

## INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

*United Nations Convention on the Law of the Sea—maritime boundary delimitation—methodology—territorial sea—exclusive economic zone—continental shelf beyond 200 nautical miles*

BAY OF BENGAL MARITIME BOUNDARY (Bangladesh v. India). At <http://www.pca-cpa.org>.  
UN Convention on the Law of the Sea Annex VII Arbitral Tribunal, July 7, 2014.

On July 7, 2014, an ad hoc arbitral tribunal (Tribunal) rendered its award on the dispute between Bangladesh and India concerning the delimitation of their entire maritime boundary in the northern part of the Bay of Bengal.<sup>1</sup> The award established the course of the boundary line in the territorial sea, the exclusive economic zone (EEZ), and the continental shelf within and beyond 200 nautical miles, ending a dispute that had persisted between the neighbors for more than three decades.

Proceedings in this case had been instituted on October 8, 2009, by the submission by Bangladesh to India of a written notification and statement of claim in accordance with Annex VII to the United Nations Convention on the Law of the Sea (Convention),<sup>2</sup> a treaty in force between the parties. India did not seek to contest the jurisdiction of the Tribunal or to challenge the admissibility of the case. The Tribunal was composed of Judge Rüdiger Wolfrum (president), Judge Jean-Pierre Cot, Judge Thomas A. Mensah (appointed by Bangladesh), Pemma-rajū Sreenivasa Rao (appointed by India), and Ivan Shearer. With the agreement of the parties, David H. Gray was appointed as the hydrographic expert.

From October 22 to 26, 2013 (between the completion of two rounds of written pleadings and the opening of the hearings), the Tribunal and the parties' representatives visited coastal "localities to which the case relates,"<sup>3</sup> including the base points proposed by the parties. Following hearings in The Hague in December 2013, in which all the issues of fact and law were argued by expert teams of counsel, the Tribunal gave its reasoned award some six months later.

The Tribunal decided unanimously that it had jurisdiction to identify the location of the terminus of the land boundary and to delimit the parties' overlapping claims to the territorial

<sup>1</sup> Bay of Bengal Maritime Boundary (Bangl. v. India) (UNCLOS Annex VII Arb. Trib. July 7, 2014) [hereinafter Award]. The basic documents, pleadings, transcripts, press releases, and other materials on the case are available on the website of the Permanent Court of Arbitration, <http://www.pca-cpa.org>, which acted as registry. See also *Bangladesh-India*, Rep. No. 6-23 (Add.1), INTERNATIONAL MARITIME BOUNDARIES ONLINE (Coalter Lathrop ed., 2015), at <http://referenceworks.brillonline.com> (by subscription).

<sup>2</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 3, available at <http://www.un.org/depts/los/>.

<sup>3</sup> *Id.*, Annex VII, Art. 6(b).

sea, the EEZ, and the continental shelf, both within and beyond 200 nautical miles. The applicable law was the Convention, particularly Articles 15, 74, and 83 (dealing with delimitation of the territorial sea, the EEZ, and the continental shelf, respectively), and 76 (defining the continental shelf and its limits). The Tribunal unanimously identified the terminus of the land boundary as the starting point of a pragmatic boundary across the territorial sea based on equidistance. For the EEZ and the continental shelf, the Tribunal adopted the three-stage (equidistance/relevant circumstances) methodology developed by the International Court of Justice (ICJ or Court)<sup>4</sup> and used by the International Tribunal for the Law of the Sea (ITLOS) in *Delimitation of the Maritime Boundary in the Bay of Bengal* between Bangladesh and Myanmar.<sup>5</sup> In view of the concavity of the coasts at the head of the Bay of Bengal and in the interest of avoiding “cut-off” effects to the detriment of Bangladesh and achieving an equitable result, the Tribunal, by a majority of 4-1 (Rao), departed from equidistance after about 30 nautical miles and determined that the boundary followed the azimuth of 177°30' until it met the boundary between Bangladesh and Myanmar established by ITLOS in 2012.

