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Abstract

On 14 March 2012, the International Tribunal on the Law of the Sea (ITLOS) delimited a maritime boundary between Bangladesh and Myanmar. The Judgment represents a landmark decision as the Tribunal's first maritime boundary delimitation case, the first adjudication of a maritime boundary in Asia and the first judicial delimitation of a maritime boundary for areas of "extended continental shelf" seaward of the 200 nautical miles (nm) limit. Rather than review the Judgment in detail, this contribution will highlight three notable, and to an extent potentially problematic, aspects of the decision: the approach to delimitation adopted and treatment of islands; relevant circumstances applicable within and beyond the 200nm limit; and, the creation of a so-called 'grey area.'

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**GREY CLOUDS OR CLEARER SKIES AHEAD?
IMPLICATIONS OF THE BAY OF BENGAL CASE**

Clive Schofield and Anastasia Telesetsky***

I. INTRODUCTION. – II. APPROACH TO DELIMITATION AND TREATMENT OF ISLANDS. – III. DELIMITATION WITHIN AND BEYOND 200 NAUTICAL MILES FROM THE COAST. – IV. THE “GREY AREA.” – V. CONCLUDING THOUGHTS

I. Introduction

On 14 March 2012, the International Tribunal on the Law of the Sea (ITLOS) delimited a maritime boundary between Bangladesh and Myanmar.¹ The Judgment represents a landmark decision as the Tribunal’s first maritime boundary delimitation case, the first adjudication of a maritime boundary in Asia and the first judicial delimitation of a maritime boundary for areas of “extended continental shelf” seaward of the 200 nautical miles (nm) limit.² Rather than review the Judgment in detail, this contribution will highlight three notable, and to an extent potentially problematic, aspects of the decision: the approach to delimitation adopted and treatment of islands; relevant circumstances applicable within and beyond the 200nm limit; and, the creation of a so-called ‘grey area’.

II. Approach to Delimitation and Treatment of Islands

The Tribunal determined that it held jurisdiction to delimit the maritime boundary between the parties for the territorial sea, exclusive economic zone (EEZ) and continental shelf, both within and beyond 200nm of the coast,³ and that the law applicable to such delimitation was the United Nations Convention on the Law of the Sea (LOSC), to which

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¹ *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, Judgment, 14 March 2012, available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf> [hereinafter *Bay of Bengal Case*].

² The term “extended continental shelf” is employed in this article to indicate areas of continental shelf located seawards of the 200nm limit.

³ *Bay of Bengal Case*, para. 50.

both Bangladesh and Myanmar are States parties.⁴ In this context, 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, had potential implications for the delimitation of both the territorial sea and continental shelf/EEZ boundaries between the parties (see Figure 1).

Regarding territorial sea delimitation, Myanmar pointed to the potentially distorting effect of St. Martin's Island on the definition of a median line because of its location immediately off its coastline, arguing for a departure from such a line.⁵ Bangladesh, in contrast, highlighted the island's proximity (approximately 4.5nm) to the mainland coasts of both States, its area (8km²), large permanent population (c.7,000 people) and 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."⁶ Bangladesh therefore expressed the view that St. Martin's Island should be accorded full effect on the delimitation of the territorial sea.⁷ The Tribunal observed that while no "general rule" exists in relation to the effect to be given to islands in the delimitation of maritime boundaries,⁸ in light of its size, population and economic and other activities, there were "no compelling reasons" to regard St. Martin's Island as a special circumstance as argued by Myanmar. As a result St. Martin's Island was awarded full effect when it came to delimiting the territorial sea boundary with an equidistance line constructed between normal baselines, thus producing a delimitation line significantly closer to that proposed by Bangladesh rather than Myanmar (see Figure 1).⁹

⁴ United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. In particular Articles 15, 74, and 83 of LOSC being respectively concerned with delimitation of the territorial sea, EEZ and continental shelf. See also, *Bay of Bengal Case*, paras. 46 and 54.

⁵ *Bay of Bengal Case*, paras. 131-133.

