A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case

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A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case

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The International Tribunal on the Law of the Sea’s March 2012 Judgment in the Bay of Bengal Case is a landmark decision in multiple ways. It represents the first maritime boundary to be delimitated by the Tribunal. It is the first adjudication of a maritime boundary in Asia, and it is also the first judicial delimitation of a maritime boundary for parts of the extended continental shelf located seaward of the 200-nautical-mile limit from baselines. While the Tribunal’s ruling largely resolves the maritime dispute between Bangladesh and Myanmar, it also raises a number of questions and concerns that are highlighted in this article, including the Tribunal’s approach to delimitation both within and beyond the 200-nautical-mile limit, the treatment of islands, the interplay between law of the sea institutions and the creation of a so-called grey area where continental shelf jurisdiction falls to one state and water column jurisdiction to the other.

Keywords baselines, extended continental shelf, grey area, maritime boundary delimitation

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Introduction

Conflicting maritime claims and confrontations over suspected seabed energy resources led two of the Bay of Bengal coastal states, Bangladesh and Myanmar, to institute proceedings in 2009 before the International Tribunal on the Law of the Sea (ITLOS) for the delimitation of the maritime boundary between them. On 14 March 2012, the ITLOS duly delivered its Judgment on the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bay of Bengal Case). The ITLOS delimited a maritime boundary for the territorial sea, the exclusive economic zone (EEZ) out to 200 nautical miles, and with respect to areas of continental shelf seaward of the 200-nm limit.

This article highlights a number of salient, and in some cases arguably problematic, aspects of the Tribunal’s decision. These include issues related to the treatment of coastlines and baselines, the delimitation methodology applied, the treatment of islands, the construction and adjustment of the provisional delimitation line, the decision to delimit a maritime boundary for extended (or outer) continental shelf areas, the interplay between law of the sea institutions, the relevant circumstances applicable within and beyond the 200-nm limit, and the creation of a so-called grey area.

Background to the Dispute

The Bay of Bengal is one of the largest bays in the world covering approximately 2.2 million km². To the north it is bordered by Bangladesh, to the north and west by India, to the east by Myanmar, and to the southwest by Sri Lanka. The bay is fed in part by the largest delta in the world, that of the Ganges-Brahmaputra river system, predominantly located within Bangladesh’s territory. The bay hosts a large marine ecosystem of great significance which, in turn, has long supported fisheries of importance to the coastal states. It is estimated that over 400 million people in the Bay of Bengal area are dependent on coastal and marine resources for their food, livelihood, and security. While incidents related to fishing activities have occurred among the coastal states, disputes over access to seabed energy resources provided the key catalyst for the Bay of Bengal Case.

The potential existence of an estimated 13.7 trillion cubic feet (tcf) of gas reserves in the Bay of Bengal acted as a major driver in the dispute because these resources were regarded by both states as being potentially critical to their future economic development. When Bangladesh and Myanmar issued overlapping hydrocarbon concession blocks, both states were ready to protect their interests with the deployment of naval vessels, which raised concerns of a confrontation at sea. For example, in November 2008 Myanmar provided a naval escort for South Korean Daweoo International ships flying the flags of the Bahamas, Belize, and India to explore oil and gas reserves 50 nm southwest of St. Martin’s Island in maritime areas that were also claimed by Bangladesh. In response to this perceived threat to its sovereign rights, Bangladesh sent its own naval vessels to the area. The Bangladeshi government also handed a protest letter to Myanmar’s ambassador to Bangladesh demanding that Myanmar stop all exploration in Bangladeshi waters. Myanmar in turn alleged that the Bangladeshi navy was trespassing. This standoff and underlying threat led to the reopening of negotiations between the two states aimed at resolving their maritime disputes and maritime boundary delimitation after a hiatus of 22 years.

Although these renewed boundary delimitation negotiations proved to be unsuccessful, they paved the way for resolution of the dispute through international adjudication. In early 2009, Bangladesh’s minister for foreign affairs submitted the dispute for arbitration under Annex VII of the United Nations Convention on the Law of the Sea (LOSC). However,
Bangladesh and Myanmar were unable to reach a consensus on nominating arbitrators. Subsequently, in December 2009, Bangladesh and Myanmar both agreed to accept the jurisdiction of the ITLOS. The Tribunal’s objective was to secure a full and satisfactory delimitation of the maritime boundary between Bangladesh and Myanmar with respect to territorial sea, EEZ, and continental shelf.

Preliminary Jurisdictional Issues

The ITLOS reached the view that it had jurisdiction to delimit the maritime boundary between Bangladesh and Myanmar for the territorial sea, EEZ, and continental shelf within 200 nm of the coast, and that the law applicable to such delimitation was the LOSC. While the jurisdictional issue was not a prominent source of controversy between the parties, it did stimulate discussion within the Tribunal regarding its powers to adjudicate. Judge Treves cautioned the Court about not being explicit in its decision about the relationship between compulsory jurisdiction under the LOSC and subsequent agreements that parties might reach limiting the potential scope of compulsory jurisdiction. As Judge Treves observed, the Tribunal should have been clearer about why it was accepting jurisdiction over the delimitation of maritime boundaries in this case. Did the ITLOS accept compulsory jurisdiction as provided for under Articles 286 and 287 of the LOSC, or did it accept jurisdiction on the basis of the “mutual consent” agreements in November and December 2009 to submit delimitation questions to the ITLOS? While the potential disparity between these two sources of jurisdiction did not prove to be a barrier to the ITLOS in exercising its jurisdiction, it could prove to be a stumbling block in future cases. Judge Treves’s declaration suggests that the practice of some countries to utilize additional jurisdictional statements may impact the ability of dispute settlement bodies to exercise the broader jurisdiction under Article 287. Similar concerns were raised by Judge Ndaiye who was the only judge to decide that the ITLOS did not have jurisdiction to decide the continental shelf delimitation beyond 200 nm.

Approach to Delimitation

With respect to the delimitation of the territorial sea boundary between Bangladesh and Myanmar, the ITLOS first needed to address the contention of Bangladesh that the territorial sea boundary line had already been agreed between the parties or, failing that, that a de facto boundary line was already in existence. Concerning the prior agreement argument, the Tribunal was of the view that the line referred to in the Agreed Minutes on maritime boundary delimitation negotiations of 1974, and reaffirmed in analogous discussions dating from 2008, did not constitute a legally binding agreement. Bangladesh also argued that both parties had respected the 1974 line for “over three decades” and sought to demonstrate that a tacit or de facto boundary existed through the submission of affidavits from fishermen as well as its navy and coast guard personnel. Myanmar, in contrast, contended that no such agreed boundary was in place and that it had “never acquiesced” to any territorial sea delimitation. The Tribunal drew on the finding of the International Court of Justice in the 2007 Nicaragua-Honduras Case that evidence of a tacit legal agreement “must be compelling” and that the evidence presented by Bangladesh fell short of this standard.

Finding no preexisting or de facto territorial sea boundary in place, the Tribunal delimited the territorial sea in accordance with Article 15 of the LOSC. With regard to delimitation seaward of the 12-nm limits of the territorial sea (i.e., concerning the continental shelf and EEZ), the Tribunal unsurprisingly concluded that Articles 74 and 83
of the LOSC were, respectively, applicable to the delimitation of the EEZ and continental shelf.23

The Tribunal framed the dispute by geographically defining what it considered to be the relevant coastlines and maritime area for delimitation. With respect to the relevant coastlines, in order to “avoid difficulties caused by the complexity and sinuosity of the coast,” the coastline of each of the parties was approximated for the purposes of measurement by two straight lines.24 This arguably constitutes an oversimplification of a coast given the assertion of the Tribunal that “the whole of the coast of Bangladesh is relevant for delimitation purposes.”25

It is, however, hard to fault the outcome on this issue since Bangladesh itself approximated its coast for this purpose by drawing two straight lines.26 That said, use of the parties’ normal baselines would have been conceivable for the purposes of measuring and comparing relevant coastal lengths through the straightforward process of digitizing the low-water line of both states on a particular chart or charts and then comparing the results. A more compelling rationale for approximating the coast in this manner would be as a response to the unstable character of Bangladesh’s coast, which features constantly changing normal baselines due to substantial seasonal deposition and erosion.27