Bangladesh and India have adjacent mainland coasts (see map, p. 148) and a land boundary established in 1947 when independence was gained by India and Pakistan (the predecessor state of Bangladesh). The dispute arose following maritime boundary negotiations between Bangladesh and India conducted over several years. In these negotiations, India supported the use of equidistance to draw the boundary, while Bangladesh favored equitable principles to avoid being cut off from the center of the Bay of Bengal. Attempts to find a compromise were unsuccessful, as were talks between Bangladesh and Myanmar. Against that background, Bangladesh instituted separate proceedings against Myanmar and India on October 8, 2009, under Annex VII to the Convention.<sup>6</sup>

The precise location of the terminus of the land boundary was disputed by the parties. In 1925, the governor of Bengal had determined that the boundary between the two districts in question ran along “the midstream of the main channel for the time being of the rivers Ichhamati and Kalindi, Raimangal and Haribhanga till it meets the Bay.” Subsequently, in 1947, the Radcliffe Commission<sup>7</sup> adopted this line as the international boundary between India and Pakistan as part of the independence settlement. The line along the midstream was shown in black (dash-dot-dash) on the illustrative map in Annexure B to the Radcliffe award.<sup>8</sup>

The Tribunal adopted a straightforward approach. Taking the illustrative map, the Tribunal first drew a closing line across the estuary of the Haribhanga; next, it identified the junction of the dash-dot-dash line with the closing line, as the latter would have been drawn in 1947; and finally it transposed this point onto a modern chart. The Tribunal unanimously decided

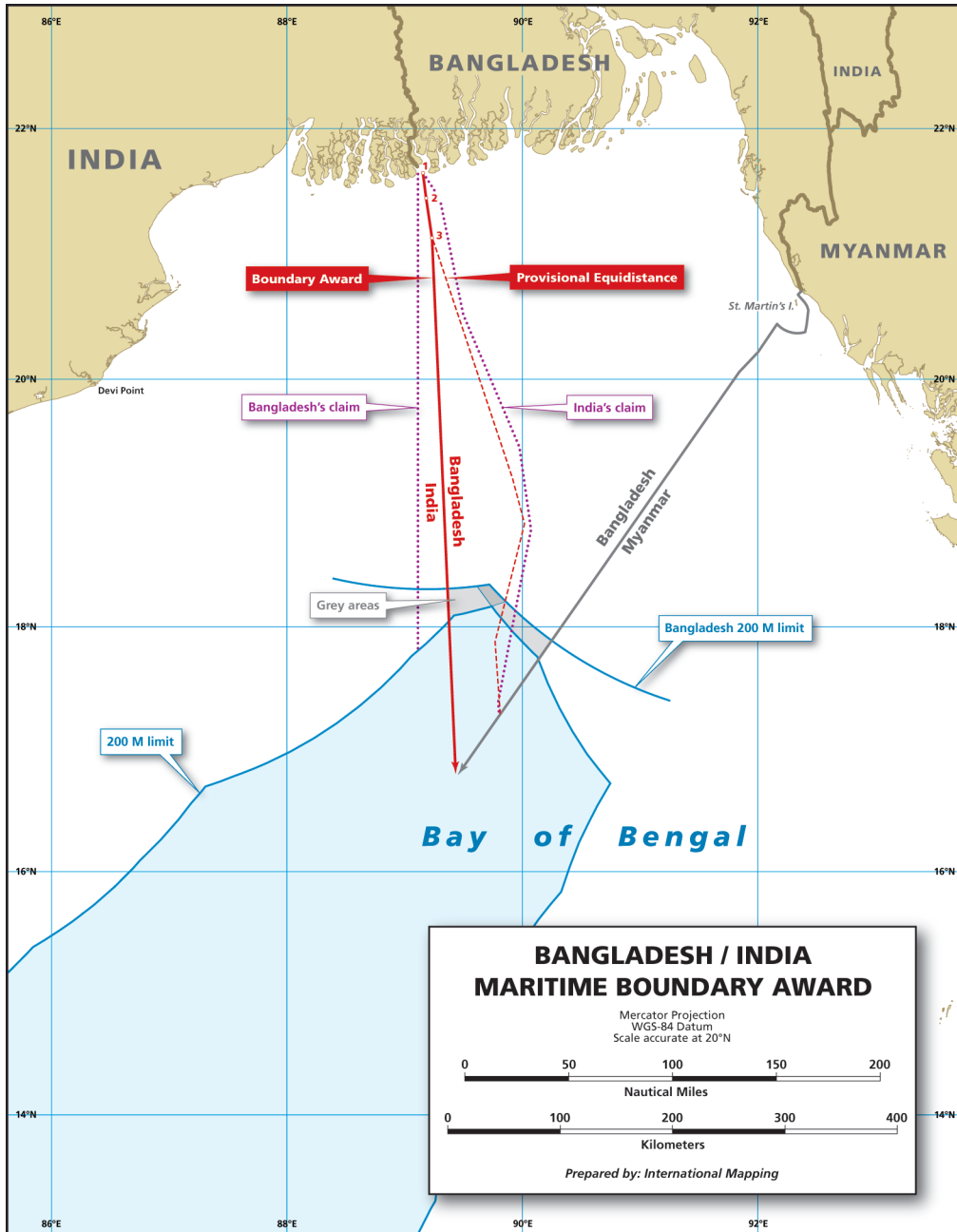
<sup>4</sup> See especially *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, 2009 ICJ REP. 61 (Feb. 3).

