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## BAY OF BENGAL BOUNDARY (BANGLADESH *v.* INDIA) 167 ILR 1

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**Sea — Maritime boundary delimitation — Single maritime boundary — Territorial sea — United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”) — Article 15 — Equidistance/special circumstances — Whether suitable base points could be on low-tide elevations — Exclusive Economic Zone — Continental shelf — Continental shelf beyond 200 nautical miles — UNCLOS Articles 74 and 83 — Three-stage approach — Equidistance/relevant circumstances — Proportionality — Relevant coasts — Relevant area — Bay of Bengal — Coastal instability — Concavity of coast — Cut-off effect — Dependence on fishing — Angle-bisector method — Whether geographical configuration of Bay of Bengal warranting use of angle-bisector method — UNCLOS Article 76 — “Grey area” issue — Whether UNCLOS allowing “grey areas”**

**International tribunals — Arbitration tribunal constituted under UNCLOS Annex VII — United Nations Convention on the Law of the Sea, 1982 — Jurisdiction — Unilateral application — Maritime boundary delimitation — Site visit**

**Territory — Land boundary terminus — 1947 Radcliffe Award — Whether Radcliffe Award determining land boundary terminus between Bangladesh and India — Maps — Whether a map constituting contemporaneous evidence to be used for determination of land boundary terminus — Whether exchange of letters between Parties constituting binding agreement on their land boundary — Level of seniority of officials concerned**

## BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN THE PEOPLE’S REPUBLIC OF BANGLADESH AND THE REPUBLIC OF INDIA<sup>1</sup>

(PEOPLE’S REPUBLIC OF BANGLADESH *v.* INDIA)

*Arbitration Tribunal.*<sup>2</sup> 7 July 2014

(Wolfrum, President; Cot, Mensah, Rao and Shearer, Members)

<sup>1</sup> Counsel for Bangladesh and India are listed in para. 41 of the Award.

<sup>2</sup> The Tribunal was constituted pursuant to Article 287 and in accordance with Annex VII of the United Nations Convention on the Law of the Sea, 1982. The Permanent Court of Arbitration served as Registry.

**SUMMARY:**<sup>3</sup> *The facts:*—On 8 October 2009,<sup>4</sup> the People’s Republic of Bangladesh (“Bangladesh”) instituted arbitral proceedings against the Republic of India (“India”) under Annex VII of the United Nations Convention on the Law of the Sea, 1982 (“UNCLOS” or “the Convention”) for the delimitation of the maritime boundary between Bangladesh and India in the Bay of Bengal.

The dispute originated at the time of the partition of British India. By the Indian Independence Act 1947, the United Kingdom provided that the province of West Bengal would remain part of India, while the province of East Bengal would become part of Pakistan. Section 3 of that Act provided that the land boundary between East and West Bengal would be traced by a commission appointed by the Governor-General of India. The commission was established on 30 June 1947, and was chaired by Sir Cyril Radcliffe (“the Radcliffe Commission”). The Radcliffe Commission presented its Report on 13 August 1947 (“the Radcliffe Award”), which described the land boundary as the line running along the frontier between the districts of Khulna and 24 Parganas to the point where it met the Bay of Bengal. Annexure A to the Radcliffe Award contained the description of the land boundary, while Annexure B contained a map illustrating the course of such a boundary. On 26 March 1971, Bangladesh declared its independence from Pakistan, and succeeded to the territory of former East Bengal and its boundaries.

The dispute between the Parties concerned the delimitation of the maritime boundaries between Bangladesh and India in the Bay of Bengal. The Tribunal was requested to delimit the boundaries in the territorial sea, continental shelf within and beyond 200 nautical miles (“nm”), and Exclusive Economic Zone (“EEZ”) of the Parties.

The Parties agreed that the land boundary terminus, established on the basis of the Radcliffe Award, was to be the starting point of the maritime boundary. The Parties also agreed that the Tribunal had jurisdiction to delimit the continental shelf both within and beyond 200 nm from their respective baselines.

