Bay of Bengal Maritime Boundary Arbitration
between Bangladesh and India

Concurring and Dissenting Opinion

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1. This arbitration, concerning the delimitation of the maritime boundary between Bangladesh and India in the Bay of Bengal, has raised many issues, including the interpretation of legal principles concerning the law of maritime delimitation. The Tribunal's mandate included the determination of the land boundary terminus, the selection of suitable base points for the purpose of delimitation, the selection of the appropriate method or methods of delimitation, the identification of relevant coasts and the maritime area to be delimited, and the identification of relevant circumstances for the delimitation of the continental shelf, in particular for areas beyond 200 nm.[1]

2. I happily concur with my colleagues in the Tribunal on the determination of the land boundary terminus, the delimitation of the territorial sea, and the identification of suitable base points for the construction of a provisional equidistance line in the exclusive economic zone and the continental shelf.

3. I also concur with the decision to reject the angle bisector method as a basis to delimit the maritime area within 200 nm and the continental shelf beyond 200 nm. Bangladesh could not offer any compelling reason[2] to dispense with the otherwise standard three-stage method, which

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[1] This is the second time a Tribunal has had occasion to delimit continental shelf beyond 200 nm. The first such occasion occurred in the case concerning the delimitation of maritime boundary between Bangladesh and Myanmar decided by the ITLOS in March 2012. See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*. For a note on the case, see D. H. Anderson, "International Decision: Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)", 106 A.J.I.L. 817 (2012).

[2] The test of compelling reasons is laid down in the *Nicaragua v. Honduras* case. *See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, pp. 659-764, para. 287. The Court adopted the angle bisector method, after a gap of nearly 25 years, and saw this as a necessary exception to the standard method of adopting a provisional equidistance method and adjusting the same where relevant circumstances so demanded. For a comment on this case, see D. Bodansky, "Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)", 102 A.J.I.L. 113 (2008).

relies on the establishment of a provisional equidistance line that is open to adjustment if "relevant circumstances"[3] so require "in order to achieve an equitable solution".[4]

4. The ultimate objective of a maritime delimitation thus is to achieve an equitable solution, applying "equity", or "equitable principles". In this connection, legitimate questions have been raised as to the nature, content and scope of "equity" or "equitable principles" and their relationship to rules of law in general, and in the context of maritime delimitation, to the equidistance and special circumstances rule incorporated in Article 6 of the 1958 Geneva Convention on the Continental Shelf. The ICJ in the *North Sea Continental Shelf Cases* (1969) found sanction for the principle of "equity" or "equitable principles" in customary international law. The [US] Truman Declaration, which initially sowed the seeds for the flowering of the concept of the continental shelf through widespread State practice during 19451958, first invoked the principle of equity for the settlement of maritime boundaries. It must be noted, however, that while almost all the unilateral declarations on the continental shelf followed the example of the Truman Declaration in claiming sovereign rights over the same on the basis of continuity of land mass or natural prolongation, few referred to the issue of maritime boundary delimitation, much less sought the same on the basis of equitable principles. In contrast, some States – in particular Denmark and the Netherlands in the *North Sea Cases* – preferred a line based on the "equidistance and special circumstances" formula stressing that it was the most objective and easily verifiable method for the delimitation of maritime boundaries. This method of delimitation was incorporated in Article 6 of the 1958 Convention on the Continental Shelf on the basis of draft articles prepared by the International Law Commission ("ILC") in the early 1950s, which did not give much attention to the principle of equity, despite a brief mention at an initial stage of the ILC's work. Sir Elihu Lauterpacht described the background as follows: a Committee of Experts composed not of lawyers, but cartographers, appointed in 1953 to assist the ILC in its work suggested that "the strict application of the concept of equidistance might in certain circumstances give rise to an inequitable situation". Even though no elaboration of what

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3 See the *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v. Nigeria), I.C.J. Reports 2002, pp. 303-458,* para. 288 where the Court noted that there is no difference between the "special circumstances" and "relevant circumstances" which the case law consistently examines to see if the delimitation on the basis of equidistance method requires adjustment to achieve an equitable solution. Islands, peninsulas, major bays, island fringes, or other such configurations low-tide elevations or major protrusions, among others, that dramatically skew the course of an equidistance line are considered as "special circumstances". See *Guyana v. Suriname*, *Award, PCA Awards Series (2007)*, para. 375. More general information on "relevant circumstances", see M. Evans, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION (Oxford: Clarendon Press, 1989).

4 Articles 74(1) and 83(1) of the 1982 UN Convention on the Law of the Sea state that achieving an equitable solution is the main objective of any exercise on the delimitation of maritime boundary. For a reference to drafting history and clarification of these provisions, see *Continental Shelf (Tunisia/Libya), Dissenting Opinion of Judge Shigeru Oda, I.C.J. Reports 1982*, pp. 246-247, paras. 144-145.

was meant by inequitable was forthcoming from the Committee of Experts, from the ILC, or from the Geneva Conference, the ICJ "felt itself able in 1969 to identify the concept of equity as being a rule of customary international law to be applied to the delimitation of adjacent and opposite continental shelves. And the Court attached controlling importance to that concept".[5]

5. It may be recalled that in 1969 while dealing with the *Continental Shelf Cases* between the Federal Republic of Germany on the one hand and Denmark and Netherlands on the other, the Court did not consider the method of delimitation by equidistance as part of customary law. It noted that, although that method possessed practical convenience and certainty of application, those factors were not sufficient "of themselves to convert what is a 'method' into a rule of law".[6] Referring in this connection to the pronouncement of the Court to the effect that delimitation in that instant case should be effected by "agreement . . . arrived at in accordance with equitable principles",[7] in the sense not "simply as matter of abstract justice, but of applying a rule of law which itself requires application of equitable principles",[8] Jennings observed thus:

> The legal rule, as expounded by the Court, seems to be merely a rule of law that equitable principles must be applied. Well, if equity is, as it surely must be, part of the law, it must be applied anyway. The idea that a special legal rule is needed in the law of the continental shelf, in order to ensure the application of equity seems on the face of it novel, otiose, and unexplained[9].

Continuing his exposition, Jennings noted that in effect what the Court was suggesting, after rejecting the principle of equidistance, was that for delimiting maritime boundaries we may have recourse to "a bag of tools (the so-called 'methods') which the courts may choose or reject at their discretion in their pursuit of a result in accord with 'equitable principles', undefined, and unlisted, but apparently indistinguishable from 'equity' in general".[10] This will lead us to the inescapable result, according to Jennings, "that what the litigants get is in effect a decision *ex aequo et bono,* whether they wanted it or not". He asks in this connection a rather troubling question: "At any rate the very serious question arises of what exactly is the difference between

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5 E. Lauterpacht, "Equity, Evasion, Equivocation and Evolution in International Law", Proceedings of the American Branch of the ILA (1977-1978), pp. 33-47, p. 35.

6 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 3-56, para. 23.

7 *Ibid*., para. 88.

8 *Ibid*., para. 85.

9 Robert Y. Jennings, "The Principles Governing Marine Boundaries", in: Kay Hailbronner et al. (eds.) STOAT UND VOLKERRECHTSORDNUNG - FESTSCHRIFT FUR KARL DOEHRINGM (1989), p. 401.