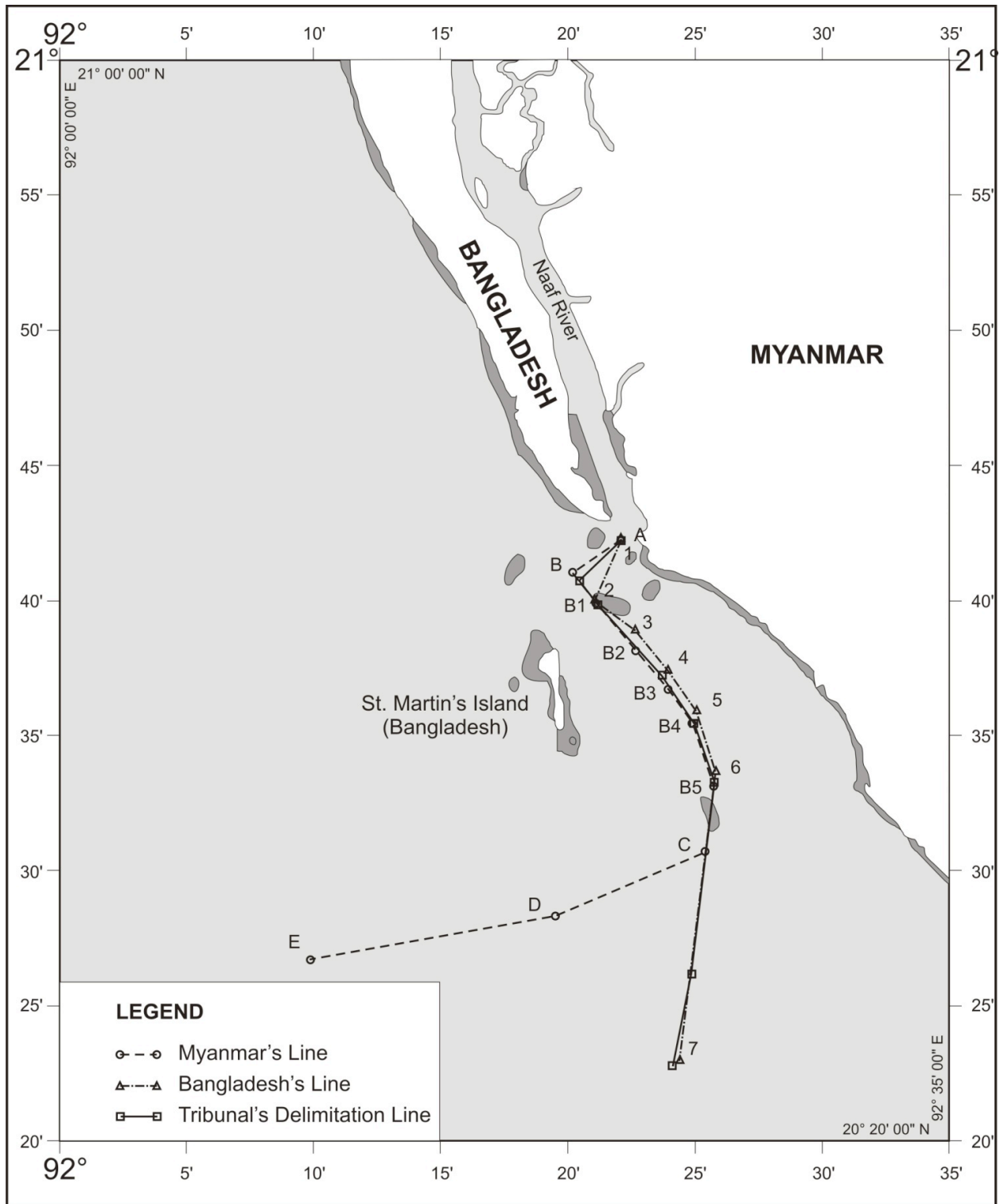
⁶ *Id.*, para. 143.

⁷ *Id.*, para. 141.

⁸ *Id.*, paras. 147 and 317.

⁹ *Id.*, paras. 147.

