

## **Delimitation of Maritime Boundary between Bangladesh and Myanmar by the ITLOS**

**Rear Admiral Md. Khurshed Alam (Retd) \***

On 14 March 2012, the 40 years longstanding maritime dispute between Bangladesh and Myanmar in the Bay of Bengal was finally delimited in an equitable manner by the International Tribunal for the Law of the Sea (ITLOS), a judicial body established under the UN Convention on the Law of the Sea (UNCLOS) 1982 in Hamburg, Germany.

One year on, most people have accepted the simple mathematics that Bangladesh enjoyed undisputed rights over 40,000 sq km of sea areas since 1974 and March 14, 2012, verdict has awarded Bangladesh an area over 1,11,000 sq km. Some people tried to find faults with the historic judgment by just translating the 160 pages verdict in Bangla without having any real input from Laws of Maritime Delimitation which is not given in the text of the UNCLOS 1982, some criticized based on his ideas without going through the 3000 (approx) pages of Bangladesh's submission and some 800 pages of Myanmar's submission to the tribunal and few even remarked getting only saline waters demonstrating complete ignorance about the nautical knowledge required to draw lines over the water. But none came up with any suggestion or solution which could have given Bangladesh much better equitable apportionment than what has been achieved or requested by Bangladesh based on the laws of delimitation and Jurisprudence.

The ITLOS drew lines over the water and allotted Territorial sea (TS) extending 12nm (22.2Km) from the St. Martin's Island, 200nm (370km) of Exclusive Economic Zone (EEZ) (about 486km from Chittagong) and also Continental Shelf (CS) beyond 200nm to Bangladesh. It now has total sovereignty over the seabed, subsoil, water column and airspace up to 32 km of sea areas from the Naaf River mouth up to the 22km limit southwest of St. Martin's Island.

Bangladesh now has sovereign right to explore, exploit, conserve, and manage living and non-living resources of water column, seabed and subsea strata and economic activities, such as the production of energy from the water, currents and winds within 200nm of EEZ. It has exclusive right to construct and establish artificial islands, installations and structures any where within the EEZ and areas beyond 200nm. There is no doubt that such opportunity though costly, could one day relieve Bangladesh from its population pressure as it can also

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exercise jurisdiction over customs, fiscal, health, safety and immigration over all such artificial islands, installations and structures. If there are any violations of jurisdictional authority, Bangladesh can proceed for hot pursuit against any ship or vessel operating illegally within our EEZ. Bangladesh now also has the exclusive right to lay submarine cables and pipe lines anywhere in the EEZ and also allow other countries whoever is willing to lay such pipelines in our waters.

Bangladesh can effectively establish the regulations fishing in our EEZ, equipment, areas, and seasons for fishing, conservation measures for marine mammals, anadromous and catadromous stocks, cooperative measures regarding straddling stocks and highly migratory species. Through legislation it can also ensure that the living resources in the EEZ are not endangered by over exploitation, conservation of dependent and associated species, and sustainable harvesting of species. This has provided our ships of the Navy and coast guard with authority to inspect, arrest and institute proceedings against transgressors. If a foreign fishing vessel is arrested, the coastal state has to promptly notify the flag state, arrested vessels and crew are to be promptly released if a reasonable bond or other security is posted. No non monetary penalties for violations of fisheries laws: No imprisonment, or any other forms of corporal punishment is to be awarded.

Bangladesh has also gained other important economic benefits from this verdict. The government can now start drilling for oil and gas within 200 nm and beyond 200nm out to sea. The discovery of new oil and gas may help the country meet its domestic demands, and the government could also generate capital by allocating blocks to international companies for further exploration. Any foreign ship can be boarded in EEZ if there is reasonable ground for suspecting that: it is engaged in piracy, slave trade, unauthorized broadcasting, without nationality, illicit traffic in narcotic drugs and psychotropic substances. Continued detention of vessels and crews, beyond what is required for investigation is discouraged. Flag State's right of pre-emption which enables the flag state to take over the proceedings itself.

Bangladesh now has the authority to permit, regulate and enforce the relevant laws and regulations with respect to pollution by dumping, to enforce pollution laws and regulations which conform to generally accepted international rules and standards, to prosecute foreign vessels where an actual pollution discharge has occurred and protect and preserve the marine environment. Bangladesh can now regulate, authorize, and conduct marine scientific research, and suspend unauthorised marine scientific research activities but can not interfere with the

shipping and deploy and use any type of scientific research installation or equipment which can constitute an obstacle to established international shipping routes.