Concerning the identification of the land boundary terminus, the Parties disagreed as to the interpretation of Annexures A and B to the Radcliffe Award. According to Bangladesh, Annexure A should have been interpreted in the sense that the land boundary terminus lay where the midstream of the main channel of the River Haribhanga met the Bay of Bengal, since the course of the boundary through the rivers mentioned by the Radcliffe Award (Ichhamati, Kalindi, Raimangal and Haribhanga) was sequential. India argued that the land boundary terminus lay where the Raimangal–Haribhanga conjoined channel met the Bay of Bengal, east of New Moore Island.

<sup>3</sup> Prepared by Mr M. Lando.

<sup>4</sup> On the same day, Bangladesh also commenced arbitral proceedings against Myanmar with regard to the delimitation of the maritime boundary between the two States in the Bay of Bengal. The case between Bangladesh and Myanmar was decided by the International Tribunal for the Law of the Sea on 14 March 2012, and is reported in 166 ILR 464.

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The Parties also disagreed regarding the meaning of the phrase “for the time being” in the Radcliffe Award. According to Bangladesh, this phrase signified that the land boundary would shift to the extent that the main channel of the river shifted. However, Bangladesh maintained that the critical date when the land boundary would have been crystallized was the date of the Radcliffe Award, meaning that after the award no change in the river’s course was relevant. India contended that the inclusion of the phrase “for the time being” codified the Parties’ agreement that their land boundary was fluid, and thus not definitively fixed by the Radcliffe Award in 1947.

India also referred to a 1951 exchange of letters between India and Pakistan, whereby Pakistan agreed to a fluid boundary finding the application of the Radcliffe Award impracticable. Bangladesh argued, however, that correspondence between two civil servants was unable to bind their States as to a particular land boundary course. In addition, while India contended that the map in Annexure B to the Radcliffe Award showed the course of the land boundary and was an integral part of that Award, Bangladesh argued that the map was merely illustrative, and that it did show accurately the course of the land boundary. In any event, according to Bangladesh the map should have been authenticated by an expert.

Bangladesh contended that British Admiralty (“BA”) Chart 859 was the most authoritative map for the determination of the land boundary terminus, as evidence contemporaneous to the Radcliffe Award. India rejected the accuracy and relevance of BA Chart 859 and contended that it was not contemporaneous evidence, since the survey on which it was based had been conducted in 1879. India also disputed the relevance and weight of contemporaneous evidence, and argued that subsequent evidence should be accorded more weight.

India submitted satellite imagery of the land boundary terminus area. Bangladesh disputed its conclusiveness, arguing that it disregarded charts available at the time of the Radcliffe Award.

Bangladesh argued that the midstream of the main channel was to be identified with respect to the Haribhanga River, based on the 1931 printing of BA Chart 859. India contended that it was to be determined by reference to the conjoined channel of the Raimangal and Haribhanga Rivers which flowed to the east of South Talpatty/New Moore Island as shown in the map annexed to the Radcliffe Award.

Concerning the identification of the point where the land boundary met the Bay of Bengal, Bangladesh argued that such a point was on the closing line drawn in BA Chart 859. India agreed to use the *inter fauces terrae* doctrine, but identified the point where the land boundary met the Bay of Bengal on Indian charts issued in 2011.

For the delimitation of the maritime boundary, each Party proposed a number of base points with which the opposing Party took issue. Bangladesh disputed the relevance of three Indian base points since they were placed on low-tide elevations, the existence of which was disputed. The Indian base

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point on South Talpatty/New Moore Island was contested due to the island's insignificance and that sovereignty over it could only have been determined by reference to the location of the maritime boundary. India argued that South Talpatty/New Moore Island was stable since the 1970s, and was shown to be a low-tide elevation in recent satellite imagery.

Concerning the delimitation of the territorial sea, the Parties agreed that Article 15 of the Convention was the applicable law. However, they disagreed on the existence of special circumstances and on the method of its application. Bangladesh argued that equidistance had no priority over other methods under the applicable law, and that the Tribunal should have drawn a boundary based on the bisector of the angle formed by the lines approximating the general direction of the Parties' coasts. India underscored the primacy of equidistance, requesting the Tribunal to trace an equidistance line between the two coasts.