<sup>5</sup> *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.)*, Case No. 16, Mar. 14, 2012, 12 ITLOS Rep. 4 (2012) (reported by D. H. Anderson at 106 AJIL 817 (2012)). Judges Wolfrum, Mensah, and Cot were members of the ITLOS bench for this case.

<sup>6</sup> By agreement between Bangladesh and Myanmar, cast in the form of two declarations made under Article 287 of the Convention, the dispute relating to the delimitation of their maritime boundary was transferred to the International Tribunal for the Law of the Sea on December 16, 2009, which gave judgment on March 14, 2012, while the case between Bangladesh and India remained pending.

<sup>7</sup> Sir Cyril Radcliffe was chairman of the Bengal Boundary Commission, charged by the preindependence government of India with drawing the boundaries between India and Pakistan.

<sup>8</sup> The historical background is summarized in paragraphs 50–53 and accompanying notes of the Award.



that the transposed point, at 21°38'40.2" N, 89°9'20" E (WGS-84),<sup>9</sup> was the terminus of the land boundary. This solution cut through the uncertainties in the meaning of the boundary definition, uncertainties that had inhibited waterborne activity in the Haribhanga Estuary after 1947.

<sup>9</sup> WGS-84 denotes the 1984 revision of the World Geodetic System, a standard used in cartography.

Addressing next the delimitation of the territorial sea, the parties accepted that the applicable law was Article 15 of the Convention, but they interpreted it very differently. Bangladesh argued that special circumstances existed on three grounds: concavity at the head of the Bay of Bengal, unstable coasts, and the risk of significant changes in base points caused by rising sea levels. For these reasons, Bangladesh contended that the angle-bisector method was appropriate and that the boundary should run due south from the land boundary terminus. India favored equidistance and proposed several base points on insular territory, as well as some on low-tide elevations. On the basis of case law supporting the use of equidistance in the first instance, the Tribunal rejected application of the angle-bisector method, without considering Bangladesh's reasons in the context of the territorial sea, and proceeded to construct an equidistance line.