10 *Ibid*. As to the vagueness of "equity" or "equitable principles" as a concept of law, Sir Elihu Lauterpacht observed that "[T]hey are intended to refer to elements in legal decision which have no objectively identified normative content". See E. Lauterpacht, *supra* note 5, p. 33.

a decision according to equitable principles and a decision *ex aequo et bono*?"[11] He suggested, in answering this question, that the distinction, if any, lies in "why" such a decision is to be made and not "how" it is made, "or indeed does it leave any room for any difference in the practical results of the two supposedly distinct processes".[12] It is apt to refer to this highly reflective and thought provoking line of argument here at the outset of this opinion for two reasons. It represents the opinions or comments from a wide cross-section of decision-makers involved in the maritime delimitation and commentators who studiously followed the process of decision-making concerning the delimitation of maritime boundaries from 1969 through to today.[13] Second, it is necessary to find some way out or solution to this inevitable problem arising from the indispensable recourse to the principles of equity. For this we could return to Jennings himself who indicated in another context, that the way out lies in attempting to establish "a structured and a predictable system of equitable procedures" as an "essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate".[14] This, in essence, is the yardstick by which the majority's decision concerning the adjustment of the provisional equidistance line in this case – like in all other cases where adjustments on grounds of equity were and will be made

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11 E. Lauterpacht comes to the same conclusion when he noted that when one refers to equity or equitable principles, as opposed to what is fair or reasonable, which in some cases may seem synonymous, "we are occupied with much vaguer or more relative, and more closely comparable with the concept of *ex aequo bono* as it appears in Article 38(2) of the Statue of the International Court of Justice". *Ibid*., p. 34

12 *Ibid.*

13 See P. Weil, THE LAW OF MARITIME DELIMITATION– REFLECTIONS (Cambridge: Grotius Publications, 1989); *Gulf of Maine (Canada/United States), Dissenting Opinion of Judge Gros, I.C.J. Reports 1984,* pp. 360-390; *Continental Shelf* (*Libya/Malta), Dissenting Opinion of Judge Oda, I.C.J. Reports 1985*, pp. 123-171; D.W. Bowett, "The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches", B.Y.I.L. 49 (1) (1978), pp. 1-29; E. Lauterpacht, *supra* note 5; J. Charney, "Ocean Boundaries between Nations: A Theory for Progress", 78 A.J.I.L. 582 (1984).

14 See R.Y. Jennings, "Equity and Equitable Principles", in: *ANNUAIRE SUISSE DE DROIT INTERNATIONAL,* Vol. XLII (1986),pp. 27-38, p. 38. E. Lauterpacht makes in this regard what he himself considered as a novel suggestion when it comes to make adjustments on the basis of equity. He suggested that arbitrators, judges or conciliators involved in resolving maritime boundary disputes might consider "a two-stage procedure – a procedure which involves not only the traditional techniques of written and oral pleadings but also a preliminary assessment by the Court of the main elements of the case, which, in its judgment, are going to affect its decision. And that preliminary assessment could be conveyed privately to the parties. They could be given an opportunity for further argument specifically related to the issues which appear to control the court's decision. Then and only then will the court be sufficiently informed to decide on the equities of the matter". E. Lauterpacht, *supra* note 5, p. 46. It is a very interesting suggestion which promotes a more interactive engagement between the members of the Tribunal and the parties to the dispute. It resembles more a procedure of conciliation. But, if not taken in the right spirit, it could also delay the proceedings of the Tribunal from reaching its logical conclusion in an expeditious manner and could even be counter-productive, if the parties were to repeat their earlier positions. Nevertheless, this is a suggestion that is open to further evaluation and even adoption in a suitable case.

– would be judged.[15] I regret to say that while the Award sets out well many of the relevant considerations that should go into achieving an equitable solution, it does not succeed, as will be explained below, where it matters most: in adequately meeting the test of transparency, certainty and predictability when it comes to adjusting, as it did, the provisional equidistance line in this case.

6. This brings us to the central issue of identifying the criteria necessary to achieve an equitable solution and then applying those criteria to the facts of the delimitation at hand. As a first step, the Award constructs the provisional equidistance line using geometrically objective criteria that are also appropriate for the geography of the present case. The Award then examines whether there are any relevant circumstances that would require an adjustment of the provisional equidistance line so constructed. In this respect, the Award identifies a "cut-off" effect on Bangladesh, both within and beyond the 200 nm from its coast, and finds that the concavity of Bangladesh's coast constitutes a relevant circumstance that would warrant an adjustment of the provisional equidistance line. The Award dismisses factors such as coastal instability and the dependency on fishing claimed by Bangladesh as relevant circumstances. The Award then goes on to adjust the provisional equidistance line and to delimit the maritime boundary as follows:

> the maritime boundary between Bangladesh and India is a series of geodetic lines joining the following points in the order listed (all coordinates in WGS-84):
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> | Point No. | Latitude | Longitude |
> |---|---|---|
> | Land Boundary Terminus (Delimitation Point 1) | 21° 38′ 40.2″N, | 89° 09′ 20.0″E |
> | Delimitation Point 2 | 21° 26′ 43.6″N, | 89° 10′ 59.2″E |
> | Delimitation Point 3 | 21° 07′ 44.8″N, | 89° 13′ 56.5″E |
>
> then along a geodetic line that has an initial azimuth of 177° 30′ 00″ until it meets the maritime boundary established by the International Tribunal for the Law of the Sea in paragraph 505 of its judgment of 14 March 2012 in the *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*.
>
> (Award, paragraph 509)

[15] Judge Oscar Schachter, judge in the case concerning the delimitation of maritime areas between Canada and France, echoes much of what Judges Jennings and Oda in general are concerned about in the "subjectivity" of delimitation decisions based on principles of equity. He notes in particular that, citing the ICJ award in 1985 in the case of *Libya/Malta*, both equity and law required "a certain generality and certain consistency; otherwise it [the decision] will not fulfil the essential functions of the law: certainty and predictability…", and adds that unique features of a case or the so-called relevant circumstances by themselves are of no aid and their relevance and weight would have to be determined in each case. In this respect, as he stressed, the "decision should not be dependent on the 'eye of the judge'". See O. Schachter, "Linking Equity and Law in Maritime Delimitation", in: N. Ando et.al. (eds.), LIBER AMICORUM JUDGE SHIGERU ODA (Kluwer Law International, 2002), pp. 1163-1168, p. 1168.

7. For the reasons explained below, I regret that I must disagree with the adjustment decided on by the majority of the Tribunal. Before I proceed to elaborate further, I must register my reservation, if not total disagreement, on the matter of selection of appropriate coastlines and relevant area as part of the process of achieving an equitable solution. It is now well-established that, as a preliminary step in arriving at an equitable solution on the basis of international law, the Tribunal should first identify the relevant coastal segments which in turn would establish the relevant area to be delimited. At the outset, it must be acknowledged that the process of selecting the relevant coasts and relevant areas cannot be too precise or exact, but involves some measure of discretion. The main purpose of this exercise is, first, to provide a rough idea of the disputed area and, second, to provide a reference point for the conduct of the "disproportionality" test in terms of the ratios of the relevant coasts and the areas allotted, eventually as a result of the decision, to the parties. Nevertheless, the construction of the relevant area should first of all correspond to the disputed area and should exclude that which is clearly not disputed. It should not include in addition any areas in which the interests of third parties are likely to be affected. Further, as a minimum, there are certain well-established principles that govern this initial phase of the selection of relevant coasts for the purpose of identifying the relevant area. The applicable jurisprudence on this matter is stated by the ICJ in the *Black Sea* case thus:

