parties' territorial sea, exclusive economic zone and the continental shelf, including the area beyond 200 nautical miles. Overall, the Arbitral Tribunal's approach in delimiting the exclusive economic zone and the continental shelf between Bangladesh and India stayed faithful to established jurisprudence, which is mainly a preference for the application of the equidistance line unless relevant circumstances exist to justify adjustment of the line. The Arbitral Tribunal's decision to exercise jurisdiction despite the absence of recommendations concerning the outer limits from the Commission on the Limits of the Continental Shelf was sound as it clarifies that in accordance with the United Nations Convention on the Law of the Sea: (1) delimitation and delineation, while interconnected, are two separate processes, and (2) delineation is not a prerequisite to delimitation. Unfortunately, the Arbitral Tribunal was restrained in its consideration of the role that Article 76 plays in the delimitation of the continental shelf beyond 200 nm, thereby losing the historical opportunity to offer the first judicial or arbitral articulation of the law surrounding the issue.

Keywords

Bay of Bengal, maritime delimitation, territorial sea, exclusive economic zone, continental shelf within and beyond 200 nm, *acquis judiciaire*

1. Introduction

On 7 July 2014, the Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),² rendered its Award in the *Bay of Bengal Maritime Boundary Arbitration* (Award) between Bangladesh and India.³ Both parties welcomed the Award as

¹ Dr iuris (Hamburg), LLM (Dalhousie), LLB (Univ Philippines).

² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

³ *In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India) (Award)* (Arbitral Tribunal) Case No 16 (2014) <www.pca-cpa.org/BD-IN%2020140707%20Award2890.pdf?fil_id=2705> accessed 7 November 2015.



a positive end to a long-standing dispute between them.⁴ The Award constituted the definitive end to a legal journey that Bangladesh started in 2009 when it initiated two separate arbitration proceedings against its neighbours, India and Myanmar, under Annex VII of the Convention concerning the delimitation of the territorial sea, exclusive economic zone and the continental shelf in the Bay of Bengal.⁵ Bangladesh, India and Myanmar are all State Parties to the Convention.⁶ An arbitral tribunal under Annex VII of the Convention is the default mechanism when neither party to the dispute chose any or the same settlement mechanism.⁷

By way of separate unilateral declarations, Myanmar and Bangladesh agreed to transfer the arbitration proceedings between them to the International Tribunal for the Law of the Sea (ITLOS) in December 2009.⁸ ITLOS considered the case between Bangladesh and Myanmar before the Bangladesh-India Arbitration and delivered the judgment on 14 March 2012, two years prior to the Award in the case between Bangladesh and India.⁹

The main purpose of this Commentary is to provide a summary of the issues considered in the Award, and to reflect on the process and approach employed by the Arbitral Tribunal in completing its task to delimit the maritime zones of the parties. The Arbitral Tribunal's treatment of the issues relating to the delimitation in the area of the continental shelf beyond 200 nautical miles (nm) will be given particular attention since this is only the second time a court or tribunal has delimited an area of the continental shelf beyond 200 nm. The Commentary will conclude with a discussion of the Award's contribution to the further development of international maritime boundary law – if any.

4 Ministry of Foreign Affairs (Government of the People's Republic of Bangladesh), 'Press Statement of the Honourable Foreign Minister on the Verdict of the Arbitral Tribunal/PCA' (8 July 2014) <www.mofa.gov.bd/media/press-statement-hon%20%99ble-foreign-minister-verdict-arbitral-tribunalpca> accessed 7 November 2014; Ankit Panda, 'International Court Rules in Favor Bangladesh on Maritime Dispute with India' (10 July 2014) <<http://thediplomat.com/2014/07/international-court-rules-in-favor-of-bangladesh-on-maritime-dispute-with-india/>> accessed 7 November 2015.

5 Copies of Bangladesh's notifications to India and Myanmar initiating arbitration proceedings under Annex VII are attached, as Attachments A and B, in the letter of Bangladesh dated 13 December 2009 to the President of the International Tribunal for the Law of the Sea <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Notification_Bangladesh_14.12.09.pdf> accessed 5 November 2015.

6 Bangladesh acceded on 27 July 2001; Myanmar acceded on 21 May 1996; and India acceded on 29 June 1995: Division for Ocean Affairs and the Law of the Sea, 'Chronological list of ratifications, accessions and successions to the Convention and related Agreements as at 2 January 2015' <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea> accessed 5 November 2015.

7 Art 287 UNCLOS.

8 Myanmar and Bangladesh made separate declarations, on 4 November 2009 and 12 December 2009 respectively, to accept the jurisdiction of the ITLOS in the matter of the maritime delimitation dispute between them. On 13 December 2009, the Ministry of Foreign Affairs of Bangladesh informed the ITLOS concerning the separate declarations in its favour, and on 14 December 2009 the case was entered in the List of Cases as Case No. 16: *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of 14 March 2012) <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf> accessed 5 November 2015 [5]; Letter of 13 December of the Bangladeshi Minister for Foreign Affairs to ITLOS <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Notification_Bangladesh_14.12.09.pdf> accessed 5 November 2015.