The parties had proposed base points, most of them on islands but some on low-tide elevations. One source of contention was the status of New Moore Island/South Talpatty, an island that had emerged during the 1970s but by the time of the arbitration had reduced to a low-tide elevation. Although the parties agreed on the existence and location of this and other relevant low-tide elevations, none of them had been visible during the site visit on account of the state of the tide.<sup>10</sup> The Tribunal proceeded to select two base points, one on each side and both on islands, rejecting the use of low-tide elevations on the grounds that they did not "fit the criteria elaborated by the International Court of Justice in the *Black Sea* case," which had referred to "the most appropriate points on the coasts" and to "protuberant coastal points" (para. 261).<sup>11</sup> The Tribunal's dictum, however, should be confined to the circumstances of this case: in shallow seas in other parts of the world, low-tide elevations may well be appropriate base points.<sup>12</sup> The equidistance line began at the midpoint between the two base points and ended at the territorial sea limits: the Tribunal rejected Bangladesh's plea to adjust the line to allow for the concavity of the coasts (paras. 270–72).

Because the dash-dot-dash line followed the midstream of the main channel, the terminus was not equidistant between the nearest points on the coasts of the parties. The Tribunal found that this discrepancy represented "special circumstances" within the meaning of Article 15 and decided to delimit the territorial sea pragmatically by adjusting the median line on the basis of

<sup>10</sup> This fact is not determinative since Article 5 of the Convention defines the normal baseline by reference to "large scale charts officially recognized by the coastal State." Similar factors apply to low-tide elevations, many of which appear as such on charts but dry out and rarely become visible in the tidal cycle. The 2012 Report of the Committee on Baselines of the International Law Association included the following "General Conclusion":

The Committee concludes that the legal normal baseline is the actual low-water line along the coast at the vertical datum, also known as the chart datum, indicated on charts officially recognized by the coastal State. The phrase "as marked on large-scale charts officially recognized by the coastal State" provides for coastal State discretion to choose the vertical datum at which that State measures and depicts its low-water line. The charted low-water line illustrates the legal normal baseline, and in most instances and for most purposes the charted low-water line provides a sufficiently accurate representation of the normal baseline. As a matter of evidence for proving the location of the normal baseline the charted line appears to enjoy a strong presumption of accuracy. However, where significant physical changes have occurred so that the chart does not provide an accurate representation of the actual low-water line at the chosen vertical datum, extrinsic evidence has been considered by international courts and tribunals in order to determine the location of the legal normal baseline.

Committee on Baselines, *Baselines Under the International Law of the Sea, Part II*, 75 ILA, CONFERENCE REPORT 385, 417 (2012).

<sup>11</sup> Quoting Maritime Delimitation in the Black Sea, *supra* note 4, at 101, 105, paras. 117, 127.

<sup>12</sup> *E.g.*, *France–United Kingdom (Jersey)*, Rep. No. 9-24, 4 INTERNATIONAL MARITIME BOUNDARIES 2979 (Jonathan I. Charney & Robert W. Smith eds., 2002) (by the present writer).

equidistance. The Tribunal unanimously drew the territorial sea boundary as a 12-nautical-mile geodetic line from the terminus of the land boundary (point 1) until it met the median line at point 2. In adopting this solution, the Tribunal drew inspiration from the decision of another Annex VII arbitral tribunal in the *Guyana v. Suriname* case.<sup>13</sup>

As regards the EEZ/continental shelf, the parties were in agreement that the Tribunal should establish a single maritime boundary for both the EEZ and the continental shelf, and that the applicable law was stated in Articles 74, 83, and 76 of the Convention. On the method of delimitation, the parties were again divided. Bangladesh argued for the bisector of an angle between the two coasts, following the azimuth of 180° (or due south), and repeated its arguments to do with concavity, instability, and sea level rise advanced in the context of the territorial sea. India supported the three-stage equidistance/relevant circumstances method, constructing first a provisional equidistance line from selected base points, as described by the ICJ in the *Black Sea* case.<sup>14</sup>

