

## Arbitral Jurisprudence and Sovereignty over the Sea

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### Abstract

*Analysis of case laws and legal propositions through rational deductions contribute to the delimitation of maritime boundary disputes among the state parties. The emergence of the principle of equidistance gives pertinence in normal situations to the equitable method of the equidistance line. The privileged status of equidistance method was diminished by the International Court of Justice (ICJ) and Arbitral Tribunals, as a method which in some cases led inequitable results. The notion of equity is at the heart of the delimitation of the Continental Shelf and entered into the delimitation process with the 1945 proclamation of United States President Truman. The concept of proportionality has been taken into account in every judgment relating to maritime delimitation that maritime delimitation should be effected by taking into account the ratio between the water and Continental Shelf areas attributed to each party and the length of their respective coastlines. The author examined relevant principles and case laws including recent judgment of International Tribunal for the Law of the Sea (ITLOS) which established our sovereign rights over the sea. The judgments in Bangladesh v Myanmar case portray land mark judicial activism. The author tried to identify equidistance principle, equitable principle and concept of proportionality in relevant case laws with the aim to explain the application of delimitation principles in the Bangladesh v Myanmar case in determining and exercising sovereign rights over the sea.*

Key Words: Territorial Sea, Exclusive Economic Zone, Continental Shelf, ICJ, ITLOS.

### Introduction

Judicial Activism in Arbitral Jurisprudence provides legal frameworks, detailed provisions and principles for demarcation of maritime boundaries to exercise sovereign rights over the sea areas. Analysis of case laws and legal propositions through rational deductions contribute to the delimitation of the maritime boundary disputes among state parties. The dispute between Bangladesh and Myanmar concerned the delimitation of the maritime boundary with respect to the Territorial Sea (TS), the Exclusive Economic Zone (EEZ) and the Continental Shelf (CS). The ITLOS applied the provisions of articles 15, 74, 76 and 83 of the UNCLOS to the delimitation of the TS, EEZ, CS and declared its judgment. The author examined ‘Arbitral Jurisprudence’, relevant principles and case laws including recent judgment of ITLOS (International Tribunal for the Law of the Sea) which established our sovereign rights over the sea. The judgments in the Bangladesh v Myanmar case portrays land mark ‘Judicial Activism’ as inherited in the Keshavananda Bharati v State case (AIR 1973, S.C. 1461)<sup>i</sup> or the Anwar Hussain Chowdhury v Bangladesh case, popularly known as the Eighth Amendment case (41 DLR (AD) 165, 1989)<sup>ii</sup>. The author tried to identify equidistance principle, equitable principle and concept of

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proportionality in relevant case laws with the aim to explain the application of delimitation principles in the Bangladesh v Myanmar case (ITLOS, 2012) which will influence the upcoming litigations.

The article is organized in the following way: after introduction in Section 1, Section 2 explains equidistance principle in case laws, Section 3 describes equitable principle in case laws, Section 4 provides concept of proportionality in case laws, Section 5 analyses the Bangladesh v Myanmar case and Section 6 ends with concluding remarks.

### **Research Objectives**

The following objectives were pursued:

- (a) To justify the claims of Bangladesh over various maritime zones.
- (b) To justify application of suitable methods, and acceptable solutions to delineating the maritime zones of upcoming litigations in conformity with the Law of the Sea, Case Laws, and existing International Laws.

### **Methodology**

Author adopted ‘Doctrinal Research Methodology’ (Tewari, 2004) with ‘Analytical Approach’ (Faruque, 2009) to identify *Ratio Decidendi*<sup>iii</sup> of the cases. Deductive legal reasoning of case laws and Harvard reference style of Case Citation have been followed. Reasonable importance has been given to identify Judicial Activism (Halim, 2008). Case study has been taken as Empirical Tool, where relevant maritime delimitation cases from 1969 to 2014 including existing agreements among State Parties within the meaning of Articles 15 & 16 (2) of the UNCLOS (1982) and Article 102 (1) & 102 (2) of the United Nations Charter.

### **Equidistance Principle in Case Laws**

The emergence of the principle of equidistance gives pertinence in normal situations to the equitable method of the equidistance line. The privileged status of equidistance method was diminished by the ICJ and Arbitral Tribunals, as a method which in some cases led inequitable results. In the majority of cases, it was declared that equidistance was not a binding rule of law, but merely one method among others and it was not regarded as part of customary international law which plays the major role in delimitation process. The defects of the equidistance method, even tempered by the notion of special circumstances, led to its undoing. In many cases, governments negotiated by considering an equidistance line, while subsequently at liberty to modify it. The first case brought before the ICJ in 1969 was the case between three adjacent states, and was the case which started the demolition of the equidistance principle. The second case involving adjacent states was in 1982, concerning the delimitation of the CS between