The Govt of Bangladesh now has the legal rights to explore and exploit living, "sedentary" species like clams, crabs, corals, scallops, sponges, and mollusks, non-living resources of the seabed and subsoil of the continental shelf like minerals such as cobalt, manganese, copper, nickel, gas, oil from ferromanganese crusts, ferromanganese nodules, gas hydrate deposits, and petroleum etc in the continental shelf extending beyond 200nm. If we don't explore or exploit these natural resources, no one may undertake these activities without the consent of Bangladesh. Bangladesh has so far failed to utilise these resources due to its dispute with Myanmar and India over the last 40 years. But now it is able to access different types of fish and mineral resources, which should help strengthen its economy.

The verdict has also helped Dhaka and Chittagong Universities in opening the Oceanography departments since 2013 which would go a long way in preparing skilled manpower capable of surveying, quantifying and extracting much-needed resources from the sea. It's a good start and hopefully skilled manpower would be available within Bangladesh in 3 to 4 years time who would be able to survey the areas beyond 200nm and find out what types of resources are available, whether they are exploitable and if so by how much. Bangladesh can now dictate the course for laying submarine cables and pipelines by other countries beyond 200nm. It can authorize and regulate drilling and mining to exploit the subsoil by means of tunneling. UNCLOS, 1982 stipulates that the EEZ and the High seas must be used for peaceful purposes in exercising its rights and performing its duties under the Convention. States shall take all possible steps to prevent pollution to the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

## **History of the Dispute**

The history of negotiations for delimitation of maritime boundary between Bangladesh and Myanmar dates back to 1974. The negotiations continued till April 2010. The only success achieved through the 38 years' long negotiation was an agreement in the form of 'agreed minutes' for delimitation of 12 nautical miles (nm) territorial seas from the mouth of Naaf River signed on 23 November 1974 and reaffirmed in 2008. The agreement delimited the maritime

boundary within 12 nautical miles on the basis of equidistance formula between St. Martin's Island and Myanmar's Mainland. Although never converted into a treaty, both the countries respected the agreed minutes and under the terms of the agreement, the vessels of Myanmar have enjoyed, till date, free and unimpeded navigation through Bangladesh's waters around St. Martin's Island to and from the Naaf River for trade and commerce. However, apart from this, all subsequent attempts for delimitation of exclusive economic zone and continental shelf failed to bring any result.

During the whole period of negotiations, Bangladesh made continuous efforts to achieve an 'equitable solution', whereas, Myanmar always insisted on the rigid application of 'equidistance formula'. Due to unique geographical location of Bangladesh, 'equidistance' could no way bring equitable result for Bangladesh. Bangladesh is tucked between Myanmar and India in the concave north coast of Bay of Bengal. Added to that is the concavity of Bangladesh's own coast. Thus, the equidistant lines with Myanmar in the eastern side and with India in the western side lock Bangladesh's maritime area within 130 nm from its coast as against Bangladesh's claim for 200 nm Exclusive Economic Zone (EEZ) and continental shelf beyond 200nm Bangladesh urged upon its neighbours to agree to an alternative formula so that the cut-off could be avoided. Unfortunately, Myanmar never considered any other alternative formula and continued its adherence to equidistance, for which, an agreement for equitable delimitation of maritime zones between the countries was never reached. The disagreement created deadlock in the negotiations which eventually obstructed the exploration of natural resources in the Bay by both the countries. Having failed to resolve bilaterally the Government of Bangladesh took a bold and timely decision for settlement of this issue through compulsory dispute settlement procedures under UNCLOS. On October 08, 2009, Notice of Arbitration was issued with Myanmar under Part XV of the United Nations Convention on the Law of the Sea for delimitation of territorial sea, the exclusive economic zone and the continental shelf in accordance with international law. Both parties thereafter accepted the jurisdiction of ITLOS for resolution of the dispute and transferred the case to the ITLOS. On 14 December 2009, the case entered the docket of the Tribunal as 16th case. In addition to 21 members of the Tribunal, two (02) ad-hoc judges were also appointed by the parties, Judge Thomas Mensah by Bangladesh and Judge Bernard Oxman by Myanmar.

