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Kathmandu School of Law (KSL)

Suryabinayak-4, Bhaktapur, Nepal, Ph: 6634455, 6634663,

Email: info@ksl.edu.np, www.ksl.edu.np

Bangladesh-Myanmar Maritime Boundary Delimitation in the Bay of Bengal: An Analysis on the Development of International Law

Md. Kamrul Hasan Arif*

Abstract

The judgment delivered by the International Tribunal for the Law of the Sea (ITLOS) in the dispute concerning the delimitation of the maritime boundary between Bangladesh-Myanmar in the Bay of Bengal has a historic significance. The Bay of Bengal is an important area for many significant reasons for both the parties. To explore and for the exploitation of living and non-living resources, this judgment has played a vital role. The unique contribution of the judgment is that, the extension of the continental shelf beyond 200 nautical miles (nm) from the baseline, and pronouncement of the grey area. This article mainly focuses on the contribution of the case in international law which covers: background of the dispute; straight baseline; continental shelf beyond 200 nm; the role of the Commission on the Limits of the Continental Shelf (CLCS) to delimit the continental shelf beyond 200 nm; and the grey area. Before the conclusion. It also focuses on the theory of natural prolongation and the dissenting opinion given by the judge of the Tribunal.

Introduction

In today's international law there are a variety of maritime zones in which the coastal State exercises sovereignty, sovereign rights or jurisdiction to the exclusion of other States.¹ Each maritime zone demands a separate delimitation on the territorial sea, the exclusive economic zone (EEZ) or exercise of fisheries zone and the continental shelf.² Because of the close geographical proximity of many States, and their maritime zones often overlap to a greater or lesser extent.³ Generally, where there are overlapping claims, States must establish a boundary.⁴ With the extension of national marine jurisdiction to 200 nm, every coastal state in the world will eventually have to negotiate at least one maritime boundary with at least one neighbor.⁵ Every coastal State is trying to

* Md. Kamrul Hasan Arif is Advocate at Judge Court of Chittagong, Bangladesh.

¹ Tullio Treves, 'Coastal States' rights in the maritime areas under UNCLOS', vol. 12, *Brazilian Journal of International Law* p. 40, 2015, p. 41.

² R. R. Churchill & A. V. Lowe, *The Law of the Sea*, 3rd edition, Manchester University Press, 1999, p. 181.

³ Ibid.

⁴ Julia Lisztwan, 'Stability of Maritime Boundary Agreements', vol. 37, *Yale Journal of International Law*, 2012, p. 153.

⁵ Robert D. Hodgson & Robert W. Smith, 'Boundary Issues by Extension National Marine Jurisdiction', vol.

exercise exclusive rights in their respective maritime boundaries, which are recognized by the United Nations Convention on the Law of the Sea, 1982 (UNCLOS, hereinafter LOS Convention). And nowadays numerous international courts and tribunals are available to address a broad range of international disputes, and one such court is the International Tribunal for the Law of the Sea (ITLOS, hereinafter Tribunal).⁶

On 14 March 2014, the Judgment⁷ of the Tribunal⁸ in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal is an important contribution to the international law for many significant reasons.⁹ Firstly, it's the first maritime boundary delimitation dispute decided by the Tribunal.¹⁰ Before this dispute, maritime delimitation cases that were not resolved by the States involved had gone either before the International Court of Justice (ICJ) or to other arbitral tribunals, the other fora allowed by the LOS Convention.¹¹ Secondly, it's the first decision on the delimitation of the continental shelf beyond 200 nm from the baseline.¹² Thirdly, this is the first instance where either Bangladesh or Myanmar has participated in binding State-to-State dispute resolution.¹³ Finally, this is also the first occasion on which an international tribunal has made the pronouncement of the grey area.¹⁴ Moreover, the Tribunal established a single maritime boundary to delimit the territorial sea of each State, as well as its EEZ and continental shelf.¹⁵

This judgment resolves legal uncertainty and political tension surrounding the two States' claims in the north-eastern part of the Bay of Bengal. The judgment also demonstrates

69, *Geographical Review*, 1979, p. 423.

⁶ John E. Noyes, 'The International Tribunal for the Law of the Sea', vol. 32, *Cornell International Law Journal*, 1998, p. 32.

⁷ *The Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Case No. 16 of the International Tribunal for the Law of the Sea (ITLOS), Judgment, 2012 (Hereinafter the Judgment) available at <https://www.itlos.org/cases/list-of-cases/case-no-16/> accessed on 27 March 2016.