Tunisia and Libyan Arab Jamahiriya (ICJ, 1982). For the use of equidistance principle, the Court reviewed the developments since the North Sea Continental Shelf case (ICJ, 1969) involving adjacent states and held that:

*“the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed”.*

In the North Sea case, the Chamber held that:

*“equidistance is not a principle of customary international law, thus not a method to be given priority”, and later added that “it has no intrinsic merits which could make it preferable to another in the abstract”.*

For the delimitation of the maritime boundary between Guinea and Guinea-Bissau (ICJ, 1986), the Tribunal held that:

*“the equidistance method is just one among many and there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied”.*

The Cameroon v Nigeria case, (ICJ, 2002), was the first case between adjacent states in which the ICJ applied the equidistance line without modification as it represented equitable result. The same view was expressed by the Court in the Qatar v Bahrain case (ICJ, 2001). In cases with opposite states, the Tribunal found it convenient to use the equidistance method as in the arbitration between the United Kingdom and the France (ICJ, 1977), the Tribunal held that:

*“the equidistance-special circumstances methods have the same goal as the general rules of customary law to achieve an equitable result”.*

Despite the fact that, in some cases, the equidistance method was subsumed into the equity principle, case laws emphasized that the equidistance method may lead to an equitable result in particular cases and not in general. Since equidistance principle was neither a mandatory legal principle, nor a privileged method, its use in the Bangladesh/ Myanmar case (ITLOS, 2012) was based on such evaluation and balancing of all relevant circumstances.

### **Equitable Principle in Case Laws**

The notion of equity is at the heart of the delimitation of the CS and entered into the delimitation process with the 1945 proclamation of US President Harry S. Truman. The Truman proclamation inspired the Court during the North Sea case (ICJ, 1969), and the Court held that:

*“delimitation is to be effected by agreement in accordance with equitable principles, and*

*taking into account all the relevant circumstances”.*

This idea became doctrine, was reiterated and confirmed by the ICJ and arbitral tribunals in subsequent cases. Articles 74 and 83 of the UNCLOS III of 1982 concerning the delimitation of the EEZ and the CS provides for effecting the delimitation by agreement, in accordance with international law and in order to achieve an equitable result. The Court (ICJ, 1969) held that:

*“it is not a question of applying equity simply as a meter of abstract justice, but of applying a rule of law” during the North Sea Case, and later, during the 1985 Libya v Malta Case, it reiterated that “the Justice of which equity is an emanation, is not abstract justice but justice according to the rule of law”.*

The equitable principles that the Court felt obliged to apply where subordinated to an equitable result. They were equitable not in abstract but only as a function of satisfactory result that they enabled the Court to reach (ICJ, 1982):

*“the equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. Each continental shelf case should be considered and judged on its own merits, no attempts should be made here to over conceptualize the application of the principles”.*

The idea of *unicum* and that it is not possible to define equitable principle for all maritime boundary delimitation cases as reiterated and expressed more clearly in the Cameroon v Nigeria case (ICJ, 2002). In the Guinea v Guinea-Bissau arbitration, the Tribunal expressed the same idea:

*“the equitable principles and methods result form the legal rules, however none of them is obligatory for the Tribunal since each of delimitation is unicum” .*

It is more prudent to rely on the idea expressed by the Chamber in the Gulf of Maine case (ICJ,1984) with respect to the role of equitable criteria that:

*“equitableness can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases”.*

### **Proportionality in Case Laws**

The concept of proportionality has been taken into account in every judgment relating to maritime delimitation (Weil, 1989). According to that concept, maritime delimitation should be effected by taking into account the ratio between the water and CS areas attributed to each party and the length of their respective coastlines. Thus, the Court and tribunals have to estimate roughly, or calculate exactly, the lengths of the relevant coastlines and compare that ratio to the ratio of the

provisionally delimited relevant water and CS areas. If the proportion of the relevant maritime zones does not roughly coincide with the relative length of the coastlines, further analyses or adjustment would be considered. The North Sea case is the first of the maritime delimitation cases between adjacent states to apply the concept of proportionality. The Federal Republic of Germany (FRG) formulated this concept in the case by contending that each state concerned should have a “just and equitable share” of the available CS, proportionate to the length of its coastline or sea frontage. The idea of proportionality was to use it as a corrective element for inequitable results in order to avoid an unreasonably inequitable result deriving from geographical particularities of the coasts. In the *Tunisia v Libya* case, (ICJ, 1982), the Court held that:

*“the court considered that the element (proportionality) is indeed requested by the fundamental principle of ensuring an equitable delimitation between the states concerned”.*

In the *Gulf of Maine* case (ICJ, 1984), the Chamber took proportionality into account for the second segment. This was a pure and simple application of proportionality. It was not used here as a test of equity, but as a criterion of equity, even of decisive value for drawing the delimitation line and verifying the latter’s equitableness. In the *Guinea v Guinea-Bissau* Case, the Tribunal considered the proportionality issue at the verification stage. A bright example of the use of proportionality concept in state practice is the 1974 agreement between France and Spain in the Bay of Biscay.