The Tribunal then traced the evolution of jurisprudence on ocean boundary making and the development of the equidistance/special circumstances approach,28 including the three-stage methodology29 applied by the International Court in the 2009 Black Sea Case.30 The Tribunal decided that the equidistance/special circumstances approach constituted the appropriate method for delimiting the continental shelf and EEZ of the parties,31 and opted to follow “the most recent case law on the subject” and apply the Black Sea Case three-stage approach.32 This process comprises: first, the construction of a provisional delimitation line based on equidistance; second, consideration of any factors that might lead to a modification of the provisional line with a view toward achieving an equitable result; and, third, undertaking a (dis)proportionality test.33 This approach to maritime delimitation is, at the first stage at least, inherently reliant on geographical factors since an equidistance-based provisional boundary line is dependent on the baselines, or more specifically critical basepoints, located along the coasts of the parties. The crucial role of coastal geography in maritime boundary delimitation within 200 nm of the coast was explicitly acknowledged by the Tribunal, and the same methodology for delimitation within the 200-nm limit was subsequently applied to delimitation of the extended continental shelf (see below).34

On the face of it, the Tribunal’s chosen approach contrasted with Bangladesh’s preferred option of an angle-bisector method of delimitation whereby the general direction of the coastlines of the parties are approximated and the bisector of the angle between the two general directions taken as the basis for delimiting the maritime boundary seaward of the limit of the territorial sea between them. This approach was favored by Bangladesh as a “macro-geographic” one, consistent with the overall geography of the coasts in question, providing a way to overcome the distorting effects of the concavity of its shoreline relative to its neighbors and thus the pronounced “cut-off” effect that the application of equidistance would impose on its maritime entitlements.35 It appears, however, that the angle-bisector approach strongly informed, or at least was coincident with, the eventual adjustment of the provisional equidistance-based line at the second stage of the three-stage process, although the Tribunal did not make this connection explicit in its ruling (see below).36 For its part, Myanmar rejected the angle-bisector method as “clearly unacceptable”37 while noting that, in any case, Bangladesh had misapplied this approach to delimitation38 and instead preferred an equidistance solution, albeit one giving no effect to Bangladesh’s St. Martin’s Island on its proposed EEZ and continental shelf boundary.39
Treatment of Islands

A particular issue in the delimitation of the territorial sea, EEZ, and continental shelf was the presence of Bangladesh’s St. Martin’s Island just offshore the terminus of the two states’ land boundary on the coast at the Naaf River. (See Figure 1.)

Islands and the Delimitation of the Territorial Sea

In Myanmar’s view, the presence of St. Martin’s Island immediately off its coastline constituted an important special circumstance warranting a departure from the median line with respect to the delimitation of the territorial sea boundary between the parties. Myanmar argued that to grant the island full effect on the territorial sea delimitation would “lead to a considerable distortion,” observed that in adjacent state coastal relationships “islands
generate more exaggerated distortions," and furnished the Tribunal with numerous examples of islands in such situations being accorded a reduced impact on the delimitation of maritime boundaries. Myanmar argued that St. Martin’s Island was on the Myanmar side of a theoretical equidistance line constructed between the mainland coasts of the parties such that the island was located “on the wrong side” of that line. Myanmar also argued that since St. Martin’s Island was in front of Myanmar’s rather than Bangladesh’s coastline, it could not be considered as a “coastal island” of the latter. Consequently, Myanmar proposed that St. Martin’s Island be accorded a significantly reduced, essentially half, effect in the construction of the territorial sea delimitation line.

Bangladesh responded to Myanmar’s arguments regarding St. Martin’s Island by highlighting the island’s proximity (approximately 4.5 nm) to the mainland coasts of both states, its area (8 km²), its large permanent population (7,000 people), and its significant economic role, including the fact that the island is extensively cultivated and able to produce “enough food to meet a significant proportion of the needs of its residents.” Bangladesh observed that the examples of islands being accorded reduced effect in maritime delimitation provided by Myanmar were “not pertinent” to the treatment of St. Martin’s Island on the grounds that they did not relate to territorial sea delimitation, were geographically dissimilar to the circumstances under consideration, and in many cases reflected “political solutions” peculiar to their contexts.

Bangladesh took the view that St. Martin’s Island should be accorded full effect on the delimitation of the territorial sea, contending that the island fulfilled the criteria of Article 121(1) of the LOSC and that it was in principle entitled not only to a 12-nm territorial sea but also to its own continental shelf and EEZ. The Tribunal observed that no “general rule” existed in relation to the effect to be given to islands in the delimitation of maritime boundaries. While the Tribunal acknowledged that precedents did exist for islands, particularly “insignificant maritime features,” to be given less than full effect in the construction of an equidistance line–based maritime boundary, it concluded that St. Martin’s Island did not fall into that category “by virtue of its size and population and the extent of economic and other activities.” The Tribunal found “no compelling reasons” to regard St. Martin’s Island as a special circumstance and awarded the island full effect when it came to delimiting the territorial sea boundary with an equidistance line between normal baselines. The delimitation line ultimately decided by the Tribunal was to a substantial extent analogous to the line agreed to in principle in 1974 and, thus, considerably nearer to Bangladesh’s rather than Myanmar’s proposed line. (See Figure 1.)

Of note in this context is that the territorial sea boundary line established by the Tribunal pays no regard to the numerous low-tide elevations that exist in the area. Indeed, the delimitation line passes over and thereby divides the low-tide elevations between Bangladesh and Myanmar; notably, the Sitaparokia Patches. This is somewhat surprising given that these features lie within 12 nm of the above high-tide coast and, therefore, represent potential basepoints for territorial sea boundary delimitation in accordance with Article 13 of the LOSC. However, both Bangladesh and Myanmar ignored these features in their claims and that undoubtedly led the Tribunal to do likewise. While this might be considered a relatively minor issue, some potential for friction is conceivable over access to these divided features in the context of local fishing activities.

**Islands and Delimitation of the EEZ and Continental Shelf**

In keeping with the three-stage approach, for the EEZ the Tribunal first constructed a provisional boundary line based on equidistance, though not a strict equidistance line. In particular, with respect to St. Martin’s Island, the Tribunal determined that as a consequence...
of its location “immediately in front of the mainland on Myanmar’s side of the Parties’ land boundary,” use of the island as a basepoint for a provisional equidistance line “would result in a line that blocks the seaward projection of Myanmar’s coast” leading to “an unwarranted distortion of the delimitation line.” The Tribunal, therefore, excluded St. Martin’s Island as a basepoint for construction of the provisional delimitation line based on equidistance.

This scenario was analogous to the treatment of Serpents’ Island by the International Court in the Black Sea Case. Indeed, the Tribunal referred to that case with the contention that to use such a basepoint would be tantamount to “a judicial refashioning of geography.” Arguably, however, the counterargument can also be advanced that to ignore certain potentially critical basepoints and to depart from strict equidistance as a starting point for delimitation necessarily also represents a judicial refashioning of geography. Thus, while the Tribunal’s (and earlier the International Court’s) adoption of the three-stage approach should yield greater clarity and consistency in the approach of judicial bodies to the resolution of maritime boundary disputes, the selectivity with respect to basepoints on the part of both the International Court and ITLOS at the first stage of this process is troubling and serves to substantially undermine the objectivity of its application.

An alternative option, and one that might be viewed as more rigorous, impartial, and methodologically systematic, would have been to draw the strict equidistance line including all potential basepoints and then adjust or modify the provisional delimitation line at the second stage of the three-stage process. Indeed, at the second stage the Tribunal could have opted to adjust the strict equidistance line so as to award St. Martin’s Island no effect, though it is worth noting that a provisional equidistance line in this scenario would still need to be adjusted southward in order to address the marked concavity of Bangladesh’s coast. Thus, even a provisional equidistance line giving St. Martin’s Island full effect would tend to inequitably cut off Bangladesh’s maritime entitlement. Nonetheless, this approach would have been a clearer and more systematic way to achieve the same result.

Had the Tribunal in fact constructed a strict equidistance line from all potentially contributing coastal basepoints, including St. Martin’s Island, another island would have come into consideration; that is, Oyster Island. This small feature, belonging to Myanmar, has a lighthouse situated on it, but has no permanent population. However, even a line adjusted to give full effect to St. Martin’s Island and no effect to Oyster Island would not have delivered a delimitation line analogous to the one decided on by the Tribunal. Further adjustment of the provisional equidistance line in favor of Bangladesh would have been required in order to address the cutoff effect suffered by Bangladesh as a consequence of the concavity of its coasts. The second stage of the three-stage approach would then have offered an appropriate opportunity for making such adjustments.