Figure 1



With respect to the delimitation of the continental shelf and EEZ, the Tribunal decided that the equidistance/special circumstances approach constituted the appropriate method for delimitation, and opted to apply the three-stage approach pioneered in the *Black Sea Case*.¹⁰ Accordingly, the Tribunal first constructed a provisional boundary line based on equidistance.¹¹ However, the provisional delimitation line so defined was not a strict equidistance line as St. Martin's island was excluded as a basepoint in its construction, notwithstanding Bangladesh's assertions that the island fulfils the criteria of Article 121(1) of LOSC and should therefore be entitled to not only a 12nm territorial sea but also its own continental shelf and EEZ.¹² The Tribunal determined that as a consequence of the island's location "immediately in front of the mainland on Myanmar's side of the Parties' land boundary", use of the island as a basepoint "would result in a line that blocks the seaward projection of Myanmar's coast", leading to "an unwarranted distortion of the delimitation line."¹³ This scenario was analogous to the *Black Sea Case* where the International Court of Justice ruled that to use Serpents' Island as a basepoint in the construction of the provisional delimitation line would be tantamount to "a judicial refashioning of geography",¹⁴ and this decision was duly cited by the Tribunal in support of its treatment of St. Martin's Island.¹⁵ This emerging trend towards selectivity in choice of basepoints prior to constructing the provisional delimitation line is troubling. After all, to ignore certain potentially critical basepoints itself represents a judicial refashioning of geography that serves to undermine the clarity and consistency of the three-stage process.

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 to adjust or modify the provisional delimitation line at the second stage of the three-stage process. Such an adjustment could, in fact, have led to the adjustment of a strict equidistance line so as to award St. Martin's Island a nil effect, thereby yielding the same result but in an arguably more logical and elegant manner.

¹⁰ *Bay of Bengal Case*, para. 240 (relying on Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, 2009 I.C.J. 61 (Feb. 3), available at <<http://www.icj-cij.org/docket/files/132/14987.pdf>> [hereinafter *Black Sea Case*], paras. 118-122.) (The three-step 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 to achieving an equitable result and, third, a (dis)proportionality test.)

¹¹ *Bay of Bengal Case*, para. 240 and 271-274.

¹² *Id.*, para. 142.

¹³ *Id.*, para. 265.

¹⁴ *Black Sea Case*, para. 149.

¹⁵ *Bay of Bengal Case*, para. 265

Nonetheless, it can be observed that the Tribunal's treatment of St. Martin's Island as having nil effect at the first stage of the delimitation process is consistent with a growing trend in the treatment of islands in the delimitation of maritime boundaries, especially those that are small and sparsely inhabited or are located far from the coast or in such a manner as to significantly and potentially inequitably impact on an equidistance line-based boundary. This trend is welcome in that it tends to downplay the potential significance of the sort of tiny, remote or problematically positioned insular features that are frequently the focus of maritime disputes.

Subsequent to drawing the provisional delimitation line, the Tribunal proceeded to determine whether there existed any reasons to adjust or modify that line in order to achieve an equitable delimitation¹⁶ Bangladesh argued persuasively that the concave character of Bangladesh's coastline would mean that the application of strict equidistance line maritime boundaries would result in its maritime entitlements being severely and inequitably curtailed.¹⁷ The Tribunal ruled that Bangladesh's coast is "manifestly concave"¹⁸ and considered it appropriate to adjust the provisional equidistance line in such a way as to relieve the resulting 'cut off' effect on Bangladesh's maritime entitlements.¹⁹ It did so by adjusting the equidistance line "at the point where it begins to cut off the seaward projection of the Bangladesh coast", considered to be from a point on the provisional delimitation line due south of Kutubia Island where the Bangladeshi coastline makes an abrupt change in direction, and then proceeding along a geodetic line with an azimuth of 215° (see Figure 2).²⁰ The Tribunal offered no mathematical formula for such an adjustment.

Finally, a proportionality test was undertaken to ensure that the proposed delimitation line was equitable.²¹ The Tribunal calculated the ratio of relevant coasts to be 1:1.42 in favour of Myanmar with the ratio of maritime spaces allocated on the basis of the adjusted delimitation line determined to be 1:1.54 in Myanmar's favor.²² On comparing these ratios, the Tribunal ruled that no significant disproportion between them existed, warranting further adjustment of the delimitation line.²³

¹⁶ *Bay of Bengal Case*, para. 275.

¹⁷ *Id.*, paras. 279-287.

¹⁸ *Id.*, para. 291.

¹⁹ *Id.*, paras. 293-297.

²⁰ *Id.*, para. 334.

²¹ *Id.*, para. 497.

²² *Id.*, para. 498-499. Relevant coastal lengths and areas calculated to be 413km and 111,631km² for Bangladesh, and 587km and 171,832km² for Myanmar.

