THE CONTINENTAL SHELF BEYOND 200 NM: A FIRST LOOK AT THE BAY OF BENGAL (BANGLADESH/MYANMAR) CASE

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Abstract
The decision in the Bay of Bengal (Bangladesh/Myanmar) Case before the International Tribunal for the Law of the Sea (ITLOS) brought forward a number of complex questions concerning the international legal regime of the continental shelf.

The focus of this contribution will be on the continental shelf area beyond 200-n. miles where the challenge for the ITLOS was the relationship between delimitation of the bilateral shelf boundary and delineation of the outer limits of the continental shelf, the latter of which, pursuant to Article 76 of the 1982 U.N. Convention on the Law of Sea, engages the Commission on the Limits of the Continental Shelf (Commission).

This essentially involved two questions:

• Was the ITLOS precluded from establishing a boundary for the continental shelf between the two States beyond 200-n. miles, or if not precluded, should the ITLOS refrain from establishing a continental shelf boundary because of the role to be played by the Commission respecting the outer limits of the shelf beyond 200-n. miles?
• Was the ITLOS precluded or, if not precluded, should the ITLOS refrain from determining whether either or both States have a legal entitlement to a continental shelf area beyond 200-n. miles since the question of whether a shelf existed beyond 200-n. miles was a question also for the Commission?

The Bay of Bengal Case has not diminished or otherwise changed the role of the Commission in the process of the establishment of a coastal State of its outer limit of the continental shelf. The Commission has always been confined by Article 76 to the matter of the outer limits of the continental shelf and the ITLOS Case simply confirmed this.

The Bay of Bengal Case is respectful of the role of the Commission in dealing with the scientific application of Article 76. This, of course, is the expertise of the Commission. However, it is the State Parties to the LOS Convention and where they engage dispute settlement, adjudicative dispute settlement bodies, which have the authority to determine whether or not the wording or application of wording in Article 76 is subject to legal or scientific interpretation.

* This contribution was written while Professor McDorman was on secondment with the Bureau of Legal Affairs of the Canadian Department of Foreign Affairs and International Trade. The contents and views in the abstract and paper are personal and do not reflect the views or opinions of the Bureau of Legal Affairs, the Department of Foreign Affairs and International Trade, or the Government of Canada. Professor McDorman is on the Faculty of Law, University of Victoria, British Columbia, Canada. He has a cross-appointment with the Department of Geography and is an Associate of the Centre for Asia-Pacific Initiatives.
1.0 Introduction

The decision in the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*\(^1\) before the International Tribunal for the Law of the Sea (ITLOS) came down in March 2012 and brought forward a number of complex questions concerning the international legal regime of the continental shelf.

The focus of this contribution will be on the continental shelf area beyond 200-n. miles and will not deal with those aspects of the *Bay of Bengal Case* that involved maritime delimitation. Beyond 200-n. miles, the challenge for the ITLOS was the relationship between delimitation of the bilateral shelf boundary and delineation of the outer limits of the continental shelf, the latter of which, pursuant to Article 76 of the 1982 U.N. Convention on the Law of Sea,\(^2\) engages the Commission on the Limits of the Continental Shelf (Commission).\(^3\) This essentially involved two questions:

- Was the ITLOS precluded from establishing a boundary for the continental shelf between the two States beyond 200-n. miles, or if not precluded, should the ITLOS refrain from establishing a continental shelf boundary because of the role to be played by the Commission respecting the outer limits of the shelf beyond 200-n. miles?\(^4\)
  
The ITLOS answered that it was not precluded from establishing a shelf boundary beyond 200-n. miles and that in the case before it, it would not refrain from so doing.

- Was the ITLOS precluded or, if not precluded, should the ITLOS refrain from determining whether either or both States have a legal entitlement to a continental shelf area beyond 200-n. miles since the question of whether a shelf existed beyond 200-n. miles was a question also for the Commission? In other words, did there exist overlapping claims of the two States to a continental shelf area beyond 200-n. miles in the Bay of Bengal?\(^5\)
  
The ITLOS again answered that it was not precluded from determining whether the States were entitled to a shelf area beyond 200-n. mile. The ITLOS, however, carefully found that, based on the facts of the case and the essential point in argument between the parties, it would not refrain from answering the question as the main point of argument was a legal question within the expertise of the ITLOS.

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3. The Commission on the Limits of the Continental Shelf is established pursuant to *ibid.*, Annex II. See the website of the Commission at www.un.org/Depts/los/clcs_new/clcs_home.htm.

4. *Bay of Bengal Case, supra* note 1, at paras. 342, 360 and 363.