Having already dismissed the use of St. Martin’s Island as a basepoint for construction of the provisional boundary line, the Tribunal at first glance somewhat counterintuitively returned to consider the potential role of this island as a special circumstance that could potentially influence the course of the EEZ and continental shelf boundary. This rather curious scenario arose as a consequence of Bangladesh arguing that St. Martin’s Island should be a special circumstance warranting adjustment of the line and Myanmar countering those arguments. Unsurprisingly, the Tribunal found Bangladesh’s arguments unpersuasive.

The Tribunal’s treatment of St. Martin’s Island, awarding the feature no effect beyond the territorial sea, is consistent with a sustained trend in the treatment of islands in the context of the delimitation of maritime boundaries, especially those features that are small and sparsely or not inhabited (e.g., Serpents’ Island), or are located far from the coast, or are located in such a manner as to significantly and potentially inequitably impact the construction of an equidistance line–based boundary (which applied to both Serpents’ Island and St. Martin’s Island). While the Tribunal’s route to this result is arguably problematic,
this general trend is welcome in that it tends to downplay the potential significance of tiny, remote insular features that are frequently at the center of maritime disputes.

**Adjustment of the Equidistance Line**

Subsequent to drawing the provisional delimitation line, the Tribunal determined whether there existed any reasons to adjust or modify that line with a view toward achieving an equitable delimitation. Bangladesh argued persuasively that the concave character of its coastline would mean that the application of strict equidistance line maritime boundaries would result in its maritime entitlements being severely and inequitably curtailed. The pronounced character of this concavity is, however, only clearly evident when India’s coastline along the western shores of the Bay of Bengal is taken into account. The Tribunal appears to have adopted a macrogeographic perspective even if it did not explicitly state this in the Judgment. Primarily as a consequence of these arguments, the Tribunal considered it appropriate to adjust the provisional equidistance line in such a way as to relieve the resulting cutoff effect on Bangladesh’s maritime entitlements. This adjustment took effect at a point due south of Kutubdia Island, where the Bangladeshi coastline was considered to make an abrupt change in the direction of the Bangladeshi coastline (see Figure 2).

To achieve a reasonable adjustment to the provisional equidistance line that would relieve the cutoff to Bangladesh but not in such a way as to cut off the maritime entitlements of Myanmar, the Tribunal considered it appropriate to adjust or deflect the equidistance line “at the point where it begins to cut off the seaward projection of the Bangladesh coast” and proceed along a geodetic line with an azimuth of 215°. What is notable here is that no mathematical formula is apparent for such adjustment. That said, the result is consistent with the aforementioned angle-bisector method proposed by Bangladesh. Because its coastline arguably comprises two distinct sectors, one oriented east-west and the other northwest-southeast, Bangladesh proposed that they be combined into one line joining the terminus of its land boundary with Myanmar to Mandabaria Island in close proximity to the limit of Bangladeshi territory to the west. The bisector proposed by Bangladesh as a result of this approach yields a 215° line—precisely the same azimuth chosen by the Tribunal, albeit shifted somewhat further to the north. (See Figure 2.)

**Delimitation Beyond 200 Nautical Miles**

Having satisfied itself regarding the potential impact of it exercising the jurisdiction to delimit a maritime boundary beyond 200 nm on both the rights of third parties and on the Area, the Tribunal considered its role and that of the United Nations Commission on the Limits of the Continental Shelf (CLCS). The ITLOS drew a clear distinction between the delimitation of the continental shelf (under Article 83 of the LOSC) and the delineation of the outer limits of the continental shelf beyond 200 nm (in accordance with Article 76), noting that while disputes related to former could be resolved by international courts and tribunals (such as ITLOS), the CLCS was entrusted with providing recommendations to coastal states on the latter. The Tribunal was at particular pains to distinguish between the functions and remits of these institutions, reaching the conclusion that there was no tension between their distinct yet complementary roles.

Myanmar was of the view that the delimitation of continental shelf areas beyond 200 nm between the parties did not arise as the appropriate equidistance-based delimitation line, albeit one ignoring all islands, terminated well short of the 200-nm limit. Myanmar further argued that even if the Tribunal were to find that it had jurisdiction to delimit such a
boundary, it would be inadvisable for it to do so in the absence of the outer limits of the continental shelf being finalised on the basis of recommendations provided for by the CLCS.72 Bangladesh maintained that the ITLOS was “expressly empowered” to adjudicate on the delimitation of both the inner and outer parts of the continental shelf and that the relevant provisions of the LOSC “draw no distinction” between these areas.73 Bangladesh also rejected Myanmar’s contention that the delimitation line should terminate well within the 200-nm limit.74

The Tribunal was sympathetic to Bangladesh’s contentions regarding circularity.75 That is, that if, in keeping with Myanmar’s view, the Tribunal did not delimit a boundary for extended continental shelf areas until the CLCS had issued recommendations concerning the outer limits of the continental shelf and the coastal states concerned had delineated such
limits, then deadlock would ensue since the CLCS itself was prevented from acting because of existence of the dispute preventing it from acting.\textsuperscript{76} This would be the case because the commission is a scientific and technical body rather than adjudicative one and lacks the mandate to resolve sovereignty and maritime disputes such as overlapping claims to outer continental shelf areas. Moreover, the CLCS’s recommendations are specifically without prejudice to the delimitation of continental shelf boundaries for states with opposite or adjacent coasts.\textsuperscript{77} In Bangladesh’s view, making the delineation of the outer continental shelf limits with the input of the CLCS a prerequisite for delimitation of the extended continental shelf by the Tribunal would mean that “the Tribunal would have to wait for the Commission to act and the Commission would have to wait for the Tribunal to act” leading to the creation of an unacceptable “jurisdictional black hole into which all disputes concerning maritime boundaries in the outer continental shelf would forever disappear.”\textsuperscript{78} The irony here is that the block on the commission formulating recommendations on the submission of Myanmar arose because of Bangladesh’s objections, yet it was Myanmar which sought to forestall the Tribunal from delimiting an extended continental shelf boundary.\textsuperscript{79}

Ultimately, the Tribunal concluded that not only could it delimit a maritime boundary with respect to the continental shelf beyond 200 nm, but that it should do so in order to “resolve the existing impasse” that would otherwise potentially prevail, this being deemed to be “contrary to the object and purpose of the Convention.”\textsuperscript{80} The Tribunal also concluded that it had an obligation to adjudicate the dispute and delimit the continental shelf beyond the 200-nm limit and that outer continental shelf limits did not need to be established prior to engaging in this process. Indeed, the ITLOS stated explicitly that “[t]here is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constitutes an impediment to the performance by the Commission of its functions.”\textsuperscript{81} The Tribunal further observed that its delimitation seaward of the 200-nm limit did not constitute an encroachment on the functions of the CLCS as it is without prejudice to the establishment of the outer limits of the continental shelf.\textsuperscript{82}

The Tribunal was, therefore, of the view that there was no impediment to its delimiting a continental shelf boundary seaward of the 200-nm limit where it was convinced that such areas of extended continental shelf did indeed exist to be delimited. The Tribunal remarked that maritime boundary delimitation presupposes the existence of an area of overlapping entitlements.\textsuperscript{83} The Tribunal drew a useful analogy to disputed baselines, arguing that lack of agreement on baselines issues does not preclude the delimitation of maritime boundaries within 200 nm of the coast.\textsuperscript{84} The Tribunal further concluded, in keeping with the fact that continental shelf rights are inherent,\textsuperscript{85} that entitlement to areas of extended continental shelf can exist independently of the establishment of outer continental shelf limits:

\textit{[T]he fact that the outer limits of the continental shelf beyond 200 nm have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned.}\textsuperscript{86}

