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Bay of Bengal: ITLOS' first ruling in favour of Bangladesh

Jalila Abdul Jalil

Jalila Abdul Jalil, Senior Researcher from the Centre for Straits of Malacca discusses the ITLOS judgment on the maritime boundary delimitation dispute between Bangladesh and Myanmar in the Bay of Bengal

Negotiation in the classic diplomatic sense assumes that parties are more anxious to agree than to disagree
- Dean Acheson -

Wednesday, 14th March 2012, marked an important date when the International Tribunal for the Law of the Sea (ITLOS) delivered its judgment on a maritime boundary delimitation dispute between Bangladesh and Myanmar in the Bay of Bengal. The ruling, by a vote of 21 to 1, awarded Bangladesh territorial and full 200 nautical miles (nm) economic rights as well as a substantial share of the outer continental shelf beyond 200 nm. The Tribunal also awarded a full 12 nm territorial sea around St. Martin's Island to Bangladesh. The conclusion of the dispute

now opens up opportunities for exploration and exploitation of petroleum and natural gas in the bay.

This commentary provides an overview of the case, particularly focusing on the delimitation issue on the respective maritime zones as well as the international law perspective relating to them.

Territorial sea disputes

In addressing the issues of the delimitation of the territorial sea between the two nations, the Tribunal referred to the Agreed Minutes (1974 and 2008), tacit or de facto agreement, and the situation of estoppel. On the 1974 Agreed Minutes, Bangladesh argued that Myanmar had agreed to the delimitation of the territorial sea boundary between the two nations. Myanmar, on the other hand, viewed the Minutes as part of documents that were “merely an understanding reached at a certain stage of the technical-level talks as part of the ongoing-negotiations”. Myanmar did not sign the 1974 Agreed Minutes because it preferred to incorporate a comprehensive maritime delimitation regime on the territorial sea, exclusive economic zone, and continental shelf. The Tribunal commented that the terms of the Agreed Minutes are a “record of a conditional understanding reached during the course of negotiations and not an agreement within the meaning of Article 15 of the United Nations Convention on the Law of the Sea 1982” and concluded that there is no legally binding agreement between the parties.

On the second point, Bangladesh had argued that the fact the Parties had conducted themselves in accordance with the agreed delimitation to the boundary line in the territorial sea for over three decades demonstrates the existence of a tacit or de facto agreement. These included the “exercise of peaceful and unchallenged administration and control over its agreed territorial sea”. Myanmar contended that the conduct of the Parties had not established a tacit or de facto agreement as per the 1974 Agreed Minutes. The Tribunal concurred with Myanmar stating that there is no tacit or de facto agreement in proving the existence of boundary agreement concerning the territorial sea.

With regard to the situation of estoppel, Bangladesh argued that for over thirty years, Myanmar had enjoyed the benefit of a stable maritime boundary and right of free passage through Bangladesh’s territorial waters, and asserted that for this reason the 1974 Agreement is valid and binding upon Myanmar. In international law, a situation of estoppel exists when a state, by its conduct, creates the appearance of a particular situation and another state, relying on such conduct in good faith, has acted or abstained from an action to its detriment. Myanmar countered that Bangladesh had not produced any evidence to show that Myanmar had adhered to the Agreement with regard to unimpeded passage of Myanmar’s vessels or fisheries. The Tribunal decided that, “The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation” and concluded that, “there is no indication that Myanmar’s conduct caused Bangladesh to change its position to its detriment or suffer some prejudice in reliance on such conduct”. As such, Bangladesh’s claim of estoppel cannot be upheld.

As the three issues of the agreed minutes, tacit or de facto agreement, and estoppel did not constitute an agreement within the meaning of Article 15 on delimitation of the territorial sea, the Tribunal proceeded to delimit the territorial sea based on Article 15 taking into account historic title or special-circumstances elements.

In assessing the issue of St. Martin's Island, the Tribunal investigated whether it represents a special circumstance and entitled to full effect in relation to the territorial sea delimitation, which calls for shifting or adjusting the median line as it lies in front of Myanmar's coast and within the 12 nm limit drawn from Bangladesh's coast. The Tribunal concluded that St. Martin's Island is entitled to full effect but did not constitute a special circumstance.