### **The Bangladesh v Myanmar Case**

Myanmar raised the issue of St Martin’s Island as a special circumstance in the context of the delimitation of the territorial sea between the Parties and argued that St Martin’s Island is an important special circumstance which necessitates a departure from the median line. It further pointed out that St Martin’s Island lies immediately off the coast of Myanmar, to the south of the point in the Naaf River which makes endpoint of the land boundary between Myanmar and Bangladesh and is the starting point of their maritime boundary. Myanmar argued further that granting St Martin’s Island full effect throughout the territorial sea delimitation would lead to a considerable distortion with respect to the general configuration of the coastline (ITLOS, 2012). It further argued that St Martin’s Island cannot be defined as a coastal island and it is an island within the meaning of Art 121, paragraph 1 & 2 of the UNCLOS III. It referred to a number of cases: the *United Kingdom v French Republic* case (ICJ, 1977), the *Tunisia v Libyan* case (ICJ, 1982), the *Dubai v Sharjah Arbitration* (ICJ, 1981).

In response to Myanmar claim, Bangladesh argued that St Martin’s Island be accorded full effect referring the relevant cases: the *Qatar v Bahrain* case, the *Nicaragua v Honduras* case in the Caribbean sea, the *Black Sea* case. However, the Tribunal held that:

*“in the circumstances of this case, there are no compelling reasons that justify treating St Martin’s Island as a special circumstance for the purpose of article 15 of the Convention or that prevent the Tribunal from giving the island full effect in drawing the delimitation line of the territorial sea between the Parties”.*

Pursuant to article 15 of the UNCLOS III, the Tribunal decided that the Territorial Sea of the Parties needed to be delimited by an equidistance line and held that:

*“Having concluded that full effect should be given to St Martin’s Island, the Tribunal decides that the delimitation line should follow an equidistance line up to the point beyond which the Territorial Seas of the Parties no longer overlap”.*

The Tribunal further concluded that:

*“Bangladesh has the right to a 12 nm territorial sea around St Martin’s Island in the area where such Territorial sea no longer overlaps with Myanmar’s territorial sea. A conclusion to the contrary would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea”.*

The Tribunal adopted equidistance line principle for TS only and special circumstances for giving full effect to St Martin’s Island which went to Bangladesh side. The Tribunal further found that the concavity of the coast of Bangladesh is a relevant circumstance in the Bangladesh v Myanmar case. In case of Historic Title and other Special Circumstances, the Tribunal held that:

*“The Tribunal finds no evidence of an historic title in the area to be delimited and notes that neither party has invoked the existence of such title”.*

For the Delimitation of the EEZ Bangladesh claimed 200 nm and referred Art 121 of the UNCLOS III. Myanmar claimed the EEZ could be the mid point on the line connecting the St Martin’s Island. Myanmar referred Art 7(4), 15, 74, 83 and cited relevant cases and the fact that proportionality of the two coastlines should be considered. Myanmar referred to the case concerning Territorial and Maritime dispute between Nicaragua v Honduras in the Caribbean Sea (ICJ, 2007) and Bangladesh pointed out the case between Cameroon v Nigeria. Bangladesh reiterated about the full effects of St. Martin’s Island as per regime of Islands as stipulated in Article 121 of the UNCLOS III (1982). Myanmar argued that the starting point for the EEZ and CS could be the mid point on the line connecting the St. Martin’s Island and Oyster Island. Myanmar referred to Article 7(4), 15, 74, 83 and cited relevant case laws, further emphasized on the proportionality of the coastlines. Myanmar argued further on special circumstances for not giving full effect of St Martin’s Island as stipulated in Article 121. The Tribunal held that the full effect should be given to St. Martin’s Island and here is the foundation victory on Bangladesh side. Both Bangladesh and Myanmar stood on the same platform in asking the Tribunal to draw a single maritime boundary line for the superjacent waters, the seabed and subsoil, that is, for the

EEZ and the CS. The Tribunal accordingly proceeded to draw a single delimitation line for both the EEZ and the CS. The Tribunal tried to find an appropriate method to be applied for delimiting the EEZ & the CS between the Parties and decided the equidistance plus relevant circumstances method. The Tribunal noted that the coast of Bangladesh, seen as a whole, is manifestly concave and portrays a classic example of a concave coast. The Tribunal further noted that, on account of the concavity of the coast in question, the provisional equidistance line produces a cut-off effect on the maritime projection of Bangladesh and that the line if not adjusted would not result in achieving an equitable solution as required by articles 74 and 83 of the Convention. For equity, the Tribunal became convinced that in the delimitation of the maritime boundary in the EEZ and the CS would depend on the geographic realities and the circumstances of the case. This benefited Bangladesh side and further established a strong foot hold for argument in case of western front.