9 *ibid.*



2. The Award

2.1 Jurisdiction

The parties submitted three main issues to the five-person Arbitral Tribunal for consideration. The first pertained to the Arbitral Tribunal's jurisdiction. In the absence of any declaration pursuant to Article 287(3) UNCLOS, as well as the absence of any written declaration excluding certain categories of dispute under Article 298 UNCLOS, the Arbitral Tribunal unanimously voted that it had jurisdiction.¹⁰ The Arbitral Tribunal noted that both parties' submissions concerning the outer limits of the continental shelf beyond 200 nautical miles were still pending before the Commission on the Limits of the Continental Shelf (CLCS) pursuant to Article 76 UNCLOS.¹¹ Neither India nor Bangladesh considered this fact as a ground for the Arbitral Tribunal to refrain from exercising its jurisdiction to delimit the continental shelf beyond 200 nm.¹² On the contrary, it was important for the parties that the Arbitral Tribunal resolved the delimitation dispute in order to allow the CLCS to continue consideration of their submissions. Both parties informed the CLCS that a delimitation dispute existed between them with respect to the area that was the subject of the submission and that the arbitration proceedings to resolve the dispute were ongoing.¹³ Under Rule 46 and Annex I, paragraph 5(a) of the Rules of Procedure of the CLCS, consideration of a submission will be deferred unless all parties to a dispute give their consent for the CLCS to consider the submission,¹⁴ which was the case here.

Consistent with the ruling of the ITLOS in the *Bangladesh/Myanmar* case, the Arbitral Tribunal underlined that the procedure under Article 76 UNCLOS and the dispute settlement mechanisms under the Convention are separate, independent, yet complementary, procedures.¹⁵ Article 76 requires that the process of delineating the continental shelf beyond 200 nm, which is a sovereign prerogative of a coastal State, be submitted for review to the CLCS. The settlement of maritime delimitation disputes, on the other hand, is a function assigned to the different dispute settlement mechanisms under Part XV UNCLOS. There is nothing in the UNCLOS that explicitly states that

¹⁰ *ibid* 19-20 [65]-[73].

¹¹ India submitted to the CLCS information relating to the outer limits of its continental shelf on 11 May 2009 <www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/ind_clcs48_2009e.pdf> accessed 7 November 2015. Bangladesh submitted to the CLCS information relating to the outer limits of its continental shelf on 25 February 2011 <www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/clcs55_2011_feb_2011.pdf> accessed 7 November 2015.

¹² *Bay of Bengal Maritime Boundary Arbitration* (n 3) 20 [74].

¹³ Bangladesh, in a Note Verbale dated 29 October 2009, informed the CLCS that it is disputing the area claimed by India as its continental shelf beyond 200 nm: <www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/bgd_re_ind_clcs48_2009e.pdf> accessed 7 November 2015. India, in a Note Verbale dated 20 June 2011, informed the CLCS of the ongoing dispute between it and Bangladesh relating to the area of the continental shelf beyond 200 nm: <www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/ind_nv_un_001_20_06_2011.pdf> accessed 7 November 2015.

¹⁴ CLCS, Rules of Procedure of the Commission on the Limits of the Continental Shelf (17 April 2008) CLCS/40/Rev.1, <www.un.org/depts/los/clcs_new/commission_rules.htm> accessed 7 November 2015.

¹⁵ *Bay of Bengal Maritime Boundary Arbitration* (n 3) 22 [80]; *Bangladesh/Myanmar* case (n 8) [369]-[394].



delineation shall first be completed before delimitation can take place. Article 9 of Annex II UNCLOS, which mandates that the actions of the CLCS shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts, leads one to conclude that delineation under Article 76 is not a prerequisite to delimitation under Article 83 UNCLOS.¹⁶

2.2 Land boundary terminus

The second issue concerned the location of the land boundary terminus at the mouth of the Bay of Bengal, which separates India from Bangladesh. In determining the exact location of the land boundary terminus, the Arbitral Tribunal's main task was to interpret two terms of the Radcliff Award of 1947, which established the boundary between India and the then-newly independent Pakistan, as well as to determine the evidentiary value of the map attached thereto, which purported to show where the land boundary terminus was located.¹⁷ The Arbitral Tribunal reached a unanimous verdict on the location of the land boundary terminus, positioning it at 21° 38' 40.2"N; 89° 09' 20.0"E (WGS-84).¹⁸

2.3 Delimitation line

The third and final issue that the Arbitral Tribunal voted on was the delimitation line marking the boundary between the territorial sea, exclusive economic zone and the continental shelf between the parties. The parties asked the Arbitral Tribunal to draw a single maritime boundary line delimiting the three maritime zones.¹⁹ Consistent with previous jurisprudence, the Arbitral Tribunal emphasised at the outset that it would undertake its delimitation task in three stages because different legal parameters apply for each maritime zone.²⁰ The first segment delimited the territorial sea, the second segment was the delimitation of the exclusive economic zone and the continental shelf within 200 nm, and the final segment concerned the delimitation of the continental shelf beyond 200 nm.²¹ The Arbitral Tribunal's decision on the delimitation line was not unanimous, with Rao dissenting in part.²²

16 cf Separate Opinion Judge Tafsir M Ndiaye, *Bangladesh/Myanmar* case, 28, 36-38 [87], [106]-[116] <www.itlos.org/file-admin/itlos/documents/cases/case_no_16/C16.sep_op_Ndiaye.TR.E.pdf> accessed 7 November 2015.

17 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 26 [89], [91] 46 [158], [159] 46-47 [161] 50 [178] 51 [184] 50 [181].

18 *ibid* 52 [188].

19 *ibid* 57 [190].

20 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40 [173]-[174] referring to *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 246 [194].

21 *ibid*.

22 *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (Concurring and Dissenting Opinion Dr PS Rao) 12-13 [9], [20]-[22] <www.pca-cpa.org/BD-IN%2020140707%20Concurring%20and%20Dissenting%20Opinion%20of%20Dr%20PS%20Rao5fb0.pdf?fil_id=2706> accessed 7 November 2015.