⁸ The Tribunal is a universal, independent and specialized court. It was created by the LOS Convention, signed in Montego Bay on 10 December 1982 and entered into force on 16 November 1994. This court started its work on 1 October 1996. Similar to the International Court of Justice (ICJ), the Tribunal was established as a permanent court that serves for the international community as a whole. However, unlike the ICJ, the Tribunal has a more limited jurisdiction as it is a specialized court.

⁹ Bjarni Mar Magnusson, 'Current Legal Developments: International Tribunal for the Law of the Sea' Judgment in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar (14 March 2012)', vol. 27, *International Journal of Maritime and Coastal Law*, 2012, p. 623.

¹⁰ Ibid.

¹¹ Samuel J. Zeidman, 'Sittin' on the Dhaka the Bay: The Dispute Between Bangladesh and Myanmar and its Implications for the International Tribunal for the Law of the Sea', vol. 50, *Columbia Journal of Transitional La*, 2012, p. 442.

¹² Ibid.

¹³ David P. Riesenberg, 'Introductory Note to the International Tribunal for the Law of the Sea: Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)', vol. 51, *International Legal Materials*, 2012, p. 840.

¹⁴ See Judgment (n 7), para 463.

¹⁵ Robin Churchill, 'The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation', vol. 1, *Cambridge Journal of International and Comparative law* p. 137, 2012, p. 138.

an admirable commitment to protect maritime boundary law from fragmentation.¹⁶ The proceedings were also impressively rapid, and transparent if compare with other maritime boundary disputes mechanism. It is a credit to the Tribunal that it has shown such strength and speed in settling the dispute and providing a remedy to the parties in a short span of time.¹⁷

Background of the Dispute

Since 1974, both the parties have negotiated many times¹⁸ on their respective maritime boundaries in the north-eastern part of the Bay of Bengal. The Bay of Bengal is situated in the north-eastern Indian Ocean, covering an area of approximately 2.2 million square kilometers, and is bordered by Bangladesh, India, Myanmar, and Sri Lanka.¹⁹ Bangladesh and Myanmar are both parties to the LOS Convention.²⁰ To establish its maritime boundary, Bangladesh passed the Territorial Waters and Maritime Zones Act, 1974, which outlined its maritime boundary claims for the first time.²¹ Bangladesh was the first South Asian country to enact a law for that purpose.²²

In 1974, Myanmar claimed a boundary with Bangladesh based on “principles of equidistance” and Bangladesh rejected this boundary line because the coastline of Bangladesh is historically concave in nature and highly unstable.²³ Consequently, Myanmar passed its own law defining its maritime boundaries in 1977.²⁴ But, the issue of delimitation of maritime zones came to the fore when, on 1 November 2008, four drilling ships from Myanmar started exploitation for oil and gas reserves within 50 nm southwest of St. Martin Island, an island territory of Bangladesh.²⁵ The Government of Bangladesh claimed that Myanmar’s unilateral action to explore for hydrocarbons in these disputed waters was a clear violation of the LOS Convention.²⁶

On 13 December 2009, Bangladesh, by a letter notified the President of the Tribunal

¹⁶ Riesenber (n 13), p. 840.

¹⁷ The Judgment was delivered with commendable speed, in two years and three months after referral. The case was entered in the list of cases as Case No. 16 on 14 December, 2009.

¹⁸ Both Bangladesh-Myanmar were trying to establish the legal boundary agreement since 1974. In 1974 they agreed on territorial sea boundary of 12 nm so is called ‘1974 Agreed Minutes and later in 2008 Agreed Minutes’.

¹⁹ Judgment (n 7), paras 33-34. Moreover, Bangladesh is situated to the north and northeast of the Bay of Bengal. Its land territory borders India and Myanmar and covers an area of approximately 147,000 square kilometers. And, Myanmar is situated to the east of the Bay of Bengal. Its land territory borders Bangladesh, India, China, Laos and Thailand and covers an area of approximately 678,000 square kilometers.

²⁰ Myanmar ratified the Convention on 21 May 1996 and Bangladesh ratified on 27 July 2001.

²¹ Zeidman (n 11), p. 445.

²² M. Shah Alam & Abdullah Al Faruque, ‘The Problem of Delimitation of Bangladesh’s Maritime Boundaries with India and Myanmar: Prospects for a Solution’, vol. 25, *International Journal of Marine and Coastal Law* p. 405, 2010, p. 407.

²³ Zeidman (n 11), p. 446.

²⁴ Ibid.

²⁵ Alam & Faruque (n 22), p. 408.