The Tribunal measured the relevant coasts of Bangladesh and Myanmar, and found that the ratio between these coastal lengths is approximately 1:1.42 in favor of Myanmar. The Tribunal estimated relevant sea area (total 283,471 square kilometers) and distributed among Bangladesh (111,631 square kilometers) and Myanmar (171,832 square kilometers) which did not distort concept of proportionality. The Tribunal observed St. Martin's Island an important feature and because of its location, giving full effect to St. Martin's Island, in the delimitation of the EEZ and the CS, would result equity between the parties. The Tribunal also established its own base points for TS, on the basis of the geographical facts of the Parties, rejected base points proposed only by Myanmar. From the arbitral jurisprudence and case laws the ITLOS conceived that adjusted equidistance line in relation to special circumstances results equitable solutions. Therefore, the Tribunal upheld such intent and held that:

*“The delimitation line for the EEZ and the Continental Shelf of the Parties within 200 nm begins at coordinates 20° 26' 39.2” N, 92° 9' 50.7” E, the point at which the envelope of arcs of the 12 nm limit of Bangladesh's Territorial Sea around St. Martin's Island intersects with the equidistance line”.*

Here, the Tribunal considered special circumstances to give full effect St Martin's Island.

*“The delimitation line continues as a geodetic line at an azimuth of 215° until it reaches a point which is located 200 nm from the baselines from which the breadth of the territorial sea of Bangladesh is measured”.*

Here, the Tribunal carefully avoided cut off effect which allowed Bangladesh to exercise sovereign rights over extended area.

*“The line delimiting both the EEZ and the CS within 200 nm between the Parties continues in the same direction beyond the 200 nm limit of Bangladesh until it reaches the area where the rights of third States may be affected”.*

Here, the Tribunal showed Judicial Activism which allowed Bangladesh to exercise sovereign rights over the sea bed and subsoil within and beyond the 'Grey Area'. The Tribunal formulated new guidelines in relation to grey area and declared the judgments on the basis of judicial activism. This judgment will be considered as a landmark case law similar to *Keshavananda Bharati v State* case, which will have influence on the upcoming *Bangladesh v India* case of 2014.

Doctrinal researchers may interpret and explain the *Bangladesh v Myanmar* case from different angle as the *Keshavananda Bharati v State* case (AIR 1973, S.C. 1461) or the *Anwar Hussain Chowdhury v Bangladesh* case, popularly known as the Eighth Amendment case (41 DLR, 1989 BLD), because of Judicial Activism. Doctrinal researchers of the Law of Torts and Administrative Law or Constitutional Law always showed keen interest to find judicial activism for social justice. They may find the same flavor of judicial activism in the case laws of LOS for 'social justice', 'economic justice' and 'distributive justice' in the days to come.

### **Conclusion**

It is well settled that application of the principles of equidistance, which is more formal and mechanical in nature, does not always ensure spirit of justice. Equitable principle is more flexible and open ended in nature. The principle of equity is firmly rooted in the Law of the Sea and emanates from the idea of uniqueness of each maritime boundary. Such uniqueness is the result of great variety of geographical features of the CS which indicates that it is very difficult to posit any fixed rule governing the establishment of maritime boundaries between states. The idea of the uniqueness of each boundary finds significant support in the jurisprudence of the ICJ and Arbitral Tribunals dealing with maritime boundary disputes. The application of the equitable principle warrants the existence of special circumstances. The UNCLOS III of 1982 and existing judicial decisions endorse equitable principle for Bangladesh. Special circumstances constitute the basis of the title of the coastal state. Concave coast is one of the most prominent geographical circumstances in equitable solution. The recent judgment of ITLOS once again established the spirit of equity on the basis of equidistance plus special circumstances. Recent case law of ITLOS established in Arbitral Jurisprudence that equidistance concept plus special circumstances equals equitable solutions. Thus *Bangladesh v Myanmar* case will remain as milestone case Law which established our sovereign rights over the sea. These case laws will have influence on the upcoming *Bangladesh v India* case of 2014.

## Endnote

<sup>i</sup> *Kesavananda Bharati vs State Of Kerala, India*, (A.I.R. 1973 S.C. 1461),1973.

<sup>ii</sup> *Anwar Hussain Chowdhury v Bangladesh case*, (DLR 41), 1989.

<sup>iii</sup>**Ratio decidendi** ([Latin plural](#) rationes decidendi) is a [Latin phrase](#) meaning "the reason" or "the rationale for the decision". The ratio decidendi is "the point in a case which determines the judgment" or "the principle which the case establishes".

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