

ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA



सत्यमेव जयते

PEOPLE'S REPUBLIC OF BANGLADESH

v.

REPUBLIC OF INDIA

REJOINDER OF THE REPUBLIC OF INDIA

VOLUME I

31 JULY 2013

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CHAPTER 1

INTRODUCTION

1.1 This Rejoinder is filed by the Republic of India in the proceedings initiated by Bangladesh under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) in terms of its notification of 8 October 2009. Bangladesh thereby requested the Tribunal to delimit the maritime boundary between Bangladesh and India in the Bay of Bengal, in the territorial sea, the exclusive economic zone and the continental shelf, including the portion of the continental shelf beyond 200 nautical miles from the baselines from which its territorial sea was measured. Bangladesh and India have filed their Memorial and Counter-Memorial respectively, and Bangladesh has since filed its Reply, all in accordance with the revised time-table for the filing of the pleadings set out in Article 9 of the Rules of Procedure and communicated to the Parties in the Tribunal's letters of 14 September 2012 and 11 February 2013. Accordingly, India submits this Rejoinder in response to the Reply of Bangladesh of 31 January 2013.

1.2 In new procedural developments in these proceedings, the Parties were advised by a letter of 11 February 2013 that the Tribunal, having considered the Memorial of Bangladesh and the Counter-Memorial of India, had requested the Parties to file additional information listed in the letter consisting, *inter alia*, of: charts, maps and hydrographic surveys of the area that is the subject-matter of the dispute which were to be used in the proceedings, in particular large charts envisaged under Article 5 of UNCLOS; hydrographic surveys indicating low water marks; copies of other charts (particularly, where the main channel of the Hariabhang¹ and Raimangal Rivers meet the Bay of Bengal); description of the present shipping and navigation activities which take place within and around the mouth and length of the Hariabhang and Raimangal Rivers; and information regarding fishing and fisheries relevant to the dispute. The Parties duly provided the relevant available documents and information, the receipt of which has since been acknowledged on behalf of the Tribunal.²

¹ The Hariabhang River is spelled differently in different texts and charts but there is no question that all the spellings refer to the same river. For consistency, India has continued to spell it "Hariabhang" throughout.

² By the Registrar's letter of 11 March 2013 and 1 May 2013 to Pakistan and India respectively.

1.3 By another letter of 11 February 2013, the Parties were also informed on behalf of the Tribunal that, having considered the Memorial of Bangladesh and the Counter-Memorial of India, the Tribunal had determined (referring to Article 6(b) of Annex VII, UNCLOS; Article 12(3), Rules of Procedure) that a site visit is appropriate in order to better establish and understand the facts of the case and that in particular the Tribunal wished to observe the mouth of the Hariabhanga River *in situ*. In consultation with the Tribunal, it has been agreed that such a site visit by the Tribunal, members of the Registry, the Parties' Agents and designated Counsel shall take place from 22 to 26 October 2013. Although the details have not been confirmed, the visit will include an aerial tour of Bangladesh and Indian coasts as well as visits to points requested by the Tribunal and other specified areas in the Estuary on both Bangladesh and Indian sides, by helicopters, hovercrafts and other means.

I. An Overview of the Case

1.4 In its Statement of Claim, Bangladesh asserted that “[s]ince 1974, India has proposed delimitation based on what is claimed to be an equidistant line”³ which Bangladesh has rejected as inequitable, on the ground that the line in combination with Bangladesh’s concave coastline would severely cut off and reduce Bangladesh’s maritime entitlement. Reiterating this reason for institution of proceedings in its Memorial, Bangladesh also claimed such a cut-off would deny it access to an extensive area of a “natural prolongation” based on supposedly well-established geological and geomorphological realities which it claimed formed part of its outer continental shelf. It further claimed that as its coastline is highly unstable and changes from year-to-year (sometimes even day-to-day),⁴ it is difficult, if not impossible, to identify any normal base points for maritime delimitation purposes and therefore to draw the boundary using the equidistance methodology. Bangladesh therefore claimed that in situations where recourse to equidistance is unfeasible, international law permits, and it therefore proposes, the adoption of the angle-bisector methodology, which it submits, would be fully equitable to both Parties.⁵

³ Counter-Memorial of India (hereinafter CMI), para. 1.2.

⁴ Memorial of Bangladesh (hereinafter MB), para. 3.22.

⁵ MB, para. 1.31.

1.5 Bangladesh simultaneously, on 8 October 2009, also commenced similar proceedings against Myanmar before the International Tribunal for the Law of the Sea (ITLOS) for the delimitation of the Bangladesh/Myanmar maritime boundary in the Bay of Bengal, in which it also objected to the use of the equidistance methodology on a number of grounds identical to those taken in these proceedings, i.e., based on the concavity of its coastline, its effect on the natural prolongation that it claimed beyond 200 nautical miles and the instability of the coastlines of the Bengal Delta. Bangladesh in that case also proposed recourse to the angle-bisector methodology for delineating its continental shelf for drawing its maritime boundary with Myanmar.⁶

1.6 On 14 March 2012, the ITLOS issued its Judgment in the *Bangladesh/Myanmar* case. India has shown in its Counter-Memorial that the Judgment rejected a number of Bangladesh's contentions identical to those raised in the present case. It rejected Bangladesh's claim to an outer continental shelf based on a "natural prolongation", holding that such a claim is not an independent basis for entitlement under Article 76 of UNCLOS.⁷ Furthermore, the Judgment did not accept Bangladesh's submissions on the instability of the Bangladesh-Myanmar coast and, rejecting its proposal to draw an angle-bisector, applied the equidistant/relevant circumstances methodology for determining the maritime boundary between the two countries.⁸

1.7 In its Reply, Bangladesh also draws attention to the other relevant judgment delivered since the Parties filed their Memorial and Counter-Memorial, i.e., the decision of the International Court of Justice (ICJ) delivered in *Territorial and Maritime Dispute (Nicaragua v. Columbia)*.⁹ Bangladesh claims both the ITLOS and the ICJ decisions substantially strengthen the Bangladesh case¹⁰ failing to fully recognize that the ITLOS rejected Bangladesh's submission to draw an angle-bisector and that both decisions confirmed and employed the equidistance methodology as the settled method for determination of maritime boundaries in the absence of reasons that made its application unfeasible.

⁶ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 217.

⁷ *Ibid.*, para. 460.

⁸ *Ibid.*, paras. 237-239.

⁹ On 19 November 2012.

¹⁰ Bangladesh's Reply (hereinafter BR), para. 1.12.

1.8 Bangladesh does state in its Reply that “[i]n light of the decision of ITLOS in *Bangladesh/Myanmar* case and that of the ICJ in *Nicaragua v. Colombia*, Bangladesh accepts that one way to approach this delimitation is to try to draw a provisional equidistance line, assuming that to be possible, having regard to the instability of the coastlines”.¹¹ Bangladesh, in the Reply, did in fact proceed to construct its own equidistance line, using its own choice of base points. As can be seen in Figure R3.14 of Bangladesh’s Reply, the two versions of the equidistance lines, based on different base points, though not identical, are similar enough to show that base points are available and it is feasible to construct such a line. However, Bangladesh goes on to assert that this does not preclude Bangladesh having recourse to a different delimitation methodology altogether. It therefore reverts to claiming that an equidistance line in the present case, though feasible, will not have an equitable result due to the concavity in its coastline and its instability making it impossible to find stable base points. Although Bangladesh seeks to distinguish aspects of the instability of the Myanmar/Bangladesh coastline from those it claims in the India-Bangladesh coast (in an effort to show the impossibility of finding stable base points),¹² such alleged distinction, as India will show, is unfounded¹³ and that the Bay of Bengal provides a large number of locations for stable base points; and furthermore, that there are no compelling reasons to depart from equidistance/special or relevant circumstances justifying any adjustments in the provisional equidistance line.

1.9 Bangladesh agrees with India¹⁴ and also accepts the ITLOS position in the *Bangladesh/Myanmar* case that concavity *per se* is not a relevant circumstance. However, it then seeks to rely on the ITLOS Judgment to contend that concavity is a special/relevant circumstance in a case where it produces a cut-off effect. Bangladesh fails to notice that most recent case law clearly demonstrates that this principle does not have application in every

¹¹ BR, para. 1.21.

¹² BR, para. 1.13.

¹³ See Chapter 5. One instance from the *Bangladesh/Myanmar* case which also evidences the fact that for constructing the equidistance line in that case, the ITLOS adopted the base point $\beta 2$ proposed by Myanmar located nearest to the land boundary with India (and now also proposed as a base point by India in this case) which Bangladesh claimed was located on a coast characterized by a very active morpho-dynamism and that its location “this year might be very different from its location next year” (BR, para. 4.160). Yet, as will be shown, the Tribunal recognized that the area in question in the Bay of Bengal was quite stable and in fact proceeded to accept this and all other base points proposed by Myanmar as well as selecting an additional base point to construct a provisional equidistance line in that case (*Bangladesh/Myanmar* Judgment, paras. 243-244).

¹⁴ BR, para. 3.68.

case of a cut-off, i.e., there is a difference between a real cut-off and an unavoidable cut-off, e.g. a cut-off that stops a State's seaward extension, which is a feature of all maritime delimitation, on the one hand, and, on the other, a cut-off that triggers suspension of the application of the normal delimitation procedures involved in favour of an alternative methodology. It is unavoidable that any seaward extension of the coast beyond the territorial sea will cause some degree of encroachment and cut-off to the seaward approach; in other words, neither a concavity nor a cut-off effect constitutes *per se* a relevant circumstance. India will show that the ITLOS in the *Bangladesh/Myanmar* case was careful in finding that the cut-off resulting from the concavity in the Bangladesh coast was a relevant circumstance *in the facts and circumstances of the delimitation of the Bangladesh-Myanmar maritime boundary*. The principle on which that finding was made actually applies to India in the present case, as the cut-off effect on India's coast is similar, if not worse, than on the Bangladesh coast.

1.10 Bangladesh also wrongly contends that in applying the third stage of the equidistance methodology's disproportionality test, India's relevant coast should be "deemed" to include an additional area of the Indian Peninsular coast beyond 200 nautical miles which will show an inequitable result. As India will show, there is no legal basis for this contention nor does Bangladesh offer any. Furthermore, Bangladesh also ignores the ICJ guidelines set out in the recent case of *Nicaragua v. Colombia* to the effect that the disproportionality test is not designed to achieve a correlation between the lengths of the Parties' relevant coasts and ratio of their respective shares of the relevant area but only to test for a significant disproportionality.¹⁵

1.11 As to the land boundary terminus, the Parties agree that the Radcliffe Award defines the land boundary terminus from where the maritime boundary is to commence, which is the location where the midpoint of the main channel of the Hariabhanga River meets the Bay of Bengal. But Bangladesh continues to assert that the precise location was thereby fixed under the Radcliffe Award and that, in that sense, it appears to claim that the "definition" is self-executing, i.e., there was already an executed demarcation on the date of the Award in August 1947 at a point west of New Moore Island and hugging the Indian coast. India

¹⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 240.

disagrees and will show that the Parties have not regarded this to be so.¹⁶ But whether it was fixed in 1947 in accordance with the Radcliffe Award and its map or is to be determined now in accordance with those terms and/or with the large scale charts produced over many years and relied upon by the Parties, the land boundary terminus is at a point east of New Moore Island.

1.12 Figure RJ 1.1 at page 7 shows the relevant features of the Estuary area.

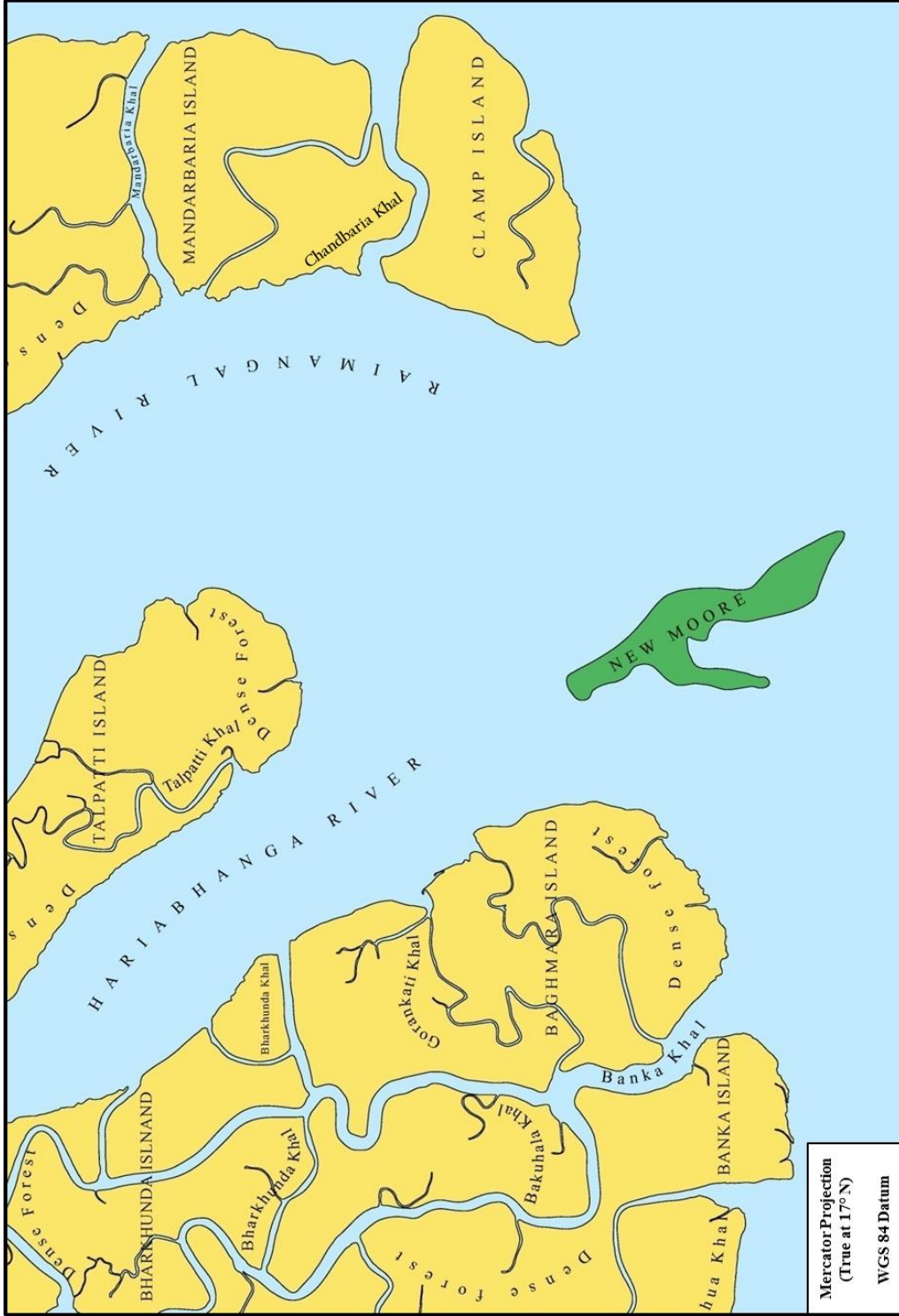
II. Points of Disagreement

1.13 The first point of disagreement is with respect to the land boundary terminus, as described above. The point from which the maritime boundary is to commence, as proposed by Bangladesh, is neither at the point fixed by the Radcliffe Award and it is not on the so-called channel of the Hariabhanga identified by Bangladesh; the provisions of the Radcliffe Award are, rather, to be applied at the moment of decision, by reference to all relevant large scale charts and other evidence, in order to determine where the mid-point of the main channel of the Hariabhanga, conjoined with the Raimangal River (the vertical axis) meets the correct closing line drawn from headland to headland (the horizontal axis) in the Estuary.

1.14 While the Parties agree that the law applicable to the delimitation of the territorial sea is Article 15 of UNCLOS and India contends that the general and well-established rule of delimiting the territorial sea is by drawing an equidistance line, Bangladesh claims that the coastal instability and the concavity of its coast are special circumstances which necessitate the Tribunal to refrain from applying a median line and that it should instead delimit the boundary by constructing a 180° angle-bisector.

1.15 Bangladesh contends that the instability of the coastlines of Bangladesh and India makes the use of an equidistance line inappropriate as it is not possible to establish suitable base points. India disagrees and asserts that the facts do not support this contention, as the coastline of the Bay of Bengal allows for selection of appropriate base points and that, moreover, the base points selected by India, on both Bangladesh's and its own coastline, are appropriate and perfectly feasible for delimiting the territorial sea.

¹⁶ See Chapter 2.



Depiction of all Features Including Islands in the Estuary Area
 Figure RJ 1.1

1.16 Bangladesh claims that the concavity at the north-eastern corner of the Bay of Bengal produces a severe cut-off of its coastal projection and using the equidistance line would severely prejudice Bangladesh; this would represent a relevant circumstance and any equidistance line delimiting the continental shelf and the exclusive economic zone would require an adjustment of the line. India asserts that neither concavity nor cut-off effect are *per se* relevant circumstances; the concavity is shared by both States, and both suffer a similar cut-off; it is thus not a relevant circumstance in this case.

1.17 The disproportionality test in relation to the equidistance line applied by India, far from indicating disproportionality, actually confirms an almost equal division of the relevant area. Bangladesh distorts the application of the test; Bangladesh disagrees with the determination of the extent of the relevant coasts for purposes of the test and contends it leads to an inequitable result.

III. Points of Agreement

1.18 As shown above, although fundamental issues of the methodology to be used for delimitation of the maritime boundary between Bangladesh and India are the subject of strong disagreement, the Parties are in agreement on a number of general points arising in the pleadings. Indeed, the Parties are generally agreed on the following:

- (i) Bangladesh and India agree that the applicable law for the delimitation in this case is the 1982 Convention and other rules of law not incompatible with it.
- (ii) They agree that there is no reason why the Annex VII Tribunal cannot issue a judgment on the merits of this dispute, and that the Tribunal has jurisdiction to effect the delimitation, notwithstanding submissions made by Bangladesh and India to the Commission on the Limits of the Continental Shelf.
- (iii) India agrees with Bangladesh that “the Bangladesh coast is concave” – (though India disagrees that this concavity is a relevant circumstance in the present case; and maintains that the concavity is shared by both States at the North of the Bay; and furthermore, that the coasts of both Parties have a concavity within a concavity).

- (iv) The Parties agree that the land boundary terminus was “authoritatively defined” by the Radcliffe Award in 1947.
- (v) The Parties agree that the feature known to Bangladesh as South Talpatty and to India as New Moore Island is not an island within the meaning of UNCLOS and constitutes a low-tide elevation.
- (vi) Bangladesh and India agree that the final step in the delimitation process is for the Tribunal to conduct a disproportionality test to confirm that the delimitation line provisionally drawn does not yield a disproportionate result. However, India disagrees with Bangladesh’s attempt to include in the relevant coasts of the Parties Indian peninsular coastline beyond 200 nautical miles.

IV. The Implications of the Case

1.19 This case is important for reasons that go far beyond the delimitation of the maritime boundary of the two litigating States. In *Bangladesh/Myanmar*, the ITLOS confirmed the progress which international law had achieved:

“[i]nternational courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end.”¹⁷

1.20 Bangladesh, with its insistence on discarding the carefully constructed legal arrangements which now constitute the international law of maritime delimitation, in favour of some sort of purely intuitive supposed equitable approach, is putting at risk the rule-based legal system of what the ICJ has described, in *Nicaragua v. Colombia*, as “the orderly management of maritime resources, policing and the public order of the oceans in general”.¹⁸ Bangladesh would have the Tribunal scrap it and, in its place, adopt an entirely discretionary system, based not on rules but on subjective assessments; moreover, such assessments would

¹⁷ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 226.

¹⁸ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 230.

not even be disciplined by current geography but would be based on speculations of possible future geographical configurations.

1.21 India affirms that there is a proper role for equitable principles in maritime boundary delimitation; indeed, the rules, which have been refined in this area of international law, represent a systematization of equity which, when rigorously applied, produce equitable results. As the Tribunal in *Barbados/Trinidad and Tobago*, following the International Court in *Libya/Malta*, put it,

“The search for predictable, objectively determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases, emphasized that the role of equity lies within and not beyond the law (*Libya/Malta*, I.C.J. Reports 1985, p. 13).”¹⁹

1.22 The point of emphasis is two-fold: first, that it is equity within the law and not equity against the law and, second that the predictability of the law in this area is necessary if it is to be law. The case law of international courts and tribunals has achieved that; in view of Bangladesh’s assault on it in this case, the future of that achievement is at stake.

V. Structure of the Rejoinder

1.23 India’s Rejoinder consists of three volumes. Volume I contains its response to the Reply of Bangladesh together with figures. Volume II comprises 12 annexes. Volume III reproduces the Radcliffe Map.

1.24 **Volume I** contains 8 chapters including this Introduction.

1.25 **Chapter 2** deals with the issue relating to the identification of the precise location of the land boundary terminus of the India-Bangladesh boundary from where the maritime boundary is to be delimited.

¹⁹ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 212, para. 230. See also the Separate Opinion by Judge Wolfrum in *Bangladesh/Myanmar*, p. 2.

1.26 **Chapter 3** addresses issues in regard to the extent of the Parties' relevant coasts and responds to contentions raised by Bangladesh in its Reply.

1.27 **Chapter 4** deals with issues of the alleged instability of the coastlines of the Parties and shows there is no force in Bangladesh's contention that the impossibility of determining stable base points is a special circumstance.

1.28 **Chapter 5** addresses the applicability of the three-stage equidistance/relevant circumstances methodology for the determination of the maritime boundary of the Parties in this case; and the absence of any special/relevant circumstances requiring any adjustment of the equidistance line.

1.29 **Chapter 6** describes the delimitation of the territorial sea in accordance with Article 15 of UNCLOS, and confirms the absence of any special circumstances.

1.30 **Chapter 7** is devoted to the description and explanation of the delimitation line based on the equidistance line that India proposes in the exclusive economic zone and the continental shelf; as well as shows that the delimitation line proposed by Bangladesh, beyond 200 nautical miles, is arbitrary and lacks legal basis. It analyses and points out the flaws of Bangladesh's 180° angle-bisector line as well as Bangladesh's definition and application of the non-disproportionality test to the equidistance line.

1.31 **Chapter 8** incorporates a summary of conclusions.

1.32 The Rejoinder concludes with India's formal submissions.

CHAPTER 2

THE LAND BOUNDARY TERMINUS

2.1 The question posed to the Tribunal in this part of the case is the precise location of the land boundary terminus, which, it is agreed, is where a north-south or vertical axis determined by the Radcliffe Award intersects the closing line of the Bay of Bengal. India has located the land boundary terminus to the east of the low-tide elevation known as New Moore Island,²⁰ at 21°38'40.4" N, 89°10'13.8" E. Bangladesh would locate it, to the west of New Moore Island and almost "hugging"²¹ the Indian bank, at 21°38'09.8 N, 89°06'45.2" E. Figure RJ 2.1 at page 15 indicates the competing points respectively submitted by the Parties.

2.2 The principal differences between the Parties relate to the precise position of the north-south vertical axis. The actual differences between the Parties with respect to the east-west or horizontal axis, which functions as the closing line of the Estuary into which the Hariabhanga and Raimangal Rivers pour, are more difficult to assess. While India has specified the co-ordinates of the Indian closing line from India's headland at 21°37'56" N, 89°05'1" E to Bangladesh's headland at 21°39'00.2" N, 89°12'2" E, Bangladesh offers no co-ordinates. It simply describes a line on a sketch-map without indicating the co-ordinates of the points on the headlands between which its horizontal or closing line is drawn. In its Reply, Bangladesh states rather blandly that "[t]he discrepancy in the angle of the two closing lines advanced by Bangladesh and India in the Memorial and Counter-Memorial is . . . related to the disparity between the two charts relied upon by the Parties."²² Precise co-ordinates would, of course, dispel or confirm the impression that an apparent disparity was based on different charts. India can only conclude that the preceding quoted sentence of Bangladesh, assigning the cause of the disparity to the use of different charts, means that Bangladesh accepts India's co-ordinates for the horizontal axis or closing line. Accordingly, India will not address the horizontal axis or closing line further, other than to confirm its presentation in the Counter-Memorial.

²⁰ Bangladesh refers to it as South Talpatty Island.

²¹ MB, para. 5.8.

²² BR, para. 3.41.

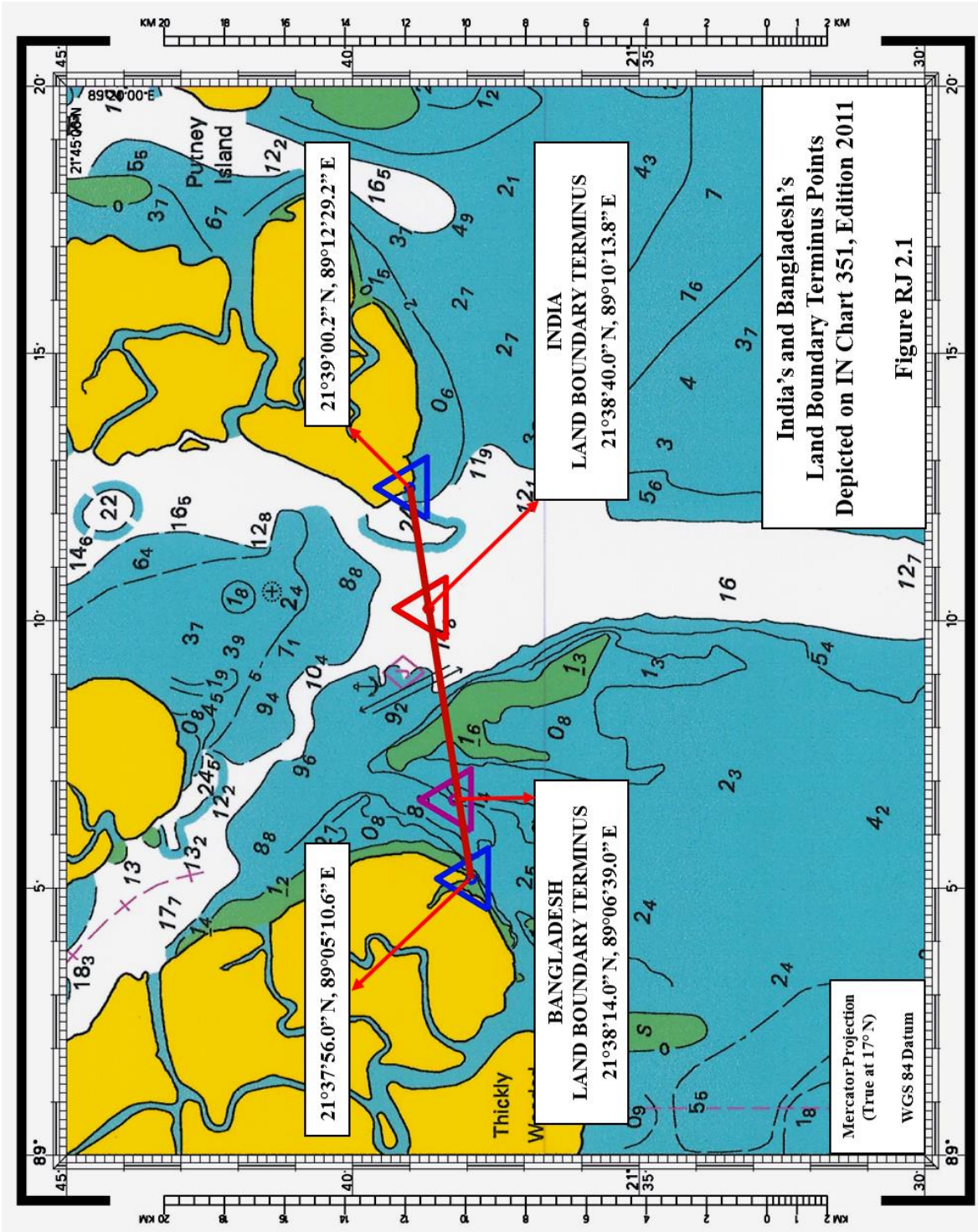
2.3 With respect to the vertical axis, India also confirms its prior arguments and affirms its submission that all of the relevant indicators, i.e., the text of the Radcliffe Award, the map in Annexure B of the Radcliffe Award, the Bagge Award, the principles of international law with respect to boundary determination, hydrographic and bathymetric data, satellite imagery and cartographic evidence, support India's submission that the land boundary terminus is to the east of New Moore Island, at 21°38'40.4" N, 89°10'13.8" E. India will not repeat its reasoning, as already elaborated in its Counter-Memorial, but will confine itself to responding to Bangladesh's key contentions in its Reply.

I. Points of Agreement and Disagreement on the Vertical or North-South Axis

2.4 The Parties agree that the Radcliffe Award and Notification No. 964 Jur. are decisive for the determination of the north-south vertical axis.²³ They are the basis for the title in this case. But the Parties do not agree on the relevance of the *entire* Award, including its Annexure B; Bangladesh rejects the significance and weight of Annexure B, as will be explained below.

2.5 The disagreement over the location of the vertical axis also includes some important disagreements as to the methods, the data relevant to the application of those methods and the sequences of application of those methods to the issue. In resolving the difference as to the location of the vertical axis, a number of different lines of inquiry must be pursued: textual analysis of the Award (*including* the Radcliffe Map) and cartographic analyses for all of the other charts and maps that have been adduced. In the context of an inter-state dispute, the interpretation and application of the Award (in its entirety) and the Notification No. 964 Jur. import international law's methodology for applying boundary instruments. Because Notification No. 964 Jur. employs terms such as "main channel", comparative hydrographic and bathymetric data are also necessary for the determination.

²³ BR, para. 3.2.



2.6 Bangladesh states “[w]here the Parties are in significant disagreement is with regard to the precise location of the midstream of the main channel of the Hariabhanga River in the Estuary”.²⁴ That formulation is imprecise in that it implies a single question when there are, in fact, two distinct and sequential questions. The first is the identification of “the main channel” to which the Radcliffe Award and Notification No. 964 Jur. refer which involves both a textual and a geographical inquiry. Once “the main channel” has been located, the second question is the location of the midstream within that main channel. The answer to the first question – the identification of the main channel – will be found by analysis of the texts of the Radcliffe Award, Notification No. 964 Jur., as illustrated by the map in Annexure B of the Award, and any other authoritative instruments; with respect to this first question, hydrographic and bathymetric data serve a confirmatory function. By contrast, the second question is factual. Inasmuch as neither the Award, including the map, nor Notification No. 964 Jur. provides a precise location for the midstream and other authoritative instruments indicate that the Parties agree that it was a fluid boundary, the answer to the second question must ultimately be sought in hydrographic and bathymetric data contemporaneous with the moment of this Tribunal’s decision in this instance.

2.7 There is a further disagreement between the Parties with respect to the evidence necessary to answer this second question. Bangladesh contends that the land boundary terminus is located where the midstream was “as of 15 August 1947”²⁵ and, accordingly, that this “can only be determined by recourse to an authoritative *contemporaneous* chart”,²⁶ which Bangladesh interprets as “including those in existence in 1947.”²⁷ In fact, the principal evidence which Bangladesh marshals in this regard is from charts based on uncorrected data from 1879, some 70 years earlier and hardly “contemporaneous” with 1947. There is evidence closer in time to the moment of the issuance of the Radcliffe Award and nothing could be more contemporaneous than the Radcliffe Map itself. But it has been “authoritatively” decided, as will be explained below, that when there is disagreement regarding the location of the land boundary terminus, as indeed there is concerning the

²⁴ BR, para. 3.9.

²⁵ BR, para. 3.12.

²⁶ *Ibid.* (italics in original).

²⁷ *Ibid.*

location of the vertical axis, then it is the situation prevailing at the moment of decision of this Tribunal that is decisive.²⁸

2.8 There are other significant differences in the approaches of the Parties in their written submissions. Bangladesh's statement that "the Parties agree that this [the land boundary terminus] was the point where 'the midstream of the main channel' of the Hariabhangha River meets the Bay of Bengal" seems designed to conceal one of those differences, for it elides several important distinctions which India's Counter-Memorial drew to the Tribunal's attention. For one thing, Bangladesh tries to glide past the legal implications of both the word "channel" and of the adjective "main". In the context of international waterways, the term "channel" imports a criterion, when it is the "main" one, of navigability, as not all channels are navigable or equally navigable. Obviously, a key utility of a navigable waterway is its comparative navigability. In the instant case, this was a meaning which was plainly intended by qualifying the noun "channel" with the preceding adjective "main". Here, moreover, the Radcliffe Commission was acting consistently with a historic concern of international law which seeks to optimize the use of common river and ocean resources.

2.9 As for the introduction of the adjective "main", it also indicates that if there should be more than one channel, the boundary channel is to be the main utilizable one. The resolution of the factual questions which this issue presents will turn on cartographic, hydrographic and bathymetric data which will be analyzed below.

2.10 There is another important difference between the Parties. In asserting in its Reply that an ostensible point of agreement between the Parties is the focus on the main channel of the Hariabhangha, Bangladesh continues to elide the language of Notification No. 964 Jur. which links the "Ichamati *and* Kalindi, Raimangal *and* Haribhangha".²⁹ As India explained in its Counter-Memorial, this linkage is important in indicating the location where Notification No. 964 Jur. identified the "main channel", i.e., where the main channels of the Raimangal *and* Hariabhangha conjoin.³⁰

²⁸ BR, para. 3.2. For analysis, see para. 2.48 below.

²⁹ Notification No. 964 Jur., CMI, Vol. II, Annex IN-1 (emphasis added).

³⁰ CMI, para. 4.17.

II. Analysis of the Relevant Instruments

2.11 The Parties agree that the Radcliffe Award has “authoritatively defined” the land boundary terminus as “the boundary between the Districts of Khulna and 24 Parganas, to the point where that boundary meets the Bay of Bengal.”³¹ The Parties also agree that the Radcliffe Award’s reference to a pre-existing boundary refers to Notification No. 964 Jur., which provides, in relevant part:

“The Western boundary of district Khulna passes along the south-western boundary of Chandanpur to [. . . intermediate villages omitted . . .], till it meets the midstream of the main channel of the river Ichhamati, then along the midstream of the main channel of the rivers Ichhamati and Kalindi, Raimangal and Haribhanga till it meets the Bay.”³²

2.12 But the Parties disagree on a number of major points related to the Radcliffe Award, including the map in its Annexure B, and Notification No. 964 Jur., which, they agree, the Award does incorporate. This section addresses the text of the Award and those parts of Notification No. 964 Jur. which apply to this case. The map in Annexure B will be treated below.

2.13 Bangladesh’s discussion of the text is set out in paragraphs 3.14 to 3.25 of its Reply. India has no comment on paragraphs 3.16 to 3.19 as they simply restate the predicates of the issue before the Tribunal without addressing the method of its resolution. Nor need India comment on the principle of *uti possidetis*, as it simply affirms the enduring validity of the colonial boundary without assisting the Tribunal in its task of determining the proper method for identifying that boundary in a case in which what constitutes the boundary as well as the mode of its determination had already been prescribed.³³

2.14 As a matter of textual analysis, Bangladesh persists in ignoring the explicit language of Notification No. 964 Jur. As will be recalled, Notification No. 964 Jur., after specifying the midstream of the main channel as the continuous boundary, identifies the rivers in linked

³¹ Radcliffe Award, Annexure A, para. 8, CMI, Vol. II, Annex IN-2.

³² The full text of Notification No. 964 Jur. is reproduced in CMI, Vol. II, Annex IN-1.

³³ See discussion of the Radcliffe and Bagge Awards’ prescribed methodology, below at paras. 2.47 and following.

pairs: “the river Ichamati, then along the midstream of the main channel of the rivers Ichhamati and Kalindi, Raimangal and Haribhanga till it meets the Bay.” In its Memorial, Bangladesh used a strategic font-change to obscure the Notification’s linkage between the Raimangal and Hariabhanga; it only italicized the river Hariabhanga. Thus it reproduced the last line of the Notification as “Ichamati and Kalindi, Raimangal and *Hari[a]bhanga till it meets the Bay.*”³⁴ Thereafter in its Memorial and throughout its Reply, Bangladesh has referred only to the Hariabhanga.

2.15 Bangladesh’s selective italicization would create the impression that the Notification treated the rivers Raimangal and Hariabhanga sequentially; this distorts the Notification’s clear purport. In its Counter-Memorial, India noted that “Bangladesh has ignored the ‘twinning’ of each set of rivers and has simply assumed that the relevant river is the last in the series.”³⁵ India also noted that Bangladesh’s error was immaterial because, as a factual matter, the *main* channels of the Raimangal and Hariabhanga conjoin in the Estuary, such that the main channel of the Hariabhanga and the conjoined main channels of the Hariabhanga and Raimangal coincide at the point at which they reach the Bay of Bengal.³⁶

2.16 The point was clearly made in a study on bays and estuaries prepared by Commander R.H. Kennedy in 1958 for the United Nations Conference on the Law of the Sea.³⁷ In his study, Commander Kennedy reviewed 48 bays and estuaries, including the Sundarbans. Based on Chart 859 and the eighth edition of the Bay of Bengal Pilot (1953), Commander Kennedy wrote:

“The boundary between India and East Pakistan reaches the sea in the vicinity of the mouths of the Hariabhanga and Raimangal Rivers, two of the rivers forming part of the delta of the River Ganges.

³⁴ MB, para. 5.9.

³⁵ CMI, para. 4.17.

³⁶ In its Counter-Memorial, India showed that the pronoun “it” preceding the last three words of the relevant section of the Notification must refer to the “midstream of the main channel” and not to the Hariabhanga under the rule of the last antecedent. In footnote 16 to paragraph 3.11 of its Reply, Bangladesh, after purporting to reject India’s textual analysis, concedes that “it refers to the midstream of the main channel.”

³⁷ Commander R.H. Kennedy, “A Brief Geographical and Hydro Graphical Study of Bays and Estuaries the Coasts of which Belong to Different States”, Document A/CONF.13/15, 13 November 1957, *Extract from the Official Records of the United Nations Conference on the Law of the Sea*, Vol. I (Preparatory Documents), p. 209, para. 4 – The Sunderbans (Hariabhanga and Raimangal Rivers), reproduced in Volume II of this Rejoinder, Annex RJ-3.

These two rivers meet in a common estuary, with an entrance about 4 ½ miles wide, and are separated near their mouths by an island 12 ½ miles long in a north-south direction with a general width of about 2 ½ miles. The southern end of this island lies back about 5 miles from the general line of the coast formed by the other islands of the delta. Thus, the estuary of the two rivers has a penetration of about 5 miles, a width at the entrance of about 4 ½ miles and a maximum width of 7 ¾ miles. The breadth of the Hariabhanga River when it enters the estuary at the northwest corner is about 2 miles wide and the breadth of the Raimangal River in the north-east corner is 2 ½ miles.

The deep channels from the river mouths, with depths of from 4 to 10 fathoms, lie towards the sides of the estuary, leaving a shallow bank between and south of the island separating the rivers. A small area, dry at low water, is charted on this bank and about a mile south of the island; depths of between a half and 3 fathoms extend from the island as far southward as the entrance to the estuary. Seaward of the entrance, the channels unite to form a single approach over a distance of about 15 miles between the coastal banks, with depths of less than 3 fathoms. The general breadth of the approach channel is 1 ½ miles; depths therein are from 3 ½ to 8 fathoms. On the western coastal bank are three patches, marked by breakers and which dry at low water; these lie 1 ½, 5 and 10 miles south of the entrance to the estuary.

Tidal streams are almost certainly strong and local knowledge is essential for navigating in the vicinity, as the banks are subject to change; the land is low and there are no navigational marks.

About half the coastline of the estuary is Indian and the remainder Pakistan.”³⁸

2.17 Bangladesh steadfastly ignores the actual text of the Notification and repeats its error, stating, in its Reply, that “the clear language of Notification No. 964, . . . states that the boundary runs along the midstream of the main channel of the Hariabhanga up to the point where ‘*it meets the bay*’”.³⁹ It repeats itself in paragraphs 3.12, 3.13, 3.23 and 3.34 of its Reply, as if repetition can somehow transform a misstatement into truth. At paragraph 3.33, Bangladesh acknowledges the relevance of the linkage of rivers in Notification No. 964 Jur. but then muddies the waters by attributing to India reliance “on the channel created by the combination of the Raimangal and Jamuna Rivers.” That is a misstatement for multiple reasons: it is not what the Award says, not what Notification No. 964 Jur. says, not what

³⁸ *Ibid.*, pp. 209-210.

³⁹ BR, para. 3.34 (italics in original).

India says and not what the bathymetric data on the charts and the satellite images say. When the Reply obliquely acknowledges the existence and relevance of the Raimangal River, it is only to assert, absurdly, that it is a “purely national river”,⁴⁰ as if the fact that a segment of a river serving as an inter-state boundary is national in its other reaches is of any relevance to the question of the location of the international boundary in that segment.

2.18 Moreover, Bangladesh pretends that India has agreed with its misreading. Thus, Bangladesh asserts that “[t]he Parties further agree that the land boundary terminus is located at the intersection of the midstream of the main channel of the Hariabhanga River and the closing line across the mouth of the estuary”.⁴¹ As explained above, that is neither what Notification No. 964 Jur. says nor what India says.

2.19 In its Reply, Bangladesh continues to avoid rigorous textual analysis, preferring to rely on non-authentic maps to buttress its idiosyncratic reading. India will address Bangladesh’s misapplication of maps below but will note, at this juncture, that extraneous and inauthentic maps may not be used *against* the meaning of the text or *against* an authentic map which forms part of it.⁴² Thus, when the Award uses the words “main channel”, importing the existence of secondary channels, Bangladesh may not assert, on the alleged basis of inauthentic maps, that “at the time of the Radcliffe Award there was only one channel of the Hariabhanga River as it meets the Bay of Bengal.”⁴³ In point of fact, neither contemporaneous nor current maps support that contention, as will be explained below.

2.20 There are other important differences between the Parties’ respective approaches to the relevant texts. If the Parties agree that the Radcliffe Award “defines” the boundary, it is clear from Bangladesh’s Reply that they do not agree that a “definition”, in this context, is, as Bangladesh seems to think, somehow “self-executing”, i.e., on the order of an agreed “delimitation” or, for land boundaries, an executed “demarcation.” The other sectors of the boundary described in the Radcliffe Award certainly have not been, requiring decades of negotiation to achieve agreement on the application of the “definition” in the Radcliffe Award to sectors north of the land terminus.

⁴⁰ BR, para. 3.53.

⁴¹ BR, para. 3.8.

⁴² This is elaborated in Section III below.

⁴³ BR, para. 3.30.

III. The Radcliffe Map as an Integral Part of the Radcliffe Award

2.21 The relevant portion of the Radcliffe Map is set out at page 25 (Figure RJ 2.2). A reproduction of the entire map is annexed⁴⁴ and the authentic map is available to the Tribunal and Bangladesh. As can be seen, the line which Radcliffe drew and certified descends south-south-east to the east of New Moore Island.

2.22 The Radcliffe Map is a very large map, measuring approximately 1.75 by 1.25 meters, comprised of four separate sheets which are carefully put together but with discernible seams, “a congregated map of the district maps used at the time of the latest notifications”.⁴⁵ It is a map only of Bengal and, at the bottom right hand corner of the map, it indicates that it was produced in the Bengal Drawing Office in 1944. Its legend is “Map of Bengal” and its scale is one inch to 8 miles. Inasmuch as all the district boundaries, including the boundary in the Estuary, were inserted in 1944 in clear black lines, the map is also an authentic interpretation of Notification No. 964 Jur.

2.23 As a map of Bengal, all the district boundaries are marked by a black line which is highlighted by a thicker green line. The legend indicates that the black and green highlighted line marks the provincial boundary. The boundaries are plainly drawn with care, especially those boundaries which run in rivers. Some of the river boundaries are on one or the other of the banks, sometimes the river boundaries follow the approximate center of the rivers. The care with which the black lines are drawn is particularly striking in marking the boundaries in the many inlets which dot the Bengali coast. Sometimes the boundary line veers sharply to one bank or the other. A clearly distinguished red line indicates the Radcliffe Commission’s boundary line and, as will be explained below, both it and the black provincial line which it follows, descend to the east of the center of the Estuary.

2.24 The certification by Sir Cyril Radcliffe of the authenticity of the map is portrayed at page 27 on Figure RJ 2.3 A. It says, in Radcliffe’s hand, “Certified as Annexure B of my Report dated 12th August 1947, Cyril Radcliffe, Chairman – Bengal Boundary Commission”.

⁴⁴ Vol. III.

⁴⁵ Bagge Award, *UNRIAA*, Vol. XXI, p. 28; MB, Vol. III, Annex B16. Bangladesh mentions the Bagge Award at MB, para. 3.17 and fn. 13. The Bagge Award is discussed in more detail below at paras. 2.52 and following.