2.3.1 Territorial sea

In the territorial sea, the Arbitral Tribunal drew the boundary line by applying Article 15 UNCLOS.²³ Article 15 requires the use of the median/equidistance method unless special circumstances exist to justify the use of another method. The Arbitral Tribunal interpreted Article 15 in accordance with established jurisprudence, that is to say, it first drew a provisional equidistance line, following which it considered whether special circumstances existed to justify the use of another delimitation method.²⁴

The Arbitral Tribunal constructed the provisional equidistance line with two base points: one from the Bangladeshi coast, point B-1 at 21° 39' 04" N; 89° 12' 40" E, which was a proposal of Bangladesh, and the other, I-1 from the Indian coast, which was determined by the Arbitral Tribunal itself, at the low-water line of Moore Island at 21° 38' 06" N; 89° 05' 36" E. The mid-point between the two base points became the starting point of the median/equidistance provisional line at Prov-0 at 21° 38' 35.0" N; 89° 09' 08.0" E. Prov-0 thereafter was made to continue at an initial azimuth of 171° 40' 32.81" until it reached the 12 nm limit for both States.²⁵ It is interesting to note that the accepted base points were located on the coastlines of the parties, not on any low-tide elevation. According to the Arbitral Tribunal, none of the proposed base points on low-tide elevations met the criteria for 'protuberant coastal point' as elaborated by the International Court of Justice (ICJ) in the *Black Sea* case.²⁶

Bangladesh contended that two special circumstances – that is, coastal instability and coastal concavity – justified the use of an alternative method, namely the angle-bisector method.²⁷ With respect to coastal instability, Bangladesh submitted evidence that the Bengal Delta is the principal recipient of 'massive quantities of sediment' from the Ganges and Brahmaputra Rivers.²⁸ The consequence of this has been the long-time rapid erosion of the western portion of the Delta, where Bangladesh's Haringhata River and the mouth of India's Hooghly River are located, and accretion in the eastern part.²⁹ The erosion of the Bengal Delta has been further aggravated due to a rise in sea level,³⁰ such that radical alterations to the coastline by 2100 are anticipated.³¹ The Arbitral Tribunal, however, declined to accept Bangladesh's argument of existing and future coastal instability, pointing out that Bangladesh was able to submit base points for the establishment of a provisional equidistance line,³²

23 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 71 [246].

24 *ibid.*

25 *ibid* 75 [270].

26 *ibid* 74 [263] (quoting *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61 [117]).

27 *ibid* 67 [234].

28 *ibid* 68 [237].

29 *ibid.*

30 *ibid.*

31 *ibid* 109 [376].

32 *ibid* [215].



which meant that the physical reality at the time of delimitation allowed the parties to apply the equidistance line to delimit the territorial sea.³³ Bangladesh's argument on concavity, or significant indentation of the coast, was also rejected as a special circumstance, with the Arbitral Tribunal noting that within 12 nm, concavity as such does not produce a cut-off effect.³⁴

After it drew the provisional equidistance line, the Arbitral Tribunal realised that the land boundary terminus it earlier identified on the basis of the Racliffe Award was not at a point equidistant from the selected base points.³⁵ The Arbitral Tribunal considered this a special circumstance similar to that faced by the tribunal in *Guyana v Suriname* where the terminus of a previous delimitation line that did not fall on the median line had to be connected with the delimitation line based on equidistance.³⁶ The provisional equidistance line dividing the territorial seas between the parties was adjusted by gradually connecting the land boundary terminus in a southerly direction to the median line at 21° 26' 43.6"N; 89° 10' 59.2"E.³⁷

2.3.2 Exclusive economic zone and the continental shelf within 200 nm

In the exclusive economic zone and the continental shelf within 200 nm, the Arbitral Tribunal confirmed that Articles 74 and 83 UNCLOS apply to the delimitation of the exclusive economic zone and the continental shelf. Unlike Article 15 UNCLOS, Articles 74 and 83, which contain identical provisions, do not mandate a particular delimitation method. India argued that modern jurisprudence has mostly favoured the application of the equidistance line/relevant circumstances method.³⁸ Bangladesh countered that application of the equidistance method would be inequitable and advocated for the application of the angle-bisector method at an initial azimuth of 180°. Bangladesh relied on the ruling of the ICJ in *Nicaragua v Honduras*, which used the angle-bisector method by drawing a straight line reflecting the general direction of the parties' coasts.³⁹

The Arbitral Tribunal, in making its decision on which delimitation method to use, underscored that, in addition to achieving an equitable solution, the delimitation method must also be transparent and objective.⁴⁰ The Arbitral Tribunal compared the two methods and arrived at a conclusion that the three-step equidistance line/relevant circumstances technique followed by the ICJ in the

33 *ibid* 64 [223]; *Black Sea Case* (n 26) 106 [131].

34 *ibid* 75 [272].

35 *ibid* 75 [273].

36 *ibid*; *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname (Guyana v Suriname)* (2007) XXX RIAA 1, 90 [323].

37 *ibid* 76 [276].

38 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 92 [319]. India referred to the observation of the tribunal in *Guyana v Suriname* that the equidistance method has been the preferred delimitation method (n 36).

39 *ibid*; *Bay of Bengal Maritime Boundary Arbitration* (n 3) 99 [342]; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Merits) [2007] ICJ Rep 659, 69, 294-298 [748]-[749].

40 *ibid* 98 [339].