The Tribunal began by determining the relevant coasts of the parties: to this end, it identified the coasts that in its view generated projections, taking into account the continental shelf beyond 200 nautical miles. For Bangladesh, the entire coast was relevant, measured in two sectors: the first consisted of the south-facing coast of the Ganges-Brahmaputra Delta; and the second, the generally west-facing coast from Kutubdia Island to the headland near the terminus of the land boundary with Myanmar.<sup>15</sup> The total length was 418.61 kilometers. For India, the relevant coasts were found to be those on the delta (south facing) and those to the west (south-east facing), including Devi Point (the base point for constructing the final points on the provisional equidistance line) as far as Sandy Point, totaling 706.38 kilometers. India had argued that its relevant coast ended at Devi Point, but the Tribunal concluded that “the Indian coast between Devi Point and Sandy Point generates a projection that overlaps with a projection from the coast of Bangladesh and is therefore relevant to the delimitation to be effected by the Tribunal” (para. 300). In addition, the Tribunal considered a part of the coasts of the Andaman Islands as also relevant, making a total of over 800 kilometers, on the grounds that those coasts generated projections that overlapped with projections from Bangladesh as shown in its memorial.<sup>16</sup> The ratio between the two relevant coasts was 1:1.92.

Next, the Tribunal determined the relevant area, including the continental shelf beyond 200 nautical miles, and found that this area extended from the relevant coasts, which generated projections that overlapped.<sup>17</sup> The area was limited by the Bangladesh/Myanmar boundary in the east and in the south by the outer extent of Bangladesh’s (still pending) submission to the Commission on the Limits of the Continental Shelf. These factors produced a relevant area of 406,833 square kilometers.

The Tribunal reviewed Articles 74 and 83 of the Convention, together with the case law on the method of delimitation, before rejecting the angle-bisector method and deciding in favor

<sup>13</sup> *Guyana v. Suriname* (Sept. 17, 2007), 30 R.I.A.A. 1, 90, para. 323, 47 ILM 164 (2008) (reported by Stephen Fietta at 102 AJIL 119 (2008)).

<sup>14</sup> Maritime Delimitation in the Black Sea, *supra* note 4.

<sup>15</sup> St. Martin’s Island, belonging to Bangladesh, was not used.

<sup>16</sup> The inclusion of the Andamans, lying to the southeast of the area shown on the map on page 148, was perhaps surprising.

<sup>17</sup> These imaginary projections were illustrated on map 6 of the Award, showing thick arrows similar to those depicting troop movements in old newspapers. Previously, such arrows had been featured in parties’ pleadings.

of equidistance/relevant circumstances (para. 345). As regards Bangladesh's arguments concerning coastal instability and the risk of sea level rise, the Tribunal held that those considerations were not relevant to maritime delimitation. In a significant dictum, the Award stated that "[f]uture changes of the coast, including those resulting from climate change, cannot be taken into account in adjusting a provisional equidistance line" (para. 399).<sup>18</sup>

To delimit the EEZ, the Tribunal first constructed a provisional equidistance line from base points it selected, following the same criteria as those applied in the context of the territorial sea: again, low-tide elevations were rejected. Five base points were selected for the EEZ and a further one at Devi Point for the continental shelf beyond 200 nautical miles. The Tribunal followed ITLOS in deciding to delimit the continental shelf beyond 200 nautical miles. The map above shows the whole of the provisional equidistance line, extending to a tri-point with Myanmar.

The Tribunal then examined the issue of concavity, holding that the entire area of competing claims should be taken into account (para. 404), that Bangladesh's coast was manifestly concave, that the provisional equidistance line cut off maritime entitlements, and that this effect was "evidently more pronounced from point Prov-3"<sup>19</sup> southwards where the provisional equidistance line bends eastwards . . . , influenced by base point I-2 . . . and the receding coast of Bangladesh" (para. 407).<sup>20</sup> The Tribunal concluded that an adjustment of the provisional line was required to produce the equitable solution called for in Articles 74 and 83.