A stamp along with writing above the legend of the map indicates that the map was also submitted in the Bagge arbitration (see Figure RJ 2.3 B at page 27).

2.25 The map in Annexure B of the Radcliffe Award, signed by Radcliffe, is an integral part of the Award. Article 31 of the Vienna Convention on the Law of Treaties provides, in relevant part:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”.

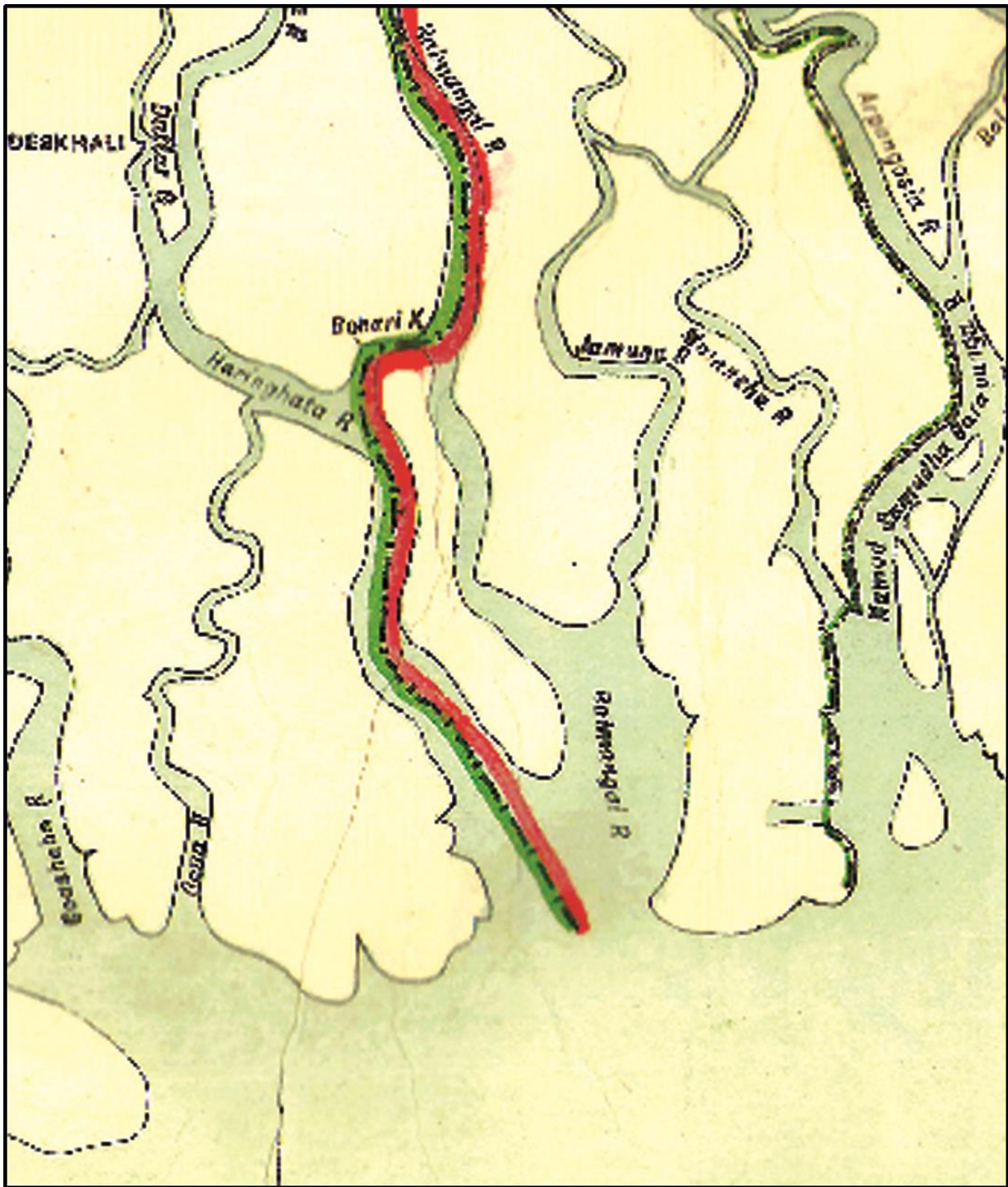
Hence analysis of the text of the Award cannot be undertaken without consulting and taking account of the map.

2.26 Bangladesh has struggled against the Radcliffe Map. In places in its Reply, Bangladesh tried to diminish the probative value of the Radcliffe Map by referring to it dismissively as “the rough-drawn map attached to the Radcliffe award”⁴⁶ and “the rough Radcliffe sketch-map.”⁴⁷ Yet Bangladesh can hardly evade the Radcliffe Map so it elsewhere concedes that it “is important and instructive, but plainly not intended to be authoritative.”⁴⁸ Bangladesh does not explain how it concludes that the signed map was not intended to be authoritative. India maintains that the Radcliffe Map, in addition to being authoritative, is very important and instructive. Indeed, it is the only authentic illustration of the boundary as conceived by the Radcliffe Award. Annexure B is part of the text of the Award.

⁴⁶ BR, para. 3.3. Ironically, the two other maps which Bangladesh adduced are, like the Radcliffe Map, a line drawn on a published chart. See paras. 2.58-2.71 below.

⁴⁷ BR, para. 3.27.

⁴⁸ *Ibid.*



Extract of the Estuary Area
from the Original Radcliffe Award Map (Annexure B)

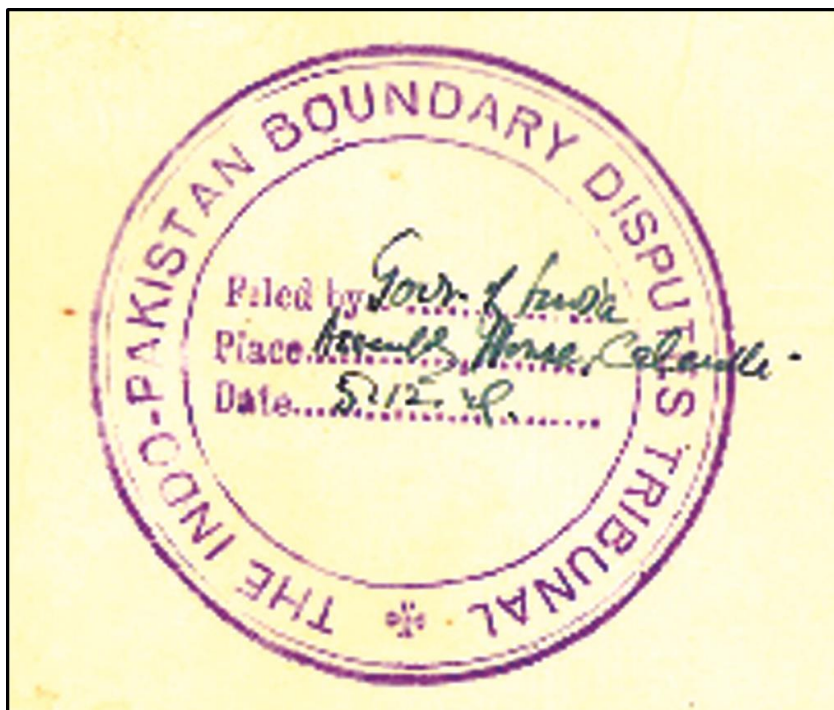
Figure RJ 2.2

Certified as Annexure B to my
Report dated 12th August 1947 -
Cyril Radcliffe
Chairman -
Bengal Boundary Commission -
A

G

Signature of Cyril Radcliffe
Dated 12 August 1947 on the Original Radcliffe Award Map (Annexure B)

Figure RJ 2.3 A



Stamp of the Indo – Pakistan Boundary Disputes Tribunal
on the Original Radcliffe Award Map (Annexure B)

Figure RJ 2.3 B

2.27 In the *Frontier Dispute* case, the Chamber of the ICJ set out the evidentiary value of maps in frontier delimitations or territorial disputes. As a general matter, the Chamber said:

“maps merely constitute information which varies in accuracy from case to case: of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.”⁴⁹

But the Chamber immediately added:

“Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits; it is because such maps fall into the category of physical expressions of the will of the State or States concerned. *This is the case, for example, when maps are annexed to an official text of which they form an integral part.*”⁵⁰

In these terms, the Radcliffe Map has acquired precisely the “legal force” to which the Chamber referred.

2.28 Consistent with its prior jurisprudence, the plenary Court, in its 2013 *Frontier Dispute* Judgment, confirmed the conditions for the authority of maps. In that case, Article 2 of the Special Agreement which submitted the case, provided:

“The frontier shall be demarcated by boundary markers following the course described by *Arrêté* 2336 Should the *Arrêté* and Erratum not suffice, the course shall be that shown on the 1:2000,000-scale map of the Institut Géographique National de France, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties.”⁵¹

The Court noted that “the IGN map is not an official document,” but held, nonetheless, that “[i]n the present case, by virtue of Article 2 of the 1987 Agreement, the line shown on the IGN map is always of decisive value, where the *Arrêté* does not suffice.”⁵²

⁴⁹ *Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54.

⁵⁰ *Ibid.* (emphasis added).

⁵¹ *Ibid.*, para. 64.

⁵² *Ibid.*, para. 68.

2.29 When Bangladesh does engage the Radcliffe Map, it tries to diminish its probative weight by introducing qualifying words that are not in the Award. It contends that the Radcliffe Map “is not intended to be anything more than generally illustrative” and that “the Award itself states that the map is not intended to be authoritative.”⁵³ Those are misstatements of the Award’s words. Paragraph 10 of the Radcliffe Award says something materially different from Bangladesh’s parsing of the text:

“The demarcation of the boundary line is described in detail in the schedule which forms Annexure A to the award, and in the map attached thereto, Annexure B. *The map is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated in Annexure B, the description in Annexure A is to prevail.*”⁵⁴

2.30 If the highlighted sentence in the preceding paragraph of the Award had stopped after the first clause, then the ICJ’s general principle about the evidentiary value of maps would have applied. But the Award does not stop at the end of the first clause; the concluding sentence of the quotation is a compound sentence and it continues “if there should be any divergence between the boundary as described in annexure A and as delineated in Annexure B, the description in Annexure A is to prevail.” The Award thus expressly assigns the map a value whose evidentiary weight is negated only if the description of the boundary on the map diverges from the boundary as described in Annexure A. If the boundary line which Radcliffe drew on the map does not diverge from the text of the Award, the map should be conclusive as to the meaning of the text of the Award. So the Radcliffe Map is to be carefully studied to determine whether it diverges from the boundary as described in Annexure A of the Award. India did this in its Counter-Memorial, providing an enlargement of the portion of the map which relates to the land boundary terminus.

2.31 Bangladesh asserts that “even if the original map were produced, it would lack sufficient scale and level of detail necessary to determine the exact location of the boundary along the midstream of the main channel of the Hariabhanga River.”⁵⁵ The size and clarity of the boundary itself refutes Bangladesh’s assertion. Moreover, Bangladesh’s criticism of the

⁵³ BR, para. 3.27.

⁵⁴ Radcliffe Award, para. 10, CMI, Vol. II, Annex IN-2 (emphasis added).

⁵⁵ BR, para. 3.29.

map on this ground mistakes the specific evidentiary relevance of the Radcliffe Map in the instant case. Given that the Parties have proposed different channels, the critical question for the Tribunal in the first phase of its inquiry is *which* of the two different channels proposed respectively by the Parties was referred to in the Radcliffe Award. The question is not whether the Radcliffe Map shows “the exact location of the boundary along the midstream of the main channel.” The Radcliffe Map neither attempted to nor could have identified the precise location of the midstream, for, as will be explained below, it was understood (and this was entirely in accordance with general international law as it was then and is now) that the midstream itself was “fluid” or, as Justice Shahabuddin (Pakistan) put it in his separate opinion in the Bagge Award, “the district boundary in question was the midstream wherever it may be whenever the question arises”.⁵⁶ The Radcliffe Map is relevant for determining which of the two different channels which have been proposed by the Parties is the *main* channel. As explained earlier, hydrographic and bathymetric data must be consulted to determine its “midstream,” as the Radcliffe Award, other than specifying that the boundary was the “midstream”, did not and could not actually locate it.

2.32 The Radcliffe Map and the Award which it illustrates and of which it is an integral part had selected the main channel which lies to the east of New Moore Island and not the secondary and in places unnavigable channel to the west of New Moore Island, virtually “hugging”⁵⁷ the Indian shore.

IV. The Legal Identification of the “Main” Channel

2.33 As noted briefly above, two words in the relevant provision of Notification No. 964 Jur. are particularly important for its interpretation and application: “channel” and the adjective “main” with which the Notification qualified “channel”. With respect to both of them, Bangladesh commits major errors.

2.34 India pointed out in its Counter-Memorial that the Radcliffe Award incorporated criteria, well-known in international law, to ensure that the henceforth *international* boundary would maximize utilization of the various resource potentialities for both of the new States,

⁵⁶ Bagge Award, *UNRIAA*, Vol. XXI, p. 28; MB, Vol. III, Annex B16.

⁵⁷ MB, para. 5.8.

each of which would thereafter have to live with the boundary.⁵⁸ Bangladesh would ignore this important dimension of the task of determining the land boundary terminus. The adjective “main”, which qualifies “channel”, indicates clearly that if there were more than one channel, the boundary was to be the center of the midstream of the main of the two or more channels.

2.35 Situations in which there are more than one channel within a stretch or extended lengths of a river are hardly unusual. As India explained in its Counter-Memorial,⁵⁹ there are criteria in international law for distinguishing, from among a plurality of channels in rivers that constitute inter-state boundaries, the specific channel which, in the absence of a *lex specialis* to the contrary, is the international boundary. The ICJ in *Kasikili/Sedudu* identified, as controlling criteria for this determination, depth, width, water flow and comparative navigability.⁶⁰ Navigability, as the combined result of the other criteria, is determinative. Thus, even assuming *arguendo* that Bangladesh’s channel is a plausible channel within the meaning of the Radcliffe Award and the Radcliffe Map in Annexure B, the question would still remain as to whether that channel or the channel to the east of New Moore Island which India has specified, is, as a matter of fact, the main channel.

2.36 This is confirmed by Bangladesh’s own evidence. The four navigational charts submitted by Bangladesh, i.e., BN 40001,⁶¹ BN 35001,⁶² BN 7501,⁶³ and BN 3529,⁶⁴ are based on surveys which the Bangladesh Navy conducted (in part in Indian waters), from 2003 to 2010. Their bathymetric data show that the main channel of the Hariabhanga descends in a south-easterly direction, east of New Moore Island, where it joins the Raimangal River, whereupon the conjoined main channels continue into the Bay of Bengal.

⁵⁸ CMI, para. 4.19.

⁵⁹ *Ibid.*

⁶⁰ *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999.*

⁶¹ BR, Vol. II, Figure R3.14 (edited on 20 January 2003).

⁶² Chart edited on 26 August 2010, produced and send by Bangladesh to the Registrar of the PCA by Letter MOFA/UNCLOS(MAU)/113(A)/2013 dated 4 March 2013.

⁶³ BR, Vol. II, Figure R3.13B and Vol. III, Annex BR1 (edited on 29 November 2011)

⁶⁴ Chart edited on 13 November 2012, produced and send by Bangladesh to the Registrar of the PCA by Letter MOFA/UNCLOS(MAU)/113(A)/2013 dated 4 March 2013.

2.37 The course of the main channel is even clearer when viewed in three dimensions. Using the bathymetric data in Bangladesh's Chart 3529, which was published on 13 November 2012, India has generated a digital terrain model (DTM) of the relevant area, in which the substantial difference in the dimensions of the channels proposed by India and Bangladesh is starkly exposed (see Figures RJ 2.4 A and B at pages 34 and 35). The source data on the chart indicate that hydrographic survey of the relevant area was undertaken by the Bangladesh Navy between 2007 and 2010.

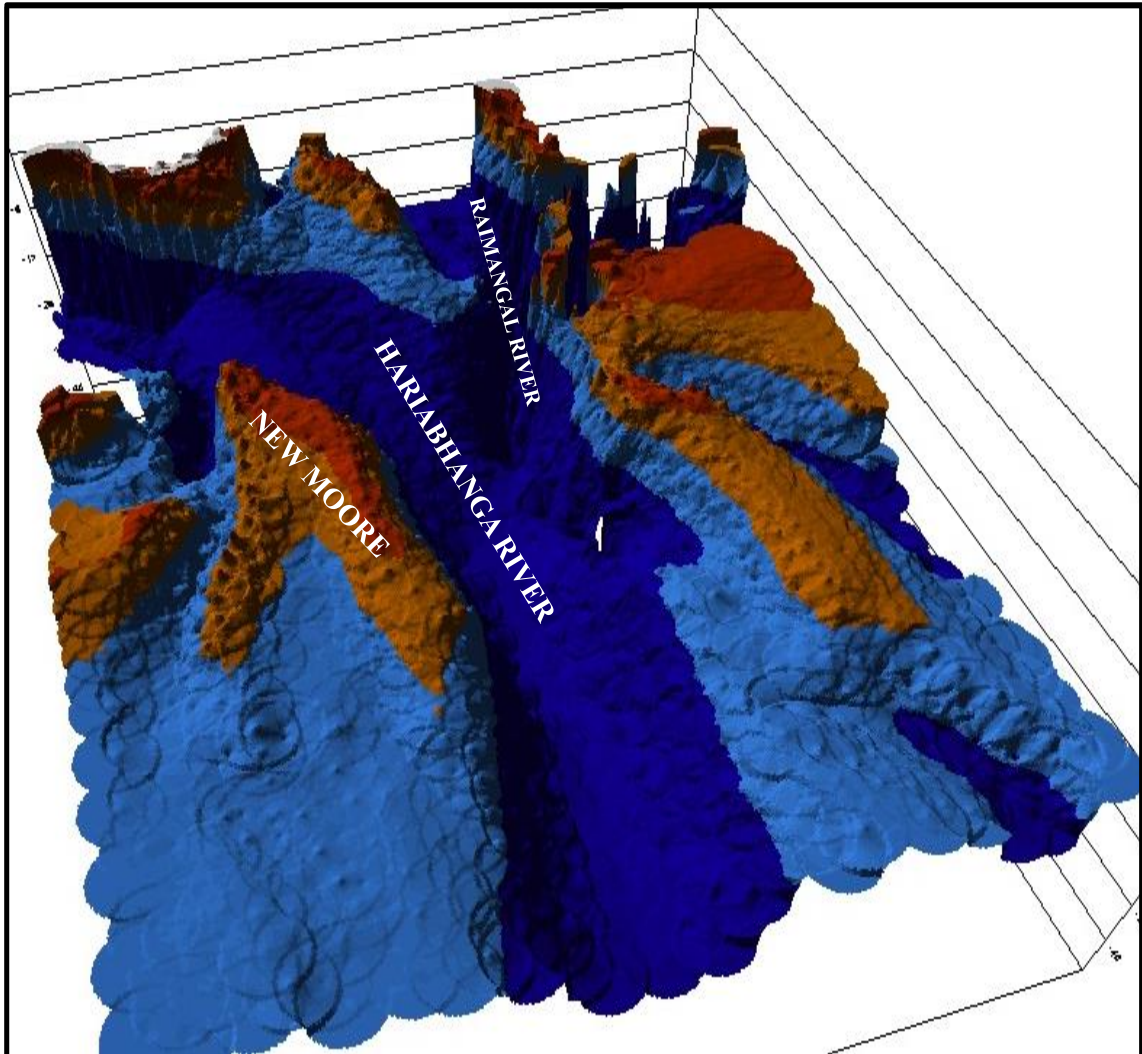
2.38 The DTM indicates various depth regions by different colours; the ranges for each colour are as follows:


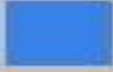


- Dark Blue – Depths greater than 10 meters;
- Light Blue – Depth between 5 to 10 meters;
- Light Brown – Depth between 2 to 5 meters;
- Dark Brown – Depth between 2 meters to shoal.

2.39 The DTM model shows graphically that the deepest part of the Hariabhanga is due east of New Moore Island; this means that the main channel flows east of New Moore Island. The part of the river flowing due west encounters shoals or lesser depth between 2 to 5 meters which means that it cannot be the main channel.

2.40 Bangladesh's four charts, which also confirm this, are set out on Figures RJ 2.5 A, B, C and D at page 37.

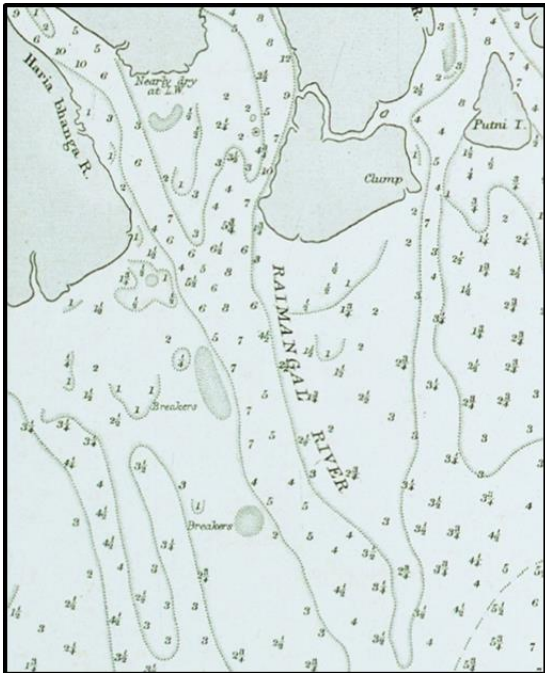
2.41 In the extract of British Admiralty Chart (hereinafter BA) 859, 1931 Edition, New Moore Island can be discerned and the flow of the conjoined Hariabhanga and Raimangal Rivers descends in a south-easterly direction, to the east of New Moore Island. Inasmuch as the same 1879 data was still used, the same configuration appears on the extract of BA 859, 1953 Edition. More telling is the extract of Bangladesh's Chart 7501 of November 2011 which shows that the channel west of New Moore Island is blocked and that the channel to the east of New Moore Island is deeper. The extract of Bangladesh's Chart 3529 of November 2012 shows the 5-meter contour and lesser depths to the west of New Moore Island, while the channel east of New Moore Island has depths of 15 to 17 meters.



Colour	From	To
	37.00	10.00
	10.00	5.00
	5.00	2.00
	2.00	-1.70

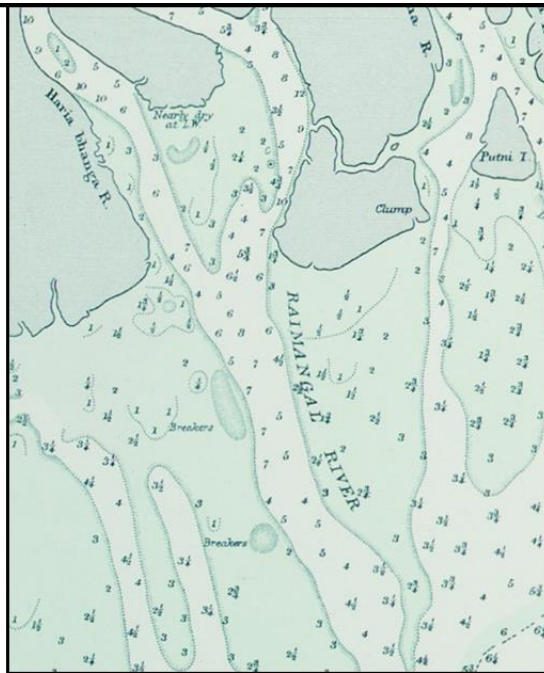
Digital Terrain Model Generated Based on Bangladesh Chart 3529

Figure RJ 2.4 B



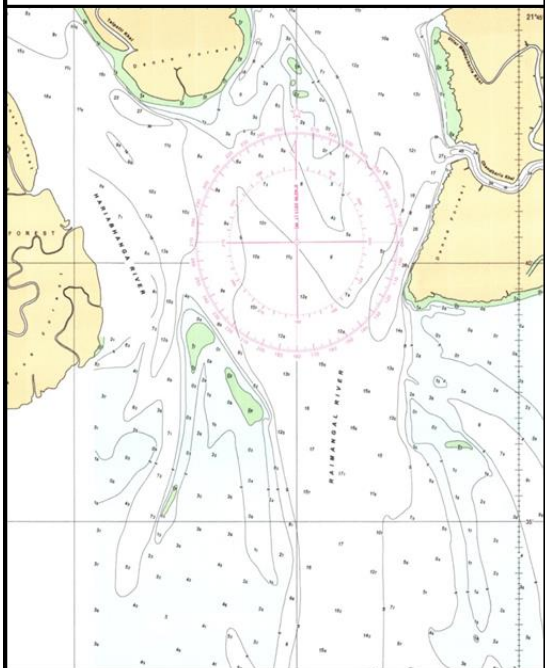
Extract of BA 859, 1931 Edition Showing the Existence of New Moore Island and the Flow of the Hariabhanga River in SE Direction and East of New Moore Island

Figure RJ 2.5 A



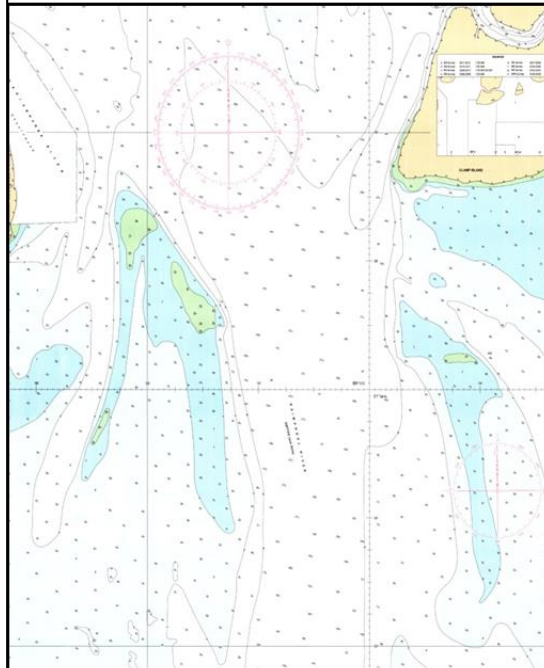
Extract of BA 859, 1953 Edition also Showing New Moore Island and the Flow of the Hariabhanga River in SE Direction and East of New Moore Island

Figure RJ 2.5 B



Extract of Bangladesh Chart 7501 (Nov. 2011) Showing that the Channel West of New Moore Island Is Blocked and that the Channel to the East Is Deeper

Figure RJ 2.5 C



Extract of Bangladesh Chart 3529 (Nov. 2012) Showing the 5-Meter Contour and Less Depth to the West of New Moore Island while the Channel to the East Has Depths of 15 – 17 Meters

Figure RJ 2.5 D

2.42 The same data which confirm the existence and location of the main channel to the east of New Moore Island also show that the so-called channel to the west of New Moore Island, which Bangladesh has proposed as the main channel to which the Radcliffe Award is supposed to have referred, is not only shallower and narrower than the main channel to the east of New Moore Island, but, in terms of the navigability criterion, is not even a continuous channel; its navigability is effectively blocked, as a result of shallow soundings, as it descends southward.

2.43 This is a critical fact which Bangladesh strains to conceal by stating that its proposed channel has “a depth of *up to* 8.6 and 9.6 metres”.⁶⁵ The question, of course, is not simply “depth *up to*” but, even more important in this context, “depth *down to*”, for if part of the flow is in very shallow sections or over features that effectively obstruct passage, it does not qualify as a channel, let alone as the main channel. Having isolated pockets where depths of 8.6 and 9.6 meters are available does not make the entire area safe for navigation. Sketch-map No. 4.3⁶⁶ (which, incidentally, was not created by India solely for this arbitration but is an extract of the official navigational Chart 351 produced by the National Hydrographic office) clearly indicates the presence of shoals having depths of -0.3, -1.3, 0.8, 1.4, and 2.5 meters which are, in fact, dangerous to navigation. Moreover, the width of the area between New Moore Island and the bank on its west is narrow and not suitable for navigation. In point of fact, as Bangladesh’s own data confirm, its proposed “main channel” is not continuous and at many points its depth is so shallow that it makes passage all but impossible for vessels of any significant draft.

2.44 Thus, Bangladesh’s own data not only defeat its claims that its proposed channel is the main channel to which the Radcliffe Award refers. In the light of that very data, the question remains as to whether the westernmost line which Bangladesh proposes even qualifies as a “channel” in international law, where the term is associated generally (and certainly whenever a main channel is to serve as an international boundary), with the continuous and most navigable of the options.

⁶⁵ BR, para. 3.35 (emphasis added).

⁶⁶ CMI, p. 67.

2.45 When Bangladesh's charts are carefully examined rather than Bangladesh's gloss on those charts, it is clear that the main channel to which the Radcliffe Award refers is to the east of New Moore Island, at the co-ordinates proposed by India. This is confirmed by the satellite images which India has adduced (see Figure RJ 2.6 at page 41).

2.46 In the satellite image of the area, dark blue colour pixels indicate the deeper depths, strong currents and less suspended sediments, whereas the lighter shades of blue pixels indicate lesser depths, slower currents and the presence of more suspended sediments. The red colour indicates dense vegetation. Hues of grey and white indicate land mass and, at times, inter-tidal zones. The colour in the image indicates that the Hariabhanga River is flowing in a direction well east of New Moore Island before meeting the Bay of Bengal. To date, there has been relatively little navigation in the area, due, in part, to the dispute over the boundary between India and Bangladesh. Once the boundary is settled by the Tribunal, each riparian will be able to use the waterway. However, if the line proposed by Bangladesh were to be adopted, it would effectively block India from sharing in the use of the common maritime area, precisely because Bangladesh's proposal is non-navigable, as explained below.⁶⁷

V. The Enduring Location of the Land Boundary Terminus and Its Evidentiary Implications

2.47 The third putative point of agreement which Bangladesh volunteers is that "the location of the land boundary terminus has remained unchanged since the time of the Radcliffe Award."⁶⁸ India agrees with this statement.

⁶⁷ See para. 2.71 below.

⁶⁸ BR, para. 3.2.



**Indian Satellite Image (IRS - Resourcesat - 2) Acquired on 4 February 2013
Showing Main Channel East of New Moore Island**

Figure RJ 2.6

2.48 Yet Bangladesh would draw a strange legal consequence from its point of agreement. Bangladesh insists that subsequent cartographic evidence (other than its own subsequent evidence) may not be used to ascertain the exact location of the main channel of the conjoined Hariabhangha and Raimangal Rivers. This is illogical. If the location has not changed over time, then subsequently prepared and better charts must not only be admissible, but, indeed, preferable and accorded more weight, precisely because they provide the best evidence of the facts in contention. The source data of the BA Chart 859 1931 Edition and other editions on which Bangladesh relies indicate that the survey of the River mouth of the Hariabhangha and Raimangal Rivers, on which the charts are based, was carried out in 1879. By modern standards, the survey methods used then were rudimentary; for example, depths were obtained by hand lead line. Resulting charts had less data and are not as descriptive as today's charts. To insist on relying on these charts because they are supposedly closer to the date of the Radcliffe Award is absurd, when "the location of the land boundary terminus has remained unchanged" and there are later charts giving more – and more accurate – information. In fact, as will be explained, later charts are actually based on data closer in time to the Radcliffe Award than data taken in 1879. Yet even BA Chart 859 of 1931, as rudimentary as it is, does not support Bangladesh's position.

2.49 Bangladesh purports to find authority for its self-contradictory position in three judgments of the ICJ. None supports Bangladesh. In *Kasikili/Sedudu*, the Court used modern documents precisely because, as in the instant case, the course of the river in question had not changed.⁶⁹ In *Gulf of Fonseca*, by contrast, both Parties contended that the Goascorán River had shifted over the course of time. It was in that context that the Court stated that "since what is important is the course of the river in 1821, more significance must be attached to evidence nearer to that date."⁷⁰ (In fact, in terms of temporal proximity, the cartographic data which India has adduced is "nearer to that date" than Bangladesh's cartographic data.⁷¹) In any event, unlike the *Gulf of Fonseca*, the Parties agree that the main channel has not shifted.

⁶⁹ *Kasikil/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, para. 1045.

⁷⁰ *Land, Island and Maritime Frontier Dispute, (El Salvador/Honduras; Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 549, para. 313.

⁷¹ See below Section VII.

Bangladesh states indeed that “the location of the land boundary terminus has remained unchanged since the time of the Radcliffe Award.”⁷²

2.50 Bangladesh also invokes the Chamber’s Judgment in *Benin/Niger* to support its contention that later best evidence is inadmissible. But that decision does not assist it, for even though the Chamber observed that “the Parties agree that the course of their common boundary should be determined, in accordance with the *uti possidetis juris* principle by reference to the physical situation . . . as that situation existed at the dates of independence”, the Chamber immediately went on to state

“the consequences of such a course on the ground, particularly with regard to the question of to which Party the islands in the River Niger belong, must be assessed in relation to present-day physical realities.”

The authentic French text, which is somewhat clearer, than the English version, states:

« Les conséquences de ce tracé sur le terrain, notamment en ce qui concerne l’appartenance des îles du fleuve à l’une ou l’autre des Parties, doivent cependant s’apprécier par rapport aux réalités physiques contemporaines ». ⁷³

2.51 India maintains that contemporary satellite imagery of the conjoined main channel of the Raimangal and Hariabhanga is admissible and entitled to full weight. There are two reasons for this. First, as noted, Bangladesh specified that the relevant channel as determined by the Radcliffe Award has not changed. Second, even if the Tribunal wishes to entertain the possibility that the position of the *main* channel may have changed since 1947, in such a circumstance, the applicable law prescribes that in case of dispute as to the location of the riverine boundaries as defined by the Radcliffe Award, the situation obtaining at the relevant moment is to be the moment of demarcation. This is established by Indian-Bangladeshi inter-state practice that followed the Bagge Award to which India now turns.

⁷² BR, para. 3.2.

⁷³ *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 109, para. 25.

VI. The Bagge Award

2.52 The Radcliffe Award was rendered, as will be recalled, on 13 August 1947. When disputes arose as to its interpretation, India and Pakistan agreed, on 14 December 1948, to establish a three-member Tribunal to decide on two areas between East and West Bengal and two areas between East Bengal and Assam.⁷⁴ The chairman of the Tribunal, Algot Bagge, a former member of the Supreme Court of Sweden, was to make the final decision.

2.53 The Bagge Award rendered an authoritative interpretation of the meaning of some key terms in the Radcliffe Award. In particular with respect to fluvial boundaries, Justice Bagge held that

“the boundary following the course of the midstream of the main channel of the river Ganges as it was at the time of the award given by Sir Cyril Radcliffe in his Report of August 12th [sic] 1947, is the boundary between India and Pakistan to be demarcated on the site.

If the demarcation of this line is found to be impossible, the boundary between India and Pakistan in this area shall then be a line consisting of . . . the boundary following the course of the midstream of the main channel of the river Ganges as determined on the date of demarcation and not as it was on the date of the award.”⁷⁵

2.54 This practice has been followed by the Parties in their implementation of the Radcliffe Award in those areas which demarcation has been negotiated. In its letter to India of 7 February 1951, Pakistan stated

“the Government of Pakistan have very carefully considered the question of river boundary between Khulna and 24 Parganas and they are of the opinion that the boundary in this section should be fluctuating. It is hoped that the Government of India will agree”.⁷⁶

On 13 March 1951, India replied

⁷⁴ Bagge Award, *UNRIAA*, Vol. XXI, p. 28; MB, Vol. III, Annex B16.

⁷⁵ *Ibid.*, para. 29 (emphasis added). The reference to the land boundary has not been reproduced, as indicated by the three suspension points.

⁷⁶ No. 1(1).3/10/50, 7 February 1951 (Vol. II, Annex RJ-1).

“[W]e agree that the boundary between Khulna and 24 Parganas running along the midstream of the rivers should be a fluid one and are issuing necessary instructions to the authorities concerned.”⁷⁷

2.55 This holding of the Bagge Award, confirmed by subsequent State practice, represents an authoritative interpretation of the Radcliffe Award as to the critical moment for determination of fluvial boundaries. It applies to the determination of the land boundary terminus.

2.56 Thus, two possibilities are open to the Tribunal as to the critical moment for determination of the land boundary terminus. If the Tribunal finds that the language of the Radcliffe Award, together with the map in Annexure B, are clear and consistent, then they conclusively determine the course of the main channel of the conjoined Hariabhanga and Raimangal Rivers at the point where that main channel meets the Bay of Bengal. Alternatively, if the Tribunal finds the demarcation of “this line . . . to be impossible”, it must confirm the boundary as the main channel “as determined on the date of demarcation and not as it was on the date of the Award.”⁷⁸ The latter is determined by reference to the best evidence currently available which would include the satellite imagery which India has adduced. In either of those options, the precise location of the midstream of the main channel, which is fluid, is always contemporaneous with the moment of decision.

2.57 It is India’s submission that these lines are the same, such that whichever method of decision the Tribunal elects, the land boundary terminus is at the point which India has indicated to the east of New Moore Island, i.e., 21°38’40.4” N, 89°10’13.8” E.

VII. The Maps and Their Role in the Decision

2.58 Bangladesh devoted only seven paragraphs of its Memorial to the land boundary terminus. Paragraph 5.5 quoted seven selected lines from the Radcliffe Award. Paragraph 5.6 submitted that “the land boundary terminus established in 1947 has remained unchanged”. Paragraph 5.7 was devoted to maps: Bangladesh quoted the Radcliffe Award, which, as will

⁷⁷ Copy of Express Letter from Foreign, New Delhi to Foreign, Karachi, No. F. 20/50-Pak.III, 13 March 1951 (Vol. II, Annex RJ-2).

⁷⁸ Bagge Award, see para. 2.53 above.

be recalled, stated that “the map is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated in Annexure B, the description in Annexure A is to prevail.”⁷⁹

2.59 In that same paragraph, Bangladesh then proceeded to identify three maps: a map with the boundary clearly marked and signed by Radcliffe, an authentic copy of which Bangladesh said was not available to it; a map with a different line, not signed by Radcliffe, published in the Gazette of Pakistan; and a map with a still different line showing “Partition Boundaries in Bengal and Assam”, produced by the British Foreign Office (FO). Both the Pakistani and FO maps, like the Radcliffe Map, contained a hand-drawn line on a previously published chart. In the case of the Radcliffe Map, we know who drew the line; in the case of the other two maps, we do not.

2.60 In paragraph 5.8, Bangladesh asserted that “[i]n the absence of an authoritative map – one that is certified to be a true copy of the original prepared by the Radcliffe Commission – these [the Pakistani and United Kingdom Foreign Office] maps are to be treated as illustrative.”

2.61 India has now located and attached “a true copy of the original prepared by the Radcliffe Commission” and has made the original available to the Tribunal and Bangladesh. This was only found in the past several months because it was in a large collection of historical documents which had been in the possession of the Ministry of Home Affairs and its whereabouts were not known.⁸⁰ As can be seen, this map had also been submitted to the Bagge Tribunal. (It may be noted that the authentic map is identical on all points with the exemplar of the Radcliffe Map which India had adduced in its Counter-Memorial, with the exception of the red dotted line paralleling the Radcliffe line; that dotted line was inserted by an Indian official on a facsimile used in the Bagge proceedings.) Hence, as Bangladesh must concede, the map of the Pakistani Gazette and the map prepared by the United Kingdom Foreign Office are not to be taken as “illustrative” of the Radcliffe Award. Notwithstanding its admission of the authority of a certified exemplar of the Radcliffe Map, should Bangladesh continue to insist on the relevance of the line drawn on the two maps it had

⁷⁹ Radcliffe Award, para. 10, CMI, Vol. II, Annex IN-2.

⁸⁰ See the affidavits of 15 July 2013 in Vol. II, Annex RJ-11.

adduced, some comments are in order. In its Memorial and Reply, Bangladesh fails to explain why the lines on two maps, neither of which was signed or authorized by the Radcliffe Commission, can be taken as “illustrative” of the Award and why both of these non-authoritative maps should be given precedence over the original map *signed* by Radcliffe himself and made part of the Award in Annexure B.

2.62 The map which was prepared by Pakistan and published in the Gazette of Pakistan, Bangladesh’s Figure R3.3,⁸¹ is misleadingly labelled. In the Memorial, where it appears in Volume II as Figure 5.1, it bears the title “Radcliffe Award, Annexure ‘B’ from the 1947 Gazette of Pakistan”, allowing the unwary reader to assume that it is a reproduction of the Radcliffe Map. It is reproduced again in the Reply, this time under the title “Annexure B from the Gazette of Pakistan 17 August 1947.” This time, the B is not in quotation marks. In fact, the Gazette map is not a reproduction of the Radcliffe Map in Annexure B of the Award. It is a line drawn on a different map, by an unknown author, and, moreover, the line does not track Sir Cyril Radcliffe’s line. Wholly apart from these distortions, it would be of doubtful international authority if for no other reason than the fact that it was prepared by one of the Parties. As the Court said in *Nicaragua v. Honduras*, the probative value of a map produced by the Parties turns on “the neutrality of their sources towards the dispute in question and the parties to that dispute.”⁸²

2.63 As for the British Foreign Office map, it was prepared by the Research Department of the Foreign Office in September 1948 by one D.H. and appears in Volume 12 of “Constitutional Relations between Britain and India: the Transfer of Power 1942-47”, a compilation of diplomatic correspondence published by Her Majesty’s Stationery Office in 1983.⁸³ But it is dated 1948 and is not part of the documents from 1942-47, so there is no indication that it was an official document, nor is there any indication, beyond the initials D.H., of who prepared it or why. It is certainly not “contemporaneous” with the Radcliffe Award. Moreover, its line is plainly imprecise, as its reproduction on Bangladesh’s

⁸¹ BR, Vol. II, Figure R3.3.

⁸² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 723, para. 216.

⁸³ Volume 12 is entitled “The Mountbatten Viceroyalty Principles, Partition and Independence 8 July – 15 August 1947”.

Figure R3.4 demonstrates.⁸⁴ The map itself is approximately 15” x 15””; the entire Estuary is depicted in approximately 1/16th of an inch; the black line which is supposed to have illustrated the line, unlike the Radcliffe line, is on the Indian coast, while the breadth of the red line highlighting it covers the entire Estuary. It would appear that it was prepared to indicate the terrestrial allotments effected by the Radcliffe Award and did not focus on the land boundary terminus.

2.64 Whatever the provenance of this map and wholly aside from its focus and intended use, Bangladesh does not explain why the reading, a year after the Award, by an anonymous British civil servant in the United Kingdom research department should be deemed an authoritative interpretation of the decision of an independent boundary commission and why that graphic interpretation should trump the line drawn by the Commission itself as part of its Award. The FO map is of no authority and has no illustrative value for the determination of the land boundary terminus.

2.65 The point of emphasis is that in both of these maps – that of the Pakistani Gazette and that of the British Foreign Office – their respective lines, insofar as they can be read, diverge from the line drawn by Sir Cyril Radcliffe on the authentic signed map in Annexure B; they also diverge from each other.

2.66 Bangladesh has depicted its own conception of the Radcliffe Award’s line on a copy of the 1931 Edition of the 1924 British Admiralty Chart 859, “which”, Bangladesh asserts, “was current as at 15 August 1947.”⁸⁵ Its line, too, diverges from the Radcliffe Map. Precisely the same questions which India asks with respect to the evidentiary value of the Pakistani and FO maps and to their power to trump the Radcliffe Map, apply to Bangladesh’s map.

2.67 When India adduced an exemplar of the signed Radcliffe Map in its Counter-Memorial, Bangladesh, in its Reply, dismissed its relevance and repeatedly criticized “India’s failure to use a contemporary chart.”⁸⁶ It also criticized India’s use of satellite imagery showing the location of the main channel as failing the test of contemporaneity with the

⁸⁴ BR, Vol. II, Figure R3.4.

⁸⁵ MB, para. 5.9.

⁸⁶ BR, para. 3.9.

