Bangladesh–Myanmar ITLOS Verdict: Precedence for India?

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The International Tribunal for the Law of the Sea (ITLOS) is a body set up under the United Nations Convention on the Law of the Sea (UNCLOS) to deal with disputes that emerge because of a difference in the interpretation and application of the convention.1 Bangladesh has had an ongoing maritime boundary dispute with India and Myanmar since 1974. On 14 March 2012, the ITLOS delivered a verdict and ended the long-running maritime boundary dispute between Bangladesh and Myanmar.

In the current global world, energy resources are a crucial element for a nation’s growth. India, Bangladesh and Myanmar are no different in this regard. India discovered 100 trillion cubic feet (tcf) of gas reserve in the Bay of Bengal (BoB) in 2005–2006. Soon after, Myanmar discovered seven tcf of gas reserves near the Rakhine coast. This discovery of colossal gas reserves sparked a claim-staking contest between the three countries in the BoB.

Shelf claims made by India and Myanmar converged in the BoB, leaving Bangladesh with less than 200 miles of Exclusive Economic Zone (EEZ) and consequently with no continental shelf. India and Myanmar commenced bilateral negotiations with Bangladesh to delineate their respective maritime boundaries in 1974. Bangladesh clashed head on with both countries over the method for demarcating the base lines. In addition, it did not wish to use the ‘equidistant principle’ to delineate the EEZ and the continental shelf.

India, Myanmar and Bangladesh had ratified the 1982 UNCLOS in 1995, 1996 and 2001 respectively. The Sheikh Hasina government, after several rounds of unsuccessful talks with India and Myanmar, decided to submit the dispute under the dispute settlement mechanism of the UNCLOS. Myanmar agreed to refer the issue to the ITLOS. India, on the other hand, decided to take the matter to the Permanent Court for Arbitration (PCA).

The ITLOS judgement in the Bangladesh–Myanmar maritime boundary dispute is remarkable for two reasons. This is the first case in which an international court or tribunal has delimited a continental shelf boundary beyond 200 miles. It also contemplated the issue of the ‘grey area’. The ITLOC verdict in the Bangladesh–Myanmar maritime dispute delimited:

1. The territorial sea boundary
2. The relevant coasts and their approximate lengths of the parties involved

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(3) The single maritime boundary between their EEZs
(4) The continental shelf
(5) The boundary of the continental shelf beyond 200 miles
(6) The ‘grey areas’

The ‘equidistant’ principle has been consistently used by India to determine its EEZ boundaries. Bangladesh strongly opposed the adoption of this method to determine its maritime boundaries. This opposition was rooted in the fear of losing approximately 5,000 square km of seabed and the related hydrocarbon and fish resources in the BoB. It passed the Territorial Waters and Maritime Zones Act in 1974, which adopted the depth method to determine the base line, leading to strong objections from India and Myanmar.

This conflict over the method to be used to determine the maritime boundaries has been put to rest by the ITLOS verdict. The International Tribunal saw no special circumstances in Bangladesh’s case to prompt the use of a method other than the equidistant principle and used the same to determine the maritime borders of Myanmar and Bangladesh.2 The tribunal’s verdict in the Bangladesh–Myanmar maritime boundary dispute is likely to be used as a precedent during the 2014 India–Bangladesh arbitration in the PCA. Since the ITLOS decided to continue with the use of the ‘equidistant’ principle to demarcate the boundaries, it is safe to assume that the upcoming PCA verdict will do the same.

St. Martin’s island had been another bone of contention between Bangladesh and Myanmar. Myanmar had ignored St. Martin’s island completely while drawing the provisional equidistant line. According to Myanmar, since the island would be on the wrong side of an equidistant line drawn between the two countries, it must be considered a ‘special circumstance’. This argument was rejected by the tribunal. Owing to the island’s size, population and economic activity, the ITLOS granted the island ‘full effect’ in the delimitation of the territorial sea.3

In accordance with the recognition of the island as a substantial maritime feature of Bangladesh, the tribunal also recognised Bangladesh’s right to a 12 nautical mile (nm) territorial sea around St. Martin’s island.4 After having taken St. Martin’s island into consideration, the approximate lengths of the relevant coasts of Bangladesh were set out as 413 km and for Myanmar 587 km.5 The tribunal on the basis of the determined relevant coasts allocated roughly 111,631 square km of relevant area to Bangladesh and 171,832 square km of relevant area to Myanmar.6

The area allocated to Bangladesh is liable to change with the boundary delimitation between India and Bangladesh. The tribunal has ruled: ‘The fact that a third party may claim the same maritime area does not prevent its inclusion in the relevant maritime area for purposes of the disproportionality test. This in no way affects the rights of third parties’.7 This ruling keeps the door open for contestation between the two countries.