²⁶ Ibid, p. 450.

that the Government of Bangladesh had instituted arbitral tribunal proceedings on 8 October 2009, against the Union of Myanmar (now the Republic of the Union of Myanmar) pursuant to Annex VII of the LOS Convention ‘to secure the full and satisfactory delimitation of Bangladesh’ maritime boundaries with Myanmar in the territorial sea, EEZ and continental shelf in accordance with international law’.²⁷ By the same letter, Bangladesh notified the President of the Tribunal about the declarations made under Article 287 of the Convention. In later, both the countries are agreed, respectively, concerning the settlement of the dispute relating to the delimitation of their maritime boundary in the Bay of Bengal.²⁸ By the written declaration, both parties accepted the jurisdiction of the Tribunal under Article 287 (1) of the LOS Convention.²⁹ They also agreed that the Tribunal had jurisdiction to delimit the maritime boundary in the territorial sea, EEZ and continental shelf within 200 nm, and the Tribunal also had jurisdiction in the continental shelf beyond 200 nm from the baselines. Finally, it was decided by the majority decision where only 1 negative vote has cast which was given by the Judge Anthony Amos Lucky from total 21 Judges. And the 2 ad hoc Judges also voted with the majority on all points.

Contribution of the Case

Straight Baseline

Every coastal State’s maritime boundaries are measured from the baseline. The first modern straight baseline was established by the *Norwegian Royal Decree* on 12 July 1935.³⁰ The validity of straight baselines in international law was given in the *Anglo-Norwegian Fisheries case*, 1951 by the ICJ, and made it clear that the coastal State does not have unfettered discretion as to how it draws straight baselines, and it laid down a number of conditions governing the drawing of such baselines.³¹ That was the first case; wherein straight baselines were legitimized as a method of determining maritime boundaries in the international court.³² The ICJ clearly stated in the *Qatar v. Bahrain case* that, as an exception to the normal rules for the determination of baselines, the straight baselines method has to be applied restrictively.³³

Later, Article 7 of the LOS Convention now allowed straight baselines to be used in “localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity”.

²⁷ Luther Rangreji, ‘Bangladesh-Myanmar Maritime Boundary Delimitation Dispute’, vol. 16, *Journal of International Affairs*, 2012, pp.33-37.

²⁸ Riesenberg (n 13), p. 847.

²⁹ Rangreji (n 27), p. 37.

³⁰ Victor Prescott & Clive Schofield, *The Maritime Political Boundaries of the World*, 2nd edition, Martinus Nijhoff Publishers, 2005, p. 139.

³¹ Churchill & Lowe (n 2), p. 35.

³² Zeidman (n 11), p. 455.

³³ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, 1st edition, Cambridge University Press, 2005, p. 269.

In the present case, Bangladesh's depth method is neither 'normal' nor 'straight' but it is somewhat an isomer of a straight baseline method that is not prohibited by international law, even it is not expressly mentioned in Article 7 (2) of the LOS Convention.³⁴ Article 7 (2) of the LOS Convention is also unclear as to whether the delimitation of baselines by depth-method is permitted.³⁵ Myanmar first enacted a Statute establishing a system of straight baseline in 1968 which was not present in its 1977 Territorial Sea and Maritime Zones Law.³⁶ The coastline of Bangladesh is highly unstable due to the cumulative effects of river floods, monsoon rainfall, cyclone storms and tidal surges which have contributed to a continues process of erosion and shoaling.³⁷ The use of straight baselines as applied to delta coasts has been a key position of Bangladesh since the State came into existence. On 3 July 1974, Bangladesh made its proposal on drawing straight baselines along the deltaic coast for the first time to the Second Committee of the LOS Convention in Caracas emphasizing unstable characteristics of its coast.³⁸ While the Committee did not accept the proposal, it eventually revisited its opinion partially and allowed for the drawing of straight baselines along the delta coasts.³⁹ The Tribunal has drawn straight baselines to delimit the parties' maritime boundary zones. To apply the straight baselines, the Tribunal has taken into account of geographical circumstances and presence of deltas under Article 7(2) of the LOS Convention.

Continental Shelf beyond 200 NM

The 1958 Convention⁴⁰ defined the continental shelf in terms of depth and exploitability and only gave rights for exploitation and exploration.⁴¹ To establish an outer continental shelf (OCS) beyond the 200 nm, coastal States that are parties to the LOS Convention must submit data to the CLCS. The LOS Convention has adopted a more expansive definition of the continental shelf than the Truman Proclamation⁴² or that found in

³⁴ Alam & Faruque (n 22), p. 411.