Black Sea case, being more structured and transparent, offered a clear advantage in giving an equitable result to the parties.⁴¹ The equidistance line method starts with the establishment of a provisional equidistance line 'based on a geometrically objective criteria, while at the same time account is taken of the geography of the area through the selection of appropriate base points.'⁴² The second step of the equidistance method involves adjusting the provisional equidistance line when relevant circumstances are found to exist.⁴³ The third step is to check whether the delimitation line produced during the second step is proportionate.⁴⁴

After the provisional line was established starting at point Prov 3 with an initial azimuth of 171° 40' 32.81" located at 21° 07' 44.8"N; 89° 13' 56.5"E up to point Prov 7 at the 200 nm limit,⁴⁵ Bangladesh argued that the provisional line should be adjusted on the basis of three relevant circumstances: instability of the coast, concavity of the coast and its population's dependency on fishing in the Bay of Bengal.⁴⁶ Although the Arbitral Tribunal agreed with Bangladesh's observation that its coast is unstable, it did not consider this a relevant circumstance to adjust the provisional line. Citing a similar ruling by the ICJ in *Nicaragua v Honduras*,⁴⁷ the Arbitral Tribunal reasoned that despite the instability of the coast, it was still feasible for Bangladesh to establish base points for its proposed provisional line. As for future instability of the coast, the Arbitral Tribunal reiterated the position it took in the delimitation of the territorial sea, underscoring that 'only the present geophysical conditions are of relevance ... Future changes of the coast, including those resulting from climate change, cannot be taken into account in adjusting a provisional equidistance line.'⁴⁸

As for Bangladesh's claim of fishing dependency in the Bay of Bengal, the Arbitral Tribunal found the evidence submitted by Bangladesh to be insufficient.⁴⁹ The Arbitral Tribunal referred to a similar ruling made by the *Barbados/Trinidad and Tobago* tribunal, which declined to adjust the provisional line to favour the fishermen from Barbados since their interest in fishing was not proven to be long-standing.⁵⁰ Like the tribunal in *Barbados/Trinidad and Tobago*, it did not completely exclude socio-economic considerations from delimitation law, but it effectively set a very high bar for this particular factor to be considered relevant.⁵¹

41 *ibid* 99 [343]-[345].

42 *ibid*.

43 *ibid* 99 [345].

44 *ibid* 98 [341].

45 *ibid* 105 [368].

46 *ibid* 105 [371].

47 *ibid* 116 [399]; *Nicaragua v Honduras* (n 39) 745.

48 *ibid* 117; *Bay of Bengal Maritime Boundary Arbitration* (n 3) 116-117 [399].

49 *ibid* 124 [424].

50 *ibid*; *In the matter of an arbitration between Barbados and the Republic of Trinidad and Tobago* (Award) (2006) XXVII RIAA 147, 221-23 [264]-[271].

51 *ibid*.



With respect to concavity, the Arbitral Tribunal underscored the established view in jurisprudence that concavity by itself is not a relevant circumstance capable of automatically adjusting a provisional equidistance line.⁵² Concavity must produce a cut-off effect in order to be considered relevant. For the cut-off effect to be relevant, the Arbitral Tribunal tested it against two criteria. First, did it prevent Bangladesh from extending its maritime boundary as far seaward as international law permits? Second, if the provisional line was not adjusted, would it fail to achieve an equitable solution as required under Articles 74 and 83 UNCLOS?⁵³ The Arbitral Tribunal did not explicitly answer the two questions in the affirmative but offered the following observations: 1) that the area allocated to Bangladesh narrowed into the shape of a triangle the further it was from the coast; and 2) that from point Prov 3, the 'provisional equidistance line bends markedly eastward to the detriment of Bangladesh.'⁵⁴ The Arbitral Tribunal therefore decided to adjust the line in order to produce an equitable result, but with the caveat that such adjustment must not 'produce an unreasonable result for India.'⁵⁵

2.3.3 The continental shelf beyond 200 nm

The Arbitral Tribunal decided to delay its adjustment of the provisional line only after its consideration of the delimitation issues of the continental shelf beyond 200 nm.⁵⁶ This move is consistent with the Arbitral Tribunal's position that, in law, there is a single continental shelf.⁵⁷ Since the Arbitral Tribunal concluded that it was dealing with a single continental shelf, it also decided that the delimitation method used in the area within 200 nm – namely the three-step equidistance/relevant circumstance method – must also be applied for the area beyond 200 nm.⁵⁸

The Arbitral Tribunal first established a provisional equidistance line in the area beyond 200 nm, starting from the 200 nm limit, which was at a point between point Prov 6 and point Prov 7, continuing towards Prov 7, and from Prov 7, at an azimuth of 175° 50' 50.30", progressing until it met the ITLOS Boundary Line.⁵⁹ India argued that no adjustment to the provisional equidistance line in the area of the continental shelf beyond 200 nm was necessary and proposed that the same provisional equidistance line within the 200 nm be retained and, from point T-7, should continue at an azimuth of 172.342° until it meets the ITLOS Boundary Line.⁶⁰

52 *ibid* 117 [402]; *Bangladesh/Myanmar case* (n 8) [292]; *Case Concerning the Land and Maritime Boundary (Cameroon v Nigeria)* [2002] ICJ Rep 303 [272].

53 *ibid*; *Bay of Bengal Maritime Boundary Arbitration* (n 3) 122 [417].

54 *ibid* 123 [418].

55 *ibid* 123 [419].

56 *ibid* 123 [421], 129 [437].

57 *ibid* 129 [437].

58 *ibid* 142 [465].

59 *ibid* 142 [464].

60 *ibid* 136 [451], 143 [468].