The Tribunal next sought to "ameliorate [the] excessive negative consequences" the provisional equidistance line would have on the entitlement of Bangladesh, but not in a way that "unreasonably encroaches on the entitlement of India" (para. 477). The Tribunal decided to adjust the provisional equidistance line so as to achieve an equitable result and to do so in a way that departed from the equidistance methodology. From point 3, situated about 19 nautical miles beyond the territorial sea, the boundary would be a geodetic line with an initial azimuth of 177°30' running until it met the boundary established by ITLOS in the *Bangladesh/Myanmar* case, a distance of about 263 nautical miles. The Tribunal added that "[a]s far as the whole area in dispute is concerned the Tribunal considers that the adjusted delimitation line does not unreasonably limit the entitlement of India" (para. 479). This geodetic line is similar to that established by ITLOS: they are not anchored on or related to the coasts of the parties in the way that equidistance lines, perpendiculars, and bisectors are so linked.

Applying the non-disproportionality test, the Tribunal found that the adjusted delimitation line divided the relevant area of just over 400,000 square kilometers in the ratio of 1 (Bangladesh) to 2.81 (India). This result compared with a ratio between the relevant coasts of 1:1.92. In the Tribunal's view, there was no "significant disproportion in the allocation of maritime areas" (para. 497).

<sup>18</sup> At the 75th General Conference in Sofia in 2012, the International Law Association's Committee on Baselines reviewed the law on sea level rise and coastal erosion. Later that year, the ILA established a new Committee on International Law and Sea Level Rise.

<sup>19</sup> Point 3 is where Indian base point I-2 on Bhangaduni Island comes into effect, causing the line to deflect more toward the east.

<sup>20</sup> This finding was followed by the statement that "the south facing coast of Bangladesh is given insufficient weight by the provisional equidistance line from Point Prov-3 to the south" (Award, para. 474), and the eventual decision to depart from the provisional equidistance line at point 3. Nevertheless, the geographical factors attending point 3 do not appear to be linked to concavity.

The Tribunal noted that within an area beyond 200 nautical miles of Bangladesh but within 200 nautical miles of India, a “grey area” existed, and that part of it overlapped the “grey area” defined by ITLOS in the *Bangladesh/Myanmar* case. The Tribunal made clear that its delimitation between Bangladesh and India did not prejudice the rights of India vis-à-vis Myanmar with respect to the water column in that part of the two grey areas where the EEZ claims of India and Myanmar overlapped (para. 506).

Viewed together, the two boundaries in the Bay of Bengal, shown on the map above, meet at a tri-point 295 nautical miles from Bangladesh, 259 nautical miles from India (Devi Point), and 278 nautical miles from the mainland of Myanmar. Compared with strict equidistance lines (that is, counting all base points), which meet about 137 nautical miles offshore, the two boundaries accord some 41,000 square kilometers of additional maritime space to Bangladesh.<sup>21</sup>

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This case represents another example of contentious proceedings brought to resolve a maritime boundary dispute and conducted under Annex VII to the Convention.<sup>22</sup> Prior to the entry into force of the Convention, such disputes were usually brought to arbitration or judicial settlement by means of an agreement between the parties. For instance, the *North Sea Continental Shelf* cases were submitted to the Court by agreement.<sup>23</sup> Now that the Convention enjoys quasi-universal participation, the possibilities for the unilateral submission of maritime boundary disputes to arbitration or judicial settlement have increased. Relatively few states parties have made declarations under Article 298 of the Convention excluding maritime boundary disputes from compulsory procedures. These are considerations states contemplating or engaged in boundary talks should keep in mind.

Procedurally, the case is noteworthy in two ways: first, for the appointment of a hydrographic expert, whose report is annexed to the award and whose expertise in mapping is manifest from the many different maps included in the award; and second, for the visit to the disputed localities, which, while no doubt costly in terms of both time and resources, may have assisted the Tribunal.<sup>24</sup>

The case was unusual in that it concerned the Bay of Bengal, the subject of separate, parallel proceedings before ITLOS, which moved more quickly. The latter’s judgment of 2012 was clearly influential in many ways: It influenced the arguments adduced by the parties and the Tribunal’s award. The two boundaries were constructed similarly, using equidistance for the territorial sea and relatively short equidistance lines followed by long geodetic lines on specified

<sup>21</sup> By way of comparison, the boundaries agreed by Germany with the Netherlands and with Denmark following the *North Sea Continental Shelf* cases produced a narrow corridor toward the center of the North Sea. See *Denmark-Netherlands*, Rep. No. 9-18, 3 INTERNATIONAL MARITIME BOUNDARIES, *supra* note 12, at 2497, 2504 map (Jonathan I. Charney & Lewis M. Alexander eds., 1998) (by the present writer). For a general review, see ALEX G. OUDE ELFERINK, *THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN DENMARK, GERMANY AND THE NETHERLANDS* (2013).