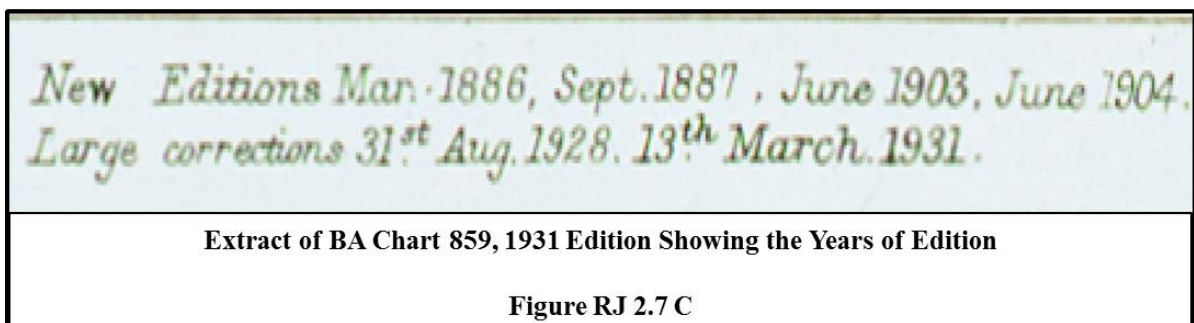
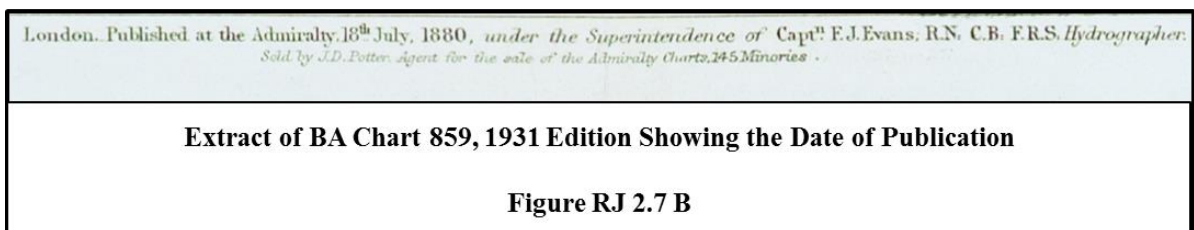
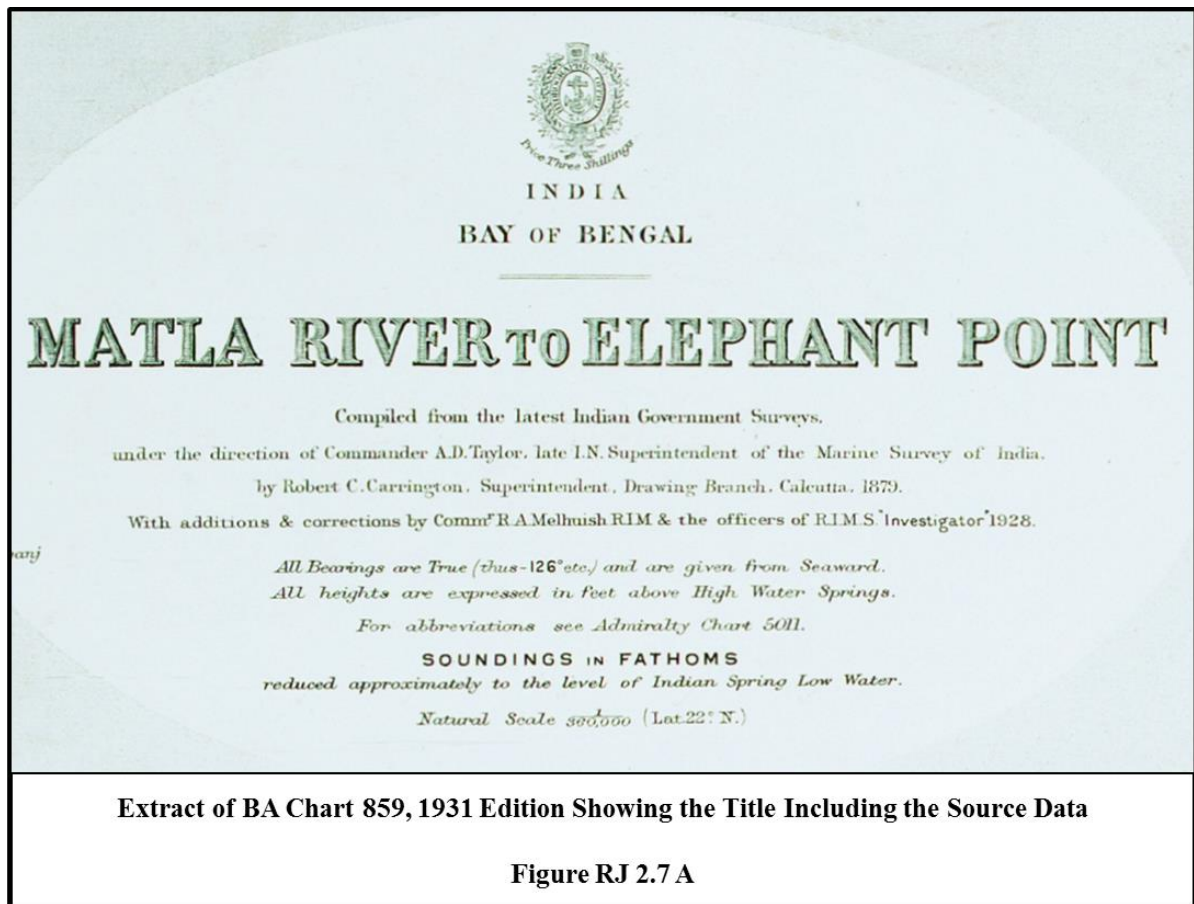
Radcliffe Award of 1947, despite the fact that Bangladesh had asserted, in its Memorial and restated in its Reply, that the channel has not changed since 1947. In spite of Bangladesh's repeated insistence on contemporaneity, Bangladesh fails to note that the 1931 chart which it was using was based on data taken in 1879 which had not been updated since then (see Figures RJ 2.7 A, B and C at page 51).⁸⁷

2.68 Although subsequent iterations of the 1931 map adjusted certain segments based on data from RIMS investigator surveys in 1928 and 1929, the data and the corresponding adjustments were only for the approaches to the Karnaphuli River (well to the east), Chittagong and the approaches to the Rangoon River. None of the data which the subsequent iterations of the 1931 chart incorporated contained new data with respect to the area of the Estuary under discussion here. For that area, which is critical to this part of the Tribunal's decision, all the subsequent maps which Bangladesh invokes essentially relied on source data from no later than 1879.

2.69 Thus Bangladesh's supposedly contemporaneous chart was based on data taken almost 70 years before the Radcliffe Award. British Admiralty Chart 859 of 1953 and British Admiralty Chart 829 of 1959, both of which Bangladesh has adduced, are also based only on the data of 1879. But even that early map shows the deepest channel hugging the *eastern* and not the western coast and clearly to the east of New Moore Island. Extracts of these maps are set out on Figures RJ 2.5 A, B, C and D at page 37.

2.70 The critical point is that because the boundary as Sir Cyril Radcliffe marked it on the map *does not* diverge from the boundary as described in Annexure A, it is admissible as an authentic and authoritative illustration of the boundary as the Award decided it. For these reasons, India disputes Bangladesh's assertions at paragraphs 3.14 and 3.15 of its Reply, which would exclude the relevance of the Radcliffe Map in favour of the other maps it has adduced.

⁸⁷ M. Bhattacharya, *Charting the Deep, A History of the Indian Naval Hydrographic Department*, National Hydrographic Office, 2004, pp. 130-131, recording the deployment of RIMS investigator (Vol. II, Annex RJ-9).



VIII. Social and Economic Consequences of Fixing the Land Boundary Terminus

2.71 Although India's case with respect to the land boundary terminus rests on the terms of the Radcliffe Award, the Radcliffe Map, inter-state practice and scientific data based on hydrography and bathymetry, the Tribunal may wish to take account of the dramatically different social and economic consequences which will attend the respective land boundary terminus which each of the Parties has submitted. If the Tribunal were to select the line proposed by Bangladesh, which was accurately described in its Memorial, as "hugging" the Indian coast,⁸⁸ the consequence would be that, henceforth, India and its population would be effectively and permanently excluded from participating in the multiple uses of this common waterway, even for the minimal use of navigation from the north for access to the Bay of Bengal. While these multiple uses have, until now, been severely limited because of the uncertainty of the location of the boundary in this sector, they will unquestionably increase when title is quieted by the Tribunal's Award. By contrast to the line which Bangladesh proposes, India's line, which India has demonstrated was determined by the Radcliffe Award, affords both riparian States full access and opportunity to participate in the uses of this common resource.

IX. Conclusion

2.72 For the foregoing reasons, India confirms its prior arguments and affirms its submission that all of the authoritative and relevant indicators of the location of the land boundary terminus – i.e., the text of the Radcliffe Award, the map in Annexure B of the Award, the principles of international law with respect to boundary determination, hydrographic and bathymetric data, satellite imagery and cartographic evidence – confirm India's submission that the land boundary terminus is to the east of New Moore Island, at 21°38'40.4" N, 89°10'13.8" E.

⁸⁸ MB, para. 5.8.

CHAPTER 3

THE RELEVANT COASTS AND THE RELEVANT AREA

3.1 The present Chapter responds to Bangladesh's Reply on the relevant coasts and the relevant area.⁸⁹

3.2 As a preliminary point, attention is drawn to the irrelevance of Bangladesh's repeated references to India's coasts and maritime areas outside the area that is relevant for the purposes of the present delimitation (the "relevant area").⁹⁰ For example, after setting out its position on the relevant coasts of the two Parties, and after (mis)applying the non-disproportionality test, Bangladesh claims that "[c]ompounding this inequity is the fact that India retains substantial, indeed massive, potential entitlements to the continental shelf beyond 200 M outside the area of overlap, whereas Bangladesh does not."⁹¹ This and similar remarks, found throughout Bangladesh's pleadings,⁹² are irrelevant to the maritime delimitation between India and Bangladesh. By definition, maritime areas attributable to India that do not overlap with areas that might be attributable to Bangladesh have nothing to do with the present case.

3.3 It will be recalled that, in its Memorial, Bangladesh failed to define in any rigorous geographic and legal fashion the relevant coasts of India or of Bangladesh for the purposes of the present delimitation.⁹³ As a consequence, and as was explained by India in the Counter-Memorial, its purported relevant coasts were wrong.⁹⁴

3.4 For its part, India set forth in appropriate detail its position on the relevant coasts of India and Bangladesh for the purposes of the present delimitation in Chapter 6 of the Counter-Memorial.⁹⁵

⁸⁹ BR, paras. 5.60-5.66.

⁹⁰ BR, e.g., paras. 4.138-4.146, 5.74, Figures R4.26A and R4.26B.

⁹¹ BR, para. 5.74.

⁹² BR, paras. 4.139-4.140, 5.16-5.17, 5.35-5.36, 5.38.

⁹³ CMI, paras. 6.18-6.30.

⁹⁴ CMI, paras. 6.31-6.34 (Bangladesh relevant coast); paras. 6.38-6.39 (India relevant coast).

⁹⁵ CMI, paras. 6.18-6.41.

3.5 In its Reply Bangladesh has changed its position radically. As it explains, “[i]n light of the Judgment of the ITLOS in *Bangladesh/Myanmar*, Bangladesh has reassessed its views concerning the relevant area and the relevant coasts as expressed in the Memorial.”⁹⁶

3.6 Bangladesh addresses the relevant coasts of India and of Bangladesh in Chapter 5 of its Reply, concerning delimitation beyond 200 nautical miles.⁹⁷ It considers that the disproportionality test should be applied in a single combined exercise to all of the areas to be delimited.⁹⁸

I. The Law Applicable to the Determination of the Relevant Coasts

3.7 India set out the law applicable to the determination of the relevant coasts in its Counter-Memorial.⁹⁹ Since the Counter-Memorial was submitted, the ICJ has confirmed this legal position in its *Nicaragua v. Colombia* Judgment of 19 November 2012, in which the Court first recalled that

“It is well established that ‘[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts’ (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*), *Judgment, I.C.J. Reports 2009*, p. 89, para. 77).”¹⁰⁰

The Court then stated that the relevant coasts are “those coasts the projections of which overlap”:

“The Court will, therefore, begin by determining what are the relevant coasts of the Parties, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the

⁹⁶ BR, para. 4.151.

⁹⁷ BR, paras. 5.60-5-66.

⁹⁸ BR, para. 4.151.

⁹⁹ CMI, paras. 6.28-6.29, 6.32. As India said, and as Bangladesh now accepts (BR, paras. 5.67-5.68), the determination of the direction of the coasts in the event that an angle-bisector line had to be constructed (*quod non*) is a quite separate exercise from the determination of the relevant coasts for the purpose of applying the non-disproportionality test. In the first case, it is the direction of the coasts that is relevant; in the second, it is their lengths.

¹⁰⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 140.

overlapping claims by drawing a line of separation between the maritime areas concerned.”¹⁰¹

The Court went on to recall the “two different though closely related legal aspects” of the role of relevant coasts,¹⁰² citing the following passage from *Romania v. Ukraine*:

“The role of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line.”¹⁰³

3.8 The Court considered “that the relevant Nicaraguan coast is the whole coast which projects into the area of overlapping potential entitlements and not simply those parts of the coast from which the 200-nautical-mile entitlement will be measured”, and thus included the entire mainland coast of Nicaragua, with the exception of “a short stretch of coast near Punta de Perlas, which faces due south and thus does not project into the area of overlapping potential entitlements”.¹⁰⁴

3.9 In the case of Colombia, the position was more complicated geographically. The Court first recalled

“that, in order for a coast to be regarded as relevant for the purpose of a delimitation, it ‘must generate projections which overlap with projections from the coast of the other Party’ (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 97, para. 99) and that, in consequence, ‘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’ (*Continental*

¹⁰¹ *Ibid.*, para. 141.

¹⁰² *Ibid.*

¹⁰³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89, para. 78.

¹⁰⁴ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 142.

*Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 61, para. 75).*¹⁰⁵

3.10 Given the Court's conclusion that Nicaragua had not established that it had a continental margin that extended far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court was concerned only with those Colombian entitlements which overlapped with the continental shelf and exclusive economic zone entitlements within 200 nautical miles of the Nicaraguan coast. Colombia's relevant coast was therefore limited to its islands, and did not include its mainland coast.

3.11 The only case in which the relevant area has included continental shelf beyond 200 nautical miles was *Bangladesh/Myanmar*. The ITLOS decided that the relevant area to be delimited was "approximately 283,471 square kilometres",¹⁰⁶ a figure that included overlapping continental shelf projections beyond 200 nautical miles from either coast, in particular in the south-west area defined by the Tribunal (as can also be seen on Sketch-map 8 in the Judgment¹⁰⁷).

3.12 However, the inclusion of continental shelf beyond 200 nautical miles did not alter the accepted method of defining the relevant coasts, as can be seen from the Judgment:

"The Tribunal notes at the outset that for a coast to be considered as relevant in maritime delimitation it must generate projections which overlap with those of the coast of another party".¹⁰⁸

3.13 In short, to define the relevant coasts of India and Bangladesh, and consequently the relevant area to be delimited, it is necessary to determine India's and Bangladesh's coasts (adjacent or opposite) generating overlapping maritime projections.

¹⁰⁵ *Ibid.*, para. 150.

¹⁰⁶ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, para. 496.*

¹⁰⁷ *Ibid.*, Sketch-map 8: EEZ/CS, Tribunal's measurement of the relevant area, p. 144.

¹⁰⁸ *Ibid.*, paras. 198 and 489.

II. Determination of the Relevant Coasts

A. Bangladesh's Relevant Coast

3.14 India and Bangladesh are in agreement that, in the case of Bangladesh, the relevant coast is the whole of the coast from the land boundary terminus with India to the land boundary terminus with Myanmar. As both India and Bangladesh have noted,¹⁰⁹ the ITLOS found the length of Bangladesh's coast to be approximately 413 kilometres.¹¹⁰

3.15 In its Counter-Memorial, India concluded in its Counter-Memorial that the relevant coast of Bangladesh was 417 kilometres in length.¹¹¹ It maintains that position. In the Reply, Bangladesh concluded that the length of its coastline was 424 kilometres.¹¹² The difference reflects the difference over the location of the land boundary terminus (see Chapter 2 above).

3.16 These minor differences (413/417/424 kilometres) are immaterial in the context of applying the non-disproportionality test.

B. India's Relevant Coast

3.17 In its Counter-Memorial, India described the relevant coast of India in three sections extending westward from the land boundary terminus to Devi Point.¹¹³ The total length of India's relevant coast, thus measured, is 411 kilometres.¹¹⁴

3.18 In the Reply, Bangladesh does not appear to question India's description of the three sections of coast or the calculations based thereon, except to suggest that the actual length should be 404 kilometres. As with Bangladesh's relevant coast, the minor difference between the lengths proposed by India and by Bangladesh reflects the difference over the location of

¹⁰⁹ CMI, para. 6.35; BR, para. 5.62.

¹¹⁰ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, paras. 201-202.

¹¹¹ CMI, para. 6.37.

¹¹² BR, para. 5.62.

¹¹³ CMI, para. 6.40.

¹¹⁴ CMI, para. 6.41.

the land boundary terminus, but is immaterial in the context of applying the non-disproportionality test.

3.19 However, Bangladesh goes on to assert, without explanation, that, “considered in light of the ITLOS Judgment, India’s relevant coast must actually be deemed longer than [404 kilometres]”.¹¹⁵ It considers that to stop the relevant coast at Devi Point is inappropriate since India “limits its consideration of the relevant area to the space within 200M”.¹¹⁶ Bangladesh “considers it appropriate to extend India’s coast to that point on peninsular India directly opposite the point on the proposed outer limit of Bangladesh’s continental shelf that is closest to India”.¹¹⁷ It identifies this as Sandy Point, and then connects Devi Point and Sandy Point by a straight line of 304 kilometres. This makes India’s relevant coast, according to Bangladesh, 708 kilometres in length.¹¹⁸

3.20 Bangladesh does not develop this point further. It deals with it in two brief paragraphs, citing no authority and giving no explanation.¹¹⁹

3.21 India cannot accept this approach towards the determination of the relevant coasts. In seeking to apply its approach, Bangladesh introduces two anomalies that reinforce its unworkability:

- (a) As can be seen from Figure R5.11 in its Reply, reproduced in Figure RJ 3.1 A at page 63, Bangladesh has purported to include as part of the relevant area India’s territorial sea, exclusive economic zone, and continental shelf within 200 nautical miles adjacent to a stretch of coast between Devi Point and Sandy Point, areas which on any basis are not part of the overlapping areas. Even if this stretch of coast could in some way be included in the calculation of India’s relevant coast, these areas could not to be included in the relevant area. Figure RJ 3.1 B at page 65 highlights these areas of Indian maritime zones that do not bear any possible relationship to

¹¹⁵ BR, para. 5.64.

¹¹⁶ *Ibid.*

¹¹⁷ BR, para. 5.65.

¹¹⁸ *Ibid.*

¹¹⁹ BR, paras. 5.64-5.65.

Bangladesh's maritime projections. These areas do not overlap any areas to which Bangladesh might be entitled, and so cannot be part of the relevant area.

(b) The choice of Sandy Point (or indeed any other point) as the southernmost point in India's relevant coast is wholly arbitrary. India's coastline that projects onto the continental shelf beyond 200 nautical miles goes well southwest of Sandy Point, and there is no reason to choose one point over another.

3.22 In the present case, the relevant coasts are readily definable to determine overlapping projections up to the 200-nautical-mile limit under Article 76(1) of UNCLOS. For Bangladesh to seek extension of India's relevant coast with an additional stretch of coastline based on presumed projections beyond 200 nautical miles, without Bangladesh having any corresponding relevant coast has no legal basis.

3.23 As indicated at paragraph 3.11 above, in *Bangladesh/Myanmar*, the ITLOS delimited areas of territorial sea, exclusive economic zone, and continental shelf both within and beyond 200 nautical miles. The fact that there was an overlapping area of continental shelf beyond 200 nautical miles did not affect the calculation of the relevant coast of Bangladesh or Myanmar.

C. Conclusion

3.24 In conclusion, the relevant coasts of the Parties are those that generate overlapping maritime projections, and serve as the relevant coasts for all purposes of this case. Bangladesh's relevant coast (the entirety of its coast) is 417 kilometres in length. India's relevant coast extends to Devi Point, its total length being 411 kilometres.

III. Determination of the Relevant Area

3.25 In its Reply,¹²⁰ Bangladesh has proposed a relevant area based on its unfounded approach to the relevant coasts. The unacceptable aspects of this (such as its inclusion of areas of India's territorial sea, exclusive economic zone and continental shelf within

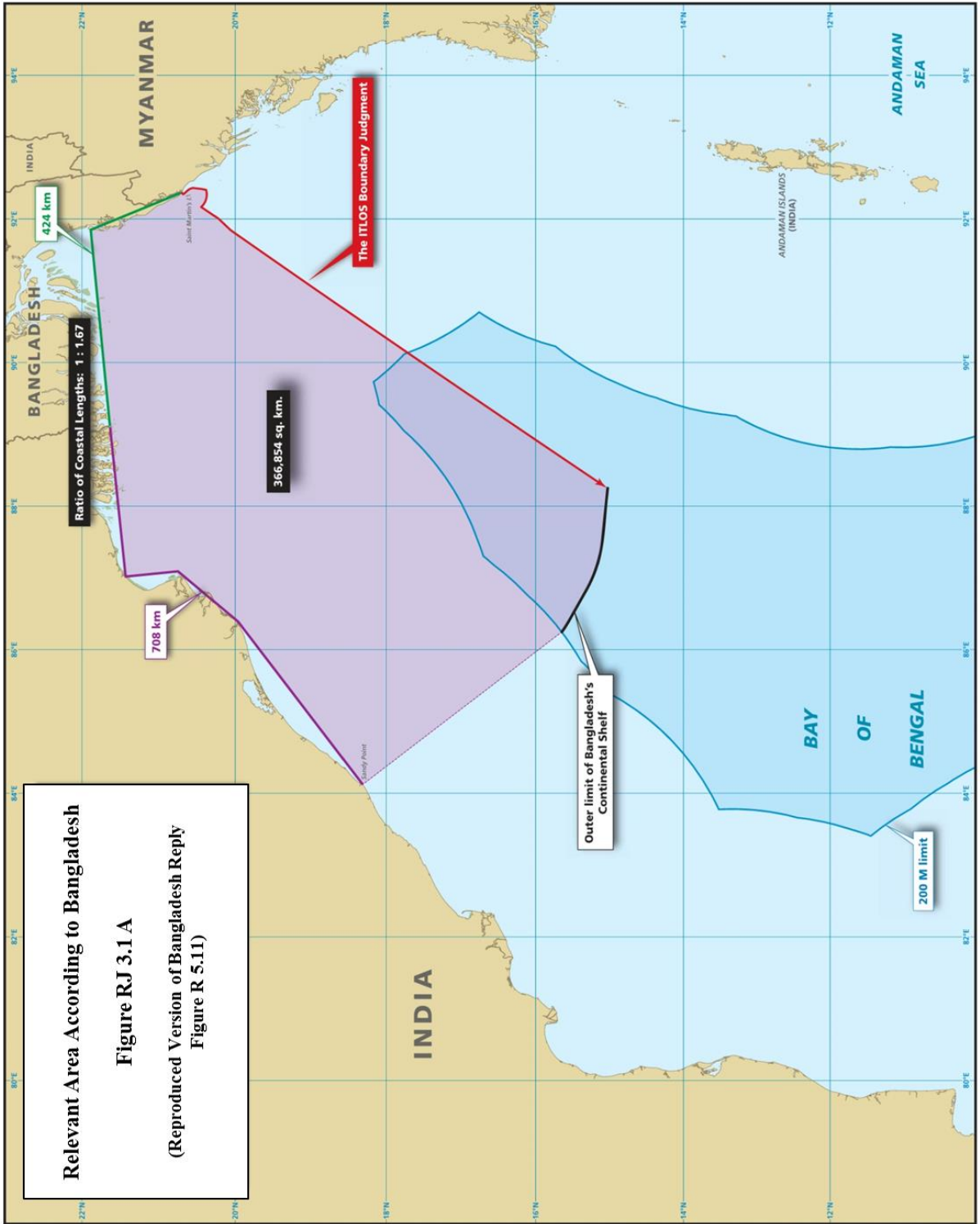
¹²⁰ BR, Figure R5.11, paras. 5.69-5.70.

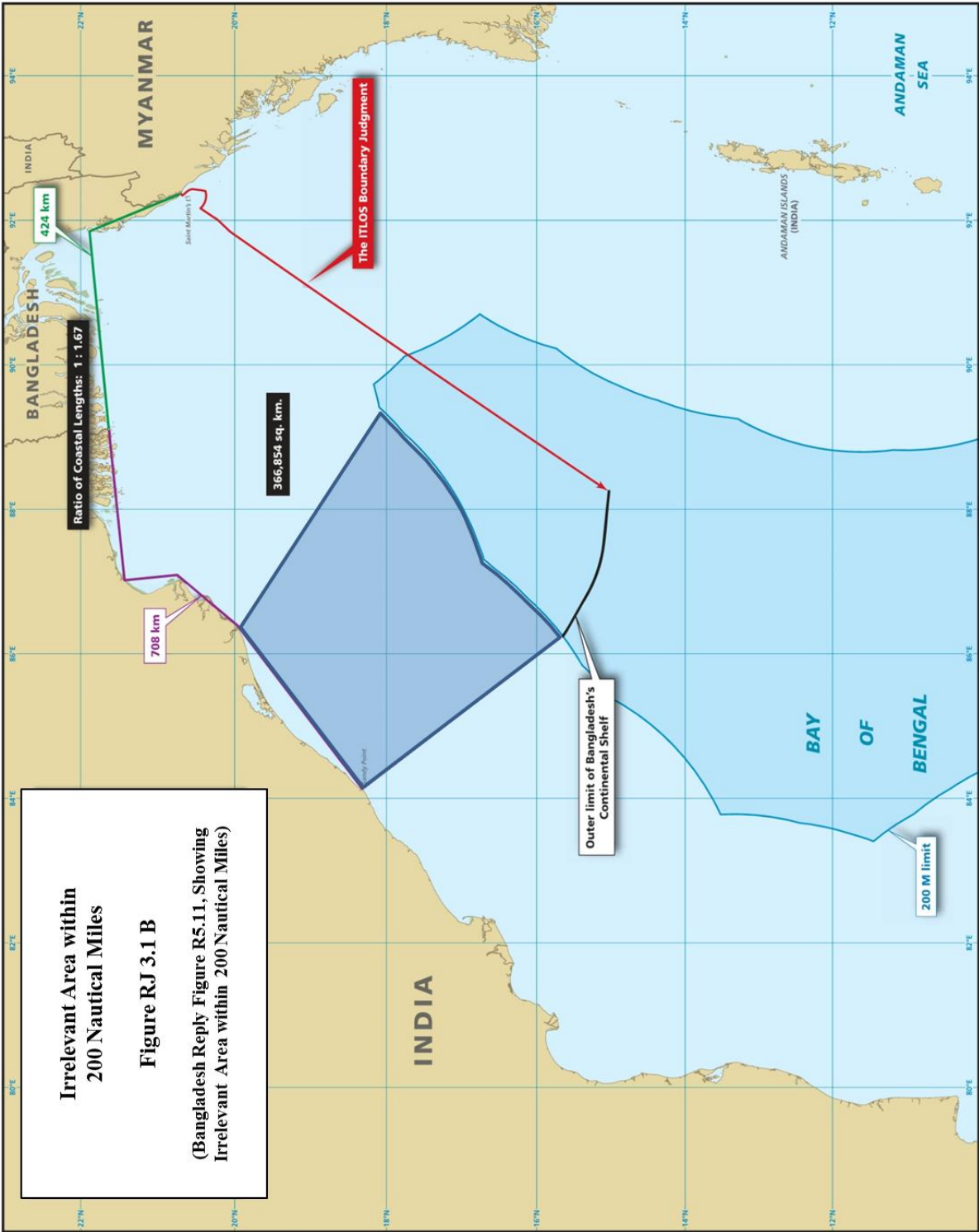
200 nautical miles that on no basis could overlap with projections from the Bangladesh coast) have been discussed above at paragraph 3.21.

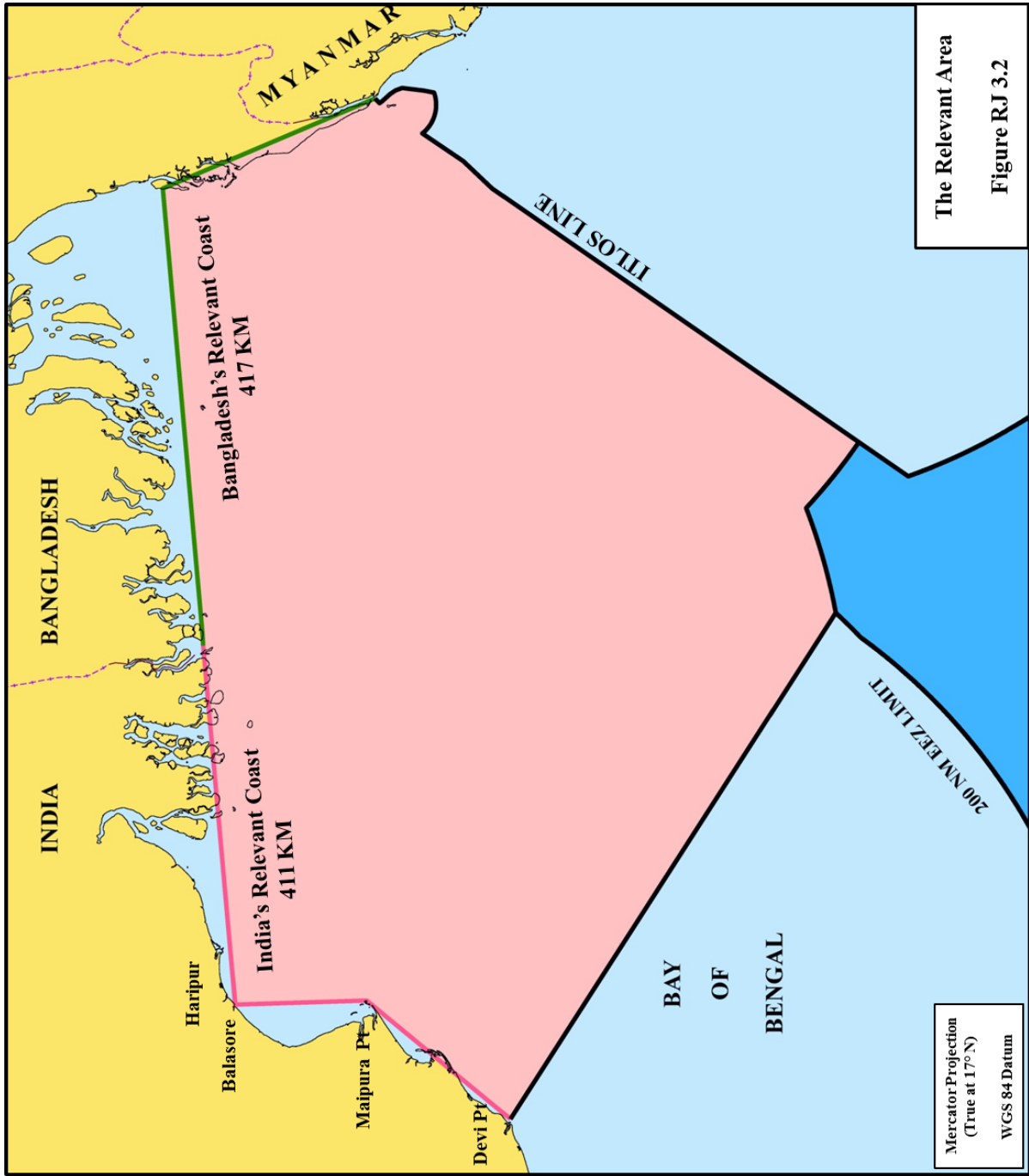
3.26 For its part, India maintains the determination of the relevant area set out in its Counter-Memorial,¹²¹ subject to a minor adjustment. The relevant area described in the Counter-Memorial¹²² did not take into account the low-tide elevation on which base point I-3 is located. This is now done. The revised relevant area measures 176755.9 square kilometres and is depicted on Figure RJ 3.2 at page 67.

¹²¹ CMI, paras. 6.42-6.43.

¹²² CMI, para. 6.44.







The Relevant Area
Figure RJ 3.2

CHAPTER 4

METHODOLOGY AND DETERMINATION OF BASE POINTS

4.1 In Chapter 6 of its Counter-Memorial, India set out the modern international law on maritime delimitation, with special reference to the *Black Sea* and *Bangladesh/Myanmar* Judgments.¹²³ India showed that achieving an equitable solution involved application of the “equidistance/relevant circumstances” three-stage method.

4.2 It will be recalled that, in *Bangladesh/Myanmar*, the ITLOS held:

“In the *Black Sea* case, the ICJ built on the evolution of the jurisprudence on maritime delimitation. In that case, the ICJ gave a description of the three-stage methodology which it applied. At the first stage, it established a provisional equidistance line, using methods that are geometrically objective and also appropriate for the geography of the area to be delimited. ‘So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case’ (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 101, para. 116). At the second stage, the ICJ ascertained whether ‘there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result’ (*ibid.*, at pp. 101, para. 120). At the third stage, it verified that the delimitation line did not lead to ‘an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line’ (*ibid.*, at p. 103, para. 122).”¹²⁴

4.3 Both the *Black Sea* and *Bangladesh/Myanmar* cases reaffirmed the identification of the “relevant coasts”, which “generate projections which overlap those of the coast of another party” as the task providing the context for the three-stage methodology which is then applied.¹²⁵ Thereafter the first of the “defined stages”¹²⁶ of the methodology involves

¹²³ CMI, paras. 6.3-6.16.

¹²⁴ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 233; see also para. 240.

¹²⁵ *Ibid.*, para. 186; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89, para. 77.

¹²⁶ *Black Sea*, p. 101, para. 115. See also *Bangladesh/Myanmar*, para. 240.

projecting a provisional equidistance line “using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place.”¹²⁷

4.4 After the first stage of drawing a provisional equidistance line, the Tribunal seized of the case proceeds to the second stage. Here, the Tribunal determines “whether there are factors calling for the adjustment or shifting of that line in order to achieve an equitable result.”¹²⁸ Once this has been accomplished, the third and final step involves a check to ensure that the provisional equidistance line as adjusted, does not produce a marked disproportionality.

4.5 This systematic approach confines the introduction of equitable considerations to the second phase. When applied, however, the systematic methodology achieves an equitable solution.

4.6 The jurisprudence has been confirmed in the recent decision of the International Court of Justice in *Nicaragua v. Colombia*.¹²⁹ Of special relevance to the case in hand, in which the application of the three-stage methodology is challenged by Bangladesh, the Court in *Nicaragua v. Colombia* explicitly confirmed the three-stage methodology as the mode of maritime boundary delimitation:

“191. In the first stage, the Court establishes a provisional delimitation line between territories (including the island territories) of the Parties. In doing so it will use methods that are geometrically objective and appropriate for the geography of the area. This task will consist of the construction of an equidistance line, where the relevant coasts are adjacent, or a median line between the two coasts, where the relevant coasts are opposite, unless in either case there are compelling reasons as a result of which the establishment of such a line is not feasible (see *Territorial and Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 745, para. 281). No legal consequences flow from the use of the terms “median line” and “equidistance line” since the method of delimitation in each case involves constructing a line each point on which is an equal distance from the nearest points on the two relevant coasts (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J.

¹²⁷ *Black Sea*, para. 116. See also *Bangladesh/Myanmar*, para. 233.

¹²⁸ *Black Sea*, p. 112, para. 155.

¹²⁹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012.

Reports 2009, p. 101, para. 116). The line is constructed using the most appropriate base points on the coasts of the Parties (*ibid.*, p. 101, paras. 116-117).

192. In the second stage, the Court considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result. If it concludes that such circumstances are present, it establishes a different boundary which usually entails such adjustment or shifting of the equidistance/median line as is necessary to take account of those circumstances (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports 1985*, p. 47, para. 63; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, pp. 102-103, paras. 119-121). Where the relevant circumstances so require, the Court may also employ other techniques, such as the construction of an enclave around isolated islands, in order to achieve an equitable result.

193. In the third and final stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts. As the Court explained in the *Maritime Delimitation in the Black Sea* case

‘Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line . . . A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.’

This is not to suggest that these respective areas should be proportionate to coastal lengths – as the Court has said ‘the sharing out of the area is therefore the consequence of the delimitation, not vice versa’ (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *Judgment*, *I.C.J. Reports 1993*, p. 67, para. 64).’ (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p. 103, para. 122.)¹³⁰

¹³⁰ *Ibid.*, paras. 191-193.

4.7 As is clear from both its Memorial and its Reply, Bangladesh rejects this method. India, by contrast, insists that it be applied, albeit not “in a mechanical fashion”, and that the introduction and, where appropriate, the application of the equitable considerations of which international law takes cognizance of is confined to the second step.

4.8 India affirms its submission in its Counter-Memorial that this is the applicable method in the instant case.

4.9 Bangladesh, however, in its Reply, as in its Memorial, argues that there are what it terms “special circumstances”, which render an equidistance line “inappropriate”.¹³¹ It contends that, first, the coastline between the Meghna (Bangladesh) and Hooghly (India) estuaries is highly unstable making it “extremely difficult, if not impossible, to establish stable and reliable base points on which to construct a meaningful equidistance line.”¹³² Second, it contends that the concavity of its coastline renders an equidistance line inequitable.¹³³

4.10 In response, it is necessary, at the outset, to stress that “special/relevant circumstances”, which may come into play at the second stage of the equidistance/relevant circumstances method, must not be confused with the “compelling reasons” which, in very exceptional cases, may lead an international court or tribunal to depart altogether from the equidistance/relevant circumstances method and adopt some other method. In *Nicaragua v. Colombia*, the ICJ clearly distinguished the two notions. In that case, Nicaragua had argued “that the geographical context of the present case is one in which the Court should not begin by constructing a provisional median line.”¹³⁴ The ICJ rejected this argument:

- First, the Court noted that “[u]nlike the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, this is not a case in which the construction of such a line *is not feasible*”

¹³¹ BR, para. 3.55.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 194.

since “[t]here is no difficulty in constructing a provisional line equidistant from base points on these two coasts.”¹³⁵

- Then, the Court explained that the geographical features invoked by Nicaragua “are factors which the Court will have to take into account in the second stage of the process, when it will consider whether those factors call for adjustment or shifting of the provisional median line and, if so, in what way.”¹³⁶ However, “*they do not justify discarding the entire methodology.*”¹³⁷

4.11 The concavity argument, which is put forward by Bangladesh as a special/relevant circumstance, is dealt with in Chapter 5 below. The present Chapter responds to Bangladesh’s arguments regarding coastal instability and its relevance to the present case. It does so, first, by setting out the proper legal context within which instability of coastlines may possibly be considered as a compelling reason. What matters is whether appropriate base points can be identified, not whether the coastline as such is unstable, and if so to what degree (**Section I**). While not, therefore, accepting its relevance, the Chapter next addresses Bangladesh’s patchwork of facts and figures concerning the instability of the coastlines in the Bay of Bengal to show that the facts do not support Bangladesh’s erroneous legal arguments. Indeed, the coastlines in the Bay of Bengal have demonstrated relative stability over the years (**Section II**). The Chapter then responds to Bangladesh’s arguments concerning the specific the base points selected by India (**Section III**).

I. The Feasibility of Determining Base Points, and the Irrelevance of the Alleged Instability of the Coasts

4.12 Bangladesh has, once again, presented the Tribunal with a distorted set of facts regarding the stability of the relevant coasts. In addition, it has misconstrued the legal relevance of the picture it is trying to present to the Tribunal. The issue before the Tribunal is straightforward. In order to construct an equidistance line, the Tribunal must identify appropriate base points. General considerations of the stability or instability of coastlines are

¹³⁵ *Ibid.*, para. 195 (emphasis added).

¹³⁶ *Ibid.*, para. 197.

¹³⁷ *Ibid.*, para. 196 (emphasis added).

irrelevant to this exercise and the applicability of the equidistance method, as is clear from the ITLOS *Bangladesh/Myanmar* Judgment.¹³⁸ As can be seen in the ICJ's Judgment in *Nicaragua v. Honduras*, it is only when identifying base points is "impossible"¹³⁹ that instability becomes a compelling reason which negates the feasibility of applying the equidistance method, and that a court or tribunal has to look at alternative methods of delimitation.¹⁴⁰

4.13 Bangladesh rejects India's position on the relevance – or lack thereof – of the approach taken by the ICJ in *Nicaragua v. Honduras*. Bangladesh asserts that what the ICJ stated in its dicta is that "when the instability of the relevant coastlines makes it impractical to identify reliable base points, recourse to the equidistance method is inappropriate."¹⁴¹ It suggests that India's reading of the Judgment is that only in situations of a "needle-like" protrusion – as in *Nicaragua v. Honduras* – will active morpho-dynamism make the choice of base points unfeasible, and labels this "a poor argument".¹⁴² Bangladesh then goes on to compare the morpho-dynamism of the mouth of the River Coco with that of its Mandarbaria Island.¹⁴³

4.14 Bangladesh has presented a distorted reading of the legal reasoning and the facts in *Nicaragua v. Honduras* and their application to this case. It has also misrepresented India's reading of that Judgment. An accurate reading of the *Nicaragua v. Honduras* Judgment leads to the conclusion that the facts of that case were very different from those in the present case, and that the Court, had it been faced with the arguments put forward by Bangladesh and the facts in this case, would have reached a different conclusion.

4.15 As for the legal reasoning, neither Honduras nor Nicaragua took the view that equidistance was the primary method to be applied in that case: thus the method was not

¹³⁸ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, paras. 241-266.

¹³⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 743, para. 280.

¹⁴⁰ *Ibid.*, pp. 743 and 745, paras. 280 and 283.

¹⁴¹ BR, para. 3.63.

¹⁴² *Ibid.*

¹⁴³ BR, para. 3.64.

advocated by either side as their main argument.¹⁴⁴ In addition, the morpho-dynamism of the coast (which, again, was not in dispute between those two States) was deemed to be of grave importance and treated as a compelling reason due to the specific and unique configuration of the coastline and the land boundary terminus, in a situation “in which it cannot apply the equidistance principle.”¹⁴⁵ While Bangladesh prefers to ignore this simple fact, the ICJ was explicit on the geographical ramifications caused by the fact that the whole of the equidistance line would be controlled by a pair of base points at the river mouth, at the tip of the “needle”:

“Cape Gracias a Dios, where the Nicaragua-Honduras land boundary ends, is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west. Taking into account Article 15 of UNCLOS and given the geographical configuration described above, the pair of base points to be identified on either bank of the River Coco at the tip of the cape would assume a considerable dominance in constructing an equidistance line, especially as it travels out from the coast. Given the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line.”¹⁴⁶

4.16 It is given this reality – that the only possible controlling base points were highly unstable – that the Court concluded that “it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting the maritime areas off the Parties’ mainland coasts.”¹⁴⁷

4.17 The ICJ reiterated its clear position on this point in its Judgment in the *Nicaragua v. Colombia* case. Referring back to its previous jurisprudence, the Court stated that

“Unlike the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, this is not a case in which the construction of such a line is not feasible . . . There is no difficulty in constructing a provisional line equidistant from base points on these two coasts. The question is not whether the construction of such a line is feasible but

¹⁴⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 742, para. 275.

¹⁴⁵ *Ibid.*, p. 745, para. 281.

¹⁴⁶ *Ibid.*, p. 742, para. 277.

¹⁴⁷ *Ibid.*, p. 743, para. 280.

whether it is appropriate as a starting-point for the delimitation. That question arises because of the unusual circumstance that a large part of the relevant area lies to the east of the principal Colombian islands and, hence, behind the Colombian baseline from which a provisional median line would have to be measured.”¹⁴⁸

4.18 In addition, the facts in the present case are far removed from those in *Nicaragua v. Honduras*. Whether the Tribunal adopts India’s base points or those put forward by Bangladesh, or if it chooses different base points altogether, no single or pair of base points will control the entire equidistance line as was the case in *Nicaragua v. Honduras*. Rather, several base points along the relevant coastlines will control and eventually determine the maritime boundary and reflect the general direction of the coast. As opposed to the situation confronting the Court in *Nicaragua v. Honduras*, rejecting the appropriateness of some of the base points in this case would not render the Tribunal’s task of identifying base points “impossible”. The Tribunal could then choose other appropriate base points to construct an equidistance line that duly reflects the configuration of the relevant coasts. India maintains that its base points are appropriately placed to construct an equidistance line as required by Article 15 of UNCLOS. And while it stands by its position, India notes that Bangladesh itself has not found it impossible to construct its own equidistance line, using its own choice of base points.¹⁴⁹

4.19 Bangladesh’s comparison of the mouth of the River Coco with that of Mandarbaria Island at the south-east of the Estuary goes exactly to this point. While, as is common in many river mouths, Mandarbaria Island may be subject to erosion or accretion, it bears no resemblance to the River Coco in terms of its relevance to the applicability of the equidistance method. As shown, the only possible base points to choose from between Nicaragua and Honduras were located at the unstable River Coco mouth and the needle-like formation meant that even multiple base points would not generate an equidistance line. As a result, any shift in the land mass of the islands at the river mouth would bear great consequences as the maritime boundary went further and further out to sea. In the present case, in contrast, the geography of the Bay of Bengal provides for a large number of possible locations for base points along the relevant coastline. Furthermore, possible erosion of the

¹⁴⁸ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 195.