Bangladesh, on the other hand, argued that the concavity of its coast was a relevant circumstance that justified the adjustment of the provisional line.⁶¹ According to Bangladesh, the ‘results produced by an equidistance line in the case of a concave coast become more unreasonable as the line moves further from the coast.’⁶² The Arbitral Tribunal agreed with Bangladesh that the concavity of its coast resulted in a cut-off effect within 200 nm, the detrimental consequence of which continued beyond 200 nm, and was therefore a relevant circumstance justifying the adjustment of the provisional line.⁶³ In explaining the cut-off, the Arbitral Tribunal referred to two observations. The first was that the area attributed to Bangladesh within and beyond 200 nm was limited in scope in comparison with the area in which the entitlements of the parties overlap.⁶⁴ Second, the Arbitral Tribunal observed that starting at point Prov 3, the provisional equidistance line within 200 nm gave ‘insufficient weight’ to the south-facing coast of Bangladesh.⁶⁵ Beyond these two observations, however, the Arbitral Tribunal did not make further elaborations on the cut-off effect of the concavity of the coast. The Arbitral Tribunal clarified that its objective in adjusting the line was to ‘ameliorate the excessive negative consequences’ for Bangladesh and, at the same time, to ensure that no unreasonable ‘encroaches on the entitlement of India’ ensued.⁶⁶

It is interesting to note that Bangladesh proposed to adjust the provisional delimitation line by way of an angle-bisector method starting at the land boundary terminus, with an initial azimuth of 180° at point Prov-0 to continue up to the 200 nm limit, thereafter to deflect at an azimuth of 215° in order to run parallel to the ITLOS Boundary Line between Bangladesh and Myanmar until it reaches the declared outer limits of the continental shelf of Bangladesh.⁶⁷ With respect to its proposal to deflect the line at the 200 nm point to an azimuth of 215°, Bangladesh defended this position by arguing that the delimitation line adopted within 200 nm need not be the same in the area beyond 200 nm if doing so would result in an inequitable situation for either of the parties.⁶⁸ Bangladesh calculated that if the equidistance line were to remain unchanged, it would give Bangladesh only a small entitlement in the area beyond 200 nm as it ‘terminates a full 140 nm short of the claimed outer limits it submitted to the CLCS.’⁶⁹

The Arbitral Tribunal did not accept Bangladesh’s proposal and set out to adjust the provisional line starting at point Prov 3 with a geodetic line at an initial azimuth of 177° 30’ 00” until it met the ITLOS Boundary Line in *Bangladesh/Myanmar*.⁷⁰ The Tribunal stated that the adjusted line ‘does

61 *ibid* 131 [440].

62 *ibid* 143 [467].

63 *ibid* 144 [471].

64 *ibid* 144 [473].

65 *ibid* 144 [474].

66 *ibid* 147 [477].

67 *ibid* 133 [444].

68 *ibid* 132 [443].

69 *ibid* 132 [441].

70 *ibid* 147 [478].



not unreasonably limit the entitlement of India⁷¹ and since it ‘avoids turning points ... is simpler to administer and implement by the Parties.’⁷²

Although Rao voted with the majority on jurisdiction and the location of the land boundary terminus, he dissented on the final delimitation line on three points. First, Rao argued that prov Point 3, which was located within 200 nm, was well before any significant cut-off to Bangladesh’s entitlement occurred.⁷³ Second, Rao found the Arbitral Tribunal’s reasoning unsatisfactory. Finally, Rao, describing how the azimuth line at 177° 30’ 00” looked very similar to Bangladesh’s proposal of an azimuth line at 180°, called the decision ‘arbitrary and intrinsically runs counter to the majority’s own reasoning which effectively rejected a bisector as a matter of law.’⁷⁴

The Arbitral Tribunal took the final step in delimiting the continental shelf beyond 200 nm by performing the disproportionality test. The ICJ in the *Black Sea* case explained that the test is designed to check whether ‘a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.’⁷⁵ The Arbitral Tribunal further underscored that the process of applying the disproportionality test is not a ‘mathematical exercise’⁷⁶ and must be undertaken ‘by reference to the overall geography of the area.’⁷⁷ The Arbitral Tribunal applied the disproportionality test by comparing the ratio of the relevant maritime space it accorded to each party to the ratio of the parties’ relevant coastal lengths. Bangladesh’s relevant coast is 418.6 kilometres⁷⁸ and India’s is 803.7 kilometres.⁷⁹ The ratio between the lengths of the relevant coasts is 1:1.92. The relevant area as established by the Arbitral Tribunal was 406,833 square kilometres.⁸⁰ After adjustment of the line, the area allocated to Bangladesh was approximately 106,613 square kilometres and India’s was approximately 300,220 square kilometres. The resulting ratio, which was approximately 1:2.81, was considered by the Tribunal to not be disproportionate, thus requiring no further shifting of the line.⁸¹ Map 12 below is the illustrative map provided by the Arbitral Tribunal and depicts the final delimitation line.⁸²

71 *ibid* 147 [479].

72 *ibid* 147 [480].

73 Concurring and Dissenting Opinion of Dr Rao (n 22) 12-13 [9], [20]-[22].

74 *ibid*.

75 *Black Sea Case* (n 26) 99-100 [110].

76 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 153 [494].

77 *ibid* 154 [494].

78 *ibid* 81 [286].

79 *ibid* 87 [305].