Based on International Court Justice cases relating to islands, there is no discernible trend in terms of whether the islands are given full, partial or no effect in relation to maritime delimitation. Each case is treated differently based on various factors i.e., geographical, etc. There is no direct correlation between the earlier cases and that of Bangladesh and Myanmar. However, in relation to 'islands', the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Merits, Judgment, I.C.J. Reports 2001), represents the closest judgment to the Bangladesh and Myanmar case. Here, Qatar argued that the feature, Qit'at Jaradah, is a low-tide elevation and Bahrain considered it an island. The Court, however, treated Qit'at Jaradah as an island and constituted a special circumstance but that did not give any effect to the delimitation. For St. Martin's Island in the Bangladesh and Myanmar case, the Court quoted *Qatar and Bahrain* (Judgment, I.C.J. Reports 2001), that "*while it is not unprecedented in case law for islands to be given less than full effect in the delimitation of the territorial sea, the islands subject to such treatment are usually 'insignificant maritime features'*".

Exclusive Economic Zone and continental shelf within 200 nautical miles

In addressing the issue of drawing a single delimitation line for both the exclusive economic zone (Article 74) and the continental shelf (Article 83) between Bangladesh and Myanmar, the Tribunal stated that these two articles are identical in content but differ in respect of the designation of the maritime area. It further elaborated that the delimitation under articles 74 and 83 must be effected "on the basis of international law as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

Taking cognizance of decisions of international courts and jurisprudence, the Tribunal cited the three-stage methodology on establishing maritime delimitation. This involves constructing a provisional equidistance line based on the geography of the parties' coasts and mathematical calculations, making any adjustments to the line to take into account any relevant circumstances (i.e., concavity and cut-off effect, St. Martin's Island, and Bengal Depositional System) and finally, examining whether the adjusted line results in any significant disproportion between the ratio of the respective coastal lengths and the relevant maritime areas allocated to each party.

The Tribunal stated that concavity, one of the factors of relevant circumstances and which produces a cut-off effect to Bangladesh coast, would require an adjustment to the provisional equidistance line be made in order to achieve an equitable result.

Continental shelf beyond 200 nautical miles

As to the issue of delimiting the continental shelf beyond 200 nm, Myanmar argued that although the delimitation of the continental shelf beyond 200 nm could fall within the jurisdiction of the Tribunal, “the Tribunal would still not have jurisdiction to determine this line because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area”. Bangladesh argued that the Tribunal had jurisdiction stating that “the Tribunal is empowered by the Convention to adjudicate disputes between States arising under articles 76 and 83, in regard to the delimitation of the continental shelf as the Convention draws no distinction between jurisdiction over the inner part of the continental shelf i.e., that part within 200 nm and the part beyond that distance...”

The Tribunal concluded that it has jurisdiction to delimit the continental shelf in its entirety (within 200 nm and beyond) as Article 76 embodies the concept of a single continental shelf. The Tribunal mentioned that the coastal state exercises exclusive sovereign rights over the continental shelf in its entirety without any distinction made between the shelf within 200 nm and the shelf beyond that limit.

In relation to the rights of third parties, the Tribunal commented that the delimitation of the continental shelf cannot prejudice their rights, as the Tribunal decision shall have no binding force except between the parties to the particular dispute. As to the issues concerning the international seabed area, the Tribunal stated that the delimitation of the continental shelf area beyond 200 nm between Bangladesh and Myanmar is situated far from the area and, hence, will not prejudice the rights of the international community.

Conclusion

The judgment concerning the delimitation between Bangladesh and Myanmar serves as a good case study on maritime boundary delimitation. Particularly on the issue relating to continental shelf beyond 200 nm, the case serves as an important jurisprudence for countries including Malaysia to analyse as it will have implications for other nations considering such ITLOS-type engagement for similar disputes with their neighbours, and the importance of seeking and continuing to negotiate regardless of the outcome. A similar delimitation dispute between Bangladesh and India is awaiting resolution at the UN court with a verdict due in 2014. It will be interesting to follow the progress and ramifications of the case post the ITLOS judgment and its bearing on which way the 2014 verdict will pan out.