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No. 048/2012 dated 20 March 2012

Solving Maritime Disputes: The Bangladesh-Myanmar Way

By Sam Bateman

Synopsis

The maritime boundary dispute between Bangladesh and Myanmar has been resolved peacefully by international arbitration. However this is not necessarily a precedent for other disputes in the region.

Commentary

ON 14 MARCH, the International Tribunal for the Law of the Sea (ITLOS) delivered its judgment in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal. The Tribunal decided on an adjusted equidistant line as the boundary between the two countries. This was rather more in favour of Bangladesh than a median or equidistant line between the boundaries proposed by each of the two countries would have been. Nevertheless, it still gave over half as much more of the "relevant area" to Myanmar than to Bangladesh.

As is often the case with international settlement of maritime boundary disputes, there was no outright "winner" or "loser" with the ITLOS judgment. The Foreign Minister of Bangladesh, Dr Dipu Moni, has claimed it as a victory for her country; but conversely, Myanmar might also claim a "win" as it received a much larger share of the relevant area while St. Martin's island was not given full weight in the delimitation, as had been argued by Bangladesh.

Background of dispute

Bangladesh and Myanmar have long had a boundary dispute in part of the Bay of Bengal where valuable hydrocarbon reserves exist. During 2008-2009, there were several clashes in the area between the navies of the two countries, but the situation quietened down when the neighbours agreed to take their dispute to ITLOS. This was a positive step matched also by India and Bangladesh agreeing to take their maritime boundary dispute in the Bay of Bengal to international arbitration.

The Bangladesh-Myanmar case was the first maritime boundary dispute to go before ITLOS, which was established under the 1982 UN Convention on the Law of the Sea (UNCLOS) to deal with law of the sea disputes. Previously it had only handled relatively minor cases, mainly associated with fishing. International lawyers and political geographers watched the case carefully to see how ITLOS would handle the matter and what the outcome might be.

Maritime Boundary Making

There are many technical arguments why the Tribunal reached its decision. Not only are more maritime boundaries required now due to the broader maritime zones allowed under UNCLOS, but the principles of maritime boundary making have also become more complex. As well as geographical issues and concepts of equidistance, attention is given to so-called “equitable principles”, which can be economic, physical or social.

For example, one party in a dispute might argue that a boundary should be biased in its favour because its fishers have traditionally fished on the other side of the equidistance line whereas those of the other party have not. However, despite much legal debate on the issue, there is no accepted definition of just what is an ‘equitable principle’.

The separate opinion of Judge Zhiguo Gao from China is an interesting aspect of the ITLOS judgment. While the judge did not vote against the judgment, his separate opinion shows views that are more or less in line with China’s position on its disputes in the East and South China seas.

Firstly, Judge Gao opined that the equidistance/relevant circumstances method was not appropriate for determining the boundary because it failed to take into account the concave nature of the Bay of Bengal and produced some inequity in the outcome. This view is relevant to the differences between China and Japan in settling their boundary dispute in the East China Sea.

Secondly, he thought that the treatment of St. Martin’s island at the junction of the landward end of the boundary between the two countries was flawed. He argued that the island, by virtue of its size and ability to sustain economic life and human habitation, more than justified it being treated as an island under the UNCLOS regime of islands entitled to a full suite of maritime zones. Thus Judge Gao seems to be protecting China’s position in the South China Sea where China claims some islands are full “islands” under UNCLOS, but other countries do not share that view.

Lastly, Judge Gao questioned the rest of the Tribunal’s views of the effect to be given natural prolongation of the land mass of a coastal State in determining the limits of its continental shelf and its maritime boundaries. Again, his views reflect those of China in its boundary dispute with Japan in the East China Sea.

Implications for Other Disputes

In strategic terms, the ITLOS judgment is a positive development for the region. It resolves a major source of tension in the Bay of Bengal, and shows that with political will, maritime disputes can be settled peacefully. However, this does not mean that there will be a rush of maritime disputes from the region going to ITLOS.

The disputes in other regional seas, particularly those in the South China Sea, are complex with intractable aspects that militate against them being taken to international arbitration in the foreseeable future. The disputants will remain reluctant to do so for the simple reason that the outcome may go against them.

The recent ITLOS judgment does not necessarily provide a precedent for other boundary disputes. In the final analysis, the settlement of boundary disputes is inherently political in nature and two countries can agree whatever boundary they want in the absence of any impact on a third party.

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