While Bangladesh and Myanmar struggled over the question of giving recognition to St. Martin’s island, India and Bangladesh have been arguing over the sovereignty of the New Moore/South Talpatty Island. The island emerged in the aftermath of the Bhola cyclone in 1970 in the estuary of Haribanga and Raimongal rivers in the BoB. Since then, both India and Bangladesh have attempted to claim the island as part of their territory. Successful recognition of the claim by either India or Bangladesh may result in a further 16,000 square km of continental shelf that may be rich in oil.
Currently, New Moore Island does not fall within the accrued area allocated to Bangladesh. As per the tribunal’s ruling, Bangladesh’s coastline begins from the southern tip of Mandabaria Island located near the land boundary between the two countries and at a small distance from New Moore. Nevertheless, one cannot jump to the conclusion that India will be granted sovereignty over the island. In the course of the trial, Bangladesh had identified New Moore Island as one of its potential base points. The tribunal, on account of the disputed nature of the island, refuted the use of the island as a base point. The ITLOS was careful not to tread on India’s right to dispute Bangladesh’s claim over the island but this does not prevent Bangladesh from doing the same.

There is a chance that the issue of New Moore Island may be of no consequence during the 2014 arbitration. Jadavpur University’s School of Oceanic Studies in March 2010 generated a report which contended that the island had sunk due to the rising of the sea. Such scientific reports may disqualify the feature as an island and consequently neither of the two countries would stand to gain anything from pursuing this issue. Importantly, the absence of the island could open up an avenue for a possible amicable solution to the dispute between India and Bangladesh in the Bay of Bengal.

India and Myanmar have shared a similar stance on Bangladesh’s right to a continental shelf beyond 200 nm. Figure 1 shows Bangladesh effectively ‘zone locked’ because of India and Myanmar’s claims in the BoB. Myanmar, during the trial, had asserted that Bangladesh’s delimitation line concluded well before 200 nm and therefore the country was not entitled to an extended continental shelf. This argument was rejected by the ITLOS.

The tribunal ruled that both Myanmar and Bangladesh were entitled to a continental shelf extending beyond 200 nm. In accordance with this verdict, a maritime boundary that included the EEZ, the continental shelf and an extended continental shelf was established between Bangladesh and Myanmar using the equidistance method. Furthermore, while drawing Bangladesh’s maritime boundary, the ITLOS took the concavity of the country’s coast into consideration. This was done to avoid cutting off its maritime entitlements.

To protect India’s rights, the verdict has not provided the exact location of the area beyond 200 nm. It simply states that the equidistant line delimiting the EEZ and the continental shelf of Bangladesh and Myanmar ‘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’.

By using the allocated base points and the maritime boundary drawn between the EEZ and the continental shelf by the ITLOS, it is possible to make a rough map of Bangladesh’s continental shelf. India has filed claims to extend its continental shelf to 350 nm under Article 76 of the UNCLOS. The map shown in Figure 2 displays the outer limits of the continental shelf as claimed by India in the Commission on the Limits of the Continental Shelf. Bangladesh’s allocated base points, when plotted on the map, show its continental shelf ending near the outer limits of India’s claimed continental shelf.

The area claimed by Myanmar was reduced by the tribunal to ensure equitable distribution of area to Bangladesh and to prevent it from becoming ‘zone locked’. This precedent set by the ITLOS will be difficult to alter in the 2014 arbitration proceeding. On examination of the map in Figure 2, and by comparing it with Figure 1, it may safely be assumed that the outer limits of the continental shelf as claimed by India will be altered in the future.
India has claimed will not be granted unless India manages to prove that its seabed is a natural extension of the outer edges of the sub-contontinal landmass.

If India does manage to substantiate its claims, the issue then arises of a large grey area in the BoB. Currently, the tribunal’s ruling has resulted in the creation of a ‘grey area’ measuring approximately 1,100 square km in the Bay of Bengal between Bangladesh and Myanmar (see Figure 3). This area is located beyond 200 nm from Bangladesh and thus is a part of Bangladesh’s extended continental shelf, but it is also within 200 nm of Myanmar. There is a high possibility of a similar ‘grey area’ being formed between India and Bangladesh after the 2014 arbitration. In fact, if the verdict is passed in favour of India, then the ‘grey area’ between India and Bangladesh may be bigger than the one between Bangladesh and Myanmar.