¹⁴⁹ BR, paras. 4.45-4.58.

land mass of the Bay would not affect the general configuration of the relevant coasts of Bangladesh and India.¹⁵⁰

4.20 Bangladesh further argues that the ITLOS did not reject its arguments pertaining to coastal instability in its recent *Bangladesh/Myanmar* case when it adopted point $\beta 2$ – identical to point B-2 proposed by India in this case – as an appropriate base point to construct the provisional equidistance line.¹⁵¹ It contends that the ITLOS simply considered that Bangladesh had no reason to dispute $\beta 2$ since Myanmar did not use it to construct its equidistance line.¹⁵² While acknowledging that the ITLOS made use of $\beta 2$ to construct its own equidistance line, Bangladesh contends that it accorded $\beta 2$ “very little weight.”¹⁵³

4.21 There is no need to explain the *Bangladesh/Myanmar* Judgment in detail. It suffices to reiterate the basic facts. First, the ITLOS was fully aware and noted Bangladesh’s arguments concerning the instability of its coast, and in particular regarding the location of point $\beta 2$ on Mandarbaria Island.¹⁵⁴ Second, it found that point $\beta 2$ was an appropriate base point for constructing the equidistance line.¹⁵⁵ Third, point $\beta 2$ was one of the base points controlling the turning points of the provisional equidistance line drawn by the ITLOS, from Point T3 onwards.¹⁵⁶ Fourth, in determining the provisional equidistance line, the ITLOS duly noted that Bangladesh, while raising its concerns about the instability of the coast, did not actually disagree with the selection of point $\beta 2$ (again, the same point B-2 Bangladesh rejects in the present case) but, in fact, criticized the fact that “Myanmar does not use the base point in its construction of the equidistance line.”¹⁵⁷

4.22 The facts are therefore straightforward: the ITLOS did not find Bangladesh’s claims concerning instability relevant to the choice of base points on its coast. It adopted what is

¹⁵⁰ On a side note, Bangladesh’s emphasis of land erosion on Mandarbaria Island demonstrates again the falseness of its claim that its landmass is undergoing a process of accretion as opposed to the erosion of India’s coast. Compare BR, para. 3.64 with RB paras. 2.18 and 2.29.

¹⁵¹ BR, para. 3.61.

¹⁵² BR, para. 3.62.

¹⁵³ *Ibid.*

¹⁵⁴ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 2.44.

¹⁵⁵ *Ibid.*, para. 2.66.

¹⁵⁶ *Ibid.*, para. 2.73.

¹⁵⁷ *Ibid.*, paras. 2.62-2.63.

India's proposed point B-2 in the current case as an appropriate base point for the construction of an equidistance line and it gave effect to that point in the construction of the said line.

4.23 Thus, Bangladesh was, and apparently still is according to its Reply, agreeable to the fact that a base point could indeed be located on Mandarbaria Island in *Bangladesh/Myanmar*, but not in the current case, notwithstanding that the facts and legal claims advocated by Bangladesh are hardly new.¹⁵⁸ More importantly, the *Bangladesh/Myanmar* Judgment not only shows that B2 can serve as an appropriate base point in the construction of an equidistance line, but it also answers Bangladesh's claims regarding the feasibility of placing base points along the relevant coasts in the Bay of Bengal, including the Bengal Delta, in order to construct an equidistance line and achieve an equitable solution.

4.24 In sum, it is only when identifying base points is impossible, and therefore the application of the equidistance method unfeasible, that the Tribunal is compelled to look to alternative methods of delimitation. In the case at hand, both Parties have demonstrated that base points can be identified; indeed, appropriate base points are readily identifiable and, hence, coastal instability does not come into play. As many coastal States experience land erosion and accretion,¹⁵⁹ to accept Bangladesh's approach on the legal relevance of coastal instability would have far reaching consequences over the stability of maritime boundaries between other countries.

II. The Stability of the Coastlines in the Bay of Bengal

4.25 Not only has the ITLOS already rejected Bangladesh's argument regarding the impossibility of identifying "reliable base points for the construction of an equidistance

¹⁵⁸ BR, paras. 3.61-3.62.

¹⁵⁹ G. Prasetya, "The Role of Coastal Forests and Trees in Protecting against Coastal Erosion", in S. Braatz, S. Fortuna, J. Broadhead and R. Leslie (eds.), *Coastal Protection in the Aftermath of the Indian Ocean Tsunami: What Role for Forests and Trees?*, *Proceedings of the Regional Technical Workshop, KhaoLak, Thailand, 28-31 August 2006*, FAO, 2007, pp. 104-106 (available at <http://www.fao.org/forestry/13191-0ce216e2fd6097aecc9708480cec2b6d0.pdf>) (CMI, Vol. II, Annex IN-31).

line”,¹⁶⁰ this argument has no basis in fact either. As explained in Section I above, Bangladesh’s arguments and alleged evidence regarding coastal instability are irrelevant, since the sole question for the Tribunal is the identification of appropriate base points. Yet even if forming an assessment of the degree of instability of the coastline were considered relevant, which is not the case, Bangladesh’s assertions in this regard are unconvincing.

4.26 Bangladesh claims that the Bengal Delta is “known to be among the most unstable coastlines in the world.”¹⁶¹ It contends that New Moore Island/South Talpatty is unstable.¹⁶² It contends that Mandarbaria Island (Bangladesh) and Sagar and Bhangaduni Islands (India) are suffering from “rapid coastal erosion”, as is the rest of the coastline.¹⁶³

4.27 Bangladesh also rejects India’s position that the Sundarbans Mangrove forests have a stabilizing effect on the Bengal Delta coast.¹⁶⁴ It argues that studies show that the Sundarbans coastal area is subject to erosion and that mangroves are suffering from “environmental stress factors” that are reducing their effectiveness.¹⁶⁵ It quotes the Geological Survey of India and other studies to argue that mangrove forests have eroded in recent years in the Bengal Delta.¹⁶⁶

4.28 Bangladesh then gives an “erosion rate” in the Sundarbans of 4.6 square kilometres per year, and a “true erosion rate” of 7 square kilometres if one ignores the accretion of islands in the Delta on their northern side.¹⁶⁷ It refers to climate change as a key factor in rising sea levels and alerts the Tribunal to the fact that the sea levels along the northern coast of the Bay are rising at “the highest rate in the world.”¹⁶⁸ It then reverts to its argument concerning the sedimentary process in the Bay as another cause for coastal instability.¹⁶⁹

¹⁶⁰ BR, para. 3.56.

¹⁶¹ BR, para. 3.57.

¹⁶² BR, para. 3.58.

¹⁶³ BR, paras. 2.18, 2.23-2.25, 3.58-3.59.

¹⁶⁴ BR, para. 3.60.

¹⁶⁵ *Ibid.*

¹⁶⁶ BR, paras. 2.20-2.21.

¹⁶⁷ BR, para. 2.27.

¹⁶⁸ BR, para. 2.28.

¹⁶⁹ BR, paras. 2.28-2.31.

4.29 Bangladesh inconsistently argues that whereas India's coast is eroding, its own coast is experiencing an accretion process and that India's territory is more vulnerable than its own to rising sea levels.¹⁷⁰

4.30 Bangladesh attempts to give a scientific stamp of approval to its assertions on the coastal instability of the coastline by annexing certain materials. But, in fact, its claims are not supported by the information provided in the materials annexed to the Reply.

4.31 For instance, Bangladesh claims that the sea-level is rising in the Bay at the highest rate in the world, yet neglects to mention that the study it is quoting gives several – much lower – figures of sea-level rise in the Bay, and does not express a preference for one view over the other.¹⁷¹ Another study it refers to gives several predictions, both in the Bay and globally on future sea-level rises, and attaches to the Bay the same sea-level rise rate as the global average.¹⁷² The study urges the reader to use these predictions as to the future with caution, and notes that it is not based on any data retrieved from the Indian side of the Sundarbans.¹⁷³

4.32 In fact, most of Bangladesh pseudo-scientific arguments on the future configuration of the coastlines are no more than speculation. It is only in this way that Bangladesh can argue that its coast will experience accretion in the future and India's coast will erode; that islands will continue to erode even though Bangladesh itself claims they are also undergoing accretion,¹⁷⁴ and that New Moore Island will vanish despite its recorded existence in one form or another for decades. Bangladesh argues this while its own studies suggest that any process of erosion in the Bay concerns the coastline as a whole; that some are of the view that the coastline is going through a process of accretion rather than erosion,¹⁷⁵ and that any erosion of the coastline is made up for by land aggradation and sediment deposition.¹⁷⁶

¹⁷⁰ BR, paras. 2.18 and 2.29.

¹⁷¹ Annex BR14.

¹⁷² Annex BR12.

¹⁷³ *Ibid.*

¹⁷⁴ BR, para. 2.27.

¹⁷⁵ Annex BR14.

¹⁷⁶ Annex BR9; Annex BR13.

4.33 Changes in the coastline induced by erosion and accretion are caused by such short-term natural events as storm surges, wave action and winds, or in response to long-term events such as sea level changes or tectonic events. Excluding the impact of human activity, these processes are simply natural evolutionary phenomena.

4.34 Many human activities induce erosion of coastlines as well. These include mangrove deforestation, the building of dams and houses, agriculture, sand and clay mining, sediment extraction in the Bay and flooding engineering.¹⁷⁷ In view of this multitude of natural and human activities, Bangladesh's speculation regarding the future configuration of the coastline of the Bay of Bengal is even more tenuous. The central role that human activities play also entails that curtailing certain activities while enhancing other human activities, such as mangrove afforestation, will lead to a decline in erosion.¹⁷⁸

4.35 As India pointed out in its Counter-Memorial, scientific research has concluded that the Sundarbans, the world's largest mangrove forest, have a stabilizing effect on the coast and slow the erosion process down considerably.¹⁷⁹ According to the scientific research which Bangladesh itself introduced and upon which it places so much emphasis, mangrove forests play an important role in stabilizing coastlines and their value in this regard has gone underappreciated for many years.¹⁸⁰ They provide protection against the effects of tidal waves and extreme weather events and stabilize sediments to reduce the risk of erosion.¹⁸¹ Bangladesh itself concedes that mangroves are successful in slowing land erosion when it stresses that erosion is "dominant" in places where "cultivated land has replaced forest."¹⁸² And most importantly, the articles it quotes strongly recommend afforestation to reduce coastal erosion.¹⁸³ Undoubtedly for these reasons, Bangladesh has one of the world's largest

¹⁷⁷ Annex BR14; Annex BR7; Annex BR9; Annex BR13; Annex IN-31, pp. 107-108.

¹⁷⁸ Annex BR13; Annex IN-31.

¹⁷⁹ CMI, para. 5.36.

¹⁸⁰ Annex BR7; Annex BR9; Annex BR11.

¹⁸¹ Annex BR14; Annex IN-38, p. 12; Annex IN-24, p. 25.

¹⁸² BR, para. 2.18.

¹⁸³ Annex BR7; Annex BR13.

coastal afforestation programmes, dating back to 1966.¹⁸⁴ The plan has been successful in stabilizing thousands of kilometres of land.¹⁸⁵

4.36 Several studies show that mangroves do play a significant role in stabilizing low-lying coasts, both from short-term events as well as long-term events. The dense structure of mangrove root systems helps consolidate the coastal soil, making the shoreline relatively more resistant to erosion.¹⁸⁶ In addition, mangrove roots reduce flow and promote flocculation and sedimentation upon the soil surface, allowing for eventual accretion.¹⁸⁷ On the other hand, exposed soil of non-vegetated land and former mangrove forest areas are more prone to erode.¹⁸⁸ Based on their scientific investigations in the Bay of Bengal, scientists have shown that the “stability of sediments seems to be much greater in the mangrove forests of the Sunderbans than in the eastern part of the Delta along the deforested water course of the Ganges.”¹⁸⁹

¹⁸⁴ Annex IN-28, p. 9, 18; Annex IN-24, pp. 25-26.

¹⁸⁵ Annex IN-24, p. 35; Annex IN-28, p. 18.

¹⁸⁶ U. Thampanya, J.E. Vermaat, S. Sinsakul, N. Panapitukkul, “Coastal Erosion and Mangrove Progradation of Southern Thailand”, *Estuarine, Coastal and Shelf Science*, Vol. 68, 2006, pp. 75-85, at p. 83 (Vol. II, Annex RJ-10); Y. Mazda, M. Magi, M. Kogo, P.N. Hong, “Mangrove as Coastal Protection from Waves in the Tong King Delta, Vietnam”, *Mangroves and Salt Marshes*, Vol. 1, 1997, pp. 127-135, at p. 134 (Vol. II, Annex RJ-6); J.M Smoak, S.R. Patchneelam, “Sediment Mixing and Accumulation in a Mangrove Ecosystem: Evidence from 210Pb, 234Th and 7Be”, *Mangroves and Salt Marshes*, Vol. 3, 1999, pp. 17-27, at p. 18 (Vol. II, Annex RJ-7).

¹⁸⁷ U. Thampanya, J.E. Vermaat, S. Sinsakul, N. Panapitukkul, “Coastal Erosion and Mangrove Progradation of Southern Thailand”, *Estuarine, Coastal and Shelf Science*, Vol. 68, 2006, pp. 75-85, at p. 83 (Vol. II, Annex RJ-10); F. Blasco, E. Janodet and M.F. Bellan, “Natural Hazards and Mangroves in the Bay of Bengal”, *Journal of Coastal Research Special Issue No. 12: Coastal Hazards*, 1994, pp. 277-288, at pp. 280, 284 (Vol. II, Annex RJ-4); K. Furukawa, E. Wolanski, “Sedimentation in Mangrove Forests”, *Mangroves and Salt Marshes*, Vol. 1, 1996, pp. 3-10, particularly p. 9 (Vol. II, Annex RJ-5); J.M Smoak, S.R. Patchneelam, “Sediment Mixing and Accumulation in a Mangrove Ecosystem: Evidence from 210Pb, 234Th and 7Be”, *Mangroves and Salt Marshes*, Vol. 3, 1999, pp. 17-27, at p. 18 (Vol. II, Annex RJ-7).

¹⁸⁸ U. Thampanya, J.E. Vermaat, S. Sinsakul, N. Panapitukkul, “Coastal Erosion and Mangrove Progradation of Southern Thailand”, *Estuarine, Coastal and Shelf Science*, Vol. 68, 2006, pp. 75-85, at p. 83 (Vol. II, Annex RJ-10).

¹⁸⁹ F. Blasco, E. Janodet and M.F. Bellan, “Natural Hazards and Mangroves in the Bay of Bengal”, *Journal of Coastal Research Special Issue No. 12: Coastal Hazards*, 1994, pp. 277-288, at p. 281 (Vol. II, Annex RJ-4). The role of mangroves in reducing sea-waves has been scientifically proven. For instance, scientists have demonstrated that a six-year-old mangrove strip of 1.5 kilometres width will reduce 1 meter high waves at the open sea and 0.05 meter at the coast (Mazda, p. 134, Vol. II, Annex RJ-6). Hydraulic model experiments also show that mangroves can serve as effective as seawall structures for reduction of tsunami effect on houses behind a mangrove forest (K. Harada, F. Imamura, T. Hiraishi, “Experimental Study on the Effect in Reducing Tsunami by the Coastal Permeable Structures”, *Proceedings of the Twelfth International Offshore and Polar Engineering Conference*, 2002, pp. 652-658 (Vol. II, Annex RJ-8)).

4.37 Coastal erosion is far from inevitable. In areas where mangroves are declining, that is in large part – some even say mostly – due to human activities.¹⁹⁰ In fact, the amount of land covered by mangrove forest in the Bay of Bengal is likely to remain stable absent human interference.¹⁹¹ Mangroves are being deforested for agricultural purposes and other unmanaged economic development activities such as crops and cattle grazing.¹⁹² Their density is affected by human behaviour while their proper management enhances coastal stability.¹⁹³ Research has shown that most erosion in these areas is caused by diversion of river flow to coastal areas and destruction of mangroves due to human activities that convert them for agriculture or aquaculture purposes.¹⁹⁴

4.38 In reality, it is not the effectiveness of mangroves in countering the erosion that is declining, but the reduction in the coverage area of mangrove forests that negatively effects erosion. Intentional human deforestation has a direct impact on erosion rates.¹⁹⁵ As can be seen, human behaviour on both sides of the border is directly related to such coastal erosion, and altering human behaviour in the future can assist in stabilizing the coastline.¹⁹⁶

4.39 In addition, the decline of areas covered by mangroves is partially explained by their success in stabilizing the coastline: in some areas, mangrove forests have been so successful that they eventually made way for other types of vegetation suitable for dry land formed by

¹⁹⁰ G. Prasetya, “The Role of Coastal Forests and Trees in Protecting against Coastal Erosion”, in S. Braatz, S. Fortuna, J. Broadhead and R. Leslie (eds.), *Coastal Protection in the Aftermath of the Indian Ocean Tsunami: What Role for Forests and Trees?*, *Proceedings of the Regional Technical Workshop, KhaoLak, Thailand, 28–31 August 2006*, FAO, 2007, pp. 105-108, at p. 113 (available at <http://www.fao.org/forestry/13191-0ce216e2fd6097aecc9708480cec2b6d0.pdf>) (Annex IN-31).

¹⁹¹ F. Blasco, E. Janodet and M.F. Bellan, “Natural Hazards and Mangroves in the Bay of Bengal”, *Journal of Coastal Research Special Issue No. 12: Coastal Hazards*, 1994, pp. 277-288, at pp. 287, 282 (Vol. II, Annex RJ-4).

¹⁹² Annex BR9; Annex BR10; Annex BR13; Annex IN-24, p. 33; J.M Smoak, S.R. Patchneelam, “Sediment Mixing and Accumulation in a Mangrove Ecosystem: Evidence from 210Pb, 234Th and 7Be”, *Mangroves and Salt Marshes*, Vol. 3, 1999, pp. 17-27, at p. 17 (Vol. II, Annex RJ-7); U. Thampanya, J.E. Vermaat, S. Sinsakul, N. Panapitukkul, “Coastal Erosion and Mangrove Progradation of Southern Thailand”, *Estuarine, Coastal and Shelf Science*, Vol. 68, 2006, pp. 75-85, at p. 75 (Vol. II, Annex RJ-10).

¹⁹³ Annex BR13; Annex IN-31, p. 113.

¹⁹⁴ F. Blasco, E. Janodet and M.F. Bellan, “Natural Hazards and Mangroves in the Bay of Bengal”, *Journal of Coastal Research Special Issue No. 12: Coastal Hazards*, 1994, pp. 277-288, at p. 277 (Vol. II, Annex RJ-4).

¹⁹⁵ Annex BR13.

¹⁹⁶ Annex IN-31; Annex IN-38, pp. 12-17.

accretion.¹⁹⁷ And yet, the vast majority of mangrove forests in the Ganges-Brahmaputra Delta in Bangladesh remain dense.¹⁹⁸

4.40 Bangladesh refers to the web page of the Geological Survey of India (GSI) as evidence of the limited defence of mangroves against coastal erosion. However, Bangladesh overlooks the fact that the same web portal also states that mangroves protect coastal areas from erosion, storm surge (especially during hurricanes) and tsunamis.¹⁹⁹

4.41 Bangladesh suggests that India's statement that mangroves are "likely" to slow land erosion is a "weak basis on which to contest instability."²⁰⁰ It is not. It is Bangladesh that is basing itself on speculation, on predictions of future sea-level rise, on future human behaviour that can effect erosion, and on the unfounded assertions that the general configuration of the Bay will change beyond recognition in the unknown future. Selective speculation is indeed a weak premise on which to base an argument for coastal instability as a legally-relevant compelling reason to discard the usual delimitation method. The end results of natural processes and human behaviour are unpredictable, subject to changes and shifts and by their very nature speculative. That is exactly why international law provides that the task of the Tribunal is to delimit the maritime boundary between the Parties in accordance with the geographical reality as it stands today. The resulting delimitation line will be final and definite.²⁰¹

4.42 Finally, India recalls that Bangladesh's exaggerated claims of instability between the Meghna and Hooghly estuaries ignore the actual geography of the Bengal Delta. As India pointed out in its Counter-Memorial, of the three sub-areas of the Delta between the two rivers, only the Meghna Estuary east of 90°10' longitude is affected by any kind of significant instability.²⁰²

¹⁹⁷ Annex IN-24, pp. 35-36; Annex IN-28, p. 18.

¹⁹⁸ See chart with figures in Annex IN-28, p. 17.

¹⁹⁹ GSI Website http://www.portal.gsi.gov.in/portal/page?_pageid=127,723772&_dad=portal&_schema=PORTAL&linkId=1213

²⁰⁰ BR, para. 2.19.

²⁰¹ Cf. Vienna Convention on the law of Treaties, Article 62.2(a).

²⁰² CMI, para. 2.25. See also M. M. Rahman and S. K. Biswas, "Feasible Solution of Protection and Adaptation Strategy for Coastal Zone of Bangladesh", *Pakistan Journal of Meteorology*, Vol. 8, 2011, p. 9 (Annex IN-38).

4.43 At the end of the day, Bangladesh is trying to divert the Tribunal from the real issue – finding appropriate base points to construct an equidistance line – by focusing on unfounded “facts” that are as irrelevant as they are speculative. The relevant facts are that coastal fluctuation is a universal phenomenon, that only in rare and extreme cases, such as the one with which the ICJ was faced in *Nicaragua v. Honduras*, does this render the equidistance method impossible to implement, and that – as the ITLOS has already found – the Bay of Bengal does not constitute such an extreme case.

4.44 Bangladesh itself gives testament to this simple truth in its Reply when it identified specific base points to construct its own version of a “strict equidistance line” in the territorial sea.²⁰³ The equidistance line in the territorial sea depicted in Figure R3.14 in the Reply, according to Bangladesh, ignores unstable low-tide elevations (which according to Bangladesh are actually under water) and uses the “most stable base points possible” plotted on Bangladesh’s Chart 40001.²⁰⁴ Figure R3.14 shows India’s proposed equidistance line alongside Bangladesh’s new construction.

4.45 Bangladesh’s proposed equidistance line in the territorial sea is remarkably similar to that of India, except that it lies due west of the Indian line because of the difference as to the land boundary terminus. Evidently, the instability of the coastline, that Bangladesh emphasizes time and time again, does not change the configuration of the coastline, or the equidistance line that results from plotting appropriate base points on a given chart. The same goes for the “provisional equidistance line” constructed by Bangladesh for the entirety of the maritime boundary. Figure R4.12 of Bangladesh’s Reply depicts this line side-by-side with India’s proposed equidistance line. Though not identical, the two versions of the equidistance lines are similar enough to show that the use of two different sets of base points in this case will not result in grave distortions of an equidistance based maritime boundary.

4.46 In sum, there is no difficulty in finding appropriate base points and no warrant for the Tribunal to invoke *Nicaragua v. Honduras* in the present case.

²⁰³ BR, paras. 3.84-3.86.

²⁰⁴ BR, paras. 3.83-3.84.

III. The Selection of Base Points

4.47 Bangladesh rejects India's selection of base points to construct the equidistance line in the territorial sea.²⁰⁵ It claims that all of India's base points are under water.²⁰⁶ It also claims that India's use of "five incorrectly plotted base points" leads to a line that "manifestly fails to reflect the direction of the coastlines of Bangladesh and India" leading to an inequitable result.²⁰⁷ It then continues to construct its own "strict equidistance line" choosing the "most stable base points" as mentioned above.²⁰⁸ None of these propositions are correct.

4.48 Bangladesh puts much emphasis on New Moore Island/South Talpatty. It contends that according to the Bangladesh Space Research and Remote Sensing Organization, after first appearing as an island in 1970, from 1976 to 1990 it shrank until it was no longer an island.²⁰⁹ It considers it "at best, a low-tide elevation" since 1990 (in other places it claims it was last an island in 1989).²¹⁰ It then rejects India's claim that New Moore Island is a low-tide elevation that has shown stability, asserting that its precise location has varied over the years.²¹¹

4.49 India stands by its position that New Moore Island has demonstrated stability over the years.²¹² It was known to be an island from 1970 onwards, as Bangladesh concedes, and was featured on charts beforehand in other forms as well, as India pointed out in its Counter-Memorial.²¹³ The most recent satellite imagery from 2012 clearly shows that it is a low-tide elevation.²¹⁴ Its existence was marked and recognized at least since 1879 according to the information presented by Bangladesh, nearly a century and a half ago: British Admiralty Chart 859 of 1931 put forward by Bangladesh depicts New Moore Island as a low-tide

²⁰⁵ BR, paras. 3.69-70.

²⁰⁶ BR, para. 3.70.

²⁰⁷ BR, para. 3.71.

²⁰⁸ BR, paras. 3.83-3.86.

²⁰⁹ BR, para. 2.34.

²¹⁰ BR, para. 3.78.

²¹¹ BR, paras. 2.35-2.36.

²¹² CMI, paras. 2.7-2.8, 5.56.

²¹³ CMI, para. 2.8.

²¹⁴ CMI, Figure 2.3, para. 2.7.

elevation. As can be seen in the excerpt from Chart 859 in Figure RJ 4.1 at page 89, New Moore Island is visibly charted then as it is today. Notably, while Chart 859 was published in 1931, the source data in the chart for the Estuary area is dated back to 1879.²¹⁵ The account of the coastline in the Imperial Gazetteer of India of 1881 attached by Bangladesh to its Memorial identified breakers in the same area.²¹⁶ This account may have well been taken at high-tide. Hence, much like the rest of the coastline in the Bay of Bengal, New Moore Island has been a relatively stable maritime feature.

4.50 Bangladesh misrepresents India's claim regarding the irrelevance of the satellite imagery presented by Bangladesh regarding the existence of New Moore Island. According to Bangladesh, India's rejection of a satellite image from 2000 on which New Moore Island does not appear as proof of the disappearance of New Moore Island is untenable.²¹⁷ Yet to the contrary, India stated that while the satellite imagery may be evidence of New Moore Island as a low-tide elevation rather than an island, it does not prove – and cannot prove – that it disappeared at low-tide.²¹⁸ More to the point, India produced in its Counter-Memorial satellite imagery from 2012 (Sketch-map No. 2.3) that clearly shows the existence of New Moore Island – at the very least as a low-tide elevation – a point that Bangladesh has chosen to ignore in its Reply. Finally on this point, Bangladesh's own charts, upon which it relies in these proceedings, all feature New Moore Island as a low-tide elevation.²¹⁹

4.51 Bangladesh claims that India's placing of base points I-1 and I-2 on New Moore Island ignores “well established practice, as well as case law” to disregard low-tide elevations.²²⁰ It argues that according to the ICJ's Judgment in *Qatar v. Bahrain*, low-tide elevations are to be disregarded and rejects India's position that that decision was based on the specific circumstances of that case which is not comparable to the case in hand.²²¹ It then refers to other judgments of the ICJ which did not make use of low-tide elevations.²²² Finally,

²¹⁵ BR, Figure R3.6; see also Figure RJ 2.7.

²¹⁶ MB, Annex B37.

²¹⁷ BR, para. 3.78.

²¹⁸ CMI, para. 2.9.

²¹⁹ For example Chart 40001 in BR, Figure R3.14.

²²⁰ BR, para. 3.73.

²²¹ BR, paras. 3.72-3.76.

²²² BR, para. 3.76.

it adds that New Moore Island is located on its own side of the boundary, in accordance with its erroneous placement of its land boundary terminus²²³ 3.5 nautical miles west of its true location, as explained in Chapter 2.

4.52 First, it is important to point out that India has been consistent in measuring the breadth of its territorial sea, basing itself on its official charts and land surveys, as prescribed in Article 5 of UNCLOS. Second, India has been consistent in placing its base points: points B-3 and B-4 on Bangladesh's coast also rest on low-tide elevations, much to the benefit of Bangladesh in constructing an equidistance line. But more to the point, as India has already explained in its Counter-Memorial, extensive State practice treats low-tide elevations as an integral part of the coastline.²²⁴ This is in line with Article 13 of UNCLOS which states that

“Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea”.

4.53 Bangladesh's reliance on *Qatar v. Bahrain* is misplaced. In that case, the Court was clear that it must disregard the low-tide elevations as they were subject to overlapping claims of the Parties, and it was not clear to which party they belonged.²²⁵ All the other cases referred to in Bangladesh's Reply miss the mark for the same reason. In those cases, the ICJ could not determine sovereignty over a low-tide elevation and thus could not make use of them in its delimitation.²²⁶

4.54 This problem does not arise in this case. As India pointed out in its Counter-Memorial, once the location of the land boundary terminus is established by the Tribunal, the appurtenance of New Moore Island to one Party or the other will be evident.²²⁷ If the land boundary terminus is east of New Moore Island, it would be entirely proper for India to establish base points on it in accordance with Article 13 of UNCLOS.

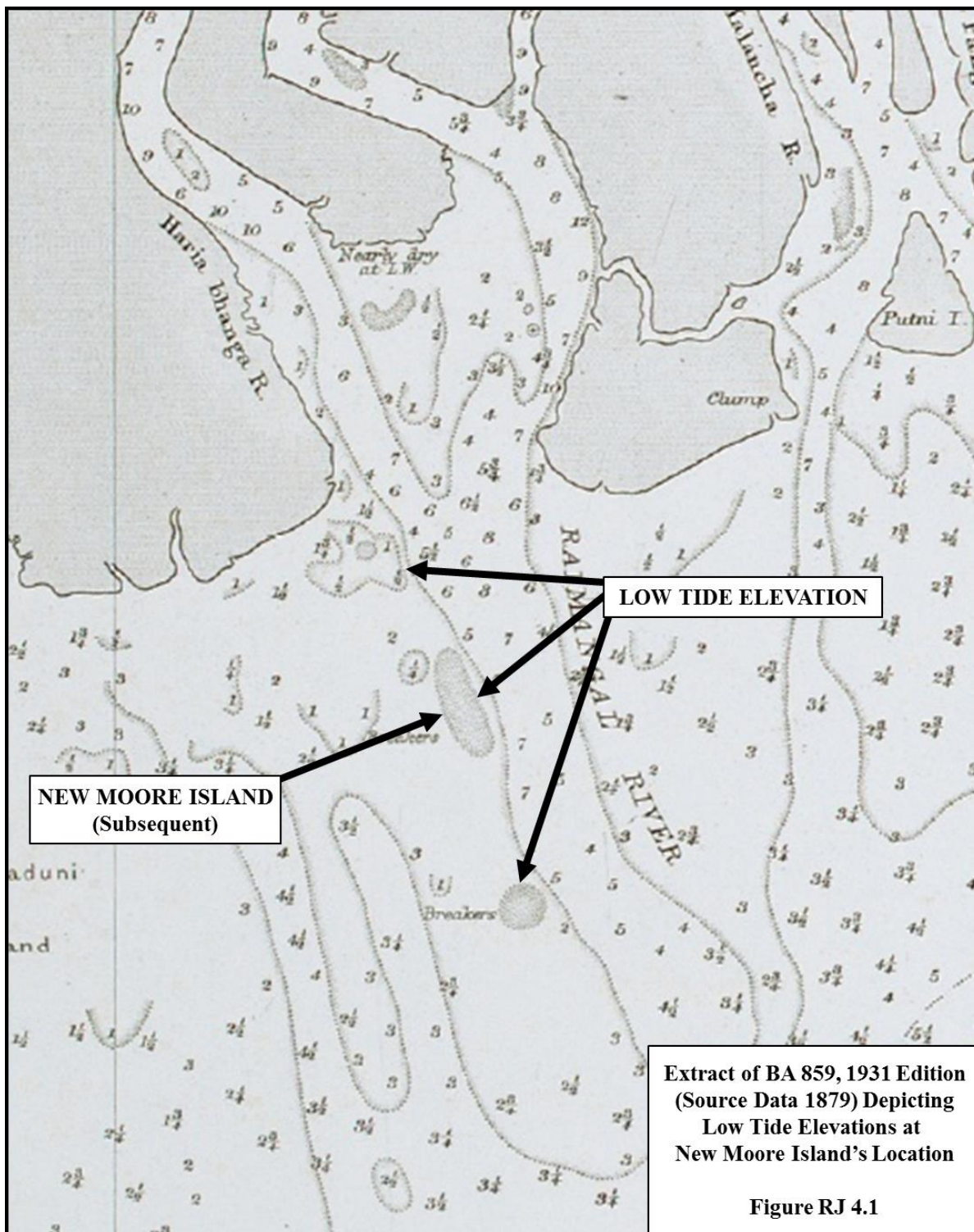
²²³ BR, paras. 3.72 and 3.73.

²²⁴ CMI, paras. 5.50-5.52, in particular fn. 170 quoting Sir Derek Bowett.

²²⁵ *Qatar v. Bahrain*, pp. 102-103, para. 209.

²²⁶ *Nicaragua v. Colombia*, para. 26; *Nicaragua v. Honduras*, pp. 40-41, paras. 138-144.

²²⁷ CMI, para. 5.52.



4.55 While Bangladesh has pointed out several times that sovereignty over New Moore Island is in dispute (though one may wonder how sovereignty over a non-existent feature as Bangladesh would have it is possible), it concedes this very point. In its Reply, under the assumption it favours that the land boundary terminus is west of New Moore Island, it twice makes the point that

“the locations of India’s base points I-1 and I-2 are incorrect because they are situated on a low-tide elevation that is on the Bangladesh side of any conceivable boundary line.”²²⁸

4.56 Bangladesh thus accepts in its Reply that the allocation of New Moore Island to one of the Parties is entirely based on the location of the land boundary terminus. Thus, unlike Bangladesh’s assertion in its Reply,²²⁹ the allocation of New Moore Island to one of the Parties – and subsequently its appropriateness to establish base points – is similar to the determination of the ICJ in *Malaysia v. Singapore*. In that case, the Court concluded that sovereignty over South Ledge, a low-tide elevation, “belonged to the State in the territorial waters of which it is located.”²³⁰

4.57 Bangladesh also contests the location of India’s base point I-3 on the low-tide elevation called “West Spit”. It contests that “it does not even dry fully at low-tide, the only time any of it is above water.”²³¹ It then states that it does not reflect the general geography of the coast.²³²

4.58 Yet Bangladesh’s arguments are beside the point. First, base point I-3 is located on a feature that falls under the definition of a low-tide elevation, under Article 13

“A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide”.

²²⁸ BR, paras. 3.72 and 3.76.

²²⁹ BR, para. 3.76.

²³⁰ *Malaysia v. Singapore*, pp. 101-102, paras. 297-300.

²³¹ BR, para. 4.38.

²³² BR, para. 4.39.

That the area in question “dries in patches”²³³ does not take away from the fact that base point I-3 has been plotted on a patch of land that is above water at low-tide.

4.59 Second, as can be seen by Figure RJ 4.4 at page 101 in the Appendix to this Chapter, the feature is situated within 12 nautical miles of India’s mainland coast, just south of Dalhousie and Bhangaduni Islands. It serves as an appropriate base point reflecting the coastline of India.

4.60 Bangladesh also takes issue with India’s suggested base points on its own coast. As mentioned above, it contests placing any base points on Mandarbaria Island (B-1 and B-2) as it claims it is highly unstable due to coastal erosion.²³⁴ Regarding point B-3, it claims that it is located on an unstable low-tide elevation and that when plotted on its Chart 7501 and British Admiralty Chart 90, it is located under water.²³⁵ As for base point B-4, it claims that while “outdated nautical charts suggest the presence of a low-tide elevation in the location India identifies,” the feature does not exist on most recent charts.²³⁶ It then claims that placed on British Admiralty Chart 90, India’s base point B-4 is now “approximately 5 m in depth and nearly 3 M from the nearest from the nearest extant low-tide elevation.”²³⁷

4.61 Bangladesh’s arguments regarding these four base points are unfounded. Bangladesh’s claims that these points are submerged and its coast has receded north stand in stark contradiction to its claim that only India’s coast is eroding. In any event, it will be noted that India’s suggested base points B-1, B-2, B-3 and B-4 on the coast of Bangladesh are more favourable to it than those put forward by Bangladesh itself, as they place Bangladesh’s coast further south.

4.62 With respect to points plotted on Mandarbaria Island, Bangladesh has already accepted that it is an appropriate feature on which to place base points according to the ITLOS. Secondly, India has plotted its base points B-1, B-2 and B-3 on Chart IN 351, which was the latest available to it. For all the reasons mentioned above, it accurately reflects the

²³³ BR, para. 4.38.

²³⁴ BR, para. 3.80.

²³⁵ BR, para. 3.81.

²³⁶ BR, para. 4.41.

²³⁷ *Ibid.*

general configuration of the coast. Figure R3.12 in Bangladesh's Reply, which plots India's suggested base points for the territorial sea delimitation in order to attempt to show that they are now submerged due to coastal instability, shows quite the opposite: it shows that base points B-1 and B-2 are just south of where Bangladesh Chart 40001 places the low-water line of Mandarbaria Island, thus demonstrating the relative stability of the coastline.

4.63 As for base point B-4, it has also been correctly plotted on British Admiralty Chart 859 of 27 January 2011.²³⁸ Bangladesh stresses the discrepancy between the point as plotted on British Admiralty Chart 90 and on British Admiralty Chart 859.²³⁹ While Bangladesh asserts that these discrepancies, which are not significant when constructing the equidistance line, are due to instable coasts, they may also occur due to different source data for both charts, and varying methods of conversion of data into WGS-84 datum. The slight discrepancies between the two British Admiralty Charts are therefore not uncommon.

4.64 Finally, Bangladesh objects to the fact that India has plotted base point B-5 on Shahpuri Point rather than on St. Martin's Island.²⁴⁰ It then, however, when providing the Tribunal with its own set of base points, plots its B-5 on Shahpuri Point as well, explicitly stating that it chooses "not to argue that a base point should be placed on St. Martin's."²⁴¹ It is notable that Bangladesh has chosen to plot its base point B-5 on British Admiralty Chart 817 (2009) and not British Admiralty Chart 90, which it has used to plot the other base points of its coast. The use of the less recent chart places its base point B-5 west of the low-water line on Chart 90. Despite this inconsistency, Bangladesh apparently has no difficulty in using British Admiralty Chart 90 in other locations to question India's base points.

4.65 In summary, Bangladesh's arguments regarding the base points chosen by India fail. India refers the Tribunal to the base points it has identified on both Bangladesh's and India's coasts in its Counter Memorial.²⁴² The co-ordinates of the base points for the territorial sea, the exclusive economic zone and continental shelf are restated in Chapters 6 and 7 below.

²³⁸ CMI, para. 6.55, Sketch-map No. 6.10 and below, Appendix to Chapter 4, para. 4A.9.

²³⁹ BR, para. 4.41. India notes that British Admiralty Chart 90 dates from August 2011, not 2012 as Bangladesh asserts.

²⁴⁰ BR, paras. 4.42-4.43.

²⁴¹ BR, para. 4.52.

²⁴² CMI, paras. 5.55 and 6.54-6.55.

4.66 Attached to the present Chapter is an Appendix containing a technical description of each base point proposed by India, together with figures.

IV. Conclusion

4.67 In summary, Bangladesh has misconstrued the legal issue in hand. Coastal instability can only be a “compelling reason” if it renders the selection of appropriate base points impossible, as demonstrated by the case law. Bangladesh has resorted to a mosaic of alleged facts in an effort to show the general instability of the coastline, yet it has ignored the real issue and has failed to show that appropriate base points cannot be identified in the present case. Even its claims, irrelevant as they may be, regarding the general instability of the coastline are unfounded and speculative. The Tribunal should, therefore, delimit the territorial sea by constructing an equidistance line based on appropriate base points, such as those identified by India in its Counter-Memorial and repeated in this Rejoinder.

APPENDIX TO CHAPTER 4

TECHNICAL DESCRIPTION OF THE BASE POINTS IDENTIFIED BY INDIA

4A.1 This Appendix contains a brief technical description of each of the nine base points identified by India for the construction of the provisional equidistance line (base points I-1 to I-4 and B-1 to B-5). The Appendix includes figures for each point (Figures RJ 4.2-RJ 4.10 at pages 97 to 113).

I. On the Indian Side

4A.2 **Base point I-1** has been identified on the eastern edge of the low-tide elevation known as New Moore Island. The co-ordinates of the base point in WGS 84 are 21°37'50.7" N, 89°08'49.9" E. This point has been derived from the official Indian navigational chart of the area IN 351 (INT 7419-Paradip to Pussur River), 31 August 2011 Edition. The point is situated on the low-water line on the eastern limit of the low-tide elevation.

4A.3 **Base point I-2** has been identified on the southern tip of New Moore Island. The co-ordinates of the base point in WGS 84 are 21°35'30.0" N, 89°09'40.6" E. This point has been derived from the official Indian navigational chart of the area IN 351 (INT 7419-Paradip to Pussur River), 31 August 2011 Edition. The point is situated on the low-water line on the southern limit of the low-tide elevation.

4A.4 **Base point I-3** has been identified on the low-water line on the south western limit of the low-tide elevation south of Dalhousie Island and lying between West Spit and Dalhousie Sand. The co-ordinates of the base point in WGS 84 are 21°22'47.6" N, 88°43'43.7" E. This point has been derived from the official Indian navigational chart of the area IN 351 (INT 7419-Paradip to Pussur River), 31 August 2011 Edition.

4A.5 **Base point I-4** has been identified on the low-water line on the east coast of India near Devi Point. The co-ordinates of the base point in WGS 84 are 19°57'33.1" N, 86°24'20.0" E. This point has been derived from the official Indian navigational chart of the area IN 352 (INT 7416-Gopalpur to Paradip), 31 July 2009 Edition.

II. On the Bangladesh Side

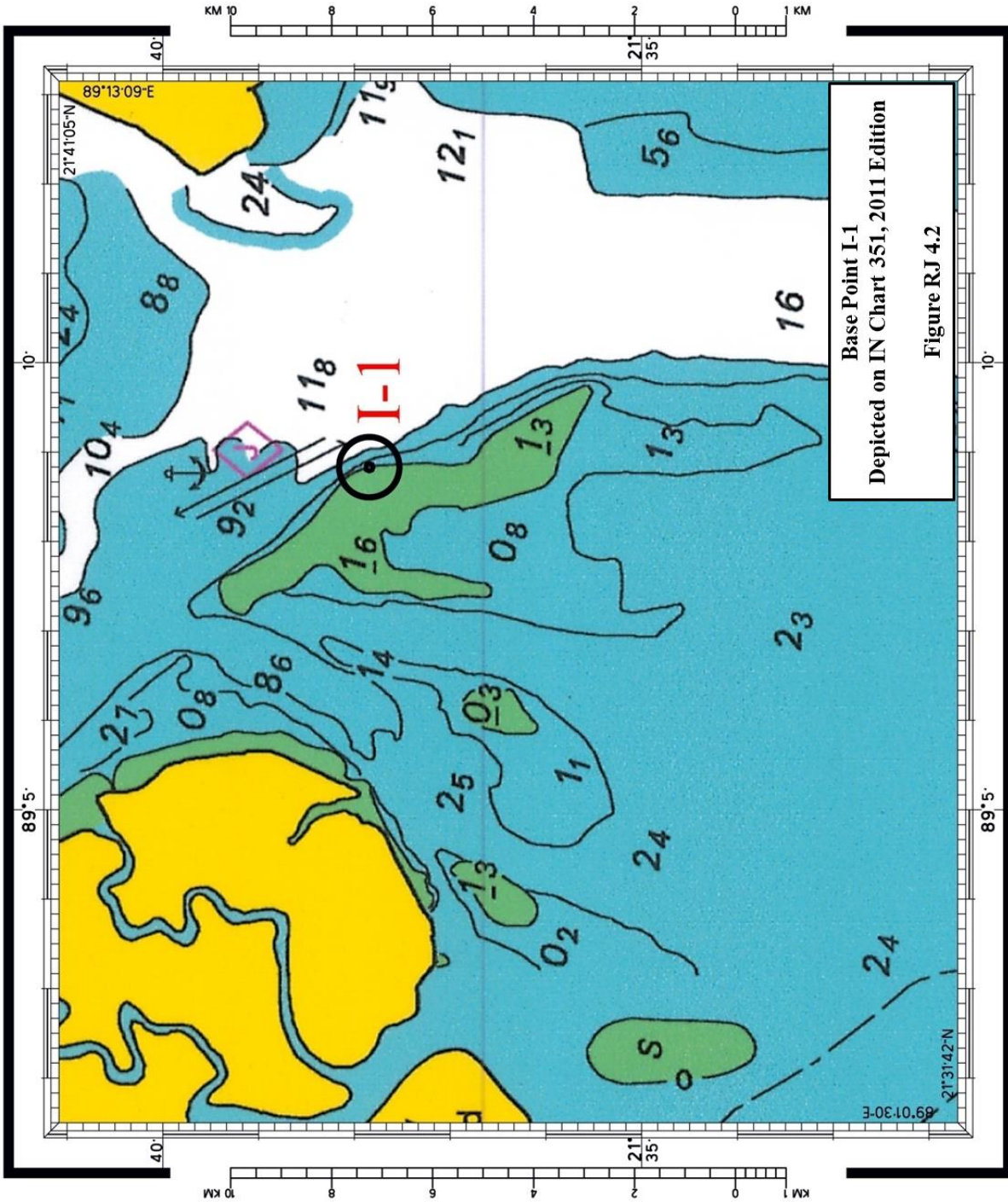
4A.6 **Base point B-1** has been identified on the south-western edge of the low-water line on Clump Island, which lies on the east of the Hariabhanga Estuary. The co-ordinates of the base point in WGS 84 are 21°38'56.0" N 89°12'41.8" E. This point has been derived from the official Indian navigational chart of the area IN 351 (INT 7419-Paradip to Pussur River), 31 August 2011 Edition.