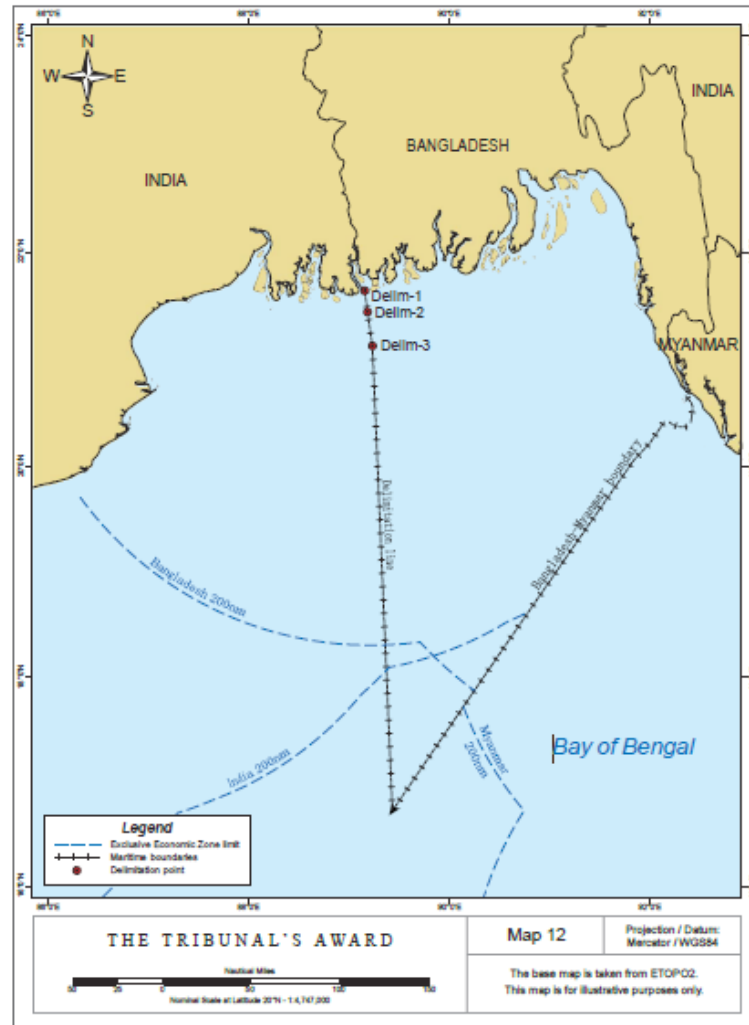
80 *ibid* 88 [311].

81 *ibid* 154 [497].

82 *ibid* 163.



MAP 12



2.3.4 The grey area

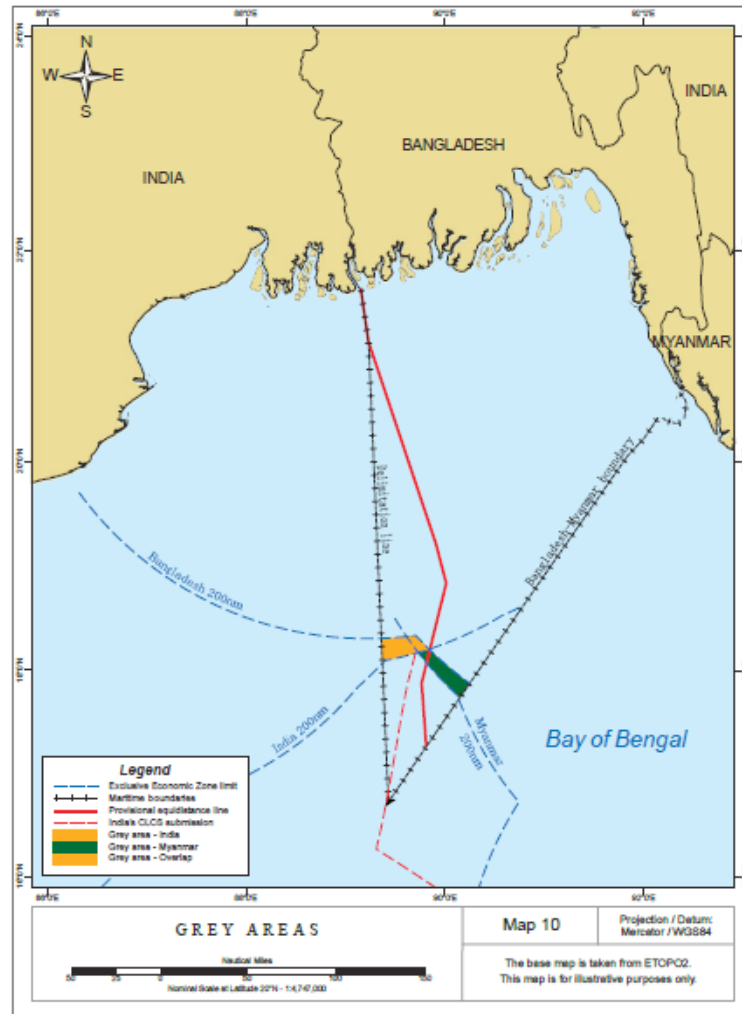
The final delimitation line that the Arbitral Tribunal drew resulted in a so-called ‘grey area.’ In the grey area, which lies beyond the 200 nm limit of Bangladesh, Bangladesh only has rights to the seabed and subsoil of the continental shelf, but not to the superjacent waters of the exclusive economic zone, which fall within 200 nm of India and thus belongs to the latter.⁸³ A further complication of

⁸³ *ibid* 156 [503].



the said grey area is that it partially overlaps with the grey area created by ITLOS in the *Bangladesh/Myanmar* case.⁸⁴ Map 10 below illustrates the grey areas created as a result of the delimitation line drawn by the Arbitral Tribunal.⁸⁵

MAP 10



84 *ibid* 156 [506].

85 *ibid* 159.