The basis for the Tribunal’s conviction that there was indeed an extended continental shelf to delimit in large part rested on what it termed the “uncontested scientific evidence” of the parties.\textsuperscript{87} Both Bangladesh and Myanmar were in agreement regarding the existence of extended continental shelf areas in the Bay of Bengal and reference to the academic literature indicating the existence of some 14- to 22-km depth of sedimentary rock underlying the Bay of Bengal.\textsuperscript{88}
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That the parties were in agreement on scientific aspects of the case (i.e., they concurred as to the existence of substantial areas of extended continental shelf underlying the Bay of Bengal beyond their 200-nm EEZ limits), resolved a potential conundrum for the Tribunal. This served to remove the possibility that the Tribunal could have delimited an extended continental shelf boundary only for the CLCS to subsequently recommend that the outer limits of the continental shelf should terminate at the 200-nm limit. On the basis of the parties’ concurrence at least regarding the existence of outer continental shelf area, coupled with the “unique situation” presented by the Bay of Bengal in terms of the existence of exceptionally deep sediments in the area to be delimited, the Tribunal felt confident to proceed with delimitation seaward of the 200-nm limit. The Tribunal stated that it “would have been hesitant to proceed with delimitation of the area beyond 200 nm had it concluded that there was any significant uncertainty as to the existence of continental shelf in the area in question.” Accordingly, the Tribunal delimited an extended continental shelf boundary. It remains open as to the value of this ruling in providing guidance in the delimitation of maritime boundaries seaward of the 200-nm limit where there is less certainty over the existence of areas of outer continental shelf. Further, the Tribunal did not employ geophysical factors as a basis for its delimitation beyond the 200-nm limit (see below). Instead, the Tribunal concluded that the concavity of Bangladesh’s coastline, and thus the cutoff effect suffered by Bangladesh, had “continuing effect” beyond the 200-nm limit. Thus, the delimitation line applied within 200 nm along the azimuth of 215°, which had already been adjusted to take into account the cutoff effect resulting from the concavity of Bangladesh’s coast, was extended seaward of the 200-nm limit until the point where the rights of third states may be affected.

The Death Knell for Geophysical Factors in Maritime Delimitation?

As noted above, Bangladesh and Myanmar were in agreement that substantial areas of continental shelf existed seaward of their 200-nm EEZ limits. Where they differed was over the interpretation of Article 76 of the LOSC and, in particular, the meaning and effect of the term “natural prolongation.” The practical consequence of this disagreement was that each of the parties argued that the entirety of the extended continental shelf area in question should belong to it to the exclusion of the other party. Bangladesh argued that natural prolongation required a coastal state to demonstrate geological and geomorphological continuity extending from its land territory into and under the sea to its continental shelf areas beyond 200 nm. Essential to the Bangladeshi case was that the sediments that make up the seabed and subsoil underly the Bay of Bengal are predominantly derived from Bangladesh, so that these areas of continental shelf should more properly be subject to the sovereign rights of Bangladesh rather than Myanmar (or, indeed, India). It followed from this that Myanmar was not entitled to a continental shelf seaward of the 200-nm limit because Myanmar could not meet the “physical test of natural prolongation” on account of a “fundamental geological discontinuity” marking the geological division between the Burma and Indian tectonic plates (Sunda Subduction Zone).

Myanmar contended, in keeping with its position that an equidistance line was the appropriate boundary line, that delimitation of the extended continental shelf did not arise as the maritime entitlement of Bangladesh terminated well before the 200-nm limit. Bangladesh countered this view arguing that the physical, geological, and geomorphological connection between Bangladesh’s land territory and adjacent seafloor was “so clear, so direct, and so pertinent” that the adoption of a boundary that terminated within its 200-nm
limit would cut it off from access to and rights over areas of extended continental shelf and "constitute a grievous inequity."\textsuperscript{100}

With regard to natural prolongation, Myanmar argued that there was no "test of natural geological prolongation" and rather that the provisions of Article 76(4) relating to the determination of the outer limit of the continental margin should apply.\textsuperscript{101} In keeping with its arguments as to the relevance of "natural prolongation" to entitlement to continental shelf areas, Bangladesh advanced strenuous arguments regarding the applicability of geophysical factors, notably the geology (composition and structure) and geomorphology (shape) of the seabed, to the delimitation of the continental shelf boundary both within and beyond the 200-nm limit. Within 200 nm, the Tribunal was unpersuaded by Bangladesh’s arguments regarding the “Bangladesh depositional system.” The Tribunal did not consider Bangladesh’s geophysical arguments relevant to the delimitation of a single maritime boundary applicable to the delimitation of both the continental shelf and superjacent water column rights within 200 nm. The Tribunal stated that

[t]he location and direction of the single maritime boundary applicable both to the seabed and subsoil and to the superjacent waters within the 200 nm limit are to be determined on the basis of [the] geography of the coasts of the Parties in relation to each other and not the geology and geomorphology of the seabed of the delimitation area.\textsuperscript{102}

As Evans has noted, the concept of natural prolongation has been employed in a variety of ways and for varied purposes as “a basis of title, a means of delimitation, an equitable principle of delimitation, a criterion for delimitation and as a relevant circumstance.”\textsuperscript{103} The Tribunal acknowledged that, while the term “natural prolongation” had been introduced as “a fundamental notion” underpinning the regime of the continental shelf, “it has never been defined.”\textsuperscript{104} The Tribunal concluded that the concept of natural prolongation and the continental margin “are closely interrelated,” and that they “refer to the same area.”\textsuperscript{105} The Tribunal, therefore, concluded that natural prolongation should be understood in light of the subsequent provisions of Article 76 dealing with the definition of the outer limits of the continental shelf and continental margin especially Article 76(4):

Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4.\textsuperscript{106}

As a result of this, the Tribunal found it “difficult to accept” that natural prolongation referred to in Article 76(1) represents “a separate and independent criterion” that must be satisfied as a precondition for the possession of continental shelf rights seaward of the 200-nm limit as proposed by Bangladesh.\textsuperscript{107} The Tribunal concluded that both Bangladesh and Myanmar had entitlements to continental shelf extending beyond the 200-nm limit that overlap with one another and could be subject to delimitation.\textsuperscript{108}

With respect to delimitation of the continental shelf seaward of the 200-nm limit, the Tribunal was of the view that there was only one continental shelf with no essential difference between those parts within and seaward of the 200-nm limit.\textsuperscript{109} The Tribunal further concluded that Bangladesh’s “most natural prolongation” argument (i.e., that it possessed a superior connection and continuity to the extended continental shelf areas in question both geologically and geomorphologically) was of no relevance in light of its ruling that natural prolongation was to be interpreted in accordance with the terms of Article
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This represents an important development in that the Tribunal has offered a means by which natural prolongation, so often a source of mystery and confusion, can be interpreted with enhanced objectivity and precision. It remains to be seen, however, whether geophysical factors in the delimitation of maritime boundaries seaward of 200-nm limits have been entirely disposed of as the ITLOS decision seems to suggest. The Tribunal was faced with the delimitation of what it considered to be extended continental shelf areas subject to overlapping entitlements with no clear geological or geomorphological distinction between the entitlements of the parties. However, it is not inconceivable that geophysical factors may arise with respect to delimitation of extended continental shelf areas where such geophysical distinctions may be more clear-cut, raising the possibility that geophysical factors may yet play a role in the delimitation of outer continental shelf boundaries. For example, two opposite states located on separate margins may still possess overlapping outer limits of the continental shelf that require delimitation. If a major geomorphic or geological feature (e.g., a trough or plate boundary) exists in the area to be delimited, then such a feature could be used as the basis for the alignment of the outer continental shelf boundary. An alternative option might be to construct an equidistance line between opposing foot of slope points. The advantage of this approach would be that a boundary line delimited would have a stronger relationship to the basis for entitlement to and delineation of areas of outer continental shelf—something that an equidistance-based line between coastal baselines lacks.

The Grey Area

A direct consequence of the decision to continue the adjusted delimitation line seaward of Bangladesh’s 200-nm EEZ limit was the creation of an area where continental shelf rights are accorded to Bangladesh, but jurisdiction over the superjacent water column rests with Myanmar. This is because Myanmar’s 200-nm limit lies further to the south than does that of Bangladesh. Thus, those areas on the Bangladeshi side of the line delimited by the Tribunal seaward of Bangladesh’s 200-nm EEZ limit constitute areas of extended continental shelf, yet this same area still lies within 200 nm of Myanmar so its rights over the water column are unaffected by the Tribunal’s delimitation. This so-called grey area encompasses an area of approximately 1,100 km². (See Figure 2.) The Tribunal noted “there was no question” of delimiting the EEZs of the parties in this area “as there is no overlap of those zones.” Moreover, the Tribunal lacked the jurisdiction to impose a cooperative arrangement for the grey area and, in any case, it would have been inappropriate for the Tribunal to attempt to do so—cooperation cannot be imposed or forced, but must be entered into freely.