> first, that the "land dominates the sea" in such a way that coastal projections in the seaward direction generate maritime claims […]; second, that the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other Party. Consequently "the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court" […]. The Court therefore cannot accept Ukraine's contention that the coasts of Karkinits'ka Gulf form part of the relevant coast. The coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania's coast. The coasts of Karkinits'ka Gulf do not project in the area to be delimited. Therefore, these coasts are excluded from further consideration by the Court. The coastline of Yahorlyts'ka Gulf and Dnieper Firth is to be excluded for the same reason.[16]

8. The majority generally, but not quite, follows these principles in the construction of the relevant area. For example, the majority in selecting the relevant Indian coast begins from the land boundary terminus with Bangladesh and extends the relevant coast up to the Sandy Point, a point further to the southwest of Devi Point. The majority does this, even though Devi Point is recognized to have projections not only to the east, towards the coast of Bangladesh, but also towards the southern portion of the Bay of Bengal, overlapping with projections from that coast

[16] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 61-134, paras. 99-100.

of Bangladesh within and also beyond 200 nm.[17] Accordingly, the Court could have chosen to limit the relevant area on the Indian side at Devi Point, instead of including the section from that point to Sandy Point. The Tribunal's explanation, at paragraph 301 for choosing Sandy Point is obscure, even as it admits that the "projection of the coast of one Party can easily be overlapped by projections of multiple segments of the coast of the other. The task facing the Tribunal is simply to identify those sections of coast that generate projections overlapping those of the coast of the other party". And the main reason, by the same token, the coastline further southwest of Sandy Point was rejected, according to the Award, is that the angles at which these projections emanate are too acute "to the general direction of the coast". This is a consideration which is not part of the *aquis judiciare*, as noted above. The important point is to construct the relevant area as strictly as possible to denote the disputed area as closely as possible and not inflate it with figures which in the end would not do proper justice for the conduct of the so-called "disproportionality test". Equally, projections from the northern tip of the Andaman Islands would not, in my view, qualify for inclusion in the relevant area for the purpose of delimitation, given the fact that that coastal front is neither adjacent nor opposite to the coast of Bangladesh. For these reasons, I consider that the construction of the relevant coasts and the relevant area for the purpose of delimitation is not as accurate as it should have been. This is a different matter, however. Whichever way the relevant area is constructed, as the Award rightly notes, it has no bearing on the merits of the claims of the Parties, and the main purpose of the relevant area is in any case, as noted, already very limited.

9. In the event, my main objection relates to the considerations that governed the adjustment of the provisional equidistance line. First, I differ with the majority on the finding that the adjustment should start at Delimitation Point 3 (21° 07′ 44.8″N, 89° 13′ 56.5″E), as that point lies well before a significant "cut-off" effect occurs. Second, I am not convinced that the Award has reasoned its justification of the azimuth of the adjusted line (177° 30′ 00″) in a satisfactory manner. Third, the azimuth chosen by the majority (177° 30′ 00″) incidentally is similar to the azimuth of the bisector line proposed by Bangladesh, (180°). This is, in my view, arbitrary and intrinsically runs counter to the majority's own reasoning which effectively rejected a bisector as a matter of law.

10. Finally, I strongly disagree both as a matter of law and policy with the creation of a "grey area" as a result of the adjustment the majority made to the provisional equidistance line, in a not-insignificant expanse of the Bay of Bengal. In this respect the majority takes inspiration from

[17] For illustration, see India's Counter Memorial, sketch map No.6.7, p. 143.

the only other case in which such a grey area was created by a Tribunal as part of achieving an equitable solution, that is, the ITLOS decision in the *Bangladesh/Myanmar* case (2012).

11. Before elaborating on these four points, I will briefly discuss the legal principles that have guided the International Court of Justice in adjusting the provisional equidistance line drawn in prior delimitations. At the outset, it must be emphasized that the adjustment of the provisional equidistance line is an exercise that is governed by law and has to be conducted within the limits set by the geographical context and coastal configuration. Different methods or techniques may play a role in achieving an equitable solution. Where islands or other anomalous features have been involved, they have been ignored where appropriate,[18] enclaved in some cases, or given half, full or greater than full effect in others.[19] In the case of a State with a concave coast and situated in the middle of two other neighboring States, the ICJ in the *North Sea Continental Shelf cases* analyzed the "cut-off" effect that would result from boundary lines drawn on the basis of equidistance.[20] In that case, the ICJ described a "cut-off" as an area in "the form approximately of a triangle with its apex seaward and, as it was put on behalf of the Federal Republic, 'cutting-off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle".[21] The ICJ decided that, when an equidistance method produces "extraordinary, unnatural or unreasonable" results, delimitation methods other than equidistance should be considered or adjustments should be made to the provisional equidistance line.[22]

12. While it endorsed the principle of delimitation on the basis of equity, the ICJ in *Tunisia/Libya* laid down several principles to limit or restrict the role that equity could play in the adjustment of a provisional equidistance line, emphasizing that the application of equitable principles should not amount to a decision *ex aequo et bono.*[23] These principles are also well-expressed by the ICJ in *Libya/Malta,* which emphatically rejected the idea that equity could amount to a refashioning of geography or the inequalities inherent in nature:

> That equitable principles are expressed in terms of general application, is immediately apparent from a glance at some well-known examples: the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the

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18 For instance, Saint Martin's Island was ignored by ITLOS for the purpose of delimitation in *Bangladesh/Myanmar*. See *Bangladesh/Myanmar, supra* note 1, para. 319.

19 *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*), *Judgment, I.C.J. Reports 2012*, pp. 624-720, paras. 180 & 183; *Anglo-French Continental Shelf Arbitration* (*France/United Kingdom*), 54 ILR 11 (1977), para. 249.

20 *North Sea Continental Shelf, supra* note 6, para. 8.

21 *Ibid*.

22 *Ibid*.

23 *Continental Shelf (Tunisia/Libya), Judgment, I.C.J. Reports 1982*, pp. 18-94, para. 71.

> related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, "equity does not necessarily imply equality" *(I.C.J. Reports 1969,* p. 49, para. 9), nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice.[24]

13. These are not merely general principles; they are criteria that operate as limits within which an equitable solution can and should be lawfully achieved. When properly applied, they contribute to transparency, certainty and predictability, goals that properly distinguish equity in law from *ex aequo et bono.* The Award itself recognizes several of these principles as appropriate in the present case and stresses that maritime delimitation should not impinge upon the interests of third parties.[25]

Delimitation Point 3

14. Against the above background it is appropriate to examine the specific terms of adjustment. To begin, I quote from the arbitral tribunal's finding in *Barbados v. Trinidad and Tobago*: "[t]here is next the question of where precisely the adjustment should take place. There are no magic formulas for making such a determination and it is here that the Tribunal's discretion must be exercised within the limits set out by the applicable law".[26] I also recall the ITLOS decision in *Bangladesh/Myanmar* that "in view of the geographical circumstances in the present case, the provisional equidistance line is to be deflected at the point where it begins to cut off the seaward projection of the Bangladesh coast".[27]

15. In the Award, the adjustment of the provisional equidistance line starts at Delimitation Point 3 (21° 07′ 44.8″N, 89° 13′ 56.5″E). This adjustment is justified on the ground that there is a gradual decrease in the area allotted to Bangladesh as the equidistance line proceeds seaward, producing a full "cut-off" on the southward projection of Bangladesh's coast when the provisional equidistance line meets the ITLOS delimitation line in the continental shelf beyond 200 nm. In the view of the majority, the decrease in the area allotted to Bangladesh is noticeable

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24 *Continental Shelf* (*Libya/Malta), Judgment, I.C.J. Reports 1985*, pp. 13-58, para. 46.