²³ *Id.*

III. Delimitation Within and Beyond 200 Nautical Miles from the Coast

With respect to delimitation of the EEZ within 200nm of the coast, the Tribunal rejected Bangladesh's arguments based on geological and geomorphological factors and particularly on the basis of the "Bengal depositional system" as a potential "special circumstance",²⁴ on the grounds that delimitation of a single maritime boundary applicable to both the seabed and subsoil and also to the superjacent water column should be delimited on the basis of coastal geography rather than on the basis of the geology and geomorphology of the seabed.²⁵ The Tribunal therefore reasserted the primacy of arguments based on coastal geography over natural prolongation within 200nm of the coast, essentially because the geophysical factors inherent to the latter concept were applicable solely to continental shelf and delimitation of both the seabed and water column was at issue.²⁶ Seaward of the 200nm limit, in delimiting extended continental shelf areas, the Tribunal once again rejected arguments, including Bangladesh's "most natural prolongation" claims, based on the composition (geology) and shape (geomorphology) of the seabed.²⁷ The Tribunal instead ruled that, as there was only one continental shelf with no essential difference between those parts of it within and seaward of the 200nm limit,²⁸ the method of delimitation applied within 200nm of the coast should also apply beyond that limit.²⁹ Finding that the cut-off effect produced by the marked concavity of Bangladesh's coastline has "continuing effect" beyond 200nm, the Tribunal opted to continue the delimitation line for the extended continental shelf along the same 215° azimuth line relevant to the delimitation of the EEZ.³⁰ While this approach has the allure of representing a crisp solution to a complex problem, the treatment of geophysical arguments based on the natural prolongation concept within 200nm of the coast and beyond that limit seems inconsistent and overly simplistic, especially in light of the role of natural prolongation as a basis for entitlement to continental shelf rights and the Tribunal's own acknowledgement that the Bay of Bengal had been identified as a "unique situation" at the Third United Nations Conference on the Law of the Sea.³¹ Arguably, therefore, geophysical factors could have been accorded more weight with respect to delimitation of the extended continental shelf.

²⁴ *Bay of Bengal Case*, para. 320.

²⁵ *Id.*, para. 322.

²⁶ *Id.*

²⁷ *Id.*, para. 460.

²⁸ *Id.*, para. 449.

²⁹ *Id.*, para. 455.

³⁰ *Id.*, paras. 461-462.

³¹ *Id.*, para. 444.

Having satisfied itself regarding the potential impact of it exercising the jurisdiction to delimit a maritime boundary beyond 200nm on both the rights of third parties³² and on the Area,³³ the Tribunal offered a detailed and sophisticated appraisal of the operative provisions of Article 76. The Tribunal also provided a careful examination of its own role and also that of the United Nations Commission on the Limits of the Continental Shelf (CLCS). The Tribunal was at pains to distinguish between them, ultimately concluding that there was no tension between their distinct roles, thus allowing the Tribunal to proceed.³⁴ The basis for the Tribunal's finding that there were overlapping entitlements to areas of extended continental shelf for it to delimit in the Bay of Bengal³⁵ were the apparently "uncontested scientific evidence" of the parties on this issue.³⁶ Given the parties' own clear interests in this being the case this might be viewed as a problematic basis for the Tribunal to proceed with delimitation. Nonetheless, the Tribunal concluded that it was not only authorized to but should do so.³⁷

Entitlement over continental shelf areas can, however, only be confirmed through the concerned coastal States delineating "final and binding" outer continental shelf limits on the basis of recommendations from the CLCS.³⁸ That the Tribunal did not make its extended continental shelf delimitation strictly conditional on this process being fulfilled sets a potentially problematic precedent for cases where there may not be comparable certainty regarding the existence of extended continental shelf entitlements.³⁹

IV. The "Grey Area"

Perhaps the most remarkable aspect of the Judgment is the Tribunal's creation of a so-called "grey area", measuring approximately 1,100km², where continental shelf rights are

³² 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 and ruled that its delimitation line extends only "until it reaches the area where the rights of third parties may be affected." See *id.*, paras. 367 and 462.

³³ The Tribunal relied on the parties submissions related to extended continental shelf rights to conclude that the continental shelf seawards of the 200nm limit to reach the view that the extended continental shelf areas subject to delimitation in the case were "situated far from the area." See *id.*, para. 368.

³⁴ See *id.*, para. 373-394.

