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The shades of grey over blue: A maritime delimitation dogma

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ABSTRACT

Since the advent of the United Nations Convention on the Law of the Sea (UNCLOS), coastal countries have recognised the opportunity of extending their jurisdiction along the natural prolongation of their continental landmass – granting them an unprecedented thrust of economic empowerment. States that ratify UNCLOS are mandated to scientifically establish the continuity of their continental margins, beyond 200 nautical miles (nm). As a prelude to this, coastal states are required to demarcate their maritime boundaries – an exercise often complex and seldom free from disputes with adjoining or opposite states. Two noteworthy decisions in the case of India-Bangladesh and Bangladesh-Myanmar maritime delimitation resulted in the inception of a new terminology in maritime history - the 'grey area', a state of ambiguity that continues to exist even after three years of adjudication. This article draws attention to the causative circumstances that led to the development of such a scenario; its ramifications in terms of overlapping rights; while suggesting possible propositions for conflict resolution.

1. Introduction

The abysmal depths of our oceans covering a magnanimous proportion of our planet offer a myriad of resources for all mankind. Millions of tonnes of fish in its waters; a lifeline for navigation; and a preserver of minerals and hydrocarbons are just some miniscule examples of what our oceans provide. Our blue sphere with close to 70% area under oceans accentuates the need for judicious management and cooperation in order to proficiently utilize what our surrounding waters have bestowed upon us.

Up till the 1960s, a manifold rise in resource exploration and exploitation – without any protocol or governance – was starkly evident. The doctrine of freedom-of-the-seas, wherein the 'high seas' were meant for all without being under any state's sovereignty, was active on full momentum. All states, holding adequate competency and infrastructure, were rampantly extruding coastal and marine resources.

The Third United Nations Convention on the Law of the Sea (UNCLOS), was a result of a few decades' long initiative taken by representatives of numerous sovereign states in order to assess the need for monitoring the international waters and seabed along with the conception of a new mechanism to systematically govern the world's oceans and resources. Beginning with a conference in 1958 followed by others in 1960 and 1973; UNCLOS finally amalgamated as a constitution for the sea in 1982 (istorical Perspective, 2016). The mandate of the Convention was to establish legal order for the seas and oceans to facilitate peaceful and equitable international utilization of their resources, protection and preservation of the marine environment and realization of a just economic order (United Nations Convention, 1994). Resulting from these, the convention stipulated certain principles to establish the outer limits of the continental margin which is the submerged prolongation of the land mass of the coastal state; consisting of the seabed and subsoil of the shelf, slope and the rise (Article 76, 1994). UNCLOS, 1982 also defines the concept of Exclusive Economic Zone (EEZ), whereby a coastal state assumes jurisdiction over the exploration and exploitation of marine resources of the waters superjacent to the seabed and of the seabed and its subsoil, not extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Part, 1994).

The UNCLOS, hence facilitates coastal states to delineate outer limits of their continental shelf (*if it extends beyond EEZ*) before the Commission on the Limits of the Continental Shelf i.e. CLCS – established for the purpose of scrutinizing evidence of a coastal state's claim and provide recommendations on the final outer limits of the continental shelf (Commission on the Limits of the Continental Shelf (CLCS), 2018) [hereon described as Extended Continental Shelf (ECS)]. UNCLOS, 1982 details the rights of a coastal state within the EEZ vis-à-vis the ECS in Part V (Article 56, 1994) and VI (Article 77, 1994) respectively. But to simply ascertain the bottom-line difference in the two sets of rights, a given coastal state can exercise complete jurisdiction on its resources from the water column, seabed and subsoil within its EEZ; whereas; in the ECS, it can only explore resources from the seabed and subsoil.