³⁵ M. Habibur Rahman, 'Delimitation of Maritime Boundaries: A Survey of Problems in the Bangladesh Case', vol. 24, *Asian Survey*, 1984, p. 302.

³⁶ Michael A. Becker & Ernesto J. Sanchez, 'International Law of the Sea', vol. 44, *International Lawyer* 2010, p. 519.

³⁷ Alam & Faruque (n 22), p. 412.

³⁸ Muhammad Nazmul Hoque, 'The Legal and Scientific Assessment of Bangladesh's Baseline in the Context of Article 76 of the United Nations Convention on the Law of the Sea', *United Nations- The Nippon Foundation fellow 2005-2006*, 2006, available at http://www.un.org/depts/los/nippon/unfff_programme_home/fellows_pages/fellows_papers/hoque_0506_bangladesh.pdf accessed on 12 April 2016.

³⁹ Zeidman (n 11), p. 457.

⁴⁰ The first Law of the Sea Conference was held in 1956 (UNCLOS I) at Geneva. Which resulted with four conventions in 1958. These are: Convention on the Territorial Sea and Contiguous Zone; Convention on the Continental Shelf; Convention on the High Seas; and Convention on Fishing and Conservation of Living Resources of the High Seas.

⁴¹ Malcolm D Evans, *Relevant Circumstances and Maritime Delimitation*, 1st edition, Oxford University press, 1989, p. 44.

⁴² The Truman Proclamation stated that: 'The Government of United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control'. In its preamble, the proclamation justified this claim on the basis of contiguity and reasonableness. See Churchill & Lowe (n 2), pp. 143-144.

the Geneva regime, giving coastal States an entitlement of a continental shelf of 200 nm regardless of seafloor configuration.⁴³ The CLCS shall make recommendations to coastal States on matters related to the establishment of the OCS.⁴⁴ The limits of the continental shelf established by a coastal State on the basis of these recommendations shall be final and binding.⁴⁵

In this dispute, the first issue for the Tribunal was whether it had jurisdiction to delimit the continental shelf boundary beyond 200 nm and if it did, whether it was appropriate to exercise that jurisdiction.⁴⁶ The Tribunal held in its Articles 76, 77 and 83 treats the continental shelf as a single unit, without any distinction being made between the shelf within 200 nm and the shelf beyond that limit and that, therefore, it had “jurisdiction to delimit the continental shelf in its entirety”.⁴⁷ Myanmar opposed the jurisdiction of the Tribunal over the delimitation of the shelf beyond 200 nm.⁴⁸

And to be fair to the Tribunal, it delivered a bold judgment with regard to the delimitation of the continental shelf beyond 200 nm, and it was the first opportunity where the Tribunal got a first maritime delimitation boundary dispute in its docket.⁴⁹ A more relevant jurisdictional objection made by Myanmar was that, neither litigants had established the OCS on the basis of the recommendations of the CLCS, Tribunal should not exercise the jurisdiction it possessed as a matter of principle to ‘determine the line of delimitation on a hypothetical basis without knowing what the outer limits are’.⁵⁰ Bangladesh, on the other hand, argued that the Tribunal was ‘expressly empowered by the Convention to adjudicate disputes regarding the delimitation of the continental shelf between States arising under Articles 76 and 83 of the LOS Convention’.⁵¹

The Tribunal dismissed Myanmar’s argument that Bangladesh’s continental shelf could not extend beyond 200 nm.⁵² Further, the Tribunal considered whether the exercise of its jurisdiction could prejudice the rights of third States.⁵³ On the issue of third parties, namely India,⁵⁴ the Tribunal noted that they were not bound by a decision of

⁴³ Donald R Rothwell & Tim Stephens, *The International Law of the Sea*, re-printed in 2011, Hart Publishing 2010, p. 99.

⁴⁴ See *United Nations Convention on the Law of the Sea*, 1833 UNTS 397, adopted on 10 December 1982, art 76 (8). (Hereinafter *UNCLOS*)

⁴⁵ Andrew Serdy, ‘Interpretation of UNCLOS Article 76 and the Negative Recommendation of the Commission on the Limits of the Continental Shelf on Ascension Island: Is the United Kingdom Stuck with it?’, vol. 2, *Cambridge Journal on International and Comparative Law*, 2013, p.591.

⁴⁶ See Judgment (n 7), para 363.

⁴⁷ Thomas Cottier, *Equitable Principles for Maritime Boundary Delimitation*, 1st edition, Cambridge University Press, 2015, p. 88.