Bangladesh argued that the coastal instability in the Bay of Bengal and the concavity of Bangladesh's coast were special circumstances justifying the use of a method at variance with equidistance. India rejected Bangladesh's arguments.

With respect to the delimitation beyond 12 nm, the Parties agreed on the relevant coast of Bangladesh, but disagreed on the relevant coast of India. While Bangladesh argued that the Indian relevant coast extended from the land boundary terminus to Sandy Point (708 km), India submitted that its own relevant coast extended from the land boundary terminus to Devi Point (411 km). The disagreement on the relevant coast of India determined the disagreement in the relevant delimitation area.

The Parties agreed that Articles 74(1) and 83(1) of the Convention governed the delimitation beyond 12 nm. Bangladesh argued that there was no presumption in favour of equidistance, and that the need to achieve an "equitable solution" entailed a wide margin of appreciation in respect of the method to apply in delimitation. India argued that international jurisprudence developed in favour of the use of equidistance in maritime delimitation beyond 12 nm, and that relevant circumstances should not be confused with factors making the drawing of an equidistance line unfeasible. Similarly with respect to the territorial sea, Bangladesh argued for a boundary based on the angle-bisector method, while India rejected that method and requested the Tribunal to draw a boundary based on equidistance. In any case, both Parties agreed that the first step in the delimitation beyond 12 nm was to trace a provisional equidistance line.

As relevant circumstances, Bangladesh identified coastal instability in the Bay of Bengal, the concavity of its coast within the concavity of the Bay of Bengal (the so-called "double concavity"), and the dependence of Bangladesh's people on the Bay of Bengal fisheries. India disputed the applicability of all relevant circumstances as identified by Bangladesh.

Concerning the delimitation of the continental shelf beyond 200 nm, the Parties agreed that the applicable law was Article 83 of the Convention.

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Bangladesh argued that the concavity of its coast was also relevant beyond 200 nm, and that once the angle-bisector reached the 200 nm limit, it should have been extended along an azimuth of 215° parallel to the delimitation line in *Bangladesh/Myanmar*.<sup>5</sup> India argued that the boundary beyond 200 nm was the extension of the boundary within 200 nm.

With respect to proportionality, both Parties argued that the delimitation proposed by each of them would respect proportionality, although for different reasons based on a different appreciation of the relevant coasts and the relevant area.

Concerning the “grey area”, Bangladesh endorsed the conclusions of the International Tribunal for the Law of the Sea in *Bangladesh/Myanmar*.<sup>6</sup> By contrast, India argued for the absence of relevant circumstances in the area beyond 200 nm, and did not address the “grey area” issue.

*Held:*—(1) (unanimously) The Tribunal had jurisdiction to identify the land boundary terminus and to delimit the boundary in the territorial sea, EEZ and continental shelf within and beyond 200 nm.

(a) Both Bangladesh and India were Parties to the Convention, and were thus bound by the compulsory dispute settlement mechanism under UNCLOS Part XV. The Tribunal had jurisdiction to identify the land boundary terminus based on the agreement of the Parties (paras. 65 and 67).

(b) Both Parties agreed that the Tribunal had jurisdiction to delimit the continental shelf beyond 200 nm. Although the outer limits had not yet been determined by the Commission on the Limits of the Continental Shelf, there was no ground to refuse to delimit the continental shelf beyond 200 nm. In international law there was only one continental shelf, and UNCLOS Article 83 on delimitation did not distinguish between the continental shelf within and beyond 200 nm (paras. 74 and 76-7).

(2) (unanimously) The land boundary terminus between Bangladesh and India was located at 21° 38' 40.2"N, 89° 09' 20.0"E (WGS-84).