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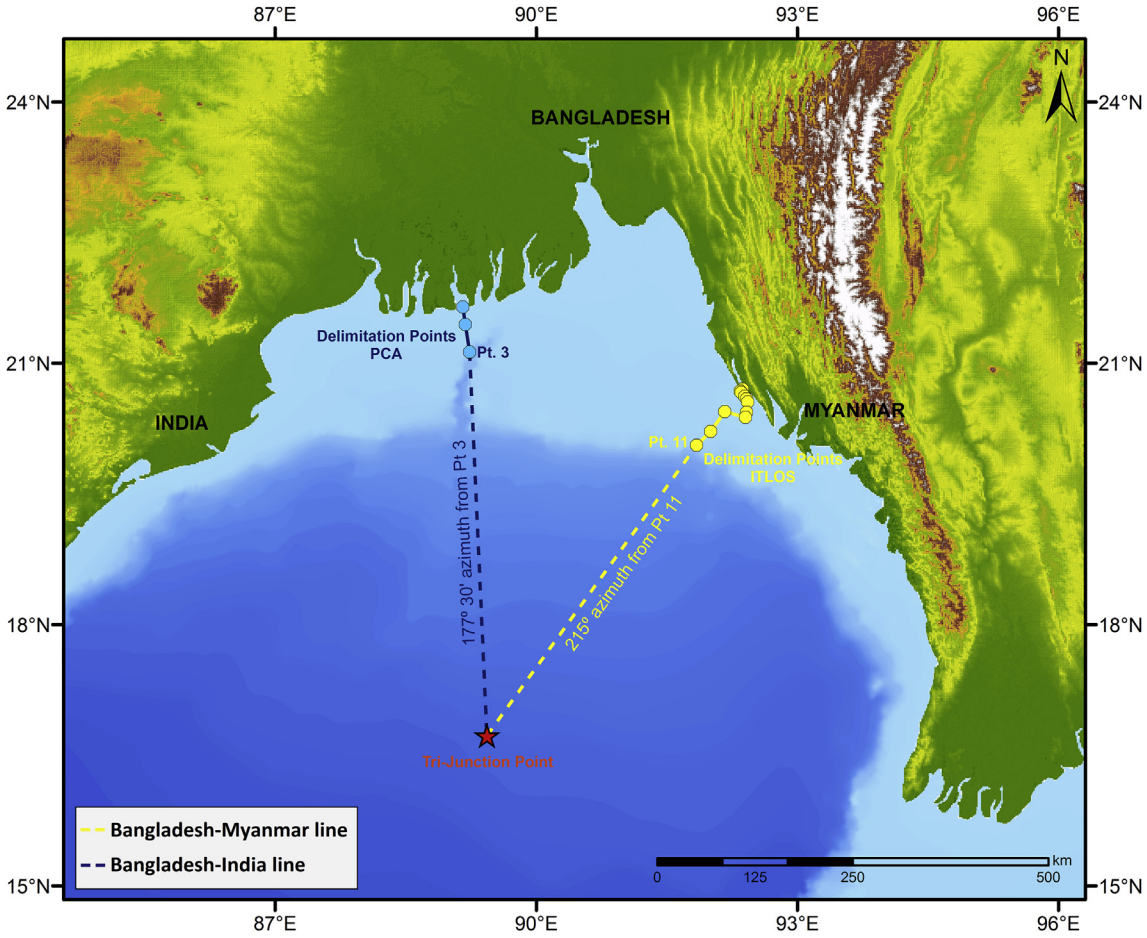

Fig. 1. Delimitation lines demarcating maritime boundary within and beyond 200 nm between Bangladesh – Myanmar (yellow) and Bangladesh – India (blue) respectively. (For interpretation of the references to colour in this figure legend, the reader is referred to the Web version of this article.)

At present 38 million square nm of ocean space lies within the EEZ of coastal states (A Historical Perspective, 2016). Given that all coastal states were to maximize their ECS claim under the provisions of Article 76, UNCLOS (Article 76, 1994) or as per the Statement of Understanding (Annex II, 1982), (contained in the Final Act of UNCLOS as Annex II), the percentage area of global ocean floor under sovereignty of coastal states for resource exploration would increase phenomenally, thereby increasing the need for mutual cooperation and management.

1.1. Maritime arbitrations

Because the oceans and their seabed and subsoil are a massive reservoir of resources, and that every coastal state under UNCLOS enjoys a rightful proportion of their marine expanse – it becomes prerogative for countries sharing common waters to demarcate their limits equitably. Most states arrive at unanimous decisions, either bilaterally or trilaterally as the case may be, but on other occasions, countries may choose from the different mechanisms for settlement of disputes, provided by Article 287, Part XV of the UNCLOS, 1982 (Article 287, 1994). International Tribunal for the Law of the Sea (ITLOS), International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA) are constituted especially to adjudicate over such disputes. To cite a recent example regarding international maritime disputes, an Arbitral Tribunal registered to the PCA declared a historic award in the matter of the South China Sea (SCS) Arbitration between Philippines and China in July 2016 (In the matter of the Sout, 2016). Since China neither accepted nor participated in the arbitration unilaterally initiated by the Philippines (The South China Sea Arbitration, 2016), there still exists a deadlock of disputes in the SCS. Although it is hoped that China along with other ASEAN (Association of South East Asian Nations) countries might amicably adopt a code of conduct in the future, the arbitration has drawn attention towards the critical necessity of maritime delimitation in the region. Similarly in other parts of the world, maritime disputes have often led to novel and unprecedented judgments. In the Bay of Bengal, maritime delimitation disputes rose amongst the tri-states – India, Bangladesh and Myanmar and two judgements later (Dispute concerning delimi, 2012; In the matter of the Bay, 2014), the concept of 'grey area' became popularly affixed with this region. To define in simple terms, a grey area is that territory of the continental shelf which lies in one state's EEZ but falls in the *potential* ECS of an adjacent or opposite state; and on the latter state's side of the maritime boundary (in case of adjacent coasts). Citing from the Arbitral Tribunal Award (In the matter of the Bay, 2014), *"The resulting "grey area" is a practical consequence of the delimitation process. Such an area will arise whenever the entitlements of two States to the continental shelf extend beyond 200 nm and relevant circumstances call for a boundary at other than the equidistance line at or beyond the 200 nm limit in order to provide an equitable delimitation"*.

1.2. Chronology of events (Bay of Bengal maritime delimitation)

Bangladesh initiated arbitral proceedings with both her adjacent neighbours – Myanmar and India on 08 Oct 2009 by submitting Notifications and Statements of Claim to the diplomatic representatives of both States in Dhaka. These were pursuant to Article 287 and in accordance with Annex VII of the UNCLOS, 1982 (Notification submitted by Bangladesh, 2009), requesting the Tribunal to delimit its maritime boundaries in the territorial sea, exclusive economic zone and