<sup>22</sup> The two earlier cases were *Barbados v. Trinidad and Tobago* (UNCLOS Annex VII Arb. Trib. Apr. 11, 2006), at <http://www.pca-cpa.org>, and *Guyana v. Suriname*, *supra* note 13. See also *supra* note 6.

<sup>23</sup> *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Feb. 20).

<sup>24</sup> Such visits are rare. An early precedent was the *Grisbadarna* case (*Nor. v. Swed.*), 11 R.I.A.A. 147 (1909), 4 AJIL 226 (1910). The value of a visit may depend upon the particular issues in a case. The members of ITLOS did not visit the Bay of Bengal before deciding the *Bangladesh/Myanmar* case.

azimuths for the EEZ and continental shelf. As a result, the two boundaries almost mirror one another.

The Tribunal's approach to the determination of the terminus of the land boundary as the starting point of the territorial sea boundary neatly combined elements from the independence arrangements with the drawing of a river-closing line across the estuary and the use of modern charts and datums, which removed the uncertainties that had led to the dispute. Similarly, the Tribunal's solution to the problem of delimiting the territorial sea from a nonequidistant starting point was pragmatic and in line with precedent, as well as fully in accord with Article 15 of the Convention, which allows for such special circumstances. These parts of the award were both unanimous and convincing.

Turning to the methodology for the delimitation of the EEZ/continental shelf, the Tribunal was clearly correct in deciding that, in the circumstances under consideration, the use of the angle-bisector method was not appropriate. Its use in the Bay of Bengal had already been rejected by ITLOS. In the light of the *Bangladesh/Myanmar* case, as well as the *North Sea Continental Shelf* cases, the decision to depart from the provisional equidistance line to take account of the concavity of the relevant coasts was supported by precedent and thus predictable. But the (majority) decision suffers from a lack of transparency concerning the construction of the delimitation line. Specifically, it does not make clear why the particular azimuth of 177°30' was chosen to mitigate the cut-off effect and why the provisional equidistance line, carefully constructed by the Tribunal between points 3 and 8, should play no further role in the delimitation. The azimuth is not related to the coast, in the way a bisector or perpendicular, or a line giving half or no weight to particular base points, would still remain linked to the coasts.<sup>25</sup> In short, it appears that the now-familiar methodology was used only in part in this case, rendering the result less predictable.

The Tribunal's decision to extend the delimitation of the continental shelf beyond 200 nautical miles followed that of ITLOS in the same Bay of Bengal. The legislative history of the Third United Nations Conference on the Law of the Sea shows that the Bay of Bengal is a special case, a factor that was not, however, brought out in the terms of the award.<sup>26</sup> In delimitation cases concerning other parts of the world, different considerations may apply.

The existence of two grey areas in the Bay of Bengal may complicate relations over fisheries issues in the future. In some boundary negotiations, the parties have agreed upon a "joint area" for a particular purpose and at the same time have defined the applicable regime for its management. The two grey areas appear at present to lack such measures of agreement and cooperation. The comments of arbitrator P. S. Rao should be kept in mind: grey areas are best avoided if the full benefits of the single maritime boundary are to be enjoyed.<sup>27</sup>

Judgments are best when they are unanimous. In the present case, the award appears to have settled the dispute between the parties notwithstanding the divisions within the Tribunal.