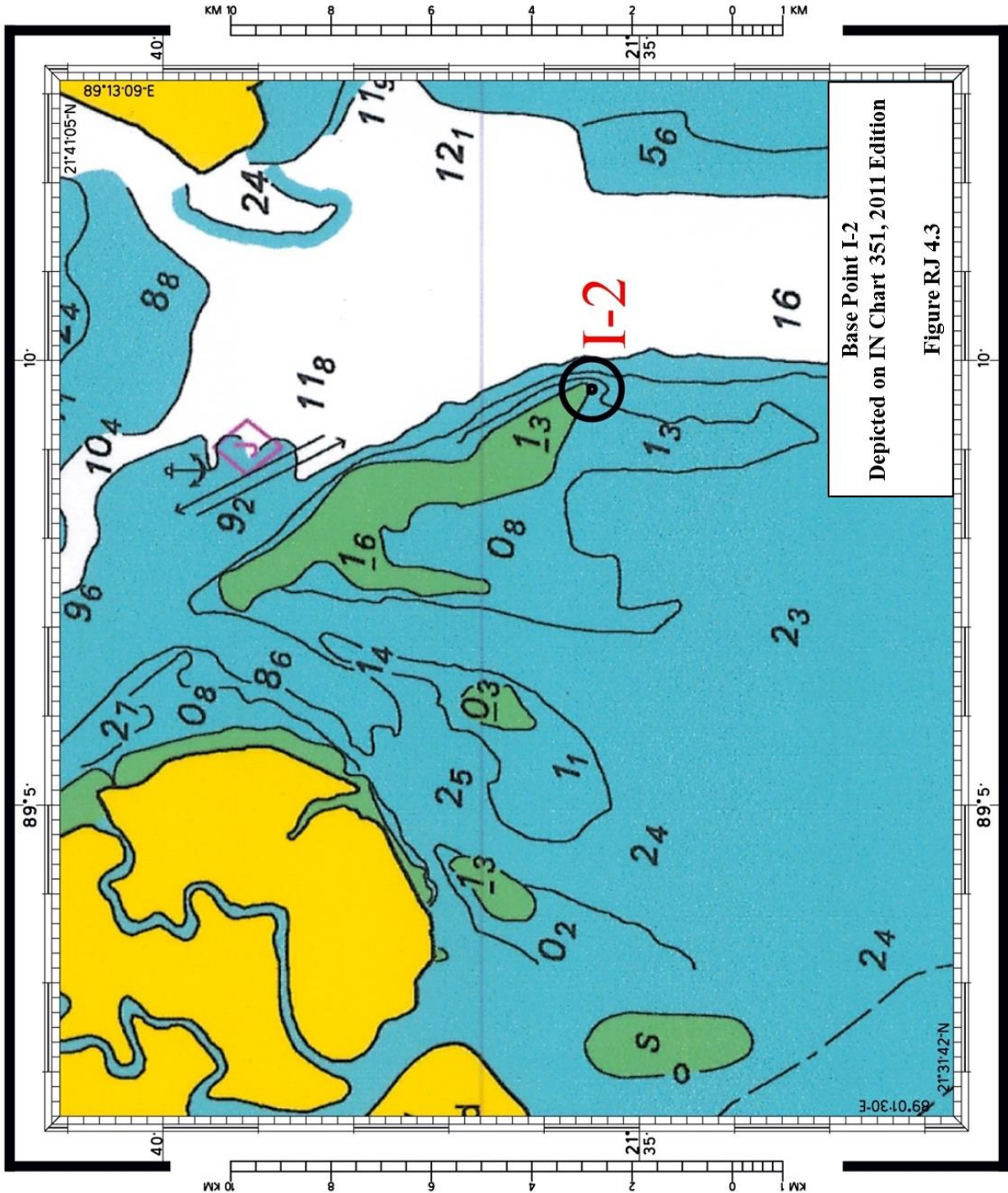
4A.7 **Base point B-2** has been identified on the south-eastern edge of the low-water line on Clump Island, which lies on the east of the Hariabhanga Estuary. The co-ordinates of the base point in WGS 84 are 21°38'57.4" N, 89°14'47.6" E. This point has been derived from the official Indian navigational chart of the area IN 351 (INT 7419-Paradip to Pussur River), 31 August 2011 Edition.

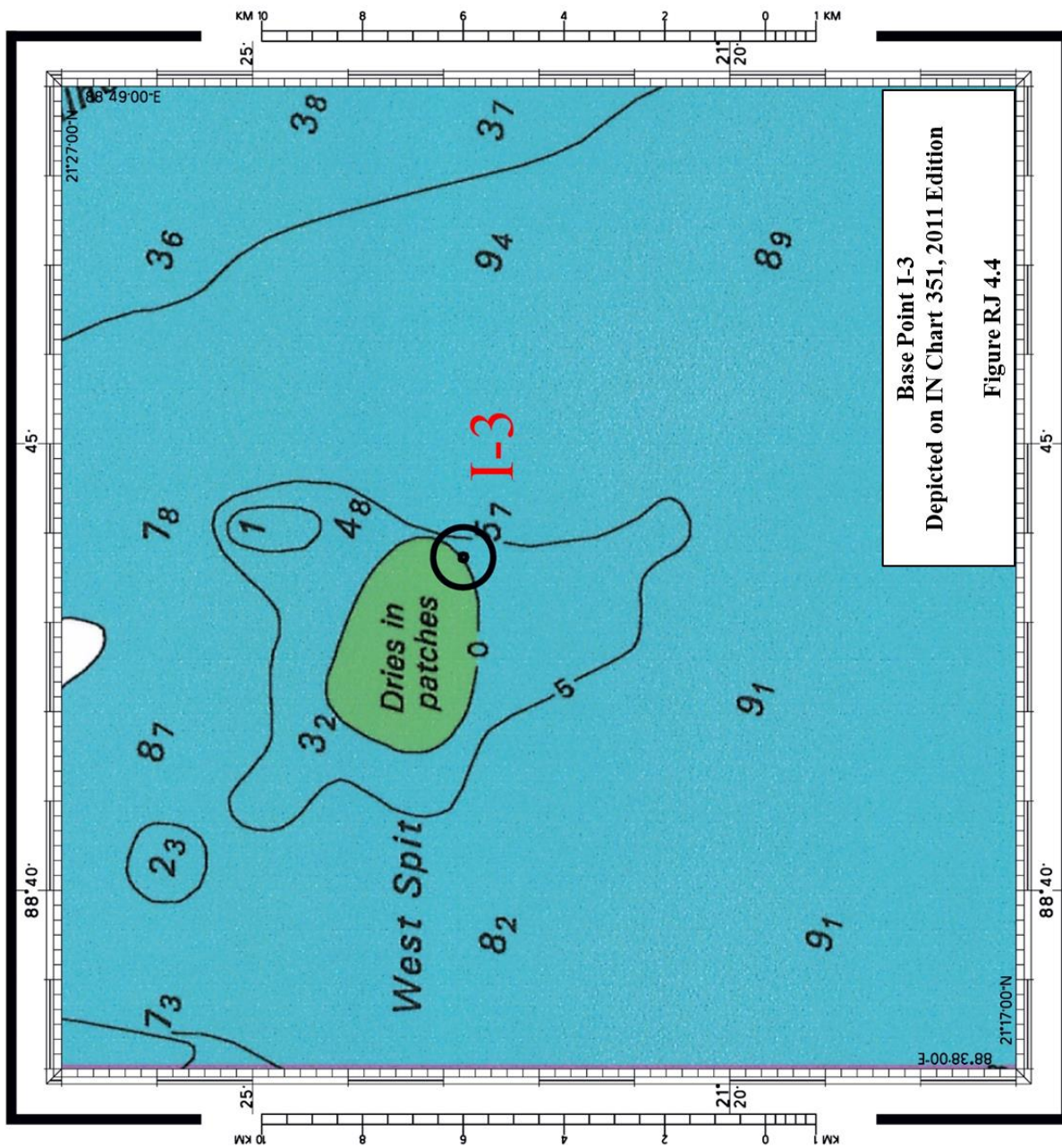
4A.8 **Base point B-3** has been identified on the south-western edge of the low-tide elevation which lies on the south east of Putney Island. The co-ordinates of the base point in WGS 84 are 21°37'32.7" N, 89°20'25.5" E. This point has been derived from the official Indian navigational chart of the area IN 351 (INT 7419-Paradip to Pussur River), 31 August 2011 Edition.

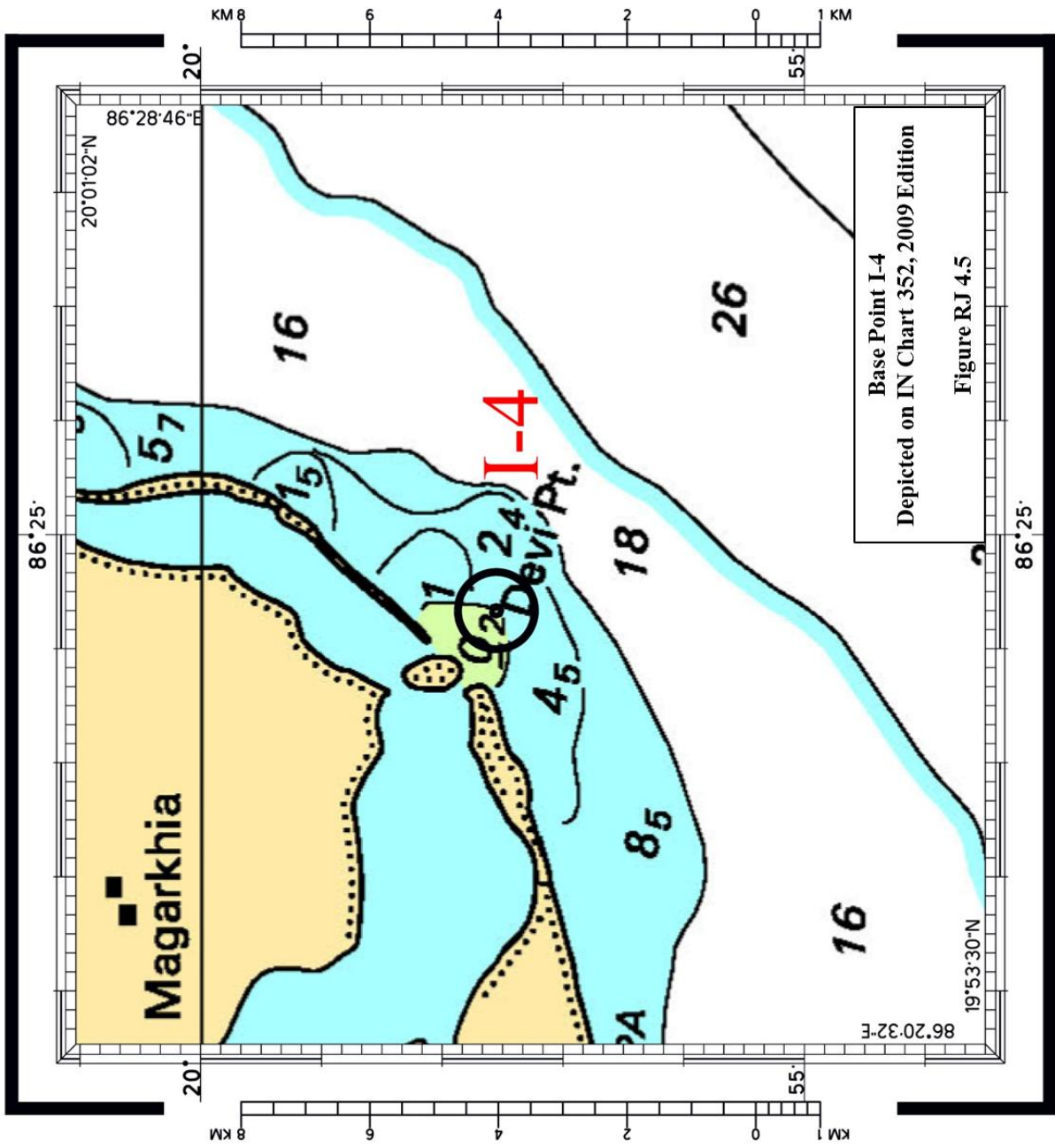
4A.9 **Base point B-4** has been identified on the southern tip of the low-tide elevation which lies approximately 11.5 nautical miles south-east of Andar Chal Island. The co-ordinates of the base point in WGS 84 are 21°38'00.5" N, 90°33'32.0" E. This point has been derived from the official British Admiralty navigational chart of the area BA 859 (Raimangal River to Elephant Point), 27 January 2011 Edition.

4A.10 **Base point B-5** has been identified on the low-water line on the west coast of Shahpuridwip, Bangladesh, which lies approximately 10 kilometres north of the mouth of the Naaf River. The co-ordinates of the base point in WGS 84 are 20°43'38.6" N, 92°19'30.2" E. This point has been derived from the official British Admiralty navigational chart of the area BA 817 (INT 7430-Elephant Point to Manaung (Cheduba) Island), 3 December 2009 Edition.

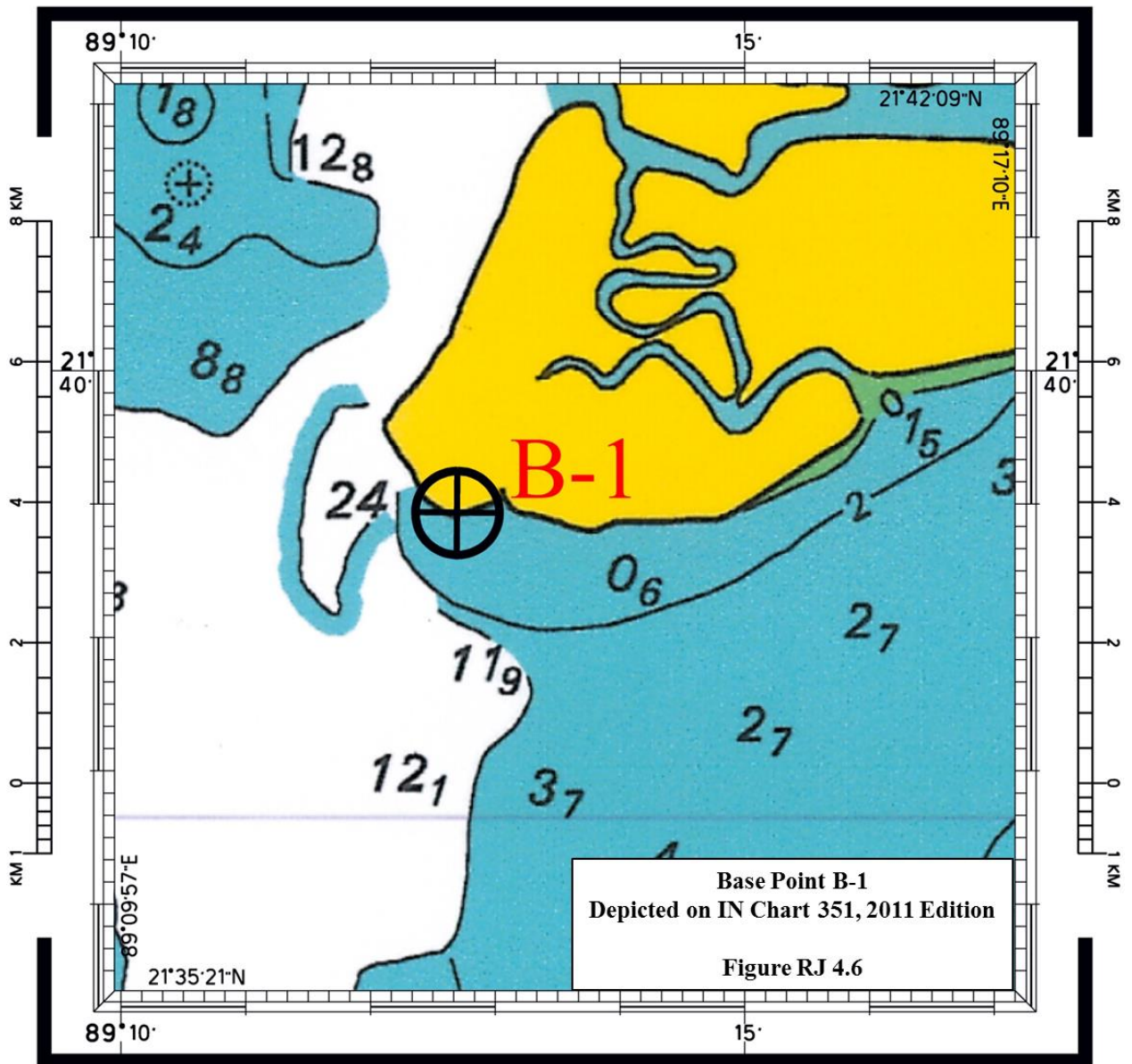


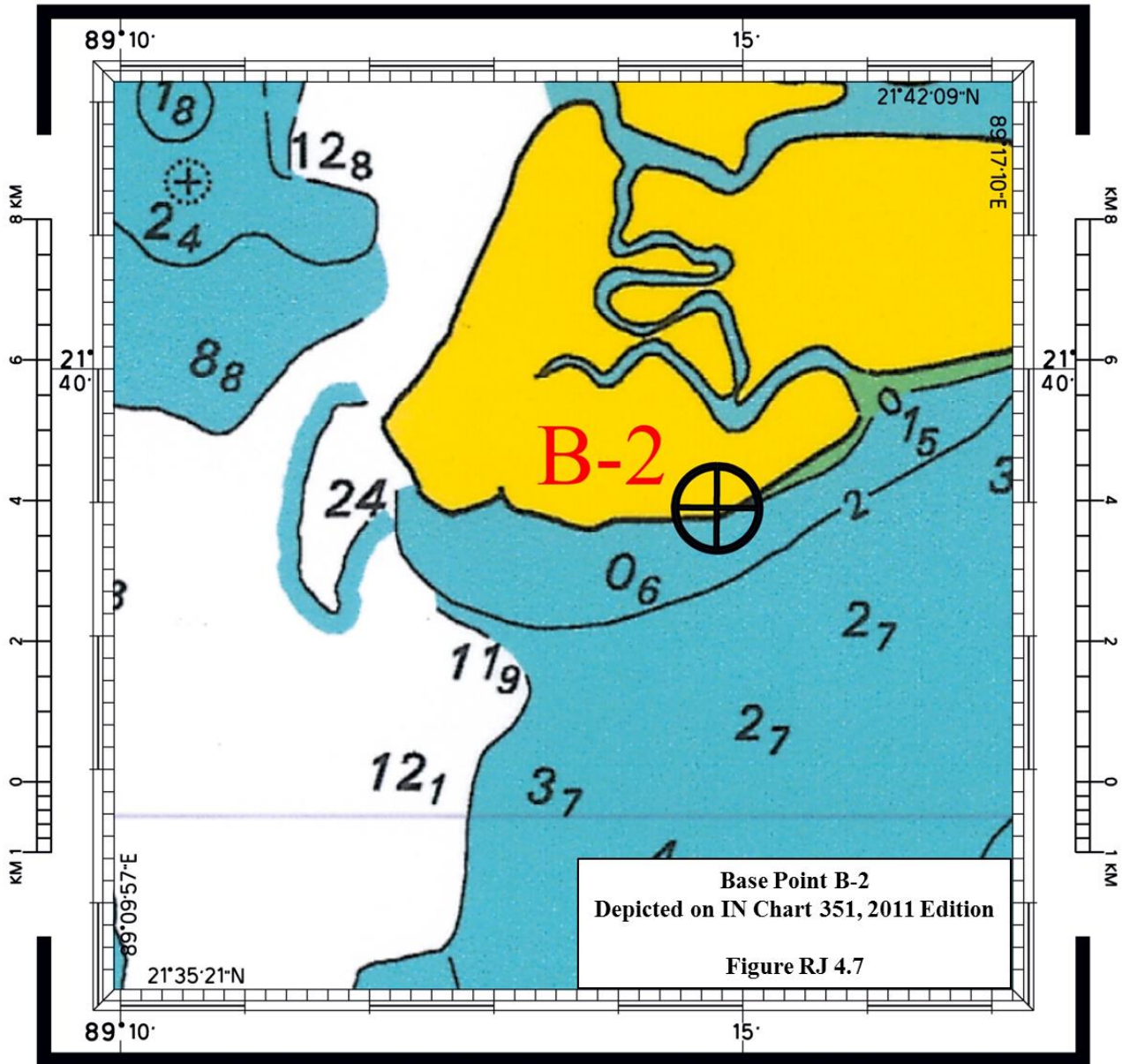


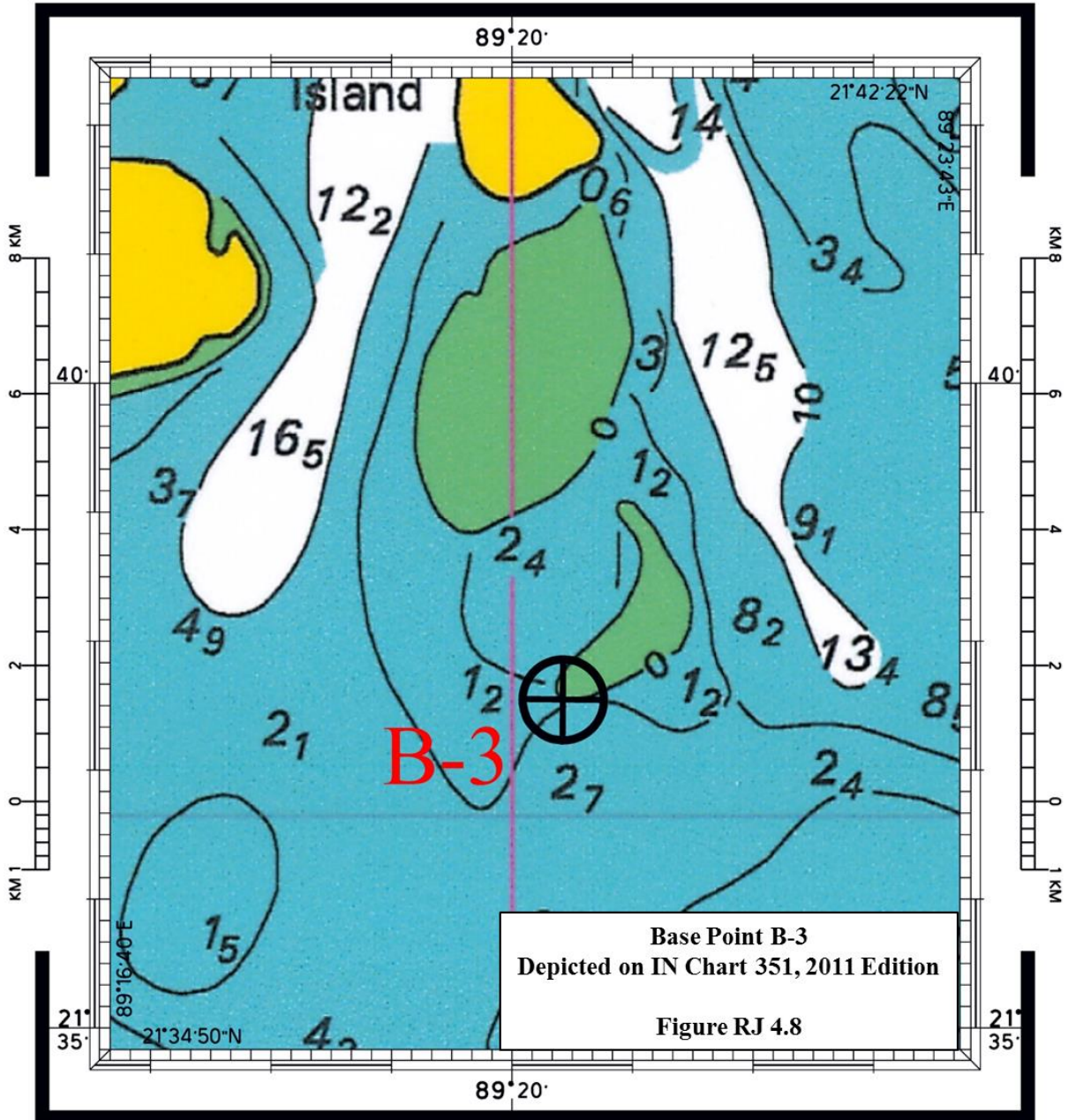


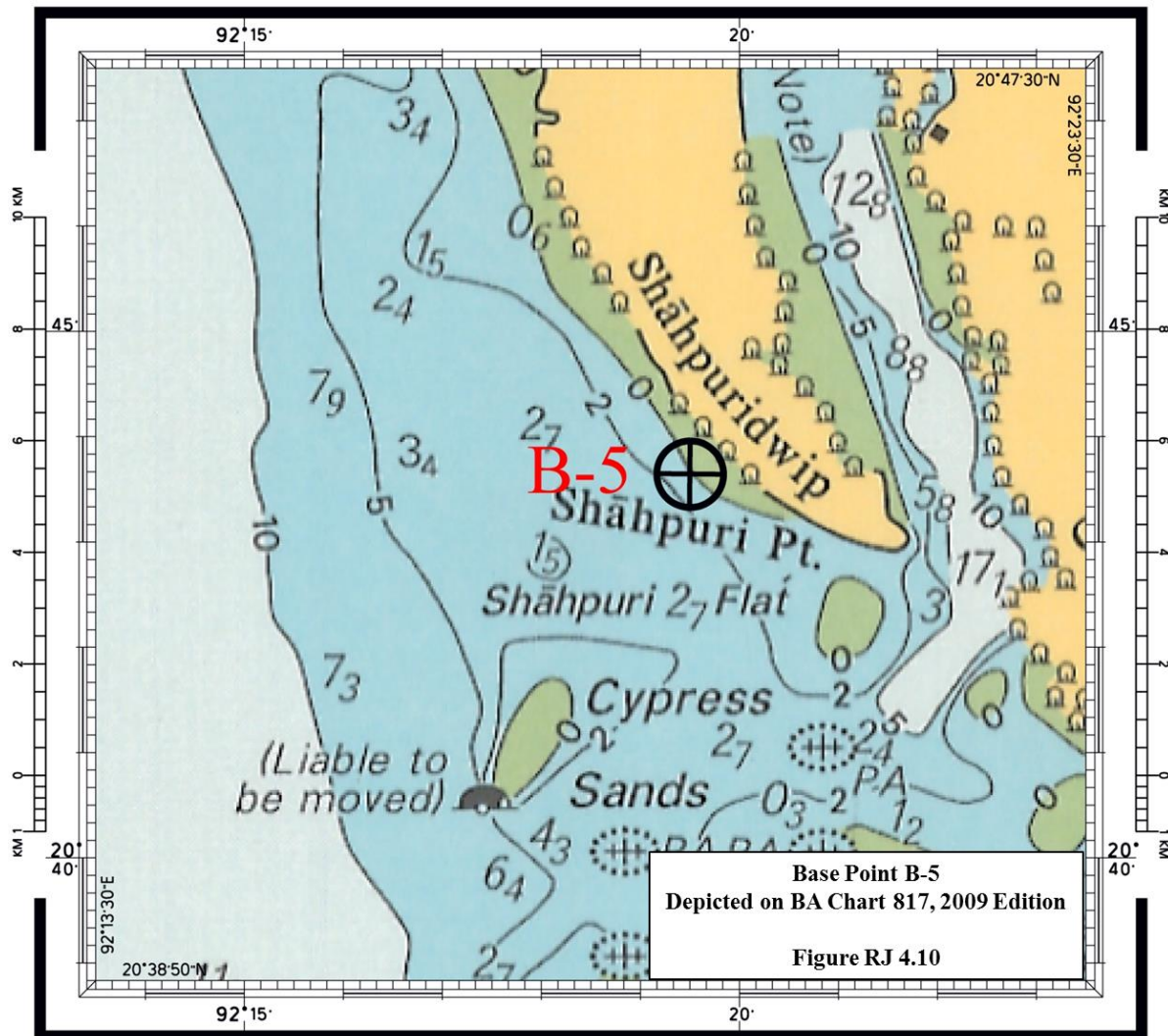


Base Point I-4
 Depicted on IN Chart 352, 2009 Edition
 Figure RJ 4.5









CHAPTER 5

SPECIAL / RELEVANT CIRCUMSTANCES

5.1 As explained in the Counter-Memorial,²⁴³ Articles 15, 74 and 83 of UNCLOS are the main provisions applicable to the delimitation of respectively the territorial sea, the exclusive economic zone and the continental shelf of India and Bangladesh.

5.2 With regard to the delimitation of the territorial sea, Article 15 of UNCLOS requires the application of the equidistance method unless “it is necessary by reason of . . . special circumstances” to adopt a method “which is at variance therewith.” Articles 74 and 83 of UNCLOS do not prescribe a precise method of delimitation of the EEZ and the continental shelf.²⁴⁴ Nevertheless, as recalled in Chapter 4 above, where India has set out the law applicable to the delimitation of the continental shelf and the EEZ, this lacuna has been filled by the case law.²⁴⁵ The “jurisprudence has developed in favour of the equidistance/relevant circumstances method”²⁴⁶ which involves the drawing of a provisional equidistance line, followed by an examination of that line in light of the relevant circumstances.²⁴⁷

5.3 It is now clear from the case law that the two methodologies are “closely interrelated”²⁴⁸ and that the expressions “special circumstances” and “relevant circumstances” have a similar meaning. As the ICJ put it in *Jan Mayen*:

“Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because

²⁴³ CMI, paras. 5.2 and 6.3.

²⁴⁴ The meaning and scope of Articles 74 and 83 are discussed in more details in Chapter 4 above (paras. 4.1-4.10).

²⁴⁵ See paras. 4.2-4.6 above.

²⁴⁶ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 238.

²⁴⁷ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 61, para. 51. See also Chapter 4, paras. 4.6-4.10 above.

²⁴⁸ *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 111, para. 231. See also MB, para. 6.21 and BR, para. 3.50.

they both are intended to enable the achievement of an equitable result.”²⁴⁹

5.4 While, in its Memorial, Bangladesh wrongly argued that “notwithstanding the now-common use of a provisional equidistance line at the outset of the delimitation process, there is no presumption in favour of equidistance”,²⁵⁰ Bangladesh now accepts “that the appropriate first step in this delimitation is the construction of a provisional equidistance line.”²⁵¹ Hence, both States now agree that it is necessary to consider whether or not there are, in the instant case, relevant circumstances. However, as India will show in the present Chapter, the conclusion that Bangladesh draws from the concept of special or relevant circumstances (**Section I**) are wrong in several respects (**Section II**).

I. The Concept of Special or Relevant Circumstances

5.5 It is noteworthy that, while Bangladesh pays lip service to the obligation to draw a provisional equidistance line, at the same time it insists that this well-established principle “does [not] preclude recourse to a different” method of delimitation:

“In light of this most recent jurisprudence, and in particular in light of the decisions of ITLOS and the ICJ in *Bangladesh/Myanmar* and *Nicaragua v. Colombia*, respectively, Bangladesh has carefully reconsidered the views presented in its Memorial. It will no longer insist that it is inappropriate to draw an equidistance line, even as a first step. It accepts that the starting point for this delimitation may be an equidistance line provisionally drawn.

That said, as the ICJ most recently stated, the construction of such a line ‘in no way prejudices the ultimate solution which must be designed to achieve an equitable result.’ It does not ‘preclude very substantial adjustment to, or shifting of, the provisional line’. Neither *does it preclude recourse to a different delimitation methodology (or methodologies) altogether.*”²⁵²

²⁴⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 62, para. 56 (Article 6 of the 1958 Convention on the continental shelf was drafted in terms similar to that employed by Article 15 of UNCLOS relating to the delimitation of the territorial sea).

²⁵⁰ MB, para. 6.21.

²⁵¹ BR, para. 4.31. See also para. 4.27.

²⁵² BR, paras. 4.27-4.28 (emphasis added).

5.6 In so doing, Bangladesh gives with one hand what it takes away with the other. In effect, it remains unyielding and reintroduces its angle-bisector line by the back door.²⁵³

5.7 Under Article 15 of UNCLOS, “special circumstances” function as exceptions to the equidistant/median line principle. The Article offers an example (“historic title”) for such exceptions without giving a general definition of the concept. However, the substance of the concept can be inferred from the abundant case law which refers to it and implements it.

5.8 It was in *Jan Mayen* that the ICJ gave the most detailed definition of the concept. The Court noted that:

“The concept of ‘special circumstances’ was discussed at length at the First United Nations Conference on the Law of the Sea, held in 1958. It was included both in the Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone (Art. 12) and in the Geneva Convention of 29 April 1958 on the Continental Shelf (Art. 6, paras. 1 and 2). It was and remains linked to the equidistance method there contemplated, so much so indeed that in 1977 the Court of Arbitration in the case concerning the delimitation of the continental shelf (United Kingdom/France) was able to refer to the existence of a rule combining ‘equidistance-special circumstances’ (see paragraph 46 above). It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of ‘relevant circumstances’. This concept can be described as a fact necessary to be taken into account in the delimitation process.”²⁵⁴

By the same token, the Court makes clear that the terms “special circumstances” on the one hand and “relevant circumstances” on the other hand, are similar in content.

5.9 The Court confirmed this analysis in its unanimous Judgment in the *Black Sea* case where it elaborated the function of relevant circumstances:

²⁵³ BR, paras. 1.21, 4.4 and 4.109.

²⁵⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 62, para. 55; see also pp. 59-60, para. 49; or *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 111, paras. 229-230; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 441-442, para. 289.

“once the provisional equidistance line has been drawn, it shall ‘then [consider] whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’ (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria : Equatorial Guinea intervening)*), *Judgment, I.C.J. Reports 2002*, p. 441, para. 288). Such factors have usually been referred to in the jurisprudence of the Court, since the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, as the relevant circumstances (*Judgment, I.C.J. Reports 1969*, p. 53, para. 53). Their function is to verify that the provisional equidistance line, drawn by the geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable. If such would be the case, the Court should adjust the line in order to achieve the ‘equitable solution’ as required by Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS.”²⁵⁵

5.10 In other words, any special or relevant circumstances come into play during the second stage of the delimitation process, that is, after a provisional equidistance line has been drawn, in order to determine the existence of and subsequently the weight to be given to any factors which *may* call “for the adjustment or shifting of that line in order to achieve an ‘equitable result’”. Such circumstances have no role to play during the first stage – that is the drawing of the provisional equidistance line. As explained in Chapter 4 above,²⁵⁶ relevant circumstances must not be confused with “compelling reasons”, which may come into play during the first stage. In very exceptional cases, these may lead an international court or tribunal to depart altogether from the equidistance/relevant circumstances method for another method of delimitation.

5.11 The methodology in Article 15 of UNCLOS is very similar in practice. “Article 15 of UNCLOS itself envisages an exception to the drawing of a median line, namely ‘where it is necessary by reason of historic title or other special circumstances . . .’.”²⁵⁷ The ICJ emphasizes that “[t]he most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in

²⁵⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 112, para. 155.

²⁵⁶ See paras. 4.10-4.15 above.

²⁵⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment, I.C.J. Reports 2007*, pp. 743-745, para. 280. See also *Second Stage of the Proceedings between Eritrea and Yemen*, Award of 17 December 1999, *UNRIIAA*, Vol. XXII (2001), pp. 370-371, para. 158.

the light of the existence of special circumstances”,²⁵⁸ whereas “compelling reasons” at the first stage require a very high degree of “speciality” of the circumstances. As India explained in the Counter-Memorial,²⁵⁹ there must be “compelling reasons” to treat a geographical feature as a special circumstance within the meaning of Article 15.²⁶⁰

5.12 As India has shown,²⁶¹ in the present case, there are no compelling reasons to depart from the equidistance/special (relevant) circumstances method in the territorial sea, the EEZ or the continental shelf. Nor are there any special or relevant circumstances justifying an adjustment or a shifting of the provisional equidistance line, as will be demonstrated in the next section.

II. Absence of Special or Relevant Circumstances in the Present Case

5.13 Asserting that it “has carefully reconsidered the views presented in its Memorial” and appearing to accept that it is appropriate to draw a provisional equidistance line,²⁶² is as far as Bangladesh is willing to go. As it did in its Memorial, Bangladesh continues to invoke the concavity of its coastline (A) and the alleged instability of the relevant coasts (B) in order to simply evade the mandatory application of the equidistance line in this case. Furthermore, Bangladesh relies on other considerations which, as India will show, are irrelevant (C).

A. Concavity

5.14 Bangladesh accepts ITLOS’ position according to which “concavity *per se* is not necessarily a relevant circumstance”.²⁶³ However, it still wrongly claims that “concavity is a

²⁵⁸ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 94, para. 176; also quoted in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 740, para. 268; see also p. 745, para. 280: “At the same time equidistance remains the general rule.”

²⁵⁹ See CMI, para. 5.33.

²⁶⁰ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 152.

²⁶¹ See paras. 4.18-4.24 above.

²⁶² BR, para. 4.27.

²⁶³ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 292.

special circumstance where . . . it produces a cut-off effect.”²⁶⁴ Bangladesh’s reasoning remains fundamentally misconceived and in contradiction with the most recent case law which shows that neither concavity nor a cut-off effect constitute relevant circumstances *per se*.

5.15 In its Reply, Bangladesh expresses its position as follows:

“Bangladesh agrees with India’s statement at paragraph 5.40 of the Counter-Memorial that ‘concavity is not a special circumstance in maritime delimitation *per se*’. ITLOS made a finding to the same effect in its Judgment of 14 March 2012. However, the Tribunal further held that *concavity is a special circumstance where, as is the case in the present proceedings, it produces a cut-off effect*”.²⁶⁵

However, Bangladesh’s claim is based on a mistaken reading of the ITLOS Judgment. It is also contradicted by other maritime delimitation Awards and Judgments including the most recent ones (1). Additionally, the principle set out in this case law does not apply in the present case since Bangladesh is not dramatically cut-off by India’s maritime entitlement as it alleges (2).

1. The Applicable Principle

5.16 As India recalled in its Counter-Memorial, the Tribunal in the *Saint Pierre et Miquelon* case explained that every delimitation unavoidably involves “some degree of cut-off effect.”²⁶⁶ This finding is supported by the most recent case law including *Cameroon v. Nigeria, Barbados/Trinidad and Tobago, Bangladesh/Myanmar* and *Nicaragua v. Colombia*.

5.17 Turning first to *Barbados/Trinidad and Tobago*, the unanimous Award delivered in 2006 radically contradicts Bangladesh’s claim according to which concavity “is relevant when a State is pinched in the middle of a concavity between two other States.”²⁶⁷ This case is particularly relevant for two reasons:

²⁶⁴ BR, para. 3.68.

²⁶⁵ *Ibid.* (emphasis added).

²⁶⁶ *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, *ILM*, Vol. 31, 1992, p. 1169, para. 67.

²⁶⁷ BR, para. 4.70.

- First, like Bangladesh, Trinidad and Tobago is located between two States (namely Barbados in the north and Venezuela in the south) and the relevant coasts of these three States form a concavity.
- Second, Bangladesh is in the same situation as Trinidad and Tobago was when the 2006 Award was made: it had already settled its maritime dispute with Venezuela when the Tribunal rendered its Award (and, in our case, the ITLOS has fixed Bangladesh's maritime boundary with Myanmar).²⁶⁸

For these two reasons, “it [was] unavoidable that any seaward extension of the coasts [of Barbados] beyond their territorial sea would cause some degree of encroachment and cut-off to the seaward projection [of Trinidad and Tobago's coasts].”²⁶⁹ Nevertheless, the *Barbados/Trinidad and Tobago* Tribunal decided to draw a modified equidistance line (see Figure RJ 5.1 at page 123).

5.18 The *Bangladesh/Myanmar* case also shows that the cut-off effect does not constitute a relevant circumstance *per se*. In a passage quoted several times by Bangladesh, the ITLOS explained that “when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line *may be* necessary in order to reach an equitable result.”²⁷⁰ Yet even though the ITLOS concluded that “the concavity of the coast of Bangladesh [and the resulting cut-off effect] is a relevant circumstance”,²⁷¹ it immediately specified “*in the present case*”.²⁷² It results *a contrario* from this formula that, in other circumstances, a cut-off effect might not call for an adjustment of the equidistance line.

5.19 This is confirmed by the weight given in *Bangladesh/Myanmar* to St. Martin's Island while delimiting the territorial sea. Myanmar argued that St. Martin's Island should be treated

²⁶⁸ See the 1990 Trinidad-Venezuela Agreement (*Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 161, para. 51).

²⁶⁹ *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, *ILM*, Vol. 31, 1992, p. 1169, para. 67.

²⁷⁰ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 292 (emphasis added).

²⁷¹ *Ibid.*, para. 297.

²⁷² *Ibid.* (emphasis added).

as a special circumstance within the meaning of Article 15 of UNCLOS because otherwise it would produce a distorting effect on the equidistance line.²⁷³ Myanmar contended that, the equidistance line “cuts across [Myanmar]’s coastline and blocks the seaward projection of that coastline”²⁷⁴ for 30 kilometres (see Figure RJ 5.2 at page 125). The ITLOS rejected Myanmar’s argument, finding “no compelling reasons that justify treating St. Martin’s Island as a special circumstance for the purposes of article 15 of the Convention.”²⁷⁵ In the ITLOS’ view, this cut-off effect simply did not call for an adjustment of the equidistance line.

5.20 The same conclusion follows from the 2002 ICJ Judgment in *Cameroon v. Nigeria*. With respect to this case, Bangladesh’s position is misleading. Bangladesh firmly asserts that “the most compelling indication that *Cameroon v. Nigeria* does not stand for the proposition for which India offers it is the fact that ITLOS has already rejected it.”²⁷⁶ This is simply not true. The ITLOS has not taken any position concerning *Cameroon v. Nigeria*.²⁷⁷ And, while it is true that the ICJ stated that “the concavity of the coastline may be a circumstance relevant to delimitation”,²⁷⁸ it did not take into account the cut-off effect that equidistance would produce to the disadvantage of Cameroon at all. Yet Bangladesh tries to infer from this decision that “concavity is a special circumstance where . . . it produces a cut-off effect”.²⁷⁹ This is precisely what the ICJ did not accept as a relevant circumstance in itself in 2002. In that case which is very similar, in several respects, to the configuration of the present one, the ICJ adopted a “strict equidistance” line.

²⁷³ See Rejoinder of Myanmar, p. 58, para. 3.16. See also *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 132.

²⁷⁴ BR, para. 3.89.