The Tribunal recognized that the fact that different states had jurisdiction over the seabed and water column would need to be addressed. However, it suggested that “[a]ny delimitation gives rise to complex legal and practical problems, such as those involving transboundary resources.” The Tribunal further expressed the view that the legal regime of the continental shelf had always coexisted with another legal regime in the same area (e.g., the high seas and, more recently, the EEZ).

Note can also be made that Australia and Indonesia have delimited continental shelf and EEZ boundaries in different locations in the Timor Sea, meaning that areas of Australian continental shelf are overlain by water column under Indonesian jurisdiction. The Torres Strait treaty also splits the vesting of rights in this case between Australia and Papua New Guinea. Moreover, the Tribunal observed that there are many ways for the parties to address their responsibilities, including “appropriate cooperative arrangements.” It
can also be suggested that the delimitation of a maritime boundary represents only the starting point for collaborative oceans management that necessarily involves transboundary cooperation.

It is difficult to find fault with the Tribunal’s suggestion that maritime cooperation offers an avenue to deal with the grey zone conundrum. There are examples of maritime cooperation in a multitude of forms, including numerous maritime joint development agreements and other provisional arrangements of a practical nature. Such arrangements are not, however, cost free. Initiating and, crucially, maintaining joint arrangements over the long term pose distinct challenges. Similarly, the above-mentioned arrangements involving multiple seabed and water column boundaries, and thus overlapping jurisdictional rights in the same maritime space are inherently complex and raise a range of challenges on which the LOSC does not offer clear guidance. Problems have been highlighted in relation to attempts by one state to develop the resources of that part of its continental shelf overlain by the EEZ of another state. The positioning of installations and structures associated with oil and gas exploitation have implications for access to parts of the EEZ belonging to the other state. Similarly, problems may potentially arise in relation to marine pollution and the conduct of marine scientific research in such multijurisdictional maritime spaces. While it may seem that the concerns outlined above have been addressed with respect to Australia and Indonesia’s arrangements in the Timor Sea, questions have been raised as to the adequacy of the arrangements. What is clear is that arrangements of multiple boundaries and layered jurisdictions are heavily dependent on the goodwill and cooperation between the states concerned.

The Tribunal’s perspective may, therefore, be overly sanguine and optimistic. After all, the parties to the Bay of Bengal Case proved unable to resolve their differences over the delimitation of their maritime boundaries despite many years of diplomatic effort. Now Bangladesh and Myanmar are faced with having to return to the negotiating table in order to reach potentially complex and contentious cooperative arrangements for the multijurisdictional space that is the grey area.

The role of grey areas in the future is unclear. Some argue that grey areas should be avoided by terminating the boundary line where entitlements overlap. There is, however, an increasing chance that such zones will occur as more cases of delimitation of extended continental shelves arise, especially in circumstances analogous to the Bay of Bengal Case where an adjustment from an equidistance line is necessary in order to achieve an equitable outcome.

Testing the Line

At the final stage of the delimitation process a (dis)proportionality test was undertaken to ensure that the proposed delimitation line was equitable. The Tribunal calculated the lengths of the relevant coastlines of the parties as being 413 km for Bangladesh and 587 km for Myanmar, giving a ratio of 1:1.42 in favor of Myanmar. Of the relevant area under consideration, the Tribunal’s adjusted equidistance line allocated approximately 111,631 km² to Bangladesh and 171,832 km² to Myanmar, yielding a ratio of 1:1.54 in Myanmar’s favor. The Tribunal determined that the comparison between these ratios did not indicate any significant disproportion warranting a further adjustment of the delimitation line.

The term “disproportionality” rather than proportionality was used by both the International Court and ITLOS in the Black Sea and Bay of Bengal Cases, respectively. This appears to indicate a shift in emphasis with the point of the test being reframed as one
designed as a check on inequitable disproportion rather than one designed to deliver a direct link between the ratios of relevant coasts and areas apportioned.

**Alternative and Dissenting Views**

As the first opportunity for the ITLOS to opine on maritime delimitation, there was a flurry of observations offered beyond the Tribunal’s majority opinion. That said, the Judgment garnered a remarkably high degree of support from the Tribunal overall, including both ad hoc judges. Accompanying the majority opinion are two declarations, two joint declarations, three separate opinions, and one dissenting opinion. Even though there were declarations and opinions from 11 of the 22 judges, the overall decision on the final maritime boundary line was widely supported. Only Judge Lucky dissented to the maritime delimitation boundary line established up to the 200-nm limit. Beyond 200 nm, Judge Ndiaye and Judge Gao joined Judge Lucky in offering dissenting views about the appropriateness of continuing the line along the 215° azimuth.

Two important declarations were offered by Judge Treves and Judge Wolfrum. Judge Treves, as discussed above, was concerned with how the ITLOS articulated its jurisdictional authority in the Bangladesh and Myanmar case—compulsory jurisdiction versus special agreement of the parties. He argued for the ITLOS to pursue progressive development of the law of the sea through its interpretation and harmonization of existing law. This is a pronounced departure from the general understanding of international institutional lawmaking capacity. For example, before the International Court, case law serves not as a primary source of law, but rather as “subsidiary means for the determination of rules of law,” moreover, the Court has declined a legislative role. Scholarly commentary has recognized that “the act of the Court is a creative act in spite of our conspiracy to represent it as something else.” While Judge Wolfrum’s call for the ITLOS to engage in a “law-making function” reflects the actual influence of international tribunals on the development of international law, his comment may renew the debate about whether international courts and tribunals should be making international law or simply interpreting the law.

Judge Wolfrum also provided specific advice both for streamlining and being more specific about the delimitation process in future proceedings. He suggested that concerns over proportionality and disproportionality should be incorporated into adjustments of a provisional equidistance line. Judge Wolfrum expressed some concern that the Tribunal did not discuss the merits and demerits of alternatives to the line that it ultimately deemed as an equitable one.

The joint declaration by the ad hoc judges in this case contributes strongly to the spirit of consensus that surrounded the results. Judge Oxman, appointed as an ad hoc judge by Myanmar, and Judge Mensah, appointed by Bangladesh, shared the opinion that there was no reason that the ITLOS could not delimit the continental shelf beyond 200 nm and, therefore, would not have to wait to receive recommendations from the CLCS. According to Judges Oxman and Mensah, there was nothing prejudicial to the rights of the parties since the two parties will have the opportunity to revisit the issue of their bilateral limits of the continental shelf after the CLCS provides its recommendations. Both judges emphasized their comfort with the Tribunal’s application of the equidistance/relevant circumstances method so that the coasts of both states were given “their effects in a reasonable and balanced way.”
In contrast to Judge Wolfrum’s perspective of the ITLOS as a lawmaker, Judge Gao was opposed to any attempted general lawmaking by the Tribunal. He voted “with reluctance” for the Judgment because he agreed for the most part with the resulting boundary line. His separate opinion strongly disagreed with the Tribunal’s articulated means to the end. In a substantial (100-paragraph, 46-page) separate opinion, Judge Gao insisted that any effort by the Tribunal to suggest that it was objectively delimiting the boundary was simply window dressing since all delimitation is an exercise in subjectivity “as far as selection of base points is required.” He faulted the majority for uncritically adopting the equidistance/relevant circumstances test. In what reads more as a dissenting opinion than a separate opinion, Judge Gao wrote: “If there is ever a case in the world in which the equidistance methodology should not be applied because of the special geography of a concave coastline, it must be this present case in the Bay of Bengal.”

Weighing the pros and cons of the equidistance/relevant circumstances methodology and the angle-bisector methodology, Judge Gao looked back at previous cases decided by the International Court and arbitration panels and concluded that there was no emerging state practice requiring the application of the equidistance approach. While Judge Gao observed that the vast majority of maritime boundaries were decided on the basis of the equidistance method, this practice was not sufficient to rise to the level of customary international law. More specifically, Judge Gao argued for an exception to any application of the equidistance approach for states with concave coastlines.