### **Chronology of the Proceedings**

According to the Rules of Procedure of the Tribunal, first, the parties submitted

their written pleadings before the Tribunal. The dates of the written pleadings were as follow-

- 01 July 2010 - Submission of memorial by Bangladesh
- 01 December 2010 - Submission of Counter-memorial by Myanmar
- 15 March 2011 - Submission of Reply by Bangladesh
- 01 July 2011 - Submission of Rejoinder by Myanmar

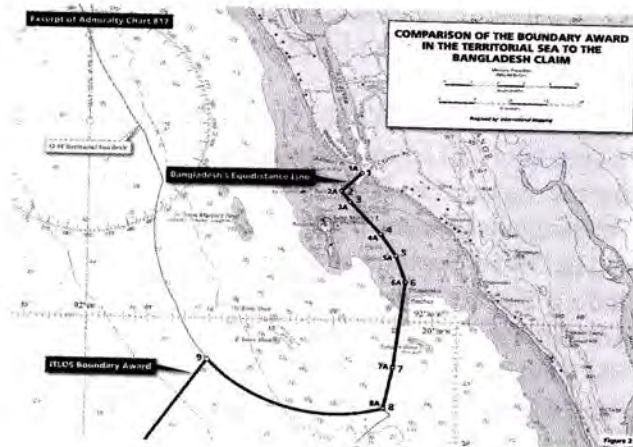
After submission of the written pleadings, long and extensive oral hearing took place from 08-24 September 2011 in the courtroom of the Tribunal. Bangladesh's counsels headed by the Agent, Dr. Dipu Moni MP, Hon'ble Foreign Minister of Bangladesh led the Bangladesh team from the front opening the submissions for Bangladesh in the ITLOS in September 2011. She was assisted by the equally capable team including Deputy Agent Rear Admiral (ret'd) Md. Khurshed Alam and international lawyers Prof James Crawford of Australia, Prof Alan Boyle, Prof Philippe Sands, Prof Lindsay Parson and Mr. Robin Cleverly of United Kingdom, Mr. Paul Reichler and Mr. Lawrence Martin of United States of America and Prof Payam Akhavan of Canada. Myanmar's counsels headed by their Agent, Dr. Tun Shin, Attorney General of Myanmar, appeared before the Tribunal comprised of the principal counsels namely Prof Allan Pellet of France and Sir Michel Wood of United Kingdom. After the oral hearings, the Tribunal finally announced its judgment on 14 March 2012. The Judgment is final and not appealable.

## **The Judgment**

In its first-ever case of maritime delimitation, the tribunal has shown unprecedented efficiency by successfully carrying out all procedural requirements in time and finally declaring its judgment within 28 months from the date of initiation. The judgment of the tribunal has ensured equitable share for both the parties in the Bay of Bengal. The main features of the judgment are as follow-

**Territorial Sea:** In the 12 nm territorial seas, the Tribunal refused to accept Bangladesh's first proposal to effectuate 1974 agreement as a binding one since it was never converted into a treaty. However, the Tribunal accepted Bangladesh's alternative proposal of drawing an equidistant line between Bangladesh (St. Martin's) and Myanmar (mainland) giving full effect to the St. Martin's Island. Thus the Tribunal rejected Myanmar's argument for giving St. Martin's Island half effect, i.e. 06 nm of territorial seas; rather considering the size, population and economic activities of the island, the Tribunal granted full effect, 12 nm territorial seas to it. The delimitation line,

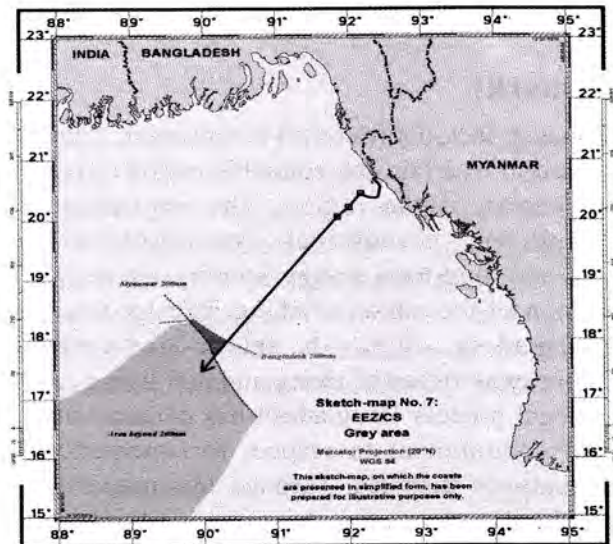
thus produced by the Tribunal, gave almost the same result agreed by Bangladesh and Myanmar on 23 November 1974. (Red Lines indicate ITLOS boundary and black lines show 1974 boundary in Map 1)