The creation of a grey area following a delimitation exercise, whether negotiated bilaterally or the outcome of a judicial or arbitral process, is not unknown.⁸⁶ The main reason that grey areas come to be is because the legal bases of entitlement over the territorial sea, the exclusive economic zone and the continental shelf differ from the legal principles of delimitation.⁸⁷ Entitlement to the territorial sea and the exclusive economic zone is based purely on distance from the coast.⁸⁸ Entitlement to the continental shelf is based either on distance, if the area claimed is up to 200 nm, or on geology and geomorphology, if an area of continental shelf beyond 200 nm is claimed.⁸⁹ Under the law of the sea, delimitation is undertaken only when there is an overlap of claims.⁹⁰ Unless a historic title exists, the territorial sea is delimited with the median line/special circumstances method.⁹¹ Delimitation of the exclusive economic zone and the continental shelf, on the other hand, is undertaken without any preferred method and with the main objective of an equitable solution.⁹²

Rao did not share the majority's position on the resulting grey area for two reasons. First, he disagreed that within the exclusive economic zone, sovereign rights on the water column may be divided from sovereign rights in seabed and subsoil.⁹³ His point was that sharing of rights might exist between exclusive and inclusive rights, such as the sovereign rights within the exclusive economic zone and the freedom of the high seas.⁹⁴ The Arbitral Tribunal defended the resulting grey area, contradicting Rao by stating that:

The establishment of a maritime area in which the States concerned have shared rights is not unknown under the Convention. The Convention is replete with provisions that recognize to a greater or lesser degree the rights of one State within the maritime zones of another. Within the provisions of the Convention relating to the exclusive economic zone and the continental shelf, articles 56, 58, 78 and 79 all call for States to exercise their rights and perform their duties with due regards to the rights and duties of other States.⁹⁵

Rao's second objection was on policy, arguing that 'international courts and tribunals should avoid

86 Alex G Oude Elferink, 'Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue' (1998) 13 Int'l J Marine & Coastal L 143; Oude Elferink cited the following cases dealing with grey areas: *Grisbadarna* case (Norway/Sweden) decision of 23 October 1909 (1910) 4 AJIL 226-236; *Dubai/Sharjah Border Arbitration* (Decision) (1981) 91 ILR 543; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau* (1985) XIX RIAA 149.

87 *ibid* 147.

88 Arts 3 and 57 UNCLOS.

89 Art 76 UNCLOS.

90 Arts 15, 74 and 83 UNCLOS.

91 Art 15 UNCLOS.

92 Arts 74 and 83 UNCLOS.

93 Concurring and Dissenting Opinion of Dr Rao (n 22) 19 [36].

94 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 19 [34].

95 *ibid* 156 [507].



delimiting boundaries in a way that leaves room for potential conflicts between the parties.⁹⁶ Indeed, the Arbitral Tribunal was aware of a potential conflict scenario and advised the parties not to leave the situation as it is, but to enter into cooperative arrangements to 'ensure that each is able to exercise its rights and perform its duties within this area.'⁹⁷

3. The delimitation of the area of the continental shelf beyond 200 nm - a lost opportunity in law-making?

In his Declaration in the *Bangladesh/Myanmar* case, Wolfrum, referring to the fact that the UNCLOS did not specify a delimitation method for the exclusive economic zone and the continental shelf, argued that a court or tribunal's rulings on delimitation have a 'law-making function.'⁹⁸ Past judicial rulings on delimitation are '*acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 73 and 84 of the Convention.'⁹⁹ The Arbitral Award of 7 July 2014 was only the second time that a court or tribunal delimited the continental shelf beyond 200 nm. The opportunity and scope to address and clarify issues relating to the law on delimitation of the area of the continental shelf beyond 200 nm was therefore present. However, the Arbitral Tribunal did not fully take advantage of this opportunity.

The first missed opportunity was the absence of a clear ruling on whether the parties' entitlements to an area of the continental shelf beyond 200 nm overlapped. Before a court or tribunal can establish an overlap, the entitlement of each coastal State must first be confirmed, which, however, the Arbitral Tribunal did not do. The basis of the title to an area of the continental shelf that extends beyond 200 nm is different from a continental shelf up to 200 nm, which is based on distance. Under Article 76(4), the geology and geomorphology of the seabed and subsoil are decisive in whether a coastal State can claim an extended continental shelf or not. The CLCS is of the view that before a coastal State can delineate or establish the outer limits beyond 200 nm, it must clearly demonstrate or offer positive proof that its outer limits lie in an area beyond 200 nm.¹⁰⁰ In practice, the CLCS calls this 'the test of appurtenance' and requires a coastal State to delineate a line based on either or both paragraph 4(a)(i) of Article 76 UNCLOS on locating the foot of the slope or paragraph (4)(a)(ii) on determining the thickness of the sedimentary rocks.¹⁰¹ Requiring the parties to provide proof

96 Concurring and Dissenting Opinion of Dr Rao (n 22) 19 [35].

97 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 157 [508].

98 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* Declaration of Wolfrum, 2 <www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16.decl.Wolfrum.rev.E.pdf>.

99 *ibid.*

100 CLCS, Scientific and Technical Guidelines, adopted 13 May 1999, CLCS/11, s 2.2.1 <www.un.org/Depts/los/clcs_new/documents/Guidelines/CLCS_11.htm> accessed 8 November 2015.