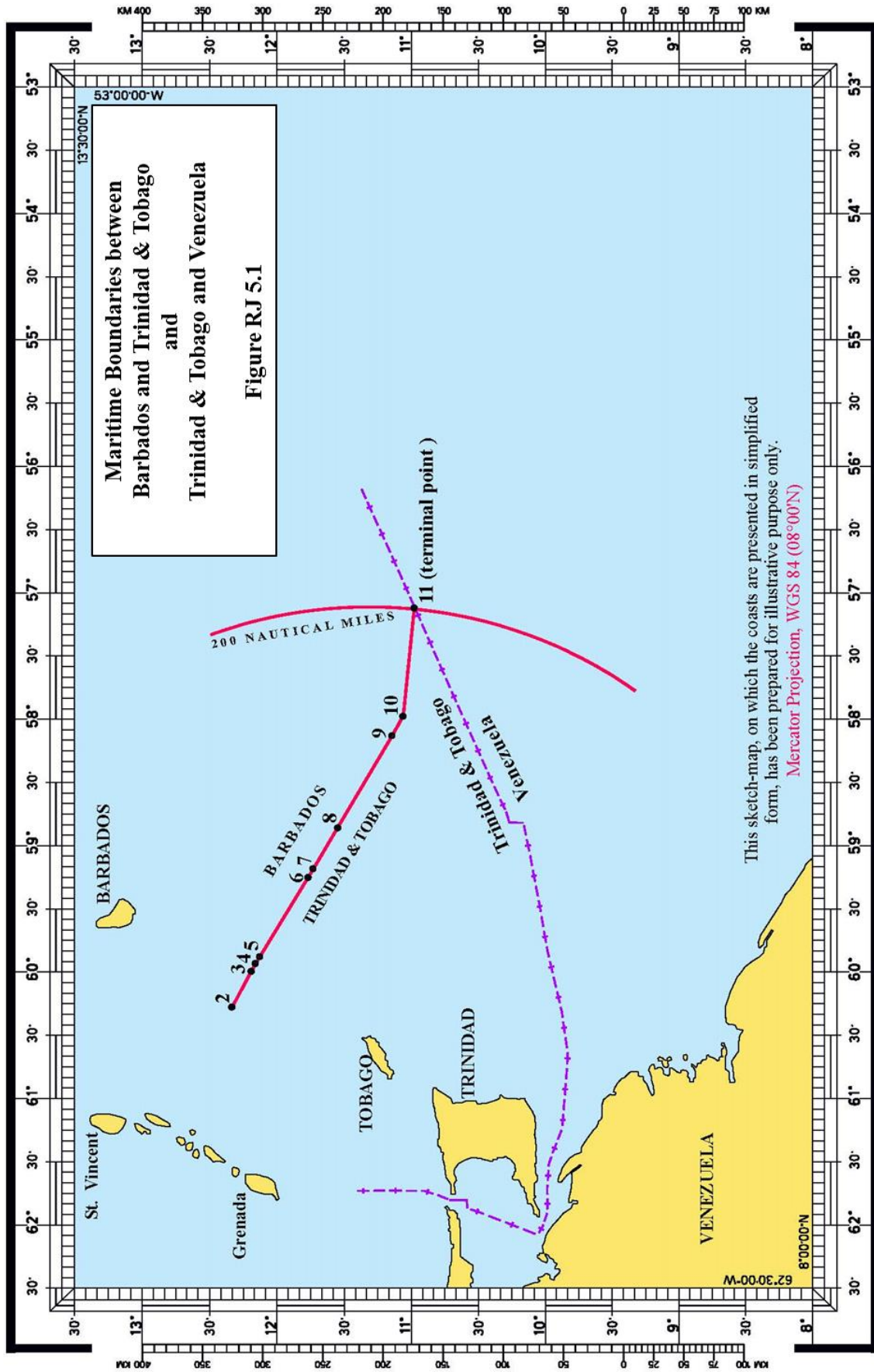
²⁷⁵ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 152.

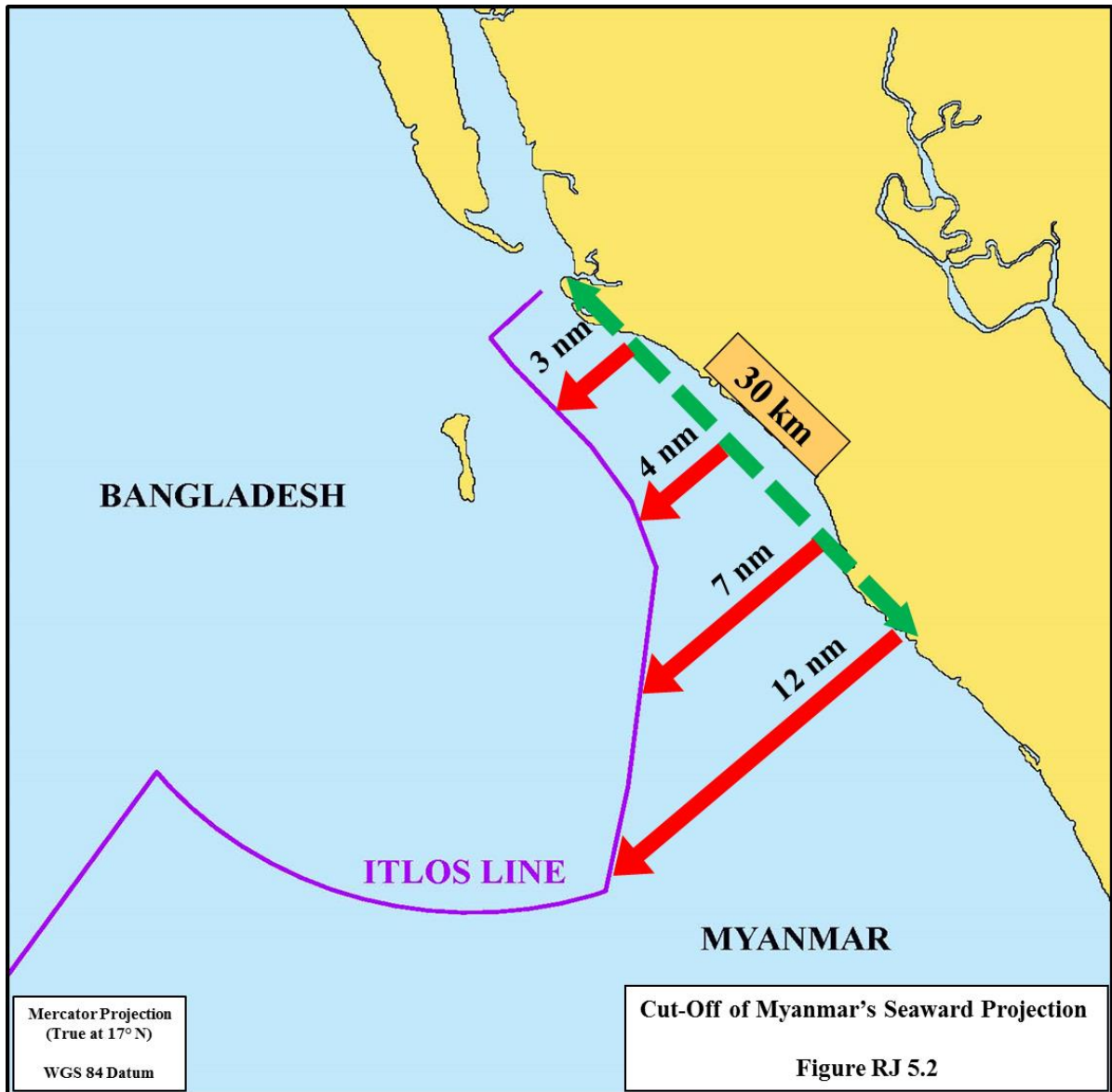
²⁷⁶ BR, para. 4.68.

²⁷⁷ In support of its bold assertion, Bangladesh referred to the paragraph 282 of the 2012 ITLOS Judgment. However, in this paragraph, the ITLOS did not state its position; it merely summarized Bangladesh’s position.

²⁷⁸ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 445, para. 29.

²⁷⁹ BR, para. 3.68.





5.21 In the *Nicaragua v. Colombia* case, the ICJ also addressed the cut-off effect issue. Bangladesh notes that the Court found “that the cut-off effect is a relevant consideration which requires adjustment or shifting [not the abandonment] of the provisional median line in order to produce an equitable result”,²⁸⁰ but it refrains from giving the full reasoning of the Court. The ICJ reached this decision because “that cut-off effect [was] produced by a few small islands which are many nautical miles apart.”²⁸¹ The Court’s decision would have certainly been different if the cut-off effect had been caused by the mainland coast of Colombia. Indeed, in the very next sentence, the Court explained that “those islands should not be treated as though they were a continuous mainland coast stretching for over 100 nautical miles and cutting off Nicaraguan access to the sea-bed and waters to their east.”²⁸²

5.22 The foregoing review of the case law clearly shows that neither a concavity nor a cut-off effect constitutes *per se* a relevant circumstance in the legal meaning of that term.

2. *The Applicable Principle Applied*

5.23 In order to appear faithful to its position, Bangladesh deploys tremendous efforts to show that the equidistance line has a cut-off effect on Bangladesh but not on India.²⁸³ However, it is apparent that the seaward projection of India’s coasts is also curtailed. A glance at a sketch-map is enough to picture the balanced effect of the equidistance line proposed by India (see Figures RJ 5.3 A and B at page 129). The cut-off on India’s east-facing coast is similar but more radical than on Bangladesh’s west-facing coast.

5.24 On the contrary, the delimitation line proposed by Bangladesh has a severe distorting effect. The 180° line proposed by Bangladesh produces a far more radical cut-off effect on India’s coast but has no such effect on Bangladesh coast. It is evident that the 180° line cuts off the seaward projection of India’s territory all along the relevant portion of its east-facing coast, from the Hooghly River to Devi Point (see Figures RJ 5.4 A and C at page 131), while the seaward projection of Bangladesh’s coasts is unimpeded (see Figures RJ 5.4 B and D at page 131). The cut-off effect can easily be explained by two geographical facts which

²⁸⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 215.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ BR, paras. 4.70-4.72. and 4.80-4.83.

Bangladesh does not challenge:²⁸⁴ first, India's relevant coasts are concave and, second, the Bay of Balasore forms a "concavity within the concavity" (see Figure RJ 5.5 at page 133).

5.25 As is unavoidable for any delimitation line, the equidistance line between India and Bangladesh produces "some degree of cut-off effect",²⁸⁵ as Bangladesh itself acknowledges.²⁸⁶ However, in the present case, the cut-off produced by the equidistance line "is shared in a mutually balanced way"²⁸⁷ by India and Bangladesh and both "enjoy reasonable entitlements in the areas into which [their] coasts project".²⁸⁸ The equidistance line proposed by India produces an almost equal division of the relevant area.²⁸⁹

B. The Alleged Coastal Instability Is Not a Special/Relevant Circumstance

5.26 Bangladesh claims that the Tribunal should depart from equidistance because "[t]he highly unstable deltaic nature of the relevant coastlines makes extremely difficult, if not impossible, to establish stable and reliable base points on which to construct a meaningful equidistance line".²⁹⁰

²⁸⁴ BR, para. 2.11.

²⁸⁵ *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, *ILM*, Vol. 31, 1992, p. 1169, para. 67.

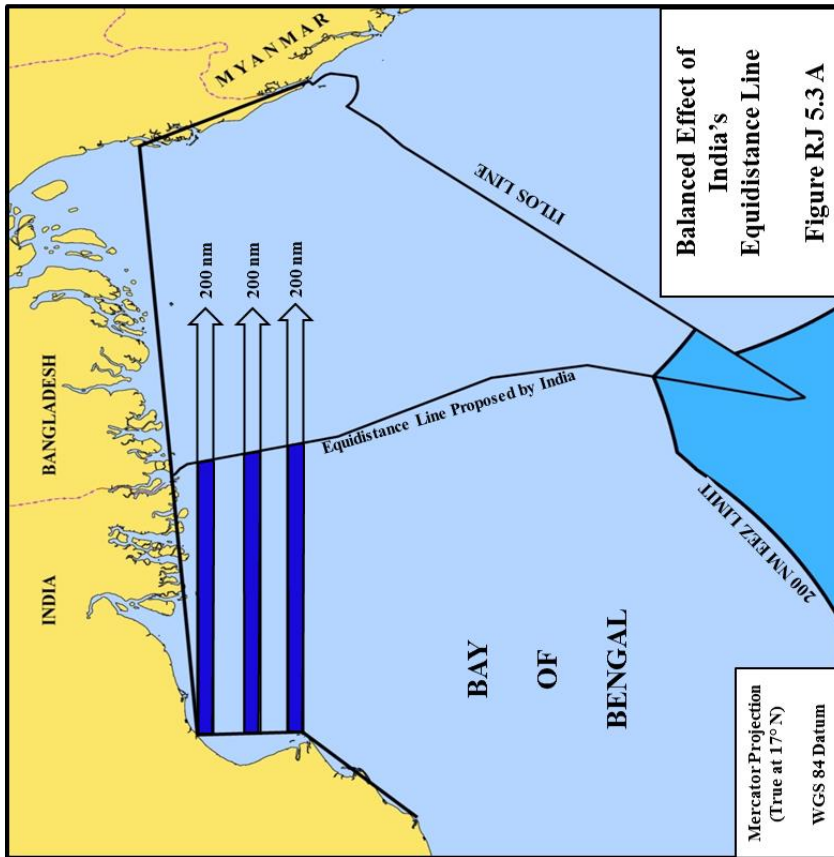
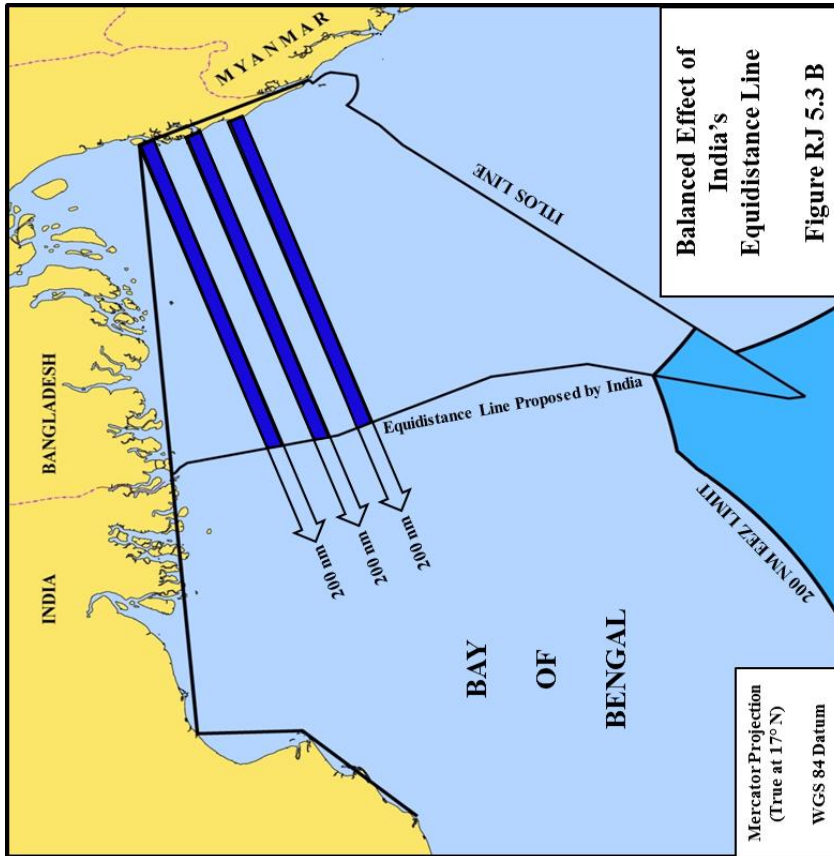
²⁸⁶ BR, para. 4.143.

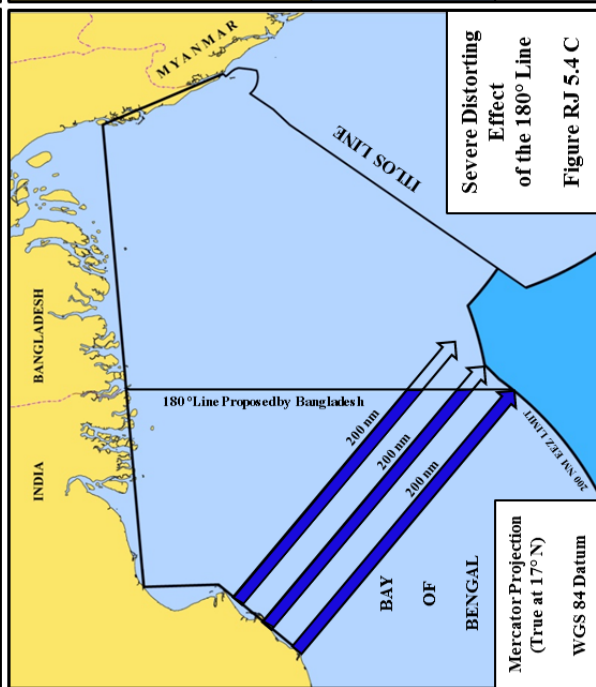
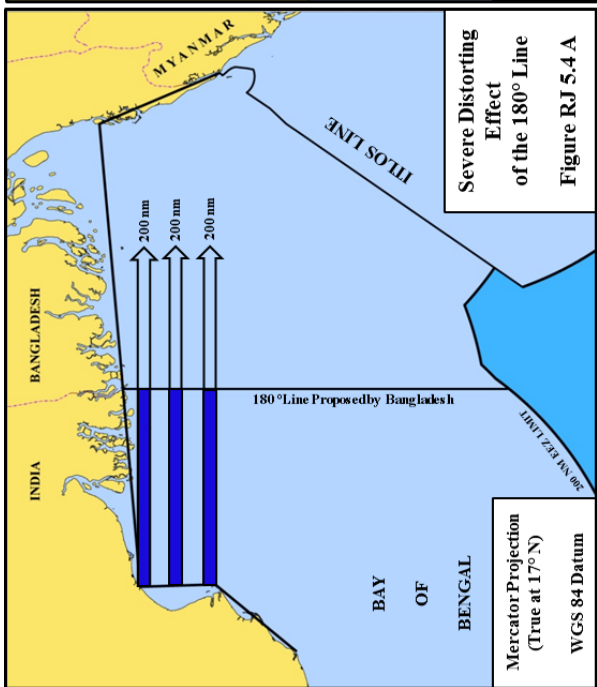
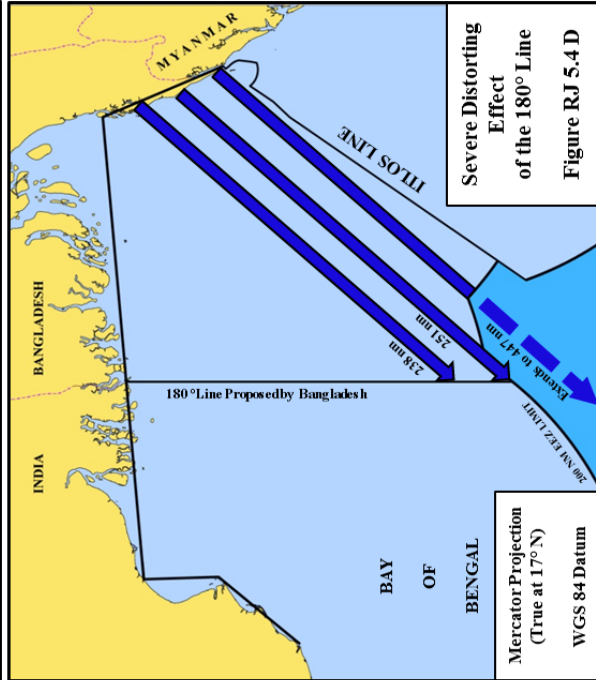
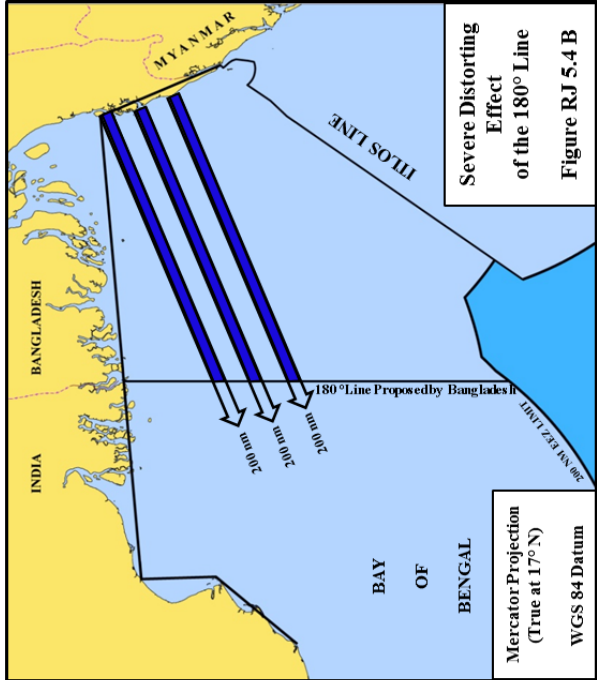
²⁸⁷ See *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 127, para. 201 and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 215. See also BR, para. 4.136.

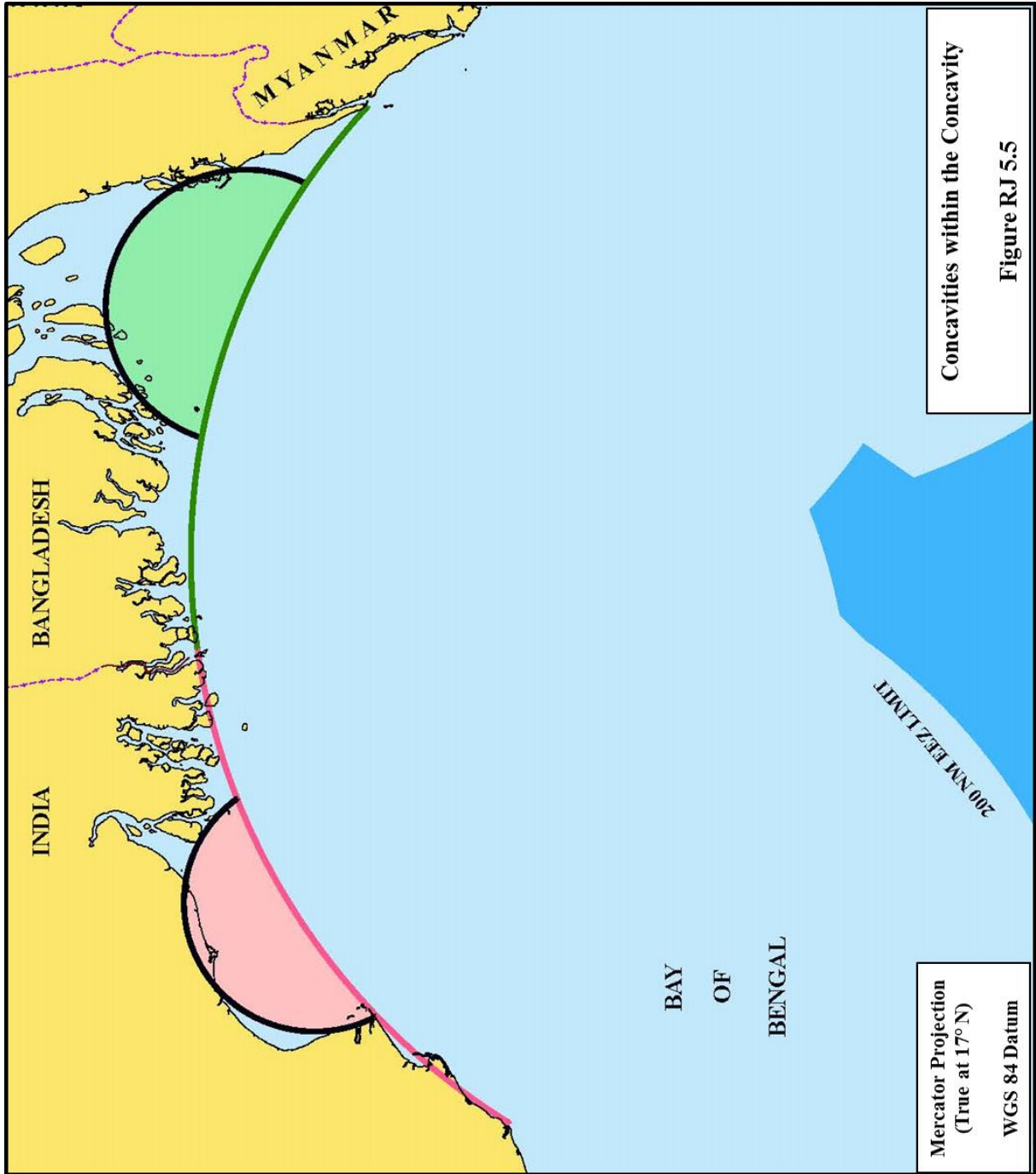
²⁸⁸ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 216.

²⁸⁹ See para. 7.37 and Figure RJ 7.3 below.

²⁹⁰ BR, para. 3.55.







5.27 As India has explained above, special and relevant circumstances must not be confused with “compelling reasons” which, in very exceptional cases can lead an international court or tribunal to depart from the equidistance/relevant circumstances method for an alternate method of delimitation.²⁹¹ It is in this context and in this context only that Bangladesh’s argument must be assessed. Furthermore, stability may only be relevant at the first stage of the maritime delimitation when the Court verifies whether there are base points on which it can rely to draw the provisional equidistance line.²⁹²

5.28 Such compelling reasons would only exist if the geographic characteristics of the relevant coasts were so unreliable that they would make it unfeasible to fix any base points from which the equidistance line could be drawn.²⁹³ As India has shown in Chapter 5, Bangladesh has not demonstrated this to be the case. Its assertion is not based on any tangible evidence. Thus, for instance:

- most of Bangladesh’s so-called “scientific evidence”²⁹⁴ on the future configuration of the coastlines is no more than very selective prediction and speculation, which have to be used with caution according to their authors;²⁹⁵
- a substantial part of the alleged erosion and accretion is caused not by natural forces but by human activities;²⁹⁶
- some of the studies Bangladesh itself has annexed to its Reply contradict its thesis, for example, the speculated future sea-level rise rate and the effectiveness of mangrove forests.²⁹⁷

But, maybe, the most “compelling reason” is that India has shown – as has Bangladesh – that it is perfectly feasible to identify appropriate base points.²⁹⁸

²⁹¹ See para. 5.17 above.

²⁹² See paras. 4.10-4.24 above.

²⁹³ CMI, para. 6.51.

²⁹⁴ See e.g. BR, para. 4.115.

²⁹⁵ See paras. 4.30-4.32 above.

²⁹⁶ See para. 4.34 above.

²⁹⁷ See para. 4.31 above.

²⁹⁸ See paras. 4.12-4.24 above.

C. Bangladesh Cannot Rely on any Other Special or Relevant Circumstances

5.29 Even though Bangladesh “hastens to make clear that . . . it is not arguing . . . that this delimitation should . . . be conducted on the basis of proportionality”²⁹⁹ and that it “is [not] seeking a delimitation *ex aequo et bono*”,³⁰⁰ it is clear that Bangladesh’s basic claim is that the “relevant” area – in which Bangladesh wrongly includes a very substantial part of the Bay of Bengal³⁰¹ – must be shared proportionally between the two States. This is evident from the numerous paragraphs in which Bangladesh compares the areas allocated to it with the maritime areas of India not only in the “relevant” area, but also “in the Bay of Bengal as a whole”³⁰².

5.30 Furthermore, Bangladesh claims that since it is a “significant coastal State”, as it describes itself, the maritime delimitation would have to respect “Bangladesh’s . . . maritime space within 200 M”³⁰³ and its “undisputed potential entitlement in the continental shelf beyond 200 M.”³⁰⁴ Therefore, since the equidistance line “impermissibly cuts Bangladesh off from the overwhelming majority of its potential entitlement in the continental shelf beyond 200 M”,³⁰⁵ it is inequitable and it should be abandoned.

5.31 This is obviously not the correct approach. Bangladesh’s reasoning contradicts the well-established principle “the sharing-out of the area is . . . the consequence of the delimitation, not vice-versa.”³⁰⁶ In other words, before the maritime delimitation is agreed, “the maritime boundaries had not been determined, and consequently neither of the two States could assert that a particular portion of the maritime area was ‘its own’”.³⁰⁷

²⁹⁹ BR, para. 4.141.

³⁰⁰ BR, para. 4.98.

³⁰¹ See paras. 7.35-7.36 below.

³⁰² BR, para. 5.36. See also para. 4.139. Bangladesh establishes no less than eight comparisons (see BR, paras. 4.139-4.140, 5.16, 5.17, 5.35-5.36, 5.38 and 5.74).

³⁰³ BR, para. 4.140.

³⁰⁴ BR, para. 4.78.

³⁰⁵ BR, para. 5.4.

³⁰⁶ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 66, para. 64.

³⁰⁷ *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Award of 31 July 1989, para. 39 (translation by the Registry of the ICJ, Annex to the Application instituting proceedings of the Government of the Republic of Guinea-Bissau in the case *Arbitral Award of 31 July 1989* (available on

1. State Practice

5.32 According to Bangladesh, State practice referred to in the Memorial “evidence[s] a broad recognition by States . . . that equidistance does not work in the case of States trapped in the middle of a concavity”³⁰⁸ and supports “Jonathan Charney’s principle of ‘maximum reach’”³⁰⁹.

5.33 In its Memorial, Bangladesh referred to five agreements concluded between States: the agreements between The Gambia and Senegal, Dominica and France, Monaco and France, and Germany and the Netherlands and Denmark.³¹⁰ In its Reply, Bangladesh describes this list as “a substantial body of State practice”³¹¹ and adds a sixth agreement: the 2009 exchange of letters between Malaysia and Brunei, the content of which remains secret.

5.34 To begin with, five or six is a minuscule number to purport to illustrate a “broad recognition of States”. And, more importantly, none of these agreements helps Bangladesh’s case for two main reasons.

5.35 First, the “modest outlet to its 200 M”³¹² claimed by Bangladesh is in fact approximately 70 nautical miles wide when it reaches the 200-nautical-mile limit, while most of these agreements created only very narrow corridors :

- the Agreement between Dominica and France³¹³ afforded Dominica a corridor 17 nautical miles wide;
- the agreements between Germany and Denmark³¹⁴ and Germany and The Netherlands³¹⁵ granted to Germany a corridor less than 10 nautical miles wide;

<http://www.icj-cij.org>); authoritative French text in *UNRIIAA*, Vol. XX, p. 134, para. 39: “les limites maritimes n[e so]nt pas fixées et par conséquent, aucun des deux Etats ne p[eu]t affirmer qu’une fraction déterminée de la zone maritime [es]t ‘sienne’”).

³⁰⁸ BR, para. 4.98.

³⁰⁹ BR, para. 4.89.

³¹⁰ MB, paras. 6.54-6.61.

³¹¹ BR, para. 5.47.

³¹² BR, para. 4.108.

³¹³ Agreement on Maritime Delimitation (with map) between the Government of French Republic and the Government of Dominica, 7 September 1987, published in *UNTS*, Vol. 1546, I-26854, p. 308.

- finally, the Convention concluded by France and Monaco³¹⁶ granted to Monaco a corridor less than 2 nautical miles wide, extending up to 49 nautical miles.

The equidistance line offers to Bangladesh an “outlet to its 200 M” of 26 nautical miles, which is wider than those agreed in these maritime delimitation treaties.

5.36 Second, as India recalled in its Counter-Memorial, maritime boundary agreements are based on *political* considerations.³¹⁷ The agreements referred to by Bangladesh illustrate this caveat.

5.37 As regards the 2009 exchange of letters between Malaysia and Brunei, it is striking that Bangladesh seeks to draw an argument from an agreement it has not even read. Furthermore, the *quid pro quo* agreed between Malaysia and Brunei appears to be of the utmost importance. Official information on which Bangladesh relies indicates that Brunei dropped nothing less than a territorial claim to the Limbang strip “which straddles the Sarawak-Brunei border.”³¹⁸ At the end of the day, one cannot reasonably draw any conclusion in terms of principles of delimitation from such a secret agreement and comments made by the Parties are purely speculative.

5.38 As regards the Agreement between France and Monaco, it has been noted that:

“As stated by Mr Paul Robert, rapporteur for the convention before the French Senate, ‘because of the tight and exceptional nature of the French-Monegasque relations, France has accepted provisions *that the rules of international law did not oblige it to accept.*’³¹⁹

...

³¹⁴ Treaty between the Kingdom of Denmark and the Federal Republic of Germany concerning the delimitation of the continental shelf under the North Sea (with annexes and exchange of letters), 28 January 1971, in *UNTS*, Vol. 857, I-12295, p. 109.

³¹⁵ Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the delimitation of the continental shelf under the North Sea (with annexes and exchange of letters), 28 January 1971, in *UNTS*, Vol. 857, I-12296, p. 131.

³¹⁶ Convention on Maritime Delimitation (with maps) between the Government of the French Republic and the Government of His Serene Highness the Prince of Monaco, 16 February 1984, in *UNTS*, Vol. 1411, I-23631.

³¹⁷ See CMI, para. 6.69.

³¹⁸ N. Najib and S. Ali Bernama, “Oil Blocks ‘Giveaway’ to Brunei”, *The Malay Mail* (30 April 2010), BR, Vol. III, Annex BR6.

³¹⁹ *International Maritime Boundaries*, Report Number 8-3, Vol. II, p. 1582 (MB, Vol. III, Annex B47) (emphasis added).

[A]n equidistant boundary would have resulted in converging boundary lines that intersect less than 12 n.m. from Monaco. This would have meant cutting off the Monegasque territorial sea from the high seas. Such a disadvantaged situation, *which however is not explicitly prohibited by international law*, prompted Monaco to seek the negotiation of the convention in order to avoid a situation that was regarded also by France as ‘uncomfortable’.³²⁰

5.39 Finally, as regards the Agreement concluded between France and Dominica, as has been explained, “[e]quity predominated as the basis for the drawing of the line”,³²¹ on the basis of “certain political perceptions”.³²²

5.40 Another significance Bangladesh attaches to the France-Dominica Agreement needs to be addressed. Comparing itself to Dominica, Bangladesh explains that, although Bangladesh has a much longer coastline than Dominica, Dominica “received a comparatively larger share of its potential entitlement within 200 M than Bangladesh would under even the best case scenario for it here.”³²³ However, Bangladesh draws no explicit conclusion from this fact. It is only later in the Reply that Bangladesh discloses its argument, when at paragraph 5.52, Bangladesh presents a similar argument with regard to the treatment of the Colombian islands in the *Nicaragua v. Colombia* case. It claims that “[i]f Colombia’s small insular possessions in the middle of the Caribbean Sea were enabled to ‘extend [their] maritime territory as far seaward as international law permits’, Bangladesh’s mainland coast should receive no less favourable treatment.”³²⁴

5.41 This reasoning is seriously flawed; any State could claim large maritime areas by invoking equality of treatment and the fact that small isolated islands in the middle of the ocean possess a full EEZ all around them. This kind of reasoning entirely misses the point for two reasons: first, maritime delimitation consists of a *delimitation* between *two* States with overlapping claims, not of an allocation to one State of areas it claims unilaterally; and,

³²⁰ *Ibid.*, p. 1584 (emphasis added).

³²¹ *International Maritime Boundaries*, Report Number 2-15, Vol. I, p. 711 (MB, Vol. III, Annex B46).

³²² *Ibid.*, p. 707.

³²³ BR, para. 4.95.

³²⁴ BR, para. 5.52.

second, in maritime delimitations, the geography is controlling and, consequently, it is quite usual that the State with the smaller land area may claim the larger maritime area.³²⁵

5.42 Indeed, what was and is relevant is to determine whether the maritime delimitation achieves an equitable solution *between India and Bangladesh in the relevant area*; it is not to assess the equitableness of the maritime areas allocated to each State in the abstract as if unlimited resources were allocated on the basis of individual and absolute rights.

2. The Case Law

5.43 Bangladesh claims that “[t]he most pertinent cases in the jurisprudence are and remain *North Sea* and *Guinea/Guinea-Bissau* cases, as well as *Bangladesh/Myanmar*.”³²⁶ Ignoring the development of the jurisprudence, Bangladesh omits the *Cameroon v. Nigeria* case and the *Barbados/Trinidad and Tobago* case.

5.44 Turning first to the *Cameroon v. Nigeria* case, the 2002 ICJ Judgment is relevant for two main reasons:

- First, in this case, the ICJ did not apply a regional approach to coastal configuration but only considered the relevant coasts of the Parties in its Judgment. This is at odds with the approach followed by the Arbitration Tribunal in *Guinea/Guinea-Bissau*, where the Tribunal used a most debatable (and fortunately isolated) method consisting “of looking at the whole of West Africa and of seeking a solution which would take overall account of the shape of its coastline”. In other words, the Arbitral Tribunal decided no longer to restrict “considerations to a *short coastline* but to a *long coastline*”.³²⁷ As a result, the Arbitration Tribunal chose a single, unidirectional

³²⁵ See *e.g.* the *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, para. 45: “The extent of the seaward projections will depend, in every case, on the geographical circumstances; for example, a particular coast, however short, may have a seaward projection as far as 200 miles, if there are no competing coasts that could require a curtailed reach”. See also *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, p. 301, para. 119; see also: See also the *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, para. 45: “The extent of the seaward projections will depend, in every case, on the geographical circumstances; for example, a particular coast, however short, may have a seaward projection as far as 200 miles, if there are no competing coasts that could require a curtailed reach.”

³²⁶ BR, para. 4.67.

³²⁷ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, p. 297, paras. 108 and following (see also *UNRIAA*, Vol. XIX, p. 189) (emphasis added).

coastal façade extending from Senegal right down to Sierra Leone – thus jumping across the territories of no fewer than five different States³²⁸ – to draw the delimitation line.³²⁹ Even Bangladesh in the present case does not use such an over-simplified method (the Tribunal selected “a straight line joining two coastal points *on the continent*”³³⁰). In fact, in 1985 the Arbitration Tribunal confused the equitable solution that any delimitation between two States must concretely achieve in with an exercise it called the “equitable integration [of the delimitation between Guinea and Guinea-Bissau] into the existing delimitations of the West African region, as well as into future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions.”³³¹

- Second, in *Cameroon v. Nigeria*,³³² in accordance with the modern case law, the ICJ restricted the delimitation to the relevant area and adopted a spatially constrained approach which it recently confirmed by stating in the *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application by Honduras for Permission to Intervene)* that “[b]etween Colombia and Nicaragua, the maritime boundary will be determined pursuant to the coastline and maritime features of the two Parties” only.³³³

5.45 The 2006 *Barbados/Trinidad and Tobago* Award completely contradicts Bangladesh’s main argument according to which the equidistance line is inequitable because

³²⁸ Senegal (twice), The Gambia, Guinea-Bissau, Guinea and Sierra Leone.

³²⁹ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, pp. 297-298, paras. 110-111 (see also *UNRIAA*, Vol. XIX, pp. 189-190).

³³⁰ *Ibid.* (emphasis added).

³³¹ *Ibid.*, para. 109. Compounding in many other errors, the Tribunal even contradicted itself in its reasoning: on the one hand, the Tribunal considered that it “could not take into consideration a delimitation [the delimitation between Guinea and Sierra Leone, which produced a cut-off effect detrimental to Guinea] which did not result from negotiations or an equivalent act in accordance with international law” (the said delimitation was unilaterally fixed by *Guinea* and the Tribunal noted that “Sierra Leone has apparently not recognized this delimitation” and “[t]here is nothing to say whether, in the event of a formal agreement finally being achieved, the line adopted would follow the same direction or a direction more or less favorable [*sic*] to Guinea”) (para. 94); on the other hand, it rejected equidistance because the equidistance line would “arrive too soon at the parallel of latitude drawn from the land boundary between Guinea and Sierra Leone which Guinea has unilaterally taken as its maritime boundary” (para. 104).

³³² *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Judgment*, *I.C.J. Reports* 2002, p. 445, para. 297.

³³³ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Application by Honduras for Permission to Intervene*, para. 73.

it “impermissibly cuts Bangladesh off from the overwhelming majority of its potential entitlement in the continental shelf beyond 200 M.”³³⁴

5.46 Bangladesh appropriately annexed the Award to its Memorial since Trinidad and Tobago’s claim was virtually the same as that of Bangladesh in the present case. It is expressed as follows in the Award:

“Adoption of the equidistance line in the Atlantic sector, as claimed by Barbados, would, Trinidad and Tobago maintains, prevent Trinidad and Tobago from reaching the limit of its EEZ entitlement, and allow Barbados to claim 100% of the outer continental shelf in the area of overlapping entitlements, a result which Trinidad and Tobago argues is inequitable and in violation of the principle of non-encroachment.

Trinidad and Tobago argues further that where there are competing claims, the Tribunal should draw the delimitation ‘as far as possible so as to avoid ‘cutting off’ any State due to the convergence of the maritime zones of other States’.”³³⁵

5.47 Barbados opposed this claim saying that it was wrongly based on the assumption that Trinidad and Tobago possessed an “inherent right” or an “absolute entitlement” to the maritime areas it claimed. Yet maritime delimitation “is the ultimate refutation of a claim of absolute entitlement”. Its effect could only be to leave to each party its putative entitlements “as much as possible” as international courts and tribunals have recalled, including in the *North Sea Continental Shelf* and *Guinea/Guinea-Bissau* cases so heavily relied upon by Bangladesh.³³⁶

5.48 Facing Trinidad and Tobago’s claim to the adjustment (and not the abandonment) of the equidistance line on the ground of an entitlement to a continental shelf beyond 200 nautical miles, the Tribunal decided *not* to adjust the equidistance line on that ground because “the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond

³³⁴ BR, para. 5.4.

³³⁵ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, pp. 192-193, paras. 152-153.

³³⁶ See Reply of Barbados, 9 June 2005, (available on <http://www.pca-cpa.org/>), paras. 233-235, and largely paras. 233-241 and 273-274.

200 nm”³³⁷ (see Figure RJ 5.1 at page 123). In the circumstances of the case, it meant that Trinidad and Tobago had no access to the continental beyond 200 nautical miles *as a result* of the delimitation process which, according to the Tribunal and Bangladesh, lead to an “equitable result”. Its decision is without any ambiguity:

“The Tribunal has concluded above that it has jurisdiction to decide upon the delimitation of a maritime boundary in relation to that part of the continental shelf extending beyond 200 nm. As will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm.”³³⁸

...

The delimitation line is . . . drawn . . . in a straight line in the direction of its *terminal* point, which is located at the point of intersection of Trinidad and Tobago’s southern maritime boundary [with Venezuela] with its 200 nm EEZ limit . . . This terminal point marks *the end of the single maritime boundary* between Barbados and Trinidad and Tobago *and of the overlapping maritime areas between the Parties*.”³³⁹

5.49 Similarities between the *Barbados/Trinidad and Tobago* Arbitration and the present case do not end here. As India explained above,³⁴⁰ like Bangladesh and Myanmar, Trinidad and Tobago and Venezuela had already settled their maritime dispute when the Arbitral Tribunal decided the case. Trinidad and Tobago sought to artificially unify its disputes with Barbados and Venezuela in order to obtain from the Arbitral Tribunal compensation for the agreement it has made with Venezuela. The Tribunal summarized Trinidad and Tobago’s attempt as follows:

“Just as the tribunal in *Guinea/Guinea-Bissau* held that an equitable delimitation cannot ignore other delimitations already made or still to be made in the region . . ., so too, Trinidad and Tobago asserts, the delimitation between Trinidad and Tobago and Venezuela in the region south of Barbados and that between France (Guadeloupe and

³³⁷ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 242, para. 368.

³³⁸ *Ibid.*

³³⁹ *Ibid.*, para. 374 (emphasis added).

³⁴⁰ See para. 5.17.

Martinique) and Dominica in the region north of Barbados need to be considered in this dispute as they entail a recognition of a departure from the equidistance line in order to avoid a cut-off effect.”³⁴¹

5.50 In *Barbados/Trinidad and Tobago*, the Arbitral Tribunal made very clear that:

“The Tribunal is not concerned with the political considerations that might have led the Parties to conclude the 1990 Trinidad-Venezuela Agreement, and *certainly Barbados cannot be required to ‘compensate’ Trinidad and Tobago* for the agreements it has made by shifting Barbados’ maritime boundary in favour of Trinidad and Tobago. By its very terms, the treaty does not affect the rights of third parties. Article II(2) of the treaty states in fact that ‘no provision of the present Treaty shall in any way prejudice or limit . . . the rights of third parties’. The treaty is quite evidently *res inter alios acta* in respect of Barbados and every other country.”³⁴²

5.51 Similarly, in the present case, Bangladesh seeks to create an artificial link with the *Bangladesh/Myanmar* case in order to convince the present Tribunal that India should help Myanmar to compensate Bangladesh for its location.³⁴³ Bangladesh asserts that the delimitations between Myanmar and Bangladesh and between India and Bangladesh form a “single situation”.³⁴⁴ In support of its claim, Bangladesh refers to the *North Sea* cases and quotes the ICJ Judgment selectively. An actual reading of the 1969 Judgment demonstrates that it does not help Bangladesh’s case.

5.52 The ICJ treated the two cases as a single situation for two reasons:

- First, because of the “manner in which the Parties themselves have brought the matter before [the Court]”.³⁴⁵ The three States agreed in the Protocol (Special Agreement) to submit the two cases to the ICJ³⁴⁶ and “(a) that the Government of the Kingdom of the Netherlands would notify the two Special Agreements to the Court . . . together with the text of the Protocol itself; (b) that after such notification, the Parties would ask the

³⁴¹ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 237, para. 340.