³⁵ *Id.*, para. 449.

³⁶ See *id.*, para. 411, 444, and 446. It can be observed that scientific evidence is rarely "uncontested". However, both Bangladesh and Myanmar were in agreement regarding the existence of extended continental shelf areas in the Bay of Bengal and the Tribunal also referred to academic literature indicating the existence of some 14-22km depth of sedimentary rock underlying the Bay of Bengal.

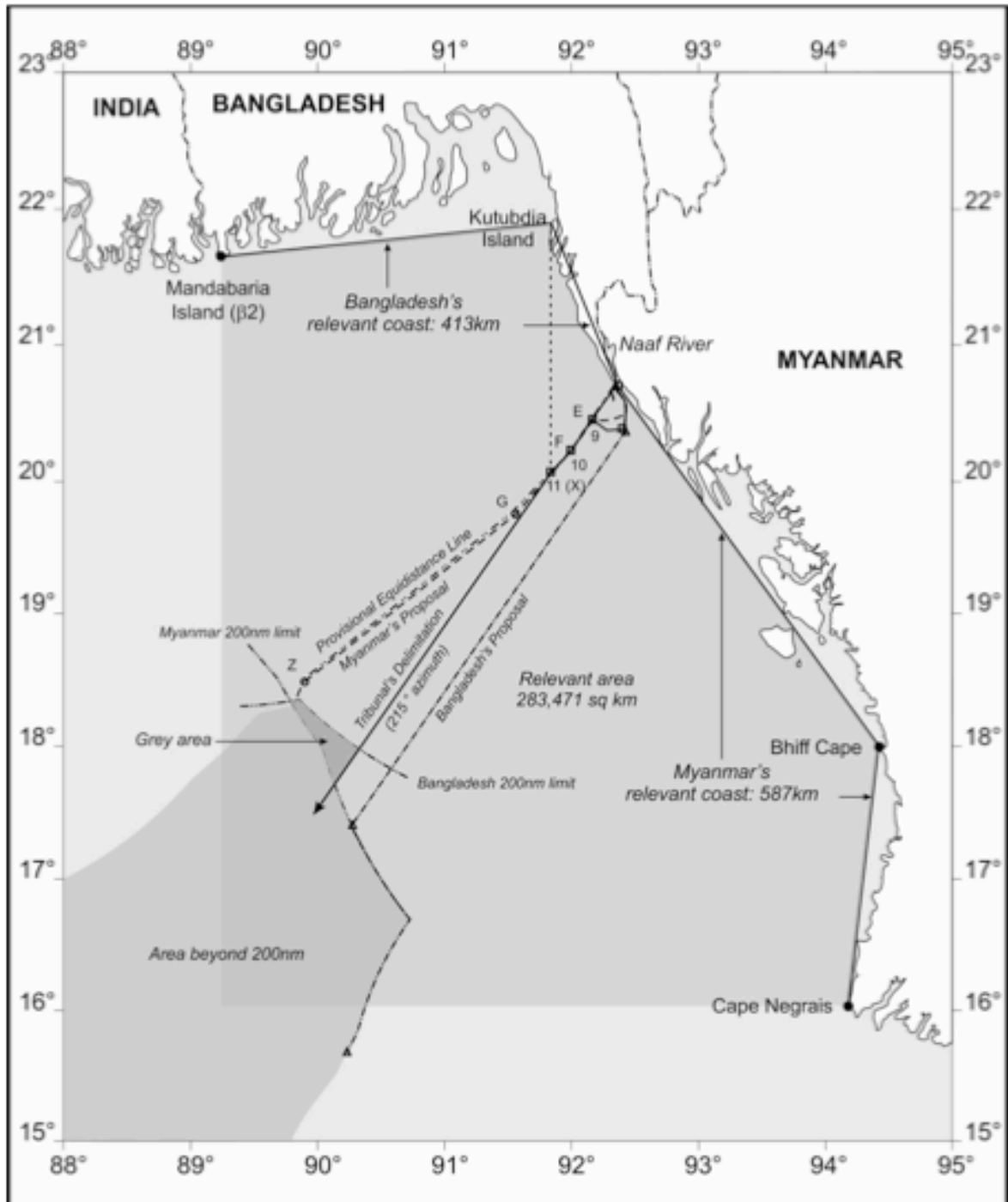
³⁷ *Id.*, paras. 363 and 394.