⁴⁸ See Judgment (n 7), paras 343-347.

⁴⁹ Rangreji (n 27), p. 47.

⁵⁰ Magnusson (n 9), p. 628.

⁵¹ *Ibid*, p. 629.

⁵² Robin Churchill, ‘Dispute Settlement in the Law of the Sea: Survey for 2012’, vol. 28, *International Journal of Marine and Coastal Law* p. 563, 2012, p. 578.

⁵³ See Judgment (n 7), para 366.

⁵⁴ In the meantime, *The Bay of Bengal maritime Arbitration between Bangladesh and India was pending before the*

the Tribunal, and the delimitation of the continental shelf could not prejudice the rights of the third parties.⁵⁵ Finally, the Tribunal concluded that in order to fulfill its duties under Part XV of the Convention, it had “an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm”.⁵⁶ In short, the Tribunal agreed entirely with Bangladesh on the issue of jurisdiction beyond 200 nm.⁵⁷ Moreover, if we look at the entire judgment of the dispute, the continental shelf beyond 200 nm is the most unique and new development in the history of the law of the sea. It open-up a new chapter in the part of the law of the sea.

The Role of CLCS to Delimit the Continental Shelf beyond 200 NM

The CLCS is neither a judicial nor a purely administrative body.⁵⁸ In accordance with the provisions of Article 76, the LOS Convention established the CLCS. The CLCS consists of 21 members elected by the States Parties to the LOS Convention serving in their personal capacities, who must be ‘experts in the field of geology, geophysics or hydrography.’⁵⁹ The fundamental duty of coastal States and the CLCS with respect to the determination of the limits of an inner and OCS within and beyond 200 nm respectively without affecting boundary delimitation of these areas is expressly laid down in Article 76 (10) of the LOS Convention.⁶⁰ As all States have a right to a continental shelf up to the 200 nm, the CLCS is concerned only with an area beyond the 200 nm and the maximum outer limit that a coastal State can establish as its continental shelf.⁶¹ Where a coastal State intends to establish the OCS 200 nm in accordance with Article 76 that State is required to submit the particulars of such limits, along with supporting scientific and technical data to the CLCS, as soon as possible.⁶²

For the extension of its continental shelf, the first submission in this region was made by Myanmar to the CLCS on December 16, 2008.⁶³ The submission expressly claimed that ‘the area of continental shelf that is the subject of this submission is not subject to any dispute between Myanmar and other States’, noted only that ‘delimitation

Permanent Court of Arbitration” (PCA) at The Hague, The Netherlands. That Award was given on 7 July 2014. The PCA to delimit the territorial sea, EEZ, and the continental shelf between the parties within 200 nm and beyond 200 nm. For further, see the Award, available at http://archive.pca-cpa.org/showpage5a3b.html?pag_id=1376 accessed on 28 March 2016.

⁵⁵ Magnusson (n 9), p. 630.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Surya P. Subedi, ‘Problems and Prospects for the Commission on the Limits of the Continental Shelf in Dealing with Submissions by Coastal States in Relation to the Ocean Territory Beyond 200 Nautical Miles’, vol. 26, *International Journal of Marine and Coastal Law*, 2011, p. 430.

⁵⁹ Serdy (n 45), p. 596.

⁶⁰ Barbara Kwiatkowska, ‘Submissions to the UN CLCS in Cases of Disputed and Undisputed Maritime Boundary Delimitations or Other Unresolved Land or Maritime Disputes of Developing States’, *Utrecht Universit Repository*, 2011, available at <https://dspace.library.uu.nl/handle/1874/235430> accessed on 14 April 2016.

⁶¹ Subedi (n 58), p. 413.

⁶² See UNCLOS (n 44), Annex II, art 4.

⁶³ Becker & Sanchez (n 36), p. 519.

negotiations between Bangladesh and Myanmar are ongoing’, and concluded that the submission, therefore ‘has been made without prejudice to the eventual delimitation’.⁶⁴ On the other hand, Bangladesh submitted a strongly-worded rejoinder to Myanmar’s submission. Bangladesh claimed that ‘the unresolved delimitation in the Bay of Bengal’ clearly did constitute a dispute under the Rules of Procedure of the CLCS, which thus required the CLCS to refrain from considering the submission.⁶⁵ Bangladesh submitted its own claim to the CLCS in February 2011, ahead of its disputes with Myanmar and India and asked its claims to be considered without prejudice to those disputes.⁶⁶ The issue remained unresolved when Myanmar made a formal presentation in support of its submission to the CLCS in August 2009, but the CLCS formally suspended its consideration of Myanmar’s claim as of November 18, 2009.⁶⁷