³⁴² *Ibid.*, p. 238, para. 346 (emphasis added).

³⁴³ See BR, paras. 4.84, 4.88, 4.148, Figure R4.27, paras. 5.5-5.6 and 5.74.

³⁴⁴ BR, para. 4.86.

³⁴⁵ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 19, para. 11.

³⁴⁶ *Ibid.*, p. 18, para. 9.

Court to join the two cases; and (c) that for the purpose of the appointment of a judge *ad hoc*, the Kingdoms of Denmark and the Netherlands should be considered as being in the same interest within the meaning of Article 31, paragraph 5, of the Court's Statute."³⁴⁷

- Second, because "the legal arguments presented on behalf of Denmark and the Netherlands, both before and since the joinder, have been substantially identical, apart from certain matters of detail, and have been presented either in common or in close co-operation."³⁴⁸

The situation is quite different in the present case where two separate disputes have been brought before two different Tribunals and when the legal arguments in the two cases are quite different. Therefore, the two cases cannot be treated as a single situation.³⁴⁹

5.53 The Tribunal's reasoning in *Barbados/Trinidad and Tobago* is applicable *mutatis mutandis* in the present case. India "cannot be required to "compensate" [Bangladesh] for the [2012 Judgment] by shifting [India's] maritime boundary in favour of [Bangladesh]. By its very terms, the [Judgment] does not affect the rights of third parties. . . . The [Judgment] is quite evidently *res inter alios acta* in respect of [India] and every other country."³⁵⁰

5.54 The conclusion is straightforward: it is firmly rooted in the case law that absent special or relevant circumstances, within the meaning of this term, there is no reason whatsoever to depart from the equidistance line which the Court must draw provisionally as the first stage of the now universally accepted three-step maritime delimitation methodology. It must be noted in particular that

³⁴⁷ *Ibid.*, pp. 18-19, para. 10.

³⁴⁸ *Ibid.*, p. 19, para. 11.

³⁴⁹ Furthermore, in a very obscure paragraph, Bangladesh invokes the spirit of the 2012 ITLOS Judgment and several "procedural" facts, including the fact that three Members of the present Tribunal also sat as judges in the *Bangladesh/Myanmar* case to conclude that "it is unlikely that ITLOS rendered its Judgment intending that the full measure of relief to be accorded Bangladesh would be extracted from Myanmar alone" (see BR, para. 4.84). This calls for two remarks. First, unless Bangladesh is able to read in ITLOS Judges' minds, these assertions are purely speculative. Second, it would imply that these three Members (one of whom has since withdrawn from the Tribunal) have not acted in full independence and impartiality in this case – an untenable and unjustified allegation, even if made indirectly.

³⁵⁰ *Ibid.* See also *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 352.

- (i) the alleged instability of the coast is irrelevant as a special circumstance in so far as base points adequate to draw the equidistance line can be identified – and they can in the present case; and
- (ii) the concavity of the coast of one of the Parties does not induce an unbalanced cut-off effect: the Indian coast *is* concave as well and the situation typically is one in which a disadvantage resulting from concavity is “shared in a mutually balanced way”.³⁵¹

Therefore, no special circumstance calls for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution.

³⁵¹ See para. 5.25 above.

CHAPTER 6

DELIMITATION OF THE TERRITORIAL SEA

6.1 In this Chapter India will address the delimitation of the territorial sea. There is nothing in Bangladesh's Reply that requires a change in India's position. The Chapter therefore begins by briefly recalling India's proposed delimitation of the territorial sea, as set out in Chapter 5 of its Counter-Memorial (**Section I**). The Chapter then reaffirms India's objection both to the principle of using the angle-bisector method in the present case, and to the extraordinary manner in which Bangladesh has sought to apply it (**Section II**). The Chapter concludes by restating India's proposed delimitation line in the territorial sea (**Section III**).

I. India's Proposal for the Delimitation of the Territorial Sea

6.2 The Parties agree that the law applicable to the delimitation of the territorial sea is to be found in Article 15 of UNCLOS:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith”.

6.3 Neither Party has suggested that there is an agreement between the Parties or an “historic title” within the meaning of Article 15. Bangladesh does, however, claim that there are special circumstances, which necessitate that the Tribunal refrain from delimiting the territorial sea by an equidistance line. It contends that, because of the existence of these circumstances, the Tribunal should delimit the boundary between the Parties by constructing

a 180° angle-bisector stretching from the land boundary terminus.³⁵² Bangladesh claims that coastal instability and the concavity of its coast are such special circumstances.³⁵³

6.4 Bangladesh also accuses India of misrepresenting its position on the law applicable to the delimitation of the territorial sea in this case and in comparison to its position in *Bangladesh/Myanmar*. Bangladesh disputes India's observation that, while Bangladesh argues before this Tribunal that "equidistance does not have an automatic *a priori* character",³⁵⁴ it took the opposite position in *Bangladesh/Myanmar*.³⁵⁵ But the record speaks for itself.

6.5 As for the ITLOS Judgment, India addressed this comprehensively in its Counter-Memorial.³⁵⁶ It stands by its position that the modern case law has shifted from an expansive understanding of special circumstances to a more systematic application of the equidistance method and the selection of base points to determine the delimitation in the territorial sea.³⁵⁷ India will not repeat points made in its Counter-Memorial. Rather, India observes that Bangladesh concedes in its Reply that "the median line method is accorded primacy under UNCLOS."³⁵⁸ And notably, that Counsel for Bangladesh argued that Article 15 "connotes a presumption of equidistance" before the ITLOS in *Bangladesh/Myanmar*.³⁵⁹

6.6 As for special circumstances, India has addressed these claims in Chapters 4 and 5 above. It has shown that Bangladesh's assertions are without merit and that therefore, it is not *necessary* – to use the language of Article 15 – to diverge from the equidistance method to delimit the maritime boundary in the territorial sea.

³⁵² BR, paras. 4.108-4.161.

³⁵³ BR, paras. 3.55-3.68.

³⁵⁴ MB, para. 5.35.

³⁵⁵ BR, paras. 3.52-3.54.

³⁵⁶ CMI, paras. 5.6-5.8.

³⁵⁷ CMI, para. 5.6.

³⁵⁸ BR, para. 3.47

³⁵⁹ ITLOS/PV.11/5/Rev.1, 12 September 2011, p. 21 (Crawford).

6.7 As Bangladesh has not met the onus of establishing that there are special circumstances in this case, the Tribunal must turn to the application of the “general rule”,³⁶⁰ i.e., of an equidistance line. To do so, it must identify appropriate base points to serve the construction of the line. As India has shown in its Counter-Memorial and in Chapter 4 above, such base points are readily available along the coasts of the Parties.³⁶¹ India’s selection of viable and appropriate base points on the coasts of the Parties is fully detailed in its Counter-Memorial.³⁶² These base points are then used to construct the equidistance line which India laid down in detail in paragraph 5.58 of its Counter-Memorial and depicted in Sketch-map No. 5.4. India emphasises that it continues to stand by its description and depiction of the equidistance line in the Counter-Memorial. India’s proposed delimitation line in the territorial sea is restated in Section II below.

II. Bangladesh’s Angle-Bisector Proposal

6.8 The overall impression given by the Reply is that Bangladesh no longer seriously relies on its angle-bisector proposal, to which it gave such weight in the Memorial.³⁶³ Nevertheless, at least formally, Bangladesh continues to claim that the Tribunal should adopt the angle-bisector method as equidistance “does not lead to an equitable solution in this case.”³⁶⁴ And it continues to argue that a bisector of 180° is required to produce an equitable result, though in its Reply it suggests that such a line can be used to modify a provisional equidistance line if applied.³⁶⁵ According to Bangladesh, a 180° angle-bisector would reflect the general coastlines of the Parties and the relationship between them.³⁶⁶

³⁶⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 744, para. 280.

³⁶¹ CMI, paras. 5.46-5.57.

³⁶² CMI, para. 5.55 and Sketch-map No. 5.3.

³⁶³ MB, paras. 5.48-5.50 and 6.84-6.131.

³⁶⁴ BR, para. 4.109.

³⁶⁵ BR, para. 4.113.

³⁶⁶ BR, para. 4.111.

6.9 Bangladesh's application of the angle-bisector method is misconceived³⁶⁷ and its arguments are without merit. First, for the reasons given in the Counter-Memorial³⁶⁸ and in Chapter 4 above,³⁶⁹ this is not a case where it is necessary to abandon the equidistance/special circumstances method in favour of some other, exceptional method, such as the angle-bisector. There is no reason to resort to the angle-bisector method as there are no circumstances that make it impossible to apply the equidistance/special circumstances method in the present case.

6.10 India considers it necessary to recall and reaffirm that Bangladesh's self-serving application of the angle-bisector method, which it has contrived in order to achieve its desired 180° degree line, is wholly artificial.³⁷⁰ If this method were to be applied (*quod non*), in India's submission an appropriate line would be 168.8 degrees.³⁷¹

6.11 Bangladesh argues that offering the Tribunal two approaches to applying the bisector method – both of which led it to construct a 180° angle-bisector – shows that no matter how you look at it, the proper bisector remains the same.³⁷² It does no such thing. Instead, it demonstrates that Bangladesh has found an angle-bisector that suits its interests, and has made the conscious choice not to concern itself with matters such as geography or law.

6.12 Bangladesh refers to the *Gulf of Maine* case to support its invention of coastal façades, none of which pass through the land boundary terminus.³⁷³ The case, however, provides no such support as the Parties had agreed to a starting point at sea for the delimitation.³⁷⁴ Moreover, as opposed to the situation in *Gulf of Maine*, Bangladesh's coastal façades do not even necessarily begin at the same starting point. Figure RJ 6.1 at page 153 reproduces the two coastal façades which Bangladesh placed separately in Figures R4.20 and R4.21 of its

³⁶⁷ CMI, paras. 5.41-5.45, 6.18-6.30.

³⁶⁸ CMI, paras. 5.9-5.26.

³⁶⁹ See paras. 4.12-4.24 above.

³⁷⁰ CMI, paras. 5.41-5.45 and 6.28-6.30.

³⁷¹ CMI, para. 5.44.

³⁷² BR, para. 4.122.

³⁷³ BR, para. 4.125.

³⁷⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 265, para. 20.

Reply. As can be seen, the coastal façades do not commence at a single starting point, neither from the land boundary terminus nor from an agreed starting point as in the *Gulf of Maine* case.

6.13 In an attempt to rebut India’s position, Bangladesh has mischaracterized the general configuration of the coastlines of the Parties. Bangladesh recalls that in *Nicaragua v. Honduras* the ICJ said that assessing the general direction of the coasts “calls for the exercise of judgment.”³⁷⁵ But this statement of the Court is not a *carte blanche* for a State to apply its own subjective notions of “judgment” in defiance of geography.

6.14 Bangladesh claims that it has attempted to evaluate the general configuration of each Party’s coast in isolation from each other. In doing so it states that it is impossible to construct coastal façades that leave “only water on one side and only land on the other.”³⁷⁶ India does not expect Bangladesh to achieve the impossible; rather it would note that if a coastal façade is to be constructed along India’s coastline, it should not be considerably inward of India’s coast, virtually entirely on dry land. At the same time Bangladesh’s coastal façade should not lie seawards from its actual coastline, virtually entirely on water. A glance at Figure R4.23 in Bangladesh’s Reply, entitled “Balanced Coastlines in the Northern Bay of Bengal” and reflecting Bangladesh’s representation of the general configuration of the coasts, is quite telling in this regard. Figure R4.23 can be found at page 155 (Figure RJ 6.2 A). India has reproduced Figure R4.23 with its wide red arrows hollowed out (Figure RJ 6.2 B at page 157), from which it can clearly be seen that the arrow purportedly representing the general configuration of India’s coastline lies on India’s mainland. On the other hand, the arrow purportedly representing Bangladesh’s coastline is virtually all at sea, and does not reflect the general direction of Bangladesh’s coastline.

6.15 One thing the Parties do agree on is that the Tribunal should indeed look carefully at Figures R4.20 and R.421 of the Reply, as Bangladesh suggests.³⁷⁷ These figures make clear

³⁷⁵ BR, para. 4.126.

³⁷⁶ BR, para. 4.128.

³⁷⁷ BR, paras. 4.127-4.128.

that Bangladesh conjured up coastal façades that bear no resemblance to the geographical circumstances of the coasts of the Parties.

6.16 Bangladesh relies heavily on *Guinea/Guinea Bissau* and the application of the angle-bisector method in that case.³⁷⁸ In fact, this curious case does not offer any useful guidance for the application of the angle-bisector method; it has not been followed in the case law or in doctrine, nor has its delimitation method. In that case, the Arbitral Tribunal showed an unprecedented – and never followed since – consideration for the “integration [of the delimitation between the Parties] into the existing delimitations of the West African region, as well as into future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions.”³⁷⁹ In accordance with this extraordinary approach, the Tribunal drew an 800 kilometres long line that did not reflect – and was not intended to reflect – the general direction of the coasts of the two disputing Parties as is contemplated in the application of the angle-bisector methodology.³⁸⁰

6.17 Bangladesh adds that the angle-bisector abates but does not eliminate the effect of its concavity. In addition it claims, by attaching a series of figures, that an equidistance line would cut off its coastal projection.³⁸¹ It also tries to demonstrate by producing a sketch-map of “South Asia”, how minimal is the effect that a 180° angle-bisector would have on India, while having grave consequences on Bangladesh.³⁸² Furthermore, Bangladesh goes as far as to assert that if the Tribunal accepts its 180° angle-bisector, the loss of maritime space for India would be “*de minimis*”.³⁸³

³⁷⁸ BR, para. 4.130-4.132.

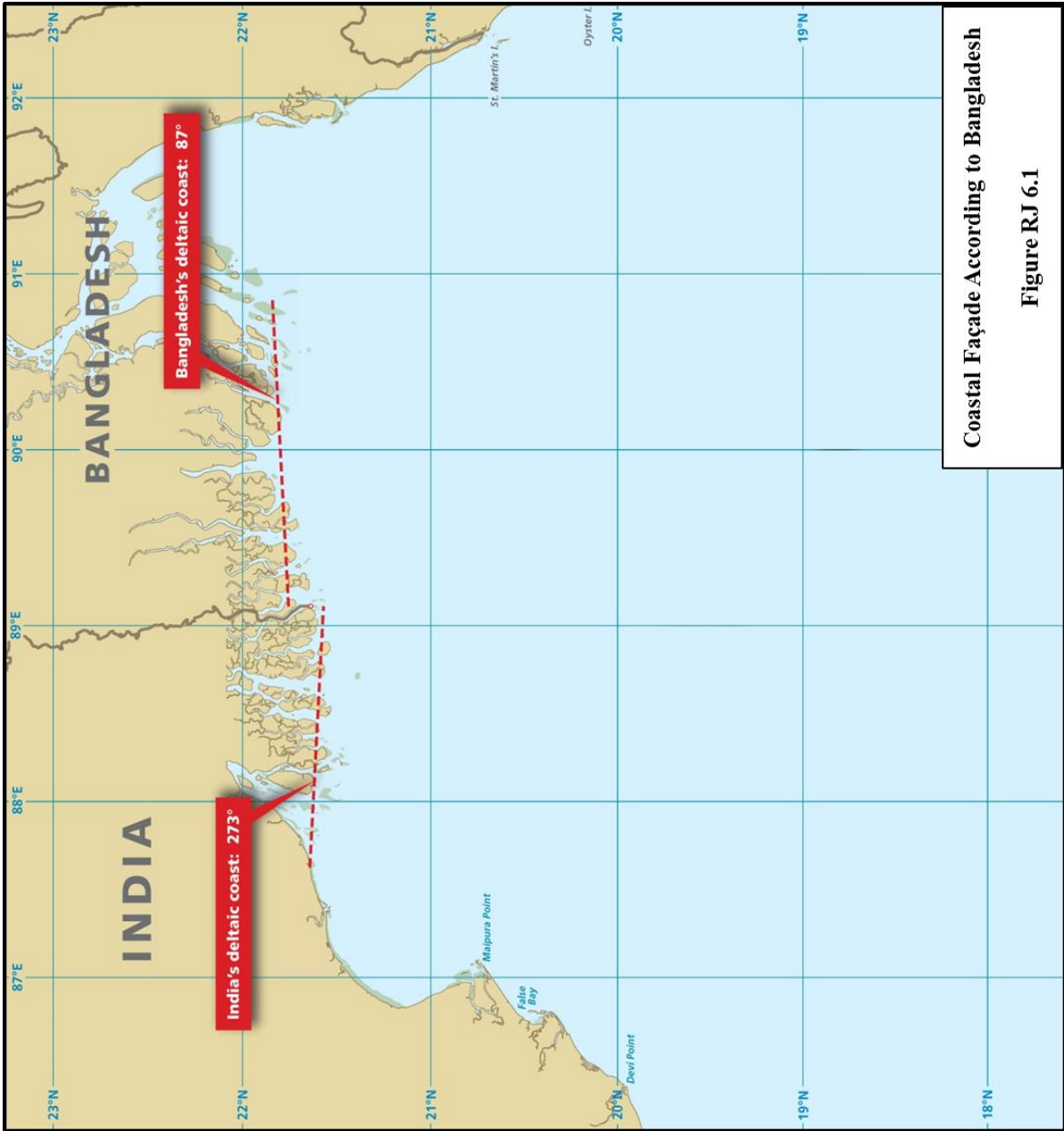
³⁷⁹ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, p. 297, para. 108.

³⁸⁰ See also dissenting opinion of arbitrator Mr. Bedjaoui in *ibid.*, p. 194, para. 104 and note 109. The President of the ICJ described the Award in 1985 as a “*sui generis* case”, explicitly distancing himself, less than four years after its adoption, from the methodology applied in that case.

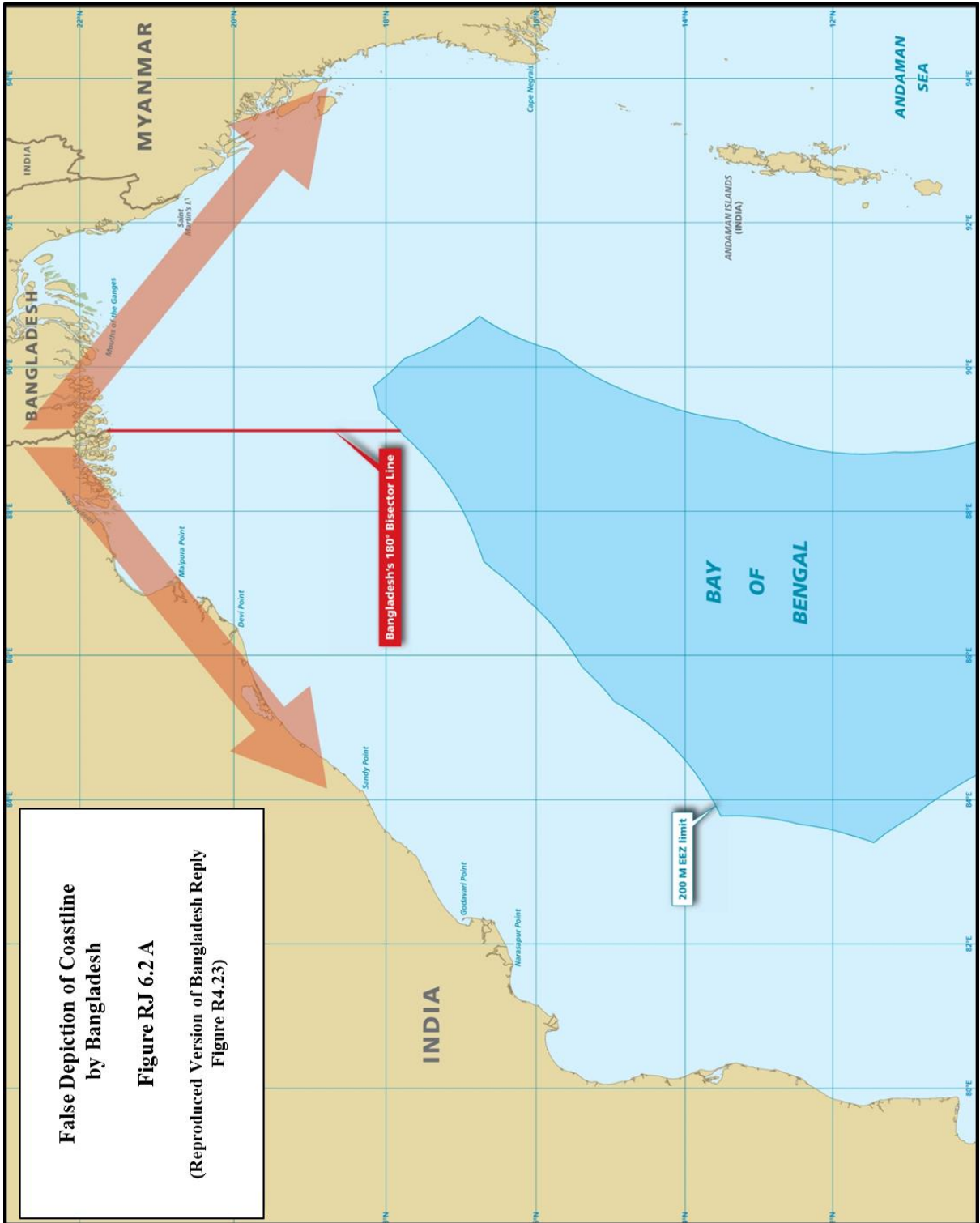
³⁸¹ Figure R4.25B.

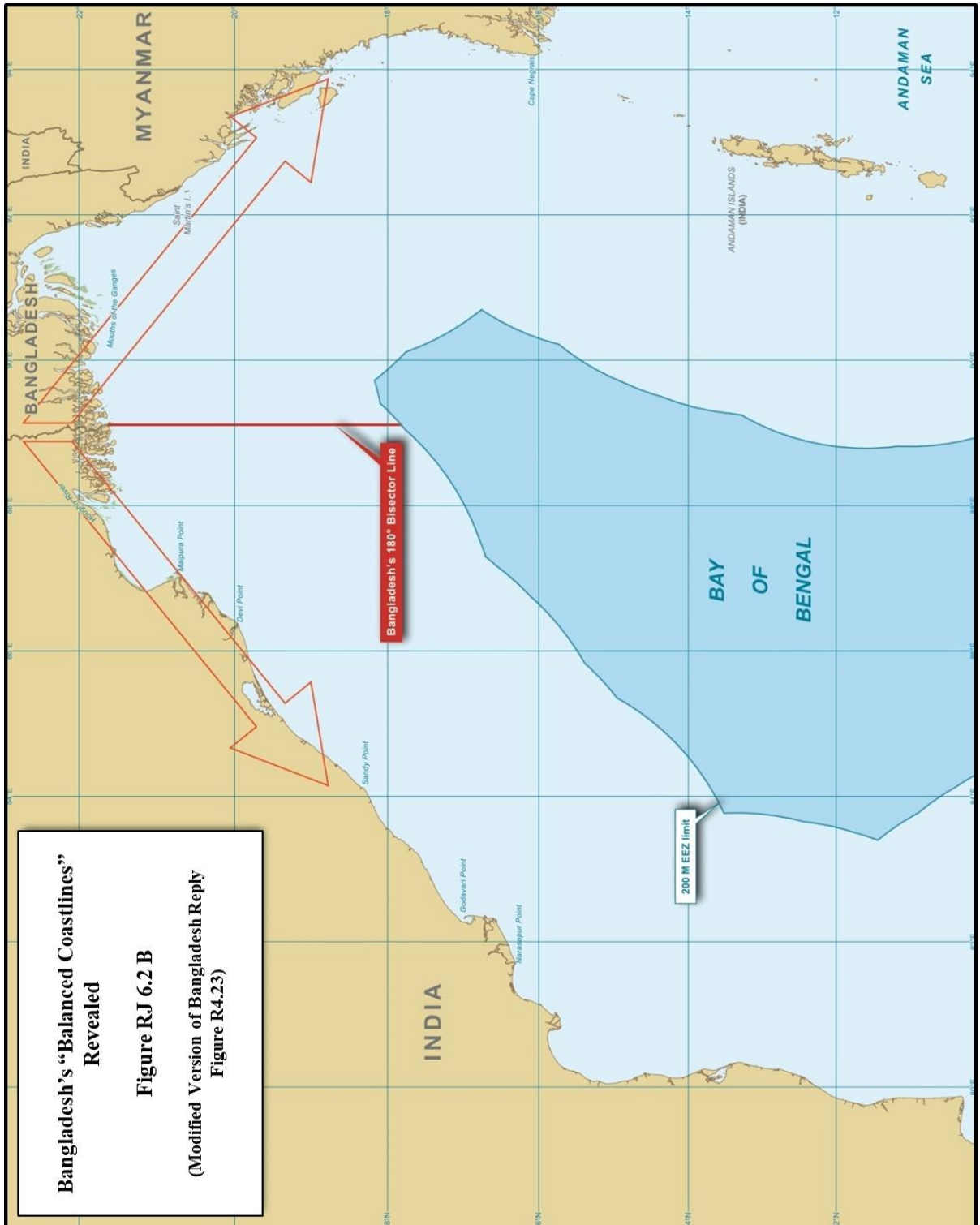
³⁸² Figures R4.26A and R4.26B and BR, paras. 4.138-4.144.

³⁸³ BR, para. 4.146.



Coastal Facade According to Bangladesh
Figure RJ 6.1





Bangladesh's "Balanced Coastlines" Revealed
Figure RJ 6.2 B
 (Modified Version of Bangladesh Reply Figure R4.2.3)

6.18 India rejects this attempt to base its case on maritime areas that have no bearing on the present case and are not subject to overlapping claims. That India has entitlements to a large maritime space is a result of geographical circumstances, including a coastline that runs from its border with Pakistan to the land boundary terminus with Bangladesh. That these irrelevant assertions by Bangladesh should serve as a justification for it to claim more maritime areas than the law of the sea grants it is absurd. Moreover, it implies that these maritime areas are of no interest to India, an assertion that could not be further from the truth. The basis for this arbitration is that both Parties have claims regarding their overlapping maritime areas and view the settlement of these claims as important. As explained in Chapter 4 above, the task of the Tribunal is to delimit the overlapping projections of the Parties' coasts, and consideration of maritime areas outside of these is beyond the scope of this arbitration, both from a substantial aspect and from a jurisdictional one.

6.19 Furthermore, a closer look at the figures put forward by Bangladesh to demonstrate how its coast is "blocked" by India's coastline – or how its proposed angle-bisector relieves this effect – shows how misleading they are.³⁸⁴ For example, Bangladesh produced Figures R4.25A and R4.25B to show how its angle-bisector ensures that the "cut off" is shared in an equitable fashion.³⁸⁵ But Bangladesh's separation between the projections of the Parties' deltaic coasts and the Parties' opposing coasts into two slides is deceptive. While the greater part of Bangladesh's coastline (all of which is relevant) faces south, the majority of India's relevant coasts project in a southeast direction. A comparison of the southward projections of the two coasts divided by a 180° angle-bisector (Figure R4.25A) and, separately, the projections of the opposing coasts (Figure R4.25B) does not reflect the true "blocking" effect – to use the parlance of Bangladesh – on the projections of the relevant coasts of the Parties.

6.20 Figure RJ 6.3 at page 161 demonstrates the severe blocking effect of Bangladesh's 180° angle-bisector. The blue arrow facing due east from India's coast shows that India's coast is in fact blocked by Bangladesh's 180° angle-bisector. Meanwhile, the blue arrow pointing west shows that the 180° angle-bisector allows Bangladesh's coast facing west to

³⁸⁴ BR, paras. 4.135-4.140.

³⁸⁵ BR, para. 4.137.

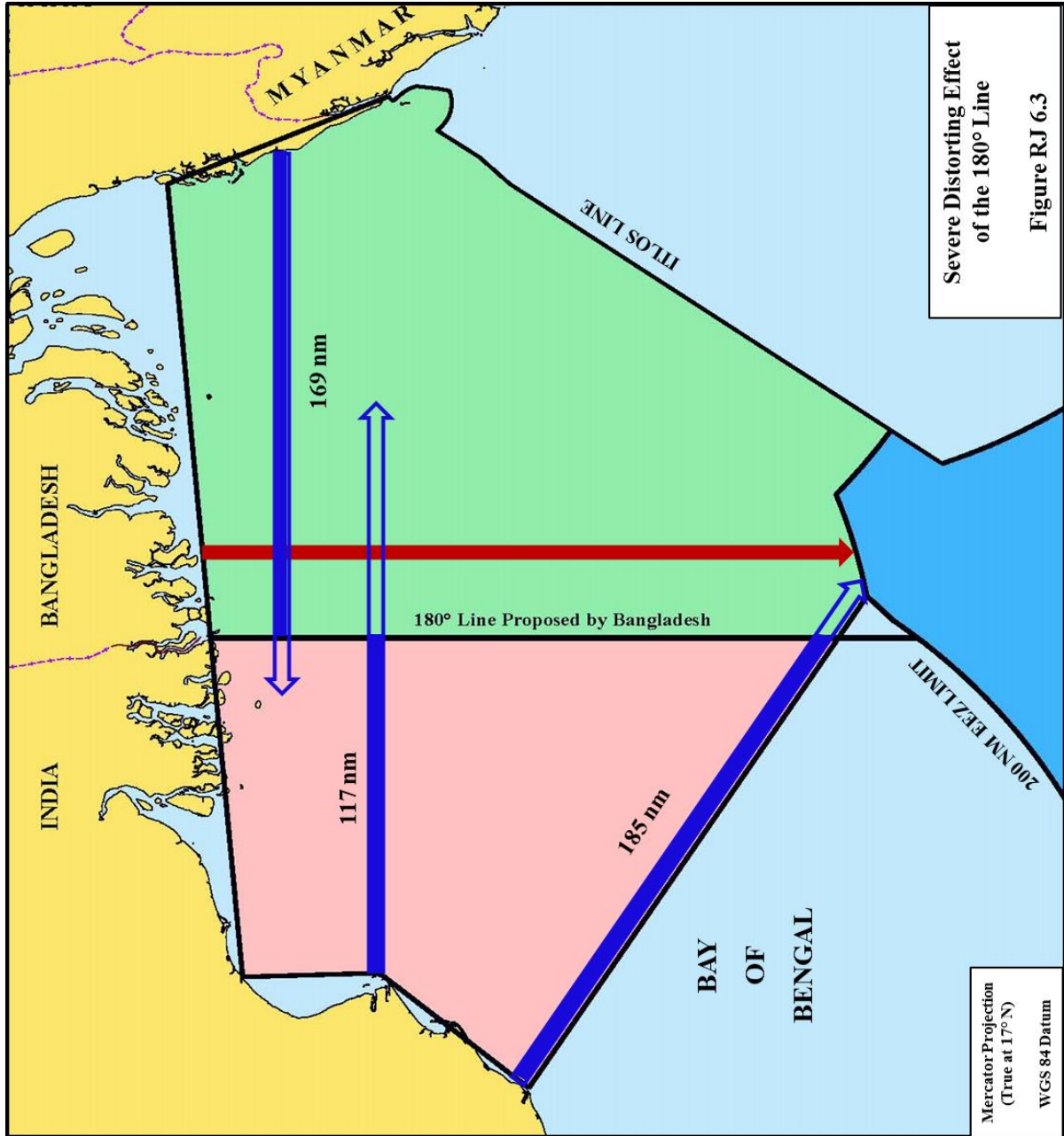
extend nearly to 200 nautical miles. And at least as significantly, the 180° angle-bisector would allow the majority of Bangladesh's coast to project all the way up to 200 nautical miles, as the red arrow placed on Figure R J6.3 demonstrates. At the same time, India's southeast-facing coast would not enjoy a projection up to 200 nautical miles if the 180° Bangladesh angle-bisector were to be used. This disparity shows that Bangladesh's angle-bisector is neither justified legally nor does it reflect an equitable delimitation line between the Parties.

6.21 Bangladesh is eager to point out that India has not explicitly stated in its Counter-Memorial that it finds the 180° angle-bisector inequitable.³⁸⁶ India is firmly of the view that a delimitation line based on an angle-bisector, let alone Bangladesh's 180° angle-bisector, is not geographically justified and is inconsistent with the methodology prescribed by international law. It would not be an equitable delimitation line between the Parties. It is devoid of legal basis.

III. The Delimitation in the Territorial Sea

6.22 In summary, India submits that in accordance with Article 15 of UNCLOS, and absent any special circumstances, the territorial sea of the Parties is to be delimited by an equidistance line. India rejects Bangladesh's position that the Tribunal should depart from the general rule, i.e., the equidistance method, in favour of the angle-bisector method. In addition, India rejects Bangladesh's blatant misapplication of the angle-bisector method.

³⁸⁶ BR, paras. 4.145-4.146.



6.23 Accordingly, as already described in the Counter-Memorial³⁸⁷ and above in the Appendix to Chapter 4, India put forward two base points on its coast for delimiting the territorial sea:

- I-1 21°37'50.7" N 89°08'49.9" E
- I-2 21°35'30.0" N 89°09'40.6" E

In addition, the following three base points have been selected on Bangladesh's coast for the purpose of delimiting the territorial sea:

- B-1 21°38'56.0" N 89°12'41.8" E
- B-2 21°38'57.4" N 89°14'47.6" E
- B-3 21°37'32.7" N 89°20'25.5" E

6.24 The base points in the territorial sea have been plotted on Chart 351 in Figure RJ 6.4 at page 165.

6.25 Using the aforementioned base points identified, beginning from the land boundary terminus at 21°38'40.4" N, 89°10'13.8" E (Point L), the median line delimiting the territorial seas of India and Bangladesh is then constructed as follows:³⁸⁸

- Starting from the land boundary terminus at Point L (21°38'40.4" N, 89°10'13.8" E), the boundary follows a geodetic azimuth of 149.3° until it reaches Point T1, with the co-ordinates 21°37'15.7" N, 89°11'07.6" E.
- From Point T1, the boundary follows a geodetic azimuth of 129.4° until it reaches Point T2, with the co-ordinates 21°35'12.7" N, 89°13'47.5" E.
- From Point T2, the boundary follows a geodetic azimuth of 144.2° until it reaches Point T3, with the co-ordinates 21°32'25.7" N, 89°15'56.5" E.

³⁸⁷ CMI, paras. 5.55-5.57 and Sketch-map No. 5.53.

³⁸⁸ See also CMI, paras. 5.58-5.59 and Sketch-map No. 5.55.

- From Point T3, the boundary follows a geodetic azimuth of 168.6° , until it reaches the end of the delimitation line in the territorial sea, at a distance of 12 nautical miles from the low water line of both States' coasts.

6.26 The equidistance line in the territorial sea is depicted in Figure RJ 6.5 at page 167.

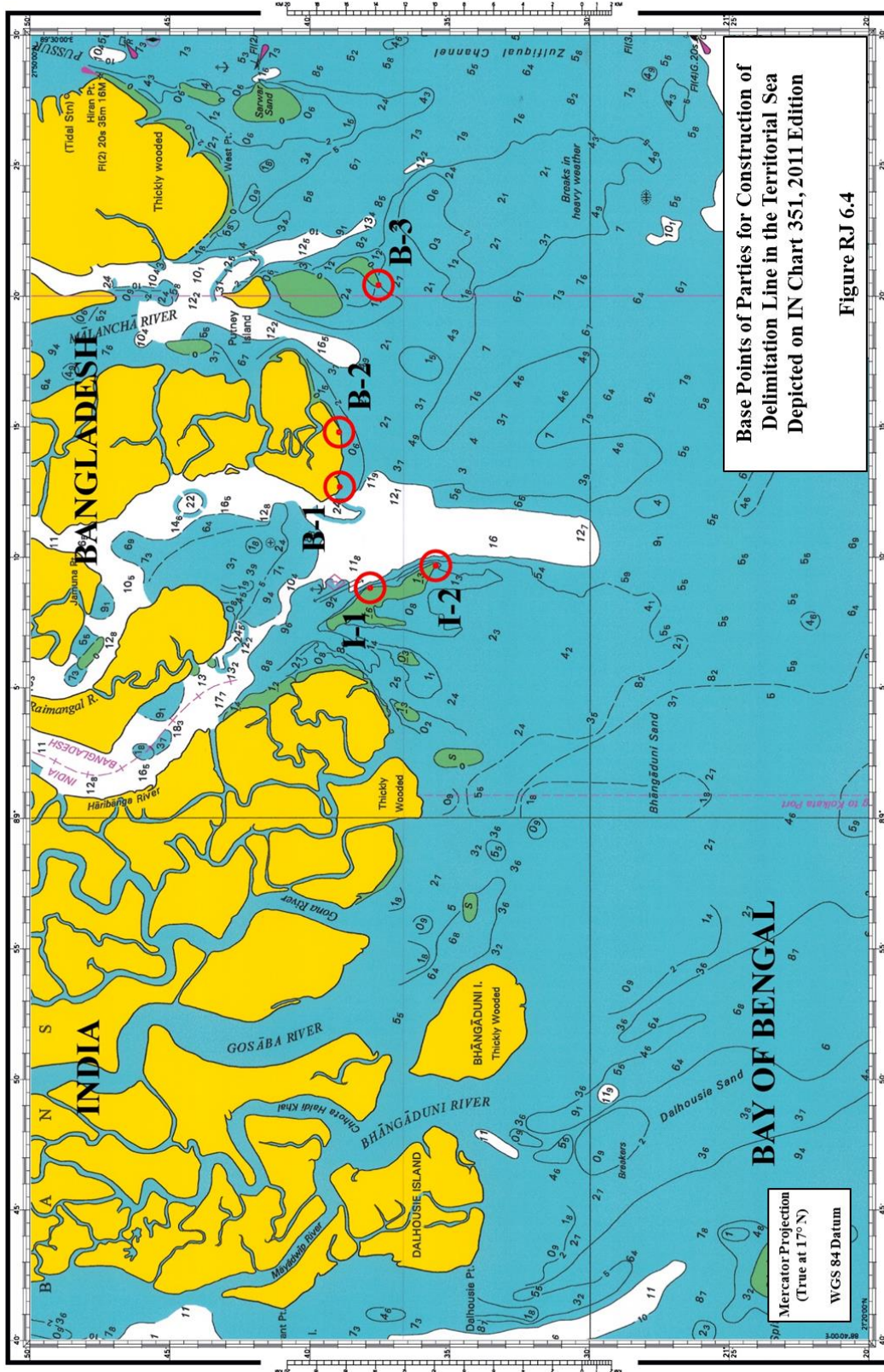
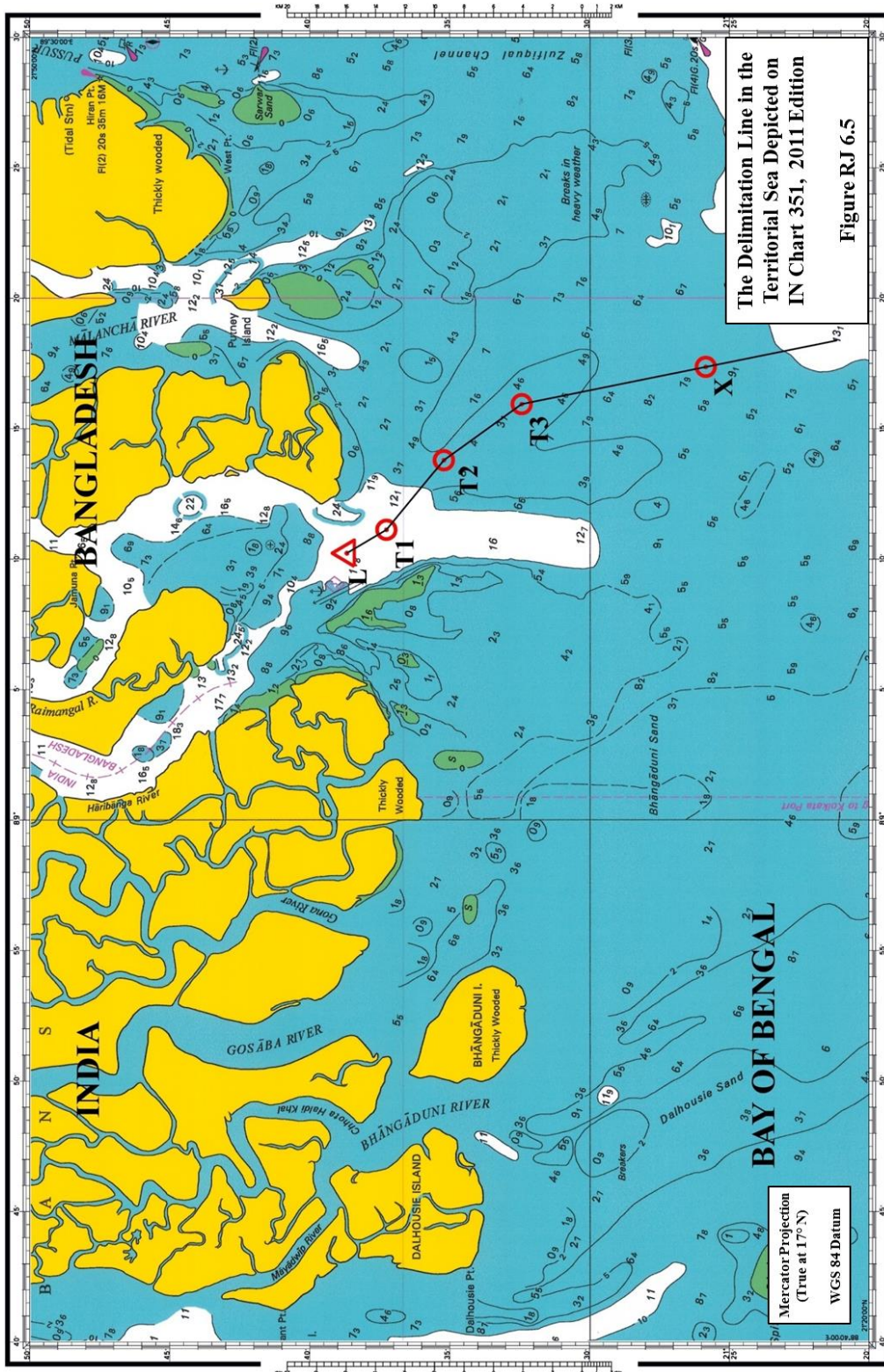


Figure RJ 6.4



CHAPTER 7

DELIMITATION OF THE EXCLUSIVE ECONOMIC ZONE AND THE CONTINENTAL SHELF

7.1 In Chapter 4 of this Rejoinder, India has shown that the method applicable to the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles is the equidistance/relevant circumstances method.³⁸⁹ It has also demonstrated that, in the present case, there are neither compelling reasons that make the drawing of the provisional equidistance line unfeasible³⁹⁰ nor relevant circumstances that should require the Tribunal to adjust this provisional equidistance line.³⁹¹

7.2 In the present Chapter, after explaining why the delimitation line should continue along the equidistance line beyond 200 nautical miles (**Section I**), India will address two issues:

- first, for the sake of completeness, India will provide the Tribunal with the description of the delimitation line in the exclusive economic zone and the continental shelf it proposes and will show that the delimitation line beyond 200 nautical miles proposed by Bangladesh is purely arbitrary and lacks legal basis (**Section II**);
- second, India will discuss the flaws in Bangladesh's definition and application of the non-disproportionality test and will show that the equidistance line easily passes that test (**Section III**).

I. A Single Methodology

7.3 There is not much to say on the applicable methodology to the delimitation of the continental shelf beyond 200 nautical miles. The Parties agree:

³⁸⁹ See paras. 4.1-4.8 above.

³⁹⁰ See paras. 4.10-4.24 above.

³⁹¹ See paras. 5.13-5.54 above.

- that “there is in law only one continental shelf, not two”;³⁹²
- that both Parties have an entitlement beyond 200 nautical miles;³⁹³
- that “the continental shelves of the Parties overlap beyond 200 nautical miles and must be delimited in accordance with Article 83 of the Convention”;³⁹⁴ and, following Bangladesh’s volte-face,
- that the method applicable to the delimitation of the continental shelf is the equidistance/relevant circumstances method.³⁹⁵

7.4 Furthermore, as recalled in the Counter-Memorial,³⁹⁶ the ITLOS expressly stated that, in its view:

“the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm. Accordingly, the equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 nm.”³⁹⁷

7.5 Nevertheless, Bangladesh asserts that the ITLOS Judgment confirms its claim according to which, beyond 200 nautical miles, a second deflection of its proposed line, far more radical than the first one effected within 200 nautical miles, is necessary.