(a) As agreed by the Parties, the land boundary terminus was to be found by applying the Radcliffe Award. Although referred to by both Parties, the *uti possidetis juris* principle was not useful to determine the land boundary terminus (paras. 85 and 144).

(b) The Radcliffe Award located the land boundary terminus in the midstream of the main channel of the Haribhanga River, and not of the conjoined Haribhanga and Raimangal Rivers, at the point where they entered the Bay of Bengal. The phrase “for the time being” in the Radcliffe Award did not entail that the boundary would be shifting depending on the fluctuations

<sup>5</sup> *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, 166 ILR 464, para. 505.

<sup>6</sup> 166 ILR 464, paras. 471-6.

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in the region's geography, and thus the land boundary terminus was to be determined by reference to the situation in 1947 (paras. 158 and 163).

(c) The 1951 exchange of letters between the Parties did not constitute a binding treaty overriding the Radcliffe Award's decision on the land boundary, as the Indian letter was unsigned and the correspondence exchange was between low-level civil servants (para. 165).

(d) The land boundary terminus had to be determined by reference to the "photography of the territory" as it was at the critical date, in 1947. BA Chart 859 was not reliable to identify the estuary of the Raimangal River as it was in 1947 since it was based on surveys conducted prior to 1879. The Radcliffe Award's map was drawn using surveys conducted in 1915-16, and was thus not wholly reliable in depicting the geographical situation in 1947. It was, however, based on a survey conducted later than that on which BA Chart 859 was based. The Radcliffe Award's map was to be used to locate the land boundary terminus since Sir Cyril Radcliffe had used that map to determine the location of the land boundary terminus (paras. 170, 175 and 182-4).

(3) (by four votes to one, Dr Rao dissenting) The maritime boundary between Bangladesh and India was a series of geodetic lines joining Point 1 (the land boundary terminus), Point 2 ( $21^{\circ} 26' 43.6''$ North,  $89^{\circ} 10' 59.2''$ East) and Point 3 ( $21^{\circ} 07' 44.8''$ North,  $89^{\circ} 13' 56.5''$ East), and from Point 3 continuing along a geodetic line with an initial azimuth of  $177^{\circ} 30' 00''$  until it met the maritime boundary established by the International Tribunal for the Law of the Sea in *Bangladesh/Myanmar*.<sup>7</sup>

(a) The selection of base points was an exercise distinct from the identification of the land boundary terminus. In particular, base points did not have to be found with reference to the geographical situation existing in 1947. Base points in order to delimit the maritime boundary had to be selected with reference to the geographical situation at the time of the Tribunal's Award (para. 212).

(b) Bangladesh's argument that a maritime boundary based on equidistance was inappropriate due to coastal instability was irrelevant. The physical reality at the time of the delimitation was important. Maritime boundaries had to be stable and definitive in order to ensure a peaceful relationship between the Parties in the long term (paras. 214-16).

(c) The methods for the delimitation of the territorial sea were more established than the methods for the delimitation of functional maritime zones. It was possible to identify suitable base points for the construction of the equidistance line in the territorial sea. Since the Tribunal was concerned with the physical reality at the time of the delimitation, it did not need to address whether coastal instability was a special circumstance in the sense of Article 15 of the Convention. Suitable base points were selected, and the equidistance line subsequently constructed. Base points located on low-tide elevations did not fulfil the International Court of Justice's selection criteria in

<sup>7</sup> 166 ILR 464, para. 505.

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*Black Sea.*<sup>8</sup> Alternative base points were preferable if they could be found on the Parties' coastline. Bangladesh did not prove that special circumstances required the adjustment of the provisional equidistance line in the territorial sea. However, the fact that the land boundary terminus was not at a point equidistant from the Parties' coasts was a special circumstance. This required an adjustment of the provisional equidistance line so that it started from a point equidistant from the Parties' coasts (paras. 246, 248-9, 261-2 and 272-3).