Judge Gao was particularly troubled with the application of the equidistance methodology in the Bay of Bengal Case. He argued that the adjustment to the provisional equidistance line was unprecedented and unprincipled. Going to great lengths to describe what factors have been considered to be relevant circumstances in previous adjudications and the impact on the provisional equidistance line in those cases, Judge Gao concluded that the Tribunal exercised “considered manipulation based on clearly subjective determinations.” He called for the Tribunal to exercise “honesty” about its application of the methodology. While the Tribunal may have intended to apply an equidistance approach, the final azimuth line of 215° drawn by the Tribunal was in fact drawn from the angle-bisector approach.

Judge Gao further found fault with the application of the latter method suggesting that a proper treatment of the coastal facades of the parties would have yielded a bisector azimuth of 218°.

Judge Gao expressed surprise regarding the Tribunal’s treatment of St. Martin’s Island in the continental shelf and EEZ delimitation. Citing a number of bilateral treaty examples where islands have been given effect, Judge Gao questioned why St. Martin’s Island, which qualifies under Article 121 as an island, was given no effect since it impacts Bangladesh’s expectations of a “legitimate seaward projection” and “constitutes a detriment to Bangladesh’s rights and interests.” He suggested that St. Martin’s Island could have been awarded a “half-effect.” While this view did not carry the day in the Tribunal’s decisions, it has merit in that it draws a distinction in the treatment of an island 4.5 nm from Bangladesh’s mainland with 7,000 economically self-sustaining residents, as compared with one that is wholly uninhabited save for governmental personnel (Serpents’ Island in the Black Sea Case), suggesting that the former should be entitled to at least some effect on the boundary line.

Acknowledging for the purposes of his argument that the equidistance method was the method adopted by the Tribunal, Judge Gao expressed consternation that the Tribunal did not apply the three-stage equidistance/relevant circumstances method that it claimed it would apply. Regarding the continental shelf beyond 200 nm, the Tribunal did not perform any adjustment of the provisional equidistance line or proportionality test, with Judge
Gao suggesting that it would have been appropriate for the Tribunal to have adjusted the line to reach an equitable solution until such a line would impact third party interests.\textsuperscript{162}

Judge Gao provided a proposed test for future delimitations. Rather than the approach based on the \textit{Black Sea Case}, he suggested that parties might start with the approach of an equidistance method but, if “drastic” adjustments to the provisional line were required, then the Tribunal should consider using another method.\textsuperscript{163} He concluded his separate opinion with a clear statement that if there had been a vote regarding the delimitation method, he would have voted against the equidistance-based approach.\textsuperscript{164} Regarding the equidistance line, Judge Lucky agreed with Judge Gao that the appropriate method for the \textit{Bay of Bengal Case} was one of employing the angle-bisector approach because the geographical issues were unique including a double concavity, an extensive deposition system, natural prolongation of the coastline, and St. Martin’s Island.\textsuperscript{165}

**Implications and Reflections**

The \textit{Bay of Bengal} Judgment has the hallmarks of a landmark decision in several ways: it represents the first venture into maritime boundary delimitation on the part of the ITLOS; it is the first adjudication of a maritime boundary in Asia; and it is the first judicial delimitation of a maritime boundary for parts of the continental shelf located seaward of the 200-nm limit. Overall the Tribunal’s Judgment is to be welcomed. Fundamentally, the Tribunal’s decision, delimiting as it does maritime boundaries for multiple zones of jurisdiction, represents substantial progress toward maritime dispute settlement in the Bay of Bengal.

With respect to reflections on the experience of the Tribunal itself in its first maritime boundary delimitation case, a few observations can be made based on interviews with sources within the ITLOS. Two key issues or challenges appear to have animated the Tribunal’s judges. First, there was a desire to demonstrate that the ITLOS is the main judicial body for dealing with all ocean law issues. Since a majority of the cases handled thus far by the ITLOS have related to vessel prompt release, the contribution of the ITLOS toward the development of international ocean law has been less than clear. Thus, there was pressure on the Tribunal to make a specific impact on the law of the sea regime, in particular within the framework of international judicial bodies. The ITLOS’s response to assuming a more active role in ocean adjudication can be observed through its exercise of jurisdiction and competence regarding the outer continental shelf, particularly in deciding whether and how to delimit the continental shelf beyond 200 nm and in creating the grey area to acknowledge overlapping maritime interests.

Second, despite seeking to make a distinct impact on the substance of ocean law, the legal reasoning of the ITLOS was consistent with the existing jurisprudence. Accordingly, the Tribunal’s Judgment is steeped in references to previous judicial decisions and its treatment of St. Martin’s Island, the methodology for delimitation of EEZ and continental shelf within 200 nm, and adjustment of the provisional equidistance line are all consistent with earlier jurisprudence. This serves to insulate the Tribunal from accusations that it may be contributing to a fragmentation of international jurisprudence.

In meeting the two challenges above, the ITLOS in the Bangladesh and Myanmar dispute moved forward the development of international law on maritime delimitation (particularly on the continental shelf beyond 200 nm) and it also reinforced the existing jurisprudence of international law on maritime delimitation by looking back to what was done by other international judicial bodies (mainly, the International Court). Following the precedents can, however, lead to the repetition of the same problems that occurred in previous cases.
While the Statute of the ITLOS emphasizes that the decisions of ITLOS “shall have no binding force except between the parties in respect of that particular dispute,” there is little question that future international judicial bodies will follow the precedent set by the Bay of Bengal Case. In other words, future cases of not only the ITLOS but other judicial bodies (including the International Court and the arbitral tribunals) are likely to show little deviation from this approach and to demonstrate that particular concerns regarding the fragmentation of international law caused by creation of the ITLOS are groundless.

In spite of the caution against lawmaking by judicial institutions, the Bay of Bengal Case may reflect another step toward the progressive international lawmaking that Judge Wolfrum explicitly called for in relation to maritime delimitation. For example, the outcomes of the Bay of Bengal Case, in particular treatment of islands, delimitation methods, and physical (geological or geomorphological) factors in maritime delimitation, were at the center of the recent debate in the public hearings held in the Territorial and Maritime Dispute (Nicaragua v. Colombia) before the International Court. The Black Sea Case was also prominently referred to in those hearings.

Overall, the Tribunal’s adoption of the same three-stage process from the Black Sea Case should be welcomed as a contribution to enhance the consistency and predictability in judicial decisions relating to maritime boundary delimitation. Past international rulings on maritime boundary delimitation have been subject to criticism for their apparent lack of clarity in approach. The apparent standardization of approach offered by the three-stage process, most recently applied by the International Court in the 2012 Colombia-Nicaragua Case, is generally helpful, in that it clearly indicates the likely approach to maritime delimitation to be taken in future judicial decisions.

That said, it is problematic that the ITLOS, and also the International Court in the Black Sea Case, were selective with respect to choice of basepoints at the outset of the three-stage process. This overt judicial refashioning of geography and consequent departure from strict equidistance in the first stage substantially undermine the clarity and objectivity of the process. The Tribunal’s uncritical acceptance of the manner in which the International Court applied the three-stage process in its previous jurisprudence is disappointing.

The Bay of Bengal Judgment also has significant implications, particularly in relation to the interpretation of the term “natural prolongation,” to the delimitation of maritime boundaries beyond the 200-nm limit and the relevant factors that may be considered. The Tribunal’s rejection of natural prolongation as “a separate and independent criterion” and the linkage of this hitherto ambiguous concept to the delineation of the limits of the continental margin in keeping with Article 76(4) of LOSC, provides for the objective determination of the limits of a coastal state’s natural prolongation. Concerning the relevance of such issues to maritime boundary delimitation, while the Tribunal’s rejection of geophysical factors as relevant to the delimitation of maritime boundaries for a single maritime boundary relevant to both seabed and superjacent water column within 200-nm limits was hardly unexpected, its rejection of geophysical factors in its delimitation of the extended continental shelf represents an important development.

This is of significance in light of the many, yet to be delimited, maritime boundaries seaward of 200-nm EEZ limits. It has been estimated that, as of late 2012, submissions to the CLCS encompassed on the order of 29.5 million km² of extended continental shelf areas. Of particular note is that in excess of 3 million km² of these potential outer continental shelf areas overlap with one another. Natural prolongation-inspired geophysical arguments could have a role to play in the delimitation of the numerous potential extended continental shelf boundaries. The Tribunal’s ruling, however, suggests otherwise. Nevertheless, it is not inconceivable that geophysical factors may play a role in the delimitation of...
extended continental shelf boundaries in certain circumstances. For example, where marked distinctions in the composition or morphology of the seafloor and subsoil are apparent in the area to be delimited, there is no reason that they could not serve as factors influencing the course of the boundary line seaward of the 200-nm limit. This would, however, go against the increasingly established trend in favor of equidistance-based lines in keeping with the three-stage approach to maritime delimitation.