The Tribunal thus confirmed that a State has an inherent right to a continental shelf beyond 200 nm (where it physically exists) and the LOS Convention provides a procedural opportunity to establish the outer limits of that shelf that will enhance the opposability of those limits vis-à-vis other States or, as has been described elsewhere, the CLCS process/procedures provide a legal legitimacy to a coastal State’s determined outer limits.⁶⁸ In *Canada/France Maritime Boundary* and *Nicaragua/Honduras cases* the arbitral tribunal and ICJ, respectively, took the view that they could not delimit the continental shelf beyond 200 nm; whereas in the *Barbados/Trinidad and Tobago case*, the arbitral tribunal decided that it could (although in practice it did not do so as there were no overlapping continental shelves beyond 200 miles).⁶⁹

In the present case, the Tribunal decided that it was competent to, and should, delimit the continental shelf beyond 200 nm.⁷⁰ As to the CLCS, the Tribunal found that such delimitation would assist, not impede, the function of the CLCS and would not prejudice the letter’s finding.⁷¹ After all, the CLCS is a unique mechanism for determining the OCS of the coastal States and for resolving differences among the coastal States over outer limits of a maritime zone on the ocean floor.⁷² After the above assessment, the Tribunal touched one the difficult area in the maritime delimitation. Tribunal further said it has done this with substantive laws and recommendations of the CLCS. And it has clear jurisdiction to do this.

Pronouncement of Grey Area

Another remarkable aspect of the Judgment is the Tribunal’s creation of the so-called

⁶⁴ Ibid, p. 525.

⁶⁵ Ibid, p. 519.

⁶⁶ Zeidman (n 11), p. 468.

⁶⁷ Ibid, p. 519.

⁶⁸ Ted L. McDorman, ‘The Continental Shelf Regime in the Law of the Sea Convention: A Reflection on the First Thirty Years’, vol. 27, *International Journal of Marine and Coastal Law*, 2012, p. 747.

⁶⁹ Churchill (n 15), p. 184.

⁷⁰ Ibid.

⁷¹ Zeidman (n 10), p. 470.

⁷² Subedi (n 57), p. 420.

grey area, measuring approximately 1,100 square km in the Bay of Bengal between Bangladesh and Myanmar.⁷³ This is the first occasion on which an international court or tribunal has ever made any pronouncement on a grey area, as the issue has never arisen in previous cases.⁷⁴ A grey area, in the context of maritime boundary delimitation, refers to the situation where an area on one side of a maritime boundary is beyond 200 nm from the State on the same side of that boundary but within 200 nm of the State on the other side of the boundary.⁷⁵ In the present case, the Tribunal noted that the delimitation of the continental shelf beyond 200 nm gave rise to a 'grey area' located beyond, or southwest, of the 200 nm arcs of Bangladesh but within the 200 nm arcs of Myanmar.⁷⁶ This area is located on Bangladesh's side of the Tribunal's deflected equidistance line but within 200 nm of Myanmar's coast.

The Tribunal noted that the boundary abutting the grey area delimited the continental shelf only (since the EEZs of the parties in this area did not overlap), but did not 'otherwise limit Myanmar's rights with respect to the (EEZ), notably those with respect to the superjacent waters'.⁷⁷ Thus, the seabed of the grey area was Bangladesh's continental shelf and the superjacent waters were part of Myanmar's EEZ.⁷⁸ This grey area was not delimited by the Tribunal.⁷⁹ The Tribunal simply suggests that 'appropriate cooperative arrangements' to resolve this matter.⁸⁰ The unsettled so-called the grey area is also an important part of exploring and for the exploitation of living and non-living resources. For those purposes both the parties can come to the table to negotiate or can make bilateral agreements, or it can be a joint agreement on that particular area.

Theory of Natural Prolongation

The expression of natural prolongation was entered in the vocabulary of the international law of the sea with the judgment of the ICJ in the *North Sea Continental shelf case*.⁸¹ According to this case 'a natural prolongation' of the land territory of a State by virtue of its sovereignty over the land.⁸² In the *Anglo-French Continental Shelf*

⁷³ Clive Schofield & Anastasia Telesetsky, 'Grey Clouds or Clearer Skies Ahead? Implications of the Bay of Bengal Case', vol. 3, *Law of the Report*, 2012, p. 1.

⁷⁴ Churchill (n 52), p. 586.

⁷⁵ Ibid.