Map : 1

- 1. EEZ & Continental Shelf within 200 nm:** In the EEZ and continental shelf within 200 nm, the tribunal followed the general trend of the international courts and tribunals and applied 'equidistance-special circumstances' principle for delimitation of the boundary between the two countries. The Tribunal adopted the three-step method used by the International Court of Justice, i.e., first drawing a provisional equidistance line, second, examining all relevant circumstances to see if any of them deserves consideration for shifting of the line and finally through 'proportionality test' determining whether or not the 'equitable solution' has been ensured. The tribunal itself selected relevant base points on the coast of both countries to draw provisional delimitation line. In the second step, the tribunal recognized the 'extreme concavity' of Bangladesh's coast to be a 'special circumstance' and to avoid 'cut-off' (of Bangladesh's EEZ within 130 nm only) caused by such concavity, it decided to modify the provisional line, by drawing a geodetic line starting at an azimuth of 215° from a point on the provisional line close to the coast. This 215 deg line was the same line was requested by Bangladesh to the tribunal as an equitable line and allowing reasonable access upto 200nm of EEZ. After that, 'proportionality test' of the maritime area allocated to the parties vis-à-vis respective relevant coasts was done and the line towards 215° azimuth was declared to be the final delimitation line in the EEZ and Continental shelf within 200 nm ( Map 2).

2. **Continental Shelf beyond 200 NM:** In the Continental Shelf beyond 200 nm, the Tribunal's jurisdiction was challenged by Myanmar on the ground that, the entitlement of such area is subject to the recommendations of UN Commission on the Limits of the Continental Shelf, a special body created by under Article 76 of the UNCLOS. However, the Tribunal has made it clear that a Court or Tribunal having jurisdiction on the basis of Part XV of the UNCLOS can delimit the continental shelf beyond 200 nm even in the absence of recommendations by the Commission. Myanmar argued that, even if the tribunal had the jurisdiction, since the delimitation line blocks Bangladesh well before the 200 nm limit preventing it from exercising any



Map : 2

right in the outer continental shelf, the Tribunal should not use its jurisdiction in this particular case. The tribunal rejected the argument and recognized Bangladesh's entitlement over the Continental Shelf beyond 200 nm. However, the Tribunal also refused to accept Bangladesh's argument of 'natural prolongation' according to which, geologically, Myanmar is not entitled to continental shelf beyond 200 nm. The Tribunal recognized both parties' right to outer continental shelf. In delimitating the outer continental shelf, the Tribunal decided that the concavity of Bangladesh's coast continues to be relevant and to avoid cut off decides to extend the same 215° line it adopted within 200 nm into the area beyond 200 nm. The Tribunal did not

specify the end-point of the 215° line but rather put an arrow on the end of it, saying it should continue in the same direction until it reaches the area where the interests of a third State (namely, India) are affected. (Map 2)

- 3. Grey Area:** The tribunal has created another history with its decision on the 'grey area', where, the continental shelf of Bangladesh beyond 200 nm overlaps with 200 nm EEZ of Myanmar. The tribunal, in order to ensure Bangladesh's access to outer continental Shelf allowed the two separate regimes to co-exist in that area and decided that, in the 'grey area,' Myanmar will enjoy its rights over the water column while Bangladesh will have its rights on the sea-bed. This has certainly proved to be a landmark decision, where Bangladesh's continental shelf claim has superseded Myanmar's EEZ claim. (Map 2)

### **Concluding Remarks**

Thus, the tribunal has in fact, delimited all the maritime zones that Bangladesh and Myanmar are entitled to in a fair and equitable manner giving appropriate respect to geographical context of the region. The implication of this verdict for Bangladesh is significant/ phenomenal. The verdict will play major role in enhancing medium and long-term energy security interests of the country. It will also ensure expansion of the nation's fishing industry towards the deep sea. The Government of Bangladesh will now be able to take immediate as well as well-planned measures for exploration of living and non living resources in the Bay. By entering into this legal process Bangladesh has demonstrated its adherence to its firm constitutional commitment to respect for international law and peaceful settlement of international disputes. Through this process both States have now left the dispute behind and created the opportunity to move ahead and work together on the basis of friendship, cooperation and good neighbourliness.