The Tribunal’s elegant articulation of its own role and that of the CLCS is also welcome. Nevertheless, it is difficult to draw definitive conclusions with regard to future cases. The Tribunal rightly acknowledged that Article 76 of the LOSC “contains elements of law and science” such that the commission, as a scientific and technical body, is competent to offer recommendations on the scientific and technical issues arising from the implementation of Article 76 while the Tribunal can interpret and apply the legal provisions of the same article. The Tribunal deemed itself able to proceed with delimitation beyond the 200-nm limit in the Bay of Bengal Case precisely because the scientific issues, whether the extended continental shelf areas existed to be delimited, were not in question. It remains unclear when scientific questions become legal ones in the context of Article 76.

In spite of the unresolved aspects of resource sharing in the grey area, the decision raises development hopes for both countries. Bangladesh has been awaiting the Tribunal’s decision so that it can pursue offshore exploration of prospective fields without fear of reprisal from Myanmar. Likewise, Myanmar is also eager to confirm offshore leasing arrangements with companies that had licenses for some of the previously disputed blocks containing an estimated 6 tcf of gas. Both Bangladesh and Myanmar should benefit because the decision provides security and certainty for foreign investors regarding the relevant coastal state’s entitlements to assign exploration and exploitation rights.

Dipu Moni, minister of foreign affairs for Bangladesh, expressed her approval of the Tribunal’s decision because “it finally resolves—peacefully and according to international law—a problem that has hampered the economic development of both States for more than three decades.” One can only hope that the Tribunal’s decision has strengthened political commitment to bilateral cooperation in the region and that, if disputes regarding the grey area arise, they too will be resolved peacefully and according to international law.

The regional maritime delimitation story is not closed and there is much conjecture as to how the Bay of Bengal Case will influence the arbitration between Bangladesh and India. Hopefully, the Arbitral Tribunal in the dispute between Bangladesh and India will be as successful as the ITLOS in the Bay of Bengal Case in creating a consensus among judges regarding the drawing of an equitable and lasting delimitation boundary.

Notes


2. Technically, the correct abbreviation for nautical miles is M or NM, with nm denoting nanometers. However, M is often taken to mean meters and nm is widely used as an abbreviation for nautical miles, so the latter will be used in this article.

3. It is acknowledged that neither of the terms outer or extended continental shelf is ideal or has gained universal acceptance. The term outer continental shelf suggests that there are distinct parts of the continental shelf when legally this is not the case. For its part the term extended continental shelf gives the somewhat misleading impression that coastal states are somehow extending or advancing claims to additional areas of continental shelf when the sovereign rights enjoyed by the
coastal state over the continental shelf are inherent. Because “extended continental shelf” is used by the UN Commission on the Limits of the Continental Shelf (CLCS) in its Scientific and Technical Guidelines, it will be employed in this article. See the Scientific and Technical Guidelines of the Commission, Doc. CLCS/11, available at www.un.org/Depts/los/clcs_new/commission_documents.htm#Guidelines.

4. Bay of Bengal Case, supra note 1, para. 33.
5. The Bay of Bengal Large Marine Ecosystem is subject to a Global Environment Facility (GEF) project. See www.boblme.org/projectOverview.html.
7. Ibid.
8. Ibid.
12. Bay of Bengal Case, supra note 1, paras. 1, 40.
13. Ibid., para. 50.
15. Declaration of Judge Treves, Bay of Bengal Case, supra note 1, para. 3.
16. Separate Opinion of Judge Ndaiye, Bay of Bengal Case, supra note 1, para. 53 et seq.
17. Bay of Bengal Case, supra note 1, para. 98. The line in question was one of equidistance, connecting the “mid-point between the nearest points on the coast.” See 1974 Agreed Minutes, reproduced in ibid., para. 57.
18. Ibid., paras. 101–106.
19. Ibid., paras. 107–111.
21. Bay of Bengal Case, supra note 1, paras. 117–118.
22. Ibid., paras. 127–128.
23. Ibid., para. 182.
24. This phrase was used with respect to the coast of Bangladesh. Ibid., para. 201. Similarly, the Tribunal stated that Myanmar’s relevant coast should be measured by two straight lines to “avoid difficulties caused by the sinuosity of the coast” and “to ensure consistency” in the measurement of the relevant coast of each party. Ibid., para. 201.
25. Ibid.
26. Ibid., para. 187.
27. According to Article 5 of the LOSC, supra note 10, “normal baselines” are coincident with “the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”
28. Bay of Bengal Case, supra note 1, paras. 226–232.
29. Ibid., para. 233.
31. Bay of Bengal Case, supra note 1, para. 239.
32. Ibid., para. 240. It can be noted that the three-stage approach was again adopted by the International Court in the Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, 19 November 2012, paras. 191–193, available at www.icj-cij.org/docket/files/124/17164.pdf.
34. Bay of Bengal Case, supra note 1, paras. 322, 462.
35. See Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), International Tribunal for the Law of the
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Sea (ITLOS), Case No. 16, Written Proceedings, *Memorial of Bangladesh*, para. 1.14. See also paras. 6.56–6.80.

36. Since Bangladesh’s coastline arguably comprises two distinct sectors, one oriented east-west and the other in a northwest-southeast direction, Bangladesh proposed that they be combined into one line joining the terminus of its land boundary with Myanmar to Mandabaria Island in close proximity to the limit of Bangladesh’s territory to the west. The bisector proposed by Bangladesh as a result of this approach yields a $215^\circ$ line that Bangladesh suggested should be transposed southward to start at the terminus of the equidistance-based territorial sea boundary that it favored. See, *ibid.*, para. 6.70; and *Bay of Bengal Case*, supra note 1, paras. 213–217.

37. See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, International Tribunal for the Law of the Sea (ITLOS), Case No. 16, Written Proceedings, *Counter-Memorial of the Union of Myanmar*, para. 5.84.

38. In Myanmar’s view, Bangladesh’s interpretation of the angle-bisector method “very abusively” reduced the influence of Myanmar’s relevant coasts in order to shift the proposed boundary line further south to Bangladesh’s advantage. While firmly rejecting use of the angle-bisector method, Myanmar nonetheless illustrated a “less untenable” application of the method, resulting in an azimuth of $237^\circ$. *Ibid.*, paras. 5.85–5.86, sketch map 5.6. Bangladesh, in turn, rejected Myanmar’s criticisms and version of the angle-bisector method and mounted a robust defense of its own interpretation in its Reply. See *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, International Tribunal for the Law of the Sea (ITLOS), Case No. 16, Written Proceedings, *Reply of Bangladesh*, paras. 3.129–3.164.