25 On the importance of protection of the third party interests, see *Romania* v. *Ukraine*, *supra* note 16, paras. 112 & 114; *Nicaragua v. Colombia, Declaration of Judge Xue, I.C.J. Reports 2012*, pp. 746-750, paras. 11-14; *Nicaragua v. Colombia, Separate opinion of Judge Donoghue, I.C.J. Reports 2012*, pp. 751-761, para. 29; *Nicaragua v. Colombia, Declaration of Judge ad hoc Mensah, I.C.J. Reports 2012*, pp. 762-767, para. 13; and *Nicaragua v. Colombia, Declaration of Judge ad hoc Cot, I.C.J. Reports 2012*, pp. 768-771, paras. 9-13.

26 *Barbados v. Trinidad and Tobago*, *Award, PCA Awards Series (2006)*, para. 373.

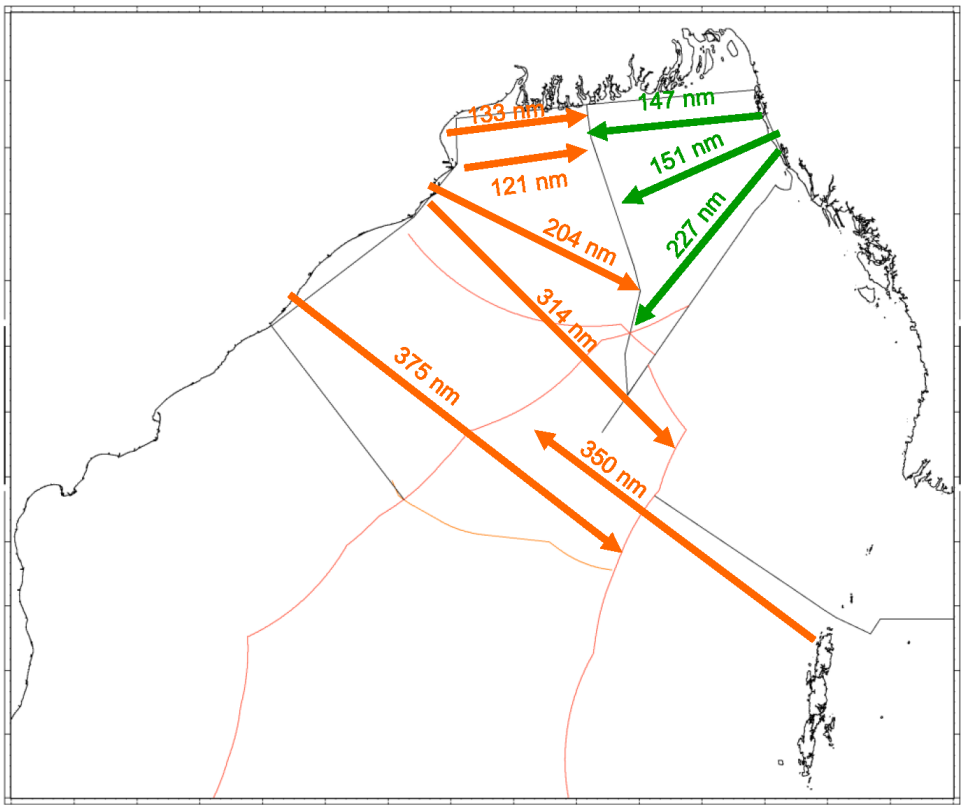
27 *Bangladesh/Myanmar*, *supra* note 1, para. 329.

from Delimitation Point 3 on the provisional equidistance line. But at this stage the majority did not make any effort to assess the size of areas that are allocated to Bangladesh and India on the basis of the provisional equidistance line. Yet, the majority favoured adjusting the equidistance line from that point.

16. With great respect, I disagree with the majority that Delimitation Point 3 represents the point at which the provisional equidistance line requires adjustment. While it is evident that a State with a concave coast and situated in the middle of two other coastal States would suffer a "cut-off", it is necessary to examine the nature of cut-off and where in the disputed area it actually occurs. In the context of adjustment, the Award itself explains that it is only an unreasonable "cut-off" that may warrant a departure from the provisional equidistance line and that the Tribunal must nevertheless take care to avoid creating a new "cut-off" as a result of the adjustment (Award, paragraphs 419-421). During the oral hearing, even Bangladesh noted that a "cut-off" is one of degree and that there is no generic prohibition against cut-off, which is an inevitable consequence of the delimitation process under certain geographical circumstances[28]. As noted above, the ICJ in the North Sea Continental Shelf cases supported this view and found that a "cut-off" merits adjustment when the equidistance method produces "extraordinary, unnatural or unreasonable" results.

17. In the present case, the cut-off occurs at a point anywhere from 240-290 nm depending on the point chosen along the coast of Bangladesh to measure the distance (for instance, Kutubdiya lighthouse lies 290nm from the point at which the cut-off occurs). Whereas some deflection is noticeable in the direction of the provisional equidistance line from point Prov-3 to the east, it is situated closer to the coast and far from the 200 nm limit of Bangladesh beyond which the only actual cut-off occurs. Even more significant is the fact that Delimitation Point 3 is situated in an area in which, when viewed with reference to points on the eastern and western shores, the provisional equidistance line actually allocates to Bangladesh a greater share of the bay than to India. This observation can be demonstrated by the sketch map below:

[28] See statement of Professor James Crawford, Hearing Tr., 554: 18-19.



18. Further, there are situations where a "cut-off" may occur as a result of other factors, even when the coast involved is not concave, but among other things, because of the existence of a maritime boundary with a third State. As the ICJ observed in the *North Sea Continental Shelf Cases*, "[t]he effect of concavity could of course equally be produced for a country with a straight coastline if the coasts of adjacent countries protruded immediately on either side of it."[29] Therefore, in the present case where both the concavity of Bangladesh's coast and its maritime boundary with Myanmar are relevant factors, the resulting "cut-off" effect cannot be entirely attributed to the concavity of the coast, while according to the Award it is that cut-off alone that warrants adjustment, and then only to the extent that the cut-off is "unreasonable". In comparison, the cut-off that the Court in the *Continental Shelf Cases* (1969) found to merit adjustment occurred at 80 nm, close to the German coast (which, incidentally, is twice as long as the combined coasts of its two neighbors). One important message of this case, which is often referred to by the Parties, must be noted. That is, cut-offs that occur closer to the coast merit, taking into consideration other relevant circumstances, greater adjustment on account of equity than do cut-offs that occur further to seaward. In other words, common sense and good judgment both postulate that the greater the distance from the coast at which a cut-off occurs, the lesser the area it requires by way of an adjustment to accomplish equity.

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[29] *North Sea Continental Shelf cases*, *supra* note 6, para. 8.

19. As depicted in the sketch map above, the provisional equidistance line as it travels southward from point Prov-3 exhibits a deflection towards the eastern coast of Bangladesh with effects that become a bit more pronounced at a point below provisional point Prov-4 and above provisional point Prov-5. From there on, the provisional equidistance line has an increasingly prominent effect on the seaward projection of the coast of Bangladesh, thanks to the maritime boundary it now has with Myanmar, until it cuts Bangladesh off entirely and terminates at a distance of roughly 250 nm from the coast where it meets that boundary set by the decision of the ITLOS. In my view, it is only from this point at which the line's effects become pronounced (20° 09′ 00″N, 89° 34′ 50″E) that the provisional equidistance line should have been adjusted, even if we follow the logic of the majority, which I could have been persuaded to accept to achieve an equitable solution. I come to this conclusion, not because Bangladesh is losing significantly in the Bay on account of the provisional equidistance line, which appears in fact to be more favorable to Bangladesh than to India, or because the cut-off it suffers at a distance of 250 nm from its coast comes any closer to being "extraordinary, unnatural or unreasonable", to meet the test laid down by the *Continental Shelf Cases* (1969), but because the exercise of a margin of appreciation by the majority may then appear more defensible as an exercise to achieve equity within bounds of law.[30] On this more below.