⁷⁶ D. H. Anderson, 'Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)', vol. 106, *American journal of International Law*, 2012, p. 822.

⁷⁷ Churchill (n 52), p. 586.

⁷⁸ Ibid.

⁷⁹ Abdullah Al Faruque, 'Judgment in Maritime Boundary Dispute between Bangladesh and Myanmar: Significance and Implications under International Law', vol. 18, *Asian Yearbook of International Law*, 2012, p. 79.

⁸⁰ Riddhi Shah, 'Bangladesh-Myanmar ITLOS Verdict: Precedence for India?', vol. 37, *Strategic Analysis*, 2012, p. 178.

⁸¹ L. D. M. Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries', vol. 84, *American Journal of International Law*, 1990, p. 846.

⁸² Wolfgang Friedmann, 'The North Sea Continental Shelf Cases- A Critique', vol. 64, *American Journal of International Law*, 1970, p. 236.

Arbitration, the court endorsed that, ‘the continental shelf of any State must be the natural prolongation of its land territory and must not encroach on the land territory of another State’.⁸³

In the present dispute, Bangladesh argued that Article 76(1) of the LOS Convention, which provides that the continental shelf of a coastal State comprises the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nm. It means; a State was not entitled to a continental shelf beyond 200 nm unless the whole of the submarine area of its coast was a natural prolongation of its landmass.⁸⁴ Regarding the relevant circumstances in the delimitation of the OCS, Bangladesh contended that ‘the geology and geomorphology of the seabed and subsoil’, since in the view of Bangladesh the ‘entitlement beyond 200 nm depends entirely on natural prolongation while within 200 nm it is based on distance from the coast’.⁸⁵ Bangladesh argued that the Tribunal should ‘take full account of the fact that Bangladesh has the most natural prolongation into the Bay of Bengal, and that Myanmar has little or no natural prolongation beyond 200 nm’.⁸⁶

The Tribunal rejected Bangladesh’s interpretation of Article 76(1), because of the significant geological discontinuity dividing the Myanmar plate from the Indian plate, Myanmar is not entitled to a continental shelf beyond 200 nm.⁸⁷ The Tribunal stated that “natural prolongation is not an independent basis for entitlement and should be interpreted in the context of the subsequent provisions of Article 76(4) of the Convention.”⁸⁸ However, the Tribunal did not take into account geological and geomorphological circumstances such as natural prolongation as a relevant factor argued by Bangladesh.⁸⁹ The natural prolongation would only provide the legal basis for the title to a continental shelf, where a geological shelf extended beyond 200 nm from any State, i.e. it would not conflict with a 200 nm zone drawn from the coast of another State.⁹⁰

Dissenting Opinion of Judge Anthony Amos Lucky

Judge Lucky has cast an only negative vote to the judgment. He says, this case would result in at least one or more dissenting opinions should come as no surprise. He mainly disagreed with the following findings: Agreed Minutes, treatment of St. Martin Island, Method of delimitation, natural prolongation, grey area, and continental shelf beyond 200 nm. In his dissenting opinion, he broadly criticized the ‘Agreed Minutes’

⁸³ Evans (n 41), pp. 47-48.

⁸⁴ Churchill (n 52), p. 614.

⁸⁵ Magnusson (n 9), p. 631.

⁸⁶ Ibid.

⁸⁷ Judgment (n 7), para 438.

⁸⁸ Magnusson (n 9), p. 631.

⁸⁹ Faruque (n 79), p. 78.

⁹⁰ Evans (n 41), p. 51.

signed between the parties in 1974 and 2008. He finds that the 1974 Agreed Minutes as amended in 2008 amount to a tacit agreement with respect to the boundaries of the territorial sea.⁹¹ He says Bangladesh submitted eight affidavits and it is suggested that a court or tribunal should treat such affidavits with caution.⁹² The Tribunal should take into account their credibility and the interests of those providing the information concerned.⁹³ Judge Lucky found that the affidavits are evidence in the case, and Agreed Minutes amount to an agreement.⁹⁴ Based on the 1974 Agreed Minutes and evidence in support thereof, an agreed boundary between the Parties has been established.⁹⁵ In this issue, his final conclusion is that the maritime boundary between Bangladesh and Myanmar in the territorial sea should be the line first agreed between the Parties set out in the Agreed Minutes of 1974, which was reaffirmed in 2008.⁹⁶