101 *ibid* s 2.2.8.



of their entitlement would have been a practical matter considering that both States have already made their submissions to the CLCS. The Arbitral Tribunal, however, did not require the parties to provide positive proof of entitlements beyond 200 nm in accordance with Article 76(4). Instead the Arbitral Tribunal simply relied on the parties' submissions that they both agreed that each is entitled to an area of the continental shelf beyond 200 nm.¹⁰² While the delimitation method can be a matter of agreement between the parties, proof of entitlement can only be determined in accordance with Article 76 UNCLOS, not by agreement between the parties.¹⁰³

The majority should have also elaborated that the continental shelf beyond 200 nm has a different legal basis of title than that of maritime zones based on distance, thereby warranting consideration of the issues that differ from the principles applied to the delimitation of areas within 200 nm. Title to maritime areas within 200 nm is based on distance, whereas title to the continental shelf beyond 200 nm rests on geological and geomorphological requirements in accordance with Article 76. The Arbitral Tribunal was actually aware of this conceptual difference and indeed stated that in the delimitation of the continental shelf beyond 200 nm, in addition to Article 83, Article 76(4) UNCLOS also applied.¹⁰⁴ Article 76(4) refers to the formulas that coastal States must apply in delineating the outer limits of the continental shelf beyond 200 nm. It reads as follows:

- (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
 - (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
 - (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
- (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

So what roles do these formulas play in the delimitation? Some experts are of the view that geomorphological and geological elements serve as relevant circumstances in the delimitation of the continental shelf beyond 200 nm, but that they 'do not operate to exclude other facts.'¹⁰⁵ Unfortunately,

102 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 131 [438].

103 Bjorn Kunoy, 'A Geometric Variable Scope of Delimitations: The Impact of Geological and Geomorphological Title to the Outer Continental Shelf' (2006) 11 *Austrian Rev Intl & Eur L* 49, 72.

104 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 138 [456].

105 David Colson, 'The Delimitation of the Outer Continental Shelf between Neighbouring States' (2003) 97 *AJIL* 91, 107; see also Bjorn Kunoy, 'The Rise of the Sun: Legal Arguments in Outer Continental Margin Delimitations' (2006) 53 *Netherlands International Law Review* 247.



the Arbitral Tribunal did not elaborate on how exactly Article 76(4) applied nor did it elaborate on the role of Article 76(4) in the delimitation process.

4. Conclusion

Overall, the Arbitral Tribunal's approach to delimiting the maritime zones between the Bangladesh and India stayed faithful to established jurisprudence in maritime delimitation. The final delimitation line established by the Arbitral Tribunal was a result of detailed application of the three-step approach of the provisional equidistance/relevant circumstances developed by past judicial rulings and refined in the *Black Sea* case. With respect to the adjusted line, there is some merit to the critique that the Award did not provide a fully reasoned explanation as to how the Arbitral Tribunal arrived at its decision. However, the same critique can be made of many decisions that have applied the provisional equidistance/relevant circumstances method. No matter how objective a court or tribunal is in establishing the provisional line, its adjustment on the basis of relevant circumstances always calls for the application of judicial discretion.¹⁰⁶ There will therefore always be an element of subjectivity with respect to a final adjusted line.

In contrast to its faithful application of established doctrine, the Arbitral Tribunal's attempt at law-making was not as successful. As previously discussed, the Arbitral Tribunal held back from elaborating certain fundamental underlying issues, which prevented it from fully contributing to the progressive development of the law on maritime delimitation of the continental shelf in areas beyond 200 nm. These issues included the necessity of undertaking the test of appurtenance in order to confirm entitlement and any ensuing overlap of claims as well as the importance of elaborating the principles applicable to the delimitation of the continental shelf beyond 200 nm.

Nevertheless, this Award occupies a distinct place in international jurisprudence, as it was one of the first two cases in which the extended continental shelf beyond 200 nm was delimited before the CLCS made its recommendations concerning the outer limits.¹⁰⁷ Prior to the two cases, the courts and tribunals tended to refrain from exercising jurisdiction over a delimitation dispute involving the continental shelf beyond 200 nm, rather waiting for the CLCS to make its recommendations.¹⁰⁸ This reluctance can be attributed to the idea that delineation by the CLCS, which also involves making a determination concerning a coastal State's entitlement to an extended continental shelf, must be completed before delimitation can take place.¹⁰⁹ In addition, there is also doubt whether a judicial or arbitral body comprised of legal experts is qualified to determine a coastal State's entitlement to

106 *Bay of Bengal Maritime Boundary Arbitration* (n 3) 99 [344].

107 The other case was the *Bangladesh/Myanmar* case (n 8).

108 Robin Churchill, 'The *Bangladesh/Myanmar* Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation' (2012) 1 CJICL 137, 148.

109 This was the reason given by the Arbitral Tribunal which decided the *France/Canada Maritime Boundary Delimitation* in 1992: Louise de la Lafayette, 'The Award in the *Canada-France Maritime Boundary Arbitration*' (1993) 8 IJMCL 77, 86.



a continental shelf beyond 200 nm as it involves the application of a complex set of geological and geomorphological factors.¹¹⁰ There is nothing in the UNCLOS that explicitly states that delineation shall first be completed before delimitation can take place. On the contrary, and which was argued earlier, Article 9 of Annex II of the UNCLOS, which mandates that the actions of the CLCS shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts, leads one to conclude that delineation under Article 76 is not a prerequisite to delimitation under Article 83 UNCLOS. Finally, it must be noted that by exercising jurisdiction to delimit the area beyond 200 nm and resolving the delimitation dispute, the Arbitral Tribunal paved the way for the CLCS to consider the submissions of India and Bangladesh and to make recommendations on the outer limits of the continental shelf of both countries.¹¹¹

110 *ibid* 150.

111 This was the same outcome for the submissions of Bangladesh and Myanmar when ITLOS decided to settle their delimitation dispute with each other: *Bangladesh/Myanmar* (n 8) 115 [391]-[394].