The 177° 30′ 00″ Azimuth and the 180° Bisector

20. With respect to the manner in which the adjustment of the provisional equidistance line is made, paragraph 478 of the Award provides as follows:

> To ameliorate the excessive negative impact the implementation of the provisional equidistance line would have on the entitlement of Bangladesh to the continental shelf/exclusive economic zone and the continental shelf beyond 200 nm and to achieve an equitable result, the Tribunal decides that the adjusted line delimiting the exclusive economic zone and the continental shelf between Bangladesh and India within and beyond 200 nm is the azimuth of 177° 30′ 00″ from Prov-3 until this line meets with the maritime boundary established by the International Tribunal for the Law of the Sea to delimit the exclusive economic zone and the continental shelf between Bangladesh and Myanmar within and beyond 200 nm.

21. It is self-evident from the text above that the Award offers no explanation for choosing the 177° 30′ 00″ azimuth and leaves one to guess at the loss to Bangladesh arising from the provisional

[30] In exercising its margin of appreciation, the majority appears to have kept in view the proposals for adjustment made by Bangladesh. It may be noted that Bangladesh's proposal, by way of adjustment of the 180 degree bisector angle, which it favored as an initial or provisional line of delimitation, would give it an additional area of 25, 069 sq.km. This is similar to the space which Bangladesh gained to the east abutting Myanmar, which is about of 25,654 as a result of the decision by ITLOS. See Bangladesh's Reply, para. 4.148.

equidistance line, which the Award termed as causing "excessive negative impact" on it. It is, after all, common knowledge that not all coastal States are endowed with wide and generous coastal fronts (not to speak of those landlocked States with no coast whatsoever), which would benefit from the maritime delimitation to the same extent as those with such long coasts. In addition, the presence of anomalous features and the protruding coastlines of adjacent States limit the extent of the area a coastal State would receive by way of delimitation. Take the case of Germany itself, which given its geographic situation, could not extend its maritime area beyond 200 nm because it has to share the available maritime area not only with adjacent States but also with the United Kingdom which is has an opposing coast across the North Sea. Under the circumstances, the simplistic explanation offered for this azimuth in the Award is highly unsatisfactory. This will be left, in the absence of any verifiable factors or criteria of what the Tribunal did, to one's imagination. This difficulty is compounded, in my view, by the fact that this azimuth effectively directs from Delimitation Point 3 the rest of the course of the final boundary line. If an azimuth of 177° 30′ 00″ could achieve an equitable solution in the present case, why cannot an azimuth of 177° 20′ 00″ or 177° 40′ 00″ achieve the same objective? In this respect, I note that the 177° 30′ 00″ azimuth line nearly matches a geodetic line connecting Delimitation Point 3 with the intersection of the ITLOS delimitation line and India's submission to the Commission on the Limits of the Continental Shelf (the "CLCS"). The difference in azimuth between these two lines is less than 0.5°.

22. Further, the 177° 30′ 00″ azimuth constructed by the majority comes very close to (and indeed nearly matches) the 180° bisector claimed by Bangladesh. In my view, it is unacceptable for the Tribunal, to adopt, by way of adjustment, a line that so closely approximates a 180° bisector which it rejected as a method of delimitation. As stated by Judge Cot in his separate opinion in *Bangladesh/Myanmar*, "[t]he re-introduction of the azimuth method deriving from the angle-bisector theory results in mixing disparate concepts and reinforces the elements of subjectivity and unpredictability that the equidistance/relevant circumstances method is aimed at reducing".[31] For the same reasons, I find the final adjusted maritime boundary line, given the similarity between the azimuth chosen by the majority (177° 30′ 00″) and the azimuth of the bisector line proposed by Bangladesh (180°), to be flawed.

Adjustment of the Provisional Equidistance Line

23. I understand and can sympathize with the purpose of the adjustment (i.e. the 177° 30′ 00″ azimuth) evident in the Award: to allocate to Bangladesh an area that the majority considered

[31] *Bangladesh/Myanmar, Separate opinion of Judge Cot*, p. 8.

reasonable and workable for the purpose of exploring and exploiting the resources of the exclusive economic zone and continental shelf. But cases may be cited where the adjustments made created, as in the case of *St Pierre et Miquelon* case, only narrow corridors for the purposes of access. In addition, the areas allotted as a result of adjustment must be seen in the light of the over-all areas allotted in the exercise of delimitation and not in isolation. I cannot underscore, therefore, with greater emphasis that these considerations are purely arbitrary and cannot be justified by any principle of law. I accept that the task of adjusting a provisional equidistance line requires that the Tribunal be accorded a certain margin of appreciation. But it appears here that the majority has not been guided by the general principles governing the application of equity that has, in other cases, restricted the range within which an equitable solution could be achieved. I have described these principles above. Indeed, the Award itself records these principles, but does not give them any real weight or consideration in fashioning the adjustment. Instead, the majority subjectively shifted the provisional equidistance line to the 177° 30′ 00″ azimuth, the direction of which was not mandated by any observable criteria.

Grey Area

24. As described in paragraphs 498-508 of the Award, the line so adjusted creates a "grey area", i.e., an area that falls within the continental shelf of Bangladesh and also within the 200 nm EEZ of India. Apart from the difficulties inherent in having concurrent sovereign rights affecting a single area, one further unintended and problematic consequence of this grey area is that it actually overlaps in part with the grey area created by the ITLOS decision in *Bangladesh/Myanmar*. As a result, within this overlapping portion of the grey areas (or "double grey area", if you will), Bangladesh would have exclusive rights over the continental shelf and India and Myanmar would have to share or agree to apportion the rights concerning the EEZ. I cannot accept the notion of a grey area, or the prospect of utilizing it as convenient legal device to provide by way of adjustment an area which is otherwise beyond the grasp of the Tribunal to award in the present case (indeed, even going so far as to permit the existence of a double grey area). The creation of a grey area is entirely contrary to law and the policies underlying the decision taken in UNCLOS to create the EEZ as one single, common maritime zone within 200 nm which effectively incorporates the regime of the continental shelf within it.

25. I note that in creating a grey area, the Award is obviously influenced by the only instance of this that we have until now, that is the decision of the ITLOS in *Bangladesh/Myanmar* (see Award, paragraphs 499-508). The majority substantially borrows the rationale adopted by the ITLOS judgment in support of its own action. As in the case of the ITLOS decision, the boundary line

in the grey area delimits only the continental shelves of the Parties, on the grounds that Bangladesh has no entitlement to an EEZ in this area.[32] The Award also echoes ITLOS in noting that, pursuant to article 56(3) of the Convention, the rights of a coastal State in respect of the seabed and subsoil in the EEZ are to be exercised in accordance with the regime for the continental shelf.[33] Further, it notes that article 63 excludes sedentary species from the regime of EEZ.[34] With respect to practical matters concerning the grey area, the Award, like the ITLOS decision, encourages the Parties to conclude further agreements or to create a cooperative arrangement in order to ensure the proper exercise of their respective rights in that area.[35]

26. With great respect, in my view, the ITLOS decision on the grey area was ill-conceived, in as much as the majority treated it as a by-product of the adjustment that they thought fit to make, which awarded to Bangladesh an area of continental shelf beyond 200 nm. In so doing they did not have much support from either of the parties, and both seemed to have even expressed their opposition to the concept.[36] In the process that Tribunal appears to have misconstrued the true nature and juridical significance of the EEZ. That Tribunal justified the creation of a grey area thus:

(i) the judgment is only delimiting the continental shelves common to both the Parties and not addressing the parties' EEZ rights in the superjacent waters, suggesting thereby that such rights are different and separable;

(ii) the grey area arises as a consequence of delimitation; and any delimitation may give rise to complex legal and practical problems, such as those involving transboundary resources;

(iii) the judgment refers to different articles dealing in some respects with the exercise of high sea freedoms, and others dealing with specific resources of the continental shelf and sedentary fisheries and its delimitation, suggesting one or two things. First that the rights States enjoy over the continental shelf are different from the rights they have over the

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32 *Bangladesh/Myanmar*, *supra* note 1, para. 471.