The tribunal has left Myanmar and Bangladesh with the potentially contentious issue of ocean governance in the ‘grey area’. This was also the area over which the two
countries came close to an armed clash because of its massive hydrocarbon deposits. The ITLOS verdict simply suggests ‘appropriate cooperative arrangements’ to resolve this matter. A similar question may perhaps emerge at the end of 2014. India and Bangladesh can avoid a confrontation and prolongation of their conflict by pursuing
Resolution of their maritime dispute is in the interest of both countries. Bangladesh’s current natural gas production is hovering at roughly 2,160 million cubic feet per day (mmcf/d), while the demand is for over 2,500 mmcf/d. It has approximately 16.59 tcf of gas reserves that will last for approximately 18 years. Yet up until December 2011, Bangladesh had managed to lift merely 10.14 tcf, which was primarily used for electricity generation, fertiliser factories, tea estates, Compressed National Gas, and other industrial purposes. This highlights the need for a resolution to their maritime boundary dispute to access the remaining gas reserves.
Gas (CNG) filling stations and household cooking. Many international companies believe the quantities of gas available are much higher than the current estimate.

However, this requires further exploration. It is at this point that Bangladesh’s maritime disputes further add to its energy dilemma. The country does not have the necessary equipment to carry out exploration in the hydrocarbon-rich BoB and therefore needs international oil and gas exploration companies. It had offered its 28 offshore blocks for exploration to international companies but had received a weak response due to its maritime disputes with India and Myanmar. Resolving the maritime dispute with India would encourage these companies to invest time and money in Bangladesh’s reserves in the BoB.

India too stands to gain from this. According to the Ministry of Petroleum and Natural gas (MoPNG), India in 2009–2010 consumed 59 billion cubic metres (bcm) of natural gas. The International Energy Agency (IEA) expects the Indian demand for gas to rise to 94 bcm by 2020 and 132 bcm by 2030. It is thus clear that India must pursue all available conventional and unconventional options for energy resources in order to reach the target growth of eight per cent per annum. One of the easiest options is to import gas from Bangladesh through a pipeline.

In return, Bangladesh would receive an estimated US$3.7 billion in revenue and tax receipts over 20 years—the expected lifetime of the project. Bangladesh, however, has been reluctant to export gas to India owing to its own domestic shortages. According to the Bangladeshi government, the proven gas reserves are not high enough to be considered for export. Any exports would have to be of value-added content from gas processing, for instance electricity generated by gas or fertiliser manufactured from gas. With the clearing up of the India–Bangladesh maritime dispute, the blocks in the BoB could be freed up for thorough exploration, allowing Bangladesh to eventually export gas to India.

The ITLOS verdict has ensured that Bangladesh will stand a fair chance in the upcoming 2014 arbitratiton. Paradoxically, while India may lose some of the territory that it is claiming in the BoB, it may be able to address some of its energy security concerns and profit in the long term. After reviewing the ITLOS verdict, it is advisable for India to pursue bilateral negotiations rather than take the case up in 2014. One of India’s main points of concern with regard to the use of the ‘equidistant’ principle to delimit the maritime boundaries has been addressed by the tribunal.

Since the verdict has used the ‘equidistant’ principle to demarcate the Bangladesh–Myanmar maritime boundary, India can safely begin bilateral negotiations with Bangladesh. India may also lose substantially less territory if the boundaries are demarcated by mutual agreement between the two countries. The Government of India appears to be thinking along the same lines, especially since many are hailing this judgement as a victory for Bangladesh. The Government has recently agreed to discuss the issue bilaterally.

Notes

3. Ibid., Para. 151.
4. Ibid., Para. 169.
5. Ibid., Para. 498.
6. The tribunal defines the relevant area as ‘the area of overlapping entitlements of the parties that
   is relevant to this delimitation’. International Tribunal for the Law of the Sea, Judgment, no. 2,
   Para. 477; Para. 499.
8. Ibid., Para. 266; Para. 261; Para. 263.
9. Ibid., Para. 247; Para. 266.
10. Mark Magnier, ‘Sunk by global warming? Wave goodbye to this disputed island’, The
11. Ibid., Para. 351.
12. Ibid., Para. 449.
13. Ibid., Para. 239; Para. 255.
14. Ibid., Para. 293; Para. 461.
15. Ibid., Para. 355; Para. 462.
16. Government of India, ‘The Indian Continental Shelf: Partial Submission to the Commission on
    the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8 of the United Nations
17. ‘Grey area’ refers to an overlapping of the EEZ, the continental shelf or the extended continental
    shelf of two or more states.