39. *Counter-Memorial of Myanmar*, supra note 37, para. 5.88.
40. *Bay of Bengal Case*, supra note 1, para. 131.
42. *Ibid.*, para. 133.
44. Myanmar’s proposed territorial sea boundary line lies around 6 nm rather than 12 nm off the coast of St. Martin’s Island.
45. *Bay of Bengal Case*, supra note 1, para. 143.
52. Article 13 of the LOSC, supra note 10, defines a “low-tide elevation” as a “naturally-formed area of land which is surrounded by water at low-tide but submerged at high-tide.” While low-tide elevations are not capable of generating claims to maritime space independently, if one is located wholly or partially within the breadth of the territorial sea measured from the normal baseline of a state’s mainland or island coasts, it can be used as a territorial sea basepoint.
53. *Bay of Bengal Case*, supra note 1, para. 265.
54. The Tribunal also excluded other islands from consideration, exclusively using mainland basepoints for the construction of the provisional delimitation line. This approach was in keeping with Myanmar’s proposals, which also ignored all islands. However, the provisional boundary line was substantially adjusted in order to take the concavity of Bangladesh’s coastline into account.
55. *Black Sea Case*, supra note 30, para. 149.
56. *Bay of Bengal Case*, supra note 1, para. 265; *Black Sea Case*, supra note 30, para. 149.
57. *Bay of Bengal Case*, supra note 1, paras. 298–319, in particular para. 318.
59. In its Memorial, Bangladesh stated that Oyster Island had an area of “roughly 0.02 sq
km” and was “a sandy outcrop” approximately 10.5 nm off the coast of Myanmar “on which is
located a lighthouse.” Bangladesh also asserted that “Oyster Island has no permanent population, and
none could be sustained. Nor is it capable of sustaining an economic life of its own.” Memorial of
Bangladesh, supra note 35, para. 2.21, see also paras. 6.49–6.52. Incidentally, Oyster Island was the
critical feature for the construction of the delimitation line based on equidistance line proposed by
Myanmar—something Bangladesh highlighted and objected to strongly in its pleadings in a section
titled “The Entire Course of the Equidistance Line Is Determined by a Single, Insignificant Feature.”
See ibid., paras. 6.47–6.55.
60. Bay of Bengal Case, supra note 1, paras. 298–315.
61. Ibid., paras. 316–319.
62. Ibid., paras. 293–297.
63. Ibid., paras. 329–331.
64. Ibid., para. 334.
65. Memorial of Bangladesh, supra note 35, para. 6.70.
66. This shift resulted from the Tribunal’s decision to discount St. Martin’s Island in the
construction of the EEZ and continental shelf boundary line. As a result, St. Martin’s Island is
semienclaved with a 12-nm arc of territorial sea joining the terminus of the territorial sea boundary
delimited by the Tribunal based on equidistance and the start of the EEZ/continental shelf boundary
line proceeding seaward. In contrast, Bangladesh had proposed that the bisector line be transposed
to the south such that it would start from seaward terminus of an equidistance-based territorial sea
boundary line.
67. In the view of the Tribunal, any decision it made “shall have no binding force except
between the parties in respect of that particular dispute” in accordance with Article 33(2) of its
Statute and thus have no impact on third party rights. Bay of Bengal Case, supra note 1, para. 367.
68. The Tribunal relied on the parties’ submissions related to extended continental shelf rights
to reach the view that the extended continental shelf areas subject to delimitation in the case were
“situated far from the Area.” Ibid., para. 368.
69. Ibid., paras. 373–394.
70. Ibid., para. 376.
71. Ibid., para. 373.
72. See ibid., paras. 342–249.
73. See ibid., para. 350.
74. Ibid., para. 351.
75. Ibid., para. 359.
76. Following the submission of Myanmar to the CLCS, Bangladesh sent a Note Verbale to
the commission indicating that a dispute existed. See Myanmar, Continental Shelf Submission, of
77. LOSC, supra note 10, art. 76(10).
78. Bay of Bengal Case, supra note 1, para. 358.
79. T. L. McDorman, “The Continental Shelf Beyond 200 nm: A First Look at the Bay of
Bengal (Bangladesh/Myanmar) Case,” paper presented at the thirty-sixth annual conference of the
Center for Oceans Law and Policy, Faculty of Law, University of Virginia, Halifax, Nova Scotia,
21–22 June 2012.
80. Bay of Bengal Case, supra note 1, para. 392.
81. Ibid., para. 377.
82. Ibid., para. 394.
83. Ibid., para. 397.
84. Ibid., para. 370.
85. See LOSC, supra note 10, art. 77(3); North Sea Continental Shelf Cases, [1969] I.C.J.
Reports 3; and Bay of Bengal Case, supra note 1, para. 409.
86. *Bay of Bengal Case*, supra note 1, para. 410.
87. See *ibid.*, paras. 411, 446.
104. *Bay of Bengal Case*, supra note 1, para. 432.

111. For instance, where areas of deep ocean floor lie between two margins and opposite coastal states. The delineation of outer continental margins on the basis of foot of slope points plus 60 nm could readily result in an overlap beyond 200 nm from the coast. Such an overlap would require delimitation even though the entitlement to the overlapping area arises from separate margins.

112. The authors are indebted to Phil Symonds, former member of the CLCS, for his advice on this matter. Phil Symonds, personal communication with the authors, 5 April 2013.
114. The entirety of Bangladesh’s 200-nm limit lies within the 200-nm limits of India and Myanmar combined by virtue of the fact that both India and Myanmar possess coasts located to the south of Bangladesh’s coast.
115. *Bay of Bengal Case*, supra note 1, para. 474.
117. Area calculated using the Caris Law of the Sea (LOTS) geographical information system (GIS) software.
123. *Bay of Bengal Case*, supra note 1, para. 476.
124. See, for example, *Memorandum of Understanding Between Thailand and Malaysia on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand*, 21 February 1979, in *Intern-


127. For example, artificial islands, installations, and structures that might be used in the extraction of seabed energy resources generally have a 500-m safety zone defined around them. Such safety zones could result in denying access to parts of the water column for the purpose of fishing. See Kaye, supra note 126, at 52–53.

128. See ibid., at 54–56; and Herriman and Tsamenyi, supra note 126, at 362, 375–378.

129. See Herriman and Tsamenyi, supra note 126, at 378.

130. Ibid., Herriman and Tsamenyi suggested that the regime of oceans management established through the Australia-Indonesia arrangements “depends utterly on continued goodwill between the two countries.” See also Kaye, supra note 126, at 72.

131. Parties to the maritime delimitation dispute between Peru and Chile may also raise issues of a grey area of overlapping entitlements. Peru argues that a large maritime zone is located within 200 nm of Peru’s coast and Peru has the right to assert coastal jurisdiction. Chile considers the area to be part of the high seas. See Oral Proceedings (Peru), CR 2012/29, paras. 39–41, at 60–61 (public sitting held on Tuesday 4 December 2012, at 3 p.m., at the Peace Palace in the Case Concerning the Maritime Dispute (Peru v. Chile)), available at www.icj-cij.org/docket/files/137/17208.pdf.


133. Bay of Bengal Case, supra note 1, para. 498.

134. Ibid., para. 499.

135. Ibid.

136. Declarations of Judge Wolfrum and Judge Treves, Bay of Bengal Case, supra note 1.


138. Separate Opinions of Judges Ndiaye, Cot, and Gao, Bay of Bengal Case, supra note 1.

139. Dissenting Opinion of Judge Lucky, Bay of Bengal Case, supra note 1.

140. See section on Preliminary Jurisdictional Issues above.


142. Statute of the International Court of Justice, art. 38(1)(d).

143. Legality of the Threat or Use of Nuclear Weapons, [1996] I.C.J. Reports, 237, para. 18: “It is clear that the Court cannot legislate. . . . Rather its task is to engage in its normal judicial function
of ascertaining the existence or otherwise of legal principles and rules applicable. . . . The Court . . . states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.”


146. Joint Declaration of Judges ad hoc Mensah and Oxman, supra note 137, para. 3. Judge Oxman and Mensah refer in their Declaration to Article 76(8) of the LOSC, supra note 10, providing that the parties shall submit information to the CLCS for it to then formulate its recommendations on the outer limits of the continental shelf. It is also the case that Article 76(10) of the LOSC provides that the provisions of Article 76 “are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”

147. *ibid.*, para. 8.


149. *ibid.*, para. 62.

150. *ibid.*, para. 53.


154. *ibid.*, para. 53.

155. *ibid.*

156. *ibid.*

157. *ibid.*, para. 70.

158. *ibid.*, para. 81.

159. *ibid.*, para. 80.

160. *ibid.*, para. 4.

161. *ibid.*, para. 94.

162. *ibid.*, para. 97.

163. *ibid.*, para. 56.

164. *ibid.*, para. 98.

165. Dissenting Opinion of Judge Lucky, supra note 139, at 49, 51.


168. *Bay of Bengal Case*, supra note 1, para. 435.

169. A figure of 29,417,052 km² was estimated in October 2012 with respect to submissions made at that time. It should be noted that this figure does not include extended continental shelf areas for Chile, China, the Comoros, and Vanuatu as these states had yet to supply any indication of the extent of their areas of continental shelf located seaward of the 200-nm limit from their baselines. Additionally, there are seven states that are likely to (or may yet decide to) make submissions in due course, but have yet to do so. These are Canada, Ecuador, Liberia, Morocco, Peru, the United States, and Venezuela. See R. Van de Poll and C. H. Schofield, “Exploring to the Outer Limits: Securing the Resources of the Extended Continental Self in the Asia-Pacific,” paper presented at the Advisory Board on the Law of the Sea (ABLOS) conference “UNCLOS in a Changing World,” International Hydrographic Bureau, Monaco, 3–5 October 2012.
170. Ibid.
171. Bay of Bengal Case, supra note 1, para. 411.