33 *Ibid*., para. 473.

34 *Ibid.*

35 *Ibid*., para. 476.

36 The ITLOS decision notes "The Parties differ on the status and treatment of the above-mentioned "grey area". For Bangladesh, this problem cannot be a reason for adhering to an equidistance line, nor can it be resolved by giving priority to the exclusive economic zone over the continental shelf or by allocating water column rights over that area to Myanmar and continental shelf rights to Bangladesh"(*Ibid.*, para. 465). For Myanmar, "the solution submitted by Bangladesh is untenable, the problem of a "grey area" does not arise in the present case, because equitable delimitation does not extend beyond 200 nm" (*Ibid*., para. 470).

resources of the EEZ. Second, it is common under the law of the sea for different regimes to operate in the same area.

As these are the same arguments this Tribunal has also made in support of the creation of the grey area in this case, they require a thorough review.

27. Ever since the concept of the EEZ has emerged as a concept of international law and as part of the law of the sea, it has been a *sui generis* concept, which acquired the status of customary international law in the shortest time span possible, even as the Third UN Conference to the Law of the Sea was putting the final touches on the Convention in 1981.[37] The EEZ is a single juridical entity that combines three different resource regimes: living resources, non-living resources, and other uses involving or generating economic value out of this area. When the Court in the *Continental Shelf (Libya and Tunisia)* case attempted to delimit only the continental shelf and was not ready to accept that the same delimitation applies to the EEZ (which by that time, as Oda noted, acquired the status customary law), Judge Evensen, also a prominent player in the Third UN Conference on the Law of the Sea, had this say:

> The emergence of the 200-mile Exclusive Economic Zone concept in Part V of the draft convention is not based on the concept of natural prolongation, but on the concept that a coastal State should have functional sovereign rights over the natural resources in a belt of water and sea-bed 200 miles seawards whether the coastal State concerned possesses a continental shelf in the traditional sense or not. This new development has been accepted in recent State practice. This 200-mile economic zone concept refers not only to the resources of the seas (living or non-living), but also to the natural resources on or in the sea-bed. To this extent it is also in practice a continental shelf concept.[38]

28. "Note should likewise be taken of the fact", Judge Evensen pointed out, "that the provisions concerning the delimitation of the Exclusive Economic Zones in Article 74 of the [then] draft convention and the provisions on the delimitation of continental shelves between States with opposite or adjacent coasts, contained in Article 83, are identical. Certain questions appear to arise because of the inter-relation between the new concept of exclusive economic zones and the continental shelf concept, the more so since certain new trends in Article 76 of the draft convention seem to strengthen this inter-relation and interdependence."[39] "The first question which may be raised", according to Judge Evensen, "is whether the concept of natural

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37 See observations of S. Oda, who noted that "[E]ven apart from the provisions of the 1981draft convention, the Court need have qualms in acknowledging the general concept of the exclusive economic zone as having entered the realm of customary international law." Shigeru Oda, "Delimitation of a Single Maritime Boundary: The Contribution of Equidistance to Geographical Equity in the Interrelated Domains of the Continental Shelf and the Exclusive Economic Zone", in: INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO, Vol.II (1987), pp. 349-362, p. 353.

38 *Continental Shelf (Tunisia/Libya), Dissenting Opinion of Judge Evensen, I.C.J. Reports 1982*, pp. 278-323, para. 9,

39 *Ibid.*

prolongation has not been weakened by these recent trends within the 200-mile zone".[40] Another question, he noted, which appears to arise is "whether different lines of delimitation are conceivable for the Exclusive Economic Zone and the continental shelf in such a case, bearing in mind that the exclusive economic zone concept laid down in Part V of the draft convention also comprises the natural mineral resources of the sea-bed and its subsoil, that is the natural resources of the continental shelf".[41]

29. The development of the exclusive economic zone concept, Judge Evensen continued,

> is not an insignificant element in this respect and might perhaps influence the practical method of delimitation. In this context, note should be taken of a development in the Law of the Sea Conference and in the domain of State practice which has weakened the practical impact of the concept of natural prolongation through the development of that of the 200-mile economic zone; this aside from the practical difficulties of basing a line of delimitation for a joint shelf on the natural prolongation thereof when the two adjacent countries also share the same landmass. […] I feel that it is hardly conceivable in the present case to draw a different line of delimitation for the exclusive economic zone and for the continental shelf. The areas to be delimited will in both instances be situated well inside the 200 nautical miles 'from the baselines from which the breadth of the territorial sea is measured'. To my mind, it is somewhat doubtful that a practical method for the delimitation of the areas concerned should be based solely or mainly on continental shelf considerations.[42]

30. Thus, it may perhaps be a too restrictive approach in the present case to maintain, as Judge Evensen concluded, that "the 'principles and rules of international law which may be applied' for the delimitation of continental shelf areas must be derived from the concept of the continental shelf itself".[43]

31. It is clear from the above, within 200 nm from the coast, the sovereign rights of a coastal State over the water column and the seabed and its subsoil are considered as two *indispensable and inseparable parts* of the coastal State's rights in the EEZ.[44] As is now evident, the entitlement of coastal States no longer rests either on the concept of natural prolongation and adjacency or on depth or exploitability criterion, but is solely dependent on the 200 nm distance criterion.[45] This

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40 *Ibid.*

41 *Ibid.*

42 *Ibid.*, para. 10.

43 *Ibid.*

44 *Continental Shelf (Tunisia/Libya), Separate Opinion of Judge Jiménez de Aréchaga*, *I.C.J. Reports 1982*, pp. 100-142, para. 55.

45 See J. Charney, "International Maritime Boundaries for the Continental Shelf: The Relevance of Natural Prolongation", in: N. Ando et.al. (eds.), LIBER AMICORUM FOR JUDGE SHIGERU ODA, (Kluwer Law International, 2002), pp. 1011-1029. Referring to the use of the concept of natural prolongation as part of the definition of the continental shelf in Article 76(1) of 1982 LOS Convention, and relying on the examination of the drafting history of that article by Judge Shigeru Oda in his dissenting opinion in the *Libya/Malta* case, Charney noted thus: "He (Oda, J.) concludes accurately that the language of Article 76(1) was intended to provide all coastal States an entitlement to a continental shelf of 200 nautical miles

more than anything else unites the legal regimes of the exclusive economic zone and the continental shelf, within 200 nm, since the adoption of the 1982 Law of the Sea Convention. The unity of this legal basis is now well-recognized, with States and Tribunals engaged in the delimitation of the EEZ and the continental shelf routinely seeking or establishing a common maritime boundary, without regard to the differing nature of the resources of the superjacent waters, the seabed and its subsoil.