<sup>25</sup> The azimuth awarded by ITLOS had a tenuous link with the coast in that it began at a point due south of a headland on the coast of Bangladesh. See Anderson, *supra* note 5, at 823. The azimuth awarded by the ad hoc arbitral tribunal in the case between Guinea and Guinea-Bissau was perpendicular to a straight line joining points on the coasts. *Delimitation of the Maritime Boundary (Guinea/Guinea-Bissau)*, 77 ILR 636 (Arb. Trib. Feb. 14, 1985), 25 ILM 251 (1986); see also *Guinea–Guinea-Bissau*, Rep. No. 4-3, 1 INTERNATIONAL MARITIME BOUNDARIES, *supra* note 21, at 857.

<sup>26</sup> See generally M. C. W. Pinto, *Article 76 of the UN Convention on the Law of the Sea and the Bay of Bengal Exception*, 3 ASIAN J. INT'L L. 215 (2013).

<sup>27</sup> Award, Concurring and Dissenting Opinion of Dr. P. S. Rao, para. 36.



India benefits from the determination of the terminus of the land boundary and the delimitation of the territorial sea, whereas Bangladesh vindicates its claim to a continental shelf extending beyond 200 nautical miles.

D. H. ANDERSON\*

*World Trade Organization—Agreement on Technical Barriers to Trade—General Agreement on Tariffs and Trade—discrimination—protection of public morals regarding animal welfare—indigenous communities*

EUROPEAN COMMUNITIES—MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS. WT/DS400/AB/R, WT/DS401/AB/R. At [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

World Trade Organization Appellate Body, May 22, 2014 (adopted June 18, 2014).

On May 22, 2014, the World Trade Organization's Appellate Body (AB) issued its report on the controversial "*EC—Seal Products*" dispute,<sup>1</sup> finding that a European Union (EU or Union) prohibition on the importation and sale of seal products violated the General Agreement on Tariffs and Trade 1994 (GATT).<sup>2</sup> It did so, however, in a way that largely upheld the Union's defense on animal welfare grounds, so that the prohibition remains effective. The decision marks the first time that the Appellate Body has found that a trade ban on animal welfare grounds falls within the exception under GATT Article XX(a) for measures necessary to protect public morals. This determination implicates the legality of future trade restrictions on animal welfare grounds, as well as restrictions imposed on human rights grounds, such as labor rights.

In 2009, through Regulation No. 1007/2009 and implementing Regulation No. 737/2010,<sup>3</sup> the European Union prohibited the importation and sale of seal products on animal welfare grounds, subject to an exception for seal products from traditional hunts conducted by Inuit and other indigenous communities (the IC exception), as well as an exception for products from seals hunted for purposes of marine resource management. Shortly afterward, Canada and Norway challenged the EU regulation and implementing regulation (collectively, EU seal regime) under the WTO Agreement on Technical Barriers to Trade (TBT Agreement or TBT)<sup>4</sup> and the GATT. Their primary claims under the TBT Agreement were that the EU seal regime was discriminatory (under Article 2.1) and more trade-restrictive than necessary (under

\* Former judge, International Tribunal for the Law of the Sea.

<sup>1</sup> Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (adopted June 18, 2014) [hereinafter AB Report]. Reports and other documents of the World Trade Organization cited herein are available at its website, <http://www.wto.org>.

<sup>2</sup> General Agreement on Tariffs and Trade [GATT], Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154 [hereinafter Marrakesh Agreement], Annex 1A, 1867 UNTS 190, reprinted in WORLD TRADE ORGANIZATION, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 3, 17 (1999) [hereinafter LEGAL TEXTS].

<sup>3</sup> Regulation (EC) 1007/2009 of the European Parliament and of the Council on Trade in Seal Products, 2009 O.J. (L 286) 36; Commission Regulation (EU) 737/2010 Laying down Detailed Rules for the Implementation of the Regulation (EC) 1007/2009, 2010 O.J. (L 216) 1.

<sup>4</sup> Agreement on Technical Barriers to Trade, Marrakesh Agreement, *supra* note 2, Annex 1A, 1868 UNTS 120 [hereinafter TBT Agreement], reprinted in LEGAL TEXTS, *supra* note 2, at 121.