Secondly, St. Martin's Island has the full effect of a territorial sea of 12 nm. He says St. Martin's Island is entitled to a territorial sea, continental shelf, and EEZ, as part of Bangladesh.⁹⁷ He mentioned St. Martin Island is not "special circumstances" because the geographical circumstances are different than other islands applied by the earlier decision of international court and tribunals.⁹⁸

Judge Lucky further says the most suitable method, in this case, is the angle bisector method, and he did not agree with Tribunal's applied method.⁹⁹ In this case, geographical circumstances were extremely important in delimiting the maritime boundary. The equidistance will not be appropriate for the following geographical reasons:¹⁰⁰ concavity of the coastline of Bangladesh; Bay of Bengal dispositional system; the location of St. Martin Island; the geomorphological prolongation of the Bangladesh coastline. He found that the angle bisector method of delimitation is the most suitable in this matter for the reasons set out.¹⁰¹

Judge Lucy's other unique dissenting opinion has given on grey area, he says grey area must be divided and, for the reasons set out in this opinion, he allocates the grey area to Bangladesh.¹⁰² About the allocation of the grey area he says:¹⁰³

⁹¹ Anthony Amos Lucky, *Dissenting Opinion in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the bay of Bengal (Bangladesh/Myanmar)*; the Judgement of ITLOS on 14 March 2012, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_diss_op.Lucky.rev.E.pdf, accessed on 16 April 2016.

⁹² Ibid, p. 29.

⁹³ Ibid, p. 29.

⁹⁴ Ibid, p. 31.

⁹⁵ Ibid, p. 31.

⁹⁶ Ibid, p. 63.

⁹⁷ Ibid, p. 45.

⁹⁸ Ibid, pp. 44-45.

⁹⁹ Ibid, pp. 49-50.

¹⁰⁰ Ibid, p. 51.

¹⁰¹ Ibid, p. 54.

¹⁰² Ibid, p. 64.

¹⁰³ Ibid, p. 58.

If the grey area is allocated to Myanmar, then Bangladesh will be denied access to the OCS. If the said area is allocated to Bangladesh, then its entitlement to the OCS in the Bay of Bengal will not be infringed. It is obvious that if the former is adopted, Bangladesh will suffer a greater loss.

Finally, he says the delimitation line beyond 200 nm is the continuation of the line dividing the EEZ and the continental shelf of the States until it reaches the point where the rights of a third State may be affected.¹⁰⁴

Conclusion

The LOS Convention is probably the most important development in the settlement of international disputes since the adoption of the UN Charter and ICJ,¹⁰⁵ and it also makes extensive provision for compulsory dispute settlement procedures in the involving States.¹⁰⁶ It is recognized that maritime delimitation is a very complex and multiform subject as every maritime dispute are unique in nature and there is no single obligatory rule which would have been applied in a particular dispute, as it depends on upon particular disputes, nature, and circumstances. The decisions of the international courts and tribunals, State practice, and the LOS Convention clearly demonstrate that there has been a shift from the equidistance principle to the equitable principle of delimitation and strongly indicate that the equitable principle is the preferred method of delimitation.¹⁰⁷ The desired result of maritime boundary delimitation should obviously be in accordance with equitable principles to achieve an equitable result.

In the present case, the Tribunal has created several milestones in the history of the maritime boundary delimitation. It has begun a new chapter in the Law of the Sea. Although by this judgment it has been proved that, the Tribunal has risen for the purpose of maritime boundary delimitation. The continental shelf beyond 200 nm and the issue of grey area are the new dimensions in the law of the sea. No doubt, this Judgment ended the long-standing debate that had spanned more than three decades. Both Bangladesh and Myanmar are claiming victory in this dispute. Though, it is felt that the Judgement created “win-win” result for both the Parties. It produced a largely unanimous decision, based on the Convention and numerous judicial and arbitral proceedings. The Tribunal also applied the most recent jurisprudence in the history of maritime boundary delimitation. After all assessments, this Judgment is significant for both Bangladesh and Myanmar to begin exploration and exploitation of living and non-living resources in the Bay of Bengal. Now the maritime boundary of the two neighboring States is settled and recognized by the Tribunal to exercise their exclusive rights in respective maritime boundary zones.

¹⁰⁴ Ibid, p. 64.

¹⁰⁵ Alan E. Boyle, ‘Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’, vol. 46, *International and Comparative Law Quarterly*, 1997, p. 37.

¹⁰⁶ Jillaine Seymour, ‘The International Tribunal for the Law of the Sea: A Great Mistake’, vol. 13, *Indiana Journal of Global Studies*, 2006, p. 1.

¹⁰⁷ Alam & Faruque (n 22), p. 421.