32. That the legal regulation of the resources in the superjacent water column differs from the legal regulation of the resources of the seabed and subsoil under the Convention simply reflects the fact that the differing nature of these resources requires different forms of regulation. The same holds true for natural resources within the national jurisdiction of a coastal State. In this regard, it is apt to quote the ICJ's observation in the *Libya/Malta* case:

> Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the regime laid down for the continental shelf. Although there can be a continental shelf, where there is no exclusive economic zone, there cannot be an exclusive economic zone without corresponding continental shelf. It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone.[46]

This clear statement on the juridical concept of the EEZ negates any conclusions the Award draws to the effect that the continental shelf is a single unit and that no distinct inner continental shelf and an outer continental shelf exist. That is only true partially, insofar as the resources the shelf encompasses and any regulation that goes with them. It cannot, however, hold true as far as it concerns the indivisibility of the coastal State's sovereign rights over the resources of the EEZ, as noted above.

33. It is suggested that any delimitation may give rise to complex legal and practical problems, such as those involving transboundary resources. It is not unusual, according to this argument, in such cases for States to enter into agreements or cooperative arrangements to deal with problems resulting from the delimitation. This is not a proper analogy, in my view. Transboundary resources are a natural phenomenon, and they do not admit in some cases to a neat division. Straddling resources require common arrangements in the interest of economy and efficiency. The situation with respect to the grey area, however, is not comparable with that

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regardless of the geology and geomorphology of the sea-bed and subsoil. That basis for the entitlement consequently conditions the relevant considerations for defining maritime boundaries between States with overlapping entitlements to exclude geology and geomorphology from consideration, as Judge Oda also argued in his dissent. …While all international maritime boundaries are indeed unique, rights to the resources of areas within 200 nautical miles of a coastal State's coastline are now merely a function of distance from the shore"(pp. 1026-27).

46 *Libya/Malta*, *supra* note 24, para. 34.

of the straddling resources, as grey areas are creatures of convenience and purely man-made. Delimitation to achieve an equitable solution must in any case respect legal limitations and certainly should avoid violating the existing rights of States to create new rights for other States.

34. As for the point that under the law of the sea, it is not uncommon for different regimes to operate in the same area, it may be noted that these are freedoms States enjoy over the high seas. They are inclusive rights.[47] In contrast, the rights accorded to coastal States over the EEZ are sovereign rights and exclusive rights. These have been accepted, as part of evolution of law, while preserving the freedoms of the high seas. In other words, by their very nature, they are different types of rights which admit co-existence. The same cannot be said for dividing sovereign and exclusive rights and control over resources, living and non-living as well as of economic value, in respect of which we ever so often witness disagreements and even serious political conflicts.

35. Further, as a matter of policy, international courts and tribunals should avoid delimiting boundaries in a way that leaves room for potential conflicts between the parties. The entire purpose of delimitation is to settle inter-State disputes definitively by allocating particular areas where one party can effectively exercise sovereign rights (such as exploitation) without the need for permission of another sovereign. Grey areas do precisely the opposite. The Award is itself conscious of this fact and for that reason urges the Parties, when exercising rights and duties under the Convention, to give due regard to the rights and duties of other States (Award, paragraph 507). The Award leaves it to the Parties to determine the appropriate measures associated with the concept of "due regard", which includes the conclusion of further agreements or the establishment of a cooperative agreement.

36. I respectfully disagree with this approach, on the basis that, first, it may not be possible in practice to divide the EEZ and separate the rights of one coastal State in the water column from the rights of another over the seabed and its subsoil. Second, inviting the Parties to negotiate a solution in the grey area may lead to further problems and may be considered as a failure on the Tribunal's part to delimit the maritime areas in a definitive manner. When it comes to economic and energy resources, even States with very good bilateral relations may disagree as to which should have priority for a particular purpose within the same maritime zone. Third, the grey area created by the Award will not only divide the single maritime zone (i.e. the EEZ) between two parties as in the case of ITLOS decision but among three States. It is worth noting that the risk

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[47] On the concept of inclusive uses and their co-existence with the exclusive uses of the EEZ, see P. Sreenivasa Rao, THE PUBLIC ORDER OF THE OCEAN RESOURCES: A CRITIQUE OF THE CONTEMPORARY LAW OF THE SEA (The MIT Press, 1975), ch.3 on Limits for National jurisdiction, pp. 47-75, p. 74.

of potential conflict in the grey area will only compound the already existing potential for conflict resulting from competing interests involving security, navigation, marine scientific research, as well as the protection and preservation of the marine environment.[48] Moreover, installations for the exploitation of the resources in the seabed and its subsoil inevitably affect the water column. The grey area may thus create more problems for the Parties – who are now forced to co-habit the same area – than the benefits it could potentially offer.

37. To conclude, I disagree with the majority's decision to draw a boundary line that creates a grey area based on both legal principles and policy considerations. In my view, the grey area would ill serve the purpose of the efficient, economical and ecologically sound management of ocean resources. The grey area also has the potential to exacerbate bilateral relations and pose avoidable security problems. I hope that future maritime delimitation arrangements will examine this problem more carefully and refrain from creating grey areas unless exceptional conditions so warrant, and then only with the full consent of all the parties involved. It is a pity that the Tribunal in this case did not seek the specific views of India which rightly or not assumed on the merits that this problem would not arise (Award, paragraph 502).

My Proposed Line of Delimitation

38. For the reasons explained above, I consider that the line of adjustment constructed by the majority is not supported by the general principles governing delimitation on the basis of equity; it is also not in conformity with the international law governing the sovereign rights of coastal States within 200 nm. As regards the ITLOS decision in *Bangladesh/Myanmar*, I differ with its reasoning and cannot share the view of the majority on its persuasiveness. Any decision on maritime boundaries should help a neat and final allocation of the maritime areas to the parties involved, and avoid the creation of the potential for conflict.

39. Having explained that the grey area should best be avoided, I will now turn to the question of how to draw a boundary line that would effectively eliminate the grey area in the present case, and yet meet the concerns of the majority to achieve an equitable solution. As the ICJ stated in the *Libya/Malta* case, "[t]he legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation".[49] It is clear from the Convention that the entitlement to the EEZ is based solely on distance from the coast and does not depend on other

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48 On multiple uses and conflicts, see *Ibid*., ch.5, pp. 109-165.

49 *Libya/Malta*, *supra* note 24, para. 27.

factors.[50] By contrast, the entitlement to the continental shelf beyond 200 nm is based on natural prolongation which is in turn explained and conditioned with reference to the foot of the continental slope. From the foot of the continental slope, the entitlement to the continental shelf beyond 200 nm may extend seaward a further 60 nm, or as far as "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".[51] According to the Convention, the entitlement to the continental shelf beyond 200 nm is further subject to one of two alternative limitations, namely, that the outer limits of the continental shelf shall not exceed 350 nm from the baselines or shall not exceed 100 nm from a point at which the depth of the water is 2,500 meters.[52] Having calculated the outer limits of its continental shelf, the coastal State shall submit details of the calculation to the Commission of the Limits of the Continental Shelf, the role of which is to examine the submission and to make recommendations to the coastal State.[53] The coastal State will then establish the outer limits of the continental shelf on the basis of such recommendations, which limits shall be final and binding.[54]

40. This complicated method to calculate the outer limits of the continental shelf suggests that the entitlement to the continental shelf beyond 200 nm depends on different factors and is not as absolute as the entitlement to the EEZ. It follows that the entitlement to the EEZ takes priority over the entitlement to the continental shelf beyond 200 nm. Accordingly, the line of adjustment should run from point R-1 (20° 09′ 00″N, 89° 34′ 50″E) to the intersection of Bangladesh's 200 nm limit and Myanmar's 200 nm limit (point R-2: 18° 19′ 32.0″N, 89° 36′ 31.8″E), and then to the intersection of Myanmar's 200 nm limit and India's 200 nm limit (point R-3: 18° 10′ 18″N, 89° 43′ 54″E). After the line enters the maritime area beyond 200 nm from the coast of any of the three States involved, it would turn to follow a geodetic line until it meets the point of intersection created by the ITLOS line of delimitation with India's submission to the CLCS (at point R-4: 16° 40′ 54″N, 89° 24′ 05″E). The proposed line is depicted in the diagram on the final page of this opinion.