(d) The relevant coast of Bangladesh extended along two segments. The first ran from the land boundary terminus to the lighthouse on Kutubdia Island, and the second ran from the latter point to the land boundary terminus between Bangladesh and Myanmar on the Naaf River. The total length of Bangladesh's coastline was 418.6 km. The Indian coast between Devi Point and Sandy Point generated projections overlapping with the coastal projections of Bangladesh, and was thus part of the Indian relevant coast. Part of the Indian coast on the Andaman Islands also generated entitlements overlapping with those of Bangladesh, and was thus included in the relevant coast. The relevant Indian coast measured 803.7 km (paras. 286, 300, 303 and 305).

(e) Concerning the delimitation beyond 12 nm, the reference to equidistance in Article 15 of the Convention could not be read into Articles 74 and 83 of the Convention. Transparency and predictability were core values in the delimitation process. While both the angle-bisector method and the equidistance/relevant circumstances method were based on geometric principles, the latter was more transparent as it distinguished the stages for its application. Tracing an angle-bisector involved a higher degree of subjectivity than the equidistance/relevant circumstances method. The equidistance/relevant circumstances method was thus appropriate for the delimitation beyond 12 nm. Coastal instability was not deemed a relevant circumstance. The concavity of the coast of Bangladesh was a relevant circumstance warranting the adjustment of the provisional equidistance line beyond 200 nm. A cut-off produced by a provisional equidistance line had to meet two criteria to warrant adjustment of that line: first, the line had to prevent a coastal State from extending its maritime boundary as far seaward as international law permitted; second, the line had to be such that it would have failed to constitute an equitable boundary if not adjusted. Bangladesh had not proved its people's dependence on fishing (paras. 338-9, 343, 345, 399, 407-8, 417 and 424).

(f) The same equidistance/relevant circumstances method used for the delimitation within 200 nm was appropriate for delimiting the continental shelf beyond 200 nm. The Bay of Bengal's concavity would have produced a cut-off of Bangladesh's coast beyond 200 nm, which warranted the adjustment of the provisional equidistance line beyond 200 nm to achieve an equitable solution. The ratio between the Parties' coastal lengths was 1:1.92, while the ratio between the maritime areas appertaining to each State was

<sup>8</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, 144 ILR 179 (paras. 117 and 127).

1:2.81; there was no disproportion requiring further adjustment of the boundary. A “grey area” had been created where Bangladesh had rights over the seabed and subsoil and India had rights over the water column (paras. 465, 469, 475, 495-7 and 503-8).

*Concurring and Dissenting Opinion of Dr Rao:* (1) Although the land boundary terminus, the delimitation of the territorial sea and the selection of base points for the delimitation beyond 12 nm were correct, the adjustment of the provisional equidistance line beyond 12 nm was not (paras. 2, 7).

(2) The Tribunal’s decision to choose Sandy Point as the endpoint of India’s relevant coast was obscure; equally, the northern section of the coast of the Andaman Islands would not have qualified for inclusion in the Indian relevant coast. Accordingly, the Tribunal’s determination of the relevant coast and relevant area was not as accurate as it should have been (para. 8).

(3) The adjustment of the provisional equidistance line should not have begun so close to the coast, where no cut-off effect could have been detected. Cut-off occurred at a point anywhere between 240 and 290 nm from the coast (paras. 9, 17).

(4) The Tribunal did not provide a sound reason for choosing the azimuth of 177° 30' 00" for the adjusted equidistance line. Choosing an azimuth so close to the 180° angle-bisector line that it had previously rejected was unacceptable (paras. 21-2).

(5) The creation of a “grey area” was contrary to law and the policies underlying the decision taken in UNCLOS to create the EEZ as one single maritime zone within 200 nm which effectively incorporated the continental shelf regime. The sovereign rights of a coastal State over the water column were indispensable and inseparable parts of the EEZ regime. While international dispute settlement aimed to solve disputes between States conclusively, the creation of “grey areas” did not fulfil that aim, since it left the States party to a dispute to determine the measures for the exercise of their rights in such “grey areas” (paras. 24, 31 and 35).

The text of the opinion of Dr Rao commences at p. 184. The following is the text of the Award of the Tribunal:

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