³⁸ LOSC, Article 76(8).

³⁹ The Tribunal did, however, note that its delimitation was "without prejudice to the establishment of the outer limits of the continental shelf." See *id.*, para. 394.

determined to belong to one of the parties (Bangladesh) but jurisdiction concerning the overlying water column rest with the other party (Myanmar). This situation arises because of the adjustment of the provisional boundary line. As a result, the grey area is located beyond 200nm from Bangladesh, and from the Bangladeshi perspective is an area of extended continental shelf, yet is within 200nm of Myanmar (see Figure 2).

Figure 2



While innovative, the definition of the grey area arguably leaves the parties with potentially contentious issues to resolve in the future, especially with respect to as yet unresolved ocean governance arrangements. In this context, it is worth noting that the pivotal event that led to this case being brought before ITLOS was the discovery of gas deposits in the disputed regions, the unilateral authorization of exploration concessions by Myanmar in 2008, and the armed response by Bangladesh.⁴⁰

The Tribunal, recognizing that this complex multi-jurisdictional scenario would need to be addressed, noted that the legal regime of the continental shelf had always coexisted with another legal regime in the same area⁴¹ and further observed that there are many ways for the parties to protect jurisdictional interests, including “appropriate cooperative arrangements.”⁴² It is difficult to find fault with the Tribunal’s suggestion that maritime cooperation offers a promising avenue to deal with the grey area. Indeed, many examples of such maritime cooperation including maritime joint development agreements already exist in State practice. Moreover, it is worth noting that differential jurisdiction over the seabed and water column is not an entirely unique scenario, which offers some hope for a positive outcome.⁴³ Nonetheless, the Tribunal’s perspective may be overly-optimistic. After all, the parties proved unable to resolve their differences over the delimitation of their maritime boundaries despite many years of diplomatic effort. It is also notable that some Judges dissented from the creation of the grey area.⁴⁴ Ultimately, the parties may be faced with a return to the negotiating table in spite of their expectations for a final and binding resolution by ITLOS to their maritime dispute.

⁴⁰ See, for example, “Tensions Rise as Bangladesh Sends Another Warship”, November 5, 2008, *available at* www.aseanaffairs.com.

⁴¹ *Bay of Bengal Case*, para. 475 (see, for example the high seas regime and, more recently, the EEZ regime).

⁴² *Id.*, para. 476.

⁴³ Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997, *available at* <http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/1997/4.html> (not in force); Torres Strait Treaty, Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the Two Countries, including the area known as Torres Strait and Related Matters, 18 December 1978, (1985) 4 *Australian Treaty Series*.

⁴⁴ For example, Judge Lucky advocated the prioritization of continental shelf rights over EEZ rights with a view to the clear assignation of rights in the grey area to one or the other party so that the dispute would be fully rather than conditionally resolved. See, *Bay of Bengal Case*, Dissenting Opinion of Judge Anthony Amos Lucky, p. 2.

V. Concluding Thoughts

Overall the Tribunal's Judgment is to be warmly welcomed. Fundamentally, the Tribunal's decision, delimiting as it does maritime boundaries for multiple zones of jurisdiction, represents substantial progress towards maritime dispute settlement in the Bay of Bengal. The Tribunal's adoption of the same three-stage process pioneered in the *Black Sea Case*, is to be commended as enhancing the consistency and predictability in judicial decisions relating to maritime boundary delimitation.

That said, there remain some problematic aspects to the Tribunal's Judgment, notably in respect of selectivity regarding the choice of basepoints to construct the provisional delimitation line and therefore in the application of the three-stage process and regarding the circumstances deemed relevant to delimitation within and beyond the 200nm limit. Further, the Tribunal has left Bangladesh and Myanmar, however, with potentially challenging jurisdictional issues, and thus grey clouds on the horizon, to resolve between themselves. Given the decision and the looming matter of the maritime boundary between India and Bangladesh,⁴⁵ the Tribunal's decision nonetheless offers hope of clearer skies regarding what approach parties can expect from an international judicial body deliberating on boundaries in the Bay of Bengal, even if some potentially troublesome grey clouds remain.

⁴⁵ *Bangladesh v. India*, Permanent Court of Arbitration, 2009, http://www.pca-cpa.org/showpage.asp?pag_id=1376.