7.6 In point of fact, the ITLOS did not deflect the delimitation line between Bangladesh and Myanmar for a second time beyond 200 nautical miles. To the contrary, it decided that:

“the adjusted equidistance line delimiting both the exclusive economic zone and the continental shelf within 200 nm between the

³⁹² BR, paras. 5.28 and 5.47. See also MB, para. 7.57 and CMI, para. 7.44.

³⁹³ BR, para. 5.13. If Bangladesh’s exorbitant claim to a 390-nautical-mile continental shelf were to be even considered by the Tribunal, the entitlements of India’s Andaman Islands coasts would also have to be taken into account.

³⁹⁴ *Ibid.*

³⁹⁵ See e.g. BR, para. 4.4 and, in this Rejoinder, paras. 4.1-4.8 above.

³⁹⁶ CMI, para. 7.49.

³⁹⁷ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 455.

Parties . . . *continues* in the same direction beyond the 200 nm limit of Bangladesh until it reaches the area where the rights of third States may be affected.”³⁹⁸

7.7 There is no reason not to follow the ITLOS’ sound reasoning, where there are relevant circumstances which lead to adjusting the equidistance line, this adjusted equidistance line should continue beyond 200 nautical miles. *A fortiori*, where, as in the present case,³⁹⁹ no relevant circumstance dictates any adjustment of the provisional equidistance line within 200 nautical miles, the dividing line should continue to follow the equidistance line beyond 200 nautical miles.

II. The Delimitation Line

7.8 As India has shown in Chapter 4 above, in the present case, it is perfectly feasible to draw a provisional equidistance line since the base points identified by India are appropriate.⁴⁰⁰ It is to be noted that Bangladesh too has proposed base points, which it presumably considers appropriate.

A. The Equidistance Line Proposed by India

7.9 *On the coast of India*, the appropriate base points are:

- (i) I-2 – co-ordinates 21°35’30.0” N, 89°09’40.6” E shown on Figure RJ 4.3 at page 99;
and
- (ii) I-3 – co-ordinates 21°22’47.6” N, 88°43’43.7” E shown on Figure RJ 4.4 at page 101.
- (iii) I-4 – co-ordinates 19°57’33.1” N, 86°24’20.0” E shown on Figure RJ 4.5 at page 103.

³⁹⁸ *Ibid.*, para. 462 (emphasis added).

³⁹⁹ See paras. 5.13-5.54 above.

⁴⁰⁰ See paras. 4.12-4.24.

The first point (I-2) is relevant both for the drawing of the territorial sea boundary and for the limit between the exclusive economic zone and continental shelf of the Parties;⁴⁰¹ base point I-3 only influences the drawing of the latter.

7.10 *On the coast of Bangladesh*, the appropriate base points are:

- (i) B-3 – co-ordinates 21°37'32.7" N, 89°20'25.5" E shown on Figure RJ 4.8 at page 109;
- (ii) B-4 – co-ordinates 21°38'00.5" N, 90°33'32.0" E shown on Figure RJ 4.9 at page 111; and
- (iii) B-5 – co-ordinates 20°43'38.6" N, 92°19'30.2" E shown on Figure RJ 4.10 at page 113.

Base point B-3 controls both the lines separating the territorial sea of both Parties and their respective exclusive economic zones and continental shelf;⁴⁰² points B-4 and B-5 are specific to the drawing of the boundary between the exclusive economic zones and the continental shelf.

7.11 Consequently, the provisional equidistance line between the continental shelf and exclusive economic zones of the Parties is constructed as follows:

- from Point X, the delimitation line described at paragraph 6.25 above continues along the geodetic azimuth of 168.6° until it reaches Point T4, with co-ordinates 20°30'17.9" N, 89°29'20.9" E, which is equidistant from base points I-2, I-3 and B-3;
- from Point T4, the line continues in a south direction and follows a geodetic azimuth of 157.0° until it meets Point T5, with co-ordinates 19°26'40.6" N, 89°57'54.9" E, which is equidistant from base points I-3, B-3 and B-4;

⁴⁰¹ See paras. 4.49 and 6.23 above.

⁴⁰² See paras. 4.52 and 6.23 above.

- from Point T5, the line takes a broadly south direction and follows a geodetic azimuth of 171.7° until it reaches Point T6, with co-ordinates 18°46'43.5" N, 90°04'02.5" E, which is equidistant from base points I-3, B-4 and B-5;
- from Point T6, the equidistance line follows a geodetic azimuth of 190.7° until it reaches the limit of 200 nautical miles of Bangladesh at Point Y, with co-ordinates 18°19'06.7" N, 89°58'32.1" E;
- from Point Y, the maritime boundary becomes a pure continental shelf boundary and continues along the same azimuth until it meets Point T7 with co-ordinates 17°22'08.8" N, 89°47'16.1" E, which is equidistant from base points I-3, I-4 and B-5;
- from Point T7 the delimitation line follows a geodetic azimuth of 172.3° until it meets the maritime boundary between Bangladesh and Myanmar.

For the sake of comprehensiveness, the delimitation line between India and Bangladesh in the exclusive economic zone and the continental shelf is reproduced on Figure RJ 7.1 at page 175.

7.12 As India has demonstrated in Chapter 5 above, there are no relevant circumstances in the present case and, therefore, no reason to shift or adjust the provisional equidistance line.⁴⁰³

7.13 As India explained in the Counter-Memorial,⁴⁰⁴ it is of the opinion that the Arbitral Tribunal could fix the end point of the maritime boundary between India and Bangladesh at the point where it meets the Bangladesh-Myanmar maritime boundary as decided by the ITLOS in its 2012 Judgment – that is at Point Z with co-ordinates 17°15'12.8" N, 89°48'14.7" E. Alternatively, the Arbitral Tribunal could also end the delimitation line with an arrow indicating its general direction.

⁴⁰³ See paras. 5.13-5.54 above.

⁴⁰⁴ CMI, paras. 7.52-7.53.

B. The Flaws in Bangladesh's Proposed Delimitation Line

7.14 Even if the Tribunal were to find that the equidistance line should be adjusted (*quod non*), it could not accept the solution proposed by Bangladesh, which is purely arbitrary and lacks legal basis both within and beyond 200 nautical miles.

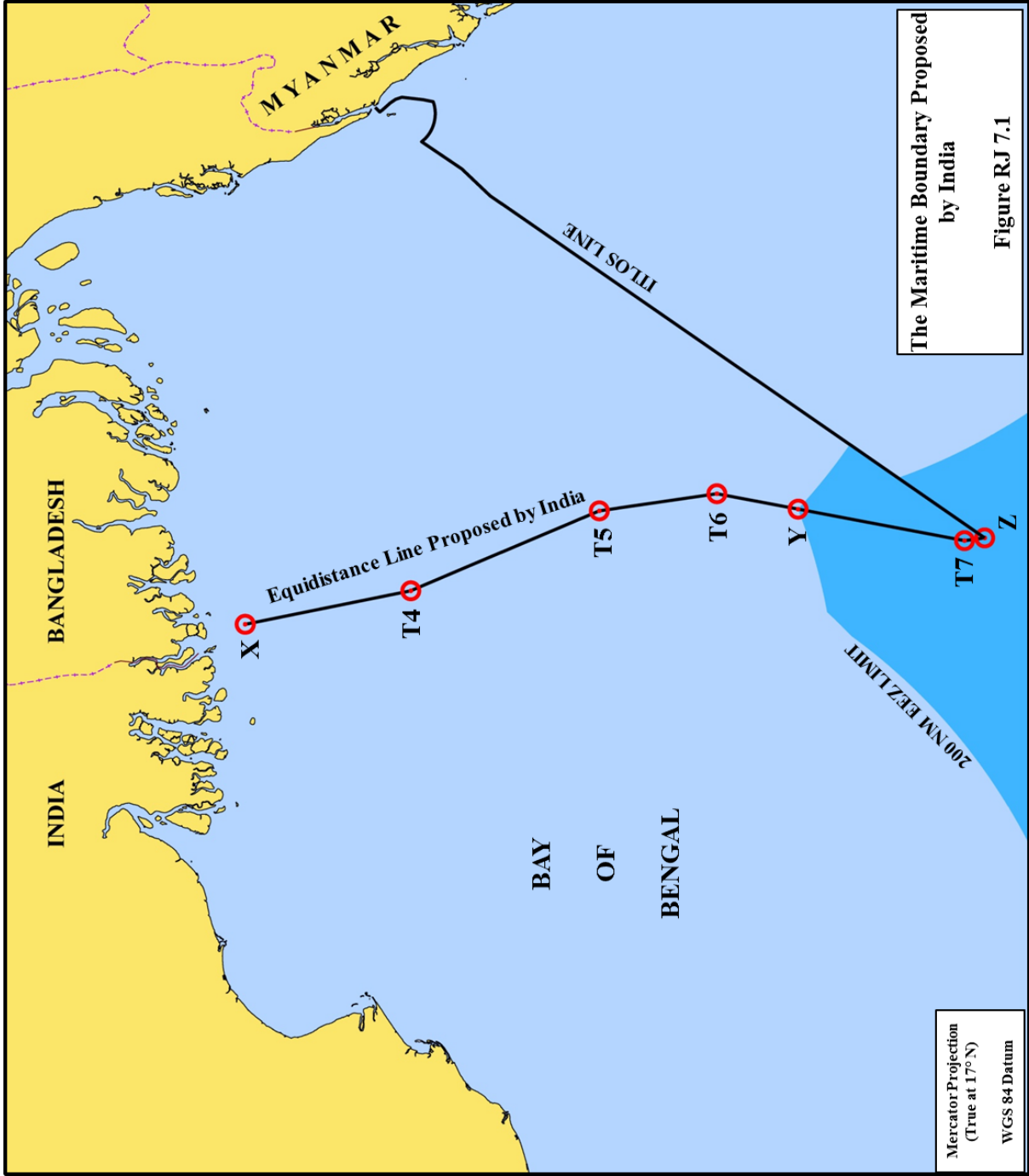
7.15 Within 200 nautical miles, India has already shown in Chapter 6 that Bangladesh's proposed bisector line is based on an erroneous and self-serving depiction of the general direction of the coasts of the Parties. India has provided the Court with the coast's correct depiction.⁴⁰⁵ India has also demonstrated that the 180° line proposed by Bangladesh has a severe distorting effect.⁴⁰⁶

7.16 Beyond 200 nautical miles, Bangladesh proposes a second deflection of the equidistance line. It claims a line running parallel to the maritime boundary between Bangladesh and Myanmar up to the outer limit of the continental shelf claimed by Bangladesh. Bangladesh argues that "[t]here are at least three compelling and inter-related reasons why this constitutes the equitable solution that Article 83 of the 1982 Convention requires."⁴⁰⁷ However, none of these reasons justifies the deflection proposed – a deflection just as arbitrary if not more so as the one Bangladesh is calling for within 200 nautical miles. Before examining these three reasons, India wishes to make clear that the following discussion is irrelevant if the Tribunal decide to draw, as it should, a strict equidistance line. With this correct use of applicable methodology, the delimitation line between India and Bangladesh will meet the maritime boundary between Bangladesh and Myanmar at Point Z. Consequently, Bangladesh would have no right south of Point Z.

⁴⁰⁵ See paras. 6.2-6.7 above.

⁴⁰⁶ See para. 5.24 and Figure RJ 5.4 above.

⁴⁰⁷ BR, para. 5.42.



The Maritime Boundary Proposed by India
Figure RJ 7.1

7.17 First, Bangladesh invokes yet again the allegedly dramatic cut-off effect produced by an equidistance line as its justification for a second deflection of the delimitation line.⁴⁰⁸ According to Bangladesh, this is based on the 2012 ITLOS Judgment.⁴⁰⁹ This is simply incorrect. As explained above, in its Judgment, the ITLOS found the exact opposite.⁴¹⁰ The Tribunal did not apply a second deflection to the delimitation line between Bangladesh and Myanmar but simply decided that the line *continues* in the same direction.⁴¹¹ Furthermore, in Chapter 6 of the Rejoinder, India has demonstrated the non-relevance of the cut-off effect in the present case.⁴¹² For the same reason and *a fortiori*, another adjustment of the equidistance line is not justified beyond 200 nautical miles and the delimitation line should continue along the equidistance line.⁴¹³

7.18 It must also be recalled that Bangladesh has claimed four deflections by reason of its one geographical circumstance.⁴¹⁴ The concavity of Bangladesh's coast cannot be the reason to claim repeated deflections of the equidistance line. In *Bangladesh/Myanmar*, the ITLOS adopted a line avoiding the excessive resulting cut-off for Bangladesh; this precludes Bangladesh from raising the same alleged disadvantage again now that it is no longer cut off.

7.19 Bangladesh further claims that the deflection it proposes

“is consistent with these principles. It would more appreciably – although not at all entirely – abate the effects of the relevant circumstance that permeates this case: its pronounced coastal concavity. Bangladesh would more truly enjoy ‘reasonable

⁴⁰⁸ *Ibid.*

⁴⁰⁹ BR, para. 5.21.

⁴¹⁰ See para. 7.6 above.

⁴¹¹ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 462 (emphasis added).

⁴¹² See paras. 5.16-5.25 above.

⁴¹³ See paras. 7.3-7.7 above.

⁴¹⁴ In the *Bangladesh/Myanmar* case, see e.g. Bangladesh Memorial, pp. 91-92, paras. 6.68-6.73 and Figure 6.11 (deflection within 200 nautical miles) and p. 98, para. 7.9 and Figure 7.2 (beyond 200 nautical miles). In the present case, see e.g. pp. 115-121, paras. 6.101-6.117 and Figures 6.17 and 6.18 (within 200 nautical miles) Bangladesh Reply, pp. 134-150, paras. 5.15-5.54 and Figure R5.7 (beyond 200 nautical miles).

entitlements' in the area beyond 200 M, yet without creating any meaningful countervailing cut-off effect on India."⁴¹⁵

Once again, this is incorrect. Bangladesh's claimed line beyond 200 nautical miles produces a cut-off on India, as it blocks the seaward projection of both the south-facing and south-east-facing coasts of India (see Figure RJ 7.2 at page 179).

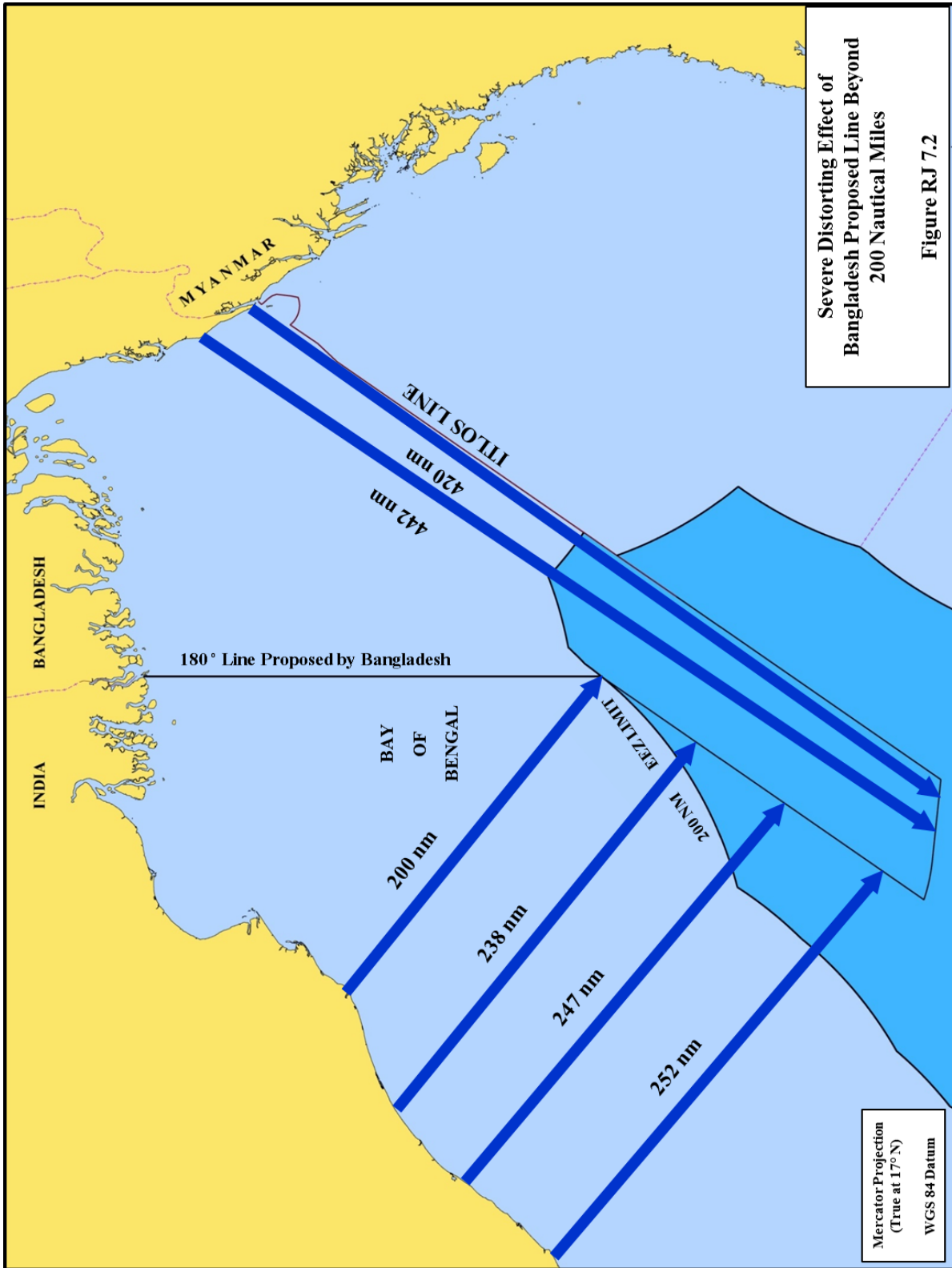
7.20 Bangladesh's second reason based on the "general directional axis of the Bay and the result in Bangladesh/Myanmar"⁴¹⁶ is, if anything, even more peculiar. Bangladesh asserts:

"Bending the delimitation line in this case to run along a 214° azimuth that is parallel to the Bangladesh/Myanmar boundary beyond 200 M would align the Bangladesh/India boundary both with the general directional axis of the Bay and the result in *Bangladesh/Myanmar*. Moreover, there is substantially more flexibility to deflect the line on the Indian side than there was on the Myanmar side. There is, as stated, no danger of cutting India off to any significant degree. Bending the line as Bangladesh proposes would still allow India to reach a substantial portion of its potential entitlement in the area of overlap, not to mention its very ample entitlements (unclaimed by Bangladesh) to the south. Conversely, failing to bend the line would exacerbate the cut-off of Bangladesh, and leave all or virtually all of the area of overlapping entitlements to India."⁴¹⁷

⁴¹⁵ BR, para. 5.43.

⁴¹⁶ BR, para. 5.46.

⁴¹⁷ *Ibid.*



7.21 This is rather perplexing:

- Bangladesh's view of the "general directional axis of the Bay" is baffling: notwithstanding the fact that it has clearly not changed since the 2012 ITLOS Judgment (in which the Tribunal clearly refused to envisage a second deflection of the line), it is apparent that, in fact, *in the relevant part of the Bay*, its general direction (globally north/south), cannot be a source of any kind of "disadvantage" for Bangladesh;
- as for the "*the result in Bangladesh/Myanmar*", it is clearly irrelevant to the present delimitation since the ITLOS Judgment is *res inter alios acta*.
- as explained above,⁴¹⁸ it is manifestly incorrect to assert that India would not be cut off, which it would very significantly by the deflected line claimed by Bangladesh; and
- India's other entitlements toward the south are entirely irrelevant; and
- Bangladesh keeps mentioning them but, at the same time, it accepts that it has no claim in this respect.

Moreover, as the Arbitral Tribunal in *Barbados/Trinidad and Tobago* explained, "the Tribunal's discretion must be exercised within the limits set out by the applicable law."⁴¹⁹ The present case is a bilateral delimitation between India and Bangladesh. The Tribunal is not called upon to delimit the whole of the Bay of Bengal and the present case has clearly not been joined to the *Bangladesh/Myanmar* case.

7.22 Third, Bangladesh purports to invoke State practice in support of its claim for a second deflection of the delimitation line.⁴²⁰ Bangladesh's third argument has already been

⁴¹⁸ See para. 7.17 and Figure RJ 7.2 above.

⁴¹⁹ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 243, para. 373.

⁴²⁰ BR, para. 5.47.

dealt with at length in Chapter 5.⁴²¹ Where India pointed out that the alleged “substantial body of State practice”⁴²² is limited to five or six agreements.⁴²³ As India explained, none of these agreements helps Bangladesh’s case:

- most of these agreements created only very narrow corridors which are not comparable at all to the “modest outlet to its 200 M”⁴²⁴ claimed by Bangladesh which is in fact approximately 70 nautical miles wide when it reaches the claimed 390-nautical-mile outer limit of Bangladesh’s continental shelf;⁴²⁵ and
- maritime delimitation agreements – at least those referred to by Bangladesh – take into account *political* considerations⁴²⁶ and do not necessarily reflect the application of the law of maritime delimitation.

7.23 Finally, in a single and isolated paragraph, Bangladesh proposes a second and *separate* maritime boundary which would delimit the continental shelf beyond 200 nautical miles between it and India’s Andaman Islands.⁴²⁷ Without offering any explanation, Bangladesh asserts that:

“Bangladesh observes that in *Bangladesh/Myanmar*, ITLOS ruled that the 215° boundary adopted in that case extended “until it reaches the area where the rights of third States may be affected.” Should the Arbitral Tribunal agree with Bangladesh that the boundary with India beyond 200 M should be deflected so as to accord Bangladesh a corridor out to the limits of its continental shelf, the ITLOS boundary would by necessity reach the area where Bangladesh, India and Myanmar all maintain claims. In that event, Bangladesh submits that the 215° line should continue to mark the limits of its maritime jurisdiction; it makes no claim to anything east of the line. In the event that any portions of this area are later determined to appertain to

⁴²¹ See paras. 5.32-5.42 above.

⁴²² BR, para. 5.47.

⁴²³ To be compared with probably more than 250 (in 2011) maritime delimitation agreements concluded in the World.

⁴²⁴ BR, para. 4.108.

⁴²⁵ See para. 5.35 above.

⁴²⁶ See paras. 5.36-5.38 above. See also CMI, para. 6.69.

⁴²⁷ In this area of continental shelf beyond 200 nautical miles, the maritime boundary between India’s Andaman Islands and Myanmar in the continental shelf beyond 200 nautical miles also remains to be delimited.

India, the Arbitral Tribunal should determine that the same 215° line equally delimits the area between it and Bangladesh.”⁴²⁸

7.24 Contrary to what Bangladesh argues, the extension of the ITLOS line up to 390 nautical miles is in no way a “necessity”.⁴²⁹ As recalled above, the ITLOS 215° line constitutes the maritime boundary between Bangladesh and *Myanmar*.⁴³⁰ As Bangladesh successfully argued before the ITLOS “third States are not bound by the Tribunal’s judgment and their rights are unaffected by it” since “delimitation judgment by the Tribunal is merely *res inter alios acta*.”⁴³¹ For this reason, Bangladesh cannot claim maritime areas *east* of the 215° line on the basis of the ITLOS Judgment. However, the ITLOS line does not affect India and, certainly, does not prevent it from claiming maritime areas *west* of the 215° line. And, indeed, India has a claim to a 350-nautical-mile continental shelf from the Andaman Islands as outlined in India’s Counter-Memorial.⁴³²

7.25 Before turning to the disproportionality test, India wishes to answer Bangladesh’s curious argument at paragraph 5.5 of the Reply. In this paragraph, Bangladesh claims that:

“The wholly inequitable nature of this solution can be demonstrated with a single fact: the small triangle of maritime space India’s proposed equidistance line leaves for Bangladesh would involve *no diminution whatsoever* of India’s claim beyond 200 M. Indeed, it would allocate to India areas in the outer continental shelf it has not even claimed before the CLCS. As can be seen in **Figure R5.1** (following page 130), India has not claimed before the CLCS any of the small area its proposed equidistance line would leave to Bangladesh. Only Myanmar and Bangladesh have claimed this area. Yet, by virtue of the *Bangladesh/Myanmar* Judgment, Myanmar can no longer have any valid claim there. Put simply, the equidistance solution India proposes in the outer continental shelf would allot to Bangladesh only what already belongs to it. Moreover, this space comes exclusively from areas previously claimed by Myanmar but not India. Here once again, India is trying to make Myanmar pay the

⁴²⁸ BR, para. 5.54.

⁴²⁹ *Ibid.*.

⁴³⁰ See para. 7.21 above.

⁴³¹ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, paras. 352 and 367.

⁴³² CMI, paras. 7.25-7.43.

entire price of achieving an equitable maritime boundary solution in the Bay of Bengal.”⁴³³

7.26 Bangladesh’s argument is both misleading and legally incorrect. India’s position vis-à-vis this area is logical and consistent with the law of delimitation. India submitted its claim to the CLCS on 11 May 2009.⁴³⁴ At the time of its submission, in the absence of any maritime boundary between Bangladesh and Myanmar or between Bangladesh and India, India assumed that these maritime boundaries would be comprised of two equidistance lines. Had this been the case, Bangladesh would have had no access to the continental shelf beyond 200 nautical miles. Logically and justifiably, India followed this reasoning and assumed that the same principle of equidistance would apply between India and Myanmar in the continental shelf beyond 200 nautical miles. That is why the outer limit of India’s claim before the CLCS is *today* the equidistance line between India’s peninsular coast and Myanmar’s Rakhine coast.

7.27 It is true that, when it drafted its Counter-Memorial, India had not yet included this area in its submission to the CLCS. But, that does not mean, as Bangladesh claims, that this area “already belongs to it”.⁴³⁵

- First, as Bangladesh itself asserted in its Memorial,⁴³⁶ submissions to the CLCS and “actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.”⁴³⁷
- Second, once again, Bangladesh puts the cart before the horse. Bangladesh has no pre-existing rights in this area to which both Parties have overlapping claims. Only the delimitation line will determine whether and which area belongs to Bangladesh or to India. Since the Parties have requested the present Tribunal to determine their common maritime boundary, it is for this Tribunal only to make this determination.

⁴³³ BR, para. 5.5.

⁴³⁴ http://www.un.org/Depts/los/clcs_new/submissions_files/submission_ind_48_2009.htm

⁴³⁵ *Ibid.*

⁴³⁶ MB, para. 4.20.

⁴³⁷ Article 9 of Annex II of UNCLOS. See also Article 76(10) of UNCLOS.

- Third, India has sent a Note Verbale to the Secretary-General of the United Nations concerning this matter.⁴³⁸

III. The Non-Disproportionality Test

7.28 As Bangladesh notes, “the final step in the delimitation process is for the Tribunal to conduct a disproportionality test to confirm that the delimitation line provisionally drawn does not yield a disproportionate result.”⁴³⁹ However, when it comes to the application of this test, Bangladesh completely distorts it:

- it turns the “disproportionality test” – which should more rightly be called the “non-gross disproportionality test”,⁴⁴⁰ into a “most proportionate test” (A); and
- it applies *its* “most proportionate test” to a wrongly depicted relevant area (B).

On the contrary, as India will show, its own application of the non-disproportionality test is fully consistent with the law of maritime delimitation and the results of this test confirm that the equidistance line proposed by India achieves an equitable solution (C).

A. Bangladesh Distorts the Non-Disproportionality Test

7.29 At the end of its Reply, Bangladesh claims that the line proposed by India “cannot constitute an equitable solution in the case”.⁴⁴¹ However, Bangladesh does not show that the

⁴³⁸ Note Verbale PM/NY/443/1/2013 from the Permanent Mission of India to the United Nations to the Secretary-General of the United Nations, 16 July 2013 (Vol. II, Annex RJ-12).

⁴³⁹ BR, para. 1.22.

⁴⁴⁰ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 214, para. 238. See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, paras. 241-242. International courts and tribunals also use the expression “significant disproportionality” (see e.g. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 129, para. 210, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, para. 499 and, again, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 240).

⁴⁴¹ BR, para. 5.72.

equidistance line “has caused a significant disproportion by reference to the ratio of the length of the coastlines of the Parties and the ratio of the relevant maritime area allocated to each Party.”⁴⁴² It simply asserts that “India’s claim line and the provisional equidistance line . . . are significantly less proportionate”⁴⁴³ than the 180° line it proposes. And it further adds that the 180° line attributes to Bangladesh “marginally more maritime space than it would get by drawing a strictly proportionate boundary” and, therefore, the 180° line “easily passes the disproportionality test.”⁴⁴⁴

7.30 Bangladesh’s reasoning is flawed for two main reasons:

- the purpose of the disproportionality test is not to check whether the delimitation line establishes the most proportionate sharing of the relevant area, but to check that the delimitation line does not lead to a “gross (or marked) disproportion”;⁴⁴⁵
- the disproportionality test is not supposed to be applied in the abstract or at a macro-geographical level but to the *relevant area to be delimited* – precisely because a *delimitation* is at stake.

7.31 In *Nicaragua v. Colombia*, the ICJ laid down useful guidelines concerning the application of the non-disproportionality test. Bangladesh ignores them. The ICJ explained that “[i]n carrying out this third stage, the Court notes that it is not applying a principle of strict proportionality.”⁴⁴⁶ Therefore, its task “*is not to attempt to achieve even an approximate correlation between the ratio of the lengths of the Parties’ relevant coasts and the ratio of their respective shares of the relevant area*”⁴⁴⁷ but only “to check for a significant

⁴⁴² *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, para. 497.

⁴⁴³ BR, para. 5.72.

⁴⁴⁴ BR, para. 5.71.

⁴⁴⁵ See the case law referred to in fn. 440 above.

⁴⁴⁶ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 240. See also the ICJ Judgment in the *Black Sea* case in which the Court stated that “[t]he purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation” (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, pp. 99-100, para. 110).

⁴⁴⁷ *Ibid.*, para. 242 (emphasis added).

disproportionality”⁴⁴⁸ As the ICJ explained, its conclusion is based on the fact that “[m]aritime delimitation is not designed to produce a correlation between the lengths of the Parties’ relevant coasts and their respective shares of the relevant area.”⁴⁴⁹

7.32 Bangladesh’s position is wholly incompatible with the jurisprudence and, instead, offers a radically new and entirely different test. As Bangladesh describes it, the “now-familiar”⁴⁵⁰ “disproportionality test” turns into a “most proportionate test”: the Arbitral Tribunal is urged to choose the line proposed by Bangladesh because it is the most proportionate solution. But, as the Court put it in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

“If such a use of proportionality were right, it is difficult to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation.”⁴⁵¹

7.33 Finally, once again, Bangladesh imports macro-geographical considerations in its application of the disproportionality test. In a sort of final re-checking of the “final check”,⁴⁵² Bangladesh explains that, even when applying the 180° bisector line, India:

- retains substantial entitlement “in the continental shelf beyond 200 M *outside* the area of overlap”,⁴⁵³ and
- “loses” less maritime territory than Myanmar in *Bangladesh/Myanmar* case.⁴⁵⁴

⁴⁴⁸ *Ibid.*, para. 240.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ BR, para. 5.59.

⁴⁵¹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 45, para. 58. See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 240.

⁴⁵² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 103, para. 122. See also *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 214, para. 238.

⁴⁵³ BR, para. 5.74.

⁴⁵⁴ *Ibid.*

7.34 Once again, Bangladesh misses the point. India has already answered similar arguments put forward by Bangladesh in Chapter 3.⁴⁵⁵

- The sole task of the Tribunal is to delimit. To that end, it applies the three steps of the equidistance/relevant circumstances method.
- India has already explained that the *Bangladesh/Myanmar* case and the present case are clearly separated.⁴⁵⁶ Therefore, the present Tribunal is in no way concerned with the consequences of the 2012 ITLOS Judgment for Myanmar.

B. Bangladesh Applies Its Erroneous “Most Proportionate Test” to the Wrong Area

7.35 In its Reply, Bangladesh defines the relevant area as follows:

“In the south, it is limited by the outer limit of Bangladesh’s claim in the outer continental shelf as submitted to the CLCS. Beyond that limit, no areas can be relevant to this dispute.

In the east, it is limited by the extension of the 215° azimuth adjudged by ITLOS. Bangladesh recognises that it can have no claim to the areas to the east of that line.

And in the west, it is limited by the line connecting India’s Sandy Point with the point on Bangladesh’s outer limit line closest to the Indian coast.”⁴⁵⁷

7.36 Even if India were to agree (*quod non*) with Bangladesh that the relevant area should include “not only areas within 200 M but also areas beyond 200 M that are in dispute between the Parties”,⁴⁵⁸ it cannot, for the reasons explained in Chapter 3, accept Bangladesh’s wholly arbitrary definition of the relevant area.

⁴⁵⁵ See para. 3.2 above.

⁴⁵⁶ See paras. 5.51-5.53 above.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ BR, para. 5.69.

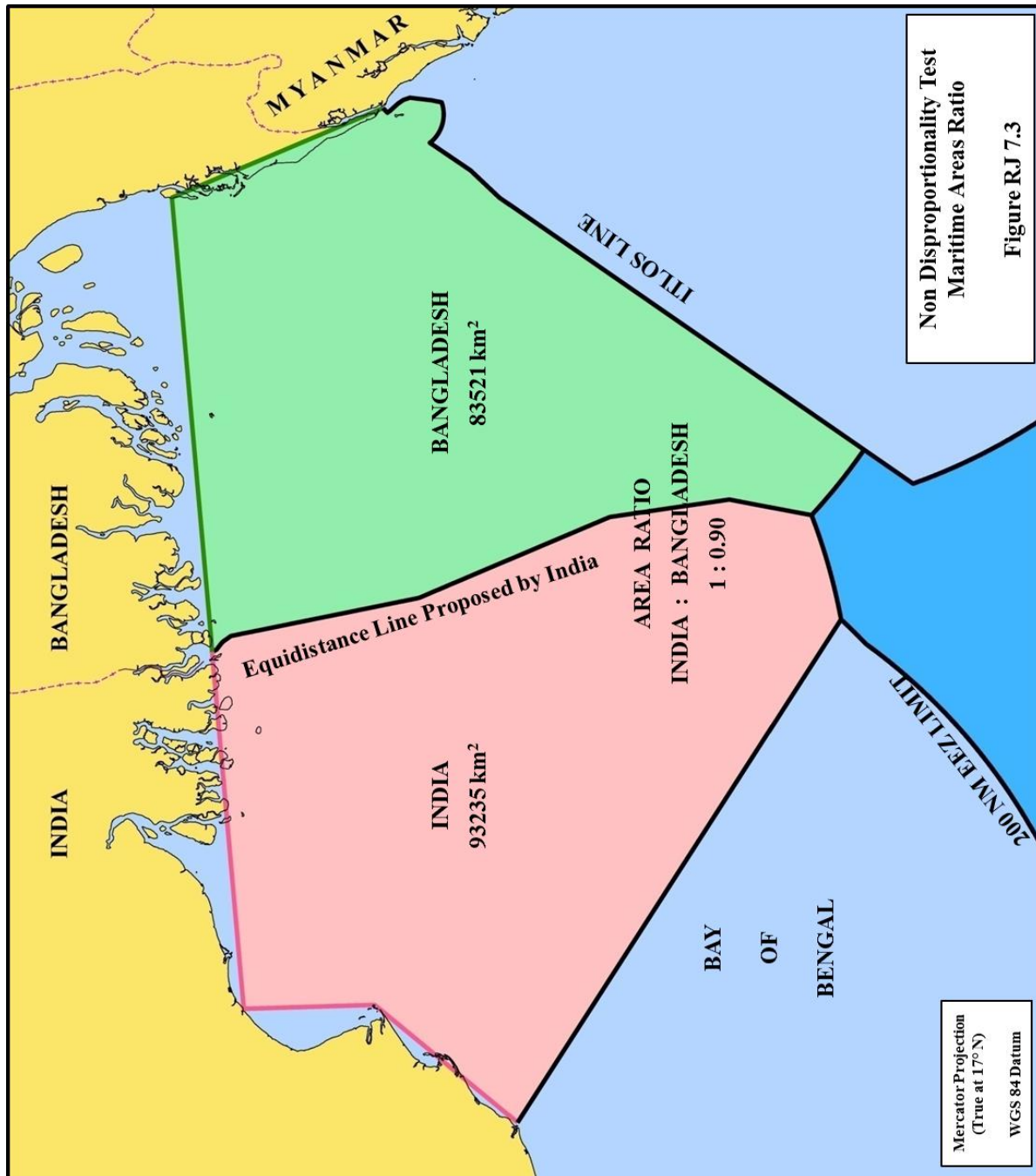
C. The Non-Disproportionality Test Confirms the Equitable Character of the Equidistance Line Proposed by India

7.37 As recalled above,⁴⁵⁹ at the third and final stage, the Arbitral Tribunal sole task is to “test the position resulting from the provisional application of the line that it has drawn, so as [to] avoid gross disproportion in the outcome of the delimitation.”⁴⁶⁰ In the present case, India’s relevant coasts are 411 kilometres long and Bangladesh’s relevant coasts 417 kilometres long.⁴⁶¹ The ratio of the lengths of the Parties’ relevant coasts is 1 : 1.015 slightly in favour of Bangladesh. The relevant area measures 176,756 square kilometres. With the equidistance line proposed by India, India receives 93,235 square kilometres and Bangladesh 83,521 square kilometres. The ratio is 1 : 0.90, slightly in favour of India. This ratio does not reflect a significantly or grossly disproportionate division of the relevant area. The result of the disproportionality test is shown on Figure RJ 7.3 at page 191.

⁴⁵⁹ See paras. 7.30-7.31.

⁴⁶⁰ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, pp. 243-244, para. 376.

⁴⁶¹ See para. 3.24 above.



CHAPTER 8

SUMMARY

8.1 The present Chapter summarizes India's position as set out in the Counter-Memorial and in this Reply. It is followed by India's formal submissions at the end of the written proceedings.

I. The Land Boundary Terminus

8.2 The starting point for the maritime delimitation is the land boundary terminus, which – as both Parties agree – was determined by the Radcliffe Award. According to the Award, the land boundary terminus is the point where the mid-stream of the main channel of the Hariabhanga River meets the Bay of Bengal. The main channel joins the Raimangal River and flows to the east of New Moore Island to meet the Bay of Bengal at Point L with coordinates 21°38'40.4" N, 89°10'13.8" E.

8.3 This is fully consistent with the map included in the Radcliffe Award, and is confirmed by hydrographic and bathymetric data, satellite images and other cartographic evidence. Bangladesh has failed to establish that the official charts it relies on (including the 1931 Edition of the BA Chart 859 and its own four new charts, of which three were produced by it after these proceedings were initiated), support the location, in a secondary channel, of its proposed land boundary terminus.

II. Delimitation Methodology

8.4 India's case is straightforward. The present case lends itself without any particular difficulty to the application of the well-established three-stage method. It is perfectly feasible to draw a provisional equidistance line in this case since appropriate base points can be identified to determine the territorial sea and EEZ/continental shelf boundary between Bangladesh and India, as was already shown in India's Counter-Memorial. Accordingly, resort to an angle-bisector, as advocated by Bangladesh, is neither necessary nor appropriate.

8.5 In the absence of any compelling reasons to the contrary, the Tribunal should draw a provisional equidistance line at the first stage of the three-stage methodology universally accepted by international courts and tribunals.

III. Absence of Special or Relevant Circumstances

8.6 There is no special or relevant circumstance relative to either the stability of coasts, or the shared concavity or the similar cut-offs that require adjustment of the equidistance line. A review of the case law clearly shows that neither a concavity nor a cut-off effect constitutes *per se* a relevant circumstance in the legal meaning of that term. The cut-off on India's east-facing coast is similar, if not worse, than that on Bangladesh's west-facing coast. This cut-off is far worse with the 180° angle-bisector method proposed by Bangladesh. In the present case, the cut-off produced by the equidistance line "is shared in a mutually balanced way".⁴⁶²

IV. The Proposed Equidistance Line Achieves an Equitable Solution

8.7 India's proposed equidistance line for the maritime boundary in the continental shelf and EEZ achieves an equitable solution. There is no "gross disproportionality".

8.8 The delimitation line with a second deflection beyond 200 nautical miles proposed by Bangladesh is arbitrary and lacks any legal basis.

⁴⁶² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 127, para. 201; see also BR, para. 4.135.

SUBMISSIONS

Having regard to the facts and law set out in the Counter-Memorial and this Rejoinder, the Republic of India requests the Tribunal to adjudge and declare that the maritime boundary between India and Bangladesh (in WGS 84 datum terms) runs as follows:

- Starting from the land boundary terminus at Point L with the co-ordinates 21°38'40.4" N, 89°10'13.8" E, the boundary follows a geodetic azimuth of 149.3° until it reaches Point T1, with the co-ordinates 21°37'15.7" N, 89°11'07.6" E.
- From Point T1, the boundary follows a geodetic azimuth of 129.4° until it reaches Point T2, with the co-ordinates 21°35'12.7" N, 89°13'47.5" E.
- From Point T2, the boundary follows a geodetic azimuth of 144.2° until it reaches Point T3, with the co-ordinates 21°32'25.7" N, 89°15'56.5" E.
- From Point T3, the boundary follows a geodetic azimuth of 168.6° until it reaches Point T4, with the co-ordinates 20°30'17.9" N, 89°29'20.9" E.
- From Point T4, the boundary follows a geodetic azimuth of 157.0° until it reaches Point T5, with the co-ordinates 19°26'40.6" N, 89°57'54.9" E.
- From Point T5, the boundary follows a geodetic azimuth of 171.7° until it reaches Point T6, with the co-ordinates 18°46'43.5" N, 90°04'02.5" E.
- From Point T6, the boundary follows a geodetic azimuth of 190.7° until it reaches Point T7, with the co-ordinates 17°22'08.8" N, 89°47'16.1" E.
- From Point T7, the boundary follows a geodetic azimuth of 172.342° until it meets the maritime boundary line between Bangladesh and Myanmar at Point Z with co-ordinates 17°15'12.8" N, 89°48'14.7" E.

The Republic of India reserves its right to supplement or to amend these submissions in the course of the present proceedings.



31 July 2013

(Dr. Neeru Chadha)

**Joint Secretary and the Legal Adviser
Agent of the Republic of India
Ministry of External Affairs, India**

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- Annex RJ-3** Commander R.H. Kennedy, “A Brief Geographical and Hydro Graphical Study of Bays and Estuaries the Coasts of which Belong to Different States”, Document A/CONF.13/15, 13 November 1957, *Extract from the Official Records of the United Nations Conference on the Law of the Sea*, Vol. I (Preparatory Documents), pp. 198-243.
- Annex RJ-4** F. Blasco, E. Janodet and M.F. Bellan, “Natural Hazards and Mangroves in the Bay of Bengal”, *Journal of Coastal Research Special Issue No. 12: Coastal Hazards*, 1994, pp. 277-288.
- Annex RJ-5** K. Furukawa, E. Wolanski, “Sedimentation in Mangrove Forests”, *Mangroves and Salt Marshes*, Vol. 1, 1996, pp. 3-10.
- Annex RJ-6** Y. Mazda, M. Magi, M. Kogo, P.N. Hong, “Mangrove as Coastal Protection from Waves in the Tong King Delta, Vietnam”, *Mangroves and Salt Marshes*, Vol. 1, 1997, pp. 127-135.
- Annex RJ-7** J.M. Smoak, S.R. Patchneelam, “Sediment Mixing and Accumulation in a Mangrove Ecosystem: Evidence from 210Pb, 234Th and 7Be”, *Mangroves and Salt Marshes*, Vol. 3, 1999, pp. 17-27.
- Annex RJ-8** K. Harada, F. Imamura, T. Hiraishi, “Experimental Study on the Effect in Reducing Tsunami by the Coastal Permeable Structures”, *Proceedings of the Twelfth International Offshore and Polar Engineering Conference*, 2002, pp. 652-658.
- Annex RJ-9** M. Bhattacharya, *Charting the Deep, A History of the Indian Naval Hydrographic Department*, National Hydrographic Office, 2004, pp. 130-131.

- Annex RJ-10** U. Thampanya, J.E. Vermaat, S. Sinsakul, N. Panapitukkul, “Coastal Erosion and Mangrove Progradation of Southern Thailand”, *Estuarine, Coastal and Shelf Science*, Vol. 68, 2006, pp. 75-85.
- Annex RJ-11** Affidavits regarding the Custody of the Original Radcliffe Map, 15 July 2013.
- Annex RJ-12** Note Verbale PM/NY/443/1/2013 from the Permanent Mission of India to the United Nations to the Secretary-General of the United Nations, 16 July 2013.

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Full Reproduction of the Original Annexure B to the Report of the Bengal Boundary Commission (“Radcliffe Map”), 12 August 1947