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50 UNCLOS, Article 57.

51 UNCLOS, Article 76 (4) (a).

52 UNCLOS, Article 76 (5).

53 UNCLOS, Article 76 (8).

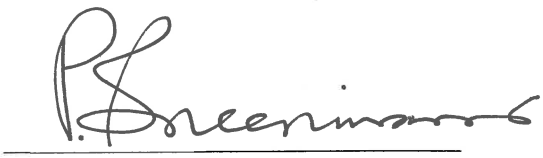
54 UNCLOS, Article 76 (8).

41. The area resulting from this adjustment would allocate to Bangladesh 7,948 square kilometers more than what would result from the unadjusted application of the provisional equidistance line established by the Award. The line so adjusted also meets the disproportionality test. This adjustment would allocate the relevant area identified by the Tribunal between Bangladesh and India in a proportion of 1 : 3.28. This is in comparison to the proportion of 1 : 1.92 between the relevant coasts of the two States, and the proportion of 1 : 2.81 achieved by the delimitation line constructed by the majority.

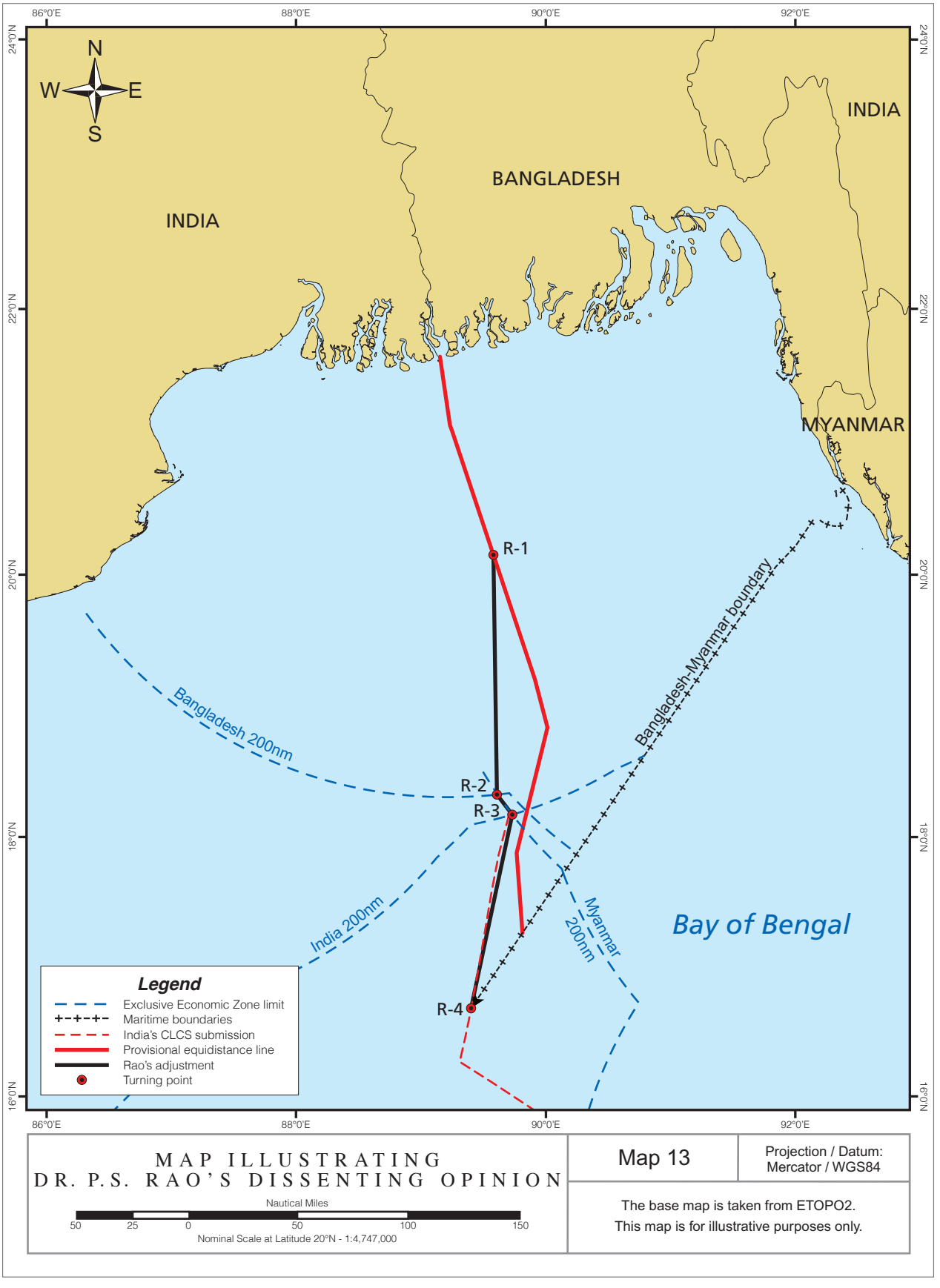
42. The difference between these two approaches should be evaluated not in terms of who gets what area and how much, but in terms of the principles on which they are based. It is a matter of satisfaction in this respect that both proposals are united behind the concept of protecting the interests of third parties. My approach and that of the majority differ because of the attempt on my part to stay within what I consider the limits set by the principles governing equity and the lack of necessary legal sanction for the creation of a grey area. In addition to legal compulsions, it is my humble submission that for practical and policy reasons the creation of such grey areas as part of maritime delimitation is not justified. I strongly believe that the methods and means used or to be used to achieve an equitable solution cannot be open ended but must be governed by principles of law that now form the *acquis judiciare*. The methods and means used in delimitation should also be in conformity with the well-established sovereign rights of coastal States over the resources of the EEZ which cannot and should not be bifurcated, even if we all agree there is only one continental shelf when it comes to the exploration and exploitation of the resources of the seabed and subsoil and the conservation and management of the sedentary fisheries traditionally associated with the resources of the continental shelf.

43. In conclusion, I wish to record my deep appreciation and respect for my very distinguished colleagues on the Tribunal, working with whom was a pleasant learning experience. I very much regret that I found myself unable to join them on all the issues on which this Award now pronounces.

Dated: 7 July 2014



Dr. Pemmaraju Sreenivasa Rao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India 200nm
Myanmar 200nm
Bangladesh-Myanmar boundary
Bay of Bengal
Legend
Exclusive Economic Zone limit
Maritime boundaries
India's CLCS submission
Provisional equidistance line
Rao's adjustment
Turning point
MAP ILLUSTRATING
DR. P.S. RAO'S DISSENTING OPINION
Nautical Miles
50 25 0 50 100 150
Nominal Scale at Latitude 20°N - 1:4,747,000
Map 13
Projection / Datum:
Mercator / WGS84
The base map is taken from ETOPO2.
This map is for illustrative purposes only.